

MENTAL RETARDATION, GROUP HOMES AND THE RABBI

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The Committee on Jewish Law and Standards of the Rabbinical Assembly provides guidance in matters of halakhah for the Conservative movement. The individual rabbi, however, is the authority for the interpretation and application of all matters of halakhah.

שאלה

From a halakhic perspective, must one support a group home for the “developmentally challenged” in one’s back yard? Does one have the halakhic right to be opposed to the placement of such a group home in his or her neighborhood? Is a rabbi to speak for or against this issue?

תשובה

In the United States, there are an estimated 7.5 million people with mental retardation. This constitutes between 2.5 and 3 percent of the U.S. population. As such, mental retardation is fifteen times more prevalent than cerebral palsy, thirty times more prevalent than neural tube defects such as spina bifida, and thirty-six times more prevalent than total blindness. It is also fifty times more prevalent than total deafness.¹ Worldwide, approximately 156 million people, or 3 percent of the world population, have mental retardation.²

Though several hundred causes for mental retardation have been discovered, the three major sources are Down’s syndrome, fetal alcohol syndrome and fragile X syndrome. In addition to genetic conditions, primary causes can include problems during pregnancy such as rubella, toxicity, malnutrition, RH incompatibility, radiation, pre-

¹ “What is Mental Retardation?” at www.paso.org/about/whatismr.html, quoting the American Association on Mental Retardation (AAMR). See also *Diagnostic and Statistical Manual of Mental Disorders (DSM IV)* (Washington, DC: The American Psychiatric Association, 1994), pp. 40-46.

² “What is Mental Health?”, *ibid.*, quoting the World Health Organization.

maturity or birth injury. Environmental issues are sometimes factors as well, including physical accident, fever, malnutrition, lead poisoning, poor parental care, sensory deprivation and educational deprivation.³

Mental retardation is most often divided into three categories:

Mild: This category encompasses those with an IQ range between fifty-five and seventy. Individuals in this range are often physically indistinguishable from the typical population. They are capable of learning academic skills to approximately an eighth grade level. They can usually acquire vocational and social skills necessary for independent living. Of all individuals with mental retardation, eighty-nine percent are mildly retarded.

Moderate: Those with an IQ range between forty and fifty-five. Within this range, individuals have significant impairment in achieving academic success. However, they can learn self-care, social and vocational skills. The language is generally functional and partial independence is achievable.

Severe: Those with an IQ range between twenty-five and forty. (Sometimes combined with *Profound*, where IQ scores fall below twenty-five.) In this category, individuals are less capable, but with special instruction, can achieve a significant degree of self-care and independence in highly structured settings. Individuals in this category have some language but understand more than they can express. Only 3.5% of all persons with mental retardation have severe or profound retardation.⁴

In the 1970s, a wholesale move towards de-institutionalization took place. Most large institutions are now gone. Intermediate care facilities (ICFs) and group homes have replaced them. The hope was that, in this way, individuals with retardation could more closely integrate into the community. The Americans with Disabilities Act (1990) mandates that individuals with disabilities be provided with the least restrictive environment for the services they receive.⁵ As such, group homes help developmentally delayed people live in the community while providing the care they need.

Commonly, one finds a range of individuals who reside in group homes. However, those with lesser skills benefit greatly from the safety of these environments. Medications and safety can be more carefully monitored in such facilities. Physical accommodation is more readily supervised when necessary. In general, it is considered the safest setting for those with greater support needs.⁶

Typically, four to six individuals live in a group home along with supervisory staff. Residents typically receive other services provided by private agencies or the government such as vocational training, social outings, etc.

Homes are organized by individuals, private agencies and, in some cases, by state agencies for the retarded. Housing sources include Supplemental Security Income (SSI), states' SSI supplements, Social Security Disability Insurance, Section 8 vouchers, housing subsidies and private sources including family trusts, housing associations, community land trusts, community loan funds, Habitat for Humanity, etc.

Currently, most people with mental retardation live with their families. However, as parents age, other living arrangements are sought. Over 87,000 individuals nationwide liv-

³ "Mental Retardation," ARC (The Association of Retarded Citizens) at www.main.org/arc/mr.html.

⁴ Ibid. See also AAMR report.

⁵ ADA Technical Assistance Manual General Requirements III-3.1000. ADA Regulations 28CFR36.201-36.213 and 36.203-Integrated Settings.

⁶ "Consumer Control of Housing," University of Missouri at Kansas City Developmental Disabilities Resource Center at www.moddrc.com/info/cch.htm.

ing with families are waiting for other arrangements. The waiting time for individuals hoping to enter group homes can be as long as twelve years. Most states prioritize their lists allowing emergency cases such as homeless children and those who suffer the death of parents to move more immediately into group home settings.⁷

All group homes are licensed by the state and must meet zoning, health, fire and general safety regulations. Many homes can cost up to half a million dollars per year to administer.⁸

N.I.M.B.Y.

The “not in my back yard” phenomenon is a common concern in twentieth-century America. Frequently, neighborhood residents have banded together to protest the building of prisons, waste dumps and other unsightly institutions within proximity to their neighborhoods. At times, there have been ugly expressions of protest against the purchase of a home designed for group living of the developmentally disabled. Among concerns cited are the possibility of residents wandering at odd times throughout the neighborhood, declining property values and “a slippery slope” leading to criminal halfway houses. While such concerns are exaggerated, it is fair to raise a potential concern that may be voiced by neighbors to group homes. In order to provide services, many homes have frequent visitors who arrive to provide transportation, therapies and other medical services to residents. Some home might appear to be a virtual agency within a residential neighborhood. It is likely that there would be a more frequent parade of visitors than one might find in a typical residential neighborhood.

Of late, protests have centered far more on the establishment of actual halfway houses. The Federal Fair Housing Act⁹ prohibits discrimination in sale or rental of housing on the basis of race, religion, color, national origin or sex. In 1988, amendments to that act extended to people with disabilities and families with children. Disability is defined as including physical or mental impairment. Furthermore, the U.S. Supreme Court has ruled that communities cannot utilize single-family zoning to bar group homes for the disabled by enforcing occupancy limits in a discriminatory way. Thus, group homes for the developmentally disabled, provided they meet state licensing requirements, are protected under American law.¹⁰

Indeed, many advocates for retarded citizens have noted the relative decline of overt protests against the establishment of group homes for those with developmental delay. Group home leaders take great pains to introduce residents to neighbors, open their homes to visitation and do everything possible to demonstrate their intention to be good neighbors.¹¹ While this improvement can be partially traced to a greater receptivity of handicapped individuals, pockets of opposition are sure to remain.

There is a significant volume of halakhah governing the roles of neighbors and the physical construction of homes and property in order to provide privacy and security. For example, we read in the Mishnah, Bava Batra 2:4:

⁷ Dennis Geary, Director, Jewish Association for Communal Living (JCL), Hartford, Connecticut. (Personal conversation.)

⁸ *Ibid.*

⁹ U.S. code, Title 42, Chapter 45.

¹⁰ <http://www.bazelon.org/cpha/nlc95pap.html>. Also see *lectlaw.com*, *New York Times Services*, 16 May 1995.

¹¹ Dennis Geary. (Personal conversation.) See also D.A. Arens, “What Do the Neighbors Think Now? Community Residences on Long Island,” *Community Mental Health Journal* 29(3): 235-245, 1993.

If one has a wall running alongside his neighbor's wall, he should not bring another wall alongside unless he keeps it (at least) four cubits away. If there are windows (in the neighbor's wall), he must leave a clear space of four cubits whether above or below or opposite.

The Gemara there¹² elaborates that allowing such a space is a means of avoiding one from "peeping" into another's room.

Some might argue that there is a potential for group home residents to constitute a disturbance because of their "unusual appearance." Some might even assert that the placement of a group home in proximity to neighbors potentially constitutes a form of *חזק ראייה*, a kind of damage in halakhah that emerges from unseemly sights in a neighbor's property.

We shall see below all other considerations supercede this potential. Moreover, the Gemara reflects debate whether or not *חזק ראייה* is genuine damage or not.¹³ Also, the scenario in the Mishnah cited above is entirely mutual. The laws governing the construction of walls and the placement of windows protects both parties.

Mental Retardation and Halakhah

The most relevant halakhic categories to mental retardation are the *שוטה* and the *פתי*. Concerning the *שוטה*, the Talmud in Haggigah 3b states the following:

איזהו שוטה? היוצא יחידי בלילה והלך בבית הקברות והמקרע את כסותו.

Who is named a *שוטה*? One that goes out alone at night and he that spends the night in a cemetery and he that tears his garments.

A *שוטה* is typically translated as "idiot," "imbecile," "mentally impaired," or "incompetent." It is an ambiguous category to delineate.

In the Gemara, Rav Huna states that one is not considered a *שוטה* unless he manifests each of the three forms of bizarre conduct described herein.¹⁴ Rav Yochanan holds that if one manifests any of the three forms of erratic conduct depicted, one is deemed a *שוטה*. In general, the *חרש* – deaf mute – *שוטה* and minors are not required to fulfill the mitzvot and not subjected to the penalties for which adults would normally be culpable. *שוטים* are legally classed as minors in this regard.¹⁵

The *שוטה*, as presented in the Gemara, displays the kind of behavior typically associated with emotional disturbance such as psychoses, bizarre or stereotypic actions characterized by self-abuse and inappropriateness of orientation. Certainly, not all individuals with mental retardation would fit this description. Those with mild or moderate expressions of retardation are intellectually immature but rarely display such inappropriate behaviors.

Maimonides introduces a new element regarding *שטות* in discussion of *עדות*. In the Mishneh Torah we read:

הפתאים ביותר שאין מכירין דברים שסותרין זה את זה ולא יבינו עניני הדבר כדרך שמבינין שאר עם הארץ, וכן המבהלים והנחפזים בדעתם והמשתגעים ביותר-הרי אלו בכלל השוטים.

¹² Bava Batra 22b. See also the discussion in the *Encyclopedia Talmudit* (Jerusalem: Encyclopedia Publishers Ltd., 1980), vol. 8, pp. 759, 786-788, s.v. *חזק ראייה*.

¹³ Bava Batra 2b.

¹⁴ See also Tosefta Terumot 1:3.

¹⁵ Rashi, Haggigah 3b, s.v. *איזהו שוטה*.

The extremely simple-minded who do not recognize things which contradict one another and who do not comprehend the particulars of a situation as do the rest of the masses; and so also those whose thought processes show confusion and disinhibition, as well as those who are extremely bewildered are included among the שוטים (M.T. Hilkhhot Edut 9:10).

This would indicate that with respect to עדות, where requirements are particularly stringent, the Gemara's categories are merely representative of a consistent pattern that would disqualify one from serving as a witness. Any consistent confusion or bizarreness of thought would also classify one as a שוטה.¹⁶

Maimonides believes that some forms of שטות are temporary:

He who is sometimes a שוטה and sometimes normal, as is the case with epileptics, his actions are like any other individuals when he is normal. . .and witnesses are needed to determine whether he may have committed his action either at the beginning or end of his abnormal episode (M.T. Hilkhhot Mehira 29:5).¹⁷

Clearly, for Maimonides, the issue of דעת, a capacity to function intellectually with consistent clarity, is central in defining clear qualifications for עדות. However, halakhah recognizes gradations in the שוטה's capacity to function. We read in the Shulhan Arukh in Orah Hayyim 199:10 (Rama) that, a חרש or a שוטה can be included in the זימון for ברכת המזון if they can concentrate and comprehend even though the חרש does not hear the blessing. The Mishnah Brurah there states that the שוטה referred to is not a complete שוטה since such a total שוטה could not be part of the quorum. This individual is simply not as intelligent as others, and the masses regard him as a שוטה. Again, though popularly considered a שוטה, a lack of intellectual capability alone would not make one fit this categorization. There is no disoriented behavior involved.¹⁸

The second category is that of the פתי. As quoted above, Maimonides defines the פתיים as a sub-class of שוטים whose members display impaired intellectual ability. Reuven Hammer, in a תשובה concerning the permissibility of conducting a Bar/Bat Mitzvah for children with mental retardation, asserts that the Rambam's inclusion of the פתי as a שוטה is only to exclude both שוטים and פתיים from serving as witnesses. He draws a sharp

¹⁶ See also Kesef Mishnah on עדות 9:9.

¹⁷ This is particularly relevant for marriage and divorce. A גט could be authorized by a husband when in a period of lucidity. See S.A. Even HaEzer 121:3.

¹⁸ Two more recent responsa addressed the question of placing a child with retardation in a setting where non-kosher food would be given. The Hatam Sofer (Rabbi Moses Sofer) denied permission to have a seven year-old boy placed in an institution though his bizarre behavior and weak intelligence made him a candidate for such an environment. The Hatam Sofer rules that because this particular boy was considered educable and "curable," his placement in this institution would improve his mental status and make him responsible to fulfill the mitzvot upon reaching adulthood. However, feeding him non-kosher food in his childhood would prejudice him against a life of mitzvot.

In a תשובה by Moshe Feinstein, a contradictory conclusion is reached. Feinstein rules that there is no problem in placing an eleven year-old girl whose retardation was ascribed to brain injury in a setting where non-kosher food would be served. Her condition is considered incurable and, hence, she will forever be free from observing all of the mitzvot. Feinstein also states that the case of the Hatam Sofer refers to a situation where there is a possibility that the individual was not a שוטה at all but that his intelligence was weak and that in such a setting, that his real status as פתי would emerge. As such, a פתי is required to observe the commandments and feeding him non-kosher food would be clearly wrong. See *Teshuvot Hatam Sofer* Orah Hayyim no. 83 and *Iggrot Moshe* Orah Hayyim, vol. 2, no. 88.

distinction between the שוטה who displays clear mental illness and the פתוי who has reduced cognitive capacity.¹⁹

While such distinctions are important for discerning the status of halakhic obligation to observe the mitzvot, they are less relevant in our matter. There may be a biological difference but little practical distinction between an individual suffering from an acute psychotic episode and a profoundly retarded adult who cannot understand proper social behavior in a given setting. In any event, such a person needs a safe home in which to live.

Clearly, the שוטה is a highly subjective category requiring individual assessment. Some people with mental retardation at the severe or profound levels may, indeed, display some of the classic disoriented behavior of the שוטה. Others will be best viewed as פתויים, those of significantly diminished intelligence. Both are at a societal disadvantage and require concerted efforts to attain integration into the culture at large.

Disability in the Torah

There are sources in the Torah that indicate that disabilities were considered a sign of disgrace. When, for example, the Philistines discover the secret of Samson's strength, they seize him and put out his eyes as an act of humiliation (Judg. 16:21). When Nebuchadnezzar defeats Jerusalem during the reign of King Zedekiah, the King attempts to flee, but he and his sons are captured and brought before Nebuchadnezzar. We read: "They captured the King and brought him before the King of Babylon at Riblah, and they put him on trial. They slaughtered Zedekiah's sons before his eyes; they put out Zedekiah's eyes, bound him in bronze fetters and brought him to Babylon" (2 Kings 25:6-7). Here, too, the theme of humiliation is linked to a created disability.

The Book of Leviticus provides for us a long list of physical attributes that disqualify the Kohen from service:

Speak to Aaron and say: not man of your offspring throughout the ages who has a defect shall be qualified to offer the food of his God; no one at all who has a defect shall be qualified, no man who is blind, or lame, or has a limb too short or too long; no man who has a broken leg or a broken arm; or who has a hunchback or is a dwarf, whoever has a growth in his eye or who has a boil, scar or scurvy, or crushed testes. No man among the offspring of Aaron the Priest who has a defect shall be qualified to offer the Lord's offerings by fire; having a defect he shall not be qualified to offer the food of his God (Lev. 21:17-21).

Maimonides comments: "For the multitude does not estimate man by his true form but by the perfection of his bodily limbs and the beauty of his garments, and the Temple was to be held in great reverence by all."²⁰

At the same time, many Biblical characters though physically blemished are still deemed heroic. The patriarch Isaac has dim eyes (Gen. 27:1); Moses protests his allotted mission due to a speech defect (Exod. 4:10). The Divine response is: "Who gives man

¹⁹ תשובות ועד ההלכה של כנסת הרבנים בישראל, כרך ד' תש"ן-תשנ"ב עמ' 14-11.

²⁰ Moses Maimonides, *The Guide for the Perplexed*, trans. Moses Friedlander (New York: Dover Publications, 1956), 3:45, p. 357.

speech? Who makes him dumb or deaf, seeing or blind? Is it not I, the Lord? Now go, and I will be with you as you speak and instruct you what to say” (Exod. 4:11-12).

There is, of course, the admonishment from Leviticus:

לא תקלל חרש ולפני עור לא תתן מכשל.

You shall not insult the deaf nor place a stumbling block before the blind (Lev. 19:14).

This passage has often been utilized as a basis for avoiding the deception of the unknowing or vulnerable in general. Indeed, Nahmanides asks the question:

איך לי אלא חרש, מנין לרבות כל אדם.

The Torah speaks only of the חרש. How do we know that this applies to all people?²¹

The implication is not only must those with disabilities be treated justly, there are instances when all are in a sense “disabled” by ignorance, circumstances, etc. Thus, all deserve proper treatment.

Rabbinic literature outlines a variety of specific disabilities. Among them: the סומא (the blind person), the נכפה (one who has epilepsy), the אנדרוגיניוס and טומטום (one who is sexually neuter and a hermaphrodite), the סריס ואילונית (one who is sterile), the אלם (one who is mute) and, of course the חרש and שוטה. A ברכה is ordained where one sees an individual possessing such conditions. The text, משנה הבריות, simply notes the variety of divine creations. The blessing makes no mention of divine justice but simply celebrates the various forms of God’s creations.

The Inviolability of Human Life

The Torah makes no distinction between fully competent and challenged individuals in declaring that all humans are created in God’s image. Any act that compromises the intrinsic worth of a handicapped person is prohibited by the Torah. We are forbidden to defame the character of such an individual nor place him or her in any situation where physical or psychological harm might take place.²²

The inviolability of human life is expressed in a variety of other ways. For example, we read in the Biur Halakhah that slaying a handicapped person is no different than slaying a non-handicapped person, and we violate Shabbat in cases of פקוח נפש for a challenged person as well.²³ Furthermore:

היה הבן ממזר או חרש שוטה וקטן קיים המצוה.

If one has fathered a ממזר or חרש or a שוטה, one has fulfilled the commandment (of “be fruitful and multiply”).²⁴

Also, with respect to criminal penalties, the offender is culpable for damages against the שוטה.²⁵

²¹ Nahmanides, ad loc.

²² See the discussion in Edwin Kaminetzky, *Studies in Torah-Sins of Omission-The Neglected Children* (New York: Yeshiva University Press, 1977), p. 90.

²³ Mishnah Berurah, Biur Halakhah on S.A. Orah Hayyim 329:4.

²⁴ See the Beit Yosef and M. Isserles on S.A. Even HaEzer 1:6.

²⁵ S.A. Hoshen Mishpat 424:8.

The Halakhic Requirement to Support Group Homes

The fundamental goal of establishing group homes is to provide a safe living environment for people coping with retardation. Their mental status certainly makes them among society's most vulnerable members. Individuals with autism, for example, often display not only significant mental impairment but also unusual repetitive or self-abusive behavior, and, as such, need supervised settings. Those with a greater capacity to function (the פתיים) often do well in less supervised apartment settings. Thus, to support group homes is to assist the most disadvantaged among the disadvantaged in many cases.

It is crucial to remember that many individuals with mental retardation suffer from a variety of physical ailments. In addition to concerns for self injury, it is common to find cardiac, neurological and other impairments in the population of the developmentally disabled. The physical needs can be very great.

Moreover, mental retardation is a form of mental illness. It is so classified in the *DSM IV*. Though in certain contexts we might de-emphasize this diagnostic aspect lest such individuals be stigmatized, it is important here to note that these conditions, whatever their etiologies, are permanent, debilitating, and, in more extreme cases, even life-threatening.

Group homes provide not only shelter, but also food, and attentiveness to medical problems. It is not unusual to find within them residents who have difficulty in picking up a pill and swallowing it, much less understanding its purpose. As such, the most significant argument on behalf of group homes in one's neighborhood is that such places fall under the rubric of caring for the ill.

Recent תשובות of the Committee on Jewish Law and Standards have addressed the central necessity of preserving life. A responsum of Rabbi Joseph H. Prouser²⁶ argues that Organ Donation is a halakhic obligation in light of פקוח נפש – the saving of life.

As Maimonides states:

כל שיכול להציל ולא הציל – עובר על: "לא תעמד על דם רעך" (ויקרא ט"ז:ט"ז).

Anyone who is able to save a life but fails to do so violates "You shall not stand idly by the blood of your neighbor" (Lev. 19:16).²⁷

Rabbis Elliot N. Dorff and Aaron L. Mackler, in a series of three related תשובות, have argued that individuals, physicians and the community must provide a decent minimum for health care. These תשובות have also been adopted by the Committee on Jewish Law and Standards.²⁸

Among their salient points: To visit and care for the sick is a fundamental expression of *Imitatio Dei* as the aggadah in Sotah 14a states. They also cite the source from Sanhedrin (17b) which states that a Torah scholar should not reside in a city where a physician is absent. This effectively makes it every Jewish community's responsibility to furnish needed medical services.²⁹

²⁶ Rabbi Joseph H. Prouser, "Hesed or Hiyuv? The Obligation to Preserve Life and the Question of Post-Mortem Organ Donation," above, pp. 175-190.

²⁷ *Hilkhot Rotzeach v'Shmirat Nefesh* 1:14.

²⁸ Rabbis Elliot N. Dorff and Aaron L. Mackler, "Responsibilities for the Provision of Health Care," above, pp. 319-336.

²⁹ *Ibid.* p. 322.

Drawing from the analogy of צדקה on behalf of the poor, they state that we provide for those in need according to their needs (די מחסרו אשר יחסר לו).³⁰ In the paradigmatic cases there quoted from Shulhan Arukh Yoreh De'ah 250:1, we find that one must rent a house for one in need. All the more so is this a need for many who have mental retardation.

In the תשובה that specifically relates to the community's responsibility, they state, "In distribution of health care as in other areas, halakhah would understand health and health care to include mental as well as physical health."³¹ This is supported by traditional sources including Yoma 82a and the *Iggrot Moshe* E.H. no. 65 of R. Moshe Feinstein. Moreover, we might add that in a contemporary, diverse society we would make no distinction between Jews and non-Jews regarding support for a group home. As Maimonides states: "We bury the dead of heathens, comfort their mourners and visit their sick as this is the way of peace."³²

A group home serves as an element of a "decent minimum" of care for those of the mentally retarded population who need it the most. It is a clear expression of social justice reflected in Lev. 19:16, "Nor shall you stand idly by the blood of your fellow." At the same time, there is another verse from Leviticus that gives us an added imperative to support group homes in our midst. We read:

וכי ימוך אחיך ומטה ידו עמך והחזקת בו גר ותושב וחי עמך. אל תקח מאתו נשך ותרבית ויראת מאלהיך וחי אחיך עמך.

If your kinsman being in straits comes under your authority and you hold him as though a resident alien, let him live by your side; do not exact from him advance or accrued interest, but fear your God. Let him live by your side as your kinsman (Lev. 25:35-36).

While individuals with mental retardation may or may not be in personal financial straits at any one point in time, their vulnerability is clear. Moreover, the goal of group homes extends beyond a mere shelter and security. A second important goal of group homes is to integrate people with developmental delay into the general community. These homes provide an opportunity to fulfill the imperative of וחי עמך אחיך עמך.

The principle of וחי אחיך עמך has a noble history with respect to people with disabilities in the Conservative movement. The Tikvah programs at Camp Ramah wherein children with a variety of learning and mental challenges participate in a full camping program at the Ramah camps serve as a fine example of this principle in action.

The support of the establishment and maintenance of a group home is a fundamental act of גמילות חסדים, a form of צדקה, which is a mitzvah unto itself.³³ To do so in one's own neighborhood provides rabbis with a powerful opportunity to advocate for the insistence by halakhah on caring for the ill and recognizing the uniqueness of all human life as created בצלם אלוקים.

³⁰ Ibid. p. 324.

³¹ Ibid. p. 331.

³² Mishneh Torah, Hilkhoh Avel 14:12.

³³ T. Peah, ch. 4; Bavli Sukkah 49b, J. Peah, ch. 1:5.

Conclusion

Group homes provide genuine physical and emotional shelter to the people with developmental disabilities who live in them. They are places of care for those who cope with the illness and challenge of mental disability. Such homes are frequently the only proper placement, given de-institutionalization and other societal trends.

The tradition's concern for caring for the ill and the well being of those with handicapping conditions, as well as the inviolability of human life, requires that we support independent living conditions for them especially in our neighborhoods.