

**Science, Religion and the Humanity Within:
A Jewish American Approach to the Stem Cell Debate**

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Introduction

It is early in the twenty-first century, and the United States is in the middle of a debate that is, on its surface, about stem cell research and more deeply about the nature of illness and healing and even about the nature of humanity itself. With stem cell research, we are facing the prospect of being able to eradicate many of the major diseases and ailments that plague humanity. It could be a dream come true.

Americans have long lived by a narrative of cure. Our stories tell of the triumph of the weak over the mighty, of science over disease. America is the source of much of the world's medical research, and we train many of the best doctors alive. America is a world where death is an inevitable fact of life that should nonetheless be fended off for as long as possible. Doctors are the defenders, their therapies are the weapons. To die of a disease is, for many, to admit defeat. Americans do not like to be sick and Americans do not like to die. Stem cell research, while not a fountain of youth, could answer our prayers for a new way to stave off death by curing illness in completely new ways. It truly could be an American dream come true.

Clearly, the American cure narrative is not simply about making sick people better and improving the quality of life. It is about staring death in the face and winning. It is about learning and doing more than anyone thought possible, about breaking the boundaries of our limited minds and outsmarting even God in his divine plan. These prospects of such enormous power are frightening, but they are the

prospects faced by those who wish to move ahead with this most promising scientific development.

With stem cell research, we will make almost unthinkable decisions about the nature and value of life. We may use fetal tissue, we may create brand new human organs in a petri dish, we may even create exact copies of human beings. We must decide how much trust we are willing to put in our boldest and most brilliant scientists, and how much trust we are willing to put in ourselves to make moral decisions about this complex issue. These daunting tasks make the possible dream come true of stem cell research seem like a source of nightmares.

This paper will explore the pulse of the nation, of traditional Judaism and of American Reform Judaism as we all struggle to reconcile our desires to cure disease and preserve life with the enormous decisions involved in actually pursuing those goals. The connections between these three seemingly distinct groups will prove surprising, and hopefully a narrative of stem cell research in America, one geared toward Jews but reflective of all, will emerge.

Acknowledgements

A number of people have guided me through my research and writing process. Rabbi Bill Cutter agreed to advise me on my thesis only after some serious convincing on my part. This was a big undertaking for a man already committed to so many important projects, and probably something that he could have done without. But, thankfully, Rabbi Cutter consented to lead me on an intellectual and religious journey that I could not have planned on my own. Each of our many hours of dialogue left me feeling more excited about Judaism, my project and, most significantly, my own capability to stretch my vision of the world to include totally new or, in some cases, totally disagreeable ideas. Rabbi Cutter's ability to keep me on track in terms of my writing without applying too much pressure has made the hours sitting before my computer all the more worthwhile. And finally, the gift that Rabbi Cutter gave to me in inviting me to present my paper at a conference was beyond my wildest hopes. I am grateful and I am blessed to have worked with such a visionary man.

Rabbi Elliott Dorff provided important guidance for me as well. Early in my project, he helped me to organize my thoughts and to clarify some of my presuppositions about the nature of Jewish ethics. He helped me to better understand the value of using *Halakhah* in progressive Jewish decision-making. Finally, Rabbi

Dorff provided me with some important premises upon which I could base my understanding of the secular components of the stem cell debate.

Dr. Allan Tobin assisted me from the scientific angle, though his substantial sense of the world of Jewish ethics was also invaluable. I can actually say that, though the whole of my interactions with Dr. Tobin were of great value, there was one idea that came forth that genuinely changed my research- science is morally neutral. This concept enabled me to separate the scientists doing stem cell research from their actual research, and helped to clarify why certain understandings of stem cell research were right and wrong.

Finally, Dr. Yehoyida Amir, the dean of the HUC Israeli rabbinical school, was a surprise blessing to me. When I reached an impasse in my research and I could not discern my next step, Rabbi Cutter sent me to Dr. Amir, who happened to be spending one semester in Los Angeles as a guest professor. I knew nothing about him, yet Dr. Amir helped me to find an angle from which to present my ideas about non-*halakhic* decision-making. I only wish that we had spoken sooner, because I believe that an earlier meeting might have altered the shape of my paper even further than our meeting did. The opportunity that I did have with Dr. Amir was of great value nonetheless.

In truth, now that I have completed this project, I am ready to start the project all over again. I have learned so much and, thanks to these men who have guided me, I am now ready with a new battery of questions that build upon those already asked. I

suppose that this is what a good research experience should produce- a feeling that there is so much more to learn. There is so much more to learn...

Gratefully,

Sharon Gladstone, March 2003

1: The Stem Cell Question: News and Views

The "Secular" Debate

The national debate over whether to use stem cells for research is supposed to be a secular one. The citizens of the United States, represented by our legislators, shall evaluate the scientific, moral and ethical issues associated with stem cell research. We must reach conclusions about the propriety of such research, and, as in many other cases, we must craft laws to regulate the processes involved in it. We Americans, our lawmakers in particular, are supposed to go about this process of debating and decision making under the aegis of the First Amendment of our Constitution. Ideally, we must keep church and state, more broadly stated as religion and politics, completely separate, even when we tackle this difficult dilemma, which may go to the heart of our value systems.

It is a lofty ideal. The leading powers of this country would keep religion and/or religion inspired ideals at bay while they hashed out answers to some of the toughest moral and ethical questions of the day. But the ideal does not match reality. We do not speak of an American secular ethic. We do not keep matters of faith separate from matters of progress. Our secular decision-making processes are often influenced by our religious beliefs. There are countless other means of reaching moral and ethical decisions, consequentialism, the process of assessing the morality

of a decision based on its possible outcomes, being the most common, but these do not make the news. People who are not atheists (and most politicians are not admitted atheists) will almost invariably be influenced by their religious beliefs when making challenging moral and ethical decisions.

There exists plenty of evidence substantiating this claim. For example, Felicia R. Lee, in her August 24, 2002 article, cites a 2001 Gallup Poll that showed that 82 percent of Americans thought of themselves as Christians, 10 percent as members of other faiths and that only 8 percent were atheists or agnostics. All participants stated that, "no dogma, religious creed or denominational commitment guided their beliefs," but majorities were willing to support black, Jewish, female or gay presidential candidates while only 48 percent of those polled would vote for an atheist.¹ This influence may be so pervasive, and sometimes so subtle, that it remains either unnoticed or unspoken but the influence is significant.

Perhaps this religious influence is innocuous, even comforting, for our "One nation, under God." I suggest that it is anything but. We hear of an American ethic which, when pushed, will be characterized as "Judeo-Christian." In truth, this ethic is primarily a Christian ethic, likely due in large part to the large majority of Christians in America. Some people who see their religious views reflected back at them by their politicians will be pleased. Those who do not see their religious views reflected, alongside those who, from an atheistic or disestablishmentarian bent, do not wish to

¹ Lee, Felicia R. "The Secular Society Gets Religion." New York Times 24 Aug. 2002, late ed.: B7.

see any religious views reflected by politicians, will not be so comforted. In his August 9, 2001 speech in which he drastically limited the potential for progress in stem cell research, George W. Bush stated, "My position on these issues is shaped by deeply held beliefs. I am a strong supporter of science and technology, and I believe they have the potential for incredible good... I also believe human life is a sacred gift from our Creator. I worry about a culture that devalues human life."² While many theists might be comfortable with Bush's notion of life as a sacred gift from God, his God may not be the same as the God of the rest of the country, and his beliefs may not be the same as the beliefs of others.

It is not only George W. Bush who puts a religious spin on the stem cell debate. Countless authors use terms such as ensoulment of the embryo and sanctity of human life. I do believe that a truly secular debate should not have a religious tone (and I would maintain my position even if the informing religion was my own). But I also believe, for better or for worse, that Americans want to have some tool for reflecting on these moral dilemmas and religion is that tool. Let it be established that the challenge of church-state combination exists, and let the discussion move on.

² Bush, George W. "Stem Cell Research." Crawford, Texas. 9 August, 2001.

So what is a Stem Cell, Anyway?

Stem cells are a type of cells found in humans at all stages of development.³

There are three types of these cells, embryonic, fetal and adult. Stem cells are unique among other cells because they are unspecialized and will remain so until given a signal to develop into a specific type of cell. A heart or skin cell, on the other hand will always perform the specific biological functions of its organ. When tissues in one of the body's organs become damaged, stem cells may enable the body to restore them. Scientists believe that stem cells may be a means of curing currently incurable illnesses and repairing currently irreparable damages.

Not all stem cells are the same. Stem cells from a fertilized egg (from the moment of fertilization up to about four days or the 32-cell stage) are totipotent, meaning that they can develop into any type of cell. Once the fertilized egg reaches its 32-cell stage, the totipotent cells begin to specialize and form a hollow sphere of cells called a blastocyst. The blastocyst has an outer layer of cells and an inner cluster called the inner cell mass. The outer layer will become the fetal support system (placenta and supporting tissues that will enable the fetus to develop in the uterus) while the inner cell mass will become virtually every type of cell found in the human body. It is of vital importance to note that the inner cell mass cannot give rise to any part of the fetal support system. The cells in the inner cell mass are called

³ The following material is paraphrased from the CCAR Responsa Committee's Teshuvah 5761.7, "Human Stem Cell Research" and from Rabbi Elliot N. Dorff's August, 2002 paper entitled "Stem Cell Research."

pluripotent, meaning that they can give rise to most, but not all types of cells.

Pluripotent stem cells become more specialized types of stem cells, such as blood stem cells, capable of becoming any of the components in blood (but nothing but blood), or skin cells that can become all types of skin (but nothing but skin). These are called multipotent stem cells.

Totipotent and pluripotent stem cells are called embryonic stem cells because they occur only in embryos. Multipotent stem cells, while found in embryos, are also found in adults (an adult is any human being that is no longer in the womb), hence their name, adult stem cells. By their very nature, embryonic stem cells hold more potential for use as treatment for various ailments because of their limitless or nearly limitless developmental possibilities.

Currently 60 embryonic stem cell lines are maintained by the United States government and are available for use in government sponsored stem cell research. Embryonic stem cell lines are theoretically capable of regenerating themselves indefinitely. Therefore, those 60 cell lines could provide enough stem cells for any researcher that needs them. Realistically, though, the cell lines do not seem to be an everlasting source of new cells. They lose the ability to properly reproduce themselves as they age. It is currently under question whether any of the currently existing cell lines will prove a useful source of new stem cells.

Adult stem cells, though more limited in scope, do offer the slim possibility of being an adequate substitute for embryonic stem cells, and harvesting them poses far

fewer ethical dilemmas than does harvesting their immature counterparts. I, like every scientist, politician and theologian I have read, wish to stress the absolute preference that I assign to adult stem cells over embryonic stem cells. I would like nothing more than to see science develop ways of making adult stem cells perform as embryonic stem cells do. But this prospect seems unlikely, and so I, like every scientist, politician and theologian I have read, will engage in the embryonic stem cell debate.

There is an additional possibility for another, less morally challenging, source for stem cells. Scientists are developing a technique called Somatic Cell Nuclear Transfer (hereafter SCNT) whereby an egg would have its nucleus removed (this removes its chromosomes) so that all that remained were the materials that are essential for embryonic development. The de-nucleated egg would be placed beside any somatic cell except a sperm or egg cell. The two would be zapped, probably with some combination of electricity and chemicals.⁴ The anticipated result is a cell or cells that would be totipotent- all of the benefits of the newly created embryo without the actual embryo. The technique of SCNT has been called therapeutic cloning, a name whose controversial nature will be explained below.

Scientists and laypeople alike have high hopes for stem cells. At the top of the list is the possibility that stem cells may be the key to curing countless conditions, namely Parkinson's and Alzheimer's diseases, spinal cord injuries, strokes, burns,

⁴ This is the part of the process that is still mostly a mystery, certainly to the general public and possibly to the scientists who are attempting to develop it.

heart diseases, diabetes, osteoarthritis and rheumatoid arthritis. Stem cells are believed to be superior to any current medical treatments for these medical problems because they eliminate many of the associated complications, namely side-effects of the drugs and organ/tissue rejection. Stem cells could offer countless new and safer avenues to cures for some of our most severe medical problems.

Stem cells may be of benefit in several other ways as well. Scientists seek to discover the mechanism by which stem cells are specialized and told to turn on and off. The hope is that these scientists may be able to better understand why, when normal cell specialization does not occur, birth defects or cancer do occur. No longer would doctors need to use chemicals to force cancer into remission or various treatments to counterbalance birth defects- they could stop them at the cellular levels and prevent the mutations from even occurring.

Stem cells could also be used to test drugs more safely and effectively. While animal human trials would still be necessary, trials on human stem cells would streamline the process of drug testing. Any drugs that proved harmful to the human stem cells would never be tried in animals and human beings. Advocates hope that this would curb the risks that accompany animal and human research.⁵

Finally, stem cells may be used to develop organs for transplant. Currently, we must rely on donors to supply organs that will replace injured or failing organs (be those the heart, kidneys, skin or any other transplantable organ). Stem cells may be

⁵ Dorff, "Stem Cell Research," 4.

able to be grown into any desired organ, thus eliminating the need for organ donation. It may be possible to do SCNT using the intended recipient of the organ as the donor of the somatic cell. This means that the risk of donor rejection due to a genetic mismatch would be nullified.

With Promise Come Problems

No one can deny that stem cell research, with its promises of treatments and cures heretofore unheard of, could be a modern day medical manna from heaven. The biblical story of manna begins in Exodus 16, when the Israelites complained to Moses that they missed the plentiful food supplies of Egypt and that they feared death from starvation in the desert. God sent manna to feed the people and, by way of an acknowledged miracle, they were sustained every day of their forty years. Stem cells are coming at a time when hope for medical treatments for many illnesses and injuries is difficult to sustain- treatments and cures are just not being found at the desired rate (or at all), and stem cells offer a fresh approach to the problem of these conditions. But, the story of manna continues in Numbers 11, when the people complain bitterly to Moses that they have nothing but manna- the food of Egypt, regardless of the fact that Egypt equals slavery for the Jews, would be better than the daily bread! And, just as manna had its detractors, so does stem cell research. The stem cell debate is laden with controversy on a number of fronts. Each point that one group (usually, but not always conservative Christian factions) raises against stem cell research has a

counterpoint raised by proponents of the research. The safety of an insecure medical past is, for some, more desirable than the prospect of a controversial medical future.

There are two primary moral problems associated with stem cell research. First, though not necessarily more significant, is the fact that embryonic stem cells must come from embryos. Second is the ever-challenging argument based on the principle of the slippery slope whereby one decision leads to another more lenient decision which leads to another and the eventual dissolution of the moral standards originally imposed on the situation. I hope that as I explicate each of the components of the stem cell debate the thrust of these two primary moral problems will become clear.

Many opponents of abortion, again, mostly right wing Christian groups, rigorously oppose stem cell research because, at its current state, it requires embryonic stem cells that can only come from aborted fetuses or embryos created through In-Vitro Fertilization (IVF). They believe that life begins at inception, whether this is in a womb or in a petri dish or test tube. Therefore, harvesting of embryonic stem cells constitutes as gross a violation of a life as murdering a full-grown adult. It is ironic that these people do not raise objections when fertility clinics discard embryos that were created for IVF but not used. Some abortion opponents actually do consider IVF embryos an acceptable source for stem cells. Orrin Hatch, whose anti-abortion credentials are quite well established, stated: "At the core of my support of regenerative medicine research is my belief that human life begins in a

mother's nurturing womb."⁶ SCNT would probably be the most acceptable option for all anti-abortion activists because, not only is the embryo not implanted in a woman's womb, but the egg is never even fertilized with sperm. But, since SCNT has not been successful as of yet, the dream of developing a non-controversial means of harvesting stem cells remains a dream.

People who oppose stem cell research because of abortion issues believe that stem cell research will justify, if not encourage abortions. Perhaps the promise of medical advances resulting from embryonic research will assuage some of the guilt felt by women considering aborting their fetuses and will thus increase abortion rates in the United States. Proponents of stem cell research would likely proclaim that hypothesis preposterous simply because women who are on the fence about ending their pregnancies will probably not use notions of the greater good to inform their decisions. Other, less cutting counterarguments exist as well. Many believe that, since abortions are legal and happening in the United States, medical researchers should be allowed to use the aborted fetuses (with the full consent of the mother). While abortions are necessary (for a wide variety of reasons), no one likes them. Why not derive some benefit from what is an otherwise sad event? Additionally, using embryos created from IVF (again, with full donor consent) would circumvent the abortion issue altogether. Either of these options seems to be a rational response to the anti-abortion protesters. But, of course, none of these obviates the problem that

⁶ "The Pro-Life Case for Cloning." New York Times 2 May, 2002, natl. ed.: A26.

those who believe that life begins at inception would have with embryonic stem cell research.

Opponents of stem cell research have fears that range beyond the abortion/life issue. Charles Krauthammer, in his article entitled "Crossing Lines, A Secular Argument Against Research Cloning,"⁷ worries about the commodification of the human embryo. He is not so fearful of commodification of aborted fetuses and IVF embryos. His main fear is that, "The bill that would legalize research cloning [SCNT] essentially sanctions, licenses, and protects the establishment of a most ghoulish enterprise: the creation of nascent human life for the sole purpose of its exploitation and destruction." He differentiates between IVF embryos and SCNT created embryos by suggesting that, while the probability of destruction of IVF embryos is high, the probability of destruction of SCNT embryos is one hundred percent. Krauthammer believes that one must consider intent when determining morality (an issue that will be clouded by a Jewish principle discussed in the second chapter). It seems rather a rigid argument to suggest that scientists wish to create stem cell sources strictly for the sake of destroying them (an immoral act). In fact, scientists intend to use stem cells to cure diseases and repair currently irreparable injuries. Yes, the developed cells will be destroyed, but they were created not for destruction, but for therapeutic purposes. Krauthammer's argument is fundamentally flawed in that manner.

⁷ Krauthammer, Charles. "Crossing Lines: A Secular Argument Against research Cloning." The New Republic. 29 Apr. 2002: 20-23.

Ironically enough, Orrin Hatch's belief (quoted above) also acts as a counterpoint to Krauthammer. Krauthammer claims not to believe, "that either personhood or ensoulment occurs at inception," but he calls embryos "nascent human life." He is against SCNT for stem cell research because a nascent human life is being destroyed. Hatch and his followers would insist that there is nothing nascent, or perhaps even human, about an embryo existing outside of the womb, and thus would, and do, see no problem. There is certainly irony involved in pitting a strict anti-abortionist's argument in favor of SCNT stem cell research against a choice advocate's argument against the use of SCNT stem cell research. And, readers are also confronted with just one peek at the vast complexities involved in the stem cell debate. When the boundaries between sides are so blurred that the "enemy" becomes unknown, a true challenge is present.

Perhaps the slippery slope issues of stem cell research are the most challenging of all. They go beyond issues of belief (unlike the anti-abortion objections to stem cell) or even of morality (do the means justify the ends in stem cell research), and into the realm of absolute fear. The slippery slopes are everywhere, and just when it seems that someone has found terra firma, another slope appears and the sliding begins anew.

One party of stem cell objectors suggests that violating the embryo today will lead to the violation of fetus or infant tomorrow. A more general accusation is the oft-called "Brave New World" syndrome. People genuinely fear that there will

someday be farms where embryos are created and raised, where human life becomes devoid of all value except its medical value, and where untold horrors will unfold against the human race. Even if the intentions are worthy, opponents believe that the potential horrors are too great to justify.

While this is the stuff that science fiction is made of, a certain degree of fear is understandable. History has given us countless examples of good intentions run amok. Alfred Nobel created dynamite as a means of making nitroglycerin safer to handle. It was developed into a weapon used for destruction and murder. Glue, a seemingly innocuous and indispensable tool for art projects and the like is sometimes used as a drug by people who sniff it. It is almost impossible to create something and know with certainty that it will never be used for nefarious purposes, but the real question is whether this is reason enough to not create.

The people who suggest that stem cell research will lead to experimentation on (and possibly even destruction of) fetuses or even babies, or who envision a "Brave New World," have little faith in the entire system within which stem cell research would happen. First, the same specter of evil that frightens people into opposing stem cell research on the grounds that it could be abused frightens stem cell researchers into being exceedingly cautious with their work. No one can forget the fictional images created in "Brave New World," or the real images of Nazi doctor Josef Mengele's inhuman experiments. But today's scientists and doctors are, we

presume, not characters from a novel or throwbacks to history's darkest people. They are moral individuals motivated by a desire to do good and to do no harm.

Today's medical professionals are bound by the 2500 year old words of the Hippocratic oath. Doctors and scientists are all trained in ethics. There are countless ethics review boards (staffed by doctors, scientists and all types of lay people) watching over the most infinitesimal details of medical/scientific progress. Public opinion also plays a significant role in checking the behavior of scientists. And finally, for those who are unwilling to believe that humanity is fundamentally good, that human beings strive to help and not hurt, and that Dr. Frankenstein is a fictional character and Dr. Mengele (and his spirit) is dead, there are politicians, ready to set and enforce the rules.

A Political Party

The political debate over stem cell research is dizzying in its complexity. Every issue mentioned above has and continues to come into play, and almost all of the legislators entrusted with making a decision vis-à-vis stem cell research are neither scientists nor ethicists, but regular people with emotions and opinions, fears and beliefs. While the final sentence of the preceding section may seem to suggest that politicians will assuage any fears about stem cell research legislatively, this is anything but true.

At the head of the American stem cell debate is President Bush. The president has appointed a Council on Bioethics, "a collection of 18 doctors, legal and ethical scholars, scientists and a journalist,"⁸ to advise him on this issue. Dr. Leon Kass, a physician and biochemist who has taught philosophy and ethics at the University of Chicago since 1976, chairs the council and is Bush's primary advisor. Kass finds that his commitment to the natural (i.e. medically untouched) cycle of birth, procreation and death conflicts with the desire of science and medicine to improve this cycle by making procreation more possible and using medical means to almost defeat mortality. He is adamantly against cloning, calling it, "a major violation of our human nature" and is conservative when considering issues of medical progress where ethical questions exist. He is not satisfied that medical progress trumps ethical dilemmas. Though Kass and the Council on Bioethics have no legislative powers, they undoubtedly influence the president in his decision making.

On August 9, 2001, the president publicly addressed the stem cell debate. He outlined the potential benefits of stem cell research, noted that stem cells may also be harvested from adult cells, umbilical cords and even human placenta, and acknowledged the United States' reputation as a leader in medical progress. Bush then stated that embryonic stem cell research, "is at the leading edge of a series of moral hazards," and that, "while we're all hopeful about the potential of this research, no one can be certain that the science will live up to the hope it has generated." He

⁸Stolberg, Sheryl Gay. "Bush's Advisers on Ethics Discuss Human Cloning" New York Times, 18 Jan. 2002, natl. ed.: A19

decided to allow the 60 pre-existent embryonic stem cell lines to be used for federally funded stem cell research. These 60 lines are acceptable because "the life and death decision has already been made," and would thus not cause taxpayer funding to "sanction or encourage further human embryos that have at least the potential for life." President Bush's decision on stem cells is deemed temporary, and so the issue has been taken up by congress as well.

Senator Sam Brownback, Rep. Kansas, introduced strict anti-stem cell research legislation in January of 2002. His bill proposes the prohibition of reproductive cloning and mandates severe criminal penalties for participation in all forms of stem cell research. The bill effectively halts all progress made thus far. Senator Dianne Feinstein introduced her own legislation in December of 2001. She also proposes the prohibition of reproductive cloning, but she allows for other forms of stem cell research in order to cure life-threatening diseases. The debate over which bill to pass is not particularly partisan in nature. The House of Representatives passed Senator Brownback's bill in May of 2002. The debate in the Senate was more heated, and the bill has not yet been voted on. While it seemed unlikely that Brownback's bill would pass in the Senate prior to the 2002 election, it remains to be seen what will happen with the newly formed Senate.

In truth, this is just a surface treatment of the stem cell debate's political front. No one can fully know just who, or what is influencing the legislators when they consider this issue. Some are compelled by religious values, some by moral values,

and some, unsure of their own opinion, rely on their constituents to help them make their decisions.

Public Opinion?

There is limited information available concerning public opinion about the stem cell debate. An American Medical Association poll taken in May 2002 found that 43% of participants supported federal funding of stem cell research while 34% opposed it (it had been 55% versus 29% in August of 2001). It also found that proponents of stem cell research were influenced by the media while opponents were influenced by religious beliefs. An ABC poll conducted in late June 2002 found similar results on both fronts. Yet another ABC poll found that public opinion varied based on the wording of the question. A question that included the statement, "Live embryos would be destroyed in their first week of development to obtain these [stem] cells," garnered a 70% opposition. Another question, which presented embryos discarded after IVF as a source for stem cells, garnered a 58% support rating. One last poll found that most of the people questioned felt inadequately educated to take a decision about stem cell research.

Overall, it seems that the majority of Americans who are willing to decide on the issue favor stem cell research. But, 60% is not a huge majority, and I would like to find further evidence of public support before drawing further conclusions. More telling is the number of human-interest stories describing situations where stem cells

could save a dying child or a quadriplegic man (or superhero). The effects of such stories and personal narratives/beliefs on the stem cell debate will be discussed at length in the fourth chapter of this paper. For now, we must be satisfied knowing that the general public, who will undoubtedly integrate religious and political beliefs, ideas of morality and a fundamental desire to do good, should and will have some say in the debate over stem cell research.

2: Halakhah: Where "Old" is not Outdated and "New" is not

Unprecedented

Religious Influence?

Having just concluded a chapter on the scientific, political and public opinion aspects of the stem cell debate, a turn to *Halakhah*, Jewish law, feels somewhat ironic. Why look to a legal system that is some two thousand years old as a guide through the maze of modern medical ethics? How could the earliest rabbis, who knew nothing of the sciences that we moderns know (and sometimes even take for granted), possibly inform our understanding of this 21st Century world, of this 21st Century problem? I suggest that wisdom knows not the boundaries of time. The proof is in the precedent.

There are several specific reasons why an ancient system can and even should be applied to a modern problem. First, the ancient system still works. Though the process of Jewish legal decision-making began in ancient Israel and Babylon, and though the Babylonian Talmud and coterminous material did and do constitute the primary source for all *halakhic*⁹ decisions, *Halakhah* has traveled the face of the earth and the span of time and is reflective of a variety of cultural prerogatives as well

⁹ Note that *Halakhah* with a capital H refers to the entire body of Jewish laws (in much the same way as the United States Constitution represents much of American law) while *halakhah* with a lowercase h refers either to a single law within the *Halakhah* or to the word in an adjectival sense, i.e. *halakhic* decisions are legal decisions.

as both ancient and modern sensibilities. Why? *Halakhah* has been adapted to meet the needs and fit mores of the people who use it. Jewish law can be quite contemporary, and even flexible.

This notion of a contemporary, ever-changing and even adaptable *Halakhah* deserves consideration, in part because, for many progressive Jews (including this one), it seems an oxymoron, and in part because it does not seem to be true. Rabbi Mark Washofsky states in his essay *Taking Precedent Seriously, On Halakhah as a Rhetorical Practice*, "The law, the standard of Jewish practice, is to be derived from the recognized sources of the law, primarily the Babylonian Talmud and its cognate literature. The rulings and decisions of post-Talmudic scholars are not strictly speaking "law" but interpretations of the law; possessing no inherent authority, they do not constrain the freedom of the contemporary *posek*" (33). In principle, then, the *Halakhah* does not change because there is no notion of binding precedent. A *halakhah* can be incidentally adapted by a *posek*, an interpreter of the law, but it cannot permanently change from its original form as found in the Talmud or other "cognate literature."

R. Asher ben Yechiel, or the Rosh (d. 1327) said, "Jeptath in his generation is the equal of Samuel in his generation." In other words "You have no judge save the one who lives in your own time" (Washofsky, 19). That judge, though, according to Washofsky's correct understanding of the ideal notion of *Halakhah* as unvarying,

cannot affect a permanent change on the law. He can only affect temporary, even situational change, and his ruling bears no lasting authority.

Rabbi Elliot Dorff, in his work, *Matters of Life and Death*, explains Ronald Dworkin's distinction between rules and principles/policies: "Rules are norms to which there are no exceptions; they must either be followed at all times, or they must be changed... A principle or policy... is a general guideline, set for either moral reasons (our "principles") or pragmatic ones (our "policies"), which can admit of exceptions when weighed against other moral or practical concerns" (409). The decisions of the *poskim*, in Washofsky's ideal *halakhic* world, would be principles or policies. The Talmudic *halakhot*, on the other hand, would be the rules.

Yet the *halakhot* can and do change in a more permanent way. This happens in part *because* "Jeptath in his generation is the equal of Samuel in his generation." The modern *posek*, who reflects back to both Talmudic rule and to the policy/principle of the *poskim* who preceded him, also reflects on the present day. His decisions are, simply put, more up to date, even more relevant. If a *posek* has more information available to him at the time of his decision than was previously available, he will likely use that additional information to inform his decision. Though he will rarely, if ever contradict the Talmud itself, he may well contradict the decision of a previous *posek*. So far, though, I have only proven that the modern *posek* has the same temporary authority as any other *posek*. He and his *halakhah* are timely, but not timeless.

natural, i.e. a result of sexual intercourse and about the enormous power of science to create and manipulate life.

Today in-vitro fertilization (IVF), the process of fertilizing an egg in a petri dish and then implanting the embryo into the womb is quite common, a source of salvation for many infertile couples. The thousands of emotionally and physically healthy children born as a result of IVF have quelled fears that IVF would negatively affect its children. The thousands of parents who, before IVF, thought themselves incapable of producing a child of their own have quelled fears that the nature of parenthood would fundamentally change. The only fear that still persists and will seemingly never disappear is the fear about the enormous power of science.

Today, as I mentioned in the previous chapter, embryos created from IVF are a subject important to the stem cell debate. As I wrote there, when a couple wishes to become pregnant by IVF, the clinic usually produces many embryos because, in many cases, the first or even second attempt at implantation fails. Normally, when a couple finally meets with success, there are embryos left over. In some cases, couples choose to save the embryos so that they may implant again when they wish to have another child. Those embryos are stored in a frozen state by the fertility clinic. In other cases the embryos are discarded because they will not be used and storage costs money. Obviously, these embryos could be a valuable source of stem cells.

Enter Judaism. Modern poskim widely accept the practice of IVF as a legitimate choice for otherwise infertile couples. Fred Rosner, M.D., writes in an

A *halakhah* becomes timeless only when the body of people who adheres to it, namely the *halakhic* Jews of the world, reaches a *halakhic* consensus. Washofsky writes: "Over time, a question that has long been a subject of lively dispute within a legal community will become settled. Though the community may have in the past entertained disagreement and divergent approaches to its solution, this multiplicity of views becomes out of place once a widely accepted answer has been arrived at. That answer now holds the status of 'law'" (28). A *halakhic* consensus, then, marks the end of a law's development, but it reflects years, even centuries, of thought and debate.

To put this idea in more tangible terms, consider the American institution of eugenics, the process of sterilizing the mentally retarded, insane or criminals in the early years of the twentieth century. Originally, this process was legal and even considered morally right. Individuals in the categories mentioned above were thought of as degenerate members of society with no worth, and it was believed that the children of these people would have the same mental capabilities (and diminished human worth) as their parents. But, as views of these people and their rights changed, first in academic and medical fields and later among the general population, both politicians and citizens began objecting to the practice of forced sterilization. And, as many of these people began to be seen in a different light, as human beings capable of living fulfilling and worthwhile lives, of getting well or of reforming, it became increasingly clear that forced sterilization was simply wrong. After much discourse,

laws were changed and the practice of sterilizing the mentally retarded, insane and criminals ceased and has never been legally sanctioned again. The question of eugenics was, as Washofsky wrote, settled. Though the people who ultimately banned eugenics were not doing so out of adherence to a Jewish sense of right and wrong, nor were they intentionally going by a *halakhic* process, their process nevertheless matches that described by Washofsky above.

This process of careful, even slow, consideration by the experts combined with a reflection on what the community is *currently* doing or believing, that built-in flexibility aimed at making the best permanent decision, can be very useful for Jews engaging in the stem cell debate. On one level, *halakhic* decision making presents a viable and well-tested model for any decision making endeavor.

Embracing the Faith

On another level, though, the *Halakhah* does much more than just provide a model for modern decision-makers; it provides a framework for our decisions. At the beginning of my first chapter, I lamented the lack of separation between religion and state in terms of the stem cell debate. I worried that the lawmakers' religious views would cloud their perspective on this sensitive issue, and that they would ultimately render a religiously biased decision. Religious views must be kept separate from the political arena.

But this chapter is not about the arena of politics. Now we are in the arena of philosophy, of the love of knowledge, and *Halakhah*, the pursuit of understanding through Jewish law. This is where this paper becomes a Jewish paper, and where the stem cell debate becomes an area of Jewish interest. The stem cell debate is frightening. There are so many unknowns: What status should be afforded the fetus through whose (by whose, I do not intend to imply personhood, just a feeling that the pronoun fits better than "which's") destruction will scientists be able to collect stem cells? Who has the right to perform the research? Who sets the controls? How can we justify our failures...? Judaism, in part through *halakhic* discourse, offers a framework through which to consider those questions.

Whether or not *Halakhah* answers the questions is actually of secondary importance to the following reasons why it should be applied to the stem cell debate (though *Halakhah* does provide some helpful answers that will be explored later). First and foremost, *Halakhah* incorporates the theological convictions of Judaism. While these convictions will be explicated at length later in this chapter, at present it will suffice to say that *Halakhah* brings God into the decision-making process.

Furthermore, *Halakhah* represents an accumulated body of Jewish knowledge. It provides (Jewishly educated) Jews with a sense of familiarity, making the uncharted territory of the stem cell debate somewhat navigable. As I implied above, we have precedents for our decision-making processes, and we have long-established

and fully tested tools whereby we can think the issues through and come to a just decision. These precedents and tools exist to ground us and to help us.

Finally, *halakhah* is the most obviously Jewish system for decision-making. Though I will suggest in my next chapter that there are other means of making Jewish decisions and I will present reasons why even non-*halakhic* Jews take similar decisions on stem cell research as *halakhic* Jews, I will say that only the *halakhic* decision-making process is truly established. Even Reform Judaism, which nobly claims not to be delimited by *Halakhah*, looks to the *Halakhah* for guidance as it navigates the world of complex moral and ethical quandaries. Whether one wishes to live a *halakhic* life or not, *Halakhah* can be helpful at certain times and in certain circumstances. The stem cell debate is a fitting place for *Halakhah*.

What Lies Beneath: The Fundamental Presumptions of Halakhah

Before delving into the specific areas in which the *Halakhah* can assist with the stem cell debate, I wish to note some of the fundamental principles by which *Halakhah* operates in relation to medical ethics.¹⁰ At the outset of all medical ethics considerations lies the concept that our bodies belong to God. Because God has loaned our bodies to us (though many think of the body as God's gift) we have the duty to preserve them. Preserving the body, i.e. saving life is called *pikuach nefesh*, and we are commanded to do so under almost all circumstances for both our selves

¹⁰ These principles are taken from the second chapter of Dorff's *Matters of Life and Death*. I have not included all of his proposed principles.

and others. One can therefore understand the commandment of *pikuach nefesh* as making our pursuit of medical cures for bodily ailments compulsory. To do anything less would be to mistreat God's gift to us.

God did not merely loan us a body that we must protect; "God created Adam in his image, in the image of God he created him"(Genesis 1:27). God put the divine image into every human being. Should we choose to destroy our bodies, we would simultaneously be mistreating God's property and mistreating an actual image of the deity. That simply cannot, *halakhically* speaking, be done. In fact, much of practical *Halakhah*, the laws about day-to-day life, stem from this idea.

Humans, whose bodies are from God and who themselves are in God's image, are also an integrated whole. Judaism, under the influence of Greek thought (through many different channels), has long accepted the notion of a self comprised of body and soul. Yet while non-Jews believed and still believe that the body is far inferior to the soul, Jews value both equally. While a Christian person could view bodily illness as an affliction that does not affect the soul (and thus does not require treatment), a Jew could not make such a separation and would thus be compelled to treat the body. Again, then, Jews are compelled by the Jewish understanding of human beings to preserve life.

The Jewish mandate to heal is not without its conflicts. There is a discussion in B. *Kidushin* 82a about what a man should train his son to be in his professional

life.¹¹ The rabbis systematically discredit a number of professions until one person speaks up and calls some of the judgments into question. Then, to indicate to his peers the ludicrous nature of the discussion, he states: "The best physician is destined for hell!" The rabbi's point is to show that even the most noble seeming professions can be corrupt, but he also teaches a valuable lesson on the perception of doctors. Rashi explains: "They eat healthily and do not fear sickness, and they are therefore not humble before God; at times they cause death; and they refuse to heal the poor who cannot pay them." Probably many of us know Rashi's doctor, and yet Judaism continues to promote healthcare and doctors. The relationship between Judaism and doctors is not always easy, but it is always necessary.

The Midrash tells of an encounter between Rabbi Ishmael and Rabbi Akiva and a sick person. The rabbis prescribed a treatment for the man and he replied by asking them who has made him ill. When they told him that God had made him ill he responded, "And you bring yourselves into a matter that does not concern you? God smote, and you would heal?" The sages then asked the man his profession. When he answered that he is a tiller of the soil, they asked him how it is right for him to prosper from the vineyard that God created. The man replied that without his care of the vineyard, it would yield nothing. And so the rabbis respond: "A tree, if it is not composted, weeded and plowed, will not grow... So too, the human body is a tree, a

¹¹ See Appendix, p. A-1

healing potion is the compost, and the physician is the tiller of the soil.¹² Medical practice, though naturally presumptuous, is necessary if we wish to see humanity live on. Despite its complexities, the mandate to heal is clear and strong.

Finally, the fundamental principle behind each of these fundamental principles: Jews must sanctify God's name. Halakhically speaking, Jews are required to perform acts of *kiddush Hashem*, sanctification of God's name. Conversely, we are forbidden from *hilul Hashem*, the desecration of God's name. Jews are supposed to honor ourselves, our people and our God, and thereby enhance God's reputation. Dorff explicitly states that, should Jews neglect to engage in communal efforts to promote health and well-being, we could be perceived as shirking a clear social responsibility and thus desecrating God's name (Matters of Life and Death, 32). Image clearly matters, but at the core of this value lies something more substantive than 'what will the gentiles think.' Jews, whose lives and bodies are God's gift to us, pictures of God to be protected and loved, should make every possible effort to show our Maker how much we delight in His creation. In fact, there are only three circumstances under which Jews are required to desecrate, i.e. kill, the body. We must kill ourselves rather than murder another person, rather than bow down to idols in public and rather than commit forced adultery.¹³ In all other circumstances where Jews are faced with the choice of preserving the body or not, preservation is required.

¹² Midrash Samuel 4, taken from "The Book of Legends." See Appendix A-2.

¹³ B. *Sanhedrin* 74a, Appendix A-3

And so, it is with these principles in mind that we delve into the *halakhic* discourse relevant to stem cell research.

It Actually Works! Ancient Answers for Modern Questions

All of the above material demonstrates just how highly, and on how many different levels, Judaism values human life. Jews are, in almost every circumstance, required to save life and forbidden from ending it. This stance begs the question: what is a life, and, in light of the stem cell debate, when does life begin? Since stem cells will likely be harvested from fetal tissue, Judaism, in order to support the research, must establish that the fetus is either not a life/alive, or at least that it does not share the same status as that of an adult (any person living outside the womb) human being. The following material presents a fairly broad but not exhaustive perspective on the texts relating to the stem cell debate.

The Hebrew Bible itself legitimates the claim that the fetus does not have the status of a human being. Exodus 21:22 reads: "When people who are fighting injure a pregnant woman so that there is a miscarriage, and yet no further harm follows, the one responsible shall be fined what the woman's husband demands, paying as much as the judges determine." The text continues: "If any harm follows, then you shall give life for life." The destruction of a fetus warrants pecuniary compensation while the destruction of a life (in this case that of the pregnant mother) requires capital

punishment. A fetus, according to Judaism's most ancient legal source, does not have the same value as a human life.

Mishnah *Ohalot* 7:6a offers further support to the notion that the fetus is of lesser status than a human being: "If a woman is having difficulty delivering, they dismember the fetus in her womb and bring it out limb by limb, because her life takes precedence over its."¹⁴ The commentary on this text even specifies that the fetus is fully viable (because if the fetus was not viable there would be absolutely no question that it should be aborted to save the mother). While the text refers specifically to the pregnant woman's life taking precedence over that of her fetus, one can legitimately conclude that the rabbis believed that a fetus is categorically less valued than a person.

On the other hand, no one would argue that a child, even one minute old, who has fully emerged from the womb, is not a life. Jewish tradition even asserts that a child, the major portion of whose body has emerged from the womb is a life. *Ohalot* 7:6b teaches: "If the greater part of it was already born, it may not be touched, since the claim of one life cannot override the claim of another life." Mother and child are of equal status, and in matters of who lives and who dies, there are no even exchanges.

¹⁴ See Appendix A-4

The discussion continues in B. *Sanhedrin* 72b.¹⁵ Here Rav Huna teaches that in the situation described in *Ohalot* 7:6a, the fetus should be dismembered because it is considered a pursuer seeking to kill its victim.¹⁶ If the fetus can be given the same status as a person seeking to commit murder (i.e. deserving to be killed in order to prevent it from killing someone), then one might think that any fetus is equal in status to any person. Rav Hisda then interjects to say that a child whose majority has emerged from the womb should not be killed, in part because of the premise stated in *Ohalot* 7:6b (one life cannot override the claim of another) but also because, by the time the child is mostly emerged, it is not the child that is (even inadvertently) pursuing its mother- it is heaven that is the pursuer. In other words, the partly emerged child is not trying to affect its mother's death. God is.

Rashi, in his commentary on *Sanhedrin* further emphasizes the flaw with the idea of fetus as pursuer. He teaches that the fetus can be aborted to save the mother not because it is a pursuer but because its status is less than that of its mother. Certainly Rashi saw the implications of an understanding of a fetus as pursuer and this potentially equal in status to a person, so he clarified the point to allow for no misunderstanding. The fetus is of inferior legal status to the person.

All of the material mentioned above helps to establish the status of the embryo as inferior to that of a person, and it clearly establishes that any embryo causing harm to its mother may be aborted for the sake of her health and safety. Since this is not a

¹⁵ See Appendix A-5

¹⁶ The Talmudic discussion of the pursuer is in B. *Sanhedrin* 73a, Appendix A-6.

paper about abortion rights, it will suffice to say here that the concept of abortion for the sake of the health or safety of the mother has been parsed out at length over the years and is still open to interpretation by rabbinic authorities (the big dilemma being deciding what constitutes a threat to the mother's health or safety). While this inferior status of the fetus helps to build the *halakhic* case in favor of stem cell research, the question of destroying embryos for the purpose of stem cell research still stands. It helps that *Halakhah* has established that the fetus does not share the same status as a person (because destruction of the fetus is not equivalent to murder), but so far, we are only entitled to destroy a fetus for the sake of saving its mother. What do we do with non-threatening fetuses? Can they be aborted?

B. *Yevamot* 69b offers further insight into the status of the fetus.¹⁷ The discussion begins by stating that if a bat cohen, the daughter of a priest, marries a non-cohen and becomes pregnant by him, she is not allowed to eat of the *terumah*, the offering of food made for the sustenance of the priestly class. She is allowed to eat of it so long as she is not pregnant. Later the text teaches that if her husband dies, she may immerse in the ritual bath called the *mikveh* and then eat the *terumah* again. Rav Hisda explains that she may do this up to forty days after the last time that she had intercourse with her husband. She has the forty-day limit because, though she may be pregnant, the text states, “[The fetus] up to forty days is nothing but water.” While it is not as though the woman is not pregnant, the fetus at forty days or less is not

¹⁷ See Appendix A-7

substantial enough to change the status of the mother (in this case making her unable to immerse in the mikveh).

This text has as its basis a number of texts from Mishnah *Niddah*.¹⁸ The most helpful comes from *Niddah* 3:7: "If she suffered a miscarriage on the fortieth day, she need not take thought for it as for [human] young; if on the forty-first day, she must continue [unclean the days prescribed] both for a male and for a female. (Leviticus 12:2-5 explains that a woman who gives birth to a male is unclean for one week and must go through a thirty-three day period of blood purification. Her numbers are doubled for a female baby.) The Mishnah concludes: The sages say: The creation of a male and the creation of a female are alike: each [is fully fashioned] after forty-one days." According to Mishnaic and later Talmudic sources, the fetus is water- it has no official status, for the first forty days of its existence.

Immanuel Jakobovits, in his 1959 tome *Jewish Medical Ethics* calculated that forty days to the ancient rabbis: "May mean just under two months in the currently accepted calculation of the pregnancy period, due to the discrepancy between the rabbinic and medical methods in determining the date of conception" (275). It seems no coincidence that an eight-week old fetus does begin to have a recognizable pre-human form and that, should a woman miscarry, it would be clear that she was not having a normal menstrual period.

¹⁸ See Appendix A-8

The *Yevamot* and *Niddah* texts do a great deal to help Jews who wish to see stem cell research go forth. As I wrote in the first chapter, the totipotent stem cells that would yield the greatest effect in research can only be harvested from an embryo that is four days old or less. If that fetus is, *halakhically* speaking, nothing but water and without status, it seems that it will be permissible to use it for stem cell research (though questions concerning the source of the cells have not yet been answered). But, *Halakhah* has more challenges in store for us. Rabbi Moshe ben Nachman, or Nachmanides (d. 1270), presents one of those.¹⁹

Nachmanides, in *Torat Ha'Adam*, begins a discussion with a case of a woman dying in labor on the Sabbath and someone carrying a knife in the public domain (a direct violation of the rules of Shabbat) in order to cut the fetus from the dead woman. He explains that the knife may be carried in the public domain for the purpose of removing the fetus for the same reason that a person can do the work of removing a roof that has fallen in on a person on Shabbat- the person might be alive. Nachmanides writes, "[Even] if it is unknown whether the person is dead or the person is an idol worshipper or an Israelite/Jew, we save him." The presumption with the person under the collapsed roof (or in some other hypothetical peril) is that s/he was alive before the accident and that s/he has a good enough chance of being alive after the accident to warrant work on Shabbat. While this text underscores the importance of saving life even when there is doubt, it also begs the crucial question of

¹⁹ See Appendix A-9

whether the fetus, which had never been seen alive, could actually fit under the same category as the person under the collapsed roof. Does the full-term fetus share the same status as an adult?

Nachmanides offers an interesting answer. First he reiterates *Ohalot* 7:6 (a woman in difficult labor should have the fetus dismembered to save her because the fetus' is of lesser status than she), indicating that he knows that the fetus is not granted equal status to a person. He then points out that killing a baby, even on the day of its birth, is definitely a capital crime. So he recognizes that a fetus immediately changes status upon exiting the womb. But then, he states that the fetus in the dead mother should be saved not because it is a person while it is in the womb, but because it is a person in potential. This person in potential would be capable of following the commandments, including the commandment of observing the Sabbath and so, as Nachmanides says, "They profane one Shabbat for his sake so that he may keep many Shabbatot in the future." Then, he makes an even more extreme statement: "Even if the fetus is less than forty days old, that he is not viable at all, they still save him because he will [someday] be an observer of Halakhah." Thus Nachmanides seems to conclude that a fetus, though it is of lesser status than a person, is nonetheless a person in potential and should be, when possible (i.e. when it is not a threat to the health and safety of its mother), protected from harm. This is indeed the ultimate position of Halakhic Judaism on abortion. Abortion is banned except in cases of harm or potential harm to the mother.

It would seem, then, that even most embryos less than forty days old (from the womb- we have yet to discuss embryos created in petri dishes) are not usable for stem cell research because they are all people in potential. To use them would require their destruction via abortion, and Nachmanides seems to suggest that such a case would be somewhat akin to murder.

Fortunately, there still are circumstances under which an aborted embryo can be used for medical research. First, embryos harvested after a pregnant woman has an abortion to save her own life are perfectly acceptable. If an abortion is performed for legitimate reasons then it is not problematic for any *halakhic* reason, and we are fully permitted to derive benefit from it. But what can be done with fetuses that are aborted for reasons not sanctioned by *Halakhah*? American and Canadian laws do allow for abortion, and their parameters are far less strict than those of *Halakhah*. Certainly some of the North American women who have had abortions are Jews who have done so without *halakhic* justification. Though *Halakhah* in no way condones those unjustified abortions, the principle of *mitzvah ha-ba'ah b'aveirah*, a commanded act accomplished through sin, allows for good, in this case stem cell research, to be derived from bad.

The idea of *mitzvah ha-ba'ah b'aveirah* is discussed in B. *Berachot* 47b.²⁰ The rabbis are discussing Rabbi Eliezer, who entered a synagogue and did not find the nine additional men needed to complete a *minyan*, a prayer quorum (ten Jewish

²⁰ See Appendix A-10

men are required). He freed his slave who was with him, the slave completed the *minyan* and the men recited the prayers. The problem is that Leviticus 25:46 states in references to slaves: "They will work for you forever," commonly understood to mean that Jews are required to keep certain slaves forever. It seems as though Rabbi Eliezer, by freeing his slave, had violated a positive commandment. The rabbis ruled that Rabbi Eliezer was justified in violating a positive commandment, because he made it possible for him and his community to fulfill another, more important commandment, to pray to God. Certainly the fulfillment of this mitzvah came via the violation of another, but it was justified- a commanded act accomplished through sin.

The segment ends with an important caveat, that this is *mitzvah d'rabim*, a commanded act performed for the sake of the community. If Rabbi Eliezer were to derive only personal benefit from freeing his slave, he would not be justified to do so. But, since his transgression of one commandment allowed a group of men (perhaps the sum total of adult males in that particular Jewish community) to fulfill the mitzvah of prayer, he is fully justified. In sum, it is acceptable to derive benefit from the violation of a commandment, a sin, only if the benefit will outweigh the sin and if it will affect the community and not just the individual who sinned.

Using stem cells from fetuses aborted for reasons not sanctioned by *Halakhah* is a perfect example of a *mitzvah ha-ba'ah b'aveirah* that is *mitzvah d'rabim*. It is clear in the *Halakhah* that abortions, except under strict circumstances, are forbidden. It is also clear that *pikuach nefesh*, saving life, is a mitzvah of cardinal importance

(Leviticus 18:5 says of the commandments, "You shall live by them," from which the rabbis derive the principle that we should almost never die for the sake of the commandments and that we should, whenever possible, preserve life so that we may follow them). The importance of *pikuach nefesh* overrides the sin of abortion. It is also extremely likely that stem cells derived from even one aborted fetus would help not one but many people. Therefore, using a product of a violated mitzvah for the sake of the mitzvah of healing many people is fully justified by *Halakhah*.

Even though we are allowed to derive benefit for the community from a sin, some will still object to using aborted fetuses because, as I stated in chapter one, such an act could be viewed as a means of legitimating, or even justifying abortions.

While this stance is certainly extreme, it is justified. Fortunately, *Halakhah* and modern reproductive technologies allow us to navigate even the gray area of abortion.

The year 1978 brought the world the first "test-tube baby." For the first time ever, an egg was fertilized by a sperm in a petri dish. The embryo formed far from the womb in which it would eventually grow, and it was only by virtue of the fact that doctors implanted that embryo (which was just a few days old, no more than a few cells) into the womb of its mother that it developed into a fetus and was born a healthy baby girl. When this first happened, the world asked questions about the nature of parenthood and the bonds between mother and child, about the emotional health of the test-tube baby as she grew up knowing that her conception was not

article for the Mount Sinai Journal of Medicine that IVF is permitted based in part on B. *Yevamot* 76a that states that a married couple is required to fulfill the biblical commandment of procreation.²¹ There is no question there. Questions arise, though, as to whether the embryos created through IVF are people in potential in the same way that Nachmanides described the embryo/fetus in-utero (remembering that an embryo created through IVF would be implanted well before its fortieth day). If they are people in potential, the same ruling that applied above, that the new embryos deserve maximum protection, applies here. If IVF embryos do not share even the diminished status of the in-utero fetus who is less than forty days, though, then they may be a *halakhically* acceptable source of stem cells.

A ruling from contemporary Israeli posek Shmuel HaLevy Wagner illuminates this issue.²² He is presented with a hypothetical situation in which the embryos being stored at a fertility clinic are in danger of being destroyed on Shabbat. Perhaps the electricity has failed and freezers are beginning to thaw. He is asked whether the Sabbath may be violated for these embryos. The questioner recalls Nachmanides' ruling that the Sabbath may be violated to save a fetus in-utero: "They profane one Shabbat for his sake so that he may keep many Shabbatot in the future." So, the question at the heart of this matter is about the status of an embryo in-vitro.

²¹ Rosner, Fred, M.D. "Assisted Reproduction: A Jewish Perspective." The Mount Sinai Journal of Medicine Vol. 69, No. 3 (May, 2001): 219-223.

²² Shevet HaLevy, See Appendix A-11

Wagner states quite clearly that the embryos should not be saved, and that they do not even share the same status of the in-utero fetus of forty days or less. He states that an embryo in-utero has at least a chance of developing into a fetus and then a person. An embryo in a glass dish, on the other hand, will never develop into a fetus without being implanted into a womb. Even though the new embryo in the petri dish is exactly the same in form and content as the new embryo in the uterus, the two are fundamentally different in terms of their sustainability. The embryo in the dish, if left alone, will inevitably die. The embryo in the uterus, if left alone, may develop into a person. One may glean, therefore, that the embryo created through the process of IVF is a perfectly good and *halakhically* neutral choice for stem cell research. While some parents will choose not to donate their embryos, a choice to donate them (especially in lieu of discarding them) is acceptable.

The material included here represents only a portion of ancient and modern halakhic arguments relating to the stem cell debate. An exhaustive treatment is beyond the scope of this paper and has not, to the best of my knowledge, been done by anyone. It seems, though, that the fundamentals are clear: Judaism in even its most orthodox forms believes that stem cell research may and actually should be done. There are surely limitations on how the stem cells can be obtained, and there are certainly limitations on what the stem cells can be used to produce (reproductive cloning is categorically rejected by all Jewish sources), but the potential that stem cell therapies have to save life justifies the use of these cells even if it raises moral

questions. Moshe Tendler, a rabbi and scholar from the prestigious Yeshiva University, stated this principle in clear and stunning terms: "Jewish law consists of biblical and rabbinic legislation. A good deal of rabbinic law consists of erecting "fences" to protect biblical law. Surely our tradition respects the effort of the Vatican and fundamentalist Christian faiths to erect fences that will protect the biblical prohibition against abortion. *But a fence that prevents the cure of fatal diseases must not be erected, for then the loss is greater than the benefit.*"²³ The Jewish call to heal is loud and it is convincing, and if stem cells will help answer that call, a way ought to be found to use them.

Where to Now?

It would seem, with the above material used as a representative of *Halakhah's* possible responses to the stem cell debate, that the point is settled. Jews validate stem cell research and allow all activities that must happen in order to enable the research. It is exciting for me, a Reform rabbinic student in the year 2003, to recognize a logical pattern of allowance throughout my religious tradition. That the *Halakhah* supports my view, that stem cell research should and must go forth despite its potential for moral ambiguity, is a source of great joy and even relief, because I know the traditions and I appreciate being able to act in accordance with them. But, if I

²³ Tendler, Moshe, "Stem Cell Research and Therapy: A Judeo-Biblical Perspective," in *Ethical Issues in Human Stem Cell Research*, vol. III: *Religious Perspectives* (Rockville, MD: National Bioethics Advisory Commission, June, 2000), p.H-4. Italics added.

were to share my findings with most of the members of my Reform synagogue (or any Reform synagogue), I would be met by either blank stares or displays of total ambivalence. Most Reform Jews are not concerned with *Halakhah*. They may find it interesting as a relic, but they do not feel even slightly bound by it. They do not live for or by the law. Consequently, it would not matter to a Reform Jew that, with a close reading of a host of *halakhic* texts, we can allow stem cell research to be carried on. The majority of Reform Jews would probably advocate for stem cell research anyway. Such advocacy runs in accord with their participation in the American progressive intellectual community. It also allows the American narrative of cure, which is certainly a part of the psyche of the American Reform Jew, to continue to play itself out.

While I find the *halakhic* material fascinating and quite important to the overall thrust of this paper, it is the non-*halakhic* material that I find truly awesome. What is it that compels progressive (i.e. non-*halakhic*) Jews to advocate so fiercely for medical research? What are the internal and external factors that lead us toward healing so readily and so regularly? Is the *Halakhah* somehow deeply ingrained in us so that our decisions are in some way *halakhically* influenced, even if only subconsciously so? Does our relationship with the world around us, with its various modes of thinking influence who we are as Jewish decision-makers? These are the questions that deserve thought, if not answers, and these will be the body of the next chapter of this text.

3: Outside of the Fold, Well Within the Tradition:

Stem Cell Decisions and the Non-Halakhic Jew

This chapter is all about my grandparents. It's also about my parents, and the large majority of my Jewish friends. This chapter is about countless progressive Jews who do not live their lives according to the *Halakhah*. They too are Jewish decision makers, but their modes of decision-making differ from those who live by the Law. Their story deserves attention and thought.

Much of my information about Reform Jews²⁴ is anecdotal in nature. I found no research, no papers published in the HUC Annual or Reform Judaism Magazine, that could support my findings and my ideas. Furthermore, much of the academic material produced by the Reform movement that pertains to stem cell research is in fact based on the *Halakhah*, so it would appear that Reform Judaism is very much connected to our *halakhic* roots. All that I have to prove this possibility flawed are my conversations, but these are quite telling, and quite compelling. I do not wish to imply that I have spoken to thousands, or even hundreds of people about stem cell research. I have simply spoken with people I know, and I have observed the Jewish world around me, seeking to draw some general insight from my world. While I

²⁴ I use the term Reform Jews because the majority of the people with whom I speak are Reform Jews, but the category can actually extend beyond Reform Judaism and into progressive, i.e. non-*halakhic* Judaism as a whole.

suspect that a survey of thousands would yield results similar to my conclusions, I have no such survey at present.

Whenever I discuss my work for this paper with other Reform Jews, I ask them where they stand on the issue of stem cell research. Without fail, they state their support for the research. Many include the caveat that they abhor reproductive cloning and would never approve of such a pursuit, but every person approves of stem cell research. I push the issue a bit, and question whether they can accept that embryos, either discarded from fertility clinics or the result of abortions, will be used for stem cell research. Again, the answer is always an affirmative. Many people comment that they believe that life does not begin at inception, so abortion is definitely not murder. Everyone believes that the life of the fetus is not equal to the life of a human being, or in this case the many human beings that could be saved by stem cell research. Furthermore, while some people do not approve of abortion, they state that, since abortions are a fact of life in the world, they would prefer to see some good come from the procedure. The idea that stem cell research done from embryonic stem cells has the potential to save countless lives offers these people extra comfort- the pain of each abortion would be overshadowed by the joy of healing many.

While I have rarely heard people fully reason out their ideas and feelings about the stem cell issue and all of the other issues that cleave to it, I have learned a great deal from these conversations. It should be striking to readers how similar the

responses of these Reform Jews, most of whom know nothing of the *Halakhah* as it pertains to this issue (or at all), are to the *Halakhah*. The conclusions about abortion are practically identical to those of the *Halakhah*. An embryo is not a life, it is not equal in status to a person, and its destruction, though not always an ideal option, can at least be made meaningful if its cells can be put to noble use. This last concept is *mitzvah d'rabim* exactly as it was described in the previous chapter. Clearly, something is happening here. The similarities between *Halakhic* and Reform decisions concerning stem cell research are too great to be coincidental.

Again, I stress that I do not know from a formal research standpoint why such similarities exist in areas of medical ethics and the pursuit of healing. I have enjoyed conversations with several teachers who have helped me to theorize as to why these similarities exist despite the seemingly vast differences between *halakhic* and non-*halakhic* Jews, and I wish to share the ideas that have developed from those dialogues.²⁵

The Roots of Reform

In order to understand the perspective of the modern-day Reform Jew, one must know some of Reform Judaism's history. The French revolution, and the spirit of emancipation that swept across Western Europe during the late 17th and early 18th centuries, had a profound effect on the Jewish communities there. Jews became

²⁵ Dr. Yehoyida Amir, Rabbi Dr. Elliot Dorff and Rabbi Dr. William Cutter have been most helpful in leading my mind in helpful and instructive directions.

citizens of their nations, relatively equal in status to their gentile compatriots. There developed among some Jews a desire to acculturate within their host societies.

Many Jews wished to engage in business with the gentile majorities. Such engagement involved working business hours that coincided with those of the majority. That meant working from Monday through Saturday and using Sunday as the Sabbath- a violation of *Halakhah*, which clearly observes the Sabbath on Saturday. Working with gentiles often entailed sharing meals with them, another act banned by the *Halakhah*. Other Jews wished to attend secular schools- they would be taught subjects other than Hebrew Bible and Talmud, the course of study readily prescribed for Jewish scholars. The list goes on...

Such acculturation would certainly require a shift in religious practice, but the Jews who chose acculturation did not wish to abandon Judaism as a whole. There emerged a large group of Jews who adapted Judaism to meet their needs- they could live as Jews in a secular society. They were more lenient about the Sabbath, they decided that the *halakhot* about table fellowship were outdated... These first reformers of Judaism were certainly pioneers, but it was the next generation, the (primarily German) Jewish intelligentsia of the middle of the 19th century, that turned this trend into a movement.

These reformers opened schools devoted to teaching both *Halakhah* and secular material. They drafted prayer books that differed from those of traditional Jews, they opened synagogues in which worship services as well as architecture,

room lay-out and even seating arrangements better reflected their ideals. In short, they began formatting and living a new Jewish theology. They incorporated *Halakhah* but were not tied to it.

As the move toward a reformed Judaism became the Reform Movement, more developments ensued. Of primary interest for this paper is the fact that German Jews who immigrated to the United States developed their own style of Reform Judaism. Whereas the Reform Jews in Germany were living among an Orthodox Jewish majority, America's Reform Jews were not in such a shadow. Certainly there were some Orthodox Jews in America, but they exacted little if any influence on Reform Jews. Consequently, American Reform Judaism was more radical than its European counterpart. American Reform Jews seemed more intent on assimilating into the larger American culture than in acculturating. Reform Judaism in America was a distinctly American movement, certainly aware of its European roots, but also fully aware of the American environment in which it would develop.

In 1885, the Conference of Reform Rabbis gathered in Pittsburgh to write a platform representative of Reform Judaism. By that time, American Reform Judaism had shifted radically from *halakhic* Judaism. That shift is represented fully and clearly in the second, third and fourth principles of the platform:

Second: We recognize in the Bible the record of the consecration of the Jewish people to its mission as priest of the One God, and value it as the most potent instrument of religious and moral instruction. We hold that the modern

discoveries of scientific research in the domains of nature and history are not antagonistic to the doctrines of Judaism, the Bible reflecting the primitive ideas of its own age and at times clothing its conception of divine providence and justice dealing with man in miraculous narratives.

Third: We recognize in the Mosaic legislation a system of training the Jewish people for its mission during its national life in Palestine, and to-day we accept as binding only the moral laws and maintain only such ceremonies as elevate and sanctify our lives, but we reject all such as are not adapted to the views and habits of modern civilization.

Fourth: We hold that all such Mosaic and Rabbinical laws as regulate diet, priestly purity and dress originated in ages and under the influence of ideas altogether foreign to our present mental and spiritual state. They fail to impress the modern Jew with a spirit of priestly holiness; their observance in our days is apt rather to obstruct than to further modern spiritual elevation.²⁶

Though the platforms of Reform Judaism would change over the years, until roughly the last few years of the 20th century, Reform Judaism's attitude toward the *Halakhah* and toward most every traditional mode of Jewish life remained the same. Reform Jews continue to believe that modern science is not discordant with the Biblical tradition. Reform Jews still view most of the laws and customs in the

²⁶ "Conference of Reform Rabbis: The Pittsburgh Platform (1885)" *The Jew in the Modern World*, ed. Paul Mendes-Flohr and Jehuda Reinharz, New York: Oxford University Press, 1995, p.468.

Hebrew Bible as fitting for their Biblical times but not for the present time, as material to be studied and understood but not lived. And most Reform Jews know little or nothing about *Halakhah* and have little or no desire to learn. In fact, most modern Reform Jews have actually extended the fourth principle (from above) beyond the *halakhot* concerning diet, purity and dress to include, by way of exclusion, all other *halakhot*, including those pertaining to medical ethics. The modern Reform Jew does not know the *Halakhah*.

This situation is potentially disastrous for the Reform Jewish world. By rejecting so many of the fundamentals of traditional Judaism, Reform Jews have systematically rejected much of the glue that bound Jews together for two millennia. I have already stated that Reform Jews do think in accordance with their traditional counterparts, at least in the area of stem cell research, but it is still not clear how. As it stands thus far, it seems almost impossible!

The Mindful Response, or Salvation from Within

Arthur Green, in his short piece entitled "New Directions in Jewish Theology in America," begins by explaining that Jews in the 20th century have not been fully engaged in the pursuit of new Jewish theologies.²⁷ He logically claims that this lapse in theological development results from the Jewish struggle for survival. Jews in the

²⁷ Green, Arthur. "New Directions in Jewish Theology in America." Contemporary Jewish Theology: A Reader. Ed. Elliot N. Dorff and Louis E. Newman, New York: Oxford University Press, 1999, p.486.

last century were far too busy finding ways to avoid or escape persecution to do much sustained religious reflection. Furthermore, the Shoah took: "The lives of fully a third of the Jewish people, including an untold number of thinkers, teachers, and their students, hasidic masters and disciples, many of whom in better times might have helped us to figure out the puzzles of Jewish theology" (485).

And yet, Green goes on to reveal the fortunate fact that there has been Jewish theological creativity in the last hundred years, despite the trials of the past. He notes a list of 20th Century Jewish theologians, all of whom have been and/or are engaged in the pursuit of answers to questions such as: "What do we mean by a Jewish future in America? How much of Judaism, what sort of religious life, what kind of community can we imagine existing several generations into the future? How much assimilation can we tolerate and still survive as a distinct culture? How will we believe in our Judaism, and what will be the important Jewish experiences we will share with our children?" (487). I believe that Green's idea of America Jewry is primarily progressive American Jewry. While the Jewish theologians whom he mentions certainly have varying degrees of fluency with the *Halakhah* and other traditional Jewish works of law and literature, many of them are **not** from the *halakhic* tradition and are from various liberal non-*halakhic* traditions. Furthermore, the majority of the people whom they represent (or at least seek to influence) are definitely not from the *Halakhic* tradition. Modern Jewish theology is very much a product of and for progressive Jews.

Later in the paper, Green declares the ultimate question for Jewish theologians: What is the meaning of human life and Jewish existence. He states that the process of answering that ultimate question, and encapsulation of all of the questions mentioned above, will: "Take place as a part of the human theological enterprise and is healthily nourished today as in all ages by contact with the best in philosophical, religious and scientific thinking throughout the world" (491). Jews in the 20th Century who seek to meaning of human life and Jewish existence will look to their whole world, and they will use what they can see, and what they can understand, to lend meaning to their own existence. Implicit in his statement, and in his choice to highlight not one or two but many 20th Century Jewish theologians, is the principle that a multiplicity of views will only benefit the Jewish people.

Rabbi David Ellenson, in his response to Green's article, "The Nature and Direction of Modern Jewish Theology: Some thoughts Occasioned by Arthur Green," further illuminates the state of 20th Century Jewish theology.²⁸ He claims that the American Jewish theologians of the latter half of the 20th Century, i.e. post-Holocaust theologians, were not writing for a:

Predominantly immigrant American Jewish community... Their aim, unlike that of their predecessors on this continent, was to do more than draw haphazardly in loose conceptual patterns upon the storehouse of symbols and

²⁸ Ellenson, David. "The Nature and Direction of Modern Jewish Theology: Some thoughts Occasioned by Arthur Green." Contemporary Jewish Theology: A Reader. Ed. Elliot N. Dorff and Louis E. Newman, New York: Oxford University Press, 1999, p.498.

images contained in traditional Judaism to provide a desired fit between American culture and Judaism... [T]hey were open to dialogue about matters of theological substance across denominational and interreligious lines" (499).

Again, these theologians of whom Rabbi Ellenson speaks were, in many cases, well versed in more traditional Judaism (including *Halakhah*), but they knew that the people to whom they spoke were not of that traditional, old-world world. The American Jewish populace required something new, and they received something new.

The nuance, though, is that the something new was still rooted in the old-world sensibilities and symbols. Certainly this modern theology has far surpassed the well-developed system of *Halakhah*, but it is still a child of that system and it is even still reminiscent of that system. Rabbi Ellenson states this idea eloquently:

No great systematic Jewish theology... will be forthcoming in our day... Instead, our theological writings will be episodic and fragmentary. Some will condemn this as a shortcoming. Yet, for many of us, such finite reflection upon the texts, symbols and experiences of Jewish life and tradition will be sufficient. We, like so many of our ancestors, will participate from our own personal and communal vantage points in a conversation that stretches back over the millennia, and we will recognize that our conversation- guided and informed as it is by the literary elements and symbols as well as communal experiences that are the inheritance of the entire Household of Israel- possess

a transformative and transcendent power, a holiness, that is beyond our ability to adequately articulate and explain (501).

Here Rabbi Ellenson is by no means only referring to the intellectual, emotional and religious experience of 20th Century Jewish theologians. He is speaking of the Jewish people as a whole, and particularly the Jews who do not live within the *halakhic* system. Those Jews too create a system in which they live in and contemplate their world. This is the system that, in a sense to which I have already alluded and to which Rabbi Ellenson also alludes, draws lines of connection between each of us and between our differing traditions. This is something of an archetypal Jewish understanding of the world, and, for the purposes of this paper, it is what allows my grandmother to reason the same conclusions about abortion and stem cell research as Nachmanides did in his time and every *halakhic* Jew has done in his or her own time.

A Past and a Present

There are probably numerous ways of contextualizing the abstract ideas discussed above. There are certain areas in which the melding of ancient and modern ideas and vantage points into a unified personal and communal philosophy will be apparent. One of those areas, and one that is perfectly suited to a paper on stem cell research, is medicine.

There is an old joke about the inauguration day of the first Jewish president. As he stands on the inaugural podium, poised before the Chief Justice of the Supreme Court, the world's eyes on him, his mother, sitting just behind him in the stands, gets the attention of the person sitting next to her. "You see that man with his hand on the bible," she says, "His brother is a doctor." While the joke itself may inspire groans or giggles, the idea behind it is quite telling. We Jews really do have a love affair with medicine. We typically place health and healing at the top of our list of values (for many Jews, probably even above the study of Torah), and we consider the ability to bring healing, preferably directly through medical practice, but also indirectly through scientific research, to be a precious gem, a God-given gift. That absolute drive toward medicine and healing has its sources in very ancient days.

According to Michael Nevins, 213 of the 613 commandments in the Hebrew Bible relate to medicine and healing.²⁹ The list of 213 can be divided into two main elements. Some of the commandments taught disease prevention, and some taught the value of healing. Karl Sudhoff, a medical historian, presents the two main modes by which the bible enabled the curtailment of disease: "... The weekly day of rest and the direct prophylactics of disease."³⁰ The idea of a day of rest and recuperation seemed not to have existed prior to biblical times, and that biblical invention is touted

²⁹ Nevins, Michael. The Jewish Doctor: A Narrative History. New Jersey: Jason Aronson Inc., 1996, p.1.

³⁰ Safran, Avinoam Bezalel, Medicine and Judaism. Tel Aviv: Forum for Jewish Thought, 1971, p.26.

by many as one of the single most valuable contributions that the bible has made to the world. When people rest, people recover.

As for the prophylactics of disease, a few examples will suffice. Leviticus 13 instructs the Israelites about the need to isolate people with various skin eruptions. The authors of the bible understood contagion. Deuteronomy 23: 13 commands Israel: "With your utensils you shall have a trowel; when you relieve yourself outside, you shall dig a hole with it and then cover your excrement." While the biblical reasoning for covering ones excrement relates to keeping a clean environment for God's presence, the practical value of such an act is clear. Finally, Leviticus 17 offers a method of safe and healthy slaughtering and consumption of animals. The text mandates that the blood of the animal be drained and buried (as opposed to being somehow preserved- an act almost guaranteed to cause bacterial development). It also mandates that people not eat the flesh of an animal that they have found dead. The principle of 'if you don't know how it died, don't eat it' has obvious wisdom in light of health and safety considerations. The bible itself has made significant contributions to the preservation of the health of individuals and their communities.

One text in particular depicts the biblical value of healing. Exodus 21:18-19 discusses a person who is injured but not mortally wounded in a fight: "¹⁸When individuals quarrel and one strikes the other with a stone or a fist so that the injured party, though not dead, is confined to bed, but recovers and walks around outside with the help of a staff, then the assailant shall be free of liability, except to pay for

the loss of time, and to allow for healing.” The Hebrew for the last phrase, allow for healing, is *rapoh yerapeh*. Many translate the phrase as “heal, he shall heal” or “surely he will heal.” When the bible repeats a verb in two different forms, tradition usually understands that the text seeks to emphasize the importance of the command or action. A very modern translation of the phrase would be, “He better make sure that the victim heals.”

That particular biblical text inspired a plethora of rabbinic discourse, all of which points to the Jewish mandate to heal.³¹ Of course, some of the material, such as the Kiddushin text cited in the previous chapter, indicates a degree of wariness toward medicine, but the overwhelming majority of rabbinic statements about healing cast it, and healers, in a positive light. B. *Bava Kama* 85a offers an explication of the biblical text that serves as a foundation for all ideas of Jewish healing.³² The rabbis are discussing the five ways in which an assailant is responsible for his/her victim. One of them, as Exodus 21 states, is medical care or healing. Implicit in the rabbis’ conversation is the question of why the verb is stated twice, heal, he shall heal. The academy of Rabbi Yishmael is cited, stating: The Torah states, ‘heal, he shall heal.’ From here we derive that permission is given to a physician to heal.”

The meaning and significance of this statement may not be immediately obvious. First, this text tells us that there were doctors (which was a known fact by

³¹ Immanuel Jakobovitz presents a dazzlingly thorough essay on the Jewish attitude toward medicine in chapter one of *Jewish Medical Ethics*. He does not focus on the bible as much as on rabbinic and medieval sources.

³² See Appendix A-12

the time of the writing of the Talmud). There were people who, despite the fact that they were not the injurers, were responsible for healing people (they were hired to do so). Healing was an institutionalized act. Next, and this understanding comes from Rashi, the text tells us that doctors may heal people who are injured (or sick) by an assailant and by what could be called an act of God. A doctor has just as much a right, even an obligation, to heal a man who was hit by a brick thrown by his neighbor as he does to heal a man who was hit by a brick that fell from the roof of a house without any obvious cause. This eliminates the possibility of someone refusing to heal a patient because it is God's will that the person be sick.

A passage in *B. Berachot* 60a, where the rabbis are discussing various means of staying out of harm's way, further supports the *Bava Kama* text.³³ The rabbis introduce a prayer that Rav Acha developed for one who goes to have his blood let (a sick-visit to the doctor): "May it be your will, my God, that this therapy should serve me as a remedy, and that you should heal me, for you are God, the faithful healer, and it is your remedy that is genuine, for it is not the place of people to seek medical treatment, but so have they accustomed themselves." Abaye immediately jumps in and excludes the last line from the prayer (it is not the place...) because, as Rabbi Yishmael's academy taught, "The authority was given to a physician to offer treatment." The mandate to heal in rabbinic Judaism is clear.

³³ See Appendix A-13

In truth, I have barely scratched the surface of the biblical and rabbinic material on healing, and I am not going to delve into the medieval or modern material. The fundamentals of Judaism's practical, theological and philosophical relationships with healing have been established: we should prevent illness and injury when possible and, when prevention proves impossible, we should seek to heal. Anything else that has even been said about healing is actually an extension of one of those principles, and those principles still play the fundamental role in Jewish discussions of health and healing to this day.

Since Jews were practically, theologically and philosophically tied to medicine and healing, it would seem that we would have been enthusiastic physicians throughout our history. Such was, and was not the case. There exist any number of essays and books outlining the history of Jews and medicine.³⁴ The only notion that they all have in common is that Jews have always been involved in medicine and that our relationship with medicine began in biblical times. Most sources say that early on, from roughly the fourth century CE onward, we were wonderful innovators, and doctors were viewed not only as practitioners of a physical trade but of an art form.

³⁴ The Encyclopedia Judaica entry on Medicine is actually a very good starting point. Vaisrub, Samuel. "Medicine." Encyclopedia Judaica. Ed. Geoffrey Wigoder. Vol. 11, 1972. 1178-1211.

Some claim that we have always been innovators, while others claim that the Jewish practice of medicine became somewhat “behind the times” in the 9th and 10th centuries.

History would suggest that we were in fact most often the forerunners in the field. When the Muslims ruled much of the world (including the Jews) from the 8th to the 13th centuries, the Jews were often their doctors. The Jews and the Muslims had a fairly peaceable relationship, so it makes sense that the Muslims would trust the Jews to give them good care. Jews had a long tradition of medical practice and they were loyal to the Muslim rulers and citizenry.

More interesting is the fact that the Jews were the doctors for the Christians as well. In the year 692, the Quintisext Oecumenical (sic) Council held in Constantinople had decreed: “No Christian whether layman or cleric may eat the unleavened bread of Jews, have confidential intercourse with Jews, receive medicine from them or bathe with them. The cleric who does so is deposed, the layman is excommunicated.”³⁵ Such strictures were renewed throughout the centuries, yet early in the year 1300, a prominent gentile physician named Arnold of Villanova complained to the pope that: “in general no physician enters either a convent or a monastery except a Jew.”³⁶ Clearly the Jews had to have been very skilled physicians

³⁵ Frank Heynick, Jews and Medicine: An Epic Saga. (Hoboken: Ktav Publishing House, Inc., 2002) 123.

³⁶ *Ibid.* 124.

if Christian clerics were willing to risk everything for the sake of receiving their treatment.

Soon after, it became apparent to the majority of Christians that Jews were far more skilled as physicians than Christians, and so Jews became the doctors of choice. Gradually the Christian preference for Jewish doctors turned into a Christian demand for Jewish doctors, so that Jews were in some ways bound to the medical profession. Since Jews were living at the mercy of the Christian majority from roughly the 11th through the 18th centuries, they had no choice but to serve as doctors to their lords. And, if a Jewish doctor failed to heal a Christian patient, the Christians could punish him for what we moderns would call malpractice (whether the claim was founded or not). Consequently, it was in the best interest of the Jewish people that Jewish doctors be very good.

The relationship between Jews and medicine exists to this day. What major city does not have a Jewish hospital, a Sinai or Beth Israel? The list of Jewish Nobel Laureates in medicine contains some seventy-five names. The evidence of Jews love affair with medicine, and with healing, is simply everywhere. That love is not felt only by Reform Jews but by all Jews. Orthodox Jews are doctors and scientists as well. Our tradition, both textual/legal and historical, of pursuing treatments and cures, of excellence in the medical fields, make us an ideal people to support stem cell research.

A challenge raised by the material presented in this chapter is to put our extra-*halakhic* reasons for advocating stem cell research into more concrete terms. I have identified the reasons why Reform Jews may be in favor of this research, and I am calling for a synthesis of those reasons into a well-developed non-*halakhic* rationale for permitting stem cell research. The necessity of consulting *Halakhah* and formulating a *halakhic* perspective on this decision is clear, but the equal necessity of having a Reform perspective based on our historical as well as philosophical connections to medicine, ought also to be made clear.

For now it's time to step beyond any of our Jewish medical traditions, whether written or merely perceived. It is time to step back into the realm of modern America, where all of us exist. Jews have not developed our commitment to health and healing in a vacuum. We have been affected by the American narrative of cure, and we have affected that narrative as well. We are all connected in ways that will soon become clear.

4: The Law and the Living

The Ties that Bind

Thus far, I have presented three separate components of the stem cell debate. I have presented the debate being waged among the general population over legalizing stem cell research in the United States. I have outlined a representative body of *halakhic* material relating to the stem cell debate, and demonstrated how it is that *halakhic*, usually Orthodox, Jews can and do allow for stem cell research. And, I have offered what I will call the Reform perspective, a description of how, and perhaps why, even non-Orthodox Jews reach the same conclusions about the legality, and even the necessity of stem cell research as do Orthodox Jews. Now it is time to pull the three together.

At least one connection between the Orthodox and Reform sections presents itself fairly clearly. One might intuit that, coming from the same religious tradition, Jews would generally reach the same decisions about certain subjects. The mere fact that Jews as a people, regardless of degree of orthodoxy, have always lived by an ethic of curing the ill and pursuing new treatments makes the congruence of the two systems easy to accept. I will argue, though, that there is far stronger a connection between these two perspectives than simply a shared history.

Furthermore, one might wonder where the first chapter fits in relation to the second and third. Presumably, a simple outline of the science and medicine involved

in stem cell research would have sufficed as a background for a discussion on the Jewish discourses on stem cell research. Since the material from chapters two and three is premised on an understanding and evaluation of the science of stem cell research in light of various Jewish decision making systems, it should not matter that the secular debate may in fact be informed by the underlying religious norms of the debaters or that Oren Hatch would permit use of embryos discarded from IVF. None of the non-scientific material included in the first chapter should be at all connected to the latter material. And yet, the connections are deep. Each of these three bodies of material is closely tied to the other, either because the same modes of thought are applied in several places or, even more significantly, because one body actually enables the other to exist.

Merging Methodologies: Halakhah and Aggadah

In order for the connections between these three bodies to become clear, the connection between the first two must be drawn. The material in the *Halakhah* chapter is all *Halakhah*. It is legal in nature, and there is no obvious narrative element to it. The information and rules are presented in abstract terms. There are forty days between the moment of inception and the moment that the fetus becomes an entity. After forty days the fetuses are given certain rights but not the same rights as full humans. There are penalties for causing an abortion, there are cases in which

abortions are sanctioned, there are circumstances under which even unsanctioned abortions can lead to benefit and there are rules about IVF fetuses.

Nowhere in the material presented is there discussion of the expectant parents (except the case of the travailing mother as a live to be considered vis-à-vis the fetus within her). Nowhere is there a mention of mothers aborting their fetuses, or of parents conceiving via IVF and deciding that one child is enough. Nowhere is there discussion of sick children or adults who could be healed in some way as a result of the harvesting of these fetal stem cells. Nowhere is there mention of a long tradition of Jews in medicine, always seeking to achieve new heights in healing and prevention. The *halakhic* material appears to be entirely legal in nature, and solely about situations, not people. The closest that I have come to finding a *halakhah*-based treatment of stem cell research that reaches beyond questions of medical ethics was a short essay written by Rabbi Avi Shafran for the Jewish Law Commentary website. He nods to the importance of using *Halakhah* to navigate through the ethical dilemmas associated with making the stem cell decision. He also suggests that we should use our engagement with the potential miracle of stem cell therapies curing currently insurmountable ills to reflect: "Are the technological breakthroughs really what amaze us here... or is the true source of our astonishment and wonder the suddenly revealed workings of our bodies themselves?"³⁷ Rabbi Shafran does at least recognize some portion of the more human (or divine) side of stem cell research, but

³⁷Shafran, Avi. "Reminded by Science." Jewish Law Commentary: Examining Halacha, Jewish Issues and Secular Law. Online. 21 February, 2003.

even he does not go as far as to incorporate the people into the considerations.

Halakhah simply seems aloof to the humanity of its subjects.

The material in the Reform chapter is exactly the opposite. It is based primarily on stories and feelings. Reform Jews use their experiences of the world. To make their decisions they use their experiences of Jewish tradition (if there are any), but also their experiences of non-traditional modes of Jewish life to make their decisions. If the Orthodox approach to the stem cell decision seems entirely based on *Halakhah*, law, the Reform approach seems based on *Aggadah*, narrative. And one could easily and reasonably conclude that these two approaches are effectively polar opposites. Not so!

Hayim Nahman Bialik begins his polemical essay *Halakhah v'Aggadah* (Law and Legend) with a tongue in cheek discourse on the differences between Law and Legend: "Halakhah wears an angry frown; Aggadah, a broad smile. The one is the embodiment of the Attribute of Justice, iron-handed, rigorous and severe; the other is the embodiment of the Quality of Mercy, essentially lenient and indulgent, as mild as a dove... Halakhah enjoins a dogged adherence and imposes upon us stern obligations; Aggadah... holds out the prospect of continual rejuvenescence, liberty and freedom."³⁸ He gives voice to the first impression that one would logically have when seeing these two systems placed side by side. One does seem cold and hard, the other warm and gentle. One seems ready for immediate action, the other ready for

³⁸ Bialik, H.N. Law and Legend or Halakah and Aggadah. Trans. Julius L. Siegel. New York: Bloch Publishing Company, 1923.

further contemplation. And yet Bialik argues that nothing could be further from the truth. *Halakhah* and *Aggadah* are not at all opposite, rather that they are complements of one another, two forces that work together to create a meaningful whole.

Though the Orthodox material that has been presented is in fact legal in nature, Bialik would suggest that, if one looks just below the surface, if one reads between the lines of technical language, one can find the narrative material embedded within. In fact, the travailing birthmother whose life is placed before that of the fetus inside of her is more than just a figure. She is a mother, probably with a spouse, maybe a family. If she dies in labor, the other people, including her newborn child, will be left without her. That story informs the law. In fact, a woman who miscarries before the fortieth day of her pregnancy (which, as Jakobovitz notes, is actually the seventh week) may not appear to be pregnant- she may not have disclosed her pregnancy to anyone and so her miscarriage might go unnoticed and she might go unconsolated. It would be as if the pregnancy was not, and so the *Halakhah* can say that the pregnancy was effectively non-existent. Each of the segments of *halakhic* material does have a narrative attached to it. No, there are no stories in the Mishnaic, Talmudic or later Rabbinic materials about the people affected by these laws, but we can and must put the stories there. By reading the narrative written between the lines of the law, we make the law a more human enterprise.

It almost goes without saying, then, that the Reform material, apparently entirely narrative in nature, has an underlying legal tone to it. Whether the people who reflect on their experiences and stories know it or not, there are laws, however old, however taken for granted, that have led us to read the stories of our world as we do. If such laws did not lie just beneath the surface of the stories, there would be nothing keeping the stories afloat.

The Orthodox/*halakhic*/legal material and the Reform/*aggadic*/narrative material are each supported by the other and, in a very fundamental way, they contain one another. These two seeming opposites are in fact deeply similar and deeply dependent on each other. They are at their core not even of two separate natures—they are one force, ensuring that the world can be Jewishly just. The connection between Orthodox and Reform views of stem cell research does not stand only on shared history, but on shared knowledge and understanding of the world.

The Jew and the World

There is another tie that binds both Orthodox and Reform understandings of the stem cell debate: the world. There is no guarantee that a Reform Jew considering the dilemmas associated with stem cell research will regard his or her process as influenced at all by *Halakhah*. There is also no guarantee that an Orthodox Jew considering the stem cell issues will regard his or her process as influenced by a Reform perspective. Each could, theoretically, consider the debate to be largely

separate from the other group. They would likely be incorrect, but they could think in such a way. But no Jew, regardless of affiliation, would ever claim that he or she can engage with the material pertinent to the stem cell debate without being influenced by the world around. Much, if not all of the material mentioned in the first chapter, scientific, political and sociological seeps into the religious discourse on stem cell research. Religious discourse has never existed in a vacuum, and it certainly does not today.

Chapter one is fundamental to this paper not only because it explains the science of stem cell research, but because it sets the stage for the remainder of this discourse. It presents the social and legal debates that rage over this difficult issue. In Jewish terms, chapter one is more *halakhic* in nature. It speaks of laws and regulations relating to abortions, medical research and ultimately, stem cell research itself. It hints at the underlying narratives, of people's ideas of the nature of life and illness and medical technologies, but much of that material has been left out. Now is the time to pull that narrative into this picture of the stem cell debate, because the national narratives are what will bind all of these components together and create an integrated picture of the stem cell questions for Jews and non-Jews in America.

Curing Christopher, Dolly's Deceased

Christopher Reeve, Michael J. Fox, children with Juvenile Diabetes, adults with Alzheimer's Disease, individuals needing organ transplants, all of the people

who could be positively affected, i.e. saved, by stem cell research and technologies, have been kept out of this paper thus far. I have felt it important to present the issues involved in stem cell research in their secular and religious forms, and to attempt to keep them removed from much of the pop-culture and news media material that floods newspapers and news programs. But the fact that I have saved this part of the discourse for last should not suggest that it is any less important than any of the legal material pertaining to the debate. On the contrary, the people and the faces associated with stem cell research have in many ways fueled the debate!

No one likes the sight of a sick kid. It's one of those images that will pull at the heartstrings of even the most callous person. No one likes to see a wounded hero- it makes the rest of the world feel even weaker. No one likes to see a funny, talented adult, in the prime of life, crippled by a debilitating disease. It makes us seem so vulnerable. And no one wants to be forgotten by their parent or grandparent because it will taint the memories that we have of those people shades darker than we had wished. These are the people, the sick children, Superman fallen, a television star forced by his body to leave the small screen, the family patriarchs and matriarchs no longer able to recall their own names let alone those of their offspring, these are the faces of the stem cell research debate.

I have lost track of the number of news items describing a horribly sick child who will surely die without some form of stem cell therapy. Each and every article makes certain to develop the character of the child, the nature of his personality, her

favorite activity. Each and every article makes certain to introduce the parent or parents who will be left behind when their child dies from the disease. Grief will remain. And most every article will make some mention of the implied enemy, the government that is dragging its feet, standing idly by the blood of that young child when it has the power to help.

The image of Christopher Reeve, sitting motionless in his wheelchair, unable to breathe on his own, unable to function at all without assistance, is a compelling endorsement of the need for new therapies for spinal cord injuries. His message is clear: he and others like him will not really get better with the therapies that exist today. We must look to new horizons, specifically that of stem cell research, for methods of repairing these broken men and women. Oh, how the world would delight knowing that Superman can take flight once again!

The illustrations could go on, but the point has been made. These people have faces and names, pasts, presents, lives to be lived. Their stories will continually fuel the debate over stem cell research. The material that I have written above may seem melodramatic, it certainly seems unscientific, but it is perhaps the most profoundly effective way to promote stem cell research. There is simply nothing like a good story to pique people's interest in a subject, and the more compelling the story, the more engaged the listener, the more attention the story will receive. These stories are compelling because they could happen to us. People will listen to the stories because they can imagine themselves close to the people needing treatment.

Of course the stories of dying children and debilitated adults are not the only stories of the stem cell debate. There are also the stories of Dolly, the first cloned sheep. She was born following over a hundred failed efforts to clone a sheep before her. Dolly was never a normal and healthy lamb- she was often obese and she tended toward lung disease. When Dolly died early in 2003, it was widely speculated that she died of complications resulting from the fact that she was produced entirely through artificial means. Dolly is a story. There are the stories told by the Raelians, a group of people who can, in all seriousness, be called "space cadets," of their successes at having cloned a human being, a baby girl born December 26, 2002. There are the scenarios created by those who fear stem cell research, depicting a world of clones, where males can dominate the society simply because more of them have been made than women, where attractive or talented people can be reproduced ad infinitum. These are the stories that Christopher Reeve would like to laugh off, but which have other people very afraid. These stories have their own powers. Regardless of the nature of the stories, whether their goal is to inspire or to incite, they do more than merely grab the attention of the audience.

Martha Nussbaum offers some important insights on the immense value of narrative.³⁹ She writes specifically on the fact that literary theory should be used in conjunction with ethical theory as a tool for discerning the ways in which we should live our lives. She suggests that narratives (in this instance she refers to Henry

³⁹ Nussbaum, Martha. Love's Knowledge: Essays on Philosophy and Literature. London: Oxford University Press, 1992.

James' novel *The Ambassadors*) have long been neglected as a force to be reckoned with when parsing the ethical modes of living. Certainly literature reflects the ethical and social concerns of its author, but Nussbaum suggests that it is not viewed as being a reflection on, or perhaps a prescription for, the ethical and social concerns of the larger world. Literature can and should dictate virtue.

Nussbaum makes a compelling argument through her reading of James' novel. She demonstrates time and again how material which initially seems relevant to character and plot development, also offers deeply insightful reflections on the world at large and how that world should be. The pages of the book should not confine its ideas of virtue but inspire readers to disseminate them through more universal application. The way we understand the stories we know can help us discern how we should live.

While the story of the children or the celebrities or the grandparents suffering from debilitating and presently incurable illnesses are not always written on paper, they are the narratives of the stem cell debate, and they are sending messages to those who will listen. Obviously, the immediate message of every story of people who can possibly be helped via stem cell research is that stem cell research should happen. But the less obvious message is one about the nature of illness and healing, and the nature of life itself. Illness is something to be overcome via medicine or some sort of therapeutic treatment, and life, those narrators tell us, is too precious to be lost without an enormous fight. The anti-stem cell stories also have their underlying

message. Certainly they advocate against stem cell research, but they also speak to the nature of fear- fear of progress, fear of losing one's identity, fear of not being good enough, and to another side of the nature of illness and healing- some illnesses should kill people.

These narratives are powerful. They have the power to elicit intense emotional reactions (fear, pity, empathy, anger, etc.), and, because of their incredible efficacy, they can make things happen. These are some of the stories that will be behind the laws about stem cell research. The stories of sick people hoping to get well are the very concrete narratives of cure. Perhaps they should be thought of as the illustrations of the American cure narrative! On the other hand, the stories of science run amok are narratives of fear. These two narratives certainly pull in opposite directions (in much the same way that some of the *halakhic* materials described in chapter two tugged at one another in sometimes contradictory ways), but they also both serve as strong and plentiful fuel for the all-important legal debate.

Life and Law

Robert Cover in his dense and brilliant article *Nomos and Narrative*, describes the relationship between the two.⁴⁰ We live in a normative universe, filled with right and wrong, lawful and unlawful, valid and void, all of which are dictated by law. We

⁴⁰ Cover, Robert. "Nomos and Narrative." Harvard Law Review 97:4 (1982): 4-68.

also live in a universe with people living according to or against the laws, and doing both for a reason. There are stories of lives that interplay with the laws of the nomos. In truth, says Cover, the two do not just interplay: "No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning... Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live" (4-5).

The narratives mentioned above are not merely stories told for the sake of influencing the lawmakers and the public. The narratives mentioned above are what make the laws real. Without stories of sick or injured people or stories of science run out of control and leaving only pain and suffering in its wake, stem cell research and the laws governing it would not matter- no one but its beneficiaries would care. And, without laws regulating stem cell research, the narratives would not be necessary. People could do as they pleased and no one could object. Law needs narrative needs law. It is as simple and complex as that!

First, the nomos and the narrative will act on each other in ways that cause both to stretch. As new narratives enter the discourse on stem cell research, the laws will need to adapt to fit them. For example, there is currently no proof that human cloning is possible (despite the claims of Clonaid). There is overwhelming proof that most attempts at cloning even animals have resulted in countless and often horrific failures. Therefore, it is easy to place a ban on human cloning for safety reasons- it is too risky to experiment with human life. But, if and when the first human is

successfully cloned, and one must presume that this will happen whether the government funds it or not, Philip M. Boffey points out in a New York Times editorial, "The safety argument would become less persuasive. It will then be imperative to look much harder at the ethical and moral implications of reproductive cloning."⁴¹ As Cover says, "A *nomos* is a present world constituted by a system of tension between reality and vision (9)."

This sounds fairly promising and indeed it is. Law and narrative should inform one another and help each other to expand. But growth involves pain and expansion is not easy. The relationship between *nomos* and narrative can be explosive, or as Cover says, violent. Assuming a system where the narrative contradicts the law, such as the narrative of cure side of the stem cell debate versus the current laws banning any federal funding for research with new stem cell lines (remember the 60 lines that were cultivated prior to August 2002), the two sides are in almost direct opposition. It is widely believed that the 60 lines will yield little or no benefit for curative therapies, so stem cell research is effectively held in a moratorium. If or when it becomes official that the 60 lines will be of no benefit, the situation between the narratives and the laws will become even more heated. Something will have to change, and, based on the myriad objections that current lawmakers have against stem cell research (as presented in chapter 1), the change will come in the form of combustion.

⁴¹ Boffey, Philip M. "Fearing the Worst Should Anyone Produce a Cloned baby." New York Times 5 Jan. 2002, late ed.: sec.4: 10.

Fortunately, these “combustion events” generally make the laws and the narratives all the more meaningful. People become more and more invested in the laws or the stories that inform their lives. As I said earlier, if people don’t care, neither the laws nor the narratives will matter. Cover seems to imply that, though both *nomos* and narrative need one another, narrative is actually the source of *nomos*. If there is no story, no situation, there need be no law to govern it. “Narrative,” Cover says, “is the literary genre for the objectification of value” (45).

This brings us back to Nussbaum, the *halakhic* and *aggadic* material and the American stem cell debate. The laws are the ways by which stem cell research will or will not happen in the United States, and the narratives are the reasons. Each component influences the other, and they exist, sometimes peaceably, sometimes with great violence, in order for the debate to progress.

Americans, regardless of their religion or, in the case of Jews, their movement, are fundamentally influenced by the narratives of our world. Our lives are wrapped up in the laws and our attentions are held rapt by the narratives. In essence, the patterns that prevail in American legal discourse also prevail in Jewish legal discourse, whether it is *halakhic* or not. We are the people who make the law and who live the law, and so we engage in the complicated process of extracting law, and hopefully truth, from the many and sometimes conflicting narratives that inform our lives. This truth applies to the stem cell debate and to every other facet of life.

But these matters of life and death make the narratives and the laws all the more important.

In Those Days at This Season

The story of the stem cell debate is deeply entrenched in the American and Jewish past. We have a long-established narrative of cure running through much of American and Jewish culture. Americans look to the mistakes and “miracles” of medical research in days gone by and hope to find some clues on what direction to take in the stem cell debate. Jews look to our textual/legal past and find *Halakhot* upon which to base our opinions concerning stem cell research. We look to our history, our millennia-old relationship with medicine and healing, and we find people and stories that guide us toward our decisions about this issue. We look for our answers in our deepest roots.

And those roots will help keep us grounded and steady as we move into the future. We are equipped to repeat the processes that our ancestors undertook when faced with complex, sometimes seemingly insurmountable ethical problems. We have the tools to move into tomorrow and the next day, to answer the questions that are here now, and to answer those that will arise in the future.

Certainly this debate is far from over. It was impossible even to choose a time to stop doing research on newspaper articles relating to stem cell research. Material significant to the debate, the alleged birth of a cloned baby, the death of Dolly, the stories of people already being healed through stem cell therapies and the legal machinations throughout the House and Senate is published nearly every day. Each item brings new information, new understanding, and new questions. The *Halakhot*

will also continue to change and produce new material for our struggle. The process of considering stem cell research is an ongoing one, well worth the struggle and filled with challenges. And so, this paper must end not with a conclusion, but with a command: Go and study.

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belong,¹⁶ שאין אומנות שאין בה עניות וצשירות – because there is no trade that does not include indigence and wealth.¹⁷ שלא עניה מן האומנות ולא עשירות מן האומנות – For poverty is not the result of a trade, nor is wealth the result of a trade; אלא הכל לפי זכותו – rather, all is in accordance with one's merit.¹⁸

אמר ר' שמואל בן אבא – R' Shimon ben Elazar says: ראינו מן החיה ומה נעוה שיש להם אומנות – Have you ever seen a wild animal or a bird that has a trade? וכן מתפרנסין שלא בצער – Yet they sustain themselves without travail, ונאני נבראתי לשמש את – though they were created only to serve me,¹⁹ את – Does it not follow that I certainly should be able to sustain myself without difficulty? אלא שהורעתני מעשי וקפחתי את פרנסתי – However, I have corrupted my deeds and thereby forfeited my sustenance.²⁰

אבא גוריון דסידון – Abba Guryon of Sidon, quoting Abba Gurya says: לא נלמד אדם את – A man should not teach his son to be a donkey driver, a camel driver, a wagon-driver,²¹ a sailor,²² רועה – a shepherd,²³ וקונן – or a storekeeper,²⁴ – because their trade is the trade of robbers, i.e. these trades lend themselves to dishonesty. רבי יהודה אמר משמו – R' Yehudah, quoting him [Abba Guryon], says:²⁵ החמריין רובן רשעים – Most donkey drivers are evildoers;²⁶ והספינין רובן חסידים – most sailors are pious men;²⁷ טוב שבדוקאיים לגיהנום – even the best of physicians is destined for Gehinnom.²⁸ והקשר שבבבקהיים – and even the most righteous of animal slaughterers is a partner with Amalek.²⁹

אניני – R' Nehorai says: מניח אני כל אומנות שבבבל – I put aside every trade in the world – for a man benefits from its reward in this world, אלא תורה – and I teach my son only Torah,³⁰ והקשר קיימת לו לעולם הבא – and the principal remains for him in the World to Come.³¹ ושאר כל אומנות אינן כן – But all other trades are not so;³² ואינו יכול לעסוק במלאכתו – when a man becomes sick, old, or afflicted, and he cannot engage in his

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in that it does not require excessive involvement, so that he can spend most of his time studying Torah (Maharsha).

16. [I.e. he should pray to God] that he be successful in his trade and not assume that this trade [which is "clean and easy"] cannot bring him wealth (Rashi).

Maharsha explains that he should not be afraid to choose a light trade in order to spend more time learning Torah (see previous note), and he should pray to God that he be able to support himself even from this light trade.

17. In every trade there are wealthy men and poor men. Thus, no matter what his trade, he must rely on God.

18. And with God's mercy, which can be invoked through prayer (Meiri). Tosafos assert (based on a passage elsewhere in the Talmud) that by נכחו, his merit, the Mishnah is actually referring to a person's mazal, the lot which is destined for him from the time he is conceived (see Moed Katan 28a, Niddah 16b). Thus, R' Meir is stating that a person's financial status is dictated by his mazal.

Others argue that the word נכחו, his merit, cannot possibly be explained to mean mazal. Rather, R' Meir is teaching us that although there is an element of predetermination in regard to a person's wealth, which is decided at the time he is conceived (Niddah 16b), nevertheless, if a person achieves great merit, this status can be altered (Maharsha, based on Tosafos to Shabbos 156a אן ר"ה, Tos. Yom Tov; see also Tos. HaRosh; see Tiferes Yisrael §66 for a lengthy discussion of the concepts of merit and mazal).

19. See Rashi to Genesis 6:7 ר"ה מאדם.

20. Through the proper use of my free will (Maharsha).

21. That is, by Adam's sin mankind lost the privilege of being sustained without effort, as Adam was in the Garden of Eden (Maharal; Pnei Yehoshua, first explanation).

Alternatively, "I have corrupted my deeds" refers to the individual. I.e. one who does God's will has his livelihood provided to him in a way that leaves him free to involve himself exclusively in Torah study. However, by corrupting their deeds most people have forfeited this privilege (Pnei Yehoshua, second explanation).

22. See Rashi and Rashi to Bava Metzia 75b ש"ה ש"ה. Cf. Tosafos there ר"ה את.

23. These people tend to be thieves, because they steal supplies from nearby properties when they lodge on the road, and they violate the terms of their agreements with those who hire them [since they travel for long distances and cannot be overseen] (Rashi).

24. A shepherd who tends his own sheep often allows the sheep to graze in the fields of others (Rashi).

25. Who often practices deceit by mixing water in his wine and pebbles

26. I.e. R' Yehudah disputes the quote of Abba Gurya by Abba Guryon regarding camel drivers and sailors (Tos. HaRosh).

27. Because their trade lends itself to dishonesty, as explained above (Rashi), and they do not travel far enough to be affected in the manner described below regarding camel drivers (Meiri).

28. Since they travel in deserts which abound with dangers, their fear is aroused and they humble themselves before God (Rashi).

29. ["Pious" is a greater appellation than "righteous."] Sailors' travels are even more fraught with danger, and they are therefore more deeply moved to fear God than are camel drivers (Rashi).

30. They eat healthily and do not fear sickness, and are therefore not humble before God; at times they cause death; and they refuse to heal the poor who cannot pay them (Rashi).

Some suggest that the Mishnah refers specifically to the best of physicians. Because these men consider themselves the best in their field, they often rely completely on their own judgment and refuse to consult others, which can bring tragic results (Maharsha, Tiferes Yisrael).

31. One who slaughters animals is constantly faced with questions of kashrus, and he often makes wrong decisions to prevent himself from suffering a financial loss, resulting in Jews eating non-kosher meat (Rashi). According to this interpretation the connection to Amalek is difficult to explain (see Tos. HaRosh and Meiri).

Others explain that his constant involvement in slaughtering animals causes him to become hardened and cruel like Amalek, who was the first nation to attack the Jewish people after the exodus from Egypt (Tos. Ri HaZaken, Ramban to Deuteronomy 22:6 [near the end], Tos. Yom Tov; cf. Meiri).

32. It would appear that R' Nehorai is disputing the view of R' Meir, who said that a father must teach his son a trade. However, it is possible that R' Nehorai was referring specifically to his own son. That is, R' Nehorai rules that the exceptional individual who is capable of achieving lofty levels of Torah scholarship and piety is permitted to abandon all avenues of financial endeavor in order to pursue only spiritual goals, and God will cause his needs to be provided by others. Since R' Nehorai saw these exceptional qualities in his own son, he taught him only Torah (Pnei Yehoshua).

Others explain that anyone whose faith in God is complete, and who is able to rely on Him for all his needs without anxiety may pursue only Torah, and his needs will be provided for. Those who are unable to maintain this degree of faith must take time from their Torah studies to earn a living (Sefer HaMiknah; see Berachos 35b and Rambam, Hil. Shemittah V'Yovel 13:13; cf. Maharsha).

33. I.e. the main reward for Torah study is given not in this world but in the afterlife (see Mishnah Pe'ah 1:1).

34. Their rewards are temporary, and provide benefit only at the time

195. Though anointing [oil] and bath[water] do not enter the body, the body benefits from them.⁵

196. If a man bathes but does not anoint himself, it is like water on top of a [covered] cask.⁶

197. It was told of R. Hanina that, when he was eighty years old, he could take his shoe off or put it on while standing on one foot.

[Speaking of robust old age], R. Hanina said: Warm baths and oil, with which my mother anointed me in my youth, stood me in good stead in my old age.⁷

198. He who wishes to anoint his entire body should first anoint his head, because it is king over all other parts of his body.⁸

Healing the Body

199. "[The Lord will] make strong thy bones" (Isa. 58:11). R. Eleazar said: This is the most perfect of blessings.⁹

200. The sages said in the name of Rav: It is forbidden to live in a city where there is no physician.¹⁰

201. In a human body, the component parts are dependent on one another. When one ceases to function, so does the other. When they break apart one from the other, the body is stricken and the person dies, like a house that has four sides—if one side breaks away, the house collapses.¹¹

202. The sages in the school of R. Ishmael taught: "He shall cause him to be thoroughly healed" (Exod. 21:19). From this verse we infer that permission has been given [by Heaven] to the physician to heal.¹²

203. It is told of R. Ishmael and R. Akiva that, while they were walking through the streets of Jerusalem accompanied by a certain man, a sick person confronted them and said, "Masters, tell me, how shall I be healed?" They replied, "Take such-and-such, and you will be healed." The man accompanying the sages asked them, "Who smote him with sickness?" They replied, "The Holy One." The man: "And you bring yourselves into a matter that does not concern you? God smote, and you would heal?" The sages: "What is your work?" The man: "I am a tiller of

the soil. You see the sickle in my hand." The sages: "Who created the vineyard?" The man: "The Holy One." The sages: "Then why do you bring yourself into a matter that does not concern you? God created it, and you eat the fruit from it!" The man: "Don't you see the sickle in my hand? If I did not go out and plow the vineyard, prune it, compost it, and weed it, it would have yielded nothing." The sages: "You are the biggest fool in the world! Have you not heard the verse 'As for man, his days are as grass' [Ps. 103:15]? A tree, if it is not composted, weeded, and [the area around it] plowed, will not grow; and even if it does grow, if not given water to drink, it will die—will not live. So, too, the human body is a tree, a healing potion is the compost, and a physician is the tiller of the soil."¹³

204. When a man has a pain, he should visit a physician.²

205. R. Eleazar said: Honor your physician even before you have need of him.³

206. A physician who heals for nothing is worth nothing.⁴

207. A physician not nigh is [as good as] a blind eye.⁵

208. Hapless is the city whose physician has gout.⁶

209. Physician, heal your own lameness!⁷

210. The best physician deserves Gehenna.⁸

211. Hezekiah hid away the Book of Cures, and the sages approved.⁹

212. Rav said to his son Hiyya:¹⁰ Don't fall into the habit of taking drugs, don't leap over a sewer,¹¹ don't have your teeth pulled,¹² don't provoke serpents.¹³

213. "The saving sun with healing in its wings" (Mal. 3:20). Abbaye said: This proves that the shining sun brings healing.¹⁴

¹ Midrash Sam. 4.

² B. BK 46b.

³ P. Ta 3:6, 66d.

⁴ B. BK 85a.

⁵ Ibid.

⁶ And can't get about. Lev. R. 5:6.

⁷ Gen. R. 23:5.

⁸ Either because he is haughty or because he occasionally endangers life. B. Kid 82a.

⁹ For people would no longer trust only in medical treatment. B. Ber 10b.

¹⁰ Who was not in good health.

¹¹ So B. Pes 113a; BR: "Don't leap feet-first."

¹² Wait for them to get better.

¹³ B. Pes 113a.

¹⁴ B. Ned 8b.

B. Ber 57b.

Since it is not possible for the water to penetrate the body, the body does not benefit from it. B. Shab 41a.

B. Hul 24b.

B. Shab 61a.

B. Yev 102b.

P. Kid 4:12, 66d.

Midrash Sam. 4 (ed. Buber [Cracow, 1903], p. 54).

B. Ber 60a.

which would surely hold the rescuer liable for damages. Rather, he is exempted **שָׂאֵם אִי אָתָּה אוֹמֵר בֵּן** - because if you do not say so and instead hold him liable, **נִמְצָא אִין לֵךְ קַל אֲרָם שְׂמַיִל** - the result will be that you will never find a person who is willing to save his fellow from the hand of his pursuer, because his liability for damage to third parties will deter him from undertaking the rescue. Therefore, the Rabbis decreed that a rescuer not be held responsible for any damage that he causes.

The Mishnah continued:
אָבֵל הַרְיוּף אֲחֵר בְּהִטָּה - BUT when ONE PURSUES A BEAST for the purpose of sodomy, or one is about to desecrate the Sabbath, or one is about to engage in idolatry, we may not kill any of these people to prevent them from sinning.

The Gemara cites some dissenting opinions:
הָיָא רַבִּי שְׁמַעוֹן בֶּן יוֹחָי אוֹמֵר - It was taught in a Baraisa: **רַבִּי שִׁמּוֹן בֶּן יוֹחָי אָמַר** - R' SHIMON BEN YOCHAI SAYS: **הַעֲבוֹד עֲבוֹדַת עֲזָבוֹת וְיִתֵּן לְהַעֲוִיל** - ONE WHO IS ABOUT TO ENGAGE IN IDOLATRY MAY BE SAVED AT THE COST OF HIS LIFE. **מִקַּל נְחוֹמֵר** - We derive this from the following **KAL VACHOMER**: **וְיָמָה בְּנֵם הָרִיטוּ** - IF, TO AVOID THE BLEMISHING OF AN ORDINARY PERSON, **יִתֵּן לְהַעֲוִיל** - the Torah states that [THE PERSON] MAY BE SAVED AT THE COST OF [THE PURSUER'S] LIFE, **בְּנֵם נְבוֹהָ לֹא קָל שְׂעָן** - then to avoid THE "BLEMISHING" (i.e. dishonoring) OF GOD through the sacrilege of idol worship,¹⁸ is it not certain that we may protect Hashem's honor at the cost of the would-be idolater's life?¹⁹

The Gemara challenges R' Shimon ben Yochai's source:
וְכִי עֲוֹשֵׂין מִן הַדִּין - But do we derive a punishment on the basis of a logical inference (i.e. a *kal vachomer*)? Surely not!²⁰ How, then, can a *kal vachomer* be the source that we kill a would-be idolater?

The Gemara answers:
וְכִי עֲוֹשֵׂין מִן הַדִּין - R' Shimon ben Yochai maintains that we may, in fact, derive a punishment on the basis of a logical inference.²¹

Another Baraisa that disputes our Mishnah's ruling:
רַבִּי אֶלְעָזָר בֶּרֶבִי שְׁמַעוֹן אוֹמֵר - It was taught in a Baraisa: **רַבִּי אֶלְעָזָר בֶּרֶבִי שִׁמּוֹן אָמַר** - R' ELAZAR THE SON OF R' SHIMON SAYS: **הַמְחַלְלֵל אֶת הַשַּׁבָּת וְיִתֵּן לְהַעֲוִיל** - ONE WHO IS ABOUT TO DESECRATE THE SABBATH MAY BE SAVED FROM DOING SO AT THE COST OF HIS LIFE.

The Gemara cites the source for this ruling:
וְכִי עֲוֹשֵׂין מִן הַדִּין - He holds like his father, R' Shimon ben Yochai, who maintains that we may derive a punishment on the basis of a logical inference. Thus, he agrees with his father that one who is about to engage in idolatry may be killed to prevent him from sinning. **וְאִתְּמַר שָׂבַת קַל וְהַעֲוִיל** - And the ruling regarding Sabbath is derived by means of a *gezeirah shavah* between the words *desecration* and *desecration* from the verse discussing idol worship.²²

The Gemara now turns to discuss when one must allow himself to be killed rather than sin:
אָמַר רַבִּי יוֹחָנָן בְּשֵׁם רַבִּי שְׁמַעוֹן בֶּן יוֹחָנָן - R' Yochanan said in the name of R' Shimon ben Yehotzadak: **יָמְנוּ וְנָגְדוּ עֲוִילָה** - They took a vote on the matter and decided in the attic of Nizzah's house in Lod: **קָל עֲבִירוֹת שְׁבוּתוֹרָה** - Concerning all prohibitions in the Torah, **אִם אוֹמְרִין לְאָדָם** - the law is that if they tell a person: "Transgress such-and-such a prohibition and you will not be killed, but if you refuse to do so, we will kill you," **וְעָבַד וְאֵל הַתֵּרַג** - he should transgress the prohibition and not allow himself to be killed,²³ **וְחַץ מִקְּבוּרַת בּוֹקְרִים וְגִילּוֹי עֲרִיזוֹת וְשִׁמְבוֹת קִמְטוּ** - except for when he is told to engage in idol worship, illicit relations with an *ervah*, or murder. A person must give his life rather than commit any of these three sins.²⁴

The Gemara asks:
וְעֲבוֹדַת בּוֹקְרִים לֹא - Now, is it true that one may not engage in idol worship even if it costs him his life? **וְהָאֵתְּמַר** - But it was taught in a Baraisa: **אָמַר רַבִּי יִשְׁמָרְאֵל** - R' YISHMAR'EL SAID: **מִמֶּנָּה יָדָעוּם שֶׁאִם אָמְרוּ לוֹ לְאָדָם** - FROM WHERE DO WE KNOW THAT IF THEY SAID TO A PERSON: **עָבַד עֲבוֹדַת בּוֹקְרִים וְאֵל הַתֵּרַג** - "ENGAGE IN IDOL WORSHIP AND YOU WILL NOT BE KILLED, but if you refuse to do so, we will kill you"; **מִמֶּנָּה יָדָעוּם שֶׁאִם אָמְרוּ לוֹ לְאָדָם** - FROM WHERE DO WE KNOW THAT HE SHOULD WORSHIP the idol AND NOT BE KILLED? **וְהַתּוֹרָה לֹא מְלַמְּדָה לֵאמֹר** - SCRIPTURE TEACHES:²⁵ **וְשָׂמַרְתָּ אֶת דְּבָרֵי אֱלֹהֶיךָ וְאֶת דְּבָרֵי אֱלֹהֶיךָ וְאֶת דְּבָרֵי אֱלֹהֶיךָ** - *You shall guard My decrees and My laws that man shall carry out AND BY WHICH HE SHALL LIVE.* **וְלֹא שְׂמַרְתָּה בָּהֶם** - This implies that man shall live by God's laws AND NOT DIE by them. Thus, if a person is threatened with death unless he engages in idolatry, he should worship the idols to save his life. **וְכִי אָמְרוּ לוֹ לְאָדָם** - YOU MIGHT THINK THAT the above is true EVEN if he is being forced to worship idols IN PUBLIC.²⁶

NOTES

18. When someone worships idols, he dishonors God by denying His Omnipotence.
 19. In short, the logic of the *kal vachomer* is as follows. If the Torah allows us to kill a pursuer to protect the dignity of a human being (i.e. an *ervah* in danger of being violated), then it surely allows us to kill someone to protect God's honor!
 20. *Yad Ramah* notes, however, that this *kal vachomer* has a weakness. Attacking a human being, it can be argued, is indeed a most grievous sin, because the victim is actually harmed; that is why we may kill a pursuer who is attacking a human being. God, on the other hand, is not harmed at all when someone dishonors Him, so perhaps we may not kill to protect His honor. Nevertheless, *Yad Ramah* continues, R' Shimon ben Yochai considers it obvious that the sin of desecrating God's Name through idol worship is an inherently more serious offense than harming a human being, and if we may kill a pursuer to protect his victim, we may surely kill someone about to engage in idol worship.
 21. See above, 73a note 10.
 22. That is, although the generally accepted view is that we do not derive a punishment on the basis of logical inference, R' Shimon ben Yochai subscribes to a minority view that we do. (See *Margalit* *to Yam* for an explanation of this view.)
 23. The Torah mentions "desecration" in connection with both

Sabbath and idolatry. In *Exodus* 31:14 it states: *One who desecrates it (the Sabbath) shall be put to death*; in *Leviticus* 18:21, it states concerning the Molech cult of idol worship: *You shall not present any of your children to pass through for Molech; and do not desecrate the Name of your God.* Thus, we may use a *gezeirah shavah* to link the subjects of Sabbath and idolatry, and we draw the following analogy: Just as we kill someone who is about to worship idols, so do we kill someone to prevent him from desecrating the Sabbath (*Rashi*).
 23. The source for this principle is a verse in *Leviticus* (18:5) stating that the Torah contains the laws that man shall carry out *and by which he shall live*. Since Torah laws were given "to live by them," it is generally preferable for someone to sin rather than to endanger his life (*Rashi*).
 There is a difference of opinion as to whether one is permitted to go beyond the call of duty and sacrifice his or her life to avoid sinning; see *Rambam*, *Hil. Yesodei HaTorah* 5:4 with *Kesef Mishneh*; *Tur* and *Shulchan Aruch Yoreh Deah* 157:1 with *Shach* ad loc.; *Minchas Chinuch* §296.
 24. The Gemara will soon give the source for this ruling (*Rashi*).
 25. *Leviticus* 18:5.
 26. The Gemara (74b) below will teach how many observers make something "public" (*Rashi*)

A.

בן סורר ומורה פרק שמיני סנהדרין

כ"ג פסוק אמר . אלו דקאני אחיה ית לה קום במשיחה קאמר דבין קאמו בני היא ולהלכה לא יתן הוא אינו מקדש : אכ"י אמר . (טולט)
באוסה ובין דייטס האציל להציל בחד מאבריו של זה שלא יתן להרעו מעשה ו' יונתן מן שאלו היא : וטולט . אכרדף לו הארחה להציל
בחד מאבריו ולא אציל אלא בנפשו נסב עליו : כמלטה שממיתה . כחא מחסין להרעו אלו האוסה האסב מדבר : דמטיב
ואם אפון יהיה . וזו לא מחסין להרעו דסוג הוא אמרי מקטיל אלא לוי ע"מ כמחסין וסמס רוחו ניתן להציל בנפשו כדלמדין למיל חס
רודף היה סמס מחסין והציל כחב ורעה אור
ואם לא ייהא אפון שאין כאן חיוב
מיחה עטק יענה דמי ודחה . ו'י
למדת כשלמה ופי' כגון שישל הארחה
להציל בחד מאבריו דהוא לא ניתן
להרעו אלא אן כח מיחה וסמס :
אלא מי למדת ופי' . אמרי יענה כח
רודף סוף ויתן להציל בנפשו : דילמא
שמי האל לסי כמלטה ופי' (דלכח)
לז מיחה ומחלמון אק כאן ע
פי' אדם אחד שהמיתה כח עליו
בשכל הכירו סמס מדיב עט
והמחלמון דכחל האוסה מן דלמטה
דעלמא הוא אלא לא מיסכר
מחלמון דהוא ממש חוב מיחה
ומיחה אלוך : לא ענה . אם היה
כח חוב מיחה אן הילק להחייב
מחלמון מן שהמיתה כח עליו בשכל
כחל המחלמון מן סמס עליו בשכל
אז סמס : מחייב כממש הוא .
כדידיה א סמס ניתן להציל בנפשו
ואפי' דמס אלו על קל כל אדם
מן דמיחה לזו ומחלמון לזו סמס :
ורודף שהיה רודף . אחר הכירו להרעו
זה רודף ארזי להציל ושיבר את
הכלים ופי' : סמס לה האוסה . כמסדת
סכיס דעונשין מן הרין והרז ופי'
ענה כחל חלל מחסדת סכיס
מחלמון מן יומה (עמט 6) ומרעד
לא סק להעביר למיך ולא סמס
(אקדח 7) : נמס . סס האוס : יעמד
ואל יעמד . וזו כח עליו שישמס כחם
חז מחסדת סכיס ופי' . לקמן ופי'

שלא יאמר

יבא אבר במפורחה ודברי הבל אביו
אמר כיכול להציל באחד מאבריו ורבי יונתן
בן שאול הוא רתנא *רבי יונתן בן שאול
אומר ירודף שהיה רודף אחד חבירו להרעו
ויכול להצילו באחד מאבריו ולא הציל נהרג
עליו מאי מעמא רבי יונתן בן שאול רכתיב
*וכי ינצו אנשים (יתרו) וגו' *ואז אלעזר
*כמזנות שבמיתה הברזב נמשך רכתיב
*ואם אפון יהיה ותתנהג נפש רוח נפש האפיה
אמר רבנא ולא יהיה אפון עונש יענה אי
אמרת בשלמא יכול להציל באחד מאבריו
לא ניתן להצילו בנפשו היינו דמשכחת לה
דיענש כגון שיכול להציל באחד מאבריו
אלא אי אמרת יכול להציל באחד מאבריו
משכחת לה דיענש דילמא שאני הבא דמיתה לזה וחשלומו לזה (ה) לא שגא
*דאמר רבא ירודף שהיה רודף אחד חבירו ושיבר את הכלים בין של נרדף
ובין של כל אדם פסור מאי מעמא מחייב בנפשו הוא ונרדף ששיבר את
הכלים של רודף פסור של כל אדם חייב של רודף פסור שלא יאמר כממו
חייב עליו כגופו של כל אדם חייב שמציל עצמו בממון חבירו ורודף שהיה
רודף אחד רודף להצילו ושיבר את הכלים בין של רודף בין של נרדף בין של
כל אדם פסור ולא מן הרין שאם אי אתה אומר כן נמנא אין לך כל אדם
שמציל את חבירו מיד דרודף : אבל הרודף אחר בהמה : תניא רשב"י אומר
העובר עבדת כוכבים ניתן להצילו בנפשו מקו ומה פגם הרוח ניתן להצילו
בנפשו פגם גבוה לא כל שכן *ובי עונשין מן הרין קא סבר עונשין מן הרין
תניא רבי אלעזר רבבי שמעון אומר המציל את השבת ניתן להצילו בנפשו
סבר לה כאברה רבבי עונשין מן הרין ואתיא שבת כדלול הלול מעבדת
כוכבים א"ר יודן משום ר"ש בן יודנאק נימטו ונפשו בעליית בית גזוה בלוד
*כל עבדות שבתורה אם אומין לאדם עובר ואל תהרג *עובר ואל יתג דין
מעבדת כוכבים וגילוי עריות ושפיכות דמים ועבדת כוכבים לא הוא תניא
*א"ר ישמעאל כגון שאם אפון לו לאדם עובר עבדת כוכבים ואל תהרג
למין שיעבד ואל יתג חל *וחז בהם *ולא שמת בהם יכול אמילו
בפרהסיא תלמוד לומר *ולא תחללו את שם קדש תקדושי אינדי דאמר
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לכך נאמר בכל נפשך ואם יש לך אדם שממט חייב עליו כגופו לכך
נאמר בכל מארך גילוי עריות ושפיכות דמים כדברי רתנא *רבי אומר *כי
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מעתה דרי זה בא ללמד תמצא למד מקיש רעהו לעודה המאורסה מה
נעודה המאורסה ניתן להצילו בנפשו אף רעהו ניתן להצילו בנפשו ומקיש
נעודה המאורסה לרעהו מה רעהו יתג ואל יעבור אף נעודה המאורסה תהרג
ואל העובר רעהו גופיה מנא לן סברא הוא דהוה דאתא לקסיה *דדבה
ואמר ליה אמר לי מדי דודאי זיל קסליה לפלגיא ואי לא קסלינא לך אמר ליה
לקסלך ולא תיקפול מי *ימר דמא דרך סומק מפי דלמא דמא דהוא נברא
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*אבל בשעת גורת המלכות אפי' מצוה קלה יתג ואל יעבור כי אתא רבין א"ר
*יודן אפי' שלא בשעת גורת המלכות לא אמרו אלא בניענא *ואבל בפרהסיא אפי'
מצוה קלה יתג ואל יעבור מאי מצוה קלה אמר רבא בר רב יצחק *אמר רב
(*) לכבוד אה יחלל דמים (לפנות סכיס) .

קסבר

תמיתין להציל בנפשו כל
סק דניתן כמותו :
*טובין מן הרין . לא דמי
לשענן מן הרין ולמלגו
כח אפי' ורנא לקמן נה' הגרסין
(ד' טו) (ה) כדשריית כפרין דמיחה
(ד' נבד"י כמסא) והוא דלמדיה לטיל
חד למשתי סכיס סכיס היט עמי
למין דלמך שונש ומדי אן מונשין
סוס מדי חד למשתי כמא דמי
לפחות ואלך חידו דמדי נמר
כחכ עמי עמס :
אפילו

שלא יאמר

יבא אבר במפורחה ודברי הבל אביו
אמר כיכול להציל באחד מאבריו ורבי יונתן
בן שאול הוא רתנא *רבי יונתן בן שאול
אומר ירודף שהיה רודף אחד חבירו להרעו
ויכול להצילו באחד מאבריו ולא הציל נהרג
עליו מאי מעמא רבי יונתן בן שאול רכתיב
*וכי ינצו אנשים (יתרו) וגו' *ואז אלעזר
*כמזנות שבמיתה הברזב נמשך רכתיב
*ואם אפון יהיה ותתנהג נפש רוח נפש האפיה
אמר רבנא ולא יהיה אפון עונש יענה אי
אמרת בשלמא יכול להציל באחד מאבריו
לא ניתן להצילו בנפשו היינו דמשכחת לה
דיענש כגון שיכול להציל באחד מאבריו
אלא אי אמרת יכול להציל באחד מאבריו
משכחת לה דיענש דילמא שאני הבא דמיתה לזה וחשלומו לזה (ה) לא שגא
*דאמר רבא ירודף שהיה רודף אחד חבירו ושיבר את הכלים בין של נרדף
ובין של כל אדם פסור מאי מעמא מחייב בנפשו הוא ונרדף ששיבר את
הכלים של רודף פסור של כל אדם חייב של רודף פסור שלא יאמר כממו
חייב עליו כגופו של כל אדם חייב שמציל עצמו בממון חבירו ורודף שהיה
רודף אחד רודף להצילו ושיבר את הכלים בין של רודף בין של נרדף בין של
כל אדם פסור ולא מן הרין שאם אי אתה אומר כן נמנא אין לך כל אדם
שמציל את חבירו מיד דרודף : אבל הרודף אחר בהמה : תניא רשב"י אומר
העובר עבדת כוכבים ניתן להצילו בנפשו מקו ומה פגם הרוח ניתן להצילו
בנפשו פגם גבוה לא כל שכן *ובי עונשין מן הרין קא סבר עונשין מן הרין
תניא רבי אלעזר רבבי שמעון אומר המציל את השבת ניתן להצילו בנפשו
סבר לה כאברה רבבי עונשין מן הרין ואתיא שבת כדלול הלול מעבדת
כוכבים א"ר יודן משום ר"ש בן יודנאק נימטו ונפשו בעליית בית גזוה בלוד
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גילוי העריות
נב' עובר ואל יתג
מין פי סמס
פי' סמס דרי פי

[ל' טו]

משנה ה

If [at the birth of twins] the first came forth dead, [and was immediately taken from the room], and [then] the second [was born] alive, [the latter] is clean¹; if the first [were born] alive and the second dead, [the former] is unclean² [even if it has been removed from the room before the other came forth]. R. Meir³ says, [If both were born together as though] in one foetal sack⁴, [the living one] is unclean, but if [as] in two [separate] foetal sacks⁵, [the living one] is clean⁶.

יצא הראשון מת והשני חי, יטהור; הראשון חי והשני מת, יטמא. רבי ימאיר אומר, יבשפיר אחד, טמא, בשני ישפירים, יטהור.

1 It cannot become unclean while still in the womb. 2 Because the living passed through the 'opening of the womb' before the dead one.* 3 His opinion is rejected. 4 Or amnios, amnion; in general fetus, embryo. i.e., they were born at the same time. Compare ויהי 3². 5 sc., one after the other. 6 Whether he was first or second. * See ADDENDA at the end of this Tractate.

Mishnah 6

משנה ו

If a woman suffer hard labour in travail, the child¹ must be cut up in her womb² and brought out piecemeal³, for her life takes precedence over its life; if its greater part has [already] come forth, it must not be touched⁴, for the [claim of one] life can not supersede [that of another] life.

האשה שהיא מקשה לילד, מחתכין את-הילד יבמעיה, ומוציאין אותו יאברים אברים, מפני שחיה קודמן לתיו; יצא רובו, אין נוגעין בו, שאין דוחין נפש מפני נפש.

1 Popular pronunciation הילד. 2 Or uterus. Literally belly, stomach, bowels, inside, inwards. 3 Literally member by member, limbs [by] limbs. 4 i.e., it must not be destroyed.

CHAPTER 8

פרק ח

Mishnah 1

משנה א

There are things that permit¹ the passage of uncleaness and act as a screen² [against it]; [some] allow יחוצצין; מביאין את-הטומאה

יש מביאין את-הטומאה יחוצצין; מביאין את-הטומאה

3 i.e., made a statement to that effect. 4 Or בחליון. 5 See Volume I, Page 18f. 6 In some texts, והוא שחשב, And that is when one has formed the intention . . . 7 sc. a new opening is made for the removal of the corpse.

Mishnah 4

משנה ד

If a woman suffer¹ hard labour in travailing, and she is taken out² from one room³ into another room [and she gives* birth to a dead child], the first [room] is unclean because of doubt⁴, and the second [room is unclean] of a certainty. R. Judah⁵ said, When does this apply? When⁶ she has to be supported⁷ [on the transfer] by the arms; but if she be† able to walk [unaided], the first [room] is clean, for after the opening⁷ of the womb⁸ it is impossible⁹ to walk¹⁰. There is no opening of the womb [in the case of] abortions¹¹, until [the foetus expelled from the vagina] forms a rounded head like a spinner's coil¹².

האשה שהיא ימקשה לילד, והוציאה ימבית לבית, יהראשון זמא יבספק, והשני בודאי אמר רבי יהודה, אימתי? יבזמן שהיא יניטלת בנפיים; אבל אם היתה זנהלכת, הראשון טהור, ישמשנפתח הקבר אין פנאי ילהלף. אין ילנפלים פתיחת הקבר, עד שיצגילו ראש יכפיקה.

1 Literally suffered (viz., in the past tense). 2 Literally was taken out (viz., in the past tense). 3 Or house. 4 Popular pronunciation בִּסְפֵק. Doubt whether the head of the child had protruded before her removal. If the head had emerged it is considered completely born and conveys uncleanness; an unborn dead child cannot communicate uncleanness. 5 His view is accepted. 6 Or the definite form בזמן. 7 יחוצצת, Niphal past, or Niphal participle משנפתח. 8 Or uterus. 9 אין פנאי, literally there is no opportunity (or time). 10 להלף [Pie] or להלף [Ka]. 11 Or, perhaps, the definite form ילנפלים. Some paraphrase this It is not considered an opening of the womb when women miscarry. 12 Or כפיקה. This concluding part is R. Judah's ruling. He amplifies his first statement by explaining that he deems the 'opening of the womb' prevents the woman walking without support when the projecting head of the embryo is as large as a spinner's coil, and therefore if she was able to walk without help the head was not projecting; but if the projecting head was smaller than a spinner's coil, then she was able to walk on her own, and this condition could have commenced in the first room which is therefore also unclean. * Literally gave (viz., in the past tense). † Literally had to be supported (viz., in the past tense). § Literally were supported (viz., in the past tense).

A Baraisa teaches more details about the law of a tunneler:
 אָן רַבֵּן - The Rabbis taught in a Baraisa: „מִתְחַתֵּר׃” -
 Scripture states: *If the thief was discovered while TUNNELING IN*,
 he may be killed. אֵין לִי אֵלָא מִתְחַתֵּר׃ - From here I KNOW ONLY
 that someone who TUNNELS into a house may be killed. וְגַם תְּצִירוּ
 וְגַם תְּצִירוּ - But FROM WHERE do I know that a burglar may be
 killed if he climbed a ladder to [THE VICTIM'S] ROOF OR walked into
 HIS YARD OR HIS FIELD through an open door? תְּלַמְדוּ לִמְרָא
 „וְיָצָא הַנֶּגֶב׃” - SCRIPTURE therefore STATES: *If THE THIEF IS*
DISCOVERED. מִקֵּל קָקוּם - This teaches that someone who
 burglarizes IN ANY MANNER may be killed.^[21]

The Baraisa continues:
 אָם כֵּן - IF it is SO that a burglar may be killed even if he did not
 tunnel in, „מִתְחַתֵּר׃” מִה תְּלַמְדוּ לִמְרָא - WHY DID SCRIPTURE
 specifically STATE that he was discovered while TUNNELING IN?
 מִתְחַתֵּר׃ - It did so BECAUSE MOST THIEVES
 COMMONLY burglarize a house BY TUNNELING IN. Thus, the Torah
 spoke about the most common method of burglarizing, but the law
 is equally applicable to other methods as well.

The Gemara cites a Baraisa that expounds the term *tunneling*
 differently:

תְּנִיג אֵינֶךָ - It was taught in another Baraisa: „מִתְחַתֵּר׃” -
 Scripture states: TUNNELING. אֵין לִי אֵלָא מִתְחַתֵּר׃ - From here I
 KNOW ONLY that someone who TUNNELS through a wall into a
 house may be killed. וְגַם תְּצִירוּ וְגַם תְּצִירוּ - But HOW DO I KNOW
 that the same applies to a thief who gained entry to HIS victim's

ROOF OR to HIS YARD OR to HIS FIELD without digging a tunne
 „וְיָצָא הַנֶּגֶב׃” - SCRIPTURE therefore TEACHES:
 THE THIEF IS DISCOVERED. מִקֵּל קָקוּם - This teaches th
 someone who burglarizes IN ANY MANNER may be killed.
 אָם כֵּן - But IF it is SO that a burglar who did not tunnel in may b
 killed, „מִתְחַתֵּר׃” מִה תְּלַמְדוּ לִמְרָא - WHY DID SCRIPTUR
 specifically STATE TUNNELING?
 מִתְחַתֵּר׃ - It is because the Torah is teaching the
 THE TUNNELING OF [A BURGLAR], THIS IS in place of HIS leg
 WARNING.^[22]

The Gemara cites a related ruling:

אָמַר רַב הוּנָא - Rav Huna said: קָטָן הָרוֹדֵף - If a minor pursue
 his fellow^[23] with intent to murder him, נִיתָן לְחַפְזוֹ בְּנַפְשׁוֹ - [th
 fellow] may be saved at the cost of [the pursuer's] life.^[24]

The Gemara explains the basis for Rav Huna's ruling:

קָטָן הָרוֹדֵף אֵינוֹ צָרִיךְ הַתְּרָאָה - [Rav Huna] maintains that
 pursuer needs no legal warning, אֵינוֹ צָרִיךְ הַתְּרָאָה -
 and therefore, it makes no difference whether he is an adult or
 minor.^[25] Thus, a pursuer who is a minor may be killed ever
 though he lacks the competence to legally acknowledge a warning
 The Gemara questions Rav Huna's law from a Mishnah
 discussing a woman whose life became endangered during child-
 birth:

אֵיתִיבֵיהּ רַב הוּנָא לְרַב חִיָּדָא - Rav Chisda challenged Rav Huna
 from a Mishnah: וְיָצָא רֵאשׁוֹ - Once [A BABY'S] HEAD HAS LEFT

NOTES

come as one. They both teach that a murderer may be put to death in any
 manner possible if the procedure described by the Torah cannot be
 followed exactly. That is, one verse teaches that if it is impossible to
 execute a convicted murderer through beheading, the prescribed method
 of execution for him, he may be executed through any possible method.
 Another verse teaches that although a murder victim's death should be
 avenged by a close relative, the court may appoint an avenger if no close
 relative exists (see 45b note 25). Thus, we would not apply the "execute
 in any manner possible" rule to a tunneler, unless the Torah specifically
 indicated that it applies to him as well.

21. *Rashi*; cf. *Yad Ramah*, *Chidushei HaRan*.

22. Regardless of whether he tunneled through a wall or not. The Baraisa
 derives this law from the Torah's superfluous use of the word *thief* in the
 verse discussing a tunneler. The verse (*Exodus 22:1*) states: אִם בְּנִקְחָתָּ
 אִם בְּנִקְחָתָּ, *If the thief is discovered while tunneling in*. But it could have
 stated simply, אִם בְּנִקְחָתָּ, "If he is discovered while tunneling
 in," because the previous verse clearly indicates that a thief is being dis-
 cussed. The Baraisa derives from the otherwise superfluous term *thief*
 that the Torah mentioned a tunneler merely as an example but in fact,
 a burglar may be killed no matter how he entered the property (*Rashi*).

23. *Rashi* explains how we derive that a tunneler may be killed without
 warning even though a criminal must have received legal warning to be
 liable to corporal punishment. Our verse specifies that a tunneler may
 be killed during a burglary when in fact any burglar may be killed during
 a break-in. From this we derive that a tunneler may be killed without
 warning, but a burglar who enters some other way must first be warned
 in the presence of witnesses, "Beware! I am confronting you and I shall
 kill you!" If the burglar then responds, "I know your intentions, and if
 you try to resist, I will kill you," the burglar may be killed. [For a discus-
 sion about whether the previous Baraisa agrees with this law, see
Maggid Mishneh and *Mirkeves HaMishneh to Hil. Geneivah 9:8*, and
Aruch LaNer.]

Rashi explains the difference between a burglar who tunnels through
 a wall and one who enters some other way. If a burglar expends the effort
 to dig a tunnel, we may assume that he has decided to carry out the
 burglary even if it becomes necessary to kill his victim. Therefore, he is
 considered a pursuer, which make him subject to being killed without a
 warning. But a burglar who expends little effort to reach his victim (e.g.
 he climbs a ladder to the roof or he walks into the yard through an open
 door) might have been tempted to commit the burglary because

killed unless he is warned of the gravity of his act, and he persists in spite
 of the warning.

[*Meiri* and *Chidushei HaRan* add that even if the burglar tunneled
 into a field or garden, he may not be killed summarily without warning,
 for the owner is usually not found in these places. Hence, it might well
 be that the burglar went to the trouble of tunneling on the assumption
 that he would not encounter the owner, but he never intended to murder
 the owner if he confronted him.]

24. *Rashi* states that this refers to a minor who is pursuing a fellow
 minor. It seems difficult to understand, however, why there should be a
 difference between pursuing a minor and pursuing an adult. See
Margaliyos HaYam and *Yad David* for some possible explanations.

25. Rav Huna asserts that a minor who pursues his fellow may be killed
 even though there are two possible reasons not to kill him: 1) Ordinarily
 a minor is not punished. [Rav Huna maintains, however, that a pursuer
 is killed to save the victim and therefore, we may even kill a pursuer who
 is not subject to punishment, i.e. a minor (*Afikei Yam* vol. 2 §40).] 2)
 Generally, a criminal is not executed unless he receives a "legal warn-
 ing" in advance. (For a full definition of "legal warning," *hasraah*, see
 Baraisa at the bottom of 40b and notes 28 and 29 there.) One aspect of
 a legal warning is that the criminal must declare, "I shall continue to
 perform the act even though I realize that I will be executed for it." But
 when a minor makes such a declaration, it is legally meaningless; he is
 simply too immature to comprehend the implications of this acknowl-
 edgement. Consequently, a minor is not subject to court-ordered
 execution. Rav Huna teaches that in spite of this, a minor who is
 pursuing his fellow may be killed (see *Rashi* and *Yad Ramah*). The
 Gemara will now explain the basis for Rav Huna's ruling.

26. Rav Huna differentiates between a criminal who is executed by the
 court and a pursuer. Although a criminal is not executed unless he was
 warned in advance and he acknowledged the warning, a pursuer may be
 killed without any warning in order to save the victim. Thus, although
 a minor cannot receive a legal warning, we may kill him in order to save
 the fellow he is pursuing (see *Rashi* and *Yad Ramah*).

27. *Oholos 7:6*. The first section of the Mishnah states that as long as
 [most of] a baby's head is still inside the mother, the baby may be
 dismembered to save the mother's life because a fetus does not have a
 [full-fledged] life. The Mishnah now continues that once a baby's head
 is outside the mother, the baby is considered born, and it may not be

the mother's body, אין נוגעין בו - WE MAY NOT TOUCH, i.e. kill, [THE BABY] to save his mother's life, לפי שאין דוחין נפש מפני נפש - FOR WE DO NOT PUSH ASIDE one person's LIFE ON ACCOUNT OF another person's LIFE.

Rav Chisda explains his challenge: ואמאי - But why not kill the child if his birth threatens the mother's life? רודף הוא - He is a pursuer! Apparently he may not be killed because he is a minor, and a minor is not killed even if he is pursuing someone to kill him.^[24] - ? -

The Gemara answers: שמי קהם - It is different there in the case of the baby's birth because [the mother] is being pursued by Heaven, i.e. the mother's life is being endangered by the natural phenomenon of childbirth.^[25] Thus, even if a pursuer who is a minor may be killed, as Rav Huna maintains, still a baby may not be killed during childbirth in order to save its mother.^[26]

The Gemara adduces proof to Rav Huna's position (that a pursuer may be killed without a legal warning): ניקא קטוע ליה - Let us say that [the following Baraisa] supports the reasoning of [Rav Huna]: רודף שקהה רודף אחר - If a PURSUER WAS PURSUING HIS FELLOW Israelite SO AS TO KILL HIM and someone witnesses the pursuit, אוקר לו - HE SHOULD TELL [THE PURSUER], ראה שישוראל הוא ובן ברית - "SEE THAT [THE PERSON] you are pursuing IS AN ISRAELITE AND A MEMBER OF THE COVENANT."^[27] שפך דם -

האדם באדם דמו וישקר - AND THE TORAH HAS STATED: WHOEVER SHEDS THE BLOOD OF MAN, BY MAN SHALL HIS BLOOD BE SHED. - אקרה חורה העל דמו של זה קדמו של זה - The witness then continues, "In this verse SCRIPTURE IS SAYING: SAVE THE BLOOD OF THIS intended victim BY shedding THE BLOOD OF THIS PURSUER; I will therefore kill you unless you halt your pursuit."^[28] Now, a warning is legally meaningless unless the offender acknowledges it,^[29] yet this Baraisa does not mention that such an acknowledgment must be made. This supports Rav Huna's position that a pursuer may be killed without a legal warning.^[30]

The Gemara dismisses the proof: והוא רבי יוסי ברבי יהודה היא - It might be that this Baraisa is reflecting the view of R' Yose the son of R' Yehudah, as it was taught in a Baraisa: רבי יוסי ברבי יהודה אוקר - R' YOSE THE SON OF R' YEHUDAH SAYS: הקר אין צריך התראה - A LEARNED PERSON DOES NOT REQUIRE A legal WARNING in order to be punished for a transgression, לפי שלא ניתנה התראה אלא - BECAUSE the law requiring a legal WARNING WAS GIVEN ONLY FOR the purpose of DISTINGUISHING BETWEEN UNINTENTIONAL AND INTENTIONAL DEEDS and not to fulfill a Biblical decree.^[31] According to this, it is never necessary for the person being warned to acknowledge the warning. Thus, the above Baraisa (which omitted any mention of the pursuer's acknowledgment) reflects this view of R' Yose. The Baraisa might well agree, however, that a pursuer is not subject to execution unless he was warned in advance.

NOTES

forbidden to abort a baby when the life of the mother is not in danger (see Tosafos above, 59a לכה ר"ה and to Chullin 33a אחר ר"ה; Mahari' vol. I §97; Chavos Yair §31; Noda BiYehudah vol. II, Choshen Mishpat §59 וראמנו ר"ה; Igros Moshe, Choshen Mishpat vol. II §69).]

Rashi questions the Mishnah's rule (that one life may not be sacrificed to save another) from an incident recorded in II Samuel 20. In that incident, Yoav, King David's general, ordered a town harboring the rebel Sheva ben Bichri to surrender him for certain execution, and threatened to destroy the town if they failed to comply. The residents of the town indeed surrendered him, in effect sacrificing his life, in order to save the town! Rashi suggests two answers. First, Sheva's life was not being sacrificed to save others, because he was surely doomed to die, no matter what. Even if he had not been surrendered, Yoav would have found him and executed him along with the other residents of the town, who had ignored the threat. Since Sheva was doomed to die in any case, it was permitted to surrender him to save the lives of others. Alternatively, Sheva was rebelling against King David [which was a capital offense. Hence, he actually deserved to die, and that is why the town surrendered him to Yoav] (cf. Yad Ramah and Meiri at length; see also Rash to Terumos 8:12 and Chidushei R' Reuvein to Bava Kamma 13:4 והשתא ר"ה).

28. This refutes Rav Huna's statement that a minor should be killed to prevent him from committing murder.

29. See Rambam, Hil. Rotzeiach 1:9.

30. Because the baby is not willfully pursuing the mother to kill her; he is a mere participant in the natural birth process. Since the baby is not a willful pursuer, it may not be put to death once it has a full-fledged life of its own, i.e. when most of its head is out of the mother's body. (Cf. Rambam ibid., Tosafos R' Akiva Eiger to Ohalos 7:6 and Chidushei R' Chaim HaLevi to Rambam ad loc.; see also Aruch LaNer for the Talmud Yerushalmi's answer to our Gemara's question.)

31. I.e. he is not an apostate (see Tosafos; see also Magen Avraham to Orach Chaim 189:1).

32. Genesis 9:6.

33. Rashi explains how this Gemara interprets the verse. The "ב" prefix of the word באדם can mean on account of as well as by. According to the former interpretation, the verse means: Whoever [is attempting to] shed the blood of a man, on account of that man his blood shall be shed. In other words, if someone is seen pursuing his fellow in an attempt to kill him, the pursuer may be killed in order to save the fellow.

[Aruch LaNer notes that the Gemara below (73a) cites a different verse as the source that a pursuer may be killed, and the Gemara above (57b) derives a different law from our verse. Consequently, Aruch LaNer concludes that our Gemara quotes this verse as an allusion to the law of a pursuer, but the actual source for the law is the verse cited on 73a.] See also above, note 14.

34. See note 25 above; see also Gemara above, 40b-41a.

35. Although the Baraisa indicates that a full-fledged legal warning is not required, it does suggest that the witnesses warn the pursuer to stop ("see that your intended victim is an Israelite" etc.) in the hope that this will deter the pursuer, thereby saving his life and the life of his victim (Yad Ramah; see also Maharsha).

36. There is a fundamental Tannaic dispute as to why a criminal must be legally warned in order to be liable to execution. According to the Sages, the legal warning requirement is simply a Biblical decree; they expound a verse to be teaching that the offender must be warned about the severity of his act and he must acknowledge that he intends to sin in spite of this (see 40b-41a and note 25 above). R' Yose, however, rejects the Sages' exposition. According to him, a legal warning is given to deprive the offender of the claim that he thought the act was permitted. Thus, if the offender is learned, we may assume that his transgression was intentional even if he was not warned, because a learned person knows which acts are forbidden. Hence, a learned person requires no legal warning (see Rambam, Hil. Sanhedrin 12:2 and Kesef Mishneh).

There are two practical differences between the Sages and R' Yose: 1) According to R' Yose, a learned person needs no legal warning because he already knows which acts are forbidden. According to the Sages, however, any offender - learned or not - requires a legal warning by Biblical decree. 2) According to R' Yose, it suffices to apprise the offender that his act is forbidden and will result in execution; the offender need not acknowledge the warning. According to the Sages, however, acknowledgment is required by Biblical decree (see Rashi).

Given the above, we conclude that the Baraisa quoted to support Rav Huna's position (that a pursuer needs no legal warning) in fact provides no conclusive proof. It could be that the Baraisa does not require acknowledgment because it follows the view of R' Yose, i.e. that acknowledgment is never needed, but it does require that a pursuer be legally warned before he is killed (contrary to Rav Huna's position).

Misfnah The previous Mishnah taught that a burglar may be killed because he poses a threat to the occupant of the house he enters. The coming Mishnah cites other scenarios where a criminal is killed to prevent him from perpetrating a foul deed:

ואלו הן שעשילין אותן בנקשן - These are those whom we save from sinning at the cost of their lives
 הרודף את חברו להרוג - One who pursues his fellow to kill him, ואתר נזקר - or one who runs after a male to sodomize him ואתר נעצרה המאורקה - or after a betrothed *naarah* to violate her.¹

The Mishnah now provides a partial list of those who may not be killed to prevent them from sinning:
 אבל הרודף אתר בעמה - But when one pursues a beast for the purpose of sodomy, ונתער עבודה זרה - or one is about to engage in idol worship, ואתר בנקשן - we may not save any of these people from sinning at the cost of their lives.²

Gemara A Baraisa provides the Scriptural source for our Mishnah's ruling:

הט רבנן - The Rabbis taught in a Baraisa: מניין לרודף אתר - FROM WHERE DO WE KNOW THAT IF SOMEONE PURSUES HIS FELLOW TO KILL HIM, שנייתן להצילו בנקשו - that [THE FELLOW] SHOULD BE SAVED AT THE COST OF HIS [PURSUER'S] LIFE? תלמוד לומר, לא תעמד על-דם רעה - SCRIPTURE TEACHES: DO NOT STAND BY THE BLOOD OF YOUR FRIEND but rather save him.³

The Gemara objects:
 והא להכי הוא דאמרי - But does [the verse] really come to teach this law of our Mishnah? האי מיבעי ליה לכרתיה - This cannot be, because we need this verse to teach a different law that was taught in a Baraisa: מניין לרואה את חברו שחוט טובע בנהר - FROM WHERE DO WE KNOW THAT IF ONE SEES HIS FELLOW DROWNING IN A RIVER, או חיה גוררתו או לקטין באין עליו - OR if he sees A WILD BEAST RAVAGING [A FELLOW] OR BANDITS COMING TO attack HIM, שהוא חייב להצילו - THAT HE IS OBLIGATED TO SAVE [THE FELLOW]? תלמוד לומר, לא תעמד על-דם רעה - SCRIPTURE TEACHES: DO NOT STAND BY THE BLOOD OF YOUR FRIEND, but

rather save him from death. According to this Baraisa teaches the general obligation to rescue another from death. How do we know, though, that one should pursue to rescue his victim?

The Gemara concludes:
 אין הכי נמי - Indeed it is so; this verse does not tell pursuer may be killed.⁴

The Gemara returns to its original question:
 ואלא ניחא להצילו בנקשו מנין - But then from where derive that [a fellow] should be saved at the cost of [pursuer's] life? אתר נזקר מעצרה המאורקה - derived through a *kal vachomer* argument from a betrothed *naarah*.⁵ המאורקה שלא בא אלא למנוחה - whose [pursuer] is to blemish her,⁶ אמרי חיה נזקת ניחא להצילה בנקשו - states that she should be saved at the cost of [the life, רודף אתר חברו להרוג - then in a case where one much more so should the fellow be saved at the cost of pursuer's life!⁷

NOTES

1. That is, we may kill a person and thus save him from committing certain transgressions (*Rashi*; cf. *Rambam, Commentary to the Mishnah*, and *Yad Ramah*). The Gemara below exegetically derives this law from several verses.
 [The forthcoming Gemara indicates that we kill a pursuer in order to protect his intended victim. For this reason, *Rambam* and *Yad Ramah* render the first clause of our Mishnah: *These are [the victims] whom we save at the cost of [their pursuers'] lives*. *Rashi* agrees in principle that we kill a pursuer to save his victim. Nevertheless, he maintains that our Mishnah expresses the law from the perspective of the pursuer (i.e. saving the pursuer from sinning) rather than from the victim's perspective (i.e. saving the victim). Apparently, *Rashi* interprets the Mishnah as he does because the Mishnah's first clauses must parallel the last ones. These clauses cannot focus on the victim since it discusses victimless crimes (Sabbath desecration and idolatry). Therefore, the first clause does not express itself in terms of the victim either (see, however, *Tosafos* להצילו דיהוה and *Binyan Shlomo*; see also gloss to *Noda BiYehudah Tinyana, Choshen Mishpat* §60 for further discussion of why a pursuer is killed).]
 2. For a definition of a betrothed *naarah*, see 71b note 24. Our Mishnah states that we kill a pursuer who wants to sodomize a male or violate a betrothed *naarah*, because these are examples of severe sexual crimes that debase and humiliate the victim. However, we also kill a man who is pursuing any *ervah* (i.e. a woman forbidden to him on pain of excision or execution) to prevent him from violating her. Presumably, our Mishnah chooses the specific examples of sodomy and adultery with a betrothed *naarah* because the Torah alludes to these two cases more directly, as the Gemara will explain.
 In short, we kill a pursuer to prevent him from sinning in either of the following two situations: 1) When he is trying to kill someone and 2) when he wants to force someone to commit a severe sexual crime that will debase and humiliate the victim (e.g. he is pursuing a man to commit sodomy or a betrothed *naarah* to commit adultery). A Baraisa below will cite a Scriptural source for the above ruling (see *Rashi* and *Yad Ramah*).

teaching the following principle: A pursuer may not be killed from committing a capital crime if that crime would not kill the victim.
Rashi explains why our Mishnah illustrates the above principle: the three specific sins of sodomizing a beast, Sabbath desecration, and idol worship. Sodomy with a beast could have been confused with serious sexual crimes that involve a human victim, where the victim is indeed killed to prevent the crime. The Mishnah therefore tells us we may not kill a pursuer to prevent him from sodomizing a beast because no human victim is involved. The Mishnah also forbids Sabbath desecration and idol worship, because there is a Tannaic view that we in fact kill a person to prevent committing these sins (see 73b). For this reason, our Mishnah states its opinion that we may not kill such a person (*Rashi* *Leviticus* 19:16).
 5. This implies that you may kill your friend's assailant if that assailant takes to save your friend.
 6. Our Gemara's conclusion seems difficult to understand in light of the first Baraisa that it quoted. How can the Gemara conclude that the verse *do not stand by the blood of your friend* teaches not to kill a pursuer, when the Baraisa quoted at the beginning of the Gemara explicitly states that it does? See *Toras Chaim, Arach* and *Margaliyos HaYam* for some possible resolutions.
 7. *Kal vachomer*, an a fortiori argument, is one of the thirteen rules of Biblical hermeneutics. Here, it involves the following relative stringency: a relatively lenient case (rape) certainly applies in a more serious case (murder).
 8. In that the rape would demean and humiliate her (*Rashi* *Leviticus* 19:16).
 9. *Tosafos* object to the *kal vachomer*, because it seems to assume that murder is a more severe crime than raping a betrothed *naarah*. In fact, *Tosafos* argue, that such rape is punishable with the most severe form of execution, whereas murder is punished with a more lenient form! *Tosafos* answer that the relative stringency applies in a more serious case (murder).

IF SHE BECOMES PREGNANT SHE MAY NO LONGER EAT TERUMAH.⁸ IF THE EMBRYO WAS CUT IN HER WOMB SHE MAY EAT.⁹ IF¹⁰ A PRIEST HAD INTERCOURSE WITH THE DAUGHTER OF AN ISRAELITE, SHE MAY NOT EAT TERUMAH. [EVEN IF] SHE BECOMES PREGNANT SHE MAY NOT EAT.¹¹ IF, HOWEVER, SHE GAVE BIRTH TO A CHILD SHE MAY EAT.¹² THE POWER OF THE SON IS THUS GREATER THAN THAT OF THE FATHER.¹³

A SLAVE, BY HIS COHABITATION, DEPRIVES A WOMAN¹⁴ OF THE PRIVILEGE OF EATING TERUMAH¹⁵ BUT NOT AS HER OFFSPRING.¹⁶ HOW?—IF THE DAUGHTER OF AN ISRAELITE WAS MARRIED TO A PRIEST OR THE DAUGHTER OF A PRIEST WAS MARRIED TO AN ISRAELITE, AND SHE BORE A SON BY HIM, AND THE SON WENT AND VIOLATED A BONDWOMAN WHO BORE A SON BY HIM, SUCH A SON IS A SLAVE;¹ AND IF HIS FATHER'S MOTHER WAS AN ISRAELITE'S DAUGHTER WHO WAS MARRIED TO A PRIEST, SHE MAY NOT EAT TERUMAH;² BUT IF SHE WAS A PRIEST'S DAUGHTER AND MARRIED TO AN ISRAELITE SHE MAY EAT TERUMAH.³

A BASTARD DEPRIVES A WOMAN⁴ OF THE PRIVILEGE OF EATING TERUMAH AND ALSO BESTOWS THE PRIVILEGE UPON HER.⁵ HOW? IF AN ISRAELITE'S DAUGHTER WAS MARRIED TO A PRIEST OR A PRIEST'S DAUGHTER WAS MARRIED TO AN ISRAELITE, AND SHE BORE A DAUGHTER BY HIM, AND THE DAUGHTER WENT AND MARRIED A SLAVE OR AN IDOLATER AND BORE A SON BY HIM, SUCH A SON IS A BASTARD; AND IF HIS MOTHER'S MOTHER WAS AN ISRAELITE'S DAUGHTER WHO WAS MARRIED TO A PRIEST, SHE MAY EAT TERUMAH;

(8) The embryo causes its mother's disqualification. V. *supra* 67b. (9) Immediately. And the same law applies where the embryo was born dead. (10) Cur. edd., 'he was'; BaH, 'behold'. (11) An embryo in the womb cannot confer upon its mother the privilege of eating *terumah*, as deduced from *bera* in his house (Lev. XXII, 12). V. *supra* 67b. (12) By virtue of the existence of a son.

(13) While the latter, as a violator or seducer, cannot confer the privilege, the son can. (14) If she is a priest's daughter entitled to eat *terumah*. (15) As explained *supra* 68b. (16) If the slave is the offspring of a priest's daughter who was married to an Israelite now dead, he does not deprive her of the right of returning to the house of her father again to eat *terumah*. V. *infra* for further explanation.

a (1) The child of a bondwoman, though of an Israelite father, is deemed a slave, as deduced from Ex. XXI, 4. (2) If her husband and her son (the father of the slave) are dead. Though the son of a son (like a son) confers upon his grandmother the right of eating *terumah* (v. *infra* 70a), the offspring of a union between an Israelite and a bondwoman is not regarded as the legitimate son of his father but as the child of his mother. (3) The slave not being regarded as legitimate offspring (cf. *supra* n. 2) to deprive her of the privilege. (4) If she is a priest's daughter entitled to eat *terumah*. (5) If she was the daughter of an

BUT IF SHE WAS A PRIEST'S DAUGHTER WHO WAS MARRIED TO AN ISRAELITE SHE MAY NOT EAT TERUMAH.

A HIGH PRIEST SOMETIMES DEPRIVES A WOMAN⁴ OF HER RIGHT TO EAT TERUMAH. HOW? IF A PRIEST'S DAUGHTER WAS MARRIED TO AN ISRAELITE AND SHE BORE A DAUGHTER BY HIM, AND THE DAUGHTER WENT AND MARRIED A PRIEST AND BORE A SON BY HIM, SUCH A SON IS FIT TO BE A HIGH PRIEST, TO STAND AND MINISTER AT THE ALTAR. HE ALSO BESTOWS UPON HIS MOTHER⁶ THE PRIVILEGE OF EATING TERUMAH, BUT DEPRIVES⁷ HIS MOTHER'S MOTHER⁸ OF THIS PRIVILEGE. THE LATTER⁹ CAN RIGHTLY SAY, '[MAY THERE] NOT [BE ANOTHER] LIKE MY GRANDSON THE HIGH PRIEST WHO DEPRIVES ME OF THE PRIVILEGE OF EATING TERUMAH'.

b GEMARA. [Here]¹ we learn what the Rabbis taught: If an imbecile or a minor married and died, their wives are exempt from *halizah* and from levirate marriage.²

IF AN ISRAELITE HAD INTERCOURSE WITH THE DAUGHTER OF A PRIEST SHE MAY STILL CONTINUE TO EAT TERUMAH. IF SHE BECOMES PREGNANT SHE MAY NO LONGER EAT. Since she may not eat when she is definitely with child, precaution should be taken against the possibility that she might be with child!¹ Did we not learn, 'They⁴ must be kept apart⁵ for three months, since it is possible that they are pregnant'⁶—Rabbah son of R. Huna replied: In respect of genealogy⁷ precautions were taken;⁸ in respect of *terumah* no such precautions were considered necessary. But was no such precaution considered neces-

Israelite who was married to a priest now dead. (6) Even after the death of his father. (7) As the living offspring of an Israelite. (8) Though his own mother is dead. Were it not for his existence, his grandmother would have regained her original right of eating *terumah* on the death of her daughter. V. *infra* 87c. (9) Lit., 'this'.

b (1) In the statement that an imbecile's betrothal neither confers upon a woman, nor deprives her of the right of eating *terumah* (v. our Mishnah), thus affirming that an imbecile's *kinuy* has no validity. (2) *Tosef. Yeb. XI, infra* 96b, 112b; because there is no validity whatsoever in the *kinuy* of his marriage. (3) And should, in consequence, be forbidden to eat *terumah* immediately after intercourse had taken place. Why then was it stated, IF AN ISRAELITE HAD INTERCOURSE . . . SHE MAY STILL CONTINUE TO EAT TERUMAH? (4) Women who have been exchanged for one another. [V. the Mishnah, *supra* 33b]. (5) I.e., they are forbidden to cohabit with their husbands. (6) *Supra* 33b. Similar precaution, then, should have been taken here also! (7) The Mishnah cited is concerned with safeguarding the status of a legitimate child by taking the necessary precautions to distinguish him from the illegitimate. (8) In the interests of the purity of family life special precautions were necessary.

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sary in respect of *terumah*? Surely, it was taught: [If a priest said]⁹ 'Here is your letter of divorce [which shall become effective] one hour before my death', she is forbidden to eat *terumah* at once!¹⁰ —In fact,¹¹ said Rabbah son of R. Huna, precautions were taken c in respect of legitimate marriage,¹ but in respect of illegitimate intercourse² no such precaution was considered necessary.³ But was such precaution, taken in respect of legitimate marriage? Surely, it was taught: If a priest's daughter was married to an Israelite who died,⁴ she may perform her ritual immersion⁵ and eat *terumah* the same evening!⁶ —R. Hisda replied: She performs the immersion but may eat *terumah* only until the fortieth day. For if she is not found pregnant⁷ she never was pregnant;⁸ and if she is found pregnant,⁹ the semen, until the fortieth day, is only a mere fluid.¹⁰ Said Abaye to him: If so,¹¹ read the final clause: If the embryo in her womb can be distinguished she is considered to have committed an offence¹² retrospectively!¹³ —The meaning is that¹⁴ she is considered to have committed an offence¹⁴ retrospectively¹⁵ to the fortieth day.¹⁶

It was stated: Where a man cohabited with his betrothed in the house of his [future] father-in-law, Rab said: The child is a bastard; and Samuel said: The child is a *shethuki*.¹⁷ Raba said: Rab's view is reasonable in the case where the betrothed woman was suspected of illicit relations with strangers.¹⁸ Where, however, she is not suspected of illicit relations with strangers the child is ascribed

to him.¹⁹ Said Raba: Whence do I infer this? From the statement IF, HOWEVER, SHE GAVE BIRTH TO A CHILD SHE MAY EAT. For how is this to be understood? If it be suggested to refer to a woman who is suspected of illicit relations with strangers, why should she be allowed to eat *terumah* when she bore a child!¹ Consequently it must refer to a woman² who was suspected of illicit relations with him only but not with strangers. Now, if there³ where she is forbidden to the one as well as to the other,⁴ the child is regarded as his⁵ how much more so⁶ here⁷ where she is forbidden to all other men and permitted to him. Said Abaye to him: It may still be maintained that Rab is of the opinion that wherever she is suspected of illicit relations with him,⁸ the child is deemed to be a bastard ever where she is not suspected of such relations with others. What is the reason? Because it is assumed that as she exposed herself to the man who betrothed her so she exposed herself to others also; but our Mishnah⁹ deals with the case where both of them¹⁰ were imprisoned in the same gaol.¹¹

Others say: Where he⁸ cohabited with her, no one disputes that the child is regarded as his; but the statement made was in the following form. Where a betrothed woman became pregnant, Rab ruled: Such a child is a bastard; and Samuel ruled: The child is a *shethuki*.¹² Raba said: Rab's view is reasonable where the woman was not suspected of illicit relations with him,³ but was suspected

(9) To his wife, the daughter of an Israelite. (10) Suk. 23b, Git. 28a, Ned. 3b; since the priest might die at any moment while the woman was indulging in the consumption of *terumah*. This proves that in respect of *terumah* also precautions were taken. (11) Withdrawing from his first reply.

c (1) Of which the Mishnah (*supra* 33a) cited speaks. (2) The subject of the section of our Mishnah under consideration. (3) V. *supra* 33a. (4) On the same day, after one act of cohabitation. (5) Prescribed in Lev. XV, 18. (6) No precaution being taken against the possibility that the woman may have conceived and thereby remained forbidden to eat *terumah*. (7) On the fortieth day. (8) And is allowed to eat *terumah* after that day also. (9) On the fortieth day. (10) And cannot be regarded as a child. (11) That prior to the fortieth day the woman is not regarded as pregnant. (12) Lit., 'injured'. (13) She pays compensation for any *terumah* she may have consumed by returning to the priest the principal plus a fifth. V. Lev. XXII, 14. (14) Lit., 'what'. (15) If

she ate *terumah* at any time after the fortieth day. (16) But not earlier. She pays no compensation for any *terumah* she may have consumed prior to the fortieth day. (17) Only a doubtful bastard. V. Glos. and Kid. 69a. (18) Lit., 'when she is spoken of in a low voice from (by) the world'. (19) The man who betrothed her.

d (1) There is no proof that the priest was the child's father. (2) Lit., 'but no'. (3) In our Mishnah. (4) To the violator and seducer as well as to any other man, for it is forbidden to have intercourse with a woman without betrothal. (5) The violator's or seducer's. (6) Should the child be regarded as the son of the man who betrothed her. (7) The case where the man cohabited with his betrothed. (8) The man who betrothed her. (9) Which regards the child as the son of the violator or seducer. (10) The man and the woman. (11) Where no intercourse with any other man was possible. (12) Only a doubtful bastard. V. Glos. and Kid. 69a.

the completion of the eightieth day (as for the birth of a female child).

Mishnah 7

If a woman abort on the fortieth day [after ritual immersion], she need have no consideration regarding it as for [human] young;¹ [if she abort]² on the forty-first day, she must abide [in uncleanness for the number of days enjoined] both³ for a male [child] and for a female [child] and also for a menstruant. R. Ishmael⁴ says, [If she abort] on the forty-first day, she must abide [in uncleanness for the enjoined number of days] for a male [child] and for a menstruant, but if on the eighty-first day, she must abide [in uncleanness for the enjoined number of days] both⁴ for a male [child] and for a female [child] and for a menstruant, too, for a male [fetus] is completely formed after forty-one

משנה ז
המפלת ליום ארבעים, אינה חוששת ילד; ילום ארבעים ואחד, תשב ילד, ולקבה ולגדה. רבי ישמעאל אומר, יום ארבעים ואחד, תשב ילד ולגדה. יום שמונים ואחד תשב ילד ולקבה ולגדה, שהזכר נגמר לארבעים ואחד, והקבה לשמונים ואחד. יוחכמים אומרים, אחד בריית הזכר ואחד בריית הקבה. והנה לארבעים ואחד.

days but a female [fetus is fully formed only] after eighty-one days. But the Sages⁵ say, The formation of the male [fetus] and the formation of the female [fetus] are alike, both⁶ [are perfectly formed] after forty-one days.

1 Popular pronunciation לולד. The embryo does not become perfect before the completion of the forty-first day. 2 The sex is indeterminate, nor is it known whether the abortion was that of a child. 3 See the preceding Mishnah. 4 His view is rejected. 5 Their opinion is accepted. 6 Literally the former and the latter, this and that. Less idiomatic והנה.

CHAPTER 4

פרק ד

Mishnah 1

משנה א

The daughters of the Cutheans¹ are [considered unclean as] menstruant from their cradle, and the

בנות יפותים נדות מעריסתן, ונהפכות ימטמאים משכב תחתון

for the number of prescribed days] both for a male [child] and for a female [child].³ [If a woman bore twins], one of undeterminable sex and a [normal] male, or one of double sex and a [normal] male, she must abide [in uncleanness for the number of days prescribed] both* for a male [child] and for a female [child]; [if she bore] one of undeterminable sex and a [normal] female, or one of dual sex and a [normal] female, she abides [in uncleanness for the number of days prescribed] for a female [child] only. [If the embryo] came out in pieces or with feet foremost, when the greater part thereof has come forth [then only] is it accounted born. If it issued forth in its ordinary manner,⁴ when the greater part of its head has come forth [only then is it deemed born]. And what is [meant by] 'the greater part of its head'? When its forehead has come forth.

אנדרוגיגוס חזר, תשב ילד ולקבה; טומטום ונקבה, אנדרוגיגוס ונקבה, תשב ילד ולקבה ולגדה. יצא מחותך או מסורס, משיצא רובו הרי הוא כילד. יצא כדרך, עד שיצא רוב ראשו. איזהו רוב ראשו? משיצא פדחתו.

1 Or undeterminate, indeterminate, indeterminate. 2 טומטום a person of unknown or doubtful sex or whose genitals are hidden or undeveloped. אנדרוגיגוס, androgynous,* hermaphrodite, man-woman, a person of double sex. See 41f. 3 Compare Mishnah 3 of this Chapter. 4 i.e., sound and head foremost. *Greek ἀνδρόγυνος.

Mishnah 6

משנה ו

[If a woman] aborted, but it is not known what sex [the abortion] was, she must abide [for the prescribed number of days in uncleanness]¹ both for a male [child] and for a female [child]. If it be not known whether it was [human] young² or not,³ she must abide [in uncleanness for the prescribed number of days] both for a male [child] and for a female [child] as well as for a menstruant.⁴

המפלת ואין ידוע מה הוא, יתשב ילד ולקבה. אין ידוע אם ילד יהיה, אם ילאו, תשב ילד ולקבה, וילגדה.

1 See 17 and Mishnah 2 of this Chapter. 2 Popular pronunciation לולד. 3 Popular pronunciation לא. 4 She observes fourteen days in uncleanness as for a female child; and then when she saw blood she observes forty days from the outset in uncleanness, and then requires immersion in the ritual bath, but she is still not

ובהלכות גזילות³⁸ נמי אשה עוברת דידעינן דאי לא אכלה מתעקר ולדה, אף על גב דאמרינן ספק בו קיימא הוא ספק נפל, שפיר דמי למיתן לה. ורב יצחק בן גיא³⁹ אמר לאו בדיעה דידן תליא מלתא אלא בדיעה דידה, ובדעתה תליא מלתא. דמשוריה גותנין לה וכחולה דמיא. ומסתברא כבעל הלכות, שאם אמרה צריכה אני פשיטא דמאכילין אותה, אלא אפילו דראו אותה מתאוה לאותו הריח ופניה מוריקות * מאכילין אותה, חוששין לעיקור. ודקאמר נמי משום סכנת וולד שמע מינה אפי' ליכא למיתש * מחללין. והיינו דגרסינן בשלהי פרק קמא דערכין⁴⁰: אמר רב נחמן אמר שמואל האשה שישבה על המשבר ומתה בשבת מביאין סכין ומקרעין את כרסה ומצויאין את הולד. פשיטא, מאי עביד מחתך בבשר הוא. אמר רבא לא נצרכה אלא להביא סכין דרך רשות הרבים. מאי קא משמע לן דספיקא מחללינן שבתא, תנינא ספק חי * ספק מת ספק עכו"ם ספק ישראל מפקחינן. מהו דתימא התם הוא דהוה ליה חזקה דחיותא אבל הכא דלא הוי ליה חזקה דחיותא מעיקרא אימא לא קא משמע לן. ואע"ג דתנן אהלות פרק ז'⁴¹ האשה המקשה לילד מביאין סכין ומחתיכין אותו * אבר אבר⁴², יצא ראשו * אין נוגעין בו * שאין דוחין גפשי מפני נפש. אלמא דמעיקרא דלית ביה משום הצלת נפשות, ותנן נמי גבי תיבוק בן יום אחד והורגו חייב⁴³, ודקא בן יום אחד אבל עובר לא, וקרא נמי כתיב דמשלם דמי ולדות⁴⁴, אפילו הכי לענין שמירת מצות מחללין עליו * אמרה תורה⁴⁵ חלל עליו שבת אחת שמא ישמור שבתות הרבות, הלכך אפי' בהצלת עובר פחות מכן ארבעים יום שאין לו חיות כלל, מחללין עליו, כדעת בעל הלכות, ואיכא דסבירא ליה שאין מחללים משום נפלים * אלא עוברת שהריחה חששא דמנתה בנה, היא, שכל המפלות בחזקת סכנה, וטעמא דידשבת על המשבר שמחה, טעמא אחרינא הוא דכיון שמתה הרי הוא כילוד, לאו ירך אמו הוא, ולא בדידה תליא אלא חי הוא ודלת נבעלת בפניה, ליכא⁴⁶ אלא דלא הוי ליה חזקה דחיותא, וספק נפשות לחקל *.

כב. א. 34 כריתות יג, א. 35 מחות מחות, ספ: פחות. 36 ליתכל, ספ: תיבוק. 37 ספ: הוותרה לה לעוברת פחות. 38 הלכות גזילות, סוף הלכות יום הכפורים. 39 ספ (אמצע ה' יורכ"פ). 40 ערכין ז, א"ב. 41 אהלות ז, ו. 42 ספ: מתחבין את הולד במעיה ומצויאין אותו אברים אברים מפני שחייב טורחין לחייו. 43 ראשון, כן בסנהדרין עכ"ב. ובספנה דאהלות: רובו. 44 נדה סד, א. 45 ישאח כא, כב. 46 כבת קנא, ב: אמרה תורה חלל עליו שבת אחת כרי שיכסור וכו'. וכן הוא ביומא פא, ב, ובסאלתא א בראשית, ולגירסת רבינו, שמא יטמור" לא מצאתי סמוכין. 47 ליכא, ליתא בכשון הרשב"ן (מובא בר"ן). 48 כתובות סא, א"ב. 49 רב המנוגא, ספ: רב הונא.

ברכה קסו, יז): אם איתא דמחללין את השבת אפילו על העובר שאמו חיה אע"ג שאין ישראל חייב עליו מדמשלם דמי ולדות, מאי קשיא לתוס', ומי הקיש איסור רציחה לפקוח נפש, הכא כתיב מכה איש, והכא כתיב אשר יעשה האדם, ועובר בכלל, אלא פשיטא לרבתינו בעלי החושי דכמו דעובר אינו איש הכי נמי אינו בכלל אדם ואין מחללין עליו את השבת, וספק נפשות להקל. והר"ן (אחרי שהביא את כל דברי רבינו) מעיר: ואין צורך לכל הדקדוקין הללו, דהא לא משכחת סכנת עובר בלא סכנת עוברת, ולא סכנת עוברת בלא סכנת עובר, דמפלת בחזקת סכנה היא, וכן פירש רש"י דיל דאם אינה אוכלת שנייה מסוכנין, — וכן כתב הרא"ש אות יג, ובקרבן נתנאל כתב: ולא ידעתי מאי קא קשיא ליה, וכי לא ימצא אשה שמחזקת בנפלים ולא הזיק לה כל פעם כלל, וכן העתיק הטור בסימן תריז: תסתכן היא או הולד, ודלא כבית יוסף שנחקשה בהו, טורגינא דמלכא. מושיב המון לפני השרים (כגירסת רש"י — רש"י כתובות סא, א). דחוור אנפיה, פניו ועפיים שנתאוה למאכל (שם), בפומיה.

ספק חי. מי שנפלה עליו מפולת ספק הוא שם ספק אינו שם. ספק חי ספק מת, ספק עכרים ספק ישראל, ספקחין עליו את הגל (גמרא שם), ומחתיכין אותו, דכל זמן שלא יצא לאויר העולם לאו נפש הוא וניתן להורגו ולהציל את אמו (רש"י סנהדרין עב, ב). אין נוגעין בו, להורגו דהנה ליה כילוד ואין דוחין נפש (הולד) מפני נפש (האשה), מחללין עליו, כן צ"ל כמו דאיתא ברין לר"ף, ופי' מחללין על העובר, וכן מוכח ממה שכתב רבינו מיד אחר זה: אמרה תורה חלל עליו... ובפ"ש: מחללין עליו, וזו סליאה, שהרי דברי רבינו מוסבים פה על העובר ולא על האם (ולפלא על הג"ם שלא תיקן פה, כמו דאיתא ברין), שאין מחללין משום נפלים, היא דעת התוספות בגדה מד, א, ד"ה איתו, שכתבו: ואם תאמר אם תמצוי לומר דמותו להורגו (לעובר) בבטן אפילו מתה אמו ולא הוי כמונה בקומסא, אמאי מחללין עליו את השבת שמביאין סכין דרך רשות הרבים לקרוע האם וכר". והעיר הנצי"ב (העמק שאלה

The Gemara objects:

מְצוּה הַבָּאָה בְּעִבְרָה הֵיא – This is a mitzvah brought about through a transgression!³⁹ – ? –

The Gemara answers:

מְצוּה דְרַבִּים שְׂאֵנִי – A communal mitzvah, such as the recitation of *Kedushah* by a *minyan*, is different. Although the fulfillment of a personal mitzvah would not justify emancipating one's slave, the fulfillment of a communal mitzvah does justify this.⁴⁰

The Gemara cites another statement by R' Yehoshua ben Levi regarding a *minyan*:

וְאָמַר רַבִּי יְהוֹשֻׁעַ בֶּן לֵוִי – And R' Yehoshua ben Levi said: לְעוֹלָם יִשְׁבּוּ אָדָם לְבֵית הַתְּפִלָּה – A person should always awake early to go to the synagogue, קָרִי שִׁזְזָה וְיִמְנָה עִם עֲשָׂרָה – so that he should merit to be counted among the first ten. הַרְשָׁאוֹנִים – For even if one hundred people come after him, קָבַל עָלָיו שְׂכָר כּוֹלֵם – he receives the reward of all of them.

The Gemara asks:

שְׂכָר כּוֹלֵם קָלָא דְעִתָּךְ – Would it really enter your mind that he receives the reward of all of them, and they do not receive any reward at all?

The Gemara therefore emends the previous statement:

וּנְתַתֵּן – Rather, say that R' Yehoshua ben Levi said: אֵלָא אִמָּא – They give him a reward equal to that of all of [the one hundred who come later].⁴¹

The Gemara cites a related ruling regarding a *minyan*:

אָמַר רַב הוּנָא – Rav Huna said: תְּשַׁע וְאָרְוֹן מִצְטַרְתִּין – Nine men and the ark containing the Torah scrolls combine to complete a *minyan*.

An objection is raised:

אָמַר לִיה רַב נַחְמָן – Rav Nachman said to [Rav Huna]: נְקִיָּה הֵיא – But is the ark a person? How can it complete the *minyan*?

Rav Huna therefore emends his statement:

תְּשַׁע וְאָרְוִין מִצְטַרְתִּין – Rather, Rav Huna said: אֵלָא אָמַר רַב הוּנָא – Nine men who appear as ten combine to complete a *minyan*.

The Gemara elaborates:

כִּי מִקְטַנֵּי – Some say that nine people appear as ten when they are gathered together, for in that situation it is difficult to discern their exact number. וְאִמְרֵי לָהּ – And some say that nine people appear as ten – כִּי מִקְדָּרֵי – when they are spread out, for in that situation they create the impression of being greater in number.⁴²

The Gemara continues with a similar ruling regarding the three-man *zimun* quorum:

אָמַר רַבִּי אָמִי – R' Ami said: שְׁנַיִם וְשָׁבַת מִצְטַרְתִּין – Two men and the Sabbath combine to complete the three-man quorum; i.e. when two men eat together on the Sabbath, they qualify as a quorum for *zimun*.

Rav Nachman raises an objection similar to his previous one:

אָמַר לִיה רַב נַחְמָן – Rav Nachman said to [R' Ami]: וְשָׁבַת נְקִיָּה הֵיא – But is the Sabbath a person? How can it complete the quorum?

R' Ami therefore emends his statement:

אֵלָא אָמַר רַבִּי אָמִי – Rather, said R' Ami: שְׁנֵי תַלְמוּדֵי חֻקִּים – Two Torah scholars who sharpen each other intellectually with their debates in halachah combine to complete the three-man *zimun* quorum.⁴³

The Gemara provides examples of Torah scholars to whom this rule applies:

מַחֲוֵי רַב חִסְדָּא – Rav Chisda motioned to indicate: כְּגוֹן אֲנִי וְרַב שֵׁישֵׁשׁ – This applies to scholars such as me and Rav Sheishesh. מַחֲוֵי רַב שֵׁישֵׁשׁ – Rav Sheishesh motioned to indicate: כְּגוֹן אֲנִי וְרַב חִסְדָּא – It applies to scholars such as me and Rav Chisda.

The Gemara cites another ruling regarding the ten-man quorum:

אָמַר רַבִּי יוֹחָנָן – R' Yochanan said: שְׁנַיִם וְשָׁבַת מִצְטַרְתִּין – Two Torah scholars who sharpen each other intellectually with their debates in halachah combine to complete the three-man *zimun* quorum.

NOTES

39. I.e. why is reciting *Kedushah* more important than keeping one's slave? [The Gemara's objection is especially pointed in view of the fact that the mitzvah of reciting *Kedushah* is merely Rabbinic, whereas the mitzvah to keep a slave is Biblical! (see *Rosh*).]

40. A mitzvah that is performed by a large group of people overrides a commandment that applies only to an individual, even where the public mitzvah is Rabbinic and the personal commandment is Biblical. R' Eliezer was thus allowed to free his slave in order to complete a *minyan* and enable the public to fulfill the Rabbinic mitzvos of reciting the *Kaddish* and *Kedushah* prayers, although in the process he violated his personal Biblical mitzvah of retaining the slave (*Rosh*).

Others explain the Gemara's answer as meaning that in this particular case the prohibition against freeing a slave did not apply, because the Torah forbids one to emancipate his slave only if he does so as a gesture of kindness. One may emancipate his slave to repay a favor or to derive any reasonable benefit. Therefore, R' Eliezer was permitted to release his slave in order to complete the *minyan* (*Ramban to Gittin* 38b, found in the addendum to the standard edition of *Ramban; Rashba and Ran to Gittin*). One might ask, however, if so it should be permitted to free the slave even to enable oneself to perform a personal mitzvah! Why did the Gemara contend that it would be a mitzvah brought about by a transgression? (*Magen Avraham* 90:30, *Turei Even to Chagigah* 2b). The answer is that if the only benefit to accrue would be the performance of a personal mitzvah, there would be no profit in freeing the slave, for the mitzvah would be the result of having committed a prohibition. And passively neglecting the mitzvah and refraining from the prohibited act would therefore be preferable to actively committing the prohibited act and performing the mitzvah! The emancipation is justified – and thus permitted – only where it will lead to the performance of a public mitzvah (*Chasam Sofer*

Hagahos HaBach and *Maharatz Chayes* for further discussion of our Gemara.

41. See *Maharsha*, who explains why this is so.

42. See *Beurei HaGra*, who explains in a fascinating manner that Rav Huna meant this originally, and his statement that nine men and an ark combine was an allusion to the rule that nine men who appear as ten combine.

43. Rav Nachman does not object to this ruling, as he did to the previous ones. The reason is that his difficulty with the earlier rulings lay in the fact that the same nine men who do not form a quorum when they are in a room that has no ark do form a quorum when they are in a room with an ark; and the same two men who cannot join in *zimun* on a weekday can do so on the Sabbath. Since the ark and the Sabbath replace the missing person, Rav Nachman asked, "Is the ark a person?" and "Is the Sabbath a person?" In this case, however, R' Ami rules that the two Torah scholars who sharpen each other's minds always have the status of three ordinary people. It would not be fitting to ask, "Is the sharpening of minds a person?" since the point is not that the act of sharpening replaces a person, but that these two themselves are considered like three (*Tzlach*). [Perhaps R' Ami's reasoning can be further explained on the basis of the Gemara's expression above (top of 45b) that three "minds" are needed in order to join in a collective blessing to Hashem. That is, a collective blessing is appropriate when it represents no less than three different perspectives of Hashem's bountifulness. When two Torah scholars who hone each other's minds eat together, there are in effect three "minds" present, since each of them is constantly prodded by his fellow to new insights. Thus, they are qualified to join in the collective blessing.] See also *Tos. HaRosh*.

Beurei HaGra explains that R' Ami meant this originally, and he mentioned two men and the Sabbath because it was originally common

The Mishnah stated further:

וְהַשֵּׁשֶׁת שֶׁאֵכַל כְּזוֹת מִקְּנוֹת – OR if THE WAITER ATE LESS THAN AN OLIVE'S VOLUME of bread . . . we do not join in *zimun* on account of him.

The Gemara asks:

מִשֵּׁשֶׁת – It is obvious that anyone who eats less than an olive's volume is ineligible to complete the *zimun* quorum.^[32] – ? –

The Gemara concedes that the ruling is unnecessary, but explains why the Mishnah included it:

אֵינִי דִּיְהֵא רִישָׁא בְּנוֹת – Since [the Mishnah] taught in its first clause that if a waiter ate an olive's volume of bread he completes the quorum, הֵנָּה שִׁיבָא כְּזוֹת מִקְּנוֹת – it taught the parallel law in the latter clause, that if the waiter ate less than an olive's volume he cannot complete the quorum.

The next clause of the Mishnah stated:

וְהַגֵּרִי אִין מְזַמְּנִין עִלָּיו – OR if A GENTILE ate with us, WE DO NOT JOIN IN *ZIMUN* ON ACCOUNT OF HIM.

The Gemara asks:

מִשֵּׁשֶׁת – It is obvious that a gentile cannot complete the *zimun* quorum, since the mitzvah of *zimun* does not apply to him. – ? –

The Gemara answers:

בְּגֵר שֶׁל – What are we dealing with here? הֵבֵא בְּמֵאֵי עֲסָקִין – With a proselyte who was circumcised but did not immerse himself in a *mikveh*. The Mishnah informs us, by stating that he cannot join in *zimun*, that his conversion is not yet effected. רַבִּי זֵירָא – For R' Zeira said in the name of R' Yochanan: לְעוֹלָם אֵינוֹ גֵּר עַד שִׂימּוֹל וְיִטְבּוֹל – One can never become a proselyte unless he circumcises and immerses in a *mikveh*.^[33] – But as long as he does not immerse, he is still a gentile.

The Mishnah continued:

נְשִׂים וְעֲבָדִים וְקַטְּנוֹת – If WOMEN, SLAVES OR MINORS ate bread, WE DO NOT JOIN IN *ZIMUN* ON ACCOUNT OF THEM.

The Gemara cites a ruling regarding minors:

רַבִּי אֲסִי – Rav Assi^[34] said: קָטָן הַמוֹשֵׁל בְּצִדְקָתָהּ – Although they said – We may join in *zimun* on account of an infant resting in a cradle.

An objection is raised:

נְשִׂים וְעֲבָדִים וְקַטְּנוֹת – But we learned in our Mishnah: נְשִׂים וְעֲבָדִים וְקַטְּנוֹת אִין מְזַמְּנִין עִלָּיהֶם – If WOMEN, SLAVES OR MINORS ate bread, WE DO NOT JOIN IN *ZIMUN* ON ACCOUNT OF THEM. – ? –

The Gemara answers:

– הוא דאמר רבי יהושע בן לוי – [Rav Assi] stated his ruling in accordance with a teaching of R' Yehoshua ben Levi. דאמר רבי יהושע בן לוי – For R' Yehoshua ben Levi said: קָטָן הַמוֹשֵׁל בְּצִדְקָתָהּ אִין מְזַמְּנִין עִלָּיו – Although they said – We may not join in *zimun* on account of an infant resting in a cradle, אָבַל עוֹשֵׂן אוֹתוֹ קָטָן לְעִשְׂרָה – we may nevertheless make him an accessory to nine adults in order to complete a quorum of ten.^[35]

A related statement is cited:

וְאָמַר רַבִּי יְהוֹשֻׁעַ בֶּן לֵוִי – And R' Yehoshua ben Levi said: תְּשֻׁעָה – Nine adult Jewish males and a Canaanite slave combine to complete a ten-man quorum, i.e. a *minyán*.^[36]

This ruling is challenged:

מִיְהֵיבֵי – They challenged R' Yehoshua ben Levi on the basis of the following Baraisa: מַעֲשֵׂה בְּרַבִּי אֱלִיעֶזֶר – There once occurred AN INCIDENT INVOLVING R' ELIEZER, שֶׁנִּכְנַס לְבֵית הַבְּרַכּוֹת – WHO ENTERED A SYNAGOGUE AND DID NOT FIND TEN men, the minimum number required to recite *Kedushah*, וְלֹא מָצָא עֲשָׂרָה – AND HE FREED HIS SLAVE AND COMPLETED the *minyán* of TEN WITH HIM. שֶׁחָרַר אִין – Evidently, by freeing his slave, he was indeed able to complete the *minyán*, לֹא – but without freeing his slave, he would not have been able to complete the *minyán*. This contradicts R' Yehoshua ben Levi's ruling that a slave can be used as the tenth man in a *minyán*. – ? –

The Gemara answers:

– תְּרֵי אַפְסָרִיכוֹ – In the aforementioned incident, they needed two to complete the *minyán*, for there were only eight men in the synagogue, and R' Eliezer had two slaves with him. שֶׁחָרַר חָד – He freed one slave, which gave him a total of nine adult Jewish males, וְנִקְיָה בְּתֵר – and discharged the mitzvah of reciting *kedushah* by using the other one to complete the *minyán*.

The Gemara questions R' Eliezer's justification for freeing his Canaanite slave:

– וְהָאֵמַר רַבִּי יְהוּדָה – But how could he do this? – וְהֵיכִי עָבִיד תְּבִי – Why, Rav Yehudah said: כָּל הַמְּשַׁחֵרֵר עַבְדוֹ עוֹבֵר בְּעֵשָׂה – Anyone who emancipates his Canaanite slave transgresses a positive commandment, שֶׁנֶּאֱמַר „לְעַלְמָא קָדָם תַּעֲבִדוּ” – for it is stated, regarding Canaanite slaves: you shall work them forever.^[37] – ? –

The Gemara answers:

– לִרְבֵּר מִקְּנָה שְׂאֵי – Freeing a slave for the sake of fulfilling a mitzvah is different.^[38]

NOTES

32. [Why, the Mishnah's first clause stated that if the waiter ate an olive's volume he can join in *zimun*, and the obvious implication is that if he ate less than that amount he cannot join in *zimun*!] The reason one must eat at least an olive's volume (*kezayis*) to join in *zimun* is that one who eats less than that measure is not required to recite *Bircas HaMazon* (see *Rashba* to 48a or 48a). Alternatively, partaking of less than a *kezayis* of food is not classified as "eating" (see 39a note 1), and thus, one cannot respond with *Blessed is [He] of Whose we have eaten etc.* (*Pri Megadim*, in *Eishel Avraham* 197:4; see *Mishnah Berurah* 197:8). Cf. *Chazon Ish*, *Orach Chaim* 30:11. See also *Rashash*.

33. The Gemara in Tractate *Yevamos* (46b) derives from the "conversion" process of the Israelites at Mount Sinai that immersion is necessary to effect conversion. The verse states (*Exodus* 24: 8): *And Moses took the blood and sprinkled it upon the people*. Since there is an oral tradition that wherever sprinkling is required, it must be preceded by immersion, we can infer that immersion occurred as well (*Rashi*). [The conversion of a woman is effected by immersion alone, whereas that of a man by circumcision and immersion. In all cases, the process

commandments. See *Yevamos* 46a-47b, where these matters are discussed in detail.]

34. The text has been emended in accordance with *Mesoras HaShas* and *Rashi* סניף.

35. So that they may join in the special version of *zimun* that is recited when ten people eat together (see *Mishnah* below, 49b). Rav Assi's ruling was issued only in regard to the ten-man *zimun* [and does not contradict the Mishnah's ruling, which means that a minor is ineligible to complete the quorum for a three-man *zimun*] (*Rashi*; cf. *Tzlach*).

36. [Canaanite slaves are converted to Judaism, but they differ from the standard convert in that they do not attain the full status of Jewish males. They are subject only to those commandments which pertain to women (see *Chagigah* 4a), and are not eligible to form a *minyán* on their own. R' Yehoshua ben Levi teaches that a Canaanite slave is nevertheless valid as the tenth member of a *minyán*, when the first nine members are adult males.]

37. *Leviticus* 25:46.

38. The mitzvah of reciting *kedushah* overrides the mitzvah to keep a

סימן מז

יום א' עקב תשי"ב, פה אוברגאו ע"י לצרן.
כבוד ידידנו האברך השלם בחו"י הה"ג ר' רוד שרופ שליט"א.
אחדשה"ט וש"ת באה"ר.

אשר נספיק כפי מעיל לפי משיב בעניי בהשגחה שנת הלי
חייג סי' ל"ז דלהלכה לפנין פקויז דוחה זיומה פיה
שני הטעמים אמה הן טעם דוחי זכס ולא שימיה זכס,
יכן טעם דכדי שיממור שנהות ברצה, חה הטעם דמחללק
שנה על השוצרין לדעה זכ"ג, ונקטינן כן, וכנודו הביא
ר"ח לדרך זכ.

ומסופק כפי לפי צפנת חונק המצנחה, אשר כידוע פורסם
מרפאים ממחיס, לזג אשר תחילה קליטה הורע
זה היתה אפשריה צניוכס ועשו תחילה תקליטה בחון
(בחופן שיכה מיהר עפ"י הלכה) בחנחי המצנחה, ואח"כ
הוכנסו בתקליטם החאים חזרה לגוף האם, והשאלה אם
בחנחים מוקדמים חלב יש לזך לחלל שנה כדי להמשיך
ההפתחותם אם נותר והספק זכח אם גם זכ"ג אמר
הזכ"ג דמחללק על השוצרין, ומטעם שיממור שנהות ברצה,
דכסנרתו דגם לפני מ' יום חייג דכמיה צעלמא נחשב
מכ"מ מחללק, וכמזכיר ברמב"ן ור"ן לדעה זכ"ג, או דלמא
דוקא שכבר כס בגוף האם, חייג שפדיון לפני מ' יום
יכר משאיכ הכא עדיו חסר מעשה להביא לגוף האם אח"כ
מעל והאריך קלה.

לדעתי צרור דגם לזכ"ג חסור לחלל שנה זכ"ג, דמיכ לה
כחיר זכ"ג לחלל שנה על השוצרין חפילו לפני מ'
יום חייג דמיה צעלמא הוא חלל צעוצר חון מעי האם,
דחייג דטעם וחי זכס עדיו ליכא, מכ"מ הוא דפסקינן
עליו שמתר לחלל שנה גם זה נכנה על היסוד שיכה עכ"פ
חייג בני קיימא פיי שרוב ולדוח בני קיימא כס ורק
מישט מפילות וכיבמה ל"ז ושס קיי"ע, כרי דברז מצרר
לזו שיכה בן מלוח וס"ל לזכ"ג דוכי וחי זכס עכשו
ליכא דעדן אינו צגדר זכ, וגם ישראל אינו מלוח על
השוצרין מכ"מ כיון דנתברר מדיו רוב שיכה בן מלוח גם
לחלל עליו שנה מותר.

משא"כ זרע זה שנהון המצנחה שאינו נכלל כלל צרוב זה
דרוב השוצרין בני קיימא כס, דצוחנים רק מנחה
חון יכה בהפתחות הדברים, וגם אינו דומה למשיב בעניי
צשו"ה שנת הלי חייג סי' קמ"ח לענין ולדי אינקובטור
צחודש כחי וכיו"צ דמותר לחלל עליהן שנה דסם כהבתי
דגם לרמב"ן דעמ"י החולקים על זכ"ג מותר דיון דעכשו
עכ"פ חי והספק רק אם אפשר להמשיך חיותו, וכלי
אינקובטור אם אצרו שלמים ונגמר בכל גורם גשור להמשיך
חיותו, וכן פסק כלל שלא לחלל יעשיה, משאיכ צני"ד דעדיו
חפי אינו צגדר תחילה עיבור, [וגם אם פעה יתפתחו
דברים אלו עד שיכה אחו גדול מלוח צנסיין כני"ל,
מ"מ דכ"מ יועב כני"ל].

מתוס' צ"מ קו"ד פ"ב שהעור כפי שכתבו דכ"ה דכחי
חלי זלי"ע זכס של האלמנה חייג שחי' ככ"ה כיון
משום שחי צרור לו שחייכו לכך חי מותר מפני פקוח נפש,
והניא מה שגם צאדה שאינו חי איכא גדר פקויז, מה זה

f

דמיון דכחם ככר חי לפני זה חי וקיים כחוד האדם, ואם
אפשר להחזיר לו חיותו חון לך פקוח נפש גדול מה, ושיין
בעירובין ז' פ"ב כהם הוא דכ"ל חזקה חיותה, חבל הכא
דלה כ"ל חזקה חיותה אימא לא קמ"ל, כרי מזכיר חילוק
כני"ל, ואפ"כ דכן האלמנה חנד ככר חזקה חיות, מכ"מ פ"י
צרור של חלי זלי"ע כמשיב הוסי' דינו כאלו חי, ואפ"כ
דמסקנה הגמי שח דחייג דליה כאן חזקה חיות מחללק, ככר
מזכיר צפוסקים דשאני האם דכעידור ככר נגמרי, או דעכ"פ
שם עיבור ולד עליו משאיכ כני"ל.

וד"י מקום עוד להאריך בנושא זה, אך כותב אני צח"ל

דדני ידידו דוש"ת, מצפה לדחמי ה'

סימן מח

כבוד ידידי הרב האברך השלם טובא בתורה הרה"ג
ר' רוד שרופ לא"ט.
אחדשה"ט וש"ת באהבה.

זה חיוב שבוטח קבלתי מהכני היקר, ואפ"כ בקצור, כשאלה
חופשי שבנסיעתו צשיק נפגע בחלוצה וכדלה לנית
חולים צמ"ב חנוש (מרוזן) חיוי חיי שעה שגבולים צייתר
האם לעפל צו צשיק כאשר כרזן הטעוול בחילול צייק.

וכב' העיר ממשיב בעניי צספרי חיה סי' קכ"א, וצמשיב
צחייג סי' ל"ז, ועוד כהנהני קלה מה צגליון שנת
הלי חיה שס, וכנה כפי רוב לחלל חלכב זאה צמחלקה
הפמיא והכני"ל אריח פרי"ס שכי"ע דכנה הפמיא שס צמי
שהי חייב מיהה צזמן מיהה ציי"ד חמן כריגחו אחרי כשנה,
יבשנה נפל עליו גל כי הפמיא דמסקחין עליו דכלא חון
ממחון צשנה וחיי שעה עכ"פ יש, וצכני"ל שס כי ד"ל
דכהורס חסב פל חיי שעה חיינו למי שהסב פל חייס שלו,
ולחפוקי זה דגברא קטילה ממחה רשעתו, ולא בדיק מרזעי
צכמה דקב דקוי"ל יר"ד סי' קני"ה דאין משלח אותו מן
כבור, וכפי שפע דלהפמיא ח"ל לשפוט דחכ כמחודע הוא
מלואות דין ד' מיהות שאפ"פ שלה צפל ד' מיהות דין ד'
מיהות לא צעל, ואיכ הלא י"ל צזכ דין ד' מיהות שההנכ"ב
לפניו, דככל זאה חון חנו מקבלים זה לרינא וכלכב דספק
פקוח נפש וחייבים להנילו, ורק לדברי צכ"ל מלוד כפי
דאין להנילו דרשב כזה גברה קטילה דחיי חייג חייס,
או דכוונת צכני"ל משום דכבר ילא פסק מיהה מפי
הצני"ד חייג צר מיהה הוא צאמה, ומכ דלא נקפל צשנה
הוא משום דחיסור שנה מעכ"פ, ולפי"ז צני"ד גם לצכ"ל
כיון דעדיו לא נפסק עליו דין מיהה, שפיר חייב עדן
חייס, ושפיר משקחין עליו, חפילו מרוזן להיי שעה, כנפסק
צשו"ע סי' שכי"ע.

הנה משיב צכוונה צכני"ל דדוקא משום שכבר נפסק עליו
דין מיהה ציי"ד ושי"ז כוחזק גברה קטילה (ועיין
עירובין ז' ע"א) חון זה נכון דכ"ה צכני"ל אחי עלב משעם
דלא גרע מרזעי צכמה דקב דלא משלח, חכ אינו משום
שנפסק עליו דין מיהה ח"ל משום רשעתו לחוד, דרשב
חסור להנילו.

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Rabbis maintained that since Scripture made a double mention of healing there will be liability also for Loss of Time which is compared to Healing. R. Judah, however, maintained that there will be no liability for Loss of Time as Scripture excepted this by [the term] 'only';⁹ to which the Rabbis¹⁰ might rejoin that 'only' [was intended to exclude the case] where the ulcers that grew were not caused by the wound. But according to the Rabbis mentioned last¹⁰ who stated that whenever there is liability for Loss of Time there is liability for Healing, whereas where there is no liability for loss of Time there could be no liability for Healing, why do I require the double mention of Healing?—This was necessary for the lesson enunciated by the School of R. Ishmael, as taught: 'The School of R. Ishmael taught: [The words] "And to heal he shall heal"¹¹ [are the source] whence it can be derived that authorisation was granted [by God] to the medical man to heal.'¹²

Our Rabbis taught: Whence can we learn that where ulcers have grown on account of the wound and¹³ the wound breaks open again, the offender would still be liable to heal it and also pay him for [the additional] Loss of Time? Because it says: *Only he shall pay for the loss of his time and to heal he shall heal.*¹⁴ [That being so, I might say] that this is so even where the ulcers were not caused by the wound. It therefore says further 'only'. R. Jose b. Judah, however, said that even where they were caused by the wound he would be exempt, since it says 'only'. Some say that [the view of R. Jose that] 'even where they were caused by the wound he would be exempt' means altogether from any [liability whatsoever],¹⁵ which is also the view of the Rabbis mentioned last. But others say that 'even where they were caused by the wound he would be exempt' means only from paying for additional Loss of Time, though he would be liable for Healing. With whom [would R. Jose b. Judah then be concurring in his statement]? With his own father.¹⁶

The Master stated: '[In that case I might say] that this is so even

where the ulcers were not caused by the wound. It therefore further "only". But is a text necessary to teach [that the exemption] in the case where they were caused not by the wound?—It may be replied that what is meant by 'caused not by wound' is as taught: 'If the injured person disobeyed his medical advice and ate honey or any other sort of sweet things, the honey and any other sort of sweetness are harmful to a wound and the wound in consequence became *gargutani* [scabby], it may have been said that the offender should still be liable to [con] to heal him. To rule out this idea it says "only".¹⁷ What is the meaning of *gargutani*?—Abaye said: A rough seam.¹⁸ How can he be cured?—By aloes, wax and resin.

If the offender says to the injured person: 'I can personally as your healer',¹⁹ the other party can retort 'You are in my way like a lurking lion.'²⁰ So also if the offender says to him 'I will bring you a physician who will heal you for nothing', he might object saying 'A physician who heals for nothing is worth nothing.' And if he says to him 'I will bring you a physician from a distance' might say to him, 'If the physician is a long way off, the eye will be blind [before he arrives].'²¹ If, on the other hand, the injured person says to the offender, 'Give the money to me personally I will cure myself', he might retort 'You might neglect yourself and thus get from me too much.' Even if the injured person says to him, 'Make it a fixed and definite sum', he might object and 'There is all the more danger that you might neglect yourself thus remain a cripple], and I will consequently be called "A blind ox."

A Tanna taught: 'All [the Four Items]²² will be paid [even in the case where Depreciation [is paid independently]. Whence this ruling be deduced?—Said R. Zebid in the name of R. Scripture says: *Wound for wound*,²³ to indicate the payment of even in the case where Depreciation [is paid independently].²⁴

(9) I.e., the first Tanna. (10) Under the name of Sages.

(11) Cf. *supra*, n. 56. (12) And it is not regarded as 'flying in the face of Heaven'; v. Ber. 60a. (13) V. *supra*, n. 25. (14) Ex. XXI, 19. (15) Even from Healing.

(16) I.e., R. Judah who orders payment for Healing but not for Loss of Time.

(17) Why indeed would liability have been suggested?

(18) (1) Implying that the liability is qualified and thus excepted in such and similar

cases. (2) Rashi: 'wild flesh'. (3) And need thus not employ a medical (4) I.e., 'I am not prepared to trust you'; cf. B.M. 101; B.B. 168a. (5) [? Strashun; Rashi: 'If the physician is from far he might blind the eye'; or 'A physician from afar has a blind eye', i.e., he is little concerned about the fate of his patient.] (6) I.e., Pain, Healing, Loss of Time, and Degradation (7) Ex. XXI, 25. (8) *Supra* 16b.

... speak of the disaster threatening him - דלא לתתח פומיה לשטן - so that he does not give Satan an opening. (41) דאמר ריש לקיש - For Reish Lakish said, - וכן תנא משמיה דרבי יוסי - and a Baraisa was also taught in the name of R' Yose: לעולם אל יפתח אדם פיו לשטן - ONE SHOULD NEVER GIVE SATAN AN OPENING. אמר רב יוסף - Rav Yosef said: מאי קראה דכתיב - What verse supports this idea? The following verse, which is written: (42) "במקצת קדום היינו לעמרה דמינו" - Had not Hashem left us a small remnant we would have been like Sodom; we would have resembled Gomorrah! (43) מאי אהדר להו נביא - And what does the prophet say in rejoinder to them in the very next verse: "שמעו דברייה קציני קדם וגו'" - Hear the word of Hashem, O chiefs of Sodom, etc.; give ear to the teaching of our God, O people of Gomorrah. (44)

The prayer to be recited upon leaving a bathhouse: אמר רב - When he exits, what does he say? בי נסיק מאי אומר - Rav Acha said: מודה אני לקנייך ה' אלהי שהצלתני מן האור - I thank You, Hashem, my God, for having spared me from the fire.

A related incident: R' Abahu entered a public bathhouse. The floor of the bathhouse gave way beneath him, falling into the pit. A miracle occurred to him: He was left standing on a pillar - אהרזיש ליה ניקא - and he saved one hundred and one men with his one limb. (45) אמר - [R'

Abahu] said: הוייך דרבך אהא - This is the kind of danger to which Rav Acha was referring. (46)

A prayer to be recited when maintaining one's health: (47) הנכנס להקו דם - (For Rav Acha said:) (48) (דאמר רב אחא) - One who goes to have his blood let says: ויהי רצוני מלקנייך ה' אלהי שיהא עסק זה לי לרפואה ותרפאני - May it be Your will, Hashem, my God, that this therapy should serve me as a remedy, and that You should heal me, כי אל רופא - for You are God, the faithful Healer, and it is Your remedy that is genuine, נאמן אמה ורפואתך אמת - לטי שאין דרבך - for it is not the place of people to seek medical treatment, but so have they accustomed themselves. (49)

Abaye takes exception to the last line: אבאי אינש הכי - A person should not say this, that it is not the place of people to engage in medical treatment, because it is not true. דתני דבי רבי ישמעאל - For a Baraisa was taught in the academy of R' Yishmael: ויפא, - AND HE SHALL PROVIDE FOR HEALING, i.e. he should pay the victim's medical expenses. (50) מנאן שותנא רשות לרופא - FROM HERE we may derive THAT AUTHORITY WAS GIVEN TO A PHYSICIAN TO OFFER TREATMENT. (51)

The prayer to be said after receiving treatment: אמר - When he stands up, what does he say? בי קאי מאי אומר - Rav Acha said: ברוך רופא חנם - Blessed are You ... the free Healer. (52)

NOTES

- 41. [Literally: one should not open one's mouth to Satan.] By such speech he gives Satan, who functions as the prosecutor in the Heavenly Tribunal, an opening to demand that he be punished as he himself admits that he deserves (see *Maharsha* to *Kesubos* 8b).
- 42. *Isaiah* 1:9.
- 43. I.e. we would have been deserving of being utterly destroyed, as was Sodom (*Rashi* to *Isaiah* *ibid.*).
- 44. This illustrates the principle of Reish Lakish and R' Yose: By confessing that they were deserving of punishment as the Sodomites of old, the people gave the prophet an opening to label them *chiefs of Sodom*. In our case, the explicit reference to one's possible death in the bathhouse raises an issue that would better be left unmentioned.
- 45. That is, R' Abahu held on to one or two men with his arm, and each man held on to another, forming a chain of one hundred and one men (*Rashi*).
- 46. This is why Rav Acha said one is required to offer a prayer of thanksgiving for leaving a bathhouse safely (*Rashi*). The Gemara in *Kesubos* 62a records another version of this incident (see *Rashash*).
- 47. See *Magen Avraham* 230:6 and *Shaar HaTziyun* 230:8.
- 48. These three words are omitted from the text by *Gra* and other authorities.
- 49. I.e. people should not seek medical solutions to their health problems but should rather pray for Divine mercy (*Rashi*). [The Gemara immediately rejects this view.]
- 50. *Exodus* 21:19. The passage discusses two men who quarrel. One of them strikes and injures the other. Among other things, the aggressor is obligated to pay for the injured party's medical expenses.
- 51. Had authority not been granted to doctors, they might have been forbidden to practice. One would have said, if God struck this person with disease...

- decree? (*Rashi* to *Bava Kamma* 85a נרעה ר"ה). The verse therefore informs us that this reasoning is specious. It makes no difference whether the illness was brought about by a man or natural causes; in either case, a physician has the permission to heal (*Tosafos* *loc. cit.* ר"ה שניתנה).
- Indeed, once a physician is permitted to administer treatment, he fulfills a mitzvah by doing so (see *Nedarim* 41b; see also *Sanhedrin* 73a and *Rambam's Commentary to the Mishnah, Nedarim* 4:4; *Responsa of Rashba* I §413).
- Ramban* (to *Leviticus* 26:11 and in *Toras HaAdam, Inyan HaSakanah*) takes a somewhat different approach. He contends that in an ideal world, sick persons would turn to God and not to doctors to heal them. Thus, the Torah's permission is granted to the doctors and not their patients. The patients should really restrain themselves, but if they do approach a doctor, the Torah allows him to treat them.
- However, *Ramban* concedes, such a standard is reserved for a utopian society, a righteous generation who generally partakes of God's blessings bestowed upon their food, drink and health. The Torah recognizes, though, that a generation which is far from that pinnacle should not be discouraged from seeking medical treatment. *Birkei Yosef* (*Yoreh Deah* 336:2) states forcefully that nowadays one cannot rely on miracles, and an ailing person is duty-bound to act in accordance with custom and seek out physicians. To neglect to do so is almost prohibited conduct.
- [For further discussion of this issue, see the introduction of *Nishmas Avraham* to his commentary on *Yoreh Deah* 336. Among the sources he cites: *Ibn Ezra* to *Exodus* 21:19; *Responsa* of *Chasam Sofer, Orach Chaim* §177; *Kereisi U'Peleisi, Yoreh Deah* 188:5; *Responsa* of *Binyan Tzion* §111; *Responsa* of *Aunei Nezer, Choshen Mishpat* §193; *Chochmas Adam* 151:25; *Igros Chazon Ish* I §136; *Responsa* of *Yechaveh Daas* I §61.]
- 52. *Hagahos HaGra* cites another version: ברוך רופא חולים, *Blessed are You ... Who heals the sick. Rabbeinu Chananel's* version reads: רופא

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