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SURVEY OF RECENT HALAKHIC PERIODICAL LITERATURE

War and the State of Israel

In the relatively few years of its existence the State of Israel has experienced three major armed conflicts: the War of Independence of 1948, the Sinai campaign of 1956 and the Six-Day War of 1967. Although very little has appeared in print, with the noteworthy exception of the writings of Rabbi Joel Teitelbaum, the Rebbe of Satmar, the halakhic sanction for each of these wars has been challenged in some rabbinic circles. [See Rabbi Norman Lamm, "The Ideology of the Neturei Karta," *TRADITION*, Fall, 1971.] The venerable Rabbi Shlomo Yosef Zevin, general editor of the *Encyclopedia Talmudit*, addresses himself to this emotion-laden topic in a scholarly, objective manner and endeavors to show that definite halakhic sanction does in fact exist for each of these wars. The basic issues with which Rabbi Zevin grapples are at the core of the theological controversy concerning the establishment of the State. Rabbi Zevin's views are contained in article appearing in the 5731 edition of *Torah she-be-'al Peh*.

The prime argument cited in objection to the War of Independence, and indeed to the very establishment of the State itself, is based upon a literal understanding of the Talmud, *Ketuvot* 111a. In an *aggadic* statement, the Talmud declares that prior to the exile and dispersal of the remnant of Israel God caused the Jews to swear two solemn oaths: 1) not to endeavor to retake the Land of Israel by force and 2) not to rebel against the nations of the world. Rabbi Zevin maintains that these Talmudic oaths are not binding under circumstances such as the ones which surrounded the rebirth of the Jewish state. In support of this view he marshalls evidence from a variety of sources. *Avnei Nezer, Yoreh De'ah*, II, no. 454, notes that there is no report in any of the classic writings regarding an actual assemblage for the purpose of accepting these oaths as is to be found, for example, in the narrative concerning the oaths by which Moses bound the community of Israel prior to the crossing of the Jordan. The oaths administered before the exile are understood by *Avnei Nezer* as having been sworn by yet unborn souls prior to their descent into the terrestrial world. Such oaths, he argues, have no binding force in Halakhah. Similarly, the Maharal of Prague in his Commentary on the *Aggada, Ketuvot* 111a, and in chapter 25 of his *Netzach Yisrael*, interprets these oaths as being in the nature of a decree or punishment rather than as injunctions incumbent upon Jews in the Diaspora. There is ob-

viously no transgression involved in attempting to mitigate the effects of an evil decree. A third authority, R. Meir Simchah of Dvinsk, author of the *Or Sameach,* accepts the premise that these oaths do apply in a literal sense. However, he expresses the opinion that following promulgation of the Balfour Declaration establishment of a Jewish homeland in Palestine no longer constitutes a violation of the oath concerning rebellion against the nations of the world. The text of *Or Sameach's* statement on this important issue is reprinted by Z. A. Rabiner, *Toldot R. Meir Simchah* (Tel Aviv, 5727), p. 164. Rabbi Zevin adds that this argument assumes even greater cogency subsequent to the U.N. resolution sanctioning the establishment of a Jewish state.

There is yet another line of reasoning on the basis of which Rabbi Zevin denies the binding nature of these oaths at the present juncture of Jewish history. He advances a forceful argument which, particularly in the present post-holocaust era, must find a sympathetic echo in the heart of Jews who have witnessed an unprecedented erosion of all feelings of humanity among the nations of the world which permitted the horrendous oppression and torture of the Jewish people. The Talmud, *loc. cit.,* records that the two oaths sworn by the people of Israel were accompanied by a third oath which devolves upon the nations of the world; namely, that they shall not oppress Jews inordinately. According to Rabbi Zevin and others who have advanced the same argument, these three oaths, taken together, form the equivalent of a contractual relationship. Jews are bound by their oaths only as long as the gentile nations abide by theirs. Persecution of the Jews by the nations of the world in violation of this third oath releases the Jewish people from all further obligation to fulfill the terms of their agreement.

Objections to the Sinai campaign and the Six-Day War are founded upon completely different considerations. According to Halakhah, the declaration of an offensive war requires the affirmative act of both the *Sanhedrin* and the king (*Sanhedrin* 2a and 20b), but in our day we possess neither *Sanhedrin* nor monarch. R. Abraham Isaac Kook, *Mishpat Kohen,* no. 144, sec. 15, has argued that the latter requirement is not a literal one because declaration of war is not a royal prerogative. The king, in performing this function, merely serves as the agent of the nation. In the absence of a monarchy, authority for the declaration of war is vested in the established state authority. This contention is borne out by the words of Ramban in his addendum to Maimonides' *Sefer ha-Mitzvot,* no. 17. Discussing the declaration of war, Ramban states that this is the prerogative of "the king, the judge or whosoever exercises authority over the people." In contrast, the second requirement, namely, concurrence of the *Sanhedrin,* is crucial. Accordingly, Rabbi Zevin concludes, that there is no possible halakhic authority for the waging of an offensive war in our time.

However, Rabbi Zevin asserts

that these objections do not affect the halakhic status of the armed conflicts in which modern Israel was involved. A defensive war does not require the sanction of either the king or the *Sanhedrin*. These requirements apply only to wars of aggression carried out for purposes of exacting tribute, of territorial aggrandizement or of enhancing national prestige. Rabbi Zevin concludes that no objections can be raised against any of Israel's three wars since each of these was defensive in nature.

These questions are also discussed by Rabbi Judah Gershuni whose contribution dealing with this topic appears in the same issue of *Torah she-be-'al Peh* and in the Tevet 5731 edition of *Or ha-Mizrach*. Rabbi Gershuni asserts that acquiescence of the *Sanhedrin* for the declaration of a war of offense may be dispensed with in our day. Quoting *Meshekh Chokhmah, Parshat Bo,* Rabbi Gershuni argues that only in the absence of a general desire on the part of the nation to engage in war is agreement of the *Sanhedrin* necessary. *Meshekh Chokhmah* contends that sanctification of the New Moon, ordinarily a prerogative of the *Sanhedrin,* may be performed by the community as a whole in the absence of the *Sanhedrin*. Rabbi Gershuni avers that this provision may be extended to declaratons of war as well. Hence, in Rabbi Gershuni's opinion, approval of the *Sanhedrin* is necessary only when the populace is unwilling to engage in battle of its own accord.

Moreover, declaration of war by the king and the concurrence of the *Sanhedrin* is not required with regard to obligatory wars such as the conquest of *Eretz Yisrael*. Although some authorities disagree, Ramban is of the opinion that the commandment "And you shall inherit the land and dwell therein" (Numbers 33:53) is binding in all generations. In his commentary on the above passage Ramban clearly states that this *mitzvah* includes the commandment to conquer the Land of Israel.

Rabbi Gershuni, however, notes that another condition must be satisfied even with regard to obligatory wars. Both Ramban in the previously cited gloss to the *Sefer ha-Mitzvot* and Maimonides, *Sefer ha-Mitzvot, shoresh* 14, declare that even obligatory wars require consultation and guidance of the *urim ve-tumim*. Rabbi Gershuni argues that since this prerequisite cannot be fulfilled at the present time, war for the sake of conquering the territory of the Land of Israel cannot be sanctioned even according to Ramban.

There is, however, one category of warfare which does not require guidance of the *urim ve-tumim*: viz., the war against Amalek. It is usually assumed that because population shifts have occurred and ancient peoples are no longer ethnically identifiable this *mitzvah* cannot be fulfilled. Ramban, *Hilkhot Melakhim* 5:4-5, states that the commandment to eradicate the seven Canaanite peoples has lapsed because of precisely these considerations but fails to make a similar statement with regard to the people of Amalek. Rabbi Gershuni quotes an unpublished comment attributed

to R. Chaim Soloveitchik of Brisk in resolution of this difficulty. R. Chaim is purported to have declared that the commandment to destroy Amalek extends not merely to genealogical descendants of that ancient people but encompases all who embrace the ideology of Amalek and seek to annihilate the Jewish nation. Hence, the "war of God against Amalek" continues "from generation to generation" against the professed enemies of Israel and in our day is directed against those Arab nations which seek to eradicate the people of Israel. Since the battle against Amalek is in the nature of a continuous and ongoing war it does not require the sanction of the *urim ve-tumim*.

Hijack Victims

The weeks preceding the High Holy Day period of fall, 1970 were a time of high tension for the Jewish community throughout the world. Members of an Arab terrorist movement succeeded in hijacking several jet airliners and in diverting them to a landing-strip in Jordan. Passengers and crew members were seized as hostages for the release of a large number of guerillas then held captive by Israel and several European governments.

During these harrowing weeks the State of Israel remained steadfast in its resolve not to free any imprisoned terrorists in exchange for these hostages. This decision was based upon two factors: 1) Acceding to the demands of the terrorists would establish a dangerous precedent and could at any time lead to further hijackings as a means of securing hostages in order to strengthen any future demands set forth by the guerillas. 2) Although release of the captured guerillas might save the lives of the hostages, the released terrorists would once more be free to return to their nefarious activities, thereby endangering the lives of Israeli citizens. The validity of these considerations as justification for a course of action which permitted continued danger to the lives of the hostages is examined by Rabbi Judah Gershuni in the Nisan 5731 edition of *Ha-Darom*. Related to this problem is the more general question of the propriety of paying ransom in order to secure the release of hostages.

The Mishnah, *Gittin* 45a, declares that captives are not to be ransomed if the sum demanded is "greater than their value" — a term which the vast majority of commentators understand as meaning a sum equal to that which the captive would command if he were to be sold as a slave. This limit is placed upon the amount which may be paid as ransom because of concern lest the abductors succeed in extorting exorbitant sums and potential captors thus be encouraged to kidnap additional victims. *Tosafot, Gittin* 58b, contends that this limitation does not apply if the captive's life is in danger. This exception, however, is not cited by either Ramban or *Shulchan Arukh*. It may therefore be assumed that the latter authorities view the prescribed maximum as being applicable even in cases of actual danger to the victim. Latter-day authorities are divided with regard to a

definitive decision on this matter; numerous responsa on the subject are cited by *Pitchei Teshuvah, Yoreh De'ah* 252:4.

Tosafot, Gittin 54a, enumerates two other exceptions to the general rule that excessive ransom may not be paid. *Tosafot* maintains that restrictions upon the amount of ransom do not apply if the victim is a scholar of renown. Furthermore, such limitations are not imposed subsequent to the destruction of the Temple. For, *Tosafot* claims, during the period of the exile, the enemies of the people of Israel require no encouragement in their desire to victimize Jews. Hence, payment of an excessive ransom will not significantly intensify their motivation. The second exception formulated by *Tosafot* is not incorporated in *Shulchan Arukh's* codification of the relevant laws.

The 1970 hijackings, involving, as they did, the requested release of celebrated terrorists, pose an entirely different question. Is it obligatory or even permissible to endanger one person, or a group of people, in order to save the life of another? Release of known terrorists who would then be enabled to return to their malevolent pursuits should give rise to, at the very minimum, a *safek* or reasonable fear that the freeing of such terrorists will lead to their resumption of guerilla activities and ultimately result in loss of life. *Bet Yosef, Choshen Mishpat* 426, is of the opinion that one is obligated to expose onself to possible danger in order to rescue another person from certain danger. Rabbi Gershuni, however, adduces numerous authorities who disagree and maintain that one is not obliged to expose oneself to the possibility of danger in order to save another person's life. Certainly, argues Rabbi Gershuni, when both dangers are merely potential ones, the danger to the victim also being indefinite in nature, no overt action is mandated.

Rabbi Gershuni advances yet another argument in defense of the stance adopted by the Israeli government. It is his thesis that just as an individual is obliged to sacrifice his life on behalf of his country in time of war, so is he also duty-bound to assist in the preservation of law and order even at the risk of his own life. Rabbi Gershuni quotes R. Ya'akov Emden's explanation of the motive which prompted the tribe of Benjamin to enter into battle against the rest of Israel. Judges 19:25-29 describes how some members of the tribe of Benjamin subjected a concubine to repeated sexual assaults which ultimately resulted in her death. Subsequently the tribe of Benjamin resorted to warfare in order to prevent the perpetrators of this heinous deed from summary execution by members of the other tribes of Israel. In his *Migdal Oz,* R. Ya'akov Emden explains that it was the prerogative of each tribe to judge its own members and that the tribe of Benjamin was therefore justified in resorting to violence in defense of this right. Surrender of this prerogative would have constituted capitulation to a measure of anarchy. Rabbi Gershuni views this analysis as establishing an obligation to risk one's life in order to

preserve law and order. Since release of the terrorists would have undermined law and order in Israel the government, in Rabbi Gershuni's opinion, was justified in refusing to release captured terrorists despite the fact that the lives of innocent people were endangered thereby. These considerations are quite apart from the argument that it is within the sovereign power of a state to promulgate laws and to issue edicts in order to protect the welfare and safety of its inhabitants, even though some individuals may be adversely affected.

Induced Labor

Occasionally, during the final stages of pregnancy, when medically indicated, labor is induced either chemically or by rupturing the membrane surrounding the amniotic fluids. Moreover, it is common practice to administer a drug to a woman already in labor in order to speed the birth process. This procedure is designed to minimize the period of labor and to reduce the danger of subsequent hemhorraging.

Rabbi Y. E. Henkin, nestor of the American rabbinate and one of its foremost halakhic authorities, published a short item in the Tishri 5732 issue of *Ha-Pardes* in which he states that, in his opinion, children whose delivery has been speeded by means of medical intervention should not be circumcised on the Sabbath or the Day of Atonement. Unfortunately, Rabbi Henkin, in his brief remarks, does not include the rationale upon which his innovative decision is based.

Two possible lines of reasoning which might lead to this conclusion are formulated and presented in another article appearing in the Kislev 5732 edition of the same periodical. The author, Rabbi Moshe Bunim Pirutinsky, himself a *mohel* by profession, has written many erudite articles concerning various aspects of circumcision and is the author of *Sefer ha-Brit,* a comprehensive work dealing with the laws of *milah.* In his present article, Rabbi Pirutinsky outlines and rejects the arguments which might lead to a ruling prohibiting circumcision on *Shabbat.* When delivery is hastened, the possibility exists that the child may be sufficiently premature for the embryo not to have been fully developed prior to birth. Halakhah stipulates that an infant whose viability is in doubt may not be circumcised on the Sabbath. This consideration does not apply to the case at hand, observes Rabbi Pirutinsky, since the medical procedures in question are generally performed during or after the ninth month. In any event, the child may be examined for physical signs of fetal maturation such as the presence of hair and nails which are accepted by Halakhah as evidence of viability.

Another possible factor militating against circumcision on *Shabbat* in the cases under discussion is the element of artificiality in the birth process. Children whose birth occurs as a result of Caesarean section may not be circumcised on the Sabbath. It may be argued that children born following medically induced labor may be equated in

status with children delivered by means of Caesarean section. Rabbi Pirutinsky dismisses this contention as being unfounded. The provision forbidding *Shabbat* circumcision of children born by Caesarean section is not predicated upon the fact that this procedure constitutes an "unnatural" form of childbirth. The *Gemara, Shabbat* 135a, cites Leviticus 12:2-3, "If a woman conceive and give birth to a male child, she shall be unclean seven days . . . And on the eighth day the flesh of his foreskin shall be circumcised." On the basis of the juxtaposition of these two verses the *Gemara* concludes that only in cases when the mother is subject to the laws of impurity associated with childbirth is there an overriding necessity for circumcision to be performed on the eighth day even when that day coincides with the Sabbath. Since Caesarean delivery in and of itself does not result in the ritual impurity which follows normal childbirth, the child born in this manner may not be circumcised on *Shabbat.* There is no question whatsoever that artificially induced delivery does result in such ritual impurity. Hence the element of artificiality present in medically induced delivery does not preclude circumcision on the Sabbath. Rabbi Pirutinsky concludes that there is no reason to postpone *Shabbat* circumcision of infants whose delivery has either been hastened or induced by medical means.

Circumcision on Shabbat

It is a sad fact that, unfortunately, many circumcisions performed on *Shabbat* become the occasion for desecration of the Sabbath on the part of guests travelling to the *brit milah* and in the preparation of the circumcision repast. In the Tishri 5732 issue of *Ha-Pardes,* Rabbi Simon Schwartz opines that performance of a circumcision under such circumstances borders upon the transgression "Thou shalt not place a stumbling block before the blind." He bolsters this argument by citing Rabbi A. Yudelevitz, *Bet Av Chamisha-'i, Yoreh De'ah,* no. 280, who records that "some rabbis among the scholars of Galicia and Hungary" forbade circumcision on the Sabbath of children whose parents were known to be willful *Shabbat* violators.

Rabbi Pirutinsky, in the previously quoted article, rejects this position as well. The Sages abrogated fulfillment of the commandments concerning the shofar and the four species when *Rosh ha-Shanah* or the first day of *Sukkot* occurs on a Sabbath lest an individual intent upon performance of these precepts violate the Sabbath laws by transporting the requisite ritual objects through a public thoroughfare. The identical consideration may be applied to circumcision on *Shabbat;* namely, fear lest the *mohel* transport the circumcision knife through a public thoroughfare. Yet circumcision on *Shabbat* was never proscribed. A variety of reasons have been advanced in explanation of why the Sages did not feel prompted to forbid circumcision on the Sabbath. Citing *Magen Avraham, Orach Chaim* 301:58, Rabbi Pirutinsky

argues that since no such edict was issued in days of yore despite the perfectly obvious basis for such a pronouncement we, in our day, are not empowered to forbid circumcision on *Shabbat*.

A similar query was addressed to Rabbi Moses Feinstein by a *mohel* who sought permission to decline an invitation to officiate at a circumcision on *Shabbat*. The *mohel* explained that he did not wish to witness desecration of the Sabbath. Rabbi Feinstein, *Igrot Mosheh, Yoreh De'ah,* no. 156, agrees that the sentiments of the *mohel* are well-founded. Indeed, the *Gemara, Yoma* 70a, states that merely being present at the performance of a *mitzvah* is meritorious because "In the multitude of people is the king's glory" (Proverbs 14:28). By extension, the more individuals present at the commission of a transgression the greater the dishonor to the King. Hence, being present when transgression occurs is itself an infraction. However, the *mitzvah* of circumcision constitutes an overriding obligation and cannot be suspended or postponed because of transgression on the part of the non-observant. Accordingly, Rabbi Feinstein directed the *mohel* to perform the circumcision but to depart immediately thereafter.

Autopsies with Consent of the Deceased

The regular appearance of *Talpiot,* a quarterly devoted to all areas of Jewish scholarship and published under the auspices of Yeshiva University, has been suspended since the death of its editor, the late Professor Samuel K. Mirsky, over five years ago. Prior to his demise, Professor Mirsky had been engaged in the compilation of material to be included in yet another volume of this publication. This task has now been completed by his son, Rabbi David Mirsky, Dean of Yeshiva University's Stern College for Women.

This issue of *Talpiot,* bearing the date Elul 5730, contains a hitherto unpublished responsum by the renowned scholar, the late R. Yechiel Michel Tykocinski, dealing with a timely issue pertaining to the general question of autopsies. The question concerns individuals who have willed their bodies to institutions engaged in medical research or, who, while yet alive, have given permission for autopsies to be performed upon their bodies. Rabbi Judah Greenwald, in his *Kol Bo* — a twentieth-century compendium which has gained wide acceptance as a standard work on the laws of mourning and related topics — cites R. Ya'akov Ettlinger, *Binyan Zion,* nos. 170 and 171 and declares that dissection may be performed without transgression if such were the wishes of the deceased. This ruling is predicated upon the rationale underlying the halakhah forbidding desecration of a dead body. Halakhah demands that every honor be accorded the human corpse; dissection constitutes a violation of the dignity of the deceased body. The claim to honor and dignity is essentially a personal prerogative and may be renounced at will. If prior consent is obtained during an individual's lifetime, claims with

regard to honor and dignity after death can no longer be entertained. Accordingly, the person who performs dissection under such circumstances commits no transgression.

Rabbi Tykocinski contests this thesis. It is an established verity that from the point of view of Judaism man has no proprietary rights with regard to his body. A person's body has been committed to him for safekeeping only and must be returned to the Creator as it was received. Thus, self-mutilation or any assault upon the body other than for therapeutic purposes, is forbidden by Halakhah. The prohibition against desecration of the dead, points out Rabbi Tykocinski, is based upon similar considerations. The Torah declares, "You shall not cause his body to remain all night upon the tree . . . for a reproach unto God is hanged" (Deuteronomy 21:23), and thereby indicates that even after life has ebbed it is forbidden to commit indignities against the human body which is created in the "image of God." Rabbi Tykocinski argues that since all laws pertaining to violation of the corpse are predicated upon this verse, man has no rights of "proprietorship" with regard to the disposal of his body after death just as he enjoys no rights of ownership over his body during his lifetime. Violation of the body is then essentially a crime against God rather than a crime against man. Since the crime is against God, prior permission of the person whose body is to be dissected is of no significance. We may note that a similar view is recorded in *Teshuvot Chatam Sofer, Yoreh De'ah,* no. 336 and in *Teshuvot Maharam Schick, Yoreh De'ah,* no. 347.

Temporary Crowns

In order to secure adequate protection of teeth prepared for single crowns or bridge retainers it is common dental practice to insert a temporary crown which then remains in place during the interval between preparation and final cementation of the restoration. This interval may vary in length from several days to several months. The temporary crown serves to protect the margins of preparation from damage and fracture, to maintain proper occlusal relationship between the teeth and also to protect the dentine and pulp from thermal, chemical and medicinal irritants. A temporary crown of aluminum or plastic is cemented in place either with an inert substance or a medicinal agent which is sedative in nature. Such temporary restorations are later removed with the aid of dental instruments and normally cannot be removed by the patient himself.

Temporary crowns of this nature pose a halakhic problem with regard to ritual immersion by female patients. Immersion must be performed by submerging the entire body in water; the interposition of an intervening object constitutes a *chatzizah* and invalidates the immersion. Do such crowns constitute a *chatzizah* and must they therefore be removed before immersion, or may immersion be performed with the temporary crown in place? In general, a foreign substance perm-

anently affixed to the body (e.g., a permanent filling in a tooth) is halakhically considered to be part of the body and hence does not constitute a *chatzizah*. The plastic crown, although securely affixed with cement, must eventually be removed. Hence the problem: is a foreign substance which is now attached but eventually to be removed to be deemed a part of the body or is it to be considered an entity distinct from the body and hence a *chatzizah?* Rabbi Aaron Zlotowitz, writing in the Iyar 5731 issue of *Ha-Pardes,* cites a similar question which had been referred to *Chatam Sofer*. The case discussed deals with the initial immersion of the bride prior to her marriage. It was the custom in Hungary to cut the bride's hair after the wedding ceremony. Since it was soon to be cut, was the hair to be considered a foreign object and hence a *chatzizah* in immersion? Quoting *Tosafot, Baba Kama* 76b, *Chatam Sofer* declares that while under certain circumstances Halakhah considers an anticipated act to have taken place even prior to its actualization this principle applies only if such actualization follows without interruption or delay. Since the bridal custom was to delay cutting the hair until the day following the wedding the hair did not constitute a *chatzizah*. Similarly, concludes Rabbi Zlotowitz, since the temporary crown must remain in place until the time set by the dentist for its removal, such a crown does not constitute a *chatzizah*.

Although Rabbi Zlotowitz formulates the problem of temporary crowns as a new question the issues involved have been investigated previously in responsa literature in connection with related problems. Rabbi Moses Feinstein, *Igrot Mosheh, Yoreh De'ah,* no. 97, advances a number of arguments on the basis of which he rules that certain types of temporary fillings do not constitute a *chatzizah*. Many of those considerations are equally applicable with regard to temporary crowns.

There is a general rule that a foreign object which is not an item of "concern" (*aino makpid*) i.e., its presence is not a source of annoyance and there is no "concern" to remove it, does not constitute a *chatzizah*. Items which are a source of "concern" i.e., with regard to which there does exist a desire for removal, do constitute a *chatzizah*. Rabbi Feinstein seeks to demonstrate that a foreign substance which is to remain attached to the body for a specific period of time does not constitute a *chatzizah* even though there is definite reason and desire for removal at a later period. This is certainly the case if there is a positive reason for desiring the object to remain attached in the interim. This decision is based upon clarification of the halakhic provision that a foreign substance whose presence is not a matter of "concern" (*aino makpid*) does not invalidate the immersion. Rabbi Feinstein maintains that this rule is not predicated upon the rationale that the object in question acquires the status of an integral part of the body, but is based upon the facile explanation that something which is not an object of "concern" simply does not consti-

tute an "interposition." Therefore, even though a temporary filling cannot be deemed to be a permanent part of the body, it nevertheless does not constitute a *chatzizah*. If a definite date has been set for removal of the filling the patient is "unconcerned" with its presence in the interim. On the contrary, he is "concerned" that it remain in place until the time set for its removal by the dentist.

Rabbi Feinstein advances a second reason for ruling that a temporary filling does not constitute a *chatzizah*. Although the filling is to be removed the patient's "concern" is not that it be removed in order that the cavity be exposed. On the contrary, the patient wishes the cavity to be filled, his sole "concern" being that the temporary filling be replaced with a filling which is permanent in nature. Thus, a temporary filling may be deemed to have become part of the body because, even though the particular filling now in the tooth is eventually to be replaced, nevertheless, *a* filling will always be utilized to close the cavity. Both reasons advanced by Rabbi Feinstein apply to temporary crowns no less than to temporary fillings.

Rabbi Feinstein cautions that an improperly inserted filling — or crown — which causes toothache or which interferes with mastication does constitute a *chatzizah* and hence at the time of immersion toothache involving a tooth which has already been filled poses a halakhic problem.

Earlier responsa are replete with questions concerning individual false teeth, apparently of ivory or wood, which had to be removed from time to time for cleansing. Shalom Mordecai Schwadron, *Da'at Torah, Yoreh De'ah* 198:24 and R. Pinchas Horowitz, *Pitcha Zuta* 198:41, cite several authorities who maintain that despite their periodic removal such teeth do not constitute a *chatzizah* if either of two conditions are present: a) the tooth can be removed only by a dentist or b) removal of the tooth by the patient causes pain.

Many scholars maintain that since false teeth serve a cosmetic purpose they do not constitute a *chatzizah* because there is a definite desire that they remain in place in order that personal appearance not be marred. Such false teeth must, however, be of a type which cannot easily be removed. [*Vide* R. Abraham Danzig, *Binat Adam, Sha'ar ha-Nashim,* no. 12; R. Ya'akov Ettlinger, *Binyan Zion ha-Chadashot,* no. 57 and R. Ya'akov Breish, *Chelkat Ya'akov,* III, no. 33.] Rabbi David Spector, *Ha-Pardes,* Tammuz 5732, notes that false teeth located in the rear of the mouth also do not constitute a *chatzizah*. Although such teeth do not serve a cosmetic purpose they are designed to aid in mastication of food. Since they serve a functional purpose there is a definite desire that they remain in place and hence the same line of reasoning applies.

It has been brought to the reviewer's attention that some Orthodox dental practitioners are careful to use a medicinal cement in preparing temporary crowns for female patients. Apparently, these dentists are under the impression

that such cement does not constitute a *chatzizah* simply by virtue of the fact that it serves as a therapeutic agent. This assumption is, however, erroneous. Numerous authorities indicate that foreign substances serving a therapeutic function, such as powder or salve, do constitute a *chatzizah* unless applied to alleviate a threat to the very life of the patient. [*Vide Mishneh Acharonah, Mikva'ot* 9:9; *Shakh, Yoreh De'ah,* 198:14; *Binat Adam, Sha'ar ha-Nashim,* 12 and *Igrot Mosheh, Yoreh De'ah,* no. 97.] Accordingly, there is no halakhic preference for use of medicated rather than inert cement. The previously cited arguments serve to establish the fact that neither the crown nor the cement with which it is affixed constitute a *chatzizah.*

Mamzerut

Problems associated with marriage and divorce are recurring sources of irritation within Israeli society. Questions of personal status fall under the exclusive jurisdiction of the rabbinate with the result that many secularists feel themselves deprived of basic freedoms. The problem of *mamzerut* is a particularly painful one and threatens to create a major rift between the religious and the non-religious sectors of the Israeli populace. According to Halakhah, a bastard is defined as a child born of an adulterous or incestuous relationship and may marry only a person of similar birth or a convert; a *mamzer* is forbidden to marry a Jew of legitimate birth. Since in Israel marriage is entirely within the domain of the rabbinate restrictions upon *mamzerim* are not merely matters of personal observance but are enforced as the law of the land. Unquestionably, problems associated with *mamzerut* may occasion deep anguish. Many of those who are troubled by the ramifications of this issue, particularly those who have no personal commitment to the halakhic ethic, have called upon the Israeli government to institute a system of civil marriage. In turn, such proposals have aroused the concern of members of the Orthodox community. Their counterargument is that since according to Jewish law a child born to a *mamzer* has the same status as the parent, a policy of civil marriage will ultimately lead to a situation in which free intermarriage between different groups of Jews will be severely restricted.*

Professor Moshe Silberg, formerly a justice of the Israeli Supreme Court, has advanced an interesting proposal which, in his opinion, would obviate this problem. His written views on this matter were published in the Israeli weekly, *Panim el Panim,* 5 Iyar and 4 Sivan, 5731. Justice Silberg recommends a form of civil marriage to be restricted to bastards. This proposal, he contends, is compatible with the provisions of Halakhah concerning liaisons with bastards. His suggested innovation centers around Rambam's ruling, *Hilkhot*

*See also the articles by Professor Yeshayahu Leibowitz and R. Yehuda Gershuni on pp. 5-34.—*Ed.*

Issurei Bi'ah 15:2, to the effect that sexual intercourse between a bastard and a person of legitimate birth is a culpable offense only within the framework of a matrimonial relationship. Rambam maintains that the prohibition, "A bastard shall not enter into the assembly of God" (Deuteronomy 23:3), refers solely to validly contracted marriages. *Migdal Oz, ad locum,* explains that Rambam renders the term *"lo yavo"* as "he shall not enter," the form of "entry" to which reference is made being marriage. Rabad, in a gloss to this ruling, disagrees sharply with Rambam and asserts that all cohabitation with a bastard is proscribed by this prohibition. Rabad apparently translates the term *"lo yavo"* literally as referring to the sexual act (*bi'ah*). Professor Silberg urges rabbinic authorities to accept Rambam's position as authoritative. This would open the way for a form of civil marriage to be contracted in a manner which would regularize the relationship in the eyes of civil authorities but would not constitute a halakhically valid marriage. From the point of view of Halakhah the woman entering into such a relationship would have the status of a concubine.

Professor Silberg himself notes a number of objections which may be raised with regard to his proposal but expresses the hope that rabbinic scholars will somehow resolve these difficulties. In the first place, Rabad and other authorities take issue with the basic premise and assert that all forms of sexual intercourse between *mamzerim* and those of legitimate birth are proscribed. According to *Migdal Oz,* Rambam merely rules that the statutory forty lashes are not to be inflicted as punishment for cohabitation outside of the marital relationship; Rambam does not declare such cohabitation to be permissible. *Migdal Oz* asserts that according to Rambam such cohabitation is forbidden by rabbinic edict. Thirdly, Rambam himself maintains that the prohibition "There shall be no harlot among the daughters of Israel" (Deuteronomy 23:18), encompasses fornication with unmarried women. Finally, it is not at all clear that concubinage can be sanctioned within the framework of Halakhah. Professor Silberg notes that the late Sephardic scholar, Rabbi Ya'akov Moshe Toledano at one time advocated reinstitution of concubinage as a means of ameliorating certain social and halakhic problems but subsequently withdrew this recommendation. Actually, a similar suggestion was originally formulated by R. Ya'akov Emden, *She'elat Ya'avetz,* II, no. 15, in response to the threat posed by the licentiousness of the Sabbatians. Needless to say, this proposal never gained wide acceptance within the community of rabbinic scholars.

Professor Silberg's views are carefully analyzed and refuted by Rabbi Judah Dick in the Tishri 5732 issue of *Ha-Pardes.* Rabbi Dick is a member of the staff of the Corporation Counsel of New York City and an officer of the National Jewish Commission on Law and Public Affairs (COLPA). In his article, Rabbi Dick points out that Silberg's thesis contains an inherent self-contradiction. Ram-

bam indeed maintains that cohabitation with a *mamzer* outside of marriage does not constitute an infraction of the prohibition against entry by a bastard into the "assembly of God." Yet it is Rambam himself, *Hilkhot Melakhim* 4:4 who maintains, that concubinage is a royal prerogative and is forbidden to commoners. Moreover, Rabbi Dick notes that according to Rambam any form of sexual intercourse outside of marriage is Biblically forbidden. There is some question as to whether the basis for this ban is the prohibition "There shall be no harlot among the daughters of Israel" since *Lechem Mishneh, Hilkhot Melakhim* 4:4, maintains that this prohibition is limited to intercourse with a promiscuous woman who dispenses her favors indiscriminately. (Cf., however, *Kesef Mishneh* and *Maggid Mishneh, Issurei Bi'ah* 15:2.) In any event, the verse "When a man takes a wife . . ." (Deuteronomy 24:1) is understood by Rambam, *Hilkhot Ishut* 1:1, as constituting a positive commandment regarding marriage and as a prohibition against fornication outside of matrimony. On the other hand, those authorities who disagree with Rambam and permit concubinage nevertheless maintain that all forms of sexual intercourse between a *mamzer* and a person of legitimate birth are forbidden.

Rabbi Dick claims that a logical connection exists between Rambam's ruling that the prohibition with regard to *mamzerim* is limited to sexual relations within marriage and his prohibition of concubinage. According to those authorities who permit concubinage, this relationship, no less than matrimony, is included in the meaning of the term "assembly of God" and hence is forbidden to a *mamzer*. Rambam maintains that concubinage is forbidden and hence cannot be deemed an "assembly of God." It is precisely because concubinage is forbidden that the prohibition devolving upon intercourse with a *mamzer*, according to Rambam, is restricted to cohabitation within a marital relationship. Rabbi Dick concludes that, intriguing as Professor Silberg's proposal may be, it lacks halakhic validity.

Furthermore, in the opinion of this reviewer, Professor Silberg's proposal proves to be untenable on other grounds as well. In *Perushei Ivra*, no. 4, Rabbi Y. E. Henkin presents a fundamental analysis of the essence of the matrimonial relationship. In a far-reaching ruling, he declares that civil marriage results in a relationship identical to that which follows upon the traditional nuptial ceremony and cannot be dissolved other than by means of a bill of divorce. This relationship can in no way be equated with concubinage. The essence of marriage, asserts Rabbi Henkin, is a permanent and exclusive conjugal relationship. When such a relationship is established the woman has the status of a wife, and not of a concubine, whether or not the relationship has been formalized by means of a religious ceremony. The type of civil marriage proposed by Professor Silberg would, according to this analysis, constitute marriage rather than concubinage and hence is of no avail in alleviating the

problem of *mamzerut.*