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## HALAKHIC PLURALISM

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## TRADITION

There appears to be yet another procedure that can be recommended with even greater confidence. A preparation containing 0.12% chlorhexidine gluconate in 70% ethanol alcohol will serve to inactivate HIV quickly in a relatively short contact time. Chlorhexidine gluconate is available from pharmaceutical companies in a 20% solution. That solution should be combined with 151-proof rum in a ratio of 6 to 1,000, e.g., 0.12 ounce of chlorhexidine gluconate in 20 ounces of 151-proof rum or 0.24 ounce (a little less than  $\frac{1}{4}$  of an ounce) in 40 ounces of 151-proof rum. Higher concentrations should be avoided because toxicity studies have not been performed at higher levels. Use of this solution will combine the effectiveness of both alcohol and chlorhexidine gluconate and hence should obviate any lingering doubts concerning use of alcohol alone or of a lower concentration of chlorhexidine. Although no clinical studies have been performed, there is no reason to suspect that the combination will inactivate either agent. It should be noted that extreme care must be taken to prevent any solution containing chlorhexidine gluconate from coming into contact with the eyes or ears.

In summary, on the basis of the published reports and my own consultation with experts in the field, those who require oral *metsitsah* need not abandon that practice because of fear of contracting AIDS, particularly since their exposure is to persons in an extremely low risk group and certainly if they take the precaution of having the mother tested for HIV virus. The *mohel* should, however, rinse his mouth for thirty seconds with Peridex, or for several minutes with 151-proof rum, or optimally, with a solution of chlorhexidine gluconate and 151-proof rum as indicated above.

4. I suspect that Dr. Cooper has misread my comments concerning use of a glass tube for performance of *metsitsah*. I regard use of a glass tube, when properly employed, to be perfectly acceptable insofar as halakhic considerations are concerned. The issue is not whether suction by means of a glass tube is feasible but whether suction from *mekomot ha-rehokim* is likely to occur. I clearly indicated that this can be accomplished by use of a glass tube having the proper circumference. The *mohel* must also be knowledgeable and vigilant in creating a seal in which suction from *mekomot ha-rehokim* can be accomplished. The only remaining objections of which I am aware are based upon extra-halakhic kabbalistic considerations and/or custom. My skepticism was expressly reserved for direct oral suction, not involving use of a glass tube, when performed with interposition of a gauze pad.

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TO THE EDITOR:

Rabbi Michael Rosensweig's truly excellent article "*Elu vaElu Divre Elokim Hayyim: Halakhic Pluralism and Theories of Controversy*" (*Tradition* 26:3, Spring 1992) surveys nearly all of the theoretical basis for controversy in Halakha in an admirable way. However, I would suggest that there is one other way to view post-mishnaic "controversies." This approach posits that nearly all post-talmudic disputes contain two opinions, both of which are of possible halakhic value. One view becomes "normative" and the other not; but the "non-normative" view is certainly not "incorrect."

Inherent to this method of analysis is the rise of the doctrines such as *sefek sefeka* (double doubt) and *kim le* (choice of law rules), both of which are predicated on the fact that Halakha no longer is capable of deciding legal controversies in a manner which makes minority opinions of no jurisprudential value except as they help explain the majority opinion (as, for example, they are in American law or as the opinion of Bet Shammai is now). Indeed, an examination of the Rishonim shows that *sefek sefeka* and *kim le* are rarely employed, as early authorities were not inclined to accept the distinction between “normative” and “correct.”

Undoubtedly there are some opinions that are just “wrong” rather than “not normative.” They are internally inconsistent, cannot be harmonized with the binding talmudic precedent, or the like. However, the vast majority of opinions found in the major Rishonim are tenably correct in that there are no obvious questions lodged against them; they are consistent, both externally and internally. These opinions are not normatively followed for a number of secondary reasons, such as: the majority of the Rishonim might have chosen to accept an alternative understanding as correct (without demonstrating this understanding to be wrong); certain opinions were historically lost; the Ashkenazic practice is to reject Rambam’s opinions when both Ri and Rabbenu Tam decline to follow it; Sephardic practice is to reject Ri and Rabbenu Tam’s opinion when Rabbenu Alfasi and Rambam reject it; or simply because Jewish custom is to rely on these opinions. In most circumstances, rejected opinions are not normatively followed without being proven “incorrect”.

According to this “theory of controversy,” all post-talmudic controversies are part of the halakhic discourse precisely because they are tenably correct and, hence, can be followed in a time of need. For example, when Rabbi Yechiel Michel Epstein, following in the intellectual footsteps of Bach, writes about the problem of *hadash* in the diaspora (*Arukh haShulhan Yore Dea* 293:20), he indicates that in a time of need one may follow the opinion of any talmudic authority that is not explicitly rejected in the Talmud. Similarly, *Mishnah Berurah (Orakh Hayyim*, 489:10, *Biur Halakha*, s.v. *af bezeman*) states that a small minority of Rishonim may be relied on in a time of need if that is the custom. Thus, one studies minority opinions because, in certain situations, even the tenably correct opinion of just one authority can be relied on, even though it is not accepted—but not proven wrong—by all of the other authorities.

It would seem that this approach adopts an unstated theory of controversy and a different analysis of the role of “halakhic pluralism.” The reason why Jewish law examines “rejected” opinions in the area of *pesak* is because such opinions are not really rejected at all, but merely *not currently followed*. This approach—living with *legal* doubt—has become a hallmark of modern halakha and too represents a “theory of controversy” and a method of understanding pluralism in the area of *pesak*. Since all logically tenable opinions can—in the right circumstances—be followed, they are studied and discussed in case a time might come when they will be needed. Indeed, one studies even those opinions that are so widely discredited that one cannot imagine a time when they will be relied on, as perhaps they will be used as one side of a *sefek sefeka* or a *sefek sefek sefeka*. See, e.g., *Responsa Bet David (Yore Dea* 6 & 18), where the author explicitly states that opinions completely rejected by Halakha can be used in one side of a *sefek sefeka*, and Rav Ovadia Yosef (*Taharat Habayit*, 2:553-554), who demonstrates that many authorities (including he himself) accept this rule.)

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Of course, how quickly various *poskim* resort to this type of analysis is a matter of intellectual temperament and custom. For example, even a cursory comparison of the style of *pesak* of Rabbi Ovadia Yosef with Rabbi Moshe Feinstein reveals that the former is much more inclined than the latter to rely on *sefek sefeka* doctrinally. Indeed, a survey of the first six volumes of both works finds that term used only 24 times in Rabbi Feinstein's responsa and 530 times in those of Rabbi Yosef.

To put it another way; a number of latter authorities use the metaphor of "dwarfs standing on the shoulders of giants" to explain why later authorities see farther than the earlier authorities who are much greater themselves. However, dwarfs standing on giants' shoulders know that it is very hard to determine which giant really is taller and thus live in continuous theoretical doubt as to the tallness (correctness) of the giant they chose to stand on. This doubt allows the "dwarfs" to incorporate the opinions of "lesser giants" into the Halakha or sometimes straddle the shoulders of two incompatible giants, in a way that the giants themselves could not do and would not accept.

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