

## ***Survey of Recent Halakhic Periodical Literature***

### **COMPELLING TISSUE DONATIONS**

#### **I. THE OBLIGATION TO RESCUE**

In late 1990 it was determined that a Jewish teenager, Meir Shor, of Queens, N.Y., was suffering from leukemia. His physicians advised that the only treatment likely to save his life was a bone marrow transplant. A campaign to identify a suitable donor was immediately instituted by the National Jewish Children's Leukemia Foundation. Six months later, after some three thousand people were tested, a perfect match was found. However, the potential donor declined to provide the necessary marrow on the plea that he was unable to absent himself from work in order to make himself available for the transplant procedure. Since the federally funded testing program assures donor confidentiality and anonymity it proved to be impossible even to communicate with the potential donor in an attempt to persuade him to reconsider.<sup>1</sup>

To be sure, unless a potential donor can be identified and located, all other questions are moot. Nevertheless, this case serves to focus attention upon a complex ethical issue. Assuming that the potential donor could be located but that he remained adamant in his refusal, would such refusal be justified and, if not, could he be compelled to serve as a donor of a life-saving transplant?

At least one virtually identical case has been considered by an American court. In 1978 David Shimp, a resident of Pittsburgh, Pennsylvania, initially undertook to donate bone marrow to his terminally ill cousin, Robert McFall, but later reneged on his agreement. Mr. McFall initiated proceedings in Allegheny County Court to compel his cousin to donate bone marrow but did not prevail.<sup>2</sup> Indeed, the Court's ruling was virtually inescapable since common law does not require a person to render life-saving assistance to another unless the person of whom the demand is made has in some manner assumed a duty of care. Good Samaritan statutes providing a penalty for failure to intervene exist only in Vermont<sup>3</sup> and Minnesota<sup>4</sup> and even in those jurisdictions the statutes cannot fairly be read as mandating invasion of a person's body without his consent.

Judaism, on the contrary, posits a clear and unequivocal obligation to preserve the life of another. The attitude reflected in that requirement is most eloquently captured in a talmudic passage regarding the creation of Adam: "Therefore, only a single human being was created in the world, to teach that if any person has caused a single soul of Israel to perish, Scripture regards him as if he had caused an entire world to perish; and if any human being saves a single soul in Israel, Scripture regards him as if he had saved an entire world" (*Sanhedrin* 37a). The normative obligation to save the life of an endangered person is formulated by the Gemara, *Sanhedrin* 73a, on the basis of two separate biblical texts. The first is the scriptural exhortation with regard to restoration of lost property, "and you shall return it to him" (Deuteronomy 22:2). On the basis of a pleonasm in the Hebrew text, the Gemara

declares that this verse establishes an obligation to restore a fellow man's body as well as his property. A second source is the command "nor shall you stand idly by the blood of your fellow" (Leviticus 19:16). As indicated by the Gemara, *Sanhedrin* 73a, the latter obligation mandates not only the rendering of personal assistance, as is the case with regard to the positive obligation applicable to restoration of lost property, but, by virtue of inclusion in the negative commandment, the obligation is expanded to encompass commitment of financial resources for the sake of preserving the life of a fellow man.<sup>5</sup>

Although an individual is obligated to intervene in order to preserve the life of another, the existence of an obligation to do so when such intervention entails self-endangerment is fraught with controversy. The Palestinian Talmud, *Terumot* 8:4, reports that Rav Ami was abducted and faced imminent execution. A debate ensued with regard to whether or not an attempt should be made to use force in an attempt to secure his release. Rav Yonatan rejected the proposal declaring, "Let the corpse be wrapped in its shroud." Resh Lakish, however, insisted upon embarking upon an attempt at rescue and announced, "Either I will kill or I shall be killed."<sup>6</sup> R. Joseph Caro, both in his commentary on the *Mishneh Torah*, *Kesef Mishneh*, *Hilkhot Rozeah* 1:14, and in his commentary on *Tur Shulhan Arukh*, *Bet Yosef*, *Hoshen Mishpat* 425, citing *Hagahot Maimuniyot*, rules that one must place one's own life in jeopardy in order to preserve the life of another. That ruling is apparently in accordance with the opinion of Resh Lakish.<sup>7</sup> In his *Kesef Mishneh*, R. Joseph Caro explains the rationale underlying this position, viz., that it is predicated upon the premise that if there is to be no intervention the victim will surely die, whereas the threat to the life of the rescuer is merely "doubtful." Consequently, the certainty of rescuing one life must be accorded precedence over the doubtful loss of another.<sup>8</sup> Nevertheless, as Sema comments *ad locum*, it is noteworthy that R. Joseph Caro did not incorporate this ruling in his *Shulhan Arukh* and that no such ruling appears in the compendia of earlier authorities. That position is, however, espoused by R. Ya'ir Chaim Bacharach, *Teshuvot Havot Ya'ir*, no. 146 and R. Chaim David Abulafia, *Teshuvot Nishmat Hayyim*, *Derushim*, p. 11a.

A contrary position is espoused by a long line of rabbinic decisors beginning with the thirteenth-century authority, R. Jonah Gerondi, *Issur ve-Hetter* 59:38. That view is, however, most frequently cited in the name of the sixteenth-century authority, R. David ibn Zimra, *Teshuvot Radbaz*, III, no. 1052.<sup>9</sup> Radbaz alludes to the principle enunciated by the Gemara, *Baba Mezi'a* 62a, in R. Akiva's dictum "Your life takes preference over the life of your fellow" and declares that avoidance of even "one's own doubtful [danger] takes precedence over the certainty of one's fellow."<sup>10</sup> That position is endorsed by numerous authorities including *Eliyahu Rabbah*, *Orah Hayyim* 329:8; *Knesset ha-Gedolah*, *Hoshen Mishpat* 425:18; *Pri Megadim*, *Mishbezot Zahav*, *Orah Hayyim* 328:7; *Agudat Ezov*, cited by *Pithei Teshuvah*, *Hoshen Mishpat* 426:2; *Shulhan Arukh ha-Rav*, II, *Orah Hayyim* 329:8 and V, *Hilkhot Nizkei Guf va-Nefesh*, sec. 7; *Teshuvot Maharam Shik*, *Yoreh De'ah*, no. 155; and *Arukh ha-Shulhan*, *Hoshen Mishpat* 426:4.<sup>11</sup> *Arukh ha-Shulhan*, adds an appropriate cautionary note indicating that the proper course of action in any given situation depends upon the attendant circumstances and that all factors must be carefully weighed lest one be overly protective of oneself with the resultant loss of the life of another.<sup>12</sup> It is likely that the ruling of these authorities reflects a decision to accept the opinion of Rav Yonatan in his dispute with Resh Lakish. Alternatively, it may be based upon their assessment of Resh Lakish's conduct as reflective of an act of piety

rather than as compelled by a halakhic norm.<sup>13</sup> It is also possible that those authorities understood the discussion found in the Babylonian Talmud, *Sanhedrin* 73a,<sup>14</sup> or one or more of several other discussions in the Babylonian Talmud,<sup>15</sup> as being in disagreement with the position of Rav Yonatan that is recorded in the Palestinian Talmud.

R. Meir Simhah of Dvinsk, *Or Sameah*, *Hilkhot Rozeah* 7:8, adduces support for this position from phraseology employed by Rambam in codifying the rule regarding exile in a city of refuge. The Mishnah, *Makkot* 11b, states that a person who has inadvertently committed an act of homicide for which he is required to go into exile may not leave the city of refuge under any circumstances. Rambam follows the statement recorded in the Mishnah in ruling that the exile may not depart from the city of refuge even if "all of Israel are needful of his succor" and, moreover, "if he leaves he surrenders himself to death." The latter phrase does not occur in the Mishnah and *Or Sameah* suggests that it was added by Rambam in order to establish the underlying rationale, i.e., the reason that the exiled manslayer is not required to disregard the rules regarding exile in order to preserve the lives of others (as he would be required to do with regard to other provisions of law) is that he is not obligated to endanger himself to save others from certain death.<sup>16</sup>

The same author, in his novellae on the Pentateuch, *Meshekh Hokhmah*, Exodus 4:19, finds an intriguing allusion to this principle in the verse "Go, return to Egypt for the people who sought your life have died." Since God explicitly commanded Moses to return to Egypt, all other considerations would appear to be immaterial. Why, then, does Scripture expressly tell us that Moses was informed that the danger had passed? *Meshekh Hokhmah* comments that God's command to Moses was inherently no different from any other commandment of the Torah and, despite the fact that Moses' mission was designed to rescue the lives of the children of Israel, Moses was under no obligation to risk his own life in fulfilling a divine command. Hence Moses might legitimately have declined to undertake the mission of rescue. Only divine assurance that the danger no longer existed made it impossible for him to decline on a plea of self-endangerment.<sup>17</sup>

## II. TRANSPLANTS

R. David ibn Zimra, *Teshuvot ha-Radbaz*, III, no. 627, addresses another, and perhaps even more intriguing, question as well. A certain feudal potentate demanded that a Jew permit him to amputate "an organ upon which life is not dependent" and warned that if that individual refused to acquiesce to the amputation the life of another person would be forfeit. Radbaz was asked whether there exists an obligation to sacrifice a limb in order to rescue the life of one's fellow. Radbaz astutely divides the question into two separate issues: (1) Is there an obligation to endanger one's self in order to preserve the life of another?; and (2) assuming that the amputation itself poses no danger to the rescuer, is a person required to sacrifice a limb in order to save the life of another?

To the latter question Radbaz responds that the Torah, "whose ways are ways of pleasantness" (Proverbs 3:17), could not possibly demand the sacrifice of a limb even for such a noble purpose.<sup>18</sup> Nevertheless, a person who is willing voluntarily to make such a sacrifice without endangering his own life acts in accordance with the

highest traits of piety and merits approbation. If, however, the procedure involves self-endangerment, Radbaz dismisses the act as that of a "pious fool".<sup>19</sup>

Although Radbaz emphatically declares that the Torah would not demand the sacrifice of a limb because "its ways are ways of pleasantness" that statement is essentially conclusory and does not really serve to explain the basis upon which exemption from such a requirement is based. It is, however, not at all difficult to fill in the lacuna in Radbaz' reasoning. The obligation to preserve the life of one's fellow, while mandating both personal intervention and expenditure of financial resources, is not all-encompassing. In general, the fulfillment of a positive commandment requires the expenditure of no more than one fifth of one's net worth. However, the obligation not to violate a negative commandment is much more onerous. A person is obligated to spend his entire fortune rather than transgress a negative commandment. The commandment to preserve life is not expressed solely in positive terms, but is repeated in negative language—"nor shall you stand idly by the blood of your fellow." Transgression of that commandment, however, is through passive nonperformance rather than by means of an overt, forbidden act. Since no overt act of transgression is involved in failing to rescue an endangered person, is the expenditure of twenty percent of one's financial resources sufficient, or, since the commandment is couched in negative terms, does the fulfillment require expenditure even of one's entire fortune? There is significant dispute among rabbinic scholars with regard to the resolution of that question.<sup>20</sup>

Formulation of a monetary maximum in limiting obligations for fulfillment of a *mizvah* serves to establish limits with regard to nonpecuniary matters as well. Although it is a truism that many matters of importance in human life cannot be acquired in exchange for money and hence do not carry a price tag, it is certainly possible to express a hypothetical value for such matters in monetary terms. A burden that cannot possibly be avoided upon payments of a fee can nevertheless be evaluated monetarily in terms of how much one would be willing to expend in order to avoid the burden, were that to be an available option. A burden may be evaluated in terms of how much a person would be willing to spend in order to escape this onus. If the sum equals more than one fifth of a person's financial resources he need not assume that burden in order to fulfill a *mizvah*. If it may be assumed that people in general would willingly expend a fifth of their net worth in order to avoid such a particular burden, the burden in question need not be assumed in order to fulfill a *mizvah*. Thus, *Teshuvot Helkat Yo'av*, I, *Dinei Ones*, sec. 7, rules that a person need not expose himself to the risk of illness in order to discharge a religious obligation. Although *Tosafot*, *Pesahim* 28b and *Yevamot* 70a, fails to offer an explicit explanation, it is presumably this consideration<sup>21</sup> that constitutes the basis of *Tosafot's* ruling that a person need not submit to a surgical procedure in order to become physically capable of fulfilling a *mizvah*.<sup>22</sup> Normal people, endowed with a balanced set of values, would cheerfully part with much more than one fifth of their possessions in order to avoid surgery or the threat of significant illness.<sup>23</sup>

There are also burdens that a person would cheerfully surrender his entire fortune in order to avoid. A person would do so if he deemed the burden to be more onerous than the loss of all his earthly possessions. Such a burden need not be assumed even in order to save a human life since no authority requires the expenditure of more than one's entire fortune even for that noble purpose. Radbaz presumably assumes that a reasonable person would place a higher value upon a limb or

an organ than upon material wealth and hence would willingly expend his entire fortune in order to preserve a limb or organ of the body.<sup>24</sup> Consequently, Radbaz rules that a person need not sacrifice a limb in order to prevent the execution of a fellow Jew. However, although not mandated, expenditure of more than that which is normatively required, when such is feasible, does constitute an act of piety. Accordingly, Radbaz remarks that a person who is prepared to sacrifice a limb in order to save the life of another is deserving of highest approbation.

The essential factor serving to distinguish limbs and organs from wealth is that material resources can be replenished while boldly organs cannot be regenerated. The reason that a person is prepared to surrender his entire fortune rather than sacrifice a limb is that the lost limb can never be replaced. That rationale is certainly absent in the case of replenishable body tissues such as blood and bone marrow. Certainly, the phenomenon of some people selling blood for extremely modest sums is rather common. The discomfort of blood donation is generally limited to the prick of the needle. Aspiration of bone marrow is performed under anesthesia in order to eliminate pain. The donor is kept in the hospital for one or two days for observation. Occasionally infection is readily treated with antibiotics. Usually, the only side effect is soreness in the area of the pelvis from which the bone marrow is aspirated. Donations of both blood and bone marrow are not at all burdensome because, generally, both are present in the body at levels in excess of need and, moreover, when removed in medically acceptable quantities, are replenished within a rather short period of time. In bone marrow donations the quantity removed is between three and five percent of the donor's total bone marrow and is restored within two or three weeks. Accordingly, it would seem that Halakhah would compel donations of such tissue in life-threatening situations, just as it mandates dedication of financial resources for the purpose of saving a life. Since the burden of such donations is *de minimis* it falls far short of a burden equal to twenty percent of one's net wealth and hence would be mandated according to all authorities provided, of course, that the procedure does not endanger the life of the donor.<sup>25</sup>

To be sure, although there is no reported case of fatality as a result of bone marrow donation, the removal of bone marrow is not entirely without risk. The risk to the donor is, however, limited to the hazard of general anesthesia.<sup>26</sup> Nevertheless, it may be argued that the risks of general anesthesia in an otherwise normal and healthy person do not rise to the threshold of risk of which Halakhah takes cognizance.<sup>27</sup>

There is an obvious tension between the pertinent talmudic dicta bearing upon actions which pose a hazard to life or health. The Gemara, *Shabbat* 32b, declares, "A man should not place himself in a place of danger." Yet elsewhere, (*Shabbat* 129b and *Niddah* 31a as well as other places), the Gemara cites the verse "The Lord preserves the simple" (Psalms 116:6) as granting sanction to man to place his trust in divine providence and to ignore possible danger. The Gemara itself dispels what would otherwise be an obvious contradiction by stating that certain actions which contain an element of danger are permitted since "the multitude has trodden thereupon."

The concept embodied in this dictum is not difficult to fathom. Willfully to commit a daredevil act while relying upon God's mercy in order to be preserved from misfortune is an act of hubris. It is sheer audacity for man to call upon God to preserve him from calamity which man can himself avoid. Therefore, one may not place oneself in a position of recognized danger even if one deems oneself to be a

worthy and deserving beneficiary of Divine guardianship. Nevertheless, it is universally recognized that life is fraught with danger. Crossing the street, riding in an automobile, or even in a horse-drawn carriage for that matter, all involve a statistically significant danger. It is, of course, inconceivable that such ordinary activities be denied to man. Such actions are indeed permissible since "the multitude has trodden thereupon," i.e., since the attendant dangers are accepted with equanimity by society at large. Since society is quite willing to accept the element of risk involved, any individual is granted dispensation to rely upon God who "preserves the simple." Under such circumstances the person who ignores the risk is not deemed to be presumptuous in demanding an inordinate degree of Divine protection; on the contrary, he acts in the manner of the "simple" who pose no questions. An act which is not ostentatious, which does not flaunt societally accepted norms of behavior and does not draw attention to itself, is not regarded by Halakhah as an unseemly demand for Divine protection. The risk involved may be assumed with impunity, even for purely discretionary purposes, if the individual desires to do so.

The current mortality risk of general anesthesia for all patients is generally estimated as being in the neighborhood of 1 in 10,000.<sup>28</sup> Although precise data seem to be unavailable, there is strong reason to believe that mortality attributable to anesthesia in healthy young adults is far lower, particularly when the patient is anesthetized for only a brief period.<sup>29</sup> That risk is commonly assumed in undergoing elective surgery and is accepted even for purposes of cosmetic surgery. It seems to this writer that in our society that hazard is either disregarded or accepted with equanimity. Since "the multitude has trodden thereupon" it is a hazard which is to be ignored for purposes of halakhic consideration.<sup>30</sup>

### III. PEDIATRIC DONATIONS IN AMERICAN AND ISRAELI CASE LAW

The permissibility of tissue donations by a minor, even with his or her consent, presents a far more complex problem. The legal ramifications of the problem are illuminated by a ruling of an Illinois court in July, 1990. A twelve year old boy, Jean-Pierre Bosze, was diagnosed as suffering from leukemia and failed to respond to available therapy. His physicians predicted that he would die unless he underwent a successful bone marrow transplant. A number of family members were tested but were found to be incompatible as bone marrow donors. The boy's father, Tamas Bosze, had been named in a successful paternity suit by a woman to whom he was not married. Subsequently, Jean-Pierre's mother, Nancy Curran, gave birth to fraternal twins fathered by another man. Jean-Pierre's father requested Nancy Curran to permit the twins, who were three years old at the time, to be tested in order to determine possible compatibility for a bone marrow transplant. Since the twins and Jean-Pierre were half-siblings, tissue compatibility was a distinct possibility. Nancy Curran refused to accede to this request. Thereupon, Mr. Bosze filed suit in Cook County Circuit Court to compel her to permit the test to be performed. On July 18, 1990 his suit was dismissed.<sup>31</sup> In her decision, Judge Monica Reynolds declared that "to subject a healthy child to bodily intrusions" would "seriously impinge and forsake the constitutional rights of the child and render him a victim."<sup>32</sup> That decision was confirmed by the Supreme Court of Illinois on September 28, 1990.<sup>33</sup> Jean-Pierre died while a motion for the Illinois supreme Court to reconsider its decision was pending.<sup>34</sup>

Although the *Bosze* decision represents the culmination and synthesis of a series of decisions handed down by American courts regarding pediatric organ donations the legal doctrine announced therein is the subject of a somewhat checkered judicial history. The crucial issue is whether or not parents themselves enjoy legal capacity to make such decisions on behalf of their children. The earliest consideration of the issue arose indirectly in *Bonner v. Moran*<sup>35</sup> in conjunction with an action for assault and battery brought by a minor who had consented to the removal of a "tube of flesh" to be utilized as a skin graft on behalf of a severely burned cousin who had become a helpless cripple. The results were unsatisfactory and the child, who was fifteen years of age at the time, was hospitalized for close to two months. The child then brought an action for damages resulting from assault and battery. The trial court instructed the jury that if they believed that the child was capable of appreciating, and did indeed appreciate, the nature and consequences of the surgical procedure and had consented to the operation, they must deny him damages. Damages were denied and an appeal was brought. The issue before the U.S. Court of Appeals for the District of Columbia was whether those instructions were correct as a matter of law or whether the consent that is required is consent of the parents. The Court of Appeals found that, with certain limited exceptions, consent of the parents is required and accordingly ordered a new trial to determine whether or not there had been such consent by subsequent ratification.<sup>36</sup> The sole issue addressed by the court was whether parental consent is needed or whether the consent of a mature child is sufficient to prevent the invasion from creating liability.<sup>37</sup> The clear implication of that decision is that consent of the parents would certainly be sufficient and might be relied upon even in situations in which the procedure is of no therapeutic benefit to the minor. Parental authority to consent to a tissue donation of such nature was not at all questioned by the court.

Parental consent for donation of a kidney to a sibling by a minor was subsequently addressed in three separate unreported Massachusetts cases.<sup>38</sup> In two of those cases, the minors were fourteen years of age; in the third, the child was nineteen. In each case the court found that the parents had the legal authority to authorize the donation.

The underlying legal doctrine is enunciated in *Strunk v. Strunk*<sup>39</sup> and in *Hart v. Brown*.<sup>40</sup> In 1816, in *Ex parte Whitebread*,<sup>41</sup> a British court held that a court of equity has the power to make financial provisions for a needy brother from the estate of an incompetent. Later, in *In re Earl of Carysfort*,<sup>42</sup> the Lord Chancellor permitted the payment of an annuity out of the income of the estate of the lunatic earl to the latter's aged and infirm personal servant on the finding that, although no supporting evidence was advanced, the court was "satisfied that the Earl of Carysfort would have approved if he had been capable of acting himself."<sup>43</sup> That rule has been recognized in this country since 1844 when in *In re Willoughby*<sup>44</sup> a New York court ruled that a chancellor has the power to deal with the estate of an incompetent in the same manner as the incompetent would have acted were the incompetent in possession of his faculties. This rule has been extended to cover not only property matters but also the personal affairs of an incompetent.<sup>45</sup> The right of a court of equity to act for an incompetent has been termed the "doctrine of substituted judgment" and has been recognized as covering all matters pertaining to the well-being of legally incapacitated persons. Substituted judgment requires the guardian of an incompetent person to examine the incompetent's life history to ascertain that person's previously held interests, attitudes and values and to act in accordance with

the motives and considerations that would have moved the incompetent.<sup>46</sup>

In *Strunk*, the lower court, in permitting the transplanting of a kidney from a mentally incompetent brother, did not rely upon the doctrine of substituted judgment but found that the procedure "would not only be beneficial to Tommy but also beneficial to Jerry because Jerry was greatly dependent upon Tommy, emotionally and psychologically, and that his well-being would be jeopardized more severely by the loss of his brother than by the removal of a kidney."<sup>47</sup> Although in a 4 to 3 decision affirming that judgment the Kentucky appellate court, in its concluding statement, referred to the circuit court's finding that "the operative procedures in this instance are to the best interest of Jerry Strunk,"<sup>48</sup> that decision, unlike the decision of the circuit court, dwells primarily and at some length upon the doctrine of substituted judgment.

Writing for the minority, Judge Steinfeld candidly acknowledged that his "sympathies and emotions are torn between a compassion to aid an ailing young man and a duty to fully protect unfortunate members of society"<sup>49</sup> and that he was particularly conflicted by his "indelible recollection of a government which, to the everlasting shame of its citizens, embarked on a program of genocide and experimentation with human bodies."<sup>50</sup> Despite, or perhaps because of, that conflict, the minority insisted upon applying a best interest standard and declared that no other standard was authorized by statute. In applying a best interest standard the minority found that a kidney donation by a person lacking legal capacity to consent cannot be authorized unless it is conclusively demonstrated that it would be of significant benefit to the incompetent donor. In the words of Judge Steinfeld: "The evidence here does not rise to that pinnacle. To hold that committees, guardians or courts have such awesome power even in the persuasive case before us, could establish legal precedent, the dire result of which we cannot fathom. Regretfully, I must say no."<sup>51</sup>

*Hart v. Brown* involved an action for a declaratory judgment permitting an isograft kidney transplant from a seven year old girl to her identical twin. As was the case in the appellate court's decision in *Strunk*, the court relied heavily upon the doctrine of substituted judgment but simultaneously seemed to suggest that the transplant could be justified by application of a best interest standard as well. The court relied upon medical testimony, perhaps overly optimistic in nature, to the effect that "the only real risk" to the donor would be in the case of trauma to the one remaining recovering kidney "but testimony indicated that such trauma is exceedingly rare in civilian life" as well as upon testimony indicating that life insurance actuaries do not rate persons with one kidney as presenting a higher risk of mortality than those with two kidneys.<sup>52</sup> Also cited are the earlier-noted Massachusetts decisions in which the court gave strong weight to the "grave emotional impact the death of the twin would have upon the survivor"<sup>53</sup> as well as psychiatric testimony that the procedure "could be of immense benefit to the donor" since it would be more beneficial for her to be reared in a happy family environment than in a family that was distressed and that the death of her twin would constitute "a very great loss" to the healthy child.<sup>54</sup>

In sharp contrast to the decisions handed down in *Strunk* and *Hart*, in *In re Richardson*,<sup>55</sup> the Court of Appeals of Louisiana, Fourth Circuit, found that a decision of such nature could be made solely on the basis of a best interest standard. Louisiana statutes prohibit an incompetent minor from making any *inter vivos* donation of his property and unequivocally prohibit donation of a minor's property by his

parent or guardian. The court found that since the law affords unqualified protection against intrusion into a mere property right "it is inconceivable . . . that it affords less protection to a minor's right to be free in his person from bodily intrusion to the extent of the loss of an organ unless such loss be in the best interest of the minor."<sup>56</sup>

Wisconsin and New York do not have statutes as protective as those of Louisiana regarding the property interests of a minor. Nevertheless, in both states, courts have insisted upon applying a best interest standard. The Supreme Court of Wisconsin, in *In re Guardianship of Pescinski*,<sup>57</sup> refused to permit a sibling kidney donation by a chronic catatonic schizophrenic and explicitly refused to adopt the substituted judgment doctrine advanced by the Kentucky Court of Appeals. In New York, in *In the Matter of John Doe*, the Court expressly declined to apply a substituted judgment doctrine and was affirmed in its position by the Appellate Division, Fourth Department.<sup>58</sup> That case involved, not a kidney transplant, but a bone marrow transplant from a 43-year old severely mentally retarded person to his 36-year old brother. The trial court permitted the procedure but only because it found that the evidence established to a "reasonable certainty" that participation in the procedure would be in the incompetent's best interest. The appellate court endorsed the trial court's application of a best interest standard and expressed hesitation only with regard to whether the best interest of the incompetent must be established to a degree of "reasonable certainty" or by a "clear and convincing" standard of evidence as the Court of Appeals of New York has held to be required in "exceptional civil matters."<sup>59</sup> Nevertheless, the appellate court found that even that high standard of proof was satisfied in the case under consideration.

In *Little v. Little*,<sup>60</sup> the Court of Appeals of Texas, Fourth District, chose to interpret the *Strunk* decision as predicated upon a best interest standard: "Although in *Strunk* the Kentucky Court discussed the substituted judgment doctrine in some detail, the conclusion of the majority there was based on the benefits that the incompetent would derive, rather than on the theory that the incompetent would have consented to the transplant if he were competent."<sup>61</sup> The *Little* court attempted to weigh the benefits and dangers of the procedure as they affected the donor. The court found the danger posed by the surgical procedure to be minimal, future risks small and danger of psychological harm absent. The *Little* court also accepted the conclusions of studies showing that persons who had donated kidneys experienced positive benefits in the form of heightened self-esteem, enhanced status in the family, renewed meaning in life including transcendental experiences flowing from their gift of life to another<sup>62</sup> and found that, unlike the situation in *Richardson*, Anne Little, although adjudged to be mentally incompetent, was yet "capable of experiencing such an increase in personal welfare from donating her kidney."<sup>63</sup>

Nor has the issue of pediatric organ donations been overlooked by Israeli courts. In fact, Israel is one of the few jurisdictions in which the matter has been addressed by the jurisdiction's highest judicial body. The case, *Legal Advisor to the Government v. Anonymous*,<sup>64</sup> involved the question of a possible kidney donation by a 39-year old mentally retarded son on behalf of his 65-year old father. Israeli law is even more explicit than the Louisiana statute in providing that a guardian acting on behalf of his ward in real estate conveyances and in certain other matters may act only on the basis of the interests of his ward. Moreover, Israel's Capacity and Guardian Law was amended in 1983 to include §68(a) which provides that a court may authorize surgical or other procedures only if it is convinced by medical opinions that "the specified measures are necessary for preservation of the physical or

psychological well-being" of the minor or incompetent individual.<sup>65</sup>

Despite the statutory enactment of a best interest standard the Be'er Sheva court found grounds for granting permission for the renal transplant. The district court was convinced (1) that the father's condition would deteriorate if he failed to receive a transplant; (2) no other source for a renal transplant was available; and (3) that death or deterioration of the health of the father would result in institutionalization of the son. The son had been institutionalized during earlier periods and became able to function within the family unit and, to some measure, as a member of society only because of the dedicated and sacrificial efforts of the father. The child's mother, a Holocaust survivor, was unable to relate to her son in a positive and beneficial manner. Indeed, concern for the welfare of the child was a significant factor in the father's desire for the transplant. The district court reasoned that the phrase "physical or psychological well-being" appearing in the statute should be broadly construed as encompassing indirect benefit accruing to the child as a result of the procedure, *viz.*, that the incompetent child would not be subjected to institutionalization.

An appeal from the decisions of the Be'er Sheva court was taken by the government's legal advisor and was heard by a five member panel of the Israeli Supreme Court. In a wide-ranging decision the Deputy President of the Supreme Court, Justice Menahem Elon, undertook a broad survey of discussions of this issue in rabbinic literature as well as of the decisions of American courts in relevant cases. Although essentially extraneous to the issue before the Israeli Supreme Court, the decision includes a critique of the doctrine of substituted judgment adopted by some American courts.

The Supreme Court reversed the decision of the district court on the grounds that the benefit to the son was not clear-cut. The court was not convinced that the father could not continue to be treated by dialysis; it was somewhat skeptical of the likelihood of successful transplantation in a patient of the father's relatively advanced age;<sup>66</sup> it took note of the fact that even if the transplant were to be successful, longevity enhancement would probably be marginal; it was unconvinced that the child's sisters would prove to be incapable of caring for him outside of an institutional setting; and suggested that one of the child's sisters might have become a willing and suitable donor if permission to approve transplantation of the incompetent's kidney were to be denied. Unquestionably, the question posed to the Israeli Supreme Court is one that is most difficult to decide and hinges essentially upon an *ad hoc* evaluation of complex factors regarding which there is a lack of certainty even among experts.<sup>67</sup>

Later, in *Bosze*, the Illinois court found that the doctrine of substituted judgment is valid in making a decision on behalf of a formerly competent person but not on behalf of a life-long incompetent or on behalf of a young child. In the former case, the guardian "may look to the person's life history, in all its diverse complexity, to ascertain the intentions and attitudes which the incompetent person once held."<sup>68</sup> However, in the case of 3-year old twins, the Court reasoned that they had not yet had the opportunity to develop intent of any kind. By the same token, the guardian has no evidence on the basis of "philosophical, religious and moral views, life goals, values about the purpose of life and the way it should be lived, and attitudes toward sickness, medical procedures, suffering and death"<sup>69</sup> by which to be guided.

Accordingly, reasoned the Court, a determination can be made only on the basis of a best interest standard. Since there is no physical benefit to the donor, the benefit that must be considered is entirely psychological. The Court found the psychological benefit of altruism too abstract to be considered in and of itself and that in each of the cases in which earlier courts approved a kidney donation there was an existing, close relationship between the donor and recipient. In such cases the psychological benefit "is grounded firmly in the fact that the donor and recipient are known to each other as family. . . . it is the existing sibling relationship, as well as the potential for a continuing sibling relationship, which forms the context in which it may be determined that it will be in the best interests of the child to undergo a bone marrow harvesting procedure for a sibling."<sup>70</sup> The court also found that lack of support on the part of the twins' mother, the only caretaker they had ever known, would impact adversely upon the psychological trauma associated with hospitalization and surgery. The court found that, under the circumstances, the bone marrow donation would not be in the best interests of the children.

#### IV. PEDIATRIC DONATIONS IN JEWISH LAW

##### A. Best Interest Standard

It may readily be demonstrated that Jewish law recognizes a best interest standard. On the basis of talmudic discussions recorded in *Gittin* 52b and *Baba Batra* 8a, Rambam, *Hilkhot Nahalot* 10:4 and 10:8, rules that guardians are to be appointed for mentally incompetent persons to provide for their needs. As reflected in a narrative recorded in *Baba Batra* 8a, Rambam, *Hilkhot Matnot Ani'im* 7:16 and *Shulhan Arukh*, *Hoshen Mishpat* 290:15, rule that, if their assets are sufficient for such purposes, the guardian is authorized to distribute charity on behalf of orphaned minors so that they may acquire "a good name."<sup>71</sup> Rabbi Moshe Hershler, *Halakhah u-Refu'ah*, II, (Jerusalem, 5740), 126, applies the standard reflected in that ruling in analyzing the propriety of a sibling renal transplant. In applying what is, in effect, a best interest standard he concludes that the mentally incompetent donor would derive no benefit from the procedure and, in light of potential danger to the donor, the procedure might result in actual harm to him. In the case of a mentally incompetent person who enjoys no significant relationship with the prospective recipient, that conclusion is entirely cogent. However, considerations presented in *Hart and Little* might lead to a different conclusion with regard to a donation by a minor who may derive psychological and developmental benefit from restoring a sibling to good health and upon whom the death of a sibling whose demise he might have prevented would have a negative effect.<sup>72</sup> In situations in which the donor is physically or psychologically dependent upon the recipient, the argument is even more compelling. As the court reasoned in *Strunk* and considered but rejected in *Richardson* on the basis of the particular facts in that case<sup>73</sup>—and as found to be the case by the Be'er Sheva district court—a kidney donation on behalf of a close relative who contributes to the care and well-being of the incompetent, might well be deemed to further the best interests of the donor.

## B. Substituted Judgment

The question of whether or not Jewish law posits a doctrine of substituted judgment is much more complex. *Tosafot*, *Baba Mezi'a* 22a, and other early authorities rule that a person may not eat food belonging to another without the latter's consent even if it is certain that such consent, if solicited, would be freely forthcoming. *Tosafot* bases this conclusion upon the normative rule regarding lost property which provides that a finder cannot acquire title to lost property unless the owner is aware of his loss. The underlying principle is that "constructive despair" (*ye'ush she-lo me-da'at*) does not qualify as "despair." *Kezot ha-Hoshen* 358:1 takes issue with that position on the basis of the statement of the Gemara, *Ketubot* 48a, declaring that the children of a person who becomes mentally incompetent may be supported by his estate even if the children have reached an age at which the father is no longer halakhically liable for their support. Such use of the incompetent's financial resources is justified on the assumption that "presumably" the father would consent to such use were he capable of doing so.

Both Rabbi Hershler, *Halakhah u-Refu'ah*, II, 127 and Rabbi Moshe Meiselman, *Halakhah u-Refu'ah*, II, 121, raise the possibility that a sibling donation might be warranted according to the position of *Kezot ha-Hoshen*. In effect, they argue that *Kezot* accepts a doctrine of substituted judgment.<sup>74</sup> However, the "substituted judgment" applied by the Gemara in sanctioning expenditure of an incompetent's resources for the support of his children is not based upon an analysis of previously expressed interests, values or desires of the incompetent as is the case with regard to the substituted judgment doctrine of the common law; rather it is a judgment reflecting an assessment of the presumed desire of mankind in general. Since, from a halakhic vantagepoint, the judgment to be applied is that of mankind in general rather than a judgment imputed to a specific individual, that judgment can be imputed to a minor as well as to an incompetent without incurring the objection voiced in the *Bosze* decision. However, such judgment would not be imputed in situations in which there is reason to assume that the individual in question would have exercised his personal judgment in a different manner. Nevertheless, both Rabbi Hershler and Rabbi Meiselman concede that application of this principle is difficult since, particularly because of the risks posed to the donor, it is not clear that the donor, if competent, would consent to the procedure.<sup>75</sup>

As has been argued earlier, unlike kidney donations,<sup>76</sup> donations of blood and bone marrow pose no halakhically cognizable danger. Nevertheless, at first glance it would appear that even such donations may be sanctioned only upon application of a best interest standard or on the basis of a doctrine of substituted judgment with the result that such donations could be considered only in situations in which the recipient is a close relative. Further examination, however, yields a different conclusion.

On the basis of the earlier formulated line of reasoning, an adult can be compelled to cooperate in the donations of replenishable tissue because he is bound by the commandment "nor shall you stand idly by the blood of your fellow." Not so a minor. Minors differ from adults in that they are not bound by any of the biblical commandments. The Gemara, *Erukhin* 22a, reports that R. Nahman declared, "Originally, I did not seize the property of [minor] orphans [in order to satisfy their fathers debts]; now that I have heard that [which was declared by] our colleague R. Huna in the name of Rav, viz., 'Orphans who consume that which is not theirs, let

them follow their deceased,' from now on I will seize [their property]." Why did he not [seize their property] originally? Said R. Papa: "Payment of a creditor is a *mizvah* and [minor] orphans are not obligated to perform *mizvot*."<sup>77</sup> The Gemara clearly establishes that the property of a minor cannot be seized to satisfy a debt if the sole justification for such seizure is performance on the obligation of repaying a creditor. It should then follow, *mutatis mutandis*, that body tissues of a minor cannot be "seized" in order to satisfy the duty of "Thou shall not stand idly by the blood of your fellow". Minors are exempt from that obligation just as they are exempt from all other obligations. Quite apart from any pecuniary value that may attach to blood or to bone marrow, the biblical provision against battery establishes a right to bodily integrity.<sup>78</sup> Arguably, since in the case of a minor, that right is not limited by virtue of an obligation to suffer a "wound" in order to save the life of another, it would follow that the minor cannot be compelled to make such a donation.<sup>79</sup> Indeed, it might be argued that pediatric organ or tissue donations cannot be sanctioned even with the consent of the child. Since the Gemara, *Pesachim* 50b, declares that minors lack capacity for "forgiveness" (*lav bnei mehilah ninahu*) their consent is of no halakhic import.<sup>80</sup>

The two situations are, however, different in one salient aspect. Only a debtor, or his heirs, is obligated to repay a debt; an uninvolved third party has no obligation whatsoever to satisfy the debt and, if he should do so, he fulfills no *mizvah* thereby. Since the minor is under no obligation to repay a debt until he reaches the age of halakhic capacity, the Bet Din has no grounds to intervene by seizing the property unless it can be established that repayment of the debt redounds to the benefit of the minor himself.

Rare blood or bone marrow needed for life-saving transplantation presents a somewhat different halakhic issue. Although the minor is exempt from a duty of rescue, other parties, including the members of the Bet Din themselves, are fully bound to preserve endangered lives. Consequently, their "seizure" of such tissue would be in the nature of fulfillment of their own obligation rather than by way of compelling performance of a duty on the part of a minor. Surely, given a situation in which a unique item belonging to a minor is required in order to rescue a life, it would be permissible to appropriate the item in question, even though the minor is under no obligation to volunteer his possessions for such a purpose. Thus, for example, in a situation in which an artery has been severed and the accident victim is in danger of bleeding to death and, assuming that the only object available for use as a tourniquet is a necktie belonging to a minor, there is no doubt that the necktie may be taken from the minor and used for this purpose. This is so, not because the minor is obligated to provide the necktie, but because the person rendering first aid is not only permitted, but required, to pursue any and all means in order to prevent loss of life even if those measures entail what is, in actuality, an act of theft.

There is, however, a significant difference between appropriating property of another for the sake of saving a life and committing an act of battery upon another person for the same purpose. *Shulhan Arukh*, *Hoshen Mishpat* 359:4, rules that in order to preserve one's own life it is permitted to seize property belonging to another with intent to compensate the lawful owner. As noted by R. Jacob Ettlinger, *Teshuvot Binyan Zion*, no. 170, theft without intent to make restitution even for the purpose of preservation of life is prohibited.

As *Binyan Zion* remarks in an entirely different but parallel context, invasion of a person's body or an act of battery is significantly different from theft of property.

Since property is essentially fungible, financial restitution serves to redress the wrong that has been committed. However, compensation for pain and suffering sustained in conjunction with bodily assault does not really render the person whole; financial compensation is not a remedy in the sense of restoring the *status quo ante*. Financial compensation is indeed required as the only available redress but it fails fully to eradicate the harm. As *Binyan Zion* argues, although the Torah suspends religious obligations for purposes of saving a life it does not sanction irreversible harm to another for that purpose.<sup>81</sup>

### C. Privileged Battery

There is, however, one rabbinic source that clearly sanctions the "wounding" of a minor for the therapeutic benefit of another. Although Jewish law certainly prohibits feticide, there is considerable controversy with regard to the precise nature of the prohibition. Rambam, *Hilkhot Rozeah* 9:1, regards feticide, when performed by a Jew, as constituting a form of non-capital homicide. Other authorities regard abortion of the fetus as constituting a less serious offense.<sup>82</sup> Among those authorities who regard feticide to be subsumed under a prohibition other than homicide is the seventeenth-century authority R. Joseph di Trani. In his responsa collection, *Teshuvot Maharit*, I, no. 97, that authority asserts that performance of an abortion is forbidden because it constitutes an illicit form of "wounding," i.e., although the Torah does not prohibit the killing of the fetus, it does prohibit wounding the fetus. Hence, abortion of a fetus is forbidden because the destruction of a fetus entails its "wounding."<sup>83</sup> In another responsum, *Teshuvot Maharit*, I, no. 99, the same authority rules that, since destruction of a fetus in no way poses a problem of homicide, "therefore, with regard to Jewess[es], for the sake of the mother, it appears that it is permissible to treat them so that they will abort since [the abortion] is therapeutic for the mother."

Maharit rules that therapeutic abortion is permissible. Since he does not incorporate a qualifying statement to the contrary in his ruling, it must be inferred that he sanctions therapeutic abortion designed not only to preserve maternal life, but also to preserve maternal health.<sup>84</sup> Indeed a therapeutic procedure involving incision of tissue or loss of blood constitutes a permissible form of "wounding."<sup>85</sup> In ruling in this manner, Maharit is far more permissive than, for example, Rambam who, in *Hilkhot Rozeah* 1:9, permits abortion only when the mother's life is endangered and, even then, only in circumstances in which the fetus is the author of the danger. That stringent position follows necessarily from the view that feticide constitutes a form of homicide; hence the elimination of a fetus can be sanctioned only in circumstances in which the taking of life can be sanctioned, i.e., in instances in which the fetus is a *rodef* or "pursuer." Maharit's permissive view is similarly entailed by his position regarding the transgression incurred in performance of an abortion. "Wounding" for purposes of achieving a cure does not constitute a transgression of the prohibition; hence, therapeutic surgical procedures are entirely permissible. Since abortion is prohibited solely as a form of illicit wounding, it follows that an abortion may be performed in any situation in which "wounding" is permitted. Hence, Maharit rules that therapeutic abortion is entirely permissible.

This responsum of Maharit is quite remarkable not only for his unique characterization of abortion but for another reason as well. Although there is no dispute regarding the exclusion of therapeutic "wounding" from the prohibition "Forty

stripes he shall give him, he shall not exceed" (Deuteronomy 25:3), classical sources describing permissible therapeutic "wounding" invariably describe "wounding" in the form of an incision or excision designed to be of therapeutic benefit to the patient himself. There is no reference in these sources to the "wounding" of one person for the therapeutic benefit of another. Yet that is precisely what Maharit permits. He rules that "wounding" the fetus in the course of its removal from the uterus is permitted in order to preserve maternal health, i.e., the wounding of the fetus is permitted for the therapeutic benefit of another, namely, the mother.<sup>86</sup> Maharit's position is even more remarkable in light of the fact that the fetus is a "minor." In positing an extension of the prohibition against "wounding" to encompass the fetus, Maharit establishes a fetus' right to bodily integrity. Since the fetus certainly has no obligation to preserve the life of another, much less so to preserve the health of another, it is remarkable that Maharit finds that it is permissible to "wound" the fetus in order to avoid a threat to maternal health.<sup>87</sup> It is certainly noteworthy that, although Maharit's thesis concerning the nature of the prohibition entailed in performing an abortion was the subject of considerable controversy, there has been no challenge in rabbinic literature to the conclusion he draws from that thesis, i.e., that the "wounding" of the fetus is permissible for the purpose of preservation of maternal life or health. Indeed, it must be inferred that the authorities who challenge Maharit's ruling on other grounds would acquiesce in the position that an assault upon the fetus that does not lead to fetal mortality may be sanctioned for the purpose of preserving maternal health. The rationale underlying that conclusion requires explication.

In enumerating situations of involuntary manslaughter in which the individual responsible for shedding innocent blood is not exiled to one of the designated cities of refuge, the Mishnah, *Makkot* 8a, cites the verse "and who comes with his fellow in the forest" (Deuteronomy 19:5) that occurs in the context of the Bible's description of an act of manslaughter necessitating exile. The Mishnah regards the reference to the forest as paradigmatic of the type of misadventure entailing such punishment. The Sages understand the term "forest" as restricting the penalty to manslaughter occurring at a particular site and declare that exile is warranted only if the accident occurs in a place comparable to a forest, i.e., a locale in which aggressor and victim equally enjoy a right of entry. Accordingly, they rule that no exile attends upon manslaughter that occurs pursuant to trespass by the victim upon the domain of the person responsible for his death. Abba Sha'ul, however, understands the verse as establishing a paradigm for the nature of the act itself rather than for the locale in which it is committed. Accordingly, Abba Sha'ul declares that exile is merited only if manslaughter results from an act that is entirely discretionary—as is the chopping of wood. Excluded from that penalty, declares Abba Sha'ul, is a father who strikes his son, a teacher who smites his pupil and a person deputized by the Bet Din to administer corporal punishment who in carrying out those acts inadvertently causes the death of the person he intends only to beat. Those acts are privileged since each of the enumerated persons acts with authority in administering punishment or chastisement and in order to achieve an end which those persons are charged with achieving. Such acts do not merely lie outside the ambit of prohibited "wounding," but are affirmatively required. Thus the actions of those individuals are not a matter of "discretion" (*reshut*) but constitute the discharge of a duty. Accordingly, bona fide misadventure in discharging those duties entails no penalty. Although the Sages disagree with Abba Sha'ul with regard to the implication of such

categorization in establishing an exclusion to the punishment of exile, there is no dispute regarding the underlying premise, viz., that those acts are privileged batteries.

The Tosefta amplifies the principle recorded in the Mishnah with the statement: "An agent of the Bet Din who smites with the authority of the Bet Din must go into exile; a physician who cures with the authority of the Bet Din must go into exile. . . ." The Tosefta is best understood as reflective of the position of the Sages who disagree with Abba Sha'ul.<sup>88</sup> Yet, although the Sages declare that exile must be imposed, the very fact that individuals committing such acts are singled out for the purpose of establishing their liability in instances of misadventure reflects the fact that the Sages are in full agreement that those actions are privileged at least insofar as the prohibition against battery is concerned.

The Tosefta's inclusion of a physician in the same category as an agent of the Bet Din indicates that the surgical procedure performed by the physician is a privileged form of wounding lying beyond the ambit of the prohibition against "wounding." Placing the physician's act outside the ambit of the prohibition *ipso facto* establishes both a privilege and an obligation with regard to therapeutic wounding. The wound caused by a physician's incision is not sanctioned by virtue of a principle that transcends the prohibition and warrants its suspension but is permitted because such acts were not prohibited in the first instance.

The exclusion of therapeutic wounding from the commandment that serves to establish a prohibition against battery must be understood in the context of the right to bodily integrity as recognized in Jewish law. Common law regards protection of the human body from nonconsensual intrusion to be a fundamental right. That right has been recognized consistently since 1891 when, in *Union Pacific Railway Co. v. Botsford*,<sup>89</sup> the Court declared, "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference by others, unless by clear and unquestionable authority of law."<sup>90</sup> In early American case law freedom from bodily invasion was regarded as a "liberty" accorded constitutional protection by the 14th Amendment.<sup>91</sup> Since the 1965 U.S. Supreme Court decision in *Griswold v. Connecticut*,<sup>92</sup> in which the court declared that the Bill of Rights serves to establish a broad constitutionally protected right of privacy, American courts have applied that doctrine in prohibiting bodily invasions as a violation of a person's right to privacy. In *Griswold v. Connecticut*, Justice William Douglas, the author of the decision, wrote that the specific guarantees of the Bill of Rights "have penumbra formed by emanations from those guarantees that give them life and substance."<sup>93</sup> Taken collectively, those penumbra establish a "zone of privacy."<sup>94</sup>

Judaism does not posit a sweeping right of privacy, nor does its jurisprudence incorporate the equivalent of a constitutional protection of liberty.<sup>95</sup> Indeed, Judaism places far greater emphasis upon duties than upon rights.<sup>96</sup> Nevertheless, prohibitions against certain forms of conduct serve to generate collateral rights for those who would otherwise be victims of such conduct. Thus, for example, a prohibition against theft has the effect of creating a right to undisturbed enjoyment of lawfully owned property. Similarly, the obligation to render medical assistance generates a corresponding right to health while the obligation of a father to teach his son Torah guarantees the child's right to an education. The biblical prohibition against "wounding" entails as a corollary a biblically recognized right to bodily integrity. However, since this right is born of a prohibition restraining the conduct of others, it follows

that when no such prohibition obtains there is no concomitant right to bodily integrity. Clearly, no such right may be invoked by a chastised son or pupil or by the transgressor sentenced to forty stripes. Inclusion of a patient in the selfsame category implies that the physician's act is similarly privileged and that the patient enjoys no right to be free from such an assault. Therapeutic wounding is excluded, not because of benefit caused to the patient, but because of the privileged nature of the act.<sup>97</sup> If so, there is no compelling reason to assume that the exclusion is limited to therapeutic benefit of the person wounded. Maharit assumes that therapeutic wounding is excluded from the prohibition even when the therapeutic benefit accrues to a third party. Hence a person does not enjoy a right of privacy or a right to bodily integrity when the "wounding" incurred is therapeutic in nature, even if it is therapeutic to some other person.

If so, Maharit's position is readily understandable. A battery may be committed against a minor—or even against a fetus—not only for the benefit of the minor but also for the benefit of a third party. Justification is found, not in the fact that the minor, is duty-bound to aid in restoration of the health of his fellow but in the fact that, in face of the therapeutic need of another, no "liberty" or right of privacy is recognized.

The matter, then, is entirely analogous to a situation in which it is necessary to seize the property of a minor for the rescue of another. The minor is under no obligation of rescue. But neither does he enjoy an untrammelled right to unimpeded enjoyment of the property under such circumstances. The sole distinction is that, in the latter case, the right to enjoyment of property is subordinate to the rescuer's obligation to preserve life, whereas with regard to "wounding" the right is extinguished *ab initio* in face of any threat to the health of another.

The minimal danger to which the child is exposed by being placed under general anesthesia during removal of his bone marrow does not serve to militate against the permissibility of the procedure. The Gemara, Yevamot 72a, reports that blood-letting carries with it an element of increased danger when performed on a cloudy day or on a day when the South wind blows. Accordingly, R. Papa prohibited both blood-letting and circumcision on such days. Nevertheless, the Gemara, invoking the principle "The Lord preserves the simple" (Psalms 116:6), concludes that since people, in general, customarily disregard this particular danger those procedures are entirely permissible. The underlying principle, invoked by the Gemara in a number of different contexts, is that although a person may not ordinarily expose himself to danger, he may engage in activities generally regarded as innocuous even though, in actuality, they do pose a danger. In such circumstances, a person may act in the manner of "simple" persons who do not give thought to such matters and rely upon Providence to protect them.

In context, the Gemara permits a person not only to expose himself to danger of such nature but to subject others to that danger as well. The Gemara explicitly permits circumcision of a child on a cloudy day despite the obvious lack of consent on the part of the child. It is the father who subjects the child to the hazard in order that the father may fulfill the *mizvah* incumbent upon him.<sup>98</sup> Such endangerment of another person can be justified only on the assumption that a hazard within the parameters of danger from which "The Lord preserves the simple" does not rise to the threshold level of danger of which Halakhah takes cognizance. If, as argued earlier, the risks inherent in general anesthesia to an otherwise healthy person fall within this category, exposure of a minor to such danger is not prohibited.

## V. PEDIATRIC DONATIONS AND TORT LIABILITY

The distinction between the prohibition against "wounding" which is entirely absent in a therapeutic context and the prohibition against appropriation of the property of another which is merely superseded in life-threatening situations carries with it a significant ramification. Rosh, *Baba Kamma* 6:12, as well as *Tur Shulhan Arukh*, *Hoshen Mishpat* 426:1, rule that a person may appropriate the property of another in order to save his own life, but must compensate the owner of the property for any loss incurred.<sup>99</sup> A related but different question arises in a situation in which a third party appropriates property in order to rescue an endangered person but the beneficiary of the act of rescue is unable to compensate the person whose property was appropriated. Under such circumstances, is the rescuer liable for restitution since, technically, he has committed an act of theft? R. Chaim Palaggi, *Nishmat Kol Hai*, II, no. 48, draws a distinction between rescue that takes place in the presence of the person whose property has been appropriated for this purpose and rescue which takes place other than in his presence. The underlying principle, asserts R. Chaim Palaggi, is that the obligation to preserve life is personal in nature and hence does not engender a lien against property. To be sure, as is established by the Gemara, *Sanhedrin* 73a, a person is obligated to expend his own funds in order to preserve the life of another. That obligation, however, is the product of the individual's duty to fulfill the command "and you shall not stand idly by the blood of your fellow" and, although an individual is obligated to expend funds rather than violate a biblical commandment, such a duty does not generate a lien against his property. If a person is not physically present when the life of another is in danger, argues *Nishmat Kol Hai*, the obligation of rescue does not devolve upon him.<sup>100</sup> Since he has no obligation of rescue, he may claim compensation from any person who seizes his property for that purpose.<sup>101</sup> If, however, he is physically present, he is obligated both to render personal service and, if necessary, to make his property available for that purpose. He must make his property available, not because of a lien that attaches to his property, but because use of his property is instrumental to the fulfillment of his personal obligation. Since, under such circumstances, he is obligated to make his property available, asserts R. Chaim Palaggi, he has no claim upon another who seizes his property for this purpose.<sup>102</sup>

The right to claim compensation for damages resulting from a battery is quite distinct from the prohibition regarding "wounding." The prohibition against wounding is derived from Deuteronomy 25:3 and is in the nature of a "criminal" offense; liability for damages is derived from Exodus 21:19-25 and is in the nature of a civil remedy. Therapeutic wounding is excluded only from the prohibition recorded in Deuteronomy 25:3. Thus, therapeutic wounding may be entirely permissible and yet result in tort liability. *Tosafot*, *Baba Kamma* 60b, and Rosh, *Baba Kamma* 6:12 and *Sanhedrin* 8:12, rule that the victim whose life has been saved must compensate the rescuer for expenses incurred in the rescue. It should logically follow that the rescuer is also entitled to compensation for injuries to his person sustained in the rescue endeavor. The selfsame principle should logically apply to intentional "wounding" for the purpose of saving the life of another. Indeed, *Hagahot Mordekhai*, *Sanhedrin*, sec. 718, declares that a person may cut off the limb of another in order to save his own life "but must pay him the value of his hand." As has been shown earlier, *Hagahot Mordekhai's* ruling regarding committing an act of mayhem in order to preserve one's own life is decidedly a minority opinion but, if that posi-

tion is accepted *arguendo*, his ruling regarding tort liability appears to be unexceptional. *A fortiori*, in situations in which the person wounded is under no obligation to render assistance, he should be entitled to damages for any wound sustained, including compensation for pain and suffering. A minor is certainly not bound by any biblical commandment. Hence, even in circumstances in which a minor's bone marrow may be removed for purposes of transplantation, the minor would be fully entitled to receive compensation for tort damages to the extent that damages for battery are actionable in our era.<sup>103</sup>

It would appear that the minor's primary claim is against the beneficiary of the transplant since the victim is obligated to compensate his rescuer for any expenses incurred in coming to his rescue. If, however, the beneficiary is unable to compensate the minor<sup>104</sup> it would appear that, according to the position of *Nishmat Kol Hai*, he would be entitled to demand such compensation from the tortfeasor, i.e., from the physician who removed the bone marrow.

However, the position of *Nishmat Kol Hai* obligating a rescuer to compensate a third party for loss of property seized in preserving a life seems to be contradicted by the Gemara, *Baba Kamma* 117b and *Sanhedrin* 74a. The Gemara declares that if, in escaping from a pursuer, a putative homicide victim breaks utensils belonging to a third party he is liable "because he has saved himself at his neighbor's expense." The Gemara continues with the statement that if another person intervenes on behalf of the endangered person and, in seeking to thwart the pursuer, breaks utensils belonging to a third party he is absolved from financial liability "not as a matter of law but [because] if you will say [that he is liable] the result will be that no man will rescue his fellow from a pursuer." The Gemara clearly recognizes the rescuer's liability but at the same time recognizes that public policy cannot permit recovery of damages under such circumstances. As a result liability is extinguished, presumably by rabbinic decree, in order not to discourage assistance to the pursued.

Assuming, as is the position of *Tosafot* and *Rosh*, that seizure of a third person's property is permissible in order to preserve life, any person who is capable of preserving the life of his fellow is obligated to do so by virtue of the duty of *piku'ah nefesh* even in circumstances in which he must appropriate the property of another in order to do so. To be sure, the individual whose life has been preserved may be liable "because he saved himself at his neighbor's expense." However, it stands to reason that the rescuer should be exempt from liability for the same reason that a person who intervenes in order to thwart a pursuer is exempt from liability, i.e., because otherwise "no man will rescue his fellow." It would stand to reason that the rabbinic decree relieving the rescuer from liability is not limited to rescue from homicide but includes rescue from any threat to life. If so, the physician can not be held responsible by the minor for any form of compensation.

However, one contemporary authority, writing in an entirely different context, asserts that the immunity from liability posited by the Gemara, *Baba Kamma* 117b and *Sanhedrin* 74a, is limited in a different manner. Apparently, during World War II, Rabbi Shlomo Halberstam, the *Bobover Rebbe*, borrowed funds which he then transferred to Europe for the funding of endeavors to rescue Jews from extermination. His original intent was to raise money from the public in order to repay the loan. That vision appears to have been illusory since in 1953 Rabbi Halberstam initiated correspondence with Rabbi Moshe Feinstein with regard to whether, as a matter of law, he was to be held personally liable. Rabbi Halberstam asserted that he was not halakhically liable and hence, since repayment of the loan on his part was

*ex gratia*, he felt justified in establishing a schedule of periodic payments rather than satisfying the debt at once.

Rabbi Feinstein, *Iggerot Mosheh, Hoshen Mishpat*, II, no. 63, refused to endorse that position and, quite to the contrary, ruled that a person who borrows money in order to save the life of another is fully liable for repayment of the debt. Rabbi Feinstein declares that the rabbinic enactment exonerating a rescuer from financial liability is circumscribed in nature. Rabbi Feinstein does not argue that immunity conferred by that decree is limited to a person who thwarts a pursuer and hence may not be relied upon by a person who rescues another individual from some other hazard. Rather, he asserts that the rabbinic enactment confers immunity: a) only from tort liability incurred in damaging property but does not include immunity from restitution of stolen property or from repayment of a debt even though the property was appropriated, or the funds were borrowed for the purpose of saving a life; and b) even immunity from tort liability is limited only to liability incurred for damage caused to property that impedes the rescuer in performing a necessary act of rescue.<sup>105</sup> Thus, for example, according to this analysis, no liability would result from breaking a glass window in an attempt to rescue a person from a burning building but damage to property used to smother the flames would be actionable.<sup>106</sup> The analysis presented by *Iggerot Mosheh* serves to resolve any contradiction between the rule formulated by the Gemara, *Baba Kamma* 117b and *Sanhedrin* 74a, and the thesis advanced by *Nishmat Kol Hai*.

This line of reasoning does not extend to the donation of pediatric organs such as a kidney. Such donations are accompanied by a medically recognized element of danger<sup>107</sup> and hence cannot be regarded as obligatory even though the survival rates for recipients of a kidney from a live donor are more favorable than for patients treated by dialysis and are also more favorable than for patients who have received a cadaveric transplant.<sup>108</sup> Although, according to numerous authorities,<sup>109</sup> a person may voluntarily expose himself to danger in order to preserve the life of another, no one is permitted to place another person's life in jeopardy, even for the purpose of saving a life, without the consent of the person whose life is endangered. Since minors lack capacity for consent it follows that pediatric transplants cannot be carried out even if consent of the minor is forthcoming other than upon application of a best interest standard or a doctrine of substituted judgment. As shown earlier, application of those principles is problematic at best and, moreover, those principles are not likely to pertain other than in the case of a donation on behalf of a close relative.

## NOTES

1. See *Jewish Telegraphic Agency Community News Reporter*, vol. 31, no. 40 (Oct. 4, 1991), p.1, col. 2.
2. *McFall v. Shimp*, 10 Pa. D. & C.3d 90 (1978).
3. Vermont, *Annotated Statutes*, Title 12, § 579 (1973). The Vermont statute provides for a fine of not more than \$100 for willful violation.
4. Minnesota, *Annotated Statutes*, § 604.05 (1992). Violation constitutes a "petty misdemeanor." Under §609.02(4a) of the Minnesota Statutes a petty misdemeanor is punishable by a fine of not more than \$200.
5. For sources elucidating the specific application of these obligations to medical intervention see J. David Bleich, "The Obligation to Heal in the Judaic Tradition: A Comparative

- Analysis," *Jewish Bioethics* (New York, 1981), ed. Fred Rosner and J. David Bleich, pp. 1-55; and J. David Bleich, *Judaism and Healing* (New York, 1981), pp. 1-10.
6. This interpretation is reflected in the comments of *Pnei Mosheh, ad locum*, and is in accordance with the plain meaning of the text. Cf., however, R. Ovadiah Yosef, *Dinei Yisra'el*, VII (5737), 28, who suggests that Resh Lakish was merely expressing the foolhardiness of single-handed intervention and intended to indicate that he would organize a large party to assist him in that endeavor. Earlier, R. Chaim Heller, *Sefer ha-Mizvot* (Jerusalem, 5706), p. 175, in a strained interpretation of the terminology employed by the Palestinian Talmud, explained Resh Lakish's comment as expressing a plan to ransom Rav Ami.
  7. See also the citation of *Berakhot* 33a by *Torah Temimah*, Leviticus 19:16, as a source for this ruling. Cf., however, R. Ovadiah Yosef, *Dinei Yisra'el*, VII, 41 and R. Pinchas Barukh Toledano, *Barka'i*, III (Fall, 5746), p. 28, note 3.
  8. Hence, even according to this view, there is no obligation for a rescuer to expose himself to risk unless the likelihood of preserving a life is virtually a certainty; in situations in which the likelihood of success is less certain a potential rescuer need not intervene even if the probability of saving the life of another is significantly greater than the likelihood of losing his own life. See *Agudat Ezov, Derushim*, p. 38b; *Teshuvot Amudei Or*, no. 96, p. 80a; R. Meir Dan Plocki, *Klei Hemdah, Parashat Ki Tezei*; R. Chaim Heller, *Sefer ha-Mizvot*, p. 175; R. Yitzchak Ya'akov Weisz, *Teshuvot Minhag Yizhak*, VI, no. 103; R. Ovadiah Yosef, *Dinei Yisra'el*, VII, 29; R. Moshe Hershler, *Halakhah u-Refu'ah*, II (Jerusalem, 5741), 125; and R. Meir Yosef Slutz, *Halakhah u-Refu'ah*, III (Jerusalem, 5743), 161-163. Cf., however, *Teshuvot Havot Ya'ir*, no. 146, who adopts an opposing view. See also *Bah, Shulhan Arukh, Hoshen Mishpat* 426:2.
  9. For a further discussion of self-endangerment as a limiting factor see J. David Bleich, "AIDS: A Jewish Perspective, *Tradition*, vol. 26, no. 3 (Spring, 1992), pp. 69-74.
  10. Cf., however, the apparently contradictory comments of *Teshuvot Radbaz*, V, no. 1582. R. Ovadiah Yosef, *Yehaveh Da'at*, III, no. 84, reprinted in *Halakhah u-Refu'ah*, III, 61-63, endeavors to explain Radbaz' earlier responsum as not requiring self-endangerment only when there is at least an equal chance of losing one's own life. See also R. Ovadiah Yosef, *Dinei Yisra'el*, VII, 27-28, 30 and 41; *Maharam Shik al ha-Mizvot*, no. 238; and Abraham S. Abraham, *Nishmat Avraham*, I, *Orah Hayyim* 329:6. That explanation of Radbaz' position is apparently based upon the comments of R. Chaim Heller, *Sefer ha-Mizvot*, p. 175. A similar analysis is presented by R. Moshe Hershler, *Halakhah u-Refu'ah*, II, 123-124; R. Eliezer Waldenberg, *Ziv Eli'ezer*, X, no. 25, chap. 28; and R. Samuel ha-Levi Wozner, *Halakhah u-Refu'ah*, IV (Jerusalem, 5745), 139-140. That interpretation, however, is not supported by the text of Radbaz' earlier responsum and assuredly is not to be attributed to the numerous later authorities who rule that self-endangerment is not required.
  11. See also *He'emek She'elah, She'ilta* 147:4; *Teshuvot Amudei Or*, no. 96, sec. 3; and *Minhat Hinukh*, no. 237. Cf., *Hiddushei Hatam Sofer, Ketubot* 61b, s.v. *m'ai ta'ama*, and *Teshuvot Imrei Binah, Orah Hayyim*, no. 13, sec. 5.
  12. The comments of R. Iser Yehudah Unterman, *Shevet me-Yehudah* (Jerusalem, 5715), *sha'ar rishon*, chap. 9, p. 23, although they do not constitute a definitive halakhic norm, are nevertheless instructive. Rabbi Unterman suggests that, in making a decision, the potential rescuer should ask himself if he would incur the identical danger in order to rescue a cherished possession. If yes, he should cherish the life of his fellow equally and accept the danger.
  13. See *Teshuvot Yad Eliyahu*, no. 43, p. 48b; *He'emek She'elot, She'ilta* 147:4; *Ziv Eli'ezer*, IX, no. 45, sec. 5; and R. Ovadiah Yosef, *Dinei Yisra'el*, VII, 23-28. This analysis is inconsistent with the position of Radbaz, who describes a person who acts in such a manner as a "pious fool"; see *infra*, note 19. *Teshuvot Yad Eliyahu* offers an alternative interpretation of Resh Lakish's conduct in stating that self-endangerment is permitted in order to rescue the life of a great scholar. See *Sefer Hasidim* (Jerusalem, 5720), no. 698; R. Jacob Emden, *Migdal Oz, Even Bohen* 1:78 and 1:85; and *Ziv Eli'ezer*, X, no. 25, secs. 9-11.
  14. *He'emek She'elah, She'iltot de-Rav Aha'i Ga'on* 457:4, asserts that the Babylonian Talmud, *Nedarim* 80b, disagrees with the Palestinian Talmud and hence it is the position

of the Babylonian Talmud that is accepted by the majority of rabbinic decisors. For a survey of conflicting discussions regarding the proper understanding of *Nedarim* 80b see R. Ovadiah Yosef, *Dinei Yisra'el*, VII, 32-36.

*Teshuvot Yad Eliyahu*, no. 43, p. 48b and *Agudat Ezov, Derushim*, p. 3b, opine that, according to the interpretation of *She'iltot de-Rav Aha'i Ga'on*, the Babylonian Talmud, *Niddah* 61a, disagrees with the Palestinian Talmud. Their argument is rebutted by R. Chaim Heller, *Sefer ha-Mizvot*, p. 175. It should also be noted that *He'emek She'elah, She'ilta* 129:4, finds support for the position of the Palestinian Talmud in that discussion. See also R. Eliezer Waldenberg, *Ziz Eli'ezer*, IX, no. 45, sec. 5. Cf., however, *Teshuvot Bet Ya'akov*, no. 107 and R. Ovadiah Yosef, *Dinei Yisra'el*, VII, 28.

Discussion of other statements found in the Babylonian Talmud that may serve to establish existence of a dispute between the two Talmuds are presented by *Teshuvot Yad Eliyahu*, no. 43; R. Chaim Heller, *Sefer ha-Mizvot*, p. 175; and R. Ovadiah Yosef, *Dinei Yisra'el*, VII, 36-38.

15. See *Arukh la-Ner, Sanhedrin* 73a; *Agudat Ezov* cited in *Pithei Teshuvah, Hoshen Mishpat* 426:2; *Arukh ha-Shulhan, Hoshen Mishpat* 426:4; R. Chaim Heller, *Sefer ha-Mizvot*, p. 195; and R. Ovadiah Yosef, *Dinei Yisra'el*, VII, 31-32.
16. Cf., however, R. Shlomoh Yosef Zevin, *Le-Or ha-Halakhah* (Tel Aviv, 5717), pp. 15-16, who cogently argues that this proof is not conclusive. See also, *Klei Hemdah, Parashat Pinhas*, who sharply disagrees with *Or Same'ah*. See also R. Ovadiah Yosef, *Dinei Yisra'el*, VII, 26, who analyzes other talmudic statements cited by *Or Same'ah*.
17. The comments presented in *Or Same'ah* and *Meshekh Hokhmah* serve to establish that self-endangerment is not required even if the entire community of Israel, rather than a single individual, is endangered. Cf., however, R. Abraham I. Kook, *Mishpat Kohen*, nos. 142-144 and *Klei Hemdah, Parashat Pinhas*; R. Isaac ha-Levi Herzog, *Teshuvot Heikhal Yizhak, Orah Hayyim*, no. 34; R. Ovadiah Yosef, *Dinei Yisra'el*, VII, 38-40; and R. Pinchas Barukh Toledano, *Barka'i*, III, 32.
18. Radbaz' interlocutor informed him that he had "found it written" that sacrifice of a limb is obligatory in order to save the life of another person. That view is espoused by R. Menachem Recanati, *Piskei Recanati*, no. 470, and is cited by R. Yehudah Ashkenazi of Tiktin, *Be'er Heteiv, Yoreh De'ah* (Amsterdam, 5529) 157:13, who declares that "some say" that it is indeed obligatory to sacrifice a limb in order to preserve the life of another person; cf., *Nahal Eitan, Hilkhot Ishut* 21:11. See also *Hagahot Mordekhai, Sanhedrin*, sec. 718, who states that a person may cut off the limb of another in order to save his own life.
19. The term "pious fool" would appear to denote a person who is foolhardy in his pursuit of pious deeds and assignment of this appellation certainly implies that such acts should not be encouraged. However, in context, the term does appear to connote that the act performed by the individual is forbidden. Although the verse "and your brother shall live with you" (Leviticus 25:36) is cited by R. Akiva, *Baba Mezi'a* 62a, as establishing that one dare not give preference to the life of another over one's own life, that discussion serves only to prohibit the sacrifice of one's own life on behalf of another but not to prohibit acceptance of a measure of danger in order to save the life of another. To be sure, as explicitly stated by *Teshuvot Radbaz*, III, no. 1052, the principle expressed in the dictum formulated by the Gemara, *Sanhedrin* 74a, "Why do you think that your blood is sweeter than the blood of your fellow?" is valid in the converse as well, viz., "Why do you think that the blood of your fellow is sweeter than your own blood?" However, application of that principle would require passive nonintervention only when the danger to one's own life is greater or equal to the danger to the person in need of rescue. In a situation in which the danger to the endangered person is significantly greater than the danger to the rescuer that consideration does not appear to be applicable. Hence, although the Torah does not demand self-endangerment even under such circumstances, the act of rescue, when posing a hazard to the rescuer, should be regarded as discretionary, albeit foolhardy, rather than as prohibited.

Nevertheless, *Ziz Eli'ezer*, IX, no. 45, sec. 13, cites Radbaz' use of the term "pious fool" in ruling that self-endangerment is forbidden even for the purpose of preserving the life of another. That position is reiterated in *Ziz Eli'ezer*, X, no. 25, chap. 7, secs. 5 and 12

and no. 25, chap. 28. See also R. Chaim David Halevi, *Assia*, IV (Jerusalem, 5743), 256-257 and R. Shemayah Dikhovski, *Ne'ot Deshe*, II, 155-156. An identical view is also espoused by R. Moshe Hershler, *Halakhah u-Refu'ah*, II, 123. However, in the course of resolving the contradiction between *Teshuvot Radbaz*, III, no. 1052 and *Teshuvot Radbaz*, V, no. 1582 (see *supra*, note 10), Rabbi Hershler limits the prohibition to situations in which the potential danger to the rescuer is equal to, or greater than, the danger to the person to be rescued since he regards Radbaz as requiring intervention when the danger to the victim is disproportionate to that of the intervenor. *Ziz Eli'ezer's* discussion is rather confusing since he also resolves the contradiction in a manner similar to the resolution presented by Rabbi Hershler (see *supra*, note 10), but in his definitive rulings does not seem to apply the principle that arises therefrom. Most striking is his ruling in *Ziz Eli'ezer*, XIII, no. 101, to the effect that blood donations cannot be compelled because of the attendant danger. See *infra*, note 27. As will be shown shortly, *Ziz Eli'ezer's* rulings with regard to kidney transplants are also inconsistent with this principle. Moreover, *Ziz Eli'ezer*, IX, no. 45, sec. 5, himself states that Resh Lakish's self-endangerment did not reflect a controversy with Rav Yonatan but represented an act of piety. That statement is inconsistent with the view that self-endangerment is prohibited.

A number of authorities explicitly declare that, under such circumstances, self-endangerment is discretionary but permissible. *Teshuvot Minhat Yizhak*, VI, no. 103, declares that the controversy between *Hagahot Maimuniyot* and Radbaz is limited to whether or not there is an obligation of rescue when there is a hazard to the rescuer but that all agree that "it is permissible if he so desires." *Minhat Yizhak*, however, qualifies that statement with the caveat that self-endangerment is permitted only if such self-endangerment will "with certainty" lead to the rescue of the victim. See *supra*, note 8. R. Moshe Feinstein, *Iggerot Mosheh*, *Yoreh De'ah*, II, no. 174, *anaf* 4, explicitly permits a person to risk his own life in order to save the life of another provided that he does not expose himself to "certain death." Similarly, R. Samuel ha-Levi Wozner, *Teshuvot Shevet ha-Levi*, V, no. 119, reprinted in *Halakhah u-Refu'ah*, IV, 139-142, finds no transgression in endangering oneself in order to preserve the life of another provided that the probability of survival is more than fifty percent. R. Moshe Dov Welner, *Ha-Torah ve-he-Medinah*, VII-VIII (5715-5719), 311, also regards self-endangerment for purposes of rescuing another person to be permissible. See also Jacob Levy, *No'am* XIV (5731), 319.

The hazards involved in donation of a kidney are not insignificant. See *infra*, note 107. Accordingly, the propriety of transplantation of a kidney from a living donor is directly related to the resolution of this issue of whether or not a person may risk his own life in order to preserve the life of another. Despite his earlier cited comments in resolving the contradiction found in Radbaz' *resonsa*, in *Ziz Eli'ezer*, IX, no. 45, sec. 13 and *Ziz Eli'ezer*, X, no. 25, chap. 7, secs. 5 and 12, Rabbi Waldenberg asserts that, pursuant to the opinion of Radbaz, such donations are prohibited. Although in *Ziz Eli'ezer*, IX, no. 45, sec. 13, Rabbi Waldenberg concludes that such transplants cannot be sanctioned unless it is medically determined that "the matter does not entail possible danger to the life of the donor," in *Ziz Eli'ezer*, X, no. 25, chap. 7, he incongruously cites his earlier discussion of this topic and rules that such transplants may be permitted "where the danger is not certain and medical science states that it is reasonable [to assume] that as a result both will remain alive." That conclusion is inconsistent not only with his earlier ruling but also with his discussions in the same chapter. R. Pinchas Barukh Toledano, *Barka'i*, III, p. 26 and p. 32, similarly understands Radbaz as prohibiting self-endangerment and rules that donation of a kidney by a living person is forbidden. R. Saul Israeli, *Barka'i*, III, p. 35, notes 1 and 2, takes no definitive stand with regard to whether self-endangerment constitutes a transgression but opines that Radbaz' negative view regarding self-endangerment is limited to situations involving a significant immediate danger. He also suggests that Radbaz' comments are limited to the danger experienced in the loss of an external organ that would render the donor a cripple. However, neither qualification of Radbaz' position is supported either by the text of the responsum or by an analysis of the underlying position.

The earlier cited authorities who permit self-endangerment for the purpose of preserving the life of another would certainly sanction transplantation of a kidney from a live

donor. Such procedures are also permitted, at least under usual conditions, by R. Ovadiah Yosef, *Dinei Yisra'el*, VII, 41-43; *idem*, *Yehaveh Da'at*, III, no. 84 and *Halakhah u-Refu'ah*, III, 61-63; R. Shlomoh Zalman Auerbach, as cited by *Nishmat Avraham*, II, *Yoreh De'ah* 157:4 (sec. 2) s.v. *akh katav li*; R. Moshe Hershtler, *Halakhah u-Refu'ah*, II, 124; R. Saul Israeli, *Barka'i*, III, p. 35, note 1 (cf., however, *idem*, p. 36, note 2); R. Moshe Meiselman, *Halakhah u-Refu'ah*, II, 119-125; R. Chaim David Halevi, *Assia*, IV, 257; and *Ne'ot Deshe*, II, 156.

It is certainly clear that Radbaz himself not only permitted amputation of a limb in order to preserve the life of another but also lauded such a sacrifice as an act of inordinate piety and voiced such approbation despite his observation that loss of blood resulting from perforation of an earlobe has been known to result in loss of life. Radbaz explicitly maintained that even the relatively high risk associated with amputation of a limb, particularly in his day, did not rise to the threshold of risk acceptable only to a "pious fool." The comment of *Ziz Eli'ezer*, IX, chap. 45, sec. 11, stating that, "since the multitude has trodden thereupon," the surgical amputation of a limb does not rise to the halakhically significant threshold of danger is both empirically incorrect and contradicted by Radbaz' comments concerning perforation of an earlobe. See Jacob Levy, *No'am*, XIV, 322. Accordingly, contrary to the comments of *Ziz Eli'ezer* and others, prohibition of a kidney transplant from a living donor cannot be sustained even according to their understanding of Radbaz. Cf., *Ne'ot Deshe*, II, 156.

20. See sources cited in *Hiddushei R. Akiva Eger*, *Yoreh De'ah* 157:1 and *Pithei Teshuvah*, *Yoreh De'ah* 157:4. See also R. Shalom Mordecai Schwadron, *Teshuvot Maharsham*, V, no. 54; *Teshuvot Shevet ha-Levi*, V, no. 174; and *Nishmat Avraham*, III, *Hoshen Mishpat* 426:1.
21. Cf., however, *Teshuvot Pri Yizhak*, I, no. 32.
22. Cf., however, *Me'iri*, *Yevamot* 72a.
23. For a further discussion of the absence of an obligation to expose oneself to illness in the performance of a *mizvah* see sources cited by R. Ya'akov Weingold, *Halakhah u-Refu'ah*, IV, 339-362, and *Nishmat Avraham*, III, *Hoshen Mishpat* 420:4 (sec. 3). See also R. Moshe Sternbuch, *Halakhah u-Refu'ah*, IV, 147. Cf., however, R. Chaim Pinchas Scheinberg, *ibid.*, pp. 125-138.
24. See *Iggerot Mosheh*, *Yoreh De'ah*, II, no. 174, *anaf* 4 and R. Moshe Meiselman, *Halakhah u-Refu'ah*, II, 116-118.

In a similar vein R. Jacob Emden, *Migdal Oz*, *Even Bohen* 1:83, declares that a person is not obligated to accept "severe and bitter pain" in order to preserve the life of another. It is readily understood that excruciating pain constitutes a greater burden than loss of one's fortune. In *Even Bohen* 1:13 R. Jacob Emden offers a similar analysis of the remarkable statement of the Gemara, *Sanhedrin* 75a, declaring that a woman should not engage in sexually provocative activity in order to save a person from death because of the "dishonor of her family." R. Jacob Emden explains that the degradation and embarrassment engendered by such conduct is more onerous than loss of an entire fortune. See also *Iggerot Mosheh*, *Yoreh De'ah*, III, no. 179 and *Teshuvot Minhag Yizhak*, V, no. 8. Cf., however, R. Ovadiah Yosef, *Dinei Yisra'el*, VII, 24, who expresses difficulty in understanding R. Jacob Emden's comments in light of the many sources indicating that a person must suffer discomfort and even pain in order to save the life of another. If R. Jacob Emden's position is understood to be in accord with the foregoing comment the difficulties are resolved: R. Jacob Emden refers only to pain the burden of which is at least equal to the burden of losing one's entire fortune while the sources cited by Rabbi Yosef refer to a much lower level of pain.

25. Cf., R. Moshe Meiselman, *Halakhah u-Refu'ah*, II, 118, who concludes that donation of blood and skin is obligatory. Similarly, R. Samuel ha-Levi Wozner, *Teshuvot Shevet ha-Levi*, V, no. 119, reprinted in *Halakhah u-Refu'ah*, IV, 139-142, apparently regards ordinary blood donations as mandatory. See, however, *infra*, note 27.
26. Until now, medical studies conducted in conjunction with bone marrow procedures have failed to uncover a linkage between donation of bone marrow and an increased incidence of either mortality or morbidity. In the unlikely event that further studies yield data pointing to the existence of such a causal connection the issues herein discussed will require reexamination.

27. Cf., *Ziz Eli'ezer*, XIII, no. 101, sec. 6, who rules that even donation of blood cannot be regarded as compulsory because of the attendant danger. A similar view is advanced by R. Moshe Dov Welner, *Ha-Torah ve-ha-Medinah*, VII-VIII, 311. Rabbi Waldenberg, *Halakhah u-Refu'ah* IV, 143, advances an additional, albeit fanciful, reason for his refusal to regard blood donations as mandatory. Citing the verse "For the life of the flesh is in the blood" (Leviticus 17:11), Rabbi Waldenberg argues that requiring the donation of more than a minimal amount of blood (the quantity of a *revi'it*) is tantamount to requiring a person to surrender his life. Apart from the obvious objections that might be raised that position is difficult to maintain in view of the fact that the Talmud regards bloodletting as therapeutic and beneficial in preserving health. Cf., *Iggerot Mosheh*, *Hoshen Mishpat*, II, no. 103.
28. See Alan F. Ross and John H. Tinker, "Anesthetic Risk," *Anesthesia*, 3rd edition (New York, 1990), ed. Robert Miller, I, 721. Of course, mortality attributed to anesthesia was not always so low. A 1944 study reported an incidence of anesthetic death of 1:1,000. Among later studies, a 1961 study reported the incidence of death resulting primarily from anesthesia at 1:536, while a 1960 report set the mortality rate at an astonishing 1:232. A highly regarded multi-institutional survey conducted in 1954 reported a mortality rate of 1:2680. *Ibid.*, pp. 721-722. The high risk of general anesthesia in times past may account, at least in part, for the view of some contemporary authorities who are reported to have ruled that bone marrow donations cannot be compelled. These rulings, and the reasons upon which they are based, are unfortunately not available in writing.
29. Two studies conducted in the early 1970's indicate a marked decrease in prospective mortality in patients who were either healthy or had mild systemic disease. However, the death rate reported in those studies represents overall prospective mortality, rather than deaths from anesthesia exclusively. See *Anesthesia*, pp. 723-724.
30. Other facets of the obligation to donate blood and bone marrow are discussed by this writer in an article published in *Ha-Pardes*, Heshvan 5752, pp. 11-14.
31. *The New York Times*, July 19, 1990, p. A17, col. 2.
32. *The New York Times*, July 30, 1990, p. A8, col. 1.
33. 141 Ill.2d 473; 566 N.E.2d 1319; *The New York Times*, September 29, 1990; p. A11, col. 1.
34. *The New York Times*, November 20, 1990, p. B9, col. 1.
35. 126 F. 2d 121, 75 U.S. Ap. D.C. 156 (1941).
36. Mature minors have at various times been found to have capacity to consent to at least some procedures. In all such cases the minor has been seventeen years old or older. See *Bakker v. Welsh*, 144 Mich 632, 108 N.W. 94 (1906) (17 years); *Gulf & Ship Island Railroad Co. v. Sullivan*, 155 Miss. 1, 119 So. 501 (1928) (seventeen years); *Bishop v. Shurly*, 237 Mich. 76, 211 N.W. 75 (1926) (nineteen years); *Lacey v. Laird*, 166 Ohio St. 12, 139 N.E.2d 25 (1956) (eighteen years). The general rule is that capacity exists when the minor has the ability of the average person to weigh the risks and benefits of the procedure to which he consents. See *Prosser and Keiton on the Law of Torts*, 5th ed. (St. Paul, 1984), p. 115.
37. Consent of a person on whom an otherwise actionable invasion is inflicted is not effective in eliminating liability if that person lacks capacity to consent, e.g., because of infancy. See *Prosser and Keiton on the Law of Torts*, p. 114.
38. *Masden v. Harrison*, No. 68651, Eq. Mass. Sub. Jud. Ct. (June 12, 1957); *Hershey v. Harrison*, No. 68666, Eq. Mass. Sub. Jud. Ct. (August 20, 1957); *Foster v. Harrison*, No. 68674, Eq. Mass. Sup. Jud. Ct. (November 20, 1957).
39. 445 S.W. 2d 145; 35 A.L.P. 3d 683 (1969).
40. 29 Conn. Supp. 368; 289 A. 2d 386 (1972).
41. [1816] 2 Mer. 99, 35 Eng. Rep. 875 (Ch).
42. [1846] Craig & Ph. 76, 41, Eng. Rep. 418.
43. Annot. 24 A. L. R. 3d 863 (1969).
44. 11 Paige Ch. 257 (N.Y. Ch. 1844).
45. See 27 *American Jurisprudence* 2d 592, Equity § 69.
46. See, for example, *City Bank v. McGowan*, 323 U.S. 594, 599 (1944).
47. *Id.* at 146.

48. *Id.* at 149.
49. *Id.*
50. *Id.* In response to similar concerns expressed by a guardian ad litem, Judge Day, in a minority opinion in *In re Guardianship of Pescinski*, 67 Wis. 2d 4; 226 N.W. 2d 180 (1975), wrote: "I fail to see the analogy—this is not an experiment conducted by mad doctors but a well-known and accepted surgical procedure necessitated in this case to save the life of the incompetent's sister. Such a transplant would be authorized not by a group of doctors operating behind a barbed wire stockade but only after a full hearing in an American court of law." *Id.* at 183.
51. *Id.* at 150.
52. 20 Conn. Supp. 368, 374; 289 A.2d 386, 389.
53. *Id.* at 390.
54. *Id.* at 374-375.
55. 284 So.2d 185 (La. Ct. App.), certiorari denied, 284 So.2d 338 (La. 1973).
56. *Id.* at 187.
57. 67 Wis. 2d 4; 226 N.W. 2d 180 (1975).
58. 104 A.D. 2d 200; 481 N.Y.S. 2d 932 (1984).
59. *Id.*
60. 5765 S.W.2d 493 (1979).
61. *Id.* at 498.
62. *Id.* at 499.
63. *Id.*
64. (1988) 42(ii) *Piskei Din* 661.
65. This amendment was enacted following a decision of the Jerusalem District Court in 1982 in which, on the facts of the case, the court found that a donation of bone marrow to a sibling would be in the best interest of the minor. The case involved bone marrow donation by an 8-year old girl on behalf of her twin sister. The court found that the knowledge that she might have saved the life of her sister but did not do so would likely result in grave psychological harm to the child. The amendment was designed to render application of a best interest standard mandatory by virtue of statutory authority. See (1988) 42(ii) *Piskei Din* 661 at 686.
66. Medically, age is no longer considered a significant factor in determining suitability for renal transplants. As stated in one prominent source, "Chronological age and severe systemic disease such as diabetes have decreased in importance as factors determining eligibility for transplants and patients in their seventh and eighth decades may now reasonably be considered physiologically stable." See P. Keown and C. Stiller, "Kidney Transplantation," *Surgical Clinics of North America*, vol. LXVI, no. 3 (June, 1976), p. 519.
67. Nevertheless, to this writer, the Israeli Supreme Court's emphasis upon potential availability of one of the sisters as a donor seems inappropriate. At the time that the matter was before the Court, the siblings had declined to serve as donors and there was no concrete reason for failure to accept that refusal at face value, particularly since each sister advanced a cogent reason for her demurral. Moreover, given the fact that the incompetent stood to derive the most tangible benefit from prolongation of the father's life, his interest in the success of the procedure was paramount and should have served to trigger application of a best interest standard.  

The Israeli Supreme Court also cited testimony indicating that in the event of injury to the remaining kidney the mentally retarded son would be unlikely to be cooperative in ongoing dialysis procedures. In point of fact, the likelihood of trauma to the remaining kidney is negligible. See *supra*, note and accompanying text. The Court also cited provisions of Israeli regulations governing workmen's compensation that classify loss of a kidney as resulting in a 30 percent disability. The spectre of such disability is entirely illusory. Medical testimony in *Hart v. Brown* established that, assuming an uneventful recovery, the donor would thereafter be restricted only from violent contact sports and would otherwise be able to engage in all normal life activities. See 29 Conn. Supp. 368, 374; 289 A.2d 386, 309.
68. 141 Ill. 2d 473 at 484.
69. *Id.* at 485.

70. *Id.* at 524.
71. Cf., Rambam, *Hilkhot Nahalot* 10:11 and *Kesef Mishneh*, *ad locum*.
72. See *supra*, note and accompanying text.
73. 284 So.2d 185, 187.
74. Rabbi Meiselman argues that even *Tosefot* would concede that "substituted judgment" is warranted in situations in which, given the opportunity, all persons would make such a determination. The principle of *ye'ush she-lo me-da'at*, he argues, applies only to individual decisions that may vary from person to person and require the particular state of mind of a given individual; decisions that are nearly universal, he argues, reflect a "general will" and do not require a particular state of mind.
75. R. Shlomoh Zalman Auerbach is cited in *Nishmat Avraham*, IV, *Hoshen Mishpat* 243:1, as permitting pediatric bone marrow transplants with the consent of the minor provided that the child has reached a stage of maturity at which his consent is meaningful. Rabbi Auerbach is quoted as stating that the propriety of a bone marrow donation at a younger age requires further deliberation. It is apparent from the accompanying discussion that the factor serving as Rabbi Auerbach's consideration in favor of sanctioning such procedures is that the child acquires "merit" (*zekhut*) by virtue of the "great *mizvah*" fulfilled by means of the procedure and hence donation of bone marrow constitutes a benefit for the child and may be sanctioned on the basis of *zakhin le-adam she-lo be-fanav*, i.e., a form of constructive agency. The consideration militating against sanctioning such procedures is that, although benefits may be acquired for a person without explicit consent, nevertheless, according to numerous authorities, property may not be taken from a person even for his benefit without explicit consent. In this situation, the pain caused the child is comparable to the taking of property.  
 A number of aspects of Rabbi Auerbach's position are unclear: 1) Since Halakhah does not recognize minors as being endowed with capacity to contract or to perform any act requiring rational determination, the distinction between minors of differing ages is unclear. 2) Discussions of *zakhin me-adam* found in latter-day sources deal with situations in which, in actuality, the "loss" constitutes an unmitigated benefit, e.g., disposal of *hamez* on *erev Pesah* which otherwise becomes *asur be-hana'ah* or situations in which it may be assumed that the benefit far outweighs the loss so that all rational persons, if apprised of the facts of the situation, would readily grant consent. Since many people decline to donate bone marrow, it is difficult to see how the principle of *zakhin me-adam* can be applied. 3) Were the situation to be regarded as one of clear-cut benefit to the child, the controversy concerning *zakhin me-adam* would appear to be irrelevant since the authority of a guardian to act on behalf of his ward is not a subject of dispute.
76. See *infra*, note 107.
77. That principle, of course, remains unaffected by Rav's dictum, "Orphans who consumes that which is not theirs let them follow their deceased." R. Nahman's change of heart upon hearing Rav's pronouncement must, I believe, be understood as reflective of the principle that a guardian may expend resources belonging to a minor for the minor's own welfare. Although, in consuming assets claimed by a creditor, the orphan minors do not commit an actionable offense, those actions are unethical and, in the purely ethical sense, the orphans deserve to join their deceased progenitor. Moreover, unethical acts to which children become habituated in their minority are likely to be repeated subsequent to reaching legal majority as well. Hence, the removal of the ethical taint of unlawful enjoyment of property claimed by others becomes a matter of moral and spiritual benefit to the minors themselves. Accordingly, R. Nahman justified seizure of their property on the grounds that, in doing so, he did not seek to compel the performance of a *mizvah*, but to purge the orphans of unethical traits. In effect, R. Nahman justified seizure of their property by applying a best interest standard.
78. The prohibition against "wounding" (*havalah*) is derived from the verse "Forty stripes he shall give him, he shall not exceed (Deuteronomy 25:3) or from the immediately following phrase "lest he exceed" or from both phrases. See conflicting authorities cited in *Encyclopedia Talmudit*, XII (Jerusalem, 5727), 679-680. Although, in context, the verse speaks of a transgressor who has incurred the penalty of forty lashes, the prohibition applies to any illicit battery. As formulated by Rambam, *Sefer ha-Mizvot*, *lo ta'aseh*, no.

- 300 and *idem*, *Hilkhot Sanhedrin* 16:12, "If with regard to one whom Scripture permits to be smitten, the Torah forbids smiting more than warranted by his transgression, a *fortiori*, [this is forbidden] with regard to all other people."
79. Cf., However, R. Isaac Schorr, *Teshuvot Koah Shor*, no. 20, who asserts that "wounding" a minor entails no infraction of the biblical prohibition. He reasons that since only an individual who has reached the age of halakhic majority can be punished by forty stripes, the entire verse, including the prohibition of imposing further lashes, applies only to an adult, but not to a minor. That view is not supported by any other halakhic source.
  80. See R. Yitzchak Zilberstein, *Halakhah u-Refu'ah*, IV, 156-157. Rabbi Zilberstein's citation of the ruling of *Shulhan Arukh*, *Hoshen Mishpat* 96:4, regarding a minor's lack of capacity to alienate property is a bit imprecise since the issue is not title to property but consent to an act that would otherwise constitute a tort.
  81. *Binyan Zion's* comments are advanced in conjunction with development of his position prohibiting post-mortem dissection of a corpse even for the purpose of preserving the life of another patient suffering from the same malady. *Binyan Zion* argues that desecration of a corpse constitutes a harm that cannot be remedied. *Binyan Zion* further argues that appropriation of the property of another for the purpose of preserving life is sanctioned only because the owner of the property seized for that purpose is himself subject to an obligation of rescue but that the dead are free from all obligations. The latter argument would logically apply to minors as well since, as stated by the Gemara, *Erukhin* 22a, "minors are not obligated to perform *mizvot*."
  82. For a survey of these various opinions and the ramifications that flow therefrom see J. David Bleich, *Contemporary Halakhic Problems*, I (New York, 1977), pp. 325-371.
  83. See R. Yechi'el Ya'akov Weinberg, *Seridei Esh*, III, no. 127, sec. 22. Cf., however, R. Aryeh Lifschutz, *Aryeh de-Bei Ila'i*, *Yoreh De'ah*, no. 14, p. 58a, who maintains that the "wounding" to which Maharit refers is the wounding of the mother, i.e., the removal of the developing fetus necessarily entails an assault upon the body of the mother.
  84. See, however, R. David Dov Meisels, *Teshuvot Binyan David*, no. 60, who asserts that Maharit's permissive ruling applies only to situations in which there is actual danger to the life of the mother. All other rabbinic writers understand Maharit's ruling as encompassing situations in which only maternal health is in danger.
  85. R. Moshe Feinstein, *Iggerot Mosheh*, *Hoshen Mishpat*, II, no. 69, sec. 3, dismisses the statement recorded in *Teshuvot Maharit* as a "forged responsum" authored by an "errant student" and improperly attributed to Maharit. In light of the fact that this responsum is cited and accepted by Maharit's disciple R. Chaim Benveniste, *Sheyarei Knesset ha-Gedolah*, *Yoreh De'ah* 154, *Hagahot ha-Tur*, sec. 6, *Iggerot Mosheh's* assessment is highly improbable. The discrepancies between responsa no. 97 and no. 99 have been addressed by *Aryeh de-Bei Ila'i*, *Yoreh De'ah*, no. 19; R. Ovadiah Yosef, *Yabi'a Omer*, IV, *Even ha-Ezer*, no. 1, sec. 7; and R. Eliezer Waldenberg, *Ziz Eli'ezer*, IX, no. 51, chap. 3. Acceptance of Maharit's authorship of this responsum does not detract from the cogency of *Iggerot Mosheh's* halakhic conclusions regarding the nature of the prohibition concerning feticide.
  86. The statement of R. Dimi bar Hinena, *Sanhedrin* 83b, "'And he who kills a beast, he shall restore it; and he who kills a man, he shall be put to death' (Leviticus 24:21): just as one who strikes an animal to heal it is not liable for damage so if one wounds a man to heal him he is not liable" does not necessarily establish authority to "wound" a person for the benefit of a third party. Cf., R. Moshe Meiselman, *Halakhah u-Refu'ah*, II, 114. Nor does Rambam's statement, *Hilkhot Hovel u-Mazik* 5:1, limiting the prohibition to wounding "in the manner of strife" necessarily exclude wounding for the therapeutic benefit of a third party. Moreover, Rambam's comments may serve to circumvent only the prohibition against "smiting" but not the prohibition against "wounding," i.e., causing blood to flow. See R. Moshe Meiselman, *ibid.*, p. 115, but cf., *Iggerot Mosheh*, *Hoshen Mishpat*, II, no. 66.
  87. In *Teshuvot Maharit*, no. 99, Maharit makes no attempt to predicate his ruling sanctioning abortion for preservation of maternal health upon the premise "a fetus is a thigh of its mother" (*ubar yerekh imo*). In the first lines of *Teshuvot Maharit*, no. 97, Maharit states that feticide constitutes a transgression of the prohibition against "wounding" and only

later in his discussion does he employ the principle "a fetus is a thigh of its mother." See also R. Yechi'el Ya'akov Weinberg, *Seridei Esh*, III, no. 127, who cites the statement of *Tosafot*, *Sanhedrin* 80b, in which *Tosafot* declares that a fetus preserves "independent animation" and hence the principle "a fetus is a thigh of its mother" does not render the fetus a *treifah* simply because its mother is a *treifah*. Similarly, argues *Seridei Esh*, since the fetus possesses "independent animation" its destruction in order to save the mother is not comparable to the removal of a limb in order to save the body.

88. Cf., however, *Teshuvot Besamim Rosh*, no. 386; *Birkei Yosef*, *Yoreh De'ah* 336:6; and *Or Sameah*, *Hilkhot Rozeah* 5:6.
89. 141 U.S. 250 (1891).
90. *Id.* at 251. See also *Winston v. Lee*, 470 U.S. 573 (1985); *Schneider v. California*, 304 U.S. 757 (1966); *Paige v. Massachusetts*, 321 U.S. 158 (1944).
91. See, for example, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).
92. 381 U.S. 479 (1965).
93. *Id.* at 484.
94. *Id.*
95. See J. David Bleich, "AIDS: A Jewish Perspective," *Tradition*, vol. XXVI, no. 3, pp. 58-59.
96. See Moshe Silberg, "Law and Morals in Jewish Jurisprudence," *Harvard Law Review*, vol. LXXV, no. 2 (December, 1961), pp. 306-331. See also Robert M. Cover, "Obligation: A Jewish Jurisprudence of the Social Order," *Journal of Law and Religion*, vol. V, no. 1 (1987), pp. 65-74.
97. There is no reason to assume that therapeutic wounding is sanctioned only when it results in benefit to the person sustaining the "wound" on the grounds that there is actual or constructive consent for such wounding, whereas no such assumption can be made with regard to consent when the benefit is received by another party, since many authorities assert that the prohibition applies equally to "wounding" with permission of the victim. See *Teshuvot Havot Ya'ir*, no. 163; *Shulhan Arukh ha-Rav*, V, *Hilkhot Nizkei Guf ve-Nefesh*, sec. 4; commentary of R. Yitzchak Perla on *Sefer ha-Mizvot* of R. Sa'adya Ga'on, *mizvot lo-ta'aseh*, nos. 47-48; and *Hazon Ish*, *Hoshen Mishpat* 19:5. Cf., however, *Teshuvot Maharalbah*, *Kuntres ha-Semikhah*, (first responsum), s.v. *od ani omer de-gam*; *Turei Even*, *Megillah* 27a; and *Minhat Hinnukh*, no. 48.
98. See letter of R. Joseph Eliashiv addressed to R. Yechezkel Grubner published in *Am ha-Torah*, *Mahadurah II*, no. 3 (5742), p. 102.
99. The permissibility of appropriating the property of another in order to save one's own life is the subject of a controversy between Rashi and *Tosafot* in their respective analyses of a discussion recorded in *Baba Kamma* 60b. Rashi understands the issue under discussion to be the question of the permissibility of the act and the conclusion to be negative while *Tosafot* understands the issue to be relief from restitution. The consensus of latter-day authorities is in accordance with the opinion of *Tosafot* and Rosh although a number of authorities, including *Teshuvot Binyan Zion*, nos. 167 and 168; *Sho'el u-Meshiv*, *Mahadura Kamma*, II, no. 174; and *Dvar Yehoshu'a*, III, no. 24, rule in accordance with Rashi. An excellent digest of the pertinent responsa appears in *Nishmat Avraham*, II, *Yoreh De'ah* 157:4.
100. It seems to this writer that *Teshuvot Binyan Zion*, no. 17 would not accept this distinction. *Binyan Zion* argues that *Tosafot* and Rosh permit a person whose life is threatened to seize the property of another only because the owner of the seized property is under an obligation of rescue and hence the seizure is not at all an act of theft. Whenever such obligation is absent, argues *Binyan Zion*, the seizure is an act of theft and is forbidden. A person whose life is threatened clearly has the right to seize property in order to save himself even in the absence of the proprietor. Contrary to *Nishmat Kol Hai*, *Binyan Zion* apparently maintains that an obligation of rescue can devolve upon an individual even without his knowledge, with the result that his property may be seized in discharging that obligation on his behalf. See *Teshuvot Maharsham*, V, no. 54, from which it appears that the interlocutor espoused the position of *Nishmat Kol Hai* and that Maharsham disagrees.
101. The text of this responsum is corrupt in at least one and probably in several places. The statements here presented are believed by this writer to be faithful to the position espoused by the author of *Nishmat Kol Hai*.

102. A quite similar position is advanced by R. Pinchas Barukh Toledano, *Barka'i*, III, p. 24, note 1, with regard to the victim's obligation to compensate his rescuer for financial loss. Rabbi Toledano infers from Rambam's formulation of the relevant rulings that it is Rambam's view that the potential victim is liable for damage caused to the property of another person only if the owner of the property is not present and is not aware of the danger. However, if the owner of the property is present or is aware of the danger, the victim is not liable since the owner of the property is under obligation to come to his rescue.
103. See *Shulhan Arukh*, *Hoshen Mishpat* 1:2 and 1:8.
104. *Nishmat Avraham*, III, *Hoshen Mishpat* 426:1, addresses the question of whether a person who is impoverished at the time of his rescue is obligated to compensate the rescuer if he acquires funds at some later time. R. Shlomoh Zalman Auerbach is quoted as stating that, unlike the situation with regard to a person who accepts alms, a lien attaches to the beneficiary with the result that he remains liable. It should however be noted that *Teshuvot Maharashdam*, *Yoreh De'ah*, no. 204, rules that a person lacking assets at the time of rescue cannot be held liable subsequently.
105. In support of this position, *Iggerot Mosheh* cites a narrative recorded in *Baba Kamma* 60b. King David found it necessary to burn bales of barley in which Philistine soldiers had hidden and subsequently sought to determine whether he was liable to make restitution to the owners of the barley. The Gemara invokes a theory akin to that of eminent domain as recognized in common law in releasing him from liability. *Iggerot Mosheh* points out that the act was necessary in order to eliminate a threat to life and hence failure to exonerate King David on the basis of the rabbinic enactment conferring immunity upon a person who thwarts a pursuer is indicative of the fact that such relief is limited solely to liability for damages caused in removing impediments preventing the rescuer from reaching the pursuer. *Iggerot Mosheh's* argument is subject to challenge on two grounds: 1) David was indeed in pursuit of the Philistine soldiers and the bales of barley in which they had hidden themselves impeded him from apprehending them. [No distinction is drawn between unwitting destruction of property in the course of apprehending the pursuer and knowingly destroying property in the course of such an endeavor.] 2) David's life was in jeopardy as well. The rationale underlying the rabbinic conferral of immunity is that otherwise "no man will rescue his fellow from a pursuer." No such inducement is necessary to prompt a person to act when he is also among those whose life is endangered. See *Teshuvot Hatam Sofer*, *Hoshen Mishpat*, no. 194, who makes a similar point with regard to suspension of the rabbinic prohibition against journeying more than 2,000 cubits beyond a settlement for those returning from a mission of mercy. *Hatam Sofer* rules that the prohibition is suspended only on behalf of a person who altruistically engages in the rescue of others but not in the case of a person who, in engaging in a mission of mercy, acts to preserve his own life as well.
106. The resolution of the issue has a direct bearing upon a Jewish law analysis of the Robin Hood narrative. There is no question that a rabbinic decisor would act in a manner similar to Friar Tuck in granting ecclesiastic sanction for a Jewish Robin Hood's theft from the Sheriff of Nottingham in order to feed starving orphans and widows. The question of whether or not Robin Hood would be liable to make restitution hinges directly upon the question of whether the immunity conferred by rabbinic decree upon the person who thwarts a pursuer extends to every rescuer and whether it is limited to specified tort damages or includes all forms of financial liability. Application of the relevant principles to Noahides presents a more complicated array of issues.
107. The perioperative mortality risk to a kidney donor is comparable to that of similar surgical procedures, i.e., it is in the area of 0.1 to 0.4 percent. Long-term risks are more difficult to identify although there is no documented evidence of subsequent mortality as a result of a living kidney donation. One study did show that 10 to 20 percent of donors develop mild hypertension, although other studies show no significant difference between donors and members of age-matched control groups. A third of kidney donors develop a mild degree of proteinuria. Since donors have thus far been monitored only for a period of ten to twenty years there is as yet no evidence regarding whether proteinuria and renal function will remain stable over a longer period. See Barry M. Brenner and Floyd C. Rector Jr.,

*The Kidney*, 4th ed. (Philadelphia, 1991), II, p. 2365. Cf., Jacob Levy, *No'am*, XIV, 322. There is of course an additional danger, i.e., that the remaining kidney may be injured as a result of trauma or disease. The statistical probability of such injury is negligible. Medical testimony admitted by the court in *Hart v. Brown* indicates that the risk to the donor is such that live insurance carriers do not rate such individuals higher than those with two kidneys. The testimony further indicated that the only real risk to the donor is that of trauma to the one remaining kidney but that such trauma is extremely rare in civilian life. See *supra*, note 52 and accompanying text.

108. Although a report issued in 1984 indicated that when variables such as age and co-morbid conditions such as diabetes and cardiac disease are considered there is no difference in five-year survival rates between cadaveric donor transplant recipients and patients treated with dialysis, a more recent study published in 1989 indicates an improvement in one-year patient survival in the preceding decade among transplant recipients of from 85 to 93 percent. All studies show that patient survival with transplantation from a living related donor is higher than with a cadaveric transplant or dialysis. A 1983 study reported a three-year patient survival rate of 91 percent for transplantation of live kidneys as opposed to a 78 percent survival rate for cadaveric transplants. A 1989 report of one-year graft survival indicated a survival rate of 89 percent for living related transplants compared with 77 percent for cadaver transplants. See Barry M. Brenner and Floyd C. Rector Jr., *The Kidney*, II, 2361-2362. Another survey published in 1986 indicated that 82 percent of grafts from living related donors were still functioning one year after transplantation compared with a rate of 71 percent for cadaver grafts. See Task Force on Organ Transplantation, *Organ Transplantation: Issues and Recommendations* (Washington, D.C.: U.S. Dep't of Health and Human Resources, 1986), p. 13, Table I-1.
109. See *supra*, note 19.