J. David Bleich

Validity of DNA Evidence for Halakhic Purposes (Part 3)

I. EXHUMATION FOR THE PURPOSE OF OBTAINING DNA

Teḥumin XXII (5762), pp. 412-426, features an article by Rabbi Zevi Yehudah Ben-Ya'akov discussing use of DNA evidence for resolving questions of inheritance. In that contribution Rabbi Ben-Ya'akov also addresses the issue of exhumation of a body for the purpose of obtaining a DNA sample on the basis of which the decedent's wife may be permitted to remarry. The prohibition against exhumation is recorded in *Semaḥot* 13:5 and in the Palestinian Talmud, *Mo'ed Katan* 2:4. Exceptions are provided in order to reinter the body on property belonging to the deceased or to transfer the remains from an ignominious location to a dignified grave.

The commentaries identify the narrative recounted in I Samuel 28:15 describing how Samuel was raised from the grave by a sorceress as the scriptural source for the prohibition against exhumation. Samuel exclaimed in distress, "Why did you cause me to tremble by raising me?" *Bet Yosef*, *Yoreh De'ah* 363, followed by *Shakh*, *Yoreh De'ah* 363:1, and *Taz*, *Yoreh De'ah* 363:1, explains that disturbing the repose of the deceased is distressful to them as alluded to in Job 3:13, "I slept, then it was restful for me." Two reasons are given for such distress: 1) pain experienced by the deceased as a result of disturbance of the corpse; and 2) trepidation on the part of the deceased in the form of *ḥerdat ha-din*, i.e., anxiety on the part of the deceased because he fears that he is being summoned for Heavenly judgment.

R. Judah Leib Graubart, *Teshuvot Ḥavalim ba-Ne'imim*, II, no. 72, suggests that it may be the case that the alternate reasons underlying the prohibition against exhumation are rooted in those two separate scriptural passages and that they differ in their ambit. *Ḥavalim ba-Ne'imim* assumes that "pain" is experienced only by actual movement of the body whereas even uncovering the body disturbs the repose of the deceased by causing *ḥerdat ha-din*. Accordingly, *Ḥavalim be-Na'imim* surmises that "perhaps whether such fear is caused only by actual exhumation or even by exposure of the corpse depends upon which of the reasons serves as

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the source of the prohibition." The incident involving Samuel serves to establish only that actual "raising" and removal of a body from its grave is prohibited; even uncovering the corpse for examination *in situ* as described in Job disturbs the repose of the deceased because of fear of divine judgment.

However, R. Ẓevi Hirsch Ashkenazi, *Teshuvot Ḥakham Ẓevi*, no. 50, cites Job 3:13 as establishing a prohibition against disturbing the repose of the dead quite independent of any fear of judgment and finds such repose to be occasioned by any movement of the remains from place to place even in a sealed coffin. That appears to be the opinion of *Bet Yosef, Yoreh De'ah* 363, as well. Moreover, *Ḥakham Ẓevi* finds even uncovering the corpse to be prohibited for yet a third and probably more serious reason, namely, the prohibition against *nivul ha-met*, i.e., ignominious behavior that constitutes desecration of the corpse.[1]

R. Ezekiel Landau, *Teshuvot Noda bi-Yehudah*, *Yoreh De'ah*, *Mahadura Kamma*, no. 89, cites the verse "but his flesh shall pain him" (Job 14:22) as establishing that the dead experience pain only until their flesh has entirely decomposed but do not experience pain when it is only their bones that are displaced. *Noda bi-Yehudah* explains that the fear and distress caused to the deceased arises because of dread of punishment to which they may be subjected, as suggested by *Ḥakham Ẓevi*, no. 50, but that upon total decomposition of the flesh there is no further punishment and hence no occasion for fear.[2] However, R. Shalom Schwadron, *Teshuvot*

[1] R. Meir Simchah ha-Kohen of Dvinsk, *Or Sameaḥ, Hilkhot Semaḥot* 14:16, expresses doubt with regard to whether the prohibition of *nivul ha-met* is biblical or rabbinic in nature but, citing *Shabbat* 85a, regards it as associated with the verse "You shall not move the boundary of your fellow" (Deuteronomy 19:14).

[2] R. Zevi Hirsch Ashkenazi, *Teshuvot Ḥakham Ẓevi*, no. 47, cites R. Gershon Metz, author of *Avodat ha-Gershuni,* who maintains that minors are not subject to judgment and hence do not experience fear of impending judgment, as well as the opposing view of R. David Oppenheim. R. Gershon Metz's opinion was later published by R. David Oppenheim in the latter's *Nish'al Dovid, Yoreh De'ah,* no. 27. Citing the *Zohar* and *Ḥesed le-Avraham*, *ma'ayan* 5, *nahar* 3, *Ḥakham Ẓevi*, no. 50, asserts that even minors are subject to fear of judgment. See also R. Shlomoh Kluger, *Ha-Elef Lekha Shlomoh*, *Yoreh De'ah*, no. 299, and R. Abraham Samuel Benjamin Sofer, *Teshuvot Ktav Sofer*, *Yoreh De'ah*, no. 183. Cf. R. Moshe Schick, *Teshuvot Maharam Shik*, *Yoreh De'ah*, no. 354, who declares that "fear of judgment" is limited to the twelve-month period following death. See the responsum of R. David Oppenheim, published as an addendum to *Teshuvot Ḥavvot Ya'ir* and included in his *Nish'al Dovid, Yoreh De'ah*, no. 27, who suggests that there is no fear of judgment on the part of a person who dies prior to attaining the age of twenty but rejects that view and asserts that there is no distinction between an adult and a minor. See R. Ezekiel Landau, *Teshuvot Noda bi-Yehudah*, *Yoreh De'ah, Mahadura Tinyana*, no. 164, and *Ktav Sofer*, *Yoreh De'ah*, no. 183, who disagree and maintain that even minors below the age of thirteen

Maharsham, II, no. 343, does not accept that distinction. In addition, R. Mordecai Benet, *Parashat Mordekhai*, *Yoreh De'ah*, no. 24, takes issue with *Noda bi-Yehudah* in arguing that, even granting *Noda bi-Yehudah*'s contention regarding fear of judgment, the entirely separate prohibition of *nivul ha-met*, or desecration of the corpse, applies even to bones alone, as is evident from the comments of *Or Zaru'a*, *Hilkhot Aveilut*, no. 419. Indeed, it is quite evident from the discussion of the Gemara, *Bava Batra* 154a, that desecration of the corpse is an independent reason for prohibiting exhumation and that such consideration applies even to mere visual observation of the uncovered remains.[3] Rabbi Ben-Ya'akov draws attention to *Teshuvot Ḥakham Ẓevi*, no. 50, from which it is clear that the distress caused to the deceased and their "fear of judgment" are two independent reasons for not disturbing the remains of the deceased.

Rabbi Ben-Ya'akov himself asserts that within three days of death, during which time the countenance has not undergone deterioration, there is no ignominy in merely observing the face of the deceased for purposes of identification. However, it would appear that, although opening a grave within the first three days following death and removing a miniscule DNA sample[4] without moving or disturbing the remains may not involve a violation of either *nivul ha-met* or occasion fear of judgment, it would nevertheless constitute disturbance of the repose of the deceased according to *Bet Yosef*, *Ḥakham Ẓevi* and later authorities who cite the verse in Job, "it was restful for me," as the basis of the prohibition and apply it literally.

The fundamental question of whether the prohibitions involved in exhumation are superseded by the need to identify a corpse so that the wife may be enabled to remarry is the subject of controversy between R. Eleazar Flekeles, a disciple of *Noda bi-Yehudah* and author of *Teshuvah me-Ahavah*, and R. Samuel Landau, a son of *Noda bi-Yehudah* and author of *Teshuvot Shivat Ẓion*. The responsa of both authors are published in the latter's *Shivat Ẓion*, nos. 64-66. R. Eleazar Flekeles asserts that, in light of the fact that the Sages assiduously strove to remedy the plight of the *agunah*, the grave may be uncovered "for such an important

experience fear of judgment. R. Judah Aszod, *Teshuvot Mahari Asad*, *Yoreh De'ah*, no. 347, asserts that even abortuses and non-viable neonates experience fear of judgment. See also *Teshuvot Bet Leḥem Yehudah,* no. 363; *Teshuvot Yosef Omez,* no. 37; *Teshuvot Seridei Esh*, II, no. 125; and *Sedei Ḥemed, Asifat Dinim, ma'arekhet aveilut*, no. 3.

[3] See also the earlier-cited responsum of R. David Oppenheim and the responsum of R. Jacob Reischer, *Teshuvot Shevut Ya'akov*, *Yoreh De'ah*, no. 103.

[4] See R. Moshe Feinstein, *Iggerot Mosheh, Yoreh De'ah*, II, no. 151.

matter... particularly since it is also for the honor [of the deceased] so that his progeny will mourn and recite *kaddish*." This position is also espoused by R. Joseph Saul Nathanson, *Teshuvot Sho'el u-Meshiv*, I, no. 231.

Shivat Ẓion disagrees and argues that the sole "honor" that justifies opening a grave is the honor of burial in an ancestral plot or in the Land of Israel. Moreover, although the Gemara, *Bava Batra* 154b, recognizes the right of purchasers who have expended funds in acquiring property to demand exhumation in order to establish the decedent's legal majority by examining the corpse for the presence of pubic hair and hence his capacity to convey real property, the wife has no comparable claim against the deceased. *Shivat Ẓion*, no. 66, reaffirms the halakhic points he made in his earlier responsum but retracts his previous ruling because there is no guarantee that the attempt at identification will be successful. If the endeavor does not prove to be successful, the deceased, a complete stranger who is under no duty and who derives no benefit from the exhumation, will have been treated ignominiously without justification.

R. Abraham Benjamin Samuel Sofer, *Teshuvot Ktav Sofer*, *Yoreh De'ah*, no. 174, agrees that the corpse may not be defiled solely for the benefit of the widow but nevertheless finds reason to permit opening the grave. He argues that the grave may be uncovered in order that benefit may accrue to the deceased, including the spiritual merit that would accrue to the deceased through release of his widow from levirate obligations by means of *ḥalizah*.

Moreover, *Ktav Sofer* finds that, if the wife would otherwise be an *agunah* and there are also surviving sons, disinterment yields a benefit for the deceased. In a situation in which a wife is not permitted to remarry it is forbidden to observe mourning practices and sons may not recite *kaddish* lest the wife and prospective suitors erroneously believe that she is eligible to remarry as a widow. Thus, releasing the wife from the chains of *igun* results in benefit to the deceased in that it renders it permissible for the decedent's son to recite *kaddish* for the repose of his father's soul.

Ktav Sofer fully recognizes that should there be no affirmative identification subsequent to exhumation there will have been a miscarriage of Halakhah in the disrespectful treatment of an anonymous stranger without concomitant benefit to him. Accordingly, *Ktav Sofer* limits dispensation to open the grave to situations in which there is an *umdena*, i.e., reason to assume, that the corpse is that of the husband or that "intermediate" identificatory marks have been observed but those identificatory

marks in themselves are insufficient evidence to permit the widow to remarry only because of the severity of the prohibition against adultery.[5] Such evidence, however, argues *Ktav Sofer*, is acceptable for other purposes of Halakhah, including suspension of the prohibition against violation of a corpse. The result is an almost paradoxical situation: Intermediate identificatory marks do not constitute evidence of sufficient strength to permit a wife to remarry nor can exhumation of a corpse be sanctioned for purposes of identification because the attempt at identification may fail. But intermediate identificatory marks do give rise to the degree of certainty necessary for other halakhic purposes, including the need to exhume the corpse in the anticipation that a more positive identification will indeed be available. Similarly, avoidance of the transgression of adultery requires a higher degree of certainty by virtue of rabbinic decree but the already available level of certainty is sufficient to obviate the prohibition against disturbing the dignity of the corpse in order to obtain the level of evidence necessary to permit the wife to remarry.[6]

II. MAMZERUT

A. DNA as Evidence of Mamzerut

The question of whether a child can be declared a *mamzer* on the basis of DNA analysis is complex. *Teshuvot R. Akiva Eger*, no. 101, rules that principles of evidence and procedure for making such a determination are comparable to those governing capital cases. Consequently, the two-witness rule applies and testimony may be heard only in the presence of the putative *mamzer*. The various contemporary writers who regard DNA to be comparable to a *siman*[7] do not accept such evidence for purposes of awarding child support and certainly not for determination of *mamzerut*.

However, the issue of declaring the child to be a *mamzer* certainly does arise if DNA is regarded as tantamount to an *umdena de-mukhaḥ* or to *tevi'ut ayin* and hence as acceptable evidence to substantiate the claim of a plaintiff in financial matters.[8] Nor does acceptance of DNA analysis as only a manifestation of *rov* serve to obviate the problem. DNA evidence

[5] See J. David Bleich, "Validity of DNA Evidence for Halakhic Purposes (Part 2)," *Tradition*, vol. 52, no. 1 (Winter, 2020), pp. 98-101.

[6] See also *Ozar ha-Poskim*, V, 17:24, sec. 200:19.

[7] See J. David Bleich, "Validity of DNA Evidence for Halakhic Purposes (Part 1)," *Tradition*, vol. 51, no. 4 (Winter, 2019), p. 146.

[8] *See ibid*., p. 141 and p. 141, note 33.

does serve to generate doubt. Although, even according to *Pnei Yehoshu'a*, *Kiddushin* 72a, s.v. Rashi, and 75a, s.v. *ve-rami*, who maintains that only a *mamzer* certain is biblically categorized as a *mamzer* and that *rov* does not establish the requisite degree of certainty for that purpose, nevertheless, *rov* does serve to establish status as a *mamzer* doubtful who is forbidden to contract a marriage with a person of legitimate birth by virtue of rabbinic decree.

Many writers cite the comment of *Reshash*, *Bava Batra* 58a, indicating that R. Bena'ah did not choose to apply R. Sa'adia Ga'on's blood test in order to disprove a filial relationship[9] because there is no halakhic obligation to engage in such an endeavor.[10] However, as has been noted,[11] it is far from clear that R. Sa'adia Ga'on's test is halakhically conclusive. More significantly, since marriage between a *mamzer* and a person of legitimate lineage involves a biblical transgression why is there no obligation to resolve the matter in instances of doubt?

Declaring DNA evidence to be in the category of a *siman muvhak*, R. Asher Weiss, *Teshuvot Minḥat Asher*, III, no. 81, regards DNA evidence as acceptable with regard to all noncriminal matters. Rabbi Weiss accepts the view of *Shakh, Ḥoshen Mishpat* 297:1, and *Netivot ha-Mishpat* 46:8, as opposed to that of *Keẓot ha-Ḥoshen* 46:8, 259:2 and 297:1 and *Teshuvot R. Akiva Eger*, no. 107, in affirming that, as a matter of biblical law, singular identificatory marks are recognized as tantamount to the testimony of two witnesses and hence are sufficient to support a plaintiff's monetary claim. Accordingly, he intimates that DNA evidence should constitute adequate proof of paternity for the purpose of establishing an obligation of child support. Although the Israeli Rabbinical Courts disagree with that position and do not recognize DNA evidence as dispositive, they do acknowledge that it gives rise to doubt.

Logical consistency should require that, in the case of a married woman, the selfsame evidence demonstrating that the husband is not the father should also establish that the child is a *mamzer* certain or—if the possibility that the wife's paramour was a non-Jew is to be entertained —a *mamzer* doubtful.[12] Rabbi Weiss, however, declines to accept that conclusion. In justifying that reluctance, he presents a number of considerations. One is that the tests are carried out by a technician and the results subsequently conveyed to the *bet din*, usually in writing. Rabbi Weiss objects to

[9] *See Ibid.*, p. 141.
[10] See *Ḥelkat Meḥokek, Even ha-Ezer* 2:9.
[11] See Bleich, "Validity of DNA Evidence (Part 1)," p. 141, note 33.
[12] See *ibid.*, p. 149, note 55 and p. 160, note 67.

reliance upon that form of testimony because (1) *Shulḥan Arukh* and Rema, *Ḥoshen Mishpat* 28:11, rule in accordance with the opinion of Rashi who maintains that only oral testimony is admissible; (2) two witnesses are required; and (3) frequently, the technician is not a halakhically qualified witness. Rabbi Weiss regards DNA evidence as intrinsically sufficient for all purposes but, since the *bet din* does not itself have knowledge of the DNA results, it must be apprised of such findings by means of acceptable testimony and, generally, such testimony is not forthcoming.

That argument is hardly dispositive. First, if the usual rules of evidence govern with regard to conveyance of the results of the DNA test to the *bet din*, the *bet din* should also be unable to award child support and the like in the absence of the testimony of two qualified witnesses. Of course, if the putative father voluntarily accepts the accuracy of the results, further testimony would not be required insofar as the father's financial obligations are concerned. However, the father has no standing to enter a waiver on behalf of the child that would enable the *bet din* to declare the child to be a *mamzer*. It would then seem that other earlier-cited authorities who are willing to rely upon blood typing and DNA evidence would agree that two qualified witnesses would be required 1) to establish the provenance of the DNA sample, 2) to observe the testing process and 3) to testify to the authenticity of any written information conveyed to the *bet din*. Although the witnesses need not have the technical expertise to carry out the test themselves, they must acquire the knowledge necessary to understand the nature of the test in order to certify the results. If those conditions are satisfied, according to those authorities, child support might be assessed against the father—but, logically, the child must be declared a *mamzer* as well.

Rabbi Weiss' second objection is that the testing process is subject to human error. Rabbi Weiss acknowledges that the possibility of human error is present in all instances of eyewitness testimony, nevertheless, although such evidence is fallible, the two-witness rule mandates acceptance of the testimony of two qualified witnesses. However, claims Rabbi Weiss, although the technician can testify to the results of the tests he has conducted, he cannot possibly testify that no error has occurred because statistical evidence shows that some error does occur.

That argument is not compelling. The technician certainly does testify to the absence of error. He knows full well that error does occur but, nevertheless, he must be prepared to testify that he did not err and that, in effect, if at times error does occur it must be on the part of other technicians. Eyewitnesses cannot, and need not, testify that witnesses never

err. Indeed, witnesses may err and may even commit perjury.[13] Implicit in the testimony of witnesses is that, despite the fallibility of human faculties, they themselves have not erred and they themselves have not committed perjury. The technician may have erred, but all witnesses may err. Witnesses can testify only to what they believe to be true. The technician similarly testifies to that which he believes to be true regarding the DNA sample he has examined. If so, it should follow that if DNA evidence is sufficient to compel child support it should establish the child's status as a *mamzer* as well.

B. Mishpaḥah she-Nitme'ah Nitme'ah

Some writers have sought to apply the principle of "*mishpaḥah she-nitme'ah nitme'ah* – a family that has become intermingled remains intermingled" formulated by the Gemara, *Kiddushin* 71a. R. Moshe Sternbuch, *Teshuvot ve-Hanhagot*, I, no. 896, reports that he was consulted by a physician who in the course of performing a routine blood test discovered that the child's blood type was incompatible with that of his presumed father. The physician questioned whether he was obligated to disclose that the child is a *mamzer*. Rabbi Sternbuch replied that, since the child was recognized in the community as the son of the mother's husband and a *ḥazakah* had already been established, the principle of *mishpaḥah she-nitme'ah* formulated by the Gemara applies; consequently, the child cannot be relegated to the status of a *mamzer* other than on the basis of "absolute proof."

That brief response presents a number of difficulties: (1) nonpaternity established on the basis of blood typing represents conclusive application of scientifically based Mendelian principles and seemingly is the type of circumstantial evidence accepted by *Tosafot*, *Shevu'ot* 34a as admissible even in capital cases;[14] and (2) *mishpaḥah she-nitme'ah* is a widely misunderstood principle. It applies only in situations in which there is a cloud over a family because it is known that a *mamzer* has married into the family but no particular individual is known to be a *mamzer*.[15] It does not apply when a specific individual is known to be a *mamzer* or even a *mamzer* doubtful.[16] Furthermore, Rema, *Even ha-Ezer* 2:5, declares that

[13] See Rambam, *Hilkhot Yesodei ha-Torah* 8:2; *Hilkhot Talmud Torah* 7:7; and *Hilkhot Sanhedrin* 24:1. See also Bleich, "Validity of DNA Evidence (Part 1)," pp. 125-126.

[14] See Bleich, "Validity of DNA Evidence (Part 1)," pp. 128-31.

[15] See *Ḥelkat Meḥokek, Even ha-Ezer* 2:9 and *Bet Shmu'el* 2:19.

[16] Some authorities limit this rule to a family into which an unidentified doubtful *mamzer* has married; others extend the rule to include a *mamzer* certain as well. See *Oẓar ha-Poskim*, I, 2:5, sec. 34.

it is proper to disclose the identity of even a possible *mamzer* to "*ẓenu'in*," i.e., persons who are discrete and would themselves not wish to marry a person whose genealogy is under a cloud. Moreover, Rema rules that the matter is not to be disclosed publicly only if the possible *mamzer* has already married but that if the person is as yet unmarried his status should be revealed and publicized so that others will not enter into marriage with him.[17]

The formulation of the cryptic and much misunderstood doctrine "*mishpaḥah she-nitme'ah nitme'ah*" ascribed by the Gemara, *Kiddushin* 71a, to R. Yitzchak reads: "The Holy One, blessed be He, performs an act of charity on behalf of Israel, for a family that has become intermingled remains intermingled." The Gemara introduces that dictum with an elucidation of Malachi 3:3, "And He shall sit as a refiner and as a purifier." The prophet is understood by the Gemara as declaring that families whose lineage has been contaminated by persons disqualified from entering into marriage with persons of legitimate birth, e.g., *mamzerim*, but who succeeded in contracting prohibited marriages because of their wealth will not be separated from the community of Israel; rather, "since they have become intermingled, (i.e., unrecognized), they will remain intermingled." Rambam understands that comment as referring to individuals of illegitimate lineage but who are presumed by the public to be of legitimate birth. Rambam, *Hilkhot Melakhim* 12:2, states:

> He (Elijah) will come neither to declare the pure impure nor the impure pure; neither to disqualify those who are presumed to be of legitimate descent nor to pronounce qualified those who are deemed to be of illegitimate descent; but to bring peace to the world, as it is said: "And he shall turn the hearts of the fathers to the children" (Malachi 3:24).

Rambam makes it explicitly clear that this principle is applicable only upon the coming of the Messiah 1) by recording the principle in *Hilkhot Melakhim* rather than in his codification of the laws pertaining to forbidden marriages and 2) in declaring explicitly in the very next paragraph, *Hilkhot Melakhim* 12:3:

> *During the days of the messianic king,* (emphasis added) when his kingdom has been established and all of Israel has gathered around him [the entire nation's] line of descent will be established by his mouth on the

[17] See also R. Yechiel Michel Epstein, *Arukh ha-Shulḥan*, *Even ha-Ezer* 2:26; R. Menasheh Klein, *Mishneh Halakhot*, IX, no. 238; *Piskei Din Yerushalayim le-Dinei Mamonot u-Birur Yuḥasin,* XII (Jerusalem, 5770), pp. 414-417.

> basis of the prophetic spirit which shall rest upon him, as it is said: "He shall sit as refiner and purifier."

Thus, according to Rambam, the dictum of *mishpaha she-nitme'ah nitme'ah* has no application prior to the arrival of the Messiah.

However, Rabbenu Nissim, in his commentary on *Kiddushin* 71a, disagrees with Rambam and emphasizes that no halakhic provisions will be suspended upon the coming of the Messiah. He understands R. Yitzchak as teaching that, just as Elijah will not identify illegitimate families even though their identities will have been revealed to him, so also we should not, and dare not, do so.

Nevertheless, *Shiltei ha-Gibborim*, *ad locum*, citing Ri'az, carefully distinguishes between individuals of known tainted lineage and persons whose status is not publicly established. According to *Shiltei ha-Gibborim*, R. Yitzchak's dictum is limited in application to persons who have become recognized as individuals of legitimate birth. The verse in Malachi serves to confirm their legitimacy, both future and present. Nevertheless, *Shiltei ha-Gibborim* concludes, "However, perhaps it is proper to reveal [their disqualification] to discrete persons because the Holy One, blessed be He, causes His presence to rest only upon the genealogically pure families of Israel." This is also the position of many early-day authorities and is codified in *Shulḥan Arukh*, *Even ha-Ezer* 2:5.

Ḥelkat Meḥokek, *Even ha-Ezer* 2:9, and *Bet Shmu'el, Even ha-Ezer* 2:19, emphasize that the restriction against revealing illegitimate lineage is limited to a particular individual who has come into possession of information not known to others. However, when the *irur,* or challenge to the legitimacy of the family, is widely known, it is obligatory to conduct an investigation into their lineage; otherwise, it is forbidden to enter into marriage with a member of such a family.

It might be possible to understand those authorities as interpreting R. Yitzchak's dictum to be inclusive of all unidentified persons of illegitimate birth who are otherwise subject to marital restrictions, including situations in which the unidentified individual is a *mamzer* certain. However, *Ḥelkat Meḥokek* and *Bet Shmu'el* as well as subsequent latter-day authorities fail to do so. Those authorities limit the ambit of R. Yitzhak's statement to situations in which the unidentified individual is a *mamzer* doubtful. According to those authorities, the prohibition against marrying into a family one of whose number is a *mamzer* certain remains firmly in place and will remain in effect even subsequent to the advent of the Messiah. Why, then, is a person in possession of personal knowledge of

illegitimacy not obligated to reveal that information in order to prevent transgression?[18]

Both *Ḥelkat Meḥokek* and *Bet Shmu'el* limit application of this rule to a situation in which 1) the cloud of illegitimacy extends only to a single unidentified member or to a small number of unidentified members of a family and 2) the illegitimacy of the person or persons is not known with certainty but is merely a matter of doubt. The result is a *sefek sefeika*, or a "double doubt." In instances of *sefek sefeika* there is no infraction whatsoever. Elijah himself will not be in a state of doubt; as a prophet he will be fully aware of all genealogical information but "the Torah is not in heaven" (Deuteronomy 30:12) and issues of doubt must be resolved solely by means of natural human intelligence and prowess.[19] Accordingly, Elijah will not reveal instances of illegitimacy. Since the identity of a *mamzer* doubtful will never become known, each member of the family is permitted to marry without restriction. Since that is the normative Halakhah, no person may cast aspersion upon members of the family by publicizing the existence of an inconsequential *sefek sefeika* that does not pose an impediment to marriage. Consequently, there is certainly an obligation to disclose the status of an identifiable *mamzer* certain, or even of an identifiable *mamzer* doubtful, in order to prevent transgression and to prevent a *sefek sefeika* with regard to the entire family from arising with the passage of time.

In defense of those who invoke the principle *mishpaḥah she-nitme'ah nitme'ah* in support of nondisclosure it must be said that the dictum is often used as a *bon mot* rather than a halakhic justification. Used in that sense, *mishpaḥah she-nitme'ah nitme'ah* is conclusory in nature and applied in situations in which halakhic doubt has been resolved permissively on adequate grounds and consequently there is no reason to air the matter publicly. In such contexts, the import of the aphorism is "Let sleeping dogs lie." In the present context it does not explain why it is

[18] Indeed, Rema, *Yoreh De'ah* 265:4, records that it is customary to proclaim a male child's status as a *mamzer* at the time of his circumcision. In some locales it was even the practice to name the baby "*Kidor,*" an illusion to the verse "*ki dor tahpuḥot hemah"* (Deuteronomy 32:20) which, in turn, is understood as a reference to licentiousness. See *Yoma* 83b.

[19] See R. Elchanan Wasserman, *Kuntres Divrei Soferim*, no. 5, sec. 5, who asserts that a prophet lacks credibility with regard to matters of fact only in proceedings in which the two-witness rule is applicable. Cf. *Tosefet Yom ha-Kippurim, Yoma* 75a; R. Ẓevi Hirsch Chajes, *Torat ha-Nevi'im*, chap. 2 and addendum as well as R. Abraham Israel Rosenthal, *Ke-Moẓe Shalal Rav* (Jerusalem, 5762), V, 337-338. As noted earlier, *Teshuvot R. Akiva Eger,* no. 107, states that two witnesses are required to determine status as a *mamzer*.

unnecessary to seek available genetic information in order to avoid transgression.

C. Ḥazakah as Determinative

In an article published in *Shurat ha-Din*, V, pp. 70-93, R. David Levanon addresses, *inter alia*, the question of the reliability of DNA evidence in establishing that a child is a *mamzer*. The anecdote recorded in *Sefer Ḥasidim* regarding acceptance of absorption of blood by a bone as evidence of paternity is certainly far less scientifically reliable than DNA evidence. Nevertheless, *Eliyahu Rabbah* and *Teshuvot Rivash* accept that test as conclusive confirmation of a filial relationship.[20] R. Abraham Price, *Mishnat Avraham*, *Sefer Ḥasidim*, I, no. 232, ascribes extravagant reliability to that test in categorizing it as constituting an *anan sahadei*. Earlier, the Tel Aviv *bet din* accepted evidence in the form of incompatible blood types as constituting a *rov* but found that, in the case of a married woman, there is a contradictory *rov* in the form of *rov be'ilot*.[21]

In point of fact, it was probably not necessary for R. Sa'adia's examination to yield a positive proof of the absence of a filial relationship in order for the child whose blood was not absorbed to be disinherited. Consequently, there is no evidence that R. Sa'adia would regard hematological evidence as an absolute proof of illegitimacy. In all likelihood, the claim of the son whose blood was absorbed had already been established as a matter of public knowledge in the deceased's original place of domicile and was merely confirmed by the blood experiment. That fact was presumably known to R. Sa'adia, albeit not to the non-Jewish king. Hence, the son was already an heir certain. It was not necessary for the non-absorption of blood of the putative son to be accepted as proof positive of the absence of a father-son relationship for him to be disinherited. Even if failure of the experiment generated only a doubt with regard to the existence of an additional paternal-filial relationship, any other claimant would have been disinherited; his status would have been that of an heir doubtful whereas the newly-arrived son was an heir certain, since there was no evidence to contradict the already established paternal-filial relationship. The son whose blood was absorbed would have prevailed on the basis of the halakhic principle *ein safek moẓi midei vadai*.[22]

[20] See Bleich, "Validity of DNA Evidence (Part 1)," pp. 141-142 and p. 142, note 35.

[21] See *ibid*., p. 147. See also the decision of the Rabbinical District Court of Ashdod, *Piskei Din Rabbaniyim*, XIII, 51-68, with regard to DNA evidence.

[22] For explanation of that principle see *infra,* note 41 and accompanying text.

In an earlier-cited decision of the Rabbinical District Court of Ashdod, *Piskei Din Rabbaniyim*, XIII, 51-68,[23] R. Shlomoh Deichovsky tentatively argues that if a child's legitimacy is challenged on the basis of DNA evidence the issue can be resolved on the basis of *ḥazakah*. The argument is that *rov be'ilot* and DNA evidence are contradictory *rov*s that render a child a *mamzer* doubtful. However, if the child was earlier accepted as the child of the mother's husband on the basis of behavior and comportment, that in itself establishes a *ḥazakah* having the effect of resolving the doubt by establishing the husband as the father. In the case before the *bet din*, because, prior to the doubt created by DNA analysis, a presumption of paternity had been established in the wake of the husband's original acknowledgment of paternity. Rabbi Deichovsky rejects that conclusion in arguing that a *ḥazakah* established in error is not a *ḥazakah*. To put the matter somewhat differently, he maintains that a *ḥazakah* based upon a presumption later shown to be erroneous must retroactively be recognized as an erroneous *ḥazakah*. The husband's acknowledgement of paternity, as manifested by his behavior *vis-à-vis* the child and the resultant public perception of a paternal-filial relationship, all came about in error as established by subsequent DNA evidence. If so, in light of contradictory *rov*s, it should follow that the child has the status of a *mamzer* doubtful.

R. Ya'akov Eliezrov, another member of the Ashdod *bet din*, followed by Rabbi Levanon in his contribution to *Shurat ha-Din*, takes issue with Rabbi Deichovsky's contention that DNA evidence has the effect of negating a previously established presumption of paternity based on *ḥazakah*. Although they concede that an erroneously established *ḥazakah* is of no evidentiary value, they nevertheless maintain that, unless the *ḥazakah* is demonstrated with certainty to have been established in error, the *ḥazakah* remains effective as a nonprobative presumption. Rabbi Eliezrov and Rabbi Levanon contend that when a presumption established by *ḥazakah* has not been successfully rebutted but has merely become a subject of doubt, e.g., by application of a contradictory *rov*, the previously established *ḥazakah* has not lost its procedural efficacy.[24] According

[23] See Bleich, "Validity of DNA Evidence (Part 1)," p. 155.

[24] Rabbi Deichovsky's explanation is complex and nuanced and is propounded in order to explain a fundamental difficulty with regard to mistakenly established *ḥazakot*. For example, a woman has virtually absolute credibility in informing her husband that she is a menstruant. At the same time, she can withdraw her statement upon offering an *amatla*, or cogent reason, for her original misstatement. If, however, her status became known in her social circle, e.g., she donned garments known to be worn by her only during her menstrual periods, such comportment gives rise to a

to those authorities, the *rov* reflected in DNA analysis, since it remains contradicted by *rov be'ilot*, does not definitively demonstrate that the previous *ḥazakah* was established in error. Hence, the *ḥazakah* remains effective and, consequently, the father retains the prerogative of establishing the illegitimacy of the child on the basis of the principle of *yakkir*.[25]

In a concurring opinion in a case before the Rabbinical District Court of Haifa,[26] and in an article published in *Teḥumin*, XXXV (5775), 212, R. Yizchak Zevi Ushinsky suggests that, although *Bet Shmu'el*, *Even ha-Ezer* 2:2,[27] maintains that a single witness is insufficient to establish matters of lineage, he would agree that DNA analysis, in and of itself, is

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ḥazakah that she cannot readily negate unless she can credibly claim that her conduct was born of genuine error. Unlike a mere verbal statement that can be withdrawn as having been false if the original deceit is acknowledged but explained (e.g., she felt unwell and did not wish to engage in intercourse) she cannot negate a resultant *ḥazakah* even if it arose only because of her misleading act unless she can establish that she acted in actual error. Thus, she cannot claim that she wore inappropriate clothing simply because other laundered clothes were not available. Unless there was an incontrovertible error in its establishment, a *ḥazakah* generates a halakhic status that cannot be explained away. Rabbi Deichovsky explains that the *ḥazakah* controls because the woman could have prevented its inception by "seizing a cymbal in her hand" and explaining to her friends that she was wearing those clothes only because she had no others and thereby would have prevented a *ḥazakah* from arising; if that option was not available to her, e.g., she believed that a particular stain rendered her a *niddah* but subsequently discovered that her presumption was incorrect, her error made it impossible for her to prevent a *ḥazakah* from arising. A *ḥazakah* arising as a result of such error has no halakhic import.

It seems to this writer that this analysis has an impact upon child support subsequent to DNA testing as well. A husband who treats a child as his own until a DNA test shows otherwise can certainly contest liability for child support by asserting that, since the facts revealed to him by DNA testing were previously unknown to him, he acted out of unavoidable error in allowing a paternal-filial relationship to be presumed. However, if the husband was earlier aware of the fact that the child was not his but, by virtue of his comportment allowed a public perception to that effect to arise by virtue of his failure to negate that perception, according to Rabbi Deichovsky's analysis, the *ḥazakah* will control and cause him to remain liable for child support.

[25] The distinction may perhaps be captured by a somewhat different formulation. *Ḥazakah* may operate either as a *birur*, i.e., an evidentiary rule, or as *din*, i.e., a judicial presumption that might be categorized as "halakhic inertia." The value of a *rov* arising from an erroneously established *ḥazakah* loses all evidentiary value when contradicted by a second *rov*. An unknown conflict between two *rov*s does not disprove the application of either *rov*; the conflict serves only to neutralize the *birur* or evidentiary capacity of the *ḥazakah* arising in its wake. However, since the fact established by the *ḥazakah* has not been disproved, the status of the *ḥazakah* as *din*, i.e., non-evidentiary establishment of a presumed status, is not affected unless and until the erroneous presumption is conclusively rebutted.

[26] No. 954915-1, 20 Elul 5773.

[27] Cf. however, *Oẓar ha-Poskim* 2:2, sec. 4.

sufficient to determine a maternal-filial relationship. Rabbi Ushinsky compares DNA evidence to the acceptance of comportment as mother and child, *viz.*, "a child following a woman in the marketplace," as proof of a maternal-filial relationship.

However, the comparison of DNA evidence to comportment as mother and child is inapt. The latter is a *ḥezkat hanhagah*, i.e., comportment that is recognized by the public as emblematic of a maternal-filial relationship; it is only after that relationship has been publicly demonstrated and hence antecedently established that it becomes the premise for consequential matters, e.g., punishment for striking a parent, incest, etc. If, as *Bet Shmu'el* asserts, a single witness cannot testify to legitimacy for purposes of marriage it is because of the principle of *ma'alah asu beyuḥasin,* i.e., a rabbinic stringency designed to protect against forbidden marriages when the status of the individual seeking to marry has not been previously established by means of *ḥazakah.* There is no reason to assume that, for *Bet Shmu'el*, in the absence of a *ḥazakah*, *rov* is any more acceptable than the testimony of a single witness. Consequently, there are no grounds to assume that the *rov* rejected by DNA analysis should suffice in itself to create a presumption of a paternal relationship unless accompanied with, or followed by, a behavioral *ḥazakah.*

D. Should DNA Testing Be Performed?

The issue of why a DNA test should not be performed if it would lead to unwelcome identification of a *mamzer* has not been addressed directly in the rather extensive literature dealing with DNA and Halakhah. However, the Rabbinical District Court of *Ẓefat*, composed of R. Chaim Bazak, R. Yo'ezer Ariel and R. Shlomoh Shoshan,[28] did recently issue a ruling in a different matter that addresses similar considerations.

An unmarried woman became pregnant by means of artificial insemination using semen that was obtained from a donor (AID). In an earlier decision dated 17 Cheshvan 5778, the *bet din* of *Ẓefat* ruled that anonymous sperm donations are forbidden because of the possibility of future incestuous relationships but that *post factum* a child born as a result of such a procedure might enter into a valid marriage since the likelihood of an incestuous marriage is remote. The issue before the *bet din* was whether a young woman born of AID and her prospective groom should undergo a DNA test before a marriage license is issued in order to assure that no consanguineous relationship exists.

[28] No. 112395/1, 20 Adar 5778.

The *bet din* recognized that there is no barrier to the daughter's marriage to any unmarried member of the overwhelming majority of eligible male suitors. The principle of *rov* serves to determine that any particular prospective groom is not a member of the class of forbidden relatives. The issue is whether it is permissible to rely upon *rov* or whether, when possible, there is an obligation to investigate further rather than to rely upon *rov*. The *bet din* marshalled a number of well-known sources indicating that such an investigation is required.

The Gemara, *Ḥullin* 3b, posits a presumption to the effect that a majority of persons who undertake the slaughter of an animal are proficient in the laws governing the procedure. Nevertheless, a prospective slaughterer must undergo an examination to determine his knowledgeability regarding such matters before he is entrusted with carrying out the procedure. However, if the slaughterer was not tested prior to slaughter of the animal and is presently unavailable to be tested subsequent to the slaughter of the animal, *post factum* the slaughtered animal is regarded as kosher in reliance upon the *rov*. Quite evidently, at least in some cases, it is not appropriate to rely upon *rov* when the facts can readily be established with certainty.

The rule with regard to reliance upon *rov* is clarified in a number of sources:

1) Animals suffering from certain anatomical anomalies, either congenital in nature or the result of trauma, are *treifot* and hence non-kosher. Unless there is evidence to the contrary, the animal is presumed to be kosher because the majority of animals do not suffer such defects. Nevertheless, unless they have been lost, examination of the animal's lungs is required. Rashi, *Hullin* 12a, s.v. *Pesaḥ*, and *Shakh*, *Yoreh De'ah* 39:2, explain that there is a *mi'ut ha-moẓuy,* or "prevalent minority," of animals that suffer from adhesions and other pulmonary anomalies. The rule formulated by those authorities is that in face of a "prevalent minority" reliance upon *rov* is appropriate only *post factum*. Otherwise, an examination or investigation should be undertaken in order to determine the salient facts with certainty.
2) The Gemara, *Pesaḥim* 9a, discusses whether a person who leases a dwelling on the fourteenth day of Nisan may assume that the search for *ḥameẓ* has already been carried out. It is to be presumed that the majority of property owners carry out the search for *ḥameẓ* at the designated time, *viz.*, the eve of the fourteenth day of Nisan. However, the Gemara states that if the lessor is available one should not rely on such a presumption; rather, the lessor must be asked whether

> the domicile has actually been inspected for the presence of *ḥameẓ*. One member of the *Ẓefat bet din*, R. Yo'ezer Ariel, cites *Mishkenot Ya'akov*, *Yoreh De'ah*, no. 17, who rules that a minority of ten percent constitutes a *mi'ut ha-moẓuy* but that a lower percentage may be ignored.[29] The proportion of children born of AID is extremely small and does not rise to the level of a *mi'ut ha-moẓuy*. Consequently, DNA testing to exclude the possibility of consanguinity is not necessary.

Moreover, *Pri Megadim*, in his introduction to *Yoreh De'ah* 39, demonstrates that if the matter requires "*toraḥ gadol*," or "great travail," no examination is necessary.[30] Rema, *Yoreh De'ah* 102:3, equates expenditure of funds with "travail" in ruling that if a non-kosher utensil has become mingled with kosher utensils the utensils need not be koshered

[29] That is also the position of *Teshuvot Dvar Shmuel*, no. 260. See also R. Shlomoh Zalman Auerbach, *Minḥat Shlomoh*, *Tinyana,* no. 63. That figure is derived from a presumption recorded in the Mishnah, *Bava Batra* 93b, to the effect that ten percent of wine turns to vinegar and hence a buyer has no recourse if less than that quantity of the purchased wine is found to be spoiled. R. Samuel ha-Levi Woszner, *Teshuvot Shevet ha-Levi,* IV, no. 81, objects that, although the source establishes that ten percent is certainly a *mi'ut ha-moẓuy,* a lower proportion might constitute a *mi'ut ha-moẓuy* as well. In response it may be argued, that since there is no confirmatory evidence that such is the case and, consequently, since the obligation to be concerned with a *mi'ut ha-moẓuy* is rabbinic in nature, any doubt is to be resolved permissively. Other authorities, including R. Joseph Shalom Eliashiv, R. Nissim Karelitz and R. Chaim Kanievsky, define *mi'ut ha-moẓuy* as five percent. See J. David Bleich, *Contemporary Halakhic Problems*, VI (Jersey City, New Jersey, 2012), 245, note 72. See also R. Moshe Viya, *Bedikat ha-Mazon ke-Halakhah* I (Jerusalem, 5738), *sha'ar* 2, chap. 4:2, note 3. In the second edition of that work, I (Jerusalem, 5765), 116, the author cites R. Joseph Shalom Eliashiv as maintaining that *mi'ut ha-moẓuy* is to be defined as four percent.

[30] *Shulḥan Arukh, Yoreh De'ah* 184:49, similarly rules that a *sefek sefeika*, or "double doubt," cannot be relied upon if the doubt can be resolved but that there is no need to do so if "exertion" is necessary. See also Rashba, *Ḥullin* 53b and R. Shlomoh ha-Kohen of Vilna, *Teshuvot Binyan Shlomoh*, no. 13. Cf., Rema, *Yoreh De'ah* 110:9, who rules that there is no obligation to investigate matters subject to a *sefek sefeika*. See *Contemporary Halakhic problems*, VI, 343-354, regarding whether the pregnant wife of a *kohen* who contemplates coming into contact with a corpse is required to undergo a sonogram in order to ascertain that she is not carrying a male fetus who would be subjected to defilement.

Shulḥan *Arukh*, *Oraḥ Ḥayyim* 14:4, rules that one may borrow a *tallit* belonging to another person without permission and Rema, *Oraḥ Ḥayyim* 649:5, similarly rules that one may borrow the four species on *Sukkot* without permission because of a presumption that people are pleased to have *miẓvot* performed with their possessions. Nevertheless, *Mishnah Berurah* 14:13 and 649:34, rules that if the owner is present one should not rely upon that presumption "since the matter can readily be clarified."

because of the expense involved.[31] Rabbi Ariel concludes that, since DNA testing involves significant expenditure of both time and money, the prospective bride need not seek DNA confirmation of the absence of consanguinity before marrying.

Nevertheless, Rabbi Ariel entertains the possibility that requirements pertaining to a possibly forbidden marriage may be more stringent and hence require investigation and clarification despite the presence of *rov* even though the investigation may be cumbersome and/or require an expenditure of funds. The Gemara, *Nazir* 11b, declares that a person who designates an agent to betroth an unspecified woman on his behalf is prohibited from entering into a marital relationship with all other women because of 1) the presumption that the agent has fulfilled his duty and 2) the resultant possibility that any particular woman he seeks to marry may be a prohibited relative of his presently unidentified wife. *Tosafot*, *ad locum*, s.v. *asur*, explains that the rule is rabbinic in nature and is predicated upon the stringent nature of prohibitions concerning forbidden marriages.[32]

However, *Arukh ha-Shulḥan*, *Even ha-Ezer* 4:58, points to a further comment of *Tosafot, ad locum,* indicating that the prohibition in the case of the earlier described agent is in the nature of a rabbinic penalty for having created a potential pitfall by giving the agent absolute discretion to act on his behalf. *Arukh ha-Shulḥan* notes the absence of a similar restriction because of fear of a consanguineous marriage in the case of a child whose parents are unknown. *Arukh ha-Shulḥan* contends that the two cases are dissimilar in that the principal who designated the agent and granted him unrestricted power is deserving of a penalty for having acted incorrectly but that a foundling is not guilty of any infraction and hence not deserving of punishment. Similarly, contends Rabbi Ariel, a woman who avails herself of artificial insemination with the semen of an anonymous donor may deserve to be penalized, but a child born of that procedure is entirely innocent.

Moreover, Ramban, *Gittin* 64a, is of the opinion that the restriction upon the principal is not a rabbinically imposed penalty but is biblical in nature. The restriction, according to Ramban, is biblical because the principle of *rov* does not apply. The principle of *rov* applies only in situations in which the person or object upon whom doubt devolves has become separated from other members of his or its class; *rov* does not apply in instances in which the subject of doubt remains *kavu'a*, i.e., *in*

[31] See also R. Shlomoh Luria, *Yam shel Shlomoh*, *Ḥullin*, chap. 8, no. 87.

[32] See *Bi'ur ha-Gra*, *Even ha-Ezer* 4:89, who posits an identical concern with regard to foundlings and with regard to a person whose father is unknown.

situ. Ramban maintains that the principle of *rov* does not apply in the case of an unidentified bride because the bride is in a status of *kavu'a*, i.e., she remains stationary and is sought out by the groom.[33] Nevertheless, *Ḥelkat Meḥokek* 35:33 and *Bet Shmu'el* 35:67 apparently reject Ramban's position. Furthermore, Rabbi Ariel correctly points out that Ramban maintains that the principle of *rov* is not applicable in the case of an unidentified bride because a woman is stationary in the sense that she has a permanent dwelling and even if she goes abroad she returns to that dwelling. Thus, the identity of the bride is always a matter of *kavu'a*. In contradistinction, the sperm donor presents his specimen in a clinic or in a physician's office and the act of insemination takes place in that or a similar locale. The semen assuredly does not return to its earlier site. Thus, the identity of the sperm donor is always subject to determination by means of *rov*.

Despite the foregoing, R. Chaim Bazak points to the rule recorded in *Shulḥan Arukh, Even ha-Ezer* 2:11, to the effect that a man may not maintain wives in two separate cities lest his progeny, unmindful of their shared paternal relationship, enter into a marriage with one another with the result that "a brother may marry his sister." Rabbi Bazak asserts that this halakhic provision demonstrates that, despite the presence of a *rov*, the Sages prohibited all marriages that might conceivably lead to a consanguineous relationship. Rabbi Ariel responds that any such rabbinic decree is directed solely against the person who causes a possibility of consanguinity to arise. There is no corresponding rule to the effect that a person who becomes aware that his father had an unidentifiable family in another city is in any way restricted from entering into a marriage on the basis of reliance upon *rov*. Similarly, he argues, there can be no restriction upon a child born of AID impeding him from marrying freely in reliance upon *rov*.

Rabbi Bazak cites *Bi'ur ha-Gra*, *Even ha-Ezer* 4:99, in demonstrating that *rov* is of no avail in any situation involving a possibly consanguineous relationship. Biblical law would permit a *shetuki*, i.e., a person whose father is unknown but whose mother has declared that she was impregnated by an unidentified male with whom she might have contracted a legitimate marriage, to marry a woman of legitimate birth. Nevertheless, *Shulḥan Arukh*, *Even ha-Ezer* 4:37, rules that the child is prohibited from marrying any woman who might be a consanguineous paternal relative. The class of such individuals includes any woman whose father or brother

[33] Cf., however, *Tosafot, Nazir* 12a, *s.v. asur*; *Rabbenu Nissim, Gittin* 30b; and *Bet Yosef*, *Even ha-Ezer* 35:11.

was alive at the time that the person's mother became pregnant as well as any divorcée or widow since the woman in question might have been his father's wife or the wife of a paternal uncle. *Bi'ur ha-Gra* equates that situation with the case of a person whose agent is presumed to have betrothed a woman of unknown identity on his behalf. In equating the two situations, *Bi'ur ha-Gra* implies that there is a global decree prohibiting any possibly consanguineous relationship.

Similarly, R. Pinchas ha-Levi Horowitz, *Giv'at Pinḥas*, no. 5, rules that a person whose mother has declared him to be the legitimate child of an otherwise unidentified father is also forbidden to marry a woman who had a male consanguineous relative living in the city at the time his mother conceived. The concern is that such a relative may have been the child's father and hence that person's close blood relatives are forbidden to the child. *Arukh ha-Shulḥan*, *Even ha-Ezer* 4:58,[34] *Teshuvot Maharam Minz̤*, no. 95, and *Teshuvot Noda bi-Yehudah*, *Even ha-Ezer, Mahadura Kamma*, no. 7, disagree with *Bi'ur ha-Gra* and *Giv'at Pinḥas*. Rabbi Bazak concedes that, even according to the authorities who rule stringently in such instances, a problem arises only because the father lived in the same town as the mother and hence, at least by virtue of rabbinic decree, *rov* does not pertain because the father returns to his place of domicile and is considered to be *kavu'a* as is the case with regard to an unidentified bride betrothed by an agent on behalf of his principal.

Nevertheless, as noted earlier, Rabbi Bazak recognizes that the Sages prohibited a person from establishing families in different locales whose identities are unknown to each other "lest a brother marry his sister." The Sages prohibited that practice despite the presence of a *rov* and despite the fact that members of the minor class of prohibited marriage partners are *eino maz̤uy*, i.e., not at all numerous. Without citing sources, Rabbi Bazak suggests that the reason for that edict is that, unlike other situations in which application of *rov* can at worst result in a one-time transgression, incestuous marriage results in ongoing transgressions and thus even a remote possibility was interdicted by the Sages. Rabbi Bazak then argues that the same concern is present in pregnancy resulting from AID

[34] *Arukh ha-Shulḥan* notes that a minor female whose father has died is not prohibited from marrying in consideration of the fact that her father may have given her in marriage to a consanguineous relative of her prospective husband. For that matter, she is not prohibited from marrying any and all persons because of the possibility that her father deprived her of capacity to enter into a marriage by contracting a marriage on her behalf during his lifetime.

and, accordingly, the self-same rabbinic prohibition pertains. Therefore, he concludes that DNA testing is required to eliminate that concern.[35]

Although in his opinion it is not strictly necessary, Rabbi Ariel strongly advises that DNA testing be performed in cases of AID in order to determine paternity and thereby prevent possible incestuous marriages. However, both Rabbi Ariel and Rabbi Bazak agree that, although a *rov* should not be relied upon when an investigation would resolve any existing doubt, the father of the prospective groom has credibility to declare that he has never been a sperm donor. Consequently, they further assert, that if such a declaration is made, there is no remaining doubt. Hence, there is no need for further investigation and, accordingly, no need for DNA confirmation of the absence of consanguinity.[36]

Although unstated by Rabbi Bazak, it might follow from his position that a person who designates an agent to betroth an unspecified woman on his behalf should be permitted to marry freely provided that the parties undergo DNA testing to eliminate the possibility of consanguinity. Nevertheless, assuming that DNA matching is valid because its accuracy is predicated upon the principle of *rov*, it is not at all clear that, having enacted an ordinance negating reliance upon *rov* of the male populace in

[35] The third member of the *bet din*, R. Shlomoh Shoshan, concurred with Rabbi Bazak's opinion. Rabbi Shoshan cites Rashi, *Ketubot* 2a, regarding the ordinance requiring marriages to be solemnized on Wednesday so that, if the groom finds the bride not to be a virgin, he will have immediate recourse to a *bet din* that normally sits on Thursday. The ordinance reflects a rabbinic concern despite the presence of a double doubt: a) perhaps the hymen was ruptured accidentally and there was no adultery; and b) perhaps the loss of virginity was due to rape rather than consensual adultery. *Tosafot*, s.v. *she'im*, assume that the concern was primarily with regard to a *kohen* to whom the wife would be prohibited even in cases of rape with the result that there is but a single doubt but the edict was made uniform and extended to all men on the basis of *lo plug*. It is to be inferred that *Tosafot* understood Rashi as maintaining that the decree was specifically extended to encompass situations of *sefek sefeika*, not because of *lo plug*, i.e., a desire to enact a uniform edict admitting of no exceptions, but because the Sages did not wish to rely upon *sefek sefeika* or *rov* when the underlying issues can be investigated and clarified.

The identical rebuttal applies to Rabbi Shoshan's proof as well. The Sages did not enact a broad ordinance eliminating reliance upon *rov* and *sefek sefeika* in all conceivable situations. They enacted particular ordinances for particular cases; *rov* remains definitive in any situation in which there is no specific legislation. Otherwise, *Tosafot* would have no reason to invoke and dismiss the consideration of *lo plug*. *Tosafot*'s understanding of Rashi serves to contradict Rabbi Shoshan's reliance upon Rashi in establishing his point and, in fact, contradicts Rabbi Shoshan's conclusion.

[36] Cf., R. Pinchas ha-Levi Horowitz, renowned as the author of *Hafla'ah*, in his *Netivot la-Shevet*, cited in *Oẓar ha-Poskim*, I, 4:37, sec. 173, who rules that a person alive at the time of a child's conception has credibility to deny that he impregnated an unwed mother with the result that her son may marry that person's female relative.

determining that the possibility of an incestuous relationship need not be considered, the Sages were willing to permit reliance upon another *rov* in order to escape the onus of their original decree. Moreover, whatever the underlying rationale, the prohibition against having "wives in every port" is quite specific and there is no evidence that the edict was intended to encompass every future contingency in which only a far-fetched concern of an incestuous relationship might arise.

The foregoing notwithstanding, the argument advanced in the majority opinion of the Rabbinical District Court of *Ẓefat* recognized that the obligation to investigate underlying facts despite the presence of a *rov* is limited to situations that do not involve undue travail or a significant financial expenditure. If indeed, as the majority asserts, the Sages suspended the reliance upon *rov,* at least before the fact, even when the result is disqualification from entering into any marriage, such an edict was enacted only to avert the possibility of incest. There is no evidence that such an edict was issued in order to prevent the lesser transgression of consorting with a *mamzer*. Consequently, since DNA testing involves both significant inconvenience and a financial burden, DNA testing (or even R. Sa'adia's test described by *Reshash, Bava Batra* 58a) need not be undertaken in order to establish that a person is not a *mamzer* doubtful or even a *mamzer* certain.

III. INHERITANCE

A. DNA to Establish a Right of Inheritance

Identification of a body is necessary not only to permit a widow to remarry but also to distribute a person's estate to the heirs. The Gemara, *Ɣevamot* 107a, records a dictum of Rav Pappa to the effect that evidence sufficient to enable a wife to remarry also suffices to establish death for purposes of inheritance. If DNA evidence is accepted for the purpose of permitting a widow to remarry, it follows that it should also suffice for purposes of inheritance. However, Rambam, *Hilkhot Naḥalot* 7:1, rules that an estate cannot be assigned to heirs other than upon "*ra'ayah berurah*," or "clear evidence" of the death of the ancestor. R. Isaac ben Sheshet, *Teshuvot Rivash*, no. 155, appropriately interprets the term "clear evidence" as excluding the testimony of a single witness and the like. If so, Rambam's ruling contradicts the principle established by Rav Pappa. R. Simon ben Ẓemaḥ Duran, *Tashbaẓ*, I, no. 77, explains that Rambam understood Rav Pappa's dictum as having been rejected in the course of

the ensuing discussion presented in the Gemara.[37] *Tashbaẓ*, I, no. 82, explains that the testimony of a single witness is accepted for the purpose of establishing widowhood because the matter is a *milta de-avida le-igluyei*, i.e., a matter that will eventually become known to everyone. The rationale is that a person will not place himself in a situation in which he will be exposed as a liar; hence, he will not testify untruthfully when it is certain that the falsity of his testimony will be discovered. R. Isaac Elchanan Spektor, *Teshuvot Bet Yiẓḥak*, *Even ha-Ezer*, II, no. 12, secs. 12-13, explains that the credibility of a single witness in such circumstances is not absolute but is based upon the principle of *rov*, i.e., the majority of people will not allow themselves to be caught in a lie.[38] Thus, since the underlying principle is *rov* and since evidence based upon *rov* is insufficient for adjudicating financial matters, a single witness is not sufficient to establish pecuniary rights to an estate.[39]

However, *Teshuvot Noda bi-Yehudah, Even ha-Ezer, Mahadura Kamma*, no. 33, advances the novel view that the talmudic discussion, *Yevamot* 107a, concerning the testimony of a single witness as sufficient for purposes of establishing a widow's capacity to enter into a new marriage is an elucidation of an entirely different principle. According to *Noda bi-Yehudah*, the Gemara is explaining why the hearsay evidence of a single witness is given credence when repeated to the *bet din* by the wife herself. The underlying principle, asserts *Noda bi-Yehudah,* is *ishah daika u-minseva*, i.e., a presumption that a woman will not enter into a new marital relationship unless she has investigated and is fully convinced that her husband is deceased. *Ishah daika u-minseva* is limited to establishment of license to remarry but is not sufficient grounds to commence distribution of an estate. In contrast, asserts *Noda bi-Yehudah*, the personal testimony of a single witness before a *bet din* is accepted on the basis of a different principle, namely, credibility of a single witness with regard to a *milta de-avida le-igluyei*. The latter principle, asserts *Noda bi-Yehudah*, is

[37] See also R. Shlomoh Kluger, *Ḥokhmat Shlomoh*, *Ḥoshen Mishpat* 284:1.

[38] Cf., *infra*, note 65 and accompanying text.

[39] R. Naphtali Zevi Judah Berlin, *Ha'amek Davar*, Numbers 27:8, develops a novel thesis in explaining why a *milta de-avida le-igluyei* or any other form of *giluy milta* is not sufficient for purposes of inheritance. The conventional explanation is that inheritance occurs *nolens volens*, i.e., the estate passes to heirs automatically, and hence, any role played by the *bet din* is only ministerial in nature. *Ha'amek Davar*, however, points to the phrase "and you shall cause his inheritance to pass to his daughter" (Numbers 27:8) which seems to connote that the *bet din* plays an active role in assigning an estate. According to *Ha'amek Davar*, resolution of a dispute regarding an estate is not a mere declaration of fact but a judicial fiat. As such, the standard of evidence is the two-witness rule.

biblical in nature and regarded as absolute rather than as the product of the principle of *rov*. As such, it is sufficient for adjudication of financial matters.

According to *Noda bi-Yehudah*, a single witness to the death of an ancestor is biblically acceptable evidence sufficient to vest title to the estate in the heirs. That is so, according to *Noda bi-Yehudah*, because biblical law extends absolute credibility to a single witness regarding a *avida le-igluyei* which, in turn, is predicated upon the principle of *rov*. On the other hand, the rules of evidence do not allow monetary recovery on the basis of *rov*. Assuming that reliance upon DNA matching is based on the principle of *rov*,[40] *Noda bi-Yehudah* would agree that DNA evidence is not sufficient proof of death for distribution of an inheritance. The question of whether it is possible for a putative heir of a person whose demise has been conclusively established to advance a claim to share in an estate on the basis of DNA matching is more complex.

Among the rules applicable to distribution of an estate is that a doubtful heir cannot disinherit an heir certain in whole or in part. The applicable principle is known as *ein safek moẓi midei vadai* or "the doubtful cannot displace the certain."[41] Accordingly, a person whose relationship to the deceased is uncertain cannot claim a share of the estate to the detriment of known heirs. Persons known to be children of the deceased are heirs certain; the claimant who alleges that he is also a son is unknown and hence an heir doubtful. As such, he has no claim against an heir certain. The issue is whether DNA evidence can establish a claimant's status

[40] See Bleich, "Validity of DNA Evidence (Part 1)," p. 155.

[41] Examples of application of the principle *ein safek moẓ'i midei vadai* includes situations in which two individuals with potential interests in an estate perish in a common disaster, e.g., a widow and her son. If the widow died first, the estate would pass to the son and then to his heirs. If the son died first, the widowed mother's estate would pass to her family. The widow's family definitely survived and are heirs certain but it is doubtful that the son survived the mother with the result that the son and his heirs are heirs doubtful. Heirs doubtful cannot claim against heirs certain.

A similar result will occur if a father and his sole issue, a married daughter, perish in a common disaster. If the father died first, the estate would pass to the daughter and through the daughter to her husband. If the daughter died first, the estate would pass to the father's closest paternal relatives. Those in hereditary succession to the father certainly survived and hence are heirs certain. The daughter's husband is an heir only if the father died before his daughter. Therefore, the husband is only an heir doubtful who cannot claim against heirs certain.

Yet another illustration is the case of a father who dies leaving two children, a son and a hermaphrodite. The son is an heir certain whereas the hermaphrodite is doubtfully a male and doubtfully a female. The hermaphrodite, as an heir doubtful, cannot claim against the son who is an heir certain. See *Shulḥan Arukh*, *Ḥoshen Mishpat* 280:7.

as an heir. Obviously, if DNA evidence is probative on the basis of *umdena*,[42] *tevi'ut ayin*[43] or other proof regarded as absolute, a claimant who presents DNA evidence would be recognized as an heir certain.[44]

However, if DNA evidence is accepted on the basis of the principle of *rov*, a person so identified must also be regarded as an heir certain. By the same token, no blood relationship between the decedent and any male member or members of his family can be established other than by reliance upon a *rov*, namely, *rov be'ilot aḥar ha-ba'al*. Consequently, the claims of other heirs are no more definite than a claim based upon DNA evidence. In each case the claim is predicated upon a *rov*. It might be argued that the claims of the known heirs and the claim of a putative heir based upon DNA evidence, since they are all based on *rov*, are equal in nature.

However, the statement of the *bet din* of Rabbi Woszner, published in *Teḥumin*, IV, 123,[45] contains a ruling to the effect that a person cannot claim a share of an inheritance on the basis of DNA evidence. That ruling flows from recognition that DNA evidence involves invocation of the principle of *rov* together with recognition that application of *rov* is insufficient to displace a person in possession because known heirs are deemed to be in possession. Rabbi Woszner presumably regards the individuals previously known to be heirs as being in possession because of a *ḥazakah* that arises from their presumed relationship to the deceased. Rabbi Woszner similarly rules that a person cannot be excluded from inheritance of an estate on the basis of DNA evidence. Presumably, his reasoning is that all presumptive heirs are regarded as being in possession and

[42] See Bleich, "Validity of DNA Evidence (Part 1)," pp. 162-164.

[43] See Bleich, "Validity of DNA Evidence (Part 2)," pp. 110-127.

[44] R. Zevi Yehudah ben-Ya'akov, *Mishpatekha le-Ya'akov*, V, 136-137, concludes that if DNA constitutes a *siman muvhak be-yoter* it may be used to establish a claim to inheritance.

Rabbi ben-Ya'akov further cites *Teshuvot Avodat ha-Gershuni*, no. 110, who addresses the case of an unknown person residing in a distant locale who claimed to be an heir to an estate. It was known that the deceased had a son who left the family home at a young age. Decades later, when he appeared subsequent to his father's death no one recognized him but two witnesses testified that they could identify him on the basis of his voice. *Avodat ha-Gershuni* did not accept voice recognition as a form of *tevi'ut ayin de-kala* because it could not be confirmed by actual *tevi'ut ayin*. Rabbi ben-Ya'akov infers that voice recognition would be acceptable but for the fact of "contradiction" by virtue of the witnesses' inability to confirm their identification by visual recognition. Rabbi ben-Ya'akov then proceeds to form an analogy between DNA evidence and uncontradicted vocal recognition. The analogy to *tevi'ut ayin de-kala* is either inapt or unnecessary. For a discussion of DNA identification as a form of *tevi'ut ayin* see Bleich, "Validity of DNA Evidence (Part 2)," pp. 119-127.

[45] See *ibid*., pp. 109-110.

the *rov* reflected in DNA evidence is not sufficient to substantiate a financial claim against an adversary who is in possession.

Rabbi Woszner further rules that when it is known that no potentially identifiable heir exists, a person can claim an inheritance on the basis of DNA evidence. In such circumstances, seizure of the estate by a non-heir is of no avail because it is only against possession accompanied by claim of rightful title that *rov* cannot prevail. That ruling also flows from the principle that *rov* is of sufficient weight to substantiate a financial claim when the claim is not advanced to dispossess a person in possession. *Rov* can prevail against seizure of property that would otherwise be *res nullius*.

Rabbi Woszner's ruling with regard to establishing a claim to recognition as an heir on the basis of DNA analysis was impliedly rejected by the Israeli Supreme Rabbinical Court of Appeals. That *bet din* also tangentially addressed another intriguing question.

B. DNA Evidence Contradicted by Eyewitness Testimony

Imagine a situation in which an unknown individual claims to be the long-lost son of a deceased person and hence entitled to inherit the decedent's estate. Assuming that DNA evidence is acceptable for disproving a relationship between a putative heir and a progenitor, and that such evidence is produced. What would be the effect of absence of a DNA match in a situation in which witnesses appear and testify to their personal recognition of the claimant as a previously unknown relative? That issue was addressed tangentially in a decision of a panel of the Israeli Rabbinical Supreme Court of Appeals comprised of Rabbi Eliezer Igra, R. Eliyahu Hisrik and R. David Levanon.[46]

The fact pattern of the case is intriguing. A person, apparently of means, died intestate. A number of cousins claiming to be the sole heirs were awarded the estate. Subsequently, the *bet din* was informed that the deceased had a son who had emigrated to South America several decades earlier. The *bet din* annulled the earlier award and sent an emissary, a former chief rabbi of Uruguay who was proficient in Spanish, to South America to conduct an investigation. That delegate found ample documentary evidence establishing the existence of a hitherto unknown son. He then proceeded to convene a *bet din* in Argentina for the purpose of hearing the testimony of witnesses who had been personally acquainted with the son during his stay in Argentina and also testified that they remembered having attended the *bar mizvah* of the son decades earlier together with

[46] No. 927675/4, 4 Kislev 5777.

the son's parents. One of the witnesses further testified that he himself had been the tutor who prepared the son for the latter's *bar mizvah*. The Rabbinical District Court of Haifa awarded the entire estate to the son, assessed the costs of the investigation as well as court costs against the false claimants, imposed a fine upon them payable to the treasury of the State of Israel and delivered the *bet din* file to the Israeli civil authorities for possible criminal prosecution. The cousins submitted an appeal to the Rabbinical Supreme Court. The appellees' primary argument was that, in the course of the proceedings before the Rabbinical District Court, the parties had agreed to submit to a DNA test and that the putative son would withdraw his claim to the estate if a DNA test failed to show a relationship between the claimant and the deceased. The test involved matching the DNA of the putative son with the DNA of his recognized cousins. The claimant, if he was indeed the son of the decedent, would have been a blood relative of the cousins and consequently that should have been reflected in at least some shared DNA alleles. That test was not performed. The appellants, particularly in light of the appellee's original undertaking, contended that in the absence of a DNA test the award of the estate to the son was improper.

The appeal was dismissed in a two-to-one decision.[47] R. Akiva Hisrik stated succinctly that, in light of eyewitness identification establishing a filial relationship, a DNA test would have been superfluous and, moreover, the *bet din* would have been compelled to ignore any negative result of a DNA test that contradicted the already accepted testimony of witnesses.

In a concurring opinion Rabbi David Levanon entertained the possibility that DNA evidence might be accepted by Halakhah as invariably accurate but finds no need to seek confirmation in the form of DNA matching in light of the testimony presented by the witnesses.[48] In a

[47] The cousins had previously presented a similar claim to an Argentinean court claiming that the decedent was childless. The putative son became aware of those proceedings and opposed the cousins' claim. The Argentinian court ruled in favor of the son. Apparently, the decedent also had property in Israel. After losing their case in Argentina, and recognizing that Israeli secular courts would extend full faith and credit to the judgment of the Argentinian court on the basis of the rule of comity, the cousins bypassed the Israeli probate court and claimed the remaining property by means of a proceeding before a rabbinical court.

[48] Both Rabbi Levanon and Rabbi Hisrik dismissed the claim that the appellant is bound by his agreement to submit to a DNA test because at the time of his undertaking to do so no witnesses had come forward. Consequently, the undertaking to submit to a DNA test was an obligation undertaken in error, particularly since there is no obligation to seek confirmation of a matter to which witnesses are prepared to

dissenting opinion, R. Eliezer Igra rather unconvincingly argued that the agreed-upon test should be conducted and the case remanded to the Rabbinical District Court for further deliberation based upon the totality of evidence.

Both Rabbi Levanon and Rabbi Hisrik accept DNA testing as establishing a *siman muvhak* even though the test does not serve to establish that two DNA fragments come from the same person but involves samples from different individuals that are never exactly identical but are sufficiently similar that they serve to establish that the persons from whom they were taken had a common progenitor and hence are blood relatives. This is in contradiction to the decision of Rabbi Woszner who maintained that comparison of two DNA samples taken from the same person establishes "a *siman karov le-muvhak*" while comparison of DNA with a DNA sample taken from a relative can be no better than a *siman benoni*.[49]

Rabbi Hisrik found grounds to rule that DNA evidence is to be accepted even if contradicted by witnesses who testify to the existence of a filial relationship. The Gemara, *Bava Meẓi'a* 28a, declares that, if two individuals claim a lost object and one provides identificatory marks while the other brings witnesses testifying to his ownership, the lost object is to

attest. Moreover, the undertaking was one-sided in nature in the sense that the son agreed to forfeit his claim if DNA analysis were to fail to establish a familial relationship but that the cousins' claim might go forward even subsequent to confirmation of the son's claim on the basis of DNA comparison. If so, argued Rabbi Levanon, the son should not be compelled to undergo a test that is of no benefit to his adversary. Rabbi Hisrik added that an undertaking to perform an act that is not coupled with an assumption of a financial liability is an unenforceable *kinyan etan* comparable to a contract for personal services.

[49] See Bleich, "Validity of DNA Evidence (Part 2)", p. 109. DNA evidence is strongest in establishing that two separate samples come from the same person because in such instances there is a total match between all examined alleles. Accordingly, matching a DNA sample taken from a corpse with a DNA sample reliably established as having been derived from the same person during the course of his lifetime, e.g., DNA recovered from a toothbrush or the like, is the strongest type of DNA evidence. Matching the DNA of an otherwise unidentified person with that of a parent or other relative will never yield a total match but, when a sufficient number of alleles match, the statistical probability of a relationship—and hence of the identify of an otherwise unidentified body—can be established with an extremely high degree of statistical probability. DNA identification based upon matching a sample of the unidentified person's own DNA with DNA of known provenance is described by Rabbi Wozsner's *bet din* somewhat enigmatically as "more than an intermediate identificatory mark and close to a *siman muvhak*." In a rather imprecise manner, Rabbi Woszner's *bet din* stated that the DNA match should not be relied upon unless there are "additional factors" present as well. Identification on the basis of comparison with DNA of even parents or children is categorized as "no more than an intermediate identificatory mark."

be awarded to the person whose claim is supported by witnesses. Rashi, *ad locum*, seems to indicate that this ruling is valid even if *simanim* are a biblically recognized form of evidence. However, R. Shlomoh Luria, *Ḥokhmat Shlomoh*, *Ḥoshen Mishpat* 267:8, understands Rashi's comment differently and concludes that, if *simanim* are a biblically recognized form of proof, *simanim* are of equal weight to the testimony of witnesses and when contradictory evidence in the form of *simanim* and testimony of witnesses is presented no decision can be made. However, *Shakh*, *Ḥoshen Mishpat* 267:7, rejects the position of *Ḥokhmat Shlomoh*. *Teshuvot R. Akiva Eger*, no. 107 and *Teshuvot Ẓemaḥ Ẓedek*, *Even ha-Ezer*, no. 86, follow the position of *Shakh*.

Quite obviously, the various *batei din* and other authorities who regard DNA to be acceptable evidence solely on the basis of *rov* would maintain that the testimony of witnesses would prevail over *rov*.[50]

C. DNA Evidence to Disprove Heirship

Another issue mentioned *en passent* by Rabbi Levanon but left undiscussed by him is whether absence of any identical allele is halakhically acceptable as disproof of a familial relationship. The genetic science upon which DNA is based is statistical in nature. The reason that DNA cannot establish identity with a hundred percent scientific certainty is primarily because mutations do occur in genetic material with a high degree of regularity. The chances of multiple identical mutations occurring in a manner that would establish a false positive identification are virtually nil. On the other hand, the chance of a series of mutations occurring that would change an allele in a manner that would make it impossible to recognize it as having the same source as an allele in the DNA of a relative seems somewhat more likely. This writer is unaware of any scientific study describing false negatives in DNA testing.[51] In the case before the Rabbinical Supreme Court, that issue would have arisen had DNA analysis been undertaken but failed to disclose a relationship between the son and his cousins. The implication to be drawn would have been that the "son" was not related to the deceased.

[50] See Bleich, "Validity of DNA Evidence (Part 1)," pp. 142 and 153ff.

[51] Rabbi Levanon added that were DNA to be 100% accurate it would be acceptable even if contradicted by eyewitnesses. *Tosafot, Yevamot* 88a, s.v. *ve-ata gavra*, declare that witnesses have no credibility to contradict "that which is seen and known by everyone." Such testimony is to be peremptorily dismissed as false. Cf., *Netivot ha-Mishpat* 46:7.

IV. COMPELLING CONTRIUBTION OF A DNA SAMPLE FOR PURPOSES OF INHERITANCE

Assuming that DNA evidence is sufficient to establish identity for purposes of establishing a claim of inheritance, Rabbi Ben-Ya'akov, *Teḥumin*, XXII, 425-426, questions whether a putative heir can demand that a known heir provide a DNA sample in order for the former to establish his own relationship to the deceased.[52] The hypothetical situation is quite simple: A person is known to be the son of the decedent and that relationship is unchallenged. Another claimant appears and protests that he is also a son of the deceased and hence an equal heir. Short of disinterring the body, there is no way of comparing the claimant's DNA with that of the deceased. Comparison of the putative son's DNA with the DNA of the acknowledged heir will serve either to confirm or to disprove the existence of a fraternal relationship between them.

Rabbi Ben-Ya'akov cites rabbinic sources justifying a course of action that in modern legal parlance would be called "discovery." Rambam, *Hilkhot To'en ve-Nit'an* 5:7, rules that a litigant who claims that his adversary is in possession of documents that would support the former's claim is entitled to demand that such documents be produced. *Teshuvot ha-Rosh*, *klal* 68, chap. 25, disagrees and rules that no such demand can be enforced unless the *bet din* has grounds to assume that those documents will indeed support the litigant's claim. Alternatively, "the adversary should show the document to the judges and they will determine if the alleged benefit claimed in this matter is to be found in the document." Rosh notes that it is not at all unreasonable for a person to refuse to produce financial documents in response to an allegation supported only by "mere words" for "a person does not wish to make himself appear wealthy, that everyone know his wealth and fortune."

Sema, *Ḥoshen Mishpat* 17:14, adopts an intermediate position in ruling that a person who claims that the documents demanded of him do not support his adversary's claim cannot be compelled to produce them. Nevertheless, if his response is that he does not know whether he possesses documents containing such information or that he cannot determine whether or not those documents support his adversary's claim, the *bet din* may compel him to conduct a search for such documents, to deliver documents that support such claim and, if he does not comprehend the import of those documents, to deliver them to the *bet din* for

[52] See also Rabbi ben-Ya'akov, *Mishpatekha le-Ya'akov*, V, 141-143.

scrutiny. R. Jonathan Eybeschutz, *Urim ve-Tumim* 16:3, rules that a litigant can compel delivery only of documents whose authenticity he challenges in order to examine them for forgery. However, he cannot compel discovery of documents whose authenticity he concedes but which he demands for examination in order to scrutinize them for possible technical flaws.

Rabbi Ben-Ya'akov asserts that, assuming that the DNA evidence is sufficient to substantiate a claim, such a sample is no different than a document and, according to Rambam, may be demanded. Rabbi Ben-Ya'akov further suggests that a DNA sample may be demanded even according to Rosh. He argues that Rosh's objection to compelling discovery applies only to financial documents that may contain information reflecting upon a person's fortune but does not apply to a DNA sample used only for purposes of identification. Rabbi Ben-Ya'akov assumes that a person enjoys a right of privacy regarding the extent of his financial worth but has no similar right with regard to DNA samples designed solely to resolve a disputed familial relationship. That point may not be entirely correct in light of the fact that much significant medical and genetic information that is personal in nature can be gleaned from DNA samples. Privacy of medical and genetic information certainly warrants no less respect than privacy of financial information. *Teshuvot ha-Rosh* does, however, acknowledge that the *bet din* may examine financial documents *in camera*. The same should be true of DNA evidence as well.

Rabbi Ben-Ya'akov would apparently concede that an invasive procedure, such as a blood test, is not at all comparable to delivery of financial documents and therefore cannot be demanded even according to Rambam. Although Rambam does not recognize a right of privacy that takes precedence over another person's possible financial interests, Rambam would presumably agree that the right of bodily integrity is not subservient to an otherwise unsupported countervailing claim. However, in most instances a DNA sample can be obtained without violation of bodily integrity by examining personal items that had been handled by the deceased.

Based upon those assumptions it may readily be concluded that a *bet din* may demand that DNA samples obtainable without violation of bodily integrity be made available for confidential examination by the *bet din*, with the assurance that personal information revealed by examination of the DNA sample having no bearing upon the proceedings be held in confidence by the *bet din*.

V. IDENTITY AS A JEW

In the wake of the vast number of Russian immigrants admitted to Israel under the Law of Return, Israeli rabbinical courts were taxed with verifying the status of many of those immigrants particularly because they arrived with little or no evidence of association with a Jewish community. One available method of proving one's identity as a Jew is establishing the existence of a biological relationship with a maternal relative whose status has already been verified. Unfortunately, in a large number of cases involving Russian immigrants documentary evidence of such a relationship is not available.

Not long ago the Rabbinical District Court of Haifa addressed one such case in a decision authored by R. Yitzchak Zevi Ushinsky.[53] A prospective bride already in the fifth month of pregnancy applied for a marriage license. The bride claimed to be the daughter of a woman recognized as a Jewess but failed to produce any written evidence or oral testimony to support the existence of such a relationship. The question before the *bet din* was whether marriage could be permitted on the basis of a DNA test establishing a maternal-filial relationship.

Rabbi Ushinsky also addressed that problem in *Teḥumin*, XXXV (5775), 211-212. Citing the earlier discussed declaration of R. Samuel ha-Levi Woszner's *bet din* regarding the reliability of DNA matching,[54] Rabbi Ushinsky categorizes that statement as rejecting the reliability of DNA evidence for all matters requiring formal proof but as accepting the results of DNA testing as sufficient for matters that require a lower standard of evidence. There are matters that are in the category of a *milta de- avida le-igluyei* that require evidence only in the nature of *giluy milta*, i.e., establishing a matter that would become evident in the course of events even without testimony. Such matters can be substantiated on the basis of the testimony of relatives, disqualified witnesses, and even a single witness. Those matters include confirming the death of a close relative for purposes of observing the laws of mourning,[55] establishing the identity of a bride,[56] establishing the identities of a husband and wife in order to execute a bill of divorce[57] or of a brother-in-law and sister-in-law in order to allow the sister-in-law to remarry subsequent to *ḥalizah,*[58] and establishing

[53] No. 954915-1, 20 Elul 5773.
[54] See *supra*, note 45 and accompanying text.
[55] See *Shulḥan Arukh*, *Yoreh De'ah* 397:1.
[56] See *Be'er Heitev*, *Even ha-Ezer* 42:2.
[57] See *Shulḥan Arukh*, *Even ha-Ezer* 120:3.
[58] See *Shulḥan Arukh*, *Even ha-Ezer* 157:2 and 169:24.

the identity of persons named in financial instruments.[59] Rabbi Ushinsky asserts that an individual's identification of a woman as his or her mother is a matter of *ġiluy milta* and hence, confirmation of Jewish identity can be established on the basis of DNA evidence demonstrating a mother-daughter relationship.

Under the given circumstances, this writer finds it difficult to categorize the matter under discussion as a *milta de-avida le-igluyei*. The general rule is that a person declaring himself to be a Jew has credibility to do so. Ritva and *Nimmukei Yosef*, *Yevamot* 47a, explain that such credibility is based upon the principle of *milta de-avida le-igluyei* and hence does not require further confirmation. However, *Teshuvot Rivash*, no. 254, and *Noda bi-Yehudah*, *Even ha-Ezer*, *Mahadura Kamma*, no. 27, define a *milta de-avida le- igluyei* as a matter that is likely to become known with certainty in the near future even in the absence of presently available supporting testimony. The principle is based upon a psychological assessment that a person will not lie if he faces imminent exposure of his duplicity. That is not the case with regard to a non-Jewish Russian immigrant, whose deception in claiming to be a Jew is unlikely to be exposed imminently, if at all. R. Moshe Mordecai Farbstein, cited in *Teḥumin*, XII, (5751), 40, and R. Ovadiah Yosef, *Teshuvot Yabi'a Omer*, VII, *Even ha-Ezer*, no. 1, sec. 4, state that the principle cannot be applied to Russian immigrants since many of those immigrants stem from locales in which there are few Jews. Consequently, it would be difficult to find anyone capable of rebutting such a claim.[60] Strangely enough, those arguments were advanced by Rabbi Ushinsky himself in an earlier-cited decision of the Rabbinical District Court of Haifa of which Rabbi Ushinsky was the author.[61]

Moreover, other early-day authorities advance quite different considerations in support of the rule extending self-credibility to a person claiming to be a Jew.[62] It must be assumed that since those authorities posit a

[59] See *Shulḥan Arukh*, *Ḥoshen Mishpat* 49:1.

[60] Rabbi Farbstein also rejects the applicability of *milta de-avida le-igluyei* with regard to Russian immigrants because, even if witnesses were to testify that the immigrant was known to be a non-Jew, their testimony does not establish the immigrant as a liar. He may readily and believably claim that while yet in the U.S.S.R. he concealed his identity as a Jew because of discrimination and fear of persecution. See *Teḥumin*, xii (5741), 38-41.

[61] No. 954915/1, 21 Elul 5753.

[62] See *Tosafot*, *Yevamot* 47a, s.v. *be-muḥzak* and Rambam, *Hilkhot Issurei Bi'ah* 13:9. *Tosafot* explain that the majority of persons claiming to be Jews are indeed Jews and Rambam declares that such credibility is predicated upon a *ḥezkat hanhagah, viz.*, comportment as a Jew as manifest in the observance of *mizvot*.

more circumscribed degree of justification they reject the view of Ritva and *Nimmukei Yosef* who maintain that *milta de-avida le-igluyei* is a sufficient basis to justify self-credibility in establishing identify as a Jew.

In his contribution to *Teḥumin* Rabbi Ushinsky cites *Bet Shmu'el*, *Even ha-Ezer* 2:2, who follows Rashi and Ramah in ruling that testimony of a single witness is insufficient with regard to questions pertaining to matters of lineage. However, *Bet Mosheh*, cited in *Oẓar ha-Poskim* I, 2:2, sec. 4, disagrees with *Bet Shmu'el* and rules that a single witness is sufficient. *Be'er Heitev*, *Even ha-Ezer* 2:4, cites a number of authorities who maintain that a person of unknown lineage who declares himself to be a Jew must produce sufficiently acceptable evidence. Rabbi Ushinsky infers that *Bet Mosheh* would disagree with *Bet Shmu'el* with regard to the latter matter as well.

In his article published in *Teḥumin*, Rabbi Ushinsky asserts that, even according to *Bet Shmu'el* who rules that a single witness is insufficient to establish status as a Jew, circumstantial evidence "close to certainty" is sufficient for that purpose. Rabbi Ushinsky regards matching DNA as proof "close to certainty" of a Jewish relationship between a woman and her putative Jewish mother.[63]

VI. IDENTITY AS A KOHEN

Few people heretofore not recognized in their communities as *kohanim* would seek to establish their identity as members of the priestly class.[64] But instances of persons presumed to be *kohanim* seeking to marry divorcées are rampant. Generally, those endeavors involve an attempt to show that the mother of a person heretofore presumed to be a *kohen* was disqualified from marrying a *kohen* with the result that her progeny are *ḥalalim*, or disqualified *kohanim*, not subject to such marital restrictions.

A more direct, but more difficult, way to achieve the same result is to demonstrate that the presumption that the individual's father was a *kohen*

[63] Not surprisingly, the State of Israel accepts DNA evidence as proof of familial relationship for purposes of identification as a Jew, eligibility for citizenship and the privileges of the Law of Return.

[64] In one such case brought before the Jerusalem *Bet Din le-Birur ha-Yahadut*, IV, 319-320, the petitioner, born three months after his mother's marriage to a *kohen*, sought a share in the estate of his putative father and to be identified as a *kohen* as well. Citing *Ḥelkat Meḥokek*, *Even ha-Ezer* 3:12, the *bet din* ruled, that, as a stringency applying to the priesthood, an ordinary *rov* is not sufficient to establish identity as a *kohen*.

is predicated upon an error. Such a finding would result if it could be shown that the putative father, in reality, is not the biological father.

R. Moshe Feinstein, *Iggerot Mosheh*, *Even ha-Ezer*, IV, no. 12, rules that a person who claims that his mother informed him that she was disqualified from marrying a *kohen*—with the result that her son is a *ḥalal*—may marry a divorcée provided that the son has absolute faith in the credibility of his mother. The same would be the case if the mother confides to her son that he is the issue of an adulterous relationship and hence the son could not possibly be a *kohen*. In the eyes of a *bet din* a wife has no credibility to establish her adultery or to render her son a *mamzer*. Nevertheless, *Iggerot Mosheh* advances the novel view that, outside of a judicial framework, when absolutely convinced of an informant's probity, a person may act upon his own subjective reliance on another person's truthfulness.

Although he has no directly supporting proof, *Iggerot Mosheh* assumes that it is precisely this consideration that underlies the rule that, in certain circumstances, the testimony of even a non-Jewish artisan or member of a profession may be relied upon. Ostensibly, the underlying rationale is a presumption in the nature of the *ḥazakah* to the effect that *uman lo mara umnateih*, i.e., a person will not compromise his professional integrity and reputation. It is generally presumed that the *ḥazakah* is the product of a person's concern for financial consequences or professional reputation.[65] *Iggerot Mosheh* maintains that such presumption is not strong enough to establish a *ḥazakah* that would give rise to the rule. However, contends *Iggerot Mosheh*, the awareness by others of that motivating consideration does serve to create psychological reliance and establishes a sense of trust on their part. Those persons may then act upon their own subjective belief in the veracity of the professional.[66] In effect, *Iggerot Mosheh* declares that *uman lo mara umnateih* is not an ancillary factor conferring credibility upon the testimony of an otherwise disqualified witness but a principle that empowers a person to act upon his own informed subjective belief in matters of religious compunction.

Rabbi Asher Weiss, *Teshuvot Minḥat Asher*, III, no. 87, sec. 5, correctly observes that subjective belief may be sufficient for reliance on the part of the person having such conviction but not for others who do not

[65] As discussed earlier, R. Isaac Elchanan Spektor, *Teshuvot Bet Yiẓḥak*, *Even ha-Ezer*, II, no. 12, secs. 12-13, maintains that the *ḥazakah* is actually a *rov*, i.e., the majority of people will not present false evidence of such nature because of a concern for financial consequences and/or professional standing. See *supra*, note 38 and accompanying text.

[66] See *Iggerot Mosheh, Yoreh De'ah*, I, no. 54.

share that trust. The son may have absolute faith in his mother's truthfulness but there is no reason for the son's prospective wife to place similar faith in her future mother-in-law's confession. Prohibitions forbidding a *kohen* to enter into prohibited marital alliances are equally forbidden to the woman with whom he might consort.[67] Hence marriage under such circumstances is effectively precluded.

Absent credible witnesses, the most direct way of disproving paternity is DNA analysis. The issue is whether DNA evidence may be relied upon to "dekohenize" a son and make it permissible for him to marry a divorcée. It must be presumed that DNA evidence does not suffice in penal matters in which the two-witness rule must be applied to the exclusion of DNA evidence, that is based upon *rov*, *simanim,* or *tevi'ut ayin*. The selfsame two-witness rule also applies to matters pertaining to a *davar she-be-ervah*, i.e., to certain conjugal matters defined by *Tosafot*, *Gittin* 2b, as including "marriage, divorce and adultery to render a wife forbidden to her husband." It must be presumed that *Tosafot* pointedly omit any reference to either *mamzerut*[68] or to disqualification as a *kohen*. *Kessef Mishneh*, *Hilkhot Sanhedrin* 16:6, followed by R. Chaim Ozer Grodzinski, *Teshuvot Aḥi'ezer*, I, no. 5, rules explicitly that matters pertaining to status as a *kohen* are treated as ordinary halakhic matters subject to a single-witness rule. *Tosafot* presumably understand the term "*davar she-be-ervah*" as connoting only matters pertaining to incest and adultery to the exclusion of sexual matters of lesser severity. However, *Pnei Yehoshu'a*, *Kiddushin*, *Kuntres Aḥaron*, sec. 91, disagrees and regards disqualification as a *kohen* to be subject to the two-witness rule.[69]

Rabbi Weiss argues that the controversy with regard to whether disqualification as a *kohen* is subject to the two-witness rule is limited to testimony regarding a matter that is literally a *davar she-be-ervah*, i.e., a conjugal matter, e.g., the status of the mother as a potential consort of a *kohen*, but not to matters pertaining solely to genealogical identity of her son, e.g., disqualification of the father as a *kohen*. Issues of genealogical status, he argues, are not sexual matters and hence are not subject to the two-witness rule even according to *Pnei Yehoshu'a*.

However, that analysis does not affect the hypothetical question here presented. The DNA evidence that refutes the presumption that a *kohen* is the father of a particular child also establishes that the child is a

[67] Cf., however, the opinion of R. Eliezer of Metz, cited by *Tosafot*, *Nedarim* 90b, s.v. *hayu*, who maintains that it is only the *kohen* who is subject to such prohibitions.
[68] Cf., however, *Teshuvot R. Akiva Eger*, no. 100.
[69] Cf., *Or Sameaḥ*, *Hilkhot Sanhedrin* 16:6.

mamzer. The authorities who maintain that the two-witness rule applies to disqualification as a *kohen* also maintain the same view with regard to status as a *mamzer* since a *mamzer* is forbidden to enter into a sexual relationship with a person of legitimate birth. If a person cannot be disqualified as a *kohen* other than by concomitantly establishing that he is a *mamzer*, the matter hinges upon a matter of conjugality and, consequently, according to *Pnei Yehoshu'a*, the two-witness rule should apply.

The situation presented to Rabbi Weiss was significantly different. The matter brought to his attention did not allege an adulterous union. The mother claimed that her husband was infertile and that her pregnancy was a result of artificial insemination. Many authorities maintain that a child born of artificial insemination involving a donor is not a *mamzer*.[70] Nevertheless, assuming that the principle of *rov be'ilot* does not pertain in situations of male infertility,[71] the husband is not to be

[70] See Abraham S. Abraham, *Nishmat Avraham, Even ha-Ezer* 1:1 note 4, sec. 2, and Fred Rosner "Artificial Insemination in Jewish Law," *Jewish Bioethics,* ed. Fred Rosner and J. David Bleich, augmented edition (Hoboken, New Jersey, 2000), pp. 129-130.

[71] It is not to be assumed that a husband refrains from intercourse with his wife while she undergoes artificial insemination. Nevertheless, it seems to this writer that when it has been medically established that a husband cannot possibly father children, e.g., he produces no sperm whatsoever, the principle of *rov be'ilot* cannot be applied.

However in many cases involving AID the husband suffers from low or even moderate male infertility, i.e., the husband produces some sperm but has been unsuccessful in impregnating his wife. Conception occurs upon penetration of a single ovum by a single sperm. Normally, well over a hundred million sperm enter the vagina with each ejaculation. The overwhelming majority of those sperm are destroyed with the result that few survive to enter the fallopian tube where conception occurs. The chances of a single sperm making contact with and fertilizing the single ovum present in the fallopian tube are even lower. The greater the number of sperm present in the ejaculate, the higher the probability of achieving pregnancy. In instances of low or moderate male infertility the statistical probability of pregnancy is low but such a result is not at all impossible. Consequently, if the couple engage in intercourse during the woman's fertile period there can be genuine doubt with regard to whether the husband or the donor is the father of the conceptus.

The few authorities who regard the child born of AID to be a *mamzer* do not discuss the possibility that the child is a *mamzer* doubtful because of the husband's access. The husband certainly has opportunity for multiple acts of coitus while AID is typically limited to a single insemination per reproductive cycle. If the husband's ejaculates are combined it is even possible that, in the aggregate, the husband has provided more sperm than the donor. But even if that is not the case, it is likely that *rov be'ilot* should be understood as denoting a majority of coital acts likely to culminate in pregnancy, rather than as the majority of sperm entering the vagina, with the result that, in instances of AID, the *rov* is not applicable. The result should be a *safek* with regard to the status of the child according to the authorities who maintain that a child born to a married woman by means of AID is a *mamzer*.

regarded as the father and hence the child cannot be a *kohen*. It is only in a situation of that nature, i.e., a situation in which a child can be "dekohenized" without alleging an improper conjugal relationship, in which it might be argued that *Pnei Yehoshu'a*'s opinion regarding the applicability of the two-witness rule to disqualification of a *kohen* does not pertain.

In a decision of the Jerusalem *Bet Din le-Birur ha-Yahadut*, V, 85, R. David Levanon contends that in situations in which an unwed mother has consorted with both a *kohen* and with a non-*kohen* and those facts are acknowledged by both parties, DNA can establish priestly lineage, again on the basis of the principle of *rov* inherent in DNA matching. Similarly, *rov* as represented by DNA evidence can establish paternity for purposes of levirate obligations even when it is known that the woman has had multiple sexual partners.[72] However, citing *Ḥelkat Meḥokek*, *Even ha-Ezer* 3:12, the Jerusalem *Bet Din le-Birur ha-Yahadut*, IV, 319-320, ruled that a single *rov* is not sufficient to establish identity as a *kohen*.

Although, according to the authorities who do not regard a child born of AID to be a *mamzer,* the result should be that, when the husband is a *kohen* and suffers from low or moderate infertility but engages in normal marital intercourse with his wife, a child born pursuant to AID should have the status of a *safek kohen,* or *kohen* doubtful, and consequently be forbidden to marry a divorcée. In such situations, DNA evidence showing that the husband is not the father would result in contradictory *rov*s, *viz.,* the *rov* established by DNA versus a contradictory *rov* in the form of *rov be'ilot.*

[72] In cases of fornication a single *rov* is generally not sufficient to establish status that flows from paternal identity, particularly as a *kohen*. Accordingly, two parallel *rov*s are required, e.g., a city in which neither intercourse between the woman and one of the male inhabitants nor between her and an itinerant traveler would have a negative effect upon the legitimacy of her offspring. Rabbi Levanon maintains that that the requirement for a double *rov* applies only to a *rubba de-ita kaman, viz.,* a *rov* employed to determine who among a group of people served as the mother's consort because of the possibility that the paramour visited the mother rather than vice versa. If intercourse occurred in a context in which the woman was *kavu'a,* i.e., in an "established" place, meaning that the paramour visits the woman rather than the reverse, *rov* does not apply. That rule, contends Rabbi Levanon, does not apply to a *rubba de-leta kaman*, *viz.,* an abstract *rov* which serves to establish a general principle, in the present case the reliability of DNA testing.