

THE WEIGHT OF KNOWLEDGE:
An Analysis of the work of Rabbi Eliezer Waldenberg
on the Social and Moral Responsibility of the Physician to the
Patient and Society

Kathy S. Schwartz

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Hebrew Union College-Jewish Institute of Religion

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Referee -- Dr. Mark Washofsky

To my grandmother, Bella Schwartz Kluger,
whose deep love for and commitment to
God and Judaism have been for me
an unending source of
inspiration.

יהושע בן פרחיה אומר:

עשה לך רב
וקנה לך חבר
והוי' דו אחד כל האדם לכר זכות

Throughout my years of formal schooling, I have met very few people who have been a teacher, a friend, and a role model simultaneously. It is with appreciation for his intellectual gifts, his caring personality and his unique ability to see merit in all, that I feel confident in applying this maxim to Dr. Mark Washofsky. I thank him not only for being an excellent advisor, but for being a friend and a rabbi in the deepest sense of the word.

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DIGEST

Though Exodus 15:26 clearly states that it is God who heals the sick, Jewish tradition has always permitted physicians to serve as God's instrument in this matter. As such a corpus of law developed discussing the rights and responsibilities of those individuals who chose to pursue the study of the inexact science of medicine. The knowledge and competence of the physician could be a matter of life or death for the community which he served. The physician was bound to become a source of controversy when his medical judgements were not sufficient to save the life of the patient. In order to protect both the physician and the patient, *halachic* clarifications on the role of the physician were essential.

In Joseph's Caro's Shulchan Arukh, Yoreh Deah 336 the laws concerning physicians and medicine are presented. They are slightly expanded upon in the Arokh HaShulchan, Yoreh Deah 336, but with controversies continually surrounding medical practitioners in our day more comprehensive discussions are necessary. Rabbi Eliezer Waldenberg, one of the most prolific authors of responsa in our day and considered by many to be the leading authority on Jewish medical law, has composed theoretical treatises as well as specific responsa on questions regarding the social and moral responsibilities of the physician.

I have examined the works of Rabbi Waldenberg as they relate to the above mentioned texts in the *Shulchan Arukh* and the *Arokh HaShulchan*. The specific topics covered include the physician's right and responsibility to engage in the act of healing, reimbursement for the physician's services, questions involving malpractice, and problems surrounding medical

confidentiality. In addition to providing a detailed summary of each of the appropriate texts, I have presented an analysis of how Waldenberg uses the traditional sources to conceptualize and justify his positions. In the last chapter I explore the validity of this approach for the modern Reform Jew.

CHAPTER ONE IN THE BEGINNING . . .

Greek mythology records that Atlas was to bear the weight of the world on his shoulders as a punishment for his sins. The weight was great, and as such, the punishment was one of physical dimensions. Yet more than merely retribution for actions taken, this demand of the Greek gods may be understood as a tool of instruction. Through the performance of this overwhelming task, Atlas was to learn the nature of responsibility and obligation. If he simply shrugged, disaster would result. A task had been given to him, it was to bear the weight of the world. His unique situation obliged him to fulfill a responsibility that appeared greater than his abilities. It would require great forbearance and commitment.

From this ancient Greek myth our society has come to understand the implications of the phrase "to bear the weight of the world on your shoulders." There are certain leaders in our era who have the power to end all life on the planet. Their positions require of them the greatest possible maturity and patience. When life and death are the cards with which one deals, one must shuffle carefully and with great skill. Though the world's most important political leaders hold our fate, as a world community, in their hands; there are other professionals, such as the physician, who often control our destiny as individuals. Certainly the weight of responsibility which the physician must bear is in some ways as great as the weight of the world borne by Atlas.

According to the Jewish tradition, it is by virtue of his knowledge that the physician is required to perform acts of healing. Once he has

received adequate training in the art of medicine, there is no shrinking from the obligation of treating the ill. Fear that the patient may die as a result of, or despite the treatment is not grounds for the physician to withhold his medical expertise. The physician is obliged to make life and death decisions by virtue of his specialized education. At times the physician's knowledge serves him as a welcome anchor in a rough sea; at times it appears to be as burdensome as carrying the weight of the world on one's shoulders.

This dichotomy leads to questions of an ethical-legal nature when one considers the role of the physician in society and his obligations before God and the patient in Jewish tradition. Does the physician have the right to refuse treatment to a patient? Is the physician obligated to endanger himself in order to aid a patient? May the physician require an exorbitant salary in exchange for his services? If the patient dies while under treatment is the physician to be blamed? What should the physician do when he is faced with the conflict of fulfilling a time bound commandment during a time when his medical expertise is required? When is the physician permitted to reveal a medical confidence? Perhaps most significantly, the theological issues pertaining to the role of the physician must be addressed. If God is omnipotent and caring, why do humans need to engage physicians? Should pious Jews be permitted to take advantage of the discoveries of modern medicine? How do we know that we are not frustrating the will of God by engaging in the science of medicine?

Every comprehensive religious, philosophical or legal system must respond to these dilemmas. The Jewish legal tradition has struggled with these questions for many centuries. Since Nachmanides' treatise on medical ethics (פְּרִקַּת הָאֲדָמָה) in the twelfth century until the present day, halachic scholars have debated and critically refined their responses to these all-

important questions. In our era the most prolific and authoritative halachic scholar in this field, R. Eliezer Waldenberg, has provided his followers with both a theoretical treatise as well as practical responsa to the challenges raised above.

Rabbi Eliezer Yehuda Waldenberg serves as the chief judge of the Rabbinical District Court of Jerusalem. He is the author of sixteen volumes of responsa, approximately fifteen percent of which deal with questions of Jewish medical law. Additionally he has published halachic texts regarding the laws of war and the Israeli army, governmental policies, sea travel and shipping on the Sabbath and the nature of legal punishment in the modern era. Among his co-religionists, he is highly respected for the depth and breadth of his knowledge. The recipient of many awards for his scholarship and contributions to the halachic lifestyle, Waldenberg is recognized among his followers as one of the most important halachic authorities of our day. His opinions and suggestions are highly regarded by his colleagues and their communities. In the field of medical ethics, Waldenberg is among a handful of authoritative halachists.*

It is most logical, therefore, that if one desired to respond to the everchanging dilemmas of bioethics in our day from within the defined, though often debated, Jewish tradition, one would first turn to Waldenberg. Waldenberg's composition of a theoretical treatise as well as practical responsa on these issues allows the reader to better understand the preconceptions and the direction with which he responds to the questions. A careful reading of this material allows one to understand and evaluate the methodology which Waldenberg employs. As a halachic scholar, Waldenberg

* The above material is taken from Avraham Steinberg, Jewish Medical Law, (Jerusalem), 1980, pp. 18-20

is bound by his understanding of the Jewish legal process. As we examine his material, we will need to ask if his loyalty to the halachic system inhibits his own ethical moment. Does Waldenberg truly believe that halacha consistently represents the highest ethical response?

It is, perhaps, legitimate at this point to inquire as to why a Reform Jew should be interested in the halachic minutiae concerning the role of the physician. After all, Reform Jews are not bound by the halachic process; we believe that our minds are free to consider the highest ethical position. Of what significance is modern *pilpul* to the liberal, enlightened, Western mind? Certainly the answer to this question will differ for each Reform Jew, but I do believe that it is fair to suggest that for many Reform Jews plagued by these questions, the Jewish tradition can be viewed as a treasure-trove of thoughtful responses. If our minds can be stretched to see these dilemmas in a new light, to consider a form of response which was previously unknown or ignored, then the intellectual effort will prove worthwhile. Despite the fact that we no longer accept halacha as eternally and presently binding, we recognize that Jewish tradition can often provide well developed and thoughtful guidance to the most difficult questions that the human must confront.

Each of us will one day take on the role of patient; we will be forced to enter into the physician-patient relationship. It is an encounter unlike any other. Rarely do we place our very lives into the hands of another. We expect and deserve only the highest quality of care. We demand that the physician be completely immersed in our medical problems. Upon a successful recovery we secretly place the physician at the right hand of God; in the case of continued illness we quietly curse the physician as incompetent or negligent. From the physician we expect nothing less than

Godlike perfection. Clearly, we are bound to be disappointed. In order to protect both the physician and the patient, some ground rules must be established. Through halacha, Waldenberg seeks to do this. If, as Reform Jews, we find Waldenberg's approach to be untenable, it will become our responsibility, for the sake of communal peace, to develop an acceptable approach to the dilemmas presented above.

The next four chapters will present detailed summaries and short analyses of the relevant material extant in Waldenberg's theoretical treatise, *Ramat Rachel*, and his many volumes of responsa, *Tsitz Eliezer*. The last chapter of this work will address the manner in which this material may be applied within a more liberal Jewish context. In order to provide the reader with an understanding of the basic rabbinic approach to these issues, the relevant material from Joseph Karo's *Shulchan Arukh* will be presented in the appendix.

CHAPTER TWO HEAL, WHO SHALL SURELY HEAL?

For Jews of today it is a forgone conclusion that the physician and the patient have the right and the moral obligation to engage in the science of medicine. To some, medicine appears to be a Jewish occupation if not a Jewish preoccupation. "My son, the doctor," is more than just the traditional Jewish parent's dream - it is symbolic of the fact that the practice of medicine is not only an accepted, but an extremely respected and coveted profession. To the modern Jew the very idea that perhaps on religious grounds the practice of medicine is of dubious moral standing is heresy. "Christian Scientists we are not!" would be the commonplace response. As such, it may come as a shock to the Jew of the twentieth century to discover that our sages struggled over the question of whether or not the physician, by the nature of the profession, was arrogantly assuming a role that only God could fulfill. It may be possible to understand legitimately the Biblical texts referring to the physician and God's role in the process of healing as stating that the practice of medicine is outside of the human realm. Our liturgy instructs that God is the faithful healer. Perhaps illness is a sign of God's displeasure with a particular person or community. If so, how could the rabbis justify human intervention in God's business? If such rationalization can be presented, does this give the physician carte blanche to practice medicine in all situations?

This chapter will explore the various theoretical and practical responses which arise when one considers the role of the physician vis-a-vis God. The passages from Waldenberg's theoretical treatise *Ramat Rachel* seek to explicate the theological and textual problems which must be

confronted when one attempts to understand the role of the physician in traditional Jewish circles. After establishing that medicine is an accepted profession, Waldenberg argues that it is in fact a divinely ordained command. He seeks to prove that the physician is Toraitically obligated to engage in the science of healing. In his responsa germane to the topic, Waldenberg clarifies the obligation of the physician to endanger himself on behalf of patients as well as the patient's responsibility to seek medical aid. He also addresses the conflict which is likely to arise between the physician's medical and religious obligations (e.g. breaking the laws of Sabbath in order to treat a patient) as well as the question of whether or not the physician may perform unnecessary elective surgery. Detailed and slightly annotated summaries of Waldenberg's thoughts on these subjects follow.

SECTION 1: "The Faithful Healer"

RAMAT RACHEL • 1

Arokh Hashulchan 336a: ... One should be cautious in his actions especially during a time of illness. He should not rely on the physicians alone as it is written (2 Chronicles 16:12) regarding Asa, "In his illness, he sought not God, only the physicians."

A) Waldenberg comments that the language of the *Arokh Hashulchan* is not precise regarding this matter. From his wording, one may erroneously assume that it is permissible to rely equally on physicians and God. This is forbidden; it is prohibited to have faith in sources other than God. One should have complete trust and faith in God. The physician and his cures

should be thought of as emissaries of God. Their purpose has been previously designated by the Creator. A proof-text for this concept of medical predestination is brought from Avodah Zarah 55a. "At the time when afflictions are sent to man an oath is imposed upon them, 'you shall not come upon him except on such and such a day, and at such and such an hour, and through the medium of so and so, and through such and such a remedy.'"

Not only is the language imprecise, but the verse itself is quoted incorrectly. In 2 Chronicles 16:12 the verse referring to Asa reads "וַיִּשְׁכַּח אֲשָׁרָא" physicians" rather than "וַיִּשְׁכַּח אֲשָׁרָא" as the *Arokh Hashulchan* transmitted. Waldenberg suggests that this faulty transcription may be the source of Epstein's misunderstanding of the verse. If one reads וַיִּשְׁכַּח in place of וַיִּשְׁכַּח, one may conclude that Asa's guilt was associated with the fact that he relied solely on the physicians. Waldenberg avers that the word וַיִּשְׁכַּח does not allow the verse to be interpreted in this way. He understands וַיִּשְׁכַּח to imply that Asa viewed the physician as an independent factor in his sought after recovery even though he also relied on the righteousness of God. The proper attitude is to trust in God alone, accepting that his faithful emissaries (i.e. the physicians) will execute His will.

In *Hovat HaLevavot* a similar explanation is provided. Asa's transgression stems from the fact that he placed another of God's creatures on the same level as God. Asa's sin was not that he trusted in physicians alone, rather it was that he did not request help solely from God. He viewed the physician as an independent source of help. *Hovat HaLevavot* opines that

* Rabbi I. Epstein (ed.) Hebrew /English Edition of the Babylonian Talmud, London: Soncino Press 1964, (translation by A. Cohen)

one must trust in God alone. When this trust is divided among His creatures, one's faith in God decreases. This, of course, is unacceptable

B) RAMBAN, in his commentary on Leviticus 26:11 remarks that Asa's transgression was that he requested human medical help at all. RAMBAN comments "when Israel is in perfect [accord with God], constituting a large number, their affairs are not conducted at all by the natural order of things, neither in connection with themselves, nor with reference to their Land, neither collectively nor individually, for God blesses their bread and their water, and removes sickness from their midst, so that they do not need a physician and do not have to observe any of the rules of medicine, just as He said, 'for I am the Eternal that healeth thee (Exodus 15:26)'. And so did the righteous ones act at the time when prophecy [existed], so that even if a mishap of iniquity overtook them, causing them sickness, they did not turn to the physicians but only to the prophets." RAMBAN continues specifying that this was Asa's sin. "Scripture states, 'Yet in his disease he sought not God, but only physicians.' Now had the practice of [consulting] physicians been customary among them, why should the verse mention [as a sinful act, Asa's consulting] the physicians, since his guilt was only because he did not [also] seek God? But the verse can be compared to someone saying: 'That person did not eat unleavened bread on the Festival of Passover, but instead ate leavened bread'." For he who seeks the Eternal through a prophet, will not consult the physicians. What part do the physicians have among those who do the will of God? We have been assured that, 'He will bless thy bread, and thy water, and I will take sickness away from the midst of thee (Exodus

* The intent of the statement is that he transgressed two commandments - the negative commandment of not eating leaven and the positive commandment of eating matzah. Likewise Asa not only sinned by not seeking God but also by pursuing medical help.

23:25),⁷ whereas the physicians are concerned [mostly] with food and drink, warning [the patient] against [eating] certain foods and commanding him to eat others."⁸

One could read *Hovat Halevavot* likewise, but the contextual meaning implies that Asa's transgression was not that he sought medical help, for the Torah permits this, rather that he held physicians to be equal partners with God - not emissaries of God. This attitude lessens one's faith in God. Thus King Hezekiah hid the medical books when the public began to place more faith in them than in God. This incident is further explained in the responsa of RASHBA.

Ibn Ezra interprets the verse about Asa similarly to RAMBAN. On Exodus 23:25 he comments that "one who observes the commandments has no need for physicians. Therefore Scripture states, 'Yet in his disease he sought not to the Eternal but to the physicians.'" Despite the greatness of Asa's piety, this slight deviance in his trust in God is noted.

There appears to be no support for Epstein's claim that Asa's transgression was that he relied solely on physicians, the verse deals with his seeking medical help in general. At any rate, Asa erred in believing that physicians were an independent source of healing. Waldenberg avers that one should have full faith in God, understanding that physicians can only practice medicine with Divine permission.

C) RAMBAM in his commentary on the Mishnah on tractate Pesachim 56a remarks that in the same manner in which one praises God for creating food and satisfying hunger, so one praises God for creating medical help and curing illness. This should be central in one's thoughts even while receiving

⁷Ramban, Commentary on the Torah, New York: Shilo, 1973 (translation by Charles Chavel), Volume iii, p.459ff

medical aid. Many sources agree that when one seeks medical treatment it should be as a sign of faith in God's creation. One should think that "perhaps such and such a person and such and such a drug was designated to provide treatment at this time" (*Ma'avar Yabok*, Helek Korban, Taanit 85)

D) In both the *Zohar* and *Ma'avar Yabok* a relationship between wealth and illness is suggested. Both aver that once the wealthy have used their resources to fulfill the needs of the less fortunate, they will be subject to a Divine Healing. As is explained in Baba Batra 10a, a person's fortunes and deficits are decreed at the beginning of the year.

E) *Matteh Moshe* clearly states that a person should seek medical help for both internal and external wounds.

Sefer Tasbetz Katan relates a midrash concerning the origins of the medical book which King Hezekiah hid. In addition to all the animals and Noah's family, there were demons flying around the ark. The combination of the demons and the foul odor caused almost everyone to fall ill. Finally an angel came and took one of Noah's sons to the Garden of Eden. There, he was taught the secrets of medicine and recorded them in a book. This was the medical book of King Hezekiah.

A similar reference to Noah and the origins of medicine can be found in the medical book of Asaf the physician.

This midrash points out that the sages accounted the origins of medicine to the Garden of Eden. God, in great compassion, directly instructed humanity in the ways of medicine. When Hezekiah hid the book, the basics of medicine were not uprooted from the world for they had already been taught to humanity. Rather he hid it so that human beings would not learn all of the fine details of medicine which were contained in

the book and thus believe that they no longer needed to trust in God as the faithful Healer.

In short, when one falls ill, he should put his full trust directly in God, the Healer of all flesh, repenting both on account of his illness (praying the God will not punish without cause and reflecting on the words of Ramban on Parashat B'chukotai 'a gateway not open to commandments is open to medicine') and on account of the necessity of making use of physicians and their medicants "for the true healing is brought by seeking after the Compassionate One to send a Divine Healing. As it is written, 'as I have smitten, so I will heal.'" But humanity is not so meritorious and must therefore rely on human medical intervention.

RAMAT RACHEL #20

Arokh Hashulchan 336a It is written (Ex. 21.19) "and heal, he shall surely heal." From this passage we derive that the Torah permits the physician to practice medicine (see Baba Kama 85a). That is to say, that the physician should not abscond from his responsibility by declaring that since medical science is inexact he may err (and thus harm his patient). For this reason the Torah gives permission to the physician to practice his chosen profession.

1. There is another reason brought as well by Nahmanides in *Torat Haadam* and the *TUR*- the Torah specifically permits the physician to practice medicine lest he conclude that when God smites a human, the physician has no right to interfere and attempt to restore the patient's health. The physician may erroneously assume that it is not consonant

with human nature to engage in the art of healing even though it has become customary. The straight forward interpretation of 2 Chronicles 16:12 would seem to support this position. "In his illness he (King Asa) did not seek the Lord, but relied upon physicians." In order to prevent the logical, but incorrect, reading of this verse (i.e. that God condemns those who seek medical help), the Torah specifically grants permission to the physician to heal. This is the reason cited by RASHI in his comment on Baba Kama 85a - "permission was given to the physicians to practice medicine so that it can not be said 'that which God smites, He will heal.'" The Tosafot reason likewise but on a different level. They point out that the verse ("and heal, he shall surely heal") employs the word "heal" twice. This appears to be an unnecessary repetition, for if the verse contained the word "heal" only once we would still be able to conclude that physicians are granted license to heal. The Tosafot opine that this verse refers to two different types of wounds that require medical attention - those inflicted by humans and those which are the result of God's will. In order to prevent one from assuming that it is permissible to seek medical attention for those wounds caused by humans but not for those which are the apparent will of God, the verse uses the word "heal" twice - implying that both types of illness may be treated by the physician. It may appear that the physician is frustrating the will of Heaven with his actions but this is not the case.

2. From RAMBAN's reasoning, we may deduce that were it not for the midrash on Exodus 21:19, not only the physician might assume that the practice of medicine was presumptuous, but also the patient, on the basis of this verse, may fear that seeking medical help was contrary to God's will. Thus, the verse "and heal, he shall surely heal" employs the verb

"heal" twice in order to indicate that the physician has the right to heal and the patient has the right to be healed.

This interpretation is supported by a passage in B'rachot 60a which discusses the blessing one should say when about to have blood drawn. Though Rav Aha maintains that the patient's prayer should include the phrase "for it is not the nature of humanity to heal", Abaye contends that one should not recite this phrase since the verse "and heal, he shall surely heal" carries the accepted interpretation that physicians are granted the right to engage in the practice of medicine. In order that neither the physician nor the patient should assume that they have no right to engage in medicine, the Torah specifically states "and heal, he shall surely heal" thus permitting the physician to dispense medical aid and the patient to accept it.

3 Thus, RAMBAN'S comments on Parashat B'hukotai, Leviticus 26:11 in which he states that it is Toraitically permissible for physicians to engage in the practice of medicine but that this permission does not extend to the patient, are surprising. RAMBAN indicates that if the patient approaches the physician, then the physician should treat him. RAMBAN's point is that the patient ought to avoid medicine. Should he choose to consult a physician, this is evidence of lack of trust in God. Thus, God will leave this patient to the caprice of natural causation. The physician must treat the patient, but the patient is not obligated to seek medical help. He simply chooses this option. This passage is problematic as it contradicts the B'rachot passage as well as RAMBAN's own words in Torat HaAdam both of which state that the patient has Divine permission to seek medical help. R. Azulai, in his commentary Birchot Yosef (Yoreh Deah 336) concludes that RAMBAN's words are not irreconcilable. Rather, he claims,

that in Torat HaAdam RAMBAN is referring only to the physician and not to the patient when he proclaims that the practice of medicine is a commandment inclusive in the category of saving human life.

Waldenberg believes that Azulai has gone astray on this point. He avers that in Torat HaAdam RAMBAN'S concern was to explicate the urgency of the commandment regarding medical practice and to warn that there is an issue of saving human life in this matter for both the patient and the physician. The patient, as well as the physician, is engaged in a sphere of doubt. Just as the physician worries about committing murder, the patient is equally concerned about committing suicide. Therefore, the verse "and heal, he shall surely heal" comes to confirm that just as the physician has license to practice medicine, so too, the patient has the right to seek medical help. It reassures both that medicine is included in the category of saving life. It appears to Waldenberg that RAMBAN's statement in Torat HaAdam is the operative one.

Waldenberg resolves the difficulty of RAMBAN'S conflicting comments by claiming that his interpretation on B'hukotai is representative of an ideal situation (i.e. when no external factors influence health), while the words of Torat HaAdam respond to current conditions. Waldenberg points out that since we are instructed not to rely upon miracles (e.g. divine healing), it is not only permissible, but also an obligation for the patient to seek medical help. His very life depends upon it.

4. R. Azulai arrives at the same conclusion - nowadays, the patient is obligated to seek medical help and may not rely upon miracles or his arrogant piety. He should simultaneously seek God's help, and rely, with all his heart, upon God's mercy. Similarly, R. Baer Iybshtiz comments in Maten Moshe that one should not differentiate between wounds inflicted

by humans and those inflicted by God or between internal and external injuries. In fact, he writes, this distinction has never been made in practice. The Torah permits, rather, obligates, the physician to engage in the practice of medicine and this obligation extends to all aspects of the science. The patient must seek medical attention although he should continue to trust in God, for all is according to God's will and the physician is merely God's emissary.

A similar interpretation is apparent in Sefer T'shuvah Meahavah which states that God granted permission to the physician to treat all patients and all illnesses without differentiation.

R. Yehuda Ayash in Shivtei Yehuda concludes in no uncertain terms, that the patient is required to seek medical help. This obligation devolves not only upon the patient but also his relatives. They are responsible for seeing that the patient has acquired the drugs prescribed for him. Anyone who is negligent in these matters - choosing not to rely upon the natural practice of medicine, in the pious hope that the Holy One Blessed be He will send a miraculous healing - has acted foolishly and improperly, causing harm to himself. He will be required to account for his actions on the Day of Judgment. Anyone who relies upon God alone to keep him from danger, not taking normal precautions, is a pious fool. As our rabbis have taught (Ketubot 30a), "Everything is in the hands of God except for the heat and cold." The concept applies likewise to medicine. God allows the world to operate according to its natural course and certain drugs and herbs were given to heal certain illnesses. That is to say, by the very fact that God has provided the ingredients for the drugs which heal many wounds, we can assume that it is permissible to make use of them.

R. Ayash brings the following midrash in support of his position. A story is told about Rabbi Ishmael and Rabbi Akiva. They were walking through the streets of Jerusalem with a companion when an ill man approached them. He said to them, "Sirs, what medicine will cure me?" They instructed him to take a certain drug until he felt better. The companion asked replied, "Who has struck him with this illness?" They responded, "God." The companion said to them, "How can you, sages, allow yourselves to engage in a matter over which you have no right - God strikes and you presume to heal?" They asked him, "What is your profession?" He responded, "I am a tiller of the soil. See, my scythe is in my hand." They inquired of him, "Who created the earth and who created the vineyard?" He replied, "The Holy One, Blessed be He." They inquired, "And you engage yourself in matter over which you have no authority - God created it, yet you eat its fruit?" He responded, "Don't you see the scythe in my hand, if I did not go out and plow it, clear it, fertilize it, and weed it, nothing would come forth." They replied, "Fool! Have you never heard the verse (Psalms 103:15) 'A man's days are like grass'? Just like a tree, if it is not fertilized and plowed it will not grow, and if it grows and it is not fertilized and watered, it will die. Thus a man's body is comparable to a tree, the fertilizer is the drug (that makes it healthy), the tiller of soil is the physician."

In *Shivtei Yehuda*, Ayash concludes with the warning that sometimes a person will be struck with an illness which the physicians cannot heal. In this case it is permissible to assume that it is God's will and no human intervention will avail. However, if one can cure his illness but does nothing, he is a fool. He is like one who walks into fire - it is not God's

decree that he die at this time! Any other understanding of such a situation would be distorted.

R. Aharon Berechiah in *Ma'avar Yabok* explicitly states that any patient who does not seek medical help is considered a sinner. Likewise, he avers that one who causes himself to become ill by pursuing his desires or not protecting himself against the natural exigencies of life is to be compared to one who kills himself – in the future he will have to account for his actions before God. If he must absent himself from divine service on account of his self-imposed illness, he is required to make restitution for his absence.

On the other hand, suggests Waldenberg, we should pay heed to the strong words of RAMBAN in Parashat B'hukotai from which we may derive much spiritual guidance so that "evil may not befall me and plague not come near my tent" (after Ps. 91:10). He envisions a time when people will not need to use the natural elements to sustain them, for God will bless food and drink and keep illness at a distance. Because we will be more perfect (שלמים), there will be no need for the physician or for the study of medicine as God will be the Healer.

If one concludes that these words of RAMBAN are operative only after the entire community of Israel acts in such a faithful manner, (even though it is clear from the context that RAMBAN is speaking as well of the righteous individual) the comment of Ibn Ezra on Parashat Mishpatim (Ex. 23:15) is instructive. He rejects the position that in matters of health there is a differentiation between the individual and the community. In that comment, he explains that there are intermediaries between the body and the soul yet they have an effect on each other. He concludes "as the soul is strengthened [through the study of Torah], so too is the body's

immune system - which is received from God. [When one devotes himself to Torah] God will bless food and drink for illness develops when the immune system is weakened (e.g. when one eats and is not satisfied.) Many illnesses are caused by food which has entered the body and thus the verse states 'when you worship God, He will bless your food.' Other illnesses are the result of changes in natural conditions and therefore the verse includes the phrase 'and I will turn away disease from your midst.' From this one may conclude that the Torah-true Jew has no need for a physician and can rely upon the Holy One."

Waldenberg concludes his comments on this matter by praising the worldly wisdom and ideals of Ibn Ezra with the words "Happy is the one who can achieve this."

RAMAT RACHEL #21

Arokh Hashulchan 336a. Furthermore, the very fact that the Torah grants license to the physician to practice implies that he is obligated to engage in the science of healing and may even profane the Sabbath, if necessary, on its account. If a patient is endangered, and certainly if his life is at stake, the physician may transgress the Sabbath laws. A physician who refuses to practice medicine is comparable to one who spills blood. This applies even in the situation where another physician is available to treat the patient - for not all patients benefit equally from all physicians. All who hasten to save lives are surely blessed.

1. **RAMBAM**, in his commentary to Mishnah Nedarim 4:4, explains that one who has vowed not to derive benefit from another is permitted to be

medically treated by that person if he happens to be a physician. This exception is granted because the physician is Toraitically obligated to heal the sick of Israel. The phrase (Dt. 22:2) "and you shall return it to him", which is understood as indicating that the physician has the obligation to return health to the patient, is employed as a prooftext. The commandment derived from this verse extends to saving someone by means of one's body, money, or knowledge.

RAMBAN also suggests that this Nedarim passage reveals the Toraitic base for the claim that a physician is under obligation to practice medicine. He concludes that the patient's health is the lost object which the physician is capable of, and therefore obligated to, return to its owner.

Thus, from the verse, "and heal, he shall surely heal" we derive that the physician is granted the right to engage in the medical profession. The verse "you shall return it to him" clarifies that the physician is obliged to practice medicine.

2. As RAMBAN explicates in *Torat HaAdam*, it is also possible to employ the verse "you shall love your neighbor as yourself" (Leviticus 19:18) as a prooftext for the obligation devolving upon a physician to heal. RAMBAN brings a text which questions when a son must medically aid his father. The story itself is irrelevant to the present examination but it is germane that within RAMBAN'S discussion the verse "you shall love your neighbor as yourself" is appropriated to justify the claim that medicine is not prohibited on the grounds that it may involve physical damage to the patient. Without these prooftexts we may assume that medicine is permissible only when it does not involve physical damage or pain to the patient. Furthermore, the practice of medicine is included in the category of commandments dealing with the saving of human lives. This, of course

takes precedence over all other commandments. Clearly, in the case where a life is at stake, the physician is obligated to act according to his medical knowledge. The above examples prove that the physician is also commanded to engage in healing even when a possible fatality is not involved. The physician must be available to treat less serious problems such as pain, wounded limbs, etc.

TSITS ELIEZER VOLUME # 8, SECTION 15, LAST CHAPTER

Any discussion of the laws of medicine must include a discussion of the patient's and physician's rights regarding medical intervention. As mentioned earlier RAMBAN comments on Leviticus 26:11, "when Israel is in perfect [accord with God], constituting a large number, their affairs are not conducted at all by the natural order of things, neither in connection with themselves, nor with reference to their Land, neither collectively nor individually, for God blesses their bread and their water and removes sickness from their midst, so that they do not need a physician and do not have to observe any of the rules of medicine, just as He said, 'for I am the Eternal that healeth thee.' (Exodus 15:26)."

Yet, simultaneously R. Abraham Danzig in *Hochmat Adam* proclaims that God understands the nature of man and therefore He created grasses and trees which would bring forth medications. God gave permission to humanity to benefit from these medicines. It has previously been established, as explained in *Birchei Yosef* "that in our days, we must not rely upon miracles and thus the patient is obligated to seek professional help." One should not presume that he is of greater stature than the pious throughout the generations who relied on medical aid. This is, for all

intents and purposes, forbidden as it smacks of arrogant piety and implies that one is trusting in miracles during a time of danger. When one is ill, he should remember his sins and repent. Furthermore in the responsa of RASHBA (1:413) we are reminded that "anyone who is negligent or lazy and does not seek medical help but rather trusts that God will send a miraculous healing is foolish. He may harm himself ^{and} for this he will be held accountable in the future."

Before engaging in medical cures one should place his faith in God understanding that true healing flows only from Him – not from the physicians or their medicaments. Both the physician and the patient should be cognizant of this. The patient should place his trust solely in his Creator while the physician should view himself as fulfilling the lofty mission for which he was designated. Avodah Zarah 55a is offered as a proof-text: "At the times that afflictions are sent to man an oath is imposed upon them, 'You shall not come upon him except on such and such a day, and at such an hour, and through the medium of so and so, and through such and such a remedy ... Rabbi Yohanan commented on the verse (Dt. 28:59) 'and sore and faithful diseases' – 'sore' in their mission and 'faithful' to their oath."* If it is against God's will that a certain individual be cured, the doors of treatment are as if locked before him (i.e. the physician's help will be of no avail.) The comment of Meiri on this matter is "awesome": "There are many medical cures which the physician does not think employing. Thus many people die though successful treatment was possible. Some die despite the fact that their death has not been decreed."

Therefore the patient's only recourse is to have complete faith in God expressed through prayers and supplications. The ill should pray that the

*Translation according to A. Cohen

Creator grants them healing and delivers them from their danger. The physician must continually pray that God grants him understanding and knowledge in the ways of medical science. The physician prays that God will focus his eyes and provide him with a clear vision so that he will know how to best treat the patient.

Waldenberg concludes with a prayer appropriate to his above comments: May the Merciful One send a complete recovery to all of the ill among His people, the house of Israel, and establish for us as it is written in the Torah "If you hearken unto the Lord, your God, doing what is proper in His eyes, obeying His commandments and following His laws - all of the illness which I decreed for Egypt, I will not decree for you, for I am the Lord, your Healer. Amen.

TSITS ELIEZER, VOLUME 10, SECTION 25, CHAPTER 19,
paragraph 2

2) Though Waldenberg fully addressed this subject in *Ramat Rachel* numbers 1, 20, 21, a letter from a colleague prompted him to further his comments. Waldenberg reiterates that Avodah Zarah 55a provides the clue "At the time that afflictions are decreed upon man, they are made to swear according to these words: you will appear only on the appointed day, at the appointed time, to the appointed person and (you will be counteracted) by the appointed medicine. R. Yohanan quoted the maxim "illnesses are bad and faithful - bad in their mission and faithful to their oath." The sages explain that when a man sins, the extent of his punishment is divinely decreed. He will suffer afflictions and illness for an established time period. If he repents properly, turning his heart completely to God, until the Omniscient One aids him, he will merit a Divine Healing prior to the appointed time.

This is what is meant by "the appointed time." If he is not so deserving God turns him over to nature which was created to help sustain life. The predetermination of the cessation of the afflictions assumes medical help in the form of the physician and medicine. RAMBAN writes similarly when he remarks that physicians are performing the will of God yet God prefers that people have no part in medicine.

Yet, it should be recognized that some fall ill because of carelessness and not as a result of sin. As stated in Baba Metzia 107b, "everything is in the hands of God except for heat and cold." That is to say that one is capable of protecting himself from dangers such as hot and cold and that, when an illness's cause is "natural", its remedy is also "natural". How, then, can one know the source of his illness? Waldenberg suggests an examination of Tosafot and Maharsha on the question.

TSITS ELIEZER, VOLUME 11, SECTION 41

As a result of RAMBAN's comment on Leviticus 26:11 which implies that Toraitically the physician is permitted to heal the sick but that the patient does not have the Torah's approval to seek out medical help, one would conclude that the Sabbath laws may not be transgressed on behalf of the patient. This may be based on the idea that recourse to physicians is evidence of lack of faith.

This is an erroneous conclusion. It is contrary to our tradition to prohibit an endangered patient from transgressing the Sabbath regulations in order to receive medical aid. In *Torat HaAdam*, RAMBAN, himself, concludes that the practice of medicine is included in the category of commandments which involve the saving of life. He points out that a patient

may be fed on Yom Kippur and be given medicine on the Sabbath if necessary. Thus, even according to RAMBAN, the Sabbath laws may be suspended in order to treat an endangered patient. The saving of life is a commandment of great stature - all who are zealous to perform it are certainly to be praised. One who even entertains the question of whether it is permissible to transgress the Sabbath laws in order to receive medical help is comparable to one who has shed blood, all the more so one who dispairs of receiving permission and thus does not even ask. It is therefore emphasized that any physician who possesses both the theoretical and practical knowledge is obligated to practice medicine. If he refuses to fulfill this responsibility it is accounted to him as if he has shed blood.

It may be concluded from these words that RAMBAN held that it was permissible to transgress the laws of Sabbath in order to practice medicine as this is included in the area of saving life. It is also clear from his words that one who does not call a physician when necessary is thought of as one who has shed blood. From these comments, we may conclude that RAMBAN did believe that the patient is commanded to seek medical aid.

Various commentators raise difficulties against RAMBAN's commentary to Leviticus 26:11. In *She'at Yaakov* it is noted that the Talmud records many examples of the sages seeking medical advice for themselves and others. In Baba Metzla 86a, we learn that Samuel was the physician of Rabbi though he primarily studied medicine in order to treat Gentiles. In Gittin 56a-b Rabbi Yohanan ben Zakkai requests from Vespasian that he send physicians to treat Rabbi Zadok. How could these sages be accused of transgression?

In *Sefer Shevet Yehuda* Ayash also mentions that Samuel was Rabbi's physician. He quotes from the end of the first chapter of Sanhedrin to

emphasize the acceptance and importance of medical science. "A scholar may not reside in a city in which there is no physician." Ayash further supplements the discussion by stating that it is permissible to suspend the regulations of the Sabbath in order to treat an endangered patient or to prepare medications on his behalf.

In *Akedat Yitzhak*, perek v'yishlach, another objection is presented to Ramban's comment on Leviticus 26:11. It is there stated that all people are obligated to see themselves as neither wholly righteous nor wholly sinful. No one is righteous enough to rely upon God for healing and everyone should seek after that which will benefit him (i.e. medical treatment). Furthermore, let no one suppose that the physician is permitted to practice but that the patient should refrain from seeking medical advice. From the verse "do not put a stumbling block before the blind" one may derive that the patient has a right to medical intervention.

This is clarified when the hermeneutical rule of *kal v'chomer* is applied to a situation raised in Baba Metzla 5b. The discussion regards the testimonial validity of a shepherd. It is generally believed that a shepherd is likely to be a thief as he may allow his flock to graze on another's land. The Talmud presents the question of how we can entrust cattle to any shepherd without transgressing the principle (Leviticus 19:14) "you shall not place a stumbling block before the blind." The principle is understood to mean that we should not be the source of temptation to one who may therefore transgress a commandment. Allowing a shepherd to care for cattle may cause him to transgress the laws of robbery. Likewise, in our situation, discouraging the ill from seeking medical advice may encourage him to view himself as overly pious and meritorious of a Divine healing. Furthermore he may commit the offense of not saving a life - his own!

The hermeneutical principle, *kal v'chomer*, may also be applied to a situation discussed in Avodah Zarah 2a. We are instructed that we may not enter into business deals with Gentiles on the day of their festivals as they may go and thank their gods on our behalf. Once again the verse "do not put a stumbling block before the blind" is employed to emphasize that we should not lead others into transgression. If this ruling applies when no life is at stake, it will certainly apply when a life is at stake. Thus the patient is permitted to seek medical treatment lest we find ourselves guilty of placing a stumbling block before the blind.

3. Waldenberg restates (*Ramat Rachel* #20) his position that Ramban's comments on Parashat B'chukotai refer to abstract, ideal situations. In *Torat HaAdam*, RAMBAN addresses concrete situations realizing that the majority of people do not merit Divine healing. He thus concludes that the patient is not only permitted to seek medical help but commanded to do so as his very life may depend upon it.

The Torah specifically grants permission to the physician to practice medicine and only indirectly permits the patient to seek medical advice. This format is employed to emphasize that Israel should always strive towards its highest goal of becoming a kingdom of priests and a holy nation. The attainment of such a status would preclude the need for seeking medical advice as all would merit a Divine healing. The physician is permitted to engage in his profession as long as Israel has not yet reached the exalted status which she pursues. During the prophetic era, Israel had indeed elevated herself so that human medicine was superfluous. With the cessation of prophecy, Israel regressed to her previous state and therefore God allowed the use of human medical knowledge. Since it is a general principle that one should not rely upon miracles, the Torah permits the

practice of medicine for both the physician and the patient. One who refrains from healing in accordance with human medical knowledge is similar to one who sheds blood.

Sefer Kehilat Yaakov also discusses RAMBAN's comments in Parashat B'chukotai. The subject is approached through an examination of two interpretations of the verse (Deuteronomy 14:14) "you shall gather your grain" offered in B'rachot 35b. According to Rabbi Yishmael, this verse instructs us that when we do God's will (i.e. study Torah and observe the commandments), we will be rewarded with grain in our fields. This reasoning, which understands God's will to include the natural domain, when applied to the verse "heal, he shall surely heal" allows it to be interpreted as meaning that the physician is given the right to engage in the practice of medicine. Rabbi Shimon bar Yohai understands God's will to be above the natural domain. He interprets the phrase "you shall gather your grain" to mean that when we are not acting in accordance with God's will, we will be obligated to spend time gathering our crops. When we obtain a higher spiritual level, others will do our manual labor. Thus according to Rav Shimon b. Yohai, God does not desire that humans engage in earthly matters such as the science of healing. This is the opinion held by Rav Aha in B'rachot 60a "it is not the way of humans to engage in medical science though it has become customary." Abaye's objection (B'rachot 60a) to this formula is clarified by the statement in B'rachot 35b "the many who attempted to live according to the precepts of Rabbi Yishmael succeeded while those who desired to live according to the dictate of Rabbi Shimon b. Yohai failed."

It is, therefore, surprising that RAMBAN concludes that Toraitically it is permissible for the physician to practice medicine but not for the patient.

to seek medical aid. This contradicts the above reasoning. If God desires that humans engage in the practicalities of daily existence (e.g. gathering crops, medical aid) then this extends equally to patient and physician. If God's will is that humans operate on a plane above the mundane (e.g. not to practice medicine) then this likewise extends equally to physician and patient. Rabbi Shimon b. Yohai believes that humans should conduct themselves with the highest level of piety. It would be forbidden and unnecessary to seek medical advice. Regarding this high level of piety, it is mentioned in Shabbat 121b that one who kills a poisonous snake on the Sabbath lacks the spirit of piety but those who are pious (and do not kill the snake) lack wisdom. Thus the law is decided according to Rabbi Yishmael.

The difficulty expounded upon in *Kehilat Yaakov* derives from the fact that RAMBAN apparently contradicts himself. In *Torat Haadam*, he concludes that the verse "heal, he shall surely heal" implies that the physician has a right to engage in the practice of medicine. Yet, RAMBAN's comment on Parashat B'chukotai, in which he declares that it is not natural for humans to engage in the science of healing, must be taken into consideration. Thus he would prevent the patient from seeking medical aid since it is merely a human custom to practice medicine. Apparently the author of *She'at Yaakov* did not consult the *Bayit Hadash* on the *TUR* 336 in which the words of RAMBAN as they appear in *Torat HaAdam* are recorded. "... so that a man will not say 'God smites - who am I to heal?' He may [erroneously] assume this from the statement 'it is not natural for humans to engage in the practice of medicine though this has become customary.' Thus the Torah specifically teaches that the physician is given permission to engage in the science of healing, and that furthermore this is a commandment included in the category of saving life."

In the *Bayit Hadash* a different difficulty is raised. Commenting on RAMBAN's words in *Torat Haadam* the *Bayit Hadash* remarks that Brachot 60a can only be interpreted to mean that it is merely custom for people to engage in the science of healing. The interpretation of the *Bayit Hadash* contradicts that of *Kehilat Yaakov*. The *Bayit Hadash* implies that Abaye and the school of Rabbi Yishmael also believe that the central problem is that it is merely custom for physicians to practice medicine. Their objection is only to the particular wording since it must be recognized that Torahically it is permissible for humans to engage in this profession.

Furthering the discussion on this Brachot passage, Waldenberg introduces the comments of *Sefer Shevet Yehuda* which concludes that Rav Aha and Rabbi Yishmael were in agreement with each other and that Abaye and the school of Rabbi Yishmael are in accord with the thinking of Rav Aha. *Sefer Shevet Yehuda* interprets Rav Aha's wording as meaning that there are two methods of seeking medical aid - 1. in the natural manner by obtaining drugs and a physician and 2. miraculously, by seeking Divine Compassion. There is an appropriate place for each of these methods. Abaye objects because he feels that Rav Aha's formula completely negates the work of the physician despite the fact that the Torah grants physicians the right to engage in their occupation. It is here opined that Abaye's objection is to the wording, not necessarily to the contents of R. Aha's statement.

The *Turei Zahav* (Yoreh Deah 336a) also addresses itself to this question. It is suggested that Rav Aha includes the phrase "it is not natural for people to engage in medical science though it has become customary" to indicate that the patient is aware of the fact that he is submitting himself to fallible human medical treatment. He does so, rather than relying on Divine Compassion, because this is the custom of his society. In any case

the patient thanks God for the healing which will hopefully come his way - for God is the ever faithful healer. Abaye's objection to the wording stems from the fact that the Torah recognizes the lowly human condition and permits physicians to engage in their science. Abaye and Rabbi Yishmael would agree, according to this interpretation, that if a ~~some~~ someone had risen to the level which would allow him to merit a Divine Healing, he would receive it. For those who do not merit Divine Healings, God has permitted human medical aid. The physician is obligated to treat those who approach him requesting his help. The words of RAMBAM on Parashat B'chukotai are thus explicated and strengthened. It is only those who are able to exist on this exalted level of piety who are not to seek medical help.

5) In actuality, the comments of *Kehilat Yaakov* are not contradictory to RAMBAM's method. Both agree that those of a very pious (superhuman) level should not seek the aid of physicians. Regardless, the practice of medicine is obligatory for the physician as it is included in the category of saving a life. Thus it is permissible to suspend the laws of the Sabbath in order to grant medical aid.

6) In *Gilyonei HaShas* to B'rachot 60a, another possible difficulty is presented. The question is asked why a legally practicing physician who accidentally causes the death of his patient is sentenced to exile (according to the Shulchan Arukh, Yoreh Deah 336:1) while a parent or teacher who accidentally causes the death of a child during a permitted disciplinary act is not subject to exile. One may respond that the parent or teacher are engaged in the performance of a commandment and therefore are not responsible for the tragedy. Is not this situation analogous to that of the physician? The case of the parent or teacher may be considered to be of a different nature since their actions are desirable in and of themselves. On

the other hand, even when one falls ill, it is not desirable that he seek out a physician, rather he should have faith in God. That is to say that the physician does not have the same right vis-a-vis his patient as the teacher or parent have vis-a-vis the child. Waldenberg explains that if this argument is accepted, engaging in the science of healing can no longer be understood as a commandment to which the physician is obligated. It is possible to interpret this situation in a different light. When a child misbehaves, the father has no choice but to chastise the child. In the case of the patient and physician, there is a choice. It would be more suitable for the patient to be on the level of piety which would allow him to merit a Divine Healing. Furthermore, there are many different kinds of treatment available (thus the physician has greater responsibility for his actions than either the teacher or parent.) In any case, those who are not worthy of a Divine Healing must obtain medical advice.

Waldenberg criticizes the *Torah Temimah* (Deut. 22:3) for his method of responding to RAMBAN's statements. He opines that although RAMBAN is problematic, we must resolve this difficulty by showing that RAMBAN does look favorably upon the practice of medicine. It is unsound scholarship to merely state, "I don't agree with him." RAMBAN's claims must be answered with a greater degree of thought.

7) Clearly, the words of RAMBAN should not be interpreted to mean that the patient should not seek medical help or that the laws of the Sabbath should not be suspended in order to provide for the ill. Actually, ~~one should be compelled to violate the Sabbath laws in order to provide and~~ receive medical attention. The *Magen Avraham* strengthens this declaration by remarking that even when there is professional disagreement as to the

seriousness of the illness, the patient is obligated to seek medical advice even on the Sabbath. The *Kitzur Shulchan Arukh* comments that two malfeasances occur when a patient refuses to seek medical help: 1. he professes a lack of humility by relying solely upon Divine Miracle and 2. he exhibits excessive pride by believing that he is righteous enough to receive a miraculous healing. As discussed in *Sefer Shevet Yehuda*, we do not follow the example of the wholly righteous who do not present themselves for medical treatment but rather rely upon prayer and God's compassion. Even the learned seek the advice of physicians when they fall ill.

The law is clearly stated in *Sefer Shevet Yehuda*: A patient, or his relatives, are Toraitically obligated to contact an experienced physician and to acquire the medications which will aid him. One who relies upon a miraculous healing is foolish and will have to account for his actions in the future. However, it must be recognized that occasionally a person will be struck with an illness that the physicians cannot heal. In this case it is permissible to assume that this is God's will and no human intervention will avail. However, if one's illness is curable and he does not make use of human medical knowledge, he is a fool. He may be likened to one who walks into a burning fire - it is not God's decree that he should die at this time.

The same conclusion is reached in *Birchei Yosef* of R. Azulai. He avers that in our day the patient is obligated to seek medical help and may not rely upon divine miracles. By refusing to seek medical help, the patient is essentially stating that he is greater than the pious of many generations who relied upon human physicians. This behavior is reprehensible as it smacks of arrogant piety and transgresses the general principle that an endangered person should not depend on miracles. One should act according to accepted human behavioral standards. It is normative for people to

subject themselves to human medicine but simultaneously one should not forget to pray for Divine Mercy

Similarly, R. Baer lybshitz comments that the physician was granted permission to treat all illness - whether they be external or internal. Furthermore, he opines that this permission is of the nature of obligation and that it is included in the category of saving a human life. In this matter, the zealous are to be praised. One who denies himself treatment is comparable to one who has spilt blood. A patient must not refuse medical help but neither should he rely solely upon human medical care. Trust in God must be maintained and the patient should pray that God aids the physician so that he will not err. The patient should view the physician as God's emissary so that it may not be said regarding him, "in illness he did not seek the Lord but relied upon physicians" (2 Chronicles 16:12).

Regarding this matter the *Bayit Hadash* remarks that King Asa's transgression as reflected in 2 Chronicles 16:12 was that he relied solely upon physicians. If one maintains their faith in God, praying that God will send him healing through the hand of the physicians, it is permissible to seek medical help even for illnesses whose source is other than human. All of Israel behaves in this manner.

R. Aharon Berechiah in *Ma'avar Yabok* states that any patient who does not seek medical help is considered a sinner. He cautions that one who pursues medical aid must take note of the fact that God created the world with certain plants whose purpose is to cure certain illnesses.

In the *Zohar*, end of Parashat Haazinu, Dt. 32:10, the paternal relationship between the physician and the patient is developed through midrashic techniques. The verse reads "He found him in a desert region,/ In an empty howling waste./ He engirded him, watched over him,/ Guarded him

as the pupil of his eye"*. Each phrase of this verse is applied to the relationship developed between the physician and the patient. The physician, according to this schema, becomes the protector - the parent figure - of the patient.

As Waldenberg points out in the remainder of the responsum, there are situations which cause this general principle (that the physician is obligated to treat the ill) to be questioned. Is the physician permitted to engage in all types of medical treatment? May the physician treat a defect which causes the patient no harm nor pain? The case of the barren woman demonstrates one manner in which these problems may be approached. Waldenberg concludes, with much textual support, that it is permissible for physicians to attempt to treat a barren woman.

Naturally the performance of plastic surgery for cosmetic reasons raises similar questions. Waldenberg presents a very strong case against elective cosmetic surgery. He claims that this procedure not only prevents the physician from engaging in more significant work but that it also cannot be permitted on the basis of the verse "and you shall return it (a lost object) to him". It should be recalled that this is one of the verses employed in understanding the physician's occupation to be an obligation. Additionally, plastic surgery symbolizes an illegitimate desire to undo or outdo God's creative force. A lack of humility is sensed with the performance of unnecessary cosmetic surgery. For marginal cases of this type, the Toraitic permission to engage in the practice of healing must be carefully examined. Carte blanche is not given to the physician.

* Tanakh: A New Translation of the Holy Scriptures, Philadelphia: Jewish Publication Society, 1985, p. 326

TSITS ELIEZER, VOLUME 11, SECTION 42

In addition to the many opinions discussed in the previous section regarding the physician's obligation vis-a-vis medicine, it will be worthwhile to lengthen the discussion by considering the words of Rabbi Yohonatan Eybeschuetz, the author of *Keret uFelet*. He avers that a physician's knowledge is always hypothetical as he must judge from common sense and visual perception. It is for this reason that the sages declared (Kiddushin 82a) "the finest of the physicians is destined for Gehenna." The author opines that the Toraitic allowance for engaging in medical science extends only to external wounds. Diagnosis of external wounds is more precise since they are visible to the eye. The treatment of internal wounds is guesswork - one may die from such cures.

Eybeschuetz's method of differentiating between internal and external wounds is similar to the methodology of Ibn Ezra and Bahya, though his reasoning differs. He bases his opinion on the availability of visible evidence. A physician who diagnoses on the basis of hypothetical evidence follows a dangerous path which leads to the entrance of Gehenna. In an age in which diagnosis of internal wounds can be based on visible evidence such as x-rays, the physician is likewise obligated to treat these wounds.

2) Eybeschuetz did not address the words of RAMBAN on *Torat Haadam* which, as has been previously discussed, present a similar conflict to the statement in Kiddushin 82a. Relying upon RAMBAN, Waldenberg suggests a different understanding of the rabbinic saying "the finest of the physicians are destined for Gehenna." He recognizes that medicine is an inexact science - what cures one may cause the death of another. This phrase, according to Waldenberg, may be interpreted to mean that physicians should

act with great caution. He insists that this phrase does not forbid the practice of any form of medicine as implied by Eybeschuetz. Rather the situation of the physician is similar to that of the butcher and driver also discussed in Kiddushin 82a. Their professions are not forbidden but they must exercise caution in order to avoid sin.

Waldenberg concludes that any physician⁴⁵ who administers medical care with great thought and caution is not prohibited from engaging in the practice of medicine. Since medicine is an inexact science, we must accept the fact that a treatment may cure one patient while it kills another. Despite the danger involved, the physician is Toraitically commanded to treat the ill. The phrase "the finest of the physicians are destined for Gehenna" comes to warn the physician that he should act with caution as the door of Gehenna is always open before him. When one is engaged in a profession like medicine, which may become monotonous and in which failure is frequent, cautious action is of great importance. One who dispenses medicine while employing his full knowledge and acting with great caution and diligence brings much merit to himself.

A different interpretation is presented in *Tiferet Yaakov*. It is there claimed that the Mishnah is referring to one who considers himself to be among the finest of the physicians. His arrogance is based on dubious knowledge and prevents him from seeking the counsel of colleagues. He is likely to act hastily and thus harm the patient. This is the implication of "the finest of the physicians are destined for Gehenna."

3) A further interpretation is offered by the author of *Menachem Haim*. In his commentary on the Mishnah, *Kol Safer*, He suggests that "finest" refers to those physicians who are overly diligent. They investigate every

possible cure, searching for the finest. Many patients may die due to his experimentation. This type of physician is destined for Gehenna.

4) In conclusion, Waldenberg offers another interpretation to the problematic verse 2 Chronicles 16:12 which discusses the sin of King Asa. A discussion in Sotah 10a sheds some light on the matter. The rabbis interpret the verse in 1 Kings 15:23 "but in the time of his old age he [Asa] was diseased in his feet" to mean that Asa was struck with gout. Raba adds that Asa was thus punished because he imposed forced labor on the scholars. One may wonder why the rabbis proposed that gout was the illness from which he suffered. Furthermore, why did the sages presume that the sin for which he was punished was enslaving the scholars? Gout was one of the diseases for which the physicians could offer no help. Asa would seek medical help but his efforts would be in vain. The rabbis derived the specific sin of disgracing the scholars from the verse "in his illness he did not seek the Lord". The definite article **ה** precedes the word "Lord" in the Hebrew. Rabbi Akiva taught that the definite article functions as an inclusive term. Asa not only disregarded God by seeking only human medicine, he also disgraced the scholars by not allowing them to retain their proper place in society. The presence of the definite article teaches us that Asa's sin was not only directed against God. This is apparent from the fact that he imposed forced labor upon the sages. Our rabbis have taught that one who degrades a scholar will find no cure for his afflictions. These are the reasons why the rabbis believe that Asa was struck with gout and that he was punished on account of his enslavement of the scholars. The same explanation is presented in the collection of responsa *T'shuvah*

Meahava, number 325.

Waldenberg clarifies that the cure to Asa's illness was repentance, release of the scholars from forced labor, and praying to God. Since he did not recognize that his transgression was the source of his illness, he sought medical help. The physicians, of course, were incapable of soothing his discomfort. According to Waldenberg, this is the best explanation of the Asa saga.

TEXTUAL ANALYSIS - SECTION I

Waldenberg's plethora of material on this subject points to the fact that many theological and textual difficulties must be contemplated as one attempts to define the role of the physician in modern Jewish society. Since *Ramat Rachel* is a theoretical treatise, the reader is given the opportunity to understand what Waldenberg would view as the ideal situation. Throughout this material the reader will notice that Waldenberg relies heavily on RAMBAN as the basis for his discussions. This is particularly interesting since RAMBAN appears to offer opinions in conflict to one another in his treatise *Torat Haadam* and his comments on parashat B'chukotai. As Waldenberg suggests in his criticism of the *Torah Temimah* above, RAMBAN is an outstanding pillar of the Torah as well as the author of a most influential treatise on medical halacha. His comments in parashat B'chukotai cannot be blithely dismissed. Waldenberg is thus forced to build an argument that supports one of the texts over the other or to analyze the two documents in such a way that the conflict between them is resolved. This method should allow the reader to discover Waldenberg's presuppositions and prejudices.

Waldenberg chooses to open his discussion of the role of the physician vis-a-vis God with a discussion in *Ramat Rachel* 1 of the verse in 2

Chronicles 16:12. King Asa is apparently implicated for his use of physicians during his illness. Waldenberg brings forth from this verse the most basic, practical, theological problem which must be adequately resolved before further discussion of the role of the physician in society can be addressed. It is possible to place such great trust in the human physician that one forgets that the most faithful healer is God. During times of sickness, the patient exposes his true colors. Will he close his eyes to the Power that created the universe in favor of the more immediate and visible physician whose knowledge of the human body and available cures seems to promise him the most likely chance of recovery?

It is not only the question of this human weakness which Waldenberg addresses but also the more basic question of what is the need for physicians if God is truly the **רופא חולים**? The resolution presented by Waldenberg to this latter problem is one familiar to the student of Jewish law. He suggests that allowance must be made for the imperfect human condition. Truly, God is the Source behind healing but few these days are worthy of a direct Divine Healing. For now, physicians, as God's emissaries, may do their best to restore health to the ill. At a future time Israel will return to her exalted status and the intermediary of the physician will no longer be a necessity.

Recognizing that this compromise to the human condition in the form of the physician may lead the blind astray, Waldenberg continually emphasizes that both the physician and the patient must constantly beseech God for the strength to dispense and receive effective cures. The hierarchy of God-physician-patient is presented as the resolution to this challenge.

Waldenberg's differentiation between the ideal world and the real world is one which runs through his entire discussion of the role of the

physician in society. The conflict presented between RAMBAN's comments on parashat B'chukotai and those in *Torat Haadam* on the right of the patient to seek medical help is assuaged by Waldenberg's insistence that *Torat Haadam* refers to practical situations while the comments on B'chukotai refer to an ideal situation. Clearly, Waldenberg is attempting to establish that the practice of medicine in modern times is acceptable in terms of Jewish theology. He offers no conclusive evidence for his supposition that one document represents a utopia while the other was composed to offer practical advice. His solution is attractive but not well supported.

Fortunately his attempt to show that the practice of medicine is not only understood to be Toraitically permissible but also commanded is significantly more convincing. Exodus 21:19 ("heal, he shall surely heal") is shown to be the basic proof-text for the claim that the practice of medicine is Pentateuchally ordained. The repetition of the word heal allows Waldenberg to present an abundance of traditional commentaries in order to show that no distinction between types of wounds, or between patient and physician is acceptable in defining the Jewish position on the practice of medicine. Waldenberg is careful to not allow the Toraitic basis for the practice of medicine to rest on one verse alone. He is careful to have the reader note that at least two other verses lead to the same conclusion - Leviticus 19:18 "you shall love your neighbor as yourself" and Deuteronomy 22:2 which speaks of returning a lost object to the rightful owner. With the help of hermeneutical principles, Waldenberg establishes that the practice of medicine, even when the saving of a life is not directly involved, is Divinely commanded.

It is interesting to note that despite the fact that he is able to present some rather strong, halachically sound proof-texts, Waldenberg feels

free to support his opinions with midrashim as well. He first establishes God's role in allowing humans to practice medicine with the midrash from *Sefer Tashbetz Katan* discussed in *Ramat Rachel* 1. The midrash about Rabbi Ishmael and Rabbi Akiva discussed in *Ramat Rachel* 20 is yet another example of Waldenberg's willingness to emphasize a halachic point with the use of non-halachic material. Since these halachic points are dependent on information derived from the sphere of theology, this proves to be an example of halachic theology. The accepted view must be established according to halachic procedures, but the material in question will be aggadic in nature.

Though one may justify the use of midrashim, there are several places in the preceding material where Waldenberg places himself on rather shaky grounds. In volume 11, section 41 his rejection of the analogy of the relationships between parent-child and physician-teacher in favor of the dubious explanation about different means of medical care is, at best, questionable. One further example can be found in the material presented above from volume ten of his responsa. Waldenberg suggests that the predetermination of the cessation of affliction (*Avodah Zarah* 55a) implies that God accounted for the existence of human medicines and physicians. This is a rather illogical jump for if God determines when an illness will conclude, He is certainly omnipotent and thus capable of eradicating the sickness without the help of human medicines or physicians. It is important to note that in order to resolve contradictions among the sources which are not resolved by his predecessors, he will create his own reasoning.

The main points which Waldenberg has established in this section are that both the physician and the patient are Toraitically obligated to engage in medical science, that the physician is to be viewed as an emissary of God

and not a separate source of healing, and that illness may be the result of individual or community sins or personal carelessness. Waldenberg has also made it clear that human medicine is necessarily an imperfect science but that we can look forward to a time when healing, in its perfect form, will come directly from God.

SECTION 2: EXCEPTIONS, LIMITATIONS AND CONFLICTS

Since Waldenberg has interpreted Jewish tradition to say that the physician is obligated by Toraitic law to engage in the practice of medicine, he must confront the possible exceptions to this general rule. Are all physicians at all times to place the practice of medicine above all other commandments - including those of prayer and Shabbat? Is the physician permitted or obliged to endanger himself in order to treat his patient? What if this treatment required of the physician great effort or embarrassment? Does this principle apply equally to all physicians - both the experts and the interns? Waldenberg's responses are summarized in detail below.

RAMAT RACHEL 22

Arokh HaShulchan, 336b: However, one who is not an expert and one who has not received a license from the court permitting him to practice medicine, in our days it must be government sanctioned, may not engage in the art of healing. There should also be no one about who is more knowledgeable than he. One who practices medicine disregarding these precepts and errs is liable for the spilling of blood.

1) It is interesting to note that neither the *TUR Shulchan Arukh* nor RAMBAN in *Torat Haadam* mention that a physician must obtain permission from the court in order to practice medicine. In these codes it is the degree of the physician's expertise which makes him suitable to engage in the medical profession. All three employ practically the same language. One may practice medicine if he "is an expert and knowledgeable in this area and there is no one in the vicinity of greater experience." It is not mentioned that court endorsement is one of the requirements. In the case where the patient is harmed by the physician's cure, these codes do refer the matter to the court (i.e. a government license protects the physician from liability). Nevertheless, it is clear that, according to the sources, an expert and knowledgeable physician may practice medicine without first receiving court approval.

This can be explained by pointing out that the court is not qualified to judge the level of the physician's expertise. The permission of the court merely confirms that the physician agrees to treat the community to the best of his ability and knowledge, recognizing that at times he will succeed and at times he will fail. When permission is thus granted, he is not responsible for payment of damage claims. This is similar to the case presented in Sanhedrin 5a: Rav said, "One who wants to decide monetary cases by himself and be freed from liability if he errs, must obtain permission from the court of the Resh Galuta (exilarch)." The lack of the court's sanction does not delay or prevent an expert physician from engaging in the practice of medicine, but it makes him liable for damages should he err in his practice.

2) The problem of how a court can judge the expertise of a physician is addressed in *Sefer Shulchan G'vohah*. If a panel of physicians is

comprised to judge colleagues entering the vicinity, the requirement that one practice in an area in which there are none of greater medical renown cannot be fulfilled (i.e. the panel of physicians would be viewed as of greater medical stature.) Rather a normal court of judges is the subject of this statement. The judges are not to engage in an assessment of the physician's competence. The *Arokh HaShulchan* is discussing the specific case of a physician who enters the town with written credentials. The court is to examine the signatures and determine their authenticity. In this manner, the court grants permission to the physician to practice medicine in the area.

Waldenberg maintains that a court comprised of men who know nothing about medicine cannot determine the relative expertise of a physician. He believes that the explanation in the *Shulchan G'vohah* is a forced attempt to be true to the *Tur*, *Shulchan Arukh*, and RAMBAN. It is too obvious that in the particular case mentioned court approval is necessary. Waldenberg avers that court permission is required in all situations. For Waldenberg, the first suggestion of the *Shulchan G'vohah* (that a court of physicians be established) is preferable despite the conclusion that this leads to a type of logical absurdity. He resolves this problem by limiting the scope of the *Arokh HaShulchan's* decree that a physician may not practice in a community where there are physicians of greater stature than he. Waldenberg points out that this rule is inoperable in large cities where there is a shortage of physicians. Clearly physicians who are of lesser stature are permitted, even obligated, to work in such areas despite the fact that others may be more knowledgeable than they.

Sefer Divrei Shaul contends that the court must be composed of medical experts but presents the same problem discussed in *Shulchan*

G'vohah. Waldenberg maintains that this is not problematic since he understands the courts' involvement to be one of coordination between the physician and the society. The judges are not ruling on anything which requires medical knowledge. The court will rely on the written recommendations of experts in order to determine the physician's expertise.

Waldenberg finds support for his claim in *Sefer Beit Hillel*. The argument is presented that if a community accepts the services of a particular physician, who carries recommendations from other expert physicians referring to him as 'doctor', this is the equivalent of court sanction to practice medicine. *Beit Hillel* extends the argument further. Even if the physician has no written confirmation of his expertise but proves that he can comprehend medical textbooks and that such knowledge is familiar to him, he may be considered an expert. If the community accepts his services, he is exempt from legal proceedings should he err and harm a patient. Certainly the community is not capable of assessing the relative expertise of the physician, especially if he does not have written recommendations. Thus, the matter of granting permission to practice medicine centers around the community's acceptance of the physician's services.

4) It is also important to mention that in our day no one seems to take receiving rabbinic court sanction very seriously. Apparently the only reason for the court's involvement was the exemption from legal proceedings in the event that the physician inadvertently harmed the patient. The community's tacit acceptance of the physician's services serves the same purpose. Furthermore, the governments of the countries in which we live have taken over this responsibility. This law was initially instituted to comply with the government. It has no Toraitic force.

5) Regarding the rule that a physician may not practice in the vicinity of one who is of greater medical stature than he, Waldenberg remarks that this applies only when the greater physician is capable of meeting the needs of all of the patients in the area. Otherwise the less experienced physician is certainly permitted to treat patients despite the presence of one of greater medical renown⁴² than he in the proximity. The less experienced physician may also treat well known diseases and perform routine operations in the company of one more experienced or knowledgeable than he. * *Birchei Yosef* insists that the patient seek the most experienced physicians. Otherwise, given the prevalence of incompetent physicians, the patient is liable for harm caused to himself.

Clearly the intention here is regarding the physician who has no credentials and was not properly trained. We are not stringent concerning this matter as it has become the government's responsibility. One should do what appears to him to be proper. *Sifrei Shiurei Bracha* contends that it is the rabbis' responsibility to insure that young physicians not seize too much responsibility when more experienced physicians are available. *Sefer Misgeret Shulchan* emphasizes the necessity for some type of regulation vis-a-vis physicians practicing medicine. He believes that the rule "one may not practice in the vicinity of one of greater renown" was enacted to prevent witch doctors and other quacks from treating patients. These quacks have caused the deaths of many. They apply medicine like a blind man in a chimney. Since, in our day, the government regulates the matter, we do not need to be involved. A person cannot simply claim the title 'physician' without first presenting qualifications. Any physician who

* Waldenberg continues by comparing the laws regarding the young physician to those governing the young scholar. See Yoreh Deah 242

deviates from the accepted norm of treatment is likely to be prosecuted. This applies, of course, only if the method of treatment was not an improvement over the standard cure.

If a physician of renown demands a fee above the means of the patient, the patient may seek the help of a less-experienced physician. This is easily justified by resorting to the comment of *Beit Hillel* discussed above.

6) The physician, especially if he is less experienced, must always be clear regarding the course of medical treatment for his patients. If a question arises, he must put aside his embarrassment and take counsel with those who are of greater renown. A physician should always act as if there is a sword between his thighs and the door of Gehenna is open beneath him. His profession, when executed without caution, is comparable to that of highway robbers. RAMBAN, in *Torat Haadam*, declares that that medicine always contains a degree of danger - what cures one, kills another. Thus the Mishnah warns that the best of physicians are destined for Gehenna. Nevertheless, there is no prohibition regarding the employment of medical technology. A physician, like an animal slaughterer, must conduct himself with absolute dignity. In this way he will be deserving of merit and add merit to the name of his profession.

The phrase "the best of the physicians is destined for Gehenna" has been the source of varied interpretation. *Tiferet Yisrael* remarks that this phrase refers to the physician who thinks that he is the finest and becomes too proud to ask the advice of others. This type of physician may act hastily

and not check medical books when appropriate. The physician who remains humble and cautious in his work will be greatly rewarded and praised.*

TSITS ELIEZER, VOLUME 9, Section 17, Chapter 7,
paragraphs 6 and 7

6) If a physician is summoned to treat an endangered patient while reciting the Amidah or reading the weekly Torah portion, he must cease praying and treat the patient immediately.

The same situation is discussed in the responsa collection *Lev Haim*. He concurs that even if the time for praying that service will pass, the physician is permitted to leave the synagogue at any time in order to treat the patient.

7) *Sefer Hadrei Deah* comments that if there is no other way to rescue the patient, nothing takes precedence over saving a life. Even if there was an alternative way to save the patient, one may claim that the physician should, nevertheless, immediately attend to the patient. The principle of priorities expounded in the *Shulchan Arukh* Yoreh Deah 259** may be involved. The Maharshah rejects this reasoning stating that the saving of a life does not, in all cases, supercede the study of Torah. The *Turei Zahav* and the *Dreesha* do not resolve the problem in his opinion. In any case, we are not stringent when lives are at stake.

Waldenberg comments that the ROSH, *TUR* and *Shulchan Arukh* permit the physician to leave the synagogue in order to treat an endangered patient.

* The remainder of this responsum, paragraphs 7 and 8, deal with subjects beyond the scope of our interest. In these paragraphs Waldenberg discusses the prohibition of taking unprescribed medications and the role of the pharmacist vis-a-vis prescribing medications.

** The laws concerning the distribution of funds collected for purposes other than their suggested or actual usage is discussed in this section.

even if alternative methods to aid the patient are available. They do consider this action to be in consonance with the principle of priorities outlined in the *Shulchan Arukh*. Waldenberg does not understand why the *Hadrei Deah* finds the comments of the *Turei Zahav* and the *Dreesha* to be insufficient.

It should be noted that the author of *Hadrei Deah* agrees with the general consensus that when there is no alternative, the physician must interrupt his praying or studying in order to treat an endangered patient. After all, not every physician is capable of treating every patient. As mentioned in Yoreh Deah 336a "a physician who refuses to practice medicine is likened to one who has spilt blood." This ruling applies even in the case that another physician is available to treat the patient. Not all patients benefit equally from all physicians.

VOLUME 10, SECTION 13, PARAGRAPH 5

Waldenberg continues with a discussion of the possible conflict that could arise for a physician during the time of prayer.

Sefer Minchat Aharon, basing itself on Mishnah Shabbat 12, mentions that one should not study or engage in judgment at the time of afternoon prayers. He suggests that there is no differentiation in this matter between a judge and a Jewish physician who is attending a consultation session with other physicians. The advisory session has a tendency to become prolonged with a plurality of opinions expressed and a detailed examination of all possibilities. These meetings may be more than an hour's length. It is possible that the matter will be prolonged to such an extent that the physician will not have the opportunity to pray the afternoon prayers at all.

This ruling applies, says Waldenberg, when the patient is not in immediate danger. If the patient is endangered it is not only permitted but also obligatory for the physician to arrange an advisory session without hesitation even if it is close to the time of afternoon prayers. He should furthermore not fear that the time for recitation of the prayers will pass.

Sefer Petach HaD'vir concurs that when the patient is endangered the physician is obligated to take counsel with his colleagues. He should not fear that the time of the afternoon prayers will pass as he is engaged in the commandment of "do not stand idly by the blood of your neighbor."

Petach HaD'vir justifies his comments by the fact that the recitation of afternoon prayers is not Toraitically based. Waldenberg suggests that such justification is unnecessary. He claims that it makes no difference as to whether or not mincha is Toraitically based. The appropriate point is that nothing takes precedence over the commandment of saving a life. Thus an advisory meeting on a life and death situation supercedes even the recitation of the morning Shema (a clearly Toraitically-based obligation). Just as it is permissible to transgress the Sabbath commandments in order to aid the ill, thus it is permissible to arrange advisory sessions whenever necessary. It matters not whether the patient, in the end, actually benefits from these meetings.

Yet, remarks the *Petach D'vir*, if the patient will not be further harmed by waiting an additional hour so that the physician can recite the afternoon prayers, the physician should do so. Waldenberg disagrees suggesting that in this case it is preferable to rearrange the daily schedule and hold the advisory meeting prior to the time of mincha. Thus the patient receives treatment earlier and the physician is still able to pray the afternoon service at its proper time.

Since it is permissible to suspend the laws of the Sabbath in order to treat an endangered patient through the hermeneutical principle of *kai v'homer*, we may assume that it is permissible to abstain from reciting obligatory prayers in order to treat such patients.

TSITS ELIEZER VOLUME 8, SECTION 15, CHAPTER 7,⁴⁵

Paragraph 21

Waldenberg addresses a question posed by the Hatam Sofer (responsa Orah Hayim, no. 82) Why is it permissible to slaughter an animal on the Sabbath if a patient so requires but forbidden to serve him non-kosher meat? One response may be that a transgression is committed with each and every mouthful of non-kosher food. The RASHBA raises an objection to this citing the beginning of tractate Shabbat (4a) "A person should not infringe even a minor injunction so that his friend may merit." Given this and the fact that the punishment for deliberately transgressing the Sabbath laws is stoning, why should one not feed a patient non-kosher meat (which would thus avoid the necessity of slaughtering on Shabbat)? This objection is rejected on the basis that slaughtering an animal on the Sabbath in order to save the endangered is not considered a transgression. Rather, it is a positive commandment to profane the Sabbath or to transgress prohibitions in order to sustain life. It matters not if the patient acts on his own behalf or if someone else acts for him. This is similar to the case of the circumcision which must be performed on the Sabbath. It is a positive commandment and may be fulfilled by anyone.

Furthermore, this is not a case of "infringing a minor injunction so that a neighbor may merit." (This refers to cases like the freeing of a slave so that he may fulfill the commandment of 'be fruitful and multiply'.) In the

case of feeding a patient non-kosher meat or slaughtering kosher meat on the Sabbath, the issue involved is not that of someone else slaughtering on behalf of the patient. Everyone is commanded to care for the welfare of others. Even if the patient himself could ^{ed}slaughter the animal, the problem would still exist. The operating principle is that we suspend the laws of Shabbat in order to save lives.

The Hatam Sofer also notes that the suspension of the Sabbath laws to aid the endangered is not considered profaning the Sabbath. He, likewise, mentions that such behavior is mandatory and comparable to the case of circumcision on the Sabbath. That is to say, one is not "doing" on behalf of another; one "does" on behalf of himself in fulfillment of the commandment of saving a life. He comments that just as anyone who is skilled in the practice of circumcision is obligated to see that a child is circumcised, so anyone who can aid a patient is obligated to do so.

Waldenberg addends that he found a surprising response in R. Shlomo Kluger's *Hagahot Hochmat Shlomo*. If shame or excessive burden is placed upon the rescuer, he claims that the rescuer is not under obligation to save the endangered. This rule also applies to a sage who would have to sacrifice his dignity while attempting to save the endangered. Waldenberg points out that this is a problematic position, citing Yoma 84b - "even where there would be an opportunity for others to perform the commandment of saving a life and thus transgressing the Sabbath laws, the leaders of the community (RAMBAM and others comment - "the great sages") should perform the rescue operation themselves. Waldenberg suggests that this text implies that no one, because of dignity, is exempt from the commandment of saving a life.

Referring back to the difficulty raised by the Hatam Sofer, Waldenberg mentions that the TASHBETZ and Rabbenu Nissim address the issue

TSITS ELIEZER, VOLUME #8, SECTION #15, CHAPTER #10,
PARAGRAPH #13, (first words - HaRADBAZ sham)

The RADBAZ comments that one is not required to possibly endanger himself in order to save another. Moreover, he continues, if one is strict and does place himself in danger, he is a pious fool. Possible danger to oneself outweighs the certain danger to another. As opposed to this, *Sefer Meirat Anayim* quotes the Yerushalmi Terumot 8:4 which bids one to endanger himself in order to save another, for the danger of the redeemer is questionable while that of the endangered is certain. The silence of the *poskim* is taken to mean that they disagree with the Yerushalmi and would hold that one is not obliged to risk possible danger in order to save another. The *Pitchei T'shuvah* conclude that one must consider well whether or not the situation implies personal risk but should not be overly precise in their determination. This is similar to the case presented in Baba Metzia 33a (i.e. one should not be punctilious in his observance of the rule that the reclaiming of your property supercedes the reclaiming of a neighbor's property.) In both cases one is warned that selfish behavior will lead to the end which one is attempting to avoid.

Regarding the physician who may endanger himself by treating a patient with a contagious illness, according to the letter of the law the physician is not required to treat the patient. He should, however, seriously consider the extent to which he would be endangering himself.

TSITS ELIEZER, VOLUME 9, CHAPTER 11, paragraph 2

As was noted earlier (vol. 8, section 15, chapter 7, paragraph 21), R Shlomo Kluger, author of *Hagahot Hochmat Shlomo*, maintains that the commandment "you shall return (a lost object) to him" does not extend to a sage who would lose his dignity by fulfilling the commandment. R Y Alishav, in a letter to Waldeberg, rejects this interpretation claiming that no such limits or exceptions should be placed upon this commandment. If a sage's daughter was drowning in a river would he do nothing? There is no reason for exempting the sage from this commandment especially when life is at stake. Alishav, thus, also rejects Kluger's reading of Sanhedrin 73 from which the limitation on "you shall return it to him" is derived.

TSITS ELIEZER, VOLUME 9, SECTION 17, CHAPTER 5

1) The first paragraph is a summary of volume 8, section 15, chapter 10, paragraph 13 presented above (i.e. the position of RADBAZ that the physician may not endanger himself in order to aid others).

2) As Waldenberg previously indicated a responsum of Moshe Isserles emphasizes that the physician is required to treat a patient despite possible harm to himself. The following case is discussed in the responsum. Reuven rents his home to Shimon. After the agreement has been completed but before Shimon takes possession, Shimon's wife becomes contagiously ill. Thus, Reuven wishes to delay Shimon's entrance into the house. Isserles declares that this is not sufficient reason for postponing the date of Shimon's entrance. Isserles maintains that "it is a shame that the disease is contagious. A remorseful person understands that God's will is behind both the illness and the cure. Yet, if we agreed to Reuven's request, all of the laws of visiting the sick would be annulled. There is a fine line between

that which is contagious and that which is not. Only in the case of skin diseases do we forbid visitation." A quotation of this comment can be found in *Siftef Kohen*

Netivot HaMishpat (Hoshen Mishpat 312, #2) adds that this applies in the case that the contagious disease was contracted after the contract was signed. If she was ill prior to the signing of the contract and the landlord was unaware of this, the contract is not binding.

3) This paragraph discusses the changing attitudes towards contagious diseases. It is not germane to our purpose.

4) Waldenberg suggests that Isserles made mention of skin diseases particularly, not because he believed that this was the only contagious form of illness, rather because he found significance in the rabbinic specification of this type of disease. Perhaps when visiting patients with other types of contagious illnesses, one is protected by the very performance of the commandment of visiting the sick.

The RADBAZ, on the other hand, was speaking of a more concrete form of personal risk like the amputation of a limb which would endanger the entire body. It is permissible to endanger yourself in order to help another in more abstract situations such as traveling along a road known to be the site of highwaymen, through an area in which wild beasts dwell, or diving into deep water.

Clearly, one is prohibited from providing aid to another when he will certainly endanger himself.

We must make this distinction as we know that there is a practice of paying people who consent to treat contagious patients. Under what conditions can we allow another to endanger themselves on behalf of a patient? Would their actions not be accounted to them as wanton suicide?

Thus, we must conclude that these medical situations do not fall under the category of "danger."

5) Waldenberg suggests that Isserles' comments apply to the patient who is himself contagious but whose disease does not spread via air. If the patient is afflicted with a disease transmitted through the atmosphere, the laws of visiting the sick are rendered inoperable. Great care should be taken to quarantine the patient. Isserles would apparently concur with this as he mentions that one should flee from a city at the first sign of plague.

Rabbi Akiva Eiger lends support to Waldenberg's interpretation of Isserles' statement with a comment of R. Bachya on Parashat Korach. Commenting on God's command to Moses and Aaron to separate themselves from the community (Numbers 16:24) so that God would not destroy them along with the others, the Bachya remarks, "Why was it necessary for God to so instruct them? Surely God is capable of killing the majority but sustaining one who is in their midst. The case of three covering themselves with a tallit, two dying and the middle one surviving, is well known. Psalms 91:7 (A thousand may fall at your left side,/ ten thousand at your right,/ but it shall not reach you.)* further strengthens this argument. But in the case of Korach the separation was necessary so that the air contaminated with plague would not affect them. Another possible explanation can be found in the maxim, "when the measure of justice asserts itself it is unable to differentiate between the righteous and the evil."

When the air is polluted with contagions the situation needs to be considered more seriously. There seems to be a differentiation between an individual struck with such a disease and a larger group. The above

* JPS, p. 1218

indicates that in the case of a larger group the measure of justice is incapable of differentiation

Isserles, himself, maintains "that in the matter under discussion, the illness is carried via the air of the city. It is very common - there is not one house which has not been afflicted. One may reasonably conclude that all men are aware of the illness." Isserles' point is to deny the landlord's claim that he was unaware of the condition of his new tenant's wife. The landlord must have been aware of the presence of the illness in the vicinity. He does not seem terribly concerned that the disease is contagious as he did not flee from the city. Waldenberg prefers Isserles' earlier comment that in general we do not recognize when an illness is contagious and furthermore it is not clear when the atmosphere serves as the conductor of the contagions.

Apparently the disease which Isserles was speaking of was not fatal. Otherwise people would have fled the city.

6) *K'nesset HaG'dolah* quotes in the name of Isserles that "we do not differentiate between those struck with a plague and other types of illnesses with regards to the commandment of visiting the sick. We do, however make an exception to this rule where skin diseases are concerned." Certainly his intention was not to draw a distinction between plagues and other types of contagious diseases or disease carrying air.

It should be noted that Rabbenu Haim Plagi, in his *Sefer Nefesh Kol Chai* strongly criticizes this position of Isserles and *K'nesset G'dolah*. He claims that Isserles and the others would never have claimed that there is an obligation to visit a patient who is suffering from a contagious plague if they had seen the words of the *rishonim* on this subject.

7) Regarding the physician, perhaps it is possible to interpret the superfluous use of "heal" in the verse "heal, he shall heal" as granting the physician permission (i.e., commanding him) to treat contagious as well as non-contagious patients despite the personal danger which is involved. Thus, physicians should rely on the opinions of the great sages such as Isserles, *K'nesset G'dolah*, etc. Their approach provides treatment for the contagious patient and assures the physician that while he is performing the commandment of healing no evil will befall him.

8) Furthermore, it is the way of the world for physicians to treat all patients. Chaos would be the result of any other policy as all people - both the ill and the healthy - would object. Since we conduct ourselves according to universal custom, the personal risk a physician entails by treating the contagiously ill is not in vain and cannot be considered under the prohibition of endangering oneself in order to rescue another. (This may have been the intention of Isserles and others who formulated their rulings during times of plague.)

A question of similar significance is brought up in the responsa of *Imrei Aish*. Is it permissible for a man to enlist in the army for the sake of the money that he will thus receive? The responsum answers that this is not considered a case of intentional suicide, citing King David's non-obligatory war as a proof-text. Further proof is offered from tractate *Shevuot* 35b - "a government that kills one of six (in time of war) is not punished." It may still be possible to conclude that in the case of medicine, permission for treating the contagiously ill should be sought in an examination of the superfluous use of "heal" in the verse, "heal, he shall surely heal."

9) Waldenberg suggests that just as the Torah permits a worker to enter dangerous places in order to enter a living, so too the physician, for the sake of his professional livelihood, may endanger himself. Commenting on Deuteronomy 24:15 "he urgently depends on it", Baba Metzia 112a offers proof for Waldenberg's contention. "Did not the man climb the ladder, suspend himself from a tree, risking death, in order to receive his wages?" Apparently, therefore, it is permissible for a man to risk his life by entering dangerous places on account of his profession (It should be noted that it is forbidden to do this casually, without a specific purpose.) This certainly applies to the physician, especially when state law orders that the medical license of a physician who refuses to treat contagious patients be revoked.

Noda B'Yehuda concurs that a Jew may endanger himself, by entering areas in which wild animals are known to roam, by being an overseas merchant, etc. if this is required in order to earn a living. If he has no choice, he is permitted to sustain himself in this manner.

10) When the physician must place himself in such a precarious position, he should take heed to recite a special prayer for deliverance to God. *Noda B'Yehuda* likewise mentions the importance of this short prayer relying on B'rachot 29b as his proof: "What is a time of crisis? Rav Hisda said in the name of Mar Ukba, 'even at a time when you are filled with wrath, etc.' Others quote Rav Hisda as saying, 'at a time when they transgress the words of Torah.' One who endangers himself transgresses the words of Torah, for it says (Deut. 4:15) 'be most careful.' Recognizing his transgression, God's wrath will be upon him and therefore the sages have instructed those who must so endanger themselves on behalf of their profession to recite this short prayer in a pleasant manner. It is most

fitting that the physician engage in this practice before treating a contagiously ill patient. God will hearken to his pleas and send Divine help to the physician as well as the patient.

11) Further support for this position may be derived from a discussion in *Nishmat Kol Chai*. During a time of plague, one of the physicians treating the ill desired to enter the synagogue. He was prevented from entering the synagogue by a few who feared that through him they would contract the plague. Plagi discusses whether or not it is permissible to prohibit him from entering the synagogue. It is apparently an accepted fact that the physician is permitted to engage in this type of healing. He concludes, stating that one who has fled on account of the plague is obligated to fulfill the commandment of visiting the sick and burying the dead. One who is busy performing a commandment will not be harmed. He will not meet with the evil and his days will be lengthened.

Waldenberg reports that he found recorded in the name of R. Isaac Luria, the "Ari", that it is permissible to visit one struck with plagues as long as he is standing and not sitting. Further support is deduced from the practice of the city of Izameer where special people perform the task. Also several God-fearing people take it upon themselves to care for the ill during time of plague, to visit the sick and to employ both their money and their energy in an attempt to cure them. The majority of these God-fearing people have not met with harm for "one who abides by the commandments does not meet with harm."

12) At this point it should be clear that the physician is permitted to endanger himself in order to treat patients with contagious illnesses of all types. Furthermore, such action is considered obligatory. It should be mentioned that many of the authorities disagree with RADBAZ and claim

that the physician is commanded to take personal risks if his actions are likely to save another. The verse (Deut. 4:4) "you, who hold fast to the Lord are all alive today" is offered as a proof-text.

**TSITS ELIEZER, VOLUME 10, SECTION 25, CHAPTER 21,
Paragraphs 4-7**

In reaction to Kluger's claim that the sages are not required to forfeit their dignity in order to save a life, the author of *Sefer Agudat Ezov* responds with strong disagreement. "Since we agree that one does everything within his capabilities to restore a lost object to its owner, and certainly that one would not forfeit his own life on account of his dignity, one may not be exempt from the commandment of saving another's life because this may involve acting in a manner not befitting his stature. Furthermore, how could one think that for the sake of dignity it is permissible to allow the loss of a Jewish life? All of the negative precepts are suspended in cases of life and death. Certainly the laws of saving a life are not suspended on account of dignity. Rather as RAMBAM explains (Hilchot Shabbat, chapter 2:1), the highest form of dignity is found in the opportunity to rescue another. That is to say that when saving a life is involved, the prohibitions preventing this act are waived for everyone. Thus a rabbi is the first one to violate the Sabbath in order to save a life. Regarding the returning of material objects it is permissible to consider one's dignity, but this is not the case when the object is life. It is the general consensus that one is obligated to undergo various types of embarrassment in order to save a Jewish life.

Furthermore the Sanhedrin 75a proof-text offered by Kluger is irrelevant to the case at hand. In that situation, the man must be held responsible for the violent lust which overcame him. It would be improper

to embarrass the woman's family on his account. He is likened to one who has lost his sanity. Yet, if one sees a neighbor drowning or highwaymen approaching him, he is obligated to embarrass himself if necessary in order to rescue his neighbor. He would also be obligated to hire others to aid him in the rescue attempt.

May God forgive the printers who printed such words allowing dignity and effort to serve as reasons sufficient to permit the death of a Jew. One who saves a Jewish life is likened to one who has saved an entire world. This is the extent of the comments of *Sefer Agudat Ezov*⁶³.

Waldenberg clarifies that the case of Sanhedrin 75a is not only different because the man must be held accountable for his own lust, but also because he is capable of curing himself by engaging in repentance. As stated in tractate Succah "His distress is self-inflicted, he must resolve it."

Waldenberg finds it surprising that Kluger's statement, that "the matter needs further investigation" and his (Kluger's) cognizance of the possible conflict flowing from Rashi's comment to Baba Kama 100 that one is required to bury another (presumably at the risk of personal embarrassment)) remains unnoticed by *Agudat Ezov*. In any case, Kluger is likewise aware of the clarification offered on Baba Metzia 100b that one is obligated to engage in the commandment of saving a life even if it involves personal embarrassment. Thus, the issue here is not an attack against the printers for their willingness to print Kluger's argument.

5) *Agudat Ezov* offers another proof-text (which apparently supports Kluger) for his contention from tractate Sotah 21b. "A pious fool is the type of person who sees a woman drowning in the river and thinks, 'it is improper for me to look at her in an attempt to save her.'" Yet one who does nothing

to aid a drowning person transgresses the commandment "do not stand idly by the blood of your neighbor." Furthermore, the commandment to return a lost object is extended to include returning one's life when it is endangered. But since this person is called a pious fool and not a sinner it appears that one is not obligated to fulfill this commandment if one's dignity is at stake. This explanation is rejected because the text does not say that he did not want to look at her and thus save her. If this was the case he would be considered a sinner. Rather the pious fool is one who at the moment of saving her, closes his eyes so that he will not look at her in spite that it is permissible to look at her in order to save her life. The pious fool is acting beyond the letter of the law. He is not considered a sinner for he did attempt to save her but his foolish piety may cause his efforts to meet with failure. This proof-text, according to *Agudat Ezov*, therefore, does not aid Kluger's argument. Dignity is of no consequence: one is always obligated to save a Jewish life. If one does not fulfill this duty he is thought of as a sinner. This situation is different -- for he did save her.

Waldenberg rejects this understanding of the Sotah passage. He prefers Meiri's understanding of the text that the man did not save the woman lest he view her nakedness.

Even this interpretation does not aid Kluger. The fact that such a man retains the title pious fool is contrary to Kluger's goal. This is not exactly the legal exemption on account of personal dignity that he is seeking to establish. In fact, there is even an opinion which states that a sage is forbidden to sacrifice his dignity even if he desires to do so (see Isserles, *Hoshen Mishpat* 263, paragraph 3). The Gemara refers to him as a pious fool rather than as a sinner because he did not intentionally trespass the law.

with malevolence. He was simply mistaken in his interpretation of the Torah's priorities.

Though it is recognized by many commentators that saving a woman in such a situation may require seeing her as well as touching her, since this is not done for the sake of love it is permissible. The *Beit Yosef* finds this difficult and prefers to leave the matter with the suggestion that it be investigated further. The collection of responsa *P'nei Yehoshua* suggests that in such a case terror is felt and we should not stop to reflect upon the proper course of action. In any case there appears to be some halachic justification (connected to the laws of nakedness), even though it is not acceptable, for not rescuing the endangered in such a case. One who acts in this manner out of honesty and innocence cannot be considered a sinner. Thus the sages called him a pious fool as is found in *Sefer Eishel Avraham*.

6) The author of *Sefer K'li Hemda* also disagrees with Kluger. He avers that since this man is called a pious fool, one may conclude that in capital cases there is no exemption on account of dignity. The author of *Sefer K'li Hemda* opines that this man is a pious fool because he attempted to save the woman but insisted on taking unnecessary precautions so that he would not be guilty of transgressing the laws of nakedness. *Sefer K'li Hemda* also states that the Sanhedrin passage is best differentiated by the fact that the man is responsible for his lust. Waldenberg rejects this explanation in favor of his interpretation presented above. *K'li Hemda* further remarks that one is obligated to save another who attempts to commit suicide. The Sanhedrin passage contains an halachic disagreement. Additionally, in that situation the humiliation inflicted upon the woman's family remains even after the "rescue." This applies to minors as well.

despite that fact that they are not obligated to fulfill the the commandment of saving a life

7) *Sefer Nefesh Hayah* remarks that the situation discussed in the Sotah passage is not one in which the man made no effort to save her (for the would be called a sinner) but rather the passage discusses one who hires others to perform the rescue. Since he did not act immediately, he is caled a pious fool. Though this is not the obvious meaning of the passage it provides support for a comment made in the responsa of the TASHBETZ. He avers that one who questions acts improperly. The "one who asks questions" is one who when given the opportunity to save a life which requires him to transgress another law chooses to reflect upon the situation, deciding to instruct others to perform the action so that he does not transgress the lesser commandment. He thus acts improperly, impiously declaring that it is permissible for another to transgress the lesser commandments though he refuses to do so. Therefore he is called a pious fool. A truly pious man would not allow himself to manipulate others to rescue the endangered while he chooses not to participate

TEXTUAL ANALYSIS AND CONCLUSIONS - SECTION 2

A close reading of the material presented in this section suggests that Waldenberg supports the contention that there exist very few, if any, situations in which the physician may legitimately claim that he should not be required to treat a patient for religious or personal reasons. Methodologically, Waldenberg is occasionally forced to rely on the fact that our society is vastly different from the societies which generated the basic halachic literature and as such certain cautions of an earlier generation (e.g. rabbinic court licensing of physicians) are no longer of concern in our day.

This type of reasoning, prevalent in the *Ramat Rachel* passage above, may serve as a precedent for further liberal rulings. Waldenberg seems to apply it rarely and with great caution. Nevertheless, it should not escape the notice of the liberal halachic scholar that this type of regard for the mores of modern culture is given some credence in the work of this traditional halachic author. He seems content with the fact that since physicians no longer request rabbinic court sanction for their practice, it is no longer necessary. The reality principle of Jewish law is latent but clearly functional.

When faced with the conflict between religious and medical obligation (i.e. treating a patient or attending communal prayer) Waldenberg invokes the principle that when lives are at stake we are not stringent regarding the commandments. There need be little discussion over the fact that when a patient is endangered, the physician's first and most important responsibility is tending to the patient. Waldenberg further reads the texts to imply that the physician may attend to related medical responsibilities even when these will not directly lead to the saving of a life. He cautions that this principle should be invoked only when necessary. He recognizes that abuse of his lenient ruling is possible. These responsa lead the reader to conjecture that for Waldenberg the practice of medicine should have to contend with as few conflicts as possible. He seems to be implying that the very practice of medicine (not just when saving a life is directly involved) is a commandment of equal or greater stature than those of a ritual nature.

Certainly the most difficult question which Waldenberg must address is whether or not the physician is obligated to endanger himself (e.g. treat contagious patients) in order to treat a patient. The question is of particular importance in our decade as we deal with the fatally contagious

AIDS disease. Does the physician have the right to respectfully decline from treating those who are in need of his expertise? This type of question reaches to the very core of medical ethics surrounding the physician. Though Waldenberg admits that there is no way halachically to force the physician to treat such a patient, he avers that the physician is under ethical obligation to do so. He employs the rabbinic technique of attaching significance to apparently superfluous Biblical words to the verse "heal, he shall surely heal" in order to suggest that the physician is obligated to treat both contagious and non-contagious diseases. It should be noted that this is Waldenberg's innovation. No other authorities cite this verse to prove that physicians may risk potential danger in order to treat patients. Additionally, he once again suggests that social reality must be considered in this situation. Chaos will be the result if physicians refuse to treat those who are highly contagious. Waldenberg compares the physician confronted by this situation with the worker who is halachically permitted to endanger himself in order to earn a livelihood. As a last resort, Waldenberg presents the rabbinic dictum that those who are occupied with the performance of a commandment will not be harmed. He addends that the physician who must place himself in danger in order to treat another should be zealous in his prayer. Waldenberg's plethora of reasons emphasize that he does not feel that he has sufficiently established his point. Halacha is rather equivocal on the issue. Since the law does not clearly respond, Waldenberg is forced to face an ethical dilemma for which arguments on either side may be logically cast. He decides in favor of what he perceives to be good for the society as a whole as opposed to one individual physician within the society.

In these texts, Waldenberg emphasizes the ultimate priority that the practice of medicine has in the modern halachically observant Jewish community. Neither sagely wisdom, the lack of extended medical experience, ritual obligation, nor self endangerment exempts the physician from treating the ill. The obligation of the physician is not only to treat the ill but to do so even under the most adverse of circumstances. Ethics seems to demand this much.

CHAPTER THREE

THE JUST REWARD

A bright youngster is raised in a middle class family and dreams of becoming a medical doctor. Her parents are simultaneously pleased with her aspirations and concerned that the cost of a medical education is prohibitive. She seeks to get an edge on the competition to get into medical school by attending one of America's better known, private undergraduate institutions. The bills of this four-year pre-medical college education will total more than \$50,000. Guaranteed student loans, university loans and bank loans will guarantee that this ambitious young woman will have a chance of acceptance to a medical college. The four-year medical school stint could make her and her family responsible for another \$100,000 worth of debts. Following medical school, this young medical doctor will be required to spend a minimum of two or three years working 72-80-hour weeks for a salary generally ranging between \$18,000 - \$25,000 per year. The interest on the loans continues to pile up but there is precious little money available to make payments. After eleven years of financial ruin, does not the medical practitioner, whose services are so vital to our society, have the right to expect a significant remuneration for services rendered?

A middle class family with four children receive the news that their youngest child has developed a rare form of leukemia. The medical bills are likely to run between \$75,000 and \$100,000 per year. Their insurance will cover slightly less than half of the cost. Is it not enough that they have to deal with the pain of the child's illness and the lingering possibility of his death, that they should also have to contemplate massive financial

obligations which his treatment will stipulate? Why is the time of the physician, whose occupation is often rather mechanical, of greater financial importance than the time of the university professor (the length of whose training is somewhat parallel)? Does the medical profession have the right to financially bleed its patients?

Clearly there are ethical justifications on each side of this issue. There is no relative financial value to our health and certainly none exists when the problem is life threatening. Simultaneously, such thinking allows the ill to be prey to the physician's financial whims and avarice. The very publication of a magazine entitled *Medical Economics*, which instructs physicians on various opportunities available to them for the expenditure of their excess income, reveals the fact that the patient may often be the financial victim. According to a Newsweek article a full "one third of America's physicians receive *Medical Economics*. It is not a magazine they leave lying around their waiting room."¹

There is no easy solution to the question of what is truly equitable. The physician does not work nine-to-five hours; the accoutrement of a beeper is a twenty-four-hour-a-day responsibility. We cannot lose sight of the fact that the physician's hours are often untenable yet their commitment, at least on the part of the majority, has proven to be unwaning. The issue of equitable financial remuneration for the physician is certainly one for the ethicist.

In addition to these dilemmas, Waldenberg must also address the question of whether or not Jewish law can even permit a physician to be paid for her services since we have previously established that such

¹Newsweek, "A Doctor's Desire to Do Good - And Do Well", January 26, 1987, p. 53

services are considered to be the fulfillment of a Divine Commandment. Is it permissible to receive financial recompense for the performance of a *mitzvah*? Waldenberg addresses these questions both in his theoretical work *Ramat Rachel* and in a responsum. Detailed summaries of his material are presented below.

RAMAT RACHEL #24

Arokh HaShulchan, 336c Regarding the physician's salary The TUR has written in the name of Ramban that it is permissible for the physician to receive money for his time and trouble. Yet, he may not be compensated for his knowledge. For example, when the physician merely instructs his patient to take such and such a drug he may not be compensated, for that would be reimbursement for knowledge and wisdom. Yet, when the physician travels to the patient, he may receive a fee for his trouble and likewise when the physician writes a prescription to be filled in a pharmacy.

A) From the *Arokh HaShulchan* we learn that when a physician is troubled, makes use of his time examining patients, or writes a prescription, he may receive a fee for his services. But if someone comes to his home to merely ask his advice regarding an illness or drug, he may not be reimbursed for this distribution of knowledge. Waldenberg questions whether or not a physician may receive a fee for simply writing a prescription when he has not even examined the patient. This does not seem to be appreciably different from oral instruction for which a fee cannot be rendered. *Siftei Cohen* agrees that reimbursement for the writing of a prescription is unwarranted. It takes no more time for the physician to

write out a prescription than it does for him to verbally advise the patient. Additionally the cost of the paper is insignificant.

B) The majority of the texts are in agreement with the *Arokh HaShulchan*. *Shevet Yehuda* raises a related question. Can one be reimbursed for the teaching of medical knowledge? *Shevet Yehuda* remarks that this type of instruction is similar to other professions and therefore one who engages in it may receive a salary. *Zedah LaDerekh* disagrees. He permits the physician salary for his trouble and time spent away from other things but not for the teaching of medical knowledge. Medical knowledge is a category of Torah study and thus it falls under the rubric of "what God does without compensation (i.e. teach Torah), so man does without compensation." This certainly applies to situations which include endangered lives. *Mateh Moshe* supports *Zedah LaDerekh* on this issue. He denies that the teaching of medicine is similar to other professions as the acquired medical knowledge will be employed to save lives. Thus it is a commandment whose fulfillment carries no financial reward.

Despite this, Waldenberg opines that it is permissible to receive a salary for teaching medicine since the student will apply his knowledge to treating Gentiles as well. Furthermore, the teacher is certainly eligible to receive a salary for his time not spent earning money in other ways.

C) Though the physician may receive a fee for his trouble and time, he may not refuse to treat a person who cannot afford to pay him. According to *T'shuvah Me'ahavah*, if he does so the court has the authority to compel him to treat the poor person. Just as a mohe'i must circumcise the son of a poor man, so a physician must treat his ailments. The court assumes the responsibility of circumcising the orphan since circumcision is a Toraitic commandment. Likewise, since the Torah commands that a lost object be

returned to its owner (and this is extended to include his health), the court has the responsibility of fulfilling this commandment for those who cannot do so for themselves. Thus, the court has the authority to force the physician to treat the indigent patient.

D) It may be impossible to force a physician to treat a patient free of charge. In this case the court may deceive him, promising him a salary and then not paying him. This is justifiable because the physician is not adhering to the commandment and is not behaving as if he is a descendent of Abraham - the pursuer of righteousness and kindness. Furthermore, the physician should not be paid from the community's charity fund nor should a special collection be established. The physician is obligated to treat the patient free of charge because of his specialized knowledge.

F) If there is more than one physician in town the obligation to treat the indigent must be evenly distributed. The community could decide to pay the physicians from the community charity fund, start a special collection for the purpose, or establish a system of rotation wherein each physician is responsible for treating, without compensation, a share of the indigent cases. In wealthier communities, the community should be responsible for paying the physician a fixed rate when the patient proves that such payment is beyond his means.

G) Waldenberg concludes by praising Israel's *Kupat Holim* system as an excellent way of dealing with this sensitive problem.

RAMAT RACHEL #25

Arokh HaShulchan, 336d If a physician specifies a large fee in return for his services, a patient is obliged to pay him because his art is what he is selling and one cannot affix it with a relative value. Despite the

fact that for the physician the practice of medicine is a commandment, as with any commandment which devolves upon all humans, if one has the opportunity to fulfill it but will only do so on the condition that he receive a certain sum of money, we do not reclaim the money. There are those who say that this ruling is in effect even in the case when the physician has not yet received his requested fee. That is to say that the patient is required to pay him.

A) This ruling seems to contradict the conclusion reached in the previous section (i.e. that a court has the right to force a physician to administer care free of charge to the indigent). The *Arokh HaShulchan* reasons that the physician has the right to specify a large fee because everyone is subject to fulfilling the commandment. This is problematic, as clearly "everyone" does not have the necessary knowledge and background to engage in medical science. It is more reasonable to conclude that the commandment of pursuing medical knowledge devolves to a greater extent upon the physicians than on the rest of the world.

B) Waldenberg suggests that the *Arokh HaShulchan* was referring only to other physicians in its use of the phrase "upon all humans". Thus, in areas where there are many physicians this law applies, but in a place where there is only one physician eligible to treat the patient, he may not specify a fee beyond reason.

C) Textual support for Waldenberg's suggestion can be found in the *Levush*. The *Levush* remarks that the commandment of returning a lost object when the object is one's health operates differently than with any other lost object. Whereas, in general, the commandment devolves only on the finder of the object, regarding one's health the commandment devolves

on all humans – that is all who have studied the ways of medicine. The *Levush* clearly states what is meant by “all humans” – only those who would be capable of fulfilling the commandment (i.e. physicians)

D) Waldenberg's claim is further strengthened by RADBAZ's understanding of Ramban's comment on this matter. In this case, where there is only one physician capable of treating the patient, Ramban recognizes that the physician may be likely to specify a large fee. The idea that when a “commandment devolves upon all humans, if one has the opportunity to fulfill it but will do so only on the condition that he receive a sum of money, we do not reclaim the sum” (presumably, after he has been paid) is employed as support. In this particular case the obligation falls only on the individual physician – if he does not attempt to save the patient he has transgressed a positive commandment. If he is given a fee as a gift, he may keep it. If, however, he was paid a salary because the patient felt that he was legally obligated to do so, the physician may not keep the money. This explanation of RADBAZ clarifies the contradictory readings of the *Shulchan Arukh* and the *Arokh HaShulchan*.

E) On the other hand there is an argument to be made for granting the physician the fees that he requests. Not doing so may endanger future patients. *Zedah LaDerekh* also makes note of this problem.

The RAMA and *Yam Shel Shlomo* both suggest that the physician be paid what he requests since it is the custom of our times to pay physicians well.

Thus the physician and patient should agree on an appropriate payment in advance of the treatment. The patient is obligated to pay the specified amount.

It has been established that the physician should receive the compensation he requests. Waldenberg strongly urges the physicians to understand that this may cause severe financial problems for many families. He pleads that physicians take care to avert this situation whenever possible.

Misgeret HaShulchan likewise avers that though we are obligated to pay physicians their stipulated fees, it is shameful that some physicians insist on receiving exorbitant remunerations.

VOLUME 10, Section 25, Chapter 29

Is one obligated to reimburse a physician whom he did not select and whose treatment was to no avail?

A) An applicable situation is discussed in *T'shuvot Tzvi T'feret*. A child became dangerously ill on Yom Kippur in a village which lacked a physician. The neighbor of the ill child convinced a Jewish man who owned a carriage to send it to the neighboring town and bring back the physician. The man sent his servant with the carriage. The servant succeeded in returning with the physician but the physician was unable to save the child. The child's father did not want to pay the physician on account that he did not request his services and the child did not recover.

The *Siftei Kohen* (Hoshen Mishpat, 264:4) states that one who attempts to save an ass when the owners are not present, and therefore cannot be consulted, should be paid even if the rescue attempt was unsuccessful. The author of *T'shuvot Tzvi T'feret* applies this ruling of the *Siftei Kohen* to the above case and concludes that the parent is obligated to pay a salary.

Waldenberg avers that the ruling of the *Siftei Kohen* is not applicable to this case. He opines that in the above situation the physician should receive reimbursement only for his trouble. The *Shulchan Arukh* states that if one descends (in order to save an ass) without first consulting with its owners and is unsuccessful, the owner is not required to pay him a salary (*Siftei Kohen* addends the *Shulchan Arukh* by suggesting the situation in which the owners are not present.) One may presume from this that the man should receive reimbursement for his trouble and expenses but does this imply that all others who took part in attempting to save the child are also deserving of a salary? If one contends that he hired others in order to save the child because he was incapable of doing so himself (as discussed in Sanhedrin 73a), one further deduces the parents' responsibility to reimburse those who aided their son. For in disregarding the parental responsibility in such a manner, the situation is no longer comparable to one in which the "owners were consulted." The trouble in which they engaged was not on behalf of the father of the child, but rather because of their moral obligation. The ROSH on the above-mentioned Sanhedrin passage mentions that the victim must pay his redeemer. This applies when the victim was actually delivered from danger but it is of no consequence if the victim died despite the redeemer's effort. (In short, Waldenberg argues that the father would be obligated to pay for the expenses and trouble of others, but not additional salary.)

B) Further proof for Waldenberg's interpretation can be found in the responsa of RASHDAM (Yoreh Deah, 204). A casuistic inquiry into parental responsibility is presented. A Jewish child has adopted a "cult religion" and consorts with a group of evil doers. The Jewish community has decided to abduct him and conceal his whereabouts until they have raised ransom

money. Is the father obligated to provide the ransom for his son? The RASHDAM declares that the case is perfectly clear - the father is not obligated, neither by societal nor divine law, to contribute any money if it is not to be used to reimburse those who have troubled on account of his son. If his son is not saved, he owes nothing other than the wages of those who attempted to save him. One may argue by employing the hermeneutical principle of *kal v'chomer* that if one is not obligated to pay those who, without being obligated, aid the endangered but are unsuccessful, then certainly one is not obligated to pay those who are obligated to aid the endangered but fail. They have expended their energy in fulfillment of an obligation. If they had abstained from doing so, they would have been liable before divine law. The fulfillment of this obligation provides them with a great reward.

According to this responsum, anyone who spends money on behalf of someone else's medical care ought to be reimbursed. This act of saving a life should not depend on the issuing of explicit instructions.

The question is posed as to whether or not a patient is required to reimburse his relatives if they take on the responsibility of finding a physician and obtaining medicine for him. Despite the fact that the patient did not request their assistance, he is required to see that no one suffered financial loss on his account. It is customary for relatives to aid one another during times of illness. The ROSH adds that this principle applies to anyone who expends money to aid the endangered. This position is contrary to the RASHDAM in that no differentiation is made as to whether or not the patient was saved. As mentioned above the ROSH avers that the redeemer is to be paid only if successful.

Waldenberg resolves this conflict by establishing that the ROSH would agree that if the patient experienced no relief at all from the physician's cure, one would not be required to pay the physician for his efforts. If, however, the physician treated the patient, momentarily aiding him, the physician is to be reimbursed. Waldenberg claims that the ROSH would agree that if the physician's treatment was of no avail, the patient's family is under no obligation to pay him.

D) RASHDAM mentions another situation relevant to our discussion. If an indigent person falls ill and another agrees to finance his medical treatment, and at a later date the indigent patient acquires wealth, is he required to reimburse his benefactor? RASHDAM declares that the patient is not required to repay the benefactor as long as he was indigent at the time that the treatment was administered. This is supported by Mishnah Peah, chapter 5:4 where a similar situation is discussed. Rabbi Eliezer opines that one who is traveling and must take from the corners of the field must pay for them when he returns home. The sages contest that at the time that the man took food from the fields he was indigent and therefore need not pay for it upon return to his home. The law is decided with the sages. Similarly, the poor patient who acquires wealth at a later date need not repay his benefactor.

E. *Machane Ephraim* discusses a similar case regarding the redemption of a captive. One who has been captured and is unable to pay the ransom requested from among his own possessions need not reimburse his benefactor. Furthermore, if the captive was actually capable of providing the sum, but the benefactor thought that he was not of the means to do so and thus paid the ransom with no thought of being reimbursed, the captive is not obligated to reimburse him. The benefactor acted with the

fulfillment of a commandment in mind. Since he already forfeited his money on behalf of the captive, he need not be repaid.

TEXTUAL ANALYSIS

In this chapter Waldenberg has addressed an extremely prevalent and modern problem. The bottom line is that whether we live in America or Israel we are all aware of the gross financial abuse perpetrated by at least some members of the medical profession. It is interesting to note that Waldenberg's understanding of the physician's role in society (i.e. that he is the expert and authority) becomes of paramount importance to this issue. He quotes, as support for his own position, *Zedah LaDerekh* which describes the physician as "he who gives life and peace."² If indeed, we see the physician as superhuman on some level, we cannot effectively present a case denying him his financial desires. I believe that Waldenberg, though fully cognizant of the problem, has succumbed to this manner of thinking.

He offers two rather unconvincing arguments for the retention of the status quo vis-a-vis physician's fees. The claim that "it is the custom of our time" to support physicians in this manner is particularly weak and unsatisfying. After all, many of the customs of our time are antithetical to Judaism and certainly to halachic Judaism. We are not a people who "follow after the majority to do or support evil." Waldenberg further argues that in order to insure the availability of medical services we are obligated to pay physicians their stipulated fees. This, of course, assumes that the main reason that a physician practices medicine is for the financial remuneration. I am not at all convinced that this reflects reality. To sustain and improve the quality of life for another is in itself a highly satisfying reward. It seems to me that the conclusion that medical services

² Ramat Rachel 25, paragraph 5

will no longer be available if we refuse to overpay physicians is unconvincing and probably erroneous.

Waldenberg's belief that ultimate respect and authority must be given to the expert physician binds him to the precarious conclusion that little can actually be done, according to the letter of the law, regarding excessive physician fees. Nevertheless, he is clearly not of the opinion that such abuse is acceptable to the spirit of the law. He passionately pleads with the physicians that they police themselves on this matter and he praises Israel's form of socialized medicine, *Kupat Holim*.

The question that the modern patient must ask is whether Waldenberg's response has any effect on the prices that halachically bound physicians actually charge. As is evident from the onslaught of malpractice cases that have reached the courts in the last decades, physicians have not been successful in policing themselves. As a national group they have been singularly impotent in uprooting the unqualified from their midsts. Likewise, they have yet to establish satisfactory fee guidelines, let alone to enforce such a measure.

Regarding Waldenberg's claim that *Kupat Holim* may serve as a paradigm for alleviation of this problem, one must also point out that many Israelis are completely disenchanted with the medical care dispensed at *Kupat Holim* offices. As we believe that our teachers and rabbis should be our role models, it would be interesting to know whether or not Rabbi Waldenberg makes use of a private physician. Long waits and physicians of questionable expertise are often the refrains that one hears from the subscribers to this medical plan.

Yet, perhaps Waldenberg does have a point. Israel operates a modified form of socialized medicine which enables most Israelis to afford the

necessary medical care. Despite its problems, Israelis do not generally have to worry that catastrophic or sudden illness will mean total financial ruin. It should also be noted that Waldenberg is limited in his textual support by the fact that traditional societies did not face a problem with excessive medical fees. The particular challenges that we face in this area are unprecedented in the sources. It is a fact that physicians are not adequately providing care for the indigent. It is reasonable to suggest that one valid solution would be tighter governmental control over the dispensation of medical care. The suggestion of socialized medicine as a resolution to the fee structure problem raises a whole different set of ethical questions (especially for American Jews) which are beyond the scope of this paper.

A medical revolution has taken place in the past few decades. Physicians are now capable of curing diseases and prolonging life in ways which our grandparents could not have imagined. This advanced medical technology carries with it a price - both to our society and to our pocketbooks. We have entered into a medical era which is significantly different from the past. It very well may be that the beliefs and values expressed in halachic literature are simply not applicable to some modern challenges. Most of us do not conceive of the individual physician as the ultimate authority or expert. We strive to obtain fair and equitable fee structures for all professionals. We are the children of a new medical generation. The wisdom of our ancestors may serve as a guide but our solutions will need to be as unique as is our generation.

CHAPTER FOUR

JUSTICE, JUSTICE SHALL THE PATIENT PURSUE

As of January 1987

the average medical malpractice jury award was up from \$166,165 in 1974 to \$1,179,095 in 1985. A decade ago there were about three claims per 100 physicians, by 1983 the number was up to 20, the equivalent of one physician in five sued per year. It's thought that there were four jury awards of \$1 million or more nationwide in the year 1974, in 1985 there were 79. Premiums now range from about \$2,000 a year for family physicians in rural areas to \$100,000 for some specialists in major cities. According to Jury Verdict Research, the biggest malpractice award so far is \$29 million!

The statistics suggest that our society has become increasingly litigious and that physicians may be becoming the jury scapegoats. Some physicians, especially in the field of obstetrics have decided that this type of pressure makes practicing medicine untenable. They claim that too many cases have come to trial in which the physician was held responsible for an error which he could not possibly have prevented. Medicine is an inexact science - some will die in the hands of the physicians. Yet, simultaneously, surely even the physicians themselves recognize that there are some medical practitioners who act hastily and with considerable negligence. There are times when a patient is unnecessarily harmed by the physicians treatment or carelessness. The current trend of American society is to

¹"Malpractice Suits: Doctors Under Seige", *Newsweek*, January 26, 1987, p. 62

place the burden of proof on the physician for all questions of possible medical negligence and error. Traditional Jewish law also addresses this question. Once again, it responds to the issue with the preconception that the physician *qua* physician is to be accorded the greatest respect. Waldenberg makes a valiant attempt to apply the main thrusts of this literature to the modern era. A detailed summary of his material is presented below.

TSITS ELIEZER VOLUME 4, SECTION 13

REGARDING OPERATIONS WHICH MAY ENTAIL DANGER

A) It has been previously established from Baba Kama 85a, as well as the comments of RASHI and Tosafot on that passage, that the physician has Toraitic permission to practice medicine.

In *Torat Haadam*, RAMBAN concurs that the Torah permits humans to engage in the field of medical science. He further interprets the statement of the Tosefta Baba Kama 6:5 (that a physician who errs causing the death of his patient must be exiled) to apply only in the cases in which the physician did not repent or make restitution. If the physician remains unaware of his error he is exempt from legal proceedings, both human and divine. If he recognizes the error and does not make restitution or appropriate repentance, he is subject to the laws of heaven.

The *TUR* remarks that despite possible exile one should not abstain from practicing medicine or administering the cures which he believes will aid the patient. If the physician accidentally errs due to improper use of his knowledge or lack of knowledge, he should engage in appropriate repentance.

The *Bayit Hadash*, in the name of the MAHARSHAL, claims that the Tosefta comment pertains only to the situation in which the patient died.

immediately from the treatment. That is to say that his death could not have been caused by eating, drinking or being moved

Thus we learn that the physician has Toraitic permission to engage in the inexact science of medicine and should not abstain from doing so out of fear that he may cause the death of a patient. Furthermore, this permission takes on the character of an obligation as it is included in the category of saving life. A physician should treat his patients with the best of his ability and knowledge. If he abstains from doing so, he is comparable to one who has spilt blood.

B) The remark of the Tosefta is further explicated in the responsa of TASHBETZ. The Tosefta, he claims, is referring to a physician whose method of healing includes wounding (e.g. a surgeon). If he errs in his handiwork he is culpable for the unintentional injury. An example of an intentional injury is a death caused by an iron object which is by nature a lethal weapon. On the other hand, the physician who treats with drugs, potions or baths is not the subject of the Tosefta passage. From these substances, according to the TASHBETZ, one cannot be injured. Therefore, this type of physician need not be responsible for damages. If this type of physician unintentionally harms, kills or causes great pain to his patient, he is not liable before even heavenly law. As long as he acted in accordance with his wits, consulting others when necessary, his reward will be great.

There is room to question the comment of TASHBETZ that if the physician did what was proper in his eyes and is exempt from legal action, then why is the surgeon any different? Afterall, the instruments of this type of physician - drugs, etc. - ~~certainly can harm~~ the patient. If one instructs another to take a certain drug and it harms or kills him, is not the first party responsible?

C) *Sefer Divrei Shaul* brings a text from Sanhedrin 84b to the discussion of the Tosefta comment. The Sanhedrin passage states that just as one who wounds an animal as part of a medical treatment is exempt from legal proceedings, so too one who wounds a fellow man while treating him is not culpable for damages. "Exempt" in this context is understood as exempt from both human and divine laws. Rabbenu Nissim to Sanhedrin 84b supports this reading of the text. One may understand the next part of the Sanhedrin text as presenting a difficulty to this interpretation. "Rab would not permit his son to withdraw a thorn [from his flesh]." This need not be viewed as in conflict with the earlier portion of the text. The analogy is not exactly parallel. This is not a case of an expert physician abstaining from the practice of medicine out of fear that he may accidentally injure his patient. Rabbenu Nissim adds that even if this were the case, the physician would not be guilty of an "unintentional" transgression. His transgression would fall under the category of "forced" as he had no choice but to dispense medical treatment. In any case, Rab fears that his son, by acting as his physician, will transgress the commandment stating that a child may not wound his parents. One may suggest that the passage brought by Rabbenu Nissim resolves this problem, but the possibility that the son may accidentally dispense medical aid causing harm to his father, without leading to a recovery, remains. RAMBAN would agree that, except in the case of a son, a physician who wounds a patient as part of a medical cure is not liable for damages.

Nevertheless, in *Torat Haadam*, RAMBAN states that a physician who errs is culpable for damages. When a physician is treating one who is not his parent, he is less likely to consider the amount of harm which he could accidentally impose on the patient. He will do as he sees fit and he

recognizes his obligation to treat his patients. Yet if he is cognizant of the fact that he harmed a patient, he is liable. Regarding his father as patient, the laws are even stricter. Thus three different approaches have been suggested: 1. that of RAMBAN and the *TUR* which states that the physician should not fear that he will err but if he is cognizant of the fact that he has erred, he is liable; 2. that of the TASHBETZ who differentiates between the physicians whose method of treatment includes wounding (e.g. surgeons) who is always culpable if he errs and the physician who treats patients with drugs who is exempt from legal action and 3. that of Rabbenu Nissim who frees the physician from responsibility since the Torah commands him to engage in this profession. His sin is not dismissed because it was "unintentional" but rather because it was one of compulsion (i.e. he could not abstain from acting.)

All three approaches agree that the physician should not abstain from practicing medicine out of the fear that he may err. He is Toraitically obligated to treat his patients to the best of his ability and in accord with contemporary practice. The obligation to practice medicine derives from the verse "you shall love your neighbor as yourself" and the fact that it is clearly included in the category of commandments dealing with the saving of life.

Recognizing that medicine is not an exact science, Jewish law permits its practice provided that the physician treat in accord with contemporary practice and knowledge.

D) It is possible to conclude from the preceeding that even medical treatments which are not always successful and those which will either cure or kill the patient should be permitted on the basis that all medicine entails a certain degree of risk.

This is a controversial question. It is one thing to permit medical treatments whose consequences are generally positive and well known though complications may arise in individual situations. It is an entirely different matter to administer experimental treatments, the outcome of which even the physician is unsure. The tendency is against permitting this type of surgery.

SECTION B: REGARDING DANGEROUS TREATMENTS*

A physician should administer a dangerous drug to a dying patient only after consulting with other experts in the city. He should proceed according to the majority opinion with the approval of the most knowledgeable physician in the area.

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Arokh HaShulchan, 336b: The physician who practices legally and errs, harming the patient, is absolved from human legislation but culpable before Divine law if the harm was caused by his negligence or by a hasty diagnosis. If he considered the case with the requisite care (and the patient was harmed) he has not transgressed - after all it is a commandment for the physician to engage in the practice of medicine. It has been taught that "a physician's unintentional mistake is the Creator's will."

* The vast majority of sections B and C are beyond the scope of this paper. Section B concentrates on the question of whether it is permissible to risk bringing death closer. Section C deals with the problems surrounding experimental treatments for the mentally ill. The comments included in this section come from page 69, paragraph #1, the last five lines.

A) Waldenberg previously discussed the issue of physician liability in his responsa, volume 4, section 13. In that responsum he discussed three approaches to the problem. The first approach presented is that of RAMBAN, the *TUR* and the *Shulchan Arukh* which states that if the physician erred, causing harm to his patient, and he is cognizant of the error, he is morally liable for damages. If the patient died, the physician is subject to exile. The *Bayit Hadash* in the name of the MAHARSHAL adds that this applies only when the patient died immediately after the medical procedure, in such a way that we can determine that death was directly caused by the physician's act and not by some other factor.

The second approach discussed is that of the TASHBETZ who differentiates between physicians whose treatment includes physical wounds (e.g. surgeon) and those who treat only with drugs. The physician whose treatments include possible wounds are always culpable for damages. The physician who treats with drugs and like substances is exempt even from divine legal proceedings if he did not intend to cause harm. He cannot be held liable for the results of his best professional judgment.

The third approach presented is that of Rabbenu Nissim of Gerona. He suggests that the physician is never culpable for damages because his transgression is not "unintentional" but rather one of compulsion (i.e. he had no choice but to treat the patient.) [One who sins under compulsion is exempt from punishment.]

The TASHBETZ concludes his discussion of the matter by stating that a specialist (e.g. surgeon) who is licensed to practice and errs is liable, whether or not the error was intentional, if others in his field acknowledge that he erred. He is to be tried under the laws of assault and battery or murder. If the physician acted properly but was unintentionally negligent

and thus wounded that patient, he is exempt from human legal proceedings so as to insure societal peace. If he killed that patient he is subject to exile. If the physician killed the patient by an overdose or by going beyond accepted practice, the family has the right to avenge the deceased's blood.

According to the *Misgeret HaShulchan* and the TASHBETZ, if the physician erred due to lack of knowledge with which he should have been familiar, he is liable.

B) Waldenberg adds that if a physician erred giving the wrong patient an injection or medication, thus harming or killing the patient, he is liable according to all of the above opinions. If he prescribed the wrong medication, believing that it would benefit the patient but it harmed him, one may claim that this is a sin committed under compulsion. He did what he thought was proper. There is also room to claim that all medical science involves a degree of danger and therefore the physician should not be held responsible for this type of error. Furthermore, one could compare the situation of the physician to that of the teacher who causes the death of his student during a permitted disciplinary action or to that of the court emissary who strikes the litigant, accidentally killing him, in an attempt to bring him to the courthouse. In both cases the one who kills is exempt from legal proceedings and is not subject to exile. The physician should engage in the commandment of healing, employing the best of his abilities and the depth of his knowledge. Nevertheless, when a physician gives an injection or medication to the wrong patient, he is not engaging the depths of his understanding nor is he practicing medicine. Rather he is acting with careless haste. This unintentional sin is accounted to him as if it were premeditated.

This is further clarified in *Sefer Tov Ayin* which states that a physician who prescribes medications for an illness which he does not recognize and thus harms or kills the patient has acted with negligence and is culpable for damages. Furthermore, if the physician recognizes later that he did not research the matter sufficiently, but prescribed drugs according to a cursory assessment of the situation, he is liable. The situation is similar to the physician who prescribed the wrong medication out of negligence. Likewise, if the physician, acting negligently, gives an injection in an improper place, harming or killing the patient, he is liable for damages.

C) *Sefer Zedeh Laderekh* comments on the Tosefta passage in a way which supports Rabbenu Nissim. RAMBAN, the *TUR*, and the *Shulchan Arukh* base their arguments for limited immunity on the Tosefta passage, Makkot 2:5 (which states that a physician who errs causing the death of his patient must be exiled and that all physicians who err are culpable before Divine law). *Sefer Zedeh Laderekh* remarks that this pertains only to the physician who is not an expert. *Mat'eh Moshe* comments similarly. Since we no longer employ physicians who are not experts it can be argued that RAMBAN, the *TUR* and the *Shulchan Arukh* would support Rabbenu Nissim's claim that the modern physician who unintentionally errs should never be held liable.

This situation is further complicated by the contemporary practice of having the nurses arrange the trays of medications and injections since the nurse is not authorized to perform these medical procedures.

D) In our times it is customary to discontinue the physician's services and revoke his medical license when it is proven that he acted irresponsibly and thus made light of human life. There is a precedent for this in Jewish law. *Tanna Eliahu Rabbah* avers that a judge who has caused

the death of one by lashes, a teacher who has killed a student while disciplining him, and a physician who has killed a patient, may not continue working in their chosen professions. If they have repented or made restitution, they will not be punished further.

Waldenberg concludes stating that there is much textual support for removing people from sanctified work if they have publicly transgressed. The physicians, whose work centers around life and death, are certainly included in this category.

TEXTUAL ANALYSIS

On the issue of malpractice, Waldenberg seems to have some personal difficulty with what the rabbinic literature suggests. With confidence the halachic Jew can declare that mainstream Jewish law demands that the physician practice in accordance with contemporary standards and knowledge and as such that dangerous experimental treatments are beyond the ken of Jewish medical law. Furthermore, halacha dictates that the physician take requisite care before acting and that he consult colleagues on matters which are not eminently clear. Should a physician intentionally harm a patient or do so as the result of negligence or haste, he is, according to halacha, liable for damages and may be exiled as a result of his action. Nevertheless, the reader may conclude that Waldenberg is not satisfied with what might be perceived as questionable halachic toleration on this issue.

The halacha is somewhat lenient, at least in comparison to American court decisions, on the issue of physician responsibility in malpractice cases. As noted above a physician who unintentionally errs would find relief in the Jewish textual tradition. Waldenberg is cognizant of the fact and seems troubled by the reality that to the patient it makes little

difference as to whether or not the physician intentionally or unintentionally erred. The patient has still been unnecessarily harmed

Waldenberg presents his case in a number of different ways. He suggests that we should be careful in our decision as to what constitutes the practice of medicine. If a physician unintentionally gives the wrong medicine to a patient, Waldenberg would claim that he is not practicing medicine and as such cannot take advantage of the halachic leniency granted to the medical practitioners in cases of wrongdoing.

Additionally, the halachically prescribed punishment of exile is certainly inoperative in our day. Waldenberg suggests that the physician who is guilty of malpractice have his medical license revoked. Though he claims that this can be textually supported by paralleling the situation of the physician to those who perform sanctified work and have publicly transgressed, this is essentially his innovation (and the solution offered by Israeli and American secular courts) read into the halachic literature. There appears to be no textual precedent for treating the guilty physician in this manner.

Though clearly Waldenberg seeks to be stricter than the halacha on this matter, he is cognizant of the fact that the physician cannot be expected to perform his task without mistakes. Jewish law acknowledges that the science of medicine is an inexact science and as such, the physician is often placed in a precarious position. A clear differentiation must be made between unnecessary human error on the part of the physician and misjudgments for which a human physician cannot be held accountable.

Both the physician and the patient are in need of court protection when issues involving suspected malpractice are presented. Halacha appears to be rather lenient regarding the physician while current American

courts seem to find more and more favor with the position of the patient. Both legal systems recognize that equity in this matter can only be achieved on a case-by-case basis. Basic to a court's perusal of the issue will be its general understanding of the position of the physician in society. In Jewish law the physician has always been accorded the utmost respect.

CHAPTER FIVE

HOLD THY TONGUE?

The very nature of the physician's profession makes him the recipient of confidential information on a daily level. No patient would feel comfortable revealing private information to a physician whom he did not trust. The patient must be made to feel confident that the information need be revealed only so that the treatment procedure can be most effective. In general, one assumes that the physician, as professional, understands and guards the confidences of his patients. Rarely does this become an issue. As a society we generally adhere to the principle of medical confidentiality.

Yet, at times such confidentiality may prove to be a danger to the patient and/or the society at large. In such situations does the physician have the right or the obligation to break a medical confidence? Other than life and death situations, are there times when a physician can be compelled, or is permitted, to break his oath of confidentiality? Waldenberg's paucity and brevity of material on this subject suggest that in the pragmatic realm these questions are not of great concern to the contemporary halachic physician (i.e. the halachic sources have little to say on the subject and physicians have not addressed significant numbers of detailed queries to halachic scholars). Presented below are detailed summaries of Waldenberg's discussion on these issues.

Is a physician permitted to testify in a court of law regarding his patient and does the physician's oath offer any instruction on this matter?

2) If a man swears that he will not testify, this is considered a false oath as explained in Mishnah Sh'vuot 29a, "If one said to a witness, come and testify on my behalf and the witness swore that he would not testify (this is considered an oath taken in vain) Such action is reprimanded by whipping. RAMBAM (Hilchot Sh'vuot 5:15) likewise comments that one who swears that he will not testify for (or against) his neighbor if he knows or comes to know certain information is guilty of a false oath and is liable to be whipped on account of it. He is commanded to testify

Likewise, one finds in Yoreh Deah 228:33 that if a witness swears, promising not to reveal a certain matter the court may still require him to testify under pain of excommunication. *Turei Zahav* and *Elijah of Vilna* explain that "the oath of Sinai comes first." Others comment that if a witness appears before the court and says that he promised not to reveal a certain matter, the litigant must grant him permission to reveal it. Isserles remarks that one who has sworn not to tell another of a matter which will prevent him (the other) from loss, he has sworn an invalid oath. It is not to be enacted.

From the preceding, we have learned that an oath sworn stating that one will not testify for another or that one will not reveal a matter which will save another from financial loss is an invalid oath as it is in opposition to a commandment. Likewise, a physician may not promise that he will refuse to testify about a patient to his detriment (i.e. that he will not reveal something that may cause the patient loss upon his return to health.)

Such an oath would be in opposition to a command. The physician is permitted and obligated to testify

The trouble is not that he engaged in a verbal oath but rather that the idea of medical confidentiality is generally accepted among physicians. A general physicians' oath is also part of the medical profession. Both the promise of medical confidentiality and the physicians' oath deal in general with testimony before a court of law. The physicians' oath is acceptable before the rabbinic court

Nevertheless, Waldenberg avers that this solution is problematic. After all, the orthodox Jewish physician must still contend with the fact that he took an oath in opposition to a commandment (when his failure to testify causes loss) and thus has sin before him. At the time of taking the physicians' oath, the physician did not intend to include such situations. In fact, had he thought of such a situation he would have purposely excluded it from the contents of his oath. Therefore, he may testify before a court revealing all that is necessary

Even if by some distant chance the physicians' oath included such a situation, one may renege on the vow by appearing before a court of three and repenting. As mentioned in the *Arukh HaShulchan* (Yoreh Deah 239) if the oath is considered inclusive, it is obligatory to allow the physician to break the oath through repenting. After all he is attempting to rescue another's material goods.

Isserles (Yoreh Deah 239:7) comments likewise. He remarks that one should *a priori* release him from his vow and afterwards explain to him that such behavior, though rabbinically permitted, is not preferred. Isserles seems to contradict himself for earlier he claimed that one who takes such an oath would be swearing in opposition to a commandment and it therefore

is null and void. Actually, he is suggesting that this is an oath taken in vain but since it is rabbinically permitted, it is allowed to stand. Therefore, it is obligatory to release someone from such a vow before he is ordered to reveal ~~what~~ he knows.

One may also inquire as to whether or not it is permissible for physicians to reveal confidential facts about a patient's health when he is instructing medical students. The purpose of such discussion is to benefit the students in their studies. It is of no help to the patient. Clearly, when the physician took the oath he had no intention of including this situation in his oath. There is an additional manner of approaching this problem. The maxim (Taanit 7a) "I have learnt much from my teachers, and from my colleagues more than from my teachers, but from my disciples more than from them all" is established in all professions. In the medical field this may be understood to mean that occasionally the students' insights or questions may lead to a more beneficial form of treatment for the patient. Thus, the patient may be aided by the revelation of such confidential matters.

(Waldenberg suggests that the question should be examined further. A patient may be embarrassed when a physician shows students the signs of an illness on areas of the physician's body which are generally considered to be private. This is likely to be the case when dealing with the opposite sex.)

Waldenberg brings the comment of R. Naftali Tzvi Yehuda Berlin (*Ha'amek Davar*) as support for his position. Commenting on Leviticus 14:55ff: "this is the instruction you shall follow in cases of leprosy" Berlin avers that "instruction" in this case means that the priest gathers his students and shows them the extent of the leprosy. The verses conclude with the exhortation "this is the law concerning leprosy" in order to

emphasize that this practice is followed only in the case of leprosy. After all it is very embarrassing to have a group of students staring at one's disease. Others say that it is forbidden to embarrass anyone but in the case of leprosy one may be forgiven.

Waldenberg opines that this is sufficient evidence to permit questioning physicians' current practice in such matters. He suggests that the physician should request the patient's permission before he gathers students around the patient's bed. The patient should have the right to refuse.

The last question which remains to be answered on this subject is whether or not a physician should, or is required, to inform the authorities if he knows of a patient whose illness may cause harm to himself or others. Waldenberg sees the answer to this question as clear cut. The physician may, and in fact, is required to notify the proper authorities. Nothing (other than murder, idolatry or certain sins of a sexual nature) may stand before the saving of a life.

TSITS ELIEZER VOLUME 13, SECTION 104, paragraph 1

In this section Waldenberg responds to a question as to whether or not a physician transgresses the prohibition of gossip when he reveals confidential information concerning a patient. Also, what is the judgement regarding a physician who does not reveal a medical matter which may endanger others (e.g. a contagious disease or epileptic fits)? Is he permitted or even obligated to inform the patient's family or the proper authorities?

In general it is prohibited to break a medical confidence if no danger is presented to others. Proverbs 11:13 states that "a base fellow gives away

secrets, but a trustworthy soul keeps a confidence." Likewise Sanhedrin 44b remarks, "do not reveal the secret of another."

Furthermore, the physician has sworn according to the medical oath. Breaking his oath may be committing a Toraitically defined transgression.

A fuller discussion of this issue can be found in section 81 of this volume, presented above.

TSITS ELIEZER VOLUME 16, SECTION 4, paragraph 3

Waldenberg discusses the obligation of a woman lacking a womb to reveal this matter to her prospective husband. The question of whether or not a knowledgeable third party is obligated to reveal this matter is discussed. Waldenberg believes that such a person is under obligation to discuss the issue with her prospective husband. He addresses the responsibility of the physician in the last subsection of the third paragraph. Waldenberg avers that the physician is required to disclose the matter to the groom and his family even if the couple is already engaged.

TEXTUAL ANALYSIS

Waldenberg's presentation of this topic is generally consistent with thrust of the rabbinic literature on this issue. The general principle is that whenever possible medical confidentiality is to be observed. Exceptions to this generality are called for when such information is necessary for court proceedings or when the individual is likely to harm himself or another. Medical confidentiality does not take precedence over saving a life. Waldenberg objects to the current practice of bringing medical students on rounds and discussing the patient's illness without the patient's permission. He views this as an infringement on the patient's right to confidentiality,

yet he recognizes that this practice is necessary as a teaching mechanism. His suggestion that the physician request the patient's permission before such visits is sensitive and logical though not expressly stated in halachic terminology.

This is an example of Waldenberg's methodology. He desires to reconcile the practice of medicine (in this case represented by the teaching mechanism of allowing students to accompany the physician on rounds) within halachic categories (e.g. the patient's obligation to behave modestly). Waldenberg attempts to satisfy the demands of both the medical profession and the halachic system. Since physicians will continue to take students on rounds, Waldenberg's suggestion affords a way for the practice to continue and receive unqualified halachic endorsement.

In the same way that the general principle of observing medical confidentiality must occasionally be overruled, so too the general oath that the physician swears by cannot be understood as applicable to all situations. Waldenberg points out that though people should take great heed to observe their oaths, the physician would have invoked certain exceptions to this general oath if he had thought of them at the time. The oath is not to serve as a stumbling block to the situations when it is ethically and halachically necessary to reveal confidential information.

Waldenberg avers that an additional exception to the general principle of medical confidentiality is the physician's obligation to inform a prospective groom of his bride's lack of a womb. Clearly this is a value-laden judgment for which many would require greater evidence. Waldenberg's adherence to the traditional belief that Jews should procreate seems to inject itself into this situation. His presentation of this issue is cursory, lacking sufficient texts to lead to a viable discussion. Suffice it to

say that even within halachic frame of reference, Waldenberg has not presented a case which would suggest that medical confidentiality should be dismissed when the commandment of "be fruitful and multiply" is its opponent.

In terms of medical confidentiality there are no absolutes. Certain exceptions to this principle are clear and unquestionable. It is the non-life-threatening cases which one may consider to be marginal and in need of greater investigation.

CHAPTER SIX

GO TO THE JUDGES OF YOUR OWN DAY

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"The best of the physicians are headed for Gehenna" (Kiddushin 82a) yet, "a scholar should not reside in a town which lacks a physician" (Sanhedrin 17b). Clearly, the position of the physician in Jewish society is a controversial one. No other professional deals with life and death issues as a daily exercise. No other professional is required to do so with often limited and inexact knowledge of both the problem and its solution. The very job of the physician requires him to make decisions, the outcomes of which he cannot be sure. When a patient dies after receiving a physician's treatment, the physician is likely to be under suspicion as a possible cause of the death. There is always the fear that one will be labeled as a "shedder of blood" for merely performing one's task to the best of his ability. The physician, by virtue of his knowledge, faces an awesome responsibility every day.

The recognition of that responsibility and the ethical questions which it provokes have been fully addressed by R. Eliezer Waldenberg. As a halachic-ethicist, Waldenberg feels completely bound by the voices of tradition. Simultaneously, he recognizes that rabbinic texts often express seemingly different points of view and furthermore that halacha has not previously addressed all of the issues surrounding the social and moral responsibility of the physician adequately. As such, we have seen that Waldenberg finds sufficient room to apply creatively the halachic process to modern problems. This is most evident from his discussion of malpractice situations in Jewish law. Despite the analytical creativity which

Waldenberg permits himself, there can be little argument that occasionally his loyalty to traditional modes of Jewish legal thinking prevents him from expressing what he believes to be the ethical solution in halachic terminology. His equivocal analysis of the physician fee structure is representative of this problem. The reader understands that Waldenberg's praise of the State of Israel's form of socialized medicine, *kupat holim*, is more than idle flattery. Halacha does not permit him to suggest that physician's remuneration be regulated, but clearly he is of the opinion that private practice in our decade has led to many financial abuses of the ill. The strength with which Waldenberg could create "new" halacha based on ethical notions is curtailed by his loyalty to the traditional understanding of the Jewish legal process. It seems that, at times, what a modern Jew may understand as an unquestionably ethical position may be in conflict with the established halacha on the situation.

This leads to an important question regarding the relationship between halacha and ethics within the traditional Jewish framework. Aharon Lichtenstein and Eugene Borowitz address this question in their articles, "Does Jewish Tradition Recognize An Ethic Independent of Halacha?"¹ and "The Authority of the Ethical Impulse in Halakhah"² respectively. Borowitz's article is written in reaction to Lichtenstein's suggestions.

Lichtenstein completely and competently examines those facets of the textual Jewish tradition which appear to be outside the strict realm of

¹ Aharon Lichtenstein, "Does Jewish Tradition Recognize an Ethic Independent of Halakha?", *Modern Jewish Ethics*, ed. Marvin Fox, (Ohio State University Press, 1975)

² Eugene Borowitz, "The Authority of the Ethical Impulse in Halacha," *Through the Sounds of Many Voices: Writings Contributed on the Occasion of the Seventieth Birthday of W. Gunther Plaut*, 1982.

Jewish law. He points out that Talmudic principles such as "acting beyond the letter of the law" (*lifnim mishurat hadin*) and avoiding the selfish behavior characteristic of Sodom (*kofin al midat Sodom*) present logical difficulties if one insists that these principles are of the status of commandments. How can one claim that that which is recognized as exemplary behavior beyond the letter of the law is in fact that which the law requires? Simultaneously, to the traditional Jew there can be no other source of ethical instruction than that delivered to the people at Mount Sinai. Lichtenstein plays a careful and guarded game of semantics to work himself around these obvious, logical inconsistencies.

He maintains, providing sufficient textual support for his position, that the rabbis recognized a natural morality but that revelation included, refined and superseded that which humans could initially discover through the proper use of their rational powers. The question which then must be addressed is whether or not halacha can stand on its own as an ethical system. The problematics lie in the fact, as mentioned above, that the Talmud itself seems to recognize that there is an ethic more stringent and of significant value in addition to that which halacha dictates. Lichtenstein avers that both Maimonides and Nachmanides can fairly be understood as advocating the position that supralegal conduct is indeed of an imperative character. He further explicates a few passages of the Maharal as support for this position. If the reader accepts Lichtenstein's explanation of these texts, one must still inquire what makes these principles of a supralegal character if they are indeed imperative? Once again, Lichtenstein falls back upon a semantic differentiation. He suggests that Halacha (with a capital 'H') and *din* be understood as separate though related concepts. *Din* can be employed to signify a body of statutes which are a part of the umbrella

term, Halakha. Thus that "which is beyond the letter of the *din*" can still be understood as part of the halachic, imperative framework. The ethical moment, therefore, is certainly not at odds with Halakha and may be understood to be a constituent of it.

Borowitz takes issue with Lichtenstein's semantic games and his somewhat equivocal language. He suggests that Lichtenstein's argument is blurred by the difficulty that the concept of authority must operate on many different levels if one accepts that that which is supralegal can simultaneously be fully imperative. He avers that the true relationship between halacha and ethics is not as harmonious as Lichtenstein opines. "The ethical, which ought to come as a categorical or unmediated imperative, operates within Judaism in a quite qualified, mediated way"³ Borowitz suggests that the position of women in Jewish law is a prime example of this tension. In the context of this research, one might suggest that the physician's fee structure is of a similar problematic nature. Though the ethical moment may be of concern to halachist, it is granted no real power to institute change.

As a modernist, non-halachic Jew, Borowitz is able to ascertain that Rabbinic Judaism is not capable of fully absorbing and supporting such modern concepts as democracy, pluralism and tolerance. Despite the fact that these concepts do not operate in complete consonance with the traditional Jewish legal process, many Jews believe that these ideals, properly understood and enacted, represent the height of morality. Borowitz points out that many Jews are disappointed with the exceedingly slow pace at which halacha develops and that they will act "extralegally" when their conscience so dictates. Ultimately, Borowitz concludes that though halacha

³ Borowitz, p. 166

contains a strong ethical base, it does not sufficiently address all of the moral dilemmas which a Jew today must face. He suggests that the combination of universalistic ethics and the "corrective guidance of the Torah" can work together to provide acceptable direction for the modern Jew.

Though it is conceivable to reinterpret the meanings of such phrases as halacha and *din* in such a manner that ethics appear to be a natural and fully compliant part of the halachic system, as Borowitz clarifies, this does not seem to be the reality that the modern Jew encounters. The modern, liberal Jew is constantly faced with the challenge of being true to her Jewish heritage as well as to her internal notion of what comprises right and wrong. The Reform Jew approaches the ethical dilemmas of his age with a perspective wholly different from that of his more traditionally minded colleague. When halacha (as traditionally defined) ceases to be the code by which all decisions are made, new possibilities and challenges are encountered. A new direction, a different type of reaching out to the Holy One must be forged.

Though individual Reform Jews may radically differ about the imperative nature of a specific ritual or ethical commandment, most would agree that if their own response is to be authentically and thoughtfully Jewish they must first be cognizant of the traditional Jewish approach and response to the question at hand. Certainly, on that level the content of the responsa presented in this work are of significance to the probing Reform Jewish mind.

Of greater difficulty is the determination of exactly what direction may be gleaned from these responsa for the modern Reform Jew. Do we, as a Reform Jewish community, find it to be appropriate to single out the

medical practitioner to be the recipient of our guidebook to professional ethical behavior? Do we believe that Reform Judaism has the right to offer suggestions concerning the physician's approach to the patient and to society?

The diversity of American Reform Judaism does not permit these questions to be rhetorical in nature. After all they speak to the very manner in which one defines Reform Judaism. If we are among those that believe that Judaism, and Reform Judaism, as well, is a way of life, then certainly it is appropriate that direction be given to the physician as he must constantly face issues of life and death. If, however, we count ourselves among those who strongly adhere to the idea that we are no longer a nation but only a religion and that there must be a complete separation of church and state, these questions are not so easily addressed. As emphasized in the second chapter of this work, religion often suggests a relationship between belief in God, the physician and health. Simultaneously, in our society it is the state which regulates the manner in which the physician functions in the public domain. Whether or not we conceive of liberal Judaism as pervading all aspects of our lives, we must be cognizant of the fact that, unlike traditional Judaism which can invoke its legal authority over its adherents, the most that, as Reform Jews, we can develop is a thoughtful guideline for the Reform Jewish physician to issues of controversy concerning his professional life. It is not our function to develop a different legal corpus, but rather to aid each individual in addressing life's dilemmas as a modern Jew. Robert Kahn writes, "the function of Reform Judaism, . . . , is not legislation but inspiration."⁴

⁴ Robert Kahn, "Shall We Frame a Reform Ethical Halacha", CCAR Journal, April 1963, p.63

If our goal, then, is to offer optional guidance to the physician who must face the issues raised by Waldenberg in his responsa, there should be no reason that we would shrink from the responsibility. After all, many physicians actively affiliate with Reform congregations and may wish to know how the leaders of their religious movement would address these questions of distinctly modern import. Nevertheless, it is interesting to note that *American Reform Responsa*⁵ contains only one responsum (#74, physician keeping truth from patient) which directly addresses the unique position of the physician. Our silence on these issues, the fact that our physicians have become unaccustomed to asking such questions of their religious tradition, is somewhat disturbing. If we recognize, as Borowitz suggests, that general ethics in tandem with the corrective forces of our Jewish tradition, is the unique hallmark of Reform Judaism, then we have shortchanged the physicians in our midst the liberal guidance which they most certainly deserve.

The purpose of this thesis was to present and analyze the responsa of a well-known halachic scholar on the subject of the physician's responsibility to the patient and society. We have seen that Waldenberg's commitment to the halachic process as traditionally understood limits his ability to strive for the ethical peaks of certain medical dilemmas. As Reform Jews, we have the unique opportunity to blend the wisdom of our ancestors with the established and accepted ethics of our day. Our understanding of the richness of halacha allows us to be rooted in a proven and successful tradition without fettering us to an era that has gone by. We need not enter the world of semantics or *pilpul* to justify our Jewish

⁵ Walter Jacob (ed.), *American Reform Responsa* (Central Conference of American Rabbis, 1983)

decision making processes. Dr. Eugene Mihaly suggests that "halacha" for the Reform Jew is that process by which our Jewish selves confront the world in which we live

The question may be formulated in terms of "What does God require of me as a Jew?" or "What does the historic Jewish experience demand of me here and now?" or "What does my conscience, my higher self, as an aware, committed Jew, tell me to do in a specific situation?" "Halacha", in its primary meaning, is in other words, the imperative, the mitzvah that an aware committed Jew feels and hears and experiences in a specific situation.⁶

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By virtue of his profession, the physician is often in the situation in which he must ask, "what does my conscience, my higher self, as an aware committed Jew, tell me to do?" It is time that the leaders of Reform Judaism suggest a halacha, a way, in which the liberal Jewish physician can confidently respond, as a Jew, to the challenges of her profession. The first step to this process, an examination of the rabbinic textual material with its traditional interpretation, is presented in the pages of this research project. It is now the task of the "judges of our day" and our movement to thoughtfully blend this material with the highest ethical ideals of prophetic Judaism.

⁶ E. Mihaly, "Halacha, Discipline and Reform Judaism", Speech before the CCAR, 1975, p. 7

APPENDIX

TRANSLATION SHULCHAN ARUKH, Yoreh Deah, 336

LAWS REGARDING THE PHYSICIAN

1. The Torah gives permission to the physician to engage in the practice of medicine. In fact, this occupation holds the status of a commandment to the physician as it involves the saving of human lives. A physician who refuses to practice is comparable to one who has spilled the blood of another. This applies even in the case where another physician is available to treat the patient, for a patient does merit to receive healing from every physician. One should only engage in the practice of medicine if he is an expert and there are none about who are more knowledgable than he. If this is not the case (i.e. the less-knowledgable man attempts to heal others), he is comparable to one who has shed blood. If one engages in the practice of medicine without a license from the court, (and the patient's health does not return) he is liable for financial restitution. This ruling applies even if the man is an expert physician. The properly licensed physician who errs and harms the patient is not liable with regard to human laws but will have to account for his actions before God. If the patient died and the physician was aware that he unintentionally erred, he is to be exiled.

2. The physician may not receive recompense in return for his wisdom or knowledge but he can be reimbursed for his time and trouble.

3. One who possesses drugs, which an ill person is in need of, may not

charge an unreasonable price for them. Furthermore, because the need for these drugs are so great, their prices should be in consonance with that which is generally acceptable even if a higher price was previously agreed upon. Despite the fact that these drugs cannot be found elsewhere, he may receive no more than their fair-market value in exchange for them. Yet, if a physician specifies a large fee in return for his services, a patient is obliged to pay him because one cannot affix a relative value to his knowledge.

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