YESHIVAT HAR ETZION

ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)

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**20th Century Teshuvot**

**By Rav Gidon Rothstein**

**Shiur #19: Amniocentesis and Aborting a Baby with Down Syndrome**

My study of responsa (for [*Judaism of the Poskim*](https://mosaicapress.com/product/the-judaism-of-the-poskim/)) highlighted the common tendency to place people in incorrect boxes, based on limited information. When I would mention *Tzitz Eliezer,*for instance, too often the reaction was, “Oh, *Tzitz Eliezer* –he permitted aborting Tay-Sachs babies!” A man who published twenty-six volumes of responsa, as well as other books, and served on a rabbinical court – and he’s whittled down to this one view!

*Shu”t Tzitz Eliezer*14:101, dated 17 Adar Sheni 5739 (1978), follows up on that famous ruling, about six months later. [Dr. David Meir](https://www.szmc.org.il/eng/about-us/directors-general/), head of Shaare Zedek, the hospital where R. Waldenberg served as *posek*, had chaired a committee about how to avoid major birth defects, including significant intellectual deficits. Based on his committee’s work, the Ministry of Health had articulated a plan for managing Down syndrome pregnancies, and he now wanted to check the plan’s halakhicramifications with R. Waldenberg.

**Down Syndrome: How much less of a problem?**

In 1978, one in nine hundred Ashkenazic couples were carriers for Tay-Sachs on both sides, meaning a one in four chance of having such a baby. The statistics of the time showed that women over thirty-seven had babies with Down syndrome one percent of the time, and two percent when she was over forty. [More recent [statistics](https://www.ndss.org/about-down-syndrome/down-syndrome/) report one in 350 over age thirty-five, one percent at age forty, and one in thirty, or 3.33 percent, at age forty-five. Allow me to point out how small these chances are, even at the latest stages.]

Amniocentesis could tell the parents about their fetus, but only after three months of pregnancy. [Today, it’s performed between fourteen and sixteen weeks.] Dr. Meir reminds R. Waldenberg of the significant challenges of raising such a child, some of whom require institutionalization. Many have a reduced life span, although much longer than for Tay-Sachs. (Today, the reported average life expectancy of someone with Down syndrome is sixty, where Tay-Sachs babies generally expire within five years of birth.)

R. Waldenberg had based his Tay-Sachs ruling on the psychological cost to the parents, especially the mother; in his view, this concern was enough to allow aborting the fetus as late as the seventh month of pregnancy. Down syndrome has a blurrier impact, negating any quick assumptions. Many families, Dr. Meirpoints out, raise and include their Down syndrome members – despite the significant challenges – welcomingly and with love [and, I’m pretty sure he means, without obvious debilitating damage to the family].

He wants R. Waldenberg’s advice, to help him discuss best options with expectant parents.

**No *Lifnei Iver***

R. Waldenberg splits the question in two: whether the test itself is permissible and, if it is, whether abortion would be allowed. He raises some concerns with regard to the risks involved in performing the test itself (the laws of *tereifot*, making certain physical wounds in animals, might have led us to believe we cannot perform such a test), but dismisses them fully enough that we can leave the discussion for a time when we are interested in those laws in particular (it’s a fairly long responsum).

We might also think the test would be halakhically problematic because it could lead the parents to do something halakhically forbidden, in which case the hospital could be considered a sort of accessory. If R. Waldenberg concludes such abortions are prohibited, for example, the mother might take her test results and secure an abortion at another hospital. Shaare Zedek might then be considered to have participated in the abortion. On the other hand, the State of Israel and the Ministry of Health expect Shaare Zedek to act in certain ways, such as by providing the test.

R. Waldenberg assuages the concern, because if a Jew helps another in a way where the second Jew *could* sin but could also plausibly move forward with a permissible set of actions, the first Jew has not directly abetted a sinful act – i.e., has not violated *lifnei iver*. To support his claim, R. Waldenberg points out thatRitva to *Avoda Zara*limits the prohibition to giving a fellow Jew a prohibited item (such as wine to a *nazir*; there, we may not give the wine despite the possibility the *nazir*will not drink it, because it is itself a prohibited item).

**A Distant Likelihood**

Here, the hospital would be giving information. In the vast majority of cases, the hospital will tell the parents they are expecting a baby with no known genetic problems. In the small minority (mostly under two percent), the parents will not necessarily decide to abort the baby [a couple might prefer to know about their baby’s Down syndrome in order to mentally prepare, without thought of abortion]. Third, the circumstances of their case may lead a qualified halakhic authority to permit ending the pregnancy (in which case, there would be no sin in the abortion, so no issue of *lifnei iver*in the amniocentesis).

With so many halakhicallyacceptable outcomes possible, we need not worry even about *mesaye’a lidei ovrei aveira,*the more expansive Rabbinic prohibition against aiding sinners.

**Personal *Pesak*Rather Than General Rulings**

The potential complications of permitting such an abortion were already laid out in the question. Even granting one-hundred-percent accuracy of the amniocentesis, the test would only yield its information after three months of gestation (when the fetus is developed enough to present more of a halakhic issue than a first-term abortion); furthermore, Down syndrome is not Tay-Sachs.

Notably, R. Waldenberg does not prohibit abortions in these circumstances; rather, he says each couple must consult a competent rabbinic authority, who can evaluate and decide whether *halakha*sees enough reason in their situation to permit the abortion. Should the rabbi permit it, the hospital would then have the right to perform it.

The reasons he had given in his Tay-Sachs rulings *might*apply to Down syndrome as well, he agrees, but not necessarily. For instance, he mentions a *chareidi*couple who had already had two babies with Down syndrome, each of whom passed away as toddlers. The mother’s pain was so significant that she refused to continue ordinary marital relations, for fear of another pregnancy, and the couple was about to divorce. R. Waldenberg assured her she could have an amniocentesis when she got pregnant again, which she did, and they had a healthy baby and were restored to marital peace.

On the other hand, he was approached about a woman over age forty whose doctor had told her to take the test. R. Waldenberg advised against it, and urged the couple to adopt our traditional reliance on Hashem. [This is a point not to be missed, nor dismissed as overly old school. Part of any Torah lifestyle is the verse *tamim tihyeh ‘im Hashem Elokekha*, be complete with Hashem, your God; we are supposed to trust Hashem rather than other ways of assuring our future. That’s obviously balanced by whatever is considered the standard of proper human care for our lives, as this responsum itself is showing.]

Complicating this case, however, the husband, an Orthodox scientist, said it was too late for that – his wife had been nervous ever since the doctor told her she should take the test; she was not sleeping at night, etc., and was at the point that the test was necessary. It’s an example of too much knowledge leading to heartache (a fulfillment of *Kohelet*1:18: more wisdom leads to more anger, more knowledge to more pain).

Later in the responsum, he gives another example: a couple who married late and were told by the doctor to have an amniocentesis, but did not want to (they were so anxious for a child, they wanted to take whatever Hashem sent them). Given their circumstances, *Tzitz Eliezer*validated their instincts and told them to turn down the test. (They eventually had a healthy baby, but that’s not his point.)

**Some Reasons to Allow Abortion**

*Tzitz Eliezer* briefly reviews the reasons abortion may be allowed, beginning with the fact that most authorities classify it as a Rabbinic prohibition, since the fetus is not a full halakhicperson. As part of this, many of those authorities explicitly deny it counts as *avizrayhu,*an extension, of murder, about which there are stringencies beyond the technical seriousness of the act itself.

Maharit and others allow abortion for maternal *health*, not just mortal danger, and say this would be true even if it were a violation of the Torah itself – because the fetus does not yet have a *chazaka de-chiyuta*, a presumption of life. R. Yaakov Emden and others thought maternal *pain* could be cause to allow an abortion, and *Rav Pe’alim* (responsa by the author of *Ben Ish Chai*, generally thought of as *machmir* –tending to the stricter view) even accepted psychological damage as part of the abortion decision.

Later in the responsum, *Tzitz Eliezer* adds another way to ease the choice: if an abortifacient drink or injection can be administered to produce a miscarriage, *halakha*will view the doctor’s actions as *gramma*, causation – acts less directly attributed to the person who did them, and therefore less of a halakhic problem.

**How Medicine Helps**

R. Waldenberg then adds a parenthetical note that I think deserves prominence. There are those who argue against using medical interventions, since if Hashem wants these parents to be challenged with caring for a baby with Down syndrome, who are they to stop it? In addition, the baby might be a reincarnation of a soul which needs further atonement, and who are we to short-circuit it?

He points out that our tradition, articulated in a responsum by *Chatam Sofer*, is to follow *halakha*where it takes us, even if itleads to a different conclusion than a kabbalistic or metaphysical approach would. In the case of medicine, *Chatam Sofer*to the Torah had boldly addressed those who wondered what role a doctor played in healing, arguing that if Hashem wanted the person healed, the person would live, and if not, not, so what does the doctor do? *Chatam Sofer*’s response is that the question ignores Hashem’s interest in a world which generally operates according to certain patterns, which we call Nature.

Within a natural framework, some people fall ill in ways they will not survive naturally without medical care. True, Hashem could heal them miraculously, but they may not be of a high enough level to deserve or elicit miracles. In the reverse, medical care is often so naturally effective that only a miracle would make it fail, and the patient’s deficiencies are not so egregious as to lead Hashem to make such a miracle.

Both of which are reasons Hashem obligated us to take advantage of medicine.

The same applies to pregnant couples, says *Tzitz Eliezer.*Once Hashem has made it possible for doctors to discover methods of testing pregnancies, doing our reasonable due diligence, and reacting to news we receive in halakhicallyproper ways becomes part of our obligatory natural response to our medical lives.

He last reminds us of the husband’s right to weigh in on the issue as well; both parents need to agree before proceeding with an abortion (an important topic R. Waldenberg does not pursue further).

And there you have it: abortion is not always allowed, but it is a Rabbinic prohibition that *might*be allowed, depending on when in the pregnancy it would be performed and on the ramifications of the pregnancy for *this* family’s health – as is all attested by many authorities who came before *Tzitz Eliezer*, not just one man’s radical view.