

RESPONSA IN
THE JEWISH
TRADITION

A TEXT PACKET FOR ADULT EDUCATION
FALL 2022 - SPRING 2023

Streaming:

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Class Dates:

October	27
December	15
January	26
March	2

Blessing for Study:

בְּרוּךְ אַתָּה ה' אֱלֹהֵינוּ מֶלֶךְ הָעוֹלָם, אֲשֶׁר קִדְּשָׁנוּ בְּמִצְוֹתָיו
וְצִוָּנוּ לְעֲסוֹק בְּדִבְרֵי תוֹרָה.

Barukh Atah A' Elokeinu Melekh Ha-Olam Asher Kidshanu B'mitzvotav v'Tzivanu

La'asok b'Divrei Torah.

Blessed are You, Eternal our God, who hallows us with
commandments and commands us to busy ourselves with
words of Torah.

Important Elements of, and Stages in, the Development of Halakhah—הלכה (Jewish Law):

- **Torah** (תורה): The first and most important. The Torah, which was given by God to Moses, records not only the history of the Children of Israel, but also begins to describe to us how we are to fulfill God's expectations. The system of Mitzvot—מצוות (the Commandments) that govern our behavior is established thereby.
- **Mishnah** (משנה): The second layer comes into existence as the Rabbis discover that the Torah is not perfectly clear in describing exactly how to perform the various Mitzvot. The Mishnah is the beginning of Torah Shebe'al Peh—תורה שבעל פה (Oral Torah), called that as it was originally passed orally from Teacher to Student. Rabbi Judah Ha-Nasi redacts (edits) the Mishnah into a written text in approximately 220 CE.
- **Talmud** (תלמוד): The third layer comes into existence as the Mishnah itself does not always give a sufficiently clear answer as to how we are to perform the Mitzvot. The Talmud is made up of two parts: the Mishnah and the Gemara (גמרא). There are two distinct versions of the Talmud—the Jerusalem Talmud (circa 450 CE) and the Babylonian Talmud (circa 550). The Babylonian Talmud, or Bavli is considered authoritative as it was written later.
- **Mishneh Torah** (משנה תורה): This was a text compiled by Maimonides (Rabbi Moshe ben Maimon) in the 12th Century.

Maimonides, like some of his contemporaries, was inspired to collate this text (the name itself can mean either ‘The Teachings of the Torah,’ or, ‘Second Torah’) from existing texts because of the deficiencies of the Talmud.¹ The Talmud records a wide variety of opinions and thus still frequently leaves unclear how the Mitzvot are to be performed. In addition, the Talmud lacks a clear, concise organization. Maimonides gathered all of the Mitzvot pertaining to a particular topic into discrete sections so that someone could quickly look up how to perform a particular Mitzvah, rather than having to know it all themselves, or having to seek out a Rabbi who might issue an individual ruling.

- **Arba’a Turim** (ארבעה טורים): Written by Rabbi Jacob ben Asher (known as the *Ba’al Ha-Turim*) in the 13th Century, the author sought to improve on the Mishneh Torah. Instead of including ALL of the Mitzvot as Maimonides had, ben Asher focused his work solely on those Mitzvot that might be performed now—that is to say at a time when the Temple (and all of the sacrifices associated with it) are no longer extant.
 - Ben Asher’s other key innovation was in organizing his subject by dividing the Halakhah into Four Turim—Columns (hence the name Arba’a Turim—the Four Columns):

¹ Mishneh Torah is also referred to as *Yad Ha-Hazakah* (יד החזקה—The Outstretched Arm), the name is also a pun, as it is divided into 14 (יד) sections.

- **Orakh Hayyim** (אורח חיים): Laws pertaining to the observance of Shabbat and the Holidays, synagogues, and prayer.
 - **Yoreh De'ah** (יורה דעה): Laws pertaining to miscellaneous topics, such as Kashrut, and the like.
 - **Even Ha'ezer** (אבן העזר): Laws pertaining to marriage and divorce.
 - **Hoshen Mishpat** (חושן משפט): Laws pertaining to financial affairs and legal procedures.
- **Shulkhan Arukh** (שלחן ערוך): Written by Joseph Caro in the 16th Century, and meant to be the clearest possible explanation for how the Mitzvot are to be performed. Caro used the same structure as Rabbi Jacob ben Asher, thus standardizing the Four Columns as the way Halakhah is organized. Caro was writing for a Sephardic audience, but his work was later treated with a gloss by Moses Isserlis (approximately 50 years later), which adapted the work for Ashkenazi Jews.²

Responsa Literature:

In essence Responsa are a continuation of the endeavor that started with the questions first addressed by the Mishnah: How do we perform specific Mitzvot? The first identifiable Responsa emerge during Talmudic times, but the body of literature grows exponentially in the

² The title of Caro's book, Shulkhan Arukh, means, "The Set Table." In a bit of linguistic wordplay, Isserlis called his gloss the "Mappa (Table-Cloth)."

later half of the First Millennium as the Jewish Community spreads far and wide across Europe and the Levant. As Communities diversify and emerge farther and farther away from the traditional seats of learning, more questions about proper behavior arise.

The process begins when an Individual or a Community sends a She'elah—שאלה (A Question) about a particular practice or observance to a Posek—פוסק (a Recognized Rabbinic Authority). The Posek then researches the Question. In formulating an answer a Posek will take into account what has been written in Rabbinic Literature, as well as what other Poskim (pl. of Posek) have written. Once the Posek arrives at a satisfactory conclusion, he will issue a Teshuvah—תשובת (an Answer). With the difficulties of travel, and/or the reliability of mail, in times past Individuals or Communities might have had to wait many years for a Teshuvah to arrive. With the advent of technology, today many She'elot are answered quickly.

A particular Teshuvah is generally only binding on the Individual or Community that sent the She'elah; differing Rabbis from differing communities or traditions can, and do, give different answers. Individual Poskim of great renown, however, end up carrying a great deal of weight with a number of different communities, and their rulings eventually take on the trappings of authoritative Halakhah. Such Poskim will often have their Teshuvot (pl. of Teshuvah) published in collections, which are still organized according to the Four Columns first laid down by Rabbi Jacob ben Asher in the 13th Century.

Responsa in non-Orthodox Judaism:

Conservative Judaism: Since its inception the Conservative Movement has prided itself on being a “Halakhic Movement.” That is to say, though Conservative Judaism may deviate from the practices of Orthodox Judaism, it has sought to root any such deviations in Tradition. New or different practices are therefore carefully rooted in a thorough understanding of Jewish Law.

Since 1927 the Rabbinical Assembly (the Rabbinic body of the Conservative Movement) has maintained the Committee on Jewish Law and Standards (CJLS), whose mandate is to issue Teshuvot clearly elucidating Conservative Practice, and how such practice is based in Halakhah. In theory, at least, these Teshuvot are binding upon those who consider themselves Conservative Jews. The current Chair of the Committee is Rabbi Elliot Dorff. If you would like more information about the Committee on Jewish Law and Standards, please visit: <https://www.rabbinicalassembly.org/jewish-law/committee-jewish-law-and-standards>. There you can find a number of different Teshuvot that have been issued over the years.

Reform Judaism: Reform Judaism has never sought to identify itself as a Halakhic Movement. In fact, from the time of the Declaration of Principles (also known as the Pittsburgh Platform—1887), Reform Judaism sought to differentiate how and why it eschewed much of the prescriptive nature of Halakhah.

At the same time, since 1906 the Central Conference of America Rabbis (the Rabbinic Body of the Reform Movement) has maintained a Responsa Committee. In keeping with the Talmudic concept of *Dina de Malkhuta Dina*—דינא דמלכותא דינא (The Law of the Land is the Law) this committee generally does not issue Teshuvot on areas covered by secular law, rather only on those topics of Religious Practice, or where secular law might intersect with Religious Practice. Such rulings are not thought to be, nor accepted as, binding upon Reform Jews. Rather, Reform Judaism holds to the dictum first put forth by Rabbi Mordecai Kaplan, “Halakhah has a VOTE, but not a VETO.” That is to say Halakhah should offer us guidance and wisdom but we do not accept it as binding on our behavior. The current Chair of the Committee is Rabbi Dr. Joan Friedman. If you would like more information about the CCAR Responsa Committee, please visit: <https://www.ccarnet.org/rabbinic-voice/reform-responsa/>. There you can find a number of different Teshuvot that have been issued over the years.

A Note About Included Texts:

Where possible, I have tried to indicate my sources. Light editing has been done for readability and consistency of terms, but other language—including that which some may feel is dated or inappropriate—has been retained.

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The Earth Revolving Around the Sun³

She'elah

Does the Earth revolve around the Sun or does the Sun go around the Earth?

(Lawrence Fleck, Brooklyn, NY)

Teshuvah

Modern science has proven that the Earth revolves around the Sun. The new authoritative *Great World Atlas* (Readers Digest) states the following: The Earth is 92,900,000 miles from the Sun and in its yearly orbit around the Sun it travels at a speed of 66,600 miles per hour. The planets of the Solar System not only travel around the Sun in the same direction they also all lie in practically the same plane.

Now, the question arises, if this is so how do we explain the Rambam's views, that the planet Earth is the center of the Solar System?⁴

It is very difficult to understand astronomy in our Torah, for it is interspersed with spiritual and Kabbalistic meanings. Rabeinu Caro points this out in his Kesef Mishneh explanation of the Rambam. He explains that according to the Gemara,⁵

“There are seven firmaments; *Wilson*, *Rakia*, *Shekalim*, *Zebul*, *Ma'on*, *Makon*, and *Araboth*. *Wilson* serves no purpose except that it enters in the morning and goes forth in the evening. (Tosefot explains that *Wilson* produces the light of the day and when it withdraws at night, darkness prevails.)

³ Originally published in, *Responsa of Modern Judaism*, Rabbi Sholom Klass, 1965.

⁴ *Mishneh Torah* Yidsodai Ha-Torah 3:1.

⁵ Haggigah 12b.

“*Rakia* is the one in which the Sun, Moon, stars and constellations are set. *Shekalim* is the one in which millstones stand and grind manna for the righteous. *Zebul* is the one in which the heavenly Jerusalem and the Temple and the Altar are built and the great prince (Michael) stands and offers up therein an offering. *Ma'on* is the one in which there are companies of ministering angels who sing by night but are silent by day. *Makon* is the one in which there are stores of snow, hail, dew, raindrops, the chambers of the whirlwind and the storm, etc. *Araboth* is the one in which there are right and judgment and righteousness, the souls of the righteous and the spirits of the souls which are yet to be born, etc.”

Thus you can see that the text is full of spiritualism and Kabbalah and we cannot take it literally. The *Miharsha*⁶ considers this text as an allegory. Kindness, goodness, and charity, etc., upon which the world stands, is metaphorically implied in the usage of such expressions as, “The world stands on twelve beams, while others say it stands on seven beams.” The *Miharsha* itemizes the different qualities needed for the world to exist, to stand on a solid foundation.

This is similar to many of the *Ramban's* explanations of these terms. Some *Gaonim* give this explanation to the *Ramban's* views that all the celestial spheres revolve around the Earth. God created everything to serve the Earth (its people—for man was created to rule over everything—Gen. 1:26). Therefore, the entire world, revolves around the Earth (man).

Another explanation is that the *Ramban*⁷ is describing the nine systems which exist in our universe. Each system has its own stars, planets, etc. the Earthly system is in the center of all these galaxies.

⁶ Rabbi Shmuel Eidels (1555-1631).

⁷ *Ibid.*

This is similar to the subject discussed in the Gemara,⁸ “The Sages of Israel maintain that the Sun travels beneath the sky by day and above the sky at night. While the Sages of the nations of the world maintain that it travels beneath the sky by day and below the Earth at night. Said Rabbi,⁹ “There view is preferable to ours, for the wells are cold by day but warm at night.”

Rabeinu Caro reviews Rabbi’s explanations and questions some of its reasons. Many of the passages of the Talmud describing astronomy were derived from the common knowledge of the era such as Tosefta in the Gemara¹⁰ describing thee exploits of Alexander of Macedonia (aka, Alexander the Great) who ascended high into the heavens in a balloon and saw that the entire Earth was shaped like a ball. Alexander lived in the time of Shimon Ha-Tzaddik, around 2200 years ago and the Talmud verifies the fact that the scientists of that time knew that the Earth was round, like a ball. It lent credence to this fact, which was not acknowledged by the world until 1492.

We find many of our Sages delving into the science of astronomy as the Gemara¹¹ narrates. “Samuel said, ‘I am familiar with the paths of heaven as I am with the streets of Neharda (his dwelling place) with the exception of one comet about with I am ignorant.’”

The Gemara¹² tells us that Rabban Gamliel had a telescope through which he could see a distance of two thousand cubits across the land and a corresponding distance across the sea.

⁸ Pesakhim 94b.

⁹ Rabbi Judah Ha-Nasi (circa 135-217)

¹⁰ Avodah Zarah 41a.

¹¹ Gemara Berakhot 58b.

¹² Eruvin 43b.

Rabbi Shimon ben Pazi said in the name of Rabbi Joshua ben Levi on the authority of Bar Kappara, “He who knows how to calculate the cycles and planetary courses, but does not, of him Scripture says, ‘But they regard not the work of the Eternal One, neither have they considered the operation of God’s hands.’(Is. 5:12)”

Rabbi Samuel ben Nahmani said in Rabbi Yokhanan’s name, “How do we know it is one’s duty to calculate cycles and planetary courses? Because it is written, ‘For this is your wisdom and understanding in the sight of the people.’(Deut. 4:6) What wisdom and understanding is in sight of the people? Say, that is the science of the cycles and planets.¹³

Scientist’s Verifies the Torah

The space satellite recently launched by the United States radioed back photos and information, which have appeared in papers throughout the country. The reports and pictures revealed that the planets Mars and Venus can not sustain life. The satellite’s sensitive instruments recorded temperatures of over 600 degrees, on the planet Mars so that life as we know it could not possibly exist.

King David knew this when he said, “The heavens belong to God, but the Earth God gave to the children of man.”(Ps. 115:16) Only the Earth is inhabited.

Rabbi Abuha said, “God created the worlds and destroyed them— ‘Machrivam.’”(Genesis Rabbah 3:9) The Divrei Chaim¹⁴ explains that the Hebrew word ‘Charav’ need not mean destroy literally, but means desolated and uninhabited. Before God created the Earth God experimented with other planets but found them unsuitable, so God made them ‘Chorev,’ barren and uninhabited. They are now hanging in the sky as a symbol for all to see and study.

¹³ Shabbat 75a.

¹⁴ Rabbi Chaim Halberstam of Sanz (1793-1876).

Playing Chess on Shabbat¹⁵

She'elah

Can you please tell me if it is permissible to play chess or checkers on Shabbat? Are we allowed to play other games that do not include dice or cards?

(Chaim Shnur, Bronx)

Teshuvah

The Rambam prohibits playing any games, which accomplish nothing in this world. For a person is required to occupy himself in this world only in Torah, business, or labor to support or improve his station in life.¹⁶ Kalonymus ben Kalonymus¹⁷ also opposed the game during the 13th and the following four centuries. Chess was then commonly played and Poskim were for and against it.

The Jewish Encyclopedia quotes the Rama¹⁸ as calling chess, “The game with bones” and the Rama approved of it being played not only on weekdays but on Shabbat, though not for money. An old Responsum¹⁹ states that in Spain the game of Chess was sanctioned by the Rabbis. After a visitation of the plague in 1575 the three Rabbis of Cremona declared that with the exception of chess (*Ishkaki*) all games were primary evils and the cause of all troubles.

¹⁵ Originally published in, *Responsa of Modern Judaism*, Rabbi Sholom Klass, 1965.

¹⁶ Commentary on the Mishna, Sanhedrin 3:3. Also Rambam Hilchot Eidut 10:4.

¹⁷ A French Sage (1286-after 1328).

¹⁸ Rabbi Moses Isserlis (1530-1572) author of the gloss to the *Shulkhan Arukh* known as the *Mappa*. See the introduction.

¹⁹ ben Chananya 1864 pp. 601, 650.

In Frankfurt-on-the-Main after the great fire of 1711, the Jewish Community passed a resolution forbidding for a period of fourteen years any Jew or Jewess (except sick persons and lying-in-women) to play chess. When played on Shabbat it became customary in Germany, in honor of the day, to use chessmen made of silver.

The Gaon Rabbi Aaron Sasson²⁰ of Constantinople recommended the avoidance of chess on Shabbat.²¹ Rabbi Elijah de Vidas²² prohibited the game on Shabbat.²³ Children under 14 years were allowed to learn the game on the grounds that it rendered the intellect more acute. Elijah Cohen of Smyrna²⁴ objects to chess on the ground that it wastes time and takes the mind away from study.

Rabbi Gabriel Puntrimoli in the Book *Pachad Yitzhak* classifies chess as an Oneg Shabbat, which is therefore permitted on Shabbat. The Ba'al Shiltai Ha-Gibborim in the Alfasi at the end of the Gemara Eruvin states the following, "Any game which requires skill and knowledge and is not gambling may be played on Shabbat, providing it does not take time away from studying and praying. The *Pachad Yitzhak* sums it up as follows: Normally we should prohibit playing chess on Shabbat for no benefit can be derived from the many hours wasted. But what can I do when many aged Rabbis permit it and they offer good reasons too. Therefore we too permit it.

Rashi Mentions Chess

Rashi in the Gemara²⁵ is the first to refer to the game of chess. The Gemara discusses the many duties a wife should perform for her husband. However, if she has many servants she is exempt from these duties. Rabban Shimon ben Gamliel suggests that she be compelled to

²⁰ Rabbi Aaron ben Joseph Sasson (1550/-1526).

²¹ Responsa 180.

²² Rabbi Elijah de Vidas (1518-1587) a Rabbi in Ottoman Palestine.

²³ Shevet Musar, 1712, Chap. 42.

²⁴ Rabbi Elijah ben Solomon Abraham Ha-Cohen (d. 1729), in Shevet Musar, ibid.

²⁵ Ketubbot 61b.

do some work for idleness leads to idiocy. The Gemara, however, states that this wouldn't apply to a woman who plays with little cubes. Rashi explains that to mean the game of chess.

Authorities agree that chess was known to the Hindus as early as the 6th Century of the present era. From India the game was carried into Persia. Masirdi (947) speaks of chess as an Indian invention sent by an Indian King to Khosrow, King of Persia (531-579), the sixteen pieces of one side being of emerald and those of the other side being of ruby. From Persia the game passed into Arabia and then to Central and Western Europe.

In the 12th Century, chess had spread to France, Germany, and England, and by 1200 had become a favorite gambling game throughout Europe, to such an extent that it was prohibited by the Council of Paris 1212, and afterwards by Louis IX. In the same epoch the *Sefer Hasidim* p. 400, strongly recommended the game. The Sage ibn Ezra (d. 1167) even composed a poem entitled, "The Song of Chess."

King Solomon Played Chess

There is an ancient Aggadah that King Solomon, wisest of all men, was the best chess player in his time. He would usually play with his Chief of Staff, Benaiah ben Jehoiadah, whom he would always defeat.

Once, while playing a game, a fight broke out outside the palace. King Solomon stood up to investigate the disturbance and while he was not looking Benaiah took one of the diamonds (which were used as chessmen) and pocketed it. When Solomon returned to the game, he didn't notice the missing diamond and because of it he lost the game.

The King was irritated that he, the wisest of all men, should lose a game. He then began to reconstruct every play and he soon discovered that a diamond was missing. He immediately surmised that Benaiah had taken it when his back was turned. Not wanting to embarrass him

by questioning him about it, King Solomon devised a plan wherein Benaiah would admit it voluntarily.

A few days later King Solomon convened the Sanhedrin and he requested his Prime Minister Benaiah to participate as a member of the Sanhedrin. The King then produced a young man whom he accused as having robbed the royal palace of a valuable diamond. He asked the court to mete out the proper punishment.

Benaiah became frightened; surely this man was innocent and he would now have to pay for a crime which he, the Prime Minister, committed. Motioning King Solomon to an anteroom, Benaiah fell on his knees and admitted to stealing the diamond during the chess game. He begged forgiveness. He was too righteous to allow another man to suffer for his sins.

King Solomon told him to rise and he laughingly said "Fear not, my good friend, Benaiah. It is not the diamond that I miss, but the fact that you beat me in chess. Now I am happy to know that you could never have won if the game was played honestly."

And King Solomon was happy and content that he was still the wisest of all men, and the best chess player in the country.

Computer Privacy and the Modern Workplace²⁶

Introduction: The Urgency of the Questions.

A Wall Street Journal poll conducted in the Fall of 1999 asked Americans what they feared the most in the new millennium. Privacy loss came out on top (29%), substantially higher than terrorism, global warming, and overpopulation (none higher than 23%).²⁷ The intense concern over privacy is relatively new. While in 1970 only 34% of people in a Lou Harris-Alan Westen privacy poll were concerned about threats to personal privacy, 88% of people surveyed had such a fear in 1998.²⁸ This increased fear of privacy loss is due largely to the growing use of computers, with their powerful ability to gather fragments of information and disseminate that information quickly and widely.

Among the important issues in the raging debate over privacy is an employer's right to monitor employees' Email, a rapidly growing practice in the workplace. In a 1993 survey of major companies, *MacWorld* estimated that 22% of the workers of companies surveyed, or twenty million employees, were subject to some type of electronic monitoring while on the job.²⁹ A survey of nearly a thousand large companies in 1999 by the American Management Association found that 45% monitored the e-mail, computer files or phone calls of their workers, up from 35% two years earlier.³⁰

²⁶ Rabbis Elliot N. Dorff and Elie Kaplan Spitz. Part I: Intrusion. Approved by the CJLS on March 13, 2001, by a vote of 16 in favor, 0 opposed and 6 abstaining (16-0-6). Part II: Disclosure. Approved by the CJLS on March 13, 2001 by a vote of 15 in favor, 0 opposed and 7 abstentions (15-0-7).

²⁷ Cited in Privacy Rights Clearinghouse, National Association of Attorneys General Annual Conference, June 22, 2000, Seattle, Washington:
www.privacyrights.org/ar/nagg-mill.htm.

²⁸ *Supra*.

²⁹ See Charles Piller, "Bosses with X-Rays," *Macworld*, July 1993, at 118, 120.

³⁰ Jeffrey Rosen, "The Eroded Self," *NY Times Magazine*, April 30, 2000, p. 46, 50.

Many employees do not realize that Email messages, even when deleted, are electronically stored and can be reviewed by anyone with access and the right equipment. With Email messages already in ASCII code, using a computer to search large numbers of Emails for mention of particular words is as easy as searching in a document being word-processed. There are new software programs, with names like Assentor or Investigator, that are able to screen all incoming or outgoing Email for forbidden words and phrases and can automatically forward the suspicious messages to a supervisor for review.³¹

The pervasiveness of Email monitoring and the ease with which private network providers may infiltrate employees' accounts are alarming for anyone concerned with personal privacy. Yet, employers also have rights to make sure that employees are doing their job, maintaining a work environment that is free of harassment, and not misusing the corporate name in their correspondence. Hence, a variety of questions emerge. Should private employers be allowed to have indiscriminate access to Email accounts on networks financed, installed, and maintained by corporate funds? Conversely, should, or do, employees have a right to privacy shielding them from this form of corporate surveillance?

There is a whole set of separate questions that emerge from the computer's ability to amass bits of information, put them together into a coherent profile, and then disseminate the information rapidly and widely. Often the party who uses a website is unaware that the use of their computer is being monitored, including what it is that they are seeing on the web, how much time they spend reading a page, and what they purchase. New software allows companies to profile their website customers, and in many cases that information is sold to third parties. People are legitimately afraid that the commercial incentives to share private information will make their lives transparent. What kind of

³¹ Supra.

notice should be required in the gathering of information and in its sale to a third party?

We approach these questions of intrusion and disclosure in the modern workplace through the lens of Jewish Law, whose emphasis is different from that of American Law. A secular system of law, such as the American System, is based on “rights” and is written for the bad person in order to maintain the basic conditions of social order. In contrast, Jewish law is grounded in “duties” with an emphasis on how a person “ought” to behave in order to be a good person.³² Consequently, the analysis and guidance that we offer is not intended to describe the responsibilities of a person to respect people’s rights before the American courts, but rather our duties before God.

In some ways, the threats to privacy posed by computers in our time resemble the hazards our ancestors faced when they sought to protect privacy, for they too were worried about intrusion and disclosure and took steps to protect people from them. Computers, though, expand the potential for intrusion and disclosure well beyond anything ever contemplated before our time. This difference of degree sometimes even rises to a difference in kind, as we find that the very nature of the privacy we can assume in our society has changed and, along with it, our own sense of identity and security. This Responsum, then, seeks to address the Jewish concern for privacy in the new venue of the age of computers and the Internet in order to restate and reinforce traditional Jewish norms where they apply directly to the modern workplace and to apply Jewish beliefs, values, and laws to some of the genuinely new questions that the electronic age raises.

³² See Moshe Silberg, “Laws and Morals in Jewish Jurisprudence,” 75 *Harvard Law Review* 306 (1961) and Robert Cover, “Obligation: A Jewish Jurisprudence of the Social Order,” in *Narrative, Violence, and the Law*, Martha Minow, Michael Ryan, and Austin Sarat, eds. (Ann Arbor, Michigan: The University of Michigan Press, 1995), pp. 239-248. But see David Novak, *Covenantal Rights: A Study in Jewish Political Theory* (Princeton: Princeton University Press, 2000), who argues that the Jewish covenant actually forms the basis for individual rights.

The Value of Privacy: A Religious Perspective

Privacy is necessary for human dignity. The loss of privacy entails the fear that others will misjudge us and even harm us by using fragments of information taken out of context. Confidence in privacy furthermore enables creativity to flourish, for when privacy is assured, nonconformist people feel sufficiently safe and protected from interference to experiment.³³ In addition, privacy is a prerequisite for the bond of friendship, which includes sharing confidential feelings and vulnerabilities.³⁴ A free and tolerant society needs an assurance of privacy, because each person has secrets that, “Concern weaknesses that we dare not reveal to a competitive world, dreams that others may ridicule, past deeds that bear no relevance to present conduct or desires that a judgmental and hypocritical public may condemn.”³⁵

Moral concerns such as these are central in Judaism not only because Judaism concerns itself with the relations of people with each other, but also because we are supposed to model ourselves after God. We who are, “Created in the image of God,”(Genesis 1: 27) are repeatedly directed in the Torah to follow God’s ways: “You shall be holy, for I, the Lord your God, am holy;”(Leviticus 19:2) “Walk in all His ways;”(Deuteronomy11:22) and, “Follow the Lord your God.” (Deuteronomy 13:5) The Rabbis understood these biblical verses as establishing the principle of *imitatio dei*, of modeling ourselves after God: “As God is gracious and compassionate, ...you too must be gracious and compassionate; as the Holy One is righteous, ...you too must be

³³ Gavison, “Privacy and the Limits of the Law,” 89 Yale Law Journal 421, 447 (1980).

³⁴ Fried, Privacy, 77 Yale Law Journal 475 (1983).

³⁵ Bazelon, “Probing Privacy,” 12 Gonzaga Law Review 587, 589 (1977). See also E. Shils, *The Torment of Secrecy*, 22-24 (1956); Martin Bulmer, *Censuses, Surveys and Privacy* (London: Macmillan, 1979); and P. Westin and F. Allan, *Privacy and Freedom* (New York: Atheneum,1967). These sources and those cited in the previous two notes are suggested in Elie Spitz, “Jewish and American Law on the Cutting Edge of Privacy: Computers in the Business Sector” (Los Angeles :University of Judaism, 1986), p. 1. This Responsum, in fact, is the result of our joint effort to expand the work that he originally did in that paper.

righteous; as the Holy One is loving, ...you too must be loving.”³⁶ At the same time, Jewish texts depict God as in part known and in part hidden; God is made manifest to human beings through revelation and through divine acts in history, but no human being, even Moses, can know God’s essence (Exodus 3:6; 33:20-23).³⁷ Furthermore, the Mishnah declares that one who probes God’s essence beyond what God has chosen to reveal to us should not have been born, for, as the Jerusalem Talmud explains, to know more about God than the Holy One chooses to reveal to us is an affront to God’s dignity.³⁸

As God keeps His own confidences, then, we too must preserve both our own privacy and that of others to enable us to be like God.³⁹ Moreover, since human beings are created in God’s image (Genesis 1:27), when we honor God’s creatures we honor God, and, conversely, degrading people is tantamount to dishonoring God.⁴⁰ Furthermore, God intends that the Israelites be, “A kingdom of priests and a holy people,” (Exodus 19:6) not just a nation that observes the minimal necessities of maintaining order and providing for basic needs. As the Torah specifies, to be a holy

³⁶ Sifre Deuteronomy, Ekev.

³⁷ See also Deuteronomy 29:28, according to which, “Secret matters belong to the Lord our God, while revealed matters are for us and for our children forever to carry out the words of this Torah.” Similarly, in the visions of the Heavenly Chariot in Isaiah (Chapter 6) and Ezekiel (Chapter 1), both prophets can only see God’s attendants and not God Himself.

³⁸ M. Haggigah 2:1; J. Haggigah 2:1 (8b).

³⁹ Norman Lamm makes this point; see his article, “The Fourth Amendment and Its Equivalent in the Halacha,” *Judaism* 16:4 (Fall, 1967), pp. 300-312; reprinted as “Privacy in Law and Theology,” in his *Faith and Doubt: Studies in Traditional Jewish Thought* (New York: KTAV, 1971), pp. 290-309, esp. pp. 302-3. “There are, of course, important differences between God and human beings, and we cannot imitate God in some divine characteristics (e.g., God’s ability to know our innermost thoughts, God’s power, etc.) and perhaps should not imitate God in others (e.g., God’s apparent arbitrariness on some occasions, God’s jealousy, God’s wrath, etc.). Here, however, we both can and should imitate God’s concern for privacy, as biblical and Rabbinic law spell out.”

14Mekhilta, Yitro, on Exodus 20:23 (ed. Horovitz-Rabin [Jerusalem: Bamberger and Wahrman, 1960], p. 245); Sifra, Kedoshim, on Leviticus 19:18 (also in J. Nedarim 9:4 and Genesis Rabbah 24:7); Deuteronomy Rabbah 4:4.

people requires, among other things, that a lender not intrude on a borrower's home to collect on a loan (Deuteronomy 24:10-11), and that nobody be a talebearer among the people (Leviticus 19:16). Thus both intrusion and disclosure are forbidden so that a person's home, reputation, and communication are all protected as part of the effort to create a holy people.

She'elah (Part I: Intrusion)

Are there conditions under which employers may monitor their employees' Email or Internet usage?

Teshuvah

The Prohibited Forms of Intrusion.

One category of privacy violation is intrusion, defined as the unauthorized entry into another's property or the use of that property without permission. In interpreting the biblical laws prohibiting intrusion (Deuteronomy 24:10-11), the Rabbis maintain that these laws bar not only physical trespass, but also visual penetration of a person's domain (*Hezek Re'iyah*). They interpret Balaam's praise of the tents of the Israelites "O how fair are your tents, O Jacob, your dwelling places, O Israel," (Numbers 24:5) as arising from his observation that the Israelite tents were so situated that the tent openings did not face each other. The Rabbis thus insist that two joint landowners contribute equally to erect a wall between their respective halves of the property to serve as a deterrent to visual intrusion, and they prohibit making a hole in the wall opposite the neighbor's window. They also deny the option to either or both parties to waive their rights to this protection of their mutual privacy because the wall was not only supposed to safeguard the

privacy of each party but was also intended to deter each one from the temptation to intrude on the other.⁴¹

In the Middle Ages, when the mail system expanded, Rabbenu Gershom (Mayyence, Germany, 960-1028) issued a decree prohibiting mail carriers and others from reading other people's mail lest they learn trade secrets or spread gossip. According to the decree, violators would be subject to excommunication even if they did not publicize the improperly read letter. Privacy was thus recognized as an important value in its own right apart from its importance in protecting people from harm.⁴² Moreover, intrusion, as understood in Jewish sources, is thus not limited to forbidden entry (physical, visual, or aural) into another person's property or personal space, but also forbidden use of what one learns when one does that: I may not read another person's letter without permission, and, if I do, I may not tell anyone else the contents. That is, intrusion includes the prohibitions against unauthorized entry (Deuteronomy 24 and the Rabbinic extension of that to *Hezek Re'iyah*) and also the prohibition against tale bearing (*Rekhilut*, cf. Leviticus 19:16).

At the same time, there are limits to the expectation of privacy in Judaism, for there are times in Jewish life when the tradition prefers the value of community togetherness over that of individual privacy. Thus, for example, invitations are not traditionally required to console mourners in their home or to enter a private welling to celebrate the

⁴¹ B. Bava Batra 60a; see also 2b, 3a. M.T. Laws of Neighbors 2:14. The legal requirements mentioned were enforced through monetary fines and, if necessary, excommunication; see Nahum Rakover, *The Protection of Individual Modesty* (Jerusalem: Attorney General's Office), pp. 7, 8 (Hebrew). See also "*Hezek Re'iyah*," *Encyclopedia Talmudit* 8:559-602 (Hebrew); and Lamm, *ibid.*, pp. 294-5.

⁴² Louis Finkelstein, *Jewish Self-Government in the Middle Ages* (New York: Jewish Theological Seminary of America, 1924), pp. 31, 171ff, 178, 189. "Herem d'Rabbenu Gershom," *Encyclopedia Talmudit* 7:153, footnotes 877-904 (Hebrew), cites Ashkenazic and Sephardic codes and responses that adopted and extended Rabbenu Gershom's mail decree.

Brit Milah (ritual circumcision) of a newborn boy with his parents. These moments are intended to be public because our tradition directs us to link life-cycle events with community.

Yet in daily life, we need and should have privacy. The Rabbis specifically point out, for instance, that although after the wedding the bride and groom are allowed to engage in sexual relations, the wedding guests are forbidden to mention that fact out of respect for the couple's privacy and dignity.⁴³ From the viewpoint of Judaism, sexual relations between husband and wife are a good thing, but a private thing. In sharp contrast to life-cycle events and to other clearly public occasions like worship, one's personal life must remain private. Thus the Rabbis, as we have mentioned, conscientiously sought to insure that people would not spy on others and that, conversely, people would value their own privacy enough to erect walls to protect it. Moreover, they insisted that we take steps to shield both parties from their temptations to intrude.

In the work place, people's expectations of privacy are, and should be, different from those in their own home. The Jewish tradition emphasizes that an employee has a clear duty to do a fair day's work.⁴⁴ To prevent employees from idling on the employer's time, Jewish law prohibits workers to stand up in deference to a rabbinic scholar while engaged at work, and Abba Hilkiyah, according to the Talmud, even refused to return a greeting to a delegation of rabbinical scholars while

⁴³ B. Shabbat 33a.

⁴⁴ Isaac Abravanel (Spain-Italy, 1437-1508) maintains that the employee's duties actually come logically before the employer's duties, and that is why, he suggests, Leviticus 19:13 says, "Do not oppress your neighbor and do not steal, do not keep your employee's wages overnight:" First the verse warns the employee not to oppress the employer and not to steal from him, but rather the employee must do his work faithfully, and then, after that, the verse warns the employer not to keep the wages of the employee with him overnight. Cited in *Mai'am Lo'ez*, Deuteronomy, p. 940.

working as a day laborer.⁴⁵ Similarly, the Talmud instituted an abridged form of Grace after Meals, dropping the fourth blessing, for day workers eating lunch in order to impinge as little as possible on the employer's time; later, though, employers customarily and voluntarily allowed their workers to add the fourth blessing, and the right to do so ultimately became an implicit condition of the employment of the day laborer.⁴⁶ Workers were also not allowed to "moonlight" or to starve themselves, even to provide food for their families, for then they could not produce a fair day's work for their primary employer.⁴⁷ Conversely, employees have the positive duty to work at their jobs with all their power, modeling themselves after Jacob who, according to the Torah, proclaimed to his wives, "You know that I worked for your father with all my strength." (Genesis 31:6)⁴⁸

Given these provisions of Jewish law, employers have the right to monitor their employees to assure that they are not wasting time but are rather carrying out their responsibilities fairly and faithfully. As the Talmud says, "Whoever is left much money by his parents and wishes to lose it should... hire workers and not watch over them," for then the workers will either fail to plow the land properly, so that the subsequent crop is a poor one (Tosafot's explanation), or they will cause direct damage to the crops by driving the ox carts carelessly over the crops when engaged in harvesting (Rashi).⁴⁹ That is, unsupervised workers might either fail to carry out their responsibilities altogether or do so poorly. In times past, employers would simply look to see what

⁴⁵ B. Ta'anit 23a; M.T. Laws of Hire 13:7; S.A. Yoreh De'iah 244:5; S.A. Hoshen Mishpat 337:20.

⁴⁶ B. Berakhot 16a; M.T. Laws of Hire 13:7; S.A. Hoshen Mishpat 337:20. The subsequent customary acceptance of workers taking the time to say the fourth blessing of Grace after Meals: Rabbi Meir Ha-Kohen (Germany, 13th century), Haggahot Maimoniyot on M.T. Laws of Blessings, I; S.A. Orah Hayyim 110:2; 191:2.

⁴⁷ The prohibitions of moonlighting and of starving oneself: T. Bava Metzia 8:2; J. Demai 8:3; Rif, B. Bava Metzia 90b.

⁴⁸ M. T. Laws of Hire 13:6; S.A. Hoshen Mishpat 337:19.

⁴⁹ B. Bava Metzia 29b-30a; Rashi (on 30a), s. v. *De-Nafish P'sidyhu*; Tosafot (on 30a), s. v. *B'torei D'nafish P'sidyhu*.

their employees were doing. Now that many forms of work involve use of the computer and the Internet, employers need to monitor what employees do on those instruments in order to assess the quality of their employees' work. Employers do not, as a matter of course, have a right to know what their employees are thinking or writing, but employers certainly do have the right to insist that their employees spend their time at the computer on business and not on playing games or trading on the stock market for their personal benefit, for, after all, the employees are being paid to do work. Thus employers do have the right to monitor employees' use of their office computers as a corollary of their right to oversee and evaluate their employees' work.

An English journalist, Roger Dobson, recently wrote in London's *The Independent*:

Not long ago, computer abuse at work was limited to an occasional game of minesweeper or solitaire. Not any more. The huge growth in Internet use means thousands of employees are doing myriad private jobs online, from trading stock and placing bets, to researching their children's homework.... As much as 59 per cent of Internet use at the office is estimated as not work-related. And, as a result of all this inappropriate use, increasing numbers of employees are being sacked for unwarranted Internet abuse.⁵⁰

How shall we balance the employee's right to privacy with the employer's right to a fair day's work? In order to clarify expectations, employers should notify employees of their intent to monitor the use and content of what their employees do on their office computer. Without such notification, employees could easily infer an expectation of privacy at work, especially because the employer arranges for the employee to have a personal password to gain access to the company's

⁵⁰ Roger Dobson, *The Independent-London*, September 13, 2000- Foreign; Issue: PSA-2682; Business section; http://special.nothernlight.com/privacy/big_brother.htm.

system. To avoid any misunderstanding, an employer who plans on monitoring employees' Internet usage and Email should provide employees, at the time of hiring, with both an oral and a written notice of company policy about this matter. The notice should state that computers are company property intended for business purposes. The employer will therefore retain the right of access to all written messages on the system and will monitor employees' use of the computers to advance the company's legitimate business interests. Employers should also insist at that time that candidates for employment sign a copy of this policy, acknowledging that they understand that they can have no legitimate expectation of privacy when using their company computers. That way employees will have ample knowledge ahead of time as to whether or not they can reasonably expect protection from intrusion in their use of the office computer, Email facilities, and Internet access.⁵¹

⁵¹ While a current West 2000 search indicates that United States law and court decisions on Email and Internet usage on company computers is sparse, these recommendations accord with the guidelines that have emerged so far. Specifically, the omnibus Crime Control and Safe Streets Act of 1966 established rules for wiretapping and other electronic interceptions. It was amended at Title III by the Electronic Communications Privacy Act of 1986 (ECPA), Public Law #99-508, 100 Stat. 1848, 18 U.S.C. Section 2510, to include protections of electronic communications, including email, from hackers and other people who have no legitimate interest in the communications, but this act specifically excludes employees working on computers belonging to their employers when employees have consented explicitly or even by implication to their employers' monitoring of their communications on company computers: see 18 U.S.C. Sections 2511(2)(c); 2701 (c)(1); and 2702 (b)(3). It is obvious that explicit, written acknowledgment by the employee of the employer's right to do this is best, but employees also agree to this stipulation by implication if they accept employment in a company where employees are warned that company computers are for business purposes only and where employee' Email and Internet communications are in fact monitored routinely for legitimate business purposes.

The courts have upheld these provisions. So, for example, in an unpublished opinion, the California Court of Appeals held that the California Invasion of Privacy Act (Penal Code 630 through 637.5) prohibiting wire-tapping, eavesdropping, recording confidential communications, or disclosing telegraphic or telephonic messages does not apply to Email in *Bourke v. Nissan Motors* (July 26, 1993) and that the company was therefore within its rights in firing Mr. Bourke for using the company computer for sending personal and sexual messages because (1) employees signed a notice of the company policy limiting computer use on company

Employers should also specify both orally and in writing at the time of hiring an employee whether personal use of company machines is totally forbidden or allowed for given purposes and given amounts of time. This written notice should include the company policy on personal use not only of the computer, but also of the telephone, fax, and copy machine. That way the lines between legitimate use and theft will become clear.

Conversely, employees who use office equipment for personal communications must take steps to insure that nothing private is seen or heard by others. After all, Jews have the duty to protect themselves from intrusion, a duty dramatically articulated by the Talmudic interpretation of the good qualities Balaam saw in how Israel's tents

computers to company business and (2) employees were aware that their Email messages were being read by supervisors and not just by their intended recipients. Several more notes about this. First, sometimes employees assume that their personal password for gaining access to their company computer creates a legitimate expectation of privacy for their messages emanating from there. The courts, however, have specifically denied this claim, maintaining that the facts that the company owns the computer and assigned the password indicates that the company retains rights of access to the computer at any time. Acceptance of a password from the employer to gain access to the company's electronic system, in other words, amounts to acceptance of the company's rules governing that system. Second, American Law draws a distinction between government and private employees, such that government employees have a greater right to assume the privacy of their computer communications than employees of private companies. Therefore, government employees must sign a consent form to waive their privacy rights vis-a-vis their computers at the office rather than just an acknowledgment of company policy that computer usage will be monitored.

Third, list serves present yet another wrinkle in this whole area. In the California case of Intel Corporation vs. Hamidi (California Superior Court, 98AS05067, November 2, 1998), the court held that Mr. Hamidi did not have the right to organize union activity at Intel by soliciting union membership there through sending a letter to each of 30,000 employees on their internal list serve because the company owned the computer system and therefore had the right to restrict its use. That case, though, involved an internal e-mail system within the company. It is not clear what courts will do with using company computers to contact lists outside the company. In any case, the issue addressed in this Teshuvah's clearly on the cutting edge of American Law as well.

were arranged. Thus rabbis and educators should refrain from using Email for confidential communications, especially on the congregational server, lest others intentionally or accidentally read them. Similarly, if an employer makes clear that any and all communications on cyberspace generated on office equipment is subject to surveillance but that employees may occasionally send short Emails to friends to set lunch dates and the like, employees must make sure that the employer will see nothing in such messages that should remain private with them. Just as employers must take steps to ensure that employees know what is, and what is not, protected from intrusion, so too employees are responsible to preserve their own integrity and honor by insuring that their communications open to employer scrutiny do not contain information that will harm them. Both parties must take these steps to create clear boundaries of employee privacy for all of the moral, legal, and theological reasons described above.

In sum, the employer's duty to protect an employee's privacy from intrusion in the work place must be balanced against the employee's duty to produce an honest day's work. That latter duty, together with the employer's responsibility to judge employees fairly when it comes to decisions about retention and promotion, together establish an employer's right to monitor the use of an employee's time. When the employee's job involves work on the Internet, employers justifiably intrude on their employees' computer usage to monitor their job performance. The employer's duty to protect their employees' right against intrusion is achieved through notice that employees' Internet usage will be monitored, consent, and the duty to avoid harmful disclosure.

CONCLUSION

In accordance with our understanding of Jewish laws governing intrusion as applied to the new realities of cyberspace:

1. Employers who intend to monitor their employees' input on company computers must announce the rules governing company cyberspace equipment (and telephones and fax machines) to potential employees at the time of hiring, both orally and in writing. Moreover, employers should insist that employees sign a copy of the company policy, thereby acknowledging that the employer has provided ample notice of the company's policies on these matters and that the employee should expect nothing else.
2. Employers must also announce company policy as to whether employees may use company equipment for personal use at all and, if so, employers must clearly specify the parameters of legitimate personal use so that all employees know what is permitted and what is not.
3. Conversely, employees who are permitted to use company computers to communicate on personal matters through cyberspace but whose communications may be examined by employers at any time must take precautions to ensure that their supervisors will see in such communications nothing undermining the employee's integrity or honor.

She'elah (Part 2: Disclosure)

Are there conditions under which a business may disclose information it gleans from a customer's use of its website or registration form?

Teshuvah

The Scope of the Prohibition of Disclosure in Jewish Law

The Rabbis also took steps to insure that some information would not be disclosed to those who should not, for some reason, know it. A judge,

for example, was forbidden to reveal his vote lest the privacy of the other judges on the panel be compromised, and the Talmud records that a student was ejected from the house of study when he revealed his vote a full twenty-two years after the trial!⁵² Private individuals were also enjoined to maintain confidentiality. According to the Talmud, a person may not reveal a private conversation, even if there is no harm intended or anticipated, unless the original speaker gives explicit permission to do so.⁵³ Rabbenu Gershom's decree forbidding the opening of other people's mail, mentioned above, prohibits learning about other people's business even when one does not disclose it to others, and how much the more so when one does.

Jewish communities also sought to insure confidentiality in the collection of taxes. Some demanded that the collectors be sequestered while working. The Frankfurt Jewish tax collectors refused to reveal entries in their books even to their superiors, the city treasurers, and the Hamburg community imposed severe fines for breaches of confidence.⁵⁴

Privacy, though, is not an absolute value; it is sometimes set aside to protect an individual, family, or group. Accordingly, the Torah imposes a duty to testify in court when one knows of relevant facts, even though they may be incriminating (Leviticus 5:1).⁵⁵ During the Middle Ages, from the thirteenth century on, people would have to declare their assets under oath to the tax collectors, even though some of the tax collectors might be their competitors who would thus gain a

⁵² M. Sanhedrin 3:7; B. Sanhedrin 31a.

⁵³ B. Yoma 4b. According to Magen Avraham (S.A. Orah Hayyim 156:2), even if the party revealed the matter publicly, the listener is still bound by an implied confidence until expressly released. Likewise Hafetz Hayyim 10:6.

⁵⁴ Salo W. Baron, *The Jewish Community* (Philadelphia: Jewish Publication Society, 1942), vol. 2, p. 281.

⁵⁵ See also B. Bava Kamma 56a; Gordon Tucker, "The Confidentiality Rule: A Philosophical Perspective with Reference to Jewish Law and Ethics," 13 *Fordham University Law Journal* 99, 105 (1984); and A. Cohen, *Everyman's Talmud* (New York: Schocken, 1949), p. 307.

competitive advantage.⁵⁶ Similarly, the communal good outweighs the rules against disclosure when it comes to fighting crime, and so institutions or companies would have a duty to disclose employee communications to governmental officials investigating a crime. This exception would not extend, though, to morally questionable activities that have not been criminalized. So, for example, the Dean of Harvard Divinity School was recently fired because he had asked a school technician to fix something on his home computer, and the technician found pornographic files. If the technician were Jewish, he should not have disclosed what he found there.

Jewish law also insists on breaking confidentiality when it would harm someone in non-judicial settings, based on the Torah's command, "Do not stand idly by the blood of your neighbor." (Leviticus 19:16).⁵⁷ Rabbi Israel Meir Ha-Kohen Kagan (Radin, Lithuania, 1838-1933), the "Hafetz Hayyim," taught, based on that verse, that A must warn B of potential problems in a business deal that B is contemplating with C if five conditions apply:

1. A must thoroughly examine the extent to which B will be harmed by the business deal.
2. A must not exaggerate the extent of the potential harm.
3. A must be motivated solely by the desire to protect B and not by dislike of C, let alone by A's own financial gain.
4. A can enable B to avoid the partnership without defaming C to B.

⁵⁶ Irving A. Agus, *Urban Civilization in Pre-Crusade Europe* (New York: Yeshiva University Press, 1968), vol. 2, p. 472-474. We would like to thank Rabbi Joel Rembaum for this reference.

⁵⁷ The Rabbis' interpretation (in the Sifra on that verse and in Targum Pseudo-Jonathan there) was: "Do not stand idly by when your neighbor's blood is shed. If you see someone in danger of drowning or being attacked by robbers or by a wild beast, you are obligated to rescue that person."

5. A must only harm C to the extent of thwarting the partnership and must not tell B anything that will cause C to be publicly embarrassed.⁵⁸

In sum, individuals, under Jewish law, have a right to decide who will have access to their correspondence and private information. Exceptions to the duty against disclosure occur only when there is an overriding communal need to prevent harm, such as a revelation of private facts necessary to investigate a crime or to prevent an ill-fated business partnership. When the disclosure is not in response to a legal case, such exceptions are circumscribed by the requirement that the person making the revelation has no personal gain in breaching confidentiality and that the potential harm is substantial.

Disclosure of a Customer's Profile

Businesses have a profit incentive to gather information about current customers. Knowledge of buying habits and personal taste enable businesses to better serve their customers' needs and to market new products to their existing customers and to potentially new ones more effectively. Although the desire to gather information is as old as business, the computer dramatically changes the capacity of a business to quickly piece together a customer profile from small bits of information. Moreover, an Internet company can gather information with little or no awareness of the surveillance on the part of the consumer. A consumer's on-line searches may provide companies with minute details of individuals' buying habits, including the Internet sites

⁵⁸ Israel Meir Kagan, *Be'er Mayyim Hayyim* (Rabbi Kagan's extensive notes to his book, *Hafetz Hayyim*), ch. 9, par. 1. Summarized in Samuel Mordecai Huminer, *Sefer Ikkarei Dinim* (based on the work of Rabbi Kagan), included as part of *Shemirat Ha-Lashon: Ikkarei Dinnim* (Jerusalem: Mercaz Ha-Sefer, 1983), ch. 9, par. 56, p. 62-63, and translated and adapted in Zelig Pliskin, *Guard Your Tongue* (based on the *Hafetz Hayyim* and his notes in *Be'er Mayyim Hayyim*) (Jerusalem: Aish Ha-Torah, 1975), p. 164; see also Alfred S. Cohen, "Privacy and Jewish Perspective," *The Journal of Halacha and Contemporary Society* 1 (1981), p. 74-78.

they browsed, the amount of time they spent on a page, and the purchases they made.

A computer user may be unaware that his or her Internet use is being monitored through the use of “cookie.” A “cookie” is a small file placed on the hard drive by the web-browser that allows websites and advertising networks to monitor online movements with great precision. Double-Click is the Internet’s largest advertising placement company. After Double-Click sends you a cookie, you may find yourself targeted by ads from any of its 2500 clients. For instance, if you visit Alta Vista’s auto section, you might find unsolicited ads following from GM or Ford.⁵⁹

The ability of businesses to collect information in this way, though, is not only a boon to those interested in selling someone something: it also can aid the consumer. For instance, when customers go online to Amazon.com, they may appreciate knowing about recommended new books in areas of their interest, as indicated by their past purchases. It may be of interest to know “People who bought this book also bought” and then have a list. Thus “cookies” are not, in and of themselves, objectionable from the perspective of Jewish Law; here, as in most technology, the moral and legal valence of the technology depends upon how it is used.

At the same time, though, Amazon and other companies are not regulated in the United States or Canada with what they do with their client information. The key motivation for self-regulation is fostering a reputation of trustworthiness. In 1999, for instance, Amazon.com shocked privacy advocates by posting the book, music, and video tastes of its best corporate customers online. As a result of the public protest,

⁵⁹ Jeffrey Rosen, “The Eroded Self,” NY Times Magazine, April 30, 2000, p.46, 48.

it reversed itself and said it would allow shoppers in the future to keep their buying habits to themselves.⁶⁰

In many cases, however, consumer information is treated as a company asset and is sold to other marketers. Beyond our buying habits, companies may access much private information about our lives from searching databases on line or from businesses that sell such information. A person's school transcripts, credit reports, and medical histories, together with his or her home's purchase price and current standing in the payment of taxes, are all potentially available. No wonder Americans worry about diminished privacy.

In response to consumer alarm over loss of privacy, companies are beginning to offer notice as to their information gathering practices and what they will do with the information. Increasing numbers of companies are providing people with the choice to opt in or out of the company's gathering of data about them. Companies are also being pushed by public opinion to adopt policies to protect the privacy of the people covered by their database. Companies then often distribute written copies of their procedures to protect consumer privacy in order to improve their public relations. The pressure companies feel to protect people from unwanted disclosure is similar to the pressure they are feeling to reveal intrusion through the increasingly familiar announcement regarding telephone use—namely, that your call may be monitored to assure quality of service. In both cases, the public is effectively requiring companies to adopt measures to protect people's privacy even before, and sometimes well beyond, legal demands to do so.

At the same time, there is a debate among business and consumer groups as to how much privacy notice and protection is needed. It is understandable that an online company wishes to make a consumer's

⁶⁰ Amy Doan, "Amazon Backs Off on Customer Lists," *Forbes.com*, August 27, 1999.

online experience as powerful and memorable as any on-land shopping experience, which entails knowledge of a customer's likes and dislikes, advertising demographics and tailoring. The question is how much do they have to disclose to the consumer about what they are learning about him or her in the process of making a sale. Many companies simply do not notify customers that information is being gathered and potentially sold. These companies would argue that information is an asset and that all companies are in the business of gathering information, that buyers should know this, and so buyer beware! Other companies provide some notice, but do so either with jargon that makes it hard to understand or as an "opt-out" box—that is, click here if you do not give us permission to gather or sell information, a box that often goes unread. Moreover, many companies keep their data secret, failing to provide consumers with access to their profiles. That makes it impossible for consumers to correct harmful misstatements. And last, some companies fail to maintain adequate security on their collected information, enabling, if not inviting, other parties' access to private information.

As students of the Jewish tradition, we bring to the growing discussion of privacy and the workplace a high regard for the duty to refrain from making disclosures without consent. As we apply Jewish law to modern circumstances, we believe that Jewish law demands that businesses take into account their moral duty to give notice that they gather information about consumers, including disclosure of how the information will be used. Companies should collect only timely, relevant, and accurate data; they should take steps to keep it up to date and secure; they should use it only for purposes announced at the time of collection; and they should disclose it only in accordance with stated rules known and accepted by consumers. Furthermore, data about individuals should be removed from files used for marketing, direct mail-advertising, and for use by a third party unless consent is obtained from the consumer. Indeed, companies may gather such information in the first place only with the

prior, written consent of the consumer and only if there are easy ways for the consumer to opt-out at any time.

The harm that could be done to an individual by inaccurate information or by mishandling of personal health, financial, or other data is obvious and severe. Therefore, companies that collect and disseminate marketing information about individuals minimally have the duty to ensure that the information they disseminate is accurate, and that duty minimally entails that they provide an easy way for individuals to see and correct such information. Moreover, from a Jewish perspective, such companies also have the duty to allow individuals to delete anything in their file that they do not want disclosed, including the whole file—except, of course, if it is required by governmental authorities investigating crimes. Finally, Jewish law requires that such companies specifically ask permission from individuals to gather and disseminate information about their buying habits; they may not just assume such permission until and unless the individual specifically denies it (“opts out”).

Such privacy disclosure procedures will protect consumers from unwanted commercial solicitations. Gaining greater control of the information about us may also help to protect us from unwanted discrimination because knowledge of our status, choices, and communication behavior may all too easily form the basis of unwanted distinctions, labeling, and prejudice.

CONCLUSION

In order to comply with Jewish Law, a business may disclose information to a third party gleaned from individuals’ registration forms or their use of its website only if the consumer provided informed consent with an opt-in declaration to the gathering and specific use of the information. In addition, a company has a duty to provide a consumer with access to the private information it collects about him or her and to provide an easily usable means to correct inaccurate

information, thereby protecting the consumer against the use of false and harmful information. The presumption of privacy protection is rebutted by a legitimate communal need, such as the duty to testify in a court case, the duty to assist law enforcement agencies in investigating a crime, and even the duty to prevent a potentially harmful relationship under the conditions delineated by the Hafetz Hayyim, as described above. Informed consent for disclosure helps assure greater control over the private facts in our lives, a control that offers us greater dignity and the opportunity to lead holy lives.

Reciting Blessings over Tube Feeding⁶¹

She'elah

Over the course of multiple life-threatening esophageal ruptures, I spent 6 months being fully sustained by feeding tubes – certain times only through a Jejunostomy tube (J-tube) and certain times through a combination of the J-tube and a Gastrostomy tube (G-tube). Throughout most of that time period, I was torturously conscious and aware of my situation. I asked an Orthodox friend of mine if there was a blessing I could say over my tube feedings, and she informed me that because tube feedings are not considered a form of eating, there was no blessing I could say. At the time I already felt that almost everything had been taken from me, so when I learned of this facet of Halakhah I felt that I was being isolated from Judaism as well.

I therefore ask this question of you: from the standpoint of our Reform Responsa tradition, is it appropriate to recite a blessing over tube feeding?

(Courtney L. M. Berman, Cincinnati, OH)

T'shuvah

Your Orthodox friend is correct. By that, we mean that she is accurately representing the consensus view among contemporary Orthodox Poskim (Halakhic Authorities) on the question you pose. At the same time, not all Halakhic Authorities follow that consensus, and an argument can be made that the consensus does not reflect the best interpretation of the sources upon which it is based. The majority of

⁶¹ Written by the CCAR Responsa Committee in 2011. <https://www.ccarnet.org/ccar-responsa/reciting-blessings-over-tube-feeding/>. Accessed 19 October 2022.

this Committee support the consensus view, namely that tube feedings are not to be defined as “eating” and that, therefore, it is inappropriate to recite the blessings for food over tube feedings. One member of the Committee dissents from this position.

Our *T’shuvah* will proceed in three stages. First, we will examine the discussion of this issue in the Halakhic Literature, so as to explain both the consensus and the minority opinions among traditional and Orthodox Poskim. Second, we will present the viewpoint of the majority of this Committee. Finally, we will offer the dissenting opinion.

1. The Halakhic Discussion

The blessings we recite before eating food, as well as *Birkat Ha-Mazon* (the “grace after meals”), are called *Birkhot Hanehenin*, literally “Blessings over things that bring enjoyment.”⁶² That term indicates the central importance of the concept of *Hana’ah*, variously translated as “enjoyment,” “pleasure,” “benefit,” or “profit:” we recite blessings as an expression of gratitude to God for deriving benefit from God’s world. As the Rabbis teach, “It is forbidden to derive benefit/pleasure (*Hana’ah*) from the world without reciting a B’rakhah.”⁶³ But precisely how do we derive this *Hana’ah*? That question lies at the center of a Talmudic *Machloket* (dispute) over the nature of the Torah’s prohibitions against the eating of various foods. Rabbi Yochanan holds that to be held

⁶² *Birkat Ha-Mazon* is often classified in a category by itself, since it is considered to be required directly by the Torah (Deuteronomy 8:10; B. B’rakhot 21a; Yad, B’rakhot 1:3). By contrast, the blessings recited before eating food or before benefiting from other things are considered Rabbinic in origin. See B. B’rakhot 35a; Tosafot ad loc., s.v. *ela s’vara hu*; Yad, B’rakhot 1:2; Chidushei haRashba, B’rakhot 35a; Meiri, Beit Hab’chirah, B’rakhot 35a.

⁶³ A *Baraita* in B. B’rakhot 35a. The text continues: “One who benefits from the world without reciting a blessing is guilty of *M’ilah*,” the misappropriation of God’s property. The Amoraim explain that, prior to the recitation of a B’rakhah, “The earth and its fullness belong to Adonai,” (Psalms 24:1) i.e., we are not authorized to draw benefit from the physical universe. Once a person recites the appropriate blessing, however, we say that “The heavens belong to Adonai, but the earth has been given to human beings,” (Psalms 115:16) and we are permitted to derive *Hana’ah* from the world.

culpable for violating these laws, a person must experience *Hana'at Garon* (literally, “enjoyment of the throat”): that is, one must orally ingest a minimum amount of the forbidden food within a prescribed limit of time. Resh Lakish, on the other hand, holds that the key is *Hana'at Me'ayim*, “satiation:” one transgresses the prohibition once the minimum quantity of the forbidden food collects in his stomach, no matter how slowly he or she consumes it.⁶⁴ The accepted Halakhah follows Rabbi Yochanan.⁶⁵ From here, later authorities conclude that, for Halakhic purposes, the act of *Akhilah* (“eating”) is defined by the ingestion of food through the mouth.⁶⁶

This definition serves as the basis for some important rules of law. For example, one may take a medication that contains prohibited ingredients provided that one consumes it in an unusual manner that does not bring “enjoyment” (*She-Lo K'derekh Hana'atan*), because even though the prohibited substance reaches the stomach, the patient has not technically “eaten” it.⁶⁷ Similarly, a patient may be fed through a stomach or intestinal tube on Yom Kippur, since artificial nutrition that bypasses the throat is not defined as “eating” and is therefore not

⁶⁴ B. Chulin 103b. The terms *Hana'at Garon* and *Hana'at Me'ayim*, which figure prominently in all subsequent discussions of this topic, are found in Rashi ad loc., s.v. *Harei Neheneh G'rono*.

⁶⁵ Yad, Ma'akhalot Asurot 14:3.

⁶⁶ See R. Yosef Babad (19th-century Poland), *Minchat Chinukh*, Mitzvah 313, no. 2: “There is no such thing as ‘eating’ in the absence of ‘enjoyment of the throat’” (*B'lo Hana'at Garon La Havei Akhilah K'lal*). See also R. Ovadyah Yosef (20th-21st century Israel), *Resp. Yabi'a Omer*, v. 5, Orach Chayim, no. 18: the word *Ve'Akhalta* (“you shall eat”) in Deuteronomy 8:10 “Comes to tell us that what is required is ‘the enjoyment of eating’ (*Hana'at Akhilah*), that is, ‘enjoyment of the throat’ (*Hana'at Garon*).”

⁶⁷ B. Pesachim 25b; Yad, Y'sodei Hatorah 5:8 and Ma'akhalot Asurot 14:10-11; *Shulchan Arukh Yoreh De'ah* 155:3. The person described here is one who does not suffer from a serious (life-threatening) illness. In the event of a serious illness, the rules of *Pikuach Nefesh* apply, and the patient is permitted to take the medication even if that act involves normal eating. See Reform Responsa for the Twenty-First Century, v. 1 (New York: CCAR, 2010), no. 5758.8, pp. 139-146, <http://ccarnet.org/responsa/rr21-no-5758-8/>, at notes 5-10.

prohibited on that day.⁶⁸ Critically for our question, Orthodox Poskim apply this same standard to the issue of B'rakhah. One fed through a tube is exempt from the requirement of reciting a blessing, since, in the words of Rabbi Ya`akov Breisch, "The recitation of a blessing was established only over the act of eating, and 'eating' is defined exclusively as the oral ingestion of food."⁶⁹ And since the blessing is not required, to recite it would violate the prohibition against *B'rakhah L'vatalah*, reciting a blessing that is not "required" in that setting.⁷⁰

The above summarizes what we have called the "consensus" position, the opinion of most contemporary Orthodox Poskim.⁷¹ On the other hand, some prominent Halakhists hold the opposite view. They regard satiation, rather than taste or *Hana'at Garon*, as the factor that triggers the requirement to recite a B'rakhah.⁷² If so, it would follow that one fed through a J-tube or a G-tube should say a benediction, for he or she is definitely gaining satisfaction from the artificial nourishment even

⁶⁸ R. Shalom Schwadron (19th-century Galicia) Resp. Maharsham 1:123-124; R. Chaim Ozer Grodzinski (20th-century Vilna), Resp. Achiezer 3:61; R. Avraham Steinberg (20th-century Poland), Resp. Machazeh Avraham 1:129. The distinction between patients suffering from serious and non-serious illnesses (see preceding note) apply here as well.

⁶⁹ R. Ya`akov Breish (20th-century Switzerland), Resp. Chelkat Ya`akov, Orach Chayim, no. 52: "*B'rakhah Nitkenet Rak Al Akhilah, V'akhilah La Mikarei Rak Derekh Hapeh L'me'av.*"

⁷⁰ The recitation of a *B'rakhah L'vatalah*, according to some authorities, violates the prohibition against taking God's name in vain (Exodus 20:7); Yad, B'rakhot 1:15, on the basis of B. B'rakhot 33a. Others regard the Exodus verse as an *Asmakhta*, a textual indication of the law but not the law's actual source. In their view, unnecessary B'rakhot are prohibited by Rabbinic decree (see R. Yitzchak bar Sheshet [14th-century Spain], Resp. Rivash, no. 384, end).

⁷¹ See Resp. Machazeh Avraham (note 7, above); R. Eliezer Yehudah Waldenberg (20th-century Israel), Resp. Tzitz Eliezer 12:1; and R. Ovadyah Yosef (note 5, above): no blessings are required in the absence of *Hana'at Garon*.

⁷² R. Ya`akov Emden (18th-century Germany), Mor Uk'tzi`ah, ch. 196 (82d) and Siddur Beit Ya`akov, Hanhagat Has`udah ("In my opinion, even if one received no pleasure [*Hana'ah*] from the act of eating – for example, if he swallowed the food whole, without tasting it – if he was satiated by it, he recites the appropriate blessing"); R. Yosef Teomim (18th-century Germany), P'ri M'gadim, Eshel Avraham, 210:1; R. Meir Eisenstadt (18th-century Austria), R. Panim Meerot 2:27.

though no “eating” is involved. While most Orthodox Poskim, to repeat, do not draw this conclusion, the arguments supporting it lead some of them to suggest a compromise: it would be “a good thing” for the patient being fed in this way to hear the blessings recited by another person “Who can thus enable (the patient) to fulfill his obligation (*Sheyotzi’o Y’dai Chovato*).”⁷³ At first glance, of course, this compromise position seems self-contradictory. How can we speak of enabling a tube-fed patient to fulfill the “obligation” to recite a B’rakhah when, according to the law, no such obligation exists? Rabbi Eliezer Yehudah Waldenberg (d. 2006), the outstanding Orthodox Medical-Halakhic authority, hints at the thinking behind this notion:

It is common in a hospital setting that the patient being fed by a tube shares a room with another patient who eats in the usual manner and who can fulfill the patient’s obligation (*V’sheyukhal L’hotzi’o*) by reciting *Birkat Ha-Mazon* (grace after meals) on his behalf. This can be a very reassuring thing for the tube-fed patient who is passionate about fulfilling the Mitzvot and who is distressed (*Mitzta’er*) when he is unable to do so.⁷⁴

Waldenberg knows that the consensus Orthodox position – a view he shares⁷⁵ – can impose a severe spiritual toll upon the religious patient. To exempt such a person from the requirement of *B’rakhah* is to separate him or her, at least for that moment, from the community that expresses its identity through the performance of Mitzvot. He and other Poskim, it seems, are sensitive to the concern you raise: They do not want observant Jews to feel “isolated” from their Judaism. For that reason, they recommend a solution that, by extending the “obligation” of

⁷³ Resp. Machazeh Avraham (note 7, above). See also R. Mordekhai (Leopold) Winkler (19th-century Hungary), Resp. L’vushei Mordekhai 1:32 and R. Eliezer Waldenberg (20th-century Israel), Resp. Tzitz Eliezer 13:35, sec. 3.

⁷⁴ See preceding note.

⁷⁵ See note 10, above.

B'rakhah to individuals in this situation, stands at odds with the consensus position.

2. The View of This Committee

The majority of us side with the consensus position: It is inappropriate to recite the benedictions for food over tube feeding. We say this, first and foremost, because of the very real distinction between food and medicine. We recite a blessing over the *Hana'ah* we receive from food because eating is an act that we consciously choose to do. Our B'rakhah expresses our thanks for God's bounty at the very moment we decide with intention (*Kavanah*) to benefit from it. By contrast, we do not recite benedictions over actions that we do not choose consciously to perform, even though we derive benefit from them. We do not say a blessing, for example, over breathing or enjoying the sunshine, because those are actions that we cannot intentionally choose not to do. The sustenance one receives from a feeding tube is comparable to these examples. Although a patient may consciously choose to allow the procedure, once the device is inserted it delivers medical treatments in the same way a saline IV delivers a nutritionally necessary solution. The body takes in the liquid without conscious intent, just as it breathes or absorbs sunlight. Thus it forms part of a medical regimen, a course of treatment undertaken in fulfillment of our tradition's commandment to preserve life.⁷⁶ In this sense it is not an act of "eating," and it ought not to be described as such.

It is critical for another reason, too, that we maintain the distinction between food and medicine. Consider the case of a terminally ill, end-stage patient who is being kept alive by way of a feeding tube. Is it permissible to remove the tube, to discontinue the artificial nutrition

⁷⁶ That is, the practice of medicine is the fulfillment of the Mitzvah of *Pikuach Nefesh*, the obligation to preserve human life. For sources and discussion, see *Teshuvot for the Nineties*, no. 5754.18, at pp. 373-375 (<http://ccarnet.org/responsa/tfn-no-5754-18-373-380>), and *Responsa for the Twenty-First Century*, v. 2, no. 5761.7, at pp. 123-124 (<http://ccarnet.org/responsa/nyp-no-5761-7>).

and hydration and to allow the patient to die when all hope for a satisfactory medical outcome has disappeared? In our 1994 Responsum on that question,⁷⁷ we have written that the answer depends in large part upon whether we define artificial nutrition as “food” or as “medicine.” To the extent that the feeding tube is a medical procedure, introduced as a response to the patient’s illness, it is arguable that we are permitted to discontinue that procedure in a situation of therapeutic futility.⁷⁸ Should we in the present *T’shuvah* unequivocally define nutrition through a feeding tube as an act of “eating,” we would raise serious doubt as to the morality of the decision to discontinue artificial nutrition in end-stage cases. Since we do believe that such a decision is morally justifiable under Jewish tradition, we do not wish to engender unwarranted confusion in the minds of patients and family members who confront such fateful choices.

CONCLUSION

For the reasons we have outlined, we think that it is inappropriate to recite a benediction for food over a tube feeding.

We are sensitive to the feelings that you bring to this *Sh’elah*. You raise a powerful concern: No Jew should be made to feel “isolated” from Judaism at a time of illness. We think, however, that there are other prayers that you could recite, words more appropriate to the situation than the blessings over food. The Rabbis long ago composed such a prayer to be recited at the time of medical treatment: “May it be Your will, Adonai my God, that this treatment be a source of healing to me, for You are a gracious healer. Praised are You, Adonai, who heals the

⁷⁷ “Treatment of the Terminally Ill,” *Teshuvot for the Nineties*, no. 5754.14, section V, at pp. 353-355 (<http://ccarnet.org/responsa/tfn-no-5754-14-337-364>).

⁷⁸ We say “arguable” because each case must be judged on its own; as the Responsum (see previous note) makes clear, the determination of “therapeutic futility” can be made only on the basis of a careful and prayerful decision with respect to this patient’s condition.

sick.”⁷⁹ We would suggest that prayer, along with any personal supplications that the patient may wish to add, as the best, most fitting Jewish liturgical response to illness.

A Dissenting View

One member of the Committee takes offers the following dissent.

I differ with the majority for two reasons.

First, the “consensus” Orthodox opinion, with which the majority agrees, rests upon a highly questionable interpretation of the relevant Talmudic source. In that passage,⁸⁰ Rabbi Yochanan and Resh Lakish dispute the precise point at which one becomes culpable for eating forbidden foods. The technical definition of “eating” is therefore entirely germane to the discussion.⁸¹ Our subject, however, is B’rakhah, which the Talmudic

⁷⁹ The original form of this blessing, recommended for those who engage the services of a blood-letter, declares that we invoke God’s protection because “It was not intended for mankind to engage in medicine.”(B. Berakhot 60a) As Rashi (ad loc.) explains the passage, “That is, mankind was intended to pray for healing” rather than call upon the physician in times of illness. Maimonides omits that passage, presumably because he did not share the Talmud’s ambivalence about the propriety of medical practice; see Yad, Berakhot 10:21. Shulchan Arukh Orach Chayim 230:4 follows Maimonides on this point, and the commentators to that work note that the blessing is appropriate for all medical procedures. On the theological struggle over the propriety of medical practice in the classical sources, see our Responsum no. 5754.18 (note 15, above).

⁸⁰ See note 3, above.

⁸¹ The definition is similarly relevant to the question of how one fulfills the positive obligation to eat certain foods, such as Matzah and Maror on the night of the fifteenth of Nisan. See B. Pesachim 115b and Yad, Chametz umatzah 6:2: one who swallows Matzah has fulfilled the obligation, while one who swallows the Maror has not fulfilled the obligation, since one must taste the bitterness of the Maror (Rashi, B. Pesachim 115b, s.v. *Bala Maror Lo Yatzah*). No such “taste” requirement applies to Matzah; so long as the unleavened bread comes into contact with a person’s mouth, that person has “eaten” it and fulfilled the commandment. See Magid Mishneh to Yad ad loc. The point is that one is required to eat the Matzah and the Maror; hence, we need to define precisely just what “eating” entails. Our argument

passage never mentions. The later authorities, those identified with the “consensus” position, connect the two issues and deduce that we recite a blessing specifically over the act of eating. Yet we need not accept that connection. As we have seen, our sources⁸² teach that we recite a B'rakhah as a statement of thanks to God for the *Hana'ah* that our food provides. The patient who receives her sustenance from a feeding tube certainly derives *Hana'ah* from it. She may therefore be obligated – and is at least entitled – to recite a blessing over that sustenance, even if she does not “eat” it.

Second, I think that the majority overstates the fear of “Unwarranted confusion.” Put differently, we can allow persons in this condition to recite a blessing over tube feeding and still justify the discontinuation of artificial nutrition for end-stage patients. The question, as our 1994 Responsum frames it,⁸³ is not whether the mechanism delivers “food” or “medicine” but whether it can be deemed a medical procedure, an action undertaken by medical personnel as part of the indicated course of treatment. Once that treatment loses its therapeutic rationale, we have moral grounds upon which to discontinue it. It does not matter that the tube delivers “food” if, as a medical procedure, it serves no legitimate therapeutic function; it may be disconnected, as any futile medical procedure may be discontinued. In the case of our *Sho'elet*, by contrast, the artificial nutrition is hardly “futile” but serves an entirely legitimate therapeutic rationale. It is, in other words, her sustenance, over which she may rightfully recite a blessing.

here is that the blessing over food has to do with the *Hana'ah* the food provides and not with the manner in which one consumes it.

⁸² See at note 2, above.

⁸³ See note 16, above.

An Adopted Asian Child⁸⁴

She'elah

I've been approached by a couple who are unable to have another child (they have one already) and are interested to adopt. They are exploring the possibilities of adoption in several countries including Thailand and China. If they were to be successful in adopting a child from one of these countries, they are seeking to know whether progressive Judaism has a view on the rights of the child to be raised with knowledge of their birth (native) culture, including religious traditions. Apparently, there is considerable discussion of this topic nowadays among those officials responsible for adopted children and their welfare. More generally, how does Judaism view the welfare of adopted children in this regard: Their right "by birth" to learn about their native culture, weighed against the adoptive parents' responsibility to raise their children with a sound Jewish education and sense of identity?

(Rabbi Fred Morgan, Melbourne, Australia)

Teshuvah

Our Responsum is based upon two earlier *T'shuvot*: no. 5753.12, "Kaddish for Adoptive and Biological Parents,"⁸⁵ and no. 5760.8, "Withholding Paternity Information." The former deals with the nature of the parent-child relationship in adoptive families; the latter discusses the responsibility shared by all parents to act in accordance with the best interests of their children.

⁸⁴ Written by the CCAR Responsa Committee in 2000. <https://www.ccarnet.org/ccar-responsa/nyp-no-5760-9/>. Accessed 19 October 2022.

⁸⁵ *Teshuvot for the Nineties* (TFN), 201-207. As with all our Responsa, this one is available online at ccarnet.org/resp.

The term “best interests of the child” does not, of course, originate in Jewish literature. We borrow it from the language of other legal traditions. Yet it is a principle deeply rooted in Jewish law, which posits that along with the child’s filial duty to honor and revere the parent (Exodus 20:12; Deuteronomy 5:16; Leviticus 19:3) come a set of obligations owed by parent to child.⁸⁶ To insure that these obligations are met, Talmudic law prescribes a number of general rules concerning parental care and custody of children.⁸⁷ These rules, however, can be altered or ignored by the rabbinical court (*Beit Din*) when it determines that the good of the child demands other arrangements.⁸⁸ “The best interests of the child,” in other words, serves as a guiding Jewish principle in matters relating to child-rearing and family relationships, and we think it applies quite directly to our case. Whether adopted children enjoy a “right by birth” to learn about their native culture, it is certainly arguable that such knowledge will be beneficial or even essential to their psychological welfare. Those who study the growth and development of adopted children report that race and culture play significant roles in identity formation among adoptees whose racial and cultural heritage differs from that of their adoptive parents.⁸⁹ While we are in no position to evaluate the scientific literature in this field, much of the data seems to argue that it is important for parents to take active

⁸⁶ These are the Mitzvot Ha-Ben al Ha-Av; see Kiddushin 1:7 and BT Kidushin 29a.

⁸⁷ For example, a child should live with his or her mother (in the event the parents do not live together) until the age of six. Upon reaching that age, boys generally live with their fathers, since it is the father’s duty to teach Torah to his son, while girls remain with their mother, who bears the responsibility of training her daughter in the ways of Jewish Womanhood. See BT Ketubot 65b, 102b and 103a; Yad, Ishut 21:17-18; Shulchan Arukh EHE 82:7.

⁸⁸ Isserles, EHE 82:7; R. David ibn Zimra (16th-century Egypt), Responsa 1:123; R. Shmuel di Medina (16th-cent. Salonika; Maharashdam, EHE, no. 123). This rule guides the jurisprudence of the Israeli Rabbinical Courts on matters of child custody; see Piskey Din Rabaniyim 1, p. 61 and p. 157.

⁸⁹ Madelyn Freundlich, *Adoption and Ethics, Volume One: The Role of Race, Culture, and National Origin in Adoption* (Washington, DC: The Child Welfare League of America, 2000), p. 123. Freundlich offers a useful, wide-ranging survey of the research in the field.

steps to assist their transracial and transcultural adopted children in building a positive appreciation for their ethnic origins.⁹⁰ If Judaism teaches us to work toward the “best interests of the child,” it stands to reason that our tradition would encourage adoptive parents to help their children learn about their native culture.

Our Responsum 5753.12 declares that, according to the best reading of Jewish tradition, adoption creates a real family and a real parent-child relationship.⁹¹ When Jewish parents build their family through adoption, therefore, it is a Jewish family they are building, a family in which the parents teach Torah and bequeath their Jewish heritage and identity to their children. Jewish identity, as we have written on numerous occasions, is religiously exclusive. There is no such thing as a “half-Jew,” a person who is simultaneously Jewish and a communicant of another religion; one is either a Jew or a non-Jew.⁹² This affirmation is basic to our understanding of Jewish identity and of the task assigned by tradition to all Jewish families, however those families are created. Its implication for our *She’elah* is clear: Jewish parents who seek to teach their adopted child about the child’s native culture must do so in a way that does not compromise the child’s perception of Judaism as his or her

⁹⁰ The following statement by D.S. Kim is representative: It is necessary for the child to be aware of personal heritage to develop his full potential or to define his place in society. Therefore, while avoiding ethnocentricity or reverse racism, foreign children can and should be instilled with a positive ethnic identity;” “Issues in Transracial and Transcultural Adoption,” *Social Casework* 5 (1978), 477-486, at 485. See also R. Rios-Kohn, “Intercountry Adoption: An International Perspective on the Practice and Standards,” *Adoption Quarterly* 1:4 (1998), 3-32, at 4: adoptive families ought to pay “due regard...to the child’s ethnic, religious, cultural, and linguistic background.”

⁹¹ See TFN, p. 206, at the end of the Responsum’s text: “Children are obligated to show their adoptive parents all the deference and honor expected of Jewish children, for indeed, these have become their parents in every respect.”

⁹² See TFN, no. 5754.3, pp. 263-264; *New American Reform Responsa* (NARR), no. 88, pp. 138-139, and no. 109, pp. 173-174; *Contemporary American Reform Responsa* (CARR), no. 61, pp. 98-99. That Judaism must be a child’s exclusive religious identity lies at the heart of the CCAR’s resolution on patrilineal descent: A child brought up in a mixed-married household must be raised exclusively as a Jew in order to qualify as a Jew under the terms of the resolution. See TFN, no. 5755.17, pp. 251-258.

exclusive religious identity. To put this in the language of the preceding paragraph, the “best interests” of a Jewish child require that he or she be raised as a Jew.

How do parents negotiate these conflicting demands? The idea that Judaism is the child’s exclusive religious identity implies, at the very least, that the child should not take part in any of the overtly religious ceremonies and rituals of his or her native culture.⁹³ This standard, we acknowledge, is somewhat vague, perhaps unavoidably so. Religious elements are woven tightly into the fabric of everyday life in many cultures, so that it is may be impossible to distinguish with absolute clarity their “religious” from their “non-religious” aspects. Indeed, Jewish culture is a prime example of this phenomenon. Still, we can say that “overtly religious” ceremonies include worship services or rituals in which deities other than the God of Israel are invoked, as well as rituals that express theological commitments incompatible with Judaism. The child may learn about these aspects of the native culture but should not participate in them.⁹⁴ In addition, the Jewish commitments of the Jewish household take precedence over conflicting claims. For example, the family’s observance of Shabbat or holidays should not be altered to accommodate events relating to the child’s native culture. Similarly, if the family observes Kashrut, they are under no obligation to allow their child to eat non-Kosher foods associated with his or her native culture. Following these guidelines, we think, will allow the child to develop a deep and keep appreciation of the native culture while establishing a firm and sure identity as a member of the Jewish people.

⁹³ See also CARR, no. 51, pp. 97-88.

⁹⁴ To use an example from a Western setting, a Jew seeking to learn about the culture of Italy would do well to witness church masses, since Roman Catholicism is such a significant element in the life and traditions of the Italian people. The Jew, however, would not worship at the mass or engage in any of the ritual behaviors particular to Catholic worship.

