HEADLINES
RADIO SHOW
TACKLING FASCINATING MODERN CONTROVERSIES FROM A HALACHIC PERSPECTIVE
with
DOVID LICHTENSTEIN

Lubavitch, IVF for older singles, West Bank Settlers

Show# 102 | January 28th 2017

Chabad – Is it wrong to believe that the Rebbi is or was Moshiach?

תלמוד בבלי מסכת סנהדרין דף צח עמוד ב

אמר רב: לא אברי עלמא אלא לדוד. ושמואל אמר: למשה. ורבי יוחנן אמר: למשיח. מה שמו? דבי רבי שילא אמרי: שילה שמו, שנאמר עד כי יבא שילה. דבי רבי ינאי אמרי: ינון שמו, שנאמר יהי שמו לעולם לפני שמש ינון שמו. דבי רבי חנינה אמר: חנינה שמו, שנאמר אשר לא אתן לכם חנינה. ויש אומרים מנחם בן חזקיה שמו, שנאמר כי רחק ממני מנחם משיב נפשי. ורבנן אמרי: חיוורא דבי רבי שמו שנאמר אכן חליינו הוא נשא ומכאבינו סבלם ואנחנו חשבנהו נגוע מכה אלהים ומענה. אמר רב נחמן: אי מן חייא הוא - כגון אנא, שנאמר והיה אדירו ממנו ומשלו מקרבו יצא. אמר רב: אי מן חייא הוא - כגון רבינו הקדוש, אי מן מתיא הוא - כגון דניאל איש חמודות.

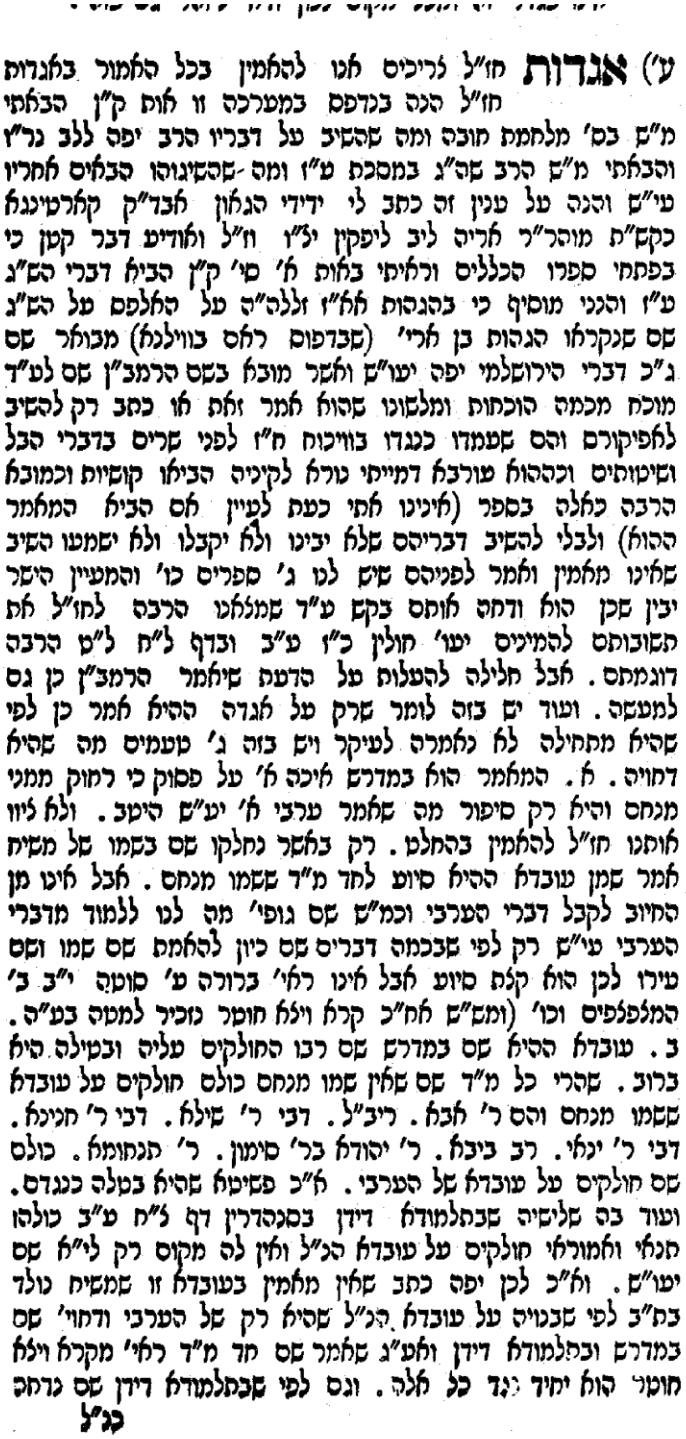
ופרש"י: אי מן חייא הוא כגון רבינו הקדוש - אם משיח מאותן שחיים עכשיו ודאי היינו רבינו הקדוש, דסובל תחלואים וחסיד גמור הוה, כדאמרינן בבבא מציעא (פה, א), ואם היה מאותן שמתו כבר - היה דניאל איש חמודות שנדון ביסורין בגוב אריות וחסיד גמור היה, והאי כגון לאו דווקא, לישנא אחרינא: כגון רבינו הקדוש, כלומר, אם יש דוגמתו בחיים היינו רבינו הקדוש, ואם דוגמא הוא למתים, היינו כגון דניאל איש חמודות.

שו"ת חתם סופר חלק ו - ליקוטים סימן צח

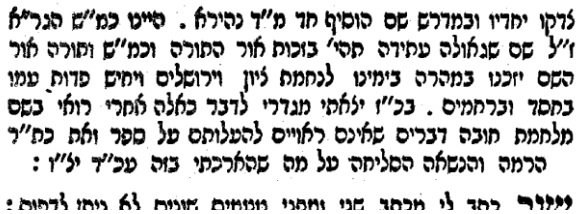
והנה בהא דביאת בן דוד צריך אני להוציא הוצעה /להציע הצעה/ א' והוא כמו שהי' משרע"ה שהי' הגואל הראשון נזדקין שמנים שנה ולא ידע ולא הרגיש בעצמו שהוא יהי' גואל ישראל ואפי' כשאמר לו הקדוש ברוך הוא לך כי אשלחך אל פרעה מ"מ סירב ולא רצה לקבל על עצמו כן יהי' אי"ה הגואל האחרון ומיום שחרב בהמ"ק מיד נולד א' הראוי' בצדקתו להיות גואל ולכשיגיע הזמן יגלה אליו השי"ת וישלחו ואז יערה עליו רוחו של משיח הטמון וגנוז למעלה עד בוא וכאשר מצינו בשאול אחר שנמשח באה עליו רוח ממשלה ורוח הקודש אשר מלפנים לא הרגיש בעצמו כן הי' בגואל הראשון וכן יהי' בגואל האחרון והצדיק הזה בעצמו אינו יודע ובעונותינו כי רבו כבר כמה וכמה מתו ולא זכינו שיערה עליהם רוחו של משיח גם כי הם ראוי' לכך אבל הדור לא הי' ראוי'

אולם כשיגיע אי"ה יגלה אליו ה' כמו למשה בסנה וישלחהו או לישראל לבד או למלך א' כמו לפרעה לומר שלח עמי.

שדי חמד פאת השדה מערכת האל"ף כללים אות ע



כנ"ל שמפורש הפסו שהרי דניאל ורבי ור"ל כולם לא נולדו בזמן
התורבן שהרי ביום שמת ר"ע נולד רבי כמ"ש בקידושין ע"ב ב'
ור"ש הי' לאחר התורבן זמן הרבה שהי' בזמן בן כוזיבא שהי' ר"ב
שנה לאחר התורבן וכידוע ומ"ע פירש"י מגלה ב' ט"ת ד"ה בזמן
הזה. ולכן ע"פ כ"ז דחה העובדת הכ"ל. ומ"ש שם לח"כ מי
שהיו מאמין היו מוין פי' היו מזיק לכללות האומה לבל בחמת
חומת הוא (ויעו' ב"ב ע"ה ח' תלמלי לא רחית לא החמת מלגלג
על דברי חכמים לחה יעו"ש) ויעויין ברמב"ם ה' מלכים פי"א ופי"ב.
כ"ז כתבתי להמלין למי שחושב שהם דברי הרמב"ן לבל בחמת
יפה כתב כת"ר בשם יפה ללב שהיו דברי הרמב"ן הלא מהיו
תלמיד חועה וכו' ובעיקר הדברים יש לי לישב בפשיטות הכל שכולם
כל החמרים מתקיימים והלו והלו דח"ח רק שהין רצוני להאריך
ולא ר"ת כ"כ. רק לפי שהבי עני בדעת למורת רוחי היו הדברים
החלה ובפרט בזה"ז לחבר בעוה"ר כמלחו קצתי החאומה לחבר מזה
ימלחו פחח ואם ניתן להם לחבע ימצחו עמו חת כל היד לכן
כתבתי מדי דברי בו ג"כ להמלין בזה. ורלוי להיות דברי מועטים
לפי הדלת כבודו לכן קלרתי וידעתי שים בדברי הכ"ל מה לפקפק
ומה לתרן ומה שכתבתי שים לתרן שיהיו כולם לחת בלא סתירה
לחזיל רק בקיטור נמרן. שמה שמוזכר בעובדת הכ"ל שרוח נשחו
להילד פשוט מאד לעל"ד שפי' שנשחו למקום ת' בעוה"ז חלל
חכם בתורה ולדיק להתגדל שם שילמדוהו תורה ויחכבוהו מנעוריו
להיות לדיק נשגב וגדול מאד בתורה שיהיה לרוי ומובסר מה שבמקום
לחו לא הי' מובסר לזה וגם לפי שהכירו וידעו החים לבל יתפרסם
להעולם נלקח מיד משם למ"ח יעו"ש במדרש ובאחרים ימיו כשלח
זכו הדור נסחלק מן העולם (יעוי' מס' ד"ח זומח פ"ח) ולפי
שלמרו בגמרח דסנהדרין ל"ח ע"ח שים לופן ת' שיהי' לדיק ומשם
עני ורובב על החמור וגם לחמרו שם היום לח בקולי חשמעו ובלופן
הכ"ל רלוי להיות רק ת' מלדיקי הדור (היינו לח יזכו רק מעט)
ולריך להיות בכל דור הח' הרלוי לח יזכו הוא יהי' השלים ע"י חלי'
ואם לא יזכו יהי' כשלר הלדיקים בלא הפרש ובמת ר"ל לחד ל"ל
לחר בדור במקומו שיהי' רלוי ע"ד דלמרו בקידושין ע"ב וחלח
השמש ובא השמש כו' יעו"ש ובדרך הזה הי' משוער חלם בכל דור
מי הוא ולכן לחר החורבן בית שני הי' מנחם עובדת הכ"ל ולחר
לחרית ימיו הי' רביעו הקדוש ולכן בדורו לחמרו וידעו שהוא המוכן
ולחרי מות רבי הי' מי שדיבר עם ריב"ל בסנהדרין ולחריו בימי רב
נחמן הי' ר"ג וכן הוא בכל דור ודור ל"ל לחד מוכשר שמא יזכו
(ועפי"ז כתבו ג"כ תלמידי החר"י ז"ל שבימיו הי' החר"י ז"ל) וכ"ז
הוא פשוט וכזה כל דברי חז"ל קיימים ולפי שים עוד לופן בזכות
גדול דעם ענני שמית כבר לינק לחת וכמ"ש בסנהדרין ל"ח ע"ח
שם לכן לחמרו על לופן זה בסנהדרין שם ל"ז ע"ב שם מן מיתה
הוא דניאל לים חמודות יעו"ש והמחלוקת בענין שמו על משיח הוא
פשוט דחלו ולחו דח"ח שהרי גם ביתרו מלחו שהי' לו שבעה שמות
יעויין פירש"י ריש יתרו. וכמ"ש במלחכים שנקרלו על שם פעולתם
והכל לפי הלופן שהי' זכות הדור וכחיזה סבה תהי' הגאולה בד"ח
שם לא יזכו כ"כ רק תהי' מתנת חנם בחמלת ה' עליהם חז נקרח
חניכה. ואם יהיה בזכות המחחבלים על ירושלים שהובטחו שיזכו
לרחום בנחמתה כמ"ש חז"ל כל המתאבל על ירושלים כו' בזה
יהיה נקרח מנחם (ובסבלו עוונות הדור נקרח חיוורח דבי רבי כמ"ש
בסנהדרין שם ל"ח ב') וכשתהיה הגאולה למען שמו ית' וכמ"ש
ביחזקאל ל"ו ותחמול על שם קדשי וכו' וכמ"ש למעני למעני לעשה
יעמי' מ"ח. חז נקרח על שם הקדוש ברוך הוא שעושה לדקה עם
ישראל והוא ה' לדקינו כמ"ש במדרש רבה שם ובבח בתרח
ע"ה ב' ויעוי' סנהדרין ל"ח ח' ויעוין שמו. פי' המפרשים והגאון
מלבי"ם לעון כין וככד הייטו כשיהיה בזכות חבות ובריח חבות שלח
תמה לכן נקרח יעון (ויש לומר ג"כ שבשיהי' הדור לדיקים גמורים
שהם נקרחו על שם הקב"ה חז יהי' נקרח ה' לדקינו כמ"ש במדרש
חיכה שם חלל עובדת הכ"ל ויעוי' שוד בב"ב ע"ה ב') ובשיבח גם משה
רביטו יחחו נקרח שילה כמ"ש הגר"ח ז"ל שקילה הוא גימטריח משה
והוא יבח עם משיח וכגואל הרחשון כן גואל האחרון יעוי' בס' חבן
שלמה וכן יתפרשו יתר הדברים ובזה נבין לנחמו ג"כ כי דברי חז"ל



שכנא שמו

רבי יוסף שאול נתנזאהן בעל "שואל ומשיב" זצ"ל בהגהות "שי למורה" על שמות גיטין לה"ביח שמואל" (אהע"ז ס' קכ"ט) אות ש', כותב על מה שכתב ה"ביח שמואל": שכנא בכ"ף, הוא לשון שכינה, לכן הגאון מוהר"ר שכנא זי"ל [הוא רבו של הרמ"א זי"ל] נתן סימן על עצמו לשכנו תדרשו, והוסיף וז"ל: ואני שמעתי שנמצא בקראקא ש"ס שהגיה הגאון מ' שכנא זי"ל בפרק חלק בשמות של משיח, שהגיה: "אני אומר שכנא שמו שנאמר "לשכנו תדרשו" וזהו הסימן שנתן הגאון ר' שכנא" עכ"ל — וכ"ה ב"סדר הגט למוהר"ר מיכל ר' יוזפש מק' קראקא", והובא גם בספר "קב ונקי" (על ה' גיטין ח"ב, שמות אנשים אות ש' סק"ג): "וגם

שמעתי שכשלמד הגאון הנז' בהגדה דפ' חלק שנחלקו שם בשמו של משיח וכל אחד מביא סמך מן המקרא, אמר הגאון הנ"ל, אילו הייתי שם הייתי אומר שכנו שמו שנאמר לשכנו תדרשו, וכן ראיתי נדפס בסוף גמרא נדה שהוגה מן הגמרא של הגאון מו"ה שכנו זי"ל..". ראה גם בספר "מרגליות הים" על סנהדרין שם, וכתב "וראה שו"ת הרמ"א (סי' כ"ה) בתשובה מבנו של הר"ר שכנא שכתב: "נטרפה שעה ונשבה ארון הקודש נתבקש בישיבה של מעלה מאור הגולה רוח אפנו משיח ה' רב הרבנים גאון הגאונים נשיא ישראל ה"ה אדוני מורי רבי הנקרא בשם קדשו מו"ה שלום המכונה שכנא...".

רבי חיים חזקיה מדיני בעל "שדי חמד" זצ"ל כותב בספרו (פאת השדה מערכת האל"ף כלל ע'): "צריך להיות בכל דור האחד הראוי אם יזכו הוא יהיה השליח על ידי אליהו, ואם לא יזכו יהיה כשאר הצדיקים בלא הפרש, ובמת ר"ל אחד צריך להיות אחר בדור במקומו שיהיה ראוי, ע"ד שאמרו בקידושין ע"ב, וזרח השמש ובא השמש כו' יעו"ש, ובדרך הזה היה משוער אצלם בכל דור מי הוא, ולכן אחר החורבן בית שני היה מנחם, עובדא הנ"ל [איכה רבתי א, נז] על הפסוק "כי רחק ממני מנחם משיב נפשי", מה שמו של מלך המשיח וכו', ואחר אחרית ימיו היה רבינו הקדוש, ולכן בדורו אמרו וידעו שהוא המוכן, ואחר מות רבי היה מי שדיבר עם ר"יב"ל בסנהדרין ואחריו בימי רב נחמן היה ר"נ, וכן הוא בכל דור ודור צריך להיות אחד מוכשר שמא יזכו, (ועפי"ז כתבו ג"כ תלמידי האר"י זי"ל שבימיו היה האר"י זי"ל), וכל זה הוא פשוט, ובזה כל דברי חז"ל קיימים, והמחלוקת ענין שמו של משיח הוא פשוט דאלו ואלו דברי אלקים חיים כמ"ש במלאכים שנקראו על שם פעולתם, והכל לפי האופן שתהיה זכות הדור ובאיזה סיבה תהיה הגאולה...".

Selected **audio from our listeners**

Rav Shach and Lubavitch *click here*

Interview a Libavitcher Chossid *click here*

IVF for older singles-Should it be done?

נשמת אברהם אהע"ז סי' א ס"ק י עמוד מח-נ

סעיף יג אשה (י) אינה מצווה על פריה ורביה (ועיין בסימן קנ"ד ומ"מ יש לומרים דלא תעמוד בלא לים משום תבדלה).

נשמת אברהם

(י) אינה מצווה.

1. הזרעה מלאכותית לפנויה. דיבר אתי רופא נשים בשאלה של אשה רווקה מסורתית בת 30 ומעלה שהתייאשה מלהתחתן אך רוצה להיות אם לילד. לשם כך היא מבקשת שיעשו לה הזרעה מלאכותית בתנאים הבאים:

א. התורם יהיה יהודי.

ב. שלא יהיה בו שום פסול מבחינת יחוס.

ג. שגורם שלישי (ולא היא), כגון משרד הדתות או משרד הבריאות ידעו על זהותו של תורם הזרע כדי למנוע בעיות בעתיד.

ד. כמובן שהזרע ילקח מתורם שבין כה וכה תורם את זרעו (עבור תשלום) לבנק הזרע.

אמרתי לו שהדבר נ"ל מכוער אך לא ידעתי אם יש איסור מוגדר ומפורש במעשה כזה כשהזרע כבר בנמצא. ענה לי אותו רופא שמכיון שדבר כזה נעשה באופן לא מבוקר אצל בתולות אחרות, אולי מוטב שלפחות כאן המעשה ייעשה בתנאים מבוקרים כפי שמפורטים לעיל על אף הכיעור בעצם ההשקפה והמעשה, מאשר ייעשה ללא בקרה. וראיתו ממה שכותב הגר"א נבנצל שליט"א[228] בהערותיו על מאמרו של הגרא"י וולדינברג זצ"ל שאוסר הפריה במבחנה לזוג שאין להם ילדים. וז"ל של הגר"א נבנצל שליט"א: מה שחשש שיוצרים בעיות מרקיעות שחקים אטו כולי עלמא צייתי דינא, הלא הבעיות צצות בלאו הכי ובינתיים כנ"ל מוטל על כף המאזניים אושרו של זוג ישראל, עכ"ל.

אך נראה לי שיש לחלק, כי במקרה של הפריה במבחנה עומדת על הפרק בעיה של שלום בית, אושר של זוג יהודי והרצון לקיים מצות הבורא וכפי שמזכיר שם הגר"א נבנצל שליט"א, משא"כ במקרה דנן יש כאן רק תאוה של אשה להיות אם בדרך שאינה דרך של בנות ישראל. ואמנם לא ניתן למנוע הדבר אבל מנין לנו שיהיה מותר לעזור לה אפילו אם כוונתה היא כדי למנוע בעיות בעתיד.

והסכים אתי הגרש"ז אויערבאך זצ"ל. ועוד כתב לי הגאון זצ"ל[229]: נאמר "הסר ממך עקשות פה ולזות שפתים הרחק ממך"[230], ובזה היא מביאה חשד של זנות על עצמה וגם לנולד יהיו קשיים ומי יודע אם לא יצטער הרבה. נוסף לזה יש לחשוש שזרע פגום שנולד בעבירה של מרציא שכבת זרע לבטלה, יתכן שיש לזה השפעה גם על הנוצר מזה. וכן שמעתי ממו"ר הגרי"י נויבירט שליט"א.

2. דינו של תינוק. כותב היביע אומר[231]: אודות שאלתו במי שנולד לאשה פנויה שקבלה זרע מאת בנק הזרע וכו' האם הבן נידון כשתוקי שאסור לו בקהל או יש מקום בהלכה להתירו לבא בקהל, וכו'. שכיון שהאשה הזאת שקבלה את הזרע היתה פנויה, כל לגבי דידה בין אם

ציונים והערות

228) אסיא, חוברת לד, תשרי תשמ"ג עמ' 5. 229) ראה מנחת שלמה ח"ג סי' קג אות טז. 230) משלי ד:כד.
231) ח"י אהע"ז סי' י.

היה זרע של עכו"ם בין אם היה זרע של ישראל, רובא דרובא הכל כשרים אצלה, ואף אם ישנם בעיר גם פסולי חיתון, אינם אלא מיעוטא דמיעוטא, והנה גם משעה שהזרע נלקח מהתורם, הוא בחינת פירש, וכל דפריש מרובא פריש וכו'. ולפי"ז כיון שהרוב כשרים אצלה, דקי"ל עכו"ם הבא על בת ישראל הולד כשר, אין לולד דין שתוקי שאסור לבא בקהל ד' מדרבנן, משום מעלה עשו ביוחסין, אלא סגי ליה בחד רובא להכשירו ולהתיר לו לבא בקהל, וכו' ע"ש. ברם יש לדון באשה פנויה שקבלה זרע מבנק הזרע כבנ"ד וונולדה בת, אם הבת כשרה לכהונה, שהרי פסק השו"ע (סי' ד סע' ה וסע' יט ובסי' ז סע' יז) עכו"ם הבא על בת ישראל, הולד כשר ופגום לכהונה, וכאן הרי יש לחוש דשמא תורם זרע עכו"ם הוא. אלא י"ל שיש כאן ס"ס להיתרא, דשמא תורם הזרע הוא ישראל, ואת"ל עכו"ם, שמא הלכה כהרמב"ם והריטב"א ורבותיו והמאירי בשם גדולי האחרונים, שאף עכו"ם הבא על בת ישראל הבת כשר לכהונה, וכיון שיש ס"ס י"ל שאף הבת כשרה לכהונה, וכו'. וגדולה מזו כתב בשו"ת מנחת שלמה (ח"ג סי' צח דף רעג), שאפילו אשת איש שנתעברה מזרע של עכו"ם באופן מלאכותי, אינה מתחללת, והולד שנתעברה בו אינו פגום כלל לכהונה ע"ש, וכו'. וכן פסק בשו"ת אג"מ (אהע"ז ח"א סוסי' י) וז"ל: ונראה לע"ד שאף אם הולד היא בת ישראל מעכו"ם, דבעלמא פסולה לכהונה, היינו דוקא כשהיה דרך ביאה, אבל בנתעברה דרך אמבטי אף לכהונה אין לפוסלה והניף ידו שנית (אהע"ז ח"ב סוסי' יא), וכן עיקר, עכ"ל של היביע אומר.

Settlers on the west Bank- Is it permissible to live there?

שו"ת הרשב"א חלק א סימן תיג

וכן אסרו לשתות ולאכול זוגות. והקפידו ז"ל עליהם הרבה עד שהקשו בתקנת ארבע כוסות של פסח ומתקני רבני /רבנן/ מילתא דאתיא לידי סכנה. והוצרכו לומר כוס של ברכה מצטרף לטובה ואין מצטרף לרעה. ומן הנחשים אסרו לחוש ולומר נפלה פתו מידו צבי הפסיקו בנו קרא לו מאחריו ושלא לחוש לקול גברא בדברא ולקול אתתא במתא. והתירו לסמוך בקול אתתא בדברא ובקול גברא במתא. וכן יונתן בן שאול סמך על כיוצא בדברים אלו ואמר (שמואל א' י"ד) אם כה יאמרו אלינו עלו אלינו ועלינו. ואותו צדיק שעשה השם הישועה הגדולה ההיא לישראל על ידו לא עבר עבירה ולא נעשה מנחש. ואף על פי שהרב ז"ל אסר אותו ואמר שהוא נחש מן הנחשים שאסרה תורה כבר השיג הרב הראב"ד ז"ל בהשגות והאמת אמר. וכן אמרו רבי יוחנן בדיק בינוקא וסמך על זה כמוזכר בחולין. שמואל בדיק בספרא ורב בדיק במעברא. ובפר' חלק (דף ק"א) אמרו סכין וממשמשין בני מעים בשבת ולוחשין לחישות נחשים ועקרבים בשבת. ועוד שם תנו רבנן שרי שמן ושרי בצים מותרין מפני שמכזבין לוחשין על שמן שביד. ועל שאלת השדים אמרו שם בברייתא אין שואלין בדבר שדים בשבת. רבי יוסי אומר אפילו בחול אסור. אמר רב הונא הלכה כרבי יוסי. ואף רבי יוסי לא אסר אלא משום סכנה כי הא דרבי יצחק בר' יוסף דאיבלע בארזא ואיתעביד ליה ניסא ופקע ארזא ופלטיה. ובגיטין פרק קורדיקוס (דף ס"ח) בשלמה דכתי' (מלכי' א' ו') ומקבות והגרזן וכל כלי ברזל לא נשמע בבית בהבנותו. ושאל לחכמים היכי אעביד ואמרו ליה זיל אייתי שידא ושידתין. וכן עשה ושאל מהן על השמיר. הנה כל אלו הוציאו מכלל מנחש

ומכשף והרבה כיוצא באלה. וגם הוציאו מכלל מעונן ומכוין מעשיו בעונה ידועה. אמרו בפרק קמא דע"ז (דף ד' ב') ברבי יהושע בן לוי דהוה מצער ליה ההוא גוי. איית' תרנגולא אסריה אכרעיה דפוריא סבר כי מטא ההיא שעתא אלטייה. כי מטא ההיא שעתא ניים כי איתער. אמר שמע מינה (משלי י"ז) גם ענוש לצדיק לא טוב ואפילו לגוי. ובשבת פרק מפנין (דף קכ"ט ב') אמר שמואל פורסא דדמא חד בשבא וארבעה ומעלי שבתא. אבל שני וחמישי לא דאמר מר מי שיש לו זכות אבות יקיז דם בשני וחמישי שבית דין של מעלה ושל מטה שוין כאחת. בתלתא מאי טעמא לא משום דקיי"ל מאדים בזוגי. מעלי שבתא נמי קיי"ל מאדים בזוגי? כיון דדשו ביה רבים (תהלים קט"ז) שומר פתאים ה'. אמר שמואל ארבע דהוא ארבע ארבע דהוא ארבסר ארבע דהוא עשרין וארבע ארבע דליכא ארבע בתריה סכנתא. מעלי יומא דעצרתא סכנתא. וגזרו רבנן אכולהו מעלי יומא טבי משום יומא דעצרתא דנפיק זיקא דשמיה טבוח. ובכתובות (פ"ק דף ה') בתולה נשאת ברביעי ונבעלת בחמישי הואיל ונאמר' בו ברכה לדגים. ואלמנה נבעלת בששי הואיל ונאמרה בו ברכה לאדם. ואנשי מעמד היו מתענין בכל יום כנגד מה שנברא בו באותו היום על מפרשי ימים בשני שבו נחלקו המים. ובשלישי על הולכי מדברות ברביעי שלא תפול אסכרה בפי התינוקות דמארת חסר כתיב. בחמישי על עוברות וכו' שכל יום ויום תתחזק בו המלאכה שנבראה בו. ועל כן נראה דרב הושעיא ורב חנניא שהיו עוסקין בספר יצירה כל מעלי יומא דשבתא וברו עגלא תלתא ואכלי ליה. ולא עושין כן בארבעה פרקים שמשחיטין בהן את הטבח בעל כרחו שצריכין הכל יותר לבשר. אלא במעלי שבתא משום שבו היתה בריאת הבהמה. ובעלי הקמיעין שאמרו דאיתמחי גברא. היינו שהוא בן מזל שקמיעיו מצליחין. וכלן משגיחין לכוין מלאכתן במזל ידוע בחודש וביום. וכן כותבין בקלף ידוע בעור שליל ובעור צבי. ושמוש תלים שמוסכם ביד גדולי ישראל כולן מסכימין שצריכין עונה ידועה. ושמעתי שאף רבי עקיבא שאמר מעונן זה המחשב עתים ושעות ואומר היום יפה לצאת מחר יפה ליקח לימודי ערבי שביעית יפות עקרי קטניות מחיות רעות הוא עשה תפלה ידועה למוצאי שבת. וכן בבבא בתרא אמרו בפרק מי שמת (דף קמ"ז) שלשה דברים צוה אחיתופל את בניו אל תהיו במחלוקת בית דוד ואל תמרדו במלכותו ויום טוב של עצרת ברור זרעו חטים. רב חסדא אמר בלול איתמר. ובאמת דברים אלו כלן צריכין זמן לתקנן ולישבן ומי יתן ידעתי ואמצאנו. ואף על פי שנאמרו דברים רבים בספרים מספרי דרכי האמורי אין אומרים כלן תחת סוג אחד הם ואב אחד לכלן ואין להתיר אחד מהם כמו שבא בכתביך. שאין הספר משתפן להיות הכל מותר או הכל אסור. שאפילו בספרי הקוסמין והמנחשין ובספרי דרכי האמורי יש דברים מותרין. ותדע דהא אמרינן בההיא דפרק במה אשה יוצאה (דף ס"ז) תני תנא בפרקא דאמוראה קמי' דרב זביד. ואמר כולהו אית בהו משום דרכי האמורי לבד מיהא דאלמא באותו פרק שאספו בו דרכי האמורי ההוא מיהא מותר. וכן יארע לנו בספורי הפלוסופים שיש בהם לנמנע טבע קיים ועושין זה סוג לכל המציאות. ומזה ודאי יצא להם בטול האותות כקריעת ים סוף ועמידת השמש והירח ויציאת המים מן הסלע ועליית /ועלית/ הבאר עם ישראל בכל מסעיהם. ובכלל חדוש העולם והמן וכלל דברים אלו אסור לשמען כש"כ לאמרן. וכיון שכן נאמר שכל מה שבספריהם שקר ואסור להאמין ולעשות שום דבר שאמרוהו ושכללוהו בספריהם. אלא כל הספרי' אם יש בהם דברי' של שקר ושיש בהן מן האיסור ברובן אפשר שיש בהם דבר יוצא מכללם ומותר. והרי הספרים כרמונים שזורקין את הקליפים ואוכלים את הגרעינים היפים. ולפי שבאו דברים אלו בספרינו המקודשים לרבותינו החכמים. ובהפך זה יראה

מפשטי מקראי התורה מקראות מלאי' שלמים (דברים י"ח) לא ימצא בך קוסם קסמים מעונן ומכשף. נלאה לבבי למצוא הפתח ולפתח חרצובות אלי ומחפש אני כמחפש בנרות ולא כמקיים בביאור וגוזר גזרות. ואולי אמצא קצת עולה למקצת המבוכה הזאת ואם לא לכול'. ואומר אני כי מחסד עליון היה בתחלת הבריאה להמציא בעולמו דברים להעמיד בריאות הנבראים. שאם יקרה המקרים כחליים ושאר הסבות יוציאו הנמצאים מגדר טבעם השלם יהיו אלו מוכנים להחזירם אל גדרם או להעמידם על בריאות'. ושם הכחות האלה בעצם הדברים הנמצאים בטבע מושג בעיון כסמים והמסעדים הידועים לחכמי הרפואו' או בטבע מסוגל לא ישיג אותו העיון. וכן הענין בעצמו בשאר הנמצאים שיש בכל אחד דבר מועיל או בטבע מושגי או בטבע מסוגל כמסמר הצלוב ושן של שועל ואבן תקומ'. וכן תמשך הסגלה בסמים הידועים המחממים בחומם ובסגל' יועילו לדבר החם וכיוצא בזה הרב'. ואינו מן הנמנע שיהיה בזה אסור גם בדבורים כענין הקמיעין והדומה לזה. ועל כן אמרו אביי ורבא דרך כלל כל דבר שיש בו משום רפואה אין בו משום דרכי האמורי. ואמנם כתב יתעלה בתורתו (דברים י"ח) תמים תהיה עם ה' אלהיך. ותמים הכתוב כאן פירושו אצלי כולל האזהרה וההבטחה. הזהיר שלא נשתבש ונחוש להבלי הגוים הקוסמים והמנחשים ואוכלי הדם בכוונתם הרעה להמשיך להם שדים לא אלה רק היות תם עם השם רוצה לומר לך עמו בתמימות מלשון ואני בתומי הלכתי. והבטיח שבעשיית מצותיו ובעבודתו יהיה תמים לא יגע בו רע מלשון שה תמים הפך מה שיחשבו אותם הטועים. והוא אומרו לאות (/דברים י"ח/ שם) כי הגוים האלה אשר אתה יורש אותם אל מעוננים ואל קוסמים ישמעו. ואולם הבטחון נחלק לענינים לפי הזמנים ולפי האנשים. ודרך כלל לעולם נבטח כי נלך בטח בלכתנו בדרכי התורה השלמה. והיא המצלת מן המקרים והסבות הנסתרות כאמרו (משלי ו') בשכבך תשמור עליך. וזה כולל פרשה והיה אם שמוע תשמעו אל מצותי ופרשת אם בחקותי תלכו. וצדקה תציל ממות שלא מדעת בנס נסתר כמעשה בתו של רבי עקיבא ומעשה דשמואל ואבלט כמוזכר בשילהי שבת (דף קנ"ו ב'). ואם חל המקרה כחליים מותר להתעסק ברפואות ובלבד שיהא לבו לשמים וידע שאמתת הרפואה ממנו וידרשנו. ולא שיכוין שהכל תלוי בסם הפלוני וברפואת האיש הרופא. והוא אמרו באסא (דבה"י ב' י"ו) גם בחליו לא דרש את ה' כי ברופאי'. ומי שהשיגו החולי אינו סומך על הנס שלא לשאול ברופאים ולהתעסק בדברים המועילים בין בדברים הטבעיים בין בסגולות. והוא אמרו ורפא ירפא ואמרו ז"ל מכאן שנתנה רשות לרופא לרפאות. ואמרם נתנה רשות לומר שאין זה הפך מה שהזהירה התורה בהשגחה. ובגדר זה נכנסו כל דרכי הרפואות אפילו מה שמועיל בסגולה מן הסגולות בין בעצמים בין בדבורים. וזה דרך הקמיעים בין קמיע של כתב בין קמיע של עיקרין. וכן כל מה שאמרו בשבת וחולין וסנהדרין ובעבודה זרה ובשאר המקומות שכתבנו למעלה. והוא שאמרו אביי ורבא /חולין ע"ז/ כל שיש בו משום רפואה אין בו משום דרכי האמורי. ולא עוד אלא שאסור להכנס בעניני הסכנות ולבטוח על הנס והוא אמר' שקיר נטוי מזכיר עון. ואמרו כל הסומך על הנס אין עושין לו נס. ומותר לבטוח באדם והוא שלא יסור לבו מן השם. ואמרו ארור הגבר אשר יבטח באדם ומה' יסור לבו. אך לבטוח בשם ושיעשה לו תשועה ע"י האיש הפלוני מותר ומצוה. וזה כולל כל עסקי בני האדם במלאכתם זולתי האנשים השלמים ושזכיותיהם מרובות. כמעשה דרבי חנינא בן דוסא עם הערוד שאמרו אוי לו לאדם שפגע בו ערוד. ואוי לו לערוד שפגע בו רבי חנינא בן דוסא. וכמעשה דרבי חנינא שהיתה אשה מחזרת ליטול עפר מתחת רגליו לכשפי'. ואמר לו שקולי אין עוד מלבדו

כתיב (דברים ד'). והקשו והא אמר מר למה נקראו שמן כשפים שמכחישים פמליא של מעלה. והשיבו שאני ר' חנינא דנפישן זכוותי'. ואפילו החסיד שבחסידים אין להם רשות לעשות במלאכתן דרך הבטחון רק כדרכו של עולם. שלא יאמר אדליק נרי במים או ביין ואסמוך על הנס. אף על פי שאמר במס' תענית (פ"ג דף כ"ה) הוא החסיד לבתו ששגגה בערב שבת ושמה בנר יין במקום שמן ונצטערה. אמר לה בתי אל תצטערי מי שאמ' לשמן וידליק הוא יאמר ליין וידליק. וכן מותר שיעשה אדם דבר קודם חול המקרה כדי שלא יחול או יאמר דבר או מקרא אחד אפילו מן התורה להגן. וזהו שאמרו בע"ז (דף י"ב ב') אי צחי לזדהר משברירי. ולימא הכי לנפשיה פלניא אמרה לך אימיך אזדהר משברירי ברירי רירי ירי רי. ואמרינן בשבועות פרק ידיעות הטומאה (דף ט"ו ב') שיר של פגעים ובנבלים ובתופים ואומר (תהלים צ"א) יושב בסתר עליון עד כי אתה ה' מחסי. ואומר (תהלים ג') מזמור לדוד ה' מה רבו וכו' לה' הישועה. ר' יהושע בן לוי מסדר להני קראי וגני. והיכי עביד הכי והאמר רבי יהושע בן לוי אסור להתרפאות בדברי תורה? להגן שאני. וכן בחולין (כל הבשר דף ק') אמר אביי משמיה דרבה הא דלא משו מיא בתראי אארעא משום דרוח רעה שורה עליהן. ולא שקלי מידי מפתורא בדנקי' איניש כסא בידי' משום דקשי לרוח צרדה. ומר בר רב אשי קפיד אאסיתא ובכנא דתבלי דצריכי לסעודת'. ועוד שם רבים כיוצא באלו. ואין זה ממיעוט הבטחון דאדרבא אסור להשען על הנס. ואפילו במקום הדברים שנודעו לחכמים בסגלה שצריך להשמר ואין העיון הטבעי משיג. הנה שנכנסו בכלל ההיתר הזה כל שאמרוהו שיש בו משום רפואה בין בסגולת העצם בין בסגולת הדבור והפעולות. ואפשר שאפילו העתים והשעות בכלל זה כל שהוא עושה צורה לרפואה ונותן דעתו לשמים. לא כאותן שמכונין לשר השולט באותו יום שזה כעובד אותו. והוא שהכ' אומר (דברים ד') פן תשא עיניך השמים וראית את השמש ואת הירח כל צבא השמים ונדחת והשתחוית להם ועבדתם. ובחובר חבר אמרו המחבר נחשים ועקרבים ואמרו ז"ל שלוחשין על הנחשים והעקרבים. ונראה שזה נכנס בכלל כל שהוא לשום רפואה מותר שלחיש' עקרבים שהתירו היא לחישה על המכה של נחשים ועקרבים וכמו שכתב הרב ז"ל בהלכות בפרק ארבע מיתות. גם בניחוש שיש בכללו חכמת התיירין שהיא מן הנחשים בעופות אמרו במעשה דרב עיליש דשמע עורב ויונה אומרין עיליש ברח עיליש ברח וסמך עליהם וברח וניצל. ואולי גם זה משום דשבי כולהו איתנהו ביה ובכלל רפואה ויותר ממנה היא. ושלא ילך אחרי נחשים אלו אלא שאם שמע במקרה שמות' לסמוך עליו להנצל מן השבי. ובכלל מעונן אמרו ראש חדש הוא מוצאי שבת הוא. ואמרו לא יקיז דם בראש חדש וזהו גם כן מצד היתר במקום רפואה משום דאיכא חולשא כמוזכר שם בגמ'. גם בלא יקיז בשני ובחמישי שאמרו מפני שהם ימים קבועין לדין בית דין של מעלה ובית דין של מטה. ואין בזה הסרת הלב מן השמים רק כמאמין בהשגחה ומוסיף ביראת ה'. וכמצו' התרועה וההכנעה בראש השנה שהוא מוכן לדין עמים ונוסיף /ומוסיף/ יראה וההכנעה בוידויין להגן מדין שמים. דכל שעת הדין והפקידה על באי עולם קרוב יותר לעונש. על כן אמרו אדכורי ריתחא בריש שתא לא מדכרינן. ואמר ליה רב קטינא למלאכא ענשיתו אעשה. ואמר ליה בעידן ריתחא ענשי ושעת החולי כעולה לידון. וכמו שאמרו בעולה לגרדום לידון שאומרין לו הבא ראיה והפטר. יום ההקזה כשעת הסכנה שהכח נחלש בהתמעט הדם ואפילו רוח מועט מזיקתו. ושמואל שהיה רופא לא היה מקיז אלא בבית של שבעה אריחי. ומזה הזהירו שלא להקיז דם באותן הימים העומדים בזוגי למאדים. ובערב עצרת שהרוח רע וחזק באותו יום דשמו טבוח כנזכר שם. ואמרו שהשטן מקטרג בשעת

הסכנה. והזהירו להשמר מזוגות לפי שמלאכי החבלה מקפידין בהן. וכבר הזכירו בגמרא מה שאירע מן ההיזק על זה. ומה שאמרו בבעילת הנשואות בחמישי וששי מפני שהעסק בפריה ורביה. והימים האלה רצוני לומר חמישי וששי נתברכו מפיו יתעלה בתחלת הבריאה בפריית ורביית בעלי חיים כדגים והעופות והאדם. וכבר אמרתי שכל יום מימי הבריאה פועל יותר במלאכה שנתחדשה בו משאר הימים. וכן אפשר שמותר להתעסק באותן הדברים האסורים כדי לבטל מעשי מכשופי המכשפים. והוא שאמרו בפרק כל הבשר במעשה דההיא מטרוניתא דאמרה מילתא ואסרתה לספינתא ואמרו אינהו מילתא ושריוהא. ונכנס בכלל זה מעשה דר' אליעזר ור' יהושע בן חנניא שעשו עם אותו המין במרחץ. ומעשה שעשו באביו של רבי יהודה בן בתירא ברומי כמוזכר בירושלמי בפרק ארבע מיתות. והוא הטעם שאמרו בשילהי פרק קמא דסנהדרין (דף י"ז) שאין מושיבין בסנהדרין אלא בעלי חכמה ובעלי כשפים כדי שיבינו במעשה הכשפים ויבטלום. ולא יוכלו לעכב על ידם או לשבש את דעתם מכשף מן המכשפים. והוא אומרו (דברים י"ח) לא תלמד לעשות ובא בפירושו אבל אתה למד להבין ולהורות. רוצה בו להבין מעשיהם ולהורו' במה ינצל הנכשל בהם. והוא שאמר ר' אליעזר בשילהי פרק ארבע מיתות (פ"ח) כמאשי' מי שאינו לומד מהם על הכונה הזו. ואומר יש לי ג' מאות הלכות בנטיעת קשואין ולא שאלני אדם בהם מעולם אלא עקיבא בן יוסף. פעם אחת ולמדו נטיעתן ועקירתן דאמר מילתא ונתמלאה כל השדה קשואין ואמר מילתא ונעקרו. והקשו והיאך עביד הכי והא העושה מעשה חייב? והיתה התשובה לא תלמד לעשות אין אתה למד אבל אתה למד להבין ולהורות. אבל מעשה דר' אבהו דעל להההוא אושפיזא ואשקייה להההיא איתתא והות חמר'. לא ידעתי האיך היה מותר לו לעשות מעשה כזה אלו היה ר' אבהו המוזכר כתלמידו של רבי יוחנן. ואולי אחר היה. וכן נראה מפי' רש"י ז"ל. דרבי אבהו תלמיד של רבי יוחנן לא היה עושה מעשה כזה. ובשואלין בשדים שאמרו שהוא מותר אלא משום הסכנה ראיתי תשובה לרמב"ן ז"ל. וזה לשונו מה שהתירו בפרק חלק (דף ק"א) דללחוש על השדים אלא משום סכנה. אין זה ללחוש ולהשביע לצאת מן האיש כדרך מעשה בן תמליון. ורבי יוסי אוסר שמא יזיק אותו כשמוציאים אותו בעל כרחו. ואני תמה כי שמעתי בבירור שמנהג חסידי אלמנייא לעסוק בדברי השדים ומשביעין אותן ומשלחין אותן ומשתמשין בהן בכמה עניני'. וסבור אני שיש לומר דמעשה שדים לחוד ומעשה כשפים לחוד. כמו שאמרו בלטיהם אלו מעשה מעשה שדים בלהטיהם אלו מעשי כשפים. ופרש"י ז"ל מעשה כשפים על ידי מלאכי חבלה הם נעשים והם אשר אסרה תורה. אבל מעשה שדים שרי. וזהו דעתם שנהגו בו ועשו בו כמה מעשי' ובודאי פשטי השמועות כך הם. ומעשה בבן תמליון וארגנטין ויוסף שידא ושאר מעשי' בתלמו' ומדר' אגדה כך הם נוטים. עכ"ל. הנה כתבתי ממה שבא בדבריהם ז"ל בכללי ענינים אלה. ומה שהתירו מכללם רבותינו הקדושים אחד אחוז מן החמישים. ולבי עוד מגמגם כאשר כתבתי ואשר באתי לתקן ולתרגם. ולא כתבתי אחד מאלה לעשות מעשה רק באותן שהוזכרו בגמר' שאין זאת משנת חסידים רק כדורש מן הספק להלכה. עד אמצא חכם יעשה אתנו ברכה להוציא כאלו רגלינו מן הסבכה. ואתם תעמידו דבר על בוריו ותודיעונו. והאלהים יראנו נפלאות מתורתו וידריכנו באמתתו ויצליחנו בעבודתו כי לו לבדו הגדולה והגבורה והתפארת והנצח וההוד ואפס זולתו.

שולחן ערוך חושן משפט הלכות שמירת נפש סימן תכו

הרואה את חבירו טובע בים, או לסטים באין עליו או חיה רעה באה עליו, ויכול להצילו הוא בעצמו או שישכור אחרים להציל ולא הציל, או ששמע עובדי כוכבים או מוסרים מחשבים עליו רעה או טומנים לו פח ולא גילה אוזן חבירו והודיעו; או שידע בעובד כוכבים או באנס שהוא בא על חבירו ויכול לפייסו בגלל חבירו ולהסיר מה שבלבו ולא פייסו, וכיוצא בדברים אלו עובר על לא תעמוד על דם רעך (ויקרא יט, טז).

סמ"ע שם ס"ק ב

עובר על לא תעמוד כו'. ובהגהות מיימוניות [פ"א מרוצח הט"ו דפוס קושטא] כתבו דבירושלמי [ראה סוף פ"ח דתרומות] מסיק דצריך אפילו להכניס עצמו בספק סכנה עבור זה, והביאו הב"י [סעיף ב'], וכתב ז"ל, ונראה שהטעם הוא מפני שהלה ודאי והוא ספק, עכ"ל. גם זה השמיטו המחבר ומור"ם ז"ל, ובזה י"ל כיון שהפוסקים הרי"ף והרמב"ם והרא"ש והטור לא הביאו בפסקיהן, משו"ה השמיטוהו גם כן.

שו"ת רדב"ז חלק ג סימן תרכז (אלף נב)

שאלת ממני אודיעך דעתי על מה שראית כתוב אם אמר השלטון לישראל הנח לי לקצץ אבר אחד שאינך מת ממנו או אמית ישראל חבירך. יש אומרים שחייב להניח לקצץ האבר הואיל ואינו מת והראיה מדאמרינן בע"ז 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:

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. ותו דילמא ע"י חתיכת אבר אעפ"י 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 ע"י שסרטו את אזנו שריטות דקות להוציא מהם דם ויצא כ"כ עד שמת והרי אין לך באדם אבר קל כאוזן וכ"ש אם יחתכו אותו. 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 אף על גב דחייב להצילו בממונו אבל לא בסכנת איבריו. 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 כ"ש חתיכת אבר. ותו דהתורה אמרה פצע תחת פצע כויה תחת כויה ואפ"ה חששו שמא ע"י הכוייה ימות והתורה אמרה עין תחת עין ולא נפש ועין תחת עין ולכך אמרו שמשלם ממון והדבר ברור שיותר רחוק הוא שימות מן הכויה יותר מעל ידי חתיכת אבר ואפ"ה חיישינן לה כ"ש בנ"ד. תדע דסכנת אבר חמירא דהא התירו לחלל עליה את השבת בכל מלאכות שהם מדבריהם אפילו ע"י ישראל. ותו דכתיב דרכיה דרכי נועם 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 חלקו מי שיוכל לעמוד בזה **ואם יש ספק סכנת נפשות הרי זה חסיד שוטה** דספיקא דידיה עדיף מוודאי דחבריה. והנראה לע"ד כתבתי.

ספר מנחת חינוך מצוה תכה אות ג

ונוהגת מצוה זו בכל איש מישראל, הן אנשים והן נשים כמבואר בש"ס סוטה מ"ד ע"ב דמלחמות מצוה אפילו כלה מחופתה וכו'. וכתב הרב המחבר והעובר על זה ובא לידו ויכול להרגו מבלי שיסתכן בדבר ולא הרגו ביטל עשה זה. וצ"ע, דנהי דכל המצוות נדחות מפני הסכנה, מ"מ מצוה זו התורה ציותה ללחום עמהם, וידוע דהתורה לא תסמוך דיניה על הנס כמבואר ברמב"ן [במדבר ה', כ'], ובדרך העולם נהרגים משני הצדדים בעת מלחמה, א"כ חזינן דהתורה גזרה ללחום עמהם אף דהיא סכנה, וא"כ דחויה סכנה במקום הזה ומצוה להרוג אותו אף שיסתכן, וצ"ע.

שו"ת אגרות משה אורח חיים חלק ג סימן סט

באחד שברור לו שתהיה ענין סכנה לו למחר בשבת ויצטרך לעשות מלאכה בשבת וכשיעשה מלאכה בע"ש שהוא יום טוב לא יצטרך לעשות בשבת איך יעשה.

ובדבר חדוש של הגאון הנצי"ב ז"ל בספרו העמק דבר פ' קרח במי שברור שתהיה לו ענין סכנה למחר בשבת ויצטרך לעשות מלאכה בשבת וכשיעשה המלאכה בע"ש לא יצטרך לעשות המלאכה בשבת שאף כשע"ש הוא יום טוב יעשה בע"ש שהוא רק באיסור לאו כדי שלא יצטרך לעשות המלאכה בשבת שהוא איסור סקילה, ודאי הוא מילתא דתמיהא כדכתב כתר"ה, דכיון דהיום ליכא סכנה ומחר אם תהיה סכנה יוכלו להצילו אז מהסכנה ע"י מלאכה אין טעם להתיר לחלל יום טוב אף שהוא קיל משבת מאחר דעדיין ליכא ענין הפק"נ לדחות שום איסור, והענין שלהציל מסכנה מאכילין הקל הקל תחלה שאיתא ביומא דף פ"ג וכן הוא בכל איסורין שצריך להציל בהקל הקל תחלה, הוא כשאיכא כבר הסכנה שאז הוא זמן ההצלה ויש להציל באיסור קל ובאיסור חמור צריך להציל בהקל, וכן היה הדין כשאיכא חשש סכנה למחר ולא ידוע אם יהיה אפשריות למחר להציל אם לא יעשו המלאכה היום שודאי אף שלמחר יהיה חול והיום הוא שבת יהיה מותר לעשות בשבת אף שעדיין ליכא הסכנה מאחר שלפי דרך הטבע והאומדנא תהיה למחר סכנה וספק אם יוכלו אז להצילו, ואם כה"ג יהיה כשהסכנה אומדין שתהיה ביום ראשון ואז לא יוכלו להצילו ואף רק בספק אם יוכלו להצילו וכשיעשו המלאכה לזה בע"ש שהוא יום טוב או בשבת יוכלו להצילו, ודאי יצטרכו לעשות בע"ש ולא בשבת שהוא בדין הקל הקל תחלה, אבל כשהסכנה תהיה בשבת באופן שברור שגם בשבת יוכלו להצילו באיסור מלאכה אין לעשות ביום טוב אף שהוא קל כיון שעדיין ליכא סכנה ולא ניתן יום טוב לידחות ממנה אף שהוא איסור קל משבת.

והיא קושיא אף אם נימא דאין לנו לחוש שמא יבריא ולשמא יסתלק הסכנה מאחר שלפי דברי הרופאים יהיה בו סכנה מחר ולפי דרך הטבע בהמצב שנמצא תהיה סכנה אחרת בענינים אחרים, דהא מ"מ עדיין ליכא הסכנה

ולא ניתנה לידחות לאו דיו"ט אלא שבת יותן לידחות, ולחלל יום טוב בשביל שלא יחולל שבת בהיתר לא מצינו שנדחה, דאף שבסימן ש"ו סעיף י"ד פסק המחבר שמותר לילך אפילו חוץ לג' פרסאות להציל בתו מהמרה ואיתא במג"א ס"ק כ"ט בשם הב"י דלגבי שלא תמר ותעבור כל ימיה בחלול שבת הוי זה איסורא זוטא דמוטב לחלל שבת אחת כדי שתשמור שבתות הרבה, הוא להציל מחלול שבת דאיסור מטעם דניחא לאדם לעשות איסור קטן כדי שלא יעשה חברו איסור גדול כדאיתא במחצה"ש, ומש"כ הב"י הא דמוטב לחלל שבת אחת בשביל שתשמור שבתות הרבה הוא לראיה שחלול שבת אחת אף דידיה הוא איסור זוטא מחלול שבתות הרבה אף של אחר, אבל להציל מחלול שבת דהיתר כהא דמה שיחללו שבת למחר בשבת כשתהיה הסכנה הוא חלול שבת דיהיה מותר בשביל פק"נ ליכא דין דחיה על לאו דיו"ט שיהיה בע"ש, וכמו שהתם גופא איתא במג"א בשם הב"ח דלחלל שבת כדי שלא תעבור עבירה באונס אסור לחלל שבת, והמג"א שחולק עליו הוא באיסור ממש אך שאצלה הוא באונס אבל בהצלה מחולי וכדומה שהחלול שבת הוא דבר שמותר אף להרמב"ם שכתב ברפ"ב משבת שהיא דחויה הוא למעשה עכ"פ דבר המותר וגם מצוה וחיוב גם למג"א ליכא דין דחיה על יום טוב ושאר איסורין אף הקלים טובא משבת. ואף אם נפרש בכוונת הב"י שבשביל שבתות הרבה איכא דין דחיה לשבת אחת נמי מסתבר שהוא לחלול שבת דאיסור ולא לחלול שבת דהיתר, וגם הא הוא רק לחלול שבת אחת ואין חלוק בדין דחיה לאיסור שבת לאיסור לאו כמו שאין חלוק בפק"נ בין האיסורין, אך בעצם אין לפרש כפשוטו שהוא מדין דחיה דהא אף שר"ש בן מנסיא ביומא דף פ"ה ורשב"ג בשבת דף קנ"א שאמרו בפק"נ טעם זה אינו טעם ממש לדינא שבבשביל /שבשביל/ זה מחללין שבת דהא לכו"ע מחללין שבת אף על חיי שעה שלא יהיה מהצלתו אף קיום שבת אחת דליכא מאן דפליג בזה, אלא הוא טעם בעלמא מ"ט אמרה זה תורה והוא ככל הטעמים שנאמרו במצות התורה שאינם לדינא אלא שבשביל זה החשיבה תורה חיי נפש של אדם ומאחר שהחשיבה בזה חיי נפש של האדם החשיבה אף לחיי שעה שלו וא"כ לא שייך זה באין נוגע לחיי נפש של האדם אלא לקיום השבת לבד, ולכן משמע שכוונתו הוא רק לראיה שחלול שבת אחת הוא איסורא זוטא לגבי שבתות הרבה אף שלו לגבי אחרים, וא"כ ודאי הוא רק נגד חלול שבת דאיסור.

ובדבר מש"כ כתר"ה אם מחשש הסכנה תהיה בשבת זו לאחר שני שלישי היום ויהיה האפשריות גם אז להצילו בחלול מלאכה בשבת אם מותר לעשות מלאכה זו גם בתחלת היום כשיש לו איזה צורך בזה תליא דאם יש לנו לסמוך לפי הטבע ואומדן הרופאים אף עתה שעדיין ליכא הסכנה יהיה מותר מאחר ששבת זו ניתנה לידחות, ול"ד ליו"ט דאיסור יום טוב לא ניתנה לידחות בשביל הפק"נ דלמחר כדלעיל. אבל יש סברא גדולה לומר כדברי כתר"ה שיש לנו לחוש לשמא יבריא ויסתלק הסכנה אף שהוא כדרך הטבע והאומדנא אלא בדרך נס ממש, וכתר"ה לא כתב טעם בזה, משום דרק כשכבר איכא חשש סכנה חייבה תורה לרפא ע"י רופאים ולעשות כל התחבולות אף בחלול שבת ועבירת כל איסורין ולא לסמוך על נסים, אבל כל זמן שאין הסכנה עדיין ליכא חיוב זה ורשאין לסמוך גם על נסים שמא לא תהיה הסכנה כלל אף שהוא שלא כפי דרך הטבע ואמירת הרופאים, וממילא אסור לחלל שבת בתחלת היום שעדיין ליכא הסכנה. אבל ודאי אם אח"כ כשתהיה הסכנה לא יוכלו

להצילו אסור לסמוך על נסים ומחוייבין לעשות כל התחבולות שבדרך הטבע אפילו בחלול שבת ועבירת כל איסורין. וכך נוטה הסברא לדינא לע"ד, נמצא שגם זה היא קושיא על הגאון הנציב וצע"ג.

Comments on the show 1 *click here*

THE TIMES OF ISRAEL

'The hardest thing in the world is to lose a child'

Israeli Couple Wins Right to Produce and Raise Grandchild from Fallen Soldier Son's Sperm

November 16, 2016
by Renee Ghert-Zand

Kfar Saba — Like many couples in their early 50s with grown children, Irit and Asher Shahar look forward to becoming grandparents in the near future. The Shahars, however, plan on welcoming their first grandchild in a highly unconventional way.

Ever since their son Omri, a captain in the Israeli Navy on active duty, was killed in a June 2012 car crash at the age of 25, the couple has fought the state to gain the legal right to produce a child from their son's posthumously-retrieved sperm. The Shahars plan to raise that child themselves.

Irit and Asher's hard-fought battle ended this past September in a precedent-setting ruling. The Petah Tikvah Family Court granted permission for them to raise a child created from their deceased son's sperm and a purchased female egg. The embryo would be carried by a gestational surrogate.

The court's decision is believed to not only be a first for Israel, but also for the world. Since 2003, Israeli regulations have allowed for posthumous sperm retrieval for the purpose of later insemination or IVF by a surviving female partner. In the last decade there have also been numerous instances of parents legally providing their sons' posthumously retrieved sperm to single women wishing to become pregnant. In those cases, the women were the biological mothers of the children. They raised the children, and the parents of the posthumous sperm donors remained in the picture as engaged grandparents.

Despite the September ruling, however, the state is currently preparing an appeal linked to the unusual circumstance of the Shahars' desire to be, in effect, both grandparents and parents to Omri's offspring. In the meantime the court has issued an injunction preventing Irit and Asher from accessing and using Omer's stored gametes.

"As soon as the injunction is lifted, we are going to move on things right away," Irit told The Times of Israel in an interview at the spacious Kfar Saba home she shares with Asher and their youngest daughter, 16-year-old Lotem. A second daughter, Inbar, 26, was recently married.

Confident the state will not succeed in its possible appeal, Irit believes it is not unrealistic for her and her husband to hold Omri's biological son or daughter in their arms within a year or two...

The Shahars, who have already spent hundreds of thousands of shekels in their quest to continue their son's biological line, remain undaunted. Cost, including surrogacy fees reaching as high as $130,000 in the US, is no object.

"I am ready to sacrifice so that Omri will have a continuation here in Israel," Irit insisted.

...

Irit said she understood people's opposition, but that she can't understand the cruelty with which some critics have expressed their disapproval. She is especially hurt by erroneous assumptions that she and Asher are just doing this so they can collect from the state. (The Defense Ministry does not make regular allowance payments to orphans of fallen IDF soldiers.)

"It angers me that people respond this way to someone who has experienced such a terrible fate," Irit shared.

Asher put the legal battle's hardships into perspective.

"The legal process and its pressure are nothing compared to the depths of our grief. The hardest thing in the world is to lose a child. All the other things that people complain about in life are tiny and inconsequential in comparison," he said.

An unprecedented court decision, but not a legal precedent.

While all professional experts the Shahars approached were sympathetic to their plight, only some were willing to support their case. One of them was philosopher Asa Kasher, who related to the bereaved parents' pain on a personal level. Co-author of the IDF Code of Ethics and himself the father of a fallen soldier, he provided a key opinion that helped sway Judge Yocheved Greenwald-Rand to rule against the state's claims, as reported in Ha'aretz, that the child would be subject to a "planned orphanhood," and would be "fragile in relation to children from normative families."

The judge wrote in her opinion that "there is nothing unacceptable about the way [the Shahars] chose to deal with their bereavement and their request to give their late son descendants and raise them as their own."

The opinion further stated that whereas many children are brought into the world in less than favorable circumstances and suffer for it, this child would be born into a loving, supportive family deemed by the court to be more than fit enough to raise it.

...

The world looks on

As the court's decision in favor of the Shahars pushes the bioethical envelope here in Israel, the world looks on with interest. Some countries permit posthumous sperm retrieval when the deceased has left a written directive. Others such as France, Germany and Sweden ban it outright.

In the US, the law in this regard has varied from state to state, and key legal cases have centered more on the inheritance and social security consequences of the use of such sperm, rather than on permission for its use.

According to Harvard University law professor I. Glenn Cohen, a leading expert on the intersection of bioethics and law, there are many issues to be considered in cases such as the Shahars'. These include the invasion of the body, the right not to procreate or be a parent, harm to the children (as well as to other children in the family), rights claims of grandparents, and intent of the deceased.

While Cohen preferred not to comment in detail on the Shahar case, he did tell The Times of Israel that he was not taken aback by the Israel court's decision.

Irit Shahar at her son Omri's grave in Kfar Saba. (Courtesy)

"I will say that Israel is well known in terms of policy, culture, and court decisions as one of the most pro-natalist countries in the world — think about the funding for IVF in Israel which is about as robust as any country I know of," said Cohen.

"The whole effect of the halachic [Jewish religious law] view of be fruitful and multiply no doubt has an impact here too, so it doesn't surprise me if Israel authorizes posthumous reproduction in these cases where many other countries would not," he said.

Irit and Asher recalled their son speaking many times about wanting to marry and have a large family. Therefore, they are certain they are doing not only what is right for them and their daughters, but also what their son would have wanted.

According to Asher, they are doing it not only for their own family, but also for parents the world over.

"It is important for everyone to know that if you lose your child, it doesn't mean that you lose the chance for his children to be born," Asher said.

Fathering a Child After Death

In June 2012, Omri Shahar, a Captain in the Israeli Navy, was tragically killed in a car accident near Rishon Letzion, along with First Lieutenant Rafael Bublil. After the tragedy, Omri's parents, Irit and Asher Shahar of Kfar-Saba, decided to have sperm removed from his body and stored for later use in the production of a child, whom they would then adopt and raise. A tense and costly legal battle ensued, and it was only four years later, in September 2016, that a court in Petach-Tikva granted Irit and Asher the right to produce a child from their fallen son's reproductive material and raise that child.

According to a Times of Israel report covering the story,[1] posthumous retrieval of sperm has been allowed in Israel since 2003 for the purpose of impregnating a surviving partner, and more recently, Israeli courts have permitted parents to have sperm removed from their deceased sons and used to impregnate single women desiring to conceive through artificial insemination. The Shahars' case marks the first time a deceased man's parents were given the right to have the sperm conceive a child whom they would adopt and raise as their own.

Would *halacha* approve of such a practice? Is it permissible, from a halachic standpoint, to extract a man's reproductive material after death and to then use it to artificially inseminate a woman?[2]

A second halachic question relates to the possible implications of this procedure vis-à-vis the obligation of יבום. The Torah (*Devarim* 25:5–10) requires that when a married man dies without children, his widow must either marry his brother (יבום), or be "released" from the levirate bond through the חליצה

1. See media article above.
2. This essay will deal exclusively with the question of extracting sperm from a deceased male's body, without addressing the issue of artificial insemination for a married couple that is incapable of producing children through cohabitation. The consensus among the halachic authorities permits the extraction of sperm from a husband for the sake of artificially inseminating his wife (see Maharsham 3:268; *Zekan Aharon, Tinyana* 97; *Iggeros Moshe*, E.H. 2:18). The notable exception is Rav Malkiel Tzvi Tannenbaum of Lomza (*Divrei Malkiel* 4:107), who forbade this practice, arguing that given the possibility that the doctor may not in the end use the sperm for insemination purposes and the chance that the sperm may be ineffective in fertilizing the ovum, producing sperm for this purpose constitutes "wasting seed" (הוצאת זרע לבטלה). For a discussion of other halachic aspects of artificial insemination, see the next chapter, "Is Artificial Insemination an Option for Unmarried Women?"

ritual performed by the deceased's brother. Nowadays, חליצה is always performed instead of יבום. If a man's only child is produced from sperm extracted from that man's body after his death, would that child suffice to absolve the widow of the need to undergo חליצה?

I. מת אסור בהנאה — Deriving Benefit From a Human Corpse

The Gemara in *Maseches Avoda Zara* (29b) establishes that it is forbidden to derive benefit from a human corpse. This prohibition is derived from a textual parallel between the Torah's brief account of Miriam's death (ותמת **שם** מרים — *Bamidbar* 20:1) and the command of עגלה ערופה, the special ritual performed when a murder victim is found between cities, in which a calf is killed for atonement (וערפו **שם** את העגלה — *Devarim* 21:4). The Gemara infers that just as it is forbidden to use the עגלה ערופה for personal benefit, as it has the status of a quasi-sacrifice, it is similarly forbidden to use a human body after death. The consensus among the *poskim* follows the straightforward reading of the Gemara, which indicates that benefitting from a human corpse constitutes an outright Biblical violation.[3] Seemingly, using sperm taken from a human corpse to produce a child would violate this prohibition, as the inseminated woman is clearly deriving practical benefit from part of the deceased's body.

Using Body Parts for the Deceased's Honor

One might argue that the Torah prohibition against deriving benefit from a human corpse is intended for the sake of כבוד המת — preserving the deceased's honor — and that this prohibition would thus not forbid making use of someone's body after his death for the sake of his honor. In the case under discussion, particularly if the deceased had not fathered any children during his lifetime,

3. Shach, Y.D. 79:3; *Mishneh Le-Melech*, *Hilchos Avel* 14:21; *Sedei Chemed* 9:51. The *Mishneh Le-Melech* there asserts that the Rambam considered this a Rabbinic prohibition, but the Chida (*Birkei Yosef,* Y.D. 349) rejects this claim and insisted that benefiting from a corpse constitutes a Torah prohibition even according to the Rambam. Some draw proof to this conclusion from the Rambam's ruling in *Hilchos Ma'achalos Asuros* (11:1) that drinking wine that had been used in pagan worship is forbidden for consumption by force of the comparison drawn in the Torah between such wine and pagan sacrifices (אשר חלב זבחימו יאכלו וישתו יין נסיכים — *Devarim* 32:38). This inference is based on the Gemara (*Avoda Zara* 29b), which establishes the prohibition against benefiting from pagan sacrifices on the basis of the fact that such sacrifices are considered like human corpses (ויאכלו זבחי מתים — *Tehillim* 106:28). Since the Rambam bases the prohibited status of ritual wine on this inference, he must, *ipso facto*, recognize the Biblical prohibition against deriving benefit from a human corpse.

producing children from his reproductive material ensures a biological legacy that he would otherwise not leave behind. Far from being a cause of disgrace, extracting sperm for the sake of producing offspring would certainly appear to be in the posthumous interest of the deceased. Perhaps, then, the prohibition against deriving benefit from a human corpse, which the Torah introduced to preserve the dignity of the deceased, would not forbid the extraction of sperm to produce a child and thereby perpetuate the man's memory and legacy.

Several sources, however, indicate that to the contrary, the prohibition against making use of a human corpse stands independently of the concern to preserve the deceased's dignity. Rav Yosef Engel (*Beis Ha-Otzar, kelal* 8, 2) writes that a living human being is endowed with sanctity, and the loss of this special sanctity with a person's death results in what Rav Engel calls תיעוב (contamination). This תיעוב, he writes, is the basis and source of the prohibition against making use of the body. According to this approach, we certainly have no reason to distinguish between benefit that brings disgrace to the deceased and benefit that brings him honor. Therefore, preserving the deceased's legacy would not offer us any grounds for an exception to this prohibition.

Similarly, Rav Moshe Feinstein rules (*Iggeros Moshe*, Y.D. 3:140, 4:59) that a deceased person's remains may not be taken for the purpose of medical research, even if this was his explicitly stated wish during his lifetime. A person does not enjoy ownership over his body, Rav Moshe explains, as the human body is given to him on loan, as it were, to use during his lifetime. After death, the body in its entirety must be interred, regardless of the deceased's wishes to the contrary.[4] Clearly, then, honoring a deceased person by producing offspring would not permit the use of his reproductive material after death.

It is important to distinguish in this regard between two distinct prohibitions: benefiting from a corpse and disgracing a corpse (ניוול המת). The Rashba (Responsa 1:369) writes that although it is generally forbidden to tamper with a human corpse out of concern for the deceased's dignity, postmortem procedures are allowed when this serves the purpose of preserving the deceased's dignity. The question addressed by the Rashba relates to a procedure to hasten the body's decomposition so that it can be transported for interment in the deceased's specifically chosen burial site. Such a procedure, the Rashba rules, is permissible, since the prohibition of ניוול המת is defined as disgracing the deceased; thus, postmortem tampering intended for his honor is allowed. This is quite different from the prohibition against deriving benefit from a corpse, which, as we have seen, does not relate to the concern for preserving the deceased's dignity.

4. We do not discuss here the question of harvesting organs from a brain-dead patient to save a gravely ill patient, which is an entirely separate issue.

A "Resurrected" Body Part

Nevertheless, according to one prominent 20th century *posek*, we might be able to permit the posthumous extraction and use of sperm by viewing the material as "resurrected" in the woman's body.

Rav Isser Yehuda Unterman, in a responsum cited and discussed by Rav Shlomo Zalman Auerbach (*Minchas Shlomo*, *Tinyana* 97), permitted transplanting a cornea taken from a deceased person into the eye of a live patient. This does not violate the prohibition against benefiting from a human corpse, Rav Unterman averred, because this prohibition applies only to a "dead" body part. Once the cornea is implanted within the living patient's eye, it is "resurrected," as it were, in the sense that it again becomes functional. Rav Shlomo Zalman suggests an analogy to the case addressed by the Mishna (*Terumos* 9:7) of a sapling designated as תרומה (a gift for the *Kohen*) that became טמא, but was then planted in the ground. The planting has the effect of divesting the tree of its status of impurity, as it is, in effect, "born" anew. In a similar vein, the cornea regains its "living" status by being implanted in the eye of a living human being, and is thus no longer subject to the prohibition against deriving benefit from a dead body.

Conceivably, this rationale could apply to insemination as well. Even though the sperm is taken from a corpse, and is thus forbidden for benefit, the moment it is injected into the woman's uterus, it becomes a functional part of a living human organism. As such, it becomes permissible for use, as it is no longer deemed part of a deceased person.

However, while it is indeed likely that Rav Unterman would approve of this posthumous procedure, Rav Shlomo Zalman Auerbach did not accept his view. He argued that if benefit from something is halachically forbidden, then transforming it into something that is no longer forbidden is prohibited as well, since in the end, one derives benefit from the forbidden entity. Rav Shlomo Zalman notes the case of מבטלין איסור לכתחילה — intentionally mixing a small amount of prohibited food with a much larger amount of permissible food so that the entire mixture will be permissible. While the intentional creation of such a mixture is clearly forbidden, some authorities maintain that this prohibition applies only on the level of Rabbinic enactment. Rav Shlomo Zalman notes, however, that according to all views, this would be forbidden on the level of Torah law when dealing with a food for which not only consumption, but also all other kinds of benefit, are forbidden. Making forbidden food permissible through the process of ביטול ("nullification" by a majority) effectively amounts to benefit. Therefore, if benefit from the food is forbidden, knowingly triggering ביטול is forbidden. By the same token, Rav Shlomo Zalman reasons, "resurrecting" a body part taken from a human corpse through transplantation would violate the prohibition

against deriving benefit from a corpse. In his view, then, it would likely be forbidden to extract sperm from a deceased man for insemination, even though the sperm is "resurrected" inside the woman's body.

Hair and Skin from a Human Corpse

Another possible argument that could perhaps be advanced for permitting posthumous fathering is that sperm may be viewed as extraneous matter, and not as an actual part of the deceased person's body.

Such a possibility might hinge on a debate among the *Rishonim* concerning the status of hair taken from a deceased person — an issue that was debated already by the *Amoraim*, as discussed by the Gemara (*Arachin* 7b). While the Rambam (*Hilchos Avel* 14:21) permits the use of a deceased person's hair, the *Shulchan Aruch* (Y.D. 350:2) follows the stringent position, forbidding the use of even hair taken from a corpse. We may reasonably assume that the sperm found inside a deceased person's body is no less "extraneous" than his hair. Thus, if the *Shulchan Aruch* forbids benefiting from the hair, it would likewise be forbidden to use sperm taken from the body.

One might, however, suggest comparing sperm taken from a deceased man to skin taken from a deceased person, which some *Rishonim* permit for use. *Tosfos* (*Nidda* 55a) raise the possibility that since the prohibition against benefiting from a human corpse is, as mentioned above, rooted in the implied association between a corpse and sacrifices, it does not apply to skin, since the hide of sacrificial animals is permissible for use (once the sacrificial blood has been sprinkled). Just as the skin of sacrifices is permissible, *Tosfos* contend, the skin of a human corpse should likewise be permitted for use. This theory is also proposed by the Rashba in one of his responsa (1:365).

The halachic status of skin taken from a corpse is addressed by the *Rishonim* in the context of a perplexing comment made by the Gemara in *Maseches Chullin* (122a). The Gemara establishes that although the skin of a deceased person is not, strictly speaking, considered טמא (ritually impure), the Sages legislated that it be treated as such, in order to prevent people from using their deceased parents' skin as carpets. The implication of the Gemara's remark is that using a deceased parent's skin as floor carpeting is technically permissible, but as this would be inappropriate, the Sages proclaimed the skin טמא, which would prevent people from making practical use of them. The Rashba, in the aforementioned responsum, cites those who drew proof from the Gemara's comment that skin taken from a deceased person is, indeed, permissible for use.

The Rashba refutes this proof, however, noting that *Chazal* were perhaps concerned about foolish people who are more deterred by the status of טומאה

assigned to the skin of their deceased parents than by the strict prohibition against deriving benefit from a human corpse. The designation of skin as טמא was made specifically to prevent against violations of the *halacha* forbidding benefit from the skins, a prohibition that some people would likely otherwise ignore. The Rashba concludes that he prefers this understanding of the Gemara, according to which skin from a deceased person is forbidden for use.[5]

The Ramban and Ran add a different explanation, suggesting that the Gemara speaks of people who would spread the skins of deceased loved ones and eulogize them in front of the skins. The concern was that with time, people might forget the origins of these skins and then use them as carpets. According to this approach as well, the Gemara never considered the permissibility of making use of skin from a deceased person.

This also appears to be the position taken by the Rambam, who writes (*Hilchos Avel* 14:21), המת אסור בהנאה כולו חוץ משערו — "The entire corpse is forbidden for benefit, except its hair." This clear-cut ruling would certainly indicate that every part of the corpse is forbidden with the exception of the hair.[6]

To this we might add the fact that, as we have seen, the *Shulchan Aruch* forbids the use of even hair taken from a human corpse. It stands to reason that if the hair is forbidden for use, then certainly the skin, which is more integral to the body than the hair, is forbidden.[7]

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5. Several *Rishonim* — including the Rashba himself — offer this explanation of the Gemara's remark in their commentaries to *Maseches Chullin*. See Ramban and *Tosfos Ha-Rosh*.
6. Interestingly, however, Rav Shlomo Eiger (*Gilyon Maharsha, Avoda Zara* 29b) asserts that the Rambam permits benefiting from the skin of a deceased person, based on the Rambam's ruling (*Hilchos Avodas Kochavim* 7:3) that the skin of pagan animal sacrifices are permissible for benefit. The Gemara infers the prohibition against benefiting from pagan sacrifices from the comparison made by a verse between such sacrifices and human corpses. Thus, if the Rambam permits the use of skins of pagan sacrifices, he must also permit the use of skin of a human corpse. It is unclear how Rav Shlomo Eiger would reconcile this inference with the Rambam's categorical ruling in *Hilchos Avel* forbidden the use of the entire corpse with the exception of its hair.
7. Indeed, the *Chasam Sofer*, in his commentary to *Chullin*, notes that according to the view that hair taken from a corpse is forbidden for use, it is clear that the skin is likewise forbidden, *a fortiori*.
   Elsewhere (*Avoda Zara* 29b), the *Chasam Sofer* writes that just as a deceased person's shrouds are forbidden for use, since they were placed on the body for it be buried in them, the deceased person's skin is likewise forbidden for use, according to all opinions, since the intention is to bury the body in the skin. Those *Rishonim* who permit deriving benefit from the skin of a human corpse, the *Chasam Sofer* contends, refer only to the rare case in which the intention before the person's death was for his skin to be removed from his body before burial.

In conclusion, it would seem that there is no room to permit using sperm taken from a corpse on the basis of its being considered extraneous matter and not an actual part of the body.

שלא כדרך הנאתו

Another factor to consider in determining the permissibility of extracting sperm from a deceased person is the rule established by the Gemara in *Maseches Pesachim* (24b), כל איסורין שבתורה אין לוקין עליהם אלא דרך הנאתן — "All Torah prohibitions are violated only in the normal manner of benefit." When the Torah forbids deriving benefit from a particular object, the prohibition applies only to the standard uses of that object. It is permissible on the level of Torah law to derive benefit from a forbidden object in an unusual manner, i.e., for a purpose for which it is not ordinarily used.

Later, the Gemara qualifies this rule, stating that it was stated only in regard to prohibitions that the Torah formulates by forbidding consumption. When the Torah introduces a prohibition against eating a certain food — which is understood as referring to other forms of benefit as well, and not merely consumption — we apply the prohibition only to standard types of benefit. However, when the Torah introduces a prohibition without specifying consumption, then all forms of benefit are included in the prohibition, even unusual ways of using the object in question.[8]

How would this rule apply with regard to the prohibition against deriving benefit from a human corpse? This prohibition, as noted, is based upon an association indicated by the Torah between a human corpse and עגלה ערופה, which is forbidden for benefit by virtue of its being a quasi-sacrifice. It would seem, then, that if sacrifices are forbidden only כדרך הנאתן — for standard forms of use — then a human corpse should similarly be forbidden only for ordinary uses, and not for unusual forms of benefit.

The issue of whether sacrifices are forbidden for all uses or only כדרך הנאתן is a matter of debate among the *Rishonim*. The debate revolves around the Gemara's remark in *Maseches Pesachim* (26a) that one may sit just outside the wall of the *Beis Ha-Mikdash* and benefit from the shade it produces. Rashi and *Tosfos* explain that although one may not derive personal benefit from the structure of the Temple, sitting outside the wall to benefit from its shade is permissible because it falls under the category of שלא כדרך הנאתו. Walls of buildings are constructed to provide shelter for those inside, not for people situated outside the

8. The Gemara makes this point in reference to *kilayim*, from which any kind of benefit is forbidden since the Torah does not formulate this prohibition as a prohibition against consumption (*Devarim* 22:9).

building. Therefore, sitting outside the Temple's wall and benefiting from its shade is considered an abnormal form of benefit, and is thus permitted.[9] By contrast, the Rambam (*Hilchos Me'ila* 5:5) writes that one may benefit from the shade of sacred structures only because this prohibition does not apply to hallowed objects attached to the ground. The implication, as noted and discussed by Rav Moshe Feinstein (*Iggeros Moshe*, Y.D. 1:229), is that כדרך הנאתן is not a factor when it comes to the prohibition against benefiting from sacred objects. As such, it would seem that according to the Rambam, the prohibition against benefiting from a human corpse, which is rooted in the prohibition against benefiting from sacrifices, would apply even to unusual forms of benefit.

This debate does not appear to have been conclusively resolved. The Radbaz wrote a responsum about the permissibility of the use of mummies for medicinal purposes (3:548), concluding that this form of benefit constitutes שלא כדרך הנאתו and is thus permissible. This view is adopted by several *Acharonim*.[10] By contrast, Rabbi Akiva Eiger, in his commentary to the *Shulchan Aruch* (Y.D. 349), citing the *Ginas Veradim*, disputes this position and maintains that all uses of a human corpse are forbidden, even non-standard forms of benefit.

The question then becomes whether extracting sperm from the body of a deceased male for insemination qualifies as "unusual" benefit from the corpse. On the one hand, one might argue that sperm found inside a dead body has no other useful function than fertilization through artificial insemination, and thus such utilization of sperm is precisely its "ordinary" form of benefit. However, one might counter that to the contrary, after a person's death, the sperm in his body is no longer considered to be reproductive material designated for the purpose of fertilization. We might even go further and contend that the "normal" use of sperm is fertilization through intercourse, and not via artificial insemination, even during a man's lifetime. Accordingly, we should perhaps deem the posthumous extraction of semen for fertilization שלא כדרך הנאתו, such that it would be permissible according to the view of the Radbaz, assuming that allowing the widow to bear offspring from her late husband offers the same grounds for leniency as treating an illness.

This question likely hinges on another question inconclusively addressed by Rav Tzvi Pesach Frank (*Har Tzvi*, Y.D. 277) concerning corneal transplants.[11]

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9. Tosfos comment that although the Torah does not formulate the prohibition of מעילה (benefiting from hallowed property) as a prohibition against consumption, nevertheless, the Gemara elsewhere associates this prohibition with the prohibition against benefiting from תרומה, which is indeed introduced as a prohibition against eating תרומה.
10. Rav Shmuel Landau, *Shivas Tziyon* (62); Rav Shlomo Kluger, *Mei Nidda* (p. 52); *Mishneh Le-Melech*, *Hilchos Avel* 14.
11. See the appended notes to this responsum published at the end of the volume (p. 258),

Rav Frank raises the possibility of considering transplanting a cornea into a live patient שלא כדרך הנאתו, since once a person dies, his cornea is no longer slated to serve the function of facilitating vision. On the other hand, one might insist that facilitating vision is precisely the cornea's purpose, and thus implanting it into a live patient so that he can see is actually its "standard" use.

Rav Moshe Feinstein addresses a similar question regarding the transplantation of organs from a human cadaver to a live patient (*Iggeros Moshe*, Y.D. 1:229). He writes that although nowadays it is not customary to use human corpses for any purpose other than organ transplantation, nevertheless, this form of benefit qualifies as שלא כדרך הנאתו, since this is not the normal function of a person's organs. However, Rav Moshe firmly sides with the stringent view of Rabbi Akiva Eiger, forbidding even unusual benefit from a human corpse, and thus he concludes that it is forbidden to benefit from a deceased person's organs through transplantation. According to Rav Moshe, then, we certainly cannot permit the use of a deceased's posthumously extracted sperm on the grounds of שלא כדרך הנאתו.

Moreover, it is possible that even Rav Moshe would view the posthumous extraction of sperm for fertilization as "normal" use, and thus consider it forbidden according to all *poskim*. Body parts are intended to sustain the individual's own body, and thus utilizing them to sustain someone else's body would be deemed abnormal use. Sperm, however, is specifically intended to exit the body and fertilize an ovum. Conceivably, then, extracting sperm from a deceased man for insemination would qualify as "normal" use of the sperm, and would thus be forbidden even according to the Radbaz.

Regardless, as noted, Rav Moshe ruled in accordance with Rabbi Akiva Eiger's view, and thus he would not permit extracting sperm posthumously on the basis of the rule of שלא כדרך הנאתו.

כזית

Another argument that may be advanced to permit this posthumous procedure is that the volume of sperm taken from the deceased for fertilization amounts to less than the minimum volume required for the prohibition to be applicable.

The *Acharonim* debate the question as to the minimum size required for an object or substance to be considered forbidden for use. Generally, when the Torah forbids a certain food for consumption, one must consume at least a כזית (the volume of an olive) in order to be liable for a Biblical violation. Does this rule apply as well to objects forbidden for other forms of benefit, or are

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where the point of uncertainty is clarified.

such prohibitions subject to different guidelines, and thus require a different minimum size?

The *Mishneh Le-Melech* (*Hilchos Me'ila* 1:3) establishes that if the prohibition is formulated by the Torah as a prohibition against eating, then the minimum size is a כזית even with respect to other forms of forbidden benefit. When it comes to such prohibitions, one is not liable for a Biblical violation unless he derives benefit from a כזית of the forbidden food, regardless of the monetary value of the benefit he enjoyed. However, with regard to prohibitions that are not formulated in the Torah as prohibitions against consumption, one is guilty of a violation by deriving benefit the value of a פרוטה (the smallest unit of currency in Talmudic times), regardless of the size of the forbidden object. Since the Torah forbade the use of the object in question without any reference to consumption, there is no reason for the violation to depend on any particular physical size. The only relevant factor is the benefit enjoyed, and thus any significant benefit — defined as a פרוטה's worth — suffices for the prohibition to take effect, irrespective of the object's physical properties. This is also the view taken by the *Peri Megadim* (introduction to *Hilchos Pesach* 2:3).

Rabbi Akiva Eiger, in one of his published responsa (190), disagrees, and maintains that physical size is never a factor with respect to forbidden benefit. Even if the Torah formulates the given prohibition by forbidding eating the product in question, one violates the prohibition by deriving a פרוטה's worth of benefit from the product, regardless of its size. Even if one made use of a tiny morsel of forbidden food, he has transgressed the Biblical prohibition if the value of the benefit equals or exceeds one פרוטה.

Applying this debate to the question surrounding the use of a cadaver, we must seemingly return to the earlier discussion concerning שלא כדרך הנאתו. As noted, Rashi and *Tosfos* would treat the prohibition against the use of a human corpse as a prohibition formulated in terms of consumption. According to this view, the permissibility of using a small piece of a cadaver would appear to hinge on the debate between the *Mishneh Le-Melech* and Rabbi Akiva Eiger. The *Mishneh Le-Melech* would permit the use of a substance amounting to less than a כזית,[12] whereas Rabbi Akiva Eiger would forbid using such a substance if the

12. At first glance, one might argue that even according to the view of the *Mishneh Le-Melech*, benefiting from a small morsel of human remains would be forbidden by force of the rule of חצי שיעור — the notion that although one is liable to punishment only if his violation involved the minimum requisite amount, one nevertheless commits a sinful act with even a small quantity. Thus, for example, although one is liable to punishment for breaking the Yom Kippur fast only if he consumes the volume of a large date, nevertheless, it is forbidden to consume any amount (*Yoma* 74a). Seemingly, then, benefiting from even a minuscule portion of a corpse would be forbidden, irrespective of the debate between

benefit is valued at a פרוטה or more. However, as we saw, the Rambam seems to forbid benefiting from a human corpse even in an unusual manner, since this prohibition is not treated as a law associated with consumption, and this is the position accepted by Rav Moshe Feinstein. In his view, then, benefit from any quantity of human remains would be forbidden, even according to the *Mishneh Le-Melech*.

In truth, however, it is possible that this question hinges on an entirely separate issue. The Ran, in his commentary to *Maseches Chullin* (122a), cites a view that the prohibition against using human remains is dependent upon the status of טומאה assigned to human remains. In other words, only parts of a cadaver that are deemed ritually impure are forbidden for use. This theory was advanced to explain the aforementioned passage in the Gemara that indicates that skins taken from a deceased person may, in principle, be used as carpeting. The Gemara elsewhere (*Nidda* 55a) establishes that body parts that regenerate — such as hair, nails, and skin — are not considered טמא after a person's death. The view cited by the Ran asserts that since skin does not — on the level of Torah law — become impure after death, there is no prohibition against benefiting from it.[13]

According to this view, it would seem that a portion from a corpse comprising less than a כזית would be permissible for use, since a body part detached from a corpse is deemed טמא only if it comprises a כזית or more. This position is cited by the *Sedei Chemed* (*Ma'areches Mem*, 103) in the name of other *poskim*. Likewise, the *Chasam Sofer* (Y.D. 336) suggests that the Torah imposes an especially stringent status of טומאה upon a corpse specifically to prevent people from deriving personal benefit from human remains. This would seem to imply that body parts that are not considered impure are not included in the prohibition against deriving benefit from a corpse. By extension, then, a portion of human

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the *Mishneh Le-Melech* and Rabbi Akiva Eiger. However, as noted by Rav Tzvi Pesach Frank (in the aforementioned responsum), the rule of חצי שיעור is not applicable to the case of a small piece of human remains implanted in a live patient. The prohibition of חצי שיעור, as the Gemara explains, is rooted in the factor of חזי לאצטרופי — the possibility of this small portion of forbidden matter combining with other small portions to reach the requisite quantity. For example, if one eats a small portion of forbidden food, he might then eat another small portion, and then another, until he eventually reaches the volume of a כזית, and thus each small portion is deemed independently forbidden. In the case of a transplant, there is no possibility of deriving additional benefit to reach the minimum required quantity. (See the notes to this responsum in *Har Tzvi*, p. 158.)

13. The Ran writes that those who advance this view draw proof from the Gemara's account in *Maseches Berachos* (5b) of Rabbi Yochanan, who lost all of his children and would carry around a tooth taken from his tenth son in order to comfort bereaved parents. Rabbi Yochanan was permitted to make use of this tooth, these *Rishonim* contend, because a deceased person's teeth are not deemed טמא.

remains that it is too small for טומאה is not forbidden for use. Indeed, Rav Tzvi Pesach Frank permitted the use a cornea taken from a cadaver because, among other reasons, its size is smaller than a כזית.

Accordingly, we might similarly permit the use of sperm taken from a deceased person for the purpose of fertilization. Since only a very small quantity of sperm is used — certainly less than a כזית — this procedure does not fall under the prohibition against deriving benefit from human remains. Furthermore, it stands to reason that since sperm is regenerated by the body, like hair and nails, sperm extracted from a deceased person does not have the status of impurity assigned to other parts of a cadaver. Hence, if we assume that the prohibition against benefit hinges upon the status of impurity, a deceased person's sperm is entirely permissible for use.

We might, however, question Rav Frank's ruling in light of the fact that the Ran disputes the claim that the prohibition against using human remains is linked to a corpse's status of טומאה. He notes that hair taken from a corpse is unquestionably excluded from the cadaver's status of impurity, and yet its status vis-à-vis the prohibition against benefit is subject to debate among the *Amoraim* (as we noted above). This would seem to indicate that the prohibition against using a corpse and the status of impurity assigned to a corpse are not interdependent.

One could defend the view cited by the Ran by suggesting that the debate among the *Amoraim* regarding the use of hair taken from a corpse hinges on this very question of whether the prohibition against benefiting from a corpse is linked to its status of טומאה. As we saw earlier, the *Shulchan Aruch* codifies the position that hair taken from a corpse is forbidden for benefit, which might prove that according to the accepted *halacha*, the prohibition against benefiting from human remains applies independently of the status of טומאה. As such, we should perhaps conclude that one may not make use of even a tiny morsel of matter taken from a corpse.

Interim Summary

We have seen that the consensus view among the *poskim* would likely forbid making use of posthumously extracted semen, although this would be permissible according to those authorities who permitted corneal transplants. Rav Unterman maintains that "resurrecting" a dead organ in the body of a live patient is permitted, and Rav Frank asserts that a small organ such as a cornea does not fall under the prohibition of benefiting from human remains, and a transplant may constitute an abnormal form of benefit. It would appear that in the case of a man who died childless and whose wife very much wishes to

perpetuate his biological legacy, especially if it is known that this was the man's desire, we may rely on these rulings of Rav Unterman and Rav Frank to allow inseminating the wife from the husband's posthumously retrieved sperm.[14]

II. Absolving the Widow from יבום and חליצה

Let us now turn our attention to the question of whether a man's posthumously conceived child suffices to absolve the widow of the obligation of יבום or חליצה. As noted in the introduction, the Torah requires the widow of a childless man to either marry his brother or to perform the חליצה ceremony, which releases her from this responsibility and allows her to marry any man she wishes. The fascinating question thus arises as to the status of a widow who was impregnated with sperm extracted from her husband's body after his death. Whether or not this procedure is halachically permissible, if it is performed and the widow conceives and delivers a child, is she now absolved of the obligation of יבום and חליצה, since her husband had fathered a child? Or does the obligation take effect the moment the husband dies without children, irrespective of his wife's subsequent conception?

Conception between Intercourse and the Husband's Death

A similar question was addressed in a famous and controversial responsum of Rav Yechezkel Landau (*Noda Be-Yehuda*, *Mahadura Kama*, E.H. 69). He notes that, as the Mishna and Gemara in *Maseches Yevamos* (35b) unequivocally establish, if a woman is pregnant with her husband's only child when the husband dies, she does not require יבום or חליצה (on condition that the pregnancy reaches full-term and the infant survives). The question he addresses is whether this also applies if the husband died immediately after intercourse, before conception occurs. On the one hand, since the woman was not pregnant at the time of her husband's death, perhaps she is subject to the requirement of יבום. On the other hand, one could argue that since the husband had already ejaculated his sperm inside the wife's body before his death, and it was only a matter of time before the sperm would fertilize her ovum, she may be considered halachically pregnant at the time of the husband's death.

14. Rav Yitzchak Herzog (*Pesakim U'Ksavim*, vol. 5, Y.D. 157) permitted corneal transplants for a different reason, asserting that this kind of benefit is not direct, and is thus forbidden only on the level of Rabbinic enactment. This prohibition is therefore overridden by the concern to restore a visually-impaired patient's eyesight. It is unlikely that this rationale would apply to posthumously retrieved sperm. See *Be-Mareh Ha-Bazak*, vol. 5, pp. 165–166.

The *Noda Be-Yehuda* advances the theory that a woman is not halachically considered "pregnant" before conception. Thus, if a husband died before the wife conceived with his only child, she is obligated to perform either יבום or חליצה. This theory is proposed to answer the question posed by a contemporary of the *Noda Be-Yehuda* ("the elderly sage of Tartakow") as to how the *halacha* permits יבום ninety days after the husband's death. *Chazal* assumed that pregnancy can be detected within ninety days after conception, and they therefore required a widow to wait this period before marrying her brother-in-law, in order to ascertain that she had not been impregnated by her first husband, and thus that יבום is warranted.[15] However, the sage of Tartakow wonders why the Sages did not require waiting an additional several days, to account for the delay between intercourse and conception. Even if the woman does not appear pregnant ninety days after the husband's death, it is possible that she will appear pregnant several days later, when ninety days will have passed since the moment of conception. Seemingly, then, *Chazal* should have ordained an additional several days of waiting.[16]

To answer this question, the *Noda Be-Yehuda* proposes that conception that occurs between intercourse and the husband's death does not absolve the woman of the יבום obligation. If the woman was not pregnant at the moment her childless husband died, the Biblical command of יבום applies even if she conceives immediately thereafter from sperm ejaculated from her husband during intercourse before his passing. Therefore, she needs to wait only ninety days before marrying the deceased's brother, for even if she conceived several days after her husband's death, this has no effect on the יבום obligation.

The *Noda Be-Yehuda* concludes by expressing his ambivalence regarding his theory, which he openly acknowledges appears nowhere in earlier halachic literature. He goes so far as to say that this novel theory should not inform normative halachic practice. Thus, a woman whose pregnancy is discerned ninety-two days after her husband's death does not require חליצה. Although it is possible that she conceived with his only child only after his death, nevertheless, the *Noda Be-Yehuda* was not prepared to introduce a new measure of stringency that does not appear in earlier sources.

Notwithstanding the *Noda Be-Yehuda*'s ambivalence, we might draw proof

15. Normally, it is forbidden for a woman to marry her husband's brother, even after her husband's death. It is only when the husband dies without children that the Torah sanctions a woman's marriage to her brother-in-law. *Chazal* therefore required waiting ninety days before performing יבום to ascertain that the deceased had not fathered a child, and thus that the widow's marriage to his brother is legitimate.
16. The *Noda Be-Yehuda* speaks of a three-day delay, in light of the assumption made by *Chazal* that a woman can conceive up to three days after intercourse.

to his theory from the Gemara's discussion in *Maseches Yevamos* (87a) regarding the case of an only child who died after his father's passing. The Gemara establishes that the widow does not require יבום, despite the fact that her deceased husband now has no children. The reason cited by the Gemara is the famous verse in *Mishlei* (3:17), דרכיה דרכי נעם ("Its ways are ways of pleasantness"), which conveys the message that Torah law must apply in a "pleasant" manner. In the case in which a man died and left behind a child, whereupon the widow remarried, if *halacha* would retroactively require יבום after the death of the first husband's child, this would create a gravely disagreeable situation, whereby the woman would now have to divorce, as she is retroactively required to marry her brother-in-law. Such a scenario, the Gemara instructs, is inconceivable in light of the principle of דרכיה דרכי נעם. Thus, necessarily, *halacha* does not require יבום in such a case.

The Gemara's application of דרכיה דרכי נעם would seemingly be relevant also in the case of conception after the husband's death, in the converse. The widow in such a case has no children at the time of her husband's death, and is thus required to marry the deceased's brother. If we then retroactively revoke the יבום obligation upon her conception, this would certainly cause a most undesirable situation. Thus, in this instance, too, we should determine a widow's status vis-à-vis יבום based only upon the circumstances at the time of the husband's death; if she was not pregnant at that time, she requires יבום even if she subsequently conceives her husband's child.[17]

One might refute this argument, however, by claiming that we do not have the authority to expand the halachic application of דרכיה דרכי נעם beyond the scenario to which the Gemara applies it. The Gemara invokes this factor to explain the specific rule that a child's death does not retroactively trigger a יבום obligation upon the mother, but this does not necessarily give us license to assume that this would apply in the reverse case as well.

Returning to the case of a widow inseminated with her husband's sperm after his death, her status vis-à-vis יבום would seemingly hinge on this theory postulated by the *Noda Be-Yehuda*. According to this theory, the determining factor is the presence of biological offspring — either living or in utero — at the moment of the husband's death. Therefore, since the widow was not pregnant at the time the husband died, she requires יבום or חליצה before remarrying, even though her husband will later have a child. However, as the *Noda Be-Yehuda* was reluctant to apply his theory as normative halachic practice, perhaps we

17. This point is made by Rav Shaul Yisraeli in an article published in *Torah She-Be'al Peh*, vol. 33 (5752).

should not require a woman to perform חליצה in such a case, since her husband ultimately produced a child.

Objections to the *Noda Be-Yehuda*'s Position

Rav Yitzchak Minkovsky of Karlin (*Keren Ora*, *Yevamos* 87a) dismisses the *Noda Be-Yehuda*'s theory. He notes the Gemara's discussion (*Yevamos* 87b) comparing the rules that apply to יבום to those that that apply to תרומה (hallowed portions of food given to a *Kohen*). A *Kohen*'s daughter is permitted to eat תרומה until she marries a non-*Kohen*, whereupon she loses this privilege. Even after she is widowed, she is forbidden to eat תרומה if she has children from her husband. The Gemara indicates that this woman's disqualification from תרומה after her husband's death is subject to the same guidelines as a widow's exclusion from יבום by virtue of having borne her husband's children. The only difference between the two cases, the Gemara establishes, is that in the case of תרומה, the widow regains her right to eat תרומה if her child dies, as the child's death breaks her connection to her husband. Although the widow's status vis-à-vis יבום is not affected by her child's death, her status vis-à-vis תרומה indeed changes. In every other respect, however, these two issues are identical. Clearly, Rav Minkovsky writes, if the woman conceives after her husband's death, she remains disqualified from eating תרומה, since she carries her husband's child. Necessarily, then, this conception also disqualifies her from יבום.

We can easily refute this argument, however, in light of the point made earlier regarding the possibility of applying the concept of דרכיה דרכי נעם to the case addressed by the *Noda Be-Yehuda*. The Gemara's distinction between the cases of יבום and תרומה is the situation of a child who dies subsequent to the father's death, which does not change the widow's status vis-à-vis יבום due to the consideration of דרכיה דרכי נעם. This same consideration, as noted, could perhaps apply in the converse, so that the woman would be obligated in יבום even when she conceives from the husband after the husband's death. If so, we can argue that this case, too, is subsumed under the exception noted by the Gemara.

Rav Minkovsky further argues that the *Noda Be-Yehuda*'s position yields the inherently paradoxical situation of a son inheriting the estate of his father whose widow was obligated to perform יבום. If a father has a son eligible to inherit his possessions, then by definition, his wife is excluded from יבום. This point is also made by Rav Tzvi Pesach Frank (*Har Tzvi*, E.H. 8), who notes the Gemara's remark (*Yevamos* 17b, 24a), יבום בנחלה תלה רחמנא — the יבום obligation is directly linked to the inheritance of the deceased's estate. If a deceased man

has a son who inherits his estate, then by definition, his widow is not eligible for יבום.[18]

Rav Mordechai Halperin,[19] however, questions this argument, noting a precedent for יבום without inheritance. The Mishna (4:7) addresses the case of a childless man who dies during his father's lifetime, and cites the view of Rabbi Yehuda that the father inherits the deceased's estate, despite the fact that the deceased's brother performs יבום and marries the widow. The Gemara (40a) explicitly states that the obligation of יבום can be fulfilled without inheriting the deceased's estate, and thus Rabbi Yehuda awards the deceased's estate to the father even though the deceased's brother marries his widow to perpetuate his memory. Although the majority view disputes Rabbi Yehuda's ruling, Rav Halperin contends that the majority view accepts the premise that יבום can occur independently of inheritance rights, but simply maintains that the Torah grants precedence to the brother-in-law who performs יבום over the deceased's father.[20]

However, one could argue that to the contrary, herein precisely lies the point of debate between Rabbi Yehuda and the majority view. The other *Tanna'im* may have disputed Rabbi Yehuda's view specifically because they maintained that inheritance rights are inherent to the יבום process, and thus there can be no possibility of a man marrying his sister-in-law in fulfillment of the יבום obligation without also inheriting the deceased's estate. Hence, since the *halacha* follows the majority opinion,[21] we should perhaps conclude that יבום cannot occur in the absence of inheritance rights, in support of Rav Minkovsky's objection to the *Noda Be-Yehuda*'s theory.[22]

Rav Shlomo Zalman Auerbach (*Minchas Shlomo*, *Tinyana* 124) raises a different question concerning the *Noda Be-Yehuda*'s theory. He argues that if, with regard to יבום, halachic pregnancy does not begin immediately following intercourse, this should conceivably be true with regard to other areas of *halacha*

18. Interestingly, however, Rav Frank is reluctant to reach a definitive conclusion, and thus rules that if a widow is inseminated from her husband's sperm after his death, she should perform חליצה in deference to the *Noda Be-Yehuda*'s position.
19. In an article published in the compendium *Devarim She-Yesh Lahem Shiur* (pp. 159–180), available online at http://www.medethics.org.il/website/index.php/he/homepage/101–2012–02–20–09–46–54/assia/2012–03–05–10–02–56/1000–2012–03–22–17–04–184.
20. As for the Gemara's comment יבום בנחלה תלה רחמנא, Rav Halperin cites a number of *Rishonim* who clarify that this does not mean that יבום necessarily includes inheritance rights. See *Tosfos Yeshanim* to 40a, and the Rashba to 108a.
21. Rambam, *Hilchos Nachalos* 3:7; *Shulchan Aruch*, E.H. 163:1.
22. This point was made by Rav Aryeh Katz of the Puah Institute, in an article published online at http://www.puah.org.il/page.aspx?id=260.

as well. Thus, for example, if a married woman had an extramarital relationship, and in the period between intercourse and conception she was widowed or divorced, the child should not be assigned the status of *mamzer*. Since the child was conceived after the dissolution of the mother's marriage, the child should not be considered the product of infidelity. Conversely, if an unmarried woman has intimate relations with one man and then gets married to another before conception, the child should, according to the *Noda Be-Yehuda*, be considered a *mamzer*, as he was conceived in the womb of a married woman from another man's sperm.[23] Such a theory appears nowhere in the Talmud or later halachic sources, seemingly indicating that the father-child relationship is established at the time of intercourse, regardless of any developments that occur between the intercourse and conception.[24]

Rav Shlomo Zalman therefore dismisses the *Noda Be-Yehuda*'s view and maintains that if intercourse leads to pregnancy, the woman is halachically deemed pregnant from the moment of intercourse, even though the conception occurs sometime later. Since the process of conception takes place inside the woman's body and is not visible, *halacha* ignores the time lapse between intercourse and conception, and treats the pregnancy as beginning from the time of the union between the father and mother.[25]

In light of this analysis, Rav Shlomo Zalman distinguishes between the issue addressed by the *Noda Be-Yehuda* and the case of posthumous fertilization. Since conception occurs naturally and indiscernibly after intercourse, *halacha* overlooks the time lapse between the two, and treats the pregnancy as though it commences at the time of intercourse. As such, a woman who is widowed after

23. Rav Shlomo Zalman raises this point in reference to the theory he seeks to prove in this responsum that the status of *mamzer* is defined not by the act of infidelity, but rather by the biological merging of two halachically incompatible people. Thus, the fact that the child owes his existence to an illicit relationship does not, in itself, render him a *mamzer*.

24. Interestingly, Rav Shlomo Zalman does not entertain the possibility of distinguishing between different areas of *halacha* with respect to the lapse between intercourse and conception. It was obvious to him that since a child's status of *mamzeirus* is determined at the moment of intercourse, this is true as well with regard to יבום in a case of an only child conceived after the father's death. The *Noda Be-Yehuda* presumably maintained that these different areas of *halacha* follow separate guidelines in this respect, and thus even though a child's status of *mamzeirus* is determined at the time of intercourse, his status vis-à-vis יבום is determined by whether he was conceived before his father's passing.

25. Regarding the question raised by the *Noda Be-Yehuda* as to why *halacha* allows a widow to perform יבום immediately after the passage of ninety days from her husband's death, Rav Halperin references several other approaches taken to resolve this difficulty that appear in the Talmudic commentaries.

intercourse with her husband does not require יבום or חליצה if their final union produces a child, even if conception occurs after the husband's death. Artificial insemination, by contrast, is the result of human intervention, a separate step that needs to be taken in order for conception to take place. Therefore, a woman whose husband died without a child, and who is then artificially impregnated with his semen after his passing, requires יבום or חליצה even though her husband ended up begetting a child. Rav Shlomo Zalman applied this conclusion to the case of a husband who produced sperm during his lifetime that was stored and then used to inseminate his wife after his death. Even though Rav Shlomo Zalman rejects the position of the *Noda Be-Yehuda*, he concludes that in the case of posthumous insemination, the woman requires יבום or חליצה despite subsequently delivering her husband's child, since at the time of his death she was not in a position to naturally conceive from him.[26]

This is also the view taken by Rav Moshe Sternbuch (*Teshuvos Ve-Hanhagos* 6:244). However, Rav Sternbuch extends his ruling even further than Rav Shlomo Zalman, postulating that a child produced from a man's sperm after his death is not considered his father's halachic son in any respect. The halachic concept of "fathering," Rav Sternbuch writes, is likely inapplicable after a man dies. Although a man who dies immediately after intercourse is considered the child's father even if his death precedes conception, this does not apply when his sperm is posthumously injected into his wife's uterus. In the former case, the man has, for all intents and purpose, fathered a child before leaving this world, as he had completely performed the male role in reproduction. In the latter case,

26. Based on this distinction, Rav Shlomo Zalman addresses the interesting case of a married woman with an intrauterine contraceptive device (IUD) who betrayed her husband shortly before his death, and just after his death the device was removed and she conceived from her adulterer. Rav Shlomo Zalman notes that the child might not be considered a *mamzer*, because he was conceived after the husband's death and only as a result of medical intervention (i.e., the removal of the IUD). However, Rav Shlomo Zalman adds that he is uncomfortable with this conclusion, and he leaves the question unresolved.

Dr. Yossi Green, in an article published in *Techumin* (vol. 30, p. 145), contends that Rav Shlomo Zalman would not apply this conclusion to a case in which conception occurred via in vitro fertilization before the husband's death. Since the woman's egg was already fertilized — albeit outside her body — at the time her husband passed away, she is considered "pregnant" at the moment of the husband's death, thus absolving her of the need to undergo יבום or חליצה. Rav Katz (in the article referenced above, note 22) dismisses this claim, noting that since the fertilized egg must still be implanted in the woman's uterus, Rav Shlomo Zalman would not consider the woman pregnant at the time she is widowed, and she would thus require יבום or חליצה. See Rav Tzvi Ryzman's discussion in *Ratz Ka-Tzvi — Even Ha-Ezer, Poriyus*, pp. 120–123.

however, the process of "fathering" had not begun before the man's death, and thus he can no longer be considered a father. Rav Sternbuch therefore concludes that with respect to all *halachos*, a child produced from a man's sperm after his death is not considered his father's child. This means that he does not inherit his father's estate, and he is permitted to marry his father's family members. In light of this theory, Rav Sternbuch writes that fathering a child after death is forbidden, as it is improper to knowingly produce a child that has no halachic father.

Rav Shlomo Zalman, however, clearly did not take this view; he recognized a posthumously fathered child as the man's child, despite the fact that the mother requires יבום or חליצה.

Conclusion

According to the *poskim* who permit removing a cornea from a human corpse for transplantation in a live patient, it is likely that fathering a child from sperm taken from a deceased man would be permissible, whereas those who forbid the use of a deceased person's cornea would likewise forbid the use of posthumously retrieved sperm.

According to Rav Moshe Sternbuch, a child produced after the biological father's death is not halachically regarded as the father's child, and this procedure is thus forbidden due to the impropriety of knowingly producing a child who has no halachic father.

The consensus among the *poskim* is that a child produced from a man's sperm after his death does not absolve the widow of the obligation of חליצה.

Forward

Dina Pinner of KayamaMoms Talks Motherhood for Single Orthodox Women

May 2, 2016
by Rebecca Schischa

"I'm 41, religious and single. I'm not prepared to give up on motherhood and I'm also not prepared to give up on my halakhic devotion. If I can't have a partner, at least I should have a child."

With this impassioned plea, Aviva Harbater opened up the 2011 inaugural conference of KayamaMoms, a Jerusalem-based organization set up to support religious women anywhere on "the single mother by choice journey."

Five years later, KayamaMoms can take credit for some 48 babies born to single mothers, and for creating a unique supportive community for these alternative families. The organization provides information on pregnancy and adoption, advice on financial planning and parenting, and runs seminars and regular support groups.

The Sisterhood recently interviewed KayamaMoms co-founder and co-director Dina Pinner, originally from the U.K. and living in Jerusalem for many years now.

Rebecca Schischa: How did KayamaMoms come about?

Dina Pinner: I was 37 and a friend sent an informal email round saying: "We're all single and none of us is getting any younger — let's have children and form a community." I thought: "Why not?" We met at the home of one woman — who already had children on her own — and sat around the table discussing it. But it was completely

Kate with Amichai and Akiva

non-committal. We met again a few months later and this time we said: "OK, let's organize a conference."

Together with my co-founders/co-directors, Yael Ukeles and Dvora Ross (and another woman who since left the group and got married), we spent a year planning, and our inaugural conference took place in November 2011.

And during this time, I met my partner! I was meant to be setting up this thing with single women and I felt kind of bad. Finally, about three months after we met, I emailed the others and said: "I've met someone, can I still be involved?"

How does KayamaMoms support single women to become moms?

We run two separate monthly meetings. One is for anyone on the journey to becoming a single mother by choice — to talk, ask questions, think out loud.

The other is for moms and kids. It's important for the kids to meet up and realize that although their family does not look like other families, there are others just like theirs. It's also important for our moms to have a safe space to talk. Single mothers by choice have particular challenges. One mom said when she was pregnant with her second child, her doctor told her not to carry anything heavy. She laughed and asked the doctor: "Can you carry my child and my shopping for me?"


Merav with Yoav and Eitan

We're an international organization and have two secret Facebook groups, one in Hebrew and one English. We have women from the U.S., England, Europe, all over the place. I'll be in New York and London in the next few months and hope to organize meetings in both places.

Have attitudes changed towards single mothers by choice in the religious community in Israel?

We knew we had become mainstream when my friend — who always tells me about Yossi, the janitor at the big organization where she works, who's been saying to her for years: "Nu, when are you getting married?" — called me up and said: "You cannot believe what just happened to me! Yossi said to me: 'What are you waiting for? Go have a baby! Haven't you heard — religious women are having babies on their own now!'" We knew we had arrived then.

What kind of issues do single moms by choice describe?

The single mother by choice story is a beautiful story, which our moms pass on to their kids: "I was willing to do absolutely everything to have you." All the kids know their stories. But situations do come up. One member described a conversation with her son. They were in the car and he said out of the blue:

"Yuval's got an abba [dad], Can I have an abba?" At first she panicked…but then

she remembered how to approach the subject: “Yes, Yuval’s got an abba — what did you notice about his abba that made you think you wanted one?” “Well, Yuval’s abba helped him learn to ride a bike. Who’s going to help me learn to ride a bike?” “OK, no problem, we’re going to speak to Saba [grandpa] tomorrow and he’s going to teach you how to ride a bike too.”

Are there any halakhic issues involved in single women becoming mothers?

There are rabbis who have said we are “destroying the Jewish family.” But there is no halakhic prohibition. Our rabbi-advisor, Rabbi Yuval Cherlow, says that a woman shouldn’t really go into this before she’s around 34, as she should make “a gallant effort” to get married first. He says that ideally women should use non-Jewish sperm to prevent any issues later on of *yichus* [when someone could inadvertently marry a sibling]. But some women prefer to use Jewish sperm. It’s a personal choice.

Any final thought?

Alternative families are not going away anywhere, and either we can embrace them or we can make them and their children feel rejected. It’s the choice of the rabbi of each community as to what message they want to send out: that the unmarried and the childless should be ignored or that they should be embraced.

Is Artificial Insemination an Option for Unmarried Women?

The so-called "*shidduch* crisis" — the term used to describe the difficulties faced by many Orthodox men and women in finding suitable marriage partners — has triggered a great deal of discussion, aimed primarily at identifying the root cause of the problem and possible effective solutions. Traditional Judaism, of course, has always placed great emphasis on the importance of marriage, not only as a means of producing children, but also as a value unto itself, as God Himself proclaimed immediately after Adam's creation: לא טוב היות האדם לבדו אעשה לו עזר כנגדו — "It is not good for man to be alone; I shall make for him a helpmate alongside him" (*Bereishis* 2:18). Unfortunately, however, there are many who, for any one of a large variety of reasons, have been unable to find their "helpmate," and thus live alone, without a spouse and without children.

While living unmarried is difficult and agonizing for both men and women, it is especially disheartening, and even frightening, for single women, who face the prospect of entering menopause childless. Women naturally wish to bear children, and no one wishes to spend their elderly years alone, without any family around to offer affection, love, and practical support. The fear of finding themselves alone in old age has prompted a growing number of unmarried Orthodox Jewish women to turn to artificial insemination as a means of conceiving and begetting children. Most of these women have reached their upper 30s or 40s without marrying, and have begun to realize that the window of opportunity to produce children — and to raise them while still young, healthy, and energetic — would soon close. They thus decided to bear and raise children alone, preferring single motherhood over the risk of never experiencing the joy and satisfaction of raising a child.

In 2011, two such women — Dvora Ross and Yael Ukeles — as well as a third woman, Dina Pinner, started an organization in Israel called Kayama Moms, which provides information and assistance to single women aged 35 and over seeking to conceive. It is reported that Rabbi Yuval Charlow, Rosh Yeshiva of the Orot Shaul hesder yeshiva in Raanana, serves as the organization's rabbinic advisor.[1]

1. Jennifer Richler, "In Israel, Religious Single Moms Gain Greater Acceptance," http://www.jta.org/2017/01/12/life-religion/in-israel-religious-single-moms-gain-greater-acceptance.

Many other rabbis, however, have expressed strong opposition to the practice. This essay will examine the possible halachic barriers to this practice, and will seek to determine whether these concerns suffice to deny unmarried women the possibility of producing children.

Distinguishing Between Insemination and Intimacy

The first question that arises when considering this option is whether the introduction of a man's previously-ejaculated sperm into a woman's body through the vaginal tract is considered a sexual act that would be forbidden if the man is not her husband. When the Torah forbids sexual relationships outside the framework of marriage, does it forbid specifically the act of intercourse, or the introduction of a man's sperm into a woman's body?

Numerous sources indicate that it is the physical union, rather than the introduction of sperm, that the Torah forbids. The Rambam, for example, writes in his commentary to the Mishna (*Sanhedrin* 7:4):

> ואין להוצאת שכבת זרע בענין חיוב העונשין סרך בשום פנים אלא כיון שהכניס האבר יתחייב העונש עליה ואפי' פירש מיד.
>
> The ejaculation of sperm is of no consequence whatsoever with regard to liability to punishment; rather, once he inserted his organ, he is liable to punishment for it, even if he withdraws immediately [before ejaculation].

One transgresses the Torah's sexual code not by ejaculating inside the body of a woman to whom he is not married, but rather by performing the act of intercourse, irrespective of whether ejaculation occurs during the act. The clear implication of the Rambam's remarks is that the sole defining component of a forbidden sexual act is the physical union, not the introduction of the man's sperm into the woman's body.

Similarly, the Gemara in *Maseches Chagiga* (14b-15a) addresses the case of נתעברה באמבטי, whereby a woman who bathed conceived from sperm that was ejaculated by a man who had used the bath previously. It was believed that sperm in a tub could potentially enter a bathing woman's body and impregnate her, and the halachic literature surrounding this scenario provides us with a test case of conception without intercourse. The Gemara in *Chagiga* establishes that a virgin woman who conceived in this fashion does not lose her halachic status as a בתולה (virgin), and thus remains eligible to marry a *Kohen Gadol*.[2] A

2. The Torah in *Sefer Vayikra* (21:13) requires a *Kohen Gadol* to marry specifically a virgin:

number of writers suggested drawing proof from this ruling that *halacha* does not equate the introduction of sperm into the woman's body with intercourse. The fact that a woman who conceived without intercourse retains her status of בתולה, as she has never experienced an intimate encounter with a man, indicates that the insertion of sperm is not halachically equivalent to a sexual act.

Rav Eliezer Waldenberg (*Tzitz Eliezer,* vol. 9, p.241), however, refutes this proof, asserting that the status of בתולה vis-à-vis eligibility to marry a *Kohen Gadol* hinges on the physical presence of the hymen, and not on the woman's sexual history. In other words, even if *halacha* regards the body's absorption of sperm as a sexual act, a woman who conceived without intercourse is nevertheless permitted to marry a *Kohen Gadol* because her hymen is still intact.[3] Therefore, a woman's status with respect to her marriage to a *Kohen Gadol* provides no proof of the halachic status of inserting sperm without physical intimacy.

Others draw proof from the Gemara's ruling in *Maseches Yevamos* (76a) regarding the status of homosexual intimacy between two females. The Gemara establishes that such activity is deemed פריצותא — inappropriately promiscuous — but does not fall under the category of forbidden sexual relations. As such, a woman who engages in such activity is permitted to marry a *Kohen*, even though women who are guilty of a forbidden sexual act may not marry *Kohanim*. Rashi comments that the Gemara speaks of an encounter involving direct contact between the partners' genitals, and the Rivan adds that this results in each woman's husband's sperm entering the other woman's body. The Gemara does not regard such an act as forbidden sexual relations, despite the introduction of sperm into a married woman's body, seemingly proving that the introduction of sperm into the body does not independently constitute an illicit act.[4]

Yet another source that has been cited in reference to this question is the Gemara's comment in *Maseches Bava Kama* (32a) in explaining the warning in *Sefer Vayikra* (18:29) of punishment for forbidden sexual acts: ונכרתו הנפשות העושות — literally, "The souls who perform [this] shall be excised." The Gemara notes that both partners are described with the term עושות ("perform"), despite the fact that the female is passive during the act of intercourse. The reason, the Gemara explains, is that both the male and the female derive enjoyment from

והוא אשה בבתוליה יקח.

3. Rav Waldenberg notes that this is how the *Mishneh Le-Melech* (*Hilchos Issurei Bi'a* 17:13) understood the Gemara's ruling, although the *Mishneh Le-Melech* maintained that the *halacha* does not follow this view regarding the definition of בתולה vis-à-vis eligibility to marry a *Kohen Gadol*.
4. This proof is brought by Rav Dov Krauser, citing earlier writers, in an article published in the first volume of *Noam* (p. 119).

intercourse, and it is to this aspect of intercourse — the enjoyment, as opposed to the performance of the act — to which the Torah here refers. It has been suggested on the basis of this Talmudic passage that the prohibitions against illicit relations are defined as prohibitions of הנאה — enjoyment.[5] By definition, a violation of the Torah's sexual code requires הנאה, and absent the experience of enjoyment, no violation has occurred.

Others, however, refute this proof,[6] suggesting that the Gemara introduced the factor of הנאה only to explain why both partners are liable to court-administered punishment. Normally, *beis din* does not administer punishment to violators who commit a transgression that entails no concrete action. When it comes to sexual offenses, however, the experience of הנאה obviates the need for an action to warrant punishment, and thus even the passive partner of a sexual union is punishable.[7] Hence, the Gemara's comment cannot be enlisted as proof that the introduction of sperm without intercourse does not qualify as a halachically-defined sexual act.

Rabbeinu Peretz

Another source cited by numerous *poskim* is a ruling of Rabbeinu Peretz, cited by the *Bach* (Y.D. 195) and his son-in-law, the *Taz* (Y.D. 195:7). Rabbeinu Peretz noted the practice of married woman to avoid sleeping on bedding on which a man other than their husbands had slept. This practice stems from the concern that the man may have experienced a seminal emission, and his sperm may enter the woman's body if she sleeps on the bedding. The woman would then conceive a child that is presumed to be her husband's son or daughter, while in truth that child was fathered by a different man. This confusion could give rise to numerous halachic concerns, and so such a situation should be avoided.

Rabbeinu Peretz states explicitly that the reason this situation must be avoided is because of the need to identify the child's father. There is no mention at all of this conception constituting an inadvertent adulterous act. To the contrary, Rabbeinu Peretz observes that common practice allows women to sleep on their husbands' bedding during their period of *nidda*, despite the possibility that they might conceive. Although relations with a *nidda* are strictly forbidden, and a child conceived from such a union — even in the case of a married couple

5. Rav Chaim Mednick, writing in *HaPardes* (Nissan, 5713).
6. See Rav Eliyahu Meir Bloch's response in *HaPardes* (Sivan, 5713).
7. Rav Bloch adds that *Tosfos* (*Yoma* 82b) write explicitly that one is liable to punishment for a forbidden sexual act even if no enjoyment is experienced.

— is considered "defective,"[8] nevertheless, there is no need for a wife to avoid her husband's bedding while she is a *nidda*. Rabbeinu Peretz notes the legend of Ben Sira, author of a famous ancient work of ethics, who is said to have been conceived by the daughter of the prophet Yirmiyahu while she bathed in a tub that contained semen from her father. Ben Sira was not considered a *mamzer* or in any way "defective," and thus a child conceived when his mother was a *nidda* and slept on her husband's bedding is likely not to be deemed "defective." This would seem to prove that conception without intercourse is not halachically akin to intercourse from the man who produced the sperm.

This inference was made already by the *Mishneh Le-Melech* (*Hilchos Ishus* 15:4), who proved from Rabbeinu Peretz's comments that a married woman who conceived from another man's sperm while bathing is not considered an adulteress and may continue living with her husband. Numerous recent *poskim*, including Rav Yechiel Yaakov Weinberg,[9] Rav Moshe Feinstein,[10] and Rav Ovadia Yosef,[11] likewise draw proof from this source that the entrance of sperm into a woman's body does not qualify as an act of intercourse.

On this basis, Rav Moshe Feinstein, in a responsum that elicited a great deal of fierce opposition, ruled that a woman married to an infertile man, who endures a great deal of grief due to her inability to have children, may be artificially inseminated with the sperm of a non-Jewish man. As cited from Rabbeinu Peretz, the only reason to forbid allowing another man's sperm into a woman's body is the concern that her child will be mistakenly identified as her husband's offspring. This concern does not arise when the sperm is taken from a non-Jew, as *halacha* does not recognize any familial relationship between a Jew and his or her non-Jewish father.[12] In a letter published years later,[13] Rav Moshe emphasized that he issued this ruling only in exceptional cases, when the physicians

8. *Shulchan Aruch* (E.H. 4:13). The *Beis Shmuel* comments that it is proper not to marry a child born from a couple that did not observe the laws of *nidda*, although recent *poskim* have generally ruled that this does not apply if the child is an upstanding and God-fearing individual. See Rav Shimon Eider's *Halachos of Niddah*, vol. 1, p. 3, note 15, and the letter by Rav Moshe Feinstein published at the end of that volume, section 19.
9. In *HaPardes* (October, 1950), pp. 7–8.
10. *Iggeros Moshe*, E.H. 71.
11. *Yabia Omer*, vol. 2, E.H. 1.
12. That is to say, in the case of a Jewish woman who cohabited with a non-Jewish man, the child is Jewish and is not considered the halachic offspring of the father. This would apply also in the case of a child fathered by a gentile through artificial insemination.
13. The letter appeared in Rav Tzvi Hersh Friedman's *Tzvi Chemed*, and is cited by Rav Ovadia Yosef in *Yabia Omer*, vol. 8, E.H. 21:5.

are certain that the couple is unable to produce a child because of the husband's infertility, and the couple is in great anguish over their state of childlessness.

Rav Yoel Teitelbaum — the first Satmar Rebbe — penned a lengthy letter condemning Rav Moshe Feinstein's ruling permitting artificial insemination, which was published in the journal *HaMa'or*.[14] He dismissed the proof drawn from Rabbeinu Peretz's ruling, for two reasons. First, the Chida (*Birkei Yosef*, E.H. 1:14) suggests an alternate reading of Rabbeinu Peretz's responsum, arguing that when a woman conceives while sleeping on a bed that was used previously by a man, the child is not considered to have a father. Since the child was not produced through intercourse, *halacha* does not treat him as the offspring of the father whose sperm had entered the mother's body. Rabbeinu Peretz nevertheless forbids a woman to sleep on bedding that had been used previously by a man other than her husband because the entry of another man's sperm into her body is itself problematic. Even though the child is not halachically related to that man in any way, the "mixing" of sperm inside a woman's body is prohibited.[15] According to this reading of Rabbeinu Peretz's ruling, the introduction of sperm from someone other than a woman's husband into her body is forbidden.

It should be noted, however, that the Chida proposed this reading only to establish that Rabbeinu Peretz's ruling does not provide definitive proof that a child conceived without intercourse is halachically considered the son of the man whose sperm impregnated the mother. The Chida concedes that according to the simple reading of the responsum, a woman should not sleep on bedding that might contain another man's sperm only because of the confusion that will arise if she conceives with another man's child, which could lead to a brother marring his sister. The novel, strained reading[16] suggested by the Chida was intended only to leave open the possibility that a child conceived without intercourse is not halachically related to the biological father.

The Satmar Rebbe also asserts that Rabbeinu Peretz considers the child produced in this manner a legitimate child only because the woman did not knowingly inject the sperm into her body. True, Rabbeinu Peretz writes, כיון דאין כאן ביאת איסור הולד כשר לגמרי — "Since there was no forbidden intercourse here, the child is entirely legitimate" — implying that it is forbidden intercourse that determines a child's illegitimate status. However, the Satmar Rebbe claims that Rabbeinu Peretz's intent is that in the case of a woman lying on a bed, there was

14. *HaMa'or*, Av, 5724.

15. The Chida's formulation is, הגם דלא שייכא גזרה שמא ישא אחותו מאביו ואין אב, מ"מ יש להקפיד בדין עירובא זרע הבא ממקום אחר.

16. Rav Waldenberg (p. 247) questions the validity of the Chida's reading of Rabbeinu Peretz's responsum, noting that it is very difficult to sustain.

no forbidden act. As Rabbeinu Peretz was entirely unaware of the possibility of artificial insemination, he mentioned specifically intercourse, which in his time was the only way to knowingly inject sperm into a woman's body. In truth, however, even other methods are forbidden.

However, this interpretation of Rabbeinu Peretz's formulation is highly speculative, as the simple reading suggests that a child's status of illegitimacy stems from a forbidden intimate encounter, and not from the entry of semen into the woman's body.

Rav Waldenberg[17] presents a different argument for why we cannot permit artificial insemination on the basis of Rabbeinu Peretz's responsum. He notes that the Chida, in the passage noted earlier, writes that he found a manuscript of ancient responsa that included a ruling by Rav Shlomo of London forbidding a wife who is a *nidda* to bathe in the same water in which her husband had bathed. The wife might conceive from the husband's semen in the water, and the child would then have been conceived during the wife's period of impurity. This ruling would certainly appear to reflect the view that insemination without intercourse is halachically equivalent to intercourse, in contradistinction to Rabbeinu Peretz's position.

Rav Waldenberg goes even further, suggesting that Rabbeinu Peretz might accept this ruling of Rav Shlomo of London. The Chida, after noting that Rav Shlomo of London appears to dispute Rabbeinu Peretz's position, writes ambiguously that there might be room to distinguish between the two cases such that these rulings do not conflict. Although the Chida does not specify any distinction, Rav Waldenberg suggests that the Chida refers to the possibility of distinguishing between conception while sleeping on bedding with semen, which happens passively, and conception while bathing, which occurs as the woman bathes and inadvertently brings the semen into her body. Even Rabbeinu Peretz, who permits a wife to sleep on her husband's bedding while she is a *nidda*, might forbid her to bathe in water in which her husband had bathed previously, as she would then actively bring his sperm into her body over the course of bathing.[18]

If so, Rav Waldenberg writes, then even Rabbeinu Peretz would concede

17. *Tzitz Eliezer*, vol. 9, pp. 244–245.

18. As mentioned, Rabbeinu Peretz also notes the example of Ben-Sira, who, according to legend, was conceived while his mother bathed and Yirmiyahu's sperm entered her body. This would seem to negate the theory that Rabbeinu Peretz distinguished between bathing and sleeping. However, Rav Waldenberg notes that the legend surrounding Ben-Sira's conception recounts that Yirmiyahu and his daughter were coerced into this situation, and so the action that brought Yirmiyahu's sperm into his daughter's body was performed against her will. Ordinarily, however, Rabbeinu Peretz would not permit a woman to bathe in water in which a man other than her husband had previously bathed.

that knowingly injecting a man's sperm into a married woman's body would be forbidden, and the child would be considered a *mamzer*.

Rav Waldenberg proceeds to draw our attention to the *Shiltei Ha-Gibborim* commentary to the Rif (*Shevuos* 2a), which cites a responsum of the Maharam on the very same topic addressed by Rabbeinu Peretz. Asked why women do not avoid sleeping on their husbands' bedding while in a state of *nidda*, the Maharam replied that the "deficiency" ascribed to a child conceived while his mother was a *nidda* is not a significant enough concern to warrant measures to avoid a remote risk of conception. In essence, the Maharam claims that a child conceived without intercourse while the mother was a *nidda* is, indeed, considered to have been conceived by a *nidda*, but since the consequences of this status are not terribly significant, women need not go to such great lengths to avoid it. Rav Waldenberg speculates that this responsum cited by the *Shiltei Ha-Gibborim* was in fact authored by Rabbeinu Peretz, but a copyist mistakenly wrote the name מהר"פ (referring to Rabbeinu Peretz) as מהר"ם. According to this theory, two different versions of Rabbeinu Peretz's responsum exist, such that no definitive conclusion can be reached on the basis of the responsum cited by the *Bach* and the *Taz*.[19]

We might respond, however, that since the *Bach* and the *Taz* cite Rabbeinu Peretz's ruling that a child conceived without intercourse is perfectly legitimate, this is the accepted position. Indeed, Rav Ovadia Yosef comments that Rabbeinu Peretz is a more widely accepted halachic authority than Rav Shlomo of London, and thus one may rely upon the lenient ruling of Rabbeinu Peretz.[20]

Seemingly, then, we should conclude, as Rav Feinstein ruled, that a woman may undergo artificial insemination with sperm produced by a non-Jewish man. Since artificial insemination is not halachically equivalent to an intimate relationship, and the only potential concern is the halachic pitfalls one could face if he cannot identify his father — a concern that does not arise when the sperm donor is a gentile — there appears to be no halachic barrier to this procedure.

Artificial Insemination as an Intimate Relationship

However, many *poskim* disputed Rav Feinstein's ruling and forbade artificial insemination, for a variety of reasons.

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19. Rav Waldenberg (*Tzitz Eliezer*, vol. 9, p. 246) adds that several sources question the authenticity of the legend of Ben-Sira's conception, and so it cannot serve as a reliable source for permitting artificial insemination.
20. *Yabia Omer*, vol. 8, p. 450. However, Rav Ovadia Yosef nevertheless forbids artificial insemination, for other reasons.

One of the earliest responsa on the subject was penned by Rav Yehuda Leib Tsirelson and published in 1932 in his work *Ma'archei Lev* (73). Rav Tsirelson strictly forbids women from undergoing artificial insemination with another man's sperm, arguing that such a procedure constitutes a forbidden sexual act. He claims that this "union" between a man and woman would fall under the category of שלא כדרך הנאתן — deriving benefit from something forbidden by the Torah in the unusual manner. Injecting another man's sperm into a married woman's body is, in Rav Tsirelson's view, an unusual form of intercourse, and it thus constitutes שלא כדרך הנאתן. Since even such forms of benefit are forbidden by the Torah,[21] the prohibition against illicit sexual relations includes even this abnormal form of intercourse.

This contention, however, is very difficult to understand. The rule of שלא כדרך הנאתן applies to prohibitions against utilizing a certain item, extending that prohibition to include even unusual forms of use. When it comes to illicit sexual relations, the Torah forbids the act of intercourse. Injecting sperm with a tube into a woman's body is not an unusual form of that which the Torah forbids, but rather an entirely different act, which the Torah never prohibits.

Rav Tsirelson then proceeds to note the Torah's formulation in introducing the prohibition against adulterous relations with a married woman: ואל אשת עמיתך לא תתן שכבתך לזרע (*Vayikra* 18:20). The Torah here does not simply forbid intimate relations with another man's wife, but rather forbids inserting one's semen into another man's wife. The implication of this wording, Rav Tsirelson claims, is that any manner of inseminating another man's wife is prohibited, and not only through intercourse.

This inference was proposed already by Rav Yehonatan Eybeschutz in his *Benei Ahuva* (*Hilchos Ishus*, chapter 15), amidst his discussion of the case of a woman who conceives from another man's sperm in the bath. Rav Eybeschutz suggested that since the Torah describes adultery as the entry of another man's sperm into a married woman's body, a woman who inadvertently absorbs another man's sperm should perhaps be considered an adulteress and may therefore no longer engage in relations with her husband. However, Rav Eybeschutz immediately dismisses this contention, noting the Gemara's ruling noted earlier that such a woman retains her status of בתולה and may marry a *Kohen Gadol*.

This theory is embraced, however, by the Satmar Rebbe, in the aforementioned letter, where he draws support from the Ramban's discussion of this verse in his Torah commentary. The Ramban observes the Torah's formulation of the

21. *Pesachim* 24b. The exception to this rule is food items that the Torah forbids specifically for consumption; unusual forms of benefit from such products are forbidden only by force of rabbinic enactment (See previous chapter).

prohibition of adultery, and explains that the reason underlying the Torah's ban on adultery is the fact that the woman's offspring will be unable to identify their father. As this is the basic reason behind the prohibition, the Torah formulated this law as a prohibition against the introduction of another man's reproductive material in the body of another man's wife. And although one transgresses the Torah prohibition at the moment of penetration, irrespective of the ejaculation of sperm, the Satmar Rebbe explains that the Torah imposed an outright prohibition against all intercourse, even that which cannot lead to fertilization, but the core reason and essence of this prohibition is the need to ensure that all of a woman's children were fathered by her husband. As such, it applies even to the introduction of sperm in a woman's body without intercourse.[22] The Satmar Rebbe thus ruled that if a married woman is artificially inseminated with the sperm of a man other than her husband, she is guilty of an adulterous relationship. She must therefore divorce her husband, and the child she conceives is considered a *mamzer*.

Other *poskim*, however, rejected this argument. Rav Yechiel Yaakov Weinberg noted that we find no such inference in Talmudic literature from the verse לא תתן שכבתך לזרע, and we do not have the authority to determine practical *halacha* on the basis of our own exegesis.[23] Rav Moshe Feinstein addresses this verse in a later responsum,[24] where he denies outright the claim that the prohibition of adultery is linked to the interest in avoiding illegitimate children. He notes that Ibn Ezra, in his commentary to this verse, makes reference to those who suggested such an interpretation in order to justify intimate relations with women in situations in which conception is impossible, and Ibn Ezra strongly condemns this theory. The Torah formulates the prohibition with a reference to the offspring, Ibn Ezra explains, in order to clarify that an adulterous relationship is forbidden even if one's intent is strictly for the noble purpose of procreation, as opposed to simply satisfying lust. As for the Ramban's comments regarding the reason underlying the prohibition of adultery, Rav Feinstein counters that the Ramban noted the concern of illegitimate children as a factor that makes an adulterous relationship an especially severe offense, and not as the exclusive

22. The Satmar Rebbe concedes that we generally do not invoke the reasons and rational underpinnings of the Torah's laws as proofs in halachic discourse. However, he contends that when the Torah explicitly states the reason of a given law, that reason can and must be used to inform halachic decision-making. The Rebbe further states that according to some *poskim*, the reasons behind the Torah's laws must be taken into consideration when they yield stringencies; it is only when they imply a lenient conclusion that they cannot be invoked.

23. In the article referenced above, n. 9.

24. *Iggeros Moshe*, E.H. 2:11.

or even primary reason for this law. Moreover, Rav Feinstein adds, the Ramban introduces this interpretation of the verse with the word "*Ve'efshar*" — "Possibly," indicating that he does not definitively accept this reading. And he concludes his remarks by noting that he prefers a different interpretation, that the Torah makes specific reference to sperm in this context to clarify that the capital offense of adultery is violated only through full intercourse, and not through other forms of intimate physical contact. In other words, those who seek to draw proof from the Ramban's commentary that the prohibition of adultery refers even to the introduction of sperm without intercourse rely on a reading that the Ramban proposes with considerable skepticism.

Rav Feinstein also points to the fact that relations with another man's wife are forbidden even when there is no possibility of conception — such as if one of the parties is infertile or in a case of anal penetration. This fact, Rav Feinstein argues, demonstrates that it is the sexual act, and not the married woman's conception, that lies at the heart of this prohibition.

אין השכינה שרויה אלא על הוודאים

Both the Satmar Rebbe[25] and Rav Waldenberg[26] forbid artificial insemination from a sperm bank for an additional reason, namely, on the basis of the requirement of הבחנה — ascertaining that a child's father can be definitively identified.

The Mishna in *Maseches Yevamos* (41a) establishes that a divorced or widowed woman may not remarry until three months have passed since her divorce or her first husband's passing, in order to avoid uncertainty regarding the biological origins of her next child. In earlier times, pregnancy could generally be detected only after three months from conception, but not earlier.[27] Therefore, if a woman remarries within three months of being widowed or divorced, and then immediately conceives, it will be unknown whether that child was fathered by the first husband or the new husband. In order to avoid such uncertainty, *halacha* requires the woman to wait three months after her divorce or her husband's death before remarrying.

The Gemara (*Yevamos* 42a) brings several different reasons for why this uncertainty must be avoided. The first is God's promise to Avraham, להיות לך

25. In the aforementioned article in *HaMa'or* (Av, 5724), p. 4.
26. *Tzitz Eliezer*, vol. 9, p. 252.
27. Nowadays, of course, pregnancy tests can determine if a woman is pregnant before the three-month period. The results of pregnancy tests, however, do not usually eliminate the halachically mandated need to wait a three-month period before a woman can get remarried.

לאלוקים ולזרעך אחריך — that He would establish a special relationship with him and "with your offspring after you" (*Bereishis* 17:7). This phrase implies that God's blessing depends upon a definitive connection between parents and their offspring, and thus instructs that children should not be produced in a manner that makes the identity of their biological father uncertain. Rashi explains by commenting, אין השכינה שורה אלא על הוודאים שזרעו מיוחס אחריו — "The Divine presence rests only on the 'certain' ones — a person whose offspring is attributed to him." The source of Rashi's comment is the Talmudic teaching presented in *Maseches Kiddushin* (70b), כשהקב"ה משרה שכינתו אין משרה אלא על משפחות מיוחסות שבישראל — "When the Almighty rests His presence, He rests it only upon the families in Israel with clear pedigree." The ability to definitively identify one's father and one's children is a *sine qua non* of Jewish life, without which we cannot merit the Divine presence in our midst.

Second, the Gemara notes, the situation of a child who cannot definitively identify his biological father can result in catastrophic halachic consequences. For example, if a person thinks his father is his mother's second husband, but he was really fathered by her first husband, he might marry the daughter of the first husband, thereby inadvertently marrying his sister — in violation of the Torah's prohibition against incest. Furthermore, the Gemara adds, if the child was conceived by the first husband, but is presumed to have been fathered by the second husband, he will naturally be considered the full brother of the second husband's other children. If the second husband's other son gets married and then dies childless, such that his widow is subject to the obligation of *yibum*, requiring her to marry her deceased husband's brother, his half-brother, who is mistakenly presumed to be his full brother, might marry her to fulfill this obligation. However, as *yibum* applies only to brothers who share the same father, the marriage in this case is not required, and as such, it is forbidden.[28]

Another concern noted by the Gemara is that the second husband might die without children, and since he was mistakenly assumed to have fathered a child, his wife will be unaware that she is bound by the *yibum* obligation. She might then remarry without being released by her brother-in-law through the *chalitza* ritual, in violation of a Biblical command. Likewise, if the first husband had one other son, and that son marries and then dies childless, his widow will assume that as her husband had no brothers, she is not subject to the obligation of *yibum*, when in reality, her husband had a brother, who must first perform *chalitza* before she may remarry.

The Satmar Rebbe and Rav Waldenberg note that nearly all these concerns

28. The Torah forbids marrying one's brother's wife, even after the brother's passing, except when this is required by force of the command of *yibum*.

apply as well to a woman who is artificially inseminated with a non-Jewish man's sperm. The exception is the concern of an incestuous marriage; as noted earlier, since *halacha* does not recognize familial relationships between a Jew and a non-Jew, a Jew fathered by a gentile is not halachically related to his father's other children. (Of course, there is also no concern regarding the possibility of the biological father having another child who will mistakenly assume that he has no brothers and whose widow will thus not realize she is bound by the *yibum* obligation, as this obviously does not apply to gentiles.) The other concerns, however, seem to apply. Artificial insemination with a non-Jew's sperm creates a child without a Jewish father, and the *yibum*-related concerns involving his mother and half-brothers are relevant in such a case. Rav Waldenberg argues that if *Chazal* were concerned about the remote possibility that a woman who remarried less than three months after being widowed or divorced might have conceived from her first husband, then *a fortiori* they would forbid actively and knowingly impregnating a woman with another man's sperm.[29]

Rav Moshe Feinstein addresses this argument in one of his responsa on the subject,[30] and he convincingly refutes the claim. Regarding the principle that אין השכינה שורה אלא על הוודאין, Rav Feinstein notes that there is no uncertainty at all when a child is conceived by sperm produced by a gentile. Halachically speaking, this child simply has no father. The rule established by the Gemara requires ascertaining the identity of every Jew's father; if a person has no father, then quite obviously this requirement is entirely irrelevant. As for the practical halachic consequences of a child who is mistakenly attributed to his mother's husband, Rav Feinstein writes that this concern applies only when no one knows who fathered the child. The Gemara requires a divorced or widowed woman to wait three months before remarrying because otherwise, no one — not even she — will know whether her child was fathered by the first or second husband. Likewise, as we saw earlier, Rabbeinu Peretz ruled that a married woman should not sleep on bedding used by a man other than her husband due to the concern

29. Intuitively, we might respond that we do not have the authority to extend *Chazal*'s decrees beyond the specific contexts for which they were enacted. Thus, although *Chazal* required a divorced or widowed woman to wait three months before remarrying to avoid uncertainty about her child's pedigree, we cannot forbid artificial insemination despite the fact that it poses the same concerns. However, as discussed earlier, Rabbeinu Peretz forbade married women to sleep on bedding that had been used by a man other than her husband due to the possibility that she might conceive with that man's sperm, and the child will be mistakenly identified as her husband's son. Rabbeinu Peretz clearly works off the assumption that *Chazal*'s enactment requires avoiding all situations of uncertain pedigree.

30. Referenced above, note 24.

that she might conceive from his sperm and the child will be misidentified. In that case as well, no one will know that the child presumed to have been fathered by the mother's husband is actually a different man's child.

In the case of a child conceived through artificial insemination with donor sperm, by contrast, the parents know full well that this is not their biological child. The requirement of הבחנה was not instituted for situations in which the parents know the child's biological origins but others might not. If הבחנה would, in fact, apply in such cases, Rav Feinstein argues, then *halacha* would have forbidden adoption, since people might mistakenly assume that a couple's adopted child is their biological child. The concept of הבחנה was introduced to prevent situations in which no one, including the mother, knows who fathered a child. Therefore, Rav Feinstein contends, the Gemara's discussion of הבחנה has no bearing whatsoever on the question surrounding the permissibility of artificial insemination.[31]

We might add another reason to discount this challenge to Rav Feinstein's ruling. The Gemara addresses the case of a widow or divorcee who wishes to remarry, and in order to avoid misidentification of the child's father, it requires her to wait three months. In such a situation, there is a very reasonable measure that can be taken to avoid the risk of attributing the child to the wrong father — a three-month waiting period. There is no reason to assume that *Chazal* would apply this measure in the situation of a woman who has no other possibility of bearing children. For a woman married to an infertile man, artificial insemination with donor sperm represents the only opportunity to become a mother. Thus, even if *halacha* prefers producing children with a definitively-identified Jewish father, we cannot presume, without compelling evidence, that this preference suffices to deny a woman the possibility of bearing children.

לא תהיה קדשה

A later edition of *HaMa'or* featured an essay by Rav Yosef Eliyahu Henkin strongly condemning artificial insemination with donor sperm.[32] Among the arguments he advances is that although this procedure does not halachically constitute a sexual act, it might nevertheless fall under the Torah prohibition of לא תהיה קדשה מבנות ישראל (*Devarim* 23:18) — the prohibition against harlotry. As opposed to other prohibitions in the Torah's sexual code, Rav Henkin observes, this law is not formulated as a prohibition against intercourse. Rather, it forbids being a קדשה (prostitute), and not the act per se. Perhaps, then, it refers to what

31. This point is also made by Rav Shlomo Zalman Aurbach, *Minchas Shlomo*, vol. 3, p. 10.
32. *HaMa'or*, Tishrei, 5725.

Rav Henkin terms בלבול הזרע — a woman's absorbing into her body sperm from different men. Conceivably, this could apply even to artificial insemination, when no sexual act is performed.

Rav Henkin adds that *Targum Onkelos* famously translates this verse as a prohibition against marrying a slave or maidservant. The reason for this prohibition, it could be argued, is that, as the Gemara (*Kiddushin* 69a) establishes, עבד אין לו חייס — a servant has no familial connections. Halachically, his children are not regarded as his offspring. Accordingly, Rav Henkin suggests understanding the command לא תהיה קדשה as a prohibition against creating a situation in which a woman may conceive a child who is not halachically related to his father. If so, then undergoing artificial insemination with a non-Jewish man's sperm would transgress this prohibition.

One could easily argue, however, that this is a far-fetched application of the prohibition of קדשה. Stronger evidence is needed to establish that this transgression can be violated without sexual intercourse.

ודבק באשתו

Rav Shmuel Wosner, in his treatment of the topic,[33] boldly asserts that although artificial insemination with donor sperm does not qualify as a sinful intimate act, it is nevertheless forbidden by force of the Torah's earliest description of marriage (*Bereishis* 2:24): על כן יעזב איש את אביו ואת אמו ודבק באשתו והיו לבשר אחד — "Therefore, a man leaves his father and mother and attaches to his wife, and they become one flesh." The Gemara (*Sanhedrin* 58a) cites this verse as the source for the prohibition of adultery as it applies to non-Jews. This verse establishes already from the time of Adam and Chava's creation, before the Torah was given, that a man "clings to his wife," implying that he must avoid physical relationships with the wives of other men.[34] *Tosfos* (*Kiddushin* 13b) comment that although a separate Torah prohibition forbids adultery for Jews, this verse from the time of man's creation is relevant even to us, adding a *mitzvas asei* (affirmative command) to avoid physical unions with other men's wives, alongside the *lo sa'aseh* (prohibition) forbidding adulterous acts.

Rav Wosner claims that the command of ודבק באשתו, unlike the *lo sa'aseh* of adultery, refers to the production of offspring, and not to the act of sexual intimacy. He bases this contention on Rashi's interpretation of this verse in his Torah commentary: הולד נוצר על ידי שניהם ושם נעשה בשרם אחד — "The child is created by them both, and there their flesh becomes one." Accordingly, this

33. *Shevet Ha-Levi* 3:175.

34. In the Gemara's words, ודבק באשתו ולא באשת חבירו.

verse introduces a prohibition not against sexual intercourse with another man's wife, but against creating a child with another man's wife. Hence, impregnating a woman with another man's sperm is forbidden, even if no sexual act occurs.

It seems highly questionable, however, whether we can reach such a far-reaching practical halachic conclusion based on this inference from Rashi's Torah commentary.[35]

Other Concerns

Numerous *poskim* forbade the practice of artificial insemination with donor sperm due to the deleterious spiritual effects of conceiving children from members of foreign nations. These *poskim* note the comment of the *Sefer Ha-Chinuch* (560), ואין ספק כי טבע האב צפון בבן — "There is no doubt that the father's nature is embedded within the son." Therefore, in order to preserve our nation's singularity and purity, it is argued, we must not allow creating Jewish children from non-Jewish fathers.

This is the theme of a lengthy and strident letter by the Bobover Rebbe printed in 1964,[36] and it is a point emphasized by Rav Waldenberg in the beginning of his treatment of the topic.[37] Rav Waldenberg emphatically states that halachic arguments are unnecessary to establish the prohibition of such a practice, given its harmful spiritual effects. He writes that he was compelled to present technical halachic reasons for prohibiting artificial insemination with a gentile's sperm only because there were those who permitted the procedure — referring, quite obviously, to Rav Moshe Feinstein.

We must wonder, however, whether these "mystical" concerns suffice to compel a woman to lifelong childlessness. While we would of course ideally prefer producing Jewish children naturally, through the union between a lawfully wedded husband and wife, it seems difficult to understand why, when a woman cannot conceive from her husband, we would deny her the joy and satisfaction of raising children due to mystical concerns that do not appear to have any halachic basis.[38]

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35. We might also add that Rabbeinu Peretz, as discussed, forbids a married woman to put herself in a situation where her body might absorb another man's sperm only because the child will be mistakenly attributed to her husband. According to Rav Wosner's theory, this should be forbidden also due to the concern of accidentally violating the prohibition of ודבק באשתו.
36. *HaMa'or*, Tishrei, 5725.
37. *Tzitz Eliezer*, vol. 9, p. 251.
38. Rav Henkin (in the essay referenced above, note 31) wrote that if the husband is biologically incapable of producing children, the couple should adopt orphans in lieu of bearing

This consideration is noted by Rav Shlomo Zalman Auerbach at the outset of his discussion of the topic.[39] After noting the adverse spiritual effects of conceiving through artificial insemination with a gentile's sperm, Rav Auerbach writes:

> אך היות ובשביל רוב הנשים הבאות לשאול על כך והנכונות לפעולה זו ה"ז ממש שאילת חיים, כיון שאי אפשר לעשות ההזרעה מישראל...חושבני דכל זמן שחכמי הדור לא גזרו איסור ברור על כך שומה עלינו לברר מצד ההלכה אם מותר או אסור.
>
> However, since for most of the women who come to ask about this, and who are prepared to undergo this procedure, this is an actual question about life, as the insemination cannot be done from a Jew…I think that as long as the sages of the generation have not decreed a clear-cut prohibition against it, it behooves us to determine halachically whether this is permissible or forbidden.

Rav Auerbach then proceeds to show that there is no clear halachic prohibition against such a procedure. Nevertheless, his close disciple, Rav Yehoshua Neuwirth, reported that despite this conclusion, Rav Auerbach did not permit artificial insemination as a matter of practice.[40]

Another consideration that has been raised is that of צניעות ("modesty"). The aforementioned *poskim*, as well as others,[41] contended that it is simply inappropriate for a married woman to receive in her body the sperm produced by another man. Even Rav Moshe Feinstein, who permitted artificial insemination in principle, writes that it should generally be discouraged, as it could create tension in the marriage.[42]

Once again, however, we must ask whether a couple that sincerely wishes to have and raise a child should be denied this opportunity due to this concern. While we can certainly understand discouraging this option if the husband has misgivings about the injection of another man's reproductive material into his wife's body, it is hard to forbid this practice if the husband is fully on board.

Unmarried Women

All of the essays and responsa referenced until now dealt with the situation of a woman married to an infertile husband, who desires to conceive by receiving

children. While this solution might be satisfactory to some childless couples, we cannot overlook or discount the natural desire of a woman to produce children of her own.

39. *Minchas Shlomo*, vol. 3, pp. 8–9.
40. Cited in *Nishmas Avraham*, vol. 3, p. 44.
41. See, for example, Rav Yechiel Yaakov Weinberg's responsum referenced above, note 9.
42. שייך שיצא מזה קנאה גדולה לבעלה ולכן אין זה עצה טובה (*Iggeros Moshe*, E.H. 4:32:5).

the sperm of another man. Most of the reasons given for forbidding the practice would apply also to unmarried women seeking to conceive through artificial insemination.[43] As we saw, however, these reasons are either based on tenuous theories, or do not appear to outweigh the legitimate and noble desire of women to bear children. The question then becomes whether Rav Moshe Feinstein's ruling that artificial insemination could, in some circumstances, be an option for a married woman, would apply also to single women who fear that they will not find their soulmate before they become biologically incapable of conceiving.

Rav Shlomo Zalman Auerbach — who, as we saw earlier, ruled that artificial insemination is, in principle, permitted for married women — opposed artificial insemination for unmarried women. As cited in *Nishmas Avraham* (vol. 3, p. 49), Rav Auerbach expressed the concern that as the child grows up and is raised by a mother who had never married, false rumors will spread that he is the product of an illicit union. The halachic basis of this consideration is the ruling of the Rama (E.H. 1:13) that a woman should endeavor to get married in order to avoid suspicions that she engages in illicit relationships. It has been argued that if a woman should not remain unmarried by choice due to the concern of disparaging rumors, then she should certainly not choose to become pregnant without marrying, which would appear even more suspicious.

One could easily argue, however, that this concern would not apply nowadays, when artificial insemination has become a standard reproductive procedure, and when the phenomenon of unmarried women conceiving through this method is becoming increasingly common. When a religiously observant single woman chooses to undergo artificial insemination, and openly speaks about having conceived her child in this manner, it is difficult to imagine anyone seriously raising allegations about sexual misconduct.

Rav Auerbach also raised the concern that since the process of artificial insemination requires a man to ejaculate outside of the context of intercourse, something that *halacha* strictly forbids, conception through this method could result in a spiritual defect in the child.[44] Since this child was created through an inappropriate autoerotic act, he may be spiritually "tainted," and this is therefore a situation that ought to be avoided.

However, as noted by Rav Mordechai Halperin,[45] the consensus among the

43. The two exceptions are the theory that the specific prohibition of adultery relates to the introduction of another man's sperm into the body (based on the verse לא תתן שכבתך לזרע) and the concern of creating tension in the marriage.

44. Rav Auerbach's formulation, as cited in *Nishmas Avraham*, is: יש לחשוש שזרע פגום שנולד בעבירה של מוציא שכבת זרע לבטלה, יתכן שיש לזה השפעה גם על הנוצר מזה.

45. In an article published in *Assia*, vol. 20, pp. 113–123, available online at http://www.

poskim permits a man to produce sperm without intercourse for the purpose of reproduction. Therefore, even if we accept the premise that fertilization with sperm ejaculated through a forbidden autoerotic act would result in a spiritual deficiency that overrides the value of producing a child, this is entirely irrelevant in the case of sperm that was produced specifically for the purpose of insemination. Moreover, this assumption itself seems highly questionable. If a woman's choice is either to beget a child with sperm that had already been produced through halachically illegitimate means, or to never have children, there is little reason to assume that Torah law and ethics would encourage her to choose the latter option.

Indeed, Rav Yechiel Yaakov Weinberg, in the aforementioned essay, writes that as long as the sperm is taken from a non-Jewish man, there should seemingly be no halachic barrier to artificial insemination for an unmarried woman. However, Rav Weinberg stopped short of permitting this as a practical matter, emphasizing that his comments were intended only for the purpose of theoretical halachic discussion.[46]

A number of contemporary *poskim* discourage this practice out of practical and societal concerns, such as the difficulties the child will experience as he or she grows up without a father, and the potential long-term consequences of formally authorizing reproduction without marriage.[47] However, while these concerns are certainly valid, it is doubtful whether they suffice to forever deny a woman the joy and privilege of having a child.

כך עונים את המעיקות?

In conclusion, it is worth taking a moment to reflect upon the way our Sages taught us to view the plight of childless women.

The Torah tells of how Rachel expressed to her husband, Yaakov, her anguish over her inability to conceive: הבה לי בנים ואם אין מתה אנכי — "Give me children, and if not, I will die!" (*Bereishis* 30:1). Yaakov responded angrily, rhetorically asking his wife, התחת אלוקים אנכי אשר מנע ממך פרי בטן — "Am I in the place of God, who has withheld from you fruit of the belly?" (30:2).

The Midrash (*Bereishis Rabba* 71:7) sharply criticizes Yaakov for his angry

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medethics.org.il/website/index.php/he/research/2012–02–29–11–36–06/2012–03–05–10–08–21/101–2012–03–05–10–02–56/1008–2012–03–22–17–04–192.

46. Referenced above, note 9. The essay was later printed in *Seridei Eish* 3:5.

47. See the letters of several leading sages cited by Rav Tzvi Ryzman in *Ratz KaTzvi — Even HaEzer, Poriyus*, pp. 108–111, and the transcriptions of interviews with leading contemporary *poskim* printed below.

response: אמר לו הקב"ה: כך עונים את המעיקות? — "The Almighty said to him [Yaakov]: This is how one responds to women in distress?"

Rachel's cry to Yaakov was, fundamentally, inappropriate, as she appeared to cast upon him the blame for her infertility. Nevertheless, it was wrong for Yaakov for react harshly. What Rachel needed at that time was sensitivity and compassion, not a cold, rational response to her outburst of raw emotion. The inability to bear children naturally causes a woman a great deal of anguish and distress, and we are bidden to show them support and sensitivity.

In our day and age, *Chazal*'s proclamation, כך עונים את המעיקות?, must inform our attitude not only to married women struggling with infertility, but also to the large number of God-fearing women who have been unable to find a suitable marriage partner. As these women grow older, they endure not only the anguish of loneliness and the absence of a soulmate, but also the anguish of childlessness. They deserve our support, encouragement, and assistance.

While sensitivity for מעיקות certainly does not override *halacha*, and there is no justification whatsoever for suspending or overturning clear-cut halachic dictates in order to help a woman conceive, our concern for their plight must certainly be taken into consideration and introduced into the discussion as a significant factor. As the trend towards artificial insemination as an option for unmarried women continues to gain traction, this issue will become an increasingly important one for modern-day *poskim*, who will need to delicately balance the relevant halachic and practical concerns with the natural and noble desire of women to bear and raise children. The sensitivity owed to the מעיקות requires us to seriously consider legitimate grounds for leniency — which, as we have seen, indeed exist — as part of our effort to give all women who so desire the ability to raise Jewish children.

INTERVIEWS

Rav Herschel Schachter on *Headlines with Dovid Lichtenstein**

Yes, it's permissible, but you're creating a *yasom* (orphan). The child is going to wonder who the father is. The woman feels terrible, she has no family, but now she's going to create a child who is going to be a *yasom*, and the child is going to wonder, maybe the mother had an affair with somebody. It's not at all recommended. The *gedolim* said it's not recommended. I know in Dr.

Abraham's *sefer* about *halacha* and medicine…he says it doesn't make sense that a single girl should have artificial insemination in order to have children. It's not right.

* Broadcast on 2 Shevat, 5777 (January 28, 2017).

Rav Dovid Cohen on *Headlines with Dovid Lichtenstein**

Unfortunately, as a *rav* who deals with human beings, [I know that]…there are many women who have this situation. I maintain that there is an איסור גמור. It is an act of selfishness, really, to create a *yasom*. Let's forget about other problems. This person, because she does not want to be alone, which is very understandable, is creating an individual [in a condition] that the Torah says is the most pitiful — the widow, the foreigner, and the orphan are really lonely people. The *yasom* is a very lonely person… It's one of the biggest *aveiros* that I can conceive of, and I say it's איסור גמור to do it. This is besides the fact that it borders on ומלאה הארץ זמה — the whole concept of becoming pregnant with the sperm of somebody who is totally unknown. That [concern] can perhaps be handled, because it could be the sperm of an אדם כשר, though you're getting into great debates among the *poskim*.

In any event, I feel it's איסור גמור to do this. The Torah says that a *yasom* is unhappy, and this child is almost guaranteed to be an unhappy child… A *yasom* is a *yasom* is a *yasom*.

* Broadcast on 9 Shevat, 5777 (February 4, 2017).

Rav Mendel Shafran on *Headlines with Dovid Lichtenstein**

According to *halacha*, בן הפנויה כשר לבא בקהל [the son of an unmarried Jewish woman who was impregnated by a non-Jewish man is allowed to marry into the Jewish nation]. As for whether she should do it or not — it's not simple to do it. He will be the child of a single parent. I don't know if she'll have a lot of *nachas* from him… This is not the way to solve a problem. It will just make bigger problems. She will have to tell the whole city that she had a child like this… And how will she bring up this child? The child is going to have a lot of problems…

* Broadcast on 9 Shevat, 5777 (February 4, 2017).

Dr. David Pelcovitz on *Headlines with Dovid Lichtenstein**

There is a series of studies that were done in London that looked at single mothers by choice — most of whom got married later in life, who could not find the right person, women who would have loved to get married but just couldn't find anybody. These are women in their late 30s and early 40s who decided to conceive by donor insemination. The researchers compared a group of these women and their children with a group of women who were married and conceived by donor insemination because of medical reasons. They looked at it in an interesting way — the quality of the mother-child relationship, and how the kid does.

In every study done that I've seen, both here and in *Eretz Yisrael* — though these are not large-scale studies, around 50 or 60 people in each comparison group — the kids of single mothers seemed for the most part to be doing just as well, if not better, than the others. For example, when they compared in London those who are single mothers by choice and their children, with kids of regular marriages conceived by donor insemination, they found no differences in parenting quality, or in the kids' adjustment. The reason is because of everything we know about the problems in cases of single mothers. These are largely due to the fact that children of divorce are at risk for obvious reasons — because they were exposed to conflict, and there are often financial problems afterward. Here [with single women having children through donor insemination], you don't have it. Here's a kid who is very much loved, who is, in many cases, brought into the world by a more mature mother. Most of these mothers are financially able to care for their child, are settled, and the child is incredibly loved.

Of course, I certainly understand what the various *poskim* are saying. It makes a lot of sense — how can you bring a child into the world who is not going to have a father actively involved? But when you look at it more empirically… it seems there is no obvious kind of difference in any findings. Everything they have found thus far has been positive.

However, here's the problem: This hasn't been going on long enough for us to have permanent answers. Right now, the studies are of kids who are, let's say, six years old. We don't know what it's going to look like when these kids are fifteen years old and much more aware of who they are and the differences between them and kids who have fathers actively involved. But in terms of main measures, there is a wonderful relationship between the kid and his or her mother, and there tends to be great functioning all around, in any way they could measure it.

When a child grew up with a father and then lost the father — that's the

yasom. Here, we're dealing with a child who never knew anything else. There's no loss of any kind. They're born to a mother who wanted them more than anything in the world. They are born to a mother who, in the studies, is as psychologically healthy as any other women. The reason they are single has nothing at all to do with psychological health. It's a whole different psychological process.

The reality is that we don't know. As these kids get older, and many of them will know how they came into this world — because the tendency of women in these situations is to share the story of how the children came into being — we don't know how this will look as their kids become old enough to be self-aware and aware of how they are alike and different. But in the short term — the first five or six years of life — I am not aware of any studies that show anything other than significant evidence of good functioning in every area that has been looked at.

* Broadcast on 9 Shevat, 5777 (February 4, 2017).