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ETHICS IN CERTAIN HOLOCAUST RESPONSA:

THE LIFE FOR LIFE PROBLEM

DOUGLAS KAHN

Thesis Submitted in Partial Fulfillment of
Requirements for Ordination

1979

Hebrew Union College-Jewish Institute of Religion
New York, New York

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HEBREW UNION COLLEGE - JEWISH INSTITUTE OF RELIGION
New York School

Report on the Rabbinic Dissertation Submitted by Douglas Kahn
in Partial Fulfillment of the Requirements for Ordination

ETHICS IN CERTAIN HOLOCAUST RESPONSA:
THE LIFE FOR LIFE PROBLEM

Mr. Kahn's thesis proceeds on three levels. Primarily it is a study in Jewish law as it relates to an ethical issue: sacrificing one life for another life. Here the author has carefully analyzed the five major relevant classic texts on which later respondents drew for their decisions. And he elaborated his study of the Holocaust decisions with such fragments of information as we have about other such Holocaust discussions and decisions. Secondarily, the author subjected the same case material to an ethical analysis, proceeding then to compare and contrast the halachic approaches and decisions in given cases with what he believes to be the ethical values therein. While he finds much similarity between the two, some significant differences also emerge. This then leads him to some speculation about the oft-heard suggestion that contemporary Jewish ethics should be done primarily out of the sources of Jewish law, a position he finds valuable but not thoroughly satisfactory in the light of this research, albeit of a limited nature. He concludes that a new approach to the ethics of Judaism remains to be fashioned in our day.

This is an extraordinarily rich thesis, in depth, in range and in suggestiveness. Meticulous attention to detail in legal matters is the basis for abstract ethical speculation of a high order. The history of Jewish law is encompassed with ease yet the contemporary ethical consciousness is livingly present. On every one of the multiple levels of exposition, study, discernment, interpretation, comparison, conclusion and speculation, Mr. Kahn distinguishes himself and does honor to the College's educational program. He shows a rare promise for work in this difficult area of modern Jewish thought and he should receive every encouragement to do further work in it. It is with very great pleasure indeed that I recommend this thesis for acceptance.

Respectfully submitted,

Eugene B. Borowitz
Rabbi

April 1979

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CHAPTER I

INTRODUCTION

Both Judaism and general ethics view life as a good. Furthermore, both maintain that man has a responsibility toward his fellow man. Thus, as a rule, life ought to be preserved and one ought to be able to count on his fellow man to assist in its preservation.

Yet, from time to time, situations arise in which human life can only be preserved at the expense of other human life. In such situations, the only way to uphold the values of life and responsibility toward one's fellow man is to save life in a way that guarantees the destruction of other life. It is not difficult to choose one life over another if one life clearly has a greater claim on life than the other. Such is the case with self-defense or defense of another. It is universally recognized that one has an ethical and legal right to kill a willful aggressor in order to prevent the killing of an innocent human being - precisely because a person who intentionally seeks to destroy another's life is judged to have a lesser claim on life.

However, there are many situations in which the choice of who should live and who should die is not so clear because none of the people whose lives could be sacrificed has committed an act for which he is deserving to die according to any usual standard. For example, the Talmud contains several such situations: (1) A gang of non-Jews demands that a group of Jews hand over one of its members to be killed by the gang. Non-compliance will result in the death of the entire group of Jews.

Should the Jews comply if the person to be handed over has done nothing for which he is deserving to die? (2) Again, the non-Jewish authority orders a Jew to kill another Jew or else be killed himself. Should the Jew obey even when the person to be killed has done nothing to lessen his claim on life? (3) Two Jews are wandering in the desert with only sufficient water for one of them to drink and survive. If both drink, both will die. Should one drink, although it will cause the death of the other who has committed no act for which he could be judged deserving of death?

Agonizingly difficult situations such as these are known as the life for life problem. Because both life itself and the responsibility to preserve it are values of paramount importance in both Jewish tradition and ethical tradition, no problem poses as great a challenge to either system as does the life for life dilemma.

Jews, like all people, have been and will continue to be faced with life for life problems. But perhaps no other people has been faced with as many such situations, because it is a reality of Jewish history that the tyrannical powers which have oppressed the Jewish people have consciously sought to force the Jews to choose between lives. And the Nazis virtually institutionalized the idea that the Jews must choose who should live and who should die.

Many of the Nazi policies forced the Jews into the life for life dilemma. The Judenrate (the Jewish councils established by the Nazis) were given quotas to fill for deportation. They had to select from among the Jews of their particular ghetto who should live and who should die (by being deported). The resources distributed by the Nazis to the

Jewish communities (food, work permits, etc.) were purposely limited so that only a few could obtain them. The Jews themselves had to choose who would receive the resources (and live) and who would not, and as a result die. The Nazis had an official policy of collective responsibility. If a Jew escaped from his concentration camp, for example, the Nazis would select a large number of Jews to die in retaliation for the escape. Any Jew who sought to flee from the Nazis, thereby saving his life, knew that the saving of his own life would result in the sacrifice of tens of others who had to pay for his act with their lives. A more unofficial Nazi policy was to watch families agonize over the selection of who should live and die. Mothers or fathers would be ordered to select one child for deportation and one to remain with them. Finally, the overall Nazi policy of instituting the "Final Solution" against the Jews resulted in many types of life for life situations. As Jews desparately struggled to save themselves and their loved ones from arrest, round-ups, deportation, extermination, etc., they found themselves constantly locked into situations in which lives could only be saved through acts which would result in the sacrifice of other lives.

If the life for life problem poses the greatest challenge to the ethical and Jewish legal systems, then there could be no better examples of the systems' attempts to respond and give guidance than those cases which emerged from the most extreme of extreme situations - the Holocaust. It is precisely those life for life cases which occurred during the Holocaust, and which came before rabbis for <u>halachic</u> resolutions which are the focal point of this thesis.

The major goal of this thesis is to determine to what extent the

halachic solutions to the life for life problems faced by Jews during the Holocaust are ethical solutions. The primary sources for the thesis are the five Holocaust teshuvot known to this author which attempt to resolve the life for life problems faced by Jews during the Holocaust. (The process by which the author selected the teshuvot is discussed below.)

The first substantive chapter of the thesis examines the major Jewish legal precedents upon which decisions in life for life issues have always been based. As the classical halachic statements on the subject, these precedents form the basis not only for the legal discussion contained within the five teshuvot studied here, but also for any Jewish legal or ethical discussion which is concerned with this issue. The historical and legal background of these classic texts is studied in order to gain an insight into the original intent of these laws, the degree to which any of the laws are flexible, the applicability of these laws to the situations faced by Jews during the Holocaust, and any gaps which might exist within the laws themselves. The preliminary study of the major legal sources, in short, is necessary in order to understand the dynamics of the Holocaust teshuvot.

The second substantive chapter, then, contains a detailed examination of the teshuvot themselves. The legal reasoning employed within each responsum is studied in order to gain an insight into the application of the major legal sources to real situations, to identify implicit or explicit ethical issues arising from the discussion, and to compare the different approaches to the legal issues utilized by each respondent. In this chapter, each teshuvah is analyzed individually so that the reader

can be exposed to the style and legal approach taken within each given teshuvah.

The final substantive chapter consists of a discussion of the ethical issues which are implicit in or can be derived from the teshuvot. Since many of the ethical issues are common to more than one of the teshuvot, the material in this chapter is reorganized on the basis of ethical themes which run through the teshuvot. The study of the ethical issues is undertaken in order to be able to compare the process by which ethical solutions are found with the process by which halachic solutions are found, and in order to be able to compare the solutions themselves. This, in turn, will allow us to make some conclusions about the extent to which the answers found in the teshuvot are ethical.

In a sense, the thesis is an experiment toward a new way of doing Jewish ethics. Over the past fifty years, the decline of confidence in general ethics has resulted in a re-examination of the assumption that universal ethics is equivalent to Jewish ethics. This re-examination has been accompanied by a belief that it is important that one concern himself with authentically Jewish ethics and a belief that one cannot arrive at authentic Jewish ethics independently of the halachah.

Thus, while the major goal of the thesis is to determine what the halachic and ethical solutions are to the life for life problems faced by Jews during the Holocaust, the secondary goal is to determine how one can do Jewish ethics. The process employed in the fulfillment of the first goal (the comparative study of the halachic and ethical solutions to the issues), as well as the nature of the life for life issue (as a challenge to the halachic and ethical systems to provide guidance) lend

themselves to consideration of the secondary question. For the comparison will allow the author to generalize about the extent to which ethical values emerge from the halachic discussion as well as the extent to which Jewish values emerge from the ethical discussion. And the nature of the issue itself lends credence to the exercise because the life for life problem is a major test of both systems.

Before commencing the substantive discussion, it is important to mention a few words about the selection of teshuvot as the primary sources for the thesis and the author's search for relevant Holocaust teshuvot.

The author's interest in ethical issues and in the Holocaust led him to the decision to find a thesis topic which brought the two interests together. It was recommended to him that he take a look in two secondary works which survey the she'elot and teshuvot which emerged from the Holocaust. The two works are H. J. Zimmels' The Echo of the Nazi Holocaust in Rabbinic Literature and Irving Rosenbaum's The Holocaust and Halakhah. It was thought that from the she'elot which grew out of the disruption of normal Jewish life in Nazi-occupied Europe, the author would find ethical issues of interest. Furthermore, since the teshuvot were written in Hebrew, they could possibly serve as the primary sources for the thesis.

The author, as a result of his reading the two works, became fascinated with one particular ethical issue - the life for life problem. His own sense that the life for life problem was as difficult an ethical issue as could exist, his desire to read classical Jewish texts which addressed the problem, and his feeling that the life for life problem was at the core of the major ethical and historical debate concerning the

role of the Jewish councils during the Holocaust, all led this author to the conclusion that he wanted to focus his thesis on the life for life issue.

While Zimmels' and Rosenbaum's works were not particularly helpful in discussing the ethical issues which emerge from the life for life problem, since they tend to be defensive about the ability of the halachah to respond ethically to the moral crises faced by the Jews, this author would not have found his primary sources without their assistance.

Their books discuss the five Holocaust teshuvot on life for life problems which are analyzed in this thesis. The author sought out other teshuvot on the subject by leafing through the great majority of teshuvot collections which center on she'elot and teshuvot from the Holocaust. Ultimately he was unable to find any additional teshuvot concerned with the issue.

Even if there exist one or two more teshuvot on the subject which did not come to the author's attention, one cannot help but be surprised by the small number of teshuvot which address such a major and complex issue faced by many Jews during the Holocaust. It is particularly surprising in view of the fact that Zimmels' and Rosenbaum's works reveal that great numbers of teshuvot exist on issues related to personal observance of mitzvot and marital responsibilities. Indeed, the variety and number of Holocaust teshuvot are important testimony to the determination of many Jews to uphold their dignity and perpetuate Judaism in the face of Nazi attempts to destroy not only the lives of Jews, but the spirit of Jews.

So why are there so few teshuvot on our subject? This author has

considered several possibilities: (1) the respondents did not view the life for life issue as important as other issues which concerned the daily observance of the Jew; (2) the respondents were generally afraid to address the issue because they knew the halachah alone could not provide answers to such complex ethical questions; (3) the nature of life for life situations does not generally lend itself to the she'elot and teshuvot process. Either a life for life situation requires an immediate reaction, in which case there is no time to seek a teshuvah (and generally little desire after the fact), or it involves a decision of the leaders of the community who do not generally seek a teshuvah because they perceive it to be a "no choice" situation.

Whatever the explanation, we do have five teshuvot which expose us to the full range of life for life situations faced by Jews during the Holocaust - surrender of life, direct killing of life, redemption of life, and the saving of life. They are quite sufficient to expose us to the classical Jewish texts on which the discussions are based, to enable the author to study a variety of complete teshuvot, and to raise the ethical issues which must be addressed along with the halachic issues.

CHAPTER II

THE MAJOR LEGAL SOURCES

It is necessary to understand the Jewish legal background to the issue of life saved at the expense of other life before proceeding directly with an analysis of the specific Holocaust responsa on the subject. It is both fortunate and unfortunate that Jewish law has confronted in considerable detail agonizing life for life situations similar to those thrust upon the Jews during the Holocaust. It is fortunate because the authors of these Holocaust responsa had clear legal precedents upon which to base their decisions - even in the most extreme situation. It is unfortunate because the development of such legal precedents indicates that throughout its history, the Jewish people has repeatedly been at the mercy of tyrannical powers.

The emergence of these precedents, however, is due to more than the tyranny of foreign powers. It is also the result of two basic values inherent in the Jewish tradition: (1) that life is a good;[1] and (2) that all Jews have a responsibility to each other.[2] This commitment to life means that, as a rule, life is to be protected and preserved.[3] This commitment to the sense of Israel as a corporate entity means that, as a rule, individual Jews and the entire Jewish community are obligated to protect the rights and life of members of the community. Those situations in which life could only be preserved at the expense of other life undermined both commitments. Regardless of the decision made in each situation, life would still be sacrificed and the ability of all Jews to

be responsible for one another would be seriously questioned. Each life for life situation, then, dramatically challenged the Jewish value system. Accordingly, it was critical that each situation be confronted in the law.

This chapter will discuss those major Jewish sources which have attempted to resolve the difficulties in life for life situations: (1) a discussion in the Tosefta, Palestinian Talmud and Genesis Rabbah concerning the surrender of life to non-Jews; (2) a discussion in the Babylonian Talmud concerning the direct taking of another's life; and (3) a discussion in the Babylonian Talmud concerning the loss of life due to a situation of necessity.

These sources have been chosen for several reasons. Firstly, they represent the major legal sources cited and discussed in the Holocaust responsa considered in this paper. Each of these sources is prominent in at least two of the responsa. Secondly, these sources are considered classic texts; i.e., they have been at the center of many Jewish legal and ethical discussions. This partially explains their prominence in the responsa. Thirdly, each situation to be discussed here represents one of the major issues which needs to be resolved. Thus, through analysis of these sources, the issues of indirect killing (or collaboration), direct killing and inaction will be discussed. Finally, each situation also corresponds closely to a standard line of defense.[4] The surrender of life to non-Jews could be discussed to a large extent in terms of self-defense. The direct taking of another's life could be discussed in terms of duress. The loss of life through inaction could be discussed in terms of necessity. The discussion of these sources, then, should provide the best possible background with which to understand the responsa.

I. SURRENDER OF LIFE

Perhaps the single most important Jewish sources for the purpose of this paper are those which discuss the question of surrendering Jews to non-Jews to be killed by them. The reason they are of such great significance is that one of the great moral issues of the Holocaust is whether or not the Jewish councils should have complied with Nazi orders to surrender Jews to them for certain death, in attempts to save the remainder of the community. These sources deal with the identical problem faced by the Jewish councils. While only one of the responsa discussed in this paper deals directly with the question of surrender, it is known that discussions were held in many of the Jewish ghettoes of Nazi occupied Europe regarding whether or not Jewish law permitted the surrender of Jews.[5]

The Basic Teaching

The basic law regarding surrender is contained in a baraita.[6]

תני סיעות בני אדם שהיו מהלכין בדרך פגעו להן גוים ואמרו תנו לנו אחד מכם ונהרוג אותו ואם לאו הרי אנו הורגים את כולכם אפילו כולן נהרגין לא ימסרו נפש אחת מישראל ייחדו להן אחד כגון שבע בן בכרי ימסרו אותו ואל ייהרגו.

The first half of the teaching describes a situation in which non-Jews demand of a group of Jews that someone be handed over to them to be killed or else the entire group will be killed. The non-Jews evidently have nobody specific in mind, although it is possible that they seek someone specific but are not positive about the person's identity.[7] In such a case, the law is that even if all the Jews will be killed, nobody is to be surrendered. The second half of the teaching describes a situation in which somebody specific is demanded by the non-Jews. An

example is given of the case of שבע בן בכרי.[8] In such a situation, the law states "יתנו להן ואל יהרגו כולן." David Daube,[9] an outstanding jurist and biblical scholar, suggests, in his detailed study of the Talmudic texts on surrender, that the word יתנו can be translated in numerous ways. It might mean that they must hand over the specified person, should hand over the specified person or may hand over the specified person. The possibilities range from surrender of the man being something which the law tolerates to something which the law demands. At any rate, the second half of the teaching supports a policy of accommodation.

Daube argues that the first half of the teaching once stood on its own, without qualification. He believes the second half was introduced during the Hadrianic persecution. Daube bases part of his theory on the absolute phrase which closes the first half, "ואל ימסרו להן נפש אחת מישראל." For Daube, such a phrase is an indication of the conclusion of a teaching. He finds support in the fact that it is clear that this baraita originally followed a mishnah regarding the surrender of women to non-Jews for defilement.[10] The mishnah states,

> וכן נשים שאמרו להם גויים תנו לנו אחת מכם ונטמאה ואם לאו הרי אנו מטמאים את כולכם יטמאו את כולן ואל ימסרו להם נפש אחת מישראל.

In other words, the mishnah ends with a phrase which is identical to that which culminates the first half of our teaching. It is logical to assume, then, that our teaching would also have ended with such a firm statement. Daube suggests that the first half of the teaching may have been developed at the end of the first or beginning of the second century c.e., a time of continuous conflict between Jews and non-Jews in Palestine.

The second half, according to Daube, originated after the Bar Kochba revolt, during the Hadrianic persecutions. He maintains that it is likely that, during that time period, the rationale behind the teaching changed. Originally, the teaching was referring to a gang of non-Jews which lynched a group of Jews and demanded that someone be surrendered to them. It was to be expected that a gang of non-Jews chancing upon a group of Jews would have nobody specific in mind. On the other hand, the request for a specific individual which is recorded in the second half suggests a much more official encounter between Jews and non-Jews. For Daube, it is likely that it was official government authorities who would have demanded a specific individual. Such an understanding of the teaching clarifies three issues for Daube: (1) the variant readings in the texts; (2) the intent of the inclusion of the Sheba incident; and (3) the fact that specification makes such a difference in terms of compliance.

Daube attributes the variant readings in the texts of this teaching to attempts in the Hadrianic period to have the first part of the baraita correspond to the law's new setting - that of demands by official government authorities. Thus, whereas the original text must have read "סיעות בני אדם שהיו מהלכין בדרך פגעו להן גוים[11]," later editing could explain the text which reads, "סיעה של בני אדם שאמרו להם גוים[12]." In the latter case, there is no mention of Jews being on the road and no mention of an attack. For Daube, this is a powerful argument that the text was now concerned with official non-Jewish authorities.

According to Daube, the Sheba incident is included to bolster the argument for accommodation. Specifically, one Sheba, son of Bichri, rebelled against David's kingdom. Sheba fled to Abel of Beth-maacah and was pursued by David's soldiers (led by Joab). Joab threatened to destroy

the city and in the process encountered a woman who cried out against the imminent destruction. Joab answered her.

לא כן הדבר כי איש מהר אפרים שבע בן בכרי שמו נשא ידו במלך בדוד
תנו אתו לבדו ואלכה מעל העיר ותאמר האשה אל יואב הנה ראשו מושלך
אליך בעד החומה׃ ותבוא האשה אל כל העם בחכמתה ויכרתו את ראש שבע
בן בכרי וישלכו אל יואב ויתקע בשפר ויפצו מעל העיר איש לאוהליו
ויואב שב לירושלים אל המלך׃

This biblical incident provides an example of a Jewish community whose survival is threatened by the presence of a particular individual. Furthermore, the individual has been specified. The community can avoid destruction by surrender of the individual and opts for such a course of action.[13] Thus, the second half of the teaching is able to invoke a biblical precedent for surrender of a specified individual. But Daube sees more in the example. For him it is significant that the demand is made by officials of the government and not by a gang. In addition, the threat in the case of non-compliance is directed toward a Jewish community and not simply a group of Jews. Again, both these factors indicate that the second half of the teaching, which contains the Sheba incident and the policy of accommodation, was formulated during the Hadrianic persecution - a time when the Jewish community was concerned about official government demands and threats against entire communities.

Daube also interprets the critical importance of specification in terms of the changing setting of the teaching. For him, specification was irrelevant to the teaching when a gang of non-Jews lynched a group of Jews. The gang would have no idea of the specific identity of any of the members. However, as previously stated, it would be most appropriate for official authorities to demand a specific individual. Furthermore, understanding the text according to Daube's reading makes it possible to understand why specification makes the difference between non-

compliance and compliance to the demand. In a case where a person was specified, the Jews were dealing with official authorities. That meant several things: (1) the authorities were more likely to be justified in their demand for a specific person than was the non-Jewish gang in its demand for anybody; (2) the authorities were more likely to carry out their threat in the case of non-compliance than a gang was; and (3) if the threat were carried out, the result would be the extinction of a community, rather than the slaughter of one group of Jews.[14] In view of such a reality, Daube finds it very understandable that compliance was mandated in a case of specification. And he ultimately believes that the words, "יתנו להן ואל יהרגו כולן" should be understood as a duty during the time of the Hadrianic persecution since the alternative could have been extinction. For Daube, the goal of the rabbis during that time must have been to save a remnant of Jewry. This explains why, for them, the community took precedence over the individual.

If Daube's theory is correct, and it is difficult to dispute, it adds even greater significance in the application of these sources to situations during the Holocaust. For what Daube suggests is that there is contained within this teaching a precedent of opting for collaboration with authorities in a time of extraordinary persecution. Indeed, according to the law, such compliance may be an actual obligation during such a time in order to preserve a remnant of Jewry.

Independent of his theory, the issue of specification is also of crucial importance in terms of the Holocaust. It is not clear from the teaching what constitutes specification. The actual naming of a person is the likely interpretation, for that would be consistent with the Sheba example. However, it is conceivable that the non-Jews might have de-

manded a specific kind of person - based on age, sex, work, health, social status, etc., without stating a name. The law does not answer whether this would serve as adequate specification. Whether or not the term יחדו can be interpreted flexibly has major implications for the Holocaust, for Nazi demands that individuals be surrendered to them almost always specified the kind of person and not the names of persons sought.

Controversy Between Judah ben Ilai and Simeon ben Johai

The Tosefta and Genesis Rabbah texts retain a controversy immediately following the basic teaching.

אמר ר' יהודה במי דברים אמר' בזמן שהוא מבפנים והן מבחוץ אבל בזמן שהוא מבפנים והן מבפנים הואיל והוא נהרג והן נהרגין יתנוהו להן ואל יהרגו כולן. וכן הוא אומ', ותבא האשה אל כל העם בחכמתה וגו', אמרה להן הואיל הוא נהרג ואתם נהרגין, תנוהו להם ואל תהרגו כנלכם. ר' שמעון או' כך אמרה להם, כל המורד במלכות בית דוד חייב מיתה.

The initial problem with the text is that it does not appear to follow logically what precedes it. Specifically, Judah states, "במי דברים אמורים בזמן שהוא מבפנים והן מבחוץ" and it is clear that the first example, when he is inside and they are outside, refers to a situation in which the wanted man should not be surrendered. Yet the words, "במי דברים אמורים," (that he should not be surrendered) follow immediately after the statement, "יתנו להן ואל יהרגו כולן." While it is possible that Judah was reacting to a segment of the text which no longer exists, Daube resolves the difficulty in terms of his theory that the first half of the initial teaching once stood by itself. Specifically, he suggests that Judah's statement originally followed directly from the first half of the teaching, at a time when the teaching still stood by itself. This raises a new problem. The first half of the teaching re-

fers to a non-specific demand, whereas it is clear that Judah was referring to a specific demand from his use of the word הוא. Daube resolves this problem by suggesting that following the Bar Kochba revolt, perhaps prior to the inclusion of the second half of the teaching, the first half of the teaching was read in a new context - and was now interpreted as referring to demands by official authorities for a specific political undesirable.[15] If this possibility is accepted, then Judah's words make sense as they appear.

A more difficult problem is Judah's use of the words הוא and הן. While it seems clear that הוא refers to the specified individual, there is disagreement about whether הן refers to the non-Jews who demand the individual or to the Jewish community from which the individual is demanded.[16] Furthermore, the terms בפנים and בחוץ are not explained. It is possible that they are intended literally as inside and outside. If so, it would seem likely that הן refers to the authorities. Judah would be arguing that when the wanted man was inside the city and the authorities were outside the city, he should not be surrendered. For as long as the authorities have not penetrated the city, there is a possibility that both the man and the community can be saved. However, when the wanted man and the authorities are both inside, Judah argues that the man should be surrendered. His reason is that whether he is surrendered or not, the wanted man will be killed. If the community surrenders him, at least it will be preserved.

It is also possible, as Daube suggests, that בפנים means to be encircled by the authorities or at their mercy, while בחוץ means to have the possibility of escape. This makes sense if הוא refers to the wanted individual and הן refers not to the authorities, but to the Jewish com-

munity. Judah would be arguing that when the wanted man was at the enemy's mercy, but the Jewish community was not, the man should not be surrendered. Presumably, the community could escape the threat and, therefore, should not comply. However, when both the individual and the community were at the mercy of the authorities, the man should be surrendered, since he was doomed anyway and the community's only chance for escape from death was through surrender.

In practical terms, the two major possibilities are similar. However Judah's terms are understood, the principle seems to be that if the threat to exterminate the community can be carried out, and the wanted man is doomed whether or not he is surrendered, then the community should surrender the man to save itself.

It is clear from what follows "וכן הוא אומ', והבא האשה אל כל העם בחכמתה וגו'," that Judah derived his reasoning from the Sheba incident. This lends some support to Daube's interpretation of בפנים and בחוץ since in the Sheba incident the authorities did not enter the city, but the community was at their mercy.[17] More importantly, Judah has expanded the relevance of the Sheba example. The woman's חכמה was that she discerned that whether or not the community complied with the demand for Sheba he was doomed. It, therefore, made no sense for the community to resist the demand and doom the entire community as well. According to Daube, she knew that the threat was real. Judah, by explaining her חכמה accordingly, intended to suggest that non-compliance was mandated only in a case where the threat was not real. But if the threat was real, the community was obligated to surrender the individual. In short, Judah reasoned that specification was appropriate grounds for compliance when the threat was real and the wanted individual was doomed

regardless. Judah's advocacy of accommodation is viewed by Daube as being the result of the pressures of the Hadrianic persecution, as well as perhaps Judah's admiration of Rome.

Simeon's response to Judah, "כך אמרה להם, כל המורד במלכות בית דוד חייב מיתה," should be viewed as a dissenting opinion. The introduction to Simeon's statement, "כך אמרה להם," referring to the woman of Abel, indicates clearly that Simeon disagreed with Judah on the nature of the woman's חכמה. According to Simeon, her חכמה was that she recognized that Sheba, by virtue of his rebellion against David, was חייב מיתה, and that she agreed to surrender his life because he was both specified and חייב מיתה and not simply specified. If Judah was arguing that a specified person could be surrendered if the threat was real and his life was doomed anyway, as seems likely, then Simeon's response was intended to argue that surrender was warranted only when the wanted man was חייב מיתה. While it is difficult to translate חייב מיתה,[18] it seems to mean deserving of the death penalty by virtue of having committed a capital crime. Simeon, in short, advocated a no compromise policy. According to Daube, this is consistent with Simeon's attitude toward the non-Jewish authorities. He lived as an outlaw, hunted by the Romans, and resentful of their tyranny.

This controversy also has important implications for life for life situations during the Holocaust. It is important to note that there was a great deal of dissent regarding the law of surrender, as is seen in this controversy and will be seen again. Such controversies result in more flexible interpretations of the laws since different respondents could justify their opinions on the basis of a wide range of opinions - from no compromise to collaboration. Thus, those Jews who faced the

problem of surrender during the Holocaust could justify fairly easily their approach to the problem.

Secondly, the substance of the controversy has important implications. Judah's argument that a person could be surrendered if the threat was real, and his fate was doomed anyway, is extremely relevant to the situation during the Holocaust, in which it could be convincingly argued that the threat was extremely real and anybody sought by the Nazis was virtually doomed. Furthermore, Simeon's retort that a person must be חייב מיתה in order to be surrendered is relevant.[19] Is it possible to say that the Jews of Nazi Europe were חייב מיתה (interpreted as doomed to death rather than deserving of death or sentenced to death by a legitimate court), and thereby the surrender of Jews was permissible even according to Simeon? Or should חייב מיתה be strictly interpreted and not applicable to the Jews of Nazi Europe unless they had been specifically sentenced to die? This was an issue which had to be resolved.

Controversy Between Resh Lakish and Rabbi Johanan

The Palestinian Talmud does not contain the controversy discussed above. In its place, immediately following the original teaching, it retains a controversy between Resh Lakish and Rabbi Johanan.

א"ר שמעון בן לקיש והוא שיהא חייב מיתה כשבע בן בכרי ורבי יוחנן אמר אע"פ שאינו חייב מיתה כשבע בן בכרי.

What seemed implicit in the controversy discussed above now becomes explicit. Resh Lakish argues that a person may only be surrendered if he is חייב מיתה.[20] Furthermore, he draws his reasoning from the Sheba incident. He states that Sheba was חייב מיתה. His view is clear and forthright: specification and חייב מיתה are required, the same two requirements

as in the case of Sheba.[21] Johanan argues that he may be surrendered even though he is not "חייב מיתה כשבע בן בכרי." Either Johanan felt that although Sheba was חייב מיתה, it was not a requirement for surrender (specification was enough) or else Sheba was not חייב מיתה and, therefore, חייב מיתה should not be a requirement. Either way, Resh Lakish placed a great restriction on surrender and Johanan, his brother-in-law, advocated a policy of accommodation.

Daube, in an attempt to understand Resh Lakish's inflexible position, suggests that his ruling was rendered during the third century, at a time when the systematic persecution had ended. As a result, the Jews did not face the same pressure to compromise that they had encountered during the time of Hadrian. The threat of extinction of entire Jewish communities was, therefore, less real and more distant. Such a view is consistent with Daube's theory that flexibility tended to increase in proportion to the severity of the persecution faced by the Jews, as well as the opposite. While Daube may be correct, one would like to think that the different opinions were formulated not only as a result of the pressures felt at that particular time, but also as a result of independent reasoning of the right course of action.

Daube suggests that Resh Lakish was really advocating that a demand for surrender should be judged on the basis of its merits. Intimidation should not be the criteria for compliance, but rather evidence that the wanted person was deserving of death. In essence, Resh Lakish was taking the original rationale for specification to an extreme. The rationale was that a claim for a specific person was sufficient to warrant a person's surrender because the claim was not entirely arbitrary. Resh Lakish, Daube suggests, was demanding that the claim be completely just-

ified. A person should be surrendered to death only if he was deserving of death. In short, Resh Lakish advocated surrender only in exceptional circumstances.

The connection of this controversy to the Holocaust is similar to what was pointed out above. Here there is little ambiguity. The opposing opinions are clearly drawn. Again, if Daube is right, it is crucial to understand the dynamics behind the decisions - namely, the effect which external pressures had on the relative rigidity or flexibility of an opinion - so that we may see later on whether or not the same dynamics were at play during the Holocaust.

Incident of Ulla bar Qosheb

Following the controversy between Simeon and Judah in Genesis Rabbah and the controversy between Resh Lakish and Johanan in the Palestinian Talmud, there appears a story about Rabbi Joshua ben Levi and a man named Ulla.

עולא בר קושב תבעתיה מלכותא ערק ואזיל ליה ללוד גבי ריב"ל אתון ואקפון מדינתא אמרו להן אין ליה אתון יהבון ליה לן אנן מחרבין מדינתא סלק גביא ריב"ל ופייסיה ויהביה לון והוה אליהו זכור לטוב יליף מחגלי עלוי ולא אתגלי וצם כמה צומין ואיתגלי עלוי אמר ליה ולמסורות אני נגלה א"ל ולא משנה עשיתי א"ל וזו משנת החסידים. 22

Ulla, about whom we know nothing, was wanted by the non-Jewish government for an unspecified reason. (In keeping with earlier discussion, it is likely that the non-Jewish government's demand for Ulla was not entirely arbitrary. This is supported by the fact that the text makes no attempt to claim that Ulla was innocent of wrongdoing.) Ulla fled to the home of Rabbi Joshua ben Levi in Lydda. It seems apparent that Ulla was not a resident of Lydda, but a stranger there.[23] The rabbi, in whose attic he stayed, was a leading rabbi of Palestine during the first half of the third century, according to Daube. He was wealthy and enjoyed

good relations with Rome. According to the Palestinian Talmud text, representatives of the government came to Lydda and surrounded it. They demanded that Ulla be surrendered to them (for death) or else they would destroy the city. The Genesis Rabbah text simply records the next step.

ופייסיה ואמר ליה מוטל דלקטול ההוא ולא ליענשי ציבורא על ידיה.

The Palestinian Talmud does not detail the discussion between the rabbi and Ulla, only the outcome. Ulla allowed himself to be given up. The story then relates that Elijah, who used to reveal himself regularly to Rabbi Joshua ben Levi (a measure of great status), stopped revealing himself. As a result, Joshua ben Levi fasted.[24] Elijah again revealed himself to Joshua ben Levi. Joshua ben Levi asked Elijah why the prophet had stayed away. Elijah responded, "וכי חבר אני למוסרת" ("Am I then the companion of informers?"), according to the Genesis Rabbah text, and "ולמסורות אני נגלה" ("Should I reveal myself to informers?"), according to the Palestinian Talmud text. The key word in both texts is מסורות, indicating that Elijah viewed the rabbi as an informer, a betrayer. Joshua ben Levi responded by asking, "?ולא משנה עשית" ("Have I not done a mishnah?") Genesis Rabbah cites the mishnah which Joshua ben Levi felt he had observed, "'סיע של בני אדם וכו'." This is our original teaching. Elijah then retorted, "?וזו משנת החסידים." ("Is this a mishnah of the chasidim?") The Palestinian Talmud ends the story there. However, Genesis Rabbah expands Elijah's retort, "מיבעי להאי מלתא מתעבדא על ידך אחרינא ולא על ידך." ("It was needful for this thing to be done by others and not by yourself.")

The story is obviously included because of its relevance to the discussion on surrender. At first glance, in view of the fact that Elijah absented himself from Joshua ben Levi's presence because of the latter's

surrender of Ulla, it appears that the story is an argument against accommodation. But in some ways the opposition to Ulla's surrender is restrained. Firstly, although Elijah momentarily stopped his revelations because of Joshua ben Levi's action, he continued them shortly thereafter, and Joshua ben Levi's stature was apparently unaffected. Had the story been intended as an extreme position against surrender, it is hardly likely that Elijah would have resumed his visits to Joshua ben Levi. Secondly, although the Palestinian Talmud does not explain the exact nature of Joshua ben Levi's wrongful deed, Genesis Rabbah does. It states that the surrender of Ulla should have been done by other people and not by Joshua ben Levi. Thus, according to this version, there was nothing wrong with the surrender per se, rather with the way in which it was done. Daube suggests that the addition to the Genesis Rabbah text may be the result of a desire to retrieve a policy of accommodation with respect to surrender.[25] He argues that the author of the Genesis Rabbah version wanted to reverse the extreme position against surrender advanced by Elijah and to reinstate the teaching upon which Joshua ben Levi had acted. His tactic for doing so was to add a fresh point to Elijah's rebuke - a point which suggested that surrender itself was appropriate. However, the proper procedure was not followed.

Despite the Genesis Rabbah addition, which suited its own purposes, it is not clear exactly what Joshua ben Levi did wrong. He did indeed follow a mishnah, but he was rebuked for having done so on the basis that what he followed was not a משנת החסידים. The meaning of this puzzling term is not clear. The text seems to indicate that Joshua ben Levi was expected to observe a משנת החסידים, and that the mishnah he did observe did not fall into this category. Daube suggests that משנת החסידים could

refer, in a general way, to a teaching for pious, saintly people or, in a technical sense, to a teaching of the Essenes.[26] While most people support the former view, it is still not clear what the status of the משנת החסידים is. It could be, as Daube suggests, evidence of a double standard - the law which the average Jew was capable of observing, and the law (משנת החסידים) which the pious were capable of observing and, therefore, expected to observe. The term appears to be related to the concepts of lifnim mishurat ha-din and middat chasidut. These two rabbinic concepts endorse or mandate actions which go beyond the normal requirement of the law. There is substantial debate as to whether these concepts indicate that more than the letter of the law is expected from each Jew; that more than the letter of the law is demanded of each pious Jew (the law perhaps being the minimum requirement); that ethics is built into the law in the form of terms such as משנת החסידים, etc.[27] From our text, it is at least clear that something more was expected of Joshua ben Levi than the observance of the mishnah.

Many attempts have been made to suggest Joshua ben Levi's specific error. A popular view was that Joshua ben Levi should not have taken refuge behind legal accommodations.[28] Another view was that Joshua ben Levi erred by not opening the city's gates and letting the authorities seize Ulla themselves, thus making his own role more passive.[29] One view suggests that Ulla was not חייב מיתה, according to Jewish law. He erred by surrendering him when the law, according to Resh Lakish, prohibited such an action.[30] Still another view suggests that Joshua ben Levi surrendered Ulla too quickly. He should have waited to see if the authorities were serious about their threat to destroy the city.[31] Finally, a view is presented which suggested that Joshua ben Levi erred by

not praying for divine assistance in the matter.[32]

As we have seen, Genesis Rabbah came up with a novel approach to suggest Joshua ben Levi's error. A more novel approach can be found in a responsum by Mar Rav Shalom Gaon.[33] In the course of his responsum he cites the story of Ulla. The unique conclusion found there states:

א"ל ר' יהושע והלא משנה עשיתי. א"ל וזו משנת חסידים שמוסרין חביריהם בידי גוים. א"ל מה היה לי לעשות. א"ל היה לך לפדותו בכל מטלטלין שבמדינא. כיון ששמע ר' יהושע כך, הלך ופדאו באלף דינר זהב.[34]

The validity of this tradition has, however, been discounted.

The story of Ulla gives further indication of the extent to which dissent existed on the subject of surrender. In a sense, the story dramatizes the horrible ordeal faced by Jews during the Holocaust who had to make the agonizing decisions. Just as Joshua ben Levi suffered the loss of Elijah's companionship (though he made his decision in order to save the community), so too did the Jews of the Holocaust who made similar decisions out of the purest of motives find it to be the loneliest of tasks. The story of Ulla is uniquely relevant to the Holocaust because it reveals the fact that, whether the decision was made to surrender or not to surrender, great suffering would result and a great price had to be paid.

Maimonides' Teaching

Now that we have looked at the major texts contained within the legal discussion of the material, it is important to look at Maimonides' classic restatement of the law. For during the Holocaust, discussion which took place in ghettoes regarding the Jewish legal view on surrender centered around Maimonides' ruling and became known as the Maimonides debate. Maimonides' teaching[35] states:

נשים שאמרו להם עובדי כוכבים תנו לנו אחת מהן ונטמא אותה ואם

לאו נטמא את כולכן יטמאו כולן ואל ימסרו להם נפש אחת מישראל. וכן אם אמרו להם עובדי כוכבים תנו לנו אחד מכם ונהרגנו ואם לאו נהרוג כולכם. יהרגו כולם ואל ימסרו להם נפש אחת מישראל. ואם יחדוהו להם ואמרו תנו לנו פלוני או נהרוג את כולכם. אם היה מחוייב מיתה כשבע בן בכרי יתנו אותו להם. ואין מורין להם כן לכתחלה. ואם אינו חייב מיתה יהרגו כולן ואל ימסרו להם נפש אחת מישראל.

Maimonides has accomplished something remarkable in this restatement. He has reunited the original pair of the mishnah regarding the defilement of women and the mishnah regarding the surrender of men for death. Then he quotes the original teaching found in the Tosefta, Palestinian Talmud and Genesis Rabbah. Next, he incorporates into his ruling the opinion of Resh Lakish that both specification and חייב מיתה are required for surrender. In the process, he adds the phrase, " " which apparently means "We do not instruct them thusly from the outset."

Maimonides' restatement of the law is very clear and unambiguous. Yet there are two problems. Firstly, Maimonides, by ruling that a person must be חייב מיתה, has sided with Resh Lakish over Johanan. Nearly all the commentaries express surprise over this fact, since disputes between the two are usually decided in favor of Johanan. As a result, many of the commentaries attempted to argue that Maimonides actually sided with Johanan. The view of the commentaries notwithstanding, there seems no reason to suppose that Maimonides intended anything other than what the text clearly states. Resolution of the second problem, the phrase "אין מורין להם כן לכתחלה" supports the notion that Maimonides intended very definitely to make surrender possible only in extraordinary circumstances, and did not favor a flexible view.

The phrase "אין מורין להם כן לכתחלה" appears to be a reservation to the surrender of somebody who is חייב מיתה. The most likely interpreta-

tion is that, although one who is חייב מיתה may be surrendered, the community is not instructed that this is the law at the outset. This author understands Maimonides' intent to be that one should not surrender such a person. However, after the fact - i.e., if the surrender occurred and met the requirements - the law permits the act. This understanding would approximate a defense of excuse as opposed to justification. The act of surrender is wrong, but under extreme circumstances it is excused. This understanding would also suggest that Maimonides was afraid of too much flexibility, even within his limitations. If a community knew in advance that it could surrender an individual, it might be tempted to surrender the person at the earliest opportunity. If, however, the community were not instructed in the law from the outset - i.e., it was not able to fall back on a convenient law at first - there would be a much greater likelihood that the community would first exhaust all possible ways to save both the community and the wanted individual - through negotiations, bribes and any other strategy. That is what Maimonides probably intended with this phrase.[36] If such a reading is correct, then Maimonides adopted a very rigid position toward surrender, and it was only logical that he should side with Resh Lakish.

Most scholars, according to Schochet, believe that when Maimonides stated, "אין מורין להם כן לכתחלה," he had in mind the Ulla incident and specifically Elijah's rebuke. In the story it appears that it was permissible to surrender Ulla. Yet Elijah still challenged the surrender. It is possible that Maimonides interpreted the challenge to mean that, although surrender was permissible, it would still have been better had it not been done. "אין מורין להם כן לכתחלה" is, so to speak, very likely Maimonides' way of saying, "וזו משנת החסידים." More is expected of

the Jew (or the pious Jew) than the letter of the law.

Again, if this understanding is correct, it would seem to favor the translation of "ימנו אותו להם" as "they may surrender him to them" rather than "they must surrender him to them."

Maimonides' ruling's significance for the Holocaust has already been stated generally. His ruling was the major one under discussion. His adoption of Resh Lakish's ruling created major problems for those Jews who, under the extreme conditions of the Holocaust, would have preferred a more flexible law as the classic legal statement on surrender.

Two Additional Legends

It is important to mention two additional stories which are found in the Genesis Rabbah text and which complete the material on surrender presented in the three rabbinic collections discussed here. These two legends add convincing support to the idea that Genesis Rabbah was a strong advocate of accommodation.

In the first legend, which immediately precedes the original teaching, the wise woman of Abel (who is identified here as Serah, the daughter of Asher) agrees to surrender Sheba's life upon hearing that he had rebelled against the kingdom of David. The text then states:

> מיד ותבא האשה אל כל העם בחכמתה. אמרה להון לית אתון ידעין מיליא דדוד הידא אומה קמת בהון הידא מלכותא קמת בהון אמרין לה ומהו בעי אמרה להון אלף גוברין..ולא טב אלף גוברין מלמחרבה מדינתכון. אמרו לה כל חד וחד ליהב לפום מה דאית ליה. אמרה להון דלמא אגב פיומא שביק ציבחר. עבדא נפשה כמה דאזלא מפייסא והדרה מאלף לחמש מאין למאה לעשרה לחד והוא אכסנאי ומנו שבע בן בכרי מיד ויכרתו את ראשו.

Her חכמה was the strategy she devised by which to convince the fellow members of the community to surrender Sheba's life. She told them at first that Joab demanded one thousand men, and suggested that the loss of so many was still better than the destruction of the entire city.

The people responded by suggesting that each family surrender one or more of its members according to its size. She then suggested that she might be able to get Joab to settle for less, and she pretended to go and discuss it with him. She then returned and informed the community that only five hundred were demanded, then one hundred, then ten and ultimately one. The one was Sheba, a stranger, whose life was then surrendered.

In addition to giving a new interpretation to the woman's חכמה, it is clear that the text is in sympathy with her strategy and with the ultimate surrender. It seems that her intention in stating the false demand for one thousand and then pretending to bargain Joab down was to make the ultimate surrender of one person seem more palatable. If the community was willing to surrender one thousand, as indeed it was, then the ultimate surrender of just one person seemed to be a net saving of nine hundred and ninety-nine lives. Genesis Rabbah makes the surrender of just one person seem perfectly acceptable in view of the alternatives spelled out. It thus appears that Genesis Rabbah comes close to offering an arithmetical justification - one life can be surrendered to save hundreds. (Such an argument was never accepted in the mainstream of Jewish law.)[37] Indeed, the text implies that surrender of one person would have been fitting even if the person were guilty of no misdeed. Again, the reasoning seems to be that such a surrender was actually a means to save life. There can be no question that this legend supports a view toward extreme flexibility.

During the Holocaust, many Jewish communities faced demands to surrender thousands of lives. If the leaders were able to convince the Nazis to demand hundreds or tens of lives, or even one life, instead,

was the ultimate surrender of less lives an acceptable course of action? Certainly many Jewish leaders argued that their actions were to be viewed as saving life, just as the people of Abel surely convinced themselves that the surrender of one, when it could have been one thousand, was an act of saving life and therefore justified.

The other legend in Genesis Rabbah, which follows the Ulla incident, is about the surrender of Jehoiakim.[38] The legend explains that, when Jehoiakim rebelled against Nebuchadnezzar, the latter marched on Jerusalem. The Great Sanhedrin asked Nebuchadnezzar if the time had come for the destruction of the temple. He replied, "No." He simply demanded the surrender of Jehoiakim, who had rebelled against him, and he would depart. When the Sanhedrin explained this tc Jehoiakim, he responded by saying:

אמר להו וכך עושים. דוחים נפש מפני נפש לא כן כתיב (דברים כג)
לא תסגיר עבד אל אדוניו.

Jehoiakim had raised two objections to his surrender. The first, "וכך עושים דוחים נפש מפני נפש," is a phrase from the mishnah regarding embryotomy to save the life of the mother.[39] The notion that one does not push away a life for a life means that one life should not be destroyed in order to save another. The second objection, "לא כן כתיב לא תסגיר עבד אל אדוניו " ("You shall not deliver a slave to his master") is from Deuteronomy.[40] Neither attempt by Jehoiakim succeeded. The Sanhedrin cited the example of Sheba's surrender as justification for their surrender of Jehoiakim. When he persisted in his protest, he was overpowered and surrendered.

Daube points out that this legend has many parallels to the Sheba incident. Nebuchadnezzar is parallel to David and Joab; the Sanhedrin

to the wise woman; Jehoiakim, like Sheba, was guilty of rebellion; and Nebuchadnezzar's request, "give him and I will depart," is virtually identical to Joab's.

It is clear that in the legend there is no particular sympathy Jehoiakim. His objections are quickly dismissed and it is implied that the Sanhedrin acted properly. Again, this legend lends support to an accommodating view.

Daube correctly points out that there are major gaps in the rabbinic discussion on surrender. Questions such as: What if more than one person was really demanded by the authorities? What if the demand was to surrender a person not for death, but for slave labor or imprisonment? What if the threat in the event of non-compliance was not extinction of a community, but something less? What if there was a remote possibility that physical resistance could succeed? What if the demand was not totally specific? are not addressed by the rabbis. Since each of these questions is applicable to situations during the Holocaust, it meant that rabbis during the Holocaust had a difficult task in trying to render decisions in situations for which precedents did not really exist.

Din Rodef

This author believes that the rabbinic discussion on surrender is evidence of early expansion of din rodef. The standard definition of a rodef as one who pursues somebody in order to kill him or in order to commit a reprehensible act, and therefore should be killed if necessary to prevent the commission of the act, is found in the Babylonian Talmud:[41]

תנו רבנן אחד הרודף אחר חבירו להרגו ואחר הזכר ואחר נערה המאורסה ואחר חייבי מיתות ב"ד ואחר חייבי כריתות מצילין אותו בנפשו

The killing of a rodef is viewed essentially as self-defense, although Jewish law allows, or requires, a third party to kill a rodef.

Maimonides, in his Mishneh Torah, however, expanded the definition of a rodef to include a foetus which threatens the life of its mother and whose head has not yet emerged.[42]

ואף זו מצות לא תעשה שלא לחוס על נפש הרודף. לפיכך הורו חכמים שהעוברה שהיא מקשה לילד מותר לחתוך העובר במיעיה. בין בסם בין ביד מפני שהוא כרודף אחריה להורגה. ואם משהוציא ראשו אין נוגעין בו שאין דוחין נפש מפני נפש וזהו טבעו של עולם.

Maimonides based this expansion of the rodef principle on a Babylonian Talmud text which implies that a foetus whose head has not yet emerged may be destroyed.[43]

איתיביה רב חסדא לרב הונא יצא ראשו אין נוגעין בו לפי שאין דוחין נפש מפני נפש ואמאי רודף הוא שאני התם דמשמיא קא רדפי לה.

Thus, the rodef principle was expanded to include a situation in which the foetus did not intend harm, but its very presence made it a rodef.

The third example is similar, although it does not apply to a foetus, but rather to a passenger aboard a boat who had brought an ass on board with him. The ass was so heavy that it threatened to sink the ship and all the passengers. A person pushed the ass overboard and was judged not to be liable for restitution because the owner was a rodef.[44]

ההוא גברא דאקדים ואסיק חמרה למברא קמי דסליקו אינשי במברא בעי לאטבועי אתא ההוא גברא מלח ליה לחמרא דההוא גברא ושדייה לנהרא וטבע אתא לקמיה דרבה פטריה אמר ליה אביי והא מציל עצמו בממון חבירו הוא א"ל האי מעיקרא רודף הוא

Again, the definition has been extended (or an inference parallel has been drawn) to the point of including a person whose non-intentional actions threatened the life of a community.

While most scholars recognize the fact that the rodef principle was

extended in the middle ages to the moser (informer) and that by the seventeenth century to anybody who had angered the non-Jewish authorities and thereby threatened the community in which he resided,[45] few acknowledge that the expansion of the rodef concept is actually Talmudic, and applicable to the case of surrender.[46]

Once it is accepted that the Talmud expanded the rodef concept to anyone who endangered life, regardless of intent, it is obvious that the rodef concept was a dynamic at work in the issue of surrender. A person who was specified or חייב חיתה was permitted to be surrendered precisely because he was viewed as a rodef, a threat to the community. The person was labelled a rodef without the term itself being used. Such a label enabled the act of surrender to be viewed as permissible, indeed required, since the killing of a rodef was an act of self-defense.

It has been explained[47] that the concept of rodef was employed in order to resolve the difficult issue of the worth of one life against the other. By being labelled a rodef, an aggressor, one gave up his equal claim on life. Thus, in a life for life situation, the question of whose life should be preserved could be answered if one of the parties could be identified as a rodef. Jewish law extended the concept from basic self-defense situations to extremely complex situations such as those discussed here. It did so because the rodef concept afforded the rabbis with a seemingly objective solution in an impossible situation. Thus, in the case of abortion, by labelling the foetus a rodef, the killing of the foetus was objectively justified. The same process was true in the case of surrender. In circumstances where the wanted person could be viewed as a rodef, there was an objective justification to sacrifice his life. It is not surprising that the rabbis felt a need for a general

way to resolve such situations.

II. KILL OR BE KILLED

Raba's Ruling

Our first discussion was concerned with the surrender of a person in compliance with the threat of the non-Jewish authorities. Now we turn to a classic text which discusses the actual killing of a person in compliance with such threats. The text reads as follows:

סברא הוא כי ההוא דאתא לקמיה דרבה א"ל מרי דוראי אמר לי זיל קטליה לפלני' ואי לא קטלינא לך א"ל ליקטלוך ולא תיקטול מאי חזית דדמא דידך סומק טפי דילמא דמא דדהוא גברא סומק טפי

48

A man had been ordered by the non-Jewish authority to kill another person or be killed. The text makes no mention of whether or not the intended victim had done anything to warrant his death. The man went to Raba to ask whether or not he should comply. Raba's response, that the man should be killed rather than kill another, was based on the fact that the man could not make the judgment of whose life was more valuable.

" מאי חזית דדמא דידך סומק טפי דילמא דמא דההוא גברא סומק טפי ."

The situation is obviously not one of self-defense, since the intended victim, a third party, was not an aggressor toward the person ordered to do the killing. Thus the only justification for killing the innocent man would be if his life were less valuable than the man who would die if he did not follow the orders. It was the only other possible line of justification, then, to which Raba responded. His point is clear. There was no way of knowing whose life was more valuable. Therefore, there was no justification in killing the other man. Louis Jacobs adds that the commentaries point out that even if one of the men is a great scholar and

a pious man and the other is not, the decision is still binding because it is impossible to know which man is more significant in God's eyes.[49]

While this situation is similar in some ways to the situation of surrender (both involve demands by non-Jewish authorities and lead to the death of the intended victim in the event of compliance, and to the death of the party addressed by the non-Jews in the event of non-compliance), it is also different in several respects. Firstly, in the Raba incident it is a case of one individual's life versus another individual's life. In the case of surrender, it was an individual's life versus the life of an entire community. An important question is whether or not Raba would have ruled differently if more than one person was ordered to kill a third party. He might have ruled that the blood of more than one individual is certainly redder than the blood of one individual. However, such reasoning comes quite close to mathematical justification and, therefore, probably would not have been invoked.

The second major difference is that in the Raba incident, collaboration with the non-Jewish authority meant actually committing the murder, whereas in the previous cases it was limited to surrender of the victim. The question arises, then, did Jewish law view the actual murder of a third party as more reprehensible than the surrender of a third party? The original teaching on surrender implied that surrender of an innocent party was comparable to murder. However, there were later trends which suggested that indirect killing was preferable to direct killing, and sometimes justified when direct killing was not.[50] Because Raba's ruling is absolute, whereas the ruling regarding surrender is flexible, it is possible that direct murder was a more serious occurrence in the rabbinic mind.

The relationship of this incident to the Holocaust is crucial. Continuously, the Jews were faced with Nazi demands to choose who should live and who should die. If they were to collaborate in such an undertaking, they had to justify their action in view of Raba's ruling that no man knows whose life is more valuable.[51] Furthermore, Jews were sometimes faced with the prospect of "kill or be killed," as was the man in this incident. During the Holocaust, the pressure to comply resulted in a reversed reading of Raba's ruling, "How do I know that his blood is redder than mine; perhaps my blood is redder than his?" The inflexibility of Raba's ruling, as well as its essence, posed a challenge to Jewish community leaders who sought to justify their surrender of people on the basis of their worth.

III. A CASE OF NECESSITY

Dispute Between Akiba and Ben Patura

There is one final classical text which deserves brief examination in this discussion of "life for life" situations. It contains a discussion about two men who were in the desert. One of them possessed a canteen of water. There was only sufficient water for one of them to drink and reach civilization. The other would die. If they both drank, they both would die. What should they do? The text states:

> וחי אחיך עמך. זו דרש בן פטורי שנים שהיו הולכים במדבר ואין ביד אחד אלא קיתון של מים אם שותהו אחד מגיע לישוב ואם שותים אותו שנים שניהם מתים. דרש בן פטורי ישתו שתיהם וימותו שנאמר וחי אחיך עמך. אמר לו ר"ע וחי אחיך עמך חייך קודמים לחיי חבירך.

52

Both Ben Patura and Akiba built their opinions around the phrase, "וחי אחיך עמך."[53] Ben Patura argued that the words, "that your brother may live with you," meant that they both should drink and die. Akiba felt that it meant that "חייך קודמים לחיי חבירך" ("Your life takes precedence over your fellow's life"). Jacobs[54] explains that Ben Patura felt that one's obligation was to make sure that his brother "live with him." That meant that for as long as possible both should live. Akiba felt that the verse meant:

> Where you will live you must see to it that your brother, too, is allowed to live. That does not mean where your brother's life is gained, for the time being, at the expense of your own. You do not need to give your life for his.[55]

This situation is yet another example of a case in which a life has to be sacrificed in order to preserve life. Jacobs states that this case is different from the Raba incident. For here, while the man's drinking the water resulted in the other man's death, he committed no crime in saving himself at the other's expense. In our discussion, we have compared indirect murder (surrender) with direct murder (the Raba incident). Now we have another level - passive murder. It is a case of death resulting from one's abstaining from action (giving water to drink) as much as from one's engaging in action (drinking the water himself).

It has been suggested by scholars that Akiba's decision was motivated by one of two factors. Either he believed that it was wrong for two to die if one could be saved, or he believed that the one who owned the canteen was entitled to drink. Again, the first possibility involves a mathematical solution. The second possibility is more likely. Akiba could have believed that the one who owned the canteen had no responsibility to part with its contents if in so doing he parted with his life. A later

commentary concurs that ownership was the decisive factor, and that had both of the men owned the canteen, the drinking by one would not have been justified.[56] There is yet another possibility. Akiba may have felt that a person had no obligation to sacrifice his life for the life of another person. Ben Patura, on the other hand, may have felt that it was inherently wrong for either person to decide that his life was more valuable. Thus, by both drinking the water, both lives retained their equal value. Furthermore, he may have felt that when one is on a journey in a desert with his fellow, both, in effect, owned all the property for the journey, regardless of who actually brought an individual item with him. Therefore, neither person would have had a greater claim on the water. Finally, he may have believed that one cannot really know how much longer his life, or the life of his fellow, will last. Therefore, they should both drink because there might be even the slightest chance that they would both survive. There is a debate about whose opinion is law, but most assume it to be Akiba's opinion since the general rule is that in debates between Akiba and others, the halachah follows Akiba.

It is interesting to note that the text itself does not mention the issue of whose life is more valuable. Schochet cites a second century Stoic's question[57] regarding two people in a waterless desert. One of them possessed enough water for only one of them to survive. Under these circumstances it was decided that the water should be given to the person whose life was more valuable to mankind.

This controversy is also relevant to the situations which occurred during the Holocaust. In particular, there were numerous situations in which a shortage of resources (food, work permits, etc.) meant that some Jews would receive the resources and others would die as a result. In

view of this case, how, if at all, should the resources have been distributed? In addition, when Jews took, for example, work permits intended for other Jews, it had to be decided whether they had wrongfully taken what was "owned" by others or rightfully taken what they mutually owned. In both situations, the story of Akiba and Ben Patura is a critical precedent.

We have seen the major classical texts which are the basis for much of the discussion in the Holocaust responsa which deal with life for life situations. Through this discussion, it is hoped that the reader has gained a sense of the original intent of these laws, the degree to which any of these laws has flexibility, the applicability of these laws to situations faced by Jews during the Holocaust, the inter-relationship of these laws and the gap which these laws sometimes leave. Let us now turn to an analysis of the responsa themselves.

NOTES

1. This can be seen most clearly in the concept of פקוח נפש, a rabbinic concept derived from Leviticus 18:5, "ושמרתם את חוקותי ואת משפטי אשר יעשה אתם האדם וחי בהם אני יהיה". The rabbis interpreted the verse to mean that one should live by the commandments, but not die by them. Thus, B.T. Sanhedrin 74a states,

> כל עבירות שבתורה אם אומרים לאדם עבור ואל תהרג יעבור ואל יהרג חוץ מעבודת כוכבים וגילוי עריות ושפיכות דמים.

. This statement of the principle of פקוח נפש means that acts which were otherwise viewed as unlawful to omit or commit should be omitted or committed in order to save a life (with the exceptions stated in the text).

2. Thus, for example, B.T. Sanhedrin 73a states, "מניין לרואה את חבירו שהוא טובע בנהר או חיה גוררתו או לסטין באין עליו שהוא חייב להצילו ת"ל לא תעמוד על דם רעך."

. The commitment of a Jew to his fellow Jew is derived, here, from Leviticus 19:16, "לא תעמוד על דם רעך." Another example of the obligation each Jew has toward other Jews can be found in B.T. Sanhedrin 37a, where witnesses in capital cases are exhorted by the judges to tell the truth in their testimony.

3. Jewish law, like all legal systems, recognizes that the taking of life is sometimes warranted. Specifically, Jewish law states in B.T. Sanhedrin 72a, "אם בא להורגך השכם להורגו." Thus, according to Jewish law, a person is required to kill in self-defense. Furthermore, the law requires a third party to save a pursued person, if necessary, by killing the pursuer. Thus Mishneh Torah, Hilkhot Rotzeach 1:6 states: "אבל הרודף אחר חבירו להרגו אפילו היה הרודף קטן הרי כל ישראל מצווין להציל הנרדף מיד הרודף ואפילו בנפש של רודף."

. Self-defense is justified because a particular person is easily identified as the aggressor and, as the aggressor, he gives up his equal claim on life. All the situations discussed in this paper are different. At least at the outset, nobody can be easily labelled a willful aggressor whose life can therefore be sacrificed.

4. See Elaine Wintroub Stone, "Justification and Excuse in the Judaic and Common Law: The Exculpation of a Defendant Charged with Homicide," New York University Law Review, Vol. 52, No. 3, June 1977, pp. 599-628, for an excellent discussion of the legal defenses employed in life for life situations. According to Stone, a defense of necessity could have been applied to the case of two men in the desert with only enough water for one of them to survive (Babylonian Talmud, Baba Metzia 62a). "The defense of necessity may be invoked by a defendant who has injured other persons or their property in order to avoid personal injury to himself." The classic case is that of sailors shipwrecked at sea. Two sailors killed and ate a cabin boy in order to survive. A defense of duress could have been applied to the case of a man ordered to kill a third man

or else be killed (Babylonian Talmud, Sanhedrin 74a). "The defense of duress is invoked when the defendant claims that he submitted to another person's demands to commit a criminal act." A defense of self-defense actually was applied to the case of surrender of a specified individual to non-Jews (Palestinian Talmud, Terumot 47a). This was achieved as a result of the expansion of the rodef concept to the point of viewing a person wanted by non-Jews as an aggressor (rodef) to the community in which he resided. Thus, each of the major sources under discussion in Chapter II is connected to a different line of defense. Stone adds that each of these three defenses is accepted or denied by the common law "on the basis of two exculpatory theories, justification and excuse. Justification involves balancing the harm the defendant causes by deviating from the letter of the law against the social benefit realized through his conduct. If, on balance, more benefit than harm to society results, the defendant is deemed to have chosen the proper course of behavior and is exonerated...Excuse focuses on the accused - specifically, the unique facts of his case and the pressures he faced at the time of the criminal act. Acknowledging that the defendant's acts were not 'right,' the decision maker nonetheless has discretion to exculpate the defendant. The wrongfulness of the conduct is affirmed, but the particular defendant is not held accountable for his wrong." Stone, in her comparison of the Judaic and Common Law systems, found that Jewish law operated primarily within the framework of justification. Ultimately, Stone argues, the Jewish legal preference for resolving life for life situations on the basis of justification rather than excuse resulted in the great expansion of the concept of the rodef. According to Jewish law, it is not only all right to kill a rodef; it is obligatory.

5. Philip Friedman, "Preliminary and Methodological Problems of the Research on the Jewish Catastrophe in the Nazi Period," Yad Vashem Studies II, p. 111, footnote 10, states that debates centered around the Jewish law with respect to surrender took place in Heidmuhle, Sosnowiec, Kaunas and Vilna.

6. The baraita is found with variant readings in Tosefta Terumot 7:20; Genesis Rabbah 94:9 on 46:26 and Palestinian Talmud Terumot 47a.

7. Lieberman makes such a suggestion. See S. Lieberman, Tosefta Kifshuta, Zeraim, 1955, pp. 420ff.

8. II Samuel 20.

9. David Daube, Collaboration with Tyranny in Rabbinic Law. Daube has written a brilliant work regarding the Jewish rabbinic sources on surrender. To a large extent, the discussion on surrender contained in this chapter is dependent upon his analysis.

10. Mishnah Terumot 8:12. This in turn follows a discussion of the surrender of loaves to non-Jews. (Mishnah Terumot 8:11). Daube explains that the actual connection between the surrender of women for defilement and the surrender of men for death is absent in all the texts, excluding the Palestinian Talmud. The Mishnah may have dropped the discussion of

the surrender of men for death because its concern in Terumot is defilement and this baraita is irrelevant to the discussion. The Tosefta jumps from a parallel with Mishnah Terumot 8:9 to the discussion of the surrender of men for death. According to Daube, this bears out the view that the Tosefta is primarily a supplementary work. It contains the discussion of the surrender of men because it is not contained in the Mishnah. The Babylonian Talmud contains none of this discussion because it has no gemara to Terumot. It is interesting to note that the Palestinian Talmud contains a unique expansion of the discussion of women surrendered for defilement. It implies that a slave woman and an impure woman may be surrendered. The rationale seems to be that if the purity of most of the women can be preserved at the expense of these two types (which might represent loose moral behavior), then it should be done.

11. Palestinian Talmud, Terumot 47a.

12. Tosefta Terumot 7:20 and Genesis Rabbah 94:9.

13. The Sheba incident does not fit the context of the law exactly. There are two major differences. Firstly, Sheba is sought by a Jewish government and not a non-Jewish government. Secondly, in the end, the community actually kills Sheba rather than surrender him.

14. Schochet adds another factor in specification. He suggests that if somebody is specified, once the wanted person is delivered, the threat will vanish. But in the case of a threat for just anybody, there is no guarantee that surrender of a person will eliminate the threat. See Elijah J. Schochet, A Responsum of Surrender. Schochet's book analyzes a 1620 responsum of surrender by Joel Sirkes. The book contains an excellent discussion of all the relevant legal sources, including numerous responsa and commentaries which have dealt with similar situations throughout Jewish history.

15. This is consistent with the variant readings of the original teaching discussed above.

16. While Daube believes that הן refers to the Jewish community, Lieberman, op. cit., believes that הן refers to the authorities. His view is the more commonly accepted one.

17. Lieberman, op. cit., cites a variant reading in which it states that the wanted man was בחוץ. He believes this was a faulty text. Nevertheless it raises an interesting question: Would a community be allowed to, or obligated to, actively pursue a wanted person who was outside the community if the community was threatened with extinction?

18. Daube suggests that the term חייב מיתה is extremely elastic. While its normal sense is "deserving of death" (and, indeed, that seems to be its meaning here), it can also be used almost as a metaphor. Daube cites Shabbat 114b in which it states that a student of the Torah, who has a stain on his garment, is חייב מיתה. Does חייב מיתה here mean "sentenced to death," "deserving of death," "liable for death," "doomed to death," etc.? The text is not absolutely clear.

19. It is true that Simeon does not explicitly state that a person must be חייב מיתה in order to be surrendered. Nevertheless, that is the understanding of his opinion, and through Resh Lakish and Maimonides it becomes explicit.

20. The surrender of somebody who is חייב מיתה raises an important question. How did the Jewish community decide whether or not a person was חייב מיתה? Did it rely on the evidence produced by the non-Jewish authorities? Did it require that the man be חייב מיתה according to Jewish law? Daube suggests that Resh Lakish used the term to mean someone who was guilty of committing a crime for which by the general standards of Jewish law, and the specific standards of the non-Jewish government's law, death was an appropriate sentence. However, there is no way of being positive about the criteria utilized. Daube suggests that the lack of an absolute criteria might be intentional, to allow flexibility in such a difficult situation.

21. Daube suggests that Resh Lakish's ruling may have been influenced by Simeon's ruling of the preceding century.

22. The text quoted here is the Palestinian Talmud text. There are some remarkable differences between the two texts, as will be noted in the discussion.

23. An additional story in Genesis Rabbah, to be discussed below, makes it clear that Ulla was a stranger. The text states, "לחד והוא אכסנאי ומנו שבע בן בכרי ."

24. Genesis Rabbah specifies that he fasted for thirty days.

25. That Genesis Rabbah advocated a policy of compliance will become clear in later discussion.

26. Daube states that Joshua ben Levi was a disciple of Phinehas ben Jair, who was probably an Essene.

27. For a superb discussion of many of these issues, see, "Does Jewish Tradition Recognize an Ethic Independent of Halakha?", by Aharon Lichtenstein, in Modern Jewish Ethics, edited by Marvin Fox. Also see Steven S. Schwarzschild, "The Question of Jewish Ethics Today," Sh'ma, 7/124, pp. 29-35; "The non-Jew in Jewish Ethics," Gerald Blidstein, Sh'ma, 7/125, January 7, 1977.

28. Sefer Chasidim, no. 258, pp. 84-85, cited in Schochet, op. cit., p. 68.

29. Moses Haliva, Commentary on Pesachim, Jerusalem, 1963, p. 63, cited in Schochet, op. cit., p. 69.

30. Rabbi Isaac Noah ben Meir, Or Yitzhak, Warsaw, 1890, no. 15, cited in Schochet, op. cit.

31. Menachem HaMeiri, Commentary on Sanhedrin, p. 270, cited in Schochet, op. cit.

32. Abraham Karlitz, Hazon Ish on Sanhedrin, no. 25, p. 203, cited in Schochet, op. cit., p. 70.

33. Mar Rav Shalom Gaon, Sura, vol. 1, edited by Mirsky, "Teshubot Gaon Artzei Yisraeli," by A. I. Agus, pp. 23-25, Jerusalem, 1954.

34. Lieberman finds this text highly suspect. op. cit.

35. Hilkhot Yesodei HaTorah 5:5.

36. Schochet suggests a unique explanation of the phrase. He alters the word "morin" so that it can be translated as "show." He understands the phrase to mean "we should not show the non-Jews how anxious we are to surrender."

37. While some, like Menachem HaMeiri, argued that one could sacrifice one life in order to save even two lives, Jewish law never endorsed a mathematical approach. As Schochet states, "the concept of the sanctity of 'a single soul of Israel' renders any arithmetical games a bit ludicrous."

38. This legend is also recorded in Leviticus Rabbah 19 on 15:25.

39. Mishnah, Ohalot 7:6.

40. Deuteronomy 23:16.

41. Babylonian Talmud, Sanhedrin 73a.

42. Mishneh Torah, Hilkhot Rotzeach 1:9.

43. Babylonian Talmud, Sanhedrin 72b.

44. Babylonian Talmud, Baba Kamma, 117b.

45. See in particular Elijah J. Schochet, op. cit., pp. 48-57, on the extension of the rodef principle throughout Jewish history.

46. It is, however, recognized and discussed in Stone, op. cit., and Eliahu Ben Zimra, "קדושת החיים ומסורות נפש בימי השואה עפ"י ההלכה" Sinai, כסלב, תשל"ג, pp. 155ff.

47. Stone, op. cit.

48. Babylonian Talmud, Pesachim 25b; also found in Babylonian Talmud, Sanhedrin 74a.

49. Louis Jacobs, Jewish Ethics, Philosophy and Mysticism, pp. 11ff.

50. See Schochet, op. cit., pp. 62ff.

51. It might appear that Jewish law has a conflicting viewpoint about the worth of a person's life. There are numerous laws which detail precedence in life saving. The basic statement is in Mishnah, Horayot 3:7. It states there that with respect to saving a life, a man takes precedence over a woman. 3:8 states that a priest takes precedence over a Levite, a Levite over an Israelite, an Israelite over a bastard, etc. Thus, it seems that there is a hierarchy in terms of the value of one's life. However, these examples are given in the context of a person seeing more than one person who need to be saved from death. These laws attempt to answer who should be saved first. This is quite different from actively selecting a person to die on the basis of the person's worth being less than that of another. Yet, as we shall see, during the Holocaust, Jewish leaders developed a hierarchy of worth and applied it to cases which involved active selection of who would live and who would die.

52. Sifre on Leviticus 25:36; it can also be found in Babylonian Talmud, Baba Metzia 62a.

53. Leviticus 25:36.

54. Jacobs, op. cit., p. 12.

55. ibid.

56. Maharsha to Babylonian Talmud, Baba Metzia 62a.

57. Schochet, op. cit.

CHAPTER III

THE HOLOCAUST RESPONSA

There are five full-scale texts of Holocaust responsa known to this author which attempt to resolve life for life situations faced by Jews in the Holocaust. In this chapter, the legal reasoning employed within each responsum will be examined. Through this examination, we will attempt: (1) to gain an insight into the application of the major legal sources to real situations, as well as an exposure to other relevant Jewish legal texts; (2) to identify implicit or explicit ethical issues arising from the discussion; and (3) to compare, to a limited extent, the approach to the legal issues utilized by each respondent.

The five responsa can be divided into three thematic groupings. The first group consists of two responsa which deal with the fundamental moral problem faced by Jews during the Holocaust - can lives be surrendered in order to save the remainder of the community? The second group consists of a responsum concerned with the question - can one person's life be redeemed if as a result another's life will be sacrificed? And the third group contains two responsa which deal with the question - can or should a Jew risk his own life in order to save the life of others? Whether the issue is the sacrifice of another person's life, as is the case in the first two groupings, or the sacrifice of one's own life, as is the case in the third grouping, every one of these responsa confronts a situation in which life can be gained only at the expense of another life. Let us now turn to the responsa.

I. SURRENDER OF LIFE

Distribution of White Cards by the Jewish Council of Kovno

Rabbi Ephraim Oshry[1] recorded that on September 15, 1941, the Nazi commandant in charge of the Kovno ghetto gave five thousand white cards to the Aeltestenrat (Jewish council) to distribute to workers and their families. Only those Jews who received the cards would remain in the ghetto. (It was clear that the remainder would be deported and killed.) At this time, there were some thirty thousand Jews still in the ghetto, ten thousand of whom were workers and their families. A great commotion ensued and the strongest people seized the cards for themselves and their families from the Aeltestenrat. Oshry was asked[2] two questions: (1) Is it permissible for the Aeltestenrat to take the cards and distribute them to workers as the commandant had ordered? and (2) Is it permissible for the workers to seize the cards, thereby depriving their fellow workers from receiving one of the five thousand cards?

Oshry begins his teshuvah by citing the Palestinian Talmud text[3] on surrender of a Jew to the non-Jewish authority. This version contains both the basic teaching and the dispute between Resh Lakish and Rabbi Johanan.

> סיעות בני אדם שהיו מהלכין בדרך פגעו להן גוים ואמרו תנו לנו אחד מכם ונהרוג אותו ואם לאו הרי אנו הורגים את כולכם אפילו כולן נהרגים לא ימסרו נפש אחת מישראל אבל אם ייחדוהו להן אחד כגון שבע בן בכרי ימסרו אותו ואל ייהרגו אמר רשב"ל והוא שיהיה חייב מיתה כשבע בן בכרי ור' יוחנן אמר אע"פ שאינו חייב מיתה כשבע בן בכרי

He then states that the Rambam[4] decided according to Resh Lakish, that even if a person is specified, he may not be surrendered unless he is חייב מיתה, like Sheba ben Bichri. Oshry alludes to the lengthy debate over Rambam's support of Resh Lakish's ruling, in view of the fact that

disputes between Rabbi Johanan and Resh Lakish are generally decided in favor of Rabbi Johanan, but concludes that since later authorities accepted Rambam's decision, it is binding. Thus, Oshry rules that even if one could consider the non-workers in the Kovno ghetto to be specified, they still cannot be considered חייב מיתה according to the laws of the Torah or the state, and therefore it is forbidden to distribute the cards.

Oshry then continues to respond to the second question, but at the end of his teshuvah he returns to the issue of the distribution of cards which will result in the surrender of non-recipients. He writes,

> אפשר לומר דבנידון דידן ל"ש כלל לדמות לדינא דייחדוהו דלפי כונת הרשעים ימ"ש רצו להשמיד כולם רק עתה יש עצה להציל מקצתם במה שנתנו הכרטיסים וא"כ לקיחת וחלוק הכרטיסים הוא ענין הצלה

Rosenbaum[5] explains Oshry's reasoning as follows:

> Perhaps, he says, it was incorrect to say that this case was analogous to the one in the Tosefta, where the threat was made that if one of the company was not delivered up, the rest would die. In that case, the intent of the attackers was to spare the lives of all except the one they sought. The others were thus buying their own lives at the cost of one of their number. In the case of Kovno, however, there was certainly no intent on the part of the Germans to spare the lives of anyone, even those who distributed the cards. They, too, would soon be put to death. If so, then the distribution of the cards was actually a means of saving a portion of the community - mandatory, according to the Halakhah.

Oshry finds some support for this interpretation in a decision given by Rabbi Abraham Shapira, chief rabbi of Kovno. He writes that he later heard from Rabbi Shapira that when the Nazis issued a decree ordering the Aeltestenrat to post signs announcing that all men, women and children were to assemble at the Demokratia-Platz on October 26, 1941 (for a selection), the Aeltestenrat came to the rabbi to ask him how they should act according to the laws of the Torah.[6] The Aeltestenrat knew that the great majority would be sentenced to death. After Shapira recovered from

fainting (as a result of hearing the Aeltestenrat's report), he gave his decision.

> באם יצאה גזירה ר"ל על קהלה מישראל להשמידם ובאמצעים אפשר להציל המקצת מהעדה מוכרחים ראשי העדה ליקח עוז בנפשם והאחריות עליהם לעשות המעשה ולהציל מה שאפשר

Thus, according to Shapira, if extermination of the entire community is a real threat, and there exist a means to save a portion of the community, it is an obligation to do so.

Oshry, then, concludes that the distribution of cards also appears to be an act of saving. If so, the laws of specification and מאי חזית[7] do not apply and the Aeltestenrat is obligated to take the cards and divide them.

It appears to this author that Oshry has consciously avoided giving a definitive ruling. He argues at one point that distribution of the cards is forbidden and at another that it might be required. In effect, he is arguing that while the law demands non-compliance, the circumstances demand compliance. He couches the rationale for compliance in what sounds like legal language, calling it ענין הצלה, but he is unable to cite any text which justifies surrender as an act of saving in the face of extermination, or which renders the basic teaching on surrender inapplicable when the intent of the non-Jewish authority is extermination. Therefore, this author views Oshry's concluding argument as an ethical, as opposed to a legal, argument. It is Oshry's ethical sense which makes him believe that it must be right to save a remnant in the face of extermination. And while he does not concede that this ethical sense is contrary to the law, it nevertheless appears to be.[8] This teshuvah, then, really raises two ethical questions. The first is whether or not it is ethical to collaborate with the Nazis in the surrender of innocent

life. The second is to what extent should the threat of genocide influence normal ethical considerations? Whereas the first question is implicit in the teshuvah, the second question is really confronted by Oshry in what amounts to an ethical context.

The issue of collaboration with the Nazis in the surrender of innocent life was, as stated above, the greatest moral crisis faced by Jews during the Holocaust. To this day, the role of the Judenrate in the surrender of lives is the subject of intense and explosive ethical debate. While Oshry's teshuvah is the only written teshuvah on the issue of the Jewish councils' participation in the surrender of lives, virtually every Jewish council had to confront this painful issue. Several councils felt compelled to seek a rabbinic ruling on the question of surrender. (We have already referred to this as the Maimonides debate because of his authoritative ruling on the subject.) The decisions of the rabbis in these ghettoes are important to mention here because they amount to oral teshuvot.[9]

In October, 1941, the Germans gave three thousand yellow permits to the Vilna Judenrat to distribute to those people who were engaged in essential work. Those who did not receive the cards were rounded up and deported to death. Jacob Gens, the police chief of the Vilna ghetto, and for all intents and purposes the head of the Judenrat, participated directly and willfully in the distribution, selections and actions. In a speech he stated his rationale.

> ...After 5 million have been slaughtered, it is our duty to save the strong and the young and not let sentiment overcome us. I am not sure that everyone has understood what I have said, or that people will justify our deeds after we are liberated from the ghetto, but this is what the police think: to save whomever possible, our personal emotions notwithstanding...[10]

Among those who disagreed with Gens' policy were the rabbis of the Vilna ghetto. After his personal participation in the "action of the yellow certificates," Gens was visited by a delegation of four rabbis.

> They told him that according to religious law a Jew may be delivered to the authorities if charged with common law crimes, but not simply as a Jew. The rabbis advised Jacob Gens that he had no right to select Jews and deliver them to the Germans. Jacob Gens replied that by participating in the selections and delivering a small number of Jews, he is rescuing all the rest from death. The rabbis answered with the following quotation from Maimonides: "...if pagans should tell them (the Jews) 'give us one of yours and we shall kill him, otherwise we shall kill all of you,' they should all be killed and not a single Jewish soul should be delivered."[11]

This ruling by the Vilna rabbinate indicates that the argument employed by Gens and earlier by Shapira and Oshry (that collaboration in surrender was an act of saving) did not make Maimonides' ruling inapplicable. From their point of view, his ruling still applied and, therefore, participation was not permitted.

In May, 1942, the Nazis began a series of "resettlements" of Jews from Eastern Upper Silesia. The Judenrat, headed by Moses Merin, decided to fill its quota for deportation by asking for volunteers. The first time approximately one thousand people came for deportation. The next time nobody showed up. Merin argued that the Judenrat should comply with the Nazi orders and deliver Jews for deportation by force. In that way, informers, thieves, immoral people, the sick, etc., could be selected and the healthy and good people of the community could be saved. However, because of intense criticism, Merin agreed to turn the problem over to the rabbis and comply with their decision.

According to one account, after long discussion, a statement was made on behalf of the rabbis. Trunk states,[12]

Basically Merin's suggestion was against the fundamentals of

> Jewish ethics and religion, but according to his presentation, each Jewish household in town faced a great calamity. There was no other way, therefore, but to choose the lesser evil. They hoped that Merin would act as his Jewish heart dictated. In conclusion, Rabbi Groysman expressed the hope that Merin would be granted the privilege of becoming a savior and would deliver from bondage the Jews of Eastern Upper Silesia. Consequently both Merin and the Jewish police took an active part in setting up the next transport of about 1,200 people to Auschwitz.

Thus the rabbis of Eastern Upper Silesia argued in support of participation as an act of saving, and agreed with Shapira's rationale. Another witness to the rabbis' meeting there stated that, during the discussion, the opinion was expressed that Maimonides' ruling was binding and, therefore, participation should be forbidden. However, there was dissent and so it was agreed that Merin could participate, "particularly since the authorities had said nothing in the order about the fate awaiting the deportees."[13]

Merin's own statement is quite interesting. During the deportations, which lasted from May to August, 1942, he delivered a speech justifying his actions.

> I knew that I would be blamed for causing the deportation of 25,000 Jews. I am even glad to hear this accusation in my own circle (of associates), and I want to show how superficial, unfounded and foolish this reproach is. Quite to the contrary to what is said, I state that I have saved 25,000 people from resettlement. Blood would have flowed in the streets. I have information from very reliable sources that the resettlement would have engulfed 50,000 people, and our entire district would have been crushed, so that no might in the whole world would have been able to rebuild it. Respected people, active in our community life, would have been the first to go. It is easy to imagine what the lot of the remaining ones might have been. Nobody will deny that, as a general, I have won a great victory. If I have lost only 25 percent when I could have lost all, who can wish better results? Diaspora has made an asocial people of the Jews. Only we could have adopted the teaching of Maimonides, who ordained that the entire community be sacrificed for the sake of one man. We shall all be condemned to extinction if we do not change our mentality in this

> respect... I have never considered the interests of the individual as against the interests of the community. I always bear in mind the best interests of the community, for whom I am ready to sacrifice the individual at any time.[14]

In Heidemuhle, a colony near the village of Kowale Panskie, in Turek county in the Wartheland, the chairman of the Jewish council, Hershel Zimnawoda was given an order at the end of October, 1941, to make a list of all Jews and note next to their names whether they were "fit" or "unfit" for work. All children under twelve and adults over sixty-five were to be labelled "unfit." Zimnawoda, disturbed by the consequences which would await those labelled "unfit," turned to the rabbis for a ruling.

The rabbis delivered a ruling after two days of discussion.

> The judgment of the rabbis was that, according to the religious law, a decree of the government is obligatory and must be obeyed. Therefore, Hershel must deliver the list. Everyone, however, has to be given the chance to check the list to see how he has been marked.[15]

Thus, in Heidemuhle, Eastern Upper Silesia, and Kovno, the rabbis argued for participation. They justified their positions by stating: (1) that in the face of extermination it was a duty to save those who could be saved; (2) participation was the lesser of two evils; (3) nobody could be sure that those who were deported would suffer death; and (4) the law had to be obeyed.

Only the Vilna rabbinate stood firm on the binding force of Maimonides' ruling. It is interesting that it, the Vilna rabbinate, was not approached for a ruling. In all the other cases, a rabbinic ruling was solicited. It is, therefore, an indication that the Vilna rabbinate was not under the same kind of pressure that the other rabbis were. This, in turn, reveals an important reality in connection with rabbinic decision making. The rabbinic decisions were influenced by more than a reading of texts. They were influenced by community pressure, practical

considerations, self-interest, crisis atmosphere, an unstated ethical sense, etc.

These additional influences, which are partially evident in Oshry's teshuvah, become clear when one looks at the various rabbinic rulings. The rabbis were confronted with a case which had direct parallels and precedents in the law. They did not need to apply precedents whose applicability was questionable nor did they face a situation which had no precedents in Jewish law. From a legal standpoint, the rabbis had an easy decision. This explains why Oshry's teshuvah is extremely brief. Nevertheless, each ruling discussed above was slightly different and based on slightly different reasoning. This can only be explained by the additional, non-legal factors which influenced the rabbis.

Now let us come back to Oshry's second question. Is it permissible for the workers to seize the cards, thereby depriving their fellow workers from receiving one of the five thousand cards?

Oshry first concerns himself with the problem of a person engaging in an action intended to avert harm coming to himself or another which will result in the harm coming to a third party. What are the legal limits of such action?

He begins by citing the Shakh:[16]

> אם יצא גזירה מהמלך על ב' אנשים סתם מותר להשתדל על איזהו אנשים שלא יכנסו בכלל הגזירה אע"ג שבודאי יכנסו אחרים

The Shakh, then, argues that if a ruler issues a decree to seize two unspecified people (and kill them), it is permissible to make an effort on behalf of specific people so that they will not be seized under the decree, even though others will then be taken. Oshry indicates that this would appear to legitimate the actions of the workers (in seizing the

cards).

Yet Oshry concludes that the Shakh's ruling does not apply because the Shakh refers to an effort which can be made prior to seizure, in order to avoid seizure. He suggests that the Shakh would not permit such an effort after seizure. Oshry argues that the workers of the Kovno ghetto are basically in a state of seizure at the time of the decree. He writes,

> ובנ"ד יש להסתפק ולומר דכל העדה היו כנתפסים ויצאה הגזירה וא"כ אותם הבע"ם שחוטפים הם דומים לאלו משתדלים אחר שנתפסו

So Oshry suggests that perhaps the ruling of Yad Avraham applies.[17]

> שהוא בעצמו מותר לו להשתדל בהצלתו אף לאחר שנתפס אף שיקחו אחרים במקומו ודוקא לאחרים אסור להשתדל בהצלתו אם ע"י שיצילו אותו יקחו אחרים תחתיו אבל לו לעצמו מותר

Thus, Yad Avraham states that a person may make an effort to save himself even after he has been seized, although others would be taken in his place. Again, Oshry suggests that on the basis of this ruling it might appear that the workers would be permitted to seize the cards, but then concludes that the two cases are not analagous. He writes,

> דהתם בה שמציל עצמו אינו גורם הריגה הפועל ממש תיכף רק שיחפשו ויתפסו אחרים אבל הכא מיד בחטיפת הכרטיסים מציל עצמו וגורם מיתה בפועל לחברו ואפשר דבזה אסור

Thus, Oshry suggests that whereas in the Yad Avraham it refers to another person being seized after the freeing of the first person (no direct action is taken by the freed person which results in the seizure of another), the Kovno case involves one saving himself and causing the death of another through direct action (the seizure of the cards).

Oshry then concerns himself with the distinction between direct and indirect action in order to prove that there is an important difference. He begins by citing the classic text concerning the two men in the desert with only enough water for one to survive.[18] Oshry suggests that the dispute between Ben Patura and Rabbi Akiba is based on the issue of direct versus indirect action. He believes that Ben Patura rules that both should drink because if only one were to drink, the saving of his life would be the direct cause of his companion's death. Oshry states that this is the exact understanding of Ben Patura's statement, "ואל יראה האחד במיתתו של חברו." And for Ben Patura, the positive mitzvah, "וחי בהם"[19] does not apply if a person gains his life in a way that directly causes the death of his companion.

Akiba disagrees with Ben Patura, Oshry argues, because he believes that the person who drinks the water does not take any direct action to cause the death of his companion. However, if a person were to die as a result of direct action (as is the case in Kovno), Akiba would also forbid a person to save himself. Oshry, as a result of this interpretation, adopts the rule that one is not permitted to save himself if that act causes another's death through direct action.

Oshry then offers one more possible approach which might permit the seizing of the cards, an approach which is also connected with the Akiba/Ben Patura dispute. If it were possible to say that all the workers in the Kovno ghetto had title to all of the cards, since they were to be distributed for the benefit of all, then perhaps every worker was entitled to seize what he partially owned.

However, at the time of publication of this teshuvah, Oshry learned of a comment by the Maharsha[20] which made him reject this possibility.

The Maharsha stated,

> אם היה הקיתון של מים של שניהם דמודה ר"ע לבן פטורא ששניהם ימותו ואל יראה וכו'.

The Maharsha's suggestion that Akiba would have agreed with Ben Patura that both men should die had they been joint owners of the water would mean that the ghetto workers would also have to refrain from seizing the cards. As Oshry states,

> אם נחשוב אותם לשותפים אזי אסורים להם לחטוף משום שחוטף דבר של חברו ומציל עצמו במה ששייך לחברו.

Thus, with respect to the seizing of the cards, Oshry gives an unequivocal opinion that the seizure of the cards is contrary to Jewish law. His response to this question is considerably longer than his response to the first question. This is probably the result of the fact that there are no legal precedents which are directly applicable to the second case. Therefore, Oshry wants to present a number of different precedents which can shed light on his case. In each instance, Oshry presents a precedent which might be parallel, only to conclude that the cases are not analagous. Yet it seems to this author that Oshry could have accepted just as easily the opinions of the Shakh, Yad Avraham or Akiba as binding in this case. His systematic presentation and rejection of each precedent is a good example of the role of subjectivity in the halachic process. The precedents which Oshry rejected could easily have been considered binding by another respondent, just as the precedents which he accepted could have been rejected by others.

In this second case, Oshry does not depart from legal reasoning. This is probably a sign that Oshry feels more comfortable with the legal options presented in this case than he did with those offered in the first case. In his discussion there is an implicit ethical question of

great significance: Should a person be able to save his own life when it can only be saved at the expense of another person's life?

Killing of an Infant in a Bunker

The second teshuvah on the subject of surrender was written by Rabbi Shimon Efrati.[21] A community of Jews was hiding in a bunker[22] to evade the Nazis. It was clear that if the Jews were found they would be killed. During one of the Nazi searches for those Jews hidden in bunkers, an infant in this bunker began to cry and could not be quieted. The Jews knew that if the infant's cries were heard by the Nazis, they all would be seized and killed. So the question arose: Could a pillow be placed over the infant's mouth to silence it if there was danger that the infant would suffocate to death as a result? While this question was under discussion, one of the Jews acted and placed a pillow over its mouth. After the Nazis completed the search, the pillow was removed and it was discovered that the infant was dead. The question posed to Efrati was: Was it permissible to place the pillow over the infant's mouth (with the knowledge that it might endanger the infant's life) in order to save the rest of the community; and, if it were not permissible, does the man who actually placed the pillow have to make atonement?

While the question directed to Efrati addressed the issue of an action which might result in an unintentional death, Efrati's teshuvah answers a different question: Is it permissible to willfully surrender a person to death in order to save the remainder of the community? Although Efrati's case deals with the direct killing of a person, and Oshry's case deals with the surrender of a person to be killed by the Nazis, they are really a single issue - the surrender of a person's life. Therefore, Efrati's teshuvah also focuses on the legal texts concerning

surrender.

Efrati begins by citing the various texts on surrender which he intends to analyze. He cites first the Rambam's ruling.[23]

וכן אם אמר להם עכו"ם תנו לנו אחד מכם ונהרגנו ואם לאו נהרוג כולכם -- יהרגו כולם ואל ימסרו נפש אחת מישראל -- ואם יחדוהו להם ואמרו תנו לנו פלוני או נהרוג את כולכם -- אם הי'מחוייב מיתה כשבע בן בכרי יתנו אותו להם, ואין מורין להם כן לכתחילה -- ואם אינו חייב מיתה יהרגו כולם ואל ימסרו להם נפש אחת מישראל.

Efrati concludes that, according to the Rambam, two conditions must be met in order to surrender a person to death: (1) that he be specified, i.e., called by name; and (2) that he be חייב מיתה, as in the case of Sheba ben Bichri.

He then cites the Tosefta text,[24] which contains the controversy between Rabbi Judah and Rabbi Simeon.

סיעה של בני אדם שאמרו להם נכרים תנו לנו אחד מכם ונהרגנו ואם לאו הרי הורגין את כולכם? יהרגו כולם ואל ימסרו להם נפש מישראל -- אבל אם יהדוהו כגון שיחדו לשבע בן בכרי, יתנוהו להם ואל יהרגו. א"ר יהודא בד"א בזמן שהוא מבחוץ והם מבפנים אבל הוא והם מבפנים הואיל והוא נהרג והן נהרגין יתנוהו להם ואל יהרגו כולם; וכן הוא אומר (ש"ב כ'): ותבוא האשה אל כל העם בחכמתה וגו' -- אמרה להם: הואיל והוא נהרג, ואתם נהרגים, תנוהו להם ואל תהרגו כולכם. ר"ש אומר כך אמרה להם כל המורד במלכות בית דוד חייב מיתה.

And, he cites the controversy contained in the Palestinian Talmud[25] between Resh Lakish and Rabbi Johanan.

ר' שמעון בן לקיש אמר והוא שיהא חייב מיתה כשבע בן בכרי ור' יוחנן אמר אעפ"י שאינו חייב מיתה כשבע בן בכרי.

Following his presentation of the texts, Efrati begins a discussion of what is viewed as the major problem with the ruling on surrender, Rambam's support of Resh Lakish against Rabbi Johanan. For, as stated above, the rule is that, in their disputes, the law is decided according to Rabbi Johanan.

Efrati cites Sirillo's commentary on the Palestinian Talmud, which attempts to resolve the problem.[26] It states,

ההוא דאתא לקמי' דרבא א"ל אמר לי מרי דוראי דליקטלי לפלניא
ואי לא קטילנא לך, א"ל ליקטלך ולא תקטול מאי חזית דדמא דידך
סומק טפי דילמא דחברך סומק טפי, והא הכא דיחדוהו ועל מעשה בא
לשאול וקאמר לפלניא ואפי"ה קאמר ליי' רבא ליקטלך ולא תקטול.
וליכא למימר דשאני בין יחיד לרבים דהא קא יהיב טעמא משום
דילמא דחברך סומק טפי אלא מעשה שהי' כך הי' - ביחיד וה"ה
ברבים. וא"כ דברי הרב ז"ל קיימין וגמ' דילן אזלא כריש
לקיש והכי נקטינן.

Sirillo believes that he can resolve the problem by drawing on the Raba incident,[27] and Raba's ruling that the man should be killed and not kill because "who knows that your blood is redder..." His point is that the Raba incident was also a case of specification. (This is supported by the use of the word לפלניא for the person who is to be killed.) That is precisely why the man who had been ordered to kill a specific person sought Raba's ruling. Raba's opinion, "מאי חזית דדמא דידך סומק טפי..." meant that specification was not enough and it is binding in a case where one person is ordered to kill another and in a case where many are so ordered. Thus, according to Sirillo, Rambam's ruling according to Resh Lakish is binding and appropriate because, in fact, he is ruling according to Raba: specification is not enough.

Efrati rejects this solution. He points out that Raba's rationale, "מאי חזית" ("Who knows whose blood is redder?"), is only relevant to a case in which regardless of the action taken, one person will live and one person will die. But the bunker case is different because, unless the infant's life is surrendered (even if the infant is not חייב מיתה), all will die, including the infant. Since Raba's ruling would not apply here, Efrati asks, "Why is it forbidden to surrender him?"

Efrati then attempts to go back to the source of Raba's ruling. He cites the principle that, with respect to the spilling of blood, a person is to be killed and not transgress. Raba's ruling, "Who knows that your blood is redder," is the rationale behind the principle. The

rationale is also explained by the Ran.[28]

מאי דעתך למשרי מילתא משום "וחי בהם" ולא שימות בהם, וליתא
דטעמו של דבר לפי שחביבה נפשו של ישראל לפני המקום יותר מן
המצוה, ולפיכך אמר הקב"ה תבטל מצוה זו ויחיה, אבל עכשיו שיש
כאן ישראל נהרג, והמצוה בטלה למה ייטב בעיניו של מקום שתעבור
על מצוותו, למה יהא דמך חביב עליו יותר מדמיו של ישראל זה?

The Ran's point is that God permits the suspension of a mitzvah in order to save a life, because a "soul of Israel" is favored more than a mitzvah. But such a suspension would not be permitted when a Jew is killed. Rashi[29] adds that the man would not have asked Raba for a ruling unless he knew that a mitzvah did not stand in the way of the saving of life. But his situation was different. Regardless of the action taken (or abstained from), a life would be destroyed. Raba's ruling, "Who knows...," was his way of saying that it was inconceivable that the Torah would permit a situation in which a transgression was committed and a person killed.

Thus Efrati concludes that a Jew must be killed and not spill clean blood. And this is true, as Sirillo stated, whether it is an individual or a community faced with such a choice. But then, Efrati suggests that this ruling applies only when there is some doubt that they will all be killed. For example, perhaps the community could kill the enemy, or the enemy will retreat and surrender of a life will be prevented. But if it is clear that non-compliance would result in the death of everyone, including the intended victim, there would be no logical reason to prohibit the surrender.

With this distinction in mind, Efrati returns to Rabbi Judah's distinction between "inside" and "outside."[30] He suggests that Rabbi Judah is arguing that when he (the victim) is inside and they (the enemy) are outside, the intended victim may only be surrendered if he is חייב מיתה

like Sheba, because there is no certainty that he would be killed anyway. However, when both the intended victim and the enemy are inside, and it is certain that all, including the intended victim, will be killed (this is also comparable to the case of Sheba), it is permissible to surrender him, whether or not he is חייב מיתה. As Efrati states,

> פירוש הדברים שהוודאות גם היא קובעת ולא רק החיוב מיתה ולכן כששניהם מבפנים כיוון שבודאי יהרג, הוא כשבע בן בכרי ומותר למוסרו.

Efrati finds support for his opinion in Rashi's commentary:[31]

> באשה המקשה לילד והיא מסוכנת וקתני רישא החיה פושטת ידה וחותכו ומוציאתו לאברים, דכל זמן שלא יצא לאויר העולם לאו נפש הוא, וניתן להורגו ולהציל את אמו. אבל יצא ראשו אין נוגעים בו להורגו דהוה לי' כילוד ואין דוחין נפש מפני נפש. וא"ת מעשה דשבע בן בכרי (שמואל ב' כ) הנה ראשו מושלך אליך דדחו נפש מפני נפש, התם משום דאפי' לא מסרוהו לו היי נהרג בעיר כשיתפשנו יואב, והן נהרגין עמו, אבל אם היי הוא ניצל אעפ"י שהן נהרגין לש היו רשאין למסרו כדי להציל עצמן, אי נמי משום דמורד במלכות הוה.

Thus, Rashi suggests that the principle, אין דוחין נפש מפני נפש (one does not push aside a life for a life), does not apply in the case of Sheba because, even if he had not been surrendered, he would have been killed (together with the rest of the community). But, he states, if Sheba could have been saved, even though everybody else would have been killed, it would not be permitted to surrender him because of the principle, "one does not push aside a life for a life."

Efrati suggests that Rashi understood the intent of Rabbi Judah's opinion: While specification is not sufficient to warrant surrender (as seen in the Raba incident), surrender is permitted if the enemy specifies a person like Sheba, who, regardless, would be killed.

Rashi adds to his comment the possibility that Sheba's surrender may have been justified on the basis of his rebelling against the kingdom. Efrati points out that this is essentially the opinion of Rabbi Simeon

who, in his dispute with Rabbi Judah, said, "כך אמרה להם כל המורד במלכות בית דוד חייב מיתה"? Rabbi Simeon's point, as understood by Efrati, is that certainty of death did not justify the surrender of Sheba, only the fact that he was חייב מיתה according to the law for having rebelled against the kingdom.

Efrati then seeks to resolve the dispute between Rabbi Johanan and Resh Lakish in the light of the true meaning of Rabbi Judah's and Rabbi Simeon's words. He cites the Matanot Cahuna,[32] which concurs in his view that Rabbi Judah permits surrender when all are inside and cannot escape (as was the case in the Sheba incident), even though the person has committed no sin for which he can legally receive the death sentence, and Rabbi Simeon requires that the person be חייב מיתה. Then he adds that in the Palestinian Talmud text, which states, "ר' שמעון בן לקיש אמר והוא שיהא חייב מיתה כשבע בן בכרי ור' יוחנן אמר אעפ"י שאינו חייב מיתה כשבע בן בכרי," Rabbi Johanan's opinion is actually like Rabbi Judah's, for he also believes that one is not permitted to surrender a person on the basis of specification alone unless the intended victim will die even if he is not surrendered, like Sheba.

Efrati points out that Rabbi Johanan's statement, "אעפ"י שאינו חייב מיתה כשבע בן בכרי," supports the suggestion that Rabbi Johanan reasons like Rabbi Judah, by the use of the term כשבע בן בכרי. Had Rabbi Johanan wanted to argue that a person who was not חייב מיתה could be surrendered even though it was possible to save him, he simply would have stated, "אעפ"י שאינו חייב מיתה." Yet he used the term, כשבע בן בכרי, to make it clear that a specified person could only be surrendered if his case was like Sheba's, meaning that his death was a certainty regardless. Similarly, Resh Lakish's argument is like Rabbi Simeon's opinion.

Efrati now returns to the Rambam's ruling, "אם היו מחוייב מיתה כשבע בן בכרי יתנו אותו להם," and suggests that the Rambam actually reasoned according to Rabbi Johanan's view and not according to Resh Lakish's opinon. He states,

> ומש"כ אם היה מחוייב מיתה כשבע בן בכרי כונתו לכלול גם אם בפועל עומד למיתה, היינו כשברור שיהרג בלאו הכי, וכדוגמת שבע בן בכרי, וכמש"כ רש"י בסנהדרין הנ"ל. ומה שסיים ואם אינו חייב מיתה יהרגו כולם הכונה כשאין וודאות שיהרג אז לא ימסרוהו, ואם יש ודאות שיהרג ע"י הגויים הוה כחייב מיתה וכשבע בן בכרי.

Efrati is suggesting that Rambam's use of the term, כשבע בן בכרי, in the statement, "...אם היו מחויב מיתה כשבע בן בכרי," refers not only to the fact that Sheba was חייב מיתה according to the law, but also to the notion that he was "כחייב מיתה," as good as dead (i.e., certain to die anyway). Thus, according to Efrati, Rambam rules according to Rabbi Johanan: a person who is not חייב מיתה may be surrendered if his death is certain anyway;

> אין הכונה שיהיה חייב מיתה בדין כשבע בכרי אלא שלא יוכל להמלט כשבע בן בכרי ובודאי יהרג ולכן דינו כדין שבע בן בכרי וימסרוהו.

Efrati finds support for his interpretation of Rambam's intent from Sirillo's commentary.[33] Although Sirillo implies that Rambam rules according to Resh Lakish, it is only when there is a possibility that the intended victim can be saved (as in the Raba incident) that Rambam forbids surrender. However, if the death of everyone, including the intended victim, was certain, the Rambam would not forbid surrender.

On the basis of this reasoning, Efrati gives his decision in the bunker case.

> ובנ"ד שתינוק בוכה ואם נשמע קולו היו נהרג בודאי יחד עם כולם ע"י הרוצחים ימ"ש, הרי זה כיחדוהו, והוה כשבע בן בכרי כיוון שכל היהודים הם בדין מיתה אצלם, ואין אפשרות להנצל מידם. ומכאן יוצא, שהיו רשות בידם להשתיקו. ואפילו אם היו זה כרוך בסכנת מיתה של התינוק.

The man was permitted to silence the infant because were his life not surrendered, the death of the entire community (including the infant) would be a certainty.[34]

Efrati has obviously interpreted the intent of Rambam's ruling very differently from the traditional understanding that a person may not be surrendered unless he is specified and deserving of death. It is important to try to understand why Efrati felt it was necessary to do so.

Efrati's case is very different from Oshry's case. Firstly, in Efrati's case the action being judged had already taken place. Efrati's decision would not determine whether or not a person's life would be surrendered; it would primarily determine whether or not the person who had already surrendered the infant's life was guilty of a transgression. It is likely that Efrati sought to find a way to justify the action so that the man could live with his conscience. He might have taken an entirely different approach if his decision were going to determine whether or not a life should be surrendered.

Secondly, in Efrati's case the life of a person who was not חייב מיתה (according to the usual understanding) was surrendered. This action was in apparent violation of Rambam's ruling. Efrati could only justify the action if it could somehow be brought in line with Rambam's ruling. While it is difficult to reinterpret the Rambam's meaning, Efrati had one major opening, the Rambam's surprising acceptance of Resh Lakish's ruling when the standard practice is to accept Rabbi Johanan's opinion in his disputes with Resh Lakish. Jewish commentators have never been able to accept the possibility that Rambam really preferred Resh Lakish's opinion. So Efrati, in seeking to prove that Rambam ruled according to Rabbi Johanan, could depend on support from

the commentators. Efrati's lengthy discussion was the result of his realization that, if he could conclude that the Rambam had in fact ruled according to Rabbi Johanan (as Efrati reinterpreted Rabbi Johanan), he would be able to justify the surrender of the infant's life and he would resolve the Rambam's ruling in a way that would be consistent with expectations, and therefore would be acceptable. Most striking to this author is the cleverness of Efrati's reasoning. His teshuvah is evidence of the extent to which a law which appears to be clear can be reinterpreted in a number of ways in order to fit the need of a given situation.

The major ethical question implicit in Efrati's discussion is whether or not an innocent person's life may be sacrificed under any circumstances in order to save other life. Efrati's answer is yes - if the person is doomed anyway. But while he may have sought to arrive at that answer because of an ethical sense, the discussion is centered entirely on what the law permits, and not at all on what ethics requires.

Efrati could have let his teshuvah stand on his reinterpretation of the laws regarding surrender. However, he decided to apply an additional legal principle to this case - the rodef principle. Efrati cites the Rambam's classic ruling.[35]

> ואף זה מצות ל"ת שלא לחוס על נפש הרודף לפיכך הורו חכמים מעוברת המקשה לילד מותר לחתוך העובר במע' בין בסם בין ביד מפני שהוא כרודף אחרי' להורגה - ואם משהוציא ראשו אין נוגעים בו, מפני שאין דוחין נפש מפני נפש וזהו טבעו של עולם.

Rambam's ruling that, in the case of a woman in labor whose life is threatened by the foetus, the foetus is to be regarded as a pursuer (and should, therefore, be destroyed unless its head has emerged), is based on a Talmudic passage.[36] The Talmudic passage states,

> א"ר הונא קטן הרודף ניתן להצילו בנפשו וכו'. איתביה רב חסדא

לרב הונא יצא ראשו אין נוגעים בו לפי שאין דוחין נפש מפני נפש. ואמאי רודף הוא שאני התם דמשמיא קא רדפי לה.

There is a problem here.[37] Rambam seems to have understood the Talmudic text to imply that a foetus whose head had not yet emerged should be destroyed because of the fact that it was a pursuer. Yet the mishnah[38] which is the source of this Talmudic discussion does not appear to apply the rodef principle to the foetus. It states,

האשה שהיא מקשה לילד, מחתחין את הולד במעיה, ומוציאין אותו אברים אברים, מפני שחייה קודמין לחייו; יצא רובו אין נוגעין בו שעין דוחין נפש מפני נפש.

Thus the mishnah states that the foetus is to be destroyed because her life takes precedence over its life. Rashi's accepted interpretation is that her life takes precedence because the foetus is not yet a nefesh. However, this is no longer true once its head has emerged. Yet, if the rodef principle is invoked (as it was by Rambam) and the foetus is to be destroyed because it is a rodef, then even after its head has emerged the rodef label should still apply.

However, the Rambam concurs with the Talmud's statement forbidding the touching of a foetus once its head has emerged. The Rambam's statement, "ואם משהוציא ראשו אין נוגעים בו מפני שאין דוחין נפש מפני נפש, וזהו טבעו של עולם," is essentially a restatement of the Talmud's position, "יצא ראשו אין נוגעים בו לפי שאין דוחין נפש מפני נפש. ואמאי רודף - ומשני שאני התם דמשמיא קא רדפי לה." So it appears that, while the Rambam supported the Talmudic distinction which permitted destruction prior to the head's emergence and prohibited it after its emergence, he contradicted the Talmud's decision not to apply the label of rodef to the foetus.

Efrati supports Rambam's decision to label a foetus which threatens the life of its mother a rodef, because such a label would permit the destruction of the foetus to save the mother. However, the basis on which the Talmud would permit destruction, namely that the foetus is not yet a nefesh, is not adequate for every situation. Specifically, Efrati cites a Talmudic passage[39] regarding a pregnant woman condemned to death. It states there that as soon as a foetus moves from its place (in the womb) it is considered another body. It also contains the statement of Rabbi Abbahu in the name of Rabbi Johanan, that scripture's statement, "They shall both of them die,"[40] means that the foetus is to die with the mother. Both statements indicate a status for the foetus somewhere in between that of non-nefesh and that of human being whose head has emerged. In this situation, according to Efrati, only the label of rodef would permit the destruction of the foetus.[41]

Efrati also derives from the Rambam's and Talmud's statements regarding the foetus after the emergence of the head another status, that of rodef under compulsion. This is Efrati's interpretation of the phrase, "התם דמשמיא קא רדפי לה." Here the principle of "one does not push aside a life" applies. Yet, Efrati argues that since this principle does not apply when both the mother and the foetus will die, the rodef principle is still applicable and the foetus whose head has already emerged may be destroyed in order to save a life.

Thus Efrati rules that in his case, since all including the infant would be killed, it is permitted to kill the infant because he is a rodef under compulsion for whom the principle, "one does not push aside a life for a life," does not apply. As Efrati states,

> וא"כ בההיא דידן כיוון שכולם יהרגו אין כאן ספק שיוכלו להטיל עליו כר כדי להציל כולם. כי יש עליו דין רודף באונס, ובזה

אין להורגו רק אם ע"ז הוא יבצל, ומדין אין דוחים נפש מפני נפש, אבל לא באופן דילן שממילא לא יבצל.

Efrati concludes his teshuvah by comparing the two different principles on which he based his decision - the rodef and surrender principles. He suggests that it would appear that the Rambam's ruling regarding surrender would permit the sacrifice of a life, whereas his ruling regarding the rodef would require the sacrifice of a life. He bases this assumption on two key phrases. In his ruling on surrender, the Rambam states, "אין מורין להם כן לכתחילה." Efrati argues that this statement was derived from Elijah's dissatisfaction with Joshua ben Levi's surrender of Ulla,[42] and specifically from his suggestion that the law permitting surrender was not a mishnat chasidim. Thus the Rambam, by using this expression, was indicating that surrender was less than desirable. However, regarding the rodef, the Rambam stated, "ואף זהו מצוה ל"ת שלא לחוס על נפש הרודף..." thus indicating that it is a requirement to kill the rodef. Yet, Efrati concludes that this requirement pertains only to a willful rodef. But in a case like his, where the rodef is under compulsion, killing the infant would be permissible, but not mandatory. Thus, Efrati ends by concluding that both principles would justify the killing of the infant, and the person who did it need not have an unclear conscience. Yet, since the act had the status of permission, and not requirement, if a person refused to kill a rodef in such a situation, he would be considered a martyr[43] who sanctified God's name.

It is interesting that Efrati felt the need to justify the killing of the infant on the basis of the rodef principle, as well as the principle of surrender It is perhaps an indication that Efrati knew that his interpretations were forced in order to get the act to conform to

the law, and he felt two questionable interpretations could stand better than one. It is possible that he honestly believed that, because both principles were applicable, the man who had committed the act should know that more than one legal principle justified it. Or, perhaps, since Efrati's teshuvah was given after the fact, and he therefore had plenty of time to respond, he decided to explore interesting sidepaths to satisfy his own intellectual curiosity.

Efrati's extension of the rodef principle to apply to a situation in which a person's very presence unintentionally threatens the lives of others is not unprecedented. Yet he is the first to extend the label to an innocent infant. This extension raises an important ethical question not dealt with by Efrati: Is it right to label an innocent person a rodef? Efrati was able to answer "yes" because there are legal precedents for such an extension. But once again, his answer takes the form of citation of legal texts rather than ethical reasoning.

II. REDEMPTION OF LIFE

The Redemption of a Boy from Auschwitz

Rabbi Zvi Hirsch Meisels,[44] while in Auschwitz, was asked two she'elot concerning the right to redeem a boy's life at the expense of another life. Meisels, himself, witnessed the tragic events which led to the she'elot, and the bulk of his teshuvah contains this background.

He writes that on Rosh Hashanah eve, 1944, all the male youth from the ages of fourteen to eighteen were rounded up for a selection. Each of the approximately sixteen hundred youth were forced to pass a height test. If a boy's head could reach the horizontal bar, he was deemed fit for work and sent back to the camp alive. The fourteen hundred youth

who failed to reach the height were put in an isolation block. It was understood that the next night they would all be sent to their deaths in the crematorium.

On Rosh Hashanah, the next day, fathers and relatives tried frantically to secure the release of their loved ones. While some attempted to persuade the kapos who guarded the youth with words, others offered whatever possessions they had left to the kapos in exchange for their children's lives. At first the kapos refused to take bribes because they knew that the Nazis had an exact count of the youths, and for any missing boy they would have to pay with their own lives. As the day wore on, the kapos began to accept bribes and release specific youths. However, they would immediately seize another youth (who had not been designated to be killed) to take the place of the released boy and keep the total count accurate. It is clear that the inmates were aware that any life which was saved was saved at the expense of another life.

Meisels states that many relatives were not willing to redeem the lives of their children if, as a result, another life would be sacrificed. They adhered to the principle, מאי חזית .

One of the Jews who was concerned about the right to redeem his son approached the rabbi. This man from Oberland stated that his only son was one of the fourteen hundred doomed to death. He had the means by which to obtain his son's release, but he knew that in so doing, another would be seized in his place (and killed). Therefore, the father asked Rabbi Meisels a שאלה להלכה ולמעשה (a question which requires an immediate answer to a real situation), so that he could know if the Torah would permit him to save his son's life at the expense of another.

The rabbi replied by asking how he could give an answer in such a

serious matter given the conditions of existence in Auschwitz. He was without halachic books, without other rabbis to consult, and without any peace of mind. He added that redemption might be possible if the kapos would first release the redeemed youth before seizing another. If that were the case, perhaps the kapos' Jewish hearts would be stirred up and they would abide by the principle, יהרוג ועל יעבור , and not seize another. However, because the kapos' tactic was to seize another youth before releasing the first, Meisels could not justify redemption on such grounds. Meisels then pleaded with the father to refrain from asking his she'elah because he did not want to give a teshuvah without being able to rely on the sources.

Ultimately the father interpreted Meisels' reluctance to answer him as a definite sign that the halachah would not permit him to redeem his son. The father willfully and joyfully refused to redeem his son at the expense of another life.[45]

Thus the first halachic question which arose out of selection of the fourteen hundred youth was whether or not a person could be redeemed at the expense of another's life. This question is quite similar to Oshry's second question regarding the right of the workers to seize cards, thereby saving themselves at the expense of another's life. Whereas the specific situation there concerned a person saving himself, the situation in Auschwitz concerned a person saving a dear relative.

Meisels indicated that he had no halachic books on which to rely. Yet, when he published this teshuvah, he included some of the halachic discussion which influenced or could have influenced him in this case.

He begins by citing the Rema, who stated,[46]

> הי' רואה נזק בא עליו מותר להציל עצמו, אע"פ שע"י זה בא הנזק לאחר.

Thus a person who sees impending danger may save himself from it, even though as a result he endangers another. Yet another statement indicates that once the danger has already come upon him, he is forbidden to remove it if by so doing the danger will come upon his fellow.[47] This would mean that a person could save himself at the expense of another only in a situation of potential danger and not one of actual danger.

The Shakh stated,[48]

אם כבר נתפס אחד וידוע שאם יפדוהו יתפס אחר תחתיו אסור לפדותו ולהצילו

Thus he ruled that, if one had already been seized, it is forbidden to redeem him if as a result another will be taken in his place. From this statement, two principles have been deduced. Firstly, it is permitted to make an effort on behalf of a person who is not yet in danger. Secondly, the endangered person may make an effort to save himself even after he is in danger, but others may not make an effort on his behalf when another would be placed in danger as a result.

The Yad Avraham concurred in this view.[49] He wrote,

נראה שהוא בעצמו יכול להשתדל בהצלתו אף אחר שנתפס, אע"ג שידוע שע"י יקחו אחר במקומו.

Thus, there appears to be doubt regarding the right of a father to redeem his son in a case such as Meisels', where it is certain that another would be taken in the son's place. It would seem, Meisels concludes, that the father could only redeem his son if their relationship was considered to be so close that they were considered the same person, or if one could establish the principle, חיי בנך קודמין לחיי אחרים .

It is obvious from the format of the teshuvah that these halachic rulings were not considered by Meisels until he had access to halachic

books. And he is honest about that fact. More importantly, after having studied three teshuvot, we have seen three different kinds of responsa. Oshry dealt with she'elot for which there was sufficient time for him to write a teshuvah which would determine what action should be taken.[50] Efrati dealt with a she'elah concerning an action that had already been taken. And Meisels was confronted with a שאלה להלכה ולמעשה, for which an immediate, even verbal, answer had to be given (although the text itself is a later, scholarly discussion of it).

In Meisels' teshuvah, the same ethical question which was implicit in Oshry's teshuvah arises: How far can a person go toward saving a life at the expense of another life? Only here the question pertains not to the saving of oneself, but to the saving of another. There is also an additional ethical question which is implicit in Meisels' teshuvah: What are the limits on the efforts a person can make to save his closest relatives?

An additional case emerged from the selection of the fourteen hundred youth. One of the boys doomed to die was a devout, scholarly, God-fearing pupil of the rabbi, named Moshe Rosenberg, from Hungary. A youth by the name of Akiba Mann wanted to save Moshe, so he proposed to Meisels that he be redeemed with money. When the rabbi told him that if this were done, another would be taken in Moshe's place, Akiba responded by saying that he had a plan for that as well; he would take his place. The rabbi rebuked him and refused to permit this action on the basis of the principle, "חייך קודמין."[51] Akiba said he would still exchange places with Moshe if the rabbi would assure him that his action would not be considered suicide. (He was anxious to save Moshe because he believed Moshe was a תלמיד חכם and the world needed him,

whereas his life /Akiba's/ would never amount to much.) But the rabbi refused to assure Akiba that it would not be considered suicide, and Akiba left feeling sad that he could not offer his life for Moshe's.

Again Meisels includes separately some of the halachic reasoning which he considered or would have considered. He begins by stating that the Mishnah might support Akiba's request. It states:[52]

> דכל המקודש מחבירו קודם את חברו... האיש קודם לאשה להחיות... כהן קודם ללוי, לוי לישראל, ישראל לממזר, וממזר לנתין, ונתין לגר, וגר לעבד משוחרר. אימתי? בזמן שכולן שוין, אבל אם היה ממזר תלמיד חכם וכהן גדול עם הארץ ממזר תלמיד חכם קודם לכהן גדול עם הארץ.

Thus, the halachah supports the notion of giving precedence to certain categories of people with regard to being saved. And included in the Mishnah is the category of תלמיד חכם. Meisels cites a case which supports the notion that the תלמיד חכם has precedence with regard to being saved.[53]

> הוי מצטער רבי על שנתן פתו לע"ה. דמסתברא בכה"ג שהי' שני בצורה. ומה שהי' אוכל ע"ה יחסר לת"ח. אבל ודאי בלאו הכי חייב להחיותן מיהו אם הוא ודאי שיחסר לת"ח, אין נותנין לעולם לע"ה דקיימ"ל דת"ח קודם לכל דבר.

Yet the Shakh stated[54] that in this time there is no תלמיד חכם, even with regard to the measuring of gold. If that is so, the setting aside of Akiba's life would not be warranted.

Furthermore, Meisels argues that a תלמיד חכם would only take precedence if the person saving him made no intentional effort to cause the death of the עם הארץ; only that when the man could only save one (and chose to save the תלמיד חכם), the עם הארץ drowned by himself. However, what Akiba proposes to do in this case amounts to intentionally causing the death of the עם הארץ. This would not be permitted.

Meisels also argues that the עם הארץ cannot offer to be killed in the place of the תלמיד חכם because of the principle, מה חזית דדמא דידך סמוק טפי . In this regard, Meisels cites Rashi's comment,[55]

כיון שיש כאן ישראל נהרג, והמצוה בטילה למה ייטב בעיני המקום לעבור
על מצותו למה יהי' דמך חביב עליו יותר מדם חבירך ישראל.

Thus Meisels is pointing out the fact that even when one can be labelled a תלמיד חכם and another an עם הארץ, nobody can know who is more favored in God's eyes.

To amplify this point, Meisels cites a case discussed by מרן הרי"ם.[56] He was discussing the dispute between Rabbi Akiba and Ben Patura[57] with his students. He posed the question: What would the law be if there were three men who walked in the desert and only sufficient water for two? Whose life should take precedence? One of his students answered that the greater תלמיד חכם should take precedence. Upon hearing this answer, מרן הרי"ם told the students a story from his youth.

While he was in פשיסחא , the rabbi asked him a question. A famous fool who was old and single lived in the city. This man, whose name was Moshele, would draw all the water for the residents. What should be done if the soldiers from the government came and threatened to kill either Moshele or the rabbi? The rabbi answered his own question by stating that, according to the halachah, there is no distinction between the rabbi and Moshele with respect to the saving of life. The principle of מאי חזית דדמא דידך סמוק טפי applies. The rabbi added his own understanding of this principle.

הרי אם אומרים לו הרוג אחד מישראל אף שהוא חשוד על כל עבירות רק
שהיא מותן שאין אתה רשאי להרגו אף שהוא רשע בודאי מחויב למסור עצמו
למיתה ולקיים יהרג ואל יעבור אע"פ שאתה צדיק ות"ח יותר ממנו כי יוכל
להיות שיהי' לו יותר עוה"ב ממנו.

Thus, since only God knows whose life is more valuable, not even the most evil Jew can be sacrificed in order to save the most pious.

On this basis, Meisels concludes that the law would not permit Akiba

to sacrifice his life voluntarily in order to save the life of a תלמיד חכם. Furthermore, the principle of חייך קודמין would also apply here.

Two new important ethical questions are implicit in this discussion. Firstly, can one place a value on the life of other people? And, secondly, does a person have the right to devalue his own worth? Meisels answers both questions in the negative on the basis of his reading of the legal texts.

Meisels, unlike Oshry and Efrati, cites legal precedents without attempting to reinterpret them. This is possibly due to the fact that, while the situation confronting him was very real, he was not able to consider the relevant halachic rulings until the case was entirely academic. Or it may be that Meisels believed that the matter before him was straightforward.

While Meisels' first teshuvah, concerning the redemption of the boy by the father, bears a resemblance to Oshry's teshuvah regarding the seizing of cards, Meisels' second teshuvah, concerning Akiba's willingness to sacrifice his own life, bears a close resemblance to the issue discussed in our final grouping: Can or should a Jew risk his own life to save the life of others? Thus Meisels' teshuvot serve as the connecting link between the issue of surrender of another and the issue of surrender of oneself to save another, to which we now turn.

III. RISKING ONE'S OWN LIFE

Saving of Yeshivah Students

Rabbi Ephraim Oshry[58] writes that, as soon as the Nazis occupied the city of Kovno on June 23, 1941, they began their destruction of the Jews there. Every day the Nazis would seize Jews on the streets and take

them to the seventh fortress where their fate was decided. (The seventh fortress was a site used for mass executions.) There were numerous Lithuanians who were very glad to be able to assist the Nazis in the round-up, seizing and murdering of the Jews. Among those rounded up by the Lithuanians was a group of yeshivah students.

At this time, Rabbi Abraham Grodzinsky, head of the Slobodka Yeshivah, asked Rabbi Oshry to go to Rabbi David Itzkowitz, secretary of the Agudath ha-Rabbanim, and request that he approach the Lithuanians who were responsible for seizing the Jews (and whom he knew from before the war), to persuade them ~~to~~ free the yeshivah students.

And thus the question arose: Was it permissible, according to Jewish law, for Rabbi Itzkowitz to approach the Lithuanians about releasing the students since they might seize him as well and he would be endangering his life? In other words, was it permissible for him to endanger his life in order to try to save another?

Oshry begins his teshuvah by citing two Talmudic passages which, according to Oshry, appear to contradict each other. The first states,[59]

מנין לרואה את חבירו שהוא טובע בנהר או חיה גוררתו או לסטין
באין עליו שהוא חייב להצילו תלמוד לומר לא תעמוד על דם רעך.

Thus a person is obligated to save another from danger to his life because of the principle לא תעמוד על דם רעך .[60]

The second passage states,[61]

סברא הוא דההוא דאתא לקמיה דרבא ואמר ליה אמר לי מרי דוראי
זיל קטליה לפלניא ואי לא קטלינא לך אמר ליה לקטולך ולא תיקטול
מי יימר דדמא דידך סומק טפי דילמא דמא דההוא גברא סומק טפי.

This is interpreted to mean that just as one cannot kill another to save himself, because of the principle מי יימר דדמא דידך סומק טפי , so too should a person not have to risk his own life to save another be-

cause one could also say, מי יימר דדמא דההוא גברא סומק טפי דילמא דמא דידך סומק טפי." Since the second passage implies that a person does not have to risk his own life, it would be a contradiction if the first passage implied that a person was so obligated. Therefore, Oshry concludes that the first passage refers to a situation where there is no danger to the life of the saver. It is in such a case that the principle of "Do not stand idly by the blood of your neighbor" applies.

Oshry finds support for the idea that a person does not have to risk his own life in the Tosafot.[62]

ורוצח גופיה קאמר התם דסברא הוא דמאי חזית דדמא דידך סומקא טפי וכו' וזה לא שייך אלא במאנסין אותו להרוג בידים אבל אם רוצים לזורקו על התינוק ויהמעך בזה אדרבה איכא למימר איפכא מאי חזית דדמא דחבריה סומקא טפי כו' כיון שאינו הורג בידים ולא הוי אלא קרקע עולם בעלמא ואין מצוה להציל חבירו בגופו ואדרבה חייו קודמין וההיקש דקרא בהורג בידים כתיב כי כאשר יקום איש על רעהו וגו'.

Oshry explains that the Tosafot means that the principle of "be killed and do not transgress" applies only when they force a person to kill through direct action and not when a person takes no direct action (for example, if they threw a person on an infant and the infant was crushed to death as a result). Oshry argues that if a person need not risk his own life in such a situation, how much the more so may one not endanger himself to save another from the river, beasts or bandits, when it involves risk to his life.

On this basis, Oshry concludes that, in his case, it would seem certain that Rabbi Itzkowitz would be forbidden from approaching the Lithuanians if, as a result, he would be endangering himself.

Yet Oshry suggests that, perhaps, his case is different. For in the other cases, the situation involves a person placing himself in certain danger in order to save another. And there exists no obligation for a person to endanger himself because of the principle of מאי חזית

דדמא דחברך סומק טפי דילמא דמא דידך סומק טפי.

But this is a case of a person placing himself in possible danger in order to save another from certain danger. (There is fear, but not certainty, that the Lithuanians would seize the rabbi.) And perhaps in such a situation a person would be obligated to place himself in doubtful danger because of the principle of "do not stand idly by the blood of your brother."

And so Oshry moves on to a discussion of doubtful versus certain danger. He cites the Kesef Mishnah's comment on the Rambam's statement, "כל היכול להציל ולא הציל עובר על לא העמוד על דם רעך." 63

The Kesef Mishnah wrote,

וכתב הגהות מיימון עבר על לא תעמוד וכו' בירושלמי מסיק אפילו להכניס עצמו בספק סכנה חייב.

Thus, on the basis of a passage in the Palestinian Talmud, an opinion was given that one is obligated to place himself even in doubtful danger in order to fulfill the commandment, "Do not stand idly by the blood of your neighbor." Oshry adds that the reasoning appears to be that the rescuer would only be incurring doubtful danger in the process of saving another from certain danger. This is the situation in Oshry's case.

But Oshry questions the Kesef Mishnah's opinion on the basis of the Rambam's ruling regarding an exile in a city of refuge.[64]

הגולה אינו יוצא מעיר מקלטו לעולם ואפילו לדבר מצוה או לעדות בין עדות ממון בין עדות נפשות ואפילו להציל נפשו בעדותו או להציל מיד העובד כוכבים או מיד הנהר או מיד הדליקה ומן המפולת אפילו כל ישראל צריכין לתשועתו כיואב בן צרויה אינו יוצא משם לעולם עד מות הכהן הגדול ואם יצא התיר עצמו למיתה כמו שביארנו.

Oshry cites the Or Someach's commentary[65] which explained that the reason the Rambam ruled that an exile could not leave a city of refuge even to save the life of another was because as soon as he was outside the city of refuge, the blood avenger would be permitted to kill him.[66]

There is, of course, no certainty that the blood avenger would be able to kill the exile. Therefore, his leaving the city would be tantamount to placing himself in possible danger and the Rambam's ruling that an exile may not leave the city of refuge (thereby placing himself in possible danger) in order to save another from certain danger contradicts the ruling cited in the Kesef Mishnah. Thus it would appear that in Oshry's case, the rabbi would not be obligated to endanger himself and he might be forbidden to place himself in possible danger to save the students.

Oshry also refutes the Kesef Mishnah's opinion by pointing out that none of the codes include the Kesef Mishnah's ruling. Therefore, it must not be binding.[67] He cites one commentary's view[68] that the codes omitted the opinion (whose source was the Palestinian Talmud) because it is in conflict with the Babylonian Talmud. And when the two are in conflict, rulings follow the Babylonian Talmud. (Oshry adds that there may in fact be no conflict and that the Palestinian Talmud would concur with the Babylonian Talmud's view that a person in doubtful danger takes precedence over a person in certain danger. It is just that the significance of the Palestinian Talmud's words were misunderstood.[69])

While it thus appears that Rabbi Itzkowitz may not endanger himself, Oshry considers two new questions which might alter the decision: Even though the law does not require a person to endanger himself, are there times when a person should endanger himself? And can a person endanger himself if he wants to do so?

He first cites the Aruch Hashulchan's comment.[70]

הפוסקים הביאו בשם הרושלמי דחייב אדם להכניס את עצמו לספק סכנה כדי להציל חבירו והראשונים השמיטו זה מפני שבש"ס שלנו מוכח שאינו חייב להכניס את עצמו ומיהו הכל לפי הענין ויש לשקול הענין בפלס

ולא לשמור את עצמו יותר מדי, ובזה נאמר ושם אהאנו בישע אלקים
זהו ששם אורחותיו, וכל המקיים נפש מישראל כאילו קיים עולם מלא.

Thus, while acknowledging that there is no such requirement to place oneself in danger, the Aruch Hashulchan states that each situation should be carefully weighed and a person should not be overly protective of himself. In other words, depending upon the gravity of the situation, it might be desired, though not required, that a person place himself in doubtful danger.

Next he cites a passage from the Babylonian Talmud:[71]

אמר רבא האי לישנא בישא אף על פי דלקבולי לא מיבעי מיחש ליה
מיבעי הנהו בני גלילא דנפק עלייהו קלא דקטול נפשא אתו לקמיה
דרבי טרפון אמרו ליה לטמרינן מר אמר להו היכי נעביד אי לא
אטמרינכו חזו יתייכו אטמרינכו הא אמור רבנן האי לישנא בישא אף
על גב דלקבולי לא מיבעי מיחש ליה מיבעי זילו אתון טמרי נפשייכו.

The Tosafot commented on Rabbi Tarfon's refusal to hide the Jews who were being sought for the alleged murder of a man, and his decision that they should go hide themselves.[72]

ד"ה אטמרינכו הא אמור רבנן, פירש בקונטרס ושמא הרגתם ואסור
להצילכם ובשאלתות דרב אחאי מפרש שמא הרגתם ואם אטמין אתכם
חייבתם ראשי למלך והיינו מיחש מיבעי ליה למיחש שיש לחוש ללה"ר
להאמינו לגבי זה שיזהר שלא יבא לו הפשד ולא לאחרים.

Thus the Tosafot cites the reason for Rabbi Tarfon's unwillingness to hide them; "שמא הרגתם ואם אטמין אתכם חייבתם ראשי למלך." In other words, by hiding them, Rabbi Tarfon would have placed his life in possible danger (for aiding the murderers sought by the ruler) in order to save them from certain danger. He was unwilling to do this.

Most importantly, the Netziv,[73] in explaining some of the difficulties in the Tosafot passage, states,

... על פי דין גם כן לא היה מחוייב ר' טרפון להכניס עצמו בספק
סכנת נפש אפילו היה עלילה ודאי אלא מצד מדת חסידות רשאי.

Thus, while one is not obligated to endanger himself, it would be considered a middat chasidut[74] for one to do so. And one is permitted to be stringent with himself because, with respect to saving life, one may risk his life even when the law does not obligate him to do so. And this is precisely what the situation was in the Palestinian Talmud passage which served as the source for the ruling that one was obligated to place himself in doubtful danger. Resh Lakish's decision there to endanger himself to save another was not a result of a duty but of his being stringent with himself.[75]

The opinions of the Aruch Hashulchan and the Netziv bring Oshry to the conclusion that, while Rabbi Itzkowitz is not obligated to endanger himself, he will do so if he is a man of strong character and generous spirit. In particular, the Aruch Hashulchan's statement, that each situation should be weighed and a person should not be overly protective of himself, influenced Oshry. For since the very existence of the Torah depends on yeshivah students, and the aim of the Nazis is to destroy the body and soul of Israel, each Jew has an obligation to do whatever he can to save yeshivah students so that the light of the Torah will not be extinguished and the evil plans to destroy the Jews and obliterate their memory from the world will be annulled. In effect, Oshry ruled that, while risking one's own life was not required, it was permissible and, in this case, very desirable.

The postscript states that Rabbi Itzkowitz followed Oshry's advice and approached the Lithuanians. He succeeded in his effort and they were freed.

This teshuvah is another example of a teshuvah which really determined what course of action would be taken. It appears, on the basis of

the two teshuvot of Oshry's discussed here, that Oshry's style is to begin by offering possible legal precedents which, through comparison to other precedents, reveal to what extent they are applicable in his cases. This allows him to employ an elimination process until he arrives at the precedent which governs his case. This makes for a very readable teshuvah.

It has been suggested that some of the teshuvot reveal the significant role of subjectivity on the part of the respondents in their arrival at a particular conclusion. A high degree of subjectivity is evident here, as will be seen through a comparison of the precedents cited in this case as compared to those cited in the next case to be discussed.

Finally, it appears here, as it did in Oshry's previous teshuvah, that Oshry evaluates the law in terms of a personal ethical sense. While such an ethical sense is not conspicuous, it is fair to assume that Oshry's argument in support of risking one's life as a measure of middat chasidut is an indication that his ethical sense feels that a person should do more than the law requires. Indeed, his teshuvah raises the important ethical question: What is a person's duty to save another's life, and what are the limits of such a duty?

Saving of One's Brother

Rabbi Mordecai Ya'akov Breish[76] was asked a she'elah by Rabbi Abraham Israel, concerning a tragic event which took place during the final days of World War II. A group of prisoners were taken from a concentration camp and forced to march along with their Nazi captors in the latter's attempt to flee from the American army. Anybody who could not keep up in the death march[77] was immediately shot by the SS. Occasionally, the

prisoners were given a little time to rest on the side of the road. When the order would come to fall back in line, anybody who did not respond immediately was also shot. Thus the prisoners formed a buddy system so that when they rested, one prisoner would be responsible to wake up the other.

Some thirteen years after the war, one of the prisoners from this death march told Rabbi Israel that he was marching with his younger brother. At one rest stop he told his brother to sleep and he would be sure to wake him when the command to resume the march came. But the older brother also fell asleep. When the command came, he was so startled and disoriented that he immediately ran into the line of the march. By the time he remembered that he had forgotten to wake his younger brother, it was no longer possible for him to go back and wake him without endangering his own life. So he did not go back and his younger brother was never heard from again. He was sure that he had been killed at that rest stop. After carrying tremendous guilt feelings around, the older brother asked Rabbi Israel two questions: Should he feel remorse because he did not wake up his brother? And, secondly, should he have gone back to save his brother even though he would have been endangering himself? We will examine the second question here.

Breish's teshuvah, then, focuses on the exact question which concerned Oshry: Must or can a person endanger himself in order to save another? It should not be surprising that Breish utilizes many of the same sources as Oshry.

Breish begins by quoting the Kesef Mishnah's statement[78] that a person is obligated to place himself in possible danger in order to save another from certain danger. After pointing out that the codes omitted

this law, Breish states that he has his own serious questions about the ruling[79] and thus wished to return to the original Palestinian Talmud text on which it was based in order to confirm his doubts.

Breish examines two precedents from the Palestinian Talmud.[80] The first states,

ר' אמי איתצד בסיפסיפה (מקום סכנה) אמר ר' יוחנן, יכרך המת בסדינו (כלומר נתייאש הימנו) אמר ריש"ל בן לקיש עד דאנא קטיל, אנא מתקטיל, (או אני אהרוג, או אני נהרג) אנא אזיל, ומשזיב לי' בחיילא (אצילו בכח) אזול ופייסון, ויהיבנ'י לי, ואייתו להגזלנים לר' יוחנן, שיתפלל עליהם וכו'.

Resh Lakish's willingness to endanger himself in order to save Rabbi Ammi from certain danger was the basis for the ruling cited in the Kesef Mishnah. The second precedent follows in the text and states,

גזלו גזלנים מר' יוחנן נכסיו, וכך שאיל ר"ל לרי"י, לא השיב לו, מפני שליבא בכיסא תלוי, א"ל ר"ל לרי"י, חמי לי זויזה (הראני הדרך שהלכו הגזלנים) ורדף אחריהם, והתחיל לצעוק אם לא תחזירו, אנקום נקמתי מכם, והחזירו הכל.

Here is another example of Resh Lakish's willingness to endanger himself. Yet it was not in order to save another's life, but rather to retrieve stolen property.

Breish argues that it would be forbidden for one to endanger his life in order to save another's property. Yet Resh Lakish did so. Since he could not have done so out of obligation, Resh Lakish's decision to try to retrieve the property may have been motivated by the fact that he had special information about the thieves, that he knew the thieves would fear him because of his renowned physical strength, or by his desire to engage in an act of special piety.[81] So it is logical to assume that the same motivation existed in the first case, where Resh Lakish endangered his life in order to save another. In other words, the second precedent, by virtue of the fact that his action was not obligatory, proves

that the risks taken by Resh Lakish were precipitated by his own great bravery and not by a duty. And this applies to the first case, as well as the second. Thus, the first precedent does not mean that a person is obligated to place himself in possible danger in order to save another from certain danger. It is rather a statement about Resh Lakish's personal standard. Furthermore, the first precedent is essentially a dispute between Resh Lakish and Rabbi Johanan. And in disputes between the two, the law is decided according to Rabbi Johanan.

To support his view that one is not required to endanger himself, Breish cites the Ridvaz.[82]

להכניס א"ע בספק סכנה להציל לחברו מקרי חסיד שוטה.

According to this view, not only is one not obligated to endanger himself, but the person who does endanger himself is called a pious fool.

Breish also cites the Netziv's comment[83] on the Tosafot to the Talmudic passage concerning the Jews who asked Rabbi Tarfon to hide them.[84] The Netziv concurs with the view that Rabbi Tarfon was not obligated to endanger himself in order to save the others.

Breish then moves on to a discussion of the dispute between Rabbi Akiba and Ben Patura.[85] He interprets Ben Patura's argument as follows,

התם א"ר', דאינו ודאי שימות בעל המים, אם יתן לחברו מים, דאולי עד כה יזדמן להם מים, וחיו שניהם, ואם ישתה לבדו בטח, יגיע לישוב וחי' - ודעת בן פטורי דצריך להכניס א"ע בספק, מפני ודאי דחברו...

Thus Breish interprets Ben Patura's ruling that both should drink to be the result of his belief that there is a chance that later on they will find water and both will live. If so, then by both men drinking the water, one would be placing himself in possible danger (that they would not find water) in order to save his companion from certain danger

(which would result if the other person drank all the water). But Akiba disagrees and rules that "וחי בהם" and "חייך קודמים" apply, and therefore the one should drink and not place himself even in doubtful danger. Breish adds that the law follows Akiba, i.e., one is not obligated (or allowed) to place himself in doubtful danger.

Breish then states that were it not for the Ridvaz' statement, that a person who places himself in doubtful danger is a pious fool (and Breish comments that many poskim cite these words of the Ridvaz), it would seem more appropriate to call such a person a kadosh, and to view such an act as middat chasidut. (Indeed, Resh Lakish's actions fall into just such a category.) Breish states a fear that the Ridvaz' reasoning could be used by someone to justify his refraining from saving another's life. He states,

> גם יכול לצמוח מזה, דבניקל יוכל לומר שמתפחד מספק סכנה, ולמנוע מלהציל - ודברים כאלו צריכין לשקול במאזני צדק, ולא לעקל הדין רק לטובתו, מבלי להשגיח על חיותו של האחר להצילו.

Breish thus rules that the brother need not be troubled by his conscience because he certainly acted within the law.

One can learn a great deal through a comparison of Breish's teshuvah and Oshry's teshuvah. Oshry, while alluding to the Palestinian Talmud text on which the ruling that one should place himself in possible danger was based, made no attempt to go back to the original source and dispute the basis for the ruling. Breish, on the other hand, sought to demolish the ruling by proving that it had no real basis. Furthermore, while Oshry greatly emphasized the idea that endangering oneself was a middat chasidut, Breish quickly passed over it. Almost in its place he cited the Ridvaz' view that a person who endangered himself was a pious fool.

And Oshry made no mention of that viewpoint. Similarly, Oshry was greatly influenced by the Aruch Hashulchan's view that a person should not be overly protective of himself, and the point was neglected by Breish. It should be obvious from this comparison that Oshry tried to emphasize the virtue of endangering oneself and Breish wanted to emphasize the fact that it was very definitely not a duty. Thus, while both authors included most of the major precedents, they also excluded precedents which undermined the decision they sought to make.

And, indeed, by examining the circumstances surrounding the she'elot, it is not surprising that either author argued as he did. Oshry was dealing with a situation in which the lives of numerous yeshivah students were really at stake. The man asked to plead on their behalf knew their captors from before the war. It was clear that all parties concerned hoped that a justification for his going to the Lithuanians would be found. So Oshry wanted to emphasize the texts which would support such an effort, while at the same time discussing most of the precedents which were relevant. Breish's teshuvah was for the sake of a man who had been living with a guilty conscience for thirteen years over the death of his brother. His teshuvah would not determine any action; all he could do would be to decide whether the brother's action was indeed sinful. Since the question was academic, it would have served very little purpose to rule that the action was sinful and to force the man to continue to feel great remorse. So Breish wanted to emphasize the texts which would allow the brother to view his action as justified, while at the same time discussing most of the relevant precedents.

Thus the comparison of these two teshuvot, the selectivity and emphasis of texts, and the background of the two she'elot, give convincing

evidence of the importance and role of subjectivity in the halachic process. The respondents function as judges, applying law to a specific situation. As the situation changes, so too will the application of the law.

We have now seen those Holocaust teshuvot which are concerned with life for life situations. It is appropriate to share, at this point, a few general impressions about the teshuvot.

The teshuvot reveal complete confidence in the law on the part of the respondents. Furthermore, they reveal complete confidence in God. Despite the horrible situations which these rabbis had to respond to, none of them questioned God for even a moment. Because of this confidence, the respondents felt no need to sidestep or avoid giving a teshuvah. (Only Meisels hesitated and that was only because he did not have halachic books with him.) This author has found in the course of discussing his thesis with friends and acquaintances, that the majority of people have great difficulty deciding what would be the right course of action, and feel more comfortable evading the issues. Not so the rabbis. They knew that the halachah would provide answers, and it is a great thing that the rabbis could give answers to such difficult questions at such a crucial time.

As indicated in the discussion, there is a great variety with respect to style and reasoning. Some of the teshuvot accepted legal precedents on the basis of their usual meaning; others gave new and very plausible interpretations of texts; and still others gave radical reinterpretations. The degree to which this was done (and many of the teshuvot contained more than one level of reasoning) depended upon the need of the situation, as understood by the respondent. A marvelous by-

product of this entire process is the great wealth of precedents and interpretations cited with regard to life for life situations. Thus this author was exposed to a great number of very significant and relevant halachot. In turn, these texts and the issues they confronted greatly helped this author to derive ethical questions which were inherent in the teshuvot.

And therein is the limitation of the teshuvot in the author's eyes. Ethical questions have to be derived from, or implied from, the teshuvot because there is no explicit ethical discussion. The lack of explicit ethical discussion is an indication that the rabbis concerned themselves solely with legal reasoning and not ethical reasoning. The end result is that answers are given in terms of what is permissible or required, and not in terms of what is right. And this author would like to be able to examine these issues in terms of what is right. And while it might be said that law and right are synonymous for these rabbis, there are several examples (as indicated in the discussion) of the rabbis' personal ethical sense coming into conflict with the law. Indeed, the extent to which a given rabbi was lenient in a particular teshuvah seemed directly related to the degree to which his own ethical sense came into play, and not to a leniency mandated by law. Furthermore, the most questionable interpretations given of a law's intent grew out of a given rabbi's need to resolve the gap between what the law seemed to require and what he thought it should require on the basis of his own ethical sense.

Halachic reasoning on these matters, as far as its relation to ethics is concerned, has two major characteristics: (1) it is the law which should determine one's action and not a sense of right; and (2) the law

sometimes has to be stretched and radically reinterpreted in order to close the gap between what the law seems to indicate and what ethics seems to indicate as the right course of action.

But this author, as a liberal Jew, is not comfortable with either consequence. On the one hand, he believes that our ethical sense ought to be our primary guide to Jewish religious duty in interpersonal situations. On the other, he believes that where gaps exist between law and ethics, intellectual honesty should prevail and the law should not be distorted to close the gap. Rather, one might have to choose between law and ethics, and liberal Jews see this as the appropriate response to what God demands of us. Let us then look at the treatment of the same issues from an ethical approach, as opposed to a halachic approach, to see if it is more satisfying.

NOTES

1. Ephraim Oshry, "Kuntras Mi'emek Habacha," She'elah Aleph, in Divrei Ephraim, pp. 95-96. Oshry, according to Rosenbaum, was one of the few halachic authorities from Kovno who remained alive. As a result, he was asked a great number of she'elot. He committed his teshuvah to writing on paper scraps and buried them in the ground. As custodian of the warehouse of Jewish books in Kovno, Oshry had access to the great rabbinic works. His four volume work, MiMa'amakim, is the most voluminous and wide-ranging collection of responsa from the Holocaust. In his introduction to that work, Oshry states that, except for an occasional passage or citation, the teshuvot appear exactly as he prepared them during the Holocaust.

2. Irving Rosenbaum, The Holocaust and Halachah, pp. 25-28, suggests that it appears from the style of this teshuvah that Oshry's considerations were basically theoretical and not real, i.e., nobody came to Oshry in advance to ask what the Halachah permitted. Rosenbaum then cites the report of Leib Garfunkel in Kovno Ha-Yehudit be-Hurbanah on the events and considerations which led the Aeltestenrat to cooperate and distribute the cards.

3. Palestinian Talmud, Terumot 47a.

4. Hilkhot Yesodei HaTorah 5:5.

5. Rosenbaum, op. cit., pp. 30-31.

6. H. J. Zimmels, The Echo of the Nazi Holocaust in Rabbinic Literature, gives a more detailed account of the circumstances surrounding the order for all the Jews of Kovno to assemble at the Demokratia-Platz, pp. 50-51.

7. The laws of "מאי חזית" refer to Raba's ruling (Babylonian Talmud, Pesachim 25b) that when a person is ordered to kill another person or else be killed himself he must not comply because "who knows that your blood is redder; perhaps his blood is redder."

8. There is no legal basis for assuming that Maimonides' ruling does not apply when compliance would result in extermination of the entire community. Indeed, the specific wording of the law clearly indicates that the price to be paid for non-compliance will be the death of all. All could refer to an entire community, as well as a small group. Yet it must be acknowledged that none of the precedents on surrender could have anticipated a threat as all-consuming as that posed by the Nazis.

9. The Maimonides' debate, and the specific examples discussed below, are detailed in Isaiah Trunk's book, Judenrat, Chapter 16, "The strategy and tactics of the councils toward the German authorities," in the section entitled 'The strategy of surrendering certain groups during 'resettlement actions.'" pp. 420ff; Jacob Robinson's And the Crooked Shall be Made Straight, Chapter 4, "Jewish Behavior in the Face of Disaster," in the section entitled "Authority, Influence and Activities of the Jewish Councils: Tragic Choices," pp. 161ff; and Lucy S.

Dawidowicz, The War Against the Jews 1933-1945, Chapter 14, "Who Shall Live, Who Shall Die," pp. 279ff.

10. The speech is quoted in Mark Dvorzhetsky, Yerusholaim delite in kamf un umkum, Paris, 1948, cited in Trunk, ibid, p. 421.

11. Dvorzhetsky, ibid, p. 294, cited in Robinson, op. cit.

12. Pinkos Bendin, pp. 188-189, cited in Trunk, op. cit., p. 428.

13. Pawel Wiederman, Plowa bestia, p. 98, cited in Trunk, op. cit.

14. ibid., p. 25, cited in Trunk, op. cit., pp. 422-423.

15. Quoted from Sh. Glube, "Di din-toyre," Fun letstn Khurbn (Munich), No. 6, August 1947, pp. 44-47, cited in Robinson, op. cit., p. 185.

16. Shakh, Choshen Mishpat 163:11.

17. Yad Avraham, Yoreh Deah 157.

18. Babylonian Talmud, Baba Metzia 62a.

19. Leviticus 18:5.

20. Maharsha, Baba Metzia 62a.

21. Shimon Efrati, Migei Haharegah, Siman Aleph, pp. 23ff. Efrati, a rabbi from Bendery, was deported to Siberia during the Holocaust. After the war, he was appointed rabbi of Warsaw and he concerned himself greatly with the problem of Agunot.

22. Thousands of Jews hid in bunkers during the Holocaust as one of the only possible ways of escaping the Nazis. The role of bunkers in the lives of Jews is discussed in some detail in Raul Hilberg, The Destruction of the European Jews.

23. Mishneh Torah, Yesodei ha-Torah 5:5.

24. Tosefta, Terumot 7:20.

25. Palestinian Talmud, Terumot 47a.

26. Solomon ben Joseph Sirillo's commentary to Palestinian Talmud, Terumot 47a.

27. Babylonian Talmud, Yoma 72.

28. Ran, Yoma 72.

29. Rashi, Pesachim 25.

30. Tosefta, Terumot 7:20.

31. Rashi, Sanhedrin 72b.

32. Matanot Cahuna

33. Solomon ben Joseph Sirillo, op. cit.

34. Efrati also cites Sefer Hachinuch 296 and the Ran, perush Yom Kippurim to support his view that certainty would justify surrender.

35. Mishneh Torah, Hilkhot Rotzeach 1:7.

36. Babylonian Talmud, Sanhedrin 72b.

37. For a discussion of this problem, see David M. Feldman, Marital Relations, Birth Control and Abortion in Jewish Law, Chapter 15, "Warrant for Abortion," section entitled "The Foetus as Aggressor: Therapeutic Abortion," pp. 275-284.

38. Mishnah, Ohalot 7:6.

39. Babylonian Talmud, Arachin 7a.

40. Deuteronomy 22:22.

41. A similar explanation is given by Immanuel Jakobovits in Jewish Medical Ethics, Chapter 14, "Controlling the Generation of Life," pp. 185-186.

42. Palestinian Talmud, Terumot 47a.

43. Efrati adds that members of his own family sanctified God's name in a similar situation. They would not save themselves by suffocating a child.

44. Zvi Hirsch Meisels, Mikadshei haShem, vol. 1, pp. 7-10. Meisels, according to Rosenbaum, was the scion of a distinguished chasidic and rabbinic family. Before being deported to Auschwitz, he was rav of Veitzen, Hungary. After the Holocaust, the British authorities appointed him as chief rabbi of the British zone. He served in the displaced persons camp at Bergen Belsen.

45. Rosenbaum, op. cit., p. 158, states that another eye-witness to this Rosh Hashanah selection gives a more detailed account of the exchange between the father and the rabbi. (Shlomo Rozman, Zikhron Kedoshim, pp. 380ff.) Rozman states that the persistence of the father led Meisels to render the pesak din, "Who can say that your blood is redder ..." (Sanhedrin 74a).

46. Rema in Shulchan Aruch, Hoshen Mishpat 388:2.

47. Sema in the name of the Nimukei Yosef.

48. Shakh, Choshen Mishpat 163:11, citing a teshuvah of the Maharival.

49. Yad Avraham, Yoreh Deah 157.

50. The dispute over whether or not Oshry's teshuvah was real or theoretical has already been cited.

51. Baba Metzia 62a.

52. Mishnah, Horayot 3:6, 3:7.

53. Bet Yosef, Yorah Deah 251, in the name of the Ritba.

54. Shakh, Yoreh Deah 251.

55. Rashi, Yoma 82b.

56. מרן הר"ם , Baba Metzia 62a.

57. Baba Metzia 62a.

58. Ephraim Oshry, MiMa'amakim, vol. 2, no. 1, pp. 7-15.

59. Babylonian Talmud, Sanhedrin 73a

60. Leviticus 19:16.

61. Babylonian Talmud, Sanhedrin 74a.

62. Tosafot, Yevamot 53a.

63. Kesef Mishnah, Hilkhot Rotzeach 1:14 (Kesef Mishnah is citing a passage from Hagahot Maimuni based on the Palestinian Talmud).

64. Mishneh Torah, Hilkhot Rotzeach 7:8.

65. Or Sameach, Hilkhot Rotzeach 7:8.

66. See Numbers 35:26-28 for the source of the laws discussed here regarding the blood avenger and the exile.

67. Oshry cites the Shulchan Aruch, Hoshen Mishpat 426:1 to show that its ruling contains no mention of an obligation to place oneself in possible danger. The Sema's commentary here as well points out the omission in all the codes.

68. Pitchei Teshuvah, Choshen Mishpat 426:2.

69. The Palestinian Talmud passage on which the ruling was based, Terumot 47a, will be discussed in detail in the next teshuvah.

70. Aruch Hashulchan, Choshen Mishpat 426:4.

71. Babylonian Talmud, Niddah 61a.

72. Tosafot, Niddah 61a.

73. Netziv, in Emek She'elah 129:4.

74. The force of "middat chasidut" will be discussed in the next chapter. At its least, it implies that one should do more than the law requires.

75. Again, this passage, Terumot 47a, will be discussed in detail in the next teshuvah.

76. Mordecai Ya'akov Breish, Chelkat Ya'akov (London, 1959), vol. 2:143, pp. 239-242.

77. Even at the close of World War II, with the advance of the allies and the assured defeat of the Nazis, the Nazis refused to abandon their extermination program against the Jews. At numerous camps, Jews would be evacuated and forced to walk for days without end in "death marches" as the Nazis tried in vain to evade the allies.

78. Kesef Mishnah, Hilkhot Rotzeach 1:14.

79. He argues that the positive commandment, "and live by them," and the principle that saving of life sets aside the commandments should be weightier than the negative commandment, "Do not stand idly by the blood of your brother," which is applied here. If so, he questions the ruling that one would be obligated to endanger himself.

80. Both are from Palestinian Talmud, Terumot 47a.

81. Baba Metzia 84a, for example, mentions that Resh Lakish had once been a leader of a group of robbers. Thus his reputation for strength and perhaps his special information.

82. Teshuvot Ridvaz 3:625.

83. Netziv, in Emek She'elah 129:4.

84. Tosafot, Niddah 61a.

85. Baba Metzia 62a.

CHAPTER IV

ETHICAL THEMES

Although ethical themes are not explicitly discussed in the teshuvot, we have been able to isolate those major ethical issues which are implicit in or can be derived from the teshuvot. In this chapter, by examining the major ethical issues, we will be able to compare the process by which ethical solutions are found with the process by which halachic solutions are found. In addition, we will be able to compare the solutions themselves so that we can determine to what extent the answers found in the teshuvot are ethical.

I. ETHICS IN THE HALACHAH

Prior to beginning our ethical discussion, it is important to ask the question: Can it really be true that ethics as such is not found in our halachah? Do we really need a separate discussion in order to determine the ethical solutions which our teshuvot should give?

Lichtenstein[1] asserts that ethics is contained within the halachah and is fully imperative. He states that "the demand or impetus for transcending the din is itself part of the Halakhic corpus." Aware of the potential gap between what the law is and what it should be, Lichtenstein asserts that terms such as lifnim mishurat hadin (beyond the line of the law) and middat chasidut are part of the halachah's own internal and authoritative system. They are evidence of the halachah's self-contained ability to correct the law in the direction of the ethical.

Lichtenstein cites numerous examples of ethical demands contained in the halachah.

> Rav Yohanan said, "Jerusalem was but destroyed because they (i.e., the inhabitants) judged in accordance with Torah law within it." "Well, should they rather have followed the law of the Magians?! Say, rather because they based their judgments solely upon Torah law and did not act lifnim mishurat hadin (i.e., beyond the line of the law)."[2]

For Lichtenstein, this statement demanding that a person go beyond the letter of the law is equivalent to an ethical corrective on the law, and contained within the law. He cites another example.

> "'And thou shalt show them the way' - this is the study of Torah; 'and the action they should take' - good conduct" - these are the words of Rabbi Yehoshua. Rabbi Eleazer of Modiim says: "'And thou shalt show them' - teach them their life's course; 'the way' - this alludes to visiting the sick; 'they shall walk' - to burying the dead; 'therein' - to exercising kindness; 'and the action' - to din proper; 'which they shall do' - to lifnim mishurat-hadin."[3]

Lichtenstein asserts that the conjunction of lifnim mishurat hadin with mandatory elements of the law proves that it is not optional, but required of a person to go beyond the line of the law.

If Lichtenstein is correct, and these devices are an ethical element contained within the halachah, it could mean that there is no need for an independent ethical discussion. However, there is no certainty that the use of these devices to move beyond the literal law constitutes ethics. They may simply have been employed to urge people to do more than the law demands in every area of life. And while the imposition of more rigorous demands might sometimes lead to the approximation of ethics (as in Elijah's rebuke of Joshua ben Levi for not observing a mishnat chasidim), it is not clear that the devices are intended to promote more ethical behavior.[4]

And even if it could be proven that the use of these devices consti-

tutes ethics, it is not necessarily sufficient to close the gap between law and ethics. Firstly, if concepts such as lifnim mishurat hadin are really enforceable (and there is little evidence that they are), they certainly do not carry the same weight as fixed halachic demands. Secondly, the vague nature of any of these "ethical requirements" is bound to lead to every Jew interpreting the demand to go beyond the letter of the law according to his own needs and standards. There is no guarantee that the result will close the gap. Thirdly, there is a possibility that the sense of mishnat chasidim, for example, is that a pious Jew is required to do more than the law requires. However, the ordinary Jew would not be expected to do more than the letter of the law. If this is so, the gap between law and ethics would remain unchanged for the vast majority of Jews.

It appears, then, that even if these devices are an indication that ethics operates within the halachah, they are not sufficient to close the gap. While these devices make it more possible for the halachic system to approximate ethics, they do not in any way guarantee that the halachic solutions will be ethical solutions. It is, therefore, essential that we look at our ethical issues independently of the halachah. We now turn to this ethical discussion.

II. ETHICAL DISTINCTIONS

The all-encompassing ethical question which emerges from our life for life situations is: How does one determine, on an ethical basis, who shall live and who shall die?

Two objections are often raised in connection with this subject. The first is that each situation tragically required that the saving of life

be achieved only through the sacrifice of other life. Therefore, each was an untenable situation for which no moral solution could possibly be found. This author, while acknowledging the lack of easy alternatives, believes that every situation requires a search for the most ethical options within that situation. If normal ethical standards cannot be applied to the extreme situation, then an effort must be made to find those ethical standards which would apply.

The second objection is that those who did not experience these situations faced by Jews during the Holocaust have no right to sit in judgment over those who faced such situations. This objection is to some extent born out of the same perspective as the previous objection, that normal moral alternatives were not available in these situations. The goal of this author, however, is not to sit in judgment. Rather, it is to take a fresh look at the ethical considerations in each situation so that we can compare the ethical approach to the legal approach, and so that we can provide ethical guidance in life for life situations which may confront us at any time. Still it is inevitable that some judgment will take place, depending on the extent to which Jews during the Holocaust acted in accord with the ethical principles established in this discussion. And this author is not convinced that such limited judgment is either unfair or unuseful. It would be pointless to concern ourselves with ethical principles which can be derived from life for life situations if we were to conclude that anyone who faced such a situation is exempt from moral judgment.

So let us proceed with the discussion. Prior to discussing possible ethical bases on which to determine who shall live and die, it is important to discuss certain general distinctions (between types of situ-

ations) which could influence the ethical considerations.

Personal Decision Making and Collaboration

The first such distinction is between those situations which involve personal decision making and those which involve collaboration. Efrati's case of the infant in the bunker and Oshry's case of the workers' seizure of the cards are two examples of actions which were taken as a result of the initiative of the group or persons concerned, without any cooperation with or pressure from the Nazis. Thus they are examples of situations of personal decision making. On the other hand, Oshry's case of the Judenrat's distribution of the cards is an example of an action which was taken as a result of demands from and cooperation with the Nazis. It is an example of a situation of collaboration.

The question arises: Is a situation of collaboration inherently unethical because it involves cooperation with the Nazis? It has been argued that, because the Nazis' plans were evil and totally unethical, and because collaboration meant assisting them in their plans, then any degree of collaboration should be viewed as unethical.[5] This author feels, however, that collaboration is essentially neutral. It is the extent to which the actions taken as a result of collaboration are ethical or unethical which determines whether the collaboration itself is ethical or not.

Thus, for example, if a Jewish community were approached by an evil power and ordered to pay a head tax of twenty five percent of the community's income or else the entire community would be killed, the ethical response would be to pay the tax and preserve the lives of the community members. Thus ethics would require collaboration because the action involving collaboration is ethical. Similarly, if the evil power

demanded from the Jewish community that it surrender a person's life or else face extinction of the entire community, as in our situation, the ethics of collaboration would depend on the ethics of the act of surrender. If it were decided that it was ethical to surrender a person's life, then collaboration would be ethical. If, however, surrender was viewed as unethical, then collaboration in that specific act would be unethical. Such a view of collaboration means that there is no inherent ethical distinction between situations of personal decision making and situations of collaboration. Both depend on the ethics of the action taken.

Yet this author is not entirely comfortable with the implications of this viewpoint. It seems to be a reality of collaboration between an oppressor and the oppressed that once a process of collaboration has begun, it is exceedingly difficult for the oppressed group to draw the line in its collaboration, and to refrain from committing unethical actions. This is precisely what happened during the Holocaust.[6] Also, it is possible that a specific act of collaboration, which appears to be ethical when the action is judged on the basis of the immediate alternative, is unethical when viewed in a long-range context. For example, when the Nazis demanded of the Jews of Warsaw that they construct a ghetto wall which would lock them in, compliance may have appeared ethical if, for example, the Nazis threatened to kill twenty thousand Jews if they chose not to comply. Yet, in the long-range, the erection of the ghetto wall contributed greatly to the Nazis' extermination campaign against the Jews of Warsaw. And it is likely that it also contributed to the dehumanization process of the Jews. Thus, in an overall context, such compliance may have been unethical.

So how, then, should a group of Jews decide whether or not to collaborate? They should first decide whether an action demanded by the power is of itself unethical. If so, the group should refrain from collaboration. If it is judged not to be unethical (for example, the collection of the head tax), it should be viewed in the context of the overall design of the oppressive power. If it is concluded that collaboration in a particular instance would contribute significantly to a long-range process of destruction the result of which would be worse than non-collaboration in the specific instance, then on the long-range scale such an action must be viewed as unethical.

Of course, it is not always possible to know to what extent performing a given action will contribute to a long-range plan or what the long-range plan is. Indeed, this is the difficulty with Arendt's scathing attack on the Judenrate.[7] She concludes that the Judenrate were immoral because they assisted the Nazis in their program to exterminate the Jews. The basis for her claim is evidence which she cites to suggest that Jewish collaboration actually made it easier for the Nazis to carry out their program; and that were the Jews not so well organized, they would have fared much better.[8]

The problem with Arendt's conclusion is that it is based on a result which was not necessarily foreseeable. Furthermore, by judging the collaboration to be unethical on the basis of the end result, Arendt invites the possibility that, had the end result proved that collaboration in the surrender of life had saved hundreds of thousands of lives, the collaboration would have been judged to be ethical.[9] On the surface, such a reasoning process may appear to be fair. After all, this author has stated that an individual act which might otherwise be ethical, can

be considered unethical as a result of the long-range context. Is it not fair, then, to state that an individual act which might otherwise be unethical can be considered ethical as a result of the long-range context? This author would argue that such a suspension of the ethical would amount to the ends justifying the means, and would be unacceptable.

Although it has been shown that the process of collaboration raises very difficult problems, it is still the act itself which determines whether or not a given instance of collaboration is ethical or unethical. Collaboration, then, has the same neutral status as personal decision making, and there is no ethical distinction between the two. Rather, in both situations, the ethics depends upon the actions themselves.

Direct and Indirect Action

The second distinction is between those situations which involve direct action and those which involve indirect action. Efrati's case of the infant in the bunker, for example, involved direct killing. Oshry's case of the distribution of cards, on the other hand, involved surrender and indirect killing. Is it possible that the more direct act is more unethical or ethical, as the case may be? Similarly, it is possible to view the saving of oneself in Oshry's case of the card seizure, and the saving of one's relative in Meisels' case of redemption, as acts which either directly or indirectly led to the seizure of others. Is it possible that the extent to which these acts directly or indirectly led to the seizure of others (and their loss of life) influences the ethical considerations?

With respect to the distinction between killing and surrender, this author would again argue that no special ethical consideration exists. If it is judged ethical to surrender a person's life, then it is ethical

to surrender the person to another for the killing or to kill the person directly. If it is judged unethical to surrender a person's life, then giving the person over to another to do the killing does not render the act less unethical than the direct killing. The author arrives at this conclusion because of his belief that there is really no difference between shooting a person to death and handing him over to another to shoot him to death. It is true that reports of Jewish police actually taking part in the execution of Jews[10] are extremely distasteful. Yet such direct action was no more unethical than the simple surrender of those lives would have been. To argue that direct action is more unethical is to allow a person to justify the surrender of life on the basis that it is more ethical than direct killing would be. It is interesting to note that the distinctions discussed here are closely related to the first set of distinctions. Direct killing is most likely going to arise in a case of personal decision making (although not exclusively) while surrender is only an issue in a case of collaboration.

What about the saving of oneself or another in a way which directly or indirectly leads to the sacrifice of another's life? Is there an ethical distinction? Let us suppose that the redemption of the boy from Auschwitz could have been achieved in two ways - both of which involved the substitution of another person for the boy who was being redeemed. By the first way, the father would have captured another boy and taken him to the block where his son was being held. He would have handed over to the kapos this boy who was to take his son's place. Upon receiving the boy, the kapos would release the father's son. This would be an example of direct seizure of another. By the second way, the father would have pleaded with the kapos to release his son. Upon his release,

the kapos, with the full knowledge of the father, would seize another in his son's place. This would be an example of indirect action on the part of the father. As in the distinction between killing and surrender, whether a person directly or indirectly causes the seizing of another makes no difference from an ethical point of view. They are essentially the same. The direct or indirect seizure is judged to be ethical or unethical solely on the basis of whether the saving act which led to the seizure is judged ethical or unethical.

Danger to Self and Danger to Others

The third distinction is between situations in which one's own life is directly threatened and situations in which it is the lives of others which are threatened. Oshry's case of the seizure of the cards and Efrati's case of the infant in the bunker are examples of situations in which people took an action which would result in the death of others only because they wanted to save their own lives. On the other hand, Oshry's case of the Judenrat's distribution of the cards and Meisels' case of the father's redemption of his son are examples of situations in which the people who took the action which would result in the death of others did so not to protect their own lives, but to protect the lives of still other people. Is it possible that the saving of one's own life at the expense of another is more ethical than the saving of others at the expense of still others because of a basic right to self-preservation? Put differently, is it possible to use a different ethical standard when one acts out of his basic instinct and right to live as opposed to when one chooses between the lives of others?

We must first ask whether a person's right to self-preservation would ethically justify any action to defend that right. It is conceivable

that the Nazis would have threatened a Jew and demanded that he deliver into their hands a group of twenty-five Jews who had been hiding, by showing them the hiding place. The Nazis would then kill the entire group. If he refused to comply, the man would be killed. Would he be ethically justified in complying because it would be an act of self-preservation? If it were ascertained that this group of people had done nothing for which they deserved to surrender their lives, the answer must be no, it would not be justified. Similarly, if the Nazis ordered a Jew to kill another Jew who had committed no act for which he deserved to surrender his life, murder for the sake of self-preservation would not be ethically justified.

While we have shown that an act of self-preservation may not always be ethically justified, it is possible that an act of choosing between the lives of others may never be ethically justified. Yet the same principle would seem to apply. If a person were to witness a murderer attempting to kill another person, he would be ethically justified in attempting to save the intended victim's life, even by killing the murderer. This is because the murderer, through his intention to wrongfully kill, has given up for the moment his equal claim on life. At any rate, this is an example of a situation in which choosing between other lives is ethically justified. Similarly, if the Judenrat were ordered to select four thousand Jews for death, that act would be ethically justified if the four thousand Jews had truly given up their equal claim on life.

Thus the same principles apply in situations of self-preservation and situations of action taken in the interest of others. The action is justified or not justified by the same ethical standard, whether or not a particular life deserves to be sacrificed. Yet one distinction can

surely be made. The closer we get to an act of self-preservation, the greater the likelihood that a given act judged to be ethically unjustifiable should be viewed as excuseable given the extreme situation. Thus, while it may not be ethically justifiable for a worker to have seized a card, thereby causing another's death, that act of self-preservation is quite understandable and even excuseable. Similarly, the father's redemption of his son would probably not have been ethically justifiable. Yet here was a father who knew that he had the capability of saving his only son. Had he decided to commit the act, it would have been understandable and excuseable, to almost the same degree as an act of self-preservation. That willingness to excuse an unethical act diminishes, for this author, as the situation moves farther away from an act of self-preservation.

It is interesting to note that the only major Jewish ethical discussion to be found concerning life for life situations centers around the distinction between the self and others. The discussion was prompted by Ahad Haam's use of the Akiba/Ben Patura dispute to show that justice is the basis of Jewish morality, as compared to love, which serves as the basis of Christian morality.[11] Ahad Haam was attempting to show that Judaism was distinguished from other religions by its commitment to an abstract ideal. To prove his point, he cited Akiba's application of justice in the case of the two men with only sufficient water for one.[12] (He accepted Akiba's view as binding.) Akiba ruled that the one who had the water should drink because his life took precedence. Ahad Haam interpreted this as the answer justice gives. In this case, where only one life can be saved, it is an ethical duty to overcome any feeling of compassion and to save what can be saved. Justice requires that the per-

son who has the power to do so should save himself. Akiba's ruling is viewed by Ahad Haam as the best example of Judaism's commitment to a justice which is both abstract and objective, an absolute justice which "attaches moral value to the individual as such, without any distinction between the 'self' and the 'other.'" He contrasts this sense of justice with the Christian sense of altruism which denies "the individual as such all objective moral value, and makes him merely a means to a subjective end." Ben Patura's view is, according to Ahad Haam, that of the Christian altruist who does not value human life for its own sake.

Nearly every conclusion reached by Ahad Haam has been the subject of wide debate.[13] His labelling of Judaism as a religion of justice and Christianity as a religion of morality, his assumption that Akiba's ruling was binding in the case of the two men with only enough water for one, and his dismissal of self-sacrifice as an important tradition in Judaism, have all been challenged. Yet, regardless of the merits of his arguments, Ahad Haam, in the writing of his essay and his example of the Akiba/Ben Patura dispute, set the stage for the single major Jewish ethical discussion on a life for life situation.

Immediate and Delayed Action

The final distinction is between situations which demand immediate action and those which do not. In Efrati's case of the infant in the bunker, if the infant were not killed immediately the entire group would have been discovered and killed. There was almost no time to consider the action. However, in Oshry's case of the Judenrat's distribution of the cards, the Judenrat had several days to weigh carefully its actions. Is it possible that the action taken in the bunker is more ethically justified than the action taken by the Judenrat because an immed-

iate response was required?

Once again, the same principle applies. The sacrifice of a life is not ethically justified on the basis of the circumstances surrounding the situation, but on the basis of whether or not there was sufficient reason to take a person's life. The need to respond immediately is not in itself sufficient reason to warrant the taking of a life. If, for example, a person were in the path of an onmoving car, he might need to take immediate action in order to save himself. If he pushes two people in front of him to protect his body, and they die as a result, the action is not ethically justified unless they deserved to die anyway. The point is the immediacy of the danger does not make an otherwise unethical act ethical. Rather it is similar to the distinction discussed above. The more immediate a danger is, and the less time there is to think out a response, the more understandable and excuseable is an act committed to save one's life.

There is one possible exception. This author believes that people have a natural instinct for self-preservation. While that instinct should not be taken as license to commit otherwise unethical acts, it is possible that an action is taken solely out of instinct for self-preservation. This is probably what actually happened in the case of the infant in the bunker. In such a situation, this author would argue, an act which would result in another's death and which would otherwise be viewed as unethical, would be ethically neutral. It is just not possible to judge one's natural, and virtually involuntary, instinct to be unethical. However, as soon as there is sufficient time for one to consider the act, normal ethical standards must hold. Thus, in the case of the lifeboat,[14] a decision was made to kill a cabin boy so that the

others could survive. While this action may appear to have been motivated by instinct, normal ethical standards should apply because there was sufficient time to consider the implications of the act.

We have seen that, in general, distinctions between collaboration and personal decision making, direct and indirect action, danger to self and danger to others and immediate and non-immediate action, do not provide a substantial basis on which to determine whether or not the sacrifice of a particular life is ethical or unethical. So now we will turn to those bases on which such an ethical decision might be made.

III. DESERVING OF DEATH: THE ETHICAL BASIS FOR KILLING

It is universally recognized that the major basis on which a person is ethically justified to surrender another person's life is self-defense or defense of another. Specifically, if a person threatens to kill another, then the intended victim or another person is ethically justified in sacrificing the life of the intended murderer if that is the only way to preserve the intended victim's life. Self-defense or defense of another is ethically justified because a person has a basic right to defense of his life against those forces which would intentionally deprive him of that right. This author would argue that it is also ethically justified because at the moment a person willfully attempts to kill another he gives up his equal claim on the right to life.

In a real sense, the intended murderer becomes deserving of death as a result of his willful aggression. That is why it is ethically justified to kill him. But what about situations in which it is not so clear that a person is deserving of death? Can there be an ethical

basis for surrender of life in such a situation?

It is this question which must be addressed with respect to the issues raised in the teshuvot. For none of the situations can be considered clear-cut cases of a person or persons deserving of death. In Oshry's case of the Judenrat's distribution of the cards, in his case of the worker's seizure of the cards, in Efrati's case of the infrant in the bunker and in Meisels' case of the redemption of the son, those who will sacrifice their lives as a result of whatever action is taken have not committed a willful act of aggression which would make them deserving of death. Since only the killing of a person who is deserving of death is ethically justified, there is only one way to justify ethically any of the actions suggested in the teshuvot - to enlarge the category of "deserving of death" to include the people whose lives would be sacrificed. Let us look at some of the possible areas of expansion.

Acceptance of the Label, "Deserving of Death"

One possibility is to accept on face value the designation of a person as "deserving of death." Thus, if the Nazis ordered the Jews to surrender a person because he was "deserving of death," the person should be surrendered if in so doing other lives can be saved. There are serious ethical problems, however, with such an expansion. Automatic compliance in such a situation would mean acceptance of the Nazi definition of "deserving of death." Thus, for example, if the Nazis ordered the Jews to surrender all the old people in a ghetto (who were "deserving of death" because they were no longer fit to work), acceptance of the Nazi standard would require compliance. Furthermore, if the Nazis ordered the surrender of people who were known to smuggle food into the ghetto, or who were known to administer health care, on the basis that they were

"deserving of death," the same problem would persist. Clearly the Nazi standard of who was deserving of death was unethical and compliance with that standard would not solve the ethical problem.

The Unintentional Aggressor

A second possibility is to expand the label of "deserving of death" to include the unintentional aggressor. This would be a person who does not intend to cause the death of anybody, but who nevertheless will cause death. This is precisely what Efrati sought to do by labelling the infant a rodef. It is also one way by which Judenrate sought to justify the surrender of certain individuals. If the Nazis demanded that the Jews surrender food smugglers, or else members of the community would be killed, it could be argued that even if the Nazi definition of deserving of death were not accepted, their lives should be surrendered because they were now an endangering presence to the community.

Yet, once again, there are several major ethical problems with the extension of the label of "deserving of death" to include the unintentional aggressor.

Firstly, some people do, in fact, become unwillful aggressors because of a certain behavior which they cannot control. Can it be ethical to kill a person who is not responsible for his actions? For example, if a mentally ill person attacked someone (and was, therefore, an unwillful aggressor), would it be ethically justified to kill the attacker in self-defense or defense of another? Reluctantly, this author would maintain that the killing of the attacker would be ethically justified because, although the attacker is an unintentional aggressor, he is still committing a wrongful act. The commission of the act lessens the attacker's claim on life and ethically justifies the killing of the attacker as an

act of self-preservation.

The author's reluctance to justify ethically the killing of an unwillful aggressor stems from a feeling that it is somewhat unfair to diminish the claim on life of a person who is not responsible for his actions. Yet he recognizes that the controlling factor is not whether the person's actions are intentional, but the fact that they threaten life. It seems to this author that many of history's mass murderers were probably people who were not responsible for their actions. Yet, surely, if the only way to prevent the mass murders was to kill the attacker, it would be ethical to do so and unethical not to do so. For, by refraining from killing the attacker, many innocent lives would be lost.

The view that it is ethical to kill the unintentional aggressor raises a new problem. What limits, if any, are there on who can be labelled an unintentional aggressor and thus deserving of death? Does it refer to any person who constitutes an endangering presence to the community? If so, and the Nazis threatened to exterminate the community unless all children, women, sick people and elderly were surrendered, it would, according to the extension of the label, be ethically justified to surrender them, for as long as they remained in the ghetto they would be unintentional aggressors threatening the lives of the remainder of the ghetto. (This brings out the major problem regarding the extension of the label, a temptation to label people as unintentional aggressors indiscriminately in order to make easy the decision to sacrifice their lives.)

But there is a major difference between this case and the one discussed above. Here the people whose lives would be surrendered have committed no wrongful act. Since it is the commission of a wrongful act which allows a person to be considered deserving of death, it would not

be ethical to view the children, women, sick people and elderly as deserving to die. Thus the label of unintentional aggressor may, from an ethical point of view, only be extended to a person who has committed a wrongful act which endangers the lives of others.

This, in turn, raises another problem. What constitutes a wrongful act? It is obvious that a person who attacks another with an axe is committing a wrongful act. It is also obvious that an elderly person whose surrender is demanded by the Nazis (because he is old) has not committed a wrongful act. But what about the infant in Efrati's case, who cried in the bunker and endangered all the lives as a result? Was his act of crying wrongful? This author would argue that it was wrongful. If a group of people went into hiding from authorities who sought to kill them, and one of the members of the group (who knew what he was doing) decided to shout at the top of his lungs to attract the authorities, it seems clear that the shouting was a wrongful act. Similarly the crying in the bunker, although unintentional, must be viewed as a wrongful act, and it is ethical to kill the infant to save the others.

In the context of our discussion, a wrongful act is an act which a person intentionally or unintentionally commits which directly endangers other life. Sick people, elderly, etc., whose lives were demanded by the Nazis, could not ethically be surrendered because the danger they posed was not a result of an act they committed but of their state of being. Also, a food smuggler could not ethcially be surrendered because his act of smuggling food did not directly endanger other life.

There is yet another ethical problem with the extension of the label, "deserving of death," to include the unintentional aggressor. In the context of the Holocaust, a person usually became an unintentional

aggressor as a result of being wanted by the Nazis. If the Nazis wanted a particular person, and threatened to kill others if he were not handed to them, that person became an unintentional aggressor toward the others. To surrender him would once again mean the acceptance of the Nazi definition of "deserving of death." This, as has been pointed out, is unacceptable ethically.

Doomed to Die

A third possibility is to expand the label of "deserving of death" to a person who is doomed to die whether or not his life is surrendered. In a sense, this is a sub-category of the unwillful aggressor. Thus, for example, the infant in the bunker was doomed to die along with the group of Jews, whether or not his life was surrendered.

This kind of situation has been the subject of some Christian ethical discussion. Thomas Davitt,[15] in his discussion, gives several examples of situations in which lives were doomed whether or not they were surrendered. His first example is about an archaeological expedition in the desert. Several of the expedition members become sick with an extremely contagious plague. There are no medications available to treat the disease and no possibility to quarantine the stricken members. Furthermore, there is not sufficient time to return to civilization. It is certain that, unless the stricken members are killed and buried, the disease will be transmitted to the other members. It is also certain that, even if such drastic action were not taken, all the stricken members would die.

Davitt's second example concerns a mother who is three months pregnant and has a uterine tumor. The uterus has to be opened and the foetus expelled in order to prevent the mother from bleeding to death.

Davitt adds that, since the foetus is non-viable, it would be doomed to death even if it were not removed.

His third example concerns a mother who is having difficulty in labor. If an embryotomy is not immediately performed, both the mother and the child will die.

All three of his examples contain two common factors: (1) It is a lethal presence (or unintentional aggression) which is threatening life, and (2) whether or not the person who is the endangering presence is killed, his life is doomed. Davitt believes that in all these examples it is ethically justifiable to kill the person who is the lethal presence. He bases this conclusion on the following: (1) the person will die anyway; (2) a person has a right to kill somebody who endangers his life; and (3) the "who, what, where, when and how" of the killing are value-judged not to be evil.

This author concurs in the view that the killing of an unintentional killer who is doomed anyway is ethically justified in order to save the others. He bases this conclusion on the fact that there is nothing achieved by not surrendering the doomed person's life. Neither the doomed person nor the others would be saved. Since the major ethical value inherent in this entire discussion is the worth of life, it would make no sense to favor a decision which would result in the loss of everybody's life over a decision which would result in at least one life being saved. Thus, on this basis, too, the killing of the infant in the bunker would be ethically justified.

A similar conclusion was recently reached in a fascinating case. Siamese twins were born to an Orthodox couple. They shared a single heart. Both were doomed to die unless one of the two was killed. After

days of ethical and religious debate, it was decided that the twin with the lesser chance of survival should be sacrificed in order to save the other twin.[16] Thus there seems to be general ethical consensus that a person who, in the process of dooming others to death, is doomed himself, has a lesser claim on life and may be viewed as "deserving of death."

However, there are some difficulties with this conclusion. All of the cases cited so far involve situations in which it is certain that a person is doomed to die anyway, and in which the person who is the endangering presence is clearly identifiable. Yet not all cases are so clear. During the Holocaust, some of the Judenrate justified the surrender of old people or terminally ill people on the basis that they were doomed to die anyway. Thus Jacob Gens of Vilna, after participating in an "action" in October, 1942, was quoted as justifying the participation with the following words,

> It is true that our hands are smeared with the blood of our brethren, but we had to accept this horrible task. We are innocent before history. We shall be on the alert to preserve the remnants. Who can tell whether victims will not be demanded here (in Vilna) as they were demanded there (in Oszmiana)? We shall give only the sick and the old. We shall not give the children; they are our future. We shall not give young women. A demand has been made to deliver workers. My answer was, 'We shall not give them, for we need them here ourselves."[17]

It is clear, then, that in the eyes of many members of the Judenrate, the ability to label a person doomed to die justified that person's surrender to save the others. The problem is that the category of "doomed" is too easily extended from a person who faces imminent death, as in the cases discussed above, to a person who is likely to die soon. And once the label "doomed" is applied to the sick or old, it can apply to any person who is likely to die prior to another person. Because of the un-

checked potential of the label, this author believes that its use is only ethical in those cases where doom is clearly imminent. Thus it would not be ethical for the Judenrate to sacrifice the elderly and the sick on the grounds that they are doomed. There is, of course, the likelihood that people will continue to extend the "doomed" rationale too far. Yet the possible abuse of the concept does not make its correct application unethical.

The second problem is that in certain situations the people who constitute a lethal presence, and who are doomed anyway, are not necessarily identifiable. Oshry, in his case of the Judenrat's distribution of the cards, ultimately justifies compliance on the grounds that the Nazi intention is to exterminate the Jewish people, and compliance is the only means of saving a part of the Jewish people. A real threat of extermination means that, unless lives are surrendered, everyone is doomed to die. Thus, within the community, any person whose surrender would save life can be considered an endangering presence and doomed to die anyway. Yet no person is visibly identifiable as that endangering presence who is doomed to die. Conceivably, then, the community could justify the surrender of any individual on the grounds that he constitutes a lethal presence and would die anyway. But would such surrender be ethically justifiable? Reluctantly, this author must say yes, it would be justifiable because the same principle exists. If our major ethical value is the worth of life, it would make no sense to favor a decision which would result in the loss of everyone's life over a decision which would result in at least one life being saved.

While this appears to justify the main strategy of the Judenrate, to sacrifice certain individuals who would die anyway, in order to save

other life, it must be clear that this strategy is only ethical if certain conditions are met. (1) There must be virtually no doubt that if the individuals are not surrendered their lives would be doomed together with the remainder of the community. (2) Since every individual is potentially the endangering presence and doomed, the selection of those to be surrendered must be objective and impartial. (Fair selection will be discussed below.)

This author trembles at the thought that the actions of some Judenrate were ethically justified. Yet it would be even worse to justify non-compliance when the result would be the extermination of the Jewish people. It is inconceivable that it could be ethical to permit the extermination of one's people if there exists the possibility to prevent it.

Quality of Life

A fourth possibility is to expand the label of "deserving of death" to a person whose life is judged to be less valuable than that of others. This would mean, for example, that the father would be able to redeem his son (as discussed in Meisels' teshuvah) if the person taken in his son's place was judged to be less valuable. Indeed, it was on the basis of the quality of people's lives that the Judenrate often created a hierarchy for surrender. Among the groups which were generally judged to be of lesser quality were criminals, prostitutes, the elderly, the sick, the mentally ill, children with defects and non-workers. These groups were viewed as expendable. If the Nazis demanded surrender of lives, it was considered reasonable in the eyes of most Judenrate to sacrifice members of these groups in order to save those who were members of groups which were judged to be more valuable: community leaders, workers, rabbis

and children, for example. While the hierarchies were partially connected to the issue of doom (the elderly and sick were included because their lives were judged to be doomed anyway), they were mainly the result of a general sense of worth. The question arises: Is the creation of such a hierarchy of worth and expendability ethically justified? This author would argue no, on several grounds.

Most importantly, it is beyond man's capability to know the true worth of an individual. The fact that one person is a non-worker and another a worker does not make the non-worker's life less valuable. Who knows what the non-worker might do to contribute to the welfare of the community? Perhaps he smuggles food into the ghetto. Perhaps he teaches children at night. On the other hand, perhaps the worker steals food from others. Perhaps he is secretly an informer. It is impossible for any human being to assess another person's total worth. Any effort to do so will automatically be incomplete and dishonest. And since it is dishonest, it is unethical. Furthermore, on ethical grounds, every person is entitled to be viewed as the equal of every other person, unless he has committed a wrongful act which lessens his equal claim. To label an innocent person as less than equal is to dehumanize him and to strip him of his rightful protection as a human being. (A person viewed as less than equal is subject to discrimination and abuse.)

Dehumanizing an individual is unethical in any context. It is, however, particularly offensive in the context of the Holocaust. The key to the Nazi success in the extermination of its Jews was their ability to dehumanize the Jew. By labelling certain groups as expendable, and in the process dehumanizing the members of those groups, Jews contributed to the Nazi program of dehumanization. Such assistance in the Nazi

effort to destroy the Jews was obviously unethical.

Thus, in those situations in which life would be sacrificed, it was unethical to determine who would be killed on the basis of assigning a value to one's life. This is as true for the Judenrate as it is for the father who sought to redeem his son.

Quantity of Life

A fifth possibility is to expand the label of "deserving of death" on the basis of the quantity of life. According to this rationale, a person would be "deserving of death" if as a result of his life being surrendered, more lives would be saved than if his life were not sacrificed. For example, if the Nazis demanded that the Jews surrender a specific individual or else the entire group would be killed, it would be reasoned that the person's life should be surrendered because only one life would be lost and many would be saved. Similarly, according to this reasoning, it would be justified for a group to kill a person who is on the lifeboat with them (to eat that person's flesh) because there would be a net saving of life. Is quantity of life an ethical basis on which to justify the surrender of life?

Again this author would argue no, quantity of life cannot be an ethical basis. Firstly, the rationale ultimately proves to be absurd. According to this rationale, it would be justified to sacrifice one life to save a thousand. It would also be justified to sacrifice one hundred lives to save a thousand. And conceivably it would be justified to sacrifice nine hundred and ninety nine lives to save a thousand, because there would still be a net saving of life. But it would not be justified to sacrifice a thousand lives to save a thousand lives. In other words, where does one draw the line with respect to what constitutes a

significant enough saving of life to justify the surrender of innocent lives? The quantity of life rationale leads to an impossible situation.

Secondly, in this calculating process, the individual's life is once again dehumanized and cheapened. Its only worth is as a statistic, either on the side of those to be sacrificed or those to be saved. When one believes, as this author does, that each human being is made in God's image and each human being carries the potential to create an entire world, then the cheapening of life which automatically comes with a quantification (or qualification) rationale is totally unethical.

Thirdly, just as one cannot place a qualitative value on human life, because it is beyond man's capacity to do so, it is also impossible to place a numerical value on human life. Perhaps a person's life is actually worth two other lives. The point is that we do not know. Therefore, any effort to assign a numerical worth is again dishonest.

None of our teshuvot discuss a quantity justification. Yet the Judenrate did. Moshe Merin, in the course of justifying his participation in an "action" in Eastern Upper Silesia, boasted,

> ...Nobody will deny that, as a general, I have won a great victory. If I have lost only 25 percent when I could have lost all, who can wish for better results...[18]

It is the author's view that such a rationale based on quantity cannot be ethically justified.

This author has concluded that neither a quality approach nor a quantity approach justifies the labelling of an otherwise innocent person as "deserving of death." Furthermore, because of the dehumanization and cheapening of life which are inherent in both rationales, this author also believes that neither rationale is acceptable as a means to select people to be surrendered when every member of a community is a poten-

tial endangering presence and is doomed to death unless lives are sacrificed.

Fair Selection

We stated above that one of the conditions which had to be met in order to justify the surrender of individuals to avoid extinction was to insure that the selection of those to be surrendered would be objective and impartial. This statement anticipated the rejection of the quality and quantity rationales. But the question remains: What would be a fair and ethical basis for selection?

This author would propose three possible bases: random selection, proportional selection and volunteers. Random selection would mean essentially casting lots. The names of every individual would be collected. The necessary number of names would be drawn randomly from the total list. Proportional selection would mean that within predetermined groups (families, occupational groups, etc.) a drawing would take place to select the names. Each group would be responsible to furnish a number appropriate to its size. The final possibility is to arrive at the necessary number by soliciting volunteers. The problem with this alternative is twofold. Firstly, it would be incumbent upon the Jewish councils to be honest about the fate which would most likely be awaiting the volunteers; secondly, many Judenrate started with a volunteer approach only to discover that after one or two deportations, nobody came forward. At any rate, all three of these methods have the potential to be objective and impartial.

Duty to Save Life

Before concluding this ethical discussion, there is one remaining

issue which should be addressed: What is a person's duty to save another's life? This issue is quite different from the others discussed above. All the other issues involved a situation in which a person considered an action to minimize the danger to himself or to others whom he wanted to protect. Now we shall look briefly at a situation in which a person considers an action which will expose him to danger in order to protect others.

Our teshuvot furnish us with two similar cases. Oshry's case regarding the saving of the yeshivah students and Breish's case of the saving of one's brother both concern the duty of a person to risk his life in order to save another.

From our standpoint, the question is whether a person ever has an ethical obligation to place his life in jeopardy. Firstly, it should be stated that a person has an ethical obligation to save life when he can. If a person observed a young child about to fall over the rail of a bridge, would he be obligated to save that child if it involved no risk to himself? This author would answer yes, because he believes (1) that life is a good and (2) that every person has a responsibility for his fellow human being.

Yet what if there was a danger that the intended saver would be pulled over by the child and would die along with the child? This is comparable to a situation in which the potential victim is in certain danger and the potential saver is in doubtful danger. Would a moral obligation still exist? This author is forced to conclude that it would depend on whether or not the would-be rescuer had helped to create the initial danger. If, for example, a person coaxed a child to climb over a bridge railing, he would have an ethical obligation to save the child

even if it meant placing his life in possible danger. If, on the other hand, a person bore no responsibility for the situation, he would not have an automatic ethical obligation to risk possible danger to himself. He would, however, have an ethical obligation to weigh the risks involved in a saving attempt against the degree of danger facing the potential victim.

Essentially the same principles would apply if the situation involved certain danger in order to save a person from certain danger. Thus, if the only way to save the child was for a person to climb over the rail himself and be exposed to certain danger, one would be ethically obligated to risk his life if he bore partial responsibility for the situation. However, if he bore no responsibility he would not be so obligated. In the latter case, if a person chose to endanger his life in order to save another, it would be his right. But ethics would not require such a noble act, for in asserting his right to self-preservation he would not be responsible for the fate of the endangered person.

This distinction between a situation in which one is partially responsible for endangering one's life and a situation in which one bears no responsibility leads this author to the conclusion that the rabbi who had no hand in bringing danger to the yeshivah students was not ethically obligated to risk his life to save them, even if it involved only possible risk. But the man who had promised to wake his brother was ethically obligated to risk his life, since the danger facing his brother was partially caused by him.

IV. SUMMARY: COMPARISON OF ETHICAL AND HALACHIC SOLUTIONS

We have now considered those life for life situations faced by Jews

during the Holocaust from both a halachic perspective and an ethical perspective. It is important to see how close the halachic solutions are to the ethical solutions so that we can determine whether or not one can do ethics out of the law.

Let us quickly review the halachic solutions. In our first teshuvah, Oshry ruled that according to Jewish law the Judenrat of Kovno could not distribute the cards. He based that decision on the fact that Jewish law requires that a person be deserving of death before he can be surrendered, and the Jews of Kovno were not. The reasoning and the conclusion are virtually identical with the ethical approach which also argues that one must be deserving of death before he can be surrendered.

Yet Oshry, in the conclusion of his teshuvah, finds some basis for compliance. He suggests that, since the Nazis intended to exterminate the entire Jewish people, compliance might be considered an act of saving. Once again, this conclusion parallels the ethical conclusion that if an entire community is doomed (and faces extermination), one is ethically justified in surrendering life because non-surrender would result in the death of everyone. It is not surprising that the ethical solution is the same as Oshry's, because here it is Oshry's ethical sense which is deciding and not mere legality. Oshry is unable to cite a single text to justify his belief that compliance might be mandated.

In the second half of this teshuvah, Oshry concludes that the workers have no right to seize the cards. He bases his reasoning primarily on the fact that through the seizure of the cards, the workers would be directly causing the death of others who were not deserving of death. Ethics comes to the same conclusion, although through different reasoning. Ethics argues that there is no distinction between direct and in-

direct action and between the saving of oneself and another. If the person whose life will be sacrificed as a result of the action is not deserving of death, then the action is unethical. Yet Oshry suggests that there is such a distinction and that halachah would permit the seizure of the cards if it only indirectly led to the death of others.

Efrati rules that it was permissible to kill the infant in the bunker on two grounds: (1) that he was doomed anyway; and (2) that he was a rodef. His conclusion that it is permissible to sacrifice the life of a person who is doomed anyway in order to save the lives of the others is identical with the ethical conclusion which argues that it is inconceivable that ethics would favor a decision which would result in the loss of everyone's life when it is possible to save life. Yet, although the conclusion is identical, it is only as a result of Efrati's ingenious and questionable reinterpretation of the major ruling on surrender which requires that a person be specified and deserving of death.

Efrati's ruling that the infant is a rodef (under compulsion) and can, therefore, be killed is also equivalent to the ethical view. Both halachah and ethics reason that if a person commits a wrongful act which directly endangers others, it is permissible to kill the person, whether his act was intentional or unintentional. The infant, by crying, had committed a wrongful act which directly endangered the others and which, thus, made him deserving of death.

Meisels refuses to permit the father to redeem his son. His reasoning is that the halachah would permit a person to attempt to save himself even though others would die as a result, but another person is not permitted to make an effort. While his conclusion is the same as the ethical conclusion, the reasoning is once again different. Ethics, as

stated above, does not make a distinction between the self and another except in a matter of instinct. Thus even the son would be forbidden to attempt to save himself because the person who would be seized in his place could not be considered deserving of death. Halachah seems to be arguing primarily from the perspective of the person contemplating an action. Ethics argues from the perspective of both the person contemplating an action and the potential victim.

Meisels, in the second half of the teshuvah, refuses to permit a young boy to substitute himself for a person who, he believes, to be a much more valuable human being. He bases his ruling primarily on Raba's statement, "Who knows whose blood is redder..." In this case, ethics reaches the same conclusion through identical reasoning - it is beyond man's capacity to know the true worth of the individual. Furthermore, the deciding of a man's worth cannot help but be both dishonest and dehumanizing.

Oshry ruled that Rabbi David Itzkowitz was permitted to place himself in possible danger in order to save the yeshivah students from certain danger, but that he was not obligated to do so. Oshry suggests that it would be considered a middat chasidut for him to endanger himself for the sake of the students. His reasoning is primarily based on the fact that under normal circumstances the halachah requires a person to save another because of the principle, "Do not stand idly by the blood of your brother." However, one cannot be required to place himself in certain danger to save another because of the principle, "Who knows that his blood is redder; perhaps your blood is redder." Yet this is a case of only possible danger and, therefore, while one is still not required to endanger himself, it might be desired.

Breish, in the case of the older brother's decision not to risk his life in order to save his brother, comes to essentially the same conclusion, although he minimizes the fact that doubtful risk might be desired.

Ethics reasons and concludes similarly. According to ethics, a person has a duty to save his fellow man from danger. This is equivalent to the principle, "Do not stand idly by the blood of your brother." Similarly, ethics would not require a person to risk his own life for the same reasons that the halachah would not require it; the lives are of equal value. However, ethics would obligate a person to risk his life if he were partially responsible for the danger facing the intended victim. This is at variance with Breish's ruling, since the older brother, by forgetting to wake his brother, had contributed to the danger.

Two of the major ethical questions were not addressed in the teshuvot: the quantity of life issue and the question of fair selection. It is likely that quantity of life would be rejected by the halachah as a basis for sacrifice of life for the same reasons that it is rejected by ethics - the worth of an individual life is far too great to reduce it to a statistic. It is not as clear, however, that halachah would concur with ethics on the basis by which it would be permitted to surrender life. Ethics argues that any selection must be done on a fair basis, either by random selection, proportional selection or volunteers. Halachah has never been enthusiastic about solutions such as casting lots. Rather it tends to support the creation of a hierarchy of expendability. Classes of people judged to be lower in worth are to be sacrificed before those of higher worth. Conversely, members of those classes which are judged to be higher in worth (males, scholars, priests, military leaders, etc.) are to be saved before those of lower worth. While this halachic

precedent was not really used in our teshuvot, it was the principle basis for selection in most ghettoes.

Ethics, however, maintains that the creation of such a hierarchy contradicts the principle that no man is capable of assessing the full worth of the individual. It also appears to contradict the principle of "Who knows that your blood is redder; perhaps his blood is redder."

On the basis of this comparison between the ethical solutions and the halachic solutions for life for life situations, it appears that the halachah and the ethics are usually in agreement. However, the two are not equivalent, and the comparison helps us to see the problems which exist in attempting to equate the law with ethics:

(1) On occasion, the halachah is in conflict with ethics. This is true in Breish's ruling that the older brother has no duty to risk danger to himself to save his brother. It is also true when the halachah would support the creation of a hierarchy of expendability.

(2) On several other occasions, the halachah is in agreement with ethics only because of the interpretation of the respondent. Oshry ruled that the workers could not seize the cards because it constituted an act which directly caused the deaths of others. Another respondent could have easily ruled that it was an indirect action and, therefore, permissible to seize the cards. If so, the halachic ruling would have been in conflict with ethics. Similarly, Efrati ruled that the infant could be killed because its life was doomed anyway. While this ruling concurs with the ethical view, most other respondents would have probably ruled according to the usual understanding of the law, that a person must be specified and deserving of death. If they had, then in this case the halachah would again be in conflict with ethics. In other words, much

of the agreement between the halachic solutions presented in our teshuvot and the ethical solutions is the result of the subjectivity of the respondents. Since subjectivity is always a factor, what appears to be agreement between ethics and halachah in one case may be a conflict in another when the halachah is interpreted according to another posek's subjectivity.

(3) Sometimes the halachah itself offers what appear to be contradictory alternatives - one ethical and one not ethical. This is true, for example, with the question of the quality of life. On the one hand, the halachah rules that no person can consider his blood redder than another's; each life has the same value. On the other hand, the halachah justifies the creation of a hierarchy of expendability, thus acknowledging that certain lives have more worth than others. It would be dishonest then to cite the former ruling (and the ethical one) as the Jewish view on the quality of life. If one were to rely solely on the halachah, then he would have to be prepared to abide by either ruling, for in a given situation either ruling might be applied.

(4) As stated above, ethics is primarily concerned with what is right while halachah is concerned with what is permissible or required. These different goals lead to different approaches and perspectives. Oshry, in his discussion of the seizure of cards; Efrati, in his discussion of the infant; and Meisels, in his discussion of the father's redemption of his son, confine themselves to a search for relevant texts which will determine whether or not a particular action is permissible. The texts which are employed do not generally argue from the perspective of the potential victim of any action. Their focus is limited. Ethics, on the other hand, requires a broader perspective. Before one can act he needs to consider the full implications of his act: how it

will affect him; how it will affect the potential victim; how it will affect other interested parties. One most then weigh all the implications and decide what would be the right action to take.

On the basis of the gap which exists between halachah and ethics, and which has been confirmed by our comparison, this author must conclude that one cannot do ethics solely out of the halachah. Yet it must also be stated that there is a remarkable degree of equivalence between ethics and the halachah. Firstly, the reasoning and conclusions found in the halachah are often identical to the reasoning and conclusions found in ethics. Secondly, in the course of the ethical discussion, this author found himself dependent on halachic texts in order to be able to articulate some of his ethical positions. Concepts such as the creation of man in the image of God, the saving of one life being tantamount to the saving of an entire world and the duty of man not to stand idly by the blood of his brother are at the very foundation of the ethical discussion. Thirdly, without reading the relevant halachic texts, this author would not have been able to formulate all the ethical questions which needed to be discussed. Many of the questions emerged out of the halachic discussion and thus the halachah served as a valuable aid to the ethical discussion. Finally, this author maintains a general sense that much of Jewish law is ethical and concerned with ethical behavior.

So, while it is not possible to do ethics solely out of the halachah, it is possible to rely on the halachah for ethical guidance. The person who wants to be a good human being and to act ethically in life for life situations probably cannot be bound by the halachah. However, the person who wants to be an ethical Jew ought to consider the halachah.

NOTES

1. Aharon Lichtenstein, "Does Jewish Tradition Recognize an Ethic Independent of Halakha?", in Marvin Fox's Modern Jewish Ethics: Theory and Practice.

2. Babylonian Talmud, Baba Metzia 30b, cited in Lichtenstein, ibid.

3. Mekhilta, Yithro, Massekhta D'Amalek, ii. (ed. Horowitz-Rabin) p. 198, cited in Lichtenstein, ibid.

4. There are numerous articles which present different perspectives on these devices or which challenge Lichtenstein. See, for example, Rabbi Saul Berman, "Law and Morality," in Jewish Values, Israel Pocket Library. Berman asserts that devices such as lifnim mishurat hadin and middat chasidut were originally introduced to resolve inner contradictions in the Mishnah and to resolve the disparity between existing law and the behavior of an earlier scholar. Other discussion can be found in Steven S. Schwarzschild, "The Question of Jewish Ethics Today," Sh'ma, 7/124, pp. 29-35; Gerald Blidstein, "The non-Jew in Jewish Ethics," Sh'ma, 7/125, January 7, 1977, pp. 37-39; and in Michael Wyschogrod, "The Particularism of Jewish Ethics," Sh'ma, 7/125, January 7, 1977, pp. 39-41.

5. This is essentially Hannah Arendt's thesis in Eichmann in Jerusalem, pp. 117-125.

6. The general literature on the Holocaust shows that once most Judenrate began to cooperate - in the maintenance of order, collection of taxes, distribution of yellow stars, etc. - they were carried by momentum, precedent, and an inability to distinguish between one task and another to perform virtually all tasks requested of them, including those which were clearly unethical. Yet a few Judenrate did find the strength and moral capacity to draw the line. These are discussed in Trunk's, Robinson's and Dawidowicz' books, op. cit.

7. Arendt, op. cit.

8. Arendt, op. cit., p. 125. Arendt states, "The whole truth was that if the Jewish people had really been unorganized and leaderless, there would have been chaos and plenty of misery, but the total number of victims would hardly have been between four and a half and six million. (According to Freudiger's calculations about half of them could have saved themselves if they had not followed the instructions of the Jewish council...)"

9. Thus Jacob Robinson, in And the Crooked Shall be Made Straight, op. cit., challenges Arendt by citing the example of the Lodz ghetto. He suggests that the fact that the Lodz ghetto was maintained longer than any other ghetto, and tens of thousands of Jews from Lodz were almost saved by the advance of the Red Army in July, 1944, was partially the result of Mordechai Chaim Rumkowski's willingness to cooperate fully with the Nazis in the surrender of life and a "rescue through work" program, p. 178.

10. Trunk, op. cit., p. 421, reports that the Vilna ghetto police took an active part in an "action" in Oszmiana in October, 1942. The police assembled more than four hundred victims and transported them to the site of execution. According to Dvorzhetsky, op. cit., they even took part in the execution itself (i.e., in the shooting of the victims).

11. Ahad Ha-am, "Jewish and Christian Ethics," in Ahad Ha-Am, Essays, Letters, Memoirs, edited by Leon Simon, pp. 127-137. The essay was originally written under the title, "Between Two Opinions."

12. Babylonian Talmud, Baba Metzia 62a.

13. See, for example, Chaim Reines, "The Self and the Other in Rabbinic Ethics," reprinted from Judaism, Vol. 2, no. 1, 1953, in Contemporary Jewish Ethics, edited by Menachem Marc Kellner, pp. 162-174. Also see Louis Jacobs, "Greater Love Hath No Man... The Jewish Point of View of Self-Sacrifice," reprinted from Judaism, Vol. 6, no. 1, 1957, in Contemporary Jewish Ethics, pp. 175-183.

14. The lifeboat case is the 1884 English case of Regina v. Dudley and Stephens, cited in Stone, op. cit. Two sailors who had been shipwrecked at sea ate a cabin boy to survive.

15. Thomas E. Davitt, Ethics in the Situation, in his section entitled, "I Kill Others," pp. 112-126.

16. "The Twins Decision: One Must Die so One Can Live: Parents, Doctors, Rabbis in Dilemma," The Philadelphia Inquirer, October 16, 1977.

17. Gens speech according to Zelig Kalmanovich, cited in Trunk, op. cit., p. 421.

18. Merin's speech according to Wiederman, op. cit., p. 25, cited in Trunk, op. cit., p. 422.

CHAPTER V

CONCLUSION

In the conclusion, the author will seek: (1) to summarize the major sections of the thesis with an emphasis on what the author has learned from his preparation of each section; and (2) to draw some conclusions on how one ought to approach Jewish ethics.

In the first substantive chapter, the author explored the classical Jewish texts which address the life for life issue. He attempted to show the original intent of each text, the various textual problems which occur, the degree to which the interpretation of each text is flexible, and the texts' applicability to life for life situations faced by Jews during the Holocaust.

As a result of his study of the texts, the author gained many new insights: (1) he learned that the extent to which interpretations are flexible is directly related to the number and nature of problems contained within each text; (2) he learned that the language of each text, as well as different versions of the same text, are greatly influenced by the degree of security which Jews felt within their socity at a given point of time. Specifically, as pressure upon Jewish communities by outside powers increased, there was a greater tendency toward accommodation within the texts discussed here; (3) this, in turn, taught the author that the laws were generally developed out of a real context, and not a theoretical one. Indeed, these laws emerged out of those real situations which challenged the halachah to maintain its values of life as a good and communal responsibility in the face of seemingly impossible choices;

(4) he gained an insight into the limits of applicability of each precedent - the gaps which exist between the situations covered by the texts and later situations which arose and which were slightly different; and (5) he gained the opportunity to study classical texts about which he had heard because of their prominence in Jewish ethical discussions. In the process, the author developed a sense and appreciation for why these particular texts were at the core of the discussions contained in all the Holocaust teshuvot on the subject of life for life.

In the second substantive chapter, the author examined each of the five relevant Holocaust teshuvot. He attempted to show the application of the classic legal texts discussed in the previous chapter to those life for life situations faced by Jews during the Holocaust, the process by which each respondent approached and resolved his particular issue, and the ethical issues which are implicit in or can be derived from each teshuvah.

In the process of studying each of the teshuvot, the author learned a great deal: (1) he gained his first opportunity to read complete, traditional teshuvot; (2) he gained a feel for the variety of styles of writing, approach to texts and reasoning employed in the teshuvot; (3) he saw how the classical texts were treated within each of the teshuvot; and (4) most importantly, he saw how the respondents attempted to resolve various problems which hindered their ability to render an easy, clear-cut opinion.

The problems which the respondents had to overcome include: (1) resolving an issue for which there was no direct precedent in the law. In that event, the respondent would feel the need to present numerous precedents which might have some relevance and weigh the degree of applic-

ability of each one. As a result, this author gained an exposure to an extraordinary number and variety of relevant legal texts; (2) resolving an apparent contradiction between an action already taken or intended to be taken and the basic legal statement on the issue. In that event, the respondents often chose to give a different but plausible interpretation of the basic law's intent, or to give a radical reinterpretation, depending upon the need of the situation as viewed by the respondent. As a result, the author gained an insight into the ways in which the respondents made seemingly inflexible legal positions flexible enough to meet their needs; and (3) the gap between law and ethics which exists and of which the respondents were aware. The respondents exhibited a concern for the gap between what the law would permit and their own ethical sense of what was right. They sought to reduce the gap by radically reinterpreting the law, by stating the standard legal position, but then adding that one was expected to do more than the law required, and by offering an opinion which, although couched in legal-sounding language, was not accompanied by legal texts, but was in fact the respondent's own ethical sense. The author, in his exposure to the respondents' attempts to resolve these problems, also learned a great deal about the role of subjectivity in the halachic process.

The lack of explicit ethical discussion, the respondents' own concern about the gap between the law and ethics, and this author's independent sense that such a gap exists, led the author to the conclusion that he might not be able to arrive at a satisfactory ethical position exclusively through the halachah.

The prospect that the author might find an ethical approach more satisfactory than a halachic approach led to the third substantive chap-

ter, an examination of the ethical themes implicit in or derived from the teshuvot. In this chapter, the author utilized his own ethical sense to reason through the major ethical issues which emerged from the teshuvot. This set up a basis for comparison between the approach and solutions found in the halachic system and the approach and solutions found in the ethical system.

In the process of taking an ethical approach to the life for life problem, and of comparing the two approaches, the author again gained some valuable insights: (1) In struggling to develop a logical approach to the ethical discussion, the author learned that the sole basis on which one could ethically decide who shall live and who shall die is by being able to judge one life as having a lesser claim on life than another, and by viewing that lesser claim as the equivalent of deserving of death within the context of our extreme situation; (2) In the course of the ethical discussion, the author was able to gain a feeling for just how theoretical some ethical discussions seem or need to be; (3) Also, the ethical discussion assisted the author in his own attempts to decide what the right action was in each life for life situation faced by the Jews during the Holocaust; and (4) The comparison of the two approaches forced the author to conclude that one cannot do ethics solely out of the halachah.

This conclusion arose out of the author's comparison between the governing principles which emerged from the halachic solutions and those which emerged from the author's own ethical solutions at the conclusion of the preceding chapter. In general, the author found that both systems maintained their commitments to the values of life as a good and man's responsibility to his fellow man in their responses to the chal-

lenges posed by the life for life problem. In other words, he felt that generally both the ethical and the halachic systems were capable of responding to the challenge. However, he found that many of the principles which emerged from his ethical sense were not apparent in the halachah. Indeed, the author found that the halachah sometimes runs directly counter to ethics, sometimes obscures ethics and sometimes is ethically ambiguous.

Therefore, the author came to the conclusion that one cannot do Jewish ethics solely out of the halachah. Since, as a liberal Jew, this author cares greatly about ethics, it should not be surprising that he finds the halachah somewhat unsatisfying in its treatment of ethical issues, and that he is unwilling to depend on it for ethical answers. Yet, is the author any more satisfied by the prospect of doing Jewish ethics out of general ethics? The author must again admit that he would be left somewhat unsatisfied.

The author's comparison between the halachic and ethical approaches not only showed him irreconcilable differences between the two systems; it also showed him a remarkable degree of equivalence between the two. The author found that the majority of halachic solutions were not only ethical, but that the reasoning employed in the two was also quite similar. Furthermore, the halachah greatly assisted the author in the process of formulating the ethical questions, articulating the ethical principles and developing the ethical solutions. In other words, the author is not sure that he could have organized the ethical discussion or come to his own ethical conclusions if he had not been aware of the halachic discussion. And, even if he could have arrived at ethical conclusions independently of his awareness of the halachic discussion, the author

could not consider ethics which ignores the primary guide to Jewish legal, spiritual and communal life as Jewish ethics. As both committed liberal and committed Jew, this author is no more willing to sacrifice his ties to the Jewish people and Jewish tradition than he is his sense of ethics.

If one cannot arrive at Jewish ethics either exclusively through the halachah or exclusively through general ethics, then how can one arrive at Jewish ethics? While this author has no definite answers, he believes that the process by which he examined the life for life problem is a step in the right direction. The author examined the halachic and ethical systems' approaches to the issue independently of each other. This allowed the author to gain a sense of the inherent needs of each system (for example, the need of the halachic system to be practical, and the need of the ethical system to be idealistic), and the ways in which those needs led to a certain kind of reasoning. In a sense, he was able to appreciate the complexity of the issues, the possible ways in which the issues could be resolved and the extent to which the systems could meet the challenge posed by the extreme situation because he let each system stand initially on its own terms.

After the independent study of both approaches, the author compared the reasoning and solutions found in both systems. While the comparison revealed major differences, as well as equivalent solutions, the author is not willing simply to choose one system over the other. This reluctance is primarily due to the respect which the author developed for both systems as a result of his effort to examine seriously the entirety of each system's approach to the life for life problem. It is also due to his belief that general ethics helped the author judge the halachah critically, and the halachah helped the author formulate his general ethical

principles.

This author, then, took the halachah seriously. In most cases, he believes that the halachic reasoning and solutions are equivalent to ethical reasoning and solutions. Where the two systems differ, this author feels compelled to accept the ethical principle. And, although a given principle may contradict the halachah, the author believes that he can consider such an ethical principle Jewish since it upholds the same values of life as a good and man's responsibility to preserve it which are of paramount importance in Jewish tradition.

The author feels genuinely good about his approach. He believes he has exhibited a commitment to both the importance of the halachah and general ethics for the liberal Jew. He believes that he has maintained a respect for the integrity of both systems and their influence on his thinking. Finally, he believes the comparison of the two systems has given the author a check on both systems, so that he can determine what is ethical about the halachic solutions and ask himself what is Jewish about the ethical solutions. Out of this comparison has emerged, for this author, a set of principles which he believes to be Jewish and ethical because of the influence of both systems on the process.

The major question which remains is: Does the process by which the author has examined the life for life problem constitute a way of doing Jewish ethics? And, if not, how does today's Jew figure out what Jewish ethics are?

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