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Survey of Recent Halakhic Periodical Literature

SECLUSION UNDER VIDEO SURVEILLANCE

Other than in the case of close relatives, Jewish law forbids *yihud*, or seclusion, of a male and a female. Generally speaking, assuming the parties lead moral lives (*eino poruz*) and do not enjoy a fond relationship (*ein libo gas bah*), a woman may seclude herself in a built-up area with two males during the day and early evening; late at night or in an uninhabited area she may do so only if three males are present.[1] For many authorities, a man may seclude himself only with three women;[2] some authorities require the presence of four women in an uninhabited area at night.[3] A more stringent view forbids seclusion of a single individual with any number of individuals of the opposite gender.[4] Some authorities, including, *inter alia*, R. Moses of Coucy, *Sefer Mizvot Gadol*, *Lavin*, no. 126, and R. Aaron ha-Levi, *Sefer ha-Hinnukh*, no. 188, maintain that, in at least some circumstances, the prohibition is biblical in nature and forbidden as a prohibited form of sexual intimacy encompassed by the admonition recorded in Leviticus 18:19.[5]

There are two principal exclusions to the prohibition, i.e., circumstances in which the prohibition does not apply: 1) if a door is open to a public area (*petah patuah le-reshut ha-rabbim)*; and 2) if a "watchman" or "guard" is present. The watchman, or *shomer*, is defined as a person with whom, under the circumstances, seclusion is not forbidden but whose presence serves as a constraint upon the conduct of the secluded individuals, e.g., a young girl between the ages of six and eleven, a boy between the ages of six and nine, a woman whose husband is "within the city," the father or brother of the secluded woman, or the wife, daughter,

[1] See Rema, *Even ha-Ezer* 22:5.

[2] See Rema, *Even ha-Ezer* 27:5 and *Helkat Mehokek* 22:8.

[3] For differing sources see *Shulhan Arukh* and Rema, *Even ha-Ezer* 22:5; *Yam shel Shlomoh*, *Kiddushin* 4:20, *Hokhmat Adam* 126:4; *Arukh ha-Shulhan* 22:9; *Teshuvot Maharsham*, III, no. 152; *Teshuvot Shevet ha-Levi*, III, no. 182 and *Iggerot Mosheh*, *Even ha-Ezer*, IV, no. 65, sec. 14. For a discussion of those of those various opinions see R. Abraham Horowitz, *Dvar Halakhah*, nos. 9-10 and addenda.

[4] See Rambam, *Hilkhot Isurei Bi'ah* 22:8 and *Shulkhan Arukh*, *Even ha-Ezer* 22:5.

[5] For a comprehensive list see *Dvar Halakhah* 1:1.

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or sister of the secluded man. In addition, the presence of a woman's mother-in-law, sister-in-law, or step-daughter serves to obviate the prohibition. Halakhah imputes a degree of wariness to the parties in such a relationship that serves to inhibit untoward conduct.[6]

These exceptions to the prohibition against seclusion are best understood in light of the thesis that the prohibition is designed as a safeguard against illicit sexual acts. Persons endowed with normal inhibitions will not engage in intercourse unless they enjoy a reasonable anticipation of privacy. A door open to a public place heightens the possibility that some other person may enter unannounced. Such a possibility has an inhibiting effect that renders intercourse unlikely. Similarly, although two men, for example, may conspire to commit an illicit act, a person who, contextually, lacks a libidinous desire for such conduct *ipso facto* assumes the role of a "watchman" because his presence serves as a constraint upon the instinctive desires of others. The presence of a child or of certain female in-laws may not prevent conspiratorial immorality but poses a threat that secrecy will not be honored. Fear of subsequent disclosure, with its attendant embarrassment, serves to inhibit illicit sexual activity.[7]

[6] Some scholars, however, adopt the position that seclusion is intrinsically forbidden and hence the prohibition is quite independent of potential for illicit intercourse. Any exceptions to the prohibitions, they would contend, must be understood as qualifications inherent in the definition of "seclusion." See R. Eliezer Menachem Man Shach, *Avi Ezri*, *Hilkhot Isurei Bi'ah* 22:12 and the comments of *Hazon Ish* thereto. For practical differences between those two analyses see R. Nachum Yarnov, *Divrei Soferim*, *Kelalei Hilkhot Yihud*, sec. 4 and *ibid*, *Birur Halakhah* 1:s.v. *be-divrei soferim* and R. David Ribiat, *The Halachos of Yichud* (Jerusalem, 1996), *Kuntres Tovim Dodekha*, sec. 26. Another possible ramification is whether or not the prohibition is applicable in instances in which the male has reached senescence. See also R. Eliezer Brizel, *Zikhron Akeidat Yizkak* (Jerusalem, 5721), pp. 19-24, reprinted in *idem*, *Mekor be-Halakhah* (Jerusalem, 5754).

Zikhron Akeidat Yizhak, pp. 12-14, endeavors to demonstrate that there are two separate prohibitions: 1) an intrinsic prohibition against seclusion; and 2) a prohibition because of fear of an illicit sexual act.

[7] It may perhaps be argued that the presence of a minor or of one of the enumerated in-laws serves to obviate the prohibition of seclusion because of the confluence of both considerations, i.e., the inhibitory effect of the discomfort engendered by the presence of an immature child or by a strained in-law relationship as well as a fear of subsequent disclosure based upon the same factors. If so, a videotape preserved for later viewing is not entirely comparable since the element of contemporaneous inhibition is lacking. However, Rabbi Sinai Malowitzky, *Or Torah,* Tishri 5773 (no. 65), cites the terminology employed by Rambam, *Commentary on the Mishnah*, *Kiddushin* 4:12 and *idem*, *Hilkhot Isurei Bi'ah* 22:9; *Shulhan Arukh*, *Even ha-Ezer* 22:10; and R. Ovadiah of Bartenura, *Kiddushin* 4:12, as indicating that fear of future disclosure suffices to obviate the prohibition. As will be shown, those writers who disagree with Rabbi Malowitzky do so

Logically, the presence of a video monitor should have the same inhibiting effect as a door open upon a public place. Moreover, since the person viewing the monitor has no opportunity to participate in the events he observes, he has no reason to suppress knowledge of any illicit act he may witness. If so, fear of subsequent disclosure should serve as an additional factor vitiating the prohibition against seclusion. It is also arguable that the latter consideration – and perhaps the consideration that a video tape is comparable to a door open upon a public place as well – is applicable with regard to the presence of a video camera that does not allow for contemporaneous surveillance but yields a filmed record available for viewing at a later time.[8] Of course, in order for the monitor to have an inhibitory effect, the parties must be aware of the presence of a functioning video monitor and the camera must be positioned in a manner that will enable it to capture the entire room.[9] It must be emphasized that, unless the surveillance system is intentionally designed to obviate problems of seclusion, commercially available systems do not necessarily focus upon activity in the entire area.

The use of video monitors to obviate problems of *yihud* is the subject of a symposium published in the Tishri 5773 (no. 65) issue of *Or Torah*. Included is an initial analysis of the question by R. Sinai Malowitzky and a series of reactions by R. Yechezkel Roth, formerly the Satmar *dayyan*; R. Ben-Zion Ya'akov Woszner of Monsey; R. Gavriel Zinner, author of *Nit'ei Gavri'el*; and R. Pinchas Eliyahu Rabinowitz, author of *Torat ha-Yihud*.

The crucial issue with regard to use of video monitors for this purpose is whether the earlier discussed exclusions from the prohibition are

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because they do not attach the requisite seriousness to the possibility of actual viewing of the videotape at a future time.

[8] A minority of latter-day authorities, including R. Joseph Rosen, *Zofnat Pa'aneah*, *Hilkhot Isurei Bi'ah* 21:4 and 22:1; R. Aaron Walkin, *Teshuvot Zekan Aharon*, II, *Yoreh De'ah*, no. 29, s.v. *ve-hineh;* and R. Nathan Gestetner, *Teshuvot le-Horot Natan*, I, *Even ha-Ezer*, no. 57, assert that seclusion is prohibited, not necessarily because of fear of an illicit sexual act during seclusion, but because of the fact that seclusion generates intimacy that may lead to future transgression. See also Ramban, *Shabbat* 13a. Rabbi Malowitzky rather unconvincingly argues that, just as the presence of a minor girl thwarts the development of such intimacy, so does a video monitor. Be that as it may, a contemporaneous monitor is certainly comparable to a window that opens upon a public thoroughfare.

[9] Rabbi Rabinowitz requires that the monitor also capture the corridor leading to the bathroom and the hallway leading to the door providing entry and egress. See also, *idem*, *Torat ha-Yihud* 5:5.

limited in all aspects to the expressly formulated circumstances or whether the described circumstances are paradigmatic in nature.[10]

The Gemara, *Kiddushin* 81a, states that there is no restriction against seclusion if "a door is open to a public thoroughfare." An open door serves to enable passersby to observe all activities within the enclosed area and negates any expectation of privacy. An open door also makes it possible for all and sundry to enter the premises. Were that to occur while the parties are engaged in a sexual act, they would undoubtedly find the disturbance to be more discomfiting than the offense to modesty entailed in observation from a distance. The possibility of actual entry by a stranger makes it even more unlikely that the parties would engage in a sexual act while the door is open. Nevertheless, *Ezer me-Kodesh*, *Even ha-Ezer* 22:9, permits seclusion even without an open door through which a passerby might enter, provided that the room has a window through which the parties may be observed despite the fact that it is not possible for another individual to gain entrance to the closed room.[11] That is also the position of R. Ezekiel Landau, *Teshuvot Noda bi-Yehudah*, *Mahadura Kamma*, *Even ha-Ezer*, no. 71 and R. Shlomoh Drimmer, *Teshuvot Bet Shlomoh*, *Orah Hayyim*, I, no. 48.

The conclusion to be drawn, it is argued, is that the declared exceptions to the rule are paradigmatic but not necessarily limited to the specific situation described. Rabbi Malowitzky poses the following hypothetical: Suppose a man and a woman are each chained to a wall on opposite sides of a locked room. The chains allow for movement but are too short to enable the parties to come within touching distance of each other. Despite the fact that there is no explicit source identifying that

[10] See *Ezer me-Kodesh*, *Even ha-Ezer* 22:9, who suggests that regulations governing seclusion are situation dependent.

[11] Conversely, *Ezer me-Kodesh* is inclined to permit seclusion in a closed, but unlocked, room even though there is no actual loss of privacy because the parties are aware of the fact that the door may be opened at any moment by a stranger without prior warning. See also *Teshuvot ha-Rashba*, I, no. 1,251; *Teshuvot Radvaz*, I, no. 121*; Teshuvot Mabit*, I, no. 287; *Erekh Shai*, no. 22; *Sha'arei Yosef*, *Horiyot*, responsum no. 3; *Teshuvot Maharsham*, II, no. 76 and index; R. Shlomoh Drimmer, *Teshuvot Bet Shlomoh*, *Orah Hayyim*, no. 48; *Teshuvot Avnei Nezer*, *Even ha-Ezer*, no. 33; *Teshvuot Dvar Halakhah*, no. 22; and *Teshuvot Dovev Mesharim*, I, no. 5; as well as *Dvar Halakhah* 3:9 and 11:7. Both *Teshuvot Binyan Zion*, no. 138, and *Dvar Halakhah* distinguish between circumstances in which it is unlikely that a person will enter the closed room, in which case seclusion is forbidden even if the door is unlocked, and circumstances in which there is reason to anticipate that someone might enter the room if it is left unlocked, in which case seclusion is permitted. Cf., however, *Teshuvot Bet Me'ir*, cited by *Teshuvot R. Akiva Eger*, no. 103, and *Pithei Teshuvah*, *Even ha-Ezer* 22:9 as well as by *Dvar Halakhah* 3:9 and 11:7.

situation as an exception to the prohibition of seclusion, Rabbi Malowitzky assumes that in such circumstances there is no prohibition against seclusion, despite the fact that no direct statement to that effect is found in earlier sources.

Rabbi Malowitzky argues that the status of a video camera should be regarded as similar to that of a window. Acceptance of a window as negation of seclusion, he contends, indicates that an open "door" is not a *sine qua non*. Instead, it is the potential for observation that obviates seclusion. If so, observation by means of a monitor should have the same effect.

Rabbi Roth agrees that contemporaneous surveillance by means of a monitor is sufficient to avoid the prohibition.[12] Such surveillance can be accomplished by charging a single individual with monitoring the system or, as Rabbi Zinner observes, by placing the monitor in a public place frequented by passersby. However, Rabbi Zinner regards videotaping for subsequent viewing as insufficient for this purpose. The crux of his argument is that the Sages required that any mitigating factor serving to obviate the prohibition against seclusion must be actual at the time of seclusion. He also regards the very real possibility that, in practice, the video will not be reviewed as vitiating the inhibitory function of the taping. Rabbis Roth and Woszner also reject use of an unmonitored videotape for that reason.

Rabbi Malowitzky suggests, and Rabbi Woszner emphatically asserts, that contemporaneous video surveillance is of greater halakhic effect than a door open to a public thoroughfare. Factually, persons in a room opening upon a public place are secluded but their awareness that their actions may be observed, or their privacy intruded upon, suffices to render such seclusion permissible. The effect of a monitored surveillance system is to transform the room itself into a public place with the effect that "seclusion" in such a place is an oxymoron.

The practical advantage of electronic surveillance over a door open to the public area is pertinent in instances of seclusion with a person of whom one is fond (*libo gas bah*). *Taz*, *Even ha-Ezer* 22:8, followed by R. Chaim Joseph David Azulai, in responsum no. 3, s.v. *hadran*, appended to his *Sha'arei Yosef* on *Horiyot*, regards a door open to a public thoroughfare

[12] Rabbi Roth regards the ongoing presence of a single viewer in a non-public place as sufficient even according to Rambam and *Shulhan Arukh* cited *supra*, note 1. Those authorities regard two people as insufficient because of the possibility of collusion. Such collusion is not possible when those persons are not in proximity to one another.

as sufficient even in such cases. However, *Helkat Mehokek*, *Even ha-Ezer* 22:13, and *Bet Shmu'el*, *Even ha-Ezer* 22:13, disagree and maintain that in such situations an open door is of no avail. Use of a video monitor, assert Rabbis Malowitzky and Woszner, eliminates any concern with regard to an infraction even if the parties are fond of one another. Rabbis Roth and Zinner,[13] however, find use of a video monitor to be of no avail in such circumstances.

Rabbi Woszner argues that a manned surveillance system serves to permit the parties to be alone together for yet another reason. There is no prohibition against seclusion in the presence of a qualified "watchman" who is himself not subject to the prohibition, e.g., a minor. The person monitoring the surveillance system is removed from the site and hence, in such circumstances, is not subject to strictures concerning seclusion. Accordingly, contends Rabbi Woszner, he qualifies as a watchman. Moreover, as a "watchman" he need not monitor the system every single moment; rather, asserts Rabbi Woszner, a *yoze ve-nikhnas*, a person who "goes and comes," is sufficient for this purpose. Rabbi Zinner adopts a similar position.

THE PARADOX OF R. CHANINA BEN TERADION

Halakhah forbids the foreshortening of human life in any and all circumstances regardless of the longevity anticipation of the person whose life is to be extinguished. *Shulhan Arukh*, *Yoreh De'ah* 339:1, admonishes that a moribund patient dare not be moved lest he be deprived of even the most ephemeral period of life. In a poignant simile, the patient is compared to a flickering candle: left to itself, the candle will continue to burn until all available fuel is consumed, but any movement will cause the flame to flicker and hasten the inevitable extinguishing of the candle.

Motivation, in Jewish Law, is not an element of homicide. Murder, even in the absence of malevolence, is a capital offense; even a noble motive is not exculpatory. R. Jacob of Mecklenburg, *Ha-Ketav ve-ha-Kabbalah*, Genesis 9:5, points to the terminology employed by Scripture in its criminalization of homicide: "From the hand of a person's brother will I demand the life of man; He who spills the blood of man, by man shall his blood be spilled." (Genesis 9:5-6) Since both phrases refer to the taking

[13] Rabbi Zinner also seems to suggest that a monitor should not be relied upon in situations in which the parties are alone on an ongoing basis.

of a human life, the second seems to be redundant. Moreover, reference to a malevolent perpetrator as the "brother" of the victim is somewhat curious. *Ha-Ketav ve-ha-Kabbalah* notes that, at times, the motive for extinguishing a human life is not malevolence, hatred, animosity, anger, jealousy, or even self-interest, but rather mercy, compassion, and love. Euthanasia, or mercy-killing, is born of a desire to curtail misery and suffering; it is undertaken as an act of compassion arising from a noble concern; it is an expression of fraternal love seemingly worthy of approbation. Nevertheless, Scripture brands it an act of murder, pure and simple. The taking of a human life is a *malum per se* and license to do so even for the loftiest of motives, *viz.*, as an altruistic act of brotherly love, is decried by the Heavenly Father. Thus, there is no redundancy: repetition of the prohibition is designed to disabuse man of the perfectly human predilection to exclude euthanasia from the ambit of criminal homicide. Indeed, the talmudic aphorism "What makes you think that your blood is sweeter than the blood of your fellow" (*Sanhedrin* 74a) is labeled a "*sevara*," an *a priori* moral principle establishing a normative obligation to allow oneself to be killed rather than spill the blood of another, even for purposes of self-preservation. Imposition of a penalty for murder may demand an express biblical directive but proscription of homicide apparently does not require a formal admonition. A formal ban is required in order to extend the ambit of the prohibition to encompass situations in which the odious nature of the act cannot be apprehended by the light of reason alone. In instances of mercy-killing the prohibited nature of the act may even be counter-intuitive.

From such a perspective the narrative recorded by the Gemara, *Avodah Zarah* 18b, is perplexing in the extreme:

> … they found R. Chanina ben Teradion engaged [in the study of] Torah, publicly gathering assemblies and a scroll of the Torah lying in his bosom. They brought him, wrapped him in the scroll of the Torah, encircled him with bundles of branches and set them on fire. They brought tufts of wool, soaked them in water and placed them over his heart so that his soul should not depart quickly… His disciples said to him, "…open your mouth so that the fire may enter into you." He said to them, "Better that He who gave it should take it away rather than one should wound himself." The executioner said to him, "Rabbi, if I increase the flame and remove the tufts of wool from over your heart will you bring me to life in the world-to-come?" "Yes," he replied. "Swear to me." [R. Chanina ben Teradion] swore to him. The executioner immediately increased the flame and removed the tufts of wool from over his heart; his soul departed

quickly. [The executioner] also jumped and fell into the fire. A heavenly voice exclaimed, "R. Chanina ben Teradion and the executioner are destined for life in the world-to-come!"

Persons lacking requisite competence in analyzing talmudic texts all too frequently misunderstand this anecdote as justification for passive euthanasia or withdrawal of treatment. Removal of "woolen tufts" by the Roman executioner was not the proximate cause of the death of R. Chanina ben Teradion; his death was caused by the flames already engulfing him. The tufts were merely an impediment serving to prolong his agony. Withholding or even withdrawing an impediment, goes the argument, is not an overt act and hence does not constitute homicide.[14] The text, however, reads, "Rabbi, if I *increase the flame* and remove the tufts of wool from over your heart, will you bring me to life in the world-to-come?" The executioner proposed two separate and distinct acts: (1) increasing the flame; and (2) removal of the woolen tufts. Removal of tufts interposed between the fire and the body of a person being burned at the stake may well constitute removal of an impediment to death rather than an overt cause of his demise but causing an increase in the intensity of the conflagration by adding wood to the fire or by any other means constitutes an overt act intentionally undertaken for the purpose of causing death to occur as rapidly as possible. Hence, the executioner's conduct must be categorized as *active* euthanasia[15] for which, no matter how laudable his intention may have been, halakhic justification is entirely lacking.[16] Yet, not only does R. Chanina ben Teradion suborn such conduct, he further assures the executioner that such an act in itself will suffice to assure him heavenly reward in the form of a share in the world-to-come.[17]

[14] For a discussion of the validity or invalidity of the underlying position and an analysis of its parameters see this writer's "Treatment of the Terminally Ill," *Bioethical Dilemmas*, I (Hoboken, 1998), pp. 76-86.

[15] Cf., R. Isaac Liebes, *Teshuvot Bet Avi*, II, no. 153, s.v. *kvar bi'arnu*.

[16] R. Moshe Dov Welner, *Ha-Torah ve-ha-Medinah*, VII-VIII (5715-5717), 318, states that R. Chanina ben Teradion was already a *goses* at the time of his reported exchange with the executioner and assumes that removal of an impediment is permissible in the case of a *goses*. Remarkably, he adds that the overt act of enhancing the conflagration was permissible because it was of no effect in hastening the death of R. Chanina ben Teradion. If that was indeed the case, adding wood to the fire would have been entirely innocuous and the executioner had no need to seek permission to do so.

[17] There is a similar problem with regard to the comment of Rosh, *Nedarim* 22a, amplifying an anecdote concerning Ula who told a murderer to expose the victim's wound. Rosh explains that Ula's advice was designed to cause death to occur more rapidly. See R. Shlomoh Kluger, *Nidrei Zerizin, ad loc*. Cf., however,

A number of contemporary rabbinic scholars have sought a resolution of the difficulty based upon particular facts present in this case which serve to distinguish the incident from usual situations of euthanasia:

1. Iggerot Mosheh, Yoreh De'ah II

Addressing this problem, R. Moshe Feinstein, *Iggerot Mosheh*, *Yoreh De'ah*, II, no. 174, *anaf* 4, expresses perplexity but states with hesitation that "perhaps" non-Jews[18] may hasten the death of a person being put to death by human hands.[19]

The Gemara, *Sanhedrin* 78a, establishes that, although hastening the death of a *goses*, i.e., a patient who has become moribund as the result of natural causes, is a capital crime, killing a person who has become a *treifah* as a result of a heavenly-caused anomaly is non-capital homicide. Nevertheless, the Sages and R. Judah ben Beteira disagree with regard to culpability in a case in which the victim is beaten to death by "ten people with ten strokes." The beating administered by the first nine is of a severity sufficient to assure death; the tenth administers a *coup-de-grâce* that merely serves to hasten death. The Sages compare that situation to putting a *treifah* to death and rule that none of the perpetrators is culpable for capital punishment. The first nine administered potentially lethal blows but, because of a supervening event, did not actually kill the victim; the tenth hastens the demise of a person whose death was already foreordained by a human act. R. Judah ben Beteira disagrees and declares that, since no vital organ had been removed or perforated, the victim, although moribund, is not a *treifah* and hence the person administering the last blow, and who thereby has hastened the death of the victim, is culpable for the death penalty.[20]

R. Eli'ezer Waldenberg, *Ziz Eli'ezer*, XII, no. 104, who rejects *Nidrei Zerizin*'s understanding of Rosh and fails to find that Ula counseled hastening the death of the victim.

See *Tiferet Yisra'el, Yoma, Bo'az* 8:3, who addresses the problem and advances the novel view that "perhaps" the life of a moribund person may be sacrificed in order to rescue another individual facing death, at least in situations in which only an oral indication having the status of a *gerama* is required. Cf., *Ziz Eli'ezer*, XVII, no. 72 who takes strong exception to that suggestion.

[18] R. Menasheh Klein, *Mishneh Halakhot*, VI, no. 320, advances a similar thesis but does not distinguish between a Jew and a non-Jew with regard to hastening death. See also *infra*, note 23.

[19] See also R. Shneur Zalman Reiz, *Ha-Ma'or*, Iyar-Sivan 5734.

[20] According to the Sages, the person who administered the final blow would be guilty of the less severe infraction of foreshortening the life of a *treifah*.

R. Shlomoh Revivo, *Mishnat Shlomoh*, *Avodah Zarah* 18a, suggests that the

Even if one assumes that R. Chanina ben Teradion subscribed to the position of the Sages, it does not follow that his directive to the executioner was proper. The Sages compare hastening of death under such circumstances to the murder of a *treifah*, i.e., a lesser, non-capital form of homicide. *Iggerot Mosheh* opines that hastening the death of a person already rendered a *treifah* by means of a human act, although forbidden to a Jew, is permitted to a non-Jew. However, *Iggerot Mosheh* fails to cite sources indicating that the Noahide Code excludes such acts from the prohibition against homicide as it applies to non-Jews. Indeed, as codified by Rambam, *Hilkhot Melakhim* 9:4, under the Noahide Code murder of a *treifah* – to which the Sages compare this act – by a non-Jew is punishable by the death penalty. Nor, as apparently presumed by R. Menasheh Klein, *Mishneh Halakhot*, VII, no. 287, does the fact that R. Chanina ben Teradion was being executed by government officials appear to be of material significance in reaching a conclusion that hastening an inevitable and imminent death as a result of execution is permissible.

The Gemara, *Pesahim* 75a and *Bava Kamma* 51a, does cite the verse "and you shall love your fellow as yourself" (Leviticus 19:18) as commanding that it is necessary to "choose a good death" in administering capital punishment. That consideration, however, is advanced solely in the context of clarifying precise details of the method to be employed in carrying out one of the forms of capital punishment administered by the *bet din*. "Choose a good death for him" is solely a definitional principle determining that the prescribed mode of punishment

executioner acted with impunity in hastening the death of R. Chanina ben Teradion because, even had he refrained from doing so, he would nevertheless have been culpable for killing R. Chanina ben Teradion. Since, in any event, the latter perished as a result of the fire the executioner had already kindled, contends Rabbi Revivo, the executioner could not, in effect, be deemed twice guilty for killing the same victim.

That reasoning does not seem to be correct. A person who administers a lethal wound is guilty of a capital transgression event if death of the victim is not immediate. According to the majority opinion recorded in *Sanhedrin* 78a, a second person who hastens the victim's death by administering a second blow is not liable for the death penalty but has committed a less serious transgression, *viz.*, hastening the death of a *tereifah*. The first perpetrator, were he to administer a second blow, would seem to be no less guilty of a second transgression. To be sure, he cannot evade the death penalty by claiming that the second blow that he himself administered constitutes a supervening event exonerating him from punishment for his original act, but that is so only because the resultant death cannot be ascribed to another actor and hence, under the circumstances, he is solely responsible for the death of the victim. It is for that reason that the Sages would agree that a single person who administers ten blows which only in the aggregate result in the death of the victim incurs the death penalty.

must be the least painful method consistent with the biblical description;[21] it is not license to hasten the agonizing death of a victim of homicide.

2. *Iggerot Mosheh, Hoshen Mishpat II*

In a later responsum, *Iggerot Mosheh, Hoshen Mishpat*, II, no. 74, sec. 2, Rabbi Feinstein suggests that a non-Jew is not forbidden to take a human life in circumstances in which the act is intended for the benefit of the victim. If so, all forms of euthanasia are permitted to non-Jews. "Perhaps," suggests *Iggerot Mosheh*, the varying applications of the respective prohibitions against homicide in the Noahide and Sinaitic codes flow from a difference in the phraseology in which the respective prohibitions are couched. "Thou shalt not kill," or, more accurately, "Thou shalt not commit homicide" (Exodus 20:12) is a blanket prohibition encompassing all forms of homicide, including well-intentioned acts of killing. However, "he who spills the blood of man" (Genesis 9:6), upon which the Noahide prohibition is predicated, has the flavor of wanton and malevolent bloodshedding. However, (a) the philological distinction is far from obvious; (b) as noted earlier, Genesis 9:5 is read in a completely antithetical way by *Ha-Ketav ve-ha-Kabbalah*; and (c) there is no support whatsoever for such a motivational distinction in the writings of any earlier authority.

Moreover, it seems to this writer that, while Genesis 9:5 spells out the punishment for homicide, it does not serve as the locus of the prohibition. It is an accepted principle that announcement of a punishment is always preceded, or accompanied, by explicit language of admonition. Thus, the Gemara, *Sanhedrin* 56b, states: "'and the Lord God commanded upon the man' (Genesis 2:16) … 'upon the man' -- that is spilling of blood and it similarly says 'he who spills the blood of man' (Genesis 9:6)." The commandment is formulated in the words "And the Lord God commanded upon the man" -- a blanket and absolute commandment; the phrase "he who spills the blood of man" is cited simply to demonstrate that the commandment denoted by the term "the man" is homicide. At most, it might be contended that euthanasia is not a capital crime in the

[21] Curiously, *Mishneh Halakhot*, VII, no. 287, extends that principle to execution by civil authorities, even in the situations in which execution is an unvarnished act of persecution and asserts that "choose a good death for him" applies to such execution as well. Earlier, in his *Mishneh Halakhot,* VI, no. 320, Rabbi Klein does not limit the principle either to instances of execution or to non-Jews seeking to the hasten the death of a homicide victim.

Noahide Code because it is arguably excluded in the verse that provides for punishment, just as killing a *treifah* is non-capital homicide in the Sinaitic Code. Although homicide involving a *treifah* is encompassed in the admonition "Thou shalt not kill," the punishment "he shall be put to death" (Leviticus 24:17) is limited to "a man who smites *kol nefesh*" which is understood as limiting the punishment to killing a victim who possesses a "full life," but not a *treifah*.

3. *Ziz Eli'ezer*

R. Eliezer Waldenberg, *Teshuvot Ziz Eli'ezer*, IV, no. 13, chap. 2, sec. 7, states that R. Chanina ben Teradion's course of action was permissible solely because it was designed to mitigate *hillul ha-Shem*, or profanation of the Divine Name. R. Chanina ben Teradion was executed because he flouted the edict of the Roman conqueror by publicly disseminating Torah. Since the execution of R. Chanina ben Teradion was designed to bring ignominy upon God and His Torah, prolongation of the event would have served to enhance desecration of the Divine Name. If so, hastening death was permissible, not to avoid suffering on the part of the victim, but to minimize *hillul ha-Shem*. Some authorities advance a similar consideration in explaining why King Saul sought to hasten his own death subsequent to his capture by the Philistines.[22] *Ziz Eli'ezer*'s explanation is problematic because, if the underlying thesis is correct, why did

[22] See *Bereshit Rabbah* 34:13 as well as *Matnot Kehunah* and *Peirush Maharyav*, *ad loc*. See also *Teshuvot Hayyim Sha'al,* I, no. 46; *Teshuvot Afarkasta de-Anya,* IV, *Inyanim Shonim,* no. 370; *R. Samuel Jaffe-Ashkenazi, Yefeh To'ar*, *Bereshit Rabbah* 34:19*; Bet Yoshef*, *Yoreh De'ah* 157; *Avodat ha-Melekh, Hilkhot Yesodei ha-Torah* 5:4; and *Shevat me-Yehudah*, pp. 42ff. Other authorities maintained that *Bereshit Rabbah*'s justification of Saul's suicide was based upon the consideration that Saul's realization that he would not be able to withstand duress in being compelled to commit either an act of apostasy or, according to some, to engage in grievous sexual misconduct. See R. Aaron ha-Kohen of Lunel, *Orhot Hayyim,* II, *Din Ahavat ha-Shem ve-Yir'ato*, sec. 1; *Da'at Zekenim me-Ba'alei ha-Tosafot,* Genesis 9:5; *Tosafot ha-Rosh, Shitat ha-Kadmonim, Avodah Zarah* 18a; *Yefeh To'ar*, *Bereshit Rabbah* 34:19; and *Hagahot Smak*, cited by *Bah*, *Yoreh De'ah* 157. R. Abraham I. Kook, *Mishpat Kohen*, no. 144, sec. 4, understands Rosh, *Mo'ed Katan* 3:94, as espousing this position. Cf., *Pithei Teshuvah*, *Yoreh De'ah* 157:8. R. Jacob Emden, *She'ilat Ya'avez*, I, no. 43, cites this midrashic comment in support of his astonishing opinion that a person guilty of a capital sin may commit suicide as a form of expiation.

Da'at Zekenim, Genesis 9:5 cites one early-day authority who maintains that Saul "acted without license of the Sages (*she-lo be-reshut hakhamin*)." See also, R. *Ovadiah Yosef, Teshuvot Yabi'a* Omer, II, *Yoreh De'ah*, no. 24, sec. 2.

R. Chanina ben Teradion refuse to open his mouth in order for the flames to enter and hasten death?[23]

Centuries earlier, R. Shlomoh Luria, *Yam shel Shlomoh*, *Bava Kamma* 8:59, did not explicitly offer this justification of R. Chanina ben Teradion's conduct but did assert that R. Chanina ben Teradion was willing to sanction only an indirect act that would result in hastening his death but could not justify an act that would constitute a proximate cause. Opening one's mouth in order to present the body cavity to the flames was apparently regarded by *Yom Shel Shelomoh* as a direct act whereas adding fuel to enhance the conflagration, or even kindling a bonfire, he regarded as merely a *gerama* or indirect act.[24] In his discussion, *Yam shel Shlomoh* forbade a person fearful of succumbing to torture designed to induce adulterous acts to commit suicide directly but did permit him to burn his house down so that he may perish in the fire.

4. *Teshuvot Bet Avi*

R. Isaac Liebes, *Teshuvot Bet Avi*, II, no. 153, s.v. *u-be-Tosafot*, couches the matter somewhat differently in stating that the martyrdom of R. Chanina ben Teradion was an act of *kiddush ha-Shem*, i.e., sanctification of the Divine Name. The repetition of the *mussaf* service of *Yom Kippur* includes a recitation of the martyrdom of ten sages executed by Roman officials, one of whom was R. Chanina be Tradion. The liturgical poem contains a passage indicating that R. Ishmael ascended to heaven to ascertain the nature of the decree. Upon being told by an angel who had "heard from behind the drape" that such was the divine edict, he returned to earth and refrained from any attempt to thwart the decree. Accordingly, asserts *Bet Avi*, R. Chanina ben Teradion was informed that his martyrdom had been ordained by Heaven and that the executioner's

[23] See *Ziz Eli'ezer*, XVII, no. 72, sec. 5, who asserts that even in such circumstances the transgression must be minimized to the extent possible. See also, *Mishneh Halakhot*, V, no. 314, who suggests that the commandment concerning *kiddush ha-Shem* is fulfilled only if death is caused by a non-Jew. If so, Saul's suicide could not be justified on those grounds.

[24] *Yam shel Shlomoh*'s depiction of setting a fire as a *gerama* seems to hinge upon the controversy recorded in the Gemara, *Bava Kamma* 22a, with regard to whether liability for arson is comparable to liability incurred by shooting an arrow (*isho mishum hizav*) or whether it is in the nature of liability for harm caused by one's property (*isho mishum memono*). Whether or not causing death by means of arson is a capital crime is contingent upon that controversy. Rambam, *Hilkhot Nizkei Mammon* 2:16, rules that liability for arson is comparable to liability for shooting an arrow, i.e., even though fire is spread by wind, setting the fire is regarded as a direct human act rather than as a form of *gerama*.

act was ordained by God. That analysis certainly raises the age-old issue of divine omniscience versus freedom of the will and hardly serves to justify counseling performance of an illicit act even if such an act is divinely intended, unless justification in the form of a *hora'at sha'ah* is invoked. A prophet may sanction violation of biblical law as a *hora'at sha'ah*, or "directive of the hour," i.e., as an emergency measure designed to encourage or confirm the faithful in their faith. In any event, *Bet Avi*'s comment that "nothing can be learned [from the narrative] for application elsewhere" is certainly cogent.

5. R. Samuel Baruch Werner

R. Samuel Baruch Werner, *Torah she-be-al Peh*, XVIII (5736), offers an incisive, but extremely novel, solution to the problem. It is well established that a person has no proprietary interest in his body and hence has no right to "wound" or cause himself bodily harm. Hence the prohibition against "wounding" another person derived from Deuteronomy 25:3 extends even to situations in which the victim grants permission for, or even requests, the act.[25]

A non-Jew is similarly forbidden to wound another person, whether Jew or gentile. Although Deuteronomy 25:3 is addressed only to Jews, Ran, *Sanhedrin* 58b, states that "it might be inferred" that such acts are prohibited to non-Jews as a proscribed form of theft "since what difference is there if he wounds his body or his property."[26] Accordingly, declares Ran, it follows that battery is a culpable offence in the Noahide Code regardless of whether the victim is a Jew or a gentile.

It is readily understandable that a battery committed by a Jew even with consent of the victim constitutes a transgression because the victim lacks capacity to grant consent and the offence "you shall not increase upon it" (Deuteronomy 25:3) is statutory in nature. However, if a non-

[25] See Radvaz, *Hilkhot Sanhedrin* 18:8; *Teshuvot Ri mi-Gash*, no. 186; R. Levi ibn Haviv, *Kuntres ha-Semikhah* appended to his *Teshuvot Maharlbah*; *Shulhan Arukh ha-Rav, Hilkhot Nizkei Guf va-Nefesh*, sec.4; R. Jerucham Fischel Perla, commentary on *Sefer ha-Mizvot le-R. Sa'adia Ga'on*, II, *lo ta'aseh*, nos. 47-48; R. Iser Yehudah Unterman, *Shevet me-Yehudah*, I, *sha'ar* 1, sec. 15; and R. Shlomoh Yosef Zevin, Le-Or ha-Halakhah, 2nd ed. (Tel Aviv, 5717), pp. 318-327. Cf., however, R. Joseph Babad, *Minhat Hinnukh*, no. 48; *Turei Even*, *Megillah* 27a and R. Shiloh Rafael, *Torah she-be-al Peh*, XXXIII (5752), reprinted in *Mishkan Shiloh* (Jerusalem, 5755), pp. 212-221.

[26] Cf., Rashi, Genesis 9:5, who comments that the verse "at the hand of man... will I demand the life of man" establishes a prohibition against suicide. The Gemara, *Bava Kamma* 91b, indicates that "wounding" is also included in that prohibition.

Jew is forbidden to commit a battery solely because it is a form of theft, as is the opinion of Ran, consensual battery should be permissible just as consensual theft is hardly theft.[27] Rabbi Werner cites Ran as further commenting that homicide is similarly forbidden to Noahides as a form of theft or by virtue of the commandment concerning *dinin* and, accordingly, queries why homicide is enumerated as a separate prohibition in the Seven Commandments of the Sons of Noah.

That analysis leads to the astonishing conclusion that, not only consensual battery, but also consensual murder is permitted to non-Jews. But, if so, the difficulty in understanding the narrative concerning R. Chanina ben Teradion and executioner is entirely dissipated.[28] As a gentile, the executioner was not barred from committing an act of consensual homicide.

Rabbi Werner finds support for his thesis in the narrative concerning the death of Saul recorded in I Samuel 31:3-4 and II Samuel 1:4-10. I Samuel reports that Saul and his army were defeated by the Philistines. Fearing that, if captured, he would be tortured, Saul directed his armor-bearer to pierce him with his own sword. When the armor-bearer refused to obey, Saul took the sword himself and fell upon it. The narrative continues in II Samuel with the death of Saul being reported to David by an Amalekite lad. Upon being asked how he was certain that Saul was dead, the Amalekite responded by saying that he came upon Saul when the latter was still alive and was requested by Saul to put him out of his misery. Recognizing that Saul's wound was mortal, the Amalekite reported that he acceded to the request. Thereupon, as recounted in II Samuel 1:1, David declared the Amalekite to have been convicted of homicide by his own mouth.

That narrative stands in stark contradiction to the anecdote concerning R. Chanina ben Teradion. The executioner who hastened the death of R. Chanina ben Teradion is assured heavenly reward whereas the Amalekite is condemned to death by King David. Rabbi Werner cites Rambam, *Hilkhot Sanhedrin* 18:6, who declares that the Amalekite de-

[27] It should similarly follow that, according to Ran, a non-Jew may also inflict a wound upon himself. R. Pinchas ha-Levi Horowitz, author of the *Hafla'ah*, in his *Panim Yafot*, *Parashat Lekh Lekha*, s.v. *va-yehi Avram*, explains that Abraham did not circumcise himself before being commanded to do so because, absent the commandment, circumcision would have constituted a forbidden form of self-mutilation. When commanded to do so, Abraham had no option but to perform his own circumcision because his confreres did not recognize the authenticity of his prophecy and refused to assist him.

[28] A quite similar explanation is advanced by *Ateret Paz*, *Hoshen Mishpat*, no. 7.

scribed in II Samuel 1:13 as "the son of an Amalekite" was a convert to Judaism. As a Jew, he was forbidden to commit euthanasia even with the consent of a suffering, moribund individual.[29] The executioner of R. Chanina ben Teradion, argues Rabbi Werner, was a non-Jew to whom consensual homicide is not forbidden.

Unfortunately, Rabbi Werner's thesis is based upon a misreading of the text of Ran's commentary on *Sanhedrin* 58a. Ran begins his comment with the observation that "it may be inferred" (*mashma*) that the prohibition against a non-Jew "smiting a Jew" is subsumed in the prohibition against theft and follows with the observation that, if so, the talmudic reference to "a non-Jew who smites a Jew" should not be understood restrictively but connotes a non-Jew who smites another non-Jew as well. Thereupon, Ran declares, "But to me it does not seem so.... Furthermore, if so, why is shedding blood, *viz.*, homicide, included in the Seven Commandments? Why is [the prohibition] not categorized as smiting a fellow?" Ran points to the absence of a prohibition against battery among the Seven Commandments and of its applicability solely to battery of a Jewish victim as proof that it is *not* a form of theft (or murder). In a final comment, Ran declares that "wounding" cannot be construed as a form of theft because, were that to be the case, it would be punishable by death.

It must be emphasized that Ran does not ascribe his original inference to an anonymous early-day authority with whom he then proceeds to disagree. Were that the case, conjecture with regard to how that authority might resolve Ran's objection in a manner consistent with the former's thesis would be entirely appropriate. However, Ran is simply reporting a possible inference to be drawn from the text -- an inference not made by any authority -- and hence such an inference cannot serve as the basis of any halakhic conclusion.

6. *A Suggested Explanation*

It seems to this writer that R. Chanina ben Teradion's course of conduct may be justified on entirely different grounds. A person dare not take the life of another even in circumstances in which failure to do so will result in loss of his own life. *Tosafot*, *Pesahim* 53b, *Ketubot 33b* and *Avodah Zarah* 3a, assume that a person must also suffer torture or intractable pain

[29] As stated *supra*, note 23 and accompanying text, Saul's suicidal act has been explained by various authorities as justified because of a fear that he would not have been able to withstand torture designed to force him to commit an act of idol-worship or to prevent the *hillul ha-Shem* attendant upon the king of Israel being taken captive.

rather than take the life of another.[30] A person is obligated to expend his entire fortune in order to avoid transgressing any negative commandment. It is evident from the comments of *Shitah Mekubbezet*, *Ketubot* 33b, that a person is not obligated to expend more than his entire fortune even were it possible for him to do so and that being subjected to torture is tantamount to expenditure of more than an entire fortune.[31] There is no reason to assume that *Tosafot* reject that principle with regard to ordinary transgressions. *Tosafot* disagree only with regard to transgression of the three cardinal sins and assume that expenditure of more than an entire fortune, and hence acceptance of torture, is required in such situations.[32] Rema, *Yoreh De'ah* 157:1, states that a person may "place a stumbling block before the blind" rather than sacrifice his own life, even if the "stumbling block" causes another person to violate one of the cardinal transgressions. Employing that principle, R. Isaac Schorr, *Teshuvot Koah Shor*, no. 20, p. 32, permits a person to request a non-Jewish physician to abort the fetus of a Jewish woman whose life is endangered by the pregnancy. *Tosafot*, *Sanhedrin* 59a, expresses doubt with regard to whether such an act is permitted to a Noahide. The most obvious reason for forbidding such an act is that feticide is a form of capital homicide in the Noahide Code and hence, since both lives are of equal status, neither the life of the fetus can be set aside to preserve that of the mother nor *vice versa*.[33] *Koah Shor* justifies directing a non-Jewish physician to perform what is for him an act homicide because the Jew who directs him to do so does not himself commit an act of homicide but merely "places a stumbling block before the blind" in suborning such an act on the part of the non-Jew. The Jew himself is in violation of an ordinary negative commandment, a transgression entirely permissible when necessary in order to rescue a life.[34]

Applying the same line of reasoning to suffering intractable pain results in the conclusion that one may not commit euthanasia in order to

[30] The anonymous authority cited by *Shitah Mekubbezet*, *Ketubot* 33b, s.v. *u-be-kuntreisin piresh*, apparently disagrees and maintains that one need not suffer pain of that magnitude in order to avoid martyrdom.

[31] See *supra*, note 31. The issue in dispute is whether torture is more onerous than death. *Shitah Mekubbezet* apparently agrees that torture is more onerous than expenditure of one's entire fortune.

[32] For a fuller development of that point see this writer's *Bioethical Dilemmas*, I (Hoboken, N.J., 1998), 86-94.

[33] For other possible theories supporting the doubt expressed by *Tosafot* see this writer's *Contemporary Halakhic Problems*, IV (New York, 1995), 194, note 50.

[34] See *Contemporary Halakhic Problems*, I (New York, 1977), 368-370.

eliminate such pain even though experiencing such pain is tantamount to expending more than one's entire fortune, but that one need not suffer such pain in avoiding making such a request of a non-Jew. Requesting another person to perform a cardinal transgression is not to be equated with commission of such transgression oneself. Avoidance of a cardinal transgression requires martyrdom, expenditure of one's entire fortune and even torture; a directive issued to a non-Jew requesting the latter to commit a cardinal sin constitutes an ordinary negative transgression and does not require either martyrdom or acceptance of intractable pain.

Thus, R. Chanina ben Teradion was constrained not to commit suicide by opening his own mouth even in order to avoid excruciating pain but, to avoid such pain, was permitted to violate the lesser transgression of placing a stumbling block before the blind by requesting a non-Jew to hasten his death. Presumably, the executioner could be assured of heavenly reward, not because his deed was intrinsically acceptable, but because of his good-faith motivation in abiding by the council of the eminent sage, R. Chanina ben Teradion. Rabbi Feinstein alludes to an explanation of this nature in a very brief comment in *Iggerot Mosheh*, *Hoshen Mishpat*, II, no. 74, sec. 2.