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Organ Donation: Parts I-IV

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Preface

I shall forego an extensive excursus on the history of organ transplantation, as interesting as it would be. I do so because the reality of transplantation is so clear that the historical discussion would add little of substance to our halakhic deliberation. Similarly, I shall also not include an extensive description of the scientific background. Whenever such material is required to comprehend the halakhic discussion, I shall include it within the body of the halakhic discussion.[1]

Part I: Artificial Limbs

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שאלה

Is the use of artificial limbs and organs permissible in Jewish law? Are any limbs more problematic halakhically than others? If permissible, are there any restrictions in general or in particular?

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[1] A good summary of that material can be found in Abraham Steinberg, ed., *אינציקלופדיה הלכתית רפואית* (Jerusalem: The Dr. Falk Schlesinger Institute, 1991), pp. 191-210.

תשובה

In general, the use of artificial organs and limbs for transplantation is the least problematic halakhic area. So long as the chances for successful implantation and use are greater than the danger involved to the patient from the procedure or its possible after effects, it is difficult to see what the halakhic objections might be. Indeed, for precisely this reason, there is very little in the halakhic literature on the use of artificial limbs and organs, with the exception of the case of the artificial heart. Thus, it is clear that the use of artificial heart valves,[2] bone replacements, joints, and skin is acceptable without any reservations.

We should, in fact, include dialysis in this category of deliberation,[3] since dialysis is a type of mechanical replacement for insufficiently functioning kidneys. The cleansing of toxins from the blood can be accomplished artificially either by hemodialysis or by peritoneal dialysis. The former requires the patient to be hooked up to a machine, usually several times a week for several hours each. It causes a significant loss of mobility to the patient, who must always be near his or her appropriate place of treatment. Peritoneal dialysis, in which the removal of toxins is accomplished via a stoma in the abdomen, is much more convenient for the patient as far as restrictions on normal life activities is concerned. It does, however, entail greater medical risks than hemodialysis. The greatest risk is the risk of infection – peritonitis. However, since kidney failure results in death, it is clear that the risk and/or inconvenience of either of these methods is far outweighed by their benefit, and, when medically indicated, there can be no halakhic objection to dialysis.

One more artificial "organ" should be included in the category of the clearly permissible. The heart-lung machines used during open heart surgery are, of course, artificial organs. Obviously, however, they are not used except in cases when open heart surgery is required, and we must assume that the surgery is being performed because there is greater risk or danger to the patient without it than with it. Under those circumstances, it is clear that there is no halakhic objection to the use of the artificial heart-lung machine during the surgery.

The single artificial organ to which significant attention has been paid in the halakhic literature is the artificial heart. At present, of course, there is not much of a success rate in the use of an artificial heart, and work on it must be considered still experimental. On the one hand, therefore, it might be possible to claim that its use is currently forbidden in Jewish law. Since the likelihood of success is so minimal, the patient should not agree to its implantation, and the halakhically committed doctor should also not agree to perform the operation. That is precisely the contention of Abraham Sofer-Abraham, who wrote in his medical commentary to Shulhan Arukh entitled *Nishmat Avraham*:[4] במצב היום שהדבר הוא אך ורק בגדר הנסיוני, מסתבר שיהיה אסור לחולה להסכים לניתוח כזה ולרופא לבצע זאת. – "In today's situation where [artificial heart surgery] is entirely experimental, it seems probable that it is forbidden for the patient to agree to such surgery, and for the doctor to perform it."

On the other hand, even that is not so clear. After all, the most famous case of artificial heart surgery was that of Dr. Barney Clark, in 1983. Dr. Clark lived for 112 days after implantation of his artificial heart. And, his surgery was pushed up one day earlier than originally scheduled because his doctors were convinced that he would not live out the

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[2] This includes even porcine parts. See below, pp. 208ff.

[3] I recognize, of course, that dialysis machines and heart-lung machines (which will be mentioned in the next paragraph) are not actually artificial organs. Organs are permanently affixed or implanted and these are not. Nonetheless, this is the appropriate place for their mention.

[4] *נשמת אברהם* (ירושלים: מכון שלזינגר, תשנ"ג), הלכות עבודת כוכבים, סימן קנ"ה, אות ב (1), עמוד מ"ה.

night if surgery were not performed immediately.[5] So, for Dr. Clark, even the very experimental procedure served to prolong his life, the dangers of the procedure and its uncertainty notwithstanding. The halakhic dilemma, of course, lies in the fact that the judgment of the likelihood of prolonged life with an experimental procedure can only be made with relative precision after the fact. Nonetheless, it is sufficient to note that an absolute prohibition against the use of an admittedly experimental procedure is unwarranted. We should remember that initiating a highly experimental treatment is likely only when all else has failed, and the condition of the patient leaves no other option, short of allowing the patient to die. Under those conditions, it is not self-evidently clear that use of an artificial heart must be considered halakhically forbidden, even today.

Since the matter of agreeing to experimental treatment is not the subject of this paper, we shall suffice with a brief statement. We quote the following from Dr. Avraham Steinberg:[6]

> חולה שצפוי למות בזמן קרוב, וכבר קיבל כל הטיפולים הידועים והמקובלים עד כה, וכעת רוצים לנסות עליו תרופה חדשה, או טיפול ניסיוני אחר, אשר מצד אחד יתכן שיאריך את חייו, אך מאידך עלול לקרב את מיתתו... מסקנת הפוסקים היא שמותר לעשות כן אם הסיכוי להצלה הוא גדול יותר מהסיכון למות.
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> [In the case of a] sick person whose death is expected soon, and who has already received all of the known and customary treatments, and now they want to try some new drug, or other experimental procedure on him, which, on the one hand, might prolong his life, but, on the other hand might hasten his death. . .the conclusion of the poskim is that it is permissible to do so, if the likelihood of saving is greater than the danger of dying.

One of the central issues in the literature regarding cadaver heart transplants has been the question of the harvesting of the donor heart, and whether or not that very act constitutes an act of homicide. When we deal with heart transplants of that nature, we will address that question. In the matter of artificial hearts, however, the issue is moot, since there is no donor. In that regard, then, the use of artificial hearts is less problematic halakhically than the use of cadaver hearts because one side of the equation – the donor side – has no halakhic problem whatsoever, since there is no donor.

Of course, even in the use of artificial hearts there is a recipient, just as there is in cadaver heart transplantation. We shall focus now, therefore, on the halakhic issues as they involve the recipient of a heart, either cadaver or artificial. If the issues can be resolved permissively, we shall have reached the conclusion that artificial heart transplantation is permissible (and that cadaver heart transplantation is permissible from the perspective of the recipient).

In the earliest discussions of the halakhic status of heart transplant surgery, the questions regarding the recipient focused on two issues: (1) Does the removal of the diseased heart itself constitute an act of homicide?[7] (2) If it is an act of homicide, what is the legal status of the heart recipient following a successful heart implantation?

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5 See the *New York Times*, 24 Mar.1983, p.1.

6 *אנצקלופדיה הלכתית רפואית* (ירושלים: המכון ע"ש ד"ר פלק שלזינגר, 1994), כרך ד', ערך "נסויים רפואיים בבני אדם," עמ. 489-490. Dr. Steinberg provides a bibliography there, in n. 90. See especially *Iggrot Moshe*, Yoreh De'ah, pt. 1, no. 36.

7 The question of the halakhic acceptability of brain death is irrelevant to this issue since heart transplants are not perfomed on brain dead recipients.

The major sources brought to bear on the first question reflected a dispute between Rabbi Zevi Ashkenazi (Hakham Zevi, 1660-1718) and Rabbi Yonatan Eybeschuetz (1690-1754). In three teshuvot,[8] the Hakham Zevi dealt with the case of a woman who was preparing a chicken to be soaked and salted and claimed that she could find no heart in it. The Hakham Zevi affirmed that the chicken was to be considered kosher because no creature can live for even an instant without a heart.[9] Therefore, he concluded, the cat which had been nearby waiting to eat must have managed to take away the heart without the woman's noticing. The chicken, however, is kosher! What's more, even if there are witnesses who claim that they saw the whole process from beginning to end and who testify that there was no heart, the chicken is still considered kosher because they must be lying.

Eybeschuetz took issue with the decision of the Hakham Zevi, at least in the instance when there are witnesses.[10] He claimed that the witnesses are to be believed because we have no real grounds to make them into false witnesses by our mere assertion that they must be. The reality must have been that there was no normal heart (hence the testimony of the witnesses), but rather, יש לתלות... דיש דבר אחר דלמראית עין אין מראהו דומה ללב כלל... שהיה משמש במקום הלב – "It should be assumed that there was some organ (tissue) which did not at all have the appearance of a heart, but which fulfilled the function of the heart."[11]

Among the earliest poskim who dealt with the issue of heart transplants, the views of the Hakham Zevi and the *Kereti u'Feleti* played a significant role. Rabbi Judah Gershuni wrote:[12]

> אם מותר להוציא הלב מהחולה מסוכן כדי לשתול לב חדש, דאם נאמר דתיכף כשמוציאין את הלב הוא נחשב כמת וע״י הוצאת הלב הורגין בן אדם... אם כן אפשר דאסור לעשות כן... ואף שהיה מקודם בבחינת טריפה על פי קביעות הרופאים, בכל זאת אסור לכתחילה להרוג טריפה ויש כאן איסור לאו דלא תרצח... ומה ששותלין אח״כ לב חדש הוה כבריה חדשה.
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> Regarding whether it is permissible to remove the heart from a dangerously ill person in order to implant a new heart, for if we say that immediately upon removal of the heart he is considered dead and that murder is committed by removing the heart. . .[i]f so, it may be forbidden to do so. . .[a]nd even though the person was already in the category of a *terefah* by determination of the doctors, it is nonetheless forbidden before the fact to kill a *terefah* and involves a violation of the negative commandment "Thou shalt not murder" . . .[a]nd the subsequent implantation of a new heart constitutes the person as a new being.

The source for Gershuni's initial premise is the Hakham Zevi, as he himself says in a part of the responsum not quoted. Note, too, how Gershuni moves from the first of the two issues (is it murder?) to the second (what is the status of the patient after receiving the

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8 שו״ת חכם צבי, סי׳ ע״ד, ע״ו, ע״ז.

9 And any body motion that exists must be considered merely convulsive (פרכוס), and not indicative of life.

10 See כרתי ופלתי (על יו״ד), סי׳ מ׳ סע׳ ה׳, ס״ק ד׳ בכרתי.

11 Interestingly, the כרתי ופלתי did not declare the chicken kosher. He declared it *terefah* on the grounds that it didn't have a normal heart. The Hazon Ish (Rabbi Abraham Karelitz, 1878-1953), Yoreh De'ah 4:14, took exception to the decision of the כרתי ופלתי, at least according to Eybeschuetz's own reasoning, for it is the absence of a heart that makes an animal *terefah*, not the normalcy of the appearance of the heart.

12 אור המזרח, vol. 18, no. 3 (issue 64), Nisan 5729, p. 138, reprinted in the collection of his responsa, ספר קול צופיך, Jerusalem 5740, p. 378b.

heart?). The fact that the person is now alive does not necessarily imply that the act of removing his heart was anything but murder. No matter what the positive result, the doctor has committed murder.[13]

Rabbi Menahem M. Kasher also dealt at length with the views of the Hakham Zevi and Eybeschuetz.[14] After quoting from the responsum of the Hakham Zevi, Kasher wrote:[15]

> הרי מפורש יוצא מדבריו לפי שיטתו, שבעת שנוטלין ממנו הלב, לא רק שאין לו חזקת חיים, אלא שיש לו דין מת ממש, ובוודאי לשיטתו אם בא לשאול, אם לעשות נתוח כזה, יש לפסוק לו שאסור לישראל לכתחלה לעשות נתוח כזה, שהרי הוא ממית עצמו בכך. ואף שהרופאים אומרים שעל ידי הנתוח אפשר שיחיה תקופה יותר ארוכה מאשר אם לא יעשה נתוח כזה, מ"מ מכלל ספק לא יצא. והנה לשיטת החכ"צ אין ספק חיים יותר ארוכים בעתיד מתירים מיתה ודאית לחיים שהם ברגע זה חיים ודאים, ואפילו אפשר שאינם אלא חיי שעה.
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> It clearly follows from his words that according to his (the Hakham Zevi's) view, when his heart is removed from him, he has not only lost the presumption of life, he has the legal status of a dead person. And surely according to his view, if one comes to ask whether to undergo such surgery, one must decide for him that it is forbidden for a Jew to undergo such surgery, *a priori*. In doing so he commits suicide. And even though the doctors claim that the surgery may enable him to live longer than he would without the surgery, [their claim] is still in the category of "doubtful." And, according to the Hakham Zevi, "doubtful" longer future life does not permit "certain" death for life which is "certain" at this moment, even if it is possible that [his current life] is only temporary.

And, like Rabbi Gershuni, Kasher also links the second issue with the first. Near the end of his teshuvah Kasher wrote:[16] על מה שכתבתי לעיל שלדברי החכ"צ אם הוציאו הלב מן האדם יש לו דין מת... נמצא שיש בחידוש השתלת הלב מעין תחיית המתים. – "Regarding my earlier claim that according to the view of the Hakham Zevi one has the legal status of a dead person if his heart has been removed. . .it follows that the renewal [of life] by the heart implantation is a type of revival of the dead."

Furthermore, Kasher makes an important observation regarding the relationship of the views of the Hakham Zevi and Eybeschuetz. He wrote:[17]

> ובכן המו"מ בין הגדולים הנזכרים נוגע רק בנקודה זו, שלפעמים נוצרה אפשרות באבר אחר למלא התפקידים של הלב, אבל כשהלב הנורמלי נעקר הרי אז בוודאי שאין בגוף חיות עצמית עד שהחדש נקלט כראוי ומפעיל את כל הגורמים להחיות את כל חלקי הגוף כקדם.
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> And so, the debate between the two sages whom I have mentioned regards only this point: that perhaps a condition can exist

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[13] Gershuni does not reach a definitive conclusion. Indeed, the section of the responsum from which the quotation in the paper comes ends with ועוד צריך עיון גדול בזה ללבן ההלכה.

[14] See *Noam*, vol. 13, 5730, pp. 10-20, printed as well in דברי מנחם, חלק ג', חשן משפט, סי' כ"ז, pp. 240-245.

[15] *Noam*, p. 12, דברי מנחם, p. 241a.

[16] *Noam*, p. 20, דברי מנחם, p. 244b.

[17] *Noam*, p. 11, דברי מנחם, p. 240b.

> where some organ (tissue) can fulfill the function of the heart. But when the normal heart is removed [and there is no such other tissue present], surely [both agree] that the body has no independent vitality until the new heart is appropriately implanted and controls the functions necessary to revitalize all the parts of the body as prior.

Rabbi Kasher makes very clear that, in his opinion, the dispute between the Hakham Zevi and the *Kereti u'Feleti* does not have any real significance regarding the matter of the permissibility of removing the heart from the potential recipient of a transplanted heart. Even according to Eybeschuetz, when the damaged heart is removed the person is considered dead because there is no basis to claim that there was some other tissue perfoming the functions of the heart at the time of the removal of heart.[18]

Rabbi J. David Bleich has also written an extensive article on the subject of the artificial heart.[19] He, too, concurs that the dispute between the two sages of the eighteenth century may not indicate any difference between them with regard to the removal of the diseased heart. He wrote:[20]

> It has been argued that, since according to the Hakham Tsevi it is impossible for any creature to survive without a heart, removal of a diseased heart *ipso facto* causes the death of the patient and hence constitutes an act of homicide. Reanimation by means of subsequent implantation of a cadaver heart would thus be viewed either as a form of *pirkus* (convulsive movement) or as the generation of a new life.
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> Actually, the selfsame argument can be formulated in a manner which is entirely consistent with the position of the *Kereti upeleti*. As already noted, this authority accepts the basic premise that, absent a heart, a living creature cannot survive. *Kereti upeleti* merely posits the possibility that cardiac functions may be assumed by an organ which does not at all resemble a normal heart. Hence *Kereti upeleti* might well concede that removal of the heart from a living creature would lead to its immediate demise.

Before we deal with the question of whether or not the removal of the diseased heart is itself an act of murder, let us deal first with the matter of the status of the recipient subsequent to the implantation of the new heart, *even if we assume that the removal of the diseased heart was an act of murder.*

We saw above that Gershuni, Kasher, and Bleich refer to the person as a type of new person, an instance of revival of the dead – at least according to their understanding of the view of the Hakham Zevi. So, let us pose a question that will seem absurd at first blush. If a person is killed and then revived, is his halakhic identity the same after his revival as it

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[18] Kasher also does not reach a definitive conclusion in his earlier version. His responsum, in *Noam*, ends with והדבר צריך עיון גדול. In דברי מנחם, however, there is an additional small section which does affirm that the removal of a heart from one live person for implantation in another constitutes murder, and while that statement was made about the donor, there is no halakhic difference between removing the heart of a still-living donor and removing the heart of a still-living recipient.

[19] The article appears in Hebrew in תורה שבעל פה 25 (5744): 151-163, and in English, A.M. Fuss, ed., *Jewish Law Association Studies III* (Atlanta: Scholars Press, 1987), pp. 109-145.

[20] In the English version, p. 121, and in the Hebrew article (in slightly different wording), p. 155.

was before his death? If the answer is affirmative, his wife would still be his wife, his children would not have automatically inherited his estate, his family would not have been required to sit shivah and begin the recitation of kaddish. If the answer is negative, his wife would be free to remarry without a *get*, mourning rites should have begun, and his estate would have been passed already to the heirs. These questions may be fascinating (though absurd) to raise, but the answer to them is of interest to us for only one reason. If the person remains the same person halakhically, and if a doctor is confident that he will be able to resurrect the person he kills by implanting an artificial heart, there *may* be grounds to conclude that the act of removing the heart would not itself be an act of homicide. Such a possibility is untenable if the person becomes somebody new as a result of the implantation. The "earlier" person is dead, the "revived" person is an entirely new entity.

It is quite clear that the literature cannot be full of prior precedents on this matter. There seem to be two approaches to this issue in the literature. One of them is reflected well and succinctly in an article by Rabbi Moshe Hershler, who wrote:[21]

> האם יש לדון שעם השתקתו של הלב הטבעי נעשה האדם בגדר "מת," והשתלתו של הלב המלאכותי הוא מעין "תחיית המתים" מחודשת. יסוד גדול חייבים תמיד להזכיר בזה, כי להחיות אדם מת אינו בכוח של האדם והמדע. מפתח תחיית המתים נמסר ביד הקב"ה[22]... וכל שאנו רואים שאדם קם לתחייה אחר שנחשב כמת, הוכיח סופו על תחילתו שמעולם לא מת הלז... משום כך אין לשאול כאן ולהסתפק דמיד כשהוציאו והשתיקו את הלב, ונשאר זה נטול לב, נמצא כאילו האדם מת ואינו חי, ורק עם השתלת הלב החדש קם זה לתחייה.
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> Ought we to consider that with the stopping of the natural heart the person becomes categorized as "dead," and that the implantation of the artificial heart constitutes a type of new "resurrection of the dead?" We are duty bound to mention in this context an important axiom: that resurrecting the dead is not within the power of humans or science. The key to resurrection is entrusted only to God[23]. . .and whenever we see a person resurrected after being considered dead, the end proves about the beginning that the person was never really dead. . . .Therefore, there is no reason to ask in our case and to wonder whether upon removing and stopping the heart, leaving the person without a heart, it is as though the person has ceased living and died, and only upon implantation of the new heart been resurrected.

Hershler's approach is more theological than halakhic. True resurrection of the dead is only within the capability of God. If humans perceive something as death followed by resurrection through human agency, it could not have been death. If that is the way it appeared to us, we must change our definition of death. Thus, there is no halakhic impediment to the removal of the diseased heart. It cannot be murder since the subsequent rean-

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[21] "הלב המלאכותי בהלכה" in *הלכה רפואה* 4 (5745): 84-90. The quotation comes from p. 87. An earlier version of this article appeared in תורה שבעל פה, 5743, pp. 99-103. The quotation does not appear in the תורה שבעל פה version.

[22] He adds: וכל התופעות שאנו מוציאם כמעשה אליהו ואלישע ושאר צדיקי עולם, תופעות ניסיות הם למעלה מן הטבעיות והישג אדם.

[23] He adds: And all of the instances which we do find, like the acts of Elijah and Elisha and other righteous of the world, are miraculous occurrences, beyond nature and human ability.

imation of the person demonstrates that death had not really occurred. For Hershler, then, the status of the "reanimated" person is clear. It is the same person as before, because there was no death.

Not surprisingly, Hershler's approach is not shared by Bleich, who seeks more classical halakhic evidence to answer the question. He starts with the premise that, with the removal of the heart, the person is, in fact, dead, at least according to the Hakham Zevi and Eybeschuetz. Assuming that, what is the person's status following reanimation? The Gemara records:[24]

> רבה ורבי זירא עבדו סעודת פורים בהדי הדדי. איבסום. קם רבה שחטיה לרבי זירא. למחר בעי רחמי ואחייה. לשנה אמר ליה ניתי מר ונעביד סעודת פורים בהדדי. אמר ליה, לא בכל שעתא ושעתא מתרחיש ניסא.
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> Rabbah and Rabbi Zeira made their Purim meal together. They became drunk, and Rabbah arose and slaughtered Rabbi Zeira. The next day he prayed on his behalf and restored him to life. The next year he said to him: "Let the master come and we will have a Purim meal together." He responded: "A miracle does not occur every moment."

In commenting on this episode recorded in the Gemara, Rabbi Hayyim Joseph David Azulai (Hida, 1724-1806) wrote the following:[25]

> ויש להסתפק, אשת ר׳ זירא כי נשחט בעלה ומת ודאי פקעי קדושיהו והותרה לשוק, וכי חיה למחר ר׳ זירא היה צריך לקדש לאשתו קידושין חדשים דפנויה היא, ודמי למחזיר גרושתו דבעי קידושין חדשים דקידושי קמאי נדדו הלכו בגט ופנים חדשות באו לכאן, והוא הדין בזו שמת בעלה הנה מיתתו מתירה אף מפקיעה קידושין דידיה, וכי הדר חי, מילתא חדתא היא. או דילמא הא דהאשה קונה עצמה במיתת הבעל היינו דווקא כאשר מת ונשאר מת, אך כשלא נקבר וחי ע״י נביא או חסיד, אגלאי מילתא דאותה מיתה לא היתה מיתה כמות כל האדם, ולא פקעי קידושי קמאי, ואשת איש, ולא תפס בה קידושי דאיניש דעלמא, ובעלה כאשר חי מותר בה מיד כאשר היה לפני מותו.
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> The following is in doubt: When Rabbi Zeira was slaughtered and clearly dead, was the marriage between him and his wife absolutely dissolved with her becoming marriageable to others, such that when he was resurrected the next day he had to betrothe her anew because she was unmarried? [Is this case] comparable to one who remarries a woman whom he has divorced, which requires a new betrothal because the first marriage is gone, terminated by divorce, and a new situation is now present; such that similarly in the case where her husband has died, his death makes her permitted to others and terminates his marriage to her and when he is subsequently revitalized it is a new matter? Or perhaps, the premise that a woman acquires the right to marry others upon the death of her husband applies only when the man has died and remained dead, but if he were never buried and was resurrected

[24] Megillah 7b.

[25] ברכי יוסף, אבן העזר, י״ז: א.

> by some prophet or righteous figure it becomes clear that his death was not a normal death, and his original marriage is not terminated, his wife remains married to him and any betrothal contracted by her with another is null and void, and when her husband is revitalized he may resume marital relations with her immediately, as it was before his death?

The Hida raises the question of the halakhic status of a person who has died and been resurrected. He couches it in the clearest of all categories, a man's marriage to his wife. Death terminates a marriage. If the resurrected man is halakhically a new creature, that new creature was never married to the woman who was the wife of the person who has died. If, however, the legal status of the revived man is the same as it was prior to his death, he is not a new creature, and remains married to his wife. This is the question that the Hida has raised. He turns to the Yerushalmi to find the answer.

The Mishnah reads:[26] הרי זה גיטך מעכשיו אם לא באתי מכאן ועד י״ב חדש ומת בתוך י״ב חדש הרי זה גט – "[If a man says:] 'Let this be your divorce from now if I do not return within the twelve months,' and he dies within twelve months, it is a valid *get*." On this the Yerushalmi comments:[27] מהו שתהא מותרת לינשא? ר׳ חגיי אתר מותרת לינשא, רבי יוסי אמר אסורה לינשא, אני אומר נעשו לו נסים וחיה – "What is the law regarding her right to be married [immediately upon learning of the death]? Rabbi Haggai said: 'She is permitted to marry [immediately].' Rabbi Yosi said: 'She is forbidden to marry [immediately]. For I say that perhaps miracles were performed for him and he was resurrected.'"[28] Obviously, if the classical codes include the view of Rabbi Yosi as law, the answer to the question of the status of the resurrected man would be clear. He would be the same person after revival as he was before death. However, that is not the case. When Maimonides recorded the consequences of the Mishnah he wrote:[29] הרי זה גיטך מעכשיו אם לא באתי מכאן ועד י״ב חדש... מת בתוך י״ב חדש אע״פ שאי אפשר שיבוא והרי היא מגורשת לא תנשא במקום יבם עד אחר י״ב חדש כשיתקיים התנאי – "[If one says to his wife:] 'This is your divorce from now if I don't return within twelve months' . . .and he died within the twelve months, even though it is impossible for him to come and she is divorced, she should not get married in a case when the levirate law would apply until after twelve months have passed and the condition has been fulfilled." In other words, Maimonides' concern is whether her remarriage would be permitted because she is a widow or because she is a divorcee. If the former, she must comply with the levirate laws if they apply; if the latter, the levirate laws are inapplicable by definition and she may marry whoever she wishes. So, he mandates that she wait until she definitely becomes a divorcee, making the levirate laws inapplicable. Maimonides is obviously *not* concerned with the possibility that the husband *himself* might return after being miraculously revived.

The question for the Hida then becomes the following: Does the failure of the poskim to take account of the view of Rabbi Yosi indicate that he is mistaken? If the view of Rabbi

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[26] Gittin 7:8, 76b.

[27] Gittin 7:3, 48d (40a).

[28] That is, had the man been resurrected and returned home within the twelve months, he would not be divorced from his wife. And if we would permit her to remarry immediately upon hearing of the death of her husband, we do not take account of this possibility, and the result might be that she would be married adulterously to a second husband because her original husband has been miraculously resurrected and returned home within the time frame of his condition.

[29] M.T. Hilkhot Gerushin 9:11, and cf. S.A. Even HaEzer, 144:3.

Yosi is mistaken, then a person who was miraculously revived would be legally a different person from the one who died. And if Rabbi Yosi is not mistaken, why do the poskim ignore his view? The Hida wrote:[30]

> אף שהפוסקים לא חיישי כלל לשמא נעשו לו נסים וחיה, היינו מפני שזה לא שכיח כלל, ואפי׳ ר״מ דחייש למיעוטא[31] מ״מ למיעוטא דמיעוטא לא חייש, כ״ש דלא חייש להא דלא שכיח כלל. מ״מ מוכח מהירושלמי דאם אחר שמת נעשו לו נסים וחי אכתי אגידא ביה אשתו זאת, ולא מהניא לה מה שמת ודאי, דלבסוף חי. ובהא אית לן למימר גדם תלמודא דידן מודה, דאי אתרמי כי האי, המיתה שמת כמאן דליתה.

> Even though the poskim do not concern themselves at all with the possibility that he was revived by miracles performed on his behalf, the reason [for the lack of concern] is because it is a very uncommon occurrence. And even Rabbi Meir who is concerned about infrequent occurrences,[32] is not concerned with very infrequent occurrences, and surely is not concerned with this possibility which is *utterly* infrequent. Nonetheless, it is clearly demonstrated from the Yerushalmi that if one is miraculously revived after he has died, he remains married to his wife. Even the fact that he was definitely dead is irrelevant since, in the end, he lived. And regarding this even our [Babylonian] Talmud would agree, that if something like this happened, the death would be as though it didn't happen.

The Hida makes several important points. First, the silence of the poskim does not mean that Rabbi Yosi is incorrect. They ignore his view because the law simply does not mandate required behaviors on the basis of infrequent occurrences, and certainly not on the basis of utterly infrequent occurrences. Second, even though the Bavli's analysis of the Mishnah in Gittin ignores Rabbi Yosi's view altogether, that should not be misunderstood. The Bavli ignores Rabbi Yosi because what he posits is so unlikely, not because he would be wrong if it actually occurred.[33] Third, the person may, in fact, have died. The death, however, is rendered null and void by the subsequent resurrection. The Hakham Zevi and Rabbi Yonatan Eybeschuetz can be correct that the removal of the heart entails certain death. What the Yerushalmi proves is that the death is superseded by the subsequent revival, without any legal change in the status of the person who died.

As applied to the question under discussion, Bleich puts it well:[34]

> According to *Birke Yosef's* analysis, it necessarily follows that removal of a diseased heart followed by implantation of either a cadaver organ or an artificial heart does not constitute an act of

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[30] See above, n. 25.

[31] יבמות קי״ט, א, ומובא בהרבה מקומות.

[32] Yevamot 119a, and referred to in many places.

[33] This point is very important for the Hida. If the interest of the Bavli in the levirate issue must be understood to imply that it is the only possible issue, the Bavli would have rejected the view of Rabbi Yosi, not simply ignored it. If the Bavli rejects a view of the Yerushalmi, it is the Bavli which prevails in the determination of the law. Rabbi Yosi would be deemed incorrect, and were any person to be resurrected he would have to be considered a new person, legally speaking.

[34] English article, p. 117; Hebrew version (not quite identical with the English version), p. 153.

homicide since, in his view, death is retroactively nullified by virtue of subsequent animation.

To this point, therefore, we conclude that the status of the recipient of an artificial heart is the same after the implanation as it was prior to the removal of his heart. According to Hershler this is so because he cannot have been considered dead, since resurrection is only possible for God, not for doctors. According to the Hida, it is so because the subsequent resurrection nullifies the death and the view of Rabbi Yosi in the Yerushalmi proves that the status of the individual is unchanged after his revival from what it was before his revival.

It is a little surprising that Bleich did not refer to a source even earlier than the Hida. Rabbi Hayyim Benveniste (1603-1673) refers, as well, to the same issue, though from the perspective of the death of the woman. He wrote:[35]

וסבור אני דאם מתה אשה תחת בעלה מיתה ודאית ושוב חיתה על ידי נביא כמו אליהו לבן הצרפתית[36] ואלישע לבן השונמית[37] דלא פקעה זיקת הבעל מעליה ואינה יכולה להנשא לאחר, ויש סעד מעובדא דאשת ר׳ חנינא בן חכינאי.[38]

And it seems to me that if a woman died, unmistakably, while married, and was then revived by a prophet, like Elijah with the son of the Zarephatit[39] or Elisha and the son of the Shunamit,[40] her marital relation has not been terminated, and she may not marry another. And there is support [for this contention] from the precedent of the wife of Rabbi Hanina ben Hakhinai.[41]

The case of the wife of Rabbi Hanina records the miraculous resurrection by Rabbi Hanina of his wife, whom he surprised by returning from the academy after a twelve-year absence from home. Upon seeing him, she died. Rabbi Hanina cried out to God: "Is this her reward [for faithfulness during my long absence]?" He prayed on her behalf, and she was resurrected. This incident is taken as support for the claim of Benveniste because there seems to be no indication that there was any need for a new act of betrothal by Rabbi Hanina.

Rabbi Eliezer Waldenberg deals with the question of the need for a new betrothal following the stoppage of the natural heart for open heart surgery in a thorough responsum. He writes there:[42]

העלה הבעל כנסת הגדולה בפשיטות דלא פקעה זיקת הבעל מעליה ואינה יכולה להנשא לאחר, וא״כ דין מינה במכל שכן על כגון נידוננו דלא מת ממש וחיותו של הבעל נמשכת במציאות כל הזמן דבודאי ובודאי דעל ידי הוצאת הלב לזמן מה לא נפקע על ידי כך כלל זיקתו של הבעל, והרי היא נידונית בכל העת ההיא כאשת איש גמורה, וממילא כשמחזירים לו הלב וחוזר לחיות חיי משפחה איננה זקוקה כלל לקדושין מחדש.

[35] כנסת הגדולה, אבן העזר סי׳ י״ז, הגהות הטור אות ב׳.

[36] 1 Kings 17.

[37] 2 Kings 4.

[38] Ketubot 62b.

[39] 1 Kings 17.

[40] 2 Kings 4.

[41] Ketubbot 62b.

[42] שו״ת ציץ אליעזר, חלק ט״ז, סי׳ כ״ד. The quotation in the paper comes from p. 52, letter *heh*.

> The author of the *Keneset ha-Gedolah* concluded definitively that the marital relationship was not terminated, and that the woman could not marry another. If so, deduce from that by an argument of "surely so" regarding our case (of open heart surgery) in which the man does not actually die, and his vitality continues in reality throughout. It is absolutely clear that the act of removing the heart temporarily does not terminate the marital status. His wife is considered throughout to be married, and certainly when his heart is restored and he resumes normal family life she requires no new act of betrothal.

Thus, it is clear to Waldenberg that the person remains after the surgery exactly the same person as before the surgery. And, in a later responsum,[43] he makes very clear that there would be no difference in this regard between a case in which the heart is physically removed from the body and a case in which the heart is merely stopped, but not physically removed.

There is one more direction for our discussion of this issue to take. We quoted Bleich above[44] to the effect that the *Kereti u'Feleti* may not disagree with the Hakham Zevi. Bleich also argues in the opposite direction, and his argument is convincing. The argument between the Hakham Zevi and Eybeschuetz is most probably over the probability that the chicken had some other organ that took over the functions of the heart. The Hakham Zevi considered that so unlikely a prospect that he was compelled to consider false the testimony that there was no heart present. But what would the Hakham Zevi say if he had incontrovertible evidence that some other organ had *in fact* assumed the functions of the heart? Surely it is not the physical presence of an actual heart that determines for him whether there is life present. When people die, the heart remains physically present, but the people are dead. Why should the opposite case be any different? If some other organ were *clearly and incontrovertibly* fulfilling the functions of the heart would there be any reason for the Hakham Zevi to disagree with the *Kereti u'Feleti*? Logic would dictate a negative answer. What must matter for both of them is whether there is something causing the blood to flow through the circulatory system. If there is, the person is alive; if there is not, and it cannot be quickly restored, the person is dead. It is a functioning heart or heart replacement that is determinative for both. Death is not caused by the stoppage of the heart, but by the irreversible cessation of cardiac activity. Were that not the case, every instance of open heart surgery would also be an act of homicide, for the pulsation of the heart is stopped on purpose[45] and the functions of the heart taken over by a heart-lung machine. No halakhic decisor has even raised this issue, let alone determined that open heart surgery is forbidden because it constitutes homicide. The reason must be obvious. It is cardiac function that is critical, not whether that function is being carried out by one's heart.

Bleich is not the only, or even the first, to make this claim. It appears before him, too. The earliest claim to this effect, as far as I have been able to find, was made by Rabbi Aryeh Leib Grossnass, who wrote:[46] **ואף שהח״צ כתב דבלי לב הוי כמת, אבל בענינֵנו שהמכונה עושה כל תפקידי הלב ולא נפסק זרם מרוצת הדם בגוף אף לרגע ואח״כ כששתלו בו הלב היה חי א״כ בודאי לא היה מת מעולם** – "And even though the Hakham Zevi wrote that without a heart one is considered dead, surely in our case we must consider that the person was never dead since

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[43] Ibid., no. 64.

[44] Above, p. 199.

[45] In order to prevent movement of the organ being operated upon.

[46] **שו״ת ליב אריה** (London: 5733), vol. 2, 36, p. 120b.

a machine fulfilled all the functions of the heart and the flow of blood through the body did not stop even for a minute, and after the implantation of the heart the person was alive." Hershler also made a similar claim.[47]

A fine synopsis of the issues and the directions we should go in on this issue can be found in נשמת אברהם:[48]

> במרוצת הזמן אי״ה והידע הרפואי יתקדם עד שיהיו סיכויים טובים וברורים להצלחת הניתוח ולהארכת ימי החולה, יתכן שאז יהיה מותר לחולה שימיו ספורים, וככל ניתוח לב פתוח. והסכים אתי בענין זה הגאון רש״ז אויערבאך שליט״א [ז״ל]. ואמנם ראיתי שדנו בזה לאיסור משום רציחת החולה בעצם הוצאת הלב מגופו. אך צריך עיון, הלא בכל ניתוח לב פתוח היום׳ אמנם אין מוציאים את הלב מגופו של החולה, אך משקיטין אותו לחלוטין על ידי תרופות וכל תפקידו של הזרמת דם לכל חלקי הגוף נעשה ע״י מכונה (לב מלאכותי) העומד מחוץ לחולה ובו הוא קשור, ולא שמעתי על מי שמפקפק בניתוח לב פתוח משום רציחת החולה... ובמיוחד כאן שתפקוד הלב, דהיינו הזרמת דם לכל חלקי הגוף, נעשה ע״י מכונה.
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> With the passage of time, God willing, and the advancement of medical knowledge, [this matter of artificial hearts] will progress to the point that the chances for successful surgery and the prolonging of the life of the patient will be good and clear. It is probable that at that time it [implanting an artificial heart] will be permissible for a terminal patient, just as any open heart surgery. And Rabbi Shlomo Zalman Auerbach agreed with me on this matter. Indeed, I have seen that some have judged this forbidden on the grounds of the murder of the patient by the very removal of the patient's heart. But the argument requires investigation because in every open heart surgery today, while it is true that the heart is not removed from the patient's body, drugs are administered to stop the heart completely, and the function of causing the blood to flow through the entire body is carried out by a machine (artificial heart) which is external to the patient and to which he is attached, and I have not heard of anyone who harbors reservations about open heart surgery on grounds of murdering the patient. . .and especially in this case where the functioning of the heart, i.e., causing the flow of blood throughout the body, is fulfilled by a machine.

We have thus supported logically, theologically, and by formal halakhic argumentation our intuitive feeling that artificial hearts must be halakhically acceptable, provided they are medically feasible.

There are two final postscripts to add to this section of the paper. First, we have been dealing with the long term use of an artificial heart as a permanent replacement for one's natural heart. It is in this area that the success rate is thus far not very great, though improving. Artificial organs are also being used with greater success as temporary replacements, pending finding a natural organ for implantation. Since the success rates are reasonable, there is little halakhic objection to attaching a patient to an artificial heart

[47] See above, n. 21. In the תורה שבעל פה article, see p. 101, and in the הלכה ורפואה article, see p. 87.

[48] See above, n. 4.

replacement while waiting for the availability of a heart for implantation. The wrinkle in this is that the longer one is attached, the more medical problems are likely to develop, particularly infection and internal bleeding, and with these developments, the patient becomes an increasingly less likely candidate for a transplant. Thus, careful attention must be paid to the likely time until the replacement heart becomes available.

Second, when the time arrives that use of artificial hearts becomes common, it will probably be possible in some instances to utilize parts of the diseased heart which are still functional for implantation in others. There should be no halakhic objection to such use, provided the decision to implant an artificial heart is made independent of the need of a potential recipient for heart parts.[49]

Conclusions

1. The use of artificial heart valves, bones, joints and skin is permissible.
2. Both hemodialysis and peritoneal dialysis are permissible.
3. The use of a heart-lung machine during open heart surgery is permissible, as is its use as a temporary measure awaiting the availability of a heart for transplantation. In the latter case, consideration of the likely time span before receiving the heart for transplantation should be a factor in deciding whether or not to use it, since prolonged use may create complications that will make successful transplantation less likely.
4. Use of an artificial heart as a long term matter is fraught today with dangers, and is very experimental. Agreeing to such surgery should be discouraged so long as there is any other alternative whatsoever. However, if there is no other alternative available and the prospect for prolonged life is greater with an artificial heart than without it, it is permissible to implant an artificial heart even today.[50]
5. When the success rate for artificial hearts becomes such that the likelihood of successful implantation and use are greater than the danger to the patient from the procedure or its possible after effects, the routine use of artificial hearts will be permissible. Indeed, it will be preferable because it will eliminate the need to wait until a donor heart becomes available, and it will obviate the need to fix the moment of the death of the donor. The act of removal of the diseased heart is not an act of murder, and there is no change in the halakhic status of the patient after implantation than before removal of the diseased heart.[51]

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[49] See the end of Hershler's article, referred to above, n. 21.

[50] Compare below, n. 68.

[51] This claim is an interesting correlative to the case of conversion. There we claim halakhically and psychically that the convert is "reborn" after conversion even though he or she is the same person physically. Here, the person remains the same person legally and psychically even though he or she has been "reborn" physically.

Part II: Use of Animal Organs

This paper was approved by the CJLS on March 16, 1999, by a vote of eighteen in favor (18-0-0). Voting in favor: Rabbis Kassel Abelson, Ben Zion Bergman, Elliot N. Dorff, Jerome M. Epstein, Baruch Frydman-Kohl, Myron S. Geller, Nechama D. Goldberg, Susan Grossman, Judah Kogen, Vernon H. Kurtz, Alan B. Lucas, Aaron L. Mackler, Lionel E. Moses, Mayer Rabinowitz, James S. Rosen, Joel Roth, Elie Kaplan Spitz, and Gordon Tucker.

The Committee on Jewish Law and Standards of the Rabbinical Assembly provides guidance in matters of halakhah for the Conservative movement. The individual rabbi, however, is the authority for the interpretation and application of all matters of halakhah.

שאלה

Is the use of animal tissues or organs for transplantation in humans permissible in Jewish law? If permissible, are there any restrictions?

תשובה

The use of animal organs for human transplantation is no less experimental than the use of an artificial heart.[52] In a certain sense, the success rate for such experiments is even more disappointing than the rate for artificial hearts. Attempts have been made, though not in any great numbers, since 1964. Thus far, all attempts at the transplantation of animal organs into human beings have failed to prolong the lives of the recipients significantly.[53] Even in the most successful case thus far, the Baby Fae case of 1984, in which the heart of a baboon was implanted into the chest of an infant, the infant continued to live for only twenty days.[54] Thus, it is clear that all of the cautionary comments made in the previous section with regard to the experimental nature of artificial heart implantation will apply to this issue as well.[55]

If and when animal organ transplantation becomes a medical feasibility, it will go without saying that halakhah will demand that the animal organs be taken from the animals with all due consideration to the issue of צער בעלי חיים. It will be equally true, however, that the primacy of human life over animal life will also be an halakhic given.

This is not the place to engage in a lengthy discourse on the issue of צער בעלי חיים. We shall suffice with brief proof that the primacy of human life over animal life will be an halakhic given. The Bible itself hints that animals are to be used by humans for their needs. Gen. 1:28 gives humans dominion over the animals, and Gen. 9:2 ff. intimate the right of humans to utilize animals for their needs. Nahmanides also makes it very clear in his commentary to Gen. 1:26 that the term וירדו implies dominion and rule.

The idea that humans have the right to use animals for their own purposes, and that that was the intent of creation, is implied in the baraita quoted at the very end of Kiddushin (82b):

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[52] See above, p. 195 for our brief comments on experimental treatment.

[53] A summary of attempts at such implantation can be found in W.F. Parks et al., *Surgical Clinics of North America* 66:663, 1986.

[54] See L.L. Bailey et al., *JAMA* 254:3321, 1985.

[55] In regards to both artificial hearts and animal organs, I have been speaking only of the permissibility of their use. I can as yet conceive of no circumstances in which it would be halakhically mandatory to agree to either type of medical experimentation.

> ר׳ שמעון בן אלעזר אומר: מימי לא ראיתי צבי קייץ וארי סבל ושועל חנווני, והם מתפרנסים שלא בצער, *והם לא נבראו אלא לשמשני*....
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> Rabbi Simon the son of Elazar says: I never saw a deer tending crops, or a lion bearing a burden, or a fox operating a store, and they sustain themselves without suffering, *and they were created only to serve me. . . .*

The earliest responsum that deals specifically with the applicability of צער בעלי חיים to uses of animals by human beings is by Rabbi Israel Isserlein (1390-1460)[56] who affirmed that pulling feathers out of a live goose was not forbidden on grounds of צער בעלי חיים, so long as one was doing it for one's need and use, since all creatures were created for the use of human beings. His student, Rabbi Jonah (Ashkenazi),[57] subsequently wrote[58] in the name of Tosafot Avodah Zarah[59] that even though the prohibition against צער בעלי חיים is דאורייתא, if there is some purpose behind the act, it is permissible. To this Rabbi Jonah adds that the "some purpose" means "some medical purpose," even for one who is not dangerously ill. Finally, for our purposes now, this view is codified by Rabbi Moses Isserles:[60]

> כל דבר הצריך לרפואה או לשאר דברים, לית ביה משום איסור צער בעלי חיים.
>
> The prohibition against cruelty to animals does not apply to anything which is needed for purposes of healing, or other matters.[61]

When that time comes, and it becomes clearer exactly what issues of צער בעלי חיים may be involved, it will be critical to have a paper dealing with that subject. That paper will have to discuss even the ultimate question, namely, whether considerations of צער בעלי חיים can ever outweigh the use of an animal organ to save or to prolong a human life. The focus of our discussion at the moment, however, is on the permissiblity in halakhah of having an animal organ implanted into a human at all.

While the issue of צער בעלי חיים is what makes animal organ transplantation more halakhically complicated than artificial organ transplantation, animal organ transplantation is not a difficult halakhic issue. Given the axiomatic premise that human life takes precedence over animal life, there could be no halakhic objection to the use of animal organs to save the lives of humans. Even now it is not at all uncommon for valves from the hearts of pigs to be utilized in heart valve replacement surgery of human beings.[62] Of course, if artificial and animal organs were both equally feasible and equally effective, whatever issues of צער בעלי חיים might exist would make it preferable to utilize an artificial organ. Obviously, though, if both were available, but the animal organ would be more effective, it would be preferable to an artificial organ.

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[56] תרומת הדשן, פסקים וכתבים, סי׳ ק״ה.

[57] See below, n. 230.

[58] ספר איסור והיתר, כלל נ״ט, דין ל״ו.

[59] Probably 11a, ד״ה עוקרין, even though the wording is not exactly as quoted by the ספר איסור והיתר.

[60] אבן העזר סי׳ ה׳, סע׳ י״ד.

[61] For other responsa which also affirm that צער בעלי חיים does not apply when there is medical need, see שו״ת שבות יעקב ח״ג, סי׳ ע״א, שו״ת בנין ציון ח״א, סי׳ ק״ח, שו״ת חלקת יעקב ח״א, סי׳ ל׳, שו״ת שרידי אש ח״ג, סי׳ ז׳, שו״ת ציץ אליעזר חי״ד, סי׳ ס״ח.

[62] It is interesting to point out that the Gemara in Ta'anit 21b also posits the similarity of swine internal organs to human internal organs. On that basis it mandates that a pestilence among swine is grounds for declaring a fast for humans. See Orah Hayyim 576:3.

After the Baby Fae case, Rabbi Shlomo Goren wrote an article in the Mizrahi – Po'al ha-Mizrahi newspaper הצופה[63] in which he wrote:

> אין כל סבה לחשוש מהשתלת לב בבון או אפי' של חיה באדם משום שמשוכנעים אנו שהלב שיושתל, במידה שההשתלה תצליח, לא יהווה יותר מאשר משאבה להספקת דם מחומצן למוח ללא כל השפעה אינטלקטואלית או פסיכולוגית על האדם.... יוצא איפוא למסקנה שכל שיתברר שמבחינה רפואית יוכל הלב של בבון וכיוצא בו למלא את תפקידו הפונקציונלי של הלב הטבעי של האדם, לא תתעורר שום בעיה של שינוי זהות באדם שבחזהו הושתל לבו של הבבון, וממילא אין שום הסתייגות הלכתית או אתית יהודית מהשתלת לב חיה או של קוף בחזהו של אדם, בתנאי שיעלו הסיכויים להאריך חייו של האדם מעבר לימים ספורים, כפי המצב עד כה, כדי שלא לסכן לשוא את חיי השעה של החולה בנסיון כירורגי–רפואי.
>
> There is no reason to be concerned about implanting the heart of a baboon, or even a beast, in a human being. For we are convinced that the transplanted heart, insofar as the transplant succeeds, will be nothing more than a pump for the provision of oxygenated blood to the brain, with no influence whatsoever on the human, intellectually or psychologically. . . .It follows as a conclusion, therefore, that whenever it becomes clear that medically speaking the heart of a baboon, or similar animal, can fulfill the functional purpose of the natural heart of a person, there will arise no problem of changed identity of the person into whose chest the baboon's heart has been transplanted. As a result, there should be no halakhic or Jewish ethical reservation regarding the transplantation of the heart of an animal or monkey into the chest of a human being. [This permission] is conditional upon an increased probability that the life will be increased by more than a few days, as is now the case, otherwise we should not endanger in vain even the temporary (terminal) life of one who is sick, for a surgical-medical experiment.

Some of the wording of Rabbi Goren's conclusions will make better sense when it is understood that he devoted a large part of his article to proving that it is not the heart alone which determines and controls humanness and human characteristics and attributes. One can even understand the issue on a theoretical level. After all, the Midrash counts and lists fifty-eight characteristics which emanate and are controlled by the heart.[64] Perhaps, then, metaphysically speaking, if one were to implant an animal heart in a human being, that human being might acquire the characteristics of the animal that its heart controlled, and lose those characteristics of his own human personality that were controlled by his now-removed human heart. Once Rabbi Goren was able to dismiss that concern, there remained for him no other real halakhic concerns. Nor do there remain any such concerns for us.

Lest there be any ambiguity whatsoever, we should make clear that if and when such transplants become frequent, there will also be no restriction whatsoever on the animals

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[63] 6 Kislev 5745 (30 Nov. 1984), p. 5, with conclusion on p. 8.

[64] Kohelet Rabbah 1:38. Biblical proofs are adduced for all 58.

which can be used. Yehuda ha-Levi said it well enough in the *Kuzari*:[65] קשה בעיני הקראי ההנאה מן החזיר, אפילו לשם רפואה, אם כי על צד האמת אין זאת כי אם אחת העבירות הקלות שאדם חייב עליהן מלקות – "It bothers the Karaite to derive any benefit from a pig, even for purposes of healing. In fact use of a pig [by eating it] would be no more than a minor infraction for which a person would be liable for lashes [and not liable at all when used for medical reasons]."[66]

It is highly premature to attempt anything but a brief comment about the latest experimental technology called xenografts or xenotransplantation. The technology attempts to utilize organs of animals for transplantation into humans (usually pig organs, which resemble human organs both in infancy and adulthood). Obviously, if such a technology were to become scientifically feasible, many problems could be solved, particularly the problem of the shortage of available organs for transplantation. The major problem to be met, scientifically, is the matter of rejection by the body of the "foreign" implant. One of the avenues being tested includes some genetic engineering of the pigs to include some human genes, in order to minimize that problem.

There are, also, scientific concerns that have to be resolved, including the danger of transferring disease from animals to human beings, which is probably what happened with HIV.

This is a very new field, and it is in its infancy. Halakhically, however, there would be no objection to the utilization of such organs for transplantation.[67]

Conclusions

1. When medically feasible, the use of animal tissue or organs for transplantation into humans will be entirely permissible.

2. At that time, there will be no restrictions on the animals that may be utilized as donors.

3. Animal transplants are currently experimental, with little probability of extending the life of the recipient significantly (if at all). Under these circumstances, agreeing to such a procedure should be weighed very carefully against its risks.[68]

* * *

[65] Kuzari 3:49, in the Dvir Publishing ed. of 5733, p. 134.

[66] I admit that the wording of the *Kuzari* is a little cryptic. It seems to me unthinkable, however, that Yehudah ha-Levi is claiming that deriving benefit from pig meat for purposes of healing would be punishable in Jewish law. That might be possible only if one were talking of someone not seriously sick. More likely, the phrase אפילו לשם רפואה is parenthetical, and אם כי על צד is the direct continuation of הנאה מן החזיר. This is the way I have translated it.

[67] I offer Web site URLs for several articles about xenografts. The first of them ends with a link to a bibliography:

www.onysd.ednet.edu/~g98s46/library/xenografts.html

www.the-scientist.library.upenn.edu/yr1995/august/ . . .

www.dukenews.duke.edu/med/xenobkgd.htm

www.cdc.gov/ncidod/EID/vol2no1/michler.htm

[68] I am very aware of the difficulty implied by the fact that I am discouraging Jews from allowing themselves to be used as experiments, and allowing them to derive the benefits of others doing just that. Nonetheless, I remain convinced that this difficulty does not override the halakhic mandate to preserve even חיי שעה when tampering with it is not likely to produce positive benefits to the patient. The wording of the conclusion avoids positing an absolute prohibition, however. I can imagine circumstances similar to those of the Dr. Barney Clark case in which it would be halakhically permitted to allow oneself to undergo a transplant from an animal donor, even knowing the experimental nature of the operation and the slim chance for prolonged benefit.

Part III: Live Donors – Blood and Bone Marrow

This paper was approved by the CJLS on March 7, 2000, by a vote of fifteen in favor, one oppossed, and five abstaining (15-1-5). Voting in favor: Rabbis Kassel Abelson, Elliot N. Dorff, Paul Drazen, Samuel Fraint, Nechama D. Goldberg, Arnold Goodman, Judah Kogen, Vernon H. Kurtz, Alan B. Lucas, Aaron L. Mackler, Daniel Nevins, Paul Plotkin, James S. Rosen, Joel Roth, and Gordon Tucker. Voting against: Rabbi Elie Kaplan Spitz. Abstaining: Rabbis Ben Zion Bergman, Susan Grossman, Mayer Rabinowitz, Avram Israel Reisner, and Joel E. Rembaum.

The Committee on Jewish Law and Standards of the Rabbinical Assembly provides guidance in matters of halakhah for the Conservative movement. The individual rabbi, however, is the authority for the interpretation and application of all matters of halakhah.

שאלה

Is it halakhically permissible to donate blood or bone marrow for one who needs them now? If so, is it ever halakhically required to do so? If so, when? May one donate blood for deposit in a blood bank? For storage for one's own later use? May one donate blood or bone marrow for compensation? Under what circumstance, if any, may blood or bone marrow be donated on Shabbat?

תשובה

At the present time, there are only four transplants from live donors: blood, bone marrow, liver parts, and kidneys.[69] The first, blood, is often not even popularly thought of as a transplant, though technically, of course, it is. There would be a certain logic to treating all four of these together. However, there are also good reasons to treat blood and bone marrow together, and kidneys[70] separately. The two things that distinguish blood and bone marrow from kidneys are that the former two replenish themselves after being removed from the donor, while the removed kidney does not; and, in general, there is very little danger to the donor from the extraction of the blood or the bone marrow, while there is some danger in the removal of the kidney, both immediate and potentially in the future. Because these differences are so important, this paper will treat kidneys separately in the next section. The drawback to this approach is that in those few areas of real halakhic concern regarding blood and bone marrow, the issues become the same as those involved in kidney transplants, and it is our intention to leave detailed discussion of those issues to the next section. Hopefully, this will not be too difficult a problem.

We shall take no time in proving both the need and usefulness of blood and bone marrow in the critical medical treatment of patients, both being exceptionally clear.

As a general and guiding principle it would seem logical to posit that the utilization of organs, limbs, or tissues from live donors would be least difficult to justify halakhically when: (A) the extraction or removal of the organ does not produce any significant medical danger to the donor; (B) the life of the donor subsequent to the removal of the organ

[69] Ovary implantation and sperm donation would be other instances of live donor transplantation, with their own set of complicated halakhic issues. Since these matters are the subject of a separate paper before the CJLS (see below, pp. 461-509), this paper will not treat them at all.

[70] Whatever conclusions will apply to kidneys will apply, in principle, to liver parts, as well. Thus, we will not treat them separately. However, see below, pp. 308-309.

is basically unaffected by the fact that it has been removed; (C) the donor does not require special treatments or extensive medical follow-up; and (D) the implantation of the organ, limb, or tissue extracted from the donor is the most beneficial treatment for the recipient and has a good medical chance of working.[71] The first three of the points above most surely apply to blood and bone marrow donation. In the case of blood, the discomfort is usually no more than the initial discomfort of the insertion of the needle, and the follow up "medical treatment" is basically limited to drinking more than usual for a brief period of time, and restricting the giving of a subsequent donation for a period of six to eight weeks. (None of this is to deny that some people get very nervous and/or faint prior to donation, during it, or subsequent to it; feel weak after donation and must lie down for some brief period; and generally find the experience unpleasant and would rather avoid it entirely.) In the case of bone marrow donation, the amount of marrow removed is usually between three and five percent of the marrow of the donor, and it takes between two and three weeks for the marrow to be replenished. The discomfort of donation is greater than that of giving blood, as absolutely evidenced by the fact that bone marrow aspiration is carried out under general anesthetic, that the donor is kept in the hospital for observation for a day or two, and that there is often soreness around the pelvis which is the primary site of the aspiration.[72] The fact of the use of general anesthetic also increases the medical dangers to the donor.

But, when all is said and done, neither procedure is particularly complicated, nor are the inherent dangers very great. The follow up is relatively simple. And the beneficial and life saving or prolonging effect of the donation cannot be gainsaid. Even the issue of the danger of the general anesthesia must be kept in perspective. At the current time, the mortality rate from general anesthesia is about 1 in 10,000, and appears to be even lower for young people, those in good health, and those who are anesthetized for only brief periods.[73] It seems inescapable, therefore, to conclude that blood and bone marrow donations are halakhically permissible, at least sometimes.

We have couched the first question of this section of the paper in terms of blood and bone marrow donations to "one who needs them now," because that is the simplest of the issues. We shall discuss some of the more complicated issues in a subsequent section, where we will deal thoroughly with the primary sources which allow these types of activities only under the circumstance – כשהחולה לפנינו, and particularly the responsum of the *Noda B'Yehudah*.[74] What is clear now, however, is that when there is "one who needs them now," blood and bone marrow donations are permissible.

The question to which we move now, then, is whether one can be halakhically compelled to donate either blood or bone marrow for the life saving benefit of a חולה לפנינו. The *Nishmat Avraham* states the following with the apparent agreement of Rabbi Shlomo Zalman Auerbach:[75]

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[71] In adopting these criteria, I agree with Dr. Abraham Steinberg, who lists them in the entry השתלת איברים in the *אנציקלופדיה הלכתית רפואית*, p. 213.

[72] The greater pain involved in bone marrow donation carries with it some halakhic complications. See below, n. 249.

[73] See Alan F. Ross and John H. Tinker, "Anesthetic Risk," in Robert Miller, ed., *Anesthesia*, 3d ed. (New York, 1990), vol. 1, pp. 712ff.; and J. David Bleich, *Contemporary Halakhic Problems*, vol. 4 (New York: Ktav Publishing House, Inc. and Yeshiva University Press, 1995), pp. 286f., and especially n. 29.

[74] נודע ביהודה תנינא, חלק יורה דעה, סי' ר"י.

[75] נשמת אברהם, הלכות אבלות, סי' שמ"ט, ס"ק ג(2).

מוח עצם – כאן אין כל סכנת ניתוח מבחינת התורם אך יש סכנה של מיעוט דמיעוטא עקב ההרדמה כללית בזמן לקיחת מוח העצם ממנו.... כאן לכאורה לכל הדעות יהיה מותר, ומצוה לקרוב משפחה לנדב את עצמו לעת הצורך כדי להציל נפש מישראל, והסכים אתי הגרש"ז אויערבאך.

Bone marrow – Regarding this there is no surgical danger for the donor, even though there is a very small degree of danger as a result of the general anesthesia. . . .In this case it is likely that according to all opinions it is permissible, and it is a mitzvah for familial relations to volunteer at the time of need in order to save a Jewish life. And Rabbi Shlomo Zalman Auerbach agreed with me in this matter.

The essence of the claim is that the only argument which might be presented against some type of mandatory donation of bone marrow is the argument that it poses danger to the donor. Since those arguments are inapplicable to bone marrow donation, there could be no grounds for a prohibition. Thus, it is surely permissible. It looks, though, that the choice of the word mitzvah is not accidental, and that it implies an act of goodness and piety – a good deed – but not a legal obligation that could be compelled in the case of refusal. It is also unclear why the donation would be a mitzvah for family members, but not for others.[76] Though Sofer-Abraham gives a hint of something beyond mere permission, it is difficult to deduce a legal obligation from his words. Finally, it would follow from this statement of the *Nishmat Avraham* about bone marrow, that it would apply קל וחמר to blood, at least so far as the mitzvah status of donation at time of need is concerned. It is not clear whether the *Nishmat Avraham* would mandate an actual obligation for blood donation.

It is possible that his very carefully worded statement is an attempt to take into account the opinion of Rabbi Eliezer Waldenberg, to whom Sofer-Abraham addressed a question in 5736. The *Nishmat Avraham* had published an article in *Noam* about medical experimentation on human beings.[77] Rabbi Waldenberg sent him some comments, which he subsequently published in *Ziz Eliezer*.[78] There he wrote:

ועל כן דעתי להלכה היא דנהי דאם הרופאים קובעים שאין כל סכנה בניסוים כאלה שמציעים שאז *מותר* לו לאדם למסור את עצמו לעריכת ניסוים שכאלה בגופו לטובת חולה אחר, וכן לתרום מדמו וכדומה, וגם מקיים מצוה בכך, אבל לחייב אותו עבור כן על פי דין תורה, זה אי אפשר בשום פנים.

Therefore my legal opinion is that if the doctors determine that there is no danger in the experiments which they suggest, it is permissible for a person to allow himself to be experimented upon for the benefit of another ill person, and similarly, to donate blood and such things. Indeed, he perfoms a mitzvah thereby. But it is absolutely impossible to obligate him for such things by law of Torah.

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[76] But see our discussion below, p. 315.

[77] *Noam* (Jerusalem: מכון תורה שלמה, 5734), vol. 17, pp. 160-163.

[78] Vol. 13, no. 101. The quoted selection is from par. 6.

There is also a later responsum in which Rabbi Waldenberg reaffirms his view. It is important to note that responsum, since one might otherwise be misled by it. In 5743, the *Ziz Eliezer* was asked if there is an obligation for a sickly and squeamish (חלוש ורך מזג) person to donate blood for a dangerously sick person who requires his blood type, which is rare and unavailable for purchase from the blood bank, when donating will weaken the donor and make him bedridden, even though it will not make him seriously ill. Since the question is couched in terms of a sickly individual who would become bedridden as a result of donating blood, it might be possible to understand the answer as restricted to such people. That would be a misreading.

It seems clear, therefore, that the term mitzvah, as used both by the *Nishmat Avraham* and the *Ziz Eliezer* refers to a permissible, desirable, admirable and laudable, but *not mandatory* act. That, too, is what the term will mean throughout this section, unless otherwise indicated in the section itself.

One basis of Waldenberg's responsum[79] is the claim that nobody could ever be obligated to donate a quantity of blood equal to or greater than the amount on which life might depend. And, since the Gemara defines a quarter of a *log* as the minimum definition of נפש,[80] a very small amount indeed, it follows that nobody could be required to donate more than a רביעית. The prohibition cannot be restricted to the sickly, because even the healthy would be potentially endangered by giving more than what the Gemara considers שעור חיות. Thus, even though the question is about a sickly person, the answer is not restricted in any way. It applies to all. And this is what Rabbi Waldenberg concludes:

> ועל כן אין חיוב על האדם לתת רביעית ויותר מדמו לשם הצלת אחר אפילו שיש בו סכנה ולא משיגים סוג דם זה במקום אחר. ורק מי שחפץ ברצון עמצו לתרום מדמו ומרגיש שלא יוזק מזה, מדת חסידות יש בזה, ואשרי חלקו מי שיוכל לעמוד בזה.
>
> Therefore there is no obligation on any person to give a quarter of a *log* or more of his blood, even in order to save someone who is endangered and whose blood type cannot be acquired elsewhere. One who wishes, of his own desire, to donate his blood, and feels that he will not be hurt by that, perfoms an act of piety. Blessed is the lot of one who can do so.

Bleich[81] rejects the reasoning on the *Ziz Eliezer* as "fanciful." The Gemara, after all, views bloodletting as therapeutic,[82] and surely more than a רביעית was removed. Bleich may well be correct about that, but Waldenberg's conclusion should not be rejected so quickly. First of all, this is not his only proof, and we shall get to his other proof shortly. Furthermore, later in his responsum he claims that if it were legally mandatory to donate blood in times of such need, the most devoted advocates of such a mandate would seek the incorporation of the mandate in civil legislation, which has not happened, says the *Ziz*

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[79] שו״ת ציץ אליעזר, חלק ט״ז, סי׳ כ״ג, published also in הלכה ורפואה, כרך ד׳, תשמ״ה, עמ׳ קמ״ג.

[80] See Hulin 72a, Nazir 38a. Although translating rabbinic measures into modern terms is very difficult, a *log* seems to be about 0.3 liters, and a רביעית one quarter of that. One liter = 0.264 gallons. Thus, 0.3 liter would equal 0.079 gallons, and one quarter of that would be 0.019 gallons. That amount translates to approximately 0.16 pint. That is, the Gemara's definition of the amount of blood on which the נפש depends is about 16 percent of the amount of blood taken from blood donors at a blood bank. And, in fact, in times of emergency it is possible to remove more than a pint of blood from a donor without very great danger.

[81] See reference above, n. 73, Bleich, p. 285, n. 28.

[82] Shabbat 128a.

Eliezer. Indeed, to the best of my knowledge, there has been no such suggestion made in the United States or in Israel, ever. Even the medical profession has not made such a recommendation. In both the United States and Israel, furthermore, blood donation cannot be compelled even from members of the military, even when on duty. They may be given inducements to donate, and disinducements if they do not volunteer to donate, but by law they cannot be compelled to donate, and their refusal to donate is not actionable by the American or the Israeli army. Furthermore, if it were halakhically mandated, one should be able to coerce people and remove their blood from them when there is a need, even against their will. Yet, nobody entertains such an idea. Even those whom we shall soon refer to who consider blood donation mandatory do not make this claim.

The basic source for the claim that people can be coerced to perform mitzvot that they do not wish to perform is found in the following statement of the Gemara:[83]

> תנינא במה דברים אמורים במצות לא תעשה אבל במצות עשה כגון שאומרין לו עשה סוכה ואינו עושה, לולב ואינו עושה, מכין אותו עד שתצא נפשו.
>
> We have learned: To what does this apply [Rashi in Ketubbot: that one is given forty lashes]? To negative commandments, but regarding positive commandments, for example, they [i.e., the court] tell him to make a sukkah and he does not do so, to prepare a lulav and he does not do so, we beat him until he dies.

The quotation above might be understood to imply that there can be coercion only regarding positive commandments. That is, for negative commandments one could receive only after-the-fact whipping, but one could not be whipped in order to make one comply with the negative commandment. We shall quote several authorities, however, whose words make quite clear that coercion is also possible for negative commandments (like, for example, the negative commandment לא תעמוד). We must, of course, refer only to negative commandments where the coercion would come in time to prevent the violation of the negative commandment, otherwise, we would apply the first clause of the baraita, namely, that the person who had already violated the commandment would receive the regular, court administered lashes as punishment, but not as preventive coercion.

The Ran wrote the following:[84]

> אם היה בפסח והיה אוכל חמץ מלקינן ליה אם לא רצה לעמוד מלאכול חמץ אף דמצות לא תעשה היא מחינן ליה או עד שיאמר רוצה אני או עד שתצא נפשו.
>
> If it was Passover, and one was eating hametz, we beat him if he doesn't agree to stop eating hametz. Even though it is a negative commandment, we smite him either until he says, "I'll stop," or until he dies.

There is really no ambiguity in these words of the Ran. What they clearly mean is that if coercion can prevent further, on-going violation of the negative norm, we do not satisfy ourselves with the claim that the court will administer the accustomed lashes for violation of that norm; rather, we hit the person who is violating the norm in order to prevent that person from further violation. And, it is absolutely clear from the last words of the Ran, "or

[83] Ketubbot 86a, and cf. Hulin 132b, especially Rashi's differing explanations of the first clause.

[84] *Hiddushei ha-Ran* to Hulin 132b.

until he dies," that he is referring to the same type of hitting as the baraita which is the focus of our current discussion. It follows from this claim of the Ran, that if one were violating לא תעמוד by refusing to give blood for someone who needs it, we should be mandated to "twist his arm," quite literally, until he agrees to do so.

Now, one might argue that there is a difference between the case of the Ran and the case we are discussing. In the Ran's case, the person is actually *doing something*. The "something" that he is doing is an act which is legally a negative commandment ("Thou shalt not eat any hametz"), but the person is not simply sitting and doing nothing. In our case, though, the person is not *doing anything*. He is just standing there and refusing to do what לא תעמוד would mandate that he do. Maybe the Ran's claim does not cover such a case. If one wishes to argue thus, it must be pointed out that our case would have to be considered as one of לאו הניתק לעשה, that is, a negative command which is rectified by a subsequent act.[85] That is, if one has eaten a forbidden food, there is no act which can be done to rectify what has already taken place; but if one has refused to give blood, and the person is still alive and in need of the blood, there is an act which can be done to rectify what has taken place (i.e., the refusal) – give blood now. That is precisely what a לאו הניתק לעשה is. If one were to raise this objection to applying the Ran to our case, a quote from Rabbi Zevi Ashkenazi (1660-1718) would indicate that, in fact, coercion should be possible even in such a case:[86] אף בלאו הניתק לעשה אם הוא דבר שאפשר לתקן, ודאי ב"ד כופין אותו, שלא יעבור הלאו מכאן ולהבא – Even in the case of a לאו הניתק לעשה, if it is a matter which can be corrected, surely the court should compel him, in order that he not violate the negative prohibition from now on.

What the Hakham Zevi is saying is that though one does not usually get lashes for a לאו הניתק לעשה, if one is violating that לאו, and can be coerced into not violating it before it is too late, we should coerce the person not to violate it. The result, of course, will be that the person will have learned his lesson, and will not violate it in the future. That is directly applicable to our case. If we truly believe that refusing to give blood is a violation of לא תעמוד, most cases will be such that the coercion could bring about the non-violation of the commandment in the first place, and would surely teach the one coerced that he ought not to violate the commandment in the future.

One might, however, object even to the application of the Hakham Zevi to our case on the grounds that it was our logic that provided the עשה, when, in fact, there really is no biblical *aseh* which serves as the rectification of the לאו of לא תעמוד.[87] To respond to this we refer to the claim of the Gemara[88] that Rava coerced Rav Nathan bar Ami, and took four hundred *zuz* from him for charity. The Tosafot[89] question how Rava could have coerced him, when that seems to violate the dictate of the Gemara[90] according to which no court may compel compliance for any mitzvah for which the Torah itself stipulates a reward, and the Torah stipulates a reward for charity in Deut. 15:10 – "For in return [for giving charity] the Lord your God will bless you in all your efforts and in all your under-

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[85] For example, the Torah commands in Lev. 19:13 that, "Thou shalt not rob." In Lev. 5:23-24, however, the Torah mandates a positive act which rectifies the offense, namely, restoring the stolen article, plus a twenty percent penalty.

[86] *Hakham Zevi*, no. 105.

[87] It is for precisely that reason that we said above: "would have to be considered as."

[88] Ketubbot 49b.

[89] Ibid., s.v. אכפייה.

[90] Hulin 110b.

takings." Not all of the answers of the Tosafot are relevant to our discussion, but one of them is particularly relevant. In their final line, the Tosafot contend that the reason Rava coerced Rav Nathan bar Ami is because there are two negative commandments about charity: לא תאמץ and לא תקפץ – "Do not harden your heart and do not shut your hand against your needy kinsman."[91] The actual commandments in the Torah concerning charity include two negative commandments. That is why Rava felt it justified to compel the donation from Rav Nathan, say the Tosafot. On this claim of the Tosafot Rabbi Pinhas ben Zevi Hersch ha-Levi Horowitz (1730-1805), teacher of the Hatam Sofer, makes the following observation:[92]

> משמע דפסיקא להו דהיכא דאיכא לאו כופין אותו שלא יעבור, והא דאמרינן לקמן דף פ"ו במה דברים אמורים במצות לא תעשה אבל במצות עשה וכו׳ צריך לומר דלא מיירי התם קודם שיעבור בלא תעשה דודאי כופין אותו דלא תעשה חמור מעשה כדאיתא דריש פרק האשה רבה אם לא רצה דפנו וכו׳, אלא מיירי התם במלקות לאחר שעבר הלאו.
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> Implied [by the claim of Tosafot] is that it is established law for them that where there is a negative commandment, we may coerce someone in order to prevent them from violating it. Thus, when we say later on, on page 86: "To what does this apply? To negative commandments, but regarding positive commandments," etc., we must say that the Gemara there is not dealing with [what is appropriate] *prior* to violating the negative commandment, for surely under those circumstances we would coerce him, for negative commandments are more stringent than positive ones, as it says at the beginning of Chapter *ha-Ishah Rabbah*, "If he refuses, compel him." Rather, [therefore, we must say] that there the Gemara is dealing with lashes after the לאו has been violated.

We must understand what the claim of the *Sefer Hafla'ah* is. The fact is, he claims, that the Tosafot argue that an act of coercion was legitimate on the basis of the fact that there are two negative commandments regarding the matter about which the coercion took place. That argument would be useless and irrelevant if it were not clear to Tosafot that coercion for negative commandments is mandatory, or, at least, permissible. Thus, the clearest proof that we can coerce for compliance with negative commandments comes directly from Tosafot. Of course, if that is the case, we must understand the first part of the baraita[93] to refer only to lashes *after* the negative commandment has been violated, and not to imply that there would be no lashes for negative commandments prior to the commandments being violated. Regarding lashes prior to the violation of the commandment, negative commandments are no different than positive commandments. For both, coercion to bring about compliance is acceptable. And, it is not only acceptable, it is logical. Why? Because there is a greater stringency regarding negative commandments than positive commandments, and if it is permissible to coerce the observance of positive commandments, surely it is permissible to coerce observance of negative commandments. And how do we know that there is a greater stringency to negative commandments than to positive ones? We know it because the Gemara in

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[91] Deut. 15:7.

[92] *Sefer Hafla'ah*, to Ketubbot 49b, concerning Tosafot s.v., אכפייה.

[93] See above, p. 216.

Yevamot[94] quotes a baraita which indicates that we must force a priest to refrain from forbidden marriages, and those prohibitions are negative commandments. Yet, we find no instance in which we are told to compel priests regarding positive priestly commandments.

The claims of the Ran, the Hakham Zevi, and the *Sefer Hafla'ah* are logical and compelling. In most instances, violating a negative commandment means that one is doing an act which is forbidden. It is like קום ועשה. Violating a positive commandment means that one is refraining from doing what one is commanded to do, that is, like שב ואל תעשה. If one has violated a negative commandment by doing the forbidden act, coercion is unwarranted because there is nothing one can do about it. But if the negative commandment is such that its violation is an on-going matter (as in the eating hametz case), or that violating it means *not* doing something that is required of one (for example, *not* throwing a drowning person a rope violates לא תעמוד), there is something one can do about it that would result in compliance with what is required, and that is to compel the person not to violate the negative commandment by doing what it is that that commandment demands (i.e., stopping eating hametz or throwing the drowning person a rope). These types of negative commandments are more like a positive one, and just as coercion for positive commandments is normative, so, too, is coercion for negative commandments which are similar to them.

What follows from what we have been discussing for the last several pages is that the compulsion issue which was raised by the *Ziz Eliezer* is not so easily ignored, even if his thesis about the amount of blood which constitutes "life blood" is "fanciful." If one considers failure to donate blood to be a violation of לא תעמוד, there must be serious discussion of the compulsion issue. There has been no such serious discussion, either in halakhic circles or in non-halakhic circles. That can only be because nobody really considers compelling blood donation, literally, to be a viable option. If so, there is no way to call it a violation of לא תעמוד, and that is the category that most of the literature discussing the question seeks to apply to it.

As much as we may wish to encourage and laud those who willingly undertake to donate blood to those in need, Rabbi Waldenberg correctly urges caution against drawing the conclusion that such a donation falls under a person's mandatory halakhic obligation. It is a cautionary note that must be taken to heart, for we would not wish to stipulate a halakhic requirement which we could not really insist upon. We would have to be honest with ourselves about the implications of donation as an halakhic requirement. It is one thing to call an honorable and laudatory act a mitzvah; it is quite another to call it mandatory, with all of the legal implications implied by such an decision.[95] Furthermore, as we shall see below,[96] Waldenberg's thesis is not dependent entirely on this element of the argument.

The above, however, does not mean that no poskim have decided that donation of blood under such conditions is a requirement. Rabbi Samuel ha-Levi Woszner of B'nei Berak is one. He was asked whether a person who has a rare type of blood and refused to donate it for a critically sick individual stands in violation of the prohibition of לא תעמוד על דם רעך – Do not stand idly by the blood of thy neighbor[97] – even if the donor is physically weak, or does not wish to be bothered, or is afraid of donating blood.

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[94] 88b, referring to Lev. 21:8, and cf. Sifra, *ad locum*.

[95] Others who have taken the same stand include Rabbi Moshe Dov Welner in התורה והמדינה, VII-VIII, 5716-17, pp. 307ff, and, apparently, the Brisker Rav, as indicated in a letter to *Assia*, vol. 14, no. 1-2, p. 208, written by Rabbi Avigdor Nebenzahl.

[96] See below, pp. 220ff.

[97] Lev. 19:16. The responsum appears in שבט הלוי, חלק ה׳, חו״מ סי׳ רי״ט and was reprinted in הלכה ורפואה, כרך ד׳, תשמ״ה, עמ. קל״ט–קמ״ב. We shall deal with the issue of לא תעמוד על דם רעך in the next section of this paper, beginning from the start of the section and dealing with it in all its complexities.

The answer of the *Shevet ha-Levi* is unequivocal. He states: אם לקחת רק מנת דם בשיעור לא גדול... דלא נקרא מכניס עצמו לספק סכנה... בכה״ג בודאי מחויב ליתן – "If one takes a reasonable quantity of blood. . .which does not put the donor even in the category of 'doubtful danger,' . . .then surely under those conditions he is obligated to give." At the end of the responsum Woszner makes very clear that his answer applies even if donating the blood will put the donor in the category of חולה שאין בו סכנה, someone who does not feel well, but is in no medical danger.[98]

A similar position had also been adopted by Rabbi Moshe Ze'ev Zorger in his responsa when he wrote:[99]

> פשוט שמחוייב לתת מדמו לצורך ישראל דאע״ג דאינו מחוייב להכניס עצמו בספק סכנה להציל חבירו מודאי סכנה, שאני בהא שמעשים בכל יום שעושים כן ואין בזה שום חשש סכנה, ואין להכחיש חוש הראות.
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> It is obvious that one is obligated to give his blood for another Jew's need. Even though there is no obligation to put oneself into "doubtful danger" to save one's fellow from certain danger, this case is different for it has become a regular occurrence to do so without entailing any danger at all. One should not deny the evidence of the senses.

Others who have adopted this view include Rabbi Moshe Meiselman,[100] and Rabbi J. David Bleich.[101] Rabbi Avraham Steinberg also wrote:[102] ברור שיש במצב זה דין של לא תעמוד על דם רעך, שכן הסיכון הוא מינימלי וחייב – "It is clear that the prohibition 'Do not stand idly by the blood of your fellow' applies to this situation. Since the danger is minimal, one is obligated." Obviously, too, any whom we shall find in the next section of this paper would obligate one to donate a kidney would also have to affirm that one must donate blood and bone marrow.

Even though we have intimated above[103] that our discussion of לא תעמוד will be in the next section, we should look back to the Gemara which discusses the prohibition of לא תעמוד, before we reach any tentative conclusion about the issue of compelling blood and bone marrow donations. There,[104] the Gemara requires two verses – Lev. 19:16 (לא תעמוד על דם רעך) and Deut. 22:2 (והשבותו לו) – to deduce that one is required to attempt to save the life of another both בנפשיה and מיטרח ומיגר אגורי. That is, one must save the life of the other by one's own actual action, and one must be willing to expend one's own money and take the trouble to hire others if one cannot do it oneself. Maimonides writes[105] that the obligation of a doctor to heal נכלל בפי׳ מה שאמר הפסוק "והשבותו לו" לרפאות את גופו שהוא כשרואה שהוא מסוכן ויכול להצילו או בגופו או בממונו או

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[98] Though I am convinced that this is the correct reading of his responsum, one thing does give me pause. At the end he writes: ולענין עיקר שאלתו בנתינת דם פשוטה ודאי בגדר *מצוה* היא – "Regarding the basic question about normal blood donation, it is certainly in the category of a *mitzvah*." Nonetheless, the wording and the tone of the rest of the responsum convinces me that he really means "obligation" in his use of the word "mitzvah."

[99] וישב משה (Jerusalem, 1989), vol. 1, no. 84, p. 246.

[100] הלכה ורפואה (Jerusalem: *מכון רגנשברג*, 5741), vol. 2, p. 118.

[101] See reference above, n. 73, Bleich, p. 284f.

[102] See reference above, n. 71, *אנציקלופדיה הלכתית רפואית*, p. 218, n. 62.

[103] See above, n. 97.

[104] Sanhedrin 73a.

[105] Commentary to M. Nedarim 4:4 (41b).

בחכמתו – is included in the explanation of the verse "And you should restore it to him," namely, to heal his body. That is, when he sees that he is in danger and he can save him either with his own actions or his money or his wisdom [he must do so].

It seems quite clear that Maimonides' בגופו is the same as the Gemara's בנפשיה. In both it seems very clear that the intent is "through one's bodily action." This is clearly the meaning of the Gemara itself which is speaking about one who is drowning or being mauled by an animal. If I can save that person myself, I must do so. If it is necessary for me to hire help, I must do so. The meaning of both the Gemara and Maimonides is, to quote the *Ziz Eliezer*:[106]

> פשוט דכוונתו על פעולה פיזית בגופו, אבל לא לתת לשם כך ממה שבעצמיות גופו וממבנה חייו העצמיים.
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> Clearly that their intent is to some physical bodily action [on the part of the one who is saving], but not to giving him something of the very essence of his own body and the very structure of his own life.

Rabbi Shaul Yisraeli shares the understanding of the Gemara which we have given above in the name of the *Ziz Eliezer*. But since his words will take us on another excursus, we shall quote him in full, even though a major part of the quotation deals with kidney donation, which is the subject of the next section of this paper. Rabbi Yisraeli wrote:[107]

> עוד נלמד מאותן דוגמאות שהבאנו, שאין חיוב ההצלה, רק במה שכרוך *בטרחה* של המציל, ואף אם זו דורשת *מאמץ גופני*, ואף סיכון במדת מה. אולם *אין חיוב* לתרום מגופו הוא, אבר או רקמה דוגמת כליה וכיוצא בזה, שאינו עומד להתחדש בגוף התורם, ואף על פי שהסיכון הוא, כאמור, לא רב. אם כי "מדת חסידות" יש גם בזה בכדי להציל חבירו ממות "ואשרי חלקו מי שיוכל לעמוד בזה." ואם הנדרש להצלת חיים הוא תרומת דם, או מוח עצמות וכיוצא בזה, דברים שהגוף עומד לחדש ולהחזיר למצב הקודם, נראה שגם בזה אין חיוב, ומכל מקום יש *להמליץ* על זה בתור מעשה, שהוא מגדר לפנים משורת הדין (האותיות העבות במקור).
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> It can further be deduced from the examples which we have brought that the requirement to save applies only to what involves the *trouble* of the saver, and even if it demands *physical effort*, and even some small amount of danger. However, *there is no obligation* to donate from one's own body either an organ or tissues, like a kidney, or similar things, which will not regenerate in the body of the donor, even if the danger is, as we have said, not great. There is מדת חסידות in such an act, in order to save the life of one's fellow, "and fortunate is he who can do it." And if what is required to save a life is a blood donation or bone marrow, or such things, which the body will regenerate and restore to the status

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[106] See above, n. 78.

[107] *Assia*, issue 57-58, Kislev 5757, vol. 15: 1-2, pp. 5-8. This article by Rabbi Yisraeli, a senior member of the Chief Rabbinate Council, also appeared in English in, M. Haperin and D. Fink, eds., *The Proceedings of the First International Colloquium on Medicine, Ethics & Jewish Law* (Jerusalem: Schlesinger Institute for Medical-Halakhic Research, 1996), pp. 231-237. See also a related article by the same author in *Assia*, issue 59-60, Iyyar 5757, vol. 15: 3-4, pp. 105-107. Our discussion of the kidney related matters which Rabbi Yisraeli raises begins below, p. 313.

> quo ante, it nonetheless seems that even here there is no obligation. In any event, one should *urge* these as an act which can be defined as לפנים משורת הדין. [Emphasis in original.]

First and foremost for our current deliberation, Rabbi Yisraeli clearly understands the Gemara exactly as we have understood it above, and as the *Ziz Eliezer* has understood it. That understanding makes it impossible to view blood or bone marrow donation as an obligation stemming from לא תעמוד. What he adds to our discussion, however, is the association of the donation of blood or bone marrow to the category of לפנים משורת הדין, "inside the line of the law," "beyond the line of strict justice," "beyond the requirements of the law." What we shall undertake now, therefore, is an analysis of this category of לפנים משורת הדין, with particular attention to the degree of its mandatoriness, and the right to coerce its observance.

לפנים משורת הדין: *An Excursus*

Let us quote first several of the passages of the Gemara which involve the category of לפנים משורת הדין and which are relevant to our deliberation. We shall omit those which invoke the principle, but are irrelevant to our discussion.[108] A passage in Ketubbot reads:[109]

> איבעיא להו: זבין [מישהוא קרקע ואנו יודעים שמכר כי רצה לקנות משהו] ולא איצטרכו ליה זוזי [כי בעל החפץ שרצה לקנות חזר בו מכוונתו למכור], הדרי זביני או לא הדרי זביני? ת"ש דההוא גברא דזבין ארעא לרב פפא דאיצטריכו ליה זוזי למיזבן תורי, לסוף לא איצטריכו ליה ואהדריה ניהליה רב פפא לארעיה. רב פפא לפנים משורת הדין דעבד.
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> A question was raised: [If someone] sold [land, and we know that he sold it because he wanted to buy something specific with the money, and, it turned out] that he did not need the money [because the owner of the item he wanted to buy changed his mind about selling], is the sale reversed or not? Come and hear: There was a case of a man who sold land to Rav Papa because he needed to money to buy oxen. In the end he did not need the money, and Rav Papa returned his land to him. Rav Papa acted beyond the requirements of the law.

Taken as it appears, there is no way to understand this passage except to imply that Rav Papa acted in a way that the law did not require him to act. His act was one of righteousness, not legal mandate. Furthermore, there is no clue in this passage to the possibility that Rav Papa might have been able to be forced to act in this way, even though the law did not require it. Rav Papa did the moral thing, but not all moral things are legal mandates, and they cannot be compelled, even though they are moral.

A second passage reads:[110]

> ההיא איתתא דאחזיא דינר לר' חייא. אמר לה מעליא הוא. למחר אתאי לקמיה ואמרה ליה אחזיתיה ואמרו לי בישא הוא ולא קא נפיק לי. אמר

[108] These include Berakhot 7a, which refers to God's own prayer that He act לפנים משורת הדין in His dealing with Israel, and Berakhot 45b, which deals with two people stopping their eating to join one in zimmun.

[109] 97a.

[110] Bava Kamma 99b.

> ליה לרב זיל חלפיה ניהלה וכתוב אפנקסי דין עסק ביש.... ר׳ חייא לפנים משורת הדין הוא דעבד.
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> A certain woman showed a *dinar* to Rabbi Hiyya. He told her it was good. The next day she came back to him and said: "I showed it to [others] and they told me that it was no good. And, indeed, I could not use it." He told Rav: "Go exchange it for her, and write in my ledger, 'This was bad business. . . .'" Rabbi Hiyya acted beyond the requirement of the law.

First let us understand the story. Rabbi Hiyya was a prosperous and wealthy man, and an expert in money. According to the law, experts in money are not liable for a mistaken identification of a coin as good. Rabbi Hiyya gave such a mistaken identification to a woman, and when she came back to complain, Rabbi Hiyya instructed his nephew Rav to give her a refund in apparent compensation for his error. Ultimately, however, the Gemara affirms that Rabbi Hiyya was not, in fact, obligated to exchange the *dinar* for the woman. He did so beyond the requirements of the law. In this passage, too, there is not a hint of any type of legal obligation to have acted לפנים משורת הדין, nor of any ability to coerce one to act that way.

A third passage reads:[111]

> ר׳ ישמעאל ברבי יוסי הוה קאזיל באורחא פגע ביה ההוא גברא הוה דרי פתכא דאופי. אותבינהו וקא מתיפח. א״ל דלי לי. אמר ליה כמה שוין? א״ל פלגא זוזא. יהיב ליה פלגא זוזא ואפקרה. הדר זכה בהו, הדר יהיב ליה פלגא דזוזא ואפקרה. חזייה דהוה קא בעי למיהדר למזכיה בהו, א״ל לכולי עלמא אפקרנהו ולך לא אפקרנהו.... והא ר׳ ישמעאל בר׳ יוסי זקן ואינו לפי כברודו! ר׳ ישמעאל בר׳ יוסי לפנים משורת הדין הוא דעבד.
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> Rabbi Yishmael the son of Rabbi Yosi was walking along the road, when he chanced upon a man who was carrying a bundle of wood. He put it down, and was resting. The man said to him: "Help me lift them." Rabbi Yishmael asked: "How much are they worth?" He answered: "A half *zuz*." He gave him a half *zuz* and declared the wood ownerless. The man took possession of the wood [and asked again that Rabbi Yishmael help him lift it], so Rabbi Yishmael gave him another half *zuz* and declared it ownerless. He saw that the man was about to take possession again, so he said to him: "To the whole world I declare it ownerless, except to you." . . .But was not Rabbi Yishmael the son of Rabbi Yosi an elder, and one for whom the act of helping to lift the wood was not commensurate with his stature? Rabbi Yishmael the son of Rabbi Yosi was acting beyond the requirement of the law.

In this passage we find Rabbi Yishmael offering to buy the wood from the man, so as not to have to help him lift the bundle. The man takes advantage of Rabbi Yishmael by accepting the money and then repossessing the wood, and asking for help again. Rabbi Yishmael pays him a second time. Only when he is about to be taken advantage of again, does he cut the man off by claiming that the wood is no longer "ownerless" for the man. The Gemara wonders why Rabbi Yishmael had to do any of this. After all, elders and people of

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[111] Bava Metzia 30b.

stature are exempt from having to help others load and unload.[112] So, Rabbi Yishmael could have ignored the fellow right from the start. The Gemara answers that Rabbi Yishmael was acting לפנים משורת הדין, beyond the requirement of the law. In this passage, too, there is no clue to either mandatory behavior or coercion. Quite the contrary, the simple meaning of the Gemara's question implies that the Gemara perceives no type of obligation whatsoever on the part of Rabbi Yishmael to act as he did. His behavior is unexpected, and can be accounted for only as an act beyond the requirements of the law.[113]

We look to another talmudic text, which reads:[114]

> רב יהודה הוה שקיל ואזיל בתריה דמר שמואל בשוקא דבי דיסא. א״ל מצא כאן ארנקי מהו? א״ל הרי אלו שלו! בא ישראל ונתן בה סימן מהו? א״ל חייב להחזיר. תרתי? אמר ליה, לפנים משורת הדין, כי הא דאבוה דשמואל אשכח הנך חמרי במדברא ואהדרינהו למרייהו לבתר תריסר ירחי שתא לפנים משורת הדין.
>
> Rav Yehudah was holding up the cloak of Mar Samuel and walking with him in the market of ground grains. He (i.e., Rav Yehudah) asked him: "What would be the law if someone found a purse here?" He answered: "The money would belong to him." [He asked:] "And if a Jew came and identified it [as his] on the basis of a clear identifying mark, what would be the law?" He answered: "He would be obligated to return it." [He asked:] "Is that not a contradiction?" He answered: לפנים משורת הדין. Just as in the case of the father of Samuel who found donkeys in the desert and [yet] returned them to their owners after an entire year because of לפנים משורת הדין.

First let us understand what the facts of the case are. By law, if one lost an article in a public place frequented by both Jews and non-Jews, the finder is entitled to keep the lost article, on the presumption that the loser would give up ever recovering it since it was likely to have been found by a non-Jew, who would not return it. The market of the ground grains was just such a place, and, therefore, the answer which Mar Samuel gave to the first question of Rav Yehudah is not at all surprising. But when Rav Yehudah posed his second question, and was told that the finder would be obligated to return it, if it were subsequently identified by a Jew, the Gemara finds it baffling. Does that answer not contradict the first answer, which seemed to assume that the item belonged to the finder, whether the loser was Jewish or not? Samuel's answer is that the grounding of the answer to the second question is not the law, but the principle of לפנים משורת הדין, and is consistent with the behavior of Samuel's father in returning the donkeys. What the two cases have in common is that the law does not require that the lost item(s) be returned, but they should be returned because of לפנים משורת הדין.

Unlike the first three examples we have looked at, this one does carry an element of obligation. Samuel uses the word חייב in his answer to the second question of Rav Yehudah. That is a word associated with obligation. Nonetheless, the word cannot here imply "legal

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[112] See the baraita on Bava Metzia 30a.

[113] That seems to be the understanding of Maimonides, too, who records (M.T. Hilkhot Roze'ah u-she-mirat Nefesh 13:4): This is the rule: In any case when if it were one's own animal he would load or unload, one must help his fellow load or unload. And if one were a חסיד, and acts beyond the requirement of the law, then, even if he were the great Patriarch and saw his fellow's animal bent under the weight of his burden of straw or wood, or similar things, he should load or unload with him.

[114] Bava Metzia 24b.

obligation," because that would contradict the final answer. Thus, this passage seems to imply a type of obligation associated with לפנים משורת הדין. Of course, it is possible to claim that Samuel's use of the term חייב was not intended to imply actual obligation, and that he used it as a literary parallel to the answer to the first question. That is, both answers come from the language of the Mishnah in the second chapter of Bava Metzia, and the distinction drawn in the Mishnah is always between "the item would belong to him" and "the finder would be obligated to return it." Once the final answer of לפנים משורת הדין is given, it becomes retroactively clear that the term חייב did not really imply obligation. That seems to be the way Maimonides understood this Gemara. For in recording this law, he wrote:[115]

> הרי המציאה שלו ואפי׳ בא ישראל ונתן סימניה, שהרי נתייאש ממנה כשנפלה מפני שהוא אומר עכו״ם מצאה. אע״פ שהיא שלו, הרוצה לילך בדרך הטוב והישר ועושה לפנים משורת הדין מחזיר את האבידה לישראל כשיתן את סימניה.
>
> The lost article belongs to him [i.e., the finder] even if a Jew comes and offers identifying marks, for the loser had given up hope of recovering it when [he discovered that] it fell because he assumed that a non-Jew had found it. Even though it is his, one who wishes to walk in the path of the good and the right, and acts beyond the requirements of the law, will return it to a Jew who identifies it as his.

There is no way that Maimonides could have codified his legal conclusion from the passage we are discussing this way if he had taken the term חייב to imply obligation. He must have understood it in a less literal way. Clearly, the implication of this decision of Maimonides is that לפנים משורת הדין is beyond the realm of the enforceable, and within the realm of the moral, but not legally mandated. We shall look at several other primary passages before we look to those who understand the implications of this passage differently from Maimonides.

Another talmudic passage reads as follows:[116]

> רבה בר בר חנה תברו ליה הנהו שקולאי חביתא דחמרא. שקל לגלימייהו. אתו אמרו לרב. אמר ליה הב להו גלימייהו. אמר ליה דינא הכי. אמר ליה אין ״למען תלך בדרך טובים״ (משלי ב:כ). יהיב להו גלימייהו. אמרו ליה עניי אנן וטרחינן כולא יומא וכפינן ולית לן מידי. אמר ליה זיל הב אגרייהו. א״ל דינא הכי. אמר ליה אין ״וארחות צדיקים תשמור״ (משלי ב:כ).
>
> Some porters broke a cask of wine of Rabbah bar bar Hannah. He took their cloaks. They came and told Rav. He said to him: "Return their cloaks." He asked: "Is that the law?" Rav answered: "Yes, 'In order that you tread in the path of the good' (Proverbs 2:20)." He returned their cloaks. The porters said to Rav: "We are poor, and have labored all day long and are hungry, and we have nothing." Rav said to Rabbah bar bar Hannah: "Pay them their wages." He asked: "Is that the law?" Rav answered: "Yes, 'And you should observe the paths of the righteous.'"

The term לפנים משורת הדין does not actually appear in this passage, but it is the way Rashi explains what Rav meant by quoting the verse from Proverbs. We accept the notion that

115 M.T. Hilkhot Gezeilah va-Aveidah 11:7.

116 Bava Metzia 83a.

this passage reflects an instance of לפנים משורת הדין. There is simply no way that Rav's answers to Rabbah bar bar Hannah could be understood to imply actual legal mandate since the porters had broken his wine cask through negligence and he was entitled to take their cloaks, and he did not owe them for their labor.

Surely, though, this passage also intimates an obligatory nature to לפנים משורת הדין. When Rav answers "Yes" to Rabbah bar bar Hannah's question, "Is that the law?," twice, what else could he possibly mean but that the latter was obligated to take the actions that Rav had commanded? But, it is interesting and important to note that Rav quotes a verse from Proverbs as his support for the obligation of Rabbah bar bar Hannah. Rav Yosef taught[117] that לפנים משורת הדין was derived from the Torah itself, from Exod. 18:20 – אשר יעשון. The Tosafot[118] explain that Rav utilized the verse from Proverbs, rather than the verse from Exodus, on the grounds that לפנים משורת הדין would not have been sufficient grounds to obligate Rabbah bar bar Hannah to comply with what Rav had ordered, because the porters had caused him so great a loss. Clearly implied by Tosafot is that לפנים משורת הדין is not a catch-all. Nonetheless, this passage does imply some type of obligation to a moral decision, which is not mandatory law.

The very passage in which the Exodus verse is used to deduce the category of לפנים משורת הדין is important to quote:[119]

> ״אשר יעשון״, זו לפנים משורת הדין, דאמר ר׳ יוחנן לא חרבה ירושלים אלא על שדנו בה דין תורה. אלא דיני דמגיזתא לדיינו? אלא אימא שהעמידו דיניהם על דין תורה ולא עבדו לפנים משורת הדין.
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> "Which they should do" – this refers to לפנים משורת הדין, as Rabbi Yohanan said: "Jerusalem was destroyed only because they judged Torah judgment therein." And should they judge arbitrarily!? Say rather, "[It was destroyed only] because they insisted on acting according to Torah judgment, and did not behave beyond the requirements of the law."

The very words of the verse imply that one should act on לפנים משורת הדין, and the very forceful statement of Rabbi Yohanan indicates that sometimes the moral thing to do may be different from the requirements of the law. On the other hand, his very statement implies that there is no ability to coerce behaving לפנים משורת הדין, because if it were possible, his court should have made people behave that way and avert the destruction of Jerusalem. So, Rabbi Yohanan lauds לפנים משורת הדין greatly, and makes clear that failure to act on it may have disastrous consequences, but he does not really claim that acting on it is mandatory or enforceable.

There is yet one further passage that comes up in the discussion of the commentators as relevant to our deliberation, even though the phrase לפנים משורת הדין does not appear in it at all. That passage reads:[120]

> אמר ר׳ חייא בר אבא אמר ר׳ יוחנן האומר לחבירו מנה לי בידך והלה אומר איני יודע, חייב בבא לצאת ידי שמים.
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> Rabbi Hiyya bar Abba said in the name of Rabbi Yohanan: "If one

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117 Bava Metzia 30b.

118 Bava Metzia 24b, s.v. לפנים.

119 Bava Metzia 30b.

120 Bava Kamma 118a.

> says to his fellow, 'You owe me a *maneh*,' and the other answers, 'I don't know,' the other is obligated [to pay him], if he wishes to discharge his duty toward Heaven."

It is pretty clear why this passage comes up in the context of our discussion. The phrase "to discharge his duty toward Heaven" means, essentially, to act beyond what the law requires. Note, then, that if we equate these two, this passage also indicates an obligation to act לפנים משורת הדין, though it seems not to imply any way to enforce that requirement.

We have looked briefly at seven talmudic passages. Of those seven, four do not imply any obligation to act לפנים משורת הדין, though they clearly recognize that the moral thing to do may be other than what the law requires. Three of the passages intimate an obligation to לפנים משורת הדין, two by using the term חייב and one by answering "yes" to the question "is that the law?" If we assume that what is obligatory can be enforced or coerced, then these passages also indicate some type of enforceability.[121]

Our next step, then, is to see what became of these passages in the process of halakhic evolution. A critical comment appears in both the Mordecai[122] and the *Hagahot Maimoniyot*.[123] We quote from the latter:

> מצא כאן ארנקי... חייב להחזיר א"ל לפנים משורת הדין.... ואשכחן נמי בהגוזל בתרא חייב בבא לצאת ידי שמים, וכיון דחזינא דהוו כייפין להו להכי כדאיתא פ' האומר (צ"ל האומנין) גם אנן כייפינן למיעבד לפנים משורת הדין אם היכולת בידו לעשות דתני רב יוסף והודעתם להם וכו' ואמר ר' יוחנן לא חרבה ירושלים אלא מפני שהעמידו דבריהם על דין תורה ולא עשו לפנים משורת הדין. וכן פריש רבינו מקינון דכייפינן ליה לעשות לפנים משורת הדין עכ"ל הראבי"ה.
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> "If he found a purse here. . .he is obligated to return it. He said to him: לפנים משורת הדין. . . ." And we also find in the latter *ha-Gozel*: "He is obligated if he wishes to discharge his obligation to Heaven." And since we see that they used to compel people, as is demonstrated in *ha-Omer* (must be: *ha-Umanim*), we, too, compel a person to act לפנים משורת הדין, if he is able to do so, for Rav Yosef taught [on the basis of the verse in Exod. 18:20 which begins] "And you should inform them" etc. [including אשר יעשון as a source for לפנים משורת הדין], and Rabbi Yohanan said that Jerusalem was destroyed only because they insisted on acting according to Torah judgment, and did not act לפנים משורת הדין. And so explained our Master from Chinon[124] that we compel one to act לפנים משורת הדין. This is the language of the Ra'avia.[125]

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[121] We shall ignore in all following deliberation of this issue the possibility that these passages make לפנים משורת הדין different for scholars than for others. It should not go unnoted, however, that *Responsa Heshiv Moshe 48* (Rabbi Moses Teitelbaum) makes just that point. He goes as far as to say that for an אדם חשוב an act which is for others in the category of לפנים משורת הדין is for him דין גמור.

[122] Bava Metzia, ch. 2, siman 257.

[123] Hilkhot Gezeilah va-Aveidah, ch. 11, letter gimel.

[124] The reference is probably to Rabbi Mattathias of Chinon, who was one of the teachers of the Ra'avia.

[125] I am not able to find this passage in *Sefer Ra'avia*. Of course, that book contains almost nothing on sedarim Nashim and Nezikin. Ra'avia's comments on these were probably included in his book *Avi-asaf*, which is known to us only from quotations of it.

The *Hagahot Maimoniyot* begins by quoting the passage we have quoted above, page 224, which includes the claim of obligation to return the lost article. He then refers to the passage which did not include the phrase לפנים משורת הדין, but spoke of "discharging one's obligation to Heaven," above, page 226. Then he refers to the passage in which Rav made Rabbah bar bar Hannah return the cloaks of the porters and pay them for their labor (above, page 225). He concludes from these passages, that there is both an obligation and enforceability to לפנים משורת הדין, and since the consequences of not acting לפנים משורת הדין can be so catastrophic (as evidenced by what Rabbi Yohanan had to say, above, page 226), we, too, compel behavior on the basis of לפנים משורת הדין. The *Hagahot*, however, includes the words "if he is able to do so," and we shall have to see what those words are understood to mean. It is not at all clear who the "he" is, and what his ability has to do with the matter. Note, however, at least, that the cases to which the *Hagahot* applies coercion seem to be restricted to lost articles and loans which the borrower cannot remember.

Rabbi Joseph Karo, in the Beit Yosef, has this to say:[126]

> כתב ר׳ ירוחם בשם הרא״ש אין כופין על לפנים משורת הדין, ופשוט הוא בעיני. ותמהני על מה שכתב המרדכי בפ״ב דמציעא דכייפינן למעבד לפנים משורת הדין, מהנך עובדי דמייתי ראיה מינייהו לא נזכר בהם כפיה.
>
> Rabbenu Yeruham wrote in the name of the Rosh that there is no coercion for לפנים משורת הדין, and that seems simple in my view. I am amazed at what the Mordecai wrote in the second chapter of [Bava] Metzia, that we do compel compliance with לפנים משורת הדין. In those examples which he brings as proof compulsion is not mentioned.

Karo quotes the claim of the Rosh,[127] quoted by Rabbenu Yeruham, according to which there is no coercion for לפנים משורת הדין. But more than merely quoting it, he expresses agreement with it, claiming it to be virtually self-evident that coercion for לפנים משורת הדין is impossible, almost by definition. As far as the cases cited by the Mordecai and the *Hagahot Maimoniyot* are concerned, they prove nothing, since none of them mentions coercion at all. The Beit Yosef is correct that none of them mentions coercion directly. We had deduced coercion from the use of words like חייב and "yes" in answer to "is it the law." Remember, though, that we have already referred to Maimonides' codification of the law for one of those passages, and it did not intimate any obligation or enforceability whatsoever, even though the word חייב appeared in the talmudic passage.[128] It is very likely that Karo understands the obligatory nature of these passages exactly as Maimonides does. Indeed, there is great logic to that understanding, since it is difficult to understand why it would be called לפנים משורת הדין, if it were enforceable. It is probably the *peshat* of the term that led Karo to assert that it was virtually self-evident to him that לפנים משורת הדין was not enforceable. Very clear expression of this view can be found in the work of Rabbi Samuel David Munk, who wrote:[129]

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[126] Tur, Hoshen Mishpat 12, Beit Yosef s.v. רבינו ירוחם.

[127] See Rosh to Bava Metzia 2:7.

[128] The talmudic passage appears above, p. 224, and the comment of Maimonides, above, p. 225. Note, too, that the term לפנים משורת הדין appears in legal contexts in Maimonides only there and in Hilkhot Gezeilah va-Aveidah 11:17, and in Hilkhot Roze'ah u-Shemirat Nefesh 13:4 (see above, n. 113). In none of these is there any intimation of coercion. He also uses the term in Hilkhot Yesodei ha-Torah 5:11, and in Hilkhot De'ot 1:5, but there the context is not legal.

[129] *Pe'at Sadekha* (Jerusalem: M. Safra, 5735), siman 155.

> והרא"ש דחי לה בלא ראיה כלל דסברא פשוטה היא בעיניו שלא נתנה תורה רשות לב"ד לכוף אלא על הדין ואין מרחמין בדין... וסברא זו פשוטה היא כל כך עד שכדאי לדחוק בלשון חייב להחזיר דחיובא בעלמא קאמר, אבל אין כופין על כך. ונר' שזהו טעמו של הרב ב"י שכתב על דברי רבינו ירוחם בשם הרא"ש ופשוט הוא בעיני ותמיהני על המרדכי ולא פירש טעם תמיהתו.
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> And the Rosh rejected that idea [i.e., that one could coerce for לפנים משורת הדין] without any proofs whatsoever, on the grounds that it is a simple premise in his eyes: that the Torah does not grant permission to a court to coerce except for legal judgment, in which no mercy has a part [i.e., as it surely does in לפנים משורת הדין] . . .and this idea is so self-evident that it becomes preferable to force the meaning of the phrase, "he is obligated to return it," to mean a mere obligation, which is not enforceable. And it seems that this is the reasoning also of the Beit Yosef who wrote concerning the view of Rabbenu Yeruham, which he had quoted from the Rosh, "and that seems simple in my eyes, and I am amazed at what the Mordecai wrote," without ever explaining the source of his amazement.

The thesis which cannot easily accept forcing the meaning of the word חייב is best expressed by the BaH, who wrote as follows:[130]

> איתא בסוף האומנין בעובדא דרבה בר בר חנא דתברו ליה הני שקולאי... משמע דרב הוה כייף ליה לרבה בר בר חנא, דאם לא כן מאי קאמר ליה דינא הכי אם לא בא לכופו.... וכן במצא ארנקי בשוק בפרק אלו מציאות דקאמר חייב להחזיר משום לפנים משורת הדין, לפחות משמע חייב להחזיר בבא לצאת ידי שמים כדאמר פרק הגוזל בתרא... דאם לא כן, מאי "חייב." ולכן פסק המרדכי דכייפינן ליה למיעבד לפנים משורת הדין אם יכולת בידו לעשות, שהוא עשיר... וכן פסק ראב"ן וראבי"ה דכייפינן להחזיר היכא דהמוצא עשיר. מיהו ב"י הביא דברי הר"ר ירוחם בשם הרא"ש דאין כופין על לפנים משורת הדין... ולית', אלא הנהו עובדא מיירי בכפייה כדפרישית וכן נוהגין בכל ב"ד בישראל לכוף לעשיר בדבר ראוי ונכון ואף על פי שאין הדין כך.
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> At the end of Chapter *ha-Umanin*, regarding the case in which the porters broke casks of Rabbah bar bar Hannah. . .it is implied that Rav would have compelled Rabbah bar bar Hannah, for otherwise what did he mean by telling him that the law was thus. . . .Similarly in the case of one who found a purse in the market, in chapter *Eilu Mezi'ot*, where he said that he is obligated to return it because of לפנים משורת הדין, at least that implies that he must return it if he wishes to discharge his obligation to Heaven, as it says in the latter chapter *ha-Gozel*. . .for if not, what is the meaning of "must." . . .Therefore the Mordecai decided that we do compel obedience for לפנים משורת הדין, where he is able, that is, when he is wealthy. . . .And thus did

[130] BaH, Hoshen Mishpat 12, s.v. וכל דיין.

> Ra'avan[131] and Ra'avia decide, that we compel one to return it when the finder is wealthy.[132] Nonetheless, the Beit Yosef quoted the words of Rabbenu Yeruham in the name of the Rosh, that we do not compel for לפנים משורת הדין. . .but that is not correct. Rather, all of these instances refer to cases of coercion, as I have explained. And it is the custom of all Jewish courts to compel a wealthy person in an appropriate and just matter, even though that might not be the law.

The BaH quotes the three passages which intimate coercion, which we have already seen above. What else could those "intimating" words mean if not some type of coercion? This is the opposite of the view of Munk, explaining the Rosh and the Beit Yosef. The *peshat* of words like חייב implies coercion, so, even if it seems that the *peshat* of לפנים משורת הדין does not, that must be mistaken. And that is precisely what the decision of the Mordecai (and the *Hagahot Maimoniyot*) makes clear.

The question to ask, however, is where did the BaH get the claim "where the finder is wealthy?" Obviously, he quotes it in the name of early Ashkenazic authorities, so the tradition does not originate with him. It seems most likely that it is the BaH's explanation of the phrase in the Mordecai and *Hagahot Maimoniyot* which reads: אם היכולת בידו, and about which we said earlier[133] that we would have to come back to it. The phrase, as it appears in the *Hagahot Maimoniyot* is cryptic, to say the least. It means, according to the BaH, that if the *finder* is able, that is, if returning the lost article will not cause him financial problems, then we would coerce him to return it. Of course, there is nothing in the words of the Mordecai and the *Hagahot Maimoniyot* that actually states that the finder must be wealthy. What's more, the talmudic passage which seems to be the essential source for this derivation gives no clue that a wealthy person is necessarily being spoken about.[134] In that passage[135] Mar Samuel answers a question posed to him by Rav Yehudah, and there is no hint that his answer is restricted to a wealthy finder!

Nonetheless, the BaH is a decisor of considerable influence, and, in any event, the view is reflected in early Ashkenazic authorities. It is not surprising, therefore, that this view of what type of coercion takes place, and in what types of cases, finds echoes from then on, either just as stated, or with modifications which attempt to bring conflicting posi-

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131 I am not able to find exactly this statement anywhere in *Sefer Ra'avan*. However, in his comments to Bava Metzia 24b (p. 197, end of b, in the Grossman Publishing ed., with commentary *Even Shelemah*), the Ra'avan does say: ". . .therefore, it is right (דינא) that Simon should act לפנים משורת הדין and return the purse to Reuven." And in his comments to Ketubbot 49b (page 260c in that ed.), he does mention wealth as a factor in determining whether we compel a father to support his children. If the father is wealthy, we compel him; if he is not, we request, but do not compel.

132 Their view is also quoted by the *Sefer ha-Agudah* (Elazar Brazil ed., Jerusalem: 5730), Bava Metzia, p. 20, par. 34, which says about returning a lost article לפנים משורת הדין: "And it is our custom to return it, and so did Ra'avia and Ra'avan decide that we coerce to return it if the finder is rich." But see previous note.

133 Above, p. 227.

134 It is interesting to note that in S.A. Hoshen Mishpat 259:5 Rabbi Joseph Karo writes: "Even though by law one is not obligated to return an object lost in a place where the majority are not Jews, even if a Jew indicates a definite identifying mark, it is good and just to act לפנים משורת הדין and to return it to the Jew who identified it." This comment of Karo makes no distinctions based on wealth, and seems to imply this behavior as desirable for anyone. Also, there is no clue here to any type of coercion. At the end of this paragraph the Rema adds the following comment: "And if he (i.e., the finder) is poor, and the owner of the article is rich, it is not necessary to act לפנים משורת הדין." While the Rema does make the distinction between rich and poor, this passage makes no statement about coercion. However, see below, pp. 233-234.

135 Above, p. 224.

tions closer together. Let us look at an example from Rabbi Menahem Mendel Krochmal of Nickolsburg (1600-1661), the *Zemah Zedek*, who wrote:[136]

> מ"מ נר' אם זה שמצא הארניקי אינו עני צריך להחזיר... משום לפנים משורת הדין וכייפינן אלפנים משורת הדין דהכי כתב המרדכי אהא דאמר בפרק אלה מציאות... וכן פסק ראב"ן ואבי העזרי דכייפינן להו לעשות לפנים משורת הדין. ותו התם במרדכי אהא דרבא הוה שקיל ואזול בתריה דרב נחמן בשוקא דגלדאי וכו' אמר ליה מצא כאן ארנקי מהו אמר ליה הרי אלו שלו ומסק נעשה כצווח על ביתו שנפל כתב המרדכי וז"ל נר' לראבי"ה מא דלא כייפינן התם לעשות לפנים משורת הדין אפשר שהמוצא היה עני ובעל האבידה היה עשיר עכ"ל הרי מבואר דכייפינן על לפנים משורת הדין. ואע"ג דהרא"ש כתב הך דרב יהודה הוה שקיל ואזיל בתריה דמר שמואל... וז"ל לאו דכייפי ליה דאין כופין לעשות לפנים משורת הדין עכ"ל נראה לי [דלא] כתב כן אלא דאין כופין בשוטין אבל בהורדת נכסים מודה דכייפינן כיון דנקט לשון חייב להחזיר... ודאי דכייפינן עליה אלא דאין כופין בשוטין אבל בהורדת נכסים כייפינן.
>
> Nonetheless it seems that if the one who found the purse is not poor, he must return it. . .on grounds of לפנים משורת הדין. We coerce for לפנים משורת הדין because that is what the Mordecai wrote regarding what is taught in chapter *Eilu Mezi'ot*. . .and thus decided Ra'avan and Ra'avia that we coerce people to comply with לפנים משורת הדין. Furthermore, there in the Mordecai, regarding the case of Rava who was holding the cloak and following after Rav Nahman in the market of leather workers etc., he said to him: "If one found a purse here what would be the law?" He answered: "It would belong to him." And the conclusion there is that the loser of the purse would be as one who is yelling about his collapsed house. On that passage the Mordecai wrote[137] as follows: "It seems to Ra'avia that the reason that we don't compel in that case to act in accordance with לפנים משורת הדין could be because the finder was poor and the loser was rich." Thus it is clear that we coerce for לפנים משורת הדין. And even though the Rosh wrote concerning the case of Rav Yehudah who was holding the cloak of Mar Samuel and following after him. . .as follows: "Not that we compel him, for we do not compel for לפנים משורת הדין," it seems to me that he meant only that we do not coerce with physical force, but he admits that we could coerce by taking away possessions. Since [the Gemara] uses the expression חייב להחזיר. . . surely we can coerce him, but not by physical force, only by removing possessions.

The other talmudic case to which this passage from the *Zemah Zedek* refers, appears in the Gemara immediately following the Rav Yehudah and Mar Samuel incident.[138] The new incident is identical with the earlier one, except that it takes place in the market of

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[136] *Zemah Zedek*, 89.

[137] Mordecai, Bava Metzia, ch. 2, 257.

[138] Bava Metzia 24b.

the leather workers. The characters are Rav Nahman and Rava. Rav Nahman gives the same answer as Mar Samuel to the first question. But when Rava asks what the law would be if a Jew came and offered an identifying mark, Rav Nahman answered that the finder could still keep the purse. Rava asks: "But he is standing there yelling and claiming his purse, with identifying marks." To this Rav Nahman answers: "His screaming and yelling is just like one who yells about the fact that his house has collapsed or his ship has sunk." That is, his yelling is ineffective to bring about the return of the lost item.

The responsum of the *Zemah Zedek* was, in fact, about a case very similar to the case of the Gemara. He asserts that if the finder is not poor,[139] he must return the item. He gives as his proofs all of those we have seen referred to already. Then he adds an additional proof based on another statement of the Mordecai, deduced by the Ra'avia from the Rav Nahman and Rava incident. That incident seems to be identical with the Rav Yehudah and Mar Samuel incident, yet Mar Samuel and Rav Nahman give two different answers. The Ra'avia explains that, in fact, there is no contradiction between the two incidents. In the latter, the finder must have been poor and the man who lost the item was rich. That is why Rav Nahman did not insist on action לפנים משורת הדין. Had the finder been wealthy, even Rav Nahman would have insisted.

Thus far, then, we see how the *Zemah Zedek* accepts the claim of the Mordecai and *Hagahot Maimoniyot* positing wealth as the determining factor in whether לפנים משורת הדין would be coerced. He even offers a further proof which we have seen in his words for the first time. However, he cannot ignore the Rosh, and he attempts to close the gap between the Rosh and the Mordecai. For the Rosh, too, the Gemara uses the phrase חייב להחזיר, and it is virtually inconceivable to the *Zemah Zedek* that the Rosh would simply ignore the implication of the words. Thus, he says, the Rosh, too, agrees that if the finder were wealthy we could compel him to return the item. The difference between the Rosh and the Mordecai is entirely in the manner of coercion. Here, however, the *Zemah Zedek* gets a little unclear, at least as far as the view of the Rosh is concerned. For the Mordecai, all is clear. We could force the finder to return the item, even to the point of physical coercion. For the Rosh, we can force the finder to return the item (that is what הורדת נכסים must mean in this discussion), but we cannot have recourse to physical coercion. He does not seem to answer how we accomplish this if the finder simply refuses. In any case, though, he has reduced the gap between the two views by positing that the Rosh, too, allows for some type of coercion for לפנים משורת הדין.

We shall quote only one more passage which directly reflects the view of the BaH. The Rabbinic Court Decisions of the State of Israel has the following:[140]

> והנה בשו"ע חו"מ סי' יב סע' ב' כתב הרמ"א שתי דעות אם כופין לפנים משורת הדין, והב"ח הכריע להלכה כדעה שכופין לפנים משורת הדין אם היכולת בידו לעשות כגון כאשר הוא עשיר. וכן נוהגין בכל בי"ד בישראל לכוף לעשיר בדבר הראוי והנכון ואע"פ שמן הדין אינו חייב בזה.
>
> In the Shulhan Arukh, Hoshen Mishpat, siman 12, paragraph 2, the Rema wrote two views about coercion for לפנים משורת הדין. The BaH tipped the balance in law in favor of the view that we do coerce for לפנים משורת הדין, if he is able, for example, when he is

[139] Clearly he is changing the quality of the finder from "wealthy" to "not poor." Nonetheless, the intent is the same, and it is useless for us to spend time on this distinction.

[140] *Piskei Din Rabbaniyim*, vol. 11, p. 262.

> wealthy. And that is the custom of all Jewish courts to compel a wealthy person in an appropriate and just matter, even though that might not be the law.

We have already noted that we have seen references to compelling compliance with לפנים משורת הדין only concerning the return of a lost article or money. This leads to an interesting question concerning what we have been discussing: Even if there is coercion for לפנים משורת הדין, does it apply to categories that do not involve the return of money or lost articles? A quotation from the *Minhat Yitzhak* is the only passage this author has found that deals with the subject at all.[141] Rabbi Isaac Jacob Weiss wrote:[142]

> וצ"ע אם לומר כן גם במקום אחר, בתובע ונתבע בשאר ענינים, היכא דשייך לפנים משורת הדין, וי"ל דדוקא באבידה אמרינן כן, דסוף כל סוף אינו מחזיר רק ממון מחבירו, משא"כ בשאר מקומו'.

> And it requires investigation whether to say so even in other instances, with a plaintiff and defendant in other matters to which לפנים משורת הדין applies. And it is reasonable to say that we claim thus specifically in the matter of a lost item, in which, in the final analysis he is returning money which originated with the other person. That would not be the case in other matters.

Rabbi Weiss' contention is logical and compelling. If there is going to be any coercion at all for לפנים משורת הדין, it is reasonable that it should occur in an instance in which we are returning to a person what came from him anyway. So, for example, if one dropped a purse in a location frequented by Jews and non-Jews, even though one might relinquish ownership because one suspects that the purse could well be picked up by a non-Jew, it is nonetheless logical that if a Jew picked it up it should be returned to the original owner who identifies it, even though he has really relinquished ownership of it. It may not be legally required, since the owner has relinquished ownership, but one could claim that it is right and just to return what was his originally. That is a far cry from claiming that one who is exempt from a certain act because of his stature or status should be compelled to do the act which falls under the category of לפנים משורת הדין. The person may choose to do it, but his act does not merely return to another what was his to begin with.

As was noted in the decision of the Rabbinical court, Karo makes no statement in the Shulhan Arukh on the matter of coercion for לפנים משורת הדין,[143] but Moses Isserles does. He wrote:[144]

> ואין בית דין יכולין לכוף ליכנס לפנים משורת הדין, אף על פי שנר' להם מן הראוי (ב"י בשם ר"י ובשם הרא"ש), ויש חולקים (מרדכי פ"ב דמציעא).

> The court may not coerce someone to act beyond the requirements of the law, even though it might seem appropriate to them

[141] I have also not succeeded in finding any source which speaks of compelling compliance with לפנים משורת הדין in a non-financial matter.

[142] *Minhat Yitzhak*, vol. 5, 121.

[143] But see above, n. 134, for a comment by Karo on לפנים משורת הדין, with no comment on coercion, and the reaction of the Rema.

[144] Hoshen Mishpat, siman 12, par. 2.

(Beit Yosef in the name of Rabbenu Yeruham and the Rosh), but some disagree (Mordecai, chapter two of [Bava] Metzia).

The Rema dutifully records both of the views we have already seen. By the generally accepted principles of decision making in the Rema, his view coincides with the first view, and not with the יש חולקים. That, of course, does not prove that those who came after him must agree with his decision. But, for the moment, note that both Karo and Isserles agree that there is no coercion for לפנים משורת הדין.

Since the ויש חולקים of the Rema is clearly the Mordecai, and since we have noted earlier that the phrase אם היכולת בידו which appears there is problematic, we shall now turn our attention to a different strand of interpretation of the Mordecai.

Rabbi Yonatan Eybeschuetz (1690-1714) wrote the following:[145]

> ״ויש חולקים״ – דעה זו היא בהמרדכי ובכל ראיה שמביא המרדכי שם אין בו ראיה מכרעת שיש כח ביד ב״ד לכוף ליכנס לפנים משורת הדין. ועוד יש לדקדק בלשון המרדכי דכתב דאנן כייפינן לפנים משורת הדין אם יש יכולת בידינו עכ״ל ולכאורה זה שתלה הדבר ביכולת או אינו יכולת בלתי מובן, דמה ענין זה לפשר, אף בגוף הדין אם אין יכולת בידינו מה לעשות, ובעוונותינו הרבים מיום שגברו בעלי זרוע תש כח ידי ב״ד ואם יכולת ביד ב״ד לכוף לדין א״כ לשיטתו אף לפשר נכוף. מאי שנא פשר מדין? והב״ח פי׳ יכולת שהוא עשיר, והמעיין במרדכי יראה דהך חילוק בין עשיר לעני נאמר אחר כך במרדכי, ולא אמרה מקודם כנר׳ מלשונו שם. ולכן נראה ברור כי מכל הראי׳ שהביא מרדכי הוא רק שנאמר בו לשון חייב והוא מורה על כפיה, והיינו כפייה במילי כמו שיש דיעות ביבמות וכתובות גבי כופין אותו להוציא ואומרים לו חייב אתה לעשות כן ואם אינך שומע אתה עבריין אבל לא נכוף אותו בשוטים ונדוי וכדומה כיון דאין שורת הדין כן, עיין כתו׳ דף נ׳ גבי עשיתינהו ע״ש בתוס׳.... ולכך קאמר המרדכי אם היכולת בידינו לעשות הרצון שהוא גברא דצייתנא ושומע בקול ב״ד של ישראל מבלי לעבור על דבריהם, אבל אם אין יכולת, שאין סר למשמעותו ודברי ב״ד כדאמרינן בדברים לא יוסר עבד, אין לכוף אותו בשוטים ונדוי משא״כ בדין כופין בכל מיני כפיות ואתי שפיר. ועתה יש לומר דגם הרא״ש מודה לזה, ואין כאן מחלוקת כלל.
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> "And some disagree" – This view appears in the Mordecai. But none of the proofs which he offers there is conclusive evidence that the court has the authority to compel people to behave לפנים משורת הדין. Furthermore, one can make a deduction based on a careful reading of the language of the Mordecai, who wrote: "We compel for לפנים משורת הדין if we are able." Now the fact that he made the matter dependent upon our ability or lack thereof is not comprehensible, for what does this have to do with compromise. Even in actual law, what can be done if we do not have the ability. And because of our many sins, the authority of the court has diminished since the powerful ones have ascended. But if the court has the ability to compel for law, then, according to his view, it should compel for compromise too. Why should compromise be any different than law?

[145] *Urim ve-Tumim*, Tumim to Hoshen Mishpat, siman 12, subpar. 4.

> And the BaH explained "ability" to mean that the person is wealthy. If one looks in the Mordecai he will see that the distinction between a rich person and a poor person is said only later by the Mordecai, and he did not intend it earlier, as is apparent from his language there. It therefore seems clear to me that the only proof that the Mordecai has from all the cases he quoted is the fact that they say **חייב**, and that seems to indicate coercion. But that means coercion by words, as there are views in Yevamot and Ketubbot regarding the cases where we coerce him to divorce. And we say to him: "You must do as we say. If you do not obey, you are considered a sinner." But we do not coerce him physically or with excommunication, or similar things, since the strict law does not require what we require of him. Look at Ketubbot 50, in the context of **עשיתינהו**, looking there at Tosafot. . . .Therefore the Mordecai says: "If we are able" to do what is desirable, that is, if he is an obedient person who listens to what a Jewish court says, and does not violate their dictate. But if there is no ability, for he is not obedient, and the words of the court are as we say:[146] "A slave is not chastised by words," we may not coerce him physically or with excommunication. All of this is not the case with a matter of law, where we coerce with all manners of coercion. It all works well. And now we can even say that the Rosh, too, admits to this, and there is no dispute at all.

This has been a lengthy quotation, and it includes other passages that we will have to look at in order to see what the *Urim ve-Tumim* was talking about. He begins, though, by quoting the final two words of the comment of the Rema's gloss in the Shulhan Arukh. He correctly identifies the source of the Rema's comment, but asserts that none of the proofs of the Mordecai is conclusive. Quite the contrary, he argues, a careful look at the language of the Mordecai will lead to a very different conclusion. After all, the Mordecai says that we coerce for **לפנים משורת הדין** if we are able (**אם יכולת בידנו**),[147] making the last clause appear to be part of the theory of coercion, and not just a statement of actual ability of the court to enforce its decision. As part of the theory it makes no sense, says Eybeschuetz. Even in actual law, if the court does not have the ability to enforce its decision, nothing can be done. But we do not make the court's ability to enforce part of the theory of coercion. When we state a law in the abstract, we would simply say that we may compel obedience. So, here, too, according to the theory of the Mordecai that coercion is permissible for **לפנים משורת הדין**, there should have been no reason for him to include the "reality" matter, "if we are able." Thus, Eybeschuetz's claim to this point is that the language of the Mordecai does not support the conclusion that real coercion is permissible, since if that is what he was arguing, he would never have included the phrase "if we are able" as part of the theoretical statement. At this point, therefore, the *Tumim* remains without an explanation for why the Mordecai included that cryptic clause.

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[146] The reference is to Prov. 29:19, as understood by the gemara in Ketubbot 77a to imply that physical coercion is likely to be far more effective than verbal coercion since "A slave is not chastised by words."

[147] This is not the reading of the printed version of the Mordecai. There the reading is as quoted by the *Hagahot Maimoniyot*, **אם יכולת בידו**. That is the phrase which we said above was cryptic. Now it is clear that Rabbi Eybeschuetz has a different version in that statement.

Then Eybeschuetz refers us to the explanation of the BaH, according to which that clause refers not to the court's ability, but to the ability of the finder to tolerate the loss of the article which is legally his because he is wealthy. Eybeschuetz rejects this interpretation of the clause in the Mordecai on the grounds that the distinction between wealthy and poor is utilized by the Mordecai only in the passage which follows the one in which the cryptic clause appears. Had the Mordecai intended that interpretation to apply to his previous passage, he would have introduced it there. Indeed, we had noted above, page 234, that there was nothing in the words of the Mordecai to indicate a distinction between wealthy and poor. That distinction only appears in the next comment of the Mordecai.[148]

Having rejected the possibility that the passages referred to by the Mordecai themselves imply actual coercion, and having rejected the explanation of the BaH as to what the Mordecai was the talking about when he used the phrase "if we (he) are (is) able," Eybeschuetz contends that the only basis on which the view of the Mordecai can be based is the fact that the passages contain words like חייב, which indicate some type of coercion. But, says the *Tumim*, getting to his own explanation of what the Mordecai meant, that refers to verbal coercion, similar to the views of some commentators in passages in Yevamot and Ketubbot where the Mishnah says, "We compel him to divorce," by saying to him: "You are duty bound to do thus, and if you do not obey you are a sinner." But, we do not compel him physically or with excommunication, or such things, for this is not the strict line of the law.

There are some mishnayot in both Yevamot and Ketubbot that record a requirement that a man divorce his wife, under certain circumstances. The requirement is sometimes phrased, יוציא ויתן כתובה (he should divorce her and pay her marriage contract), and sometimes כופין אותו להוציא (we compel him to divorce).[149] Eybeschuetz refers us to the commentators on those passages who claim that when the passage in the Talmud says כופין, that refers to actual physical coercion; but when it says יוציא, it means oral persuasion, but not physical persuasion. He actually refers us to a single Tosafot in Ketubbot, to which we will come in due course. We will not start there, however, since it is not from a passage in which any of our key words of obligation actually appears. The words that Eybeschuetz says we say to the person we are trying to persuade appear first in the Tosafot[150] in the name of Rabbenu Hananel. They wrote:

> ורבינו חננאל הביא מירושלמי דכל הנך יוציא דמתניתין אין כופין והכי איתא התם אמר שמואל אין מעשין אלא לפסולות... ופסק ר"ח משם שמע מינה שאין כופין אלא היכא שמפרש בהדיא כופין אבל היכא דאמור רבנן יוציא אומרים לו כבר חייבוך חכמים להוציא ואם לא תוציא מותר לקרותך עבריינא, אבל לכפותו לא.
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> And Rabbenu Hananel deduced from the Yerushalmi that in all the cases of יוציא in the Mishnah we do not coerce. And this is what it says there:[151] "Samuel said: 'We do not compel except for those who are disqualified.'" . . .On that basis Rabbenu Hananel

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[148] Bava Metzia, ch. 2, 257.

[149] See the mishnayot of the seventh chapter of Ketubbot for both. In Yevamot, see ch. 4:2, 9, and 12; 14:1, 8, and 9 for יוציא, and 9:3 and 13:12, 13 for כופין.

[150] Ketubbot 70a, s.v. יוציא.

[151] J. Yevamot 9:4, 10b, and other places. In addition to the quote in the passage in the text, Samuel is quoted there as saying: "We do not compel except for the likes of a high priest to a widow, or a priest to a divorcee." That is, we compel for biblical prohibitions, but not for rabbinic dictates. Whether this second statement of Samuel is really his, or is the Talmud's in explanation of his statement is irrelevant to our discussion.

> decided: "We do not compel except in those cases where the Talmud states explicitly that we compel. But where the sages said that he should divorce, we say to him: 'the sages have already obligated you to divorce, and if you do not divorce, it is permissible to call you a sinner.'" But to compel him, no.

While it may be that the *Tumim* refers us directly only to one Tosafot, it is not unlikely that this other Tosafot, quoting the RaH, was one of the commentators to Yevamot and Ketubbot to which he referred,[152] especially since the words that he quotes that we say to the sinner are almost identical with the words quoted by Rah. Where does this leave us? Since **יוציא** means "he is obligated to divorce her," it follows that an expression of obligation does not necessarily imply the right to coerce physically. It may refer to verbal inducement or exhortation only, but exclude physical force.

Since the Mordecai has been critical in these deliberations, it is important to note that he, too, agrees with the claim of the Rah in at least two places. We shall quote one of them:[153]

> אין כופין אלא היכא דקתני בפירוש כופין, אבל היכא דאמור רבנן יוציא אמרינן ליה חיובך להוציא ואם לא הוציא שרי למקרייה עבריינא, אבל לכפותו בשוטים לא.

> We do not compel except where the Mishnah explicitly teaches כופין. But where the sages said that he should divorce, we say to him: "It is your obligation to divorce, and if you do not divorce, it is permissible to call you a sinner." But, to compel him physically, no.

The wording of the Mordecai is almost identical with the wording of the Rah. Surely his conclusion is the same. How likely is it that the Mordecai would be so explicit about the restricted admissibility of physical coercion in this case, yet intend such latitude for coercion in the לפנים משורת הדין? It simply is not likely, claims Eybeschuetz. It cannot be that the Mordecai would present two such dissimilar positions.

Now let us look at the Tosafot to which the *Tumim* himself refers us. It is based on a Gemara which reads as follows:[154]

> אמר ר׳ אילעא אמר ריש לקיש באושא התקינו הכותב נכסיו לבניו הוא ואשתו ניזונין מהם.... איבעיא להו הלכתא כוותיה או אין הלכתא כוותיה? ת״ש דר׳ חנינא ור׳ יוחנן הוו קיימי אתא ההוא גברא גחין ונשקיה לר׳ יוחנן אכרעיה. אמר ליה ר׳ חנינא מאי מאי? א״ל כותב נכסיו לבניו הוא ועשיתינהו לזניה. אי אמרת בשלמא לאו דינא, משום הכי עשיינהו, אלא אי אמרת דינא עשינהו בעי.

> Rabbi Ila'a said in the name of Resh Lakish: "In Usha they ordained that one who assigns all of his possessions to his sons must be sustained together with his wife from the estate." . . .A question was raised: Is the law in accordance with this edict or not? Come and hear: Once Rabbi Hanina and Rabbi Yohanan

[152] Note that in the Tosafot referenced above, n. 150, the view of Ri is also quoted. He holds the position that we do compel for the cases in which the mishnah says **יוציא**. For the purposes of our argument, however, even that would not be conclusive proof that Ri would believe that compulsion is also called for for **לפנים משורת הדין**, which is not even in the category of rabbinic prescriptions.

[153] Mordecai, Ketubbot, 194. The other is also in Ketubbot, 204. Both of these appear in the seventh chapter of Ketubbot, which is the one in which **כופין** and **יוציא** appear.

[154] Ketubbot 49b.

were standing when a man came over, bent down and kissed the feet of Rabbi Yohanan. Rabbi Hanina said to him: "What is that all about?" He answered: "He had assigned all of his possessions to his sons, and I compelled them to sustain him." Now if you say that the law does not follow the edict, that is why he compelled them. But if you say that the law does follow the edict, he was duty bound to compel them.

The meaning of the story is fairly easy to follow, until the conclusion. The fact that the man kissed Rabbi Yohanan's feet indicated great gratitude. That is, Rabbi Yohanan had done something kind for the man, beyond the requirements of the law, and he was so grateful that he kissed his feet. From this the Gemara deduces that the law does not follow the *takkanat Usha* in this matter. If that is correct, it is clear why the man kissed Rabbi Yohanan's feet. But, if the law does follow the *takkanah*, the man's behavior is not very explicable. According to Rashi it means: If the law follows the *takkanah*, what Rabbi Yohanan did for the man was to force compliance with the law, as he ought to have. And, therefore, Rabbi Yohanan didn't do any favor for the man. So, why did the man kiss his feet? Rashi's explanation of the *sugya* would not be of any use to Eybeschuetz, because it would be impossible to prove that the *piel* of the root עשה means verbal coercion. The way Rashi understands the *sugya*, Rabbi Yohanan may have coerced the sons physically to sustain their father. The man shows gratitude for this coercion of לפנים משורת הדין by kissing his feet. If it were the law, however, he would not have kissed his feet, because the physical coercion would not have been beyond the requirements of the law.

Nonetheless, the use of that root for coercion is somewhat strange. The root חייב would be the more common verb to use even for physical coercion to comply with the mandate of the law. Therefore, the *Tumim* refers us to the Tosafot,[155] who have a very different explanation:[156]

האי עשתינהו צריך לומר דהיינו בדברים... והשתא אתי שפיר דאמר עשיתינהו בעי דאם מן הדין היה מה היה לו לעשותם בדברים היה לו להלקותם ולכופם עד שיזונו אותו, פירש רבינו תם.

This "I coerced them" must mean verbally. . . .And now [the *sugya*] flows smoothly. For it says: "Ought he have coerced them verbally?" If the sons were obligated to feed their father by law, why would he have sought to compel them verbally? He should have lashed them and compelled them to feed him. And thus did Rabbenu Tam understand.

The view of the Tosafot, probably motivated by the question we have just raised, is very different from that of Rashi. Here is the way they understand the *sugya*. The verbs in the sugya from the root עשה mean to coerce verbally, but not physically. If the law does not follow the *takkanat Usha*, then it is easy to understand why the man kissed the feet of Rabbi Yohanan, since he had verbally coerced the sons to behave beyond the requirements of the law. But, if the law follows the *takkanah*, "should he have coerced him verbally?" Tosafot read those two words of the text as a question, as opposed to Rashi who reads them as declarative.

[155] Ketubbot 50a, s.v. עשיתינהו.

[156] See, too, Rashba, Ritba, and Shita Mekubbezet, *ad locum*.

Now we can follow the thrust of the argument of the *Tumim*. The only real proof of coercion for לפנים משורת הדין that the Mordecai has is expressions like חייב which imply coercion. But that coercion is not physical, but verbal, similar to the type of coercion implied, according to many commentators, by the passages in Yevamot and Ketubbot, where at least claims that יוציא means by verbal coercion, and the threat of being called a sinner, but not physical coercion. And the same is implied by the understanding of Tosafot of the *sugya* in Ketubbot which we have just analyzed. And, in that *sugya*, the gratitude of the man toward Rabbi Yohanan was because he had coerced his sons verbally to act לפנים משורת הדין.

Having proved that the only possible coercion for לפנים משורת הדין is verbal, the *Tumim* goes back to the cryptic clause in the Mordecai, which had been explained by the BaH to refer to wealth. He says: When the Mordecai wrote אם היכולת בידינו he meant, "If we are able to bring about compliance with לפנים משורת הדין on the basis of our verbal coercion, because the man is obedient to Jewish courts and obeys what they tell him, fine and good. But if the man is not inclined to be obedient, we cannot force him physically or with excommunication. And all of this is the opposite of actual law, where we would compel obedience by whatever means were necessary." Now, for the *Tumim*, the clause in the Mordecai is, in fact, part of the theory of coercion for לפנים משורת הדין, and not just a statement of some reality. Our ability to be persuasive in our verbal coercion determines whether there is coercion even in theory, not just because Jewish courts may no longer have the power they once did. Even if that same power still existed in Jewish courts, they could still compel obedience to לפנים משורת הדין only because of their persuasive powers, not their enforcement powers.[157]

Having gotten to this point, Rabbi Eybeschuetz can now add the frosting to the cake. When the Rosh (and, we might add, the Beit Yosef) reject out of hand the possibility of coercion for לפנים משורת הדין, they refer only to physical coercion. But, even they would agree that the court should engage in verbal coercion for לפנים משורת הדין, and that those who do not comply could be called sinners. So, in the final analysis, says the *Tumim*, there is no dispute at all. The Rosh and the Mordecai agree with each other. Each was talking about a different matter.

Just as the view of the BaH had a following in later authorities, so, too, does the view of the *Tumim*, either with or without crediting him. For example, Rabbi Jacob Reicher (c.1670-1733) wrote:[158]

> לפנים משורת הדין הא מבואר בש"ע סי' י"ב שני דעות... דעת המרדכי פ' אלו מציאות דכופין על לפנים משורת הדין, והרא"ש ורבינו ירוחם הובא בב"י סי' זה דאין כופין. והב"ח מסיק עיקר להלכה דכופין... ויותר תמוה לי על הב"י ותשובת צ"צ שנעלם מהם סוגיא דש"ס דכתובות פרק נערה דף נ' ע"א גבי כותב נכסיו לבניו ועשתינהו לזניה יע"ש בפי' רש"י ותוס' לשם דכופין על לפנים משורת הדין היינו בדברים בעלמא, והמרדכי פ' המדיר כתב בשם ר"ת כגון לגזור עליו שלא לישא וליתן עמו וכה"ג, אבל לא על ידי מלקות ושמת'.
>
> Two views are explained concerning לפנים משורת הדין in the Shulhan Arukh, [Hoshen Mishpat,] section 12. . .the view of the Mordecai in chapter *Eilu Mezi'ot* that coercion is possible for לפנים

[157] Understanding the Mordecai to refer only to verbal persuasion eliminates the contradiction between our previous understanding of the Mordecai's intent and the passage of his we quoted above, p. 237.

[158] *Responsa Shevut Ya'akov*, pt. 1, 168.

> משורת הדין, and the Rosh and Rabben Yeruham, quoted by the Beit Yosef in the same section, that coercion is not possible. And the BaH concluded the law in accordance with the view that we do coerce. . .[b]ut I am most surprised at the Beit Yosef and the *Zemah Zedek* who seemed to have ignored the *sugya* in Ketubbot, chapter *Na'arah*, page 50a, concerning the case of one who had assigned his possessions to his sons, and they were forced to support him. Look there in the commentaries of Rashi and the Tosafot [for evidence that] coercion for לפנים משורת הדין refers only to verbal coercion. And the Mordecai wrote in Chapter *ha-Maddir*[159] in the name of Rabbenu Tam, that it means, for example, making a declaration that nobody should do business with him, and similar things, but not [to coerce him] with whipping or excommunication.

Rabbi Reicher lays out the range of views, which we have already seen. He then expresses surprise at both the Beit Yosef and the *Zemah Zedek* for having paid no attention to the *sugya* we analyzed in our discussion of the *Tumim*. For the Beit Yosef, the surprise is that he did not refer to it as evidence that physical coercion is forbidden,[160] and for the *Zemah Zedek* the surprise is that he did not see that it belies the possibility of physical coercion. For Rabbi Reicher, too, the statement of the Mordecai in Ketubbot that rejects physical coercion seems to undermine the reading of his statement in Bava Metzia to imply physical coercion, and the two can be reconciled by understanding the Bava Metzia statement to refer exclusively to verbal coercion.

We quoted above, page 229, the words of Rabbi Samuel David Munk in explanation of why the view of the Rosh and the Beit Yosef was so logical that it did not even require proof. Munk himself agrees with them, and concludes:[161]

> ולכן נלענ"ד הלכה למעשה כדברי האומרים כופין בדברים, ואם הוא דבר שנאמר בפוסקים חייב כופין אף בדברים קשים.
>
> So, it seems to me that the law is in accordance with those who say that the coercion is with words, and if it is a matter where the poskim have used the word חייב, then the words can be harsh.

Rabbi Munk finds the logic of his defense of the view of the Rosh and the Beit Yosef so convincing and compelling that it persuades him that the law must reflect that logic. Therefore, the only type of coercion that could be possible for לפנים משורת הדין is verbal coercion. His concession to the strength of the word חייב is that in those instances where the poskim have used that word, as in the instance of returning a lost article found where many non-Jews are but identified by a Jew, the words used to coerce can be harsh.

There is one more avenue to go down before we finish this excursus on לפנים משורת הדין. One of the talmudic passages, above, page 226, that we have been considering as one speaking of לפנים משורת הדין did not, in fact, use the term. It used instead the phrase חייב בבא לצאת ידי שמים, he is obligated, if he wishes to discharge his duty towards Heaven. We assume this comment to be the equivalent of חייב בדיני שמים. What we must do now is see whether the matter of coercion is any different for חייב בדיני שמים than for לפנים משורת הדין.

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159 I.e., Mordecai, Ketubbot, 204.

160 It is possible that his surprise at the Beit Yosef is over why he did not raise the *sugya* as a rebuttal of the proofs brought by the Mordecai.

161 See reference above, n. 129.

The greatest concentration of items for which there is חיוב בדיני שמים can be found in Bava Kamma.[162] We need concern ourselves with only one of them. A baraita lists four matters for which one is exempt by law, but obligated by דיני שמים. One of the items is: הכופף קמתו של חבירו בפני הדליקה, one who bends the standing crops of his fellow toward a fire. In explaining the specifics of this case, the Gemara offers two explanations. First, it asks, if the crops were bent toward the flame in such a way that the fire would reach them even with a normal wind (ברוח מצויה) the perpetrator should be liable even by law, so, it must be that he bent the crops in such a way that they could not be burnt by a normal wind, but could be by an abnormal one (רוח שאינה מצויה). For such damage the perpetrator is exempt by law, but liable to Heaven. Rav Ashi says that the baraita refers to a case in which someone covered over the standing crops of his fellow as the flame was approaching. This is the case in which he is not liable at law, but liable to Heaven. Why is he not liable at law? Because it is not he who set the fire. Why is he liable to Heaven? Because his act resulted in the crops being in the category of "hidden," for which the Sages exempt from legal liability.[163] Thus, if he had not covered the crops, whoever lit the fire would have been liable for the damages to the crops caused by the fire. Now, however, that the crops are "hidden," he is no longer liable, and, thus, the act of covering the crops resulted in a loss to the owner of the crops that will now go uncompensated. This is his liablility toward Heaven.

The Gemara proceeds to explain why the author of the baraita had to list the four he did, when those four do not exhaust the list of items for which one would be liable toward Heaven. For each of the four, the Gemara claims, there might have been an argument that would have led one to believe that the person would not even have been liable toward Heaven, and the baraita had to teach that one does not argue thus. Regarding our case, the Gemara gives the following explanations, one for each of the opinions as to its specifics:[164]

> הכופף קמתו של חבירו נמי מהו דתימא? לימא, מי הוה ידענא דאתיא רוח שאינה מצויה ובדיני שמים נמי לא ליחייב, קמ״ל. ולרב אשי דאמר נמי טמון איתמר מהו דתימא אנא כסויי כסיתיה ניהלך, ובדיני שמים נמי לא ליחייב, קמ״ל.
>
> In the case of one who bends his fellow's crops, too, what might you have said? [He could contend:] "How could I have known that an unusual wind would blow," and, if so, he should not even be considered liable to Heaven. Its inclusion in the baraita comes to teach us that we do not make that claim. And according to Rav Ashi who said that the case is one of "hidden," what might you have said? [He could contend:] "I covered your crop for your benefit," and, if so, he should not even be considered liable to Heaven. Its inclusion in the baraita comes to teach us that we do not make that claim.

The reason for the inclusion of our case, according to the first explanation of its specifics, is to indicate that a person should think about the possibility of unusual occurrences, at least as far as liability toward Heaven is concerned. A human court may not be able to consider such a person liable, but that person should pay for the damages caused if he wishes to fulfill his obligation to Heaven. According to Rav Ashi's view of the specifics

[162] Beginning of ch. 6, 55a-56a.

[163] See M. Bava Kamma 6:5, 61b.

[164] Bava Kamma 56a.

of our case, it is included in the baraita in order to indicate that even if a person were to claim that he had covered the crops in order to impede the flame, and without any intention to cause harm to the owner of the crop, that would not be sufficient to exempt him from liability toward Heaven.

The Tosafot[165] wonder why the theoretical claim according to Rav Ashi is not, in fact, sufficient to exempt the man from liability even to Heaven, since God knows whether he is telling the truth or lying, and if he is telling the truth, he should be exempt even in God's eyes. Their answer is that even if his intention was completely pure, it was his responsibility to be extremely careful and consider the possibility that the act which he was doing from pure motivation might still cause damage to the very one he was trying to protect. Since he obviously didn't do that in our case, he stands obligated toward Heaven.

Rabbi Solomon Luria (c. 1510-1574) has a comment which refers to this *sugya*, and deals directly with coercion for חיוב בדיני שמים. He wrote:[166]

> ומצאתי כתוב בתשובה וז״ל נ״ל היכא דאיתמר חייב בדיני שמים אע״ג דאין לב״ד לכופו לשלם, מ״מ בדברים בלי כפיה יש לדוחקו, דאם לא כן איך קאמר בפרק הכונס גבי הטמין קמה של חבירו לפני הדליקה כו׳ מהו דתימא מצא אמר אנא כסייא כסיתיה ובדיני שמים נמי לא לחייב קמ״ל. ומאי קאמר והא היודע מחשבות הוא יודע דעתו אלא כדפי׳ עכ״ל. ולא נהירא לי מדלא תירצו התוס׳ כך ש״מ דלא ס״ל כלל. גם לישנא דדיני שמים לא משמע להיות חיובא אפי׳ במקצת דיני אדם, אלא לעניין יוצא ידי שמים לחוד קאמר. וכן מצאתי בצפנת פענח וז״ל כל מקום שאמרו חייב בדיני שמים, אם בא צריך להודיעו ״אין אנו יכולין לחייב אותך אבל צריך אתה לצאת ידי שמים כי דינך מסור לו,״ כדי שיתן אל לבו וירצה את חבירו ויצא ידי שמים.
>
> I found a responsum in which the following was written: "It seems to me that wherever it says 'he is liable before Heaven,' even though the court cannot coerce him to pay, nonetheless, it may push him to do so verbally, without [physical] coercion. If this is not so, how does the Gemara say in Chapter *ha-Kones*, in the context of one who "hid" the crop of his fellow before the fire: 'What might you say? He could say, "I covered it," and not be liable even before Heaven, so the baraita comes to teach that we do not say that.' And what kind of an argument is that, since He who knows the thoughts of all, knows what his intent was. Rather, [it must be] as I have explained." But this claim is not acceptable to me. Since the Tosafot did not explain that way, it implies that they did not agree with that view at all. Furthermore, the expression "laws of Heaven" does not imply any liability whatsoever according to "laws of man," but rather [is restricted] exclusively to fulfilling an obligation toward Heaven. And thus did I find in *Zofenat Pa'ane'ah*:[167] Wherever they said חייב בדיני שמים, if one comes he must be informed thus: "We are not able to make you liable, but you are

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[165] *Ad locum*, s.v. כסויי.

[166] *Yam Shel Shlomo*, Bava Kamma 6:6.

[167] *Zofenat Pa'ane'ah* is a name by which *Sefer Ra'avan* is sometimes called. The passage quoted by Luria appears there (see above, n. 131, for ed. information), p. 190a.

> duty bound to fulfill your obligation toward Heaven, for your case is handed over to It," in order that he will take the matter to heart, appease his fellow, and fulfill his obligation to Heaven.

The *Yam Shel Shelomo* begins by quoting an anonymous responsum, according to which verbal coercion for חיוב בדיני שמים is permissible, even though other coercion is not. How does the author of the responsum deduce this? He deduces it from the answer of the Gemara, according to the position of Rav Ashi, to the theoretical argument one might have raised against considering the one who "hid" the standing crop of his fellow liable בדיני שמים. The author's claim is this: In fact, that claim, namely, that he had acted with the best intention of the crop owner in mind, *should* exempt him from דיני שמים. Why does it not? Because since only God knows whether he is telling the truth or not, Rav Ashi believes that the man can be verbally pressured to pay. While we have no idea of what that wording would be, the juxtaposition of this part of Luria's quote with the next, leads one to believe that the wording would be something like: "God who knows the thoughts of all knows whether you are telling the truth. Are you absolutely positive that your motivation was entirely pure? If you are not, you will spend the rest of you life obligated in the eyes of Heaven to the man whose crop you caused damage to. Would you not be smarter to fulfill your possible obligation to Heaven, and pay the man for the damage you caused him?"

We should summarize the argument of the anonymous author of the responsum quoted by Luria this way: The Gemara clearly implies that in all matters of חיוב בדיני שמים there can be verbal, though not physical, coercion. Why is that the implication? Because the Gemara should really *accept* the argument which Rav Ashi says we *do not* accept in the case of the man who "hid" his fellow's crops. Now if we should accept it, but we do not accept it, that can only be because in matters of דיני שמים we can engage in verbal coercion under all circumstances, so the fact that the person has a claim which might be valid (if he is telling the truth) is irrelevant (since he might also be lying). This seems to be the way the anonymous author understands the Gemara. Note, that the author accepts the problem of the Tosafot, but does not offer their answer.

Luria expresses disagreement with the author of the responsum on two grounds. The first is that the Tosafot raise the same problem as he does, but do not give the same answer. They give an answer which makes the man liable even if it is assumed that he is telling the truth. They make no claim that we deduce anything about coercion, verbal or otherwise, from this *sugya*. Therefore, claims Luria, they must reject that possibility. And why do they reject it? Because according to them, there can be no coercion whatsoever, even merely verbal for חיוב בדיני שמים.

The second grounds for rejection are based on the expression itself. What else, asks Luria, could an expression like "liable in the sight of Heaven" mean if not, "We, the human court, can do nothing about this case; but you, the person involved are liable in the sight of Heaven"? "By the laws of Heaven" is clearly intended to be contrasted with "By the laws of man." It is only about the latter that human courts can do anything. About the former they are absolutely powerless to do anything but inform the person that they have an obligation toward Heaven.

Where does this leave us regarding coercion for חיוב בדיני שמים? At the maximum, if we accept the claim of the anonymous responsum, there can be verbal coercion for חיוב בדיני שמים, but nothing more. If that is the case, this type of obligation is identical in terms of coercion with the view of the *Tumim*, and others, regarding coercion for לפנים משורת הדין. For both categories the most that a court could do would be to exercise verbal persuasion. If we reject the view of the anonymous responsum, either on the grounds that

Luria did or on other grounds, we are left with the view of Luria himself. According to him, there can be no verbal coercion for חיוב בדיני שמים whatsoever. The most there could be would be verbal informing.

Luria sees a difference between verbal informing and verbal coercion. We have tried to make that difference clear in preceding paragraphs. It is possible to argue, however, that what Luria quotes as verbal informing in the name of Ra'avan is precisely what we have meant all along by verbal coercion. If we say the former, then חיוב בדיני שמים has even less enforceability than לפנים משורת הדין. If we say the latter, the two are equal, at least as the *Tumim* understood coercion for לפנים משורת הדין.

We have been on a lengthy excursus, initiated because Rabbi Shaul Yisraeli linked blood and bone marrow donation with לפנים משורת הדין.[168] The time has come to summarize the route we have taken, and where it has led us. We began with the presentation of the actual talmudic passages that deal with relevant instances of לפנים משורת הדין. Of the seven passages, four carried no implication whatsoever of obligation for לפנים משורת הדין and surely no implication of coercion; three, by using such words as "obligated" and answering "yes" to the question "Is that the law?" seemed to imply obligation. That, in turn, led us to discuss whether obligation should be understood in these contexts to imply the right to compel obedience with the dictate of לפנים משורת הדין. We quoted Maimonides, whose view is clearly that it does not. Then we quoted the words of the Mordecai (corresponding to the view of the *Hagahot Maimoniyot*) which clearly say that we compel for לפנים משורת הדין, but appends the words אם היכולת בידו (or: בידנו). In tracing what happens to this Mordecai in legal history, we noted that the Beit Yosef, taking his cue from the Rosh and Rabbenu Yeruham, rejects it entirely, saying that it is clear to him that there is no coercion for לפנים משורת הדין, and expressing surprise at what the Mordecai had said. We found the explanation of the certainty of the Beit Yosef most compelling as offered by Rabbi Samuel David Munk, namely, that "Torah does not grant permission to a court to coerce except for legal judgment."

The BaH, however, defended and explained the Mordecai. He understood the key phrase אם יכולת בידו to refer to the finder of the lost article which should be returned because of לפנים משורת הדין. He explained it, probably on the basis of some early Ashkenazic authorities, though not really implied by the Gemara itself, to mean that the finder was wealthy. Under those circumstances there is an obligation for the finder to return it, and the court can compel obedience. We then traced the support for the view of the BaH through the *Zemah Zedek* and the Rabbinic Court Decisions of the Religious Courts of Israel. We concluded our tracing of the BaH's position with a reference to the *Minhat Yitzhak* who asserts that the coercion issue refers only to instances of returning to one what was his in the first place, as evidenced by the fact that it applies to the wealthy who are compelled to return to losers who are poor what was theirs originally. To other matters, however, coercion would not apply.

Consistent with his view in the Beit Yosef, Karo makes no statement about the admissibility of coercion in the Shulhan Arukh. The Rema also states that coercion is not permitted, but notes that some disagree. The "some disagree," of course, is the Mordecai. In his comments to the Shulhan Arukh, Rabbi Yonatan Eybeschuetz, the *Urim ve-Tumim*, rejects the view that the Mordecai means physical coercion at all, and the contention that a wealthy person is being spoken of. What the Mordecai means is verbal coercion, and nothing more. Eybeschuetz's evidence is based on two things: his version in the Mordecai,

[168] See above, pp. 221-222.

which reads אם היכולת בידנו, and passages in Ketubbot and Yevamot. The former, according to this explanation, refers to the persuasive power of the court to convince the person to act לפנים משורת הדין, and makes no reference to physical coercion. The latter lead Rabbenu Hananel to conclude that, as a matter of law, physical coercion is utilized only in contexts where the law includes the term כופין. That, of course, would exclude all instances of לפנים משורת הדין.

We then saw further quotations from the Mordecai that indicate agreement with the Rah, thereby lending support to the thesis of the *Tumim* concerning the original quotation from the Mordecai, rather than lending support to the understanding of the BaH. Then we returned to the *Tumim* and saw his further proof from the Tosafot's explanation of the *piel* of the root עשה to indicate only verbal persuasion. Subsequently, we traced the followers of the *Tumim* through Rabbi Jacob Reicher and Rabbi Samuel David Munk.

In a postscript to our extensive treatment of לפנים משורת הדין, we engaged in a brief discussion of the admissibility of coercion in matters of חיוב בדיני שמים. Our discussion was based primarily on a passage of Rabbi Solomon Luria, quoting an anonymous responsum and a Tosafot in Bava Kamma. Our conclusion was that the only type of coercion possible in such matters would be verbal, at most.

If we were forced to take an unequivocal stand from all of the views we have quoted and explained, it would have to be in favor of the view of the Rambam, the Beit Yosef, the Rosh, and the preferred position of the Rema. It simply stretches the language too far to think that there could be a humanly enforced coercive element in matters that are "beyond the requirements of the law," or "to discharge one's obligation to Heaven." But even if we do not make that absolute judgment, the weight of precedent from the middle ages on seems to favor either restricting coercion to wealthy people returning objects to their original owners or to verbal persuasion and coercion. And, if we adopt the later position, it is uncontested. That is, everybody agrees that the court should attempt to convince a person to behave לפנים משורת הדין. It is the moral thing to do, and there can be no objection to attempting to convince a person to behave accordingly. That, however, is a far cry from claiming that there is a legal right to compel obedience.

None of this is meant to deny that the view that coercion for לפנים משורת הדין exists, if one relies on the early Ashkenazic sources of the Mordecai without considering the legal history of those sources' claims. That, however, would be irresponsible law.

Rabbi Yisraeli was the only one who attributed the status of לפנים משורת הדין to blood and bone marrow donation. All the others treated it in terms of לא תעמוד. We have now demonstrated that by either standard there is not a legal obligation to donate either blood or bone marrow. Given the relative ease of these procedures, however, we affirm that it is the moral thing to do. Yisraeli equates a moral act with לפנים משורת הדין, and states very beautifully:[169] "A moral obligation (לפנים משורת הדין, which is the opposite of *midat sedom*) is more than a mere praiseworthy action (*midat chasidut*). In the latter case, a volunteer should be encouraged; in the former, one should be encouraged to volunteer." Yisraeli was silent about his views on coercion for לפנים משורת הדין in his article. But this quotation makes it very clear. "One should be encouraged to volunteer" is a statement of verbal persuasion and encouragement. The most one could possibly call it is verbal coercion.

The motivation of those who would make blood donation and bone marrow donation mandatory is both understandable and laudable. However, it is probably not implied by the Gemara either as לא תעמוד or as לפנים משורת הדין, and takes a step that creates unen-

[169] See n. 13 in the English version of the article referenced above, n. 107.

forceable and bad law. Of course we must encourage people to donate blood and bone marrow, especially to those in critical need. We must admonish them to overcome common tendencies to claim that one cannot do so for a host of reasons. We must stress what a great mitzvah they will be perfoming by becoming donors, and how great the reward of saving another's life will be. But, we would be ill advised to posit either blood donation or bone marrow donation as a legal requirement which any halakhically observant Jew *must* agree to when needed. To mandate them as halakhic requirements implies the right to compel halakhic Jews to donate. We would be better off to take the lesser step, which is more defensible. To refuse to donate violates ועשית הישר והטוב and perhaps לפנים משורת הדין, which cannot be coerced, but does not violate לא תעמוד על דם רעך.

There is an obvious difference between donating blood for deposit in a blood bank, either for the use of someone else or for one's own use, and donating blood for a חולה שלפנינו. In the latter case, the person in need of the blood is present and waiting, while in the former case, the ultimate recipient is not yet in need of the blood. The question, then, is whether that fact makes any difference in terms of the halakhic permissibility to donate blood under such circumstances. In addition, we shall see that this issue is tied to the question of the permissibility of donating blood for compensation.

Let us begin with the primary halakhic sources that impinge on our question. The Mishnah reads:[170]

> מעשה באחד שפרע ראש האשה בשוק. באת לפני ר' עקיבא וחייבו ליתן לה ארבע מאות זוז. אמר לו: רבי, תן לי זמן. ונתן לו זמן. שמרה עומדת על פתח חצרה ושבר את הכד בפניה ובו כאיסר שמן. גלתה את ראשה והיתה מטפחת ומנחת ידה על ראשה. העמיד עליה עדים ובא לפני רבי עקיבא. אמר לו: לזו אני נותן ד' מאות זוז? אמר לו: לא אמרת כלום, החובל בעצמו אף על פי שאינו רשאי פטור, אחרים שחבלו בו חייבים.
>
> There was a case of a man who removed the head covering of a woman in the market place. She came before Rabbi Akiva who declared the man liable to pay her four hundred *zuz*. He said to him: "Rabbi, give me some time." He granted him time. [During that time,] he waited until she was standing by the door of her courtyard. He broke a pitcher in her presence that contained about an *issar's* worth of oil. She removed her head covering and began patting the oil [into her palm] and putting it on her head. The man had brought witnesses to her act. He came before Rabbi Akiva and said: "Am I to pay four hundred *zuz* to such a one?" He answered: "Your claim is irrelevant. For, even though one should not damage oneself, if one did, one is exempt; but, if others cause the damage, they are liable."

Even though the woman had also caused herself some type of disgrace (damage), the claim of the man that this exonerated him from liability fell on deaf ears. There is a difference, says Rabbi Akiva, between one who inflicts damage on oneself and one who inflicts damage upon another. Both have done something wrong, but the former is not legally liable, while the latter is.

In its discussion of the Mishnah, the Gemara[171] quotes a baraita in which Rabbi Akiva is quoted as saying: צללת במים אדירים והעלית חרס בידך, אדם רשאי לחבול בעצמו – "You have

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[170] Bava Kamma 8:6 (90b).

[171] Bava Kamma 91a.

dived into turbulent waters but brought up only sherds. A person is entitled to inflict damage upon himself." The view of Rabbi Akiva in this baraita is that it is permissible to inflict injury upon oneself. In the Mishnah he claimed it was forbidden, though one who did so was not liable at law. In its further discussion, the Gemara[172] affirms that the view of Rabbi Akiva expressed in the Mishnah is his view as understood by Rabbi Elazar ha-Kappar. But, at a minimum, we see that there are two opinions about whether it is permissible to inflict injury or damage upon oneself.

Maimonides records the law in accordance with the view of Rabbi Akiva of the Mishnah. He wrote:[173] אסור לאדם לחבול בין בעצמו בין בחברו – "It is forbidden for one to inflict damage either upon oneself or upon one's fellow."[174] This, too, seems to be the view of the Rif and the Rosh, since both quote the wording of the Mishnah without any indication of the contrary view of the baraita.[175] The Tur also affirms that it is forbidden to inflict injury upon oneself, but then adds:[176] כתב הרמ״ה שאינה הלכה אלא האדם רשאי לחבול בעצמו – "Rabbi Meir ha-Levi Abulafia wrote that this is not the law. Rather, a person is entitled to inflict injury upon himself."[177] Finally, the Shulhan Arukh[178] records the law precisely in the language of the Mishnah.

It seems clear, therefore, that the classical poskim have taken the view that inflicting injury upon oneself is forbidden. Only according to the Ramah is that not the case. Obviously, if one adopts the position of the Ramah, there can be no halakhic objection to blood donation, even without the presence of one who is awaiting the blood right now.[179] However, adopting that view would leave one in the position of ignoring the weight of precedent, which favors the view that self-injury is forbidden. The question, then, becomes whether blood donation is permissible or forbidden according to the view of the majority of the poskim.

One factor which is relevant to that question is whether the status of the prohibition against self-injury is דאורייתא or דרבנן. If it is the former, we would be inclined to be strict in a matter of doubt, based on the principle ספיקא דאורייתא לחומרא; and if it is the latter, we would be inclined to be lenient in a matter of doubt, based on the principle ספיקא דרבנן לקולא.

An apparently straightforward answer is offered by the Meiri in his comments to Bava Kamma, where he wrote:[180] זה שבארנו במשנה שאין אדם רשאי לחבול בעצמו מן התורה הוא –

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[172] Bava Kamma 91b.

[173] M.T. Hovel u'Mazik 5:1.

[174] He intimates the same in Hilkhot Shevuot 5:17, where he states: נשבע להרע לעצמו כגון שנשבע שיחבול בעצמו, אע״פ שאינו רשאי, שבועה חלה עליו – If one swears to do evil to himself, as, for example, he swears to inflict injury upon himself, the oath is effective even though he is not permitted to do so.

[175] See Rif, 32a, and Rosh 8: 13.

[176] Hoshen Mishpat 420.

[177] The Beit Yosef (בד״ה ומ״ש בשם הרמ״ה) explains the reasoning of the Ramah based on the fact that the Gemara attributes the view of Rabbi Akiva in the Mishnah to Rabbi Elazar ha-Kappar, and the law never follows him. Thus, the law must be in accordance with Rabbi Akiva of the baraita. The BaH (בד״ה החובל) refers to the Gemara in Shevuot 8a as proving that the sages disagree with the view of Rabbi Elazar ha-Kappar from which support for the view of Rabbi Akiva in the Mishnah was adduced. Since the sages disagree with him, the systemic principle יחיד ורבים הלכה כרבים – in a dispute between one sage and the majority, the law follows the majority- impels us to reject the view of Rabbi Elazar ha-Kappar, and if it is that view which supports the Rabbi Akiva version of the Mishnah, it, too, must be rejected in favor of the Rabbi Akiva version of the baraita.

[178] Hoshen Mishpat 420:31.

[179] Though see below, p. 248, for the view of Rabbi Menashe Klein, even according to the Ramah.

[180] בית הבחירה לבבא קמא, Kalman Schlesinger ed. (Jerusalem, 1963), p. 266.

"What we have explained in the Mishnah, that it is forbidden for one to injure oneself, is from the Torah." What complicates this apparently straightforward answer is that a few lines later the Meiri writes: אע"פ שאמרו אין אדם רשאי לחבול בעצמו, אם נשבע שיחבול [ב] עצמו, שבועה חלה עליו... שאין זו מצוה גמורה אלא דברי סופרים... וכבר בארנו שכל שהוא איסור סופרים שבועת ביטוי חלה עליו – "Even though the sages said that a person is not entitled to injure himself, if one swore that he would do so, the oath takes effect. . .for this [prohibition against self-injury] is not a complete mitzvah, but rather based on the words of Soferim (i.e., is דרבנן) . . .and we have already explained. . .that all such rabbinic prohibitions are subject to fulfillment in the case of oaths."

At first blush, there seems to be a conflict within the Meiri's words. He calls the prohibition against self-injury דאורייתא, and then claims that an oath to injure oneself applies because the prohibition against self-injury is דרבנן. The resolution to the problem is found in the Ran. In his comments to the Rif on Shevuot[181] he wrote: אע"ג דבפרק החובל אמרינן דאין אדם רשאי לחבל בעצמו מדרשא אתיא לן, (ו)כל דליתא מן התורה מפורש לא מיקרי מושבע ועומד לענין שלא תחול שביעה עליו – "Even though we say in *Perek ha-Hovel* that a biblical midrash serves as the source for the claim that a person is not entitled to injure himself, nothing that is not explicit in the Torah falls in the category of 'already under oath,' such that oaths not apply to it." The Ran affirms that the prohibition against self-injury is דאורייתא. One would, however, still be obliged to fulfill an oath to inflict such injury upon oneself because one is exempt from such fulfillment only in the case of מושבע ועומד, and that applies only to explicit prohibitions of the Torah. The distinction is made even more clearly by the Ran in his comment to Nedarim[182] where he wrote: כל מידי דאתא מדרשא אע"פ שהוא מן התורה, כיון דליתיה מפורש בקרא בהדיא שבועה חלה עליו – "Even though anything deduced by midrash has the status of דאורייתא, oaths apply to such matters since they are not explicit in the Torah." Indeed, the same distinction as is drawn by the Ran is the most reasonable solution to the apparent contradiction in the words of the Meiri. From both of them, then, it follows that the prohibition against self-injury is דאורייתא.

Based on precisely these sources, Rabbi Menashe Klein draws the apparently inevitable conclusion, in his monumental work משנה הלכות:[183]

> שמעינן מיהו דדעת המאירי והר"ן ז"ל ושאר הראשונים דאיסור שאין לחבול בעצמו דאורייתא היא ומעתה ודאי אזלינן בזה לחומרא.... וממילא שמעינן נמי לפשוט שאילתא דידן דודאי אסור לישראל ליתן מדמו לבלאט באנ"ק דהרי כשנותן דם לבאנק הרי חובל בעצמו הוא, והעיקר חבלה הוא כל שהוציא דם, וכיון דקיי"ל אין אדם רשאי לחבול בעצמו א"כ אסור ליתן דם מעצמו שהרי בזה חובל בעצמו ואע"פ שרוצה אינו רשאי, והוא באיסור תורה.
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> We learn, at any rate, that the view of the Meiri and the Ran, of blessed memory, and the other Rishonim is that the prohibition against self-injury is דאורייתא. Thus, surely, we are strict concerning it. . . .And from this we can also deduce the answer to our question, namely, that it is certainly forbidden for a Jew to donate his blood to a blood bank. For when one donates to a bank one inflicts injury upon oneself, the essence of which being the actual removal of the blood. And since we have established that a person is not

[181] P. 11a, ד"ה אביא נשבע.

[182] P. 8a, ד"ה הא קמ"ל.

[183] Menashe Klein, *Mishneh Halakhot* (Brooklyn: 5747), vol. 4, no. 245, p. 380.

> entitled to inflict injury upon himself, it follows that it is forbidden to donate blood since that constitutes self-injury. And it is forbidden דאורייתא even if one wishes to donate.

Rabbi Klein adds one more important point that pertains even to the position of the Ramah, who holds that it is permissible to inflict injury upon oneself. Based on a claim of Rabbi Shelomo Luria[184] that אפילו לפירוש הרמ״ה אינו מותר אלא לצורך דאי לא לצורך לכ״ע אסור אפילו להזיק בגדים – "Even according to the understanding of Abulafia, it is permissible only for need, for without need all agree that it is even forbidden to damage clothing" – Klein concludes[185] that it would be forbidden to donate to a blood bank even according to the Ramah, since some possible future need of the donor for blood (which would not even be the blood he donated) does not constitute "need."

If the Ramah permits only for need, it must follow that those who forbid must forbid even for need, otherwise there is no dispute between the Ramah and the others. Indeed, the Tosafot[186] make precisely this point: ואור״י... שאסור לחבול אפי׳ לצורך – "And Ri says. . .that it is forbidden to injure even for need."

The responsum of Rabbi Klein was written on January 9, 1964 (though not published until about twenty-three years later). Klein often takes note of responsa of Rabbi Moses Feinstein, though in this instance he does not. Feinstein had written a responsum on the question of the permissibility of donating blood for compensation on October 26, 1962.[187] It is, of course, very possible that Klein did not know of it at all. Feinstein begins with the premise that it should be forbidden, since the view of Maimonides is that self-injury is forbidden, and the Ri has made it clear that the prohibition applies even when there is "need." Earning money is "need," but would still be prohibited according to this. At the end of the responsum, however, the following appears:

> אבל בחבלה זו להוציא דם על פי השגחת הרופאים יש טעם גדול שלא לאסור, דהא מצינו שבדורות הקודמים היו נוהגין להקיז דם אף רק לאקולי כמפורש בשבת דף קכ״ט (ע״ב).... ולכן אף שנשתנה אח״כ... מ״מ ודאי גם עתה איכא גם רפואה בזה דלא יהיה שינוי גדול כ״כ וגם היום מוציאין הרופאים כמעט בלא צער, ולכן אפשר אין לאסור בחבלה זו דהקזת דם. והרוצה להקל אין למחות בו כיון שהוא סברא גדולה.
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> But there is a compelling reason not to forbid this injury of removing blood under medical supervision, for we find that in earlier generations it was customary to let blood even for palliative purposes, as is explained in Shabbat 129(b). . . .So even though matters [concerning bloodletting changed] afterwards. . .nonetheless there must be some therapeutic value even now because such a great change is improbable. And furthermore, doctors today are able to take the blood with almost no pain. Therefore, it is possible that one should not forbid this injury of bloodletting. One who wishes [to donate] should not be prevented, since this is compelling logic.

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184 ים של שלמה, בבא קמא, פרק ח״ סי׳ נ״ט.

185 Ibid., p. 381.

186 Bava Kamma 91b, ד״ה אלא האי.

187 שאלות ותשובות אגרות משה, חשן משפט, חלק א׳ סי׳ ק״ג.

Feinstein seems to be making two points. First, if the taking of blood were in the category of self-injury, it would have been permissible to let blood in the talmudic period only for therapeutic reasons, but not for mere palliative ones. After all, self inflicted injury is forbidden, as stipulated by Ri, even for "need." Yet, the evidence of the Gemara is that it was done even for merely palliative reasons. Hence, if the Gemara did not prohibit it for the palliative need, we should not prohibit it for the financial need of the donor who is giving for compensation. The reason the Gemara did not forbid blood letting for palliative purposes is that there must always also have been some medical benefit to the person. Thus, even though attitudes toward blood letting have changed over time, it is unlikely that the changed reality could be so great that there is no medical benefit to the removal of blood. Furthermore, the very grounding of the prohibition may no longer be applicable. Giving blood should be forbidden only if it constitutes self-injury. Today the medical personnel are able to take it without any pain or injury to the individual at all. Hence, the sole defensible justification for the prohibition is no longer applicable, and the prohibition no longer obtains.

Feinstein is clearly trying very hard to find a היתר, but his grounds are both weak, and we would be disinclined to rely upon them. While it may have been difficult for Rabbi Feinstein to admit the possibility that חז״ל may have been entirely mistaken in believing that there are medical benefits to blood letting, we do not find such a premise so impossible. Therefore, any היתר to donate blood which is based on the premise that the removal of the blood benefits the donor medically would be untenable. Furthermore, enough donors have black and blue marks on their arms after donation to make the claim that all blood donation is painless and without injury unacceptable as a grounding for halakhic decision making.

There is another avenue, however, which seems to be more halakhically sound. The passage in Maimonides from which the prohibition against self-injury is deduced reads in its entirety:[188]

> אסור לאדם לחבול בין בעצמו בין בחברו. ולא החובל בלבד, אלא כל המכה אדם כשר מישראל בין קטן בין גדול בין איש בין אשה דרך נציון, הרי זה עובר בלא תעשה, שנא׳: לא יוסיף להכותו (דב׳ כה:ג), אם הזהירה תורה מלהוסיף בהכאת החוטא, קל וכמר למכה את הצדיק.
>
> It is forbidden for one to injure either himself or someone else. [And the prohibition applies] not only to inflicting actual injury, but rather even anyone who strikes another Jew, whether a minor or an adult, whether a man or a woman, in a manner of strife,[189] violates a negative commandment. Scripture says: "He should not add to his lashes." If the Torah warns against adding lashes in the whipping of the sinner, *kal va'homer* regarding one who is not a sinner.[190]

We quote from the words of Rabbi Abraham Sofer Abraham, who gives a reasonable explanation of the conclusion that should be drawn from the careful wording of the Rambam. The *Nishmat Avraham* wrote:[191]

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[188] M.T. Hilkhot Hovel u'Mazik 5:1.

[189] Based on Exod. 21:22 – וכי ינצו אנשים. Most editions of Maimonides have a marginal gloss suggesting the reading בזיון instead of נציון. For the purposes of the argument soon to be made, either reading would lead to the same result.

[190] The actual scriptural derivation is not relevant to our deliberation. See, however, Sifre Devarim, 286: לא יוסיף, אם היה מוסיף עובר על לא תעשה, and Rashi to Ketubbot 33a, ד״ה ופרכינן חובל, and Sanhedrin 85a.

[191] *Nishmat Avraham*, Hilkhot Aveilut, siman 349:2, letter ג, p. 265; appearing also in המעין, Nisan 5745, p. 27.

> וממה שכתב ״דרך נציון״ משמע דוקא דרך נציון, דהיינו ריב (או דרך בזיון), אבל אם עשה זאת לא לשם ריב (או בזיון) אלא לתועלת, ולא מיבעיא לתועלת של ריפוי אלא אפילו לתועלת של ממון, מותר.
>
> And one can deduce from the fact that he wrote "in a manner of strife," that the implication is that it applies only when done in a manner of strife (or a degrading manner). But if one did it (i.e., inflict injury) not for the purpose of strife (or degradation), but for some positive purpose, not restricted to medical positive purpose but even financial positive purpose, it is permissible.

The wording of Maimonides does not imply an absolute prohibition against inflicting injury. The prohibition is not independent of the intent when inflicting the injury. Only when the intent is to injure or degrade, as opposed to injury or degradation being an unavoidable result of the act, does the act fall under the prohibition of חובל. Surely that is not the case with blood donation. It is not the intent of either the donor or the technician to inflict injury. The intent of both is merely to extract blood, not to engage in strife or degradation. Thus, the prohibition against self-injury is simply inapplicable to the question at hand, and since there is no other conceivably applicable prohibition, there is no prohibition whatsoever.[192]

A different approach is also indicated by Rabbi Joseph Babad in his *Minhat Hinukh* when he wrote:[193]

> ונלע״ד דזה שחייבה התורה בהכה אביו ואמו או בחבירו היינו דוקא בלא רשות, אבל אם אביו ואמו אומרים לו שיכם או יקללם, או חבירו, אינו בלאו הזה, ואינו חייב מלקות ולא מיתה.
>
> It seems to me that when the Torah makes one liable for hitting one's father or mother, or one's fellow, it does so specifically in the case where one did so without permission. But, if one's father or mother ask to be hit or cursed, or [similarly] one's fellow, this negative commandment (i.e., the prohibition against being חובל) does not apply, and one is not liable either for lashing or death.

In the case of blood donation the injury is being inflicted with permission from the donor. Surely the claim of Babad exonerates the technicians from any liability. It is reasonable, as well, to affirm that if the actual inflicter of the injury is exonerated by the grant of permission by the injured party, that party must have had permission to forego his own prohibition against self-injury.[194]

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[192] Two comments: First, it is a little surprising that Feinstein himself did not have recourse to this argument, since he himself makes the same deduction from Maimonides in a different context. In אגרות משה, חשן משפט, חלק א׳, סי׳ ג׳ Feinstein wrote: משמע דאם אינו דרך נציון לא הוי בכלל הלאו כלל. Second, in fairness to Rabbi Menashe Klein, he might interpret Maimonides' clause דרך נציון to refer only to the case of hitting someone without causing any injury. If one hits someone in that way, in the manner of strife, one violates a negative mitzvah even though there is no injury. If there is no injury and no manner of strife, no mitzvah is violated. If, however, one actually causes injury, the negative mitzvah is violated even if not in a manner of strife.

[193] מנחת חנוך, מצוה מ״ח, אות ב׳, דף ע׳ ע״א (ירושלים: הוצאת פרדס, תשי״ט).

[194] The claim of the מנחת חנוך is surely not self evidently true. There is no clear statement in the Talmud that permits one to supersede the prohibition against self-injury. One could even make the opposite case fairly strongly. The clearest statement of the opposite view can be found in the שלחן ערוך הרב, ח״ה, הלכות נזקי גוף ונפש, סע׳ ד׳ where בעל התניא wrote: אסור להכות את חברו אפילו הוא נותן לו רשות להכותו כי אין לאדם רשות על גופו כלל להכותו. A fascinating analysis of the issue can be found in Shlomo Yosef Zevin, לאור ההלכה: בעיות ובירורים (ירושלים: מוסד הרב קוק, תש״ו) in the chapter entitled משפט שיילוק לפי ההלכה, pp. 181-196, esp. pp. 188-189.

Finally, Abraham Sofer Abraham[195] claims that Rabbi Shlomo Zalman Auerbach permitted blood donation to a bank because the act is ultimately one intended for saving a life, even if the primary motivation of the donor may have been monetary. That is, the prohibition against חבלה is inapplicable because it is superseded by the mandate of הצלת נפש.[196]

We claimed above[197] that the majority of poskim, who disagree with the Ramah, forbid self-injury, even for need. Rabbi Moshe Zorger refers[198] to an incident with Abba Hilkiah in order to draw a helpful distinction. On his way home from the fields one day, several sages saw Abba Hilkiah lift up his clothing as he approached a field of thorns and brambles. Obviously, his intention was to prevent tears in his clothing that would be caused by the thorns. When the sages had a chance to discuss this, and other elements of his behavior, with him, they expressed surprise that he lifted his clothing, but allowed himself to be pricked by the thorns. Abba Hilkiah answered: זה מעלה ארוכה וזה אינה מעלה ארוכה – "The skin will heal itself, but the clothes will not."

If the prohibition against inflicting self-injury applies even to cases of need, without any distinctions, the behavior of Abba Hilkiah is difficult to understand. Based on this, Zorger concludes:

> הרי שכדי שלא להפסיד בגדיו התיר לעבור במקום קוצים לחבול בעצמו משום שגופו מעלה ארוכה. להכי נראה לדינא שכל חבלה שאינו מעלה ארוכה, כגון לקטוע ידו ורגלו וכדומה אסור לצורך ממון, אבל לחבול להוציא דם וכה"ג מותר לצורך ממון.
>
> It seems that he (Abba Hilkiah) permitted passing through thorns and injuring himself in order to protect his clothing since his body would heal itself. Thus it seems reasonable to conclude legally that an injury which will not heal itself, for example, amputating a hand, a foot, or something similar, would be forbidden even for monetary need. But to inflict self-injury in order to remove blood, and similar matters, would be permissible for monetary need.

The distinction which Rabbi Zorger draws does not appear in the work of other poskim, at least as far as I have been able to find. Nonetheless, it seems to be a reasonable and even compelling distinction. It leaves the laws of self-injury as follows: (1) all self-injury which will not heal itself is forbidden, even for cause (other than medical necessity); (2) self-injury which will heal itself is nonetheless forbidden in the absence of cause; and, (3) self-injury which will heal itself is permissible for cause.

In the case of blood donation, the cause which permits might be the financial need of the donor who is donating for money, or the ongoing protection of one and one's family in the event that blood is needed by them in the future, or (in an extension of Rabbi Auerbach's claim above) the saving of the life or health even of a stranger or one whose identity is as yet unknown because his need of blood is not yet present.

Though many of the poskim restrict their permission to donate blood to those who have a rare blood type, which is often unavailable for purchase, or which might cost a great

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[195] See above, n. 191.

[196] I shall forego the "pleasure" of a lengthy discourse at this time on the subject of whether this would apply if the chances were significant that the recipient might be non-Jewish. Rabbi Moshe Ze'ev Zorger addresses this issue in וישב משה (ירושלים 1989), סי', צ"ד.

[197] P. 249.

[198] וישב משה, סי' צ"ג, אות ב', דף רמ"ב ע"א, referring to the Gemara in Tan'anit 23b.

deal because it is so rare, there is no reason to be so restrictive. While it is true that there are sometimes acute shortages of rare blood types, hospitals and blood banks are always in need of all types of blood. There never seems to be a glut in the blood market of even the most common types of blood. If there is never enough blood, there is always a need.

Our deliberation thus far has made mention of the donation of blood for compensation. But, the essence of our discussion was about the laws of self-injury and their applicability to blood donation. Now, though, we will turn our attention specifically to the question of the permissibility of donation for compensation.[199] Obviously, there is a relationship between one's view on the issue of self-injury, and one's view on the permissibility of donating blood for compensation. If one forbids self-injury even for need, as does Rabbi Menashe Klein, it must be forbidden to donate blood for compensation even when in financial need. Indeed, Klein says so explicitly at the end of his responsum.[200] According to the views above that exempt blood donation from the laws of self-injury either on the grounds that there is medical benefit to the donor, or that there is no injury, or that the prohibition against self-injury does not apply when the donor gives permission for the injury to be inflicted, or because the category of הצלת נפשות supersedes the prohibition, or because the prohibition against self-injury does not apply to injuries inflicted for cause and which heal themselves – there can be no objection to donation for compensation based on the prohibition of חבלה. Indeed, that is the thrust of Rabbi Feinstein's responsum,[201] the comment of Rabbi Auerbach quoted by Abraham Sofer Abraham,[202] and the responsum of Rabbi Zorger.[203]

The question that needs yet to be addessed, however, is whether there are other grounds on which receiving compensation for blood donation should be considered halakhically prohibited. The issue that might be raised is that the blood donation and the bone marrow donation are in the category of a mitzvah, and perhaps the performance of a mitzvah for compensation is itself forbidden. Without going into the history of the acceptance of pay by those who perform mitzvot – like teachers, doctors, *mohalim*, and *shohatim* – it is now an accepted practice. Indeed, the Radbaz makes an interesting comment about those who might practice מילה without pay. He wrote concerning one who had taken an oath not to derive any benefit from the inhabitants of a city, whose services were then needed, and about whom Maimonides codified that his oath should be annulled:[204] דאפ׳ אם רוצה לעשות בחנם מתירין לו, דאסיא במגן מגן שויא[205] וכיון שאינו נוטל שכר לא יעשה המצוה כתקנה – "That even if he wishes to perform the services without cost,[206] the oath should be annulled, because 'a doctor who treats for nothing is worth nothing,'[207] and since he would be taking no wage, he would not be fastidious in performing the mitzvah correctly."

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[199] There is clear evidence of some types of sale. In the Mishnah (Nedarim 9:5, 65b), Rabbi Akiva insists that a man pay the full amount of his wife's ketubbah, even if he has to sell his own hair to eat! It seems, too, that Rabbi Akiva was drawing on his own family experience, for the Yerushalmi (Shabbat 6:1, 7d) records that his wife used to sell her hair in order to support him at the academy.

[200] See above, n. 183.

[201] See above, n. 187.

[202] See above, p. 252.

[203] See above, p. 252.

[204] M.T. Hilkhot Shevuot 6:9.

[205] בבא קמא פ״ה ע״א.

[206] Thereby avoiding the need to annul the oath since he would not be deriving any benefit from the inhabitants of the city since he would be acting without charge.

[207] Bava Kamma 85a.

We must be realistic in this matter. If we declare compensation for blood donation (or blood platelets, or bone marrow) to be halakhically forbidden because the donation is a mitzvah, we will succeed mainly in reducing the supply of available blood. Donors, after all, have the right to refuse to donate. If receiving fair and reasonable compensation for their time and pain can serve as an inducement to donate, we should not seek to impose a level of "piety" upon them that will do nothing more than reduce the available supply.

We might wish to make a theological claim similar to that made by Rabbi Moshe Sternbuch:[208]

> אם תורם מדמו למצוה לשם שמים, הלוא זוכה למצוה גדולה של הצלת נפש מישראל שאין כמוה ואם לוקח על זה כסף לא נוכל למנוע אותו ולהורות שצריך בחנם דוקא, אבל ודאי ששכרו מן השמים פחות.
>
> If one donates his blood as an act of מצוה לשם שמים, he merits the great and incomparable mitzvah of saving a life. But if he takes compensation for this, we should not prevent him from doing so by issuing a decision that the donation must be free. Surely, though, his heavenly reward will be less.

We would even wish to add the admonition of Rabbi Moshe Ze'ev Zorger[209] that

> אם אינו נותן דמו רק בשביל כסף ועושה מזה איזה מסחר, הגם דנראה דלפי מה שפירשתי אין לאסור מדינא דהא חבלה מותר לצורך פרנסה אם הוא מעלה ארוכה, מכל מקום מכוער הדבר.
>
> If one does not give his blood except for compensation, making a type of business of it, even though it follows from what I have explained that it is not forbidden by law since self-injury is permissible for purposes of a livelihood when the body heals itself, it is nonetheless unseemly.

But, we would be ill advised to prohibit compensation for the donation of blood or bone marrow.

We shall have to return to this issue later, as well. Suffice it for now to affirm that the distinction drawn by Rabbi Zorger between מעלה ארוכה and not מעלה ארוכה may, but also may not, allow us to distinguish between compensation for blood or bone marrow, on the one hand, and the creation of markets for the sale of other organs (like kidneys, for example), on the other.

We can deal with the question of Shabbat blood donation with some brevity, since two quotations epitomize what our view of the subject should be. Rabbi Moshe Ze'ev Zorger wrote the following:[210]

> והנה זה ברור לדינא שבשבת אסור לתרום דאפשר לתרום בחול. ומ"מ יתכן שאם הוא עת מלחמה ואין להם זמן אחר להקיז וליקח תרומות דם רק בשבת, כגון שפרצה מלחמה פתאום ואין די דם מהמוכן עד שיוכלו להמתין עד יום ראשון או שקשה מאוד ליקח ביום ראשון דם.... לא ידעתי מקום לאסור ליתן דם.

[208] תשובות והנהגות, מהדורה חדשה (ירושלים תשנ"ב), חלק א', סי' תתצ"ח, עמ' תקפ"ג.

[209] See p. 246a of Zorger's responsum detailed above, n. 198.

[210] וישב משה (ירושלים, 1989)' סי' צ"ד, דף רמ"ו ע"א.

> The following is clear legally, that it is forbidden to give blood on Shabbat since it is possible to donate during the week. Nonetheless, it is likely that if it is war time, and there is no other time to take the donations than Shabbat, as, for example, if the war broke out suddenly and there is insufficient available blood to allow waiting until Sunday to take donations, or if it will be very difficult to take the donations on Sunday. . . .[Under such conditions,] I know no reason to forbid blood donations [on Shabbat].

In a similar vein, but expanded beyond the eventuality of war, Rabbi Joshua Isaiah Neubirt wrote:[211]

> כשיש צורך בעירוי דם לחולה ואי אפשר להשיג דם מן המוכן בבנק הדם, מותר לבריא לתרום דם בשבת, ואף מותר, בעת הצורך להשתמש ברכב להבאת התורמים או ציוד ההתרמה, ומותר לעשות גם אם התרומה מותנית ברישום שם התורם.

> When a blood transfusion for a sick patient is needed, and it is impossible to obtain blood from the available supply in the blood bank, it is permissible for a healthy person to donate blood on Shabbat. It is even permissible, when necessary, to use automobiles to transport the donors or the donation equipment. And it is permissible [to carry out the donations] even when they are contingent upon recording the names of the donors.

Under normal circumstances, blood donation on Shabbat is inappropriate, and entails prohibited acts. It should be avoided whenever possible. Blood donation on Shabbat is permissible, however, in circumstances that can be defined as פקוח נפש. When it would be permissible to desecrate the Sabbath in other ways, it is also permissible to desecrate it through blood donation. When Shabbat blood donation is permissible, one should seek to avoid ancillary Sabbath desecrations, but when they are unavoidable, they do not render the donation forbidden. Rather, the ancillary desecrations should be violated, and the blood donated and collected.

Conclusions

1. There is no halakhic impediment to the donation of either blood or bone marrow for the use of an identifiable individual. Indeed, under such circumstances donation is a great mitzvah and should be greatly encouraged and lauded. It should be spoken of in terms of moral imperative, reflected in the halakhic categories of ועשית הישר והטוב and, possibly, לפנים משורת הדין. Those in positions of authority or influence should couch their encouragement to donate in the strongest possible religious and theological terms, stressing the obligation of Jews to behave morally and ethically. Refusal to donate is not, however, a violation of the negative commandment לא תעמוד על דם רעך, for which physical coercion would be halakhically justified.

2. It is permissible, indeed, desirable and praiseworthy, to donate blood to a blood bank for later use either by oneself or by someone else. Such donation does not put the donor in violation of the prohibition against self-injury.

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[211] שמירת שבת כהלכתה, מהדורה חדשה (ירושלים: בית מדרש הלכה – מוריה, תשל״ט), פרק מ׳, סע׳ כ״ה in the name of Rabbi Moshe Wasserman, שאילת משה, סי׳ נ׳.

3. Though it should be discouraged as unseemly, donation of blood or bone marrow for compensation is not halakhically forbidden. Of course, if civil law forbids accepting compensation, it becomes forbidden under the category of דינא דמלכותא דינא.

4. Blood donation on Shabbat is forbidden except under circumstances of פקוח נפש. Under such circumstances, even prohibitions which are ancillary to the actual donation process become permissible, when unavoidable.

Part IV: Live Donors – Kidneys

This paper was approved by the CJLS on March 16, 1999, by a vote of fifteen in favor and one abstaining (15-0-1). Voting in favor: Rabbis Kassel Abelson, Ben Zion Bergman, Elliot N. Dorff, Baruch Frydman-Kohl, Myron S. Geller, Nechama D. Goldberg, Arnold M. Goodman, Judah Kogen, Vernon H. Kurtz, Lionel E. Moses, Mayer Rabinowitz, James S. Rosen, Joel Roth, Elie Kaplan Spitz, and Gordon Tucker. Abstaining: Rabbi Susan Grossman.

The Committee on Jewish Law and Standards of the Rabbinical Assembly provides guidance in matters of halakhah for the Conservative movement. The individual rabbi, however, is the authority for the interpretation and application of all matters of halakhah.

שאלה

Is it permissible to donate a kidney? If so, is it ever halakhically required? If so, when? May one donate a kidney for compensation? Are there instances in which donation would be forbidden even if the potential donor wishes to donate?

תשובה

The essential issue which must be discussed thoroughly before any answers can be offered to the שאלות of this section is the question of putting oneself in danger for the benefit of another. The issue, as we shall see, has many subissues, and is a matter of considerable disagreement among poskim. We shall be best served by presenting the central primary texts first, and following them through the deliberations of poskim.

Maimonides records the following:[212]

> כל היכול להציל ולא הציל עובר על לא תעמוד על דם רעך. וכן הרואה את חבירו טובע בים או ליסטים באים עליו או חיה רעה באה עליו ויכול להצילו הוא בעצמו או שישכור אחרים להצילו ולא הציל, או ששמע גוים או מוסרים מחשבים עליו רעה או טומנין לו פח ולא גלה אוזן חבירו והודיעו, או שידע בגוי או באנס שהוא קובל על חבירו ויכול לפייסו בגלל חבירו ולהסיר מה שבלבו ולא פייסו, וכל כיוצא בדברים אלו, העושה אותם עובר על לא תעמוד על דם רעך.
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> Anyone who is able to save one in danger and who does not do so violates the negative commandment, "Do not stand idly by the blood of your fellow." And similarly, if one sees one's fellow drowning in the sea, or being attacked by bandits or by a dangerous ani-

[212] M.T. Hilkhot Rozeah 1:14.

> mal, and is able to save him either by himself or by hiring others to save him, and does not do so; or, if one heard either non-Jews or informers plotting evil against someone, or laying a trap for him, and did not inform the person; or, if one knew about a non-Jew or some violent person who was lodging a complaint about his fellow, and he could appease that person on behalf of his fellow and did not do so; and all such similar matters, whoever does these things violates, "Do not stand idly by the blood of your fellow."

For the moment, we shall suffice with the following brief observations about this quotation from Maimonides. First, the obvious talmudic source which serves as Maimonides' basis is the Gemara in Sanhedrin 73a. Second, while the baraita quoted there by the Gemara uses the phrase חייב להצילו – "He is obligated to save him" – Maimonides does not.

In commenting on this passage, Joseph Karo writes:[213] וכתב הגהות מיימון... בירושלמי מסיק אפילו להכניס עצמו בספק סכנה חייב עכ״ל. ונר׳ שהטעם מפני שהלה ודאי והוא ספק – "The *Hagahot Maimon[iyot]* wrote. . . 'The Yerushalmi concludes that one is even obligated to put oneself in uncertain danger.' The reasoning of the Yerushalmi seems to be that the endangered person is a case of 'certainty,' while the potential saver is a case of 'doubt.'"[214] At face value, Karo understands the *Hagahot* to imply that the certainty of the death of the endangered person supersedes the uncertain danger of the potential saver, and compels him to attempt to save, even though he is himself potentially jeopardized thereby.

The Tur[215] basically quotes the Rambam. Karo, in the Beit Yosef, refers again to the comment of the *Hagahot*, using almost exactly the same language as he did in the *Kesef Mishneh*, but adding וכל המקיים נפש אחת מישראל כאילו קיים עולם מלא – "And anyone who preserves one life of Israel is as though he preserved the entire world." Note, though, that neither the Rambam nor the Tur state explicitly that one must put oneself in jeopardy in order to save the life of another. It is, apparently, precisely because they do not say so that Karo adds the comment to each. Additionally, and perhaps surprisingly considering his comments on Maimonides and the Tur, the Shulhan Arukh itself also contains no statement obligating one to put oneself in jeopardy in order to save another. Neither the Rosh nor the Rif has such a comment either.

None of the sources that refer to the Yerushalmi clarify where the passage appears in the Yerushalmi. Among the few who adopt the view clearly, Rabbi Ya'ir Haim Bacharach seeks to buttress support for the unidentified Yerushalmi from the Bavli. He wrote:[216]

> כתב בכסף משנה ספ״א דהלכות רוצח ושמירת נפש בשם הירושלמי שמחויב לכנוס לספק נפשו להציל נפש חבירו וש״ס דידן ב״מ ד׳ ס״ב [ע״א] נמי הכי משמע התם שאם ישתו שניהם ימותו ודאי מה שאין כן בספק יש לומר ישתו שניהם ולא ישתה הוא לבדו וימות חבירו ודאי, וא״כ מחויב לכנוס לספק נפשות אפי׳ בספק הצלה.
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> The *Kesef Mishneh* wrote in the name of the Yerushalmi at the end of chapter one of *Hilkhot Rozeah* that one is obligated to put one-

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[213] Kesef Mishnah, *ad locum.*

[214] The comment attributed by Maimonides to the *Hagahot Maimoniyot* does not appear in our editions of the Mishneh Torah. It does, however, appear in the Constantinople printing of 1509, and reads: בירושלמי מסיק אפילו להכניס עצמו בספק סכנה.

[215] Hoshen Mishpat 426.

[216] שאלות ותשובות חות יאיר, סי׳ קמ״ו.

> self in jeopardy in order to save the life of another. And our Talmud, in Bava Metzia 62[a] also implies the same thing by referring to a case in which if both drink they will surely die, but implying that were it doubtful whether both would die if they both drank, perhaps both should drink rather than he alone drinking and bringing about the certain death of the other. Thus, [the Bavli also implies that one is] obligated to jeopardize himself, even when the ultimate saving is also in doubt.

The *Havat Ya'ir* refers to the passage which contains the dispute between ben Petura and Rabbi Akiva concerning the case of two who were in the desert, but had only a small amount of water. About this case the Gemara claims: אם שותין שניהם מתים, ואם שותה אחד מהם מגיע לישוב – "If they both drink, they will die; but if only one drinks, he will be able to arrive at a populated area [and get more water]." Ben Petura affirms that they should share the water, even if both die, rather than that one should see the death of the other. Rabbi Akiva claims that the verse וחי אחיך עמך – "That your fellow might live with you"[217] – implies that חייך קודמין לחיי חברך – "Your life takes precedence over the life of your fellow."

Bacharach understands this passage to intimate agreement between the Bavli and Yerushalmi that one must jeopardize oneself in attempting to save another. He deduces this by affirming that the dispute between ben Petura and Rabbi Akiva refers to a case where it is absolutely certain that both will die if they share the water. In that case ben Petura says they should share, while Rabbi Akiva – whose view is normative – says that one should drink. Implied, however, is that in a case where it is not certain that both will die if they both share, even Rabbi Akiva would agreee that they should share. Since the law follows the view of Rabbi Akiva, it would follow that one is obligated to put oneself in potential danger in order to attempt to save the life of another.[218] If the analysis of the *Havat Ya'ir* is uncontestable, the combined support of the Bavli and the Yerushalmi for the position it espouses would make it a potent argument.[219]

The view of the *Havat Ya'ir* was taken on directly by Rabbi Eliyahu ben Samuel of Lublin.[220] He claimed that the dispute between ben Petura and Rabbi Akiva is in a case of doubt. That is, though the chances are that they both will die if they share the water, it is not absolutely certain that they will. In this case ben Petura says they should share, and Rabbi Akiva says that only one should drink, to insure that one survives even if that also insures that the other dies. Since the view of Rabbi Akiva is normative, it follows from the *Yad Eliyahu* that the passage in Bava Metzia does not support the claim of the

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[217] Lev. 25:36.

[218] Our major focus, at the moment, is on the question of putting oneself in potential jeopardy. However, we should not overlook the other important implication of this statement of Bacharach. He claims that one must put oneself in potential jeopardy even if it is uncertain that one's efforts to save the other will be successful. One could have held that it is obligatory to put oneself in danger for the benefit of another only when it is certain that one's efforts will succeed, even if one dies in the process.

[219] Bacharach ends his analysis with the claim וצ"ע. He does not exactly explain what requires further investigation. Perhaps he is wondering why, if the Bavli supports the view of the Yerushalmi, the poskim seem to ignore them.

[220] He lived in the second half of the 17th century and the first part of the 18th century, serving communities in Poland, Lituania and Moravia. He died in Hebron in 1735. His responsa, שו"ת יד אליהו, were published in Amsterdam in 1712. The responsum in which he deals with our subject of discussion is no. 43, pp. 48a-50b of the book.

Yerushalmi, because Rabbi Akiva mandates that one *not* put oneself even in doubtful jeopardy for the benefit of another.[221] Indeed, the passage from the Bavli contradicts the view of the Yerushalmi.[222]

The *Yad Eliyahu* is not the only one to reject the explanation of this passage given by the *Havat Ya'ir*. Rabbi Naftali Zevi Berlin, the Netziv, also understands that passage differently from Bacharach. The passage itself appears not only in the Bavli, but also in the Sifra.[223] There it is clear that both ben Petura and Rabbi Akiva base their views on the verse וחי אחיך עמך. Ben Petura requires both to drink because he understands the verse to mean: "Your brother must live together with you." Ostensibly, the implication seems also to be that if your brother cannot live together with you, you, too, should not live. Rabbi Akiva understands: "Your brother should live with you," but you come first. If he can live "with you," fine; if he cannot live "with you," you take precedence.

The Netziv understands the dispute as does the *Yad Eliyahu*, but comes at it by logic. He wrote:[224]

> ולכאורה דעת בן פטורי תמוה, וכי בשביל שאי אפשר לקיים וחי אחיך מחוייב הוא להמית את עצמו, חס וחלילה, ואיזו תועלת תהיה מה שיתן גם לחבירו. אלא הענין דאם ישתו שניהם על כל פנים יחיו יום או יומיים גם שניהם, שלא יגיעו לישוב, ואולי עד כה יזדמן להם מים, מה שאין כן אם לא יתן לחבירו הרי ימות בודאי בצמא, ובא ר׳ עקיבא ודרש וחי אחיך עמך חייך קודמין.
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> It seems that the view of ben Petura is astonishing. Is it reasonable that just because one cannot fulfill "Your brother shall live," that he should be obligated to kill himself, God forbid? And what will it help to share the water with his fellow [since they will both die for sure anyway]? Rather, the issue is that if they both drink, they will both live for another day or two. And even though they will not reach a populated area, perhaps they will find some water during that period [and both live]. But that would not be the case if he did not share with his fellow, for his fellow would then die of thirst with certainty. [Thus, ben Petura insists that they share in the hope of ultimately fulfilling "Your brother shall live *together with you*]. But Rabbi Akiva came along and explained the verse to mean: "Though your brother should live together with you," your life comes first.

For Berlin it is so illogical that two should certainly die when one could certainly live, that he affirms that ben Petura could not have meant that. He must have been referring to

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[221] We shall not deal at length with the textual evidence for and against the views of Bacharach and Eliyahu of Lublin. Suffice it to say, however, that the phrase אם שותים שניהם מתים seems to support the *Havat Ya'ir*, implying that if both drink they will surely both die. On the other hand, the phrase ואל יראה אחד מהם במיתת חברו is problematic for him, because surely one will still see the death of the other (it being highly unlikely that both will die at exactly the same instant). For the *Yad Eliyahu*, on the other hand, that phrase is less problematic. He understands it to mean: Both should drink when it is not clear that both will die, rather than one of them drinking and surely seeing the death of the other because *he causes that certain death by withholding water from him*. For the Yad Eliyahu, though, the phrase אם שותים שניהם מתים is not so smooth.

[222] We shall return to this point, and its possible implications on our subject, below.

[223] Parashat Behar, Parashah 5, Mishnah 3, to Lev. 25:36, Weiss ed., p. 109c.

[224] *She'eltot*, no. 147, *Ha'amek She'elah*, near the end of par. 4, p. 212.

a case when two might die because they share, but they might also both live. It is precisely the element of doubt that justifies ben Petura's view. The normative view, however, is that of Rabbi Akiva for whom the certain life of the one takes precedence over the doubtful life of both. Hence, for Berlin, too, this passage implies that one ought not put oneself in even potential jeopardy for the benefit of another.

What's more, the Netziv finds support for his understanding from elsewhere in the Gemara, as well. The Talmud[225] proves the principle that life endangerment supersedes the Sabbath by quoting a variety of biblical proofs offered by a variety of sages. The last verse quoted as proof, by Samuel, is וחי בהם – "And live by them."[226] Samuel says: וחי בהם ולא שימות בהם – "You should live by them, not die because of them." When the Gemara proceeds to ask how we know that even a case of potential life endangerment supersedes the Sabbath, it rejects all of the verses quoted by the sages other than Samuel. None of those verses necessarily applies to ספק פקוח נפש, but Samuel's does. Thus, וחי בהם is applied by the Talmud itself to ספק פקוח נפש, implying that even potential life endangerment supersedes the other mitzvot of the Torah. Thus, the mitzvah to save the life of another is also superseded in the face of potential life endangerment to the saver.

In the final analysis, then, the Netziv and the *Yad Eliyahu* agree that the passage quoted by the *Havat Ya'ir* to support the position of the Yerushalmi not only does not support the Yerushalmi, it contradicts it.

Rabbi Haim Heller[227] also rejects the explanation of the *Havat Ya'ir*. Bacharach had deduced from אם ישתו שניהם ימותו that the case was about inevitable death to both, and that ben Petura and Rabbi Akiva were discussing the same case. Thus, it is only in the case of inevitable death to both that Rabbi Akiva allows one to drink without sharing, whereas if it were doubtful that both would die, even Rabbi Akiva would demand sharing. Heller claims that the phrase אם ישתו שניהם ימותו was correctly understood by the *Havat Ya'ir* to imply certain death for both. But, Bacharach is mistaken, says Heller, in thinking that ben Petura and Rabbi Akiva must both be referring to exactly the same case. The words of ben Petura are a רבותא, applying only to ben Petura. That is, he indeed does require that both drink, even if the death of both is certain. Rabbi Akiva's disagreement with him, though, is not restricted to that case. Rabbi Akiva believes that even if the death of both is not certain, the water should not be shared, but drunk by one of them.[228]

It is not only moderns who assume that the dispute between ben Petura and Rabbi Akiva is about ספק נפשות. The יחוסי תנאים ואמוראים also makes the same claim:[229] ונראה לפרש מפני שמהלכין בדרך ושניהם בספק, שבודאי אין במדבר מים לטרוח ולהביא – "[The essence of the dispute] seems to be linked to the fact that they are walking on the way and are both in potential danger, since water is not readily available in the desert."

[225] Yoma 85a and b.

[226] Lev. 18:5.

[227] In his edition of the *Sefer ha-Mitzvot* of Maimonides, negative commandments, no. 297, n. 9, pp. 175.

[228] What seems to lead Rabbi Heller to this explanation is that if Bacharach is correct, one must jeopardize oneself to save another even when it is not certain that the saving will actually be effective (see above, n. 218). That claim, says Heller, seems to go beyond the demand of the Yerushalmi which לא אמר אלא שמחוייב להציל את חבירו ואפ׳ אם יכניס את עצמו לספק נפשות והיינו היכא שבודאי יצילנו, אבל משום ספק הצלה לא מצינו – "Demands only that one put oneself in potential jeopardy in order to save another, but only when the saving is certain, but there is no demand [to put oneself in potential jeopardy] when the saving is doubtful." Heller feels that the conclusion to which Bacharach is drawn by his understanding of the passage is so unlikely that it calls the entire understanding into question, and forces its rejection.

[229] Judah Leib Maimon ed. (Jerusalem: Mosad ha-Rav Kook, 5723), p. 33.

We were led to the discussion of the past few pages by the fact that Bacharach affirmed the position of the Yerushalmi, as stipulated by the *Hagahot Maimoniyot*, and contended that the position was supported by the Bavli. We have been analyzing whether his understanding of the Bavli is compelling. We have quoted the opinions of the *Yad Eliyahu*, the *Ha-amek She'elah*, Rabbi Haim Heller, and the יחוסי תנאים ואמוראים, all of whom find that understanding wanting. Given the understanding of these four, the very passage adduced by Bacharach as support, contradicts his claim and indicates a disagreement between the Bavli and the Yerushalmi. Of course, of the four, only the Netziv sought support for his understanding of the passage from elsewhere in the Bavli. For three of the four, at least, the matter boils down to a difference of opinion on the meaning of the *sugya*, but their interpretations do not disprove Bacharach's.

As the *Havat Ya'ir* took a clear stand in favor of the view of the Yerushalmi, there is a chain of others who took a clear stand against the view of the Yerushalmi. We shall quote a couple of them. The ספר איסור והיתר wrote:[230]

> הרואה את חבירו טובע בנהר או חיה רעה או ליסטים באין עליו ויכול להצילו ואינו מציל נחשב כאיו הרגו.... ומיהו אם בודאי היה גם כן הוא מסוכן עמו אין לו לסכן גופו מאחר שהוא חוץ מן הסכנה, אע"פ שרואה במיתת חבירו כדדרשינן וחי אחיך עמך ולא מצינו חילוק בין סכנה למיתה ודאית.
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> If one who sees his fellow drowning in the river or attacked by an animal or robbers and is able to save him but does not, he is considered as though he had killed him. . . .Nonetheless, if he would also become endangered together with him, he should not endanger himself, since he is currently not in danger, even if that results in the death of the other. For thus have we understood "And your fellow should live together with you," and there is no distinction between endangerment and certain death.

Similarly, the *Sema* (Rabbi Joshua Falk, 1555-1614) wrote:[231]

> ובהג"מ כתבו דבירושלמי מסיק דצריך אפי' להכניס עצמו לספק סכנה.... גם זה השמיטו המחבר ומור"ם ז"ל, ובזה יש לומר כיון שהפוסקים הרי"ף והרמב"ם והרא"ש והטור לא הביאו בפסקיהם משום הכי השמיטוהו גם כן.
>
> The *Hagahot Maimoniyot* wrote that the Yerushalmi concludes that one must even put oneself into potential danger. . . .This, too, is omitted by Karo and Isserles, of blessed memory. It is reasonable to claim that they omitted this because neither the Rif, the Rambam, the Rosh, or the Tur included it in their Codes.

The *Eliya Rabbah*[232] quotes the *Issur ve-Heter* as his decision in the matter. And Rabbi Hayyim Benveniste (1603-1673) agrees, writing:[233] אבל אם הבא להציל יש שיסתכן בהצלתו אין לו להצילו וליכנס עצמו בספק סכנה – "But if the one who attempts to save would

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[230] Kelal 59:38. The book is often attributed to Rabbi Jonah Gerondi, but was most probably written by a Rabbi Jonah who was a student of Rabbi Israel Isserlein.

[231] S.A. Hoshen Mishpat 426, *Sema*, par. 2.

[232] Orah Hayyim 329:8. The Eliya Rabbah was written by Rabbi Eliyahu Shapira, 1660-1712.

[233] *Kenesset ha-Gedolah*, Hoshen Mishpat 425:10.

endanger himself in the act of saving, he ought not to save him by putting himself in potential danger." Rabbi Shneur Zalman of Lyady (1745-1813) is also very clear, sounding much like the *Issur ve-Heter*. He wrote:[234]

> ומ"מ אם יש סכנה אין לו לסכן עצמו כדי להציל את חבירו מאחר שהוא חוץ מן הסכנה, ואף שרואה את מיתת חבירו, ואע"פ שהוא ספק וחבירו ודאי מ"מ הרי נאמר וחי בהם ולא שיבא לידי ספק מיתה ע"י שיקיים מה שנאמר לא תעמוד על דם רעך.
>
> Nonetheless, if there is danger, one should not endanger himself in order to save his fellow, since he is currently not in danger, even if that results in the death of his fellow. And even though his death is "doubtful," while his fellow's is "certain," nonetheless, it says: "And live by them," and not that he should put himself in potential danger by virtue of fulfilling the verse, "Do not stand idly by the blood of your fellow."

Rabbi Shnuer Zalman is equally clear in another place as well.[235] ואפי' ליכנס בספק סכנה י"א שצריך כדי להציל את חבירו ממיתה ודאית ויש חולקים בזה, וספק נפשות להקל – "And even regarding putting oneself in danger there are some who say that one must do so in order to save one's fellow from certain death, while others disagree. And [we apply the principle that] we rule leniently in matters of doubt where life may be involved." The קולא, obviously, is that we do not require one to endanger oneself, even if that will result in the death of another.

At some point it seems reasonable to seek the source in the Yerushalmi which is referred to by so many, but not defined. The earliest identification of the source that this author is able to find is by the *Yad Eliyahu*. Though admitting near the beginning of his responsum that he is not certain that the *Hagahot Maimoniyot* referred to the same Yerushalmi he would later explain, the *Yad Eliyahu* refers to a passage of Yerushalmi as a potential source for deducing that one must put oneself in potential danger in order to attempt to save the life of another. His doubts nothwithstanding, everyone else who attempts to define where the source in the Yerushalmi is, accepts the identification of the *Yad Eliyahu* as accurate. Let us look at the source:[236]

> רבי אימי איתצד בסיפסיפה. אמר ר' יונתן יכרך המת בסדינו. אמר ר' שמעון בן לקיש עד דאנא קטיל אנא מיתקטיל אנא איזיל ומשיזיב לי' בחיילא. אזול ופייסון ויהבוניה ליה.
>
> Rabbi Ami was trapped in a place of great danger. Rabbi Yonatan said: "Let the dead be wrapped in his shroud." Rabbi Shimon ben Lakish said: "Either I shall kill or I shall be killed, but I am going to save him by force." He went and appeased them, and they handed him over to him.

The translation above reflects the understanding of the P'nei Moshe on this passage. Assuming it to be the passage to which the *Hagahot Maimoniyot* referred, it must be understood as follows: Rabbi Yonatan and Resh Lakish disagree over the appropriate response to the plight of Rabbi Ami. Rabbi Yonatan considers it forbidden. Rabbi Ami

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[234] *Shulhan Arukh ha-Rav*, Orah Hayyim 329:8.

[235] Ibid., Hoshen Mishpat, *Hilkhot nizkei guf va-nefesh*, par. 7.

[236] J. Terumot 8:4, 32b (46b).

should prepare to die. Resh Lakish, however, disagrees and affirms that though he will put himself in potential danger, he will go attempt to save Rabbi Ami. The *Hagahot* understands their dispute to be over whether or not one is obligated to endanger oneself for the benefit of another. Rabbi Yonatan says no, and Resh Lakish says yes. The *Hagahot* feels that the thrust of the Yerushalmi favors the view of Resh Lakish, whose act should be viewed as a מעשה רב. Hence, "the Yerushalmi concludes that one is even obligated to put oneself in danger."

In his response to this passage, the *Yad Eliyahu* says: אפשר לומר דר׳ יונתן דאמר יכרוך המת בסדינו רוצה לומר דאינו מחוייבים להסתכן, אך ריש לקיש עביד ממדת חסידות ולא מצד דין – "It is possible to say that Rabbi Yonatan meant to imply by his statement, 'Let the dead be wrapped in his shroud,' that there is no [legal] obligation to endanger oneself. But Resh Lakish acted out of piety, but not law." In other words, the fact that Resh Lakish took the risk does not mean that one must take a risk. It is permissible, as an act of piety, to endanger oneself for another, but it is not mandatory. The same position is affirmed by the Netziv:[237] מכל מקום, הרוצה להחמיר רשאי והיינו עובדא דרבי שמעון [בן לקיש] בירו׳ דתרומות, ולא פליג על ר׳ יונתן בדינא, אלא החמיר על עצמו – "In any event, one who wishes to be strict upon himself is allowed, and that is the case of Rabbi Shimon [ben Lakish] in the Yerushalmi Terumot; and not that he disagrees with Rabbi Yonatan about the law, but that he was strict for himself."

Rabbi Haim Heller[238] also questions whether the Yerushalmi implies what the *Hagahot* affirms:

> ואמנם בעיקר הדין שמביא הגהות מיימוניות מירוש׳ והוא כמו שהבינו כולם מירושל׳ תרומות (ספ״ח)... ומכאן המקור לכל הדין. ולענ״ד שהראשונים פירשו פי׳ אחר בירושל׳ שמוכח היפך הדין הזה וה״ק רשב״ל עד דאנא קטל פי׳ אם אלחם אתם וטרם שאהרגם אנא מתקטל יוכל להיות שיהרגוני ולזה אינו מחוייב כלל אנא איזיל ומשיזיב ליה בחיילא מוטב לי שאפדנו בממון וכך עשה אזל ופייסון ומעתה כמובן לא קשיא מידי על הא דהשמיטו הפוסקים דין זה.
>
> Indeed, regarding the law quoted by the *Hagahot Maimoniyot* on the basis of the Yerushalmi, it is, as all have said, based on Yerushalmi Terumot (end of chapter eight). . .which serves as the basis for the decision. And it seems to me that the Rishonim [must have] explained it differently, such that it yields the opposite of this law [as understood by the *Hagahot*], to wit: This is what Resh Lakish meant: עד דאנא קטל – "If I fight them, and before I kill them" – אנא מתקטל – "It could be that they will kill me" – for which he is not at all obligated. אנא איזיל ומשיזיב ליה בחיילא – "I am better off ransoming him with money" – which is what he did, אזל ופייסון ("He went and appeased them"). And now it is completely comprehensible why the poskim omitted this law [of the *Hagahot*].

In essence, all of the commentators are trying to figure out why the classical codifiers seem to ignore the view of the *Hagahot*. Heller's answer is that they all ignored it because they understood the Yerushalmi very differently from the way the *Hagahot* understood it. The Yerushalmi, they understood, rejects the claim that one must put one-

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[237] *She'eltot*, no. 129, *Ha'amek She'elah*, letter four, p. 76; cf. no. 147, *Ha'amek She'elah*, letter four, p. 212.

[238] See above, n. 227.

self in potential danger for the benefit of another. Even Resh Lakish who says: "Why should I take the chance of getting myself killed before I can kill enough of them to save Rabbi Ami. I am under no legal obligation to do so, thereby endangering my life. I'll take ransom money and go to buy his freedom," does not believe that he is legally obligated to endanger himself. Why did the poskim ignore the view of the *Hagahot*? They ignored it because they disagreed with the way he understood the Yerushalmi on which his decision was based![239] An explanation of the Yerushalmi very similar to Heller's was also given by Rabbi Ovadiah Yosef.[240]

Rabbi J. David Bleich[241] rejects Yosef's explanation as not being in accordance with the plain meaning of the text; and Heller's explanation as strained. It is worth noting, however, at least in passing, that the reading of the Venice printing and the Leiden manuscript has עד דאנא קטיל ואנא מתקטיל which would lend support to the meaning, "Rather than that I should go and kill while being killed." What's more, the ending of the story – אזל ופייסון ויהבוניה ליה – "He went and appeased them, and they gave him to him" – seems also to support the view that force was not the method used by Resh Lakish.

We have now been analyzing the only Yerushalmi reference which is quoted as being the source of the claim of the *Hagahot Maimoniyot*. We have raised several explanations for why the poskim may have ignored this decision of the *Hagahot*. The first is that there is a dispute in the Yeruashalmi passage, and no incontrovertible evidence that the view of Resh Lakish is normative. Perhaps it is the view of Rabbi Yonatan which is normative. Second, perhaps there is no real dispute between Resh Lakish and Rabbi Yonatan at all. Both agree that one is under no obligation to endanger oneself for the benefit of another. The behavior of Resh Lakish, then, is to be understood either as his having acted out of piety,[242] but not intimating an obligation to endanger oneself; or, that even Resh Lakish did not endanger himself, because he went to ransom rather than to force or because he went with a large contingent that could easily have overpowered those holding Rabbi Ami, without endangering them.

There is one further comment on the Yerushalmi to be made before we move on. One author, Rabbi Yehiel Ya'akov Weinberg,[243] believes that the Yerushalmi can be understood to imply that even Rabbi Yonatan agrees that one must endanger oneself for the benefit of another. According to him, Rabbi Yonatan would agree that one must endanger oneself for the benefit of another, but only when it is clear that the effort, if carried out, will result in saving the person in danger. In the case of Rabbi Ami, Rabbi Yonatan thought it was probably a lost cause. There would probably be no success in saving him. That is what he meant by יכרך המת בסדינו. But were saving Rabbi Ami certain, even Rabbi Yonatan would agree that one must endanger oneself. According to his explanation, one must say that Resh Lakish was certain that his efforts would succeed, and that is why he undertook the mis-

[239] Rabbi Menashe Klein, משנה הלכות, vol. 6, no. 324, p. 394, finds this thesis problematic because קשה לפרש כן נגד כל הראשונים והאחרונים ז"ל שלא פירשו כן – "It is difficult to explain thus against all the Rishonim and Aharonim who did not explain thus." I do not understand Klein's objection. After all, we don't have explanations of Rishonim on this passage in the Yerushalmi. All we have is their continued quotation of the *Hagahot* that such a deduction can be made from the Yerushalmi.

[240] See his thorough article in דיני ישראל, vol. 7, pp. 27-43. This point is on p. 28. The only significant difference between him and Heller is that Rabbi Yosef takes חיילא to mean "large force," rather than "money," as Heller does.

[241] *Contemporary Halakhic Problems* (New York: Ktav and Yeshiva University Press, 1995), vol. 4, p. 275, n. 6.

[242] These two explanations are also offered by the *Ziz Eliezer*, vol. 9, no. 45, letter ה, p. 181a.

[243] *Moriah* 4, issues 3-4 (Nisan-Iyyar 5732): p. 64, as part of an entire article, pp. 62-67.

sion. Only that would justify Resh Lakish's putting himself in potential danger. According to this, the lesson of the Yerushalmi must be refined to mean that one is obligated to put oneself in danger for the benefit of another only when it is certain that the efforts will be marked by success. That is, when it is certain that the person being saved will, in fact, be saved if the person doing the saving survives the attempt, the attempt should be made.

It is well known that for poskim, the Bavli has primacy over the Yerushalmi. One turns to Yerushalmi for guidance on issues where there is no guidance in Bavli, but only very rarely would one decide according to the Yerushalmi when it disagrees with the Bavli. It would not be surprising, then, to expect decisors and commentators to seek evidence elsewhere in the Bavli to prove that the Bavli disagrees with what the *Hagahot* says the Yerushalmi says. If one can find such evidence, it would surely account for why the poskim ignored the *Hagahot*. The *Hagahot* must be mistaken, as a matter of actual law, because the Bavli disagrees. It is to such evidence among the poskim that we now turn.

Both the *Yad Eliyahu* and the *Agudat Ezov*[244] refer to the following story of the Gemara:[245]

> הנהו בני גלילאה דנפק עלייהו קלא דקטול נפשא אתו לקמיה דרבי טרפון אמרו ליה לטמרינן מר אמר להו היכי נעביד אי לא אטמרינכו חזו יתייכו אטמרינכו הא אמור רבנן האי לישנא בישא אע״ג דלקבולי לא מבעי מיחש ליה מבעי זילו אתון טמרו נפשייכו.
>
> There were certain Galileans about whom there was a report that they had killed someone. They came to Rabbi Tarfon and said to him: "Let the master hide us." He answered: "What should I do? If I do not hide you, they will find you. If I do hide you, the Sages have said that though one should not listen to rumors, one must be concerned about them. Go and hide yourselves."

Rabbi Tarfon refused to hide the suspects, though they were clearly in danger, and certain danger, at that. Rabbi Tarfon, however, seems not to have been in certain danger, but only potential danger. After all, perhaps they would never be found, and even if they were, he might not be identified as the one who hid them, or he might well be able to convince the authorities that he was unaware of their crime. Also, maybe the rumor was just that, and they were innocent of any wrongdoing and would be exonerated at trial. Thus, Rabbi Tarfon's refusal to hide the suspects clearly indicates that the Bavli does not believe that one must jeopardize oneself for the benefit of another.

This understanding of the passage is predicated on the assumption that what Rabbi Tarfon was worried about concerning himself was that he might be endangered if he were discovered to be harboring fugitives. That is exactly the understanding of the Tosafot, who explain in the name of the *She'eltot*:[246] אם אטמין אתכם חייבתם ראשי למלך – "If I hide you, you make me liable for execution." Rashi, on the other hand, does not understand the Gemara that way. He understands that Rabbi Tarfon is concerned about hiding the men because שמא הרגתם ואסור להטמין אתכם – "Perhaps you did commit the murder, and it is forbidden to hide you." For Rashi, then, the passage is irrelevant to our discussion because Rabbi Tarfon's concern is not for his safety, but for the halakhic legitimacy of hiding the men since they might be guilty. The passage is understood by the *Yad Eliyahu* and the *Agudat Ezov* according to Tosafot, and they see it as confirm-

[244] Rabbi Moshe Ze'ev Ya'avetz, in the דרושים section of the book, p. 3c, and later there, p. 38b.

[245] Niddah 61a.

[246] Ibid., ד״ה אטמרינכו, referring to *She'eltot* no. 129, p. 76 in the *Ha'amek She'elah* ed.

ing that one need not put oneself in jeopardy for the benefit of another.

But even if we understand the passage according to Tosafot, it is not conclusive proof. It may be only partial proof. That is, it is clear from the passage that Rabbi Tarfon was concerned that the fugitives might be found and the purpose of their hiding thwarted. Thus, hiding them was not certain to save them, but only potentially saving. Thus, the point of the passage is that one need not endanger oneself for doubtful saving. Perhaps, though, both Rabbi Tarfon and the Yerushalmi agree that one must endanger oneself for certain saving.[247] Furthermore, there is another difference between the Rabbi Tarfon instance and the Rabbi Ami instance of the Yerushalmi. Rabbi Ami was completely guiltless while the fugitives in the Rabbi Tarfon case were, at least, the subject of a government search because of some accusation against them. Perhaps the degree of requirement to jeopardize oneself is greater when the one who needs to be saved is a total innocent.

This last claim leads us to comment on an interesting fact. Tosafot refer to the *She'eltot*, as we have already indicated. In the *She'eltot*, the end of Rabbi Tarfon's comment reads as follows: למיחש ליה מיבעי דילמא איתא למילתא ולא מסתייעא מילתייכו וגרמיתון צערא לדילי נמי אזילו אתון אטמירו נפשייכו – "One must be concerned lest the rumor is true and the matter of hiding you not work out, and you will cause pain to me, too. Therefore, go and hide youselves." Ignore, for the moment, the words "and you will cause pain. . . ." The Netziv comments on the Rabbi Tarfon case as follows:[248]

> ולפי זה יש להוכיח (עוד) מדקאמר ר׳ טרפון דילמא איתא למילתא, הא אם היה ברור לר׳ טרפון שאינו אלא עלילת שקר היה מזדקק לטמורינו אע״ג שאי לא מסתייע מילתא היה מסתכן בעצמו ומחייב ראשו והיינו כמש״כ בהג״מ... בשם הירושלמי.... ולכאורה הכי דעת התוס׳ ורא״ש בשמו של רבינו.
>
> From this one can demonstrate that since Rabbi Tarfon [justified not hiding them on the grounds that] "maybe the rumor is true," it would follow that if it were clear to Rabbi Tarfon that the accusation was entirely false, he would have been required to hide them even though he himself might have been endangered and even become liable for execution if the hiding was not effective. And that would be exactly as is written in the *Hagahot Maimoniyot*. . . in the name of the Yerushalmi. . . .And it appears that this is precisely the view of the Tosafot and the Rosh in the name of our Master [i.e., the *She'eltot*].

What is fascinating is that the very passage in Niddah which was used by the *Yad Eliyahu* and the *Agudat Ezov* to prove that the Bavli *disagrees* with the Yerushalmi, is understood by the Netziv to prove that the Bavli *agrees* with the Yerushalmi. Rabbi Tarfon could refuse to hide the persons involved only because the rumor about them might be true. If it were clear to him that the rumor was false, he would have to hide them, even if his own life were jeopardized thereby. That, says the Netziv, is how the Tosafot must have understood, since they say that Rabbi Tarfon was worried that ראשי למלך – "You will make me liable for execution."

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[247] The proof from Niddah is rejected in precisely this way by Rabbi Yehiel Heller in שו״ת עמודי אור, no. 96, sec. 3, p. 80a. See Ovadiah Yosef's article in *Dinei Yisrael*, vol. 7, p. 29, and cf. the explanation of the Yerushalmi given above (p. 264) by Rabbi Ya'akov Weinberg.

[248] See the passage referred to above, n. 237, letter ד in the Netziv.

But, continues the Netziv, our version of the *She'eltot* does not support this conclusion.

> אבל לפנינו ליתא כל זה בדברי רבינו אלא וגרמיתון צערא כו׳ והא ודאי דמחויב לקבל כל צער שבעולם להצלת נפש... אבל ספק סכנת נפשות עדיין לא שמענו.... ורבינו פוסק שאין להכניס עצמו בספק סכנה בשביל חבירו.... והנראה דדעת התו׳ והרא״ש ג״כ אין מוכרח להלכה דדינא הכי אלא מדת חסידות היא.
>
> But our version of the *She'eltot* does not have any such thing [i.e., that "You will make me liable for execution"], but rather "You will cause me pain, etc." And surely it is the case that one must endure significant pain in order to save the life of another. . .[b]ut there is no proof that one must jeopardize his very life. . . .And it is the view of our Master that one need not jeopardize one's life for one's fellow. . . .And it seems that even the view of Tosafot and the Rosh is not to be taken as a definite legal requirement, but rather as an act of piety.

In the final analysis, the Netziv denies that the Niddah passage supports the Yerushalmi, according to his version of the *She'eltot*. The Niddah passage requires one to endure pain in order to save the life of another,[249] but does not require one to jeopardize one's own life. And even according to Tosafot, the implication of the Niddah passage need not be that one *must* jeopardize one's life. One is permitted to jeopardize one's life as an act of piety, but one is not required to do so.

We have now analyzed a passage in Niddah which has been utilized to prove both that the Bavli disagrees with the Yerushalmi and that the Bavli agrees with the Yerushalmi. We do not deny that the passage can be defensibly understood in either of those ways. We affirm, however, that neither understanding is so compelling as to force us to conclude either that the Bavli agrees or disagrees with the Yerushalmi. Thus, the Niddah passage can become supportive, but not determinative.

The next Bavli passage which is quoted both by the *Yad Eliyahu* and the *Agudat Ezov* as proving the Bavli's disagreement with the Yerushalmi is from Sanhedrin 73a. There the Gemara quotes a baraita which deduces the obligation to save a person who is drowning or being chased by an animal or bandits from the verse לא תעמוד על דם רעך. Whereupon the Gemara asks:

> והא מהכא נפקא מהתם נפקא אבדת גופו מניין ת״ל והשבותו לו אי מהתם הוה אמינא הני מילי בנפשיה אבל מיטרח ומיגר אגורי אימא לא קמ״ל.
>
> Is it true that we deduce [the obligation to save] from here? Do we not deduce it from the following: "From where do we know that one is obligated to return the body of someone to him (i.e., save him)? The Torah says: 'Return it to him (Deut. 22:2)'? If we were to deduce exclusively from there, I would claim that the obligation applies only when the person doing the saving can do so alone. But I would think that there is no obligation if it would be necess-

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[249] Even this is not certain. See, for example, the comment of Rabbi Jacob Emden in מגדל עוז, אבן בחן, א:פ׳ ג, who wrote: גם יסורים קשים ומרים נר׳ שאין צריך לסבול בשביל הצלת חבירו דנגידא קשי ממותא – "One need not endure great pain and torture in order to save another, for whipping is worse than death." On the last clause, cf. Ber. 55a, חלמא בישא קשה מנגדא – "A nightmare is worse than a beating." The view of Emden has serious implications for the question of bone marrow donation, as well, since there is more than a little pain involved. See *Nishmat Avraham*, Hilkhot Avodah Zarah, 157:5, p. 66; and, in his מהדורה תנינא, Even HaEzer, Hilkhot Ketubbot, 80:1, pp. 193-194.

> sary for him to bestir himself and go hire help [to save the person]. The verse "Do not stand idly by" teaches us [that he must even hire help].

At face value, this passage indicates that two verses are needed in order to know both that one must save another by his own efforts and that he must also take the trouble to go out and hire help in order to accomplish the act. We shall quote from the *Yad Eliyahu* his proof that this passage contradicts the claim of the Yerushalmi, but the same deduction is made by the *Agudat Ezov*. The *Yad Eliyahu* wrote:

> הרי לפניך דאינו חייב רק למיטרח ולמיגר ולחזור על כל הצדדין שלא יאבד דם רעהו ואי הוי ס״ד דצריך אפילו לסכן עצמו מאי בעי קרא על טרחתו למיגר אגורי ועוד טפי הוה ליה למימר דקרא דלא תעמוד אתא דצריך אפילו לסכן עצמו דלא הוה ידעינן מקרא דוהשבת לו.
>
> This clearly demonstrates that one is obligated only to exert himself and hire help in seeking every way to insure that the blood of his fellow not be lost. And if the Gemara felt that one is required even to jeopardize himself, why would a verse be needed to prove that one must hire help. Furthermore, [if one really were obligated even to jeopardize himself,] it would have been much more likely for the Gemara to claim that the verse "Don't stand idly by" comes to teach that one must endanger himself, for we would not know that fact from "And you shall restore it to him."

The *Yad Eliyahu* makes the following claim: The argument of the Gemara proves that one need not endanger oneself for the benefit of another. The Gemara deduces from לא תעמוד that one must hire help to save. That would be self-evidently true if one were also obligated to endanger oneself. It would be so self-evident that there would be no need of a verse to prove it. Thus, the fact that we do need the verse to prove it demonstrates that the obligation to endanger oneself must not exist. Furthermore, if there were such an obligation, it would have been most logical for the Gemara to deduce it from לא תעמוד, since it cannot be deduced from והשבותו לו, which is needed to deduce the obligation to save in the first place, and could not be used to deduce that one must also endanger oneself. Hence, the passage in Sanhedrin proves that according to the Bavli there is no obligation to jeopardize oneself in order to save another. Finally, in the absence of any convincing evidence to the contrary one would have to say that the obligation to jeopardize oneself does not exist even if it is only potential jeopardization of the saving party and certain death for the party to be saved.

That this sugya proves that the Bavli disagrees with the Yerushalmi has met with wide agreement. Rabbi Moses Schick (1807-1879) affirms it.[250] Rabbi Jacob Ettlinger affirms it.[251] It may well be the basis on which those who were quoted at the beginning of this section

[250] See שו״ת מהר״ם שיק, חלק יו״ד, סי׳ קנ״ה: ואי כירושלמי אפי׳ בספק נפשות לא פריך הגמרא וע״כ דהש״ס דידן לא סבירא ליה כן – "And if the law were according to the Yerushalmi that [one must endanger oneself] even for a case of doubtful saving, the Gemara would not argue [about the need for לא תעמוד]. Therefore, perforce, our Gemara must not agree." It is interesting to note that in the continuation of the responsum, Schick equates the Rabbi Akiva and ben Petura dispute with the Bavli-Yerushalmi dispute. Rabbi Akiva agrees with the Bavli view and ben Petura with the Yerushalmi view. Of course, in order to make that equation, Schick must assert that the case is one in which it is not certain that the one who does not drink will die, but rather that he will put himself in potential jeopardy.

[251] See *Arukh La-ner*, Sanhedrin, 73a, s.v. והא מהכא.

were so certain that the requirement of the Yerushalmi is not normative. Rabbi Menashe Klein accepts it.[252] The Ziz Eliezer says about it:[253] הראיה היסודית של הגאון בעל אגודת אזוב מההיא דסנהדרין דאין חיוב להכנס לספק סכנה חזקה היא – "The basic proof of the author of *Agudat Ezov* from Sanhedrin that one need not enter a state of potential danger is strong."

And the support comes not only from Aharonim. Here are the straightforward words of the Meiri:[254]

> בהצלתו, ולא סוף מי שראה חברו טובע בנהר או חיה גוררתו או לסטים באים עליו חייב להשתדל דבר בעצמו אם הוא יכול בלא סכנה.
>
> If one sees his fellow drowning in the river, or being dragged by a beast, or attacked by bandits, he is duty bound to attempt to save him, and not only by himself if he can do so without danger.

And here is what the Sefer Hasidim has to say, based on this passage in Sanhedrin:[255]

> כתיב לא תעמוד על דם רעך אבל אם הרבה מתלחמים עליו אל ישליך עצמו בסכנה ואל יעשה פשיעה בגופו ואם אדם טובע בנהר והוא כבד אל יעזור לו פן יטבע עמו.
>
> Scripture says: "Do not stand idly by the blood of your fellow," but if he is under mass attack, he should not put himself in danger and should not commit an offense toward his body. And if a person is drowning, and he is corpulent, he should not help him, lest he himself drown.

Even though Joseph Karo does not include the requirement of the Yerushalmi in the Shulhan Arukh, the very fact of his mentioning it both in the *Kesef Mishneh* and the Bet Yosef makes it highly desirable to find some method to defend it. In this instance, then, that would require finding some explanation of the Sanhedrin passage that does not put it in direct conflict with the Yerushalmi. The direction that takes is based upon the comments of the Ran to the passage in Sanhedrin.

In order to understand them completely, we must note that the primary focus in the *sugya* is really about the case of the רודף – one who can be summarily killed in order to save the life of another. The classical case is of one who is running after another with the intent to kill him. A third party is entitled to kill the pursuer in order to save the pursued. It is not critical to understand the details of the Talmud's proof of the legitimacy of such behavior, but we should understand the overall picture. The right to kill a pursuer is deduced either by קל וחמר or by הקש from the case of similar permission to kill one who is pursuing a woman for purposes of rape. Once deduced, the permission to kill the pursuer who is intent on killing is itself considered as proved from Scripture.

Both Tosafot and the Ran ask:[256]

> ואם תאמר וכיון שמצווה הוא להרוג הרודף כדי שיציל הנרדף למה לי קרא דלא תעמוד על דם רעך פשיטא דהוא מצווה לטרוח בהצלתו כגון טובע בנהר או ליסטים באים עליו. י"ל דמקרא דניתן להצילו בנפשו לא שמעינן

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[252] See משנה הלכות, חלק ו׳, מדור התשובות סי׳ שכ״ד, עמ׳ קצ״ז ע״ב.

[253] שו״ת ציץ אליעזר, חלק ט׳, סי׳ מ״ה, אות ט׳, עמ׳ קפ״ג ע״א.

[254] *Beit ha-Behirah*, Sanhedrin, Abraham Schreiber ed., p. 272.

[255] *Sefer Hasidim*, Reuven Margolioth, ed. (Jerusalem: Mossad Harav Kook, 1964 [5724]), sec. 674, p. 428.

[256] Tosafot, Sanhedrin 73a, s.v. להצילו, and חידושי הר״ן, סנהדרין ע״ג ע״א, Jerusalem, 5718 ed., p. 138. We quote from the text in the Ran, whose answer is different from the answer of Tosafot.

> אלא במי שברור לו כשמש שהוא רוצה להרגו ובכי האי גוונא במי שברור לו כשמש שיטבע בנהר אם לא יצילוהו הוא דמחייב להצילו אבל על ספק לא שמעינן מידי משום הכי אתא קרא דלא תעמוד על דם רעך לומר שהוא מצווה לטרוח אף על הספק.
>
> And if you ask: Since one is already commanded to kill the pursuer in order to save the pursued, what purpose does "Do not stand idly by the blood of your fellow" serve? Obviously one is commanded to bestir himself to save one who is drowning or who is being attacked by bandits [since it is even mandatory to kill someone in order to prevent the death of the pursued]. One might answer: From the scriptural proof that one may kill the pursuer for the benefit of the pursued one would assume that [the obligation to save] applies only to a case in which it is absolutely clear that the pursuer is intent on killing, or, similarly, that it is absolutely clear that the person will drown if he does not save them. Only in such cases of certainty is one obligated to save him. But, in cases of doubt we would have no evidence one way or the other. It is precisely for that purpose that the verse "Do not stand idly by the blood of your fellow" comes, to teach that one is commanded to bestir oneself [to save] even in cases of doubt.

We must first understand the Ran on his own terms. Then we will apply his explanation to our subject of discussion, viz., does the Bavli disagree with the Yerushalmi. As an explanation of the *sugya* itself, the Ran says that לא תעמוד (which the Gemara said proves that one must bestir himself and hire aid) refers to a specific category of cases, and not to the overall category of all people in danger. It refers to the category of people whose danger is uncertain, doubtful. לא תעמוד demonstrates that even for them one must bestir himself and go out and hire help to assist them, even though it is not certain that they are in danger. לא תעמוד could not possibly be telling us that we must bestir ourselves for the benefit of those who are in certain danger. We already know that from the fact that if we are sometimes duty bound even to kill for the benefit of one in certain danger, surely we are duty bound to bestir ourselves and hire aid for those in certain danger. We might have thought, however, that when one cannot himself save one in doubtful danger, he is under no obligation to do anything further. It is to negate such a thought that לא תעמוד comes, according to the Ran.

Now let us apply this to our issue. For the Ran, the לא תעמוד verse deals with cases of doubtful danger to the person who requires saving. It cannot be referring to a case in which the saver would also be in doubtful danger together with the person needing saving, and mandating that the saver nonetheless attempt himself to save him. Why not? Because if both were in the same category, namely, doubtful danger, what would be the grounds for mandating action on the part of the saver? To the contrary, we would say מי יימר דדמא דחבריה סומק טפי דילמא דמא דידיה סומק טפי – "Who says the blood of one's fellow is sweeter? Perhaps his own blood is sweeter."[257] There would be no reason to mandate the precedence of the life of the one who needed saving over the life of the saver. Quite the contrary, if both were in the same degree of danger, we should apply

[257] Cf. Sanhedrin 84a where the opposite claim is made to prove that one cannot save one's own life at the cost of another's life. Here, the Ran would assert that if both parties are in doubtful danger, the party requiring saving has no greater claim on being saved than the saver has on not endangering himself.

חייך קודמין לחיי אחיך. Thus, what does לא תעמוד teach us? It teaches that even in the case where one would not be required to attempt himself to save the other, he would still be obligated to seek his saving through bestirring himself to get aid. But, if the case were one in which the person requiring saving were in certain danger, while the saver was in doubtful danger, the Ran might well affirm that the sugya in the Bavli does require him to attempt to save the other. At a minimum, we can say that the Bavli does not reject that claim, and there is, therefore, no proof of a contradiction between the Bavli and the Yerushalmi.

This approach to proving that even the passage in Sanhedrin does not necessarily contradict the thesis of the Yerushalmi is adopted by Rabbi Ovadiah Yosef[258] and by Rabbi Haim Heller.[259] One must admit, though, that this application of the Ran to our issue is a little forced. Why, after all, would the Ran need a special verse to prove that one should bestir himself to save even when the danger to the person in need of saving was doubtful? Is it not well known and clear that even ספק פקוח נפש supersedes the Sabbath? If one may violate a capital offense for a ספק, is there any real doubt that one should bestir oneself to help save someone, even if the danger is only a ספק?[260]

Rabbi Meir Slutz[261] attempts to go even further, and to demonstrate that the Bavli actually agrees with the Yerushalmi. He contends that the *sugya* shows that there are three sources for derivation of laws on the subject: (1) the קל וחמר or הקש, (2) the verse והשבותו לו, and (3) the verse לא תעמוד. He claims that the three can be used to deduce (1) the essential requirement for one to save another himself, (2) the requirement to bestir oneself and hire help when needed, and (3) the requirement even to put oneself in some danger in order to effectuate the certain saving of the other[262] Once going that far, though, Rabbi Slutz must account for why the *Hagahot Maimoniyot* bases his claim on the Yerushalmi rather than on the Bavli. He answers that the Yerushalmi was the preferable basis because the norm is explicit there in the behavior of Resh Lakish, while in the Bavli it is only implicit.

The attempts of Rabbi Ovadiah Yosef, Rabbi Haim Heller, and Rabbi Meir Slutz are valiant, but, though possible, are less than entirely convincing. For the former two, the Bavli is basically silent about the subject of self-endangerment, and for the latter the most far reaching conclusion is left to be entirely inferred. Neither is likely.

Furthermore, some affirm that the very wording of the law as it appears in Maimonides argues against the thesis that the *sugya* implies or is silent about a requirement to endanger oneself. Let us look once more at Maimonides' wording:

> כל היכול להציל ולא הציל עובר על לא תעמוד על דם רעך. וכן הרואה את חבירו טובע בים או ליסטים באים עליו או חיה רעה באה עליו ויכול להצילו הוא בעצמו או שישכור אחרים להצילו ולא הציל, או ששמע גוים או מוסרים מחשבים עליו רעה או טומנין לו פח ולא גלה אוזן חבירו והודיעו, או שידע בגוי או באנס שהוא קובל על חבירו ויכול לפייסו בגלל חבירו

[258] *Dinei Yisrael*, vol. 7, p. 32.

[259] See above, n. 227.

[260] See the article by Rabbi Meir Slutz, *Halakhah u'Refu'ah*, vol. 3 (Jerusalem, 5743), pp. 158-163, and especially p. 162 for this point. Slutz attempts to resolve the issue by claiming that the fact that ספק supersedes the Sabbath does not necessarily imply an obligation to act, but only permission to act. Thus, we would still need the second verse. What he says is possible, but also seems quite forced.

[261] See previous note.

[262] Slutz agrees with the Ran and the *Arukh la-Ner* that there is no necessary link between the words of the verses and the derivations from them. The derivations are based on יתורים. The Ran phrases the same claim thus: מיתורא דקראי הוא דמרתינן גופי' וממוניה ומשום הכי כתיבי תרי קראי.

> ולהסיר מה שבלבו ולא פייסו, וכל כיוצא בדברים אלו, העושה אותם עובר על לא תעמוד על דם רעך.
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> Anyone who is able to save one in danger and who does not do so violates the negative commandment "Do not stand idly by the blood of your fellow." And similarly, if one sees one's fellow drowning in the sea, or being attacked by bandits or by a dangerous animal, and is able to save him either by himself or by hiring others to save him, and does not do so; or, if one heard either non-Jews or informers plotting evil against someone, or laying a trap for him, and did not inform the person; or, if one knew about a non-Jew or some other violent person who was lodging a complaint about his fellow, and he could appease that person on behalf of his fellow and did not do so; and all such similar matters, whoever does these things violates "Do not stand idly by the blood of your fellow."

In commenting on this wording of Maimonides, quoted by the Tur, the BaH wrote:[263]

> נראה דלפי דמלשון הברייתא משמע דחייב להצילו אפי׳ אינו ברור לו שיוכל להצילו חייב להכניס עצמו בספק סכנה להצילו אבל הרמב״ם כתב ״יכול להצילו״ דמשמע דדוקא בדאין ספק שיכול להצילו אבל אינו חייב להכניס עצמו בספק סכנה להצלת חברו.
>
> It seems that the language of the baraita implies that one is obligated to save another even when it is not certain that he will be able to save him. He is duty bound to place himself in danger in order to save him. But the Rambam wrote, "And he is able to save him," which specifically implies that there be no doubt that he can save him, but that he is not obligated to put himself in potential jeopardy in order to save his fellow.

The BaH notes the difference between the language of the baraita and the language of Maimonides. The baraita says שהוא חייב להצילו – "He is obligated to save him" – while Maimonides uses the phrase ויכול להצילו – "And he is able to save him." After having quoted the language of the baraita, the Tur quotes the language of the Rambam. The BaH is explaining this apparent redundancy by clarifying that the Tur quotes the Rambam as well as the baraita in order to make certain that we understand that the baraita is to be understood as the Rambam understood it, and not as we might mistakenly have understood it, namely, to imply an obligation to put oneself in danger.[264]

The claim of the BaH on the basis of the language of Maimonides affirms that the Rambam understood the Bavli to disagree with the Yerushalmi. Thus, Maimonides must be numbered among those who reject the view of the Yerushalmi because it is contradicted by the Bavli. This inference from the language of Maimonides is affirmed by

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[263] BaH to Tur, Hoshen Mishpat, 426.

[264] It is virtually impossible that the wording of the Rambam implies a disagreement between the Rambam and the baraita. Since the baraita is uncontested in the Gemara, there is just no way that the Rambam would reject it in his code. In this, Rabbi Isaac Jacob Weiss (מנחת יצחק, חלק ה׳, סי׳ ז׳ אות י״ג, עמ כ״ט ע״א) is absolutely correct when he wrote: הטור רצה לשלול שלא תטעה בלשון הברייתא, אבל באמת גם הברייתא ס״ל כן, דבודאי הרמב״ם לא יחלוק על הברייתא – "The Tur wants to make sure that we not misunderstand the language of the baraita. But, in fact, [what Maimonides says] is the view of the baraita too, since surely Maimonides would not disagree with the baraita."

Rabbi Isaac Jacob Weiss,[265] by Rabbi Eliezer Waldenberg,[266] Rabbi Hayyim David ha-Levi,[267] and Rabbi Pinehas Barukh Toledano.[268] Admittedly, the final three also raise objections to this derivation and claim that the proof is not definitive.

By far the most interesting objection to this derivation from the language of the Rambam is offered by Rabbi Yehiel Ya'akov Weinberg.[269] It is well known that before each collection of laws Maimonides lists the positive and negative commandments which the laws reflect. If one looks at that list for *Hilkhot Roze'ah* it will become clear that Maimonides does not list a positive commandment to save a person who is in danger. He lists only a negative commandment against standing idly by such a person's blood. Of course, the existence of the negative commandment implies some positive action, but the purpose of the action, legally speaking, is to avoid violation of the negative commandment. Thus, Weinberg claims, the language of Maimonides reflects nothing at all about whether the Bavli disagrees with the Yerushalmi. Rather, it reflects a wording which allows Maimonides to couch the failure to save as a violation of a negative commandment. Obviously, if one literally cannot save another one does not violate the negative commandment. So the only way for Maimonides to word the law so as to make clear that failure to save is a violation of a negative commandment, and yet make it clear that not all failures to save constitute such a violation, is to phrase the law thus: "If you are able to save and do not do so, you violate a negative commandment against standing idly by the blood of your fellow." The wording intimates *nothing, one way or the other*, about whether or not one should endanger oneself in order to save one's fellow.

There is a benefit to finding some way to account for Maimonides' wording that does not imply that one ought not jeopardize oneself for the benefit of another. If the wording *did* imply that, it would be difficult to understand why Karo, in the *Kesef Mishneh*, would refer to the Yerushalmi position without at least noting that it was rejected by Maimonides. It would not be problematic, however, if the wording of Maimonides were silent on the subject.

Whether or not the language of Maimonides proves his understanding of the passage in Bavli Sanhedrin can be a matter of disagreement. There is no disagreement, however, with the affirmation that the Rambam does not clearly insist that self-endangerment for the benefit of another is a requirement of the law.

At this point, then, we have analyzed another Bavli passage which is understood by some to prove that the Bavli disagrees with the Yerushalmi. We have affirmed that the evidence is strong, though not absolutely conclusive. As a postscript, we have also discussed whether the language of Maimonides' codified position based on this passage implies that *he* understood the passage to reject the Yerushalmi view. We have claimed that his language can certainly be understood that way, and that some have understood it precisely that way. It is not, however, the only way to understand the language of Maimonides.

There are other Bavli passages which we must address. But, having referred to the language of Maimonides as evidence of Bavli disagreement with the Yerushalmi, we turn to another example of the same phenomenon. The Mishnah records[270] that one who has

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265 See preceeding note.

266 *Ziz Eliezer*, vol. 10, no. 25, ch. 7, letters א and ב, pp. 124-125.

267 *Sefer Asia* (Jerusalem: Reuben Mass, 5743), vol. 4, p. 255.

268 *Barkai* 3 (fall 5746): 24. Rabbi Toledano is head of the Sefardic court in London. *Barkai* is a journal of the Mizrahi – ha-Po'el ha-Mizrahi, and was under the editorship of Rabbi Saul Yisraeli.

269 *Moriah* 4, issue 1-2 (Nisan-Iyyar 5732): 63.

270 Makkot 2:7 (11b).

committed manslaughter and gone into exile into one of the cities of refuge may not leave it. He may not leave it ואפי׳ ישראל צריכים לו ואפילו שר צבא ישראל כיואב בן צרויה אינו יוצא – "Even if the people of Israel need his aid, and even a general of Israel like Yoav ben Zeruiah, he may not leave." When Maimonides records this norm[271] he adds a phrase not found in the mishnah: ואם יצא התיר עצמו למיתה – "And if he does leave, he surrenders himself to be killed."

In explaining the purpose for this addition, the content of which seems quite self-evident, Rabbi Meir Simha of Dvinsk, the *Or Sameah*, writes:

> הוסיף רבינו טעם למה אינו יוצא הלא פקוח נפש דוחה כל מצות שבתורה ומכל שכן פקוח נפש דכל ישראל ואסתר תוכיח.... וכיון שהותר דמו לגואל הדם אין לו להכניס עצמו בספק סכנה עבור הצלת חבירו מסכנה ודאית, כן נראה. ומוכח מזה דלא כהגמ״י בשם ירושלמי דתרומות.... ומירושלמי גופיה אינו מוכח למעיין היטב בו.
>
> Our master [i.e., Maimonides] added a reason to explain why he should not leave since saving another, and surely saving all of Israel, should supersede all mitzvot of the Torah [including the commandment not to leave the city of refuge], as the case of Esther proves.[272] . . .But since [the act of leaving] makes him eligible to be killed by the blood avengers, he ought not put himself in a positon of potential life endangerment even to save another from certain life endangerment. This seems [to be the implication of Maimonides' having added the clause]. And this proves that the view of the *Hagahot Maimoniyot* in the name of Yerushalmi Terumot is incorrect. . . .And a careful look at the Yerushalmi itself will demonstrate that it need not be understood [as the *Hagahot*].

Before we deal with the essence of the claim of the *Or Sameah*, let us comment briefly about his final sentence. Rabbi Meir Simha *must* affirm that the Yerushalmi need not mean what the *Hagahot* says. Indeed, it probably cannot mean that! Maimonides is explaining the law of the Mishnah, and he understands it to imply that one ought not jeopardize oneself for another. Since the Yerushalmi has the same Mishnah as the Bavli, it is highly unlikely that Maimonides would understand the Mishnah contrary to the Yerushalmi without absolutely firm basis to believe that the Bavli disagrees with the Yerushalmi. Since there is no such basis in this case, it must be that the Yerushalmi need not be understood to imply what the Rambam rejects.

As to the substance of the claim of the *Or Sameah*, he contends that there could be only one reason for Maimonides to add the apparently superfluous clause to his codification of the law. It adds an explanation which clarifies an otherwise inexplicable law. Since all commandments are superseded in order to save the life of another, there should be no distinction between the commandment to remain in the city of refuge and any other commandment.[273] Yet, according to Maimonides' codification, there is. Though a manslaughterer can violate any

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[271] M.T. Hilkhot Roze'ah 7:8.

[272] Though the *Or Sameah* does not stipulate exactly what about Esther proves the point, he apparently means that Esther's consorting with a pagan king was justified because it was needed to save Israel, even though such relationships are otherwise forbidden. The discussion in Sanhedrin 74b is an attempt to explain why Esther was not obligated to allow herself to be killed rather than violate one of the cardinal sins which are not superseded by פקוח נפש.

[273] See *Tiferet Yisrael*, Makkot 2:8, *Bo'az*, letter ב.

other commandment in order to save a life, he cannot violate the commandment to remain in the city. Why? Because the mitzvot are superseded in order to save lives only when the life of the saver is not thereby endangered. When the saver's life is endangered, even potentially, the mitzvot are not superseded. In the case of a manslaughterer there is potential endangerment if he leaves the city, because he becomes fair game for the blood avenger. Thus, he should not leave the city even to save others because by doing so "he surrenders himself to be killed."[274]

If the *Or Sameah* is correct, the Mishnah itself proves that one ought not to jeopardize himself for the benefit of another, and the *Hagahot Maimoniyot* must surely be mistaken, and that is why the view was ignored as a matter of actual law by all of the classical poskim. What's more, the implications of Maimonides are very far-reaching. They imply that a single individual may not jeopardize himself, even potentially, even for the benefit of all of Israel. It is no wonder, then, that others have rushed to reject this claim of Rabbi Meir Simha.

The most direct attack can be found in *Klei Hemdah*, by Rabbi Meir Dan Plotzki (1867-1928), who wrote:[275]

> במחילת כבוד תורתו לא דיבר נכונה שהדבר ברור שחובה להכניס עצמו בסכנה להצלת ישראל. ובדין רוצח אין הפירוש בדברי הרמב״ם כמ״ש האור שמח שמפני זה לא יצא אפי׳ במקום פקוח נפש, אלא נהפוך הוא, שמאחר שגזרת הכתוב שלא יצא משם לעולם אפי׳ לצורך פוק״נ של כל ישראל.... אבל חס וחלילה לומר כמ״ש הראו שמח שאין להכניס עצמו בספק סכנה להציל כלל ישראל מסכנה, והאור שמח עצמו הוכיח מאסתר להיפך, ואף פנחס סיכן עצמו בהריגת זמרי להצלת כלל ישראל, זה ברור.
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> With all due deference, he is simply mistaken. For it is clear that one is obligated to put oneself in danger in order to save Israel. And the law of the manslaughterer in Maimonides should not be understood as the *Or Sameah* did to imply that one ought not endanger oneself even in a case of פקוח נפש, but just the opposite. [The manslaughterer case] contains a biblical decree that he should not leave [the city of refuge] ever, even for the פקוח נפש need of all of Israel. . . .But God forbid that we should say as the *Or Sameah* that [in general] one should not jeopardize oneself even potentially even in order to save Klal Yisrael from danger. And even the *Or Sameah* himself proves the opposite [by referring to] Esther. And so too did Pinehas endanger himself by killing Zimri in order to save Israel. And this is clear.

The essential claim of the *Klei Hemdah* is that the manslaughterer case is exceptional, a גזרת הכתוב.[276] It cannot be a paradigm for other cases. Thus, Maimonides is correct in his statement of the law, but the deduction of Rabbi Meir Simha is erroneous. Note, though,

[274] Rabbi Meir Simha makes the same claim in his Torah commentary, *Meshekh Hokhmah*, to Ex. 4:19. There God tells Moses to return to Egypt כי מתו כל האנשים המבקשים את נפשך. The *Or Sameah* affirms that God had to tell Moses that his enemies had died because otherwise Moses would have been obligated to violate God's command to return because fulfilling it would have put Moses in potential jeopardy.

[275] Beginning of Parashat Pinhas.

[276] It is clear that the restriction of the manslaughterer to the city of refuge is not exclusively for his protection against the blood avenger. See, for example, the statement of Abbaye (Makkot 11b) that even if the manslaughterer dies immediately after conviction, his bones must be taken there. Besides that, those who die in the city of refuge are buried there, even though they are no longer in any danger from the blood avenger. One must admit, though, that this argument is not overly persuasive as a way of accounting for the language of Maimonides, ואם יצא התיר עצמו למיתה.

that Rabbi Plotzki restricts his rejection of Rabbi Meir Simha to the case of general endangerment of Klal Yisrael.[277] He makes no claim that one must endanger oneself for the benefit of a single other. There may, in fact, be no such obligation, but that cannot be proved as the uncontestable view of the Mishnah, based on the language of Maimonides.[278]

We return, then, to our analysis of Bavli passages which have been understood to imply that the Bavli disagrees with the Yerushalmi. The Gemara in Nedarim[279] quotes a baraita which reads:

> מעיין של בני העיר, חייהן וחיי אחרים חייהן קודמין לחיי אחרים, בהמתם ובהמת אחרים בהמתם קודמת לבהמת אחרים כביסתן וכביסת אחרים כביסתן קודמת לכביסת אחרים חיי אחרים וכביסתן חיי אחרים קודמין לכביסתן רבי יוסי אומר כביסתן קודמת לחיי אחרים.
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> Regarding a spring which belongs to one city [but which other surroundings cities which have no spring also use: if the amount of water available is such that it creates a conflict between] their lives and the lives of the others, their lives take precedence over the lives of the others; their cattle and the cattle of the others, their cattle take precedence over the cattle of the others; their laundry and the laundry of the others, their laundry takes precedence over the laundry of the others; the lives of others and their laundry, the lives of the others take precedence over their laundry. Rabbi Yosi says that their laundry takes precedence over the lives of the others.

The contents of the baraita produce no surprise until the last line, the view of Rabbi Yosi. On the surface, it seems counterintuitive. In explaining the importance which Rabbi Yosi attributes to cleaning clothes, the Gemara continues:[280]

> כביסה אלימא לר׳ יוסי דאמר שמואל האי ערבוביתא דרישא מתיא לידי עוירא ערבוביתא דמאני מתיא לידי שעמומיתא ערבוביתא דגופא מתיא לידי שיחני וכיבי.
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> Laundry is so critical for Rabbi Yosi because of what Samuel said: "The skin disease resulting from insufficient attention to the cleanliness of the head leads to blindness, that resulting from insufficient attention to the cleanliness of clothing leads to madness, and that resulting from insufficient attention to cleanliness of the body leads to boils and scabs.

Finally, the *sugya* seeks the biblical grounding for the view of Rabbi Yosi, and says:

> קרא מנלן... דכתיב[281] ומגרשיהם יהיו לבהמתם ולרכושם ולכל חיתם מאי חייתם אילימא חיה והלא חיה בכלל בהמה היא אלא מאי חייתם חיותא ממש פשיטא אלא לאו כביסה דהא איכא צערא דערבוביתא.

[277] It is very difficult to understand how the *Or Sameah* seems to have ignored the fact that Esther put herself in potential danger by appearing in the king's anteroom without having been beckoned.

[278] Similar arguments to those of the *Klei Hemdah* are also offered by Rabbis Slutz and Toledano in the articles referred to earlier, and by Rabbi Shlemo Zevin in לאור ההלכה (Jerusalem: Mosad haRav Kook, 5706), p. 8f. See, too, Abraham Sofer Abraham in המעין, Nisan 5742, pp. 35-36.

[279] 80b. See also T. Bava Metzia 11: 33-37, Lieberman ed., p. 127f.

[280] Nedarim 81a.

[281] במדבר לה:ג.

> What is the scriptural verse. . .as it is written:[282] "And the surrounding fields should be for their cattle and their possessions and all חיתם." What is the meaning of חיתם? If we say it means "beasts," beasts are included in "cattle." Rather, perhaps, חיתם means their sustenance, literally. [No, because] that is obvious. It is, rather, [that חיתם] means "laundry," because there is the pain of the resultant skin disease [for insufficient attention to it].

Taken at face value, without embellishment, the Gemara seems to be claiming that for Rabbi Yosi, understood on the basis of Samuel's dictum, refraining from laundering presents real danger, and, therefore, the laundry of the community on whose territory the spring is found takes precedence over the thirst needs of the other community. The *tanna kamma* obviously disagrees, but it is not clear on what basis. Does he hold that the thirst needs predominate even if the real danger from not laundering materializes? Does he disagree with the premise that there are serious consequences to not laundering?

The earliest decision we have regarding the dispute of Rabbi Yosi and the *tanna kamma* comes in the *She'eltot*:[283]

> אלא מאי היא [וחייתם שבפסוק]? כביסה, וקרי ליה רחמנא חייתם. וטעמא מאי? משום דשמואל דאמר ערבוביתא דמנא אתית לידי שעמום, והילכך כביסה הוויא חיותא, וחייהן וחיי אחרים חייהן קודמת לחיי אחרים וכן הילכתא.
>
> Rather what is [חייתם of the verse]? It is laundry, which is called חייתם ("their life") by Torah. And why [is laundry equated with life]? [It is equated] because of Samuel who said: "The skin disease resulting from insufficient attention to laundering leads to madness." And therefore, laundry is equated with life, and their lives take precedence over the lives of others. And that is the law.

The Geonic decision recorded in the *She'eltot*, therefore, determines the law in accordance with Rabbi Yosi. The Netziv[284] notes that the *She'eltot* seems to be deciding in favor of Rabbi Yosi because Samuel agrees with him, and because a verse is quoted to support his position. He objects, however, by reminding us that Samuel's statement was not made as an explanation of Rabbi Yosi's statement. It is an independent *and uncontested* statement. There is no hint that the *tanna kamma* disagrees with Samuel. What's more, it is highly unlikely, says the Netziv, that the argument between the *tanna kamma* and Rabbi Yosi is over whether certain things are dangerous, since such matters are "objective." Thus, the Netziv explains:

> במאי קמיפלגי? ונראה דודאי אינה דומה סכנת צמא לסכנת בהמתן וכביסתן, דסכנת צמא ברור שימותו בצמא מה שאין כן בהמתן וכביסתן אפשר שיבואו לידי סכנה, אבל... כמה בני אדם אינם באים לידי שעמום בהעדר הכביסה אלא דמכל מקום ספק סכנת מפשות הוא, וס"ל לת"ק דחייב להכנס בספק סכנת נפשות בשביל ודאי פקוח נפש של חבירו כמו שכתב הב"י חשן משפט סי' תכ"ו בשם הגהות מיימוניות ור' יוסי פליג על זה, ופסק רבינו כר"י ולא משום דשמואל קאי כוותיה אלא כיון דהכי

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[282] Num. 35:3.

[283] Parashat Re'eh, no. 147, p. 212 in the *Ha'amek She'elah* ed.

[284] *Ha'amek She'elah*, letter ד.

> קאמר שמואל דיש בזה ספק סכנת נפשות, ממילא הלכה כר״י דאין להכנס בספק סכנת נפשות בשביל ודאי פקוח נפש של חבירו.... והפסק חוא על פי הירושלמי תרומות... דר״ל עביד הכי במדת חסידות אבל הכא במילתא דבני העיר לא שייך להתחסד ולסכן טפלי דלאו בני מחילה נינהו אם אין הדין הכי.
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> About what do they differ? It seems [that they differ about the following:] That surely the danger of thirst is not exactly comparable to the danger of their cattle[285] and their laundry. The danger of thirst will certainly result in death, while regarding their cattle and laundry it is [merely] possible that they will result in endangerment, since . . .some people do not go mad because of the absence of laundry. Nonetheless, [not laundering] constitutes a potential life endangerment. The *tanna kamma* holds that one must put oneself in potential danger for the certain saving of another, as the Bet Yosef wrote in Hoshen Mishpat, no. 426, quoting the *Hagahot Maimoniyot*. And Rabbi Yosi disagrees. Our Master [the *She'eltot*] decided in favor of Rabbi Yosi. [He did so] not because Samuel agreed with him, but because it was Samuel who informed us that there was potential danger in this. From this it follows that the law is according to Rabbi Yosi, that one should not put oneself in potential life endangerment even for the certain saving of another. . . .And the decision is based on the Yerushalmi Terumot. . .where Resh Lakish acted out of piety. But in our case about the city dwellers [whose water supply is not sufficient to share], it is inappropriate to behave with such piety and endanger the lives of children, if the law is not that way, since they (the children) are not entitled to forego their legal rights.

The Netziv, remember, is explaining the decision of the *She'eltot*, who decided in favor of Rabbi Yosi. Rabbi Berlin claims that the dispute between Rabbi Yosi and the *tanna kamma* parallels the dispute in the Yerushalmi concerning the need to put oneself in potential life endangerment for the certain saving of another. The *tanna kamma* holds that one should, and Rabbi Yosi holds that one need not. The *She'eltot* decides in favor of Rabbi Yosi because, as the Netziv understands the Yerushalmi,[286] Resh Lakish acted from מדת חסידות, not from legal requirement. Hence, since there is no attested legal requirement to endanger oneself, the law in the Nedarim passage under discussion must follow Rabbi Yosi. This is the way the Netziv can explain the view of the *She'eltot*, which, on the surface ignores the majority view (*tanna kamma*) in favor of a דעת יחיד. Hence, assuming that the Netziv is correct, this passage reflects that for the *She'eltot* the Bavli disagrees with the Yerushalmi, as understood by the *Hagahot Maimoniyot*.

It seems, though, that one can raise serious objections against the *She'eltot*, as

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[285] The baraita in the Bavli has no disagreement between Rabbi Yosi and *tanna kamma* about cattle. The Netziv, however, quotes a clause from the Tosefta (Bava Metzia 11:33) in which there is such a disagreement: אחרים ובהמתן חיי אחרים הן קודמים לבהמתן ר׳ יוסי אומר בהמתן קודמת לחיי אחרים. The Netziv explains that the view of Rabbi Yosi is based on the statement of the Mekhilta (Beshalah, Vayasa, Parashah 6, Horovitz-Rabin ed., p. 174) that בהמתו של אדם הוא חייו של אדם המהלך בדרך אם אין בהמתו עמו מסתגף הוא. Thus, both בהמה and laundry are potentially life threatening. For the purposes of our discussion, we can ignore the בהמה clause.

[286] See above, p. 263.

explained by the Netziv. Since the Yerushalmi is ambiguous, why not claim that this very passage of Bavli proves that Resh Lakish acted from legal obligation, not piety? After all, if the majority view in our passage is that of *tanna kamma*, should not the *She'eltot* have decided in favor of the majority, and clarified thereby that both the Bavli and the Yerushalmi require one to jeopardize oneself for the benefit of another?

While it is impossible to prove, it seems reasonable that it was precisely such an objection that prompted others to seek a different reason for the decision of the *She'eltot*. Rabbi Menashe Klein[287] thinks that when the *She'eltot* adopted the view of Rabbi Yosi on the basis of Samuel, he meant "on the basis of Samuel's view concerning ספק פקוח נפש in which the law follows him." We have already referred[288] to the *sugya* in Yoma 85a and b, from which the Talmud deduces that even ספק פקוח נפש supersedes the Sabbath. Only the proof of Samuel from the verse וחי בהם is affirmed as an uncontestable proof. Thus, claims Rabbi Klein, when the *She'eltot* refers to Samuel it is not only because it was he who taught that failure to launder can lead to problems, but because it was he who taught the uncontestable law that ספק סכנת נפשות must be avoided, even at the cost of Sabbath desecration. It must follow, therefore, that since failure to launder sufficiently can lead to ספק סכנת נפשות, and since Samuel has proved conclusively that we should avoid such things, the law in the dispute between Rabbi Yosi and the *tanna kamma* must follow the view of Rabbi Yosi. Thus, it is the internal consistency of the Bavli that leads the *She'eltot* to conclude as he does, and that very consistency proves that the Bavli disagrees with the Yerushalmi on the basis of the passage in Nedarim.

There could be another explanation of why the *She'eltot* decided in favor of Rabbi Yosi. This explanation, too, does not require an *a priori* understanding of what Resh Lakish meant in the Yerushalmi. The Gemara in Eruvin[289] asserts that הלכה כר׳ יוסי מחבריו – "The law follows Rabbi Yosi even when he disagrees with more than one other sage." There is considerable uncertainty about whether the correct version is as we have just quoted, or whether it ought to read הלכה כר׳ יוסי מחברו – "The law follows Rabbi Yosi when he disagrees with one other sage [but not when he disagrees with more than one other sage]."[290] Nonetheless, there are many[291] who have the first reading, and it could well be that the *She'eltot* decided in favor of Rabbi Yosi because of that mandate of the Gemara itself. Furthermore, the opinions of Rabbi Yosi are defined several times by the Gemara itself by the phrase ר׳ יוסי נימוקו עמו – "Rabbi Yosi's reasoning is cogent."[292] Thus, there could be more than one reason that might have prompted the *She'eltot* to decide in favor of Rabbi Yosi, and those reasons are independent of the Yerushalmi. The argument of the Netziv that the dispute between Rabbi Yosi and the *tanna kamma* reflects the issue of whether one should endanger oneself for the benefit of another has merit, and the decision of the *She'eltot* in favor of Rabbi Yosi lends support to the claim that the Bavli disagrees with the Yerushalmi.

A proof that one need not endanger oneself for the benefit of another, based on our

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287 Mishneh Halakhot, vol. 6, no. 324, p.396.

288 See above, p. 260.

289 46b.

290 See Tosafot, *ad locum*, ד״ה כרבי יוסי and Eruvin 83b, Tosafot s.v. שבעת, and *Dikdukei Soferim* to Eruvin 46b.

291 See Ta'anit 28a, Tosafot s.v. אי ר״מ; *Semag*, positive commandment no. 74 (46d) who claims that this was the version of Ri and Rambam; *Sefer Ra'avia*, Megillah, siman 579 (Aptowitzer ed., vol. 2, p. 306). See Rabbi Ovadiah Yosef's article in *Dinei Yisrael*, vol. 7, p. 34.

292 See Eruvin 14b and 51a, Gittin 67a, and Bava Kamma 24a.

passage in Nedarim, is also brought by Rabbi Abraham Braun in his comments to the *Sefer Issur ve-hetter*.[293] He wrote:

> ויש להביא ראיה (דאינו חייב להכנס לספק סכנה) מנדרים ד״פ ע״ב דפליגי ר יוסי ורבנן, לר״י אמר כביסתן קודמת לחיי אחרים דכיון דבמניעת כביסה איכא צערא טובא חיי נפש הוא.... הרי דאף שאין זה ברור כל כך סכנתו וסכנתם ברורה ומ״מ אין להם ליכנס בספק סכנה עבור חבירהם. וגם חכמים לא פלידי רק משום דס״ל דכיבוס אין בהם חיי נפש כ״כ.
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> One can bring proof (that there is no obligation to enter even into doubtful danger) from Nedarim 80b, where Rabbi Yosi and the sages disagree. Rabbi Yosi holds that the laundry of the city takes precedence over the lives of the others because in refraining from laundering there is great anguish, actual life endangerment. . . . From this it follows that even though their danger is not so certain and the danger of the others is certain, nonetheless they need not put themselves in potential danger for the benefit of their friends. And the sages disagree only because they feel that there is no significant danger in refraining from laundering.

The comment of the *Zer Zahav* differs from what we have seen already seen in one important way. For him, the disagreement between the Bavli and the Yerushalmi, as evidenced by this passage from Nedarim, is not at all contingent on whether the law follows the sages or Rabbi Yosi. Both agree that one need not endanger oneself for the benefit of another. Their dispute is over a question of *realia*, viz., does refraining from laundering have such potentially dire consequences. The very matter that the Netziv found unlikely to be the source of their disagreement becomes for the *Zer Zahav* the very essence of their dispute.

The relevance of our passage to our discussion also comes up in the context of the comments of commentators on the Shulhan Arukh. Karo wrote:[294]

> פסקו לה מזונות הראוים לה והרי היא מתאוה לאכול יותר או לאכול מאכלות אחרים, יש מי שאומר שאין הבעל יכול לעכב מפני סכנת הולד שצער גופה קודם ויש מי שאומר שיכול לעכב.
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> If they had ordained for her (a nursing mother) an appropriate amount of food, but she craves eating more or eating other foods, some claim that the husband may not prevent her on the grounds of the danger to the child because her bodily discomfort takes precedence, while some claim that he may stop her.

The first view alluded to is none other than the Rambam. He is very clear on the subject, saying:[295] הרי זו אוכלת... כל מה שתרצה ואין הבעל יכול לעכב ולומר[ש]ימות הולד מפני שצער גופה קודם – "She may eat. . .whatever she wants, and her husband may not stop her by claiming that the child will die, because her physical discomfort takes precedence." There is no ambiguity in the Rambam's wording either. The passage implies a confict

[293] Zer Zahav, Comment 21, to Kelal 59, no. 38. See above, p. 261, where we have already quoted the passage from the *Sefer Issur ve-Hetter*.

[294] Even HaEzer 80:12.

[295] M.T. Hilkhot Ishut 21:11.

between the death of the infant and the bodily discomfort of the mother,[296] and the stance of Maimonides does not seem unclear. Its clarity, of course, does not eliminate surprise. In the comments of the *Bet Shmuel* (Rabbi Samuel Phoebus, mid-seventeenth century) to the quotation above from *Even HaEzer*, Phoebus quotes the *Helkat Mehokek* (Rabbi Moses Lima, 1605-1658) and then offers his own reflection. The *Bet Shmuel* wrote:[297]

> ״שצער גופה קודם״ – כן כתב הרמב״ם. וכתב בחלקת מחוקק: ׳אם מגיע מזה לולד ספק סכנה ולה אין סכנה אלא צער, מהי תיתי דמכח צער תסכן הילד, ואם גם לה סכנה לא ידעתי מי שיחלוק על זה דחייה קודמין בוודאי, ואפשר לומר אע״ג דמגיע לולד ספק סכנה מ״מ מותרת לאכול כמה דאיתא בש״ס נדרים דף פ׳ בכיסתה וחיי אחרים כביסתה קודם אע״ג דאינו אלא צער. מיהו שם ר׳ יוסי סבירה ליה כן ורבנן פליגי על זה וסבירא להו חיי אחרים קודם, ומנא ליה לרמב״ם לפסוק כר״י.
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> "For her physical discomfort takes precedence" – thus wrote the Rambam. And the *Helkat Mehokek* wrote: "If [her eating] results in potential danger to the child, and she experiences discomfort but not danger, from where could one deduce that the child should be endangered on account of her discomfort? And if she, too, is endangered, I do not know of anyone who would disagree that under those circumstances her life would surely take precedence." And it is possible to say that even though the child is potentially endangered, nonetheless it is permissible for her to eat, as we find in the Talmud, Nedarim 80, that the laundry of a city takes precedence over the lives of another city, even though [refraining from laundering] causes only discomfort. However, it is Rabbi Yosi who holds this view there, while the sages disagree with him and affirm that the lives of the others take precedence. And on what basis did the Rambam decide according to Rabbi Yosi.

The Shulhan Arukh had given two views, one permitting and the other forbidding the mother from eating more than had been stipulated as her need. That, of course, implies a dispute. The *Helkat Mehokek* is in a quandry because he cannot understand the grounds of any dispute. If the child is potentially endangered and the mother suffers only discomfort, surely the child should take precedence, and there should be no dispute. If both the child and the mother are potentially endangered, the mother should take precedence, and there should be no dispute.

The *Bet Shmuel*, without having to say so, surely agrees with the final point of the *Helkat Mehokek*. He offers, as well, an answer to the first claim of the *Helkat Mehokek*. The *sugya* in Nedarim contains an example of the discomfort of one potentially superseding the life of another, if one adopts the view of Rabbi Yosi. That, says the *Bet Shmuel*, is what Maimonides seems to have done. The problem he has with this is his inability to see what basis the Rambam would have for such a move.

The *sugya* we are analyzing is cited as the source for the Rambam's view, provided that Maimonides decides according to Rabbi Yosi. That is what Maimonides did, and that is the

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[296] We will not go into a long digression on whether pain and discomfort ever supersede the life of another. Surely, though, it would follow by קל וחמר that for anyone who would allow pain to supersede the life of another, ספק סכנת נפשות surely would. We have already made passing reference to the question of pain, above p. 267, and n. 249. See, too, in Rabbi Ovadiah Yosef's article, p. 34.

[297] Even HaEzer, sec. 80, par. 15.

underpinning of that view in the Shulhan Arukh. Even if the *Bet Shmuel* can find no justification for Maimonides' doing so, we have seen several justifications above. So, here again, our *sugya* becomes the evidence that the Bavli disagrees with the Yerushalmi. If we can say that Maimonides was motivated in his decision regarding the nursing mother by any of the proofs offered above as to why the view of Rabbi Yosi should predominate over the view of the sages, we can understand well why Maimonides makes no mention in his code of a requirement potentially to endanger oneself for the benefit of another.

There are some, however, for whom this view in the name of Maimonides is so astounding, that they must find some other explanation of the Nedarim passage which does not leave Maimonides claiming that the personal discomfort of one supersedes the life of another. If one could find such an approach, and if one continues to affirm that what is true of discomfort is also true of ספק פקוח נפש, our *sugya* might no longer be evidence of a disagreement between the Bavli and the Yerushalmi.

One such approach redefines the way we have understood חיי אחרים – the lives of the others – until now. Thus far, we have taken the words literally, and understood Rabbi Yosi to be allowing their lives to be forfeit, while the sages have affirmed that their lives take precedence. The author of יחוסי תנאים ואמוראים[298] understands that אפשר להו על ידי טורח להסתפק ממעיין אחר או ילכו למקום אחר – "It is possible for them, with effort, to use another spring or to go elsewhere." Under such conditions, Rabbi Yosi allows the convenience of the original city to override the convenience of the other city, even though for one it is a convenience relating to their laundry while for the other it is a convience relating to their drinking water. Similarly, Rabbi Pinhas ha-Levi Horowitz wrote:[299] נר' דהתם לא מיירי ביש סכנה להעיר האחרת אלא שיכולים להביא מים מעיר אחרת או שילכו משם – "It seems that there they are not dealing with a case in which there is real [life threatening] danger to the other city because they can bring water from some other city or leave there." Also, Rabbi Moses Feinstein wrote:[300]

> הא לא איירי שם באופן פקוח נפש דלא יפלוג ר' יוסי לומר שכביסתן קודמת לחיי אחרים כשאיכא פק"נ.... וגם אם היה בכביסה פקוח נפש, איך פליגי רבנן דמאי שנא פקוח נפש דשתייה מפקוח נפש דכביסה.
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> We are not dealing there with a case of real life endangerment, for Rabbi Yosi would never say that their laundry would take precedence over the lives of others when there is real life endangerment. . . .What's more, if there were real life endangerment in laundry, how could the sages disagree [with Rabbi Yosi,] because there is no difference between life endangerment resulting from [absence of water for] drinking and life endangerment resulting from [not doing the] laundry.

Finally, Professor Saul Lieberman wrote[301] פשיטא שאין מדברים בסכנת נפשות ממש – "It goes without saying that we are not speaking about real life endangerment."

For all of the above, the dilemma presented by the view of Rabbi Yosi is ameliorated. One must admit, however, that the language of the text of the Talmud does not so easily lend itself to that meaning. But, assuming this understanding, our passage in Nedarim is

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[298] Judah Leib Maimon ed., p. 34.

[299] ספר כתובה הוא חוק אחד מן ספר הפלאה, עם קונטרס אחרון (Warsaw, 1861), in the קונטרס אחרון, sec. 80, no. 12.

[300] *Iggrot Moshe*, Yoreh De'ah, pt. 1, no. 145, p. 288a.

[301] T. Bava Metzia 11:33, p. 127 in the פרוש הקצר to line 112. See, too, the באור הארוך in *Tosefta Ki-feshuta*, p. 326.

silent on the issue under our discussion, namely, whether one must put oneself in jeopardy for the benefit of another.

There is another small group that reacts to the decision of Maimonides in the nursing mother case in a way that rejects his having deduced his decision from the Nedarim *sugya*. This approach posits that the nursing mother might endanger herself if she does not satisfy her craving. If so, her potential self endangerment takes precedence over the potential endangerment of the child, and that is why Maimonides says that the husband cannot stop her. Rabbi David Oppenheim is one who adopts this view. He wrote:[302] גם צערא דתאוות מאכל אתיא לידי סכנה כדאיתא עובדא טובא בש״ס דכתובות (דף ס״א ע״א וב׳).... וכן ע״כ צ״ל לדעת הרמב״ם שכתב דצער גופה קודמת – "Even the discomfort of food craving can lead to [real] danger, as the examples in Ketubbot 61a and b[303] show. . . .And, perforce, that must be the view of the Rambam when he wrote that her bodily discomfort takes precedence." The same view is espoused by Rabbi Pinehas Toledano[304] אם לא נמלא את רצונה בזה... ״חולי״ זה עלול להביאה לידי ״ספק סכנה״ – "If we do not fulfill her craving. . .this 'disease' is likely to result in 'potential danger.'" This explanation would surely explain why Maimonides decided as he did. It is also not an entirely untenable (though not entirely smooth, either) reading of his words. It does leave very difficult to understand why the Shulhan Arukh would record a dispute about the matter, however. And finally, according to this explantion, there is no relationship at all between Maimonides' decision in the nursing mother case and the *sugya* in Nedarim.

In the final analysis, then, we have again made a reasonably strong, but not decisive, case that the Nedarim passage, at least as understood by the *She'eltot* and possibly understood by Maimonides, demonstrates that the Bavli rejects the view of the Yerushalmi that one must endanger oneself for the benefit of another.

Thus far, then, we have seen and analyzed four *sugyot* from the Bavli, and several decisions of the Rambam. Each of the four was understood initially to imply that the Bavli disagreed with the Yerushalmi. For each, that argument was clearly defensible. However, each of the four, some more strongly than others, could be understood differently. At a minimum, they could be understood in such a way that there was no conflict between the Bavli and the Yerushalmi, because the Bavli was silent on the matter; and two of them were understood by some to imply even that the Bavli agreed with the Yerushalmi. Of the four, the *sugya* from Sanhedrin 73a seemed to provide the most convincing proof of a disagreement between the Bavli and Yerushalmi, but even it is not absolutely conclusive. Additionally, it is good to remind ourselves that even the Yerushalmi itself is not so clear. Though the *Hagahot* understands it to imply an obligation to jeopardize oneself, it may be that others disagree with that explanation, seeing the behavior of Resh Lakish not as a reflection of mandatory behavior, but as an act of piety.

There is one final *sugya* which we shall deal with. Unlike those we have already seen, however, this one is quoted originally to prove that the Bavli agrees with the

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[302] שו״ת נשאל דוד, חלק אבן העזר, סי׳ ו׳ (Jerusalem: Machon Hatam Sofer, 5735), p. 13b.

[303] That very *sugya*, in which Rav Ashi apparently puts himself at risk by sticking his finger in the king's food for the benefit of Mar Zutra, is raised by Rabbi Ovadiah Yosef (p. 40) as perhaps indicating at least that one is entitled, if not obligated, to jeopardize himself for the benefit of another. Rabbi Yosef himself rejects the claim that this *sugya* really proves that. First of all, the *sugya* makes clear that Rav Ashi saw that something was wrong with the food, and thus was probably not endangering himself. Secondly, Rav Ashi was known to be a friend of the king, and his act would not have endangered him. Rabbi Chaim Heller also mentions this passage as a possible proof, but concludes his reference with ויש לדחות. He does not, however, actually provide the דחיה.

[304] See reference above, n. 268. This point is made there on p. 27.

Yerushalmi. Rabbi Baruch ha-Levi Epstein, the *Torah Temimah*, wrote the following regarding Lev. 19:16 – לא תעמוד על דם רעך:[305]

> ועי' בחו"מ סי' תכ"ו... ובב"י ובאחרונים שם חקרו אם מחויב אדם להכניס עצמו בספק סכנה כדי להציל את חבירו מודאי סכנה, ואפשר להביא קצת ראיה דמחויב בזה מאגדה דברכות ל"ג א': מעשה בערוד שהיה מזיק את הבריות, באו והודיעו לר' חנינא בן דוסא, אמר להו הראו לי את חורו, נתן עקבו על פי החור, יצא ונשכו ומת הערוד.... והנה בפ"ג דתענית כ"ד ב' ובכמה מקומות באגדות אמרו על ר' חנינא בן דוסא שהיה מלומד בנסים, נמצא דלפני רחב"ד היתה העמידה על חורו של הערוד ספק סכנה כיון שרגיל בנסים, ולפני אחרים היה הערוד ודאי סכנה, והרי מבואר דמחויב אדם להכניס עצמו בספק סכנה כדי להציל חבירו מודאי סכנה. ופשוט דלא שייך בזה לומר אין למדין מן האגדות אחרי שזה מעשה שהיה.
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> See Hoshen Mishpat, no. 426. . .and in the Bet Yosef and other Aharonim there is investigation of whether one is obligated to put oneself in potential danger in order to save one's fellow from certain danger. And some proof of such an obligation can be brought from the aggadah of Berakhot 33a: It happened once with a lizard that was injuring people, that they came and told Rabbi Hanina ben Dosa. He asked them to show him the lizard's hole. He put his foot on the hole. The lizard came out and bit him and the lizard died. . . .Now in the third chapter of Ta'anit, 24b, and in several other aggadic passages, it is said about Rabbi Hanina ben Dosa that he was experienced with miracles. Therefore, standing on the hole of the lizard was [only] potential danger for him since he was accustomed to miracles, while for others it would be certain danger. Thus this tale proves that one must put oneself in potential danger in order to save another from certain danger. And it goes without saying that one may not object to deducing something from this passage on the grounds that one ought not deduce matters of legal behavior from aggadah, since this incident actually happened.

At the end of this passage, the *Torah Temimah* rejects the potential objection that might be raised at its use in the first place, namely, that it is an aggadic statement which cannot serve as a legal source. He rejects that claim because the passage is a record of a real event. The essence of the proof is that since Rabbi Hanina ben Dosa was no stranger to miracles, putting his foot on the hole was only a potential danger for him, and his action provides evidence that one is obligated to do so for the benefit of others who are in certain danger.

The proof of the *Torah Temimah* is rejected both by the *Ziz Eliezer*[306] and Rabbi Ovadiah Yosef,[307] on the grounds that for Rabbi Hanina ben Dosa there was no danger at all because he was accustomed to miracles.[308] Rabbi Waldenberg makes an interesting addi-

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[305] *Torah Temimah* to Lev. 19:16, no. 110.

[306] Vol. 9, no. 45, par. 6, p. 181b.

[307] P. 41.

[308] This could also account for other acts of sages that seem to rely on the miraculous. See Ta'anit 20b, 21a, 25a, and Kiddushin 29b.

tional comment to the effect that this claim must be correct, or else we must consider the danger to Rabbi Hanina to be certain, not just potential. Supernatural factors can never be used to change the status of real dangers from certain to doubtful. If one is not certain that he merits a miracle being worked for him, he must refrain from any danger which in the natural world would be considered a certain danger. Reliance on the supernatural is acceptable only when one is certain of one's merit.

We end this set of analyses inconclusively. We cannot prove definitively one way or the other regarding the view of the Bavli, though we incline to believe that it seems to disagree with the Yerushalmi. We note, however, that none of the passages dealt directly with the issue, but only by implication. We turn our attention, then, to the one posek whose direct words on this subject become the focus of attention of almost all subsequent poskim, the Radbaz (Rabbi David Ibn Abi Zimra, 1479-1573). First, the question that was addressed to him:[309]

> שאלת ממני אודיעך דעתי על מה שראית כתוב אם אמר השלטון לישראל הנח לי לקצץ אבר אחד שאינך מת ממנו או אמית ישראל חברך, יש אומרים שחייב להניח לקצץ מאבר הואיל ואינו מת, והראיה מדאמרינן בע"ז (כ"ח ע"ב) חש בעיניו מותר לכוחלה בשבת ומפרש טעמא משום דשורייני דעינא בלבא תליא. משמע הא אבר אחר לא. והשתא יבוא הנדון מק"ו: ומה שבת החמורה שאין אבר אחד דוחה אותה היא נדחית מפני פקוח נפש, אבר אחד שנדחה מפני השבת אינו דין שתדחה מפני פקוח נפש? ורצית לדעת אם יש לסמוך על טעם זה.
>
> You asked me to express my view concerning what you found written, viz., that if the ruling power said to a Jew: "Let me cut off one limb, from which you will not die; or I will kill your fellow Jew," that some say that he is obligated to allow the limb to be cut off, since he will not die. And the proof [for that view] comes from what is said in Avodah Zarah (28b), that one who experiences eye pain on Shabbat is allowed to apply salve. [And that permission] is explained on the basis of the fact that the eye muscles are connected to the heart [and would endanger one if he did not take care of the eye]. The implication [of the reason for the permission] is that for some other limb it would not be permissible [to violate the Sabbath]. And now our case can be answered by קל וחמר: If the Sabbath, which is strict insofar as it is not superseded by other limbs, is superseded by [a limb which, if not tended to would cause] life endangerment; surely other limbs, which are superseded by the Sabbath, should also be superseded by life endangerment. And you wish to know if one should rely on this reasoning.

The opinion which the Radbaz's questioner cites comes almost verbatim from the late thirteenth-early fourteenth century Italian kabbalist and halakhist, Rabbi Menahem Recanati.[310] He mandates that one must allow a limb to be cut off in order to save the life of another, provided it is not a limb whose removal will result in certain death. Recanati reaches that conclusion on the basis of a קל וחמר, based on the Gemara in Avodah Zarah. From the Gemara it follows that one may tend to his eye problem on Shabbat *only because failure to do so*

[309] שו"ת הרדב"ז, חלק ג', סי' תרכ"ז (אלף נב).

[310] See פיסקי ריקאנטי, סי' ת"ע.

would endanger him. If failure to tend to some other limb would not endanger him, he may not desecrate the Sabbath for that limb, even though he might lose it. Surely, then, it follows that one must forfeit such a limb for the benefit of another, since saving the life of another supersedes even the Sabbath, even though saving that limb would not. It is to this argument that the Radbaz is asked to react by his questioner.

Almost every line of the response of the Radbaz is important. We shall quote the entire responsum, in sections. We shall number the sections in the English translations.

> תשובה: זו מדת חסידות אבל לדין יש תשובה. מה לסכנת אבר דשבת שכן אונס דאתי משמיא ולפיכך אין סכנת אבר דוחה שבת, אבל שיביא הוא האונס עליו מפני חבירו לא שמענו.
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> I. Response: This is an act of piety, but as a matter of law, there is a rebuttal. What distinguishes the case of the endangerment of a limb on the Sabbath is that the danger came from Heaven, and therefore, the endangerment of that limb does not supersede the Sabbath; but we have never heard of a requirement to bring such a danger on himself for the benefit of his fellow.

First, the Radbaz defines the act of sacrificing the limb in order to save the life of the threatened person an act of piety. There can be no question that the term מדת חסידות intimates both approval and praise. However, the קל וחמר which led Recanati to posit the sacrifice of the limb as mandatory is flawed. The essence of the argument of Recananti was based on a comparison to a person's obligation to forfeit a limb, the loss of which would not kill him, in deference to the Sabbath. Radbaz's answer is that in the Sabbath case the obligation to forfeit the limb stems from the fact that God Himself has endangered it. The person himself had nothing to do with it. It would be erroneous to conclude that because one must forfeit a limb in a case where the danger is already existent one must also "chose" to forfeit a limb in a case where the danger to it is not already there, not from Heaven. From this statement of the Radbaz it would follow that the halakhic evidence which proves that one must sometimes submit to danger not of his own making is insufficient to compel the halakhic conclusion that one must ever bring danger upon oneself. Allowing one's limb to be cut off in order to save another is a laudable act, a pious act, but not a required act.

> ותו, דילמא על ידי חתיכת אבר אע"פ שאין הנשמה תלויה בו שמא יצא ממנו דם הרבה וימות, ומאי חזית דדם חבירו סומק טפי, דילמא דמא דידיה סומק טפי. ואני ראיתי אחד שמת על ידי שסרטו את אזנו שריטות דקות להוציא מהם דם ויצא כל כך עד שמת. והרי אין לך באדם אבר קל כאוזן, וכ"ש אם יחתכו אותו.
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> II. Furthermore, perhaps the act of cutting off a limb the loss of which does not entail death will result in sufficient blood loss to cause death; and on what basis would one conclude that the blood of the other person is sweeter, perhaps his own blood is sweeter. Indeed, I have witnessed the case of one on whose ear were made thin lacerations in order to remove blood, which resulted in such profuse bleeding that he died. And there is no thinner organ on a human [and yet we see that even it can result in death], and surely [such danger] would exist if one were to cut off the ear.

Beyond the fact that the קל וחמר does not work, the very premise that the limb can be removed without putting the person in potentially life threatening danger is questionable.

Even the simplest surgery can result in uncontrolled bleeding and cause death. And if that can happen even when one is not intending actually to remove the limb, how much more can it happen when that is one's intention. Surely one might have to take such risks for one's own health, but there is no halakhic basis to a claim that another's life is more important than mine. Thus, I could be under no obligation to put myself at risk, even potential risk, that could result in my death.

> ותו דמה לשבת שכן הוא ואיבריו חייבין לשמור את השבת, ואי לאו דאמר קרא ״וחי בהם – ולא שימות בהם״ הוה אמינא אפילו על חולי שיש בו סכנה אין מחללין את השבת, תאמר בחבירו שאינו מחוייב למסור עצמו על הצלתו אע״ג דחייב להצילו בממונו, אבל לא בסכנת איבריו.
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> III. Furthermore, what distinguishes the Sabbath case is that one is duty bound to observe it with all of his limbs. And were it not for the derivation from "And live by them – rather than die for them," one would have held that one should refrain from desecrating the Sabbath even for a dangerous disease. Could one possibly make the same claim regarding one's fellow, for whose benefit one is not obligated to forfeit one's own life? And even though one is obligated to forfeit one's money to save him, one is not obligated to put one's limbs in danger.

It would probably have been better to have part III after part I, since it, too, offers a rebuttal to the קל וחמר of Recanati. The argument of part III is as follows: It is not self-evident that the Sabbath should be desecrated in life-threatening situations. Indeed, were it not for the midrash on the verse "And live by them," which interprets the verse to mean, "Don't die by them," there would be no grounds to make such an assumption. In other words, we need the Torah itself to teach us that the maintenance of our lives takes precedence over the commandments of the Torah. But, unlike the case of forfeiting one's life for God, it would never occur to anyone to think that there is an obligation to forfeit one's life for another, since one's own blood may be sweeter than his. Indeed, we need a special scriptural derivation even to learn that one must sacrifice one's wealth to save the life of another. Surely, then, there could be no argument to compel one to sacrifice one's limbs for the benefit of another.

> ותו דאין עונשין מדין ק״ו ואין לך עונש גדול מזה שאתה אומר שיחתוך אחד מאיבריו מדין ק״ו, והשתא ומה מלקות אין עונשין מדין ק״ו, כל שכן חתיכת אבר.
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> IV. Furthermore, one may not impose punishment on the basis of an argument by קל וחמר.[311] And there could be no greater "punishment" than cutting off one's limb on the basis of a קל וחמר. Now if one cannot even impose lashes on such a basis, how much more so the cutting off of a limb.

Even if the קל וחמר offered by Recanati were solid and irrefutable, it could not become the basis for an actual decision that involves removing somebody's limb. Removal of a limb falls into the category of עונש, and cannot become mandated by a קל וחמר argument.

> ותו דהתורה אמרה פצע תחת פצע כויה תחת כויה, ואפי׳ הכי חששו שמא ע״י הכוייה ימות, והתורה אמרה עין תחת עין ולא נפש ועין תחת עין, ולכך

[311] See Sanhedrin 54a, 73a, 74a.

אמרו שמשלם ממון. והדבר ברור שיותר רחוק הוא שימות מן הכויה יותר מעל ידי חתיכת אבר ואפי׳ הכי חיישינן לה, כל שכן בנידון דידן. תדע דסכנת אבר חמירא דהא התירו לחלל עליה את השבת בכל מלאכות שהם מדבריהם, אפי׳ על ידי ישראל.

v. Furthermore, the Torah says:[312] "A wound for a wound, a burn for a burn," and even so the sages were concerned that an actual burn might result in death. And since the Torah said: "An eye for an eye," and not "An eye and a life for an eye," the sages mandated that [the law is fulfilled by] monetary compensation.[313] And it is clear that the danger of death from a burn is far less likely than from cutting off a limb, and still the sages were concerned about it. Surely, then, it is so in our case. And know how serious a limb is [to the sages], for they permitted the violation of all rabbinic prohibitions on the Sabbath, even by the Jew himself, in order to save it.[314]

This section of the Radbaz's argument provides additional proof of the lengths to which the law goes to protect even limbs which would not automatically result in loss of life if lost. The demand of the Torah is, "An eye for an eye, a wound for a wound, a burn for a burn." When the sages stipulated that monetary compensation replace the literal fulfillment of the Torah's mandate, the motivation was to protect against possible life endangerment. Even though the inflicting of a wound or a burn on a person is not likely to result in that person's death, surely less likely to do so than the removal of a limb, the law is concerned even for the unlikely. Compensation replaces literal fulfillment of the law in order to prevent accidental and unintended loss of the limb. Limbs are very important, even to the extent that rabbinic violations of the Sabbath are ignored in order to protect them. Surely, then, there can be no requirement to sacrifice a limb for the benefit of another, since, even though perhaps unlikely, such an act could lead to the endangerment of one's own life.

ותו דכתיב דרכיה דרכי נעם וצריך שמשפטי תורתינו יהיו מסכימים אל השכל והסברא. ואיך יעלה על דעתנו שיניח אדם לסמא את עינו או לחתוך את ידו או רגלו כדי שלא ימיתו את חבירו. הלכך איני רואה טעם לדין זה אלא מדת חסידות, ואשרי מי שיוכל לעמוד בזה. ואם יש ספק סכנת נפשות הרי זה חסיד שוטה דספיקא דידיה עדיף מוודאי דחבריה. והנראה לע״ד כתכתי.

vi. Furthermore, it is written:[315] "Its ways are ways of pleasantness." That implies that the laws of our Torah must agree with common sense and logic. And is it logical to think that a person would allow another to blind his eye or cut off his hand or foot in order to prevent the killing of his fellow? Therefore, I see no justification for this as law, but only as an act of piety. Happy is he who can fulfill it. But if there is any danger of a life threatening type, such a person would be a "foolish saint," for his

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[312] Exod. 21:25.

[313] Bava Kamma 84a.

[314] On this complicated subject, see Orah Hayyim 328:17.

[315] Prov. 3:17.

> doubtful danger supersedes the certain danger of his fellow. This is my opinion.

Finally, the Radbaz argues that positing such a requirement is counterintuitve, and violates the premise that the laws of the Torah must be reasonable and logical. It is simply not reasonable to demand that one allow the cutting off of a limb of his even in order to save the life of another. It is not a demand that most people will find acceptable and reasonable. A pious individual might be able to accept this, and blessed would be such a person. Then, as almost a post script, the Radbaz adds that if by doing so one puts oneself in the position of even doubtful life threatening danger, he would be a "foolish saint" for doing it.

The following conclusions would seem to follow from the responsum of the Radbaz:

1. There is no halakhic obligation to allow the amputation or removal of a limb, even to save another from certain death.
2. It is permissible to allow it, even though it puts a person in סכנת אבר, and that one who does allow it is praiseworthy, acting from מדת חסידות.
3. A person who allows it is a "foolish saint" if the act engenders ספק סכנת נפשות.

Clearly, somehow the Radbaz is distinguishing between סכנת אבר and סכנת נפש. Two things, however, complicate a clear understanding of the view of the Radbaz. First, does labeling a person as a חסיד שוטה imply that the act is forbidden; or does it remain a permissible act, intimating only that the person is a fool for having done it? Second, how can we really distinguish between סכנת אבר and סכנת נפש in any reasonable way when the Radbaz himself, in parts II and V, makes the claim that even the most ostensibly "safe" actions might involve life endangerment?

Surely the Mishnah is not too fond of a חסיד שוטה, listing it among those who destroy the world.[316] When the Bavli gives an example of such a "foolish saint," it is embodied in the case of man who refuses to save a drowning woman because it is improper to look upon her.[317] The Yerushalmi gives as its example one who refuses to jump in the water to save a drowning child without first removing his tefillin, fearing that the water will erase the parchments, while the child drowns in the meanwhile.[318] The Radbaz himself uses the term elsewhere to define one who refuses to desecrate the Sabbath in a case of פקוח נפשות.[319] In these cases, it seems quite clear that we would define acting as a "foolish saint" to be forbidden. If we apply this to our case, it would follow that for the Radbaz it is permissible to donate an organ when the act does not endanger the life of the donor, and forbidden to do so when the act does endanger the donor.

Having said that, the relevance of the second complication raised above becomes all the more critical. The *Ziz Eliezer* addresses the issue:[320]

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[316] Sotah 3:4 (20a), and reading מכלי עולם rather than as appears in the Mishnah in the Bavli, מבלי עולם. Of course, even the latter reading is anything but favorable.

[317] Sotah 21b.

[318] J. Sotah 3:4, 19a. Quoted by the Tosafot, Sotah 21b, s.v. היכי.

[319] שו"ת רדב"ז, חלק ד', סי' אלף קלט (סז).

[320] Vol. 9, no. 45, par. 11. See, too, vol. 10, no. 25, ch. 7, par. 5, p. 127a, b. I admit that I am ignoring a distinction that Rabbi Waldenberg makes between internal and external organs. Nonetheless, his basic distinction stands.

ובאמת יש לעיין מתי יצויר הדבר שנאמר שזאת מדת חסידות ולא נקרא חסיד שוטה, הא הרדב"ז שם מאריך בדבריו לבאר שכל הפסדת אבר מאדם כרוך בספק סכנה.... וצריך לומר שסבר הרדב"ז שאעפ"י כשיבואו לשאול לנו נגדיר הכל בגדר ספק סכנה, מ"מ לא נדקדק על כך למי שרוצה לנדב מרצון לבו כל אבר שאין הנשמה תלויה בו... ונאמר לו שלא יקרא עי"כ חסיד שוטה כי אם זוהי דרגא גדולה של מדת חסידות.... [ו]אם יקבעו שיש בזה ספק סכנת נפשות הרי זה חסיד שוטה דספיקא דידיה עדיף מודאי דחבריה.

> In truth, some thought is required to determine when it should be considered an act of piety and not the act of a foolish saint, since the Radbaz went to some length to explain that all limb removal entails danger to a person. . . .So one must say that the view of the Radbaz is that if one comes to ask, we must define all limb removals as entailing potential danger. However, we should not be overly zealous [to discourage or forbid] with one who wishes, of his own free will, to donate an organ the loss of which will not cause certain death. . .and we should say to such a person that the act is not one of a foolish saint, but rather constitutes the highest level of acts of piety. . . .But if [experts] determine that the act entails significant potential danger, [the donor] would be a pious fool, since his case of doubtful danger supersedes even the certain danger of the other.

Rabbi Waldenberg treads a fine line. But he is forced to do so by the responsum of the Radbaz. The term חסיד שוטה seems to have a fairly clear meaning, and implies more than simply discouraging one from taking an act. And the Radbaz does go to lengths to make clear how potentially life threatening all organ removals can be. Yet, he also does define the act of the donor of a limb for the benefit of another as an act of piety. Since it is reasonable to assume that the Radbaz is not contradicting himself within a single responsum, the solution of Rabbi Waldenberg is not unreasonable. There is always the possibility that a life threatening situation could arise, even in the "safest" of procedures. One who is worried about that possibility may rest assured that the law does not require him to donate an organ, even to save the life of another. However, when that possibility is more remote than real, the act of donation is a highly praiseworthy act of piety. When that possibility is more real than remote, a person would be a foolish saint to put himself in that position, and should even be instructed not to do so, since being a חסיד שוטה is actually forbidden, no matter how pure the motivation.[321]

Rabbi Menashe Klein[322] even raises the possibility that there is no conflict between

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[321] Rabbi J. David Bleich, *Contemporary Halakhic Problems*, vol. 4, p. 279, n. 20, has a different approach. He prefers to understand that חסיד שוטה in the context of the responsum of the Radbaz means foolhardy, but discretionary and not forbidden. He reaches this possibility by contending that the claim מי יימר דדמא דידיה סומק טפי, דלמא דמא דידך סומק טפי becomes an imperative only when "the danger to one's own life is greater or equal to the danger to the person in need of rescue." If there is real danger to the donor, but it is not greater than the danger to the one in need of rescue, the donation may be foolhardy, but it is permissible. Rabbi Bleich offers no proof to this claim. Furthermore, the Radbaz raises the דלמא דמא דידך סומק טפי argument in section II, where the ostensible danger to the donor was far less than the danger to the person needing rescue. Bleich would have to say that there the claim merely allows one to refuse to donate, but does not intimate even that the act was foolhardy. But I can see no place in the Radbaz's teshuvah where the degree of danger to the donor versus the degree of danger to the one in need of rescue is raised or hinted at as a factor.

[322] משנה הלכות, חלק ו', סי' שכ"ד, דף קצט, ע"ב.

this responsum of the Radbaz and the Yerushalmi. The latter mandates jeopardizing oneself for the benefit of another only when the saving party reverts, upon successful completion of his mission, to a state of no longer being in danger. But in the case of organ donation, the danger into which the donor enters remains forever, since the organ will be forever gone. In such a case, even Resh Lakesh would not insist that one is duty bound to endanger oneself.

Rabbi Moses Feinstein also expounds upon the responsum of the Radbaz.[323] On July 15, 1968, he reacts to it as part of a responsum on heart transplants. Rabbi Feinstein did not have the actual responsum of the Radbaz before him, and referred to it through the *Pithei Teshuvah*.[324] While the actual teshuvah of the Radbaz is directed at answering the position of Recanati, Rabbi Feinstein provides a theoretical basis for the Radbaz's thinking. The reason one is not obligated to donate one's limb is that the prohibition of לא תעמוד is not different from all other prohibitions. About all other negative commandments the law mandates that one must expend one's fortune in order to avoid violating it, but there is nowhere indicated that one must go beyond that. Surely one need not give up one's life in order to avoid violating the prohibition. One might wonder whether losing a non-life threatening limb is in the category of life or money. The Shakh[325] contends that one need not give up a limb in order to prevent violation of a לאו. Thus, the logic of the Radbaz is that since it is permissible to violate a לאו rather than lose a limb over it, it is possible to violate the commandment of לא תעמוד rather than lose a limb over it.

Even without having the actual responsum of the Radbaz in front of him, Feinstein also raises the possibility that the law requiring forfeiting a limb rather than violating the Sabbath might seem to belie his claim. And he gives exactly the same explanation of the difference between the two as does the Radbaz himself, in section I. So, concludes the *Iggrot Moshe*:

> סובר הרדב״ז מאחר שלא מצינו שעל לאו דלא תעמוד על דם רעך יהיה חמור מכל לאוין שבתורה שיהיה מחוייב גם לחתוך אברו להציל חברו שאינו מחוייב דבלא ראיה להחמירו משאר לאוין אין לנו לומר חדוש כזה, ולכן אינו מחוייב לחתוך אבר בשביל הצלת חברו.
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> The Radbaz holds that since we find no indication that the negative commandment, "Do not stand idly by the blood of your fellow," is any more strict with regard to being obligated to cut off a limb in order not to violate it than any other negative commandment in the Torah, [it follows] that it is not mandatory. For we cannot apply such a novelty to this commandment against all others without evidence. Thus, one is not obligated to sever a limb in order to save another.

The argument of Rabbi Feinstein is quite substantive. There is no indication that לא תעמוד is different from other לאוין, so why should this mitzvah demand a measure of sacrifice that no other negative mitzvah demands, or gets. The problem which Feinstein's analysis leaves him with is that it could push him to claim that not only is it not required, it is forbidden. After all, we do not usually permit one to sacrifice a limb in order to pre-

[323] שו״ת אגרות משה, יורה דעה, חלק ב׳, סי׳ קע״ד, ענף ד׳, עמ׳ רצ״ב ואילך. An answer very similar to the one which Rabbi Feinstein gives is also given by Rabbi Aryeh Leib Grossnass, שו״ת לב אריה, חלק ב, סי׳ ל״ח, דף קכ״ב ע״א.

[324] Yoreh De'ah 157:15.

[325] Ibid., par. 3.

vent the violation of other negative commandments. We tell them to violate the commandment instead. He avoids that conclusion by assertion that להציל נפש חברו אף שג״כ הוא רק באיסור לאו יהיה מותר להכניס עצמו בספק מוכר דעכ״פ יוצל נפש מישראל – "To save the life of one's fellow, even though [that obligation stems] from a negative commandment, it would be permissible to put oneself in potential danger, since the life of another Jew will be saved."[326]

Rabbi Isaac Jacob Weiss also affirms that the right to donate exists, and that the dispute between the *Hagahot Maimoniyot* and the poskim who disagree with him is only about אם צריך או לא, אבל מותר אם רוצה [ו]כל זה דוקא אם יכניס עצמו לספק סכנה יציל את חבירו ברור – "Whether it is mandatory or not. But it is permissible. And all of this concerns a case in which it is certain that the other will be saved if the donor puts himself in potential danger."[327]

We have been analyzing a responsum of the Radbaz which seems to state very clearly that there is no obligation to donate a limb, even if failure to do so will certainly cause the death of another. While there is no obligation, it is an act of great kindness and piety to do so, provided the donation does not put the donor in a situation of ספק סכנת נפשות. If it does put him in such a situation, he would be a חסיד שוטה to donate.

There is, however, another responsum of the Radbaz which considerably complicates our ability to understand him. Indeed, on some level, this second responsum of his seems to contradict the teshuvah we have been dealing with until now. Therefore, we must look at the second responsum of the Radbaz.[328]

> מה שכתב הרב ז״ל[329] ״כל היכול להציל [ולא הציל עובר על לא תעמוד על דם רעך]״ איירי במי שיכול להציל להדיא בלא שיסתכן המציל כלל, כגון שהיה ישן תחת כותל רעוע שהיה יכול להעירו משנתו ולא העירו או כגון שיודע לו עדות להצילו, עבר על לא תעמוד על דם רעך.
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> 1. When the Master [Maimonides] wrote:[330] "Whoever can save [but does not save violates "Do not stand idly by the blood of your fellow,"] it refers to one who is clearly able to save without endangering himself at all; for example, if one was sleeping at the foot of a rickety wall and it was possible to wake him from his sleep, but he did not do so; or, for example, that one knew exculpatory testimony [concerning the other, but did not offer it], these constitute violations of "Do not stand idly by the blood of your fellow."

Maimonides wrote that כל היכול להציל ולא הציל עובר על לא תעמוד על דם רעך – "Whoever is able to save and does not do so violates 'Do not stand idly by the blood of your fellow.'" The Radbaz offers a straightforward explanation of this clause. It applies to cases in which saving is certain and there is no danger whatsoever to the saving party, as, for example, warning people to move from a dangerous location.

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[326] Rabbi Feinstein restricts this permission to certain saving of the person in need, when accompanied by only potential danger to the saving party. He does not permit one to sacrifice his life, even if that sacrifice would surely save another. That one may not do, even if the one who will be saved is a sage or a saint.

[327] שו״ת מנחת יצחק (ירושלים, תשל״ו), חלק ו׳, סי׳ ק״ג.

[328] שו״ת הרדב״ז, חלק ה׳, ללשונות הרמב״ם, סי׳ אלף תקפ״ב (רי״ח). All of part v of the Responsa of the Radbaz is devoted to explanations of questions arising from the Rambam and the *Hasagot* of the Ravad, two hundred and thirty-four such questions in all.

[329] רמב״ם, הלכות רוצח ושמירת נפש, פרק א׳, הל׳ י״ד.

[330] M.T. Hilkhot Rozeah u'Shemirat Nefesh 1:14.

After this clause, Maimonides paraphrases the end result of the passage in Sanhedrin,[331] mandating saving one from drowning or attack by animals or bandits, both by one's own efforts and by hiring help, if needed. He then adds a couple of other examples which do not come from the Talmud, including them in the prohibition against standing idly by. The Radbaz continues:

> ולא זו בלבד אלא אפילו יש בו קצת ספק סכנה, כגון ראה אותו טובע בים או לסטים באים עליו או חיה רעה שיש בכל אלו ספק סכנה, אפילו הכי חייב להציל, ואפילו שלא היה יכול להציל בגופו לא נפטר בשביל כך אלא חייב להציל בממונו ולא זו בלבד דברי היזיקיה אלא אפילו שמע עכו"ם [או מוסרים מחשבים עליו רעה או טומנין לו פח ולא גלה אוזן חבירו והודיעו או שידע בגוי או באנס שהוא קובל על חבירו ויכול לפייסו בגלל חבירו ולהסיר מה שבלבו ולא פייסו וכל כיוצא בדברים אלו], דלא ברי היזיקיה כולי האי דדילמא ממלכי ולא עבדי, אפילו הכי חייב להציל ואם לא הציל עבר על לא תעמוד על דם רעך.
>
> II. And not only in the cases already mentioned [is one duty bound to save], but even in cases where there is some small potential danger; for example, if he saw somebody drowning or attacked by bandits or an animal – in all of which there is some potential danger – nonetheless he is duty bound to save. And he is not exempt from this responsibility even if he cannot save him alone. Rather, he must save him with his money. And not only in such cases where the danger to the one in trouble is clear and certain, but even if he heard pagans [or informers plotting evil against him, or setting a trap for him, and he did not reveal the information to his fellow and tell him; or if he knew about some gentile or property confiscator who was registering a complaint against his fellow, and he could assauge him on behalf of his fellow to alter his intention, and he did not do so; and such similar things, even in these cases where] the danger is not as clear and certain, for perhaps they would rethink their intentions and would not carry them out, nonetheless one is obligated to save them, and if he did not do so, he is in violation of "Do not stand idly by the blood of your fellow."

One is obligated, says the Radbaz, to save another even when there is some small potential danger to oneself. Normally, one can save a drowning person by throwing him a rope. Usually, the danger to the saver is minimal. But, it could happen that he might fall into the water, or be pulled in by the drowning person, and be endangered. Nonetheless, he must take that risk. Furthermore, the obligation to save extends even beyond the cases of immediate and clear danger to the person needing saving, like drowning or being under attack. The obligation encompasses even cases in which one is privy to information about plans which, if acted upon by those plotting them, would endanger one's fellow.

Note that nothing in the first responsum of the Radbaz contradicts part II of this responsum. The contents of this section are based on the Gemara in Sanhedrin. It already anticipates the possibility of minimal potential danger to the saving party, and already includes failure to act under those circumstances in the לא תעמוד prohibition. The first responsum may seem to be unaware of the Yerushalmi, but it cannot be unaware of the

[331] 73a.

Bavli. It is inconceivable that the intent of the Radbaz in the first responsum was to exclude the obligation to attempt to save another who was drowning on the grounds that one might be pulled into the water, because such an exclusion would contradict the Bavli. Thus, in this responsum, the Radbaz makes clear that the obligation to save extends to these circumstances.

But, the Radbaz concludes:

> הוי יודע שיש בכלל לאו זה שלא יעמוד על הפסד ממון חבירו אלא שאינו חייב להכניס עצמו לספק סכנה בשביל ממונו. אבל להציל נפש חבירו... אפילו במקום דאיכא ספק סכנה חייב להציל, והכי איתא בירושלמי. ומכל מקום, אם הספק נוטה אל הודאי אינו חייב למסור עצמו להציל את חבירו, ואפי׳ בספק מוכרע אינו חייב למסור עצמו דמאי חזית דדמא דידך סומק טפי דילמא דמא דידיה סומק טפי[332] אבל אם הספק אינו מוכרע אלא נוטה אל ההצלה והוא לא יסתכן ולא הציל עבר על לא תעמוד על דם ראך. הנראה לעניות דעתי כתבתי.
>
> III. Be aware that refraining from saving the wealth of one's fellow is included in the prohibition, though one is not duty bound to put himself in potential danger for another's wealth. But one is obligated to save the life of another, even when it entails potential danger, and that is what the Yerushalmi says. However, if the potential danger leans toward certainty, he is not obligated to put himself in such a position for another's benefit. And even if the potential is fifty-fifty, he is not obligated, for why would it be certain that your blood is sweeter, perhaps his blood is sweeter.[333] But if the danger is not even fifty-fifty, but leans toward saving without his being endangered, one violates "Do not stand idly by the blood of your fellow" if one does not save him. So it seems in my opinion.

Part III of this responsum goes considerably further than part II. It obligates one to save another even when there is some danger to himself, greater than the minimal danger indicated in part II. The Radbaz distinguishes between levels of danger. He seems to be saying that one violates לא תעמוד if he fails to attempt to save his fellow when the chances are fifty percent or less that attempting to save him will result in actual danger to himself. One does not violate לא תעמוד if the chances of actual danger to oneself are greater than fifty percent, and, as a result, one does not attempt to save the person in danger.

Surely there appears to be a conflict between this responsum and the first. In part II of the first the Radbaz makes the case that even the most minor surgery can result in life threatening danger. His example of bleeding to death as a result of a laceration on the earlobe surely must be one where such a chance was less than fifty percent. And in part V of the first responsum, where he talks about why restitution is made rather than literal fulfillment of פצע תחת פצע כויה תחת כויה, it is also clear that the chances were less than fifty percent that literal fulfillment of the verse would result in death. Yet, these arguments led him to conclude that there is no obligation to endanger oneself at all, and that doing so would be an act of מדת חסידות. Surely, though, if one did not do so he would not be guilty of violating לא תעמוד, even though he would not be a חסיד.

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[332] ברור שצריך להיות: דמאי חזית דדמא דידיה סומק טפי, דילמא דמא דידך סומק טפי.

[333] This must clearly be read: "Why is it certain that his blood is sweeter; perhaps your blood is sweeter."

One might wish to argue that in the second responsum the Radbaz is explicating the view of Maimonides, while it is in the first responsum that his own view is expressed. That is highly unlikely, however. First of all, there does not seem to be anything in the language of Maimonides that implies what the Radbaz says in part III of the second responsum. Furthermore, many poskim reject the view of the *Hagahot* precisely because they thought the Rambam, the Rosh and the Tur decided against it by ignoring it. Additionally, the Radbaz does not link anything in part III of the second responsum with the language of Maimonides himself, while he does do that in parts I and II. Finally, the Radbaz actually says that part III of the second responsum is based on the Yerushalmi. So, we must reasonably conclude that the contents of the second resposum reflect the opinion of the Radbaz himself,[334] creating a contradiction between the two responsa.

There exists the theoretical possibility that one of the responsa is intended to be a retraction of the other. There is no hint to that, however. Besides, we could probably never tell which responsum is the retraction!

Another possibility is simply to concede that the two contradict each other, and decide which we would choose to follow on the basis of which we think the more compellingly argued. This approach would leave part III of the second responsum at a great disadvantage, since it is not *argued* at all, but merely *asserted*. What's more, the Radbaz does not identify the Yerushalmi which ostensibly is the basis for the essential claim of part III. We would have no choice but to identify it as we have assumed all along. And, in that Yerushalmi passage there is no evidence whatsoever what percentage chance of endangerment Resh Lakish accepted in deciding to go after Rabbi Ami.

A significant number of poskim who refer to the Radbaz as the source of their decisions on our question do not refer to the second responsum at all. They appear totally unaware of it. This is true, for example, of Rabbi Feinstein, Rabbi Isaac Jacob Weiss, Rabbi Aryeh Leib Grossnass, Rabbi Pinehas Toledano, and Rabbi Menashe Klein. In his responsum in volume 9 of the *Ziz Eliezer*, Rabbi Eliezer Waldenberg also makes no mention of the second responsum of the Radbaz. There are others, however, who are aware of the second responsum of the Radbaz, including Rabbi Waldenberg in volume 10, and it is to them that we turn our attention now. Not surprisingly, of course, the premise which they all try to substantiate is that there is no contradiction between the two teshuvot of the Radbaz. The reconciliations take two different directions, and we shall focus first upon the direction taken by the *Ziz Eliezer*.

After spelling out the apparent contradiction between the two teshuvot, and quoting the last part of section III of the second responsum in which the Radbaz distinguishes between various percentages of potential danger, Rabbi Waldenberg wrote:[335]

> הרי בהדיא שהרדב״ז ז״ל חזר והבהיר את דעתו וגם הטה לכך כוונת הירושלמי, שרק בספק שאינו מוכרע אלא נוטה אל ההצלה אזי מחויב גם ליכנם לכך כדי להציל את חבירו אבל כל שהספק לכך מוכרע אזי איננו מחויב כבר למסור נפשו ואמרי׳ להיפך דילמא דמא דידיה סומק טפי. ולפי זה אין יותר סתירות בדברי הרדב״ז.
>
> The Radbaz explicitly clarifies his opinion, and even intimates that it is the intent of the Yerushalmi. Only if the danger is less than 50%, inclining toward saving, is one obligated to put one-

[334] It does seem reasonable to claim that the Radbaz saw no contradiction between Maimonides and what he says in part III of the second responsum. I do admit that it is difficult to see how he reaches that conclusion.

[335] *Ziz Eliezer*, vol. 10, no. 25, ch. 28.

> self in danger in order to save his fellow. But whenever the danger is 50% [or greater], one is no longer obligated to put himself at risk. Indeed, we say the opposite: "Perhaps his own blood is sweeter." In this way, there are no contradictions in the words of the Radbaz.

The solution of the *Ziz Eliezer* to the contradiction between the teshuvot of the Radbaz is to claim that the two complement and clarify each other, rather than contradict each other. That solution is also adopted by several others: Rabbi Abraham Sofer Abraham,[336] Rabbi Ovadiah Yosef,[337] and Rabbi Moshe Hershler.[338] And the idea that this distinction is also implicit in the Yerushalmi also appears earlier than the Ziz Eliezer. Rabbi Haim Benveniste wrote in כנסת הגדולה:[339] ואפילו לסברת ההגהות אם הספק נוטה אל הודאי ואפי ספק מוכרח אינו חייב.... אלא דוקא בספק שאינו מוכרח נוטה אל ההצלה – "Even according to the *Hagahot*, one is not duty bound if the potential danger inclines toward certain or is even. . . .[He is obligated] only when the danger is less than even, inclining toward saving." And Rabbi Moses Schick wrote:[340] נ"ל דגם הירושלמי לא קאמר בחשש סכנה ממש וספק השקול אלא דאיכא חשש עפ"י המיעוט אבל עפ"י הרוב ליכא ספק נפשות – "It is my opinion that even the Yerushalmi does not refer to a significant danger or an even danger; but only to a case in which there is usually only slight danger, but usually not significant danger."

The motivation of these poskim to wish to reconcile the teshuvot of the Radbaz is both understandable and commendable. It is eminently reasonable to assume that the Radbaz would not contradict himself so blatantly. And if that is reasonable, there must be some way to reconcile his teshuvot. The test of the reconciliation, however, lies in the ability to apply it to the teshuvot in question. In our case, the distinction made by the Radbaz in the second responsum is presumed to apply also to the first responsum. We would then have to say that the חסיד שוטה of the first responsum is one who donates a limb even when that endangers him more than fifty percent. But to which level of danger can the category of מדת חסידות be applied? Since it is clear that מדת חסידות refers to an act of piety, rather than a dictate of law, it cannot be applied to a case of less than fifty percent risk on the part of the donor, because according to the second responsum that donation should be mandatory and not merely an act of piety. What's more, as we have said above,[341] in the first responsum the Radbaz uses cases where the danger is less than fifty percent to prove that there is no obligation to donate, while in the second responsum those very cases should be obligatory. Thus, the reconciliation proposed by the *Ziz Eliezer*, and the others, works well enough to help us define a חסיד שוטה, but not well enough to help us distinguish between an obligatory act and an act of piety which is not obligatory.

It is perhaps just such considerations that moved other poskim toward a different solution to the contradictions in the Radbaz. This direction differentiates the two teshuvot in such a way that they are dealing with entirely different subjects and ought not be compared at all. This approach is formulated by Rabbi Moshe Hershler as follows:[342]

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[336] See *המעין*, ניסן תשמ"ה, pp. 25-26, and cf. *המעין*, ניסן תשמ"ב, p. 34, and *נשמת אברהם*, הלכות אבילות, סי' שמ"ט, עמ' רס"ד.

[337] See *יחוה דעת*, חלק ג', סי' פ"ד, עמ' רפ"ד, and his article in *דיני ישראל* ז', עמ' כ"ז–כ"ח.

[338] See הלכה ורפואה, כרך ב', תשמ"א, עמ' קכ"ג–קכ"ד.

[339] Hoshen Mishpat no. 426, comments on Beit Yosef, no. 1.

[340] ספר מהר"ם שיק על תרי"ג מצות (מונקאטש, תרנ"ח), מצוה רל"ח.

[341] P. 294.

[342] See above, n. 338.

בתשובת הרדב"ז... כתב עוד הבדל יסודי... והוא שכל עקירת אבר פנימי יש סיכון ואסור לו (ל)[מ]ספק להכנס לסכנת נפשות, ומדבריו משמע דלגבי חתיכת אבר אין תלוי בגודל הסיכון, וגם אין מקום לומר שיש הבדל אם זה ספק שקרוב להצלה או קרוב לספק השקול, אלא כל אבר שהנשמה תלויה בו כל העושה זאת הרי הוא תמיד שוטה ואסור לו להכנס לספק סכנת נפשות.... [ו]אם רצה להציל חברו בזה כיון שאין בזה סכנת נפשות מותר והרי זה מדת חסידות בעלמא.

In the responsum of the Radbaz [i.e., the first responsum]. . .he indicates a fundamental distinction. . .[namely,] that any removal of an internal organ is dangerous, and it is forbidden for one to enter into a situation of potential life endangerment. And his words imply that the removal of limbs is not at all contingent upon level of danger, even the case where the danger is not significant or the danger is even. Rather, nobody may put himself in potential danger regarding an organ on which life depends, and is always considered a "fool" [if he does]. . . .But if he wishes to save his fellow through [limb donation of a limb on which life does not depend], it is permissible as an act of piety since it does not entail life endangerment.

Hershler's assertion is that the responsa run on different tracks. The second responsum, which distinguishes between levels of danger and posits a requirement even to endanger oneself at times, refers to a danger which passes entirely when the saving is done. When the saving party is done saving, he is no longer in danger and has reverted to his former state. When one pulls another from the water, the danger to both ceases when the act is completed, and both are as they were before the event occurred. Even in such cases there is no requirement to endanger oneself if the chances are greater than fifty-fifty that the saving party will be endangered. The first responsum, on the other hand, does not indicate any such distinctions precisely because they are inapplicable. Sacrificing a limb is different because it is permanent, and because it always is potentially dangerous, even when it seems to be not very dangerous. Nobody is ever obligated to donate an organ. Indeed, if he donates one the loss of which is likely to cause his death, he is a "foolish saint." If he wishes to donate one the loss of which is not likely to cause his death, he may, as an act of piety.

The same view is expressed by Rabbi Moshe Meiselman, who wrote:[343] ומה שכתב הרדב"ז דכשנוטה להצלה חייב, כל זה דוקא במקום דליכא הפסד אבר אבל במקים דיש הפסד אבר הרדב"ז עצמו כתב בתשובה אחרת דאין כאן חיוב – "And when the Radbaz wrote [in the second responsum] that there is an obligation [to endanger oneself] when saving is almost certain, that applies only when no loss of limb is entailed. But when there is loss of limb, the Radbaz himself wrote in another responsum that there is no obligation."

Rabbi Shaul Yisraeli also distinguishes between the two responsa.[344] He contends that the first responsum considers the act as **מדת חסידות** alone because there is no obligation under **לא תעמוד** when the saving would entail either pain or suffering or the invasion of the body in any way. The second responsum, however, would be included under **לא תעמוד**, because it refers to physical activity, effort, and difficulty, but not physical invasion or bodily pain and suffering.

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[343] *הלכה ורפואה* (ירושלים: מכון רגנשברג, תשמ"א), כרך ב', עמ' קי"ח.

[344] We have quoted from this responsum above, p. 221. The way he distinguishes between the two responsa of the Radbaz is made clear in n. 8 of that article.

There is more to be said in favor of this direction for resolving the apparent conflict than there is in favor of the first direction. Assuming that the Radbaz is not just simply contradicting himself is reasonable. After all, these two teshuvot, if seen as contradictory, are fundamentally different from each other. It is simply unlikely that the Radbaz would have changed his mind so radically, and left unstated that he had changed his mind. One of the two should tell us it is a retraction of the other. Furthermore, the first responsum never leaves the issue of limbs. It never distinguishes between percentage chances of saving or endangerment. It never says that the absence of obligation regarding limbs does not extend to other types of dangers. It simply ignores other types of dangers. And the second responsum never mentions limbs or organs. Indeed, if the distinctions within it applied to limbs as well, the Radbaz had a wonderful chance to make that clear in his conclusion, which is where he introduces the factor of percentage of danger. It is possible that the responsa are connected, but it is not probable.

Additionally, there is a common sense distinction to be drawn between subjecting oneself to danger which passes and leaves one unchanged, and a danger which may pass, but leaves one permanently changed; or, between a requirement to extend oneself physically for the benefit of another, and a requirement to allow the invasion of one's body for the benefit of another. It does not seem implausible that the Radbaz meant just such distinctions when he claimed that the demands of the law must seem reasonable and logical to average people. It is reasonable that the law might demand of one to put himself in some minimal amount of temporary danger in the anticipation that the danger will not materialize and the person will return to his prior state. It is less reasonable to think that the law would demand of one to subject himself to a similarly minimal amount of temporary danger from which, even if the danger does not materialize, he will not return to his previous state of being. It is precisely because the latter is unreasonable to demand of average people that the Radbaz affirms that acting in such a manner is an act of admirable piety, worthy of praise, but impossible to impose.

We have been discussing two teshuvot the Radbaz at length. They have been the focus of our discussion because they were the focus of discussion of so many of the poskim. At the point we began this discussion, we had concluded that the talmudic passages raised as relevant to the issue of endangering oneself for the benefit of another were inconclusive, though some made quite strong cases that the Bavli did not require self endangerment. Now we see that the first of the responsa of the Radbaz is exceptionally clear, and cogently argues against a requirement of self endangerment. It calls one who risks endangerment for the sake of another a pious person, provided the risk does not pose a significant danger to his life. If it does, and the person yet undertakes it, the Radbaz calls that person a חסיד שוטה – "a foolish saint." The second responsum seems to contradict the first by requiring self endangerment if the chances of its actualization are less than fifty percent. We have argued, however, that it is improbable that the two responsa, so widely different on the surface, really contradict each other. It is precisely because they are so widely different that it is unlikely that the same decisor would have contradicted himself thus. One possibility we entertained was that the second responsum fills in detail not clear from the first. That is, that the two complement each other. That possibility seemed far less likely, however, than the possibility that the two deal with different issues. Thus, at this point we would say that the view of the Radbaz about self endangerment resulting from organ removal or donation is as summarized earlier in this paragraph.

There is one other approach to the question of self endangerment for the benefit of another that we should look at. It is espoused by Rabbi Eliyahu ben Samuel of

Lublin, the *Yad Eliyahu*.[345] What is quite remarkable is that the *Yad Eliyahu* makes no mention of the Radbaz whatsoever. He actually puts his conclusion right at the beginning of the responsum:

> אך לעניות דעתי עיקרא דהאי דינא הכי: אם שניהם שוים במעלה, כגון שניהם תלמידי חכמים או עמי הארץ, ומכ״ש אם המציל ת״ח והניצל ע״ה, דאינם רשאים להכניס עצמם אפילו בספק וההצלה ודאי, ולא איכפת לן בספק או בודאי בזה.... אך אם המציל אינו ת״ח כמו הניצל אז נלע״ד דמותר להכניס עצמו אבל אינו מחויב אם לא ממדת חסידות אם ירצה.
>
> In my opinion, the basic law in this matter is thus: If the two are of equal standing, for example, if they are both scholars or both uneducated, and surely if the potential saver is a scholar while the party in need of saving is uneducated, one is not permitted to endanger oneself. [And this is so] even if the endangerment is merely potential while the saving is certain. In these circumstances the categories of "doubt" and "certainty" are irrelevant. . . .But if the saving party is less of a scholar than the party to be saved, it seems to me that it is permissible as an act of piety, without legal obligation, to put oneself in danger if one wishes.

Later in the responsum he adds that regarding one's own teacher it is not only permissible to put oneself in danger, but מצוה נמי בשביל רבו... ממדת חסידות, אע״פ שאינו מחויב – "There is even a mitzvah to do so for one's teacher. . .as an act of piety, even though one is not obligated." Putting the two together we can summarize the view of the *Yad Eliyahu* as having three parts: (1) Persons of equal standing should not endanger themselves for each other. (2) One may endanger oneself for a person of higher standing as an act of piety, though there is no obligation to do so. (3) Though there is no legal obligation to do so, it is a mitzvah to endanger oneself for one's teacher as an act of piety.

The evidence of the *Yad Eliyahu* that there are different statuses which have legal implications is very clear. The mishnayot at the end of Horayot[346] list the order of precedence for saving, and end with the claim that the stipulated order applies only when the persons in question are of equal wisdom, but if among two people in need of saving one is an עם הארץ high priest and the other a sage ממזר, the latter takes precedence over the former – ממזר תלמיד חכם קודם לכהן גדול עם הארץ.[347]

It is also clear that if one is himself among those in need of saving, as in the case of multiple captives, he takes precedence over everyone else. There is a clear baraita to this effect in Horayot[348] which states: היה הוא ואביו ורבו בשבי הוא קודם – "If he, his father and his teacher were captives, he takes precedence."[349] If he himself takes precedence when they are already captive, surely it follows that he is under no obligation to endanger himself even for the benefit of his teacher when he himself is not in danger. And you should not think that he himself takes precedence only when he and others are in equal

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[345] No. 43. See above, pp. 262ff., where we have dealt with parts of the responsum already.

[346] 3:7-8.

[347] See M.T. Hilkhot Matanot Aniyim 8:15-18; Yoreh De'ah 251:9, 252:8, and the comment of the Rema in 248:15.

[348] 13a.

[349] The baraita itself includes the claim that one's mother takes precedence over all three for redemption. The Shakh, Yoreh De'ah 252:10, affirms that this is so only when none is in danger of death. If they are in danger of death, חייו קודמין אפי׳ לשל אמו.

danger, but if his danger is only "doubtful" and his ability to save is certain, he ought to endanger himself for the benefit of another (even his equal, not only his superior). There is no such distinction drawn in any authoritative source. Indeed, the very silence of the mishnayot about the matter of "doubtful" versus "certain" seems to imply that the distinction is irrelevant. Had it been relevant, either the Mishnah itself, or at least the Gemara, would have told us that the list of precedence applies only when the people in danger are in equal degrees of danger. If the danger of one lower on the list, however, was greater than the danger of one higher on the list, the one lower on the list should be saved first. Neither the Mishnah nor the Gemara say anything of the sort and, therefore, they imply that it is not true. Thus, there is no grounds to distinguish between "doubtful" and "certain." What matters is status. But, one's own danger, certain or doubtful, takes precedence over the danger of even one's superiors. Thus it follows, at a minimum, that one need not endanger oneself, even "doubtful" danger, for the benefit of another.

The basis of the claim that one's own redemption from captivity takes precedence over even that of one's father and teacher is that the obligation to save a life is linked to the obligation to save the property of another. After all, the context of the verse והשבתו לו,[350] from which the obligation to save the life of another is deduced,[351] is returning lost articles, i.e., saving the money of another. So it is logical that as one's lost article takes precedence over those of all others,[352] so too should one's own life take precedence over the lives of all others.

Yet, the Gemara makes quite clear that one ought not be so much a stickler on the precedence of his own money over that of others that he never is prepared to risk his own money for the benefit of others. As Rav put it:[353] כל המקיים בעצמו כך סוף בא לידי כך – "Anyone who is too fastidious [in observing the verse 'Be careful not to impoverish youself' (Deut. 15:4)] ultimately becomes what he sought to avoid." Rashi explains: "Even though Scripture does not impose it upon him, a person should act beyond the requirement of the law. He should not always say to himself, 'Mine comes first.' He should say that only when significant loss is likely. And if he is overly fastidious, he ignores the obligation for גמילות חסדים and charity, and will utimately himself need the aid of others."

Finally, the *Yad Eliyahu* puts together all of the relevant verses and concludes:

> אי כתב קרא דוהשבתו לו, הוי אמינא דלא מיטרח ומיגר, כתב לא תעמוד. ואי כתב לא תעמוד הוי אמינא דצריך אפי׳ לסכן עצמו.... ועל כן כתב רחמנא והשבתו לו כמו אבידת ממונו דשלך קודם לשל כל אדם. אך עדיין הוי אמינא דהרשות בידו לסכן עצמו בשביל כל אדם כמו באבידת ממון דהרשות בידו אע״פ שאינו מחויב בדבר, כתב רחמנא דרשה דחייך קודמין, דאינך רשאי לסכן עצמך. ואי כתב הני תרתי ולא קראי דוהשבתו ה״א דאינו רשאי לסכן עצמו אפי׳ בשביל רבו ומי שגדול הימינו, כתב רחמנא קרא דוהשבתו לו דגבי אבידה על כל פנים רשאי ומצוה נמי בשביל רבו כמו שכתבתי לעיל ממדת חסידות אף על פי שאינו מחויב.
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> If Scripture had written only והשבתו לו, I would have believed that there is no obligation to expend money to save another. So, Scripture included לא תעמוד [to teach that one must do so.] And

[350] Deut. 22:2.

[351] Sanhedrin 73a.

[352] M. Bava Metzia 2:11, 33a.

[353] Bava Metzia 33a.

> if Scripture had written only לא תעמוד, I would have believed that one must put oneself in danger [for the benefit of another]. . . . Therefore Scripture wrote והשבתו לו, [in order to make the obligation to save a life] comparable to saving the possessions of another, in which one's own takes precedence over those of all others. Yet, even so I would have believed that one is allowed, though not obligated, to endanger oneself for the benefit of another as one is allowed with one's money. Therefore, Scripture indicates through midrash that your life takes precedence, namely, that you are not allowed to endanger yourself. And if only these two [i.e., לא תעמוד and חייך קודמין] had been written, but not והשבתו לו, I would have believed that one is not allowed to endanger oneself even for one's teacher or one greater than oneself. Therefore Scripture wrote והשבתו לו in the context of lost articles, from which I have demonstrated above that one is allowed, though not obligated, to endanger oneself, and for one's teacher it is a mitzvah.

The *Yad Eliyahu* constructs a צריכותא, utilizing לא תעמוד, והשבתו לו (including its contextual juxtaposition with monetary possessions), and חייך קודמין to prove the three points he began with: one may not endanger oneself for someone of identical or lesser status, may for anyone of higher status, and may – with an element of true piety verging on mitzvah – for one's teacher. And, *mirabile dictu*, one of the passages he quotes to demonstrate that one is entitled, though not obligated, to endanger oneself for the benefit of another of identical status is the Yerushalmi to which we have been referring all along. In that passage, the *Yad Eliyahu* views the act of Resh Lakish not only as one of מדת חסידות as opposed to legal obligation, but also one in which Resh Lakish and Rabbi Ami are not just "any men," but both sages.

The *Yad Eliyahu* may present the most complete argumentational defense for the position he espouses, but he is not the only one, or even the first one, to advocate it. Rabbi Judah he-Hasid had already written in the twelfth century:[354]

> שנים שיושבים ובקשו אויבים להרוג אחד מהם, אם אחד תלמיד חכם והשני הדיוט מצוה להדיוט לומר הרגוני ולא חבירי כר' ראובן בן איצטרובלי שבקש שיהרגוהו ולא לר' עקיבא כי רבים היו צריכים לר' עקיבא.

> If enemies demanded to kill one from among two who were sitting, and one of the two was a sage while the other was a commoner, it is a mitzvah for the commoner to say: "Kill me, not my fellow." And this is what Rabbi Reuven ben Strobilus did when he requested that they kill him rather than Rabbi Akiva, since the many needed Rabbi Akiva.

This passage could, on the one hand, be understood as a great support for the position of the *Yad Eliyahu*. We quoted another position of the *Sefer Hasidim*[355] in which he had decided clearly that one should not endanger oneself for the sake of another, even if that meant certain death for the other. Yet, here, Rabbi Judah he-Hasid affirms that it is at

[354] *Sefer Hasidim*, Reuven Margolioth ed. (Jerusalem: Mossad haRav Kook, 5734), no. 698, p. 436.

[355] Above, p. 269, taken from *Sefer Hasidim*, no. 674, p. 428.

least very praiseworthy, even if not exactly mandatory, to actually sacrifice oneself for the benefit of another, provided the other is a sage. Indeed, that is exactly the way Rabbi Menashe Klein understands the relationship between the two passages. He wrote:[356]

> ומיהו לא קשיא מידי דהכא מיירי בשניהם שוים אבל באחד גדול מותר אפילו למסור נפשו וכמו שכתב לעיל וזה ראיה גדולה להיד אליהו.
>
> In reality, there is no conflict between the two passages of the *Sefer Hasidim*. For there [i.e., in the passage from section 674] the case deals with two people of identical status. But, in a case where one is a great person, it is permissible even to sacrifice one's life, as he [Rabbi Judah he-Hasid] wrote above [i.e., in section 698]. And this constitutes a great proof for the view of the *Yad Eliyahu*.

On the other hand, the proof is not necessarily so compelling, as the *Ziz Eliezer* realized.[357] First of all, the beginning of the passage can be understood to mean that the initial demand was to kill one of them, with no stipulation as to which to kill. In which case, the claim of the *Sefer Hasidim* would be somewhat more restricted. It would mandate a mitzvah for the commoner to sacrifice himself only under those circumstances. There would be no mitzvah on the commoner, however, to offer himself instead of the sage who had been stipulated as the victim. One must admit, though, that the end of the passage argues against this understanding of its beginning. The end of the passage does seem to indicate that Rabbi Akiva had been stipulated as the victim, and even so Rabbi Reuven ben Strobilus offered himself instead. But even if we understand this way, the incident does not necessarily support the *Yad Eliyahu* because the clause כי רבים היו צריכים לר׳ עקיבא – "Since the many needed Rabbi Akiva" – could intimate that Rabbi Reuven's action was motivated by a desire to help the many, not a single individual.[358]

Even more, the incident of Rabbi Reuven ben Strobilus has no talmudic source. There does seem to have been an ancient tradition concerning Rabbi Reuven's desire to sacrifice himself, but it cannot be traced to the Talmud itself.[359] It would be risky, claims the *Ziz Eliezer*, to base a legal claim that it is a mitzvah to sacrifice oneself upon the *Sefer Hasidim* alone.[360]

Rabbi Yehudah he-Hasid is the earliest to espouse the view subsequently adopted by the Rabbi Eliyahu ben Samuel (d. 1735 in Hebron). But a younger contemporary of

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356. משנה הלכות, חלק ו׳, סי, שכ״ד, עמ׳ 396 ע״ב.

357. Vol. 10, no. 25, ch. 7, p. 128a and b.

358. It is interesting to note that Rabbi Hayyim Benveniste, in שיירי כנסת הגדולה, יורה דעה סי׳ קנ״ז, הגהות בית יוסף אות ל״ה quotes only the first part of the *Sefer Hasidim*. According to him, therefore, it would follow that the reference to Rabbi Reuven ben Strobilus in the *Sefer Hasidim*, and the fact that Rabbi Akiva was needed by the many, are incidental. The behavior of Rabbi Reuven ben Strobilus indicates the desired, though not mandatory, behavior of any single individual toward another single individual of higher status. All of this also assumes that Rabbi Akiva was clearly of higher status than Rabbi Reuven, who was as a commoner vis-a-vis Rabbi Akiva. That claim, too, is debatable since Rabbi Reuven was also a *tanna*.

359. In the ספר סדר הדורות, חלק ב׳ (סדר תנאים ואמוראים), אות ר׳, Rabbi Yehiel ben Solomon Heilprin (1660-1746) makes brief reference to the same tradition, but there רצה שיהרגהו במקום ר׳ יהודה בן בבא – "[Rabbi Reuven] wanted to be killed in lieu of Rabbi Yehudah ben Baba." The version of the עשרה הרוגי מלכות published by Dr. Aaron Jellinek in בית מדרש (Jerusalem: Bamberger & Wahrmann, 1938), vol. 6, p. 35, also records the incident. There, too, the two involved are Rabbi Reuven and Rabbi Yehudah ben Baba. In that version, Rabbi Reuven asks of Rabbi Yehudah: רצונך שאמות אני תחתיך ותנצל אתה – "Do you wish that I should die instead of you, and you be saved?"

360. Of course, the *Yad Eliyahu* barely mentions the *Sefer Hasidim*, and it would be an error to conclude that this claim of the *Ziz Eliezer* constitutes any direct refutation of him.

his also espoused the same view, carrying it even further than does the *Yad Eliyahu*. Rabbi Jacob Emden (1697-1776) also quotes[361] as law the passage from *Sefer Hasidim* which affirms the mitzvah of sacrificing oneself for another of greater status. Even more stunning, however, is the extrapolation from it made by Emden. He wrote:[362]

> גם נראה פשוט שאין אדם רשאי למסור עצמו להריגה להציל חברו מרצון פשוט ומאהבה שאינה תלויה בדבר, אם אינו ברור שחברו תלמיד חכם כשר וצדיק יותר ממנו או בשביל אביו ורבו דאי לא הכי ודאי אמרינן מאי חזית דדמא דידיה סומק מדידך. ולפיכך אפי׳ בנו יחידו אשר אהב אינו יכול להציל באופן זה אם לא שהאב זקן שאי אפשר לו לקיים עוד מצות פרו ורבו, בזה נרא׳ להקל כשהבן אדם כשר לפחות, אפי׳ אינו גדול כמותו ולא ממלא את מקומו, או שהוא ילד שעדיין לא התנכר במעלליו, ועדיין צריך עיון.
>
> It is very clear that one is not allowed to sacrifice himself out of pure good will and selfless love in order to save the life of another, except if it is certain that the other is a scholar who is more worthy and righteous than he, or for one's father or teacher. Except for such cases, we claim, "Why do you think his blood is sweeter than yours." Therefore, one cannot sacrifice himself thus even for his dearly beloved son, except if the father is old and no longer capable of fulfilling the commandment to procreate. In that case one can be lenient, provided the son is at least worthy, even if not as great as he himself is and not his replacement; or, if the son is yet young, not yet having established alienating behaviors. Still, the matter requires investigation.

Emden extrapolates from the principle of the *Sefer Hasidim* in a way that no one else had. Not only may one sacrifice himself for an actual scholar, one may do so also for one who is owed honor by him, namely, his father. One may not do so for his son, however, except if one has reached the stage of his life that it seems clear that the life of his son will be "more useful and productive" than his own. Even then he may do it only if the son is at least minimally worthy. Finally, he may sacrifice himself for his son who is so young that judgments of his character and worthiness cannot yet be made. Having made the extrapolations, Emden ends with a cautionary note. That note is sufficient for the *Ziz Eliezer* to claim that one should not act on the view of the מגדל עוז. In the absence of support from other poskim, and in light of Emden's own doubts, his words should not be implemented למעשה, lest one find himself in violation of the biblical prohibition ונשמרתם מאד לנפשותיכם because he has acted in accordance with an unsupported view.

Finally, the *Ziz Eliezer* objects to the conclusions of the *Yad Eliyahu* because he believes that he never saw the words of the Radbaz. Had Rabbi Eliyahu ben Samuel seen the words of the Radbaz, who so clearly and compellingly argued against any obligation to endanger oneself for the benefit of another without any mention whatsoever of distinctions between statuses as a factor, he surely would not have decided as he did. The most use that one should make of the view of the *Yad Eliyahu* is as support in cir-

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[361] ספר בירת מגדל עוז, אבן בוחן, פנה א׳, אות ע״ח. Remember, too, that it was Emden to whom we referred above in n. 249, who claimed that one need not even endure extreme pain for the benefit of another. That makes it all the more striking that he allows the actual sacrifice of one's life for a sage.

[362] Ibid., אות פ״ה.

cumstances when the doctors are convinced anyway that the level of danger to the donor is very minimal.

At the other end of the spectrum, Rabbi Menashe Klein finds the argument of the *Yad Eliyahu* very convincing. As he puts it:[363] ע"ש באריכות גדולה מה שהקיף הענינים מכל הצדדים ולא השאיר מה שראוי להתגדר בו כלל – "See [how the *Yad Eliyahu*] dealt at length with all the pertinent matters from every angle, and left no stone unturned and requiring further comment." What's more, Rabbi Klein immediately proceeds to refer to the Radbaz, seeing no inherent conflict between the two.

Finally, Prof. Abraham Sofer Abraham quotes a private communication to him from Rabbi Joshua Isaiah Neubirt:[364] היום אנו נוהגים כהרדב"ז גם כשהמציל והניצל שוים – "Today we follow the view of the Radbaz even when the potential saver and the one in need of saving are equal." That is, we are not concerned with matters of status in terms of permissibility or prohibition to donate.

We began this section with the assertion that we must undertake an analysis of the issue of self-endangerment in halakhah. We have been engaged in that enterprise until now. We have now reached the end of our analysis of texts – talmudic, medieval, and modern – that impinge on the subject. Though we have provided summaries periodically throughout, it is appropriate to summarize once again now that we have reached the end.

None of the authoritative codes contains a clear requirement to put oneself in danger, even potential, for the sake of another. There are, however, references in commentators to the codes to a passage of Yerushalmi which does require it. We undertook discussion of a responsum of Rabbi Ya'ir Bacharach which sought basis for the Yerushalmi view in Bavli Bava Metzia 82a. Our analysis, during the course of which we first made mention of the *Yad Eliyahu*, led us to conclude that Bacharach's understanding of the passage, though possible, was hardly conclusive. Indeed, we quoted others who used the very same passage to prove the opposite, namely, that Bava Metzia proves that the Bavli disagrees with the Yerushalmi. At a minimum, the passage remains inconclusive.

Thereafter, we analyzed passages from Yoma 85a and b, the Yerushalmi at the end of chapter eight of Terumot, Niddah 61a, Sanhedrin 73a, Nedarim 80b and 81a, Berakhot 33a, and several codified statements of Maimonides. These passages were quoted principally because they have been used by various poskim to prove that the Bavli disagreed (or agreed) with the Yerushalmi. In the course of analysis we affirmed that none of the passages was conclusive, one way or the other. The passage from Sanhedrin did seem to be very strong evidence that the Bavli disagreed with the Yerushalmi, though even it was not conclusive. We noted that the Yerushalmi itself goes unidentified by the early authorities, and that its identification by the *Yad Eliyahu* seems to be universally accepted thereafter as the source of the reference of the early authorities. The Yerushalmi itself was inconclusive upon analysis, and could cogently be argued to affirm that self-endangerment was not a legal requirement, but an act of piety. It could be that those codifiers who actually knew the Yerushalmi passage may have decided that it did not mandate such a requirement, and that is why they did not codify such a view. For whatever reason, the vast majority of poskim do not include any requirement to put oneself in danger for the sake of another, and many include specific statements contending that one ought not to do so. We conclude that it is impossible to find sufficient talmudic evidence for such a far reaching requirement that would warrant positing it as an halakhic requirement.

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[363] See above, n. 356.

[364] *המעין*, ניסן תשמ"ה, p. 25.

Our analysis then turned to two responsa of the Radbaz, with which we dealt at length. His first responsum was a reaction to a decision of Rabbi Menahem Recanati which mandated that one must allow the removal of a non-life-threatening limb in order to save the life of another. The Radbaz presented strong arguments against Recanati's claim, and concluded with a three-tiered answer to our question: (1) There is no legal requirement to sacrifice a limb for the benefit of another. (2) Sacrificing such a limb would be an act of great piety and highly praiseworthy, if its severance did not confront one with significant threat to life. (3) If the removal of the limb would endanger one significantly, agreeing to have it removed would be the act of a "foolish saint," and forbidden.

The second responsum of the Radbaz, which makes reference to the Yerushalmi, posits that it is mandatory to put oneself in jeopardy for the benefit of another, provided that the chances are less than fifty percent that the potential danger will be actualized. We rejected the claim that the second responsum merely explains the view of Maimonides, but not of the Radbaz himself, and the claim that one or the other of the responsa retracts the Radbaz's earlier view. We entertained the view that the second responsum clarifies the first. That view allowed us a fairly clear definition of when one would be considered a חסיד שוטה, but left us in a real quandry over how to define the act as מדת חסידות. If the fifty percent level is the divide between mandatory and "foolish piety," where is the domain of מדת חסידות? Ultimately, therefore, we preferred the view that the two responsa run on parallel tracks. The first, dealing with the sacrifice of limbs, is as we have summarized. The second mandates self-endangerment when the risk is lower than fifty percent in cases where the risk to the saver does not involve threat to his limbs, and is not permanent and continuing, but passes when the act of saving is over. This resolution to the contradiction between the teshuvot allows us a fairly clear definition of מדת חסידות and חסיד שוטה in the first responsum: one's act is one of piety when, under usual conditions, one endures סכנת אבר but not ספק סכנת נפשות; and one's act is that of a חסיד שוטה when, under usual conditions, one endures significant ספק סכנת נפשות.

Finally, we turned again to the *Yad Eliyahu* who also posits a three-tiered view: (1) that if persons are of equal status, or if the potential saver is of higher status than the person to be saved, it is forbidden to endanger oneself for the benefit of the other, and the categories of "doubtful" and "certain" are irrelevant; (2) that if the saver is of lower status than the person to be saved, it is permissible to endanger oneself as an act of piety, but not mandatory; and (3), if the person to be saved is the parent or teacher of the saving party, the act of piety is in the category of mitzvah, though still not obligatory. We noted that his view is not without talmudic basis, and that it finds echoes in the decisions of others, both earlier than he and later than he. We affirmed that some of these other views, as, for example, the *Sefer Hasidim*, need not be understood to imply the same position as the *Yad Eliyahu*. We quoted an *obiter dictum* of Rabbi Joshua Isaiah Neubirt to the effect that today we follow the Radbaz, even in cases where the parties are of equal status. Beyond that, it should be noted that far more poskim affirm the position of the Radbaz than affirm the view of the *Yad Eliyahu*. We, therefore, reject the stringencies of the *Yad Eliyahu*, and posit that donation is an act of piety under the situations stipulated by the Radbaz no matter what the status of the two parties; and accept the leniencies of the *Yad Eliyahu* in defining as a mitzvah certain acts of donation to one's parent, teacher, or child (following the extrapolation of Rabbi Jacob Emden).[365]

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[365] It must be as clear as possible that we accept only that such donation would be a mitzvah. We do not intend to intimate that one may literally cause his or her own death through donation to parent, teacher or child. Even if we were inclined (and we are not so inclined) to go that far, no physician could currently perform such surgery without becoming liable for prosecution for murder.

We turn our attention now from the theoretical to the practical. Just what danger is involved in the donation of a kidney from a live donor? It is important for us to deal with this issue in order to determine whether such donations should be considered piety or foolishness, and to guide us in determining the extent to which we should encourage or discourage those who come to us for consultation on this matter.

Kidney transplantation is not particularly new, as far as transplantations are concerned. There were Russian experiments as early as 1936, French in the 1940s, and American beginning in the 1950s. At the present time, kidney transplantation from live donors is considered virtually medically routine. In 1988 there were 8,831 kidney transplants reported to UNOS (United Network for Organ Sharing), and 10,204 reported in 1996. The increased number derives mainly from the increase in donations from live donors, from 1,812 to 3,149 during the same period.

The most current statistics on one-year survival and projected ten-year survival reveal the following: when the donor is an HLA-identical[366] living sibling, the one-year survival rate is 96%, and the projected ten-year survival rate is 73%; when the donor is an HLA-mismatched living donor, those figures become 91% and 56%. Compare these figures to those for cadaver donors. In that category, when the cadaver donors were HLA-matched, the percentages were 89 and 55, comparable to those for *HLA-mismatched living* donors. For cadaver donors that were not HLA-matched, the figures drop to 82% and 39%.[367] The differences remain striking even at the three-year survival rate which, for recipients of live kidney donations is 90%, while for cadaver kidney recipients is 80%.[368] All studies show that survival rates for kidney donation from live related donors is higher than for dialysis and cadaver donations, and related donors are still preferred over unrelated donors.[369]

In terms of the danger and risks undertaken by the donor, we note the following. Immediate post-operative (usually called now "perioperative") mortality rates for the donor are very low, under 0.03%.[370] Immediate medical complications following removal of the live donor kidney fluctuate between 15% and 47%, mainly mild and passing, with 2.5% being serious.[371] In the study referred to in footnote 370, which is based on the 920 kidney transplants performed at the University of Minnesota between January 1, 1988, and December 31, 1995, from live donors, the overall complication rate was 8.2%, with only 0.2% considered to be serious. In that study, most donors were discharged from the hospital in fewer than five days, and only 4% of the donors expressed dissatisfaction and regret at having been a donor. Long term medical complications are always more difficult to measure, and there are not yet as many studies. One study did show that 10% to 20% of donors develop mild hypertension, and about 33% develop proteinuria (loss of protein in the urine). Some believe that these findings are directly related to the earlier kidney donation which causes some type of long term damage to the remaining kidney.[372] Others dis-

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[366] The abbreviation stands for Human Leukocyte Antigens, and refers to a test of tissues for genetic compatibility.

[367] See J. Michael Cecka and Paul I. Terasaki, eds., *Clinical Transplants 1997* (Los Angeles: UCLA Tissue Typing Laboratory, 1998), ch. 1, pp. 1-2, 13-14.

[368] J. Krakauer et al., *New England Journal of Medicine* 308:1558, 1983.

[369] Greater success is being achieved in recent years with unrelated live donors when the patient preparation includes blood transfusions from the donor. See A.S. Levey et al., *New England Journal of Medicine* 314:914, 1986, and M. Evans, *Medical Ethics* 15:17, 1989.

[370] See ch. 22 of Cecka and Terasaki, above n. 367, p. 231. Note, however, that in the specific study from which the data of that chapter were drawn, the morbidity rate was zero.

[371] See A. Spital et al., *Archives of Internal Medicine* 146:1993, 1986.

[372] See R.M. Hakim, *Kidney International* 25:930, 1984.

pute that interpretation and believe that these after effects are a natural result of the aging process of the donor and have no relationship to the kidney donation.[373]

An additional factor which should be mentioned stems from the desirability of related donors as the best matches for kidney transplants. If the transplant is necessitated by a genetic or hereditary problem, the statistical probability is increased that the donor will himself develop the same problem at some later stage in his life. Rabbi Moshe Meiselman reports[374] having been asked about such a case in which the hereditary nature of the disease made it likely that donation of the kidney was likely to shorten the life of the donor by ten years.

The final potential additional danger, logically speaking, is the possibility that the kidney donor's remaining kidney will suffer a trauma or disease. Bleich reports[375] the Connecticut case of *Hart v. Brown*, in which the court accepted medical testimony to the effect that such danger is minimal, and that life insurance companies do not even rate such individuals higher than those with two kidneys. Bleich himself adds the phrase, "Perhaps overly optimistic," in his reporting of the medical testimony.

The facts and figures now presented make it clear that almost all kidney donations have a statistically high chance of prolonging the life of the recipient significantly. The dangers and risks to the donor, however, are neither negligible nor overwhelming, and include unknowns about which judgment is virtually impossible. Even according to the most demanding interpretation of the Radbaz – not the interpretation we have recommended – it is highly unlikely that kidney donation could be considered halakhically mandatory. The thrust of his second responsum seems to have mandated jeopardizing oneself for the benefit of another when the risk to the donor was less than fifty percent only in cases when the effectiveness of the intervention to save the person in need was certain. In the case of kidney donations, particularly to unrelated persons, the effectiveness is high, but certainly not certain.

It should be clear, therefore, that all common and usual kidney donations would surely be in the category of מדת חסידות, and should be encouraged and praised as the laudatory act they are. We must, however, walk the fine line between the just praise we lavish on those who are able and willing to undertake kidney donation, and couching that praise in a way that induces great guilt in those who are unwilling. It would be appropriate to utilize the view of the *Yad Eliyahu* and the extrapolations of Rabbi Jacob Emden especially when we discuss the possibility of donation from a relative.

Though we have argued the position that the donation cannot be compelled and that it does put one in potential jeopardy, סכנת אבר, and even ספק סכנת נפשות, we end this part of this section with the wise and sage counsel of Rabbi Moshe Ze'ev Ya'avetz, the *Agudat Ezov*, who wrote:[376]

> ומ"מ צריך לשקול הענין היטב אם יש בו ספק סכנה או לא, ולא לדקדק ביותר שמא יש סכנה, וכמ"ש (בב"מ לג ע"ש) כל המדקדק ומקיים בעצמו כך, סוף בא לידי כך.
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> Nonetheless, it is mandatory to evaluate the matter with great care to determine whether or not there really is danger, and not to be

[373] See A. Spital, above, n. 371.

[374] *הלכה ורפואה* (ירושלים: מכון רגנשברג, תשמ"א), כרך ב', עמ' קי"ט.

[375] *Contemporary Halakhic Problems*, vol. 4, p. 291, and nn. 53, 109.

[376] P. 38b. See above, n. 244.

> overly cautious [to decide in almost every case that] maybe there is danger. And that is what the Talmud (Bava Metzia 33a) cautions against when it says that one who is overly punctilious in fulfilling [the law that one's own money takes precedence over the money of others] is destined to end up in the state of need.

The same idea was also expressed by Rabbi Yehiel Epstein, with an ending more in tune with modern sensibilities:[377]

> בשס שלנו מוכח שאינו חייב להכניס את עצמו [לספק סכנה], ומיהו הכל לפי הענין, ויש לשקול הענין בפלס ולא לשמור את עצמו יותר מדאי ובזה נאמר[378] ״ושם [דרך] אראנו בישע אלקים,״ זהו ששם אורחותיו, וכל המקיים נפש אחד מישראל כאלו קיים עולם מלא.

> It is clear from the Bavli that one is not obligated to put himself in potential danger. Nonetheless, everything depends on circumstances. It is essential to weigh each situation carefully, and not to be overly cautious. And about such matters is it said:[379] "To one who appraises [his path], I will show the salvation of the Lord." And this [careful, but not over zealous weighing] is the meaning of "appraising one's path." And one who saves a Jewish life is as though he had saved an entire world.

We affirmed above[380] that whatever conclusion would apply to kidney donation would also apply to the donation of liver parts. It should be pointed out, however, the donation of liver parts is much newer medically and there have not been nearly as many attempts as there have been for kidney donations. The need for the development of this technology is clear: as of July 1999, there were 13,519 people awaiting liver transplants in the United States. In 1998, only 4,450 liver transplants were performed, and more than 1,125 people died waiting for a liver. So, if it were possible to receive one of the lobes of the liver of a live donor, rather than having to wait for the death of a donor, and if the miraculous ability of the liver to regenerate itself continues unabated, the problem of the shortage of available livers could be virtually eliminated. Nonetheless, clear caution is to be advised. Surgeons report that the operation is technically difficult, because blood vessels and bile ducts must be carefully divided between the donor and the recipient. This same issue does not exist in kidney donation, and its existence puts the liver part donor at considerably higher risk than the kidney donor. Even more, until recently almost all such donations were from an adult to a child, because such an operation would only require removal of about fifteen to twenty percent of the adult's liver. In adult-adult donation, however, it may be necessary to remove as much as sixty percent of the donor's liver, the entire right lobe, for the operation to be effective for the recipient. The medical world, as yet, has little experience with this, and that makes the dangers to the donor greater.

Regrettably, there are not yet, at least to the best of my knowledge, enough data on this matter to allow us to determine whether agreeing to donate would be an act of **מדת חסידות**, or the act of a **חסיד שוטה**. This practical caveat is therefore included in this

[377] Arukh ha-Shulhan, H.M. 426:4.

[378] תהילים נ:כ״ג, על פי מועד קטן ה סע״א, על סמך משחק מלים בין ״ושם״ (בנקודה בצד שמאל) ו״שם״ (נקודה בצד ימין).

[379] Ps. 50:23, as understood by Mo'ed Katan 5a, with a play on words between *ve-sam* and *ve-sham*.

[380] Above, p. 212.

section, even though the halakhic issues involved in liver part donation are the same as in kidney donation.[381]

We have dealt above[382] with the question of blood and bone marrow donation for compensation, and need not repeat all of the discussion again. Suffice it to say that even those who would forbid donation of blood to a bank because of חבלה, would have to permit חבלה for the donation of a kidney, since kidneys are not removed from live donors except for an actual recipient – חולה לפנינו – and, thus, fall under the category of פקוח נפש. Once we accept the premise that kidney donation is not entirely forbidden on grounds of self-endangerment, we must confront head on the question of whether donation for compensation changes our view of the permissibility of the donation.

(N.B. – It is our intent to deal with compensation for organ donation from a live donor from a halakhic perspective. There is always the theoretical possibility that halakhah may permit what דינא דמלכותא may forbid. Obviously, Jews do not have the legal right to violate a prohibition of civil law because Jewish law permits the act forbidden by civil law. On the other hand, if Jewish law forbids what דינא דמלכותא permits, Jews have no halakhic right to violate the halakhic prohibition on the grounds that civil law permits it.)

I do not have statistics on this matter, but am prepared to assume that the issue of compensation for donation is very uncommon when the case is of donation from related donors. However, with the increased success in transplants from live, unrelated donors, the problem will be more acute. That is particularly true considering the intense shortage of kidneys available for transplantation. People in dire financial straits, convinced that the donation will not place them in significant danger, may consider donation entirely unobjectioable, and perhaps even a mitzvah. People in need of a kidney, knowing that they are likely to die without a transplant, may consider it unobjectionable to offer money for a kidney, particularly when the party to whom the money would accrue is in financial need.

Rabbi Isaac Zilberstein, of B'nei Berak, wrote the following simple sentence in the context of a more complicated issue that he was discussing:[383] ישנם המציעים לחולי כליות את כליתם למכירה, ונראה שאין בזה איסור חבלה והדבר מותר – "There are those who offer their kidney for sale to someone with renal disease. It seems that this does not fall under the prohibition of self-injury, and is permissible." In the previous sentence he had made clear that he was speaking of people in dire financial straits, who saw no way to extricate themselves from their financial problems except through sale of their organs.

Professor Abraham Sofer Abraham writes at greater length:[384]

> מה יהיה הדין לגבי אדם שמוכן, מתוך בריאות שלמה, לתרום כליה אחת לחולה הזקוק להשתלת כליה, אך דורש עבור הכליה סכום כסף. ישנה אפשרות שהוא מנהל משא ומתן ישירות עם החולה או עם סוכן שמטפל בענין. האם הדבר מותר או אסור כשיוצאים מהנחה שתרומת כליה לא מהוה אלא סכנה קטנה... [ו]אדם שעושה את זה כדי להציל נפש קרובו ולשם שמים חסיד יקרא, אך כמובן אין לחייב אותו מן הדין לעשות את זאת.

[381] Much of the information for these paragraphs about liver part donation came from an article in the 3 Aug. 1999 edition of the *International Herald Tribune*, based on an article by Denise Grady of the *New York Times* Service.

[382] Pp. 253-254.

[383] זכרון ישעיהו: ורפא ירפא – לדמותו של רופא חרדי, לזכרו של הר"ר ד"ר ישעיהו לוי זצ"ל, 1989, p. 32.

[384] *נשמת אברהם* (ירושלים: המכון ע"ש ד"ר פלק שלזינגר, תשנ"ג, הדפסה שניה מתוקנת), כרך ד', חשן משפט סי' ת"כ, ס"ק א', עמ' רי"א–רי"ב.

> What would be the law regarding a completely healthy person who is prepared to donate a kidney to a sick person in need of a kidney transplant, but who demands compensation for the kidney? This can occur either through direct negotiation between him and the sick person, or via a middleman who handles such matters. Is it permissible or forbidden, presuming that the donation is only minimally dangerous. . .and that a person who did the same for the benefit of a sick relative, and acting for the sake of heaven, would be considered pious, though there is no obligation on his part to donate.

Here is the issue, in all of its initial complexity. The act in question is identical to an act about which we have already made a praiseworthy judgment. We have decided that the medical risks do not prohibit the act, while we affirm that the halakhah also does not demand the act. The only difference between the two acts is that one is carried out on behalf of the relative of the donor, and without compensation; and the other is carried out for a stranger, and with compensation. Does that difference change the halakhah?

Prof. Sofer Abraham continues:

> ואין לומר שהתורם הזה, במקום לעשות מצוה גדולה עד מאד של הצלת נפש מישראל עושה אדרבה דבר מגונה. כי אם אמנם אין עליו שום חיוב לתרום כליתו להציל את הזולת, אם בכל זאת הוא עושה את זה, מצוה גדולה יחשב לו. ויש לעיין אם עושה את זה רק משום בצע כסף, האם יש כאן שום מעשה מצוה או אדרבה, מכיון שאינו מכוין למצוה יש לדון אם אין כאן איסור משום חבלה.... אך אם הוא עצמו זקוק לכסף כדי להציל את קרובו הנמצא במצב של פקוח נפש (וזקוק לטיפול מסויים הכרוך בהוצאות כספיות), יתכן שעושה מצוה כפולה, ומותר לו לתרום את כליתו עבור תשלום, כי מאי נפקא מינה אם הוא תורם את כליתו ורק מציל חולה באופן ישיר, או גם מציל חולה עם הכסף שהוא מקבל כתשלום עבור כליתו.

> One cannot claim that this donor, instead of performing a very great mitzvah of saving the life of another Jew, is, to the contrary, guilty of an unseemly act. For if, in fact, he is under no obligation to donate his kidney to save another, and he does so nonetheless, it must be considered a great mitzvah for him. What needs to be investigated is whether one who does the same from pure avarice is also considered to have performed a mitzvah; or whether, to the contrary, he is in violation of the prohibition against self-injury because there was no intention on his part to perform a mitzvah. . . .But if the donor needs money in order to pay for the medical treatment of a dangerously ill relative of his [who needs a certain expensive treatment], it is probable that his act of donation constitutes a double mitzvah, and it is permissible for him to donate his kidney for compensation. For what difference could it make [legally] if he donates his kidney for the exclusive purpose of directly saving another, or he also saves yet another party with the money he receives in compensation for his kidney.

Professor Sofer Abraham begins his answer: Since there is no legal obligation to donate, a donation must be considered an act of kindness. Even if the donor demands payment for his kidney, part of his desire is to save the life of another. That cannot be considered an unworthy or blameworthy act.[385] Indeed, one can posit a situation in which demanding payment for a kidney may constitute a double mitzvah. If one donates for pay in order to use the proceeds for the medical expenses of one's relative, one saves two lives. His act is no less praiseworthy for having received the compensation than if he had donated exclusively to save the life of the kidney recipient.

Prof. Sofer Abraham continues:

> וכתב לי הגרש״ז אויערבאך שליט״א: בנדון זה שלפנינו נראה שגם אם התורם הוא עני או שרוצה בכך לפרוע חובותיו, אך הואיל ויודע שמציל בכך נפש משראל ודאי קעביד מצוה אע״ג שבשביל הצלה בלבד לא היה תורם, עכ״ל.... ולגבי הסרסור שמתווך, תמורת אחוזים, בין החולה הזקוק להשתלה ובין התורם, אמר לי הגרש״ז אויערבאך שליט״א שגם מותר לכתחילה ואין בזה שום מעשה מגונה או עבירה, כי את כספו הוא מקבל עבור המאמץ והטרחה למצוא ולתאם בין התורם ובין המקבל האבר, עכ״ד. ולכאורה אין הבדל בין זה לבין מרכז או משרד ששולח רופא תורן, בכל שעות היממה, לבית החולה כדי להצילו ומקבל תשלום עבור השרות.
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> And Rabbi Shlomo Zalman Auerbach wrote to me: "In the matter before us it seems that even if the donor is a poor person or wants to pay off his debts, he has still performed a mitzvah since he knows that his act of donation will save a life, even though he would not have donated for that reason exclusively." . . .And regarding the broker who serves as a middleman between the sick person in need of a transplant and the donor, in exchange for a percentage, Rabbi Auerbach told me that his deeds are permissible *ab initio*, and entail no transgression or unseemly act, since he receives his payment in exchange for his efforts and labor to find and co-ordinate between the donor and the recipient. [This is what he told me.] And there seems to be no difference between this [brokering] and a center or office which provides and sends on-duty physicians on house calls at any hour of the day to provide medical services, and receives a fee for this service.

Relying on communications from Rabbi Shlomo Zalman Auerbach, Prof. Sofer Abraham completes his answer. Whatever the motivation of the donor, he knows that his donation will be used to save a life. That knowledge cannot be separated off from any assessment of the donor's act. Even if his exclusive motivations were personal financial ones, the act of donation for compensation is not illegal or even blameworthy. Even the broker is not guilty of any illegal or immoral act. He is providing a service for a fee, just as many others provide such services. He is not compelling the donor to donate, but rather serving as a go-between to coordinate between the two parties.

There is both logic and reason to the line of reasoning offered by Sofer Abraham/Auerbach. If the level of danger in kidney donation is low enough to make it permissible in the first place, why should motivations short of pure and selfless altruism on the part of the donor impel us to forbid him from putting himself in an acceptable level of danger? It is hard to have it both ways. We cannot easily justify the danger as acceptable when, in our opinion, the motivation of the donor is also acceptable; and judge the danger as unacceptable when, in our opinion, the motivation of the donor is unacceptable. By what logic do

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[385] See, however, the comments of Rabbis Sternbuch and Zorger, quoted above, p. 254.

we reach the conclusion that one's desire to free oneself from terrible financial burdens is less defensible a justification to enter into acceptable ranges of danger that result in saving the life of another than is the pure desire to save the life of another? Perhaps Rabbi Sternbuch is correct that the Divine reward for the selfless act is greater, but that alone does not constitute grounds for forbidding the act itself.[386]

Earlier on,[387] we quoted from Rabbi Moshe Ze'ev Zorger a distinction between injuries which are מעלה ארוכה – "heal themselves" – and those which are not. Rabbi Zorger permitted injury to self healing organs for money, but not to organs which do not heal themselves. His own examples of organs which do not heal themselves were the amputation of an arm or a leg. Obviously, therefore, he could not have meant that the open wound remains forever open, because there is some closing of the wound after the removal of an arm or leg. What he appears to mean is that it is forbidden to remove an organ which is not self replacing, if the motivation to remove it is financial. Thus, one could receive compensation for blood and bone marrow because they replenish themselves; but one could not receive compensation for a kidney because it does not grow back, and one is not allowed to remove it for financial reasons.

If we adopt the view of Rabbi Zorger, it appears to allow us grudgingly to permit compensation for blood and bone marrow donation, but to forbid it for kidney donation. Of course, we must remember that Rabbi Zorger was not talking about kidneys in his responsum, and it is our responsibility to judge whether he would have included them with arms and legs, or with blood and bone marrow.

There is, medically speaking, a vast difference between removing an arm or leg, and removing a kidney. The removal of the former affects the person from then on. One may learn to compensate for the absence of an arm or leg, but one does not function identically with one arm or leg as one would with two. There will always remain things that one could do when he had both arms or legs that one cannot do now. On some level, his functioning is adversely affected by the removal of the arm or leg. This is not the case with the removal of a kidney. The claim of the doctors is that one will not notice its absence at all. No function of the body will be adversely affected. The kidney will not replace itself, but its absence will be irrelevant, so long as the patient does not suffer any of the immediate or possible long term after effects of the surgery, and so long as the remaining kidney remains healthy. In truth, then, even for Rabbi Zorger, the removal of the kidney should be considered more comparable to the removal of blood and bone marrow than to the removal of an arm or leg.

This conclusion, then, leaves us where we were before we reintroduced Rabbi Zorger's distinction between מעלה ארוכה and not מעלה ארוכה. It leaves us with the conclusion that there is no halakhic reason to forbid kidney donation for compensation, no matter how much our hearts may incline us otherwise.[388] That, too, was the conclusion

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[386] The conclusion of Prof. Sofer Abraham's position is not relevant to our analysis, but worthy of being quoted: "What needs to be looked into is a community that permits a person to reach such a low level in terms of his debts, and certainly in terms of his inability to pay for needed, though costly, medical treatment, that he finds no alternative solution to his problem than to sell an organ in order to earn enough money for livelihood or medical care."

[387] P. 252.

[388] Rabbi Mordecai Halperin in an article in *Assia* 45-46 (Tevet 5749): pp. 54-55, attempts to make two further halakhic arguments to prohibit donation of kidneys for compensation. He contends that the financial pressure and need which ultimately motivate donors for compensation prevent complete informed consent and willingness (גמירות דעת). It is risky, to say the least, to begin to posit that actions done out of financial need can be invalidated in halakhah, because they lack these ingredients. Halperin is forced to untenable considerations such as these because he believes that there is no longer authority to make תקנות and גזרות which will be universally authoritative among Jews. Even by his reasoning, though, each מרא דאתרא still

drawn by Rabbi Shaul Israeli[389] and Rabbi Israel Meir Lau.[390]

The question is, why do our hearts incline us otherwise? If kidneys are like blood and bone marrow halakhically, why do we accept compensation for blood donation with relative equanimity, yet recoil from the idea of compensation for kidney donation? We quote, in translation, from the words of Rabbi Abraham Steinberg:[391]

> The matter of commerce in organs is a very difficult question. There are numerous possibilities for receiving compensation for the donation of organs: (1) receipt of compensation from another living person, when the transplant is intended to be carried out in the life of both of them; (2) receipt of compensation by one person from another, when the transfer of the organ will be done after the death of the organ owner; (3) receipt of compensation by members of the family of a deceased person in exchange for their agreement to transfer the organ;[392] (4) receipt of compensation by the organ owner during his life, or by his family after his death, from an organization or state, in exchange for their agreement to donate the organs; and, (5) the purchase of organs by people in need of transplants in order to push them to the head of the line.
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> Most ethicists and doctors who perform transplants oppose all commerce in organs in exchange for compensation, other benefits, political pressure, etc., and prefer that all selection be made on a purely medical basis of preference. [They prefer this] since there is a real danger that there might be created a medicine that is not even-handed, such that the rich will receive preferential treatment in receiving organs; and the poor will not only not receive organs, they will become a source for the acquiring of organs as a result of financial pressure. Indeed, this very thing has happened in reality in poor countries, like India and states in South America, where living people have offered to donate their organs [on which life depends] in exchange for money. Beyond that, there are medical centers which suggest transplants for citizens of other countries in exchange for compensation, or which export organs to citizens of other countries in exchange for money, thus giving citizens of other countries preference over their own citizens.

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possesses the authority to make such enactments for his community. Thus, even if he were correct that we cannot make a גזרה, it would be better to suggest that each מרא דאתרא make the necessary enactment than to argue on the basis of informed consent and גמירות דעת.

[389] See *Assia*, vol. 15:3-4, nos. 57-58 (Kislev 5757): p. 8.

[390] See *Tehumin* (Alon Shevut: Tzomet, 5758), vol. 18, pp. 125-138.

[391] *אנציקלופדיה הלכתית רפואית* (ירושלים: המכון ע"ש פלק שלזינגר, 1991), כרך ב', עמ' 239–240.

[392] This was forbidden by Rabbi Shlomo Zalman Auerbach because the receipt of money by the family would constitute הנאה מן המת. He allowed it when the money received would be used for payment of medical treatment by another family member (see his notes to *Nishmat Avraham*, vol. 4, Hoshen Mishpat 420:2). It was also forbidden by Rabbi Eliahu Bakshi-Doron, on the grounds that the family of the deceased has only an obligation to bury, but have no proprietary rights to organs or limbs of the deceased relative (see *Torah she-be-al Peh*, vol. 38, 5752). Rabbi Eliezer Waldenberg, however, permitted it on the grounds that it is not הנאה מן המת, relying on the view of the *Imrei Yosher* (Rabbi Mordecai Arik), pt. 2, no. 22, that when one performs a mitzvah with something that would otherwise be אסור בהנאה, one is not liable for profiting from איסורי הנאה.

Many recoil at the idea of compensation for organs because it conjures up images of the exploitation of the underpriveleged,[393] of a reversal of whatever small progress has been made toward universal medical rights and treatment. Compensation for organ donation would be a step backward in its potential consequences. We have become too civilized to tolerate the use of one's body parts as an economic commodity. Such use diminishes the צלם אלקים of humans. All of this is true! Commerce in body parts could throw us back to earlier standards of ethics that we believe we have long outgrown, and the return of which we could not tolerate.

Let us be clear and honest with ourselves. We oppose organ donations for compensation because we cannot devise a reasonable and enforceable method to allow it in a controlled and acceptable way, even if we think there could even be a controlled and acceptable way.[394] We fear, and not without reason, that the slightest breach in the wall will bring a flood of uncontrollable activities that will make humans into mere commodities, restoring a medieval standard of conduct in which the value of human life will be diminished because it will become an economic commodity to be bought and sold on the open (and not so open) market.

In halakhic terms and categories, we need to make a גזרה that forbids the permissible. We would forbid all commerce in organs by halakhic decree, in order to put up a protective fence against human abuse of the limits of what might be acceptable. We should do this, but with full knowledge of what we are doing. We, who are so eager always to remember that "Whoever saves one life is as though he saved the entire world," will make a decree that will make that impossible in certain circumstances when there would be no technical halakhic objection. We must at least acknowledge that we will allow people to die when they might live, in order to prevent abuses that we will not be able to control. And we should not delude ourselves into thinking that this will be an infrequent occurrence. As the medical potential for successful transplantation of kidneys from unrelated donors increases, the impetus to purchase such a kidney from a donor willing to sell will be very great. We are making the difficult judgment that the צלם אלקים of the potential donor is safeguarded more by refusing to allow him to benefit from the money which he might earn, than by allowing him to improve his life through the sale of an organ, the loss of which is not likely to cause him any long term debilitation of any kind. Our imposition of this judgment not only leaves the potential donor in no less financial need than he was before, it probably will often condemn the intended recipient to death.

We ought to take the step of making such a גזרה with full knowledge of its consequences, both positive and negative. And though we make it, we should not be too quick to judge the contrary view as totally indefensible and unreasonable.

Once we have affirmed that kidney donation is permissible as an act of piety, but not as a mandatory act, there are conflicts of values and interests that can arise. It is not our intention to deal with these at length, but to make a few comments.

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[393] It is fascinating to note that Rabbi Judah HaHasid used the same thesis to explain the Torah's prohibition against remarrying one's divorced wife if she has been married subsequently. In his remarks to the end of Parashat Ki Teze (יצחק שמשון לנגה, טעמי מסורת המקרא לר׳ יהודה החסיד [ירושלים, תשמ״א]) he says that "if it were permissible, the rich would hire the poor to divorce their own wives so that the rich could marry them for their pleasure, and when they were sated, they would divorce them and they would return to their original husbands."

[394] Rabbi Lau, in the article referred to above, n. 390, precisely makes the point that we should not mandate a prohibition against what is in fact lawful. We should, rather, make laws to prevent our worst fears from coming to pass.

It is clear that the objection of one's spouse or parents to one's fulfillment of a legal obligation is null and void, legally. The obligations of the law supersede the objections of spouses and parents. But what is the status of such objections regarding positive and praiseworthy acts which are not mandatory, but acts of מדת חסידות?

We referred above[395] to a comment by Rabbi Isaac Zilberstein, taken from the context of a more complex discussion. The subject of that discussion was our current question. The actual respondent in Rabbi Zilberstein's article was Rabbi Moshe Sternbuch, to whom the questions had been sent, after having been raised.

Regarding a conflict between the husband's desire to donate a kidney and his wife's opposition, Rabbi Sternbuch was inclined to allow the wife to have veto power. His considerations included, among others, that since there was some danger in the donation, both immediate and long term, especially the fear that something might happen to his one remaining kidney, the wife could claim that his act infringed on her rights. And since the act was one of piety but not obligation, her rights should predominate. After having formulated his response, Rabbi Sternbuch writes:[396]

> הצעתי את הדברים לפני מורי וחמי הגאון ר׳ יוסף שלום אלישיב שליט״א ולא הסכים להם: הוא סובר שאם תרומת הכליה תפגע בחיובי ״עונה״ אין הבעל רשאי להיות חסיד על חשבון אשתו ולקפח זכויותיה. כמו כן אם יפגע בפריה ורביה.... אבל כאשר מצות עונה ופריה ורביה לא יפגעו, אין די משקל בהתנגדות האשה מול הערך העליון של הצלת נפש.
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> I presented my position to my master and father-in-law, Rabbi Yosef Shalom Elyashev, and he did not agree with my view: He claimed that if the donation of the kidney would interfere with the fulfillment of the obligation for conjugal relations, the husband would have no right to be a pious one at his wife's expense, infringing on her rights. And similarly if it would interfere with procreation. . . .But when these would not be affected, his wife's objection is insufficient to out-balance the supreme value of saving a life.

Rabbi Elyashev's remarks were accepted by Rabbi Sternbuch, who retracted his own view in favor of his father-in-laws's view. Indeed, Rabbi Elyashev's view seems completely on the mark. There is a potential conflict between the husband's desire to donate and his wife's rights. If there is a significant risk that those rights will be infringed upon, the act of piety is no longer so pious. Indeed, Rabbi Elyashev called it גזל – "robbery." But, in the kidney case, the evidence is great that the donation will not result in any infringement of the rights of his wife. It is not that her concerns are without any basis, but rather that her fears are not likely consequences of his act of donation. In such circumstances, his desire predominates, and his donation is permissible as an act of מדת חסידות. Since Rabbi Elyashev's reasoning is ultimately based on whether the rights of the wife would likely be infringed, that would clearly be the basic concern if the situation were reversed, too. Thus, it seems clear, that if it were the wife who wished to donate, and the husband who objected, his objection would not be sufficient to forbid her donation, since she would be able to fulfill all of her obligations after donation, and there would be no infringement of his rights.

The same type of conflict could arise between the desire of a child to donate and the wish of the child's parents that he or she not donate. The added wrinkle here is a

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[395] N. 383.

[396] P. 32 in Rabbi Zilberstein's article.

specific commandment incumbent upon children to honor their parents. It is not simply a matter of infringement of their rights, as in the spouse case. In the parent case there is a specific duty of children to be obey their parents, so long as they do not order them to violate the law.

In dealing with this issue, Rabbi Sternbuch refers to a statement of the *Sefer Hasidim*[397] which forbids a child from continuing to observe voluntary fasts, because his parents object.[398] He refers, as well, to the claim of Rabbi Moshe Greenvald[399] that a son whose parents have ordered him not to immerse himself in any mikveh which is unheated must convince them to withdraw their objection, or else he may not violate their order.

But Rabbi Sternbuch's conclusion makes an important distinction:[400]

> מסתבר שאין להתחשב בהורים, כי רק מצוה שהיא ממדת חסידות אין לעבור על כבוד אב ואם לעשותה, מה שאין כן בענינו שתרומת כליה מצוה גדולה מאד היא שכל המציל נפש אחת מישראל כאילו קיים עולם ומלואו, אלא שהחיוב הוא רק ממדת חסידות, כי אינו חייב לאבד אבר להצלת חברו, ודאי שמצוה גדולה זו דוחה כיבוד אב ואם.
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> However, it stands to reason that the objection of the parents can be ignored [in the kidney case]. The only time the wishes of the parents cannot be ignored is when the mitzvah itself is only ממדת חסידות. But that is not the case in the matter of the kidney donation because it itself is a very great mitzvah, since whoever saves a Jewish life is considered as though he had saved an entire world. Only the obligation to donate the kidney is an act of piety, since nobody is legally obligated to forfeit a limb for the benefit of his fellow. In such circumstances, surely this great mitzvah supersedes the honor of parents.

The voluntary fasts of which the *Sefer Hasidim* spoke, and the immersion in the mikveh of which the ערוגת הבושם spoke, are very different from kidney donation. In the former two cases, the entire mitzvah is completely voluntary. There is no obligation of any kind to undertake voluntary fasts. There is no obligation of any kind for men to immerse themselves in the way that pious men often do, as a regular or daily act of sanctification. The fasting and the immersion are themselves "acts of piety," with no element of law whatsoever. The kidney case is very different. There is an actual legal obligation to save the life of another. That commandment is not an act of piety, but a legal mandate. There are limits, however, to how far one must go in fulfilling that commandment. An obligation to forfeit an organ is beyond the limit of requirement, and is permissible only as an act of piety. The underlying commandment which this act of piety fulfills, however, is not itself merely an act of piety, but a real commandment. Thus, concludes Rabbi Sternbuch, if one is motivated to act piously in the fulfillment of the mitzvah to save another person by donating a kidney, one's parents cannot prevent him from fulfilling the mitzvah because they object to his willingness to go further than the law requires.

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[397] Margolioth ed., no. 340, p. 256.

[398] To show to what extent the mitzvah to honor parents goes, consider that in the case described by the *Sefer Hasidim* the child is undertaking these voluntary fasts as a method of convincing his parents to stop their own punishing voluntary fasts, which the child fears are too difficult on them. Nonetheless, the child is obligated to cease his own fasts because of parental objection, even though his desirable goal will remain unaccomplished.

[399] ערוגת הבושם, או"ח סי' י"ט.

[400] Zilberstein article, pp. 32-33.

The principles adduced by Rabbis Elyashev and Sternbuch seem very sound. They can serve us well as preliminary guidance in resolving conflicts that might arise between potential kidney donors and their spouses, parents, and children. And, since other relatives have even less of a claim against the potential donor, their objection, too, would be insufficient to forbid the donor from donating.

There is one further issue to be dealt with briefly. Since there are countries that are reported to be taking organs from prisoners against their will, our position should be clear and unambiguous. Prisoners are no less created in the image of God than anybody else, and their bodies and organs belong to the government no more than those of anyone else. Organs may not be taken from prisoners against their will.

What about suggesting kidney donation to a prisoner with either an explicit or implied promise that the donation will benefit the prisoner somehow? The following quotation, written about the same question regarding a suggestion to prisoners that they allow themselves to be used for medical experiments, speaks exactly to the issue:[401]

> העולה הן האמור עד כה הוא כי מותר לאסיר להתנדב לעריכת ניסויים ומחקרים רפואיים על גופו אך אסור לכפותו.... לכאורה מדובר באסיר הפועל בהתנדבות, אך עם זאת יתכן שהוא פועל מתוך אוירת לחץ ובמיוחד כשנאמר לו במפורש או ברמז שאם יסכים לעריכת הניסוי יזכה לשיפור בתנאיו, כגון סיכוי לשחרור מוקדם, ניכוי שליש ממאסרו כו׳. היש בכך כפיה?... נר׳ כי רצוי להתרחק מכפיה, ולא להשיג הסכמת האסיר לעריכת ניסויים בגופו ובנפשו על ידי איום מפורש או נרמז כגון שחרור מוקדם וכדומה. יש להציג בפניו את חשיבות הניסויים על הסיכונים שבהם ולא לקשור אותם להקלות אחרות בתנאי המאסר. הוא, האסיר, יעשה את החשבון לעצמו, ואם בין היתר יחשוב שהדבר משתלם לו, אין בכך משום כפיה. ככל שהסיכון גדול יותר... יש להדגיש יותר את חומרת הסיכון.
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> What follows from what we have said so far is that it is permissible for a prisoner to volunteer to be a subject of a medical experiment or research, but it is forbidden to compel him. . . .Ostensibly, we are speaking of a prisoner who acts [completely] voluntarily. But, it is probable that[, in fact,] he is acting from an atmosphere of pressure, especially if he has been told either explicitly or implicitly that if he agrees to the experiment he will benefit from improved conditions, for example, a chance to be freed early, a one-third reduction in his term, etc. Does this constitute "compulsion?" . . .It is clear that it is desirable to refrain from [all] compulsion, and not to obtain the agreement of the prisoner for the experiments on his body or soul by means of either an explicit or implicit promise (like early freedom, etc.). We must present before him how important the experiments are, together with the dangers that might be involved, but make no connection to any other leniencies in the conditions of his imprisonment. He, the prisoner, will make his own calculation, and if, among other things, he thinks it might pay for him, that does not constitute "compulsion." The greater the danger. . .the more one must stress the seriousness of the danger.

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[401] *Tehumin* (Alon Shevut: Tzomet, 5740), vol. 1, pp. 533-36. The author is listed as "the editor." The beginning of the volume lists only one editor, Dr. Itamar Warhaftig.

Prisoners may be treated no differently than any other person. Just as we would not remove the kidney from a living donor without the donor's consent, so, too, we may not remove a kidney from a prisoner without his or her consent. What's more, we have already made clear that we will refuse to allow any compensation for the donation of the kidney, and that refusal must apply to the prisoner as well as to everyone else.

The added wrinkle in the prisoner case is the possibility of subtle coercion. The reaction of the author above, whom we assume to be Dr. Itamar Warhaftig, seems to be exactly correct. Any type of subtle coercion which we can recognize as probably putting pressure on the prisoner to agree, is unacceptable. On the other hand, we do not wish to create a situation that would make it totally impossible for prisoners to be kidney donors, since we do not prohibit others from donating. A prisoner might well be motivated by exactly the same altruistic motives that we hope others will be motivated by. Prisoners, in fact, may have the additional motivation of a type of teshuvah for some earlier act. We may not link donation to any other benefit which we might have to offer, and we must give prisoners exactly the same honest evaluation of the risks involved in the procedure as we do all others, but once we have taken care to do these things, there is every reason to allow prisoners to become live kidney donors.

Conclusions

1. It is permissible for a live donor to donate a kidney, and under general circumstances the act is highly laudable. Indeed, it is considered by some to be even more than merely laudable when the donation is made to a parent, teacher, or child (in some instances), based on the view of the *Yad Eliyahu* and Jacob Emden.[402] Except for the possible exceptions intimated above, however, the act of donation is one of piety and not of legal obligation.

2. We affirm our commitment to a גזרה forbidding donation for compensation under all circumstances, even as we affirm that there is no compelling technical halakhic objection to such donation.

3. An objection to donation by the spouse, parents, or children of the potential donor is insufficient to forbid it.

4. Prisoners may be considered voluntary kidney donors when they have agreed to donate, have been given no explicit or implicit promise of improved conditions, are not being compensated, and have been apprised of the possible dangers and risks of the procedure.

[402] See above, pp. 301-303.