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Holocaust Responsa

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Digest

This thesis consists of 35 rabbinic responsa written during or about the Holocaust era. They are translated and annotated with a view toward both their halakhic and historical significance. Together the responsa comprise a representative sampling of the entire range of halakhic problems occasioned by the Holocaust, from ritual law to more harrowing issues of life or death. The purpose is to provide, through the lens of the responsa, direct sight of the life of religious Jewry under Nazi impact. The responsa are ordered chronologically to reproduce the sequence of the persecution and the Jewish response to it.

Since the responsa concern the lives of Jews in extremity, most of the legal decisions are horaot shaah, emergency rulings which do not serve as legal precedents. The halakhic significance of these responsa lies in the tenacious determination of the rabbis to apply the halakhah and the rigorous halakhic method even in desperate circumstances; the treatment of certain tragic matters without precedent in halakhic literature; and the tendency to render compassionate legal decisions for largely therapeutic reasons.

From 1933 to 1939, the responsa included here deal with such problems as the Nazi boycott of Jewish businesses in Germany, Nazi policies of involuntary sterilization, the prohibition of ritual slaughter without prior stunning, and the return of Jewish victims' ashes to their families. From 1941 to 1944, the issues addressed to the rabbis include the risk of one's life for the sake of others, the saving of one's life at the expense of others, suicide, posing as a non-Jew, and the proper modes of prayer and ritual observance under the extreme circumstances. After 1945, the concerns

of the responsa include the legal status of women liberated from the camps (especially agunot), proper burial and mourning procedures, the legal status of Jewish apostates and collaborators, and the retrieval of Jewish children hidden among the gentiles.

Virtually all of the responsa included here are characterized by compassion and leniency for the Jewish victims of the Holocaust.

In memory of my beloved father, George Kirschner

Acknowledgement

Dr. Alexander Guttmann, renowned scholar, revered teacher, guided this project from its inception. His comprehensive mastery of rabbinic literature, devotion to his students, and personal humility have been an inspiration to me. I will always cherish the many hours of study we spent together.

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Introduction

Rabbinic responsa, the written decisions of halakhic authorities on questions arising in daily life, comprise the case law of the Jewish legal system. In post-talmudic times they have served as the major vehicle for the evolution of Jewish law. Where the law was muddled or contradictory, the responsa sought to clarify; when problems arose for which the existing law offered no express remedy, it was often necessary to prescribe remedies which differed from the existing law. Thus the halakhah, rooted in Torah and Talmud, evolved as a law of life and practice, shaping the course of daily events as it was shaped by them. As Menachem Elon has written, "The entire development of the law has been the creative invention of the Jewish people. The preservation of this has been the main factor in the preservation of Jewish national existence."¹

In the nineteenth century the primacy of halakhah in Jewish life was challenged by the advent of secularism. Among western and central European Jews, recourse to the gentile courts became common. The loss of Jewish judicial autonomy meant a drastic reduction in the authority and vitality of the halakhah. More and more, Jewish law was confined to narrow ritual or theoretical concerns removed from the day to day realities of Jewish life. The traditional Jewry of eastern Europe, however, still preserved for some time its intimate relations with Jewish law. Disputes were still submitted to the rabbi and bet din. The catastrophe that engulfed the Jews of Europe in the years 1933-45 put an end to millions of Jewish lives but did not put an end to the development of halakhah.

Even under the most extreme conditions of deprivation and suffering, many Jews continued to seek the halakhah's guidance. Historian Jacob Robinson estimated that at least half of the six million Jewish victims of the Holocaust observed the halakhah.² Rabbinic responsa were written throughout the Holocaust period. Not many survived intact. After 1945 a large number of responsa were written discussing the problems of Jewish life and law under Nazi impact.

The responsa written during or about the Holocaust era concern the lives of Jews in extremity. Most of the decisions are horaot shaah, emergency rulings which do not serve as legal precedents. Yet these responsa are significant for a number of reasons. Like the ghetto diarists who carefully preserved their testimony for future generations, the rabbis were aware of the historical value of their responsa. R. Efrayim Oshry of the Kovno ghetto, in the introduction to his first volume of Holocaust responsa, explained what compelled him to publish them: "Fifteen years after I first wrote these responsa, I went through the scraps of paper which had begun to crumble in the course of time. I realized that they contain extraordinary historical material of great value, portraying the spiritual life of the ghetto prisoners and the background of the daily struggle for survival."³ R. Yehiel Yaaqov Weinberg of Berlin hoped that his responsa from the Holocaust era would illuminate "the spiritual circumstances that prevailed in the Judaism of Germany, Poland, and Lithuania before the complete destruction" (resp. 3). R. Tsevi Hirsch Meisels described a halakhic decision he was asked to make at Auschwitz so that future generations would "be horrified and consciences stirred to turn the hearts of the children to their fathers" (resp. 22). The responsa of the Holocaust bear the historical imprint of the Nazi

persecution and the Jewish response to it.

As historical documents, however, the Holocaust responsa present certain difficulties. Whether the author was himself a victim or was asked to decide a case involving victims, his own involvement and compassion inevitably affected his objectivity. It was the victim's version of events that concerned him. On the other hand, as Lucy Dawidowicz has observed, German documents have all too often been accepted at face value, partly because their thoroughness and precision have been mistaken for truthfulness.⁴ For the historian, the advantage of the Holocaust responsa is that they are not propaganda purporting to be scientific truth. Their primary subject is not the Holocaust, nor the murderers, nor even the victims, but the halakhah. Events are reported only to the extent that they intrude upon halakhic observance. Committed to the survival of the Jewish people and the primacy of halakhah, the rabbis had no need to invent or manipulate history. Their task was to guide those Jews who, like their rabbis, could not bear to live outside the halakhah even in conditions of utter extremity. Certainly the responsa are biased toward the Jewish version of events: this version is their sole concern. Incidentally they tell us the objective facts of Nazi edicts and persecutions; more significantly, they comprise a precious record of the Jewish experience under Nazi impact: how the victims viewed the catastrophe as it occurred; how they suffered; how they responded; how they groped for precedents to a persecution whose magnitude they could scarcely grasp; how they brought to bear the entire weight of Jewish law and tradition in an attempt to impose on the chaos some semblance of order; and how afterward they struggled to recover from the decimation of their people.

From the standpoint of Jewish law, the responsa of the Holocaust era are equally valuable. They represent the tenacious effort to apply Jewish law to circumstances of utter lawlessness; in the words of the rabbis (Avot 2:5), to strive to be human where there are no humans. Persecution was not a new development but a recurring phenomenon of Jewish life to which the halakhah had responded for centuries. Leniency for those under duress had long ago been established. Even if a Jew committed one of the three cardinal sins-- murder, incest, or idolatry-- of which it is said that he should suffer death rather than transgress, according to the law he would not be punished (cf. resp. 6, 10). In the Talmud (Ned. 27a, BQ 28b) the sages had already ruled that "in all cases of duress, the Merciful One exempts [from punishment]." Yet although the final judgment in cases of duress was invariably lenient, this did not suspend the refined halakhic process of argument: precedent and counter-precedent, exacting logic, the introduction of dissenting views, creative interpretation and innovation. In the Holocaust responsa, as in all halakhic literature, differences of opinion are considered not only legitimate but vital to the development of halakhah. While Jewish law is based on common principles, it adjusts to individual cases in changing circumstances. Legal principles which emerge from the responsa become a part of the cumulative body of laws comprising the halakhic system; but they do not rule out dissent or contradiction. After consulting the pertinent sources and examining the relevant issues of Jewish law, the halakhic authority considers each case on its merits and rules according to his own knowledge and understanding. Despite the horrifying ordeal of the Jews during the Holocaust, to which the questions posed to the rabbis bear compelling witness, the authors of the responsa insist

on considering the halakhah carefully before rendering decisions. Precedents or legal principles that contradict the rabbi's line of argument are never ignored. Depending on the circumstances and whether the rabbi augmented his original responsum prior to publication, some of the discussions are more thorough than others. But all of them are legitimate contributions to the halakhah, worthy of study in their own right.

Some of the Holocaust responsa have additional halakhic significance. Although most forms of Nazi persecution had been suffered by Jews in the past-- e.g., mass murder, torture, beatings, pillage, rape, infanticide, imprisonment, forced labor, expulsion-- the Germans devised some methods which were without precedent: e.g., gas chambers and crematoria (resp. 25, 26); "selection" (resp. 11, 22, 26); the return of victims' ashes in boxes delivered by the government (resp. 5); the requirement that animals be electrically stunned before kosher slaughter (resp. 3, 4); the tattooing of victims (resp. 23, 33). The responsa that deal with these matters open new, if tragic, territory in Jewish law.

Students of the halakhah may also note how psychological considerations play a major role in many of the Holocaust responsa. As Alexander Guttmann has observed, although "psychology is not among the explicitly accepted concepts or means in making halakhic decisions... its tacit application... plays an increasingly significant role in the realm of applied halakhah."⁵ To be sure, all writers of responsa try to be sensitive to the needs of those concerned. Some may even seek to perceive hidden motives which may prompt a given question. But the cases rabbis were asked to decide during and after the Holocaust were often of a kind that required therapeutic more than legal treatment. What advice does the rabbi give a woman whose husband's ashes have arrived in the mail

(resp. 5)? How does he relieve the conscience of a man who smothered a crying infant in a ghetto bunker to avoid detection by the Nazis (resp. 9)? What can the rabbi say to a fellow prisoner at Auschwitz who wants to save his only son from death but knows that if he does, another boy will be taken in his son's place (resp. 22)? How does the rabbi answer a man who asks for permission to commit suicide rather than witness the massacre of his family (resp. 10)? How can a husband be persuaded not to reject his wife because her body bears the Nazi tattoo, "whore for Hitler's armies" (resp. 23)? All of these cases involve complex halakhic issues; yet the rabbi was also obliged to treat the personal trauma, the anguish, guilt, and misery of those who needed his help. In such cases it was not always possible for the rabbi to harmonize the demands of the law with the needs of the Holocaust victims. When the legal decision warranted by the evidence seemed too harsh or inequitable, and yet could not be mitigated by extenuating circumstances or reinterpretation, the rabbi tried to express the decision as compassionately as possible, stressing consolation and the promise of redemption. When a course of action was proposed during the Holocaust that might not be sanctioned by Jewish law, the rabbi often refrained from rendering a definitive decision. Virtually every question involved life or death, and even when the halakhah on a given matter seemed obvious he was reluctant to impose it for fear that Jewish lives would perish in consequence. For example, at Auschwitz in 1944 a Jewish man had the opportunity to rescue his only son from certain death; but he knew that before his son was released another boy would be taken in his place. He asked R. Tsevi Hirsch Meisels for permission to save his son (resp. 22). Although R. Meisels could not give such permission to the father, he was not willing to say

so: "I do not decide either yes or no. Do as you wish as if you had not asked me at all." By the rabbi's refusal to render a decision, the father understood that the ransom was not permitted. In this case the rabbi's compassion for the father, as well as his own reluctance to explicitly decide a matter of life or death, took precedence over strict halakhic considerations. This inner dialogue between the rabbi's devotion to the halakhah and his compassion for his people is characteristic of many Holocaust responsa.

Yet while emotion is evident and at times overt in Holocaust responsa, the reader is struck by the discipline of the rabbis. With few exceptions, they consider each issue analytically with a minimum of self-pity or despondency. While they were certainly not immune to the desperate circumstances, they knew that their task required composure and reason. To have yielded to emotion entirely would have been to forfeit the crucial responsibility entrusted to them by their people.

Of the estimated 300,000 extant responsa written in post-talmudic times,⁶ the Holocaust responsa comprise only a tiny fraction. 35 of them are translated and annotated here. Together they provide a representative sampling of the entire range of halakhic problems occasioned by the Holocaust. Deliberately these include matters of ritual law as well as more harrowing issues of life or death. The purpose is to provide, through the lens of the responsa, direct sight of the life of religious Jewry under Nazi impact. This explains the chronological ordering of the responsa, which reproduces the sequence of the persecution and the Jewish response to it. By this arrangement it is intended that the responsa comprise, as it were, a history of the Holocaust from the inside.

Most of the Holocaust responsa included here consist of five basic components: 1) a description of the circumstances from which the question arises; 2) the question itself in either interrogative or summary form; 3) a discussion of the pertinent halakhic issues and sources; 4) the rabbi's decision; 5) a concluding message of consolation in the form of biblical pleas for vengeance and redemption. The stress on each component varies. The given circumstances may warrant an exposition lengthier than the rabbi's decision (resp. 32); the halakhic discussion may be brief (resp. 29) or extremely convoluted (resp. 35); the decision may be conclusive (resp. 14) or equivocal (resp. 15). Many of the responsa are in the form of correspondence between halakhic authorities (resp. 1, 2, 4, 19, 25-27); these include honorific salutations and are usually more abbreviated, especially with respect to the descriptive component.

Each of the responsa included here is separately annotated. The notes discuss the halakhic issues involved, examining the author's citations, comparing opinions, explaining discrepancies or ellipses, etc. Obvious mistakes and printing errors are corrected in the translation; apparent mistakes or errors are duly noted. In addition to halakhic matters, the notes also include historical information designed to place the responsa in their proper contexts.

Except for resp. 3, which is excerpted from the introduction to a collection of responsa, all of the responsa are reproduced in translation exactly as they appear in original publication. None of the responsa are abridged or edited in any way. With very few exceptions necessitated by coherence, even paragraphing and punctuation are preserved without alteration.

Notes

Introduction

1. Menachem Elon, ed., The Principles of Jewish Law (Jerusalem: Keter, 1975), p. 24.
2. Encyclopedia Judaica (Jerusalem: Keter, 1971), vol. 8:878.
3. Teshuvot Mimaamaqim, vol. 1, introduction.
4. Lucy Dawidowicz, ed., A Holocaust Reader (New York: Behrman House, 1976), p. 10.
5. Alexander Guttman, "Humane Insights of the Rabbis Particularly with Respect to the Holocaust," Hebrew Union College Annual, vol. 46 (1975), pp. 454-55.
6. This is the figure estimated by Elon, op. cit., p. 13.

Arrangement of Responsa

The responsa are arranged chronologically in three periods: 1933-39, 1941-44, and 1945- . They are designated by the date reported in the responsum itself, not the date of its publication. In responsa 2, 4-8, 10-12, 14, 17-19, 22, 25-27 precise dates are given. In responsa 1, 3, 23, 24, 34 only the year is given (or there is obvious evidence of the year in the text). Responsa 9, 13, 15, 16, 20, 21, 28-33, 35 are undated. Of these, responsa 28-33, 35 were obviously written after the Holocaust; responsa 9, 13, 15, 16, 20, 21 are inserted into the chronological order according to the weight of evidence that can be gleaned from the text and corroborated by historical developments. In the absence of such evidence, the responsa are arranged by the correspondence of their subject matter to that of dated responsa.

Each of the three sections (1933-39, 1941-44, 1945-) begins with an introduction briefly summarizing the subject matter of the responsa contained there, the historical conditions from which they arose, and the attitudes of the responsa authors as reflected in their decisions.

Annotations are found at the conclusion of each responsum.

Translation

Rabbinic responsa comprise a technical literature with roots in the Bible and Talmud. In addition to the unique rabbinic amalgam of Hebrew and Aramaic, the responsa of the Holocaust era also contain occasional idioms or narrative passages in Yiddish, German, Polish and other European languages. While all of the responsa deal with the same corpus of halakhic literature, and all are informed by the same structure of question (sheelah) and answer (teshuvah), each author has his own unique style, whether discursive, poetic, ornate, elliptical, or polemical. Familiarity with Talmud and codes is assumed by all writers of responsa; decisions, precedents, and principles are usually cited by a mere word or phrase. Syntax and semantics pose particularly acute problems, since rabbinic Hebrew depends greatly on the context of words and phrases. The precision and subtlety of halakhic argument, honed by intense study and debate over the course of a millenium, does not easily translate to English.

Every translator tries to strike a balance between fidelity to the text and felicity of expression. I have sought to translate the 35 Holocaust responsa included here as literally as possible. Only honorific salutations are paraphrased. Otherwise a freer rendering is provided only when literal translation would be incoherent.

Words, phrases, explanations, and references set off in (parentheses) were written by the authors of the responsa; all information set off in [brackets] is provided by the translator for the sake of clarity and coherence.

The Hebrew Bible is cited by chapter and verse except when scriptural

allusions occur in the course of narrative introductions or poetic conclusions to the responsa. These portions of the texts are so redolent with biblical phrases that citations are impractical.

Epithets, whether in praise of pious Jews or vilification of their persecutors, are included in the translation but without the repetition often found in the original texts.

Hebrew terms are usually rendered into English; exceptions are duly noted and explained.

Since rabbinic authorities and the titles of their works are usually cited by the same name, and since both occur so frequently in the texts, they are not underlined. The context makes such underlining unnecessary, and its frequent repetition would distract the reader.

Transliteration

Transliterations of Hebrew and Aramaic names, titles, and terminology follow the American National Standard Romanization of Hebrew "More Exact Romanization Style" with the following modifications: 1) alef and ayin are not identified or differentiated; 2) vet and vov are both represented by (v); 3) sameh and sin are both represented by (s).

When names and places are cited from the Hebrew Bible, they are transliterated according to their standard English equivalents, e.g., Jacob (not Yaaqov).

Transliterations from Yiddish are confined to proper names.

Names of halakhic authorities are reproduced exactly as they appear in the responsa texts. This accounts for some inconsistencies: e.g., Rema, R. Mosheh, and Darkhei Mosheh all refer to Moses Isserles. A complete list of authorities cited is found in the Appendix.

Abbreviations

| | |
|--------|----------------|
| Ch. | chapter |
| EH | Even Haezer |
| Hal. | halakhah |
| Hil. | hilkhot |
| HM | Hoshen Mishpat |
| MT | Mishneh Torah |
| OH | Orah Hayyim |
| Par. | paragraph |
| Resp. | responsum |
| Sh.Ar. | Shulhan Arukh |
| YD | Yoreh Deah |

Bible

| | | | |
|-------|--------------|--------|-----------|
| Dan. | Daniel | 1 Sam. | I Samuel |
| Dt. | Deuteronomy | 2 Sam. | II Samuel |
| Ecc. | Ecclesiastes | Zeph. | Zephaniah |
| Est. | Esther | | |
| Ex. | Exodus | | |
| Ezek. | Ezekiel | | |
| Gen. | Genesis | | |
| Is. | Isaiah | | |
| Jer. | Jeremiah | | |
| Josh. | Joshua | | |
| Jud. | Judges | | |
| 1 Ki. | I Kings | | |
| 2 Ki. | II Kings | | |
| Lam. | Lamentations | | |
| Lev. | Leviticus | | |
| Nu. | Numbers | | |
| Pr. | Proverbs | | |
| Ps. | Psalms | | |

Talmud

All tractates refer to the Babylonian Talmud unless prefaced by:

M. Mishnah
Tosef. Tosefta
Yer. Yerushalmi

| | | | |
|-------|--------------|-------|-----------|
| Av. | Avot | Sanh. | Sanhedrin |
| Ar. | Arakhin | Shab. | Shabbat |
| AZ | Avodah Zarah | Sot. | Sotah |
| BB | Bava Batra | Suk. | Sukkah |
| Bekh. | Bekhorot | Taan. | Taanit |
| Ber. | Berakhot | Ter. | Terumot |
| Bets. | Betsah | Yev. | Yevamot |
| Bik. | Bikkurim | | |
| BM | Bava Metsia | | |
| BQ | Bava Qamma | | |
| Er. | Eruvin | | |
| Git. | Gittin | | |
| Hag. | Hagigah | | |
| Hor. | Horayot | | |
| Hul. | Hullin | | |
| Kel. | Kelaim | | |
| Ker. | Keritot | | |
| Ket. | Ketubbot | | |
| Mak. | Makkot | | |
| Meg. | Megillah | | |
| Men. | Menahot | | |
| MQ | Moed Qatan | | |
| Ned. | Nedarim | | |
| Nid. | Niddah | | |
| Oh. | Oholot | | |
| Pes. | Pesahim | | |
| Qid. | Qiddushin | | |

1933-39

During the period between Hitler's accession to power and Germany's invasion of Poland, German Jewry was most directly affected by Nazi persecution. Various Nazi edicts posed grave problems for the Jewish community: in Hitler's first year in power (1933), he decreed the boycott of Jewish businesses in Germany (resp. 1); prohibition of ritual slaughter without prior stunning by electric shock (resp. 3, 4); and the "Act for the Prevention of Hereditary Diseased Offspring," which initiated compulsory sterilization for the physically or mentally impaired (resp. 2). Such punitive legislation was only a prelude to open attacks on the German Jewish community, culminating in Kristallnacht, 9-10 November 1938, when at least 20,000 Jews were taken into "protective custody." At this time it was the Nazi government's practice to mail the ashes of those they murdered to the family of the deceased. The anguished Jews who received such packages were not sure how to proceed with respect to mourning and burial (resp. 5).

Several of the responsa of this period reflect the initial response of some Orthodox rabbis, which was to blame the misfortunes on the lack of Jewish fidelity to the halakhah. R. Spira of Munkacs (resp. 1) denounces the German Jews in vitriolic terms. For keeping their stores open on the Sabbath, they were "being paid back measure for measure" when the Nazi boycott closed the stores. These "wicked" Jews had "denied and overturned the words of the living God," and a sympathetic public fast would only reinforce their irreligious conduct. Current Jewish political leaders were a disgrace to Israel: "They work only

for themselves, their honor, their money, and their triumph." R. Spira sees the Nazi tyranny as the tribulation preceding the advent of the Messiah: "When the Jews return to God... then we will already be redeemed..." R. Yeruham of Altstaadt, too, calls upon the Jews to "stand up to the trial and show that you are among those who are stoned and hanged for the sake of the commandments of our holy Torah" (resp. 4).

These responsa also evidence an as yet incomplete comprehension of Nazi intentions. R. Weinberg of Berlin, while inclined to be lenient in the matter of electric stunning prior to kosher slaughter, retracted this opinion when he saw that the majority of rabbis refused to condone stunning (resp. 3). He concludes that the Jews "must show the entire world that we are ready to sacrifice ourselves for the sanctity of Israel... Then perhaps-- they will leave us alone." While he understands why the Nazis had prohibited ritual slaughter without stunning-- "They want to starve Jewish people to death by making false charges and feigning pity for the animals"-- still he retains the hope that by refusing to eat improperly slaughtered meat the Jews will "merit complete deliverance and the redemption of our souls."

As the severity of Nazi persecution escalated and the plight of the Jews grew more ominous, the tone of the responsa changed. R. Kirschbaum of Frankfort prescribes that the victims' ashes received from the Nazi government should be treated with reverence, placed on a bier, and wrapped in a prayer shawl and burial shrouds "in order to strengthen the belief that the deceased is prepared to awaken and rise at the resurrection" (resp. 5). Since cremation is prohibited by Jewish law because it implies disbelief in physical resurrection, R. Kirschbaum reassures religious Jews that in this case cremation does not preclude resurrection.

He does not urge the Jews to "stand up to the trial"; rather he seeks to console them in their sorrow. With the advent of mass murder only a year away, the attitude of R. Kirschbaum was soon to become characteristic of the Holocaust responsa.

Responsum 1

Concerning your request for my consent to fix a public fast on account of the murders and calamities, owing to our many sins, that have befallen our fellow Jews in Germany

When I heard the reports¹ my heart was broken; for it is exactly as explained in Sh.Ar. OH (577, Magen Avraham, note 2): if the calamity drags on for a long time-- the persecutions and great suffering, God forbid-- then no fast whatsoever should be ordained. See the Magen Avraham on the authority of the Ran;² and if you read what I explained, with God's help, in Minhag Eliezer (vol. 4, no. 5), you will understand.³ Indeed the enemy, God forbid, incited and seduced [the people] and raised his army [against the Jews] from the very beginning of the war. Until now [the Jews'] thoughts have been confused. They have yet to see the truth, for the war in my opinion is merely the tribulation preceding the advent of the Messiah. When the Jews return to God, blessed be His name (at least [by fulfilling] the major commandments of the Jewish religion-- observing the Sabbath and the laws of menstruation, raising one's children to study the Torah, to act truthfully, and the like), then we will already be redeemed when the righteous Messiah comes, may it be soon in our days.⁴ This is what the Rambam wrote in MT Hil. Teshuvah;⁵ it is also explained in Midrash Rabbah in several places,⁶ in the Talmud at the end of Sot.,⁷ [in Sanh.] ch. Heleq,⁸ at the end of Ket.,⁹ in several places in the holy Zohar,¹⁰ and in all the holy books in many chapters: these are truly the tribulations preceding the advent of the Messiah.

But the legions of the devil, among them the hypocritical leaders including many rabbis and others, have led all Israel astray. For their main goal is only to pray for the welfare of the gentile nations and other such foolishness. They have turned things upside down, as God did to Sodom and Gomorrah, [but] against the Torah. They flatter [the gentiles], give them large amounts of money, etc., etc. Meanwhile I have shouted at the risk of my life from the day the war began until now, when each day is harder than the last, God forbid, that their despicable "peace"--- that is, the peace of the devil--- will be worse for all Israel (especially religious Jews) than the war, in every way. Now it has been revealed to everyone--- just as I received [the tradition] from my holy forefathers, may their merit protect us--- what the nature of the war is, and what its end will be: the salvation of our Jewish brethren and the approach of the redemption. But they [i.e., the German Jews] denied and overturned the words of the living God, as discussed by Rambam (MT Hil. Melakhim): even if one believes in the coming of the Messiah, if he does not await the Messiah's coming, he denies [the God of Israel].¹¹ For a person of understanding, [this is clear] enough.

In any event I thought that when [the Nazis] imposed the boycott in Germany against Jewish businesses,¹² this was certainly not a reason to ordain a fast. For nearly all [of the Jews] in Germany profane the Sabbath publicly by [keeping] their stores [open]. Now they are being paid back measure for measure, the same measure [i.e., the closing of the stores] for the rest of the week. If the German Jews do not repent their sin of profaning the Sabbath, then [to ordain a public fast] would be to reinforce their behavior of profaning the Sabbath. It was better to warn our fellow Jews from the beginning; for even though

Israel has sinned, they will see and understand that it is the finger of God¹³ for profaning the Sabbath; and they will return to God, close their stores and [cease] their work on the Sabbath. Then we will pray for them and ordain a public fast for their rescue and welfare together with all Israel's.

But then I thought that perhaps [the current situation] is no less serious than, God forbid, a spreading sickness suffered by pigs; and according to Sh.Ar. [OH 576:3] we ordain a fast in such an event because their intestines are similar to man's.¹⁴ All the more so in the current situation which is a spreading plague, God forbid; for the Nazis are doing [such things] in all the countries to our fellow Jews who observe the Sabbath as well. It is known that Esau hates Jacob, just as it is explained in the holy Zohar (at the end of Torah portion Balaq) among the signs of the tribulations preceding the advent of the Messiah: "Calamities will follow calamities, and the enemies of Israel will gain the upper hand-- and then the king Messiah will come."¹⁵ Now that the Nazis have cast off the veil of everlasting shame from their faces, there is real danger to life in our country, Poland, Hungary, and others. Especially the news we have just heard grieves me deeply. Therefore it is certainly proper to ordain a fast, and every wise person should act in accord with the opinion of the Orthodox rabbi of his town. God, may He be blessed, will save us and help us soon in our days when He brings the righteous Messiah for the sake of His glorious name and His true faith, with love for the merit of our forefathers.

Indeed I was alerted by your honor and by other friends, learned and pious rabbis, that I should call for a general and worldwide public fast, to be publicized and organized in such a way that all Israel would fast

on one day, reciting psalms, awakening repentance, and so on. But I cannot consent to sign my name to the proclamation. For who would go ahead [with us in observing the fast] in this generation of apostasy? Will the Zionists, Mizrahists, Agudists and the like return to God and His religion?¹⁶ "Is this the fast I have chosen?" cried the Lord's prophet Isaiah [Is.58.5]. It also says there [Is.58.4]: "To smite with the fist of wickedness, ye shall not fast..." And it says [Is.58.6]: "Loose the fetters of wickedness and undo the bands [aguddot] of the yoke..." These are the political parties [aguddot]. When I was in Marienbad during the slaughter (may it not befall us) of our fellow Jews in Hebron and Jerusalem,¹⁷ I suggested a plan to calm the bloodshed: to travel that same day to Prague and Vienna to [ask] the chief emissaries of the British government to notify their government in London by radio to commence immediate rescue operations, so that the [British] political parties would turn from their partisan politics (which obviously had no purpose except to stir up hatred and jealousy among the Arabs, leading to many troubles, God forbid). But not one of the [Jewish] party leaders who were in Marienbad wanted [to do this], although they admitted that it was a great idea (this is not the time to discuss current politics) and that there was indeed a way to save lives immediately. Their disgrace was revealed then as it is now; they work only for themselves, their honor, their money, and their triumph. They are shepherds of idols, seducers of all Israel. Woe to us that such a thing has happened to us in our days.

Our sages of blessed memory said in Ker. (6b): "A fast in which none of the sinners of Israel participate is no fast," and we learn this from the galbanum [whose odor is unpleasant] which was one of the ingredients

of the incense [used in the Temple]. This means that the sinners of Israel may comprise only one tenth [of those who fast]. This is indicated by the Maharsha (in Hiddushei Aggadot) to this passage: the main thing is that ten proper Jews participate; then they mix in an eleventh part [of sinners] following the example of the galbanum.¹⁸ It appears that the Maharsha to Ker. would include only those wicked Jews who have not separated from the community's way of life.¹⁹ But our case does not warrant a worldwide fast, for these wicked [German] Jews are known to be nearly as numerous as we, and nearly all of them are separated from the community's way of life. If we leave them alone and they do not participate [in the fast], they will certainly go on doing the opposite. What will people say? Therefore it is certainly not proper, in my humble opinion, to ordain a gneral worldwide public fast. May God take pity on the remnant of His people with salvation and redemption.

Kindest regards,

Hayyim Eliezer Spira

[Teshuvot Minhag Eliezer, vol. 5, no. 36]

Notes

Responsum 1

1. Evidently referring to the Nazi boycott of Jewish businesses in Germany. See note 12.

2. Magen Avraham comments on Sh.Ar.'s ruling that if excessive rain prevents the people from ploughing their crops, they should fast; but a public fast is not decreed if there is no time to observe it properly or if the people would have to fast every day. Magen Avraham comments: "This means that [were a fast to be decreed] they would be required to fast continually, for every day [their livelihood is impaired] they are in danger. For instance, if gentiles conquered the city, a fast could not be decreed every day. Therefore we do not decree any fast at all ([according to] Ran)."

3. R. Spira responds to the identical request for his consent to the declaration of a public fast owing to the suffering and famine induced by "this terrible war which has now dragged on continuously for three years." The resp. is not dated, but since Minhag Eliezer, vol. 4 was published in 5690 (1930-31), the war he mentions must be World War I and the year about 1917. He refuses to consent to the declaration for the following reasons: 1) the people are too weak to fast, and they cannot fast continually in any case; and 2) these sufferings are actually the tribulations preceding the advent of the Messiah, so that to fast and pray for peace is to delay the final deliverance. For this second contention he cites Hatam Sofer, Sefer Hazikkaron. Finally he concludes with a plea to correct the sins which are delaying the deliverance and to increase

Torah study and prayer so that the congregation of Israel may speedily return from exile.

4. A similar view was expressed by Hillel Zeitlin in the Warsaw ghetto, 1941. "The Jews have shown themselves to be unable to withstand the least hardship, as we saw before the war, for instance, in the struggle against prohibiting ritual slaughter [cf. resp. 3, 4] and on behalf of kashrut. People ate non-kosher meat even when the difference in price was only a few pennies. We observed this too in the struggle to keep the Sabbath as a day of rest... Our salvation lies only in an inner religious awakening capable of working miracles..." See Lucy Dawidowicz, ed., A Holocaust Reader (New York: Behrman House, 1976), pp. 220-21.

5. E.g., ch. 7, hal. 5: "All the prophets commanded concerning repentance; Israel will not be redeemed save by repentance. The Torah long since gave the assurance that finally Israel will repent at the end of the period of exile and be immediately redeemed." Cf. Dt.30.14; Yoma 87b.

6. E.g., Shemot Rabbah, Beshallah, ch. 25, Ex.16.29: "R. Yohanan said: The Holy One, blessed be He, told Israel: 'Though I have set a definite term for the millenium which will come at the appointed time whether Israel returns to me in repentance or not, still if they repent even for one day, I will bring it before its appointed time.'"

7. Perhaps the reference is to Sot. 49b, where the tribulations preceding the advent of the Messiah are described in the mishnah: "On the heels of [i.e., preceding] the Messiah, insolence will increase and honor dwindle; the wine will yield its fruit but wine will be dear, the heathens will be converted to heresy and there will be no rebuke, the house of meeting shall be for fornication... So upon whom is it for us to rely? Upon our Father

in heaven."

8. Sanh. 97a-99a, where the tribulations, preconditions, and signs of the Messiah's arrival are discussed. E.g., "R. Eliezer said: 'If Israel repents, they will be redeemed; if not, they will not be redeemed.' R. Yehoshua said to him: 'If they do not repent, they will not be redeemed! But the Holy One, blessed be He, will set up a king over them, whose decrees shall be as cruel as Haman's. Then Israel will repent, and He will bring them back to the good'" (Sanh. 97b).

9. Ket. 112b, again describing the tribulations preceding the Messiah's advent: "In the generation in which the son of David [i.e., the Messiah] will come there will be prosecution against scholars... Shemuel exclaimed: [There will be] test after test... R. Yosef expounded: [There will be] plunderers and plunderers of the plunderers."

10. See note 15.

11. MT H11. Melakhim, ch. 11, hal. 1: "He who does not believe in a restoration or does not look forward to the coming of the Messiah denies not only the teachings of the prophets but also those of the law and Moses our teacher." The distinction between those who believe in the Messiah and those who await his coming-- which R. Spira attributes to Rambam-- does not appear in this passage or elsewhere in H11. Melakhim.

12. On 26 March 1933, less than two months after coming to power, Hitler gave Goebbels instructions concerning "a large-scale boycott of all Jewish businesses in Germany. Perhaps the foreign Jews will think better of the matter [the proposed plan to boycott German exports] when their racial comrades in Germany begin to get it in the neck" (cited by Lucy Dawidowicz, The War Against the Jews [New York: Holt, Rinehart, Winston, 1975], p. 52).

An

An unofficial "boycott" had been enforced for years by Nazi hooligans, whose outbursts of violence against Jewish businesses and Jewish public figures had long been endorsed by the Nazi leadership. On 29 March Hitler told his cabinet that an organized boycott was needed to harness popular anti-Semitic outbursts. The boycott lasted three days, 1-3 April. It was a preliminary step in the process which systematically stripped the German Jews of their rights and property.

13. Cf. Ex.8.15.

14. I.e., human beings may also be susceptible to the same disease.

15. The Zohar, at the conclusion of Torah portion Balaq, goes on to say that Israel, imbued with the spirit of the Messiah, will destroy their enemies and burn the land of the wicked with fire. At that time God will also resurrect the dead.

16. Mizrahi was founded in 1902 as a religious faction in the World Zionist Organization. It was the first Zionist party to establish its world center in Palestine, and devoted much effort to establish the Chief Rabbinate of Palestine. Agudat Yisrael, a world Jewish movement and political party seeking to preserve halakhic Judaism, was originally anti-Zionist, but after the Nazi accession to power this attitude changed. See Encyclopedia Judaica (Jerusalem: Keter, 1971), vol. 2:423.

17. Referring to the outbreak of Arab violence in Palestine, August 1929. In Hebron some 70 Jews were massacred.

18. The Maharsha writes that while the sinner may be the eleventh, he may not be one of the ten required to form a minyan. He cites proof for this from Gen.18.32, where in response to Abraham's plea, God agrees to

spare Sodom for the sake of ten righteous men. The Maharsha points out that Abraham did not plead for less than ten, indicating that there must be at least ten proper Jews in the minyan.

19. That is, they act wickedly not out of malice but merely for their own gratification.

Responsum 2

[Whether we are obligated to object to the sterilization of an insane woman]

With God's help, 14 Av 5697 [22 July 1937]

My honored and beloved friend, the great sage R. Yitshaq Unna, may he live a long and happy life:

Owing to many cares due to the conclusion of the period of study, I did not write until today, and in the meantime the great catastrophe¹ came and confused my thoughts. May God console us with the consolation of Zion and Jerusalem.

Concerning the question about an insane woman who they want to sterilize,² whether or not we are obligated to object, in my opinion there is reason to be lenient about this,³ for the sterilization of a woman is merely a general [i.e., minor] prohibition.⁴ See the Rambam, MT Hil. Issurei Biah, ch. 16,⁵ and Tur EH 5 with the Bah's commentary.⁶ There is reason to say that it is permitted for a woman to have herself sterilized in such a case, for this [the reason of insanity] is no less [valid cause] than [the reason of unusual] pain in childbirth.⁷ But this needs to be considered carefully.⁸ In any case, if she is insane and is not able to object [to the sterilization], there is no obligation to others except by reason of [Yev. 114a] "adults must warn minors," since an insane person is like a minor. See Yev. 114a⁹ and the Rashba concerning whether one is obligated to separate the insane person from

rabbinic prohibitions.

In the Bah's discussion referred to above he writes that [the prohibition against] sterilizing a woman stands even [if it is accomplished] by means of a potion of roots.¹⁰ He explains the [apparent] contradiction in the words of the Rambam who wrote: "One who sterilizes a female is exempt [from punishment]," implying that it is forbidden;¹¹ but also wrote: "A woman is permitted to drink root water so that she will not give birth." [The Bah] explains that [sterilization] is not prohibited unless it is done unnecessarily; but in an instance of [unusual] pain in childbirth it is permitted. Yet according to the plain sense of Rambam, the meaning is that there is a distinction between one who sterilizes physically and destroys the reproductive organs, and one who sterilizes by means of a potion. This is also implied by the Semag, Issurim 120,¹² and by the Bah's comment that in Shemonah sheratsim [Shab. ch. 14] it is implied that a woman cannot be sterilized except by means of a medicinal potion.¹³ It is said in Shab. 111a: "Rather [it refers to] a woman," indicating that it is possible to sterilize a woman, but [unlike in the case of a man, whose castration is prohibited] it is permitted [to sterilize a woman].¹⁴ Therefore we must interpret the words of the Tosafot [to Shab. 110b] s.v. "It is taught..." to mean that [the prohibition of] sterilization does not apply to a woman;¹⁵ that is, according to the law she is not commanded to procreate.¹⁶ See Sefer Maaseh Roqeah on the Rambam. I have further thoughts on this.¹⁷ See also the Tosafot s.v. "In regard to an old woman or a sterile woman..." that the prohibition of the act of castrating twice does not apply to a woman.¹⁸ See also what the Maaseh Roqeah wrote about this.

Since I journey tomorrow, God willing, to Marienbad, and I am

burdened with preparations for my trip, I am cutting this short and will answer further, please God, after studying the matter upon my return, God willing, from my trip.

With affection and great respect,

Yehiel Yaaqov Weinberg

[Teshuvot Seridei Esh, vol. 3, no. 21]

Notes

Responsum 2

1. This appears to be a general allusion to the worsening plight of the Jewish community in Nazi Germany.
2. In 1933 the Nazis promulgated the "Act for the Prevention of Hereditary Diseased Offspring." By 1939, some 375,000 people had been sterilized-- the retarded, schizophrenics, epileptics, alcoholics, etc. The majority were sterilized involuntarily. See H.J. Zimmels, The Echo of the Nazi Holocaust in Rabbinic Literature (New York: Ktav, 1977), p. 194. As late as 1942 the Nazis saw "compulsory sterilization" as the "biological solution" to the "problem" of the Mischlinge [people of mixed Jewish descent] and Jews in mixed marriages. Eventually Jews in mixed marriages could even dispose of the Judenstern if they could prove their sterility. Beginning in 1941 "Himmler became interested in 'nonsurgical sterilization of inferior women'" in the concentration camps. This led to the brutal experiments on an enormous scale at Auschwitz. See Raul Hilberg, The Destruction of the European Jews (New York: New Viewpoints, 1973), pp. 270-73, 377, 604-7. A related development was the Nazis' "euthanasia" program, code-named "T-4," initiated by Hitler in 1939. Its original aim was to inflict "mercy death" on "racially valueless" children. Later the program was expanded to include insane adults. The "euthanasia" installations became the Nazis' "first laboratories for mass murder." See Lucy Dawidowicz, The War Against the Jews (New York: Holt, Rinehart, Winston, 1975), pp. 132-35.
3. Cf. Immanuel Jakobovits, Jewish Medical Ethics (New York: Bloch, 1959),

p. 118, who writes that "Jewish legislation not only prohibits the infliction of any injury on a mentally deranged person, but regards such action as a culpable offense for which the victim can legally claim appropriate damages." He cites Sh.Ar. HM 424:8 in support of this view. Apparently R. Weinberg does not see the issue in this light.

4. Tosafot and Rashba, in their commentaries on Shab. 111a (see text of resp. below) maintain that the prohibition of emasculation in Lev.22.24 is limited to the removal of male sexual organs; the sterilization of a female is not biblically prohibited.

5. Hal. 11: "If a person sterilizes a female, whether of the human or any other species, he is exempt [from punishment]." Hal. 12: "If someone gives a potion of roots [see note 10] to a human being or other living creature in order to render it sterile, this act is forbidden, but he is not flogged for it. A woman is permitted to drink a potion of roots in order to render herself sterile so that she will not give birth."

6. The Bah points out that while a man may not drink a potion of roots even for medicinal purposes, for fear of accidentally rendering himself sterile, a woman may drink such a potion either for medicinal purposes or for the express purpose of sterilizing herself. This, he argues, makes it evident that another person may give her the potion of roots. However, this is permissible only if she is suffering unusual pain in childbirth.

7. Tosafot, Shab. 110b (see text of resp. below) cites Yev. 65b where it is reported that in giving birth to twins, the wife of R. Hiyya suffered agonizing pains of childbirth. Disguised as someone else she

came before R. Hiyya and asked him if a woman is commanded to procreate. He answered, "No," so she went off and drank a sterilizing potion.

8. By this R. Weinberg does not refer to the woman's decision whether to be sterilized, but to the halakhic issue of whether such an act is permissible.

9. In regard to prohibited food, the gemara discusses whether or not adults are obligated to prevent a child from transgressing even when the child acts in innocence. The insane are in the same legal category as children, the deaf, dumb, and blind, in that they are wholly exempt from criminal responsibility by reason of the duress inherent in their infirmity or deficiency (cf. Yev. 99b, Hag. 2b, Git. 23a). There is some question in Yev. 114a on what basis a minor should be prevented from transgressing. According to R. Yohanan (see Rashi's comment), if the child's father is present at the time and does nothing, his silence implies approval and therefore the child must be restrained. In the father's absence, no one is obligated to restrain the child. While there may be a distinction between biblical and rabbinical prohibitions, the sterilization of a woman is not biblically proscribed, nor is it clear that the rabbis prohibit it. Consequently the notion that competent adults must prevent minors or incompetents from transgressing the law does not seem to apply to the present case.

10. See Jakobovits, op. cit., pp. 162-63, 366. The "potion of roots" commonly consisted of "a concoction of various herbal ingredients mixed in wine." It may refer euphemistically to a kind of vaginal spermicide. One halakhic authority believed that the potion induced not organic but merely functional changes in the nervous system.

11. Thus Rambam's terminology suggests that surgical sterilization of women, while not an actionable offense, is nevertheless prohibited. See J.D. Bleich, Contemporary Halakhic Problems (New York: Ktav, 1977), p. 97 f.

12. In his discussion of the prohibition against mutilation (Lev.24.22), after describing the physical act of castration (cf. Bekh. 39b), the Semag quotes Rambam, MT Hil. Issurei Biah, ch. 16, hal. 11 (see note 5). The Semag then quotes Shab. 111a (which is paraphrased by Rambam in hal. 12--- see note 5). The sequence of this discussion, argues R. Weinberg, implies a distinction between the physical act of destroying the reproductive organs, which is forbidden although no punishment is incurred, and the act of administering the potion of roots, which is permitted.

13. Bah, Tur EH 5.

14. By way of explanation to Shab. 111a, Rashi cites Yev. 65b, where the mishnah states: "A man is commanded concerning the duty of procreation but not a woman." The gemara explains the distinction on the basis of Gen.1.28: "'Be fruitful and multiply; replenish the earth and subdue it...': It is the nature of man to subdue but not the nature of woman to subdue." The discussion in Shab. 111a concerns the prohibition against further damaging the genitals of a man who is already a castrate. It is suggested that this proscription may refer to an old man. Here the gemara makes the statement cited by R. Weinberg: "Rather [it refers to] a woman," who is not actually commanded to procreate. Therefore she may be sterilized.

15. See note 4.

16. See notes 7, 14.

17. R. Weinberg, *Seridei Esh*, vol. 3, no. 127, cites the opinion of Havvot Yair that women, although not bound by the commandment (Gen.1.28) "Be fruitful and multiply," are nevertheless obligated to fulfill the verse (Is.45.18), "He [God] created it [the earth] not a waste; He formed it to be inhabited." However, R. Weinberg rejects this view.

18. According to Shab. 111a, the phrase in Lev.22.24, "that which hath its stones torn or cut..." refers to two successive operations which are both forbidden. Rashi explains the first action as completely severing the seminal ducts inside the scrotum, and the second as emptying it. Thus it is forbidden to further damage the genitals of one who is already a castrate.

Responsum 3

Concerning my treatise on the electric stunning of animals prior to slaughter

From the day that the demand of the Society for "Prevention of Cruelty to Animals" was acceded to by the governments of various countries,¹ who decreed that animals must be stunned before they are slaughtered, various methods of stunning the animals were suggested. At first they suggested to either pierce the animal's brain with a sharp spear or shoot a dart into it, thus deadening the animal's sensory response. Some suggested putting the animal to sleep with strong drugs, such as chloroform and so on. Afterward they retracted this suggestion when it was shown that the drops of chloroform poison the blood, spoil the meat, and cause injury to human beings who eat the meat of such an animal.

Later on they suggested to put the animal to sleep by means of electricity before slaughtering it. In the gentile slaughterhouses it is now the procedure to apply electric shock to their animals before killing them. However, differences of opinion still prevail among researchers as to whether or not stupor induced by electricity eliminates the animal's sensitivity to pain. There are doctors who say that the electricity weakens only the motor nerves and muscles, but not the sensory nerves, in such a way that it is impossible for the animal to move its limbs or to show its pain; but still its sense of pain is not eliminated.

As is known, nerve cords proceed from the brain and are dispersed through all the extremities of the body. The nerves are divided into

two types: sensory and motor. The sensory nerves conduct all the body's physical sensations to the [nerve] center in the brain, and from here originates the sensation of pain. The motor nerves then carry the motor stimulus (which is induced by the sensation of pain) from the brain to the muscles of the extremities. Then, as a consequence of the sensation of pain, the movement of the limbs occurs. The medical controversy involves whether the electric current weakens the sensory nerve center in the brain in such a way that the animal feels no pain, or whether it weakens only the motor nerves and the muscles of the limbs.

However, this division of opinion among researchers does not affect us. To us it is important only to know if the electricity causes injury to the animal's body or organs to the extent that it is rendered ritually unfit; or if it causes only the elimination of the animal's sensation of pain or else merely a minor injury insufficient to render the animal ritually unfit.

It is known that the expert Dr. Leiben of Prague proved that the electricity causes major injuries to the animal's body, injuries that warrant fear of ritual unfitness. Therefore he suggested that new studies of electricity be conducted according to the method of the French researcher Leduc, who proposed electric stunning prior to surgical operation on a human patient.² The difference between the old method of electrification and that of Leduc is that according to the old method, they discharge a strong electric current to the animal's head and body instantaneously. Owing to the sudden shock of the strong current, major injuries occur to the animal's body which warrant fear of ritual unfitness. These are:

- 1) Fear of [injury from] collapse. Instantaneous contact with the strong current causes the animal to collapse to the ground with great force.

Serious injury might be sustained similar to that caused by falling from a roof. They have also observed that the electric shock can cause muscle cramps or paralyze the muscles completely. Thus it is possible that the electric shock itself causes serious injury.

2) Fear of damage to the brain. When they examined the animal's brain after it was slaughtered, they found fluid between the upper and lower membranes or between the lower membrane and the brain. They also found blood spots in the membranes of the brain, and other blood spots when they cut the brain into sections. Also the flesh of the brain itself was dissolved and fused together.

3) Fear of damage to the animal's natural condition. The adhesions of the lung were ruptured in such a way that they could not be further examined. They also found that the capillaries in the flesh of the lung were ruptured. Thus the electrification must impair the breathing of the animal, causing damage to the lung.

4) Absorption of blood in the organs. At the time of slaughter of animals who prior to slaughter were electrically shocked, they noted that the blood did not flow at the normal rate but rather little by little. Also the blood which flows from the slaughterhouse appears dark, and the animal's flesh appears to be slightly green. This indicates that the electric current causes the animal to suffocate, thus obstructing the flow of blood. Consequently the blood does not flow strongly and appears to be in a changed state.

5) When they examined the small intestines, they found something like blood blisters.

6) They found blood in the flesh of the heart. This indicates that the heart is weakened by the electrification.

On account of these apprehensions, Dr. Leiben suggested that we use Leduc's methods: initially a weak current is administered; then little by little it is boosted until it is potent enough to put the animal to sleep. The current does not come full force all at once; rather it sneaks up gradually. The animal does not collapse to the ground with so much force. It is possible to apply the current only in the amount necessary for the purpose of inducing stupor. By means of many examinations it should be possible to determine the proper amount, so that on one hand the animal is put to sleep, and on the other no injuries causing ritual unfitness are inflicted upon the animal's body.

However, the gentile doctors are opposed to this method of Leduc and Leiben. In their view this method does not eliminate the slaughtered animal's sensation of pain. Under the circumstances there was no hope that the governments would authorize the electrification procedure suggested by Dr. Leiben.

Subsequently new experiments were conducted with the old method. Initially they had positioned the equipment on the animal's head and spine; now they placed it upon the head near the ears.

Many of the experiments succeeded. After the examination they did not find any of those signs of ritual unfitness enumerated above. The brain was not damaged nor was fluid found in it. Also the membranes were free of blood. The lung was intact and the lesions were not ruptured. Neither was any blood found in the small intestines. But in the brain itself they did find one small irregularity: when they dissected it they found blood spots in some places. However, the brain tissue was not dissolved.

They also conducted experiments on living animals. They administered

electric shock to the animal and afterward waited until it recovered from its stupor. Many of the animals stood up by themselves and were able to walk around. Some could not stand by themselves; only after they were helped up could they walk around. But it also happened that after the electrification some animals could neither stand nor walk. Still, by means of the new modifications that were introduced or might yet be devised with the electrical equipment, one might hope that by further research they will eventually find the proper amount [of current] to put the animal to sleep without damaging its organs.

It was proposed that the examination of the animal's organs after slaughter-- e.g., the brain, heart, lung, and other internal organs-- be conducted by a Jewish doctor. There were differences of opinion as to whether a superficial examination was sufficient or if a microscopic examination of the organs was necessary.

Dr. Leiben had misgivings about relying on these examinations in any case. For the effect of the electric current depends on the body structure of the animal, its state of health, and other varying circumstances such as whether the animal had been in a damp or dry place, weather conditions, etc.; so that on the basis of experiments yielding a positive result of no injury to a given animal, one cannot conclude with certainty that no injury will be suffered by another animal. The question, then, is whether it is worthwhile to continue the experiments in order to reach the stage where it is possible to say that the current in such and such an amount neither causes injury nor provokes fears of ritual unfitness. Are the examinations mentioned above reliable, so that they should continue to experiment with living animals (to see if they can stand and walk after the electrification) as well as with slaughtered

animals (examination of the brain and the internal organs) and to decide on the basis of this research that electrification does not warrant fear of ritual unfitness?

Before we present all of the doubts and apprehensions provoked by research on the electrification of animals, we must explain the effect of the electrification on the animal's body. As is known, the nerves of the body's organs extend from the brain which is located in the skull and is contiguous with the spinal cord. In the part of the brain located in the skull reside all of the sensory centers: the senses of sight, smell, touch, and so on. The impulse of respiration is also centered in the brain (in the nodus vitalis), where the nerves attached to the muscles of respiration originate, such as chest, rib, and diaphragm muscles. If for some reason the center of respiration in the brain is destroyed, the animal cannot inhale air and suffocates. Thus if the electric current strikes the center of respiration in the brain with too much force, the animal will be seized by apoplexy and die immediately.

Whether the death must come immediately or if it can possibly occur after a short time, an examination by expert and qualified physicians on the nature of the electrification's effect is necessary. A Jewish doctor from Berlin, to whom R. Ezra Munk and I presented various questions concerning the effect of electrification, expressed his opinion that possibly the actual death would be delayed; that is, initially the apoplexy would seize the animal, but only after some time passed would the animal die. In his opinion, death by electric current may be considered only apparent death, since many times [with human patients] the physician manages by means of respiration exercises and heart massage to revive someone apparently dead. The effect of the electrification on the brain depends

on the strength of the current. A strong current may possibly kill, while a weak current may only induce stupor. It too may kill, but that is a rare instance. After the stunning the animal revives, alive and healthy as before.

As far as the blood spots found in some places in the dissected brain after the animal was electrically shocked, the above-mentioned doctor explained to us that there are many possible reasons for this. It is possible for the capillaries in the brain to be ruptured and also for the hair roots and their capillaries to be destroyed. In this same doctor's opinion it is also possible that the blood spots in the brain are caused by the slaughtering and not by the electric current. We asked him if, when the electricity causes the death of the animal, it is possible to determine [the causes of death] on the basis of the injuries to the animal's internal organs. He answered that it is possible to make such a determination by microscopic examination of the brain cells destroyed by the current. With an animal who is not slaughtered, its return to health proves that its brain cells were not damaged.

On the basis of all this one may formulate the doubts and apprehensions concerning an animal to whom electric shock has been administered before slaughter. These are the apprehensions: 1) fear of danger [to the animal's life]; 2) fear of ritual unfitness since the electrically shocked animal might not live a full year [were it not to be slaughtered]; 3) fear of injury to the animal's organs; 4) fear of injury due to collapse; 5) fear of brain damage from the current's contact with the animal's head.

The solutions to these problems will obviously have to respond to the question: is it possible to rely on the examination of an animal

who received electric shock before slaughter? Is it possible, on the basis of experiments conducted with electric current in a known quantity administered to many animals who afterward remained alive and well, to generally permit the electrification without [subsequent] examination; or rather is examination subsequent to slaughter indeed necessary?

From the beginning I made it known that anything I might write is merely an exploratory discussion of the law. I do not come to render a definitive legal decision. The laws of ritual unfitness are very strict, and the subject of kashrut is one of the foundations of Judaism. The decree requiring electric stunning is a severe measure which endangers all matters of kashrut for the entire [Jewish] nation, which in its purity would risk its life to hold fast to kashrut. God forbid that one individual should render a binding legal decision on this matter. The issue is addressed to the great halakhic authorities of this generation, from whose teachings we may not stray even a little. May God protect us from error.

Many will wonder: what moved me to publish my treatise on stunning now, which was first written 25 years ago after the decree [prohibiting] ritual slaughter was issued by the defiled and filthy oppressor (may his name be blotted out) in Nazi Germany?³ Everyone knows that during all of that time I did not heed the request of many pious people and refused to publish my treatise in the press. For I did not want to put a sword into the hands of Israel's enemies, who opposed the ritual slaughter practiced by Jews; and I wished to prevent those who do not closely observe the law from quickly making a permissive decision on a matter already prohibited by all the great authorities of that fleeting generation.

However, since a rumor has spread that I was among the permissive ones, so to speak, it is my duty to tell the next generation about the entire matter.

I wrote the treatise in a time of great distress, when a sharp sword lay against Israel's throat. The wicked Nazi regime had decreed a prohibition against ritual slaughter unless it was preceded by the stunning of the animal. Subsequently, by cruel "legal" machinations the wicked ones restricted the possibility of bringing in [kosher] meat from abroad. They did not permit kosher slaughter even for the elderly and dangerously ill. There was imminent and serious danger that the majority of Jews would not stand up to the trial, God forbid, but give in to eating meat improperly slaughtered and ritually unfit. Meanwhile it was rumored that the leaders of the great Jewish community of Berlin were considering the use of improperly slaughtered, ritually unfit meat purchased from gentile slaughterhouses for such community institutions as the hospital, homes for the elderly, and others. The community leadership, although composed almost entirely of [religiously] liberal people, had always been careful with respect to the community's official institutions to observe the rules of Sh.Ar. on matters of kashrut, and had always obeyed and submitted to the supervision of Orthodox rabbis. But the leaders complained that now, in this time of severe persecution, they were forced against their will to permit the eating of improperly slaughtered and ritually unfit meat because of the danger to the lives of the sick and elderly; according to the doctors, these people could not possibly survive without eating meat. This news touched us deeply. In our distress we decided to consult the great authorities of Lithuania and Poland to determine whether in this time of danger it was possible to permit stunning, as

stipulated by the wicked government. I traveled to Vilna, Warsaw, and Lublin to seek advice on this serious question which affected the life of Judaism in Germany. The great authorities R. Hayyim Ozer Grodzinski of Vilna and R. Meir Shapiro of Lublin requested me to write a treatise clarifying the question from a halakhic standpoint.

I heeded their advice. The responsum that follows in Seridei Esh is the fruit of my labor and toil to elucidate this question from all aspects. True, in it I appear to permit [stunning prior to slaughter], but I knew from the first that the great authorities of Lithuania, Poland, and all of Israel, the leaders of Orthodox Judaism, would never agree to any change in the manner of ritual slaughter as it had been practiced in Israel for generations. I myself had grave misgivings about approaching such a serious matter as kosher slaughter, which is the major foundation of Jewish life. Several times I said to the righteous master, R. Ezriel Munk of blessed memory (rabbi of Congregation Adat Yisrael of Berlin and in charge of the department concerned with matters of ritual slaughter in Germany), that it was not our right to search out grounds for permitting change in the method of ritual slaughter. The Orthodox Jews will not want it and will not listen to us. They will suffer and go hungry rather than defile themselves by eating meat slaughtered by the method decreed by the wicked ones, the enemies of Israel. The filthy enemy, the chief on the Nazi leaders, and thousands upon thousands like him will perish from the earth; but our holy law will endure forever. The Jews of Germany must stand up to the trial for the sake of our holy law and for the sake of our brothers in all lands. If, God forbid, we rule leniently on this method of slaughter, we are bound to endanger Jewish ritual slaughter throughout the world. We must show

the entire world that we are ready to sacrifice ourselves for the sanctity of Israel; and our enemies will see that by prohibiting ritual slaughter they will not cause Israel to transgress its law.⁴ Then perhaps--- they will leave us alone.

The so-called reason [for banning ritual slaughter]-- that it is cruel to animals, a concern they claim to profess⁵-- constitutes a grave insult to the honor of our holy Torah, which was the first to warn against cruelty to animals. At long last their naked hate and cruelty is revealed in broad daylight: they want to starve Jewish people to death by making false charges and feigning pity for the animals.

However, the advice of my colleagues prevailed upon me to deal with the clarification of this stringent halakhic matter, which owing to its novelty had never been explained or clarified in rabbinic literature. It never occurred to the rabbis of Israel that a day would come when we would be forced to alter the method of ritual slaughter as practiced among us according to the command of our holy Torah and fixed by our sages of blessed memory, who received the oral law. Now that a time of trouble and distress has arrived, and the people are convulsed with pangs of fearful suffering, it is up to the leaders of Israel to show that they are not unyielding, God forbid, but that they too share in their people's pain and will do all they can to reach the gates of deliverance.

The treatise on the stunning of animals printed here was sent on the advice of R. Hayyim Ozer of blessed memory to all the great authorities of Israel for their opinions. Virtually all of them prohibited stunning,⁶ and even the few who were inclined to be lenient in time of

distress and danger to life subsequently retracted their original opinion and joined those who prohibited it. Thus it was definitely concluded not to permit [stunning] by any means. The survival of the law of Israel, the survival of Judaism, and the rescue of its honor required that we offer the holy sacrifice of prohibited meat, by virtue of which we would merit complete deliverance and the redemption of our souls.

I myself saw that I did not manage to clear up all of the doubts or remove all of the apprehensions connected to the electric stunning of animals prior to their slaughter. In spite of all of the many experiments with the electrification of animals on which so much labor was expended, I was convinced that the experiments performed on animals who underwent electric shock and afterward remained alive proved nothing. For not all of the animals are identical in their nature or body structure; what does not injure one animal may well cause certain death to another. We lack the tested and proven means to discern that the electric current did not cause lethal injury or damage sufficient to render the slaughtered animal's internal organs ritually unfit.

There is not, then, any practical value to my treatise. I publish it here only to elucidate some talmudic problems and difficulties among the halakhic authorities, and principally-- for its historical significance in illuminating the spiritual circumstances that prevailed in the Judaism of Germany, Poland, and Lithuania before the complete destruction...

[Yehiel Yaaqov Weinberg

Teshuvot Seridei Esh, vol. 1, introduction]

Notes

Responsum 3

1. On 21 April 1933, the new Nazi government issued a law prohibiting shehitah, Jewish ritual slaughter of animals, without prior stunning by electric shock. Attempts to prohibit ritual slaughter in Germany began in 1864, but had not attracted wide support. Now the anti-shehitah movement spread to Sweden (1937), Hungary and Italy (1938). Shehitah was also banned in the countries occupied by the Nazis after 1939. The Nazis' ostensible concern was that ritual slaughter was cruel to animals. As R. Weinberg notes in the resp. text below, such scruples did not deter them in the case of human beings. See H.J. Zimmels, The Echo of the Holocaust in Rabbinic Literature (New York: Ktav, 1977), pp. 181-93, for a thorough discussion of the prohibition of ritual slaughter.
2. Apparently referring to the work of Sylvestre Anatole Leduc, 20th century French physicist.
3. See note 1.
4. Yet R. Weinberg (Seridei Esh, vol. 1, p. 387) recognized that the prohibition of ritual slaughter without prior stunning was not intended as an act of explicitly religious persecution. "In fact this reason does not apply as this is only the case when the enemy intends to force Jews to betray their religion... Although we know their intention, which can be deduced from their action, nevertheless this persecution is not in the same category as past persecutions when the enemy explicitly declared their wish to make us transgress our religion. Now, on the contrary, they openly announce that they do not object to us practicing our religion.

In truth they do not intend to force us to give up our religion, but only to trouble the Jews and deprive them of their livelihood..." The Nazi definition of the Jew was strictly "racial." The Jewish religion, while it may have excited contempt and occasional excesses of cruelty, was not central to Nazi anti-Semitic doctrine.

5. See note 1.

6. See, e.g., resp. 4.

Responsum 4

[Response to treatise by R. Yehiel Weinberg on the question of stunning]

With God's help, the tenth day of the counting of the omer, 5698

[25 April 1938]

May many friendly greetings fly up like doves on high to honor the great rabbis of exalted merit, may they live long and happily.

The pamphlet [by R. Yehiel Weinberg on the question of stunning animals prior to ritual slaughter]¹ reached me on the eve of Passover now past, and I could not answer immediately, as is fitting out of respect, due to occupation with many preparations for the sacred festival; and during the intermediate days [of the festival] writing is forbidden (although if it is permitted for matters of Torah, this is not the place to explain why). Now to my answer.

I reviewed the entire pamphlet, and the matter is simple: [stunning prior to slaughter is] absolutely forbidden. There is no possibility according to learned Torah scholars to incline in this direction, even for the sake of argument.

I do not wish to explain the reasons for this which are similar to what is written in Teshuvot Divrei Hayyim, vol. 1, OH 23, based on what he was taught by his illustrious father-in-law of blessed memory.²

See also a similar view in a letter of the great R. Berish Meisels of blessed memory, Av Bet Din of Warsaw, at the end of the booklet Modaa

Levet Yisrael:

"To you, people, I call. Please, stand up to the trial and show that you are among those who are stoned and hanged for the sake of the commandments of our holy Torah. According to Teshuvot Harosh no. 32:8,³ there were certain women who had not the strength to remain in the palace of the King.⁴ In the time of persecution they changed their religion out of fear of death. But when a miracle occurred and they were rescued, they returned to their religion. The truth of the matter is that they acted very badly and required contrition, repentance, and the acceptance of chastisements more than those who convert when it is not a time of persecution. For persecution is public, and in such a time the sages said that it is forbidden to change so much as a shoelace.⁵ This can be compared to the following: A great king had subjects who did as he ordered. A few of them turned away from him but [later] returned and made peace; and the king accepted them. One day another great king with a mighty army joined battle against him. He gathered his servants and said to them: 'You see that [the other king] will conquer me. Those who prefer me and my majesty, come forward and prepare to die.' Some of them joined him, and some turned away. But the king fought and defeated the enemy after all. Those who had turned away from him begged to make peace with him by an easy act of recompense, as in the case of those who had turned away from him [before the war], but the king would not agree to accept them again except by a great act of recompense. So also the King of the universe takes pride in Israel when they sacrifice their lives for the sake of His holiness, as it is written [Is.49.3]: 'And He said to me: You are my servant Israel, in whom I will be glorified.'"

Written and signed with an aching heart, awaiting the mercy of
heaven, may it come quickly in our [time].

(The insignificant)

Hayyim Yitshaq Yeruham

Av Bet Din, Altstaadt

Owing to our many sins I am still amid the exile, awaiting the
complete salvation, may it come quickly in our time.

[Teshuvot Seridei Esh, vol. 1, no. 16]

Notes

Responsum 4

1. See resp. 3.

2. The Divrei Hayyim responds to a question concerning whether it is permitted to make Passover matzot by machine. He agrees with "the great authorities of our time" that this is forbidden. "Concerning some matters one should respond; but it is enough to simply prohibit this... Concerning such matters one should not reveal the reason; he should simply make a definitive ruling, and those who pay heed will take heed."

3. See resp. 23, note 14. The Rosh's parable is addressed to Jewish women in captivity, who might engage in prohibited sexual conduct in order to spare themselves suffering. R. Yeruham applies the same parable to any Jew who would be inclined to transgress the law in time of persecution-- in this case, the law of ritual slaughter.

4. I.e., they did not have the strength to remain Jews in time of persecution.

5. Cf. Sanh. 74b.

Responsum 5

Regulations on how to proceed at this time¹ with the ashes of the cremated (owing to our many sins)

With God's help, Wednesday, Sabbath Vayehi, 5699 [4 January 1939],
Frankfort-am-Main:

1. The guarding² of ashes is not necessary. (For it is said in Shab. 151b: "A living day-old infant need not be guarded from weasels or mice; but when Og, king of Bashan, died he needed to be guarded from weasels and mice;³ as it is said [Gen.9.2]: 'And the fear of you and the dread of you shall be upon every beast of the earth.' As long as a man is alive, creatures fear him; once he dies, the fear of him ceases." It is said in Ber. 18a: "On a boat they place it [the dead body] in one corner, and both of them pray in another corner. In Ben Azzai's view we do not fear mice; according to the first tanna, we do fear." Accordingly it is everyone's opinion that it is not necessary [to guard the ashes], and this is obvious.)

2. When notification [of death] arrives from the gentile authorities, one is obligated to commence the seven day mourning period immediately.⁴ (See Sh.Ar. EH 17:5 which prohibits mourning as long as there is no testimony sufficient to permit [the wife] to remarry.⁵ This is explained in Sh.Ar. YD 375:7: if one drowns in waters with [visible] boundaries, they count [the seven day mourning period] from the time they give up the search [for the body]. This excludes the case where

the waters have no [visible] boundaries, for in such a case one does not mourn since there can be no permission for the wife [to remarry].⁶ See Sifteí Kohen to YD 375:7,⁷ and Teshuvot Shevut Yaaqov, vol. 1, no. 102,⁸ who heard from his father, R. Yosef, that in his boyhood a similar incident occurred in the community of Frankfort before the great R. M_____ of blessed memory; and he decided that one should not say Kaddish but rather should occasionally lead prayers. See also vol. 2, no. 114;⁹ and Teshuvot Kneset Yehezqel, no. 53, cited by the Pithei Teshuvah, YD 375:3: he is accustomed "to permit the saying of Kaddish in the home if it is already widely known that the question [of whether the husband's death is certain] has been sent to the rabbis... Then we do not fear that someone will come forward and testify without giving particulars that so and so died..."¹⁰ [This applies] only when [in the case of one who drowned in waters with visible boundaries] there is reason to permit the agunah¹¹ [to remarry], which is not so if the waters had no [visible] boundaries; for here it is obviously impossible to give permission. Moreover, the Kneset Yehezqel concurs that they do not say Kaddish [in public] for fear they appear to give permission to the agunah. This accords with the decision of the great R. M_____ of blessed memory here in our community. But this applies only when no permission [to remarry] can be given, which is not the case here since [on the basis of notification of death] from the gentile authorities, we permit [her to remarry]. So also the great halakhic authorities of this generation gave permission, as cited in the later halakhic authorities as I have discussed elsewhere. Thus one is obligated to rend [his garment] and to commence the observance of the seven day mourning period immediately.)

3. The box of ashes should be placed upon a bier out of respect for

the dead. (In our community this was the ruling of the illustrious Matteh Levi, in his letter to our community of 22 June 1893. If this should be done for those who did so [i.e., were cremated] willingly, how much the more so should it be done for these [who were cremated against their will]. He also decided that two cremated bodies should not be buried together in a grave (cf. Sh.Ar. YD 362),¹² and that [the cremated body] should be given a grave like those given the other dead, without any discrimination or alteration. All the more so should these [cremated against their will] be given a proper grave. On whether there is an obligation to bury the ashes of the cremated, see my book [Menahem Meshiv], part 1, p. 204.)¹³

4. [The ashes] should be buried in a coffin; when this is not possible, they should be buried in a small casket; and if this too is not possible, the ashes should be buried in the box they came in.

5. The box of ashes should be wrapped in a prayer shawl; also, burial shrouds should be placed inside (in order to strengthen the belief that the deceased is prepared to awaken and rise at the resurrection, and that he is not, God forbid, among the people of Titus and his followers who do not believe. See my book [Menahem Meshiv], part 1, p. 31.¹⁴ Here the custom from long ago is that we place in the coffin four threads from the fringes [of the prayer shawl]. In my humble opinion this takes the place of a halakhically defective prayer shawl as stipulated in Sh.Ar. YD 351:2.¹⁵ We enclose the four threads from the fringes to strengthen the belief that he will rise at the resurrection of the dead, and everything will be prepared for him to wrap himself in a proper prayer shawl as in the case of R. Yehudah in Yer. Kel., ch. 9, hal. 3: "Put a shoe on my foot and a staff in my hand, then put me off to the

side; when the Messiah comes, I will be ready.").

6. When it is not possible to bury the ashes in a coffin but only in the box they came in as is, they should see to it that in any event the shrouds are inside the box and a small board or stone is placed on top so the shrouds will not be soiled.

7. On the day of burial, which in the majority of cases is after the seven day mourning period and often after the 30 day mourning period,¹⁶ [the mourners] should mourn the entire day. (See Sh.Ar. YD 403:1¹⁷ concerning the gathering of bones.¹⁸ When mourning is not possible, one can be lenient about this.)

8. When they rend [their garments] on the day of the news [of death], they need not rend on the day of burial. (Although according to YD 403:2 one who rends at the time of death also rends at the time of the gathering of bones, in our case there are no bones; furthermore, ashes do not defile.¹⁹ As I wrote in my book [Menahem Meshiv], part 1, no. 16, p. 31 and in the indices, concerning the burial [of ashes] the duty exists only because it is forbidden to derive benefit from the ashes, not because of [the obligation of] burying the dead. Cf. Turei Zahav to Sh.Ar. YD 375:2 who writes: "On the tenth of Tevet [a public fast] someone was killed and thrown into the Rhine River. Before Adar they gave up the search for him. R. Yaaqov decided to begin counting the seven day and thirty day mourning periods, but after the days of mourning had passed [the body] was found and brought to the cemetery. R. Yaaqov ruled that it was only required to rend, and the Ramban agreed with him." Certainly it was his intention to observe mourning that day, for [the discovery of a body] is not less [important] than the collecting of bones, when we do observe [mourning] on that day. But in our case it

is not necessary, and for this reason I gave a lenient ruling in paragraph 7 [above] when it is impossible [to observe mourning].)

9. They should recite the funeral service and stand in the row [to console the mourners]. (Although we do not stand in the row when bones are interred-- see Sh.Ar. YD 403:3-- nevertheless since they neither recited the funeral service nor stood in the row [on behalf of the cremated person] prior to this time, surely they should stand [in the row] when the ashes are buried. I saw an essay concerning the transfer of bones from two cemeteries in the village of Greisheim by the burial societies of our community, that on 14 Adar II, 5657 [15 April 1897] they gathered the bones from there and said, "The Rock, [His work] is perfect..." [i.e., the funeral service] while walking, because of [the impending] Purim, and then said Kaddish. Likewise in the month Marheshvan 5658 [November-December 1898] they gathered the bones and recited Psalms 48, 88, 90, 91; afterward they said the funeral service aloud and then recited Kaddish at the cemetery. Certainly they did this in accord with Yer. MQ 1:5: "But we say words over [the bones]. What words? The rabbis say: Praises to the Holy One, blessed be He." Similarly the Rambam and the Tur wrote that we should say over the bones words of praise to the Holy One, blessed be He, and words of admonition. The funeral service and Kaddish are in the category of praises since they extol the Holy One, blessed be He, who causes death and revives life.)

10. The meal of condolence is not necessary on that day. (Although when bones are gathered the meal of condolence is served [that day] in the house of mourning-- see YD 403:3-- nevertheless it is preferable here [not to serve the meal on that day] as it says in paragraph 7 [i.e., one may be lenient about this]. However, on the day of the news [of

death], the meal of condolence should be conducted, as it says in YD 378.)²⁰

11. On the day of burial one should lay tefillin, except if one heard [the news of death] on the day of burial in which case it is like the day of the news [of death, and consequently he may not lay tefillin]. (Even though in our case more than the 30 days have passed, it is considered to be recent news [i.e., within 30 days], since we begin counting the seven and 30 day mourning periods from the time they abandoned hope of burying him; see YD 375:5.²¹ As far as one who hears [the news of death] only now and knew nothing of it prior to this time, from the moment he is informed of the death he begins the seven day mourning period as long as [the deceased is] not buried. However, in the event of great need one should be lenient about this too, provided that more than 30 days have passed since the cremation. Otherwise one may not be lenient.)

12. The day of death is the date of the yartzeit. (See Sifteï Kohen to YD 402:10.²² According to our custom, also during the first year [after the death] the yartzeit is on the day of death. See Teshuvot Melammed Lehoil, OH 113:3, who says that the rabbis of Germany agreed that the yartzeit is always on the day of death even if the burial occurred three days after the day of death.²³ The Kneset Yehezqel no. 44 concurs with this view;²⁴ see also Baer Hetev, OH 132:2;²⁵ Teshuvot Maharsham, vol. 2, no. 221;²⁶ and Mishmeret Shalom, legal novellae on YD, laws of mourning, section 10, no. 22.)

All of the foregoing I explained in public on Thursday evening and Friday, 21 Shevat 5699 [10 February 1939] before the burial society

of our community, so that they would know how to proceed according to our holy Torah in case of any misfortune that may occur. May God destroy death forever.

To this I affix my signature today here in the community of Frankfort on the river Main, 5699 [1939].²⁷

Menahem Mendel Kirschbaum

Av Bet Din and Rosh Yeshivah

Frankfort-am-Main

[Teshuvot Tsiyyun Lemenahem, pp. 361-65]

Notes

Responsum 5

1. According to H.J. Zimmels, The Echo of the Holocaust in Rabbinic Literature (New York: Ktav, 1977), p. 27, R. Kirschbaum wrote this resp. (actually a tagqanah) in the aftermath of Kristallnacht, 9-10 November 1938. Various families received boxes containing ashes of their family members who had been interned in Buchenwald, Dachau, and Sachsenhausen. At least 20,000 Jews had been taken into "protective custody."
2. Under ordinary circumstances the body of the deceased may not be left alone from the moment of death until burial. See Rema, Sh.Ar. YD 373:5; Y. Greenwald, Kol Bo al Avelut (New York: Feldheim, 1973), p. 34.
3. Cf. Nu.21.33-35; Ber. 54b.
4. Shivah (seven) commences after the funeral. During this period mourners remain at home and refrain from bathing and cutting the hair. Traditionally the daily minyan is convened in the house of mourning during shivah.
5. Rema's gloss.
6. Such permission might be construed if the husband is mourned.
7. Siftei Kohen cites Sh.Ar. EH 17:5 (see text of resp. above), and the Tur and Bet Yosef who reject the view of R. Hai and R. Sherira that we mourn someone alleged to be dead even when we are not certain that he is.
8. The Shevut Yaaqov has reservations, however, about the ruling of Bet Yosef and Rema forbidding a missing husband's wife to mourn. He cites

contradictory rulings by several major authorities, including the Rosh and the Mordekhai.

9. This resp. concerns a woman who had no certain proof of her husband's death. She was told by a certain ignorant teacher to mourn and say Kaddish for her missing husband. The Shevut Yaaqov rules that this was a grave error; for the woman to remarry in the future (assuming compelling evidence of her husband's death comes to light) she must secure the permission of three famous rabbis.

10. R. Kirschbaum's original text mistakenly cites no. 57. Resp. 53 (as cited by Pithei Teshuvah, YD 375:3) concerns a certain Jew who was apparently murdered on a trip to Paris. Witnesses reported where the body was buried, and the wife sent two Jews who knew her husband to exhume and identify the body. The corpse was too decayed to recognize the face, but certain discernible physical characteristics matched the husband's description; moreover there were documents buried with him bearing his signature. Despite this evidence, the gaon of Metz (who submitted the question) finds reason to forbid the wife to remarry until a full year has elapsed, during which time the family must not mourn or recite Kaddish. The Kneset Yehezqel, however, is more lenient: since the case is already public knowledge and has been submitted to rabbinic authorities, he permits Kaddish to be said privately and a minyan to be convened in the family's home.

11. See resp. 25, note 1.

12. Par. 3. Unless there is a partition between the bodies, they may not be buried together. However, a father may be buried with his young daughter and a mother with her young son or grandson: "The rule is that

whoever slept with him in life may be buried with him in death."

13. Menahem Meshiv, vol. 1, p. 204 refers to resp. 16, p. 30, where R. Kirschbaum is asked whether the remains of those [voluntarily] cremated may be buried in the cemetery together with those properly interred. Since it is forbidden to derive benefit from the dead, he is inclined to require burial of the ashes. However, to do this might violate the prohibition against burying a wicked man (such as one who wished to be cremated, evidencing his disbelief in resurrection) with a righteous man. While inclined to permit the ashes to be buried in a proper cemetery, R. Kirschbaum does not wish to make a definite ruling. In his additional remarks (p. 204), he cites Teshuvot Mahari, YD 352, that there is an obligation to bury the ashes of the cremated.

14. In Git. 56b it is said that the "wicked" Titus "vilified and blasphemed against heaven." Those who are voluntarily cremated evidence their disbelief in the resurrection of the dead.

15. Rema: "Some say the prayer shawl does not require fringes. It is the custom to bury the body with fringes, but first they render them defective or bind up one of the corners."

16. Sheloshim (thirty) consists of the first thirty days after the funeral, including the seven days of shivah. During this period the mourner may return to work but continues to observe certain restrictions as a sign of mourning. He may not attend festive gatherings, such as weddings or parties, during these thirty days. When mourning for parents, one observes these restrictions for an entire year.

17. When the bones of a relative for whom one is obligated to mourn are

transferred, one should perform all the requisite acts of mourning. The transfer should not be made near nightfall, since there would not be sufficient time to mourn. R. Kirschbaum applies this ruling to the ashes as well.

18. I.e., when the body is transferred from a provisional to a permanent grave.

19. However, in his remarks at the end of Menahem Meshiv (p. 204; cf. note 13), R. Kirschbaum mentions the opinion of a contemporary that among the ashes there are many bone fragments, so that the ashes do indeed defile.

20. Par. 12. According to par. 13, there is no meal of condolence if one is informed of the death more than thirty days after it occurred. But see the text of the resp., par. 11, where R. Kirschbaum argues that even if thirty days have passed, it is still considered to be recent news (i.e., within thirty days).

21. "[If Jews are] put to death by the ruling power, and we are unable to take the bodies away for burial, we begin to mourn for them and to count the seven day and thirty day mourning periods from the time we give up asking the king for permission to bury them. But we do not give up hope of stealing the bodies [in order to bury them in Jewish graves]."

22. Sifteí Kohen concedes the difficulty that if the yartzeit is determined in the first year of mourning by the day of death, then if the burial is delayed because of a Sabbath or holiday, the required twelve months of mourning will not be observed in full. Nevertheless he concludes that since the great authorities did not make a distinction between the

first year and subsequent years with respect to the yartzeit, the day of death is the date of the yartzeit even during the first year. If there is a considerable delay between the day of death and the day of burial, however, it might be preferable to fix the yartzeit from the day of burial.

23. Part 1, p. 119.

24. I could not find this reference as cited.

25. "The yartzeit is always [determined by] the day of death, not the day of burial, even if the burial is delayed many days, and even during the first year."

26. The resp. concerns a man who fell from a wagon into a river. A witness saw him drown on 5 Nisan; but the body was not found until 24 Nisan. Even after such a long delay before burial, the Maharsham rules that the yartzeit is determined by the day of death.

27. Since it was impossible for R. Kirschbaum to publish his tagganah in Germany, he sent the manuscript to his brother in Cracow who had it published there. See Zimmels, op. cit., pp. 27-28.

1941-44

Of the 17 responsa in this section, 13 were written by R. Efrayim Oshry of Kovno, whose Teshuvot Mimaamaqim is the major extant source of responsa from this period. These responsa provide a virtual catalog of the torments suffered by Jews in the Kovno ghetto, torments characteristic of ghetto life throughout eastern Europe. R. Oshry's responsa begin with the Nazi invasion of Lithuania in June 1941. Jews were hunted down in the streets (resp. 6). The Nazis immediately sought out pious Jews to humiliate and Torah scrolls and synagogues to desecrate (resp. 7). In addition to torturing defenseless Jews (resp. 10), they organized massive "actions" and "selections" in which thousands of Jews were murdered (resp. 11, 12). The Jews were forced to labor in work details (resp. 12, 21). The Nazis introduced labor cards without which Jewish lives were forfeit, but distributed only enough for a fraction of the ghetto inhabitants (resp. 8). They prohibited Jewish pregnancy on pain of death (resp. 18). Desperately the Jews sought avenues of escape: baptism certificates (resp. 14), forged identity cards (resp. 15), gentile disguises (resp. 15, 16), escape to the forests (resp. 21). The Jews' tragic plight forced them into impossible dilemmas: whether to risk one's own life to save another (resp. 6); whether to accept the German labor card (resp. 8); whether to commit suicide rather than suffer torture (resp. 10); whether to disguise one's Jewishness to escape death (resp. 14-16). There were less dire problems that were nevertheless significant to observant Jews: exactly what words to utter before one was killed (resp. 11); whether to praise God in the ghetto

for not making the Jew a slave (resp. 13); whether the clothes stripped from murdered Jews could be used (resp. 12); whether a post-mortem caesarean section was permissible (resp. 18); whether ghetto dwellings required a mezuzah (resp. 20).

The other four responsa in this section corroborate the description of Jewish life in the ghetto that emerges from R. Oshry's responsa. They also express the same kinds of halakhic concerns. In Slovakia, where a Jew could save his family from Nazi deportation by professing Christianity, wholesale conversions were demoralizing the Jewish community (resp. 19). Children were converting to protect their parents. Some Jews continued to practice Judaism in secret, but many abandoned their religion entirely. In Galicia as elsewhere the Nazis had imposed strict curfews after which no Jew could walk in the street, which prevented women whose time for immersion had arrived from going to the mikveh. Thus even the most intimate aspects of Jewish life were disrupted, since sexual relations between husband and wife are halakhically prohibited unless she immerses at the proper time.

Some of the horrifying choices forced upon the Jews by the Nazis are described in two other harrowing responsa, one from the ghetto, one from the death camp itself. In the ghetto, a group of Jews were hiding in a bunker while the Nazis searched for them. Suddenly a baby burst out crying and could not be silenced. The Jews had to act immediately: either stifle the infant and risk smothering it, or allow it to cry and risk discovery of the entire group. In Auschwitz, a Jewish father had the opportunity to ransom his only son from the kapos; but he knew that his son's life would be spared only at the expense of another boy's. He too needed to act immediately; what should he do? Such agonizing

decisions (resp. 9, 22) stretch the halakhah-- and human endurance-- to the very limit.

A distinct picture of eastern European Jewry in extremity emerges from these 17 responsa. Shocked and staggered by the ferocity and magnitude of Nazi persecution, the Jews who sought guidance in halakhah from their few remaining rabbis fought back in the only way they knew. As historian Philip Friedman observed,* most other nations have legacies of heroism defined by physical and military prowess; but to the traditional Jewry of eastern Europe, the concept of heroism was fused with the idea of spiritual courage and self-sacrifice. Their religious convictions, steeped in their ancestral heritage, were conditioned by the example of generations of martyrs. Religious Jews believed that the struggle between good and evil would ultimately be decided by God, and that the true weapon was the weapon of conscience and religious devotion. R. Mosheh Yehoshua Aharonson wrote that "by observing the precepts of the Torah even when it was dangerous to do so; by living a moral and ethical life in the face of temptations to behave in a bestial manner in the face of degradation; by waging unrelenting struggle for human and Jewish dignity, these Jews expressed the highest form of Jewish heroism in the same manner as those who took up arms against the enemy."^o There is abundant evidence in the responsa of such behavior; the questions themselves bear compelling witness to it. Given the chance to save their own lives, some Jews refused if it meant that others would die in their place (resp. 8, 9, 22). Others willingly

* Jacob Glatstein et al., eds., Anthology of Holocaust Literature (New York: Atheneum, 1973), p. 280.

^o Jewish Resistance During the Holocaust (Jerusalem: Yad Vashem, 1971), p. 474.

risked their lives to save others even though the halakhah did not require them to do so (resp. 6, 21, 22). Many refused to save their own lives if it meant denying their religion, even if the denial was a mere deception and would be recognized as such by non-Jews (resp. 14-16, 19). They resisted the temptation to take their own lives, trusting in the coming redemption (resp. 10). They insisted on practicing their religion even in the most desperate circumstances (resp. 11, 12, 17, 20). Even when their lives might have been preserved by a course of action that did not entail danger to other Jews or the denial of Judaism, they still insisted on halakhic permission before acting (resp. 12, 18, 21).

In addition to nobility of spirit and conduct, another outstanding characteristic of religious Jewry is evident in these responsa: the stubborn will to survive, the sheer stamina to preserve life in the midst of epidemic death. In the years 1940-41 in the Warsaw ghetto, a doctrine attributed to R. Yitshaq Nissenbaum came to epitomize the Jewish imperative under the Nazis: qiddush hahayyim, "the sanctification of life." The Jew must make a point of defending whatever the enemies want to take: previously they sought his soul-- he suffered death rather than surrender it; now they demanded his body-- he must preserve his life at all costs. The Yiddish word for this doctrine is iberleybn, to survive, to remain alive. This attitude was characteristic of all of eastern European Jewry; for religious Jews, it was linked to faith in the ultimate justice of God. Such faith did not exclude protest (resp. 11, 13), but in these responsa protest leads to affirmation, not despair.

During this period the rabbis' approach to Jewish law was lenient.

At times the leniency is difficult to justify halakhically: the advance permission to commit suicide granted by R. Oshry (resp. 10) is perhaps the most conspicuous decision of this kind. In the case of direct, if unintentional homicide committed on the baby hidden in the bunker (resp. 9), R. Efrati completely exonerates the man responsible. Rather "Esau [i.e., the Nazis] should be ashamed that he brought Jacob [i.e., the Jews] to act violently." Even though the halakhah appears to forbid workers to seize labor cards when such an act will assure the death of other Jews, possibly there is reason to permit it if at least some lives will be saved (resp. 8). Even though it is halakhically forbidden to make use of anything belonging to the dead, the discarded clothes of those who were shot by the Nazis are an exception (resp. 12). Even though one must not actively deny that he is Jewish, he may passively allow others to assume he is not (resp. 15). Even though a document declaring that one is a Christian is prohibited (resp. 14), strategic deceptions with respect to certain documents may be condoned (resp. 16).

This leniency in matters of halakhah is rooted in profound compassion for the tragic plight of the Jews and a forgiving attitude toward those unable to "stand up to the trial." R. Greenberg calls upon the bet din in Slovakia to institute restrictions to discourage expedient conversion to Christianity (resp. 19); "but secretly my soul weeps for the misfortune of my people. Before heaven our fellow Jews should be judged favorably, and as much as possible we should try not to push away altogether those who have been led astray..." Compassion, forgiveness, and the determination to heal the mortal wounds inflicted upon the Jewish people in these calamitous years were also the predominant characteristics of the responsa written after the Holocaust ended.

Responsum 6

Whether it is permitted to place oneself in possible danger to save someone in certain danger

Question: In the early days of the German occupation of Lithuania, 28 Sivan 5701 [23 June 1941], from the moment their defiled feet marched across its territory, they began to demonstrate their great cruelty toward the Jews in every wicked and wanton act. Every single day they organized manhunts in the streets of Kovno. They trapped and seized Jewish men and women and sent them to the Seventh Fort, where their fate was sealed.¹ In the task of hunting and capturing Jews the accursed wicked ones were aided by their servants, the Lithuanians, who did whatever they were told. They rejoiced that the Germans gave them the opportunity to oppress the Jews, whom they had always hated; to cause trouble for them, kill them, and wipe them out as they had yearned and longed [to do] for so long.²

"Whoever oppresses Israel becomes a leader" [Git. 56b]. Among the Lithuanians were some who excelled in acts of cruelty and wickedness toward the Jews, especially when they wanted to find favor in the eyes of their German masters. Eventually the Germans appointed them to lead and direct the hunting and capture of Jews, for they could be relied upon and trusted to perform their task faithfully owing to their virulent hatred of the Jews, pent up within them for generations and now bubbling up like a malignant poison. Indeed these Lithuanians inflicted great suffering upon the Jews; they stained their hands with

pillage and murder to a degree not even exceeded by the Germans. In those days they seized hundreds of Jews off the streets and from their homes; and among these was a large number of yeshivah students.

In those days of madness I was asked by the saintly master R. Avraham Grodzinski (may God avenge his blood), director of the Slobodka Yeshivah, to go to R. David Itzkowitz (may God avenge his blood), secretary of the rabbinical association, and request that he go to the Lithuanians appointed to round up the Jews-- he had known these Lithuanians before the war-- and persuade them to free the yeshivah students they had captured.

The question arose before us of whether or not he was permitted by law to go to these Lithuanians to seek the release of the yeshivah students, since this might entail danger to his own life: they could seize him too just as they had seized the other Jews. Was he permitted by law to endanger his own life to save another?

Answer: In Sanh. 73a we read: "From whence do we know that if one sees his companion drowning in a river, or being mauled by a wild animal, or set upon by robbers, that one is obligated to save him? Scripture says [Lev.19.16]: 'You shall not stand idly by the blood of your neighbor.'" Sanh. 74a says: "R. Yohanan said in the name of R. Shimon b. Yehotsedeq: They decided by vote in the upper chamber of Bet Nitsah in Lod: [Concerning] all of the prohibitions of the Torah, if they say to a man, 'Transgress or you will be killed,' he should transgress rather than be killed, with the exception of [the prohibitions of] idolatry, incest,³ and murder." It also says: "The [case of the] murderer is compared to the [case of the] betrothed maiden... and the [case of the] betrothed maiden

is compared to the [case of the] murderer. Just as one must suffer death rather than commit murder, so also must the betrothed maiden suffer death rather than allow herself to be violated. How do we know this of murder itself? It is common sense; even as one came before Raba and said to him: 'The governor of my town has ordered me, "Go and kill so and so; if not, I will kill you."' Raba answered him: 'Let him rather kill you than that you should commit murder. Who is to say that your blood is redder? Perhaps his blood is redder.'

Now apparently these two passages [Sanh. 73a, Sanh. 74a] are difficult to reconcile. For on one hand we are taught: "How do we know that one who sees his companion drowning in a river... is obligated to save him? Scripture says: 'You shall not stand idly by the blood of your neighbor.'" Yet if he goes to save his companion from the river or from the robbers or from the wild animal, he places himself in danger; and concerning this the opposite can be inferred: "Who is to say that his blood is redder? Perhaps your blood is redder." For we are taught there [in the second passage, Sanh. 74a]: "Who is to say that your blood is redder? Perhaps his blood is redder." Inevitably one must conclude that as long as there is no danger to the rescuer, it is proper to say that he is obligated to save his companion on the basis of "Thou shalt not stand idly by the blood of thy neighbor."

So wrote the Tosafot explicitly to Yev. 53b s.v. "The law concerning forced [intercourse] does not apply to incestuous intercourse..." In the course of their discussion they wrote: "Concerning murder itself [i.e., that one should suffer death rather than transgress], it says there [Sanh. 74a, but literally quoting Pes. 25b], 'It is common sense. What [reason] do you see [for thinking] that your blood is redder?' etc. But

this principle applies only when they force him to kill by a direct action. However, if they want to throw him upon an infant so that it would be crushed, then on the contrary one must say the opposite: 'What reason do you see for thinking that his blood is redder?' etc. For he did not kill by his own action; he was merely natural soil,⁴ and it is not a commandment that he must save his companion at the expense of his own life. Rather his life takes precedence. This can be derived from the analogy of the [case of the] murderer in the verse [Dt.32.26], 'For as when a man rises up against his neighbor [and murders him], so is this matter.'⁵ See the entire discussion of the Tosafot.⁶

Clearly the Tosafot conclude that one is required to be killed rather than transgress only when they compel him to kill by a direct action, but not when they want to throw him upon an infant so that it will be crushed. Certainly, then, he is not obligated to endanger himself in order to save his companion from the river, the wild animal, or the robbers since this would entail danger to his own life.

Thus in the present case, apparently the petitioner [R. Itzkowitz] is clearly forbidden to go and plead with the Lithuanians on behalf of the yeshivah students, thus endangering his life. The reasoning is: "What reason do you see for thinking that the blood of your companion is redder? Perhaps your blood is redder," and also according to the view of the Tosafot. However, on the face of it one might say that our case is different. The basic concern of the discussion in Sanh. as well as that of the Tosafot (which is based on the Sanh. discussion as noted in their text) is a case where one enters into certain danger in order to save his companion. It is concerning this situation that

they concluded: "For it is said: What reason do you see for thinking that the blood of your companion is redder? Perhaps your blood is redder." But where one's companion is in certain danger, and in order to save him one enters into possible danger, seemingly it can be said that where one's companion is in certain danger one is obligated to place himself in possible danger to save his companion, on the basis of "Thou shalt not stand idly by the blood of thy neighbor." If so, then in our case, since it is feared that the Lithuanians will seize the above-mentioned R. David-- that is, there is fear of only possible danger-- then surely he is obligated to go and plead with the Lithuanians on behalf of the yeshivah students who are in certain danger, since they have already been seized by the wicked ones (may their names be blotted out).

This is clearly stated in the commentary of the Kesef Mishneh to the Rambam, MT Hil. Rotseah Ushemirat Nefesh, ch. 1, hal. 14: "Whoever is able to save [a life] and does not save it transgresses [the commandment] 'Thou shalt not stand idly by the blood of thy neighbor.'" The Kesef Mishneh bases his comment on the authority of the Yerushalmi: "Concerning one who transgressed [the commandment] 'Thou shalt not stand idly by the blood of thy neighbor,'" the Haggahot Maimuniyyot says: "In the Yerushalmi it is inferred that he is obligated to place himself in possible danger." The reason appears to be that the other is [in] certain [danger] and he is [in] possible [danger]." This is exactly as we have written, that there is a distinction between a case where one enters into certain danger to save his companion and a case where one enters into only possible danger, as in the present case.

But according to the Rambam himself this is not what he meant. See

what he decided in MT Hil. Rotseah Ushemirat Nefesh, ch. 7, hal. 8:

"The fugitive may not leave his city of refuge ever, even for the purpose of a mitzvah or to testify on civil or capital matters, or even to save [someone] from a gentile or a river or a fire or debris; even if all Israel needs his help as in the case of Joab son of Zeruah,⁷ he may not leave there ever until the death of the high priest; and if he leaves he permits himself to be killed, as we have explained."

The Or Sameah commented on this as follows: "One may add [to] our master [Rambam] the reason why the fugitive may not leave. Does not danger to life supersede all of the commandments of the Torah? Is this not especially so in the case of danger to the life of all Israel, as [the deeds of] Esther demonstrate?⁸ Rather it is only with respect to something against [human] nature⁹ that we may not add to the commandments of the Creator of nature, who searches the inmost being and who said [Dt.19.6]: 'Lest while the avenger's heart is hot he kills him, [for which] he does not deserve the death penalty.' Moreover, the bet din may not put [the avenger] to death. [Since outside the city of refuge] the act of revenge against the fugitive is not punished, the fugitive must not place himself in possible danger [by leaving] even to save his companion from certain danger. This disproves the contention of the Haggahot Maimuniyyot based on Yer. Ter. as quoted by Kesef Mishneh that one is obligated to place himself in possible danger; and in the Yerushalmi itself, such an interpretation is not clearly evident if one examines the passage carefully."

Accordingly, in our case also he is not obligated to place himself in possible danger in order to save his companion from certain danger.

So R. David is forbidden to even doubtfully endanger himself in order to save the yeshivah students.

Sh.Ar. HM 426:1 rules: "If one sees his companion drowning in the sea or set upon by robbers or a wild animal, and he is able to save him either on his own or by inducing others to do so, but does not save [him]; or if one heard gentiles or informers devising evil against his companion or laying a trap for him, but did not disclose this to his companion; or if one knew that a gentile or a criminal would attack his companion and that he himself might be able to pacify the assailant and change his mind, but does not pacify him; and so on in similar instances: this person transgresses the commandment 'Thou shalt not stand idly by the blood of thy neighbor.'"

See Sefer Meirat Einayim to HM 426:2 who writes: "He transgresses [the commandment] 'Do not stand idly...' In the Haggahot Maimuniyyot it says that the Yerushalmi concludes that one must go so far as to place himself in possible danger on account of this [commandment]. The Bet Yosef quotes this opinion and adds that 'the reason appears to be that the other is [in] certain [danger] and he is [in] possible [danger].' Yet Sh.Ar. and our teacher R. Mosheh [Isserles] omit the [Yerushalmi] passage: 'Concerning this passage one must say that since the authorities Rif, Rambam, Rosh, and Tur do not cite it in their decisions, we may omit it also.'"

See Pithei Teshuvah, Sh.Ar. HM 426:2 who writes: "In the book Aguddat Ezov by the great R. Mosheh Zeev he gives the reason why the Rif, Rambam, Rosh, and Tur do not cite the words of the Yerushalmi on this matter: they believed that our [Babylonian] Talmud conflicts with the Yerushalmi [and the Babylonian Talmud is to be preferred]. See the

end of the book among the supplements which he cites in the name of the Radbaz, vol. 3, no. 626, who wrote that as a matter of course one's possible [danger] takes precedence over the certain [danger] of his companion."¹⁰

It is clear from all that has been cited that all of the great masters, by whose words we live and from whose waters we drink, our teachers who will stand forever-- the Rif, Rambam, Rosh, Tur, and Sh.Ar.-- all omit from their decisions this ruling of the Yerushalmi. Especially since according to the explanation of the Pithei Teshuvah, their basis for this is the Babylonian Talmud which in this case conflicts with the Yerushalmi; and since the Pithei Teshuvah also maintains that one's possible danger takes precedence over his companion's certain danger, as the Radbaz wrote, then apparently the law is obvious in our case: the above-mentioned R. David is not obligated to place himself in possible danger in order to save the yeshivah students, even though they are in certain danger. Moreover, even in the Yerushalmi itself it is not clearly evident that the intended meaning conforms to the understanding of the Haggahot Maimuniyyot. As the Or Sameah wrote, possibly even the Yerushalmi itself holds that one's possible [danger] takes precedence over his companion's certain [danger].

However, see Arukh Hashulhan, HM 626:4 who writes: "The [later] authorities cite the Yerushalmi that a man is obligated to place himself in possible danger in order to save his companion, but the early authorities omit this because our [Babylonian] Talmud demonstrates that he is not obligated to endanger himself. But each case should be decided on its own merits, and one should weigh each matter on the scale and not be overly protective of oneself. Concerning this it is said [Ps.50.23]:

'To him that ordereth his ways aright, I will show the salvation of God.' And [Sanh. 37a]: 'Whoever saves a single soul of Israel, it is as though he saved the whole world.'"

Now in Nid. 61a we read: "Raba said: 'As to slander, though one should not believe it, one should nevertheless take note of it.' There were certain Galileans about whom a rumor spread that they had killed someone. They came to R. Tarfon and said to him: 'Will the master hide us?' He replied: 'How should I act? Should I not hide you, they [the avengers] will see you. Should I hide you, I will be acting contrary to the statement of the rabbis, "As to slander, though one should not believe it, one should take note of it." Go and hide yourselves.'" See the Tosafot to this passage (s.v. "Should I hide you..."): "It is interpreted in Rashi's commentary: 'In case you did kill, it is forbidden to save you.' In the Sheiltot of R. Ahai it is interpreted: 'If I hide you, you will have made me culpable to the king.' Thus 'one should take note of it' means that one might invite evil talk if he believes them about this; rather one should be careful that no damage come either to him or to others." See also the Rosh to this passage.¹¹

It is difficult to understand the words of the Tosafot rightly or to apprehend their profound meaning, whichever way [one interprets them]. If R. Tarfon feared that the king would find out that he hid [the Galileans] and that he would thus be culpable to the king, why then do the Tosafot emphasize that R. Tarfon did not want to hide them because "In case you did kill, then if I hide you, you will have made me culpable to the king"? That is, R. Tarfon suspected that perhaps they really murdered someone, even if in fact they did not. However, since the king was pursuing them and seeking to put them to

death because of the rumor about them, if R. Tarfon hid them he would make himself culpable to the king. Therefore he was right to say to them: "Go and hide yourselves." If so, then why did the Tosafot write that R. Tarfon did not want to hide them in case they really did kill someone? R. Tarfon did the right thing regardless, even if they did not kill anyone, for by hiding them he would be culpable to the king. Now let us suppose that if they really did not kill anyone, R. Tarfon was obligated to endanger his life in order to save them. After all they were in certain danger, but he would be placing himself in merely possible danger since the king might never find out that he had hidden them; and whenever one's companion is in certain danger and he would be in merely possible danger, he is obligated to place himself in such possible danger to save his companion from certain danger. So it is according to the Yerushalmi cited by the Haggahot Maimuniyyot. If we accept this view, then why did R. Tarfon not hide them? Was he not by law obligated to hide them, even if someone was really murdered? How then could R. Tarfon say to them: "Go and hide yourselves"? See the Haggahot Yavets to the Talmud; he too dealt with this problem but could not solve it.¹²

Yet note what I found in the Natsiv's Emeq Sheelah on the Sheiltot [of R. Ahai] 129:4. Even he laid bare his mighty arm to explain these words of the Tosafot. "The Tosafot and Rosh, Nid. 61a, wrote in the name of our master [R. Ahai] as follows: 'If you did kill, then you will have made me culpable...' Only in such a matter as this [i.e., alleged murder] is there reason to fear evil talk, since it might occasion damage to oneself or to others. Therefore one must reason as follows: R. Tarfon said, 'Perhaps it is true,' which implies that had it been

clear to him that it was a false charge, he would have been compelled to hide them even though if he did not succeed he would be endangering himself and making himself culpable. So it is written in the Haggahot Maimuniyyot, where they cite the Bet Yosef HM 426 based on Yer. Ter., ch. 8: 'R. Ammi was arrested in Sifsifa. R. Yonatan said: "Let the dead man wrap himself in burial shrouds,"' meaning that [R. Ammi] should be left where he was [i.e., in jail], for it was a dangerous place to enter on his behalf. 'R. Shimon said: "Whether I will kill or be killed, I will go and try with all my might to save him,"' meaning whether or not I will be killed by robbers, still I will go in. Seemingly the opinion of the Tosafot and the Rosh is transmitted in the name of R. Ahai Gaon, but in fact none of this is actually quoted in R. Ahai's name. Rather he says: 'You shall cause me pain [if there is evil talk]... go hide yourselves.' Now indeed it is certain that one is obligated to suffer any pain to save a life, as we learn in Sanh. 73a: 'How do we know that one who sees his companion drowning in a river...'; and see Rashi's commentary s.v. 'This teaches us...': 'Rather one should pursue every possibility to save a life...' (One wonders at the Magen Avraham 156 who draws an inference from R. Shimon b. Yohai's statement, 'Women have frivolous minds,' when the law is simply understood as stated.) However, in the case of [saving a life when there is possible danger to] one's own life, we have yet to understand [what the law requires]. See my commentary to Torah portion Reeh 147, where I show that this legal principle is a subject of tannaitic dispute.¹³ Rambam rules that one should not place himself in possible danger for his companion, and Sefer Meirat Einayim, HM 426:2, writes that the early authorities did not agree with the

Haggahot Maimuniyyot [that one should endanger oneself]. Nor does it appear that the opinion of the Tosafot and the Rosh compels us to accept their view as binding. Rather, [to endanger one's life to save another] is an act of extreme piety, and one who wishes to demand this of himself is permitted to do so. This follows the sages' [Tosafot's] reasoning in AZ 27b (s.v. 'Perhaps...'): In regard to the sanctification of the Name, even if it is not a public act, or in regard to any transgression in the category of those which one should commit rather than suffer death, even if one may be forced to commit the transgression-- nevertheless if one wishes to be strict with himself,¹⁴ it is permitted. In the Yerushalmi they cite the example of R. Abba b. Zimra who did such a thing himself. So also in the case of danger to the life of one's companion, one is permitted to give up his own life. Even though the law does not obligate him to do so, still one who wishes to demand this of himself is entitled to do so. The case of R. Shimon in Yer. Ter. indicates not that he differed with R. Yonatan as to the law, but that he was strict with himself. Likewise, had R. Tarfon known that the accusation [of murder] was false, he would have placed himself in possible danger as an act of extreme piety; but [since he did not know for sure] he feared the evil talk [might be justified]. The Tosafot and Rosh must explain this difficulty: had there not been the fear of danger to life in this case, it could not have been R. Tarfon's obligation to suspect that the accusation was false and that [if he did not hide them] he would be standing idly by another's blood, as the Rosh contends in his objection to Rashi's view. Yet it has been explained that even in the event of danger [to one's own life], by law R. Tarfon was not obligated to place himself in danger, even if the accusation was definitely false. As an act of extreme piety,

however, he would be permitted [to endanger his life]. Still, since one must fear that the evil talk is true, it is forbidden to go beyond the limit of justice [by hiding them]. All of this depends on how one interprets R. Tarfon's intention. If we agree with the Tosafot, R. Tarfon feared only trouble to himself occasioned by evil talk; therefore [he said that the Galileans] could hide themselves without him, as the text says explicitly: 'Go and hide yourselves.' But it would have been better and easier for the Galileans if R. Tarfon had concerned himself with them. Yet he was right to answer that he must pay heed to evil talk and did not want to bring their trouble upon himself. However, had he known that the accusation was false, he would have taken pity upon them and shared in their distress. All of this is in the event that he was not endangering himself; for if there is danger to life, there is no obligation of any kind, as explained below, no. 147."¹⁵ This concludes the remarks of the Natsiv of blessed memory.

Even though one could argue at length about the opinion of our teacher the Natsiv, in any case it is clear from his explanation of the view of Tosafot that he holds as follows: even if we accept the view of the halakhic authorities that if one's companion is placed in certain danger, he should not even possibly endanger himself in order to save him, nonetheless it is an act of extreme piety to gird one's strength and hasten to save one's companion whose life is in certain danger.

In our case, then, although the law does not obligate R. David to endanger himself to save the yeshivah students captured by the cruel enemy who stretched forth his hand against them, even so if he is a pious and courageous man who is willing to voluntarily endanger himself to save them, then certainly he should not be prevented from doing so. The

opinion of our master the Natsiv of blessed memory is worthy to be relied upon, especially in light of the Arukh Hashulhan's conclusion which we cited above that one should weigh each matter on the scale and not be overly protective of oneself. Rather he should fulfill that which our sages of blessed memory said [Sanh. 37a]: "Whoever saves a single soul of Israel, it is as though he saved the whole world." How much more so is this true in our case, when the very survival of the Torah depends on the yeshivah students who meditate upon it and renounce the world for its sake. This is especially so at a time like this, since the enemy's intention is to annihilate the body and the Jewish soul together. That is why they vent their rage upon the scholars of Torah and despise the Holy One of Israel; for it is known that they taunt and revile the God of Jacob as they afflict the martyrs and carry them off to slaughter. Therefore, according to the Natsiv's opinion and the Arukh Hashulhan's conclusion that one should weigh each matter on the scale and not be overly protective of oneself, surely the obligation falls on anyone of noble spirit to do all that he can to save the yeshivah students, so that the light of the Lord-- the light of the Torah-- shall not be extinguished. So will we destroy the evil plan they have devised to stretch forth their hand against all the precious things of Israel-- the precious things of the Torah-- and to obliterate its memory from the world.

Indeed R. David heeded my request, girded his strength and went to plead with the Lithuanians on behalf of the yeshivah students. He succeeded in securing their release from prison. May God remember this unto him for good and avenge his pure blood, which was spilled sometime later in the death camps.

[Efrayim Oshry

Teshuvot Mimaamaqim, vol. 2, no. 1]

Notes

Responsum 6

1. Those Jews captured during the outburst of pogroms following the Nazi invasion were turned over to the Einsatzgruppen who shot them by the thousands in remote areas outside Kovno, including the Seventh Fort, one of the old tsarist fortifications on Russia's border. See Lucy Dawidowicz, The War Against the Jews (New York: Holt, Rinehart, Winston, 1975), p. 279.
2. According to Dawidowicz, *ibid.*, one reason the Lithuanians served the Nazis so enthusiastically was to avenge a Jew's assassination of Ukrainian nationalist and notorious anti-Semite Semyon Petlyura in 1926. Petlyura is mentioned in a different context at the end of resp. 11. Raul Hilberg, The Destruction of the European Jews (New York: New Viewpoints, 1973), p. 227, writes that Brigadefuhrer Stahlecker induced the Jews of Kovno to "agree" to the formation of a ghetto there as the only way to protect themselves from the Lithuanians. The Jews "declared their readiness to cooperate with the Security Police." While this suggests the extent to which the Jews of Kovno feared the Lithuanians, it should be noted that Hilberg's description of the Jews' "readiness to cooperate" reflects his exclusive use of German documents as well as his derisive assessment of Jewish behavior during the Holocaust. See Natan Eck, "Historical Research or Slander?" Yad Vashem Studies (Jerusalem), vol. 6, pp. 385-430.
3. The technical term used by the rabbis is gillui arayot, lit. "the uncovering of nakedness" (cf. Lev.18.6-19). It refers to all incestuous, adulterous, or other carnal relationships prohibited by the Torah as

capital offenses. Incest refers to sexual intercourse within the prohibited degrees of consanguinity (Lev.18.6-18); adultery refers to sexual intercourse between a married woman and a man other than her husband (Lev.20.10, Dt.22.22). Other capital sexual offenses include sodomy and homosexuality (Lev.18.23, 20.15-16).

4. I.e., he was passive and did not actively transgress.

5. "This matter" refers to rape; that is, just as the betrothed maiden who is violated in a field is the passive instrument of transgression and therefore blameless, so also one who is the passive instrument of murder is blameless, so that his life takes precedence.

6. The Tosafot (Yev. 53b) differentiate between one who is the passive instrument of another's transgression and one who actively commits a transgression. The former may not be punished. Even the latter is forgiven when he acted under duress. "Granted that he was obligated to submit to death; nevertheless if he did not he is not guilty of a capital offense." On the other hand, if there is no duress, then one is culpable even if he is merely the passive instrument of transgression.

7. Joab the son of Zeruah was the captain of the host under King David (2 Sam.8.16) but later sided with Adonijah against David's chosen successor, Solomon, who condemned Joab for having slain Abner and Amasa (1 Ki.2.5). Joab's refusal to leave the place of refuge is reported in 1 Ki.2.28-34: "And Joab fled unto the tent of the Lord, and caught hold on the horns of the altar... And Benaiah came to the tent of the Lord, and said unto him: 'Thus saith the king: Come forth.' And he said: 'Nay; but I will die here.'"

8. By concealing her Jewishness and becoming King Ahasuerus' queen,

Esther transgressed the law; but by doing so she was able to rescue the Jewish people from destruction at the hands of Haman.

9. I.e., the avenger of blood would not be able to resist the opportunity to kill the fugitive.

10. Pithei Teshuvah, HM 426:2, refers to his commentary on YD 157, note 15. There he cites the response of the Radbaz to the question: If the king said to a Jew, "Let me cut off your arm and I will not kill your fellow Jew," should one comply? The Radbaz replies that one is obligated to do this only according to the strict standard of the righteous. "But if possible danger to life is involved, this would be foolish piety."

11. In response to Rashi's comment (Nid. 61a), the Rosh asks: "Do we forbid a life to be saved on account of a rumor?" He prefers R. Ahai's explanation that harm may befall the rescuer or others if they do not fear evil talk. "But in regard to any other matter [apart from a rumor of murder], it is forbidden to fear evil talk or to believe it."

12. The Yavets argues that even if the Galileans are innocent, R. Tarfon extricates himself because just as the lives of the Galileans are now endangered, he would be endangering himself by hiding them. So why is it explained that R. Tarfon feared evil talk?

13. R. Ahai discusses a passage from Ned. 80b-81a: "With respect to a well belonging to townspeople, when it is a question of their own lives or the lives of others [assuming that the well is the sole source of water, sufficient for either the townspeople or for others, but not for both], their own lives take precedence; their laundering or that of others, their laundering takes precedence. But if the choice is between

the lives of others and the townspeople's laundering, the lives of others take precedence. R. Yosi said: 'Their own laundering takes precedence over the lives of others...' R. Shemuel said: 'Scabs [incurred by the wearing] of [unclean] garments cause madness...'" According to the Emeq Sheelah, the tannaim disagreed whether the wearing of soiled clothes is dangerous. In the Tosefta's version of this discussion (BM, ch. 11), R. Yosi rules that the townspeople's own cattle also take precedence over the lives of others. The Mekhilta (Beshallah, section Vayissa 87) gives the explanation that for some people, "their cattle are their life"; they would starve without them. Emeq Sheelah, however, contends that even if this is true, thirst (from which those people denied the water would suffer) is more dangerous than hunger; it is also more dangerous than dirty laundry, even if the latter causes madness. Consequently the issue arises: must one risk possible danger for the sake of his companion in certain danger? R. Ahai decides in accord with R. Yosi that one should not enter into possible danger for the sake of one in certain danger. The Emeq Sheelah compares this passage (Ned. 80b-81a) to the problem posed in BM 62a concerning two men far from civilization, one of whom has enough water to sustain only one person (cf. resp. 8, where this passage is discussed). Ben Paturah says that both men should drink rather than one surviving at the expense of the other. But R. Aqiva decides that the one possessing the water should drink it, for one's own life takes precedence. The Emeq Sheelah argues that if both men drink as Ben Paturah suggests, they are still in only possible danger, since they may yet find more water. By ruling that the one man should drink the water, dooming his companion, R. Aqiva is saying that one's own possible danger takes precedence over the certain danger of his companion.

Thus R. Aqiva agrees with R. Yosi (Ned. 80b-81a).

14. "To be strict with himself..." i.e., beyond the law, to suffer death even when he is not required to do so.

15. See note 13.

Responsum 7

On the law concerning a Jew who was forced by the murderers to tear up a Torah scroll with his own hands and desecrate it

Question: On 4 Elul 5701 [27 August 1941] the Germans organized a hunt for stray dogs and cats and collected them all in die neue Klaus (in Slobodka), where they shot the animals to death. But the accursed wanton ones, may their names be blotted out, were not pacified by the act of profaning the holy and turning a place of study and prayer into a slaughterhouse for dogs and cats and a dunghill of stinking carcasses.¹ They brought crowds of Jews in to witness the desecration of their holy place, and not only that: they forced some of the Jews to tear up a Torah scroll with their own hands and cover the animals' carcasses with the fragments of torn parchment.² The Jews who were forced to witness this desecration of the Torah scroll which was torn to pieces, the writing of God stained with the defiled blood of the carcasses and sullied with dirt, came before the Av Bet Din of Kovno³ of blessed memory, asking him to prescribe some form of repentance for all those people who were present at this frightful event, especially those who were forced to desecrate the Torah with their own hands, tearing it and besmirching its dignity, and indeed for all the inhabitants of the ghetto who heard the evil tidings about the eternal Torah's desecration. For the community saw this as a sign from heaven [foreshadowing] wrath upon the entire congregation. Therefore was it proper for all of them to fast and repent and beseech God to have mercy on His people, so that he would say to

Satan, "Stop!" and to the destroyer, "Enough!"? Since the Av Bet Din of Kovno was very ill at the time, it fell upon me to consider the matter and then to decide what the law required in regard to ordaining repentance and declaring a fast in order to impart strength to the weak and to encourage the dejected and afflicted inhabitants of the ghetto.

Answer: In MQ 26a we read: "R. Helbo said in the name of R. Huna: He who sees a Torah scroll torn is obligated to make two rents [in his garment, as a sign of mourning], one for the parchment and one for the writing, as it is said [Jer.36.27]: 'After the king had burned the scroll and the words...'" However, the Yerushalmi's version reads: "He who sees a Torah scroll burned..." and R. Alfasi and Rosh follow this reading. This suggests that one is obligated to rend only when he sees a Torah scroll burned, but not when he sees it torn. Yet this is not according to the version of our [Babylonian] Talmud that one who sees a Torah scroll torn is obligated to rend.

In Sh.Ar. OH 288:5, Bet Yosef writes that people say it is found in the works of the early authorities that we fast on the Sabbath on account of three dreams, and one of them is if one sees a Torah scroll burned. This passage suggests that the Bet Yosef follows the Yerushalmi's version, "One who sees a Torah scroll burned..." His comments in YD 340:37 indicate this as well, since he again writes, "One who sees a Torah scroll burned..." The Turei Zahav also understands this to be the Bet Yosef's view; in YD 340 note 24 he writes: "This means [that one rends] only in the case of burning, but not in the event of other types of destruction. This is the Bet Yosef's interpretation as suggested by the Yerushalmi; it is not the meaning of our Talmud... Obviously the

mention of burning is not accurate, since it is not found in our Talmud. Thus decided my father-in-law [the Bah]." See the Baer Hetev to Sh.Ar. YD 340:24 who writes: "The same applies [i.e., that one must rend] whether it is torn, cut, or intentionally erased by a Jew or a gentile. It all depends on whether one witnessed the intentional desecration of God's name."⁴

To summarize what has been said thus far, according to the Yerushalmi's version, "One who sees a Torah scroll burned..." refers only to one who sees it burned, but not to one who sees it torn. Therefore in our case, which was a desecration of the Torah scroll by tearing, those who witnessed it are not obligated to rend. But according to our Talmud's version-- "One who sees a Torah scroll torn..."-- clearly in our case those who witnessed the act are obligated to rend, since the Bah and the Taz determine that this holds true not only for the burning of a Torah scroll but for other types of desecration as well, for instance if it is cut or erased as the Baer Hetev wrote. Therefore it is certain that all who witnessed this malicious act are obligated to rend.

However, those ghetto inhabitants who did not see the malicious act with their own eyes but heard about it from others are certainly not obligated to rend, even according to our Talmud's version. This is the implication of the gemara's words, "One who sees a Torah scroll..." meaning that the basic obligation to rend applies only to an eyewitness; one who did not himself see the thing but rather heard about it from others is not obligated to rend since he himself did not see the desecration of the Torah but heard about it from others. This is the meaning of Rashi's comment on the Rif, MQ 26a: "[The sages] did not say to rend

on account of a [Torah] scroll unless one saw with his own eyes that it was burned intentionally." This suggests that the basic obligation applies only to "one who saw with his own eyes," but one who merely heard from others and did not see with his own eyes is not obligated to rend.

Hakham Tsevi no. 17 clearly states that the duty to rend applies only to one who was standing there and saw [it] at the time and place [it occurred], as in the instance of the king of Judah;⁵ but it does not apply to one who heard about it or knew about it but did not see it.⁶ This is the view of the Aguddah on MQ [26a]: if [the Torah scroll] was burned accidentally, or if one heard about it but did not see it, one does not rend.

All of this refers to the matter of rending, but in regard to fasting it certainly seems that all who saw this evil act are obligated [to fast]. For this is no less [serious a desecration] than a Torah scroll falling [to the ground], which obligates one who sees it to fast. This applies all the more so in our case, where they saw such a fearful and terrible degradation committed by the accursed wanton ones. In Teshuvot Hayyim Shaal, vol. 1, no. 12, it was asked whether one who sees a Torah scroll fall should fast. He wrote as follows: "Since you have asked me if one who sees [this] must fast, the fundamental law which is plain to you and all Israel is that one who held a Torah scroll and dropped it must fast. This is not stated explicitly in the Talmud or the early authorities, but it is a Jewish custom that even one who drops tefillin fasts; all the more so if one drops a Torah scroll, for it is logical that one must atone for treating the Torah scroll disrespectfully. But this matter is not explained in either the Talmud or

the later halakhic authorities. Only in Mishpetei Shemuel no. 12 is the reason given for the custom [of fasting if one drops] the tefillin that [the prohibition against] treating disrespectfully applies to them; and our rabbis of blessed memory said⁷ that if tefillin are intentionally burned, one must rend just as in the case of a Torah scroll, since they are like a Torah scroll. If one is in doubt as to who dropped the Torah scroll, he need not fast."⁸

The Divrei Hayyim YD 59 wrote clearly that the custom of the Ashkenazic Jews to fast when a Torah scroll or tefillin are dropped is not even hinted at by the Talmud. But his conclusion is that even so, fasts should be ordained on Monday, Thursday, and the next Monday for those who see a Torah scroll dropped, on the basis of Taan. 16a: "They bring the Ark out to the open space of the city, in order to say: We had a vessel which we kept hidden; but now because of our sins it has been degraded." So also do sins cause the Torah to be demeaned. See the entire discussion of the Divrei Hayyim.⁹ He expressed the same view in Teshuvot Bet Hayotser.¹⁰

Also, the Kappot Temarim on Suk. 41 derived a hint of [the obligation to] fast from Suk. [41b]¹¹ from which he learns that when the tefillin fall it is a case of disrespectful treatment, and it is the custom to fast to atone for the sin. But the Divrei Hayyim rejects the Kappot Temarim's opinion and writes that this still does not suggest the obligation to fast. But there is indeed support for this custom in Yer. Sot., ch. 7, hal. 4: "'Cursed is the one who does not fulfill the words of the Torah' [Dt.27.26]: If a Torah falls, Shimon b. Yaqim says, 'This verse refers to the cantor who was standing there...'" Ramban (in his commentary on Torah portion Ki tavo [Dt.] 27:26) explains that

R. Shimon refers to the cantor who does not place the Torah scrolls in the proper upright position so that they will not fall. The Tosafot to Sot. 37[b] also cite this passage from the Yerushalmi. Since the cantor is responsible for this matter, it is proper that he fast in order to remove himself from the category of those who are cursed and enter the category of those who are blessed. See also Teshuvot Devar Mosheh Teomim no. 91,¹² Teshuvot Imrei Esh, OH 6,¹³ and Teshuvot Rav Poalim, vol. 4, OH 28.¹⁴ All of this refers only to one to whom the accident happened; we find no support for [the notion that] the onlookers in the congregation [should fast]. Even if one sees a Torah scroll burned, he is obligated to rend only if it was done intentionally or as it once happened.¹⁵ See MQ 26,¹⁶ Sh.Ar. YD 340:37,¹⁷ Teshuvot Hakham Tsevi no. 17,¹⁸ and Teshuvot Shevut Yaaqov, vol. 1, no. 84.¹⁹

In Yer. MQ, ch. 3, hal. 7 we find the following: "One who sees a dead Torah scholar is like one who sees a burned Torah scroll. R. Abbahu said: 'May [punishment] come upon me if I tasted anything that entire day.' R. Yonah was in Tyre when he heard that Damaq b. R. Abuha died... He observed a fast on that day." However, all of this refers to the intentional burning of a Torah scroll or as it once happened. But from where do we derive the obligation to fast if the Torah scroll falls? Even if a Torah scroll is destroyed by means other than burning-- for instance, if it was intentionally erased-- the Bet Yosef ruled in YD²⁰ that fasting is not required; see the Taz to this passage. All the more so with respect to a Torah scroll which fell or was [desecrated] accidentally is there no obligation to rend or to fast. From the Yerushalmi passage just cited it is evident that fasting is an act of piety [and not an obligation] even upon seeing a dead Torah scholar or a burned

Torah scroll.

According to Sh.Ar. OH 288:5, on account of three dreams we fast on the Sabbath: if one sees a Torah scroll burned, or if [one imagines that it is] the Yom Kippur Neilah service, or if one [sees] either the beams of his house or his teeth fall out. In Maggid Mesharim (Torah portion Vayyakhel), the [angel called] Maggid says to our master [the author, Yosef Qaro]: "You decided properly that one should not fast on the Sabbath for dreaming that a Torah scroll fell."²¹ See Matteh Yehudah [OH 288:] 6: "Hence there is no similarity between seeing a Torah scroll burned and seeing a Torah scroll fall."²² According to Iggerot Haramaz no. 7, one who dropped a Torah scroll should fast three times as a matter of piety.²³ In any event those who see [the Torah scroll fall] are not obligated to fast, for even in regard to one who sees a Torah scroll burned, the sages do not say [that he should fast] unless this was done "intentionally or as it once happened" [MQ 26a]. Granted that it is proper for one who dropped a Torah scroll to fast, and moreover it is the custom to fast even if he dropped tefillin, still one who sees a Torah scroll [dropped] is not obligated by law to fast. Furthermore it appears that since neither the Talmud nor the halakhic authorities mention that one should fast if he drops tefillin, we should be lenient with the feeble, who should give charity as their atonement rather than fast. "Yet I do not deny that somewhere someone might drop a Torah scroll and the rabbi could decree that the entire congregation fast on Monday, Thursday, and the next Monday... Indeed the local rabbi should impose a given restriction at his own discretion and should also take measures as a precaution for the future. Everything is according to the situation and the needs of the moment."

So concludes the discussion of Hayyim Shaal.

Also the Birkei Yosef, Shiurei Berakhah 28, Salonika edition, wrote that by law one who sees [a Torah scroll fall] need not fast. True, Nahar Shalom no. 566 wrote of an incident in a certain congregation where a Torah scroll fell to the ground while being removed [from the ark]. "The sages decreed a fast on Monday, Thursday, and the next Monday for those who were present in the synagogue." Possibly this was only a temporary measure.²⁴

Teshuvot Peri Hasadeh, vol. 2, no. 72 maintains that all who see a Torah scroll fall should fast,²⁵ on the basis of [the mishnah cited in] Ber. 34b: "If one makes a mistake in his prayer, it is a bad sign for him; and if he is a prayer reader it is a bad sign for those who have commissioned him..." Therefore all of them are obligated to fast. See Teshuvot Kerem Shelomoh no. 35 in the name of a certain authority who saw such a thing in a dream;²⁶ and possibly [the requirement to fast] applies only to the prayer reader who is the congregation's agent, but not if it occurred accidentally.

See Magen Avraham [OH] 44 note 5 who also cites Teshuvot Mishpetei Shemuel no. 12 that one who drops tefillin is required to fast. "[The Mishpetei Shemuel wrote as follows:] Our sages of blessed memory said that one who sees tefillin burned intentionally is obligated to rend, just as the law requires for a Torah scroll that is burned, since tefillin are like a Torah scroll."²⁷ If a man is in doubt as to who dropped the Torah scroll, he need not fast. Some proof can also be derived from the statement that one who in a dream sees a Torah scroll burned must fast even on the Sabbath." So concludes [Mishpetei Shemuel as cited by] Magen Avraham.

Teshuvot Sedei Haarets, vol. 3, OH 31 wrote about this. In his view the same law applies to both one who sees a Torah scroll fall and one who sees tefillin fall; both should fast since both objects are equal with respect to intentional burning.²⁸ The same applies to one who in a dream sees tefillin burned: he should fast on the Sabbath just as one who in a dream sees a Torah scroll burned should fast, according to Magen Avraham [OH] 288:5.²⁹ If so, then one who sees a Torah scroll or tefillin fall needs to fast because he witnessed the desecration of the holy Scriptures. However, Marit Haayin 18:2 includes some comments of the Hida to refute the opinion of the Sedei Haarets on this matter.³⁰ For even in the case of a Torah scroll, one who sees [it desecrated] is not obligated to fast. This conforms to what the Hayyim Shaal wrote. Yet according to Yad Eliezer no. 126, the custom is widespread that the entire congregation fasts if they see the Torah scroll fall to the ground; for the requirement to fast applies to the entire congregation.³¹ To all who were present and saw it happen, it is indicated from heaven that repentance is required. However, according to Teshuvot Zekher Yehosef, OH 31, there is nothing to this,³² since a practice which is not common is not considered a custom [which has legal authority].³³

In conclusion, on the basis of all that has been cited, certainly in our case all of the people who were present are required to fast if they possibly can. The great authorities whom I have cited maintain that even if they saw a Torah scroll fall they are required to fast. All the more so in our case where they saw a Torah scroll torn [are they required to fast]. But if they cannot possibly fast due to physical weakness induced by the starvation and the misfortunes renewed in the ghetto daily, they

are not obligated to fast. However, those people who tore the Torah scroll with their own hands should certainly fast, even though they did it because their lives were threatened. The rest of the ghetto inhabitants who were not present at this terrible event but only heard about it from others should not be required to fast. As I noted above, the language of the Talmud implies that the law of rending applies only to one who sees but not to one who hears from others; and even those who see should not be required to rend, since according to the Yerushalmi, the Alfah, and the Rosh, this obligation applies only to one who sees a Torah scroll burned but not to one who sees it torn. But those who see it are certainly obligated to fast.

Nevertheless I decided that all those who had heard of the matter, even though they are not obligated to fast, should give charity, each according to his ability and means. On the Sabbath following the incident I admonished the congregation and urged them to search out their deeds, repent, and be very careful about the Torah's sanctity and honor, all the more so with respect to those who are learned in the Lord's Torah. May God who is good forgive us; may He, being full of compassion, forgive iniquity. The distinguished Av Bet Din of Kovno agreed with this decision.

[Efrayim Oshry

Teshuvot Mimaamaqim, vol. 1, no. 1]

Notes

Responsum 7

1. In the early stages of the German conquest of Poland in 1939, the indiscriminate shootings and beatings inflicted by the Nazis were accompanied by the deliberate destruction of Jewish synagogues and sacred objects, especially Torah scrolls. Another favorite Nazi "sport" was plucking out the beards of pious Jews. Chaim Kaplan (Warsaw Diary [New York: Collier, 1965], p. 54), entry of 20 October 1939, wrote: "Eyewitnesses tell that even officers and high military officials are not ashamed to chase after an old Jew with scissors in their hands to cut off his beard." Apparently such attacks on symbols of Jewish religious observance occurred when the Nazis invaded Russia as well.
2. In some cases pious Jews refused to comply with Nazi orders to desecrate Torah scrolls. Irving Rosenbaum, The Holocaust and Halakhah (New York: Ktav, 1976), p. 130, describes two instances which occurred at the end of September 1939. The Germans piled a great number of Torah scrolls in the street and ordered a Jew named Motel Hochman to rip one of the scrolls to shreds. Otherwise he would be shot on the spot. He refused. They beat him and finally placed him against the wall to shoot him. Fortunately someone intervened at the last moment and he was saved. That same month in the town of Widowa, a young rabbi, Avraham Mordekhai Maraco, was drenched with gasoline and set afire for refusing to tear a Torah scroll.
3. R. Avraham Dov Shapira.
4. Baer Hetev cites this view in the name of the Bah. It does not apply

if the Torah scroll was damaged accidentally, e.g., if it could not be rescued from a fire.

5. Jehoiakim; see Jer.36 where the incident is described. The scroll in this instance was not a Torah scroll but "the words of the Lord from the mouth of Jeremiah, which He had spoken unto him" (Jer.36.4). When it was read to Jehoiakim, he cut it with a knife and set it afire (Jer. 36.23).

6. In a responsum dated 1689, Hakham Tsevi was asked by the rabbi of Prague whether the community should rend their clothes after the loss of thousands of Torah scrolls in a great fire. He replied that in the unanimous opinion of all authorities, only an eyewitness is required to rend.

7. The source is MQ 26a (see text of resp. below); however, the requirement to rend if tefillin are intentionally burned is not explicitly stated there. Apparently the Mishpetei Shemuel infers it from the account of an incident involving R. Abba: when he got up to relieve himself, he removed the tefillin from his head, and a young ostrich came and tried to swallow them. R. Abba said, "[If the tefillin had been swallowed] I should have had to make two rents" [as in the case of a destroyed Torah scroll].

8. Mishpetei Shemuel replies to the question of whether there is any halakhic basis for the widespread practice of fasting if one drops tefillin: "Know that the tefillin are very holy, and one should be very careful with them. Whenever one is wearing them he should not let his mind be distracted. Should he drop them, [the prohibition against] desecration applies. As our sages of blessed memory said [see note 7], "Whoever sees tefillin burned intentionally must rend twice, as in the case of a burned Torah

scroll, as we find in MQ, ch. 3... Some proof [for the custom of fasting] may also be derived from what they say about one who sees a Torah scroll burned in a dream: he is obligated to fast even on the Sabbath. This is enough to establish a basis for the custom that we practice."

9. The resp. concerns robbers who broke into a synagogue and desecrated the Torah scrolls. What should the community do? Although Divrei Hayyim insists that there is no talmudic warrant for the practice of fasting, he suggests that the members of the congregation fast in repentance for their sins which caused such a desecration. "But whoever is not sufficiently healthy may be excused from fasting by performing a mitzvah according to his generosity and wealth-- e.g., raising an orphan, supporting students of Torah, etc." This conclusion is very similar to R. Oshry's; see conclusion of resp. below.

10. YD no. 14. He points out that a desecration profanes God's name only if it occurs in public. "If no one had seen [the Torah scroll fall], it would not have been a desecration... The more witnesses, the greater the desecration. Consequently whoever sees the desecration is the cause of the desecration and is obligated to fast."

11. The pertinent text from Suk. 41b: "A man should not hold his tefillin in his hand or a Torah scroll in his bosom while reciting his prayers..."

12. During the intermediate days of Sukkot, the reader inadvertantly took two Torah scrolls from the ark and dropped one. The Devar Mosheh does not ordain a public fast in this case, since the accident was not caused by negligence or carelessness.

13. Although Imrei Esh knows of no source other than Mishpetei Shemuel (see note 8) for the custom of fasting if one drops a Torah scroll, "It

must be correct since all of the Jewish people say so; yet I did not find the root [of the custom]." Nevertheless the well known practice is for the congregation to fast if the Torah was dropped in their presence, since they are all conscience-stricken to have entrusted the Torah scroll to someone who could not hold it without dropping it.

14. According to this resp., the Torah scroll was left leaning against the ark door, so that when the next man opened the ark the Torah scroll fell to the ground. Rav Poalim rules that the man who unintentionally left the Torah scroll in the improper position should fast, even though he did not actually drop it (cf. Yer. Sot., ch. 7, hal. 4). If the man finds it difficult to fast, it is suggested that in addition to giving charity he should light a candle before the ark day and night out of respect for the Torah.

15. See note 5.

16. See note 7.

17. "One who sees a Torah scroll burned, tefillin, or even one scroll of the Prophets or Writings burned, should rend twice-- but only if it was burned intentionally or as it once happened" (see note 5).

18. The Hakham Tsevi writes that in order for rending to be required, "Someone must set [the Torah scroll] afire; if it is set afire from heaven [i.e., an act of nature beyond human control], then [rending] is not required." He does not refer here to fasting; cf. note 6.

19. Rending is not required unless the Torah scroll was burned intentionally. Shevut Yaaqov accepts this ruling on the authority of Ramban, Torat Haadam, Qeriah, 16b. He does not refer here to fasting.

20. Sh.Ar. YD 340:37. Bet Yosef rules that one need not rend unless the Torah scroll is destroyed intentionally. There is no mention of fasting in this passage. In his comment, the Taz tries to show that types of intentional destruction other than burning should also occasion rending. But he does not mention fasting either.

21. Vayyaqhel 10b. The full quotation: "If he dreamed that the Torah scroll fell from his own hand [emphasis added], he need not fast," indicating that if in his dream he only witnessed the event, certainly fasting would not be obligatory.

22. He adds that even though one is not required to fast on the Sabbath for dreaming that a Torah scroll fell, if he is strict with himself and distressed by the dream, he may do so.

23. I.e., not as an obligation imposed by law.

24. A temporary measure cannot serve as a legal precedent.

25. On the basis of Ber. 34b, Peri Hasadeh distinguishes between tefillin and a Torah scroll. Tefillin involve only the individual who wears them; the community bears no responsibility. Therefore the obligation to fast falls only on the one who drops them. However, if the prayer reader should drop the Torah scroll, all must fast since he is their agent and they share responsibility for his mistake.

26. I could not find this reference as cited or in Hil. Sefer Torah.

27. Cf. Sh.Ar. YD 340:37.

28. Sedei Haarets is also asked if one who was not present when the Torah scroll was dropped but later saw it on the ground is obligated to fast. Although he is inclined not to advise fasting in such a case, he raises

the possibility that for a Torah scroll to rest on the ground is in itself a desecration, and for this reason one who sees it there might be obligated to fast.

29. Note 8 of Magen Avraham's commentary.

30. There is really no refutation, merely the statement that while some authorities are strict about this matter, one should be lenient.

31. R. Huna's statement [MQ 26a] that one who sees the Torah scroll torn is obligated to make two rents-- "one for the parchment and one for the writing"-- is interpreted by Yad Eliezer to mean "once for the desecration and once for the destruction." Since the rabbis said in AZ 18a (in regard to the martyrdom of R. Hananiah b. Teradyon) that the letters of the Torah fly up to heaven, "destruction" can refer only to the parchment. Therefore one is required to rend only because of the desecration of the holy Scriptures. Why then is fasting customary? "Because to everyone it is a sign that they need to repent."

32. In an exhaustive resp. citing many authorities, Zekher Yehosef finds no firm basis for the custom that one who sees a Torah scroll fall to the ground should fast. "We do not derive one doubtful practice from another."

33. For a custom to obtain the binding force of law, it must be widespread in either a whole country, the whole of a particular locality, or the whole of a particular class of people. See, e.g., Rambam, MT Hil. Ishut, ch. 23, hal. 12. Moreover it must be frequently observed (cf. Terumat Hadeshen 342).

Responsum 8

Is it permitted to save one's own life when to do so would cause someone else to be killed?

On 23 Elul 5701 [15 September 1941] in the Kovno ghetto, I was asked [about the following]: The commandant of the Kovno ghetto, Jordan¹ (may his name be blotted out), gave to the Aeltestenrat ["Council of Elders"]² 5,000 white cards³ ("Jordan-Scheine") to distribute among the workers and their families. Only those [who held cards] would be allowed to remain [in the ghetto]. At that time there were close to 30,000 Jews in the ghetto, about 10,000 of whom were able workers and their families. In panic, the strongest workers snatched up the cards from the Aeltestenrat.⁴ Now the question: is the Aeltestenrat permitted to accept the cards and distribute them to the workers in compliance with Jordan's order, may his name be blotted out? The second question: are the workers permitted to snatch up these cards and thus push their remaining fellow workers out of the quota of 5,000 cards; and if so, why?

Comment on the question: In Tosefta Ter., ch. 7, and also in Yer. Ter., ch. 8, it is said that if a group of men were traveling on the road and encountered gentiles who said, "Give us one of your number so we can kill him; if you do not, we will kill all of you," even though all of them would be killed they may not hand over a single Jewish soul. However, if the gentiles specified one individual, such as [in the case of] Sheba the

son of Bichri,⁵ they may hand him over so that they will not all be killed. R. Shimon b. Laqish said: "[They may surrender him] provided that he deserves death like Sheba the son of Bichri." R. Yohanan said: "[They may surrender him] even though he does not deserve death like Sheba the son of Bichri." The Rambam of blessed memory, in MT Hil. Yesodei Hatorah, ch. 5, hal. 5, ruled in accord with R. Shimon b. Laqish that even if they specify an individual, he may not be surrendered unless he deserves death like Sheba the son of Bichri; but we do not render such a decision ab initio (this according to Rambam and Haggahot Maimuniyyot).⁶ The later authorities have at length confirmed the Rambam's ruling in accord with R. Shimon b. Laqish as opposed to R. Yohanan in Yer. Ter., stipulating that [he may be surrendered] only in the event that he is specified and deserves death like Sheba the son of Bichri; otherwise they must all be killed. Now we normally decide according to R. Yohanan against R. Shimon b. Laqish, so that evidently it is forbidden for all of them to insist on being killed. But see Mareh Panim on the Yerushalmi, who wrote that the origin [of the discrepancy, i.e., that here the view of R. Shimon b. Laqish is preferred to R. Yohanan's] is that the Rambam possessed another version of the Yerushalmi text which had R. Yohanan's name in the place of the name of R. Shimon b. Laqish, and vice versa.⁷ See also the Noda Bihudah, YD 45;⁸ Tiferet Lemosheh,⁹ and Derekh Hahayyim. So ruled the Taz to Sh.Ar. YD 157:1 with the support of the Bah.¹⁰

According to the Rambam's ruling, in our case, since the people who are not workers are not deserving of death according to either the Torah or the law of the ruling power (look carefully at the Taz)¹¹ like Sheba the son of Bichri, it is forbidden to distribute the cards even if they

are within the definition of specification in conformity to the view of R. Shimon b. Laqish. Therefore it was forbidden to distribute the cards.

The second question concerns whether or not the worker is permitted to take the card even though by doing so he deprives another worker of one, since the number of cards is less than the number of workers, as explained above.

According to what the Shakh wrote, Sh.Ar. HM 163 note 1 in the name of Maharival (vol. 2, no. 40), if the king decrees [death] upon two unspecified people, it is permitted to make an effort on behalf of certain individuals to exempt them from the decree even though it is certain that others will eventually be taken.¹² On this basis, apparently the workers are permitted to take the cards even though in consequence they will subject others to the decree [of death]. However, it is possible to say that the Shakh's opinion does not apply to our case, for he indicates that if the effort [to exempt individuals] precedes the capture of the victims, then it is permitted to make the effort; but after the people are captured it is forbidden to make the effort. In our case one might say that the entire community had already been captured when the decree was issued. If so, those workers who took [the cards] are comparable to those who make the effort [to exempt individuals] after the victims are captured.

Yet perhaps even so they are permitted to take [the cards], for according to the Yad Avraham (YD 157), the individual himself is permitted to make an effort to save himself even after he is captured, even though others will be taken in his place.¹³ It is only forbidden for others to make an effort to save him if to do so would mean that others

would be taken in his place (see Noda Bihudah, second series, YD 74).¹⁴ But the individual himself is permitted [to do this]. Our case seems substantially similar to that described by Yad Avraham. But perhaps one should differentiate our case, for in the Yad Avraham's example the individual who saves himself does not actively cause the immediate killing [of others], but only their pursuit and capture. In our case, however, as soon as one seizes the card he saves himself but actively causes the death of someone else. This may be forbidden. The proof can be derived from what is said in BM 62a about two men traveling on a journey [far from civilization]. One of them has a pitcher of water. If both of them drink, both will die; if one of them drinks, he will be able to reach civilization. Ben Paturah expounded: "Better that both should drink and die than that one should witness the death of the other," until R. Aqiva came and taught [Lev.25.36] "'... that thy brother may live with thee,' [meaning that] your life takes precedence over your companion's." According to R. Aqiva's view, even if the man gave his companion a drink, the latter would still die; therefore we cannot apply the principle of [Pes. 25b] "What [reason] do you see [for thinking your blood is redder? Perhaps his blood is redder]." (Look carefully at Lehem Mishneh¹⁵ and Mishneh Lemelekh¹⁶ to MT Hil. Yesodei Hatorah, ch. 5, hal. 5.) The one man should drink and save himself, since it is a duty to save a life. Apparently one could argue that if both of them drink, each of their lives will at least be prolonged temporarily, in which case the principle of ["perhaps his blood is redder"] might apply. Yet after careful consideration, it appears that in a case of temporarily prolonging life versus saving life, the principle of ["perhaps his blood is redder"] is only Ben

Paturah's argument but does not apply. Ben Paturah reasons that if only the one man drinks he causes the death of his companion; the saving of his own life is the reason for his companion's death. His exact words are: "Let not one witness the death of the other." The positive commandment [Lev.18.5] "And live by them" [i.e., the commandments] does not apply if one gains his own life by not trying to save his companion's. Even though R. Aqiva objects that one's own life takes precedence and he should take the drink himself, this is only in the event that he does nothing active. If he refrains from giving his companion a drink, the latter will die. But in the event of a direct action-- such as that involving the work cards, where a worker saves himself by taking one but as a consequence hands over his companion to be murdered-- this direct action may be forbidden. It is clearly evident from this that it is prohibited to save oneself by positive action if this causes the death of another person. Otherwise they [Ben Paturah and R. Aqiva] would have discussed positive action; but since they disagree only with respect to whether or not one may refrain from taking action, this implies that positive action is forbidden if it saves one's own life at the expense of another person's.

Yet one might contend that in our case all the workers can be defined as partners in the ownership of the cards, since they were in effect given to all the workers. If so, each worker owns a share of them, and each worker could take a card as his share.

But later on when I was preparing [this responsum] for publication, my friend R. Israel Gustman, Rosh Yeshivah of the Lubavitsh Yeshivah, showed me what the Maharsha said concerning BM 62a: "Had the jug of water belonged to both men, R. Aqiva would have agreed with Ben Paturah

that both men should die rather than that one should witness the other's death..." Therefore the argument [of joint ownership] that has been put forward must be reversed, for if we consider the workers to be partners, they are forbidden to take the cards since one worker would be saving himself by taking something which belongs to another worker.

Yet concerning all of this one must consider whether or not the principle of specification [i.e., unless the specified victim is surrendered, all will die] can even be applied to our case. For the intention of the wicked ones, may their names be blotted out, is to annihilate all of the workers. Only for the time being do they plan to save a part of them by giving out cards. In this light, accepting and distributing the cards is an act of rescue [of part of the community]. Later I heard from our great master R. Avraham Shapira of blessed and holy memory, Av Bet Din of Kovno, that on 6 Heshvan 5702, the wicked ones ordered the Aeltestenrat to post a notice that on 8 Heshvan 5702 [29 October 1941], all of the inhabitants of the ghetto-- men, women, and children-- were to assemble in the Demokratia-Platz. The Aeltestenrat came to ask the Av Bet Din what the Torah required them to do, for it was known that a large portion of the assembled people would be condemned to death. After careful consideration, the Av Bet Din rendered the following decision: "If a decree is issued, God forbid, to destroy a Jewish community, and by some means it is possible to save part of the community, the community leaders must have the courage to take the responsibility upon themselves to do what they must in order to save who they can."¹⁷ So also in our case it appears that the acceptance and distribution of the cards is also an act of rescue [of a

part of the community], and the principles of specification and ["Whose blood is redder?"] are irrelevant. If so, the Aeltestenrat is obligated to accept the cards and distribute them.

[Efrayim Oshry

Divrei Efrayim, Meemeq Habakha no. 1]

Notes

Responsum 8

1. SS Hauptsturmfuhrer Jordan was "specialist for Jewish affairs" in the Nazi administration of Kovno. The cards became known as "Jordan permits" (see text of resp. below).
2. The Aeltestenrat ("Council of Elders"), more often called Judenrat ("Jewish Council") was "conceived by the Nazis not as an instrument for organizing life in the ghettos or for strengthening the structure of the ghetto, but the opposite; as an instrument which, in their hands, would help them to realize their plan concerning the Jewish population in the occupied territories, and, in particular, their extermination plan" (Isaiah Trunk, "The Organizational Structure of the Jewish Councils in Eastern Europe," Yad Vashem Studies, vol. 7, p. 147). The Nazis confined the councils' activities to one end: executing fully and precisely all orders. Other functions dealing with the internal requirements of the Jewish population were usually tolerated and even encouraged to serve the illusion that the Nazis did not intend to destroy the ghetto; that is, as long as such functions did not impede the annihilation process. The diabolical strategy of forcing the victim to assist his own executioner was described by Warsaw ghetto commissar Heinz Auerswald in late 1941: "Whenever difficulties arise, the dissatisfaction of the Jews is directed against the Jewish administration and not against the German supervisory organs" (cited by Jacob Robinson, "The Holocaust," in Y. Gutman and L. Rothkirchen, eds., The Catastrophe of European Jewry [Jerusalem: Yad Vashem, 1976], p. 276). As one survivor noted, the Nazis began by asking

for relatively routine things--- possessions, money, census lists, etc.; but eventually the demands were escalated until the Nazis asked for life itself. While history's verdict of the Judenrat's role in the Holocaust is a matter of bitter controversy today, Jacob Robinson (Encyclopedia Judaica [Jerusalem: Keter, 1971], vol. 8:883) points out that there is no evidence that loss of life was lower where there were no Judenrate. Moreover, "The percentage of victims among the members of the Jewish Councils was practically the same as that of their constituencies." The Judenrate were as powerless as the population they were appointed to represent. As Lucy Dawidowicz, The War Against the Jews (New York: Holt, Rinehart, Winston, 1975), p. 352, concludes: "The terminal decision to try to save some [lives] by yielding up others was humanly inevitable in circumstances without choice or opportunity."

3. The cards identified their holders as skilled workers. Believing that as long as they were useful to the German war effort, they would be protected from deportation, Jews in the ghettos tried desperately to find work, registering with the labor office of the Judenrat (Aeltestenrat). The Germans distributed only a limited number of labor cards. The most valuable cards bore the confirmation of the Security Police or the Wehrmacht workshops. Others were not considered as precious. All came to be known as Lebensscheins--- life permits. Those without cards were "illegals" targeted for deportation. Often the card afforded protection only to the worker and a limited number of dependents. Jews had to choose among children, parents, and other relatives. Periodically the Nazis would annul all previous cards, issuing new ones in constantly decreasing numbers. The Jews were always chasing after the latest labor card. This had the effect of further confusing and demoralizing the

ghetto inhabitants. It also encouraged corruption. The distribution of the labor cards obviously imposed terrible dilemmas upon the Judenrat. Refusal to comply with the distribution orders, although always contemplated (as in the present case), threatened even more dire consequences--no "life permits" at all.

4. A member of the Kovno Aeltestenrat, Leib Garfunkel, describes the situation in Jewish Resistance During the Holocaust (Jerusalem: Yad Vashem, 1971), p. 184: "... We were well aware of the Germans' purpose in having us distribute those grim white certificates. So we were faced with the tragic question of how to distribute them. Were we to accept the fact that death transports awaited all the intellectuals, the women, and the little children in the ghetto? A terrible dilemma confronted us. Suddenly an idea was presented-- I do not know by whom-- to burn all the certificates and tell the Germans that we refused to distribute them. In other words, 'Do what you will.' We knew well enough what they would do. But as soon as the idea became known in the ghetto, dozens of people came to us speaking on behalf of hundreds of the common folk, common folk in the best sense of the term, and said to us: 'You want to send us to death. What right have you to do that?' They did not speak about the generations to come. They spoke a very prosaic language, but it was the language of their instinct to live." The Aeltestenrat began to distribute the cards according to the labor registry. Meanwhile panic swept the ghetto and thousands of Jewish workers stormed the Aeltestenrat offices and seized the remaining cards. Of course most of the workers came away empty-handed. Apparently R. Oshry is asked his opinion some time after the incident. The ensuing Nazi "action" was postponed for several weeks; resp. 11 describes what happened. In the end 10,000 Jews were shot at

the Ninth Fort outside Kovno.

5. See 2 Sam.20. Sheba the son of Bichri rebelled against King David and was pursued by Joab's forces to the city of Abel of Beth-maacah. As Joab mounted his attack on the town, a "wise woman" interceded and attempted to negotiate with Joab. He agreed that if the town would surrender Sheba the son of Bichri, the siege would be halted. The inhabitants of the city then decapitated Sheba the son of Bichri and threw his head over the wall to Joab, who then departed.
6. The statement that we do not render such a decision ab initio is not mentioned by Haggahot Maimuniyyot. Kesef Mishneh, however, does mention this statement to show that while compliance with the view of Resh Laqish and Rambam is "the law of the pious" (see resp. 9, end; note 10 below), it cannot be legally mandated. For another explanation of the significance of this statement, see resp. 9, note 31.
7. Mareh Panim concludes that since all of the arguments about why the Rambam prefers the view of Resh Laqish (when the law ordinarily follows R. Yohanan) are "forced," it is more plausible to assume that Rambam's text was in error.
8. The citation is erroneous. The reference is probably to Noda Bihudah, second series, YD no. 74, which is discussed in note 14.
9. Hil. Avodat Elilim. He is inclined to permit the surrender of one who deserves death like Sheba the son of Bichri, comparing such a circumstance to the incident described in 2 Sam.21.1-9, where David accedes to the demand of the Gibeonites that seven of Saul's sons be surrendered and hanged. But he concludes with the caution that the matter needs further study.
10. The Taz suggests that Rambam sides with Resh Laqish against R. Yohanan

on the basis of the censure of R. Yehoshua b. Levi (see resp. 9, end) as reported in Yer. Ter., ch. 8. R. Yehoshua voluntarily surrendered a specified fugitive to the ruling power. The prophet Elijah had often appeared to R. Yehoshua, but now he did not appear until R. Yehoshua fasted several times. R. Yehoshua asked him: "Did I not act according to the law?" Elijah replied: "Is this the law of the pious?" Possibly R. Yehoshua was censured because the fugitive was not guilty of a capital crime and should never have been surrendered. But it is also possible that the fugitive was indeed guilty of such a crime, yet even so R. Yehoshua, a pious man, should not have surrendered him. For this reason, perhaps, the Rambam rules that "we do not render such a decision [to surrender a specified victim guilty of a capital crime] ab initio." But the Taz does not accept this explanation either: "Should R. Yehoshua permit all Israel to be slain for piety's sake?" He suggests that R. Yehoshua's mistake was not that he consented to the surrender of the fugitive, but that he personally took part in it. "He should have left the matter to the people to do as they wished. Obviously they would have surrendered the fugitive, and R. Yehoshua would have said nothing. This is what Elijah meant: the pious should not take action under such circumstances. This is why the Rambam ruled that 'we do not render such a decision ab initio.'" In short, the Taz (on the authority of his father-in-law, the Bah) accepts the ruling of Rambam and Resh Laqish, but with the proviso that the pious themselves do not participate in the act of delivering the specified victim.

11. The Taz understands the phrase "deserving of death like Sheba the son of Bichri" to refer to the crime of rebellion against the kingdom of David. He infers that a capital crime against the ruling power-- even if it is

not a violation of halakhah-- is sufficient grounds for surrendering a Jew. "Likewise in our time, one who sins and rebels against the ruling power may also be surrendered, and the same holds true for other transgressions [against the ruling power]... Such a criminal may be surrendered even if he is not specified."

12. If the victims have already been seized, it is forbidden to seek their release. But if the king's decree calls for any two victims, it is permitted to seek the exclusion of certain people even though others will still be in danger. According to the Shakh, the Maharival brings compelling evidence for this view from Yev. 79a, where the verse (2 Sam. 21.8) is cited, "But the king [David] spared Mephiboshet, the son of Jonathan the son of Saul" from death at the hands of the Gibeonites (cf. note 9). The gemara notes that favoritism is involved; the exemption of Mephiboshet meant that another would have to die in his place.

13. Yad Avraham bases this decision on the principle, "Your life takes precedence" (BM 62a). See text of resp. below.

14. Noda Bihudah points out that the Shakh need not have resorted to a lesser authority like the Maharival to sanction the view that one may try to save himself even if in consequence others will be endangered. He cites Rema, Sh.Ar. HM 388:2: "If one sees that harm may befall him, he may save himself even though as a result the harm may befall someone else." It should be noted, however, that this is not identical to the view of the Maharival, who maintains that one may also save people other than himself, regardless of the consequences for the eventual victims. The Noda Bihudah concludes that one may try to save "an important and upright man" provided that this man is not a specified victim. "But if

someone has already been designated, it is difficult to legally sanction efforts to release him, since another will be seized in his place. For whose blood is redder?" (Cf. Pes. 25b; resp. 6; resp. 22; note 15 below.)

15. Lehem Mishneh asks how the decision of Resh Laqish and Rambam (i.e., not to surrender a specified victim unless he is guilty of a capital crime) can be reconciled with the principle (Pes. 25b), "Whose blood is redder?" If one life is not more inherently valuable than another, how can we justify saving one life at the expense of many? This question is dealt with at length by R. Efrati in resp. 9. Lehem Mishneh offers the following interpretation, which he admits is forced: In the case (Yer. Ter., ch. 8) of the group of Jews confronted by gentiles demanding that one victim be surrendered, Resh Laqish and Rambam comply only if the specified victim deserves death because the possibility of escape exists and an innocent man might be saved. However, in the case (Pes. 25b) where a Jew is ordered by the governor to kill someone or else be killed, the possibility of escape does not exist. Only in the latter circumstance do we apply the principle, "Whose blood is redder?"

16. Mishneh Lemelekh makes no comment to Hil. Yesodei Hatorah, ch. 5, hal. 5.

17. On 1 November 1942 in the Vilna ghetto, noted Jewish scholar Zelig Kalmanovich mentions in his diary the case of an old rabbi who ruled that "we must save whatever can be saved." Apparently this is a reference to the rabbi of Oszmiana who, according to another entry in the diary, "handed down a decision to deliver the aged." Kalmanovich adds: "This is the situation and we cannot alter it. Of course, a noble soul cannot tolerate such deeds, but the soul's protest has only a psychological

worth and not a moral one. All are guilty, or perhaps more truly: all are innocent and holy, and, above all, those who actually carry it through. They must master themselves, brace themselves, and conquer the soul's sufferings. They exempt others and shield them from sorrow" (cited in Lucy Dawidowicz, ed., A Holocaust Reader [New York: Behrman House, 1976], pp. 227-28). The decision of R. Shapira bears obvious similarities to the one discussed by Kalmanovich.

Responsum 9

Saving one's life by causing a child's death

Question: This is a question to make one's hair stand on end. In a "bunker" (a hiding place) lived a large group of Jews hiding out so that the cruel, defiled, accursed oppressors, may their names be blotted out, would not find them. It was certain that if they were found they would be killed. Once when the wicked ones were conducting a search for these unfortunate people, an infant among those hidden [in the bunker] burst out crying. It was impossible to quiet him. If his voice was heard outside, they would all be seized and taken out to be killed. The question arose: is it permitted to place a pillow over the baby's mouth to stifle the cries? If they did this there was fear that the child might suffocate. Meanwhile [before they had decided what to do] one man drew near and placed the pillow over the baby's mouth. After the accursed wicked ones had passed, they removed the pillow and saw to their horror that the baby had suffocated.

The question is whether or not it was permitted to place the pillow [over the baby's mouth] to save the rest of the people. If it was not permissible, even though [the death was inflicted] unintentionally, must this man agree to some form of repentance to atone for his sin?

Answer: Your honor cites Tosefta Ter., ch. 7, hal. 23. This is the source of the Rambam's decision in MT Hil. Yesodei Hatorah, ch. 5, hal. 5,¹ which says: "So also if a gentile said to them, 'Give us one of

your number so that we can kill him; if you do not, we will kill all of you,' they must all be killed rather than surrender a single Jewish soul. But if the gentiles singled out a victim and said: 'Give us so and so or we will kill all of you,' then if he deserved death like Sheba the son of Bichri,² they should surrender him-- although we do not render such a decision ab initio. But if he is not deserving of death, they should all be killed rather than surrender a single Jewish soul." From these words of Rambam we see that two conditions must be fulfilled in order to hand someone over to be killed: 1) that he be specified [by the enemy] by name; and 2) that he be deserving of death like Sheba the son of Bichri. However, to clarify the matter we shall cite the Tosefta passage itself and make a judgment on this matter, with God's help.

In the Tosefta [Ter. 7:23] we find the following: "If gentiles said to a group of men: 'Give us one of your number so that we can kill him; if you do not, we will kill all of you,' they should all be killed rather than hand over a Jewish soul. But if they specified a victim, as in the case of Sheba the son of Bichri, they should surrender him and not be killed.

"R. Yehudah said: When does this apply [that they may not surrender a specified victim]? When the murderer is outside [the city] and the victims inside (according to the Gra's interpretation).³ But if the murderer and the victims are both inside (and it is certain they will be killed-- see Minhag Bikkurim to this passage),⁴ since the specified victim and the rest of the group will be killed, they should surrender him so that not all of them will be killed. So it says [2 Sam.20.22]: 'Then the woman went unto all the people in her wisdom...' She said

to them: 'Since he will be killed and you will be killed, surrender him so that not all of you will be killed.'

"R. Shimon said: This is what she said to them: 'Whoever rebels against the rule of the House of David deserves death.'" Yer. Ter., end of ch. 8, cites the Tosefta without the concluding words of R. Yehudah and R. Shimon mentioned above. The Tosefta is cited there as follows: "It is taught in a baraita: If a group of men were traveling on the road and encountered gentiles who said, 'Give us one of your number; if you do not, we will kill all of you,' even though all of them would be killed they may not surrender a single Jewish soul. [But if] the gentiles specified a victim, such as Sheba the son of Bichri, they should hand him over so that they will not all be killed.

"R. Shimon b. Laqish said: '[They may hand him over] provided that he is deserving of death like Sheba the son of Bichri.' R. Yohanan said: '[They may hand him over] even though he does not deserve death like Sheba the son of Bichri.'"

A Problem Posed by the Rambam's View and the Explanation of R. Sh. Sirillo

Apparently the Rambam decides in accord with Resh Laqish: "[They may hand him over] provided that he is deserving of death like Sheba the son of Bichri." The great halakhic authorities were puzzled that the Rambam would decide according to Resh Laqish against R. Yohanan's view, in opposition to the accepted principle in the Talmud that [when there is a difference of opinion between] R. Yohanan and Resh Laqish, the law is decided according to R. Yohanan. See the Kesef Mishneh to the Rambam passage [MT Hil. Yesodei Hatorah, ch. 5, hal. 5].⁵

I saw some astounding ideas in R. Sh. Sirillo's commentary on this passage from Yer. Ter., ch. 8. He discusses the Rambam's view and is puzzled since the accepted practice is that [when there is a difference of opinion between] R. Yohanan and Resh Laqish, the law is according to R. Yohanan, as is evident at the beginning of ch. Haholets [Yev. 36a].⁶ It appears [to R. Sirillo] that the Rambam bases his opinion on the last chapter of Yoma [82b] and ch. Kol shaah [Pes. 25b] where we read: "A certain man came before Raba and said to him: The governor of my town has ordered me, 'Go and kill so and so; if you do not, I will kill you.' Raba answered him: 'Let him kill you rather than that you should commit murder. What [reason] do you see [for thinking] that your blood is redder? Perhaps his blood is redder.'" Now [according to R. Sirillo] the victim was specified in this instance. The man came to ask [Raba what he should do] and pointed out the person [whom he had been ordered to kill], yet still Raba told him, "Let him kill you rather than that you should commit murder." One cannot argue that there is a difference between an individual [who must suffer death rather than commit murder] and a group, for the reason is given that perhaps the other person's blood is redder [a principle which applies to both an individual and a group]. Rather it just so happened that the given case was thus [i.e., it involved an individual], but the same law applies to an individual and to a group. Therefore the Rambam's words are correct, and our gemara follows Resh Laqish. This is the tradition we accept. So concludes R. Sirillo. But I do not understand how this explains the Rambam's opinion. On the contrary, this gemara passage appears to prove the opposite. The given reason [why one must suffer death rather than commit murder] is "perhaps his blood is redder." In a case where unless [one is killed], all will

be killed-- even if the one person does not deserve death-- why is it forbidden to hand him over?⁷

Indeed the Kesef Mishneh is puzzled by the view of Resh Laqish and says: "But the difficulty raised against Resh Laqish still stands. He says that even if the gentiles single out a victim, if he does not deserve death they may not surrender him. But the reason 'perhaps his blood is redder' does not apply, since both he and the group will be killed if the group does not surrender him." Apparently, then, further study is needed to determine what R. Sh. Sirillo really means.

Now we shall proceed to explain the basic issues. The sages stated a major principle: concerning murder, one should be killed rather than transgress [the prohibition against murder].⁸ This is said in Pes. 25b and Yoma 82b: "What [reason] do you see [for thinking] your blood is redder? Perhaps his blood is redder." The Ran did well to speak of this at the end of Yoma.⁹ He said: "Do you mean to permit [a forbidden] act on the basis of [Lev.18.5] 'He shall live by them [i.e., the commandments, which is interpreted in Yoma 85b to mean] and not die by them'? But this cannot be so, for the reason that one is allowed to transgress a commandment is that before God a Jewish life is more precious than a commandment. Therefore the Holy One, blessed be He, said that the commandment should be nullified so that one may live. However, in this case [Yoma 82b], where a Jew will be killed [regardless] and the commandment [prohibiting murder] will be nullified [in any event], why would it be good in God's eyes for you to transgress His commandment? Why is your blood more precious to Him than the blood of this other Jew? See Rashi's comment to Pes. 25b: "'What [reason] do you see [for thinking] your blood is redder..." That is to say, You come to ask such a question only

because you know that a commandment need not be observed when life is in danger. But this commandment [prohibiting murder] is not similar to the other commandments which may be violated in such a case, for no matter what, a soul will perish, and the Torah does not permit a commandment to be suspended except for the sake of a Jewish life. But here murder will be committed and a [Jewish] life will perish regardless. Who is to say that your life is more precious before God than the other person's? Perhaps his life is more precious to God. Thus the transgression would be committed and a life would be lost as well.'"

On account of this we hold that it is better for him to be killed than to spill innocent blood. Thus his fellow Jews will be saved. It makes no difference whether the case involves an individual or a group. If someone tells a group of people to kill an individual, and that by doing so they will remain alive, it is their duty to suffer death rather than help to kill the individual even if there is danger that all of them will be killed. However, all of this refers to a case where there is doubt whether or not they will be killed; for instance, in a case where they might resist and fight, or change the enemy's mind so that they will not be killed. But if it is absolutely certain that they will all be killed, surely there is no reason to forbid them to surrender one person.

Interpretation of the Baraita Cited Above

This clarifies for us the above-mentioned baraita: "If gentiles said to a group of men, 'Give us one of your number so that we can kill him; if you do not, we will kill all of you,' they should all be killed rather than surrender a Jewish soul. But if they specified an individual

as in the case of Sheba the son of Bichri, they should surrender him and not be killed."

R. Yehudah clarifies this (see Hazon Yehezqel [who says] that R. Yehudah wishes [only] to clarify the statement of the first tanna;¹⁰ see also the Mavo Hatalmud [who says] concerning R. Yehudah that even the phrase "When does this apply?" [merely] expresses a clarification).¹¹ He says: The first tanna's statement that one who is specified must also deserve death like Sheba the son of Bichri [before he may be surrendered] refers only to the case where the murderer is outside the city (as per the Gra's reading), since it is not certain that they will all be killed [if they refuse to comply]. But if the murderer and the victims are both inside and it is certain that the specified individual will be killed [regardless], it is comparable to the case of one who is specified like Sheba the son of Bichri. For it is certain that all of them, including the one who is sought, will be killed. In this case they may surrender [the specified victim]. In other words, the degree of certainty [of death] determines the issue as well as the liability for the death penalty. Therefore when both the murderer and the specified victim are inside the city, since the victim will certainly die [in any event], he is like Sheba the son of Bichri and may be surrendered. This is Rashi's view in Sanh. 72b which is found in his first explanation, s.v. "Once [the infant's] head came forth...": "If a woman has difficulty in giving birth and her life is in danger, it is taught¹² at the beginning of the passage that the midwife stretches forth her hand and dismembers the infant, removing it limb by limb. As long as the infant's head has not emerged into the light, he is not considered a living person and may be killed in order to save his mother. But if the infant's head has emerged, we may

not kill him since he is already as one who is born, and one life may not be taken to save another. If you cite the example of Sheba the son of Bichri [2 Sam.20.21]-- 'Behold, his head shall be thrown to you'-- where they did take a life in order to save a life, in that case it was done because even had they not surrendered him, he would have been killed inside the city when Joab captured it; and the other inhabitants would have been killed along with him. But if he could have been saved, then even though they would all be killed they are not allowed to hand him over in order to save themselves. Or, it is possible [that they were allowed to surrender Sheba the son of Bichri] because he rebelled against the kingdom [of David]." From Rashi's discussion you learn that the first explanation accords with the view of R. Yehudah that if you are certain that the specified victim will be killed one way or the other whether or not you surrender him, and that neither your killing them nor their killing you will enable you to save him, then it is permitted to surrender him or kill him. However, it is not enough that he merely be specified, since in the case of Raba at the end of Yoma [82b], where the criminals specified a certain person, Raba nonetheless said, "Let him kill you rather than that you should commit murder," because in this case it was not certain that [the specified victim] would be killed [if the man ordered to murder him refused]. Therefore Raba said, "What [reason] do you see [for thinking] that your blood is redder? Perhaps his blood is redder." For you might be killed, but he would be saved. But if he is specified like Sheba the son of Bichri, who would have been killed in any case, then it is permitted to surrender him.

Or, says Rashi, it is possible [that Sheba the son of Bichri was surrendered] because he rebelled against the kingdom [of David]. This

explanation of Rashi's coincides with R. Shimon's view in the Tosefta, which differs from R. Yehudah's. According to R. Shimon, "This is what she said to them: 'Whoever rebels against the rule of the House of David is deserving of death.'" This means that with respect to a Jewish life, the degree of certainty [of death] does not determine the issue. Even if we are certain that unless we surrender him to death we will all be killed, we are not permitted to hand him over in order to save our lives. But Sheba the son of Bichri was different; by law he deserved death for rebelling against the kingdom. Therefore they could kill him in order to be saved, since he was [legally] a dead man [anyway].

How R. Yohanan and Resh Laqish Interpret the Controversy between
R. Yehudah and R. Shimon

See Matenot Kehunah on Midrash [Rabbah], Torah portion Vayyigash,¹³ where the above-mentioned baraita is cited together with R. Yehudah's opinion that if the assailant and the victim[s] are both inside the city, since the specified victim and the others will all be killed [unless they surrender him], they should give him to the enemy so that all of them will not be killed. The Midrash Rabbah has the following version: "As Scripture says [2 Sam.20.22], 'Then the woman went unto all the people...' [She said to them:] 'Since he will be killed and you will be killed, give him to them so that not all of you will be killed.'" The Matanot Kehunah writes: "R. Yehudah's conclusion is consonant with the case of Sheba the son of Bichri, where all of them were inside the city and could not escape. They may surrender him even if his crime is not punishable by death. But R. Shimon disagrees, arguing that the phrase '[if he deserved death] like Sheba the son of Bichri' indicates that

only if one is subject to the death penalty [may he be surrendered]; but if he is not subject to the death penalty, they may not surrender him. This is also the controversy between R. Yohanan and Resh Laqish in the Yerushalmi, which is quoted by Semag 165: 'Here you have the text of Yer. Ter., ch. 8: If [the assailants] single out one person like Sheba the son of Bichri, they should hand him over. Resh Laqish says: provided he deserves death like Sheba the son of Bichri. R. Yohanan says: even if he does not deserve death like Sheba the son of Bichri.'

Even according to R. Yohanan, they are not permitted to surrender a specified victim unless he would be put to death even if they did not surrender him. He is compared to Sheba the son of Bichri [only in the sense] that he could not escape. Thus R. Yohanan agrees with the view of R. Yehudah.

R. Yohanan's language in the Yerushalmi lends support to the Matanot Kehunah's interpretation. R. Yohanan [says] "Even if he does not deserve death like Sheba the son of Bichri." If in fact R. Yohanan maintained that even if the specified victim might be saved, it is still permitted to surrender him, why then does he conclude "even if he does not deserve death like Sheba the son of Bichri"? It would have been sufficient to say [only] "even if he does not deserve death." One must necessarily conclude that according to R. Yohanan also, even if a victim is specified it is forbidden to kill him or surrender him to gentiles unless it is certain that he will be put to death regardless. Only then is it permitted to surrender him even if he does not deserve death. The concluding phrase-- "like Sheba the son of Bichri"-- means to emphasize that [if] it is certain that he will be killed together with the others [then they may surrender him]. This indicates that R. Yohanan agrees

with R. Yehudah's view in the Tosefta. It is plausible that the Yerushalmi did not have our version of the Tosefta so that they were not aware of the controversy between R. Yehudah and R. Shimon in the baraita. Consequently R. Yohanan and Resh Laqish disagree concerning this tannaitic controversy. R. Yohanan agrees with the view of R. Yehudah, and R. Shimon b. Laqish agrees with R. Shimon's view reported in the Tosefta.

Explanation of a Difficulty Raised by the Kesef Mishneh Concerning the Rambam

The Rambam says: "If [the gentiles] specify a victim and say, 'Give so and so to us or we will kill all of you,' then if he deserves death like Sheba the son of Bichri, they should give him up. But if he does not deserve death, they should all be killed rather than surrender a single Jewish soul." Now according to what has been said, it appears that the Rambam actually agrees with R. Yohanan and not with Resh Laqish. Therefore we must conclude as follows: R. Yohanan and Resh Laqish disagree concerning the controversy between R. Yehudah and R. Shimon in the Tosefta. R. Yohanan agrees with the view of R. Yehudah, and Resh Laqish agrees with that of R. Shimon. Now we hold that [when there is a difference of opinion between] R. Yehudah and R. Shimon, the law is decided according to R. Yehudah (see the Bah's responsum;¹⁴ Er. 47a-- "[When there is a difference of opinion between] R. Yehudah and R. Shimon, the law is decided according to R. Yehudah"; and Bets. 27a).¹⁵ By writing "... if he deserves death like Sheba the son of Bichri," the Rambam means to include one who is actually about to be executed; that is, it is definite that he will die no matter what, as

in the case of Sheba the son of Bichri, and as Rashi wrote in [his commentary to] Sanh. 72b. By concluding "... but if he does not deserve death, they must all be killed [rather than surrender him]," the Rambam means that when it is not certain that he will be killed, they may not surrender him. But if it is certain that the gentiles will kill him, then he is like one liable for the death penalty, and like Sheba the son of Bichri.

The Rambam's literal statement at the beginning of the passage--- "... if he deserved death like Sheba the son of Bichri"--- is based on the wording of the first tanna's statement in the baraita. R. Yohanan says [that he may be surrendered] even if he does not deserve death like Sheba the son of Bichri. That is, the first tanna's mention of Sheba the son of Bichri does not mean that the specified victim must be legally subject to the death penalty like Sheba the son of Bichri, but rather that like Sheba the son of Bichri he is unable to escape and will surely be killed. Therefore the same law applies to him as to Sheba the son of Bichri, and they may surrender him.

Although R. Sirillo does not interpret the controversy between R. Yohanan and Resh Laqish in this way, still according to the law the matter is as we have written. R. Sirillo interprets the opinion of Resh Laqish only in the sense that if they do not surrender the specified victim, he might be saved, as in the Raba incident [Yoma 82b] which he cites. Actually the baraita's phrase, "If you do not [hand him over], we will kill all of you," is only a threat by the gentiles; in fact the group might be spared. This conforms to R. Yehudah's view in the baraita, which is not an objection but a clarification of the first tanna's statement. In this respect the Rambam ruled according to

Resh Laqish. But in regard to a circumstance where they will all surely be killed, Resh Laqish does not disagree. Such a circumstance is not even discussed in this baraita. Obviously the Rambam too speaks of a case where there is doubt [whether or not the specified victim will be killed]. But when death is certain, there is no prohibition against surrendering him. This answers the difficulties raised by the Kesef Mishneh, the Raba incident, and the statement of Resh Laqish. We come to the conclusion that if it must be decided whether to surrender a specified victim in a circumstance where it is certain that he will be killed regardless, it is permitted to surrender him.

In the present case, if the crying infant's voice is heard he will surely be killed together with all the others by the murderers, may their names be blotted out. Thus he is as one who is specified; and he is like Sheba the son of Bichri in that all the Jews [in the bunker with him] are under the Nazis' sentence of death, and it is not possible to be saved from them. This leads me to the conclusion that they were permitted to quiet the infant-- even if this entailed mortal risk to the infant's life. See the Bah's responsum, no. 43.¹⁶

See also Sefer Hahinnukh, mitzvah 296:¹⁷ "Our sages of blessed memory also said: Even if there were thousands of Jews to whom gentiles said, 'Give us one of your number; if not, we will kill all of you,' they should all be killed rather than surrender a single soul-- but only if the gentiles said 'one of your number' without specifying whom. However, if they explicitly named a victim, saying, 'Give us so and so; if not, we will kill all of you,' then it is permitted to give him up, as in the well-known case of Sheba the son of

Bichri." Note that the Hinnukh does not mention the words "deserving of death" but rather "as in the well-known case of Sheba the son of Bichri." This means that just as in the case of Sheba the son of Bichri, who would have been killed regardless together with everyone else as in the present case, it is permitted to surrender the specified victim.

See the Ran, ch. Yom hakippurim [Yoma, ch. 8]: "However, if the gentiles said: 'Give us so and so who is with you; if not, we will kill all of you,' and the gentiles have the power to do this, then it is permitted to surrender him so that they will not all be killed, since if they do not, both the specified victim and all the rest of them will be killed."

The Law Concerning a Pursuer

In the present case another aspect must be added: the crying infant, since he may cause the death of all those who are hiding [in the bunker], may by law be considered a pursuer.¹⁸ The Rambam, MT Hil. Rotseah, ch. 1,¹⁹ said the following: "This too is a prohibition from the Torah: Do not spare the life of a pursuer. Accordingly the sages ruled that if a pregnant woman has difficulty giving birth, it is permitted to dismember the fetus inside her womb, whether by means of a drug or by hand, because the fetus is like one pursuing her to kill her."²⁰ But after the infant's head has emerged, we may not harm him, because one life may not be taken to save another, and [the mother's travail] is the way of nature." But Sanh. 72b presents a difficulty: "R. Huna said, 'One may take the life of a minor in pursuit to save the pursued...' R. Hisda raised an objection against R. Huna: '[We learned that] once the infant's head has emerged,

we may not harm him, since one life may not be taken to save another. But why so? Is he not a pursuer?" He answered: "There [in the case of the infant] it is different, since she [the mother] is pursued by heaven."²¹ Thus in the case of a woman in difficult labor, the infant is not called a pursuer because the mother is pursued by heaven. Now according to the first part of the passage,²² it is permitted to dismember the infant. Rashi gives the reason in his commentary to Sanh. 72b: "As long as the infant's head has not emerged into the light, he is not considered a living person." How then could the Rambam say that he is like one pursuing her to kill her? And if the law of the pursuer does apply to him, then even when his head has already emerged it would be permitted to dismember him in order to save his mother. (See Meirat Einayim 425 note 8;²³ Teshuvot Geonim Batrai 25; and Hiddushei Rabbenu Hayyim.)²⁴

Comment [on the Law] "One Life May Not Be Taken to Save Another"

We must explain the statements of the Mishnah and the Rambam that "one life may not be taken to save another." Is it not the law that it is permitted to kill a pursuer so that he will not kill the pursued? We see that in order to save the pursued, one may kill the pursuer. We derive this from [Gen.9.6] "Whoso sheddeth man's blood, by man shall his blood be shed." (See Semag, mitzvah 165, for the source of the law of the pursuer.)²⁵ Were it not for this [law], it would not be permitted to dismember the pregnant woman's fetus when she is in difficult labor in order to save her life. Even if the fetus is not called a living person, even so it is said in Ar. 7a: "As soon as the fetus moves [from its place in the womb] it is another body."²⁶ Even in the case of a

fetus still in its mother's womb, they did not say that if the woman were about to be executed we should not wait until she gives birth; rather it is written [Dt.22.22], "Then they shall both of them die,"²⁷ thus including the fetus [as a separate life]. Therefore if a woman is in difficult labor, we are certainly not permitted to kill the infant unless the law of the pursuer applies to him. But the infant is an involuntary pursuer, for it is heaven that pursues the mother, and this is the way of nature. Therefore once the infant's head has emerged, he may not be killed [to save the mother]. This returns to the law of "One life may not be taken to save another," which is interpreted [Pes. 25b]: "What [reason] do you see [for thinking] that your blood is redder? Perhaps his blood is redder."

From this we learn a new law: the law of an involuntary pursuer is the same as that of a pursuer as long as the principle of "one life may not be taken to save another" does not intercede. On this basis, if both the mother and child will die unless we dismember the infant, it is permitted to dismember him since he would not survive anyway. Once again the law of the pursuer applies to him, and he is killed to save another life. [See] Tiferet Yisrael at the end of M. Oh., ch. 7;²⁸ and Panim Meiros, part 3.²⁹

If so, then in our case, since all of those hiding will be killed, there is no doubt that they may place the pillow on the baby so that everyone else will be saved. For the law of the involuntary pursuer applies to the baby. According to this law he may not be killed even to save another life, on the basis of the law that one life may not be taken to save another; but in our case it is certain that the baby will not be saved [regardless].

The Distinction between a Specified Victim and a Pursuer

In this case we must also determine whether the crying infant should be considered a specified victim or a pursuer, since such a distinction has legal consequence. Concerning a specified victim like Sheba the son of Bichri, the Rambam says: "If they specify him and say, 'Give us so and so or we will kill all of you,' then if he deserved death like Sheba the son of Bichri, they should surrender him to them-- although we do not render such a decision ab initio." The Rambam's source is Yer. Ter., ch. 8: "A man who was sought by the government fled to R. Yehoshua b. Levi in Lod. The king surrounded the town, and R. Yehoshua surrendered the man. Elijah had often appeared to R. Yehoshua, but no longer. R. Yehoshua fasted many times until Elijah appeared to him again. Elijah said to him: 'Shall I appear to a traitor?' R. Yehoshua replied: 'Did I not act according to the law?' Elijah answered: 'And is this the law of the pious?'" Even though by law R. Yehoshua was permitted to surrender the man, this is not the law of the pious. R. Yehoshua should have placed himself in danger and not surrendered the man.³⁰ This is the basis of the Rambam's statement, "We do not render such a decision ab initio."³¹ In contrast, concerning a pursuer the Rambam says in MT Hil. Rotseah, ch. 1 [hal. 9]: "It is a prohibition from the Torah that one may not spare the life of a pursuer." But it appears that this applies only to a willful pursuer. This is not so in our case, where the infant is an involuntary pursuer. The commandment does not dictate here that the pursuer must be killed; rather it is optional. Under such circumstances, if the pursued does not want to kill the [involuntary] pursuer and is killed because of him, "He shall be called holy" [Is.4.3], and he fulfills [the commandment, Lev.22.32] "And I will be sanctified among the

children of Israel." Therefore those people who did not want to save their own lives by suffocating a Jewish child (and such incidents occurred in my family, may God avenge their blood)³² sanctified God's name. However, the man who did this [i.e., inadvertantly suffocated the child] should not have a bad conscience, for he acted lawfully to save Jewish lives. One of the great commentators of Scripture did well to speak of this. [On the verse] "For the violence done to thy brother Jacob, shame shall cover thee" (Ob.1.10), he says: "Esau should be ashamed that he brought Jacob to act violently, for only because of Esau did he need to do these things." May God rise up and avenge His servants' blood that has been shed.

[Shimon Efrati

Teshuvot Migei Haharegah, no. 1]

Notes

Responsum 9

1. Cf. discussion of this passage in text and notes of resp. 8.
2. See resp. 8, note 5.
3. See Haggahot Hagra, Tosefta Ter. 7:23 (par. 35). The language of the passage seems to require such an emendation. The same emendation is made in Bereshit Rabbah, Vayyigash 94.
4. Minhag Bikkurim writes: "The Gra's version of the text means that the murderer is outside and they are all inside, so that it is possible that [the specified victim] might be saved. In this case they should not surrender him. But if all are inside, they may surrender him."
5. Cf. resp. 8, note 6.
6. The pertinent passage, Yev. 36a: "Raba said: The law is in accordance with the view of Resh Laqish in the following three rulings..." This implies that in other cases his view is overruled.
7. The principle "perhaps his blood is redder" applies to the group just as it does to the individual.
8. Cf. Sanh. 15a.
9. Alfasi, Yom hakippurim 96a.
10. R. Yehudah's question, "When does this apply [that they may not surrender a specified victim]?" usually indicates a limitation of the preceding statement's validity. Hazon Yehezqel, with R. Efrati's support, argues that in this instance the question only seeks to clarify the preceding statement. Hazon Yehezqel refers to Rashi's comment, Sanh. 72b,

that it was permitted to surrender Sheba the son of Bichri under the circumstances because otherwise Joab would have slain everyone, including Sheba the son of Bichri. R. Efrati comes to the same conclusion.

11. See note 10.

12. See M. Oholot 7:6.

13. Parashah 94.

14. Teshuvot Bayit Hadash, no. 43. The Bah maintains that while the law is normally decided according to the view of R. Yehudah, in this case R. Yehudah and R. Shimon have no dispute with one another; "each merely emphasizes a different aspect of the case." R. Yehudah insists that even a specified victim may not be surrendered when he is inside and they are outside. R. Shimon emphasizes that even a specified victim must be deserving of death even when both he and they are inside. "Both of them agree that the case must be exactly equivalent in every respect to that of Sheba the son of Bichri." This resp. of the Bah is described in note 16.

15. Betsah 27a: "[In a dispute between] R. Yehudah and R. Shimon, the law is according to R. Yehudah."

16. This resp. appeared in print only once, as no. 43 in the 1697 ed. of Teshuvot Bayit Hadash published in Frankfort. It was deleted from all subsequent editions by censors, owing to the delicate nature of Jewish-Christian relations at the time. The resp. concerns a Jew in the city of Kalish accused of having a stolen "savior" (probably a communion wafer or perhaps a crucifix) in his possession. The gentile authorities demanded that the Jewish community surrender the man. Another Jew had already been executed for allegedly stealing the "savior." The leaders

of the Jewish community feared for their lives if they did not surrender the man; at the same time they had reason to believe that the suspect would be summarily condemned without a proper trial. The Bah renders the decision that the man may be surrendered. He assumes that the Kalish authorities will grant the suspect a fair trial. Moreover, since the suspect had done something to incite the wrath of the gentiles, thus endangering the entire Jewish community, he had assured his own surrender by making it necessary for the community to defend itself in the first place. He concludes that if the man "took possession of the purse [allegedly containing the "savior"] in the presence of the gentiles, he brought the responsibility of standing trial according to their laws upon himself, and we are permitted to surrender him to them." But if he did not take the purse, then even though he is the one specified by the authorities, he may not be compelled to surrender himself.

17. Torah portion Emor, concerning the commandment to sanctify God's name.

18. The concepts of "specification" and "pursuit" are linked. The specified victim, should he refuse to surrender as in the case of Sheba the son of Bichri, becomes the pursuer of those who will die unless he gives himself up. Thus R. Efrati's application of the law of the pursuer is pertinent.

19. Hal. 9. See Sefer Hamitsvot, Mitsvot lo taaseh, no. 293; and note 25.

20. Perhaps it is significant that Rambam, noted for the precision and clarity of his language, writes that "the fetus is like [emphasis added] a pursuer," rather than merely "the fetus is a pursuer." He seems to apply the example of the pursuer only as an analogy, not as a definition.

21. I.e., it is not willfull pursuit but an act of God.
22. M. Oholot 7:6; see note 23.
23. He too contends that while "nature's way" is the mother's pursuer and not the infant, it is nonetheless permissible to perform an embryotomy to save the mother's life. The classic proof text for this practice is M. Oholot 7:6, but Meirat Einayim cites Ex.21.22 (cf. HM 423:1): "And if men strive together, and hurt a woman with child, so that her fruit depart, and yet no harm follow, he shall be surely fined..." The fact that the assailant suffers only a fine proves that the fetus is not considered a life; otherwise the assailant would be guilty of murder.
24. Hil. Rotseah, ch. 1, hal. 9. He points out that the problem is not whether the infant may be killed to save the mother's life; the Mishnah (Oholot 7:6) has already established that an embryotomy is permissible as long as the infant's head has not emerged (cf. Rashi, Sanh. 72b). The problem is that Rambam describes the unborn infant as a pursuer, when according to Sanh. 72b it is "heaven" that is the pursuer. If we already have adequate grounds for the embryotomy, why introduce the reason that the fetus "is like a pursuer" (cf. note 20)? Rabbenu Hayyim suggests that Rambam is really talking about the saving of life, not the taking of life; that is, "The only reason the pursuer is killed is to save the life of the pursued." This is one exception to the principle (Sanh. 72b) that "one life may not be taken to save another." Thus the infant is "like a pursuer" only in the sense that the mother's life takes precedence.
25. Semag writes that the Scriptural warrant for the law of the pursuer is Lev.19.16, "Thou shalt not stand idly by the blood of thy neighbor." However, he notes in no. 164 that according to Sifre, Torah portion Ki

tetsei, the commandment not to show mercy to a pursuer is based on Dt. 25.11-12: "When men strive together one with another, and the wife of the one draweth near to deliver her husband out of the hand of him that smiteth him, and putteth forth her hand, and taketh him by the secrets; then thou shalt cut off her hand, thine eye shall have no pity." The Semag notes that Rambam cites both of these verses (MT Hil. Rotseah, ch. 1, hal. 9, 14), indicating that one who spares a pursuer violates two prohibitions. See the commentary to Semag 165 by Berit Mosheh. However, still a third proof text-- Gen.9.6 as cited by R. Efrati-- is not mentioned either by Semag 164-65 or Sefer Hamitsvot 293, where the law of the pursuer is explained.

26. See resp. 18, where this source is discussed at length.

27. This is strictly a hermeneutical interpretation of the verse, which describes the punishment for adultery, not the status of a fetus still in its mother's womb.

28. Mishnah 6, par. 10. The infant can be compared to Sheba the son of Bichri in that both, however unintentionally, bring harm upon an innocent party. In both cases only the death of the pursuer can resolve the dilemma. If the mother is in severe travail, "The infant is causing her death; she is not causing his when he comes forth from the womb." While it can be argued that the infant is not really a pursuer, still "it is possibly permissible to kill the infant in order to save the mother's life." Moreover, if such a course of action were not undertaken, "The infant's life would be prolonged only temporarily, since both he and his mother would die."

29. Sheelot uteshuvot no. 8. He is asked about a breach birth which

threatens the mother's life. He rules that in the case of severe labor endangering the mother's life, we set aside the principle that "one life may not be taken to save another" only if it is certain that if we do not kill the infant, both infant and mother will die.

30. See resp. 8, note 10.

31. E.J. Shochet, A Responsum of Surrender (Los Angeles: Univ. of Judaism Press, 1973), p. 75, offers a novel interpretation of the Rambam's expression, "We do not render such a decision [prohibiting the surrender of a specified victim not guilty of a capital crime] ab initio." He grants that while it may indicate reluctance to permit surrender, or a stalling tactic before rendering a verdict, or prohibition of a direct order to surrender the victim, it could also be that morin, a technical term meaning to "render a legal decision," may here simply mean "to show" (reading the triliteral root for "see" in the causative stem rather than "teach"). According to this interpretation, the sentence might mean "that we ought not be so hasty in showing the non-Jews that we are prepared to surrender them the victim!" In short, the statement is not a legal prescription but a strategic one. However, Shochet is cautious about such a radical departure from the customary halakhic interpretation of this phrase. It is more likely that Rambam meant the following: "Ex post facto, I hold that they did right [to surrender a specified victim], but we would hardly have advised them beforehand to do so."

32. This incident is described by R. Efrati in Teshuvot Migei Haharegah, no. 3. His brother R. Yitshaq Tsevi Efrati of Glina was hiding with his family in a bunker during a search. A baby burst out crying, and the rabbi had to decide whether to stifle the cries and risk smothering the

child, or permit it to endanger all of their lives. He decided that no one should risk harming the child. All of those hiding in the bunker were discovered and murdered by the Nazis.

Responsum 10

On the law concerning one who commits suicide in order to be buried
in a Jewish grave

Question: On 6 Marheshvan 5702 [27 October 1941], two days before the terrible destruction of the Kovno ghetto, when before our eyes some 10,000 people-- men, women, and children-- were forcibly carried off to slaughter, and each of the ghetto's inhabitants awaited the bitter end; when the evil arm of the accursed and wicked ones waved relentlessly over them, cutting them off from the land of the living-- in this time of emergency, the head of one of the respected families of the city came to me, weary from mourning and weeping. Eventually he told me that he had a question on which his life depended. How could he bear to witness the evil that would befall his family-- his wife, children and grandchildren? For it was quite possible that they would be slaughtered before his eyes to heighten his anguish and suffering, since it was the custom of the German murderers to relish the suffering and pain of their victims. They would kill the children before the parents' eyes and the wives in the presence of their husbands. Only after their raging lust for murder had been satisfied-- for it boiled within them, and they took pleasure in the cries of their unfortunate victims-- only then would they stretch forth their hand against the heads of the families. Therefore since he did not have the strength to withstand the suffering of those more beloved and precious to him than all treasure, and without a doubt his heart would stop beating inside him and his life would depart when he saw this, his

question was whether he was permitted to hasten his end and take his own life,¹ which is not according to law, only so that he would not witness the destruction of his family. Moreover he would not be forced to die by torture at the hands of the accursed murderers, may their names be blotted out; and he would have the merit of a Jewish burial in the cemetery of the Kovno ghetto.

Answer: To kill oneself when one is lucid is forbidden by the Torah, as it is written [Gen.9.5]: "Surely your blood of your lives will I require." See Bereshit Rabbah, ch. 34, where it says: "Not only one who spills his own blood but also one who strangles himself, even though no blood is shed."

This is also evident from BQ 91b: "Tannaim differed on this point: one says a man is not permitted to injure himself, and another says he is permitted to injure himself. But who is the tanna from whom you heard that a man is not permitted to injure himself? You might say it was this tanna who taught, 'Surely your blood of your hands will I require,' [about which] R. Eleazar said, '[If] by your own hand [then] will I require your blood of your lives.' But maybe murder is different." Thus it is evident that a man is forbidden to kill himself. So ruled the Rambam, MT Hil. Hovel Umaziq, ch. 5, hal. 1.

The Maharit cites proof for this from Ket. 103b: "On the day that Rabbi [Yehudah Hanasi] died, a heavenly voice went forth and announced: 'Whoever was present at the death of Rabbi is destined to enjoy the life of the world to come.' A certain laundryman, who used to come to Rabbi every day, failed to call on that day. When he heard this, he went up on a roof, fell to the ground and died. A heavenly voice came forth

and announced: 'That laundryman is also destined to enjoy the life of the world to come.'" The implication of this is that had not the heavenly voice come forth, we would say that he had no share in the world to come. What is the reason? Because he committed suicide.

Darkhei Mosheh, [Tur] YD 345 cites the opinion of the Mahariv that one is not considered a suicide unless he was warned and accepted the warning.² In this circumstance he is bound by the law forbidding suicide since he knew this was a felony and [still] said, "Even so [I will do it]." However, without a warning the law [forbidding] suicide does not apply to him. See Sedei Hemed 17³ who calls attention to this. Even a man learned in Torah is forbidden to hand himself over to death, even for the sake of the Torah, as explained in BQ 61a: "What is the meaning of 'David would not drink thereof' [2 Sam.23.16]? That he did not want to say this in their names. For he said: 'I have received this from the bet din of Samuel of Ramah: If anyone hands himself over to death for the sake of the Torah, not a word of halakhah is cited in his name.'"

In the Tur YD 348⁴ it is noted that many authorities hold that even if he repents before his death, the suicide's repentance is of no use to him, for he killed himself after he repented and thus appears to be like one who bathes while grasping a worm.⁵

The suicide has no share in the world to come, as is evident from what is taught in Sanh. 90a: "Four commoners have no share in the world to come, and one of them is Ahitofel⁶ who hanged himself. The Hida of blessed memory, in his book Nahal Qedumim, found an allusion to this in the Torah [Lev.5.21]: "If a person sins and commits a trespass...": the [Hebrew] letters of the word "trespass" are the initials of [the Hebrew

expression for] a suicide.⁷ Moreover, the Maharit holds that [the suicide] has no share in the world to come on the basis of the incident of the laundryman mentioned above.

With respect to the law, the Rambam, MT Hil. Evel, ch. 1, hal. 11, ruled that in no respect do we occupy ourselves with the suicide. We do not observe mourning for him nor do we eulogize him. But we do stand in the line [of consolation] for him and recite the mourner's blessing for him, and do everything [appropriate] out of respect for the living [relatives].⁸ This is also the ruling of Sh.Ar. YD 345:1. According to the Kesef Mishneh, the source of the Rambam's opinion is Evel Rabbati, from which Rambam concludes that mourning for the dead is not among those things that should be done out of respect for the living. Consequently he wrote that we do not mourn [for the suicide]; but the Ramban disagreed in this matter.⁹ In Sefer Eshkol, vol. 2, p. 170 it is also said that we do not mourn.¹⁰

See Teshuvot Hatam Sofer no. 326:2 who tries to justify the Ramban's opinion but concludes: "In regard to law or practice, who will have the effrontery to decide against Bet Yosef?"¹¹ See also Teshuvot Haelef Lekha Shelomoh no. 301.¹²

We do not withhold burial shrouds or a grave from the suicide, as explained in the Rashba's resp. 763.¹³ However, we do not bury him together with those who did not commit suicide; rather we bury him at a distance from them, off to the side in a special place as with those executed by the [Jewish] courts (as we learned in Sanh. 46a).¹⁴ Such has been the custom in Lithuania and Germany.

For the sanctification of God's name, however, it is a person's duty to suffer martyrdom, as explained in Sanh. 15a: "R. Yohanan said in the

name of R. Shimon b. Yehotsedeq: They decided by vote in the upper chamber of Bet Nitsah in Lod: Concerning all of the prohibitions in the Torah, if they say to a man, 'Transgress or you will be killed,' he should transgress rather than be killed, with the exception of [the prohibitions of] idolatry, incest,¹⁵ and murder.'" On AZ, ch. 1, the Ritba wrote the following in the name of Rabbenu Tam: "If a Jew injures himself fatally for fear they will force him to transgress the law, nothing [pertaining to proper mourning and burial] is withheld from him." For this reason, fathers slaughtered their children with their own hands in times of persecution. According to Shevut Yaaqov, vol. 2, no. 111, the same holds true for one who suffers the death penalty for transgressing a severe prohibition: we do not withhold anything [pertaining to proper mourning and burial] from him.¹⁶

In Besamim Rosh (attributed to the Rosh) no. 345, he is asked: "If a man who is destitute said in the presence of two witnesses that he detested his life and then committed suicide, are his relatives permitted to mourn for him?" He answers: "God forbid that this man be condemned. It was long ago written in the Midrash: 'Surely your blood of your lives will I require': One might think that this refers to such as Saul the son of Kish;¹⁷ but Scripture says 'surely'¹⁸ [excluding Saul from the category of sin]. Saul was only afraid that the Philistines would torture him. Yet this is said not only in Saul's case, where he feared they would inflict terrible disgrace upon him to mock Israel, which would be a desecration of God's name-- not merely in this instance but in regard to anyone who commits [suicide] due to the multitude of his troubles, anxieties, and sufferings or utter misery, there is no fear [that he should not be properly mourned or buried].¹⁹ On the contrary, our sages denigrated

Zedekiah the king of Judah, saying that he should have thrown himself at the wall and died rather than behold with his own eyes the slaughter of his children.²⁰ Moreover, the sages counted Ahitofel among the four commoners [who have no share in the world to come, Sanh. 90a] because he rebelled against David's kingdom, not [because] he was [considered] a suicide. A suicide is one who despises the good and hates the world, like some philosophers who do so to provoke the wrath of heaven, etc. But when one suffers unbearable anguish and cannot go on, and he does this [i.e., takes his own life] to protect himself from sin-- since all of the anguish and misery deprive a man of his senses and the knowledge of his Creator-- there is no prohibition in such a case."

This is discussed in Bedeq Habayit [Tur YD] 157 where the midrash above is cited and interpreted to mean that perhaps even Saul the son of Kish [committed suicide wrongfully], for if he was afraid that they would torture him and he would not stand up to the trial, still he could have suffered martyrdom. But Scripture says "surely" [thus excluding Saul from the category of sin]. This is the evidence brought by those who slaughtered their infants in time of persecution. However, there are some who prohibit this, interpreting "Scripture says 'surely'" to mean that one may not kill himself. Hananiah, Mishael, and Azariyah were handed over by others but did not harm themselves.²¹ But Saul the son of Kish did not act according to the will of the sages.²²

Thus it appears that some interpret the midrash to forbid [suicide], meaning that Saul the son of Kish did not act according to the law. But this interpretation is rather puzzling, since [the midrash is an example of] "[the limiting particle] 'surely' excludes"; thus the midrash excludes those such as Saul the son of Kish, who are not classified as suicides.

Furthermore there is proof for this in Yev. 78b where concerning Saul [it says]: "They were punished on account of Saul, because he was not properly mourned."²³ So we see that he was not classified as a suicide. (See the commentary of Tosafot on Torah portion Noah, who also cite the opinion of those who interpret [the midrash to forbid suicide].) Likewise the Ramban wrote in Torat Haadam: "So we find in the case of a great person who committed suicide because of duress-- like Saul, king of Israel-- the suicide is condoned. As it is said in Bereshit Rabbah, 'Surely your blood of your lives will I require': One might think that this refers even to one who is pursued like Saul; [but] Scripture says 'surely' [thus excluding Saul from the category of sin]. Consequently he was not classified as a suicide, and they were punished for it when they did not mourn him properly." See the Rosh, MQ, ch. 3, section 94.²⁴ This was also the ruling of Sh.Ar. YD 345:3: "A great person who commits suicide while under duress, like King Saul, is not denied anything [pertaining to proper mourning and burial]."

In Yam Shel Shelomoh, [BQ] ch. Hahovel no. 59, the opinion of the Ritba is cited as follows: "I found this written in the name of the Ritba: To what does AZ 18[a] in the name of R. Hanina b. Teradyon-- 'It is better that the One who gave it [i.e., life] should take it away, but no one should harm himself'-- refer? It is written in the Tosafot that Rabbenu Tam said: 'One who fears he will be forced to transgress the law is permitted to injure himself, and so it says in the Midrash: "Surely your blood will I require": One might think that this refers even to Saul; [but] Scripture says "surely" [excluding Saul from the category of sin] since he harmed himself only because he feared they would force him to transgress the law. In such a case [self-inflicted harm] is permitted.

Thus they are allowed to slaughter infants in times of persecution out of fear of transgressing the law.' Up to this point I found in the Tosafot, and these words would require careful study and deliberation if not for the fact that a sage has already decided, and we have heard in the name of the great authorities of France that they permitted it as a rule of practice. So concludes the Ritba."

Yet the Yam Shel Shelomoh concludes: "But it follows from the opinion of R. Yitshaq [in the Tosafot] that this is not so; for he wrote that it is forbidden to kill oneself out of fear, and since he wrote the word 'fear' in a general way, this implies even out of fear of God lest they would cause him to transgress the law. Therefore the Rosh permitted only that one may allow himself to be killed, which is not considered injuring oneself; but he did not permit one to injure himself. Also, Saul's intention was not as the Ritba wrote, for if it were he would have wanted to fulfill the verse [Dt.6.5], '[Thou shalt love the Lord thy God] with all your heart and with all your soul,' like R. Aqiva who was so anxious about fulfilling this commandment. Moreover, the wording of the verse [1 Sam.31.4] indicates [that he killed himself for fear] they would torture and afflict him, as it is said: 'Lest the uncircumcised come and make a mock of me.' Possibly this could be interpreted 'torture me by causing transgression,' and for this reason he was afraid;²⁵ but it says 'and thrust me through,' indicating death [is what he feared]. So renders the Targum Yehonatan: 'and kill me.' Rather the suicide was for the reason I have written."²⁶ However, the Bah, [Tur] YD 157, quotes the Semaq that Saul feared they would cause him to transgress the law, as the Ritba wrote in the name of Rabbeinu Tam.²⁷ See what Teshuvot Hayyim Shaal [46] wrote about this.²⁸

From what has been said, it appears that Saul did this only out of fear they would force him to transgress the law, and therefore his case is not proof that a man is permitted to commit suicide because of misery or suffering. Even though afflictions deprive a man of his senses and the knowledge of his Creator, as it is written in Er. 4lb,²⁹ even so he should attune his mind not to despise suffering. However, the present case is not comparable to this since the torment that is inflicted by people is different, as is evident in Ket. 33b: "If they had lashed Hananiah, Mishael, and Azariyah, would these three have worshipped the image?"³⁰ The Tosafot to this passage write that the image was not actually a false idol, but according to Midrash Rabbah, Song of Songs, section 7, it was indeed a false idol.

See the Tosafot to Git. 57 concerning the 400 children who, after being taken captive to be disgraced, jumped into the sea.³¹ There is also the example of Zedekiah,³² who already knew when he was captured that Nebuchadnezzar would torture him and that he was closer to death than to life, as is apparent from BB 8b where it says that captivity includes all forms of death, for instance sword and famine.³³ So it appears also from Yalqut Melakhim: "For Zedekiah said to Nebuchadnezzar, 'Kill me first so that I will not see the blood of my ten children.' His children said, 'Kill us first so that we will not see our father's blood spilled on the ground.' So he obliged them." Therefore it appears from all that has been said that the present case is just like Zedekiah's, as described in the Yalqut, for he did not want to see the blood of his children. This appears to me to be permissible.

As for what is maintained in the book Besamim Rosh attributed to the Rosh-- that one is not called a suicide if he does it because of a

multitude of troubles, anxieties, suffering, or misery-- I have seen this discussed in Har Evel, p. 18 as follows: "I swear by the Lord of hosts that words like these did not go forth from the holy mouth [of the Rosh]." ³⁴ The later authorities said that the publisher wrote the entire book himself, as is well known. ³⁵ See the Yad David and Pithei Teshuvah to Sh.Ar. YD 345:2, ³⁶ and Tuv Taam Vedaat, third series, no. 22. Also Hatam Sofer, in the above-mentioned resp. no. 326, attributes this to "the false Rosh."

However, the great Hida wrote in his book Shem Hagedolim: "It is in favor of Besamim Rosh that the printed edition testifies to its authenticity. It should stand among the best books." Furthermore our great teacher R. Tsevi, Av Bet Din of Berlin, gives clear evidence that he saw the manuscript [of Besamim Rosh] which belonged to the Rosh's son. Moreover, from the content of the responsa themselves it is apparent that one of the early authorities wrote them: 1) the author cites an opinion in the name of "my teacher Rabbenu Meir"; 2) he cites an interpretation of M. Neg., ch. 2 in the name of "the gaon," who is evidently R. Hai Gaon; 3) he cites an interpretation in the name of Rabbenu Yitshaq in the Tosafot to Naz. which is not found in the Tosafot we have, as was observed by R. Yitshaq of Mollenan, who lived in the time of Bet Yosef and who had the manuscript of the Besamim Rosh in his possession; 4) what the Tosafot cited anonymously from Shev. 3a is cited in Besamim Rosh in the name of R. Yehudah b. R. Natan specifically and at greater length, in a way which explains what several later authorities found difficult in this Tosafot passage: how could Tosafot write that the leper may be shaved by a gentile, when it is explained in Lev. [13.33] that shaving must be performed by a priest? It is hard to believe that all of the foregoing was

done by a fraud; and since the Bet Yosef also says that some would permit [the shaving of a leper] by a gentile, we have no reason to regard this idea as false if it is written in the name of an earlier authority. See Melammed Lehoil no. 64³⁷ and Teshuvot Kerekh Shel Romi no. 14³⁸ who at length upholds [the authenticity of] the Besamim Rosh [since] in no. 6 the author signed himself "Asher b. Yehiel."

See also Teshuvot Maharsham, vol. 6, no. 49, who was questioned in regard to people of exalted stature who committed suicide in order to be spared pain, suffering, misery, and humiliation. He answered that anyone who does this because of [fear of] suffering is not classified as a suicide, as the Besamim Rosh said.³⁹ This view is also expressed in Teshuvot Rav Poalim, vol. 3, YD 29, where he cites "the responsum of Kerekh Shel Romi" and concludes in accord with the Besamim Rosh that if someone did this in the midst of troubles and suffering, he is not judged as a suicide.⁴⁰

From all of the above it appears that if one killed himself because of suffering and pain, it is permitted to mourn for him; however, only provided that the man who committed suicide was a religious man who obeyed the word of God. Especially in such a case there is reason to judge him favorably and assume that he did this in error. But this is not so in the case of those who learn from the gentiles that one may commit suicide for any little thing; for they have no faith that God, may He be blessed, nourishes and sustains all, nor do they admit to the immortality of the soul.

In Sh.Ar. YD 345 [:3] the law is decided that for anyone under duress, like King Saul, we withhold nothing [pertaining to proper mourning and burial] from him. See Hatam Sofer, YD no. 326;⁴¹ see also Parashat

Mordekhai no. 25-26 who wrote that if someone is found strangled in jail, it is assumed that he did not do this [to himself] out of wickedness but rather out of fear of the gentile authorities' punishment, or because he suffered beatings, or because the punishment of death would be inflicted upon him, or because he feared they would sentence him to be imprisoned in a fortress. We are required to mourn for him and to say Kaddish.⁴² See also Lehem Yehudah who wrote that one who kills himself because he is afraid to suffer severe afflictions is not called a suicide.

Thus from all the above we learn that especially in the present case, where they will undoubtedly torture him as in the case of King Saul, and the oppressors, may their names be blotted out, will inflict awful sufferings upon him, it appears that he is permitted to commit suicide.⁴³ However, the Hayyim Shaal no. 46 writes that he is permitted to commit suicide only due to fear that they will cause him to transgress the law, but for fear of other sufferings it is forbidden.⁴⁴ He brings proof from the Ritba's opinion mentioned above that the only [suicide] from whom we do not withhold anything [pertaining to proper mourning and burial] is one who feared they would force him to transgress the law. Look carefully at Zakhor Leavraham no. 40 as to whether one is permitted to kill himself as an expiation for his sins.⁴⁵ The majority of authorities have decided to prohibit this. Accordingly in our case, even though his reason [for suicide] is that he wants to be buried in a Jewish grave, nevertheless he is forbidden to commit suicide.

The Hatam Sofer no. 326 cites proof that it is forbidden to commit suicide in order to be saved from suffering on the basis of AZ 18a: "They found R. Hanina b. Teradyon sitting and occupying himself with

the Torah, publicly convening assemblies, and keeping a Torah scroll in his bosom. They took hold of him, wrapped him in the Torah scroll, surrounded him with bundles of twigs, and set them afire... His disciples said to him: 'Open your mouth so that the fire may enter into you [and hasten your death, putting an end to your suffering].' He said to them: 'It is better for the One who gave [life] to take it away, but no one should harm himself.'" There is no worse ordeal than to be burned alive, but even so R. Hanina b. Teradyon did not want to open his mouth in order to accelerate his death. Consequently it is forbidden to commit suicide in order to be saved from suffering.

However, it is possible to maintain that R. Hanina b. Teradyon was extremely stringent with himself owing to the strict standard of the righteous, but really in a case like ours the man would not be called a suicide. King Saul proves this, for he fell on his spear to hasten his death before the Philistines could seize him. Therefore it might be that in the present case the man is permitted to commit suicide, and we do not withhold anything from him.

Still it seems to me that to publicize as a definitive legal ruling that in our case the man is permitted to commit suicide, is certainly forbidden. For this might give aid to the wicked oppressors who often have complained that these Jews do not commit suicide as did the Jews of Berlin.⁴⁶ A thing like this constitutes a profanation of God's name, as though the Jews do not trust in His lovingkindness and are not sure that He will save them from the defiled and accursed hands of the oppressors, may their names be blotted out. This is exactly the murderers' wish: to create a pandemonium of despair among the Jews in order to uproot from their hearts all hope or expectation of God's

salvation.

Indeed it should be emphasized here with pride that there were no incidents of suicide in the Kovno ghetto except for three people whose spirit gave out.⁴⁷ But the rest of the inhabitants of the ghetto believed with perfect faith that God would not forsake His people but would say to the killer, "Enough!" All of them believed in the coming of the Messiah, and every day they waited for him to come.

[Efrayim Oshry

Teshuvot Mimaamaqim, vol. 1, no. 6]

Notes

Responsum 10

1. See Lucy Dawidowicz, The War Against the Jews (New York: Holt, Rinehart, Winston, 1975), p. 173: "Among some Jews who had staked their whole existence on identity with Germany, despair led to suicide." Between 1932 and 1934 the Jewish suicide rate in Germany was 50% higher than in the rest of the population. The rabbinate of Cologne, together with the local Gemeinde (a communal organization based on religious association), issued a public appeal to the Jews of Cologne: "Maintain your courage and will to live, preserve your confidence in God and in yourself!" In the aftermath of Kristallnacht (9-10 November 1938), Dawidowicz writes (p. 196) that suicides accounted for more than half the Jewish burials in Germany. (However, she cites no documentary proof for this assertion.) This phenomenon bears a marked contrast to the response of Polish Jewry. While in Germany the Jews had played an important part in all spheres of life and regarded themselves as part of the German nation, the Jewish community of Poland (and Lithuania, where the present resp. originated) was generally much less assimilated and more religious in character. H.J. Zimmels, The Echo of the Holocaust in Rabbinic Literature (New York: Ktav, 1977), p. 85, writes that the Jews of Poland, although their misfortune was in some ways greater than that of the German Jews, possessed a "strength drawn from resources inherent in their nature." Whatever the explanation, many witnesses have testified to the low incidence of suicides among the Jews of Poland and Russia as well. The statistical department of the Warsaw Judenrat reported that the suicide rate in 1940-42 was only two-thirds of what it was in 1939. Diarists Emmanuel

Ringelblum and Chaim Kaplan both noted the low number of suicides. Ringelblum credited Jewish communal leaders for their role in preventing mass hysteria and despair. Kaplan (Warsaw Diary [New York: Collier, 1965], p. 131), attributed the phenomenon to the "indigenous nature of Polish Jewry, which is rooted in our eternal tradition that commands us to live." Of R. Oshry's own community in Kovno, where the present resp. was written, Aeltestenrat member Leib Garfunkel wrote that there were hardly any suicides. He corroborates the figure reported by R. Oshry at the end of the resp.: "Except for the very last days, there were no more than two or three suicides of Jews" (quoted in Irving Rosenbaum, The Holocaust and Halakhah [New York: Ktav, 1976], p. 39).

2. Par. 2, Mahariv (114). In the original text R. Oshry mistakenly cites Maharil.

3. In current edition, Asifat dinim, maarekhet avelut 123. Sedei Hemed cites one authority's view that the warning must be explicit: "[Suicide] is a great sin [as Scripture says], 'Surely your blood of your lives will I require,' and we do not do such a thing." If he is not so warned, he is not judged a suicide. Sedei Hemed concedes, however, that the great halakhic authorities do not mention this stipulation.

4. The reference is incorrect as cited.

5. One may not make himself clean while touching an unclean object; likewise one cannot repent with the intention of committing suicide. The idiom here is occasionally used in rabbinic literature to denote a hypocrite.

6. See 2 Sam. 15-17, where Ahitofel's rebellion and subsequent suicide are reported. In the text of the resp. below, R. Oshry argues that the sin

for which Ahitofel was excluded from the world to come was not suicide but rebellion against King David.

7. "... For a person does not sin unless seized by madness" (Torah portion Vayyiqra, p. 36).

8. The Radbaz points out that this is an apparent contradiction: we are not supposed to mourn the suicide, and yet in some ways we do. According to Kesef Mishneh, the principle is that we do only that which entails respect for the living relatives, but nothing else. Apparently, he adds, Rambam did not consider mourning a mark of respect for the living.

9. Ramban argues that the requirements to recite the mourners' benediction and to stand in the line of consolation for a suicide signify that we should indeed mourn in such a case. In order to reject this view, Lehem Mishneh cites a precedent for the Rambam's implication that mourning does not involve respect for the living-- see Sanh. 47b.

10. Hil. Avelut, section 51.

11. At the same time, Hatam Sofer suggests that the disgrace of the suicide should not be suffered by the members of his family also. If there is danger of this, "Mourning may be permitted ab initio even if it is obvious that the deceased was a suicide."

12. In discussing the case of a man who attempted suicide and eventually died, the author raises the issue of whether the death of a suicide expiates his sin, as in the case of one executed by the ruling power. If this were so, then he would have a share in the world to come, obviating the need to mourn him. But the suicide has no share in the world to come; his death is not his expiation. Consequently it would appear that he may be mourned, as the Ramban contends. Still, the law is according

to the Rambam and Sh.Ar.

13. "Although we do not occupy ourselves with them-- that is, we do not remove [the shoes] or eulogize [them]-- still these [restrictions] do not apply to the matter of burial and shrouds."

14. The mishnah there states: "They did not bury [the executed criminal] in the burial places of his ancestors; rather, two burial places were prepared by the bet din, one for those who were decapitated or strangled, and the other for those who were stoned or burned."

15. See resp. 6, note 3.

16. The resp. concerns a man guilty of adultery who as an act of repentance drowned himself in a river in compliance with one of the four forms of capital punishment, strangulation. The author does not restrict the mourning and burial procedure in this case only because the man drowned himself to repent for his transgression.

17. See 1 Sam.31.3-4: "And the battle went sore against Saul, and the archers overtook him; and he was in great anguish by reason of the archers. Then said Saul to his armour-bearer: 'Draw thy sword and thrust me through therewith; lest these uncircumcised come and thrust me through, and make a mock of me.' But his armour-bearer would not, for he was sore afraid. Therefore Saul took his sword and fell upon it."

18. The word akh in Hebrew, here meaning "surely," is a limiting particle according to hermeneutical principles of interpretation. Thus it is understood in this context to mean not "surely" but "except." In the ensuing discussion, whenever the word "surely" appears (in quotation marks), it is understood as "except," i.e., excluding the case of Saul.

19. Yekuti'el Yehudah Greenwald, Kol Bo al Avelut (New York: Feldheim, 1973), p. 319, describes the tendency of the rabbis to find mitigating circumstances to rule out the presumption of suicide: "Our sages often sought out excuses and exonerations for suicides, to such an extent that in truth there was no such thing as a suicide." See his discussion, pp. 319-20, n. 31.

20. See 2 Ki.25.7.

21. See note 30.

22. Bedeq Habayit, Tur YD 157, relates the story of a rabbi who took it upon himself to slaughter many infants in a time of persecution for fear they would be forced to transgress their religion. Another rabbi present at the time angrily called the first rabbi a murderer, but he would not relent. The second rabbi said, "If I was right in this matter, may he die a cruel death." The first rabbi was seized by the gentiles and tortured to death; later the evil decree was annulled. "Had [the first rabbi] not slaughtered the children, they might have been saved." The Bedeq Habayit might be suggesting that the example of King Saul-- who took his own life in anticipation of suffering or forced transgression-- is not necessarily a sound precedent.

23. Yev. 78b recognizes the apparent contradiction here: can justice be demanded for Saul because he was not properly mourned, yet also be demanded to punish him because he killed the Gibeonites? Yes; for Resh Laqish stated: "What is meant by the verse [Zeph.2.3], 'Seek ye the Lord, all ye humble of the earth, that have executed His ordinance'? Where there is His ordinance [i.e., God's judgment of Saul's guilt], there are also his actions [i.e., Saul's good deeds]."

24. The Rosh discusses who is and who is not a suicide. He cites Bere-shit Rabbah's exclusion of Saul from the category of suicide, and the passage (Yev. 78b; see note 23) critical of those who did not mourn Saul properly.

25. The argument that Saul feared he would be forced to transgress the law is the view of Ritba.

26. After establishing that Saul killed himself out of fear he would be tortured rather than because he feared the enemy would force him to transgress the law, Yam Shel Shelomoh continues: "All the more so is it forbidden to slaughter one's own children in time of persecution so that the enemy will not defile them by forced baptism. For a man is not allowed to harm even himself; how much the more so [is he prohibited to harm] others... Moreover, most forced converts return [to Judaism] after a few years, and often their children return." Yet there are ways to avoid the prohibition against self-inflicted death: in time of persecution, "One can set his house on fire so that he and his children will be burned [to death]. This is not considered self-inflicted death, but rather allowing oneself to be killed, which is permitted."

27. After citing the Semaq's view that Saul killed himself for fear they would cause him to transgress the law, the Bah adds: "Possibly he did not trust himself to withstand the trial," perhaps suggesting that if Saul had been more courageous he would not have killed himself.

28. Hayyim Shaal's resp. concerns the case of a Jew imprisoned by the gentile authorities for the crime of murder. He was placed in a cell by himself; several days later the guards found him hanged by the neck. Should he be judged a suicide? Hayyim Shaal responds that while ordinarily

one who is found strangled to death is not presumed a suicide (see Sh.Ar. YD 345:2) since others may have killed him, in this case the cell was locked and guarded and the man was alone there. Still, the rabbi is inclined not to judge the man as a suicide, since he may have been killed secretly, or more likely he may have done this out of fear of the gentiles' punishment. He compares this to the case of King Saul, who feared that the Philistines would torture him. "From this [it can be derived] that whoever kills himself out of fear of suffering is not a suicide." He cites several dissenting views, including Bedeq Habayit, Tur YD 157 (see note 22), but concludes with R. Oshry that Gen.9.5 means to exclude King Saul rather than censure him. Hayyim Shaal then cites the view of Kneset Hagedolah that there is still another mitigating factor in the case of King Saul (and likewise in the case of the Jew found hanged in prison): "Saul already knew he would not live any longer, for the prophet Samuel said to him [1 Sam.28.19], 'Moreover the Lord will deliver Israel also with thee into the hand of the Philistines; and tomorrow shalt thou and thy sons be with me.' But if it is doubtful whether one will die and he might yet be saved, he must not harm himself." In the present case, Hayyim Shaal concludes that proper mourning and burial should not be withheld from the hanged man. But it appears to him that in principle suicide is not permitted unless there is reason to fear that one will be forced to transgress the law. See text of resp. below.

29. "Three things deprive a man of his senses and of the knowledge of his Creator: idolators, an evil spirit, and oppressive poverty."

30. Ket. 33b suggests that lashing may be a more severe punishment than death, especially in the case of Hananiah, Mishael, and Azariyah (Dan. 3.13-30), since their beating might have had no limit (whereas the number

of lashes inflicted by the bet din is limited to 40). The question implies that had the three men been subjected to such torture, they might not have had the strength to resist Nebuchadnezzar's order to commit idolatry in public.

31. For this act they were not condemned; rather the gemara applies to them the verse (Ps.44.23), "For Thy sake we are killed all the day long; we are counted as sheep for the slaughter." Thus the boys are not judged as suicides. Tosafot compare this case to that of Hananiah, Mishael, and Azariyah (see note 30). Just as the three men might have faltered under torture, so the boys mentioned in Git. 57b drowned themselves rather than suffer torture at the hands of their captors, which might have led them to transgress the law.

32. See 2 Kl.25.7.

33. The exact text from BB 8b: "R. Yohanan said [in his interpretation of Jer.15.2]: The sword is worse than death... famine is harder than the sword... captivity is harder than all, because it includes all afflictions." Captors can inflict on their captives any suffering they wish.

34. Har Evel cites the example of R. Hanina b. Teradyon (AZ 18a), who while undergoing death by fire refused to hasten his death. According to Har Evel, this proves that "even on account of severe suffering it is forbidden to commit suicide; even if one knows for certain that he will undergo such suffering, [suicide] is forbidden." In the text of the resp. below, R. Oshry is inclined to see R. Hanina b. Teradyon's martyrdom as an example of extreme piety rather than as a standard of conduct. With respect to the view of Tosafot, Git. 57b that one may indeed kill oneself to avoid suffering (see note 31), Har Evel contends that this refers only

to those who fear that suffering will induce them "to hearken to the counsel of the wicked seducer." Finally, he notes that some consider the Rosh's signature to be a forgery (see note 35).

35. According to Encyclopedia Judaica (Jerusalem: Keter, 1971), vol. 4:663, the author of Teshuvot Besamim Rosh was Saul b. Tsevi Hirsch Levin Berlin (1740-1794). First published in 1793, Besamim Rosh contains 392 responsa supposedly written by the Rosh and prepared for publication by R. Yitshaq di Molina. "Although Berlin maintained that he had copied the book from a manuscript in Italy... it soon became evident that the statements attributed to [R.] Asher and the other rabbis quoted were full of strange leniencies..." These "leniencies" with respect to suicide are precisely the issue here. However, R. Oshry argues that the Besamim Rosh is authentic.

36. Pithei Teshuvah cites the opinion of Besamim Rosh and the objections of Har Evel (note 34) and Hatam Sofer that it is a forgery.

37. As an example of the "great authorities of their generation," Melamed Lehoil cites the Besamim Rosh "in the name of the Rosh." Whether or not he believed that the Rosh really wrote it, he evidently regarded it as authoritative.

38. The resp. concerns the case of a religious man who due to misfortune and shame lost his mind and faith and was found dead with his prayer book opened to the confession (viddui). It was suspected that he drank poison. Clearly, in accord with Besamim Rosh, such a death does not meet the criterion of willful suicide.

39. In support of this opinion he cites Parashat Mordekhai (see note 42).

40. Rav Poalim is asked: May one recite Kaddish and light a yartzeit candle each year in memory of a suicide? He cites the examples of Saul, Zedekiah, and Ahitofel, who in the certain knowledge of imminent death killed themselves yet were not denied the world to come for doing so. He then quotes Teshuvot Kerekh shel Romi (see note 38): "Without doubt the legal criteria of a suicide are rarely met, since the act must fulfill these conditions: 1) that he explicitly says he is going up [to the roof to jump off] or to do something similar; 2) that he goes up immediately and falls from there; 3) that when he goes up, he is angry or depressed; 4) that it is certain he did not repent at all. After all of these conditions, we would add a fifth: that it is certain he was neither troubled nor distressed, in accordance with the Besamim Rosh." However, Rav Poalim does not accept this view.

41. Unlike other major authorities, Hatam Sofer describes suicide as murder. Moreover, he does not consider despair or suffering a form of duress severe enough to excuse suicide. Thus his opinion does not appear to support R. Oshry's lenient decision given in text below.

42. In the case of King Saul, Parashat Mordekhai argues that one who kills himself out of fear of torture and humiliation cannot be said to have done so willfully. Under such circumstances, he may have lost his mind. "He could not be called wicked because of this." In the case of the man found strangled in jail, "He may have thought he was allowed to commit suicide to save himself from suffering. Not everyone knows the law."

43. Note that the sources upon which R. Oshry relies throughout the resp. to permit suicide under duress address the question of how to judge the suicide after the fact-- that is, with respect to mourning and burial.

They do not appear to warrant advance permission to commit suicide, as required in the present case.

44. Hayyim Shaal's decision is not as categorical as that; he also introduces several mitigating factors and more lenient opinions (see note 28). In the case presented to him, concerning a man found hanged in prison, Hayyim Shaal ruled that the man should not be judged a suicide even though there is no evidence that he feared he would be compelled to transgress the law. Rather it is apparent that the man feared the suffering the gentiles would inflict upon him.

45. Page 41a, par. 19. Most authorities cited here prohibit killing oneself to expiate one's sins; at the same time, they do not appear to classify such an act as a willful suicide. Cf. note 16.

46. See note 1.

47. See note 1.

Responsum 11

The law concerning the wording of the benediction recited when sanctifying the name of God

Question: O that my head were water and my eyes a fountain of tears [that I might weep] for the slain of my people who were killed, slaughtered, and burned for the sanctification of God's great name by the wicked Germans (may their names be blotted out). When I remember "The Black Day"--- as the Jews of the Kovno ghetto called that bitter day, 8 Marheshvan 5702 [29 October 1941]¹--- my heart and soul dissolve within me for the murder of men, women, and children, the old with the young, infants in their nurses' arms, all destroyed by the merciless enemy who killed without pity and drank his full of the blood of the innocent, pure, and holy.

On that day the accursed Nazis issued the command that all of the inhabitants of the ghetto without exception must assemble at the Demokratia Platz in the ghetto for an inspection by the Germans. Whoever did not comply with this order and remained in his home would be put to death. One cannot imagine or describe the magnitude of terror and fright that seized the Jews of the ghetto. They all knew that on this day their fate would be decided for evil or for good. All of them would pass before the inspection of the tormentors, and the murderers' anger would determine their sentence, to live or to die.

The ghetto dwellings were emptied of their inhabitants. Parents carrying their small children, sons supporting their elderly fathers who walked

with canes, the sick and the feeble borne by their families--- all of them went weeping to the place of horrors. Sounds of crying, wailing, and lamentation rent the air. I cannot describe the sounds of despair, agony and grief that were heard everywhere. We did not know what our end would be, but we knew we had been condemned to perish.

It was a stormy day and rain and ice slashed down together from the sky, as if those who dwell in the high heavens, the angels and servants of God Almighty, were also terrified and confounded, asking one another: "Where is God? Where? Lord, have mercy on the remnant of the flock of your pasture, carried off to slaughter like sheep!"

So did they gather at this site, all of the inhabitants of the ghetto, then numbering about 30,000. They awaited the appearance of one of the German murderers, one known to be particularly loathesome by the name of Rauke, the Gestapo's selector.² In his hands was the fate of all the Jews of the ghetto, like clay in the hands of the potter. He could give life or inflict death as he wished.

Amid this assembly I was approached by R. Eliyahu of Warsaw (may God avenge his blood), one of the survivors who escaped from Warsaw to Lithuania to seek refuge for himself, only to fall from one trap into another even worse, since the defiled hand of the Nazis, who had said they would destroy Israel, had also reached Lithuania. Since he well knew the way of these wicked ones, he knew that a large portion of those assembled at this place would perish and not have the good fortune to see the light of life upon the earth, for tomorrow at this time thousands would be taken to be killed. He asked me: "What is the proper wording of the benediction that those who sanctify God's name are required to recite? Should they say before their death '... who hast

sanctified us by His commandments and commanded us concerning the sanctification of the Name' [al qiddush hashem]? Or should they say: '... who hast sanctified us by His commandments and commanded us to sanctify the Name' [leqaddesh et hashem]?" He told me that he wanted to know for himself how to bless, if God forbid he should need to, and in addition to this he wanted to fulfill a mitzvah, perhaps the last of his life: to pass among those condemned to death and teach them the proper thing to do should their final moment arrive, to let them have the merit of pronouncing the benediction according to the law.

Answer: Sefer Yosef Omets no. 383 quotes the wording of the benediction that those who sanctify God's name are required to recite, as well as the confession of our teacher R. Asher of Frankfort, who himself sanctified the Name, as follows: "'Blessed art Thou, O Lord our God, King of the universe, who hast sanctified us by His commandments and commanded us to love His glorious and awesome name, which was, is, and will be, with all our heart and soul, and to sanctify His name in public. Blessed art Thou, O Lord, who sanctifiest Thy name in public.' After this one should say 'Hear O Israel' and submit to death for the sanctification of His name."

But the Shenei Luhot Haberit, end of section 1, writes that one should bless in these words: "Blessed art Thou, O Lord... who hast sanctified us by His commandments and commanded us to sanctify His name in public," in the same way that we recite a blessing for many positive commandments when performing them. He also tells the reason why we recite "to sanctify" [leqaddesh] and not "concerning the sanctification" [al qiddush]: "As R. Yitshaq b. Eliezer wrote, for any commandment that can possibly be performed by an agent, one should recite with the word 'concerning...'; but

for a commandment which requires that one perform it himself, and which cannot possibly be performed by an agent, he should recite the word 'to...' [e.g., 'to sanctify...']." See the Rosh and the Ran who wrote that the opinion of R. Yitshaq b. Eliezer has some support in the Talmud; and they appear to agree with this opinion. They explain very well the objections raised against R. Yitshaq b. Eliezer on the basis of texts of various benedictions. Moreover, the sanctification of the Name is certainly a commandment which is performed by oneself. Therefore when performing this act one is required to recite the blessing with the word "to..." (Look carefully at the Shenei Luhot Haberit.)³

See Pithei Teshuvah, Sh.Ar. YD 157:6 who quotes the Shenei Luhot Haberit that one should bless with this wording. I found also that Reqanatî (no. 70) agrees with the Shenei Luhot Haberit.⁴ According to the Roqeah, who holds that in regard to anything the descendants of Noah [i.e., gentiles] are commanded, we need not recite a blessing, whether or not gentiles are commanded to sanctify the Name depends on the controversy among the great sages Rashi, Tosafot, and Rambam.⁵

On the basis of all this I gave him the decision that in my opinion one should bless according to the Shenei Luhot Haberit: "Blessed art Thou, O Lord... who hast sanctified us by His commandments and commanded us to sanctify [leqaddesh] His name in public." This in my view was the proper blessing.

This saintly man R. Eliyahu (may God avenge his blood) repeated over and over this wording of the benediction, and he taught it also to other Jews so that they would know how to bless when their time arrived, God forbid, to die a martyr's death.⁶

After a while this saintly man came to me again and told me that the

great R. Elhanan Wasserman (may God avenge his blood) also taught his son, the great R. Naftali (may God avenge his blood), who was also there, the wording of the benediction according to the Shenei Luhot Haberit. R. Elhanan told R. Naftali this in the name of our master the Hafets Hayyim of blessed memory.

I also heard from the Hafets Hayyim's grandson, R. Yehoshua Levinson (may God avenge his blood) who was also in the ghetto, that he heard this from the Hafets Hayyim when the latter was in Russia during World War I while gangs of murderers-- Petlyura's,⁷ Makhno's,⁸ and others-- were running wild there: one should recite the benediction according to the wording of the Shenei Luhot Haberit.

[Efrayim Oshry

Teshuvot Mimaamaqim, vol. 2, no. 4]

Notes

Responsum 11

1. See note 2.
2. SS Hauptscharfuhrer Rauke, RSHA (Reichssicherheitshauptamt, Reich Security Main Office) specialist in Jewish affairs. On 25 October he had "politely" explained to the Kovno Judenrat that those Jews incapable of heavy work would be moved to the "small ghetto" by the Germans. According to H.J. Zimmels, The Echo of the Holocaust in Rabbinic Literature (New York: Ktav, 1977), p. 50, Rauke told them he "would like to get to know the inmates of the ghetto 'face to face'." On 26 October notices were posted that on Tuesday, 28 October at 6:00 a.m., the entire ghetto population was to assemble for a mass roll call at the Demokratia Platz. "Small families and young people were directed rightward, large families and older people leftward. The procession lasted all day. Nearly 10,000 people were segregated and sent for the night into the desolate small ghetto. The next day they were marched out in columns to the Ninth Fort and shot." See Lucy Dawidowicz, The War Against the Jews (New York: Holt, Rinehart, Winston, 1975), pp. 282-83; and the account of eyewitness Dr. Aharon Peretz in Gideon Hausner, Justice in Jerusalem (New York: Holocaust Library, 1966), pp. 330-31.
3. In Shaar Otiyyot no. 44, Shenei Luhot Haberit defines the act of sanctifying the Name as follows: "When a Muslim [i.e., gentile] intends to cause a Jew to transgress the law in public-- that is, in the presence of ten Jews-- the Jew must suffer death rather than transgress." However, he goes on to say that ten Jews need not actually be present; the phrase

[Lev.22.32], "[And I will be sanctified] among the children of Israel," indicates that even if the Jews merely know of the matter, whether they are actually present or not, a Jew must suffer death rather than transgress. Shenei Luhot Haberit rejects Rabbenu Tam's classification of the benedictions, according to which all those commandments requiring a physical action are blessed with the word "concerning..."-- e.g., "concerning the reading of the Megillah"; "concerning immersion"; "concerning the washing of the hands," etc. He points out that many benedictions do not fall under this classification, e.g. "to lay tefillin" (not "concerning the laying of tefillin"); "to wrap oneself in the fringes"; "to sit in the sukkah," etc.

4. Reqanati's wording is ambiguous. He uses the phrase "concerning the sanctification of the Name," but it appears that he is merely stating that the sanctification of the Name is a positive commandment from the Torah, rather than specifying the proper wording for the benediction. The former is the Shenei Luhot Haberit's understanding (44b).

5. Rashi and Tosafot comment on Sanh. 74b, where it says: "It was asked of R. Ammi: 'Is a gentile bound to sanctify the divine Name or not?' Abaye said: 'Come and hear: The gentiles were commanded to keep seven precepts [see Sanh. 56a]. Now if they were commanded to sanctify the divine Name, there are eight.' Raba said to him: 'Those [seven] and all that pertain to them.'" Rashi explains that the question is raised as a logical consequence of the prohibition of idolatry which applies to gentiles [Sanh. 56a]. Are they then obligated to die rather than transgress this prohibition; i.e., must they sanctify God's name? As Rashi interprets Raba's reply, the sanctification of the Name is incumbent

upon gentiles: "If a gentile is told to transgress or die, and he does not sanctify the Name, then he has transgressed." The Tosafot also agree that gentiles are obligated to sanctify God's name. Rambam, *Sefer Hamitsvot*, Mitsvot aseh 9, also appears to subscribe to this view.

6. The Kovno ghetto was not the only place where pious Jews were concerned about memorizing this benediction. According to Meir Dworzecki, "The Day-to-Day Stand of the Jews," The Catastrophe of European Jewry (Jerusalem: Yad Vashem, 1976), p. 385, "In the Vilna ghetto a group of girls carried with them their prayer books into which they had written, on the page before the first, the 'Kiddush Hashem [sanctification of the Name] Blessing.'" The concern with the proper wording of the benediction may be seen as part of a larger phenomenon among pious Jews under the impact of Nazi persecution. When death was certain, many victims believed their last act of freedom was to choose the manner of their death; that is, to choose between "going to one's death degraded and dejected as apposed to confronting death with an inner peace, nobility, upright stance, without lament and cringing to the enemy. This new option became... another attribute to kiddush hashem [sanctification of the Name] during the Holocaust." From Peter Schindler, "Responses of Hassidic Leaders and Hassidim during the Holocaust," Ph.D. dissertation, New York Univ., 1972, p. 137.

7. Simon Petlyura was a Ukrainian nationalist leader held responsible for not stopping the wave of pogroms which engulfed Jews in the Ukraine, 1919-20.

8. Nestor Makhno was a commander of one of the bands of peasants (atamans) responsible for pogroms in 40 communities and the deaths of about 6,000 Jews in the summer of 1919.

Responsum 12

Concerning the martyrs' clothes which the murderers stripped from them before their death: is it permitted to make use of these clothes?

Question: After that bitter day, 8 Marheshvan 5702 [29 October 1941],¹ the day of fearful slaughter when the German head executioner for the seed of Amalek slaughtered some 10,000 of our holy martyrs in the Ninth Fort²--- the valley of slaughter of Kovno Jewry--- I was approached by R. Eliyahu Zhidikov, may God avenge his blood. He was one of the forced laborers in the work detail called the "Jordan Brigade,"³ and he told me that in the place where they worked at the Ninth Fort, there was a warehouse of clothes which the Germans had stripped from the martyrs before murdering them. The pockets of these clothes were filled with personal letters, photographs, and other small possessions usually found in people's pockets; so there was no doubt that they were the clothes of those who had been killed. This was not all. Many [of the forced laborers] found among the photographs pictures of their own beloved relatives: a brother recognized his own brother's photograph; a son recognized his mother's. Yet there were no blood stains on the clothes, proving that the murderers stripped the victims of their clothes before killing them. R. Eliyahu asked me if it was permitted to use these clothes.

Answer: In the Bah's Teshuvot Hayeshenot no. 112 he renders a decision concerning a garment which the gentiles had stripped from a dead [Jew's] body and then sold.⁴ The dead man's heirs redeemed the garment from the

purchaser. The Bah concludes that this garment is prohibited for any use, indicating that the basic reason is because the gentiles had stripped the garment from the body after the man died. However, had they stripped him of the garment before he died, then clearly it would be permitted to use it.

Therefore in the present case where the murderers stripped off the victims' clothing before killing them, and there is no sign of blood on these clothes, certainly the clothes may be used. Moreover, one survivor who by God's mercy managed to slip away from the ranks of the murdered reported that the Germans ordered them all to take off their clothes before they killed them.⁵ Consequently the law that a dead man's clothes are prohibited for any use does not apply to these clothes.

In Sanh. 47b we read: "It has been said, 'If one wove a shroud for a dead person': Abaye says [the shroud] is prohibited [to be used for any other purpose]; Raba says it is permitted. Abaye says it is prohibited [because] designation [for the dead] is decisive [i.e., as though it had been employed for the purpose]; Raba says it is permitted [because] designation is not decisive."

In Sanh. 48a we read: "Come and hear: If one hews a grave for his [dead] father and then goes and buries him elsewhere, he [himself] may never be buried there. In this case it is out of respect for his father. This too is plausible, for the last part of the passage teaches: R. Shimon b. Gamaliel said, 'Even if one hews stones [for a tomb] for his father, but goes and buries him elsewhere, he [himself] may never be buried with the stones.' Now if you say that this is out of respect for his father, that is correct. But if you say that this is because of [the stones'] designation, who would say that yarn spun for weaving [a shroud

is forbidden]?"⁶

It is decided in Sh.Ar. YD 364:7: "If one hews a grave for his father and then buries him elsewhere, he [himself] may never be buried there out of respect for his father. But it is permissible for another person to be buried there, in accord with the first tanna's view that only the one who hews the grave for his father [may not himself be buried in it]. There are some authorities who decide in accord with R. Shimon b. Gamaliel that if one hews stones for [a tomb for] his father [but buries him elsewhere], he [himself] may not be buried with the stones.

In Shivat Tsiyyon no. 58 I noted the ruling concerning someone who designated a gravestone to be placed on his father's grave but did not succeed in transporting it to the gravesite.⁷ [The Shivat Tsiyyon] ruled that the gravestone may not be used for any other purpose out of respect for the father. He concludes that this applies all the more so to clothes in which they dressed the father for burial but in which he was not actually buried. They are prohibited for any use out of respect for the father.

The Birkei Yosef to YD 349:5 wrote about a case where they had wrapped a dead body in burial shrouds, but out of fear of the gentiles they removed the shrouds. Was it permitted to use these shrouds for another dead body? He indicates that it is permitted to use them only for another dead body; but it is prohibited for the living to use them.

Apparently, then, in our case as well these clothes should be prohibited for any use. [Our case] is [apparently] similar to that of the man who hewed stones for his father's grave, in regard to which some authorities decided according to R. Shimon b. Gamaliel; it is [apparently] similar to the Shivat Tsiyyon's case [in which he ruled] that the monument which

the man designated for his father's grave is prohibited for any use; and it is [apparently] similar to the Birkei Yosef's case [in which he ruled] that the burial shrouds are permitted only to another dead person, but not to the living.

However, our case does not appear to resemble these at all. In these cases they decide in accord with R. Shimon b. Gamaliel only out of respect for one's [dead] father; but this applies only in normal times when the world goes on as usual. Our question, however, arose in a time of emergency, when outside the sword destroyed and in the rooms there was terror [Dt.32.25]; when through us the Scriptural verse [Lam.4.9] was fulfilled-- "They that are slain by the sword are better off than they that are slain by hunger," misery and want; when the ghetto prisoners had no coats to wrap their bodies in so that they would not suffer from the severe cold and frost. Surely these martyrs who were killed for the sanctification of the Name would not mind if those who remained alive were to use these clothes in order to be saved from the terrible cold and avoid freezing from the frost. In fact, without any doubt it would give them great satisfaction that their children, their own descendants, will use these clothes to warm their bodies. Also, if other Jews who are not related to them were to use these clothes, without a doubt these innocent martyrs would not mind, as said previously. For this reason the Shivat Tsiyyon's ruling, concerning the man who designated a monument for his father's grave, obviously has no relevance to the present case.

Nor does the Birkei Yosef's ruling have any relevance to the question we are considering. For in that case the burial shrouds were already designated for the purpose of burying the dead person, and moreover they had wrapped the corpse in the shrouds. Therefore the shrouds are clearly

prohibited for the use of any living person. But in our case the clothes of these martyrs were never designated for the purpose of burial. Just because these martyrs were wearing these clothes when the Germans slaughtered them is no reason to prohibit [the clothes on the basis of designation]. For as is known, it was the custom of the accursed wicked ones to hide their true intention from their innocent victims. Until the last moment the martyrs did not know that they were condemned to death. They still hoped for divine mercy, as our sages of blessed memory taught us [cf. Ber. 10a]: Even if a sharp sword rests on a man's neck, he should not give up hope of mercy. It is also known that the Germans' procedure was to strip the condemned victims of their clothes before they slaughtered them. Therefore these clothes should certainly not be prohibited, for they were never designated for the purpose of burying the martyrs. In this case there was no designation for the dead. See my book Teshuvot Mimaamaqim, vol. 1, no. 3.⁸

This is similar to what the Pithei Teshuvah wrote, Sh.Ar. YD 363 note 6: If they placed a corpse in a coffin that was the wrong size, the coffin may be used again.⁹ Since the coffin was the wrong size, it is not prohibited because it is not proper for the corpse to be buried in it. So also in our case, these clothes could never be considered proper for the burial of these martyrs because of the Germans' order that they remove their clothes before their murder, as already described.

For the same reason, neither is the case cited in Teshuvot Arugat Habosem YD no. 249 similar [to ours]. A man was killed without his clothes; must his clothes and shoes be buried, even those with no blood on them? The author cites the Shakh's opinion, YD 364 [note 11], that these articles should be buried since their status is doubtful.¹⁰

However, this applies only ab initio.¹¹ In any event the articles are prohibited for any use.

But this case is not at all similar to ours, for it is said there that the man was killed while wearing his clothes, and only after he died did they take his clothes off. Therefore the Shakh was correct in ruling that because their status is doubtful, the clothes require a grave; in any event they are prohibited for any use. However, in our case the clothes were not on the victims when they were killed by order of the enemies, may their names be blotted out. Therefore it is not only certain that the clothes need no grave, but also that it is permitted to use them.

In Teshuvah Meahavah, vol. 1, no. 165, a question is asked concerning a coffin that was made for the purpose of burial but was too small to hold the body for which it was constructed. Was it permitted to use this coffin for another body? The author gave his permission.¹² Even though the first body had already been laid inside this coffin with difficulty, still it is permitted to use it again for another body. However, in Har Evel, p. 19, the objection is raised that since this coffin had been designated for this body, and since they had also placed this body inside it, although only temporarily, the coffin is prohibited for any use since it had been constructed and designated for this body. The Har Evel points out what the Ran wrote in the name of R. Ahai of blessed memory at the end of ch. Nigmar hadin [Sanh., ch. 6].¹³

This case cannot be compared to ours either. For the body was already in the coffin where they had placed it temporarily, and for this reason the Har Evel maintains that it is forbidden to use the coffin. But this is not the case in the matter we are considering, for the clothes were never on the martyred victims after their death. Under these circumstances

everyone agrees that it is permitted to use the clothes.

The conclusion is that these clothes may be used by the survivors of the flaming sword which turned every way, not only by the descendants of the innocent martyrs who suffered death for the sanctification of the Name, but also by other Jews.¹⁴ For surely the innocent martyrs would not resent this. In fact this would bring them great contentment in the world of truth; and their holy souls, bound up in the bond of life, would rejoice in heaven to see that their wretched brothers, who are given over to misfortune and captivity, are covered and protected by these same clothes which protected them when they were alive.

O God to whom vengeance belongeth, O God to whom vengeance belongeth, may He come forth to recompense the wicked who crushed His people and violated His inheritance, who killed the pious and upright and murdered the innocent and pure. May our eyes behold His judgment of the nations which are filled with dead bodies and viper's venom. May He crush the seed of Amalek and bring upon him his own iniquity; may He cut him off in his own wickedness. May He persecute him and destroy him in anger from under the heavens of the Lord.

[Efrayim Oshry

Teshuvot Mimaamaqim, vol. 2, no. 5]

Notes

Responsum 12

1. See resp. 11, note 2.
2. The "Ninth Fort" outside Kovno was originally part of the massive fortress system dating back to the Russian tsars. Altogether some 45,000 people were shot there by the Nazis. See H.J. Zimmels, The Echo of the Holocaust in Rabbinic Literature (New York: Ktav, 1977), p. 87 n.
3. See resp. 8, note 1.
4. The Bah explains that in this case the distinction between "before his death" and "after his death" involves the man's consent. Had the man stipulated in advance that his heirs could use his clothes for their benefit, even though without his clothes his corpse would be demeaned, then the clothes might be used. In this case, however, he did not give his consent; the garments were removed after his death. Therefore their gainful use is prohibited.
5. The procedure of stripping the victims of their clothes was not merely expedient. It was a calculated method of reducing the victims' will and ability to resist. One survivor of the ordeal writes, "Today when so many ask why all of the Jews... did not simply hurl themselves with bare hands at the Germans, I want to say only one thing: there is no better method of depriving people of their last measure of human dignity than to undress them completely..." (Deposition by Liuba Daniel, Nov. 1965, Yad Vashem Oral History Document 2568/74, quoted in Raul Hilberg, ed., Documents of Destruction [Chicago: Quadrangle, 1971], p. 226.)
6. Though it may eventually be woven into a shroud, when yarn is spun it

is not prohibited since as mere yarn it is useless for this purpose. Likewise when stones are prepared for building a tomb, they should not be prohibited.

7. Initially the son could not transport the gravestone due to the distance from his father's grave. After several years had elapsed he could no longer locate his father's grave and therefore kept the gravestone at home. Then he died, and his children wanted to use this same monument for his grave even though his own father's name would have to be erased. The Shivat Tsiyyon rules that the gravestone should not be used either for the son's burial or for any other purpose. It was originally designated for the son's father, and the children are obligated to honor their grandfather as well as their father. However, he admits that there are other opinions on this matter, and there may be grounds for leniency.

8. On 21 September 1941 (the eve of Rosh Hashanah), one month before the date of the present resp., the Nazis killed two Jewish men. Then they forced other Jews in the ghetto to dig a pit to bury the dead and to strip the two bodies of their outer garments. These clothes were not blood-stained. R. Oshry is asked if the clothes may be used. The law (Sh.Ar. YD 364:4) dictates that a Jew who evidently suffered a violent death should be buried in his clothing exactly as he is found, for the blood of the deceased must be buried with him. Since the victim died by violence, his clothes, shoes, and the earth beneath him may have soaked up blood. All of these must be buried. But in this case there is no trace of blood on the outer garments. As far as the prohibition against utilizing property designated for the dead, R. Oshry asserts that the dead would not object if these garments were to be used to warm the bodies of their

children; on the contrary, they would be honored. He also discusses some of the same sources cited in the present resp., e.g., Shivat Tsiyyon no. 58, Birkei Yosef, YD 349:5.

9. Pithei Teshuvah bases his view on a case recorded in Teshuvot Teshuvah Meahavah, vol. 1, no. 164 (see note 12). He mentions, however, that there are dissenting opinions.

10. Arugat Habosam cites the Shakh that if a corpse is found with no sign of blood, "They should not even remove his shoes, lest the blood that goes forth with the life is inside the shoes." Arugat Habosam interprets this to mean that even if it appears from the outside that there is no blood, it may be that it is simply not visible.

11. If the shoes have already been removed and there is no sign of blood, the clothes need not be buried. However, ab initio they should not be inspected but simply buried with the corpse.

12. See also no. 164, where the question is posed. Teshuvah Meahavah replies that in this case the coffin has served only as a bier. He cites Sh.Ar. YD 349:3 that garments thrown upon the corpse by the parents (as an expression of grief) are not prohibited since they are not intended for burial with the dead (see Sanh. 48a-b). The Shakh includes the bier in the same category. However, see Sanh. 48b where it is reported that the custom was to bury the bier with the body.

13. On the authority of R. Ahai, the Ran states that whether designation for the dead is permanent or temporary, it prohibits an article from further use. Thus even though the body rested in the ill-fitting coffin only temporarily, that interval was sufficient to render the coffin prohibited.

14. Nachman Blumental, "Magical Thinking among the Jews during the Nazi Occupation," Yad Vashem Studies (Jerusalem, 1963), vol. 5, pp. 232-33, writes that as a rule "the residents of the ghetto were fearful of purchasing and wearing the clothing of those who had already been transported." A survivor relates that after the transports from the Warsaw ghetto in the summer of 1942, "The survivors believed that all those who wore the clothing of the dead Jews would suffer a similar fate. The dead drew to themselves those who wore their clothes." The question asked of R. Oshry and his reply suggest a different attitude.

Responsum 13

Whether in the ghetto it is permitted to recite, as part of the morning prayer, the benediction: "[Blessed art Thou, O Lord...] who hast not made me a slave"

Question: The utterance of the valley of slaughter and the vale of tears, bound in affliction and iron, in darkness and death shadow, in the Kovno ghetto in Lithuania. Who has taken this counsel against a city full of scholars and scribes who impart goodly words and delight in the everlasting law, to place their feet in stocks and their hands in chains of hard labor, to burden the weary, who are sold as destitute slaves into double servitude without wage or recompense, to the destroying oppressor, a ravening wild animal like a wolf of prey in the night or a wild lion, who crushes and beats the head and the skull, who threshes their flesh with a threshing sledge in order to do his work?

In those days of sorrow and grief when the flaming sword turned every way, morning by morning the violent German enemy passed through, by day and by night, giving no rest. It was sheer terror when it passed, announcing: Such as are for death, to death; and such as are for captivity, to captivity. For the enemy had determined utter destruction, to annihilate the people of God and to exhaust them with hard labor.

In that time the wretched contended with the Judge of all the earth: Why do You hide Your face, O Lord? Why do You hide Your face from me? I gave my back to the smiters and my cheeks to them that plucked off the hair; I hid not my face from shame and spitting.

At the time of the morning prayer, the leader of prayers R. Avraham Yosef (may God avenge his blood) would begin to recite the blessings of the morning in fear, piety, and trembling. But when he reached the benediction "[Blessed art Thou, O Lord...] who hast not made me a slave," he cried out in a bitter voice to the Lord of Lords: "How can I say this blessing when we are oppressed and imprisoned, sold not even for money but for nothing? How can a slave recite the blessing of a free man when the yoke of servitude is on his neck and the fetters of captivity upon his body? How can a slave who is trampled upon, a reproach to mankind, without bread or water but sated with gall and wormwood-- how can such a slave bless his Creator and say: '[Blessed art Thou, O Lord...] who hast not made me slave'? Would he not be laughed at and derided as a crazy lunatic who had lost his mind? It is a major principle that one must be sincere in prayer and benediction, that one's mouth and heart should be in harmony. But how can I say a benediction like this when my heart is not in it?"¹

Every day during the morning blessing the man spoke this way. Many of the other worshippers in their anguish supported him. I was then asked to give my opinion whether according to the Torah one should refrain from saying this benediction, which appears to be a lie and so should on the contrary be forbidden; or whether perhaps we should not deviate from the formula specified by the sages in the order of prayer and blessings.

Answer: This question was introduced to the great authorities previously. Abudarham discussed (s.v. "The Prisoner") whether [the captive] should recite the blessing, "... who hast not made me a slave." He wrote

that [the sages] did not institute the blessing with reference to slavery itself, which would mean that one recites the blessing because he is not required to serve as a slave like those who [really] are slaves. Rather the point of the blessing is that a Canaanite slave may not marry into the [Jewish] community and is exempt from the commandments. Therefore a Jewish prisoner is rightly obligated to recite this benediction.²

Accordingly it appears that basically the blessing was not instituted in connection with physical servitude but rather with spiritual servitude, which found expression in the form of the Canaanite slave who is not qualified [to observe the] commandments or marry into the [Jewish] community. But the Jew is obligated by the commandments; even when he is in captivity he can fulfill the commandments. If he cannot fulfill them because of duress, God exempts [from punishment] one [who sins] under duress. But he is still obligated to fulfill the commandments of the everlasting Torah, and he is called a son of the commandments. Therefore it is right for him to recite this blessing even when he is in captivity.

Therefore to those who asked me I said: God forbid that they should suspend this blessing which was instituted by the ancient fathers, our rabbis of blessed memory. On the contrary, especially at this time we are obligated to recite this blessing so that our enemies and oppressors will recognize that even though we are in their power to do with according to their evil desire, nevertheless we see ourselves as free men who are now in captivity but who are near to our salvation which is to come and our redemption which is to be revealed.

Incidentally it is worthwhile to point out here that those women who

say, "... who hast not made me a bondmaid" instead of "... who hast not made me a slave" do not act rightly. Even though for the woman the word "bondmaid" is more exact with reference to her own person, still we find in many places that the word "slave" refers also to bondmaids.³ Consequently it is not proper to deviate from the formula specified for us by the sages. See Eshel Avraham by the rabbi of Butshatsh, who discusses this at length and concludes that one should not deviate from what is printed in the prayer books. May the good Lord redeem us from our troubles; may He proclaim freedom for the prisoners and deliverance for the captives of the nations; may He bring us up to Zion with song and rebuild our holy Temple; and may there be uttered before Him a new song for our redemption and the deliverance of our souls. So may it be His will.

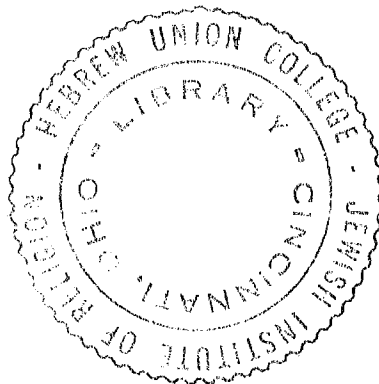
[Efrayim Oshry

Teshuvot Mimaamaqim, vol. 3, no. 6]

Notes

Responsum 13

1. Lucy Dawidowicz, The War Against the Jews (New York: Holt, Rinehart, Winston, 1975), pp. 249-50, describes similar responses of pious Jews to the tragedy which had befallen them. In a Warsaw congregation the cantor halted the closing service of Yom Kippur "saying that there was no point in praying when the gates of mercy were already locked." Hillel Zeitlin observed in 1941 that "many religious Jews... no longer wish to declare God's judgment right." Another observer concluded that "the truly pious have become even more pious... the unbelievers, in contrast, have become even more unbelieving."
2. Abudarham mentions this in the course of his discussion of the weekday Shaharit order of prayer. He writes that we recite "... who hast not made me a slave" for the following reasons: "A slave is not obligated to fulfill the positive commandments related to a specific time; a slave cannot claim the merit of our ancestors, for his ancestors did not stand on Mt. Sinai; a slave is not trustworthy-- the more slaves, the more robbery; and a slave may not marry a daughter of Israel."
3. E.g., Dt.16.12: "Thou shalt remember that thou wast a slave in Egypt..." The verse is not addressed to male Israelites only.



Responsum 14

On the law concerning whether one may save his life by means of
a baptism certificate

Question: On 1 Nisan 5702 [19 March 1942] in the Kovno ghetto I was asked if a man is permitted to save his life by acquiring a certificate of conversion to Christianity (baptism certificate) and by this means possibly escape to the forests and join the partisans.

Answer: This action is forbidden. The Rambam wrote in Sefer Hamitsvot¹ as follows: "The [ninth positive] commandment is that we must sanctify His name, and this is [derived] from what is said [Lev.22.32]: 'And I will be sanctified among the children of Israel.' The meaning of this mitzvah is that we are commanded to make known this true faith in the world, and we must not fear harm from anyone who might afflict us. Even if someone demands by force that we submit, we must not pay heed to him, but rather submit to death and not deceive him into thinking that we denied [our faith], even if in our hearts we still believed in God, may He be exalted."²

From this it appears that a person is obligated to submit to death and is forbidden to deceive the gentile into thinking that he denied, God forbid, the God of Israel, even though in his heart he still believes in God, may His name be blessed. As the Rambam wrote in his clear language: "Rather we submit to death and do not deceive him into thinking that we denied [our faith]." See Tosafot, AZ 55[a].³

In our case the whole idea of the baptism certificate is to deceive the gentiles into thinking that he too is a gentile.⁴ According to the Rambam's opinion which I have cited, this action is in the category of sanctification of the Name. It is included among [those commandments for which] one must be killed rather than transgress.

This is not similar to what the Nimmukei Yosef wrote to ch. Hagozel [BQ, ch. 10], that even though [a Jew] is forbidden to say that he is a gentile, nevertheless if the Jew's intention is to speak about something else, and at the same time he can deceive them into thinking that he is a gentile without actually saying so, then such an act is permissible.⁵ So ruled the Rema, Sh.Ar. YD 157:2: There [i.e., in the example of the Nimmukei Yosef] the logic behind the permission is that he says something which can be construed either of two ways; that is, he says something bearing two possible interpretations.⁶

However, this is not so in our case, for there is only one meaning to a baptism certificate, namely that the owner of the certificate abandoned (God forbid) the Rock from which he was hewn, and denied his people whom God chose as His treasure. This act is certainly prohibited, even though in his heart he may still believe with perfect faith in the Rock and Redeemer of Israel. In any case he is commanded to sanctify the Name, as I quoted in the name of the Rambam, and he is commanded to submit to death and not deceive the gentiles into thinking that he denied (God forbid) the God of Israel.

Look carefully at what our master Hafets Hayyim of blessed memory wrote in his book Nidhei Yisrael, ch. 7: Even if one must merely make the statement that he is not a Jew, he should submit to death, even in time of peril.⁷ All the more so is this true in our case, where even if

he acquires a baptism certificate it does not assure certain deliverance, since he might die anyway from violence or hunger even when he reaches the forests.

The conclusion of the law is that no permission whatsoever can be granted in the present case to acquire a certificate of conversion to Christianity, even if one thinks that by doing so he will succeed in saving himself. Rather he is commanded to sanctify the name of God, as it is said: "And I will be sanctified among the children of Israel."

[Efrayim Oshry

Teshuvot Mimaamaqim, vol. 1, no. 15]

Notes

Responsum 14

1. Mitsvot aseh, no. 9.
2. In his discussion of this commandment, Rambam cites the example of Hananiah, Mishael, and Azariyah (Dan.3.13-23), who alone among the Jews refused to worship the idol Nebuchadnezzar had set up. "It was a disgrace upon all Israel that this commandment [i.e., to sanctify God's name] was not observed." He goes on to cite the Sifra's statement that the Jews were redeemed from Egypt only for the purpose of sanctifying God's name in public.
3. When making wine, Jews are forbidden to tread on the grapes by walking in the pattern of a cross, since it may be inferred that they are pretending to be Christians.
4. Lit. "Jew," which makes no sense here; either it is an error or an intentional euphemism. The rabbis occasionally utilize euphemisms for enemies or anticipated misfortunes, e.g. "lovers of Israel" for their persecutors.
5. Nimmukei Yosef, Alfaz BQ 46, comments on a passage concerning the necessity of complying with the demands of the ruling power. "If the gentiles decree that anyone who is called by the name 'Jew' will be killed because he is not a heathen, a Jew is permitted to change his mode of dress to conform to theirs, since his life is in danger." He may also speak in an equivocal way which might be misunderstood. However, he may do this only "for the purpose of deceiving them; at the moment he does this he should regret" the necessity. "The prohibition [against profaning

God's name] is superseded by the danger to life." The Nimmukei Yosef then cites Ned. 62b (see resp. 16, note 4) where it is said that to avoid a punitive act, the assertion "I am a servant of fire" is permitted. To heathens, this would suggest a fire worshipper, but to a Jew it would mean that he worships the Lord, who is described as "consuming fire" in Dt.4.24. Nimmukei Yosef points out that, in contrast to such an act, the wearing of gentile clothes under duress does not require any statement at all. (Cf. Sh.Ar. YD 157:2: as long as one does not declare that he is a heathen, he may change his mode of dress.) He then recounts the incident reported in Bereshit Rabbah, Vayyishlah (to Gen.25.17): "Two disciples of R. Yehoshua changed their cloaks [to avoid recognition as Jews] at a time of persecution. A certain officer, an apostate, met them and said to them: 'If you are [the Torah's] children, offer your lives for it. If you are not its children, why should you be killed on its account?' They replied: 'We are its children, and we do suffer death for its sake' [implying that ultimately they were willing to die for the Torah, but not without first making an effort to save themselves, e.g., by disguising their identity].

6. But if there is no such danger, any such behavior is forbidden. The Baer Hetev to YD 157:2 cites the Maharshal's view that an ambiguous statement meant to mislead a persecutor may be made only by a Torah scholar, "for his mind is in heaven," but not by an ignorant person.

7. Hafets Hayyim mentions "certain men in distant lands" who do not lay tefillin for fear of being recognized as Jews. Citing Sh.Ar. YD 157:2 as proof, he contends that "even in time of extreme peril one is forbidden to say that he is a gentile, and must suffer death." However, R. Oshry does

not cite the following sentence: "But if he does not say [that he is a gentile] clearly, then provided that only the gentile is deceived, he is permitted [to do this] in time of danger." Thus the Hafets Hayyim appears to agree with Nimmugei Yosef.

Responsum 15

In a situation where one's life is in danger, is it permissible to pose as a gentile and do as they do, or is this prohibited? If [those who pose as gentiles] repent and return to the Jewish community, is it permitted to accept them without reprimand?¹

In the Kovno ghetto I was asked: 1) Is it permitted to flee to the Christian priests and pose as a gentile, outwardly doing everything they do, such as wearing the cross and attending their church? Or is one who does this professing idolatry? 2) Is a Jew permitted to flee to the gentiles and work with one of them, saying that he is a gentile and acting like one, as described above? 3) Is a Jew permitted to leave the ghetto and live outside the wall by acquiring a passport in the name of a gentile and placing his own picture inside it in order to save himself?

Comment on the question: The author of Sh.Ar., YD 157:2 wrote that it is forbidden [for a Jew] to say he is a gentile so that they will not kill him. But to change his mode of dress in a time of persecution so that they will not recognize him is permissible, since he is not actually saying that he is a gentile.² According to YD 157:3, one who is condemned to death is permitted to flee to a church and save himself. The Turei Zahav to YD 157, note 11 explains that if he does nothing active, but rather [heeds the principle] "Sit and do not act,"³ his act is merely an effort to avoid harm, and it is permitted when life is in danger.⁴

Consequently it is evident that one is permitted to escape to a church and even to work with a gentile in order to save oneself as long as [one observes the principle] "Sit and do not act." But he may not do as they do, nor may he say that he is a gentile. However, [any action in the category of] "Arise and do"⁵ such as those actions described in questions 1 and 2 [above]-- wearing the cross and so on-- is clearly forbidden.

Concerning the third question, whether it is permitted to acquire a gentile passport, one must consider: 1) the act of acquiring the passport; and 2) the act of showing it in time of trouble and saving himself by making them think he is a gentile. In Sefer Hamitsvot (mitzvah 9) the Rambam wrote as follows: "The [ninth positive] commandment is that we must sanctify His name, as Scripture says [Lev.22.32]: 'And I will be sanctified among the children of Israel.' The meaning of this mitzvah is that we are commanded to make known this true faith in the world, and we must not fear harm from anyone who might afflict us. Even if someone comes by force demanding that we submit, we must not pay heed to him but rather submit to death and not deceive him into thinking that we denied [our faith] even if in our hearts we still believed in Him, may His name be exalted."⁶ It is stated explicitly that we are obligated to submit to death, even in the case of one who believes in the Holy One, blessed be He, and would merely deceive the gentiles into thinking that he denied, God forbid, the Holy One, blessed be He. Apparently in our case, the one who acquires the passport, even though he possesses it only in order to save himself and does not profess idolatry, nevertheless is deceiving the gentiles into thinking that he has denied [his faith], God forbid. However, our case is not comparable to the Rambam's. For in the case of one who acquires a passport, the gentile [from whom he acquires it] knows that

he is not professing idolatry but simply devising a stratagem to save himself. Consequently the act of acquiring the passport is not forbidden.

However, the act of showing the passport in time of trouble would seem to be forbidden since it is comparable to what we cited from Rambam's Sefer Hamitsvot: if he shows the passport they will think he is a gentile, so by doing this he professes idolatry. In fact, the Rambam's words suggest that even without speaking, merely to make the gentiles think that one professes their religion is in all respects forbidden. Still, perhaps our case is not similar to this one at all. Otherwise the Sefer Hamitsvot passage would seem to contradict the ruling of Sh.Ar. [YD 157:2] cited earlier: if he changes his mode of dress and the like, but does not say explicitly that he is a gentile--yet the gentiles think he is-- such conduct is permissible [in time of emergency]. Consequently one must say that these two opinions are completely at odds. The Rambam argues that for the gentiles to know that he is a Jew who now professes their religion is prohibited in all respects. The prohibition involved here is not that his act constitutes a profession of idolatry, but that it does not fulfill [the commandment, Lev.22.32] "And I will be sanctified..." If the situation is such that they even think a Jew has accepted idolatry, this is a profanation of God's name. However, according to the decision of Sh.Ar., when they think he has been a gentile from birth and have no idea that he really is a Jew, the only prohibition involved is the profession of idolatry, and this would be applicable only in the event that he actively professes it. See Sifteí Kohen, YD 157 note 17, who quotes the Darkhei Mosheh in the name of Maharai⁷ as follows: "Even in time of religious persecution it is not forbidden [to dress as a gentile] unless the gentiles recognize

him and would force him to transgress. To wear clothing made like that of the gentiles is permitted; there is no profanation of the Name, because they do not know who he is." The Shakh then cites the view [Sanh. 74b] that if they force a Jew to wear such gentile clothes, then he must not change even a shoelace [of his own attire]. This accords with our own opinion. So it is possible to say that even the act of showing [the passport] is permitted as long as he does not actually say he is a gentile. Yet perhaps one could also contend that showing the passport is in itself an active deed which might be forbidden. This matter needs further study.

2.

Is there doubt [about the status of] those sinners, God forbid, who because of danger acted in the manner described above, doing as the gentiles did, and afterward returned to the Jewish community? Should they be accepted without any reprimand,⁸ rebuke, or other measures?

Comment on the question: This is what Rambam said in MT Hil. Yesodei Hatorah, ch. 5, hal. 4: "Anyone [in a circumstance] of which it is said that he should be killed rather than transgress, yet does transgress and is not killed, profanes God's name... Nevertheless, because he committed the transgression under duress, he is not lashed, and needless to say the bet din may not execute him even if he committed murder under duress. For no punishment of either lashes or execution is inflicted unless one commits a transgression willfully... Concerning adultery it is said [Dt.22.26]: 'But unto the [betrothed] maiden [who was violated]

thou shalt do nothing' [since she did not transgress willfully]."

Similarly the Rambam wrote in MT Hil. Sanhedrin, ch. 20, hal. 2 as follows: "Even though it was a commandment for the sake of which he should have been killed rather than transgress, and even though he profaned God's name, still if he was under duress he is not put to death, as it is said, 'But unto the [betrothed] maiden [who was violated] thou shalt do nothing.' This prohibits the bet din from inflicting punishment upon one [who sins] under duress." This [conclusion] is based on the discussion in AZ 54a, and it also conforms to the opinion of the Tosafot at the beginning of ch. Haba al yevimto [Yev. 53b], and with the Ribba.⁹

So we see that one who sins under duress transgresses only the positive commandment "And I will be sanctified...", even when it is his duty to be killed rather than transgress. This is explained in a resp. of the Ribash (no. 4) concerning one who committed a transgression for which he should have suffered death rather than transgress.¹⁰ Nevertheless if he is careful to observe the commandments along with other Jews, then he is a proper Jew in every respect. He transgressed only the positive commandment "And I will be sanctified..." Thus it seems to me that even with respect to the positive commandment of sanctifying the Name, one under duress is guilty only of transgressing the commandment "And I will be sanctified...", and he is considered a proper Jew.

However, one may object that the argument of the Rambam and the Ribash is that one who sins under duress is like one possessed by devils who compel him to do the thing, and he has no way of escaping it. But in our case, when he takes the passport or acts the way they do, as described above, he is no longer under absolute duress. By these acts he merely wishes to escape from danger, which no longer can be considered within the

definition of duress.

This is explained in Minhath Hinnukh (mitzvah 296): [one is exempt from punishment owing to duress] only if they forced him to practice idolatry.¹¹ But if the duress was not the idolatry itself, but merely that he wished to escape danger by practicing idolatry, then he is not exempt [from punishment] since he was not actually forced to practice idolatry. Likewise in Sh.Ar. HM 200¹² it is explained that if he chose this form of duress to escape from another form of duress, he is not considered to be under duress. Concerning the passage in Ket. [3b]¹³-- "But one should expound to them that in a case of duress it is allowed"-- see the Shittah Mequbbetset¹⁴ and the Maharsha.¹⁵

According to all of these views it appears in our case that one who of his own accord performs every action and deed in order to save himself from danger may even be penalized.

Yet in the opinion of Minhath Hinnukh [mitzvah 296, with respect to the prohibition against profaning God's name in public], the term "public" refers specifically to ten Jews; many gentiles are not termed the "public." Even if they have been forewarned about the sanctification of the Name,¹⁶ in any case gentiles are not termed the "public." Thus we see that if one is merely in the presence of gentiles, he is not in public, so obviously does not transgress the prohibition [Lev.22.32] "Thou shalt not profane." Nor does he transgress the positive commandment "And I will be sanctified," just as in [the case of a transgression committed in] private, he transgresses only the positive commandment [Dt.6.5] "Thou shalt love the Lord," which obligates one to submit to death by virtue of the injunction "Thou shalt love." Look carefully at the Minhath Hinnukh.¹⁷ As far as those who have a passport like the one mentioned above, it would only be

shown in time of need to those who ask for it. It is unlikely that ten Jews would be there. It is possible, then, that a person [who uses such a passport] should not be penalized. But all of this needs further study.

[Efrayim Oshry

Divrei Efrayim, Meemeq Habakha no. 3]

Notes

Responsum 15

1. Halakhic reprimand (nezifah) lasts seven days (see MQ 16a). While herem and niddui imply the compulsory isolation of an offender, the seven day isolation period of nezifah is voluntary, dictated by shame and remorse, and expires automatically after seven days.
2. This passage is discussed in resp. 14.
3. I.e., to abstain from performing a positive precept prescribed by the law of the Torah.
4. Turei Zahav explains that taking refuge when one's life is in danger cannot be compared to entering the church for the purpose of worship, which is clearly forbidden. In seeking refuge in a church, one is not actively professing idolatry; he is "merely avoiding harm, which is permitted when one's life is in danger."
5. I.e., to perform an action prohibited in the Torah.
6. See resp. 14, note 2.
7. Maharai cites Terumat Hadeshen 196; see resp. 16, note 2.
8. See note 1.
9. See resp. 6, note 6.
10. The Ribash writes, "If someone under duress transgresses all of the Torah's commandments-- even if he committed idolatry rather than suffering death as the law requires-- even so his testimony is not disqualified. He is considered a Jew in all respects, since he did this under duress and in the fear of death." Ribash expresses a similar view in no. 11; see resp.

19, note 4. However, while R. Oshry contends that one under duress is culpable only for transgressing the commandment [Lev.22.32] "And I will be sanctified," the Ribash states that if this person committed idolatry in the presence of ten Jews, then he also violated the prohibition [Lev. 22.32] "Thou shalt not profane my holy Name."

11. If the observance of a commandment does not cause immediate danger to one's life, yet prevents one from saving his life, the Minhag Hinnukh asserts that the commandment may not be violated. The same argument is advanced by Erekh Shai, YD 157, who seeks to distinguish between direct and indirect duress. If one is forced to commit a forbidden act against his will, he may be said to suffer duress; but if by his own volition he commits a forbidden act in order to save himself from impending danger, it is not a case of duress. Cf. resp. 19, note 9.

12. The citation is erroneous.

13. The context of this quotation in Ket. 3b is a discussion of the Romans' edict that a virgin who married on the fourth day of the week-- which is fixed by the Mishnah as the day for a virgin's marriage-- must submit to intercourse with a Roman. "One should expound to them [the women] that in a case of duress it is allowed..." and no woman is obliged to give up her life rather than submit to the forced intercourse.

14. Shittah Mequbbetset cites the view of Rabbenu Tam that the women were permitted to submit to forced intercourse with the Romans because this is not among the forbidden sexual acts which fall under the category of "One must suffer death rather than transgress." Moreover, the Tosafot maintain that the woman in this case is not actively violating a prohibition; her role is passive. Yet if a woman is dissolute and would submit to forbidden

intercourse with the Romans willingly, she cannot be said to suffer duress. This suggests the distinction the Minhath Hinnukh sought to establish (see note 11) between one who is forced to transgress a specific commandment and one who by his own volition transgresses in order to avoid danger.

15. Maharsha also discusses the possible distinction between duress and danger in this case (Ket. 3b). It may be forbidden for a woman to willingly submit to intercourse even if her life is in danger, since in this case the act of intercourse is not forced upon her directly. This issue is discussed in resp. 23, concerning Jewish women raped by the Nazis.

16. See resp. 11, note 5.

17. The "public" consists of ten adult male Jews. Minhath Hinnukh concludes that this number does not include the person who suffers the duress.

Responsum 16

[Because of the danger may a Jew write the initials "R.K." (Roemisch Katholisch) on a gentile passport so that they will think he is one of them? Or is this prohibited because he appears to profess idolatry?]

In the Kovno ghetto I was asked about the following: A Jew whose name sounded like the name of a gentile, as is quite common among German Jews, still had a gentile passport from the beginning of the war. Now because of the danger he wanted to write on the passport the letters "R.K." which are the initials of their religion "Roemisch Katholisch [Roman Catholic]," so that they would think he was one of them. Is this prohibited because he appears to profess idolatry?

Comment on the question: In Sh.Ar. YD 157:2, the Rema in the name of the Nimmuqei Yosef to ch. Hagozel [BQ, ch. 10] writes as follows: "Even though it is forbidden for him to say that he is a gentile, if the Jew's intention is to speak about something else and in this way deceive them into thinking that he is a gentile, then the act is permitted."¹ This is based on Terumat Hadeshen (196),² and Eliyahu Gaon reveals the Terumat Hadeshen's source in AZ 18b.³ See also ch. Qonam [Ned. 62b], "I am a servant of fire..."⁴ The Keneset Hagedolah and Siftei Kohen to YD 157:2 distinguish between a scholar and an uneducated person and between danger to life and monetary loss.⁵

In our case it is possible to say that [the proposed act] is permitted, as I have seen in Torat Hayyim by the master R. Hayyim Shor of

blessed memory. He commented on the words from AZ 17b-- "If one is a robber he is not a scholar..."-- as follows: "I have heard about one of the great scholars of earlier times who in a time of persecution was asked whether he was a Jew. He answered them, 'Kein Jude,' [apparently] in German, so that the wicked ones would think that he was not a Jew; and thus he was saved. But he really intended the meaning of these words in the holy tongue [Hebrew]: 'Kayn, yud,' the true and honest response that he was a Jew."⁶ According to this it is also possible to say that when the Jew writes on his passport the letters ["R.K."] he should intend the meaning [of their reverse order, as in Hebrew] "K.R.," "Kein Roemer" ["not a Roman Catholic"].⁷ If this is his intention it is possible to permit such an act.⁸

[Efrayim Oshry

Divrei Efrayim, Meemeq Habakha no. 4]

Notes

Responsum 16

1. See resp. 14, note 5.
2. Terumat Hadeshen writes that according to Sefer Hassidim, even though the Torah (Dt.22.5) prohibits a woman from wearing a man's clothes or vice versa, in case of grave danger Jewish women may dress as men in order to deceive assailants. Likewise boys who have not yet grown beards may dress as women to avoid harm from persecutors. Gentile clothes are permitted even when there is no grave danger. Terumat Hadeshen adds that this would be a profanation of God's name only if the enemy recognized the Jew, in which case the disguise would point to the Jew's denial of the God of Israel. Only at the end of his resp. does Terumat Hadeshen mention the opinion of R. Bun in Yer. AZ, ch. 2, that one in fear of death is permitted to say that he is a gentile. However, R. Haga disputes this view. Terumat Hadeshen is inclined to agree with R. Haga; he does not mention the possibility of a deceptive statement.
3. AZ 18b reports several versions of how R. Meir eluded the Romans who were pursuing him. According to one of these versions, he hid in a harlot's house to avoid detection. According to another, just as the Romans saw him he happened to see food cooked by gentiles; so that he too would appear to be a gentile, R. Meir dipped one finger into the food but sucked the other. According to the Gra, this deception is the basis for the Terumat Hadeshen's ruling (see note 2).
4. To the Persians this description would suggest a fire worshipper, but to the scholar making the assertion it would mean that he worships the

Lord, who is described as "consuming fire" in Dt.4.24. The Ran emphasizes that even a scholar may make such a deceptive statement; an ordinary person may certainly do so. Moreover, the case cited in Ned. 62b concerns the avoidance of a poll tax, not danger to life. The gemara permits the deception "because it is [only] said in order to drive away a lion" [i.e., in self-defense].

5. As a rule it is only in the case of danger to life that a Jew may deceive the gentiles into thinking that he too is a gentile. However, from Ned. 62b it appears that a Jew learned in the law may also practice such deception to avoid a punitive tax.

6. In defense of the view that such deception is permissible, Torat Hayyim cites Vayyiqra Rabbah, Behuqqotai (to Lev.26.3): "It was taught in the name of R. Eleazar: The sword and the book were given from heaven wrapped together. The Holy One, blessed be He, said to Israel, 'If you keep what is written in this book you will be delivered from the sword; if not, the sword will kill you in the end.'" The Torat Hayyim infers from this that a Jew whose life is threatened should deceive the gentiles, since he has already chosen the Torah while they have chosen the sword. To die at their hands needlessly would imply the sword's primacy over the Torah.

7. Mordekhai Eliav, Ani Maamin (Jerusalem: Mossad Harav Kook, 1965), p. 126, reports that this deception was suggested by a group of pious young men to one of their number who was passing as a gentile.

8. Some Jews devised other compromises between forged and Jewish identities. Several examples are mentioned by Nachman Blumental, "Sources for the Study of Jewish Resistance," Jewish Resistance During the Holocaust

(Jerusalem: Yad Vashem, 1971), pp. 52-53. E.g., after Laban Leibowitz (a commander of the Jewish Fighting Organization in Cracow) was killed, the Jewish prisoners in the Plaszow camp found in his clothes a note written in Polish: "I am a Jew." Leibowitz had been posing as an Aryan, with a Polish identity card. "He apparently felt that in one of the encounters with the enemy he would eventually be killed, and he was afraid that when it happened he would be taken for a Pole." Another example is related by A. Kleinman, who kept a diary on the "Aryan side" in Belgium: after the war Kleinman found out that Moshe Wohl, a Jewish partisan fighter sent among the Germans as a spy, always wore a tallit qatan under his shirt. Wohl explained why he wore it: "First, it protects against harm; secondly, if I am caught let them see immediately that I am a Jew and let them know what Jews are capable of doing."

Responsum 17

[Whether owing to the 6:00 p.m. curfew imposed by the Nazis, women whose time for immersion arrives on the eve of the Sabbath may immerse on their seventh day in the daytime]

With God's help, may He be blessed, the eve of the Great Sabbath,
5702 [28 March, 1942], Werbul

Greetings and best wishes to my friend, the outstanding and beloved
rabbi of great merit Yitshaq Friedman, Av Bet Din of Tirnau

I received your urgent question, my honored friend, which arrived during these times-- times of sorrow, God forbid-- concerning the decree that from six o'clock in the afternoon on, no Jewish man or woman is permitted to walk in the streets;¹ they are restricted from going anywhere and may not be seen outside [their dwellings]. What should those women do whose time for immersion arrives on the eve of the Sabbath? From what is said in the decree it is impossible for them to immerse either on Friday night or on Saturday night. Thus they will be delayed until Sunday, and even then [immersion is possible] only before noon; after that it is impossible since Sunday is their [the gentiles'] holiday and the mikveh is not open. Are they permitted to rely on and decide the law of practice in accord with Hokhmat Adam 118:5, who cites the Sidrei Tohorah in the name of the Bah that if it is impossible for a woman to immerse on the eighth or ninth day because of duress-- for instance if it is their [the gentiles'] holiday and similarly--

and on the seventh day [after her menstruation ceases] she can immerse in the daytime but not at night, then she may immerse on the seventh day in the daytime; but she must be very careful to conceal her immersion from her husband until the night?² This was your honor's question.

It would seem that there is an obligation to try very hard to permit [the proposed time of immersion] so that Israel will not be prevented from the duty of procreation. Our sages of blessed memory were very concerned about this, for instance as it is found in Er. 63b: "Joshua the son of Nun was punished because he prevented Israel from the duty of procreation for one night."³ In Ber. 4a our sages tell of the piety of David, king of Israel, whose hands were soiled with the blood [of menstruation], with the fetus and the placenta, in order to declare a woman clean for her husband. It is said in the name of our master Noda Bihudah, may his merit protect us, that our sages proclaimed that King David tried with all his might to declare a woman clean for her husband so that there would be no obstacle to the duty of procreation. Although I searched in the essay of the Tsiyyun Lenefesh Hayyah on Ber., I did not find this [passage];⁴ however, it is widely accepted that the Noda Bihudah said these worthwhile and enduring words. In Teshuvot Zikhron Yehudah, OH 176, the Roqeah's citation of Yer. Ket. is quoted that the commandment to procreate is greater than the commandment to build the holy Temple.⁵

According to BM 84b, R. Eleazar b. R. Shimon rejoiced to declare clean 60 specimens of blood, and all of those women gave birth to male children. About this our sages said: "How much procreation did this wicked regime prevent in Israel" (see the Rashi to this passage).⁶ See the Bah, OH, beginning of 280, that when evening falls at the beginning

of the Sabbath, a man should seek peaceful relations with his wife so that his conjugal duty will not be cancelled because of anger.⁷ According to Midrash Eikhah Rabbati on the verse [Lam.1.1] "The city once so full of people," they used to marry off their sons and daughters at age twelve or thirteen in order to increase procreation in Israel. See also Kerem Shelomoh, EH 1 on this midrash.⁸ [Nevertheless] concerning all of this I say that it is still not an easy matter to decide in accord with the Sidrei Tohorah cited in the Hokhmat Adam mentioned above [permitting early immersion because of duress].

Yet in this case there is the positive argument that the decree affects all of the women. In such an event there is clear permission [to immerse early] even according to the Hamudei Daniel 197:4: where there is duress, such as fear of immersing at night due to cold, or fear of robbers and others, or [fear] that they will close the city gates-- then she can immerse on the eighth day [after her menstruation ceases] in the daytime. According to Hamudei Daniel, cited in Pithei Teshuvah, Sh.Ar. YD 197:11, apparently duress is valid cause [to delay immersion] only if it affects all of the women in the city. This is discussed extensively in Teshuvot Divrei Malkiel [vol. 2], no. 57;⁹ and his view is corroborated by Teshuvot Peri Hasadeh, vol. 2, no. 45, p. 22 at the end of the front side of the page, s.v. "and mentioned above."¹⁰

However, our master Hatam Sofer, may his merit protect us, discusses in YD no. 197 the question of whether under duress a woman may immerse during the daytime if her seventh day falls on the eve of the Sabbath. He asks how it is possible to permit this since she must conceal her immersion from her husband until the night, and she is not permitted to tarry in another woman's house.¹¹ In Darkhei Teshuvah 197:32, the Devar

Yaaqov, no. 82, ch. 3 is cited concerning women from the villages who come to the city and immerse during the daytime; that is, on the eighth day only. On the seventh day there is no permission even if they do not return to their homes until evening.¹² Therefore the village women whose immersion on the seventh day falls on the eve of the Sabbath must immerse on Sunday. Look carefully at these sources.

According to all of the above, at the present time it is impossible for the woman who must immerse to delay herself in the house of another woman, since this is also prohibited by the [Nazi] decree; and in the opinion of our master Hatam Sofer there is no use in her delaying in the house of another woman; and according to Teshuvot Devar Yaaqov she is not permitted to immerse on the seventh day if it is the eve of the Sabbath. Consequently we do not know what to do for our sister who must immerse on the eve of the Sabbath. For on this day she also must return to her house to kindle the Sabbath candle, as it says in Sh.Ar. OH 263;¹³ and for this reason it is impossible for her to conceal her immersion.¹⁴

Just now while I was reading your honor's letter, I recalled the counsel of our master Hatam Sofer, YD no. 197 (mentioned above), [that in case of duress preventing immersion at the proper time] to instruct these women to examine if they are ritually clean two times, once on the fourth day after last seeing [the blood of menstruation], and the second time on the fifth day. That is, the woman should examine if she is ritually clean on the fourth day at dusk leading to the fifth day after last seeing [the blood of menstruation]. In any event she must not begin to count [the seven days] until the sixth day after last seeing [the blood]. Then when she immerses on the seventh day which falls on

the eve of the Sabbath, she must not return to her house until the night of the Sabbath. However, when I thought about this it occurred to me that in these times most of the women are weak and in most cases would not count seven clean days previous to the seven or eight days [already required]. But today when I opened some books, I was very happy to see what was written in Teshuvot Peri Hasadeh, vol. 2, no. 45 mentioned above.¹⁵

I also thought over whether or not, since the woman must return to her house on the eve of the Sabbath to light the candles, it would be useful to appoint a little boy or girl as a guard [to prevent intercourse before nightfall], in the manner explained by the Rema, Sh.Ar. YD 192:4 in regard to a groom whose bride menstruated before he could consummate the marriage.¹⁶ However, who is entitled to invent something new which we do not find in any of the authorities, early or late? This needs further study.

However, I then looked closely at the words of our master Hatam Sofer mentioned above: "The master Sidrei Tohorah gave a definitely lenient decision that, when the conjugal duty may otherwise be prevented, [the woman] should immerse on Friday and not return to her home until nightfall. As long as the decree is not pressing, and since the reservations are [only] rabbinical and would lead to the nullification of the duty to procreate, the geonim were lenient. After them who will presume to be more severe?" After this Hatam Sofer points out that no matter what, the woman must delay her return home until the night. But in his conclusion he writes (s.v. "There is no permission to stay in the house of another woman in that city..."): "And a wise man's eyes are in his head" [Ecc.2.14], suggesting that by this our master wants [to say] that if it is suspected that the husband would sin and harbor lustful thoughts

(see Yoma 29a),¹⁷ or if there is any other suspicion in regard to the immersion, it is possible to decide to give permission [for early immersion] even if she will come home before the night. It appears in my humble opinion that this is the implication hinted at by the final words of our master, may his merit protect us. I heard recently that in one of God's great cities where there is much knowledge, they ruled as a matter of law and practice in accord with the Sidrei Tohorah mentioned above concerning the seventh day [after a woman's menstruation ceases] which falls on the eve of the Sabbath. I too propose this after searching my heart.

With affection and best wishes,
awaiting God's salvation at any moment,

(the insignificant) Yitshaq Weiss

Rosh Bet Din, Werbui

[Teshuvot Meqaddeshei Hashem, vol. 1, no. 71]

Notes

Responsum 17

1. As soon as the war began, local police in Germany ordered the Jews off the streets after 8:00 p.m. "The Reich Press Chief instructed the newspapers to justify this restriction with the explanation that 'Jews had often taken advantage of the blackout to molest Aryan women.'" After the ghettos were established in the occupied countries, Jews could not move about freely even within the confines of the ghetto. A typical curfew period was from 7:00 p.m. to 7:00 a.m.; in the present case it was even earlier. See Raul Hilberg, The Destruction of the European Jews (New York: New Viewpoints, 1973), pp. 116, 149.
2. The reason given by Hekhmat Adam for the permission is that otherwise the conjugal act will be prevented.
3. Joshua's punishment was that he died childless.
4. The statement is not found in the discussion of Ber. 4a; on the passage concerning David's act of declaring women clean for their husbands, Tsiyyun Lenefesh Hayyah says only that David established himself as the authority on such matters so that women were accustomed to come to him.
5. With respect to the ninth of Av, Zikhron Yehudah distinguishes between washing for one's own pleasure and washing to fulfill a mitzvah, e.g., immersion following the menstrual period. He is inclined to be lenient if the purpose is to fulfill a mitzvah. The verse cited to prove the pre-eminence of procreation is 1 Ki.5.28: "A month they [30,000 men] were in Lebanon, and two months at home..."
6. According to Rashi, the term "this wicked one" may refer to the

Romans who, by appointing R. Eleazar b. R. Shimon to track down criminals, prevented him from his duty of determining whether a woman's blood was ritually clean, thus permitting her to her husband and making possible conjugal relations (thus the translation "this wicked regime"). Rashi also notes that the term may refer to the wife of R. Eleazar b. R. Shimon, who did not permit him to go to the house of study.

7. "Before nightfall [on the Sabbath] a man is obligated to show extra affection and love for his wife..." The Bah cites a gematria suggested by the Rosh: Veshamru venei yisrael et hashabbat, "The children of Israel shall keep the Sabbath" (Ex.31.16): the numerical value of the initial letter of each word (excluding veshamru) is equivalent to the numerical value of biah, sexual intercourse.

8. The midrash says: "How used the Israelites to multiply? A man married off his son at the age of twelve to a wife capable of bearing children. Then he married off the grandson at the age of twelve, so that he himself did not reach age 26 without seeing grandchildren." Kerem Shelomoh notes that this appears to contradict the ruling of Sh.Ar. EH 1:3 that for one to marry before age thirteen is prohibited since it is "like fornication."

9. An abbreviation accompanies this citation which I could not decipher: dphh. Possibly it signifies dafus hehadash, "new edition." In this resp. Divrei Malkiel notes that the Hamudei Daniel requires that all of the Jewish women of the town must be under duress before immersion can be delayed until the eighth day. Yet even the Rambam, MT Hil. Issurei Biah, ch. 4, hal. 8, permits delayed immersion for a woman who is ill; Divrei Malkiel points out that "this is not duress on all the women of the city."

He concludes that "any kind of duress permits the woman to immerse on the eighth day during the daytime, even if she is the only one involved."

10. Peri Hasadeh cites Nid. 67b: "R. Idi ordained at Narash that immersion shall be performed on the eighth day [instead of the night following the seventh day] on account of lions [that the women might encounter at night]." Why did R. Idi "ordain" this rather than merely permit it? Peri Hasadeh writes: "So that [in case of duress, e.g., lions] there should be a fixed ordinance specifying the eighth day. Then even if a woman wanted to immerse on the night following the seventh day and wanted to endanger herself, she would not be permitted since [the ordinance requires that] all the women immerse on the eighth day."

11. Hatam Sofer writes: "As to how a woman may delay in the street before the Sabbath [after immersing], I already wrote that she may not stay in another woman's house in that city. A wise man's eyes are in his head." As R. Weiss concludes in the text of the resp. below, Hatam Sofer clearly implies that since the woman can stay nowhere else, she is indeed permitted to go home before nightfall.

12. According to Devar Yaaqov, the reason that even a woman under duress may not immerse before nightfall on her seventh day if it occurs on the Sabbath is that "her daughter might follow [her example; Nid. 67b]"; i.e., her exceptional act might become the rule under ordinary circumstances. Darkhei Teshuvah cites another opinion that the woman may immerse on the seventh day provided she immerses again on the eighth.

13. A possible solution to this problem may be found in the Baer Hetev's comment to OH 263:2: "[In the case of] a woman whose time for immersion arrives on the evening of the Sabbath, it is preferable for her husband

to light and bless [the candle]."

14. Yet according to Rambam, MT Hil. Shabbat, ch. 5, hal. 3, both men and women may kindle the Sabbath lights. However, "Women are more obligated than men because women are usually at home doing housework." It appears that if the woman was delayed for good reason, her husband would certainly be permitted to kindle the Sabbath lights in her absence. See previous note.

15. See note 10.

16. At night a little boy stays with the groom and a little girl with the bride. Even during the day one of the two children must stay with the couple.

17. Yoma 29a: "Unchaste imagination is more injurious than the sin itself."

Responsum 18

Whether it is permitted to cut open the womb of a pregnant woman who has just been killed in order to save the fetus

Question: On 20 Iyyar 5702 [7 May 1942],¹ the accursed Germans, may their names be blotted out, issued a decree that any Jewish woman found to be pregnant would be put to death.² On that same day a pregnant Jewish woman passed by the ghetto hospital. One of the German murderers noticed her as she passed and in fury shot her for transgressing their order not to bear children. When the murderer's bullet sliced into her heart, the woman sank to the ground, dead.

Passers-by brought her immediately to the hospital, thinking they still might save her, but all their labor was in vain. However, since she had been in the final days of her pregnancy, a Jewish doctor who was then in the hospital was urgently called in the hope that it might still be possible to save the infant. Indeed the doctor said there was still hope of saving the infant, but to do this it was necessary to perform immediate surgery on the murdered woman, opening her abdomen in order to remove the infant from her womb. Since I was also present at the time and was a witness to the horrifying murder, I was asked³ if it was permitted to do this, or if there was fear of [violating the prohibition against] disgracing the dead. Who could know whether the fetus was still viable or had not already been aborted? It might also be forbidden to open her womb immediately because she might still be barely alive, and if they waited a while she might revive; but if they operated on her and cut

open her womb, they might be hastening her death.

Answer: In Ar. 7a we are taught in a mishnah: "If a woman is about to be executed, they do not wait for her until she gives birth (and Rashi explains: 'Rather they execute the fetus with her, since it is considered one body...')."⁴ But if she was already sitting on the birthstool [i.e., her labor had already begun], they wait for her until she gives birth. If a woman has been executed, they may make use of her hair..." Concerning this the gemara goes on to say: "'If she was already sitting on the birthstool...': What is the reason? As soon as [the fetus] moves [from its attached place in the womb], it is another body. R. Yehudah said in the name of Shemuel: If a woman is about to be executed, they strike her upon the womb so that the infant will die first, in order that [subsequent to the mother's death] she will not be disgraced [should the infant emerge from her womb]. Does that mean that otherwise she dies first? But it has been established for us that the child dies first. 'A child one day old may inherit and bequeathe' [BB 142a, Nid. 44a]. R. Sheshet said: 'He inherits the mother's property to bequeathe it to his paternal brothers.' This applies only to a child [at least] one day old, but not to a fetus, which would die first; for no son already in the grave can inherit from his mother to bequeathe to his paternal brothers."⁵ This [presumption that the child dies first] applies only to [the pregnant mother's natural] death, because the child's life is very frail; the drop from the angel of death enters and severs the vital organs. But if her death is by execution, she dies first. But was there not an instance when the child kicked three times [after the woman's natural death]? This can be compared to the tail of a lizard

which convulses [after it is severed].

"R. Nahman said in the name of Shemuel: If a woman already sitting upon the birthstool died on the Sabbath, they bring a knife and cut open her womb to remove the infant." Rashi explains: "For it sometimes happens that she dies first" [and the infant is still alive]. The gemara continues: "But is that not obvious? What is he doing except cutting [dead] flesh [which does not profane the Sabbath]? Raba said: It is necessary to [give permission to] bring a knife by way of a public thoroughfare [which is ordinarily forbidden on the Sabbath]. Does this teach us that in case of doubt one may profane the Sabbath? We have already learned [Yoma 83a] that if debris falls down upon someone and there is doubt whether he is there or not, or whether he is alive or not, or whether he is a gentile or an Israelite, we still clear away the debris from him. Yet you might say: There [in the case of the debris, permission to remove it on the Sabbath is given] because there is the presumption that someone was alive [before the debris fell on him]; but here [in the case of bringing the knife, the fetus] has no original presumption of life. [Thus] I might say [that in the second case] no [permission is given to profane the Sabbath]; therefore we are taught [that also in the second case it is permitted].

"If a woman has been executed [they may make use of her hair].' Why should it be so? Is it not forbidden to derive benefit from these things? Rav said: [This refers to the case] where she said, 'Give my hair to my daughter.' But if she had said, 'Give my hand to my daughter,' would we give it to her? Rav said: [The hair] refers to a wig. The reason [it is permitted to make use of the wig after the woman is executed] is that she said, 'Give [it].' Had she not said, 'Give [it],'

it would have been considered [part of] her body and prohibited [for any use]."

It is evident from this discussion that even though we hold that in the case of a [pregnant] woman who dies [naturally], the child dies first-- "because the child's life is very frail"-- still R. Nahman said in the name of Shemuel that in the case of a woman who dies while already seated on the birthstool, they bring a knife, cut open the womb, and remove the infant for the reason explained by Rashi: "It sometimes happens that she dies first." This means that certainly in most cases the child dies first, but sometimes she dies first. This occurs in a minority of such cases, for as the word "sometimes" indicates, there is a minority corresponding to the majority, as Rashi explains in his commentary on Git. 29a s.v. "For everyone agrees...": "R. Yohanan's statement that sometimes a bill of divorce is not valid means that most of the time it is valid." This indicates that "sometimes" implies that a minority exists.

However, the Tosafot to BB 142b dispute Rashi's view. S.v. "For [the fetus] dies first..." they wrote in the course of their discussion as follows: "In regard to one who slaughters [animals], it is said [Hul. 38b] that 'the mother died and immediately afterward her young was brought forth' [i.e., extracted from the womb]. That is, whether the mother dies violently or naturally, as long as the process of labor has begun, the infant does not die, as explained in the final ch. of Af. [7a-b]." Evidently the Tosafot contend that when the mother dies [before labor begins], the infant dies first always, not only in the majority of cases as Rashi maintains. Rather [the Tosafot make] a distinction between the case where the [pregnant] mother dies [prior to labor] and the case where

she dies after labor has begun.

Yet Rashi's commentary to this discussion [Ar. 7a-b] indicates his view that even in regard to a [pregnant] woman who died [naturally], in a minority of cases she dies first [and the infant remains alive]. Consequently it is obvious from the discussion in Ar. that we profane the Sabbath for the sake of the infant in order to save its life. We have no apprehension about this, neither in regard to disgracing [the mother's body] nor the hastening of her death. All the more so must we do this if she was killed, for then it is said that she dies first. In our case, then, where this unfortunate woman was murdered, it is definitely permitted to cut open her womb to remove the infant. We need not fear [the prohibition against] disgracing the dead, since it is a matter of saving the infant's life; nor need we fear that the mother is still barely alive and that by doing this we will hasten her death.

Yet we must thoroughly consider the view of the Tosafot. Although even the Tosafot agree that if a pregnant woman is killed, she dies first-- as the gemara says-- nevertheless in their view it is forbidden to cut open the woman's womb unless she is already seated on the birthstool and the process of labor has begun. According to the Tosafot, it is only under these circumstances that we may bring a knife [on the Sabbath] and cut open her womb. But if the labor has not yet commenced we may not do this, even in the case of a [pregnant] woman who is killed. Yet one could also contend that in the case of a [pregnant] woman who is killed, the Tosafot too consent [to the surgery], since concerning her there is no disagreement between Rashi and the Tosafot. Everyone agrees that in such a case it is permitted to perform [the surgery]. This [question] needs further study.

See Teshuvot Minhath Eliezer, vol. 4, no. 28, where the author writes that it is impossible for the fetus to go on living after its mother dies.⁶ Yet according to Rashi this does not appear to be so, as we have explained. See the marginal gloss of the Gra to Ar. [7a]; the Arukh, s.v. Dofen;⁷ and Teshuvot Tashbats, vol. 1, no. 110.⁸

See also Teshuvot Harema no. 40⁹ and Magen Avraham, OH 330 note 10¹⁰ along with the Mahatsit Hasheqel there.¹¹ All of them understand that Rashi's view is as we have written; that is, Rashi holds that even if labor has not begun we bring the knife and cut open her womb. See also Eshkol, part 2, p. 117: "Even if we do not know whether the term of pregnancy is complete..." we do this.¹² This opinion conforms to Rashi's, as we have explained, but adds that the surgery is permitted even when we do not know whether the term of pregnancy has been completed. Now in Rashi's view, while one may say that he advocates [the surgery] even if labor has not begun, this is only so long as we know that the term of pregnancy has been completed. However, if we do not know whether the term has been completed, it is prohibited to perform [the surgery]. But the Eshkol adds to Rashi's opinion, contending that it is permitted to perform [the surgery] even if we do not know that the term has been completed. The opinions of these great authorities are at variance with Teshuvot Shevut Yaaqov, vol. 1, no. 13, who tries to argue that Rashi actually agrees with the Tosafot's view that only if labor has begun is it permitted to cut open the mother's womb; otherwise it is forbidden.¹³

See Sh.Ar. OH 330:5, where it is decided as follows: "If a woman who is sitting upon the birthstool dies on the Sabbath, we bring a knife even by way of the public thoroughfare, and we cut open her womb and

remove the infant in case it is still alive." The Rema adds the following gloss: "The reason we are not now accustomed to do this even on a weekday is that we are not expert enough to determine [the time of] the mother's death so precisely that it would still be possible for the infant to live (Issur Vehetter Haarukh)." Magen Avraham, OH 330 note 11, explains the Rema's words: "'We are not expert enough to determine [the time of] the mother's death,' for she might be merely unconscious, and if they operate on her she will die. Thus we must wait [to be sure that she is really dead]; and meanwhile the infant will have died."

The Eshel Avraham comments on OH 330:5 as follows: "If a [pregnant] woman suffered a violent death and her infant is still kicking, it is permitted to cut open her womb on the Sabbath. Even if it is later found that the infant is dead, they did the proper thing and [are among those who are] rewarded for their diligence. Certainly no atonement is necessary."¹⁴ Similarly in Har Evel, p. 20[b], the author writes about a pregnant woman who died. According to what she had said while she was alive, the term of pregnancy was not yet completed. Yet he permitted the disgracing [of her body] for the sake of the infant.¹⁵ R. Mosheh Konitz, in Teshuvot Hametsaref, vol. 1, no. 101, agreed with him. He wrote that if they find that the infant is alive, they should continue to operate; if not, they should halt the operation.¹⁶

From all of this it appears that if the doctor is exacting in his work and skillful enough to determine the time for surgery immediately after the mother's death; and if he says that it is possible to save the infant; then surely it is obvious that we must rely upon him. This is especially so since the Sh.Ar. decided that the law permits anyone to do this for the sake of the infant who might still be alive. Furthermore

we are inclined to say that even the Tosafot agree with Rashi that in the case of a [pregnant] woman who is killed, it is permitted to cut open her womb even if labor had not yet begun, since the [pregnant] woman who is killed dies first. In this case it is a matter of saving the infant's life. The Tosafot stipulate that the process of labor must already have begun only in the case of a woman who died [naturally], when it is said that the infant dies first. It is this last point which contradicts Rashi's view that even when a pregnant woman dies [naturally], in a minority of cases she dies first [and the infant in her womb is still alive]. The Tosafot argue that in the case of her [natural] death there is no minority, nor is there any reason to think that the infant might be alive. If a [pregnant] woman dies [naturally], the infant always dies first. However, in the case of a [pregnant] woman who is killed, the Tosafot too admit that it is permitted to cut open her womb even if labor had not yet begun, as we have written. Accordingly we may certainly rely on the view of Rashi, Sh.Ar., and Eshkol to decide the law; and it is possible that the Tosafot also share this view.

Moreover the apprehension of disgrace to the dead does not apply to our case, for as we have already shown elsewhere, where there is danger to life we do not fear disgrace to the dead (see no. 12 [of the present volume] where we go into great length about this).¹⁷ This is certainly apparent from the discussion in Ar. [7a-b] that we have cited. Apart from this, in our case as well as in the Ar. discussion, the fear of disgrace to the dead does not even apply, for the mother would wish to be disgraced if by doing so they can save her infant and bring it forth into the world, so that it should not remain in darkness as those who have long been dead. Surely the mother would pardon the disgrace. It is similar to

what is said in Sanh. 46b: "The rabbis asked: Is the eulogy recited in honor of the living or of the dead?... 'And Abraham came to mourn for Sarah and to weep for her' [Gen.23.2]: Now if you say that it is in honor of the living, then it was for Abraham's honor that he delayed Sarah's [burial]. Sarah herself was pleased that Abraham should be honored through her." See Rashi's comment on Sanh. 47a, s.v. "For the Merciful One said..." concerning this matter: "If his [living] relatives are honored through him [i.e., the deceased], it is no disgrace to him." If so, how much the more so¹⁸ is it no disgrace to the [deceased] mother when they cut open her womb to save her infant, causing him to enter into a good and long life in peace.

Concerning the statement in Ar. [7b]-- "If she says, 'Give my hand to my daughter,' would we give it to her?"-- it is not said that the mother means this seriously. For in this case the mother says, "Give my hand..." for no purpose; that is, so that it would never be buried.¹⁹

Therefore we definitely do not pay heed to her and do not give her hand to her daughter. She does not have the right to give her hand to her daughter for any purpose, since it is forbidden to derive benefit from the dead, as we have learned [AZ 29b]: "[We deduce it from the similar expression] 'there' [used in connection with] the heifer whose neck was to be broken [Dt.21, as well as in connection with the dead]." Rashi cites this passage in his commentary to the Ar. [7b] passage, s.v. "It refers to a wig..."

On the basis of all this I decided that [the doctor] should immediately cut open the womb of this unfortunate woman murdered by the defiled killers although she committed no sin, in order to remove her infant alive, to save one Jewish soul. Whoever saves a single soul of Israel,

it is as though he saved the whole world [Sanh. 37a].

But to our great sorrow we did not have the good fortune to achieve our good intention. The brutal murderers with German precision kept books of the living and the dead, exact accounts of all the martyrs they had put to death. These murderers came to finish their cruel work, to record this woman's name and enter her into the book of the dead according to their procedure. When they came to the hospital for this purpose and found the infant who had been removed [alive] from the womb of the dead woman, they were infuriated. One of the murderers seized the tender infant and smashed its head against the stone wall of the hospital room.²⁰ Woe to the eyes that witnessed this! May God remember those evil days unto the children of these savages and unto their children's children. Happy shall he be that repays them as they have done to us; happy shall he be that takes and smashes their little ones against the rock [Ps.137.8,9].

[Efrayim Oshry

Teshuvot Mimaamaqim, vol. 2, no. 10]

Notes

Responsum 18

1. According to Dr. Aharon Peretz, a gynecologist in Kovno, the decree prohibiting pregnancy was issued in July 1942. See Gideon Hausner, Justice in Jerusalem (New York: Holocaust Library, 1966), p. 213.
2. According to Dr. Peretz (cited by Hausner, *ibid.*) the Nazi decree prohibiting pregnancy imposed the death penalty on the father and the infant as well as the mother.
3. The solicitation of R. Oshry's opinion conforms to the view of Teshuvot Maharsham, vol. 1, no. 13, that a questioner should not accept the physician's judgment for practical religious purposes until he consults rabbinic opinion. See Immanuel Jakobovits, Jewish Medical Ethics (New York: Bloch, 1959), pp. 232-37.
4. Some authorities (e.g., Sheelat Yavets no. 43; Mishpetei Uziel, vol. 3, HM no. 46) explain that the fetus is an organic part of the mother and therefore under the identical sentence of death. Since the fetus will die in any event, the rabbis do not object to hastening its death in order to spare the mother the dishonor her body would suffer should the fetus emerge or be removed after her death. See J.D. Bleich, Contemporary Halakhic Problems (New York: Ktav, 1977), p. 336 n.
5. I.e., this last case assumes that the child dies before its mother; otherwise it would also deal with a living unborn child.
6. Minhag Eliezer cites the Rema, Sh.Ar. OH 330:5 (see text of resp. below), who maintains that we are not expert enough to determine the time

of the pregnant mother's death so precisely that it would still be possible for the infant to live. Magen Avraham explains that possibly the mother is merely unconscious; the surgery to remove the infant would then cause her death. In refuting the view of one authority that we should wait before burying a woman who died in labor, since the infant might still come forth alive [without surgery], Minhath Eliezer argues on the basis of Rema's ruling that "the longer we wait after her death, the more certain it is that the infant is dead." If we comply with the ruling of Rema, it is impossible to save the baby. The Minhath Eliezer does not actually maintain that the fetus cannot survive its mother's death, but that it cannot survive the period of time that must elapse before we can be certain she is dead.

7. The Arukh cites Nid. 40a: "For a fetus born from its mother's side [i.e., by caesarean section] the mother need not observe the prescribed days of uncleanness or the days of cleanness." He then writes: "This means that if the mother was pregnant and then died, and the fetus was still alive, they may cut open her womb so that the fetus can come forth." Apparently the Arukh derives this interpretation from the implication that the mother survives the surgery (she "need not observe the prescribed days...") together with Rashi's explanation that the caesarean is affected by means of a drug (implying that a knife may not be used on a living person). The Arukh assumes that the fetus can survive the mother's death; otherwise the question of a post-mortem caesarean would be superfluous.

8. Tashbats notes Rashi's comment to the discussion in Hul. 38a of how to determine which of a slaughtered animal's movements are caused by the

expiration of its life: "When an animal's life is expiring we say that it is dead," even though it is not actually dead yet. Thus if we see that a pregnant woman is near death, there might be some support for opening her womb immediately in order to save the infant. The mother might even survive the operation; but if she dies prior to the birth, "It is absolutely impossible for the infant to live."

9. Rema writes: "According to Rashi, even though most of the time the infant dies first, in rare cases the mother dies first. Therefore, since we are lenient when it is a matter of saving a life, we do not follow the majority in this instance. This appears to me to be the meaning of Rashi's statement [Ar. 7a]."

10. Magen Avraham contends that Rashi's interpretation [Ar. 7a] actually resolves the various difficulties raised by Tosafot to Nid. 44a and BB 142b. These difficulties are discussed at length by R. Oshry in the text of the resp.

11. He attempts to demonstrate in detail how Rashi's interpretation reconciles the opposing views of Tosafot.

12. In his commentary to this passage, Nahal Eshkol interprets the phrase "even if we do not know whether the term of pregnancy is complete" as follows: "This refers only to a pregnant woman who smells [food on Yom Kippur and craves it; see Yoma 82a]; the infant is [alive] inside her even though her term of pregnancy is not complete."

13. Shevut Yaaqov relates a bizarre case of a pregnant woman decapitated on the Sabbath. "We saw the infant [in her womb] kicking her. Someone came and cut open her womb-- even though it was the Sabbath-- to save the infant's life, but afterward it was found that the infant had died. Did

the man who performed the operation profane the Sabbath?" Shevut Yaaqov rules that this man acted properly, since even when there is doubtful danger to life it is permitted to violate the Sabbath. Moreover there was no question that the woman was dead. In regard to the views of Rashi and Tosafot, Shevut Yaaqov sees no controversy. While Rashi holds that in a minority of cases the infant might survive the mother's death, thus justifying surgery even on the Sabbath, "Even Rashi admits that this applies only to a woman seated on the birthstool [i.e., already in labor], for the fetus has already moved. [Under this circumstance] it often happens that she dies first. But if the fetus has not moved from its place [in the womb], certainly it dies first." This of course is precisely the position of Tosafot.

14. Par. 6. He bases this opinion on Teshuvot Maharit, vol. 1, no. 94.

15. According to calculations based on what she had said before her death, she died on the first day of her ninth month. A qualified doctor determined beyond doubt that she was dead but that the infant within her was still alive. Among his reasons for permitting surgery in this case, Har Evel explains that this woman's body would be disgraced in any case since it was the ruling power's policy in such a case to conduct an autopsy and remove the fetus. Such a practice is also implied by Rashi's comment to Ar. 7a.

16. Hametsaref cites Yoma 85a that even if a life will only be prolonged momentarily, we nonetheless suspend the laws of the Sabbath for its sake. How much the more so in this case, where the infant's life might not be just prolonged but preserved.

17. In no. 12 R. Oshry is asked whether it is permitted to exhume the body

of a Jew who was killed by the Nazis while trying to smuggle a jewel out of the ghetto to exchange for bread. The clothes in which the man was buried still contained the jewel; without it the owner could not hope to feed his family. Under the desperate circumstances, R. Oshry permits the grave to be opened to remove the jewel. He cites BB 154a, where although R. Aqiva forbids the opening of a grave owing to the prohibition against disgracing the dead, the subsequent discussion in the gemara and commentaries makes it clear that if money belonging to others was involved, they are entitled to open the grave. In this case, R. Oshry argues, not only is it a matter of loss of money but possible loss of life, since the family of the jewel's owner may otherwise starve to death. To open the grave under these circumstances actually confers honor upon the deceased (cf. Teshuvot Maharsham, vol. 2, no. 112). R. Oshry makes a similar argument in the present case: rather than disgracing the deceased mother, the postmortem caesarean honors her.

18. Qal vehomer ben beno shel qal vehomer, a strict inference from minor to major.

19. What purpose could the mother have for bequeathing her dismembered hand to her daughter so that it will not be buried? This is obviously an irrational request which could have no sensible motive.

20. The Nazis may have returned to the hospital to kill the infant because of the provision of the anti-pregnancy decree that the baby too must be executed (see note 2). However, no rational explanation is needed for the Nazis' brutal murder of Jewish children. As Hausner (op. cit., p. 163) concluded from voluminous testimony at the Eichmann trial, "The Jewish child was a special object of venom." Babies were routinely snatched from

their mothers' arms, flung against walls and curbstones or through windows, torn in two, thrown still alive into the crematoria fires, etc. See, e.g., Hausner, pp. 163-64; Raul Hilberg, Destruction of the European Jews (New York: New Viewpoints, 1973), pp. 625, 629; Adolf Berman, "The Fate of the Children in the Warsaw Ghetto," The Catastrophe of European Jewry (Jerusalem: Yad Vashem, 1976), pp. 418-19; Kiryl Sosnowski, The Tragedy of Children Under Nazi Rule (Poznan: Zachodnia Agencja Prasowa, 1962), pp. 70-93; Bernd Naumann, Auschwitz (New York: Praeger, 1966), pp. 123, 133, 138, 199, 385.

Responsum 19

[According to the law, what should we do with those people who have abandoned the Jewish religion completely or have obtained gentile documents? What of those whose wives or children have abandoned Judaism in order to protect their parents?]

With God's help, 21 Elul 5702 [3 September 1942], Kezmark
 May you be inscribed at once for a long and happy life, your honor,
 my beloved friend, relative by marriage, the illustrious and
 righteous R. Shemuel David Halevi Ungar (may he live a long and happy
 life), Av Bet Din and Rosh Yeshivah of Neutra [Slovakia]

Greetings to your honor. Here is my fond reply concerning the
 matter [which you have addressed to me]. In your humility you have
 honored me by seeking my opinion.

According to the law, what should we do with those people who have
 abandoned the Jewish religion completely or have obtained [gentile]
 documents? What of those whose wives or children have abandoned [Judaism]
 in order to protect their parents? What is the legal status of the
 parents? Should they be removed from all matters of religious observance
 or not? Also, are they eligible for any appointed positions in the com-
 munity? Is it permitted to marry such people? This was the content of
 the question.¹

First we need to determine whether those who have left [Judaism] are
 considered to have acted under duress or to have denied [Judaism] out-
 right. The situation of our fellow Jews is known; owing to our many sins

our soul is bowed to the earth from so many sufferings, renewed every day so that no spirit remains in any man. Only a few people remain from the many, and the survivors cringe and tremble at the sound of a driven leaf, in fear of being deported, forced into exile like most of the other Jews of our country whose plight is fearful and terrible. Hungry, thirsty, naked, and destitute, they are also compelled to profane the Sabbath, etc. Out of fear, some of our fellow Jews have gone astray like sheep, thinking that by leaving the Jewish religion they will be saved and protected, freed from the yoke of exile. Some of them have actually left [Judaism] completely.² Others have procured baptism certificates, God forbid, and observe the Jewish religion as before but in private, taking care not to commit transgressions.³

In truth many of them unwittingly make the mistake of thinking that they have not done anything contrary to the law of the holy Torah. Certainly one should be favorably inclined to judge them to have acted under duress, as explained in the responsa of the Ribash, no. 6,⁴ which I cited in my responsum to my illustrious relative by marriage, the Av Bet Din of Lipian, may he live long and happily. This is said explicitly in Sh.Ar. YD 119:12: "In regard to those under duress who remain in their countries, the ritual slaughter they perform is reliable and the wine they touch is not prohibited, provided they practice [Judaism] properly among themselves and are unable to escape to a place where they can [freely] worship God." See Darkhei Teshuvah [YD 119] 66-69.⁵ This is also the ruling of Sh.Ar. OH 128:37: "A convert to idolatry may not raise his hands [in the priestly benediction]. But some say that if he repented he may raise his hands. If he acted under duress, then in everyone's opinion he may raise his hands."⁶ Likewise in Sh.Ar. EH 42:5

at the end of the gloss [we find] the following: "However, those who acted under duress, who converted out of fear and could not possibly escape, yet still fulfill the commandments in private-- they are qualified to give testimony."⁷

See the Shittah Mequbbetset to Ket. 33b, s.v. "Had they not flogged him..." which is quoted in the name of R. Eliezer and conforms to Rabbenu Tam's opinion that the Torah obliges one to submit to death but not to torture or beating without limit. The Shittah Mequbbetset differs, interpreting the verse [Ex.21.23, "Thou shalt give life for life..."] this way: he shall give even his life, thus including torture.⁸ In any event, the torment of the elderly and the very young who suffer disgrace and hunger is certainly an ordeal comparable to death itself. So also in our case we should consider them to have acted under duress-- that is, those who leave [the Jewish community] but still conduct themselves according to our religion and are careful not to commit transgressions. Lawfully they should not be rejected.

However, according to the Erekh Shai, YD 157, if they do not force one to transgress, but he himself knowingly does so and saves himself by some means when it was his duty to suffer death rather than transgress, then he is not considered to have acted under duress.⁹ Likewise in our case [the enemy] has not forced them to leave Judaism; on the contrary, the government wants to shut and lock the gates of rescue against the Jews, as is known. Still it is not clear that such a person is not considered to have acted under duress. In YD 157 note 2 and 117, the Pithei Teshuvah cites the Mishnat Hakhamim to the effect that this matter is in doubt.¹⁰ He also refers to Turei Zahav, YD 179 note 4;¹¹ and I saw that according to Atsei Levonah, YD 179¹² the Turei Zahav

means that if the gentile does not want to force him to commit idolatry but issues a decree which entails danger to life, then if he can save himself by committing the transgression, it is permitted. For this is not a circumstance where one should suffer death rather than transgress. In Teshuvot Binyan Tsiyyon Hahadashot no. 169 the Turei Zahav's meaning is explained in another way.¹³

Concerning [the imposition of] a protective measure, Teshuvot Shevut Yaaqov, vol. 3, no. 92 contains a quotation from Ramban's resp. no. 244 that whenever a protective measure is imposed, the bet din is entitled to uproot a law of the Torah in order to make a fence around the Torah.¹⁴ This conforms to the ruling of Sh.Ar. YD 334:6 in the gloss: "The bet din has the right to be strict with him-- [e.g.] by not circumcising his sons, not burying him should he die, expelling his sons from the school and his wife from the synagogue-- until he accepts the bet din's verdict."¹⁵ See Turei Zahav¹⁶ and Teshuvot Hatam Sofer, YD no. 322.¹⁷

In regard to the parents whose children left Judaism in order to protect them, in my humble opinion this may be compared to the ruling of Sh.Ar. YD 99:5: "If the law was violated intentionally [with respect to the mixture of kosher and non-kosher food], the food is forbidden to the person who himself nullified the prohibition if the food is his; it is also prohibited to the person in whose behalf the prohibition was nullified." See Siftei Kohen, note 11, where the reason is given that "if you permit the food to the person in whose behalf the prohibition was nullified, he might tell a gentile or a slave to nullify the prohibition; therefore we penalize him." Turei Zahav, note 10, cites Maharshal's view that [this applies] only if the food whose prohibition was nullified would please him even if he did not order someone to nullify it..."¹⁸

Likewise in our case, there is reason to fear that if we say nothing to the parents, the breach will widen, God forbid, and the parents will tell their children to convert in order to save them [the parents]. Therefore out of respect for the holy Torah and in order not to profane the glory of heaven, it is certainly incumbent upon the bet din to institute remedies and introduce protective measures to whatever extent possible. In order to warn my own congregation, I announced several weeks ago that those who left [Judaism] would be utterly separated from the congregation of Israel in every respect. Indeed this made a great impression. But secretly my soul weeps for the misfortune of my people. Before heaven our fellow Jews should be judged favorably, and as much as possible we should try not to push away altogether those who have been led astray, especially during the coming High Holy Days. Nor should we stir up accusations, God forbid, against our fellow Jews who are oppressed and in need of God's mercy.

See Tiferet Shelomoh, Torah portion Ki tetsei, on the verse [Dt.23.10] "When thou goest forth in camp against thine enemies, then thou shalt keep thee from every evil thing."¹⁹ There is something novel in Midrash Pinhas, p. 34, no. 5 by the holy man famous in his generation, R. Pinhas of Koritz (may his merit protect us). He tells us that his grandfather, also named R. Pinhas, used to visit the apostates, God forbid, and promise them the world to come [should they return to Judaism]. He asked them (to recite the Qeriat shema)-- the author is in doubt whether it was the entire Qeriat shema or just the verse "Hear O Israel..."-- and to renounce their heresy.²⁰ It is stated explicitly in the gloss to Sh.Ar. HM 34:22: "An apostate who returns and agrees to repent is immediately considered a proper Jew, even though he has not yet done so."

See also Pithei Teshuvah, note 32;²¹ Darkhei Teshuvah, YD 159:22;²² Shaarei Teshuvah, OH 128:11;²³ and Teshuvot Ketav Sofer, OH no. 109.²⁴ It is clearly written in Sefer Hassidim 203 as follows: "If a person changed his religion and then returned to Judaism and agreed to repent as the sages have instructed, from the moment he agrees they may drink wine with him and pray with him even if he completes the minyan [i.e., the minimum number required for public prayer], as long as he behaves like other Jews. For on the festivals even the negligent are trusted with respect to the purity of holy things." Note the comment on this passage by the holy master Hida of blessed memory,²⁵ as well as Teshuvot Hayyim Shaal, vol. 2, no. 38, par. 39.²⁶

Therefore, your honor, in my humble opinion a proclamation should be announced in the name of the rabbis (long may they live) in German and in the local vernacular, that since the High Holy Days are approaching for benefit, for a year of redemption and salvation, to exalt the glory of Israel, it is the obligation of every Jew to examine his deeds. Especially those Jews who have left [Judaism], God forbid, must repair the desecration of God's name which they have committed, God forbid. So that they will not be separated from the congregation of Israel in every respect, they must confess and announce publicly in the synagogue that they regret with great remorse their apostasy, and they agree to repent in accord with the instructions of the bet din. Then surely the Holy One, blessed be He, will protect them, and they will be included together with all those who fear God and who will merit to behold His graciousness.

In Teshuvot Mabit, vol. 1, I saw the following comment at the end of no. 19: "So we see that even though these sinners fell into bad ways, rejected the words of the sages, despised the festivals and the command-

ments, and defiled themselves by eating forbidden foods, even so it is better to bring them near than to push them away. They should stand up in the synagogues and agree to never again go astray. Then we should accept them and not push them away."²⁷ All the more so is this true in our case, where many of those who have left [the Jewish community] continue to observe the commandments in private. They are like those who sin inadvertantly and cause others to do the same (owing to our many sins).

May the Lord help us for the sake of His glorious name and have mercy upon His people, even the sinners. May He cause them to return in complete repentance; may He put an end to our exile and our mourning. May grief and lament flee, and may we merit salvation soon in tranquillity, without the tribulations preceding the Messiah. May God's name be sanctified in all the world, which is the prayer of our fellow Jews who are so terribly oppressed, whose souls are afflicted and crushed, still awaiting salvation.

With best wishes, much affection, and a blessing for a happy New Year to my beloved and cherished relative and colleague,

(the insignificant) Simhah Natan Greenberg

Av Bet Din, Kezmark

[Teshuvot Meqaddeshei Hashem, vol. 1, no. 92]

Notes

Responsum 19

1. Slovakia became a separate state when Czechoslovak Bohemia and Moravia were occupied by Germany in March 1939. On 15 May 1942, the RSHA (Reich Security Main Office) and the Slovak government concluded an agreement to deport the Jewish population of Slovakia. The agreement contained the provision that "no measures were to be taken that would antagonize the churches to such an extent as to threaten Slovakia's inner stability" (Raul Hilberg, The Destruction of the European Jews [New York: New Viewpoints, 1973], p. 464). This concession was accompanied by a fee, however: the Slovak government would have to pay the cost of the deportation. This meant that the more Jews deported by the Germans, the higher Slovakia's cost. This led to a bizarre situation in which the Slovaks could save money by exempting Jews baptized by the Church. Those converts who could prove that they were baptized before 14 March 1939 (the date of the founding of the Slovak state) would not be deported. Dr. Vasek, the "Jewish expert" of the Slovak Interior Ministry, estimated that 6,000 Jews had converted to Christianity after 1939 and not been deported by November 1942. Veessenmayer of the German Foreign Office estimated there were 10,000 Jewish converts in Slovakia at the end of 1943. This figure may reflect the fact that the convert's exemption from deportation was automatically transferred to other family members, including parents. The question addressed to R. Greenberg-- "What of those who have abandoned Judaism in order to protect their parents?"-- is explained by this provision of the exemption.

2. Legally it is not within the power of a Jew, whether by birth or

conversion, to renounce his Jewishness (Sanh. 44a: "An Israelite, although a sinner, is still an Israelite"; cf. Yev. 47b with Rashi; Sh.Ar. EH 44:2,5,6). A Jew who willfully converts to another religion and refuses to recant is considered a wicked Jew-- but a Jew nonetheless.

3. A report by the SS Security Service in Slovakia of 10 October 1942 states: "It is generally known that most of the remaining Jews in Slovakia have already been baptized. They attend rosary services in a provocative and demonstrative manner... People laugh at this sudden piety, and they do not believe that it is truthful or honest." See Raul Hilberg, ed., Documents of Destruction (Chicago: Quadrangle, 1971), p. 182.

4. Ribash, no. 6, concerns a woman from Majorca who claimed to be a converso Jew. She had married another converso according to the Christian rites; Jewish witnesses were not present. Now the husband had disappeared, leaving this woman and her baby. The Ribash rules that the marriage was invalid, not only because it was performed by Christian priests but because by voluntarily participating in such a ceremony, the husband demonstrated that proper marriage was not his true intention. If a Jew voluntarily worships with the idolators, "His licentiousness is self-evident." Perhaps R. Greenberg cites this resp. in support of a lenient attitude because the woman's story is not questioned, despite the absence of proper witnesses. Even though she agreed to the Christian marriage, it is assumed that she did so unwillingly. Therefore she suffers no penalty and does not require a bill of divorce. However, it seems more likely that R. Greenberg meant to cite Ribash, no. 11, where the subject of duress is addressed more explicitly. The question there is whether the testimony of converso Jews is valid. The Ribash replies that although the law

requires one to suffer death rather than commit idolatry, "Nevertheless the testimony of one who transgressed is still acceptable, for he did this under duress and due to the fear of death. A bet din may not punish him either by the death penalty or by lashing (cf. Rambam, MT Hil. Yesodei Hatorah, ch. 5, hal. 4: 'No punishment of either lashes or death is inflicted unless one commits the crime willfully in the presence of witnesses and had been warned [not to do it]'). For the Merciful One absolves [one who sins] under duress." Ribash cites several authorities to the effect that one is considered wicked only if he commits a transgression punishable by death or lashing. If someone voluntarily converts to another religion, however, his testimony is disqualified.

5. Darkhei Teshuvah cites the opinion that it is assumed one becomes an apostate only due to duress. Thus "if we observe someone who transgresses when there is danger, as long as it is known that he keeps the commandments in private, he is believed; however, if we observe someone who transgresses even when he can [safely] refrain from doing so, or if privately he disregards even the smallest particulars of the commandments, then he is suspect."

6. See resp. 31, note 2.

7. In support of this view, Sh.Ar. cites Ribash, no. 11 (see note 4).

8. In this instance torture is understood as a less extreme punishment than death, versus the view of Rabbenu Tam to Ket. 33b. Shittah Mequbbetset discusses whether death or lashing is the more severe punishment, since lashing inflicts prolonged suffering upon the body and also subjects the soul to shame. R. Eleazar holds that the verse "[Thou shalt love the Lord thy God] with all thy soul" [Dt.6.5] means "even if one must give up

his soul. But he is not obligated to suffer more severe punishment than death." The example of R. Aqiva would seem to contradict this statement: the Romans tortured him by lacerating his flesh with an iron comb; R. Aqiva himself said that by undergoing this ordeal he was fulfilling the commandment to love God with all his soul. However, in R. Aqiva's case the mode of torture made death imminent; there was a limit to the suffering. According to R. Eleazar's view, God does not require prolonged, limitless suffering.

9. Erekh Shai seeks to distinguish between direct and indirect duress. Direct duress occurs when one is forced to commit a forbidden act against his will. Indirect duress occurs when one commits a forbidden act by his own volition in order to avoid threatened punishment. According to Erekh Shai, indirect duress does not excuse the transgression. As proof he cites Rambam, MT Hil. Yesodei Hatorah, ch. 5, hal. 6, who equates duress with sickness: "Where there is danger of death, all the prohibitions of the Torah are waived except idolatry, incest [see resp. 6, note 3], and murder, which even in case of danger must not be employed as means of healing. If one transgresses and is cured by such means, the bet din may inflict appropriate punishment." In other words, even though the patient's life is threatened, he is not actually forced to violate any of the three cardinal sins. If he does violate any of them, he is culpable, regardless of the indirect duress. This distinction, however, seems untenable. If someone's life can be saved only by committing a transgression, how can it be argued that he is not forced to commit it?

10. Pithei Teshuvah writes that the opinion of Mishnat Hakhamim is "not clear." On the one hand, he maintains that if gentiles should want to

kill a Jew but have no intention of compelling him to transgress, any transgression the Jew commits in such a situation cannot be excused by the factor of duress. On the other hand, the Mishnat Hakhamim admits that nothing (save the three cardinal sins) stands in the way of the obligation to save a life, even if the danger to life is doubtful.

11. Turei Zahav comments on the Sh.Ar.'s statement (YD 179:7) that if one is pursued by a snake, he is permitted to practice sorcery (i.e., to charm the snake) in order to prevent injury to himself. Taz writes: "If a life depends on a transgression, and by committing the transgression the life will be saved, then one may commit it. For instance, by violating the prohibition against sorcery, he saves himself."

12. Atsei Levonah sees the Taz's comment as self-evident, since even the severe prohibition against profaning the Sabbath is suspended when a life is in merely doubtful danger. He concludes that the Taz must be referring to the three cardinal sins-- murder, incest, idolatry-- for whose sake one is enjoined to suffer death rather than transgress. Accordingly, if a gentile does not seek to compel a Jew to commit a transgression but rather issues a decree that entails danger to the Jew's life, then if the Jew can save himself even by resorting to idolatry he is permitted to do so. The Atsei Levonah cites the example of Esther, who willfully became Ahasuerus' queen in order to save Jewish lives. Thus the intention of the persecutor is crucial: if he wants to force a Jew to commit idolatry, the Jew must suffer death; but if he wants only to kill the Jew, the Jew may commit idolatry in order to save himself.

13. With reference to the comment of Taz, YD 179 note 4, that one may commit a given transgression if such an action will save his life (see

note 11), Binyan Tsiyyon is puzzled that the Taz derives this principle from the law that one who is threatened by a snake may practice sorcery on it, since the same principle is stated more clearly in Yoma 83a:

"If one is seized by ravenous hunger, he may be given to eat even unclean things..." He suggests that there may be a distinction between one who is already in danger and one who merely anticipates it. If the snake has already stung him, or if he already suffers from ravenous hunger, obviously he may transgress in order to save himself; but if the snake has not yet harmed him and he is merely afraid that it will, transgression may not be permitted.

14. I.e., to promote observance of the law. Shevut Yaaqov, vol. 3, no. 92 does not quote Ramban's resp. 244; it is cited by Pithei Teshuvah, YD 334:6. To discipline someone who refuses to abide by the bet din's decision, it is permissible to refrain from joining him in fulfilling those obligations requiring more than his participation-- for instance, reciting the grace after meals (which requires three), reciting Kaddish (which requires ten), etc. For just as he has separated himself from the community's authority, so may the community separate itself from him. However, those obligations which he can fulfill by himself are not forbidden, e.g., circumcising his son (versus Rema, Sh.Ar. YD 334:6).

15. Even more severe remedies were available to the bet din to exact compliance, e.g., lashes (cf. Teshuvot Rosh 8:2, 11:4) and imprisonment (see Rema, Sh.Ar. HM 97:15).

16. Turei Zahav cites authorities who find it difficult to accept the notion that such a man's family should suffer for his wrongdoing. He contends that the Rema must be referring only to those of the man's children

who are so young that "their merit depends on the father." Burial may be withheld from these children, but not from grown children whose reward or punishment depends on their own conduct. Moreover, the Taz sees no reason to humiliate the man's wife, which the Rema permits.

17. Hatam Sofer rejects the view of Taz (note 16) in favor of the Rema's strict ruling. "With respect to one who is excommunicated, we must enforce the laws of Israel to the greatest extent possible."

18. The Maharsha's statement continues: "But if he did not know that the prohibition of the food would be nullified in his behalf, and if the nullification would not please him, the food is permitted to him." Applying R. Greenberg's analogy, if the parents do not know in advance that their children are converting to Christianity for their sake, or if the parents do not approve of their children's conversion, still the parents are permitted to accept the benefit of the prohibited conversion. R. Greenberg, however, does not choose to follow the analogy this far.

19. Concerning the observance of Rosh Hashanah, Tiferet Shelomoh writes: "The main preparation for this awesome day is [to establish] brotherhood and friendship among the Jews... One must not, God forbid, speak evil of his fellow, nor see in him any deficiency; rather he should see only his virtue... For if a person regards others as righteous, he himself will be inscribed in the books of the righteous."

20. Midrash Pinhas, p. 38, no. 17 in the edition published in Jerusalem, 1971, "[R. Pinhas] used to say that he would give them his [share of the] world to come and pleaded with them every day to recite the Qeriat shema... He entreated them so persistently that many of them heeded him and renounced their heresy."

21. The Rema, HM 34:22, bases his statement on the authority of the Mahariq. Pithei Teshuvah cites an authority who points out that the Mahariq himself required at least "the beginning of active repentance... a little self-mortification."

22. Darkhei Teshuvah cites the Berit Yaaqov and the Shakh in support of the view that any apostate who agrees to repent may not be charged interest on a loan. "Even if he does not agree to repent immediately but rather at some distant time in the future, it is forbidden to charge him interest on a loan."

23. The citation is erroneous.

24. Ketav Sofer is asked about the attitude of a certain group of people within his community toward a repentant apostate (cf. resp. 31). This group planned to organize a minyan for the purpose of study, prayer, and the recital of Kaddish, on the condition that the repentant apostate be excluded. The Ketav Sofer adamantly opposes such a stipulation. He cites Rambam, MT Hil. Teshuvah, ch. 7, hal. 4: "The sages said: 'The place where the penitent stand, the wholly righteous cannot stand,' as if saying, 'Their merit exceeds the merit of those who never sinned, because it is more difficult for them to subdue their [evil] impulse than it is for others.'" As for those who wished to exclude this man and make him an object of ridicule, Ketav Sofer suggests that they are really the transgressors, for they have violated the prohibition (Lev.25.17) "And ye shall not wrong one another."

25. The commentary on this passage, Berit Olam (by Hida), cites the dissenting view that for an apostate to merely express his intention to repent is not sufficient to accept him as a proper Jew (cf. Pithei

Teshuvah, HM 34 note 32). The Berit Olam reconciles the two opinions by suggesting that Sefer Hassidim refers only to a repentant apostate who comes before the bet din, in which case his repentance is immediately effective since his declaration is public and his repentance is under the bet din's supervision. The Berit Olam also points out that if we do not allow him to drink wine with us, he may decide to return to his gentile companions. Cf. the view of Mabit in text of resp. below.

26. The resp. concerns a Jew learned in Torah who refused to drink from a jar of wine which had been touched by an apostate. The apostate had been forced to flee from gentiles who wanted to kill him; he then returned to the Jewish community. He had since fasted a little in repentance for his sin "but had not completed his repentance." Was the scholar right not to drink from the repentant apostate's wine? Citing Sefer Hassidim and Berit Yaaqov, the Hayyim Shaal criticizes the scholar's conduct. He points out that the circumstances of the apostate's return-- under threat of death from the gentiles-- suggests that his original apostasy was coerced in the same way. Thus the apostate should be forgiven for two compelling reasons: repentance and duress.

27. The Mabit relates that certain Jews who had violated the laws of Jewish observance in every way now wanted to return. Must they submit to immersion or symbolic circumcision, since their conduct had so utterly divorced them from the Jewish people? Can it be assumed that they will be sufficiently knowledgeable of the law not to violate it even after they repent? R. Greenberg quotes only part of Mabit's reply. He omits the Mabit's stipulation that the bet din should punish these sinners by imposing a fine for each of their evil deeds. Moreover their sinful con-

duct must be examined to determine if any sexual prohibition was violated; if a man married a woman under such circumstances, the couple must be separated. Any child of such a union is forbidden to marry a Jew (see resp. 32, notes 1, 3).

Responsum 20

The law concerning whether those who dwell in the darkness and death shadow of the ghetto are obligated to have a mezuzah [on the doorposts of their dwellings]

Question: In the days of evil and siege when we were prisoners in the Kovno ghetto without any connection to the outside world, all religious articles were used up, for it was impossible to obtain them by any means. With tears on their cheeks a number of people came to me and asked what the law required them to do, since their mezuzot were now defective and it was impossible to obtain others to affix to their doorposts.

The essence of their question was whether their dwellings in the ghetto required a mezuzah. The ghetto was completely closed off so that no one could leave or enter. It was surrounded on all sides by an electrified wire fence and watchtowers with guards to prevent the ghetto inhabitants from even approaching the fence.¹ Anyone who did was immediately killed by the guards' machine guns. Thus perhaps the ghetto inhabitants had the legal status of prison inmates, and we need to know whether a prison requires a mezuzah. Is a prison considered a dwelling, or is it exempt from [the requirement of] a mezuzah?

Answer: The Rambam, MT Hil. Mezuzah, ch. 6, hal. 1, decided as follows:

"There are ten conditions to be considered before an occupant of a house is obligated to affix a mezuzah [to the doorpost]. If one of these

conditions is lacking, he is exempt from this obligation. They are as follows: the house must have an area of four cubits by four cubits or more; it must have two doorposts, a lintel [cross-piece], a roof, and doors; the entrance must be ten handbreaths high or more; the house must be fit for secular use; and it must be built for human occupancy, dignified use, and permanent residence." In Hal. 9 Rambam wrote: "The lavatory, bathhouse, ritual bath, tannery, etc. are exempt from [the requirement of] a mezuzah since they are not built for dignified use. A sukkah for the observance of Sukkot and a house on a boat are exempt from [the requirement of] a mezuzah because they are not built for permanent residence."

Now apparently since the Rambam did not mention that a prison is exempt from the requirement of a mezuzah, this implies that a prison is like any other dwelling and requires a mezuzah. However, it must be noted that among the ten conditions for a mezuzah enumerated by the Rambam is that the house must be built for dignified use; therefore he wrote in hal. 9 that the lavatory, bathhouse, ritual bath, tannery, etc. are exempt from the requirement of a mezuzah. If so, then neither is a prison built for dignified use and consequently must be exempt from the requirement of a mezuzah like all the others mentioned by the Rambam. Thus the inhabitants of the ghetto are also exempt from the requirement of [affixing] a mezuzah [to their doorposts].

Apart from this, [another] one of the conditions enumerated by the Rambam is that the house must be built for permanent residence. Therefore he wrote in hal. 9 that a sukkah for the observance of Sukkot and a house on a boat are exempt from the requirement of a mezuzah because they are not built for permanent residence. Since a prison is not built

for permanent residence either-- since a prison inmate every day eagerly awaits the moment when he will be freed from his imprisonment-- then certainly a prison is exempt from the requirement of a mezuzah, as in the case of a sukkah for the observance of Sukkot or a house on a boat.

In our case as well the dwellings of the ghetto prisoners could not be considered permanent. Each room was occupied by more people than it could hold, and the people had to arrange their beds one on top of the other. There was no limit to the crowding in the rooms. Certainly, then, the law regarding a permanent residence does not apply to a dwelling like this, and consequently the dwelling is exempt from the requirement of a mezuzah. For surely at the first opportunity the people would flee these cramped rooms to search for a better and more spacious dwelling.

Furthermore, every single day the accursed Germans were taking the ghetto prisoners out to be killed. None of us knew when his time would come. Every day people would part from each other with the blessing, "See you again in the world of truth," for they feared they would not have another chance to say farewell in this world. Either today or tomorrow they would be taken out to be killed. We were then in the habit of saying that we were "dead man on leave," since none of us was sure of his life. This makes it evident that the ghetto dwellings must be accorded the legal status of a temporary dwelling, not a permanent one which would require a mezuzah.

Indeed the question of whether a prison requires a mezuzah or not would seem to depend on the following passage from Yoma 10a: "Our rabbis taught: All the chambers in the sanctuary were without a mezuzah

except the chamber of the counsellors, where there was a dwelling for the high priest. R. Yehudah said: Were there not a number of chambers in the sanctuary which had a compartment for a dwelling, yet had no mezuzah? Rather, the mezuzah on the chamber of the counsellors was there as a preventive measure." Further on in the gemara [Yoma 10b] it is concluded: "The rabbis hold that a forced dwelling is still called a dwelling, while R. Yehudah maintains that such a dwelling is not called a dwelling. It is [only] a rabbinical enactment to affix a mezuzah [on the chamber] so the people will not say that the high priest is imprisoned." We agree with the sages that a forced dwelling is still called a dwelling. Accordingly a prison is a forced dwelling, and since we agree with the rabbis that a forced dwelling is still called a dwelling and requires a mezuzah, then a prison too requires a mezuzah. If so, then this is the law in our case: the ghetto prisoners are obligated to affix the mezuzah.

However, it must be said that a prison is different from the counsellors' chamber. For while the rabbis hold that a forced dwelling is still called a dwelling and requires a mezuzah, this is only in the case of the counsellors' chamber which was meant for dignified use but whose occupant lived there involuntarily. A prison, however, is not built for dignified use, and one may say that the sages would also agree that it is exempt from the requirement of a mezuzah. The proof for this contention is as follows: R. Yehudah holds that a forced dwelling is not called a dwelling, but nevertheless the counsellors' chamber requires a mezuzah on the basis of a rabbinical ordinance so that no one will say the high priest is imprisoned. In other words, if there were no mezuzah on the counsellors' chamber, people would say, "The high priest is imprisoned;

the proof is that there is no mezuzah on the counsellors' chamber. Therefore it must be a prison." So the sages ordained that the counsellors' chamber requires a mezuzah to show that it is not a prison. This clearly indicates R. Yehudah's view that a prison is exempt from the requirement of a mezuzah. The rabbis do not object to this; rather, their reasoning is that even if the counsellors' chamber had no mezuzah, there would be no reason to fear that people would say the high priest is imprisoned, since people would not confuse the counsellors' chamber with a prison. The rabbinical enactment [requiring the mezuzah] is imposed only because they hold that a forced dwelling is still called a dwelling, and only for this reason does the counsellors' chamber require a mezuzah. But in regard to an actual prison, the rabbis hold also that it is exempt from the requirement of a mezuzah for the reason that it is not built for dignified use and is comparable to a lavatory, bathhouse, ritual bath, tannery, etc. which are exempt because they are not meant for dignified use. The same applies to a prison.

Yet if we say that a prison is exempt from the requirement of a mezuzah because it is not built for dignified use and is comparable to a public lavatory, bathhouse, etc., then also the dwellings in cities of refuge² would be exempt from this requirement as well. For the law specifies that if people should want to honor [a resident of a city of refuge], he must say, "I am a manslayer."³ Since this indicates that dwellings in cities of refuge are not built for dignified use, would they not be exempt from the requirement of a mezuzah? But this cannot be.

Rather one must necessarily conclude that dwellings in cities of refuge are different from lavatories, bathhouses, etc. which are obviously loathesome and not intended for dignified use. In regard to

dwellings in cities of refuge, however, the dwelling itself is built for dignified use like other dwellings. Is anything in the dwelling changed because the occupant is a manslayer? "The character of a place is the estimation of its inhabitants" [Sot. 47a]. The same holds true for a prison, where the dwelling is like other dwellings except that the prisoner's punishment is to stay there for the specified time of his sentence. Now in our time it is the custom to occasionally declare a curfew, and people must remain prisoners in their homes. Would we then say that during the curfew their houses are exempt from the requirement of a mezuzah? The house is not changed in any way; and just as its occupant is responsible for all of the commandments, so is he responsible for the mezuzah, for the mezuzah is the obligation of the occupant. Therefore a prison certainly requires a mezuzah. If [it is argued that a mezuzah is not required] because a prison is not a permanent residence, and the Rambam counted among the conditions for a mezuzah that the dwelling must be built for permanent residence, this is not a valid objection either. For there are some prisoners who are imprisoned for months and years. Thus for them the prison may certainly be called a permanent residence. Also, when someone rents a dwelling, he rents it in advance for a fixed time, but nevertheless he is required [to affix] a mezuzah and we do not say that it is not a permanent residence. If so, then a prison is no different.

Finally, if one were to say that a prison is exempt from the requirement of a mezuzah because it is a forced dwelling, we agree with the sages that a forced dwelling is still called a dwelling. Moreover the Rambam, MT Hil. Mezuzah, ch. 6, hal. 1, did not count among the conditions for a mezuzah that the dwelling must not be a forced dwelling. Thus we learn

that this does not preclude the requirement of a mezuzah, and from all that has been said it appears that a prison does require a mezuzah.

See Birkei Yosef no. 286:3 who considers whether or not a Jewish prison requires a mezuzah. He cites R. Bet Hillel to have exempted [a prison] on the basis of the Yoma [10a-b] passage discussed above.⁴

Also, according to Teshuvot Shaar Efrayim no. 83, a prison is exempt from the requirement of a mezuzah; but according to a note there he is inclined to require it,⁵ which is also the Birkei Yosef's conclusion. Still, the Birkei Yosef's view is that a prison whose inmates stay for no more than two months is exempt since it is only a temporary residence. After the liberation I also saw what Mishpetei Uziel, YD wrote about this matter.⁶

It appears to me that our case is worse than a prison whose inmates stay for no more than two months, which according to Birkei Yosef is exempt because it is a temporary residence. The ghetto prisoners dwell in the vale of tears; their souls are weary because of the murderers. Every day the accursed wicked ones bring people out by the tens and hundreds to be killed, and there is no one to say, "What is this you are doing?" Surely the dwellings of these people have the legal status of temporary residences, since every day the prisoners' lives hang in the balance, and every day they are ready to sanctify God's name. For the edict has gone forth from the oppressor, may his name be blotted out, to destroy and murder all the Jews. All the ghetto prisoners have been condemned to death. Therefore it seems certain that their houses and dwellings are for them only temporary, and they are exempt from the requirement of a mezuzah because any day they might be carried off to slaughter by the cruel enemy.

Even so, whoever has a mezuzah and wants to affix it to his doorpost to remind him of the unity of the Holy One, blessed be He, performs a mitzvah.⁷ As our rabbis of blessed memory said in Men. 43b: "Whoever has tefillin on his head and arm, fringes on his garment, and the mezuzah on his doorpost, will be strengthened against sin; as it is said [Ecc.4.2]: "And a three-fold cord is not quickly broken..." It is also written [Ps.34.5]: "The angel of the Lord encampeth around those that fear Him and delivereth them." Whoever is careful to observe the commandment of the mezuzah will live long, as it is said [Dt.11.21], "That your days may be multiplied, and the days of your children," as found in Shab. 32b.⁸

Therefore those who affix mezuzot to their doorposts are performing a great mitzvah. But they should affix it without a benediction, since by law they are exempt [from the duty], as we have concluded. Those who have no mezuzah should not be troubled or worried. May God who is good send us His help from the sanctuary, and may we merit for Him to return His captive people to Zion with singing and to Jerusalem His temple in everlasting joy; and may it be soon in our days. Amen.

[Efrayim Oshry

Teshuvot Mimaamaqim, vol. 1, no. 13]

Notes

Responsum 20

1. R. Oshry's description of the Kovno ghetto in this resp. indicates that the Nazis' conversion of the ghetto into a concentration camp (September 1943) had already occurred. See H.J. Zimmels, The Echo of the Holocaust in Rabbinic Literature (New York: Ktav, 1977), p. 43.
2. Cities of refuge (Nu.35.13, Dt.19.9) were populated towns in which a manslayer was immune from reprisal by the victim's blood avenger (Nu.35.12).
3. M. Mak. 2:8. As an atonement for his crime, the manslayer must abase himself when people wish to show him deference.
4. On the basis of Yoma 10b, R. Bet Hillel concludes that a prison is not a dignified dwelling and therefore does not require a mezuzah. But Birkei Yosef points out that a prison is not like a toilet or public bath, where filth, odor, and naked bodies mingle. Even a barn and woodshed require a mezuzah (as long as women do not bathe there); is a prison any less dignified? He cites the conclusion of Shaar Efrayim (see note 5) in support of his view.
5. The resp. refers to Yoma 10b and the controversy over a forced dwelling. Shaar Efrayim does not decide one way or the other. In a marginal gloss by the author's son, it is argued that since the rabbis conclude that a forced dwelling is called a dwelling, and since the Rambam did not stipulate among his ten conditions that a dwelling be voluntary, a prison does require a mezuzah.
6. Second series, vol. 3, no. 77. He concludes that any dwelling which

serves as a human residence cannot be considered "undignified." Moreover, forced dwellings are still considered dwellings. For both of these reasons, a prison requires a mezuzah.

7. According to poet Yitshaq Katzenelson, a group of Jews in the Lodz ghetto from 1940 to 1942 tried to see to it that every doorpost in the ghetto had a mezuzah. The group's leader argued from the Bible and Talmud that the Judenstern was a kind of symbolic recompense for the Jews' neglect of their own marks of identification, the mezuzah and tsitsit. See Mordekhai Eliav, Ani Maamin (Jerusalem: Mossad Harav Kook, 1965), p. 84.

8. This interpretation is based on the conjunction of Dt.11.20 ("Thou shalt write them upon the doorposts of thy house and upon thy gates") and Dt.11.21 ("... that your days may be multiplied and the days of your children"). R. Hiyya b. Abba contends that the promise of long life (Dt. 11.21) is made conditional upon the immediately preceding command to affix the mezuzah (Dt.11.20).

Responsum 21

Does the law permit a prisoner of the ghetto to endanger his life by escaping to the forests to join the partisans?

Question: While we were suffering imprisoned in the Kovno ghetto, I was asked the following question by the honorable R. Yitshaq Gold. Every day the accursed Germans were taking more than a thousand people from the ghetto to forced labor at the air field. There they worked these people ruthlessly, compelling them to meet the Germans' daily work quota.

If the Germans saw that the ghetto workers could not meet the daily work quota which they in their wickedness had imposed, their anger ignited like a blazing fire, and they descended upon the ghetto in murderous fury, seizing more Jews for forced labor in order to meet the work quota.

Once the destroyer had been given the opportunity to begin inflicting the plague upon the prisoners of the ghetto, the German soldiers eradicated from themselves all semblance of the human image. They turned into wild rabid animals whose only aim was to tear their prey to pieces and quench their thirst for blood. They fell upon the unfortunate Jews and beat them murderously, at the same time mocking and ridiculing them in the desire to inflict suffering on both the body and soul of the Jews.

There was not a day in the ghetto that was not more calamitous than any other, that did not introduce new and even stranger persecutions. Every morning gave birth to more gloom and depression. Evil tidings followed evil tidings; the ghetto prisoners afflicted by misery asked

one another: "What are today's evil tidings? What are tonight's evil tidings?"

Then one day a rumor circulated in the prison camp that was not good: the Germans had decided to move a number of people to another camp, which meant a death camp.

Following this rumor another took wing: a large number of ghetto prisoners were fleeing to the forests in the darkness of night to join the partisans who were taking vengeance against the Germans and killing many of them. This was the only way left to the Jews, whom the Germans thought of as sheep led to the slaughter: to defend themselves by joining the partisan bands and risking their lives to fight for them.

However, there was a difficulty: the way to the forests was pregnant with danger.¹ Apart from the fact that the ghetto itself was surrounded by an electrified wire fence that was lethal to whoever touched it, at a certain distance apart lookout towers had been erected. German soldiers stood watch on these towers day and night with their machine guns poised, ready at any instant to hit anything that moved, even in the dark of night. Their big searchlights lit up the entire area surrounding the camp.

Moreover, the partisans had a strict rule that no men could join their army unless they were armed. Among the partisans there was a severe shortage of weapons. Therefore they would add to their ranks only those who had their own weapons.²

This condition further magnified the imminent danger for all those who escaped from the ghetto wanting to join the partisans. The Germans executed at once anyone captured outside the ghetto, as is known; how much the more so if someone was captured with a weapon in his possession. He was immediately as good as dead.

In addition to this, there were some partisan units that did not want to accept any Jews at all, for they too were great haters of the Jews in spite of the fact that they were fighting against the Germans. A Jew who fell into the hands of these partisan bands paid with his life.³

In light of all this I was asked by the honorable R. Gold if the law permitted a ghetto prisoner to endanger his life by escaping to the forests, for perhaps God would help him and by escaping he would manage to stay alive. Here inside the ghetto the immediate danger to life was certain; but by escaping he would place himself in merely doubtful danger.

The saying that circulated in the ghetto was well known: the very characteristic saying of the ghetto prisoners that they were "dead men on leave," that is, they considered themselves dead but had accepted a temporary leave...

For in addition to the "actions" carried out by the Germans in the ghetto from time to time, when they seized men, women, and children and sent them to the death camps, the lives of the Jews also hung in the balance when there were no "actions." The Germans shot and killed Jews for every little thing. Maybe it seemed to a German that a Jew did not show proper respect; or maybe when a Jew returned from forced labor they found concealed in his clothing a slice of dry bread which he had hoped would keep alive his child dying of starvation. Life in the ghetto involved certain danger, while in comparison escape meant only possible danger.

Or perhaps there is reason to consider the reverse and say that those living in the ghetto are not now in imminent danger because the rumor is also current that nothing evil will befall those who have remained in the ghetto until now, if only they work and do all that the

Germans ask of them. In contrast to this, the danger to the escapees is very great, not only from the Germans but from the Lithuanians who conspire to seize such Jews to either kill them or hand them over to the Germans.

Answer: In Er. 45a we read: "R. Yehudah said in the name of Rav: 'If foreigners besiege Israelite towns, we do not go out armed against them and do not profane the Sabbath on their account.' It was also taught: 'If foreigners besiege...': When does this apply? Only when they come for money, but if they come to take lives then we do go out armed against them and we do profane the Sabbath on their account. If it is a town close to the border, then even if they do not come to take lives but merely for straw, we go out armed against them and profane the Sabbath on their account' (Rashi [comments]: 'In case they should capture the town, since from there the entire country might easily be conquered.'). R. Nahman said: 'Bavel is considered a border town...' R. Dostai of Biri expounded: 'Why is it written [1 Sam.23.1], "And they told David saying, 'Behold the Philistines are fighting against Keilah, and they rob the threshing floors'"? A tanna taught: Keilah was a border town and they only came for straw, for it is written, "... and they rob the threshing floors," yet it is also written [1 Sam.23.2], "Therefore David inquired of the Lord saying, 'Shall I go and smite the Philistines?' And the Lord said unto David: 'Go and smite the Philistines, and save Keilah.'"

In Sh.Ar. OH 329 [:6] we find the following: "When gentiles besiege a Jewish city, if they come for money we do not profane the Sabbath on their account; but if they come to take lives, or even if they besiege

for any reason, we go out armed against them and profane the Sabbath on their account. In a town close to the border, even if they come only for straw, we profane the Sabbath on their account." The gloss [adds]: "Even if they have not yet come but want to come (Or Zarua)."

In OH 329:7 it says: "Some say that in these times, even if they come [only] for money we profane [the Sabbath], for should the Jews not allow the enemy to rob and plunder their property, they will be killed, and then it will be a matter of taking lives. (In any case, it all depends on the circumstances.) (Pisqei Maharai 120,)"

Also the Rambam ruled in MT Hil. Shabbat, ch. 2, hal. 23: "When gentiles besiege Jewish towns, if they come for money we do not profane the Sabbath on their account and we do not wage war against them. But in a town near the border, even if they come only for straw, we do go out armed against them and we do profane the Sabbath on their account. Anywhere they come to take lives or wage war or to besiege for any reason, we go out armed against them and profane the Sabbath on their account. All Jews who can come to the aid of their brothers under siege and save them from the gentiles on the Sabbath are commanded to do so; and it is forbidden to delay until the Sabbath ends."⁴

See also Yer. Ter., end of ch. 8, where we read: "R. Ammi was arrested in Sifsifa. R. Yonatan said: 'Let the dead man wrap himself in burial shrouds' (meaning that it was hopeless for him [R. Ammi] and all he could do was prepare his burial shrouds-- Penei Mosheh). R. Shimon b. Laqish said: 'Whether I will kill or be killed, I will try with all my might to save him.' He went there and appeased the robbers [in the prison], and they let him in and returned [R. Ammi] to him."

From this passage in the Yerushalmi we see clearly that R. Shimon b.

Laqish placed himself in possible danger of being killed in order to rescue R. Ammi. This conforms to the ruling of the Tur, HM 426⁵ on the authority of the Haggahot Maimuniyyot who inferred from the Yerushalmi that even if one must place himself in possible danger, he is obligated to rescue [someone in certain danger]. See what I wrote about this in Teshuvot Mimaamaqim, vol. 2, no. 1.⁶

Yet see Mishnah Berurah [OH 329], note 19, who wrote: "In any event if it is dangerous to save [someone] then one is not obligated to do so, for one's own life takes precedence over his companion's. Even if it is only a case of possible danger, still one's own doubtful [danger] takes precedence over the certain [danger] of one's companion. However, one needs to weigh carefully whether there is possible danger and not be too cautious; as some people say, one who is too cautious becomes caution's victim." So it is found in Pithei Teshuvah, HM 426:2.

In the ghetto there appears to be certain danger. The whole purpose of isolating the Jews and imprisoning them in ghettos was to pillage and devastate all they had at the very beginning, to make them like an empty vessel with nothing left except their lives, and eventually to destroy both their body and soul by persecution, murder, and every kind of bizarre death, as is known.⁷

In contrast to this, escape to the forests was only a possible danger, since whoever had gathered his courage and decided to escape had surely examined carefully in advance where he was going. Occasionally partisans entered the ghetto who knew how to get out and where to go, and they gave information to others who wanted to join them on how to find the roads in the forests which led to the partisans' camp. Although all of these roads were presumed to be dangerous, still we saw with our own eyes that

it was possible to pass along these roads. These partisans who came and went freely in the ghetto proved that this was so.

In Sefer Hahinnukh, concerning commandment 425 [Dt.20.17]-- to slay the seven nations of the Canaanites-- the author wrote: "[We are commanded] to slay the seven nations who held our land before we conquered it from them. Even though we already did the required thing to them by the hand of King David, who destroyed them all until only a few remained who were dispersed and swallowed up among the nations until their memory perished... even so we do not call this commandment one of those which is no longer observed... One who transgresses this commandment-- should a gentile come under his power and he can slay him without endangering himself, but he does not-- nullifies this positive commandment in addition to transgressing a prohibition, for it is said [Dt.20.16], 'Thou shalt save alive nothing that breathes.'"8

The Minhag Hinnukh commented on the above passage: "'And he can slay him without endangering himself...': This needs further study. Granted that all the commandments are set aside because of danger to life; still the Torah commands us to fight against them. Since it is known that the laws of the Torah are not contingent upon miracles, as explained by the Ramban, it is the way of the world that soldiers on both sides are killed in time of war. We see that the Torah ordained that we fight them even though it is dangerous. Consequently danger to life is disregarded in this instance, and it is a mitzvah to slay him even if one must endanger himself. But this needs further study."

According to the opinion of Minhag Hinnukh, then, it is clear that in this war which the accursed Germans-- the offspring of Amalek, may their names be blotted out-- declared against the Jews, to utterly

annihilate them, surely the Jews are obligated and commanded to turn back the battle at the gate, pay them their due reward, and do to them what they plan to do to us. It is a mitzvah to pursue them in anger and to destroy them from under God's heaven.⁹

Certainly, then, danger must be disregarded in this instance, and it is a mitzvah to slay them even if one must endanger himself, as the Minhag Hinnukh wrote. Actually, the larger the number of escapees in the forests who join the partisans and attack the rear guard of the Germans, the less danger there will be for those who escape to the forests. So will the hand that holds the weapon be strengthened, and they will have the power to take vengeance upon the Germans.

Therefore I decided not to discourage those who were prepared to escape to the forests; on the contrary, we should strongly encourage them and help them to procure weapons so that they do not come to the partisans empty-handed.¹⁰ Rather they should be trained for combat and prepared to take their place immediately in the front ranks of the fighters.

May God to whom vengeance belongeth show Himself to fight for them [the Jews], that they may see vengeance and wash their feet in the blood of the wicked Germans, may their names be blotted out. May their [the Jews'] enemies be scattered and flee before them; as smoke is driven away, may the enemies be driven away and perish forever. May the few who take their lives in their hands to escape to the forests herald a great army that will smite the German enemy and crush the German viper's head, may his name and memory be blotted out.

[Efrayim Oshry

Teshuvot Mimaamaqim, vol. 4, no. 10]

Notes

Responsum 21

1. Kovno was one of the few ghettos where the surrounding terrain was conducive to partisan warfare, since it was surrounded by broad forests. "Partisan tactics required bases in dense forests which also had space for retreat" (Shalom Cholvsky, "Jewish Partisans-- Objective and Subjective Difficulties," Jewish Resistance During the Holocaust [Jerusalem: Yad Vashem, 1971], p. 327). However, "Most of the fighters were killed even before they could reach the forests."
2. Yitzhak Arad, "Jewish Armed Resistance in Eastern Europe," The Catastrophe of European Jewry (Jerusalem: Yad Vashem, 1976), pp. 499-500, writes that while anti-Nazi underground movements in eastern Europe had caches of hidden arms, they generally refused to share them with Jews. In the later stages of the war, other partisan organizations received arms parachuted to them by governments or governments-in-exile. "The Jews were the only anti-Nazi underground in occupied Europe which did not receive weapons from any outside source. The serious shortage of weapons was the greatest obstacle faced by Jews wishing to take an active part in the struggle against the Nazi conqueror."
3. Arad (ibid.) writes that the attitude of the partisan units toward Jews, together with the lack of weapons (see note 2), "determined the extent of Jewish warfare in advance." Even if Jews managed to procure weapons, partisan commands often confiscated them and gave them to non-Jews. "The prevailing opinion was that Jews were bad fighters. Non-Jews were never required to prove themselves and were immediately accepted as

equals" (ibid., p. 511). Often after Jews were stripped of what weapons they had, they were consigned to "family camps" which were sometimes abandoned to the mercies of the Germans or the hostile local population. Jews were robbed of their possessions and even murdered.

4. The Kesef Mishneh adds that while there is no explicit talmudic basis for permitting the Sabbath to be profaned "even if they besiege for any reason," Rambam permits it since whenever there is even doubtful danger to life, the laws of the Sabbath are suspended.

5. This statement is not in the text of the Tur; rather it is found in the commentary of Bet Yosef who attributes it to the Haggahot Maimuniyyot (MT Hil. Rotseah, ch. 1, hal. 14).

6. See resp. 6.

7. R. Oshry's insight into the nature of the Nazi persecution is echoed in the diary kept by Zelig Kalmanovich in the Vilna ghetto. The entry is dated 30 April 1943 (cited from Lucy Dawidowicz, ed., A Holocaust Reader [New York: Behrman House, 1976], p. 232): "For a Jew is part of the sacred triad: Israel, the Torah, and the Holy One, blessed be He... History rages now, a war is waged against the Jews, but the war is not only against one member of the triad but against the entire one: against the Torah and God, against the moral law and the Creator, Can anyone still doubt which side is the stronger?"

8. Sefer Hahinnukh continues: "Just because we cannot now pursue them and kill them is no reason to designate this commandment among those that are no longer observed." He bases his opinion on Rambam, MT Hil. Melakhim, ch. 5, hal. 4: "It is a positive commandment to utterly destroy the seven [Canaanite] nations... If one does not put to death any of them that falls

into one's power, he transgresses a prohibition... But their memory has long perished."

9. See resp. 29.

10. The Kovno ghetto was unusual in that the Judenrat and the underground resistance cooperated with one another. This resp. probably coincides with the decision of the leaders of the Kovno Judenrat to equip and outfit some 300 young people to leave the ghetto and attempt to join the partisans. See Lucy Dawidowicz, The War Against the Jews (New York: Holt, Rinehart, Winston, 1975), pp. 324-25. According to survivor Dov Levin (who fixes the number of young people at 350), Judenrat chairman Elhanan Elkes was aware of "the national significance of the act, expressing it in such words as these: 'Even if only a few dozen or a few hundred of the Jewish youth manage to get out of the ghetto armed and to fight, it will be a deed of honor for the Jewish people'" (from "Debate: Jewish Leadership-- Policy and Responsibility," Jewish Resistance During the Holocaust [Jerusalem: Yad Vashem, 1971], p. 251). Natan Eck, "Jewish Political Parties in Countries under Nazi Rule," *ibid.*, p. 140, asserts that the political parties and general public also contributed to this effort, and that several hundred youths reached the forests.

Responsum 22

1400 imprisoned children condemned to be burned

May the generations be horrified and consciences stirred to turn the hearts of the children to their fathers, as I tell publicly of the fearful and exalted things my eyes beheld at Auschwitz on Rosh Hashanah and Simhat Torah; the magnitude of self-sacrifice, the sanctification of God's name by 1400 boys, fourteen to eighteen years old, who were chosen on the day of the eve of Rosh Hashanah (in a "selection") to be sacrificed upon the altar, to be burned for the sanctification of God's name.

I will not go on at length with stories like these, for the paper would run out and they would still not suffice. Much ink has already been spilled in writing about the events and calamities of the days of the Nazis, may their names be blotted out. Each person writes according to his intellect, understanding, and perception in order to derive benefit from the fruits of his pen. But I will not refrain, for the sake of the glory of the sanctification of His blessed name, from bringing up here in the introduction to Meqaddeshei Hashem this incident that I myself saw, from among an ocean of incidents and events that were engraved upon my heart and mind, which I personally witnessed while under the yoke of the Nazis. I promise to be brief even though it is possible to go on and on. So I begin with the help of God, may He be blessed.

On the eve of Rosh Hashanah [17 September 1944], the Nazi guards and

their helpers in the camp seized and assembled the boys of eighteen years of age or less who were still scattered throughout the camp, who by various methods and pretexts had managed to elude the inspection of the Nazi camp commander, may his name be blotted out, when [the Nazis] entered the camp. About 1600 boys were assembled in an empty lot behind the camp blocks, and all of them knew the destiny that awaited them. (My dear son Zalman Leib, may his light shine, a boy of fourteen years who was with me at Auschwitz, was saved by a miracle with the help of God, may He be blessed. He was not taken with the other youths.)

Then the Nazi camp commander came there and ordered that a wood pole be sunk into the ground, and at the top of the pole a board laid [horizontally across] and fastened with nails so that it appeared like a kind of letter dalet [T]. He then gave the order that all the boys pass by one by one under the board. Those whose heads touched the board remained alive and were sent back inside the camp; but those whose heads did not touch the board were taken separately into a closed block. In this way the enemy estimated for himself their ages and their fitness for work. Since the boys knew what the failure to touch the board meant-- that whoever failed to touch it was considered a child and condemned to be burned-- many of them rose up on their toes at the moment they passed beneath the board so that their heads would touch it. But this oppressor stood near them, and the instant he saw anything like this-- a boy elevating himself to touch the board-- he struck him hard on the head with the heavy rubber club in his hand, with such force that the unfortunate boy would drop to the ground covered with blood and die right there; or else if he was still barely alive they would take him this way straight to the crematorium. This happened to many of the boys.¹

After this examination and procedure, about 1400 boys remained on the site, and they were taken immediately to an isolated locked block until the next day when their doom would be sealed. They received nothing more to eat or drink. The kapo² guards stood at the entrance, and no one could go out or in.

Trading lives with the kapos

The next day, the first day of Rosh Hashanah, when all the people of the world pass before [God] like sheep, there was panic and confusion. By word of mouth the news spread throughout the camp that on that evening they would take the boys away to the crematorium (since during the day they did not bring new victims to the ovens, but only during the night). In the case of many people in the camp, their only children, the only survivors left to them, were among these boys condemned to be burned; or else they had close relatives or beloved friends from their own towns [among the condemned boys]. These people ran around bewildered all day outside the closed block. Perhaps a ray of light would appear to rescue their beloved child from there before the sun went down.

But the kapo guards paid no attention to all their pleas and tears to release this or that boy from among the prisoners condemned to burn. As is known, most of these kapos were wicked and hardhearted, the dregs of the wicked among our people. Yet in this instance their argument was somewhat justified, since they were liable for the number of boys they had been ordered to guard, which was a precise number. In the evening it would be their responsibility to deliver to the SS³ the same number that

had been delivered to them. If one was missing, they themselves would be held accountable and would be taken away to be burned, a life for a life.

Even so, at last after much effort and bargaining between the relatives and the kapos, the kapos' greed conquered them and they agreed-- in exchange for large payments-- to free this or that boy. But immediately they snatched another boy in his place from those they could capture inside the camp (who had managed to elude yesterday's round-up, or had been freed during the selection because their heads touched the board). Then they shut up the new captive in the block in place of the ransomed boy in order to meet the quota.

Many people had money or gold pieces or jewels concealed in hiding places or in their shoes for a time of emergency, and of course there were some simple people of little understanding who gave no thought to what would be done to replace the ransomed boy. At great sacrifice they collected all the wealth that remained to them, or else managed to gather the required amount from friends or acquaintances, and ransomed their imprisoned child from certain annihilation. This trading continued throughout most of the Day of Judgment [Rosh Hashanah] before the eyes of all the people in the camp. (For it was known that the SS men did not walk around inside the camp during the day, but only around its perimeter. Within the camp itself the Jewish kapos ruled.)

However, there were of course many people of conscience in the camp who would not run to ransom their children at the expense of another boy's life, in accord with the statement of our sages of blessed memory [Pes. 25b], "What [reason] do you see [for thinking your blood is redder? Perhaps his blood is redder]." ⁴ Never will I forget one fearful incident

that I myself witnessed during the time described above, an incident which symbolizes the holiness of the Jews and their sacrifice for the ways of the holy Torah offered in perfect piety, even in the time of their anguish and fearful suffering.

The self-sacrifice of a father by not saving his only son

I was approached by a Jewish man who appeared to be a simple Jew from Oberland.⁵ In innocent piety he said to me something like this: "Rabbi! My only son, my dear one so precious to me, is over there among the boys condemned to be burned; and I have the ability to ransom him. Yet we know without a doubt that the kaapos will seize another in his place. Therefore I ask of the rabbi a question of law and practice:⁶ according to the Torah, am I permitted to save him? Whatever you decide, I will do."

When I heard this question I was seized by trembling. Could I decide a matter of life and death? I answered him: "My dear friend, how can I render a clear decision for you on a question like this? In such a situation, even when the Temple stood, a question concerning matters of life and death came before the Sanhedrin.⁷ But I am here in Auschwitz without any books of law, without any other rabbis [to consult or join in a bet din], and without a clear mind because of so much suffering and grief."

If it were the way of the wicked kaapos to release the ransomed prisoner first and afterward take another in his place, it might be possible to incline a little toward permitting [the ransom], since after

all the kares were Jews, and for them it was certainly forbidden by law to do such a thing with their own hands and endanger another life whose fate had not been to burn. Such an act is included in the prohibition, "One should suffer death rather than transgress." If so, it is possible to assume that it was not certain that the kares would take another life in place of the ransomed one. For perhaps at the last moment their Jewish soul would be stirred and they would not transgress a severe prohibition like this. See the Tosafot to Ket. (72a) s.v. "If..." in the name of the Rashba that even if a wife wanted to feed her husband a forbidden thing, she does not leave [the marriage] without her Ketubah [the sum guaranteed by her marriage contract], for she could say, "I was only joking, and if you had actually started to eat I would have stopped you." Likewise one could say that as long as the sin was not actually committed, it could be that it would never be committed at all, that the Jewish soul would awaken and a severe prohibition like this would not be violated.

However, to my sorrow I knew with certainty that it was the kares' practice to first take someone else from the camp and only afterward release the ransomed prisoner. Thus they would be sure that none were lacking from the exact number delivered to them by the SS, for which they were responsible. If they released the ransomed prisoner and did not succeed in taking another in his place, they would pay with their own lives when the SS found that one was missing from the number handed over to them. Obviously there were not [sufficient] grounds to allow anything.⁸

Still the man mentioned above wept and pleaded with me. He said to me: "Rabbi, you must decide for me now what the law is in this case,

for it is very urgent that I save my only son while it is still possible to save him." I begged him, "My dear, precious friend, leave off from asking this question, for I cannot say anything at all to you without studying a book, [especially] in a situation as fearful and dreadful as this." But he continued to plead with me and said the following: "Rabbi, does this mean that you cannot permit me to ransom my only child? Is it not so? Then I will accept with love the decision."

I entreated him and protested, saying, "Dear Jew, I did not say this either, that I do not permit you to ransom your child. I do not decide either yes or no. Do as you wish as if you had not asked me at all." But still he stood there and pleaded with me to give him a clear answer. When he saw that I stood firm in my opinion and that I did not want to render a legal decision,⁹ he responded with emotion and great fervor: "Rabbi, I did what I could, what the Torah obligated me to do: I asked a question of a rabbi, and there is no other rabbi here. Since you cannot answer me that I am allowed to ransom my child, this is a sign that according to the law you may not permit it. Were it permitted without any hesitation, you surely would have answered me that it is permitted. This means to me that the verdict is that by law I am not allowed to do it. This is enough for me. It is clear that my only child will be burned according to the Torah and the law, and I accept this with love and rejoicing. I will do nothing to ransom him, for so the Torah has commanded."

Nothing I said to him was of any use. I urged him not to lay the responsibility for this upon me, that I was as if I had never heard his question. But he repeated once again with pious fervor and weeping what he had said, which tore the heart into twelve pieces.¹⁰ So he

carried out his words and did not ransom his son. All that day of Rosh Hashanah he walked around talking to himself, murmuring joyfully that he had the merit to sacrifice his only son to God, for even though he could have ransomed him, nevertheless he did not because he saw that the Torah did not permit him to do so; and that his sacrificial act should be considered by God like the binding of Isaac which also occurred on Rosh Hashanah.

And you, my dear brother, look closely and consider the righteousness and perfect piety of this Jewish man. I have no doubt that his words caused a great uproar among the celestial host; and the Holy One, blessed be He, gathered together all the host of heaven and was, so to speak, very proud: "Behold the creatures that I created in my world." Justifiably it is said of this man [Is.49.3]: "Israel, in you I will be glorified."

A young man ready to be burned as a substitute for his friend,
a Torah scholar

I will tell here another incident from that very bitter day which is engraved upon my heart forever. Among this isolated group of boys awaiting their bitter fate was my dear student, a lovely young man outstanding in the study of Torah and piously religious by the name of Mosheh Rosenberg (may God avenge his blood) from the community of Shalgortoryan (Hungary). He was almost twenty years old, but short of stature. Because the examination and selection were conducted in the manner described previously-- anyone whose head did not touch the wood board was added to the young boys condemned to be burned-- obviously it happened

that a boy who was older but small in stature would be condemned together with the young boys, just as a young boy of about fourteen or fifteen years but tall in stature would escape the sentence of the young. This young man Mosheh was a diligent and superior student of Torah, and when he studied at the yeshivah in Weitzen he taught the boys younger than he.

I was approached by a young man of about fifteen years from my town of Weitzen. His name was Akiva Mann, the son of my friend, the pious and illustrious R. Barukh Mann (may God avenge his blood), director of teachers. This young man said to me: "Rabbi. What will happen to Moshele?" I answered him: "What can be done? Is there any way of saving him?" "Yes," he replied, "I have in my possession enough money to ransom him." I said to him: "Surely you know that this ransom would take place at the expense of another boy's life, since the count must be complete. Who can take upon himself the responsibility to give permission to save him this way?" He answered me that he had a plan for this too. I asked him: "What plan? Tell me." He replied with great fervor: "The plan is that I will go instead of him. And I accept this with great joy, to be sacrificed in his place." When I heard this I rebuked him, telling him, "Certainly I will not permit you under any circumstances to place yourself in danger, for the law was long ago determined that your life takes precedence."¹¹ With that he left.

After a while he came back again and said to me: "Rabbi, my soul will find no rest if Moshele is burned and I who am so inferior that I do not even reach the soles of his feet should walk among the living. I have decided to do this, to go in his place, even without the rabbi's explicit permission. Promise me only this, Rabbi: that I shall not be

considered, God forbid, as one who committed suicide and has no share in the world to come."¹² I rebuked him once again, saying, "I cannot promise you even this, since you are not required to do this thing; it is very doubtful that you are permitted to do it at all. What is the difference in heaven if he is killed or you are killed?"

To this he answered in a tearful voice: "Rabbi, certainly there is a big difference between me and Moshele, for Moshele is a young scholar diligent in his studies, and the world will have use for him, but not for someone as lowly as me. I am stupid and know nothing; I am worthless. Already I have seen with my own eyes the destruction of my family, my parents and brothers and sisters who were led away to the left side, to be burned in the crematorium while I remain alone and bereft. In what way am I better than they? What is my life now worth on the face of the earth? But if I can still have the merit to do one exalted thing like this by sacrificing my life, which obviously is worth nothing, then perhaps I can save dear Moshele, whose life is worth much, who the world needs. Why should I not gladly and eagerly do such a thing?" So this young man pleaded with me.¹³

I was stunned. I felt that a little more of this dear boy's tearful pleas and my heart would break. But I did not give him my consent under any circumstances, and I rebuked him a second time. Finally after many entreaties and supplications, he left in great disappointment.

My brother, consider for a brief moment this incident, and what was said in heaven about the plea of this young boy which came from deep inside his heart in truth, simplicity, and fervor. Surely he was raised at that moment to the exalted level of the holy ones of old. May their portion be my portion, and would that our portion be with his.

[Tsevi Hirsch Meisels

Teshuvot Meqaddeshei Hashem, vol. 1, pp. 7-9]

Notes

Responsum 22

1. According to the testimony of Joseph Kleinman at the Eichmann trial (cited by Gideon Hausner, Justice in Jerusalem [New York: Holocaust Library, 1966], p. 172), a nearly identical selection ritual was conducted at Auschwitz on Yom Kippur, when 2,000 boys were assembled "on the central football grounds of the SS. Dr. Mengele, 'the angel of death'... appeared on his bicycle. Mengele got up onto a platform... scanned the field, and pointed to a very lean and sunburnt boy of about fourteen who was standing in the first row. 'How old are you?' he asked. The boy answered shiveringly that he was eighteen. 'I will show you,' Mengele shouted. He called for a hammer and nails and a piece of wood, and pointed to a place on the goal-post at the height of one of the taller boys, where he wanted the plank to be fixed. 'Pass beneath it!' he shouted... We saw immediately that the short boys were being ordered to one side, and we knew that this meant death... About a thousand were supposed to have reached the required height... The others were kept for two days in closed huts and then sent off to be gassed." Since there are many striking similarities between this account and that of R. Meisels, it is possible that Kleinman might confuse Rosh Hashanah (R. Meisels' date) and Yom Kippur.

2. Kapo was concentration camp slang for a Jewish prisoner in charge of a section of Jewish inmates. There are different theories of the word's origin, e.g.: an abbreviated form of the French caporal; a German slang word for "foreman"; a borrowing from the Italian capo, "head"; or perhaps most plausibly, an abbreviation of Kamp Polizei.

3. Originally Schutzstaffel (Defense Corps), an elite armed guard within the SA (Sturmabteilung-- Storm Troops), the Nazis' private army. Eventually the functions of the SS were expanded drastically. One of its subdivisions was the Totenkopfverband (Death's Head Units), who were assigned to the concentration camps.

4. Cf. Pes. 25b, Sanh. 74a. The issue is discussed at length in resp. 6.

5. Part of Slovakia occupied by Hungary.

6. The rabbis differentiate between the purely theoretical study of a legal question and its common application. "Only decisions handed down in connection with an actual case constitute practical law" (Boaz Cohen, Law and Tradition in Judaism [New York: Ktav, 1969], p. 49). See Bets. 28b, BQ 30b.

7. See resp. 35, note 8.

8. In his own gloss to this account, R. Meisels cites the view of Rema (Sh.Ar. HM 388:2) that one may save himself from impending danger even if his action may endanger others. However, this appears to apply only in the case of potential danger; if one is in immediate peril, he may not save himself at the certain expense of another life. The Shakh (HM 163:11) cites the view that if a man is imprisoned and held for ransom, he may not be rescued if another will be seized in his place; but according to Yad Avraham, YD 157 (see resp. 8, note 13), the prisoner himself may certainly try to escape. In the present case, it might be argued that the father and his son should be considered "the same person," thus permitting the father to bribe the kapos. But R. Meisels finds no definitive warrant for such a view. Cf. resp. 8, where R. Oshry discusses the same sources.

9. Shelomoh Rozman, an eyewitness to this encounter, understood R. Meisels to render a definite decision forbidding the father to ransom his son. See Irving Rosenbaum, The Holocaust and Halakhah (New York: Ktav, 1976), p. 158.
10. Cf. Ju.19.29.
11. See BM 62a. The problem is discussed at length in resp. 8.
12. See resp. 10.
13. According to M. Hor. 3:7, the life of a priest (kohen) has the highest priority, the life of a bastard (mamzer; see resp. 32, note 1) the lowest. Yet if the mamzer is a scholar in the law and the High Priest is an ignoramus, the mamzer's life should be saved first. So important is knowledge of the law that one is obligated to redeem his teacher from captivity before his own father-- unless his father happens also to be a sage (M. BM 2:11). Sefer Hassidim describes two Jews, one a scholar, one not, who are told by assailants that one of them must be killed. In this circumstance "it would be meritorious for the non-scholar to say, 'Kill me, but do not kill my companion'" (cited by E.J. Shochet, A Responsum of Surrender [Los Angeles: Univ. of Judaism Press, 1973], pp. 45, 96; the author does not cite the text's specific location). The reverence for Jewish learning expressed by these passages was apparently shared by Akiva Mann at Auschwitz.

1945-

Immediately after the Holocaust, the most urgent problems discussed in the responsa were: 1) the legal status of women liberated from the camps (resp. 23, 25-27); 2) proper burial and mourning procedures (resp. 24, 28, 34); 3) the legal status of Jewish apostates and collaborators (resp. 30, 31); and 4) the rescue of Jewish children hidden among the gentiles (resp. 32). The problem of agunot-- married women whose husbands disappeared in the mass annihilation but whose death could not be substantiated-- is the major concern of responsa written in the wake of the Holocaust. Three brief responsa (resp. 25-27) from a large number are included here. They only suggest some of the complex halakhic issues surrounding the matter of agunot. One of these responsa (resp. 25), written by R. Sh. Kahana in 1948, is placed before the two others (written in 1945) because it expresses in concise terms the attitude which characterized the rabbinic approach to the problem of Holocaust agunot.

Jewish suffering did not cease with the end of the war. Death took its toll even after the liberation. Thousands died from disease and lack of medical supplies; thousands of others were in such deteriorated health that nothing could help them. Jewish communities had been obliterated; missing relatives were virtually impossible to trace (resp. 25). There were fields and open pits where thousands of Jews had been massacred; countless bodies, limbs, and bones lay unburied (resp. 28). The local non-Jewish population was amassing ashes from the crematoria for fertilizer or digging up corpses to search for gold teeth. Some

Jews sought revenge against known murderers among the gentiles (resp. 29). While a few gentiles had risked their lives to help Jews during the war (resp. 24), most had been and continued to be indifferent and even hostile to Jewish survivors (resp. 32). Jewish cemeteries were desecrated. Jews found their homes occupied by strangers. New pogroms broke out; in Kielce, Poland on 4 July 1946, 36 Jews were murdered. Other pogroms occurred in Hungary and Slovakia. Jews, officially "displaced persons," wandered across Europe or drifted into refugee camps in the Allied zone (resp. 26).

R. Meisels (Bergen-Belsen), R. Oshry (Kovno), R. Efrati (Warsaw), and R. Kahana (Jerusalem) were among the few rabbis who survived the Holocaust and were now faced with the task of guiding other survivors in this bitter time with respect to matters of halakhah. The rabbis were hampered by a shortage of books which severely limited their ability to render halakhic decisions (resp. 26). The number of problems requiring their attention was far greater than their capacity to adequately address them all (resp. 25, 26). The crucial task of retrieving Jewish children from gentiles was fraught with particularly severe difficulties (resp. 32). Travel was dangerous. Many gentiles hid the Jewish children and denied any knowledge of them. Priests and nuns, to whom a large number of Jewish children had been entrusted, now refused to return the newly-baptized orphans.

Among the Jews themselves there were painful differences. A Jew suspected of having collaborated with the Germans in any way was the object of hatred. Even if such a person was dead, some survivors were not prepared to forgive his children (resp. 30). Nor were some observant Jews ready to grant full religious privileges to repentant Jews who had

converted to Christianity during the war to save their lives (resp. 31). Many Jews who had observed the halakhah before the war now flouted it openly (resp. 26). Some Jewish husbands divorced wives who had been forced to submit sexually to the oppressors (resp. 23). A case is reported of a Jewish husband who refused to acknowledge his dead wife's son because the boy was born out of wedlock (resp. 32). The rabbis themselves differed over the degree of leniency permissible in matters of agunot (resp. 25).

The overriding motive of the rabbis, as reflected in the 13 responsa in this section, was to heal and rebuild the Jewish people. Halakhic leniency was spurred not only by compassion for the survivors but by the fear that strict decisions would instigate more serious violations of Jewish law. Thus mass expediency marriages presided over by ghetto officials during the Holocaust were now legally sanctioned (resp. 27). Jewish women sexually abused by the Nazis were permitted to their husbands and deserved the highest praise for surviving their terrible ordeal (resp. 23). Even if a Jew collaborated with the Nazis, if he confessed his sins in the presence of other Jews before he died, he is forgiven (resp. 30). A Jew who converted to Christianity under the duress of Nazi persecution is restored to full privileges in the Jewish community if his repentance is sincere (resp. 31). Although there is little halakhic warrant for the recital of Kaddish in memory of a gentile, since this person saved Jewish lives it is permitted to say Kaddish in her memory (resp. 24).

While leniency was the rule in most cases, the post-Holocaust responsa included here also insist on certain imperatives. In the Bergen-Belsen refugee camp, men and women living together in the same room

were required to have a rabbi's verification that they were properly married; a childless widow with a living brother-in-law must observe the requirement of halitsah (resp. 26). The execution sites where Jews were murdered en masse should be left alone; monuments are improper (resp. 28). Jews are obligated to do all they can to bring the murderers to justice (resp. 29). No child born of a Jewish mother and gentile father during the Holocaust should be turned away by the Jewish community (resp. 32). Jews must not efface the numbered tattoos engraved on their arms by the Nazis; to do so would only help the criminals to "make everyone forget the frightful atrocities they inflicted upon the Jewish people" (resp. 33). Every Jew is obligated to recite the "General Kaddish" in memory of the six million Holocaust victims, even if one has no relative among them (resp. 34). There is no prohibition against accepting indemnity payments from the German government for Jewish material losses incurred during the Holocaust (resp. 35).

Responsum 23

The law concerning women shamefully raped by the murderers

Question: Immediately after liberation from the confines of the ghetto, I was asked an important and fearful question that affected not only the person who came before me but a great number of Jewish women who were fortunate to remain alive after the terrible things that happened to them when they were captured by the cruel enemy, who stretched forth his hand upon all their loveliness and handed them over to be disgraced and shamed by the ravening animals and wild pigs, the gangs of Germans (may their names be blotted out) who cruelly abused their [the women's] bodies and their honor.¹

This is the content of the question: A young woman from one of the good and respected families of Kovno came to me weeping bitterly and ceaselessly, with no one to console her. She had a very urgent question. Like many of her unfortunate sisters, she was captured by the accursed Germans and disgraced. In addition to this the wicked ones abused her body still further: they engraved a tattoo on her arm with the words, "Whore for Hitler's armies."

After the liberation she managed to find that her husband too was alive. The two of them planned to restore their house, which had been destroyed, so that it would be built upon pure and sacred pillars as is proper for a faithful house in Israel, and to have children, since all of the children they had before perished at the hands of the Germans. But when her husband saw the terrible inscription tattooed on her body,

he recoiled and said that the two of them must clarify beforehand whether she was permitted to him by law, or if she was forbidden to him since she had been a captive of the oppressors to treat as they pleased. Perhaps she had sexual intercourse with them willingly. For this [reason] she came to me to ask what was proper to do in her misfortune, which was as great as the ocean. Her eyes pleaded with me to bring forth as the light what was just in her case.

Answer: The Rambam, MT Hil. Naarah Betulah, ch. 1, hal. 2, wrote as follows: "Who is a seducer and who is a rapist? He is a seducer if she is willing; he is a rapist if he has intercourse with her against her will. Any woman who has intercourse in a field is presumed to have been forced, and we judge her as a victim of rape unless witnesses testify that she consented to intercourse. A woman who has intercourse within the city is presumed to have been seduced, since she did not scream [in which case she would have been rescued], unless witnesses testify that she was raped, for instance if he drew a sword on her and said to her, 'If you scream I will kill you.'" In his critique the Rabad comments: "Upon my life I do not see the reason for this presumption. If there are witnesses, let them come forward and testify; if there are no witnesses, no fine is imposed [on the man]. As far as the three [financial] aspects² are concerned, if there is a dispute between them [the man and the woman], then an important legal principle applies: whoever wants to collect from another must bring proof; and [in this respect] both the city and the field are alike."

See the Migdal Oz who wrote on the same subject as follows: "This [difficulty] can be resolved by allowing presumption to replace [the

requirement of] witnesses when both partners admit to the intercourse, or when there are witnesses who saw her in the act of intercourse from a distance, but did not know or see if she was raped or if she consented willingly: she says, 'I was raped and should be compensated for my suffering,' and he says, 'You were seduced and should not be compensated...' See also Kesef Mishneh who wrote: "As the Migdal Oz said, if the witnesses saw from a distance that he lay with her, but did not know whether she was raped or gave her consent, then if it happened in the city it is presumed that she was seduced if she did not scream or witnesses did not testify that he drew [a sword], etc. But if it happened in a field, it is presumed that she was raped." See also Bet Yosef and Bah, [Tur] EH 177³ who arrive at this conclusion; and the Ramban, commenting on Torah portion Ki tetsei, who also suggests that this is so.⁴

According to this, since in the present case she was in the city [i.e., in a densely populated area], we must presume that she had intercourse willingly since she did not scream. However, everyone knows that the flaming sword of the oppressors was turning everywhere at every moment upon anyone who was designated a Jew. It was no use to scream or shout, for no one could say to the Nazis, "What is this you are doing?" Furthermore there was no refuge for any of these unfortunate women, who were given to the accursed wicked ones from whom there was no deliverance. Certainly this is more compelling evidence than what the Rambam required-- that even in the city, if witnesses testify that he drew a sword on her, then she is a victim of rape. For in our case it is common knowledge that the sword was always poised above the heads of these unfortunate women, and whoever refused [the oppressors] would be punished with death. Therefore this poor woman is certainly permitted to her husband. There

is no suspicion at all that she gave in to them willingly, for she too saw how they afflicted the Jews, killing men, women, and children without pity, slaughtering without mercy. Thus it is certain that these oppressors were too, repulsive, loathesome, and abhorrent in her eyes to ever give in to them and have intercourse willingly.

See Noda Bihudah, second series, [EH] end of no. 21, who wrote that if the woman says that she fought with the man thinking she was strong enough to prevent him, but he prevailed, then she is permitted to her husband and there is no derogation because she did not scream while within the city. According to the Noda Bihudah, it is obvious that in our case she is permitted [to her husband], since the woman is always believed when she says she was raped, even when it happened in the city.⁵ However, see Pithei Teshuvah [EH 6:11] who comments on what was written by our teacher R. Mosheh Alashqar in the name of many early authorities: The woman who has intercourse in the city is not believed when she says she was raped. Note where he says that had the Noda Bihudah heard of R. Mosheh Alashqar's view, he would have accepted it.⁶

However, see Teshuvot Har Hamor⁷ and Tiferet Tsevi, EH no. 53,⁸ who like the Noda Bihudah permit [her to her husband] even though the woman who has intercourse in the city is presumed to have consented to it. Even so she is believed when she says she was raped. See also Teshuvot Ketav Sofer, EH no. 17, who at length confirms the above-mentioned opinion of Noda Bihudah and demonstrates this on the basis of the Mishneh Lemelekh.⁹ He also maintains that it appears to be so from the early authorities who gave only a general formulation: they wrote that she is believed when she says, "I was raped," but they did not write specifically, "I was raped in a field." Consequently, even if she says, "I was raped in the

city," she is believed. So I have seen in Teshuvot Mosheh Haish, EH no. 2, p. 109b, who gathers a whole sheaf of opinions from later authorities who are lenient about this: even in the city she is believed when she says, "I was raped."¹⁰ Also Teshuvot Mishpetei Uziel, EH no. 23, concludes that she is believed.¹¹

The consequence of all that has been said is that in our case she is certainly believed when she says, "I was raped." In addition to what was concluded above--- that here there is a more compelling case than that discussed by the Rambam, since it is common knowledge that the sword was drawn against them--- moreover all of the great scholars I have cited hold that even in the city she is believed when she says, "I was raped," as concluded by the Noda Bihudah.

Now the Even Haozer 7:1 wrote: An imprisoned female captive aged three years and one day or more is prohibited to a kohen. For it is presumed that the captors fornicated with her; and she is prohibited to a kohen because once they captured her, who could prevent them from raping her?¹² Therefore, even though she is not prohibited to her husband because of witnesses who testified that she fornicated, or because [her husband] expressed jealousy [of another man, but she nevertheless] secluded herself [with this man], even so the female captive is prohibited to a kohen. But she is not prohibited to a Jew who is not a kohen. For certainly she did not fornicate willingly. It may be that when she was handed over to them to be killed, she consented to them. This does not constitute rape, since it is rape only if the act of intercourse itself is forced upon her. When she is forced in some other way and agrees to intercourse, this is an act of complete consent. So why is she not prohibited to her husband who is not a kohen? Because the overriding interest

of nearly all captors is the ransom price, and the women know this and do not fear that they will be killed [and consequently do not consent to intercourse to save their lives]. Therefore she is permitted to a Jew who is not a kohen. See also Arukh Hashulhan, EH 7.¹³

Yet even according to the Even Haozer, in our case the suspicion has already been established that she may have willingly consented to intercourse with the oppressors because she feared that they would kill her. Here it was not ransom money the oppressors had their eyes on, and the notion that the women did not fear they would die simply does not apply. Thus in our case it is possible to say that she did have intercourse willingly, because she feared that if she did not give in to them, they would kill her.

However, after considering the matter thoroughly it seems that in our case there is no suspicion whatsoever that she had intercourse willingly in order to save her life. For the accursed wicked ones customarily killed these unfortunate women some time after they had abused them and dropped their filth in the women's pure bodies. So ruled the Rosh, no. 32: When they know that appeasement is useless, we do not suspect them concerning [voluntary intercourse].¹⁴ All of this [i.e., that appeasement was useless] was well known to these unfortunate women. Certainly, then, they would not have thought that by consenting to intercourse they could save their lives, especially since the [Nazis'] practice was to mark them with the sign of disgrace mentioned above, which was tattooed on their arms immediately after they were captured and consigned to shame. Thus they would remain contemptible and detested forever, since everyone would know that this woman was a whore. In light of this there is surely no suspicion whatsoever that she consented willingly to inter-

course with these accursed ones in the hope that they would keep her alive if she did.

Although she was alone with the oppressors, she does not lose the presumption of her legal propriety. Even though it is the opinion of Rabbenu Simhah, as quoted by the Mordekhai to Ket., ch. 2, that if she was alone with the gentiles she loses the presumption of legal propriety, still he too agrees that witnesses to the seclusion are required.¹⁵ See Teshuvot Haradbaz, vol. 1, no. 121 who wrote as follows: "I was asked to give you my opinion on the matter of seclusion discussed so often by the sages: whether it is [considered a case of seclusion] only when the door of the house or room is closed, or even when it is open, etc. I was already asked a similar question at another time and I concluded that the definition of seclusion is when the two of them are in one place where, if he wanted to have intercourse, no one would see them." He then cites the Rashba, resp. 651: "In regard to the locking of doors, it says that there is no seclusion unless the house is locked, because the words 'the door is bolted' in the Yerushalmi imply that the door should be locked. The reason is that one should fear that whenever [the door] is not locked, someone may enter without permission."¹⁶

See also Berit Yaaqov, EH no. 55, who wrote: "Moreover, since women are not learned in the law, as the Ravyah wrote in the Mordekhai, and especially in our generation which is not careful about this impropriety, she does not lose her presumption of legal propriety."¹⁷ From all this it seems that also in the case before us, she does not lose her presumption of legal propriety because she was alone with them.

Even if we suppose that in our case the matter is more serious because she was alone with them in a place set apart for fornication, and thus it

is as if there were witnesses that she was alone with them in a closed and locked room, nevertheless it is common knowledge that she was not alone with them out of goodwill but rather because they took her by force to the house of disgrace. This is similar to ~~the~~ Rambam's criterion that I cited above: if he draws a sword on her and says to her, "If you scream, I will kill you," there is no doubt whatsoever that she should be permitted [to her husband]. This case accords with ours, for it is common knowledge that the devouring sword was always drawn upon these unfortunate women, and the shadow of death did not recede from their heads for even a moment. Therefore the contention that she lost her presumption of legal propriety in this way certainly has no validity at all.

The conclusion of the law is that this humiliated woman, and likewise all of her unfortunate sisters whose bitter fate it was to be captured, disgraced, and shamed, are permitted to their husbands who are not kohanim. The women are prohibited only to kohanim, and this would be so even in the case of rape.¹⁸ But if the husbands are not kohanim there is absolutely no apprehension whatsoever that the women should be forbidden to their husbands. Should we deal with our unfortunate sisters as with harlots? Are they any worse than Rahab the harlot [Josh.2.1], who married Joshua the son of Nun? In the Tanna Devei Eliyahu and also in the Yalqut Erekh Yehoshua, it is related that "Rahab said before the Holy One, blessed be He: 'Master of the universe, concerning three things did I sin before You-- menstrual impurity, [giving the priest's share of] the bread, and lighting the candle [for the Sabbath]. For the sake of three things I ask You to forgive me-- the rope, the window, and the wall' [by which means she saved the Israelite spies; see Josh., ch. 2]. What was her reward? R. Eliezer

says: She merited to have among her descendants eight prophet-priests: Jeremiah, Hilkiyah, Seraiah, Maaseiah, Baruch the son of Neriah, Hanamel, Shallum, and, says R. Yehudah, Huldah the prophetess also."

Surely these our dear sisters, who were humiliated yet did not inflict humiliation, who drank to the dregs an overflowing cup of sorrows at the hands of the wild pigs and ravening animals who dragged their dignity and honor in the dirt, abusing and spoiling their innocence and purity--surely it is about these women that Scripture says [Jud.5.31]: "Those that love Him are like the sun when it goes forth in its might." The sun of good fortune will yet shine upon them and restore their dignity and honor, and they will rejoice in God and His salvation and establish their destroyed homes as before. It may be compared to the example of Dinah, the daughter of Jacob, the chosen one among the forefathers. What was done to her was a beastly thing¹⁹ which defiled her, but even though when it happened she suffered great disgrace and shame, as it is said [Gen.34.7]-- "And the sons of Jacob came from the field when they heard; and the men were grieved and very angry that he had wrought an outrage in Israel in lying with Jacob's daughter, which thing ought not to be done"--nevertheless in His glory and power the Holy One, blessed be He, avenged her humiliation and restored her honor to her as before. As it says in Midrash Talpiyot, the section on Dinah, she married her brother Simeon, one of the tribes of God, and her son-in-law was Joseph the righteous who overcame his evil urge. Her bones were brought up to the land of Israel, and one of the pairs of those who received and transmitted the Torah merited to be buried at her side.

God forbid that anyone should slander these virtuous daughters of Israel. On the contrary it is a mitzvah to proclaim the greatness of

the reward they will merit. He who hears the cry of the wretched will surely heal the broken hearts of these unfortunate women and assuage their sorrows. He will bless them as Jael, wife of Heber the Kenite, who was blessed above women.²⁰ "All the favors of the wicked are evil for the righteous," as it says in Yev. 103[a-b]. By proclaiming their reward, we can prevent grief and pain and that which has befallen a few of these women, whose husbands have divorced them because of this. Woe to us that this should happen in our days!

For this reason there is in my opinion no need to remove the disgraceful inscription from her body.²¹ On the contrary, this inscription should be preserved and seen not as a sign of disgrace and shame but as a symbol of honor and heroism, to show that for the sanctification of the blessed Name we were killed all the day. The One who requires blood will remember them; He will not forget the cry of the lowly. This inscription--- by means of which the murderers scorned and abominated the upright and pure daughters of Israel, casting endless shame upon them--- this inscription honors them and our people. It is an eternal sign that we will yet merit to see the corpses of these sinful people in dreadful disgrace, these sinners from whose faces all semblance of the human image was eradicated, who were like wild animals and wolves of prey who rushed to spill innocent blood and to kill the pious and righteous. This inscription that the wicked ones tattooed upon the arms of the innocent and pure will remind us always of what is written in the Torah of Moses, the man of God [Dt.32.43]: "Rejoice, O ye nations, with His people; for He will avenge the blood of His servants and will render vengeance to His adversaries."

[Efrayim Oshry

Teshuvot Mimaamaqim, vol. 1, no. 27]

Notes

Responsum 23

1. The Nuremberg Laws (1935) prohibited "extramarital intercourse between Jews and subjects of German or kindred blood" (Law for the Protection of German Blood and German Honor, article 2). Ironically this law enabled the rabbis after the Holocaust to rule leniently in matters of "captive women" who might be prohibited to their husbands, especially husbands who were kohanim. R. M.J. Breisch, Helqat Yaaqov, vol. 1, no. 16, writes, "The accursed Germans in their arrogance prohibited intercourse between Germans and Jews on pain of great penalty." However, this is not to say that Jewish women were not raped. The present resp. indicates that during the Holocaust "houses" of prostitution existed in the camps. Raul Hilberg, The Destruction of the European Jews (New York: New Viewpoints, 1973), p. 494, cites a Jewish pamphlet circulated in Bessarabia in 1941 charging that "our girls are hauled to houses of prostitution on the eastern front." Moreover, Leon Poliakov, Harvest of Hate (Philadelphia: Jewish Publication Society, 1954), p. 38, points out that the Nuremberg Laws were never even introduced in conquered countries whose inhabitants were regarded by the Nazis as racially inferior. The practice of killing Jewish women after sexually abusing them, mentioned by R. Oshry, is corroborated by R. Breisch (ibid.): "It is well known that the Germans later killed those women and girls who were specially kept for immoral purposes for soldiers in the battle field in order that their seed should not remain in the bodies of Jewish women." Yet in order to discredit the story of 90 devout Jewish girls in Cracow who chose mass suicide over consignment to a German brothel, Lucy Dawidowicz,

ed., A Holocaust Reader (New York: Behrman House, 1976), p. 13, writes:

"It is a fanciful and moving tale... fashioned by people who knew nothing of the Nuremberg Laws which made sexual relations between Germans and Jews illegal, criminal, and subject to severe punishment." Dawidowicz' insistence that such sexual abuse could not have occurred, especially in the conditions of utter degradation and lawlessness that prevailed during the Holocaust, is difficult to understand.

2. Compensation for pain and suffering, shame, and blemish, assessed according to the circumstances in each case. See Rambam, MT Hil. Naarah Betulah, ch. 2, hal. 1-6.

3. The Bah remarks that her scream need not actually be heard by witnesses at a distance; as long as they see the man "draw a sword on her," she is presumed to have been raped. Likewise the man's threat is not established by what witnesses may have heard but by what she claims he said.

4. Ramban writes: "... It is normal for any woman who is raped in the city to scream for help and to be saved. But if the witnesses saw in the field that the man grabbed her and lay with her, she is presumed to have been raped and is therefore exempt from punishment... In general, if there are people to save her [and she did not scream], whether it be in the city or the field, she is guilty; where there is none to save her in either the city or the field, she is exempt from punishment."

5. Noda Bihudah discusses a case concerning a woman who confessed to her husband that once when she was traveling with a young male relative, they spent the night in an inn where many gentiles were staying. The woman, fearing the gentiles would molest her, slept in her relative's room; but later that night he stole in upon her and, although she struggled, he

forced himself upon her. After citing the rule that a woman who has illicit intercourse in the city is presumed to have consented to it, he writes: "But if she says that she fought against him with all her might from beginning to end, then even though they were in the city and she did not scream, there is no proof that she was seduced. Perhaps she did not scream because she thought she did not need others to rescue her, trusting her own strength. If one maintains that this is still no excuse for the intercourse, since after she saw that he would overpower her she could still have screamed, such an objection is still not sufficient to forbid her to her husband. For even if she really did consent to the intercourse, one who is initially forced and then consents is permitted to her husband, for she is considered to have suffered duress."

6. Pithei Teshuvah points out that the Noda Bihudah himself, in the second series of his responsa, no. 15, admits that he does not possess a copy of R. Alashqar's resp. no. 94. "It is reasonable to assume," writes Pithei Teshuvah, "that if the Noda Bihudah had known of R. Alashqar's resp., he would have accepted it, for it cites several early authorities who wrote explicitly that if a woman has intercourse in the city, we do not rely on her testimony that she was raped unless she brings evidence, e.g., if witnesses saw him draw a sword on her, or if he shut her mouth to prevent her from screaming."

7. After no. 41, p. 29a. The resp. concerns whether or not a woman who admits she was raped by her husband's brother in his house may be permitted to her husband. Har Hamor cites Rambam, MT Hil. Naarah Betulah, ch. 2, hal. 13, where it is said that in the absence of witnesses, even if the man does not admit to her charge of rape but claims that she se-

duced him, he is still fined because he acknowledges part of her complaint (cf. note 9). From this Har Hamor concludes: "Both in the field and in the city, she may complain that she was raped; even if she did not scream, [it is assumed that] she fought with him and tried to escape."

8. Tiferet Tsevi comments upon a case involving a married woman who claimed she was raped in a wine cellar. Her husband believed her. The Tiferet Tsevi declares emphatically that she is believed in this case, since she need not have disclosed the incident. "To separate the couple would subject the woman to ridicule and break down the fence of morality and piety."

9. Ketav Sofer reasons as follows: According to Mishneh Lemelekh (MT Hil. Naarah Betulah, ch. 1, hal. 2), the Rambam's distinction between the field (where rape is presumed) and the city (where seduction is presumed) is not meant to exclude the possibility of rape in the city even if there are no witnesses to confirm it. Rather the distinction has a more limited application: "If witnesses saw from a distance and did not know whether she was forced or she consented, then if it occurred in the city, her claim of rape is not sufficient grounds for him to be penalized or forced to marry her against his will; but if it occurred in the field, then she is presumed to have been raped [and he is penalized]. The Mishneh Lemelekh adduces proof for this from Hil. Naarah Betulah, ch. 2, hal. 13, where if she claims she was raped and he claims that she seduced him, he must pay a fine since he has admitted to part of her complaint. On the basis of this interpretation, Ketav Sofer finds support for the Noda Bihudah's view that in the city the woman's claim of rape is credible even if there are no witnesses.

10. Mosheh Haish mentions the case of a married woman who said she was raped in her own home at knifepoint. There were no witnesses, but her husband believed her and knew of her assailant, a known criminal. Mosheh Haish cites, among other authorities, Beer Hamayim, Migdal Oz, Ramban, Ralbag, M. Alashqar, and Melekh Lemishneh to be lenient in such a matter. "If there are no witnesses that she fornicated, and she tells us she was raped, she is believed... The presumption that in the city she consented to intercourse applies only when there are witnesses... If there was no one to rescue her, then even in the city she is believed when she says she was raped."

11. In his question to Mishpetei Uziel, R. M. Alisher cites Ramban's view that in the city, if a woman evidences her resistance to her assailant in any way-- e.g., weeping, clutching her hair-- she is considered a victim of rape. In the field, even if it is clear to witnesses that she did not resist, she is nonetheless considered a victim of rape. R. Alisher objects: "For us to believe her when she says she struggled, where there is more certain proof that she consented without struggle, does not make sense to me." He concludes that her tears or words alone do not constitute sufficient proof of her refusal to consent. Moreover, if she is raped more than once by the assailant, then although the first instance may not prohibit her to her husband even if she did not resist, the subsequent instance surely would unless she fought back. Mishpetei Uziel agrees with R. Alisher that if there is compelling evidence that she consented without protest, then her claim of rape is not credible. Otherwise, he is inclined to believe her, even in the city. He rejects R. Alisher's contention that if there were subsequent forced acts of intercourse

which she did not resist, after the first time she is prohibited to her husband.

12. If the wife of a kohen is raped, he must divorce her. See Yev. 56b; Rambam, MT Hil. Ishut, ch. 24, hal. 19; Sh.Ar. EH 6:10, 11.

13. Unless witnesses testify that a captive woman did not have intercourse, she may not marry a kohen; if she is married, he must divorce her (see note 12). According to Arukh Hashulhan, the sages were favorably disposed to accept such testimony, since "Jewish women in captivity strive to escape and make every effort to avoid their captors' attentions... The ruling power supervises the prisons and strictly punishes those who want to molest the women... At night the women are removed into a separate room of their own. Therefore [once they are released] they are permitted [even] to their husbands who are kohanim."

14. Par. 8. According to Ket. 26b, "With respect to a [Jewish] woman imprisoned by Cutheans, if their purpose is money, she is permitted to her husband; if their purpose is [to take] lives, she is forbidden to her husband." Rabbenu Tam comments: "She is forbidden to her husband even if he is not a kohen, for we suspect her of consenting to intercourse to find favor in their eyes so that they will not kill her." The Rosh rejects this view: "In time of persecution... even if she consented to intercourse it would not save her."

15. Section 147. A woman who had been traveling with two Jewish men in a remote place claimed that one of them held her while the other raped her. The rabbis permitted her to her husband, since in the absence of witnesses she could have denied that intercourse occurred and yet confessed to it (cf. note 8). R. Simhah, however, dissented, contending that since

she willingly went off with them, she could not claim that the intercourse was forced upon her. However, witnesses must come forward and testify that she went off with them willingly.

16. "Anywhere where others might see them," writes the Radbaz, "is not suited for the act of intercourse." Thus a woman secluded in such a place with a man does not lose her presumption of legal propriety. By this definition, unless the doors of the Nazi "house of shame" were locked, she would not be assumed to have engaged in intercourse.

17. Berit Yaaqov discusses the dissent of R. Simhah (see note 15) at length. He introduces the criterion that there must be proof that the woman has "fixed her eyes on another," i.e., that she desires a man other than her husband, before her subsequent seclusion with him can be grounds for the loss of her presumption of legal propriety.

18. See note 12.

19. Lit. "donkey-like," a pun on the word hamor, donkey, the name of the man who raped Dinah.

20. Cf. Ju.5.24, and the account of how Jael slew Sisera (Ju.5.17-22).

21. See resp. 33.

Responsum 24

Concerning one who was saved by a gentile woman who placed herself in danger [for him] and later died: is he permitted to say Kaddish [for her]?

Question: In the days of evil and rage, when outside the sword destroyed and in the rooms there was terror [Dt.32.25], the accursed Germans (may their names be blotted out) killed without mercy the young and the old, babies and infants. The local inhabitants, the gentiles among whom the Jews had dwelled for hundreds of years, lent a hand to the wicked Germans and helped them in the work of murder and pillage. They searched for Jews in holes and cracks, hiding places and caves, hoping they would find Jews hiding from the oppressor. When they succeeded in catching a Jew, they immediately gave him to the German murderers so that they could punish him with all kinds of sufferings and afflictions.

But despite the pervasive hatred of the Jews which had built a nest in the gentiles' hearts, a hatred that the Germans fanned into a flame of vengeance, retribution, and malicious joy,¹ even so there were exceptional individuals among the gentiles--- few in number--- in whose hearts the spark of humanity was not entirely snuffed out. They were sorry to see the great cruelty inflicted before their eyes upon the Jews. They felt that they must do something for the Jews' benefit and save them from their pursuers, even though this involved real danger to their lives. The Germans immediately executed any gentile suspected of offering help to Jews. Nevertheless these individuals among the gentiles did not

refrain from doing everything they could to save Jews.

In 5705 [1945], immediately after we had the good fortune to see God's salvation, when He took pity upon His people, broke the arm of the wicked and brought forth His people Israel from the darkness to the great light, R. Mosheh Segal came to me with an urgent question. He had been saved from death by a gentile woman who placed herself in danger by hiding him in the cellar of her house together with some ten other Jews. She fed them bread and water and tried to give them all they needed to stay alive until the danger was past.

Now after the liberation these Jews who were saved by this gentile woman wanted to extol the great act of kindness she had done for them and to repay the fruit of her good deeds as is proper and fitting. It became known to them that, to their deep regret, this woman had passed away a short time after the liberation, and in light of this those she saved developed the idea of memorializing her after her death by having one of them say Kaddish for her. They then assigned this task to the above-mentioned R. Mosheh Segal, and he came to me to ask if he was permitted to say Kaddish for a gentile woman, or if there might be a prohibition against this.

Answer: In regard to an apostate, the question of whether it is permitted to say Kaddish for him was decided in Sh.Ar. YD 376:4 by the Rema at the end of his gloss: "Some say that for an apostate killed by gentiles, [his] sons say Kaddish (Radak, section 11;² Benyamin Zeev;³ and see above, YD 340 [:5])."⁴

According to the Shakh to YD 376:15, "This is the case only if he is killed, but not if he died a natural death. This is what I wrote above,

[YD] 340: when he is killed he is forgiven." See also Turei Zahav to YD 376:6 that only if he is killed is he forgiven; but if he dies naturally, he is not.⁵

See Teshuvot Ketav Sofer, OH no. 109 who is puzzled by the Rema's view mentioned above that "some say that Kaddish is said for an apostate who is killed."⁶ However, in his gloss to YD [376:4], the Maharsha interprets the Shakh's comment that "[he is forgiven] only if he is killed but not if he died a natural death" as follows: "Whoever examines the resp. of Radak will see that if [an apostate] is killed, his relative is entitled to say one Kaddish, whether or not there are other mourners. However, if there are no other mourners, then even if he died [naturally] the Kaddish is said for him. See Maharash Halevi, YD 29." See also YD 340:5, where the Rema discusses the subject of not mourning for an apostate;⁷ and see the Shakh, YD 340 note 9,⁸ and the Turei Zahav, YD 340 note 3.⁹

In Teshuvot Hesed Leavraham, second series, YD no. 84, the author brings up the case of one who abandoned his religion [Judaism] and became rich, but ever since then supported the poor members of his family. Now he came to the man who distributed his charity for him and asked him to promise to say Kaddish for him after his death. If this were done, he would give even more generously to charity. The Hesed Leavraham concludes that it is permitted to promise this man [to say Kaddish], citing proof from the example of R. Meir [MQ 15b], who saved [his teacher] Aher [Elisha b. Abuya] from going to hell even though Aher had denied the Torah and profaned the Sabbath. Consequently this is not prohibited.¹⁰ See also Mishmeret Shalom 40:53.

However, all of this refers to an apostate who is a Jew; but in our

case the woman is a gentile. Even though her righteous deeds are greater than those of the man who gave extravagant sums of his money to charity, as described in Teshuvot Hesed Leavraham-- for this gentile woman actually saved lives-- nevertheless one must still determine whether it is permitted to say Kaddish for her.

The essence of the Kaddish, its actual content, consists of prayer and petition, as is evident in Sefer Yohasin (Cracow) 23 [and] Shevet Yehudah (Koenigsberg edition), p. 85 where it tells about the time when R. Natan Habavli was appointed Exilarch.¹¹ When the cantor recited Kaddish and came to the words, "... in your life and in your days," he said: "... in the life of our leader the Exilarch and in the life of all the house of Israel." Also, in the days of the Rambam of blessed memory, they used to say during the Kaddish: "... in your life and in your days and in the life of our master Mosheh bar Maimon."¹² This makes it evident that the subject of the Kaddish is prayer and petition.¹³

Accordingly it is obvious that the law permits the Kaddish to be said for this gentile woman who saved several Jewish lives from death at the hands of the accursed enemy. For according to the Sefer Hassidim, it is permissible to entreat the Holy One, blessed be He, to judge with favor a gentile who had been good to Jews. There is no greater good than what this gentile woman did, saving Jewish lives from the grave. Therefore it is surely permissible to say Kaddish for her. See Yer. Meg. 83, hal. 6: "R. Pinhas said: One must say that [even the eunuch] Harbonah¹⁴ is fondly remembered-- as they say, 'of blessed memory'-- because [without meaning to] he did Israel a favor and saved them."

In Av. 3:2 it is written: "R. Hanina, the chief of the priests,

said: Pray for the welfare of the ruling power, since were it not for the fear of it, a man would swallow up his neighbor alive." See the Meiri, who wrote that the tanna meant to point out that we should pray not only for the welfare of the king of Israel but also for the welfare of the realm of the gentile nations among whom we live,¹⁵ as our Torah commanded [Nu.29.13-32]: to bring 70 bullocks on Sukkot [which is interpreted to] correspond to the 70 nations.¹⁶

As I prepared [this resp.] for publication, I noted in Teshuvot Zeqan Aharon, YD no. 87, [a discussion of] whether a convert [to Judaism] is obligated to say Kaddish for his gentile father. The Zeqan Aharon is inclined [to permit the convert] to say Kaddish for his gentile father.¹⁷ However, one must not make a definite ruling since it could easily be imagined that people would wonder why one says Kaddish for a gentile. There are other worthwhile things to do [on behalf of the deceased], for instance to study or to read Psalms, etc. But one can say Kaddish as well, which benefits the father's soul. Who knows the counsel of God? Perhaps even the soul of a gentile [benefits from the Kaddish]. In the opinion of the Zeqan Aharon, he may say Kaddish occasionally and pray before the ark in such a way that no one will notice that he is mourning for his gentile father, for they may mock him on this account.

This gentile woman's great act of kindness saved these Jews from death at the hands of the accursed wicked ones who would have swallowed them alive. Now since her death it is surely a mitzvah to pray for her and say Kaddish for her. As we have shown, the Kaddish is merely a prayer. For this reason I gave R. Mosheh Segal permission to say Kaddish for this gentile woman who saved him from death.

May the One who performs deeds of lovingkindness for His people Israel also act with lovingkindness toward the righteous gentiles who endangered their lives to rescue Israel. May God who blesses His people Israel with peace bless them also in every good way. May they see the Lord bring back the captives to Zion and the Temple rebuilt. There we will offer before Him the feast He desires, 70 bullocks for the 70 nations.¹⁸ May it happen soon in our days. Amen.

[Efrayim Oshry

Teshuvot Mimaamaqim, vol. 3, no. 8]

Notes

Responsum 24

1. Prior to an aktion the Germans would warn the non-Jewish population against hiding Jews, receiving any goods from them, or helping them in any way. They threatened to summarily execute anyone who did not comply. N. Blumental, "Action," Yad Vashem Studies (Jerusalem: 1960), vol. 4, pp. 76-77, writes that the Germans also waged a relentless propaganda campaign against the Jews. "They 'proved' beyond a shadow of a doubt with posters and films that the Jews were causing the spread of typhus. When [the Nazis] were planning the destruction of the Warsaw ghetto [April 1943] they exploited the Katyn case and described how the Jews slaughtered over 10,000 Polish officers. In this manner they strengthened the hatred and wrath against those Jews who remained alive." According to K. Iranek-Osmecki, He Who Saves One Life (New York: Crown, 1971), p. 25, the Germans destroyed the statue of Polish national hero Kosciuszko and forced several Jews to pose with it. Poles were dismissed from their jobs with the explanation that Jews were replacing them.
2. In the case of an apostate father murdered by highway robbers, Radak is asked if the son may recite Kaddish, and if so, must he wait until those whose fathers died as believing Jews finish their Kaddish. He rules that the son should recite Kaddish together with all the other mourners, basing his opinion on Sanh. 44a: "'Israel hath sinned' [Josh.7.11]: R. Abba b. Zavda said, 'Even though [the people] have sinned, they are still [called] Israel.'"
3. Benyamin Zeev differentiates between an apostate who was killed and

one who died a natural death. With respect to the former we can assume that if he knew his death was at hand, he would repent; but in the latter case, he did not repent even when he knew he was dying. Thus the son of the apostate who died violently may recite Kaddish; but the son of the apostate who died "in his bed" may not.

4. The Rema attributes this ruling to Asheri, MQ, ch. 3, and Or Zarua. Cf. Shakh, YD 340 note 10.

5. Cf. note 3.

6. See resp. 19, note 24 for a summary of this resp. After emphasizing the view of the sages that "nothing stands in the way of repentance," it is difficult for the Ketav Sofer to reconcile the statement of Rema that some permit the Kaddish to be said for an apostate who is killed; after all, the apostate did not actually repent. He suggests that the other mourners should recite Kaddish first, since they are "more obligated because of the commandment to honor one's father" than one whose father died unrepentant.

7. Rema: "If one was accustomed to sin [before he died], we do not mourn for him (Mordekhai, end of MQ). This applies all the more so to an apostate... Some say that if he was killed by gentiles, we do mourn for him... But some say that we do not mourn, and this is the rule."

8. The Shakh finds support for the view of Asheri and Or Zarua that we do mourn for an apostate killed by gentiles from Sanh. 47a-b: "'They have given the dead bodies of Thy servants to be food unto the fowls of the heaven; the flesh of Thy saints unto the beasts of the earth' [Ps.79.2]. Who are meant by 'Thy servants' and who by 'Thy saints?' 'Thy saints' means literally, saints, while 'Thy servants' means those who were

initially liable to the [death] sentence, but once slain, are designated 'servants' [since their execution expiates their sin]. Abaye said: Would you compare those who are slain by a [gentile] government to those who are executed by a bet din? The former [i.e., the servants] are forgiven, since their death is not in accord with [Jewish] law." Therefore since they are forgiven it is proper to mourn for them.

9. Turei Zahav cites the Asheri's statement at the end of MQ, ch. 3, that Rabbenu Gershom mourned for his apostate son for 14 days.

10. There were other mitigating circumstances in this case. It was rumored that this man practiced Judaism privately. Moreover it could be that he was now under duress, since the Christians forbid an apostate to return to Judaism. The Hesed Leavraham argues that this man has already expressed his desire to repent by supporting his family, giving charity, and seeking someone to say Kaddish for him.

11. According to the account of Shevet Yehudah, the entire assembly, including the heads of the academies of Sura and Pumbedita, rose to their feet and recited these words in unison.

12. In 1172, Maimonides addressed a letter to the Jews of Yemen who were threatened with forced conversion to Islam. This letter was read publicly and heartened the entire community. In gratitude for his guidance and encouragement, the Yemenite Jews included this complimentary allusion to Maimonides in the daily Kaddish.

13. Since such particular references to an individual's lifetime were allowed to be interpolated into the text of the Kaddish, R. Oshry concludes that despite its significance in Jewish mourning practice, the Kaddish is

essentially a petitionary prayer. Since one may petition God on behalf of a righteous gentile, the Kaddish may be recited in memory of this woman.

14. See Esther 7.9. Harbonah did a good deed without meaning to: he mentioned to the king that Haman had prepared gallows for Mordekhai. Haman was eventually hanged on those same gallows.

15. In *Bet Habehirah*, pp. 123-24, Meiri comments as follows: "The conduct of man can be divided into two categories: first, religious conduct according to the tradition of the sages; and second, political conduct according to the traditions of rulers and judges. Political conduct is not hampered by the lack of religious conduct; but if political order is lacking, both [politics and religion] suffer. If there is no fear of the ruling power, everyone is in mortal fear of his neighbor."

16. This is the total number of bullocks prescribed over the seven day period of Sukkot.

17. Zeqan Aharon is inclined not only to permit but to require the son to say Kaddish for his deceased gentile father. He grants that a convert is considered by the sages as a newborn child, cutting him off from his gentile family; and moreover the traditional purpose of the Kaddish-- to elevate a Jewish soul above the judgment of hell-- cannot affect a gentile. However, according to Rambam, *MT Hil. Mamrim*, ch. 5, hal. 11, "A proselyte is forbidden to curse or strike his gentile father, nor is he to treat him disrespectfully, lest it be said that he descended from a higher to a lower degree of holiness, seeing that he disgraces his father." Zeqan Aharon marshals other arguments in support of a proselyte's obligation to say Kaddish for his gentile father, but concedes that a definitive

ruling to this effect would be ill-received. He adds that if a proselyte is afraid to recite the Kaddish in public, he may study Torah or recite Psalms instead.

18. See note 16.

Responsum 25

On the matter of permission [to remarry] for agunot¹

Union of Rabbis from Poland

Deapartment for Matters of Agunot from the War²

R. Shelomoh David Kahana, Director (Rosh Bet Din of Warsaw), rabbi in
the old city of Jerusalem, Or Hayyim Court

With God's help, Jerusalem, 22 Tevet 5708 [4 January 1948]³

Honored rabbi, famed master R. Mordekhai Yaaqov Breisch, Av Bet Din
of Zurich, may he live long and happily, greetings:

Owing to the burden of human troubles accuyping R. Herzog concerning
matters of rescue, settlement, and public welfare, he has not been able
to enjoy and consider your honor's pleasant correspondence at length, as
is the way of Torah, concerning the question of two agunot, Hella Weitz
and Hannah (Anka) Singer, which you rushed to him on the evening after
Sabbath Vayyeshev. Therefore in response to the essence of the question,
he has sent you by telegram his decision to permit these two agunot to
remarry.

Because we are attending to questions like these from the days of the
first World War as well as the last war and annihilation, we have already
in our files nearly 1800 depositions sent to us by the rabbis of the [dis-
placed persons'] camps in Germany, Sweden, Cyprus, and other countries
such as Poland and Russia. The Chief Rabbi [Herzog] has assigned to me

all of the questions sent to his office; so I wrote for him my humble opinion also. Now I relate to your honor the words of my letter.

In my opinion the agunot Weitz and Singer, about whom you asked, should be granted clear permission [to remarry]. "Let a palanquin be put up" [BM 119a] for the rabbi who clarifies at length, as if the good hand of the Lord were upon him, all of the theories of the authorities and the differences of opinion among them with precious new insights into the law that will be of great value to us in considering other complicated questions of agunot.

But in the question before us, although the husband of the agunah Weitz, according to the deposition, merited to be a brand snatched from the fire along with 150 others from some 40,000 who were killed in Tirnau in the concentration camps, they too were transported in 1943 to the camp in Plaszow, Cracow, where they worked as tailors until the end of 1944. In October they were transported to Gross-Rosen, where there was a crematorium. From then on nothing was heard of him. This information already opens the way for permission on the basis of two majorities,⁴ for the majority of the Jews from camps which had crematoria were annihilated, and the majority of those who survived wrote to their homes or sent information [that they were alive]. Such permission is mentioned in the books of the great later authorities Beer Yaaqov and Qohelet Yaaqov in the name of the great authorities of Vilna; by the master Rema in many of his responsa; by the Berit Yaaqov; and by other famous authorities. Moreover, in our case there were additional witnesses: you received a letter that they had heard that her husband died in Gross-Rosen; the witness Daniel Verstaendig of Tirnau told the woman that in Tirnau they were saying that her husband was dead; her brother-in-law Israel Roth

wrote to her that he had asked the two Rosenbaums, and they verified with absolute certainty that he was dead; the Jewish Committee, by the signature of the chairman and the secretary, confirmed that he had died in Gross-Rosen; and subsequently in reply to her inquiry she received from the Jewish community of Tirnau depositions from two witnesses, Drucker and Blyvim, who testified with their own signatures that her husband, Jacob Weitz, died in the Gross-Rosen camp in 1944. Yet in spite of all these considerations, your honor raised some apprehensions which cast doubt: 1) because the statement [from a witness] "I buried him"⁵ is lacking; 2) because the witnesses' testimony may be based on rumor; 3) because of the lack of attestation;⁶ 4) because the witnesses may be irresponsible and unreligious and thus unfit⁷ even for testimony on behalf of a woman.⁸ Now according to these apprehensions, there is no way to grant permission [to remarry] to an agunah from the cruel war of annihilation, for not one of the millions who perished merited to be buried. Moreover we have recorded depositions from individuals who were buried alive and still survived.⁹ The principal basis for permission in our time is that those who were taken to the oven are in the category of those who go forth to be executed; [in addition there are the laws of] majority and estimation. If your honor thinks that perhaps the witnesses' testimony is based on rumor, there is no testimony that is immune to such suspicion, since no one saw the slaughter itself except those who were burned. Thus the suspicion that the witnesses are not qualified is contrary to the [principle of] majority and contrary to the presumption of legal propriety. There was a legal dispute recorded in the works of the great authorities about whether [Jewish] soldiers are qualified to give testimony since there is suspicion that they may have profaned the

Sabbath for some reason other than danger to life, or that they ate forbidden food willingly. But in our time, a time of general annihilation, a time when many of the martyrs submitted to death for the sanctification of God's name with the confession and [the words, Dt.6.5] "Hear O Israel..." on their lips, we should not worry about such suspicions.¹⁰ With respect to the law of attestation, the Rambam's opinion is well known: "A Jew does not need attestation." Moreover, there is the signature of the brother-in-law Israel Roth, who certainly knows the woman; and the chairman of the community also confirms the authenticity of the signatures. So also the agunah Hannah (also called Anka) Singer of Lodz is clearly permitted [to remarry]. For both she and her husband were transported to Auschwitz at the end of 1944, and the two of them agreed that whoever remained alive would notify their hometown. The witness Rosenthal, who knew the husband, testified that he was together with him for three weeks in Birkenau. There was a crematorium there called the Gypsy Camp where most of them were put to death. The witness Barukh Lazar testified before R. Kowalski, agent of the bet din, that he labored together with a Jewish man on the railway lines and [subsequently] saw this man lying ill in bed, his face swollen and his body stricken. The sick man told the witness that his name was Pinhas Singer, a fruit dealer from Lodz. A month later the witness heard that a Jew had died in the concentration camp. He asked, "Who died?" and everyone said that Pinhas Singer had died. Your honor was apprehensive that the witness did not report [that he heard] the name of Singer's town [upon hearing of his death] and that furthermore the witness admitted to the bet din that he [the witness] was not careful about the duty of laying tefillin but was careful not to profane the Sabbath. Although your honor's conclusion was to permit [the woman to

remarry], this was only so that no misconduct should ensue, and in addition because of the Shevut Yaaqov's view that an emergency is similar to an ex post facto situation. But really your honor's apprehensions are exaggerated, for negligence in laying tefillin does not render a witness unfit to give testimony,¹¹ especially testimony on behalf of a woman [seeking permission to remarry]. Nor do I see any defect [in the testimony] because the name of Singer's town was not mentioned [after his death], for the above-mentioned Pinhas told the witness that he was a fruit dealer in Lodz. Since his family's name is the same as his father's name, in this case we have his family, his city, and even his profession. If one would still suspect that there may have been another Pinhas who was also ill in the same place, did not the witness say that this man was placed in the last bed? Therefore it is proper and correct that your honor permit the agunah [to remarry] not by reason of an ex post facto situation, but ab initio, without any objection.

Also, in the very important discussions of the Hiddushei Torah there are some remarks on the matter of [a doubt which originated in] a fixed place and [the combination of] the minority [of cases] and [the principle of] presumption.¹² In 5704 I too published a well-founded treatise on these laws [of agunot], which I sent to the recognized halakhic authorities. The Chief Rabbi has sent to me many great treatises clarifying these laws, which have yet to be published. We will yet meet, God willing, for the sake of helping the agunot.

With respect and great affection,

Your dear friend,

Shelomoh David Kahana

[Teshuvot Helqat Yaaqov, vol. 1, no. 21]

Notes

Responsum 25

1. The question most frequently discussed by the rabbis of various countries in the wake of the Holocaust is that of the agunah, a married woman who is separated from her husband and cannot remarry, either because she cannot obtain a divorce from him or because it is unknown whether he is still alive. The halakhah stipulates that a marriage can only be dissolved by divorce or the death of either spouse. Divorce can only be effected by the husband's delivery of a bill of divorce (get) to his wife. Thus the husband's absence precludes any possibility of a divorce. The disappearance of the husband without proof of death is not sufficient for the bet din to dissolve the marriage. Obviously this problem was epidemic after the Holocaust. Millions of Jews perished without trace, let alone witness. The problem of the agunah, already the subject of a vast halakhic literature dating back to the talmudic era, has been exacerbated still further by the Holocaust. While historically the rabbis have sought to be lenient for the agunah's sake, they also have had to contend with the consequences should the woman's first husband reappear after she had been granted permission to remarry: she has committed adultery and is prohibited to both men, each of whom must divorce her; and any children born to her by her second husband are mamzerim (bastards; see resp. 32, note 1) according to biblical law. For this reason the rabbis were usually very cautious about granting the agunah permission to remarry in the absence of conclusive proof of her husband's death. H.J. Zimmels, The Echo of the Holocaust in Rabbinic Literature (New York: Ktav, 1977), p. 215, lists four major questions with respect to the problem of agunot from

the Holocaust: 1) If the husband disappeared, whether and when his wife is permitted to remarry; 2) If the wife disappeared, whether and when her husband (agun) may remarry; 3) If a childless woman's brother-in-law disappeared, although there is sufficient evidence of her husband's death, whether the bet din may permit her to remarry, since halitsah (see resp. 26, note 3) would be required (if husband and child were both missing and it was determined that the child had died first, halitsah would still be required); 4) If the wife disappeared, whether and when her husband may marry her sister (cf. Lev.18.18). For a summary of rabbinic rulings on agunot after the Holocaust, see Zimmels, pp. 215-238. For an authoritative and extended treatment of the post-Holocaust agunot problem, see Teshuvot Heikhal Yitshaq, EH vol. 1, no. 24.

2. This office devoted to agunah cases existed from the time of World War I. R. Kahana assumed his position there after World War II. Zimmels, op. cit., p. 225, writes that of all those agunot who sought permission from R. Kahana's office to remarry, not once was it learned later that the agunah's husband was alive.

3. This resp. is included here out of chronological order because it summarizes some of the major issues raised by the problem of agunot in the aftermath of the Holocaust. The lenient approach of R. Kahana was shared by most of his colleagues. See note 10.

4. Cf. Ket. 14b-15a, where the case is discussed of a girl who went to draw water from a spring and was raped. If the majority of the inhabitants of the town were entitled to marry their daughters into the priesthood, and if the majority of the men who passed by the place were likewise qualified, then the girl may still marry into the priesthood on the

basis of two majorities.

5. See Sh.Ar. EH 17:48.
6. Attestation refers to the presence of witnesses required to validate formal legal acts. A document duly attested by two such witnesses and confirmed by the bet din is admitted as evidence and equivalent to oral testimony in civil cases. Cf. Sh.Ar. HM 46:7-8.
7. See resp. 26, note 12.
8. I.e., confirming her husband's death so that she can remarry.
9. See opening paragraph of resp. 28.
10. Zimmels, op. cit., p. 228, concludes that the rabbis' leniency in matters of agunot was spurred by compassion for the unfortunate women and the desire to rebuild the Jewish people. Also, the rabbis were worried that otherwise many of these women would contract forbidden marriages or live out of wedlock which would forever stigmatize any children born of such unions.
11. See resp. 26, note 12.
12. Cf. Qid. 80a, where these concepts are discussed: "Combine the minority with the presumption, and the majority is weakened."

Responsum 26

[Questions concerning matters of agunot]

With God's help, Tuesday, Sabbath Egev 5705 [3 August 1945], Bergen-Belsen
Greetings to his honor, the illustrious R. Yehezqel Abramski, may he live
long and happily, of the great bet din of London:

My friend, the distinguished R. Shelomoh Baumgarten, who was sent here
by the chief rabbinate of your community, imposed upon me the burden of
deciding all matters pertaining to the law, including taking testimony in
matters of marriage. But here I have no books, not even Sh.Ar. EH.¹ Who
can decide such serious matters as these without careful scrutiny of
Sh.Ar. and the commentaries, especially after the sorrows and evil circum-
stances, God forbid, that befell me? May the One who said to [the evil
spirits in] His world, "Enough!" say to our own sufferings, "Enough!"

Therefore I decided to submit to your honor each difficult matter that
comes before me. I pray that you will give me your exalted opinion as
soon as possible, for the matters are important and affect many thousands
of our fellow Jews oppressed by suffering, may God have mercy.

1) Recently I succeeded in having the British government issue a
ruling² that any [Jewish] man wanting to live in the same room with a
woman must have my written verification that I am certain they are man
and wife. Without such verification they will be liable to penalty if
they live together in the same room.

Yesterday a serious case came before me. After careful interrogation

the husband admitted that he already had a wife and five children. In 5702 his wife and children were transported to Treblinka where there was a crematorium. He was certain that his wife was burned, God forbid. He then married his second wife. A certain ritual slaughterer performed the wedding without a wedding canopy or marriage contract. They lived together as man and wife for a year before they were separated and sent to two different places. It had been about three months since they had found one another here and resumed living together.

After careful questioning the woman too admitted that she had a husband before the war. They had no children. Her husband had two brothers. In 5704 she found the two brothers, who told her that her husband was killed at Auschwitz. About three months later she found the man spoken of above. They knew each other from their hometown and spoke of getting married. He gave her a solemn promise and vow that he would marry her. On this basis they lived together. Now she was asking me to perform her wedding according to the law of Moses and Israel. This concludes the substance of the testimony.

In my humble opinion it is clear that it is forbidden to perform this wedding; rather, there is an obligation to separate the couple. For according to the husband's admission, he married her and lived with her while her husband was alive and she was a married woman. Therefore [Sot. 26a] "just as she is prohibited to her husband [on account of her adultery] so is she prohibited to the adulterer."

Moreover, according to the woman's own words she had no children, but her husband had two brothers. Consequently she may not marry anyone [other than one of her husband's brothers], since she is a deceased brother's wife and is bound to the obligation of levirate marriage [or halitsah].³

Furthermore I am doubtful whether or not the woman's testimony that her husband died can be trusted in such a case. In his responsa R. Aqiva Eiger discusses the case of a married woman who committed adultery and was thus prohibited to her husband. If one witness testified that this woman's husband died [thus freeing her to remarry], could the witness be relied upon? The whole reason that one witness is sufficient⁴ to give testimony on behalf of a woman⁵ is that [it is assumed that] she thoroughly investigates [to be certain that he is dead] and only then remarries. Because of the severe measures imposed by the rabbis in the end [i.e., should the allegedly dead husband return], they are lenient in the beginning [by requiring only one witness]. There is an opinion that the investigation requires her to leave both husbands. But in a case where she is forbidden to her [first] husband anyway and would conduct only a cursory investigation of the second husband,⁶ the second husband's testimony is not trustworthy. But R. Aqiva Eiger concludes that the second husband may be believed, mentioning that the illustrious Hatam Sofer of blessed memory and my grandfather of blessed memory, the gaon of Lissa, author of Hav-vot Daat, agreed with him. But I do not have these books to consult. In my book Binyan Tsevi I discussed this matter at length.⁷ A resp. on this question by my honored and saintly uncle, the gaon of Lusk, author of Hedvat Yaaqov, is published there.⁸ Another resp. on this subject by my honored and saintly father of blessed memory-- may God avenge his blood-- is published in Binyan David.⁹ But I do not have these books here.

It is apparent from the great authorities that one objective witness is to be preferred over the wife herself, for it is a general rule that [the testimony of] the person involved is inferior to [the testimony of] an objective witness. If so, the above-mentioned opinion of the authorities

that a cursory investigation [of the second husband] suffices applies only in the case of testimony by an objective witness [that the first husband died]. However, when the woman herself testifies, we must require an investigation of the first husband's death. Obviously in the case of adultery, where only her second husband is investigated [concerning his eligibility to remarry], she is not a trustworthy witness [concerning her first husband's death]. I know of a long resp. on this subject by my honored and saintly father of blessed memory (may God avenge his blood) but I do not have it here.

In our case, then, it is very doubtful that the woman may be believed at all to testify that she heard of her husband's death. I hope that if your honor answers me even briefly about the law in this case, it will be possible for me to separate this couple.

2) There are many men whose wives were taken from their homes and never heard from again. Are these men permitted to remarry without the assent of 100 rabbis¹⁰ and without waiting a sufficient time until they can see all of the lists of our fellow Jews who survived? What is the law concerning those men who have already remarried because they were certain that their wives were transported to the crematorium?

3) In the Auschwitz camp, where there was a crematorium, it was the way of the cruel, wicked ones to take those men, women, and young girls still fit for work and lead them to the right side, where there was a labor camp. The old, the children, and the pregnant mothers or those who held their children were led to the left side, near to where the crematorium was visible. From that moment when husband and wife were separated, they never saw each other again. No news was ever heard from the left side. Of course it was impossible for any witness to

testify that he saw what went on inside the crematorium. The only possible testimony was that they saw a certain man or woman led away to the left side who never returned.

Once while I was in Auschwitz at hard labor very near to the crematorium, a new idea occurred to me that in my humble opinion might provide a compelling basis for permitting husbands and wives with missing spouses [to remarry]. In Yer. Ket. and Yer. Shab., it is explained that everyone knew that the Sabbath boundary extended to Reuven's field. If witnesses testify, "We came this far on the Sabbath," then [the bet din] may take the field from Shimon [who wrongfully claims it] and return it to Reuven. (I do not have this source here to consult.) From this case we learn that public knowledge-- something everyone knows-- is considered comparable to qualified witnesses on the basis of whose testimony money may be collected [by the bet din]. I recall that according to a resp. by the Radbaz, when [information] departs the category of rumor and enters the category of knowledge, it is considered comparable to witnesses. In my book Binyan Tsevi I discussed this at length, citing the Tal Torah by the gaon of Tirnau of blessed memory.

Now it is common knowledge that all of the men and women who were led away to the left side were burned there in the crematorium. This is certain knowledge to whoever was there when it happened, for each time the transports arrived we saw the flames shoot up above the crematorium. Thousands of our fellow Jews were brought inside at the same time, and we did not see even one come out. When on certain days the transports ceased, the flame from the crematorium also ceased. So everyone knew what transpired there in the crematorium. Owing to our many sins, they were burned, God forbid. This [public knowledge] is considered comparable

to qualified witnesses who saw the murder of these victims. This is what occurred to me in Auschwitz, and in my humble opinion it is a strong argument in favor of [permitting the remarriage of] husbands and wives with missing spouses.

4) In the Lodz ghetto it was the practice of the president [of the Jewish Council], Hayyim Rumkowski, to perform the wedding ceremonies of some twenty or thirty couples every Sunday, without a wedding canopy or marriage contract.¹¹ The groom merely gave [the bride] a wedding ring in the presence of two witnesses and said, "Behold thou art [consecrated unto me]..." Then they broke a glass and everyone shouted, "Mazal tov!" No rabbi was present at these ceremonies. Now couples come to me as required to request that I verify in writing that they are married according to the law of Moses and Israel, so that they will be permitted to live together in the same room.

6) To my regret virtually all of the camp inmates openly smoke cigarettes in public on the Sabbath. Ever since the war they have cast off the yoke of the commandments and proper conduct. Almost all of them tell me that at home before the war they did not profane the Sabbath but rather observed the commandments of the holy Torah. Only by reason of their suffering in the camps and the awful destruction they witnessed had they become irreligious. My urgent question is if testimony may properly be accepted from such people.¹²

I remember that my honored and saintly father of blessed memory (may God avenge his blood) was chosen by the Orthodox community in Hungary in 5702 to elucidate the conditions and particulars relating to the acceptance of testimony required [to free] wives with missing husbands [to remarry]. He wrote that initially testimony should be accepted even from

such people, for perhaps it might be necessary to include it as additional evidence.

6) A couple requested me to perform their wedding. But when I looked at the groom I was doubtful that he was Jewish, for he certainly had the appearance of a gentile. When I asked him if he had ever learned the alef bet [the Hebrew alphabet], he was dumfounded. Moreover the witnesses whom the couple had brought and who were supposed to know the man contradicted each other. They could only testify that they had seen that he was circumcised. What does the law require in this case?¹³

I have many ideas about all of the matters mentioned above. Yet as I have already said, I have no books here. It is difficult for me to discuss such matters in depth with my friend, R. Shelomoh Baumgarten, due to his numerous duties in the affairs of the entire community which are piled over his head. Indeed he labors selflessly far more than his strength can bear.

Therefore I repeat my request that you be kind enough to inform me of the word of God which is the halakhah. With this I conclude with best wishes, respect, and admiration. I await God's salvation at any moment, and the exaltation of the power of Torah and piety and the remnant of His people Israel, may it be soon in our time. So may it be His will.

(the insignificant) Tsevi Hirsch Meisels,
author of Teshuvot Binyan Tsevi; grandson of
the holy gaon of Tsanz and Ujhely, author of
Havvot Daat, judge and teacher of the community of Weitzen

[Teshuvot Binyan Tsevi, vol. 2, no. 33]

Notes

Responsum 26

1. Sh.Ar. EH includes laws pertaining to marriage and divorce.
2. At Bergen-Belsen, which as a displaced persons camp after the war had a Jewish population of some 20,000.
3. According to Dt.25.5-6, a childless widow is obligated to marry one of her late husband's brothers (levirate marriage). The purpose of this practice was "that the husband's name should not be blotted out from Israel," since as yet there were no children. The alternative was halitsah (Dt.25.7-10), the ceremony of the widow removing the brother-in-law's shoe to symbolically release him from the duty of levirate marriage. This was considered disgraceful in ancient times, but with the abolition of polygamy (see note 10), halitsah became the accepted practice.
4. As a general rule at least two witnesses are required to attest or testify (Dt.19.15). One exception is the case of an agunah: she is allowed to remarry on the basis of the testimony of a single witness that her husband is dead (see M. Yev. 16:7; Ket. 22b-23a).
5. I.e., confirming her husband's death so that she can remarry.
6. I.e., to be sure that he is eligible to marry her.
7. See vol. 1, EH nos. 1-10, where the problems of agunot and acceptable testimony are treated at length.
8. Probably referring to vol. 1, EH no. 5, concerning an agunah rumored to have committed adultery. A witness has come forward to testify to her husband's death. R. Yaaqov Meisels cites Yev. 116a, where it is

asked why a wife who has quarreled with her husband is not believed if she states that her husband is dead. According to one view she might lie out of hatred; by marrying again she would be prohibited to the first husband forever. Another opinion is that while she might not lie deliberately, her aversion for him would prevent her from finding out what happened if he ever was in a position of danger. Even if the discord between them were of his making and not hers, she might not trouble herself to locate undeniable proof of his death. However, the rabbi in this case is inclined to accept the testimony of one witness.

9. See nos. 2 and 4 by R. David Dov Berish Meisels. The question concerns an agunah who wants to marry a man with whom she is rumored to have committed adultery. He concludes that the witness who has testified to her husband's death is credible. He also assumes that the death preceded any alleged sexual relations between the woman and the second man. Thus they are permitted to marry.

10. The assent of 100 rabbis is required to waive the tagganah of Rabbenu Gershom, which prohibited a man from marrying an additional wife unless specifically permitted to do so by 100 rabbis from three "countries." It also prohibited a husband from divorcing his wife against her will. According to Sh.Ar. EH 1:10, "[R. Gershom] only imposed the ban until the end of the fifth millenium," i.e., until the year 1240. However, since later generations accepted it as a binding tagganah, it now has the force of permanent law.

11. In many ghettos the number of women exceeded the number of men, since the heads of households were often the first victims of Nazi aktionen. The surviving wives whose husbands were missing or had already been killed

were left without any means of support or protection. Thus many unmarried women tried to marry strictly in order to be saved from death. However, such marriages were not easy for a rabbi to approve, since several halakhic prohibitions might be involved: e.g., agunah, halitsah, laws of purity (requiring a mikveh), etc. Only if danger to life was certain might such a marriage be performed. Owing to such difficulties, as well as the scarcity of rabbis, many couples approached the ghetto police or Jewish Council to arrange civil marriages in hopes that the Germans would regard them as valid. The present resp. reports that in the Lodz ghetto, Hayyim Rumkowski routinely conducted wedding ceremonies for some twenty or thirty couples per week.

12. According to Ex.23.1, "the wicked" are unjust witnesses; consequently they are not qualified to give testimony. Subsequently the halakhah has extended this prohibition to include those who have no knowledge of Bible, Mishnah, or civilized standards of conduct (cf. Sh.Ar. HM 34:17), and to those who transgress the law out of either conviction or malice (HM 34:22). Violators of the Sabbath are considered incompetent witnesses (HM 34:2,24). Apparently R. Meisels' question concerns the possible application of these latter categories.

13. R. Abramski's reply (resp. 27) does not answer this question. In his next letter to R. Abramski (Teshuvot Binyan Tsevi, vol. 2, no. 35), R. Meisels reports that he had been threatened by certain violent men to perform the wedding ceremony or else. Further investigations bore out R. Meisels' suspicion that the man was not a Jew. It turned out that the woman was pregnant and claimed that she thought this man was a Jew.

Responsum 27

[Reply to questions concerning matters of agunot (resp. 26)]

With God's help, 22 Av 5705 [6 August 1945], London

To the honored and illustrious R. Tsevi Hirsch Meisels and R. Shelomoh Baumgarten, may they live long and happily. May the grace of God hover over you, and may you merit to witness the consolation of Zion and Jerusalem soon in our days.

Yesterday toward evening your letter was delivered to me, and I am answering your questions at once as thoroughly as one night permits.

Concerning your first question, there is no doubt that the woman is forbidden to cohabit with her second [husband]. They should be warned and urged to separate.

The content of your second question was as follows: "There are many men whose wives were taken from their homes and never heard from again. Are these men permitted to remarry without the assent of 100 rabbis¹ and without waiting sufficient time until they can see all of the lists of our fellow Jews who survived? What is the law concerning those men who have already remarried because they were certain that their wives were carried off to the crematorium?"

Those men who have already remarried should not be separated from their [new] wives. However, ab initio one should not permit a man to marry another wife until all of the lists from all of the concentration camps are checked.

It would be worthwhile for these men to wait another month or two and not conclude a doubtful marriage, for if such a man's first wife should be found still alive, the sorrow and hurt will be great.

Concerning your third question, please send to our bet din all of the accumulated material pertaining to those Jews who were assigned to go to the crematorium. Our bet din and others will consider this matter jointly in order to resolve it and produce a clear legal decision on well-established and trustworthy grounds that admit of no doubt.

Your fourth question concerned the wedding ceremonies performed each Sunday for some thirty couples by Hayyim Rumkowski. There was no wedding canopy; the groom merely placed a ring on the bride's hand in the presence of two witnesses. No rabbi was present. Obviously if the woman was single and the groom betrothed her in the presence of two qualified witnesses, and if he gave her a ring for the purpose of betrothal, then she is a married woman. If this is certain, their marriage should be verified in writing so that they will not think their betrothal invalid.

Your fifth question concerned whether testimony may be taken even from those who profane the Sabbath in public. (Soon our bet din will publish a resp. concerning such testimony.) One must be extremely cautious about what they say until one knows that their testimony is not deceitful or crooked (in the Rema's phrase). You should note your opinion on the manner in which each of these witnesses relates his words. Please submit all of this material to our bet din.

Best wishes and may God be with you.

Yehezqel Abramski

[Teshuvot Binyan Tsevi, vol. 2, no. 34]

Notes

Responsum 27

1. See resp. 26, note 10, where the taqqanah of Rabbenu Gershom is defined.

Responsum 28

The execution sites [concerning the legal status of those sites sanctified by the blood of the martyrs]

In various places around the cities of Poland, where the murderers saw no need to transport the Jewish population to the central annihilation camps like Auschwitz, Treblinka, and others, they led them, as is known, to an open area in the city and ordered them to get inside the pits which the victims themselves had dug¹ and lay down on the bottom. Then the murderers, may their names be blotted out, shot them to death. But sometimes not all of the victims were hit by the shots. Immediately afterward a second group entered the pit while the earlier victims were still jerking, half alive; and the cries of "Hear O Israel..." from the new group mingled with the groans of those already shot. Blood touched blood, and so the pit was filled with a mesh of bleeding bodies, some still alive. The murderers above them covered them with dirt, but the ground shook and screams were heard from beneath the earth.²

When the survivors returned from their hiding places and from the forests as far away as Siberia, they began to search for these holy places which their brothers and sisters had sanctified with their blood. The first question was whether the corpses could be exhumed from their graves and transferred to proper Jewish graves, since these places were ritually unclean or had become cow pastures which were a disgrace to the dead.

This question does not concern only whether it is permitted to open their graves and transfer them to the local cemetery, sanctified for

many generations, until their bones go up to the land of Israel; indeed it is a great mitzvah to do this. (I discussed this at length in my book *Meemeq Habakha* in the essay *Met mitsvah*.)³ Rather the question concerns the legal status of these places which were sanctified by the blood of the martyrs, may God avenge them.

Answer: Although the place is holy and sanctified by blood, when the graves are cleared it is ritually clean for *kohanim* and may be used, for instance, to build a house and so on. But I think that these places where these martyrs died together in their desolation should be left alone. Such a memorial is more expressive of the destruction than any building or monument, for there is no adequate description or depiction of such a destruction except a vacant lot and empty space. The destruction can only be captured by negation, the total absence of color. I learned this from our rabbis of blessed memory: When they commanded us to perpetuate [the memory of] the destruction [of the Temple] for future generations, the only monument they could find was the remnant of a vacant lot.

After the Temple was destroyed, the sages of that generation ordained that we should never again construct plastered buildings; rather one should coat his house with mud and leave bare the area of a square cubit (BB 60b and Tur, OH 560).⁴ Our later teachers, the Levush and the Shenei Luhot Haberit, added: not like those who blacken the area of a square cubit, for this is also a depiction [of the destruction]. The color black exists, but the destruction was the negation [of existence]; and that which exists cannot symbolize that which does not.

Is it possible to express the death spasms of those buried in this pit,

or what transpired in the heart of the mother who stood here in this holy place beside her child who was burned alive, in the moment of his sacrifice? No building or picture can transmit these horrible tortures. Only destruction and eternal desolation can symbolize what happened here.

I remember that when I was rabbi of the surviving remnant of Warsaw, we were visited by the Chief Rabbi of Israel, the illustrious R. Yitshaq Halevi Herzog of blessed memory. Together we visited the ruins of the Warsaw ghetto. He asked me why I opposed setting up a memorial statue to the fallen of the ghetto. When I explained to him that in my opinion the only memorial that could symbolize the destruction would be these mountains of ruins, he agreed with me.⁵

Then they began to clear away the ruins, and I expressed the fear that the destruction would be entirely forgotten after new neighborhoods were established in this holy place. Would a statue serve as a proper memorial of the destruction after the horrors that transpired? Will there remain here no sign or memory of the place where our martyrs perished, where a father's blood mixed with that of his son whom he loved more than his own life? In this same place will they build houses for people to live in and make merry-- is such a thing possible? Can a cold, lifeless statue serve as an appropriate memorial to our martyrs in their land?⁶

As has been said, it is my opinion that the holy places where the martyrs were buried alive should be left alone, as an eternal desolation, once the martyrs' bones are exhumed and moved to local cemeteries together with the corpse-soil. (See my book *Meemeq Habakha*, the essay Met mitsvah.)⁷ The area should be fenced off all around as an everlasting memorial.

However, according to the law itself, if there is a need to use these areas, such a site is not considered ritually unclean for kohanim, and it

is permissible to erect any building one wishes on the site.

The Law Regarding Discovered Graves and Known Graves

I shall explain my words. In Sh.Ar. YD 364:2 we find the following: "A grave that is discovered may be removed; once it is removed, the site is ritually clean and may be used. A grave that is known may not be removed; if it is removed, the site is ritually unclean and may not be used." The Rambam maintains [MT Hil. Tumat Hamet, ch. 8, hal. 5,7]: "A discovered grave may be removed; once it is removed, the site is ritually unclean and may not be used. A known grave may not be removed; if it is removed, the site is ritually clean and may be used. A deserted corpse, even if the owners of the property [on which it is found] have no knowledge of it, may not be removed since a deserted corpse acquires a right to the site."

The Bet Yosef gives a lengthy explanation of this law in Kesef Mishneh to MT Hil. Tumat Hamet, ch. 8, hal. 5, and in his commentary on the Tur, YD 364, where the first opinion [see below] is given.⁸ The Bet Yosef writes that according to a baraita (Sanh. 47b), "A discovered grave may be removed; once removed, the site is ritually clean and may be used. A known grave may not be removed; if it is removed, the site is ritually unclean and may not be used." Rashi explains that a "discovered grave" refers, for example, to a fresh grave to which the owner of the property never gave his consent, so that the corpse was buried there by stealth. In this case it is permitted to remove the grave, since the corpse does not acquire the right to the site; and the site is ritually clean, for even though the sages ordained that graves are ritually unclean, and even though the corpse was taken from there, the rabbinical decree does not

apply to this case and the site may be used. Even though the prohibition [against using a designated burial place] is from the Torah, the law concerning a grave does not apply to this site. A "known grave" is one to which the property owner gave his consent, and [once the grave is removed] the site is ritually unclean. The rabbis ordained permanent ritual uncleanness on such a site to prevent [unwarranted] removal of bones. But the Rambam has a different version [from Rashi], as cited above. In the case of a discovered grave, we did not know it was there, so clearly the corpse was buried without the property owner's permission. Thus it is not considered a deserted corpse and does not acquire a right to the grave site. Consequently the grave may be removed; once it is removed, the site is ritually unclean because we suspect that on the same property other graves might be present, making it a cemetery. Therefore the site is ritually unclean and may not be used-- since it is forbidden to treat the site disrespectfully, as it is said in Meg., ch. Benei hair (29a)-- until they search the area. In the case of a known grave, where it is known that only one grave is there, we assume that it has the owner's consent. Such a grave may not be removed; if it is removed, the site is ritually clean and does not require a search of the area. The site may be used, since an evacuated grave is not prohibited for use.

The Rabad takes issue with the Rambam and writes: "Concerning the Rambam's view that the site may not be used until the area is searched, I do not know why he says 'until the area is searched.' I say that even if one searches and does not find neighboring graves, then although he removed the corpse and the corpse-soil, even so contact with the site renders one ritually unclean and it may not be used. The uncleanness is only to discourage the use of the site. The exact words [of the baraita,

Sanh. 47b] are: 'A discovered grave may be removed; once it is removed, the site may not be used and it is ritually unclean. A known grave may not be removed; if it is removed, the site is ritually unclean and may not be used.'" The Kesef Mishneh comments on Rabad's view as follows: "Although Rashi wrote to ch. Nigmar hadin [Sanh. 47b] that even if the corpse is removed the grave is ritually unclean, since the rabbis ordained the uncleanness to prevent the [unwarranted] removal of bones, our master (Rambam) disagrees. For after the corpse and the corpse-soil are removed, how can the grave site be prohibited for use? We are taught in ch. Nigmar hadin [Sanh. 47b] that a built grave [i.e., built above ground] may not be used, but if it is not a built grave, it may be used since natural soil⁹ is not prohibited. The Rabad's view that such land may not be used is only a rabbinical restriction. Why be so severe as to declare it unclean merely to prohibit its use? Moreover I am puzzled by the Rabad's version of the exact words [of the baraita, Sanh. 47b], which does not conform to our version of the gemara, nor to the Yerushalmi, the Tosefta, or Semahot."

But see Semahot, ch. 14, where the text agrees with Rabad's version that all places from which a grave has been removed are ritually unclean and may not be used.¹⁰ This conforms to the Rabad's view.

From what has been said above, we learn that there are three opinions concerning the law of an evacuated grave: 1) Rashi's opinion is that everything depends upon permission to remove the corpse¹¹ from the grave. In the case of a discovered grave, if the owner of the property is sure he did not consent to it, then it does not have the legal status of a grave in regard to either ritual ritual uncleanness or the prohibition of use, even if it is a built grave. However, in the case of a known grave

to which the property owner consented, the corpse acquires a right to the site, and the rabbis ordained that the site is ritually unclean even if they remove the corpse. Consequently it may not be used. We see that the Kesef Mishneh agrees with Rashi that if the corpse was buried with permission, the grave may not be used even if it is natural soil. If it is maintained that this applies to a built grave also, it is explained further that indeed the corpse is prohibited even on natural soil; only the soil itself is not prohibited.

2) The Rambam's opinion is that there is no prohibition against the use of natural soil. The prohibition against use refers to the law regarding cemeteries, as the Kesef Mishneh explains.

3) The Rabad's opinion is that there is a rabbinical prohibition against the use of any evacuated grave.

Our case, where these martyrs' bones were removed and transferred to a cemetery, adheres to Rashi's opinion, to which the Tur and Bet Yosef also subscribe.¹² For if the removal was permitted, the evacuated grave has the legal status of a discovered grave, and since it may be removed it is neither ritually unclean nor prohibited for use. In our case, where the removal was carried out with permission, the graves are neither ritually unclean nor prohibited for use. They are legally considered evacuated graves, which may be used-- but not for a straw-magazine, woodshed, or storehouse, because it is forbidden to disgrace the dead (Sh.Ar. YD 364:6;¹³ Semahot, ch. 13).¹⁴ Moreover in the Rambam's opinion explained above, a discovered grave may not be used because we suspect that the site may be a cemetery; but in the case of a known grave, since it may be removed, it may also be used. (See the resp. of the illustrious R. David Oppenheim at the end of Sefer Havvot Yair.)¹⁵

Yet one may ask if the evacuated grave should be permitted for use for the reason that the corpses were buried on stolen property without the owner's consent, and therefore the site is not ritually unclean. While the uncleanness is based on a rabbinical decree [to prevent unwarranted removal of bones] and is not a prohibition against use, is not the law in our case like that applied to a deserted corpse which acquires the right to the site? Rather it is out of respect for the victims (as explained in my book)¹⁶ that we permitted the transfer to a cemetery, the place of their ancestors, together with the corpse-soil. The legal status of these graves is like that of a grave which is harmful to the public and thus is removed; that is, the site is ritually clean. Rashi explains [Sanh. 47b]: "It is not prohibited for use because of the damage, but because the Torah's prohibition [against the use of a designated burial site] is not waived."

The Evacuated Grave Space in Natural Soil

One might say that the prohibition against the use of a grave applies only to a built grave, but that natural soil is not prohibited. Does not our case involve natural soil? However, see Sidrei Tohorah, p. 216, who writes: "In the gemara it is stated (Sanh. 47b): 'It was the practice of people to take earth from Rab's grave and apply it [as a remedy] on the first day of an attack of fever. When Shemuel was told of it'¹⁷ he said: They do well, for it is natural soil and natural soil does not become prohibited, as it is written (2 Ki.23.6), 'And he cast the dust thereof upon the common people.'" Thus he compares the graves of the common people to idols. Just as the use of idols is not prohibited when they are attached¹⁸... so here, too, what is attached¹⁹ is not prohibited.'" The

pious Sidrei Tohorah introduces a difficulty suggested by the Ritba:

"If you say that the idols are not prohibited if they are attached, this applies only when no act of idolatry is performed there; but if such an act is performed, the earth is prohibited, as we learn in AZ 54b: 'When R. Dimi came [from Palestine] he said in the name of R. Yohanan: Although [the rabbis] declare that one who worships a piece of ground does not render it prohibited, if [as an idolatrous act] he dug wells, pits, or caves in it, he has rendered it prohibited.' A grave too is something that has been dug, so how could they have taken earth from Rab's grave?"

He goes on to explain: "One might say that the empty hole created by the digging is prohibited, but the dirt walls of the hole that remain obviously have not been affected and are not prohibited." So also in the case of a corpse, the empty space it occupies is certainly prohibited. As we are taught in Evel Rabbati [Semahot], ch. 13, an evacuated grave may be used-- although not for a straw-magazine, stable, etc.-- but a niche may not be used. This contradicts the Nahalat Yaaqov who revises the text to say: "An evacuated grave may not be used (since generally it is a built grave); but an evacuated niche may be used (since it is generally natural soil)." If it is true that we should read, "An evacuated grave may not be used," then why does the text specify that we must not make from it a straw-magazine, stable, etc., if in fact all forms of use are prohibited? Rather one must say that an evacuated grave refers to one which may be used-- according to the law of Sh.Ar. [YD 364:6] already mentioned-- for instance, if a corpse was buried for the purpose of removing it [later], although in any case they must not make of it a straw-magazine, etc., for this would constitute disgraceful use. However, in regard to a corpse buried without the intention of [later] removing [it], such as a deserted

corpse, the empty space created by a person's digging may not be used. In view of this, the status of the martyrs' [mass] grave is doubtful, since the law regards them as deserted corpses which acquire the right to the site. Thus the evacuated grave space would be prohibited.

Indeed I saw that R. Yehiel Yaaqov Weinberg, in the periodical Yeshurun, rejects the Sidrei Tohorah's opinion and writes: "I am astounded by this argument, for how will he explain the gemara passage (Sanh. 47) which raises the objection to Shemuel that 'if one hews a grave for his [dead] father [but buries him elsewhere], he [himself] may never be buried there'?"²⁰ Why does he not answer as follows: it is prohibited to bury [another corpse there] since the air inside the grave is prohibited once the grave is dug, which is not so in the case of the day old fever for which Shemuel permitted the [use of] soil [from Rab's grave]?" But I do not see a problem here. According to the opinion of the Sidrei Tohorah, if a grave is dug the empty space may not be used for straw or anything else utilized by the living, but to place another corpse in it is not a matter of using the space itself for burial. The principle of burial is that the body returns to the dust; that is, it is joined with the soil. If natural soil is not prohibited, then the corpse does not derive benefit from the empty space but only from the natural soil. Consequently it is permissible to bury another corpse there. Thus concerning Shemuel's opinion that natural soil is not prohibited, the gemara correctly poses the question: is it permitted for one to be buried in a grave he had hewn for his father? The gemara rightly answers that here [the prohibition of use] refers to a built grave. However, the grave space may not be used by living people. Apparently this is Rashi's interpretation of the gemara's discussion.

If it is maintained that only the grave space is prohibited, then after they close up the space with earth, is it permitted to use the soil? According to Rashi's opinion, since the grave space may not be used, the prohibition does not cease because it is closed up. See Hatam Sofer, YD no. 335, Beer Yitshaq, and Divrei Malkiel.²¹ Likewise the prohibition of use does not cease in the case of these martyrs' graves.

The Laws Applying to a Grave Do Not Apply to an Execution Pit

Yet after careful study it appears that nonetheless one may permit the use of the execution sites for another reason: these pits were not made to be graves, and the laws applying to a grave do not apply to them once the victims are exhumed from there. If we had said that by law they must be buried where they are as in the case of a deserted corpse, then the pit would have the legal status of a proper grave. But since we allowed them to be transferred to a cemetery, the pits are like a field where people to whom the law of a deserted corpse does not apply were killed, as has been said (M. Oh., ch. 16, mishnah 5): "He may gather up the bones one by one, and the entire field is deemed ritually clean"--completely clean, meaning not only the corpse-soil but also the grave itself.

This is their conclusion in the Mishnah: "[In the case of] a pit where abortions or the bodies of the slain were thrown, the bones may be gathered up one by one, and all is deemed ritually clean"--since the bodies of the slain were not there for the purpose of burial. R. Shimon concludes: "If at the outset it had been prepared as a burial place, the earth there must be accounted corpse-soil." This implies that in the view of the first tanna, even if it was prepared as a burial place, the

law concerning a grave does not apply to it. But this is not a difficulty since: 1) According to many commentators, the words "R. Shimon says..." should be deleted and the text revised to read simply, "If it was prepared as a burial place..."²² (See Malakhat Shelomoh on this mishnah.)

2) Even according to those who read "R. Shimon says," the reason is explained in Mishnah Aharonah (s.v. "A pit into which they throw...") as follows: "Here also [in the case of the pit] the same law applies as to the field where people were killed, as the first tanna [said]. For since it was not designated for the purpose of burial, the laws concerning a grave do not apply to it. So also this pit into which they throw [abortions and slain bodies] was not designated for the purpose of burial. But R. Shimon disagrees and therefore gives his own view. In regard to a field he does not disagree, for the field was certainly not prepared as a place of burial. But a pit is often designated for the purpose of burial, and R. Shimon reasons that if such a pit had been designated from the first as a place of burial, then even though they are now throwing [abortions and slain bodies] into it and not using it for burial, the rabbis ordained a precautionary measure [forbidding its use]. The first tanna holds that since it is not being used for burial, the rabbis do not prohibit its use."

From this we learn that in every instance where the pit is not used for the purpose of burial, the laws of a grave do not apply to it. In every case where it is permitted to remove the bones, the grave is not considered corpse-soil, nor is it ritually unclean, nor is its use prohibited. See the treatise Met mitsvah in my book Meemeq Habakha.²³

One may add the Rambam's opinion that there is no prohibition against

using an evacuated grave, and the grave is not ritually unclean, as explained by the Kesef Mishneh cited above. However, those who would also add the Mishneh Lemelekh's opinion-- that Rambam might also have maintained that the prohibition against using the corpse itself is not from the Torah but [merely] from the rabbis-- do not rely on a proper analogy, but a mere asmakhta.²⁴ I have already explained that without doubt the use of a corpse is prohibited by the law of the Torah.

Conclusion

The essence of the law is as I have explained: since the execution pits were not prepared for the purpose of burial, the laws applying to an evacuated grave do not apply to them. The pits are not prohibited for use. And may the God of vengeance execute his vengeance.

Notes

Responsum 28

1. Often the mass graves were prepared by local inhabitants before the Jews were shot. When the Jews themselves dug the graves, it was often after they were told that these were just bunkers to be used as shelters in case of air raids. Occasionally the Germans used abandoned military trenches as mass graves. See N. Blumental, "'Action,'" Yad Vashem Studies (Jerusalem, 1960), vol. 4, p. 85.

2. See N. Blumental, *ibid.*, p. 89: "After all the Jews had been shot, the pit was covered with a layer of lime and then a layer of earth. In some places hand grenades were thrown into the graves before covering them over, so as to ensure that all were dead. Despite this the graves moved and blood oozed from them for several days-- this was related by Jewish and non-Jewish witnesses. Cries and groans were heard from the graves for some time-- 'Vejnendike Kvorim' ('weeping graves') as they were called." A few Jews who were not fatally shot actually managed to climb out of the mass graves and survived to describe their ordeal. See, e.g., the testimony of Rivka Yoselewska at the Eichmann trial, cited by Gideon Hausner, Justice in Jerusalem (New York: Holocaust Library, 1966), pp. 73-74. See also resp. 25, where R. Kahana mentions with respect to cases of agunot that he has obtained depositions from "people who were buried alive and still survived."

3. The purpose of the law that a deserted corpse acquires a right to the site, according to R. Efrati, is that out of respect for the corpse we do not deprive it of a grave. However, this applies only in the land of

Israel, where every site bestows honor upon the corpse; it does not apply elsewhere, for "it is no honor to be buried in the fields of the gentiles." Moreover there is reason to fear that the gentiles will disturb the corpse. Thus any deserted corpse should be removed to a Jewish grave. This applies especially to "[the bodies of] our martyrs which are cast about the bloodsoaked fields of these wicked ones who give them no rest... It is a mitzvah to transfer them to Jewish graves, and how much the more so is it permitted to bring them up to our sacred land where they will find eternal repose until the Messiah comes."

4. The Tur notes the basic principle that every celebration must include a remembrance of the Temple's destruction. In BB 60b it is stated that the square cubit space must be near the door. Rashi, BB 53b, explains that this location ensures the maximum effect.

5. In 1947 R. Herzog published his own view on the question of erecting monuments to the martyrs in which he shares the view of R. Efrati: "Who of our forefathers was not mindful of the honor of the dead? Yet it never occurred to [them] to erect a monument. Therefore refrain from doing so; you should rather establish a school for children or a large synagogue." Cited by H.J. Zimmels, The Echo of the Holocaust in Rabbinic Literature (New York: Ktav, 1977), p. 151.

6. But in April 1948 a monument by sculptor Nathan Rappaport was unveiled on the site of the ghetto in the presence of the Polish government and Jewish delegations from around the world. See Ber Mark, "The Warsaw Ghetto Uprising," Yuri Suhl, ed., They Fought Back (New York: Schocken, 1967), p. 127.

7. See note 3.

8. R. Efrati bases the following summary of the Bet Yosef's opinion on Kesef Mishneh, Hil. Tumat Hamet, ch. 8, hal. 5-- not Tur YD 364.

9. I.e., soil not designated as a burial place.

10. See rule 8 where the text is in evident disorder. The first sentence, "Consequently you may say..." suggests a conclusion rather than an introduction. The Gra's emendation of this passage conforms to the view of Kesef Mishneh rather than Rabad.

11. Rashi uses the example of burial rather than exhumation, but the principle of permission applies either way.

12. YD 364.

13. The reason for the prohibition, i.e., "because it is forbidden to disgrace the dead," is not found in this Sh.Ar. passage but in the commentaries, e.g., Shakh, YD 364 note 14.

14. See rules 3, 9.

15. Havvot Yair, pp. 132-37. According to the case described by R. Oppenheim, the old synagogue building was falling apart, and the Jewish community decided to rebuild it on the same site. While digging the foundations, the workmen unearthed skulls, bones, and other human remains. The skulls were recognizably those of children; other remains were evidently those of adults. The older Jews in the community were certain that there had never been a cemetery on the site; but other bones were found nearby. R. Oppenheim rules that once the site is carefully searched and all bones are removed, the site may be used for the synagogue. The building is free of any defilement, and kohanim are permitted to enter.

16. See note 3.

17. Thus calling attention to their use of an object belonging to the dead.
18. I.e., attached to the earth-- soil, mountains, etc.
19. I.e., what belongs to the dead.
20. Indicating that natural soil is prohibited.
21. Hatam Sofer discusses the case of a new wall built around a Jewish cemetery. He is asked whether stones that were part of the old wall could be used for other worthy construction projects in the community. While conceding that the wall's purpose is to honor the dead, since it protects the cemetery from any disturbance, still the prohibition of gainful use applies only to the grave where the corpse is buried. Beer Yitshaq, nos. 29, 30, concern whether it is permitted to cut the grass in the cemetery. After surveying various sources Beer Yitshaq concludes that while the Torah may prohibit cutting the grass over the grave itself, cutting the grass between the graves (i.e., on natural soil) is merely a rabbinical prohibition and subject to dispute. If the purpose of cutting the grass on natural soil is to enhance the condition of existing graves, he permits it. Divrei Malkiel, vol. 1, no. 67, permits grass plucked from the premises of a cemetery to be used for the purpose of a mitzvah. To do so constitutes neither gainful use (which is prohibited only with respect to the grave itself) nor disrespect for the dead. Each of the above three resp. deals only peripherally with the question at hand-- i.e., is soil used to fill vacated grave space prohibited? While permitting the use of other parts of the cemetery-- e.g., the old wall, the grass-- each of the three authorities mentions that the grave itself is prohibited, although it is not clear whether they extend the prohibition to the soil

of a vacated grave. Perhaps R. Efrati intends these resp. to lend support to his ultimate decision (see Conclusion) that the execution pits were not really graves and are therefore not prohibited; or perhaps he cites these resp. only because they deal with similar issues.

22. I.e., by not attributing the statement to R. Shimon, it becomes part of the first tanna's statement so that no opposing view is expressed.

23. See note 3.

24. In rabbinical exegesis, the word asmakhta refers to the method of citing a totally unrelated verse of Scripture to sanction a rabbinical enactment. The biblical text merely "supports" the law without suggesting that the law is actually derived from it. Asmakhta may also refer to a verse utilized as a mnemonic aid.

Responsum 29

Is there an obligation to search for the murderers of one's parents in order to avenge their blood which was spilled; and may one spend money for this purpose?

Question: After the liberation when we were fortunate to go forth from the darkness to the great light, a certain man (who wishes to remain anonymous) came to me with a question of great importance to him. It had become known to him that his parents, brothers, and sisters were killed by a Lithuanian murderer who had been the superintendent of the building where his family's apartment was located. Now this same murderer was hiding in the city of Mariempol. Was this man obligated to undertake the expense of searching out the murderer in order to bring him to justice and punish him in keeping with his deeds, according to the laws of the state? Should this not be done so that the enemies of Israel will take note and no longer give free reign to the murderous rage nesting in their bosom to devour Jacob like wild beasts and lay waste his dwelling place?

This question affected many people, for to our sorrow the great majority of the German murderers-- and their allies among other peoples who helped them kill and slaughter men, women, and children from among our people-- had managed to escape and go into hiding in other countries throughout the world. They were not brought to justice for their evil deeds: slaughter, pillage, the merciless spilling of the pure and innocent blood of old and young. They stretched forth their hands to slaughter all of them, to inflict every kind of cruel and unnatural death upon them

amid fearful torture and suffering.

Is it our duty to do everything to expose these murderers in order to avenge our blood which was spilled; and may one spend money for this purpose? Or is this not a definite obligation but rather a matter left to each individual to do as his mind and heart dictate?

Answer: According to Teshuvot Tsemah Tsedeq Hayashan, no. 19, the relative of a victim of murder should be compelled to pursue the murderer in order to bring him to justice, even if the murderer is a gentile.¹ There is no limit to who may be considered the avenging relative; he may even be a [distant] relative not among those [obligated] to mourn for the victim. Nevertheless it appears that he should not be obligated to go beyond the ordinary procedure of persuading and bribing the judges.² This obligation should not be made difficult or excessive for fear that the relatives would not pursue the murderer. It is proper that the expenses of persuasion and bribery be borne by the community, for if they do not retaliate at all, Israel's blood will be, God forbid, like public property [i.e., unprotected]. This is the custom of many community leaders: they support the avengers' pursuit, even when sometimes they know that they cannot catch the murderer, so that it will be known that Jewish blood is not public property.

It appears that in our time we should weigh the matter carefully so as not to instigate persecution and hatred of all Israel. However, we should certainly not appear apathetic about this. We should do everything to expose the murderers who spilled Jewish blood and to prove before all eyes their true identity. For it is known that they have changed their names and identities in order not to be recognized.

Therefore I rendered the following decision for the man who had asked the question: he should have no peace or rest but rather should strive with all his might to seek revenge for his family against the murderer and to bring him down to hell. He should not spare any financial expense or physical hardship in connection with this.

Indeed after several weeks the man came to me and told me that he had succeeded in finding the murderer of his family, who had gone to hide in the woods near _____.³ He discovered [the murderer's] hiding place in the woods and threw a hand grenade at it, killing the murderer and the members of his family who were hiding with him.

After he told me this, I suggested that he flee Lithuania so that the murderer's relatives would not harm him, and especially so he would be saved from the frightened reaction of the government, which did not look favorably upon those who took the law into their own hands, on the assumption that justice and law are the government's affair. The man heeded my advice and escaped from Lithuania to Poland and afterward to Israel, so that he would not fall into the hands of the Russian-Lithuanian government for avenging the murder of his family.

[Efrayim Oshry

Teshuvot Mimaamaqim, vol. 4, no. 14]

Notes

Responsum 29

1. In Lemberg edition, 1861, this resp. is no. 111. A Jew was murdered on the road, and the identity of his killer is known. Revenge is possible if one of the murdered man's relatives will "seek out justice against the murderer." Can the relative be forced to pursue the murderer or to pay out money for the purpose? If so, to what extent can he be compelled to do so? Who is considered a "relative" in such a matter? Tsemah Tsedeq believes the relative should be compelled to pursue the murderer on the basis of Sanh. 45b: "It has been taught, 'The avenger of blood shall himself put the murderer to death' [Nu.35.19]: It is the duty of the avenger of blood." If the avenger is unable or unwilling to execute this task personally, he may hire someone else to act as his agent. Moreover the bet din may appoint an avenger if necessary. To be considered a "relative," one need only be a possible heir to the property of the victim's father. This criterion includes even remote family relations (cf. Rambam, MT Hil. Rotseah, ch. 1, hal. 2). The avenger should not be compelled to pay more than the customary cost of bribing the (gentile) officials to secure the capture of the criminal (see note 2). If more money is necessary, the community should raise it, for if there is no retaliation it will appear that Jews may be killed with impunity.

2. Although bribery is expressly forbidden by the Torah (Ex.23.8, Dt. 16.19), bribing gentile rulers, officials, and judges was regarded as legitimate in view of their bias against Jews. The Bible reports the bribery of kings (1 Ki.15.19, 2 Ki.16.8). Expenses involved in bribing gentile legal authorities were often expressly included in the expenses

recoverable from debtors. See Menachem Elon, ed., The Principles of Jewish Law (Jerusalem: Keter, 1975), p. 511.

3. The original text includes what is apparently a specific place name in Lithuania which I could not decipher.

Responsum 30

Concerning a Jew who collaborated¹ with the wicked ones (may their names be blotted out) and was later killed: may this man's name be mentioned when his son is called up to the Torah?

Question: A special chapter in the history of the Holocaust concerns the Jews who collaborated, willingly or unwillingly, with the accursed Germans, thinking that by doing so they would save themselves from sharing the fate of their fellow Jews. By working for the Germans they hoped to survive; but it is known that their end was bitter. Nothing availed them on the day of wrath. When the time came, their fate was decided together with the rest of their fellow Jews. However, most of them were forced against their will to do the Germans' work. There were others who naively thought that their collaboration with the Germans and [good] standing with the other authorities could be exploited for the benefit of their stricken brothers, that they might plead with the enemy to ease the yoke of oppression. The common factor in all of these cases was that all those who collaborated with the Germans, for whatever reason, aroused the hatred of their fellow Jews, who considered them to be traitors who had divorced themselves from the Jewish people and its destiny.

I was asked [a question] concerning such a man. He had collaborated with the Germans and was killed by them in the end. However, before he was put to death he confessed his sinful deeds before other Jews who were there at the time. With tears and supplications he begged for forgiveness from his Creator for the things he had done.

I was asked if it is permitted to mention the name of this man when his son is called up to the Torah, as is our custom to announce: "Let so and so the son of so and so stand up." Since the father was wicked, [perhaps] one should not mention his name since it is said [Prov.10.7], "May the name of the wicked rot." For it would seem obvious that his name should not be mentioned at the time a mitzvah is performed, such as in our case when the son performs a mitzvah by coming up to the Torah and reciting a blessing over it. On the other hand, [perhaps] there are no grounds for apprehension, and we need not depart from custom in regard to his son. Rather he should be called to the Torah like every other Jew, and it is permitted to mention the name of his father.

Answer: At the end of Suk. 56a we learn in a mishnah: "The incoming watch divided [the shewbread] in the north and the outgoing in the south. [The watch of] Bilgah always divided it in the south, since their ring [to hold the necks of the animals sacrificed in the Temple] was immovable [and hence useless] and their alcove [where the sacrificial instruments were kept] was blocked off." In Suk. 56b we learn: "Our rabbis taught: It happened that Miriam the daughter of Bilgah apostasized and married an officer of the Greek kings. When the Greeks entered the sanctuary, she stamped with her sandal upon the altar and said: 'Lukos! Lukos!'² How long will you consume Israel's money? Yet you do not stand by them in time of emergency!' When the sages heard of the incident, they made her ring immovable and blocked off her alcove. But there are some who say that Bilgah's watch was slow in coming, and [the watch of] Jeshebeab his brother entered with him and served in their stead. Although the neighbors of the wicked do not profit, the neighbors of Bilgah did

profit, since [after the penalty] Bilgah's watch always divided their shares in the south while his brother Jeshebeab's did it in the north.³ It is right according to him who says [that the reason for the penalty was that Bilgah's] watch was slow in coming, since for this reason the entire watch might be penalized; but according to him who says that [the reason for the penalty was] Miriam the daughter of Bilgah who apostasized, do we penalize him on account of his daughter? Said Abaye, 'Yes. As people say: The talk of the child in the marketplace is either about his father or his mother.' Do we then penalize the entire watch? Abaye said, 'Woe to the wicked, woe to his neighbor; it is well with the righteous and well with his neighbor. As it is said [Is. 3.10], Say ye of the righteous that it shall be well; for they shall eat of the fruit of their doings.'"

From this we see that because of Bilgah, who was wicked, we penalize the entire watch. So also in our case, apparently the son should be penalized so that he will be different from every other Jew; when he is called up to the Torah, they will not mention the name of his wicked father. This conforms to the case of Miriam the daughter of Bilgah: because of her father and mother, we penalize the entire watch. Likewise in the present case, the son ought to be penalized because of his father by the recognition that his father's name is not mentioned, just as there [Suk. 56a-b] Bilgah's watch was recognized [unfavorably on account of Bilgah's wickedness].

However, in truth we find that our teacher, the author of Sh.Ar. OH 128:37, ruled: "One who converted [to idolatry] may not raise his hands [in the priestly benediction]; but some say that if he repented he may raise his hands (and this is the accepted rule). If he was forced [to

convert], then in everyone's opinion he may raise his hands."⁴ So we see that repentance is so important that it enables the apostate to raise his hands. Moreover our teacher Rema comments that "this is the accepted rule." If so, then in our case, since the man repented before his death there should certainly be no reservation about mentioning his name when his son is called up to the Torah. The son's ascension to the Torah is not a lesser act than the raising of hands, and even the apostate himself is permitted to raise his hands if he has repented.

Apart from this, the Sh.Ar. ruled, "If he was forced [to convert], then in everyone's opinion he may raise his hands." Even according to those who hold the strict view that the apostate's repentance is of no use in such a case, still if he converted under duress, then in everyone's opinion he may raise his hands [once he returns to Judaism]. In our case, then, where there is reason to suppose that only because of duress did he collaborate with the Germans; and since his deeds testify that while in their favor he did favors for the Jews and even saved a few of them from death-- certainly one should not be so strict in such a case as to impose a penalty on his son, especially since even without this [i.e., the mitigating factor that he helped Jews] it is known that the father collaborated with the Germans only in order to save himself. Therefore on the basis of all this one should not be severe in this matter. Since the Sh.Ar. ruled that in the matter of the raising of hands, if one was forced [to convert], then in everyone's opinion he may raise his hands [once he returns to Judaism]-- which applies to our case-- then certainly in everyone's opinion his repentance enables him to once again be considered a Jew in every respect. The Sh.Ar. does not even mention that the apostate must confess to his sin in public, which the man did in our case,

since the apostate might not have the opportunity to do so or to escape. But in our case, where the man confessed before his death, surely he is considered a proper Jew in every respect. See Teshuvot Zeqan Aharon (from the time of R. Y. b. Rav), no. 95.⁵

On the basis of all this I decided that it is permitted to mention this man's name when his son [is called up to the Torah], because he repented. Furthermore the son observes the Torah and commandments. Surely we should not humiliate him or differentiate him from everyone else by failing to mention his father's name, as is customary, when he is called up to the Torah. In this case we must also consider the son's honor, for we find that to honor the son we must honor the wicked father, as in the case of Amon out of respect for Josiah.⁶ This is especially so in our case, where the father repented and from the very start did what he did only because of duress. Therefore there is no apprehension whatsoever here. Moreover since he was killed by the Germans, his death was his expiation, so that on the contrary his name should be mentioned when his son performs a mitzvah, so that the father will have merit in the world of truth. May God who is good forgive us and all Israel, so that we will never again know sorrow or grief.

[Efrayim Oshry

Teshuvot Mimaamaqim, vol. 3, no. 12]

Notes

Responsum 30

1. Lit. noges, one who became a taskmaster for the enemy (cf. Ex.3.7).
2. Lukos, "wolf," an epithet for the altar referring to its voraciousness.
3. The north was deemed superior to the south.
4. See resp. 31, note 2.
5. This resp. concerns a man who was forced to convert and later came to exert some influence with the gentile government. While among the gentiles he helped Jews both financially and by his own personal intervention, saving several Jewish lives and communities. On account of these activities the gentiles sought to burn him at the stake, but instead he was sentenced to prison. After his release he resumed his many efforts on behalf of the Jewish community. Before his death he confessed his sins in the presence of several Jews. May his name be mentioned when his sons are called to the Torah? Zeqan Aharon renders an affirmative decision, citing Qid. 40b: "Even if one is completely wicked all his life but repents at the end, he is not reproached with his wickedness, for it is said [Ezek. 33.12], 'As for the wickedness of the wicked, he shall not fall thereby in the day that he turneth from his wickedness.'" Therefore, contends Zeqan Aharon, he deserves to be judged and to inherit the world to come. Moreover, his deeds testify to his true loyalties; he never did cut himself off from the Jewish community completely. If the wicked King Amon, who never repented, can be forgiven out of respect for his son Josiah (see note 6), then surely this man should be forgiven for his sons' sake.
6. Amon was the king of Judah "who did evil in the sight of the Lord"

(see 2 Ki.21.18-26). According to rabbinic tradition, Amon burned the Torah, allowed the Temple altar to be covered with spiderwebs, and committed incest (see Louis Ginzberg, The Legends of the Jews [Philadelphia: Jewish Publication Society, 1938], vol. 4, p. 281; vol. 6, p. 376; and cf. Sanh. 103a). Yet according to Sanh. 104a, "Amon was not included [among those excluded from the world to come] because of [his son] Josiah's honor. Then should Manasseh [Hezekiah's son, also a wicked king-- see 2 Ki.21.1-18] too not be included [among those excluded from the world to come] on account of [his father] Hezekiah's honor? A son confers privileges on his father, but a father confers no privileges on his son."

Responsum 31

Whether a kohen who converted [to Christianity] in order to save his life is permitted to pronounce the priestly benediction after being freed by the wicked ones, may their names be blotted out

Question: In the days of utter darkness, when our people were crushed and afflicted by the wicked Nazis in the years of evil during the second World War, when the sun went down while it was yet afternoon and darkness covered the earth, and our fellow Jews perished and were burned in smoking and blazing ovens, many of us said, "We are doomed. A little more and we will be obliterated from the land of the living."

In that time, when God did not remove our darkness, it seemed to many of us as if, God forbid, there was no savior. A little more and they would ground us to dust and pound us into mud. All of the gentiles estranged themselves from us and helped our enemies to mercilessly persecute us and bring us to the gates of death.

Then many turned to crooked ways and perverse paths. In their search for refuge they bowed their head like a reed before a tide of stormy waters, waters of apostasy and annihilation, assimilation and baptism, loathing and defilement, the loathesome idols of idol worshippers. They denied their origin and forgot the covenant of the fathers which the One who dwells on high had made with His beloved Abraham.

They sought refuge with the gentiles by converting from their own religion, the eternal religion. By [professing] the nonsense of a crucified one who does not save, they imagined they could resemble the gentiles in

their religion and conduct, their way of life and worship. They said to themselves: "Hurrah! We are saved! The wrath of the Nazi oppressor will turn away from us. The Jews can no longer be compared to the stars in the heavens or the seed of the strong, but rather to the dust of the land of the nations, defiled and contaminated dust. Not only is the dust itself defiled, but the air and everything around it. Otherwise how could this land of the nations fall into the hand of the wicked, to kill, slaughter, burn, and annihilate? Have not the 49 gates of defilement been blown open and Satan made king, to wound, assault, and afflict the innocent and pure, righteous and holy, until even their memory is obliterated from the face of the earth?"

But after the chains of the wicked were broken and the foundations of the tyrant destroyed, and God delivered us from the iron yoke and brought us out into the open because He loves us, the descendants of Jacob, His treasure from among all the peoples; after the sun rose for us again and the morning of our lives shone once more, when the wicked Nazi's arm was cut off and his forces scattered like chaff before the wind; after his power perished and his strength was broken, when rays of light penetrated the ghetto walls and proclaimed the deliverance and the change which had occurred; then the wandering and lost souls who had assimilated among the gentiles, crouching in the foul waters of apostasy, began to feel that the dew of deliverance from the gentiles had fallen upon them as well. They began to search for ways to return to the Rock from which they were hewn and to be reunited with the Jewish people, to be once more bone of their bone and flesh of their flesh.

At that time a Jewish soldier from the Red Russian Army came to me and told me that in a Russian camp for German war prisoners there was

a couple who said they were Jews but had posed as gentiles. Now they were seeking advice on how to get out of this camp, a camp for the wicked Nazis, in order to return and live among their fellow Jews according to the law and tradition of their forefathers.

After some time the couple succeeded in leaving the German prison camp. After they returned to Judaism they came to Kovno to settle among the Jews. The man went morning and evening to pray in the synagogue. I was then asked, seeing that the man was a kohen, if he was permitted to pronounce the priestly benediction.

Answer: In AZ 54a we read: "A tanna taught: 'If a man worshipped [an animal] which is his own, it is prohibited [as an offering in the Temple]; but if the animal belonged to another, it is permitted.' But we raise the objection: which [animal] is said to have been worshipped? Any [animal] which was worshipped, whether inadvertantly or deliberately, whether freely or forcibly. How is the term 'forcibly' to be understood? Is it not, for instance, when a man took his neighbor's animal by force and then worshipped it? Rami b. Hama said: 'No; it is, for instance, when heathens forced him and he worshipped his own animal.' R. Zera objected: 'The Merciful One absolves [those who sin] under duress,¹ as it is written [Dt.22.26], "But to the [betrothed] maiden [violated in a field] you shall do nothing [to punish her]."' 'Rather,' said Raba, 'all were included in the general rule [Ex.20.5], "Thou shalt not serve them." So when Scripture specifies for you [Lev.18.5], "And live by them [the commandments]"-- [meaning] "and not die by them"-- it excludes [from liability for punishment] one who sins under duress. Yet after that the Merciful One wrote [Lev.22.32], "And thou shalt not profane my holy

name"-- [meaning] not even under duress. How can this [apparent contradiction] be [resolved]? The former ["and live by them"] refers to a sin committed in private; the latter ["thou shalt not profane my holy name"] to a sin committed in public.'

"The rabbis said to Raba: 'There is a baraita which supports your view: Altars for idol worship [erected] in a time of persecution are still prohibited after the persecution ends.' He said to them, 'If it is on that account, it gives no support to my view; for perhaps there was an apostate who worshipped before it willingly'... Hizqiyahu said, 'For instance, if he poured wine for idol worship on the horns of [his neighbor's animal].' R. Adda b. Ahavah objected: 'Is this [animal] actually worshipped? It is merely an altar [for idol worship] and so is permitted. Rather,' said R. Adda b. Ahavah, 'it is a case where he poured wine between its horns, thus performing an act [of idolatry].' This accords with what Ulla said in the name of R. Yohanan when he came [from Palestine]: 'Although they say that he who worships his neighbor's animal does not render it prohibited, if he performed an act [of idolatry] upon it, he rendered it prohibited'... They said to Ulla: 'R. Huna has already transmitted this teaching of yours in Bavel. For R. Huna said: 'If the animal of his neighbor was lying before idols, and he severed [only] one [of the two required] organs [i.e., either the windpipe or the esophagus], he has rendered it prohibited. How do we know that he rendered it prohibited? If you say because of the kohanim...' See Rashi: "'If you say because of the kohanim...': For the Israelite kings forced them to be the priests of idols, and it is written [Ezek.44.13], 'And they shall not come near me to serve me as priests.'" See the discussion [AZ 54a].

Rashi explains clearly that regarding kohanim who were forcibly converted to be idol worshipping priests, Scripture says in Ezek. 44.13: "And they shall not come near me to serve me as priests," for their service would be unfit and harmful. In Is. 66.20-21 it is said: "And they shall bring all your brethren out of all the nations for an offering unto the Lord... And of them I will also take for priests and Levites, saith the Lord." Rashi comments: "'And of them I will also take priests and Levites...': Of those who bring them and of those who are brought will I take priests and Levites; and before me it is known who among them are priests and who are Levites, and I will choose them from the others and they will be servants before me, saith the Lord. Thus 'the secret things belong to the Lord our God' [Dt.29.29]. So it is explained in Aggadat Tehillim."

It is evident from these words of Rashi that the priests whom God will select from among them will be qualified to serve before Him. If so, these words of Rashi contradict those we cited above, where in his commentary to AZ [54a] Rashi wrote that apostate priests, even if their apostasy was forced upon them, are forbidden to come to serve God as priests.

Truly it is possible to say that the intended meaning of Isaiah is that the Holy One, blessed be He, will bless and choose from those who bring and those who are brought qualified priests who did not convert at all and did not worship idols even under duress. But this is not the literal meaning of the verse, and so the difficulty of Rashi's contradictory statements still stands.

In Sh.Ar. OH 128:37, the author wrote: "A convert to idolatry may not raise his hands [in the priestly benediction]. But some say that if he

repented he may raise his hands," and the Rema remarks, "(and this is the accepted principle)." "If he was forced [to convert], then in everyone's opinion he is permitted [to raise his hands]."²

I have seen in Kaf Hachayyim Hehadash to this passage an observation on the Rema's gloss "and this is the accepted principle," i.e., if the apostate kohen repented he may raise his hands. The principle is according to the opinion of "some say" cited by the Rema,³ and not according to the opinion of the author [of Sh.Ar.] who wrote that an apostate may not raise his hands.⁴ This means that repentance does not entitle him to raise his hands, even according to the Sefardim who usually rule in accord with the Sh.Ar. For this reason the Rema remarked, "This is the accepted principle." Yet in the book Teshuvah Mehayyim⁵ I saw a quotation from Shaarei Rahamim that proper repentance free of deceit is effective.⁶ In any event it is apparent that this author also believes that repentance entitles an apostate kohen to raise his hands.

The Rambam ruled that a convert to idolatry may not raise his hands even if he repented, and this conforms to the Sh.Ar.'s [first] opinion which we have cited. However, I have seen that Noda Bihudah, second series, YD, objects that the Sh.Ar. contradicts himself: here he ruled that a convert to idolatry may not raise his hands and repentance has no effect, yet in the case of an idolator he wrote that repentance is effective.⁷

Still, according to the quotation from Teshuvah Mehayyim⁸ which we have cited, we may explain the Sh.Ar.'s words. For there are two kinds of repentance. There is general repentance, where one turns from his apostasy and returns to Judaism. It was this kind of repentance that the Sh.Ar. deemed insufficient to permit the raising of hands. But if

he turned in complete repentance without even a shred of deceit, and he repented with all his heart and soul, then even the Sh.Ar. agrees that repentance is effective. Then there is no contradiction at all in his words, and everything is fine.

I have seen that according to Sheelat Yavets, vol. 1, no. 30, the Ginzei Hayyim lists three categories of apostates with respect to the act of repentance: 1) One who was firmly rooted in apostasy and is likely to backslide. According to the Rambam, MT Hil. Avodah Zarah, ch. 2, we do not accept such a person.⁹ 2) A complete apostate who transgresses the entire Torah but is not an idolator. For this person repentance is effective.¹⁰ 3) One who went with them to study their books but did not cast off the yoke of the commandments. Even so he requires repentance, and he must return from his evil practice of going with them to study their books.

In the case of the question before us, the conclusion of the law is that this kohen, although he went among the gentiles and changed his religion, did so only because that time was a time of trouble for the Jews, and he feared death from the Nazis who might overpower and slaughter him along with his fellow Jews. He hoped that by converting he could save his life. In such a case he is surely considered to have acted under unquestioned duress. Now he has returned in complete repentance free of deceit. The proof is that he goes morning and evening to the synagogue when his prayer shawl and tefillin are under his arm, and he wants also to pronounce the priestly benediction with his fellow kohanim to fulfill the commandment [Nu.6.23], "So shall you bless the children of Israel." In this case it appears that he is certainly permitted to raise his hands. For it is concluded by the great and important scholars the Rema¹¹ and

the Teshuvah Mehayyim¹² that complete repentance entitles a kohen who had converted to raise his hands. Even according to the Sh.Ar. and the Rambam, one must conclude as we have above that if he returns in complete, authentic repentance without even a shred of deceit, if within his heart and soul he now desires to cleave to the Divine Presence and fulfill his Creator's commandments as they were told to Aaron and his sons, then certainly his repentance is accepted. Perhaps even Rambam and Sh.Ar. would agree that in the present case the kohen's repentance entitles him to raise his hands, as we have concluded.

See Teshuvot Shaarei Rahamim no. 5 and Ginzei Hayyim by the author of Kneset Hagedolah, in the treatise Teshuvah Mehayyim no. 153.¹³ Also see Mishpat Tsedeq, vol. 1, no. 18 concerning one who became a Muslim in his youth but later returned in complete repentance. He is entitled to lead prayers, and the same applies to the priestly benediction since such a case is not in the category of idolatry.¹⁴

See the Ribash on the matter of forced [converts],¹⁵ that if among themselves they observe the Jewish law when there is no danger, they are not disqualified from giving testimony. They have transgressed only [Lev.22.32] "Thou shalt not profane..." and "I will be sanctified..." So wrote the Rashba in a resp.: "A Jew [who is a kohen] who changes his religion out of fear, even though he should have allowed himself to be killed rather than transgress, and even if he went to their house of idolatry and worshipped, is still qualified to be a kohen."

Yet one may still argue against this opinion in our case based on what I saw in Teshuvot Binyan Tsiyyon Hahadashot no. 2 concerning [a kohen] who converted with his wife and then returned to Judaism. The author came to the following conclusion with respect to the law: If

before their conversion the man married his wife according to Jewish law, and they converted subsequently, then repentance is effective. Their sons are fit to be kohanim and their daughters are permitted to marry kohanim. But if his wife converted when she was still unmarried, and then he married her, she is regarded unfit to marry a kohen and their marriage is prohibited in the first place. Their sons are unfit to be kohanim and their daughters forbidden to marry kohanim.¹⁶ As it is decided in Shevut Yaaqov, vol. 2, no. 113,¹⁷ so in our case there is reason to worry that the woman converted before her marriage to this kohen, so that she became unfit to marry him. Even if he watched her carefully [to be sure she did not commit adultery] after her marriage to him, nevertheless she was unfit to marry this kohen prior to the marriage and is forbidden to be his wife, as she is forbidden to any kohen. Until he divorces her he is forbidden to pronounce the priestly benediction, as the halakhic authorities have explained.

However, [in the present case] I clarified this matter: according to qualified witnesses these two people were married before they converted. Obviously this apprehension disappears.

As far as the fact that he did not return immediately after the liberation to his people and his religion, this does not prove that his repentance was not sincere. It was only due to the magnitude of fright and fear that the enemy would put him to death that he delayed his return to his people and religion. As everyone knows, for some time after the liberation fright and fear were still impressed upon the prisoners of the ghetto. They trembled at the sound of a driven leaf. All of this [i.e., his delay in announcing his repentance] was due to duress and fear of death, for he did not believe that there were any Jews left in Kovno

so that he could return to the religion of Moses and Israel.

Yet surely now after he has returned with all his heart and soul, it is plainly evident that he is permitted to ascend the pulpit and bless his people Israel with love, together with his fellow kohanim, as it is said in the Torah [Nu.6.23]: "So shall you bless the children of Israel."

However, prior to [giving] this [permission], I ruled that he must agree to the rabbinical requirements for immersion according to the law regarding a repentant apostate who returns to Judaism, as stipulated in YD,¹⁸ and as it is said in Divrei Efrayim in the treatise Emeq Habakha.¹⁹

May God bless His people Israel with peace, bestowing life and blessing upon us so that the peace may be preserved. May it be His will that He do with us as He promised us, to look down from His holy habitation in heaven and bless His people Israel and the land that He gave to us, as He swore to our forefathers; to remove from us enemies, pestilence, war, famine, and suffering, now and forevermore; and to establish our habitation in the highest mountains and cause His Divine Presence to dwell in Zion. For there the Lord ordained the blessing to make a horn shoot up unto David, a lamp for His anointed, speedily in our days. Amen.

[Efrayim Oshry

Teshuvot Mimaamaqim, vol. 3, no. 13]

Notes

Responsum 31

1. Cf. BQ 28b.
2. R. Oshry mistakenly attributes the lenient statement to the gloss instead of the text of Sh.Ar. Actually both the strict and lenient statements are Bet Yosef's. According to Kaf Hahayyim Hehadash (see note 4), Bet Yosef reports both views because while the first is proper, the second is necessary in time of emergency. To the first part of the statement-- "A convert to idolatry may not raise his hands"-- the Baer Hetev, note 63, adds: "Even if he did not commit idolatry; and if he did, then even if he was forced to do so and later repented [he still may not raise his hands]." This is the Rambam's view (see MT Hil. Avodah Zarah, ch. 2, hal. 5), but there are many lenient opinions.
3. R. Oshry's error; see note 2.
4. Kaf Hahayyim, OH 128:37, par. 213-221, discusses several views on this subject. According to Radbaz, since the Christians require a 40 day period before accepting a convert, if a Jew returns within that 40 day period he is not penalized and may raise his hands. According to Rambam, while the Muslims are not idolators, still a Jew who embraced their religion (and later returned) is not allowed to raise his hands. Bet Yosef and other authorities suggest that while a kohen who apostasized may not raise his hands (after repenting), he retains the privilege of being called to the Torah first. The Kaf Hahayyim writes that Bet Yosef bases the lenient opinion that the repentant kohen may raise his hands on the authority of Rashi (see Men. 109a-- "If a priest slaughtered an animal to an idol, his

offering [in the Temple] is a sweet savor") and the geonim. Moreover the Bah avers that "even one who actively and intentionally commits idolatry may raise his hands if he repents." Since many other authorities also adopt this view, we accept the statement of "some say" [if he repented he may raise his hands]. While Bet Yosef reports both opinions here, "He means to be lenient in time of emergency; for we should not slam the door in the face of those who wish to repent."

5. There is no specific citation here, and the abbreviation T.H. could refer to any number of books. Since Shaarei Rahamim and Teshuvah Mehayyim are both mentioned in conjunction further on in the resp., and since each of the two sources cites the other, perhaps R. Oshry is here referring to Teshuvah Mehayyim. However, elsewhere in the resp. Teshuvah Mehayyim is not abbreviated; moreover, its initials are properly T.M. so that the prefix m would have to be dropped from the second word for it to conform to the initials T.H. This seems highly unlikely. Therefore it remains to be determined which work R. Oshry means to cite here.

6. Shaarei Rahamim, OH no. 5, concerns a kohen who in a time of misery and desperation "yielded to the seduction of the Protestant missionaries" and now wished to repent. Despite all of the halakhic controversy surrounding the issue (cf. note 4), the Shaarei Rahamim is inclined to permit the kohen to raise his hands as long as his repentance is genuine, especially since in certain respects he was under duress when he apostasized. Shaarei Rahamim suggests that the ruling, "He may not raise his hands," was meant to refer to one who returned from his apostasy but did not repent. However, he cites the view that "God, may He be blessed, knows when one repents in his heart, and He accepts repentance." This last

sentence may be the statement referred to by R. Oshry.

7. The case discussed by Noda Bihudah is described in Shaarei Rahamim, OH no. 5. A kohen married a Christian girl in a Christian wedding ceremony conducted by a priest. Apparently during the ceremony the kohen had to swear by their god. Later he returned to the Jewish community, separated from the woman, and performed repentance. The Noda Bihudah does not consider this man an apostate, since "certainly he did not accept the idolatry in his heart; rather he did this out of love for the woman."

8. See note 5.

9. Hal. 5: "An Israelite who worshipped idolatry... is an idolator with respect to the entire Torah... [His] repentance should never be accepted." But cf. MT Hil. Teshuvah, ch. 1, hal. 3: "Repentance atones for all sins."

10. See Rambam, MT Hil. Avodah Zarah, ch. 2, hal. 6. Of such a person he says: "Whoever admits idolatry as truth, although he did not worship, shames and blasphemes the glorious and awesome name of God." His punishment is hanging and stoning. But see Hil. Teshuvah, ch. 1, hal. 3: "Repentance atones for all sins."

11. See note 2.

12. See note 5.

13. See note 7.

14. Mishpat Tsedeq writes that, provided the man's repentance is sincere, there is no need to punish him excessively. Citing Terumat Hadeshen and Sefer Hamitsvot, he asserts that "there is no severer affliction than what he suffered every day that he separated himself from all the benefits [of being a Jew]."

15. See resp. 15, note 10; resp. 19, note 4.
16. Binyan Tsiyyon bases his decision on Rema, Sh.Ar. EH 7:11, and Shevut Yaaqov, vol. 2, no. 113 (see note 17).
17. According to the resp. of Shevut Yaaqov, the man and woman involved apparently were not married to each other prior to their voluntary conversion. The woman gave birth to a daughter; subsequently all three returned to Judaism. The Shevut Yaaqov rules that the daughter is unfit to marry a kohen. "[The testimony of] those who willingly change their religion cannot be trusted, nor can it be presumed that their marriage was not illicit, even after they have returned."
18. Sh.Ar. YD 268:12, gloss.
19. No such reference is found there.

Responsum 32

A married Jewish woman gave birth to a child by a gentile [father];
is the child a mamzer?¹

Question: When I was occupied with the task of rescuing Jewish children who had been assimilated among the gentiles, a task fraught with countless difficulties which cannot be described, a very unusual case came before me, one of many occasioned by the frightful situation of our fellow Jews on account of the war, the persecution, and the annihilation inflicted upon us by the Nazi enemy, may his name be blotted out.

As I have said, this task of rescue was fraught with many difficulties which accumulated on the path of those who sought to retrieve the Jewish children who were now with the gentiles. In addition to the danger on the roads which prevailed immediately after the liberation from the Germans-- which in itself was an enormous obstacle to this task which required alertness and haste-- it often happened that the gentiles who kept the children knew that the Jews were aware they had a certain boy or girl. By the time the Jews who attended to this matter had the opportunity to reach the place, since the roads were dangerous, the gentiles-- who thought it a duty of their religion to take a Jewish soul from the Jewish camp to theirs-- had meanwhile managed to hide the boy or girl in a secret place; and they denied the child was there with them. Moreover the gentiles used every excuse and evasion to avoid the duty of returning the Jewish children.

Those who especially excelled in this were the priests and the monks

and nuns who lived in the monasteries, for they held many children. They spoke to the Jews deceitfully, as if they agreed about the duty of returning the children, while their right hand lied, extending help to the gentiles who were hiding the children and doing everything to prevent the return of the children to the tradition of their forefathers.²

Therefore I considered it a most uncommon incident when a gentile woman came to me and expressed her readiness to return to his Jewish relative a Jewish boy who had been entrusted to her by his mother. However, this Jew who was the boy's relative refused to accept him or take him from her. Obviously I asked the gentile woman to tell me all the details of this matter. She told me that the boy's mother died a short time before the liberation, but before this she had become pregnant by a gentile man who had hidden her from the Germans, and gave birth to this boy. However, before her death when she felt her end was near, she called this gentile woman and tearfully pleaded with her to promise that immediately after the liberation she would return the boy to one of her [Jewish] husband's relatives. If the gentile woman would promise her this she could die in peace, assured that there still remained a root and branch of her family which had been cut down by the German murderers, leaving no one else.

This gentile woman, who was her friend, solemnly promised her she would fulfill her last request, and immediately the Jewish mother closed her eyes forever in eternal sleep. When the strength of the German enemy was broken, the gentile woman hastened to carry out the words of her dead friend. After much effort she managed to find this Jew to whom the boy's mother had asked her to entrust the child. But to her great distress and confusion, this Jew refused to accept the child, saying that the boy was

not a Jew since his father was a gentile. Since the Jew did not want to accept the child, the woman had no choice but to adopt the boy herself and raise him as a gentile. This is what she did.

However, after some time, the woman continued to explain, the boy's mother came to her at night in a dream weeping bitterly and pleading with her to go to a Jewish rabbi and tell him the whole story about this boy and how his relative refused to accept him and raise him as a Jew. So she came to me to tell me all of this in order that I might devise some way for the boy to be a Jew. Only this would bring true peace in heaven to the soul of her dear friend, who would not rest until her last request was fulfilled.

After I thanked this gentile woman for telling me this, I summoned the Jewish man who was the boy's relative to hear what he had to say and whether the gentile woman's story was true that he had refused to accept the boy. If so, then why did he refuse?

This Jew came to me and told me that the woman's story was absolutely true. It was only because of disgrace and shame that he wanted this matter hushed up. If anyone found out, he thought it would be a great disgrace and discredit to his family; for the dead woman's husband, to whom he was related, was alive and had a medical practice in Minsk. When the gentile woman first came to him wanting to give him the boy, he had immediately notified the dead woman's husband, but the latter did not even want to hear about the boy who was a child by adultery. In the relative's opinion the husband was right that the boy was a mamzer and thus forbidden to marry into the Jewish community. To accept the boy and to announce to everyone that he was a mamzer would surely disgrace and discredit his family. Therefore he thought that it was better for

the boy to remain with the gentile woman and be raised as a gentile. Then at least the number of mamzerim in Israel would not increase because of the boy, and the good name of the relative's family would not be blemished.

Then this Jewish man began to plead with me not to tell anyone about this, God forbid, for his family was distinguished and prominent among the Jews. Perhaps this unfortunate woman [the boy's mother] did what she did under severe duress in order to save her life, but we cannot reverse what has been done. Why cast aspersions upon a respected family by announcing that one of them is a mamzer?

I silenced this man with many words of reprimand, for he had been wrong to try to hush up the matter. By doing so he might have caused the loss of a Jewish soul; for not only was this boy not a mamzer by law, he was in fact a proper Jew by law.³ It was from heaven that this gentile woman made the effort to carry out the words of her dead friend who wanted to preserve the seed of her family destroyed by the cruel Nazi murderers. Were it not for this gentile woman, his silence would have caused the boy to be completely assimilated among the gentiles without ever knowing the Rock from which he was hewn nor the religion inherited from his forefathers. Indeed, if despite all this he could not care for the boy, at least he could agree to take him from the gentile woman. I would worry about finding the boy a pious Jewish family who would raise him and educate him to be faithful to his people and his religion.

This Jew listened to me and made all the formal arrangements to receive the boy from the gentile woman in accord with the last words of the boy's mother. I then found a proper and decent family who agreed

to adopt him as their son.⁴ This family later emigrated to London, and the boy studied there in a yeshivah and excelled in his studies and conduct, to the joy of his "parents" who loved him dearly and recited the blessing "God who bestows lovingkindness" in gratitude that they merited the great mitzvah of saving a Jewish soul. His own relatives had pushed him away with both hands for fear he would bring discredit upon their family. They were liable to have caused him to remain forever among the gentiles, never knowing that he was a descendant of the holy people chosen by God from among all the peoples as His inheritance and treasure.

However, the legal clarification of whether the boy is legitimate [i.e., not a mamzer]-- and I concluded he was-- now follows.

Answer: In Yev. 45b we read: "The law is that if a gentile or a slave cohabited with the daughter of an Israelite, the child [born from such a union] is legitimate whether the woman was unmarried or married." Rashi comments, "'Whether the woman was married...': As they have said, [the child is] a mamzer only when the father's marriage to others [but not to this woman] would be valid." Also the Rambam, MT Hil. Issurei Biah, ch. 15, hal. 3, ruled as follows: "If a gentile or a slave cohabited with the daughter of an Israelite, the child is legitimate whether the woman was unmarried or married, whether she was raped or submitted willingly."⁵

However, the Raban differs with the Rambam on this, commenting on the Yev. [45b] passage that the statement, "If a gentile or a slave cohabited with the daughter of an Israelite, the child is legitimate whether the woman was unmarried or married," applies only to a woman who was forced to fornicate, but not to one who did so willingly.⁶ But Teshuvot

Devar Avraham, vol. 2, no. 203 objects: "On what basis does the Raban say this?" See the comment of the Even Shelomoh, note 33.⁷

According to Sh.Ar. EH 4:19, "If a gentile or slave cohabited with a mamzeret, the child is a mamzer. If they cohabited with a [proper] Jewish woman, whether she was unmarried or married, the child is legitimate but unfit for the priesthood." See no. 25 [in the present volume] where I clarify at length the law concerning whether the child is unfit for the priesthood,⁸ as the author [of Sh.Ar.] ruled, or if he is fit even for the priesthood, as the plain sense of the Rambam's language seems to imply; for he did not mention that the child is unfit for the priesthood, as did the author [of Sh.Ar.]. Look carefully [at the Rambam passage cited above] and you will be satisfied [that this is true].

See also the Pithei Teshuvah to Sh.Ar. EH 4:23, who wrote as follows: "'Whether the woman was married...': See the resp. of Besamim Rosh, no. 5, who was asked about a married woman who abandoned Judaism, married a Muslim, and gave birth to children. Later she returned to Judaism. What is the legal status of the children? Someone wanted to say that we should suspect her of fornicating with a Jew as well. He answered that he was not inclined to agree, since while she might be presumed [to have done this], every Jewish man could not be under such a presumption. Even if you compare this to the case of a certain bridal couple,⁹ and even if there were suspect Jews or Jews who had abandoned Judaism going to her house, nevertheless her husband watches her [to be certain she does not commit adultery], and most of her sexual relations are with him. This is the majority principle about which R. Gamaliel and R. Yehoshua disagree¹⁰ -- that if the woman commits adultery, still if a man is living with her permanently, whether he is a Jew or a gentile, the children's

descent is traced from him." The Pithei Teshuvah also cites Hemdat Shelomoh, no. 1, who concerning a similar question concluded that the child was legitimate and the woman is not suspected of having fornicated with a Jew also.¹¹ But if the child is female, he concluded that she is unfit to marry a kohen. See the entire discussion of the Pithei Teshuvah.¹²

Accordingly, in our case it is obvious that the child is legitimate, even though his mother was married [to a Jewish man who was not the child's father]. As the Rambam and Sh.Ar. decided, if a gentile or slave cohabited with a Jewish woman, the child is legitimate, whether the woman was unmarried or married. Their clear source is the Yev. [45b] passage we have cited. Nor is there any reason to suspect in our case that this woman fornicated with a Jew, which would make the boy fathered by the Jew a mamzer. It is true that the argument of the Besamim Rosh-- that the wife is watched by her husband whether he is a Jew or a gentile-- does not really apply here, since she was not married to this gentile. But still she could not have fornicated with a Jew also, since there was no other Jew present where she was hiding, and no Jew knew where she was. They all thought that she had escaped to Russia during the war to be with her husband. The whole time she concealed the fact that she was among the gentiles for fear the German murderers would find out she was a Jew. Therefore it is certain that she had no contact with Jews, and we need not fear that she fornicated with a Jew so that the child would be his.

From all this it appears that the child is without doubt a proper Jew. I ordered that he be circumcised according to the law, and also that he be ritually immersed in order to accomodate all of the opinions

on this matter, as I explained at length in no. 25 [of the present volume].¹³

[Efrayim Oshry

Teshuvot Mimaamaqim, vol. 2, no. 24]

Notes

Responsum 32

1. A mamzer is a child born of a couple whose sexual relationship is forbidden by the Torah on pain of excision or death. See M. Qid. 3:12; cf. note 3.
2. According to H.J. Zimmels, The Echo of the Holocaust in Rabbinic Literature (New York: Ktav, 1977), p. 163, "The rescue of Jewish children was one of the most important tasks of the Jewish leaders in the post-war period." Many Jewish children had been entrusted to Christian priests to be safely kept in their monasteries and convents. Many of the priests accepted them in the hope of converting them to Christianity. Others agreed to accept the children for a fee: e.g., a report by the SS Security Service in Slovakia, 10 October 1942 (cited in Raul Hilberg, ed., Documents of Destruction [Chicago: Quadrangle, 1971], p. 182), notes that "two nunneries in Zilina... exist for the purpose of preserving Jewish children... It is clear that the nuns are not working for charity or for love of neighbor-- they are being paid very well." In his journal written in the Warsaw ghetto, Emmanuel Ringelblum assessed Christian motives for taking Jewish children (entry dated 14 December 1942): "Three factors have motivated the men of the cloth to propose this: first, soul-snatching. The Catholic religious leaders have always exploited such difficult moments in Jewish life as pogroms, deportations, etc., to convert adults and children... There is a second, economic factor. Every Jewish child [rescued from the ghetto, according to 'a plan now under discussion'] will have to pay 600 zlotys a month, and for a year in advance, too. This is a very good stroke of business for the monastic orders... The third

factor is that of prestige. Until now, the Polish Christian spiritual leaders have done very little to save Jews from massacre and "resettlement," to use their euphemism... Rescuing several hundred Jewish children may be offered as evidence that the Polish clergy did not sit with hands folded..." (Emmanuel Ringelblum, Notes from the Warsaw Ghetto, ed. and trans. Jacob Sloan [New York: McGraw-Hill, 1958], p. 336.) The task of reclaiming children hidden with the gentiles was impeded not only by the guardians but by the hostility that greeted the Jewish survivors returning to their old homes, and the inability or unwillingness of official agencies to intercede. Moreover, the real parents might be dead or missing; and the children themselves were often unaware of their past.

3. The mere fact that a child is conceived out of wedlock does not make him a mamzer or impair his legal status. Unlike parents who can legally marry each other but choose not to, the parents of a mamzer are forbidden to marry each other even if they want to. Thus if one parent is not a Jew, the child is not a mamzer unless the parents' relationship is forbidden by the Torah on pain of excision or death. The offspring of a union between a Jew and gentile takes the status of the mother (Qid. 66b, Sh.Ar. EH 4:19). In the present case, therefore, the boy is a legitimate Jew, not a mamzer.

4. According to Jewish law the status of parenthood is based on the natural family relationship and cannot be conferred by a legal act. However, the law does provide for consequences similar to adoption. In all matters concerning a child, his welfare is the decisive consideration. See Sh.Ar. EH 82, Pithei Teshuvah note 7; Teshuvot Radbaz, vol. 1, no. 123.

5. There is some question whether or not a female child of such a union

may marry a kohen (a male child, the son of an idolator or slave, cannot ever be a kohen); see Maggid Mishneh and Haggahot Maimuniyyot. Cf. Sh.Ar. EH 4:19, where it is stated categorically that any child of such a union is unfit for the priesthood. Rambam says only that "the child is a proper Jew," making no further qualification.

6. Actually the Raban distinguishes between a married and an unmarried woman. In the case of a married woman, the child is a mamzer if she consented to intercourse with a gentile or slave. However, if she is unmarried the child is not a mamzer even if she consented.

7. Even Shelomoh comments on the opinion of Raban (note 6): "This view is not found in the name of any early authority, and truly I have not succeeded in understanding the reason for this distinction" [between a married and unmarried woman; see note 6].

8. In this resp. R. Oshry discusses whether the child born of a Jewish mother and gentile father during the Holocaust requires conversion to Judaism. He decides on the authority of Rambam, Rashi, Ran, and others that the child does not require conversion and is a proper Jew. But there are many dissenting views on this matter: e.g., R. Yohanan, Yev. 44b, says that such a child is a mamzer; Qid. 75b reports that R. Yishmael agreed with R. Aqiva that such a child is a mamzer. To accomodate these opinions, R. Oshry prescribes immersion for the child.

9. Lit. "that betrothed [man] and his betrothed [woman]," Ket. 13b-14a. If she is pregnant and claims that he is the father, and he admits to it, then according to R. Gamaliel she is believed (cf. Ket. 12b); but according to R. Yehoshua she is not believed unless she brings proof of her statement.

10. Both names are abbreviated in Pithei Teshuvah, EH 4:23 and in Hemdat Shelomoh no. 1. Since the discussion here concerns the same issue that is raised in Ket. 12b, and since the phrase "a certain bridal couple" (see note 9) is also found both here and in Ket. 13b, it seems likely that the abbreviations refer to R. Gamaliel and R. Yehoshua. The controversy between these two tannaim concerns a woman suspected of sexual transgression. R. Gamaliel accepts the woman's word, but R. Yehoshua presumes that she had illicit intercourse unless she can prove otherwise.

11. Hemdat Shelomoh no. 1 concerns a married woman whose husband had been missing for 40 years. She assimilated into the Arab community and ceased observing Judaism, although she did not convert to Islam. She gave birth to a daughter who "did not know to which people she belonged." The Hemdat Shelomoh concludes that since the mother lived among a predominantly gentile population, since witnesses testified that she dressed like a gentile and no longer lived as a Jew, and since we presume that most Jewish men are not licentious, we do not suspect her of intercourse with a Jew. Consequently her daughter is not a mamzeret.

12. Pithei Teshuvah gives a thorough summary of the resp. of Hemdat Shelomoh (see note 11) and Besamim Rosh, no. 5, where it is also argued that in the case of an apostate woman, even if she is suspected of sexual transgression, we cannot suspect every Jewish man as well. Therefore we take her word that her children are by a gentile and not a Jewish father, and consequently the children are not mamzerim.

13. See note 8.

Responsum 33

[Concerning] surgery to remove the numbers which the accursed Germans engraved on people's arms

Question: After the Lord, may He be blessed, granted us the good fortune to go out from the darkness to the great light; when the yoke of our servitude was broken and we were freed from slavery to the wicked slaves, may their names be blotted out, a young woman of a good family asked me [a question]. The accursed Germans had engraved a tattoo on her arm. Their procedure was to engrave numbers on the arms of all the camp prisoners. Every prisoner had a number, and all of the prisoners were inscribed in the books of the living and the dead according to these numbers: who would live, who would die; who would finish his allotted span, who would go on suffering at hard labor. The accursed wicked ones kept precise statistics on everyone. Now after the liberation, this woman wanted to remove the number by means of plastic surgery, since to her the number gave rise to the terrible memory of those fearful days when the Jews' fates were decided for good or for evil. She thought that by erasing the terrible number from her arm, she could rid herself of the depressing memory of those bitter days, which disturbed her and gave her no rest. Every time she set her eyes on the detestable tattoo, the terrifying number, the vision would again rise up before her of the atrocities she had witnessed in the concentration and death camps; and the masses of prisoners who were annihilated in the camps would pass before her like sheep.

She asked if she was permitted by law to remove this tattoo from her arm. Perhaps then she could forget the anguish and grief she had witnessed and find peace for her embittered soul.

Answer: In Sh.Ar. OH 301:23, the Rema ruled as follows: "[Concerning] those round green patches that the government has ordered all Jews to wear on their garments, it is permitted to go out [on the Sabbath] with these on, even if the patch is not sewn on the garment but tacked on loosely."¹ The Or Zarua concludes [that the reason is] because [the patch] is considered a garment.

It appears from this that if the wicked government wants to abuse Israel by [requiring Jews to wear] a patch of green cloth upon their garments to shame and debase them in the eyes of the gentiles, even so the Rema ruled in the name of the Or Zarua that it is permitted to comply with this edict on the Sabbath. For on the contrary it honors the people of Israel; moreover the cloth is a garment.

Our case is the same. The Germans, may their names be blotted out, tattooed this number on the arms of the Jews as a mark of disgrace that would debase them in the eyes of all who saw them. They would say, "Those with the numbers tattooed on their arms are not considered human beings but cattle. The authorities can do with them as they wish and take them out to be killed and slaughtered like cattle." But a number like this cannot foul our spirit or debase our honor. On the contrary, this number for us is a sign of honor and splendor,² and for them-- the loathesome murderers, may their name and memory be blotted out-- it is a reminder of their iniquity and everlasting sin which cannot be pardoned or forgiven, their plot to annihilate a holy nation without leaving even

a remnant. For if a Jew ever managed to escape from the camp and save his life, they would kill him when they found him, for he would immediately be recognized by the tattoo on his arm as a Jew, the people led like sheep to the slaughter.

Therefore this degrading tattoo, the terrible number engraved on the arms of thousands of people who were at one time or another in the concentration and death camps, surely serves as a sign of honor and memorial. For we must remember what this German Amalek did to us. God forbid that we should forget this and eradicate from our hearts all that these wicked ones did to us, these wild beasts in the image of man, this seed of Amalek, the descendants of Haman the wicked.

It is our manifest and redoubled duty at this time to remember their wickedness and not to divert our minds even a moment from all the evil they wrought against us. For we see how they are. The accursed Germans spare no effort to do everything to make the entire world as well as us forget the memory of their evil deeds. As long as the silent voices of our holy and pure brothers and sisters cry to us from the earth, demanding revenge and recompense, this sign engraved on the arms of the camp prisoners serves as a symbol proclaiming: "Let the avenging of Thy servants' blood that was shed be made known among the nations in our sight, for He that avengeth blood hath remembered them. He hath not forgotten the cry of the humble. He will judge among the nations that are filled with dead bodies. He will crush the head over a wide land. And the people of Israel, this humiliated and stricken people, shall again lift up its head among the nations and be redeemed, and shall multiply exceedingly, flourish, and spread forth as in ancient days."

For this reason, God forbid that this woman should remove the number

from her arm. By doing so she would be lending a hand to the accursed German criminals, for this helps them to make everyone forget the frightful atrocities they inflicted upon the Jewish people. This would be like strengthening our enemies who in their insolence deny everything, as though we Jews are merely making false accusations against them and seeking some pretext. On the contrary, it is her duty to bear this sign with pride and exaltation. By virtue of this she will merit to see the time when God renders vengeance upon His adversaries, may it be soon in our days. Amen.

[Efrayim Oshry

Teshuvot Mimaamaqim, vol. 4, no. 22]

Notes

Responsum 33

1. Ordinarily a loosely tacked patch might be prohibited because to wear it on the Sabbath would be equated with the act of carrying. The Rema explains that normally anything attached to one's garment that does not belong there constitutes an illicit act of carrying. R. Oshry reads his own significance into the exception stipulated by Rema. According to Biurei Hagra, note 58, the Yerushalmi rules that anything attached to the garment is considered part of the garment.
2. Cf. the editorial by Robert Weltsch, editor of the Judische Rundschau, written in response to the Nazi boycott of Jewish businesses on 1 April 1933 (see resp. 1, note 12), entitled "Wear the Yellow Badge with Pride!" (in Lucy Dawidowicz, ed., A Holocaust Reader [New York: Behrman House, 1976], p. 148): "The leaders of the boycott gave orders that signs with 'a yellow badge against a black background' be affixed to the boycotted stores. Here is a powerful symbol. This measure is intended as an act of stigmatization, of disparagement. We accept it and propose to turn it into a badge of honor."

Responsum 34

The obligation of the "General Kaddish" in memory of those who
perished in the Holocaust

Question: Is one who had no relatives who perished in the Holocaust
also obligated to say Kaddish for the martyrs, or should one say Kaddish
only if he had relatives who perished?

Answer: In order to elucidate the nature of the "General Kaddish," we
will deal first with the scope of the stringency pertaining to evil
tidings in this communal catastrophe that we call the Holocaust.

1.

In MQ 26a, among the rents [in the clothing] that may not be mended,
they count the rent [upon hearing] evil tidings. The gemara says: "From
where do we derive this? From what is written [2 Sam.1.11-12]: 'Then
David took hold of his clothes and rent them; and likewise all the men
that were with him. And they wailed and wept and fasted until the eve-
ning, for Saul and for Jonathan his son and for the people of the Lord
and for the House of Israel, because they were fallen by the sword.'"
The gemara asks: "Yet do we [have to] rend clothes on hearing evil
tidings? For when they informed Shemuel that King Shapur had slain
12,000 Jews at Caesarea, he did not rend." Then the gemara answers:
"The sages said [one should rend] only when the larger part of the com-
munity is involved and in such an instance..." Rashi's commentary adds:

"'Such an instance' as that involving Saul and Jonathan."¹ The Nimmugei Yosef writes: "'Evil tidings' means they heard that the larger part of the community had been killed, as in the instance of the death of Saul and Jonathan; or else that these had been taken captive." In Sh.Ar. YD 340:36 [it says]: "They rend on hearing evil tidings, for instance if the larger part of the community was assembled for war and they heard [that this group] was routed by their enemies, even if only a few were killed." The Rema adds: "The same applies if they were taken captive." Accordingly we see that the tidings which require rending are only those which involve the larger part of the community, whether killed or captured.

However, in my humble opinion it seems plausible that what is discussed here does not actually refer to the majority of the general community of the House of Israel everywhere. For also in Saul's war there is no reason to suppose that the larger part of the Israelite community was at that time defeated in war. It says only [1 Sam.31.1]: "Now the Philistines fought against Israel, and the men of Israel fled from before the Philistines and fell down slain on Mt. Gilboa." Further on [1 Sam. 31.7] it says: "And when the men of Israel that were on the other side of the valley, and they that were beyond the Jordan, saw that the men of Israel fled and that Saul and his sons were dead, they abandoned the cities and fled; and the Philistines came and dwelt in them." That is to say, most of the [population of] the border districts escaped into the country and abandoned the border cities, and the Philistines came in and settled there. Consequently it appears that only part of the community was defeated in war. Nevertheless it is considered as the majority of the community, because at that time Saul's kingdom was the main support of

the community, and the kingdom was destroyed in that war. It is clear proof of our argument that adjoining this incident we find the recovery of the community and the establishment of the kingdom by King David in Hebron and Ishboshet in Mahanayim over all Israel (2 Sam. 2). Thus we may infer that the majority of the community was not defeated; only the kingdom and government were harmed. From here we learn that the determining factor is not the quantitative weight of the community but the qualitative power. Also the quantity need not comprise the majority of the whole House of Israel.

Accordingly, with respect to the terrible destruction which befell European Jewry, once the central power of the entire House of Israel, the full stringency of the law pertaining to evil tidings must be applied. The hearer [of these evil tidings] is obligated to rend, mourn, and fast, as said above.

The Shakh, Sh.Ar. YD 340 note 52, following Bet Yosef and Darkhei Mosheh in the name of R. Yeruham, introduces the view that one is obligated to mourn on the day of hearing the tidings for the entire day, but specifies that on the following day he can mend the rent [in the clothing]. This puzzled the master Noda Bihudah, since it is specified both in the Talmud and in Sh.Ar. (end of 340) that these rents may not be mended; in his view it should be forbidden to ever mend this rent.² R. Yeruham permitted only that the rent be stitched over loosely the following day, but not that it be mended.

In my humble opinion, with your honor's forgiveness, it should be explained that indeed one who together with the entire community rent [his clothing] soon after the catastrophe upon hearing the evil tidings, is not permitted to mend [the rent] ever, for he is a mourner among an

orphaned community. But if he heard [the evil tidings] on a later date, under circumstances where it is assumed that the majority of the community had heard about the matter previously, in this case he is obligated to rend as though for an individual, while sharing in the sorrow of the community. Concerning this the Shakh gave his view that only on the day of hearing evil tidings should one mourn, but the following day he can even mend [the rent clothing]. But this needs further examination.

Anyone who knew European Jewry and its great men is aware of the fact that it was the crowning glory and spiritual center of the House of Israel in its time, the main support in all matters of Torah and faith for our people. Other places of [Jewish] settlement in the world were only for pioneers who left the great Jewish center of Europe. Thus it appears that the destruction of European Jewry falls within the definition of the destruction of the House of Israel, as with the destruction of Saul's kingdom mentioned above. The law of evil tidings in a time of catastrophe applies here, where they rend the clothing and do not mend it. Whoever heard [the evil tidings] after the community had already been adequately informed, rends but on the following day may mend his clothing, in accord with the Shakh's decision as already mentioned.

2. Sharing in the community's sorrow

Our sages of blessed memory stressed strongly that everyone should share in the sorrow of the community. See what they said (Taan. 11a): "Our rabbis have taught: When Israel is in trouble and one of them separates himself from them, two ministering angels [who accompany every Jew] come [and place their hands upon his head and say, 'So and so who separated himself from the community shall not behold the consolation of

the community]...' But rather a man should share in the distress of the community, as it is said [Ex.17.12]: 'But Moses' hands were heavy; and they took a stone, and put it under him, and he sat on it.'" Sh.Ar. OH 574:4 says: "It is a mitzvah for a man to fast in a year of famine...";³ in par. 5 [it says]: "Whoever separates himself from the community shall not behold its consolation..."

According to these passages it appears that not only in the time of distress itself is a person obligated to join with the community and to grieve together with them. Rather even in times designated for memorial by the community in memory of the souls of their afflicted, it is forbidden to separate oneself from the community, and one is obligated to join in their mourning and sorrow.

In this case it is worthwhile to quote also from the words of the master Tiferet Yisrael at the beginning of part Besanhedrin: "...Also one who committed no sin, except that he did not join with them in their joy or in their sorrow."⁴ From all of this we understand that no one is permitted, God forbid, to take this duty lightly, and one must not refrain from taking part on the day of General Kaddish or Holocaust Memorial Day, which have been fixed as days of memorial for the perished martyrs of European Jewry.

3. The fixing of memorial days for national mourning

In the Bible and the Talmud we find that general memorial days were fixed for occasions of national mourning, such as the four fasts, etc. In the golden language of the Rambam (MT Hil. Taaniyot, ch. 5, hal. 1): "There are days on which all Israel fasts on account of the troubles that befell them, in order to stir their hearts... for in remembering

these things we return to do good..."⁴ Likewise we realize that even the grief of an individual in mourning for a family member has found expression in a fixed annual memorial day (yartzeit) according to all its laws. How much the more so, if we are speaking of all Israel, do we need to exalt the memories of the holy and pure martyrs and to perpetuate them.

In light of the laws that on the day of memorial (yartzeit) we separate ourselves from any joyful activity, and moreover some are accustomed to fast on this day (at the end of Hil. Avelut in Sh.Ar. YD, see what is written in the name of R. Efrayim Zalman Margaliyot of blessed memory),⁵ certainly a special memorial day should be fixed to perpetuate the memory and honor of our six million brethren who perished in dreadful and tragic ways, God forbid. All of the House of Israel is required to mourn for them.

4. The obligation of saying the Kaddish

Obviously it is understood that just as each individual is obligated to join with the community and share in its grief, so also is each individual obligated to do something for the spirits and souls of the departed. We find that the Kaddish has great importance, and we are obligated to [say] it for parents and relatives (Sh.Ar. YD 376:4, according to the Rema).⁶ So also is every person obligated to add to the purity of the many souls of the entire House of Israel. Come and see the ruling of Rema in Sh.Ar. OH 132:2 concerning the mourner's Kaddish following the Alenu [prayer]: even if there is no mourner in the synagogue, one who has no father or mother [to mourn] should say [Kaddish] for all of the dead. The Rema repeats this in YD 376: "[One should say Kaddish]

for all of the dead of Israel."

The law requires that whoever has forgotten the day of his father's or mother's death should choose a day of the year on which to say Kaddish for the elevation of their souls (see the Biur Halakhah by the Mishnah Berurah, OH 132).⁷ The Chief Rabbinate has chosen the bitter day of 10 Tevet⁸ as the day for "General Kaddish" for several reasons: 1) It is the day when the troubles began, the day that the king of Babylonia approached the wall [of Jerusalem] to destroy the first Temple; and all of the trouble and suffering that have befallen our nation are the bitter continuation of this event. 2) The days of Tevet are short, so that whoever wishes to fast on the memorial day in accord with the law (YD 376 [:4, gloss])-- "It is a mitzvah to fast on the days of his father's and mother's death"-- can more easily do so. 10 Tevet is a fast in any event, so that obviously even if one had no relatives who died in the Holocaust, if only because of the law that he should join in public condolence, it is his duty to exert himself for the souls of the fallen and to say Kaddish for them. If he can he should fast on the day that has been determined, especially since it is a public fast in any case.

I must dispel the erroneous notion of those who claim that the martyrs who were murdered for the sanctification of the Name do not need the Kaddish to be said for them, since they never see the face of hell. This accords with the ruling of Sh.Ar. (YD 376:4) that for one who is murdered (even an apostate), his murder is his atonement.⁹ The Turei Zahav to this passage interprets this to be all the more true of the pure of heart who were murdered for no other reason than their Judaism: their death serves to free them of any need, even the Kaddish.

However, this is utterly mistaken, for in the holy books it is explained clearly that even the perfectly righteous are in need of various improvements to ascend from one level to the next, and the Kaddish is essential even to them. The Kaddish will never depart from the House of Israel, even for a father who was the most exalted saint and was killed for the sanctification of the Name.

It is customary to say Kaddish for only eleven months and not twelve, even though the judgment of hell lasts a full year, out of respect for one's father and mother who should not be made to appear as sinners (as explained in Sh.Ar. YD 376). The reason is the principle of [avoiding detrimental] outward appearances, so that someone who hears the Kaddish [recited for a full year] will not judge the souls guilty. However, it is known that according to the Ari of blessed memory, in principle there is reason to continue saying the Kaddish and elevating [the dead] from one level to the next for twelve months.¹⁰ It is known that according to our sages of blessed memory (at the end of Ber. 64a), scholars of the law have no rest either in this world or in the world to come, since they go up from one level to the next. The meaning of all of these words is plain and obvious.

There is another reason why one is obligated to join with the community in saying Kaddish. The sages said in Ber. 18a: "Rahaba said in the name of R. Yehudah: Whoever sees a corpse [on the way to burial] and does not accompany it is a transgressor in the category of [Prov.17.5] 'Whoso mocketh the poor blasphemeth his Maker.' But if he accompanies it, what is his reward? R. Assi says: Concerning him Scripture says [Prov.19.17]: 'He that is gracious unto the poor lendeth unto the Lord' and [Prov.14.31] 'He that is gracious unto the needy honoreth Him.'" The law is decided

likewise in Sh.Ar. (YD 361:3): "One who sees a corpse [on the way to burial] and fails to accompany it is like one who mocks the poor and deserves excommunication. He should accompany the corpse for a distance of at least four cubits." According to Teshuvot Yad Eliyahu [no. 24] cited in the Pithei Teshuvah to YD 361 [note 2], this [i.e., one must accompany the corpse for a distance of at least four cubits] is said when the corpse is sufficiently attended, but when it is not sufficiently attended it is obvious that one must accompany it to its grave. See Sh.Ar. YD 343:1: "When someone dies in the town, all of the town's inhabitants are forbidden to work, for whoever sees a corpse [on the way to burial] and fails to accompany it until it is sufficiently attended deserves excommunication." Accordingly, when the entire community says Kaddish, any individuals who fail to say it are viewed as "mockers of the poor" and as if they had scorned the dead. We must be aware of the severity of this prohibition.

5. A sincere act of kindness

The essential precept in caring for the dead and saying Kaddish is based on the general obligation to perform acts of kindness. Rambam (MT Hil. Evel, ch. 14, hal. 1) wrote: "It is a positive rabbinical injunction to visit the sick, to console mourners, to accompany the corpse, etc.; to bear [the coffin] on the shoulder and to go before it to mourn, etc. These are deeds of lovingkindness for its own sake which have no measure, and even though all of these are [only] rabbinical injunctions, they are in the category of [Lev.19.18] 'Thou shalt love thy neighbor as thyself.' All of the things that you want others to do for you, do them for your brother in Torah and commandments." See also

Sh.Ar. YD 344:1: "It is a great mitzvah to mourn for the dead in the proper way." Also in YD 361:1 [it says]: "[Even] the study of Torah is cancelled for the sake of the dead..."¹¹ and so on.

Note how great is the obligation to perform deeds of kindness: according to YD 361:4, it is a mitzvah to rise for the pallbearers, and on this ruling the Turei Zahav comments, "'They are required to rise for them,' meaning for those occupied with the corpse, for they are performing an act of kindness. So it says also in the Tur on the authority of the Yerushalmi:¹² 'Those who rise for the dead do not rise for the corpse but rather for those performing the act of kindness...'"

To be sure, the Arukh Hashulhan, YD 361:1, disagrees with the Taz and writes as follows: "In my humble opinion it seems that the Yerushalmi means they should rise for those who escort [the corpse] as well [as for the corpse]. The words 'Rather they rise for...' should be interpreted, 'They do not rise for the corpse alone, but also for those who escort it.'" The master Hida, in Birkei Yosef (YD, Hil. Milah 265:2), supports the Taz's opinion and states explicitly that the Yerushalmi should be so understood.¹³

In any event it is clear according to what the Rambam wrote that these matters are based on the commandment "Thou shalt love thy neighbor as thyself," which is the source of the obligation to perform acts of kindness. I found explicit support for this in Suk. 49b: acts of kindness may be performed with one's person or with one's money, for the living or for the dead. Thus the good we can do for the dead is part of the general obligation to perform acts of kindness, whose source is in the commandment, "Thou shalt love thy neighbor as thyself." Rashi, in his comment to the above passage, Suk. 49b, s.v. "Acts of kindness..." explains:

"For instance, mourning the dead person, carrying him to the cemetery and burying him, making the groom rejoice, or escorting one's companion along the road." Note that Rashi begins his description of acts of kindness specifically with the dead, and only afterward transfers this obligation to the living. Rashi's interpretation of the beginning of the Torah portion Vayehi is also known: "'True kindness' [Gen.47.29]: when one does not look forward to payment of a recompense." That is to say, it is true kindness that we practice with the dead, for there is no selfish calculation of accepting anything from the dead in exchange, and we do it only for the sake of the obligation to practice kindness. This is sufficient to establish the significance and precious value of saying the Kaddish even for a deceased person who is not a family relative.

Therefore it is clear to us that no Jew anywhere should refrain from practicing kindness to the dead, and it is each Jew's duty to join in saying Kaddish in memory of the dead and for the elevation of their souls.

[K.P. Tchorsh

Shanah Beshanah 5729, pp. 131-36]

Notes

Responsum 34

1. Cf. 2 Sam.1.
2. No reference is given here, but the Shakh's view is also contested by Pithei Teshuvah, YD 340 note 14.
3. Shaarei Teshuvah cites the view of Tosafot that to fast under such circumstances, while it is an act of extreme piety, is not an obligation.
4. R. Tchorsh omits the Rambam's phrase that fasting "reminds us of our evil deeds, and the deeds of our fathers which were like ours now, which caused the afflictions endured by them and by us." Perhaps R. Tchorsh feels that a catastrophe of the Holocaust's magnitude cannot be attributed to the sins of the Jews and their ancestors.
5. Hiddushim mehilkhot avelut, nos. 24-25. While discussing whether or not a groom is obligated to fast if his father dies during the wedding week, R. Margaliyot mentions that some sons fast on the date of the father's yartzeit. This custom is described as a mitzvah by Rema, Sh.Ar. YD 376:4.
6. Rema cites aggadic sources for this obligation: Tanhuma, Sifre, Zohar, Tanna Deve Eliyahu Rabbah.
7. The Biur Halakhah of Mishnah Berurah, OH 132, comprises a brief treatise on the laws pertaining to Kaddish. The author writes that one may choose a day for reciting Kaddish as long as the choice does not infringe upon the privileges of other mourners who know the specific date. "The same holds true for one who is not certain whether his father or mother

is dead."

8. Other dates have been proposed for the observance of a fixed day of memorial. The Jews of France and England chose 20 Sivan, first observed by Rabbenu Tam in 1171 as a day of fasting for martyred French Jews, and subsequently observed in memory of the Chmielnicki massacres, 1648-49. In 1951 27 Nisan was fixed by the government of Israel as a national day of mourning and as a memorial day of the Warsaw ghetto uprising. Since the revolt began on the eve of Passover, 19 April 1943, the Knesset permanently designated the memorial day to prevent it from coinciding with Passover, to link the observance with both the revolt and Israel Independence Day, and because it occurs during the traditional mourning of the counting of the omer. See Encyclopedia Judaica (Jerusalem: Keter, 1971), vol. 8:916; H.J. Zimmels, The Echo of the Holocaust in Rabbinic Literature (New York: Ktav, 1977), pp. 155-58.

9. Sh.Ar. YD 376:4, gloss. R. Tchorsh cites the commentary to this passage, not the text itself. Rema says only: "Some say that the sons of an apostate murdered by gentiles may say Kaddish for him." This is interpreted to mean that the apostate's death by murder serves as his atonement. See, e.g., Turei Zahav (note 6); Shakh (note 15); Baer Hetev (note 12). This holds true, however, only if the apostate was murdered. If he dies from natural causes, his sons are forbidden to say Kaddish for him. Cf. YD 340:5, Sanh. 47a-b.

10. See Shiyyurei Berakhah to YD 376:4, where the Ari's opinion is cited along with several others. The Ari also permits the mourner's Kaddish to be recited on Sabbaths and festivals.

11. The quotation is not exact. The text reads, "The study of Torah is

cancelled to take the dead out [to the cemetery]."

12. Yer. Bik., ch. 3.

13. In discussing whether witnesses should stand when a circumcision is performed, Birkei Yosef cites an opinion that one should rise whenever a mitzvah is performed in his presence. He then cites the Turei Zahav's interpretation of the Yerushalmi in support of this view.

Responsum 35

Is it permitted to accept charity [reparations] from wicked gentiles?

I was asked by certain survivors of the war, learned in the law, if it was permitted to accept the money given by the German government as payment to those whose money and property were pillaged by the Germans in the days of murder and destruction.¹

Several great rabbis among the survivors have already considered this question, and it was raised at a gathering of the Aguddat Yisrael in Jerusalem. Nonetheless I will not refrain from expressing my humble opinion on this matter.

This is the answer I gave them.

Those who would prohibit [this] rely on the Rambam's words in MT Hil. Rotseah, end of ch. 12 [hal. 15], where he wrote: "But it is forbidden to give beneficial advice to a gentile or a wicked gentile slave. Even to advise him to perform a mitzvah is forbidden as long as he persists in his wickedness. Daniel was tested only because he advised Nebuchadnezzar to give charity, as it is said [Dan.4.24], 'Wherefore, O king, let my counsel be acceptable unto thee...'". The source for the Rambam's words is an incident involving Herod, reported in BB 4a. Bava b. Buta advised Herod to rebuild the Temple. There is an objection: "How did he come to do this, seeing that R. Yehudah said... 'Why was Daniel punished? Because he gave advice...'". It is explained that "this does not apply to a slave [of an Israelite] who is obligated to keep the commandments; or if you like, I can say that the case of the Temple is

different, for without the government it could not have been built." If this is so, then for any other purpose it is forbidden to accept charity from the wicked.

In my humble opinion, this prohibition against accepting charity from wicked gentiles applies only to their money, since then they would have the merit of fulfilling the mitzvah of giving charity. But to accept from them the money they stole from the Jews is not prohibited, since no merit is conferred for returning what they stole from the Jews in the first place. It is said in Er. 62a: "A descendant of Noah [i.e., a gentile] is put to death for [stealing] less than the value of a perutah and does not make restitution." Rashi explains the reason: "Concerning a Jew it is written [Lev.5.23], 'He shall restore that which he stole,' but this is not said about a gentile. Therefore he is put to death and cannot make restitution." Likewise in Sanh. 37a Rashi comments: "A Cuthean is not obliged to make restitution; for him robbery is a capital offense even if the stolen property is worth less than a perutah, and even if it was stolen from a Jew who would subsequently forgive him." Since also according to AZ 72a we do not apply the law of restitution to gentiles, and no merit is conferred upon them for making restitution, then it is permitted to accept from them the money they stole. Now the case of Daniel mentioned above would seem to indicate that it is forbidden to accept money from them, since Nebuchadnezzar plundered the vessels of the house of God "and carried them into the land of Shinar to the house of his god, and the vessels he brought into the treasure house of his god" [Dan.1.2]. But if the above [reasoning] is valid, then Daniel did not sin by advising Nebuchadnezzar to give charity, for this would be given as compensation for the silver and gold that Nebuchadnezzar had stolen from

Israel. Still, this may not be considered theft according to Rashi's interpretation of the verse [Ezek.7.22], "And robbers shall enter into it and profane it..." as cited in AZ 52b: "When the gentiles entered the Temple, the vessels were rendered profane, and once they were profaned, they were no longer the Temple's property." If so, then when Nebuchadnezzar acquired this silver it became his, and what Daniel advised him to give as charity actually belonged to Nebuchadnezzar. For this reason Daniel was punished.

One cannot say that a gentile is not obliged to make restitution just because "He shall restore..." is written in regard to a Jew but not a gentile. For if the law does not apply to a gentile, then if he returns the value of what he stole from a Jew, this would be like giving the Jew his [the gentile's] own money, which is forbidden because it confers merit upon the gentile. This cannot be compared to the case of a gentile who steals money from another gentile. There are two considerations here: the transgression of the prohibition [Dt.20.13] "Thou shalt not steal," and the possession of another person's money. Concerning a Jew who steals another person's money, the Torah says, "He shall restore that which he stole." In performing this duty he satisfies both commandments: he makes reparation for the prohibition against stealing which he had transgressed, and he restores the property to its rightful owner. However, concerning a gentile who steals, the Torah does not say, "He shall restore..." and thus make reparation for his sin before God. But he is obligated to compensate [the owner for what was stolen] from money which he took from others, since gentiles are culpable for robbery which is one of the seven commandments given the descendants of Noah, as explained in Sanh. 56a.² Thus he is obligated to return [what he owes] from other money he possesses,

but he receives no credit for this since the law obligates him to do it. In regard to this I must reconcile the views of Rashi which appear to contradict each other. In Er. 62a where it says that a gentile is put to death for [stealing] less than the value of a perutah, Rashi explains that "this is because concerning a Jew it is written, 'And he shall restore that which he stole,' but this does not apply to a gentile; therefore he is put to death and cannot make restitution." This implies that also in the case of a theft of property that is worth a perutah, a gentile is not obligated to make restitution, since he is put to death and [suffers] only the severer [penalty]. (See Qitsot Hahoshen, HM 385, who also interprets the above Rashi passage to mean that the gentile is exempt [from the duty of restitution] because the severer [penalty] takes precedence.)³ Now according to AZ [71b], "A gentile is put to death for [stealing] less than the value of a perutah and is not obligated to make restitution." The gemara objects: "Now if you say that acquisition by drawing [the article toward oneself] does not apply to a gentile, why should he be put to death?" Then it is explained, "Because he caused trouble to an Israelite." Once more there is an objection from the second part of the teaching: "If his gentile neighbor came and stole it from him (the original thief), he is put to death for it. Now this is quite right in the first circumstance because [the original thief] caused trouble to an Israelite. But in the latter circumstance what has [the second thief] done? We deduce from this that acquisition by drawing does apply to a gentile." Rashi explains: "Therefore the first gentile acquired it and the second gentile acquired it. The latter is put to death for it since he robbed the first gentile and it cannot be restored. Only in the first case concerning less than the value of a perutah would the Jew forgive

and the gentile not be obligated to return it." This indicates that for the theft of [property worth] a perutah, a gentile is obligated to return its value to a Jew. Thus Rashi seems to contradict himself.

Nor is it clear from Rashi if the law that the severer [penalty] takes precedence applies to a gentile. The Tosafot to the above passage from AZ 71b-72a, s.v. "A gentile..." write that in Rashi's opinion the gentile is not required to make restitution because the severer [penalty against stealing] takes precedence. But the Tosafot object that if this is true, then the gentile should not be obligated to pay back anything in any case (by which they mean, even if he stole the value of a perutah). Apparently what Rashi wrote on the Er. [62a] passage-- "Therefore he is put to death and cannot make restitution"-- indicates his position that the law which gives precedence to the severer [penalty] does apply to a gentile. However, his comment on Er. [62a]-- "Concerning a Jew it is written, 'And he shall restore...' but not concerning a gentile"-- and the similar comment on Sanh. [37a] cited above, suggest that in Rashi's opinion, even if he deserves death, since for gentiles the prohibition against stealing is simultaneous with the death penalty,⁴ even so he is exempt from restitution because it is not said of him, "And he shall restore..." [and not because the severer penalty takes precedence]. If it is maintained that according to Rashi the law which gives precedence to the severer [penalty] does apply to a gentile, the above [discrepancy] may be resolved on the basis of Rashi's own comment to BM 91a on the statement of Raba: "The Torah prohibited the hire [of a harlot for use in the Temple, Dt.23.19] even if one had incestuous intercourse with his mother."⁵ First Rashi explains: "Although if she were to have claimed it from him before us in court, we could not have obligated him to pay it

since [he suffers] only the severer [penalty]. We do not have the power to force him to give it to her, but he is obligated to do so before heaven." Rashi continues: "However, if someone⁶ seizes it, we do not take it away from him." The distinction between these two interpretations is as follows: according to the first interpretation, if a man is obligated [to pay a sum of money] before heaven [i.e., the obligation cannot be legally enforced], and the man entitled to the money [before heaven] seizes it and uses it to betrothe a woman, then if the first man [from whom the money was seized] says, "I do not want to fulfill my obligation before heaven, and I do not give him the money willingly," the second man's betrothal to the woman is not valid. But according to the second interpretation-- that if he seizes it we do not take it away from him-- by law the first man should return the money to its rightful owner, although since he is subject to the death penalty we do not have the legal authority to take the money from him. Thus if the second man betrothed a woman with the money he seized, the betrothal is valid according to the Torah. If so, then one may say that Rashi's comment above [to AZ 71b]-- that a gentile who stole the value of a perutah is obligated to make restitution even though the severer [penalty] takes precedence-- accords with the second interpretation [to BM 91a] that indeed he is obligated to return the money by law, even when he is subject to the death penalty and even though this act of restitution does not make amends for [his transgression of] the prohibition [against stealing]. Since stolen money is in his possession, he is obligated by law to return it. This [explanation] is consistent with Rashi's statement [on AZ 71b] that [if] a gentile [steals from a Jew, he] is exempt [from the duty of restitution] only if [the property is worth] less than

a perutah, since for this amount the Jew forgives him. But since the value of a perutah is money to a Jew also, the gentile must return it. As far as the meaning of Rashi's comments on Er. [62a] and AZ [71b-72a] that even [if a gentile steals] the value of a perutah from a Jew he is exempt from the obligation to return it, this is according to his first interpretation [of BM 91a], where the reason is that the thief is obligated before heaven, which does not apply to a gentile, who is completely exempt since he is subject to the death penalty. This is easy to understand. If it is maintained that in Rashi's view, the law that the severer [penalty] takes precedence does not apply to a gentile, this also conforms to what he says [about BM 91a], and there is no contradiction, since indeed the gentile is obligated to restore the stolen property in his possession, as explained above. For truly he does not make amends for [transgressing] the prohibition against stealing by this restitution; rather he is obligated to return that which he stole, as explained above. But this is only in the case of property worth at least a perutah; for less than a perutah he is only obligated to return the property to another gentile, since this is money for a gentile. But a Jew forgives him for [the theft of property worth] less than a perutah, and this is correct.

According to Rashi's second interpretation-- that if someone [who is entitled to a sum of money] seizes it, we do not take it away-- by law we should obligate the one who is not entitled to it to return it, even though the severer [penalty] takes precedence. The Turei Even raised a difficulty in Avnei Shoham, Hag., from Sanh. 79a in the discussion about a rebellious elder. There is a controversy between Rabbi and the sages concerning a man who intended to kill one person but [accidentally] killed another. In Rabbi's view, he is obligated to make restitution since he

is exempt from the death penalty; so if one of the dead man's heirs betrothed a woman with money they had seized [from the killer], the betrothal is perfectly valid. But according to the rabbis [he is not exempt from the death penalty and] the severer [penalty] takes precedence, even in the case of unintentional murder; so if one of the dead man's heirs betrothed a woman with money they had seized [from the killer], the betrothal is not valid. See Rashi's commentary to this passage. If as mentioned above the seizure [of property to which one is entitled] is legally valid, even though a bet din cannot enforce the obligation [to return the property wrongfully in one's possession], then according to the rabbis as well, the betrothal would be valid. The Qitsot Hahoshen, HM 28, also found Rashi's second interpretation difficult-- that seizure is valid even though the severer [penalty] takes precedence, and this according to the law-- on the basis of the question raised by the Tosafot to BM [91a] along with the Sanh. [79a] passage according to Rashi's first interpretation that the obligation exists only before heaven.⁷ This seems contrary to what is said in Sanh. 72a: "Raba was robbed of some rams by thieves who broke in. Later they wanted to return the rams, but he refused to accept them since [he agreed with what] Rab had said, 'The thief acquired them with his blood.'"⁸ Why did he not accept [the rams]? Were the thieves not obligated to return them before heaven? The Tosafot explain that the thieves [wrongfully] thought that they were required by law to return them; therefore Raba would not accept them [since the restitution was for the wrong reason]. But according to Rashi's second interpretation-- that if one [who is entitled to the property] seizes it, we do not take it back, so that one is obligated by law to return [property wrongfully in his possession]-- the question raised by the Tosafot still

stands: why did Raba not accept the stolen property still held by the thieves?

The Qitsot Hahoshen cites the opinion of Maharshal that the phrase, "If he seizes it, we do not take it away from him," applies only if we do not inflict the severer punishment, such as if the crime was unintentional, or in these times.⁹ However, when the severer punishment is inflicted, then the criminal is exempt [from the duty of restitution]; so that if one seizes the property from him, we do take it away. This obviously lays to rest the Turei Even's objection discussed above, for the case of the rebellious elder [Sanh. 79a] refers to the time when the bet din inflicted the death penalty, so that the rabbis would not sanction a betrothal [with money seized from the criminal]. But Rashi refers to the time when we do not inflict the death penalty, so that if one seizes the property we do not take it back, and if he uses it for a betrothal the betrothal is valid, as explained above. This answers the objection raised by the late light of the exile and Av Bet Din of the old city of Jerusalem, in a letter to his father of blessed memory, which is cited in Teshuvot Maharil Disqin, final treatise, no. 7: "A severe difficulty occurs to me: Rab holds that the thief acquires even a specific object with his blood; if so, then a gentile who has stolen something has acquired it. Yet a gentile is put to death for [stealing] less than the value of a perutah, and in many halakhic texts it is explained that he does not acquire. Perhaps, then, the law that the severer [penalty] takes precedence does not apply to a gentile." But according to the Maharshal's view, this is not a difficulty, for the circumstances are different. In Rab's case, the thieves who broke in committed an intentional crime in the time of the Temple; thus it is true that by breaking in the thief acquired

[the stolen property] with his blood, and since (he was forewarned about this [i.e., the penalty for stealing]), Raba would not accept what they wanted to return. But in a time when we do not inflict the severer punishment, a gentile is obligated to make restitution even if the law that the severer [penalty] takes precedence does apply to him. This is clear and obvious. So in our case, even if the law that the severer [penalty] takes precedence does apply to a gentile, and even if we say in conformity to Rashi's first interpretation that he is obliged to return [the stolen property] only before heaven-- which is not said of a gentile-- nevertheless these wicked ones are obligated to make restitution. Moreover, we do not decide with Rab that the thief acquires the stolen property even if it is still intact. For according to the Rambam, he is exempt [from the duty of restitution] only if the stolen property is damaged, but not when it is intact. This is also the view of Rema, Sh.Ar. HM 351[:1]. The Nazis robbed the Jews of all their houses and lands. This property is intact, so that according to everyone they are obligated to return the property or give compensation for it. According to what I wrote earlier in this resp.-- that money taken from others [i.e., which the gentiles do not rightfully possess] is not nullified-- the law of the Torah is that all the money they stole from Israel is still intact, and they must return it. Therefore there is no apprehension whatsoever about taking money from these wicked ones in payment for what they stole from Israel. There is no need to go into lengthy dialectics, for in my humble opinion there is no fear that this act is prohibited.

Shelomoh Yitshaq Levin

[Teshuvot Minhag Shelomoh, vol. 1, no. 29]

Notes

Responsum 35

1. In the matter of reparations, Jewish organizations confined themselves to the needs of surviving victims. The debt owed to the dead millions, even if limited to material losses, was beyond calculation or recovery. Thus the Jews insisted upon the restitution of confiscated property to its owner, indemnification for injured or impaired survivors, and compensation for the rehabilitation of displaced persons. The Jews described their demands as "material claims"; the Germans called their payments "amends" (Wiedergutmachung). Raul Hilberg, The Destruction of the European Jews (New York: New Viewpoints, 1973), pp. 738-59, discusses the numerous difficulties and complexities involved in computing, claiming, and securing these funds from Germany. According to the eminent historian Jacob Robinson, "The Holocaust," The Catastrophe of European Jewry (Jerusalem: Yad Vashem, 1976), p. 282, "A conservative estimate of Jewish material losses is 12 billion dollars at values of that time. Only a small part of the property was returned and only part of the damage caused by the loss of life, health, liberty, and professions was compensated."
2. Sanh. 56a: "Our rabbis taught: Seven precepts were the descendants of Noah commanded-- social laws [i.e., to establish courts of justice]; to refrain from blasphemy, idolatry, adultery, bloodshed, robbery, and eating flesh cut from a living animal."
3. Qitsot Hahoshen also cites the dissenting view of Tosafot (Er. 62a) that the principle "the severer penalty takes precedence," by which Rashi apparently exempts gentiles from the duty of restitution, does not apply

to gentiles. Much of R. Levin's argument in the text that follows appears to be based on this Tosafot passage, s.v. "A gentile is killed for less than a perutah..."

4. According to Sanh. 56b, "[God] does not punish without first prohibiting." Any negative injunction qualifies as prohibition for the purposes of penal legislation. See Rambam, Commentary to the Mishnah, Mak. 3:1.

5. This passage, on the basis of which R. Levin seeks to reconcile the two Rashi comments, is cited by Qitsot Hahoshen, HM 28, in a similar context.

6. I.e., someone entitled to a sum of money who cannot legally acquire it.

7. To resolve the difficulty, Qitsot Hahoshen cites the view of Maharshal (reported in text of resp. below) that such property may be seized only when the death penalty is not in force, for the severer penalty cannot take precedence when it does not exist.

8. I.e., since the thief risked his life by breaking in, he acquired the stolen property "with his blood," since the owner of the property could have killed him with impunity.

9.* According to Sanh. 37b and Ket. 30a, the competence to inflict capital punishment ceased with the destruction of the Temple. However, there is evidence that wherever they had the power, Jewish courts continued to pass and execute death sentences, although in view of the law they refrained from inflicting the four modes of execution sanctioned by the Talmud--stoning, burning, slaying, and strangling. See Menachem Elon, ed., The Principles of Jewish Law (Jerusalem: Keter, 1975), p. 529.

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| Aguddah | Aleksander Suslin d. 1349 |
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| Alfas | Yitshaq Al-Fasi 1013-1103 |
| Ari | Yitshaq b. Shelomoh Luria 1534-1572 |
| Arugat Habosem | Mosheh b. Amram Gruenwald |
| Arukh | Natan b. Yehiel of Rome 1035-1110? |
| Arukh Hashulhan | Yehiel Mikhael Epstein 1835-1905 |
| Atsei Levonah | Nisan b. Aharon of Dubno |
| Baer Hetev | OH, EH: Yehudah b. Shimon Ashkenazi 18th c. YD, HM: Zekhariah Mendel b. Aryeh Leib d. after 1707 |
| Bah | Yoel Sirkes 1561-1640 |
| Bedeq Habayit | Yosef Karo 1488-1575 |
| Beer Yitshaq | Yitshaq Elhanan Spektor 1817-1896 |
| Benyamin Zeev | Benyamin Zeev b. Mattitiah of Arta 16th c. |
| Besamim Rosh | Shaul b. Tsevi Hirsch Levin Berlin 1740-1794 |
| Bet Hayotser | Yoel Tsevi Roth |
| Bet Hillel | Hillel Lichtenstein 1815-1891 |
| Bet Shemuel | Shemuel b. Uri Shraga Phoebus 1650?-1705? |
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| Binyan David | David Dov Berish Meisels 1814-1876 |
| Binyan Tsevi | Tsevi Hirsch Meisels 20th c. |
| Binyan Tsiyyon | Yaaqov Ettlinger 1798-1871 |
| Birkei Yosef | Hayyim Yosef David Azulai 1724-1806 |
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| Darkhei Mosheh | Mosheh Isserles 1520?-1572 |
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Eliyahu Gaon

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Gra

Haelef Lekha Shelomoh
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1720-1797
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 Maharil
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| Tiferet Tsevi | Tsevi Hirsch b. Benyamin 18th c. |
| Tiferet Yisrael | Yisrael Lipschutz d. 1860 |
| Torat Haadam | Mosheh b. Nahman (Nahmanides) 1195?-1270? |
| Torat Hayyim | Hayyim b. Shabbetai 1555?-1647 |
| Tosafot | (various Franco-German talmudists, 12th-13th c.) |
| Tsemah Tsedeq | Menahem Mendel Schneersohn 1789-1866 |
| Tsiyyun Lemenahem | Menahem Mendel Kirschbaum 1895-1942 |
| Tsiyyun Lenefesh Hayyah | Yehezqel Landau 1713-1793 |
| Tur | Yaaqov b. Asher 1269?-1340? |
| Turei Even | Eleazar b. Shemuel Rokeah 1665-1741 |
| Turei Zahav | David Halevi 1586?-1667 |
| Tuv Taam Vedaat | Shelomoh Kluger 1783-1869 |
| Yad Avraham | Avraham Maskil Leitan |
| Yad David | David Luria 1798-1855 |
| Yad Eleazar | Eleazar Halevi Ish Hurwitz 1803-1868 |
| Yad Eliyahu | Eliyahu b. Yaaqov Rogoler 1794-1849 |
| Yam Shel Shelomoh | Shelomoh Luria 1510?-1573 |
| Yavets | Yaaqov Emden 1697-1776 |
| Yosef Omets | Yosef Hahn 1570?-1637 |
| Zakhor Leavraham | Avraham Shemuel Alkalai 1750?-1811 |
| Zekher Yehosef | Yosef Zekhariah b. Natan Stern 1831-1903 |
| Zeqan Aharon | Aharon Walkin 1865-1942 |
| Zikhron Yehudah | Yehudah Gruenwald 1849-1920 |

Appendix B: Hebrew Texts

סימן ל"ו

ע"ד אשר ניקש הסכמתי שצרכנו לקצוע ת"ז על הרצאות
ולרות נעוה"ר לאחינו בני ישראל נאשכנו וכו' וכו'.
נגוף הדבר נשמעי הנשורות ונמס לני כי הן אמת כמנזאר
נש"ע אורח חיים (סימן תקכ"ז) נמנן אברהם סק"ז כי אם
ה' הדבר נמשך זמן זמנים טונא הגזירות ולרות נרורות
ר"ל אז לא יגזרו תענית כלל עיין שם נשם הר"ן וכו' וכו'
נציארתו נעה"י נמנחת אלעזר (חלק ד' סימן ה') עיין שם
ותנין. אמנם הנע"ד ר"ל הסית והדיח והעמיד החיל שלו
מיד מתחלת המלחמה ועד עתה הדעות נפסדות ושלא לראות
האמת כי רק המלחמה לד' הוא חנלי משיח וכאשר ישונו אליו
ית"ש (עכ"פ נראשי מלות הדת והאמונה שמירת שנת.
ונדה. וגידול בניו לת"ת האמתיות וכהנה) אז כנר היינו
נגאלים נציאנג"ז כמ"ש הרמז"ס הל' תשובה וכמנזאר
נמד"ר נכמה מקומות נש"ס סוף סוטה ופרק חלק וסוף
כתובות נזוה"ק נכמה דוכתי ונכל הספרים הקדושים נכל
הסימנים כי הן הנה החנלי משיח. אמנם החיל של הס"א
ונתוכם המנהיגים והרבה אדמורי"ם הנבועים וכו' וכו'
הולוכו שולל את כל ישראל כי רק להתפלל על שלום העמים
אזה"ע עיקר התכלית וכיוצא בהנליהם והפכו את הקערה
כמהפכת סדום ועמורה. כנגד התורה. רק להחניף ולתת להם
כסף תועפות עי"ז וכו' וכו'. וכאשר נזוה"ק נמס"נ מיום
התחלת המלחמה ועד עתה אשר כל יום קשה מחנירו ר"ל
כי "השלום" המתועב שלהם כלומר של הסט"א יהי' גרוע
יותר לכ"י (ונפרט ליר"א) מן המלחמה נכל ענינים וכאשר
נגלה לעין כל וכאשר קנלתי מאצותי הקדושים זי"ע מה יהי'
המלחמה ומה תכליתה רק לתשו' לאנ"י והתקרבות הגאולה.
והמה כחשו והפכו דברי א"ח כנו' ומנזאר נרמז"ס (הל'
מלכים) שכל מי אפי' שהוא מאמין (לפי דבריו) נציאת
המשיח רק שאינו מחכה לציאתו ה"ז כופר וד"ל. עכ"פ
חשנתי לכאורה נעת שעשו הנציקע"ט נאשכנו נגד מסחרי
היהודים נודלי אינו ענין לגזור תענית כי המה רוצים ככולם
שם מחללי ש"ק נפרהסיא נחנותם ושלמו להם מדה כנגד
מדה נאותו מדה נכל השנוע ואם לא ישונו מחטאם נחילול
ש"ק איך כמו נחזיק עוד מעשיהם נחילול שנת. והי' טונ
להזהירם מקודם לאנ"י גם אעפ"י שחטא ישראל הוא שיראו
וינינו כי אנצו אלקים הוא נעד חילול ש"ק כנו' וישינו אל ה'
ויסגרו חנותם ומלאכתם נש"ק ואז נתפלל נעדס ונגזור ת"ז
להתפלל על הגלה והגלחה שלהם נכלל ישראל, אך שרעפי
השינוי כי לא גרוע ר"ל ממחלה מהלכת גם אלל הד"א
דפסקין נש"ע שנגזור תענית משום שני מעיהם דומין
לנ"א ומכ"ש נזה כי הוא מכה מהלכת ר"ל כי כן יעשו נכל
המדינות (חלילה) וגם אלל השומרי שנת מאחז"י כי נידוע
דעשו שונא ליעקב וכאשר מנזאר נזוה"ק (סוף פר' נלק)
מסימני חנלי משיח עקתין ייתין נתר עקתין ושונאי ישראל

יתגברון כדן ייתי מלכא משיחא. וכאשר הסירו מסוה הנזשה
וד"א העולמי מעל פניהם. אז הוא סכ"נ ממש גם נמדינתו
ופולין ולונגארן וכיוצא כנודע ונפרט (מהידיעות) שנשמעו
עתה אשר ממש נחליתי נשמעי ע"כ נודלי ראוי לגזור תענית
וכל ערוס יעשה נדעת כל רב יר"א נעירו. והש"י ילינו
ויעזרנו נ"ז נציאנג"ז למען נכוד שמו ואמתת אמונתו נאהנה
נזכות אבותינו אמנם נתעוררתי מכהדר"ג וגם ממק"א
מידידים רננים חכמים וחסידיים שאעורר לנזם ת"ז כללי
ועולמי ולעשות תעמולה והסתדרות כזה אשר כל כלל ישראל
יתענו ניום אחד ונאמירת תהלים והתעוררות תשובה
וכיוצא. אך לזה לא אוכל לתת הסכמתי לתתם שמי על "קול
קורא" כי עס מי נלך נדורו של שמד כזה וכו' וכי הנינים או
המזרחים או האגודיים ודומיהן ישונו אל ה' ואמונתו? הכזה
נזם אצחרה? נזוה הנציא ישי' מפי ה'. ועוד שם ולהכות
נאגרוף רשע לא תזומו וגו' (ועוד שם) פתח חרונות רשע
התר אגודות מוטה וגו' הן המה האגודות ונחיות נמארינגאד
נעת השקיעה ל"ע לאחז"י נחזרון וצירושלים נחתי או
אנטרא"ג ופלא"ן להשקיע השפ"ד על אחר ליסע אז נאותו
יום לפראג ולווינן לראשי צירי הממשלה האנגלית לפעול מיד
נממשלתם נלונדון (ע"י הראדיא) הגלה מיד על אחר ונאופן
שיחזרו אליו המפלגות מנכות הנצל פעור שלהם (אשר הוא
ממילא נלי תבלית רק להעלות חימה וקנאה נין הערציים
וכיוצא נרות נרורות ר"ל) ולא רלו שום א' מהם ממנהיגי
המפלגות הנ"ל שהי' שם (נמ"ז) אם כי הודו שהוא רעיון
נשגב (אין ענין ועת להסציר ולהאריך נפולטיק כעת) והי'
דרך להגיל נפשות על אחר. ונתגלה קלונס גם אז ועד עתה
כי רק לגרמיהו הוא דענדי לכנודם וממונם ונאחונם רועי
אליל מסיתי כל ישראל אוי לנו שכך עלתה לנו ניימיו וכו'
וכו' ואחז"ל נש"ס מס' כריתות (דף ו' ע"ז) כל תענית שאין
נה מפושעי ישראל אינו תענית ולמדו מחלצנה נקטורת
ומשמע שצריך שיהיו הפושע ישראל רק חלק העשירית מלנד
וכן משמע שם נמהרש"א (נחי' אגדות) שעיקר יהי' הנזור
של עשרה כשרים ואז ינטרפו גם חלק הי"א דוגמת החלצנה
וגם נ"ל אותן רשעים שאינם פורשים מדרכי צינור (רק
רשעים לתאותם) וכנראה שם מד' המהרש"א נכריתות.
משא"כ לעשות ת"ז עולמי שאלו הרשעים הידועים כמעט
המה נפישו מינן והמה רוצם ככולם פורשים מדרכי צינור
וכו' ואם נניחם ולא ינטרפו אליו האוילים וכו' נודלי יעשו
המה להיפוך ומה יאמרו הנריות וההמון נודלי אינו ענין
לפענ"ד לת"ז כללי ועולמי הש"י יחוס על פליטת עמו נישועה
וגאולה ושוכט"ס.

סימן כא

ב"ה יום ה' י"ד מנ"א תרצ"ז

כבוד ידיני הרב הג' החה"ש מהר"י אונגא שליט"א

אחד"ש כת"ר באה"ר!

מפני טרדות העצומות לרגל סיום זמן הלימודים לא כתבתי לכת"ר עד היום, ובינתיים בא האסון הגדול ובלבל את מחשבותינו. ה' ינחמנו בנחמת ציון וירושלים.

וע"ד השאלה באשה שוטה שרוצים לסרסה אי מחויבים למחות — הנה לפ"ד יש מקום להקל בזה, שהרי סירוס באשה אינו אלא איסורא בעלמא, עיי' רמב"ם הל' איסורי ביאה פי"ז ועיי' באהע"ז סי' ה' ובב"ח שם, ויש מקום לומר שמותר לאשה לסרס א"ע בכהאי גוונא, דלא גרע זה מצער לידה, וצריך ישוב הדעת. ועכ"פ אם היא שוטה ואינה יודעת למחות אין על אחרים שום חיוב אלא מטעם "אמור ואמרת להזהיר גדולים על הקטנים" ושוטה הוא כקטן, עיי' ביבמות דף קי"ד וברשב"א לענין איסור דרבנן אי מחויבים להפרישו.

ובגוף דברי הב"ח הנ"ל, שכתב שיש סירוס באשה גם ע"י השקאת עקרין ומתרץ הסתירה בדברי הרמב"ם שכתב: המסרס נקבה פטור, ומשמע שאסור, וגם כתב: מותר לאשה לשתות מי עקרין שלא תלד — ותירץ, שאינו אסור אלא כשמסרס שלא לצורך, אבל במקום צער לידה מותר — הנה מפשטות לשונו של הרמב"ם משמע שיש חילוק בין מסרס בידים ומשחית איברי הלידה לבין מסרס ע"י השקאה, וכן משמע גם מדבר הסמ"ג לאוין ק"כ, עי"ש, ומ"ש הב"ח שבפ"ח שרצים משמע שלא שייך סירוס בנקבה אלא ע"י השקאת סם — הנה בגמ' שבת דף ק"א, א, ע"א, שא"ש: אלא באשה, משמע שיש סירוס באשה, אלא שמותר, וע"כ צ"ל שמ"ש התוס' שם, ד"ה והתניא, שלא שייך באשה סירוס, היינו מצד הדין דלא מיפקדא בפו"ר, ועיי' בס' מעשה רוקח על הרמב"ם, ויש לי עוד הרהורי דברים בזה, ועיי' גם בדברי התוס' ד"ה בזקנה

ובעקרה, של"ש בה סירוס אחר סירוס ומ"ש במעשי רוקח ע"ז.

וכאשר אני נוסע מחר אי"ה למארי'ענבאד וטרוד בהכנות לדרכי, אני מקצר בזה ועוד אשיב בל"נ לעיין בזה בשובי אי"ה מדרכי.

ידידו ומכבדו כערכו הרם

יחיאל יעקב וויינברג

בדבר קונטרסי על הימום הבהמות ע"י חשמול קודם שחיטתן

שבבהמה או נזק קטן, שאינו עושה את הבהמה טריפה.

ידוע, שהרופא המומחה מהר"ש ד"ר ליעבען מפראג נ"י הוכיח, שהחשמול גורם נזקים גדולים לגוף הבהמה, נזקים שיש בהם משום חשש טריפות. ולכן הציע לעשות בחינות חדשות של חשמול עפ"י המיתודה של החוקר הצרפתי לעדוקי, שהציע את היישון החשמלי קודם ניתוחים חירורגיים אצל אדם חולה הצריך לניתוח. ההבדל שבין המיתודה הישנה של החשמול ובין זו של לעדוקי הוא, שעפ"י המיתודה הישנה נוהגים להביא זרם חשמלי חזק בראש הבהמה ובגופה בפעם אחת. ע"י הובלת הזרם החזק באופן פתאומי מתהווים בגוף הבהמה נזקים גדולים, שיש בהם חשש טריפות. ואלה הם:

(א) חשש נפולה. נגיעת הזרם החזק באופן פתאומי מפיל את הבהמה לארץ בכוח גדול ויש חשש ריסוק איברים, כמו בנפולה מן הגג. גם ראו שע"י פעולת החשמול נעשות תנודות בשרירים (מוסקעל קרעמפפצן), או שנדהמו השרירים לגמרי (מוסקעל לעהמונג) ואפשר שפעולת החשמול מצד עצמה גורמת לריסוק איברים.

(ב) חששות טריפות במוח. כשבדקו במוח הבהמה לאחר שחיטתה מצאו מים בין קרום העליון לקרום התחתון או בין הקרום התחתון למוח. מצאו גם נקודות של דם בקרום המוח, וכשחתכו את המוח לחתיכות מצאו נקודות של דם. גם בשר המוח עצמו נעשה נימוס, ומתדבק (קלעברג).

(ג) חשש טריפות בריאה. הסירכות שעל הריאה נקרעו באופן שאי אפשר עוד לבדוק אותן. מצאו גם שנימי-הדם שבתוך בשר הריאה נקרעו. מכאן, שהחשמול מכביד את הנשימה של הבהמה וגורם נזקים לריאה.

(ד) הבלעת דם באיברים. בשעת השחיטה של בהמות שחושמלו קודם שחיטתן ראו שאין הדם מקלח במידה הרגילה אלא מקלח מעט מעט. גם מראה הדם הזונק מבית השחיטה הוא כהה (דונקעל) ומראה הבשר של הבהמה הוא ירוק קצת. זה מורה כי הזרם החשמלי גורם חניקה לבהמה, שע"י מתעכב

מיום שנשמעו הממשלות בארצות שונות לדרישת חברת "צער בעלי-חיים" וגורו על הימום הבהמות (בעטייבונג) קודם שחיטתן, הוצעו אופנים שונים על הימום הבהמות. בראשונה הציעו לדקור בחנית חד או לירות בחץ במוח הבהמה ולהמית ע"י זה את חוש ההרגשה של הבהמה הנשחטת. יש והציעו ליישן את הבהמה בסמים חריפים, כגון חלורופורם וכדומה. אח"כ חזרו מזה, לפי שהוברר כי טיפות החלורופורם מרעילות את הדם ומקלקלות את הבשר וגורמות נזק לבריאות האדם האוכל מבשר בהמה שכוז.

בזמן האחרון הציעו ליישן את הבהמה קודם שחיטתה באמצעות חשמל ובבתי המטבחים של נכרים נוהגים עכשיו לחשמל את החזירים קודם המתתם. אמנם, עדיין שוררים חלוקי-דעות בין החוקרים אם היישון באמצעות החשמל נוטל מן הבהמה את חוש הרגשת הצער, יש רופאים שאומרים כי החשמול מחליש רק את עצבי התנועה ואת השרירים, אבל לא את עצבי-ההרגשה. באופן שאי אפשר לבהמה להגיע את איבריה ולהודיע את צערה, אבל רגש הצער לא ניטל הימנה.

כידוע יוצאים מן המוח חוטי-עצבים ומתפזרים בכל איברי הגוף. העצבים מתחלקים לשני סוגים: לעצבי הרגשה (בלעז: נערווי סענזיטיווי) ולעצבי תנועה (בלעז: נערווי מאטארי). עצבי ההרגשה מביאים כל מיני הרגשה של הגוף ואיבריו אל המרכז שבמוח, ומכאן הרגשת הצער, ועצבי התנועה מובילים את התעוררות התנועה שבמוח (שנתעוררה ע"י הרגשת הצער) אל השרירים שבאיברים ומכאן תנועת האיברים הבאה בעקבה של הרגשת צער. ומחלוקת הרופאים היא, אם זרם החשמל מחליש את מרכז עצבי ההרגשה שבמוח באופן שאין הבהמה מרגישה שום צער, או מחליש רק עצבי התנועה ושרירי האיברים.

ברם, פירוד-דעות זה שבין החוקרים אינו נוגע לנו. לנו חשוב רק לדעת אם החשמול גורם נזק לגוף או לאיברי הבהמה במידה כזו שהיא נעשית טריפה, או שגורם רק לסילוק הרגשת הצער,

הדם ואינו מקלח בחוקה וגם מראהו משתנה.

(ה) בשעת בדיקת הבניימעים מצאו עליהם מעין אבעבועות של דם.

(ו) מצאו דם בבשר הלב. זה מורה, שע"י החשמול נחלש הלב.

בשל חששות אלו הציע מהר"ש ד"ר ליעבען להנהיג את המיתודה של לעדוק. ע"פ מכניסים בתחילה זרם חלש ולאט לאט מתחזק הזרם עד שהגיע לשיעור שגורם ליישון הבהמה. אין הזרם בא במידה חזקה ובפעם אחת אלא הולך ומתגבש (בלעז איינשלייכענדער שטראם) לאט לאט. אין הבהמה נופלת לארץ בכוח. אפשר להכניס זרם רק בשיעור הדרוש למטרת היישון. וע"י בחינות רבות אפשר למצוא את השיעור הראוי, שמצד אחד יספיק ליישון הבהמה ומצד שני אינו גורם נזקים של טריפות לגוף הבהמה.

אולם, מצד הרופאים של אר"ה יש התנגדות למיתודה זו של לעדוק-ליעבען. לדעתם אין מסלקים ע"י את הרגשת הצער של הבהמה הנשחטה. ולפי המצב השורר אין תקוה כי הממשלות תרשינה להנהיג את החשמול עפ"י הצעת ד"ר ליעבען.

בזמן האחרון נעשו נסיונות חדשים עפ"י המיתודה הישנה. במקום שבתחילה היו משימים את הכלים על ראש הבהמה ועל השדרה, נותנים עכשיו את הכלי על ראש הבהמה אצל האזניים.

הרבה מן הנסיונות הצליחו. אחר הבדיקה לא מצאו כל אותם סימני הטריפות שמנינו לעיל. המוח לא ניזוק וגם מים לא נמצאו בו. גם הקרומים ה' נקיים מדם. הריאה היתה שלימה וגם הסירכות לא נקרעו. גם בבני מעים לא מצאו דם, אלא שבמוח עצמו מצאו שינוי קטן. היינו, כשחתכו אותו לחתיכות מצאו במקומות החתך נקודות של דם, אבל בשר המוח לא נימוס.

עשו גם בחינות בבהמות חיות. חשמלו את הבהמה ואח"כ המתינו עד שניעורה משנתה. הרבה בהמות עמדו מעצמן והלכו הילוך יפה ואחדות לא יכלו לעמוד בעצמן ורק לאחר שהעמידה אחרים הלכו הילוך יפה. אבל אירע גם שלאחר החשמול לא יכלו לעמוד ולילך. אולם ע"י התקונים החדשים שנעשו, או אפשר עוד לעשות בכלי החשמול, אפשר לקוות שע"י בחינות חדשות ימצאו סו"ס השיעור הראוי שמועיל ליישון הבהמה ואינו מזיק לאיברי ה' מי שהציע לבדוק אחר השחיטה את איברי הבהמה כגון את המוח, הלב, הריאה ושאר האיברים הפנימיים ע"י רופא יהודי. ויש חלוקי-דעות אם מספיקה בדיקה פשוטה או נחוצה בדיקה מיקרוסקופית של אותם האיברים.

הד"ר ליעבען מפקפק אם יש לסמוך כלל על אותן הבדיקות. כי פעולת הזרם החשמלי תלוי במבנה הגוף של הבהמה ומצב בריאותה ובמצבים שונים, כגון אם הבהמה נמצאה במקום לח או במקום יבש וגם במצב האויר וכדומה. באופן שאין לדון מן הבחינות שעלו יפה ולא הזיק, על כל בהמה שתהי' שבודאי לא תינזק. השאלה היא איפוא: אם כדאי להמשיך את הבחינות, כדי להגיע למצב, שאפשר יהי' לומר שזרם בשיעור שכזה אינו גורם שום נזק ואינו מעורר שום חששות של טריפות. אם יש לסמוך על הבדיקות הנ"ל, שיוסיפו לעשות בבהמות חיות (אם יכלה לעמוד ולילך אחר החשמול), וגם בבהמות שחוטות (בדיקת המוח והאיברים הפנימיים) ולהחליט על יסוד הבדיקות שאין בחשמול שום חשש טריפות.

ובטרם שנציע את כל הספיקות והחששות המתעוררים בבחינות של חשמול הבהמות עלינו לבאר את פעולת החשמול על גוף הבהמה: כידוע יוצאים העצבים שבאיברי הגוף מן המוח שבראש ושבתחת השדרה. במוח הראש נמצאים המרכזים של כל החושים: חוש הראות, חוש הריח, חוש המישוש, וכיוצא בהם. גם לכוף הנשימה יש מרכז במוח. שנקרא מרכז הנשימה (ובלשונם: "קן-החיים" — נאדוס וויטאליס). שממנו יוצאים העצבים הנדבקים בשרירי הנשימה, כגון שרירי החזה והצלעות וחצר הכבד. אם עפ"י איזו סבה נהרס מרכז הנשימה שבמוח אין הבהמה יכולה לשאוף אויר והיא נחנקת. ואם זרם החשמל יפגע את מרכז הנשימה שבמוח במידה חזקה יותר מדאי, יאחו אותה השבץ והיא מתה מיד.

אם המיתה מוכרחת לבוא מיד, או אפשר שתבוא לאחר זמן קצר — צריך בדיקה מצד רופאים מומחים ובקיאים בטיב פעולת החשמול. רופא יהודי מבערלין, שהרב מהר"ע מונק ואני הצענו לפניו שאלות שונות ע"ד פעולת החשמול, הביע דעתו, שאפשר שהמיתה הוודאית תאחר לבוא. היינו, שבתחילה יאחזנה השבץ ורק אחרי עבור זמן קצר תמות. ולדעתו, מות הבא ע"י זרם החשמל יוכל להחשב למות מדומה (שיינטצד), לפי שהרבה פעמים מצליח הרופא ע"י תרגילי-נשימה (אטעמאיונגען) וע"י עיסוי הלב (הערצמאססאזשע) להעיר את המת המדומה לחיים. פעולת החשמול על המוח תלוי במידת החוזק של הזרם. זרם חזק אפשר לו להמית, וזרם חלש אפשר לו ליישן בלבד. אפשר לו גם להמית, אך זוהי מלתא דלא שכיחא. אחרי היישון ניעורה הבהמה והיא חיה ובריאה כמקדם. ומה שמוצאים נקודות דם במקומות החתך

בדבר שכבר נאסר ע"י כל גדולי הדור החולף, ברם, כיון שנתפשטה שמועה שאני הייתי בין המתירים, כביכול, עלי לספר לדור הבא פרשת העניין הזה.

את החיבור כתבתי בשעה של מצוקה נוראה, בשעה שחרב חדה היתה מונחת על צואר ישראל, המלכות הרשעה של הנאצים גזרה איסור על השחיטה בלא הימום הבהמה קודם שחיטתה. לאחר מכן שללו הרשעים בתחבולות חוקיות אכזריות את האפשרות להביא בשר מן החוץ, ולא התירו את השחיטה הכשרה אפילו לזקנים וחולים מסוכנים, נשקפה סכנה חמורה, שמרבית היהודים לא יעמדו בנסיון, ח"ו, ויכשלו באכילת נבילות וטריפות, בינתיים נשמע הקול, כי שלטון הקהילה העברית הגדולה בברלין חושב מחשבות להנהיג במוסדות של הקהילה: בית החולים, בתי מושב זקנים, ועוד, אכילת בשר נבלה וטריפה הנקנה במקומים של נכרים, שלטון הקהילה, שאף-על-פי שהורכב ברובו הגדול מאנשים ליברליים, נוהר תמיד בנוגע למוסדות הקהילה הרשמיים בענייני כשרות עפ"י חוקי השו"ע והיה סר למשמעתם ולהשגחתם של הרבנים החרדים — טען, שבשעת גזירה קשה זו הם אנוסים בעל כרחם להתיר אכילת נבילות וטריפות משום פיקוח נפש של החולים והזקנים, שע"פ פקודת הרופאים אי אפשר להם להתקיים בלא אכילת בשר, שמועה זו פגעה בנפשנו, בצר לנו גמרנו להימלך עם גדולי ליטא ופולין אם יש להתיר בשעת סכנה זו את ההימום כפי דרישת הממשלה הרשעה, נסעתי לוויילנא, לוורשא וללובלין לשם התייעצות בשאלה חמורה זו הנוגעת לנפש היהדות בגרמניה, הגאונים, מרן רח"ע, זצ"ל, בוויילנא והר"מ שפירא בלובלין, הטילו עלי לחבר חיבור בבירור השאלה מצד ההלכות.

שמעתי לעצתם, והתשובה הבאה בספר זה, היא פרי יגיעתי ועמלי הרב בבירור השאלה מכל צדדיה, אמנם, הראתי בה פנים להיתר, אבל ידעתי מראש כי גאוני ליטא ופולין וגדולי ישראל, מנהיגי היהדות החרדית, לא יסכימו לעולם להיתר שיש בו משום שינוי אופן השחיטה הנהוג בישראל מדורי-דורות, ואף אני בעצמי לבי נקפני מאוד לגשת לעניין חמור זה של כשרות השחיטה, שהוא יסוד היסודות בחיי ישראל, וכמה פעמים אמרתי להרה"ג הצדיק מה"ר עזרא מונק זצ"ל, רבה של עדת ישראל בברלין, שעמד בראש הלשכה לענייני השחיטה בגרמניה, שאין לנו לחפש היתרים לשינוי אופן השחיטה, היהודים החרדים לא יאבו ולא ישמעו לנו, הם ירעבו ויענו את נפשם ולא ירצו לטמא את עצמם באכילת בשר בהמות, שנשחטו עפ"י האופן שהתקינו

שבמוח לאחר שחשמלו את הבהמה, ביאר לנו הרופא הנ"ל כי הרבה סבות ישנן לכך, אפשר שנקרעו נימי-הדם שבמוח (בלוט-גלעפסע) ואפשר גם שנהרסו שרשי השערות ונימי הדם שבתוכם, לפי דעת אותו רופא אפשר גם שנקודות הדם שבמוח באו ע"י השחיטה ולא ע"י הזרם החשמלי, על שאלתנו: כשזרם החשמל גרם למיתת הבהמה אם אפשר להכיר סיבות המיתה ע"י נזקים באיברי הבהמה הפנימיים — ענה, שאפשר להכיר ע"י בדיקה מיקרוסקופית בתאי-המוח שנהרסו ע"י הזרם, בבהמה שלא נשחטה, הרי שיבתה לבריאותה מוכיחה שלא ניוזקו תאי-המוח.

עפ"י הדברים האלה יש לנסח את הספקות והחששות שיש בבהמה שחשמלו אותה ואח"כ שחטוה באופן הבא, ואלו הן החששות:

(א) חשש מסוכנת, (ב) חשש טריפות מצד אינה חיה, (ג) חשש טריפות באיברי הבהמה, (ד) חשש טריפות מצד נפולה, (ה) חשש ריסוק המוח מצד הכאת הזרם בראש הבהמה.

בפתרון של חששות אלה תינתן ממילא תשובה על השאלה: אם אפשר לסמוך על בדיקת בהמה שחשמלו אותה ואח"כ שחטוה? ואם אפשר לסמוך על יסוד נסיונות שעשו בזרם חשמלי בשיעור ידוע, שחשמלו בו בהמות הרבה ונשאר חיות ובריאות, להתיר את החשמול בכלל בלא שום בדיקה, או לכה"פ ע"י בדיקה לאחר שחיטה.

ומראש אני מודיע, שכל מה שאכתוב לקמן אינו אלא בתור מו"מ של הלכה ולא להורות הוראה אני בא, הלכות טריפות הן הלכות חמורות מאוד ועניין הכשרות הוא אחד מיסודי היהדות וגזירות החשמול היא גזירה קשה המביאה בסכנה כל ענין הכשרות של כללות האומה, אשר מסרה נפשה על החזקת הכשרות בטרתתה, וחלילה ליחיד להורות הוראה בזה, והדבר מסור לגדולי ההוראה שבדור, אשר מדבריהם לא נוזז אף זיז כל שהוא וה' ישמרנו משגיאות.

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רבים יתמהו וישאלו: מה הגיע אותי לפרסם עתה את חיבורי על ההימום, שנכתב לפני עשרים וחמש שנה בשעה שנגזרה גזירת השחיטה ע"י הצורר הטמא והמזוהם, ימ"ש, בגרמניה הנאצית? הכל יודעים, כי במשך כל הזמן ההוא לא נשמעתי לבקשת רבים ושלוימים, וסירבתי לפרסם את חיבורי בדפוס, כדי שלא לתת חרב בידי שונאי ישראל, המקטרגים נגד השחיטה הנהוגה בישראל וגם למנוע בעד אלה שאינם מיראי-הוראה, שלא ימהרו להורות היתר

בדוקים ומנוסים להבחין אם זרם החשמל לא גרם נזק של מיתה או של טריפה לאברים הפנימיים של הבהמה הנשחטת.

אין איפוא לחיבורי זה שום ערך מעשי. ואם אני מפרסמו כאן אין זה אלא בשביל בירורים של כמה סוגיות ועניינים מפקפקים בפוסקים, ובעיקר — בשביל החשיבות ההיסטורית שיש בו לשם הארת המצב הנפשי ששרר ביהדות גרמניה, פולין וליטא לפני חורבנה הגמור.

הרשעים צוררי ישראל. הצורר המזוהם, ראש השלטון הנאצי, ואלפי אלפים שכמותו יאבדו מן העולם ודתנו הקדושה תעמוד לעד. על היהודים בגרמניה לעמוד בנסיון למען דתנו הקדושה ולמען אחינו שבכל הארצות. ואם, ח"ו, נורה להקל בשחיטה זו, עתידים אנו לסכן את השחיטה היהודית בכל העולם. עלינו להראות לכל העולם שמוכנים אנו למסור את נפשינו על קדשי ישראל, ויראו שונאינו שבאיסור השחיטה לא יעבירו את ישראל על דתו, ואולי — ירפו ממנו.

הטעם עצמו, גרמת צער לבעלי-חיים, שבשמו הם דוגלים, מהוה פגיעה קשה בכבוד תורתנו הקדושה, שהיא היתה הראשונה להזהיר על צער בע"ח. וסוף כל סוף תגלה ערות שנאתם ואכזריותם לעיני השמש. הם רוצים להמית אנשים מישראל ברעב מתוך טענת שקר ורחמנות מזויפת על בעלי-חיים.

ברם, חזקו עלי דברי רבתי וחברי הרבנים, שעלי לעסוק בבירור הלכה חמורה זו, שלרגלי חידושה לא נתפרשה ולא נתבררה בספרות הרבנית. מעולם לא עלה על דעתם של רבני ישראל, כי יבוא יום ויכריחו אותנו לשנות מאופן השחיטה שהונהג בתוכנו עפ"י צווי תורתנו הקדושה והוסדר ע"י חכמינו, ז"ל, מקבלי תורה שבע"פ. ועכשיו, שהגיעה שעת צרה ומצוקה והעם מפרפר בחבלי יסוריו הנוראים, על מנהיגי ישראל להראות שאין הם קשוחי לב, ח"ו, וכי הם משתתפים בצער עמם ועושים כל מה שביכולתם להגיע לשערי הצלה.

החיבור על הימום הבהמות המודפס כאן נשלח בעצת מרן הגר"ח זצ"ל, לכל גדולי ישראל לשם קבלת חוות דעתם. רובם ככולם אסרו את ההימום ואף המעטים, שנטו להקל בשעת מצוקה ומשום ספק פיקוח נפש, חזרו אח"כ מדעתם הראשונה והצטרפו אל האוסרים, ונמנו וגמרו שלא להתיר בשום אופן. קיום דת ישראל וקיום היהדות והצלת כבודה דורשים מאתנו להביא את הקרבן הקדוש של איסור בשר ובזכות זו נזכה לגאולה שלימה ולפדות נפשנו.

ואף אני בעצמי ראיתי כי לא עלה בידי לברר כל הספקות ולהסיר כל החששות הקשורות במעשה ההימום החשמלי של הבהמות קודם שחיתתן. למרות כל הנסיונות הרבים בחשמול הבהמות שהרבה עמלנו עליהם, נוכחתי כי הבחינות שנעשו בבהמות מחושמלות, שלאחר החשמול נשארו חיים, אינן מוכיחות כלום, כי לא כל הבהמות שוות בטבען ובמבנה גופן, מה שאינו מוזק לבהמה אחת יוכל לגרום מיתה ודאית לבהמה אחרת, ואין לנו אמצעים

מאת הגאון הרב חיים יצחק ירוחם זצ"ל

אבד"ק אלטשטאדט, בעל שו"ת „ברכת יצחק“ ו„ברכת חיים“

ב"ה ברי' דמועדא עשרה למב"י שנת של"ח
 אור"ך ואמית"ך
 ברכות מאליפות מרובכות, תעופינה כיונים על
 ארובות, לכבוד הרבנים גדולי הערך ורמי המעלה
 שליט"א.

הקונטרס הגיעני בערב חה"פ העעל"ט ולא
 יכולתי להשיב על אתר, כראוי מפני הכבוד, מפני
 טרדת הכנה דרבה לחג הקדוש ובמועד הי' ידי

אסורות מלכתוב (אם כי מותר בד"ת, ל"ה טעם
 ההיתר שי"ך כאן). ועתה הנני משיב על אתר.
 ועברתי על כל הקונטרס, והנה הדבר פשוט הוא
 לאיסור גמור, ואין כלל מדרכן של ת"ח לצדד בזה
 אפי' לפלפולא בעלמא.

ואיני רוצה לבאר הטעמים בזה כעימ"ש בשו"ת
 דב"ח ח"א האו"ח סי' כ"ג ממה שקיבל מן חותנו
 הגאון ז"ל, וע"ע כעיי' במכתב הג"ר בעריש מייקיל'ש
 אבד"ק ווארשא ז"ל בסוף הקר מודעא לבית ישראל.
 אליכם אישים אקרא. בבקשה מכם, עמדו בנסיון,
 והראו שהנכם מבני בניהם שנסקלו ושנצלבו על מצות
 התורה ק, וכ' בשו"ת הרא"ש כלל ל"ב סי' ח' על
 אודות הנשים אשר ל"ה להם כח לעמוד בהיכל המלך,
 ובעת הגזירה החליפו מפני אימת מות, וכאשר מצאו
 נס ונמלטו חזרו לדתן, אמת הדבר כי מאד הרעו
 לעשות, וצריכות חרטה ותשובה וקבלת יסורין יותר
 מהמחליפין שלא בשעת הגזירה, כי פרהסיא היא,
 ושעת הגזירה אמרו חכמים אפי' לשנויי ערקתא
 דמסאנא אסור לשנויי, ודוגמא לדבר למלך גדול
 שהי"ל הסרים למשמעתו, ומקצתם סרו מעליו ושוב
 השלימו וקבלם המלך, לימים נודווג לו מלך גדול
 בחיל כבד, ואותו המלך קבץ משרתיו, ואמר להם
 אתם רואים שכנגדי ידו תקפה עלי, אשר יבחר בי
 ובכבודי, יקרב אלי ויערה נפשו למות, מקצתם נודווגו
 אחרי המלך וקצתם נסוגו אחור, והמלך נלחם ונצח
 להם, והנסוגים אחור בקשו להשלים עמו בתיקון קל
 כאשר השלימו כבר הסרים מעליו, ולא נאות המלך
 לקבלם, כ"א בתיקון רב, כן מלכו של עולם מתפאר
 בישראל כאשר מוסרים נפשם לקדושתו כמ"ש:
 ויאמר לי עבדי אתה ישראל אשר בך אתפאר, עכ"ל.
 כו"ח מכאב לב ומצפה לרחמי שמים במהרה
 דידן.

הק' חיים יצחק ירוחם
 מלפנים אבד"ק אלטשטאדט ואני בעוה"ר
 עודני בתוך הגולה צופה לישועה שלימה
 במהרה דידן.

Responsum 5

ב"ה, יום ד' ויחי תרצ"ט, פפא"מ תע"א.

(א) **שמירה** באפר אין מהצורך [דאמרינן] (שבת קנ"א, ב') תינוק בן יומי חי א"צ לשומרו מן החולדה ומן העכברים, אבל עוג מלך הבשן מת צריך לשומרו מן החולדה ומן העכברים שנא' ומוראכם וחתכם יהי' כ"ו שאדם חי אימתו מוטלת על הבריות, כיון שמת בטלה אימתו. ואמרינן (ברכות י"ח, א') בספינה מניחו בזוית זו ומתפללין שניהן בזוית אחרת דלכך עזאי אין חוששין לעכברים ולת"ס חיישי', ולפי"ו באפר לכו"ע אין מהצורך, והוא פשוט].

(ב) **כשבאה** הידיעה מהערכאות החיוב לישב שבעה תומ"י [ועי' אבה"ו סי' י"ז סעי' ה' למחות להספיד כל זמן שאין כאן עדות שהיא ראוי' להשיאה. עכ"ו אי' בדיוק ביור"ד סי' שע"ה סעי' ז' מי שטבע במים שיש להם סוף דמונים משנתיאשו לבקש, לאפוקי שאין להם סוף שאין מתאבלין, משום דאין היתר לאשתו וע"ש בש"ך סק"ז, וע' בת' שבות יעקב ח"א סי' ק"ב דשמע מאביו מהור"ר יוסף שבימי בחרותו אירע מעשה כזה בק"ק פרנקפורט לפני הגאון מהר"ם זצלה"ה והורה שלא יאמר קדיש רק יתפלל לפעמים ע"כ. וע"ש בח"ב סי' קי"ד, ובת' כנסת יחזקאל סי' נ"ז והובא בפתחי תשובה שם סק"ג דנהג להתיר לומר קדיש בביתם מאחר שכבר מפורסם ששולחין השו"ת לרבנים, ל"ח שיבא ויעיד שפלוני מת סתם, שם דוקא שיש איזה פתח להיתר העגונה, משא"כ במים שאין להם סוף דא"א סתם להתיר. גם הכנסת יחזקאל יורה דלא יאמרו קדיש שלא יבואו להתיר עגונה עי"ז, וכמו שהורה הגאון מהר"ם זצ"ל פה קהלחנו, כל זה דוקא במקום דאין להתיר משא"כ אנו דמתירין ע"י ערכאות. וכן התירו גדולי הדור כמובא באחרונים, והבאתי מזה במק"א, ע"כ החיוב לקרוע ולישב שבעה תומ"י].

(ג) **ארגז** האפר ישאו במטה לכבוד המת [וכן הורה פ"ק הגאון המטה לוי, במכתבו לקהלחנו 22/6 1893 אף באלו שעושים כן לרצונם, על אחת כמה וכמה באלו, וכן הורה שם שכ' נשרפים לא יקברו יחד בקבר כמו בסי' שס"ב, וליתן לו קבר כמו בשאר מתים בלי שום פדות ושינוי, כ"ש באלו שיתנו קבר נכון, ואם יש חיוב קבורה באפר הנשרפים, ע' ספרי ח"א צד ר"ד].

(ד) **לקברו** בארון, כשא"א יקברוהו בארון קטן ואם גם זה א"א יקברוהו בארגז שבא משם.

(ה) **ארגז** האפר יעמפו מלית סביבו, גם יניחו שם תכריכין [כדי לחזק האמונה שהוא מוכן להתעורר לעמוד בתחי' ואינו ח"ו מאנשי מיטום וחבריו שאינם מאמינים ועי' בספרי חלק ראשון סי' ט"ז דל"א. ופה המנהג מקדמת דנא שמניחין בארון ד' חוטי ציצית, והוא לפענ"ד במקום הפסולה ע' יו"ד סי' שג"א סעיף ב'. ומניחין הד' חוטי ציצית כדי לחזק

האמונה שיקום בתח"מ ויהי' לו הכל מוכן להתעטף בציצית כשרות וכגוונא דר"י בירושלמי (כלאים פ"ט ה"ג) דיהבון מסנא ברגלי וחוטרא בירי ויהבון על סיטרא אין אתא משיחא אנא מעתד].

(ו) **כשאי** אפשר לקבורו בארון רק בארגז הבא משם כמו שהוא, יראו שעכ"פ התכריכין יהיו בתוך הארגז ודף קטן או אבן יניחו בשטחו כדי שלא יטנפו התכריכין.

(ז) **ביום** הקבורה, שהוא רובא דרובא אחר השבעה ולפעמים יותר משלשים, יתאבלו כל היום [ע' יו"ד סי' ת"ג סעי' א' מלקוט עצמות, וכשא"א יכולים להקל בזה].

(ח) **כשקרעו** ביום השמועה, א"צ לקרוע ביום הקבורה [אף דאמרי' יו"ד שם סעי' ב' כל שקורע עליו בשעת מיתתו קורע עליו בשעת לקוט עצמות, בנדר"ר אין כאן עצמות כלל, גם האפר אינו מטמא וכמ"ש בספרי שם דל"א ובמפתחות — הערות דר"ר בענין הקבורה דהחיוב הוא רק משום ראפרן אסור בהנאה, לא מצד קבורת המת, ומ"ש בט"ז סי' שע"ה סק"ב דבעשרה בטבת נהרג א' והשליכו בנהר דינוס ולפני אדר נתיאשו מלכבשו עוד והורה ר' יעקב למנות ז' ול' ולאחר שעבר ימי האבלות נמצא והובא לבית הקברות והורה לו הזקן רק לקרוע והסכים עמו הרמב"ן, בוראי כונתו לנהוג ג"ב באותו היום אבלות דלא גרע מלקוט עצמות דנוהג אותו היום, אבל בנדר"ר א"צ ומטעם זה הקלתי ג"ב בסעי' ז' כשא"א].

(ט) **יאמרו** צדוק הדין ויעמדו בשורה [אף דבעצמות אין עומדין עליהן בשורה ע' שם סעי' ג' מ"מ כיון שלא אמרו צדוק הדין וכן לא עמדו עליו בשורה מקורם יעמדו עכ"פ בקבורתו. וראיתי בקונטרס העברת עצמות משני בתי עלמין בכפר גריעזהיים ע"י חברות הקדושים דפ"ק דבי"ד אדר שני שנת תרנ"ז לקוטו העצמות משם ואמרו הצור תמים בהליכה מפני הפורים ואמרו קדיש, וכן בחדש מרחשון תרנ"ח לקוטו העצמות ואמרו מזמור מ"ט, פ"ח, צ', צ"א מתהלים ואחריהם הצור תמים בקול ואחר כך אמרו קדיש על בית העלמין. בוראי עשו כן ע"פ דברי הירושלמי (מו"ק פ"א ה"ח) אבל אומדין עליהן דברים, מהו דברים, רבנן אמרו קילוסין, וכמ"ש הרמב"ם והטור, דאומרים עליהן דברי שבח להקדוש ברוך הוא ודברי כבושים, עכ"ז הצור תמים וקדיש בכלל קילוסין הם, דמשבחין להקב"ה שממית ומחיה].

(י) **סעודת** הבראה א"צ באותו היום [אף דבלקוט עצמות מכרין עליהן בביתו ע"ש סעי' ג', מ"מ כאן עדיף יותר וכמ"ש בסעי' ז', אבל ביום השמועה ינהג סעודת הבראה כמ"ש בסי' שע"ח].

(יא) **ביום** הקבורה יניח תפילין, רק מי ששמע ביום הקבורה דינו כיום השמועה [אף בנדר"ר הוא יותר משלשים יום, דינו כשמועה קרובה, יען ראנו מונים שבעה ושלשים מעת שנתיאשו מלכברו וע"ש סי' שע"ה סעי' ה' ואצל השומע שנודע לו עתה ולא ידע כלום מקורם משעה שנודע לו מתחיל השבעה כ"ז שלא נקבר, אבל לצורך גדול מאד יש להקל גם בז האם הוא לאחר שלשים משריפתו, כאומן אחר אין להקל].

(יב) **יום** המיתה הוא יום היאצ"ט [ע' ש"ך שם סי' ת"כ סק"י, וע"פ מנהגנו גם בשנה ראשונה היאצ"ט הוא ביום המיתה וע' בת' מלמד להועיל או"ח סי' קי"ג אות ג' דכן הסכימו רבני אשכנז דלעולם היאצ"ט הוא ביום המיתה אף שהקבורה היתה ג' ימים אחר יום המיתה וכ"כ בת' כנסת יחזקאל סי' מ"ד וע' בבאר היטב או"ח סי' קל"ב סק"ה ובת' מהרש"ם ח"ב סי' רכ"א וע' במשמרת שלום בחי' דינים יו"ד ה' שמחות מערכת י' אות כ"ב. — כל זה דרשתי ברבים אור ליום ועש"ק כ"א שבט תרצ"ט לפני הח"ק דפ"ק, למען ירעו איך להתנהג ע"פ רתוה"ק על כל צרה שלא תבא ויבולע המות לנצח].

וע"ז בעה"ח חיוס יום הנ"ל פק"ק ורנקנורט על נהר מיין תרצ"ט.

מנחם מענדיל קירשבוים

אב"ד ור"מ דק"ק ורנקנורט ע"נ מיין

סימן א'

אם מותר להכניס עצמו לספק סכנה

כדי להציל חברו מודאי סכנה.

שאלה: בימים הראשונים לכניסת הגרמנים לליטא, בכ"ח סיון תש"א, מיד כשדרכו רגליהם הטמאות על אדמתה, הם החלו להראות את אכזריותם הגדולה כלפי היהודים בכל מעשי רשע וזדון, מדי יום ביומו הם התחילו לערוך ציד אדם ברחובות קובנו, צדו וחטפו יהודים, אנשים ונשים ושלחו אותם למבצר השביעי במקום שנקבע גורלם, במלאכת ציד היהודים והחטיפה נעזרו הזדים הארורים על ידי משרתיהם עושי דברם הליטאים שששו משוש על שניתנה להם על ידי הגרמנים ימ"ש האפשרות להצר את צעדי היהודים שנזאי נפשם מאז ומתמיד, לגרום להם צרות לחרגם ולהשמדם שלזה איוותה וכלתה נפשם מעולם.

וכל המיצר לישראל נעשה ראש, היו בין הליטאים כאלה שהצטיינו במעשי אכזריותם ורשעתם כלפי היהודים ביחוד כשרצו למצוא על ידי כך חן בעיני אדוניהם הגרמנים, עד שהגרמנים מינו אותם לראשים ומנהלים על מלאכת הציד והחטיפה של היהודים בהיותם סמוכים ובטוחים שיעשו את מלאכתם באמונה מתוך שנאתם העזה ליהודים הכבושה אצלם מדור דור המפעפעת בתוכם כארס ממאיר, ואכן הרבו הליטאים האלה לעשות צרות ליהודים ולגאל את ידיהם בשוד ורצח במדה לא פחותה מהגרמנים, מאות יהודים נחטפו בימים ההם על ידיהם ברחובות והוצאו גם מהבתים, וביניהם גם מספר רב של בני ישיבה.

ואז בימים טרופים אלה נתבקשתי על ידי מרן הגאון הצדיק ר' אברהם גרודזינסקי הי"ד, מנהל ישיבת מלובודקה, שאלך

אל ר' דוד איצקוביץ חי"ד שהיה מוכיר אגודת הרבנים ולבקשו שהוא ילך אל הליטאים שהיו ממונים על ציד היהודים שהוא הכיר אותם עוד מלפני המלחמה, שישתדל אצלם שישחררו את בני הישיבת שנחטפו על ידם.

ועלֵתה לפנינו השאלה אם מותר לו ללכת מצד הדין אל הליטאים הללו בדבר שחרור בני הישיבה, הואיל ויש בזה משום סכנת נפש בשבילו מכיון שהרי הם יכולים לחטוף גם אותו כדרך שהם חוטפים יהודים אחרים, אם מותר לו לסכן את נפשו בכדי להציל את חברו מצד הדין.

תשובה: במס' סנהדרין דף ע"ג ע"א גרסינן: מניין לרואה את חברו שהוא טובע בנהר או חיה גוררתו או לסטין באין עליו שהוא חייב להצילו תלמוד לומר לא תעמוד על דם רעך, ע"כ. והנח שם בסנהדרין דף ע"ד ע"א איתא: אמר ר' יוחנן משום ר"ש בן יהוצרק גימנו וגמרו בעליית בית נתזה בלוד כל עבירות שבתורה אם אומרים לאדם עבור ואל תהרוג יעבור ואל יהרג חוץ מעבודה זרה וגילוי עריות ושפיכות דמים, ועיי"ש דאמרינן: מקיש רוצח לנערה המאורסה וכו' ונערה המאורסה לרוצח מה רוצח יהרג ואל יעבור אף נערה המאורסה תהרג ואל תעבור רוצח גופיה מנא לן סברא הוא דהתא 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, ע"כ.

ולכאורה קשה מהני תרי סוגיות אהדדי, דהיכי אמרינן לעיל מניין לרואה את חברו שהוא טובע בנהר וכו' שהוא חייב להצילו תלמוד לומר לא תעמוד על דם רעך, והרי אם ילך להציל את חברו מן הנהר או מן הליסטיין או מן החיה הלא הוא מכניס את עצמו לסכנה ואם כן הרי איכא למימר להיפך מי יימר דדמא דההוא גברא סומק טפי דילמא דמא דידך סומק טפי, כדאמרינן שם מי יימר דדמא דידך סומק טפי דילמא דמא דההוא גברא סומק טפי, ובע"כ צריך לומר דההיא דלעיל מיירי שאין שום סכנה להמציל כלל ולהכי שפיר אמרינן שהוא חייב להצילו משום לא תעמוד על דם רעך.

וכן כתבו התוספות בהדיא ביבמות דף נ"ג ע"א ד"ה אין אונס לערוה, עיי"ש שכתבו באמצע הדיבור וז"ל: ורוצח גופיה קאמר התם דסברא הוא דמאי חזית דדמא דידך סומקא טפי כו' וזה לא שייך אלא במאנסין אותו להרוג בידים אבל אם רוצים לזורקו על התינוק ויתמעך 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 היו קודמין והתיקש דקרא בהורג בידים כתיב כי כאשר יקום איש על רעהו וגו', עיי"ש כל דברי התוספות.

הרי לנו בהדיא שהתוספות העלו דכל ענין של יהרג ואל יעבור אינו אלא כשמכריחין אותו להרוג בידים ולא היכא שרוצים לזורקו על התינוק ויתמעך, ואם כן על אחת כמה וכמה שאין לו לסכן את נפשו להציל את חברו מן הנהר או מן החיה או מן הלסטין היכא שיש בזה סכנה לנפשו.

ואם כן בנידון דידן לכאורה בודאי שאסור לו למשתדל ללכת להשתדל בשביל בני הישיבה אצל הליטאים ולסכן על ידי כך את נפשו מטעמא דמאי חזית דדמא דחברך סומק טפי דילמא דמא דידך סומק טפי וכמו שכתבו התוספות, אמנם לכאורה איכא למימר דנידון דידן שאני, דכל עיקר משמעות הסוגיא בסנהדרין וכן משמעות דברי התוספות שיסודם מהך דסנהדרין וכמו שכתבו בדבריהם, אינו אלא היכא שהוא נכנס לודאי סכנה כדי להציל אח חבירו, בזה הוא דהעלו דאמרינן מאי חזית דדמא דחברך סומק טפי דילמא דמא דידך סומק טפי, אבל היכא שחבירו נמצא בסכנה ודאית והוא יכנס על ידי הצלת חבירו לספק סכנה, בזה לכאורה איכא למימר היכא שחבירו נמצא בסכנה ודאית שהחובה מוטלת עליו להכנס לספק סכנה בכדי להציל את חבירו משום לא תעמוד על דם דעך ואם כן בנידון דידן מכיון שיש חשש שהליטאים יחטפו את ר' דוד הנ"ל, דהיינו שיש חשש רק לספק סכנה בודאי שמוטל עליו ללכת להשתדל עבור בני הישיבה הנמצאים בודאי סכנה שהרי נחטפו כבר על ידי הרשעים ימ"ש.

וכן איתא בהדיא בכסף משנה בשם הירושלמי, עיי"ש שכתב על דברי הרמב"ם בפרק א' מהלכות רוצח ושמירת נפש חלכה י"ד, כל היכול להציל ולא הציל עובר על לא תעמוד על דם רעך ע"כ. וכתב הכסף משנה

וז"ל: וכתב הגהות מיימון עבר על לא תעמוד וכו' בירושלמי מסיק אפילו להכניס עצמו בספק סכנה חייב עכ"ל, ונראה שהטעם מפני שהלה ודאי והוא ספק, עכ"ל הכסף משנה, והיינו ממש כמו שכתבנו שיש חילוק בין היכא שהוא נכנס לודאי סכנה עבור הצלת חבריו להיכא שהוא נכנס רק לספק סכנה כמו בנידון דידן.

אולם מדברי הרמב"ם עצמו לא משמע כן, עיין במה שפסק הרמב"ם בפרק ז' מה' רוצח ושמירת נפש ה"ח וז"ל: 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 היוצא בן צרויה אינו יוצא משם לעולם עד מות הכהן הגדול ואם יצא התיר עצמו למיתה כמו שביארנו ע"כ.

וכתב על זה האור שמה שם וז"ל: הוסיף רבינו טעם למה אינו יוצא הלא פקוח נפש דוחה כל מצות שבתורה ומכש"כ פקוח נפש דכל ישראל ואסתר תוכיה, רק דנגד הטבע אין לנו להוסיף אחרי מצות יוצר הטבע, חוקר כליות ולב, הוא אמר כי אם יחם לבב הגואל להרגו אין לו משפט מות, תו אין יכולים ב"ד להמיתו, וכיון שהותר דמו לגואל הדם אין לו להכניס עצמו בספק סכנה עבור הצלת חבריו מסכנה ודאית כן נראה, ומוכח מזה דלא כהגמ"י בשם ירושלמי דתרומות שהובא בכסף משנה פרק א' דחייב להכניס עצמו בספק סכנה ומירושלמי גופיה אינו מוכח למעיין היטב בו עכ"ל.

ולפי זה גם בנידון דידן אין לו להכניס עצמו בספק סכנה כדי להציל את חבריו מסכנה ודאית, ואסור לו לר' דוד הנ"ל להסתכן אפילו מספק כדי להציל את בני הישיבה.

ובשו"ע חו"מ סימן תכ"ו סעיף א' פסק המחבר: הרואה את חבריו טובע בים או לסטים באין עליו או חיה רעה באה עליו ויכול להצילו הוא בעצמו או שישכור אחרים להציל ולא הציל או ששמע עכו"ם או מוסרים מחשבים עליו רעה או טומנים לו פח ולא גילה אותן חבריו והודיעו או שידע בעכו"ם

מו באנס שהוא בא על חבירו ויכול לפייסו בגלל חבירו ולהסיר מה שבלבו ולא פייסו וכיוצא בדברים אלו עובר על לא תעמוד על דם רעך, עכ"ל.

ועי' בסמ"ע ס"ק ב' שם שכתב : עובר על לא תעמוד כו' ובהגמ"י כתבו דבירושלמי מסיק דצריך אפילו להכניס עצמו בספק סכנה עובר זה והביאו הב"י וכתב ז"ל ונדאה שהטעם הוא מפני שהלה ודאי והוא ספק עכ"ל, גם זה השמיטו המחבר ומור"ם ז"ל ובוה י"ל כיון שהפוסקים הרי"ף והרמב"ם והרא"ש והטור לא הביאו בפסקיהן משום הכי השמיטוהו גם כן, עכ"ל הסמ"ע.

ועי' בפתחי תשובה שם ס"ק ב' שכתב : ובספר אגודת אוזב מהגאון מהר"ם זאב כתב טעם מה דהרי"ף והרמב"ם והרא"ש והטור לא הביאו דברי הירושלמי בזה משום דס"ל דתלמודא דידן פליג על הירושלמי עיי"ש ובסוף הספר בהשטות שהביא בשם הרדב"ז ח"ג סימן תרכ"ו שכתב כן בפשיטות דספיקא דידיה עדיף מודאי דחבריה עיי"ש.

הרי מבואר לן מכל המובא שכל הנך רבבתא שמפיהם אנו חיים ומימיהם אנו שותים רבותינו עמודי עולם הרי"ף והרמב"ם והרא"ש והטור והשו"ע השמיטו בפסקיהם הך דינא דירושלמי ובפרט לפי המבואר בפתחי תשובה שיסודם בזה הושתת על הבבלי דפליג בענין זה על הירושלמי וסבירא ליה דספיקא דידיה עדיף מודאי דחבריה כמו שכתב הרדב"ז, אם כן לפי זה לכאורה פשוט הדין בנידון דידן שאין לו לר' דוד הנ"ל להכניס את עצמו בספק סכנה כדי להציל את בני הישיבה אף שהם נתונים בודאי סכנה. ולא עוד אלא שמהירושלמי גופיה אינו מוכח כלל שמשמעות דבריו תהיה כפי שהבין הגמ"י בכוונתו, וכמו שכתב האור שמח שהבאנו לעיל שיתכן שגם הירושלמי גופיה סבירא ליה דספיקא דידיה עדיף מודאי דחבריה.

אולם עי' בערוך השולחן חו"מ סי' תרכ"ו סעי' ד' שכתב : הפוסקים הביאו בשם הירושלמי 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, ובוה נאמר ושם אראנו בישע אלקים זהו ששם אורחותיו וכל המקיים נפש מישאל כאילו קיים עולם מלא עיי"ש.

והנה במס' נדה דף ס"א ע"א גרסינן: אמר רבא האי לישנא בישא אף על פי דלקבולי לא מיבעי מיחש ליה מיבעי הנהו בני גלילא דנפק עליהו 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 טמרו נפשייכו, ועי' בתוס' שם 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 שיוהר שלא יבא לו הפסד ולא לאחרים, עכ"ל, ועי' ג"כ ברא"ש שם.

ודברי התוס' קשה להולמן ולהגיע לסוף עומק דבריהם, שהרי הדברים ממה נפשך, אם חושש היה ר' טרפון שמא יודע הדבר למלך שהטמינם ואז יחייב את ראשו למלך, אם כן למה הדגישו התוס' דלהכי לא רצה רבי טרפון להטמינם משום "שמא הרגתם ואם אטמין אתכם חייבתם ראשי למלך", כלומר שר' טרפון חושש היה אולי באמת קטול נפשא, והרי אפילו אם באמת לא קטול נפשא כלל אבל מכיון שהמלך רודף אותם ומבקש להמיתם בגלל הקול דנפק עליהו, אם כן הרי אם רבי טרפון יטמין אותם יחייב בזה את ראשו למלך ולכך שפיר אמר להם זילו אתון טמרו נפשייכו, אם כן למה זה איפוא כתבו התוס' דלכך לא רצה רבי טרפון להטמינם משום שמא הרגו באמת את הנפש, הרי בלאו הכי גם כן שפיר עביד רבי טרפון אפילו אם באמת לא הרגו את הנפש מכיון שרבי טרפון יחייב על ידי שיטמין אותם את ראשו למלך, ואי נימא דאם באמת לא הרגו מחוייב היה רבי טרפון לסכן את נפשו בכדי להצילם שהרי הם נמצאים בודאי סכנה והוא לא יסתכן אלא מספק שהרי יתכן שלא יודע למלך כלל שהוא החביאם, והיכא שחבירו ודאי בסכנה והוא בספק החובה עליו להכניס עצמו בספק סכנה כדי להציל את חבירו מסכנה ודאית וכשיטת הירושלמי שהביא הג"מ, אי נימא הכי אם כן אמאי באמת לא הטמינם רבי טרפון, הרי מחוייב היה להטמינם מצד הדין אף על פי שבאמת קטול נפשא, ואיך זה אמר להם רבי טרפון זילו אתון טמרו נפשייכו, ועי' בהגהות מהריעב"ץ על הש"ס שכבר עמד על זה וגשאר בתימא. עיי"ש.

והנה ראה זה מצאתי שהנצי"ב זצ"ל בעמק שאלה על השאלות סי' קכ"ט
ס"ק ד' חשף גם הוא את זרוע עוזו לבאר את דברי התו' הללו וז"ל:
 והנה התוספות ורא"ש נדה ס"א כתבו בשמו של רבנו בזה"ל אם הרגתם
 חייבתם ראשי וכו' וכענין זה דוקא יש לחוש ללישנא בישא היכא שיש לחוש
 להיזק לו או לאחרים, ולפי זה יש להוכיח עוד מדקאמר ר"ט דילמא איתא
 למילתא, הא אם היה ברור לר' טרפון שאינו אלא עלילת שקר היה מזדקק
 לטמורינהו אף על גב שאי לא מסתייע מילתא היה מסתכן בעצמו ומחייב
 ראשו והיינו כמש"כ בהגה"מ והביאו הב"י ח"מ סימן תכ"ו בשם הירושלמי
 תרומות פ"ח ד' איסי איתצד בסיפספא א"ר יונתן יכרך המת בסדינו פי' ישאר
 במקומו דמקום סכנה היה ליכנס להזדקק עבורו, א"ר שמעון עד דאנא
 קטיל או מתקטיל אנא איזל ואשויב בחיילא פי' או אהרג או אהרוג להגזלנים,
 ואיכנס, ולכאורה הכי דעת התוס' והרא"ש בשמו של רבינו, אבל לפנינו
 ליתא כ"ו בדברי רבינו אלא וגרמיתון צערה וכו' והא ודאי דמחויב לקבל כל
 צער שבעולם להצלת נפש כדאיתא סנהדרין דף ע"ג מנין לרואה את חבירו
 שהוא טובע בנהר וכו' ועי' רש"י ד"ה קמ"ל וכו' אלא חוזר על כל הצדדין
 וכו' (והתימא על המג"א סימן קנ"ו שדקדק מדקאמר רשב"י הני נשי דדעתן
 קלות וכו', והרי הדין פשוט במקומו), אבל ספק סכנת נפשות עדיין לא
 שמענו, ועי' פ' ראה סי' קמ"ז הוכחתי דעיקר זה הדין הוא פלוגתא דתנאי
 ורבינו פוסק שאין להכניס עצמו בספק סכנה בשביל חבירו, וכבר כתב
 הסמ"ע שם סק"ב דדעת הפוסקים הראשונים לא משמע כהגהת מיימוני,
 והנראה דדעת התוס' והרא"ש גם כן אין מוכרח להלכה דדינא הכי אלא מידת
 חסידות היא והרוצה להחמיר על עצמו רשאי ולטעמיהו אזלי בע"ג דף
 כ"ז ב' ד"ה יכול, דלענין קידוש השם אע"ג דשלא בפהרסיא ובשאר
 עבירות יעבור ואל יתרוג אפילו מתכוין להעביר מכל מקום ברוצה להחמיר
 על עצמו רשאי, והביאו עובדא דר' אבא בר זימרא בירו' דעביד עובדא בנפשיה,
 וה"נ לענין פקוח נפש של חבירו רשאי למסור נפשו ואפילו באופן שאינו
 מחויב על פי הדין, מכל מקום הרוצה להחמיר רשאי למסור נפשו ואפילו באופן
 שאינו מחויב על פי הדין, מכל מקום הרוצה להחמיר רשאי והיינו
 עובדא דר"ש בירושלמי דתרומות, ולא דפליג על ר' יונתן בדינא, אלא החמיר
 על עצמו ולהכי נמי אי ידע ר"ט שעלילת שקר הוא היה מכניס עצמו בספק
 סכנת נפש מצד מדת חסידות, אלא דחש ללישנא בישא, והוצרכו התוס'

והרא"ש לפרש הכי דקשה להו אי לא היה כאן חשש ספק נפשות לא היה לר"ט לחוש לעלילה בעלמא ולעמוד על דם אדם כמו שהקשה הרא"ש שם לפרש"י, להכי פירשו בספק סכנת נפש דעל פי דין גם כן לא היה מחוייב ר' טרפון להכניס עצמו בספק סכנת נפש אפילו היה עלילה ודאי. אלא מצד מדת חסידות רשאי, אבל האי לישנא בישא כיון דליחוש מיבעי אסור להכנס לפנים משוה"ד, וכ"ז צריך לפרש כוונת רבינו אי נימא דכוון למש"כ התוס' דוקא צערא בעלמא נקיט, ומה שהיה חושש ר"ט לצערו בשביל לישנא בישא היינו משום דהיו יכולים לאטמודי גם בלעדו כמפורש זילו אתון טמירי נפשיכו, אלא שהיה טוב לפניהם וקל הדבר אם היה שהודק ר' טרפון גם כן עמהם, וע"ז שפיר השיב דלמיחש מיבעי ואינו רוצה לקבל צער שלהם, אבל אי הוי ידע שהוא עלילת שקר היה חס עליהם והודק להשתתף בצערם. וכל זה בלא חשש סכנת עצמו דבחשש סכ"נ אין חיוב בשום אופן, כמבואר להלן סימן קמ"ז עיי"ש, עכ"ל של רבינו הנצי"ב זצ"ל.

ואם כי יש לפלפל טובא בדברי רבינו הנצי"ב, על כל פנים מבואר מתוך דבריו במה שיצא לבאר את דברי התוספות דסבירא ליה, דאף אם נתפוס כשיטת הפוסקים דאפילו היכא שחבירו נתון בסכנה ודאית אין לו להסתכן אפילו מספק בכדי להציל את חבירו, מכל מקום מידת חסידות היא שיחלץ לחוש ולמהר להציל את חבירו הנתון בסכנת נפש ודאית.

ולפי זה בנידון דידן אם כי מצד הדין אין לחייב את ר' דוד הנ"ל שיסכן את עצמו בשביל הצלת בני הישיבה שנתפסו בידי הצר הצורר שפרש ידו עליהם, אבל אם בעל נפש הוא ורוחו נדבה לסכן את עצמו מספק עבור הצלתם בודאי שאין למונעו מזה וכדאי הוא רבינו הנצי"ב זצ"ל לסמוך עליו בזה ובפרט לפי מה שהעלה בערוך השולחן שהבאנו את דבריו לעיל, שיש לשקול ענין כזה בפלס ולא לשמור את עצמו יותר מדי אלא לקיים בעצמו מה שאמרו רבותינו ז"ל כל המקיים נפש אחת מישראל כאילו קיים עולם מלא, ועל אחת כמה וכמה בנידון דידן שעיקר קיום התורה תלוי בבני הישיבה ההוגים בה וממיתים את עצמם עליה, וביחוד לעת כזאת מאחר שכל עיקר כוונת הצורר היתה להכרית הגוף והנפש הישראלית גם יחד ולכן הם שפכו זעמם וחמתם על גדולי התורה וניאצו את קדוש ישראל כידוע שהיו מחרפים ומגדפים את אלקי יעקב בשעה שהיו מענים את הקדושים ומכריעים אותם לטבח, לכן לפי דברי הנצי"ב זצ"ל ובעל ערוך השולחן שהעלה שיש לשקול הענין בפלס ולא לשמור את עצמו יותר מדי, בודאי שהחובה מוטלת על כל אחד ואחד ששאר רוח בו לעשות כל מה שהוא יכול להצלת בני הישיבה כדי שגר ה'—גר התורה לא יכבה, ולהפר על ידי כך את מחשבתם הרעה שהם חורשים לפרוש יד על כל מחמדי ישראל—מחמדי התורה, ולהשכיח את זכרה מקרב העולם.

ואכן ר' דוד הנ"ל, שמע והאזין לבקשתי, הוא חגר עוז והלך להשתדל עבור בני הישיבה אצל הליטאים, והצליח בהשתדלותו שישחררו אותם ויוציאום ממאסרם, וזכרה לו זאת אלקים לטובה ונקום את נקמת דמו הטהור שנשפך כעבור זמן במחנות ההריגה והשמד.

סימן א'

בדין רוצחים שאנסו ישראל, לקרוע ספר תורה בידים ולבזותו.

שאלה: ביום ד' אלול תש"א עשו הגרמנים ציד על חיות משומטות כגון כלבים וחתולים ואספו אותם לבית המדרש החדש (די נייע קלויז, סלבודקה) והמיתו אותם במיתת יריה. אולם דעתם של הזדים הארורים ימ"ש לא נתקררה בזה שחיללו את הקודש והפכו מקום תורה ותפלה לבית מטבחים של כלבים וחתולים ולמדמנה של נבלות סרוחות, אלא שכינסו המוני יהודים שיראו בחילול מקום מקדשם, ולא עוד אלא שהכריחו יהודים אחדים שיקרעו במו ידיהם ספר תורה וביריעותיו יכסו את נבלות החיות ההרוגות, והנה אלה היחודים שהכריחו אותם לחזות בכזיון ספר התורה איך שנקרע לגזרים, והמכתב מכתב אלקים מגואל בדם טמא של נבלות ומעופר בעפר הארץ. באו בשאלה לפני הגאב"ד דקובנה וצ"ל שיתקן תשובה על כל האנשים שהיו באותו מעמד איום ובפרט על האנשים שהכריחו לבזות במו ידיהם את התורה, לקורעה ולעולל בעפר קרנה, וכן על כל תושבי הגיטו שלאזניהם הגיעה השמועה לא טובה על בזיון תורת דת יומים, כי הקהל ראה בזה אות מן השמים שיצא הקצף על כל העדה ולכן מן הראוי שכולם יקבלו עליהם תענית ותשובה ויפילו תחינתם לפני שוכן מעונה שירחם על עמו, יאמר לשמן חרף ולמשחית יאמר די. והיות שאז תקפה על הגאב"ד דקובנה מחלתו המיל עלי לעיין בדבר ולאחר העיון להחליט כדת מה לעשות בכל הנוגע לתיקון התשובה והכרזת התענית כדי לאמץ ברכים כושלות, ולאמץ לב הנדכאים והמעונים יושבי הגיטו.

תשובה: במס' מועד קטן דף כ"ו ע"א גרסינן, אמר ר' חלבו אמר רב הונא הרואה ספר תורה שנקרע חייב לקרוע שתי קריעות אחד על הגויל ואחד

הדבר אלא שמע מפי אחרים אינו חייב לקרוע מאחר שהוא עצמו לא ראה את בזיון התורה אלא ששמע על כך מפי אחרים, וכן משמע מלשון פירוש רש"י על הרי"ף שם במס' מועד קטן שכתב שם וז"ל: לא אמרו לקרוע על ספר אלא בזרוע שרואה בעיניו ששורפין אותו, ומשמע מלשון זה שעיקר החיוב אינו אלא היכא שהוא „רואה בעיניו“, אבל היכא שהוא רק שמע מפי אחרים ולא ראה בעיניו אינו חייב לקרוע.

ובחכם צבי' סימן י"ז כתב בהדיא כן דכל עיקר חיוב של קריעה אינו אלא לעומד ורואה באותו פרק ובאותו מקום כמעשה שהיה במלך יהודה אבל שמיעה או ידיעה בלא ראייה לא, וכן כתב באגודה במס' מועד קטן שאם נשרף באונס או ששמע ולא ראה אינו קורע.

וכל זה לענין קריעה אבל בתענית ודאי נראה שיש לחייב את כל אלה שראו את המעשה הרע הזה דלא גרע מהיכא שהוא רואה ספר תורה שנפל שהוא חייב להתענות וכל שכן בנידון דידן שראו זלזול נורא ואיום כזה שנעשה על ידי הזדים הארורים, וכבר נשאל בשו"ת חיים שאל ח"א סי' י"ב מהו להתענות הרואה ספר תורה שנפל שכתב וזה לשונו: עד שאתה שואלני אם הרואה חייב להתענות, אעיקרא דדינא הא דפשיטא לך ולכל המון ישראל שמי שהי' בידו ספר תורה ונפל שחייב להתענות, אינו מפורש בש"ס ובראשונים, אמנם מנהג ישראל שגם, אשר יפלו מידו התפילין מתענה, וכ"ש מי שיפלו מידו ספר תורה, ובשגם סברא היא שצריך כפרה מפני שבא זלזול לס"ת על ידו, אבל בש"ס ופוסקים לא נתבאר הדבר, ורק בספר משפטי שמואל סי' י"ב ישנו בנ"ט למנהג התפילין ששייך בהם זלזול, וארז"ל מ"ק כ"ז שתפילין שנשרפו בזרוע צריך לקרוע כמו בס"ת ומכיון שהם כס"ת וכי יסתפק אדם שמי שנפל ס"ת מידו לא יתענה.

ובדברי חיים יו"ד סי' נ"ט כתב בפשיטות שבעיקר הדבר שנוהגין אנו בני אשכנז להתענות בנפל ס"ת או תפילין אין לו שוב רמז בש"ס ומסקנתו היא שאף על פי כן יש לגזור תעניות בה"ב על הרואים בנפילת ס"ת עפ"מ"ש בתענית ט"ז שמוציאין התיבה לרחובה של עיר לומר כלי צנוע היה לנו ונתבזה בעונותינו, וה"נ העונות גרמו לבזיון התורה עיי"ש בכל דבריו וכן כתב בתשובת בית היוצר.

וגם הכפות תמרים בסוכה מ"א כתב רמז לתענית מהא דסוכה עיי"ש דיליף מש"ס שכשנופלים התפילין הוי זלזול ונהגו להתענות לכפר העון, ובדברי חיים דחה את דברי הכפות תמרים וכתב שאכתי אין רמז בזה להתענות, אמנם יש סמך לזה מירושלמי סוטה פ"ז ה"ד דאיתא שם, ארור אשר לא יקים את דברי התורה הזאת וכי יש תורה נופלת, שמעון בן יקים אומר זה החזן שהוא עומד ופי' הרמב"ן על התורה (כי תבוא כ"ז, כ"ו) דר"ל זה החזן שאינו מקים את ספרי התורה להעמידנן כתיקונן שלא יפלו עיי"ש. גם התוס' בסוטה ל"ז הביאו את דברי הירושלמי הנ"ל עיי"ש, ומכיון שהחזן הוא אחראי לדבר זה מן הראוי להתענות כדי שיצא מכלל ארור ויהיה בכלל ברוך, ועיין עוד בשו"ת דבר משה תאומים סי' צ"א ובשו"ת אמרי אש או"ח סי' י' ובשו"ת רב פעלים ח"ד או"ח סי' כ"ח, וכל זה שייך רק למי שיצאה התקלה מתחת ידו, אבל לקהל הרואים לא מצאנו סמך לזה, ואף הרואה ס"ת שנשרף שחייב לקרוע לא אמרו אלא בזרוע וכמעשה שהיה עיי"ש בגמרא מו"ק כ"ו וביו"ד סי' ש"מ סעי' ל"ז וכן הוא בשו"ת חכם צבי סי' י"ז ובשו"ת שבות יעקב ח"א סי' פ"ד עיי"ש.

ובירושלמי פ"ג דמו"ק ה"ז איתא הרואה ת"ח שמת כרואה ס"ת שנשרף, א"ר אבהו יבא עלי אם טעמתי כלום כל אותו היום, ר' יונה הוה בצור כד שמע דדמק בריה דר' אבהו וכו' אסקיה צום לההוא יומא עיי"ש, אבל כל זה בשדיפת ס"ת בזרוע וכמעשה שהיה, אבל בגפילת ס"ת מגלן שצריכים להתענות, ואפילו בכילוי ס"ת שלא בשריפה כגון שנמחק בזרוע פסק הב"י ביו"ד שא"צ לקרוע ועיי"ש בט"ז, וכ"ש בגפילת ס"ת ובאונס הא ודאי לא מצינו חיוב לקרוע או להתענות, ומהירושלמי הנ"ל מבואר דתענית הויא חסידות אפילו בת"ח שמת וס"ת שנשרף.

ובש"ע או"ח סי' רפ"ח ס"ק ה' איתא שעל ג' חלומות מתענין בשבת ואלו הן הרואה ס"ת שנשרף או יוהכ"פ בשעת נעילה או קורות ביתו או שניו שנפלו, ובספר מגיד משרים (פ' ויקהל) א"ל המגיד למדן יפה הוריתא שלא להתענות בשבת על שחלם שנפל ס"ת, ועיי' במטה יהודה סק"ו אלמא אין שום דמיון משריפת ס"ת לרואה ס"ת שנפל, ועיי' באגדות הרמ"ז סי' ל"ז שמי שנפל ס"ת מידו יתענה ג' הפסקות וכו', כל כי הני דמר מילי דחסידותא וכו' ועכ"פ הרואים אין לחייבם בתענית, שהרי גבי הרואה ס"ת שנשרף לא

אמרו אלא בזרוע וכמעשה שהיה וכו' ונהי שמי שנפל הס"ת מידו טוב שיתענה ומה גם שהמנהג הוא להתענות אפילו נפלו תפילין מידו, אבל הרואה ס"ת אין לחייבו תענית מן הדין וכו', ונראה עוד שמכיון שלא נזכר בש"ס ובפוסקים שמי שנפלו תפילין מידו שיתענה, יש להקל לתשושי כח שבמקום תענית יתנו צדקה לכפרתם ולא אחד כי באיזה מקום נפל ס"ת מיד הנושא וגזר הרב תענית בה"ב לכל הקהל, ואיברא שרב המקום לפי ראות עיניו יגזור ויתקן כדי שיהיו לעתיד והכל לפי מקומו ושעתו עכ"ד ספר חיים שאל.

וגם בבברכי יוסף בשו"ר ברכה סי' רפ"ב סק"ד דפוס שאלוניקי כתב שמן הדין אין הרואה צריך להתענות עיי"ש, הן אמת כי בספר נהר שלום סי' תקס"ו כתב, מעשה בקהל א' שנפל הס"ת לארץ בשעת הוצאתו וגזרו החכמים תענית בה"ב על אותם שנמצאו בבהכ"נ, אפשר דהוראת שעה היתה.

ובספר פרי חשדה ח"ב סי' ע"ב הביא סמך שיתענו כל אלו שראו בנפילת ס"ת מהא דאיתא בברכות ל"ד המתפלל וטעה סימן רע לו ואם ש"ץ הוא סימן רע לשולחיו ולכן כולם מחוייבים להתענות, עיי"ש בשו"ת כרם שלמה סי' ל"ה בשם גדול אחד שראה כן בחלום, ואפשר שזהו רק בש"ץ שהוא שליח לכל הקהל אבל לא בשכל המעשה היה באונס.

ועי' במג"א סי' מ"ד סק"ה שהביא ג"כ בשם שו"ת משפטי שמואל סי' י"ב שמי שנפלו מידו תפילין שצריך להתענות וכמ"ש חז"ל שהרואה תפילין שנשרפו בזרוע חייב לקרוע כדין ספר תורה שנשרף ומכיון שהם כס"ת וכי יסתפק אדם שמי שנפל מידו ס"ת לא יתענה, וקצת ראייה ממ"ש שהרואה בחלום ס"ת שנשרף חייב להתענות אפילו בשבת ע"כ.

ובשו"ת שדה הארץ ח"ג או"ח סי' י"א כתב על זה, שמתוך ראיתו משמע דה"ה לרואה ס"ת או תפילין שנפלו שיתענה שכיון שכ' ששניהם שוים לענין שריפתם בזרוע וכן ה"ה לרואה בחלום תפילין שנשרפו שמתענת תענית חלום בשבת, כדין רואה בחלום ס"ת שנשרף וכמ"ש המג"א סימן רפ"ח סק"ח עיי"ש, א"כ רואה ס"ת או תפילין שנפלו צריך להתענות מפני שראה בזלזול כתבי הקודש, אולם בספר מראית העין הובא בליקוטים להחיד"א סימן י"ח

אות ב' דחה את דברי שדה הארץ בזה, שהרי אפילו בס"ת אין הרואה חייב בתענית וכמ"ש בשו"ת חיים שאל. אבל ביד אליעזר סי' קכ"ו כתב שנשתרב המנהג שמתענין כל הצבור שראו ספר תורה שנפל לארץ דכל הקהל שייכו ביה ולכולם שהיו באותו מעמד וראו את הדבר הראו מן השמים שצריכים תשובה. אמנם בתשובת זכר יהוסף אור"ח סי' ל"א כתב דאין בכך כלום דבדבר דלא שכיח לא שייך מנהג עיי"ש.

העולה מכל המובא דבנידון דידן ודאי כל האנשים שהיו באותו מעמד אם הדבר אפשרי להם צריכים הם להתענות, שהרי הנחי רבוותא שהבאתי סבירא להו שאפילו ראו ספר תורה שנפל צריכים כל הרואים להתענות וכל שכן בנידון דידן כשראו ספר תורה שנקדע, אבל אם הדבר אינו אפשרי להם מחמת חולשת גופם מפני הרעב והצרות המתחדשות בגיטו כל יום אין לחייבם בתענית. אבל אותם האנשים שקדעו את ספר התורה בידיהם בודאי שהם צריכים להתענות אף שעשו את הדבר מחמת אונס של נפשות, אבל יתר יושבי הגיטו שלא היו באותו מעמד איום ורק שמעו על הדבר הזה מפני אחרים, על האנשים האלה אין להטיל תענית וכמו שהבאתי לעיל, דמלשון הגמרא משמע דדין הקדיעה הוא רק ברואה אבל לא בשומע מפני אחרים, ואפילו על הרואים אין להטיל עליהם חובת קריעה מכיון שלפי דעת הירושלמי האלפס והרא"ש חיוב זה הוא רק ברואה ספר תורה שנשרף ולא ברואה ספר תורה שנקדע, אבל בתענית ודאי דהרואים מחויבים.

ואף על פי כן הוריתי לכל אלה ששמעו על הדבר אף שאינם מחויבים בתענית שיתנו צדקה כל אחד לפי יכולתו והשגת ידו, ובש"ק שלאחר זה עוררתי את הקהל בדברי כיבושין שיפשפשו במעשיהם וישובו בתשובה, ושיהיו מאד זהירים בקדושת כבוד ס"ת ואחת כמה וכמה בכבודם של תלמידי חכמים לומדי תורת ה', וה' הטוב יסלח לנו והוא רחום יכפר עון, והגאון הגאב"ד דקובנה הסכים ע"ז.

יבואר אם מותר להציל עצמו, ועיי' ינרום שיתרנ חברו.

נשאלתי בגיטו קובנה, כ"ג אלול תש"א (15-טן ספטמבר 1941), היות שהמפקד על עניני הגיטו קובנה יאָרדאן ימ"ש נתן אז לה' עלטעסטען-ראָט 5000 כרטיסים לבנים (יאָרדאן שיין) לחלק בין בעלי מלאכה ומשפחותיהם ורק אלו ישארו, ואז בגיטו נמצאו קרוב לשלשים אלף נפשות בני ובתוכם בעלי מלאכה ומשפחותיהם כעשרת אלפים ונעשה מהומה גדולה, וכל דאלים גבר חטפו הכרטיסים הנ"ל מה' עלטעסטען-ראָט. ועתה השאלה הא' אם מותר לה' עלטעסטען-ראָט ליקח הכרטיסים ולחלקם להבע"מ בפי צווי יאָרדאן ימ"ש שמו?

שאלה הב' אם מותר להבעלי מלאכה לחטוף הכרטיסים הנ"ל ולדחות את חבריו הבע"מ הנשארים למעלה מהמספר של 5000 כרטיסים ומאי חזית?

השאלה הב', אם מותר להצ"מ ליקח ולחטוף הכרטיסים אף שיחסר לצ"מ חזירו כי מספר הכרטיסים הוא פחות ממספר הצ"מ כנ"ל.

נראה לכאורה לפמש"כ הש"ך צח"מ סימן קס"ג סק"א צ"ס המהרי"ל (ספר צ' סימן מ'), דאס יאל גזירה מהמלך על צ' אנשים סתם, מותר להשתדל על איזה אנשים שלא יכנסו בכלל הגזירה אע"ג שצודאי יכנסו אחרים. וא"כ הכל מותר להצ"מ לחטוף הכרטיסים אף שיגרמו שיכנסו חזריהם צהגזירה. אולם אפשר לומר דלא דמי לדברי הש"ך דהלל הוא מיירי דהשתדלות הוא קודם שנתפסו הם או מותר להשתדל, אצל לאחר שתפסו להאנשים אסור להשתדל. וצ"ד יש להסתפק ולומר דכל העדה היו כנתפסים ויאלה הגזירה וא"כ אותם הצ"מ שחוטפים הם דומים לאלו שמתדלים אחר שנתפסו.

אמנם נראה דאעפ"כ מותרים לחטוף, דע"ש ציד אצרהם (ציו"ד סי' קנ"ז) שהוא צעמו מותר לו להשתדל צהללתו אף לאחר שנתפס" אף שיקחו אחרים במקומו, ודוקא לאחרים אסור להשתדל צהללתו אם ע"י שיצילו אותו יקחו אחרים תחתיו (עי' צו"צ מהדו"ת ח"ד סי' ע"ד) אצל לו צעמו מותר. וצ"ד לכאורה דומה ממש לדברי היד אצרהם. ואולי יש לחלק ולומר דלא דמי ממש להנ"ל דהתם צה שציל צעמו אינו גורם הרגיע צפועל ממש תיכף רק שיחפשו ויתפסו אחרים אצל הכל מיד צחטיפת הכרטיסים מציל צעמו וגורם מיתה צפועל לחצרו, ואפשר דצוה אסור. וילה"ר לזה מה"ח דחמרי צצצא מציעל דף ק"צ ע"א צשנים שהיו מהלפון

ביאור השאלה:

איתא בתוספתא דתרומות (פ"ז) וכן צירושלמי (פ"ח) דתרומות, סיעות צני אלס שהיו מהלכין צדרך פגעו להן גוים ולחמרו תנו לנו אחד מכס ונהרוג אותו ולס ללו הרי לנו הורגים את כולכם אפי' כולן נהרגים לא ימסרו כפס אחת מישראל אצל לס ייחדוהו להן אחד כגון צצע צן צכרי ימסרו אותו ולל ייהרגו אחר. צצצ"ל והוא שיהיה צייצ מיתה צצצע צן צכרי ורי יוחנן אחר אע"פ שאינו צייצ מיתה צצצע צן צכרי. והרמז"ס ז"ל צצ"ל יסודי התורה (פ"ה ה"ה) פסק כר"ל דאפי' ייחדוהו אל ימסרוהו אלא"כ צייצ מיתה צצצע צן צכרי ואין מורין להן לכתחילה. עכ"מ והגמ"י. וכבר האריכו האחרונים לייצ את דברי הרמז"ס דפסק כר"ל נגד ר"י צירושלמי דתרומות וצעי דוקא יחוד וחיוצ מיתה צצצע צן צכרי ואי ללו ייהרגו כלס והרי קיי"ל כר"י נגד ר"ל וממילא אסור להס להחמיר על עצמם ליהרג ועיי"ש צמרחה פנים שעל הירושלמי שכתצ שציקר הוא שהרמז"ס היה לו גירסא צירושלמי שס ר' יוחנן צנוקוס ר"ל, ור"ל צמקוס ר"י ועיי' צנודע ציהודה חיו"ד סימן מ"ה, ועיי' צתפארת למשה וצד"ה. וכן פסק הט"ז ציו"ד סימן קנ"ז סעיף א' גס צצס הצ"ח עיי"ש.

צפ"י לפי פסק הרמז"ס ז"ל הלל הכל לא היו האנשים הנ"ל שאינם צע"מ מחוייצי מיתה עפ"ד תורה לו עפ"י חוק המלכות (ע"ש צט"ז היטצ) צצצע צן צכרי וממילא שאסור לחלק הכרטיסים אפילו הם צגדר ייחדוהו כר"ל. ולפי"ז היה אסור לחלק הכרטיסים.

ואח"כ נעת סידורי לדפוס הראה לי ידידי הגאון הר"ר ישראל גוסטמאן שליט"א הר"מ צישיצת לונאוויץ מדי המהרש"א ז"מ ס"צ ע"א וז"ל דאס היה הקיתון של מים של שניהם דמודה ר"ע לזן פטורא שניהם ימותו ואל יראה וכו' וא"כ זו הסנרא אשר יעדנו הוא סנרא להיפך דאס נחשון אותם לשותפים אזי אסורים להם לחטוף משום שחוטף דנר של חנרו ומזיל עצמו נמה ששייך לחנרו.

אמנם יש לדון בכל זה, דאפשר לומר דננידון דין ל"ש כלל לדמות לזינא דייחדוהו, דלפי כונת הרשעים ימ"ש רצו להשמיד כולם רק עתה יש ענה להזיל מקצתם נמה שנתנו הכרטיסים וא"כ לקיחת וחלוק הכרטיסים הוא ענין הללה ואח"כ שמעתי ממרן הגאון רא"ד שפירא זצוק"ל הגאון דקוננה בשעה שיאלה הגזירה ביום ו' חשון תש"צ מהרשעים ימ"ש לה'עלטעסטערקאט שידניקו מודעה שעל יוס ח' חשון תש"צ (26-טען אקטאבער 1941) להקהל כל תושבי הגיטו אנשים ונשים וטף על מגרש „דעמאקראטא-פלאץ" וה"על-טעסטערקאט" צאו לשאול מהגאון ד' היאך יעשו מדין תורה, ש'דוע היה שחלק גדול מהנאספים ידונו למיתה. ואחר ישוב הדעת פסק להם הגאון ד' צוה"ל: צאם יאלה גזירה ר"ל על קהלה מישראל להשמידם ונאמנעים אפשר להזיל המקצת מהעדה, מוכרחים ראשי העדה ליקח עוז נפשם והאחריות עליהם לעשות המעשה ולהזיל מה שאפשר. וכן נדון דין נראה שלקיחת וחילוק הכרטיסים הוא ג"כ ענין הללה ול"ש לדון צוה דין דייחדוהו ומאי חזית וא"כ מחויבים העלטעס-טערקאט ליקח הכרטיסים ולחלקם.

צדק וניד אחד מהן קיתון של מים אס שותין שניהם מתים ואס שותה אחד מהן מגיע לישון דרש זן פטורא מוטנ שיסתו שניהם וימותו ואל יראה אחד מהן נמיתתו של חנירו עד שצא ר"ע ולימד וחי אחיך עמך חייך קודם לחיי חנרך. והנה דננרי זן פטורא אע"פ שאס יתן לשתות גס לחנרו ימות חנרו ג"כ ול"ש מאי חזית (ע"י היטנ צלחם משנה ונמל"מ צפ"ה מהלכות יסוד יהתורה ה"ה) והיה לו לשתות לאי להזיל עצמו משום פיקו"ג. ולכאורה אפ"ל דנשתיית שניהם ירויח מה שיאריך חייו ויחי חיי שעה, ונחיי שעה שייך ג"כ מאי חזית. אמנם לאחר העיון נראה לומר דהן אמנם דחיי שעה נגד חיי חנרו שיהיה נזול לגמרי ל"ש לומר נחיי חזית, רק סנרת זן פטורא הוא. דנשתיית עצמו הוא גורם שימות חנרו א"כ הללת חייו הוא סיבה למיתת חנרו זה גדרו של זן פטורא ומדוקדק. לשונו של זן פטורא ואל יראה האחד נמיתתו של חנרו, וצוה ל"ש המ"ע של וחי צהם אס חייו ירויח ע"י שלא השתדל עזור חיי חנרו, ואע"פ שר"ע חולק משום שחייו קודמין ומוטנ שיסתה הוא, זה דוקא שס שהוא נשוא"ת שימות חנרו אס לא יתן לשתות אצל נקום ועשה כמו הכא שהכרטיסים לכל הנע"מ וחוטף ומוסר ע"י חנרו לרונא ומזיל את עצמו אפשר דאסור. ונמלא מזה מפורש שאסור להזיל עצמו צידים ולגרום ע"י מיתת חנרו, דאל"כ לפלגי נקו"ע ומדפליגי נשוא"ת משמע דקו"ע אסור לגרום מיתת חנרו ולהזיל עצמו.

אולם אפשר לומר דהכא כל הנע"מ הם נגדר שותפין לכל הכרטיסים כי הלא נתנו אותם עזור כולם דייקא א"כ לכולם יש חלק צהם. וא"כ יכול כל אחד לחטוף שיס לו חלק צהם.

סימן א:

הצלה ממוות ע"י גרימת מותו של ילד

שאלה

בדבר השאלה אשר שמעה תסמר שערות ראש. והיא: בבונקר — במתבוא ישובה עדה שלמה של יהודים שהסתתרו מחמת המצוק הצורך ימ"ש, כדי שלא ימצאו אותם הסמאים האדורים ימ"ש. ברור שאם היו מוצאים אותם היו מוציאים אותם להורג. — ובעת שהרשעים הללו ערכו חיפושים למצוא את האומללים האלו, פרץ תינוק, שהי' בין הנחבאים — בבכי — ולא הי' כל אפשרות להשתיקו. לוא הי' נשמע קולו החוצה — היו נתפסים ומוציאים כולם להריגה. ונעמדה השאלה המותר לשים כר בפי התינוק כדי להשתיקו. — במעשה זה הי' חשש לסכנה שמה יחנק הילד. בינתיים נגש אחד ושם את הכר בפיו של אותו תינוק. והנה אחרי שעברו הרשעים האדורים נגשו להסיר את הכר וראו לתדהמתם שהילד נחנק.

והשאלה היא, איפוא, אם הי' מותר לשים את הכר בכדי להציל שאר האנשים, או אין היתר בזה, ודאדם שעשה זאת אם כי בשגגה, עליו לקבל על עצמו תשובה שיכופר לו חטאו.

תשובה

א.

כ"ת מביא התוספתא תרומות פ"ז הכ"ג שהנו מקור לדינו של הרמב"ם בהלכות יסוה"ת פ"ה ה"ה האומר: «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. מדברי הרמב"ם הנ"ל אנו רואים שצריכים מילוי שני תנאים בכדי למוסרו להריגה: א. שיחדוהו שקראו בשם; ב. שהנו מחוייב מיתה כהא דשבע בן בכרי. אולם בכדי לברר הדבר נביא בזה גוף התוספתא ונדון בה בע"ה.

בתוספתא הנ"ל הכי איתא: סיעה של בני אדם שאמרו להם נכרים תנו לנו אחד מכם ונהרגנו ואם לאו הרי הורגין את כולכם? — יהרגו כולם ואל

כה

הצלה ממות ע"י גרימת מותו של ילד

ליכא הכא סברא, דמאי חזית דדמא דידך סומק טפי שהרי הוא והם נהרגים, אם לא ימסרוהו. וצ"ע לכאורה בכונת הרש"ס.

ונבא לבאר הדברים ביסודם. הנה כלל גדול אמרו חכמים: בשפיכת דמים יהרג ואל יעבור כאמרם ז"ל בפסחים דף כ"ה וביומא דף פב מאי חזית דדמא דידך סומק טפי דלמא דחברך סומק טפי. והיטב אשר דיבר בזה הר"ן סוף יומא. באומרו 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? וראה ברש"י פסחים דף כ"ה באומרו מאי חזית דדמא דידך סומק טפי: כלומר כלום באת לשאול על כך אלא מפני שאתה יודע שאין מצוה עומדת בפני פיקוח נפש, אין זו דומה לשאר עבירות, דממ"ג יש כאן אבוד נפש והתורה לא התירה לדחות את המצוה אלא מפני חביבת נפשו של ישראל וכאן עבירה נעשית ונפש אבודה, מי יאמר שנפשך חביבה לפני המקום יותר משל זה, דילמא של זה חביבה טפי עליו ונמצא עבירה נעשית ונפש אבודה.

משום כך אנו נוקטים שמוטב שיהרג הוא ולא ישפוך דם נקי, וינצל ישראל חבירו, ואין חילוק בזה בין יחיד לרבים, שגם אם אומר לרבים שיהרגו אחד, ועי"ן ישארו הם בחיים עליהם לתת להרג ולא יתנו ידם להרוג אחד ואף שיש סכנה שכולם יהרגו. אולם כל זה אמור בשיש ספק בדבר, שאולי לא יתהרגו, כגון שיעמדו בפניהם וילחמו בהם, או אולי יחזרו בהם ולא יתהרגו. אבל אם הדבר ברור שממילא יהרגו כולם, ודאי שאין כאן שום סברא לאסור למסור אחד.

פירוש הברייתא הנ"ל

ובזה תבואר לנו הברייתא הנ"ל, סיעה של בני אדם שאמרו להם נכרים: תנו לנו אחד מכם ונהרגוהו, ואם לאו הרי אנו הורגין את כולם, יהרגו כולם ואל ימסרו להם נפש אחת מישראל. אבל אם יחדוהו כגון שיחדו לשבע בן בכרי, יתנוהו להם ואל יהרגו.

ועי"ן בא רבי יהודה לפרש (ראה בחזון יחזקאל שר' יהודה בא לפרש דברי הת"ק, וראה ב"מבוא התלמוד" דאצל ר"י גם בד"א בא לפרש), ואומר: שזה שאמר ת"ק ביחדוהו שצריך שיהיה חייב מיתה כשבע בן בכרי, הרי זה דוקא כשהרוצח מבחין (כגירסת הגר"א) דאין וודאות שיהרג, כגו'. אבל הוא והם מבפנים ובודאי יהרגו כולם הוי כיחדוהו וכגון שבע בן בכרי, מכיוון שכולם, ובתוכם המבוקש יהרגו בודאי, יכולים למסור להם. פירוש הדברים שהודאות גם היא קובעת ולא

רק החיוב מיתה. ולכן כששניהם מבפנים כיוון שבודאי יהרג. הוא כשבע בן בכרי ומותר למוסרו. וזוהי שיטת רש"י בסנהדרין דף ע"ב בתירוץ הראשון בד"ה יצא ראשו: באשה המקשה לילד והיא מסוכנת וקתני רישא החיה פושטת ידה וחותרו ומוציאתו לאברים, דכל זמן שלא יצא לאויר העולם לאו נפש הוא. וניתן להורגו ולהציל את אמו. אבל יצא ראשו אין נוגעים בו להורגו דהוה ל"י 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 ה"י נהרג בעיר כשיתפשטו יואב, והן נהרגין עמו, אבל אס' ה"י הוא ניצל אעפ"י שהן נהרגין לא היו רשאים למסרו כדי להציל עצמן, אי נמי משום דמורד במלכות הוה, עכ"ד. מדברי רש"י אתה למד שתירוץ הא' הנו שיטת ר"י שאם ברור לך שבין כך ובין כך יהרג גם אם לא תמסור אותו, ובהריגתך או בהריגתכם לא תוכלו להצילו, מותר למסרו או להרוג אותו. אמנם ביחודו לבד לא סגי, שהרי בהא דרבא דסוף יומא, יחדוהו הלסטים לפלגיא, ואפ"ה אמר רבא ליקטליך ולא תיקטול — משום ששמה לא ה"י ברור שיהרג. ולכן אמר מאי חזית דדמא דידך סומק טפי, דילמא דמא דחברך סומק טפי, מכיוון שיכול להיות שאתה תיהרג. והוא ינצל. אבל ביחודו כמו שבע בן בכרי שבין כך ה"י נהרג, ואז מותר היה למוסרו.

אי נמי — אומר רש"י — משום דמורד במלכות הוה. תירוץ זה שברש"י הנו כשיטת רבי שמעון בתוספתא החולק על רבי יהודה ואומר: כך אמרה להם כל המורד במלכות בית דוד חייב מיתה, ר"ל כאן בנפש מישראל אין הודאות קובעת, גם אם ברור לנו שאם לא ניתן אותו למיתה ניהרג כולנו אין אנו רשאים למסרו בכדי להציל את נפשותינו, ושבע בן בכרי שאני, שהי' מחוייב מיתה כדין מורד במלכות ולכן יכלו להרוג אותו בכדי להנצל, מכיוון שהוא כהרג.

ר' יוחנן וריש לקיש ובפלוגת רבי יהודה ור"ש וראה במתנות כהונה על המדרש פ' ויגש שם מביאים הברייתא הנ"ל ועל דברי ר"י אבל אם כולם בפנים וכו', הואיל והוא נהרג והם נהרגים יתנוהו להם ואל יהרגו כולם, ושם הגירסא ככה, כגון שהוא אומר ותבוא האשה אל כל העם הואיל והוא נהרג ואתם נהרגים, תנוהו להם ואל תהרגו כולכם. וכתב בעל מתנות-כהונה: זה שמסיים ר"י כהא עובדא דשבע בן בכרי שהיו כולם בפנים ולא יכלו להמלט מסרוהו אעפ"י שאין עליו חטא "משפט מות". ור"ש פליג עלי' וסבר דהא דתנן כשבע בן בכרי היינו לענין חיוב מיתה דוקא אבל אם אינו חייב מיתה לא ימסרוהו, והכי פליגי נמי ר"י ור"ל בירושלמי, ואייתי לה הסמ"ג סי' קס"ה והא לך לשון ירושלמי פ"ח דמסכת תרומות: יחדוהו להם

כח

אודים מאש

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

ונראה שהר"ש סיריליאן אף שאינו מפרש כן המחלוקת של ר"י ור"ל, מ"מ לדינא הוא כמו שכתבנו, שמפרש דברי ר"ל רק באופן שאם לא ימסרוהו יתכן שינצל וכהא דמייתי מעובדא דרבא. ובאמת לשון הברייתא: ואם לאו נהרגו את כולכם, אינו אלא איום של העכו"ם אבל יתכן שינצלו, וכלשון ר' יהודה בברייתא, שר"ל בא לבאר דברי ת"ק, ובזה הוא שפסק כר"ל, אבל באופן שבודאי יהרגו כולם בהא לא פליג ר"ל, ובזה אין המדובר כלל בברייתא זו. וממילא גם הרמב"ם לדינא לא אומד אלא כשהדבר בספק, אבל כשזה ודאי אין איסור למסרו, וכקושית הכ"מ וכדמוכח מעובדא דרבא, וכר"ל. באנו לדינא שאם הדיון למסור האחד הוא באופן שהדבר ברור שגם בל"ז יהרג, מותר למסרו. ובג"ד שתינוק בוכה ואם נשמע קולו ה' נהרג בודאי יחד עם כולם ע"י הרוצחים ימ"ש, הרי זה כיחדוהו, והנה כשבע בן בכרי כיוון שכל היהודים הם בדין מיתה אצלם, ואין אפשרות להנצל מידם, ומכאן יוצא, שהי' רשות בידם להשתיקו, ואפילו אם הי' זה כרוך בסכנת מיתה של התינוק, ועיין בתשובת הב"ח סימן מ"ג.

וראה בספר החינוך מצוה רצ"ו האומר: עוד אמרו"ל שאפי' הי' כמה אלפים ישראלים ואמרו להם אנשים תנו לנו אחד מכם ואם לאו נהרגו כולכם יהרגו כולם, ואל ימסרו נפש אחת — ודוקא כשאמרו להם א' סתם אבל יחדוהו להם בפירוש, שאמרו להם תנו לנו פלוני ואם לאו נהרגו כולכם, רשאים ליתנו כענין הידוע בשבע בן בכרי, הרי שבעלי החינוך לא מזכיר "חייב מיתה" אלא כענין הידוע בשבע בן בכרי — ר"ל כמו ששם הי' בין כך נהרג, וביחד אתו היו כולם נהרגים בכענין זה, מותר למסור את המיוחד.

וראה בר"ן פ' יום הכיפורים. ומיהו אם אמרו הגוים תנו לנו פלוני שבידכם ואם לאו נהרגו כולכם וידם תקיפה לעשות כן — ימסרוהו לו ואל יהרגו כולם כיוון שאם לא יעשו כן יי' הוא והם נהרגים.

דין רודף

בנדון דידן יש לצרף עוד שבתנינוק הבוכה הנה שעי"ז גורם להמתתם של כל הנחבאים, יש עליו דין של רודף. וכך הם דברי הרמב"ם בפ"א מה' רוצח: «ואף זהו מצות ל"ת שלא לחוס על נפש הרודף לפיכך הורו חכמים, מעוברת המקשה לילד מותר לחתוך העובר במעי' בין בסם בין ביד מפני שהוא כרודף אחר' להורגה — ואם משהוציא ראשו אין נוגעים בו. מפני שאין דוחין נפש מפני נפש וזהו טבעו של עולם. וכבר הקשו עליו מגמ' סנהדרין דף ע"ב: א"ר הונא קטן הרודף

כט

הצלה ממות ע"י גרימת מותו של ילד

ניתן להצילו בנפשו וכו'. איתביה רב חסדא לרב הונא יצא ראשו אין נוגעים בו לפי שאין דוחין נפש מפני נפש. ואמאי רודף הוא? — ומשני שאני התם דמשמיא קא רדפי לה. הדי לפנינו דבמקשה לילד לא מקרי רודף דמשמיא קא רדפי לה. וזה שמותר לחתכו ברישא הוא מטעם שכתב רש"י שם דכל זמן שלא יצא ראשו לאו נפש הוא. והאיך אומר הרמב"ם מפני שהוא כרודף אחרי' להורגה — ואם יש לו דין רודף אז גם ביצא ראשו יהיה שרי לחתכו ולהציל את אמו. (וראה בסמ"ע סי' ת"ה סק"ח בתשובת גאונים בתראי סי' כ"ה ובחידושי רבינו חיים).

ביאור אין דוחין נפש מפני נפש

ועלינו לבאר דברי המשנה והרמב"ם מהו זה שאמרו שאין דוחין נפש מפני נפש, הלא דינא הכי שברודף מותר להרגו כדי שלא יהרג את הנרדף, רואים אנו שבכדי להציל את הנרדף, מותר להרוג את הרודף, וילפינו זה משופך דם האדם באדם, דמו ישפך. (וראה בסמ"ג מצוה קס"ה המקור לדין רודף) ולולא זה לא הי' מותר לחתוך את העובר במקשה לילד בכדי להציל את האם. ואם שאין העובר נקרא נפש מ"מ אמרינן בערכין דף ז' כיוון דעקר גופא אחרינא הוא ואף בעובר במעי אמו לא היו אומרים דאשה שיוצאת ליהרג אין ממתינין לה עד שתלד אלא דכתיב ומתו גם שניהם לרבות את הולד. א"כ במקשה לילד ודאי אין ברשותנו להרוג אותו אם לא מפני שיש לו דין רודף. אלא שכיון שהוא רודף לאונסו דמשמיא קא רדפי לה וזהו טבעו של עולם ביצא ראשו אין להורגו. וחזר הדין של אין דוחין נפש מפני נפש — שפירושו מאי חזית דדמא דידך סומק טפי דילמא דמא ידי' סומק טפי.

ומזה אנו למדים דין חדש שדין רודף לאונס ג"כ דין רודף עליו כל עוד שאין הסברא: אין דוחין נפש מפני נפש. ומכאן שאם לא יחתכו אותו ימותו גם האם וגם הבן, מותר לחתכו כיוון שגם הנפש השני לא תחי', חוזר להיות דינו כדין רודף והוא נהרג להצלת הנפש השניה. בתפא"י בסוף פ"ז דאהלות ובפמ"א ח"ג.

וא"כ בההיא דידן כיוון שכולם יהרגו אין כאן ספק שיוכלו להטיל עליו כר כדי להציל כולם. כי יש עליו דין רודף באונס, ובוה אין להורגו רק אם עי"ז הוא ינצל, ומדין אין דוחים נפש מפני נפש, אבל לא באופן דילן שממילא לא ינצל.

ההבדל בין יחדוהו לבין רודף

ועלינו לבאר בנדון, ולקבוע מה דינו של התינוק הבוכה אם דינו כיחדוהו או כרודף כיוון שיש נ"מ לדינא. ביחדוהו כשבע בן בכרי אומר הרמב"ם 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 לכתחילה. ומקורו מירושלמי בתרומות: בהאי בר נש תבעתי מלכותא וערק ללוד לגבי ריב"ל ואקיף מלכא מדינתא ויהב להו. והוה אליהו רגיל דמתגלי לי ותו לא איתגלי לי, וצם כמה צומות עד דאיתגלי להו א"ל אליהו לריב"ל לדילטור אנא מיתגלי, א"ל ולא משנה עשיתי? א"ל, וזו משנת חסידים? הרי שאף שעל פי דין הי' מותר למסרו אבל משנת חסידים אינו כן, וריב"ל הי' צריך להעמיד א"ע בסכנה ולא למוסרו. ומזה למד הרמב"ם באומרו: ואין מורין להם כן לכתחילה. לעומת זה ברודף אומר הרמב"ם בפ"א מה' רוצח, מצות ל"ת שלא לחוס על נפש הרודף. אלא שנראה שאין הדברים אמורים אלא ברודף לרצונו. משא"כ בני"ד שהוא רודף לאונסו אין כאן מצוה בדוקא להורגו אלא רשות. ונרדף בכה"ג שלא רצה להרוג את הרודף ונהרג על ידו — "קדוש יאמר לו", וקיים "ונקדשתי בתוך בני ישראל". ולכן אלו (והיו מקרים כאלו במשפחתי הי"ד) שלא רצו להציל נפשם ע"י החנקת ילד מישראל, קדשו שם שמים. אבל זה שכן עשה, א"צ להיות לבו נוקפו מכיוון שכדין עשה בכדי להציל נפשות מישראל. והיטיב אשר דבר בזה אחד מגדולי המפרשים על הכתוב: מחמט אחיך יעקב תכסך בושח. (עובדיה א) באומרו: עשיו הוא צריך להתבייש על שהביא את יעקב לחמט, שרק בגללו היה צריך לעשות דברים אלו, וד' יקום נקמת דם עבדיו השפוך.

סימן ו'

דין המאבד עצמו לדעת כדי שיבא

לקבר ישראל.

שאלה: ביום ו' מרחשון שנת תש"ב יומים לפני החורבן הנורא של גיטו קובנה, שעה שלעינינו חובלו כעשרת אלפים איש, אנשים נשים וטף להכריעם למבחן וכל אחד מיושבי הגיטו ציפה לקץ חמר עת שזרוע הרשע של הזדים הארורים תונף עליו באכזריות ותכריתו מארץ החיים, אז בשעה מרופה זו בא אלי בעת"ב אחד מנכבדי העיר יגוע באנחתו ודמעתו על לחיו וברוב שיחו אמר לי כי נפשו היא בשאלתו, כי איככה יוכל לראות ברעה אשר ימצא את משפחתו, אשתו ובניו ובני בניו, שיתכן מאד שיוטבחו לנגד עיניו כדי להגדיל את צערו ויסוריו, שחרי הרוצחים הגרמנים מנהגם היה להתענג על היסורים והצער של קרבנותיהם ולכן היו נוהגים להרוג את הבנים לעיני אבותיהם ואת הנשים לעיני בעליהם ורק אחרי שהיו משיביעים את זעפת חמת הרצח שבתוכם שרתחה בקרבם ונפשם התעננה על זעקת המעונים והמומתים, רק אז היו שולחים יד בראשי המשפחה, ולכן מכיון שאין בכחו לעמוד בפני יסורי הנפשות האהובות והיקרות לו מכל יקר, ובלי ספק שלבו יתפלץ בקרבו ונפשו תצא ממנו בראותו זאת, לזאת שאלתו היא אם מותר לו לקרב את קצו ולשלוח יד בנפשו אשר לא כדת ובלבד שלא יראה בעיניו באבדן בני ביתו. ונוסף לזה הוא עצמו לא יומת במיתת משונה תוך יסורים גדולים על ידי הרוצחים הארורים ימח שמם וגם יזכה לבוא לקבר ישראל בבית הקברות שבגיטו קובנה.

תשובה: ההורג את עצמו בשעה שדעתו מיושבת עליו דבר זה אסור הוא מדאורייתא כדכתיב ואך את דמכם לנפשותיכם אדרוש, ועי' בב"ר

שאלות ותשובות ממעמקים

מו

מליד דקרא זה קאי לא רק על השופך דם עצמו אלא אף על החונק את עצמו אע"פ שאין יוצא ממנו דם.

וכן מוכח ממה דאיתא בב"ק צ"א ע"ב, אלא תנאי היא דאיכא למ"ד אין אדם רשאי לחבל בעצמו ואיכא מ"ד אדם רשאי לחבל בעצמו מאן תנא דשמעית ליה דאמר אין אדם רשאי לחבל בעצמו אילימא האי תנא הוא דתניא ואך את דמכם לנפשותיכם אדרוש רבי אלעזר אומר מיד נפשותיכם אדרוש את דמכם דילמא קטלא שאני ע"כ, הרי מוכח מהדיא שאסור לאדם להרוג את עצמו וכן פסק הרמב"ם בפ"ה מהל' חובל ומזיק ה"א.

ובמהרי"ט הביא ראיה מהא דאיתא בכתובות דף ק"ג ע"ב, שהוא יומא דאשכתיב דרבי נפקא בת קלא ואמרה כל דהוה באכתיב דרבי מזומן הוא לחיי העולם הבא שהוא כובס כל יומא הוה אתי קמיה ההוא יומא לא אתא כיון דשמע הכי סליק לאיגרא ונפל לארעא ומית יצתה בת קול ואמרה אף ההוא כובס מזומן הוא לחיי העולם הבא, ומשמע מזה שאם לא היתה יוצאת הבת קול היינו אומרים שאין לו חלק לעולם הבא וטעמא מאי משום שאיבד עצמו לדעת.

ובד"מ סי' שמ"ה הביא דעת המורי"ל דלא הוי מאבד עצמו לדעת אלא היכא שהתרו בו וקיבל התראה, או יש עליו חיוב דין של מאבד עצמו לדעת מכיון שידע שזוהי עבירה חמורה ואמר אף על פי כן, אבל בלי התראה אין עליו דין של מאבד עצמו לדעת, ועי' בשד"ח סי' י"ז שהעיר ע"ז, ואפי' ת"ח אסור לו למסור עצמו למות אפילו על דברי תורה כמבואר בב"ק ס"א ע"א, דאיתא שם, מאי לא אבה דוד לשתותם דלא אמרינהו משמיהו אמר כך מקובלני מבית דינו של שמואל הרמתי כל המוסר עצמו למות על דברי תורה אין אומרים דבר הלכה משמו.

ובמז"ר יו"ד סי' שמ"ח הובא שכמה פוסקים סבירא להו, שהמאבד עצמו לדעת אפילו עשה תשובה לפני מותו אין תשובתו מועלת לו, שהרי הוא הרג את עצמו לאחר שעשה תשובה והוא דומה לטובל ושרץ ביד.

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מז

והמאבד עצמו לדעת אין לו חלק לעולם הבא כדמוכח מהא דתנן בסנהדרין צ' ע"א, ארבעה הדיוטות אין להם חלק לעולם הבא ואחד מהם הוא אחיתופל שחנק את עצמו, והחיד"א ז"ל בספרו נחל קדומים מצא רמז לזה בתורה מהא דכתיב, ונפש כי תחטא ומעלה מעל (ויקרא ד') "מעל" ר"ת מאבד עצמו לדעת, וגם המרי"ט הביא שאין לו חלק לעולם הבא מהאי עובדא דכובס הנ"ל.

ולענין דינא פסק הרמב"ם בפ"א מהלכות אבל הלכה י"א, המאבד עצמו לדעת אין מתעסקין עמו לכל דבר ואין מתאבלין עליו, ואין מספידים אותו אבל עומדים עליו בשורה ואומרים עליו ברכת אבליים וכל דבר שהוא כבוד לחיים, וכן פסק בשו"ע יו"ד סי' שמ"ה ס"א, וכתב הכ"מ שמקור דברי הרמב"ם הוא באבל רבתי סובר רבנו שאבילות אינו מדברים של כבוד החיים ולכן כתב ג"כ שאין מתאבלין עליו והרמב"ן חולק בדבר, וכ"כ בספר האשכול ח"ב עמוד ק"ע שאין מתאבלין.

ועי' בשו"ת חת"ס סי' שכ"ו אות ב' שכתב ליישב דברי הרמב"ן ומ"מ סיים שם בתשובה הנ"ל שלהלכה ולמעשה מי ירים ראש להורות נגד הוראות הבי"ע עיי"ש, וכן הוא בשו"ת האלף לך שלמה סי' ש"א.

והנה תכריכין וקבורה לא מנעו ממאבד עצמו לדעת כמבואר בתשובת הרשב"א סי' תשס"ג עיי"ש, אבל נהגו שלא לקברו בשורת קברים של אלו שמתו על מטתם אלא קוברים אותו רחוק מהם ומן הצד במקום מיוחד דומיא דנהרגין ע"פ בי"ד כדתנן בסנהדרין מ"ו ע"א עיי"ש, וכן היו נוהגים בליטא ובאשכנז.

אולם על קידוש השם יש לו לאדם למסור עצמו למות כמבואר בסנהדרין ט"ו ע"א, א"ר יוחנן משום ר"ש בן יהוצדק נימנו וגמרו בעליית בית נתזה בלוד כל עבירות שבתורה אם אומרין לאדם עבור ואל תהרג יעבור ואל יהרג חוץ מעכו"ם וגילוי עריות ושפיכות דמים, ובפ"א דע"ז כתב הריטב"א בשם ר"ת זו"ל: ובן ישראל הירא שמא יכריחוהו לעבור על דת וחובל בעצמו אין מונעין ממנו שם דבר, ומטעם זה בשעת הגזירות שחטו אבות את ילדיהם בידיהם, ובשבות יעקב ח"ב סי' קי"א כתב שכך הוא הדין גם מי שמקבל על

מח

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עצמו מיתה בידי אדם על איזה איסור חמור שעבר עליו שאין מונעין ממנו שום דבר.

וראיתי בספר בשמים ראש המיוחס להרא"ש בסי' שמ"ה שנשאל, באדם אחד חסר לחם וחשוף שת, שאמר בפני שנים שמאס בחייו ואיבד עצמו לדעת, אם דשאים קרוביו להתאבל עליו, והשיב שחלילה לדון את האיש הזה לרעה, וכבר אמרו במד"ר אך את דמכם לנפשותיכם אדרוש, יכול כשאויל בן קיש ת"ל אך, ושאויל היה רק מתירא פן יתעללו בו הפלשתים, ולא תאמר דוקא התם שהיה ירא שישלחוהו בבזיון גדול להתקלס בישראל ויהיה חילול ה' בדבר, לא כי אלא כל שעשה מריבוי צרותיו דאגות ויסורין או עוני גמור, אין כאן מיחוש, אדרבה גינו חז"ל את צדקיהו מלך יהודה ואמרו שהיה לו להטיח עצמו בכותל וימות ולא יראה בשחיטת בניו לעינו וגם מנו חז"ל אחיתופל בכלל ג' הדיוטות לפי שמרד במלכות דוד לא היה אחיתופל מאבד עצמו לדעת, וענין המאע"ל הוא שבועט בטובה ושונא את העולם כמקצת פילוסופים שעושים כן להמרות פני עליון וכו' אבל בצרת נפשו כי לא יוכל שאת, ואף כי זה שעשה לשמור עצמן מן החטא, שכל הצרות והעוני מעבירים את האדם על דעתו ועל דעת קונו אין בזה איסור ע"כ.

וראיתי בבדק הבית סימן קנ"ז שהביא דברי המדרש הנ"ל ופי' יכול אפילו כשאויל בן קיש, שאם ירא שמא יעשו לו יסורים קשים שלא יוכל לעמוד בנסיון שיוכל למסור א"ע למיתה ת"ל אך, ומכאן מביאים ראיה השוחטים התינוקות בשעת השמד ויש אוסרים ומפרשים ת"ל אך, שאינו יכול להרוג עצמו. וחנניה מישאל ועזריה מסרו ביד אחרים אבל הם לא פגעו בעצמן ושאויל בן קיש שלא ברצון חכמים עשה ע"כ.

ונראה מזה שיש מפרשים המדרש לאסור ושאויל עשה שלא כדין, ופירש זה תמוה שהרי „אך מיעוטא" הוא והמדרש ממעט כגון שאול בין קיש דלא הוי בכלל מאע"ל, וגם יש להביא ראיה ע"ז מיבמות ע"ח ע"ב שנעשו על שאול שלא נספד כהלכה, אלמא דלא הוי בכלל מאע"ל. (ועיין בפי' בעלי התוספות על התורה פרשת נח שהביא ג"כ דברי הי"מ). וכ"כ הרמב"ן בתורת האדם, ז"ל, וכן מצינו בגדול שאע"ל מפני האונס כדון שאול מלך ישראל שהיה האיבוד מותר לו וכדאמרינן בב"ר אך את דמכם וכו' יכול

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ממ

אפילו נרדף כשאל ת"ל אך, לפיכך לא היה בכלל מאבד עצמו לדעת, ונענשו עליו כשלא הספידוהו כראוי ע"כ, ועיי' ברא"ש פ"ג דמס' מועד קטן סי' צ"ד, וכן פסק בשו"י סימן שמ"ה סכ"ג גדול המאע"ל והוא אנוס כשאל המלך אין מונעים ממנו כל דבר.

ובים של שלמה פרק החובל סי' נ"ט ראיתי שהביא בשם הריטב"א וז"ל: מצאתי כתוב בשם הריטב"א הא דאמרינן ע"ז י"ח דר' יוחנן בן תרדיון, מוטב שיטלנה מי שנתנה ולא יחבול בעצמו, כתוב בגליוני התוס' שהיה אומר ר"ת, דהיכא שמתירא שלא יכריחוהו לעבור על דת מותר לחבל בעצמו, והכי איתא במדרש אך את דמכם אדרוש יכול אפילו כשאל ת"ל אך פ"י שחבל בעצמו מפני שהיה מתיירא שמא יעבירוהו על דת דבכה"ג שרי ומכאן לומדים לשחוט התינוקות בגזרות מפני העברת דת ע"כ מצאתי בגליוני התוס' והם דברים שצריכים תלמוד ועיון, אלא שכבר הורה זקן ושמענו בשם גדולי צרפת שהתירו הלכה למעשה עכ"ל הריטב"א

וזה של שלמה מסיק שם: אבל כבר מוכח מרעת ר"י שאינו, שכתב אסור להרוג את עצמו מפני שירא, ומדכתב סתם שירא משמע אפילו מיראת שמים' שלא יעבירוהו על דת, וכן הרא"ש לא התיר אלא להניח עצמו ליהרג וזה אינו קרוי חובל בעצמו, אבל לא שיחבול בעצמו, וגם דעת שאל לא היה כן כמו שכתב, דא"כ לא היה רוצה לקיים המקרא בכל לבבך ובכל נפשך כמו ר', עקיבא שהיה מצטער על זה וגם לישנא דקרא לא משמע כלל משום שיעבירוהו על דת, אלא שלא יתעללו בו לצערו ולענות אותו כמו שנאמר פן יבואו הערלים ויתעללו בי, ואפשר שהוא מפרש יתעלל בי על עבירת ועל זה היה מתיירא, הלא אמר ודקרוני וזה ענין מיתה וכן תרגום יהונתן וקטלוני אלא הוא מטעמא שכתבתי ע"כ, אולם בב"ח סימן קנ"ו הובאה הגהת סמ"ק שפ"י שהיה ירא שלא יעבירוהו על דת כמ"ש הריטב"א בשם ד"ת ועיי' בתשובת חיים שאל סימן מ"ו מש"כ ע"ז.

וזה מהאמור נראה שלא עשה כן שאל אלא מיראה פן יענוהו להעבירו על דת, ולכן אין ראיה משאל שיהי' מותר לאדם לאבד את עצמו מחמת עוני ויסורין, ואף על פי שהעניות מעבירה את האדם על דעתו ועל דעת קונו כמ"ש בגמרא עירובין מ"א, מ"מ איבעי ליה לכוין דעתו ולא לבעט ביסורין

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נ

ח"ו, ונידון דידן לא דמי להכא כי עינוי הבא בידי אדם שאני כדמוכח בגמרא בכתובות ל"ג דאלמלי נגדוה לחנניא מישאל ועזריה הוּו פלחו לצלמא, והנה התוס' שם כתבו דהצלם לא הי' ע"ז ממש אבל במדרש רבה שיר השירים פרשה ז' פירש דהצלם היה ע"ז ממש.

ועי' בתוס' גיטין נ"ז גבי ת' הילדי' שנשבו לקלון שקפצו כולם ונפלו אל הים, וראי' מצדיקיהו שהרי כשנשבה היה ידוע לו כבר שיתעלל בו נבוכדנצר והוא קרוב למיתה מן החיים כדמוכח מבבא בתרא דף ח' דבסתם שבוי כולהו מות, חרב ורעב איתניהו ביה, וכן נראה מילקוט מלכים, שא"ל צדיקיהו לנבוכדנצר הרגני ראשון שלא אראה בדם עשרה בני ובניו אומרים הרגנו תחילה שלא נראה דם אבינו שפוך על הארץ וכן עשה להם עיי"ש, ולכן נראה מכל האמור דבנידון דידן שהוא ממש כמו שהיה אצל צדיקיהו כמבואר בילקוט הנ"ל שלא דצה לראות בדם בניו נראה לי דמותר.

והנה על מה שהעלה בספר בשמים ראש המיוחס להרא"ש, דאינו נקרא מאבד עצמו לדעת כל שעשה כן מרבו צרותיו ודאגת יסורים או עוני, ראיתי שבספר נחר אבל סי' י"ח כתב ע"ז וז"ל: והריני נשבע חי ה' צבאות כי לא יצאו דברים כאלו מפה קדוש, והאחרונים כתבו כי המו"ל כתב את כל הספר הזה בעצמו כידוע, ועי' ביד דוד ובפ"ת סי' שמ"ה סק"ב ובטוב טעם ודעת מהדר"ג סי' כ"ב, וגם החת"ס בתשובה הנ"ל סי' שכ"ו כינה את התשובה הזאת בשם „כזבי הרא"ש".

או"ם הגאון חיד"א בספרו שם הגדולים כתב וז"ל: ואהני' לספר בשמים ראש סהדותא דפוס ברתא דליקו בבחירתא, וגם הגאון מוה"ר צבי אב"ד בערלין העיר בעדות ברורה שראה הכתב יד של בנו וגם מתוך התשובות עצמן מוכח שאחד מן הראשונים כתבם: (א) שמביא דבר בשם מורי רבנו מאיר (ב) מביא פירוש בשם הגאון כנראה הוא רב האי גאון למתני' דפ"ב דנגעים. (ג) מביא פירוש בשם רבנו יצחק בתוס' נזיר שלא נמצא בתוס' שלפנינו כמו שהעיר עליו ר' יצחק די מולינאן שהי' חי בימי ב"י ובידו היה הכ"י של בשמים ראש. (ד) מה שכתבו תוס' בשבועות דף ג' ע"א בסתם מובא בתשובה זאת בשם ריב"ן ובאריכות יותר באופן שמתורץ מה שהקשו כמה אחרונים על תוס' הנ"ל, היאך כתבו דהמצורע יגלח ע"י נכרי

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נא

הא מפורש בת"כ דבעי גלוח ע"י כהן. וקשה להאמין שכל הנ"ל נעשה ע"י זיוף וכיון שגם הב"י הביא יש שהיו מתירין ע"י נכרי אין לנו טעם להחזיק בשקר אם נמצא כתוב דיעה זו עוד בשם קדמון, ועי' בס' מלמד להועיל סי' ס"ד, ועי' בשו"ת כרך של רומי סימן י"ד שהאריך להעמיד את הבשמים ראש, בסימן ו' חתם את עצמו „אשר ב"ר יחיאל".

ועי' עוד בשו"ת מהרש"ם חלק ו' סי' מ"ט שנשאל אודות אנשים רמי מעלת שאיבדו א"ע לדעת בכדי להפטר מצער ויסורין עוני ובזיון והשיב שכל שעושה כן מחמת יסורין אינו בכלל מאע"ל וכמ"ש הבשמים ראש, וכ"כ בשו"ת רב פעלים ח"ג מיו"ד סי' כ"ט עיי"ש שהביא בשם „תשובת כרך של רומי", ומסיק כדברי הבשמים ראש שאם עשה כן מתוך צרות ויסורין אינו נידון כמאע"ל.

ונראה מכל הנ"ל שאם איבד את עצמו מחמת יסורין וצער מותר להתאבל עליו ברם דבר אם היה האיש שאיבד עצמו לדעת יר"ש וחרד לדבר ד' בזה דוקא יש מקום לדון לכף זכות שעשה כן בשגגה אבל לא לאלו שלמדו מן הגוים שעל כל דבר קטן מאע"ל, בהיות שאין להם אמונה בהשי"ת שהוא זון ומפרנס לכל ואינם מודים בהשאת הנפש.

וביו"ד סי' שמ"ה נפסק הדין שמי שהוא אנוס כשאל המלך אין מונעין ממנו דבר, ועי' בח"ס יו"ד סי' שכ"ו, ועי' ג"כ בפרשת מרדכי סי' כ"ה — כ"ו במי שנמצא חנוק בבית הסוהר שיש לתלות שלא שעה כן מחמת רשעות אלא מחמת פחדו מעונש ערכאות או מיסורי הכאות או מעונש מיתה שיוטל עליו, או מחמת שהשש שידונו אותו להיות חבש במבצר, וחשב שכדי להציל עצמו מכל אלו מותר לו להמית את עצמו, צריכים להתאבל עליו ולומר קדיש עיי"ש, ועי' בלחם יהודה שכתב שאם ממית עצמו בפני שמתירא שלא יבוא לידי ענויים קשים לא מיקרי מאבד עצמו לדעת.

ומכל הנ"ל למדנו שכ"ש בנידון דידן שבודאי יתעללו בו כמו אצל שאול המלך והצוררים ימ"ש יעשו לו יסורים נוראים נראה שמותר לו לאבד עצמו לדעת, אולם בספר חיים שאל סי' מ"ו כתב שדוקא מפחד שמא יעבירוהו על דת מותר לו לאבד עצמו לדעת אבל מפחד יסורים אחרים אסור והביא

נב

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ראיה מדברי הריטב"א הנ"ל שמשמע מדבריו דהא דאין מונעין ממנו שום דבר זהו דוקא בפני שהוא ירא שמא יכריחוהו לעבור על דת, ועי' בספר זכור לאברהם אות מ' אם מותר להמית עצמו לכפרת עונותיו עיי"ש היטב, ורוב הפוסקים פסקו לאסור, ולפי"ז בנידון דידן אף שטעמו הוא מפני שהוא רוצה להקבר בקבר ישראל מ"מ אסור לו לאבד את עצמו.

והחת"ס סי' שכ"ו כתב להביא רא"י שאסור לאבד עצמו בגלל שינצל מיסורים מהא דאיתא בע"ז י"ח ע"א, מצאוהו לרבי חנינא בן תרדיון שהיה יושב ועוסק בתורה מקהיל קהילות ברבים וס"ת מונח לו בחיקו הביאוהו וכרכוהו בס"ת והקיפוה בחבילי זמורות והציתו בהן את האור וכו' אמרו לו תלמידיו אף אתה פתח פ"ך ותכנס בך האש אמר להן מוטב שיטלנה מי שנתנה ואל יחבל הוא בעצמו, ואין לך מיצר יותר ממי שנשרף חיים ואף על פי כן לא רצה רחב"ת לפתוח את פיו ולקרב את מיתתו אלמא שאסור לאבד את עצמו כדי להנצל מיסורים.

אולם אפשר לומר שרחב"ת החמיר על עצמו ביותר ע"פ מדת חסידות, אבל באמת ככהאי גוונא לא מיקרי מאבד עצמו לדעת, ושאל המלך יוכיח שנפל על חניתו לקרב את מיתתו בטרם שהפלשתים הישגוהו, ולכן יתכן שבנידון דידן מותר לו לאבד את עצמו ואין מונעין ממנו שום דבר.

ובכל זאת נראה לי שלפרסם ברבים כפסק הלכה שבנידון דידן מותר לו לאדם לאבד עצמו לדעת, בודאי אסור, כי בזה היינו נותנים יד לפושעים הצוררים ימ"ש, כי כמה פעמים טענו כלפי היהודים על שאינם מאבדים עצמם לדעת כמו שעשו יהודי ברלין, ודבר זה יש בו משום חילול השם, מפני שזה היה מראה כאילו אין ליהודים בטחון בחסדי ה' שיצילם מידיהם הטמאות והאדורות של הצוררים ימ"ש, וכל רצונם של הרוצחים היה להכניס בקרב היהודים אדרלמוסיא של יאוש כדי לעקור מלבם כל תקוה ותוחלת לישועת ה'.

ואמנם יש לציין כאן בגאון כי לא היו בגיטו קובנה מקרי איבד ולדעת זולת שלושה אנשים שרוחם נפלה בקרבם, אבל יתר יושבי הגיטו האמינו באמונה שלימה כי לא יטוש ה' את עמו ויאמר למשחית די, כולם האמינו בביאת המשיח ובכל יום חיכו לו שיבוא.

סימן ד'

בדין נוסח ברכת קידוש השם.

שאלה: מי יתן ראשי מים ועיני מקור דמעה על חללי בת עמי, שנהרגו נטבחו ונשרפו על קידוש שמו הגדול על ידי הרשעים הגרמנים ימ"ש, וזכרי את „היום השחור" — כפי שיהודי גיטו קובנו כינו את היום המר והנמהר, יום ח' לחודש מרחשון תש"ב — נפשי עלי תתמוגג ולכי נמס בקרבי על הרג אנשים נשים וטף, זקנים עם נערים, יונקים ועוללי מפותחים בזרועות אמות רחמניות, כולם נספו בידי האויב אשר לא ידע רחם, הרג ולא חמל ורווה דם נקיים מהורים וקדושים.

אז כיום שהוא יצא הצו מהנאצים הארורים שעל כל יושבי הגיטו בלי שום יוצא מהכלל מוטל להתיצב ב„מגרש הדמוקרטי" (דעמאקראטיע פלאץ) שבתוך הגיטו לשם סקירה על יד הגרמנים, וכל שלא ימלא אחרי הצו הזה וישאר בביתו אחת דתו להמית. אין לשער ואין לתאר את גודל הפחד והבהלה שאחזו את יהודי הגיטו, כולם ידעו שביום זה יוכרע גורלם אם לשבט או לחסד. וכולם יעברו תחת שבט הבקורת של מטה החובלים והזעם של הרוצחים שיחרצו את משפמם להיים או למות.

בתי הגיטו התרוקנו מיושביהם, הורים הובילו את ילדיהם הקטנים ובנים תמכו ומעדו את אבותיהם הזקנים שחלכו על משענתם, חולים ותשושי כח נישאו על ידי בני משפחתם, כולם הלכו הלך ילך ובכה למגרש הזוועות, קולות הבכיה והתאניה ואניה בקעו את האויר תנות לא אוכל את קולות השבר היגון והאנחה שנשמעו מכל צד, לא ידענו מה בסופנו אבל אחת ידענו נגזרנו ואכדנו. ויום זה היה יום סגריר וסופה הגשם והשלג נתכו ביחד מן השמים כאילו יושבי מרום בשמי ערבות מלאכי מעלה משרתי אל-

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עליון גם הם נבחרו נחפזו וזה אל זה שואלים, איה אֵל אֵלִים, אנה, שוכן מעולים רחם על שארית צאן מרעיתך המוכל למבכה כצאן מבכה.

וככה התאספו על המגרש הזה כל יושבי הגיטו שמנו אז כשלושים אלף איש שחיכו להופעתו של אחד מהמרצחים הגרמנים, שהיה ידוע לשמצה בשם רוקא, הוא היה המעלעקטאָר ממעם הגיסטפו ובירו ניתן הגורל של כל יהודי הגיטו כחומר ביד היוצר ברצותו מחיה וברצותו ממותת.

ואז במעמד זה ניגש אלי ר' אליהו מווארשא הי"ד, אחד מהפליטים שנמלטו מווארשא לליטא בחפשו מפלמ לנפשו, אבל נפל מן הפח אל הפחת, שהרי גם לליטא הגיעה ידם הממאה של הנאצים שאמרה לכלות את ישראל, ומכיון שהיטב הכיר את דרכם של הרשעים הללו, הוא ידע שחלק גדול מהנצבים על המגרש הזה יספה ולא יזכה לראות את אור החיים עלי אדמות כי מחר למועד הזה יוצאו אלפים להורג, — הוא שאל אותי מהו נוסח הברכה שעל מקדשי שמו יתברך מוטל לברך, האם עליהם לברך אקב"ו „על קדוש השם" — לפני מותם, או עליהם לברך אקב"ו „לקדש את השם", והוא אמר לי, כי הוא רוצה לדעת בעצמו איך לברך, אם ח"ו יגיע לידי כך, ומלבד זאת הוא רוצה לקיים מצוה, אולי האחרונה בימי חייו, והיא, לעבור בין הפקודים למות וללמדם כדת מה לעשות אם תגיע שעתם האחרונה ולזכותם שיברכו את הברכה כפי הדין.

תשובה: בספר יוסף אומץ אות תפ"ג מובא נוסח הברכה שמוטל על מקדשי השם לברך, ונוסח הווידוי של מו"ה אשר מק"ק פרנקפורט שקידש את השם וזהו: „ברוך אתה ה' אלקינו מלך העולם אשר קידשנו במצותיו וצונו לאהוב שם הנכבד והנורא ההיה וההוה והעתיד להיות בכל לבבנו ובכל נפשנו ולקדש שמו ברבים ברוך אתה ה' מקדש שמך ברבים, ואחר כך יאמר שמע ישראל וימסר צווארו על קדושת שמו".

ובשלי"ה שער האותיות סוף אות א' כתב שיש לברך בנוסח זה: „ברוך אתה ד' אקב"ו לקדש שמו ברבים", כדין הרבה מצוות עשה שמברכין

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ל

על קיומן, ועיי"ש שכתב גם כן הטעם למה מברכין "לקדש" ואין מברכין "על קידוש", שהטעם הוא כמו שכתב הריב"א שכל מצוה שאפשר לעשות על ידי שליח יש לברך ב"על" אבל מצוה שהוא צריך לעשות בגופו ואי אפשר לעשותה על ידי שליח יש לברך בלמ"ד, ועיי' ברא"ש ובר"ן שכתבו שכדברי הריב"א משמע קצת מסבדת התלמוד, ונראה מדבריהם שהם מסכימים עם סברא זו, עיי"ש שתירצו בטוב טעם ודעת מה שהקשה על הריב"א מנוסחן של איזה ברכות, וקידוש השם הלא מצוה שהוא עושה בגופו ולכן צריך הוא לברך עליה בלמ"ד. עיי"ש היטב בשל"ה.

ועיי' בפ"ת סימן קנ"ו סק"ו שהביא את דברי השל"ה שיש לברך בנוסח זה ומצאתי ג"כ בריקנטי סימן ע' שכתב כהשל"ה, ולפי דברי הרוקח דס"ל שכל דבר שבן נח מצווה אין מברכין יהיה תלוי בפלוגתא דרבבתיא, היינו רש"י תוס' ורמב"ם, אם בן נח מצווה על קידוש השם.

ומכל זה הוריתי לו שלפי דעתי יש לברך כפי הנוסח של השל"ה והיינו: "ברוך ה' אקב"ו לקדש שמו ברבים" וכך בדעתי לברך.

והקדוש הזה ר' אליהו הי"ד שנה ושילש את הנוסח הזה של הברכה ולימד גם ליהודים אחרים שתהא ברכה זו משוננת ומחודדת בפיהם כדי שידעו איך לברך לכשתגיע שעתם ח"ו למות מות קדושים.

ואחרי איזה זמן בא אלי שוב הקדוש הנ"ל וסיפר לי שגם הגאון ר' אלחנן וואסערמאן הי"ד גם הוא לימד את בנו הרה"ג ר' נפתלי הי"ד שגם הוא היה שם, את נוסח הברכה כהשל"ה ואמר לו את זה בשם מרן רבנו החפץ חיים זצ"ל.

ואני גם כן שמעתי מנכדו של החפץ חיים הגאון ר' יהושע לעוויןסאן הי"ד שהיה גם כן בגיטו שכך שמע מהחפץ חיים זצ"ל בהיותו ברוסיא בזמן המלחמה העולמית הראשונה בעת שהשתוללו ברוסיא מחנות המדצחים של פעטלורא, מאכנא ועוד שהרגו ביהודים, שיש לברך את הברכה כפי תנוסח של השל"ה.

סימן ה'

בגדי הקדושים שהרוצחים הפשיטו מעליהם לפני מותם אם מותרים הם בהנאה.

שאלה: אחרי היום המר והנמהר, יום ח' מרחשון תש"כ, יום הטבח הגדול שרב הטבחים הגרמני מזרעו של עמלק הכריע לטבח כרבכה מאחינו הקדושים במבצר התשיעי, גיא ההריגה של יהדות קובנה, בא אלי ר' אליהו צ'דיקוב הי"ד שהיה אחד מעובדי הכפיה בגדוד העבודה שהיה נקרא „יארדאן בריגאדע“, וסיפר לי שבמקום עבודתם במבצר התשיעי ישנו מחסן בגדים מבגדי הקדושים שהגרמנים הפשיטו מעליהם לפני שהרגום, וכיסי הבגדים הללו מלאים מכתבים אישיים ותמונות ושאר חפצים קטנים הרגילים להמצא בכיסי אנשים כך שאין ספק שהבגדים הם בגדי ההרוגים, ולא עוד אלא שרבים מצאו בין התמונות, תמונות קרוביהם יקיריהם מחמלי-נפשם, אח הכיר את תמונת אחיו ובן את תמונת אמו, אולם הבגדים היו נקיים מכל לכלוך של דם, דבר שהוכיח שהרוצחים פשטו את בגדי החללים לפני שהרגום, ושאל אותי ר' אליהו הנ"ל האם הבגדים הללו מותרים בהנאה או לא.

תשובה: בתשובות הישנות של חב"ח סימן קי"ב העלה להלכה בדבר בגד של מת שהעכו"ם הפשיטו מגופו של המת ומכרוהו ויורשי המת פדו את הבגד מיד הלוקח, והעלה חב"ח שבגד זה אסור בהנאה, ומשמע מדבריו שכל עיקר הטעם הוא מפני שהעכו"ם הפשיטו את הבגד מגופו של המת לאחר מותו, אבל אם היו מפשיטים ממנו את בגדו לפני שמת בודאי שהבגד היה מותר בהנאה.

וכן בנידון דידן שהרוצחים הפשיטו את בגדי החללים לפני שהכריעו למות שהרי אין למצוא על הבגדים הללו סימן של דם, בודאי שהבגדים הללו מותרים הם בהנאה, וגם אחד מהניצולים שבחמלת ה' עליו

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לב

הצליח להתחמק מבין שורות המומתים סיפר, שהגרמנים ציוו על כולם לפשוט את בגדיהם מעליהם לפני שהמיתום, אם כן בודאי אין על תבגדים הללו דין של בגדי מת שאסורים בהנאה.

והנה במס' סנהדרין דף מ"ז ע"ב גרסינן: איתמר האורג בגד למת אביו אמר אסור ורבא אמר מותר, אביו אמר אסור הזמנת מילתה היא ורבא אמר מותר הזמנה לאו מילתה היא, עיי"ש.

ולשם דף מ"ח ע"א גרסינן ת"ש החוצב קבר לאביו והלך וקברו בקבר אחד הרי זה לא יקבר בהו עולמית, התם משום כבוד אביו, ה"ג מסתברא דקתני סיפא רשב"ג אומר אף החוצב אבנים לאביו והלך וקברו במקום אחר הרי זה לא יקבר בהו עולמית אי אמרת בשלמא משום כבוד אביו שפיר אלא אי אמרת משום הזמנה טווי לאריגה מי איכא למאן דאמר ע"כ עיי"ש.

ובש"ע יו"ד סי' שס"ד סעיף ו' פסק: החוצב קבר לאביו וקברו במקום אחר לא יקבר בו הוא עולמית משום כבוד אביו אבל אחר מותר ליקבר בו, והוא כתנא קמא דדוקא החוצב קבר לאביו, ויש פוסקים שפסקו כרשב"ג דאף החוצב אבנים לאביו הרי זה לא יקבר בהו עולמית.

ובספר שיבת ציון סי' נ"ח ראיתי שפסק באחד שהזמין מצבת אבן להעמיד על קבר אביו ולא איסתייע מילתא להוליך המצבה לשם, ופסק דהמצבה אסורה בהנאה משום כבוד אביו, עיי"ש שהעלה דמכש"כ הוא בבגדים שלבשוהו לקוברו בהם אף שלא נקבר בהם שאסורים הם בהנאה מפני כבוד אביו.

ובברכי יוסף יו"ד סי' שמ"ט ס"ק ה' כתב, אם חלבישו תכריכין למת ומיראת העכו"ם הפשיטוהו דמותר לתת את התכריכים הללו למת אחר, ומשמע מדבריו דרק למת אחר הוא דמותר ליתנם אבל ליתנם לחי שישתמש בהם אסור.

ואם כן לכאורה גם בנידון דידן יש לאסור את הבגדים הללו בהנאה דומיא דחוצב אבנים לאביו להך פוסקים דפסקי כרשב"ג, ודומיא דהך

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דשיבת ציון שהמצבה שהזמין לקבר אביו אסורה בהנאה, ודומיא דהך דברכי יוסף דרך למת אחר מותרין התכריכין אבל לא לחי.

והנראה דנידון דידן לא דמי כלל לכל הנך, דאף הנך פוסקים דפסקי כדשב"ג לא פסקי אלא משום כבוד אביו, דזה שייך רק בזמנים כתיקונם כשעולם כמנהגו נוהג, אבל בשעה טרופה זו של נידון שאלתנו כשבחוץ תשכל חרב ובחדרים אימה כשקיום בנו הכתוב טובים היו חללי חרב מחללי רעב, עוני ומחסור, כשכלואי הגיטו לא היה להם בגד לעטוף בו את גופם כדי שלא לסבול מזלעפות קור וכפור, בודאי שהקדושים הללו שנהרגו על קידוש השם אינם מקפידים שהנשארים בחיים ישתמשו בבגדיהם כדי להנצל מזוועת הקור ושלל יקפאו מכפור, ולא עוד אלא שבלי שום כל ספק הדבר יגרום להם קודת רוח מרובה שבניהם יוצאי חלציהם ישתמשו עם בגדיהם כדי לחמם בהם את בשרם, וגם אם יהודים אחרים שאינם שארי בשרם ישתמשו בהם גם על זה הקדושים הטהורים הללו אינם מקפידים ללא כל ספק כאמור, ומהאי טעמא גם הך דשיבת ציון לענין אחד שהזמין מצבה לקבר אביו, אין לו שום שייכות לנידון דידן ופשוט.

וגם הך דינא של הברכי יוסף אין לו שייכות לנידון שאלתנו, דשם הרי הזמנו התכריכין לצורך קבורת המת ולא עוד אלא שהלבישו בהם את המת, לכך ודאי אסורין הן בהנאה לחי, אבל בנידון דידן הרי אף פעם לא הזמנו בגדי הקדושים הללו לצורך קבורתם, ומה שהקדושים הללו היו מלובשים בבגדים הללו בשעה שהגרמנים הובילום לטבח אין בזה משום כדי איסור, שהרי כפי שידוע היו נוהגים הזדים הארורים להעלים מקרבנותיהם התמימים את מזימת לבם ועד הרגע האחרון לא ידעו הקדושים שהם נתונים למות בצפותם לרחמי שמים וכפי שכללו לנו רבותינו זכרונם לברכה שאפילו חרב חדה מונחת על צוארו של אדם אל יתיאש עצמו מן הרחמים, גם ידוע שהגרמנים נוהגים היו להפשיט מהניתנים למות את בגדיהם לפני שהיו מכריעים אותם לטבח, ולכן בודאי אין לאסור את הבגדים הללו כי אף פעם לא הזמנו הבגדים הללו לצורך קבורת הקדושים ולא היתה כאן הזמנה למת, ועי' מש"כ בספרי שו"ת ממעמקים חלק א' סימן ג'.

והרי זה דומה ממש למה שכתב הפתחי תשובה סימן שס"ד סק"ו שאם נתנו מת בארון שלא היה לפי מדתו שהארון מותר בהנאה, מכיון שהארון הזה לא היה לפי מדתו אינו נאסר שהרי אינו ראוי להקבר בו, וגם בנידון דידן לא היו הבגדים הללו ראויים אף פעם להקבר עם הקדושים הללו מחמת פקודת הגרמנים להפשיט מהם את בגדיהם לפני הריגתם כאמור.

ומהאי טעמא לא דמי נמי להא דאיתא בשו"ת ערוגת הבושם יו"ד סי' רמ"ט, בהדוג שהרגותו בלי בגדיו אם צריכין לקבור את בגדיו ונעליו אף אותם שלא היה עליהם דם, עיי"ש שהביא את דברי הש"ך ביו"ד סי' שס"ד שיש לקבורם מספק, אולם זהו רק לכתחילה אבל בהנאה אסורים בכל אופן.

גם זה אינו דומה כלל לנידון שאלתנו, דשם הרי מיירי שההרג נהרג כשבגדיו היו עליו ורק לאחר שיצאה נשמתו הורידו את בגדיו מעליו ולכן שפיר פסק הש"ך שמספק צריכין הבגדים קבורה אבל בהנאה אסורין הבגדים בכל אופן אבל בנידון שאלתנו שבשעת ההריגה לא היו הבגדים על ההחללים בגלל צו הצוררים ימ"ש כאמור, לכן בודאי לא רק שאין הבגדים צריכים קבורה אלא שמותרין הם בהנאה.

ובספר תשובה מאהבה ח"א סי' קס"ה נשאל, היכא שעשו ארון לצורך מת והיה קצר מלהכיל בו את המת הזה שלמענו עשו את הארון, אם מותר ליתן בארון הזה מת אחר, עיי"ש שהשיב להיתר, ואפילו היכא שכבר הניחו את המת הראשון בתוך הארון הזה בדוחק והוציאו אותו בגלל הדוחק הזה גם כן מותר להשתמש בו לצורך מת אחר. אולם בספר הר אבל דף י"ט חולק עליו בזה וסבירא ליה דכיון שאומניה לארון זה לצורך המת הזה וגם שמוהו בתוכו אף שלא היה אלא לפי שעה, אף על פי כן נאסר הארון בהנאה דזה הוי צר ואומניה, עיי"ש שציין את הר"ן בס"פ נגמר הדין מש"כ בשם רב אחאי ז"ל.

גם נידון זה אינו דומה לנידון שאלתנו שהרי שם כבר היה המת בארון שהניחוהו בו לפי שעה, לכך סובר בעל ספר הר אבל שהארון אסור הוא בהנאה משא"כ בנידון שאלתנו שהבגדים לא היו על החללים הקדושים אף פעם לאחר מותם, בזה אליבא דכולי עלמא מותרים הבגדים בהנאה.

תבנא לדינא, הבגדים הללו מותרים הם בהנאה לשרידי פליטי להט החרב המתהפכת, לא רק ליוצאי יריכם של הקדושים הטהורים שמסרו נפשם על קדושת השם, אלא גם ליהודים אחרים, כי בודאי אין הקדושים הטהורים הללו מקפידים על כך ולא עוד אלא שנגרם להם על ידי זה קורת רוח מרובה בעלמא דקשוט ונשמותיהם הקדושות הצרורות בצרור החיים מחדווין בשמיא בראותם ממדומים את אחיהם האומללים הנתונים בצרה ובשביה מתכסים ומתעטפים בבגדים הללו שהם התעטפו בהם בהיותם בחיים.

ואל נקמות ה' אל-נקמות יופיע להשיב גמול לרשעים שדיכאו את עמו ועינו את נחלתו להרוג חסידים וישרים ולרצוח תמימים וטהורים וענינו תחזינה כשידין בגוים מלא גויות וראש פתן, זרע של עמלק ימחוק, ישיב עליו את אוננו ויצמיתו ברעתה, ירדפהו באף וישמידהו מתחת שמי ה'.

אם מותר לברך בגיטו, בברכת תפלת השחר, ברכת שלא עשני עבד

שאלה: משא גיא ההריגה ועמק הבכא אסירי עני וברזל בחושך וצלמות, בגיטו קובנו שבליטא המעטירה, מי יעץ זאת על עיר מלאה חכמים וסופרים הנותנאים אמרי שפר ומשעשעים בדת יומים; לתת רגלם בסד וידיהם בנחושתים של עבודת פרך ומשא לעיפה, להמכר לעבדים ללא כסף ולמשנה עבודת שכיר ללא שכר ומחיר, למציק המשחית, פריץ חיות כזאב בערב יטרף וכשחל ביער, ידכא אף ייסר יכה ראש. אף קדקוד, בשרם בחרוץ ידוש, כדי לעשות מעשהו ולעבוד עבודתו.

בימים ההם ימי הצרה והיגון עת התהפכה להט החרב המתהפכת בבוקר בבוקר יעבור הצר המשחית הגרמני, ביום ובלילה לא יתן מנוח, והיה רק זוועה מדי עברו וקולו ישמיע, את אשר למות למות וזאת אשר לשבי לשבי, כי כלה ונחרצה מאתו לאבד את עם ה' ולהוגיעם בעבודה קשה.

בעת ההיא ידבר אביון משפט עם שופט כל הארץ, למה הסתרת פניך ה', למה הסתר פניך ממני, גוי נתת למכים ולחיי למורטים, חשפת פני לכלימות ורוק.

ובעת תפילת הבוקר כשהש"ץ ר' אברהם יוסף הי"ד התחיל לומר את ברכות השחר באימא ויראה ברתת וזיע, משהגיע לברכת „שלא עשני עבד“ קרא בקול מר לאדון האדונים, איך אוכל לומר ברכה זו בשעה שנמצאים אנחנו בעוצר ושבי, וחנם נמכרנו ולא בכסף, איך יוכל עבד לברך ברכת בן חורין בשעה שמוט עבדות נתון על צוארו ומוסרי שביה נתונים על גופן, איך יכול עבד נתון למרמס חרפת

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אנוש, המחמיר לחמו ומימיו ומשביעו ראש ולענה, איך יכול עבד כזה לברך ליוצרו ולומר "שלא עשני עבד", הלא לצחוק ולעג יהיה, כמשוגע וכמתלהל שאין בו דעת ותבונה, והרי כלל גדול בדינו הוא, שיש לכוון בתפלה וברכה, ושפיו ולבו יהיו שווין, ואיך אוכל לומר ברכה כזאת ולבי כל עמי.

ככה דיבר האיש מדי יום ביומו בעת ברכת השחר, ורכים מתפללים מרוב שיחם וכעסם סייעו על ידו, ונשאלתי אז לחוות את דעתי, דעת תורה האם יש להמנע מלומר ברכה זו, דמתחזי כשיקרא, ואדרבא איסורא איכא, או דילמא אין לנו לשנות ממטבעו שטבעו חכמים בסדר התפלה והברכות.

תשובה: שאלה זו נפתחה בגדולים, הלא הוא אבודרה"ם שכתב באות "השבוי" אם מברך שלא עשני עבד, וכתב דלא תיקנו הברסה מפני העבודה עצמה, היינו שמברך מפני שאינו צריך לעבוד עבודת עבד כעבדים, אלא עיקר הברכה היא מפני שאין עבד כנעני ראוי לבוא בקהל ופטור ממצות, ולכן שבוי יהודי שפיר חייב בברכה זו, עיי"ש.

וְלָפִי זה יוצא שעיקר הברכה הזאת נתקנה לא על עבדות הגוף, אלא על עבדות הנפש, שבאה לידי ביטוי אצל עבד כנעני שאינו ראוי במצוות ואינו ראוי לבוא בקהל, אבל יהודי המחוייב במצוות, ואפילו כשהוא נתון בשבי יכול הוא לקיים את המצוות, ואם אינו מקיימם מחמת אונס, הרי אנוס דחמנא פטריה, אבל בתורת קיום המצוות ישנו, ובר מצוות מקרי, לכן שפיר מברך הוא את הברכה הזאת אפילו כשהוא נתון במצור ובשבי.

לְכֵן אמרתי לשאולי, כי חס ושלום להם לבטל ברכה זו שהוקנה על ידי אבות עולם, רבותינו זכרונם לברכה, ואדרבה דוקא כעת חובה עלינו לברך ברכה זו, למען יכירו אויבינו ומנדינו, שלמרות שאנו נתונים בידם לעשות בנו כרצונם הרע, בכל זאת דואים אנו את עצמנו כבני חורין הנתונים במצור ובשביה וקדושה ישועתינו לבוא וגאולתנו להגלות.

וְאֵלֶּה כדאי להביא כאן שאותן הנשים האומרות במקום שלא עשני עבד, שלא עשני שפחה, דלא שפיר עבדן, אף כשאשה מברכת לשון "שפחה" מדויק יותר, לגבה, מכל מקום מצינו בכמה מקומות שלשון "עבד" מוסב גם על "שפחות", לכן מן הראוי שלא לשנות ממטבע שטבעו לנו חכמים בברכה זו, ראה בספר אשל אברהם של "הרב מבוטשאטש" שהאריך בזה ומסיים שאין לשנות מהנדפס בסידורים, וה' הטוב הוא יפדה אותנו מצרותינו, יקרא לאסירים דרור ופדות יתן לשבויי גוים, יעלנו לציון ברינה ויבנה בית מקדשינו ושם נאמר לפנינו שירה חדשה על גאולתנו ופדות נפשנו, אמן כן יהי רצון.

סימן ט"ו

ברין הצלת עצמו על ידי תעודת עכו"ם.

שאלה: ביום א' ניסן תש"ב נשאלתי בגיטו קובנה אם מותר לו לאדם להציל את עצמו על ידי קניית תעודת התנצרות (טויפ-שיין) ועל ידי זה תהיה לו האפשרות לברוח ליערות ולצטרף לפרטי-זנים.

תשובה: דבר זה אסור שהרי כתב הרמב"ם בספר המצות וז"ל: מצוה ד' היא שצונו לקדש את שמו והוא ממה שנאמר ונתקדשתי בתוך בני ישראל, וענין זאת המצוה אשר אנחנו מצווים לפרסם האמונה הזאת האמתית בעולם ושלא נפחד בהיזק שום מזיק, ואע"פ שבא עלינו מכריח לבקש ממנו לכפותינו שלא נשמע אליו, אבל נמסור עצמנו למיתה ולא נתעהו לחשוב שכפרנו אע"פ שלבתינו מאמינים בו יתעלה עכ"ל הטהור.

ומזה נראה שחייב אדם למסור עצמו למיתה ואסור לו להתעות את הגוי שיחשוב שכפר ח"ו באלקי ישראל אף שבלבו הוא מאמין בהשם יתברך שמו, וכמו שכתב הרמב"ם בלשונו הטהור „אבל נמסור עצמנו למיתה ולא נתעהו לחשוב שכפרנו, ועי' בתוס' ע"ז נ"ה.

והנה בנידון דידן כל עיקר תעודת ההתנצרות באה כדי להתעות את הגוים שיחשבו שהוא יהודי, והלא דבר זה הוא בכלל המצוה של קידוש השם לפי דעת הרמב"ם שהבאתי, וישנו בכלל יהרג ואל יעבור.

ולא דמי למה שכתב הנמוקי יוסף בפרק הגזול דאע"ג דאסור לו לומר שהוא עכו"ם מ"מ אם הישראל יכוון לדבר אחר היינו שהוא יכול להתעותם שיהיו סבורים שהוא עכו"ם והוא מתכוון באמירתו לדבר אחר שרי, וכן פסק הרמ"א ביו"ד סי' קנ"ז, דהתם כל הטעם של ההיתר הוא מפני שהוא אומר

שאלות ותשובות ממעמקים

קג

דבר שמשמע לשני פנים, כלומר שהוא אומר דבר הסובל שני פירושים לכן מותר לו לומר את הדבר, דאף שהגוי חושב שמשמעות דבריו הם שהוא גוי, מכל מקום מכיון שדבריו סובלים גם משמעות אחרת והיהודי מכוון בלבו לא למשמעות שהגוי חושב אלא למשמעות של היתר, שרי לו לומר דבר זה כדי להציל את עצמו.

אבל בנידון דידן אינו כן, שהרי משמעות אחת יש לתעודת ההתנצרות, והיא שבעל התעודה עזב ח"ו את צור מחצבתו והתכחש לעמו בהם בחר לו יה לסגולתו, דבר זה בודאי אסור אף שבלבו הוא מאמין באמונה שלימה בצור ישראל וגואלו, מכל מקום מצווה הוא על קידוש השם וכמו שהבאתי בשם הרמב"ם, ומצוה למסור עצמו למיתה ולא להתעות את הגוים שהוא כפר ח"ו באלקי ישראל.

וראה גם ראה מה שכתב מרן בעל החפץ חיים זצ"ל בספרו נדחי ישראל פרק ו' דאפילו על עצם האמירה לומר שהוא אינו יהודי יש לו למסור את נפשו אפילו בשעת הסכנה כל שכן בנידון דידן שאפילו אם ירכוש לו תעודת התנצרות כזאת אין בה משום הצלה ודאית שהרי הוא עלול למות בחרב ובדעב אפילו לכשיגיע ליערות.

תבוא לדינא שאין שום היתר כלל בנידון דידן לרכוש תעודת התנצרות ושמד אף שהוא חושב שעל ידי זה יצליח להנצל, אלא מצווה הוא לקדש את שם השם וכמו שנאמר ונתקדשתי בתוך בני ישראל.

אם במקום פיקוי'נ מותר להתחפש שיתשבו שחזא עכו"ם ולעשות כמעשיהם ואם אסור, אם יחזרו בתשובה וחזרו לכלל ישראל, אם מותר לקבלם בלי קבלת נויפת.

נשאלתי בגיטו קובנה אם א) מותר לברוח אצל כומרי עכו"ם ולהיות אצלם בתור גוי ולעשות ככל מעשיהם משפה ולחץ כגון לשאת השתי וערב ולילך לבית התפלה שלהם וכו' האם הוא בזה כמודה בעכו"ם?
(ב) האם מותר לישראל לברוח לעכו"ם לעבוד אצלו ולומר לו עליו שהוא עכו"ם ולעשות כמעשיהם

הג"ל?

(ג) האם מותר לישראל לעזוב הגיטו ולדור מחוץ החומה ע"י שקנה פספורט על שם עכו"ם ונתן תמונתו בתוכו כדי להציל עצמו?

ביאור השאלה:

אולם צנוגע להראות את הפספורט צעת לרה לכאורה יש לאסור ולדמות למה שהציאו מסה"מ להרמז"ס. להלא צמה שמראה את הפספורט חושנים שהוא עכו"ם ומודה לעכו"ם צזה והלא מד' הרמז"ס משמע דאפי' בלא דיבור רק צאופן שהעכו"ם יחשנו שהוא מודה לאמונתם, בכל גווי אסור. אמנם נראה דלא דמי כלל להתם דאם נאמר כן יקשה לכאורה מסה"מ הג"ל על פסק השו"ע שהציאו לעיל דאם משנה מלנשו וכדו' צדצרים שאינו אומר צפירוש שהוא עכו"ם רק העכו"ם יחשנו כן דמות. ועכ"ל דל"ד כלל הני תרי מיילי להדדי, דהרמז"ס הלא מיירי צאופן שידעיס שהוא ישראל רק עתה מודה לאמונתם וצזה אסור בכל גווי. דהאיסור צזה הוא לא מצד המעשה שלו שמודה צעכו"ם רק צזהו הדין הוא דונקדשתי ואם המצו הוא צאופן שהם חושנים רק שישראל מודה לעכו"ם זהו חילול השם, אצל צפסק השו"ע שהציאו למעלה, שחושנים שהוא עכו"ם מלידה ואינם יודעים כלל שהוא ישראל האיסור שם רק מה שמודה צעכו"ם, וצזה שפיר פסק דהוא דוקא צנוגא שהוא עושה מעשה. ועי' צש"ך יו"ד סי' קנ"ז סק"י שהציא להד"מ צשם מהרא"י וז"ל: דאפי' צשעת השמד אינו אסור אלא כשהעו"כ מכירים אותו ורוצים לכופו לעצור אצל ללצו צגד העשוי כצגדי העו"כ שרי דאז ליכא חילול השם שהרי אין העו"כ מכירין אותו, עכ"ל. וע"ש דשם מיירי צמלצו זה הוא דכופין לישראל ללצו אותו וכערקתא דמסאני. הרי כעין הסצנא שכתצנו. וא"כ אפשר לוור דאפי' להראות נמי שרי רק אינו אומר צפה שהוא עכו"ם. או אולי אפי' דמה שמראה את הפספורט זהו גופא הוי מעשה ואפשר דאסור, וז"ע.

כתב המחנר צשו"ע יו"ד סי' קנ"ז סעיף צ' שאסור לוור שהוא עכו"ם כדי שלא יהרגוהו אצל לשנות מלצושו שלא יכירוהו שהוא יהודי צשעת הגזירה מותר כיון שאינו אומר שהוא עכו"ם. וצסעיף ג', מי שנתחייב מיתה מותר לצרוח לבית עכו"ם ולהציל עצמו. וצט"ז ס"ק י"א וצאזר שצאם לא יעשה שום מעשה רק צצצ ואל תעשה אין זה אלא הרחקת הנזק ומותר צפקות נפש. נמצא וצאזר שמותר לצרוח לבית עכו"ם וגם לעצור אצל עכו"ם ולהנצל עי"ז רק צצצ ואל תעשה שלא יעשה כמעשיהם וגם לא יאמר שהוא גוי, אצל צקום ועשה כמו צשאלה אי' וצ' לשאת השתי וערב וכו' וצאזר דאסור.

ועל צצר שאלה הג' אם מותר לקנות פספורט של עכו"ם, יש לדון א) צצצם קניית הפספורט וצ) להראות אותו צעת לרה ולהנצל ע"י צמה שיחשנו שהוא עכו"ם. ונראה דהנה הרמז"ס צספר המצות (מצוה ט') כתצ וז"ל: ד' שצונו לקדש את שמו והוא שאמרנו ונקדשתי צתוך צנ"י וענין זאת הנוצרה שאנחנו מצווים לפרסם האמונה הזאת האמונית צעולם שלא נפחיד צהיזק שום מציק. ואע"פ שצא עלינו מכריח לצקס ומתנו לרפותנו שלא נשמע אליו, אצל נמסור עצמינו למויתה ולא נתעהו לחשצו שצפרנו. אע"פ שצצותינו מחמינים צו יתעלה, עכ"ל. וצאזר צפירוש שמחויבים למסור עצמינו למיתה אפי' צאופן שהוא מחמין צהקצ"ה רק, "מתעה" לעכו"ם שיחשצו שכופר ח"ו צהקצ"ה. ולכאורה צנ"ד שקונה הפספורט אף שהוא אצלו רק להציל עצמו ואינו מודה צעכו"ם אולם הוא מטעה צזה את העכו"ם שחושנים שהוא כופר ח"ו. אולם לא דמי צנ"ד לד' הרמז"ס דהלא צנ"ד אצל מי שקונה הפספורט, הלא העכו"ם יודע שהוא אינו מודה צעכו"ם כלל רק הוא ענה ותצצולה להנצל ע"י, נמצא דצצם קניית הפספורט אין שום איסור.

ב.

ויש להסתפק באלו העוברים ח"ו ע"ז שמפני הסכנה עשו כנ"ל כמעשיהם ואח"כ חזרו לכלל ישראל אם מקבלים אותם בלי שום נזיפה וקבלות או תקנות.

ביאור השאלה:

החלה הוא רוצה לפטור עצמו מהסכנה וצוה לא יחשז עוד בגדר חונס.

וזה לשון הרמז"ס (צפ"ה ה"ד) מהל' יסודי התורה וכל מי שנאמר בו יהרג ואל יעבור ועבר ולא נהרג הרי זה מוחלל השם וכי' ואע"פ כן מפני שעבר בחונס ואין מלקין אותו ואין צריך לומר שאין מומיתין אותו צ"ד אפילו הרג בחונס שאין מלקין ומומיתין אלא לעובר ברגלו וכי' ובעריות הוא אומר ולנערה לא תעשה דבר עכ"ל"ה. וכן הוא ברמז"ס צפ"כ מהל' סנהדרין ה"ב וז"ל ואע"כ שהיה נוצה שיהרג ואל יעבור אע"פ"י שחלל את השם והוא חנוס אינו נהרג שני ולנערה לא תעשה דבר אזהרה לצית דין שלא יענשו את החנוס, והוא מוסגית הגמרא ע"ז כ"ד. וכ"כ התוס' ר"פ הצ"א על יצמתו וצריט"א עיי"ש. חזינן וזה דבחונס כזה אין עובר רק על מצות עשה של ונקדשתי אפילו בדבר שיהרג ואל יעבור וכן מובא בתשובת הרי"ש (סיון ד') דביאר דמי שעבר על עזירה שצריך להרוג ולא יעבור מ"ו אם הוא זהיר ומתנהג במונות כאשר ישראל הוא ישראל כשר לכל דבר רק עבר על מ"ע של ונקדשתי כנ"ל עיי"ש. חזינן וזה שבחונס אף צמ"ע של קידוש השם אין עליו שום דבר רק שעבר על המצות של ונקדשתי והרי הוא כישראל גמור.

אולם יש לחלק דהרמז"ס והרי"ש מיידי שהחונס הוא כנו כפוי שד שמכריחין אותו וכופין אותו לעשות הדבר ואין לו עצה להמלט וזה אצל צענינינו שלוקח הפספורט או עושה כמעשיהם כנ"ל הוא אינו עוד חונס גמור רק צמעיו

וכן מובא ברמז"ס (מוצה רנ"ו) דזה דווקא אם חנסוהו לעבוד ע"ז משא"כ לחונס לא היה ע"ז רק הוא רוצה לפטור עצמו מהסכנה ע"י שיעבוד ע"ז צוה לא מתפטר וחונס כיון דלא היה חונס ע"ז עיי"ש. וכן מובא בחו"מ (סיון ר') דאם החונס היה באופן שהוא צוה לפטור וחונס אחר לא מיקרי חונס. ועיי"ש בכתובות ד' ולידרוש להו חונס שרי צמ"ק וצמ"הרש"א.

ולפי' כל הדברים האלו הנאמרים, מוצא צידן דידן שמעצמו עושה כל הפעולות והמעשים להגלל מהסכנה אפשר שוב לומר דקנסינן אותו.

אמנם לפ"ד הונ"ח שם דצפרהסיי היינו דווקא תוך עשרה וצנ"י אצל בתוך הרבה עכו"ם לא נוקרי צפרהסיי אף שגם הם מזהירים על קידוש השם ונ"ו לא מיקרי צפרהסיי ראינן וזה דאם הוא רק צפני עכו"ם אינו צפרהסיי ואינו עובר מוויילא על לאו דלא תחללו וגם אינו עובר על מ"ע ונקדשתי דהוי כמו צנעה רק עובר על מ"ע של ואהבת את 7' דומחויצ למוסור נפשו נוכח עשה דואהבת עיי"ש צמ"ח באריכות. ולאלו שיש להם פספורט הנ"ל הוא רק להראות צעת הצורך להשואלים אותו ולא שכיח שיהיה שם עשרה מיישראל אפשר דלא קנסינן להו, ונ"ע בכל זה.

בענין הנ"ל.

נשאלתי בגיטו קובנה: ישראל שיש לו שם שמשותמע כשם העכו"ם כמו ששכיח טובא בין יהודי אשכנז ויש לו פספורט כזה עוד מקודם המלחמה וכעת מפני הסכנה ברצונו לכתוב בתוכו גם האותיות "ר.ק." שהוא ר"ת האמונה שלהם "רוימיש קאטאליש" למען שיחשבו עליו שהוא עכו"ם האם יש בזה איסור של מודה בעכו"ם?

ביאור השאלה:

והנה נידון דין אפשר לומר דמותר כמו שראיתי בספר תורת חיים. להגלות ר' חיים שור ז"ל על מס' ע"ז. (נדף י"ז) וז"ל נד"ה אי סייפא לא ספרא. וכי' וכנר שמעתי על גדול אחד מהקדמונים שאלוהו נשעת הגזירה אם יהודי הוא והשיב להם "כן יוד" נלשון אשכנז כסנזרים הם הרשעים שחשיב להם נלשון אשכנז שאינו יהודי וניצל אצל כוונתו הי' נלשון הקודש "כן יוד" אמות וכנים הדנרים שהוא יהודי ולפי"ז אפשר לומר ג"כ שהיהודי יכול נעת כתיבת האותיות ק. ר. נפספורט שלו "קייין רוימער" ואפשר להתיר לו נכוונתו זה.

איתא ניו"ד סימן קנ"ז נרמ"א נשם הנימוקי יוסף נפרק הגזל, וז"ל דלע"ג דאסור לומר שהוא עכו"ם מ"מ שהוא לומר שהוא עכו"ם והוא הישראל יכול לנר דנר אחר וכן אם יכול להטעותם שהם סנזרים שהוא עכו"ם שרי, נתרומת הדשן (סימן קנ"ז) והגר"א הראה מקורו נדף (י"ח) ניו"ז. ועיין נפ' הקונס ענדל דנורא אלא. ונכנסת הגדולה ונהש"ך שם לחלק נין ת"ח לע"ה ונין סכנת נפשות והיזק ממונ.

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1891/92 1901 1902 1903 1904 1905 1906 1907 1908 1909 1910 1911 1912 1913 1914 1915 1916 1917 1918 1919 1920 1921 1922 1923 1924 1925 1926 1927 1928 1929 1930 1931 1932 1933 1934 1935 1936 1937 1938 1939 1940 1941 1942 1943 1944 1945 1946 1947 1948 1949 1950 1951 1952 1953 1954 1955 1956 1957 1958 1959 1960 1961 1962 1963 1964 1965 1966 1967 1968 1969 1970 1971 1972 1973 1974 1975 1976 1977 1978 1979 1980 1981 1982 1983 1984 1985 1986 1987 1988 1989 1990 1991 1992 1993 1994 1995 1996 1997 1998 1999 2000 2001 2002 2003 2004 2005 2006 2007 2008 2009 2010 2011 2012 2013 2014 2015 2016 2017 2018 2019 2020 2021 2022 2023 2024 2025 2026 2027 2028 2029 2030 2031 2032 2033 2034 2035 2036 2037 2038 2039 2040 2041 2042 2043 2044 2045 2046 2047 2048 2049 2050 2051 2052 2053 2054 2055 2056 2057 2058 2059 2060 2061 2062 2063 2064 2065 2066 2067 2068 2069 2070 2071 2072 2073 2074 2075 2076 2077 2078 2079 2080 2081 2082 2083 2084 2085 2086 2087 2088 2089 2090 2091 2092 2093 2094 2095 2096 2097 2098 2099 2100 2101 2102 2103 2104 2105 2106 2107 2108 2109 2110 2111 2112 2113 2114 2115 2116 2117 2118 2119 2120 2121 2122 2123 2124 2125 2126 2127 2128 2129 2130 2131 2132 2133 2134 2135 2136 2137 2138 2139 2140 2141 2142 2143 2144 2145 2146 2147 2148 2149 2150 2151 2152 2153 2154 2155 2156 2157 2158 2159 2160 2161 2162 2163 2164 2165 2166 2167 2168 2169 2170 2171 2172 2173 2174 2175 2176 2177 2178 2179 2180 2181 2182 2183 2184 2185 2186 2187 2188 2189 2190 2191 2192 2193 2194 2195 2196 2197 2198 2199 2200 2201 2202 2203 2204 2205 2206 2207 2208 2209 2210 2211 2212 2213 2214 2215 2216 2217 2218 2219 2220 2221 2222 2223 2224 2225 2226 2227 2228 2229 2230 2231 2232 2233 2234 2235 2236 2237 2238 2239 2240 2241 2242 2243 2244 2245 2246 2247 2248 2249 2250 2251 2252 2253 2254 2255 2256 2257 2258 2259 2260 2261 2262 2263 2264 2265 2266 2267 2268 2269 2270 2271 2272 2273 2274 2275 2276 2277 2278 2279 2280 2281 2282 2283 2284 2285 2286 2287 2288 2289 2290 2291 2292 2293 2294 2295 2296 2297 2298 2299 2300 2301 2302 2303 2304 2305 2306 2307 2308 2309 2310 2311 2312 2313 2314 2315 2316 2317 2318 2319 2320 2321 2322 2323 2324 2325 2326 2327 2328 2329 2330 2331 2332 2333 2334 2335 2336 2337 2338 2339 2340 2341 2342 2343 2344 2345 2346 2347 2348 2349 2350 2351 2352 2353 2354 2355 2356 2357 2358 2359 2360 2361 2362 2363 2364 2365 2366 2367 2368 2369 2370 2371 2372 2373 2374 2375 2376 2377 2378 2379 2380 2381 2382 2383 2384 2385 2386 2387 2388 2389 2390 2391 2392 2393 2394 2395 2396 2397 2398 2399 2400 2401 2402 2403 2404 2405 2406 2407 2408 2409 2410 2411 2412 2413 2414 2415 2416 2417 2418 2419 2420 2421 2422 2423 2424 2425 2426 2427 2428 2429 2430 2431 2432 2433 2434 2435 2436 2437 2438 2439 2440 2441 2442 2443 2444 2445 2446 2447 2448 2449 2450 2451 2452 2453 2454 2455 2456 2457 2458 2459 2460 2461 2462 2463 2464 2465 2466 2467 2468 2469 2470 2471 2472 2473 2474 2475 2476 2477 2478 2479 2480 2481 2482 2483 2484 2485 2486 2487 2488 2489 2490 2491 2492 2493 2494 2495 2496 2497 2498 2499 2500 2501 2502 2503 2504 2505 2506 2507 2508 2509 2510 2511 2512 2513 2514 2515 2516 2517 2518 2519 2520 2521 2522 2523 2524 2525 2526 2527 2528 2529 2530 2531 2532 2533 2534 2535 2536 2537 2538 2539 2540 2541 2542 2543 2544 2545 2546 2547 2548 2549 2550 2551 2552 2553 2554 2555 2556 2557 2558 2559 2560 2561 2562 2563 2564 2565 2566 2567 2568 2569 2570 2571 2572 2573 2574 2575 2576 2577 2578 2579 2580 2581 2582 2583 2584 2585 2586 2587 2588 2589 2590 2591 2592 2593 2594 2595 2596 2597 2598 2599 2600 2601 2602 2603 2604 2605 2606 2607 2608 2609 2610 2611 2612 2613 2614 2615 2616 2617 2618 2619 2620 2621 2622 2623 2624 2625 2626 2627 2628 2629 2630 2631 2632 2633 2634 2635 2636 2637 2638 2639 2640 2641 2642 2643 2644 2645 2646 2647 2648 2649 2650 2651 2652 2653 2654 2655 2656 2657 2658 2659 2660 2661 2662 2663 2664 2665 2666 2667 2668 2669 2670 2671 2672 2673 2674 2675 2676 2677 2678 2679 2680 2681 2682 2683 2684 2685 2686 2687 2688 2689 2690 2691 2692 2693 2694 2695 2696 2697 2698 2699 2700 2701 2702 2703 2704 2705 2706 2707 2708 2709 2710 2711 2712 2713 2714 2715 2716 271

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1/ Response

והנה חשבתי בדעתי אם לא יועיל לענין זה כאשר
האשה מוכרחת לבוא לביתה בעש"ק עבור הדלקת
נרות להושיב שומר קטן וקטנה כדרך שמבואר ברמ"א
סי' קצ"ב סע"ד גבי חתן שפירסה כלתו נדה קודם שבא
עלי' ע"ש. אמנם מי רשאי להמציא דבר חדש שלא
מצינו באחד מהפוסקים קמאי ובתראי ודו"ק.

אמנם בעייני בדברי מרנא חת"ס זי"ע הנ"ל שכותב
וזל"ק הנה הגאון ס"ט החליט קילא זו לחלוטין
דבמקום ביטול עונה למבול ביום ז' ולא תבוא לביתה
עד שהחשיכה והיות הגזירה רק רחוקה ומלי דרבנן
וביטול מצות פו"ר הקילו הגאונים ומי יבוא אחריהם
אפי' להחמיר אח"כ מעורר מרן החת"ס ז"ל שעכ"פ
צריכה לאחר לבוא לביתה עד הלילה אבל בסוף דבריו

כותב ככה אחרי דבריו שאין שום היתר במה שתיא
בבית חברתה באותה העיר כתב „והחכם עיניו בראשו“
כמדומה שרצה מרן בזה שאם חשש שהבעל יכול לבוא
לידי עבירה והרהורים עיין יומא (כ"ט ע"א) או חשש
אחר בענין המבילה יכול להורות היתר אף שתבוא
לביתה קודם הלילה כנלענ"ד שע"ז ירמזון מלוי תיבות
האחרונות דמרנא זי"ע. ושמעתי בימים אלו שבעיר
גדולה לאלקים רבתי בדעות פסקו כדברי הס"ט הנ"ל
להלכה למעשה בז' החל בעש"ק ואני הצעתי בזה מה
שתרתי בלבי בזה.

ידידו דושה"ט מחכה לישועות ה' כהרף עין

הק' יצחק ווייס

ראבד"ק ווערבוי יצ"ו

סימן י'

אם מותר לקרוע כרסה של מעוברת שהומתה כדי להציל את העובר.

שאלה: ביום כ' אייר תש"ב פירסמו הגרמנים הארורים ימ"ש צו לאמור: כל אשה יהודית שתמצא מעוברת אחת דתה למות, ובו ביום עברה אשה יהודית מעוברת על יד בית החולים שבניטון, ואחד מהרופאים הגרמנים הרגיש בה בעברה וידה בה ברוב חימה להמיתת כדון על עברה את פקודתם לבלי לפרות ולרבות, כשכדורו של המרצח פלח את לבה צנחת האשה ארצה ונפשה יצאת בנפלה.

העוברים והשבים הכניסוה מיד לבית החולים בחשבם שעוד יהיה לאל ידם להצילת, אבל כל עמלם היה לשוא, אולם מכיון שהיא היתה בימים האחרונים להריונה, הובהל אליה רופא יהודי שנמצא אז בבית החולים בתקות שאולי אפשר יהיה עדיין להציל את הולד ואמנם הרופא אמר שלא אפשר תקות להצלת הולד אבל לזאת יש הכרח לנתח מיד את ההרונה ולפתוח את בטנה כדי להוציא את הולד מתוך מעיה, והיות שגם אני נמצאתי אז במעמד זה והייתי עד ראיה לזוועת רצח זה, נשאלתי אם מותר לעשות כן, ואם אין כאן חשש של ניוול חמת כי מי יודע אם הולד הוא בן קיימא ואם איננו נפל, ועוד שמא אסור לפתוח את בטנה מיד מפני שיתכן שעדיין יש רוח חיים בתוכה פנימה ואם יחכו איזה זמן שמא ישוב עוד רוחה אליה, אבל אם ינתחוה ויקרעו את בטנה, אולי על ידי זה יקרבו את מיתתה.

תשובה: במס' ערכין דף ז' ע"א תנן, האשה שיצאה ליהרג אין ממתינין לה עד שתלד (ופירש"י ז"ל: אלא הורגין ולדה עמה דחד גופא הוא) האשה שישבה על המשבר ממתינין לה עד שתלד האשה שנהרגה נהנין בשערה וכו' ע"כ.

נד

שאלות ותשובות ממעמקים, חלק ב'

וגרסינן עלה בגמרא: ישבה על המשבר וכו' מ"ט כיון דעקר גופא אחרינא הוא, אמר רב יהודה אמר שמואל האשה היוצאה ליהרג מכין אותה כנגד בית הריון כדי שימות הולד תחילה כדי שלא תבא לידי ניוול, למימרא דהיא קדמה ומתה ברישא והא קיימא לן דולד מיית ברישא ותינוק בן יומו נוחל ומנחיל ואמר רב ששת נוחל בנכסי אם להנחיל לאחין מן האב, דווקא בן יום אחד אבל עובר לא דהוא מיית ברישא ואין הבן יורש את אמו בקבר להנחיל לאחין מן האב, הני מילי לגבי מיתה אידי דולד זוטרא חיותיה עיילא טיפא דמלאך המות ומחתך להו לסימנין אבל נהרגה היא מתה ברישא, והא הוה עובדא ופרכיס עד תלת פרכוסי, מידי דהוי אונב הלטאה דמפרכסת.

אמר רב נחמן אמר שמואל האשה שישבה על המשבר ומתה בשבת מביאין סכין ומקרעים את כריסה ומוציאין את הולד, ופירש רש"י ז"ל: „דזימנין דמיקרי דהיא מייתא ברישא“, עכ"ל, פשיטא מאי עביד מחתך בבשר הוא, אמר רבה לא נצרכה להביא סכין דרך רשות הרבים, ומאי קמ"ל דמספיקא מחללין שבתא, תנינא מי שנפלה עליו מפולת ספק הוא שם ספק אינו שם, ספק חי ספק מת, ספק עכו"ם ספק ישראל, מפקחין עליו את הגל, מהו דתימא הוא דהוה ליה חזקה דחיותא מעיקרא אבל הכא דלא הוה ליה חזקה דחיותא מעיקרא אימא לא קמ"ל.

האשה שנהרגה וכו' ואמאי איסורי הנאה נינהו, אמר רב באומרת תנו שערי לבתי, אילו אמרה תנו ידי לבתי מי יהבינן לה, א"ר בפיאה נכרית טעמא דאמרה תנו הא לא אמרה תנו גופה היא ומיתסר, ע"כ בגמרא שם עיי"ש.

הרי מבורר מסוגיא זו דאף על גב דנקטינן שם בגמרא דהאשה שמתה הולד מיית ברישא „דולד זוטרא חיותיה“, מכל מקום אמר רב נחמן אמר שמואל דהאשה שישבה על המשבר ומתה בשבת מביאין סכין ומקרעים את כריסה ומוציאין את הולד, משום טעמא דפירש רש"י „דזימנין דמיקרי דהיא מייתא ברישא“, כלומר דודאי על פי רוב הולד מיית ברישא אבל לפעמים דהיא מייתא ברישא היינו שיש מיעוט ולדות דהיא מייתא ברישא דמלת „זימנין“ ביאורה היא דיש נגד הרוב מיעוט, וכדפירש רש"י בגיטין דף כ"ט ע"א ד"ה דכולי עלמא ז"ל: מדאמר רבי יוחנן זימנין דגיטא נמי לא הוי משמע דרוב פעמים הוי גיטא, עיי"ש, משמע דמלת „זימנין“ כונתה היא דיש מיעוט.

שאלות ותשובות ממעמקים, חלק ב'

נה

אמנם התוס' בבבא בתרא פליגי על שיטת רש"י עיי"ש דף קמ"ב ע"ב ד"ה דההוא שכתבו בא"ד וז"ל: והא דאמרינן בהשוחט (חולין דף ל"ח:) דמתה אמו והדר ילידתה, היינו מתה על ידי אדם אי נמי על ידי מלאך המות וכגון שנעקר הולד לצאת דאו אין הולד מת כדמשמע בפ"ק דערכין (דף ז' ע"ב עכ"ל. הרי לנו בהדיא דסבירא להו דלעולם הולד מיית ברישא היכא שמתה האשה ולא רק על פי רוב כשיטת רש"י, אלא דחילוק יש בין היכא דמתה סתם לבין היכא דמתה לאחר שהולד נעקר לצאת.

על כל פנים מבואר מסוגיא זו דרש"י סבירא ליה דאפילו באשה שמתה יש מיעוט דהיא מייתא ברישא ולכן מילתא דפשיטא הוא בגמרא בערכין שם דמחללין בגלל הולד את השבת משום פיקוח נפש ולא חיישינן למידי, לא לניווול ולא לחששא שמא על ידי כך נקרב את מיתתה, ועל אחת כמה וכמה דעבדינן הכי היכא דנהרגה דאמרינן גבה היא מייתא ברישא, ואם כן בנידון דידן שהאשה האומללה הזאת נהרגה בודאי הוא דמותר לקרוע את בטנה בכדי להוציא את הולד מבלי שנחשוש לניווול המת הואיל ואיכא כאן ענין של פיקוח נפש בשביל הולד, ולא חיישינן גם שמא נשאר עוד באם רוח חיים ועל ידי זה נקרב את מיתתה.

אמנם לשיטת התוספות יש לדון טובא, דאף על גב דהיכא דנהרגה גם התוס' מודו דאמא מייתא ברישא כדאמרינן שם בגמרא, מכל מקום איכא למימר לשיטתם דאסור לקרוע את בטנה היכא דנהרגה, ורק היכא שהיא יושבת על המשבר והולד נעקר לצאת בזה הוא דאמרינן בגמרא לשיטת התוספות דמביאין סכין וקורעין את בטנה אבל היכא דהולד לא נעקר לצאת אין לעשות כן אפילו היכא דנהרגה, ויתכן גם כן לומר דהיכא דנהרגה גם התוס' מודו בזה, דבאופן של נהרגה אין מחלוקת בין רש"י ותוס' ולכולי עלמא מותר לעשות כן, וצ"ע.

ועי' בשו"ת מנחת אליעזר חלק רביעי סימן כ"ח שהוא כותב שהוא דבר בלתי אפשרי שיחיה הולד לאחר שאמו מתה, אכן מדברי רש"י לא נראה כן וכמו שביארנו, ועי' בהגהות הגר"א במס' ערכין שם על הגליון של הש"ס. ועי' בערוך ערך דופן ובשו"ת תשב"ץ ח"א סימן ק"י.

שאלות ותשובות ממעמקים, חלק ב'

נו

ועי' בשו"ת הרמ"א סימן מ' ובמגן אברהם בסימן ש"ל ס"ק י"א ובמחצית השקל שם שכולם הבינו דשיטת רש"י היא כמו שכתבנו, היינו דרש"י סבירא ליה דאפילו היכא דלא נעקר הולד מביאין סכין וקורעין את בטנה, ועי' ג"כ באשכול ח"ב דף קי"ז שכתב „ואפילו לא ידעינן אם כלו חדשיו“ עושין כן, והוא כשיטת רש"י לפי מה שביארנו אלא שהוא מוסיף דמותר לעשות כן אפילו היכא דלא ידעינן אם כלו חדשיו, דבשיטת רש"י היה אפשר לומר דהא דסבירא ליה הכי אף היכא דלא נעקר הולד זהו רק היכא ידיעינן על כל פנים דכלו חדשיו אבל היכא דלא ידעינן שכלו חדשיו אסור לעשות כן, ולזאת מוסיף האשכול דמותר לעשות כן אפילו היכא דלא ידעינן אם כלו חדשיו, וכל הני רבבתיא הם לא כשו"ת שבות יעקב ח"א סימן י"ג שרצה לומר שגם רש"י מודה לשיטת התוס' דרק אם נעקר הולד מותר לקרוע את בטנה אבל בלאו הכי אסור.

ועי' בשו"ע א"ח סימן ש"ל סעיף ה' שפסק: היושבת על המשבר ומתה מביאין סכין בשבת אפילו דרך רשות הרבים וקורעים בטנה ומוציאין הולד שמא ימצא חי, והגיה עליו הרמ"א שם וז"ל: ומה שאין נוהגין עכשיו כן אפילו בחול משום דאין בקיאים במיתת האם בקרוב כל כך שאפשר לולד לחיות (או"ח) וביאר את דבריו המגן אברהם שם בס"ק י"א, דמה שכתב הרמ"א „דאין אנו בקיאים במיתת האם“, דשמא נתעלפה ואם יחתכות תמות וצריכין להמתין ואדחכי מיית הולד עיי"ש.

ובאש"ל אברהם שם כתב: באשה שנהרגה בסייף והיה ולדה מפרכס, והתירו לחתוך בטנה בשבת ואפילו אם נמצא אחרי כן שמת יפה עשו והרי הוא זריו ונשכר, ומכל שכן דאין צריך כפרה עיי"ש, וכן כתב בהר אבל דף כ' באשה מעוברת שמתה ולא כלו לולד חדשיו לפי עדות אמו והתיר לנוולה בגלל הולד והסכים לו הרב ר' משה קוניץ בשו"ת המצרף חלק א' תשובה ק"א, עיי"ש שכתב דאם ימצאו שהולד חי יחתכו הלאה ואם לאו יניחוה עיי"ש.

מכ"ל זאת נראה דבדאי אם הרופא יכוון את מלאכתו ויהא זריו במעשיו לכוון את שעת הניתוח מיד אחרי מותה והם אומרים שאפשר להציל את הולד, פשיטא הוא דיש לנו לסמוך עליהם, ובפרט שהמחבר פוסק כן להלכה דכל אדם מותר לעשות בגלל זה שמא ימצא הולד חי, ובפרט למה שצדדנו לומר דאפילו התוס' מודו לרש"י היכא שנהרגה דמותר לקרוע את בטנה

אפילו היכא דלא נעקר הולד לצאת, משום דבנהרגה היא מייתא ברישא, ויש כאן פיקוח נפש של הולד, והא דהוצרכו שיהא הולד נעקר לצאת זהו רק היכא דמתה ואז אמרינן דהוא מיית ברישא בזה, הוא דפליגו על רש"י דסבירא ליה דגם במתה איכא מיעוטא דאיהי מייתא ברישא, וסבירא להו דבמתה ליכא מיעוטא כלל ואין כלל להסתפק שמא הולד חי דלעולם הוא מיית ברישא במתה, אבל היכא דנהרגה גם התוס' מודו לומר דמותר לקרוע את בטנה אפילו היכא דלא נעקר הולד לצאת וכמו שכתבנו, ולפי זה בודאי שיש לנו לסמוך על שיטת רש"י, המחבר והאשכול להלכה, ושיתכן שגם התוספות סבירא להו הכי.

וגם חשש של ניוול המת לא שייך בנידון דידן דכבר הוכחנו במקום אחר דהיכא דשייך ענין של פיקוח נפש לא חיישינן לניוול המת (עי' סי' י"ב) שהארכנו טובא בזה, וכמו שבאמת מוכח מהך סוגיא דערכין דף ז' שהבאנו, ובר מן דין בעובדא דידן ובהך סוגיא דערכין לא שייך לחוש לניוול המת כלל, כי האם ניחא לה בניוולה ובלבד שיצילו את ולדה ויוציאוהו חי לאויר העולם כדי שלא ישאר במחשכים כמתי עולם, ובודאי מוחלת האם על זילותא דידה וניוולה, וכהיא דאמרינן בסנהדרין דף מ"ו ע"ב: איבעיא להו הספידא יקרא דחיי הוי או יקרא דשכבי הוה וכו', ויבא אברהם לספוד לשרה ולבכותה ואי אמרת משום יקרא דחיי הוא משם יקרא דאברהם משהו לה לשרה, שרה גופה ניחא לה כי היכי דמייקר באברהם ע"כ עיי"ש, ועי' ג"כ ברש"י שם דף מ"ז ע"א ד"ה כי אמר רחמנא שכתב בא"ד וז"ל שם: אבל האי דליתייקרו ביה קרוביו לאו בזיון הוא לדידיה עכ"ל עיי"ש, ואם כן קל וחומר בן בנו של קל וחומר דלאו בזיון לאם הוא כשקורעים את בטנה כדי להציל את ולדה להכניסו לחיים טובים ארוכים ולשלום.

והא דאמרינן בערכין שם: „אילו אמרה תנו ידי לבתי מי יהבינן לה“, ולא אמרינן דהיא מחלה על כך, זהו משום דשם מיירי שהיא אומרת תנו ידי שלא לצורך היינו שהיד לא תקבר לעולם, לכן בודאי לא שומעין לה ולא יהבינן את ידה לבתה, ולכן בודאי לאו כל כמינה לתת את ידה לבתה לשוב איזה צורך שהרי מת. אסור בהנאה דגמרינן שם שם מעגלה ערופה, וכמו שהביא רש"י בערכין שם ד"ה בפאה נכרית עיי"ש.

מכאן הדין פסקתי שיש למהר ולקרוע את בטן האשה האומללה הזאת שהומתה בידי מרצחים טמאים על לא עול בכפיה, בכדי להוציא את ולדה חי ולהציל נפש אחת בישראל, וכל המקיים נפש אחת מישראל כאילו קיים עולם מלא.

אולם לצערנו הרב לא זכינו לקיים את מחשבתנו הטובה לפועל כי הרוצחים האכזרים שניהלו בדייקנות גרמנית ספרי חיים ומתים, וניהלו חשבונות מדויקים מכל הקדושים שהומתו על ידם, הרוצחים הללו באו לגמור את מלאכתם האכזרית, היינו לדרשום את שמה של האשה הזאת ולהכניסה בספר המתים כמנהגם, וכשבאו לבית החולים לשם מטרה זו, ומצאו את הולד שהוצא מבטן האשה המתה, כשראו זאת בערה בהם חמתם ואחד מהמרצחים תפס את הולד הרך הזה ונפץ את ראשו באבני הקיד של חדר בית החולים, אוי לעינים שראו זאת, זכור ה' לבני האכזרים הללו ולבני בניהם את ימי הרעה הללו, אשרי שישלם להם את גמולם שגמלו לנו, אשרי שיאחו ונפץ את עולליהם אל הסלע.

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סימן י"ג

בדין אם יושבי חושך וצלמות הגיטו מחויבים במזווה.

שאלה: בימי הרעה והמצור בהיותנו כלואים בגיטו קובנה ושום קשר לא היה לנו עם החוץ אפסו אזלו לנו בגלל כך כל תשמישי קדושה שאי אפשר היה להשיגם בשום אופן, והנה באו לפני מספר אנשים ודמעתם על לחיים ושאלוני כדת מה לעשות, מאחר שמזווותיהן נפסלו ואי אפשר להשיג מזווות אחרות כדי לקובען על פתחיהם.

ותוכן שאלתם היא אם דירותיהם בגיטו חייבות הן במזווה, או דילמא מאחר שהגיטו הוא סגור ומסוגר אין יוצא ואין בא וכולן מוקף הוא, בגדר של חוטי ברזל מחושמל וצריחים ומגדלים שעליהם הופקדו שומרים לשמור לבל יגשו ויתקרבו יושבי הגיטו אל הגדר וכל הקרב אל הגדר היה נהרג מיד במכונות היריה שהיו בידי השומרים, ואם כן דינם של יושבי הגיטו כדין יושבי בית האסורים, ויש לדעת אם בית אסורים חייב הוא במזווה דגם בית האסורים לדירת יחשב או דלמא בית אסורים פטור הוא ממזווה.

תשובה: הרמב"ם בפ"ו מהלכות מזווה הלכה א' פסק וז"ל עשרה תנאין יש בבית ואחר כך יתחייב הדר בו לעשות לו מזווה ואם חסר תנאי אחד מהן פטור מן המזווה ואלו הן שיהיה בו ארבע אמות על ארבע אמות או יתר ושתהיינה לו שתי מזווות ויהיה לו משקוף ותהיה לו תקרה ויהיו לו דלתות ויהיה השער גבוה עשרה טפחים או יותר ויהיה הבית חול ויהיה עשוי לדירת אדם ועשוי לדירת כבוד ועשוי לדירת קבע. שם בהלכה ט' כתב בית הכסא ובית המרחץ ובית הטבילה ובית הבורסקי וכיוצא בהם פטורין

פט

שאלות ותשובות ממעמקים

מן המזוזה לפי שאינן עשויין לדירת כבוד סוכת חג בחג ובית שבספינה פטורין
מן המזוזה לפי שאינן עשויין לדירת קבע, ע"כ.

והנה לכאורה מדלא הזכיר הרמב"ם דבית האסורים פטור הוא ממזוזה משמע
שבית האסורים הוי ככל דירה וחייב הוא במזוזה, אולם יש לומר
מאחר שהרמב"ם מנה בין תנאי הבית שהוא חייב במזוזה שיהא עשוי לדירת
כבוד ולכן כתב שם בהלכה ט' דבית הכסא ובית המרחץ ובית הטבילה ובית
הבורסקי וכיוצא בהם פטורין מן המזוזה, ואם כן לפי זה הרי בית האסורים
גם כן אינו עשוי לדירת כבוד ולזאת צריך להיות פטור ממזוזה ככל הנ"ל,
ואם כן גם יושבי הגיטו פטורין הן ממזוזה.

ובר מן דין הרי אחד מהתנאים שמנה הרמב"ם הוא שיהא עשוי לדירת
קבע ולכן כתב שם בהלכה ט' שסוכת חג בחג ובית שבספינה פטורין
מן המזוזה לפי שאינן עשויין לדירת קבע, ומאחר שגם בית האסורים אינו
עשוי לדירת קבע שהרי החבוש בבית האסורים בכל יום ויום עיניו מיחלות
ומצפות לרגע שיצא ממאסרו לחופש ולדרור בודאי שפטור הוא ממזוזה
כמו סוכת חג בחג ובית שבספינה.

ואם כן בנידון דידן גם כן לא נחשבו דירותיהם של כלואי הגיטו כדירת
קבע שהרי בכל חדר וחדר גרו יותר אנשים ממה שהחדר היה
יכול להכיל והיו האנשים מסדרים את מטותיהם זו על גבי זו והדוחק היה
בחדרים עד לאין שיעור ואם כן בודאי דירה כזאת אין עליה דין של דירת
קבע ופטורה היא מן המזוזה שהרי בההזדמנות הראשונה בודאי האנשים
יעזבו את החדרים הצרים הללו כדי לחפש להם מקום דירה יותר טוב
ומרווח.

ועוד שהרי הגרמנים הארורים היו מוצאים את האנשים כלואי הגיטו בכל
יום ויום להורג וכל אחד ואחד לא היה יודע מתי תגיע
עתו ושעתו ובכל יום היו האנשים נפרדים אחד מהשני בברכת
להתראות בעולם האמת כי היו חוששים שמא לא יתרמי להם עוד להתראות
בעולם הזה כי היום או מחר יוציאו להורג, ומרגלא בפומא דאינשי היה אז
לומר שאנו „מתים בחופשה“, עד כדי כך לא היה כל אחד ואחד בטוח בחייו.

שאלות ותשובות ממעמקים

צ

ואם כן בודאי לפי זה יש על הדירות שבגיטו דין של דירת ארעי ולא של דירת קבע כדי לחייבן במזוזה.

איברא שדין זה אם בית האסורים חייב הוא במזוזה או לא לכאורה תלוי בהא דגרסינן במס' יומא דף י' ע"א, תנו רבנן כל הלשכות שהיו במקדש לא היו להן מזוזה חוץ מלשכת פרהדרין שהיה בה בית דירה לכהן גדול אמר ר' יהודה ותלא כמה לשכות היו במקדש שהיה לן בית דירה ולא היה להן מזוזה אלא לשכת פרהדרין גזירה היתה, ומסקינן בגמרא דרבנן סברי דירה בעל כרחיה שמה דירה ור' יהודה סבר דירה בעל כרחיה לא שמה דירה ומדרבנן הוא דתקינן לה שלא יאמרו כהן גדול חבוש בבית האסורין וקיימא לן כחכמים שדירה בעל כרחיה שמה דירה, ואם כן לפי זה הרי גם בית האסורים הוא דירה בעל כרחיה ומאחר שקיימא לן כרבנן שדירה בעל כרחיה שמה דירה וחייבת במזוזה גם בית האסורים חייב הוא במזוזה, ואם כן הוא הדין בנידון דידן חייבים כלואי הגיטו במזוזה.

אולם יש לומר דשאני בית אסורים מלשכת פרהדרין דנהי דרבנן סברי שדירה בעל כרחיה שמה דירה וחייבת היא במזוזה והו דוקא בלשכת פרהדרין ודכוותה שהיא עשויה לדירת כבוד אלא שהדר בה דר בעל כרחיה אבל בבית האסורים שאינו עשוי לכבוד איכא למימר שגם חכמים מודו שהוא פטור ממזוזה, וראיה לדבר מד' יהודה שהוא סובר שדירה בעל כרחיה לאו שמה דירה ואף על פי כן חייבת לשכת פרהדרין במזוזה מתקנת חכמים כדי שלא יאמרו כהן גדול חבוש בבית האסורים, כלומר שאם תהיה מזוזה בלשכת פרהדרין יאמרו כהן גדול חבוש בבית האסורים והא ראייה שאין מזוזה בלשכת פרהדרין שמע מינה דבית אסורים היא, לכך תיקנו שלשכת פרהדרין חייבת במזוזה כדי להראות שהיא אינה בית אסורים, הרי משמע בהדיא דר' יהודה סבירא ליה דבית האסורים פטור הוא ממזוזה ומד' יהודה נשמע לרבנן דהם לא פליגי בזה אלא כל עיקר סברתם היא דאפילו אם לא תהיה מזוזה בלשכת פרהדרין גם כן לא שייך לחוש שיאמרו כהן גדול חבוש בבית האסורים דאינשי לא מיחליף להו לשכת פרהדרין בבית האסורין ולא שייכת גזירה זו לגמרי אלא דסבירה להו שדירה בעל כרחיה שמה דירה ורק לכך לשכת פרהדרין חייבת במזוזה, אבל בית האסורים ממש גם רבנן סבירא להו דפטור הוא מן

שאלות ותשובות ממעמקים צא

המזוזה מפני שאינו עשוי לכבוד והוא דומה לבית הכסא ובית המרחץ ובית הטבילה ובית הבורסקי וכיוצא בהם שהם פטורין לפי שאינם עשויים לכבוד והוא הדין לבית האסורים.

אמנם אי נימא שבית האסורים פטור הוא ממזוזה מפני שהוא אינו עשוי לכבוד והוא דומה לבית הכסא ובית המרחץ וכו', אם כן לפי זה בתי ערי מקלט גם כן יהיו פטורים ממזוזה שהרי הלכה היא שאם רוצים לכבדו מוטל עליו לומר רוצח אני ומאחר שאין בתי ערי מקלט עשויים לכבוד לפי זה האם יהיו פטורין מן המזוזה, איתמהא.

אלא בעל כרחך צריך לומר דשאני בתי ערי מקלט מבית הכסא ובית המרחץ וכדומה שכל עיקרם אינם נעשים לכבוד ומאוסים הם אבל בתי ערי מקלט הרי הדירה מצד עצמה עשויה היא לכבוד ככל הדירות כי כלום נשתנתה הדירה בגלל זה שהוא רוצח, הרי חן המקום על יושביו הוא, והוא הדין בבית האסורים הדירה היא דירה ככל הדירות ורק אסיר בא על ענשו לשבת שם זמן ידוע כפי שנפסק עליו, והרי נהוג עכשיו בזמנינו שלפעמים מכריזים על עוצר בית והאנשים מוכרחים להשאר כלואים בבתיהם, האם נימא שבשעת העוצר פטור ביתם ממזוזה בגלל כך, הרי הבית לא נשתנה בכלום וכמו שהדר בו מחוייב בכל המצוות הוא הדין שהוא מחוייב במזוזה דמזוזה חובת הדר היא, ולפי זה בית אסורים ודאי מחוייב הוא במזוזה ואי משום שדירת בית האסורים אינה דירת קבע והרי הרמב"ם מנה בין תנאי חיוב המזוזה שיהא עשוי לדירת קבע, גם זה אינו שהרי ישנם כמה אסורים שהושמו בבית הסוהר להדשים ושנים ואם כן לגבי דידם ודאי בית האסורים דירת קבע מיקרי שהרי גם כשאדם שוכר דירה הוא שוכר אותה לזמן קבוע מראש ואף על פי כן חייב הוא במזוזה ואין אנו אומרים שאינה דירת קבע אם כן גם בית האסורים לא שגא.

מאי איכא למימר שבית האסורים פטור הוא ממזוזה משום דהוי דירה בעל כרחא הרי קיימא לן כחכמים דסבירא להו שדירה בעל כרחא שמה דירה, וגם הרמב"ם לא מנה תנאי חיוב המזוזה בפ"ו מהלכות מזוזה הלכה א' שלא תהא הדירה בעל כרחו שמע מינה דזה אינו מעכב מחיוב המזוזה, ומכל חאמור נראה שבית האסורים חייב הוא במזוזה.

שאלות ותשובות ממעמקים

צב

ועי' בברכי יוסף סי' רפ"ו אות ג' שדן שם אי בית האסורים של יהודים חייב הוא במזוזה או לא, עיי"ש שהביא בשם הרב בית הלל לפטור ולמד זה מש"ס יומא הנ"ל וגם בשו"ת שער אפרים סי' פ"ג דעתו לפטור בית אסורים ממזוזה אולם בהגה"ה שם דעתו לחיוב וכן העלה הברכי יוסף שם, ואף על פי כן דעתו היא שבית האסורים שיושבים שם רק כשני חדשים ולא יותר שהוא פטור משום דהוי דירת ארעי עיי"ש, אחרי השחרור ראיתי מש"כ בספר משפטי עוזיאל בחיו"ד בענין זה.

ונראה לי דבנידון דידן עוד יותר גרוע ממה שהעלה הברכי יוסף לפטור בית האסורים שיושבים שם רק כשני חדשים משום דהוי כדירת ארעי, שהרי כלואי הגיטו יושבי עמק הבכא עיפה נפשם להורגים ומדי יום ביומו מוציאים הרשעים הארורים אנשים, לעשרות ולמאות להורג ואין מי שיאמר להם מה תעשו ואם כן בודאי דירות האנשים הללו יש עליהן דין דירת ארעי שהרי בכל יום ויום נפש הכלואים תלויה היא להם מנגד ומוכנים הם לקדש שם שמים, בכל יום ויום מאחר שהדת יצאה מאת הצורר ימ"ש וזכרו להשמיד ולהרוג את כל היהודים וכל כלואי הגיטו דין מיתה יש עליהם, לכן בודאי נראה שביתם ודירתם היא בשבילם רק דירת ארעי ופטורין הם ממזוזה מאחר שבכל יום ויום יתכן שהם יוכרעו לטבח על ידי האויב האכזר.

אולם אף על פי כן מי שיש לו מזוזה והוא רוצה לקובעה על פתחו כדי שתזכיר לו את יחודו של הקב"ה יתברך שמו בודאי מצוה הוא עושה וכמו שאמרו רבותינו ז"ל במנחות דף מ"ג ע"ב כל מי שיש לו תפילין בראשו ובזרועו וציצית בבגדו ומזוזה בפתחו הכל בחיזוק שלא יחטא שנאמר והחוט המשולש לא במהרה ינתק ואומר חונה מלאך ה' סביב ליראיו ויחלצם, וכל הזהיר במצות מזוזה מאריכין לו ימיו ושנותיו שנאמר למען ירבו ימיכם וימי בניכם כדאיתא במס' שבת דף ל"ב ע"ב עיי"ש, ולזאת אלו הקובעין מזוזות בפתחיהן בגיטו מצוה גדולה הם עושים, אולם עליהם לקובעה בלי ברכה מאחר שמן הדין פטורין הן וכמו שהעלינו ואלו שאין להם מזוזה אין להם לחוש ולדאוג כלל, וה' הטוב ישלח לנו את עזרתו מקודש ונזכה בשוב ה' את שבות עמו לציון ברנה ולירושלים בית מקדשו בשמחת עולם במהרה בימינו אמן.

שאלה י'

אם מותר מצד הדין לאחד מכלואי הגיטו
לסכן את עצמו ולברוח ליערות לפרטיונים

שאלה: נשאלתי מהנכבד ר' יצחק גאלד בחיותינו בצרת השביה בגיטו קובנה את השאלה דלהלן, היות שמדי יום ביומו היו הגרמנים הארורים מוציאים מהגיטו למעלה מאלף לעבודת כפיה בשדה התעופה, שם היו מעבירים את המוצאים הללו בפרך כדי לענותם בסבלותם במכסת עבודה יומית שהיה עליהם למלא.

והיה אם היו רואים הגרמנים שהמוצאים מהגיטו לא יוכלו למלא את מכסת העבודה היומית שהם קבעו ברשעתם, היתה מיד מתלקחת בהם חמתם כאש להכה והיו פושטים על הגיטו בחמת רצח כדי לתפוס יהודים נוספים לעבודת הכפיה למען מלא את מכסת העבודה.

וכיון שניתן רשות למשחית להחל הנגף בכלואי הגיטו, היו הקלגסים הגרמנים ימ"ש מוחקים מעליהם כל צורה אנושית והיו הופכים לחיות טרף דורסות שכל מגמתן היא אך לטרוף טרף ולרוות את צמאם לדם, הם היו מתנפלים על היהודים האומללים והיו מפליאים להם מכות רצח ושמים אותם בשעת מעשה ללעג וקלס, ברצונם לגרום ליהודים יסורי גוף ונפש כאחד.

ואין לך יום בגיטו שלא תהא קללתו מרובה מחבירו ושלא יתחדשו בו גזירות חדשות משונות לבקרים שהרה וילד רוחם ולבם הרע, ושמועה רודפת שמועה, וכלואי הגיטו המעונים בענים שואלים זה לזה, שמועה מה מיום? שמועה מה מלילה?

עד

שאלות ותשובות ממעמקים, חלק ד'

ויהי היום ותעבור השמועה לא מובה במחנה הכלואים לאמור, שהנה הגרמנים החליטו לקחת מספר רב של אנשים על מנת להעבירם למחנה אחר, זאת אומרת למחנה השמדה.

ובעקבות השמועה הזאת עשתה שמועה אחרת לח כנפים, שהנה מספר רב של כלואי הגיטו בורחים בחשכת הלילה ליערות כדי להצטרף לחבורות הפרטיזנים העושים נקם בגרמנים ומרבים בהם חללים, כי זוהי הדרך היחידה שנשארה ליהודים הנחשבים אצל הגרמנים כצאן לטבח יובל, והיא לעמוד על נפשם על ידי צירוף לחבורות הפרטיזנים הלוחמים בהם בחרוף נפש.

אולם דא עקא, כי הדרך ליערות היא הרת סכנות, כי מלבד שהגיטו עצמו מוקף הוא בגדר תיל מחושמל שכל חנוגע בו קובע את נפשו, ובמרחק ידוע זה מזה בניינים מגדלי תצפית עליהם עומדים חיילים גרמנים ככשבידיהם מכונות יריה דרוכות, הם עומדים וצופים יום ולילה על המגדלים הללו ומוכנים מיד לפגוע בכל דבר מתנועע אפילו בחשכת הלילה, כי זרקורים גדולים מאירים את כל סביבות המחנה.

וזאת ועוד אחרת, כי אצל הפרטיזנים היה חוק ולא יעבור שלא לצרף אליהם אנשים הבאים להסתפח על צבאם, אלא אם כן האנשים באים אליהם כשכלי זינם בידם, כי אצל הפרטיזנים היה מחסור גדול בנשק, ולכן היו אוספים אל שורותיהם רק את האנשים שיש להם נשק משלהם.

והתנאי זה עוד הגדיל יותר את הסכנה שנשקפה לכל אלה שברחו מתוך הגיטו מתוך רצון להצטרף לפרטיזנים, כי הגרמנים היו ממיתים מיד את הנתפס מחוץ לגיטו כידוע, ועל אחת כמה וכמה כשנתפס מישהו כשנשק נמצא ברשותו, איש כזה נחשב תיכף ומיד לגברא קטילא.

שאלות ותשובות ממעמקים, חלק ד' עת

מלבד זאת היו בערות פלוגות פרטיונים כאלה שלא רצו בכלל לקבל לתוכם יהודים, כי גם הם היו שונאי ישראל גדולים למרות שנלחמו עם הגרמנים, ויהודי שנפל לידי פלוגות הפרטיונים כזאת שילם לא אחת בחייו.

ול זאת נשאלתי אז על ידי הנכבד הנ"ל, אם מותר מצד הדין לאחד מכלואי הגיטו לסכן את עצמו ולברוח ליערות, כי אולי ה' יהי' בעזרו ויצליח על ידי בריחתו להשאיר בחיים, כי כאן בתוך הגיטו הסכנה הנשקפת לחייו היא ודאית ואילו על ידי בריחתו הוא יכניס את עצמו רק לספק סכנה.

מפני שידועה היתה האימרה שהיתה מהלכת בגיטו, אימרה אופינית מאוד שכינתה את כלואי הגיטו בשם „מתים בחופשה“, כלומר שהם נחשבים כמתים אלא שקיבלו חופשה לפי שעה . . .

כי מלבד הפעולות („אקציות“) שהגרמנים היו מעבירים בגיטו מזמן לזמן, בהן היו תופסים אנשים נשים וטף ושולחים אותם למחנות ההשמדה, היו חיי היהודים תלויים להם מנגד גם בעתים וזמנים שלא היו בהם פעולות, כי על כל דבר קטן היו הגרמנים יורים ביהודים וחורגים אותם, בין אם נדמה היה לגרמני שיהודי לא נהג בו כבוד הראוי, ובין אם נמצא בתוך כגדי היהודי בשוכו מעבודת הכפיה פרוסת לחם יבש ברצונו להחיות בזה את נפש עוללו הגווע מרעב, האם נחשבים חיי הגיטו לוודאי נתונים בסכנה בהשוואה לסכנת הכריחה שאינה רק ספק סכנה.

אז דילמא יש מקום לשקול להיפך ולומר, שהחיים בגיטו כפי שהם עכשיו אין בהם סכנה, כי ישנה גם שמועה האומרת שאלה שנשארו בגיטו עד עכשיו לא יאונה להם כל רע אם רק יעבדו וימלאו את כל מה שהגרמנים דורשים מאתם, ולעומת זאת גדולה היא מאוד הסכנה לבורחים לא רק מצדם של הגרמנים אלא גם מצדם של גויי

הארץ הליטאים המתנכלים לתפוס יהודים כאלה לתמיתם או למוסרם לידי הגרמנים.

תשובה: בעירובין דף מ"ה ע"א גרסינן, אמר רב יהודה אמר רב נכרים שצרו על עיירות ישראל אין יוצאין עליהם בכלי זינן ואין מחללין עליהן את השבת תניא נמי הכי נכרים שצרו כו' במה דברים אמורים כשבאו על עסקי ממון אבל באו על עסקי נפשות יוצאין עליהם בכלי זינן ומחללין עליהן את השבת ובעיר הסמוכה לספר אפילו לא באו על עסקי נפשות אלא על עסקי תבן וקש יוצאין עליהן בכלי זינן ומחללין עליהן את השבת. (שם) ילכודו ומשם תהא נוחה הארץ ליכבש לפניהם, רש"י) אמר רב נחמן ובבל כעיר הסמוכה לספר דמיא כו' דרש רבי דוסתאי דמן בירי מאי דכתיב ויגידו לדוד לאמור הנה פלשתים נלחמים בקעילה והמה יוסיים את הגרנות, תנא קעילה עיר הסמוכה לספר היתה והם לא באו אלא על עסקי תבן וקש דכתיב והמה יוסיים את הגרנות וכתיב וישאל דוד בה' לאמור האלך והכיתי בפלשתים ואלה ויאמר ה' אל דוד לך והכית בפלשתים והושעתה את קעילה, עיי"ש.

ובש"ע אר"ח סי' שכ"ט סעיף ז' איתא, עובדי גלולים שצרו על עיירות ישראל אם באו על עסק ממון אין מחללין עליהם את השבת באו על עסק נפשות ואפילו סתם יוצאים עליהם בכלי זינן ומחללין עליהם את השבת (ובעיר הסמוכה לספר אפילו לא באו אלא על עסקי תבן וקש מחללין עליהם את השבת) (הגה ואפילו לא באים אלא רוצים לבא) (א"ז).

ובסעיף ז' שם איתא, יש מי שאומר שבזמן הזה אפילו באו על עסקי ממון מחללין שאם לא יניחנו ישראל לשלול ולבז ממנו יהרגו והוי עסקי נפשות (ומ"מ הכל לפי הענין) (פסקי מהרא"י סי' ק"כ).

וגם הרמב"ם בפ"ג מהלכות שבת הלכה כ"ג פסק, עובדי כוכבים ומזלות שצרו על עיירות ישראל אם באו על עסקי ממון אין מחללין עליהן את השבת ואין עושין עמהן מלחמה ובעיר הסמוכה לספר אפילו לא באו אלא על עסקי תבן וקש יוצאין עליהן בכלי זינן ומחללין עליהן את השבת

שאלות ותשובות ממעמקים, חלק ד' עז

ובכל מקום אם באו על עסקי נפשות או שיערכו מלחמה או שצרו סתם יוצאין עליהן בכלי זיין ומחללין עליהן את השבת ומצוה על כל ישראל שיכולין לבוא ולצאת ולעזור לאחיהם שבמצור ולהצילם מיד העובדי כוכבים ומזלות בשבת ואסור להן להתמהמה למוצאי שבת, עיי"ש.

ועי' בירושלמי סוף פרק ח' דתדומות דגרסינן שם, רבי אמי איתצד בסיפסיפה, אמר ר' יונתן יכרך המת בסדינו (כלומר שגתיאש הימנו ואין לו אלא להכין לעצמו תכריכי המת, פני משה), אמר ר' שמעון בן לקיש עד דאנא קטיל אנא מתקטיל, אנא איזיל ומשויב ליה בחיילא (ושמע רשב"ל ואמר או אני אהרוג או אני נהרג, אני אלך ואציל אותו בכוח, פני משה), אול ופיסון ויהבוניה ליה (והלך ופיס לאותן הגזלנים והניחוהו ונתנו אותו לידו, עיי"ש).

דרי' חזינן בהדיא מיהרושלמי שר' שמעון בר לקיש הכניס עצמו לספק סכנה שיהא נהרג בכדי להציל את רבי אמי, וכן פסק הטור בחור"מ סימן תכ"ו בשם הגהות מיימוני, שכתב בירושלמי מסיק אפילו להכניס עצמו בספק סכנה חייב להציל, ועי' מה שכתבתי בזה בשו"ת ממעמקים ח"ב סי' א.

וגם בהש"ס בעירובין והש"ע והרמב"ם שהבאתי מבואר כן, שכל ישראל חייבין להכניס לספק סכנה כדי "לבוא ולצאת ולעזור לאחיהם שבמצור ולהצילם", וזה ששוט, ואם כן על אחת כמה וכמה שחייב אדם להכניס לספק סכנה כדי להציל את עצמו מסכנה ודאית.

ואכן עי' במשנה ברורה שם ס"ק י"ט שכתב, ומ"מ אם יש סכנה להציל אינו מחוייב דחיו קודם לחיי חבירו ואפילו ספק סכנה נמי עדיף ספיקו ידידה מודאי דחבירו, אולם צריך לשקול הדברים היטב אם יש ספק סכנה ולא לדקדק ביותר כאותן שאמרו המדקדק בכך בא לידי כך ע"כ הוא בפתחי תשובה חו"מ סי' תכ"ו ס"ק ב' עיי"ש.

והנה בגיטו נראה דהיה וראי סכנה שהרי כל עיקר בידודם של היהודים והכלאתם בגיטאות, היה בכדי לגזול ולשדוד מקודם כל אשר להם

ולהציגם ככלי ריק שאין בו כלום כי אם נפשו, ואחר כך לכלות גם את גופם ונפשם בהרג ושמד וכל מיני מיתות משונות כידוע.
לעומת זאת, הבריתה ליערות היתה רק ספק סכנה, כי כל מי שאור עוז בנפשו והחליט לברות, הרי בודאי חקר ודרש מקודם היטב לאן יהיו סגיו מועדות, כי מזמן לזמן היו באים לתוך הגיטו פרטיזנים שהיו יודעים איך לצאת ולבוא והיו מוסרים סימנים לאחרים שרצו להצטרף אליהם איך למצוא את הדרכים ביערות המובילות למקום משכן הפרטיזנים, ואם כי כל הדרכים הללו היו בחזקת סכנה, בכל זאת הלא עינינו רואות שאפשר לעבור בדרכים הללו, והראיה מהפרטיזנים הללו שהיו באים ויוצאים באותו נפשם לתוך ומתוך הגיטו.

והנה בספר החינוך מצוה תכ"ה, להרוג ז' עממים מארץ כנען כתב, להרוג ז' עממים המחזיקים בארצנו טרם כבשנו אותה מהם ואף כי כבר עשינו בהם המחוייב על יד דוד מלכנו שהשחיתם כולם עד שלא נשארו מהם רק מתי מספר שהתפזרו וטבעו בין האומות עד שלא נודע זכרם כו' אף על פי כן לא תקרא מצוה זו מצוה שאינה נוהגת כו' ועובר על זה ובא לידו אחד מהם ויכול להרגו מבלי שיסתכן בדבר ולא הרגו בטל עשה זו מלבד שעבר על לאו שנאמר עליהם לא תחיה כל נשמה כו' ע"ש.

וכתב על זה המנחת חינוך שם, ויכול להרגו מבלי שיסתכן בדבר וכו' וצ"ע נהי דכל המצות נדחים משני הסכנה מכל מקום מצוה זו דהתורה צויתה ללחום עמהם וידוע דהתורה לא תסמוך דיניה על הנס כמבואר ברמב"ן ובדרך העולם נהרגים משני הצדדים בעת מלחמה אם כן חוינן דהתורה גזרה ללחום עמהם אף דהוא סכנה, אם כן דחוייה סכנה במקום הזה ומצוה להרוג אותו אף שיסתכן וצ"ע עכ"ל המנחת חינוך שם.

מעתה לפי דברי המנחת חינוך הרי ברור, שהמלחמה הזאת שהגרמנים הארורים צאצאי עמלק ימ"ש הכריזו על היהודים לאבדם ולהשמידם, בודאי שהחייב והמצוה מוטלים על היהודים להשיב מלחמה שערה ולהשיב להם כגמולם ולעשות להם כאשר הם זוממים עלינו ומצוה לדרוף אותם באף ולהשמידם מתחת שמי ה'.

ולא בודאי "דחוייה סכנה במקום הזה ומצוה להרוג אותם אף שיסתכן", כמו שכתב המנחת חינוך, ואדרבה ככל אשר יתרבו זאנשים הבורחים לתוך היערות אל מחנות הפרטיזנים המזנבים את כל הנחשלים שבחיילי הגרמנים, כן תתמעט הסכנה מאלו הבורחים ליערות, וכן תתחזק ידם האוחזת בשלח ויגבר חילם לעשות בגרמנים נקם ותוכחות.

ולכן הוריתי שאין לרפות את רוחם של המתכוננים לברוח ליערות אלא אדרבה, יש לעודדם ולאמצם וכמובן שיש להושיט להם כל מיני עזרה לשם דכישת כלי זין, ונשק כדי שלא יבואו ריקם למחנות הפרטיזנים אלא יהיו מלומדי קרב ומלחמה ויהיו מיד מוכנים להיות בין העומדים בשורות הראשונות של הלוחמים.

וא נקמות יופיע להלחם להם כדי שיחזו נקם וישמחו וירחצו פעמיהם בדם הרשעים הגרמנים ימ"ש, אשר יפוצו וינוסו מפניהם וכנדוף עשן יגדלו ויאבדו עדי עד, ואלה המעטים השמים את נפשם בכפם לברוח ליערות יהיו מבשרי צבא רב שימחץ דאש האויב הגרמני וישוף קדקוד הפתן הגרמני ימשיך.

א.

י"ד מאות ילדים מסוגרים ונדונים לשריפה

ישתוממו הדורות ויתעוררו הלבבות, להשיב לב בנים על האבות, כאשר אספר במקלות, ענין נורא ונשגב, את אשר ראו עיני באושוויטץ, ביום ראש השנה ושמחת תורה, את גודל מסירת הנפש וקידוש השם, של אלף וארבע מאות בחורים צעירים, בני י"ד—י"ח שנים. שנבחרו ביום ערב ר"ה (במילעקציע), להיות עולה על מוקדה ולהישרף על קידוש השם.

ולא כאתי כאן להאריך בסיפורים מכגון אלה, כי תכלה היריעה והם לא יוכלו, וכבר נשפך הרבה דיו, על כתיבת המאורעות והצרות מימי הנאצי"ם ימ"ש, וכל אחד כותב לפי רוחו ומעמו והשגתו, וכפי אשר יפיק טובת הנאה מפרי עטיו, אך אני לא אמנע בשביל כבוד קדושת שמו יתברך, מלהעלות כאן בשער ספר מקדשי השם. סיפור הלזה אשר עיני ראו ולא זר, מתוך ים של סיפורים ומאורעות, אשר נחרתו בלבי ובמוחי, מאשר עברו על ראשי, משך הזמן שהייתי תחת שיעבוד הנאצי"ם ימ"ש, ואבטיח לקצר במקום שאפשר להאריך, וזה החלי בעזר צורי יתברך.

הנה בערב ראש השנה, נקבצו ונלקחו, ע"י השומרים הנאצי"ם ושליחיהם במחנה, הבחורים הצעירים בערך, מבין י"ח שנה ולמטה, שנמצאו עוד מפורד ומפורד בכל המחנה, שהצליחו להתחמק באיזה אופן ואמתלאות שונות, מתחת שבט הביקורת של ראש המחנה הצורר הנאצי ימ"ש. בעת היכנסם להמחנה. ונאספו ככה בערך אלף ושש מאות נערים וקטנים, על מגרש ריק מאחורי הבלאקים שבמחנה, וידעו כולם מהגורל שמחכה עליהם. (ובני היקר זלמן ליב נער בן י"ד שהי' אתי באושי-וויטץ ניצל בנס בעזרת י"ת ולא נלקח שמה עם הנערים).

ואז בא אליהם ראש המחנה הצורר הנאצי ימ"ש וציוה לתחוב עמוד של עץ בארץ. וכראש העמוד להשכיב דף של עץ הדוק במסמרים והי' נראה כמין ד', ונתן צו שכל הנערים יעברו, אחד אחד מתחת הדף הזה, וכל מי אשר יגע ראשו בהדף ישאר בחיים ויישלח חזרה במחנה. וכל אלו שלא יגעו בראשם את הדף, יוקחו מבודדים בבלאק מסוגר, כי עד"ו שיער הצורר בעצמו, את גילם וכושר סגולתם לעבודה.

ודלות שהנערים ידעו ושיערו מהו הפירוש של אי נגיעה בהדף, שזה נחשב לקמן ונידון לשריפה, היו כמה מהם שהתרוממו על כהונות רגליהם ברנע שעברו מתחת להדף, כדי שיגע ראשם בהדף. והצורר הזה שעמד שם על ידם, ברנע שראה דבר כזה, שהנער מתרומם, לנגוע בהדף, נתן לו מכה חזקה בראשו, עם המקל עב של גומי שבידו. ככה כזה שהנער המסכן נפל ארצה מתבוסס בדמו, ונפח את נשמתו על אתר, או שנשאר בו עדיין קוסמא דחיותא ולקוחו ככה לבית השריפה, וככה אירע לכמה נערים.

ואחרי הבחינה וצירוף הלו, נשארו בערך ארבעה עשר מאות נערים על המגרש, ולקחו אותם תיכף בבלוק מבודד סגור ומסוגר עד יום מחר שיחרץ גורלם,

ולא קבלו יותר שום אוכל ומשקה בפייהם, והשומרים הקאפויס עמדו על השער ואין יוצא ונכנס.

ב.

מסחר נפשות עם הקאפוי"ם

והנה ליום המחרת, שהוא יום א' דר"ה, אשר כל בני עולם יעברו לפניו כבני מרון, הי' יום מהומה ומבוכה, ומפה לאוזן נתפשטה השמועה בכל המחנה, שלעת ערב יקחו את הנערים לבית המוקד, (כי בעוד יום לא הי' מכניסים קרבנות חדשים להכשונות, רק במשך כל הלילה), ולהרכה אנשים שבמחנה הי' להם בנם יחידם, אשר נשארו להם לפליטה, בתוך אלו הנערים או שאר בשרם הקרובים אליהם, או סתם ידידים אהובים אנשי עירם, והמה רצו כל היום בראש מכולל מסביב הבלאק המוסגר, אולי יופתח איזה קרן אור להציל משם את הנער היקר להם עד שלא תחשך השמש.

אך השומרים הקאפוס לא שעו אל כל תחנוניהם ובכיר-תיהם להוציא איזה נער וילד, מבין המסוגרים אשר נדונים לשריפה. וכידוע שאלו הקאפוי"ם הי' ע"פ רוב רשעים וקשי לב, פסולת שבפסולת מרשעי עמנו, אך במקרה הלזה הי' גם מענתם כמענה צודקת בפייהם, היות שהם אחראים על הסכום הילדים שהופקדו לשומרים עליהם, אשר הי' במספר מדויק, ולעת ערב עליהם למסור אותם לידי אנשי הס' ס' ימ"ש במספר ובמנין כאשר מסרו להם, ואם יחסר אחד מהם אז דמם בראשם ויקחו אותם לשריפה, נפש תחת נפש.

אכן סוף סוף אחרי הרבה השתדלות ומו"ס של הקרובים עמהם, גברה בהם תאוות הממון, והסכימו בעד תשלום סכומים גדולים, לשחרר איזה נער וילד, ותיכף חטפו במקומו איזה נער אחר, מן הבא בידם בתוך המחנה. (מאלו שהצליחו להתחמק מהאוסף דלאתמול או שנשתחררו בעת הברור ע"י נגיעת ראשם בהדף) וסגרוהו בבלאק הנ"ל במקום הנער הפדוי כדי שיהי' המספר שלם.

והנה להרכה אנשים הי' עוד סכומי כספים, או חתיכות זהב או מרגליות, ממון במסמנים ובמנעלים לעת הצורך, וכמובן שהי' כמה אנשים פשוטים ובעלי קוצר השגה שלא עשו שום חשבונות, מה נעשה במקום נער הנפדה, וקיבצו במסירת נפש כל הונם הנשאר להם או שהשתדלו לאסוף סכום הנצרך, מאחרים ידידים ומכירים, ופדו את בנם המסוגר מכליון בטוח. וככה נמשך הסחר-מכר הלזה משך רוב היום הדין לעיני כל האנשים שבמחנה. (כי ידוע שאנשי הס' ס' לא הסתובבו במשך היום בתוך המחנה רק ע"י השער ומסביב למחנה, אבל במחנה גופא שלמו הקאפוס הישראליים).

אמנם כמובן שהי' הרבה אנשים בעלי השגה, שלא רצו לפדות את בנם, על חשבון חייו של ילד אחר, כמאמר חכמו"ל מאי חיות, ולעולם לא אשכח עובדא נוראה אחת, אשר עיני ראו ואזני שמעו, אז בשעת ענין הנ"ל, אשר מעשה הלזה מסמל את קדושת בני ישראל, והתמסרותם לדרכי התורה הקדושה בתמימות אף בעת צרתם וסבלותם הנוראה.

ג.

מסירת נפש של אב מלחציל בנו יחידו

הנה נישא אלי איש יהודי, שהי' נראה ליהודי פשוט מאויבערלאנד, מתמימות הדברים שלו שאמר לי כדברים האלה.

רבי! הבן יחיד שלי, היקר לי מבבת עיני, נמצא שמה בתוך הנערים הנידונים לשריפה, ויש בידי היכולת לפדותו, והיות שידוע לנו, בלי שום ספק, שהקא-פוס יתפסו אחר במקומו, על כן אני שואל מהרבי שאלה להלכה ולמעשה, לפסוק לי הדין עפ"י התורה אם אני רשאי לפדותו, וכאשר יפסוק כן אעשה.

ואני בשמעי השאלה הלז, רעדה אחזתני לפסוק בדיני נפשות, והשבתי לו: ידידי יקירי, איך אוכל לפסוק לך הלכה ברורה על שאלה כזה. במצב כזה, הלא גם בזמן שביהמ"ק הי' קיים, היתה שאלה כזו שהיא בדיני נפשות עולה על שלחן הסנהדרין, ואני כאן באוש-וויטין, בלי שום ספק להלכה, ובלי עוד רבנים אחרים, ובלי שום ישוב הדעת מרוב התלאות והצרות.

והנה אם הי' דרך הרשעים הקאפוס, להוציא מקודם הנפדה ואח"כ ליקח אחר במקומו, הי' מקום לצדד קצת להתיר אחרי שהרי הקאפוס הי' ישראלים, ולהם בוודאי אסור על פי ההלכה לעשות כזאת בידיים, להכניס בסכנה נפש אחר אשר לא עלה עליו הגורל להשרף, והרי הוא בכלל יתרג ואל יעבור. וא"כ יש מקום לתלות שאין זה בירור שיקחו נפש אחר במקום הנפדה. כי אולי ברגע האחרונה יתעורר בנפשם הישראלית שלא לעבור על איסור חמור כזה. ועיין בתוס' כתובות (ע"ב ע"א) ד"ה אי בשם הרשב"א דבזה שהאשה רצתה להאכיל לבעלה דבר איסור אינה יוצאת בלי כתובה דיכולה לומר משחקת הייתי ואם הייתי בא לאכול הייתי מונעת אותך ע"ש. וכ"כ י"ל דכל זמן שלא נעשית המכשול בפועל יכול להיות שבאמת לא יהי' נעשית כלל שיתעורר טבע של נפש הישראלי ולא יעשה איסור חמור כזה.

אכן לדאבוני נוכחתי לדעת שדרכם של הקאפוס ליקח מקודם נפש אחר מהמחנה ואח"כ מוציאים לחוץ הנפדה. כדי שיהי' בטוחים שלא יחסר להם המנין ומספר שמסרו להם הם"ס אשר המה אחראים עיבורם. ואם יוציאו לחוץ הנפדה, ולא יעלה בידם לחטוף נפש אחר במקומו אז דמם בראשם אם הם"ס ימצאו שחסר אחד מהמספר שמסרו להם. וממילא אין כאן ממה לצדד כלל.

אכן איש הנ"ל בבכי רבה הפציר בי מאד. ואמר לי, רבי, אתם מוכרחים לפסוק לי כעת את ההלכה

כזה, כי הוא שאלה בוערת להציל את בני יחידיו כל זמן שאפשר עוד להצילו. ואני באחת מתחנן אליו, יקירי צמיד לבבי, הרף ממני בשאלה הלזאת, כי לא אוכל לומר לך לא דבר ולא חצי דבר, מבלי עיון בשום ספר, ובמצב נורא ואיום כזה. והוא ממשיך להפציר בי ואומר לי כזה הלשון: רבי הייבט דאם אז איהר קענט מיר נישט מתיר זיין אויס ציא לייזין מיין איינציג קינד. איז נישט. בין איך מקבל באהבה דעהם פסק דין. עכ"ל.

ואני מתחנן ומוחה גם על דיבוריו ואומר לו ליעבער איר איך האב דאם אויך נישט געזאגט דאם איך בין נישט מתיר אייער קינד ארויס ציא געהמען. איך פסק'ן נישט לא הן ולא לאו. מהוט וויא איהר ווילט אזויא וויא איהר וואלט מיך גאר נישט געפרעגט. והוא עדיין עומד ומנסה ומפציר בי להשיבו דבר ברור. וכשרואה שאני עומד בשלי ואינני רוצה לענות לו דבר הלכה. ענה ואמר לי ברגש ובהתלהבות גדולה. רבי איך האב געטאהן דאם מייניגע וואס דיא תורה איז מיך מחייב ציא טאהן. איך האב געפרעגט א שאלה ביי א רב אין קיין אנדערער רב איז דא נישט דא. אין אז איהר קענט מיר נישט ענטפערין, דאם איך מעג אויסלייזן מיין קינד, איז דאך א סימן אז איהר זענט בייא אייך נישט פערטיג אין דיא הלכה מתיר צי זיין. ווארין ווען עס וואלט געוועהן מותר, בלי שום פקפוק, וואלט איהר דאך מיר זיכער געענטפערט, אז עס איז מותר. הייבט דאם בייא מיר וויא א פסק דין, אז איך טאהר נישט על פי ההלכה. אין דאם איז בייא מיר געניג, אין ממילא וועט מיין איינציג קינד פארברענט ווערין עפ"י התורה וההלכה בין איך דאם מקבל באהבה ובשמחה, אין איך טיה גאר נישט. איהם אויס צי לייזין ווייל דיא תורה האט אזוי געהייסן. עכ"ל.

ולא הועילו כל דיבורי אליו. שאל ישית עלי האחריות על הדבר הזה, כי אני כאלו לא שמעתי ממנו השאלה. אך הוא הכפיל עוד הפעם דיבורים הנ"ל בתמי-מות לבבו ובבכיו רבה שנקרע הלב לי"ב קרעים וגם ככה קיים דבריו ולא פדה את בנו. והי' כל היום יומא דר"ה הולך ומדבר לעצמו בשמחה שזוכה להקריב את בנו יחידו לה' כי אף שיש ביכולת בידו לפדותו עכ"ז אינו פודהו מחמת שרואה שהתורה לא התירה לו לעשות כזאת ויהי' חשוב לפני השי"ת כעקידת יצחק אבינו שהי' גם כן ביום ר"ה.

ואתה אחי יקירי בין והתכונן בצדקת ובתמימות איש הישראלי, ואין שום ספק אצלי שבוודאי עשו דברי האיש הזה רעש גדול בפמליא של מעלה, וקוב"ה כינס את כל חיל שמיא ומשרתי מעלה, והשתבח והת-פאר כביכול. ראו ברי' שכראתי בעולמי וכו'. ובצדק נאמר עליו ישראל אשר כך אתפאר.*

ד.

בחור מוכן להשרף בעד תמירות חבריו תלמוד חכם

ועוד עובדא בדומה לו אספר כאן מהיום המר הנמהר הזה. אשר ישאר נחרת בלכבי לעד ולעולמי עד. הנה בין אלו הנערים המבודדים שחיכו על גורלם המר הי' נמצא תלמודי היקר בחור נחמד מופלג בתורה וביראת ה' מהורה בשם **משה ראזענברג** הי"ד מק"ק שאלגא-טאריאן (הונגרי) והוא הי' כבר קרוב לבן עשרים, אך הי' קצר קומה, ומחמת שהכחינה והבירור היתה באופן הנ"ל שמי שאינו מגיע ראשו להקף של עין צירפו אותו להנערים הצעירים הנידונים לשריפה, ממילא איתרמי בחור בא בשנים אך קצר קומה נידון בקלחת אחת עם הצעירים, ונער צעיר כבן י"ד ט"ו אך נכה קומה נחלץ ממשפט הצעירים הנ"ל, וה"ב מרדכי הנ"ל הי' מתמיד ומופלג בתורה ובעת שלמד בהשיבה בוויצען הי' מלמד עם בחורים צעירים ממנו (הנקרא חור בחור).

והנה ניגש אלי בחור צעיר כבן ט"ו מעירי וויצען, ושמו **עקיבא מאנן** בן ידיד"נ הרב החסיד המפורסם ראש המלמדים מוה"ר **ברוך מאנן** הי"ד ז"ל, ואומר לי בזה"ל רבי. מה יהי עם **משה'עלע**? ואני משיבו מה יכול להיות, וכי יש אופן שיכולים להצילו, והוא אומר עוד הפעם רבי. **היתכן משה'עלע** יישרף ואנו **מחשים**. ואני משיבו עוה"פ וכי יש לך איזה עצה להצילו? כן הוא משיב לי, יש כבר בידי די כסף כדי היכולת לפדותו. ואני מעיר לו הלא בטח אתה יודע, שזה הפדי' הוא על חשבון חייו של נער אחר. כי המספר מוכרח להיות שלם. ומי יכול לקבל עליו אחריות כזאת. להתיר להצילו באופן כזה, והוא משיב יש לי עצה גם ע"ז. שאלתי איזה עצה הגד נא לי. ענה ואמר בהת-להבות גדולה, בזה"ל: העצה שאני אכנס תחתיו. ואני מקבל עלי בשמחה רבה, להיות קרבן תמורתו. ובשמעי זאת גערתי בו, ואמרתי לו שזה בוודאי לא אתיר לך,

בשום אופן, שאתה תכנים עצמך למקום סכנה, כי כבר איפסק הלכתא חייד קודמין. ובזה חלף חלף לו.

ואחרי איזה רגעים, הנה הוא בא עוד הפעם, ואומר לי רבי אינני יכול למצוא מרגוע לנפשי, **משה'עלע** יישרף ואני הנכזה שאינני מגיע לכפות רגליו אתהלך בין החיים, אני החלטתי לעשות זאת וליכנס תמורתו, אף בלי שיאמר לי הרבי היתר מפורש. רק זאת לבד יבטיח לי הרבי שלא אהי' נחשב ח"ו בכלל מאבד עצמו לדעת שאין לו חלק לעוה"ב. ואני גערתי בו עוד הפעם ואמרתי לו שאינני אוכל להבטיח לך גם זאת כי אם אינו מוטל עליך לעשות זאת ספק גדול הוא אם בכלל רשאי אתה לעשותו. ומה נפמ"נ בשמים אם הוא נהרג או אתה תהרג.

וע"ז ענה ואמר לי בקול בכי, רבי הלא בוודאי יש נפמ"נ גדול ביני לבין **משה'עלע** כי משה'עלע הוא בחור תלמיד חכם ומתמיד בלימודו, והעולם עוד יפיקו ממנו תועלת, לא כן אני בעניי, בער אנכי ולא אדע, ואינני שוה כלום, ובעיני ראיתי כבר אבדן מולדתי, אבותי ואחי ואחיותי שהובילו לצד שמאל, להישרף בבית המוקד, ואני נשארתי לבדי גלמוד שכול, ובמה אני יותר טוב מהם, ומה שווי' כבר כל חיי על פני תבל, ואם אזכה לעשות עוד דבר נשגב כזה, שעל ידי מסירת חיי, שממילא אינו שוה פרוטה אוכל להציל את משה'ע-לע היקר, שחיי שווים הרבה, והעולם יצטרכו לו, למה לא אשמה ואודרו לעשות דבר כזאת. ככה טען אלי העלם הצעיר הזה.*

ואני נדהמתי והרגשתי שעוד מעט ולבי יתפלץ, לשמוע טענות ובכיות העלם היקר הזה, אך לא נתתי לו הסכמתי בשום אופן, וגערתי בו שנית. ואחרי רוב ההפצרות ותחנונים הלך לו בפחי נפש ממני.

אחי התבונן נא רגע קט על מעשה הלזו ומה אמרו בשמים למענות הבחור הצעיר הזה, אשר יצא מקירות לבבו באמת ובפשטות ובגודל חמימות, הלא בוודאי התעלה ברגע הלזו למעלת קדושי קדמאי ומחלקם יהא חלקי והלוואי שיהי' חלקינו עמו.

קנב

שאלות ותשובות ממעמקים

כרחי. כל הנבעלת בשדה הרי זו בחזקת אנוסה ודנין אותה בדין אנוסה עד שיעידו העדים שברצונה נבעלה, וכן נבעלת בעיר הרי זה בחזקת מפותה מפני שלא זעקה עד שיעידו העדים שהיא אנוסה כגון ששלך לה חרב ואמר לה אם תזעקי אחרוג אותך, ובהשגות שם איתא: כתב הראב"ד ז"ל חיי ראשי חזקה זו איני יודע מה תועלת יש בה אם יש שם עדים יבואו ויעידו ואם אין שם עדים קנס אין שם. ואם לענין ג' דברים אם יש טענה ביניהם זה כלל גדול בדין המוציא מחברו עליו הראיה והעיר והשדה שווה הם עכ"ל.

ועי' שם במגדל עוז שכתב בא"ד וז"ל והא נמי מפריקנה לה דתיקו' חזקה במקום עדים ושניהם מודים בבעילה או שיש עדים שראוה נבעלה ממקום רחוק אבל לא ידעו ולא ראו אם באונס אם ברצון היא אומרת אנוסה הייתי ויש לי צער והוא אומר מפותה היית אין לך צער כו' עיי"ש, ועי' גם כן בכסף משנה שכתב וז"ל י"ל כמו שכתב בעל מגדל עוז שאם ראו העדים מרחוק ששכב עמה ולא ידע אם באונס אם ברצון אם היה בעיר חזקה שהיא מפותה אם לא צעקה ולא העידו העדים ששלך וכו' ואם היה בשדה חזקה שהיא אנוסה, ועי' ג"כ בב"י ובב"ח סי' קע"ז שהעלו כן וכן ברמב"ן על התורה פ' כי תצא שגם מדבריו משמע כן.

והפ"י זה בנידון דידן אף שזה היה בעיר ואם כן הרי יש לנו להעמידה בחזקת שנבעלה ברצון מאחר שלא זעקה, מכל מקום מכיון שכולם יודעים שלהט החרב הצוררים היתה מתהפכת בכל עת ובכל שעה על כל אחד ואחד אשר בשם ישראל יכונה ולא היתה שום תועלת לזעוק ולצעוק כי מי יאמר להם מה תעשו ומכיון שאבד מנוס מכל האומללות האלו שהיו נתונות בידי הזדים הארורים ואין מידם מציל, ודאי שזוהי עדיפא עוד ממה שכתב הרמב"ם שגם בעיר אם העדים מעידים ששלף לה חרב הרי היא אנוסה, שהרי בנידון דידן אנן סהדי שהחרב היתה שלופה תמיד על ראש האומללות האלו וכל המסרבת להם אחת דתה להמית, אם כן בודאי עניה זו מותרת היא לבעלה מי אין לחשוש כלל וכלל שמא נתפתתה להם ברצון, מאחר שגם היא ראתה מה שהם עוללו ליהודים אנשים נשים וטף הרגו ולא חמלו טבחו ולא ריחמו, אם כן בודאי הצוררים האלה היו מאוסים משוקצים ומתועבים בעיניה בכדי להתפתות להם להבעל ברצון.

שאלות ותשובות ממעמקים קנג

ועי' בנב"י מהד"ת ס"ס ד"א שכתב שאם האשה אומרת שנלחמה עם הבעל והיתה סבורה שיהיה בכוחה למנעו עד שבעל מותרת לבעלה ואינו מגרע מה שלא צעקה בעיר, ולפי דברי הנוב"י בנידון דידן פשוט הוא שמותרת שהרי תמיד האשה נאמנת היא לומר שבאנוס היה הדבר אפילו כשזה היה בעיר, אולם עיין בפתחי תשובה שכתב להעיר ממ"ש מהר"מ אלשקר בשם כמה ראשונים שהנבעלת בעיר אינה נאמנת לומר שנאנסה, ועיי"ש שכתב שאילו שמע ליה להנוב"י היה מקבל עיי"ש.

אמנם עי' בשו"ת הר המור ובשו"ת תפארת צבי חלק אה"ע סי' נ"ג שהעלו ג"כ להנוב"י להתיר אף שהנבעלת בעיר בחזקת רצון היא מכל מקום נאמנת היא לומר שנאנסה, וכן בשו"ת כתב סופר חאה"ע סי' י"ז האריך לקיים דברי הנוב"י הנ"ל וכתב להוכיח זאת מדברי המל"מ ושכתב שכן נראה מסתימת הראשונים שכתבו דנאמנת לומר נאנסתי ולא כתבו דדוקא נאנסתי בשדה, אלמא דאפילו אומרת נאנסתי בעיר היא גם כן נאמנת, וכן ראיתי בשו"ת משה האיש חאה"ע סי' ב' דק"ט ע"ב שאסף כעמיר גורנה דברי האחרונים המקילים בזה דאף בעיר נאמנת היא לומר נאנסתי, וגם בשו"ת משפטי עוזיאל חאה"ע סי' כ"ג העלה דנאמנה.

העולה מכל האמור שבנידון דידן ודאי שנאמנת היא לומר נאנסתי דמלבד מה שהעליתי לעיל דכאן עדיפא עוד ממה שכתב הרמב"ם שהרי אנן סהדי שהחרב היתה שלופה עליהן, הרי כל הני רבבא שהבאתי סבירא להו דגם בעיר נאמנת אשה לומר נאנסתי וכפי שהעלה הנוב"י.

והנה באבן העזר סי' ז' סעיף א' כתב: שבויה שנשבית והיא בת ג' שנים ויום אחד או יותר אסורה לכהן, ולכן השבויה בידם היא בחזקה שזינו עמה והיא אסורה לכהן דאחרי שהיא בידם מי יעכב על ידם שלא יאנסוה ולכן אע"פ שאין אשה נאסרת על בעלה על פי עדים שהעידו שזינתה או על ידי קינוי וסתירה מכל מקום השבויה נאסרת לכהן אבל לא לישראל דברצון ודאי לא זינתה ואף על פי שכשהיא מסורה בידם להדג יכול להיות שתתמצה להם ואין זה אונס דאונס לא מקרי אלא כשהיא אנוסה על עצם הבעילה אבל לא כשהיא אנוסה על ידי דבר אחר ומתמצית לבעילה דזהו רצון גמור ולמה אינה אסורה לבעלה ישראל, אך מפני שהשבאים רובם

קנד

שאלות ותשובות ממעמקים

ככולם עיקר כוונתם על דמי הפדיון והנשים יודעות זאת ואינן פוחדות שמא ימיתום לפיכך לישראל מותרת, עיי"ש ובערוך השולחן חאה"ע סימן ז'.

ו'פ' דברי האבן העזר הרי קם וגם נצב בנידון דידן החשש שמא נתרצתה להבעל להצודרים ברצון מחמת החשש שלא ימיתוה, והרי בכאן לא כסף פדיון היו עיני הצודרים, ולא שייך כאן כלל הטעם שכתב שהן אינן פוחדות שמא ימיתו, ואם כן בנידון דידן הרי אפשר לומר שנבעלה ברצון כי חששה שבאם לא תתרצת להם יהרגוה.

ב'רם לאחר העיון נראה שבנידון דידן אין לחשוש כלל שמא נבעלה ברצון כדי להציל את נפשה שהרי הזדים הארורים ימ"ש היו נוהגים להרוג את האומללות הללו וזמן מה לאחר שהיו מתעללים בהן ומטילין את זוהמתן בגופן הטהור כמו שפסק הרא"ש בסימן ל"ב היכא שידעו שלא יואיל הרצוי אין אנו חוששין עליו, וכל זה היה ידוע למדי לאומללות הללו ואם כן בודאי שלא היה עולה על דעתן שעל ידי שיבעלו להם ברצון יצילו את נפשן, ובפרט שהנוהג היה החתימן באות הקלון הנ"ל שהיו חוקקים על זרוען מיד לאחר שהיו נתפסות ונמסרות לבושת כדי להשאירן מאוסות ומשוקצות עד עולם למען ידוע כולם שאשה זו זונה היא, לזאת בודאי אין לחשוש כלל שנבעלה ברצון לארורים אלו מתוך תקוה שישאירוה בחיים על ידי זה.

ו'מ'ה שנתיחדה עם הצודרים לא איבדה על ידי כך את חזקת כשרותה דאפילו לדעת רבינו שמחה שהובא במרדכי בפ"ב דכתובות דס"ל דאם נתיחדה עם הגוים אבדה את חזקת כשרותה, מכל מקום הרי גם הוא מודה דעל כל פנים עדי יחוד בעינן, ועי' בשו"ת הרדב"ז ח"א סי' קכ"א שכתב וז"ל: שאלת ממני אודיעך דעתי בענין היחוד אשר הזכירו חכמים בכל מקום, אם צריך שיהי' פתח הבית או החדר סגור או אפילו פתוח וכו' תשובה כבר נשאלתי על כיוצא בזה פעם אחרת והעליתי שגדר היחוד הוא שיהא שניהם במקום אחד שאם ירצה לבעול לא יראה אותם אדם עיי"ש שהביא מש"כ הרשב"א בתשובה סי' תרנ"א וז"ל: והגפת דלתות שאמרה אין יחוד עד שיהיה בית נעול דתרעא טריק בירושלמי שער נעול במנעול משמע וטעמא דכל שאינו במנעול ירא הוא שמא יכנס אחר שלא ברשות עיי"ש.

שאלות ותשובות ממעמקים קנה

ועי' גם כן בספר ברית יעקב חלק אבה"ע סימן נ"ה שכתב וז"ל : ועוד כיון דנשי לא דינא גמירי כמ"ש הרבי"ה במרדכי וביותר בדורנו שאין נזהרים בזה קלקלתן לא אבדה חזקת כשרות דידה ע"כ, ועם כן מכל הנ"ל נראה דגם בנידון שלפנינו לא אבדה חזקת כשרותה על ידי מה שנתחדה עמהם.

ואפילו אם נימא דבנידון דידן מיגרע גרע שהרי היתה מיוחדת אתם במקום הנועד לזנות ואם הרי זה כאילו יש עדים שהתחדה אתם בחדר סגור ונעול, מכל מקום הרי אנן סהדי שהיא לא התחדה עמהם מרצונה הטוב אלא שנתפסה בידם בחזקת היד לבית הקלון ודמי ממש למה שכתב הרמב"ם שהבאתיו לעיל שאם שלף לה חרב ואמר לה אם תזעקי אהרוג אותך, שאין כאן בית מיחוש כלל שהיא מותרת והכי נמי דכוותה שהרי אנן סהדי שהחרב האוכלת היתה תמיד שלופת על האומללות הללו וצל המות לא ירד מעל ראשן אף לרגע, לכן בודאי לא שייך כלל לומר שאבדה את חזקת כשרותה על ידי כך.

תבנא לדינא שעלובה זו וכן כל אחיותיה האומללות שמר גורלן גרם שיתפסו לקלון ולבושת, מותרות הן לבעליהן אם ישראל הם ורק אם בעליהן כהנים הם שאפילו באונס נאסרות עליהם, הן אסורות אבל אם בעליהן ישראל אין כאן שום בית מיחוש כלל לאוסרן על בעליהן, דהאם כוונות נעשה את אחיותינו האומללות וכי גרועות הן מרחב הזונה שנשאת ליהושע בן נון? ובתנא דבי אליהו איתא והובא גם בילקוט ערך יהושע, שאמרה רחב לפני הקב"ה רבש"ע בשלוש חטאתי לפניך: בנדה, בחלה ובהדלקת הנר, בשלוש מחול לי בחבל, בחלון ובחומה, ומה שכר נטלה? רבי אליעזר אומר זכתה ויצאו ממנה שמונה נביאים כהנים, ירמיה, חלקיה, שריה, מעשיה, ברוך בן נריה, חנמאל, שלום, ר' יהודה אומר אף חולדה הנביאה.

ואם כן בודאי אחיותינו היקרות האלו הנעלבות ואינן עולבות ששנו לרויה את קובעת מנת היגונים מידי חזירי יער ופריצי חיות שעוללו בעפר קרנן וכבודן הרעו והשחיתו תומתן וטהרתן בודאי שעליהן הכתוב אומר ואהביו כצאת השמש בגבורתו, ועד יזרח להן שמש ההצלחה ותזכינה שירום קרנן וכבודן בה' ובישועתו תשמחנה להקים את הריסות ביתן כמקדם, ובדומה לדינה בת יעקב בחיר האבות שנעשה בה מעשה חמור לטמאותה,

קנו

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ואף שבשעת מעשה גדולה היתה חרפתה ובושתה קשתה וכמו שנאמר (בראשית ל"ד) ובני יעקב באו מן השדה כשמעם ויתעצבו האנשים ויחר להם מאד כי נבלה עשה בישראל לשכב אם בת יעקב וכן לא יעשה, בכל זאת הקב"ה בכבודו ובעצמו תבע את עלבונה והשיב לה את כבודה כבראשונה וכמו דאיתא במדרש תלפיות ענף דינה, שהיא נשאת לשמעון אחיה שהיה אחד משבטי יה וחתנה היה יוסף הצדיק שפטפט ביצרו, עצמותיה הועלו לארץ ישראל ואחד מן הזוגות של מקבלי ומוסרי התורה זכה להקבר על ידה.

ולאזאת חס מלהזכיר להוציא לעז על בנות ישראל כשרות אלו אלא אדרבה מצוה לפרסם את גודל מתן שכרן שיזכו מהשומע צעקת אביונים שבדאי ירפא לשבר לבן של אומללות אלו ויחבש לעצבותן לברכנן מברכותיו שתבורכנה מנשים כיעל אשת חבר הקיני שהרי טובתן של רשעים רעה היא אצל צדיקים וכדאיתא ביבמות דף ק"ג ע"י"ש, ועל ידי כך למנוע מהן עגמת נפש וצער וכמו שקרה לאחדות מהן שבעליהן גירשו אותן בכלל כך, אוי לנו שכך עלתה לנו בימינו.

ומהאי טעמא לדעתי אין להן שום צורך כלל להתאמץ להרחיק על ידי ניתוק את הכתובת המנאצת הנ"ל מעל גופיהן, אלא אדרבה יש לשמור על כתובת זו ולראותה לא כאות קלון ובושת אלא כסמל של כבוד וגבורה להראות שעל קדושת שמו יתברך הורגנו כל היום ודורש דמים אותם זכר, לא שכח צעקת עניים, כי כתובת זו שבאמצעותה רבו הרוצחים לנאץ ולשקץ את בנות ישראל הישרות והתמימות ולהמיט עליהן קלון עולם, כתובת זו היא לכבוד להן ולעמנו ולאות עולם שעוד נזכה לראות בפגרי האנשים הפושעים האלה שיהיו לדראון עולם, הפושעים האלה שכל צלם אנושי נמחה מעל פניהם ונדמו לחיתי יער ולזאבי טרף ומיהרו לשפוך דם נקיים ולהמית חסידים וישרים, כתובת זו שהזדים חקקו על זרועות נפשות תמות וטהורות תזכיר אותנו תמיד על הכתוב בתורת משה איש האלהים, הרנינו גוים עמו כי דם עבדיו יקום ונקם ישיב לצריו.

סימן ח'

**באחד שניצל את עצמו ע"י נכרית אחת
שהעמידה את עצמה בסכנה ומתה הנכרית
אם מותר לומר קדיש.**

שאלה: בימי הרעה והזעם אשר בחוץ שיכלה חרב ומחדרים אימת, והגרמנים הארורים ימ"ש הרגו ולא חמלו על נער וזקן על עוללים ויונקים, ועם הארץ, גויי הארצות אשר בשכנותם גרו היהודים מאות בשנים נתנו יד לפושעים הגרמנים ועזרו להם במלאכת הרצח וחשוד, הם חיפשו אחרי יהודים בחורים ובסדקים, במחבואים ובמחילות עפר, אולי ימצאו שם יהודים מסתתרים מחמת המצוק, וכאשר הצליחו לתפוס יהודי, מיד מסרוהו לרוצחים הגרמנים כדי שיעשו בהם שפטים וייסרום בכל מיני יסורים וענויים.

אולם למרות השנאה המפעפעת שקננה בלבות הגויים על היהודים שנואי נפשם, שנאה שהגרמנים ליבו אותה לשלחבת נקם ושילם ושמחה לאיד, בכל זאת נמצאו יחידי סגולה בין הגויים, מתי מספר, שבתוך לבם לא כבה לגמרי חזיק האנושי ונפשם דאבה למראה האכזריות הגדולה הנעשית לעיניהם ביהודים, הם הרגישו שעליהם לעשות דבר מה לטובת היהודים ולהצילם מיד רודפייהם, ואם כי הדבר היה כרוך בשבילם בסכנת נפשות ממש, כי הגרמנים הוציאו להורג מיד כל גוי שנחשד בהגשת עזרה ליהודים, אף על פי כן לא נמנעו יחידים אלו מבין הגויים ועשו ככל אשר השיגה ידם להצלת יהודים.

והנה בשנת תש"ה מיד לאחר שזכינו לראות בישועת ה', עת חמל על עמו ושיכר זרוע רשע, והוציא את עמו ישראל מאפילה לאור גדול, — בא אלי ר' משה סגל ונפשו בשאלתו, היות שהוא ניצל

ע שאלות ותשובות ממעמקים, חלק ג'

ממות הודות לנכרית אחת שהעמידה את עצמה בסכנה והסתירה אותו במרתף ביתה יחד עם עוד כעשרה יהודים. והיא כלכלה אותם שם בלחם ומים והשתדלה להמציא להם מחיה ומזון עד יעבור זעם.

ובעת לאחר השחרור כשאלה היהודים שניצלו חודות לנכרית הזאת, רצו להרים על נם את מעשה החסד הגדול שהיא גמלה אתם, ולשלם לה כפרי מעללית המוכים כראוי וכיאות לה, נודע להם למרכה הצער שהנכרית הזאת שבקה חיים לכל חי והיא מתה זמן קצר לאחר השחרור, ומכיון שכן, גמל אצל הניצולים הרעיון שיש לעשות לה יד ונפש לאחר מותה על ידי שאחד מן הניצולים יאמר קדיש אחריה, והם המילו על ר' משה סגל הנ"ל את התפקיד הזה, ולזאת בא אלי הנ"ל לשאול אם מותר לו לומר קדיש אחריה, ואם אין בזה משום חשש איסור.

תשובה: הנה בנוגע למומר אם מתר לומר אחרי קדיש, כבר נפסקה ההלכה בשו"ע יו"ד סימן שע"ו סעיף ד', ברמ"א שכתב שם בסוף ההג"א: י"א דמומר שנהרג ביד עובדי כוכבים בנים אומרים עליו קדיש (הרד"כ בית י"א ובב"ז — ועי' לעיל סי' ש"מ).

וכתב הש"ך בס"ק ט"ו: דוקא נהרג אבל מת על מטתו לא וכן כתבתי לעיל סימן ש"מ דכשנהרג יש לו כפרה עד כאן לשון ד"מ, ועי' גם כן בט"ז ס"ק ה' שם שכתב גם כן דדוקא נהרג דאז יש לו כפרה על ידי התריגה אבל מת על מטתו לא.

ועי' בשו"ת כתב סופר אור"ח סימן ק"ט שתמה על הרמ"א הנ"ל שכתב דיש אומרים דמומר שנהרג אומרים עליו קדיש, אולם בגליון מהרש"א ביו"ד שם כתב על דברי הש"ך שכתב "דוקא נהרג אבל מת על מטתו לא", וז"ל: "מעייין בת' רד"ך רואה דבנהרג יש לו קדיש גם כשיש אבלים אחרים ובאין כאן אחרים גם אם מת אומר עליו קדיש, ע' ת' מהר"ש חלק יו"ד סימן כ"ט, עכ"ל. ועי' לעיל ביו"ד סי' ש"ב סעיף ה' מש"כ הרמ"א לענין אי מתאבלין על המומר, ובש"ך ס"ק ט' שם ובט"ז ס"ק ג'.

שאלות ותשובות ממעמקים, חלק ג' עא

ובספר שו"ת חסד לאברהם תנינא יר"ד סימן פ"ד העלה באחד שעזב את דתו ונתעשר ומאז הוא תומך בעניים מבני משפחתו, וכעת הוא בא בבקשה אל האיש אשר על ידו הוא נותן צדקה, שיבטיחו לומר אחריו קדיש, ואם כה יעשה ובזבו יותר ממון לצדקה, והעלה בשו"ת הנ"ל שמותר להבטיחו, והביא ראיה מר' מאיר הציל את אחר משחת אף על פי שאחר כפר בתורה וחילל את השבת, אלמא דאין בזה איסור, ועיין בספר משמרת שלום אות מ' סימן נ"ג.

אולם כ"ז במומר שהוא יהודי אבל בנידון דידן הרי היא נכרית, ואף שמעשי צדקתה הם יותר גדולים מהמומר ההוא שדיבר עליו בשו"ת חסד לאברהם, שהיה מבזבו כספו לצדקה, שהרי היא הנכרית הזאת הצילה נפשות ממש, מכל מקום עדיין יש לדון לענין קדיש אם מותר לומר אחריה.

והנה עצם ענין הקדיש, ענינו ותוכנו הוא ענין תפלה ובקשה, כדמוכח מספר יוחסין דפוס קראקא כ"ג, שבת יהודה דפוס קעניגסברג צד 85, שמסופר שם על שעת התמנות ר' נתן הבבלי לראש הגולה, שהתן כשאמר קדיש הגיע לבחייכון וביומיכון אמר: בחיי נשיאנו ראש גלות ובחיי דכל בית ישראל, וכן בימי הרמב"ם ז"ל היו אומרים בקדיש בחייכון וביומיכון ובחיי מרגן משה בר מיימון, עיי"ש. הרי מבואר שהקדיש ענינו תפלה ובקשה.

ולפי זה הרי פשוט הדין שמותר לומר קדיש אחרי הנכרית הזאת שהצילה כמה נפשות מישראל שלא יוכרעו למות על ידי הצר הצורר הארור ימ"ש, שהרי כתב בספר חסידים, שמותר לבקש להקב"ה שיקבל את דינו של נכרי שעשה טובות ליהודים ואין לנו טובה יותר גדולה ממה שעשתה הנכרית הזאת שהצילה נפשות ישראל מרדת שחת, לכן בודאי מותר לומר אחריה קדיש, ועי' בירושלמי מגילה פ"ג ה"ו: אמר ר' פנחס, צריך לומר חרבונה זכור לטובה כמו שאומרים זכרונם לברכה, מכיון שעשה טובה לישראל להצילם.

ובמס' אבות פ"ג משנה ב' אמר ר' חנינא סגן הכהנים, הוי מתפלל בשלומה של מלכות שאלמלא מוראה איש את רעהו חיים בלעו, ועי' במאירי

עב

שאלות ותשובות ממעמקים, חלק ג'

שכתב שהתנא בא לעורר שעלינו להתפלל לא רק בשלום מלך ישראל כי אם גם בשלום מלכות של אומות העולם שביניהן אנו חיים, כמו שציונה תורתנו להקריב בחג ע' פרים כנגד שבעים אומות.

ובסדרורי לדפוס ראיתי בשו"ת זקן אהרן חיר"ד סימן פ"ז, אם יש חיוב על גר לומר קדיש אחר אביו הגוי, ומצדד לומר קדיש עליו, 'אכן' מפני שאין להורות דבר שנקל לשער שיתפלאו ע"ז שאומר על גוי קדיש וכו' אבל ישנם שאר תיקונים ללמוד ולהגיד מזמורי תהילים וכו' וגם תיקון קדיש שמועיל לנשמת האב ומי יודע סוד ד' אם לנשמת עכו"ם גם כן. לדעתי כנ"ל יאמר קדיש לפעמים ויתפלל לפני העמוד שלא ירגישו שמחמת אבלות על אביו הגוי עושה שיוכל לגרום שיתלוצצו ע"ז עיי"ש.

ומערתה הנכרית הזאת שאלמלא מעשה תחסד הגדול שעשתה עם היהודים להצילם ממות, שהודים הארורים ימ"ש לא יבלעום חיים, בודאי שמצוה להתפלל עבורה אחר מותה ולומר אחריה קדיש, דכל ענין הקדיש ענין תפלה הוא וכמו שהוכחנו, ולזאת נתתי רשות לר' משה סגל הנ"ל לומר קדיש אחרי הנכרית הזאת שחילצה את נפשו ממות וחייתו מרדת אל שחת.

והגומל חסדים טובים לעמו ישראל הוא יגמול חסדים טובים לחסידיו אומות העולם שסיכנו את נפשם בהצלת ישראל, ה' המברך את עמו ישראל בשלום הוא יברכם גם הם בכל מילי דמיטב לראות בשוב ה' את שיבת ציון ובבנין בית בחירתו שם נעלה לפניו זבחי רצון, ע' פרים כנגד שבעים אומות, במהרה בימינו אמן.

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סימן ל"ד

בהי"ת כ"ב מנחם אב תש"ה לונדון יע"א
 כבוד הרב הגאון המהולל כש"ת מוה"ר צבי
 הירש מייזליש שליט"א והרב הגאון המהולל
 כש"ת מוה"ר שלמה בוימגארטען שליט"א
 חסד ה' יהי חופף עליכם ותזכו לראות צנחמת ליון
 וירושלים במהרה בימינו.
 אתמול לפנות ערב נמסר לי מכתבכם והנני ממנהר
 להשיב על שאלותיכם עד כמה שאפשר בלינה
 לילה.

שאלתכם הראשונה אין שום ספק שהאשה חסורה
 להזדווג עם השני ויש להזכיר ולזרזם שיתפרדו.
שאלתכם השני "הרבה אנשים אשר נשתייכם הובלו
 מבתיכם ומאז לא נשמע מהם כלל אם יש
 להם היתר להנשא בלא היתר מאה רבנים ובלא המתנה
 זמן ידוע שחייב כבר האפשרות לראות כל הרשימות
 מאחז"י שנשארו בחיים ואיך הדין עם האנשים שכבר
 נשאו אשה על כמך שנגמר בלבם שהולכו נשתייכם לבית
 המוקד", זה הוא חוכן שאלתכם.

**אלה שכבר נשאו להם נשים אין להפרידם
 מנשותיהם** אבל אין להחיר עתה לכתחילה לישא אשה
 אחרת עד שיבדקו כל הרשימות מכל מחנות ההסגר.

בראי להם להאנשים להמתין עוד חודש או חדשים
 ולא להכניס את עלמן בספק שמא ימלא שאשתו
 הראשונה חי' וקיימה, גדול יהי' הצער והכאב.
שאלתכם השלישית, כל החומר הנלצר באלה בני ישראל
 אשר יחדו אותם ללכת לבית המוקד בצקשה
 למסרו לבית דינו אשר ידון בזה ביחד עם שאר בית
 דינים כדי להחיש ולחוליא הלכה ברורה ומיוסדת על
 יסודות נאמנים שאין לפקפק בהם.

שאלתכם הרביעית מה שחיים רימקאווסקי סידר
 קידושין בכל יום חי' לערך שלשים זוגות בלי
 חופה רק ששם לה עזעת על ידה בפני צי' עדים בלא שום
 רב ותלמיד חכם, כמוכן אם היתה הכלה פנוי' וקדשה
 בפני שני עדים כשרים ונתן לה העזעת לשם קידושין
 היא אשת איש ואם הדבר ברור יש לקיים נישואיהם
 בכתב כדי שלא ידמו בנפשם שאין שום ערך להקידושין
 האלה.

שאלתכם החמישית אם יש לגבות עדות גם מאנשים
 כאלה המהללים את השבת בפרהסיא (בקרוב
 תהי' נדפסה שאלה ותשובה מבית דינו ביחס על עדות כזו)
 אך יש לשים לב מאד מאד לדבריהם עד כדי לדעת שהם
 מעידים בלא רמי' ועיקול (לשון הרמי"א) ועל כל דברי
 כל אחד מהם יש לרשום את השקפתכם על אופן הגדחו
 וכל החומר הנלצר בצקשה להמליאו לבית דינו.

הי' ברכה ושלי' ויהי' הי' עמכם

יחזקאל אבראמסקי

Responsum 28

סימן יא מקומות ההריגה

במקומות שונים שבערי פולין, איפה הרוצחים לא דאו צורך להעביר את יהודי המקום למקומות השמדה מרכזיים כמו אושוויץ טראבלינקה ועוד, הובילו אותם כידוע, לאחד מכברי העיר ושם צוו עליהם להכנס לתוך הבורות, שברו במו ידיהם, ולהשתטח על דצפת הבור. הרוצחים ימ"ש ירו עליהם להשמידם וקרו מקרים שתלק לא נפגע מהיריות, ואח"כ נכנסה כתה שניה לבורות, בו בוגמן שהראשונים עוד היו מפרפרים בין החיים והמות, והתערבו קולות "שמע ישראל" של האחרונים עם אנחות הפצועים הראשונים. ודמים בדמים נגעו, וככה התמלא הבור מחוליות של אנשים המתבוססים בדמם, תצאי חיים. ולמעלה כיסו עפר והאדמה מתנועעת וקולות נשמעו מתחת לפני האדמה.

וכשחזרו השרידים ממחבואי סתר ומיערות עד בסיכוריה התחילו לחפש אחרי המקומות הקדושים האלו אשר אחיהם ואחיותיהם קדשו בדמם. היתה השאלה הראשונה אם להוציא אותם מקברותיהם ולהעבירם לקבר ישראל, מפני שהמקומות הללו היו מקום מדרס, או מקום מרעה בהמות שיש בזה בזיון המת.

על שאלה זו ענינו לא רק שיש היתר לפתוח קברותיהם ולהעבירם לבית הקברות של העירה, המקודש מדור דורות עד שיעלו עצמותיהם לא"י, כי אם גם שמצוה גדולה לעשות זאת. (הארכתי בזה בספרי "מעמק הבכא" בקונטרס מת מצוה). אלא שנשאלה השאלה מה דינם של המקומות הללו שנתקדשו בקדושת הדמים של הקדושים הי"ד.

תשובה

אם כי קדוש המקום ונתקדש בקדושת דמים, כשפינהו הרי הוא טהור למדרס כהנים ומותר בהנאה לבנות עליו בית וכד', אך הישבני שצריכים להשאיר מקומות האלו, איפוא שיצאו נשמתם של קדושי אל באחד, בשממותם, כי מצבה זו יותר מבטאת את החורבן מכל בנינים ו"גלעדים" אחרים שמקימים, כי לחורבן אין תיאור וציור אלא מקום פנוי וחלל ריק. ואין תחורבן ונתפס

אלא בשלילת כל צבע, ובהעדר כל גוון, וכך למדוני רבותינו ז"ל, כשציוו לנו
אלא בשלילת כל צבע, ובהעדר כל גוון, וכך למדוני רבותינו ז"ל כשציוו לנו
להנציח את החורבן לדורות, לא מצאו ציון אחר אלא שיוך מקום פנוי.

משחרב ביהמ"ק תקנו חכמים שהיו באותו הדור, שאין בונים לעולם
בנין מסויד, אלא טח ביתו בטיט ומשייר מקום אמה על אמה — (ב"ב דף ס'
ע"ב וטוש"ע או"ח תק"ס.) והוסיפו רבותינו בתראי, הלבוש והשל"ה: ולא
כאותם הערשים אמה על אמה שחור, דהו ג"כ ציור, כי בכל אופן השחור הנו
יש והחורבן הוא "אין" ואין ה"יש" מסמל את ה"אין".

היש בעולם אפשרות לבטא פרכוס הנפש של אלו שנקברו בבור הזה, או
לבטא מה שמתחולל בלבה של האם שעמדה כאן במקום קדוש זה ליד בנה
הנקבר חיים, בשעת עקידתו? אין בידי כל בנין או ציור להביע בלחות המעונים
הללו, ורק חורבן ושממת נצח הוא הסמל היחידי שיסמל מה שהתרחש כאן.

ודכירנא שבהיותי רבה של שארית הפליטה בורשה ואז ביקר אותנו מרן
רבן של ישראל הגדיא"ה הרצוג זצ"ל וביקרנו יחד את חורבות הגיטו בורשה
והוא שאל אותי למה התנגדתי להקמת אנדרטת זכרון לחללי הגיטו, וכשהסברתי
לו את הנ"ל, שלפי דעתי הזכרון היחיד שיסמל את החורבן הן הגבעות החורבות
האלה, הסכים לדעתי.

עמדו אז לפנות את ההריסות והבעתי את החרדה שישכח החורבן לגמרי
אחרי הקמת שכונות חדשות במקום קדוש זה, והאם האנדרטה תשמש זכר לחורבן
אחרי הבלאות שהתחוללו. כאן לא ישאר אפילו שום סימן וזכר למקום, בו
ניספו קדושינו ונתערבו בו דמים של האב והבן, דרחים ליה יתיר מגרמיה ונפשיה,
ובו במקום יקומו בתי מגורים, ואנשים יחיו בהם וישמחו בהם, היתכן דבר
שכזה? והאם האנדרטה הקרה והמתה תשמש זכרון מתאים לקדושינו אשר בארץ
המה?

כאמור, יש להשאיר, לדעתי, את המקומות המקודשים בהם נקברו חיים
קדושי אל, לשממון נצח, אחרי שפוננו מהם את עצמותיהם הקדושים והעבירו
אותם לבתי הקברות שבעיירות אלו, יחד עם תבוסת המת ותפוסת המת (עיין
בספרי בעמק הבכא בקונטרס מת מצוה) ולגדור את המקום מסביב לזכר עולם.
אולם לעצם הדיון, אם יש צורך להשתמש במקומות אלו, אין על המקום
הזה כל דין טומאה לכהנים ומותר לבנות עליו כל בנין שירצו.

דין קבר הנמצא וקבר הידוע

אבאר דברי:

הנה ביור"ד סימן שס"ד סעיף ב, הכי איתא: קבר הנמצא מותר לפנותו, פינהו, מקומו טהור ומותר בהנאה, קבר הידוע אסור לפנותו, פינהו, מקומו טמא ואסור בהנאה, והרמב"ם גורס קבר הנמצא מותר לפנותו; פינהו, מקומו טמא ואסור בהנאה, קבר הידוע אסור לפנותו — פינהו, מקומו טהור ומותר בהנאה, מת מצוה — אפילו שלא מדעת בעלים אסור לפנותו, שמת מצוה קנה מקומו.

והב"י מבאר בארוכה בכ"מ הלכות טו"מ פ"ח ה"ה דין זה, וכאן בסימן שס"ד כותב על דברי הטור שהם השיטה הראשונה וז"ל: ברייתא (סנהדרין דף מ"ז:) קבר הנמצא מותר לפנותו, פינהו, מקומו טהור ומותר בהנאה, קבר הידוע אסור לפנותו, פינהו, מקומו טמא ואסור בהנאה, ופרש"י קבר הנמצא: וכגון שהוא חדש וידוע בעל השדה שלא צוה מעולם לקברו שם, ובגזילה נקבר שמה מותר לפנותו שלא קנה את מקומו ומקומו טהור, שאעפ"י שגזרו טומאה על הקברות ואעפ"י שניטלו משם, לא גזרו על זה, ובהנאה נמי מותר, ואע"ג דאיסורא דאורייתא הוא, דאין תורת קבר עליו. קבר ידוע: שנקבר שם מדעת בעה"ב, מקומו טמא, גזירה דרבנן היא שגזרו טומאה עולמית על הקבר כדי שלא יפנהו, והרמב"ם היתה לו גירסא אחרת כדלעיל. קבר הנמצא: שלא ידענו שה' שם קבר, ומכיון שכך, בודאי נקבר שלא ברשות בעל השדה, וכיון דלאו מת מצוה לא קנה מקום קברו, ולכן מותר לפנותו, פינהו, מקומו טמא, מפני שחיישינן שבשדה נמצאים עוד קברים ובית הקברות הוא ולכן מקומו טמא, ואסור בהנאה, שאסור לנהוג בו קלות ראש כדין בית הקברות כדאיתא במגילה פרק בני העיר (דף כ"ט) עד שיבדקו אחר השטח. קבר הידוע: שידוע שאין שם אלא קבר אחד בלבד, ומסתמא נקבר שם מדעת בעל השדה, אסור לפנותו, פינהו, מקומו טהור דאין צריך בדיקה בשטח, ומותר בהנאה, דקבר אינו אסור בהנאה.

והראב"ד משיג שם על הרמב"ם וכותב: "ומ"ש אסור בהנאה עד שיבדוק, לא ידעתי מהו עד שיבדוק, שאני אומר שאפילו בדק ולא מצא שכונת קברות, אעפ"י שנטלו ואת תבוסתו, אפי"ה מקומו טמא ובמגע ואסור בהנאה, והטומאה אינה אלא כדי להרחיק אדם מן ההנאה, והנוסחה המדויקת: קבר הנמצא מותר לפנותו, ומקומו אסור בהנאה ויטמא, והידוע אסור לפנותו ומקומו טמא ואסור בהנאה, ע"כ. וע"ז כותב הכ"מ, אעפ"י שרש"י כתב בפרק נגמר הדין שאפילו אם ניטל המת הקבר טמא, שגזרו טומאה על הקבר שלא יפנהו, רבינו (הרמב"ם) אינו מודה בזה שאחר שנטלו ואת תבוסתו, היכן מצינו שמקום הקבר אסור בהנאה? דהא אמרינן בפרק נגמר הדין דקבר בנין הוא דאסור בהנאה, אבל אם אינו של בנין מותר, דקרקע עולם אינה נאסרת. ולדברי הראב"ד שהוא אסור

בהנאה אינו אלא מדרבנן ולמה יחמירו בו עוד לטמאותו כדי להרחיקו מזהנאה? ואני תמה על מ"ש שהנוסחא המדויקת היא כמ"ש שאינה לא כגירסת גמרא דידן ולא כגירסת ירושלמי ולא כגירסת התוספתא ולא כגירסת מסכת שמחות ע"כ דברי הכ"מ.

וראה במסכת שמחות פ"ד דשם הגירסא כראב"ד ובכלהו בבי טמא ואסור בהנאה כשיטת הראב"ד.

מהאמור למעלה אנו למדים שיש שלש שיטות בדין קבר שפינהו: (א) שיטת רש"י היא, שהכל תלוי בהיתר פינוי המת מהקבר ולכן "בנמצא" שברור לו לבעל השדה שהקבר נכרה שלא ברשותו — אין על קבר זה דין קבר לא לענין טומאה ולא לענין איסור הנאה, גם אם זה קבר בנין, אבל בקבר ידוע כיון שנקבר ברשות, הרי קנה המת מקומו וגזרו טומאה על הקבר גם כשפינהו ומש"ה גם אסור בהנאה, וכפי שאנו רואים מהכ"מ ס"ל לרש"י שאיפת שנקבר ברשות, הקבר אסור בהנאה אף בקרקע עולם, וכ"ת הלא משנינן הכא נמי בקבר בנין, יוסבר לקמן דבאמת החלל נאסר אף בקרקע עולם ורק הקרקע בעצמה לא נאסרה.

(ב) שיטת הרמב"ם דאין איסור הנאה בקרקע עולם ואיסור הנאה פירושו הנהגת דין בית הקברות כדברי הכ"מ.

(ג) שיטת הראב"ד שיש גזירת איסור הנאה מדרבנן על כל קבר שפינהו, והנה בגד"ד שפינו את הקדושים הללו והעבירו עצמותיהם לבית הקברות הרי לשיטת רש"י, שהיא שיטת הטור והב"י, שאם הפינוי ה' בהיתר הוי כקבר הנמצא, שכיון שמותר לפנותו אין עליו לא טומאת קבר ולא איסור הנאה ובגד"ד שהפינוי נעשה בהיתר, הרי אין על הקברים לא טומאה ולא איסור הנאה ודינם כדין קבר שפינהו — היכא שמותר בהנאה — לא יעשו בית התבן ולא בית העצים ולא בית האוצרות — רק משום בזיון המת. (סימן שס"ד סעיף ו ובמסכת שמחות פ"ג) וגם לשיטת הרמב"ם הנ"ל הא דאסור בהנאה בקבר הנמצא היינו משום דחיישינן לבית הקברות אבל בקבר הידוע כיון שמותר לפנותו מותר בהנאה (וראה בתשובת הגרד"א בסוף ספר חות יאיר).

הן אמת שיש לשאול דהא דפינהו מותר בהנאה, היכא שקברוהו באדמה גזולה שלא ברשות ובעלים, ולכן אין כאן טומאה, שהנה, גזירת חכמים ולא איסור הנאה, אבל כאן הלא דינם כמת מצוה שקנו מקומם — אלא שמפני כבודם (כמבואר בספרי הנ"ל) התרנו להעבירם לביה"ק למקום אבותם עם תבוסת המת — והוי דינם כהאי דקבר המזיק לרבים שפינהו — מקומו טהור ופירש"י: דלא גזור מפני הנזק — ומיהו אסור בהנאה דאיסורא דאורייתא הוא ולא פקע.

חלל הקבר בקרקע עולם

וא"ת הא דאסרינן בקבר בהנאה היינו דוקא בבנין אבל קרקע עולם אינה נאסרת וכאן הלא קרקע עולם היא? אבל ראה בסדרי טהרה בדף רט"ז שכותב: על הא דאיתא בגמרא (סנהדרין דף מ"ז) קברי דרב הוי שקלי מיני' עפרא לאישתא בת יומא, אתו אמרו לי' לשמואל, אמר להו יאות עבדין, קרקע עולם הוא וקרקע עולם אינה נאסרת, דכתיב (מלכים ב' כ"ג) וישלח את עפרה על קבר בני העם, מקיש קבר בני העם לעבודת כוכבים, מה עבודת כוכבים במחובר לא מיתסרא, וכו' הכי נמי במחובר לא מיתסר — וע"ז מביא תגאון החסיד הנ"ל קושית הריטב"א: וא"ת הא ע"ז נמי הא דלא מיתסרא במחובר הני מילי כשלא עשה בה מעשה אבל עשה ובה מעשה מיתסרא כדאמרי' במס' (ע"ז דף ג"ד): כי אתא רב דימי אמר רבי יוחנן אעפ"י שאמרו המשתחוה לקרקע עולם לא אסרה, חפר בה בורות שיחין ומערות אסרה, וקבר גמי הרי עשה בו מעשה וחפרו — והאיך שקלו עפרא מקברי' דרב? וע"ז תירץ: וי"ל דדוקא חלל הבור שנתחדש ע"י חפירתו הוא דנאסר אבל דופן קרקע של הבור שנשאר ממילא ולא עשה בו שום מעשה לא נאסר, וכך של מת נמי ודאי דחללו נאסר — וכדנתיא במס' אבל רבתי (פי"ג) קבר שפינהו מותר בהנאה — לא יעשה ממנו בית התבן בית הבקר וכו' — כוך שפינהו אסור בהנאה, ולכן הקשה על בעל נחלת יעקב שהגיה שכן צ"ל, קבר שפינהו אסור בהנאה (דסתם קבר של בנין) כולל שפינהו מותר בהנאה (דסתם כוך הנו קרקע עולם) דא"כ דגרסינן קבר שפינהו אסור בהנאה למה פרטו שם לא יעשו ממנו בית התבן ובית הבקר וכו' הא כל מילי דהנאה אסור ליהנות בו? אע"כ דקבר שפינהו מיירי באופן שמותר בהנאה — כדן בשו"ע הנ"ל — כגון שנקבר ע"מ לפנותו, ומ"מ לא יעשו בית התבן וכו' משום דהוי תשמיש בזיון — אבל בשפינו את המת שנקבר ע"מ שלא לפנות כגון במת מצוה — החלל שנעשה ע"י חפירת מעשה ידי אדם אסור בהנאה, ובהיות כן יש להסתפק בקבר הקדושים כיון שדינם כמת מצוה קנו מקומם ויהי' אסור חלל הקבר.

הן אמת שראיתי להגאון רי"י וויינברג בחוברת ישרון — יצא לדחות דברי הגאון הנ"ל וכותב: ונוראות נפלאות עליו דאיך יתרץ סוגית הגמרא (בסנהדרין דף מ"ז) דפריך שם לשמואל — מהא דהחוצב קבר לאביו לא יקבר בו עולמות — ואמאי לא משני, דהתם אסור לקבור מטעם האויר שנאסר בחפירה — משא"כ באישתא בת יומא שהתיר שמואל את עפר הקרקע. — ואני אינני רואה פליאה כאן. דהא לדברי הגאון הנ"ל בקבר שחפרוה נאסר החלל לשים בו תבן ודכוותי בשביל תשמישי בני אדם חיים, אבל לשים בו מת אחר כיון אין ענין הקבורה בחלל, שעיקר ענין הקבורה שהמת אל עפרו ישוב דהיינו

שיתחבר עם הקרקע ואי קרקע עולם אינה נאסרת — אין למת מהחלל הנאה אלא מקרקע עולם ולכן ה' מותר לקבור בו מת אחר. וע"כ פריך שפיר הגמרא לשמואל דקרקע עולם אינה נאסרת — ה' מותר להקבר בקבר שחצבו לאביו ולכן משני שפיר הב"ע בקבר בנין — אבל לאנשים חיים אסור חלל הקבר בהנאה. וכנראה שזוהי שיטת רש"י בסוגיא.

וא"ת כיון שאין אסור אלא חלל הקבר — א"כ כשיסתמו את החלל בעפר יהי' מותר להשתמש בקרקע עולם? וז"א, דהרי הם דברי רש"י ז"ל כיון שנאסר בהנאה לא פקע מיני' איסור הנאה ע"י הסתימה. וראה בחת"ס חיו"ד סימן של"ה ובבאר יצחק ודברי מלכאל. — וה"נ לא פקע איסור הנאה מקברות הקדושים אלו.

בור לשם הריגה אין עליו דין קבר

אולם אחר העיון נראה שבכל זאת יש להתיר בהנאה מקומות ההריגה מטעם אחר, כיון שהבורות הללו לא נעשו לשם קבורה, אין על הבור הזה דין קבר — אם פינן את ההרוגים משמה. אה"נ שאם היינו אומרים שעפ"י הדין צריכים לקברם במקום כמת מצוה, אז ה' נשאר על הבור דין קבר המת, אולם כיון שהתרנו להעביר אותם לבית הקברות הוי דינם כשדה שנהרגו בה הרוגים שאין עליהם דין מת מצוה, כאמור שם. (אהלות פט"ז מ"ה); מלקט עצם עצם והכול טהור, וטהור לגמרי משמע לא דק לענין תבוסה, אלא גם לענין קבר המת. וזה שמסיימים שם במשנה: בור שמטילים לתוכו נפלים או הרוגים מלקט עצם עצם והכל טהור מפני שההרוגים נמצאו שמה לא לשם קבורה. והא דמסיים שם רבי שמעון: אם התקינו לקבר מתחילה יש לו תפוסה, משמע דלת"ק אפילו התקינו לקבר אין דין קבר עליו, הא לא קשיא (א) להרבה מפורשים „נמחקו מלות ר"ש אומר והגיהו „ואם התקינו לקבר“ (ראה במלאכת שלמה שם).

(ב) ואפילו לגורסים ר"ש אומר, ה"ט כדמפרש שם, במשנה אחרונה, ובד"ה בור שמטילין לתוכו ז"ל: ה"נ הוי דינא כמו שדה שנהרגו בה ברישא, דמשום שלא ניתנו שם לקבורה אין לו דין קבר. וה"נ בור זה מטילים לתוכו ואינו לקבורה, ומשום דפליג ר"ש הכא, הדר תני לה, וגבי שדה לא פליג ר"ש, דשדה זו ודאי לא התקינו לקבורה, אבל בור זימנין דמייחדה לקבורה, וקסבר ר"ש דאם נעשה בור זה מתחלה לשם קבורה, אעפ"י שעכשיו הטילו בתוכו שלא לשם קבורה גזרו בו, ות"ק סבר הואיל ונותנו שלא לשם קבורה לא גזרינן עכ"ל. מזה אנו למדים דכל שהבור ה' לא לשם קבורה אין עליו דין קבר וכל שמותר לפנותו, אין על הקבר לא תבוסה ולא טומאה ולא איסור הנאה, וראה בקונטרס מת מצוה בספרי הג"ל.

אמנם יש לצרף גם שיטת הרמב"ם דאין על קבר הפנוי כל איסור הנאה ולא טומאה כמבואר בכ"מ המובא לעיל, אולם מה שרצו לצרף גם שיטת המלי"מ, דאפשר ס"ל להרמב"ם דגם מת עצמו אינו אסור בהנאה מד"ת אלא מדרבנן, וג"ש דשם שם אינה אלא אסמכתא בעלמא, כבר ביארתי למעלה שאין להסתפק בזה שמת אסור בהנאה מדין תורה.

הדרן לדינא

והנה לעצם הדין, העיקר כמו שבארתי שבורות ההריגה מכיון שלא הותקנו לקבורה אין עליהם דין „קבר שפינתו“ ואין עליהם איסור הנאה. וא"ל בקמות ינקום את נקמתו.

שאלה י"ד

**אם יש חיוב להפיש את רוצחי הוריו בכדי
לנקום נקמת דמיו השפוך ולהוציא על זה
הוצאות כסף**

שאלה: אחרי השחרור כשזכינו לצאת מאפליה לאור גדול בא אלי איש אחד (רוצה בעלום שמו) ונפשו בשאלתו, היות שנודע לו שהוריו אחיו ואחיותיו נהרגו עלי ידי רוצח ליטאי שהיה שומר הבית (מפרוץ) בו היתה דירת משפחתו, וכעת הרוצח הזה מתחבא בעיר מאריאפאל, האם חייב הוא להוציא הוצאות בכדי לחפש אחר הרוצח על מנת להעמידו לדין ולהענישו בהתאם למעשיו לפי חוקי המדינה למען ישמעו ויראו כל שונאי ישראל ולא יוסיפו עוד לתת חופש לחמת הרוצח המקנן בחובם לאכול את יעקב כחיתי יעד ולהשם את נוחו.

שאלה זאת נוגעת לרבים, כי לצערנו הרב רבים מהרוצחים הגרמנים ומרעיתם מהעמים האחרים שעזרו על ידם להרוג ולשחוט אנשים נשים ומסר מכני עמנו, הצליחו להמלט ולהתחבא במדינות אחרות בעולם כולו מבלי שיוכאו למשפט על מעשיהם הרעים, מעשי טבח ושוד ושפיך דם נקיים וטהורים ללא רחם על זקן ועולל, בכולם הם שלחו את ידם להכריעם לשבח ולהמיתם בכל מיני מיתות קשות ומשונות ותרך עינויים ויסורים גדולים.

האם מוטל עלינו לעשות את הכל לגילוי הרוצחים הללו בכדי לנקום נקמת דמינו השפוך ולהוציא על זה הוצאות כסף, או שאין בזה חיוב מפורש, אלא הענין מסור לכל אחד ואחד לעשות כפי אשר יורהו שכלו ולבו.

צב

שאלות ותשובות ממעמקים, חלק ד'

תשובה. בשו"ת צמח צדק הישן סי' י"ט איתא, יש לכופ את קרובו של הנרצח שיהא רודף אחר הרוצח להעמידו בדין אפילו ברוצח עכו"ם. ועד היכן מקרי גואל וקרוב, אין שיעור לדבר ואפילו אינו מן הקרובים המתאבלין עליו. מכל מקום נראה דאין לחייבו יותר מן הרגיל ליתן לשופטים מליצות ושותר, דאין לחייבו קשה והרבה דחיישינן שהקרובים לא ירדפו אחר הרוצח. ונכון שאותן הוצאות מליצה ושותר יתנו מתוך הקהל שאם לא יהיו נוקמין יהי ח"ו דמן של ישראל כהפקר. וכן נהגו פעמים הרבה פרנסי הקהל שמעמידים גואלים לרדוף אפילו כשלפעמים יודעים שלא יוכלו להשיג את הרוצח, כדי שיהיה מפורסם שאין דמן של בני ישראל הפקר, עיי"ש.

והנראה שבזמננו אנו יש לשקול את הענין בפלס הזתירות כדי שלא לגרום רדיפות ושנאה על כלל ישראל, אבל ודאי שאין לגלות אדישות לדבר הזה, ויש לעשות הכל לגלות את הרוצחים ששפכו דם ישראל ולהוכיח לעין כל את זהותם האמיתית, כי הלא ידוע שהם שינו את שמם ואת זהותם כדי שלא יכידום.

ולכן הוריתי לאיש השואל שלא ישקוט ולא ינוח אלא בכל מאמציו ישתדל לנקום את נקמת משפחתו מהרוצח ולהודידו שאולה ושלא יחסוך שום הוצאה כספית וטורח גופני בקשר לזה.

ואכן כעבור כמה שבועות בא האיש אלי וסיפר שהצליח למצוא את רוצח משפחתו כשהוא מתחבא ביער הקרוב למקום המרפא בירשטאן, האיש גילה את מתבואו בתוך היער הנ"ל וזרק לשם רימון יד שהרג אותו ואת בני משפחתו שהתחבאו אתו.

לאחר האיש סיפר לי זאת יעצתי לו שיעזוב את ארץ ליטא כדי שקרובי הרוצח לא ישלחו בו יד ובפרט להנצל מאימת הממשלה שלא הביטה בעין טובה על אלה שעשו דין לעצמם מתוך ההנחה שהמשפט והדין שייכים לממשלה. האיש שמע לקולי וברח מליטא לפולין ואח"כ לישראל כדי שלא יפול בידי הממשלה הרוסית-ליטאית על עשותו שפטים ברצח משפחתו.

סימן י"ב

**באחד שנעשה נוגש אצל הרשעים ימ"ש,
ואח"כ נהרג אם מותר להזכיר את שמו של
האיש הנ"ל על בנו בעת עלותו לתורה.**

שאלה: פרשה מיוחדת בתולדות השואה, היתה פרשת היהודים שהתקרב מרצונם או מאונסם לגרמנים הארורים בחשבם שעל ידי כך יצילו את עצמם מלהיות שותפים לגורל אחיהם היהודים ונפשם תהיה להם לפליטה וחיתה בגלל עבדם את הגרמנים, אולם ידוע כי מרה היתה באחריתם, לא הועיל להם כלום ביום עברה וגורלם נחרץ בכוא מועד יחד עם כל אחיהם היהודים. אמנם רובם היו שהוכרחו לעשות את מלאכת הגרמנים בעל כרחם, והיו גם כאלה שחשבו בתמימותם שיוכלו לנצל את דבר התקרבותם לגרמנים ועמדתם אצל השלטונות, לטובת אחיהם המעונים, להשתדל עבורם אצל הצר הצורך שיקל מעליהם את עול השעבוד, אולם הצד השוה שבהם היה, שכל אלה שהיו מקורבים לגרמנים תהיה מאיזו סיבה שתהיה, השנאו את עצמם בגלל זה על אחיהם היהודים ונחשבו בעיניהם כבוגדים שהוציאו את עצמם מכלל ישראל ומגורלם.

והנה נשאלתי בנוגע לאיש כזה שהיה מקורב לגרמנים ימ"ש ושנהרג בסופו של דבר על ידם, אולם לפי הוצאתו להורג התודה על עונותיו ומעשיו לפני אחיו היהודים שהיו כאותו מעמד, ובכבי ותחנונים ביקש מחילה מאת קונו על מעשיו אשר עשה.

ונשאלתי אם מותר לנו להזכיר את שמו של האיש הזה על בנו בשעת עלותו לתורה, לפי הנוהג שאנו נוהגים להכריז: "יעמוד פלוני בן פלוני", דמכיון שהיה רשע אין להזכיר את שמו והרי אמרו שם רשעים ירקב, ואם כן בודאי שאין להזכיר את שמו בשעת עשית

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מצוה כגון בנידון דידן כשהבן עושה מצוה בעלותו לתורה ובכרכו עליה, או דילמא אין בזה מיחוש כלל, ואין לנו לשנות מן הנוהג בנוגע לבנו, אלא יש לקרוא אותו לתורה בדומה לכל ישראל, ומותר להזכיר עליו את שם אביו.

תשובה: בשלהי סוכה דף נ"ו ע"א תנן: הנכנסין חולקין בצפון והיוצאין בדרום בילגה לעולם חולקת בדרום וטבעתה קבועה וחלונה סתומה ושם בע"ב תנינן עלה: תנו רבנן מעשה במרים בת בילגה שהמידה דתה והלכה ונשאת לסרדיוט אחד ממלכי יוונים כשנכנסו יוונים להיכל היתה מבעטת בסנדלה על גבי המזבח ואמרה לוקוס לוגוס עד מתי אתה מכלה ממונן של ישראל ואי אתה עומד עליהם בשעת הדחק וכששמעו חכמים בדבר קבעו את טבעתה וסתמו את חלונה ויש אומרים משמרתו שוהה לבא ונכנס ישבב אחיו עמו ושימש תחתיו אף על פי ששכיני הרשעים לא נשתכרו שכיני בילגה נשתכרו שבילגה לעולם חולקת בדרום וישבב אחיו בצפון בשלמא למאן דאמר משמרתו שוהה לבא היינו דקנסינן לכולה משמר אלא למאן דאמר מרים בת בילגה שהמידה דתה משום בריתה קנסינן ליה לדידיה אמר אביי אין כדאמרי אינשי שותא דינוקא בשוקא או דאבוה או דאימיה ומשום אבוה ואימיה קנסינן לכולה משמרה אמר אביי אוי לרשע אוי לשכיני טוב לצדיק טוב לשכיני שנאמר אמרו לצדיק כי טוב כי פרי מעלליהם יאכלו.

הרי חזינן מסאן דבגלל בילגה שהיתה רשעיה קנסינן לכולה משמר, ואם לכאורה גם בנידון דידן יש לקנוס את הבן שיהיה שונה מכל ישראל בזה שלא יזכירו עליו בשעת עלותו לתורה את שם אביו הרשע, וכמו בההיא דמרים בת בילגה משום אבוה ואימיה קנסינן לכולה משמרה גם כאן יש לקנוס את הבן משום אביו על ההיכר שנעשה שלא להזכיר עליו את שם אביו כמו ששם עשו היכר על משמרת בילגה.

אולם באמת מצינו לרבנו המחבר שפסק בש"ע אר"ח סימן קכ"ח סעיף ל"ז מומר לעבודת כוכבים אינו נושא את כפיו, וי"א שאם עשה תשובה נושא כפיו (וכן עיקר) ואם נאנס לדברי הכל נושא כפיו, הרי חזינן מדברי המחבר שגדולה תשובה שמועלת לומר שישה את כפיו ורבינו הרמ"ה הגיה

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עליו שכן עיקר, ואם כן לפי זה בנידון דידן מכיון שהאיש עשה תשובה לפני מותו בודאי שאין שום בית מיחוש בזה שמזכירים את שמו על שם בנו כשהבן עולה לתורה, דמה שהבן עולה לתורה לא גרע מנשיאת כפים שהותר אפילו למומר עצמו שעשה תשובה לישא את כפיו.

וְכֵן מִן דִּין מַכְיוֹן שֶׁהַמַּחְבֵּר פֶּסֶק "ואם נאנס לדברי הכל נושא כפיו", היינו אפילו לשיטות שמחמירין שאין תשובת המומר מועלת לענין זה, מכל מקום אם מה שהמיר היה באונס לדברי הכל נושא את כפיו. ואם כן בנידון דידן שיש דגלים לדברו שרק לאונסו התקרב לגרמנים וכפי שהעיד מעשיו בהיותו מקורב להם, שהיה נוהג לעשות טובות ליהודים וגם הציל אחדים מהם ממות, בודאי שאין להחמיר בזה ולהטיל קנס על בנו, ובפרט שגם לולי זאת ניכר הדבר שרק כדי להציל את עצמו התקרב לגרמנים, לכן מן הדין שאין לחמיר בזה. וכפי שפסק המחבר לענין נשיאת כפים שאם נאנס לדברי הכל נושא את כפיו והוא הדין לנידון דידן, בודאי לדברי הכל מועלת תשובתו לחושבו כיהודי לכל דבר, והרי המחבר לא הזכיר כלל שמומר זה התוודע על חטאו בפרהסיא כמו שעשה האיש הזה, כי יתכן שלא היה סיפק בידו לעשות כך ולא היה יכול לברוח, אם כן בנידון דידן שהתוודע לפני מותו בודאי שהוא נחשב כישראל כשר לכל דבר. ועי' בשו"ת זקן אהרן (שהי' בזמן הר"י בר רב) סימן צ"ה.

וּמַכְלָל הַדִּין פֶּסֶקְתִּי שְׁמוֹתָ לְהַזְכִּיר אֶת שֵׁם הָאִישׁ עַל בְּנוֹ מאחר שעשה תשובה וגם הבן הוא שומר תורה ומצוות, לכן בודאי שאין לבזותו לשנותו מכל אחיו ולא להזכיר בשעת עלותו לתורה את שם אביו כנהוג, כי יש להתחשב בנידון זה גם עם כבודו של הבן כדמצינו שלכבוד הבן מכבדים גם את האב הרשע, כמו אמון מפני כבודו של יאשיהו, ובפרט בנידון דידן שהאב עשה תשובה וגם מעיקרא עשה מה שעשה דק מחמת אונסו, לכן אין כאן בית מיחוש כלל, ועוד מאחר שנהרג על ידי הגרמנים ומיתתו היתה כפרתו, אם כן אדרבה יש להזכיר את שמו כשהבן עושה מצוה כדי שיהיה לו זכות בעלמא דקשוט על ידי כך, וה' הטוב יכפר עלינו ועל כל ישראל שלא נדע עוד מצרה ויגון עד עולם.

סימן י"ג

כהן שהמיר את דתו כדי להציל את עצמו,
אי מותר לו לעלות לדוכן אחרי שנשתחרר
מירי הרשעים ימ"ש.

שאלה: בימי החושך והאפילה לעמנו הרצון ודווי על ידי הרשעים
הנאצים ימ"ש בשנות הרעה, בימי המלחמה העולמית השניה,
כשהשמש שקעה לנו בצהרים ועלמה כסתה ארץ, ואחינו בני ישראל
כלו ונשרפו בתנורי עשן וכבשני אש, ורבים מאתנו אמרו נגזרנו, עוד
מעט ונמחינו מארץ החיים.

בעת ההיא כשח' לא היגה חשכנו ונראה לרבים מאתנו כאילו חם
ושלום אין מושיע, עוד מעט והם ישחקו כעפר ארץ וכמיט חוצות
יחדקו, כל בני בני נכר התכחשו לנו ונתנו יד לשונאינו ומנידנו לרדוף
אותנו על צואר ולהביאנו עד שערי מות.

אז פנו רבים אל אורחות מוקשים ונתיבות עקלקלות, ובחפזם מפלמ
לנפשם כפפו כאגמון ראשם לפני זרם מים זידונים, מי שמד
וכליה, מי שמיעה וטבילה מי גיעול וטומאה, גיעולי וגילולי עכו"ם,
לחכיש מקור מחצבתם ולחשכיה ברית אבות שיושב מרום כרת
עם אברהם אבינו.

הם ביקשו מפלמ אצל חגויים בהמירם את דתם, דת יומיים: בלחג
תלוי אשר לא יושיע, הם חשבו להדמות לגוים בדתם ומנהגם,
באורחם ופולחנם, באמרם לנפשם, האח נצלנו, חמת המציק הנאצי
יסור מעלינו, כי לא נדמינו יותר לכוכבי שמים ולזרע מצוקי ארץ,
אלא לעפר ארץ העמים, עפר טמא ומסואב, שלא רק גושו טמא אלא גם
אוירו וכל סביביו, כי אחרת, איך זה ניתנה ארץ עמים זו ביד רשע,

צד

שאלות ותשובות ממעמקים, חלק ג'

להרוג ולשחוט לשרוף ולכלות, אין זאת שנמחפה בסחף מ"ט שערי
טומאה' והשמן המשחית הומלך עליה לחבול ולפגוע ליסר ולענות
נקיים וטהורים צדיקים וקדושים עד שיכרת מארץ זכרם.

אולם לאחר שנותקו הרצונות רשע ומוסדות עריץ נשברו כשה' חלץ
אותנו ממוטות ברזל והוציאנו למרחב כי חפץ בנו, עם זרע יעקב
להיות לו סגולה מכל העמים, לאחר שהשמש זרחה שוב עלינו ובוקר
חיינו האיר שוב וזרח, כשנגדע קרן הרשע הנאצי וחילותיו נפוצו כמוץ
לפני רוח לאחר שאונו אובד ועוזה נשבר, אז כשקרני שחר חדרו לבין
החומות של הגיטו והודיעו את הגאולה ואת התמורה שנהתייה, אז
התחילו גם נפשות תועות ואובדות שהיו טמועים בין הגוים ברבצם
בתוך מדמנת מי השמד, להרגיש, שגם אליהם הגיע טל הגאולה מן
הגוים, הם התחילו לחפש דרכים כדי לשוב לצור מחצבתם ולהתחבר
לעם זרע קודש להיות עצם מעצמיו ובשר מבשרו.

ואז בעת ההיא בא אלי חיל יהודי מן הצבא האדום הרוסי וסיפר לי
כי במחנה שבויים גרמניים הנמצאים בידי הרוסים, נמצא זוג
יהודי האומרים שהם יהודים אלא שהיו טמועים בין הגוים, ולזאת
מחפשים הם עצה ותושיה איך לצאת מן המחנה הזה, מחנה הרשעים
הנאצים, על מנת לשוב לחיות בין אחיהם היהודים כדת ומסורת
אבותיהם.

ואמנם כעבור זמן הצליח הזוג לצאת ממחנה השבויים 'הגרמניים'
ולבוא לקובנה ולהתישב בין היהודים אחרי שחזרו לדת ישראל,
והאיש היה משכים ומעריב לבית המדרש להתפלל, ונשאלתי אז,
הואיל והאיש הוא כהן אם מותר לו לעלות לדוכן

תשובה: במסכת עבודה זרה דף ג"ד ע"א גרסינן: תנא נעבד שלו אסור
ושל חבירו מותר ורמינהו איזהו נעבד כל שעובדים אותו בין בשוגג
ובין במזיד בין באונס ובין ברצון האי אונס היכי דמי לאו כגון דאנס
בהמת חברו והשתחות לה אמר רמי בר חמא לא כגון שאנסוהו עובדי

שאלות ותשובות ממעמקים, חלק ג'

צה

כוכבים והשתחוה לבהמתו ידיה מתקיף לה רבי זירא אונס רחמנא פטריה דכתיב ולנערה לא תעשה דבר אלא אמר רבא הכל היו בכלל לא תעבדם וכשפרט לך הכתוב וחי בהם ולא שימות בהם יצא אונס והדר כתב רחמנא ולא תחללו אם שם קדשי דאפילו באונס הא כיצד הא בצנעא והא בפרהסיא.

אמרו ליה רבנן לרבא תניא דמסייע לך בימוסיות של עובדי כוכבים בשעת הגזירה אף על פי שהגזירה בטלה אותן בימוסיות לא בטלו אמר להו אי משום הא לא תסייען אימר ישראל מומר הוה ופלה לה ברצון חזקיה אמר כגון שניסך לעבודת כוכבים יין על קרניה מתקיף לה רב אדא בר אהבה האי נעבד הוא האי בימוס בעלמא הוא ושרייה אלא אמר רב אדא בר אהבה כגון שניסך לה יין בין קרניה דעבד בה מעשה וכי הא דאתא עולא אמר רבי יוחנן אף על פי שאמרו המשתחוה לבהמה חבירו לא אסרה עשה בה מעשה אסרה ואמרו ליה לעולא כבר תרגמה רב הונא לשמעתיך בבבל דאמר רב הונא היתה בהמת חבירו רבוצה בפני עבודת כוכבים כיון ששחט בה סימן אחד אסרה מנא לן דאסרה אילימא מכהנים, ופירש רש"י, אי נימא מכהנים, שאנסוס מלכי ישראל לעשות כומרים לעבודת כוכבים וכתיב ולא יגשו אלי לכהן לי. עיי"ש כן הסוגיא.

דרי מבואר לן בהדיא מרש"י זו דכהנים שהמירו להיות כומרים באונס לעבודת כוכבים, עליהם אמר הכתוב ביחזקאל מד, יג, ולא יגשו אלי לכהן לי, דעבודתם תהיה פסולה וקשה, שהרי בספר ישעיה סו, כ"ב, נאמר והביאו את כל אחיכם מכל הגוים מנחה לה' . . ' וגם מהם אקח לכהנים ללוים אמר ה'. ופירש רש"י שם, וגם מהם אקח לכהנים ללוים, מן העמים המביאים אותם ומן המובאים אקח כהנים ולוים ולפני גלויים הכהנים והלוים שבהם ואברור אותן מתוכן ויהיו משמשין לפני אמר ה', והיכן אמר הנסדרות לה' אלקינו, (דברים כט) כך מפורש באגדת תהלים.

ומבואר מדברי רש"י הללו, דהכהנים הללו שה' יברור אותן מתוכן יהיו כשרין לשמש לפניו, אם כן נמצא מדברי רש"י הללו סתירה גלויה למה שהבאנו לעיל, מה שכתב רש"י במס' עבודה זרה דכהנים מומרים אפילו באונס אסורים לגשת לכהן לפניו.

צו

שאלות ותשובות ממעמקים, חלק ג'

הן אמת שאפשר לומר שכוונת הכתוב בישיעה היא לומר שהקב"ה יבדוק וימצא מן המביאים והמובאים כהנים כשרים שלא המירו כלל ולא עבדו אפילו באונס עבודה זרה, אולם פשוטו של מקרא לא משמע הכי, ואם כן קושיא זו בסתירת דברי רש"י קמה גם נצבה.

והנה בשו"ע או"ח סימן קכ"ח סעיף ל"ו כתב המחבר: מומר לעבודת אלילים לא ישא כפיו, והגיה עליו הרמ"א: וי"א אם עשה תשובה נושא כפיו (וכן עיקר) ואם נאנס לדברי הכל מותר.

וראיתי בספר כף החיים החדש על שו"ע שם, שהעלה, שמה שכתב הרמ"א "וכן עיקר", כלומר, שאם הכהן המומר עשה תשובה נושא כפיו, דעיקר הוא כשיטת היש אומרים שהביא הרמ"א ולא כשיטת המחבר שכתב שמומר לעבודת אלילים לא ישא כפיו, דמשמע מזה דתשובה לא מהני כדי לישא כפיו, היינו דזה אפילו לספרדים שבדרך כלל נוהגים לפסוק כהמחבר, דבגלל כן הוסיף הרמ"א לכתוב "וכן עיקר".

אכן בספר תו"ח ראיתי דמביא מש"ר, דדוקא תשובה הגונה בלא רמיה מהני, עיי"ש, ועכ"פ מוכח מדבריו דגם הוא סובר דתשובה מהני למומר כהן לישא כפיו.

והנה הרמב"ם פסק דמומר לעכו"ם לא ישא כפיו אפילו עשה תשובה, והוא כשיטת המחבר שהבאנו, אולם הלום ראיתי בנוב"י מהד"ת בחיר"ד שהקשה על המחבר שהוא סותר את עצמו, שהרי כאן פסק דמומר לעבודת אלילים לא ישא כפיו ולא מהני תשובה, ואילו בעובד עבודה זרה כתב דמהני תשובה.

אכן לפי דברי התו"ח שהבאנו מקום אתנו לישב דברי המחבר, דיח לומר דתרי גווני תשובה איכא, יש סתם תשובה, היינו שהוא שב מהמרתו וחזר לדת ישראל בזה סבירא ליה למחבר דלא מהני תשובה זו כדי לישא כפיו, אבל אם שב בתשובה גמולה מבלי שיהיה בה שמץ של רמיה, ותשובתו היא בכל לבו ונפשו ממש בזה יש לומר דגם המחבר מודה דתשובה מהני, ואין שום סתירה כלל בדבריו והכל שריר וקיים.

שאלות ותשובות ממעמקים, חלק ג' צו

וראיתי ביעב"ץ שכתב בח"א סימן ל', דלפי ספר גנוז חיים ישנם בתשובת המינים ג' סוגים : א) נשתרש במינות ברעת משובת, בזה סבירא ליה לרמב"ם בפ"ב דע"ז דאין מקבלים אותו. ב) מומר גמור שהוא עובר על כל התורה אבל אינו אדוק בעבודה זרה, בזה מהני תשובה ג) שהלך אצלם ללמוד מספריהם, אבל לא פרק מעליו עולן של מצוות, אף על פי כן זקוק הוא לתשובה, ועליו לחזור מדרכו הרעה שהלך אצלם ללמוד מספריהם.

תבנא לדינא, דבנידון שאלתנו, הכהן הלז במה שהלך לבין הגוים להמיר דתו, הלא היה רק משום שהיתה בזמן ההוא עת צרה ליעקב, ומחמת אימת המות שהיתה לו מהנאצים פן יכריעוהו לטבח עם כל אחיו היהודים, רצה להוושע על ידי ההמרה להציל את נפשו, בכגון דא ודאי מיחשב כעשה מחמת אונס גמור ומוחלט, והשתא הרי שב בתשובה שלימה בלי שום רמיה והראיה שהוא מעריב ומשכים לבית המדרש כשטליתו ותפיליו תחת בית שחיו, והוא רוצה גם לעלות לדוכן כיתר אחיו הכהנים לקיים מצות "כה תברכו את בני ישראל", בכגון דא נראה דודאי מותר לו לישא כפיו וכפי שהעלינו מכל הני רבבא אשלי רברבי, הרמ"א והת"ח, דתשובה גמורה מהני למומר כהן כדי שישא כפיו, ואפילו לדעת המחבר והרמב"ם יש לומר כפי שהעלינו לעיל, דהיכא דחזר בתשובה גמורה אמיתית ללא שמץ של רמיה, ומתוך לב ונפש הוא רוצה עכשיו להדבק בשכינה ולקיים את מצוות בוראו כפי שנאמרו לאהרן ובניו, בודאי שתשובתו היא מקובלת, ויתכן שגם הרמב"ם והמחבר מודים דבכגון דא מהני תשובתו שישא כפיו וכמו שהעלינו בדברינו.

וראיה בשו"ת שערי רחמים, סימן ה', וגנוז חיים מבעל כנה"ג בקונטרס תשובה מחיים סימן קנ"ג, ובספר משפט צדק ה"א סימן י"ח במי שנעשה תוגר (ישמעאלי) בבחרותו וחזר בתשובה שלימה שהוא כשר להיות ש"ץ, והוא הדין לדוכן, שאין כאן סרך עבודה זרה עיי"ש.

ועיין בריב"ש בענין אנוסים, שאם בינם ובין עצמם כשלא להם סכנה שומרים הם את הדת, אינם נפסלים לעדות דעברו רק על "לא תחלל" ועל "ונתקדשתם" דכן כתב הרשב"א בתשובה, דישראל שהמיר

צח

שאלות ותשובות ממעמקים, חלק ג'

מחמת יראה אף על פי שהיה לו ליהרג ולא לעבור, מכל מקום כיון שהמיר מחמת פחד ואפילו הלך לבית עבודה זרה שלהם והשתחוה גם כן כשר לכהונה.

אולם אכתי יש לשדות נרגא בנירון דידן, על פי מה שראיתי בשו"ת בני ציון החדשות סימן ב' באחד שהמיר עם אשתו וחזר לדת יהודית שהעלה לדינא, דאם לפני המרתם נשאה על פי דת יהודית ואח"ז המירו מהני תשובה וגם בניו כשרים לכהונה ובנותיו מותרות להנשא לכהנים, אבל אם אשתו המירה כשהיתה עדיין פנויה ואחר כך נשאה, אשה זו מוחזקת היא לזונה ונשואיו היו באיסור, ובניהם הם חללים והבנות אסורות להנשא לכהונה, וכמו שפסק בשבות יעקב ח"ב סימן קי"ג, אם כן בנידון דידן הרי יש לחוש שמא האשה המירה דתה לפני נשואיה עם הכהן הלו, והיא נעשית זונה, ואם אפילו אם בעלה שמרה לאחר נשואיה אתה, מכל מקום הרי היא נעשית זונה לפני הנשואין ואסורה היא לכהן הלו להיות לו לאשה, דזונה אסורה לכהן, ועד שיגרשנה אסור לו לעלות לדוכן כמבואר בפוסקים.

אכן בררתי דבר זה על ידי עדים כשרים שנשואיהם היו לפני שהמירו את דתם וממילא אול ליה חשש זה.

והא דלא שב מיד עם השחרור לעמו ודתו, אין להביא מזה ראיה דתשובתו אינה שלימה, דשמא מחמת גודל הפחד והמורה שהיתה עליו פן ימיתוהו, ארך זמן שובו לעמו ודתו, כידוע לכל, שעוד הרבה זמן לאחר השחרור הפחד והמורה היו טבועים בפני כלואי הגיטאות, והם רעדו מקול עלה נדף, אם כן כל זה היא מחמת אונס ופחד ממיתה, כי לא האמין שעדיין נשארו יהודים בקובנה וכי יוכל לחזור לדת משה וישראל.

אמנם כעת לאחר שהוא שב בכל לבו ונפשו פשוט וברור הוא שמותר לו לעלות לדוכן ולברך את עמו ישראל באהבה עם כל אחיו הכהנים כאמור בתורה "כה תברכו את בני ישראל".

אולם הוריתי להם לפני זה שיקבלנו דברי חבירות על ידי טבילה כדין מומר הבא לשב לדת ישראל וכפי שנפסק ביו"ד, כאמור בספרי "דברי אפרים" בקונטרס עמק הבכא, בשאלה ב', עיי"ש.

השם יתברך את עמו ישראל בשלום לשים עלינו חיים וברכה למשמרת שלום, ויהי רצון שיעשה עמנו כאשר הבטיחנו להשקיף ממעון קדשו מן השמים לבדך את עמו ישראל ואת האדמה אשר נתן לנו כאשר נשבע לאבותינו, ולהסיר מעלינו אויב דבר וחרב ורעב ויגון מעתה ועד עולם, ולכונן את בית חיינו במרום ההרים להשכין שכינתו בציון כי שם צוה ה' את הברכה, להצמיח קרן לדוד נר למשיחו במהרה בימינו אמן.

סימן כ"ד

אשת איש שילדה ולד מן הגוי אם הולד

הוא ממזר.

שאלה: כשעסקתי בפעולת הצלת ילדי ישראל שנממנו בין הגוים, פעולה שהיתה כרוכה בקושיים רבים לאין ספור שאין לתארם, בא לפני מקרה אופייני מאוד שהוא אחד מרבים שקרו בעטיו של המצב האיום בו ניתנו אחינו ואחיותינו בעמיה של המלחמה ובעטיו של גזרת השמד והכליון שגזר עלינו הצורך הנאצי ימ"ש.

באמור היתה פעולת הצלה זאת כרוכה בקושיים רבים שנערמו על דרכם של אלה שעסקו בהצלת הילדים היהודיים שנמצאו אצל הגוים, כי מלבד סכנת הדרכים ששררה בזמן ההוא מיד לאחר השחרור מידי הגרמנים, דבר שהיה במבוע מכשול עצום לפעולה זו שדרשה זריזות ומהירות, כי לא פעם קרה שנודע לגוים מחזיקי הילדים שנודע ליהודים שנמצא בידיהם ילד או ילדה, ועד שסיפק היה ליהודים שטיפלו בענין זה לבוא למקום ההוא בגלל סכנת הדרכים והנה הגוים שחשבו את הדבר לאחת ממצות דתם, להעביר נפש יהודית ממחנה היהודי אליהם, — הצליחו בינתיים להחביא את הילד או הילדה במקום סתר ולהכחיש את דבר המצאם אצלם, מלבד זאת, השתמשו הגוים בכל מיני אמתלאות והשתמשויות בכדי להתחמק מחובת החזרת הילדים היהודיים.

ביחוד הצטיינו בזה הכמרים, הנזירים והנזירות חובשי המנזרים שבידיהם נמצאו הרבה ילדים, הם דיברו עם היהודים אחת בפח ואחת בלב, בפיהם דיברו, שוא כאילו הם מודים כביכול על חובת החזרת הילדים ובימינם ימין שקר חושימו עזרה לגוים מחביאי הילדים ועשו את הכל בכדי למנוע החזרתם למסורת אבותיהם.

שאלות ותשובות ממעמקים, חלק ב' קלו

לכן ראיתי את הדבר כמקרה נדיר ביותר כשבאה לפני אשה נכרית וחביעה את נכונותה להחזיר את הילד היהודי שהופקד בידה בידי אמו לקרובו היהודי, אלא שהיהודי הזה שהוא קרובו של הילד מסרב לקבלו ולקחתו ממנה. כמובן שביקשתי את הנכרית שתספר לי את כל פרטי העניין הזה, והיא סיפרה לי, שאם הילד מתה זמן קצר לפני השחרור, אולם לפני כן נתעברה מנכרי אחד שהחביא אותה מידי הגרמנים וילדה את הילד הזה, אולם לפני מותה כשהרגישה שקצה קרוב לבוא, היא קראה אליה את הנכרית הזאת וביקשה אותה כשדמעתה על לחיה שתבטיח לה שמיד לאחר השחרור תחזיר את הילד ליהודי אחד מקרובי בעלה, ואם תבטיח לה זאת תוכל למות במנוחה בהיותה סמוכה ובטוחה שנשאר נצר ושוורש למשפחתה שנכרתה בידי הרוצחים הגרמניים ולא נשאר ממנה אחד.

הנכרית הזאת שהיתה רעותה תבטיחה לה חגיגת שתקיים את צוואתה האחרונה, ומיד לאחר זאת סגרה האם היהודית את עיניה לנצח בשינת עולמים. וכשנשברה זרוע עוזו של הצר הצורך הגרמני ימ"ש, מיהרה הנכרית לקיים את דברי רעותה המתה, ואחרי רוב עמל היא הצליחה למצוא את היהודי הזה שלידו צייתה אם הילד להחזיר את ילדה, אולם למרבה צערך ומבוכתה סירב היהודי הזה לקבל את ילדה באמרו שהילד הזה אינו יהודי הואיל והוא נולד מנכרי, ומכיון שהיהודי לא רצה לקבל את הילד לא נשארה תכירה בידה אלא לאמץ את הילד הזה אליה ולגדלו כנכרי, וכך עשתה.

אולם כעבור איזה זמן — חוסיפה הנכרית לספר — באה אליה אם הילד בחלום הלילה כשהיא ממררת בבכי וביקשה ממנה שתלך אל רב יהודי ותספר לו את כל פרשת הילד הזה ואת דבר הסירוב שקרובו מסרב לקחתו ולגדלו כיהודי, ולכן היא באה אלי לספר על הדבר הזה כדי שאמצא עצה ותחבולה שהילד יהיה יהודי, ובזה להמציא מנוחה נכונה בשמי מרום לנשמת רעותה המתה שאין לה שם מנוח עד שתקויים צוואתה שציוותה לפני מותה.

קלח

שאלות ותשובות ממעמקים, חלק ב'

לאחר שהודיתי לנכרית הזאת על שסיפרה לי את הדבר הזה, שלחתי לקרוא את האיש היהודי קרובו של הילד, כדי לשמוע מה בפיו ואם אמת הוא מה שהנכרית סיפרה שהוא מסרב לקבל את הילד, ומה זה ועל מה זה הוא מסרב?

היהודי הזה נענה לי ובא לקריאתי, והוא סיפר לי, שאמת ונכון הוא מה שהנכרית סיפרה, ורק מחמת בושה ובזיון הוא ביקש להשתיק את הדבר הזה ולא לספר לאף אחד בחשבו שזהו בזיון גדול ופגם למשפחתו, כי בעל האשה שהוא קרובו חי והוא נמצא במינסק ועוסק שם במקצועו כרופא, וכשהנכרית באה אליו בפעם הראשונה ורצתה למסור לו את הילד, הוא הודיע על כך מיד לבעל האשה, אולם הלז לא רצה אפילו לשמוע על הילד הזה מכיון שבן זנונים הוא, ולדעתו הצדק עם בעלה כי הילד הוא ממזר ואסור לבוא בקהל, הואיל והיה לאשה הזאת בעל כשהרתה לזנונים מהגוי, ולפי דיני ישראל הרי ממזר הוא, ולכן גם הוא לא רצה לקבלו, כי חשב מה בצע כי יקבלו, הלא בין כך ובין כך הוא ממזר ואסור לבוא בקהל, ולקבל אותו ולהודיע לכל שהוא ממזר הלא בושה הוא ופגם למשפחתו, לכן הוא חשב שמוטב שישאר אצל הנכרית ויתגדל אצלה כנכרי, ולכל הפחות לא ירבו ממזרים בישראל על ידו ולא יופגם שם משפחתו הטוב,

והאיש היהודי הזה התחיל לבקש ממני שלא אספר חם ושלוש על הדבר הזה לאף אחד, כי משפחתו היא משפחה מיוחסת נודעה בישראל, ואם האשה האומללה הזאת עשתה מה שעשתה בגלל אונם נפשות כדי לחציל את נפשה, אבל את הנעשה אין להשיב, ולמה עוד להוציא שם רע על משפחה נכבדה לאמור כי אחד מהם הוא ממזר.

הרגעתי את היהודי בהוספת דברי תוכחה שלא טוב עשה בהתאמצו להשתיק את הדבר, כי היה יכול לגרום על ידי זה לאבדן נפש אחת מישראל, כי הילד הזה לא רק שאין לו דין של ממזר אלא יש לו דין של ישראל, ומן השמים הוא שסייעו שהנכרית הזאת תתאמץ לקיים את דברי רעותה המתה שרצתה להחיות זרע למשפחתה שנשפתה על ידי הרוצחים הנאצים האכזרים, ולולי הנכרית הזאת היה

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גורם על ידי שתיקתו שהילד הזה יטמע לגמרי בין הגויים מבלי שידע את צור מחצבתו ואת דת מורשת אבותיו, ואכן אם בכל זאת הוא אינו יכול למפל בולד הזה, לכל הפחות שיסכים לקחת אותו מיד הנכרית ואני כבר אדאג לו שימסר לידי משפחה יהודית אדוקה שתגדלהו ותחנכהו להיות בן נאמן לעמו ולדתו.

היהודי הזה שמע בקולי וסידר את כל הענינים הפורמליים הקשורים עם החזרת הילד מיד הנכרית וקבלתו, בהתאם לדבריה האחרונים של אם הילד, ואני מצאתי משפחה כשרה והגונה שהסכימו לאמצו להם לבן. משפחה זאת היגרה אחר כך ללונדון, והבן הזה לומד שם בישיבה ומצטיין בלמודיו ובדרכי הנהגתו לשמחת לב „הוריו“ האוהבים אותו כנפשם ומכרכים לגומל חסדים טובים על שזיכה להם את המצוה הגדולה הזאת לקיים נפש אחת מישראל, שקרוביו דחו אותו בשתי ידיים בחשבם שהוא יגרום פגם למשפחתם, והיו עלולים לגרום על ידי זה שישאר לעולם בין הגויים ולא ידע אף פעם שהוא מורע עם קודש בם כחר יה לעם נחלתו וסגולתו מכל העמים.

אולם הכירור ההלכתי בנידון הילד הזה אם הוא כשר או לא, שהעליתי לחיתור הוא כדלהלן וזה החלי.

תשובה: במס' יבמות דף מ"ה ע"ב גרסינן: והלכתא כותי ועבד הבא על בת ישראל הולד כשר בין בפנויה בין באשת איש, וכתב שם רש"י ז"ל, בין באשת איש, כדאמרן שאין עושה ממזר אלא מי שיש לו קידושין על אחרים, עכ"ל. וגם ברמב"ם פרק ט"ו מהלכות איסורי ביאה הלכה ג' פסק וז"ל: עכו"ם ועבד הבא על בת ישראל הולד כשר בין בפנויה בין באשת איש בין באונס ובין ברצון ע"כ עיי"ש.

אולם הראב"ן חולק בזה על הרמב"ם והוא כתב ביבמות שם, דהא דאמרינן נכרי ועבד הבא על בת ישראל הולד כשר בין בפנויה בין באשת איש, זהו דוקא כשזינתה באונס אבל לא ברצון, אבל כבר תמה עליו בשו"ת דבר אברהם ח"ב סימן ר"ג, מנין לו לראב"ן לומר כן, ע"ש באבן שלמה אות ל"ג מש"כ.

ובשני אבן העזר סימן ד' סעיף י"ט פסק המחבר: עכו"ם ועבד שבאו על הממזרת הולד ממזר ואם באו על בת ישראל בין פנויה בין אשת איש הולד כשר ופגום לכהונה, ועי' בסימן כ"ה שהארכתי בבידור דין זה אם הולד פגום הוא לכהונה כמו שפסק המחבר או שהוא כשר אפילו לכהונה כפי שמשמע מפשטות לשון הרמב"ם שלא הזכיר שהולד פגום הוא לכהונה כמו שכתב המחבר, עיי"ש היטב ותמצא נחת.

ועי' שם בפתחי תשובה ס"ק כ"ג שכתב וז"ל: בין אשת איש, עיי"ש בתשובת בשמים ראש סימן ה' שנשאל אשת איש שעזבה דת ונשאת לישמעאל והיה לה בנים ואחר כך חזרה לדת ישראל מהו דין הבנים שהיה אחד רוצה לומר דחיישינן שמא זינתה עם ישראל והשיב הוא ז"ל דאין דעתו מסכמת שאם היא הוחזקה כל ישראל לא הוחזקו ואפילו אם תדמהו לההוא ארוס וארוסתו ואפילו יש כאן ישראלים חשודים או עוזבים דת הולכים לביתה מכל מקום בעלה משמרה ורוב בעילות אחר הבעל דהנהו רובא דפליגי ר"ג ור"י היינו היכא דזינתה אבל איש הדר עם אשתו בקביעות אחד נכרי ואחד ישראל בניו מתיחסים אחריו ע"ש, ועי' שם עוד בפתחי תשובה שהביא מספר חמדת שלמה סי' א' שהעלה גם כן בשאלה מעין זאת שהולד כשר הוא ולא תלינן שזינתה עם ישראל גם כן, אלא אם הולד בת היא העלה שהיא פסולה לכהונה עיי"ש כל האריכות בפתחי תשובה.

ולפי' זה בנידון דידן הרי פשוט שהולד כשר הוא אף שאם הילד היתה אשת איש וכמו שפסקו הרמב"ם והשו"ע שעכו"ם ועבד הבא על בת ישראל הולד כשר בין בפנויה בין באשת איש ומקורם טהור מההיא דיבמות שהבאנו, וגם אין לחשוש כלל בנידון דידן שמא זינתה האשה הזאת עם ישראל והולד הוא מן הישראל הוא ממזר, דאף שכאן לא שייך לומר סברת הבשמים ראש שהעלה שהאשה בעלה משמרה בין אם הוא ישראל או נכרי, שהרי היא לא היתה נשואה לנכרי הזה, אלא רק זינתה עם ישראל גם כן, שהרי במקום מחבואה בין הנכרים לא היה שם ישראל בנמצא, ואף לשום ישראל לא היה ידוע שהיא נמצאת שם במקום ההוא כי כולם חשבו שהיא ברחת בזמן המלחמה לרוסיה להיות אצל בעלה, וגם היא העלימה את דבר היותה בין הנכרים כל הזמן מחשש שמא יודע להרוצחים הגרמנים שהיא יהודיה, לכן בודאי לא באה בשום מגע עם יהודים ואין לנו לחשוש שמא זינתה גם כן עם יהודי באופן שהולד הוא ממנו.

מכל' זאת נראה שהולד כשר בלי שום חשש, וצויתי למול אותו כדת וכדין ומלבד זאת גם להטבילו כדי לצאת ידי חובת כל השיטות בזה וכפי שביררתי באריכות בסימן כ"ה עיי"ש היטב.

שאלה כ"ב

ניתוח כדי להסיר המספרים שהגרמנים הארורים שרמו על זרועי בני אדם

שאלה: אחרי שזיכנו השי"ת לצאת מאפילה לאור גדול, כשנשכרו מומות עולנו ונשתחררנו מלהיות עבדים לעבדי בישי ימ"ש, נשאלתי על ידי אשה אחת צעירה לימים ובת טובים מאחת המשפחות הנכבדות, היות שהגרמנים הארורים חקקו על זרועה בכתובת קעקע כי כן נהגו לחקוק על זרועותיהם של כלואי המחנות מספר כי כל אסיר היה לו מספר ולפי המספרים האלה הם נכתבו בספרי החיים והמתים, מי לחיים ומי למות, מי בקצו ומי לא בקצו אלא עליו עוד להתענות בעבודת פרך, כי על הכל נהגו הודים הארורים סטטיסטיקה מדויקת, ועכשיו לאחר השחרור ברצונה להעביר על ידי ניתוח פלאסטי את המספר הזה המעלה לפניו את זכרון האימים של הימים הנוראים האלה עת היתה נתונה בידם לשבט ולחסד, והיא חושבת כי באם תמחק מזרועה את המספר האיום הזה, תוכל להסיר מעליה את זכרון מועקת הימים המרים הללו המעכר את רוחה ולא נותן לה מנוח, כי מדי פעם בפעם כשהיא שמה את עיניה על הכתובת המתועבת הזאת, מספר הבהלות, נצב לפני עיני רוחה שוב מחזה הזועות שהיא ראתה כמו עיניה במחנות ההסגר והשמדה, וכבני מרון עוברים לפני עיני רוחה המון הכלואים שהיו אתה שהושמדו שם במחנה.

והיא שואלת אם מותר לה על פי הדין להעביר מעל זרועה את הכתובת הזאת, אולי על ידי כך תוכל לשכוח את כל הצרה והיגון שעברו עליה ותמצא מרגוע לנפשה המרה.

תשובה: בשו"ע או"ח סימן ש"א סעיף כ"ג פסק הרמ"א: ואותן עגולים ידוקים שגזרה מלכות שכל יהודי ישא אחת מהן בכסותו מותר לצאת

בהן אפילו אינו תפור בכסותו רק מחובר שם קצת (א"י), ומסיק האור זרוע
משני דחשיב מלבד.

נראה מזה כי דבר שהמלכות הרשעה רוצה לבייש בו את ישראל, כדי שישא
חתיכת בגד ירוק על בגדיו כדי לביישו ולהשפילו בעיני העמים, אפילו
הכי ססר הרמ"א בשם האור זרוע שמותר לצאת בו בשבת, כי אדרבה זהו
כבוד לעם ישראל וזהו מלבד.

ולפי זה בנידון דידן גם כן הכי הוא, המספר הזה שהגרמנים ימ"ש חקקו
על זרועות בני ישראל כאות קלון שישפיל אותם בעיני כל רואם
לאמור, כי הללו בעלי המספרים החקוקים על זרועותיהם אינם נחשבים לבני
אדם אלא כבהמות נדמו והרשות גיתנה לעשות בהם כרצונם, להוציאם להרג
ולטבח כבהמות ממש, לא רק שאין בו במספר כזה כדי להבאיש את רוחנו
ולהשפיל את כבודנו, אלא אדרבה, מספר זה הוא לנו לאות כבוד ולתפארת,
ולהם, לרוצחים המתועבים ימ"ש חכרם הוא למזכרת עון ולחטאת עולם שלא
ניתן לסליחה ולכפרה, על זממם אשר זממו להשמיד גוי קדוש שלא יסאר
לו שאר ושארית, וכל מגמתם היתה שאם אחד מישראל אפילו אם יצליח לברוח
מהמחנה ולהמלט על נפשו, שכל מוצאו יהרגנו, כי תיכף ומיד יוכר על ידי
הכתובת הזאת החקוקה בזרועו, כי הוא אחד מישראל, העם לטבח וכל כצאן.

וכן בודאי כתובת מבישה זאת, מספר איום זה החקוק בזרועות אלפי האנשים
שהיו אי פעם במחנות ההסגר והשמד, משמש לנו לאות כבוד ולזכרון,
שזכור נזכור, את אשר עשה לך עמלק גרמני זה, וחלילה לנו לשכוח את
הדבר הזה ולמחוק מלבנו את כל אשר עוללו לנו הרשעים הללו, חיתי יער
בדמות אדם, זרעו של עמלק בני בניו של חמן הרשע.

והזוהר כפולה ומכופלת מוטלת עלינו לעת הזאת דוקא לזכור את כל רשעתם
ולא להסיח את דעתנו אף רגע מכל הרעה אשר עוללו לנו, כי רואים
אנו איך שהם, הגרמנים הארורים ימ"ש אינם חוסכים כל מאמץ, ועושים את
הכל כדי להשכיח מהעולם הגדול וממנו את זכרון מעשיהם הרעים, ובעוד
שקול דמי אחינו ואחיותינו הקדושים והטהורים צועקים אלינו מן האדמה
ודורשים נקם ושילם, משמש אות זה החקוק על זרועות כלואי המחנות כאות
מאות קורא ומכריז: יודע בגוים לעינינו נקמת דם עבדיך השפוך, כי דודש
דמים אותם זכר, לא שכח צעקת ענוים, ולכן, ידין בגוים מלא גויות, מחץ
ראש על ארץ רבה, ועם בני ישראל, זה העם המושפל ומעונה עוד ירים ראש
בין הגוים יפדה וירבה עד מאוד, ישגה ויפרוץ כימי עולם וכשנים קדמוניות.

לזאת חס ושלום לאשה הזאת להעביר מזרועה המספר הזה, כי בזה היא
נותנת יד לפושעים הגרמנים הארורים, והיא עוזרת להם להשכיח את
מעשי הזועה והאמים שעשו לעם ישראל, ויש בזה משום חיזוק לשונאים
הללו המתחצפים ומכחישים את הכל, כאילו אנו היהודים שמים להם רק
עלילות דברים ותואנה אנהנו מבקשים מהם, אלא אדרבה עליה לשאת את
האות הזה בגאווה וגאון, ובזכות זה היא תזכה לראות עת נקם ישיב ה' לצריו,
בביא"ס.*

חיוב ה"קדיש הכללי" לזכר הנספים בשואה

שאלה: מי שאין לו קרובים שנספו בשואה, המחויב גם הוא באמירת ה"קדיש" על הקדושים, או שמא רק מי שנספו קרוביו חייב לומר קדיש עליהם?

תשובה: כדי להבהיר טיבו של "הקדיש הכללי", נעמוד מקודם על היקף החומרא של שמועות הרעות באסון הצבור הלזה, שאנו קוראים שואה.

א) במסכת מ"ק (דף כ"ו) מובין בין הקרעים שאינם מתאחים, חקרע על שמועות הרעות. ובגמרא שם: מנלן דכתיב, "ויחזק דוד בבגדיו ויקרעם וגם כל האנשים אשר אתו, ויספדו ויבכו ויצומו עד הערב על שאול ועל יהונתן בנו ועל עם ה' ועל בית ישראל כי נפלו בחרב" (שמואל ב', א') ושואלת הגמ': ומי קרעין אשמועות הרעות, והא אמרו ליה לשמואל, קטל שבור מלכא תריסר אלפי יהודאי במדינת קיסרי ולא קרעו ומתצת הגמ', לא אמרו אלא ברוב צבור וכמעשה שהיה. ופירש"י: וכמעשה שהיה בשאול ויהונתן. והנמוקי יוסף כותב: "שמועות הרעות ששמעו על רוב צבור שנהרגו כמעשה שהיה במות שאול ויהונתן, או שהלכו בשבי", ובש"ע (יו"ד סי' ש"מ, ל"ו): "קורעין על שמועות הרעות כגון שנקבצו רוב הצבור למלחמה ושמעו שניגפו לפני אויביהם, ואפי' לא נהרגו אלא המיעוט מהם", ומוסיף הרמ"א: "והוא הדין אם הלכו בשבי". לפי זה אנו רואים ששמועה המחייבת קריעה, היא דוקא ברוב הצבור, שנפלו או שנשבו.

אבל לענ"ד מסתברא, שאין המדובר כאן דוקא ברוב הצבור הכללי מבית ישראל שבכל מקום, שגם במלחמת שאול לא נראה כלל לומר שרוב הצבור הישראלי ניגף אז במלחמה, שנאמר רק: "ופלשתים נלחמים בישראל, וינסו אנשי ישראל מפני פלשתים ויפלו חללים בהר הגלבוע" (שמואל א',

ל"א, א') ולהלן בפסוק ז': „ויראו אנשי ישראל אשר בעבר העמק ואשר בעבר הירדן כי נסו אנשי ישראל, וכי מתו שאול ובניו, ויעזבו את הערים וינוסו ויבואו פלשתים וישבו בהן“, כלומר: רוב מחוזות הספר נמלט לתוך המדינה, והפקירו את ערי הספר, והפלשתים באו והתיישבו בהן. נראה איפא, שלא ניגף במלחמה אלא חלק מהצבור, ואעפ"כ נידון כרוב צבור, משום שמשענת הצבור שהיתה אז ממלכת שאול, היא שנשברה במלחמה ההיא. וסימן מובהק לדברינו, שהרי בסמוך למעשה זה, אנו מוצאים התאוששות הצבור, והוקמה ממלכה ע"י דוד המלך בחברון, וגם ע"י איש בושת במחנים על כל ישראל (שמואל ב', ב'), שמע מינה שלא רוב הצבור ניגף, רק המלכות והממשלה נפגעו, ומכאן נלמד שלא המשקל הכמותי בצבור קובע, אלא הכח האיכותי, אף שאינו בכמות רוב מנין של כל בית ישראל.

לפי זה, החורבן האיום שנתהווה ביהדות אירופה, שהיה הכח המרכזי של כלל בית ישראל, יש לו לפי ההלכה כל חומר הדין של שמועות הרעות, שהשומע חייב בקריעה בהספד וצום, כנאמר לעיל.

והש"ך (שם ס"ק נ"ב) חידש בעקבות דברי הב"י והד"מ בשם רבינו ירוחם, שחייב להתאבל ביום השמועה כל היום, ומפרש דלמחרת יכול לאחות את הקרע. ותמה הגאון בעל „נודע ביהודה“, שהרי מפורש בגמ' וגם בש"ע (סוף סי' ש"מ) שאלו הקרעים אינם מתאחים, ולדעתו יש לאסור לעד לאחות את הקרע הזה, ורק לשלול התיר רבינו ירוחם למחרת, אבל לא לאחות.

ולע"ד, במחילת גאון תורתו, יש ליישב, דאמנם מי שקרע קרוב לאסון יחד עם כל הצבור על השמועה הרעה, אינו רשאי לאחות לעולם, כי הוא אבל בתוך הצבור המיוסר, אבל אם הוא שומע בתאריך מאוחר יותר, באופן שיש להניח שרוב הצבור כבר שמעו מהענין קודם, בנדון זה חייב לקרוע כיחיד ולהשתתף בצרתם של הרבים, ובוה אומר הש"ך סברתו שביום שמועתו בלבד מתאבל, אבל למחרת יכול אפילו לאחות, ודו"ק.

והנה מי שהכיר את יהדות אירופה וגדוליה, נוכח לדעת שהיא היתה גולת הכותרת והכובד הרוחני של בית ישראל בזמנה, ממנה יחד וממנה פנה לכל דבר בעמנו לחורא ולתעודה, ושאר מקומות הישוב בעולם היו רק חלוצים שיצאו מתוך המרכז היהודי הגדול של אירופה. ע"כ נדאה שחורבן יהדות אירופה הוא בגדר חורבן בית ישראל כמו חורבנה של ממלכת שאול, כנ"ל. ויש לו הדין של שמועות הרעות בשעת האסון שקורעים קרעים

בלתי מתאחים, ומי ששמע אחרי שהצבור כבר הספיק לשמוע, קורע ולמחרת מאחה, כפסקו של הש"ך הנזכר.

(ב) השתתפות בצרת הצבור

חז"ל הפליגו מאד בהשתתפות כל אחד בצער הצבור, ראה מאמרם (תענית יא): "ת"ר בזמן שישראל שרוין בצער ופירש אחד מהם, באים שני מלאכי השרת וכו' אלא יצער אדם עם הצבור, שכן מצינו במשה רבינו שציער עצמו עם הצבור שנאמר: "וידל משה כבדים ויקחו אבן וישימו תחתיו וגו'". ובשו"ע (או"ח סי' תקע"ד, ס"ד): מצוה להרעיב אדם עצמו בשנת רעבון וכו', ושם (סעיף ה') "וכל הפורש מן הצבור, אינו רואה בנחמתו" וכו'. על פי הדברים האמורים נראה, שלא דק בשעת הצרה עצמה מחוייב אדם להשתתף עם הצבור ולהצטרף יחד עמם, אלא גם בימי התייחדות וזכרון, שהצבור קבע לזכר נשמותיהם של המעונים, אסור לפרוש מהצבור, ועליו החיוב להשתתף באבלם וצערם.

בנידון זה כדאי גם לצטט מדברי הגאון בעל "תפארת ישראל" בראש חלק בסנהדרין, וז"ל: "אף מי שלא עשה שום עבירה, רק שאיננו משתתף עמהם לטובתם או בצרתם". ומכל זה נבין שאין שום אדם רשאי חלילה להקל לעצמו, ואין לפרוש מליטול חלק ביום הקדיש הכללי ויום השואה, שנקבעו כימי זכרון לקדושים ולחורבנה של יהדות אירופה.

(ג) קביעת ימי זכרון לאבל האומה

והנה בתנ"ך ובגמ', אנו מוצאים שקבעו ימי זכרון כלליים לאירועי אבל לאומי, כמו ארבעת הצומות ועוד, כלשונו הזהב של הרמב"ם (פ"ה מהלכות תעניות ה"ה): "יש ימים שכל ישראל מתענים בהם, מפני הצרות שארעו בהם, כדי לעורר הלבבות וכו', שבזכרון דברים אלו נשוב להטיב וכו' עיי"ש. כמו כן אנו רואים שאפי' צער של יחיד באבל משפחתי בא לידי ביטוי בקביעת יום זכרון מדי שנה (יארצייט) לכל הלכותיו, על אחת כמה וכמה שאם המדובר בענין של כלל ישראל, שצריכים להעלות את זכרוננו תיהם של הקדושים והטהורים ולהנציחם.

ובעקבות ההלכות, שבאותו היום של הזכרון (יארצייט) נפרשים מכל דבר של שמחה, ואף יש שנוהגים לצום בו (ראה בסוף הל' אבילות של שו"ע יו"ד, מה שנדפס בשם הגאון רבינו אפרים זלמן מרגליות זצ"ל), הרי שבוודאי יש לקבוע יום זכרון מיוחד להנציח את זכרם וכבודם של ששת

המיליונים מאחינו שנספו בדרכים איומים וטרגיים רח"ל, וכל בית ישראל צריך להתאבל עליהם.

(ד) החיוב באמירת הקדיש

ממילא מוכח כדבר המובן מאליו, שכמו שכל יחיד מחויב להשתתף עם הצבור ולהרגיש בצערם, כן מחויב כל יחיד לעשות דברימה לרוחם ונשימתם. מצינו בקדיש שערכו גדול ומחויבים בו על ההורים ועל הקרובים (יו"ד סי' שע"ו סעיף ד', ברמ"א), כן מחויב כל אדם להוסיף בטהרת הנשמות הרבות של כלל בית ישראל. וצא וראה מה שהורה הרמ"א בשו"ע (או"ח סי' קל"ב, ס"ב) שקדיש יתום אחר „עלינו“, גם אם אין יתום בבית הכנסת, יאמר מי שאין לו אב ואם על מתים דעלמא, וחוזר על כך גם ביו"ד (סי' שע"ו): „בעד כל מתי ישראל“.

ומאחר שהלכה היא שמי ששכח יום מיתת אביו ואמו, שיבחר לו יום בשנה שיאמר בו קדיש לעילוי נשמותיהם (עין ב, באור הלכה" לבעל „משנה ברורה“, באו"ח סי' קל"ב). ו„הרבנות הראשית“ בחרה את היום המר, עשירי בטבת ליום „קדיש כללי“, מכמה טעמים: א) שהוא היום שבו החלו הצרות, יום שבו סמך מלך בבל אל החומה בחורבן בית ראשון, וכל הצרות והתלאות שקרו לאומתנו, הכל הוא מאותו המשך מר. ב) ימי טבת קצרים המה, וכל מי שחפץ להתענות ביום הזכרון כפי ההלכה (יו"ד שע"ו), „מצוה להתענות ביום שמת אביו ואמו“ יכול בקלות לעשות זאת, ועשירי בטבת הרי בין כה וכה יום תענית הוא, לפיכך מובן שאף מי שאין לו קרובים שנספו בשואה, רק בתורת משתתף בצערם של הצבור, עליו להשתדל עבור נשמותיהם של החללים ולומר „קדיש“ עליהם, ואם יכול יתענה ביום שנקבע, ובפרט שהוא תענית צבור בין כה וכה.

ויש לי להוציא מלב הטועים הטוענים שהקדושים שנהרגו על קדושת השם אינם זקוקים לאמירת קדיש אחריהם, כיון שאלה אינן רואים פני גהינום כל עיקר, לפי מה שנפסק בשו"ע (ס"ס שעו) שמי שנהרג (אפי' מומר) מתכפר בהריגתו, וכפי שמסביר שם הטו"ז עיי"ש, על אחת כמה וכמה טהורי לב שנהרגו עבור יהדותם בלבד, שתועיל להם מיתתם שלא יצטרכו כלל אפילו לקדיש.

אבל זה שיבוש גמור, כי בספרים הקדושים מבואר להדיא, שאפילו צדיקים גמורים זקוקים לתקונים שונים ומגוונים להעלותם מדרגא לדרגא ונחוצ

להם הקדיש, ומעולם לא מש הקדיש מבית ישראל, גם על מי שאביו היה קדוש עליון ונהרג על קידוש השם.

ומה שאומרים קדיש רק י"א חודש ולא י"ב, אע"פ שמשפט הגיהנום הוא שנה תמימה זה משום כיבוד אב ואם-שלא לעשותם, "רשעים" (כמבואר בש"ע שם) והוא טעם למראית העין, כדי שהשומע את הקדיש לא ידון לכף חוב את הנשמות, כאילו המה שוכנים בגיהנום, אבל מעיקרא דדינא ידועים דברי האר"י ז"ל, שיש מקום להמשיך באמירת הקדיש ולהעלותם מדרגא לדרגא עד יב"ה. וידועים דברי חז"ל בסוף מס' ברכות (ס"ד ע"ב) ת"ח אין להם מנוחה לא בעולם הזה ולא בעולם הבא, לפי שהם עולים מדרגה לדרגה, וכל אלה הדברים הם פשוטים ומובנים.

ויש עוד נקודה שבסבתה חייב להשתתף באמירת הקדישים עם הצבור, שהרי אמרו בגמ' ברכות (דף י"ח ע"א): אמר רחבה אמר ר"י, כל הרואה מת ואינו מלווהו עובר משום, "לועג לרש חרף עושהו" (משלי י"ז) ואם הלווה מה שכרו? א"ר אסי עליו הכתוב אומר: "מלוה ה' חונן דל" (משלי י"ט) "ומכבדו חונן אביו" (משלי י"ד), וכן פסקו להלכה בשו"ע (יו"ד סי' שס"א, ס"ג): הרואה את המת ואינו מלווהו עובר משום לועג לרש, ובר נידוי הוא, ולפחות ילוונו ארבע אמות, עכ"ל. ובתשובת, "יד אליהו", הובא בפתחי תשובה (שם) שזה אמור, כאשר יש למת כל צרכו, אבל באין לו כל צרכו, פשיטא שצריך ללוותו עד קברו, וראה בשו"ע (יו"ד שמ"ג, ס"א): מת בעיר כל בני העיר אסורין במלאכה, שכל הרואה מת ואינו מלווהו עד שיחא לו כל צרכו, בר נדי הוא, ע"כ. ולפי"ז כיון שכל הצבור אומרים קדיש, אם ישנם יחידים שאין אומרים קדיש הם בבחינת לועג לרש וכאילו בונים למתים, וצריכים לחשוש לחומר איסור זה.

(ה) גמילות חסד של אמת

והנה יסוד המצווה בטיפול במתים ואמירת קדיש בכלל הוה, שרשו במצוות גמילות חסדים הכללית, והרמב"ם (הל' אבל פ"ד, הלכה א') כותב: מצות עשה של דבריהם לבקר חולים ולנחם אבלים ולהוציא המת וכו', לשאת על הכתף וללכת לפניו לספוד וכו', ואלה הם גמילות חסדים בגופו שאין להם שעור, ואע"פ שכל מצוות אלו מדבריהם—הרי הן בכלל, "ואהבת לרעך כמוך", כל הדברים שאתה רוצה שיעשו לך אותם אחרים, עשה אתה אותם לאחרך בתורה ובמצוות, ע"כ. וראה בשו"ע (יו"ד סי'

שד"מ, סעי' א') הכותב: מצוה גדולה להספיד על המת כראוי. וכן ביו"ד (שס"א, סעי' א'): מבטלין תלמוד תורה לצורך המת, ועוד.

וראה כמה גדולה מצוות גמ"ח, שהרי מצוה לעמוד מפני נושאי המטה כפי שנפסק בש"ע (יו"ד שס"א, סעי' ד') והט"ז (שם סק"ב) כתב בזה"ל: צריך לעמוד מפניו, פירוש מפני העוסקין עמו, שהם גומלי חסדים. וכן הוא בטור בשם הירושלמי: אילין דקיימי מקמי מיתא, לא קיימי מקמי מיתא, אלא מקמי אילין דגומלין חסד, וכו'.

איברא, בערוך השולחן (יו"ד שס"א, סעי' א') חולק על הט"ז וכתב בזה"ל: ולענ"ד נראה דכוונת הירושלמי דגם מפני המלוים יש לעמוד, והא דאמר לא קיימי אלא וכו' הכי פירוש, לא קיימי מפני המת בלבד אלא גם מפני המלוים עכ"ל. והגאון חיד"א בברכי יוסף (יו"ד ה' מילה סי' רס"ה סק"ב) חיוק דברי הט"ז ומפרש דכך משתמע מהירושלמי.

בכל אופן, ברור כמ"ש הרמב"ם שנוכר לעיל שענינים הללו שרשם במצות „ואהבת לרעך כמוך“, שהיא מקור המצוה של גמ"ח. ומצאתי אסמכתא מפורשת לכך בגמ' (סוכה מ"ט ע"ב): גמ"ח בין בגופו ובין בממונו, גמ"ח בין לחיים ובין למתים, הרי שהטובה שמטיבים עם הנפטרים שייך למצות גמ"ח הכללית, שמקורה במצות „ואהבת לרעך כמוך“, ורש"י בד"ה גמילות חסדים מפרש: „כגון מספיד למת, נושא, קוברו, משמח חתן, מלוה חבירו בדרך" עכ"ל, הרי מתחיל במצות גמ"ח דוקא במתים, ורק אח"כ מעביר מצוה זו לחיים, וידוע גם פירושו לחומש ריש פרשת ויחי: „חסד של אמת, שאינו מצפה לתשלום שכר“, כלומר: זה הוא החסד האמיתי שעושים עם הנפטרים, כיון שאין שום חישוב אישי לקבל ממנו תמורה, ועושים אך ורק לשם מצות עשית חסד, ודי בזה להתבונן בגודל יקרת ערך אמירת קדיש אפילו עבור נפטר שאיננו קרוב משפחה.

ולכן ברור לנו, שאין לשום איש מישראל די בכל אתר ואתר, להמנע מעשיית חסד עם המתים, ועליו להשתתף באמירת קדיש לזכרון המתים ועילוי נשמותיהם.

סימן כמ

אם מותר לקבל צדקה מרשעי עכו"ם

נשאלתי מאיזה פליטי חרב, בני תורה, אם מותר להם לקבל הכסף שנותנת ממשלת גרמני, בתור פרעון לאלה ששללו מהם את כספם ורכושם בימי הרצח ואבדון.

והנה בשאלה זו כבר דנו כמה רבנים גדולי תורה מהפליטים וכן נתעוררה השאלה זו באסיפת אגודת ישראל בירושלים, בכל זה לא אמנע מלהביע דעתי עני' בזה.

וזה מה שהשבתי להם.

הנה האוסרים סמכו את עצמם על דברי הרמב"ם ס"פ י"ב מהלכ' רוצח שכתב שם, ואסור להשיא עצה טובה לעובד כוכבים או לעבד רשע, ואפילו להשיאו עצה שיעשה דבר מצוה והוא עומד ברשעו אסור, ולא נתנסה דניאל אלא שהשיא עצה לנבוכדנצר

ליתן צדקה, שנאמר להו מלכא מלכי ישפר עלך עכ"ד. ומקור לדבריו זה ממעשה דהורדות ב"ב דף ד' שהשיא לו בבא בן בוטא עצה לבנות את ביהמק"ד ופריך שם היכי עבד הכי והא אמר וכו' מפני מה נענש דניאל מפני שהשיא עצה וכו' ומתרץ שאני עבד דאיתא במצות ואי בעית אימא שאני בית המקדש דאי לאו מלכות לא מתבני, א"כ באופן אחר אסור לקבל צדקה מרשעים.

ולענ"ד דהא דאסור לקבל מעות צדקה מעכו"ם רשעים, זה דוקא ממנום, משום דאז יש להם מצוה וזכות בנתינתם הצדקה, אבל לקבל מהם המעות שגזלו מישראל, אין איסור בזה, דאין להם זכות מה שמחזירין הגזילה שגזלו מישראל, דבגמ' עירובין דף ס"ב בהא דקאמר שם דבן נח נהרג על פחות מש"פ ולא ניתן להשבון פירש רש"י הטעם משום דבישראל כתיב והשיב את הגזילה אבל לא בבן נח, הלכך נהרג ואינו משלם וכן בסנהדרין דף נ"ז ע"א פירש רש"י וז"ל דכותי דלאו בר השבון הוא שכל דיני למיתה לא נפיק פחות משה פרוטה מכלל פרוטה ואפילו מישראל דמחיל ליה בתר הכי עכ"ל. וכן הוא בגמ' ע"ז דף ע"ב וכיון שאין מקיימים בהשבתן המצוה של והשיב וכו' ואין להם בזה שום זכות, מותר לקבל מהם הכסף שגזלו. לכאורה משמע מדניאל הנ"ל דאף בכה"ג אסור לקבל מהם הכסף, דהא נבוכדנצר שלל כלי בית האלקים ויביאם ארץ שנער בית אלהיו ואת הכלים הביא בית אוצר אלהיו כמבואר בקרא שם, ואם כהנ"ל לא חטא דניאל מה שהשיא לנבוכדנצר ליתן צדקה דהא נתן חילוף כספם וזהבם של ישראל ששלל מהם, אבל זה נחא לפי מה שפירש רש"י בע"ז דף נ"ב ע"ב על הקרא, ובאו פריצים וחללו וכו', וכיון שנכנסו עכו"ם להיכל יצאו הכלים לחולין וכיון שנפקו לחולין קנינהו בהפקרא עכ"ל. א"כ קנינהו הכסף הזה ונעשה שלו, ומה שדניאל השיאו ליתן צדקה הו' ידיה ממש, משו"ה נענש על זה.

ואין לומר דכיון דעכו"ם לאו בר השבון הוא דבישראל כתיב והשיב אבל לא בבן נח, כנ"ל. ואם הוא מחזיר הדמים שגזל מישראל הוי כמו שנותן לו מכספו ממש, ויש לעכו"ם בזה זכות ואסור, דזה אינו דמי שגזל ממון חבירו, יש בזה שני דברים. שיעובר על הלאו דלא תגזול, וגם שיש תחת ידו

ממון חבירו, וישראל שגול ממון חבירו אמרה תורה, והשיב את הגזילה, ובזה יקיים תרתי, שיתקן בזה הלאו דלא תגזול שעבר, וגם ימסור הממון ליד בעליהם, אבל בעכו"ם שגול לא אמרה התורה והשיב וכו' שיתקן בזה הלאו שעבר לגבי רחמנא, אבל הוא חייב להחזיר ממון אחד שיש תחת ידו, דהא בן נח חייב בגול שהוא אחד מו' מצוות שלו, כמבואר בסנהדרין דף נ"ו וכיון שחייב להחזיר ממון אחרים שיש תחת ידו, וכשהחזיר אין לו שום זכות בזה דהא מדינא הוא חייב לעשות זה, ובזה יש לי ליישב דברי רש"י הנראה לכאורה כסותרים זה את זה, דבעירובין דף ס"ב בהא דבן נח נהרג על פחות משהו פרוטה, פירש רש"י משום דבישראל כתיב והשיב את הגזילה אבל לא בבן נח הלכך נהרג ואינו משלם עכ"ד. משמע שסובר שגם בגול פרוטה אין עכו"ם חייב בהשבה משום שנהרג וקם ליה מדרבה מיניה (ועיין בקצוה"ח בחו"מ סימן שפ"ה שגם הוא מפרש דברי רש"י הנ"ל דפטור משום דקם ליה מדרבה מיניה) ובגמ' ע"ז בדף ע"ב בן נח נהרג על פחות משהו פרוטה ולא ניתן להשבון, פריך ואי אמרת משיכה בעכו"ם אינה קונה אמאי נהרג, ומתרץ משום דצערדיה לישראל, ופריך מסיפא בא חבירו (עכו"ם) ונטלה ממנו (מן הראשון) נהרג עליו, בשלמא רישא משום דצערדיה לישראל אלא בסיפא מאי עבד, (השני לראשון כמהו) אלא ש"מ משיכה בעכו"ם קונה, פירש רש"י הלכך קניה קמא והדר קניה האי ונהרג עליו על שגול ולא ניתן להשבון דרישא דוקא פחות משהו פרוטה דישראל מחיל ולא מחייב עכו"ם לאהדורה עכ"ד. משמע מזה דסובר דבגול פרוטה גם עכו"ם מחויב להחזיר זה לישראל וקשה דבריו זה על זה.

והנה אינו ברור בדעת רש"י אם יש בעכו"ם הדין דקם מדרבה מיניה, דהתוס' בע"ז הנ"ל בד"ה בן נח וכו' כותבים דדעת רש"י דהטעם דלא ניתן להשבון משום דקם מדרבה מיניה, והקשו דא"כ לא יתחייב העכו"ם לשלם בשום ענין, (כוונתם אף אם גזל פרוטה), לכאורה מלשונו שם בעירובין "הלכך נהרג ואינו משלם" משמע שסובר דיש בעכו"ם הדין דקם מדרבה מיניה, אבל מה שכתב בעירובין שם וז"ל: דבישראל כתיב והשיב וכו' אבל לא בבן נח וכן כתב זה בסנהדרין הנ"ל משמע שדעתו שאף במקום שמחויב מיתה דהא הוזהרתן זו מיתתן, בכל זה הוא פטור מלהשיב הגזילה משום דלא נאמר

והשיב וכו'. ואם נאמר דסובר דיש בעכו"ם הדין דקם ליה מדרבה מיניה, יש ליישב דבריו הנ"ל על פי מה שכתב בעצמו בגמ' ב"מ דף צ"א על הא דאמר רבא אתנן אסרה תורה ואפילו בא על אמו, ופירש שם בלשונו הראשון וז"ל: דאע"ג דאי תבעה מיניה לקמן בדינא לא מחייבין ליה דקם ליה מדרבה מיניה, כי נתן הוי אתנן שאין לנו כח לכופו אבל הוא חייב לצאת ידי שמים, ועוד פירש וז"ל: דאי נמי אם תפיס לא מפקינן מיניה, והנפקא מיניה בין שני הפירושים אלה, דאי החיוב הוא משום כדי לצאת ידי שמים ואם תפיס השני וקדיש אשה והנפקא אומר שאין אני רוצה לצאת ידי שמים ואין אני נותן לו הכסף ברצון טוב, אז אין הקידושין של השני קידושין באשה זו, אבל לפי פירוש השני דאיתפיס לא מפקינן מיניה אז מדינא הוא מחויב להחזיר הכסף לבעליו אף שיש עליו חיוב מיתה אלא שאין לנו כח המשפט בזה להוציאם מידו, ואם קידש אשה בהכסף שתפס הוי קידושין מן התורה, א"כ יש לומר דמה שפירש רש"י בהג"ל דבעכו"ם בגול פרוטה הוא מחויב להשיב כנ"ל, ואף דקם מדרבה מיניה, זה לפירוש השני הנ"ל שבאמת חייב להחזיר הכסף מדינא, אף במקום מיתה, ואף שאינו מקיים בזה שהשיב שום תיקון בהלאו כנ"ל אבל כיון שיש כסף גזל תחת ידו מצד הדין מחויב להחזיר, וזה ניחא דבריו הנ"ל דדוקא בפחות פרוטה הוא פטור להחזיר לישראל משום דמחיל ליה אבל בפרוטה שזה ממון אף לגבי ישראל, הוא מחויב להחזירו, והא דמשמע מדבריו בעירובין וע"ז שגם בפרוטה פטור עכו"ם להחזיר לישראל, זה לפי פירושו הראשון דהטעם הוא שחייב כי אם כדי לצאת ידי שמים, ובעכו"ם לא שייך זה, ופטור לגמרי במקום מיתה שהוזהרתן זו מיתתן, וק"ל. ואם נאמר שדעת רש"י דבעכו"ם אין לו הדין דקם מדרבה מיניה ניחא גם כן דבריו הנ"ל ואינם סותרים זה לזה, דבאמת הוא מחויב להשיב הגזילה שתחת ידו, כנ"ל. דבאמת אין מתקן הלאו בהשבתו זה, אבל מחויב להחזיר הגזילה כנ"ל, וזה דוקא אם הוא פרוטה לפחות אבל פחות מפרוטה הוא מחויב להחזיר כי אם לחבירו עכו"ם שלגבי ידיה זה ממון אבל ישראל מחיל לו כנ"ל בפחות מפרוטה, וזה נכון.

והנה על פירוש רש"י בטעם השני דאי תפיס לא מפקינן מיניה דמצד דיני בני אדם מחייבין

ובפני הבית דכן הוא הדין שקנה בדמים במחירת והוי כמו (שהתראה בזה) משום הכי לא קיבל רבא מה שהחזיר והוי וכו'. אבל בעכו"ם בשעה שאין עושין החומרא הוא מחויב לשלם ואף אם נאמר בו ג"כ הדין דקם מדרבה מיניה כנ"ל, וזה ברור ופשוט. ובדנן הנ"ל אף אם אמרינן בעכו"ם קם ליה מדרבה מיניה, וגם אי נימא כפירוש ראשון בלשוננו הראשון דהחויב להחזיר הוא משום לצאת ידי שמים, ואין אומרים זה בנכרי, בכל זה הרשעים האלה מחויבין להחזיר כנ"ל. ועוד אין אנו פוסקים כרב דאף בבעין קנה, דכן הוא ברמב"ם דדוקא שנשבר פטור ולא כשהגזילה בעין. וכן הוא ברמ"א בחו"מ בסימן שנ"א. והם שללו מהיהודים כל הבתים וקרקעות שלהם, והם בעין וחייבים להחזירם לכו"ע או ליתן דמיהן. ולפי מה שכתבתי לעיל בתשובה שממון אחרים לא בטל, וזה דין תורה הווי כל הממון שגולו מישאל עדין בעין וחייבים להחזירם, ע"כ אין חשש כלום לטול מהרשעים אלה דמי פרעון ממה שלקחו וגולו מישאל. ואין להאריך בזה בפלפולים, דלענ"ד שאין בזה חשש איסור.

שלמה יצחק לעווין

לו להחזיר אף דקם ליה מדרבה מיניה הקשה הגאון טו"א בחגיגה באבני שוהם שם מהא דסנהדרין דף פ"ז ע"ב בוקן ממרא בפלוגתא דרבי וחכמים במתכוין להרוג את זה והרג את זה לרבי חייב לשלם דהא פטור ממיתה ואם קידש אשה בממון שתפסו היורשין דהרוג, הווי קידושין גמורין וכו'. אבל רבנן דקם מדרבה מיניה, אף בהרג בלא כוונה, אם קידש בממון שתפסו אין קדושו קידושין. עיין רש"י שם. ואם כהנ"ל דמהני תפיסה בדיני אדם, אף שאין יכולין לכפו ע"י ב"ד, הא גם לרבנן צריך להיות מקודשת. וראיתי בקצוה"ח בחו"מ סימן כ"ח שהקשה גם כן על פירוש רש"י בטעם השני הנ"ל דמהני תפיסה אף בקם מדרבה מיניה, וזה מצד הדין, מהא דהקשו התוס' בב"מ הנ"ל ובסנהדרין שם לפי פירוש רש"י בלשוננו הראשון, דהחויב הוא משום לצאת ידי שמים, א"כ קשה מהא דסנהדרין דף ע' ע"א רבא איגנוב ליה דיכרי במחירת אהדרינהו לו ולא קבל הואיל ואמר רב דברמים קנינהו, ואמאי לא קבל הא הם מחויבים להחזיר כדי לצאת ידי שמים. ותירצו, שהם חשבו שצריכין להשיב בצד הדין משום זה לא קיבל ואם לפירוש רש"י בטעם השני שאם תפס לא מפקין מיניה, וחייב להחזיר מצד דיני בני אדם, חזרה קושית התוס' ואמאי לא קבל כיון שהיה הגזילה בידו.

והנה הקצוה"ח שם הביא דברי מהרש"ל דכתב דהא דאמרינן דאי תפס לא מפקין מיניה, זה שאין עושין החומרא כגון בשוגג או בזמן הזה, אבל כשעושין החומרא הוא פטור ואף אם תפס מפקין מיניה, וממילא לא קשה גם קושית הטו"א הנ"ל דהתם בוקן ממרא דמיירי בזמן שבית דין עושין החומרא דמיתה בזמן זה לרבנן אין קידושין. ורש"י מיירי בזמן שאין עושין החומרא ואז אם תפס לא מפקין מיניה ואם קידש בזה הווי קידושין, כנ"ל. ובזה מתורץ מה שראיתי בספר שו"ת מהרי"ל דיסקין מהגאון מאור הגולה אב"ד דירושלים עיה"ק זצ"ל, במכתבו לאביו הגאון זצ"ל הקשה חו"ל בקונטרס אחרון סימן ז' ועתה נפל ברעיוני קושיא חמורא, לרב דס"ל דבדמים קונה אף חפץ מסוים א"כ עכו"ם שגול קנה, דעכו"ם נהרג על פחות משה פרוטה, ובכמה משניות מבואר דלא קנה, כתב דאולי לא שייך בעכו"ם הדין דקם מדרבה מיניה. ולפי המהרש"ל הנ"ל ניחא, דלא דמי להא דרב הנ"ל בדין מחירת דהתם הווי כמו מויד

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