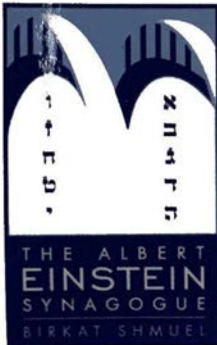
ורפא ירפא

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

VOLUME III



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Foreword

It is my distinct pleasure to introduce this volume of the Verapo Yerape journal, under the editorship of Rabbi Tzvi Sinensky, rabbi of the Einstein synagogue and graduate of the Israel Henry Beren Institute for Higher Learning at the Rabbi Isaac Elchanan Theological Seminary (RIETS) at Yeshiva University, as well as Dr. Josh Kra and Rabbi Raphael Hulkower, students at the Albert Einstein College of Medicine and members of the Einstein synagogue.

The Talmud (Bava Kama 85a) teaches us that we learn from the words in the Torah (Exodus 21:19) "*verapo yerape*" (literally, "and he shall heal") that "*mi-kan she-nitan reshut la-rofeh le'rapot*" – we derive that permission is given to the doctor to heal. While this special dispensation is given to the doctor, the Talmud elsewhere (Bava Kama 46b) states that it is so axiomatic that a person who is suffering from physical discomfort will turn to a doctor that no verse is needed to teach us such a proposition. In other words, there is a clear recognition that the sick will need the help of doctors; the only caveat is that "*ki Ani Hashem rofekha*" (Exodus 15:26) – we believe that it is ultimately G-d who provides the healing, and that the doctor must understand that his/her dispensation to heal only comes through specific license from the ultimate healer of all mankind – G-d himself.

It is with this sense of humility that we endeavor to confront the myriad medical issues confronting the modern world, realizing that we have been endowed with the responsibility both to address medical needs and to harness emerging opportunities in order to alleviate suffering and to improve quality of life, while at the same recognizing

that all of this must be done in a fashion consonant with principles of *halakha* and consistent with the ethical and moral underpinnings of Judaism.

This volume, graced by an impressive assemblage of veteran masters in the field and budding scholars, is part of a continuing effort on the part of RIETS and Yeshiva University to provide guidance and direction with respect to these critical issues and to provoke continued thought and discussion with respect to both familiar territory as well as cutting-edge issues in modern medicine. We are indebted to the leadership of President Richard M. Joel and Rosh HaYeshiva Rabbi Dr. Norman Lamm for their leadership and continuing encouragement. I also wish to recognize the editors and contributors of this volume, students at both RIETS and Einstein, for their superb scholarship and their commitment to promote the practice of medicine as the performance of a mitzvah that must be pursued within the prism of a Divine system of values. I wish to recognize as well the constant and critical support of Dr. Edward Reichman, Editorial Advisor to the journal; Dr. Jeffrey S. Gurock of the Michael Scharf Publication Trust of the Yeshiva University Press; and Dr. Edward Burns, Executive Dean at the Albert Einstein College of Medicine. Finally, as always, we are very grateful to Michael and Fiona Scharf for their largesse which allows us to publish this journal of Torah and Science.

I am confident that this thoughtful and thought-provoking volume will be valued by rabbis, laypersons and medical professionals alike.

Rabbi Yona Reiss
Max and Marion Grill Dean of RIETS
23 Menachem Av 5771

From Maimonides the Physician to the Physician at Maimonides Medical Center: A Brief Glimpse into the History of the Jewish Medical Student throughout the Ages

Rabbi Dr. Edward Reichman

Introduction

This is the third issue of a medical *halakhah* journal edited and written primarily by a group of Jewish medical students at a medical school in the Diaspora under Jewish auspices, the Albert Einstein College of Medicine of Yeshiva University. To my knowledge, this is the first such endeavor of its kind in all of Jewish history. Of course, there have been Jewish medical students in previous generations; of course Jewish medical students have contributed articles to the literature of Jewish medical ethics; but never before has there been a student publication of Jewish medical ethics

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Rabbi Dr. Edward Reichman is an Associate Professor of Emergency Medicine and Associate Professor in the Division of Education and Bioethics at the Albert Einstein College of Medicine of Yeshiva University, where he teaches Jewish medical ethics. He received his rabbinic ordination from the Rabbi Isaac Elchanan Theological Seminary of Yeshiva University and writes and lectures internationally in the field of Jewish medical ethics.

at a Jewish medical school in the Diaspora published under the press of a Jewish university. My purpose in writing this brief essay is to give historical context to this publication, and to give the reader an appreciation of the challenges that faced our predecessors in their attainment of higher education, in particular, medical training. In addition, our discussion will reveal that the unfettered religious expression in this generation would have simply been unthinkable in previous centuries. Ultimately, it is the establishment of the Albert Einstein College of Medicine by Yeshiva University that has created the milieu that has made this publication possible.

Within the vast field of medical history, we find a significant chapter devoted to the Jews and medicine. This rich and fertile field of Jewish medical history, to which has been devoted numerous volumes and dedicated journals,[1] is little known to the modern student of medical *halakhah.*

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1 The journal *Koroth,* whose first issue appeared in April, 1952, is devoted to Jewish medical history and presently under the editorship of the Jewish medical historian Professor Shmuel Kottek. Its previous editors, Dr. Sussmann Muntner, Professor Joshua Leibowitz, and Dr. David Margalit were all prominent contributors to the field of Jewish medical history. The journal *Medical Leaves,* of which five volumes appeared between 1937 and 1943, was devoted to Jewish medical history. See H. Friedenwald, *The Jews and Medicine,* 3 vol. (Johns Hopkins Press, 1944); N. Berger, *Jews and Medicine: Religion, Culture and Science* (*Beth Hatefutsoth*: Tel Aviv, 1995) (volume accompanied the *Beth Hatefutsoth* exhibit on Jews and medicine); F. Heynick, *Jews and Medicine: An Epic Saga* (Ktav Publishers, 2002). See also the works of Zohar Amar, Ron Barkai, Eliakim Carmoli, John Efron, Aaron Feingold, Sander Gillman, Solomon Kagan, Michael Nevins, David Ruderman, Harry Savitz and Joseph Shatzmiller. For works on Biblical and Talmudic medicine, see E. Reichman, "Biblical and Talmudic Medicine: A Bibliographical Essay," in F. Rosner, *Encyclopedia of Biblical and Talmudic Medicine* (Jason Aronson, 2000), 1-9. Though not generally considered part of the Jewish medical history literature, the work of H. J. Zimmels, *Magicians, Theologians and Doctors: Studies in Folk Medicine and Folklore as Reflected in Rabbinical Responsa* (Goldston and Sons: London, 1952) is an invaluable resource for the Jewish practice and response to medicine from the 15th -18th centuries.

This brief excursion into Jewish medical history, as it relates to the training of the Jewish medical student throughout the ages, will hopefully suffice to entice the reader to mine and explore its depths. The references herein to the classic works in Jewish medical history will provide the reader with a good starting bibliography. As I have endeavored to illustrate in previous contributions, the study of medical *halakhah* can be immensely enhanced in many ways by an historical perspective.

Middle Ages

We begin our historical journey in the Middle Ages, the time of one of the greatest physicians in Jewish history, Rabbi Moses ben Maimon (1138-1205), known as the Rambam. Rambam took up the practice of medicine after the death of his brother in order to support his family. While many are familiar with the accomplishments and writings of the Rambam in the fields of *halakhah* and philosophy, lesser know is the Rambam's contribution to medicine. He authored numerous treatises on topics such as asthma, hemorrhoids and sexual health, and his medical works, written in Arabic, have been translated into many languages, including Hebrew and English.[2] One of his works is entitled *Pirkei Avukrat*, a commentary on the works on none other than Hippocrates (5th century B.C.E). Rambam also wrote a commentary on the writings of Galen (2nd century C.E.). This gives us an insight into the

2 Sussmann Muntner, one of the editors of *Koroth*, translated the Rambam's medical works from Arabic into Hebrew. Dr. Fred Rosner, who has written extensively on the medical works of the Rambam, translated Muntner's Hebrew into English. Gerrit Bos is presently translating the Rambam's medical works from the original Arabic into English in what will be the definitive academic English translation.

training and practice of medicine in the Middle Ages. The works of Hippocrates, Galen and Aristotle, whose works the Rambam was also intimately familiar with, served as the core curriculum for medical training from Antiquity through the period of the Renaissance, in addition to more contemporary authors like Averroes and Avicenna.

How did the Rambam obtain his medical training? While we have no clear record of the Rambam's medical training, it is certain that it was not accomplished in a university setting. There simply were few major medical centers in Egypt on its environs in this period of time. It is more than likely that the Rambam apprenticed with an expert physician and read the extant medical literature, as was the common practice at that time.[3]

The Cairo Genizah, a rich repository of documents housed in the Ben Ezra Synagogue of Old Cairo from roughly the 9th to the 19th century, gives us a glimpse into some aspects of medical training[4] and the practice of

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3 For the training of Jewish physicians during this period, see J. Shatzmiller, *Jews, Medicine and Medieval Society* (University of California Press: Berkeley, 1994), esp. 14-27; S. D. Goiten, "The Medical Profession in the Light of the Cairo Genizah Documents," *Hebrew Union College Annual* 34 (1963), 177-194, reprinted with minor additions in *idem., A Mediterranean Society: The Jewish Communities of the Arab World as Portrayed in the Documents of the Cairo Genizah* 2 (University of Berkeley Press: Berkeley, 1971), 240-261 (see 248ff. regarding medical training).

4 For a history of the discovery and subsequent research of the Cairo Genizah, see A. Hoffman and P. Cole, *Sacred Trash: The Lost and Found World of the Cairo Genizah* (Schoken Books, 2011).

medicine[5] in Medieval Egypt. In fact, the over 1600 medical fragments of the Cambridge Genizah have been compiled into an annotated catalogue.[6] Among the documents of the Genizah we find the very writings of the Rambam himself, as well as letters addressed to him. While we possess no evidence that the Rambam acquired his medical education through apprenticeship, we do have record of others wishing to obtain their education by apprenticing with the Rambam. A letter by Meir ben al-Hamadani to Maimonides asks him to accept his son as his assistant for the study of medicine. He stresses that he dared to apply to him only because he had heard that Maimonides' own nephew, who had worked under him thus far, now practiced elsewhere. He promises to pay Maimonides a higher honorarium than the former apprentice.[7]

We also find in the Genizah records of the libraries of physicians, including the sale of a physician's library, which

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5 For studies on the practice of medicine by Jewish physicians in the Middle East in the Medieval period, see, for example, M. Meyerhof, "Mediaeval Jewish physicians in the Near East, from Arabic sources," *Isis* 27-28 (1937-1938), 432-460; M. Meyerhof, "Jewish Physicians under the Reign of the Fatimid Caliphs in Egypt (969-1171 C. E.)," *Medical Leaves* (1939), 131-139; H. D. Isaacs, "Medieval Judaeo-Arabic Medicine as Described in the Cairo Genizah," *Journal of the Royal Society of Medicine* 83 (November, 1990), 734-737; P. Fenton, "The Importance of the Cairo Genizah for the History of Medicine," *Medical History* 24 (1980), 347-348; S. D. Goiten, "The Medical Profession in the Light of the Cairo Genizah Documents," *Hebrew Union College Annual* 34 (1963), 177-194; Moshe Perlmann, "Notes on the position of Jewish Physicians in Medieval Muslim countries," *Journal of Israel Oriental Studies* 2 (1972), 315-319; J. Shatzmiller, *Jews, Medicine and Medieval Society* (University of California Press: Berkeley, 1994).

6 H. D. Isaacs, *Medical and Para-Medical Manuscripts in the Cambridge Genizah Collections* (Cambridge University Press: Cambridge, England, 1994).

7 The Friedberg Genizah Project (**http://www.genizah.org/**) is devoted to digitizing all extant Genizah fragments throughout the world and making them freely accessible on the internet. This fragment is available on this site under the following reference number- Cambridge, CUL: T-S 16.291.

provide insight into the standard textbooks for medical practice at that time. Among the library volumes, we find Arabic translations of the works of Galen, as well as works by Hippocrates, Aristotle, Averroes and Avicenna.[8]

From the Middle Ages and onward, there were a number of major impediments that made the practice of medicine difficult for Jews in Christian Europe.[9] First, Jews were prohibited from treating Christian patients. For example, the decrees of the Council of Vienna of 1267 forbade Jews from treating Christian patients. Similar decrees were repeated and reaffirmed throughout the Middle Ages.[10] Sometimes even the acquiring of textbooks required great effort. For example, the physician Leon Joseph of Carcassonne learned Latin and attended the lectures at the university in order to obtain medical texts for the use of Jewish medical students. For ten years he tried in vain to secure copies of some of the core medical texts, but their sale to non-Christians was forbidden. Finally, in 1394, he

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8 See D. Banat, "The Library of an Egyptian Physician in the Times of the Rambam," (Hebrew) *Tarbitz* 30 (5721), 171-185; J. Shatzmiller, *Jews, Medicine and Medieval Society* (University of California Press: Berkeley, 1994), 36-55.

9 For the following discussion, see H. Friedenwald, "The Jewish Medical Student of Former Days," *Menorah Journal* 7:1 (February, 1921), 52-62; C. Roth, "The Qualification of Jewish Physicians in the Middle Ages," *Speculum* 28 (1953), 834-843; J. Shatzmiller, "On Becoming a Jewish Doctor in the High Middle Ages," *Sefarad* 43 (1983), 239-249. See also C. Roth, "The Medieval University and the Jew," *Menorah Journal* 19:2 (November-December, 1930), 128-141; J. Efron, "The Emergence of the Medieval Jewish Physician," in his *Medicine and the German Jews: A History* (Yale University Press: New Haven, 2001), 13-33.

10 See, for example, J. Efron, *Medicine and the German Jews: A History* (Yale University Press: New Haven, 2001), 17. Parallel decrees were enacted against Jews in Medieval Muslim countries. For example, in the twelfth century a *fatwa* was issued against permitting a Jew from wearing the special medical attire worn by the Muslim scholars. Jews were also not permitted to treat Muslim patients. See Moshe Perlmann, "Notes on the Position of Jewish Physicians in Medieval Muslim Countries," *Journal of Israel Oriental Studies* 2 (1972), 315-319.

succeeded, though he had to pay double the normal price.[11] Despite the ban on Jewish physicians treating Christian patients, virtually every pope had a Jewish physician on their staff.[12]

Second, university education was generally off limits to Jews throughout this period. Most major universities were under Christian auspices and acceptance was predicated upon acceptance of Christian beliefs. This, in addition to official university policies barring Jews from entry, precluded Jewish attendance. In special circumstances, existing laws were suspended, with papal or governmental permission, to allow the occasional Jewish student to attend a European university.

In addition, by the thirteenth century, doctors had to obtain a medical license in order to practice medicine.[13] In general, licenses were granted to those who had completed a university education, though licensing was possible through other means as well. Jews, as mentioned above, were restricted from university attendance. Despite this hurdle, Jews still managed to obtain licenses to practice medicine throughout the centuries, as the documentary evidence indicates.

In fourteenth century Valencia, Spain, Jews were

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11 C. Roth, "The qualification of Jewish physicians," op. cit., 838, n. 8a.

12 See J. Pines, "*Des Medecins Juifs au Service de la Papaute du XII au XVII Siecle*," *Le Scalpel* 114 (May, 1961), 462-470; E. Mendelssohn, *The Popes' Jewish Doctors 492-1655 C.E.* (self-publication: Lauderhill, Florida, 1991).

13 On licensing, see J. Shatzmiller, *Jews, Medicine and Medieval Society* (University of California Press: Berkeley, 1994); L. Garcia-Ballester, et. al., "Medical Licensing and Learning in Fourteenth Century Valencia," *Transactions on the American Philosophical Society*, new series, 79:6 (1989), 1-128; Y. Assis, "Jewish Physicians and Medicine in Medieval Spain," in S. Kottek and L. Garcia- Ballester, *Medicine and Medical Ethics in Medieval and Early Modern Spain: An Intercultural Approach* (Jerusalem, 1996), 33-49.

granted medical license, though often restricted in their practice to treating fellow Jews.[14] A formal medical degree was required for licensure, but Jews were unable to obtain such degrees as the doors of the universities were generally closed to them. Alternate provisions were made for Jews, and they were allowed to apply for licensure as long as they met the requirement of an examination. In some cases, the Jewish students were required to be examined by a fellow Jewish physician, in addition to a Christian physician. For example, in May, 1346, Pere IV granted the Jew Jaffuada Abenvives a license to practice medicine in the kingdom of Valencia, accepting a verification of his qualifications based on an examination performed by two royal physicians, one Christian and one Jewish.[15]

Furthermore, the oath of Jewish graduates was sometimes tailored to their faith and made in the name of God whose precepts were given to Moses on Mount Sinai.[16]

We also have record of Jewish women receiving licenses for the practice of medicine.[17] For example, a woman by the name of Floreta received a royal license in 1374 to practice medicine throughout the territories of the Crown of Aragon.[18]

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14 On the licensing of Jews in Valencia, see Garcia-Ballester, op. cit.

15 Garcia-Ballester, op. cit., 27.

16 Assis, op. cit., 45.

17 See Roth, "The Qualification of Jewish Physicians," op. cit., 841-842 and J. Shatzmiller, *Jews, Medicine and Medieval Society* (University of California Press: Berkeley, 1994); J. Efron, *Medicine and the German Jews: A History* (Yale University Press: New Haven, 2001), 19-21.

18 Garcia-Ballester, op. cit., 32, n. 54.

The Renaissance

The early Renaissance period represented a new era in the medical training of the Jewish medical student. We find the occasional Jewish student attending universities in Europe and encountering great difficulty in doing so. For a Jew to attend medical school, it was required to obtain no less than papal permission, or occasionally higher governmental permission. One of the most famous Jewish physicians of this period was Tobias Cohen, author of *Ma'aseh Tuvia* (Venice, 1707). Although he attended medical school, he is quite emphatic about the primacy and importance of Torah study:

> For those who come from Italy, Poland, Germany and France, they should not even think of studying medicine until their bellies are first full with the study of the written Torah and the oral Torah.[19]

Tobias records how he obtained permission from the Great Elector of Brandenburg in order to study medicine at the University of Frankfurt on the Odor in Germany. He was apparently the first Jew to ever attend a German medical school,[20] which was reflected in his less than warm welcome. The mutual discomfort for both Tobias and the university led to his transfer to an institution more tolerant

19 *Ma'aseh Tuvia* (Venice, 1707), 82b, introduction to the medical section, *Eretz HaChadashah.*

20 On the discriminatory admission policies of German and other European universities with respect to the Jews, see J. Efron, *Medicine and the German Jews: A History* (Yale University Press: New Haven, 2001), esp. 43-46.

of Jews, the University of Padua (more on the University of Padua below).[21]

Tobias Cohen wasn't the only Jewish student whose social unease led to his transfer to another institution. In 1731, the Prussian King Frederick William I ordered the medical faculty of the University of Konigsberg to accept Abraham Moses Levin as a student. He was made to feel so unwelcome in Konigsberg that he transferred to the medical school in Berlin. He was the last Jewish medical student at the University of Konigsberg for many years. It wasn't until 1781 that another Jewish student, Yehuda Jacob Hirschberg, completed his studies there.[22]

The first Jewish medical student in Germany to complete his studies, apparently uneventfully, was clearly concerned with the *halakhic* ramifications of his training.

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21 See introduction to Tobias Cohen's *Ma'aseh Tuvia* (Venice, 1708). On Cohen and his work, see A. Levinson, "A Medical Cyclopedist of the Seventeenth Century," *Bulletin of the Society of Medical History* (January, 1917), 27-44; D. A. Friedman, "*Tuvia HaRofeh*," (Hebrew) (Palestine Jewish Medical Association, 1940); M. J. Mahler, *A Precursor of the Jewish Enlightenment: Dr. Tobias Cohen and his Ma'aseh Tuvia* (unpublished thesis for ordination, Hebrew Union College, NY, 1978); N. Allan, "Illustrations from the Wellcome Institute Library: A Jewish Physician in the Seventeenth Century," *Medical History* 28 (1984), 324-328; D. Ruderman, "On the Diffusion of Scientific Knowledge within the Jewish Community: The Medical Textbook of Tobias Cohen," in his *Jewish Though and Scientific Discovery in Early Modern Europe* (Yale University Press: New Haven, 1995), 229-255; S. G. Massry, et. al., "Jewish Medicine and the University of Padua: Contribution of the Padua Graduate Toviah Cohen to Nephrology," *American Journal of Nephrology* 19:2 (1999), 213-21; E. Lepicard, "An Alternative to the Cosmic and Mechanic Metaphors for the Human Body? The House Illustration in *Ma'aseh Tuviyah* (1708)," *Medical History* 52 (2008), 93-105; *Koroth* 20 (2009-2010) where five articles are devoted to Tobias Cohen and his work *Ma'aseh Tuvia*. On the relationship of Cohen with the Jerusalem physician Rabbi Dr. David de Silva, as well as for information about the death of Cohen, see Z. Amar, *Pri Megaddim by Rabbi David de Silva Physician of Jerusalem* (Yad Ben Tzvi Press: Jerusalem, 2003), 41-45. For other references on Cohen, see Ruderman, op. cit., at n. 2.

22 H. H. Beck, "Neither Goshen Nor Botany Bay: Hippel and the Debate on Improving the Civil Status of the Jews," *Lessing Yearbook* 27 (1996), 73.

In 1737, a young medical student at the University of Gottingen in Germany by the name of Benjamin Wolff Gintzburger queried the great Rabbi Yaakov Emden about the permissibility of performing dissection on Shabbos,[23] in particular dog dissection if human cadavers where not available.[24] The masterfully poetic prose of the question, as well as the attempt at *halakhic* analysis, is testimony to the quality of the student's education. Oft ignored in the medical *halakhic* literature is the identity of this student. The student, Benjamin Wolff Gintzburger, is known to us from another source as well.

The common practice to this day in universities of higher learning is to require the completion of a dissertation as a prerequisite to graduation. Gintzburger's dissertation for the completion of his medical studies at the University of Gottingen in 1743 was a study of Talmudic medicine, one of the earliest contributions of its kind in the history

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23 *She'eilat Ya'avetz*, 41.

24 With the establishment of routine dissection in medical training in the Renaissance, cadaver supply became a continued problem until laws were eventually introduced in many countries in the 19th century. Coincidentally, the supply of hospital cadavers to the University of Gottingen anatomy lab was first allowed in 1737, the very same year the young Benjamin Gintzburger posed his question to Rabbi Emden. See T. Buklijas, "Cultures of Death and Politics of Corpse Supply: Anatomy in Vienna 1848-1914," *Bulletin of the History of Medicine* 82 (2008), 570-607, at n. 42.

of medical *halakhic* literature.[25] The work is extant and has been translated into English.[26]

From the diary of Judah Gonzago, an Italian student born around 1700, we learn a first hand account of the trials and tribulations of a Renaissance Jewish student in medical training.[27] Judah's early education was confined to Mishnah and Torah studies. He later developed an interest in medicine. In order to attend the Sapienza University of Rome, he was required to obtain papal permission. He was clearly a learned and talented young man, for after he delivered a eulogy for his teacher, the rabbi of the community, he was appointed to a lectureship in the Talmud Torah.

His fees at the university were triple the average student.

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25 On the history of works on Biblical and Talmudic medicine, see E. Reichman, "Biblical and Talmudic Medicine: A Bibliographical Essay," in F. Rosner, *Encyclopedia of Biblical and Talmudic Medicine* (Jason Aronson, 2000), 1-9; Benjamin Mussafia, a graduate of the medical school of Padua, wrote *Dicti Sacro-Medicae Sententiae* (Hamburg, 1640), the earliest known work by a Jewish physician on the Bible, collecting and explaining medically related passages from *Tanakh*. See H. Friedenwald, *The Jews and Medicine* 1(Ktav Publishing House, 1967), 112. Benedetto Frizzi, a physician in Mantua in the late eighteenth century, wrote a magnum opus of over one thousand pages, called *Petach Einayim* (published from 1787-1799), on Biblical and Talmudic medicine. On Frizzi, see S. Simonsohn, *History of the Jews in the Duchy of Mantua* (Kiryat Sefer: Jerusalem, 1977), 649, n. 226; Friedenwald, op. cit., 115. On his work, see B. Dinaburg, "Ben Tzion Hakohen Frizzi and His Work *Petach Einayim*," (Hebrew) *Tarbitz*, 20 (1948/49), 241–64.

26 F. Schiller, "Benjamin Wolff Gintzburger's Dissertation on Talmudic Medicine," *Koroth* 9:7-8 (Fall 1988), 579-600. For biographical notes on Gintzburger, see N. M. Gelber, "History of Jewish Physicians in Poland in the Eighteenth Century," (Hebrew) in Y. Tirosh, ed., *Shai Li-Yeshayahu: Sefer Yovel L'Rav Yehoshua Wolfsberg*," (*HaMercaz le-Tarbut shel ha-Poel ha-Mizrachi*; Tel Aviv, 5716), 347-371, esp. 356; *Koroth* 9(Special Issue, 1988) [Proceedings of the Third Symposium on Medicine in the Bible and Talmud], 255-261; J. Efron, *Medicine and the German Jews: A History* (Yale University Press: New Haven, 2001), 190-197.

27 See A. Berlin, "Memoirs of a Roman Ghetto Youth" (German) *Jahrbuch fur Judische Geschichte und Literatur* (Berlin, 1904), 110-132. H. Friedenwald summarizes and excerpts from this article in "The Jews and the Old Universities," in his *The Jews and Medicine* 1 (Ktav Publishing, 1944), 221-240.

Though one teacher made accommodations for his Sabbath observance, most were not nearly as forgiving. When time came for final examinations, which were performed on an individual basis, he was required to visit all thirteen examiners to plead his case. One examiner told him candidly that he had passed two Jewish candidates the year before, and there was no need for another as this would set a bad precedent. With much effort and assistance from a local rabbi physician he was able to secure permission for the exams.

His last oral exam was on Rosh Hashanah, and Judah recounts how he attended the early service, left after *shacharit*, and returned just in time to hear the blowing of the shofar.

In this period, one of Europe's premier institutions, the University of Padua, opened its doors to Jews, though not without some rather disturbing discriminatory practices.[28] In addition to paying higher tuition fees, Jews were required to provide sweet meats for the entire faculty on the first snow of the season each year.[29]

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28 On the Jews and the University of Padua see, A. Ciscato, *Gli Ebrei in Padova* (1300-1800) (*Arnaldo Forni Editore*, 1901); Cecil Roth, "The Medieval University and the Jew," *Menorah Journal* 9:2(1930),128-41; S. Dubnov, "Jewish Students at the University of Padua," *Sefer Hashanah: American Hebrew Yearbook* (1931), 216-219; Jacob Shatzky, "On Jewish Medical Students of Padua," *Journal of the History of Medicine* 5 (1950), 444-47; Cecil Roth, "The Qualification of Jewish Physicians in the Middle Ages," *Speculum* 28 (1953), 834-43; David B. Ruderman, "The Impact of Science on Jewish Culture and Society in Venice (with Special Reference to Jewish Graduates of Padua's Medical School) in *Gli Ebrei e Venezia* Secoli xiv-xviii (*Atti del Convegno Internationale Organizzato D'all'Instituto di Storia della Sociata e della Stato Veneziano dell a Fondatione Giorgio Cini, Venezia*, 1983), 417-48, reprinted in *idem., Jewish Thought and Scientific Discovery in Early Modern Europe* (New Haven, 1995); S. G. Massry, et. al., "Jewish Medicine and the University of Padua: Contribution of the Padua Graduate Toviah Cohen to Nephrology," *American Journal of Nephrology* 19:2 (1999), 213-21; S. M. Shasha and S. G. Massry, "The Medical School of Padua and its Jewish Graduates," *Harefuah* 141:4 (April, 2002), 388-394 (Hebrew).

29 See Friedenwald, op. cit. For similar discriminatory practices endured by the Jewish students in Germany, see J. Efron, *Medicine and the German Jews: A History* (Yale University Press: New Haven, 2001), 60-61.

Jewish students now descended upon Padua from other European countries, such as Germany and Poland.[30] This was the first encounter for these Jews with the secular world, having come from insular communities. The contrast was made more stark by the fact that Padua was finest institutions in the world. The likes of William Harvey, Galileo, Vesalius, Morgagani, and Fallopius lectured there. The transition must have been traumatic and overwhelming for the average Jewish student, whose background for university study was sorely lacking. Some offered training in languages and rhetoric to bring the Jewish students up to par with their Italian peers. Perhaps the most famous of these programs was run by Solomon Conegliano, the teacher of Tobias Cohen.[31] The language of this preparatory instruction was usually Hebrew or Yiddish.[32] This is evidenced by an exceptionally rare manuscript in Yiddish of a digest of the works of Andreas Vesalius.[33]

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30 For a list of Jewish graduates of the University of Padua from past centuries, see Abdelkader Modena and Edgardo Morpugo, *Medici E Chirurghi Ebrei Dottorati E Licenziati Nell'Universita Di Padova dal 1617 al 1816* (Bologna, 1967); E. V. Ceseracciu, "*Ebrei Laureate a Padova nel Cinquecento*," *Quaderni per la Storia dell'Universita di Padova* 13 (1980), 151-168; D. Carpi, "Jews Who Received Medical Degrees from the University of Padua in the 16th and early 17th Centuries" (Hebrew), in *Scritti in Memoria di Nathan Cassuto* (Ben Tzvi Publishers: Jerusalem, 1986), 62-91.

31 On Conegliano, and on others filling a similar role, see D. Ruderman, *Jewish Thought and Scientific Discovery in Early Modern Europe* (New Haven, 1995), 111-113.

32 See J. Shatzky, "On Jewish Medical Students at Padua," *Journal of the History of Medicine* (Autumn, 1950), 444-447.

33 http://www.textmanuscripts.com/home/archives/archivesdescription.php?m=251#, accessed May 3, 2007. According to this website, this extremely rare manuscript of a unique and unpublished Yiddish translation of Vesalius's work on anatomy is one of only 50 surviving manuscripts in Yiddish dating before 1600, of which only five are on medical subjects, the other four containing medical recipes and folkloric cures. For more on Vesalius, his Jewish connections, and on the history of anatomical dissection in general in rabbinic literature, see E. Reichman, "The Anatomy of *Halakhah*," in Y. Steinberg, ed., *Beracha Le'Avraham* (Jerusalem, 2008), 69-97.

Unique problems were faced by the Jewish medical students of Padua. For example, the students of medicine were required to provide bodies for dissection. The Jewish students, who objected to this practice based on *halakhic* grounds, paid large sums of money for the privilege of having the deceased bodies of the Jewish community left untouched. Despite this privilege, non-Jewish medical students often forcibly claimed the bodies of Jews from their burial places.[34]

Despite the difficulties in attending the University of Padua, accommodations were made for the Jewish students. For example, the Jews at the university were exempted from the obligation of wearing the red hat, which was required to distinguish every Jew from the rest of mankind. They were permitted to wear a black head covering like the other students.[35] Another deviation from the normal university practice was the alteration of the text of the graduation diploma for the Jewish students. The standard diploma formula, which began by invoking the names of the Christian deities, was obviously not acceptable to the Jewish students. The text was thus amended for the Jews to read "In Dei Aeterni Nomine, Amen," in the name of the Eternal God. A number of such diplomas are extant

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34 H. Friedenwald, "The Jewish Medical Students of Former Days," *Menorah Journal* 7:1(1921). See the remarkable account by Isaac Cantarini describing the events of August, 1684, of the kidnapping and successful recovery of the body of Chananel Levi in *Pachad Yitzchak* (Amsterdam, 1685), 45a ff. For more on the history of dissection and grave robbing in rabbinic literature, see Reichman, op. cit.

35 See C. Roth, "The Medieval University and the Jew," *Menorah Journal* 19:2 (November-December, 1930), 128-141, esp. 137. This article discusses general university training, with a focus medical education.

today.[36] This is similar in concept to the Jews in the Middle Ages taking their oath in the name of the God of Moses as discussed above.

We have evidence of at least one student in Padua who followed the same path as Tobias Cohen and vigorously pursued his Torah studies while attending medical school in Padua. Avtalyon Modena,[37] a brilliant Talmudist and student at the University of Padua Medical School, learned with Meir ben Isaac Katzenellenbogen (1473-1565), known as the *Maharam MiPadua*.[38] It is quite possible that other Jewish medical students may have left the anatomical theater of Vesalius to attend a shiur in the yeshiva of the *Maharam MiPadua*.[39] Rabbi Yehuda Arye De Modena, another prominent Italian rabbinic figure, also had significant contact with the Jewish medical students of Padua.[40]

The graduation of Jewish students from the medical school

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36 See Bruno Kisch, "Cervo Conigliano: A Jewish Graduate of Padua in 1743," *Journal of the History of Medicine* 4 (1949), 450-459. Conigliano's diploma bears the signature of Giovanni Battisti Morgagni, a professor at the University of Padua and considered the father of anatomical pathology. The diploma of Israel Barukh Olmo, who graduated from Padua's medical school in 1755, was auctioned at Sotheby's auction of important Judaica on November 24, 2009, Lot 160.

37 Avtalyon is the uncle of Rabbi Yehuda Arye De Modena mentioned below.

38 See Judah Saltaro Fano, *Mikveh Yisrael* (Venice, 1607), 35a and 36b.

39 Rabbi Katzenellenbogen's own grandson, Shaul Wahl, attended the University of Padua. See Byron L. Sherwin, *Sparks Amidst the Ashes: The Spiritual Legacy of Polish Jewry* (Oxford University Press: 1997), 68.

40 M. R. Cohen, ed. and trans., *The Autobiography of a Seventeenth-Century Venetian Rabbi: Leon Modena's Life of Judah* (Princeton University Press: Princeton, 1988), 30 and 190. In the introduction to his *Ziknei Yehudah*, Rabbi Modena mentions a number of physicians with whom he had contact. Perhaps his most famous student was Yosef Shlomo Delmedigo, the author of *Sefer Elim*. On Delmedigo, see D. A. Friedman, "Joseph Shelomoh Delmedigo," *Medical Leaves* 4 (1942), 83-95; G. Alter, *Two Renaissance Astronomers* (Czechoslovakia Acadamy: 1958); I. Barzilay, *Yoseph Shlomo Delmedigo (Yashar of Candia): His Life, Works and Times* (Brill Academic Publishers: 1997).

of Padua was often met with great fanfare by the Italian Jews.[41] From the seventeenth to the nineteenth century, the Jews of Italy often composed occasional poems to celebrate a variety of communal and private events, including circumcisions, marriages and the deaths of prominent personalities. These literary offerings, usually composed in Hebrew, were authored by some of the most prominent Jewish writers of the period. This poetic literary form was also applied to graduation celebrations for the Jewish medical students of Padua. For example, a broadside of a beautifully illustrated celebratory poem was designed in honor of the graduation in 1734 of Shmuel Lampronti, son of the famous Rabbi Isaac Lampronti, also a graduate of Padua's medical school.[42] A similar broadside was designed in honor of the graduation of Isaac Consigli from the University of Padua Medical School in 1757.[43] The tradition of magnificently illustrated poems celebrating Jewish medical student graduations in Padua continued into the 19th century, as evidenced by the broadside honoring the graduation of Dr. Isaac Luzzatto in 1836.[44] Five

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41 For the stark contrast between the responses of the Italian and German Jewish communities to the medical school graduates, see J. Efron, *Medicine and the German Jews: A History* (Yale University Press: New Haven, 2001).

42 The broadside was on display at Sotheby's as part of the Valmadonna Trust Library exhibit in February, 2009. Unfortunately, there is no comprehensive catalogue of this exhibit.

43 See the Tajan Auction House catalogue for the Judaica auction held June 27, 2006. The illustration of a winged angel with trumpet and wreath which accompanies the poem is remarkably similar, though not identical, to the illustration on the Lampronti broadside. I as yet have been unable to find the significance of this image.

44 This item was auctioned at Sotheby's Judaica auction in 2006, Lot 191. The poem was composed by Rabbi Mordecai Samuel Ghirondi, a noted intellectual and a collector of rare Hebrew books, as well as the brother-in-law of Isaac Luzzatto. Ghirondi served as Chief Rabbi of Padua and is the author of *Toldot Gedolei Yisrael*, a classic biographical dictionary of Jewish rabbis and scholars.

generations of the prestigious Luzzatto family received medical degrees from the University of Padua between 1687 and 1836.

Some of the collections of poems were published, such as the cleverly titled volume "*B'leil Chamitz*," honoring the graduation of Yosef Chamitz in 1624.[45] This work was edited by Chamitz's teacher, Rabbi Yehuda Arye De Modena, who also contributed a poem to the volume.

The Late 19th- Early 20th Century in Europe

By the late nineteenth century Jewish admissions to universities and medical schools had significantly increased.[46] In Vienna, around 50% of the medical students were Jews.[47] The overt anti-Semitic sentiment, however, had not waned. For example, after the publication of Theodor Billroth's polemic against Jewish medical students in 1875,[48] anti-Jewish riots erupted at the University of Vienna.[49]

Another indication of the anti-Jewish sentiment is

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45 On Chamitz, see D. Ruderman, *Jewish Thought and Scientific Discovery in Early Modern Europe* (New Haven, 1995), 100ff. The book of poems honoring Chamitz, along with Chamitz's own works, were published together in N. Leibowitz, ed., *Seridim* (Darom Publishers: Jerusalem, 5697). For another example of such poems, see M. Benayahu, "Songs on the Occasion of the Graduation of the Physician Yehuda Matzliach Padova," *Koroth* 7:1-2 (April, 1976), 39-49.

46 See I. Singer, ed., *The Jewish Encyclopedia*, s. v., universities.

47 J. Efron, *Medicine and the German Jews: A History* (Yale University Press: New Haven, 2001), 240, writes that nearly forty percent were Jewish. T. Buklijas, "Cultures of Death and Politics of Corpse Supply: Anatomy in Vienna 1848-1914," *Bulletin of the History of Medicine* 82 (2008), 570-607, writes that fifty five percent were Jewish around this time.

48 Billroth's work was entitled, *On the Teachers and Students of Medical Science in the Universities of the German Nation, with General Observations on Universities: A Culture-Historic Study*. On Billroth and the impact of his anti-Semitic diatribe, see J. Efron, op. cit., 240-243. See review of his book, "Professor Billroth in Hot Water," *Medical Times and Gazette* 1 (1876), 46, which references his attacks on the Jewish students, commenting that Billroth himself was of the Jewish persuasion.

49 J. Efron, *Defenders of the Race: Jewish doctors and race science in fin-de-siecle Europe* (Yale University Press: New Haven, 1994), 156.

reflected in a chapter eerily reminiscent of some two hundred years earlier at the University of Padua. The issue of the Jewish community's refusal to provide bodies for dissection, which plagued the Jews in Padua in the seventeenth century, resurfaced in the early decades of the twentieth century in pre-World War II Europe, when it had a significant impact on the Jewish medical students.[50] This time, however, the attacks were more widespread. What exactly precipitated this vitriolic, and almost unified response by diverse medical establishments, is unclear, but a number of medical schools across Europe began to demand that the respective Jewish communities provide bodies for the local university anatomy lectures.[51] Refusal to accede to this request meant, at best, denied admittance to anatomy class; at worst, expulsion from medical school. In at least one case, in Romania, the animosity and resentment that was generated erupted into full-scale riots and university closures. In the student publication of Klausenburg University, an article called for wholesale pogroms against the Jews. The writer maintained that the pogroms would serve a dual purpose – the extermination of the Jews, and the plentiful supply of corpses.[52]

Rabbi Chaim Schor, chief rabbinic judge of Bucharest, sent a question to the Sigheter Rav, Rabbi Chaim Tzvi Teitelbaum, asking for his sage *halakhic* advice as to how to

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50 On this chapter, see N. Graber, "Anatomical Dissection for Medical Education and Research," (Hebrew) (Mada Publications: Jerusalem, 1943), esp. 28-59. Most of the material in this article is not found in Graber and should be considered a supplement to his excellent work.

51 This chapter must be viewed in the context of general anti-Semitic currents throughout pre-World War II Europe.

52 "Kill Jews So You May Have Corpses for Dissection," *Jewish Telegraphic Agency Jewish News Archive* (**http://archive.jta.org/**), Bucharest (February 5, 1923).

control the explosive situation, and as to whether allowing dissection of Jewish bodies might be allowed in such a case where harm might befall the entire Jewish community.

While most rabbinic authorities simply rejected outright the option of providing bodies to the medical school, Rabbi Teitelbaum considered another option, albeit with great hesitation and trepidation. As the concern for *pikuakh nefesh* was only theoretical, he could not justify allowing the active transfer of Jewish bodies for dissection to the medical school. However, he found it somewhat less objectionable to have the local *Chevrah Kadishah* simply refrain from collecting the bodies of those who died in the hospital, a passive act. The bodies of those who died in the hospitals would then be taken by the medical school for teaching purposes instead. Even this compromise, which involved no active violation of Jewish law, but rather passive allowance, he offered with hesitation.

There is indirect evidence that the ruling of Rabbi Teitelbaum may have been followed from the responsa of another Romanian rabbi of that time, Rabbi Yehudah Leib Zirelsohn.[53] The question posed to the latter involved the case of a family outside of Romania who had heard of the passing of their relative who lived in Romania. The family began the *shiva* observance upon hearing of the death, assuming the burial would follow forthwith. Upon arrival in Romania, however, it was revealed that the body was sent to the medical school for dissection since no one had presented to claim the body in a timely fashion. The *Chevrah Kadishah* would routinely collect even the unclaimed bodies of Jews who had died in local hospitals.

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53 *Ma'archei Lev*, n. 77.

Perhaps this very case is a reflection of the acceptance of the *pesak* of Rabbi Teitelbaum.

In fact, Rabbi Zirelsohn was directly involved in the dissection controversy. In 1926, the Romanian Parliament passed a bill excluding Jewish students from attending Romanian universities if the Jewish community refused to furnish a corresponding number of Jewish corpses.[54] Rabbi Zirelsohn was a member of the Romanian Parliament of Bessarabia and testified that Jews were beaten, houses destroyed and synagogues ransacked as a result of the ongoing anti-Semitism.

A similar story played out in Cracow. The head of the prosectorium of the medical school demanded that Jewish corpses be supplied. The Jewish students requested to perform autopsies specifically on Jewish bodies arguing that it would lead to saving human lives. They further claimed that refusal would result in exclusion of Jewish students from medical schools and weaken their attachment to Judaism.

The famed Rabbi Meir Shapira, founder of the *Yeshivat Chakhmei Lublin*, who introduced the study of *daf yomi*, responded to the query and points out that the issue was addressed at the previous year's rabbinic conference in Warsaw. The answer was clearly in the negative, that autopsies were not allowed. Rabbi Shapira rejected the claim that such a stance might lead to the alienation of students from Judaism claiming a form of slippery slope argument that if we allowed abrogation of the law in this

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54 "Jewish Students Barred from Medical Colleges in Romania Unless Jewish Corpses are Submitted," *Jewish Telegraphic Agency Jewish News Archive* (http://archive.jta.org/), Bucharest (March 8, 1926).

case, it would lead to the wholesale abandonment of the Torah.[55]

The actual delivery by the Warsaw Burial Society of a Jewish woman's corpse for dissection led to a great upheaval at the time. Rabbi Chaim Elazar Spira, the Munkatcher Rav, strongly condemned this action and referred to the burial society, known as the "*gemach shel emes*," as the "*gemach shel sheker*," the society of lies.[56]

Similar dilemmas in other cities throughout Europe, including Vilna and Kovno, led members of the Jewish communities to seek *halakhic* responses from prominent rabbinic figures throughout Europe. The expressed fear was that refusing to allow dissection of Jewish bodies would possibly lead to: 1) the absence of Jewish physicians altogether, 2) the extension of anti-Semitic sentiments to physical pogroms which could take the lives of other Jews, and 3) students who wish to pursue medicine, but who could not do so as Jews, turning away from Judaism altogether.[57] Both the reality and consequence of these claims was addressed in the responsa literature of the time. Despite the fact that the majority of rabbinic opinion refused to allow dissection of Jewish bodies, even under these dire circumstances, many of the *Chevrah Kadishah* organizations in Europe ultimately

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55 See E. Urbach, "The History of Polish Jews After World War I as Reflected in the Traditional Literature," in R. Brody and M. D. Herr, *Ephraim E. Urbach: Collected Writings in Jewish Studies* (Magnes Press: Jerusalem, 1999), 203-226, esp. 211-212; Graber.

56 *Minchat Elazar* 4:28. The reference to the case from Warsaw appears as a footnote in the index to the responsa at the beginning of the volume. The responsum itself discusses the laws of dissection, but makes no reference to the case. Assumedly, the case arose between the writing and the printing of the volume, as reflected in the text of the note that this was a very recent event.

57 "Rabbis' Ban on Jewish Corpses Causes Baptism, is Charge," *Jewish Telegraphic Agency Jewish News Archive* (http://archive.jta.org/), Warsaw (June 22, 1923).

arranged provisions with their respective local medical schools for the delivery of Jewish bodies.[58]

America in the 20th Century

In the United States, in the early 20th century, the number of applications of Jewish students to medical schools was remarkably high. In 1934, according to the secretary of the Association of American Medical Colleges, over 60% of the 33,000 applications on file were from Jews. Covert, though sometimes explicit, quotas limited the number of these students who were actually able to attend medical school. The history of the unofficial quota policies of many American universities that restricted Jews from admission has now been well documented.[59] In fact, one author in 1939, after reviewing the statistics of Jewish student acceptances to medical school, wrote:[60]

> Now that the evidence is in, I may indulge in a few words of interpretation... First, to the individual student. We must discourage Jewish young people and their parents from the exclusive hope for medical careers. We must encourage them to consider other ... fields. ...These quotas are a danger to the medical profession, as they mark the

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58 See Graber, op. cit. Often it was the unclaimed bodies, criminals or suicide victims that were given over to the medical schools.

59 See N. Ratnoff and I. W. Held, "Some Problems of the Jewish Medical Student," *Medical Leaves* 4 (1942), 146-151; L. Sokoloff, "The Rise and Fall of the Jewish Quota in Medical School Admissions," *Bulletin of the New York Academy of Medicine* 68:4 (November, 1992), 497-518; E. C. Halperin, "The Jewish Problem in U.S. Medical Education: 1920-1955," *Journal of the History of Medicine* 56 (April, 2001), 140-167.

60 L. J. Levinger, "Jewish Medical Students in America," *Medical Leaves* (1939), 91-95.

introduction of prejudice into a field that should be totally without it.

It is in fact this continued discrimination against the Jewish student that led President Samuel Belkin of Yeshiva University to charter the Einstein College of Medicine of Yeshiva University in 1951.[61] At the dedication of the Albert Einstein College of Medicine on January 21, 1955, Dr. Belkin remarked:

> We will have an opportunity to appoint men to the faculty that can do research and teach; men of outstanding caliber who at this moment do not have opportunity at other schools. All of you know the problems that exist.[62]

Thankfully, today we are beyond the age of formal quotas. To be sure, there are cases of discrimination or anti-Semitism in medical training today as well, but they are not systemic or institutionalized. Jewish medical students attend the country's finest institutions, without governmental permission, and without paying higher fees or providing meats for the faculty at the first snow of the season. Established laws and religious protections and freedoms obviate the need for the Jewish community to provide bodies for dissection. Jewish physicians also frequently attain positions of leadership in hospitals and medical associations.

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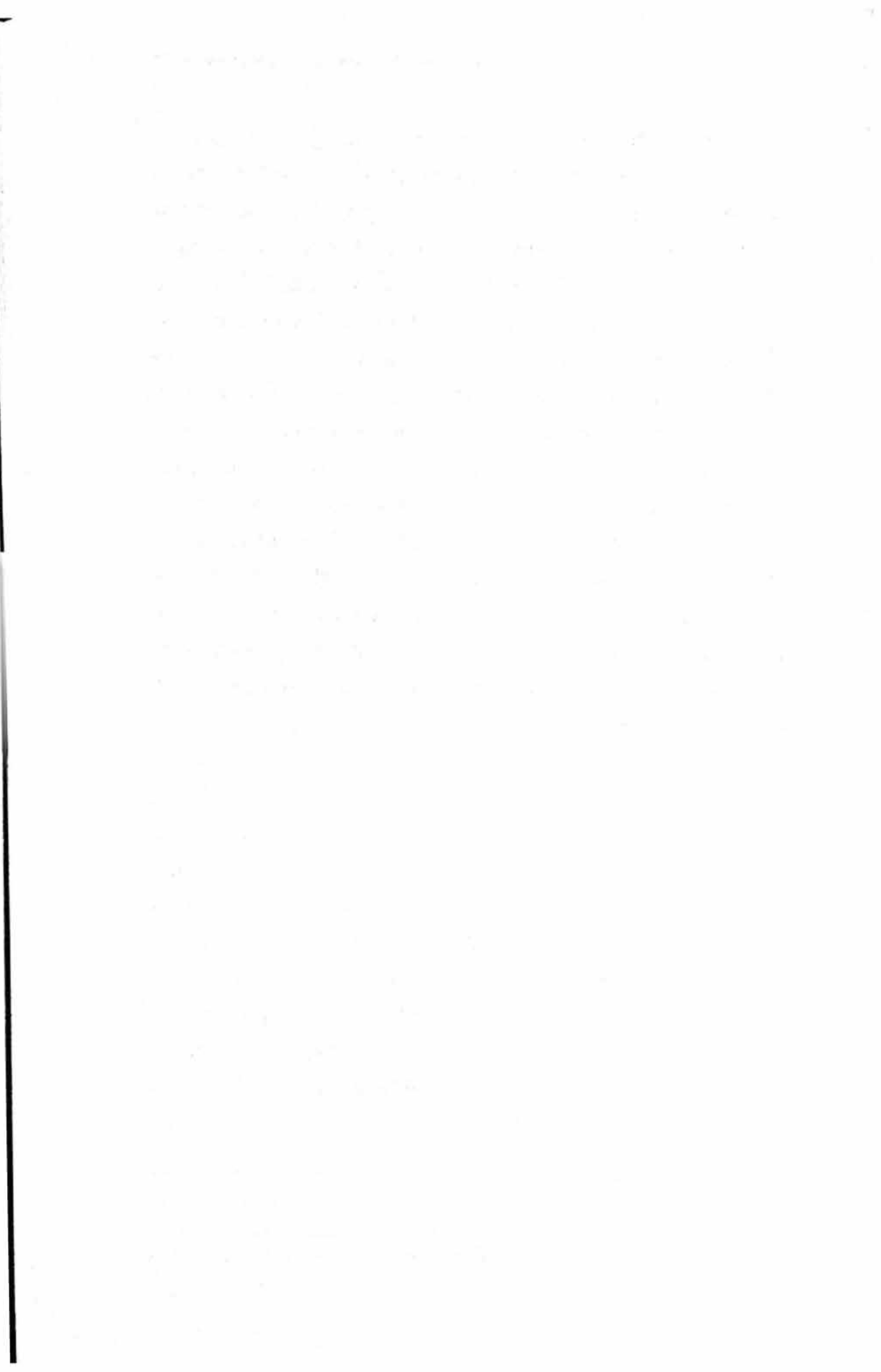
61 See Sokoloff, op. cit., 512-514.

62 http://www.yutorah.org/lectures/lecture.cfm/754670/Rabbi_Shmuel_Belkin/Dedication_of_Albert_Einstein_College_of_Medicine

Today, the struggle of the religious Jewish medical student can now properly focus on the *halakhic* aspects of the practice of medicine, as opposed to peripheral obstacles to attaining medical training. We began our study with Maimonides the physician and we conclude in the present, with Jewish students training at institutions like the Albert Einstein College of Medicine and those named after Maimonides, such as Maimonides Medical Center in Brooklyn, not to mention dozens of other medical schools across the country. Many of these students are immersed in Torah study and seeking the Torah's approach to issues such as the practice of medicine on Shabbos, treatment at the end of life, organ transplantation and the definition of death. This journal is a remarkable reflection of this new chapter in the Jewish history of medicine and it behooves us to appreciate just how far we have come from the times of the Rambam.



Genetic Testing for Late-Onset Diseases: When a Little Knowledge Might Be a Dangerous Thing

Dr. Joshua Kra

Introduction

One of the most significant scientific milestones reached this past decade was the completion of the Human Genome Project in 2003. The project's goal was to map out the entire molecular sequence of a human cell's DNA, and then to identify all the genes present in this sea of molecules. Scientists have currently found approximately 22,000-23,000 genes in human DNA, although analysis of these results is ongoing.[1] But finding the genes is only the beginning. It will take much more analysis and research to understand how certain genes can affect everything from a person's body fat index to a person's neurological state. While many diseases are inherited in complex "polygenetic" patterns, which involve a combination of many different genes and multiple variants within each gene, some

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1 http://www.ornl.gov/sci/techresources/Human_Genome/home.shtml. Retrieved April 27, 2011.

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diseases are associated with specific genetic mutations. These mutations arise when the molecular "code" of a gene is slightly altered to form a different "code."[2] Since almost all cells in the body have two pairs of genes, one inherited from the mother and the other from the father, often a single mutation will not lead to a diseased state. Such genetic diseases are referred to as autosomal[3] recessive diseases,[4] and require two mutated copies of the gene before a person will show the disease. Other mutations require only one mutated copy of the gene before disease is evident, and these diseases are known as autosomal dominant diseases. For dominant diseases, if one parent has the disease, and the other parent is genetically normal, there is a 50% chance that any child of this couple will manifest the disease.[5] Unlike autosomal recessive diseases, which often manifest the disease from birth or in early childhood, autosomal dominant diseases are usually late-onset diseases that only start showing clinical signs once a person is middle-aged or older.

This paper will discuss genetic testing for late-onset autosomal dominant diseases that have no preventive treatments and no cure. Two examples of such diseases will be described, followed by a discussion of how the medical

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2 For example, the code should read "...AGCT..." but instead a person's DNA reads as "...AGAT..."

3 Autosomal means the gene is unrelated to the person's sex (cf. X-linked diseases)

4 e.g. Tay-Sachs Disease. In such a case, if someone has one copy of the mutated gene (known as a carrier), they will appear totally normal, but if the spouse also has a mutated copy, there is a 25% chance that the child will inherit both mutated genes, and thus be affected by the disease.

5 Assuming the parent has only one mutated copy of the disease. If the parent has two mutated copies, there will be a 100% chance of passing the disease on to a child.

literature views using genetic tests as a screening tool. After describing medicine's current approach to the issue, an analysis of Jewish law's approach to such a test will be presented. The main issues include when one may reveal a terminal diagnosis to a patient (and when one may lie to hide a diagnosis), whether there is a violation of "*tamim tehiya*" (being wholehearted with Hashem) by being tested, and whether the results may be used to plan for the future.

Two Examples of Autosomal Dominant Diseases

One example of an autosomal dominant disease is early-onset Familial Alzheimer's disease (eFAD). This form of Alzheimer's disease is distinct from the classic form that is found in elderly patients. The classic form of the disease does not have a simple genetic inheritance pattern, but rather is based on a combination of multiple genetic and environmental factors (and therefore there is no genetic test for this form of the disease). However, 6-7% of Alzheimer's cases are associated with a specific genetic mutation.[6] To date, there are three main genes that when mutated have been implicated in early onset Alzheimer's.[7] This form of the disease often begins when one is in the prime of his or her life, usually between ages thirty and fifty. Currently, there is no cure for eFAD, nor is there any

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6 van der Cammen, T. J., E. A. Croes, et al. (2004). "Genetic testing has no place as a routine diagnostic test in sporadic and familial cases of Alzheimer's disease." J Am Geriatr Soc 52(12): 2110-2113.

7 Certain mutations in the APP, PSEN1, and PSEN2 genes lead to almost a 100% chance of developing disease. The mutations are thought to lead to early accumulation of senile plaques, a characteristic finding of Alzheimer's disease. The role of the ApoE gene, of which the E4 subtype has been associated with doubling the risk of getting Alzheimer's, is still a matter of discussion, and even if one has the E4 subtype of the gene, there is still a 70% chance he will never develop the disease.

treatment to slow down the path of the disease. Patients who are affected will slowly develop signs of dementia, with a loss of memory and other mental functions, along with complete dependence on others to take care of daily tasks.[8] While there is no cure, there are genetic tests available to let people know if they have the genetic mutation that will lead to the disease.

Another example of an autosomal dominant disease is Huntington's disease. This disease is caused when the Huntingtin gene is mutated so that part of the DNA that codes for the gene is repeated over and over,[9] leading to formation of a protein that causes neurological damage. Patients usually begin to show signs of the disease in the fourth or fifth decade of life. At first, patients will start to lose their balance and have trouble with simple coordination. The classic finding of progressed disease is that of involuntary writhing movements (chorea), as well as cognitive decline and eventual dementia.[10] Due to progression of disease, full time nursing care of the patient is often required, and life expectancy is approximately twenty years from onset of symptoms. As with eFAD, there is no cure for Huntington's, and there are no preventive treatments available. The only treatment that exists is symptomatic control of motor function.

In both of these cases, should one undergo genetic testing for a disease that has no cure? On the one hand, perhaps

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8 http://www.alzforum.org/eFAD/diagenetics/essay3.asp Retrieved April 27, 2011.

9 This is known as a trinucleotide repeat. In Huntington's disease the repeat is "CAG." There usually are less than 28 sets of CAG in the DNA that code for the gene, and if there are more than 36-40 repeats the disease will occur.

10 Walker, F. O. (2007). "Huntington's disease." Lancet 369(9557): 218-228.

testing will quell the anxiety bred by the uncertainty people feel when they realize there is a fifty percent chance they are latent carriers of a terminal illness. On the other hand, perhaps a positive result will lead to depression and loss of hope. Some may want to know the results to better plan for the future of the family, career, etc. What approach do current medical ethicists take? How should an observant Jew approach these issues? This paper will outline various topics that relate to genetic testing for late-onset diseases that have neither cure nor preventative treatment available for those who are positive, and for which a definitive genetic test exists (i.e. a positive test means there is close to a 100% chance of having the disease).

Criteria for Screening

Genetic testing is often viewed as a "screening test" in the medical literature. A screening test is one in which people are tested for disease even if they do not show any signs or symptoms of disease. Clearly, there must be some form of criteria met in order to decide which tests are useful screening tests, and which are not.[11] In 1968, the World Health Organization, in response to questions over how to implement and use new medical tests that were being created by a rapid technological advances, commissioned a report from Dr. Wilson, the Principal Medical Officer at the Ministry of Health in London. Dr. Wilson, together with Dr. Junger, published a set of guidelines regarding the

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11 For example, most people's instincts would agree that a blood pressure check at the doctor to screen for high blood pressure is a valid screening test, but a yearly kidney biopsy (which is invasive, painful, and expensive) to screen for kidney disease is not a valid screening test. What are the guiding principles behind this instinctive feeling?

use of screening tests; these criteria are simply known as the "Wilson and Junger" criteria,[12] and they are still in use and relevant today. There are 10 required criteria, including the need for an important health problem that has a suitable test which is acceptable to the population, and that the test recognizes the disease in a latent or early stage. There also needs to be an acceptable treatment for the patient, along with available facilities for treatment and an agreed policy of who needs to be treated. In addition, the cost of screening should be balanced economically when compared to overall medical costs.[13]

These criteria have undergone various forms of modification over the years. Some have criticized the criteria as being too vague and theoretical, with no clear way to use them.[14] Recently, the World Health Organization proposed revised criteria[15] that focus on

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12 Wilson JMG, Jungner G. *Principles and practice of screening for disease* Geneva: WHO; 1968.

13 In table form, the 10 criteria are:

1. The condition is an important health problem	6. The test should be acceptable to the population
2. There should be a treatment for the condition	7. Natural history of disease is adequately understood
3. Available facilities for diagnosis and treatment	8. There should be an agreed policy on who to treat
4. There should be a latent stage of the disease	9. The cost of finding a case should be economically balanced in relation to medical expenditure as a whole
5. There should be a test for the condition	10. Screening should be a continuous process

14 See Khoury, M. J., L. L. McCabe, et al. (2003). "Population screening in the age of genomic medicine." N Engl J Med 348(1): 50-58.

15 Andermann, A., I. Blancquaert, et al. (2008). "Revisiting Wilson and Jungner in the genomic age: a review of screening criteria over the past 40 years." Bull World Health Organ 86(4): 317-319.

integration of education, clinical services, and program management. They also mention the need for informed consent, confidentiality and patient autonomy. Finally, the benefits of the test must outweigh any harm. Instead of focusing on the role of treatment, they merely require that "objectives of screening" be defined at the outset.

Applying the Criteria

Using the two sets of criteria listed above, where does genetic testing for a disease with no cure or preventative treatment fit in? Since there is no cure, it would seem that such a test does not meet the requirements set forth by Wilson and Junger. However, one could make the argument that for some patients, even though there is no medicinal "cure," in the realm of the psychosocial, such knowledge would be empowering and a form of treatment in and of itself.[16] The only other need would be for a strong support network of counselors and family, along with proper education and explanation of what the test can and cannot do.

In practice, of all people who are eligible for genetic testing for Huntington's disease, less than 5% actually are tested.[17] All patients undergo a series of counseling sessions and appointments to clarify the test and discuss the reasons for undergoing testing. There is a 40% dropout rate after the first appointment. Interestingly, most people who are tested already have children and want to be tested to "relieve uncertainty."[18] Others wish to know their status for career

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16 This might be implied in the second set of criteria, where the stress is on the "objectives" of screening, which leaves open what the goal of screening is.

17 Walker, F. O. (2007). "Huntington's disease." Lancet 369(9557): 218-228.

18 Hayden, M. R. (2003). "Predictive testing for Huntington's disease: a universal model?" Lancet Neurol 2(3): 141-142.

or family planning purposes. Once a patient is tested, a positive test can lead to increased stress immediately after the results are told to the patient; however, two years after the test, the stress level is decreased when compared to before testing.[19] A negative result also can lead to increased stress levels, due to a phenomenon known as "survivor's guilt," whereby a person feels he has done something wrong by surviving in a situation where others have not.

Halakha's Approach

Having outlined the general principles that are used in current medical practice, let us now turn to Jewish law's approach to such a test. The main issues that will be discussed include the appropriateness of revealing a terminal diagnosis to a patient, the permissibility to lie in certain situations, the requirement of "*tamim tehiya*" (being wholehearted with Hashem), and the approach one should have in using the results to plan for the future.

Disclosure of Illness

In the cases mentioned above, a positive genetic test is the equivalent of diagnosing a terminal illness. When a doctor discovers that a patient has a terminal disease with no possible treatment that can extend the patient's life, should the doctor disclose this information to the

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19 It is important to note the rare but serious risk of suicide that has been documented in some cases. All protocols for testing include screening for any suicidal ideation.

patient or lie about the results?[20] Rabbi J.D. Bleich, in *Medicine and Jewish Law*[21], discusses this dilemma. His discussion focuses on a *halakhic* concept known as "*tiruf ha-da'as*," i.e. there is emotional toll placed on the patient by telling the truth that might lead to a quicker demise. There are several examples where *tiruf ha-da'as* plays a significant role. When one wishes to inform a sick person that a close friend or relative has died, the Shulchan Aruch[22] rules one may NOT report this news, lest the sick person experience *tiruf ha-da'as*. Moreover, we do not even perform *kriyah* (ripping a garment over the deceased) in front of the sick person, even though this is a positive commandment. Rabbi Bleich explains that while not all people react in such a strong negative way upon hearing bad news, since some people do respond in this manner, there is a possible danger to life (*safek pikuach nefesh*), and therefore no sick person may be told about any passing. In addition, Rabbi Moshe Feinstein[23] rules that hospital staff may not move one patient who is

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20 This issue is often viewed as a conflict between patient autonomy and truth-telling vs. beneficence (doing what's best for the patient). There are also legal arguments that can be made, which is not the focus of this paper. As we will see, halakha has a very different approach to the topic, as it seems clear from all sources that autonomy has no power to stand in the way of the patient's health. Even in medical ethics there is something called "therapeutic privilege" which grants a provider the right not to disclose information to a patient if it will lead to a serious psychological threat, but the use of this principle is very limited in scope. For more information, see the American Medical Association's report on "Withholding Information from Patients" (available at http://www.ama-assn.org/resources/doc/code-medical-ethics/8082a.pdf) and the associated section in the AMA's Code of Medical Ethics, Opinion 8.082 (available at http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion8082.page?).

21 Rosner, Fred. *Medicine and Jewish Law.* Jason Aronson Inc., New Jersey. 1990.

22 Y.D. 337:1

23 *Iggros Moshe Choshen Mishpat* 2:73

terminally ill out of the ICU in order to bring in someone who is deemed a more "curable" patient. The reason he gives is that such a move can lead to *tiruf ha-da'as* of the terminally ill patient, since he might realize that the move is due to his incurable nature. Therefore, Rabbi Bleich concludes one may not voluntarily reveal the nature of a terminal illness to the patient due to fear of *tiruf ha-da'as.* However, Rabbi Bleich, as well as the *Nishmas Avraham*,[24] does agree there are certain cases where the diagnosis must be revealed. These include cases where the patient is too knowledgeable about his condition[25], he will discover the diagnosis anyway, or he will develop *tiruf ha-da'as* from the lack of knowing his diagnosis. Clearly, disclosure of an illness focuses on one point alone – will the knowledge gained help or harm the patient.

Permission to "lie"

It is easy in the abstract to suggest a physician not disclose a terminal diagnosis to a patient. However, what happens if the patient asks about his or her condition? May one go so far as to lie in such an instance? The root of this issue is addressed by the *gemara* in *Kesubos*[26] that discusses an argument between *Bais Shaamai* and *Bais Hillel* regarding what one tells a groom regarding his wife on his wedding day:

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24 *Nishmas Avraham* Y.D. 338:3

25 e.g. a doctor, a healthcare professional, (and perhaps even one who will find the information on the Internet).

26 16b-17a

> How does one dance in front of the bride?[27] *Bais Shaamai* say: The bride as she is[28], while *Bais Hillel* say: The bride is nice and kind. *Bais Shaamai* said to *Bais Hillel*: But if she is lame or blind how can you say she is nice and kind? Does the Torah not say 'Distance yourself from speaking words of falsehood'? *Bais Hillel* replied: If one buys a bad purchase from the marketplace, should one praise it in his [the buyer's] eyes or denigrate it in his eyes? Of course, one praises it. From here, the Rabbis said: Always, a person's mindset should be one with all people.

On the surface, the sages are arguing over the permissibility of lying in front of a bride and groom. However, the *gemara* leaves a key issue unresolved[29]: how do *Bais Hillel* refute *Bais Shaamai's* question that the Torah tells us not to lie?[30] The *Ritva* comments on this *gemara* that the prohibition not to lie is not inviolable. There are certain situations known as *darchei shalom* (ways of peace) where lying is permitted.[31] If telling the truth would lead to hurt feelings and arguments, one should dispose of the

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27 *Rashi*: What does one say in front of her?

28 *Rashi*: Based on her beauty and stature you praise her

29 Another issue that can be raised is that according to *Bais Shaamai* should one really tell a groom that his wife is lame or undesirable? *Tosfos* answer that either one should remain quiet in such situations or find a nice feature to mention about this bride.

30 Rabbi Bleich, ibid., answers that *Bais Hillel* maintain the prohibition not to lie is limited to courts of law, and has no relevance to social situations. Thus, lying to a patient is unrelated to the prohibition of "Distance oneself from speaking falsehood"

31 It may even be that in such situations, the "lie" is not a lie. Regardless, one is permitted to tell the non-truth.

truth and dispense with the lie in its stead. The *Maharsha* explains *Bais Hillel's* opinion differently, that in this case there is no lie, because in the groom's eyes the bride is nice and kind. Just as when people buy items from the market they view their purchase as a good buy, so too does a groom view his bride in a positive light. One is merely reporting the truth that the other person sees (even if one disagrees).

In the case of the terminally ill patient who is asking for his diagnosis, clearly if divulging the truth will lead to *tiruf ha-da'as*, the doctor should lie simply because of *pikuah nefesh*, the requirement to save even a few minutes of life. Even if there is a situation where there is no *tiruf ha-da'as*, perhaps the lie will be permitted based on the premise of *darchei shalom*. Furthermore, according to the *Maharsha*, that when there are two "truths" one may report the truth that his friend sees rather than what he himself sees, the same may apply to a case of disclosing a diagnosis. As Rabbi Avraham Yitzchak Kook explains,[32] a classical diagnosis is in the realm of doubt, not one of 100% certainty. Thus, it makes sense that in reality there are two "truths" present to the doctor – the truth he sees (a terminally ill patient), and the truth that a different doctor might see (a curable patient). When the doctor then reports to the patient that he is not terminally ill, the doctor is merely choosing one of the two truths, which is no different from a friend choosing to praise a buy rather than denigrating the buy.[33]

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32 Quoted in *Assia* 1987, p.18

33 Ibid. It is unclear if this last approach would apply to a genetic test, which on the surface seems to be a clear-cut matter. It might be that the slight chance of lab error would preserve the two "truths," or maybe the fact that scientific knowledge is constantly evolving is enough to make every case a *safek*.

In concluding this part of the discussion, it appears that disclosure of a terminal illness to the patient depends on the patient's mindset and access to the facts. The *halakha* is focused on one key point – will the information be beneficial or detrimental to sustaining life, something that must be decided on a case-by-case basis.

The Requirement to be Wholehearted with *Hashem*

Let us now return to our case of testing for late-onset genetic diseases. Obviously, if the doctors, genetic counselors, and social workers determine that genetic testing of a patient may lead to a situation of *tiruf ha-da'as*, the test may not be undergone. But what if a patient passes the *tiruf ha-da'as* evaluation, and it is deemed that disclosure will not harm him, or perhaps it might even help ease any *tiruf* that he has? Are there any *halakhic* objections to undergoing genetic testing in such a situation? When discussing genetic testing for Tay-Sachs disease in potential marriage-partners, Rabbi Feinstein[34] addresses if genetic testing may violate the prohibition of "*tamim tehiya*,"[35] which *Rashi* explains to mean that one should not seek out the future.[36] He says that the prohibition should not apply to testing for Tay-Sachs because:

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34 *Iggros Moshe* E.H. 4:10

35 *Devarim* 18:13

36 Of note is that the *Rambam* leaves out "*tamim tehiya*" from his count of the 613 Biblical commandments. This may be because he views "*tamim tehiya*" as a general principle, which does not count as one of the 613 commandments, or because "*tamim tehiya*" is not a commandment, but a promise from Hashem that if one is *tamim* with Hashem, then he will be "*im Hashem Elokecha.*" *Ramban* does count it as a positive commandment, explaining it requires one to seek his needs only from Hashem, and to recognize that Hashem is omniscient and omnipotent. Rabbi Feinstein does not discuss the *Rambam* or *Ramban* in his response.

> Since it is now done in an easy way to check, one needs to judge if one does not check this might be like "closing one's eyes" from seeing what one can see. In addition, since if Heaven forbid, something like this [having a Tay-Sachs child] were to occur to the parents it would be very painful, it is appropriate for one who needs to marry to be tested. And therefore it is good to publicize the matter via magazines and media that the world will know there is such a test.

It would seem from the first part of the answer that any genetic test should be allowed, since not testing is merely closing one's eyes to the reality that lies before him. However, it is unclear why Rabbi Feinstein felt the need to include the caveat that not testing would cause great pain to the parents. If there is no prohibition, then even in cases where there is no pain one should be allowed to test. And if there is a prohibition, why would the possible future pain of parents be a *heter* (permission) for violating that prohibition? Perhaps the intent of Rabbi Feinstein is that there is no prohibition to undergo genetic testing, based on the concept that not testing is merely "closing one's eyes." However, this reason alone would not be grounds to institute an informational campaign to tell everyone to be tested. Only after considering the possible pain a couple might go through if they are not tested does Rabbi Feinstein then advocate publicizing the need for testing. According to this explanation , in the case of late-onset genetic diseases, there should be no prohibition to be tested from the aspect of "*tamim tehiyah*," as there is no distinction between recessive and dominant genetic

diseases when it comes to "closing one's eyes." However, there is also no need to form a mass screening campaign as the issue of avoiding "great pain for the parents" does not exist (since the disease cannot be prevented).[37]

Planning for the Future

As mentioned earlier, some of those who decide to undergo genetic testing explain that they did so because they wanted to know the results to help plan their future. For example, a twenty-year-old college student is deciding on a career path, and the student really feels drawn toward the field of pediatric neurosurgery (something that requires at least 12 years of medical school and medical training). However, based on the family history, there is a fifty percent chance the student is carrying a genetic disease, and in such a situation the mental effects could start right as he is finishing training. The student therefore wishes to be tested to decide if pediatric neurosurgery is the career for him, or if he is better off in a field with less training. How should a Jewish person approach the issue?

If one looks at the *gemara* in *Brachos*,[38] there is a story where King Hezekiah becomes severely sick. *Hashem* sends the prophet Isaiah to inform the king that he will "die and not live." The *gemara* explains that Isaiah was informing Hezekiah that he was to die in this world, and have no

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37 It is hard to base any decisive ruling using such inferences from the responsum. Rabbi Feinstein himself writes in Y.D. 3:91 that one of the reasons he is against a translation of his responsum into English is lest people come to compare one situation to another when such a comparison is invalid. It should therefore be obvious that the above discussion is merely theoretical in nature, trying to deduce what Rabbi Feinstein might maintain in our situation, and that any actual situation must be discussed with a contemporary *posek*, Rabbinic authority.

38 10a

portion in the world to come, due to his not having any children. Hezekiah defends his decision to not procreate because he saw through *ruach haKodesh* (divine spirit) that his progeny would be wicked.[39] The response of Isaiah is fundamental to Judaism: "With the hidden matters of Heaven why do you bother? What you are commanded to do, you must do; and what is pleasing before God, He will do." At first glance, it appears Isaiah is rebuking the king for using his power of knowing the future[40] to plan his life. Would the same be true of altering a career based on genetic information?

It appears there are two major criteria that differentiate the story recorded in *Brachos* from our case. First, the punishment for Hezekiah related to his failing to have any children, something that is a Biblical commandment, i.e. the obligation of "*peru u'revu* (be fruitful and multiply)."[41] As the *Nefesh HaChayim*[42] explains, even though Hezekiah had great intentions in not fathering a child, no one has permission to abrogate any of the commandments given in the Torah, regardless of any logical or rational reasoning.[43]

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39 Indeed, the son that Hezekiah did have was Manashe, who brought idols into the Temple, and during whose reign, G-d "sealed" the fate of Jerusalem for destruction.

40 The issue of free will in the face of Divine foreknowledge is complex and will not be discussed here. For a fascinating application of this *gemara*, see *Poras Yosef* (printed in the back of the *gemara*) to *Nedarim* 30b.

41 Genesis 1:28

42 1:22

43 Rabbi Goldberg, in his *sefer U'Vacharta B'chayim* on the *Nefesh HaChayim*, comments that this is why *Moshe* was praised by G-d for breaking the *Luchos* (Two Tablets). For the *gemara* tells us *Moshe* used a *kal v'chomer*, one of the hermeneutical principles, to learn that he should shatter the tablets. Even though *Moshe* could have reasoned to himself that if he breaks the tablets "what will be with the Jewish people and the Torah," he performed G-d's will without letting those issues interfere.

Accordingly, the results of a genetic test would not waive a man's requirement to have children. The second difference between the case in *Brachos* and genetic testing is that Hezekiah was looking into the future, searching for signs. In our case, the genetic disease already exists inside the person, i.e. it is inherently part of someone. It therefore might not be forbidden to alter one's career path based on that knowledge, as the matter is not a "secret of Heaven"; rather, as Rabbi Feinstein pointed out, it is right in front of one's eyes.

Need for Privacy

As with all personal information, the need to keep the results of any genetic test private is of utmost importance. In addition to the obvious social and legal reasons, there is also a *hashkafic* reason as well. In the previous story, when Isaiah tells Hezekiah he is about to die, Hezekiah replies "[Isaiah] son of Amoz, end your prophecy and leave."[44] The Vilna Gaon[45] focuses on the specific order of Hezekiah's retort, i.e. that first he tells Isaiah to end the prophecy, and then to leave. He explains that Hezekiah was telling the prophet he should not repeat the message once he leaves the palace, for "a matter that is well known is hard to annul except with great difficulty." Similarly, the *gemara*[46] advises that one who becomes sick should not reveal the illness on the first day of the sickness, for such publicity can make it harder for one's prayers to be answered due to the public's knowledge. Rabbi Yosef Shalom Eliashiv[47] explains that

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44 *Brachos* 10a

45 *Imrei Noam* on *Brachos* 10a

46 *Nedarim* 40a

47 Quoted in footnote in the *Mosad HaRav Kook* edition of *Imrei Noam*

there is an inherent difference between "open miracles" and "hidden miracles." The majority of people are not meritorious enough to deserve the Divine Providence required to produce an open miracle, one where everyone will know that a supernatural change of events has occurred (e.g. the 10 plagues in Egypt). However, more people are worthy to have a hidden change of events occur, and therefore it is crucial to keep the information "hidden" from the public.[48] By doing so, there is a greater likelihood of having one's prayers answered.

Conclusion

This paper has sought to raise awareness of various issues that arise in genetic testing for late-onset diseases with no known cure. Whether or not such a test can be deemed an appropriate "screening test" is debatable. Even if one undergoes testing, there is the potential for considerable fallout to occur based on the results. In determining what Judaism's view is regarding genetic testing for late-onset diseases, there does not seem to be any prohibition per-se, as the *issur* of "*tamim tehiya*" is limited to actively seeking out the future, not to opening one's eyes to what is in front of him. There also does not seem to be a problem of using the test results to plan a future career, as long as one does not avoid performing any commandments, such as marrying

48 Regarding praying to have a negative test result, it seems that such actions would be comparable to the case in the *Mishna* on *Brachos* 54a, which states that if a woman is pregnant and her husband prays that the baby should be a male (after 40 days from conception), it is a prayer in vain. The reason is that since the fetus has already formed, praying to change nature is something only a prophet or the truly righteous can do. A genetic mutation seems to be similar to the status of a fetus in-utero, since both gender and presence of mutation are unknown at the time of the prayer. Rather, one could pray that the disease either take effect later in life or be a milder form etc.

and having children. The main issue that remains from both a medical point-of-view and a *halakhic* point-of-view is deciding how the patient who wants to be tested would react to the results. It is crucial for the genetic counseling team (doctors, counselors, psychologists, etc.) to determine that there would be no *tiruf-ha-da'as* for the patient who is undergoing testing. If necessary, it would seem that the team is even allowed to lie to the patient if doing so would be required for the benefit of the patient (although in reality such a possibility is unlikely). Nonetheless, regardless of the path pursued, it is integral to keep any information confidential, largely because of the hope that doing so would help the prayers of those involved be more likely heard and answered by the Almighty.

Establishing Maternity in Egg Donations: A Halakhic Perspective

Dr. Ephraim Hollander

I. Medical Background

The first successful oocyte (egg) donation was performed in the early 1980's; this success ushered in a new tool for the treatment of intractable infertility.[1] In conjunction with improvements made to conventional in vitro fertilization[2] (IVF), the procedure has become safer and less invasive, thus making it more attractive to potential donors. Currently, IVF utilizing a donor egg accounts for 10% of all IVF procedures done in the U.S.[3] Outcomes have been described positively, implantation and pregnancy rates of egg donor cycles have been found to be as good as or better than conventional IVF cycles.[4] Risks associated with egg donation are primarily due to multiple gestations, but

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1 Klein J, Sauer MV. Oocyte donation. Best Pract Res Clin Obstet Gynaecol 2002;16:277-291.

2 In vitro fertilization is an assisted reproductive technology involving ovarian stimulation, egg retrieval, fertilization, embryo culture , and the transfer of the embryo to the uterus.

3 Klein ibid. 278

4 Ibid. 285

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there is also an association with higher rates of pregnancy-induced-hypertension and cesarean section. Dr. Jeffery Klein, a practicing reproductive endocrinologist, concludes that "egg donation today is associated with the highest success rate among the assisted reproductive options and has allowed patients with otherwise intractable infertility an opportunity to conceive."[5]

There is a wide range of medical indications for utilizing oocyte donation, including women with premature ovarian failure or reduced ovarian reserve; women over the age of 45 requiring conventional IVF; women with repeatedly failed IVF attempts or abortions; and women with genetic diseases such as Turner's syndrome.[6] In the past, couples with heritable diseases were the primary users of donor eggs but the advent of preimplantation genetic diagnosis (PGD), a procedure in which the embryo undergoes genetic testing prior to implantation, should reduce the need for donor eggs. The most controversial use of donor eggs is for women who are past normal menopause. Research has shown that older patients have achieved similar outcomes to younger patients.[7] However, there are significant financial and psychosocial considerations for older patients that must be taken into account, and therefore most programs limit recipient age to 55.

The primary source of donor eggs has changed over the years. Formerly, extra eggs from IVF cycles were the major source of donor eggs (and this source remains the only legal

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5 Ibid. 286

6 Ibid. 278

7 Ibid. 279

method in Israel).[8] Currently, eggs from women known to the recipient or anonymously recruited are the most common method of obtaining donor eggs in the U.S[9] Donors known to the recipient may include close friends, siblings, parents, or even children from a previous marriage. Anonymous donors are screened for desired phenotypic characteristics of the receiving couple. A proper history and physical of donors should screen for any infectious disease, heritable conditions, and diseases like diabetes, atherosclerosis, and familial cancers. Additionally, protocols require the donor to be less than 35 years old and preferably less than 30 years old. Risks to the donor are generally minor, usually consistent with patients undergoing a conventional IVF cycle with a lower risk of Ovarian Hyperstimulation Syndrome (OHSS).[10] A study of 1000 donor cycles showed seven serious problems leading to two hospital admissions for OHSS, but no fatalities.

The goal of the egg donation cycle is to synchronize the menstrual cycles of both the donor and recipient. At the start of the cycle, the donor is given injectable hormones for recruitment of multiple eggs, along with GnRH agonists or antagonist to prevent an LH surge[11] in the donor.[12] At the same time, the recipient is given at least two weeks of estrogen to prime the uterus for pregnancy. Prior to implantation of the embryo, progesterone is administered

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8 Ibid. 281

9 Ibid.

10 OHSS is a complication of overstimulation of the ovary from many fertility medications that leads to ovarian enlargement, fluid accumulation in the abdomen, nausea, and diarrhea. Severe cases can lead to fluid buildup in the lung space and respiratory distress.

11 The hormonal event that leads to ovulation

12 Klein ibid. 284

to the recipient. Studies have shown that the optimal embryo transfer is the implantation of a 4-8 cell embryo along with the administration of 4-5 days of progesterone.

Despite the great success oocyte donation has had in providing infertile couples with an opportunity to conceive, the lack of a maternal genetic contribution is a continuing obstacle that has led researchers to find new ways of maintaining the genetic integrity of the mother. One such approach is termed Ooplam transfer, which consists of injecting donor cytoplasm into the recipient's egg in order to overcome an extranuclear implantation problem.[13] The second approach, germinal vesicle transfer, inserts the nucleus of an immature oocyte into an enucleated donor oocyte that is matured in vitro.[14] Both of these procedures have led to successful live births in rabbits but have yet to be attempted in humans. These future procedures have the potential to offer a couple struggling to conceive a powerful new tool, but they will also introduce a slew of new ethical questions since these techniques further manipulate the egg and produce children who have components from different mothers. As such, if conception defines maternity, one would be required to define what part of the cell is critical, further complicating the issue.

II. Introduction and Ovarian Donation

The discussion in Jewish law regarding egg donation revolves around determining maternity. The determination

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13 Ibid. 286 - fertility problems that arise from the portion of the egg outside the nucleus can be remedied by exchanging that portion of the cell with a donor's cytoplasm.

14 Ibid. - in this technique, only the nucleus is transferred into an egg of the recipient, this leaves the other components of the cell including the mitochondrial DNA belonging to the recipient.

of maternity hinges on whether conception or parturition (birth) establishes maternity. If conception determines maternity then the donor would be considered the mother, but if parturition determines maternity then the recipient would be considered the mother.

One of the first cases found in the responsa that relates to oocyte donation refers to a case report in a medical journal from the early 20th century. The article claimed to have restored fertility to a previously barren woman by transplanting an ovary. When Rabbi Benjamin Weiss[15] heard of the above case, he responded that if the case were in fact true, the child would be considered the recipient's child in all respects. Rabbi Weiss's ruling is based on a Talmudic passage regarding the laws surrounding a fledgling tree grafted onto a mature tree. The Talmud[16] states that if a fledgling tree is grafted onto a mature tree, the seedling is considered part of the mature tree with regards to the laws of *Orlah,* so that one is not required to wait three years to eat fruit from the grafted fledgling tree.

Rabbi Eliezer Waldenberg[17] applies Rabbi Weiss's ruling to our case of oocyte donation. Rabbi Waldenberg extends the reasoning of a seedling or transplanted organ being absorbed by the recipient to an implanted embryo. Rabbi Waldenberg concludes that in the case of egg donation, the embryo would become an inherent part of the recipient and thus would be considered her child. However, Rabbi Aviad Trop does not accept Rabbi Waldenberg's extension of ovarian transplant to embryo implantation.[18] Rabbi

15 *Vayalket Yosef* 10 (1908) no. 9

16 Tractate *Sotah* 43b

17 *Shut Tzitz Eliezer*, vols. 15:45 and 19:40

18 Rabbi Aviad Trop, "Surrogate Motherhood," *Ateret Shlomo*, Vol. 5, p. 106.

Trop explains that ovarian transplant, like other organ transplants, is essential to the life of the fetus and the recipient and becomes an inherent part of the recipient; therefore no maternal relationship develops with the organ donor. In contrast, an embryo has already established a maternal relationship at conception, so the implantation will not act to uproot that relationship. Accordingly, Rabbi Trop believes that in the case of egg donation the egg donor would be considered the mother of the child.

Rabbi JD Bleich[19] offers a third understanding of Rabbi Weiss's responsa by introducing the possibility of dual maternity. His reasoning is derived from a passage in Tractate *Chulin*[20] that describes the classification of offspring born to two different species. One opinion in the Talmud states that since the mother nurtures and sustains the embryo, the mother determines the species of the offspring. Another opinion sates that the "seed of the father" needs to be taken into consideration. Based on these two opinions, one can envision the need to consider two mothers in the case of egg donation. There is certainly a maternal relationship established with the gestational mother through the nurturing of the embryo. However, there is an additional maternal relationship established with the genetic mother at conception. This relationship is parallel to the paternal relationship established in the Talmud, as the "seed of the father" should be considered in the same way fathering the case of egg donation.

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19 Rabbi JD Bleich, *Contemporary Halachic Problems*, Vol. 4, pp. 257-258.

20 Tractate *Chulin* 79a

III. The Rationale for Parturition Determining Maternity

a. The Case of Twin Converts

The Talmud in *Yevamot*[21] quotes the Amora *Rava* that if twin boys were conceived by a non-Jewish mother who later converted to Judaism during the pregnancy, the twins are considered to be maternal brothers. Due to the conclusion of the Talmud, which states that the twins are considered brothers, Rabbi Z.N. Goldberg[22] concludes that this can only be the case if parturition determines maternity. Since following a conversion the familial ties of the convert are severed, the twins can only be considered maternal brothers if maternity is indeed established at birth, as any relationship established at conception would be severed with the conversion. Thus, Rabbi Goldberg reasons that in a case of embryo or fetal transfer the gestational mother, and not the genetic mother, would be considered the mother of the child according to Jewish law.

Rabbi Goldberg's understanding of the Talmud is assuming that a fetus in utero is considered a distinct being separate from its mother. Since the conversion serves to sever any relationship established prior to the conversion, parturition must determine the maternity of the twins. However, if one views the fetus as merely an appendage of the mother, then no proof can be brought regarding maternity from the above case, since the severing of familial ties during conversion only applies to relationships outside oneself. For example, after conversion one still retains the right to one's own property, still remains liable

21 Tractate *Yevamot* 97b

22 Rabbi ZN Goldberg, *Techumin*, vol. 5, pp.248-259 (1984)

to prior infractions, and still is responsible to repay any loans. Therefore, the twins can conceivably be brothers even if conception determines maternity because the twin's relationship with the mother would be unchanged by the conversion. Rabbi Goldberg[23] circumvents this issue by claiming that the Talmud is most likely following the opinion that a fetus is a distinct being, separate from its mother. This understanding is based on *Rava*, who is the Amora quoted in the case, ascribing to the position of the fetus being separate from the mother.

In spite of this, several sources dispute the ability to use the case in *Yevamot* to learn that parturition determines maternity. Rabbi Trop[24] raises doubt by showing that a number of commentaries, namely *Rashi, Ritva,* and *Nemukei Yosef*, all opine that the principle of a convert losing all previous familial relationships does not apply between a mother and her fetus, or between one fetus and another. Therefore, according to these commentaries no proof can be learned from the Talmud in *Yevamot* regarding parturition establishing maternity. Furthermore, in a discussion regarding a case in which it is unknown if the mother was pregnant prior to conversion, Rabbi Shmuel Rizovsky and Rabbi Shimon Skop both reason that even if one views the fetus as being separate from the mother an additional conversion would not be required because the fetus and mother are converted as one.[25] Thus, according to this understanding no proof regarding maternity can be learned from the case of the twin converts.

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23 Ibid. p. 255

24 Rabbi Aviad Trop, ibid., pp. 109-110

25 Ibid.

b. The Case of a Minor Convert

The Talmud in *Ketubot*[26] discusses a case where a minor is converted to Judaism through the court. Is this conversion valid on a Biblical level, or is it only a Rabbinic enactment? *Tosafot* in tractate *Ketubot*[27] explain that conversion through the court operates through the principle of "agency" and since a minor cannot appoint an agent, the conversion must operate at a Rabbinic level. *Tosafot* add that a fetus would still be converted at a Biblical level. Rabbi Akiva Eger explains this last statement of *Tosafot*[28] only according to the opinion that a fetus is an appendage of the mother. As such, the conversion of the fetus is considered an extension of the mother's conversion. If *Tosafot* believed that the fetus was considered a separate entity, then there would be no reason to distinguish a fetus and a regular minor, and the conversion would only operate at a Rabbinic level. Accordingly, it must be that *Tosafot* interpret the Talmud in *Yevamot* as considering the fetus to be a limb of the mother. This discussion adds to the objections of Rabbi Trop in deriving proof of maternity from the case in *Yevamot*. However, this objection can be refuted with the opinion of *Tosfot HaRosh*, who states that the conversion of the fetus would operate at a Biblical level even if one views the fetus as independent from its mother, against Rabbi Akiva Eger's distinction. Thus, *Tosafot* can indeed interpret the case in *Yevamot* according to the opinion that a fetus is separate from the mother, while still concluding that the conversion of the fetus operates at a Biblical level.

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26 Tractate *Ketubot* 11a

27 *Tosafot, Ketubot* 11a, *s.v Matvilin*

28 Chidushei Rabbi Akiva Eger, ibid, *s.v. Ve'haTosfot Lo*

IV. The Rationale Against Parturition Establishing Maternity

a. The Case of a Fetus Inheriting

Rabbi Trop[29] quotes a discussion in the Talmud that is at odds with the opinion of maternity being established at birth. The Talmud in *Niddah*[30] states that a neonate inherits its mother if the mother dies postpartum. However, if the fetus dies in utero with the mother then the neonate does not inherit because he is considered to have died prior to the mother. Rabbi Trop explains that by implication, had the fetus not be considered dead before the mother, the fetus would have indeed inherited its mother. For this conclusion to be true, the Talmud must believe there is a maternal relationship in existence prior to birth. Rabbi JD Bleich[31] refutes this proof brought by Rabbi Trop by reasoning that if the mother was considered to die before the fetus, the fetus would have been considered born at that moment. Furthermore, even if there is a maternal relationship in existence in utero, the relationship established at birth may supersede or even supplant the gestational one.

b. The Case of *Chalav Treifah*

Rabbi ZN Goldberg[32] presents another source in the Talmud that implies gestation establishes maternity before birth. The Talmud[33] excludes milk extracted from a

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29 Rabbi Aviad Trop, ibid., p.113

30 Tractate *Niddah* 43b

31 Rabbi JD Bleich, ibid., p.243, note 13

32 Rabbi ZN Goldberg, ibid., p.249

33 Tractate *Chulin* 113b

slaughtered animal from the prohibition of milk and meat. This is due to the verse "you shall not cook a kid in the milk of its mother" (exodus 23:19), which implies that the animal must have the potential to become a mother, thus excluding a slaughtered animal. Rabbi Akiva Eger extends the discussion of the Talmud to live animals, questioning whether an animal that cannot carry a fetus to term should also be excluded from the prohibition like a slaughtered animal. In his discussion, Rabbi Eger uses another statement in the Talmud[34] that concludes paternity is established after the first trimester, and so too maternity should be established after the first trimester. Rabbi Goldberg believes this reasoning can be extended to a case of a transferred embryo, which would develop a maternal relationship during gestation.

Rabbi JD Bleich[35] also discusses the cases brought in *Chulin* regarding maternity and the prohibition of milk and meat. Rabbi Bleich focuses on the Talmud's statement that a female animal that has never given birth before and lactates is included in the prohibition, yet a male animal that lactates is excluded. The rationale behind this ruling is the female animal has the potential to become a mother while a male animal does not have this potential. *Rashi* clarifies that the Talmud is dealing with a case of a nulliparous but gravid[36] animal that is close to parturition. Additionally, a parous animal that ceases lactation but produces colostrum[37] later on is excluded from the Talmud's question because the

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34 Tractate *Sanhedrin* 69a

35 Rabbi JD Bleich, "*Chalav Treifah* and the definition of maternity," *Benitivot ha'Halacha*, vol. 3, pp.47-48

36 An animal that is pregnant but has not yet given birth yet to a living child.

37 Early breast milk that is rich in protein

status of motherhood attained after the first birth remains. Rabbi Bleich argues that Rabbi Eger's distinction is only true in a case of a nulliparous animal that cannot carry a fetus to term. A gravid animal that is close to parturition is at best considered a potential mother, as only parturition classifies the animal a mother. As such, Rabbi Bleich concludes that neither conception nor gestation alone can determine maternity; rather, only parturition determines maternity in the case of surrogacy – to the exclusion of the genetic mother.

c. The Case of Two Wombs

The Talmud in *Chulin*[38] cites a case of a woman with two wombs, in which the fetus leaves the first and enters the second. The Talmud does not resolve which womb is considered to have given birth. According to one opinion presented in the Talmud, if the fetus is not conceived in the womb and later delivered from the womb, the womb is considered a virgin womb because the fetus is not its own. Even according to the opinion in the Talmud that the womb is not considered a virgin womb, maternity is still not implied. The case is just displaying that a fetus that is not the womb's own can still render the womb "broken." Rabbi Ezra Bick[39] uses this case to show that parturition alone is not sufficient in determining maternity. However, Rabbi ZN Goldberg believes that no proof can be brought from the above case, as no maternal relationship can develop in the second womb because the fetus is considered born from the first one. Secondly, the Talmud is dealing

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38 Tractate *Chulin* 58a

39 Rabbi Ezra Bick, *Techumin*, vol.7, pp. 266-270

with a case where the fetus died, and therefore the second womb is not the mother because it has neither conceived nor nourished the fetus.

d. The Case of the Pregnant Convert

The Talmud in *Yevamot*[40] discusses a case of a convert who is pregnant at the time of the conversion. The Talmud concludes that child does not require a separate conversion because the mother is not considered a barrier to the immersion, as the fetus is considered a natural growth of the mother. Rabbi Mordechai Ralbag[41] infers from the question of the Talmud that parturition is not the determinate of maternity. He explains that since the mother is Jewish at the time of birth, the fact that the Talmud assumes the child requires immersion implies that birth from a Jewish mother is not sufficient. Rabbi Ralbag continues that the question of maternity revolves around the status of the fetus in relation to the mother. According to the opinion that the fetus is merely an appendage of the mother, then there is no maternal relationship between the fetus and the mother, and only parturition will establish one. However, if one views the fetus as being distinct from the mother in utero, then conception will establish maternity. Rabbi Ralbag goes on to compare this case in the Talmud, *Yevamot* 78b, with the case of the twin converts, *Yevamot* 97b, discussed previously. Rabbi Ralbag explains that the Talmud here is under the opinion that the fetus is distinct from the mother; therefore, since at the time of conception the mother was not Jewish the child requires

40 Tractate *Yevamot* 78b

41 Rabbi Mordechai Ralbag, *Ateret Shlomo*, vol.8, p.204

its own conversion. In contrast, the case in *Yevamot* 97b is under the assumption that the fetus is an appendage of the mother, and therefore the maternal relationship is established at birth, when the mother is Jewish.

Rabbi Aviad Abraham Kurtztag[42] refutes any proof from the case of conversion, as there is a distinction between determination of nationality and maternity. He explains that nationality is determined at conception, while maternity is determined at birth. Therefore, the fetus is not Jewish at conception and needs a conversion as it is unaffected by the birth. By implication, this distinction would complicate a scenario where a non-Jewish egg donor was used for a Jewish couple. Rabbi Abraham Issac Kilav[43] explains that since the Talmud rules that the fetus is Jewish only because it was converted along with its mother, had the conversion not taken place the child would not have been considered Jewish, despite its mother being Jewish. In a case of a non-Jewish egg donor, there is no conversion of the mother, so at birth, there is no maternal relationship with the Jewish recipient and the child will not be Jewish and thus will be the child of the egg donor. However, in a case of a Jewish egg donor and recipient, the baby is considered Jewish at conception and would be the child of the recipient, as maternity will be established at birth.

V. A Conceptual Model

Rabbi Ezra Bick[44] finds the textual arguments brought so far to support conception, gestation, or parturition

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42 Rabbi Aviad Abraham Kurtztag, *Ateret Shlomo*, vol. 4, pp.173-175

43 Rabbi Abraham Issac Kilav, *Techumin*, vol. 5, pp.260-267

44 Rabbi Erza Bick, ibid.

as the determinant of maternity to be lacking as they do not directly fit the modern model of assisted reproductive technologies. In this approach, Rabbi Bick explains that first a conceptual construct is created and then one gleans from the text which way Jewish law would sway in the discussion. As such, he develops two conceptual approaches to understand Judaism's understanding of maternity. The first model focuses on the biological perspective of the parents, in which genetic material from each parent is used to produce the child. In this case, the mother's role and father's role are equivalent, and just as the sperm donor would be considered the father, so too the egg donor would be the mother. The second approach is a more "agricultural model" of conception, in which the male's seed is placed into a fertile environment. Here the role of each parent is not parallel, as paternity focuses on the donation of genetic material, while maternity is more a focus of nurturing the fetus, rather than the mother's genetic contribution. According to this model, the gestation of the fetus is the primary determinant, and it follows the recipient of a donor egg would be considered the mother as it is her body that nourishes and develops the child.

VI. Summary and Conclusion

The central question in the discussion of Jewish law as it relates to egg donation is determining maternity. As is the case with applying Jewish law to any new technology, one must scour through seemingly unrelated laws to determine Jewish law's view of the topic. With the advent of egg donation, one has the ability to create a scenario in which the genetic mother is distinct from

the gestational mother. As such, determining the status of maternity according to Jewish law is the key to coming to a *halachic* conclusion regarding this new technology. As can be expected in a discussion applying unrelated laws to a new technology, there are sources that seem to support both possibilities; namely, that fertilization or parturition determines maternity. When there is a real question of a Jewish couple who needs to utilize an egg donor, an experienced Rabbi needs to be consulted who can synthesize scientific knowledge with Judaism's viewpoint, based on the discussions in the primary Jewish sources.

Medical Malpractice in *Halakha*

Jeremy Z. Schnall

I. Introduction[1]

Being a physician is an awesome privilege and responsibility. We live in a society today that is the most medically advanced it has ever been, and the depth and breadth of knowledge a physician utilizes in the daily practice of medicine has enabled our society to become healthier than ever. In practicing medicine, physicians face daily challenges in their knowledge, judgment, and treatment of patients and their illnesses. These challenges are compounded by the fact that physicians may feel compelled to diagnose and treat illness based on legal concerns, practicing medicine in a way that would prevent them from being held accountable for medical malpractice. In addition, as malpractice insurance premiums are at an all time high, patient care may ultimately suffer because qualified students are discouraged from going into the medical field in favor of less stressful and more lucrative careers. This article will discuss the approach Jewish law,

1 I would like to thank Rabbi Dr. Edward Reichman for all of his help in researching the sources, as well as the administration of the Albert Einstein College of Medicine of Yeshiva University, who enabled this writer to have the resources and the time to publish this article.

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halakha, takes toward physicians' liability in medical malpractice. It will become apparent that *halakha* attempts to reconcile some of the aforementioned challenges, and seeks to create a medico-legal system that incorporates the goals of appropriately compensating victims of medical error, deterring physicians from being careless, and encouraging physicians to practice medicine within the framework of laws governing malpractice. This article will also discuss relevant applications of the levels of responsibility, the different categorization of medical error, as well as the legal responsibility of residents, or training physicians.

II. General Principles of Tort Law in *Halakha*

In *Halakha*, man's actions are governed by the principle of *adam muad le'olam*, literally, man is always forewarned.[2] This means that man is held to a level of strict liability, accountable for any injury caused to another regardless of intent or fault.

In Bava Kamma 27b, Tosafos limits this strict liability to circumstances of negligence or cases approximating negligence, and therefore, instances of pure accident are exempt. Tosafos brings numerous proofs showing that the one who damages is not always liable, and argues that these cases must be cases of *ones*, accident, and therefore, *adam muad le'olam* doesn't apply. One proof that Tosafos brings is the *Gemara*'s exemption of an unpaid slaughterer (in contrast to a paid slaughterer who is liable)[3] who damages a customer's property, assuming that in this case, the only reason not to evoke the *adam muad le'olam* principle must be because of a low level of culpability, namely a

2 Bava Kama, Mishnah 2:6

3 See note 5 below.

circumstance of *ones*, accident, which is an exemption to the strict liability standard.

Ramban[4] disagrees with Tosafos' proofs, and thus with his exemption of *ones* from the strict liability principle. He argues that the damager is not held accountable for pure accident only when there is an element of *peshiat hanizak*, contributory negligence by the injured party. He says that the examples Tosafos uses must be cases of contributory negligence, and that is why the damager is exempt, not because in general *ones* is exempt. The example of the unpaid slaughterer poses a challenge to Ramban, because there is no element of contributory negligence; the slaughterer single-handedly did the damage in that case. But Ramban answers that the nature of a professional's work removes him from the *shem mazik*, or the status of a tortfeasor, and the principles of strict liability in tort law do not apply to a professional engaged in his professional duties.[5] But in general, according to Ramban, *adam muad le'olam* sets a standard which places culpability on the one who damages, even in cases of pure accident.

In an article comparing American and Jewish approaches to malpractice, Joshua Fruchter[6] conceptually explains the argument between the Tosafos and Ramban, basing it on their respective understandings of the purpose of *adam muad le'olam*. He asserts that Tosafos hold that

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4 Shita Mekubezes, Bava Metzia 82b

5 One possible explanation why the paid slaughterer doesn't have this exemption despite being a professional engaged in his field of expertise is because when one is paid for his work, he must exercise extreme caution in his craft, and if damage does result, it is assumed to be secondary to his contributory negligence.

6 Joshua Fruchter, "Doctors on Trial: A Comparison of American and Jewish Legal Approaches to Medical Malpractice." American Journal of Law and Medicine. Vol XIX No.4 1993.

the primary purpose is to deter conduct that may cause damage to another, and thus demanding strict liability in circumstances that are the result of an accident or unforeseeable chain of events does nothing to deter negligent conduct. Ramban on the other hand believes that the purpose of tort liability is to compensate the injured party, and therefore, the questions of fault or intent are not important, as long it is proven that the damager caused the damage. This also explains why in the case of contributory negligence, the damager would be exempt as well according to Ramban; since the plaintiff is no longer passive, he forfeits his right to receive compensation.

There are a number of contemporary sources that seek to interpret the rationale for the Torah exempting a professional for unintentional and accidental damage while engaged in professional activities. Rabbi Mordechai Ilan[7] asserts that since the professional had the permission and authority to work on the object that became damaged, this removes him from the category of *mazik*, a damaging outside party. Alternatively he proposes that since the professional is working for the benefit of the injured party, there is a basis for exemption. Rabbi Yeshaya Blau,[8] giving a similar but different explanation, says that since the professional does not usually err in his skill, it must have been the misfortune of the customer that 'caused' the damage. Rabbi Mordechai Willig[9] proposes a more novel and comprehensive approach, relating the exemption of a

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7 Rabbi Mordechia Ilan, "Chiyuv Nezikin B'rofeh she-hizeek..." *Torah She'beal Peh,* 1976, page 70

8 Rabbi Yeshaya Blau, Pitchei Choshen, *Hilchos Sechlios,* Ch. 13 at 322

9 Audio recording of lecture given to RIETS students in 1992, quoted in Fruchter, see note 3 above

professional to the exemption of contributory negligence. He explains that *peshiat hanizak* does not only include negligence committed by the damaged party, but also includes an assumption of risk. In a normal tort case, the tortfeasor (*mazik*) solely acts and damages the injured party's (*nizak*) property. However, in the case of a professional, the customer initiates a relationship, entrusting his property to another, implicitly assuming and accepting a level of risk that some damage may result. Therefore, the damaging professional cannot be held accountable in circumstances of accident, since the *nizak* 'contributed' to the damage of his property by assuming risk of damage.

III. Background of Medical Malpractice

The classic rabbinic source and still the accepted text governing all areas of Jewish law is the *Talmud Bavli.* One of the six orders of the Talmud is *Nezikin*, or damages, which contains ten volumes pertaining to civil and criminal law, and the Jewish court system. Curiously, in all of the pages of *Nezikin*, there is not one direct discussion of a physician who errs. However, there are a few brief sources in the *Tosefta*, the addendum to the Mishna, that discuss medical malpractice.

1. The *Tosefta* (*Bava Kamma* 6:5-6) states, "a skilled physician who treated a patient with the permission of the court and caused damage in the process is not liable by human law but his judgment is given to Heaven (*dino massur l'shamayim).*"

2. Another *Tosefta* from later in the same tractate *(Bava Kamma 9:3)* states: "A skilled physician who treats with the permission of the court and damages a patient

is not liable, but if he wounded more than necessary, the physician is liable."

3. A third *Tosefta* (*Gittin 3:13)* further states, "A skilled physician who treats with permission of the court and damages the patient: if unintentionally, he is not liable, but if he did so intentionally, he is liable; in order to preserve the social order." The commentaries explain that the exemption of liability in cases of unintentional error is because of the desire to "preserve the social order."

4. A final *Tosefta* (*Makkot 2:5-6)* discusses a case in which a physician error results in the unintentional death of his patient: "A skilled physician who has permission of the court and treats a patient but the patient died unintentionally, the physician is exiled." Exile is both a penalty and an opportunity for atonement, and the *rotzeyach be'shogeg*, unintentional murderer, must flee and remain in a city of refuge, an *ir miklat*, until the high priest dies.

There are related cases in the *Talmud* that do not directly discuss the case of the physician who errs, but still have relevant application to our topic and will be discussed below. The questions raised by these sources are certainly relevant to the practicing physician today and the degree in which he or she is held accountable by Jewish law, and will be the focus of our discussion.

IV. Physician's Exemption from Tort liability

What emerges from the *Tosefitot* quoted above is that Jewish law has generally exempted physicians from liability for unintentional injury to their patients "in order to preserve the social order." It is clear that in differentiating unintentional from intentional injury (*shogeg* and *mayzid*),

the *halakha* does not subscribe to a principle of strict liability (*adam muad le'olam* that governs torts in general), but rather uses fault litigation, or intent, as the basis for medical malpractice.

This exemption raises some very important questions. While both the second and third *Toseftot* above seem to exempt the physician for unintentional damage unconditionally, the first *Tosefta* says that while there is legal immunity, there is a residual obligation, as we see from "*dino massur l'shamayim.*" What is the nature of this obligation? Additionally, the term "unintentional (*shogeg*)" that we are talking about, to which level of culpability is this referring: *ones*, accident, or even *peshiya*, negligence? If we assume that the level of *shogeg* is the same for all four *Toseftot*, then the legal immunity of the first three *Toseftot* must be limited to cases in which the physician's act occurred accidentally, with either very little, or no fault at all, because the *shogeg* of the fourth *Tosefta* obligating the physician to exile is limited to these levels.[10] A third question that arises is what is the source and rationale for legally exempting the physician in any case? What does "in order to preserve the social order" mean? In what circumstances would this legal immunization not apply?

In *Toras Ha'adam*[11], Ramban develops a theory of medical liability from the aforementioned *Toseftot.* He raises an important question regarding this "exemption" in cases of *shogeg*. Assuming that the term *shogeg* is consistent, since it seems that there is legal immunity from monetary payment for damaging, then why would it be that there

10 As discussed in Tractate Makkos

11 Toras Ha'adam. Sha'ar Hasakana, page 41 in Mossad Harav Kook edition

is a punishment of exile if the injury were to result in the patient's death? It seems from the fourth *Tosefta* that legal liability does exist.

He develops a theory based on the verse "And he shall cause him to be thoroughly healed[12]," which is generally assumed to be the Biblical commandment for the physician to treat and heal patients. Many commentators ask why there is a need to have an affirmative commandment. Would it be forbidden if it weren't for this permissive allowance? Rashi and Tosafos answer with a theological argument – if God chooses to make someone ill, one might have thought that without a positive *mitzvah*, it would have been against the Divine decree, and an illegal intervention in God's plan. However, the Ramban offers a novel interpretation of this *mitzvah*. He writes that this verse serves as an encouragement to the physician who may be anxious and concerned with making errors and be liable for his mistakes, which may ultimately lead to disillusionment with his skill, and refrain from practicing as a result. Thus, the verse says to the physician- 'do not think that engaging in medicine is forbidden because you may damage and possibly even cause someone's death. It is not only permitted, but a *mitzvah*!'

Ramban states that if a patient is injured, but the physician never learns of the injury, or does not find there to be any error, then he is entirely exempt, legally and morally. But, if the physician realizes that he did indeed err and caused damage, then even though he is legally immune, morally he is obligated to compensate the victim, and if it were to result in the death of his patient, obligated to exile.

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12 Exodus 21:19

This is what is meant by the first *(dino massur l'shamayim)* and last *Toseftot* (exiling the physician). Thus, according to Ramban, the malpractice exemption is complete (legally and morally) in circumstances of a bad outcome for the patient when at no fault of the physician, and only legally, not morally, if the physician were at fault. But the question that remains is what level of fault – *ones*, accidental and unintentional, or even *peshiya*, negligence? To this Ramban states that the Torah exempted the physician who was "*ta'ah*," mistaken, provided he was "as careful as he should have been with respect to matters of life and death and did not injure his patient negligently *(b'peshiya)*." This clearly excludes the negligent physician from this malpractice exemption, and would make him both morally *and* legally liable for acting carelessly and recklessly. This describes a 'partial exemption theory' which would exempt a physician for a bad outcome completely, and for errs in judgment legally, but not morally, and would hold the negligent physician legally liable for his actions.[13]

V. Similar Cases, Dissimilar Liability

In the aforementioned *Tosefta* (*Makos 2:5*), where a doctor errors and unintentionally causes the death of his patient, the physician is obligated to go into exile. In the same *Tosefta*, there is the same ruling regarding a messenger of the court, who while performing the *beis din*'s mandate

13 The question raised by Rabbi Bleich is powerful: what kind of reassurance does this *mitzvah* provide if we know from the above discussions, that in certain circumstances, he will be held liable (at the very least, morally) for his errors? Even stronger, if the physician is commanded to practice medicine and to ignore the potential for error, how can he be liable for what he is commanded to do? See Rabbi Bleich's article (note 22 below) for a novel, although somewhat perplexing explanation.

of giving lashes, unintentionally causes the death of the criminal and is obligated to go into exile as well.

However, the Gemara in *Makkos 8b* seems to contradict this second ruling of the *Tosefta*. The Mishna quotes Abba Shaul who states that a father and teacher while disciplining the child, and the officer of the court who administers lashes and unintentionally cause the death of the child or criminal are exempt from the punishment of exile, because they are engaged in a *mitzvah*. The reason is that exile is only imposed in cases similar to the paradigmatic case of exile, in which the unintentional murderer and the victim were both engaged in an activity of *reshus*, voluntary action, in contradistinction to one who is commanded by a *mitzvah* to engage in the activity.

The questions that are raised by the *Rishonim* and *Achronim* are what is the difference between the two contradictory statements regarding a court appointed messenger, and why would a doctor who presumably is engaged in healing, not be exempt based on the fact that he too is engaged in a *mitzvah*?

The Or Sameach[14] resolves the problem by saying that the *Mishna* which exempts the father, teacher, and court officer, is the minority opinion of Abba Shaul, and the majority opinion, the *Tanna Kamma* (whose opinion is omitted from the *Mishna*), which is consistent with the opinion of the *Tosefta*, disagrees, and holds the father, teacher, court officer, and the doctor liable. The problem with this answer is that the Shulchan Aruch[15] quotes both the opinion of Abba Shaul exempting the father, teacher, and court officer, while

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14 Or Sameach, Hilchos Rotzeach 5:6

15 Shulchan Aruch, Yoreh Deah 336:1

also ruling that the doctor is still exiled.

One *Rishon* who discusses this, the Tashbetz,[16] gives a cryptic explanation saying that the doctor is distinct from the case of the father, but fails to explain how. The *Yad Avraham*[17] and *Besamim Rosh* both give similar explanations. They hypothesize that the physician who errs and kills, although he had the intention of performing a *mitzvah*, with the unintentional death of his patient the doctor shows that he is not engaged in the *mitzvah* to heal. As a result, he does not gain the exemption of *osek b'mitzvah* in this case, and is thus distinct from the father, teacher, and court officer, who are still engaged in a *mitzvah* even with the unintentional death, since their obligation was to discipline or punish, whereas the doctor's was to heal.

One thing to note is that both the Yad Avraham and the Besamim Rosh[18] hold that since there was a bad outcome, retroactively the doctor shows that he was not engaged in the obligation to heal. This is a matter of dispute by the *Birchei Yosef*[19] who similarly makes the distinction that the doctor is not engaged in a *mitzvah*, but not exclusively because of the bad outcome, but rather the difference is that the doctor made an **error** that resulted in the patient's death, whereas the father, teacher, and court officer did not make an error at all in fulfilling their obligation. The important difference between these opinions is a case in which a physician did not make an error, but the patient suffered an adverse outcome – the first two authorities

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16 Shut HaTashbetz Vol. 3 no. 82

17 Yad Avraham, Yoreh Deah, 336:1

18 Teshuvos Besamim Rosh, no. 386

19 Birchei Yosef, Yoreh Deah 336:1

would exile him, whereas the latter opinion would exempt him as in the *Mishna*'s cases.

VI. Contemporary Opinions Regarding the Physician Who Kills

The Rabbinic authorities of our time discuss this case of the physician who unintentionally causes the death of his patient, and, although often at variance with the discussion in the previous section, try to relate it to general principles of damages. Rabbi Zalman Nechemia Goldberg[20] writes that if the patient dies, but it is determined to be exclusively a bad outcome without any element of physician error, then the case is not that of *shogeg*, unintentional murder, but rather *ones*, complete unavoidable accident, for which there is no punishment of exile.[21] Rabbi J. David Bleich[22] argues with this conclusion. He writes that inherent in most medical and surgical treatments, there is a risk of adverse event, including the risk of death. As such, when the physician knows and assumes this statistical risk, it cannot then be categorized as pure accident, *ones*.

The Aruch Hashulchan[23] provides a lenient opinion. He writes that even if the physician was in error in his treatment of the patient, and as a result the patient dies, the

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20 Rabbi Zalman Nechemia Goldberg, "Rishlonot Refuit," Techumin 19 (1999)

21 This implies that only if there is an element of error, then it would be a case of *shogeg*, and the exile imposed on him by the *Tosefta* would apply. The reason why he would not be exempt, is the same explanation given by the Birchei Yosef, that when he errs, he is not engaged in a *mitzvah*, whereas if he were to act appropriately, he is fulfilling the *mitzvah* of healing, despite the poor outcome.

22 Rabbi David J. Bleich, "Medical Malpractice in Jewish Law," Tradition, Spring 2005, Vol. 39, no. 1

23 Rabbi Yechiel Michel Epstein, Aruch Hashulchan, Yoreh Deah 336:2

physician will still be exempt if it was an error in judgment. He asserts that a physician would get exile only if there was an element of recklessness or laziness in which "*lo iyen yafeh,*" he didn't interrogate the illness well. This assumes that if the doctor did perform a thorough investigation into the illness and the treatment, and despite this, he made an error, he is exempt from exile, whereas if his investigation into the diagnosis or therapy were inadequate, he would be exiled. This seems to imply that the physician will get exile for negligent conduct. It is with this point that Rabbi Shlomo Zalman Auerbach and Rabbi Moshe Feinstein disagree, although they come to different conclusions.

Rabbi Auerbach[24] maintains that errors **in judgment** are exempt, and the case of the *Tosefta* which exiles the physician is for an error in action (i.e. the physician performed an unintended act of reaching for one medicine and grabbing another, or grabbing an unsterilized scalpel). Rabbi Feinstein[25] disagrees and holds that errors which result from unintended actions are not ordinary negligence which gets the penalty of *galus*, but rather they are cases of gross negligence since the physician acted in haste, and the punishment of exile is insufficient. Rabbi Feinstein holds that when the physician had due deliberation in the diagnostic and therapeutic approach to his patient's illness, yet there is a bad outcome, it is considered *ones*, and completely exempt from *galus*. According to Rabbi Feinstein, exile is imposed only on a physician who errs in a situation where he was not the most qualified to treat

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24 Quoted by Abraham S. Abraham in Nishmas Avraham, Yoreh Deah 376:1, note 7

25 Rabbi Moshe Feinstein, Iggeros Moshe, Even Ha'ezer IV, no. 31

this illness, and the matter was not urgent and could have waited for a more qualified physician to be consulted.

Rabbi Bleich[26] offers a practical difference between the opinions of the Aruch Hashulchan, Rabbi Auerbach, and Rabbi Feinstein. In discussing a case of nonfeasance, in which a physician does not perform a therapeutic intervention that would be beneficial, Rabbi Bleich believes that according to the Aruch Hashulchan, since the physician had not considered this possible intervention, he was *lo iyen yafeh*, negligent in his investigation, and therefore would be exiled. According to Rabbi Auerbach, since this nonfeasance results from an error in judgment (not considering all diagnostic and therapeutic options), the physician would be exempt from exile. According to Rabbi Feinstein, if due to lack of deliberation, the doctor did not think of all the options, then since he acted in haste and was grossly negligent, if it resulted in the patient's death, exile would be inadequate.

VII. *Tashbetz* and Proximate Cause

Until this point, our discussion about the physician who errs has been about the general category of any doctor with a medical license. But the *Tashbetz*[27] presents a novel interpretation of all of the *Toseftot*, and as a result, the entire discussion this paper has presented. He writes in his *Teshuvos* that the term employed by all of the sources, "*rofeh uman*," refers exclusively to a surgeon who works with his hands and instruments in treating his patients. It is only about a surgeon that the *Tosefta* says is exempt as a matter of law from inadvertent damages, but still has a heavenly

26 See note 22 above

27 Shut HaTashbetz vol. 3 no. 81

obligation, and gets exiled for the accidental killing of his patient. A physician who heals with medicines and other non-invasive treatments, namely a doctor of internal medicine, according to the *Tashbetz*, is not mentioned at all in the sources for medical malpractice in *halakha*.

A logical conclusion that one would reach from the *Tashbetz's* distinction between a surgeon and an internist, is that just as an internist is not given the exemption of the surgeon for acts of *shogeg*, so too he would also be held liable for all acts of accidental injury under the general tort principle of *adam muad le'olam*. However, the *Tashbetz* presents a contradictory and seemingly difficult opinion. He states that an internist, in contrast to a surgeon, would be completely exempt, legally and morally, for any accidental injury or death that results from medical treatment of his patient. The *Tashbetz* explains that damage caused by medicines is "not in the realm of wounding for which he is liable for damages," and an internist is "only responsible for what he sees with his eyes."

In *Tzitz Eliezer*,[28] Rabbi Waldenberg disagrees with this distinction of the *Tashbetz*. He questions why a potent medicine that directly damages one's internal organs is not considered *chavala*, wounding, which would be under the realm of damages for which one would be liable under general tort principles, were it not for the exemption provided by the *Tosefta*.

In explaining the rationale for the *Tashbetz*, Rabbi Bleich[29] also answers Rabbi Waldenberg's challenge. He

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28 Rabbi Eliezer Yehuda Waldenberg, Shut Tzitz Eliezer, Ramat Rachel vol. 4 ch. 13

29 See note 22 above

writes that the *Tashbetz's* opinion touches on the *halakhik* definitions of *gerama* and *garmi*, two categories of indirect damage. The reason why an internist, according to the *Tashbetz*, is completely exempt and not included in the *Tosefitos*, is because the internist generally lacks proximate cause, or initiating the direct injury to the patient. But a surgeon directly causes damage, and as such this case of damage can be considered *garmi*, or as Tosafos[30] write, a "necessary and inescapable result of the tortfeasor's act," and without an exemption of the *Tosefta*, the physician would in fact be liable.

Rabbi Zalman Nechemia Goldberg[31] rules that the liability of *garmi* would extend even further, obligating an internist for simply prescribing a harmful medication, or referring a patient for a harmful surgery. But this assumes that what the doctor orders will necessarily and inescapably result, namely that the prescription will be filled by a pharmacist, or a nurse will administer the harmful medication, or the surgeon will act based solely on this recommendation and not on his own examination and assessment, which in today's healthcare field, is highly unlikely and uncertain to occur. In addition, the Rosh[32] limits liability for *garmi* to an immediate result of the indirect action, and as a result, the applicability of the internist's potential liability is extremely unlikely to occur. Thus perhaps the Tashbetz simply categorizes direct damage of a surgeon's error to be included in the *Tosefta*, although theoretically he would agree to an internist's *garmi* actions as well.

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30 Bava Basra 26b

31 See note 20 above

32 Bava Kamma 9:13

VIII. Chasam Sofer – At Variance With Accepted *Halakha*?

In the early 19th century, the Chasam Sofer was asked if a woman who inadvertently killed her maidservant should be punished or required to perform some act of *teshuva*, repentance, for her actions. The case was as follows: the maidservant fainted from fright, and perceiving her as being in physical danger, the mistress attempted to revive her by giving whiskey. In her haste, she accidentally took a bottle of kerosene, and poisoned the maid ("went down into her innards and the lass was burned")[33], causing her death. In his response, Rabbi Sofer asserted that the woman was far less responsible for the death of her maidservant than a father or teacher who disciplines a child, causing his death, which the *Tosefta* rules are exonerated.

There are many objections to the Chasam Sofer's ruling. The most powerful of which is based on the *Tosefta* quoted above and accepted as *halakha* in the Shulchan Aruch[34]: why is this woman not liable to exile just like a physician would be.

The *Divrei Aharon*[35] argues in favor of the Chasam Sofer's ruling by using the *Tashbetz's* distinction between a surgeon and an internist, based on the underlying principle of *gerama*, lacking proximate cause. He writes that since the poison must first be absorbed by the body and the harm which results is indirect, therefore the woman is exempt from any responsibility. Rabbi Bleich[36] disagrees based on the language employed by the Chasam Sofer in

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33 Teshuvot Chasam Sofer, Orach Chayim, no. 177, as quoted in Tradition.

34 Shulchan Aruch, Yoreh De'ah, 336:1

35 Rabbi S.A. Polonski, Divrei Aharon, no. 34, sec. 2

36 See note 22 above

describing the effect of the poison – it "burned her insides." This describes direct damage of her internal organs, no less a proximate cause of the surgeon's scalpel causing direct damage, for which the Chasam Sofer agrees is liable.

Rabbi Z. Spitz[37] attempts to resolve this conflict. He writes that the Chasam Sofer's ruling regarding a layperson is appropriately more lenient than the ruling regarding the physician. This is not just for their expected level of knowledge and skill, but also for their expected poise and level of composure in an emergent situation. A layperson who acts in haste and mistakenly gives the wrong bottle of medicine is considered non-negligent because of the excited and panicked state of mind she was in at the time, but a physician who is trained to be cautious and calm during an emergency situation, who panics and acts in haste would be liable for his carelessness.

The ruling of the Chasam Sofer may have further implications; it seems to underlie the principles of the good Samaritan law in the United States and other countries that provides legal immunity for accidental injury committed by first responders to a person in an emergency situation. It is interesting to note that in a few states, the good Samaritan law may only provide exemption from liability to laypeople and not to trained healthcare professionals, perhaps to encourage laypeople to act quickly to help save a victim of illness, but at the same time, encouraging a healthcare professional to be extremely cautious in tending to an incidental patient.[38]

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37 Mishpetei HaTorah, I, no. 12, note 3

38 Cameron DeGuerre, "Good Samaritan Statutes: Are Medical Volunteers Protected." Virtual Mentor. American Medical Association. April 2004. Vol. 6, no. 4

IX. Residents – Duty hours and Supervision

Effective July 1st, 2011, the new guidelines of the Accreditation Council for Graduate Medical Education (ACGME) went into effect for all residents in U.S. residency programs. These requirements are an attempt to deal with the challenges of medical errors made by overworked, fatigued, and under-supervised training residents. In Section VI of the guidelines, resident duty hours per shift will be significantly limited compared to the previously published guidelines, particularly for first year residents. In addition, the same section mandates direct supervision, or indirect supervision with direct supervision immediately available, of first year residents by an attending physician. According to the guidelines, supervision "has the goals of assuring the provision of safe and effective care to the individual patient; assuring each resident's development of the skills, knowledge, and attitudes required to enter the unsupervised practice of medicine; and establishing a foundation for continued professional growth."[39]

Of note, in *halakha*, it seems that for the physician to have the exemption "for the welfare of society," he must first have the "permission of the court" to engage in the practice of medicine. There is a debate between the Aruch Hashulchan and the Tzitz Eliezer about what exactly this means, and also what it means today. The Aruch Hashulchan[40] writes that nowadays, since the licensure by Jewish court has elapsed, the physician must be licensed and credentialed by the local government to practice medicine. This means that not only is the exemption

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39 Recovered online from www.acgme.org

40 See note 23 above

granted exclusively to those who have a medical license granted by the government, but also that one possessing medical knowledge and skill is forbidden from engaging in medicine without this license. Rabbi Waldenberg in Tzitz Eliezer[41] disagrees. He argues that anyone who possesses the knowledge and skill necessary to treat patients is allowed to, regardless of licensure. The requirement of *reshus beis din,* court authorization, is only regarding the exemption of liability in the event of inadvertent error "in order to preserve social welfare." Rabbi Waldenberg believes that without such a license to practice medicine, the erring physician would be treated no differently than any tortfeasor, but is nevertheless permitted to practice medicine.

Rabbi Waldenberg seems to base his opinion on that of a commentator on the Shulchan Aruch, the Beis Hillel,[42] who writes than any physician who has been accepted by the community can practice medicine. The rationale is that in licensing a doctor, the court is not acting in a judicial function, but rather as a representative of the community to preserve the health and welfare of that society. Therefore, court licensure is not necessary if the community accepts a qualified expert to be their community physician.

In general, all residents in the United States must graduate from an accredited medical school and successfully complete the first two exams for either the United States Medical Licensing Examination or the Comprehensive Osteopathic Medical Licensing Examination to practice medicine. But it must be understood, as stated by the

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41 Rabbi Eliezer Yehuda Waldenberg, Tzitz Eliezer, Ramat Rachel, Ch. 22

42 Beis Hillel, Yoreh Deah 336:1

ACGME, that residents are still in their training and at this point in their professional careers should not be treating patients alone. The question then is how are we to understand the resident's role in treating patients, when the Shulchan Aruch writes that even one who has a medical license "should not engage in treating patients unless he is an expert, and there is no one greater than him to treat the patient?"[43] Furthermore, the *Chazon Yechezkel* writes that a doctor who does not refer a case to a more skilled physician, discredits his medical license by such an act, and would be treated as a non-licensed physician in the event of medical error.[44]

Rabbi Waldenberg[45] writes that when both the patient's illness and treatment are routine and without doubt, there is no requirement to refer to or consult a more expert physician. The *Shevet Halevi*[46] believes that in our day, all physicians are more or less qualified and all of them are licensed, and thus, the requirement to refer is obsolete.[47] Rabbi Waldenberg disagrees if the case is more complicated, and requires referral to a specialist in such a case.

While medical residents are certainly less qualified, less experienced, and with less expertise than attending physicians, at the very least, 'simple' cases that don't have

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43 Shulchan Aruch, Yoreh Deah, 336:1

44 Chazon Yechezkel, Bava Kamma 9:3

45 See note 40 above

46 Shevet Halevi vol. 4, Yoreh Deah, no 151

47 Interestingly, the Tzitz Eliezer believes that even in a non-routine and challenging case which requires referral to a more qualified specialist, if the specialist is too busy to see the patient in a timely manner due to the volume of patients that specialists usually see, it is not only permitted, but an obligation on the less qualified physician to treat as long as he is the most qualified doctor available to the patient.

an element of doubt can be treated by them without consulting a more senior physician according to Rabbi Waldenberg. However, in today's healthcare system and with the institution of the ACGME guidelines regarding direct or indirect but immediately available supervision, consulting with a more senior physician is a routine and requisite part of a patient's management, and the questions above can be considered moot.

X. Conclusion

The challenges of utilizing acquired knowledge, judgment, and skill to perform a thorough investigation of each patient's illness and provide the appropriate therapy on a daily basis can be daunting, and the responsibility that physicians carry on their shoulders is undoubtedly great. It is clear that the *halakha* attempts to deal with many of the questions and challenges that physicians face in their daily practice of medicine. From the preceding discussion it is evident that the laws of medical malpractice successfully accomplish often conflicting objectives: to deter careless practice of medicine, compensate victims of medical error and malpractice, and encourage physicians to practice medicine within the framework of the laws governing malpractice.

The Recitation of *Birkat HaGomel* Upon Recovery from Mental Illness

Rabbi Yehuda Turetsky

Introduction

The Talmud[1] states that four groups of people are required to recite a blessing of thanks known as a *birkat hagomel.*[2] They are one who successfully travels through the desert, one who safely crosses the ocean, one who is released from captivity, and one who is healed from an illness. This Talmudic statement is quoted in the Tur[3] and Shulchan Aruch[4] and reflects normative practice. There is, however, significant debate regarding the specific circumstances under which this blessing should be recited.

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1 *Brachot* 54b.

2 The Talmud (ibid) states there is a "need" to recite *birkat hagomel. Magen Avraham* (O.C. 219) argues that its recitation may be optional. However, many authorities reject his assertion and maintain one is required to recite a *birkat hagomel.* See, for example, the discussions in *Shut Rivevot Ephraim* (5:168) and *Nishmat Avraham* (O.C. 219:1).

3 O.C. 219.

4 O.C. 219:1.

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An important issue that has not been sufficiently addressed relates to an individual who recovers from mental illness.[5] May such a person recite a *birkat hagomel*? As will be argued below, this question relates to a variety of important issues about the nature of *birkat hagomel* and the status of one who is mentally ill. It is important to determine how sick a person must be to recite this blessing, the status of non-physical illnesses, and how "cured" one must be of the illness to recite the blessing.[6]

The purpose of this article is to elucidate the general issues involved in relating to the recitation of *birkat hagomel* upon recovering from a mental illness. As will become clear, specific rulings may require not only in-depth knowledge of the *halakha*, but also a detailed awareness of the mental health issues under discussion. There are many different types of mental illnesses, and, no uniform policy can be established for all of them.

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5 There are some sources that do explicitly relate to this question. See, for example, *Shut Tzitz Eliezer* (12:18), *Shut Ohr LiTzion* (2:14:44), and the article by Moshe HaLevi Spiro in *Assia* (23:1978) "*Birkat HaGomel le'achar Hachlamah Mi-Machalat Nefesh*" with the responses in the following edition by the author and R. Shmuel David HaKohain Munk.

6 The discussion in this article does not relate to the general status of mentally ill individuals in halakha. However, it must be noted that halakhic authorities do recognize the severity of mental illness and its potentially life threatening nature. Indeed, it is possible to permit violating the Shabbat for a mentally ill individual, yet still maintain that no *birkat hagomel* should be recited because of reasons internal to *birkat hagomel*. On the general topic of mental illness in halakha, see Prof. Avraham Steinberg's *Encyclopedia of Medical Halacha* (Vol. 7) and the aforementioned article by Moshe HaLevi Spiro.

The Severity of the Illness

The *Rishonim* debate how sick one must be in order to recite a *birkat hagomel.*[7] Tur[8] quotes *Ra'avad* that only one who recovers from a potentially life threatening illness recites such a blessing. This opinion is also quoted in the *Meiri.*[9] However, *Ramban*[10] and *Rashba*[11] argue that any person whose sickness requires rest in bed recites a blessing.[12] A third, more extreme, approach is found in *Sefer HaAruch.*[13] He appears to maintain that any sickness that causes pain, even if it does not require time in bed,

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7 It is important to note that similar discussions exist in regard to the other categories of people obligated to recite a *birkat hagomel.* This is of particular importance as understanding the relationship between the individuals who recite a blessing may impact several issues of relevance to this discussion. See, for example, *Ramban* (*Brachot* 54b), *Talmidei Rabbainu Yona* (ad loc), *Meiri* (ad loc), and *Biur Halakha* (O.C. 219) regarding the circumstances under which one who travels recites *birkat hagomel* and *Magen Avraham* (219), *Sha'arei Teshuva* (219:3) and *Biur Halacha* (219: s.v. *Chavush*) regarding when a freed captive recites a blessing. For an analysis of the general relationship between these categories, see *Shut BiTzel Chachmah* (1:21)

8 O.C. 219.

9 *Brachot* 54b.
There is some discussion as to if this is actually the opinion of the *Ra'avad* (R. Abraham of Posquieres). It is possible Tur is actually referring to *Ra'avad's* father in law (R. Abraham ben Isaac, Av Beit Din) in his responsa (*Teshuva* 72), who is also sometimes referred to as the *Ra'avad.*

10 *Torat Ha'Adam, Sha'ar ha-Refuah.*

11 *Shut Rashba* 1:82 and 7:38.

12 *Tosafot* (Brachot 54b) and *Ra'ah* (ibid) also quote this opinion.

13 *Erech Arba'ah.*

warrants a blessing.[14] [15]

Shulchan Aruch[16] accepts *Ramban's* opinion as binding. As such, one who requires time in bed because of his illness must recite a *birkat hagomel* even if the illness is not life threatening or of significant danger. Ramo,[17] however, cites the opinion of the *Ra'avad*, thereby maintaining that only one healed from a potentially life threatening illness recites this blessing.[18] A middle approach is suggested by various *halakhic* authorities. *Taz*[19] and *Chayei Adam*[20] argue that even Ramo agrees that one who is in bed for more than three days recites a blessing. Amongst Sephardim, a similar approach exists. Most notably, *Ben Ish Chai*[21] writes that one must be in bed for three days prior to reciting a *birkat hagomel*.

However, many authorities reject these limitations.

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14 *Aruch's* opinion is cited in various *rishonim* including *Rosh* (*Brachot 9:3)* and *Ritva* (*Brachot 54b)*. See *Shut Divrei Yetziv* (O.C. 86) for a brief discussion whether *Aruch's* opinion was only said when there was at least some form of danger. For more on *Aruch's* opinion, see *Bach* (O.C. 219).

In terms of whether there are indeed three separate opinions, see Tur (ibid), *Ma'amar Mordechai* (219:9), and R. David Yosef's *Halacha Berurah* (Vol. 11, O.C. 219 pg. 212-214).

15 It is possible these opinions relate to the nature of this blessing and its conceptual underpinnings. *Aruch* presumably maintains that *birkat hagomel* is recited upon the cessation of pain, even without significant danger. *Ra'avad*, in contrast, may understand that *birkat hagomel* is a blessing recited as thanks for surviving a situation of serious danger. This conceptual question may relate to the discussion below about a recurring illness and if a complete recovery is necessary to recite the blessing or a mere cessation of symptoms is sufficient. See below.

16 O.C. 219:8.

17 Ibid.

18 There are those that discuss whether Ashekanzim should in fact follow Ramo. See *Magen Avraham* (O.C. 219:8) and *Mishna Berurah* (O.C. 219:28).

19 Ibid:5.

20 65:6.

21 *Parshat Ekev*, no. 7.

Biur Halakha[22] argues that the time period of three days is not relevant to the *halakhot* of *birkat hagomel*. While more open to suggesting it in Shulchan Aruch than Ramo, he notes that Shulchan Aruch's language does not support such a perspective, and it is therefore difficult to suggest it even within Shulchan Aruch. *Kaf HaChaim*[23], R. Ovadiah Yosef[24] and others reject such a requirement for Sephardim, as well; for them, Shulchan Aruch assumes like *Ramban* that any form of bed rest necessitates such a blessing.[25]

In light of the above, a critical question in determining whether one should recite such a blessing is the severity of the mental illness under discussion. It would follow that if the mental illness is life threatening, even Ramo would maintain that a blessing is recited. If it is not life threatening but still poses a significant danger, it may depend on whether one follows the Shulchan Aruch or the modified version of Ramo suggested by *Taz* and others regarding how severe the illness must be to warrant a blessing.

Birkat HaGomel on Non-Physical Illnesses

There is, however, an additional issue of particular importance to those with mental illnesses. Shulchan Aruch requires time spent in bed in order to recite such a blessing. Mentally ill individuals are often strong enough physically to avoid requiring time in bed despite the severity and

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22 O.C. 219 s.v. *kegon*.

23 O.C. 219:46.

24 *Chazon Ovadiah* to *Tu Bishvat* pg. 372.

25 See, as well, *Aruch HaShulchan* (O.C. 219:11). An additional approach of possible relevance is found in a different place in the *Aruch HaShulchan* (O.C. 328:19), where he rules that one who is unable to leave home because of sickness would recite a blessing even without needing to lie in bed.

danger inherent in their illnesses. A question regarding the underlying conceptual basis for Shulchan Aruch's opinion is therefore relevant. Does time in bed reflect upon the seriousness of the illness, in which case a severely ill individual recites a blessing even if no time in bed is needed, or is it a formal rule whereby time in bed is a necessary prerequisite to reciting this blessing? While this question may be less relevant to those following Ramo's ruling, for according to him the severity of the illness appears to be the sole determining factor, it is important for those who accept Shulchan Aruch's opinion.

Halakhic authorities debate this question. They question whether one with a serious medical problem in his eye requires a *birkat hagomel* upon recovery. *Shut Sadeh HaAretz,*[26] cited in *Shut Yechaveh Da'at,*[27] writes that even though such a person is seriously ill, and therefore Shulchan Aruch[28] rules that Shabbat is violated on his behalf, the common practice is not to recite *birkat hagomel* in such a case. He explains that no blessing is recited because this person remained sufficiently strong throughout his sickness to avoid time in bed.[29]

R. Ovadiah Yosef,[30] though, rejects this approach. According to him, the Shulchan Aruch's intention in requiring time in bed was to teach that even a sick person not in significant danger (a "*choleh she'ain bo sakanah*") recites a *birkat hagomel* if he must spend time in bed. However,

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26 3:10.

27 4:14.

28 O.C. 328:9.

29 See *Kaf HaChaim* (O.C. 219:44) and *Ben Ish Chai* (*Parshat Ekev* no. 6).

30 *Shut Yechaveh Da'at* 4:14.

even Shulchan Aruch agrees that one in significant danger (a "*choleh she'yaish bo sakanah*") would recite a blessing even without needing time in bed.[31] It seems to this author that a close reading of Ramo may support this understanding of Shulchan Aruch.[32]

This debate may directly impact the present issue. Some mentally ill individuals are dangerously ill but strong enough to avoid time in bed. If a formal rule exists requiring time in bed to recite a blessing, such a person is exempt. However, if a seriously ill individual is required to recite a *birkat hagomel* even when physically strong enough to remain out of bed, this person may, as well, recite such a blessing.

A Recurring Mental Illness

While certain mental illnesses are fully curable, there are situations where that is not the case. Certain patients may undergo periods when they are not afflicted, but a significant likelihood exists that their illness will reappear. For example, major depression may need to be viewed as a lifetime disorder because of how frequently it recurs and its complex and multidimensional nature. Indeed, even when the patient appears completely cured, clinicians may be inclined to treat patients with lifelong medication if the patient has had multiple recurring episodes.[33] In those

31 For more on how halachic authorities rule on this issue, see R. David Yosef's *Halacha Berurah* (Vol. 11, O.C. 219, pg. 214).

32 Ramo implies he is being more stringent than Shulchan Aruch, limiting when *birkat hagomel* could be recited. If the above mentioned authorities are correct, Ramo would actually be more lenient than Shulchan Aruch in certain cases. He only mentions a requirement of being in a potentially life threatening situation, with no indication that time in bed is necessary.

33 See John F. Greden, The burden of recurrent depression: Causes, consequences, and future prospects. *Journal of Clinical Psychiatry* 62 Suppl 22 (2001), pp. 5–9.

cases, should a *birkat hagomel* be recited? If so, when is the appropriate time to recite such a blessing?

Shut Rashba[34] rules that a person healed from a sickness that reappears intermittently recites a blessing each time he recovers. He explains that this is so despite the fact that overcoming the illness multiple times could indicate that the illness itself is not so dangerous. Shulchan Aruch[35] accepts *Rashba's* ruling and requires a blessing in such a case. However, *Yalkut Yosef*[36] notes *Chidah's* view[37] that one who has experienced the same illness multiple times should not recite a blessing unless it is clear that it will not reappear. *Shut Sadeh HaAretz*[38] explains that the *Rashba* refers to a case where one is entirely cured but the possibility for the illness to reappear exists. *Chidah*, in contrast, limits his comments to one who is not fully healed between appearances of the illness.

Within *Chidah's* approach, it may be necessary to assess whether the mental illness is in fact gone, albeit with the possibility of returning, or if the illness itself remains, just the symptoms are under control. In possible contrast to this approach, there are those that explicitly state that one who is able to walk as a healthy person can recite a blessing even if it is necessary to undergo minor procedures or take medicine to become completely healed. If so, one can recite a blessing even if remnants of the illness remain, and some

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34 7:38.

35 O.C. 219:8.

36 O.C. 219:25, pg. 585.

37 *Machzik Bracha* O.C. 219:5.

38 No. 7, cited in *Yalkut Yosef* (ibid).

form of medication is still required.[39]

In explicitly relating to mentally ill individuals, *Tzitz Eliezer*[40] argues that a blessing should be recited even if the illness is only gone temporarily. He marshals support for his opinion from the *Rashba* cited above.[41] He does, however, cite an authority that argued that a blessing should not be recited if it is recurring. It is possible this debate relates to the above question regarding the scope and impact of *Rashba's* ruling.

Piskei Teshuvot[42] assumes that all would agree that in the case of one who is sufficiently better though may never be totally healed, a blessing could be recited. As such, it is possible that mentally ill individuals that will not be completely healed (based on modern day medicine) would still recite a blessing.[43]

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39 See R. David Yosef's *Halacha Berurah* (O.C. 219:9, pg. 173).

This debate appears to relate to a discussion found in *halakhic* authorities regarding when one is viewed as having recovered from illness for purposes of a *birkat hagomel. Mishna Berurah* (O.C. 219:2) writes that it is when the when the sick person is able to walk independently. *Shut Shevet haLevi* (4:152) explains that even if elements of the illness remain, one can recite a blessing. However, *Shut Divrei Yatziv* (1:87) notes numerous sources that argue that one should only recite the blessing after being completely healed and with no lingering impact of the illness. For additional sources relevant to this debate, see *Piskei Teshuvot* (O.C. 219:5), *Nishmat Avraham* (O.C. 219:3), and *Halacha Berurah* (ibid).

40 12:18.

41 However, based on the above, it is not clear *Rashba* would agree with *Tzitz Eliezer*. There may be a difference between a recurring illness that is entirely gone but comes back and an illness that remains present but whose symptoms are under control. *Rashba* may have only been referring to a case where the illness is gone but comes back, and it is possible that is how the opinion *Tzitz Eliezer* cites reads the *Rashba*.

42 O.C. 219:5.

43 It is not clear to this author that all would accept *Piskei Teshuvot's* approach.

Conclusion

R. Eliezer Waldenberg[44] and R. Ben Tzion Abba Shaul[45] explicitly rule that certain mentally ill individuals would recite a *birkat hagomel* upon recovery from their illness.[46] Based on the above analysis, it would appear that there is some debate regarding this question, and at least according to some authorities, numerous issues must be analyzed in each case of a mentally ill individual. These include the level of danger involved, whether the mental illness impacted one's physical strength, and the extent to which the illness is reoccurring. It seems clear that because of the range of relevant factors involved, knowledge of both the *halakhic* and mental health issues are necessary in order to arrive at a formal ruling.

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44 *Shut Tzitz Eliezer* 12:18.

45 *Shut Ohr LiTzion* 2:14:44.

46 R. Waldenberg addresses one who has a mental illness that is severe enough to warrant a Shabbat violated on his or her behalf. According to him, there does not appear to be a need for it to have been in immediate danger. See *Shut Tzitz Eliezer* ibid. R. Abba Shaul states that a mentally ill individual that is cured recites a blessing, but he does not at all distinguish between types of mental illness.

Government-Mandated Healthcare: Halakha and Social Policy

By Chaim Apfel

I. Introduction:

The role that governments have played in caring for the level of public health has changed dramatically over the course of the twentieth century worldwide. In the United States this role has recently undergone a dramatic change with the passage of the Patient Protection and Affordable Care Act as well as the Healthcare and Education Affordability Act. With all of these changes, many of the policies that were debated touched upon legal issues that have existed for thousands of years across many civilizations. It would be useful to compare how these issues were treated according to Jewish laws and values.[1] The purpose of this paper is to explain what ethical rules should govern a government healthcare plan and to explain how such a plan should be implemented.

1 Please note that this article does not reflect on any legal ramifications regarding American Healthcare Law. It is merely a thought exercise to apply halakha to this important issue.

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II. Two Distinct Biblical Commandments for Charity

Arguably, the most fundamental ethical issue that the statute addresses is to what extent individuals can be compelled to provide for their poor. The Biblical law mandating charity can be found in two locations. The first section addresses society's reaction to abject poverty. "If your brother becomes impoverished and his means falter in your proximity, you shall strengthen him so that he shall live with you."[2] What form of strengthening is required by this verse? What standard of comfort is contemplated by the words, "so that he shall live with you"? An inference can be made from the next verse. The Torah uses language very similar to the above verse after listing a prohibition against profiting via loan interests at the expense of another Jew. The verse reads: "and let your brother *live with you.*"[3] This commandment compels society to provide resources to enable a person in trouble to recover. It can be inferred that people are not considered to be "living" within a certain community if they are in financially inferior situation to those around them. The context of the term with regard to a debtor implies that the goal of enabling "living" cannot simply refer to physical vitality. The "living" standard is a characteristic of the social relationship between poor person and the donators. Apparently, this verse regards financial assistance as enabling the sort of living within this social context. However, even with the financial resources provided for the person's physical needs, they will not be regarded to be living if the donors are collecting interest on the debt. From the juxtaposition of these verses, it can be

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2 Leviticus 25:35

3 Leviticus 25:36

confirmed that society is to take steps that actively enable the peasant to recover to a state of financial stability as was contemplated in the first verse.[4] The goal of this verse is for society to set up a system that allows a destitute individual to live a self-empowered lifestyle free from being financially subservient to others.

More can be gleamed from the *mitzvat aseh* (positive commandment) of charitable giving by comparing it to the second source for charitable giving, the *lo taaseh* (negative commandment) of miserliness. The context of the *lo taaseh* appears after a discussion on the loan nullification imposed by the laws of *shmittah*.[5] The prospect of having all loans nullified would naturally cause people to be more reticent to share their resources with others. The Torah first applies a prohibition against any manifestations of miserliness: "you shall not harden your heart or close your hand against your destitute brother."[6] Then it issues a compulsatory statement to provide your available resources to those who lack them: "Rather, you shall open your hand to him; you shall lend him his requirement, whatever is lacking to him."[7] The Torah next requires the dispelling of thoughts to withhold funds; rather, one should willfully give based on the verse "You shall surely give to him and let your heart not feel bad in this matter..." [8] Here the context is a poor

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4 See Rashi in Ketubot 15b, who notes that the responsibility mentioned in this verse falls on the *beis din*. *Beis din* is often the representative to carry out a communal responsibility. See Horayot 3b.

5 The verse describes a period that occurs every seven years in which all loans are remitted. The verse calls the remission a *shmittah*. See Deuteronomy 15:1-3.

6 Deuteronomy 15:7

7 Deuteronomy 15:8

8 Deuteronomy 15:10

person that is in some financial hardship and in need of something specific. Society is warned against turning away from such a person.

III. Practical Distinctions Between the Two Types

Maimonides applies the positive and negative commandments to two different types of needy individuals. The first form of charity, compelled by the *mitzvat aseh*, which specifies help for the "impoverished," is prescribed for the classically poor – namely, those who are in particularly dire straits from a lack of funds.[9] The second form of charity does not address a particular level of poverty. The person needing help could normally have the resources to be self-supportive, but he simply needs some specific resource, even if only a loan. Maimonides uses the negative commandment to address helping this person.[10] The person need not actually be poor to qualify; he must just lack the means to accumulate additional funds for something that he needs.[11]

A second distinction between the *aseh* and the *lo taaseh* is the degree that one is required to alleviate the person in need. The Biblical language of the *mitzvat aseh* appears to require a more limited donation. It only requires that society give this poor person enough to "be strengthened." There is no specific financial goal that would have to be met. In theory, this could be a small sum of money. The *lo taaseh*, however, forbids denying a person in need of specific help, whatever that may be. In addition, the scope

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9 Matnos Aniyim 7:1

10 See Matnos Aniyim 7:3

11 See ibid.

of funding for the two situations is also different. The *mitzvat aseh* can be fulfilled by donations towards anything, while the *lo taaseh* requires that the funds be provided for a specific need.

One explanation for the distinction between the two recipients of charity can be viewed as didactic. The Torah states the purpose in the first case of charity by writing: "so that he will live with you." Maimonides interprets enabling life as a public policy that focuses on charitable giving with the goal of revitalization to a productive lifestyle, rather than simply making resources available for their consumption.[12] Providing all of the resources that a person needs does not encourage him to seek ways of making himself productive. He may have all that he needs to survive but he is not "living." Society is compelled to give in such a way that the person is "strengthened" sufficiently to enable his own recovery. In contrast, the *lo taaseh* does not address a person who is destitute and has no ability of self-providing. At this moment the person needs help, but in general he is perfectly capable of living a productive life. The primary policy goal stated here is to avoid instituting a culture of miserliness. The Jewish people should not have an inclination to refrain from assisting those who are in dire need. Therefore, the Jewish community should provide to the extent that it is able to address the person's immediate needs.

The obligation to provide help as a goal in and of itself is obviously of supreme importance. In the context of providing healthcare, the burden is even greater because the safety of a life is involved. In this context, the charity

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12 See Matnos Aniyim 10:7

that would most often apply would arguably fit under the *lo taaseh* of providing for a specific purpose. The primary concern then is to prevent any miserly urge in the community. There should be no concern that a system must ensure that the needy individuals must be able to provide for themselves.

IV. Communal Obligations

Practical concerns with implementing a social policy are different then imposing obligations on individuals to address specific needs. To what extent a community can compel its individual members to contribute towards a public welfare system is confined to the power the conglomerate has over the private property of its constituents. Questions arise over what kinds of medical care should be provided, when should it be provided, how much should be spent on providing the healthcare, who should be the ones determining when and where it should be provided, etc. These concerns are different from the ones that an individual has to deal with. Communal policy needs to anticipate the ways funds are allocated before there is a need. It also needs to take into account the impact upon the population. Jewish law guides us as to what a communal policy should look like.

Analysis of the rights the community has over the individual can be guided based on two sources that deal with issues relating to society's responsibility to provide for the safety of individuals at the expense of the community. The Talmud states that a town is not permitted to ransom individuals for more than they are deemed to be worth. The reason for this harsh measure is out of concern "for the welfare of society".[13]

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13 Gittin 45a

In general, redeeming captives is considered one of the highest priorities in Jewish law along with saving a life.[14] Two explanations are offered in the Talmud to explain the Talmud's limitation on redeeming prisoners. The first explanation is that the community should not be impoverished in order to provide for the needs of individuals. The second explanation is that the community would be put in even greater danger of further kidnappings if the perpetrators realized that they could receive exorbitant ransoms.[15]

The difference between the two explanations is whether an individual acting on his own accord could pay to redeem the captive. According to the first explanation, there would be no problem with an individual assuming the burden of paying the cost. The individual is using privately owned resources, and therefore, there would be no problem for that individual to spend the money. Any future possible danger that might occur to the community as a result of the individual's decision does not override the right of individuals to save someone they care about. According to the second viewpoint, the needs of society would take precedence over the needs of the individual. Under these considerations, an individual would not be allowed to infringe upon society's overall safety. Clearly, a citizen has to take into account the needs of the community when it comes to using even one's own private financial resources.[16]

It might seem intuitive that the needs of the few should

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14 Shulchan Aruch Yoreh Deah 252:1

15 Ibid.

16 Steinberg, Avraham. *Encyclopedia of Jewish Medical Ethics.* Feldheim Publishers. (2009) vol 1. (citing Rif and Rosh of Ketuboth 52a s.v. vahayu; Tosafot, Gittin 45a sv. Delo; Maimonides *Ishut* 14:19; Tur, Shulchan Aruch Even Ha'Ezer 78:2 and Ramah ad loc.)

be superseded by the needs of the many. However, our capitalistic system is run under the premise that private individuals have rights that cannot be infringed upon. Jewish law states that a great need does not give a person a right to use another person's property without paying for it.[17] Not every individual has the right to determine how best to use available resources. Communities have the right to suspend the rights of individuals through a process akin to eminent domain. For example, the Talmud records that King David asked the Sanhedrin whether he was allowed to burn down private fields in which Philistine enemies were launching attacks. The Court answered: "[i]t is forbidden to rescue oneself through the destruction of another's property; you, however are king, and a king may break [through privately owned fields] and no one is entitled to prevent him from doing so."[18] Tosafot explain that King David's concern was not whether he was permitted to actually use the property, since that would obviously be permitted because it would be saving Jewish lives. The question was whether the king would have to repay the owner. According to Tosafot, the king was allowed to eliminate the property of the field owner for his needs.[19] The king as the leader represents the voice of the community. The extent to which communal needs

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17 Baba Kama 117b. Note that the Talmud exempts a person from having to pay damage caused to another person's property while saving a different person. The Talmud cautions that under a strict application of the law, this is not the appropriate outcome. However, it enacts this rule in order to prevent individuals from hesitating from saving other people. The rule is applied to someone who actually sees a person in clear and present danger. It would not be applicable to addressing a prevalent but not extant threat, like social healthcare systems are meant to address.

18 Baba Kama 60b

19 Ad loc sv mahu; also see Rashi sv vayatzilah holding that it is forbidden to save oneself with the money of one's friend.

exist is a standard that can be determined by those who speak for the community and there is an ethical obligation to contribute toward those needs.[20]

The right of eminent domain is limited. Maimonides distinguishes between the laws of a legitimate government and the laws of a "thieving government."[21] This would imply that not all acts by a government are permitted, and that there is a limit to the power that it has to command private resources. The scope of the power granted to a community to compel financial contributions, such as taxes, for communal purposes, is described in Shulchan Aruch, Choshen Mishpat 163:1. The Shulchan Aruch allows a town to obligate its members to contribute financially to the erection of a wall and fortifications to protect the town against military assault or marauders. This obligation can be imposed regardless of whether or not there is an immediate threat to the town. The Rama writes that the town can also compel residents to contribute to a fund that provides for the town to finance ethical obligations, such as taking care of the poor and strangers.

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20 It could be argued that David was given additional leeway because of his special status as an anointed king. This position is unlikely because the context of the discussion is brought with regard to the general laws of personal property. Therefore, it is likely that the lessons that were meant to be applied were more universal. The commentaries mentioned above seem to glean universal lessons from this story. This would indicate that they also viewed the lessons as appropriate for the general population. The status of a king appears to be important in its relationship to the rest of society rather than a quasi mystical status of an anointed king. In other contexts, such as *Yehoshua, Rechavam*, and the *Reish Galusa*, the status of an anointed ruler is given special significance. This would presumably be because of the function they played in Jewish society as a head of state. It would seem that David would have enjoyed this status too, even while he was anointed. For a fascinating discussion on this topic see Lichtenstein, Moshe. "Jewish Political Theory- Hilchot Melakhim" available at http://vbm-torah.org/kings.htm.

21 Gezeilah Ve'avedah 5:18

Applying this ruling leads to the conclusion that once a person is part of a community, there is a broad scope of public services that a community can compel its citizens to pay for. However, it would seem that the communal funds must be gathered for the purpose of meeting a public need. It would be easy to imagine that public medical insurance could meet this definition. Medical care is a service that everybody needs at one point or another and if a town decides to create a communal insurance system to address the issue, the town would presumably have the right to set up such a system.

A system that is similar to Medicare should presumably meet this test because it provides a service that every person will come to benefit from. Medicare is a publicly funded healthcare system for all people who are over the age of 65. It provides added financial support for people who may find that they have increased medical needs while also having decreased incomes. Even if people do not anticipate using Medicare, they still have an obligation to contribute to public services. Medicaid is more problematic. Medicaid is a public fund to provide medical care for people with low income. This will not necessarily affect all members of the public.[22] In order for a government to have a mandate to provide public services, it must have a benefit for the public. However, as can be seen above, the Biblical *lo taaseh* clearly forbids any one individual from refusing to supply a person in need. Applying the opinion of the Rama, it would seem that the government's mandate to obligate its citizens to pay

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22 This is not necessarily true. Like all social security plans, it can be argued that Medicaid does provide a financial safety net that encourages investment and consumer spending. However, this is not an obvious benefit. As can be seen below, there are more concrete sources in Jewish law to rely upon.

for its poor is limited to its mandate to see that its citizens perform their ethical obligations. Therefore, government has the ability to create charitable social programs such as Medicaid for the purpose of meeting the community's charitable obligations. However, this is not a blanket mandate for unlimited social spending. The government could only compel charities that are obligatory within the scope of Jewish law.

V. Limitations on Societal Compulsion for Social Programs

There are different limitations on the scope of the obligation for the *aseh* and *lo taaseh*. Rambam's interpretation of the laws derived from the *lo taaseh* emphasize that there should be a personal connection between the donor and the receiver. He notes that the Torah prohibition to not harden one's heart applies to "anyone who *sees* a peasant requesting money and raises his eyes and does not give him charity."[23] The prohibition circumscribes only refraining from giving in cases in which an individual is directly confronted by the peasant. It is important to keep in mind that the Torah describes the purpose for the *lo taaseh* as a way to avoid the undesirable trait of miserliness in a population. The goal is to have an impact on the donors. In this context it could be that the purpose of the *lo taaseh* is to create a charitable relationship that is intimate between donor and recipient.

The idea of an intimate charitable system necessitates that Jewish society be organized so that charity is flowing primarily from sources that are local and familiar with the

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23 Maimonides Matonos Le'Aniyim 7:2

needs of the poor. Maimonides infers from the Torah's qualification that the required amount be "what is lacking to *him*" as making all required donations determinable on a case-by-case basis. He writes "if he has no clothes, clothe him; if he has no house utensils then acquire some for him; if he has no wife, then marry him off; even if he is accustomed to ride on a horse with a servant in front of him, but he suffers financially, you should acquire the horse to ride on and a servant to run in front of him."[24] Such specific forms of donation require that the donor be familiar with the needs of the person being donated to.

Maimonides qualifies his statement by stating that this requirement only mandates a person to provide for what the person is lacking. He explicitly states that there is no obligation to enrich him. Striking the balance between supplying all of the person's needs without enriching him can only be accomplished with some familiarity of the person's needs. Maimonides also supports this contention by noting that the Torah enumerates the scope of the requirement to provide "what is lacking to *him*."[25] This suggests that the Torah assumes that a community is not required to provide broad coverage for a person who is needy because he is a peasant. Society is compelled to provide all necessary resources for a poor person who is in actual need of funds. However, it is not required to allow the poor person to profit by virtue of having been an indigent.

Failing to appreciate the specific needs of the poor is a failure of the social security system in general. For example, after the Bernie Madoff scandal became public

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24 Matnos Aniyim 7:3.

25 Ibid.

knowledge one wealthy investor committed suicide upon learning that he lost over a billion dollars. He was part of a wealthy and prestigious family, so there was no danger that he would be starving.[26] Yet this person undoubtedly needed some kind of social support, be it in the form of financial assistance or counseling, more than many people who are in considerably worse financial situations than he was. A social system that does not anticipate the needs of the public can also be susceptible to fraud. A clear example of what could constitute fraud occurred when a Long Island couple was recently charged with stealing more than $33,000 from the Medicaid system. The district attorney reported that the couple had intentionally underreported their income in order to qualify for Medicaid benefits. While receiving these benefits, the couple had sold a home for $1 million and bought another one for $2 million.[27] Clearly, the system was not aware of the needs of this couple when it gave them the benefits. The aid it provided was enrichment and not charity. A system that dispersed funds in a more personal matter would have been more efficient.

It can be presumed that the limitations that are part of Jewish law are not meant to discourage any form of charitable giving. Maimonides stresses that the *lo taaseh* is merely creating a system of priorities for charitable giving so that greater priority is afforded when there is a familiarity between the donor and the poor person.[28] Maimonides

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26 http://www.msnbc.msn.com/id/28368421. April 4, 2010.

27 http://www.nypost.com/p/news/local/prosecutor_wealthy_li_couple_stole_z4loZlMhZa6MT5vYLT4SGI. April 4, 2010.

28 Matnos Aniyim 8:1.

interprets the Torah's specification that the peasant be from "*your* land" to mean that there is priority given to those with a closer relationship with the donor. He creates a hierarchy that begins with relatives and progresses to people with whom one shares living quarters, to poor people in ones neighborhood, and finally to poor people of other cities.[29] Apparently, Maimonides assumed that geographic proximity strengthened the relationship between people.

Interestingly, with regard to the *aseh*, Maimonides creates another set of priorities in the form of charitable programs that seem to deemphasize the connection between the donator and the poor person and his specific problems. The highest priority is to give in a way that leads the poor person to not regard the gift as charity. Some examples of this kind of giving are a gift, loan, business venture, etc. Following this form of charity the list continues in descending order: anonymous giving through a communal pot, donating anonymously so that the poor person is unaware who gave, giving in a manner that you are unaware of who benefits from the charity but the poor person is aware that you gave, giving before being asked, giving once asked, etc. These requirements suggest that the Torah envisages the better charitable system to involve less of a connection between the donor and the receiver.

The distinction can be explained in light of the goals of each charity. In the case of the *aseh*, the goal of the Torah is to give the person the opportunity to break from his status as a pauper. There is no pressing need for funds towards a specific goal. Under these circumstances, the specific needs of the peasant do not matter. Maimonides'

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29 Ibid.

system of priorities avoids enforcing a poor person's self-perception of poverty. The method for doing this is to avoid making the recipient of charitable donations feel like an outsider entitled to leech funds from a separate class but as a member of a community, equal in status with all of those who contribute to the community.

VI. Conclusion

In summation, a society's ethical obligations to provide charity can be applied based on the ethical duties described in the two different Biblical descriptions of duties for charity, as well as the expanded treatment of them provided by the Talmud and Maimonides. Society can compel people to perform ethical obligations but is bound by the limits of that ethical obligation. The limits of the ethical obligation are only applicable when the community is requiring contributions to compel its citizens to give mandated charity and not a service that everyone benefits from. It appears that the community is obligated to provide charity in two different respects. There is an obligation to provide for the poor to the extent that they can recover from poverty and become part of the community. There is also an obligation to provide for the needs of others when they lack the means to supply them. This latter obligation requires that the donor be familiar with the needs of the individual in order to tailor the necessary donations for that individual in an appropriate manner. (This is especially true concerning healthcare, since providing too little or too much of a certain type of care can adversely affect a person's health.) In contrast, the former obligation should be fulfilled while avoiding the impression that a donation is

taking place. The recipient of the funds should not feel that they are receiving charity.

The distinction between local and distanced policies of charity has interesting applications in America with our system of state and local governments. It would appear that systems meant to address people with immediate needs could be relegated to the Federal government. This would allow the system to be considered an institutional public service. The recipient would experience less embarrassment and low self-esteem by applying to a large bureaucracy for help. Furthermore, the people with the most information about the economic state would be able to determine how much aid would be necessary to strengthen a poor person into becoming a viable part of the economy. Charity that is meant to address specific needs that people have would be best determined on the local level with input from people most familiar with the state of health of the local inhabitants. It would make sense for physicians and other health care professionals to be instrumental in determining what are the health needs of the local population. This would help focus available resources to meet those needs efficiently.

Autopsies in Jewish Law: A Dissection of the Sources

Jason Misher

I. Introduction

Whether in the realm of forensic medicine or in the medical studies of anatomy, autopsies have become increasingly popular in modern day society. The performance of autopsies dates back to the fourth century B.C.E. when human bodies were dissected for medical studies with the permission of King Ptolemy.[1] Some say it dates back even further to the Biblical accounts of embalming the dead, such as was done to Jacob and Joseph, which may have involved some dissection of the body. Historically, however, such a permissive attitude towards autopsy was rare, as ancient civilizations in Greece, Rome, India, China, and Syria all prohibited autopsy for religious reasons.[2] The religious debate over the permissibility of autopsy has been going on for centuries. In particular, the autopsy question in the Jewish religion dates back to Talmudic times and continues up until today.

The consensus among the Jewish public has traditionally been that autopsies are absolutely forbidden according to

1 Avraham Steinberg, *Encyclopedia of Jewish Medical Ethics*, trans. Fred Rosner (Jerusalem: Feldheim, 2003), pg. 73

2 Ibid.

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Jewish law. Where this prohibition comes from, however, is not as clear. Indeed, Judaism has always maintained the sanctity of the human body. The Torah prohibits wounding or mutilating oneself,[3] and advocates that one take care of his or her own health and body.[4] These commandments, however, refer specifically to a living body. Therefore, the permissibility of autopsies will very much hinge upon how the Torah views the treatment of the dead human body. By exploring the differing opinions on the matter and delving into the questions at hand, the conclusions drawn, contrary to popular belief, indicate that there is not necessarily an absolute restriction on Jewish autopsies, and there may indeed be instances to allow it.

II. Specific Prohibitions

There is a definite Biblical prohibition regarding desecrating a dead body.[5] What constitutes desecration, however, is subject to rabbinical debate and is dependent on the reason the dissection is being done. In addition to the prohibition to desecrate a dead body via dissection, some consider the acts of exhuming the body from the grave, viewing the body, or delaying the burial (all of which may be necessary in the course of performing an autopsy) as additional acts of desecration. According to other opinions, these acts are lesser forms of desecration and thereby are permitted under appropriate circumstances.[6]

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3 Leviticus, 19:28

4 Joshua, 23:11

5 Rashi, Deuteronomy, 21:23 states that desecrating a human body vis-à-vis leaving it unburied overnight is tantamount to desecrating God himself, in whose image man is created.

6 Rabbi Moshe Feinstein, Responsa *Iggrot Moshe, Yoreh Deah,* Part 2, #151.

There are additional issues that come into play when discussing autopsies. As noted above, there is a Biblical requirement[7] to bury the dead immediately, so as not to allow for prolonged exposure of the corpse. Moreover, there exists a specific Biblical prohibition of leaving a dead body unburied overnight.[8] The performance of an autopsy will inevitably delay the burial, thereby adding another factor that must be taken into account in deciding this issue. Still, another Biblical restriction involves deriving benefit from a dead body,[9] and there is a conflict of opinion over whether using an autopsy to attain medical knowledge constitutes deriving true benefit from the dead.

The Jewish autopsy debate is not just a question of physical desecration, but encroaches upon the spiritual realm as well. The main purpose of the Jewish human body in life is that it provides a home for the *neshama*, the eternal spiritual soul, upon which man's whole being functions. But many Rabbis believe that the human body maintains its holiness even after the soul departs in death, and thus an autopsy would be a disruption of that holiness.[10] Furthermore, there is the belief that the soul is not completely detached from the body even upon death,[11]

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7 The Biblical prohibition is learned out from executed criminals; therefore some debate whether the obligation to bury all others is of Biblical or Rabbinic origin, notably Rabbi Sadya Gaon's *Sefer Hamitzvot*, positive precept #19 and Rabbenu Chananel, Sanhedrin 46b who hold that it is Rabbinic in origin, while Rashi, Sanhedrin 46b, and Maimonides *Sefer Hamitzvot*, positive precept #231, hold that it is indeed a Biblical requirement.

8 Deuteronomy 21:23. This is subject to certain exceptions, such as when a delay would cause honor to the deceased, or if the death occurred shortly before Shabbos.

9 Rashi, Sanhedrin 47b

10 Rabbi Y. Arieli *Torah SheBe'al Peh*, Vol. 6, 5724 pp. 40 ff.

11 *Derashot Ran #7*

to the extent that the soul is pained if the body is harmed.[12] While we generally do not render *halakhic* rulings from spiritual matters, the human body's very essence is as much a spiritual entity as it is a physical one, thereby necessitating the consideration of spirituality into the final equation.

III. Early Sources

The Jewish autopsy question is raised several times in the Talmud. By looking at some of these sources, it may be possible to draw some *halakhic* conclusions with respect to the permissibility of autopsies. The Talmud in *Baba Batra*[13] talks about an instance in B'nai Brak, in which Rabbi Akiva is asked by the family of a boy who sold his father's property and then died if the boy's body could be exhumed and examined for signs of maturity to determine the validity of the sale. Rabbi Akiva gives a twofold answer that seems to indicate that the family is not allowed to examine the boy's body to prevent disgracing him. However, Rabbi Akiva adds that if the buyers of the property wanted to examine the body to determine the sale's validity, they would be permitted to do so,[14] for their own money is more important to them than the desecration of this boy's body.[15] This suggests, therefore, that under certain circumstances, such as when a monetary loss is involved, an autopsy may be permitted.

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12 Job 14:22, Shabbos 13b

13 154b

14 In reality, the Gemara concludes they would not be able to do so, not for reasons of desecration but rather because the body undergoes changes postmortem which may obscure the ability to determine if the boy was mature at the time of the sale.

15 Baba Batra, 154a-b

Another Talmudic passage in *Arachin*[16] mentions that if a pregnant woman dies during labor, one must cut open her womb to bring out the fetus. Some deduce from this case that one may desecrate a dead human body in order to save another life.[17] Other opinions point out the uniqueness of this particular case, noting that an autopsy would be permitted only if it could save another life directly and immediately, such as when that "other life" is present and in front of us.[18] A third opinion is that the Talmud's case is irrelevant to the discussion of post-mortem desecration, since the removal of the fetus from the mother through an incision is an honor to the mother and what she herself would have wanted.[19] Thus, perhaps no conclusion may be drawn from this particular case altogether.

One final Talmudic source in *Chullin*[20] mentions that if one kills a man who is determined to be a *tereifah*,[21] the murderer is not liable for the death penalty. Thus, the question arises whether it is permitted to perform a postmortem examination on a murdered man to determine whether he was a *tereifah*, thereby possibly preventing the execution of the murderer. After much deliberation, the Talmud states that since in a majority of cases the victim is not going to be a *tereifah*,[22] we do not allow a postmortem

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16 7b

17 Rabbi Ben-Zion Uziel, Responsa *Mishpetei Uziel*, Part 1, *Yoreh Deah #28*

18 Rabbi Moshe Schick, Responsa *Mahram Schick, #347-348*

19 Rabbi Yaakov Ettlinger, Responsa *Binyan Zion, #170.*

20 11b

21 A person who will die within the next twelve months

22 Another consideration is that it is possible the murderer inflicted his wound in such a spot that it would hide any evidence of the victim being a *tereifah*

examination, even to save the murderer's life.[23] The relevance of this case to whether autopsies are allowed will be discussed below. Still, it is clear that the autopsy question existed as far back as Talmudic times.

IV. Recent History

While the issue of autopsies is not a new one, it became a more prevalent issue during the 20th century in Israel, Poland, and the United States – the three major centers of Jewish life at the time. In the United States, the issue was first raised in 1916 – Rabbi Nehemiah Moseson permitted autopsy for the specific purpose of studying medicine, while Rabbi Simeon Elbaum forbade it.[24] The general view among the rabbinical organizations in the United States was against the use of autopsy in the fields of medical study and research.[25] Across the Atlantic Ocean, the Rabbis of Poland maintained a similar position, and did not allow autopsies for medical study. The issue created much controversy in the early 1920s when Jewish medical students were expected to provide Jewish bodies to their respective universities for study. Upon their refusal to do so, the students were often failed or expelled. This led to a rabbinic allowance for a limited number of Jewish bodies to be donated, but this permission was strictly a result of the circumstances.[26]

The autopsy question was also present in Israel, starting

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23 Chullin, 11b.

24 Avraham Steinberg, *Encyclopedia of Jewish Medical Ethics,* trans. Fred Rosner (Jerusalem: Feldheim, 2003), pg. 74

25 *Yagdil Torahi,* Year 9, *kuntres* 1, *Nissan* 5677.

26 Avraham Steinberg, *Encyclopedia of Jewish Medical Ethics,* trans. Fred Rosner (Jerusalem: Feldheim, 2003), pg. 75

in 1925 with the founding of Hebrew University. At that time, autopsies were permitted on very rare occasions; that is, only with the family's approval and specifically when an autopsy would determine the cause of death to help prevent future deaths. Upon the opening of the Hebrew University medical school in 1947,[27] a specific set of guidelines was published that allowed autopsies to be performed. This was the first instance in which the performance of autopsies was dictated by a strict *halakha*-based set of guidelines set out by a nation. Those guidelines permitted an autopsy if it was required for a forensic medicine case; if it was required to determine the cause of death (based on the affirmation of this fact by three doctors); if the results would directly and immediately lead to the saving of a life of another ill patient (again, with the approval of three physicians); and if the autopsy would enable the saving of relatives with the same condition (such as in a case of a genetic or inherited disease).[28] Despite these guidelines, over the course of the next fifteen years Israeli autopsies began to be performed in large numbers without rabbinic approval. Extreme controversy over the issue ensued for the next several decades until 1980, when the Israeli government added a final amendment to the Anatomy and Pathology Act, requiring familial consent before performing any autopsy, and mandating a five-hour waiting period before commencement.[29]

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27 Ibid. Interestingly, the autopsy question delayed the medical school opening for 22 years.

28 Ibid.

29 Ibid., pg. 76.

V. Major Opinions

A. Rabbi Yechezkel Landau and Rabbi Moshe Sofer

Two early authorities to address the autopsy question were Rabbi Yechezkel Landau,[30] published in his Responsa *Noda Biyehuda*, and Rabbi Moshe Sofer,[31] published in his Responsa *Chatam Sofer*. The *Noda Biyehuda* starts with the opinion that it is a Biblical violation to disgrace the dead. Thus, an autopsy for no purpose would be prohibited, but based on the case mentioned above from *Chullin*, if the mere *possibility* exists that an autopsy will result in the saving of another human life, it may indeed be performed. Furthermore, the *Noda Biyehuda* weighs in on the Biblical accounts of embalming and mentions that such a procedure did not involve any human dissection, and would therefore not pose a problem on the autopsy front.[32] The *Chatam Sofer* agrees with the *Noda Biyehuda* that disgracing the dead is indeed a Biblical prohibition, and that the embalming process mentioned in the Torah did not involve any autopsy issues. The *Chatam Sofer* adds to his responsa that the human body maintains its sanctity even after death, and thus an autopsy may indeed be a disruption of that sanctity.[33]

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30 18th century Rabbi and scholar in Poland. His most famous works include the *Noda Biyehuda* and the *Dagul Mervavah*.

31 Influential Rabbi in Austria-Hungary through the 18th-19th centuries who fought hard against the Jewish secularization movement.

32 Rabbi Yechezkel Landau, Responsa *Noda Biyehuda*, 2nd edition, *Yoreh Deah* #210.

33 Rabbi Moshe Sofer, Responsa *Chatam Sofer, Yoreh Deah* #336.

B. Rabbi Yaakov Ettlinger and Rabbi Moshe Schick

After these two responsa were published, two more major authorities came out with their own opinions on the matter. Rabbi Yaakov Ettlinger[34] and Rabbi Moshe Schick[35] published their opinions in *Shomer Zion Haneeman*, later to be published in their respective responsa (*Binyan Zion*, by Rabbi Ettlinger and *Maharam Schick*, by Rabbi Schick). In *Binyan Zion*, Rabbi Ettlinger takes a rather extreme view and specifically contrasts himself with the *Noda Biyehuda*. He states that dissecting a human body is as if one is stealing from the dead. Based on the law that one may not steal from a friend in order to save himself, Rabbi Ettlinger states that in this case too, one may not dissect a human body in order to save another life, even where a life-saving situation is extant. At the same time, however, Rabbi Ettlinger agrees that the *gemara* mentioned above in *Chullin* permits desecration of the dead in a situation where there exists a *possibility* that a human life can be saved. Rabbi Ettlinger limits the extent of this case, however, by explaining that the life-saving situation described in *Chullin* is not a "typical" life saving situation. In general, by *pikuach nefesh* (life threatening situation) it is better to be passive and allow another individual to die to avoid desecration of another human body by dissection. Since the case in *Chullin* is a case of *ibud neshama* (loss of life), in which there is no opportunity to be passive, the court must take an active role in killing the murderer. Thus, when faced with the dilemma of actively desecrating the body versus actively killing the

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34 19th century German Rabbi, author of *Aruch L'ner.*

35 19th century Hungarian Rabbi who wrote an extensive responsa on both the four sections of *Shulchan Orech* and the 613 *mitzvos*.

alleged murderer, the court should choose to desecrate the body rather than kill.[36] Rabbi Ettlinger also weighs in on the *gemara* from *Arachin* mentioned above, and offers three reasons why cutting open the dead mother in order to save the fetus is permitted. First, the mother would want herself to be cut open in order to save her child, and the wishes of the deceased can have tremendous implications on the permissibility of performing an autopsy.[37] Second, cutting open the mother in such a situation would be considered an honor rather than a desecration of her body, for her child will likely survive as a result. Finally, because the mother is holding the baby in her womb, she is viewed as a *rodef*,[38] and since it is permissible to kill a *rodef* in order to save the one being chased, it is likely permissible to cut open the mother's body in order to save the child's life.[39]

The *Maharam Schick* argues with Rabbi Ettlinger, stating that the prohibition of stealing from the dead is waived in order to save a human life, as are all other prohibitions. He derives his opinion from the *gemara* in *Chullin*, like the *Noda Biyehuda* (but in contrast to Rabbi Ettlinger) that in a case where there exists the *possibility* that a human life may be saved, it is permissible to do an autopsy. However, the *Maharam Schick* limits this rule, based on the *gemara* in *Arachin*, to cases where the life-saving situation is present in the here and now. Therefore, in a situation in which the opportunity to save a human life is not currently in our presence but is rather something

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36 Rabbi Yaakov Ettlinger, Responsa *Binyan Zion, #170.*

37 This concept will be further elaborated on below

38 One who is chasing someone else with the intent to kill

39 Rabbi Yaakov Ettlinger, Responsa *Binyan Zion, #171.*

that may potentially present in the future, performing an autopsy would not be permissible.[40]

C. Rabbi Moshe Feinstein and Rabbi Ben-Zion Uziel

Two contemporary opinions who contribute largely to the present-day approach towards autopsies are Rabbi Moshe Feinstein[41] and Rabbi Ben-Zion Uziel.[42] Rav Moshe takes an interesting approach and states that the obligation to save a human life applies only when the life-saving situation is presented right in front of you; however, there exists no obligation to actively seek out opportunities to save a life or prepare for a future life-saving scenario. Based on this approach, Rav Moshe holds that it is not permissible to desecrate the dead via an autopsy to save a life potentially sometime in the future. Rav Moshe uses the *gemara* in *Chullin* to explain that desecrating the dead is permitted only when it will undoubtedly prove the murderer's innocence. In a case of doubt, it is forbidden to disgrace the dead body.

However, using the Gemara in *Bava Basra,* Rav Moshe does allow for a lesser form of desecration – such as delaying the burial – when such an action can potentially lead to the saving of another life. He distinguishes between the relatives and non-relatives of the dead, in stating that relatives are not permitted to delay the burial, for they have a specific obligation to bury without delay. Furthermore, in an opinion unique to Rav Moshe and few other later

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40 Rabbi Moshe Schick, Responsa *Mahram Schick, #347-348.*

41 Leading Ashkenazi Rabbinic authority in the United States throughout much of the twentieth century, author of the famous responsa *Igros Moshe,* written on the four sections of *Shulchan Orech.*

42 Sephardic chief Rabbi of Israel from 1939-1954.

authorities, one would be allowed to perform any medical or surgical procedures on the dead that would similarly be performed on the living. Thus, one may perform endoscopies, laparoscopies, needle biopsies or blood draws from the deceased.[43] Rabbi Ben-Zion Uziel, in his Responsa *Mishpetei Uziel*, states that the prohibition of desecrating the dead is waived in any life-saving situation. Rabbi Uziel considers an autopsy to be a desecration only when it is performed without purpose.[44]

VI. Specific Situations

It is generally agreed upon that performing a needless autopsy is strictly prohibited. We must therefore identify various situations in which performing an autopsy has a purpose and then determine how the differing opinions rule on the matter, based primarily on what each authority defines as constructive.

A. The Study of Anatomy

Familiar to medical students across the world, the first situation in which an autopsy is performed is in the anatomy lab, in which dead bodies are dissected for the sake of learning human anatomy and studying medicine. The *Noda Biyehuda, Chatam Sofer,* and Rabbi Moshe Feinstein all prohibit performing such dissections on a Jewish body,[45] for while learning human anatomy may potentially lead to the saving of lives in the future, it will not immediately save any

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43 Rabbi Moshe Feinstein, Responsa *Iggrot Moshe, Yoreh Deah,* Part 2, #151.

44 Rabbi Ben-Zion Uziel, Responsa *Mishpetei Uziel,* Part 1, *Yoreh Deah #28-29.*

45 Rabbi Yechezkel Landau, Responsa *Noda Biyehuda*, 2nd edition, *Yoreh Deah* #210, Rabbi Moshe Sofer, Responsa *Chatam Sofer, Yoreh Deah* #336, Rabbi Moshe Feinstein, Responsa *Iggrot Moshe, Yoreh Deah,* Part 2, #151

life that is currently threatened and present in front of us. The *Mishpetei Uziel*, on the other hand, permits the dissections for several reasons. First, as stated above, the *Mishpetei Uziel* permits the performance of an autopsy if it is proven to serve a purpose, and studying medicine clearly does constitute a definitive purpose. Second, studying anatomy can lead to the saving of future lives, which, according to the *Mishpetei Uziel*, is enough to allow it. In addition, according to the *Mishpetei Uziel*, many of the prohibitions discussed above, such as leaving the dead unburied and stealing from the dead, do not apply if the dead body is being studied for the purpose of medicine.[46] Most authorities agree that merely observing an autopsy being performed for the study of anatomy and medicine is permissible, with the exception of the *Maharam Schick*, who prohibits even observing.[47]

B. Establishing the Cause of Death

Perhaps the most important modern day use of autopsies involves its ability to establish the cause of death. By identifying the cause of death, doctors can help future patients who are suffering from the same ailment. While the permissibility of performing an autopsy in order to save another human life has been previously mentioned, the following is a brief overview. Rabbi Yaakov Ettlinger prohibits using an autopsy for the immediate saving of a life even when the situation is present in front of you.[48] Most of the other authorities permit it when the information gleaned from the autopsy will directly result in the saving of a life,

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46 Rabbi Ben-Zion Uziel, Responsa *Mishpetei Uziel*, Part 1, *Yoreh Deah #28-29*

47 Rabbi Moshe Schick, Responsa *Mahram Schick, #344*

48 Rabbi Yaakov Ettlinger, Responsa *Binyan Zion, #170-171*

defined in Jewish law as being "*lefaneinu*," or present in front of us. However, the *halakhic* definition of *lefaneinu* differs among the authorities. The extreme view, taken by the *Noda Biyehuda* and *Chatam Sofer*, is that *lefaneinu* is to be taken literally, and an autopsy may only be performed when there is a patient present dying of a similar illness, and there is good reason to believe that performing an autopsy will help cure this patient.[49] Others are more lenient and say that any death that is determined to be caused by a very common disease may entitle an autopsy, for there will be many future patients who will present with such an illness and we can be ensured that information from this autopsy can, and will, save another human life.[50] The *Mishpetei Uziel* is even more lenient and deems any death to be a satisfaction of *lefaneinu*, based on the rationale that hospitals nowadays are filled with so many different types of illnesses and diseases that any deceased person can provide valuable information to help save future patients. He also writes that any autopsy performed for the study of the death-causing illness can represent the ability to save a future life, and he would therefore allow autopsies under most circumstances.[51] While others disagree and believe that, in general, autopsies are not revealing enough to provide information to save future lives, in specific circumstances (such as during epidemics or in a case of death caused by genetic disease) autopsies can be more informative and would therefore be permitted.[52]

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49 Rabbi Yechezkel Landau, Responsa *Noda Biyehuda*, 2nd edition, *Yoreh Deah* #210 Rabbi Moshe Sofer, Responsa *Chatam Sofer, Yoreh Deah* #336.

50 *Chazon Ish, Yoreh Deah* 208:7.

51 Rabbi Ben-Zion Uziel, Responsa *Mishpetei Uziel*, Part 1, *Yoreh Deah #28-29*

52 Rabbi Y. Arieli *Torah SheBe'al Peh*, Vol. 6, 5724 pp. 40 ff.

C. Financial Purposes

As alluded to in the *gemara* in *Baba Batra*, an autopsy can also serve a financial purpose, specifically when non-relatives make a claim that they are owed money from the deceased. It should be noted that an autopsy could satisfy this purpose only when the deceased person is *directly* responsible for the financial loss.[53] The *Noda Biyehuda* states that in such a situation, an autopsy can be requested by non-relatives of the dead in order to verify certain financial claims that they might have. In contrast, relatives may not demand an autopsy, as they have a specific obligation to bury and honor their dead.[54] While the *Noda Biyehuda* allows a full desecration via a complete autopsy in a situation of a financial need, Rabbi Moshe Feinstein allows for only a minor desecration, such as a viewing of the body or a slight delay in the burial.[55] If a life insurance company demands an autopsy in order to pay a claim, there is a difference of opinion over whether it would be permitted for the heirs of the deceased to request an autopsy. On the one hand, the dead person would probably desire it, for he was the one paying the monthly premiums and would prefer the claim be paid out, and the wishes of the deceased can determine the permissibility of performing an autopsy.[56] On the other hand, the relatives have a specific obligation to honor and respect their dead

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53 Rabbi Yaakov Ettlinger, Responsa *Binyan Zion*, *#170.*

54 Rabbi Yechezkel Landau, Responsa *Noda Biyehuda*, 2nd edition, *Yoreh Deah* #210

55 Rabbi Moshe Feinstein, Responsa *Iggrot Moshe*, *Yoreh Deah*, Part 2, #151

56 See below for a detailed discussion of this point.

relative. Some authorities only allow for an external examination in such a case.[57]

D. Legal Reasons

Another instance in which an autopsy may be necessary is if it is required for legal reasons. Occasionally, an autopsy must be performed to determine the cause of death as a means to help identify the killer. Sometimes, an autopsy can help prove an alleged murderer's guilt or innocence. Although one view states that an autopsy is prohibited if it will determine the guilt or innocence of a killer,[58] most others allow it in such a case.[59] Rabbi Yosef Shalom Elyashiv, one of the chief Ashkenazi Jewish authorities in Israel, limits the above permissibility to when it will potentially lead to the execution of the murderer, but not if it will result in imprisonment.[60] Others allow an autopsy to be performed when the person did not die a natural death, and performing an autopsy can yield valuable legal information to the heirs.[61] Another legal situation in which an autopsy may be permissible is if it will allow the deceased to be identified. For example, if identification is necessary to allow the wife of the dead to remarry, some permit one to be performed,[62] while others disagree.[63] However, most generally

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57 Responsa *Chemdat Tzvi*, Part 2, *Yoreh Deah* #20.

58 Ibid.

59 Responsa *Tzitz Eliezer*, Part 4 #14.

60 Avraham Steinberg, *Encyclopedia of Jewish Medical Ethics*, trans. Fred Rosner (Jerusalem: Feldheim, 2003), pg. 89 n.129.

61 *Gesher Hachayim* Part 3 Chapter 28:3.

62 Responsa *Sho'el U'meshiv*, 1st edit, Part 1 #331; Responsa *Yabiya Omer* Part 3 *Yoreh Deah* #23; Rabbi S.Z. Auerbach, cited in *Nishmat Avraham, Yoreh Deah* 349:1.

63 Responsa *Shivat Zion*, #64; Responsa *Teshuva MeAhavah* #47-48.

agree that autopsying war victims strictly for the purpose of identifying them is prohibited.[64]

E. Wishes of Deceased

One final but important aspect that must be taken into consideration is the will of the deceased.[65] Rabbi Ettlinger states that if a person willed his body to medicine in order to be dissected, he is forgoing his own honor that is due to him at death and thus it is permissible to perform an autopsy on him.[66] It may be possible to extend this to other situations in which it can be determined that the deceased would want an autopsy performed. Others are stricter and state that only an autopsy serving a concrete purpose, such as to learn about a specific illness, may be performed on someone who willed it.[67] Rav Moshe, the *Maharam Schick*, and the *Chatam Sofer* all have the most stringent view on the matter, and never allow one to request that his body be desecrated.[68]

VII. Special Categories

Until now, we have primarily discussed the issue of performing autopsies on Jewish bodies. With regards to performing autopsies on non-Jews, there is a divide over

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64 Responsa *Shevet Halevi*, Part 5 #178:1.

65 It is worth noting that the will of the deceased is a major factor in determining whether it is permissible for a Jew to donate his or her organs upon brain death, a completely separate issue that recently has been subject to much debate and is beyond the scope of this paper.

66 Rabbi Yaakov Ettlinger, Responsa *Binyan Zion, #170-171*

67 Responsa *Tzitz Eliezer*, Part 4 #14.

68 Rabbi Moshe Sofer, Responsa *Chatam Sofer, Yoreh Deah* #336, Rabbi Moshe Schick, Responsa *Maharam Schick, #344*, Rabbi Moshe Feinstein, Responsa *Iggrot Moshe, Yoreh Deah*, Part 2, #151

whether the prohibitions discussed above apply to both Jews and non-Jews alike. According to the *Mishpetei Uziel*, the same restrictions apply to both Jews and non-Jews, and therefore any situation in which an autopsy would be forbidden on a Jewish body, it would likewise be forbidden on a non-Jewish body.[69] The *Chatam Sofer* states, however, that for the medical study of anatomy, performing autopsies on non-Jewish bodies would be permissible.[70] There is also a difference of opinion over whether one may dissect Jewish sinners who were put to death by the government. Their status as a sinner may allow for their body to be desecrated postmortem. In a final special category, it is generally forbidden to perform autopsies on fetuses or on babies that died within the first thirty days of life.[71] However, Rabbi JJ Neuwirth allows autopsies on very early fetuses,[72] and Rabbi Shlomo Zalman Auerbach allows for an autopsy when a mother has had several miscarriages, if there is good reason to believe that dissecting the fetus will help prevent further miscarriages.[73]

VIII. Conclusion

In trying to determine the permissibility of autopsies in Jewish law, this paper reviewed a historical account of the world's view on autopsies, and discussed specifically some of the Biblical and Rabbinical prohibitions that might

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69 Rabbi Ben-Zion Uziel, Responsa *Mishpetei Uziel*, Part 1, *Yoreh Deah #28.*

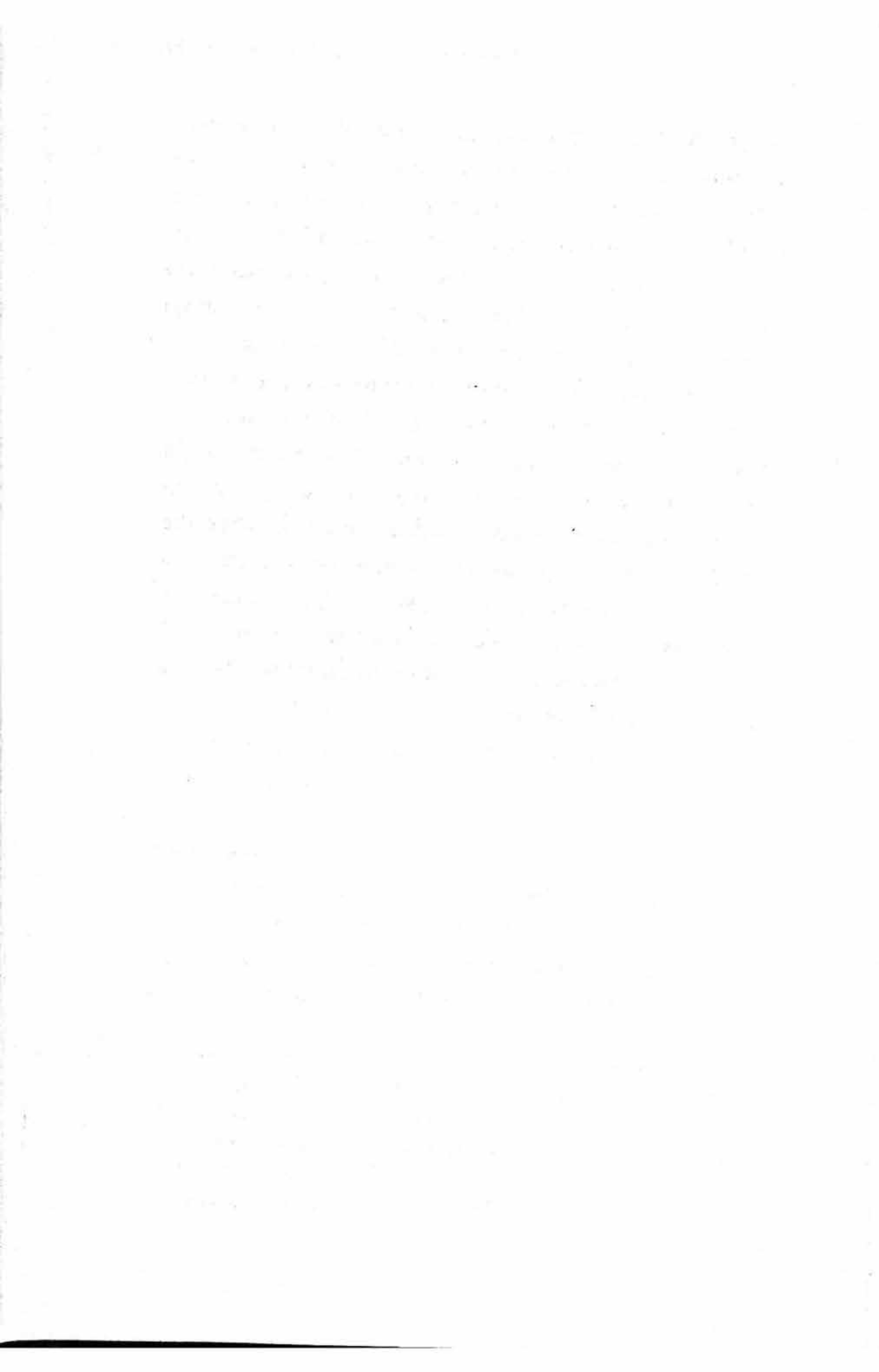
70 Rabbi Moshe Sofer, Responsa *Chatam Sofer, Yoreh Deah* #336

71 Rabbi Moshe Schick, Responsa *Maharam Schick, #344*, Rabbi Yaakov Ettlinger, Responsa *Binyan Zion, #170-171*

72 Cited in *Nishmas Avraham, Yoreh Deah* 349:2.

73 Ibid.

be involved in performing one, along with the relevant Talmudic sources on the matter. In general, there is a great debate among both early and later Jewish authorities over whether autopsies are permitted at all, and if so, under what circumstances. It is important to realize that every situation is unique and therefore must be treated as such via consultation with the appropriate authorities. What is clear is that while many Jews assume that autopsies are forbidden unconditionally, there are in fact several different situations in which they may indeed be permissible. Nevertheless, in any situation in which an autopsy is allowed, the remains of the deceased *must* be buried immediately after the completion of the autopsy. Furthermore, it is crucial that the autopsy be performed with dignity and respect towards the deceased, and it should not be done in a setting of levity and lightheadedness. For after all, the human body is sacred both in life and in death.



Can Physicians Earn a Living? Accepting Compensation for Medical Treatment

The Obligation to Heal

Avi Friedman

There are numerous sources that indicate that it is a *mitzvah* for a physician to treat the sick. In Leviticus, the verse states "'neither shall you stand idly by the blood of your neighbor."[1] This teaches that there is a negative commandment to abstain from assisting in the medical care of one's fellow man should one have any ability to help. Next, the Torah states in Exodus that "you shall surely heal."[2] Finally, the *Rambam* his commentary on the Mishna understands the verse in Deuteronomy of "And you shall return it to him"[3] to include returning someone's body or health to him as part of the *mitzvah* to

1 Leviticus 19:16

2 Exodus 21:19

3 Deuteronomy 22:2

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return a lost object.[4] [5]

In Deuteronomy, the Torah says "Behold I have taught you."[6] From this verse, the Talmud[7] teaches that just as *Hashem* taught us Torah for free, we must teach others for free. By the same token, physicians should cure the sick free of charge as well since in doing so they are performing a *mitzvah* and 'teaching' their patients how to take care of their bodies. Therefore, it may not be permissible for a doctor to receive compensation for dispensing medical care. Indeed, the Shulchan Aruch,[8] as well as the *Ramban* in *Torat Ha'Adam,*[9] rules that a doctor may not accept compensation for his medical knowledge. Nevertheless, he is entitled to payment for his time and/or effort.

Ramban, though, in that same piece opines that in the event that a patient promises an excessive sum of money to a doctor, he must pay it in full since after all he has purchased the physician's invaluable medical knowledge. How can the *Ramban* write this considering that he contends that a physician is solely owed money for his lost time and trouble since his knowledge cannot be charged for? In efforts to resolve this apparent contradiction, Chayim David Halevi[10]

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4 *Rambam*, Mishna *Nedarim* 4:4

5 For further study of topics in ensuing discussion please see: A) Rosner, Fred. "Physicians' Fees." *Biomedical Ethics and Jewish Law*. Hoboken, NJ: KTAV Pub. House, 2001. B) Salamon, Noam. "Concierge Medicine and Halacha." *Journal of Halacha and Contemporary Society*. Volume 58 Fall 2008.

6 Deuteronomy 4:5

7 *Bechorot* 29a

8 *Yoreh De'ah* 336:2

9 C.D. Chavel, Kitve Rabbenu Moshe ben Nahman (Jerusalem: Mossad HaRav Kook, 1964), 44-45.

10 C.D. Halevi, "*Tashlum Sekhar Harofe' Behalakhah*", in *Torah Shebe'al Peh*, ed. Y. Rafael (Jerusalem: Mossad HaRav Kook, 1976), 29-37.

writes that the *Ramban's* position is that in truth a physician cannot charge exorbitant fees. However, *b'dieved* (after the fact) if a doctor arranges to be paid an excessive fee, the patient is obligated to pay.

In fact, the *gemara* in *Sanhedrin*[11] provides a precedent for high physician fees. The *gemara* relates an incident that a hunchback, *Geviha ben Pesisa*, had a discourse with a certain heretic and at some point called the heretic a '*chayavaya*' which *Rashi* defines as a wicked person. Offended, the heretic said to *Geviha* that he wants to kick him and straighten his back. In response, *Geviha* says if you did that I would consider you an expert physician and you would be able to demand very high fees. Clearly, there exists a notion of larger fees being paid to good doctors. The *Ramban's* opinion, however, is not unanimous, in that the *Ritva*,[12] as well as the *Maharam* (*Meir ben Gedalyah*) as quoted by Rav Shlomo Kluger[13] never concede that fees beyond one's lost time are justified.

Physician's Fees in Contemporary Society

Assuming that a doctor should ideally only be compensated for his time, how should one place a value on that time? *Rashi*[14] in his commentary explains that the assessment of the value of lost time is based on what that individual would have earned otherwise. The difficulty with this understanding is that there is a major distinction between the doctors of *Rashi's* time and modern physicians.

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11 91a

12 Yom Tov ben Avraham Al-Ashbili, Novellae *Ritva, Nedarim* 38b.

13 S. Kluger, *Chachmat Shlomo, Yoreh De'ah* 336:3

14 *Bechorot* 29b, s.v. *kepo'el batel*

Doctors of many years ago would only practice medicine part-time whereas today they are full-time professionals. Therefore, *Rashi's* ruling above is inconsequential in today's society since those who treat the sick regularly, doctors, do not spend the majority of their days in other professions that we can thereby calculate their pay.

Bearing this in mind, we can understand the commentary of *Tosafot* in *Bechorot.*[15] *Tosafot* writes that the judges of Jerusalem were justified in their getting paid beyond mere lost time since their entire days were dedicated to issuing judgments. The *Rosh*[16] extends this ruling to teachers who are fully occupied with their teaching duties, stating that they may receive compensation beyond nominal amounts for time lost. By the same token, doctors who care for the sick are entitled to much larger salaries than described by the *Rishonim* (early commentators) since medicine is their full-time responsibility and profession. Consequently, it would be unfair to expect physicians to receive payment solely for their lost time when they dedicate all their time to medicine.

In addition, aside from the reason just provided, Shaul Yisraeli[17] suggests that since the practice of medicine today requires a license one can argue that it is no longer a *mitzvah* that anyone can perform. Moreover, a patient can decide to seek treatment from any doctor he chooses and therefore no particular doctor has an obligation to treat him. The physician can thereby charge a fee for his

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15 29a, s.v. *ma ani bechinam*

16 *Bechorot* 29a

17 Shauli Yisraeli, "*Schar Harofe*" *HaTorah VeHamedina* 7-8 5715-5716 (1955-1956), 299-300.

services. Abraham Steinberg[18] offers a different rationale for physicians' fees today. He writes that just as the *Rama*[19] says that witnesses may receive money for attesting to a divorce since in the event that they are deemed invalid they are obligated to pay the court, so too a doctor, who may be sued for malpractice should he err, may receive payment for treatment.

In summary, physician payment is problematic since curing the sick is a *mitzvah* that should be done ideally free of charge. Yet, the *Ramban*[20] suggests that physicians' fees may extend beyond merely one's lost time and trouble in the event that a patient agrees to it beforehand. Furthermore, perhaps, in modern times where physicians work full-time, are exclusive due to their need for licenses, and are subject to malpractice suits, they may collect fees for their knowledge notwithstanding any stipulations or limitations.

May a Doctor Receive Pay for work performed on the Sabbath?

A physician is permitted to practice medicine on the Sabbath since he is performing a *mitzvah* in providing medical care. The *gemara* in *Sanhedrin*[21] states that "anyone who sustains one person in Israel it is considered as if he saved the entire world." Clearly, human life is valued tremendously and threat to human life on the Sabbath mandates violation of any Sabbath restrictions to help save that individual. As a

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18 A. Steinberg, "*Bedin Schar Harofe*," in *Assia* (Jerusalem: Schlesinger Institute, 5736/1976), 279.

19 *Rama's* gloss on Shulchan Aruch, *Even Ha'ezer* 130.

20 C.D. Chavel, Kitve Rabbenu Moshe ben Nahman (Jerusalem: Mossad HaRav Kook, 1964), 44-45.

21 37a

result, it is certainly permissible for a doctor to treat someone who *halakha* deems to be in a life-and-death situation. However, may he be paid for such work? Are there any restrictions on earning money on the Sabbath?

The gemara in *Ketubot*[22] cites two opinions regarding how much money to detract per week from a woman's *ketuba* should she refuse to have relations with her husband, either seven dinars or seven "*traffik*" coins. Regarding the opposite scenario, where a husband refuses to have relations with his wife, the husband must pay an additional three dinars or three *traffik* coins depending on which opinion is correct. The *gemara*[23] there explains that his payment of three *traffik* coins in the latter scenario is a result of paying half a *traffik* coin for each day of the week he refused to have relations with his wife, whereas the seven *traffik* coins that she loses each week corresponds to one for each of the seven days of the week. Clearly, the husband is only paying for six days of the week should he refuse, whereas the wife is losing seven days of each week from her *ketuba* should she refuse. The *gemara* reconciles this distinction by saying that detracting from a pre-existing sum (should she refuse to have relations and thereby lose *ketuba* money) does not appear like an overt Sabbath payment, whereas his adding on to the *ketuba* (should he refuse relations) would appear like payment *quid pro quo* for the Sabbath. *Rashi* ad loc.[24] explains that situations where one is earning money on the Sabbath are rabbinically problematic lest one end up doing overt business on the Sabbath.

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22 63a

23 64a

24 s.v. *keeschar shabbos*

This *gemara* raises a new difficulty. Overt business transactions on the Sabbath are themselves only rabbinically prohibited lest one come to write things down. Therefore, it would seem that earning money on the Sabbath is a *gezeirah l'gzeira*, or a rabbinical decree protecting a rabbinical decree, a concept which does not exist in *halakha*?! Two main answers are given to this glaring difficulty. First, the *Eliyahu Rabba*[25] suggests that "*kula chada gezera hee*," that earning money on the Sabbath and outright business are all in the same category and were both prohibited rabbinically to prevent the violation of the Biblical command not to write. Second, the *Beit Yosef*[26] writes that earning money on the Sabbath is not a genuine, real rabbinical problem but is rather merely a '*chashash*' or a minor concern. Consequently, it is not a contradiction to the general rule of that we do not place a rabbinical decree on top of another rabbinical decree. Moreover, in light of the *Beit Yosef's* opinion that the Sabbath earnings are merely a '*chashash*,' there is more room for leniency in certain cases such as in the practice of *mitzvot*.

Despite the issues involved with working or earning money on the Sabbath, there are situations in which it may be permissible. A major factor at play is called *havla'ah* – literally, 'swallowed up.' The *gemara* in *Bava Metzia*[27] states that if one hires a watchman to guard his cow or plants daily then he may not hold him liable for Sabbath mishaps. However, if one hires a watchman on a weekly, monthly, or annual basis he may hold him accountable for Sabbath

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25 306:14

26 *Orach Chaim* 585

27 58a

mishaps. The employee must be careful not to ask for his Sabbath earnings directly and instead must verbalize his desire to collect, for example, his weekly salary and then his Sabbath earnings will be subsumed *(havla'ah)* under the weekly pay. Essentially, since the employer is not paying *quid pro quo* for the Sabbath, the Sabbath earnings may be collected without *halakhic* ramifications.

Next, Rabbi Yosef Karo in *Orach Chaim*[28] cites another potential leniency that can be applied to Sabbath work and pay. He says that it is prohibited to hire a cantor for the Sabbath or holiday prayers. The permissibility of *havla'ah* only exists in a situation in which the employee works other days of the week than the Sabbath and then is paid a weekly salary, thereby avoiding an overt business set-up for the Sabbath proper. Here, the cantor is hired exclusively for the Sabbath and can therefore not claim his Sabbath earnings are merely 'swallowed up' in a more general payment like the weekly or monthly worker.

However, Rabbi Karo claims that there is an opinion that still condones the practice of hiring a cantor exclusively for Sabbath. The *Mishna Berura*[29] explains that the basis of this opinion is that in the context of a *mitzvah*, i.e. Sabbath prayers, there is permissibility for direct payment. However there is a caveat that although he may accept the money, he will never see signs of blessing from those earnings.

These two ideas may apply to physicians working on the Sabbath as well. Since physicians often work as salaried employees (i.e. hospital-based) perhaps we can apply the

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28 Shulchan Aruch *Orach Chaim* 306:5

29 On Shulchan Aruch ibid.

permissibility of *havla'ah* to their earnings even though they may work on the Sabbath. Alternatively, if we can assume that practicing medicine is a *mitzvah* then we have found an additional permissibility for a physician to earn money on Sabbath, with the caveat of a lack of blessings from those earnings.

Compensation for Jewish vs. Non-Jewish Patients Treated on the Sabbath

The *gemara* in *Avodah Zara*[30] quotes Rav Yosef who says that a midwife may assist in the birthing of a non-Jewish woman and be paid for it to avoid *eyvah* - enmity. It would seem that since he stated the permissible method by a non-Jewish patient due to avoiding a pogrom/hatred, then most certainly he would grant permission to care for a Jewish patient where there exists a bonafide *mitzvah* of '*pikuach nefesh*' (saving a life). At first glance, this is an explicit source in the *gemara* granting license for medical caregivers to work and get paid for Sabbath work gleaned from all patients irrespective of their religion! However, the *Ritva*[31] explains that it is obvious that Sabbath earnings are prohibited and therefore although the midwife (or caregiver) can accept the money, she/he must "throw the money into the sea!" In a similar fashion, the *Chasam Sofer* writes in a responsum[32] that one may accept money for care provided on the Sabbath even for a non-Jewish patient, but it is not proper to derive benefit from it and it should be given to the destitute.

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30 26a

31 Ad loc.

32 *Chasam Sofer* 5:194

The Mahari Bruna

Mahari Bruna, a 15th century revered scholar, writes in a responsum[33] that a midwife who works on the Sabbath can accept payment because of *havla'ah* and she can even demand it in court (as opposed to just accepting it if it was given to her *b'dieved*) since there is a *sakana* (danger). The danger is for the sake of future birthing mothers. We are concerned that if the midwife is not compensated this time, perhaps she will not come next time, or at the very least, she will delay her arrival to the birth.

Rabbi Eliezer Yehuda Waldenberg, the *Tzitz Eliezer*, elucidates the Mahari Bruna's opinion in his own responsum.[34] He initially explains that Mahari Bruna must have applied the permissibility of *havla'ah* to the midwife assuming she received a monthly or annual salary. Therefore, her pay for the Sabbath work is subsumed in her larger, comprehensive salary. Accordingly, the *Tzitz Eliezer* states that this permissibility would only permit a salaried doctor, who works for a hospital for example, to be compensated for Sabbath work. However, a consulting physician in private practice, who bills per procedure or consult would end up directly billing for the Sabbath work, and that is *halakhically* unacceptable. Granted, he says the private physician can still work out a permissible approach for Sabbath billing by either: a) inquiring/ following up after the Sabbath as to the patient he helped on Sabbath or b) writing a plan for the patient after the Sabbath. Should he employ one of these two methods, he can attribute his Sabbath earnings to *havla'ah* of these

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33 Responsa of Rabbi Israel Bruna 114

34 Responsa of *Tzitz Eliezer – Kuntras Meshivat Nefesh* 8:15:13

other activities, as opposed to pure Sabbath compensation. Lastly, even under these limitations, the private-practice physician can collect his Sabbath earnings so long as it is given as a gift not as payment for work. Essentially, if he outright informs the patient and/or administration that he elects not to be paid for this Sabbath visit, or even if he remains silent, and does not make efforts to collect for his Sabbath consult he may accept a gift of gratitude from the patient out of appreciation.

The *Tzitz Eliezer* continues to analyze the Mahari Bruna and suggests that even a physician in private practice may accept his Sabbath pay as *havla'ah* without employing the above mentioned additional efforts. He explains that when a doctor establishes a certain billing rate for a procedure or consult he adjusts and inflates it to account for his accessibility. He carries a beeper and is 'on-call' always ready to race to the hospital or his office to see a patient should he be paged. Therefore, the sheer fact that he provides 24/7 availability means that any bill he serves is calculated to include his constant ease of access. It therefore follows that when he bills for Sabbath work, the dollar amount is not a pure reflection of the procedure performed, but rather incorporates this accessibility and can therefore be considered *havla'ah*.

Finally, the *Tzitz Eliezer* is bothered by the Mahari Bruna's providing two seemingly distinct reasons why a midwife can get paid for Sabbath, *havla'ah* and *sakana*. He suggests that the latter justification is only applicable to treating Jewish patients because only for their lives are we truly permitted to desecrate the Sabbath and in doing so are performing a *mitzvah*. As a result, he also cites a

permissibility of *havla'ah* to allow billing for treating non-Jewish patients on Sabbath as well. Nevertheless, although the *Tzitz Eliezer* concludes that the money may be collected for Sabbath consults, one should not derive benefit from it based on the *Ritva* in *Avoda Zara*. The *Tzitz Eliezer* adds an additional reason regarding not deriving benefit from Sabbath pay upon treating a non-Jewish patient. He writes that a big reason why it is acceptable to treat a non-Jewish patient on Sabbath at all is because it is a '*melacha she'eyna tzricha l'gufa* (act that is not done for its own sake). The doctor is merely doing it to avoid enmity or a pogrom if he showed favoritism and only treated Jewish patients. It then emerges that should he accept and derive benefit from monies collected from Sabbath work it would be extremely difficult to define that as *melacha she'eyna tzricha l'gufa* because he is not merely doing it to avoid a pogrom; instead, his purpose is to earn money.

Setting Up a Practice That Operates on the Sabbath

Another issue that arises is the permissibility of a practice being open on the Sabbath. A practice of only religious physicians is obviously not allowed to operate with 'business as usual' on the Sabbath. However, can a Jewish physician be a partner in a practice with a non-Jewish physician that is open regularly on the Sabbath? The Shulchan Aruch[35] describes two ways that a Jew can run a business on Sabbath with a non-Jewish partner. The first approach is if the partners stipulate from the outset that the non-Jewish physician will keep all the Sabbath earnings of a given fiscal year, whereas the Jewish physician will keep

35 245:1

all of a different day's earnings of that same period.

In the event that this stipulation was not made there is a dispute regarding the permissibility of the practice's earnings. Rav Sherira Gaon holds that the non-Jew should take all the Sabbath earnings and the remainder, the weekly profits, should then be divided equally between the two partners.[36] Often, the partners will not necessarily know how much money was specifically earned on the Sabbath. In that case, the non-Jewish partner should initially claim one-seventh (assuming the partnership/practice is operating all seven days of a week) of the profits and the remaining six-sevenths of the earnings should be split equally among the two of them. The *Ran*, however, holds that even should they fail to make any stipulations as described above, the Jew can still share in the practice's earnings equally to his non-Jewish partner.

A second approach quoted by the *Rama* in the Shulchan Aruch[37] may be if both partners work daily as opposed to switching off days of work. This opinion contends that the aforementioned rules and issues arise only when each partner works different days of the week. Then, the profits accrued on the Sabbath may be proscribed for the Jewish partner barring a stipulation that he (the Jew) will be entitled to sole possession of Tuesday's earnings, for example, whereas his non-Jewish partner receives all of Sabbath profits. However, in the event that both of the partners work every day other than the Sabbath together in the practice, the Jew can still collect an equal share of the annual profits. The rationale is that after working Sunday-

36 Rav Sherira Gaon, Responsa of Geonim, Musafie (Lik), siman 67.

37 245:1

Friday together side-by-side should the non-Jewish partner elect to keep the practice open and generate revenue on Sabbath as well, it is not the Jewish partner's responsibility to stop him. Indeed, so long as the Jewish partner does not encourage his non-Jewish partner to work on Sabbath, even his silence is not considered a violation of working on Sabbath or even instructing a non-Jew to do work. *Halakha* considers the non-Jew to be '*Adayta d'nafshei ka avid*,' working by his own initiative. The non-Jewish partner has decided to work on his own accord, not at the behest of his Jewish partner, and the Sabbath profits that are thereby accumulated that year will be pooled with the weekday earnings to all be split 50/50 between the partners.

A final permutation that needs clarification and discussion is the acceptability of a practice that is owned by a religious and non-religious Jew. The issue is that there may be a violation of '*lifnei iver lo teetayn michshol*' (placing a stumbling block in front of a blind person) should the Jew allow a practice he co-owns to be operated on the Sabbath by a fellow Jew who should not be working on the Sabbath either. Essentially, since the irreligious physician does not observe nor is he aware of the *mitzvah* of the Sabbath in full, therefore, support for or even silence by the religious Jew as to his partner's intentions to work on Sabbath could be considered tantamount to setting him up to sin. In fact, it may be incumbent on the Jew to vehemently protest his partner's desire to work on the Sabbath and prevent that desecration.

Rabbi Avraham Avraham[38] points out that there are three possibilities for the appropriateness of applying *lifnei*

38 Nishmat Avraham Volume 1 p.107-108

iver to the above situation. It can be a violation of *lifnei iver* Biblically, rabbinically, or not at all. When a Jew is classified as a *mumar* (apostate) to some capacity he is no longer considered Jewish. We view one who violates the Sabbath openly as an apostate to the entire Torah since Sabbath observance is equivalent to observing the entire Torah. Therefore, the extent to which we apply *lifnei iver*, either Biblically, rabbinically, or not at all, to this Jew is contingent upon whether we still consider him Jewish, and if so, to what extent.

However, Rav Moshe Feinstein in his *Iggros Moshe*[39] writes that it may be a *mitzvah* for a religious doctor to switch Sabbath call with a non-religious Jew in the same program since the non-religious Jew will undoubtedly violate more severe Sabbath prohibitions at home. When he practices medicine, at least many of the prohibitions he will violate will be downgraded to rabbinical violations since he will be treating the sick as a physician. This is better than his idling in his home where he will surely cook, turn on electricity, and perform other more stringent violations of the Sabbath that are Biblical in nature. Therefore, perhaps here, the same logic can apply and the religious Jewish partner would not be obligated to protest his non religious Jewish partner's working on the Sabbath, as he may even be doing a *mitzvah*. Nonetheless, Rav Moshe only wrote that responsum working with the assumption that the *frum* doctor could not switch with a non-Jew and thereby avoid all issues. As a result, in the case of running a practice, it is probably in the religious doctor's best interests to open a practice with a non-Jew, as opposed to an irreligious Jew,

39 *Orach Chaim* Part 4:79

and thereby be allowed to operate on the Sabbath and keep the profits as described above.

Patients who cannot afford medical care

In light of what we have discussed it would seem that normal medical fees are accepted in *halakha*. Indeed, the *gemara*[40] lists five types of payments that a Jew who injures his friend must pay. The third payment listed is called '*repuy*,' which corresponds to paying the doctor's bills. Moreover, the *gemara*[41] writes that a doctor who does not charge for his services is worthless. The rationale behind this latter statement is that the assumption is that a person will be far more scrupulous and meticulous when treating a patient who pays. Pro bono work lacks a financial incentive for the physician and that may unfortunately lead to mishaps due to the doctor's lack of motivation.

However, in contrast, the *gemara* in *Kiddushin*[42] writes in the context of a number of generalized descriptions of various professions that "*tov sheb'rofim l'gehenom*," the best of the doctors goes to hell. This denunciation has a myriad of explanations, but one of particular note and relevance here is in *Rashi*'s commentary.[43] *Rashi* suggests that this harsh statement is directed at doctors who can cure and treat a poor person but refuse to do so. This *Rashi* appears to contradict the aforementioned sources regarding the absolute necessity for doctors to be compensated in the context of injury as '*repuy*' and to ensure they care for patients carefully and

40 *Bava Kamma* 83b

41 Ibid. 85a

42 82a

43 s.v. *Tov Sheb'rofim L'gehenom*

properly. According to *Rashi*'s understanding of the *gemara* in *Kiddushin*, it seems that fees are not always vital and in fact can lead doctors to hell in certain circumstances.

How can we reconcile these contradictory approaches? In regards to the precedents for doctor's payments for an injured individual as well as the terming of a pro bono physician as worthless, those sources may only reflect the patient's obligation. Namely, a physician may and should certainly heal a patient for free and these sources merely point to the patient and expect him to pay whatever he can. The doctor, however, should not refuse to treat a particular individual simply due to lack of financial means claiming that he (the doctor) is 'worthless' in the context of pro bono work.[44] In fact, a court can coerce the doctor to treat a poor patient who cannot pay.[45] Nevertheless, this coercion is only sanctioned in the event that the physician is the sole physician in the town. Therefore, in contemporary society where there is a plethora of physicians in most cities, courts cannot execute this coercion. Instead, they should raise money for a communal 'destitute patient fund' and use that money to compensate a doctor for his services.[46]

In truth, it is incumbent upon physicians to treat even the most destitute of patients due to verses such as "neither shall you stand idly by the blood of your neighbor"[47] and others as mentioned above. In efforts to encourage

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44 Shoshanat Ha'amakim "Verapo Yerapeh" # 71, see also Talmud *Taanit* 21b and *Gilyonei Hashas Bava Kama* 85a

45 Responsa *Teshuva Meyahavah Yoreh Deyah* 3:408

46 Responsa *Tzitz Eliezer* 15:40:7

47 Leviticus 19:16

medical treatment for the poor, Yitzchak Yisraeli[48] stated, "There is no greater *mitzvah* than treating the poor." Moreover, Rabbi Eliezer Pappa[49] exhorts physicians to provide commensurate care for poor and affluent patients alike. Finally, the obligation to provide medical care may fall upon the community at large. The Chofetz Chayim[50] writes that a community that does not set up a fund for the indigent population may be in violation of "neither shall you stand idly by the blood of your neighbor."[51]

Conclusion

It is important to clarify that this essay is not meant to serve for practical guidance but rather as a *halakhic* overview of the issues involved regarding physician compensation. The laws pertaining to a physician's compensation are complex. The *halakhic* perspective on doctors essentially runs the gamut from potentially prohibiting the practice of medicine since it appears as though one is contradicting a Divine decree of sickness[52] to calling it a *mitzvah* and a most noble profession. Once we assume practicing medicine is a *mitzvah* it may thereby be prohibited to collect money for it. The nature of contemporary society and its full-time physicians may alter *halakha's* stance and thereby allow for physician compensation beyond mere lost time. In regards to Sabbath compensation, there are new prohibitions to

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48 Mussar Harofim #30, see also Oath of Assaf (quoted in F. Rosner *Ann Int Med* 63:317, 1965) and Oath of Jacob Zahalon (in otzar hachayim)

49 *Peleh Yoetz* #510 "Rofeh"

50 Ahavat Chesed vol. 3 Bikor Cholim 48b

51 Leviticus 19:16

52 *Rashi* commentary to *gemara Bava Kamma* 85a

earning money that arise even once it is accepted that physicians may be compensated for weekday work. There are multiple ways to categorize consults and procedures on the Sabbath under the rubric of *havla'ah* and in turn allow the resulting pay to be collected. Nevertheless, the money earned from those visits is potentially proscribed from any benefit and must be given to the poor and/or even destroyed. Finally, setting up a practice that operates on the Sabbath with a non-Jew or non-religious Jew presents its own challenges, but may still be feasible according to some views.