J. David Bleich

SURVEY OF RECENT HALAKHIC PERIODICAL LITERATURE

Indirect Coercion in Compelling a Get

A two to one decision handed down by the Rabbinical District Court of Tel Aviv on 12 Adar I 5738 and published in *Piskei Din shel Batei ha-Din ha-Rabbaniyim,* vol. 11, no. 10, pp. 300-308, presents an extensive discussion of an issue having ramifications far beyond the case at bar.

The decision deals with the application of a young woman for an order requiring her husband to execute a *get.* Litigation began some two years earlier. At that time the couple had been married for approximately one year, but the husband was already serving a four-year sentence in an Israeli prison for drug-related offenses and theft. The wife sought a divorce on grounds of her husband's imprisonment. The *Bet Din,* acting on her petition, issued a ruling on 12 Shevat 5736 directing the husband to grant her a divorce *(hayyav la-tet get)* for reasons of non-support and denial of consortium as a result of his incarceration. However, as is frequently the case, the court did not find that the situation warranted a ruling compelling the husband to execute a *get* or religious divorce upon pain of coercive corporal force or further incarceration. The husband declined to obey the directive of the *Bet Din.* On 27 Kislev 5738 the wife again petitioned the *Bet Din* for execution of a *get,* this time claiming as additional grounds her adulterous relationship with another man. At a subsequent hearing the husband declined to give credence to her confession of adultery and again refused to agree to the execution of a *get.* At the conclusion of the hearing the husband behaved in an uncouth and volatile manner, expectorating in the direction of the members of the *Bet Din* and hurling vile epithets and curses upon them. He was physically restrained by his guards and returned to prison.

Other than in certain limited circumstances in which Jewish law provides that a husband may be compelled to divorce his wife, a *get* obtained as a result of coercive measures is void. The issue before the *Bet Din* was whether, in the absence of a finding permitting utilization of coercive force in securing the husband's compliance, the *Bet Din* might employ an indirect method of compelling the husband to obey its directives. It is common practice in Israel, as in many other countries, for a parole board to grant a reduction of as much as one third in the term of imprisonment for reason of good behavior. The *Bet Din* found itself in a position to make a recommendation against parole on two grounds:

(1) The prisoner's refusal to abide by the order of the *Bet Din* requiring him to issue a *get* does not constitute "good behavior." Hence the husband would not be entitled to a reduction in sentence. In making such a recommendation to the penal authorities, the *Bet Din* would not be directing incarceration for non-feasance —which would constitute a form of coercion—but would simply be making a factual statement concerning the character and behavior of the prisoner. In rejecting an application for commutation of sentence, the parole board would find the prisoner to be unworthy of clemency, which is a privilege rather than a right, and would continue his imprisonment for completely unrelated offenses.

(2) If such a recommendation were found to be so closely related to the issuance of a *get* as to be regarded as coercive in nature another avenue presents itself. The untoward behavior of the prisoner at the hearing before the *Bet Din* constituted

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contempt of court. Contemptuous behavior before a *Bet Din* is a punishable offense in Israeli law. Hence, the husband's contemptuous behavior, in and of itself, regardless of compliance or non-compliance with the directive of the *Bet Din* concerning issuance of a *get*, would constitute grounds for rejecting commutation of his sentence for reason of good behavior. The *Bet Din* was thus in a position to "forgive" his contempt and to permit his release in return for voluntary execution of a *get*.

The earliest responsum dealing with one form of indirect coercion in securing a *get* is found in a classic 13th-century work, *Teshuvot ha-Rashba*, IV, no. 40:

> Question: Reuben, the husband of Leah, and the relatives of Leah entered into an agreement requiring Reuben to divorce his wife, Leah. They agreed to a penalty of 1,000 *dinari* [upon failure] to execute a divorce by a specified time. Subsequently, Reuben retracted and refused [to execute a divorce]; whereupon, the others warned him concerning the penalty. . . . Because of this fear Reuben divorced [his wife]. . . . Shall we rule this to be a coerced *get?*
>
> Answer: It appears to me that this *get* is coerced and is invalid. . .

Rashba maintains that any coercion relating to execution of a *get*, even if self-imposed in the form of a voluntarily assumed penalty for non-execution, renders a *get* invalid. Rashba's responsum was addressed to his student R. Menachem Me'iri and the view expressed therein is espoused by Me'iri in the latter's commentary on *Gittin* 88b. This view is disputed by R. Shimon ben Zemah Duran, *Teshuvot ha-Rashbats (Tashbats)*, II, no. 68, who declares, "One who says, 'I will give 100 gold pieces to the king if I do not divorce my wife may,' divorce [his wife] and there is no question in the matter for since this obligation came of his own accord he divorces of his own will." This also appears to be the position of Rabbenu Peretz as cited by *Tur Shulhan Arukh, Even ha-Ezer* 154. [Cf., however, *Teshuvot R. Bezalel Ashkenazi*, no. 17.] A similar view is cited by *Bet Yosef, Even ha-Ezer* 134, in the name of R. Maimon Nagar, a late 14th-century Spanish authority. Rabbenu Peretz and R. Maimon Nagar distinguish between an oath to execute a *get* and a penalty assumed for non-performance. The former is regarded as a form of coercion which invalidates a *get* even if the oath is sworn voluntarily. Having bound himself by an oath to execute a *get* the husband has no choice but to divorce his wife and hence the *get* is deemed to be involuntary. [See, however, *Bet Yosef, Even ha-Ezer* 154, who understands these authorities as declaring only that a *get* issued subsequent to an oath obliging the husband to divorce his wife is tainted by the appearance of coercion, but is not, properly speaking, invalid.] In contradistinction, assumption of a penalty for non-performance is not deemed to constitute coercion. Although the husband has undertaken to pay a penalty should he fail to execute a *get*, he nevertheless retains the option of satisfying the monetary obligation and not executing the divorce. Accordingly, these authorities regard execution of a *get* under such circumstances as a free expression of the husband's will. [For a discussion of various attempts to reconcile these apparently conflicting opinions see R. Mordecai Yaffo, *Levush, Even ha-Ezer* 134, cited by *Bet Shmu'el, Even ha-Ezer* 134:8; R. Meir Posner, *Bet Me'ir, Even ha-Ezer* 134:4; *Mishkenot Ya'akov*, no. 38; *Arukh ha-Shulhan, Even ha-Ezer* 134:23; *Hazon Ish, Even ha-Ezer* 99:6, and R. Elyakim Ellinson, *Sinai*, Tammuz-Sivan 5731, pp. 144 ff.]

Rema, *Even ha-Ezer* 134:5, cites both conflicting opinions and rules that a *get* should not be executed in the absence of prior forgiveness of the penalty for non-execution, but adds that if a *get* has been executed under such circumstances it is valid even in the absence of prior forgiveness of the penalty, provided that the penalty was assumed voluntarily.

The controversy between Rashba and other early authorities is limited to situations in which there is a direct relationship between the financial liability assumed by

the husband and issuance of the *get*. Since imposition of the penalty is the direct result of failure to execute a divorce, that relationship is sufficient, in the opinion of Rashba, to render the *get* the product of coercion. However, when the husband's desire is the gain of some completely extraneous benefit or the escape from some totally unrelated obligation, the situation is entirely different. Accordingly, *Teshuvot Rivash*, no. 127, finds no grounds to invalidate a *get* issued in order to escape penalties for non-payment of an unrelated debt. The case presented to Rivash involved a person cast into debtor's prison for non-payment of a debt. His wife's relatives offered to satisfy the debt on his behalf and thereby obtain his release from prison on the condition that he divorce his wife. Rivash finds no objection to execution of a *get* under such circumstances "for he was not seized in order to [compel] him to divorce [his wife] but on account of his debt; the *get* is not coerced but [the product] of free will."

Teshuvot ha-Rashbats, I, no. 1, modifies this decision by stating that such a *get* is valid only if the extraneous sanctions applied in order to secure compliance on the part of the husband are legitimate, i.e., the debt which he is called upon to satisfy is legal and actionable. A divorce executed in order to escape payment of a debt which in any event is not actionable is, in the opinion of *Tashbats*, invalid. Such a claim, since it is invalid, is regarded by *Tashbats* as a disguised attempt to compel a *get*.

This interpretation of Rivash's position is rejected by *Teshuvot Ra'anah*, no. 43. In order to prevent precipitous marriages, the community had promulgated a *herem* prohibiting any marriage ceremony in the absence of a quorum of ten. In violation of the ban, a man entered into a marriage in the absence of the requisite quorum and was incarcerated by the communal officials. His release from prison was made contingent upon execution of a divorce. *Teshuvot Ra'anah* finds that imprisonment was an inappropriate and illicit penalty for violation of the ban, but that a *get* issued in such circumstances would be valid nonetheless. The husband, argues this authority, was imprisoned not in order to compel divorce but because of another matter entirely, i.e., solemnization of a marriage in violation of the communal edict. Release from prison in return for execution of a *get* is not perceived by *Teshuvot Ra'anah* as a form of coercion since the imprisonment, even though illegal, is not the result of non-execution of a *get*.

It would thus appear that, according to *Teshuvot Ra'anah*, the Tel Aviv *Bet Din* might without any further finding properly decline to recommend parole unless the husband agrees to divorce his wife. According to *Tashbats* such a procedure would require an antecedent finding by the *Bet Din* that an Israeli court may legitimately impose a prison term for the crimes with which the prisoner was charged (and legitimately impose such penalty on the strength of the evidence presented at his trial) even though there is no explicit provision in Halakhah for incarceration as a penalty for such offenses. The *Bet Din*, however, did not examine this issue but instead cited its frequent practice of causing penal sanctions to be imposed for contempt of court through the secular judiciary and argued that the husband's contemptuous behavior was sufficient warrant to justify denial of parole. The husband, reasoned the *Bet Din*, might then be offered release from prison in return for a *get* even according to the opinion of *Tashbats*.

The *Bet Din*, however, hesitated to rule in this manner because of the opinion of yet another authority. *Teshuvot Mabit*, II, no. 138, rules that even according to *Tashbats* measures may be taken to collect a legitimate unrelated debt and forgiveness of the debt may be offered as an inducement for a divorce only if the husband has a genuine choice in the matter and the measures taken will in reality serve to exact payment in the event that the husband declines to grant a divorce. In such cases the coercive action taken is indeed undertaken for a purpose entirely extrinsic to the *get*; withdrawal of sanctions, which would otherwise realistically be effective in compelling payment, in return for execution of a *get*

is thus not deemed to be coercion with regard to the *get*. However, when it is known that, despite the pressure brought to bear upon him, the husband cannot, or will not, pay the debt, the threat of compelling payment must, according to Mabit, be viewed as direct coercion of the *get*. In the case before the Tel Aviv *Bet Din* it is evident that the husband was given no choice; he must either execute a *get* or remain in prison. Hence, according to the opinion of Mabit, a *get* issued under such circumstances would be invalid.

In point of fact, as noted by the *Bet Din* itself in its decision, this restrictive view is contradicted by the same authority in another responsum, *Teshuvot Mabit*, I, no. 22. A citizen of Sefad was imprisoned by the civil authorities for "heretical" conduct and pleaded with the communal authorities to intercede on his behalf in order to secure his release. Those authorities responded by offering to secure his release if, in turn, he would agree to divorce his wife and leave the jurisdiction. In this responsum, Mabit ruled that the *get* was valid despite the fact that the husband had no other means of securing his release from prison.

An attempt to resolve the apparent contradiction between these two responsa is undertaken in a latter-day work, *Simhat Kohen, Even ha-Ezer*, III, no. 9. *Simhat Kohen* distinguishes between coercion and forgiveness of punishment. This scholar argues that, even according to Mabit, the husband must be able to make a free choice only when coercive measures are applied in order to evoke a response. In such circumstances he must have a true choice between satisfying the debt or issuing a *get*. When no real choice exists, the *get*, according to Mabit, is valid. However, declares *Simhat Kohen*, when sanctions are applied in the nature of a punishment unrelated to the granting of a divorce, forgiveness or termination of the punishment in return for execution of a *get* is legitimate even according to Mabit. Accordingly, in *Teshuvot Maharit*, I, no. 22, the *get* is ruled to be valid since the civil authorities did not impose imprisonment upon the husband for purposes of compelling a *get* but by way of punishment for a completely unrelated matter. According to *Simhat Kohen's* analysis a recommendation that commutation of a prison sentence imposed for other offenses as a means of securing cooperation in execution of a *get* would have been valid even according to Mabit.

The *Bet Din* also found possible grounds to distinguish between a recommendation *against* parole and failure to make a positive recommendation *for* parole. The *Bet Din* is clearly under no obligation to intervene on behalf of a prisoner. *Teshuvot Maharik*, no. 123, declares, "But if a person is imprisoned by gentiles because of taxes or some other matter we may say to him, 'We will not endeavor to have you released from prison unless you divorce your wife with a valid *get*.' This is not coercion since we are not doing him evil, but rather [we] are refraining from assisting him. Withholding of benefit is not deemed coercion." At least one member of the Tel Aviv *Ben Din* was prepared to argue that, since the prisoner enjoys no statutory right to a reduction of sentence, even an explicit recommendation against reduction of sentence would merely constitute a recommendation for withholding of a benefit. Another member of the *Bet Din* expressed concern that were such a recommendation to be made by the *Bet Din*, the prison authorities would in all likelihood explicitly inform the prisoner that he has a choice of either divorcing his wife or serving his full sentence, but did not expressly indicate why this would invalidate the *get*.

Despite the arguments advanced auguring in favor of such a procedure, a majority of the members of the *Bet Din* ruled against an explicit recommendation for denial of parole. Although the reasons are not spelled out, it must be assumed that the majority of the *Bet Din* either felt constrained by the minority view of Maharit and were not convinced by *Simhat Kohen*'s analysis of Maharit or else questioned whether imprisonment for the offense for which the husband was convicted or imprisonment for contemptuous behavior toward the *Bet Din* was justifiable in terms

of Jewish law and rejected the argument that a recommendation against parole constitutes simply withholding of a benefit. Indeed, if imprisonment under such circumstances is not a legitimate penalty, it should logically follow that failure to commute the sentence is not simply the withholding of a benefit but constitutes continuation of an evil and therefore may not be used by prison authorities as a means of securing compliance with a directive to execute a *get*.

Automatic Banking Machines

Many banks in Israel as well as in this country have installed automatic banking machines for the convenience of their customers. These machines, which are available for use twenty-four hours a day, accept deposits and also dispense cash. This makes it possible for a customer to perform banking chores at his convenience at any hour of the day without waiting for the services of a teller. The availability of these services on *Shabbat* presents a unique set of problems for a Jewish bank. The United Mizrachi Bank, desiring to make automatic banking machines available for the convenience of its customers, turned to the Chief Rabbi of Israel, Rabbi Shlomoh Goren, with a series of questions. Rabbi Goren's response is published in the 5741 issue of *Shanah be-Shanah*. The questions presented are:

1. Is it permitted to allow the machines to operate on *Shabbat* since they are likely to be utilized by non-observant Jewish clients?

2. Is there any prohibition against permitting a machine owned by a Jew to perform acts of labor on *Shabbat?* A prohibition against allowing the machines to operate on *Shabbat* would prevent making such machines available even were they to be used only by non-Jews.

3. Is it permissible for the bank to charge interest on cash dispensed as a loan by the machines for the use of the money on the Sabbath day? Were the money to be dispensed one day later the interest charged would be computed on the basis of a period beginning one day later. Conversely, in accepting a deposit in an interest-bearing account is it permitted to pay the depositor the additional interest accruing to him for the deposit on the Sabbath? Were the money deposited a day later the depositor would receive interest beginning on the later day.

The problem presented in abetting non-observant Jews in engaging in forbidden financial transactions on the Sabbath is whether such action constitutes a violation of the biblical prohibition "You shall not place a stumbling block before the blind" (Leviticus 19:14). The paradigm discussed by the Gemara is the act of extending a cup of wine to a Nazarite. The Gemara, *Avodah Zarah* 6b, indicates that the biblical prohibition is operative only if the Nazarite and the wine are on opposite sides of a river. In such a situation it is impossible for the Nazarite to drink the wine without the assistance of the person placing the "stumbling block" before him. When both the Nazarite and the wine are on the same side of the river no biblical transgression is incurred in handing the wine to the Nazarite since he could readily have taken it himself. Rabbi Goren asserts that making banking machines available to non-observant Jews on the Sabbath is comparable to the situation in which both the Nazarite and the wine are on the same side of the river. Since the identical machines are provided by other banks, and presumably by non-Jewish banks as well, in allowing its machines to operate on Sabbath, the Jewish bank does not make possible a transgression which could not otherwise be committed. Nevertheless, *Tosafot, Shabbat* 3a, followed by other authorities including *Magen Avraham, Orah Hayyim* 347:4, rule that, even when the transgression could have been performed without assistance, it is forbidden by virtue of rabbinic edict for a Jew actively to aid and abet a transgressor. Although there is disagreement among the authorities with regard to whether or not this rabbinic prohibition extends to rendering assistance to a non-Jew in violating Noachide prohibitions, *Shakh, Yoreh De'ah* 151:6, declares that all are in agree-

ment that the prohibition includes rendering such assistance even to an apostate Jew.

The second question, viz., whether or not a Jew is permitted to allow his utensils to be used for labor on *Shabbat*, is the subject of dispute in the Gemara, *Shabbat* 18a. The normative position, as recorded by Rambam, *Hilkhot Shabbat* 6:16, and subsequent authorities is that a Jew may permit a non-Jew to use the former's utensils for labor which a Jew is forbidden to perform on *Shabbat*. Rabbi Goren nevertheless points to a specific provision of Jewish law which prohibits a Jew to allow his possessions to be used for purposes of transgression. The Mishnah, *Shevi'it* 5:6, declares that during the sabbatical year farming implements which are used exclusively for forbidden agricultural tasks may not be sold to a person suspected of engaging in such proscribed activities. Similarly, an automatic banking machine should not be made available to Sabbath violators. However, here again, the prohibition is not specifically against permitting use of one's property for "labor," but is the selfsame prohibition discussed earlier which forbids one to place a "stumbling block" before the blind or to assist a Jew in transgressing.

The third problem, viz., whether interest may be charged or credited for withdrawals or deposits on the Sabbath is not an actual one. The prevalent banking practice is not to debit or credit an account for transactions made by means of an automatic machine until the next business day. Thus the problem of forbidden interest charges or payments for the *Shabbat* day does not arise.

This response, however, merely begs the question, not simply because it fails to address the hypothetical question concerning a bank which *does* credit and debit an account on the same day that the automatic banking machine is used for a transaction, but because the identical question arises even if the transaction is completed on a weekday. Banks customarily calculate interest on all deposits and loans on a per diem basis. In doing so they pay and charge interest for use of money on the Sabbath-day even though the actual deposit or loan is made on a weekday. *Magen Avraham, Orah Hayyim* 307:7, explicitly forbids acceptance of interest or dividends paid expressly for use of funds on the Sabbath.

The problem posed by a per diem interest rate is discussed by R. Moses Feinstein in a responsum included in the most recent volume of his *Iggerot Mosheh*. In *Iggerot Mosheh, Orah Hayyim*, IV, no. 59, Rabbi Feinstein observes that interest is commonly calculated on the basis of a twenty-four hour period beginning and ending at midnight. Hence the interest calculated for any given Saturday necessarily includes interest for a number of hours on Saturday evening subsequent to the conclusion of the Sabbath. Interest under such circumstances is permitted since payment is not specifically for use of money on the Sabbath but includes payment for the use of money on a weekday as well *(behavla'ah)*.

Rabbi Feinstein also permits acceptance of interest for the two-day *Yom Tov* period since, in terms of biblical law, *Yom Tov* restrictions are limited to only a single day. Two days are observed in the diaspora because of the doubt which existed before the promulgation of a fixed calendar regarding the day on which *Yom Tov* actually occurred. Hence, Rabbi Feinstein rules that interest may be accepted for both days since, in actuality, only one day is *Yom Tov* and interest is accepted for a 24-hour period which includes a number of hours which are not *Yom Tov*. The two days of *Rosh Hashanah,* however, are deemed to be a single "long day" *(yoma arikhta)* and hence Rabbi Feinstein rules that benefits may not be derived from the interest paid for the day of the civil calendar which falls entirely within the two-day period of *Rosh Hashanah*. For the same reason interest may not be accepted for a similar one-day period when *Yom Tov* occurs on a Friday or on a Sunday since, under such circumstances, one entire 24-hour period contains no segment of a weekday. Rabbi Feinstein advises that the interest paid for such days be anonymously contributed to a charity so that no benefit of any nature be derived by the depositor.

Rabbi Feinstein's responsum is addressed to a depositor concerned with accepting interest and for that reason does not address itself to the propriety of interest charges on loans calculated in this manner by a Jewish bank. This problem may be obviated by including a clause in the *hetter iska* agreement stipulating that payments be deemed to accrue on a weekly rather than a daily basis. This would serve to eliminate the problem save for loans which fall due in full during the week following *Rosh Hashanah* or during the week following a *Yom Tov* which occurs on Friday or on Sunday.

Jaundice and Circumcision

Jaundice quite commonly appears in newborn infants between the second and fifth day following birth. Jaundice, a yellow discoloration of tissue and body fluids, is caused by the presence of bilirubin, a pigment produced primarily by the breakdown of hemoglobin. Normally, hemoglobin released from senescent red blood cells is converted into bilirubin which is then conjugated, i.e., transformed, by liver enzymes into a water soluble form and excreted in the urine. During the first days of life conjugation of bilirubin is limited because of hepatic immaturity causing delayed development of the enzyme system required for conversion of bilirubin. The result is physiologic jaundice of the newborn which is clinically evidenced by marked yellowness of the skin and eyes. Subsequent to the first week of life, the liver is usually able to conjugate larger amounts of bilirubin and the jaundice disappears without ill effect.

The degree of jaundice can be accurately determined by measuring the amount of bilirubin in the blood. Normal bilirubin levels range between 0.25 and 0.75 mg. per 100 ml. of blood serum. The serum bilirubin of a full-term infant seldom exceeds 10 mg. per 100 ml. at its height on the second and third days of life and usually does not exceed 7 mg. per 100 ml., although levels of serum bilirubin in a newborn infant even somewhat higher than 10 mg. per 100 ml. are not deleterious to the infant provided that the cause is normal or physiologic hepatic immaturity.[1] Otherwise, bilirubin levels in excess of 5 mg. per 100 ml. are almost always indicative of concomitant hepatic dysfunction or other disorder of serious concern.[2] Apart from normal physiologic jaundice, elevated serum bilirubin and accompanying jaundice may be caused by sepsis or infection, hemolytic disease, intrinsic red cell defects, oxidant drugs, enclosed hemorrhage or various metabolic disorders. However, in the absence of other indication of a liver disorder or other cause, jaundice may be assumed to be physiologic in nature provided that the serum bilirubin has not reached an inordinately high level and that it begins to decrease toward the end of the first week of life.

Since, at present, medical science recognizes little or no hazard in physiologic jaundice, physicians routinely advise their patients that circumcision may be performed on the eighth day without fear of endangering the infant even though the child manifests clinical signs of physiologic jaundice. Parents thus reassured are anxious to fulfill the *mitsvah* of *milah* in its proper time and are reluctant to delay circumcision until after the jaundice has disappeared. Support for this practice has also been expressed recently by Dr. Michael Amit in a contribution to the first volume of *Halakhah u-Refu'ah,* edited by Rabbi Moshe Hershler (Jerusalem, 5740).

Medical opinion notwithstanding, *Shulhan Arukh, Yoreh De'ah* 263:1, rules quite clearly that a child should not be circumcised when signs of jaundice are present. This provision of Jewish law is, to be sure, predicated upon considerations of health. Nevertheless, it is well established that matters which in rabbinic sources are regarded as posing danger to life must be considered in that light even if contemporary science fails to recognize a potential danger. Thus, *Shabbat* restrictions must be ignored in order to treat a patient deemed by Jewish law to be afflicted with a dangerous condition even if physicians deny that any danger exists. *Bah, Orah Hayyim*

328:4, states unequivocally that physicians, in espousing such opinions, are in error. Language which is even more emphatic in nature is employed by *Pri Megadim, Eshel Avraham, Orah Hayyim* 328:2. The matter can perhaps be put into a more felicitous perspective by recognizing that a talmudic statement expressing that a certain malady is dangerous in nature engenders, at the very minimum, a state of doubt. Although it is indeed possible that "nature has changed" *(nishtaneh ha-teva)* and that a given danger no longer exists, or that such a pronouncement was based upon inaccurate medical assumptions which were current at the time, it is also possible that the Sages may indeed have been privy to information not available to physicians of subsequent ages and that at some future time medical science may again perceive the hazard as veridical.[3] Certainly, absence of evidence of known danger does not exclude the possibility that danger may occur in even a single instance.[4] With regard to neonatal jaundice in particular, while it may readily be granted that physiologic jaundice poses no known danger to the child, there does exist a distinct possibility that the jaundice is, in fact, the effect of a liver or other disorder and is misdiagnosed as physiologic jaundice. This consideration itself might well have been sufficient cause for the Sages to prohibit circumcision in all cases of jaundice.

The halakhic rule is that even the possibility of hazard must be treated as a danger. Accordingly, any matter considered by the Sages as posing a threat to life must be regarded as constituting a possible hazard for all purposes of Halakhah. Indeed the attitude of Jewish law with regard to possible threat to life is succinctly stated in the final sentence of the statement codifying the prohibition against circumcizing a child who exhibits signs of jaundice. Rambam, *Hilkhot Milah* 1:18 and *Shulhan Arukh, Yoreh De'ah* 263:1, declare, "It is necessary to be extremely careful with regard to these matters. It is forbidden to circumcise a child in whom there is a suspicion of illness since danger to life takes precedence over all else, for it is possible to perform circumcision at a subsequent time, but it is never possible to restore a single Jewish life." It is therefore little wonder that authorities such as R. Shlomoh Kluger, *Teshuvot Tuv Tam va-Da'at, Yoreh De'ah,* no. 222; R. Yehudah Leib Zirelson, *Atsei ha-Levanon,* no. 62; R. Yonatan Steif, *Teshuvot Mahari Shteif,* no. 62; R. Yitzchak Weisz, *Minhat Yitshak,* III, no. 145; and R. Eliezer Waldenberg, *Tsits Eli'ezer,* XIII, no. 81, strongly admonish that physicians who advise circumcision of infants showing signs of jaundice should not be heeded.

Nevertheless, not all forms of jaundice are regarded by Jewish law in a uniform manner. Jewish law pertaining to circumcision distinguishes between minor and serious illnesses. A child may not be circumcised while suffering even a minor illness or when afflicted by pain even though such conditions present no danger whatsoever. *A fortiori,* a child afflicted with an illness which does present a danger to life or an illness which affects "his entire body," may not be circumcised while afflicted in this manner. Moreover, a child thus afflicted may not be circumcised until the expiration of seven full days subsequent to having been fully restored to a state of complete health. Jaundice which is physiologic in nature is deemed by Jewish law to be non-life-threatening in nature. Hence circumcision is forbidden only until "his blood falls" (*Shabbat* 134a), i.e., hepatic function has matured and the liver is capable of conjugating the bilirubin in order for it to be excreted by the body. However, when serum bilirubin is excessively high, or when even moderate levels are diagnosed as being the result of a liver or other disorder, the principle which pertains to affliction with a hazardous illness applies, viz., the child may not be circumcised, not only while actually endangered by the illness, but until *all* symptoms of the illness have disappeared and an additional period of seven full days has elapsed.[5]

Accordingly, it is certain that a baby who manifests yellowness should not be circumcised until all symptoms of physiologic jaundice have disappeared. When

jaundice is excessive, or is the result of a condition other than normal hepatic immaturity, the baby may not be circumcised until the jaundice has totally disappeared and seven additional days have elapsed thereafter. According to some authorities violation of these prescriptions not only endangers the child but has wider ramifications as well. Rabbi Jacob Ettlinger, *Teshuvot Binyan Tsion,* no. 87, rules that, since Jewish law forbids circumcision of an infant who shows signs of jaundice, one who circumcises a child on *Shabbat* under such circumstances is a Sabbath violator. It also follows that the *mitsvah* of circumcision has not been fulfilled. The appointed time for the circumcision of a child who is "yellow" does not arrive until his color has returned to normal. Hence, argues *Binyan Tsion,* circumcision while the child is yet yellow is tantamount to circumcision prior to the eighth day. Circumcision prior to the prescribed time does not constitute fulfillment of the *mitsvah* of *milah.* Accordingly, R. Jacob Ettlinger, both in *Binyan Tsion,* no. 87 and in *Arukh la-Ner, Yevamot* 71b, declares that if circumcision is performed while a child is afflicted with an illness, or within the subsequent seven-day period if the child has been afflicted with a serious illness, symbolic letting of blood is required following complete recovery of the infant.[6]

In light of the lamentable disregard of these provisions of Jewish law on the part of many parents and *mohelim,* a number of rabbinical figures associated with the Central Rabbinical Congress of the United States and Canada *(Hitahdut ha-Rabbanim)* issued a "Notice and Warning to *Mohelim*" dated 25 Nisan 5737. This document has received wide circulation and is included in the prefatory section of a new offset edition of *Zokher ba-Brit,* a valuable compendium devoted to the laws of *milah,* authored by Rabbi Asher Anshel Gruenwald.

The signators, however, do not content themselves simply with a restatement of the pertinent halakhah. Since perception of yellowness is subjective in nature and since ignorance or disregard of Jewish law in this matter is deemed by Halakhah to constitute a possible threat to the life of the child, these authorities advance a clinical criterion for the determination of the presence of a level of jaundice which requires postponement of circumcision. In a ruling which they candidly describe as being issued "for the purposes of containing the matter" *(le-migdar milta)* they forbid circumcision of any child either if yellowness is visually perceivable or if the child's bilirubin count is five or higher. They further rule that any child whose serum bilirubin has reached or has exceeded ten mg. per 100 ml. must be considered to be afflicted with a serious illness. As noted earlier, a child who has been afflicted with a serious illness may not be circumcised until seven complete days have elapsed subsequent to his complete cure. Accordingly, if the serum bilirubin reaches ten they require that seven full days elapse subsequent both to disappearance of all visible traces of yellowness and to the time at which the bilirubin count has fallen to five.

Insofar as the provisions of Jewish law are concerned it is difficult to correlate the visual criteria of Halakhah with the measurement of serum bilirubin. A child with a pale complexion manifests signs of yellowness at a much lower level of serum bilirubin than does a child with a ruddy complexion (although a trained physician may detect jaundice much sooner in a ruddy infant than in a pale baby). In many infants yellowness may not be perceived until the bilirubin level exceeds seven mg. per 100 ml. of serum, although, other than in newborn infants, clinical jaundice can usually be perceived when the serum bilirubin level exceeds 2.5 mg. per ml.[7] Even more questionable is the ruling of these authorities in requiring a seven-day waiting period for a child whose bilirubin has reached a level of 10 mg. per ml. Although a child who is inordinately yellow may not be circumcised until seven days have elapsed subsequent to a return of normal coloring, it is doubtful that many children are perceived as being "inordinately yellow" unless the bilirubin level is significantly higher than ten.

It should also be noted that there is

some disagreement with regard to the extent of yellowness which necessitates postponement of circumcision. R. Shlomoh Kluger, *Teshuvot Tuv Ta'am va-Da'at, Yoreh De'ah,* I, no. 222, and R. Shlomoh Mordecai Schwadron, *Da'at Torah, Yoreh De'ah* 38:8 and *Arukh ha-Shulhan* 263:3 maintain that circumcision must be postponed even if the yellowness is perceived only in the face. R. Shmuel Dov Ingelberg (known as "the *mohel* of Warsaw"), *Brit Avraham,* sec. 12, reports that this was also the position of R. Joseph Dov Soloveitchik and of R. Bunim of Varkow. However, R. Eliyahu Posek, *Koret ha-Brit, Nahal ha-Brit* 263:1; R. Malki'el Zev Tennenbaum, *Divrei Malki'el,* II, no. 132; and R. Yehudah Leib Zirelson, *Atsei ha-Levanon,* no. 62, maintain that circumcision must be delayed only if jaundice is manifest over the surface of the entire body. *Koret ha-Brit* adds the observation that jaundice over the surface of the major portion of the body must be considered as tantamount to jaundice over the entire body. This point is disputed by *Divrei Malki'el* II, no. 132. *Ot Hayyim ve-Shalom* 263:2; *Teshuvot Mahari Shteif,* no. 62; and *Teshuvot Minhat Yitshak,* III, no. 145, rule in accordance with the former opinion. *Ot Hayyim ve-Shalom,* citing *Koret ha-Brit,* agrees that circumcision may be performed if the parents are yellow in complexion provided that yellowness is perceived only on the face of the infant.[8]

The practice of some *mohelim* to circumcise an infant showing some signs of jaundice, although not in conformity with normative Halakhah, is not entirely without precedent. One source which is adduced by some in support of this practice is a somewhat cryptic statement of R. Yehudah Asad, *Teshuvot Yehudah Ya'aleh, Yoreh De'ah,* no. 240. In concluding a discussion of the prohibition against circumcising a baby who manifests clinical signs of jaundice, this authority states, "Nevertheless it is best to consult a physician with regard to similar matters *(u-ke-yotse ba-zeh)* and one may rely upon him with regard to [determining whether] to circumcise or not to circumcise." This statement readily lends itself to the interpretation that, since the consideration is entirely one of danger to the infant, the provisions recorded in *Shulhan Arukh* are subject to modification on the basis of competent medical advice. If this was indeed Mahari Asad's contention, his position is contradicted by the previously cited statements of *Bah* and *Pri Megadim* whose view was adopted by all subsequent authorities. However, Rabbi Weisz interprets Mahari Asad's statements in an entirely different manner. Rabbi Weisz understands Mahari Asad as simply elucidating the provisions of Jewish law with regard to yellow, green and red skin color and then adding the comment that since there are no statutory provisions with regard to other types of unusual skin coloring (as indicated by use of the phrase *u-ke-yotse ba-zeh*) in the event that any other discoloration is present medical advice should be sought with regard to any possibility of danger.

A somewhat firmer basis for sanctioning circumcision despite the presence of mild jaundice is the ruling of *Hokhmat Adam* 149:4. Citing phraseology employed by Rambam, *Hilkhot Milah* 1:17, *Hokhmat Adam* declares that a child who is "inordinately yellow" *(yarok be-yoter)* may not be circumcised despite the fact that other authorities, including *Shulhan Arukh,* omit the word "inordinately" *(be-yoter)* and clearly declare that any perceivable degree of jaundice necessitates postponement of circumcision. Dr. Jacob Levy, *No'am,* X (5729), 178, indicates that the practice of contemporary *mohelim*—decried in the statement cited earlier—is based upon the position of *Hokhmat Adam.* It should be noted that *Arukh ha-Shulhan* 263:3 and *Rosh Efrayim* 38:52 both maintain that there is no disagreement between Rambam and other authorities. They understand the term *"be-yoter,"* which is employed by Rambam, as excluding only "natural" yellowness of complexion which is not attributed to jaundice. It should be noted that Rambam concludes his statement with the words, "It is necessary to be extremely careful with regard to these matters."[9] Moreover, *Nimukei ha-Riv, Yoreh De'ah*

263:1, emphasizes that *Shulhan Arukh* consciously omits the word *"be-yoter"* and states that he emphasizes this point "because the [author of the] work *Hokhmat Adam* copied the phraseology of Rambam, and the [former] work is found in every person's possession and [hence] *mohelim* may come to rely upon their judgment with regard to this and from this there may arise danger to life. Therefore, I found it necessary to warn *mohelim* with regard to this."

Parenthetically, jaundice prior to the second day of life is never physiologic in nature.[10] Jaundice at or within the first twenty-four hours of birth is a symptom of dysfunction rather than of normal hepatic immaturity. Hence, when jaundice does occur on the first day, seven full days must elapse following total disappearance of all signs of jaundice before circumcision may be performed. Of interest is an opinion expressed by R. Shlomoh Kluger in his *Teshuvot Tuv T'am va-Da'at, Yoreh De'ah,* I, no. 220. Contrary to the position of most other rabbinic decisors, R. Shlomoh Kluger rules that a child who develops a yellow skin color subsequent to birth may not be circumcised until seven days have elapsed after the jaundice is no longer visible. Surprisingly, he posits an exception waiving the seven-day waiting period in one situation which, in light of contemporary medical knowledge, must be recognized as constituting a serious illness. Rabbi Kluger rules that a child who manifests yellowness at birth may be circumcised as soon as the yellowness is no longer evident. Rabbi Kluger asserts that in the latter case the jaundice may be assumed to be "natural" and not the result of sickness. Quite obviously, this opinion was predicated upon an erroneous medical assumption. Since jaundice within the first twenty-four hours following birth is now recognized as a sign of a malady, it is quite clear that a seven-day period is required subsequent to disappearance of jaundice.[11]

NOTES

1. See Carl H. Smith, *Blood Diseases of Infancy and Childhood,* 3rd edition (St. Louis, 1972), p. 107.
2. See *Smith's Blood Diseases of Infancy and Childhood,* 4th edition (St. Louis, 1978), p. 253.
3. Cf. R. Yonatan Steif, *Teshuvot Mahari Shteif,* no. 52.
4. See *Teshuvot Maharam Schick, Yoreh De'ah,* no. 24.
5. See *Arukh ha-Shulhan, Yoreh De'ah* 263:2; R. Shalom Mordecai Schwadron, *Da'at Torah, Yoreh De'ah* 38:8; R. Shlomoh Kluger, *Teshuvot Tuv Ta'am ve-Da'at, Yoreh De'ah,* I, nos. 220 and 222; R. Mordecai Winkler, *Teshuvot Levushei Mordekhai, Yoreh De'ah,* no. 180; *Teshuvot Shevet Sofer, Orah Hayyim,* no. 38; *Mishmeret Shalom,* no. 17; and *Otsar Yad ha-Hayyim,* sec. 363. Cf., however the conflicting opinions of *Hokhmat Adam* 149:4, who maintains that only the circumcision of a child who is "excessively yellow" must be postponed but that such a child is to be circumcised immediately upon his color returning to that of "other children," and of *Teshuvot Maharam Rothenberg,* II, no. 152; *Yad Ketanah, Hilkhot Milah,* no. 8, sec. 18; R. Menachem Mendel Schneersohn, *Tsemah Tsedek, Piskei Dinim, Yoreh De'ah* 263; and *Teshuvot Tuv Ta'am va-Da'at, Yoreh De'ah,* I, no. 220, who maintain that a subsequent seven-day waiting period is required in *all* cases of perceivable jaundice. (*Tsemah Tsedek* is inaccurately cited by *Koret ha-Brit, Nahal ha-Brit* 263:2 as requiring a seven-day waiting period only when the entire body is yellow.) See also *Teshuvot Bet Yitshak, Yoreh De'ah,* II, no. 91, sec. 6, who requires a seven-day period if the jaundice has not receded by the eighth day and the baby is "excessively yellow over the entire body," and R. Chaim Eleazar Shapiro, *Ot Hayyim ve-Shalom* 263:1. These authorities both rule against circumcision on *Shabbat* in all cases in which jaundice has been perceived. They also require a seven-day waiting period if circumcision, in the absence of jaundice, would have occurred on *Shabbat* and in all instances in which the jaundice was evident over the entire body. When jaundice is evident over the entire body a seven-day waiting period is required by *Teshuvot Mahari Shteif,* no. 63, as well. Cf. also R. R. Elihayu Posek, *Koret ha-Brit, Nahal ha-Brit,* 263:2.

6. This is also the position of *Yashresh Ya'akov, Yevamot* 64b, and of *Ot Hayyim ve-Shalom* 262:5. An opposing view is espoused by *Teshuvot Bet Yitshak, Yoreh De'ah,* II, no. 91 and *Avnei Nezer, Yoreh De'ah,* no. 326. See also *Teshuvot Oneg Yom Tov,* no. 22.
7. See *Smith's Blood Diseases of Infancy and Childhood,* 4th edition, p. 253.
8. *Minhat Yitshak* also rules quite cogently that circumcision may not be performed when contraindicated by Jewish law even if as a result of such a ruling the parents will seek out a *mohel* or physician who will not only perform the circumcision while the baby is jaundiced but will also fail to remove the foreskin in the prescribed manner.
9. Cf., however, *Atsei ha-Levanon,* no. 62, who on the basis of Rambam's language distinguishes between "yellow" and "weak yellow" *(kalush)* or "tendency" *(netiyah)* toward yellowness. This appears to be the position of *Avnei Nezer, Yoreh De'ah,* no. 320, as well.
10. See Smith, *Blood Diseases of Infancy and Childhood,* 3rd edition, p. 108.
11. See Dr. Jacob Levy, *No'am,* X (5727), 176.

ADDENDUM TO TRADITION 19:4, WINTER, 1981, p. 348

Copyright to Tape Recording

R. Moses Feinstein, in his recently published *Iggerot Mosheh, Orah, Hayyim,* IV, no. 40, sec. 19, rules that a lecturer may justifiably ban the taping of his lecture if the subject matter is such that "it should not be transmitted to one and all," if it includes halakhic pronouncements which, although correct in theory, are in the category of rulings which it is not proper to publicize *(halakhah ve-ein morin ken),* or if the instructor is unsure of his analysis or conclusion and hence presents his material only in a tentative manner since in such circumstances "the teacher has reason to fear that his words are not correct and he may be embarrassed."

In the same responsum Rabbi Feinstein rules that unauthorized copying of a tape prepared for commercial purposes is forbidden as constituting an act of theft. Although no sources are cited in the brief discussion presented, this ruling seems to espouse the position adopted by *Sho'el u-Meshiv.* The rights of a lecturer to material recorded by himself on a tape would appear to be identical to those of a scholar with regard to his written novellae.