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AIDS: A JEWISH PERSPECTIVE

IDEOLOGICAL ISSUES

Societal responses to the very serious problems posed by the scourge of AIDS (acquired immune deficiency syndrome) reflect, at least in part, the epidemiological association that exists between the rampant spread of that deadly disease and homosexual activity. The fact that AIDS has disproportionately affected members of the homosexual community has certainly had an impact upon how the problems associated with AIDS are viewed in our society. In some sectors, there is a strong tendency to ignore the fact that not all instances of AIDS infection are the product of homosexual conduct, or even of heterosexual promiscuity or intravenous drug abuse. Unfortunately, many cases of AIDS are directly attributable to blood transfusions, as is reflected in the relatively large number of hemophiliacs who have contracted that disease, and to other entirely innocent forms of contact with the blood or, possibly, body fluids of previously infected persons.

There are individuals who have adopted a moralistic posture in asserting that, since the condition is presumed to be self-inflicted in nature and the product of odious conduct, society is relieved, in whole or in part, from the obligations usually associated with alleviation of suffering. Alternatively, the disease is regarded as the visitation of divine punishment upon those who engage in perverse and unnatural conduct. For some, perception of AIDS as an entirely deserved punishment serves to mitigate feelings of compassion that would ordinarily be evoked in relating to victims of a debilitating illness.

Members of the gay community, on the other hand, regard themselves as victims of prejudice and discrimination. They fear that measures that might be taken by society to prevent the spread of AIDS will serve to brand them as pariahs. Precautions instituted by health-care professionals to protect themselves from contagion are regarded by homosexuals as inherently discriminatory. It is against this backdrop that the attitude of Judaism vis-à-vis treatment of AIDS victims must be assessed.

It should be superfluous to state that Judaism regards homosexual conduct as a serious transgression of divine law. Papers, statements and resolutions emanating from Reform, Conservative and Reconstructionist clergy notwithstanding, Leviticus 18:22 makes it unambiguously clear that

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homosexual behavior cannot be accepted with equanimity. Even more pertinent to current changing socio-cultural mores regarding homosexuality is a statement recorded in the Gemara, *Hullin* 92b. In general, the Sages of the Talmud had very little of a positive nature to say regarding pagan societies of antiquity. One of the very few positive comments that one finds is the statement recorded in the name of Ulla to the effect that, despite the many serious transgressions that were rampant in those societies, and despite the fact that members of those societies engaged in every conceivable form of deviant sexual behavior, including homosexuality, they nevertheless had the grace not to draft a marriage contract as a means of validating a homosexual relationship.

Reflected in that statement is a keen assessment of the mores that were prevalent in antiquity. Homosexual acts certainly took place. Indeed, the cited Talmudic statement appears to reflect the fact that relationships that we would describe as stable homosexual unions were relatively commonplace. The Sages of the Talmud certainly did not approve of homosexual conduct. But even though, in antiquity, people did engage in homosexual activity and there appears to have been no attempt to restrict such conduct, society nevertheless refused to bestow an official imprimatur upon homosexual relationships. In days of yore it was clearly recognized that such relationships do not deserve societal commendation. The peoples of antiquity earned the approbation of the Sages because, despite their rampant immorality, they recognized that society cannot bestow its Good Housekeeping seal of approval and pronounce a blessing upon homosexual unions.

One of the classical commentators, R. Isaac Arama, *Akeidat Yitshak, Bereishit, sha'ar 20,* observes that the homosexual conduct of Sodom was punished much more severely than the homosexuality that was rampant in other cities. He asserts that the inhabitants of Sodom were singled out for censure and punishment because they had institutionalized the form of deviant sexual activity that has become associated with the very name of their city. As recorded in *Bereishit Rabbah* 50:10: "The people of Sodom agreed among themselves that any stranger entering the city would be subjected to homosexual intercourse." Sodomy was not unique to Sodom. But only in Sodom was it accepted as a matter of course; only in Sodom did it become *de rigueur*. In other societies such acts were forbidden by statute, although the law was honored only in the breach. In Sodom, declares *Akeidat Yitshak,* not only was such conduct decriminalized but it was ritualized as well. Removal of the odium associated with a transgression is potentially more serious a matter than the transgression itself and it was for that reason that the people of Sodom were punished so severely.

The current demand for recognition of homosexual relationships as an acceptable alternative lifestyle is based, in large measure, upon a claim that there are some people who, genetically, or as a result of environmental influence, or both, are not heterosexual in orientation but, on the contrary,

are homosexual by virtue of natural disposition. Hence it is argued that their behavior is not at all deviant; rather, for those individuals, homosexuality is entirely normal and natural.

The present efforts on the part of the homosexual community to secure recognition of their sexual conduct as a morally acceptable lifestyle lends new poignancy to rabbinic exegesis of Leviticus 18:22. Read literally, the verse declares, "And with a man you shall not lie as one lies with a woman; it is an abomination." The Gemara, *Nedarim* 51a, renders the concluding portion of that passage as "*to'eh atah bah*—you go astray in it." The rabbinic interpretation is not intended to confute the plain meaning of the verse. For the vast majority of humanity, homosexual activity is deviant behavior; it is unnatural and repugnant—an abomination. To speak of such conduct as losing one's way—"going astray"—is almost to minimize the infraction. It may not be reading too much into the rabbinic text if it is understood as directed to homosexuals who feel no repugnance regarding their conduct. A person suffering from a homosexual orientation "goes astray" if he believes such activity to be acceptable because it does not appear to him as an abomination. Countenancing a homosexual lifestyle as morally or socially acceptable constitutes deviation from divinely established norms and hence social institutions legitimizing such arrangements cannot be accepted with approbation.

The validity or non-validity of the claim that homosexuality is natural rather than aberrant, or a normal state rather than an illness, is irrelevant to Jewish teaching regarding this matter. Not everything that is normal and natural is also licit and morally acceptable. Monogamy, for example, is probably not natural to the human species. There is very little evidence, if any, that, were man left to his own inclinations, he would adopt a monogamous lifestyle. Yet Western society has commonly maintained that adultery is to be eschewed and that monogamy represents a moral value despite the fact that a monogamous life-style is not dictated by emotional, physiological or sexual impulses. Divine commandments, by their very nature, are designed to curb and to channel human desires. They are not necessarily reflective of that which comes naturally to man.

Rambam makes this point quite forcefully in his *Eight Chapters* which serves as the introduction to his commentary on the *Ethics of the Fathers*. Among modern philosophers it was Kant, in his *Groundwork of the Metaphysics of Morals*, who grappled with the question of whether, ideally, one should act in a virtuous manner out of a desire to do so or whether it is a greater virtue to behave morally in defiance of natural desire. Rambam, in addressing essentially the same question, distinguishes between various categories of commandments and points out that while the Torah does, of course, proscribe certain forms of behavior that are unnatural and instinctively abhorrent there are also many commandments that serve to forbid conduct that is entirely normal and natural. There is no natural repugnance

associated with eating the flesh of swine; nor is there any reason to regard carnivorous birds as naturally repulsive. The prohibitions contained within the dietary code are not designed to condition us to react negatively to forbidden foods. Quite to the contrary, the Sages teach that, when confronted by that which is forbidden but desirable, one should not at all endeavor to develop repugnance or distaste. All reports indicate that French cuisine is a gastronomical delight. A Jew is under no obligation to declare that he has no appetite for such food because authentic French cooking requires the mixing of meat and dairy products in preparing sauces and the like. Quite to the contrary, the appropriate response is "*Afshi, aval mah e'eseh? Avi she-ba-shamayim gazar alai!*—I wish to eat it, but, what can I do? My Father in heaven has bound me by His decree!" The appropriate response is a frank and candid recognition that in the absence of a divine command one would naturally be inclined to enjoy such delicacies.

Man is a corporeal being and as such is subject to various and sundry desires. Some objects of desire are forbidden to man; others are consecrated and commanded; virtually all are subject to regulation. Man, by nature, is a sensual and sexual being. Fornication, extramarital liaisons and adultery would not necessarily be foresworn by heterosexuals if not for divine decree. It may well be the case that, for some persons, homosexual conduct is an entirely analogous orientation. If so, such individuals are confronted by yet another potential stumbling block which they must circumvent. Their homosexuality is yet another aspect of human nature in which natural tendencies must be confronted and subdued and represents an additional—and perhaps more difficult—trial. The challenge may be onerous in the extreme, but it may not be ignored. Others, more fortunate in not having been burdened in this manner, are duty-bound to exhibit compassion and solicitude and to provide all possible support to those endeavoring to overcome such inclinations.

For some, the challenge is undoubtedly greater than for others, but the standard is enunciated with utmost clarity for all. Commendation of pagans who did not regularize homosexual liaisons by drafting a marriage contract reflects an awareness that there is a difference between engaging in illicit conduct even while recognizing that such conduct is wrong and between regularizing and formalizing that type of conduct. We may—and indeed must—recognize that the flesh is weak and be understanding of human frailties. But to understand is not to condone, to be solicitous is not to approve.

The sharp distinction that Judaism makes between sinners and their sins is eloquently expressed by the Gemara, *Berakhot* 10a, in an exchange between R. Meir and his wife Beruria. There were a number of wicked men in R. Meir's locale who molested him in some way and caused him severe grief. R. Meir prayed for their death. Beruria assumed that her husband regarded such prayer as justified on the basis of Psalms 104:35

which is conventionally rendered "Let sinners cease out of the earth." But Beruria objected, "Is it written *hot'im*? It is written *hatta'im*!" The Psalmist carefully calls for the eradication of sin, not of sinners. Beruria adduced further proof for her understanding of this term from the concluding phrase of the verse, "and let the wicked men be no more." If sinners have been eradicated then of course there are no longer any wicked men. Hence, according to the conventional interpretation, the concluding words are entirely superfluous. However, explained Beruria, if *"hatta'im"* is rendered as "sins" the concluding phrase is entirely cogent: "Let sins cease out of the earth" and when that is accomplished "wicked men" will be no more. Accordingly, Beruria counseled her husband, "Rather pray for them that they should repent and they will no longer be wicked!" The Gemara reports that R. Meir prayed as his wife directed and the wicked individuals who had abused him did indeed repent. Beruria was one of the greatest women in Jewish history and this is clearly an instance in which her insight was accepted by Judaism as expressing a normative teaching.

I remember very vividly an incident that occurred a number of years ago. A young lady in my community called my home the day after *Rosh ha-Shanah* and requested an appointment to speak to me. When I indicated that since this was an extremely busy time of the year I would prefer to see her a week or two hence, she responded by saying that it was absolutely essential that she see me before *Yom Kippur*. Of course, I arranged to see her immediately.

The young lady came to visit me and said, "Rabbi, this is the time of year when Jews become afflicted by pangs of guilt. Their consciences begin to bother them." I answered, "Yes. Is there any way that I may be of help to you?" To this she responded, "No. It's not I who needs help; it is my boyfriend who needs your help."

The young lady proceeded to tell me that she had been having an affair with a young man who, it turned out, was an occasional worshipper in my synagogue. And then she asked for my help. Naive as I was, I assumed that she was about to solicit my assistance in hastening the process of their becoming bride and groom and thereby regularizing and legitimizing their relationship. Not at all! She proceeded to tell me: "Rabbi, I want you to speak to him so that he won't feel guilty about it. A guilt complex isn't healthy. This is the time of year when he becomes overwhelmed by guilt and his guilt is tormenting him."

The plight of a guilt-ridden person properly evokes empathy. Guilt, too, must be recognized and dealt with in terms of the emotional turmoil it may bring in its wake. Yet it is assuredly the case that one dare not bestow an ecclesiastic imprimatur upon an arrangement that is not, and cannot be, condoned by Judaism. No matter how much sympathy one may have for the individuals involved, one cannot lend support to such a lifestyle.

Certainly, in our associations with individuals who are afflicted with

AIDS we must react with compassion and love insofar as those individuals are concerned. However, that acceptance need not, and dare not, encompass any form of illicit conduct that may lie at the source of the affliction.

A distinction must be noted between homosexuality and homosexual activity. The former is an inclination, a predisposition that may or may not express itself behaviorally. The latter is an act that may be engaged in by a person who is homosexually oriented or by a heterosexual who has no such predisposition but chooses to perform homosexual acts because he wishes to experiment, because he finds such acts enticing precisely because they represent a form of forbidden fruit, or simply because he seeks to flout accepted mores.

To be sure, Judaism provides for punishment to be meted out to transgressors. However, in Judaism, punishment is not designed to serve as retribution but rather as a deterrent. Punishment as a deterrent, as a means of containing the spread of conduct regarded by society as abhorrent, is entirely consistent with the highest degree of sympathy for the perpetrator. Society may even recognize that the perpetrator is himself, in a sense, a "victim" of genetics and/or of his environment and nevertheless proceed to impose sanctions for the express purpose of discouraging imitation on the part of others who cannot plead such mitigating circumstances. Moreover, for the past 2,000 years, punishment for infraction of such transgressions has been a dead letter. Even prior to the destruction of the Temple and the advent of the present exile, we lost the ability to impose penal sanctions as prescribed by Jewish law. By virtue of its own provisions, Jewish law regards reinstitution of the sacrificial order and restoration of the Sanhedrin to its chamber within the sanctified precincts of the Temple Mount as necessary preconditions that must be fulfilled in order to make possible the administration of biblically prescribed punishment for infractions of such nature.

Accordingly, the question of punishment is one that should not arise with regard to our relationship vis-à-vis individuals who engage in deviant sexual behavior or, for that manner, with regard to our relationship vis-à-vis any person who violates any of the commandments of the Torah. Insofar as our attitude is concerned, the act must be deplored, but the person who commits such acts remains a Jew to whom our hearts and arms are open. Such a person remains a brother and our relationship to him must be the fraternal relationship one has with a brother who has strayed from the values and mores of the family, i.e., a brother to whom one's arms are always open and who will be warmly and affectionately welcomed at all times.

Punishment, to be sure, comes not only at the hands of man but at the hands of Heaven as well. It is not surprising, therefore, for a malady to be regarded as a divine visitation in the nature of punishment for misdeeds.

This is true not only with regard to AIDS but with regard to other forms of affliction as well. Nevertheless, no one, other than a prophet, can declare with certainty that there is a direct cause and effect relationship between a specific misdeed and any particular misfortune. Who knows when God chooses to punish and what means He utilizes for that punishment? But at the same time the Sages admonish, "If a person perceives afflictions coming upon himself, he should scrutinize his deeds" (*Berakhot* 5a). Judaism, without pointing a finger of accusation, blame or guilt, has always regarded any form of adversity as a divine beneficence, as a form of prodding initiated by God and designed to rouse the afflicted person from complacency so that he will stand back, scrutinize his deeds and examine his lifestyle in order to identify those aspects of his conduct, behavior and lifestyle in which there is room for improvement. And if, as King Solomon informs us, there is no person on earth who consistently does good and never transgresses,[1] there must always be at least some room for improvement. Accordingly, it is impossible to declare with certainty that misfortune or affliction is totally unrelated to one's prior conduct. One ignores what is even merely a possible divine admonition only at one's own peril.

Nevertheless, there certainly are situations in which what may be perceived as a punishment is, in reality, not a punishment at all. The Gemara, *Ketubot* 30a, declares: "Everything is by the hands of Heaven except chills and heat, as it is said, 'Chills and heat are in the way of the stubborn; he who safeguards his soul distances himself from them' (Proverbs 22:5)." A person who goes out in the heat of the day and suffers a sunstroke or a person who does not seek shelter in inclement weather and suffers the results of exposure has only himself to blame. A phenomenon of such nature is not necessarily punishment for misdeeds but is quite likely the necessary result of a cause and effect relationship inherent in nature. Surely, if a person puts his hand into a fire he should not expect God to work a miracle so that the hand will not be burned. One would have to be an extraordinary individual to merit divine intervention in natural processes in order to escape the necessary effect of a physical cause. This consideration applies to AIDS as well. Exposure to contagion, whether through transfusion of contaminated blood or sexual intercourse with an infected person, is no different from exposure to extreme heat or cold in a sense that the resultant disease is the product of man's own folly or negligence.

At the same time, one must not forget that even the laws of nature are the product of divine authorship. Although, for the individual victim, AIDS maladies may be natural rather than providential, nevertheless, it is incumbent upon society to examine the present day AIDS epidemic in order to determine what can be learned from it. From a global perspective, perhaps mankind is being taught a lesson. Were our societal standards in conformity with divinely mandated norms the opportunity for individual contagion would simply not arise. In the ultimate sense, every phenomenon

is a manifestation of providence. There can be no doubt that it is divinely intended that we take stock of our social standards and practices and realign them in a manner consonant with divine teaching.

But at the same time we dare not forget that, even insofar as any individual victim is concerned, homosexual conduct and drug abuse are certainly not the only means of AIDS transmission. There are countless individuals who have contracted AIDS in a manner which leaves them totally and completely blameless. Many individuals have contracted AIDS as a result of blood transfusion during the period after the disease first became manifest and before screening of prospective blood donors for the presence of HIV (human immunosuppressive virus) became commonplace, i.e., approximately between 1978 and 1985. Some few victims are members of the health-care professions who have led an exemplary lifestyle, individuals who have never had contact with controlled substances or engaged in deviant sexual behavior, but who have unfortunately contracted this disease as a result of a needle prick, scalpel wound or exposure of skin lesions to infected body fluids.

A response based upon the notion that AIDS victims are simply suffering the just results of their immoral actions is entirely inappropriate and, in many cases, is based on a fundamental error. How, then, should society relate to AIDS victims? Society is duty-bound to treat victims of AIDS as it treats the victims of any other infectious disease. Specifically, society is obligated (i) to do everything in its power to eliminate the suffering of individuals who are afflicted; (ii) to prevent the spread of the disease; and (iii) to commit its resources to discovering a cure.

II. PRACTICAL ISSUES

1. Screening Programs and Confidentiality

The rampant spread of AIDS gives rise to a number of practical issues that must be addressed from a Jewish perspective. In particular, society's obligation to prevent the spread of AIDS gives rise to a moral issue that must be addressed forthrightly. Whether or not society should engage in screening programs in order to identify HIV carriers and, if yes, the scope of such programs are questions that must first be referred to epidemiologists for evaluation. On a primary level, the question is whether such testing is necessary or effective. But clearly, in some areas and for some segments of our population, the answer must be in the affirmative. Presumably, experts in such matters can analyze data and identify sociological and demographic criteria to be used in identifying classes of individuals for whom testing is indicated.

Assuming this to be the case, the moral issue that must be confronted

is whether individuals may be compelled to submit to such testing against their will. Compulsory testing is certainly a gross violation of individual liberty. Should a possible HIV carrier be permitted to assert a right to personal autonomy in refusing to participate in such testing programs?

A resolution of this question must be sought within a much broader conceptual framework. Every culture and every society develops a matrix of values and ideals by which it seeks to define itself. The notions of freedom and personal autonomy figure prominently among the great American ideals to which our society subscribes. In a democratic country it is assumed that no one is told how to order his personal life or what risks he may or may not assume. Although individuals are restrained from committing antisocial acts, generally speaking, no one is compelled to perform positive acts against his will, even for his own good.

There is an unfortunate tendency among Jews to engage in a certain form of behavior that is best described as "me-tooism." This behavior consists of asserting that whatever truths others have taught, we taught much earlier than they; whatever moral or social values they profess, they acquired from us. Of course, democracy and freedom are wonderful; indeed, everyone subscribes to those values. Ergo, they must be values that Judaism taught the world.

This point is illustrated by a German biblical scholar, Benno Jakob, in an intriguing monograph entitled *Auge um Auge*. His discussion focuses upon the concept of *lex talionis*—an eye for an eye, a tooth for a tooth, a hand for a hand, a foot for a foot. Jewish law never understood the biblical passage describing such punishment in a literal manner. There is no evidence whatsoever that such punishment was ever imposed by a Jewish court, no rabbinic text that advocates such punishment and no hint in talmudic sources that the text is to be understood in a literal manner. Halakhic Judaism has consistently interpreted the verse in question as demanding monetary compensation in the form of the value of an eye for an eye, the value of a tooth for a tooth etc. Nevertheless, over a period of millennia, this biblical passage has been cited repeatedly by individuals intent upon excoriating Jews and Judaism. Jews are depicted as a cruel and vengeful people. The law of the Pentateuch is decried as being excessively harsh and punitive in demanding retribution in the form of "an eye for an eye, a tooth for a tooth, a hand for a hand, a foot for a foot" (Exodus 21:24). How could such a widespread calumny arise if the doctrine of *lex talionis* was never part of Jewish teaching? The misconception with regard to Jewish teaching was imparted to the nations of the world via the highly influential writings of Philo of Alexandria. Philo certainly cannot be described as a great halakhic scholar. But, notes Benno Jakob, Philo was not a total ignoramus either. He certainly must have known that, in terms of Jewish tradition, his rendition was a gross misinterpretation of the biblical verse in question. How, then, could he portray this doctrine so erroneously and

allow the nations of the world, through his writings in the vernacular, to acquire such a distorted view of rabbinic teaching? The answer, asserts Benno Jakob, is very simple. Philo was an Alexandrian Jew. In the Hellenistic society in which he lived, turning the other cheek was not regarded as a character trait worthy of emulation. To be the victim of a bad turn and not to respond in kind was viewed as a mark of weakness, as a sign of a lack of manliness. A real man demands his pound of flesh. In that society, virility demanded standing upon one's rights and insisting upon retribution, measure for measure. Benno Jakob asserts that Philo assumed that if such is the value to which society at large subscribes, if such is the accepted ideal, than it must be a Jewish value, a Jewish ideal and a Jewish goal as well. Accordingly, in order to demonstrate that Jews were no less Hellenistic than the Greeks, Philo cited a biblical verse and interpreted it in a literal manner. Jews could then engage in "me-tooism"; Jews could claim to have been the ones who taught this value system to the rest of the world.

However, the values of the world, indeed, of any particular society, change not simply from generation to generation and from decade to decade, but from month to month and even from week to week. Values that were accepted and lauded yesterday are rejected and decried today. In sharp contradistinction, the teachings of Judaism are eternal; those eternal verities are not subject to change. One must be extremely careful to spell out Jewish values with precision and fidelity and not attempt to tailor them to what happens to be in vogue during any particular historical epoch.

This insight is particularly germane with regard to the right to privacy. The right to privacy was first recognized by the U.S. Supreme Court in 1965 in *Griswold* vs. *Connecticut*.[2] It took American jurists more than one hundred and seventy-five years to discover a constitutionally guaranteed right to privacy. And even then the members of the nation's highest court could not agree with regard to which of the various provisions of the Bill of Rights serves as the locus of that right. Nevertheless, prominent Jewish thinkers have asserted that the notion of a fundamental right to privacy is something that Judaism taught 2,000 years ago.[3] Such a statement may not be totally erroneous, but, if the statement is intended to connote a right of privacy whose boundaries are as far-reaching as those enunciated by American courts, it is far from totally correct.[4] Certainly, there exist a plethora of rabbinic enactments that were promulgated over the ages that are designed to preserve and to protect particular rights of privacy. For example, if my neighbor and I enjoy adjacent courtyards, I have the right to compel him to contribute fifty percent of the cost of erecting a fence so that each of us may enjoy the use of his respective backyard in privacy (*Baba Batra* 2a). To be sure, *Sema, Hoshen Mishpat* 154:10, asserts that, according to some authorities, this is a biblically mandated requirement based upon rabbinic interpretation of the verse "And Balaam lifted up his

eyes and he saw Israel dwelling tribe by tribe" (Numbers 24:2). "What did he see?" queries the Gemara, *Baba Batra* 60a. "He saw that the doors of their tents were not aligned one facing the other," answers the Gemara. But even according to these authorities, the requirement reflects, not a right to privacy, but an obligation of *zeni'ut* (modesty) as evidenced by the fact that these authorities rule that this requirement cannot be forgiven by agreement of the parties. Rights can be waived; religious obligations are not subject to disposition by acquiescence of the parties. Other scholars maintain that the underlying rationale is that interference with another person's use and enjoyment of his property constitutes a tort[5] and hence reflects a property interest rather than a personal right to privacy. If this provision of Jewish law is to be regarded as reflective of a right to privacy, it could be so only as the result of a specific rabbinic ordinance establishing a particular right of such nature.

Similarly, in approximately the year 1000, Rabbenu Gershom promulgated an ordinance forbidding a person to read his neighbor's mail. Prior to that enactment there was no general right to privacy that served to assure a person that his correspondence would be inviolate. Specific rabbinic legislation was required in order to establish such a right and specific legislation is required in order to expand such rights. Were we privileged to live in an organized Jewish community having duly appointed rabbinic authorities vested with legislative power they would presumably recognize the need to promulgate decrees banning nonconsensual wiretapping. But, in the absence of such legislation, it is far from obvious that matters such as wiretapping or electronic surveillance are proscribed by Jewish law under the general rubric of a right to privacy inherent in Jewish law.

Obviously, an individual's right to privacy may come into conflict with the needs and concerns of society. American constitutional jurisprudence recognizes that there must be a balancing of interests and that, when there exists a sufficiently significant state interest, protection of that interest takes precedence over the rights of the individual.

Personal liberty may be compromised for promotion of the general welfare of society; but fundamental rights may be infringed only in the presence of a compelling state interest.[6] Judaism posited something akin to the notion of a compelling state interest long before that concept arose in American constitutional law. In the case of an individual who poses a threat to society, the individual's rights to autonomy and integrity of his person are subordinated to the needs of society to the extent necessary to eliminate the perceived threat. That is the case even if the individual in question is in no way morally culpable. In its most extreme form, the irrelevance of legal or moral culpability in such instances is manifest in "the law of the pursuer" *(rodef)*, a provision of Jewish law that pertains in situations in which an individual endangers the life of another. Such an individual must be restrained in order to eliminate the threat to others.

Most significantly, if the only manner in which the aggressor may effectively be restrained is by putting him to death, it is not only permissible but mandatory to take the life of that individual in order to preserve the life of the innocent victim. Unlike American law, which recognizes only a right to self-defense vested in the potential victim, Jewish law posits an obligation to eliminate the aggressor in order to save the victim and regards that obligation as binding not only upon the putative victim but also upon a bystander or a third party who is in no way personally threatened. The obligation to prevent the aggressor from carrying out his planned act of aggression mandates the intervention of every individual—and hence of society as the aggregate of its members—provided that it is possible to rescue the victim. As a duty owed the victim, the discharge of this obligation is in no way contingent upon moral turpitude on the part of the aggressor.

In his classic formulation of the law of the pursuer, Rambam, *Hilkhot Rozeah* 1:9, posits a situation in which the fetus threatens the life of the mother as the sole exception to the prohibition against feticide. Elimination of the fetus under such circumstances is justified, according to Rambam, because the fetus is a rodef, an aggressor bent upon causing the death of its mother. Assuredly, the fetus intends no harm to its mother. Certainly, the developing embryo is entirely without guilt. But the concern is not with assigning moral culpability or punishing a perpetrator. The concern is the defense of the victim. To say that the putative victim must be defended even against blameless aggression is to recognize the legitimacy of society's exercise of its compelling interest in restraining violence. Judaism clearly recognizes that society has the right to interfere with the exercise of individual autonomy and to infringe upon the liberty of its members in order to protect the lives of members of society at large.

To be sure, the legal system of the country in which we live exhibits far greater solicitude for individual autonomy than does Jewish tradition. Nevertheless, the American legal system also recognizes that liberty is a value that must be subordinated when it comes into conflict with a superior value. Given an appropriate state interest, individual liberties may be restricted to the extent necessary to secure that interest.[7] The concerns that augur in favor of mandatory testing programs for identification of AIDS carriers are certainly quite compelling.[8] Although there are indeed a number of constitutional issues that must be addressed,[9] the crucial problem is practical rather than theoretical; the most significant problem is how to design and implement testing programs that will effectively protect the lives and health of members of society at large.

That problem is closely related to the second in the series of issues that confront us with regard to AIDS, *viz.*, the question of confidentiality. Even more problematic than establishment of the screening program itself is utilization of information gained as the result of testing. The right to privacy, a firmly established commitment to a code of professional

confidentiality and the well-placed fear of a negative economic and social impact upon individuals identified as AIDS victims or HIV carriers combine to militate against any form of disclosure, no matter how restricted.[10] Nevertheless, it would be of only limited benefit to engage in mass screening if the results are to be withheld from the very people who require the information derived therefrom for their protection. Certainly, the minimal step of making that information available to the victims themselves would undoubtedly contribute in some degree to the mitigation of the spread of AIDS. If they are responsible people, individuals who learn that they are afflicted will comport themselves in an appropriate manner and will minimize the risk to others. But, unfortunately, not all members of society behave responsibly. In some circumstances, it is morally imperative to violate confidentiality by divulging such information to other persons who are found to be at risk so that they may be enabled to take precautions in order to eliminate or to minimize the risk of contagion.

Who should be entitled to know that a particular person is an AIDS victim or an HIV carrier? Under what circumstances should that information be divulged? Some time ago, a young man who is a practicing dentist on the staff of a major medical center on the West Coast informed me that only a short time earlier he had examined a patient in his clinic and discovered mouth lesions that he was fairly certain were associated with AIDS. He sent the patient to a laboratory for a diagnostic test but, when he called for the results, he was told that he was not entitled to become privy to that information. The dentist proceeded to explain the obvious. Putting aside the risks assumed by health-care professionals involved in treatment of such patients, some dental procedures are simply inappropriate in the case of individuals who, to put it mildly, do not enjoy a favorable longevity anticipation. It is not at all prudent to devote the time, effort and expense that must be expended in preparing multiple crowns if the patient is also an AIDS victim for the simple reason that such a person's dental needs can be met in a manner that requires the expenditure of far less time, effort and expense, not to speak of a lesser degree of risk to the health-care provider. These concerns are even more germane when treatment involves expenditure of public funds. This may be a relatively trivial example of the relevance of the health-care provider's need to be apprised of the diagnosis in order to provide proper treatment for the patient, but it is an important example nevertheless. There are health-care decisions for which a total medical evaluation is a necessary prerequisite. It is simply not good medicine to make such determinations on the basis of incomplete information.

Furthermore, the medical practitioner is entitled to information necessary to protect his own health and life. A physician should not be required to expose himself to risk in performing an elective procedure designed to effect a marginal enhancement of the quality of life of the

patient. Even if a physician is foolhardy enough to agree to the assumption of the risks to himself that such a procedure may involve, he has no right to create a situation in which nurses and support staff are exposed to risks over which they have no control. Moreover, even in situations in which the physician acknowledges that he would perform the procedure regardless of the risks of contagion because that situation warrants assumption of the risks involved, the physician is entitled to avail himself of precautions designed to minimize the risks to himself and to others. Such information is essential because a physician cannot be expected to assume that every patient is a potential AIDS victim. Constant vigilance is a human impossibility.

The problems become even more complex when the issue is whether or not to divulge the diagnosis to individuals not directly involved in the treatment of the patient. What are the physician's obligations in the case of a patient who is afflicted with a sexually transmissible disease and the physician knows that the patient is engaged to be married but the patient refuses to reveal this information to his prospective spouse?

In general, the teachings of Judaism are most protective with regard to confidentiality. There is probably no other ethical, moral or religious system that regards innocent gossip concerning another individual's affairs to be a serious transgression of divine law. "You shall not go as a bearer of tales among your people" (Leviticus 19:16) prohibits gossip-mongering even if the information divulged in no way results in substantive harm or prejudice to the interests of the person whose affairs are divulged. Disclosure of another person's private affairs without prior authorization is clearly forbidden.[11] Nevertheless, consistent with the hierarchical ranking of values that is reflected throughout the wide spectrum of Jewish law, those prohibitions are suspended on a "need to know" basis in situations in which disclosure of such information is required in order to avert a threat to life, health or even financial loss.

Consider the case of a patient who has consulted a physician and the physician becomes aware of the fact that the patient is subject to periodic epileptic fits which cannot be controlled by medication. The physician is also aware of the fact that this patient holds a driver's license that he refuses to surrender voluntarily. What are the obligations of the physician under such circumstances?

The answer is quite clear. The physician is obligated to bring the matter to the attention of the appropriate officials in the Department of Motor Vehicles so that they may take action to remove a potential menace from the highways. Indeed, the American legal system recognizes such principles as well. In most states, if not all, physicians are under legal obligation to report instances of child abuse as well as occurrences of sexually transmissible diseases to designated authorities. The privileged nature of the physician-patient relationship is not absolute. Under some circumstances, breach of professional confidentiality is not only warranted, but mandated. Profes-

sional confidentiality cannot in itself be used as an excuse to withhold information with regard to the danger of AIDS contagion in circumstances in which there is a pressing need for particular individuals to be aware of the fact that a certain person is afflicted with AIDS. Presently accepted codes of ethics adhered to by members of both the medical and legal professions recognize an exception to the obligation of maintaining professional secrecy when the patient or client plans to endanger others. In a number of cases, courts have ruled that disclosure of such information is required by law.[12] An AIDS victim's determination to continue to engage in unprotected sexual acts is entirely analogous to a marksman's announced intention to engage in Russian roulette with a person other than himself on the receiving end of the bullet. Surely, under such circumstances, protection of human life should take precedence over preservation of professional secrecy.[13]

There is, however, one significant consideration that must be assessed with regard to the issue of whether or not to disclose information of this nature to sexual partners of AIDS victims. There is an ongoing debate within the medical community with regard to whether disclosure on a routine basis will save lives or, in terms of total impact, actually cost lives. It may well be the case, as some contend, that a significant number of possible AIDS victims will refuse to submit to diagnostic testing unless they are assured of complete and absolute confidentiality with regard to the results of such tests. Accordingly, it is argued, in order to assure maximum success for proposed screening programs and to guarantee that all people at risk will indeed be tested for the presence of AIDS, confidentiality must be scrupulously respected. Otherwise, a significant number of people will refuse to be tested; even if the testing program is mandatory in nature, fear of disclosure will inevitably lead to evasion. Revealing a diagnosis of AIDS infection to sexual partners would certainly result in the saving of lives. But, it is contended, such a policy will lead to the loss of a greater number of lives since, once existence of a disclosure policy becomes a matter of public knowledge, undiagnosed victims of AIDS will avoid testing because of their fear of disclosure. Many of those undiagnosed victims, if they were made aware of their condition under conditions of confidentiality, would act in a responsible manner, i.e., they would desist from further conduct that places others at risk and might also be induced to inform spouses or other sexual partners of possible infection that may already be present so that those partners might also be tested. If, because they refuse to submit to testing, such AIDS victims or HIV carriers remain unidentified there is every likelihood that those undiagnosed individuals will infect others unknowingly. Hence, goes the argument, the net effect of a policy of involuntary disclosure would be a greater toll in terms of lives lost to AIDS infection. If this argument is factually correct, a policy of disclosure would itself create a menace to public health. I am not entirely convinced that

such a prognosis is correct, but if it were shown to be empirically accurate, it would generate a genuine moral dilemma.[14]

There is a strong temptation to dismiss the argument peremptorily on the grounds that the danger to a present, already identified sexual partner is clear and imminent, while the potential danger resulting from lack of future success in securing the cooperation of possible victims of AIDS in submitting to testing is vague and hypothetical. Moreover, the sexual partner is clearly identifiable as a person who is endangered by another. As such, the sexual partner has a clear moral claim to rescue. In contradistinction, disclosure does not yield any identifiable victim. Moreover, the person who declines to be tested is responsible for his own fate and, since the screening program is available to him, he has no further claim upon others. Sexual partners of unscreened victims exist only as a statistical probability. Hence, no particular individual is in a position to present a moral demand for rescue from contagion.

However, on closer examination, such a conclusion can be rebutted. There can be little doubt that, under ordinary circumstances, in a hypothetical situation in which one is confronted by two groups of individuals whose lives are endangered and it is impossible to rescue both groups, preference should be given to saving the lives of the greatest number of people. Insofar as Jewish law is concerned, the crucial issues with regard to the problems under discussion are whether the group of potentially undiagnosed AIDS victims and the individuals to whom they may transmit the disease are to be classified as individuals whose lives are endangered and, if so, whether specificity versus lack of specificity in identification of victims plays a role in such determinations.

In rabbinic literature, discussion of the definition of danger occurs in the context of suspension of ritual prohibitions in an endeavor to save the life of an endangered person. It is well established that such strictures are suspended on behalf of an individual who can be described as a *holeh lefaneinu*, a term that is literally translated as "a patient before us." Thus, R. Ezekiel Landau, *Noda bi-Yehudah, Yoreh De'ah*, II, no. 210, ruled that, although all Sabbath prohibitions are suspended on behalf of a patient who is already ill, nevertheless, a mother may not boil milk on the Sabbath on the plea that perhaps her young child may suddenly become seriously ill and may immediately require a hot beverage in order to promote recovery.

The concept of a *holeh lefaneinu* was formulated by *Noda bi-Yehudah* in the context of a ruling concerning autopsies. He declared that a post-mortem examination, involving, as it does, violation of the prohibition against defiling a corpse, may be performed in anticipation of deriving medical information of potential value in treating a patient already afflicted with a similar malady but that such a procedure may not legitimately be performed simply in order to advance scientific knowledge.[15]

Nevertheless, it is not necessary that a patient actually occupy a hospital

bed in order to satisfy the criterion of *holeh lefaneinu*. Consider the situation in which there is an epidemic that is spreading but has, as yet, not reached a particular locale, although it is anticipated that it will do so. May restrictions pertaining to the observance of the Sabbath or of Holy Days be violated in instituting prophylactic measures necessary to prevent the spread of disease even though the disease is, as yet, not rampant in that locale? *Hazon Ish, Oholot* 22:32, and *Yoreh De'ah* 208:7, rules unequivocally that such procedures are permitted and, indeed, that their implementation must be regarded as mandatory.[16] It is not necessary that a particular patient actually be stricken and lie before us; it is sufficient that the danger be identifiable. The distinction lies in the fact that the sick patient is already endangered whereas the possibility of the child becoming ill is merely statistical and hypothetical in nature.[17]

Yet another question was posed by the late Chief Rabbi of Israel, Rabbi Iser Yehudah Unterman, concerning a battlefield situation.[18] Although the issue raised by Rabbi Unterman concerned possible establishment of organ or tissue banks in time of war, the question can readily be reformulated in a more basic form. May an army regiment setting out to do battle on the Sabbath take with it a field hospital to be set up before engaging in battle? In that situation, infraction of Sabbath restrictions is required long before there is a single casualty and even before there is any actual danger of casualties. Rabbi Unterman ruled that even such a situation is tantamount to that of a *holeh lefaneinu*. Warfare, by its very nature, entails casualties; it must be assumed that soldiers will be wounded in the course of battle. Therefore, the decision to engage in military hostilities, in and of itself, generates a danger even though a single shot has as yet not been fired. Although it is quite true in the battlefield situation that there is no "patient before us" in a literal sense and, prior to commencement of hostilities, no actual danger can be said to exist, nevertheless, the cause of danger is already present. The decision to engage in battle is itself the proximate cause of danger and whenever the cause of danger is present the situation is comparable to that of a *holeh lefaneinu*.

Consider also the case of a far-flung settlement in which it has been statistically determined that there will be a multiple number of medical crises within any given twenty-four hour period. May the sole ambulance driver or nurse accompanying a patient to the hospital return to the settlement on *Shabbat* on the strength of the statistical probability that the services of the vehicle or of the nurse will be required during the course of the day? In such cases as well, there have been a number of rabbinic rulings to the effect that, when statistics indicate that there is a reasonable likelihood of a medical emergency, Sabbath restrictions must be ignored.[19] Those rulings establish that statistical probability of danger constitutes the halakhic equivalent of a *holeh lefaneinu*.[20]

It would appear to this writer that the selfsame principles are equally

applicable to triage issues. When faced with an immediate emergency any person capable of preserving a life is obligated to do so. When it is impossible to rescue all who are endangered, time and resources should be allocated with a view to maximizing the number of lives preserved. An emergency room physician may find himself confronted by a dilemma. Half a dozen victims of a single accident arrive simultaneously. One of the victims has sustained multiple fractures, is in shock and has difficulty breathing. He requires the immediate and undivided attention of the emergency-room physician if he is to survive. The others present have arterial bleeding, but no other life-threatening problems. If left unattended, they will bleed to death; if tourniquets are applied quickly, they will all survive. Certainly the physician will save the lives of those five accident victims even though that course of action entails abandonment of the seriously ill patient who requires more complex treatment. It is equally obvious that the physician may not abandon all of the victims in order to catch a plane to attend a medical conference on the plea that he may conceivably learn something at the conference that will perhaps one day save the lives of even a larger number of patients. Nevertheless, assuming that statistically predictable events are treated as present dangers, ignoring a present patient may be justifiable if that is the sole available method of obviating a future calamity that is otherwise certain to occur.

It has been alleged that British intelligence, making use of a device code-named *Ultra*, was able to decipher German codes and as a result became aware of Nazi plans to bomb Coventry some hours before the commencement of aerial bombardment. There was sufficient time for the citizens of the town to have been evacuated. But Winston Churchill refused to allow information regarding the imminent attack to be divulged and permitted the inhabitants of that city to perish as a result of the bombing. His argument was that, were he to divulge information regarding the impending danger, Nazi intelligence would quickly determine how that information came into British hands and the Germans would immediately take countermeasures to assure the security of their communications. British intelligence concerning German military operations would inevitably have been compromised and, argued Churchill, the net result would have been graver danger and the loss of an even greater number of lives.[21] If it is assumed that a known future danger is to be regarded in the same category as a present, imminent danger, provided that it is certain or virtually certain that the future danger will become actual, there may well be grounds to justify ignoring the imminent danger to a smaller number in order to prevent future danger to a larger number of people.

If it were to be established that identification of AIDS victims and divulgence of that information to sexual partners would ultimately result in the loss of a greater number of lives, a case could well be made for passively refraining from disclosing that information. However, I am not

at all certain that loss of an even larger number of lives would be the necessary result of such a policy. Moreover, even if this would be the inevitable result of treating confidentiality as inviolate, it is a contingency that we need not necessarily face if society is prepared to adopt other measures. If we are prepared to demand that individuals at risk for AIDS be tested and to institute compulsory diagnostic programs to assure compliance, there may be a method available that would serve to protect sexual partners without divulging privileged information in violation of patient confidentiality.

The dilemma posed by a choice between preservation of confidentiality and preservation of lives might be avoided by adopting a policy of compulsory AIDS testing analogous to IRS policy regarding income tax evasion. Certain classes of people and persons claiming certain deductions are suspect. Those individuals find that their annual income tax returns are scrutinized, and scrutinized repeatedly. In addition, a certain percentage of returns are randomly selected for audit on the basis of no particular criteria. The net result is that when a person receives a form letter inviting him to a session with an IRS auditor he does not know whether he is one of a group of people who have been randomly selected or whether his invitation came as a result of some aspect of his income tax return that triggered an audit. Together with a program for testing members of high risk groups, it is possible to institute an accompanying program of random testing as well. The effect of such a combined program would make it possible to select individuals for testing without divulging to them that have been selected because they have been identified as sexual partners of AIDS victims.

To be sure, a program of this nature would serve to identify only already existing AIDS conditions contracted as a result of sexual intercourse with victims of AIDS but would not prevent continued, unprotected sexual intercourse with presently diagnosed victims that unwittingly places the sexual partner at risk. It would be necessary to secure a commitment from the patient binding him to refrain from endangering others. The patient would be informed that his confidentiality would be respected only so long as he abided by his commitment.

Such a program affords the possibility for development of a policy that should diminish qualms regarding violation of confidentiality. If the sexual partner is free from infection, the AIDS victim can be told quite forthrightly that, if he refrains from exposing his partner to further risk, his privacy will be fully respected, but should he fail to do so, it will become necessary to reveal his status as an AIDS victim or as an HIV carrier to the endangered party. It should not prove difficult to fabricate reasons to remain in contact with the potentially endangered party in order to ascertain whether or not an ongoing danger exists. To be sure, the possibility of transmission of HIV before discovery of the carrier's breach of commitment remains. The statistical likelihood of contagion under the con-

templated circumstances must be carefully assessed and confidentiality preserved only if the hazard is judged to be minimal.

The threat of disclosure would certainly serve as a strong motive in discouraging hazardous sexual activity with a known, already identified sexual partner. Short of quarantine measures,[22] it is impossible to prevent an irresponsible victim from endangering a newly found sexual partner. There are undoubtably some devious people who, with malice aforethought, will avoid testing because they are determined to continue to engage in unsafe sexual practices even if it might prove to be the case that they are infected. It may, however, be assumed that the number of such thoroughly irresponsible people is relatively small. Most people who would seek to avoid testing would probably do so only because of a dread of the certainty of disclosure regardless of preventive or prophylactic measures they might be prepared to take in the future.

It should be recognized that such a policy would not constitute a panacea and would not eliminate sexual transmission of AIDS totally and completely. Whether or not such measures represent a prudent and acceptable means of limiting contagion probably cannot be determined other than by attempting their implementation.

2. Use of Condoms

Transmission of HIV during intercourse can be prevented only by assuring that there is no contact with the body fluids of the carrier. The only effective method of preventing such contact is utilization of a condom during intercourse.[23] For Jewish patients, the use of a condom when engaging in marital relations is a matter for the couple to discuss with a competent rabbinic decisor. Use of a condom, as well as utilization of other contraceptive methods, in situations in which pregnancy constitutes a danger to the life of the female partner is a matter that has received considerable discussion and analysis in rabbinic literature. Some authorities are prepared to sanction a wide variety of other contraceptive measures, but not use of a condom, even in situations in which pregnancy poses a distinct threat to the life of the female partner. Others are willing to permit use of a condom in situations in which pregnancy poses a grave threat to the life of the mother.

A thorough review of the permissibility of contraception in the presence of danger is beyond the scope of this endeavor. In oversimplifying a complex issue it may be said that those authorities who permit the use of a diaphragm and/or a condom in circumstances in which pregnancy poses a significant hazard do so either on the theory that protected intercourse is normal and natural in situations in which pregnancy would endanger the life of the female[24] or on the theory that, since the woman is not required—and indeed is forbidden—to endanger her life, the sole telos of intercourse

in such circumstances is the sexual gratification of the female and hence prevention of conception is not prohibited.[25]

Although the classic discussions of this issue focus upon situations in which pregnancy, rather than unprotected intercourse per se, constitutes the danger to life of the female, it appears to this writer that the considerations that serve to render contraception permissible in situations involving danger to the female serve, *mutatis mutandis,* to render contraception equally permissible when the danger is to the male. It must, however, be reiterated that many authorities forbid use of a condom under any circumstances on the grounds that coitus involving use of a condom constitutes an "unnatural" form of intercourse.[26]

3. The Physician's Self-Endangerment

Another issue that must be addressed is the question of the physician's obligations to his patients and to himself. Does the physician have a right to refuse to expose himself to an infectious disease? In particular, does the physician have a right to decline to treat a patient who is afflicted with AIDS? The prevailing view in our society is that physicians have special and unique responsibilities. Although they are under no legal obligation to do so, physicians are expected to accept risk to themselves in order to save the lives of others.[27] The American Medical Association's official policy statement regarding AIDS states that "a physician may not ethically refuse to treat a patient whose condition is within the physician's current realm of competence solely because the patient is seropositive."[28] It must however be stated that, according to Jewish teaching, a physician has no greater responsibility than any other individual to jeopardize his own life on behalf of others.[29] To be sure, his responsibility is not lesser in nature than that of any other person, but it is not enhanced by his choice of profession. The crucial moral issue is whether, and under what circumstances, an individual is obligated to expose himself to danger in order to preserve the life of another. Our society views altruistic self-endangerment on behalf of others as commendable and exemplary; our society regards the sacrifice of one's own life to save the life of another as a virtue of the highest order. Not so Judaism. There are, to be sure, examples of such sacrificial conduct in Jewish literature and in rabbinic writing, but those references constitute exceptions rather than the rule and each of the exceptions requires halakhic elucidation and justification.

The basic principle is established in a hypothetical situation recounted in the Gemara, *Baba Metsi'a* 62a. Two people are wandering in the desert and lose their way. One of them possesses a small container of water. The water in the container is sufficient only to enable one person to survive long enough to make his way out of the desert. If they divide the water

equally both will die of thirst. There is a sharp difference of opinion among the Sages of the Talmud with regard to the proper course of action. The normative position enunciated by R. Akiva is that the owner of the water should not sacrifice himself on behalf of his companion but should drink all of the water himself in order to save his own life. The principle is derived from the biblical verse "And your brother shall live with you" (Leviticus 25:36). Man is admonished to do everything possible to preserve the life of his fellow so that both may enjoy life together, but not to surrender his life on behalf of his fellow. The obligation is to enable a brother to live *with you*, but not to give him precedence over yourself. Accordingly, one's own life takes precedence over the life of one's neighbor. A person may not commit what is tantamount to suicide in order to save someone else's life. One should love one's neighbor as much as oneself, but not more than oneself. An individual's obligations to himself take precedence over any comparable obligation that he owes to his fellow.

Fortunately, in the real world, most situations in which one is called upon to preserve the life of another do not require self-martyrdom. Such situations usually do not involve certain death for the rescuer. Most situations involve only the possibility of death. A person who jumps into turbulent water in an effort to save someone who cannot swim may be carried out to sea by an undertow, but it is far from certain that this will happen. One eminent authority, R. Joseph Karo, *Kesef Mishneh, Hilkhot Rotseah* 1:14 and *Bet Yosef, Hoshen Mishpat* 426 asserts that elimination of the certain danger to the life of a fellow takes precedence over possible danger to oneself. Nevertheless, the normative rule posited by Judaism is that no individual is obligated to place himself in serious danger even if failure to do so will result in the certain death of another individual.[30] He may do so if he so wishes, provided that the circumstances are such that it is not certain that his own life will be forfeit. Indeed, in some circumstances, it would be commendable to accept a measure of danger in order to save the life of another, but there is no absolute obligation to do so.

The obligations of a physician are no different from those of any other individual. A physician has no obligation to place his own life in serious jeopardy in order to save the life of another. Assuredly, he may do so if he so wishes, but he is not duty-bound to endanger himself.

That statement must, however, be clarified and made more precise. An individual need not place himself in danger in order to save the life of another. However, the term "danger" requires careful elucidation. Physicians may become victims of automobile accidents, as is the case with regard to all who expose themselves to vehicular travel. May, then, a physician refuse to make a house call or refuse to make rounds in the hospital on the basis of a plea that he does not wish to subject himself to the danger inherent in driving his automobile in order to reach the patient? The answer, I believe, is that, under normal conditions, the level of danger

involved in the operation of a motor vehicle is below the threshold of what is recognized as "danger" for purposes of Jewish law. The term "danger" is a technical term in Jewish law and is endowed with a fairly precise definition. A comprehensive analysis of danger as a halakhic concept is beyond the scope of the present endeavor. Suffice it to say that in order to avoid an obligation to rescue the life of another on grounds of self-endangerment, the danger to the life of the person called upon to perform an act of rescue must be actual and significant and must be must be perceived as such by prudent persons. Actions entailing a level of risk perceived as insubstantial in nature are not within the category of "danger" recognized by Jewish law.

Rabbi Iser Yehudah Unterman presents a brief yet intriguing statement in which he establishes a rule of thumb for delineating the level of danger that must be assumed in rescuing another individual.[31] Rabbi Unterman remarks that if someone wishes to know whether he should accept a certain level of danger or whether that level of danger is sufficiently high that he may legitimately refuse to do so because he does not wish to expose himself to risk, the individual should ask himself a simple question. The individual should imagine to himself that the activity in which he is being asked to engage is not an activity designed to save a human life, but an activity designed to save one of his own cherished possessions. Let him imagine, for example, that it is not a human being who has fallen over the side of a ship but that it is a jewelry case that the wind has blown out of his hands and is now bobbing up and down in the water. If he wishes to determine whether he should jump into the stormy waters in order to save the drowning person's life he should ask himself whether he would do so in order to retrieve some cherished heirloom that had been blown overboard. Would he leap into the water in order to recover this irreplaceable and priceless object or would he regard such action as foolhardy and reckless? If the individual in question would assume that or a comparable risk in order to recover some item of value belonging to himself then he ought to treat the life of a fellow man as being of at least equal value and assume a comparable risk. But, if he can say with honesty that he would be willing to suffer serious financial loss because he deems the risk to be too great, then he can in good conscience similarly refuse to endanger his life for the purpose of rescuing the life of another.

Although Rabbi Unterman's statement may not constitute a definitive halakhic pronouncement to be applied rigorously in each and every situation, it certainly serves as an appropriate general approach. This rule of thumb can readily be applied in a medical context: If a physician wishes to know whether he should expose himself to a certain degree of risk, let him assume that the fee offered for the necessary treatment is an exorbitant one. Would he be willing to accept the risk in order to earn a small fortune? If the answer is in the affirmative he should also regard the

preservation of a life as sufficient motive. Under such circumstances it should be anticipated that the physician will subject himself to the same degree of risk in order to preserve a human life without regard for the size of the fee or even the absence thereof. For a medical practitioner treating patients in a clinical setting in which there is some danger to the physician, the appropriate rule of thumb is whether the physician regards the risk as being so grave that no possible fee would make the risk worthwhile to him. But if the same physician is prepared to set aside those concerns for a fee commensurate with the danger, it follows that, even if the patient is a charity case, the physician should be advised to accept the risk as inherent in what is expected of all human beings in terms of their obligations vis-à-vis their fellows.

Formulation of this standard does not imply that a physician can be *compelled* to assume such risk. Nor can it be said that there is no situation in which a physician is under absolute obligation to assume some measure of risk. There are some clinical situations in which a risk does exist but it is so minimal that it must be treated as non-existent. In such circumstances an absolute obligation does indeed exist. At the opposite end of the spectrum are circumstances in which the statistically calculable risk is so great that no one should be asked to place himself in jeopardy. But between those extremes there are instances in which the hazard is of a magnitude such that a physician would be well within his moral rights in declining to treat the patient but in which, recognition of the rights of the physician notwithstanding, society has the right to assure that medical treatment is rendered. It seems to me that society not only has the right but also the obligation to establish institutional structures that will assure its members appropriate medical care even when some hazards must be assumed by health-care professionals providing such care.

It must be recognized that there is a significant difference between the ethical obligations of an individual and the obligations of society as a whole. There is no obligation upon any individual to become a fireman, a policeman or a soldier in a volunteer army. Those professions require their members to expose themselves to an unusually high degree of risk. That is certainly evident from the fact that members of those professions are required to pay inordinately high premiums for life insurance. By the same token, society has both a need and an obligation to safeguard its citizens. The history of civilization indicates that an accommodation is possible that will guarantee both respect for rights of the individual and discharge of societal responsibility. Assuredly, society has a need to maintain law and order and a need to put out conflagrations. In order to achieve those ends society must establish a police force and assure that there are firemen on duty to combat fires. Accordingly, society seeks to do everything within its power to induce individuals to become members of a police force or of a fire department. Although, generally speaking, no particular

person can be compelled to serve in such a capacity, society discharges its obligation by encouraging and enticing individuals to enter those professions. Society appeals to its members' sense of altruism in seeking to convince individuals to accept the risks associated with police work and fire-fighting out of a sense of moral responsibility. It also appeals to other less noble but nevertheless entirely legitimate motives in providing material inducements for acceptance of such positions.

Society is similarly in a position to assure that health-care professionals will expose themselves to risks of a similar magnitude in providing necessary medical care. The nature of contemporary practice of medicine is such that extremely few health-care professionals practice solo medicine in a literal sense of that term. Virtually no one can prosper in such a practice. Surgeons require operating theaters; physicians require staff privileges in hospitals and medical centers. Those perquisites are recognized as privileges by the medical community and, as privileges, they carry with them concomitant obligations. Most medical institutions require that members of their staffs spend a certain stipulated number of hours per week on a *pro bono* basis providing care in clinics established for the treatment of indigent patients. Such service is regarded as a form of payment for the privilege of utilizing the facilities of the hospital in treating fee-paying patients.

It is common knowledge that in most hospitals and medical centers there are more applicants for staff privileges than can possibly be accommodated by the facility. That is certainly the case with regard to any prestigious medical center. Society has the right to apportion such benefits in a manner that best serves to promote the discharge of society's own responsibilities. Any individual physician may choose to treat patients who pose a certain degree of risk that to himself or he may elect not to treat such patients. But society may also say to the physician that it has an obligation to make a reasoned, rational and principled determination that certain risks must be borne by society as a whole. Accordingly, society may appropriately enter into a contract with a health-care professional in which it undertakes to provide him with certain privileges and benefits, but only on the condition that he agrees to accept a concomitant responsibility for the treatment of patients who do pose certain risks. The physician is, in essence, being asked to shoulder that responsibility as a delegate of society. In return, society makes certain resources and perquisites available to him.

Of course, society does not have the moral right to make irresponsible demands upon any of its members. It may at times be difficult to determine precisely where the point of demarcation between responsible and irresponsible demands should be drawn. The risks associated with any given medical or surgical procedure can be assessed only by clinicians. But, upon assessment of the risk, rational and moral individuals should be able to reach a consensus in making a determination in any given situation with regard to whether assumption of that risk is responsible or foolhardy. When

such risks are prudent, society has the right to seek the services of physicians who are willing to assume such risks and to reward them in an appropriate manner.

Society does not have the right to demand suicidal conduct on the part of the doctor, but society can demand that the physician assume reasonable and responsible risks in return for the privilege of drawing upon the resources of society. The physician, in choosing his profession, does not necessarily commit himself to the assumption of those responsibilities and is at liberty to decline to expose himself to danger, but society in its ongoing contract with the physician is not required to make its resources available to him other than upon a return of a *quid pro quo.*

It must be reiterated that society does not have the right to make unjustified and unreasonable demands upon the physician as part of this reciprocal contractual relationship. There are, for example, clinical circumstances in which a physician is entirely justified in refusing to perform procedures on behalf of an AIDS patient that are dangerous to himself. The first obligation of society may well be the determination of whether performance of a particular medical procedure is justified in light of the risk posed to others. As has been stated earlier, those are determinations that must be informed by ethical sensitivity but which, in the first instance, can best be made by clinicians. Thus, in light of the danger such procedures pose to the plastic surgeon, cosmetic surgery undertaken for purely aesthetic reasons probably would not be justified when performed upon an AIDS victim. Presumably, the benefit to the patient is not of a magnitude that warrants placing the physician's life at risk.

Moreover, in making even only reasonable demands upon a physician, society has a reciprocal obligation to minimize the risk to the physician insofar as possible. Others have drawn attention to the fact that not a single research dollar has been devoted to the perfection of a stick-proof latex glove. In my own discussions with an executive of a plastic manufacturing firm, I have been informed that this is a goal that is quite attainable. I have been assured that it is indeed possible to perfect a synthetic material from which a glove could be fashioned that would not be subject to punctures and perforations in the operating room but which at the same time would allow for requisite tactile sensation on the part of the surgeon wearing the glove. All that is required to turn that *desideratum* into a reality is the dedication of sufficient personnel, sufficient time and sufficient money to the necessary research and development.[32]

Certainly, society has an obligation to engage in research designed to perfect the technology necessary to minimize risks to its physician-agents and to devote its resources to that endeavor. Society has an obligation to minimize the dangers to health-care professionals in any and every way that is possible and practical. Society has an obligation to eliminate risks to health-care professionals no less so than it has a duty to provide treatment for patients whose lives are at risk.

4. Taharah, Mikveh and Metsitsah

Health-care providers are not the only ones who perceive themselves as being at risk as a result of contact with AIDS patients. Fear of contracting AIDS has, in recent years, led to numerous inquiries with regard to a number of areas of religious observance. Many of those questions are based upon an exaggerated fear of contagion. A number of years ago, a gentleman reported to me shortly before Passover that he wished to invite an AIDS patient to participate in his *seder* but was informed by members of his own family that if the invitation were to be extended they would absent themselves. There has been at least one report in an Anglo-Jewish newspaper of a chaplain who refused to enter the hospital room of an AIDS patient.[33] These are but examples of the near-hysteria which pervades our community.

Realization that AIDS can be spread only through direct contact with body fluids serves to dispel much of that fear. For example, there is no scientific basis for neglecting AIDS victims insofar as the *mitsvah* of visiting the sick is concerned. Casual social contact simply does not pose any significant danger. There is no valid reason for withholding solicitude and comfort from those afflicted by that disease. Indeed, AIDS victims require such ministration more so than most patients.

Some rabbinic figures have advised that a *taharah*, the ritual washing of the body of the deceased, need not be performed on behalf of a person who has succumbed to complications of AIDS.[34] The underlying rationale is unexceptional, i.e., members of the *hevra kaddisha* (burial society) need not expose themselves to infectious disease in discharging their duties. Nevertheless, application of that principle in the treatment of AIDS victims is the product of misinformation and hence is erroneous. There is significant evidence indicating that the AIDS virus does not survive for more than a very brief period of time following death of the victim. Even assuming that the virus remain virulent, wearing rubber gloves and a protective garment effectively eliminates any possibility of contracting the disease. There is no halakhic impediment whatsoever to employment of such precautions.[35] When those precautions are taken, the danger of a member of the *hevra kaddisha* endangering himself by slipping on a wet floor and fracturing his skull is exponentially greater than the danger of contracting AIDS from a corpse. Quite apart from denying the deceased the honor and respect that is his due, withholding of a *taharah* from a person who has died of AIDS only serves to reinforce a misplaced but widespread fear of association with AIDS patients and unconscionably contributes to the isolation experienced by those who suffer from that dread disease.

A similar fear has arisen in some quarters with regard to the possible spread of AIDS as a result of immersion in the waters of a *mikveh*. That fear, as well, is greatly exaggerated. Neither potable nor recreational waters have been implicated in the transmission of HIV infections.[36] There is no

evidence whatsoever that AIDS can be transmitted by body fluids diluted in the waters of a swimming pool or *mikveh*. Addition of chlorine to the *mikveh* because of this fear is both unnecessary and ineffective. Although chlorination of water may effectively prevent the spread of some bacteriological infections, the concentration necessary to be effective against the AIDS virus is too high to be tolerated under normal circumstances.[37] Fortunately, chlorination in order to prevent AIDS contagion is a totally unnecessary precaution.

Metsitsah be-peh, i.e. oral suction in conjunction with circumcision, presents a much more serious problem. The infected blood of a baby harboring the AIDS virus may enter the blood stream of the *mohel* via a lesion or cut in his mouth. Although there is some evidence showing that saliva serves to protect against transmission of AIDS, the possibility of contracting AIDS in this manner cannot be ruled out at present.[38]

There are extensive discussions in rabbinic literature with regard to whether or not other forms of suction may be substituted for oral suction. A review of that material is beyond the scope of this discussion.[39] Nevertheless, a number of points should be made. Many authorities rule that it is entirely proper to perform *metsitsah* by means of a glass tube. However, as formulated by Rambam, *Hilkhot Milah* 2:2, the purpose of *metsitsah* is to assure the free flow of blood *me-mekomot ha-rehokim,* i.e., from beyond the exposed tissue at the site of the wound. The only way this can be effected is by creating a vacuum by means of suction action over the entire area of the circumcision incision. This can be accomplished only by means of a glass tube that encompasses the entire membrum and is placed tightly over the abdominal area. It cannot be accomplished by means of a pipette or capillary tube. Practically speaking, *mohalim* would need glass tubes of varying circumferences in order to perform *metsitsah* properly upon infants of different proportions.

Parenthetically, some *mohalim,* because of their fear of contracting AIDS, have recently adopted the practice of placing a gauze pad over the glans before performing oral suction. They delude themselves in believing that the danger to themselves is significantly mitigated thereby. Moreover, the interposition of a gauze pad makes it difficult, if not impossible, to cause blood to be drawn from *mekomot ha-rehokim*.

Quite apart from considerations grounded in Halakhah, oral suction is preferred in some circles because of considerations derived from kabbalistic sources. Such considerations should undoubtedly be ignored were it the case that oral suction presents an unavoidable hazard to the well-being of the *mohel*. Fortunately, the danger to the *mohel* can be eliminated. Contrary to the assertions of some,[40] fear of AIDS should not deter *metsitsah ba-peh* in low-risk groups when that form of suction is desired on the basis of either considerations of Halakhah or custom provided that proper precautions are taken.[41]

AIDS is present in a neonate only when it is contracted from the mother. If a diagnostic test is performed upon the mother and the results are negative, the likelihood that the mother may be infected and have passed the virus to her child are extremely remote. A *mohel* who is requested to perform oral suction is certainly within his rights in demanding that the mother be tested for the absence of HIV virus. This diagnostic test can be performed by a commercial laboratory either during pregnancy or after parturition and the results can be made available promptly in order to provide for timely performance of circumcision. This obvious solution to the *metsitsah* dilemma has been endorsed by R. Yosef Eliashiv in a letter published in *Sha'arei Halakhot*, no. 15 (Tishri, 5749). Moreover, a member of the staff of the Center for Infectious Diseases in Atlanta has assured me in writing that a solution of 70% alcohol effectively destroys the AIDS virus.[42] Accordingly, the *mohel* may protect himself by carefully rinsing his mouth with an alcohol solution prior to circumcision. Use of 151 proof rum, readily available in any liquor store, is appropriate for this purpose.

NOTES

1. See Ecclesiastes 7:20.
2. *Griswold* v. *Connecticut*, 381 U.S. 479 (1965).
3. See, for example, Rabbi Emanuel Rackman, "Privacy in Judaism," *Midstream*, vol. 28, no. 7 (November, 1982), pp. 31-34; Rabbi Norman Lamm, "The Fourth Amendment and Its Equivalent in the Halakhah," *Judaism*, vol. 16, no. 3 (Summer, 1967), pp. 53-59; *idem*, "The Right of Privacy," *Judaism and Human Rights*, ed. Milton R. Konvitz (New York, 1972), pp. 225-233; and Haim H. Cohn, *Human Rights in Jewish Law* (New York, 1984), pp. 64-67.
4. Rather than speaking of a general right of privacy, a more felicitous manner of describing privacy in Jewish law would be to say that specific prohibitions and prerogatives posited by Jewish law give rise to concomitant particular rights of privacy.
5. See, for example, R. Iser Zalman Meltzer, *Even he-Azel, Hilkhot Shekhenim* 2:16.
6. A right is defined as fundamental if its abolition would violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." See *Snyder* v. *Massachusetts* 291 U.S. 97 at 105 (1933) and *Palko* v. *Connecticut*, 302 U.S. at 325 (1934). Among the rights recognized as fundamental are procreation, marriage, contraception, family relationships, child-rearing and education. See *Paul* v. *Davis*, 425 U.S. at 713. Regulations limiting a fundamental right may be enacted in order to satisfy a compelling state interest provided that the legislation is narrowly drawn to achieve only the legitimate state interest. See *Kramer* v. *Union Free School Dist. No. 15*, 395 U.S. 621.
7. In *Jackson* v. *Massachusetts*, 197 U.S. 11, 25 (1905) the Supreme Court upheld a Massachusetts statute mandating vaccination against smallpox and ruled that it was enforceable even in face of religious objections. In that opinion, written by Justice John Harlan, the Court acknowledged the importance of the individual's right to liberty but declared that such interest must yield to the state's right "to secure the general comfort, health, and prosperity," so long as the state does not act arbitrarily or oppressively. For an analysis of epidemic disease and the government's police power to enact reasonable regulations to preserve public health, safety, morals and welfare, as well as a discussion of HIV testing, see Janet L. Dolgin, "AIDS: Social Meanings and Legal Ramifications," *Hofstra Law Review*, vol. 14, no. 1 (Fall, 1985), pp. 202-209; and Joanna L. Weissman and Mildred Childers, "Constitutional Questions: Mandatory Testing for AIDS Under Washington's AIDS Legislation," *Gonzaga Law Review*, vol. 24, no. 3 (1988-89), pp. 433-473.
8. Nevertheless, New York law, with certain exceptions, provides that no one may be tested for AIDS without providing informed consent. See New York Public Health Law §§2780-2787 (McKinney

Supplement 1990).

9. Quite apart from the issue involving a general right to privacy, in *Schneider* v. *California* 384 U.S. 757 (1966) the Supreme Court found that compulsory administration of a blood test is a search restrained by the fourth amendment. Nevertheless, the Court found that administration of a blood alcohol test in the context of a vehicular homicide was a lawful search. For a discussion of the applicability of the criteria developed in *Schneider* to compulsory HIV testing, see "Constitutional Questions," pp. 454-461; and Paul H. MacDonald, "AIDS, Rape, and the Fourth Amendment: Schemes for Mandatory AIDS Testing of Sex Offenders," *Vanderbilt Law Review,* vol 43, no. 5 (October, 1990), pp. 1617-1627.

   Another potential problem is possible violation of the Equal Protection clause of the fourteenth amendment which prohibits government action that discriminates against some individuals. Arguably, testing programs requiring mandatory testing of members of high-risk groups must include all persons who pose a risk to society and exclude all those who do not pose a serious risk. It is, however, also recognized that all classifications are imperfect. See "Mandating AIDS Testing," pp. 464-471.

   for a discussion of these issues in connection with mandatory testing of public employees see Charles D. Curran, "Mandatory Testing of Public Employees for the Human Immunodeficiency Virus: The Fourth Amendment and Medical Reasonableness," *Columbia Law Review,* vol. 90, no. 3 (April, 1990), pp. 720-759.

10. In *Whalen* v. *Roe,* 429 U.S. 589 (1977) the Supreme Court recognized a privacy interest in preventing disclosure of personal medical information but nevertheless upheld legislation requiring pharmacists to report to appropriate state authorities the names and addresses of patients to whom prescription drugs were dispensed.
11. See R. Nissim of Gerondi, *Sha'arei Teshuvah, sha'ar* 3, no. 225.
12. See, for example, *Brady* v. *Hobber,* F.2d 329 (10th Cir. 1984) in which the Court held that a psychiatrist incurs a duty to warn a third party when a patient makes a specific threat to a particular person. See also *Taranoff* v. *Regents of the Univ. of Cal.,* 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).
13. A number of states have enacted legislation to accomplish this end. Thus, for example, in 1987 California enacted a partner notification statute which permitted a physician to inform the person believed to be the patient's spouse of the results of a positive HIV test. A 1988 amendment of the statute broadens the category of notifiable persons to include sexual and needle sharing partners but the amendment also permits notification by the physician only after he has attempted to persuade the patient to make the disclosure himself. See Cal. Health & Safety Code §199.25 (West Supp. 1990). New York allows disclosure only after the physician counsels the subject regarding the need to notify the contact and has formed reasonable belief that the subject will not inform the contact. The physician must then inform the subject of his or her intent to disclose the information to the contact and give the subject "the opportunity to express a preference as to whether disclosure should be made by the physician directly or to a public health officer for the purpose of said disclosure." See N.Y. Pub. Health Law §2783(4)(a)(3), (4). Rhode Island permits notification of third parties if "the physician has reason to believe that the patient, despite the physician's strong encouragement, has not and will not warm the third party. . . ." See R.I. Gen. Laws §23-6-17(b)(v) (1989). Public health investigators in Washington may reveal the identity of the infected person when the officer believes "that the exposed person was unaware that a risk of disease exposure existed and that the disclosure of the identity of the infected person is necessary." The statute does not state the criteria for determining necessity. See Wash. Rev. Code Ann. §70.24.105(2)(g)(Supp. 1989). For a survey of comparable legislation in a handful of other states, see Harold Edgar and Hazel Sandomire, "Medical Privacy Issues in the Age of AIDS: Legislative Options," *American Journal of Law & Medicine,* vol. XVI, nos. 1 & 2 (1990), pp. 182-196; and Larry Gostin, "The Politics of AIDS: Compulsory State Power, Public Health, and Civil Liberties," *Ohio State Law Journal,* vol. 49, no. 4 (1989), p. 1028, notes 71 and 72.
14. Two separate studies have been conducted comparing anonymous testing and confidential tesing in order to determine the relative effect of anonymous testing in encouraging voluntary testing. A study conducted by the Colorado Department of Health indicates that a policy of anonymous testing has no effect on testing attitudes. See Franklyn N. Judson and Thomas M. Vernon, Jr., "The Impact of AIDS on State and Local Health Departments: Issues and a Few Answers," *American*

Journal of Public Health, vol. 78, no. 4 (April, 1988), pp. 387-393. However, an Oregon study indicates that the availability of anonymous testing increased the rate of voluntary testing among male homosexuals by one hundred twenty-five percent, among female prostitutes by fifty-six percent, high risk heterosexuals by thirty-three percent, IV drug users by seventeen percent and others by thirty-one percent. See Laura J. Fehrm *et al.*, "Trial of Anonymous Versus Confidential Human Immunodeficiency Virus Testing," *The Lancet*, August 13, 1988, p. 379-382. Comparable statistics regarding the effects of a policy of disclosure with regard to persons at risk of contagion are not available.

15. See also *Teshuvot Hatam Sofer, Yoreh De'ah*, no. 326.
16. Cf., *Kovets Iggerot Hazon Ish*, I, no. 102.
17. See R. Joshua Neuwirth, *Shemirat Shabbat ke-Hilkhatah*, 2nd edition (Jerusalem, 5739), chap. 32, note 2.
18. See R. Iser Yehudah Unterman, *Torah she-be-al Peh*, XI (5729), 14.
19. See R. Joshua Neuwirth, *Shemirat Shabbat ke-Hilkhatah* 40:67 and *ibid.*, note 159; cf., R. Yisra'el Aryeh Zalmanowitz, *No'am*, IV (5761), 176.
20. For an even more remarkable extension of this principle reported in the name of R. Chaim Soloveitchik see R. Shlomoh Yosef Zevin, *Ishim ve-Shitot*, 2nd edition (Tel Aviv, 5718), p. 65, but cf., *Hazon Ish, Oholot* 22:32 and *Yoreh De'ah* 208:7. Cf, however, R. Mordecai Winkler, *Teshuvot Levushei Mordekhai*, II, *Orah Hayyim*, no. 174, who adopts a position almost diametrically opposed to that of R. Chaim and, apparently even in wartime, permits a choice of employment in a defense industry involving profanation of the Sabbath in lieu of army service only if the individual has already been given notice of conscription, but not if he is merely in danger of being drafted.
21. See Frederick W. Winterbotham, *The Ultra Secret* (New York, 1974), pp. 60-61.
22. In dicta, the Supreme Court in *Jacobson* v. *Massachusetts*, 197 U.S. at 28, affirmed the right of the state to impose a quarantine as a means of protecting public health. Some time later, in *People* v. *Robertson*, 302 Ill. 422, 134 N.E. 815 (1922) the Illinois Supreme Court permitted the quarantine of the proprietor of a boardinghouse who was a typhoid carrier. For a discussion of quarantine statutes see Beth Bergman, "AIDS, Prostitution, and the Use of Historical Stereotypes to Legislate Sexuality," *The John Marshall Law Review*, vol. 21, no. 4 (Summer, 1988), pp. 787-830. Some commentators have indeed called for the isolation and criminal confinement of recalcitrant AIDS carriers. See James F. Grutsch Jr. and A.D.J. Robertson, "The Comming of AIDS: It Didn't Start with the Homosexuals and It Won't End with Them," *American Spectator*, vol. 19, no. 3 (March, 1986), pp. 12-15; and Kathleen M. Sullivan and Martha A. Field, "AIDS and the Coercive Power of the State," *Harvard Civil Rights—Civil Liberties Law Review*, vol. 23, no. 1 (Winter, 1988), pp. 139-197. For similar demands on the part of political figures as reported in the media see Gostin, "The Politics of AIDS: Compulsory State Powers, Public Health, and Civil Liberties," p. 1017, note 1.
23. The condom heretofore utilized for such purposes is worn by the male and it is that condom that is discussed in rabbinic literature. Recently, however, a panel of experts convened by the Food and Drug Administration has tentatively recommended approval of the newly-developed condom for women for use in disease prevention despite reservations regarding data submitted in support of the claim that the condom is effective in preventing the spread of sexually transmitted disease. See *The New York Times*, February 7, 1992, p. 7. On the basis of available descriptions of this prophylactic device, the halakhic status of the female condom appears to be identical to that of the male condom.
24. See R. Chaim Ozer Grodzinski, *Teshuvot Ahi'ezer*, I, *Yoreh De'ah*, no. 23; and R. Eliezer Waldenberg, *Tsits Eli'ezer, IX*, no. 51, *sha'ar* 2.
25. See, for example, R. Moses Feinstein, *Iggerot Mosheh, Even ha-Ezer*, I, no. 63.
26. See *Teshuvot Shevet Sofer*, no. 2; *Teshuvot Maharsham*, III, *Maftehot*, p. 317a; *Teshuvot Maharash Engel*, VII, no. 86 and VIII, no. 90; *Teshuvot Dovev Meisharim*, I, no. 20; and *Iggerot Mosheh loc, cit.*, and *Iggerot Mosheh, Even ha-Ezer*, II, no. 16 and III, no. 21; cf., *Iggerot Mosheh, Even ha-Ezer*, I, no. 70. See also *Otsar ha-Poskim, IX, Even ha-Ezer*, 23:17, sec. 36; Abraham S. Abraham, *Nishmat Avraham*, III, *Even ha-Ezer*, 5:12, sec. 5, and IV, *Even ha-Ezer*, 2:6, sub. sec. 2.
27. This was not always the case. Physicians, including Galen in early Rome, often fled cities in time of plague. Many of those who remained either refused to treat seriously ill patients or charged exceedingly high fees for doing so. See Daniel M. Fox, "The Politics of Physicians' Responsibility

in Epidemics: A Note on History," *Hastings Center Report*, vol. 18, no. 2 (April-May, 1988), p. 5.

28. *AMA Policy Compendium* (1989), p. 9. For an analysis of the duties of members of the nursing profession under the principles enunciated by the American Nurses' Association Committee on Ethics in its "Statement Regarding Risk Versus Responsibility in Providing Nursing Care," *Ethics in Nursing, Position Statement* and *Guidelines* (1988) see D. Anthony Forrester, "AIDS: The Responsibility to Care," *Villanova Law Review*, vol 34, no. 5 (1989), pp. 819-821.
29. See *Tsits Eli'ezer*, IX, no. 17, chap. 5.
30. See *Teshuvot ha-Radbaz*, III, no. 1,052; *Pri Megadim, Orah Hayyim, Mishbetsot Zahav* 328:7; *Pithei Teshuvah, Hoshen Mishpat* 426:2; and *Shulham Arukh ha-Rav*, V, *Hilkhot Nizkei Guf va-Nefesh* 7.
31. *Shevet me-Yehudah* (Jerusalem, 5715) *sha'ar rishon*, chap. 9, p. 23.
32. For a report of progress that has been made in this endeavor see *The New York Times*, February 24, 1990, p. 34, col. 6.
33. See *Jewish Week*, July 13, 1990, p. 23, col. 1.
34. See Rabbi Barry Freundel, "AIDS: A Traditional Response," *Jewish Action*, Winter, 1986-87, p. 50.
35. See statement of R. Aaron Soloveitchik quoted in the *Algemeiner Journal*, February 5, 1988, p. 1. Cf., the aggadic comment recorded in *Pesahim* 57a to the effect that the Temple courtyard raised its voice and exclaimed, "Go from here Issachar of Kefar Barka'i" because he honored himself and profaned the sacrifices by wrapping his hands in silk while performing the sacrificial ritual. Rashi, in one explanation, indicates that this priest's action in covering his hands was an act of disdain. That consideration certainly does not pertain in situations in which gloves are required in order to avoid a hazard to life or health.
36. Syed A. Sattar and V. Susan Springthorpe, "Survival and Disinfectant Inactivation of the Human Immunodeficiency Virus: A Critical Review," *Reviews of Infectious Diseases*, vol. 13, nos. 1-3 (January-June, 1991), p. 432.
37. The levels of chlorination used in swimming pools, 0.5-1.0 ppm (parts per million), are adequate for killing certain infectants, such as the polio virus, but that level of concentration is not sufficient for neutralizing HIV. Recent studies would indicate a need for a level of 50 ppm of available chlorine in order to kill the HIV virus. See Sattar and Springthorpe, p. 444 and a letter from an offical of the Centers for Disease Control on file with this writer.
38. Philip C. Fox *et al.*, "Saliva Inhibits HIV-1 Infectivity," *Journal of the American Medical Association*, vol. 116 (May, 1980), pp. 635-637.
39. A review of that material may be found in R. Moshe Bunim Pirutinsky, *Sefer ha-Brit*, 4th edition (New York, 5751), pp. 213-226 and p. 418. An earlier survey may be found in R. Chaim Chizkiyahu Medini, *Sedei Hemed*, (New York, 5722), VII, 236-281. Further material was published by the author of *Sedei Hemed* in a monograph entitled *Kuntres ha-Metsitsah ve-ha-Milu'im* (Warsaw, 1902). Unfortunately, that work was not incorporated in later editions of *Sedei Hemed*. A most valuable and readily understandable synopsis of opposing views as well as the historical background of the controversy by R. Sinai Shiffer, *Kuntres Mitsvat ha-Metsitsah*, was translated from the original German by the author's grandson, R. Sinai Adler, and appended to the latter's *Dvar Sinai al ha-Rambam* (Jerusalem, 5726), pp. 97-112. An English publication in pamphlet form compiled by Dr. Bernard Homa, *Metzitzah* (London, 1960), contains translations of early responsa authored by R. Eliezer Hurwitz and R. Moses Sofer as well as a responsum by the late R. Isaac ha-Levi Herzog.
40. See Rabbi Alfred S. Cohen, "Brit Milah and the Specter of AIDS," *The Journal of Halacha and Society*, no. XVII (Spring, 1989) pp. 93-115 and an unpublished and undated statement of a group known as The Orthodox Roundtable entitled "The Orthodox Roundtable: Opinion Concerning Mezizah and AIDS."
41. See R. Moshe Sternbuch, *Teshuvot ve-Hanhagot*, II, no. 503.
42. Cf., the studies cited by, and the comments of, Sattar and Springthorpe, p. 439.