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It is the purpose of this Journal to study the major questions facing us as Jews in the twentieth century, through the prism of Torah values. We will explore the relevant Biblical and Talmudic passages and survey the halachic literature including the most recent Responsa. The Journal of Halacha and Contemporary Society does not in any way seek to present itself as the halachic authority on any question, but hopes rather to inform the Jewish public of the positions taken by Rabbinic leaders over the generations.

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Music In Halachic Perspective

Rabbi Aharon Kahn

Music In Halachic Perspective

Rabbi Aharon Kahn

For a number of reasons, there has been in the halacha a significant restriction of musical expression. This presentation will analyze aspects of the prohibitions against musical expression and enjoyment, including the talmudic sources, the interpretations of the *Rishonim*, and the various alternative ways to understand the *Rishonim*. This will lead us to an understanding of the various positions taken by the *poskim*, positions which are very divergent. I will attempt to relate our discussions to the varieties of musical experience that exist in our time.

Sources of the Ban

A) The Mishna in *Sotah* and the *Yerushalmi*

The Mishna *Sotah* 9:11 states that: "from the time that the Sanhedrin ceased to function, there ceased to be music [alt.: song] at *beit haMishtaot*."

There are four questions which we must ask concerning the statement in this mishna.

1. When did the Sanhedrin cease to function?
2. Wasn't the ban instituted after, and as a result of, the *Churban* [the destruction of the Second Temple]? Yet we read in the Mishna that the cessation of music occurred when the *Sanhedrin* ceased to function!
3. Precisely what is a "*beit haMishtaot*?" Does the term refer

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to a place of banquets and parties of any sort, or is it specifically wedding banquets?

4. Why does the Mishna say that music “ceased”, implying that it was a passive phenomenon? Was this something that just happened spontaneously as a reaction to the loss of the Sanhedrin [or the Temple], or was it a deliberate rabbinic decree actively promulgated to ban musical expression?

There is some controversy as to the date alluded to in the Mishna. R. Yitzchok Isaac Halevy in his *Dorot HaRishonim* [I.c. 62ff] says that the Mishna here refers to the year 57 when the Great Sanhedrin lost its authority as a result of measures taken by the Roman general, Gabinius. On the other hand, others say that this refers to the statement in *Sanhedrin* 41a that forty years before the destruction of the Temple, the Sanhedrin was exiled from its official place. This “exile” reflected a loss of authority and control. It occurred in the year 30. In any case, it seems that the limits set for musical expression were in place before the actual destruction of the Temple in the year 70.

The Rambam, however, in *Yad HaChazakah, Hilchot Ta'anit*, 5:14 writes that the ban against various forms of music was due to, and occurred after, the *Churban* of the Second Temple.¹ It is possible that the Rambam is not referring to the specific event of the destruction of the Temple itself, but rather to that time frame generally. After all, the Sanhedrin’s loss of authority and power was an initial stage in the process of *Churban*.

On the other hand, it is possible to explain the Rambam and answer questions four and two at the same time. Perhaps the depression which set in after the Sanhedrin ceased to function properly led to a natural abhorrence of all musical expression which was joyful and buoyant. That is why the passive tense is used in

1. The *Charedim*, Negative Mitzvot of Rabbinic Origin, ch. 3 and ch 5:5, reiterates the Rambam’s position that the ban was decreed after the Second Temple was destroyed. (Parenthetically, the *Charedim*, paraphrasing the Rambam, interprets the Rambam as does the *Ma’aseh Rokeach*, to wit: vocal music is also prohibited even when not with wine and drink. See the discussion of this below.)

the Mishna. It happened naturally and spontaneously, not by rabbinic fiat. Only after the Temple was destroyed and a period of mourning set in did the rabbis of that day actually decree a ban against musical expression and enjoyment.

In fact, this approach would explain the expression “*beit HaMishtaot*” in the Mishna, which has been interpreted by the Meiri (to tractate *Sotah* 48a) to refer specifically to *wedding feasts*. The Meiri bases his approach upon the Yerushalmi *Sotah* 9:12 [24b]. The Yerushalmi tells us that at first, when the fear of the Sanhedrin kept the people in line, they would never utter vulgarities in their songs, but now that the fear of Sanhedrin is no longer there, the Sanhedrin being powerless, they do utter vulgarities in their songs. If this is the case, the Mishna is dealing specifically with wedding celebrations. These celebrations were always fraught with danger because there was a gathering of men and women specifically for wine and song, in order to make bride and groom rejoice. It had always been difficult to control the singing and the dancing from becoming vulgar and totally inappropriate to the sanctity of the marriage and the solemnity of the wedding. Nevertheless, when there was a powerful Sanhedrin, the Sanhedrin controlled the wedding festivities and made sure that the singing, though joyous, remained appropriate to the purpose of the gathering. But when the Sanhedrin lost its authority, the wedding celebrations became transformed into vulgar and excessive spectacles. To combat such vulgarities, there was a natural rejection of wedding singing altogether. This was not a rabbinic decree. It was, rather, a spontaneous reaction to a problem manifest at weddings.

B. The Discussion in *Sotah* [48a] and in *Gittin* [7a]

According to the Yerushalmi and the Meiri, the Mishna does not refer at all to the ban on music due to mourning for the loss of the Temple, but rather deals exclusively with the problems of singing at wedding feasts. The discussion in *Sotah* which evolves out of the Mishna deals with music out of a concern for morals and ethical behavior and a life of sanctity. It does *not* deal with music in the context of mourning for the lost Temple.

On the other hand, according to the Rambam, there was also an actual ban against various musical expressions which was adopted on account of the *Churban* and in its aftermath. This decree is mentioned only in Tractate *Gittin* [7a] which tells us that Mar Uqba was asked whence we know that singing is prohibited. He answered: because of the verse in Hosea [9:1]: "Do not rejoice, O Israel, as the other nations rejoice." The Rambam's ruling is based almost completely upon the passage in *Gittin*, rather than the one in *Sotah*.²

I believe that the Rambam recognized this difference between the two passages. In a Responsum, he reflects the perspective of the discussion in *Sotah*. But in the *Yad, Hilchot Ta'anit*, 5:14, he reflects the perspective of the discussion in *Gittin* and states explicitly that the ban was on account of the *Churban*. This would help us understand the differences between the Responsum and the *Yad*, as we shall explain later.

The Opinion of the Meiri — The Ban is not on Account of the Churban

Although the distinction we have just made between the two talmudic texts is logical enough, and may be the position of the Rambam and others, nevertheless it is definitely not the position taken by the Meiri. A careful analysis of the Meiri's comments reveals that the Meiri *does not know altogether of a post-Churban ban enacted against music*.

The Meiri seems to be echoing the approach of the Rif

2. My distinction between the two *sugyot* as well as my distinction, in the Rambam, between the Responsum and the *Yad*, are blurred by the citations of the Gaon of Vilna in his glosses on *Orach Chayim* # 560, q.v. But see my explanation of the Rambam, as opposed to the Meiri. Such an explanation would fit the GRA's citations.

That the *sugya* in *Gittin* (7a) refers to the post-*Churban* ban on musical expression of various sorts, is corroborated by the other post-*Churban* ban mentioned in the same *sugya* — the ban against the special crowns worn by the groom at his wedding. The Rambam, too, puts them all together in *Hilchot Ta'anit* in the context of the laws of Tish'a B'Av.

[*Berachot* ch. 5, p. 21b], who is himself paraphrasing a responsum of R. Hai Gaon. The *Geonim* generally seem to follow this approach: The ban is not on account of the *Churban* but out of fear of vulgar and lewd expression.

The *Geonim* permitted the singing of religious songs over wine, and the Rambam accepts this position. However, one gets the impression from the Rambam both in the *Yad* as well as in the Responsum that he is not in full agreement with the *Geonim*. In the *Yad* he writes at the end of *Hilchot Ta'anit* 5:14: "It has already become customary for all of Israel to sing songs of thanksgiving to G-d, and similar songs, over wine." Rambam speaks of custom. He is not incorporating this into the basic halacha which he presents in 5:14. In his Responsum,³ the Rambam gives a similar impression. He argues there that those who rely on the *Geonim* to permit all sorts of songs at parties are grossly mistaken. The *Geonim* dealt only with songs of praise to G-d, not secular songs. The manner in which the Rambam refers to the *Geonim* leaves some doubt as to whether he fully underwrites their position.⁴

Music after the Churban — the Approach of the Maharal of Prague

More than many other aspect of life, the absence of musical expression creates a void which can become oppressive. There is no

3. Blau edition # 224 = Freiman # 370.

4. The Rambam is quoting the Rif (*Berachot*, ch.V) who is tentative. The Rif first cites the opinion of the *Geonim* and then adds that it has become the custom in all Israel to sing songs of praise to G-d at parties "and we haven't seen anyone object." This is not the same as clearly stating this position as absolute halacha. For the Rif, the corroboration of the *Geonim*'s opinion is the very fact that it has become accepted universally.

I believe that the hesitation of both the Rif and the Rambam is rooted in the issue of singing over wine. Is it prohibited on account of the *Churban*, as the Rambam does indeed maintain? If so, perhaps even "religious" songs are included. If the reason for the ban against singing over wine was not the *Churban* but rather the fear that such singing, since it is over wine, would evolve into vulgarity and lewdness, as the *Geonim* do indeed maintain, then the ban would not apply to religious songs.

The *Tur* (*Orach Chayyim*, 560), seems to support the position of the *Geonim*

society in which music does not play a significant role, whether in religious expression or secular. According to the Maharal of Prague, in his work on *Churban* and *Galut* entitled *Netzach Yisrael*, the ban against music was, indeed, a deliberate attempt to create just such a void in life. According to the Maharal, the text in *Gittin* 7a regards the ban against music as a natural and necessary response to *Churban*.

It is the Maharal's thesis, at the outset of chapter 23, that mourning is a response to loss in a truly existential sense. *Churban* cannot be localized. It is impossible and improper for us to view the *Churban* as a loss specific to Yerushalayim, or to Eretz Yisrael, or even to the Jewish nation alone. *Churban* is a world-wide phenomenon. It has cosmic ramifications affecting totally both the material and spiritual planes of existence. Our people's mourning is a mourning for this cosmic loss.

The Maharal argues further, that mourning is not only a reaction to loss, it is also a recognition of loss. Without such awareness there can be no renewal. Absence allows for ultimate return; that which is yet incomplete allows for fulfillment. If we regard our world as complete and our cup as full, we do not allow for the process of becoming and we shall not strive for completeness. Joy is an expression of completeness. Music was banned where it allows for such joy.

This is why there is no difference, according to the Maharal of

and cites their opinion fully. The *Mechabber* (*Orach Chayyim* 560), however, merely quotes the Rambam's words in the *Yad*.

[Parenthetically, there is some discussion as to the opinion of the *Geonim* about songs at weddings. The *SeMag*, *Hilchoth Tish'a B'Ab*, cites the *Geonim's* opinion as follows: As far as singing is concerned, there is a prohibition in *Beit HaMishtaot* only if the songs are secular. However, if the songs are religious, that is, if the songs are in praise of G-d, then they are permitted — even at parties and over wine. All songs are permitted at weddings, even those that do not praise G-d. So the *Geonim* are cited also in *Hagahot Maimoniyot* to *Yad HaChazakah*, *Hilchot Ta'anit*, 5:14 (# 4, 5). This is also the opinion of *Yam Shel Shlomo*, but see *Yam Shel Shlomo's* discussion as to the opinion of the *Geonim* themselves. (*Yam Shel Shlomo*, *Gittin*, I, 17.) See also my comments in note # 23.]

Prague, whether the music is with drinking or without. *Au contraire*, music without drinking should be banned all the more! In fact, the reason the Mishna in *Sotah* cited above mentions “*beit HaMishtaot*” specifically, is to make sure that we are aware that this too was included under the ban. We might have thought that since the ban means to limit our joy, a joy which comes from deliberate musical expression would be prohibited, but that musical expression which serves only as background filler for drinking and socializing, was permitted. To make sure we understand that the ban extended to background music as well, the Mishna singled out music at the banquet hall, “*beveit HaMishtaot*.”

Summary

There are two *sugyot* (talmudic discussions) about music — one in *Sotah*, the other in *Gittin*. The *sugya* in *Sotah* is more elaborate, but hardly mentions instrumental music, and then only with wine. The *sugya* in *Gittin* mentions both instrumental and vocal music. The Mishna in *Sotah* refers to the Sanhedrin. It is possible that there was a natural avoidance of musical expression after the authority of the Sanhedrin was weakened, but the actual ban decreed by the Rabbis was declared after the Second Temple was destroyed. According to the Rambam, the ban is on account of the *Churban*. The Maharal explains that music was banned to limit joy and create a sense of incompleteness. This sense is the fundamental response to *Churban*. Rashi also explains the ban in terms of *Churban*. According to the Meiri, on the other hand, the ban was not on account of *Churban*. The ban sought to prevent frivolity and lewdness which might attend, in certain instances, when music is played or songs are sung.⁵

5. It is interesting to note a similar dispute regarding the talmudic dictum (in tractate *Berachot* 31a) that one should not be excessively joyous in this world. There is a difference of opinion in the commentaries. Rabbeinu Yonah, to *Rif*, ad loc., offers both opinions. Some say that it is on account of our mourning after the *Churban*. But others say — and this is the opinion of R. Yonah himself — that this prohibition was in effect even when the Temple was standing. Excessive joy makes one forget one's mission and purpose in life, i.e., the performance of

Music and Halacha as Expressed in the Three Codes

All the halachic codes place the prohibitions regarding music in the context of various other prohibitions enacted after, and on account of, the destruction of the Second Temple.

1 — Rambam, *Yad HaChazakah*

We find in Rambam, *Yad, Hilchot Ta'anit* 5:14, as follows:

So too [that is, besides various other decrees] they [the Rabbis at the time of the destruction of the Second Temple] decreed that no one play upon musical instruments; moreover, it is forbidden to rejoice with, or listen to, all kinds of music and all that produce the sound of music — and even singing of voice alone, over wine, is forbidden as it is written: "with song they shall not drink wine" [Isaiah 24:9].⁶ It has already become customary for all of Israel to say words of praise or songs of thanksgiving to G-d, and similar songs, over wine.

We will offer various interpretations of these words of the Rambam later in this study.

2 — *Tur, Orach Chayim*

Similarly, in the code of Jewish law called the *Arba'ah Turim*, by R. Yaakov b. R. Asher, *Tur, Orach Chayyim* 560 (which is at the end of the laws of *Tish'ah B'Av*) we read:

mitzvot and the study of Torah. In some future time, when the evil inclination will be destroyed, there will be opportunity for absolute joy. The *Taz* [to *Orach Chayyim* 560, 7] distinguished between a *simchah shel mitzvah*, in which case absolute joy would be appropriate if the Temple was standing, and other *semachot*. See also *Kaf HaChayyim* to *Orach Chayyim* 560, # 39. [For more sources on this, see R. Ovadiah Yosef's responsa *Yabi'a Omer*, IV, *Even Ha'Ezer*, # 9.]

6. The Rambam cites the verse from Isaiah 24 "They shall not drink wine with song" because it is the verse mentioned explicitly in the *Mishna Sotah* 9:11. I believe that the Rambam quoted this verse for another reason as well. This verse and its context deal with the *Churban* and its ramifications. Since the Rambam considers this ban as a *post-Churban* reaction, he quotes this verse. It is much

They [that, is the Rabbis after the destruction of the Second Temple] forbade all forms of music, both instrumental and vocal. Now Rashi [in his comments to Tractate *Gittin* 7a] explains the prohibition as referring to the playing at parties ["*leshorrer beBeit haMishtaot*," that is, in a place of drinking and merrymaking; during feasts, festivities and celebrations at which drinking and singing go together]. Tosafot explain that it is prohibited, even without partying or feasting, for someone who listens with regularity such as is found in the Yerushalmi [*Megillah* 3:2] that the Exilarch arose and went to sleep to music, that is, they would make music for the Exilarch as he went to bed and as he arose in the morning. Yet from the wording of the Rambam, it would seem that it is forbidden to hear instrumental music under *all* circumstances, whereas song [vocal without instruments] is forbidden only with wine. However, [this latter point seems to be contradicted by the Rambam himself for] he himself says in a responsum that even with respect to vocal music it makes no difference whether it is with wine or without [i.e., it is always prohibited]. Also there is no distinction between songs in Hebrew or in Arabic. Of course, *a fortiori*, it is forbidden to hear lewd expressions even when they are not in the context of poetry or song. When do we say this [that songs are forbidden], only if they are songs of affection, such as songs which praise a handsome person for his beauty, and the like, but songs of praise and thanksgiving [to G-d] while drinking wine are permitted.

3 – Shulchan Aruch, Orach Chayyim

The third, and final, code which we cite is the *Shulchan Aruch* of R. Yosef Karo, *Orach Chayyim* 560:3. It states:

more patently about the *Churban* than is Hoshea 9:1. This may also explain why the *sugya* in *Gittin* 7a queries as to why Mar 'Uqba sent the verse of Hoshea 9:1 rather than the verse of Isaiah 24:9.

So too they decreed against the playing of musical instruments and all forms of music and all that produce sound of music to rejoice with. Moreover, it is forbidden to listen to them. All this is on account of the destruction of the Temple.

Here there is a gloss of the Ramo who qualifies the above:

There are some opinions that the prohibition against musical instruments is only for those who listen with regularity such as the kings who arise and go to bed with musical instruments, or for musical instruments at parties and feasts [that is, where there is drinking].

The *Shulchan Aruch* continues:

And even songs [vocal music] with wine is forbidden as it is written "With song they shall not drink wine" [Isaiah 24:9]. It has already become the custom of all Israel to utter, over wine, words of praise or songs of thanksgiving and commemorations of G-d's kindnesses.

Here there is a second gloss of the Ramo which adds:

And so too for the purpose of a mitzvah, such as in the house of a groom and bride, it is *all* permissible.

The initial impression that one would have of the opinions of Rav Karo and the Ramo is that there are two differences of opinion as to the extent of the prohibitions decreed:

1) The "*Mechabber*", R. Yosef Karo, forbids all use of musical instruments (both playing them as well as listening to them) *under all circumstances*. R. Moseh Isserles (Ramo), permits playing and listening to musical instruments as long as it is *not done with regularity*, and as long as it is *not in the party hall*, that is with wine and drinking. The *Mechabber* follows the Rambam, and the Ramo follows the Tosafot. We will see that there are alternative approaches to both the Rambam and Tosafot which would lead to different conclusions than those of the *Mechabber* and the Ramo.

2) It would appear from his silence that the *Mechabber* forbids

all use of musical instruments (both playing as well as listening to them) under all circumstances, even in the context of mitzvah. R. Moshe Isserles permits playing and listening to musical instruments *even over wine and in the party hall* whenever the rejoicing is for the sake of a mitzvah such as the rejoicing for a groom and bride. However, after we have analyzed carefully the opinions of the Rambam, the *Tur* and the *Mechabber*, we will see that in the matter of music at a mitzvah function, such as a wedding, they all agree with the Ramo.

Three Approaches to the Rambam

1 — Knesseth HaGedolah

The words of the Rambam, cited above, have been interpreted in diametrically opposite ways by the commentaries. *Knesseth HaGedolah*⁷ offers a possible approach that regards the words “over wine” as a qualifier which should be attached to *each* of the segments of the prohibition mentioned in the Rambam. According to *Knesseth HaGedolah*, the Rambam has no prohibition against music, instrumental or vocal, *unless it is while drinking*.⁸

2 — Ma'aseh Rokeach

*Ma'aseh Rokeach*⁹ on the other hand, interprets the Rambam to opposite effect — playing upon musical instruments or listening to such music is always prohibited. Moreover, singing alone even without instrumental accompaniment, is always forbidden, as is listening to such singing. *Ma'aseh Rokeach* argues that the passage in the Rambam should be understood as follows: “... and singing of voice alone, even if over wine, is forbidden.” The meaning of it is this: Although singing and drinking go together naturally, and are

7. Chayyim Benvenisti, Commentary (publ. 5418) on the *Tur Orach Chayyim*, # 560.

8. This approach to the Rambam is also taken by R. Yisroel Meir Mizrahi in his responsa *Pri HaAretz* I, p. 92d.

9. R. Mas'ud Chai Rokeach, Commentary (publ. 5502) on the *Yad HaChazakah* (loc. cit.).

typical of parties and feasts, nevertheless this singing still qualifies as *excessive* rejoicing and is forbidden after the Temple's destruction. According to *Ma'aseh Rokeach*'s view of the Rambam, if music and singing over wine was prohibited, then, *a fortiori*, playing instruments or singing which are *not over wine* were prohibited.

As we have seen, precisely this interpretation of the halacha is offered by the Maharal of Prague in his *Netzach Yisrael*, ch. 23.

Indeed, the *Bach* in *Tur Orach Chayyim* #560, comes to the same conclusion:

However, [notwithstanding the words of the Rambam in *Yad Hachazakah*], he [the Rambam] himself says in a responsum that even with respect to song [vocal music] it makes no difference whether it is with wine or without [it is always prohibited].

3 — The Rambam According to the Tur

We have offered, thus far, two opposing interpretations of the position of the Rambam:

- 1) *Knesseth HaGedolah* —
 - a) instrumental music is forbidden only over wine.
 - b) singing is forbidden only over wine.
- 2) *Ma'aseh Rokeach* —
 - a) instrumental music is always forbidden.
 - b) singing is always forbidden.
- 3) There is a third possibility in the Rambam:
 - a) instrumental music is always forbidden.
 - b) singing is forbidden only over wine.

This approach is taken by the *Tur, Orach Chayyim* (560).

In the approach of both the *Knesseth Hagedolah* and the

10. It seems that the *Orchot Chayyim* [of R. Aharon HaKohen of Lunel, *Hilchot Tish'a B'Av* # 14] also follows this approach to the Rambam. The *Orchot Chayyim* maintains that the use of musical instruments is inherently prohibited. Thus one would not be able to sing songs of praise to G-d to instrumental

Ma'aseh Rokeach there is no distinction made between instrumental and vocal music. Music can be made either way — the voice is also viewed as an instrument which produces musical sounds. They argue only whether the decree was aimed against music per se, or was it aimed against music in the context of merrymaking.

The *Tur*, however, understood that musical instruments were treated differently than songs.

Reconciling the Responsum with the Yad, Hilchot Ta'anit

The *Tur* has pointed to an apparent contradiction in the Rambam's writings. The Rambam's Responsum seems to say that all singing is prohibited, even without wine.

... There is no difference between vocal music and playing instruments or humming tunes. Whatever brings a person to gaiety of the spirit and its stimulation is forbidden, as they have said. And they [the Rabbis] based their words upon the prohibition of the prophet (Hoshea 9:1) who said: "Do not rejoice, O Israel, in the manner of the joy of the nations."

The concern about straying from G-d's service because of music is a post-*Churban* concern. This is what the Rambam means when he says the ban is "on account of the *Churban*." Not that the ban was introduced as a way of mourning after the Temple which was destroyed, but rather that the *Churban* brought on a re-evaluation of rejoicing and the service of G-d.

accompaniment, even if no wine was being drunk. He is very stringent on this point citing that the authority for this is from a verse in the prophets [Hoshea 9:1] and "divrei kabbalah keDivrei Torah." He does permit "music" at weddings, but it seems that he means only singing, not instrumental music.

The *Orchot Chayyim*, ibid., says also that plain singing [without instruments] of songs whose themes are secular (that is, not in praise of G-d) is generally forbidden (even without wine!). The only exception is the worker who sings during work to lighten his labors. (Note that the use of "Shirei 'Agavim" in the *Orchot Chayyim* cannot include illicit love songs. They would be forbidden in all cases on account of their innate vulgarity. What he means is the same as the *Geonim* when they refer to secular songs.)

We are still left with several questions. If the Rambam feels that singing without words is prohibited because it is subsumed under the ban against music, then why does he prohibit songs (with words) only with wine?

The answer seems to be that the Rambam has a large category of songs that are permitted. The texts of these songs include moral lessons, suggestions for religious improvement, paeans of praise to G-d, and the like. The Rambam in his commentary to *Avot* states explicitly that such songs are permitted, even recommended! However, even this category is permitted only if there is no drinking. If there is drinking, then the category becomes forbidden under the rubric of *Isaiah 24:9* ("they shall not drink wine with song").¹¹

From this perspective in the Rambam, even songs of praise to G-d should not be permitted while drinking. But the Rambam adds in the *Yad*: "It has already become customary for all of Israel to say words of praise or songs of thanksgiving to G-d, over wine."

Note that the Rambam does not say explicitly that songs of praise to G-d are permitted. He says that that is the accepted custom. It would seem therefore that, in principle, these songs should also have been prohibited, since they are over wine. But the practice of *Klal Yisrael* expressed itself to the contrary.

There is no contradiction whatever between the Responsum and the *Yad*. Songs can be prohibited under the category of the ban against music only if the texts of those songs are undesirable. But if the texts are desirable, then the moral lesson and the inspiration gained by them transforms these songs totally. This is true because

11. I should add that this prohibition is really a prohibition against drinking with song (as opposed to a prohibition against singing while drinking). The verse is structured to this effect ["they shall not drink wine with song" is different from "they shall not sing while drinking"]. This prohibition is a separate aspect of the ban as is made quite evident from the Rambam's responsum where he writes that if the person hears a lewd song with instrumental accompaniment and it is while drinking, that person violates four prohibitions. 1 — He has heard lewd words; 2 — he has heard instrumental music; 3 — he has heard singing of the lewd words; and 4 — he has heard this while drinking. The fact that it is while drinking makes it a distinct violation on account of the drinking itself.

the ban against music on account of the *Churban* was really a ban against improper gaiety and vulgarity. If the music conveys a positive didactic message through the words in the songs, then the ban never applied.¹² However, if such songs were sung while drinking wine, then they ought to have been prohibited not on account of the singing, but on account of the drinking of the wine. This seems to be the Rambam's fundamental opinion. But in practice, he cites custom as sanction for following the opinion of the Geonim and permitting songs of praise to G-d, and their like, over wine.

Weddings — A Stringent Approach to the Rambam

In *Yad, Hilchot Ta'anit*, 5:14, the Rambam does not mention wedding celebrations at all. It is quite possible that at wedding celebrations instrumental music is still prohibited, even though this will temper the rejoicing of groom and bride. It is also possible that singing the praises of the bride and groom would not be permitted over wine, even though there is no instrumental music. The only thing permissible would be the song of praise to G-d which custom has made acceptable even over wine.

According to this stringent approach, there could not be any instrumental music at any *simcha shel mitzvah*, not even at weddings.

There is a more lenient interpretation of the Rambam possible, and this is the approach which the *Tur* and the *Mechabber* seem to

12. The Rambam's commentary on *Avot* states clearly that certain songs are permitted, and even recommended. In his comments to *Avot* 1:16, the Rambam goes into a discursus on the three varieties of speech: recommended, permitted and forbidden. He then outlines a fourth category: "desirable speech." This category includes words in praise of noble traits of character and high morals as well as words in denigration of ignoble character, as well as "the arousing of the spirit to this effect (that is, to a deeper appreciation of what is desirable and good) through orations and songs." Obviously, such songs are actually recommended!

Further in the same commentary to *Avot*, the Rambam writes that what he has written with respect to speech, dividing it into four categories, applies equally to songs. Songs can be permitted, even recommended. They can also be forbidden.

take with respect to the Rambam's words. Still, it is the aforementioned, more stringent, approach to the Rambam which led the rabbis of Jerusalem to declare a ban on instrumental music at weddings.

Music at Weddings and the Jerusalem Ban

The rabbis of Jerusalem, in the second half of the nineteenth century, declared a self-imposed prohibition upon the Jewish community in Jerusalem (not in the rest of Eretz Yisrael) forbidding the use of instrumental music at weddings (with the exception of a solitary drum to keep the beat for the singers). Being that this was their understanding of the Rambam and being that they were in Jerusalem, at the very site of the destruction of the Temple, they decreed that the opinion of the Rambam should be followed there, although there might be other, more lenient, opinions. For them the destruction of the Temple was an ever-recurring reality.

It is fascinating to note that the Sefardic community in Jerusalem, although in most matters following the opinion of the *Mechabber*, R. Yosef Karo, who regularly follows the Rambam, never accepted the Ashkenazi rabbis' ban and continued to use

It all depends on the subject matter. The language of the song is irrelevant. What matters is the *content* of the song. The Rambam comments that he has seen wise and pious Jews who will protest loudly if they hear songs in Arabic sung at a social gathering or at a wedding, even if the subject matter of such songs is quite appropriate and proper. Yet these same men will not protest at all, nor find inappropriate, any song sung in Hebrew, regardless of the subject matter and even if the words are most inappropriate or even forbidden. The Rambam considers this distinction between Arabic and Hebrew to be the ultimate foolishness, albeit Hebrew is the holy tongue. [See Rambam in *Moreh Nevuchim* 3:8 who speaks about language and the sanctity of language and the effects of lewd and licentious language. He speaks there of our need to cleave to the spiritual, etc.] Songs which are permissible are permissible in other languages too, and songs which are forbidden are forbidden even if in Hebrew.

It is quite evident from the above that the Rambam knew of songs which were *not* forbidden. Indeed, it would seem that there are songs (and contexts for such songs), which are, in fact, *recommended!* Since the Rambam, in his responsum, draws explicitly from his commentary to *Avot*, it is clear that when he wrote the responsum he was referring to only certain types of songs.

musical instruments at weddings, as before.¹³

It seems that some time after the ban went into effect, there was a great effort to increase the singing at the weddings to make up for the lack of instrumental music. The women, who were with the bride in a separate room, apart from the men, sang so loud that some Rabbanim, recent arrivals to Jerusalem from Europe, objected on the grounds of "Kol Isha" and apparently sought to have the ban revoked. Moreover, these European Rabbanim, who were accustomed to *klezmer* at weddings, felt that music at a wedding was absolutely essential in order to rejoice with the bride and groom. They cited the famous *psak* of the Maharil (R. Yaakov Moelin, Ashkenazi authority, late 14th century), *Hilchot Eruvei Chatzeirot*, quoted in *Baer Hetev* to *Orach Chayyim* 338:3,) who insisted that if in a certain town, in which a wedding was to take place, they were under a royal edict forbidding musicians to play at the wedding, then the wedding party must go to another town and celebrate the wedding there — with music. The Maharil's conclusion

13. A few historical notes are appropriate here. The driving force behind the Jerusalem ban was the author of *Imrei Binah*, Rav Meir Auerbach [5575-5638], known, even when in Jerusalem, as the Kalisher Rav (whence he emigrated to Eretz Yisrael). He was a pre-eminent authority of halacha and a powerful inspiring factor in the Old Yishuv. He had come to Jerusalem a wealthy man, and he used his funds and expended his energies for the good of the Yishuv. The "Brisker Rav," Rav Yehoshua Leib Diskin, another eminent authority of halacha and giant of Torah, a leader of the Yishuv who arrived in 5637 a year before the Kalisher Rav died, supported the Kalisher Rav's ban.

Apparently, the ban must have been of an oral nature to begin with, for a generation later Rav Yosef Chaim Sonnenfeld is queried about the ban and informs his correspondent, R. Shlomo Sobel, that: "the ban was, as I have heard, instituted by the author of the *Imrei Binah*. [*Salmath Chayyim*, I:77; IV:34; V:40].

It is said that the ban was instituted in reaction to the cholera epidemic which ravaged Jerusalem in 5625. Rav Yosef Chaim Sonnenfeld insists that this ban is to be treated very seriously, and adds that one who ignores it risks divine punishment, citing *Shabbat* 110, q.v. [ibid.]

According to Rav Elyashiv the ban was meant only for the Old City of Jerusalem, not the New. (Vide. *Beth Chathanim*, p. 160, n. 12.) On the other hand, it is reported in the name of Rav Shneur Zalman Ashkenazi, the author of

was used by R. David Horowitz in *Responsa Imrei David*, #162, to allow for musicians to play at a wedding which took place on the fast day of the tenth of Tevet.¹⁴ Rav Sonnenfeld responds by insisting upon the ban since the Temple destroyed lies before their very eyes.

Does the Jerusalem Ban Apply to Music from Records or Cassettes?

Rav Sonnenfeld is asked (*Salmath Chayyim* I:77; IV:34; V:40) whether the ban applied to musical instruments only or to record players as well. (The same question applies, of course, to cassette recorders, etc.) If it *does* apply to recorded (canned) music, does it apply only to recorded instrumental music or to recorded *vocal* music as well? The query asks, in effect, whether the recorded voice is to be regarded as vocal music, as if the singing was live right now, or as instrumental music since it is coming out of a machine rather than from a human.

Rav Sonnenfeld replies very tersely that "certainly, this is also included." As Rav Waldenberg (in *Tzitz Eli'ezer* XV, #33, part 3)

the responsa *Torat Chesed* (emigrated towards the end of his life from Lublin to Jerusalem and was the Rav of the chasidim there; d. 5662), that the ban extended beyond the walls of the Old City. This seems to be corroborated by an eyewitness who maintains that the "test case" of the ban occurred in the Bokharan Quarter, which was outside the walls of the Old City.

A parenthetic remark: A biographical sketch from that era informs us that after the Jerusalem ban was enacted, the klezmer musicians lost a good many jobs, as they could no longer play at Ashkenazi weddings.

Among the Sefardim of the Old Yishuv in Jerusalem there was a custom for musicians to play as the bride was accompanied to the mikvah before her wedding. The musicians played at the wedding and also all seven days after. The *Motsoei Shabbat* of this week of *Shev'a Brachot* was an especially festive time. Y. Stuchevsky, in his book *HaKlezmerim* [Jerusalem, 5719], writes that at Ashkenazi weddings (after the ban) there was a somber atmosphere, which was only partially mitigated by the "badchanim" who tried to cheer the assembled. There were also two drummers at each wedding, one drummer for the men and another, a young girl, for the women who feasted in a separate room, away from the men.

14. See also *Responsa Yabi'a Omer, Yoreh De'ah* No. 31.

points out, since the question to Rav Sonnenfeld was really two questions in one, it is difficult to know whether Rav Sonnenfeld's responsum was addressed to both questions or only to the first. That is, we can be certain that recorded instrumental music is included in the ban, but was recorded singing regarded as singing and permitted, or as instrumental music and prohibited? Rav Waldenberg maintains that recorded voice should be regarded as vocal music rather than as instrumental music, and permitted under the ban.

Rav Waldenberg maintains, also, that even if Rav Sonnenfeld is right about the record player, the cassette recorder should be permitted, regardless of the kind of music it plays (instrumental or voice), since such a machine did not exist at the time of the ban and was therefore not included in the ban.

Certainly, it would have been plausible to permit both machines and to argue that the ban was against live music only. There is definitely a difference in the attitude that a person has, and the very nature of his rejoicing, if the music comes canned or from a live band.¹⁵ The purpose of music at a wedding is not to offer the music to listeners for their aesthetic appreciation, nor even for their entertainment. Its purpose is solely to stimulate and arouse the enthusiasm of the assembled so that they might rejoice fully. There is, therefore, a great deal of difference whether there is a live source playing the music, with whom the assembled can identify and whom they can join, and canned music which is distant and inherently less stimulating.

Logically, then, it would be appropriate that the ban was against live music only. But, if the ban was against the recorded music of the record player, it should apply also to the cassette recorder. It is hard to support Rav Waldenberg's distinction between the record player and the cassette recorder, since they are both machines and since they both accurately reproduce musical sound.

15. This should be true even if the band is made up of inferior musicians and the recording reflects great talent and is played on excellent equipment.

Rav Waldenberg, to support his position that the cassette recorder does not fall under the ban, since it did not yet exist at the time of the ban, cites, by the way of analogy, the opinion of Rav Yaakov Breisch (in *Responsa Chelkat Ya'akov*, I, #62, par. 2). Rav Breisch argues that listening to instrumental music over the radio is permitted as it does not fall under the post-*Churban* prohibition against music. Since the radio did not exist at that time, it cannot be included in the prohibition. Rav Breisch proceeds to distinguish between the radio, on the one hand, and musical instruments such as the piano, which did not yet exist at the time of the *Churban*, on the other. Since no specific instruments were singled out when the prohibition was decreed, it is clear that musical instruments were banned as a category.¹⁶ This category would therefore include all subsequently developed instruments. However, it would not include the radio whose category as a *reproducer* of music did not then exist at all.¹⁷

Rav Waldenberg wishes, by analogy, to apply this principle to the Jerusalem ban. However, it seems that the analogy is inappropriate because the category of reproducers did already exist since the record player existed. Therefore the analogy would require that the cassette recorder should be included as well. If the ban would have specifically permitted the record player, for the reasons given above, then, of course, the cassette player would also be permitted. However, since we follow the opinion of Rav Sonnenfeld, who was much closer to the sources of the Jerusalem ban, and we prohibit the record player, then we would have to prohibit the cassette recorder as well.

It goes without saying, that the electronic synthesizer should

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16. A most appropriate parallel exists in a responsum by R. Sa'adia Gaon. Rav Sa'adia is asked whether or not the prohibition applied only to the four instruments mentioned in Isaiah 5:12. R. Sa'adia Gaon declares that all instruments are prohibited and the four most popular instruments were mentioned in the verse because they are the best known.
 17. This is my inflection of Rav Breisch's explanation. He himself reasoned that the radio's sound derives from a distance and one cannot see the player. Thus the radio is unique even if one listens to live, rather than recorded, music.

also be included, regardless of the fact that it too did not exist at the time of the ban. An instrument is an instrument.

An Alternative, More Lenient, Approach to the Rambam

We have suggested above that a plausible interpretation of the Rambam's opinion forbids instrumental music in all situations — *even at weddings* — on account of the *Churban*. This was the source for the Jerusalem ban. Is this the opinion of the *Tur* and the *Mechabber* who follow the Rambam here (as opposed to the *Ramo*, who follows the *Tosafists*)? It cannot be, for the *Tur* and *Mechabber* cite the *Rabiah*'s opinion that it is permitted to tell a non-Jew to repair and to play musical instrument at a Shabbat wedding. The *Tur* and the *Mechabber* may not agree with the *Rabiah* in every detail, with respect to the laws of Sabbath, but it remains evident that they accept the fundamental assumption that instrumental music at weddings is most appropriate.¹⁸

Neither the *Tur* nor the *Mechabber* are of the opinion that the Rambam prohibits instrumental music at weddings. They feel that the Rambam, in *Hilchot Ta'anit*, did not address the issue of wedding music altogether. When the Rambam, and subsequently the *Tur* and the *Mechabber*, mention that all of Israel are singing, over wine, songs of praise and thanksgiving to G-d, they are

18. The *Tur* himself, in *Orach Chayyim* 560, does not make any mention of music at weddings. [We quoted the *Tur*, verbatim, earlier.] I believe that this is because the *Tur* is dealing in 560 with secular contexts only. He refers to the *Tosafists* and the Rambam, but sees a controversy between them only with respect to musical instruments in a *secular setting*.

What about music in a mitzvah setting? The *Tur*, who is silent on the matter here, in ch. 560, reveals his opinion about instrumental music at weddings, that is, music in a religious context, by quoting the *Ra'abiah* in ch. 338.

This assumption as to the opinion of the *Tur* and the *Mechabber* is further corroborated explicitly by the words of the *Mechabber* in his *Beit Yosef* commentary to *Tur Orach Chayyim*, 560. Here, in *Tur* 560, *Beit Yosef* quotes the *Tur*'s citation in 338 of the *Ra'abiah*. [The *Bach* makes the same point.]

When R. Yosef Karo redacted the *Tur* and created the *Shulchan Aruch*, he followed the *Tur*'s format in ch. 560 and dealt only with secular contexts, relying on his own citation of the *Ra'abiah* in *Shulchan Aruch Orach Chayyim*, 338:2, to reveal his opinion about wedding music.

referring even to get-togethers which cannot be classified as *simchot shel mitzvah*. Nowhere, in *Hilchot Ta'anit* or in *Orach Chayyim*, is there a discussion of singing at weddings.

This approach is corroborated explicitly by the code of R. Mordechai Yaffe. In his *Levush HaChur*, 560:5, he cites the Rambam practically verbatim and then adds:

So too mitzvah music, played to make the groom and bride rejoice at the *chuppah* — both instrumental as well as vocal — is permitted.

Clearly, then, the *Levush* maintains that even according to the Rambam wedding music is permitted. This is why the Sefardim of Jerusalem, even though they follow the Rambam and the *Mechabber*, did not accept the Jerusalem ban. They took this more lenient approach to the Rambam because it is the approach of the *Tur* and the *Mechabber*. This is also the approach of such recent authorities as Rav Moshe Feinstein, who follows the Rambam and *Bach*, with regard to music, and still allows for musical instruments at weddings and any other *simcha shel mitzvah*.¹⁹

The Ramo's Approach to Tosafot — Limiting the Prohibition

Let us turn now to the views of Rashi and the Tosafists. The *Tur* explains their opinion:

Rashi [to Tractate *Gittin* 7a] explains the prohibition as referring to the playing at parties "in the *house of feasting*", that is, in a place of drinking and merrymaking. Tosafot explain that it is prohibited, even without partying or feasting, for someone who listens with regularity, such as is found in the *Yerushalmi* [*Megillah* 3:2] that the Exilarch arose and went to sleep to music, that is, they would make music for the Exilarch as he went to bed and as he arose in the morning.²⁰

19. See *Iggerot Moshe*, I, # 166.

20. *Tur Orach Chayyim* 560.

The Ramo cites this opinion in *Shulchan Aruch, Orach Chayyim* 560:3 as follows:

There are some opinions that the prohibition against musical instruments is only for those who listen with regularity such as the kings who arise and go to bed with musical instruments, or for musical instruments at parties and feasts [that is, where there is drinking].

What is the Opinion of Rashi?

It seems clear from the above citations from the *Tur* and Ramo that the opinion of the Tosafists is that only *certain* instances of instrumental music are prohibited. Thus the Tosafists are in this matter most definitely in disagreement with the Rambam. Is Rashi also in disagreement with the Rambam? From the manner in which *Tosafot* cite Rashi, it would seem that he is.

That Rashi allows instrumental music when there is no drinking, contrary to the Rambam, is stated explicitly by the *Divrei Chamudot* (a commentary on the Rosh by R. Yom-Tov Lippman Heller), *Berachot*, 5:1. Nevertheless, it is the contention of Rav Moshe Feinstein, zt'l, that Rashi's interpretation of the prohibition is *not* a reflection of the final outcome of the halacha.²¹ According to Rav Feinstein, even the Rambam must explain that "Zimrah" in *Gittin* 7a means: "in the *house of feasting*", just as Rashi explained it, although the final halacha according to the Rambam prohibits instrumental music even without feasting. [Rav Feinstein admits (*ibid.*) that his contention about the Rambam's interpretation of *Gittin* 7a is contrary to the position taken by the *Divrei Chamudot*.]²²

21. See *Iggerot Moshe*, I, 166.

22. It is clear from Rashi's own words in several places that the prohibition is not restricted to "Beit HaMishtaot." See Rashi to *Sotah* 48a as he explains that R. Huna banned music from "their homes and the *Beit haMishtaot*." Rashi included their *homes* too! See also Rashi to *Chagigah* 15b. The *sugya* there tells us that Acher strayed from the true path and was not protected by the Torah which he had studied so diligently, because Greek song did not cease from his home. Rashi

The Tosafists' Approach According to the Bach

What is the common denominator of the prohibition according to the Tosafists? The *Bach* (*ibid.*) explains that according to Tosafot (and Rashi) there is absolutely no distinction between vocal or instrumental music. Whenever either occurs with wine, or whenever either occurs with regularity it is forbidden. Otherwise they are permitted.

Is the Rashi-Tosafot Position More Lenient than the Rambam's?

It is clear from the Ramo's understanding of Tosafot, that the Tosafists allow for a wider latitude than the Rambam. Whereas according to the Rambam all instrumental music is forbidden, according to the Tosafists instrumental music is forbidden only in certain situations such as with partying or on a regular basis, etc. This is grounded in the premise that the Exilarch, whose story is the prime source for the Tosafists, had musicians at his bedside who were *playing instruments*.

Since the Ramo refers exclusively to *instrumental music*, it seems that he understands that, according to Tosafot, vocal music is always permitted, save over wine.

However, it is definitely possible to interpret the statements of Tosafot as does the *Bach* (cited above). That is, that according to Tosafot (and Rashi), there is absolutely no distinction between vocal or instrumental music. Whenever either occurs with wine, or

there comments that "he should have desisted from it on account of the destruction of the Temple, for it is written 'They shaⁿt drink wine with song' (Isaiah 24)."

(Maharsha, *ad loc.*, wonders why "Greek" song is mentioned specifically. He also wonders why this violation of listening to music after the *Churban* would impair the protection of Acher's Torah. Maharsha rejects Rashi's approach and suggests instead that the music Acher was listening to had texts which were antithetic to Torah and to Jewish thought. These texts affected Acher because he was inspired by the music and did not resist the subtle message carried by the words. Nevertheless, it seems that Rashi has support in his understanding of cause and effect from the *sugya* of *Sotah* 48a: It causes Torah to be forgotten in Israel, etc., q.v.)

whenever either occurs with regularity, it is forbidden. Otherwise they are permitted. This is the second possible approach to Tosafot.

We have offered the approach of the Ramo to Tosafot and the alternative approach of the *Bach* to Tosafot. According to the text of the Tosafot itself, it would be possible to interpret that instrumental music is forbidden. It is possible that Tosafot understood that in the Yerushalmi's tale of the Exilarch there were vocalists singing without instrumental music. This is, I believe, also the *Yam Shel Shlomo*'s interpretation of Tosafot! Such an approach would make the Tosafists (and Rashi, by extension), more extreme and more stringent than the Rambam.²³

From this it is clear that Rashi's opinion is that music is forbidden on account of the *Churban*. Furthermore, Rashi regards music in one's home in the same light as music in *Beit haMishtaot*. (I believe that this is the intention of *Gilyon Hashas* of R. Akiba Eger to Rashi *Gittin* 7a. He wishes to point out that Rashi in *Gittin* does not mean only *Beit HaMishtaot*.) Moreover, Rashi interprets the song of the *Gardai* (*Sotah* 48a) as song which is solely for amusement. And such song is prohibited *even without wine*. Thus it is clear that Rashi in *Gittin* 7a does not mean "*Beit HaMishtaot*" literally.

From all these Rashi texts, it is evident that Rashi conceived of a prohibition against vocal music, not only at a party, with the drinking of wine, but in other contexts also. This seems to contradict the understanding of the Ramo and the *Tur* as to Rashi's position. Ramo will have to explain that vocal music at home meant, according to Rashi, singing while drinking wine at home. The *Gardai* will have to be explained in the same way. They sang for amusement *and therefore with wine!* The ones who sang to keep up the pace of the oxen, or the like, did not drink with their singing. This interpretation is difficult.

23. A careful reading of the following section in the *Yam Shel Shlomo* — that is, # 18 — does not allow us to corroborate either position. But there is a line in this section of the *Yam Shel Shlomo* — # 17 — which seems to support the more stringent understanding of the Tosafot. When the *Yam Shel Shlomo* wishes to prove that all kinds of singing is permitted at the wedding, and not merely songs of praise to G-d, he argues that a wedding allows any music which causes rejoicing for the bride and groom. "After all," he adds, "instrumental music itself was permitted only to make the bride and groom rejoice." This would seem to support the position that unless it is wedding music, *all* instances of instrumental music are forbidden. There is the possibility that the *Yam Shel Shlomo* is referring to instrumental music which is played to cause joy, etc., and not to all kinds of instrumental music, but at best it is a moot point.

If, indeed, the *Yam Shel Shlomo* is of the opinion that *Tosafot* prohibits all instrumental music, then, obviously, the three categories of permitted music, which the *Yam Shel Shlomo* suggests, refer only to vocal music. *Yam Shel Shlomo* will not apply his distinctions to instrumental music. Only insofar as *vocal* music is concerned, will the *Yam Shel Shlomo* permit it if "it is occasional, or to listen to a pleasant sound, or to hear something new." Instrumental music would be forbidden, across the board.

Toward Some Conclusions

According to every opinion there is some prohibition against music. The most lenient opinion allows singing, and listening to others singing as long as it is not accompanied by drinking. There is some difference of opinion about the precise definition of "drinking." Does it mean partying (that is, drinking only) but drinking during meals is not included, or is drinking in any context whatsoever included? If it is a *se'udat mitzvah*, singing is permitted even while drinking. According to many opinions, even instrumental music is permissible at a *se'udat mitzvah*. This is certainly so at weddings where the music helps create the joy that surrounds bride and groom. There is a possibility that if the text of a song is pedagogic, teaching a religious or moral lesson, or offering praises to G-d, then the singing of such a song is permitted with wine.

The widest latitude, as far as instrumental music is concerned, might be provided by the *Yam Shel Shlomo*. His three permissible categories, in a contemporary frame of reference, might allow classical or jazz concert-going, as well as listening to instrumental music. It is more likely, however, that these categories apply to *vocal* music only, and that according to the *Yam Shel Shlomo*, vocal music is permitted only if "it is occasional, or to listen to a pleasant sound, or to hear something new." Instrumental music is forbidden across the board. The *Ramo* would then remain as the most lenient position with regard to instrumental music. Instrumental music would be permitted as long as it is not pursued excessively or with great regularity. Still, the *Rambam*, *Tur*, and *Mechaber* seem to prohibit instrumental music across the board. Every authority

forbids music and song which is in a lewd and vulgar context, and even more so when the context brings men and women together.

As far as the radio is concerned, there is some question as to whether it was included, so to speak, in the ban to begin with. If it was, then the question is whether songs over the radio are subsumed under the rubric of vocal music or instrumental music. There is also a similar question about recorded music on records and cassettes.

Let us examine the halacha as it appears in the writings of *poskim* of our time.

a) Recent Decisions

Rav Moshe Feinstein, *zt"l*,²⁴ concludes that a sensitive person ("*ba'al nefesh*") should take the Rambam's responsum into account and avoid all singing. However, he adds, the halacha follows the Rambam's approach in the *Yad*, which, according to Rav Feinstein, dovetails with the opinion of *Tosafot*. All instrumental music is forbidden. Singing is permitted unless it is over wine or with great regularity and frequency.

Rav Ovadiah Yosef²⁵ cites as a rule of thumb in halachic decision, that if there is a contradiction between the *psak* of the Rambam in the *Yad* and his *psak* in a responsum, we follow the *Yad*. He adds, however, that according to the *Bach*, there is no such contradiction here, because the *Bach* will reinterpret the *Yad* according to the responsum, so that the Rambam is consistently stringent in the matter of singing.

Rav Binyomin Silber²⁶ is asked whether the *Mishnah Brurah*, who cites some stringent opinions, is writing the halacha as it must be practiced, or can we be more lenient?

Rav Silber responds that from the fact that the authorities seem to complain about current practice, it appears that they demand a change to the more stringent position. Rav Silber adds

24. *Iggerot Moshe, I, Orach Chayyim*, # 166.

25. *Yechaveh Da'ath, I*, # 45.

26. *Responsa Az Nidberu, VIII*, # 58.

that singing happy songs to prevent one from becoming melancholy, singing to banish sadness, etc., should be permitted even according to the *Bach*, provided that this does not become an excuse to do away with the ban against singing altogether.

We have seen that the opinion of several contemporary authorities is to take the position of the Rambam as interpreted by the *Bach*. This would eliminate nearly all instrumental music and a good deal of singing. But we have seen also that most people's behavior reflects the opinion of the Ramo.

Rav Eliezer Waldenberg²⁷ points out that the opinion of the Ramo was accepted, in effect, by Jews everywhere, who listen to musical instruments and teach their children to play them. He cites R. Ya'akov Chagiz, *Halachot Ketanot*, I, #9, who declares, as a general principle in halacha, that Divine Providence would not allow Jews everywhere to follow an erroneous individual opinion. If custom has followed a certain opinion, it is most probably correct. Rav Waldenberg adds that this is certainly the case here, with respect to music, since the opinion followed is none other than that of the Ramo, whose rulings are followed by Ashkenazi Jewry everywhere.

R. Ovadiah Yosef²⁸ maintains that the opinion of Rashi and Tosafot and others allows instrumental music as long as it is not in conjunction with drinking. He follows the Ramo's approach to Rashi and Tosafot, according to whose opinion it is possible to play instruments as long as it is not on a regular and frequent basis. R. Ovadiah Yosef then cites the responsum of R. Aharon Epstein (*Kapei Aharon*, #52) who says essentially the same thing and who adds that there may be a difference between someone who is playing or listening to music for its aesthetic, intellectual appeal as opposed to someone who is playing or listening to derive amusement and pleasure. Perhaps only the latter is prohibited. I have heard through an oral communication from a *talmid* of the Rav, that HaRav Soloveichik, *Shlita*, said he agreed with this approach and that Rav

27. *Responsa Tzitz Eli'ezer*, XV, # 33.

28. Loc. cit.

Dovid Tzvi Hoffman was of the same opinion.

Rav Yechiel Ya'akov Weinberg, although he does not elaborate, discusses the German Jews' habit of offering secular musical concerts in their synagogues. He maintains that these concerts are prohibited, in general. But it has become customary for the Jews of Germany to attend such concerts and it is difficult to admonish them (and have any positive impact). However, they certainly ought not to be held in the sacred confines of the synagogue.²⁹

b) Practicing a Musical Instrument

Rav Waldenberg contends further that the discussion about playing or listening to music is relevant only if the purpose is enjoyment. But if someone studies an instrument for the sake of learning a trade or a skill, so that he might later play at a wedding or other *simcha*, then it is definitely permitted according to everyone. Even a mourner is permitted to practice his professional musical repertoire and sharpen his skills, because he is preoccupied with his technical proficiency and does not pay any heed to amuse himself with his music. Thus, R. Moshe Schick in his responsa (*Maharam Schick, Yoreh De'ah*, #368, end) writes that a mourner for a parent is permitted, during the twelve-month period of mourning, to study his musical instrument and practice thereon, so that he may earn a living as a musician. (See also the list of authorities cited by R. Ovadiah Yosef in his responsa *Yechaveh Da'ath*, I, #45, p. 133.) So too the *Pri Megadim* permits a Jewish musician to play for non-Jews at their party even during the nine days of Av.³⁰ Thus the actual study of a musical instrument, or the

29. Responsa, *Sridei Esh*, II, # 12. This responsum deals with the question of musical instruments in the synagogue services. See also the halachic articles in the German Orthodox weekly, *Israelit*, 1862, # 2, 3, 4 and, *inter alia*, Rav Dovid Zvi Hoffman, responsa *Melamed LeHo'il*, # 16.

30. The *Mishnah Brurah* cites the *Pri Megadim* and offers another opinion which permits the same but only from the seventeenth of Tammuz until the first of Av, not during the nine days of Av. See the sources cited in *Kaf HaChayyim, Orach Chayyim*, 551 par. 39.

practice of that instrument, poses no problem at all, according to Rav Waldenberg.

c) For Little Children

Will those who follow the Rambam and the *Mechabber* to prohibit instrumental music prohibit it even for little children? The *Shiltei HaGibborim* to Rif, *Berachot*, 5:1, says explicitly that it is forbidden to play musical instruments even for little children. However, it is not clear if he means to lull them to sleep, or to make them happy.

With respect to singing, we know that the notion of ulterior motive is important. Workers who sing to keep up the rhythm of their work, to maintain an even speed, to guide animals in the field, etc., are permitted to sing. In the same vein, *Maamar Mordechai* to *Orach Chaiyyim* 560, #2, (also quoted in *Mishnah Brurah*, *Orach Chaiyyim*, 560, and *Kaf HaChayyim*, ibid.) allows lulling a child to sleep with songs as long as the content is not inappropriate to the proper raising of children. He cites the *Shelah* and others about the potential damage to the child if love songs are sung to him.

d) Music During Meals

The *Mishnah Brurah*³¹ in a comment on the words of the Ramo, cites the *Pri Megadim* (ad loc.) who says that it is appropriate to correct those who have their meals while there is music in the background. There is, according to some authorities at least, a difference between live music and recorded or broadcast music.³²

There is an implicit assumption in the *Mishnah Brurah* that eating one's meal to music is prohibited. The author of the *Mishnah Brurah*, in *Sha'ar HaTziyun*, ibid., qualifies this by adding that this refers to meals where wine is being drunk. Moreover, he cites the

32. See *Dvar Shaul* to *Sotah*, ch. 73, who rejects such distinctions outright. Music is music; recorders and other electronic media are musical instruments too. But see R. Ovadiah Yosef in *Yechaveh Da'ath*, I, # 45, footnote on p. 133.

Ramo's gloss to the *Mordechai, Gittin*, #314. In that segment, Tosafot are quoted as saying that since the prohibition is not to rejoice in the manner of the Gentiles, it is not prohibited to have meals to music. Only if one is drinking wine while *not eating food* is it prohibited to listen to music. In other words, partying, having cocktails, drinking at a bar, and the like, are included in the ban, but not eating a meal to music (even if wine is being served at the meal). Rav Ovadiah Yosef³³ explains that the meal prevents the one who drinks from becoming intoxicated. Therefore the singing is not in a context which can cause loose abandon and vulgarity.

e) Recorded Music

Rav Waldenberg (loc. cit.) was also asked about recorded music. He responds essentially as Rav Feinstein does.³⁴ Recordings reflect the category of the original music. Recordings on record or tape of vocal music are to be regarded as vocal music. Recordings of instrumental music are to be regarded as instrumental music. Rav Waldenberg adds that during the days of *Sefirah* between Pesach and Shevu'oth as well as during the Three Weeks, all manner of recordings, instrumental or vocal, should be avoided.

Rav Chayim David HaLevy³⁵ declares that he sees absolutely nothing wrong with listening to recordings of classical or modern music. Songs which are set to music where the primary purpose is the musical quality of the songs (the words strung together for their rhythmic, alliterative or sonorous effects) are permitted, but not songs whose content, in whole or even in part, is improper. This applies even to songs in a foreign language which is not familiar to the listener. As long as there is even a remote possibility that someone listening might understand the words, it is forbidden to acquire recordings of such songs.

Church music, with or without words, is forbidden. This Rav HaLevy bases upon the Ramo to *Orach Chayyim* 53:5 and the

33. *Yechaveh Da'ath*, I, # 45.

34. *Iggerot Moshe* responsa, I, *Orach Chayim*, # 166.

35. 'Aseh LeCha Rav, III, ch. 4 [p. 16 ff.].

commentaries, ad loc. He adds that it applies even to music which was once used by the Church even if it is no longer used. Secular music written by a wicked person, such as Wagner, is permitted as long as it does not endorse evil in the language (verbal or programmatic) of the music itself.

With respect to recordings of a woman's voice singing songs, etc., Rav HaLevy points out that there are several opinions. Some authorities regard recordings to be the same as live performance and forbidden. Other distinguish between recordings which are permitted and live broadcasts over the radio, which are forbidden. He finds it difficult to comprehend the logic of this distinction. Still other authorities permit listening to recordings and radio as long as the listener does not know the woman singer personally. Rav HaLevy adds that with newspapers, magazines and television making singers popular, their pictures and identities are known throughout the land and it is quite possible that under these conditions most authorities would agree that it is forbidden to hear the voice of a female performer singing on recordings or over the radio. Needless to say, television is inherently forbidden according to this approach, since the viewer watches the performer while he is listening to her voice.³⁶

Rav HaLevy adds that the previous discussion about recordings or radio deals only with occasional listening. Concertgoing must be studied with respect to the post-*Churban* ban against music and the various positions must be analyzed. He hesitates to formulate his opinion since it is better to leave Jews doing what they do in error rather than admonish them to no avail.³⁷

f) Over the Radio

Rav Ya'akov Breisch³⁸ remarks, with disapproval, that most

36. For more references and a full discussion of this question, see Rabbi Binyomin Cherney's article in the *Journal of Halacha and Contemporary Society*, X (Fall, 1985), pp. 57-76.

37. For this reason, the *Bach* writes, we do not admonish women who sing at their work. See *Bach* to *Tur Orach Chayyim*, # 560.

38. *Chelkat Ya'akov I*, # 62 par. 2.

Jews are not careful about many of the prohibitions on account of the *Churban* which are mentioned in *Orach Chayyim* 560. As far as music on the radio is concerned, it is possible to rely on the opinions of Rashi and Tosafot which allow musical instruments, as long as they are not being heard at a drinking party and as long as they are not heard with such regularity and frequency as would lead to excessive enjoyment or amusement. Rav Breisch adds that even if we were to follow other opinions about musical instruments, we may still regard the instance of the radio as unique. Since the radio, and the notion of radio transmission, did not exist at the time of the post-*Churban* decree, the radio may be regarded as never having been subsumed under the ban. Rav Breisch agrees that all new musical instruments (such as an electric piano, or a synthesizer, for that matter) would be included under the ban; still, there remains a difference between new instruments and the radio. There is a common denominator to all instruments, namely, that the player plays the instrument in the listener's presence. A radio can transmit music electronically over long distances and the player can be hundreds of miles away. It is inherently, essentially, and categorically different.

Rav Breisch adds, however, that the content of songs on the radio has to be proper. Lewd and vulgar songs, love songs and the like, are improper and it is forbidden to listen to them (or hear them as poetry, without the music). Rav Breisch adds that hearing a female vocalist over the radio is prohibited. This is consistent with Rav Breisch's position that it is forbidden because of "*kol isha*" to listen to the electronic reproduction of a woman's singing.

In Rav Moshe Feinstein's opinion (loc. cit.), the radio is essentially in the same category as the music that is being played through it. Therefore, if it is a voice singing, it is regarded as purely vocal music and is permissible (unless it is at a party with wine, or listened to with regularity). If, however, instrumental music is heard on the radio, it is regarded as instrumental and is forbidden.

At first, Rav Silber (loc. cit.) makes the same distinction that Rav Feinstein and Rav Waldenberg make. The radio is to be treated according to the nature of the source itself. But then Rav Silber suggests that insofar as the ban is concerned, we might regard vocal

music over the radio as instrumental music. This would apply, by extension, to recordings of the voice, as well. The radio is an instrument which produces music which sounds like the human voice. This instrument, called the radio, gives much pleasure and entertainment. It ought to be included in the ban against instruments. (Rav Silber is inclined to think this way in spite of the fact that he regards the female voice over the radio as *kol isha*.³⁹ It is *kol isha* and "instrumental" music at the very same time!) Rav Silber is generally very negative about listening to the radio and adds that, besides any other problem, a lot of time is wasted listening to the radio that could have been spent constructively, studying the Torah.

g) During Sefirah and the Three Weeks

Rav Feinstein, as we have seen, follows the more stringent opinions about instrumental music. Rav Feinstein adds, at the end of his responsum,⁴⁰ that those who take a more lenient view regarding instrumental music, should refrain from such music during the *Sefirah* days of mourning between Pesach and Shevu'oth. Undoubtedly, he means to include, a fortiori, the Three Weeks period of mourning between the seventeenth of Tammuz and the ninth of Av, and says so explicitly in a later responsum.⁴¹

h) Music at Weddings — Some Further Comments

It is appropriate to note, parenthetically, that because the pur-

39. See his commentary *Beit Baruch* to *Chayye Adam*, *klal* 10, p. 196. Rav Silber discusses the radio here too and is consistently stringent. He cites the various opinions and then says that it is best not to have a radio altogether. It is certainly wrong to play the radio when music is on, and whoever turns the radio on is in the category of "a sinner who also causes many others to sin." Besides the inherent prohibition there is also "bittul Torah," etc.

40. Loc. cit. This is repeated in *Iggerot Moshe, Orach Chayyim* III, # 87. There he writes that one can teach someone to play an instrument even during the *Sefirah* period if it is one's livelihood, but not for pleasure.

41. *Iggerot Moshe, Orach Chayyim* IV, # 21, q.v. This point is made by several decisors. See, e.g., Rav Aharon Epstein in responsa *Kapei Aharon*, # 52. See also the list in Rav Ovadiah Yosef's responsa *Yechaveh Da'ath*, VI, # 34.

pose of the live band at weddings is to make the wedding lively and stimulate dancing and rejoicing, the band has great responsibility. The musicians can guide the wedding celebrants in several, and very different, directions. They can promote a joy which G-d Himself approves, or they can be excessive and vulgar, thus abusing the verses of the Torah which they sing.⁴²

Considerations about the possible impropriety of wedding dances with musical accompaniment led some authorities to limit music at weddings.⁴³ But most authorities tend to emphasize the importance of music at weddings, as is evident from the episode, cited earlier, at the time of the Maharshal.

That music is essential to the wedding celebration is made evident in the famous opinion of the Ra'abiah⁴⁴: It is permitted for a Jew to tell a non-Jew to play upon musical instruments, on Shabbat, at a wedding celebration, for there is no joy to the groom or bride without music. This opinion is cited by the *Mechabber*⁴⁵ adding that it is even permitted to tell the non-Jew to repair his instrument so that he might play at the wedding. According to many authorities this leniency applies only to weddings and not to other *simchot shel mitzvah*. Music at weddings is essential, at *simchot shel mitzvah* it is merely appropriate.

i) Music — At Weddings Only, or at any Simcha Shel Mitzvah?

The *Kaf HaChayyim*⁴⁶ rules that instrumental music is permitted for a wedding only, because of the special nature of rejoicing at

42. See, inter alia, *Sdei Chemed*, (VII, p. 27 ff.), *Ma'arechet Chathan V'Kallah*, par. 12; *Aruch HaShulchan*, *Even Ha'ezer*, 65:3; *Mishnah Brurah* and especially *Biur Halachah*, *Orach Chayyim*, 338:3. See also *Yam Shel Shlomo*, *Gittin*, I, 17 and especially 18.

43. See *Likutei MaHaRikh*, v. 3, p. 130, who writes that he heard that the Maharam Schick advised all who would listen to have their weddings without music. He feared the consequences of the dancing to music with men and women together.

44. Cited by *Mordechai*, *Betzah* # 696, in the name of Rav Avi 'Ezri, who is Ra'abiah = R. Eliezer ben R. Yoel Halevi, the great Ashkenazi Tosafist of the late 12th century.

45. *Orach Chayyim* 338:2, q.v.

46. *Orach Chayyim*, 560, # 34.

a wedding. But this would not apply to a *brit milah* or at a *pidyon haBen* and the like. He concludes, however, that the custom is to be lenient in this and provide music for all *simchot shel mitzvah*.

R. Chayyim Yosef David Azulai⁴⁷ allows for musicians to be brought to a *brit milah* even though the infant's mother is within the thirty-day mourning period for her father.

Rav Feinstein⁴⁸ agrees that music is permissible at all *simchot shel mitzvah*.

It is permissible to play musical instruments to rejoice on *Chol HaMo'ed* and it has become customary to do so even in Jerusalem. It is also permitted to play musical instruments to enhance the celebration of Purim.⁴⁹

Kabbalat Shabbat

R. Avraham Emden mentions in his work *Tzror HaChayyim* [4d] that there was a custom in Prague to play upon musical instruments to announce the oncoming Shabbat or Yom Tov. This was done in order to create a joyous atmosphere so that the people would receive these holy days with joy and enthusiasm. In the Great Synagogue of Prague they would recite *Mizmor Shir l'Yom HaShabbat* twice. The first was to the accompaniment of music and the second, which signaled the actual *kabbalat Shabbat*, without any accompaniment.

Bar-Mitzvah and Bat-Mitzvah

It is customary to have musicians at a Bar-Mitzvah celebration, which is, of course, regarded as a *se'udat mitzvah*. This is certainly true of the *se'udah* held on the very same day that the boy becomes bar-mitzvah.⁵⁰

47. Responsa *Chayyim Shaal*, I:21.

48. *Iggerot Moshe*, I, *Orach Chayyim*, # 166.

49. Rav Ovadiah Yosef, *Yechaveh Da'ath*, I, # 45, p. 132.

50. See *Yam Shel Shlomo* to tractate *Baba Kama*, VII, # 37 based on the story about R. Yosef in tractate *Kiddushin*, 31a. See also *Magen Avraham* to *Orach Chayyim* 225:4. *Magen Avraham* adds that if the boy delivers a Torah talk, a *drashah*, then a *se'udah* on any day after he becomes bar-mitzvah is to be regarded as a

What about music at a bat-mitzvah celebration? We must first determine the nature, in halachic terms, of such a celebration. Rav Moshe Feinstein maintains that a girl's celebration is different than a boy's, and thus cannot be regarded as more than a birthday party.⁵¹ According to his opinion, a band of musicians would be out of place at a bat-mitzvah. Rav Feinstein (in *Iggerot Moshe, Orach Chayyim* I, #166) is also hard pressed to allow music at a Yeshiva fund-raising dinner. He argues, at first, that the banquet and the *simcha* are not, in and of themselves, a mitzvah. They are, rather, just a means of gathering people together and getting people to give money for charitable purposes. But then he reasons that since the dinners and banquets usually honor those who give charity and support institutions, they might be considered mitzvah occasions. He concludes that, if possible, those who arrange these banquets should forego music; but if it is not possible, it is permissible.

It is therefore quite clear from Rav Feinstein's opinion regarding the fund-raiser, that he would not permit a band to play music at a bat-mitzvah party. However, there are authorities who differ with Rav Feinstein regarding the nature of a bat-mitzvah celebration. According to those who do regard the bat-mitzvah celebration as a *se'udah shel mitzvah*, music should be appropriate (as long as the form and the content of the music is suitable).

j) Records and Tapes of "Jewish" Music

As far as listening to tapes of songs about Judaism or songs in praise of G-d, which have instrumental accompaniment, R. Ovadiah Yosef remarks⁵² that there are several indications to be lenient. First, "most poskim maintain that musical instruments are forbidden only with wine" and perhaps the halacha is with them (although this is not the Rambam's opinion). Second, perhaps the

se'udat mitzvah. The celebration of a bar-mitzvah is likened to the celebration of a wedding.

51. Responsa *Iggerot Moshe, Orach Chayyim* I, # 104.

52. See the thorough discussion in Rav Ovadiah Yosef's responsa *Yechaveh Da'ath*, II, # 29.

53. *Yechaveh Da'ath*, I, # 45, footnote on bottom of page 133.

opinion of the Rambam is indeed as interpreted by the *Knesseth HaGedolah*, and others, so that instrumental music is prohibited only with wine. Third, perhaps the ban never applied to the radio or to recordings, as Rav Ya'akov Breisch suggested.

R. Ovadiah Yosef adds that, according to nearly every opinion, singing songs of praise to G-d, without instrumental accompaniment, is permitted even over wine. (But see also *Magen Avraham, Orach Chayyim*, 560 par. 10).

In this paper, we have discussed the underlying principles of the prohibition of listening to music and suggested that there is a difference of opinion among the rabbinic authorities as to the nature and extent of the ban. We have tried to further an awareness of this issue in customs and practice of everyday life.

Appendix

[There have been several translations of this responsum which has been published many times. There is, of course, also the synopsis of the responsum in the words of the *Tur, Orach Chayyim*, 560, which I have cited. I use the Arabic text as presented in Blau, *Tshuwoth HaRambam*, Responsum #224. His own Hebrew translation is generally good. In the first footnote to the responsum, Blau gives a list of the editions of the responsum and the various translations, q.v.]

The following is my translation of the original Judeo-Arabic version of the responsum:

It is known that music and tunes in and of themselves were forbidden, even if words are not uttered with them at all. For they [the Rabbis] say [in tractate *Sotah* 48a] "The ear that hears music should be torn out" [or, "will be torn out"]. It has already been explained in the Talmud [tractate *Gittin* 7a] that there is no difference whether it is hearing vocal music [that is, songs with words] or playing upon strings [i.e., any instrumental music] or humming tunes [i.e., vocal

but without words]. Whatever brings a person to gaiety of the spirit [or rejoicing of the spirit] and its stimulation is forbidden, as they have said. And they [the Rabbis] based their words upon the prohibition of the prophet (Hoshea 9:1) who said: "Do not be gay, O Israel, in the manner of the joy of the nations."

The reason for this is very clear. For the power of this desire must be overcome and contained and reined in. And not [the reverse], that he should engage it and quicken the dead [that is, arouse the dormant instinct in him].

We cannot consider the exception to the rule, the rare individual, who [when listening to music] is brought to a more profound spirit and a quickened perception and an obedience in divine matters; for the Torah's laws were written for the majority and for the usual circumstance, and the Rabbis relate to the likely situation.

The prophets already explained this to us and declared their objection to those people who used musical instruments for their listening pleasure. Thus they said (Amos 6:5): "Those who play upon the 'nevel' as did David, so did they regard musical instruments. [See the various Commentaries, *ibid.*, and see also *Midrash VaYikra Rabbah* 5:3, which plays upon the word "nevel", a musical instrument, as if it derives from the root "naval" which means vulgarity or lewdness. See the commentary of *MaHarZu*, *ad loc.*] We have already explained in our commentary to *Avot* (1:16) that there is no difference between expressions in Hebrew or in Arabic. For speech is not forbidden or permissible save according to the subject-matter of such speech. And in truth it is forbidden to listen to foolishness [inappropriate speech] even if it is not in the form of songs [that is, even if it is regular speech]. And if lewd songs are accompanied by musical instruments there would be three violations: 1) the prohibition to listen to foolishness and lewd or obscene language; 2) the prohibition against listening to songs, that is vocal music; 3) the prohibition to listen to musical instruments. If this occurs in a place

where there is drinking [wine] then there is a fourth violation as He, may He be raised on high, has said (Isaiah 5:12): "and their parties are with the *kinnor* and the *nevel* and the *tof* and the *chalil* [four musical instruments] and with wine." And if the singer happens to be a woman then there is a fifth violation as they said [tractate *Berachot* 24a] "the voice of a woman is '*ervah*' (and can arouse man)" and most certainly when she is singing.

The truth has already been made patently clear; that is, that our purpose is to be a holy nation and have no action or expression unless it is of perfection [i.e., moral excellence] or which leads to such perfection. We must not arouse those forces [within us] which prevent us from all good, nor can we abandon ourselves in debauchery and amusement. We have already explained this matter sufficiently in the *Moreh* [*Nevuchim*] in the last section (ch. 8), with words that are evident to those with lofty character.

The *Geonim* [when they permitted songs] had in mind songs of praise [to G-d] as the *Baal Halachot* [the Rif] has mentioned. But Heaven forbid to include secular songs. This cannot be heard in Israel, neither from a *Gaon* nor from a lesser man.

[The Rambam now addresses those Syrian Jews who sent him this question] I am amazed that you state [when you pose your question] that the singing is "in the company of righteous individuals." To me, righteous individuals are not found in places where intoxicating beverages are drunk. Concerning this too we already explained sufficiently in the *Moreh* [*Nevuchim*, ibid.]. Certainly if in addition to this (drinking of wine) they listen there to musical instruments [no righteous Jews will be found there]. Shalom. This Moshe has written.

Dental Emergencies on the Sabbath
Rabbi Moses David Tendler and
Dr. Fred Rosner

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Introduction

It is axiomatic in Judaism that human life is of infinite value. The preservation of human life takes precedence over all biblical commandments and rabbinic enactments except three: idolatry, murder and incest.¹ In order to preserve human life, all ritual laws, save the above three, are suspended for the overriding consideration of saving a human life.²

How does the practicing dentist apply this basic principle when confronted with an emergency or potential emergency on the

1. Rambam *Mishneh Torah, Hilchot Yesodei Hatorah* 5:2.

2. *Ibid. Hilchot Shabbat* 2:1.

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Sabbath? What constitutes a dental emergency requiring the dentist to set aside all Sabbath laws to treat his patient? Under what circumstances may the dentist open his office on the Sabbath, turn on the lights, prepare and apply medications, cements, fillings and their like, use the drill, incise an oral abscess, and perform other therapeutic procedures for his suffering patient?

Abrogation (Hutra) or Suspension (Dechuya) of the Sabbath

One of the most renowned halachic controversies concerning medical care on the Sabbath is the question whether danger to life (*pikuach nefesh*) or potential danger to life completely sets aside the biblical laws and rabbinic rules and regulations pertaining to the Sabbath (*hutra*), or whether this danger only suspends them (*dechuya*). This famous controversy of whether the Sabbath is *hutra* or *dechuya* for *pikuach nefesh* is more theoretical than practical. Theoretically, if the Sabbath is *hutra*, it is as if the Sabbath does not exist and, therefore, the Jewish dentist may act in accord with standard dental procedures in treating his patient with *pikuach nefesh* on the Sabbath similar to that which he would do on a weekday for that patient. (Of course, even if Sabbath is considered *hutra*, this would apply only to care of the *patient*; it does not mean, for example, that the dentist could smoke a cigarette just because he is taking care of a critically ill person.) If the Sabbath, however, is only *dechuya* — suspended or set aside only for the *pikuach nefesh* situation — the dentist would have to limit himself to those dental procedures absolutely essential to take care of the dental emergency.

However, it is clear from the codes of Jewish law, including the *Shulchan Aruch*³ and *Mishneh Torah*,⁴ that a physician or dentist must perform all acts required for the care of his patient (*kol tzorchei choleh*) and not limit himself exclusively to those things which would remove the danger to life (*pikuach nefesh*).⁵ The

3. *Shulchan Aruch, Orach Chayyim* 328:4.

4. *Mishneh Torah, Hilchot Shabbat* 2:1.

5. *Mishnah Berurah* 328:14 and the commentaries of *Biur Halacha* and *Be'er Hetev* there where the question is discussed as to whether or not the Sabbath should be

medical or dental practitioner must do everything that he would ordinarily do for his patient on a weekday. Thus, from a practical standpoint, this major distinction between *hutra* and *dechuya* is irrelevant once the patient's condition has been classified as *pikuach nefesh*.⁶

A second theoretical difference between *hutra* and *dechuya* is in the use of a non-Jewish dentist who is equally competent. If the Sabbath is *hutra* for *pikuach nefesh*, there is no need to send the patient to the non-Jewish dentist and the Jewish dentist himself can treat the patient on the Sabbath as if the Sabbath were non-existent. If, however, the Sabbath is *dechuya*, or only temporarily suspended for *pikuach nefesh*, there is no need for the Jewish dentist to transgress the Sabbath and the patient can be cared for by the non-Jewish dentist. However, contrary to this line of reasoning, our Sages rule that even if the Sabbath is *dechuya* for *pikuach nefesh* situations, the most competent Jewish medical or dental practitioners and not a non-Jew should care for the patient. Maimonides⁷ clearly states that "when such things have to be done [to save a life on the Sabbath]... they should not be left to heathens, minors, slaves or women, but should be done by adult and scholarly Israelites." Thus, if an illness is classified as *pikuach nefesh*, it is not proper to refer the patient to a non-Jew. There is no distinction in this regard in practice between *hutra* and *dechuya*. The author of *Mishnah Berurah*⁸ concurs that this is the accepted halachic practice.

desecrated for something whose omission would not constitute a danger to life. Authorities supporting both opposing viewpoints are cited.

6. Although Rambam (*Hilchot Shabbat* 2:1) rules that the Sabbath is only suspended (*dechuya*) and not completely set aside (*hutra*) if human life is in danger, he nevertheless clearly states that whatever a skilled physician considers necessary should be done for the patient on the Sabbath. Rabbis Joseph Karo (*Keseph Mishneh*), Nisson Girondi (*Ran*), and Solomon ben Adret (*Rashba*) are also of the opinion that the Sabbath is only suspended (*dechuya*) for danger to life. However, Rabbi Moshe Isserles (*Ramo*) in his *Responsa* no. 76 states that the Sabbath is completely set aside (*hutra*) if human life is in danger.

7. *Mishneh Torah, Hilchot Shabbat* 2:3

8. *Mishnah Berurah* 328:37.

A real distinction between *hutra* and *dechuya* might be the performance of an act on the Sabbath in an unusual manner (*shinuy*) thereby changing the offence from a biblical to a rabbinic transgression. If the Sabbath is *hutra* for *pikuach nefesh*, the dentist may perform all acts necessary to treat his patient in the same manner he would perform them on a weekday. If, however, the Sabbath is only temporarily set aside for *pikuach nefesh*, it would seem preferable to use a *shinuy* to perform all therapeutic acts on the Sabbath in order to lessen the transgression from a biblical to a rabbinic offense.

What is a *shinuy* for a dentist? If a right-handed dentist performs root canal work with his left hand, that might be considered a *shinuy*, but this is obviously highly impractical. The definition of *shinuy* requires that the act be performed in a less competent manner than usual so that either the results of the act are less good or the method is more difficult. Rabbi Abraham Borenstein, known as *Avnei Nezer*, in the introduction to his work *Egley Tal*, specifically states that a *shinuy* is when the outcome of an act is less successful or the method of doing the act is particularly tedious. If neither definition applies, it is not a *shinuy*. Turning the light on with one's elbow or starting the dental drill with one's knee is not a *shinuy*, according to Rabbi Moshe Feinstein,⁹ because the *shinuy* of using one's elbow or knee is an act (turning on the light or starting the drill) that does not affect the electrical contact that sets into motion the forbidden activity. It is, therefore, usually not feasible for a dentist to employ a *shinuy* that is halachically valid in the direct care of his patient with *pikuach nefesh* on the Sabbath.

In practical terms for the dentist, therefore, there is no distinction between *hutra* and *dechuya*. Once a situation has been classified as *pikuach nefesh*, the Jewish dentist is obligated to do everything necessary to care for his patient on the Sabbath and that should be his only concern.

9. Personal communication.

10. *Mishneh Torah, Hilchot Shabbat* 2:5.

Definition of *Pikuach Nefesh* (Danger to Life)

A frequent halachic question in dentistry is whether or not the presence of an abscess is considered to be *pikuach nefesh* requiring incision and drainage on the Sabbath. The halachic definition of *pikuach nefesh* is not the same as the medical-dental definition of danger to life. Halacha sets a higher standard of risk-benefit, i.e., a lower level of risk or danger than that set by medicine is classified as *pikuach nefesh* by the halacha. Thus, any internal sore from within the lips and mouth, including the teeth, is halachically considered to be a situation of *pikuach nefesh*,¹¹ if that sore might lead to an actual or potential danger to life. Our Sages were especially cognizant of the fact that any infection in the mouth is potentially dangerous because of the direct circulatory connections between the oral cavity and the brain. The fact that total asepsis in the mouth is nearly impossible to achieve is compensated by G-d's creation of protective enzymes, antibodies, and other host defense systems which protect the body from sepsis secondary to the bacterial flora of the oral cavity. The fact that any "significant" infection or inflammation or abscess in the mouth can today be treated prophylactically and/or therapeutically with antibiotics in no way eliminates the classification of that abscess or infection as *pikuach nefesh* requiring the dentist to treat it on the Sabbath. Thus, conditions such as tooth abscesses, jaw swellings, gum infections and their like are all defined in the category of internal sore (*makah shel chalal*) for which Sabbath laws must be put aside in favor of the most effective and expeditious dental care.

A cancre sore or a broken orthodontist's wire or a mild tooth discomfort and their like are not considered to be *pikuach nefesh* although one could stretch the above reasoning *ad absurdum* and say that any scratch or pimple in the mouth could lead to infection, abscess formation, and brain infection. What is called *pikuach nefesh* must be "significant" pathology. Man is mortal and every human being is subject to an occasional scratch or pimple on his

11. *Shulchan Aruch, Orach Chayyim* 328.

body. "All is by the hand of Heaven except colds and fevers"¹² means that every person can have an occasional cold and/or fever. The norm or baseline is not perfection. A cold or minor sore are not pathologic conditions to be classified as *pikuach nefesh*. However, a well-established infection in the mouth is clearly a case of *pikuach nefesh*.

Categories of Illness Other Than Pikuach Nefesh

There are four classic halachic categories of illness in relation to the suspension of Sabbath laws: *pikuach nefesh* (danger or possible danger to life), *choleh she'ayn bo sakana* (ill person but without danger to life), *meychush be'alma* (minor discomfort), and *chesron eyver* (chance of loss of function of an organ or limb). Elsewhere,¹³ one of the authors of this essay provides an analysis which suggests that there is a fifth category — *choleh she'ayn bo sakana im tzar gadol* (ill person without danger to life but with great pain or discomfort).¹⁴ This category is tantamount to *chesron*

12. *Ketubot* 30a.

13. Tendler, M.D. *Bet Yitzchak*, Yeshiva University Press, 1987.

14. a) The Talmud (*Ketubot* 6b) states that he who pierces an abscess on the Shabbat — if in order to cause the pus to come out of it — is free from punishment (and it is permitted). See also the commentary of Tosafot there, s.v. *ve'im lehatzi* which states that the Talmud is certainly concerned with a patient in pain but where there is no danger to life; nevertheless, the Rabbis did not enact a preventive measure to prohibit rabbinic "work" on the Shabbat even if performed by a Jew. See also *Shabbat* 107a.

b) The Talmud (*Ketubot* 60a) states that a man suffering from pain in the chest (literally: groaning) may suck (goat's) milk (directly from the goat) on the Sabbath (even though the release of milk from the animal's udder resembles the plucking of a plant from its root, or the "unloading" of a burden which is ordinarily forbidden on the Sabbath). What is the reason? — continues the Talmud — because sucking is an "unusual" method of "unloading" against which, where pain is involved, no preventive measure was enacted by the Rabbis (even though the Jewish patient himself sucks the milk and does not ask a non-Jew to secure the milk for him).

c) *Shulchan Aruch, Orach Chayim*, no. 328:28 also rules that it is permitted to pierce a boil on the Sabbath to express the pus therefrom. *Mishnah Berurah* no. 328:28 cites the opinion of Tosafot that the permissive ruling is due to the fact that where pain is involved, the Rabbis did not enact a preventive measure.

eyver in that it is permissible for such a patient to waive all rabbinic prohibitions in addition to telling a non-Jew to do the act (*amira le'akum*).¹⁵

Pikuach nefesh has already been discussed in the previous section of this essay. *Choleh she'ayn boakanah*¹⁶ refers to a patient who is suffering from an illness which does not constitute a danger to life or limb but is serious enough or painful enough to make the patient feel that he would rather be in bed (*mutal lemishkav*). A patient with a bad toothache due to an exposed nerve but without infection should be classified in this category. For such a patient to whom there is no danger to life, therapeutic intervention on the Sabbath may only set aside the rabbinic prohibition to telling a non-Jew to do the act (*amira le'akum*). The treatment should, therefore, be provided by a non-Jew.

Meychush be'alma refers to minor discomfort for which the taking of any medication is a rabbinic prohibition. Our Sages were concerned that because of discomfort, the person may overact (*bohal al gufoh*) and allow himself some unwarranted leniencies in Sabbath observances.

Chesron eyvor refers not to the loss of an organ or limb but to

d) *Shulchan Aruch, Orach Chayim* no. 328:33 also rules that a person suffering from pain in the chest is permitted to suck milk directly from a goat on the Sabbath because where pain is involved, the Rabbis did not enact a preventive measure. The author of *Mishnah Berurah* (ibid.) cites the explanation of Rabbi Nisson Girondi (Ran) that "although the rule in regard to patients in whom there is not danger to life is to tell a non-Jew to perform the act, here [in the case of chest pain] it is different because the cure for the patient's ailment is that he suck [the milk] himself." This means that if there is pain and suffering and the relief thereof cannot be provided by an act of a non-Jew, it is permissible for the Jew to do it himself even if there is no danger to life (*pikuach nefesh*) or danger about the loss of function or an organ or limb (*chesron eyver*).

e) One should add that on the second day of *Yom Tov* it is permitted for a Jew(ess) to personally apply medication on his (her) eyes even though on the first day of *Yom Tov* this act can only be performed by a non-Jew. Similarly, for all other rabbinic rules, the Rabbis allowed such acts to be performed by Jews on the second day of *Yom Tov* (*Shulchan Aruch, Orach Chayim* 496:2).

15. *Tosafot* on *Ketubot* 60a and *Shulchan Aruch, Orach Chayim* 328:28.

16. *Shulchan Aruch*, loc. cit.

the loss of normal function of a limb.¹⁷ This category of medical condition is halachically classified in between *pikuach nefesh* and *choleh she'ayn boakanah*. The *Avnei Nezer* exemplifies *chesron eyver* as an orthopedic problem such as a torn ligament or muscle which, if not repaired on the Sabbath, would result in the patient's walking with a limp. *Chesron eyver* does not require actual loss of the limb.

Loss of a Tooth as *Chesron Eyver*

Is a tooth in the category of *chesron eyver* for which a Jew can set aside all rabbinic prohibitions on the Sabbath? The third opinion in the *Shulchan Aruch*¹⁸ concerning *chesron eyver* is the ruling we follow, namely, a Jew is allowed to waive rabbinic prohibitions in order to preserve a limb or its function. If a patient presents to the dentist on the Sabbath following trauma with two avulsed adult teeth, one could argue that halacha considers this situation as *chesron eyver* requiring the immediate reimplantation of those teeth. Teeth are not cited in the Mishnah in *Oholoth* which lists the 248 *eyvorin* (limbs or organs) or the body. However, teeth can be halachically classified as *eyver* based on *Avnei Nezer*'s definition of *chesron eyver* cited above. Less than the normal use of a limb is *chesron eyver*. Since the jaw is an *eyver* and the absence of teeth interferes with its proper functioning, and since the reimplantation of those teeth would restore the proper functioning of the jaw, the traumatic avulsion of teeth represents a situation of *chesron eyver*.

If this analysis is correct, it is permissible to reimplant an adult tooth on the Sabbath provided one does not violate any biblical (*d'oraitha*) prohibitions. A non-Jew is obviously very helpful in this situation because whatever he does for the Jewish dentist on the Sabbath is only rabbinic and not biblical in its implications. In the absence of a non-Jew, is the Jewish dentist permitted to drill, mix paste or cement, cut wires, apply wax, make dental impressions, turn on lights etc., on the Sabbath in order to reimplant a traumatically avulsed tooth? Each of these activities must be

17. Responsa *Avnei Nezer*, introduction to *Egley Tal*.

18. *Shulchan Aruch*, loc. cit.

evaluated as to whether it involves one or more biblical or rabbinic prohibitions.

A Practical Suggestion

Which activities in the sophisticated modern dentist's office would be classified as rabbinic prohibitions on the Sabbath which may be waived for the sake of *chesron eyver*? Turning on lights on the Sabbath, according to many rabbinic authorities, is a biblical offense. Mixing cement or paste is a biblical offense known as *lishah*. *Lishah* (kneading) is the mixing of water and fine particles to form a dough or paste. There is no *shinuy* possible with *lishah* since the end result is the same, i.e., the making of a paste or cement. Pre-made cements in tubes that can be squeezed out, if available, might be acceptable for Sabbath use. Another method is for two people to make the cement together employing the suggestion of *shenayim she'osu* (see below). Pushing wax into a crevice is a biblical offense known as *memacheck* (smoothing or waxing). Cutting a wire with one's left hand if one is right-handed constitutes a *shinuy* but is not practical. Starting the dentist's drill by turning on the motor on the Sabbath may or may not constitute a biblical offense. Most authorities rule that if the motor has no heating element, starting it on the Sabbath would only be classified as a rabbinic prohibition and permissible for a situation of *chesron eyver*. Obviously, it is rather difficult for a dentist to function on the Sabbath by suspending only rabbinic but not biblical prohibitions.

A practical suggestion for dentists who must treat a patient with *chesron eyver* or *choleh she'ayn bo sakanah im tzar gadol* is the intriguing approach of two people performing a single act. *Shenayim she'osu* converts every prohibited act on the Sabbath into a rabbinic prohibition. Rambam clearly states¹⁹ that whenever two persons jointly do work that can be done by each one of them alone, they are exempt, and it does not matter if each one does a different part of the work, or whether both do the work together

19. *Mishneh Torah, Hilchot Shabbat* 1:15.

from beginning to end. It is a functional practical solution.^{19a} *Shenayim she'osu* is like a *shinuy* and considered to be a technical avoidance of a biblical prohibition. If the dentist and an attendant or family member or other bystander simultaneously start the drill, only a rabbinic prohibition is involved, which is waived for *chesron eyver* on the Sabbath. Once the drill is running, the dentist can operate it alone until the procedure is completed.

Some authorities consider starting a dentist's drill to be a rabbinic prohibition if there is no heat or electricity involved in starting the motor, but only if it is an air compressor. However, according to some authorities, starting a motor involves the biblical transgression of converting a useless non-functioning machine into a functioning drill (*metaken manah*). Manipulating or cutting into gums and other soft tissue in reimplanting avulsed teeth is known as *mechatech basar be'alma* and is permitted.

Concerning rabbinic prohibition (*issurei d'rabbannam*), we have been taught that the Rabbis did not enact prohibitions in the face of severe pain (*bemakom tza'ar lo gazru bo rabbanan*). These considerations, combined within the definition of *chesron eyver* cited above, may allow the dentist to function comfortably within halacha to restore the function of a tooth on the Sabbath. This is an often-overlooked category of illness on the Sabbath — no danger of life but great pain. For this category, a Jew may transgress rabbinic but not biblical prohibitions on the Sabbath as discussed above.²⁰

Dental Abscesses

The Talmud²¹ considers the piercing of an abscess with a pin to relieve the turgidity and pain and evacuate the pus on the Sabbath (*mapis mursa*) to be a rabbinic prohibition. However, the incision and drainage of an abscess and the insertion of a drain requires the expertise of a physician (*ma'aseh uman*) and is,

19a. R. Moshe Feinstein used this rationale in dealing with the problem faced by the Israeli army concerning the intermittent running of the tank air-conditioner on Shabbat.

20. See Note 14.

21. *Ketubot* 6b, *Shabbat* 3a and 107a

therefore, classified as a biblical prohibition. Thus, the opening of an abscess to remove pus can be either a rabbinic or biblical offense if performed on the Sabbath, depending upon how it is done. In dentistry, an oral abscess is nearly always categorized in halacha as *pikuach nefesh* and, therefore, all therapeutic measures necessary to treat the abscess must be employed in the most expeditious manner possible.

Although medically the incision and drainage of a dental abscess can be postponed until after the Sabbath and the patient given antibiotics, the difference between the medical and halachic definition of *pikuach nefesh* is such that once the condition is categorized as *pikuach nefesh*, definitive treatment must be instituted promptly and not postponed because of the Sabbath.

Dental Anesthesia

The administration of an injection by a physician on the Sabbath might involve the biblical prohibition of "wounding" (*chavalah*) because the physician first aspirates before giving the injection to avoid injecting directly into a blood vessel. If blood is aspirated into the syringe, that would constitute an act of *chavalah*. However, for the dentist, giving an injection of a local anesthetic in the mouth is only a rabbinic act and, therefore, permissible for *chesron eyver* as defined earlier in this essay. In dentistry, injections are mainly for pain relief and even if they induce some gum bleeding, it is considered unintentional (*davar she'ayn miskaven*) and not in the category of *pesik reysho* (dialectic term for an absolutely unavoidable result of an act). Furthermore, the dentist has no need for that blood; on the contrary, he would prefer that the injection cause no bleeding at all. For all these reasons, the giving of an oral injection of a local anesthetic on the Sabbath by a dentist is considered to involve only a rabbinic prohibition.

Returning Home After A Dental Emergency

When a dentist has completed the treatment of a dental emergency on the Sabbath he should close his office but not turn off the lights. Shutting off the drill is permitted if otherwise a considerable financial loss might be incurred (*hefsed mamon*) and

the dentist might be reluctant to treat another patient on the Sabbath in the future.

If a dentist is called to the hospital on the Sabbath for a dental emergency, the halachic rules of his returning home are the same as for a physician or emergency medical technician returning from a medical emergency. This subject has been described in detail elsewhere.^{22, 23} A dentist should not drive his own car home from the scene of a dental emergency (office, hospital, etc.) but should take a taxi or have his car driven by a non-Jewish driver to minimize the Sabbath prohibitions involved.

Miscellaneous Dental-Halachic Issues

1. *Dental prostheses, fillings, bridges and tevilah (ritual immersion).*

Dental fillings and all permanent (i.e., functional) dental prostheses are not an impediment or barrier (*chatzitzah*) between a person and the water of a ritual immersion bath (*mikvah*). *Tevilah* may be performed without the removal unless they have been improperly placed and must be removed and corrected by the dentist. *Tevilah* must be postponed until such correction is made. For example, a filling that is interfering with chewing and must be corrected by the dentist, or a bridge that is painful because further correction must be made on the device, must be fixed before *tevilah*.²⁴

The terms temporary and permanent are often misinterpreted since the main halachic criteria relating to *chatzitzah* is whether or not the filling or prosthesis is functional. If a woman has a permanent filling which is too high and cannot chew on it because it bothers her and it hurts, she cannot go to *mikvah* until it is ground down. On the other hand, if she has a temporary cement filling which is fully functional, she is allowed to go to *mikvah*

22. *Responsa Iggerot Moshe, Orah Chayim*, Part 4 no. 80.

23. Rosner, F. and Wolfson, W. "Returning on the Sabbath from a life-saving mission." *Journal of Halacha and Contemporary Society* no. 9, Spring 1985, pp. 53-67.

24. *Responsa Iggerot Moshe, Yoreh Deah* no. 97.

since it is classified as part of the body. If the filling is not functional, it is considered a *chatzitzah* whether made of gold, cement or plastic. If it is functional, it is considered as part of the natural growth process of the tooth and is not a *chatzitzah*. Semi-permanent orthopedic dental devices are to be discouraged unless absolutely necessary because of the halachic problems concerning *tevilah* which they raise. Sutures do no hinder *tevilah* by their presence.²⁵ Plastic teeth and *tevilah* is discussed by Rabbi Feinstein.²⁶

In summary, all permanent bridgework, or cemented or wired (i.e., permanent) braces do not constitute an interposing barrier (*chatzitzah*) and therefore do not hinder the regular process of *tevilah*. However, removable dentures, removable braces, removable bridges and the like must be removed before *tevilah*. The application of a surgical dressing to the gums during extensive gum work may require a delay in the time of *tevilah*. Rabbinic consultation should be sought in such cases as each case must be adjudicated based upon the particular circumstances of that case.

2. Separate Dentures for Passover?

Separate dentures are not required for Passover or for *milchig* ("milk foods") and *fleishig* ("meat foods"). Since food that is eaten does not usually reach a degree of temperature or heat that surpasses the pain threshold, no absorption of food by the teeth is considered to occur. Therefore, separate dentures for "meat" and "milk" foods are not required. It is recommended, however, that someone with false dentures should not chew hard *chametz* on the day before Passover eve because of a legal rabbinical technicality based upon the effect of pressure in causing absorption.^{26a} Because of the unusual severity of Passover law, the false-denture-user is advised not to chew hard *chametz* from noon of the day before

25. *Ibid. Yoreh Deah*, Part 2 no. 87.

26. *Ibid.* no. 88.

26a. Rabbi Aron Felder in *Oholei Yeshurun* [p. 82, parag. 33, note 200]. See also *Tzitz Eliezer*, 9:25.

Passover eve onwards. He does not, however, have to procure a separate set of dentures for the Passover holiday. If dentures or bridges are removable, they should be soaked for a twenty-four hour period prior to the holiday after careful brushing to remove all particulate matters.²⁷

3. *Kohen (Priest) Studying Dentistry*

Under the usual academic conditions, a *kohen* is not permitted to study dentistry. Because of the requirement in United States medical schools that students take anatomy and pathology courses, it is impossible for a *kohen* to attend medical or dental school. Even if the assumption is made that most, if not all, cadavers are non-Jewish, ritual defilement of a *kohen* still occurs upon contact (*maga*) or by carrying (*massa*) of any dead body. The halachic distinction between Jew and Gentile concerns ritual defilement on being present in the same room with a cadaver (*tumat ohel*).

The same objections expressed concerning medical school apply to dental school. The latter curriculum also includes anatomical dissection which is forbidden to a *kohen*, irrespective of whether the cadaver is Jewish or non-Jewish. If, however, the dental student can avoid actual dissection and attend only as an observer, and if his early dentistry training does not include a human skull with its dentition, then there may be dispensation for a *kohen* studying dentistry. This possible restricted permissibility rests upon the fact that in the present era we follow the lenient halachic ruling that a non-Jewish corpse does not convey ritual defilement to people in the same room who do not have direct contact with it. Unlike the physician, the dentist is not usually involved with dying patients, death certificates, the mortuary, etc. which pose seemingly insoluble problems to a physician who is a *kohen*.²⁸

27. Rosner, F. and Tendler, M.D. *Practical Medical Halachah*, New York, Feldheim, 1980, p. 86.

28. *Shulchan Aruch, Yoreh Deah* 369, 371 and 372:2 and the commentary *Dagul Mir'vavah* on 372:2.

4. *Training in Hospitals with Sabbath Obligations*

Is a physician or dentist obligated to seek training or employment or attending physician status at a hospital where there is minimum or no conflict between hospital policy and Sabbath observance? The answer is that a physician or dentist must seek association with the most reputable and prestigious hospital possible to insure excellent training and continuing education. Jewish law requires that the physician or dentist acquire maximum skill and competence to practice his chosen profession. Therefore, he should forego personal comfort and convenience of training in a hospital that is sympathetic to his religious needs in favor of a hospital that will provide him with the best possible training, provided that he is certain of this fortitude in maintaining all halachic requirements, despite the less favorable environment. However, if the superior training is to be acquired at the price of Sabbath desecration, even of rabbinic ordinances only, the physician or dentist must forego the educational advantages of the prestigious hospital.²⁹

Conclusion

The classic Codes of Jewish Law rule that "for any internal sore (*makah shel challal*) that is from the lip or teeth inward, and the teeth themselves are included, one must desecrate the Sabbath." Thus, conditions such as tooth abscesses, jaw swelling, gum infections, and the like, are all classified in the category of "internal sore." In such cases, the Sabbath laws must be put aside in favor of the most effective and expeditious dental care. Oral surgery requiring postoperative care is certainly classified as a danger-to-life situation (*pikuach nefesh*) for which the Sabbath must be desecrated. However, if the patient suffering from a dental condition has only a mild discomfort without much associated pain, no Sabbath law may be desecrated. If there is danger of loss of

29. Rosner and Tendler. *loc. cit.* p. 116.

function (*chesron eyver*), rabbinic but not biblical prohibitions may be transgressed. If there is moderate pain but no real danger, only the prohibition of telling a non-Jew to act (*amira le'akum*) is suspended. In cases of extreme pain, the same rules that govern *chesron eyver* apply. The dentist has all the obligations of a medical practitioner in cases classified as *pikuach nefesh*.

Stam Yeinom

Rabbi Israel Poleyeff

Stam Yeinom

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Introduction

High on the list of those activities that the Torah abhors intensely is *avoda zara*, the worship of idols. Evidence of this abounds in the Torah and halacha. The father of our people, Abraham, is described by the Midrash¹ as having smashed his father's numerous idols as one step towards his recognition of *hashem echod*, one universal G-d. Two generations later, his grandson Jacob chafes at having to dwell and raise a family in the home of the idol-worshipping Lavan.² His wife, Rachel, upon their precipitous departure from her father Lavan's home, steals the *teraphim* (idols) of her father,³ with the specific intent of thus preventing him from worshipping them.⁴ Undoubtedly the most heinous collective transgression that the children of Israel committed was the fashioning and worshipping the *egel hazahav*, the golden calf,⁵ a transgression from whose effects we are still suffering even today.⁶ Among the three prohibitions for which one

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- בראשית רכה לח:יט
 ספר בראשית פרשת ויצא לכה, כו, ורשי פרשת וישלח על לכה:
 ספר בראשית פרשת ויצא לא-ב'יט
 בראשית רכה ערד:
 פרשת כי תשא
 רשי פרשת כי תשא לב'לד, ירושלמי תענית פרק ד' ה'ה
-

Rabbi, Cong. Ahavat Achim: Instructor of Talmud, Hebrew Academy of the Five Towns & Rockaway.

must forfeit one's life rather than transgress is *avoda zara*.⁷

This abhorrence is expressed further in strict regulations and pronouncements to avoid and shun its practice. "You shall not make for yourself any graven image,"⁸ the Torah tells us in the Ten Commandments. "You shall not bow down to them," the Torah continues, "nor shall you serve them". Not only is one prohibited to construct the idols, but once constructed, regardless by whom, they must be destroyed where possible:

But thus shall you deal with them: you shall tear down their altars, and smash their pillars, and cut down their *asherim* [trees used as an object of idol worship], and burn their graven images with fire.⁹

As a further precaution against possible attraction to idol worship, the Torah prohibits the use of anything that may have been employed for such repulsive practices.¹⁰ Under this rubric are included the laws of *yayin nesech* and *stam yeinom*.

Yayin Nesech and Stam Yeinom

At the very start a distinction by definition must be made between the terms *yayin nesech* and *stam yeinom*. *Yayin nesech* refers to wine prepared by an *Akum*, an idol-worshipping heathen, specifically for idolatrous use.¹¹ *Stam yeinom* is wine prepared by a non-Jew, where the purpose is unknown: it might be for idolatrous use or for mere personal enjoyment.¹² The former is biblically prohibited, while the latter is forbidden by decree of the rabbis only. However the halachic roots of the prohibition of *stam yeinom* are deeply imbedded in the halachot of *yayin nesech*.¹³ Thus the ultimate source of *stam yeinom* is the passage in the Torah: "Where are their gods, the rock in whom they trusted; who ate the fat of

7. סנהדרין דף ע"ד ע"א

8. ספר שמוט פרשת יתרו כ:ד

9. ספר דברים פרשת ואתחנן ז:ה

10. רמב"ם, הלכות עכ"ז, פ"ז ה"ב

11. רמב"ם הלכות מאכליות אסורת, פ"א ה"א

12. שם, הלכה ג'

13. The point is underscored by *Tosafot Avoda Zara* 29b (ד"ה יין) where they

their sacrifices and drank the wine of their drink-offering?"¹⁴ It is from the comparison inherent in the second half of the passage that the prohibition of heathen wine is derived. The passage speaks of sacrifices and wine. That led our sages to declare that just as all benefit is prescribed from (heathen) sacrifices, so too is their wine prohibited from any use or benefit whatsoever.¹⁵ This halacha in regard to *yayin nesech* is formulated by Rambam,¹⁶ who underscores the severity of the prohibition by declaring that the violator is liable to *makot* (lashes) even if he drank the minutest amount; the *Shulchan Aruch*¹⁷ and others concur in this ruling.

The rabbis extended the prohibition of *yayin nesech* to include *stam yeinom*, apparently out of concern that a distinction between the two was difficult for the average Jew to grasp and thus to observe ("gezera mishum *yayin nesech*"). Consequently, all the restrictions that apply to *yayin nesech*, such as the prohibition of every manner of benefit and pleasure, apply to *stam yeinom* as well.

A second reason for the *gezera* of *stam yeinom*, or perhaps an extension of the first, is that of *chatanut*, a concern that a close friendship with a heathen, enhanced by the effects of drinking wine together, might eventually lead to the Jew's abandonment of Torah and mitzvot. Prominent in the thoughts of the rabbis was surely the pattern of activities described in the Torah, concerning the daughters of Moab in their successful attempt to subvert the Israelites at the suggestion of the heathen prophet Bilaam. The Talmud *Sanhadrin* relates:¹⁸

question the need for the biblical source altogether since *stam yeinom* is only rabbinically prohibited. Tosafot respond by noting that similar *gezerot* by the rabbis, such as "their" bread and oil, were only prohibited for consumption, not for benefit. Wine, being prohibited for benefit as well, required a firmer source for its prohibition. Thus the need for a biblical source.

14. ספר דברים פרשׁת האינו לבָלָן

15. עבורה זורה דף ב"ט ע"ב

16. הלכות מאכליות אסורות פ"א ה"א

17. יורה דעה, סימן קכ"ג סעיף א'

18. סנהדרין דף ק"ו ע"א

...[Bilaam advised Balak to] erect for them tents for harlots enclosed by hangings, and to place old women outside, young women inside ... And when an Israelite ate, drank, and was happy, he sauntered forth for a stroll in the marketplace. The old women would say to him: "Do you not desire linen garments?" The old woman offered them at value, but the younger one for less ... After that she would say to him: "You are now like one of the family; sit down and select for yourself." Flasks of wine lay near her, and at that time heathen wine was not yet forbidden. She said to him: "Would you like to drink a glass of wine?" Having drunk, his passion was inflamed and he declared to her: "Yield to me." Thereupon she brought forth an idol from her bosom and said to him: "Worship this ..."'

The rabbis, recognizing the possible repetition of these nefarious efforts, instituted their *gezera* against the wine of the heathens. It was, in fact, one of the eighteen *gezerot* that were promulgated "on that selfsame day."¹⁹ Further, the reason for the *gezera* is clearly stated in that same talmudic discussion: "[They prohibited] their [the heathens'] wine because of their daughters."²⁰

Needless to say, these additional halachot regarding *stam yeinom* are also formulated in the various halachic compilations such as Rambam²¹ and *Shulchan Aruch*.²²

Yet another extension of *yayin nesech* was introduced by the rabbis for the reason of *chatanut*. This restriction concerned wine of Jewish ownership handled by a heathen, even without idolatrous

19. שבת דף י"ג ע"ב ויז ע"ב

20. שבת דף י"ז ע"ב. It is interesting to note that although the bread and oil of heathens were also prohibited they were not as severely proscribed as was wine in that other benefit (חכמת) was not prohibited (as indicated in note 13). Tosafot (ר"ה עלי) suggest that drinking wine, unlike eating bread and using oil, has the capacity of creating the convivial atmosphere that might lead to *chatanut*. In fact, the *gezera* against oil did not last very long altogether, since it never seemed to gain much headway among the Jews.

21. הלכות מאכילות אסורות פ"א ה"ג

22. יורה דעת סימן קכ"ד

intent.²³ This too was referred to as *stam yeinom*, and it is with this form of *stam yeinom* that, from a practical point of view, this article is primarily concerned.

Another halachic definition is in place here. The term *negia* (touch or handling) by the non-Jew which renders the wine forbidden refers only to when two actions take place: touch *and* movement.²⁴ Thus, if a non-Jew touches a flask of wine but somehow does not cause any movement of the wine, the wine remains acceptable for use.

The problem of *stam yeinom* today is further intensified by the large number of non-religious Jews in our community. Is their halachic status similar to that of a non-Jew in regard to the handling of wine?

Shulchan Aruch declares that "a *mumar* [an opponent of halacha] in regard to idol worship or in regard to the public desecration of the Sabbath ... has the same halacha as a non-Jew."²⁵ The subject at hand is accepting or rejecting the validity of the *shechita* (ritual slaughter) by various individuals, including the *mumar* (whose *shechita* is apparently treated no differently than that of a non-Jew). Does the statement, however, have broader application so as to include the handling of wine as well?²⁶ *Behag* believes the answer is yes²⁷ and declares wine handled by such an individual to be *yayin nesech*. So, too, the author of *Shulchan Aruch* himself declares²⁸ that "a *mumar*, even though he is circumcized, creates *yayin nesech* with his touch."²⁹

23. הלכות מאכילות אסורות פ"א ה"ד

24. שולחן ערוך יורה דעה פרק קכ"ד ס"א וש"ם שם סק"ב

25. יורה דעה סימן ב' סעיף ה'. Whether this is so biblically or only by decision of the rabbis is a lengthy discussion among the sages.

26. This declaration is stated in other halachic areas as well, such as in regard to *brit milah* where Ramo states (יורה דעה ס"ד סעיף א') that a "mumar for the entire Torah is treated as an *Akum*." Much of the discussion defining a *mumar* centers about the extent of his rebelliousness, whether against the entire Torah, against Shabbat alone, in regard to idolatry, or even against a particular mitzvah.

27. הלכות שחיתת חילין דקכ"ו ע"ד

28. יורה דעה סימן קכ"ד סעיף ח'

29. One's curiosity is aroused by the use of the term "even though he is

Not everyone is in agreement with *Shulchan Aruch* and *Bebag*. The opposing view is based upon a two-fold argument. *Yayin nesech*, that is *stam yeinom* today, is prohibited for two reasons: one, the fear of its use for idolatrous practices and, two, its advancement of close relationships (*chatanut* or "benoteihem"). As to the former, their reasoning goes, there is a little or no suspicion of idol worship today. The world in which the Jew dwells today is far removed from idolatrous practices. As to the latter, there is no halacha that forbids marriage with the daughter of a *mumar*. There may certainly be others more preferable for a life partner, but no blanket *issur* to marry a *mumar*'s daughter exists. Thus there would appear to be no reason to broaden the restrictions placed upon the *mumar* to areas where applicability does not appear to be warranted.

Furthermore, others argue,³⁰ the very term *mumar* implies deliberate intent and active opposition to the halacha. Some might even describe it as rebelliousness, with concomitant intent of degrading the practices of Torah and embarrassing its adherents. Such is not in fact the situation with most non-religious Jews today. Among several reasons for this view, two stand out. Firstly, their lack of Torah knowledge is so great, even in the very basics of Torah living, that they more readily fall into the category of "*omer mutar*", a belief that their actions are not wrongful in any manner. Their belief is reinforced by the activities and values of the society in which they live. Certainly their thinking and their actions are not in accord with Torah, but not perhaps of a manner that would classify them as halachic *mumarim*.

Secondly, and perhaps as an extension of the first reason, non-religious Jews of today can often be classified as equivalent to a

circumsized." Is not a *mumar* a Jew, albeit a rebellious one, and therefore certainly circumsized? Further curiosity is raised by *Shach*'s comment on this halacha: "A *mumar* who touches wine, and follows it with the declaration that he has *converted* [to Judaism]..." To what kind of *mumar* is reference being made here? It would appear that the reference is to a *mumar* in regard to idolatrous practices, the "conversion" being a return to Jewish practices.

30. שות' בנין צין סי' ב'ג

tinok shenishba, a child captured in his youth who never even had the opportunity to learn Torah, and more than likely was never even aware that there is Torah to be learned. The woeful state of Jewish education in various areas of the broad Jewish community, especially a generation or two past, would lend credence to this view.

Nonetheless, though both views have many adherents, the majority of *poskim* lean towards equating the non-religious Jew with the *akum* (non-Jew). Foremost among them is *Tzitz Eliezer*³¹ who states emphatically that no exceptions can be made from the basic principle.³² The *Chazon Ish*³³ and R. Menashe Klein,³⁴ on the other hand, with certain qualifications, find valid reasons not to be so harsh with the *mumar* of today. The *Chazon Ish* even adds that we have a responsibility to support him with the hope that he will recognize the value of living according to the dictates of the Torah. The only circumstances under which we would treat the *mumar* harshly is when he willfully refuses to accept reproof (*tochachah*). However, *Chazon Ish* goes on to say, in our times we have lost the unique ability at successful chastising (*ain onu yod-im lehocheach*).

From a practical point of view, our concerns regarding *stam yeinom* are affected primarily by two lingering questions. Firstly, *yayin nesech*, and thus *stam yeinom*, was prohibited as a result of an *akum*'s use of the wine for idolatrous purposes. During biblical times and into the era of the Talmud there was good reason to suspect every heathen with such intent. But are the non-Jews of today to be classified as *akum*? Or, with the spread of a monotheistic religious attitude among the non-Jews of the Middle Eastern and Western world, are there, from the point of view of halacha, few *akum* remaining today?

31. ש"ת צ"ץ אליעזר חלק י"ב סימן ג"ו in which Rav Waldenberg not only explains his view, but enlists the support of other recent *gedolim* whose views are consistent with his.

32. For a more complete discussion of this subject see *Yabia Omer* by R. Ovadia Yosef, א"ה סימן ט"ה, חלק א', חלק א' ו'.

33. אבן העור ס"ק י"ח סעיף ו'

34. משנה הלכות חלק ד' סי' ק"ה

35. This author is aware of another opinion that maintains that if an *Akum* even

Secondly, and more practically, there is a consideration based on a talmudic statement of Shmuel: "Cooked wine is not included in the category of *yayin nesech*."³⁶ By extension, this applies to *stam yeinom* as well. What, however, constitutes cooked wine? To what temperature must it be heated and for how long? What is its status if the grapes are cooked *before* crushing?

A brief discussion of these two general subjects should add to the understanding of the question of *stam yeinom* in our contemporary society.

Who is an *Akum* Today?

On a number of occasions halacha distinguishes between non-Jews who worships idols and those who do not. Such a distinction is made in regards to *stam yeinom*. Rambam writes "... however, if the prohibition results from a non-Jew who does not worship idols, such as the Moslems ..." ³⁷ Living in a Moslem world and with many contacts in the intellectual and professional Moslem community, Rambam was undoubtedly quite familiar with their cultural practices and concluded that the Moslems were not an idol-worshipping nation. Rambam therefore found good reason not to apply to them the halachot of *stam yeinom* to their fullest extent.

The Christians were another matter. Rambam writes in *Hilchot Akum*:³⁸ "Canaanites are idol-worshippers, and their festival day is on the first day of the week."

It is unlikely that Rambam was referring to the Canaanites of ancient days. That nation had long disappeared from the pages of history. By identifying the Canaanites as a people that observe

looks at wine it is tantamount to touch and renders the wine unfit. At this writing the only source the author was able to find was in the *Sefer Taamei Haminhagim* whose author, R. Avrohom Shperling, cites (p. 134) *Sefer Midrash Talpiot* which in turn quotes *Sefer Taamei Hamitzvot* who claims to have observed this viewpoint in practice. He even recommends it as "*minhag vatikin*," an admirable practice of the scrupulous. In any case, this opinion carries little or no weight in normative halacha.

36. עבדורה רורה דף ב' ע"א
 37. הלכות מאכליות אסורות פ"ג ה"ה
 38. הלכות עכו"ם. פרק ט' הלכה א'

Sunday as their "festival day" it is more likely that he had the Christians in mind since they were the only people to maintain Sunday as their holy day. Thus Rambam appears to equate Christianity with idolatry.

Not so Rabbi Mordechai Ha-Meiri. This giant of the fourteenth century, who lived in Provence, declared on numerous occasions that the Christians were not on the same footing as the idol-worshipping heathens of old. He described them as "nations bound by the ways of religion" and in regard to various laws directed against the *Akum* wrote:

All these laws were pronounced at the time [talmudic times] when those Gentiles adhered to their idolatry, but now idolatry has disappeared from most places.³⁹

One might suggest that the difference between Rambam and the Meiri may have resulted from the fact that the former dwelled among Moslems while the latter's home was in the Christian world.

*Shulchan Aruch*⁴⁰ also deals with the wine of a nation free of idol-worshipping practices, but, unlike Rambam, does not identify the Moslems as that particular nation. In fact, *Shulchan Aruch* identifies no nation specifically at all. *Shach*⁴¹ sees in this not an oversight but rather a deliberate choice so as not to imply that such a non-idolatrous practice is exclusive to any particular nation (such as the Moslems) but exists among other nations as well. Very likely *Shach's* attention was drawn to chapter 128 where the *Shulchan Aruch* writes: "... but anyone who is known to us not to worship idols..."⁴²

Although *Shulchan Aruch* does in one instance cite the Moslems as being non-idolatrous,⁴³ he leaves it to both Ramo and *Shach* to clarify exactly which other nation or nations are being referred to. On *Shulchan Aruch's* almost verbatim's quote of

39. בית הבחירה ע"ז פרק א'

40. הלכות יין נסך סימן קכ"ד סעיף ז'

41. שם סק"ב

42. סעיף א'

43. יורה דעתה סימן קכ"ט סעיף י"א

Rambam mentioned earlier, the Ramo declares: "And in our day when [all] the nations are not idolatrous..."⁴⁴ And commenting on *Shulchan Aruch* 129:11, *Shach* adds, to *Shulchan Aruch*'s mention of Moslems, that "they are not idol-worshippers, and so too for all other nations in our day."⁴⁵

Rabbi Moshe Isserles, popularly and respectfully known as Ramo, lived in Poland in the sixteenth century (1530-1572). Rabbi Shabbetai Hacohen, referred to as *Shach*, also was a native of Poland in the seventeenth century (1623-1663). It is reasonable to assume that both were familiar with the religious practices of the major faiths of the people among whom they lived: Russian Orthodox and Roman Catholic Christianity. It is therefore probable that they were the "other nations" that were referred to as "not idolatrous."

Among the other *gedolim* who subscribe to this view regarding the Christians is R. Moshe Rivkes of Vilna, the author of *Be-er Hagolah*, a gloss on the four sections of the *Shulchan Aruch*. On the question of saving the life of a heathen idol-worshipper, R. Rivkes writes that the question is no longer applicable:

Our sages were referring only to the *Akum* who lived in their days, since they worshipped idols, did not believe in the Exodus from Egypt, nor in the creation of the world. But of those nations under whose shadow we live and among whom we are scattered, they believe in the creation of the world and in the Exodus from Egypt...⁴⁶
Thus they are not identical to the *Akum* of the past.

The halachic effect of this widespread opinion regarding "other nations" upon the laws of *stam yeinom* is, essentially, two-fold, depending upon intent. "The wine of any non-Jew who does not practice idoltry", declares *Shulchan Aruch*,⁴⁷ "is prohibited only

44. סימן קכ"ד סעיף כ"ד

45. סימן קכ"ט סעיף י"א ערך זה. *Shach* employs the word "ovdei kochavim (*Akum*)" in referring to the other nations. But it is obvious his intent is not to identify them as idol-worshippers, but rather as being foreign nations.

46. שלחן ערוך חושן משפט סימן תכ"ה סעיף ה'

47. וורה דעתה סימן קכ"ד סימן ר

as to drinking, but not for any other beneficial use. Their handling of Jewish wine carries with it the same halacha and only drinking it is prohibited.” Clearly, then, the halacha of *stam yeinom* is more lenient than *yayin nesech* in regard to *hana-a* (benefit).

Ramo also agrees that *stam yeinom* today is forbidden, at worst, only for the purpose of drinking but not for any other beneficial use. His view is also based on the fact that idol worship is extremely rare today and thus the non-Jew’s halacha may be comparable to that of a *tinok ben yomo* (a non-Jewish child one day old) whose touch renders wine forbidden only to the extent of drinking.

As to the principle that any ruling promulgated by an assemblage of scholars requires a similar assemblage to reverse it, (כל דבר במניין צריך מןין אחר לההירו) it could very well be, Ramo reasons, that no *gezera* was ever introduced for circumstances of this kind.

Still more lenient is the halachic status of *stam yeinom* in regard to accidental handling by the non-Jew. Rambam⁴⁸ and *Shulchan Aruch*⁴⁹ are identical in their statements: “However ... if a non-Jew who is not idolatrous in practice touches wine *without intent* [shelo bekavana] ... this wine is permitted for the purpose of drinking.” No restrictions whatsoever applies to accidental touch.

Ramo adds a comment that appears to have wide-reaching effects when he declares: “and today when the nations are not idolatrous, every act of touching in their part is treated as *shelo bekavana*, accidental.”⁵⁰ It would seem, that with this statement the Ramo has virtually obviated the entire question of *stam yeinom* today. However, *Taz*⁵¹ indicates that this was not Ramo’s intent, but rather that his comment may be used where necessary *in conjunction* with other lenient factors to declare wine acceptable for drinking.

47a. שו"ת הרמ"א ס' קכ"ח

48. הלכות מאכליות אסרוות פ"ג ה"א

49. סימן קכ"ד סעיף ב"ד with further comments in יורה דעה ס' קכ"ד סע' ז

50. יורה דעה ס' קכ"ד סעיף ב"ד

51. שח ס"ק ל"א

A modern variant of the question of touch is the operation of an electric wine press, where the non-Jew's part of the wine-making process is limited solely to the pressing of a button. In this instance the non-Jew does not touch the wine itself, not even the container in which the wine is stored. May this action on his part be equated with handling the wine?

Rav Shlomo Braun, in his comments on the *Kitzur Shulchan Aruch* entitled *Sheurim Hametzuyanim Behalacha*, declares that under these circumstances the wine would, at worst, be prohibited only to the extent of drinking.^{51a} But, he continues, there are good reasons that may be marshaled to support permitting even drinking the wine. Rav Braun agrees with those who maintain that today's non-Jews do not fall in the category of idol-worshipper. Nonetheless, since some disagreement exists on this matter, Rav Braun recommends prohibiting drinking the wine at the outset (*lechatchilah*) but permitting it after the fact (*bediavad*), even when no great financial loss is involved (*afilu shelo bemakom hefsed*).^{51b}

Yayin Mevushal — Cooked Wine

The first mention of *yayin mevushal* being totally excluded from the restrictions of *yayin nesech* is the statement of Shmuel mentioned earlier ("cooked wine is not included in the category of *yayin nesech*") and the Gemara's halachic conclusion: "... and the law is *yayin mevushal* is not suspected of idolatrous use."⁵² The reason cooked wine is excluded from the restrictions of *yayin nesech* is best expressed by Rambam:

[The sages] prohibited only such wine that was suitable for [idolatrous] libations. Therefore, cooked

51a. סימן מ"ז ס"ק ז

51b. In a significant responsum regarding the use of gloves by non-Jews handling wine, R. Moshe Feinstein, י"ד ח"ב ס"ג נ"א (אייגרות משה) ruled that this may not be equated with *negia al yedei davar acher* (touch through a secondary object) which would have permitted the wine even for drinking. *Davar acher* is defined as the corner of a garment, for example, but not gloves whose proper place is to be worn on the hands.

52. עבורה וריה דף ל' ע"א

wine belonging to a Jew that was touched by an *Akum* is not prohibited, and may even be drunk in the company of an *Akum* from the same cup...⁵³

No question, therefore, exists as to its permissibility. What next remains is to seek a halachic definition of "cooked wine."

Ran⁵⁴ offers two definitions. The first, in the name of Ravad, defines wine as being cooked the moment it is "brought to a boil" (*hirtiach*).⁵⁵ The second, in the name of Rambam, defines wine as cooked when the original amount of the wine is decreased by the cooking process. It may very well be that the two definitions are one and the same, Rambam offering a measurable yardstick in determining *retichah*, boiling, mentioned by Ravad. Indeed this is the conclusion of Ran who, combining the two definitions, declares that "as a result of the cooking a decrease [in the amount of wine] must take place."

This dual definition is formulated in the halacha. *Shulchan Aruch*, after stating the permissibility of *yayin mevushal*, goes on to explain that the point of *mevushal* is reached at "the boiling point."⁵⁶ *Shach* adds Ran's proviso requiring a decrease in the wine, however slight, as a result of the boiling.⁵⁷

The halachic definition of boiling, or the boiling point, cannot be determined by the rules of physics, although it is said to occur at 212°F, the boiling point of water at sea level. Halachically, *retichah*, (and thus *mevushal*) is achieved when *yad soledet bo*,⁵⁸ the level of heat of the liquid is such that the hand will recoil at its touch. The Talmud recognizes the imprecision of this definition when it proceeds to ask just how one recognizes "*yad soledot bo*." Rashi reminds us that some individuals may recoil from a low level of heat while others may be able to withstand a higher degree of heat before withdrawing. The Gemara therefore proceeds to offer

53. הלכות מאכליות אסורות פי"א הלכה ט'

54. ר"ן עבורה וריה דף ל' ע"א

55. This phrase "brought to a boil" will soon be explained further.

56. יורה דעה סימן קכ"ג סעיף ג'

57. שם סק"ז

58. שבת דף מ' ע"ב; מג"א או"ח ס"י ש"ח סק"ב

another definition, more universal in its comprehension: "How is *yad soledet* defined? Said Ras: if an infant's belly would be scalded by it." This also is not a precise definition.

However, two responsa by R. Moshe Feinstein are quite specific and practical in defining *yad soledet bo*, and thus the level of heat which would render wine *yayin mevushal*. In the first responsum⁵⁹ a question is raised regarding the cooking of whole grapes before they are pressed. R. Feinstein concludes his responsum with the comment that *yad soledet* fulfills *Shach's* requirement that the boiling must cause a decrease in the original amount of wine. The temperature that achieves this desired result, declares R. Feinstein, is 175°F.

In the second responsum,⁶⁰ R. Moshe Feinstein directs his attention to a more thorough development of the definition of *yad soledet bo*. Considering the possibility that *Shach's* view of a decrease in the volume of wine (*mitmaet*) may be at a level *lower* than *yad soledet*,⁶¹ he concludes that to eliminate the possibility of *yayin nesech* the wine need only be heated to a temperature of 165°F. There is no real contradiction in comparing this to the earlier responsum (175°F) since R. Moshe added in the first responsum the key word "*lechumro*", implying that where the particular situation warrants, a higher level of boiling should be employed.⁶²

The Tzelemer Rebbe, basing himself on the same sources as R. Moshe Feinstein, nonetheless disagrees with him as to the level of

59. איגרות משה יו"ד ח"ב סי' נ"ה

60. איגרות משה יו"ד ח"ג סי' ל"א

61. There is good reasoning behind this view. The *yad soledet* level of boiling may refer only to the possible violation of Shabbat regulations regarding *bishul* (cooking). In regard to *yayin nesech* all that is required is a level of boiling which makes the wine unfit for idolatrous use. This may possibly be achieved at a level somewhat less than *yad soledet*.

62. It is worthwhile noting that there is little difference halachically whether the wine is cooked after the wine is separated from the grapes or whether it is cooked earlier in the wine-making process while still together with the rest of the grapes, the pits, the skin, etc. (ב"ח ס"ב נ"ב). It has come to the attention of the author that some wine companies do in fact cook the entire grapes prior to the actual process of drawing out the wine from the grapes.

heating required to achieve *yayin mevushal*. The Rebbe's view is that *mitmaet* is achieved at 190°F and wines under his kashruth certification which are *mevushal* are heated to that level.^{62a}

Pasteurization of wines, if it is within the guidelines mentioned above, would suffice in removing the possibility of *stam yeinom* through the creation of *yayin mevushal*. However, there is no required standard regarding pasteurization of wines. Some companies do not pasteurize at all, others only certain wines. Further, the heat of pasteurization may vary from 158°F to 180°F. Thus, pasteurization in and of itself cannot be considered a truly reliable barometer for *yayin mevushal*.⁶³

Two other exceptions to the rabbinic prohibition in regard to *stam yeinom* should be briefly noted here. Firstly, wine does not fall into the category of *stam yeinom* if it is liberally mixed with honey or spices to the extent that the basic taste of the wine is altered.⁶⁴ Nor is it *stam yeinom* if, according to Rashba,⁶⁵ the wine is diluted with water at a ratio of one to six.

Secondly, all wine in a sealed container remains acceptable even if the non-Jew causes the wine to slosh about while handling the container.⁶⁶

Conclusion

Yayin nesech, and in particular *stam yeinom*, like so many other mitzvot whose regulations are not fully detailed in the Torah, are surrounded by many exceptions, additions, and considerations both of a more strict and more lenient nature. Those whose tradition it is to be more strict surely have a solid basis for their practice. No less of a solid basis exists for those whose teachings in

62a. Personal conversation with the son of the Rebbe, Feb. 24, 1987.

63. As to the question whether *kiddush* may be recited over *yayin mevushal*, two opposing views are mentioned in *שולחן ערוך אורח חיים רעב ס"ק ח*.

64. הלכות מאכליות אסורות שולחן ערוך יורה דעה ס"י קב"ג טעיף ד' where he adds the reason: "since it [sweet wine] is not fit for use on the altar."

65. י"ד ס"י קפ"ג טעיף ח' as quoted by Ramo.

66. הלכות מאכליות אסורות פרק י"ב הלכה ד'.

regard to *stam yeinom* are more lenient. In this article an attempt has been made to provide the background for both points of view. When it comes to the very practical decision as to which wines are acceptable and which are not, it is best to do what one should do with any question of practical halacha: direct the question to one's *rov* and follow his guidance.

"And you will come to the priests the Levites, and to the judge that shall be in those days, and you shall inquire, and they shall inform you the decision. And you shall do according to that which they have informed you."

ספר דברים, פרשת שופטים פרק יז:ט, י'. 67.

The Challenge of Honoring Parents in
Contemporary Social Conditions

Rabbi Shmuel Singer

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There can be no doubt that the duty of honoring one's parents is regarded by the halacha as one of the paramount obligations of Judaism. This mitzvah is among the basic precepts enunciated in the Ten Commandments and is repeated elsewhere in the Torah as well. The importance of the mitzvah is emphasized by the reward the Torah promises for its observance:

למען יאריכון ימיך על האדמה אשר די אלוקיך נתן לך

So that your days will be lengthened on the land which the Lord your G-d gives you.¹

Further confirmation of the weightiness of this obligation is provided by the Mishna which tells us:

אלו דברים שאדם אוכל פרותיהם בעולם הזה והקרן קיימת לעולם הבא... כיבוד אב ואמ.

Honoring one's parents is included among those things for which one is rewarded both in this world and the next.²

1. שמות כ', ז' י'ב.

2. פאה א', א'.

*Rabbi, Cong. Beth Sholom,
Providence, Rhode Island*

The Torah refers to two separate aspects of behavior which are required towards one's parents. The first is *Kavod*, honor, the second is *morah*, fear or reverence. These attitudes are based on two different verses of the Torah.³ Both the Talmud⁴ and Midrash⁵ define these two requirements in the same way:

אייזהו מורה ואיזהו כבוד, מורה לא עומד במקומו ולא יושב
במקומו, ולא יסתור את דבריו, ולא מכריעו. כבוד, מאכיל
ומשקה, מלכיש ומכסה, מכניס ומוסיאה.

What is reverence and what is honor? Reverence is not to stand in his place or sit in his place, not to contradict his words or even agree with them. Honor is to provide food drink, and clothing, and to bring them in and out.

The general parameters of this mitzvah seem to be clear enough. Its philosophical justification appears to be similarly distinct. However, there still remain a number of questions which require elucidation in regard to this commandment. By providing such additional clarification we obtain a more faithful idea of exactly what it is that this mitzvah entails.

The ambiguous areas referred to pertain to details in the observance of *Kibud av v'em* (honoring father and mother). Some of these questionable points have arisen as the result of the impact of modern culture on the Torah-true community. It is a truism that whenever a new lifestyle is adapted by the Jewish community new halachic problems are created. Although difficult issues of *Kibud av v'em* have been present throughout the centuries of Jewish existence, many of these problems have been highlighted by the conditions of modern life.

The focus which American society has always placed on democracy and equality is probably the strongest distinguishing mark of this country's culture when contrasted to that of other

3. שמות כ, ייב, ויקרא י"ט, ג'.

4. קידושן ל'א, עמוד ב'.

5. ספרה, ויקרא ל"ט, ג'.

nations. This is, of course, still true today. As a result of this focus, the structure of the family is viewed very differently by contemporary American society than it was, and indeed still is, in many other cultures. The family is not considered an authoritarian structure by contemporary American notions. The relationship between parents and children is not conceived of as a distant, cold and commanding one. Parents are thought of as respected guides and companions rather than as removed and remote figures of authority. Members of the observant Jewish community live in contemporary society and to a great extent partake of its concepts and frame of reference. It is important to realize that the mores and standards of society do impact on the halachic requirements and definition of "honor." As a result, problems of definition and observance are created for the observant Jew living as a member of a family in twentieth century America.

It is the purpose of this article to examine aspects of the mitzvah of *Kibud av v'em* in the light of current social conditions. As observant Jews, we accept halacha even when its demands are at odds with the cultural atmosphere around us; nevertheless, there are many instances where a clear study of halacha provides grounds for leniency in the practice of certain mitzvot which appear to clash with the thoughts and self-image of those living under modern social conditions. In such cases, we would appear to be justified in accepting these leniencies. This is especially true if thereby we can justify the behavior of substantial portions of the observant Jewish community. It is obviously not the purpose of this article to decide questions of halacha. Rather, it is hoped that by suggesting certain lines of thought and logic, further discussion of these very relevant halachot will be stimulated within the Torah community.

Obeying Parents

One of the duties included in the mitzvah of *Kibud av v'em* is the requirement to obey the instructions of a parent. When a parent makes a request, the son or daughter fulfills a positive mitzvah by complying with this wish. This is true no matter how mundane the request may be. The Talmud tells us of the following question:

שאל בן אלמנה אחת את רבי אליעזר אבא אומר השקיני מים
ואמא אומרת השקיני מים איזה מהם קודם.

The son of a certain widow asked Rabbi Eliezer 'If my father says, 'Give me water,' and my mother says 'Give me water,' who comes first?'

Obviously the giving of water is here being considered a mitzvah act.

This requirement is generally not the source of any great difficulty. There are, however, a number of cases where compliance with such a mitzvah seems to present problems for the observant Jew. In a very real sense the impact of modern society has changed the cases where such problems exist from the status of being rare to that of the commonplace.

The first place where a problem exists for the religious Jew in obeying the wishes of a parent is when such a request entails a violation of halacha. If a parent demands that a child perform an action which is otherwise forbidden by Jewish law, a true quandary has been created for that child. Whatever he does would seem to be considered condemnable. If he follows the wishes of the parent he violates the rules of halacha, yet if he disregards the demand of the parent he also goes against the guidelines of halacha.

This problem was quite unusual in earlier times. Jews were generally Torah-observant and not likely to ask their children to violate halacha. Of course, such a case could occur but it was very rare. Far more common, especially in the last century, was the reverse situation. Children would fall away from the religious observance of their elders and attempt to influence their parents to violate Jewish law to conform to the children's lifestyle. Such a demand obviously bears no connection to a discussion of the mitzvah of *Kibud av v'em*.

Due to the resurgence of Orthodoxy in the last thirty years a complete reversal of this situation has taken place. As a result of both the growth of yeshivot and the *baal teshuvah* movement, an

6. קידושן ל'א, עמוד א'.

ever increasing number of young people are returning to strict standards of halachic observance. Today we have an unprecedented situation within the Jewish community — thousands of observant Jews are confronted with the reality of dealing with irreligious and sometimes anti-religious parents. These parents can, and quite often do, make demands on their children to violate different halachic norms. These requests may involve issues ranging from disregarding a *minhag* (custom) to transgressing basic Torah principles such as *Kashrut* and *Shabbat*.

The key to dealing with this question is found in the following statement by the Midrash:⁷

יכל אמר לו אביו ואמו לעבור על אחת מכל מצות האמורות
בתורה ישמע להם, תלמוד לומר אני ד', כולכם חיבים
בכבודי.

Do not think that if a parent requested a child to violate any mitzvah of the Torah that the child should obey. The Torah says "I am your G-d" [in plural]—both parent and child must honor Me.

The Talmud agrees with this principle.⁸ The *Shulchan Aruch* decides in accordance with this that if a parent commands a child to violate any rule of halacha, whether it is a Torah law or a rabbinic one, the child is forbidden to obey the parent.⁹

This would seem to resolve most questions in this area. An observant son or daughter would be required to ignore a parent's anti-halachic wishes and continue to obey the halacha despite the parent's feelings. Generally, however, a child is required to give his non-religious parents full *Kavod* in all other respects.^{9a} However, one questionable point remains. The *Shulchan Aruch* refers to a violation of either a Torah law or a rabbinic law. What is the status of a *minhag* (custom), something that is not halachically required

7. ספרא, זכרא י"ט, ג'.

8. בממות ה', עמוד ב'.

9. יורה דעה ר"מ סעיף ט"ז.

9a. יורה דעה ר"מ י"ח, שדי חמד מערכה ב' ק"ג.

but nevertheless still commonly observed? If the parent objects to the child following such a practice, can his wishes be ignored? This too is a common problem today. Many members of the older generation may have been observant of the broad outlines of halacha, and yet have an aversion to the observance of such *minhagim* which were not commonly practiced in the American community of their youth. If they express opposition to the observance of such *minhagim* by their children, are the children permitted to ignore their wishes? It goes without saying that this same question applies to those within the observant community who have totally anti-religious or non-religious parents who express such wishes.

This question appears to remain unresolved. Rabbi Shlomo Luria, the Maharshal, discusses a case where a mother has died and the father forbids the son to say kaddish for her. He argues that the son should ignore his father's wish and say kaddish. One of the reasons he gives is that the father is in effect asking his son to violate a rabbinic requirement to say kaddish for a parent, and in such a case the son should not obey the father. The Maharshal is aware that the saying of kaddish is nowhere mentioned in talmudic literature as a rabbinic law. Nevertheless he adds that since our ancestors have accepted this as a binding *minhag* it has received the status of rabbinic law.¹⁰ Rabbi Chaim David Azulai (Chida), objects to this reasoning. How can the saying of kaddish be considered a rabbinic law, he asks, when it is a *minhag*? In such a case one has no sanction to ignore the mitzvah of honoring his parent. He must rather disregard the *minhag*.¹¹ In this category he includes any practice not mentioned openly in the Talmud and Midrash.¹²

A somewhat different dilemma arises for a child whose parent asks him to do something for him which is harmful — to the parent. Should the child obey the parent in causing himself harm which is itself forbidden? If the doctor has said the father must lose weight

10. ים של שלמה, קידושין פרק א', סימן ס"ג.

11. ברבי יוסף, יו"ד ר"מ, ס"ק ח'.

12. שאלות ותשובות חיים שאל, חלק א', סימן ה'.

to stave off further heart problems, but he insists the son bring him sweets, or if a diabetic parent insists the child bring him food which is forbidden, there is a real halachic problem. Generally, it seems that if it is not a life-threatening request, the child is obligated to fulfill the parents' wishes, although the *poskim* are not wholly in agreement.^{12a}

Marriage

We have discussed the permissibility of ignoring parents when their wishes conflict with clear halachic imperatives. There are other cases as well where refusal to follow the desire of a parent can be defensible. A prime example is the question of marriage. In former generations marriages were arranged by the parents of the bride and groom. There was little regard for the ability of the couple to choose for themselves. Of course, halacha has always required consent by both parties to the match,¹³ but this demand was often followed in a formal, *ex post facto* sense—after the match had been arranged, the children were asked for their approval. Today, obviously, the situation has completely changed. No one expects parents to arrange their children's marriages, and it would be regarded as a great infringement on personal rights for a parent to attempt to perform this function for his child. This attitude has been adopted by a great proportion of the observant community as well. Due to this social development, conflict between parents and children over the choice of a mate has become not uncommon.

This problem was discussed by the Maharik in response to a question whether a father has the power to forbid his son to marry a woman whom the son desires. After all, it would seem that by virtue of the mitzvah of honor, the father should possess such rights. The Maharik disagrees. He argues that the son is not required to obey his father's wishes in this matter, for three reasons. Firstly, a child is not required to undergo an inordinate amount of financial loss for *Kibud av*. Certainly then he does not have to

12a. ערוך השולחן יו"ד ר"מ, מ"א, ברבי יוסף שם, ט"ו, ספר החסידים, רל"ד.
 13. שולחן ערוך אבן העזר מ"ב סעיף א'

impose the personal suffering on himself that would result from not marrying the woman of his choice. Secondly, the mitzvah imperative of marriage is not fulfilled by marrying just anyone, but only by choosing the mate of one's preference. Consequently, by forbidding a child to marry the bride of his choice the parent is asking him to violate a mitzvah. Finally, Maharik argues, *Kibud av* is irrelevant in this case since the parent derives no benefit from his son's obeying him in this situation. The mitzvah of honoring one's father and mother applies when the parent asks for something that benefits the parent directly. However, this matter is one that really is of no immediate concern to the parent. As such, the mitzvah of *Kibud av* does not apply.¹⁴

The *Shulchan Aruch* accepts this opinion as authoritative.¹⁵ This permissibility is broadened by the *Nodah Biyehudah* to include a daughter as well as a son. In both cases he says, it is clear that the child does not have to obey the parent.¹⁶ One word of caution must be added. If the parent claims that such a marriage would shame him, then, according to the *N'tziv*, he does have the power to stop his child. This is because if shame results, it does affect the parent directly.^{16a} Furthermore it is doubtful if one may shame a parent in order to perform a mitzvah.¹⁷

The logic of the previously mentioned argument of the Maharik can be applied to a different case as well. This is the question of whether a child can choose to follow a *minhag* or prayer *nusach* different from that of his father, when the father objects to such an action. One might think that if the parent instructs the son not to follow such a course of action, the son is required to obey. However, if we accept the logic of the Maharik, that *Kibud av* only applies when the parent derives direct personal benefit from his request, then the conclusion will be different. Since

14. שאלות ותשובות מהרייך סימן קס"ו.

15. יורה דעה ר"מ, סעיף כ"ה.

16. נודע ביהודה, תנינא, אבן העזר, סימן מ"ה.

16a. Relevant to the issue of "shame" is the question whether a son may call his father to a *din Torah*. See, קמ"ד מערכה כ, קמ"ד.

17. שאלות ותשובות מшиб דבר יורה דעה סימן נ.

it is of no immediate concern to the parent which *minhag* or *nusach* his child follows, the child would be free to do as he wishes. *Kibud av* does not enter into the question. This indeed is the conclusion of a number of *Acharonim*.¹⁸ (Of course, it must be pointed out that there is a complicating halachic factor here. This is the prohibition of changing one's traditions, not because of *Kibud av* but rather because of the binding power of *Masoret Avot* (family tradition). There would, therefore, remain a question as to whether a person is permitted to change the *nusach* of his ancestors, with or without his parent's opposition. Much has been written on this question. There are those who permit change from one *nusach* to another, and those who do not.¹⁹)

Torah Study and Aliyah to Israel

Another area where it is permitted to ignore the wishes of a parent concerns Torah study. In today's world it is not uncommon for young adults to desire to attend a place of Torah study not approved of by their parents. This is due in part to the younger generation's increasing devotion to more exacting standards of Torah study than was common for their elders. By the standards of modern American society it would appear to be tyrannical for parents to attempt to practice thought control on their children and to restrict them from studying that which they choose. However, is honor of parents involved here? Should not the express wishes of a parent against a child's studying at a certain yeshiva have to be obeyed by that child?

This problem is to some extent symptomatic of modern social conditions. However, it existed in a more limited form in earlier centuries as well. The *Terumat Hadeshen* asks whether a son who wants to study Torah in a certain city can be forbidden by his father from going there if he fears for his son's safety in that location. He answers that the son does not have to obey his father's

18. שאלות ותשובות תירוש ויצחר סימן ע"ב, שאלות ותשובות שואל ומשיב מהורה ג', סימן קנ"ט

19. שאלות ותשובות חתם סופר או"ח ט"ו, שו"ת דברי חיים חי"ב או"ח ח', שו"ת אגרות משה או"ח, חי"ב, כ"ד

wishes in this case, because the Talmud tells us that it is part of the mitzvah of learning Torah to study with a teacher of one's choosing. He reasons that in order to find such a teacher one is permitted to violate rabbinic laws of *Tumeah*. On the other hand one may not violate these same rabbinic laws for the mitzvah of *Kibud av*. By analogy we see that studying with a teacher of one's own choosing is more important than honoring one's parents.²⁰ It should be noted that this is true even if the son's going away causes the father anguish. The *Shulchan Aruch* decides in accordance with the *Terumat Hadeshen*.²¹ In light of the above argument, Rabbi Ovadia Yosef decides that a son who wishes to study in a yeshiva with no secular studies may do so despite his parent's insistence that he attend a yeshiva that teaches such subjects.²² Since the son feels that he will learn Torah better in the environment of his choice he is free of the obligation to obey his parents.

A common question in the contemporary community occurs when a son wishes to go to Israel to study in a yeshiva and his parents oppose this wish. In accordance with the previous discussion it is obvious that the son is not required to obey his parents in this case, since it involves a desire on his part to study Torah in a location where he feels he would grow in Torah knowledge. However, a second question remains. This concerns a problem every bit as common as the first. If a child wishes to go on aliyah to Israel and his parents object to his leaving their place of residence, is the child required to obey their wish? At first glance it would seem that here too the child does not have to follow his parents' demand. Living in Israel is after all a mitzvah, and we know that when *Kibud av* comes into conflict with any other mitzvah the duty of obeying one's parents is removed. Indeed some authorities use this reasoning to decide that the son should act on his wish and go on aliyah to Israel.²³

20. תרומת הדשן סימן מ'.

21. יורה בעה ר' ים, סעיף כ"ה.

22. שאלות ותשובות יחות דעת, חלק ח', סימן נ"ו.

23. שאלות ותשובות מבית, חי"א סימן קל"ט, שווית יחות דעת חלק ד', סימן מ"ט

However, there is a complicating factor here. The Talmud permits a person to leave Israel and go elsewhere in order to fulfill the mitzvah of *Kibud av v'em*.²⁴ This implies that in this particular case the mitzvah of honor takes precedence. Similarly, the Midrash says that Abraham was given special permission to leave his parents and go to Israel unlike other people.²⁵ This again suggests that the mitzvah of *Kibud av* outweighs the command to settle in Israel. Based on these arguments other authorities decide that in a case of conflict between *Kibud av v'em* and this particular mitzvah the child is not permitted to go to Israel but must obey his parents' wish and remain with them.²⁶

Standing for Parents

One of the requirements of *morah*, reverence, as defined by the halacha is rising upon the approach of a parent. The Talmud tells us:

רְבָּי יוֹסֵף כִּי הוּה שָׁמַעׁ כָּל בְּרִיעָא דְּאַמִּיה אָמַר אַיקִים מִקְמִי.
שְׁבִינָה.

When Rav Yosef would hear his mother's footsteps approaching, he would say, "Let me get up for G-d's Spirit."²⁷

This requirement is codified by the *Rishonim* and brought down as binding in the *Shulchan Aruch*.²⁸ The obligation is obviously to be viewed as similar to the mitzvah of rising before one's Torah teacher or indeed before any Torah scholar as a sign of respect.²⁹

This requirement, unanimously approved of by all the *Poskim* is seemingly neglected by most Jews in America, for it seems

24. שאלות ותשובות תשכ"ז, חלק ג' סימן רפ"ח.

25. בראשית רבבה, ל'ט, ז.

26. חכמת אדם שער משפטו הארץ, בינת אדם ג', פנים יפות לבעל הפלאהיה, פרשת לך לך

27. קיירושן ל"א, עמוד ב'.

28. יורה דעה ר"מ, סעיף ז'. Does one have to stand up for a father who is blind? See שוויות שער אפרים ע"ח.

29. ערוך השולחן, י"ד ר"מ, סעיף ב'יד.

glaringly at odds with contemporary practice. Simply said, this requirement would be viewed by the average American as totally out of step with what constitutes respect for one's father or mother. Injunctions such as not sitting in a parent's usual place, not contradicting a parent or not calling a parent by his or her first name can be accepted by the standards of the present day world as normal forms of respect for a father or a mother. The same cannot be said of rising for parents.

The truth of this assertion is proven by the fact that of all the requirements relating to *Kibud av*, it is this one which is most commonly neglected. Even people who are generally knowledgeable and careful with halachic obligations apparently make little effort to observe this law.

The question we face is whether such behavior is defensible. Can sources be found to justify that which seemingly has become the practice of a great part of the mitzvah-observant world in contemporary America, or are we required to ignore changed social conditions under which we live because there is no halachic sanction for any change in this matter?

I would suggest that a path towards a solution can be found. The Talmud tells us³⁰ that a parent can voluntarily renounce the honor due to him. If he does so, the child is no longer obligated to fulfill the requirements of *Kavod* and *Morah*. The *Shulchan Aruch*³¹ decides in accordance with this opinion. Indeed, it recommends that a parent look away from a child's violation of the requirements of honor and reverence and forgive the child, so that he not be held guilty of this sin. The *Radvaz*³² points out that, while this is true, the child still fulfills a mitzvah by honoring a parent despite the parent's renunciation of such honor. In other words, the relinquishment of *Kavod* by a father or mother removes the mandatory obligation on the child, but still allows the son and daughter to be rewarded for honoring the parent despite such a renunciation. Conversely, a child who did not fulfill the obligations

30. *קידושין ל'ב*, עמוד א'.

31. *יורה דעה ר"מ*, סעיף י"ט.

32. *שאלות ותשובות רביי חלק א'*, סימן תכ"ד.

of *Kavod* or *Morah* after such a renunciation would not be guilty of any violation of halacha.

Using the principle of renunciation it is now possible to say that children in today's world are not obligated to stand at the approach of a parent since parents have renounced this form of honor as irrelevant to today's social conditions. Of course, the sticking point here is that how can one know that one's parents have done so without the parents having stated this specifically? We are, after all, dealing with a general situation here rather than a specific one in which parents have clearly verbally absolved their children from such an obligation. Is one able to make such an assumption and rely on it in practice?

It is suggested that if a certain practice becomes the generally followed way of doing things within the observant community, then, unless we know otherwise, parents accept this procedure as proper and renounce any rights they have which run counter to such an action. If, according to prevailing social conditions, children do not rise at the approach of parents, and parents do not protest, then we are justified in claiming that parents have renounced their right to demand such rising. Of course, in accordance with the previously cited view of the Radvaz, they would still be performing a meritorious deed if they did rise. However, the practice of those in the contemporary community who do not perform this action could not be condemned.

That such logic is justified is exemplified by a different ruling of the *Aruch Hashulchan*, in discussing a further requirement of *morah* for parents. The Talmud, as previously cited, states that one may not stand in his father's specific place of standing, just as he may not sit in his father's place in the synagogue even when the father is absent. Yet, notes the *Aruch Hashulchan*, the popular practice is for sons to do this very thing. He then finds justification for the custom from the fact that since almost everyone does this, it is as if the father has given permission for it as we see that fathers do not protest against the practice.³³ In other words, we can assume,

33. ערוך השולחן, יי"ד ר"מ, סעיף ט'.

mechila (renunciation) when prevailing social conditions are such that a large body of the Jewish community does not observe a detail of *Kibud av* and we see no protest on the part of the parents. This is so, even though no indication of *mechila* was ever given by either the specific parents involved or the generality of parents in the contemporary situation. The analogy to our problem seems clear. We have thus succeeded in finding solid halachic justification for the practice of much of the contemporary Jewish community in this matter.

Calling Grandparents By Name

As mentioned earlier, one of the requirements of *Kavod* is to refrain from calling parents by their proper name. Such practice is obviously a strong expression of disrespect. The Talmud tells us:³⁴

חכם משנה שם אביו ושם רבו.

A Torah scholar who quotes Torah from his father may not refer to him by name. [He merely says "my father."]

The *Shulchan Aruch* codifies this as law.³⁵ The seriousness of the prohibition is shown by a disagreement among *Rishonim* and *Acharonim* as to whether one may refer to someone else having the same name as a parent, by that name in the presence of the parent. The fear is that it might appear as if the child is calling the parent by name.³⁶

Although it may be in vogue in certain avant-garde circles for children to call parents by their first names, it is well-accepted by the mainstream of contemporary American society that such behavior is not desirable. The great majority of even the present day non-Jewish world would clearly view such action as an expression of lack of respect to one's parents. There is no

34. קידושין ל'א, עמוד ב'.

35. יורה דעה ר'ימ, סעיף ב'.

36. יורה דעה ר'ימ, ט"ז סימן ד', ש"ך סימן ג'.

contradiction in this matter between halachic imperatives and our present day cultural conditions.

The problem comes up in regard to grandparents. Families whose children are blessed with two sets of grandparents are faced with the question of how to distinguish one grandfather from another and one grandmother from another. Due to longer life spans this is, quite happily, an increasingly common situation within the Jewish community. One way in which this question has been resolved is to refer to one grandfather by his name prefaced by the title "grandfather" or "grandpa" and to the second grandfather in similar terms. In this way, both grandparents are distinguished from one another. While there are other ways to referring to two grandfathers or two grandmothers, the above-mentioned method is quite common in general American society and more and more to be found within the Jewish community as well.

The question, of course, is whether such action is permissible. Again, we have a case here where the prevailing practice of a noticeable segment of our community might seem to contradict halacha. It should again be noted that this way of referring to grandparents is not viewed as disrespectful by our contemporary social environment. Nevertheless, should such a practice go against halacha it would be much more difficult to excuse it on the basis of *mechila* as discussed previously. This is because there is a substantial body of opinion that allows *mechila* to repeal the requirements of *Kavod* and *Morah* but not to permit actual "shaming" (בזיז) of one's parents.³⁷ It is obvious that calling a parent or grandparent by their first name can be viewed not only as lack of respect but as a positive act of disrespect as well.

A major key to answering this question is determining whether the requirements of *Kavod* and *Morah* apply to grandparents as well as to parents. The Talmud is silent on this point. The Maharik³⁸ argues that there is no such obligation for grandparents. He uses this to postulate that grandchildren who say *kaddish* for

37. ברבי יוסף יורה דעה ר' ימ', סעיף י"ד.

38. שאלות ותשובות מהרי"ק שורש ל'.

grandparents have no right to push aside children saying kaddish for parents, since the saying of kaddish is part of the mitzvah of *Kibud av*. This assertion is disputed by the *Darchei Moshe*³⁹ who quotes the Midrashic comment on *Bereshit* 46:1:

ויזכה זבחים לאלוקי אביו יצחק, חייב אדם בכבוד אביו יותר
מכבוד זקינו.

A man is required to honor his father more than he
honors his grandfather.⁴⁰

This clearly implies, says the Ramo, that while honor for a grandparent is less than for a parent, it is still a binding requirement. This is indeed the way the Ramo decides in *Shulchan Aruch*, and the decision is accepted by subsequent codifiers.⁴¹

Since this is so, the problem of referring to grandparents by name does seem to be real. If part of *morah* is not to call a parent by name, how than may one do so with a grandparent?

A possible solution to this problem is indicated by a question raised by Rabbi Akiva Eger. He asks how can we say that one may not call a parent by his or her name when we find many places in the Talmud where different sages referred to their fathers as "Abba so and so"?⁴² This same question is asked by the *Beit Meir* who answers that when the title "Abba"—"father" is added to the proper name it becomes permissible since it is now a respectful form of address. This is disputed by the Maharshal (Rabbi Shlomo Luria) who says that any mention of a parent's name is forbidden even with a preceding title.⁴³ Later authorities have pointed out that the current practice of a son, who is *gabbai* of a synagogue, calling his father to an *aliyah* by name can be justified in accordance with the opinion of the *Beit Meir* and those who follow him. This is because such a son precedes his father's name with the title "Abba" when

39. דרכיו משה יו"ד ר"מ, סימן ז'

40. מדרש רבבה שם

41. יורה דעה ר"מ, סעיף ב"ד, ס"ז סימן ב', ש"ך סימן ב"ג

42. חידושי רע"ק יו"ד ר"מ סעיף ב'

43. בית מאיר יו"ד ר"מ סעיף ב', ים של שלמה, קידושין פרק ראשון סימן ס"ח

calling him to the Torah.⁴⁴

Rabbi Moshe Feinstein pointed out that even if we decide in accordance with the negative opinion of the Maharshal, we still would differentiate between one's parent and one's Torah teacher. The halacha is that just as one may not call his parent by name, he may not refer to his Torah teacher by name.⁴⁵ Yet we find that students in the Talmud did refer to their teachers as "Rabbi so and so." The reason this would be permitted, says Rabbi Feinstein, is because in this case, the name is used for identification purposes. If the student just said "my teacher", it would be unclear which teacher he meant. Therefore, he is permitted to add his teacher's name after the title to clarify whom he means. This is not a form of disrespect, but merely a utilitarian solution to a problem. In regard to one's father, where there can be no doubt whom one means, it would be forbidden according to the Maharshal to add the parent's name after the title "father" since such an addition is unnecessary for identification. Everyone has only one father.⁴⁶

Using the logic of Rabbi Feinstein we can now say that the case of grandparents is clearly similar to that of a teacher, rather than a parent. Here too, if one says "grandfather" without an additional name it will be unclear to whom he is referring. This is so because there are two grandparents of the same sex. Therefore, even if one is concerned about the opinion of the Maharshal that using a prefixed title does not permit reference to a parent by name, the same prohibition would not apply to a grandparent in the case of there being a second grandfather in the family. According to those who disagree with the Maharshal it would be permissible to refer to "grandfather so and so" under all circumstances, since this is permitted for a parent as well.

Divorced Parents

One of the most unfortunate social trends of our time has been

44. שעריהם המצוינים בהלבה סימן קמ"ג סימן א'.

45. וורה דעה ר' ים סעיף ט'ו.

46. שאלות ותשובות אגרות משה יורה דעה חלק א' סימן קל"ג.

a tremendous rise in the divorce rate. This trend has affected the observant community as well. While in former years divorce was almost unheard of within Torah-true circles, this is no longer true today. Thus, the relationship of children to divorced parents has become a matter of practical halachic concern today, while formerly it was of mostly theoretical interest.

The first place where the mitzvah of *Kibud av v'em* is affected by divorce concerns the case of the fulfillment of the wishes of parents. As previously noted this is a basic part of the requirement of *Kavod*. The Talmud discusses the question of whether the wishes of the father or the mother have priority for the son. It states that if both parents request a drink of water the father should be served first, since the mother is required to provide for her husband's needs. This is, however, not true when the couple are divorced.⁴⁷ The *Shulchan Aruch* decides accordingly that if parents are divorced the child has free choice as to whose wishes he decides to regard as superior.⁴⁸

This would mean that in a case of conflict between the wishes of divorced parents the child would have free rein in making a decision. It should be noted that the Maharshal understands the Talmud as saying that in the case of divorce a child should not put the wishes of one parent ahead of the other, and therefore he is in a very difficult position. The directive of the halacha is that if his father asks him for a glass of water and his mother asks him for a glass of water (after they are divorced), he should take the glass of water, put it on the table, and let them work out who gets it. With this in mind, the child of divorced parents has to gingerly and carefully observe the laws of honor which he owes them both.

Another result of divorce may be the presence of step-parents on either side. This raises the issue of how a child must treat these new family members. The Talmud tells us that the extra word **הַ** before "father" in the Ten Commandments comes to include the

47. קידושין ל"א, עמוד א.

48. יורה דעה ר"מ, סעיף י"ד.

49. ים של שלמה, קידושין פרק א' סימן ס"ב.

father's second wife in the requirement of *Kavod*, and the extra word **מֵ** which precedes "mother" does the same for the mother's second husband. This requirement only applies while the father or mother are still alive but lapses after their death.⁵⁰ The Rambam points out that the honor due to step-parents is not given to them in their own rights but rather as a part of the honor due to one's parent.⁵¹ Nevertheless, it is clearly a Torah duty to give them this respect since we derive it from a Scriptural inference. The *Shulchan Aruch* codifies this as authoritative. It adds that even after the death of the parent it is proper to continue honoring the step-parent, although it is no longer strictly required.⁵²

The case of one divorced parent objecting to his child's honoring the new spouse of the other parent is unfortunately not uncommon. In such a situation there would seem to be a conflict for the child whether to obey the wishes of the parent or continue to honor the step-parent. The *Birkei Yosef* indicates that in such a case the objections of the parent to respecting the step-parent should be ignored.⁵³ He doesn't give his rationale. However, it would seem that when a parent tells the child not to honor the other step-parent he is actually ordering the child to violate halacha. In such a situation we know that the mitzvah of obeying the wish of a parent is suspended.

Older Parents

One of the most far-reaching social developments of our time has been the tremendous increase in the average human life span that has taken place in recent years. While in the not distant past people usually died in their sixties and seventies, they now are increasingly living into their eighties and nineties. Scientific studies indicate that this trend will continue to intensify.

As a result of the ability to prolong life, society is increasingly

50. כתובות ק"ג, עמוד א'.

51. משנה תורה, הלכות ממരים, פרק ז, הלכה ט"ז.

52. יורה דעה ר"מ, סעיף כ"א.

53. ברבי יוסף, יורה דעה ר"מ, ס'ק ט"ז.

confronting the problem of dealing with a large older population which is often too feeble, both physically and mentally, to care for themselves. Just because their life span has increased does not mean that people's productive years have been expanded. Science has succeeded in keeping older people alive, but is often unable to maintain their mental or physical ability. We thus have a growing population of older peoples who are increasingly unable to care for even their own basic needs.

Obviously the problem of dealing with incapacitated older parents impacts on the mitzvah of *Kibud av v'em*. While such cases were not unknown in the past, the triumphs of modern medicine have made them a matter of routine today. The observant Jew is faced with a real halachic question in dealing with this situation. What are one's obligations to parents under circumstances of mental or physical feebleness, or even incompetence? No one would disagree with the point that the child must see that his parents are cared for adequately. However, appropriate attention can also be given in an institutional setting. The question is whether the personal involvement of the child in giving such care is absolved at some point; if so, when does that time arrive?

The Talmud tells us that if one spends money to honor his parents, it should come from the resources of the parent, not from one's own possessions.⁵⁴ After the assets of the parent are exhausted, there is no further monetary requirement on the child. This position is adopted by later codifiers and the *Shulchan Aruch*. However, they add that if the son has adequate assets he must support his parents, not out of the requirement of *Kibud av v'em* but as an act of *tzedakah*.⁵⁵ His obligation will therefore be no greater than it would be to other causes of charity. There are other authorities who disagree and claim that the child is required to support impoverished parents to a greater degree than other charities. However, they also add that the child is not obliged to make himself a pauper by doing this.⁵⁶ This latter position is

54. קידושין ל'ב, עמוד ב'.

55. יורה דעה ר"מ, סעיף ה'.

56. דרכי משה, יורה דעה ר"מ ס"ק א', ש"ך י"ד ר"מ ס"ק ו'.

adopted by several later *poskim*.⁵⁷ This would mean that a child is required to accept the financial burden in caring for parents up to the point where it is fiscally possible for him but not beyond that.

In accordance with this, if a parent reaches a stage of feebleness which requires around-the-clock attention, there would be halachic justification for considering institutional care for such a person. This is because the expense involved in providing such care at home is so heavy that most people would not be able to financially manage their own family's budget if they were required to absorb this additional expense. It is obvious that when extreme measures such as constant care are not necessary but less expensive solutions suffice, that the child is not free of the financial responsibility of caring for feeble parents. It is also clear that when the wealth of children is such that they can absorb the cost of constant care, they are responsible to provide these services.

There is an additional problem in looking after older parents, which involves mental feebleness rather than physical incapacity. This is a question that is independent of one's financial responsibility in caring for parents. Advancing years are unfortunately often accompanied by senility. There can be different degrees of this condition, but they all make dealing with parents very difficult. The problem children face in this situation is how does one conform to the requirements of "honor" when parents are not mentally balanced?

The Talmud tells us that even if parents publicly embarrass children and destroy their property the children are forbidden to shame or insult their parents. The duty of *Kibud av v'em* remains binding.⁵⁸ The *Shulchan Aruch* decides in accordance with this view.⁵⁹ However, the Talmud then describes a case which closely parallels the contemporary question of senility:⁶⁰

שווית שבות יעקב חלק א' סימן ע"ה, ערוך דעה ר"מ סעיף ב'.

57. קידושין ל'ב, עמוד א'.

58. יורה דעה ר"מ, סעיף ט'.

59. קידושין ל'א, עמוד ב'.

רב אסי היה ליה ההייא אמא זקינה אמרה ליה בעינה תכשיטין, עבר לה, בעינה גברא נייעין לך, בעינה גברא דשפיר כוותך שבקה ואול לארעה דישראל.

Rav Asi had an aged mother. She said to him "I want jewlery." He gave it to her. When she said "Get me a husband," he said, "I will look for one". When she said "I want a husband as handsome as you," he arose and left her and went to the land of Israel.

Based on this incident, the Rambam decides that if one's parents become senile he should try to deal with them as long as possible. If, however, he is no longer able to do this because they have deteriorated too far, then he may leave them and appoint others to care for them.⁶¹ Rambam obviously understands Rav Asi's leaving his mother as due to her increasing senility. Ravad disagrees with Rambam and asks, if the child is not willing to care for mentally incompetent parents—who will? However, the later commentaries to the *Mishneh Torah* of Rambam point out that it is not he who originated this leniency, but a clear statement in the Talmud. Furthermore, it is logical to give senile parents into the care of others, since they often have to be forcibly restrained. This is something which the children might be forbidden to do, while others are permitted to do.⁶² The *Shulchan Aruch* and later authorities agree with the decision of the Rambam.⁶³ This provides us with some guidance as to when institutionalization of senile parents is permissible. When senility has reached a point where the child cannot personally deal with parents any longer, he is allowed by halacha to choose an alternative method of caring for them.

The points discussed in this article are not meant for practical halachic guidance in day to day questions. Hopefully the airing of these issues will increase our awareness that the requirements of honoring one's father and mother impact on modern social mores. As the Talmud says:⁶⁴

61. משנה תורה, הלכות ממרים פרק ו, הלכה ז.

62. בסוף משנה שם, רדבי' שם, צץ אליעזר יד:נט.

63. יורה דעה ר'ימ, סעיף ז.

64. קידושין ל' עמוד ב'.

בזמן שעדרם מכבדר אביו ואמו אמר הקב"ה מעלה אני עליהם
כאלו דרתי בינהם וככדוני.

When a person honors his father and mother, G-d
says "I consider it as if I dwelt among them and they
honored Me."

Malpractice

Rabbi Joseph S. Ozarowski

Malpractice

by Rabbi Joseph S. Ozarowski

I. Introduction

Malpractice has become a major issue in the secular world. Many states have enacted laws to prevent malpractice litigation from escalating to preposterous levels. Nor has the religious world been immune to these forces. One may recall the case of the non-Jewish clergyman in Southern California sued for malpractice in the course of his counselling work. Numerous rabbinic groups have explored and offered the possibilities of malpractice insurance for their members. There has also been an incident of a suit following the *brit milah* of an infant.¹ All the above underline the need to study this important issue from a Jewish perspective.

This paper will explore a number of sources regarding malpractice, with a focus on medical malpractice but also a look at ramifications outside the physician's realm.

The Torah sanctions the physician's right to heal. Based on the biblical verse, "... and he shall surely heal,"² the Talmud tells us in the name of R. Yishmael,³ "From here we have permission for the

1. See *Liberty Magazine* and *Christian Century*, various issues, 1980. *Jewish Spectator*, Fall 1980, p. 12; *Northern California Jewish Bulletin*, April 26, 1985

2. *וְרִפְאֵי רִפְאֵא* "سمות כאט"

3. *ברכות ס', ב'ק פ'ה*

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doctor to heal.⁴ This basic dictum is legislated in the *Shulchan Aruch* and should be considered a pre-eminent point before analysis of any area of Torah and medicine.⁵

II. Rabbinic Sources

There are no direct references to doctors' malfeasance in the Talmud itself. However, there are four specific references in the *Tosefta* regarding the limited liability of doctors who injure their patients in the course of treatment. Each of these references includes related cases of individuals who also have limited liability due to their status.

The first *Tosefta* reads as follows:⁶

רופא אומן שרפפא ברשות בית דין והזיק פטור מדין אדם
ודינו מסור לשמים

A skilled physician who healed with permission of *Beth Din* and caused damage [in the process] is not liable by human law but his judgment is given to Heaven.

The other cases mentioned in this section are the *Beth Din* representative who, in the process of flogging a convicted person, causes excessive injury and one who attempts to save the life of a pregnant woman by killing the fetus and, in the process injures the mother.⁷ Their liabilities are identical to the physician's.

The commentaries agree⁸ that these cases refer to unintentional

4. This is Rashi's reading. *Tosafot* in *Baba Kamma* adds, "Even one whose illness is heaven-sent and healing may seem contradictory to the King's decree, still it is permitted."

5. *ש"ע י"ד של"ה: א'*

6. *ב"ק נ"ו* See *Tosafot* in *Baba Kamma* *ו': ה"ד*.

7. *משנה אולות פרק ו' פ' מנחת בכורין ס"ק ו'* See

8. See *ס"ק ש'* "This refers to *shogeg* damage, for if it were *maizid*, he would certainly be liable."

ט"ג. *בשוגג ולא בזון להזיק השליח בית דין: מנחת בכורין ס"ק י"ד* Also see *Tosafot* in *Baba Kamma* *ו': ה"ד* says, "Hashem Yitbarach knows if his intent was to damage, he would be liable, but if he had no intent, he would be exempt (even) from Heavenly law."

damage (*shogeg*); in intentional situations, the person would indeed be held liable for damage rendered. *Magen Avraham*⁹ points out that the physician who heals *without* permission of *Beth Din* and injures would certainly be liable by human law. This general approach is legislated in the *Shulchan Aruch* as follows:¹⁰

If he heals without permission of *Beth Din*, he is obligated to pay [even] if he is an expert but if he healed with permission of *Beth Din*, erred and damaged, he is exempt from human law (*patur*) but liable by Heavenly law.

Another *Tosefta* in the same tractate has this to add:¹¹

A skilled physician who healed with the permission of *Beth Din* and damaged is not liable; but if he wounded more than necessary, he is liable.

The cognate cases in this *Tosefta* are that of a father disciplining his son, a teacher disciplining his student, and the *Beth Din*'s representative in pursuit of his duties. All these cases are adjudicated in the same way as that of the physician — the perpetrator is *patur* unless more damage than necessary was done.

The third *Tosefta* reads:¹²

A skilled physician who healed with the permission of *Beth Din* and damages — if unintentionally (*B'shogeg*) he is not liable, but if intentionally (*B'maizid*) he is liable in order to preserve society (*Tikun Olam*).¹³

The related cases mentioned here are of priests (*Kohanim*) who render animals brought for sacrifice unfit, a *Beth Din*

9. מגן אברהם שם ס"ק ט"ו

10. Also see ש"ע ס"ק ב' שלוחה בסוף. Who echoes the above-mentioned *Tosefta* commentaries — that if the damage was intentional, then even with the permit of *Beth Din*, he would be liable by human law.

11. חוספהה ב"ק ט:ג

12. חוספהה גיטון ג"ג

13. Literally, "To fix the world." Jastrow's translation of this term is "For the sake of the social order" (p. 1666) and Soncino, to *Gittin* 45a, "To prevent abuses."

representative, and one who attempts to save the woman's life via extraction of the fetus. Again, the decision is the same as for the physician — the determination is based on difference between intentional and unintentional damage as well as on the underlying reason of *Tikun Olam*.¹⁴

The last relevant *Tosefta* reads:¹⁵

A skilled physician who heals with the permission of *Beth Din* is exiled.

This obviously refers to a case where the physician not only did damage but also caused the death of the patient.¹⁶ The crime is termed manslaughter rather than murder, and the penalty is exile to a "city of refuge".¹⁷ The cases in the *Tosefta* which incur this penalty include the *Beth Din* representative and the one who operated on the fetus.

Another rabbinic reference to our subject is found in the *Mechilta* commenting on a verse in Exodus,¹⁸ "If a man comes presumptuously to slay his friend with guile, you shall take him from my altar to [be punished with] death." The comment reads:

This excludes a physician, one who hits with the permission of *Beth Din* and one who disciplines his son or student.

In other words, these cases would not be liable for murder if the recipient died. The *Torah Temima*¹⁹ suggests that the rationale

14. See ס"ק י"ג where the idea of אודם מועד לעולם is introduced as a counterargument to the *Tosefta* and then rejected. The reason for this rejection is to encourage doctors to practice medicine without the threat of over-penalization regarding physicians. This notion is not unlimited, however, as he concludes. אבל במויד מזיק ממש הוא פטורי. He continues with the same reasoning regarding the risk in the case of extracting the fetus when the mother's life is endangered. שימצא מי שירפאננה ואף בכח'ג דחויקו מזקי מ"מ פטורי.

15. תוספთא מכות ביה'ז' בהשומות ב'ז.

16. Note that the term וחרג is not used for the case of the physician but is used regarding the healer במעי אמו and שליח ב'ז regarding את העבר.

17. במכבר ל'ה: ט'כ'ט

18. מכילתה על שמות כ"א: ר'יד

19. R. Epstein suggests that this is also the explanation of the

mentioned earlier applies — that these people are all acting with (Divine) sanction; if they err and kill, it is considered unintentional.

The erring physician is not mentioned in the Gemara, but some of the cognate cases are. Abba Shaul²⁰ holds that the disciplining father or teacher and the *Beth Din* representative are excluded by the Torah from the penalty of exile imposed for manslaughter — apparently because they are in pursuit of a specific mitzvah and thereby given leeway. This resembles but is not identical to the *Mechilta* nor does it completely match the texts in *Tosefta* either. The attempts to resolve these rabbinic references with each other and with other cases form the core of the positions in the *Rishonim* (the early Rabbis).

In an extensive essay, Ramban presents the physician's "Divine license" as a rationale for preventing total reliance on G-d's healing.²¹ This is meant to encourage healing through human means and to discourage the physician's fear of error. Ramban then analyzes the *Tosefta* tests (specifically in *Makkot* and *Baba Kamma*) along with several other cases. He compares the physician to a *Dayan* (judge) of a *Beth Din*, charged by the Torah with the task of judging. If the *Dayan* errs (unintentionally) and is informed of his error, he is not considered liable by human law but is liable by Divine Hands. The Ramban understands this to mean that the *Dayan* or the doctor can expiate his heavenly culpability by payment for the damage or by exile in the case of death. However if the *Dayan* or physician is not informed of his error, he is not liable even by Heavenly standards.

Ramban then quotes the Gemara:²²

Just as one who smites [and injures] an animal for

Toseftaot in *Baba Kamma* as well as *Gittin*.

20. מכות ח' במשנה ובגמרא: מבוטס על דברים י"ט: ח'.

21. תורה האדם סוף שער הסכנה. See both Rashi and Tosafot on *Baba Kamma* 85a.

Ramban also utilizes proofs for this view from *Chronicles II* 16:12 — how King Asa took sick and did not seek the help of Hashem but of physicians; also *Yoma* 83a — one who takes ill is fed various foods.

22. י"ד של'י: ב"י וב"ח שם

healing purposes is not liable, so too one who smites [and injures] a human for healing purposes is not liable.

This allowance for healing, based on the biblical directive "Love your neighbor as yourself,"²³ is applied to the issue of whether a son may let blood for his father (considered at that time a form of healing). The Gemara cites incidents where rabbis did not allow their sons to let their fathers' blood even in the course of healing, due to the specific prohibition in the Torah, "He who smites his mother or father shall surely die."²⁴ But Ramban points out that due to the "Divine license" of the physician, smiting for the purpose of healing is permitted, and even a child may treat a parent if no one more qualified is available.

Ramban offers the following as a general position on medicine and doctor's liability:

1. A physician who heals properly has great merit.
2. A physician should not refrain from healing because of danger of error.
3. A physician must be qualified and expert in his field.
4. If he is unqualified, he should not practice.
5. If he has no license (*reshut*) from *Beth Din*, he should not practice.
6. If he operates without this license, even as an expert, he would be liable for damages in case of injury.
7. If he purposely damages, he is liable.

This approach is generally accepted by the *Tur*, *Beth Yosef*, and *Bach*.²² The *Bach* adds that the physician is liable only if the patient's death occurs immediately after the attempted cure. If it did not, one could say that death was brought on by other factors such as eating, drinking, or movement. These ideas are legislated in the *Shulchan Aruch* as follows:²³

The Torah gives permission to the physician to heal and it is a mitzvah included in *Pikuach Nefesh* ... if he

23. וְשָׁמַע הַלְכָה

refrains from this, he is guilty of spilling blood ... for not all people are privileged to heal. Still, one should not practice medicine unless he is an expert And if he heals without the permission of *Beth Din*, he is liable for damages even if he is an expert. If he heals with permission of *Beth Din*, errs, and damages [the patient], he is exempt from human punishment but liable by heavenly law. If he kills and is notified that he erred, he is exiled.

The *Shach*²⁴ adds that if the error was malicious and intentional, even with expertise and sanction of *Beth Din*, the physician is liable by human law; yet he should not be discouraged from the practice because of this danger.

Another view among the *Rishonim* is presented by R. Shimon Duran in *Sefer Tashbetz*.²⁵ R. Duran cites the *Tosefta* that one who wounded intentionally is liable because of *Tikun Olam* — preserving society — and suggests that in theory, a damaging physician should *not* be exempt; however the *Tikun Olam* principle limits the liability for damage. In addition we should invoke the legal principle that a person is always accountable for his actions (אָרֶם מָוֶעֶד לְעוֹלָם)²⁶ and apply it to physicians as well. But if we do, physicians will not heal. Therefore the Torah gives physicians this leeway. This basis for the medical professional's practice is similar but not identical to that of the *Ramban*.

R. Duran also offers interesting conclusions of his own:

A. The physician is liable if he and "other expert physicians recognize the error." This is an early indication of what today would be called "peer review".

B. *Hatraah* — Warning must be given before the physician is considered a murderer; absent this, the physician is not liable to capital punishment.

C. Finally, the "skilled physician" mentioned in the *Tosefta* is a "healer of wounds" (רַופָּא חֶבְרוֹת); thus the sources deal with

24. ש"ך ש"ך ב', א'

תשב"ץ פ"ב ח"ג

סנהדרין ע"ב, ב"ק ג': ב"ק כ"ו

wounds and liabilities for damage. However, in the case of a doctor who uses drugs (רופא משקדים) and makes no incisions, the damages are exempt even from Heavenly law as long as his intent was for the sake of Heaven. How this would translate into current practice is unclear since today's physicians heal wounds, inflict wounds in the course of healing (especially surgeons), and also use medications.²⁷

Rabbenu Nissim offers a third approach to our subject, perhaps the broadest among the *Rishonim*.²⁸ He cites the Gemara, "One who smites an animal for healing purposes is not liable ..." inferring that one who smites a human for healing is also not liable; not liable here means it is permitted.²⁹ He writes,

Though any type of healing involves damage to the patient, perhaps an error will kill the sick one. Still the skilled physician who errs in his healing is not a *shogeg* but an *oness* [totally exempt] since he is given license to heal ... he can only do what his eyes can see, just as a judge who errs is also not liable.

In contrast, the *Yad Avraham*³⁰ holds that a physician differs from the disciplining teacher or agent of *Beth Din*. These individuals are deemed to be engaged in a mitzvah *even* when the subject dies. On the other hand a physician whose patient dies has *not* fulfilled the mitzvah to heal since the treatment was not successful. The *Perisha*³¹ differs, following Ran:

27. R. Eliezer Waldenberg in צ"ץ אליעזר ד. א questions the position of *Tashbatz* regarding damage from medication. After all, if medicine damages one's inner organs, is this not also *chabalah*? Should not one who wounds in this fashion be as liable as one who wounds the skin? And would not one who kills in this way be equally guilty of *tzachik* ג:ק"ד? See also מנהת יצחק ג:ק"ד who compares this to the case of נזון סס המות לבכמה פטור מוריין אדם וחיב ברני שמים

28. חידושי הרין על סנהדרין פר: עין ג"כ בנימוקי יוסף שם

29. For a different understanding of *patur*, see my article "Tubal Ligation" in the Spring 1984 edition of this journal where Rambam's *patur* (איסורי ביהה טז:י"א בענין סירוס נשים) is understood by most commentaries as well as the *Shulchan Aruch* to mean forbidden.

30. ד"א ברהמ על ש"ע יו"ד סל"ו

31. פרישה על התור שליו ס"ק ו"ז

If he [the physician] damaged purposely, he is liable even by human hands; but if he really did not err and did heal properly, yet the patient died, he is exempt even by heavenly hands ... since the doctor did not kill him but rather G-d desired [the patient's] death.

R. Yaakov Ettlinger³² deals with the question of a dying patient's physician, who wants to use an experimental treatment which could save the life of his patient but could also shorten it. R. Ettlinger responds that either a Jew or a non-Jew may administer this treatment and there is no worry of liability due to error in this case. He quotes the Ramban and *Shulchan Aruch*, but his theoretical model is actually closer to that of Ran: "The physician's intent is not to kill but to give life." In addition the physician is perhaps considered less liable than his counterpart, the agent of *Beth Din*. The agent, according to R. Ettlinger, obviously had every intent to inflict pain during the disciplinary flogging. The doctor, however, had no intent to damage or hurt the patient.³³

R. Eliezer Waldenberg³⁴ was queried regarding the desire of Australian civil authorities to mandate neurosurgery for a case of mental illness, even without consent of the family. The particular procedure had helped the majority of patients but was still considered dangerous because some of the patients died and others experienced altered personalities. R. Waldenberg permitted this surgery, and in his responsum devotes considerable attention to the issue of liability. He analyzes the three approaches in the *Rishonim* and believes they share a common denominator:

Every physician who intends to heal according to the medical methods at hand is permitted [to do so] and it is a mitzvah for him to heal the sick according to the accepted therapy of that illness.

32. שווית בכנין ציון קי"א

33. נבי שליח ב"ד, "ויאפשר דחשייך זה דבר המתקון, כיון שעכ"פ מתקoon למשעה של ידו
באה המיתה..." משא"כ ברופא, "שאין מתקoon להמית רק להחיתות..."

34. שווית צ"ץ אליעזר ד:ג

R. Waldenberg tends toward the opinion of Ran, offering strong protection to the physician from liability. Apparently this liability, in his view, extends even to potentially dangerous experimental treatments if they offer some hope for the patient. It does not apply to patients out of danger or to therapy which does not offer help.

Elsewhere R. Waldenberg³⁵ expands on the "peer review" point of *Tashbetz*. If other physicians judge the work of a colleague to be in error, liability may then be incurred. Further, if a doctor switched medication, subsequently damaging or killing the patient, he would be liable even according to Ran. This would hold true in cases of sloppy treatment, lack of knowledge on the physician's part, misdiagnosis of the illness, or administering the drugs without knowing they were correct. If, however, the doctor believed to the best of his ability that a change in medication would benefit, he is not held liable.

In reference to an erring physician being liable "by heavenly standards", R. Waldenberg quotes *Tzeda LaDarech* to the effect that heavenly punishment is only visited upon non-experts who were somehow licensed by *Beth Din*. He claims that this is how the ruling of the *Shulchan Aruch* is to be understood as well. Today, all physicians are properly licensed and according to R. Waldenberg, all would accept the lenient opinion of Ran. This, of course, assumes that the error was genuine and not the result of gross negligence or malicious malfeasance.

R. Waldenberg further writes that the "Divine exemption" given to doctors is not extended to nurses and other related professionals.

Finally, he quotes an interesting source³⁶ on how to handle errant medical professionals.

A physician ... agent of *Beth Din* ... Rabbi, ... *dayan* ... priest ... all of whom kill with intent are to be removed from their positions and they should do

35. רמת רחל כ"ג

36. תנא רבי אליהו כ"ג

other work. If they return and do *teshuva* they are to be healed [sic!] but if they do not they are to be punished....

The *Chatam Sofer*³⁷ responds to a question regarding an employed servant woman who fainted when frightened by thugs. In this tragic case the mistress attempted to revive her by forcing what she thought was wine down the woman's throat. The liquid was actually kerosene and the servant died. Does the mistress require *kapara* — atonement of any sort?

In his response *Chatam Sofer* opines that the liability of murder is mitigated when saving lives is at stake. Because of the mitzvah of *pikuach nefesh*, this case may offer more leniency than the rabbinic cases of the *Beth Din* agent, the disciplining father, or teacher. In those cases, when the intended mitzvot are not fulfilled and the subject dies, the killer is not liable;³⁸ how much more so where the intent is the mitzvah of saving lives! Rather than the major punishment of exile, *Chatam Sofer* counsels "a bit of repentance, a small atonement." (קצת כפלה - קצת חשובה). He further urges those involved not to act harshly in the matter for

If we are stringent, people will be prevented from saving lives...

This implies that the Divine exemption is given to *all* who engage in the mitzvah of sustaining life, including nurses and laymen, a position, it will be noted which R. Waldenberg has not accepted, in restricting the Divine license to doctors alone.

R. Yitzhak Weiss³⁹ was questioned regarding a doctor who mistakenly killed his patient by injecting poison rather than the proper medication. After reviewing the literature on the subject, R. Weiss concludes that the thinking of Ramban and the *Shulchan Aruch* is based on the *Tosefta Makkot*, while the more lenient

37. שו"ת חותם סופר קע"ו.

38. See רמב"ם הל' רוצה ה:ה אבל אם יסר בנו כדי ללמודו תורה או חכמתה או אומנות ומות. רמב"ם הל' טנה רין ט"ז:י"ב לגבי מכיה מלוקות, מות חחת יתו פטור. However, see above-mentioned who takes issue with this idea.

39. מנחת יצחק ק"ד

Tashbetz and *Chatam Sofer* are based on *Tosefta in Baba Kamma* and the *Gemara Makkot*. He considers these sources to be in dispute. The view of Abba Shaul in the *Gemara* excluding the disciplining father, *rav* and court agent from punishment would also exclude and exonerate the physician, by implication. This would then lead to the more lenient positions enumerated above. R. Weiss further believes that *Rambam* accepts Abba Shaul and this is the source of his conflict with *Ramban* and the *Shulchan Aruch*.

R. Weiss also questioned the *Shulchan Aruch*'s sentence of exile for the doctor whose patient died. How could this term, "exile", even enter the Code's lexicon if it was no longer in practice by the time R. Caro wrote the *Shulchan Aruch*? R. Weiss postulates that "exile" here is identical with the phrase in *Tosefta Baba Kamma*, "His judgment is given to heaven." This must refer to heavenly exile and today would only be a spur to the offending physician's potential *teshuva*. In consequence, R. Weiss comes to a lenient conclusion resembling that of *Chatam Sofer*.

In the following responsa⁴⁰ R. Weiss dwells on the intent of a damage-doer. He clarifies the difference between intentional damage (*maizid*) and presumptuous, deceitful damage (*ha-arama*). The physician's intent is always to heal. Therefore even when he must wound intentionally, it is never deceitful and capital punishment in case of death is never incurred. Then, referring to his original query, R. Weiss writes that the creator of the poison that killed the patient is also not liable for exile since he did not directly cause death. R. Weiss maintains his lenient position as long as the doctor is an expert (*mumcheh*). The error is to be considered

.... not *shogeg* but *oness* ... once he is given permission to heal he can only do what his eyes can see.

Like *Tashbetz* and *Ran*, R. Weiss holds that the doctor would be exempt like the judge who erred and is not considered liable. There is, however, an important distinction between the physician

40. סמ"ה

who offered his best judgment and failed, and one who is negligent or

... out of instability ... changed a healing drug for a poison, then we invoke the principle "*Adam muad l'olam*" ... and the *shogeg* is considered intentional ... even death would not atone for him...."

To summarize, the majority of later authorities tend to give physicians the benefit of the doubt, assuming the physician acted with proper intent. These authorities are more lenient than the *Shulchan Aruch*, or they reinterpret the *Shulchan Aruch* in a more lenient fashion.

V. Related Issues

Criteria for the "skilled physician" go back to ancient times, as our sources have indicated. Early Jewish Courts would license or permit a doctor to practice. Rambam⁴¹ writes:

We only appoint to the Great or Minor Sanhedrin wise and understanding men, outstanding in Torah wisdom and full of great knowledge, also somewhat knowledgable in other disciplines *such as medicine*.
(italics mine)

It has been suggested⁴² that the Sanhedrin had to be aware and trained in the healing arts if they were to appoint or license physicians. With the advent of modern medical schools and professional licensing, most authorities agree that a diploma, degree, or some kind of accreditation is neccessary for the physician to

41. רמב"ם הל' טהרותן ב:א

42. דברי שאול שם

43. שיורי ברכה על או"ח שכח:א - והיום שאין שום אדם יכול לרפאות כי אם ברשות חכמייהם, סתם כל עסק ברפואה נקרא מומחה. דברי שאול שם — בקי שהיינו שיורי לו כתוב מן הרופאים והగורמים במקומות אשר למד החכמתו, שלמד וידע הטיב והה נקרא בלבשונו "דעלפלאם". כרם שלמה או"ח שכ"ח בשם עולת שמואל — וכל הרופאים שלנו יש להם דין מומחה מפני שצרכין לעמוד בנסיון לפני גורלי הרופאים המומנים ע"פ המלכות יריה והם נאמנים.

practice within halacha.⁴³ The *Aruch Hashulchan*⁴⁴ goes a step further and interprets our basic law in this way — if the physician does not have proper secular licensing, then even as an expert he would be liable for error. The only time the “Divine license” operates to exonerate him is if he has a professional license.

What of the doctor who, though fully qualified and accredited, errs due to an overload of patients or similar factors? Halachic literature has not directly addressed this question, to the knowledge of this author. However, an approach can be discerned from the works of R. Waldenberg.⁴⁵ In his analysis of liability situations, he writes:

לא התעטך כלל וכלל במצוות הרופוי אלא בפחוותו החליף
שם המות باسم החיים

He did not engage in the mitzvah of healing but in his haste (*pachaz*) substituted the drug of death for the drug of life.

The key word here seemed to be “his *pachaz*”, translated as “his recklessness, wantoness, wildness, or hastiness”.⁴⁶ Perhaps in an understaffed or ill-equipped hospital where a physician did his best but circumstances caused him to err, he would not be liable. On the other hand if the physician amassed too heavy a workload in order to make money or for other such reasons, he would be held liable in case of damage. As R. Waldenberg points out, the principle of *mo'ad le'ulam* “אדם מועדר לעולם” becomes operative here.

44. עורך השולחן יי"ד של"זב והאידנא צריך להיות מוסמך מהממשלה שיש לו רשות ליתן רפואות לחולים.

Also notice how our basic halacha is phrased:

ואם רופא שלא ברשות ב"ד והממשלה חייב בתשלומים אפי' הוא בקי אם החולה נתנק על ידי.

See further the rest of this section where he follows the lenient view totally exonerating the physician even from exile, as long as he is licensed and did his best “שגנת הרופא כוננת הבורא”. In this case he would be like the disciplining father or teacher who are not included in the *Tosefta Makkot* prescribing exile.

45. רמת רחל שם

46. נדרה ט. פחו עלי יצרי and בראשית בט:ד פחו כמיים אל תותר See

The status of mental health professionals in halacha is beyond the scope of this presentation. R. Waldenberg in his previously-cited responsum indicates that a dangerous mental illness would transform the patient into a person whose illness is threatening to himself, and perhaps to others. Based on our earlier sources, it would seem that anyone engaged in preserving life would operate under the "Divine license" protecting the physician.

The bulk of this paper treats medical malpractice. As has been shown, there are cognate cases that fall within the afore-mentioned "Divine license." These are in the *Tosefta* as well as Gemara and codified by Rambam. But what about other professionals who fail in their tasks or damage others in the process?

While this topic may be worthy of another study, it is interesting to note that the Gemara⁴⁷ considers skilled craftsmen to be "*shomrei sakhar*" — paid watchmen responsible for loss or theft as long as their work is in progress. Rashi, explaining the reason, says that the objects are for the artisan's benefit (to make a living), but the artisan also gives of his skill for that benefit. In other words, a professional has a responsibility for the objects with which he works but also he gives of his labor and knowledge.

The Gemara⁴⁸ offers a number of cases illustrating the principle.

1. If a craftsman was given an object (say, furniture) to repair and damages the said object, he must pay.

2. A builder who directly damages a stone on a building project would be liable, unless the damage was not a direct result of his work. For example, if a wall fell down opposite where the work took place, he would not be liable.

3. If wheat was brought to the miller and turned into coarse bran rather than flour; or if bread came back from the baker defective — in either of these cases the miller or baker are obligated to pay.

4. If a money-changer approved bad currency, he would be

47. בבא מציעא פ' ועיין רשי' שם

48. בבא קמא צ"ח-ק' משנה וגמרא

liable if he did this for hire. (even as an expert); if he offered his opinion for free, he would not be liable. If he was not an expert he would be liable in any case.

5. A judge who exonerated the guilty is financially liable for incurred damage, though the decision remains.

6. If a dyer burns the material given to him, he is liable to the owner for the value.

7. An expert *shohet* who caused the animal to become *nevela* (i.e. unusable) is liable if he is paid for this task. If he is not paid, he is not liable. If he is not an expert, he is liable in either case.⁴⁹

The above cases are codified in halacha.⁵⁰

Each of the above cases concerns professionals who handle objects. What of professionals who offer services? Would an attorney or insurance agent, in whom one places trust or from whom one receives intangible benefits, be considered a *shomer sakhar* as well? Nothing in the *teshuvot* regarding this has come to the attention of this author, but it could be argued that a service professional causing financial loss would indeed be obligated to pay the client's loss.⁵¹ Conversely, one could respond to this argument by saying that attorneys and the like are acting on behalf of their clients and therefore are agents (*shlichim*)⁵², rather than watchman (*shomrim*). Damage would thus revert to the owner/client on the

49. The case of the *shohet* is particularly interesting because some of its terminology (שברה בדו ולא סילקה... אריהם חייב בזקון, אומן, מומחה) and a comparative case, (חכמים וומרים טור בדרני אדם וחיב ברין שמט) are reminiscent of our sources on physicians. Also, our *Tosefta Makkot* brings a parallel case of the butcher who kills someone in the course of his work; he is exiled as are the physicians and others in this source. A point to ponder: Is the *shohet* here operating under Divine license?

R. Moshe Feinstein suggests that the *shohet* who erred in his slaughter should obtain another animal, and then he is liable for the difference in value, plus the worth of the effort. If another animal is unavailable, he should pay for the appropriate amount of kosher meat, but, as R. Feinstein concludes, "It is best to compromise in these matters..."

50. The case of the judge is in, *רמב"ם שכירות י:ג'*, *רמב"ם סנהדרין י:ד*; *שו"ע ח"ב ב"ד*. See also footnote 53.

51. Rambam, basing himself on *ב"מ ק"ט* notes that communally based craftsmen are to be removed from their positions if their work is massively defective. Raavad

principle of *שליח אדם כמותו* "an agent is the same as the sender." However, these questions are beyond the purview of this paper.

This subject of professional accountability deserves a great deal of explication and careful thought in a separate article.

The question of whether *rabbanim* are liable for damage suits is too recent for halachic literature.⁵³ In the humble opinion of this author, it would seem that a *rav* engaged in correct and authentic rabbinic functions such as teaching or rendering halachic opinions would be protected by the same "Divine license" that covers that *rav* in the cases cited *Tosefta*. Further, it would seem that a rabbi engaged in psychological concerns such as pastoral counselling and care would also be protected as similar professionals would, provided he has proper training and/or credentials. The *rav* acting with the right intent, serving his congregants, teaching the living words of G-d, is engaged in a major mitzva, with a "Divine sanction."

comments that this applies even if the shoddy work causes loss to one person; this dispute is carried into the *Shulchan Aruch*. Rambam's examples of this include the public planting of trees, communal *shochtim* who caused *nevela*, a blood-letter who damaged, a *sofer* who erred in documents, and a teacher of children who "transgressed against the children or taught in error". There is in these an issue of public interest. Note that some can be identified as operating within the "Divine License" and some cannot.

52. See for a discussion on whether the craftsman or employee must be in the same room as the owner. This is based on the assumption of *תוס' ב"מ פ: ר"ה דקא* "לפי שרוב אומנן עשן מלאכה בቤת בעל הבית One may speculate how this would affect non-medical malpractice.

53. In monetary law, we do have the dictum of *טענה בראכין מונה חזרה*, *דרעת אינו חזרה*.

See also *סנהדרין ו. ל"ג, רמב"ם סנהדרין ו:איג* ו^ומפרשים. *ש"ע חורי"ם ב"ה: א"ב, סמ"ע ס"ק ו, ו"ש"ך ס"ק ד'*.

Note that some of the factors resemble some of those mentioned here including *ሞומחה, אדם מעור ליעלום, וכוננה*.