# Journal of Halacha and Contemporary Society

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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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# Variations in Sephardi and Ashkenazi Liturgy, Pronunciation, and Custom

*Rabbi Eli Turkel*

## I. Introduction

In this paper we shall consider the permissibility of changing between Ashkenazi and Sephardi rituals, both with respect to the rites of prayer and with respect to pronunciation. We shall also discuss the problems that arise when one prays in a congregation that has a different prayer ritual *(nusach)* than one's own.

It is important to distinguish between the true Sephardim who come from North Africa and the Middle East, and the Hasidim who come from Eastern Europe but have adopted some Sephardic customs. To keep this distinction clear we shall refer to the latter as the Hasidic (or Lurianic) rite rather than the Sephardic rite. The Sephardic rite will refer to the liturgy of the true Sephardim. (The Hasidim, about 300 years ago, adopted many of the Sephardic practices based on the customs of Ari. These were later revised in various versions by Baal-Shem-Tov and his successors.[1]) Besides

1. In practice there is no uniform Hasidic version of the prayers. Rather, different Hasidic groups made their own changes. Among the most formalized are those of *Chabad* who use *Nusach Ari* though this is not identical with that found in the *siddur* of *Ari*. All these variants have in common that they are basically Ashkenaz with a Sephardi flavoring. For example, in the blessing of ברך עלינו in the *Amidah* there is a distinction between the rainy and dry season. The Ashkenazim use the phrase ותן ברכה in the dry season while ותן טל ומטר לברכה is used in the rainy season. In contrast the Sephardim have two different blessings for the dry and rainy seasons. All Hasidic versions follow the Ashkenazi pattern. In other matters, i.e. *Kedusha* and *Kaddish*, parts of the

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these customs there is also the Yemenite liturgy and pronunciation.

However, it should be noted that none of these practices are uniform. For example, though most Europeans read Hebrew with an Ashkenazi pronunciation, nevertheless each country had its own distinct way. Thus there are variations in the Lithuanian, Polish, Hungarian and German styles of Hebrew pronunciation. Similarly, there were differences in the liturgy. Even in Yemen there was not a single uniform liturgy.[2]

In concluding the introduction, we would like to address the general question whether it is preferable to have many synagogues with their own rites or fewer synagogues with a uniform prayer.

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Sephardic liturgy were introduced into the Hasidic prayers.

2. In passing, we shall mention some historical views on the origins of the various rites and pronunciations. Although no *posek* refers directly to the historical debate, nevertheless the origin and correctness of various approaches is an important factor in the halacha. Within the historical literature there are three main approaches to the origin of Ashkenazi and Sephardi rites and pronunciations. See H.J. Zimmels, *Ashkenazim and Sephardim*, Maria Publications, London, 1976.

1. The Ashkenazi rite is the product of the ancient Israeli rite while the Sephardi rite is an outgrowth of the ancient Babylonian prayers. It is well known that even in ancient times there were differences between Israel and Babylon. Over the course of thousands of years it is difficult to trace the lineage of specific prayers. This is especially true of the Ashkenazi rite. As a rule anything given in the Babylonian Talmud has precedence over the Jerusalem Talmud. Hence, many Babylonian customs were introduced into the original Israeli version. Nevertheless there are places, i.e. the *Haftorah* on *Simchat Torah*, where our custom is at variance with that of the Gemara (*Megilla 30b, Tosafot* ד"ה למחר קרינו and ושאר ימות). As a result, there are many layers of additions to both the Ashkenazi and Sephardi rites. In fact, even in *Geonic* days there were major differences between the *siddur* of Rav Amram Gaon and the *siddur* of Rav Sa'adyah Gaon. Some of the differences in pronunciation may have similar origins.

2. The Sephardi pronunciation is the original one, while the Ashkenazi pronunciation is a product of European influence.

3. The Ashkenazi pronunciation is the original Palestinian one while the Sephardi pronunciation is a product of Spain.

Thus, according to the first view, both Ashkenazi and Sephardi pronunciations are of ancient origin, while according to the other two views in ancient days there was only one pronunciation and the differences between Sephardi and Ashkenazi pronunciation arose in the Middle Ages. There is

This question was addressed to Rabbi Bakshi-Doron (Sephardi Chief Rabbi of Haifa). We shall paraphrase his answer:[3]

שמע בני מוסר אביך ואל תטוש תורת אמך

Hearken my son, to the teaching of your father, and do not reject the Torah of your mother.[4]

The "way of the father" represents the halacha while the "Torah of the mother" refers to customs. The character of a person is shaped by his mother. In a similar manner, customs shape the characteristics of a group or a nation. In pre-Exodus Egypt the Jews did not keep the halacha. Rather, it was the Jewish customs that preserved the nation; they did not change their customary language, clothing, or names. Customs are not just another level superimposed on the law. Rather, they express the feelings and emotions of the law. Customs allow each person and group to express the content of the law in their own individualistic manner.

While differing customs have arisen in all spheres of halacha, the greatest amount have appeared in prayer. At first glance this might seem to be a negative feature, a product of the exile of Israel throughout the globe. However, on a deeper level this is a great benefit. The halacha can only describe the outer content of prayer. However, the essence of prayer is devotion to G-d. Prayer is the way for each individual, in his own way, to communicate with G-d. Since we pray in public, there is need for a common procedure for the entire congregation, but the individual customs of each community allow a measure of individualism. A multitude of prayers from different communities is the most pleasing to the Almighty, and there is no contradiction between individual

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evidence from various *Rishonim* that a Sephardi-like pronunciation was used in France and Germany in the early days of the *Rishonim*. In any case it is clear that the difference in accents was not as noticeable as it is today. Thus, Rabbenu Asher (Rosh) does not discuss any differences in pronunciations in his various responsa while he does discuss many other differences between Sephardi and Ashkenazi practices.

3. שו"ת בנין אב, סימן ז.
4. Proverbs 1:8.

expression and national unity. Consequently, it is important to strengthen the customs of each community to allow such individual expression. Unification is achieved through cooperation and not necessarily through intermingling.

The greatness of a symphony is not through a single beat or a single instrument but rather by combining many instruments with their individual properties.

Let us now turn to the specific halachic issues raised by the diversity in prayer customs.

> 1. How binding are family (or community) customs on an individual when he is removed from his traditional environment? Is it permitted for an individual to change his custom?
> 2. Is it preferable for a person to follow his custom at all times, or is it better for him to follow the prayer liturgy in the congregation with which he finds himself?

In practical terms, the resolution of these questions will determine the behavior of a Sephardi student in an Ashkenazi yeshiva during the *minyan*, or an American Ashkenazi when he visits an Israeli synagogue, as well as many similar situations.

## II. Talmudic Sources

In this section we shall analyze some of the sources in the Talmud connected with the changing of one's customs. When moving to a new community, either temporarily or permanently, there are two principles that come into conflict. As we have seen, the first one is אל תטוש תורת אמך, that one should not forsake the customs of one's ancestors. On the other hand there is an obligation to follow the customs of the community, based on a Talmudic teaching derived from the verse לא תתגודדו, do not separate into groups לא תעשו אגודות אגודות.

The Mishnah[5] states that when one comes from a community

5. *Pesachim* 50a.

that does not do work in the morning of *Erev* Pesach to a community that does allow work in the morning or vice versa, then he takes on the stringency of both communities. The Mishnah then concludes that in general one should not change from the custom of the community in order to prevent conflicts: אל ישנה אדם מפני המחלוקת.

The Gemara in *Pesachim*[6] discusses the implications of this principle. Rav Ashi[7] says that the law of the Mishnah only holds if one intends to return to his original community. However, if one intends to stay, he should keep all rules of the new community both for leniencies and for stringencies.[8]

The text most relevant to our problem occurs in *Yevamot*.[9] The Mishnah states that even though the houses of Hillel and Shammai differed about the permissibility of certain marriages, nevertheless, the families of both houses of learning married with each other. Similarly, even though they disagreed about the purity of some vessels they would still borrow dishes from each other.[10] Thus we see that even great scholars kept their individual customs and did not abandon them for the sake of unity.

Abaye opines that *Lo Titgodedu* applies only to two courts in one city, but two courts in different cities may each go their own way. Rava disagrees and says that even two courts in one city can have different laws and *Lo Titgodedu* applies only to splits *within* one court in a city. It is not permissible for half the people in the court (or community) to do things one way while others do it differently.

There is a fundamental argument between Rashi and Maimonides (Rambam) about the reason of the prohibition of *Lo Titgodedu*. Rashi explains that the prohibition is there to prevent the appearance that there are two versions of the Torah when

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6. *Pesachim* 50b.
7. *Pesachim* 51a.
8. *Shulchan Aruch, Yoreh Deah* 214, see also ש"ך ס"ק ח.
9. *Yevamot* 13b.
10. Rashi explains that the reason is that everyone would inform the others of any possible problems.

different groups behave in distinct manners. Maimonides[11] rules that the purpose is to prevent arguments. Furthermore, he holds like Abaye that the prohibition applies only to two courts in the same city. However, Rif and Rosh[12] follow the general rule that we concur with Rava against Abaye. Furthermore, many *Acharonim* assume that the prohibition of *Lo Titgodedu* is a biblical prohibition while the prohibition of אל ישנה מפני המחלוקת, not deviating from the community in order to avoid arguments, is only a rabbinic prohibition.[13]

We conclude this section by surveying several other places in the Talmud that impact upon changes in one's customs.

The Mishnah[14] discusses the proper time to shake the *lulav* during *Hallel* on Succot. Rabbi Akiva notes that he saw Rabban Gamliel and Rabbi Yehoshua shaking the *lulav* only during אנא ה' הושיעה נא even though the rest of the people shook their *lulavim* at other times during recitation of *Hallel.* We thus see that Rabban Gamliel and Rabbi Yehoshua did not feel obligated to shake their *lulav* with everyone else, when they thought that it was unwarranted. Similarly, the Gemara[15] relates that when Rav came to Babylonia he did not recite נפילת אפים even though the rest of the congregation did.

Finally, we quote a text from the Jerusalem Talmud.[16] "Rabbi Yose [in Israel] sent to them [communities outside Israel, saying] 'Although we sent to you the order of the festivals, do not change from the custom of your ancestors.' " According to this version, Rabbi Yose was telling the communities outside Israel to observe two days Yom Tov even though the calendar was fixed and there was no longer any doubt which day was Yom Tov. However, there

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11. Maimonides, *Mishneh Torah, Avoda Zara* 12:14.
12. קיצור פסקי הרא"ש, יבמות פרק א סימן ט; ר"ן על הרי"ף פסחים נ. ד"ה מקום שנהגו see also מגן אברהם, סימן תצ"ג, ס"ק ו
13. שו"ת מהרשד"ם, יו"ד סימן קנ"ג
פרי מגדים אשל אברהם, סימן תצ"ג, ס"ק ו
שו"ת אגרות משה, חלק ד, סימן ל"ד
14. *Succah* 37b.
15. *Megilla* 22b.
16. *Yerushalmi Eruvin,* end of the third *perek.*

is another version, that not the order of the *festivals* but rather the order of the *prayers* was sent. According to this version, Rabbi Yose sent a listing of the prayers to a community; however, he told them that in spite of this they should continue to pray according to their ancient customs.

## III. General Survey

In this chapter we will discuss the general problem of changing customs. Specific applications will be discussed in later chapters. As we have seen before, there are two opposing principles. First, one should follow the custom of one's parents based on *al titosh*. Second, one should follow the customs of the community in which one lives based on *Lo titgodedu* and also *al yeshaneh adam mipnei hamachloket*. We shall analyze when each of these principles applies and what to do when conflicts arise. There may also be differences between one's own conduct and the education of one's children.

It is obvious on practical grounds that in the past, community practices took precedence. The communities of old could not survive if each new member kept his old customs. Instead of a unified community each city would have been a cacophony of different customs. Rabbi Feinstein[17] explicitly states that originally when one moved to a new community, he took on all the customs of the community including liturgy. However, today there are very few true "communities" still intact. Since most cities contain a mixture of many communities, he advises that one should keep his original rite of prayer and not change to that of the synagogue.

Even today we still see some evidence of the original practice of following a uniform mode. In some areas in Israel there are distinct customs which are followed both by Ashkenazim and Sephardim. For example, *Yireu Einenu* is not recited in the evening service; on the other hand *Birkat Kohanim* is recited every morning, and *shehecheyanu* is recited at a circumcision.[18] The standard

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17. שו״ת אגרות משה, או״ח חלק ד, סימן ל״ג.
18. See however, תשובות דבר יהושע, חלק ב, סימן י, סעיף ג.

practice is for all people coming on *aliyah* to Israel to follow Israeli custom in this regard. Even a *minyan* made exclusively of *Olim* would not keep their original cusoms with regard to these practices. However, with regard to rites of prayer, Israel indeed has a greater variety of customs than even New York. Hence, Rabbi Feinstein would hold that for liturgy one should follow the rites of one's parents and not that of the synagogue (an least at home and for the silent *Amidah*).

Rav Feinstein[19] also rules that if part of the congregation is still in the synagogue, the old customs are followed even though a majority of the present congregants have a different rite. Based on similar reasoning Rav Ovadiah Yosef feels that anyone moving to Israel is considered as moving to a community that follows the opinions of Rav Yosef Karo. Hence, when Ashkenazim come to Israel, Rav Yosef feels their children may eat *kitniyot* on Passover (preferably requesting *hatara* on their vows).[21]

*Chazon Ish*[22] disagrees with the position of Rav Ovadiah Yosef and says that Ashkenazim, even in Israel, do not follow the ruling of Rav Yosef Karo. Rather, they rely on the later *Acharonim*. e.g. *Shach*, Vilna Gaon, etc. even when they disagree with the *Shulchan Aruch*. Rav Sharman[23] also disagrees with Rav Ovadiah Yosef. He feels that since the original community of Rav Yosef Karo has been destroyed there is no reason to consider modern day Israel as

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19. שו״ת אגרות משה, או״ח חלק ב, סימן כ״א
see also משנה ברורה, סימן תס״ח, ביאור הלכה ד״ה וחומרי המקום
שו״ת חתם סופר, חו״מ השמטות, סימן קפ״ח; עשה לך רב, חלק ד, שאלה ט״ו.
20. שו״ת יחוה דעת, חלק א, סימן י״ב.
21. However, Rav Chaim David Halevi (עשה לך רב, חלק ז, שאלה ה׳) states that if a group moves to Israel and has its own community, they should keep their original customs. Rav Aburiviah (נתיבי עם, הקדמה) quotes Rav Uziel that when a synagogue has members who come from many different countries it is preferable that they observe the Jerusalem customs. In practice, in a shul whose members come from different communities, whoever is the *Chazzan* often uses his own custom, except on *Yom Tov*. (*Popular Halacha, A Guide to Jewish Living*, by Rabbi J. Berman, translated by Rabbi A.J. Ehrlich. Ahva Press of the Jewish Agency, Jerusalem, 1978).
22. חזון איש, זרעים שביעית, סימן כ״ג, אות ה.
23. ניב המדרשיה, כרך ח־ט, אייר תשמ״ה.

continuing the rulings and customs of Rav Karo.

More than six hundred years ago, the Rosh, a leading Torah scholar, was faced with the problem of changing his *minhag*. Rosh fled from Germany to Spain, where he became the rabbi of the Great Synagogue and the head of the court in Toledo. Nevertheless, he reports that he continued following the customs of the Ashkenazim because he believed them to be more reliable than those of the Sephardim.[24]

כי אני מחזיק את המסורת שלנו וקבלת אבותינו חכמי אשכנז
שהיתה תורה להם מאבותיהם מימות החורבן וכן קבלת
רבותינו הצרפתיים יותר מקבלת בני הארץ הזאת.

It is interesting to note that he did not say he kept the Ashkenazi customs simply because he was an Ashkenazi. Since he now lived in Spain, he should have adopted local customs; thus he felt compelled to justify retaining his Ashkenazi customs as being more correct.

In general, however, one should not behave differently than the local congregation. Let us consider the extent of this restriction. As previously mentioned, Maimonides (Rambam) decides according to Abaye that this prohibition applies even to two courts in one city, while the Rif and Rosh rule like Rava that it applies only within one court in a city. Rosh further states this prohibition does not apply to customs.

Rabbi Liebes[25] claims that according to Rambam, New York City should have one court and all synagogues should behave according to its decision and have a uniform rite of prayer.[26] However, in the Middle Ages, Rabbi de Modena[27] assumed that

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24. תשובות הרא"ש, כלל ב, סימן כ.
25. שו"ת בית אבי, חלק ג, סימן ב.
26. Following the ruling of Rif and Rosh, this would be true only if one court were greater than all the others. However, if they are equal, then each community can have its own practices. Since no one can decide which congregation is more important, each community should follow its own practices.
27. שו"ת מהרשד"ם, יו"ד סימן קנ"ג.

even according to Maimonides, congregations formed by refugees from different communities are considered as "two cities" even though they physically reside in the same city. Therefore, even according to Maimonides each community should follow its own liturgy and customs.[28]

Based on the above discussion, *poskim* conclude that one must follow the custom of the congregation in all public matters, e.g. reciting *Kedusha*. On the other hand, one should follow the ways of one's parents in all private matters, e.g. the silent *Amidah* or when praying at home.

Some say that for customs that do not involve any prohibitions, one may change his previous custom. It is fairly common for students in a yeshiva to follow the customs of their teachers.[29] According to some *poskim* it is not clear that this is permissible. In fact, a number of yeshivas have insisted that the students not change from the customs of their parents. On the other hand *gedolim* in all generations have suggested changes in the prayers based on their interpretation of the Talmud and the *Rishonim*.

This does not contradict אל תטוש (do not abandon your customs) when they suggest a more correct way. Nevertheless, many of their suggestions were never accepted since the general public preferred their old traditions, and many of the customs that the *Rishonim* objected to are still being maintained. Even the opinions of the Vilna Gaon were not accepted in Vilna! It was only in Israel where the students of the Gaon were a significant portion

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28. It is interesting to note, on a historical level, that there were two synagogues in Cairo at the time of Maimonides. One followed the Babylonian (Sephardi) rite while the smaller one followed the old Israeli rite. We do not know if Maimonides objected to this arrangement. (From *The Itinerary of Benjamin of Tudela* by M. Adler, Feldheim Publications, New York, 1908).
29. Rav Moshe Feinstein (Responsum no. 3 in *The Radiances of Shabbos* by Rabbi Cohen, Mesorah Publications, 1986) assumes that many of his students follow his custom (based on his father's custom) to sit for *Havdala*. Hence, Rav Feinstein seems to feel that one can adopt the customs of one's Rebbi even when it conflicts with parental traditions in spite of the fact that that he rules that the general public should not follow his personal custom.

of the population (in the 1800's) that the customs of the Gaon were accepted. Some *poskim* disagree and opine that if one custom is more correct, everyone should change even his private customs to the more correct way. It is clear that individuals cannot pick and choose which customs are more correct; this is left to *gedolim.* Application of these principles to specific cases will be discussed hereinafter.

## IV. **Changing of Rites**

There are a number of differences between Ashkenazic, Hasidic, and Sephardic liturgies. With regard to these differences there are several questions.

1. May one voluntarily change from one rite *(nusach)* to another?
2. How should one behave if he moves to a new community?
3. How should one conduct himself when his private rite is different from that of the community?
4. Can one educate one's children in a rite different from one's own?
5. How should the congregation behave when it includes members from different types of communities? May an entire congregation change its liturgy *(nusach)*?

We shall see that not all parts of the prayer carry equal weight and therefore the answer to some of these questions may depend on the portion of the prayer under discussion. As a general guiding principle we have seen that one should follow one's own tradition whenever it does not conflict with that of the congregation. Furthermore, for practices that involve only customs and not prohibitions, one need not follow the custom of the synagogue.

### Amidah

To discuss applications to the private *Amidah,* we must first address the issue of which rite is more correct. Rabbi Samuel de Modena[30] (1503-1590) was asked what to do in Salonika where two

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30. שו״ת מהרשד״ם, או״ח סימן ל״ה.

synagogues used a Sicilian rite, one used a Sephardi Rite, and there was also an Ashkenazi community. In another place he mentions that the Ashkenazi community had changed to the Sephardi rite, and now some members wanted to change back. Rabbi de Modena decided that אל תטוש (do not abandon...) applies only when a prohibition is involved and so does not affect prayers since all the rites have the same basic blessings. However, he considered it preferable to use the Sephardic rite (note: the Hasidic rite did not yet exist) since the *piyutim* are by the consummate poets Rabbi Yehuda Halevi and Ibn Gavirol and are clear and concise. Since one must understand the prayer of the *chazzan* in order to fulfill the mitzvah, one who listens to the *piyutim* of the Ashkenazim does not completely fulfill the mitzvah since no one truly understands these *piyutim*. Nevertheless, he points out that in his opinion each synagogue is considered a separate city and so there is no problem of *Lo Titgodedu*.[31]

*Magen Avraham* quotes *Ari* that there are 12 gates in heaven corresponding to the 12 tribes, and each tribe had its own way of praying.[33]

Many historians believe that there never was a single rite that all Jews used. Rather, from various places in the Talmud it seems that variations in the prayers always existed. Since prayer is worship in the heart (עבודה שבלב) each person expressed his prayer in his own way. It was only later that the sages gave a framework for all of Israel. According to this view the men of the Great

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31. *Chacham Tzvi* claims that on the contrary, the *piyutim* of the Ashkenazi rite were made difficult to understand on purpose. This was done so that Gentiles would not use these prayers. However, one who is well versed in the Talmud, Midrash, *Zohar* and Kabala can understand them. (שער אפרים סימן י״ג).
32. מגן אברהם, סימן ס״ח פתיחה.
33. The concept of 12 gates in heaven corresponding to each tribe is a little vague. Presumably this refers to the *Amidah* (and not other parts of the prayers). For those who do not know from which tribe they are descended, *Ari* and later Baal-Shem-Tov arranged a rite which goes through a 13th gate. Those who believe in the Baal-Shem-Tov should convert from their present rite and use the Hasidic rite. This is discussed in שו״ת מנחת אליעזר חלק א סימן י״א; שו״ת בית אבי חלק ג סימן יב.

Assembly (at the beginning of the Second Temple era) and later Rabban Gamliel (after its destruction) never fixed a definite text for the *Amidah*. Rather they specified the beginning and end of each blessing. Other historians feel that at some point there was a single authoritative version for every single word in the *Amidah*. Only with the passage of time did different versions come onto being.[34]

Rav Ovadiah Yosef[35] also quotes Ari and concludes that the Sephardic rite is the correct one. He therefore feels that all Jews should change to the Sephardic rite, though he does not distinguish between the Hasidic and the true Sephardic rite. He also disagrees with the attempts to create a common liturgy that combines all the rites (נוסח אחיד) as used in the Israeli army.

However, Rabbi Moshe Sofer *(Chatam Sofer)* disagrees with the concept that each tribe had its own prayers. He cites the Talmud that different *Tannaim* used to lead the prayers, even though some were priests or Levites and others came from other tribes, while Rabbi Akiva was a descendant of converts. (Obviously, the Talmudic sages did not worry about distinctive prayers for each tribe.) He further states that both his teachers, Rabbi Nathan Adler and Rabbi Pinchas Levi Horowitz, prayed in the Sephardic rite while they served as rabbis of the Ashkenazi congregation in Frankfurt, but that no one followed in their ways. (One wonders about the principle of following the congregational practice!) He claims that Ari was a Sephardi, and so found mystical meaning in the Sephardi prayers.[36] *Chatam Sofer* therefore concludes that all rites are equally valid and all reach G-d, but that one should remain with the rite of his parents.[37]

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34. רב יעקבסון, נתיב בינה, חלק א
also יוסף הייניטן, התפילה בתקופת התנאים והאמוראים.
35. שו״ת יביע אומר, חלק ו, סימן י״א
שו״ת יחוה דעת, חלק ג, סימן ו
שו״ת יחוה דעת, חלק ו, סימן י״ט
36. Actually *Ari* was an Ashkenazi from his father's side and a Sephardi from his mother's side.
37. שו״ת חתם סופר סימן ט״ו (ב) וסימן ט״ז

Rabbi Chaim David Halevi[38] (Sephardic Chief Rabbi of Tel Aviv) ruled that the Yemenite community in Arad, Israel, should have two synagogues — one for those who use the *"Bladi"* or Yemenite rite and one for those that use the *"Shami"* or Sephardi-like rite. *Pe'at Hashulchan*[39] writes that the Ashkenazim and Sephardim in Jerusalem who have separate synagogues are behaving properly. However, he adds that should an Ashkenazi pray in a Sephardi shul, he must follow them in all their prayer.

Similarly Rabbi Bracha says that even within Ashkenazi rites one must keep his original rite. He therefore rules that one who comes from New York to Jerusalem may not change to pray in the *Nusach Hagra* of the Vilna Gaon which is commonly used in Jerusalem. Only if they will not have a *minyan* can they join such a shul. He does not discuss how the students of the Vilna Gaon who first moved to Israel were able to change their rites from that which was used in Vilna.

Rav Feinstein[41] disagrees and says that the quality of prayer is more important than the liturgy. Thus, if one can pray with greater concentration and in more proper surroundings, one may choose a

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Rabbi Nathanson (שו״ת שואל ומשיב חלק א סימן רמ״ז) agrees with *Chatam Sofer*. He further points out that one cannot rely on the Maharshdam since he was a Sephardi. Also many other *poskim* insisted that one follow the rites of ones parents. See, for example,
שו״ת משיב דבר סימן י״ז
שו״ת הר צבי, או״ח חלק א, סימן ד
שו״ת אגרות משה, או״ח חלק ד, סימן ל״ג
שו״ת ציץ אליעזר, חלק ז, סימן כ״ח, סעיף ב
עשה לך רב, חלק א, שאלה ס״ז
יסודי ישורון, חלק א, דף רמ״ה

38. עשה לך רב, חלק ד, סימן ט״ו
He also says (חלק ח, סימן כ) that an Ashkenazi woman married to a Sephardi husband should adopt the Sephardi liturgy since it is more correct. For other customs the wife can keep her original customs as long as it doesn't affect her husband.
39. פאת השולחן, סימן ג, סעיף י״ד.
40. שו״ת ישא אי״ש, סימן א.
41. שו״ת אגרות משה, או״ח חלק ד, סימן ל״ג; see however
שו״ת מנחת אליעזר חלק א׳, סמן י״א
שו״ת בית אבי חלק ג׳, סיימן י״ג

synagogue with a different rite, even though he will have to follow the synagogue's customs in all public matters. This is preferable to choosing an inferior synagogue which follows the same rites as his own. Rabbi Feinstein[42] also disagrees with those who justify the Hasidic rite. In fact he maintains that an Ashkenazi may change from the Hasidic to the Ashkenazi rite, since all Hasidim were originally Ashkenazim. Hence such a person is still using his ancestoral rite even though for the past several generations a different rite was used.

## Public Prayer

Until now we have discussed differences in rite in terms of the silent *Amidah*. For prayers that are said out loud all agree that one must follow the custom of the synagogue. This certainly includes prayers that are normally said aloud by the entire congregation, e.g. *Kedusha*. Rabbi Feinstein[43] rules that everything other than the silent *Amidah* is considered public prayer and should be said according to the custom of the congregation.[44] Other *poskim* feel that anything that is not noticed by others can be said in one's own rite. Thus, those who do not say *Yireu Einenu* need not say it when the rest of the congregation does. Even the *chazzan* may skip *Yireu Einenu* if he can start the *Kaddish* in a manner that people will not realize that he didn't say it.[45]

With regard to shaking the *lulav* during *Hallel*, we previously saw that Rabban Gamliel and Rabbi Yehosua did not shake the *lulav* with the congregation. Therefore, today when there are different customs as to when and in what order to shake the *lulav* in *Hallel*, each person may follow his own customs.[46] Also, since *Lo Titgodedu* does not apply to customs that do not involve

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42. שם או״ח חלק ב, סימן כ״ד.
43. שם סימן כ״ג.
44. If this change of liturgy will destroy his concentration, then פסוקי דזמרא and ברכת קריאת שמע, etc., can be said quietly in his own rite. Also the private *Amida* of the *chazzan* must be the same as the public repetition.
45. שו״ת בית אבי, חלק ד, סימן י״ג
שו״ת באר משה, חלק ז, סימן רל״ו.
46. פרי מגדים, אשל אברים, סימן תרנ״א.

prohibitions, there is no problem if some people stand while others sit during the reading of the Torah or the repetition of the *Amidah*.[47] Similarly when an Ashkenazi is with a Sephardi for Chanukah he can light his candles according to the Ashkenazi custom (an additional one for each night of Chanukah).[48] Furthermore, one may alter his own customs in order to perform a mitzvah in a better way. Thus, one can choose which type of vegetable to use for *maror* at the Seder and need not be bound by his parents' custom.[49]

In the 19th century, however, Rabbi Ettlinger[50] strongly objected to Ashkenazi synogogues' changing their custom and allowing all the mourners to say *Kaddish* together. He held that the original practice of only one person reciting *Kaddish* is the correct method and therefore cannot be changed. Also, *Chavot Yair* says that one should say the *piyutim* with the congregation even though this is not one's normal custom.

## Tefillin

One of the more controversial questions is that of wearing *Tefillin* on *Chol Hamoed*. There are three customs: not to wear, to wear them but without reciting a blessing, and to don the *Tefillin* with a blessing. Numerous rabbis[52] have complained about synagogues where some people wear *Tefillin* and some do not, claiming that this violates the prohibition of *Lo Titgodedu*. Some, however, justify the common custom not to be particular since otherwise it might not be possible to have a *minyan*. Rabbi Liebes[53] also quotes *Bet Yitzchak* that it is permissible to change one's custom and not put on *Tefillin* on *Chol Hamoed*. Indeed, this is

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47. שו״ת בית אבי, חלק ג, סימן ו.
48. שערי תשובה, או״ח סימן תרי״א ס״ק ד.
49. שו״ת בית אבי, חלק ד, סימן ע״ז.
50. שו״ת בנין ציון סימן קכ״ב.
51. מקור חיים, סימן ס״ח.
52. See for example, פרי חדש סימן תצ״ו; שו״ת אגרות משה, או״ח חלק ד, סימן ל״ד; שו״ת באר משה, חלק ז, סימן ל״א, סעיף א.
53. שו״ת בית אבי, חלק ג, סימן ט״ו.

now the widespread custom in Israel, based on the opinion of the Vilna Gaon.

Another major area of discussion is what people should do in terms of prayers on the second day of *Yom Tov*, when they visit between Israel and America. Due to lack of space we can not discuss all the issues here.[54]

In Israel a controversy arose over the practice of Jews visiting from other lands to have *minyanim* on the second day of *Yom Tov* (יום טוב שני של גליות). Some people felt that this was a public display of separation from the community in Israel and hence a violation of *Lo Titgodedu.* This is especially true of *Simchat Torah* when major public dancing takes place. Rav Yosef Karo[55] says that although in theory it should not be done, nevertheless it is an old custom for visitors to observe the second day of Yom Tov even in Israel (this responsum was written more than 400 years ago). He justifies the custom on the grounds that perhaps the prohibition of *Lo Titgodedu* applies only to work on *Yom Tov* and not to prayers.

Although we refer to parental custom, there are times when parental custom is not binding. Rabbi Liebes[56] points out that one need follow a family custom (מנהג אבות) only if he was brought up in that custom by his parents. But if the parents were irreligious he should follow the customs of the group that helped him become religious. This is true even when he is of European heritage and he would assume Sephardi customs. Furthermore, he is to follow the new customs both in cases of leniency and stringency. Rav Ovadiah Yosef[57] also holds that children do not have to follow the stringent personal customs of their parents when the children were never taught to keep these customs.

In concluding this section, we wish to stress one point: According to many commentaries, the purpose of the prohibition of

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54. The interested reader is referred to
שו״ת באר משה, חלק ז, דיני בני ארץ ישראל וחו״ל; שו״ת בית אבי, חלק ג, סימן א־י״ד
as well as an article on this topic in Vol. VI of this Journal.
55. שו״ת אבקת רוכל, סימן כ״ו.
56. שו״ת בית אבי, חלק ד, סימן נ״ג.
57. שו״ת יחוה דעת, חלק א, סימן י״ס.

*Lo Titgodedu* is to prevent arguments. As such the *poskim* have pointed out that it is entirely inappropriate to start a fight in the synagogue over differences in customs. In trying to prevent violations of *Lo Titgodedu* one does violence to the whole rationale of the prohibition!! All variations of our rites are based on valid principles and are acceptable to the Almighty.

## V. Changes in Pronunciation

As in the previous section we need to analyze whether one may chance his pronuciation of Hebrew and also if one may pray in a different accent from that of the congregation. In addition we have a new difficulty: some prayers must be said in Hebrew, (לשון הקודש) and not in other languages. According to some *poskim*, using the wrong pronunciation may be equivalent to using a different language. Furthermore, in reciting the *Shema* one must be careful to enunciate the letters clearly (דקדוק באותיותיה) and an incorrect accent may be equivalent to not pronouncing the letters clearly.

The Gemara[58] states that Rav Hiya was not able to distinguish between a *Heh* and a *Chet*. Accordingly, the Tosafot ask how Rebbi was able to call on Rav Hiya to lead the congregation in prayer. They propose two answers: In one place,[59] the Tosafot say that Rav Hiya actually could pronounce a *Heh*, but only with difficulty. Elsewhere,[60] they answer that since Rav Hiya was the best one available, he was chosen to lead the services, despite his deficiencies. *Pri Chadash*[61] says that this second answer is the main one.

Maimonides teaches:[62]

> מי שקורא לאלי״ף עי״ן או לעי״ן אל״ף וכן מי שאינו יכול להוציא את האותיות כתיקונן אין ממנים אותו שליח ציבור והרב ממנה מתלמידיו להתפלל

58. *Megilla* 24b.
59. *Megilla* 24b תוס ד״ה כשאתה.
60. *Bava Metzia* 85b תוס ד״ה אחתינהו.
61. פרי חדש, או״ח, סימן נ״ג.
62. Rambam, *Mishneh Torah, Tefillah* 8:12.

> One should not appoint as a leader in prayer one who cannot pronounce the letters correctly. For example, one who does not distinguish between an *aleph* and an *ayin*. But a rabbi can choose one of his students to lead the congregational prayers.

The question is, what is the connection between the two rules in this paragraph? *Ohr Sameach*[63] answers that one who does not pronounce Hebrew correctly should not be the *chazzan* because it is not proper respect for the congregation (כבוד הציבור). However, if everyone is used to his manner and the Rabbi chooses him, there is no problem. Similarly, *Mishnah Brurah* rules that if the whole community does not distinguish between an *aleph* and an *ayin* or between other letters, there is no need to insist that the *chazzan* pronounce them correctly. Furthermore, if he is the most fit to be *chazzan*, he may be chosen to lead the prayers even though others do distinguish between the letters. (Nevertheless, in this case he should not be chosen as the permanent *chazzan*.) However, *Pnei Moshe* disagrees and says that one may not act as *chazzan* unless he can distinguish between the letters, albeit with an effort.[64]

The *Shulchan Aruch*[65] says that one should be careful to enunciate clearly and not slur letters while saying the *Shema*. Thus, one should leave a slight gap between words where the end of one word has the same sound as the beginning of the next word (e.g. בכל לבבך). One should distinguish between "hard" and "soft" vowels and between different types of *shva*. Ramo[66] adds that these laws apply as well to the Torah reading.

Based on these rules, we see that it is important to pronounce every letter and vowel correctly. This leads to the discussion as to which — Ashkenazi, Sephardi, or Yemenite — pronunciation is the most correct? Furthermore, if one uses a less correct pronunciation,

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63. אור שמח על הרמב"ם
פרי מגדים, אשל אברהם, סימן נ"ג.
64. *Mishnah Brurah* 53:37.
65. *Shulchan Aruch, Orach Chaim*, 61:15-21.
66. *Shulchan Aruch, Orach Chaim*, 61:22.

is it equivalent to not enunciating clearly, as required (לא דקדק באותיותיה)? Everyone agrees that regardless of historical accuracy, if the entire congregation uses a single pronunciation, one fulfills his obligation thereby. Thus, members of a Hasidic shul fulfill their prayer obligations even though it is clear that Moshe Rabbenu did not speak with a Hasidic accent. But a question arises in a place where several accents are used.

A well-known story of one who did switch from an Ashkenazi to a Sephardi accent is Rabbi Nathan Adler (the *"rebbi"* of *Chatam Sofer.*) He hired a Sephardi scholar, Rabbi Chaim Modai, to teach him the Sephardi accent which he then used in his prayers, in a Sephardi liturgy. Note that it took Rabbi Adler several years to master the Sephardi accent. This in spite of the fact that Rabbi Adler was considered one of the great geniuses of his time and had total recall!! We thus see the great difficulty that exists for an Ashkenazi to learn the true Sephardi (not Israeli) accent.

The strong distinction between the Ashkenazi and Sephardi pronunciations seems to be relatively recent, within six hundred years. For example, Rosh, who immigrated to (Sephardi) Spain from (Ashkenazi) Germany in 1305, does not mention pronunciation in his discussions of the differences between Ashkenazi and Sephardi customs.

One of the first discussions of pronunciations is by Rabbi Bachya on the verse ויאמר ה' אם נא מצאתי חן בעיניך.[67] He notes that one must be careful to distinguish between a *patach* and a *kametz* in the pronunciation of the name of G-d. With a *kametz (Adonoi)* it signifies a holy name but with a *patach (Adonai)* it is profane, i.e. it means "master" but does not refer to the Almighty.

> ההפרש הגדול שיש בתורתנו בין קמ"ץ לפת"ח כהפרש שיש בין אור לחושך ובין קדש לחול.
>
> The differences between a *kametz* and a *patach* is equivalent to the differences between light and

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67. Genesis 18:13.

darkness and the difference between the holy and the profane.

This passage has been used by many Ashkenazim to support their version of the pronunciation. In editing the *Siddur*, Rabbi Yaakov Emden complains that Sephardim do not distinguish between a *patach* and a *kametz*, that they have no *cholom*, and that they do not distinguish between a *tzere* and a *segol*.

As expected, Sephardic arthorities defend the Sephardi pronunciation. Rabbi Ovadiah Yosef discusses this problem at length.[68] He argues that in terms of vowels one cannot say which accent is more correct; however, with regard to consonants the Sephardi accent is more correct. Rabbi Yosef cites Rabbi Bachya but concedes that even Sephardim should make some distinction between a *patach* and a *kametz*.

Rabbi Yosef objects strongly to the apocryphal story that *Chazon Ish* ruled that an Ashkenazi does not fulfill his obligation if he hears the Torah chanted in a Sephardi accent. Not every story that is said in the name of *Chazon Ish* is true, he comments. Futhermore, even were the story true the objection could only apply to the pronunciation of G-d's name. Rabbi Yosef points out that most Israelis today speak in Sephardi-like accent. If one would insist that they all pray in an Ashkenazi accent, the result might be that many would be driven away from religion. He cites a responsum from Rabbi Unterman that one who learned Hebrew in Israel may pray in a Sephardi accent.

Rabbi Meir Mazoz[69] offers a detailed discussion of the correct pronunciation of every letter and vowel, stressing that the correct pronunciation is based on a scholarly analysis of the works of the *Rishonim* and *Acharonim* and not on the decisions of modern Israeli linguistic committees. He concludes that the original Sephardi accent is correct, but not the Ashkenazi or Yemenite.

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68. שו"ת יביע אומר, חלק י, סי' י"א
שו"ת יחוה דעת חלק ג סי' ו; שם חלק י, סי' י"ט.

69. Rabbi Mazoz is Rosh Yeshiva of *Kisei Rachamim* in Bnei Brak. The responsum appears in שו"ת יצחק ירנן, חלק ב, סימן ט.

Nevertheless, he notes, due to the expulsion from Spain in 1492 and subsequent exiles, most Sephardim do not pronounce the letters correctly. He also claims that the original Ashkenazim had a pronunciation similar to that of the Sephardim. This position is supported by evidence: when the Gemara discusses the difference between the *aleph* and the *ayin*, neither Rashi nor Rosh, nor any other scholar makes any comments that this does not apply in their days. He interprets this to mean that the early Ashkenazi rabbis also distinguished between an *aleph* and an *ayin*.[70] In terms of the vowels his hardest struggle is with the *kametz*, and since he admits that it is not clear which pronunciation is correct, he concludes that each group should keep its original accent for the *kametz*. In his opinion, the modern Israeli accent has adopted the two weakest parts of the Sephardi accent.

Several Ashkenazi rabbis agree that the Sephardi accent is more correct. But Rav Chaim David Halevi[71] opines that the Yemenite accent is the correct one.[72] Rav Henkin considers it preferable to choose a *chazzan* who has the same accent as the majority of the congregants. Rabbi Weinberg[73] concurs with Rav Henkin and feels that the Sephardi pronuciation is more correct. Therefore, he says that Ashkenazi children who grow up speaking with a Sephardi accent may read the Torah aloud for an Ashkenazi *minyan*.

Rabbi Stern[74] agrees that in principle one may switch to a

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70. He makes fun of Hasidim who distinguish the *ayin* by adding an "n" sound to the *ayin* ("*Yankov*" for *Yaakov*). Similarly, he points out that one must distinguish between an *aleph* and a *heh*.

    It is interesting to note that he faults the Sephardim for not distinguishing between a *tav* with a *dagesh* and one without a *dagesh*. He feels that a *tav* with a *dagesh* should be pronounced somewhere between a hard *tav* and a *samech*.

71. עשה לך רב, חלק ו, סימן כ"ב.

72. Rabbi Henkin (עדות לישראל דף ק"סב) places great emphasis on stressing the correct syllable, regardless of accent. To him, an understanding of grammar is essential in the proper understanding of the commentaries.

73. שו"ת שרידי אש, חלק ב, סימן ה
שו"ת ציץ אליעזר, חלק ז, סימן כ"ח, סעיף ב
שו"ת בית אבי, חלק ד, סימן ק"ו.

74. שו"ת באר משה, חלק ז, סימן ס"א, סעיף כ"ג.

Sephardi accent although, if one has already learned with an Ashkenazi accent, he should not change. The reason is that it takes a long time to learn the new accent, and in the meanwhile, he will pray in a mixture of the two accents with the result that he will not fulfill his obligation according to anyone's criteria! All these opinions feel that as a last resort (בדיעבד) one fulfills one's obligation in any accent.

One of the earliest responsa on the question of accents is by Rav Kook[75] in 1933. He states categorically that we are not allowed to change accents from that of our ancestors and one who does, violates לא דקדק באותיותיה; thus he has fulfilled the mitzvah of reading the *Shema* on a lower level. However, Rav Kook adds that this applies only to one who grew up speaking with an Ashkenazi accent. But if an Ashkenazi was educated in a Sephardi accent, it is a different case. Rabbi Uziel[76] (Sephardi Chief Rabbi of Israel contemporaneously with Rav Kook) disagrees and says that one who switches accents does not violate אל תטוש nor is he being delinquent about careful enunciation.

Rabbi Weisz[77] goes even further. Quoting Rav Kook that one is not permitted to change one's accent for prayer, he points out that those who change to an Israeli accent usually do so not for halachic reasons but rather to identify with Israel. However, Rabbi Weisz points out that even according to this opinion it would apply only to a true Sephardi accent. But he claims that the modern Israeli accent contains the worst features of both the Ashkenazi and Sephardi accents. Israelis commonly do not distinguish between a *kametz* and a *patach* or between a *segol* and a *tzere*. On the other hand, like the Ashkenazim, they do not distinguish between an *aleph* and an *ayin* nor do they make other distinctions which true Sephardim are careful about. Based on this opinion some yeshivas in Israel will not allow a Sephardi to lead the prayers since the

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75. ירחון קול תורה, חדש אב, שנת תרצ"ג
A similar opinion is expressed by the Steipler Rav קריינא דאגרתא דף קנ"ג.
76. שו"ת משפטי עוזיאל, או"ח סימן א.
77. שו"ת מנחת יצחק, חלק ג, סימן ט; וחלק ד' סימן מ"ז.

custom of the yeshiva is to use an Ashkenazi accent.

Rav Moshe Feinstein disagrees[78] and says that the ultimate correctness of a pronunciation is not the only determining factor. If a community uses a pronunciation, then it acquires the status of לשון הקודש (the holy tongue) even though Moshe Rabbenu did not use that accent. Therefore, Lithuanian, Polish, Hungarian, and all other accents are לשון הקודש even though it is clear that mistakes in pronunciation were introduced with the passage of time. It is preferable to pray with the pronunciation in which the Torah was given on Mount Sinai — but that is not known. Rav Feinstein concludes that it is an argument in law (מחלוקת בדין) which pronunciation is correct and therefore one should not change his accent unless he permanently moves to a new community. (But it would appear that even according to Rav Feinstein if certain accents are obviously not the original pronunciation one may improve that portion of his speech.) Rabbi Feinstein[79] also says that the Torah reading is a communal event. Hence, if the Torah were to be read in a Sephardi accent in an Ashkenazi synagogue (for example, at a Bar Mitzvah where the boy can only read with a Sephardi accent but still insists on reading the Torah) another *minyan* should be established for that Shabbat, in which the Torah will be read with an Ashkenazi accent.

At the other extreme is the position taken by Rabbi Broda.[80] Based on the responsum of Rabbi Mazoz, Rabbi Broda concludes that both Yemenites and Ashkenazim should use the true Sephardi pronunciation. A Sephardi who hears the prayers or the Torah reading from an Ashkenazi is in doubt if he has fulfilled his obligation. Therefore, all Sephardim should pray only in a Sephardi *minyan*. Furthermore, Rabbi Broda advises that Ashkenazim should be convinced to change their accent so that everyone can pray in the correct manner. For *Kiddush* and *Havdala*, the Sephardi students in an Ashkenazi yeshiva should say the blessing word for word along with the Ashkenazi reader.

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78. שו״ת אגרות משה, או״ח חלק ג, סימן ה.
79. שם או״ח חלק ג, סימן ס״ה.
80. שו״ת יצחק ירנן, חלק ב, סימן י.

## Torah Reading

The Torah reading on Shabbat and during the week is a rabbinical decree by Moshe Rabbenu and Ezra. Hence, Rabbi Liebes[81] opines that it is preferable to have a good Torah reader use a variant accent rather than have a poor reader use the same accent as the rest of the congregation. He points out that even among European Jewry, the different countries had different pronunciations, but no one ever complained. Based on our previous discussion, it would seem proper that the *chazzan*, Torah reader, or person receiving an *Aliya* should use the accent of the congregants because of the principle that a person should not publicly differ with communal practice (אל ישנה אדם מפני המחלקות). However, if this creates difficulties and would disturb the concentration of the *chazzan*, he may use his own pronunciation. But Rabbi Tzvi Pesach Frank,[82] relying on the above-mentioned opinion of Rav Kook, adds that if one hears the reading of the Torah from someone who pronounces a *shuruk* like a *hirik* (i.e. הוא like היא), he does not fulfill his obligation since it is not truly considered Hebrew (לשון קודש).[83]

According to many authorities the Torah reading of *Parshat Zachor* and *Parshat Parah* are mandated by the Torah and hence one must be extra careful. Rav Frank is quoted (in the notes by his grandson[84]) as saying that one should hear *Parshat Zachor* in one's own accent.[85] Rav Ovadiah Yosef[86] says that one fulfills his obligation of hearing the Torah reading in any accent with the possible exception of *Parshat Zachor* and *Parah*. Consequently, he advises Sephardi students in an Ashkenazi yeshiva to make a

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81. שו״ת בית אבי, חלק ג, סימן ב
שו״ת בית אבי, חלק ד, סימן ק״ט.
82. מקראי קודש, קריאת המגילה, סימן י״ב.
83. Only for *Megillat Esther* has he fulfilled his obligation since that can be said in any language.
84. מקראי קידש, ארבע פרשיות, סימן ז.
85. This is because the obligation to hear *Parshat Zachor* is on each individual, while the weekly Torah reading is only a communual obligation.
86. See note 68.

separate *minyan* for *Zachor* and *Parah*. As we saw before, Rabbi Broda is more insistent on the primacy of the Sephardi accent. He therefore says that if a Sephardi hears *Parshat Zachor* or *Parah* in an Ashkenazi accent, he has not fulfilled his obligation, since for a Torah obligation one must follow the stringent position. Furthermore, an Ashkenazi should also be stringent and hear *Parshat Zachor* in a Sephardi accent. During the rest of the year Sephardim who hear the Torah reading in an Ashkenazi accent do not fulfill their obligation in the preferential way. But Rav Chaim David Halevi[87] says that making a separate *minyan* for *Zachor* denigrates the other weekly readings. In any case he strongly objects to reading *Zachor* many times in different accents and says that at most twice is enough. The most important matter is to prevent fights in the synagogue. Rabbi Sternbuch[88] also strenuously objects to the custom of reading *Parshat Zachor* many times in different accents. This is an affront to *gedolim* of previous generations who did not insist on this. One needs only intention to fulfill the mitzvah and the ability to understand the *parsha*. If one wishes, he can read *Parshat Zachor* over again, in private, and without a blessing.

A further difficulty arises in connection with the priestly blessing. The *Shulchan Aruch* states that a Kohen who cannot distinguish between an *aleph* and an *ayin* cannot participate in the priestly blessing. Rashi says that an incorrect pronunciation here may lead to a curse instead of a blessing (יער instead ofיאר). *L'vush* maintains that the problem is that people will be distracted by the strange accent, which would disturb their concentration. But if they are accustomed to the pronunciation, there is no problem. Maharshal disagrees, because the problem is that the blessing is being said incorrectly. Only if the entire congregation does not distinguish between an *aleph* and an *ayin* may the Kohen

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87. See note 71.
88. מועדים וזמנים, חלק ו, סימן צ״ז.
89. *Shulchan Aruch, Orach Chaim* 128:33.

participate in the priestly blessing.[90] Rav Shneur Zalman[91] agrees with Maharshal, as does *Mishnah Brurah*.[92] Rav Ovadiah Yosef[93] quotes opinions that an Ashkenazi Kohen who goes to an eastern country should not participate in the priestly blessing; however, he notes that people are not careful about this and it is more important not to embarrass people.

Rabbi Feinstein[94] concludes that American yeshivas should continue using an Ashkenazi pronunciation. Others point out that aside from any halachic questions involved, changing one's accent will lead to a mixture of different pronunciations which would be even more confusing. Rabbi Kook, Rabbi Weinberg and Rabbi Unterman allow one to pray in the accent in which he was educated, even though it might be different from the accent of his forefathers.[95]

We have previously noted that the modern Israeli accent is not synonymous with the Sephardi accent. In fact, Rabbi Weisz claims that the Israeli accent has the worst features of both the Ashkenazi and Sephardi accents. However, one positive part of the Israeli accent is that it puts the emphasis on the correct syllable. It is agreed by everyone that for most words the accent in Hebrew should be on the last syllable. Many Ashkenazim (based on Yiddish) incorrectly emphasize earlier syllables. Thus, for example, for Shabbat (or Shabbos) the emphasis correctly belongs on the second syllable and not the first. Rabbi Henkin,[96] based on many

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90. פרי מגדים, אשל אברהם, סימן קכ״ח ס״ק מ״ז.
See also *Mishnah Brurah* 53:37,38 where he quotes the *Pnei Moshe* that one cannot be a *Chazzan* unless one can distinguish, even with difficulty, between an א and an ע.
91. *Shulchan Aruch Harav* 128:48.
92. *Mishnah Brurah* 128:120.
93. See note 68.
94. שו״ת אגרות משה, או״ח חלק ג, סימן ה.
See also שו״ת בית אבי, חלק ד, סימן ק״ט.
95. We note that in some circles in Israel it is not uncommon for people to speak with an Israeli accent but to pray with an Ashkenazi accent. However, Rabbi Ezriel Munk (נחלת צבי) objects to teaching in a Sephardi accent feeling that if children learn in a Sephardi accent they might pray in a Sephardi accent.
96. עדות לישראל, אות נ״ט.

*poskim* (e.g. Vilna Gaon, *Pri Megadim,* etc.) stresses the importance of correct grammar and pronunciation, particularly placing the stress on the proper syllable. There is no excuse to speak incorrectly based on אל תטוש. All *poskim* who insist that Ashkenazim use an Ashkenazi pronunciation do so on the grounds that we cannot decide which mode is correct. But those aspects which are obviously incorrect, such as stressing the wrong syllable, should be corrected.

Rabbi Frank writes that an Ashkenazi has not fulfilled his obligation in many parts of the prayer if the reader does not distinguish between a *cholom* and a *chirik*. Even according to those who disagree with Rabbi Frank, there is no need for one who can speak a proper Hebrew to mix up a *cholom* with a *chirik* simply because that is his tradition.

Based on our discussion, we see that the *chazzan*, Torah reader, or one who makes the blessings over the Torah reading should preferbly pronounce the words in accordance with the accent used in the synagogue even if it is not his own. As with other rites of prayer, the principle of the supremacy of harmony takes precedence. Indeed, several Israeli *poskim* use the Israeli accent when they perform a marriage ceremony for Israeli couples (מסדר קידושין), even though they use an Ashkenazi accent in their private prayers.

## VI. Writings

A further difference between Ashkenazim (including Hasidim) and Sephardim is the shape of the letters. In a change from the usual practice, Ashkenazim follow the opinion of Rav Yosef Karo while the Sephardim follow the opinion of the *Ari*; Yemenites use the Valish script. The question arises whether these differences are essential and have any effect on the validity of Torah scrolls, *Tefillin*,or *Mezuzot*.

Rosh already commented on the difference between the letters in the 14th century. His son, Rabbi Yaakov *Baal haTurim*[97] quotes

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97. *Tur, Yoreh Deah,* 274.

his father that the differences are nonessential as long as one can distinguish between the letters. Ramo[98] says that in *Tefillin* the shape of the letters is important but one fulfills his obligation in any case. *Mishnah Brurah*[99] appends a lengthy treatise on the proper appearance of each letter according to the Ashkenazi tradition.

Rav Ovadiah Yosef[100] quotes several authorities who agree with Rosh. However, the Chida[101] says that a religious article written with Ashkenazi script is not valid for a Sephardi and vice-versa. Rabbi Landau[102] claims that all the depictions Rav Karo gives concerning the letters are only preferences and not necessities. Thus, Chida seems to be in the minority. Rabbi Uziel[103] states that although one certainly fulfills his obligation with any script, nevertheless, each congregation should strive to acquire a Torah that is written in accordance with its traditions. His opinion is echoed by Rav Yosef. Most *poskim* agree that an Ashkenazi can receive an *aliyah* to a Sephardi Torah and vice-versa. Similarly, there is no problem with *Mezuzot* that use a different script.[104]

According to the *Tur* quoted above, the same law should apply to *Tefillin*. Indeed, Rav Ovadiah Yosef[105] concludes that in principle this is correct. However, in practice a Sephardi should not wear "Ashkenazi" *Tefillin*, not because of the script but rather due to the gaps left between paragraphs (פתוחות וסתומות) which differ from the traditional Sephardi spacing. Rabbi Liebes[106] concurs that

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98. *Shulchan Aruch, Orach Chaim*, 36:1.
99. *Mishnah Brurah* end of chapter 36. Rav Aharon Kotler (שו"ת משנת רבי אהרן, או"ח סימן א) says that there are so many opinions about the shape of the letter ש that one cannot decide on a shape that will satisfy everyone. Hence, we rely on the fact that the correct shape is not necessary.
100. שו"ת יחוה דעת, חלק ב, סימן ג'.
101. ברכי יוסף, או"ח סימן ל"ו, אות ב; יוסף אומץ, שאלה י"א. See also שו"ת באר משה, חלק ז, סימן ל"ו ס"א.
102. נודע ביהודה, יו"ד סימן ב. See also יסודי ישורון, חלק ב, דף קכ"ד.
103. שו"ת משפטי עוזיאל, יו"ד חלק א, סימן י"ז.
104. פחד יצחק אות מזוזה.
105. שו"ת יחוה דעת, חלק ד, סימן ג'.
106. שו"ת בית אבי, חלק ד, סימן ג; שו"ת באר משה, חלק ז, סימן ל"ו.

it is preferable not to change between Ashkenazi and Sephardi *Tefillin.*

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As has been demonstrated in this brief study, there are numerous differences in prayer customs which have arisen during the course of centuries of Dispersion. Regardless of our differences, however, all prayer which is truly a "service of the heart" is valid before G-d.

# Tevilah Issues

*Rabbi David Friedman*

The laws of *Tevilah*, ritual immersion in a mikvah, are highly complex and at the same time urgent in their practical application. A large proportion of the questions and queries posed by women to *Poskim* and other rabbis deal with problems related to the permissibility of immersion when the woman attending the mikvah is undergoing medical treatment. Simply stated, the halacha demands total submersion for the immersion to be valid, and any *Chatzitza* — substance intervening between the woman's skin or body and the water — renders the *Tevilah* invalid. How, then, can one immerse when wearing a cast, splint, or dressing for a wound? Do dentures, temporary fillings, bridges, or braces create a problem? What about a glass eye or artificial limbs? It is the intention herein to clarify many of these questions and in the process to define the underlying principles that guide *Poskim* in their analysis of these problems.

The mitzvah of *Tevilah* as purification is introduced in the Torah and elucidated in rabbinic literature:

> נפש כי תגע בו וטמא עד הערב וגו', כי אם רחץ בשרו במים (ויקרא כ"ב ו') ובא השמש וטהר וגו' (ז')
>
> Any person who touches any such [impure] thing shall be unclean until the evening, . . . until he immerses himself. And when the sun shall go down he will be purified . . . (Leviticus 22:6-7).

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יכול יהא מרחץ אבר אבר ת"ל ובא השמש וטהר, מה ביאת שמשו כולו כאחת אף ביאתו במים כולו כאחת.

Can he immerse each limb separately? No, the Torah juxtaposes the immersion with the setting of the sun. Just as the sun sets as one, so must the immersion be set as one! *(Sifra,* ibid.)

ורחץ במים את כל בשרו וטמא עד הערב (טו:טז)

. . . And he shall immerse all of his flesh and remain unclean until the evening. (Leviticus 15:16)

שלא יהא דבר חוצץ בין בשרו למים (עירובין פ, ע"ו).

Nothing should intervene between his flesh and the water. *(Eruvin* 4B).

The principles of *chatzitza,* intervening substances whose presence interferes with a proper immersion, are clearly defined in the Gemara.[1]

אמר ר' יצחק, דבר תורה רובו ומקפיד חוצץ ורובו ואינו מקפיד אינו חוצץ. וגזרו על רובו שאינו מקפיד משום רובו ומקפיד. וגזרו על מעוטו ומקפיד אטו רובו ומקפיד.

R. Yitzchak said, "According to the Torah a substance that covers most of the body and that one objects to, intervenes [is a *chatzitza*]." Should the substance cover most of the body, but is not objected to, it doesn't intervene. The Rabbis decreed against this latter case for fear of its confusion with the former. The Rabbis also extended their decree to a substance that covers a small part of the body, that is objected to.

ונגזור נמי על מיעוטו שאינו מקפיד? היא גופא גזירה, ואנן נקום ונגזור גזירה לגזירה?

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1. עירובין ד ע"ב

> Why wasn't the decree extended to a case of minimal body coverage and no objection? Since the absence of either condition is itself only forbidden by rabbinic decree, the absence of both conditions, if still forbidden, would constitute one rabbinic decree enacted to protect another rabbinic decree.

In other words, according to the Torah the efficacy of immersion in a mikvah is disrupted when there is a *chatzitza* which covers most of the person's body, if this intervening substance is something that the person would rather not have on the body. Although if the substance *doesn't* bother him (or her) it isn't really a *chatzitza*, the rabbis decided to forbid it anyway, since a person could readily become confused between an intervening substance which does invalidate the immersion and one which does not invalidate. For this reason, they also declared unacceptable an intervening substance which a person would want removed, even if it covers only a small part of his body. Consequently, most cases of *chatzitza* which normally are the subject of inquiry by women attending mikvah are actually forbidden *mi-derabbanan*, by rabbinic authority. It should be noted that according to this passage in the Talmud, the rabbis specifically did *not* declare as *chatzitza* something which intrudes upon only a small part of the body and to which a person doesn't object.

## Hakpada — Objection

The definition of *hakpada* — objection to the presence of the intervening substance — is a subject of dispute among the *Rishonim*.

The Rambam[2] defines "objection" as the prerogative of the individual. If the person immersing doesn't object to the presence of the substance, even if others might, this is called *she'eino makpid* — non-objectionable. If the substance covers a minimal part of the body *(miyut)*, the immersion is valid even without removing the *chatzitza*.[3]

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2. מובא בב"י ריש סימן קצ"ח בד"ה ומ"ש
3. וכן שיטת הטור בנטילת ידים או"ח סימן קס"א

However, according to the Rashba and *Tur*, the objection of *most* people in these circumstances defines *hakpada*, objectionability, and the individual's own preferences are nullified by the majority opinion. The *Poskim* have accepted the stringencies of both the opinions mentioned above: for a *chatzitza* to be ignored in immersion, it must be of the type that most people would not object to *and* the individual himself must have no objection to this. This approach of the *Poskim* is bolstered by the opinion of the *Bach*[4] that the Rashba introduced the majority concept only in the case of an individual's not objecting to a *chatzitza* which most others would certainly mind.

As we have noted, the normative definition of *chatzitza* is the one propounded by the Rashba — but is this defintion based on Torah standards *(d'oraita)* or does it deal with the additional rabbinic strictures we have noted? The *Bach*[5] clearly considers these definitions to be derived from the Torah. But *Chelkat Yaakov*[6] argues that we are dealing only with rabbinic regulations concerning *chatzitza*. He notes:

> כל שרצונה שתהיה החציצה דבוקה על גופה בשעת טבילה, איננה חציצה.
>
> Whenever she wants the substance on her [as is the case for many medical treatments] it does not constitute an intervening substance.

Such an opinion assumes that her acceptance of and others' objection to a particular *chatzitza* is normally only forbidden rabbinically.

But if, as the *Bach* argues, the objection of the majority defines a *chatzitza*, then her desire to have a particular substance on her skin is of no consequence, and that substance remains forbidden.

The practical ramifications of this dispute are critically important. According to the opinion of the *Chelkat Yaakov*, in a

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4. עיין אות פ
5. שם
6. מובא בס' נשמת אברהם יו"ד ק"ש סי' קצ"ח

situation where for medical reasons a substance covering most of the body such as a cast, salve, brace, etc., could not be removed, *her desire to have it remain* would render the intervention only rabbinically forbidden and *possibly* permissible because of its therapeutic value. Immersion with a tight-fitting cast or brace is a case in point. The core problem here is that although most women immersing are not satisfied with the presence of a cast or brace, it is impractical, painful, and in some instances dangerous to remove it. The woman immersing, therefore, wants this cast or brace to remain in place and its therapeutic value *might* allow us to permit it.

The *Beit Yosef*[7] quotes the opinions of the *S'mag* and *S'mak* as well as the Mordechai in *Nidah*, that a scab on a wound that is difficult and painful to remove is called "not objected to" and need not be removed, although they mention that customarily women do remove them. But in the case of a cast or similar device, it could be argued, the removal is so impractical that even this stringency does not apply.

The question raised concerning these opinions is that, as stated above, the definition of "objectionable" is what most women object to. Clearly the woman immersing does not object to the presence of the cast, but most other, healthy women do. Furthermore, the *Tur* and *Shulchan Aruch* state that "a dressing on a wound is an intervening substance *(chatzitza).*" Many *Poskim* do differentiate, therefore, between a scab that the body itself generates and can more easily be considered part of the body, and a dressing which is applied externally.

The *Panim Me'irot*[8] establishes an important principle in addressing this issue. In the *Shulchan Aruch*[9] we find that for someone whose profession it is to dye cloth, the dye splattered on his or her hands is "מיעוט שאינו מקפיד" — an insignificant, unobjectionable thing. Likewise the blood on the hands of a butcher is not a *chatzitza*, for most members of these professions do not

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7. ד"ה שאינו מקפיד עליו
8. סימן קמ"ז, מובא בשו"ת יביע אומר חלק ג' סימן יב'
9. סעי' י"ז ובהגה

object to the presence of these substances. Thus, we see that we do consider a group of people to be judged by its own standards and criteria, independent of the standards of others. Here, too, argues the *Panim Me'irot*, any individual suffering from the same malady would not object to the presence of a cast. For the category of "people who are ill" a therapeutic device is מיעוט שאינו מקפיד, non-objectionable. The case of a dressing on a wound is considered *chatzitza* not because the dressing, per se, is a *chatzitza*, but rather because it is constantly being removed in order to change the dressing or to check the progress of the healing.[10]

## Sakanah — Danger in Removal

An additional factor to be considered in the analysis of the status of a cast or a brace as *chatzitza* is the possible danger inherent in its removal.

The Ramo (ס' קצ"ח סע' ו') speaks about knots of hair that are a danger to remove as "דלא חייצי" not constituting a *chatzitza*. (Most authorities consider the hair as an entity by itself, not as a minor part of the body). The Mordechai speaks of a situation where such knots are in *most* of the woman's hair and explains that although she doesn't want these knots, the danger of their removal puts them in the category of "essential to growth" (ריבית‌יה) and thus they do not constitute a *chatzitza*. (The halacha of *ribitiya* is taught in the Gemara[11] in connection with an immersion for conversion. The immersion of a pregnant woman suffices for the fetus, although the fetus is entirely enveloped by the mother, because such a *chatzitza* is essential to the fetus' growth.) Both the *Sidrei Tahara*[12] and R. Akiva Eiger[13] argue that only a natural *chatzitza*, such as the womb or these knots of hair, can be considered *ribitiya*. A cast, salve,

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10. עיין שו"ת צמח צדק יו"ד קנ"ח ז'
שו"ת כתב סופר סי' צא
11. יבמות ע"ה ע"ב
12. ס"ק י"ט
13. שו"ת סימן ס'

brace, etc., which are artificially placed on the woman, do not qualify for this leniency. The implication of the Mordechai is therefore that even a *chatzitza* whose removal is a danger is still called objectionable (unlike the conclusion of the *Chelkat Yaakov* quoted above). Rabbi Akiva Eiger does emphasize that the case discussed by the Mordechai concerns a *chatzitza* which involves the majority of the hair, which therefore requires the logic of *ribitiya*. But in a case involving only a minor portion of the body or hair, even the Mordechai might agree that danger in removal constitutes מיעוט שאינו מקפיד — an intervention over a minor portion of the body to which the person does not object.

Many *Poskim* reject the validity of all the leniencies we have presented and are generally stringent about immersion with a cast, except in cases of dire emergency when the cast or brace must remain in place for an unusually extended period of time. Rabbi Sheinberg in Israel, in a personal communication to this author, stated that he would be willing to allow immersion if a cast must remain on the limb for a long time. For specific guidelines on how to proceed, the individual must seek personal instructions from his or her halachic advisor.

## Immersion With A Permitted Chatzitza

The Ramo[14] notes that ideally (לכתחילה), we don't permit immersion for a woman with a מיעוט שאינו מקפיד lest she also mistakenly immerse with an invalidating *chatzitza*. Rav Wozner questions this ruling in light of the Gemara's statement quoted previously to the effect that the rabbis did not forbid מיעוט שאינו מקפיד — an intervention over a small part of the body which the person doesn't mind because that would constitute a גזרה לגזרה — a rabbinic injunction formulated to protect another rabbinic injunction. Rav Wozner explains the halacha as follows: our fear is that in cases of מיעוט שאינו מקפיד, out of simple ignorance a woman might not know how to define "objectionability" for herself, nor

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14. הג"ה סע' א

might she know if others object even if she does not.

Such an explanation would not preclude objects worn loosely and not impeding contact with the water. As the Ramo notes, this halacha is only לכתחילה and since שעת הדחק כבדיעבד דמי, any emergency might permit following a halachic criterion which is בדיעבד, less than ideal. Under such circumstance, it might be possible to argue that a loose fitting brace that allows free circulation of the water would not have to be removed before *Tevilah.*

## Beit Hasetarim — Areas Not Normally Exposed

Many women find it difficult, if not impossible at times, to immerse without plugging the ears and/or the nose. The permissibility of this relates to the issue of *Beit Hasetarim* — areas not normally exposed.

> וידיו לא שטף במים (ויקרא ט"ו י"א) לפי שנאמר ורחץ את בשרו במים יכול אף בית הסתרים? ת"ל וידיו, מה ידיו בנראה, אף כל בנראה, פרט לבית הסתרים (תו"כ).
>
> "And his hands he has not immersed in water." (Leviticus, 15:11). Because the Torah has stated elsewhere that all of one's flesh must be immersed, are those areas not naturally exposed also included? Here the Torah states that one's hands must be immersed. Just as one's hands are naturally exposed, so too those parts of the body naturally exposed, are to be immersed, to the exclusion of those parts not naturally exposed. *(Torat Kohanim* to Leviticus 15:11).

From the discussion above we derive the principle that those parts of the body not naturally exposed (the inside of the mouth, nose and ear canals, etc.), called *"Beit Hasetarim"*, need not be in contact directly with the water. But the Gemara in *Nidah* 66 does add a stipulation נהי דביאת מים לא בעינן, מקום הראוי לביאת מים בעינן. Although the water need not actually come in contact with these parts of the body, no intervening substance may preclude the *possibility* of such contact. Tosafot are of the opinion that this stipulation is a biblical one, while the Ramban and Ritva hold that

this condition is only a rabbinic one.

Rav Moshe Feinstein[15] establishes a novel concept in the halacha of *chatzitza* regarding these "hidden parts" of the body.

The Mishnah in *Shabbat* 64 tells us that among the items permitted for a woman to wear into the public domain on Shabbat are a small piece of cotton in the ear. The Gemara explains that any item which is a *chatzitza* may not be worn into the public domain on Shabbat. Obviously, then, this cotton pad is not a *chatzitza.* Why not? Rav Moshe Feinstein explains that *chatzitza* comes in two forms. A) A *chatzitza* which *attaches* to the skin and impedes the contact of the skin with water — ointments, creams, nail polish, etc. B) A *chatzitza* which blocks actual contact with the water but is not attached — a tight fitting ring or garment, the firm grasp of another's hand, etc. The Gemara's stipulation that those parts of the body designated as *Beit Hasetarim* be capable of being in touch with the water would only preclude the former case, but not the latter category of *chatzitza.* In the latter case the water is not entering the *Beit Hasetarim* — but the area is perfectly clean and capable of contact. This definition is borne out by the halacha that the woman immersing need not open her mouth in order that the water enter. ס' קצ"ח סע' ל"ח: אינה צריכה לפתוח פיה כדי שיכנסו בה המים. Her closed lips block the water's entrance to the mouth, but as long as her mouth is clean, it is *capable* of being in contact with the water, and the immersion is valid. Therefore a pad placed deep within the ear canal, would be of the second type of *chatzitza* which the Gemara considered as not a *chatzitza* which could invalidate immersion.

A second problem connected to the principle of *Beit Hasetarim* and commonly raised by many women is immersion with temporary fillings, caps, or bridges. The issue is one of much controversy among the *Poskim;* many basic principles and definitions in *chatzitza* are discussed and clarified in the analysis of this question.

The problem itself is obvious: the filling is not going to remain in the woman's mouth and should therefore be considered a

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15. אג"מ יו"ד חלק א' סימן צ"ח

*chatzitza.* The lenient *Poskim*[16] offer the following points in order to permit immersion without removing the temporary filling:

A) Only an item that one removes, or would remove at *any* time, qualifies as *chatzitza.* A ring, for example, might be removed by a woman any number of times during the day if she engages in kneading, cleaning, washing dishes, etc. The filling, though, is meant to remain in place until the assigned appointment for removal and will not be removed before this time; for the time being, one is not concerned for its removal. (The point is borne out by the law in *Shulchan Aruch, Yoreh Deah* 17 mentioned above, that for those who work in dye, the dye splattered on their hands is not considered *chatzitza,* even though they will, clearly, remove the dye from their hands at some point in the future.[17]

B) Since the woman intends to replace the temporary filling with a permanent one, then she is not objecting, in fact, to the presence of a filling.[18]

C) Particulary in the mouth, which is a quintessential *Beit Hastarim,* it can be argued that the area exposed through drilling, which was not exposed prior to drilling, is not even in the category of *Beit Hasetarim* and need not be capable of coming into contact with the water. R. Moshe Feinstein comes to this conclusion based upon his reading of certain biblical verses. Yet, he is not prepared to permit immersion with a temporary filling on the basis of this re-reading of the verses alone. However, in conjunction with other rationales which the *Poskim* offer, he is prepared to allow it, as explained in the responsum cited above (note 15).

Despite the above arguments, most *Poskim*[19] are quite

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16. אג״מ שם סי׳ צ״ז, הר צבי, שיעורי שבט הלוי

17. עיין שו״ת זכרון יוסף מובא בפתחי תשובה סי׳ א׳. שו״ע כאן סע׳ כ״ג ובט״ז כ״ג, ספר גופי הלכות פתיחה לסימן קצ״ח ענפים ג׳ וד׳.

18. שולחן ערוך יורה דעה סימן כ״ב סע׳ ד

19. *Poskim* who insist on a temporary filling remaining 30 days from immersion include

שיעורי שבט הלוי סימן קצ״ח סע׳ כד אות ב׳

בדי השולחן שם ס״ק קע״ט, ס׳ מחשבת הטהרה פרק כ׳, סי׳ מ׳ בשם הכרעת האחרונים.

stringent in the matter of temporary fillings and require that the filling remain in place for at least a week or preferably for a month, while some say it must be for a month after the immersion. (These time periods are derived from the definition of a "permanent" knot as explained in the laws of the Sabbath.[20])

A woman with a glass eye that she normally *does not* remove is permitted to immerse without removing it because 1) Its presence is comparable to hair coloring, that a woman specifically desires to remain in place for its cosmetic value. Here the need is greater because of the embarrassment that the woman would endure in removing the eye. 2) The likelihood exists that should the eye be removed, the woman would shut her eyes tightly, which itself constitutes a *chatzitza*.[21] 3) The eye socket is certainly considered a "hidden part" and, as mentioned earlier, a *chatzitza* that simply blocks the contact of the water with the hidden part, but does not actually adhere to the area itself, does not constitute an intervening substance.

Stitches that require a physician's removal are similar to the case of a cast that we have discussed above. There is a special leniency applied to stitches that melt or fall off, however; the Ramban in his novellae to *Nidah* 6,7, in explaining why a scab is not a *chatzitza*, mentions that a woman does not normally remove a scab, but rather waits until it falls off by itself. Rashi, too,[22] explains that most grime found on glass does not constitute a *chatzitza* for the immersing of utensils, because it will eventually come off on its own. Thus, there is a possibility that one may be lenient about such stitches. In this situation, as in all the questionable scenarios discussed herein, the advice of a competent halachic authority must be sought.

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Those insisting on 7 days from immersion:
שיעורי שבט הלוי שם במקום ביטול פו"ר
ס' מחשבת הטהרה שם בשם חלקת יעקב, ופותח שער

20. עיין טור וב"י או"ח שי"ז
21. עיין ספר מחשבת הטהרה פרק כ' אות כ"ז בהגהות
22. שבת ט"ו ע"ב בדייה בכלי זכוכית

# Performing a Wedding in a Synagogue

*Rabbi David Katz*

The young couple has just become engaged. Now comes the first problem. Both the bride and the groom have attended yeshivot. They want the *chuppah* held outside. The parents won't hear of it. They have always had their hearts set on a proper wedding, held in their shul. The couple protest that this is improper, that in *frum* weddings the *chuppah* is held outside. What is the halacha? Does it really matter where the *chuppah* is held? Is there really a requirement that the *chuppah* be held out of doors?

## Early Sources: Maharil, Maharam Mintz, Rama

There is no mention of where to hold the marriage ceremony in the *Tanach* (Bible) or the Talmud. The earliest mention of the matter seems to come from the *Sefer Minhagim* of Rabbi Yaakov Molin, (Maharil, died 1472), who provides a full description of how weddings used to be performed in Ashkenaz (Germanic countries):

At dawn on Friday, when the *shamash* called the people to prayer, he summoned the groom to the *meien* (see below) courtyard of the synagogue, and a crowd of people followed, brandishing lighted torches and playing on musical intstruments. Having escorted the groom, the torchbearers and musicians retraced their steps and soon returned with the bride and her company. When she reached the entrance of the courtyard, the Rabbi and other notables brought the groom forward to receive her. The groom took her

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hand, and as they stood there together, all the assemblage cast wheat over their heads, and said three times, "be fruitful and multiply!" Together the pair walked as far as the door of the synagogue, where they remained seated awhile. (According to Maharam Mintz, who lived shortly after the Maharil, the custom was at this point to place a *chuppah* or canopy over their heads as they sat together. That is how, Maharam Mintz says, the halachic requirement of *chuppah* was satisfied in those days). Next, the bride was taken home again and dressed herself in a *sargenet* (white shroud) which covered her other attire; she threw a veil over her face and put on a fur robe in place of her *sarbel* (usual dress?). The groom meantime was led into the synagogue building, dressed in his Shabbat clothes, with a cowled or hooded garment suspended from his neck, in memory of the destruction of the Temple...

> The groom was placed by the *Aron Kodesh*, on the northeast side of the synagogue. Then *Adon Olam* and *Pesukei d'Zimra* were said, but not *Techina*... The *Beracha* occurred directly after *Shachrit*, and the Rabbi wore his Shabbat clothes, as did all the relatives of the bride and groom...
>
> The bride had by this time been reconducted to the synagogue door, amidst musical accompaniments. There, however, she paused while the Rabbi placed the groom on the *migdal* [*bimah*] in the synagogue. The Rabbi then strewed ashes from a furnace on the head of the groom, under the cowl, in the place where the *Tefillin* are worn in memory of the destruction of the Temple...
>
> Joined by the notables, the Rabbi proceeded to the door to receive the bride. He took her by the robe and placed her at the right of the groom, in accordance with "The Queen stands at your right hand" *(Tehillim)*. The faces of the bridal pair were turned to the south; their mothers, or other relatives, both stood near the bride. Then men took the corner of the groom's hood and placed it over the head of the bride, so as to form a *chuppah*, or canopy... They held in readiness two wineglasses, one for the *erusin* blessing and one for the *nisuin* blessing... At the end

> of the seven blessings, the Rabbi passed the wine to the groom, and then to the bride. He retained the glass in his hand while they sipped the contents, but he now gave it to the groom, who turned around, faced north, and threw the glass at the wall, breaking it. Thereupon, the assembled company rushed at the groom in great joy, conveying him — before the bride — to the wedding house.

A similar description of the wedding ceremony is given in the *Responsa* of the Maharam Mintz (159), about a half century after the Maharil. It is clear that the old Ashkenazic *minhag* included a marriage ceremony, part of which took place outside in the synagogue courtyard, where, according to Maharam Mintz, the couple would be seated together under a canopy, in fulfillment of the halachic requirements of *chuppah* (which, according to some opinions, is accomplished by the couple standing together in one spot *leshem nisuin*, for the purpose of marriage). The other part of the ceremony took place inside. This part included the *Birchot erusin ve nisuin*, and also the ring ceremony [incidentally, we see that the custom was to have the *chuppah* before the ring ceremony. That is why, the Mordechai says, the text of the *Birchat erusin* reads: *"...al yedei chuppah ve kiddushin.*].

The Ramo (*E.H.* 61) says:

> Some say that the *chuppah* should be performed under the heavens, as a good omen *(siman tov)* that their [i.e. the couple's] children should be (as many) as the stars of the heavens.

No source is given for the Ramo. The Ramo makes no mention of the earlier *minhag* of the Maharil and the Maharam Mintz. On the other hand, the Ramo in *O.C.* 88 quotes the *Terumat Hadeshen* permitting women in *nidah* to enter the synagogue on the *yamim noraim*, and the *Magen Avraham* says that the same permissibility would apply to other important occasions, such as when she marries off a son or daughter. It seems that the *Magen Avraham* (also quoted by the *Mishnah Berurah*) understands the Ramo to include a wedding inside a synagogue, despite his words in *E.H.* to the effect that weddings should be held out of doors.

More problematical are the words of the Ramo in *Y.D.* 391:

> A mourner should not enter a house where there is musical wedding entertainment. That is the custom in Germany and here [i.e. in Poland]. This only applies, however, to a wedding held in a house, where there is eating, drinking, and merrymaking. If the *chuppah* is performed in a synagogue, however, where no merrymaking takes place, merely the *Birchot erusin ve nisuin,* then the mourner may be present after *shiva.* According to some, only after *shloshim...*

Here the Ramo explicitly discusses a *chuppah* held inside a synagogue. How is this to be reconciled with what he says in *E.H.*?

This quote from the Ramo in *Y.D.* is controversial, however. The *Tiferet Yisrael* and others point out that the source of the Ramo is the Ravya, and in the Ravya it is not a wedding in a synagogue, a *Beit Haknesset,* that is discussed, but rather a wedding held in a "wedding house", a *Beit Hanisuin.* It would seem, says the *Tiferet Yisrael,* that we are dealing with an error on the part of the printer of the Ramo, who confused" *B.H.* "which were the initials for a wedding house, and thought they referred to a synagogue. This error, maintains the *Tiferet Yisrael,* led many others, including the *Levush* and the *Beit Shmuel* (30:9), to assume that the Ramo was sanctioning weddings inside a synagogue.

## Chatam Sofer

The key responsum dealing with the issue of marrying inside a synagogue is that of the *Chatam Sofer* (*E.H.* 98). The *Chatam Sofer* was asked whether it was proper to change the "old *minhag*" of marrying outside and instead hold the wedding inside a synaogue. He responded by noting the difference between the Ramo in *E.H.* who says that weddings should take place outside, and between the *minhagim* of the Maharil and Maharam Mintz. The *Chatam Sofer,* in analyzing this *minhag,* notes that the marriage ceremony was divided into two parts: (a) the *chuppat meien* (which means "merrymaking" in old German) ceremony, involving the pelting of the bridal pair with wheat, as well as other good luck features. This took place outside, in the synagogue courtyard. (b) the *Beracha*

ceremony, involving the recitation of the *Berachot*, which took place inside, in front of the *Aron Kodesh*.

Why, indeed, was the ceremony divided into two parts? Here the *Chatam Sofer* declared that the *meien* custom (which, incidentally, was still practiced in South Germany in his time, he said) was quite old, dating back to the time of Rashi, Tosafot, and others, who instituted it. They did so in imitation of the verse in *Bereishit* 15:5, which says, "The Almighty took Avram outside and said, 'Look at the sky and count the stars. See if you can count them!' He then said to him [Avram], 'That is how [numerous] your descendants will be.' " In other words, the Almighty, in promising blessing to Avram's progeny, saw fit to perform a symbolic act, taking Avram outside under the stars.[1]

According to the *Chatam Sofer*, this was done to facilitate the actualization of the Divine blessing. If the Almighty saw fit to perform such a symbolic act, so too should we, it was felt. This is the origin of holding the wedding outside, says the *Chatam Sofer*.

Why, then, wasn't the entire wedding held outside? To this the *Chatam Sofer* replies that the venerable founders of the *minhag* felt that it was most appropriate to associate such a sacred act as marriage, especially the recitation of the *erusin* and *nisuin* blessings, with a *makom kadosh*, a place of sanctity in the halachic sense, namely a synagogue. Thus, by having a two-stage ceremony, they would "have the best of both worlds", that is, they would be able to accomplish two desirable ends: 1) By having part of the ceremony outside they would bring down on the couple the blessing of being under the heavens, as in the case of *Avraham Avinu*. 2) By having the rest of the ceremony inside the synagogue they would be conducting a sacred ceremony in a sacred place, a most appropriate occurrence.

This, however, was *not* the custom of the Ramo, acording to whom the *entire* ceremony was conducted outside. To explain this, the *Chatam Sofer* points out that even in the times of the Maharil the two-stage ceremony was performed only in the case of the

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1. For other examples of such symbolic acts, see Ramban to *Bereishit* 12:60.

marriage of a *betula*, a girl marrying for the first time. Only at such a marriage was there a *meien* ceremony. It was not the custom to hold such a ceremony at the marriage of a widow. In such a case, the entire marriage was performed at a single ceremony out of doors. Obviously, points out the *Chatam Sofer*, it was felt that if there was to be a single ceremony, it should be held out of doors, the blessing associated with being under the heavens taking precedence over the appropriateness of reciting the blessings inside a synagogue. Now the *meien* custom, says the *Chatam Sofer*, never spread to Poland, where the Ramo lived. Consequently the *minhag* in Poland was to have a single-stage marriage ceremony. If it is to be a single ceremony, it was felt it should be held outside, in imitation of the symbolic act of *Avraham Avinu* with its attendant blessings. That is the origin of the Ramo's *minhag*, says the *Chatam Sofer*. Anyone who deviates from this custom, he says, is spurning the blessing of *Avraham Avinu:*

> He who does not desire the blessing [of *Avraham Avinu*], he who is removed from it, intends to learn from the way of the Gentiles, who do not enjoy the blessing of the stars. They, indeed, marry inside their houses of worship. Let such a Jew enjoy their fate [i.e. the fate of the Gentiles, bereft of the special divine blessing associated with *Avraham Avinu's* standing under the stars]!

## Imitating the Gentiles: Maharam Schick

The *Chatam Sofer* is understood as prohibiting marrying inside a synagogue because of two reasons: 1) The custom of marrying outside should be maintained because of the blessings associated with it (this would be a reason not to hold the wedding ceremony indoors at all, not only in a synagogue). 2) Marrying inside a synagogue should be forbidden because it seems to be an imitation of Gentile customs *chukot hagoyim*, which may involve an *issur d'oraita*, — *Bechukoteihem lo telechu* (*Vayikra* 20:23). That is how the *Chatam Sofer's* three most illustrious *talmidim* understood him: the *Ktav Sofer* (*E.H.* 47), the Maharam Schick (*E.H.* 87), and R. Yehudah Asad (*Yehudah Yaaleh: O.C.* 38). They repeated and

developed his line of reasoning in strongly prohibiting any wedding held inside a synagogue. In this they were followed by many other great *poskim.*[2]

Maharam Schick, especially, addressed himself to the point that there does not seem to be any intrinsic halachic prohibition in marrying inside a synagogue. There is merely the incidental one of imitating Gentile customs, which, to be sure, would possibly be biblically prohibited if it were the case.

However, the Maharik (88) says that the *issur chukot hagoyim* applies only in either of the following two cases: 1) The Gentile practice in question has no logical or rational purpose. Why does the Jew follow this practice, if not for the purpose of imitating the non-Jew? 2) The Gentile practice violates Jewish standards of modesty and humbleness. If, on the other hand, a Jew has his own reasons for doing something the Gentiles do (in the Maharik's case, a Jewish doctor wanted to wear a special uniform worn by his Gentile fellow professionals. Such a garb enhanced his own professional standing and would gain him clients), the *issur* does not apply. The Ramo (*Y.D.* 178) concurs with this ruling of the Maharik. In light of this ruling, only those who marry inside a synagogue with the intention of imitating Gentile customs ought to be forbidden to do so, but if someone wishes to do so for his own reasons (i.e. the attractiveness of the synagogue, cheaper price, weather conditions, etc.) no halachic impediments should exist.

Maharam Schick (*Y.D.* 165) argues that in all cases marrying inside a synagogue is prohibited. He was asked about moving a *bimah* from the middle of a synagogue (its proper place) to near the east wall. It was argued that there were sound reasons for doing so, as a good deal of space would be saved thereby and thus more room would be available for seats. Since this was the intention and not, it was claimed, to imitate the Gentile customs of worship, no halachic problems should arise. But Maharam Schick categorically disagreed

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2. The question of synagogue weddings is given full treatment in *Sedei Chemed, Maarechet Chasan V'kallah; Taharat Yom Tov* IX p. 101; *Mikdash Me'at* 14; *Otzar Haposkim* XVI pp. 270-5

and forbade moving the *bimah*. He argued that since the Maharik forbade, as we have mentioned, anything which violates Jewish norms of modesty, the Maharik obviously understood that any Jew who followed such practices must have been doing so with the intention of imitating the Gentiles, a point stated explicitly by the Maharik in relation to any Gentile practice lacking a rational explanation. Why, in other words, would a Jew do something contradicting Jewish traditions of modesty if not out of a desire to imitate the Gentiles? But what if this is not the case, if the Jew did it because he happens to like it, not out of a wish to emulate the Gentiles? It still remains forbidden, according to the Maharik. Obviously, argues the Maharam Schick, we have to go by the objective act. If it *appears* that the Jew is consciously imitating the Gentiles (because the act itself is un-Jewish), it is prohibited. As for the Jew's inner true intentions, they have no halachic significance (*devarim shebalev einam devarim*). Moving a *bimah* from the middle to the front of a synagogue inherently looks like a conscious effort to emulate the Gentiles (in the time of the Maharam Schick it was indeed part of Reform Jewish efforts to make the synagogue resemble the church). The alleged true intentions of the members do not affect the matter.

Similarly, in the case of marrying inside a synagogue, the fact is, says the Maharam Schick, that most people who do so are consciously imitating the Gentile practice. Even if the intentions of a particular couple are different, the act still looks as if they are imitating them. He therefore prohibited it.

The fact that marrying inside a synagogue was formerly a Jewish custom (in the time of the Maharil) makes no difference, says the Maharam Schick, citing the biblical probition of *matzevah* [i.e. the erection of a sacred pillar to mark a place of worship. *Devarim* 16:22] The *Sifri* (quoted by Rashi and Ramban) says that regardless of the fact that erecting *matzevot* was at one time the practice of the Partiarchs, it subsequently was forbidden by the Torah once idolators had made it part of pagan ritual. In our case, too, the fact that it was once a Jewish custom to marry inside

synagogues makes no difference if subsequently it became a Gentile religious practice.[3]

## Isha B'azarah

A number of reasons other than those of the *Chatam Sofer* were given by other *Acharonim* to prohibit marrying inside a synagogue. Some, including Maharam Schick and *Ktav Sofer*, argued that the very presence of a woman inside the men's section of a *Beit Knesset* was improper. As a source, they cited the *Gemara* in *Kiddushin* (52b) concerning a *kohen* who wishes to betroth (*mekaddesh*) a woman, using his share of a *korban* for the *kiddushin* money. Presented with this question, R. Yehuda exclaimed, "What is a woman doing in the *azarah* (Temple Courtyard, where the sacrifice *(Korban)* is brought)?!" Tosafot understand R. Yehudah to mean that it is improper, and indeed disgraceful, for a woman to be present in the *azarah*. Maharam Schick and others extend this to prohibit a woman's presence inside the main synagogue, and on that count alone prohibit a wedding inside a *Beit Knesset*.

Just how serious is this objection? After all, if it is indeed improper for a woman to be present in the main synagogue, how did the Maharil and the other Ashkenazim perform weddings there? Furthermore, R. Ovadiah Yosef (*Yabia Omer* III. *E.H.* 10 and *O.C.* 13) points out that the halacha in fact requires less strictness in a *Beit Knesset* than in the Temple. It is forbidden (*Berachot* 54a) to enter the Temple Mount wearing shoes, or with a staff in hand, or with a leather bag, nor may he spit on the Temple Mount. But all of these are permitted in a synagogue (*O.C.* 151: 6-7).

## Nidah

Another objection was raised to the presence of a woman in

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3. It is interesting to note in this regard that it was precisely on these grounds that the Vilna Gaon abolished the old Jewish custom of decorating the synagogue with branches and leaves on *Shavuot*. Once it had become a Christian religious practice, he felt, it was no longer permitted to the Jews. See *Chochmat Adam* 89:1.

the synagogue by a number of *Acharonim* on the basis of the Ramo in *O.C.* 88, who says that it is the custom for menstruating women to avoid entering the synagogue. While the bride may not be a *nidah*, other female guests may be.

The *Chaye Adam* (3:38), however, calls this "a custom without foundation", and says that the custom in Lithuania was for all women to pray in the synagogue. Furthermore, the *Magen Avraham* (cited above) understands the Ramo himself to permit a menstruant to enter the synagogue on the occasion of a wedding.

## Kedushat Beit Haknesset

Some *Acharonim* felt that holding a wedding inside a synagogue, with the attendant levity common at weddings, would violate the sanctity of the synagogue. The Gemara in *Megillah* (28a) says:

> A synagogue must not be treated disrespectfully. One should not eat or drink in them, nor get dressed up in them, nor stroll about in them, nor go into them in summer to escape the heat or in winter to escape the rain. One should not deliver a private *hesped* [funeral address]...

The accordance of proper respect to a synagogue is a biblical command (*Vayikra* 19:30; see *Megillah* 29a), and ought not be treated lightly by holding weddings there; (apparently, these consider the weddings held in the time of the Maharil to have been conducted in a more dignified atmosphere than modern ones). The presence of both men and women in the audience at a modern wedding, in contradistinction to the Maharil's time, when the bride and the two mothers were the only females present inside the synagogue; the often improper attire of certain female guests; the very conversation of the guests (idle conversation is considered a grave offense against the sanctity of the synagogue — see, for example *Chaye Adam*, 17:5); the unworthy motives that often are the reason for choosing a synagogue wedding (as when one wants to save the money of renting an expensive hall — see, especially, *Mishpetei Uziel E.H.* 60); the kissing that takes place in violation of

the spirit of the synagogue, where it is not proper to demonstrate affection for mortal man (see Ramo *O.C.* 98:1 — this reason was stressed by Chief Rabbi Herzog in his *Heichal Yitzchak E.H.* II 27); all these and others led many *Poskim* to wage a struggle against holding synagogue weddings in their towns.

## Minhag Yisrael

Maharam Schick and the author of *Yehudah Yaaleh (loc. cit.)* raise yet another point. It is obvious that the Ramo and his contemporaries were familiar with the old custom of the Maharil and the Maharam Mintz. It is nevertheless a fact that they did not record that custom for use, and, more importantly, that the custom for several centuries was specifically *not* in accordance with the *minhag* of the Maharil. It seems that they were consciously forbidding or discouraging indoor weddings. We are then dealing with a *Minhag Yisrael,* a custom established by *Gedolei Yisrael,* which may not lightly be disregarded. This was particularly stressed by the Maharam Schick *Y.D.* 215, and more recently by R. Ovadiah Hadaya in *Yaskil Avdi* VI *E.H.* 1, who pointed out that in 1866, nearly one hundred rabbis in Hungary and Galicia issued a *cherem* (ban) on a number of "Reform type" customs, including holding a wedding inside a synagogue (see *Lev Ivri* II 59b).

## Those Who Allow: R. Moshe Feinstein

In spite of the above strictures, it was the custom in Germany and Western Europe[4] to hold weddings inside synagogues in the nineteenth and twentieth centuries. Such weddings were performed by great figures such as R. Samson Hirsch and R. Azriel Hildesheimer. R. Menachem Kirschbaum of Frankfurt (*Menachem Meishiv*) notes that the *issur* was never accepted in Germany. The Torah leaders of one country do not have the authority to legislate for another (see Rivash 271); the banning of such weddings in Hungary, Poland and Russia did not affect Germany.

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4. R. Herzog, ibid, maintains that the custom was opposed by great Torah Sages, but they were powerless to prevent it.

What about the United States? R. Moshe Feinstein (*Iggerot Moshe E.H.*I 93) was asked by a rabbi whether he should risk losing his position for not performing a wedding inside a synagogue. R. Feinstein replied that the rabbi should perform the wedding even were his job not at risk, if the couple insist on it, for the purpose of maintaining good relations with his congregants.

In analyzing the question, Rav Feinstein deals with the two points of the *Chatam Sofer*: First that the wedding should be held outside because of the *beracha* associated with the symbolic act of *Avraham Avinu*. What if the couple, however, choose not to avail themselves of this good omen? Are they at liberty to do so? Yes, he argues. After all, even though the Gemara in *Ketubot* (5a) says that a virgin's wedding should take place on a Wednesday because, among other reasons, the couple will thereby have relations at an auspicious time, (viz., Wednesday night, which, according to halacha is part of Thursday, when the Almighty blessed the fish that they should be fruitful and multiply) nevertheless, people *do* marry on other days of the week nowadays, without any halachic stigma. (The *Pnei Yehoshua* did indeed argue that the custom of Wednesday marriages should be maintained. *Pnei Yehosua Kuntress Achron* at the end of *Ketubot*). Another example of this phenomenon is the custom mentioned in the Ramo *E.H.* 64:3 of marrying only at the beginning of the month; here, too, this custom is generally not observed. Thus, if a couple wish to decline to include in their wedding a custom associated with *beracha*, they are at liberty to do so, says R. Moshe Feinstein.

The second point raised by the *Chatam Sofer*, the prohibition of imitating the Gentiles, is a more serious one. But here R. Feinstein points out that the *Chatam Sofer* (quoted in full above) never said explicitly that marrying inside a synagogue was actually *assur*, but rather that it was an act not in conformity with the spirit of Jewish tradition (*ein ruach chachamim nochah mayhem*). Going to the heart of the matter, the objection to imitating the Gentiles , R. Moshe argues that such is not the case at all. First of all, the *Chatam Sofer* was speaking for his time, when it was clear that the intention of those who married inside a house of worship was to copy the Gentile custom. This is not the case in the United States

today. Unlike the *Maharam Schick*, R. Feinstein does not view marrying in a synagogue as an inherently un-Jewish act. In doing so one does not in fact imitate the Gentiles, for they marry in a *church*, while the Jewish couple marries in a *synagogue*, and the two are not at all the same (and that is why, R. Feinstein implies, the *Chatam Sofer* did not explicitly prohibit it on the halachic grounds of imitating the Gentiles, although many others, as we have seen, understood the *Chatam Sofer* to be doing just that). That is why, R. Feinstein writes,, there used to be a custom to marry inside a synagogue in early times, and nobody worried about the problem of *chukat hagoyim*.

## Hole in the Roof

As we have seen, R. Moshe Feinstein argues that a couple may if they so choose decline the blessing of *Avraham Avinu's* symbolic act. If they wish to marry inside a building other than a synagogue, they may do so. What is the basis for the widespread custom of marrying inside a building with an opening in the roof, either open or glass? The Hungarian *posek Levushei Mordechai* 48 says that the glass is as much of a *mechitzah* as any other material; the fact that one can see the heavens through them is irrelevant. *Birkat Chayim* argues that even an open hole in the roof is not enough. The whole point of the custom of marrying outside, as we have seen, was to repeat the symbolic act of *Avraham Avinu*, who was taken *outside* his abode. It is the leaving of the building that is the key element, something that is obviously missing when the ceremony is held indoors, albeit under an opening in the roof. This argument has not been widely accepted, as the *Divrei Malkiel* (V 205) says that the custom in Russia was to marry outside or under an opening in the roof.

Of course, those who prohibit marrying inside a synagogue such as the *Divrei Malkiel* himself would not agree to it even if there were an opening in the roof. The other problems of *chukat hagoyim* would not be obviated by such an opening, says *Peri Hasadeh* (IV 37).

## The Sephardic Custom

The Sephardim seem not to have had the custom of marrying under the heavens associated with the Ramo. The *Sedei Chemed* (beginning of Volume VII) says that the custom throughout the Turkish Empire was to marry inside houses.

Marrying inside a synagogue is another matter, however. The *Sedei Chemed,* in a comprehensive treatment of the question, very strongly opposes such practice, agreeing with the *Chatam Sofer* (as he understands it) that it would be imitating the Gentile religious practices and would therefore involve an *issur d'oraita.*

Other Sephardic authorities, however, did permit such weddings. An interesting reason was given in *Nehar Mitzrayim* (quoted in *Otzar Haposkim* XVI p. 167) for this; the sanctity of the synagogue itself will provoke a feeling of reverence on the part of the guests and will cause them to act properly during the wedding. For that reason weddings not only may, but actually *should* be held in a synagogue. This was not a widely held opinion (see *Yaskil Avdi, op. cit.,* who says that the Egyptian custom was due to special local circumstances).

In modern times, both the *Mishpetei Uziel* and *Yaskil Avdi,* as we have seen, strongly opposed synagogue weddings. R. Ovadiah Yosef (*op. cit.*) permits it.

## Conclusion

Many *poskim* oppose holding a wedding inside a synagogue because of the resemblance it has to Gentile customs. Even those who do permit it, however, do so only when there is nothing in the wedding ceremony or celebration that would violate *Kedushat Beit Haknesset.* The participants as well as the guests in such a wedding ought to realize that the rules of dress, behavior, etc. which are halachically required when inside a synagogue must be observed at all times.

# Suing Your Rabbi: Clergy Malpractice in Jewish Law

*Rabbi Mark Dratch*

In the spring of 1979 insurance companies began offering clergy malpractice insurance covering damages "arising out of any acts, errors, or omissions because of the counseling practices of a pastor."[1] On March 31, 1980, the parents of Kenneth Nally sued California's Grace Community Church of the Valley and its pastors, alleging that negligent counseling resulted in the suicide of their son.[2] This first legal action against a clergyman for malpractice has aroused interest in both legal and religious communities. Is clergy malpractice actionable in a civil court, or is such judicial review an infringement of the First Amendment guarantee of free exercise of religion?

In the Jewish commmunity, this question may be addressed in reference to halacha, the Jewish legal system with roots in biblical legislation, which has continued in uninterrupted development to this very day. Can rabbis be sued in a Jewish court, under Jewish law, for malpractice?

Let us briefly consider the United States Constitutional issue

1. C. Eric Funston, "Made Out of a Whole Cloth? A Constitutional Analysis of the Clergy Malpractice Concept," 19 *Cal. West L.R.* 508-509 (Spring 1983).
2. *Nally v. Grace Community Church of the Valley*, No. NCC 18668-B, L.A. County Super. Ct., Cal. filed March 31, 1980, 157 Cal. App. 3d 912, 204 Cal. Rptr. 303 (1984), See also Case Notes, *Arizona Law Review Journal*, 213-36, (1985); 240 Cal. Rptr. 215 (Cal. App. 2 Dist. 1987); Robert Reinhold, "Justices Dismiss Suit Over Clergy," *The New York Times*, November 24, 1988, p. A1, A20.

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before proceeding with a halachic evaluation.

Legal authorities agree that clergymen, despite the special status of thier profession, are liable for intentional torts. In the past, religious leaders have been held liable for fraud,[3] kidnapping,[4] assault and battery,[5] and false imprisonment.[6] Our question of clergy malpractice is based upon a new tort theory, relating to professional misconduct through the failure to exercise a certain standard of care applicable to other members of the profession.[7]

Opponents of this theory maintain that pastoral counseling is a uniquely spiritual and solely religious activity with no secular psychotherapeutic counterpart, and therefore protected by the First Amendment.[8] In addition, because the nature of this counseling varies with each religion and sect, the court, in order to adjudicate a malpractice claim, would have to evaluate a religion's tenets and

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3. *United States v. Ballard* 322 U.S. 78 No. 472 1944.
4. *Magunson v. O'Dea*, 75 Wash. 574, 135 P. 640 (1913).
5. *State v. Williams*, 75 N.C. 134 (1876).
6. *Whittaker v. Sanford*, 110 Me. 77, 85 A. 399 (1912). For a discussion of religious leaders' civil liability for intentional torts see "Comment, People v. Religious Cults: Legal Guidelines for Criminal Activities, Tort Liability, and Parental Remedies," 11 *Suffolk U.L. Rev. torts see "Comment, People v. Religious Cults: Legal Guidelines for Criminal Activities, Tort Liability, and Parental Remedies," 11 Suffolk U.L. Rev.* 1025, 1037-45 (1977).
7. Elements necessary for cause of action in a case of negligence are outlined by W. Prosser and West Keeton, *The Law of Torts*, 164-65:

   1. A duty, or obligation, recognized by the law, requiring the actor to conform to a certain standard of conduct, for the protection of others against reasonable risks.

   2. A failure on his part to conform to the standard required. These two elements go to make up what the courts usually call negligence; but the term quite frequently is applied to the second alone. Thus, it may be said that the defendant was negligent, but is not liable because he was under no duty to the plaintiff not to be.

   3. A reasonably close causal connection between the conduct and the resultant injury. This is what is known as "legal cause", or "proximate cause".

   4. Actual loss or damage resulting to the interests of another.
8. See Ericsson, "Clergyman Malpractice: Ramifications of a New Theory," *16 Val. U.L. Rev.* 163-64 (1981); Funston, "Made Out of Whole Cloth? A Constitutional Analysis of the Clergy Malpractice Concept," 19 *Cal. West L.R.* 507-44 (1983)

assess a clergyman's compliance with his beliefs. Concerning such scrutiny, the Supreme Court ruled in *Lemon v. Kurtzman*, "This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids."[9]

Defenders of the theory distinguish between purely sacerdotal functions and those which are not unique to a clergyman.[10] The former are protected by the First Amendment, the latter are not. Judicial precedent for this distinction is found in *Cantwell v. Connecticut*, in which the Court held that the free exercise clause "embraces two concepts, freedom to believe and freedom to act. The first is absolute, the second cannot be." "Crime is no less odious," the Court observed, "because sanctioned by what any particular sect may designate as religion."[11] Tort claims may therefore be actionable. In addition, advocates of the clergy malpractice theory maintain that since counseling has a secular counterpart, it is subject to judicial imposition of minimal standards of care and competence.

The California Appellate Court in 1987 found that the Nally case is not one of clergy malpractice, but is, rather, a question of a counselor's "negligent failure to prevent suicide" and "intentional or reckless infliction of emotional injury causing suicide" — the counselor happening to be a clergyman.[12] In November, 1988, the California Supreme Court dismissed the case, ruling that the legal duty of care imposed upon licensed counselors did not apply to the clergy. "The Legislature has recognized that access to the clergy for counseling should be free from state-imposed counseling standards," wrote Chief Justice Malcolm Lucas. "Extending liability to voluntary, noncommercial and noncustodial relationships is

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9. 403 U.S. 602 (1971).
10. See B. Bergman, "Is the Cloth Unraveling? A First Look at Clergy Malpractice Concept," 9 *San. Fern. V. L.R.* (1981); Kimmerly Anne Klee, "Clergy Malpractice: Bad News for the Good Samaritan or a Blessing in Disguise?" 17 *V. of Toledo L.R.* 209-53, (Fall 1985); Robert McMenamin 45 *The Jurist* 275-88 (1985).
11. 310 U.S. 296, 303-304 (1940).
12. 240 Cal. Rptr. 215 (Cal. App. 2 Dist. 1987).

contrary to the trend in the Legislature to encourage private assistance efforts."[13]

Grounds for clergy malpractice in a rabbinic court are more far-reaching than those in a civil court. While the civil courts are restricted by the First Amendment from adjudication of complaints in matters concerning religious law, no such inhibitions exist in halacha, and such litigation is certainly subject to judicial review by a rabbinic court operating under Jewish law. Rabbis perform many functions. They are judges and arbitrators in civil, economic, and personal disputes, supervisors of the production of ritually-fit food and various religious objects, teachers, preachers, and communal leaders. We shall here deal with the halachic implications of rabbinic malpractice with regard to two of these functions: that of judge or decisor, and that of counselor.

What is the liability of rabbi *qua* judge whose misapplication or misinterpretation of Jewish law causes unlawful financial loss? What if the rabbi settles a monetary dispute improperly? What is his liability if he certifies non-kosher food as kosher, causing financial loss by rendering unusable the vessels in which such food was subsequently cooked?

*Shulchan Aruch, Choshen Mishpat* no. 25, codifies the parameters of judicial malpractice. If the rabbi's decision contradicts explicit legal decisions of the Talmud or Codes (*devar mishnah*) the decision is reversed and proper judgment enforced.[14] If such damages are non-recoverable — such as by the absence of the person to whom the improper award was originally made, or because the non-kosher foodstuffs were mixed with kosher, rendering the entire mixture unfit — the rabbi is not liable for the damages he caused. The reason for this exemption is to protect competent, licensed professionals from fear of litigation due to

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13. Robert Reinhold, "Justices Dismiss Suit Over Clergy," *The New York Times*, Nov. 24, 1988, p. A20.

14. See *Chavot Yair* quoted in *Pit'chei Teshuvah*, no. 2, who extends *devar mishnah* status to the decisions of *Shulchan Aruch, Ramo, Sema,* and *Shach*. See, however, *Baal Hamaor* to *Sanhedrin* 33 who limits *devar mishnah* status to talmudic decisions and categorizes all post-talmudic debate as *shikul hadaat*.

nonnegligent errors.[15] Ramo (R. Moses Isserles, 1525-1572), however, maintains that rabbis are liable for unrecoverable damages caused by their misapplication of law.[16]

If the rabbi's error was discretionary (*shikul hada'at*), i.e., due to his interpretation and resolution of conflicting opinions in a manner contrary to legal tradition, liability is a function of both his expertise and his authority. If he is an expert in the area of law in dispute and either has official license to exercise judicial authority or serves by consent of the litigants, the erroneous decision is reversed, and the rabbi is not liable even if proper restitution cannot be made to the damaged party. If, however, the rabbi as an expert judge acts without either proper license or consent, or if he is a non-expert whose judgment is accepted by the parties, a mistaken interpretation is upheld; however, if the rabbi personally enforces his erroneous ruling, he is liable. If he did not personally enforce his decision, he is liable only if the damages are unrecoverable. Ramo obligates him in the latter case, maintaining that the original ruling is upheld and that the judge is liable for damages.

The halacha in malpractice by a rabbi in his judicial function is, thus, fairly clear cut. That is not the case with regard to his role as a counselor.

What is the liability of a rabbi *qua* counselor for the advice he gives? What would be the outcome of the Nally case if it were presented to a Jewish court? A halachic inquiry into such rabbinic malpractice must evaluate the nature of the counsel offered by a

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15. Rif to *Sanhedrin* 33a and Ramban in *Milchamot Hashem* suggest that the exemption is due to the limitation of *garmi* responsibility to torts. They also posit that judicial decisions are either *gerama* or that the requirement of a judge to render a decision is *ones* (duress) which exempts him from liability.

16. *Shach*, no. 5, rejects Ramo's ruling. Both Ramo and *Shach* hold that a judge, in deciding a matter of Jewish law, fulfills his biblical resposibility (mitzvah). It is this fulfillment, according to Ramo, which extends immunity to the rabbi who errs in judgment. *Shach* holds, however, that if the rabbi errs — ruling contrary to Torah principles, he is not fulfilling a mitzvah and is, therefore, liable. For a similar analysis relating to medical malpractice see Norman Lamm, "*Tippul Refui Im Yesh Bo Mitzvah*" in *Torah Shebe'al Peh*, Mosad haRav Kook, 5744.

clergyman to the individual seeking his counsel as well as the advisor-advisee relationship.

The dispensation of bad advice falls under the general biblical proscription, "Thou shalt not place a stumbling block before the blind" (Lev. 19:14). The *Sifra*, the halachic Midrash to the book of Leviticus, maintains that in this verse blindness is not a physical ailment, but rather a trope for ignorance, and the "stumbling block" is a metaphor for bad advice. Thus,

> "Before the blind." Should he ask you: "Is the daughter of so and so qualified to marry a Cohen (i.e. descendant of the priestly family)?" do not answer him "Yes, she is qualified," when she is really unfit. If he comes to consult you do not give him wrong advice. Do not say to him: "Go out early," when robbers would waylay him: "Go out at noon," that he should get sunstroke. Do not say to him: "Sell your field and buy yourself a donkey," and then by a trick take it from him.[17]

While the "stumbling block" injunction prohibits the offering of bad advice, it has only moral value and is not actionable in a Jewish court, for the halacha regards "words" — as opposed to "deeds" — as unactionable.[18]

Cause for a claim might exist, however, as an actionable tort, if there is a clear and direct relationship between the professional advisor's counsel and the resultant damage.

As a rule, one is liable for the direct and negligent damage he causes to another's person or property[19] and exempt from indirect, secondary damages (*gerama*).[20] Thus, in order for a person to be liable for injuries he caused, his action must be not only the cause in fact — meeting the *sine qua non* or "but for" test (i.e., but for

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17. For an analysis of the stumbling block prohibition see Mark Dratch, "The Ethics of Selecting a Political Candidate," *Journal of Halacha and Contemporary Society*, No. XI, Spring 1986.
18. See *Teshuvot haRashba*, no. 99; *Darkei Moshe* to *Choshen Mishpat*, no. 386.
19. *Hil. Chovel uMazik* 6:1; *Choshen Mishpat* 378:1
20. *Bava Kamma* 60a.

the fact that the defendant so conducted himself, the injuries would not have resulted) — but his action must also be the proximate (i.e., foreseeable and direct) cause of the tort. Unless proximate cause is proved, the tort is considered *gerama* and the malfeasor is exempt from responsibility. Thus, the Mishnah, *Bava Kamma* 59b:

> If one person [first] supplies the fire and another the wood, he who supplies the wood is liable. But where another person came along and fanned the flame, the one who fanned the flame is liable. If it was the wind that fanned it, all are exempt.

In the talmudic analysis of the last clause of this Mishnah, *Bava Kamma* 60a, Rava explains that the firemakers are exempt only when an unusual, unforeseen wind spreads the fire and, hence, the proximate cause criterion has not been fulfilled. When normal conditions prevail, however, the spread of fire is foreseeable and the firemaker is liable; the participation of a normal wind is no excuse. R. Ashi, however, disagrees and holds that even in the presence of normal wind conditions the firemakers are exonerated. The reason for the exemption in fanning the fire with the help of the wind is that his action "should be considered merely as an indirect cause *(gerama)*, and *gerama* in the case of damage carries no liability."

A third class of torts, conceptually situated between the liable direct damage and the exempt indirect cause *(gerama)* categories, is that of *garmi.* Examples of *garmi* damage include: burning another's bond, thus preventing him from collecting a debt; a money appraiser's making an erroneous evaluation of coins, causing financial loss to his client; and informing bandits of another's property, causing it to be stolen. Major essays elucidating the nature of *garmi* have been compsosed by such rabbinic giants as Ramban (R. Moses b. Nachman, 1194-1270)[21] and R. Shabbetai Cohen (1621-1663) known popularly as *Shach,* the acronym of his major work *Siftei Cohen.* [22] Nevertheless, as Shalom Albeck has

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21. *Dina deGarmi.*
22. Gloss to *Choshen Mishpat,* no. 386.

correctly observed, a precise explication of the differences between the exempt *gerama* and liable *garmi* torts has eluded talmudic commentators.[23] Some authorities maintain that the result of a *garmi* act has greater immediacy than that of *gerama*[24], or that it has greater proximity to the cause[25], or greater foreseeablity.[26] Others, despairing of finding a cohesive and consistent conceptual framework for the two notions, hold that there is, indeed, no difference between them and that certain actions are held liable as *garmi* because of their frequency and a government's need to protect the general welfare of society.[27]

Views differ as to the nature of the liability of *garmi* as well. Some opine that one who commits such an act is not liable for damages, while others declare him responsible.[28] Even those who hold him liable — and that is the accepted halacha — differ as to whether such obligation is biblically prescribed as compensation for damages caused,[29] or whether it is merely a statutory rabbinically enacted punitive amercement.[30]

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23. "*Gerama* and *Garmi*", *Encyclopedia Judaica*. VII, pp. 430-31. Albeck suggests that the difference between these concepts is that of foreseeability, with *gerama* referring to an indirect tort whose consequence is too remote to have been foreseeable, and *garmi* referring to indirect acts, the results of which should have been foreseeable. This distinction is not supported by Rava's definition of *gerama* in *Bava Kamma* 60a, where he holds that the *gerama* exemption from liability applies even if the fire was spread due to normal, foreseeable conditions of a normal wind.
24. Rashbam to *Bava Batra* 94a, s.v. *noten*.
25. Tosafot, *Bava Batra* 22b, s.v. *zot;* Mordecai to *Bava Kamma* 100a; *Or Zarua, Bava Kamma,* chapter 2, no. 137; *Teshuvot haRashba* III, no. 107 and *Meyuchasot* 240; Rosh to *Bava Kamma,* chap. 9 and *Bava Batra,* chap. 2, no. 17.
26. Rosh to *Bava Kamma,* chap. 9 and *Bava Batra,* chap. 2, no. 17.
27. Ritsba in Tosafot, *Bava Batra* 22b, s.v. *zot;* Mordecai to *Bava Kamma,* no. 119, quoting Riva; *Shach* to *Choshen Mishpat* 386, no.
28. *Bava Kamma* 100a.
29. Ramban to *Bava Kamma* 117a; Rashba to *Bava Kamma* 117a; *Maggid Mishnah, Hil. Chovel uMazik* 8:1 quoting R. Hai Gaon; *Gaal haTerumot,* gate 52, sec. 6; Ravan to *Bava Kamma,* chap. 9; *Teshuvot Masat Binyamin,* no. 28.
30. Tosafot, *Bava Kamma* 54a, s.v. *chamor, Bava Kamma* 71a, s.v. *Vesavar,* and *Ketubot* 34a, s.v. *savar;* Ramban in *Dina deGarmi* quoting *yesh omrim; Smag,*

With the preceding as a general introduction to the laws of damages, let us proceed to the talmudic case of the money appraiser, *Bava Kamma* 99b-100a, that will serve as the focus of our discussion of clergy counseling malpractice:

> It was stated: If a *dinar* was shown to a money appraiser [and he recommended it as good] but it was subsequently found to be bad, in one *Baraita* it was taught that if he was an expert he is exempt but if an amateur he is liable, whereas in another *Baraita* it was taught that whether he was an expert or an amateur he is liable. R. Papa stated: The ruling that in the case of an expert he would be exempt refers to such as Dankho and Issur who needed no [further] instruction whatever, but who made a mistake regarding a new mintage at the time when the coin had just [for the first time] come from the mint.

The money appraiser is acting in the capacity of an advisor, counseling inquirers as to the validity and the value of coins.[31] If coins accepted at one value based upon his evaluation are found to be of a different value, and hence, financial loss accrues, the advisor is responsible for contributory damages *(garmi)*. If the appraiser operates in an official, authoritative capacity such that the inquirer is compelled to accept the coin approved by the expert, a direct link is created between the counsel and the loss, and his status is comparable to that of a judge who makes an improper judgment.[32] In cases in which a person is not bound by the appraiser's

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Positive Commandments, no. 70; Mordecai to *Bava Kamma*, chap. 10, sec. 180 in the name of R. Avigdor; *Teshuvot haRosh*, no. 100; *Hagahot Maimoniyot* to *Chovel uMazik* 8:3; *Shitah Mekubetzet* to *Bava Kamma* 117b quoting R. Yehonatan; *Agudah* to *Bava Batra* 22b; *Shiltei Giborim* to *Bava Kamma* 48; *Shach, Choshen Mishpat* 386:1. 386:1.

31. Ramban, *Dina deGarmi; Ketzot Hachoshen* 306:11; Gra to *Yoreh Deah* 306:16.
32. *Or Zarua, Bava Kamma,* chap. 9, quoting Rabbeinu Ephraim; Mordecai, *Bava Kamma,* chap. 9, sec. 116; Ramban, *Dina deGarmi; Yam shel Shlomo,* sec. 24, *Shach, Choshen Mishpat* 386, no. 12. *Or Zarua* quotes R. Yoel who obligates the money appraiser even when the counselee is not obliged to follow his decision. See also *Shiltei Gibborim.*

evaluation, the Talmud posits another factor which creates a link between the appraisal and the damages.

> Resh Lakish showed a *dinar* to R. Eleazar who told him it was good. He said to him, "*Chazi de'alach ka samchina,* Behold, I rely upon you." He replied, "Suppose you do rely upon me, what of it? Do you think that if it was found bad that I would have to exchange it [for a good one]? Did not you yourself state that it was R. Meir [alone] who adjudicates *garmi?*" . . .But he said to him, "No, R. Meir maintained so and we do hold with him."

The statement *chazi de'alach ka samchina* (Behold, I rely upon you) is significant, its articulation creating a *garmi* relationship between the money appraiser's advice and the financial loss. While some *Rishonim* (medieval Talmudists) posit that liability is dependent on the articulation of this intent,[33] most authorities agree that liability is incurred even when such reliance can reasonably be assumed.[34] If such a provision is made, or can be reasonbaly assumed, the money appraiser is liable under the category of *garmi.* Similarly, such an assumption in the rabbi-counselee relationship may create a sufficient link between the action and the tort so as to create rabbinic liability.

It is puzzling that Rambam does not hold the money appraiser liable under the tortious category of *garmi,* but rather under contractual law. After delineating the liability of butchers and bakers who improperly prepare foodstuffs brought to them, Rambam continues:

> And so if one shows a coin to a money appraiser and he declares it good and it [was found to be] bad: If he was paid for his opinion, he must pay, even if he is an expert who requires no further instruction. If he was not paid, he is exempt, provided he is an expert

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33. Rif.
34. *Baal haMaor;* Tosafot, s.v. *ahcvei dinar; Milchamot Hashem; Ramah.*

> requiring no further instruction. If he is not such an expert, he is liable even if he renders his services for free, provided that the inquirer states, "I am relying upon your opinion," or if it can be reasonably assumed that he is depending solely upon his evaluation, and will not show it to others.[35]

Why did Rambam include the bad advice of the money appraiser in the laws of contracts rather than in the liabilities of *garmi*? Why did he introduce payment for services as a factor in liability, a factor not mentioned in the talmudic exposition?

In an attempt to understand Rambam's unique approach to our matter of the money appraiser we must first investigate his position on liability in cases of *gerama* and *garmi*. He states in *Hilchot Chovel uMazik*, 7:7,

> Anyone who harms the property of another must pay full damages. . . Even if, in the final account, he was not the ultimate perpetrator of the damage, he is liable for them since he was the first cause. What is the case? If he tosses his vessel from the roof [to fall] on top of pillows and blankets, and another came and removed the pillows and the vessel fell on the ground and broke, [the one who removed the pillows] is liable to pay full damages as if he had directly broken them by hand, because the removal of the blankets and pillows caused the vessels to break.
> If one throws his friend's vessel off the roof [to fall] on pillows and blankets, and the vessel owner removed the pillows before [it landed], the thrower is liable because his throwing was the first cause of the vessel's breaking.

Rambam's opinion is contrary to what we have previously established as exemption in cases of *gerama* and is not in accord with the talmudic evaluation of similar circumstances. The Talmud states:

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35. *Hil. Sechirut* 10:5

> Rabbah again said: In the case of one throwing a vessel from the top of the roof while there were underneath mattresses and cushions which were meanwhile removed by another person, or even if he [who had thrown it] removed them himself, there is exemption; the reason is that at the time of the throwing [of the vessel] his agency had been void of any harmful effect. [lit., "he had let his arrow off"; when the act of throwing took place it was by no means calculated to do any damage.][36]

Rabbah's opinion seems to be the classical case of *gerama* — the act of throwing was only an indirect cause of the damage which most directly resulted from the removal of the cushions.

From the disparate rulings in the *gerama* case in which the pillows will originally prevent the vessel's breakage — the Mishnah exonerates the perpetrator and Rambam obligates him to pay damages — we must conclude that Rambam holds an individual liable for all acts of damages, whether direct or indirect, *gerama* or *garmi*. Let us carefully examine Rambam's languages:

> One who causes damage to another's property is liable to pay damages from the best of his own assets, like all other malfeasors. Even though he is not the final cause, [he is liable] since he is the first cause.

Rambam clearly maintains that as long as the damager is responsible for a cause in fact, even if he is not the perpetrator of a proximate cause, he is liable. This position is affirmed in *Hilchot Nizkei Mammon* 14:7 where Rambam decides against a previously quoted Mishnah which offers exemption when the wind contributes to the fanning of the fire. Rambam maintains that if both he and the wind are malfeasors, he is liable because "he is a cause, and everyone who causes a damage to occur must pay full damages from the best of his assets, like all other damagers."

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36. *Bava Kamma* 26b.

This thesis seems to be contradicted by Rambam's statement in *Hilchot Shechenim* 11:1-2:

> One who builds a threshing floor on his property, or establishes a latrine, or performs work which creates dust or dirt, must do such activity at a sufficient distance so that the dust or odor will not be able to reach his neighbors and cause harm to them. Even if it were the wind which abetted him at the time in which he was engaged in his activity and which carried the dirt. . . He must distance himself so that they can not reach his [property] to cause harm. Even though he is obligated (to build these structures) at a distance, if the normal wind carries the chaff or dirt and (his neighbor) incurs damage, he is exempt from payment for it was the wind that assisted him and the tort is not a result of the tortfeasor alone.

Rambam's legislation is inconsistent. In the case of the fire fanned by both the actor and the wind, the tortfeasor is liable despite the presence of the wind as a contributing factor. In the case of the threshing floor and the latrine, the intervention of the wind relieves him of any liability. We may resolve this contradiciton by further refining our definition of the sort of physical cause must be, by its very nature, a tortious act *(maaseh hezek)*. Hence, in fanning a fire or tossing a vessel from a roof, both of which are objectively tortious, the actor is liable despite the subsequent intervention of the wind. Building a latrine and erecting a threshing floor are not by nature tortious — they became tortious only because of Nature — and their builders are exempt.

This requirement is confirmed in Rambam's ruling concerning the individual who places poison in front of another's animal. He states in *Hilchot Nizkei Mammon* 4:2 that such an act, although morally reprehensible, is not punishable. Although in this case the person is a cause in fact of the subsequent damage, the Talmud (*BK* 47b) posits that such poison is not consumed by animals and, hence, its placement is not naturally tortious. Rambam likewise offers exemptions in the case of judicial malpractice to a licensed expert because "even though he caused the damage he did not

intend to damage" (*Hilchot Sanhedrin* 6:1). Lack of malicious intent makes his decision, by its very nature, a nontortious one.

Let us return to the case of the money appraiser whose advice is a cause of damage. Why, according to Rambam, is his liability a case of contractual law and not a function of torts?

It appears that Rambam holds the tortfeasor liable for perpetrating a cause in fact only when he is the physical cause of damages. Where, however, the cause is verbal, and not physical — such as in the case of the money appraiser — he cannot be held liable under the category of torts. Rambam does, however, hold the money appraiser responsible as one who breaches contract law. In such situations, if an appraiser, upon entering into a professional relationship with another party, accepts responsibility for the tortious results of his advice, he is liable — even though he is not the physical cause of the damage. Hence, Rambam included the case of the money appraiser in his section on contract law and distinguished between the liability of those who are paid and those who are not.

Problematic in this explanation of Rambam's opinion is his claim that an unpaid non-expert money appraiser is also liable for bad advice. If he is not paid, and therefore not under contract — and, according to Rambam, cannot be held liable under *garmi* —how can he be held responsible? We must note, however, that Rambam maintains that to incur liability under such circumstances the inquirer must state, or it must be reasonably apparent, that he is relying upon the counselor's opinion. With such an understanding, the non-expert money appraiser, despite his legal exemption, accepts liability for his counsel.[37]

Let us now turn to our case of rabbinic malpractice occasioned by unprofessional pastoral counseling. What would be the outcome of the Nally case if it were presented to a Jewish Court?

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37. *Shulchan Aruch* also records the money appraiser's case with the laws of professional responsibility, *Choshen Mishpat*, sec. 306, and not in the chapter dedicated to *garmi*, sec. 386. Like Rambam, he includes payment as a criterion for liability.

The Nally case may be evaluated, not as a question of breach of professional standards, but as one of responsibility for the counselee's ultimate suicide. In this respect, the clergyman's advice, although it may have contributed to the ultimate suicide of Kenneth Nally, is not the immediate, direct, or proximate cause of death. Certainly Nally's own hand which pulled the trigger is an intervening factor which would render the couseling activity *gerama* — and not *garmi*.

This *gerama* exemption is further strengthened by the nature of pastoral advice itself. The rabbi, like the money appraiser, is a professional who dispenses advice. However, unlike the money appraiser, whose *garmi* liability depends upon the binding nature of his advice, conformity to rabbinic counsel is voluntary. Nevertheless, grounds for action may be found if the congregant declares explicitly his reliance upon the rabbi. In such a circumstance, adherence to rabbinic advice becomes self-imposed. This statement creates proximity between the rabbi's advice and the congregant's action, and make improper counseling actionable. If Nally had made clear that he acted solely upon the advice of the minister — and the clergyman had accepted such responsibility — there would be grounds for *garmi* liability.

For Rambam, the issue is not one of the clergyman's contribution to Nally's suicide through counseling; he holds that such behavior is unactionable, as the pastor was not a physical cause of the tort. Rambam would hold that the contracting of a rabbi *qua* pastoral counselor by a congregation subjects him to adhere to certain professional standards. Negligent breach of these standards which results in damage is actionable, even if it does not fulfill the *garmi* requirements of directness, foreseeability, and immediacy. Rabbinic liability in Jewish law exists, therefore, if the advisee is a member of the rabbi's congregation and, acting on the rabbi's negligent professional advice, suffers measurable financial loss. If the inquirer is not a member of the congregation, and the rabbi is thus dispensing his advice gratis, there is no liability. If a person is not a congregant, but pays for the rabbi's services or if he states, "Behold, I rely upon you," rabbinic liability may have been incurred.

Although we have established a halachic basis for clergy responsibility in instances of tortfeasance, we have not defined the contractual expectations of rabbinic counseling competence. To hold rabbis liable, communities would have to formulate minimal standards of care which, barring modification by the rabbi and congregant before entering into a counseling relationship, would apply to rabbis and their congregations. Such standards would have to take into account such issues as rabbis' training in counseling as well as the type of counseling relationship entered into (e.g., a five-minute-telephone call vs. ongoing intensive interaction.) Such standards have not been set in Jewish communities and do not exist in the general community. The California Supreme Court found that clergymen have no legal responsibility for suicide prevention, holding that such a duty may have deleterious effects upon the relationship between the pastoral counselor and the counselee. In the absence of such assumed or prescribed liability, the Jewish court would exempt the clergyman from liability in Nally's suicide.

# Relinquishing Yehudah and Shomron: A Response to Rabbi Bleich

*Rabbi Aaron M. Schreiber*

The current violence and unrest in Israel and pressures from the United States, the Soviet Union, and other countries, have stimulated much discussion about the desirability or necessity to relinquish Yehudah and Shomron (the West Bank) to form some kind of new Arab political entity.

Many views about the halacha concerning this issue have been expressed. One view very different from my own was presented by Rabbi J. David Bleich in his valuable article in a preceding issue of this journal.[1] In the hope that airing divergent views will lead to discussion and clarification of the halacha on this issue, I would like to present a contrary view. This disagrees sharply with Rabbi Bleich's interpretation of certain sources and disputes the reliability of other sources upon which he leans for support. I also disagree with his claim that he expresses the consensus view of the "silent majority of authoritative rabbinic decisors" on this issue. To the contrary, I believe that indeed if there is a majority opinion on this complex issue, it runs the other way. Finally, I will examine a number of crucial halachic elements in the issue of relinquishment upon which Rabbi Bleich did not focus, but which color the entire subject.

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1. "Of Land, Peace, and the Divine Command" p. 56, *Journal of Halacha and Contemporary Society*, XVI (Fall, 1988).

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## The Biblical Obligation Today to Settle the Land of Israel and Expel Its Inhabitants

Rabbi Bleich (p. 63) cites the view of Ramban, one of the foremost Jewish legal and religious authorities of all times, regarding the biblical obligation to conquer the Land of Israel. Rabbi Bleich claims that "according to Ramban's formulation, the oath [of the Israelites, cited in the Talmud *Ketubot*, 111a (author's note, see discussion *infra*)] not to seek a forceable return to the land, may well be reflective not simply of the suspension of the obligation with regard to conquest, but indicative of the abrogation of all communal obligations with regard to the Land of Israel." Ramban however states the very opposite! In very plain language, he sets out his position that *to this day* — *"mitzvot aseh le'dorot; bechol ha'dorot; be'dor min ha'dorot"* — there is still a biblical obligation to conquer the land, expel the inhabitants, and settle the land. Ramban states as follows:[3]

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2. This is one of the oaths discussed in the Talmud there. Another was that the Israelites should not "push the end", e.g., not to press for the coming of the Messiah. The third oath was imposed on the Gentiles not to oppress the Israelites too much. The existence of all three are derived from the threefold reference to oaths in the *Song of Songs* of Solomon.
3. Ramban, Addenda to Rambam's *Sefer Ha-Mitzvot, Mitzvat Asheh* No. 4. Ramban's entire statement is as follows:

מצוה ד' שנצטוינו לרשת הארץ אשר נתן האל יתעלה לאבותינו לאברהם ליצחק וליעקב ולא נעזבה ביד זולתנו מן האומות או לשממה והוא אמרו להם והורשתם את הארץ וישבתם בה כי לכם נתתי את הארץ לרשת אותה והתנחלתם את הארץ אשר נשבעתי לאבותיכם, ופרט אותה להם במצוה הזו כולה בגבוליה ומצריה כמו שאמר ובוא הר האמורי ואל כל שכניו בערבה בהר ובשפלה ובנגב ובחוף הים וגו' שלא יניחו ממנה מקום, והראיה שזו מצוה אמרו יתעלה בענין המרגלים עלה רש כאשר דבר ה' לך אל תירא ואל תחת ואמרו עוד ובשלוח ה' אתכם מקדש ברגע לאמר עלו ורשו את הארץ אשר נתתי לכם, וכאשר לא אבו לעלות במאמר הזה כתוב ותמרו את פי ה', וכן לא שמעתם הוראה שהוא מצוה לא יעוד והבטחה. וזו היא שחכמים קורין אותה מלחמת מצוה וכן אמרו בגמ' סוטה (מד:) אמר (רב יהודה) [רבא] מלחמת יהושע לכבוש דברי הכל חובה מלחמת דוד להרווחה דברי הכל רשות, ולשון ספרי וירשתה וישבת בה בזכות שתירש תשב. ואל תשתבש ותאמר כי המצוה הזאת היא המצוה במלחמת ז' עממין שנצטוו לאבדם שנאמר החרם תחרימם, אין הדבר כן שאנו נצטוינו להרוג האומות ההם בהלחמם עמנו ואם רצו להשלים נשלים ונעזבם בתנאים ידועים אבל הארץ לא נניח אותה בידם ולא ביד זולתם מן האומות בדור מן הדורות, וכן אם ברחו האומות ההם מפנינו והלכו להם כמאמרם (דברים

The fourth biblical commandment [that was omitted by Rambam] is to expel the inhabitants from the land that the Lord, may He be exalted, gave to our ancestors, to Abraham, Isaac and Jacob, and not to leave it in the hands of any other nation, or desolate, as He said to them (Numbers 33:53), "You shall expel[4] the inhabitants and you shall dwell therein because to you have I given the land to inherit it and you shall possess the land . . . that I swore (to give) to your ancestors." And He described the entire land in detail in this commandment with all of its boundaries and borders . . . in order that they [the Israelites] should not leave out any place thereof . . . and do not err and say that this commandment is the commandment to war with the seven nations that they [the Israelites] were commanded to destroy , as it says, "and you shall utterly destroy them." It is not so. We were commanded to destroy those seven nations if they fought with us, but if they desired to make

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רבה פ' שופטים) הגרגשי פנה והלך לו ונתן להם הקב"ה ארץ טובה כארצם זו אפריקא, נצטוינו אנו לבא לארץ ולכבוש (מדינות) הערים ולהושיב בה שבטינו, וכן אחרי הכריתנו העמים אם רצו שבטינו לעזבה ולכבוש להם ארץ שנער או ארץ אשור וזולתם מן המקומות אינם רשאין שנצטוינו בכבושה ובישיבתה, ומאמרם מלחמת יהושע לכבוש תבין כי המצוה הזו היא הכבוש, וכן אמרו בספרי (דברים י"א) כל המקום אשר תדרוך כף רגלכם בו לכם יהיה אמר להם כל המקומות שתכבשו חוץ מן המקומות האלו הרי הם שלכם, או רשות בידם לכבוש ת"ל עד שלא יכבשו א"י תלמוד לומר וירשתם גוים גדולים ועצומים ואחר כך כל המקום אשר כו', ואמרו ואם תאמר מפני מה כבש דוד ארם נהרים וארם צובא ואין מצות נוהגות שם אמרו דוד עשה שלא כתורה התורה אמרה משתכבשו א"י תהיו רשאים לכבוש ת"ל והוא לא עשה כן, הרי נצטוינו בכיבוש בכל הדורות. (ב) ואומר אני כי המצוה שחכמים מפליגים בה והוא דירת ארץ ישראל עד שאמרו כתובות (דף ק'.) כל היוצא ממנה ודר בחוצה לארץ יהא בעיניך כעובד ע"ז שנאמר כי גרשוני היום מהסתפח בנחלת ה' לאמר לך עבוד אלהים אחרים, וזולת זה הפלגות גדולות שאמרו בה הכל הוא ממצות עשה שנצטוינו לרשת הארץ לשבת בה, א"כ היא מצות עשה לדורות מתחייב כל אחד ממנו ואפילו בזמן גלות כידוע בתלמוד במקומות הרבה. (ג) ולשון ספרי מעשה ברבי יהודה בן בתירא ורבי מתיא בן חרש ורבי חנניה בן אחי רבי יהושע ורבי נתן שהיו יוצאין חוצה לארץ והגיעו לפלטיא וזכרו את ארץ ישראל וזקפו את עיניהם זלגו דמעותיהן וקרעו בגדיהם וקראו המקרא הזה וירשתה וישבת בה ושמרת לעשות ואמרו ישיבת ארץ ישראל שקולה כנגד כל המצות.

4. That "expel" is the correct interpretation of the biblical expression here, *"ve'horashtem"* is made explicit in the immediately preceding verse (Numbers 33:52) and in the commentary of Rashi ad loc. *Targum Yerushalmi* and Saadya Gaon translate the word meaning "destroy".

> peace, we would make peace and leave them under certain known conditions, but the land, we should not leave in their hands nor in the hands of any other nations *in any generation (be dor min ha'dorot)* . . . We were commanded to come to the land and to conquer the cities and to settle our tribes therein . . . and from their saying [in the Talmud] "the war of Joshua to conquer" you should understand that this commandment is one of *conquest.* [Ramban then goes on to cite additional talmudic sources] . . . *Thus we are commanded to conquer* [the Land of Israel] *in all generations (be'chol ha'dorot).* And I say that the [biblical] commandment that the sages spoke so highly of, that is the commandment [e.g., the second half of the biblical verse in Numbers 33:53 cited above] to dwell in the Land of Israel until they said [Talmud, *Ketubot* 110b], "He who goes out of it [the Land of Israel] and lives outside of the land should be regarded by you as though he worshipped strange gods . . . and other great praises that they spoke about this, all this is derived from the affirmative commandment that we were commanded to expel the inhabitants from the land and to dwell there. This shows that this commandment is an affirmative [biblical] commandment for all generations obligating each one of us *even during the time of exile,* as is know in many places in the Talmud. (italics added)

Rabbi Bleich apparently feels that since the Talmud mentions the oath of the Israelites not to go up forcibly to the Land of Israel, Ramban could not possibly mean that there still is a biblical commandment to conquer and settle the land today. But Ramban *does* say just that! Apparently, either Ramban regards the oath as an *aggadah,* not halachically binding, or feels that the oath is not binding because the reciprocal oath on the Gentiles not to treat the Jews too harshly (see discussion *infra*) was breached by them, or for some other reason.

Perhaps, Rabbi Bleich relies on Rashbash, [4a] although Rabbi

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4a. *Responsa Rashbash* No. 2.

Bleich does not cite him in his article. Rashbash, after citing Ramban's view, states that the commandment to dwell in the Land of Israel is incumbent upon the individual, whereas the obligation to expel the inhabitants (which implies conquest) is an obligation imposed on the community as such, and does not apply today because of the aformentioned oath imposed on the community of Israel. (Rabbi Bleich, too, propounds this dichotomy on page 63 of his article). While Rashbash does not state so explicitly, it is fair to infer from his words that he believes this to be the view of Ramban too.

This interpretation of Ramban's view is, however, very difficult to square with his plain language. Ramban says explicitly, "We are commanded to conquer [the Land of Israel] *in all generations.*" But the land, *we* should not leave in their hands nor in the hands of any other nation *in any generation*" (emphasis added). The repeated combination of the words, "we" and "in all generations" states clearly that the obligation to expel the inhabitants applies at all times, including in Ramban's own time, which was after the oath was imposed. Ramban seems to include himself as one of those so obligated. Moreover, I have not found any authority other than Rashbash who understands Ramban in this way.

Moreover, even if one were to concede for argument's sake that the oath "not to go up to the Land by force" does apply today, it is arguable that the oath applies only to the Jews who are in the Diaspora, not to Jews already legally (from the halachic point of view) in the Land of Israel. The latter, being already there, do not have to "go up" to the land. This position has been exposited at length by Rabbi Chaim Zimmerman.[4b]

In any case, however, even if the commandment to expel the inhabitants would not apply today because of the oath "not to go up by force", it does not at all follow — as Rabbi Bleich would have it — that the Land of Isreal may be relinquished once it is already

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4b. See his *Torah L'Israel,* page 15 (Jerusalem, 1978).

possessed by Jews as a sovereign nation. Setting out to conquer land one does not own is not the same as refusing to relinquish land that one already has. (See discussion *infra* at footnotes 14-18.)

## The View of Other Torah Authorities About Whether Settling in the Land of Israel is a Biblical Obligation Today

Rabbi Bleich cites a letter allegedly written by R. Yaakov of Lissa (author of *Netivot Ha'mishpat*, etc.) that there is no biblical obligation today to dwell in the Land of Israel. (Rabbi Bleich then concludes that it follows logically that there would then be no obligation of conquest, since the latter obligation is derived from the same biblical verse.) This is not necessarily so. Both Rashi and *Or Ha'Chaim* in their commentaries to Numbers 33:53 maintain that conquest of the Land of Israel is a biblical commandment, although "you shall dwell therein" is a promise, not a biblical mandate.

Rabbi Bleich remarks (p. 57, footnote 3) that "Chaim Bloch who had originally submitted the letter for publication . . . again vouched for its authenticity," and Rabbi Bleich seems to be satisfied by this assurance. Chaim Bloch however, has been persuasively attacked as a forger of anti-Zionist letters, whose three volume collection of such letters, *Dovev Siftei Yeshanim* (N.Y., 1959, 1960, and 1965), is replete with fabrications.[5] A less benign observer than Rabbi Bleich would not be inclined to rely upon Bloch's assurances. Additionally, *Netivot Ha'Mishpat* has been cited by a classic and very reliable commentator as holding a view the very opposite of that expressed in the alleged letter published by Bloch. [5a]

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5. See Shmuel Ha'kohen Weingarten, "*Ziyuf Sifruti*", *Sinai*, vol. XXXXI, p. 122 (1953) cited by Rabbi Bleich; *Id*, *Mikhtavim Me'ziyufim Neged Ha'Zionut* (Jerusalem 1982).

5a. In the alleged letter of *Netivot Ha'mishpat*, he sharply attacks as unauthentic the view set forth in standard editions of Maharit that R. Hayim Kohen held that there is no commandment today to dwell in the Land of Israel. Yet Avraham Eisenstadt, *Pithei Te'shuva*, E.H., Sec. 75, No. 6 cites *Netivot Ha'mishpat* as supporting the view of Maharit. Therer are also at least seven different indications in the text of the alleged letter that it could not have been

Moreover, Rabbi Bleich's apparent conclusion, that the *Chafetz Chaim* also felt that there is no biblical commandment to dwell in the Land of Israel today, is without foundation. An examination of the letter of the *Chafetz Chaim* that Rabbi Bleich cites (from the book by M. Gerlitz, *Mara de-Ar'a Yis-ra'el*, II, p. 27-29, Jerusalem 5734) discloses that the letter neither states nor implies, as Rabbi Bleich would have it, (p. 57) "that in our day the obligation to live in the Land of Israel is no longer incumbent upon us." The cited letter is directed at a totally different issue, *viz.*, whether the Rabbi of a town may move to Israel if this happens to conflict with other norms; particularly, if it would undermine the spiritual life of the town, including public Torah study by the townspeople and it would leave the town without the necessary spiritual supervision, including that of the Mikvah. The issue of biblical norms that conflict with each other in a particular situation is a well known phenomenom discussed throughout the Talmud, and does not imply that either norm is not valid. So, too, here. Although there are norms which conflict with the norm to dwell in the Land of Isreal, that does not at all imply that the norm to dwell in the Land of Israel is not binding today. In fact, the cited letter of the *Chafetz Chaim* expresses the thought that "dwelling in the Holy Land is a very great matter."[6]

Additonally, one cannot easily ignore or dismiss the great weight of authority that living in the Land of Israel remains a biblical commandment today in the view of the Talmud in *Gittin*

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authored by Rabbi Yaakov of Lissa, including that it cites *Shelah* as supporting the view of R. Hayim Kohen, whereas *Shelah* expressly states that the view of R. Hayim Kohen is the view of one solitary authority and that "one should not pay any attention to his words." *(Shelah, Sha'ar Ha'otyot,* Letter *Kuf).*

6. See also *Kovetz Igrot Ha'chazon Ish* (Bnai Brak, 1976) letter No. 152, "The commandment [to dwell in the] Land of Israel was ruled [to be applicable today] by Rambam and Ramban and other authorities, and it is known how much *Chafetz Chaim* of blessed memory, longed to go up [to dwell in] the Land of Israel)."No mention is made that *Chafetz Chaim* disagreed with the view of Ramban (and of Rambam, according to *Chazon Ish*) that dwelling in the Land of Israel remains a biblical commandment today too. Moreover, in cases of controversy between *Poskim, Chafetz Chaim* is usually inclined to follow the

8b, *Ketubot* 110 and 111, and in numerous other places, as understood by such *Rishonim* as Ramban, Rambam (as understood by *Avnei Nezer, Chazon Ish* and others[7]), *Tosafot*, Maharam of Rottenberg, Rosh, *Agudah, Terumat Ha'Deshen*, Rivash, *She'lah, Ma'Harit, Tur*, Tashbatz, Mabit, probably Rif, and Ran, and others[8]. It appears implicit in the codification in *Tur* and *Shulchan Aruch*, (*E.H.* Sec. 75:4) that a husband can compel his wife (and vice versa) to move with him to the Land of Israel on pain of forfeiting her *ketubah*, whereas otherwise, a husband cannot compel his wife to move to another land. It is also the view of a whole host of other *Rishonim* and *Acharonim*, including such diverse fairly recent luminaries as *Chazon Ish*, Gerer Rebbe, *Avnei Nezer* and R. Meir Simcha Ha'kohen. In the face of so many

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stricter view in order to remove all dobut. It would be strange for him to rule that in the case of this particular commandment, dwelling in the Land of Israel is *not* biblically mandated today, despite the view of Ramban (and Rambam, too, according to *Chazon Ish* and *Avnei Nezer* and a host of other authorities). See discussion at footnote 8 *infra*.

7. Letter in *Kovetz Chazon Ish, supra "Responsa Avnei Nezer, Y.D.*, No. 454, No. 4. See *Chatam Sofer, Responsa, Y.D.*, No. 234, and *E.H.* No. 132.

8. Tosafot, *Gittin* 8b, s.v. *Af Al Gav*, and *Bava Kama*, 80b, s.v. *Omer*, (The view of R. Hayim Kohen to the contrary in Tosafot, *Ketubot*, 110b, s.v. *Hu Omer* is dismissed as attributed to him in error by a student, (Maharit, *Responsa, Book II, Y.D.* No. 28), or as a view held by him, alone Y. Horowitz, *Seh'lah I, Sha'ar Ha'Otiyot*, letter *kuf*, also cites Rif and Rosh as holding that the biblical commandment applies today, too); *Responsa* Maharam of Rottenberg, No. 79 (Berlin, 5651) or No. 199 as cited by Maharit, *supra; Responsa* Rivash, No. 101 and 387; *Repsponsa* Tashbatz, Vol. 3, No. 288; *Responsa Mabit*, I, No. 139; Yehuda Ashkenazi, *Be'er Hetev* and Avraham Eisenstadt, *Pitchei Te'Shuva, E.H.*, Sec. 75:4. See the extensive annotations on the issue in H. Benebashti, *Knesset Ha'Gedolah, E.H.* Sec. 75, No. 25, and *Sdei Chemed*, section on *Eretz Yisrael*, that, "Most authorities view the biblical norm regarding dwelling in the Land of Israel as applicable today." He believes, however, that one is not obligated to dwell there, but that one who does fulfills the biblical norm (*Iggerot Moshe, E.H.* No. 102, 1961). This seems inconsistent with the Talmud, *Ketubot*, 110b and *Shulchan Aruch, E.H.* Sec. 75, that a husband can *compel* his spouse to go up and dwell in the Land of Israel and have her forfeit her *Ketubah* if she refuses. Ordinarily a husband may not even be *permitted* to move to another country without his wife's consent. See Rabbi Ovadiah Yosef *"Mitzvat Yishuv Eretz Yisrael Bazman Ha'Zeh"*, *Torah She'Baal Peh*, p. 34, (Jerusalem 1979).

authorities, reliance on two solitary letters (one of them of dubious authenticity) seems misplaced. At any rate, there is no majority view, silent or otherwise, neither in numbers nor in weight, that dwelling in the Land of Israel today is not biblically mandated. If there is a majority opinion, it would seem to incline the other way, namely, that the biblical mandate applies today as well.

## The Oath Not to Go Up From Exile to the Land of Israel by Force

Rabbi Bleich (p. 61) discusses the oath, which according to the Talmud (*Ketubot* 111a) was imposed upon the Israelites, "*She-lo Ya'alu Be'chomah*", not to attempt to return to the Land of Israel by forcible conquest.

Rabbi Bleich concludes that "many and probably most rabbinic scholars maintain" that the oath "*she-lo ya'alu be-chomah*", is not simply exegetical *aggadah* but is also binding halacha. This, however, is disputable. Rabbi Herschel Schachter, who has surveyed the literature, concludes in the same issue of the *Journal* as Rabbi Bleich's article (p. 88) that "possibly the majority of Torah leaders at the time of the Second World War were of the opinion that the prohibition [i.e., the oath] if it ever existed, was no longer binding." Many scholars felt that the oath was simply *aggadah*, and never was binding. It is not included in any of the authoritative Jewish Law Codes, including Rambam's *Yad Ha'chazaka*, the Rif and the Rosh (the three widely acknowledged "pillars" of halachic decision making) nor is it in the Mordechai or in the *Shulchan Aruch*.[9] Others, (e.g., Rabbi Meir Simcha Ha'cohen, *Ohr Sameach*)

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9. See Rambam, *Iggeret Taimon*, at end (p. 55, Jerusalem, 1922 Edition) that the term "oath" as used in the Talmud here is only a "*mashal*" (metaphor) rather than a literal binding oath. It is noteworthy that Rambam who omits mention of the oath and of the saying of Rabbi Elazar about it (*Ketubot* 110b), does cite a different saying of Rabbi Elazar in this connection that, "He who dwells in the land of Israel remains without sin" (*Laws of Kings*, 5:12). See also R. Chayim Vital, *Etz Chayim*, Introduction, who claims that the oath was binding only for one thousand years; *Responsa Avnei Nezer* Y.D. 454 No. 4. See, S. Aviner, *Shelo Ya'alu Ba'choma*, XX, *Noam* (1977).

maintained that it is no longer applicable since the land had, in his time, been given voluntarily to the Jewish people by the nations of the world at the San Remo Conference.[10] In our time, the present State of Israel was peaceably brought into being by the nations of the world in a vote at the United Nations. The West Bank territory was captured by Israel in its *defensive* war of 1976 (not the aggressive war, which seems to be alluded to by the oath). Additionally, the Gentiles had breached the reciprocal oath upon them not to treat the Jews too harshly, which, some Rabbis maintain, frees Jews of their oaths. Moreover, it is arguable that the oath not to "go up" by force to the Land of Israel applies only to Jews who are in the Diaspora, not to Jews who are already in the Land and do not have to "go up" there.[10a] I simply cannot agree with Rabbi Bleich that there is a "consensus of Torah scholars" that the oath is applicable today and is halachically binding. Finally, even if the oath "not to go up by force" were to be binding, it does not follow that the Jewish people are required to relinquish the land which they already possess, even if they have to use force to retain the land.

## Rabbi Yochanan Ben Zakkai's Alleged View Regarding War to Retain the Land of Israel

Rabbi Bleich (p. 62) cites the position of R. Yochanan ben Zakkai who urged surrender upon the leaders of the Jewish revolt in Israel against Rome (circa 70 C.E.) as allegedly establishing an "historical precedent [which] clearly establishes that war for retention of territory or sovereignty is not halachically mandated, or at least, is not always halachically mandated . . . He [R. Yochanan ben Zakkai] must have regarded any continuing obligation with

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10. Z.A. Rabiner, *Maran Rabbenu Meir Simcha Ha'cohen Ztz"l*, p. 163 (Tel-Aviv, 1967) See also, R. Yaakov Kanevsky's *(Kehilat Yaakov)* letter cited in *Kerina D'Igarta*, No. 205.

10a. Rabbi Yitzchak I. Herzog *"Al Hakamat Ha'Medina U'milhamoteha"*, *Techumin*, p. 13,18 (5743); see R. Shlomo Kluger, *Maaseh Yedai Yotzer* (commentary on the Passover Haggadah) s.v. *ve'et la'chatzenu zeh ha'dechak;* Rabbi Chaim Zimmerman, *Torah L'Israel*, p. 15 (Jerus. 1978).

regard to preservation of a Jewish homeland as suspended in the face of danger." (p. 63)

As Rabbi Bleich himself explains, the ambiguous talmudic references to Rabbi Yochanan ben Zakkai's opposition are not mentioned until it became obvious that the war against Rome was futile. The ambiguous references in the Talmud concerning Rabbi Yochanan ben Zakkai's views may be understood to be that he urged surrender simply because he became convinced that the position of the beleaguered Jews in Jerusalem was so untenable that further war was futile. His opposition to the war with Rome is mentioned in the Talmud only when the position of the Jews apppeared hopeless to him. Rabbi Yochanan ben Zakkai then hoped that surrender to the Romans would result in preserving the Temple, in saving lives, preventing further destruction, and in retaining whatever small measure of rights in the Land of Israel that the Romans had previously permitted the Jews. There is no proof that in general he was opposed to a war to preserve a Jewish homeland, or that he believed, as Rabbi Bleich puts it, that "war for the retention of territory . . . is not halachically mandated or at least, is not always halachically mandated" or that "preservation of a Jewish homeland is suspended in the face of danger."

Moreover, mere danger could not have been a factor since Rabbi Bleich himself cites the persuasive view of *Minchat Chinuch* and others that danger to life does not exempt one from the biblical commandment to conquer the Land of Israel. The very nature of the commandment to wage war implies an obligation to put one's life at risk. Even according to Rabbi Bleich, there would be no question that the biblical commandment to conquer the Land of Israel applied during Rabbi Yochanan ben Zakkai's time (as was the case with the biblical Yiftah, who went to war with the Ammonites to avoid ceding part of the Land of Israel, pursuant to their demands; Judges, Chap. 11). The situation then was unlike Rabbi Bleich's claim regarding contemporary times, since the Temple was still standing and the center of Jewish settlement was in the Land of Israel when he urged surrender. Accordingly, Rabbi Yochanan ben Zakkai could not have held that danger to life suspended the biblical obligation to wage war for the Land of Israel.

Thus, Rabbi Yochanan ben Zakkai's ambiguous position cannot be applied to the issue of relinquishing Yehudah and Shomron today, unless one is convinced that to retain them is absolutely hopeless and constitutes a great danger to life, which could be obviated by relinquishing them. The opposite may, however, be the case. There is serious reason to believe that relinquishing Yehudah and Shomron today would cause a greater danger to life of the Jews in Israel (let alone to the very existence of the State of Israel) than relinquishing that territory.

## The Analogy of the Biblical Case of a Burglar to Arab Demands for Relinquishment of Yehudah and Shomron

Finally, Rabbi Bleich (p. 64-67) goes into an extended discussion in which he analogizes defensive wars to retain the Land of Israel to the norms that apply to a burglar who tunnels into a house (*ba ba'machteret*). As codified by Rambam, the latter may be killed by the householder, as contrasted with the case of the *Rodef* (one who comes to kill) whom one *must* kill (if there is no other way to stop him from his murderous intent). Rabbi Bleich (p. 66) attempts to resolve the alleged "apparent contradiction in Rambam's Code" by asserting that the householder" . . . will be quick to recognize that all danger to his life will dissipate if he surrenders his possessions without offering resistance" and thus avoids the possibility of a murderous struggle with the burglar. Rabbi Bleich then continues, "if he [the householder] is emotionally capable of responding in such a manner, is he then not obligated to do so? . . .if so, the householder in control of his emotions should be advised that he is duty bound to surrender his possessions and, indeed, should he eliminate the aggressor instead, he will be culpable in the eyes of Heaven." Rabbi Bleich then goes on to equate the problems of Israel in Yehudah and Shomron with the problem of the burglar. He says, (p. 69) "the application of these principles to the current debate concerning 'land for peace' is perfectly obvious. What is true for the individual is true for a community or a nation as an aggregate of individuals . . . there is no duty to defend property interests in the face of danger to life." This

implies that halachically, the State of Israel may be obligated to surrender Yehudah and Shomron and not resist demands that they be handed over to Arabs.

Plainly, however, in the real world, submissive surrender to the tender mercies of a burglar can be fraught with grave danger. There are numerous cases where burglars who are not threatened with any harm, nevertheless rape, maim, or kill innocent victims. While the alternative of surrender to a burglar might, perhaps, be acceptable in an idealized world, it is not to be easily recommended in the real world. Neither is the surrender of Judea and Samaria to be recommended so facilely, without contemplating the possibly gruesome ramifications.

Moreover, the apparent "contradiction" cited by Rabbi Bleich in Rambam's Code, which led him to recommend the consideration of surrender, is resolved by the commentators in a much simpler fashion. After all, the burglar in the biblical example entered the house with the intention only to rob. He may *become* a murderer if he becomes involved in a struggle with the householder. Accordingly, he is viewed only as a *potential* murderer. The applicable talmudic norm is, therefore, that the householder *may* kill him, as a measure of an aggressive self-defense. (The Talmud, according to one view, regards the Bible as, in effect, even urging the householder to slay the burglar and applies to him the saying "he who comes to kill you, arise and kill him." *Sanhedrin*, 72a) The *Rodef*, on the other hand, is one who comes with an actual intention to kill. Accordingly, one is *obligated* to kill him (if there is no other way to stop him).[11] Carrying the analogy forward to the problem of violence by Arabs in Yehudah and Shomron who demand that Israel surrender the lands under the threat of continued and escalating violence, would lead to the alternatives that Israel either *may* or *must* use lethal countermeasures, not the alternative of meek surrender suggested by Rabbi Bleich.

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11. Y. Ettlinger, *Aruch L'ner, Sanhedrin* 72b. See also Ran, *Sanhedrin* 72b and 73a; *Chayim Al'gazi, Baya Haya, Sanhedrin*, ad loc. The Talmud, (*Sanhedrin* 72b), does call a burglar a *Rodef*.

## The Majority View of Contemporary Torah Scholars on Relinquishing Part of Eretz Yisrael

Rabbi Bleich claims that he expresses the consensus view of Torah authorities on the issue of relinquishing part of the Land of Israel to form an Arab state. Of course, no conclusion can be reached about what the majority view is without taking a poll. No poll is cited by Rabbi Bleich to support his conclusions.

Fortunately, however, a poll of sorts was taken of Torah authorities on this issue some fifty years ago. This survey disclosed the majority view to be precisely the opposite of that claimed by Rabbi Bleich.

In 1937, Great Britain established the Peel Commision to make recommendations concerning the political future of Palestine in the aftermath of the Arab riots of 1936. The Commission, after a number of hearings, recommended that the land be divided into three parts; an Arab state, a Jewish state, and a British mandatory area.

The question then arose (as in the aftermath of the Arab riots today) whether it was halachically possible to agree to the formation of an Arab state in part of the Land of Israel. Mr. Daniel Sirkis, a prominent and public-spirited Jew, sent letters to numerous Torah authorities soliciting their views on this issue. Their letters of response were published in a book.[12]

The issue also arose at the convention of Agudath Israel in Marienbad, Czechoslovakia, in 1937, in which numerous leading Torah authorities participated. The issue was also discussed at the convention of Agudat Harabonim of America, which consisted of leading Torah scholars under the presidency of Rabbi Eliezer Silver of Cincinnati.[13] A scholar who studied the issue and the foregoing episodes and published a book about it[14] concluded, that "most of the Rabbis took an emnphatic position that division [of the Land of

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12. Pinchas Sirkis, *Daniel Sirkis Z"l, His History and Work* (Jerusalem, 1977).
13. Itamar Warhaftig, *"Emdat Rabbanim Be'Pulmus Halukhat Ha'Aretz, 5697"*, *Techumin*, p. 269 ff (Elon Shvut, Gush Etzion, 1988).
14. Shmuel Dotan, *Pulmus Ha'haluka Be'Tkufat Ha'Mandat*, (Jerusalem, 1979).

Isreal] is prohibited by the Torah. The boundaries of the Holy Land were set down and sealed by the Creator of the world and one may not change them or waive [rights to] them."[15]

Among the Torah authorities who took a strong position that it is biblically prohibited to relinquish any part of the Land of Israel were the renowned *Geonim*, Rabbis Yaakov Moshe Charlap, Zvi Pesach Frank (*Av Bet-Din* of Jerusalem), Yechiel Michel Tikuchinsky, Menachem Ziemba, Avraham Alter (the Hasidic Rebbe of Ger) and Moshe Amiel (Chief Rabbi of Tel-Aviv). The Gerer Rebbe pointed to the biblical verse in Joel 4:2, "And I will gather all of the nations and I will bring them down to the Valley of Yehoshafat and I will take them to account for my nation and possession which they dispersed among the nations and for dividing my land."

At the convention of Agudath Israel in Marienbad, except for the views cited above by Rabbi Menachem Ziemba, the Rebbe of Ger, and a few others, there apparently was not a sharp focus on the issue of whether it was halachically permissible to relinquish a claim to part of the Land of Israel. The crux of the discussion centered essentially on the issue of whether to have a Jewish state before the advent of the Messiah, particularly if the state would not follow the norms of the Torah. As the Political Secretary of Agudath Israel, who was also a member of its Executive Committee, put it, some argued that "in the name of the halacha, the boundaries of the land were commanded to us in the Torah and it is forbidden to waive [ownership of] even a part of the Holy Land." Those in favor of accepting the Peel Commissions's recommendations argued that acceptance "was not waiver since the land is not in our possession for us to waive [ownership of] a portion of it. We must accept what we can get and claim the balance that belongs to us." (The parallel with the position of the PLO today is striking). The convention, in an attempt to quiet the sharp dispute that erupted among various factions, adopted only some very general resolutions, and did not decide specifically on the halachic issue of

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15. Ibid. p. 309.

relinquishment. The issue was glossed over at the convention for an additional reason. In the Fall of 1937, with the growing belligerence of Nazi Germany, many of the rabbis at the convention felt that there was a crucially urgent need to have a Jewish state, however small, to which the Jews of Europe could flee if the need arose. They accordingly focused their attention on that point.[18]

At the convention of Agudat Harabonim in Atlantic City in 1937, under the leadership of Rabbi Eliezer Silver of Cincinnati, a leading figure in Agudath Israel of America, a resolution was adopted which apparently was felt to be consistent with the position of Agudath Israel. This provided in part, "We Rabbis, our hearts are broken by the evil decree to divide the land into slivers, which [decree] fell like thunder upon the Children of Israel. We proclaim that the division which is being made of our land constitutes a robbery and bespoiling of our people. We cannot, according to our Torah, waive [rights to] a foot breadth of our Holy Land."[17]

Thus, the majority of Torah scholars in 1937 (who are generally felt to have been greater in learning and piety than those today) held that it was biblically prohibited to relinquish even a mere claim by Jews to part of the Land of Israel, although the Jews did not control or have a state in that land. If it is prohibited to relinquish a mere claim to part of the Land of Israel, then *a fortiori*, it would be reasonable to conclude that it would certainly be prohibited to relinquish land which is actually controlled and ruled by Jews, as the situation is today. Moreover, many of those

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16 Hillel Seidman, *Likrat Tekumat Ha'Medina"* page 228, 231 in S. Federbush, Edit., *Torah U'melukhah* (Jerus., 1961); see the formal proceedings of the convention in XI *Ha'Pardes*, no. 7, p. 8 (1937); *From Katowicz to Jerusalem* (Tel-Aviv, 1954); M. Kasher, *Ha'Tekufa Ha'Gedolah*, pp. 200-201 (Jeruslam, 1972); Itamar Warhaftig, *supra*, Note 13. See the views expressed by Rabbi Chaim Ozer Grodzinsky of Vilna in his letters reproduced in Itamar Warhaftig's article, *supra*. His position on the issues are not completely clear except perhaps that he seemed to think that the prohibition of *lo tichanem* might apply today to relinquishing part of the Land of Israel.

17. XI *Ha'Pardes*, No. 5, p. 7(1937).

authorities who would have permitted the relinquishment of a mere claim in the Fall of 1937, did so in order to have a Jewish state in at least some part of the land which could serve as a place of refuge for the Jews in Europe. It should be recalled that in the Fall of 1937, Jews in Europe already felt the Nazi knife at their throats. So, too, a number of authorities felt that since the Jews had no control over any part of the land, there was no harm in accepting whatever sliver of land they could obtain.[18] On the other hand, the dangers that exist today to the lives of the Jews in Israel and to the existence of the State of Israel and other factors are different than the situation as it was in 1937.

## Halachic Elements of Relinquishment Upon Which Rabbi Bleich Did Not Focus

### (a) Religious Perspectives

In Jewish law, as in all vibrant legal systems, values and policy considerations are crucial in reaching legal decisions.[19] Mechanical reliance on legal doctrines alone can result in decisions that frustrate basic religious goals. Consequently, Jewish religious perspectives concerning the importance and role of the Land of Israel and its retention must be considered in the calculus of decision about whether parts of the Land of Israel may be relinquished. This crucial element is missing in Rabbi Bleich's discussion. Possession of the Land of Israel has a special and unique place in the Jewish religious tradition. The importance of retaining the land is, perhaps, best reflected in the comment of Rashbam (in his commentary on Genesis 22:1). He understands the phrase, "*nisa et Avraham*" to mean not that, "G-d tested Abraham", but that G-d pained (or caused trouble, as in the phrase *masa u'meriva*) Abraham on account of the convenant that Abraham had just made with Avimelech, King of the Philistines, to permit the latter's

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18. Itamar Warhaftig, *Supra*, note 13.
19. See A. M. Schreiber, *Jewish Law and Decision Making* (Temple U. *Ozar Vikuchim*, p. 87a.

descendants to remain in the land and to retain control of the land that they occupied. Rashbam says:

> After Abraham made a treaty with Avimelech, with him, his children, and grandchildren of Abraham, and [Abraham] gave him seven sheep, [this] kindled the wrath of God concerning this because the land of the Philistines had been given to Abraham . . . And so I found later in the *Midrash Shmuel* . . . "G-d said to him [Abraham], you gave seven sheep to him, [I swear by] your life that his children will make seven wars on your children and will conquer them; another intrepretation is, [I swear by] your life that his children will kill seven just men of your children, and these are they: Sampson, Hafni, Phineas, [King] Saul and his three sons; another intrepretation is, [I swear by] your life that his sons will destroy seven tabernacles, and these are they: the tabernacle [in the desert], in Gilgal, Nov, Shiloh, Givon, and the two Temples [in Jerusalem]

Rashbam's understanding of this Midrash implies that nearly all of the immense death and vast suffering of the Jewish people, including the death of untold millions of Jews caused by the destruction of the two Temples and their aftermath of exile and dispersion, were a direct punishment and result of Abraham's relinquishment of part of the Land of Israel to the Philistines! While the Midrash is *aggadah* and, as such, not halachically binding,[20] nevertheless a Midrash which attributes such dire results to relinquishing part of the Land of Israel is not to be dismissed out of hand.

The central religious importance of retaining the Land of Israel in the hands of Jewish people is also reflected in the following: the most severe punishment of the Jewish people recorded in the Pentateuch, (Numbers 14:23,29) was the mass death of all of the adult Israelite males in the Sinai Desert. This was imposed upon the

Israelites when they spurned G-d and expressed the wish to relinquish the Land of Israel and return to Egypt following the report about the land given by the spies sent by Moses. No other Israelite sin received such severe sanction. Even the worship of the Golden Calf was somewhat forgiven, or at least, punishment was suspended. There was no forgiveness, however, even after repentance, for the expressed desire to relinquish the Land of Israel.

Additional talmudic and rabbinic teachings in this vein include: those that dwell outside of the Land of Israel are regarded as though they are idolators;[21] danger to life, which permits setting aside all biblical obligations (except for the three basic ones of idolatry, adultery and murder), is not considered in requiring the fulfillment of the obligation to conquer the land;[22] the view of the *Sifri* quoted by Rashi and Ramban (Deuteronomy 11:18), that all of the biblical commandments were intended to be performed primarily in the Land of Israel and were commanded to be performed elsewhere only so that they should not be forgotten when Jews returned to the Land of Israel; the view that if there are no Jews in the Land of Israel, all religious holidays, and indeed, the entire Jewish religion would be vitiated;[23] the mention of the Land of Israel in nearly every chapter of the Pentatuch; the writing and addition of the Book of Genesis to the Pentateuch for the purpose of proving to non-Jews that the Land of Israel was allocated by G-d to the Jewish people, so that Gentiles might not claim, "You are bandits who took the land by force"[24] (which is the very first teaching made by Rashi in his famous commentary to the Pentatuch); the fact that at least one-half of the Talmud is devoted to commandments which can be performed completely, if at all, only in the Land of Israel. Similarly, a very substantial proportion

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21. Talmud, *Ketubot* 110b.
22. See Y. Babad, *Minchat Chinuch*, No. 425. For other citations see Rabbi Herschel Schachter, "Land for Peace", XVI *Journal of Halacha and Contemporary Society, XVI*, (Fall, 1988) p. 74.
23. Rambam, *Sefer Ha'Mitzvot*, No. 153, See *Chatam Sofer, Responsa, O.H.* No. 203.
24. *Midrash Tanchuma*, Genesis 1:1.

of biblical commandments apply only there; specifically, there is also the biblical prohibition of *lo ti'chanem*, prohibiting the sale of land to non-Jews in the Land of Israel. The only time that the rabbis in the Talmud waived the prohibition against directing a non-Jew to perform a biblically-prohibited act on the Sabbath was the unique dispensation that one may direct a non-Jew to execute a document for a Jew to acquire land in the Land of Israel even on the Sabbath. This is not permitted for any other biblical commandment.[25] Even the existence of the long Jewish Diaspora with its immense suffering has been attributed to the failure of the bulk of the Jewish people to return to the Land of Israel, and to settle there.[26]

Moreover, the Land of Israel although an inert geographic entity, is viewed almost as though it were a live person possessing human attributes, to which one should extend tender, even passionate, love and care. Thus, the spies sent by Moses were killed, in part, because they spoke evil of the Land (*dibat ha'aretz*, Numbers 13:32, 14:36)37), although the land is merely a collection of inanimate matter. Slander of the land is thus placed on a par, if not worse than, slander of a human being, and the identical words *(hotzi dibah)* are used in the Bible to express the notion of slander of the Land as are used elsewhere in the Bible for slander of a person.

Moreover, the Land of Israel is said to possess a human-like attribute in that it will "vomit" sinners (Leviticus 18:28, 20:22). The *Sifra* (Leviticus 20:22) expresses itself similarly in utilizing the phrase, "the Land of Israel cannot tolerate sinners." So, too, the Land is said not to tolerate and permit non-Jews to settle successfully there for any length of time, and this explains why the Land remained desolate for such long periods after the Jews were expelled from there by the Romans.[27] Similarly the Land is said to

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25. Tosafot, *Gittin* 8b, s.v., *Af Al Gav*, and *Baba Kama* 80b, s.v.
26. R. Yaakov Emden, Commentary *Sulam Beth El* to Siddur p. 13a in standard editons.
27. *Torat Kohanim* 6:15; Commentary of Ramban to Leviticus 26:32.

produce less and smaller fruits for non-Jews.[28] Contrariwise, the Land is said to yield its fruits and crops most readily to Jews, and fruitful hills are said to be harbingers of the coming of the Messiah and the return of the Jewish people to the Land of Israel.[29] So, too, the Land is said by the Talmud to literally stretch out in size to accomodate more Jews, but to contract when they are gone.[30]

## (b) Geo-Political Factors

There are other factors to be weighed which were not dealt with by Rabbi Bleich, but which are crucial to halachic decision-making concerning relinquishment of land. These include geo-political factors of which the halacha has traditionally been cognizant. For halachic decision-making as well as for *realpolitik*, one cannot ignore the political context in which the State of Israel presently exists. Surrounded by hostile neighbors, Israel might be in even greater danger were she to cede more territory to her sworn enemy, the PLO.

The same considerations that give rise to political opposition to the relinquishment of territories give rise to halachic concern, although the halacha utilizes different terminology, and categories of thought, and focuses also on spiritual concerns. Does ceding territory pose a threat to life, a prime consideration of halacha? Does it pose a danger to the very existence of the State of Israel, and does this, in turn, create a threat to the lives of Jews in Israel, and, perhaps elsewhere? After all, it is not that long since millions of Jews were killed because they had no place to which they could flee for refuge. Would dismemberment of the State of Israel result in a vast *chilul ha'shem* (profanation of G-d's name), in seeming to negate Jews as G-d's chosen people and, perhaps, demeaning G-d Himself as their protector? After all, the very existence of the State and its control of holy places recognized by all three religions, is said to constitute a great *kiddush ha'shem* (sanctification of G-d's

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28. Talmud, *Ketubot* 112a.
29. Talmud, *Megilla*, 17b., *Sanhedrin*, 98a.
30. Talmud, *Sanhedrin* 20b, *Sotah* 44b; Rambam, *Laws of Kings* 5:1,2

name) in refuting Christian and Islamic theology which relegates Jews to a fate of persecution or lower status because they refused to convert to these religions. Similar concerns were forcefully stated by the biblical prophet Ezekiel, in chapters 25, 36, 39 and other places of his collected prophecies. There is additionally the danger that Islamic fundamentalists, if they acquire the power to do so, would persecute Jews (as is the case with religious and ethnic minorities in Arab countries and in Iran) and would actively restrict Jewish religious practices or even push for religious conversions to Islam.

Aside from the halachic issues of danger to life, profanation of G-d's name, and the biblical mandate to conquer the Land of Israel (as exemplified by the view of Ramban, *supra*), do the geo-political factors listed above compel resistance pursuant to the halachic norm of *milchemet mitzvah* (a religiously-obligated war) against Arab threats and demands to relinquish land?[30] The halacha at times requires resistance even to mere demands by Gentiles to hand over insignificant items, such as small amounts of straw, because compliance may lead to more demands.[31] Is resistance required even if there is only the mere possibility of a threat to life *(safek pikuach nefoshot)* that arises because giving up land makes more feasible terrorist incursions, launching of rocket attacks, missiles with chemical and biological warheads, etc.? Is refusal to relinquish land required by the talmudic norm that one should keep at a distance factors that may cause harm to well-being or that are likely to cause monetary damage?[32] Should a solemn convenant be entered into to exchange land for "peace" if this treaty may be broken, as has been the case with numerous convenants in the Middle East over the past half century? Is there any point to such an exchange if there is no assurance that peace would follow? Halachic decisions on these issues will be shaped to a very significant extent by geo-political factors and the way they are appraised.

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31. Talmud, *Eruvin* 45a; Rambam, *Laws of Sabbath* 2:23; *Shulchan Aruch, O.H.* Sec. 329:6

32. *Talmud, Baba Batra,* 17a, *Shulchan Aruch Choshen Mishpat,* Sec. 155.

On the other hand, is there an equal, or perhaps greater, danger to life and to the existence of the State of Israel, resulting from retention of Yehudah and Shomron? After all, there is the implicit threat of continued violent protests, including gasoline bomb attacks, and the possibility that retention of lands will ultimately lead to war with Arab states. In the face of serious dangers emanating both from relinquishment of territories, as well as from their retention, does the talmudic dictum apply that in cases of doubt "it is better to sit and not undertake action"?[33]

This entire complex of issues are all part of the halachic decision process and must be weighed carefully before any halachic decisions can be reached on this complicated subject. As Rabbi Yosef Dov Soloveichik allegedly put it (although attribution to him may be apocryphal) in regard to the issue of war v. peace during the political tensions in 1967, "this issue will be halachically decided *(paskened)* after the assesment of General Moshe Dayan." Both Rabbi Eliezer Shach and Rabbi Menachem Schneerson (the Lubavitcher Rebbe), who are otherwise poles apart on so many issues, have been quoted as agreeing that appraisal by qualified experts of such geo-political factors are required for a halachic decision on this complicated question.[34] Addressing and resolving the aformentioned geo-political concerns is absolutely crucial for the halachic decision-making process.

## Conclusion

I do not believe that Rabbi Bleich is correct that he expresses

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33. Talmud, *Eruvin,* 100a.
34. This article has not focused on other halachic issues, such as the view of a number of authorities that it is biblically prohibited to permit an enclave or mass of non-Jews to dwell in the Land of Israel (see, *Sifri,* Deuteronomy 23:17, and commentaries of Rabbenu Hillel, *Meir Eiyin,* and *Zayit Ra'anan* ad loc; see also *Torat Kohanim,* Leviticus 25:35, Rambam, *Yad Ha'Hazakah, Law of Idolators* 10:6), or the bibilical prohibition of *lo tichanem* which forbids conduct facilitating settlement even of individual Gentiles in the Land of Israel (Talmud, *Avoda zara* 19b). See footnote 16, *supra* regarding the view of Rabbi Chaim Ozer Grodzinsky on this issue.

the consensus view of the majority of Torah authorities on the issue of relinquishing part of the Land of Isreal. If there is, indeed, a consensus, or majority view on the relevant issues, it seems to run the other way. The sources that he cites are either unreliable or unpersuasive. Additionally, Rabbi Bleich's article does not focus upon the fact that the Land of Israel occupies a unique and central role in the Jewish religion, both halachically and ideologically and is the subject of intense religious emotional feeling. Accordingly a halachic decision concerning relinquishing the heartland of the Land of Israel cannot be made on the basis of a purely cold, analytical and dispassionate process without considering religious perspectives, policy and passions on this issue. The decision process concerning relinquishment of the Land of Israel is not the same as would be if the issue were whether or not to give up New York, Chicago or Melbourne.

# Withdrawal From Liberated Territories as a Viable Halachic Option

*Rabbi J. David Bleich*

*Chazal* were endowed with penetrating insight into the workings of the human psyche. The veracity of that observation is virtually self-evident to any student of rabbinic literature. Nevertheless, there are occasions upon which one experiences the astuteness of a rabbinic psychological observation as a forceful and self-demonstrating phenomenon. *"Ahavah mekalkelet et ha-shurah* — Love ruins the straight line," declared the Sages of the Midrash *(Bereishit Rabbah* 55:11). Professor Schreiber's response to my article reflects a highly laudable love of *Eretz Yisrael.* Unfortunately, that love has caused him to misconstrue a simple line of argumentation.

The central thesis of my article is that it is halachically legitimate to barter "land for peace" if doing so will preserve the lives of the inhabitants of *Eretz Yisrael.* That, in turn, is based at least in part upon the premise that there is no obligation to engage in a war of conquest for the establishment of a Jewish homeland within the geographic confines of the Promised Land. I further wrote that I believe this view is shared by the majority of authoritative halachic decisors.

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At the time that those lines were written, the latter statement could not have been more than an impression. Subsequent to the publication of my article and prior to the submission of Professor Schreiber's response, we have witnessed an Israeli election campaign as well as protracted negotiations for the formation of a coalition government. In both the election campaign and in the coalition negotiations prospective policy with regard to the liberated territories was by far the most hotly debated issue. No less than six "religious" parties were keen participants in the electoral process. Four of those parties were ardently wooed by both of the front-running parties as coalition partners. Not a single one of those parties ran on a platform calling for abandonment of a peace process that would entail surrender of territory. In fact, one of those parties came into being only because of its advocacy of a platform calling for return of territories as a means of achieving peace in the region. During the entire course of lengthy and complicated coalition negotiations, not one of those parties demanded a commitment to retain Judea and Samaria in their entirety. Each of those parties formulated its platform with the guidance and tutelage of prominent rabbinic mentors, many of whom played an active role in political campaigning. The entire process received extensive media coverage. Not a single rabbinic voice was reported as having been raised in dissent or admonition. Never was an *argumentum ad silentio* so loud or so clear! The deadening silence must surely indicate that return of territory, at least under some circumstances, may be accepted with halachic equanimity.

I utterly fail to see any connection between the issue of "land for peace" and the refusal to accept a policy of territorial compromise in the late 1930's. Then the issue was whether claims and demands might be compromised; the issue today is *pikuach nefesh*. Moreover, as Professor Schreiber himself reports, "many of the rabbis at the convention" were willing to compromise because they felt "that there was a crucially urgent need to have a Jewish State, however small, to which the Jews of Europe could flee if the need arose," i.e., they were willing to accept territorial compromise because of considerations of *pikuach nefesh*.

My contribution to the pages of the *Journal of Halacha and Contemporary Society* was a modest effort designed to demonstrate that there is no obligation, in our historical era, to engage in a war of conquest in order to secure any portion of *Eretz Yisrael* and that territory already secured may be relinquished for reasons of *pikuach nefesh*. Both points were demonstrated on the basis of a variety of sources and arguments, some of which have now been challenged by Professor Schreiber.

1. The very first point made in establishing the absence of an obligation to engage in a war for the conquest of *Eretz Yisrael* is that the authorities who do not regard the commandment "and you shall dwell therein" (Numbers 33:53) as binding in our day would certainly not regard the antecedent admonition "and you shall inherit the land" as remaining in force. Professor Schreiber objects that Rashi maintains "that the conquest of the Land of Israel is a biblical commandment, although 'you shall dwell therein' is a promise, not a biblical mandate." I believe that the second portion of Professor Schreiber's comment represents an incorrect reading of Rashi. It is simply not true that Rashi regards "you shall dwell therein" to be a promise. Such an interpretation of the verse is cited anonymously by Ramban, but is not to be found in Rashi. Rashi interprets the verse as follows: "You shall cast out the inhabitants, then you will be able to dwell therein. If you do so, then your dwelling therein will be permanent in nature. But if not — if you do not first cast out the inhabitants — then you will be unable to remain there." According to Rashi, the passage is to be construed as constituting prudent advice. Rashi understands the verse as informing us that if we wish to remain in the Land of Israel, there is but one way of doing so. If Jews are to enter the land and allow the Canaanite populace to remain, Jewish habitation of the land will not be tranquil and will not long endure. In order to achieve permanence and security our ancestors are advised to displace the indigenous populace.

Whether or not "you shall inherit the land" constitutes a mitzvah according to Rashi is not as clear. Ramban begins his commentary on the verse by declaring that, in his opinion, it does constitute a mitzvah and then proceeds to state "But Rashi

understood 'you shall inherit . . .,' " i.e., Ramban cites Rashi as contradicting his view. Ramban thus clearly understands Rashi as interpreting the entire verse as prudent advice, not as a mitzvah. Similarly, Seforno, clearly paraphrasing the words of Rashi, renders the verse as meaning: "When you will annihilate the inhabitants of the lands then you will be privileged to cause your children to inherit the land." Thus, Seforno also agrees that Rashi does not understand "you shall inherit the land" as constituting a mitzvah. *Or ha-Chaim* correctly emphasizes that, according to Rashi, "and you shall dwell therein" constitutes a mitzvah. *Or ha-Chaim* cites Rashi in opposition to Ramban but his elucidation is, at best, imprecise.

Much more significant, although, in and of itself, hardly dispositive with regard to the issue of whether the return of territory is permitted in order to avoid bloodshed, is whether there is a normative halachic obligation to establish residence in *Eretz Yisrael*. The very fact that so many rabbinic authorities, both in previous generations and in our own age, neither themselves relocated in *Eretz Yisrael* nor admonished their followers to do so must surely constitute evidence that they did not believe such a binding halachic obligation exists in our day. This is clearly the position of R. Moshe Feinstein, *Iggerot Moshe, Even ha-Ezer*, I, no. 102, and is also the position attributed to R. Joseph B. Soloveitchik in an article that recently appeared in *The Jewish Press*, June 23, 1989, p. 20. That is the position set forth in the letter attributed to *Netivot ha-Mishpat* cited in my article.

As I have noted elsewhere, although ceding sovereignty over any portion of the territory of *Eretz Yisrael* may constitute a violation of *Lo techanem*, understood in rabbinic exegesis as "you shall not grant them permanent encampment in land," that prohibition is clearly suspended even in cases of merely possible danger. The same is true of the mitzvah to dwell in the Land. Surrender of territory can be regarded as forbidden even at the cost of Jewish lives only if there exists a binding obligation to conquer, and hence to retain, such territory by force. It is only the mitzvah "and you shall inherit the land" that imposes an obligation which may lead to the spilling of blood.

It is very clear that the *Chafetz Chaim* did not believe residence in *Eretz Yisrael* to be mandatory for any Jew. It is true, that according to all authorities, promotion of public Torah study would be reason for leaving *Eretz Yisrael* and that such a consideration is mentioned by *Chafetz Chaim*. But in the context of that letter, it is beside the point. *Chafetz Chaim* did *not* inform the rabbi in question that dwelling in *Eretz Yisrael* is ordinarily a binding obligation but is superseded by reason of one consideration or another; he concedes only that dwelling in the Holy Land is a very great matter *"(inyan gadol)."* And so it is, even if dwelling in *Eretz Yisrael* is not a binding obligation! I have endeavored to spell out why this is so in a discussion regarding "Judea and Samaria: Settlement and Return" that appears in *Contemporary Halakhic Problems*, Vol. II. Suffice it to say that an *"inyan gadol"* can by no stretch of the imagination be construed as a normative obligation; anyone familiar with rabbinic nomenclature immediately recognizes that employment of such terminology is tantamount to rejection of a normative obligation.

In the same discussion I have also endeavored to show that the right of either marriage partner to demand removal of the marital domicile to the Land of Israel is accepted by all authorities and does *not* reflect a position that there exists a normative obligation to dwell in *Eretz Yisrael*. Hence, the view that such an obligation exists cannot be imputed to either *Tur* or *Shulchan Aruch* simply because they codify this spousal prerogative. To be sure, there are some authorities who espouse the view that such a normative obligation to reside in the Land of Israel does exist — most notably, Ramban. Professor Schreiber's comment, however, imputes this view to a long list of authorities. In most cases, as I have already painstakingly detailed, there is no convincing evidence to support that position. In others, it is simply a misreading of the text. For example, when *Chazon Ish* states *"u-mitzvat Eretz Yisrael huchra'ah al yedei ha-Rambam"* he surely does not mean to imply that Rambam codifies a normative *obligation* to dwell in the Land of Israel; even those who believe that Rambam does not disagree with Ramban concede that no such explicit codification exists. *Chazon Ish* refers only to the concept of the positive spiritual value

that is indisputedly associated with domicile in *Eretz Yisrael.* That is made abundantly clear by Rambam in numerous instances and it is in that context that the statement of *Chazon Ish* is made. Statements of the Gerer *Rebbe* and others opposing the relinquishment of our claim to *Eretz Yisrael* in its entirety have nothing whatsoever to do with a normative obligation to establish residence in the Promised Land.

The question of the authenticity of the letter of R. Jacob of Lissa is, to my mind, a tempest in a teapot for the simple reason that its content, as distinct from its authorship, is unexceptionable. Surely, it must be the position reflected in that letter which is relied upon by a committed Jew who remains at Pace University As for the letter's authenticity, the controversy concerning authorship of the letter was carefully recorded in a footnote that included a notation of Prof. Herskovics' reliance upon Chaim Bloch's personal integrity. Prof. Herskovics' only reservation lies in the possibility that Bloch was the victim of someone else's chicanery. Moreover, there is no contradiction whatsoever between the letter and the comments of *Netivot ha-Mishpat* recorded in *Pitchei Teshuvah, Even ha-Ezer* 75:6. Those comments refer only to the question of the authenticity of the declaration of Rabbeinu Chaim, as recorded by *Tosafot, Ketubot* 110b, to the effect that the prerogative of a husband to demand that his wife accompany him to *Eretz Yisrael* has been abrogated by virtue of the difficulties inherent in fulfilling the *mitzvot ha-teluyot ba-Aretz.* As has been noted earlier, the right to demand that a spouse relocate in *Eretz Yisrael* does not *ipso facto* entail a normative obligation for every Jew to establish residence in *Eretz Yisrael.*

2. There is no question that, for Ramban, the commandment "you shall dwell therein" is binding in all generations. It is for that reason that Ramban insists upon including that mitzvah in his enumeration of the 613 commandments. The only phrase requiring clarification is Ramban's statement, "*Harei nitztavinu be-kibush be-chol ha-dorot* — Thus, we are commanded with regard to conquest in every generation." Professor Schreiber agrees that Ramban's statement is contradicted by the oath not to seek a forcible return to the Land. That contradiction he dismisses on the plea that "either

Ramban regards the oath as an *aggadah* not halachically binding, or feels that the oath is not binding because the reciprocal oath on the Gentiles not to treat the Jews too harshly was breached by them, or for some other reason." That simply will not do! To take the proffered "solutions" in reverse order: (1) If there is "some other reason"that will resolve the matter, the reader deserves to be enlightened. (2) The argument that the reciprocal oath has been breached by Gentiles leads to the conclusion that force is permitted subsequent to such breach. It expressly acknowledges that, absent such a breach, use of force is forbidden. Since Ramban declares conquest to be obligatory in *every* generation, that leaves the problem exactly where it was. It fails to explain why conquest was permissible prior to the occurrence of such a breach. (3) An *aggadah* may not be halachically binding, but it is not noncognitive. The "oath," if *"aggadic,"* may not establish a *prohibition* against use of force but if, even as an *"aggadah,"* it has any cognitive meaning, it certainly connotes a negative attitude toward the use of force — a negative attitude that cannot at all be reconciled with an affirmative halachic obligation.

The resolution is, however, very simple. Ramban seeks to emphasize that the commandment was not addressed solely to the generation that entered the Promised Land — as indeed may well be the position of Rambam. Thus, even subsequent to the oath the mitzvah remains a mitzvah; its practical implementation is merely suspended temporarily because of the oath. With the coming of the Messiah — or if the oath becomes nugatory for some other reason — the mitzvah will command the deed. Hence it is to be recorded among the commandments promulgated for posterity, rather than relegated to the category of commandments addressed only to a specific age. That distinction is affirmed by Ramban in his glosses to the introduction of Rambam's *Sefer ha-Mitzvot.*

Elsewhere, in *Contemporary Halakhic Problems,* Vol. I, I have presented a fairly comprehensive list of the various views concerning the nature of the oath *"shelo ya'alu be-chomah."* The view that "the oath was simply *aggadic* and never was binding"is but one view among many and is a distinctly minority view. Reference to the statement of R. Meir Simcha ha-Kohen of Dvinsk,

"Fear of the oaths has now dissipated" is entirely inappropriate in the context of this discussion. This observation, uttered upon promulgation of the Balfour Declaration, connotes simply that establishment of a Jewish homeland in Palestine in a peaceable manner with full permission of the mandate authority would not contravene the Three Oaths. That statement is both unexceptional and entirely inapplicable in other times and under other circumstances. Moreover, it explicitly recognizes the binding nature of these oaths.

I hasten to point out that failure of Ramban or *Shulchan Aruch* to codify certain matters does not automatically render them extra-halachic. To cite but three examples, one will peruse those sources in vain in an attempt to find a codification of the prohibition against contraception that emerges from the *sugyah* of the Three Women, for a ruling that preserving one's life takes precedence over rescuing one's fellow in accordance with the definitive ruling in the case of the *kiton shel mayim,* or even for a requirement to install a *mechitzah* in a synagogue. The principles that may have governed what Ramban and *Shulchan Aruch* choose to include in their monumental works and whether or not those principles satisfactorily explain each and every omission is much too ambitious an undertaking for this endeavor.

As carefully spelled out in my article, much more significant with regard to the issue of engaging in a war for the conquest of territory is the point that, even if the oath is regarded as nonbinding, the conditions for waging a war of conquest cannot be fulfilled in our day. Be that as it may, contrary to Professor Schreiber's implication, nowhere have I suggested that "the Jewish people are required to relinquish the land which they already possess" even if it were seized in violation of the oath. Nowhere have I stated that it is forbidden to use force to retain the land. In point of fact, I have stated precisely the opposite.

3. The balance of Professor Schreiber's comments elude me entirely. The incident involving R. Yochanan ben Zakkai serves to establish that surrender of territory is justified in at least some circumstances. That much Professor Schreiber concedes and more than that I did not claim. I did endeavor to point out the

circumstances in which that is so. I further suggested an interpretation of R. Yochanan ben Zakkai's actions in keeping with my own thesis — which Professor Schreiber does not bother to challenge. That thesis is that, according to Ramban, all communal obligations with regard to the Land of Israel were suspended upon banishment from the Land. I carefully cite the position of R. Yochanan ben Zakkai as compatible with such a position, not as demonstrative proof for the validity of the position.

Professor Schreiber's comments regarding my discussion of the *ba be-machteret* are both confused and confusing. I am unaware of any "much simpler" explanation of Rambam's codification. I am gratified that in a footnote he does grant that the Talmud does call a burglar a "*rodef.*" Neither Ran, *Aruch la-Ner* nor *Baya Chaya* contradict my point or render it superfluous. The crucial point, i.e., that the householder may, at his discretion, defend hearth and home and thereby cause the burglar to become a *rodef* is explicitly affirmed by both Ran and *Aruch la-Ner.*

Finally, despite the fact that I quite strongly emphasize, "There is no obligation to relinquish territory in return for freedom from the threat of continued aggression. There is no obligation to capitulate to force of arms," Professor Schreiber repeatedly reports that I "facilely" recommend "the surrender of Judea and Samaria" and that I reject the position that Israel "may" use "lethal countermeasures"in favor of "the alternative of meek surrender"and that "halachically, the State of Israel may be obligated to surrender Judea and Samaria and not resist demands that they be handed over to Arabs." In point of fact, I strongly agree that, at least at the present juncture in the history of the State of Israel, surrender of Judea and Samaria would be foolhardy at best and possibly countermand the dictates of halacha. It is only because,

I take the strongest possible exception to Professor Schreiber's criticism based on the consideration that "Jewish religious perspectives concerning the importance of the role of the Land of Israel and its retention must be considered in the calculus of decision about whether parts of the Land of Israel may be relinquished" and his further comment that "This crucial element is missing in Rabbi Bleich's discussion." Of course it is! Even

Professor Schreiber is careful to speak of "the calculus of decision" rather than "the calculus of *halachic* decision." "Intense religious emotional feeling" is not a principle of halachic decision-making and has no place in a halachic disputation. My discussion is addressed to the question of whether halacha permits or forbids such a decision. If halacha forbids such a decision, no "values" or "policy considerations" or "religious emotional feeling" could possibly countermand the dictates of halacha. It is only because, and precisely because, halacha permits the return of territories that there is room for discussion of "values," "policy considerations," "prudence," and the like. Such considerations are germane only when halacha permits "religious emotional feeling," discretion, and subjective decision-making. My discussion was designed only to establish that a halachic framework for such a discussion exists.

But since Professor Schreiber does address questions of "values" and "policy considerations," I feel constrained to add that, although he commendably stresses "the importance and role of the Land of Israel," he lamentably ignores an equally "crucial element," *viz.* the inestimable value and sanctity of even a single Jewish life. He fails to acknowledge the tension between those values or to delineate the canons for determining how the conflict between those values is to be resolved.

My own reading of the present military and political situation is that return of any significant portion of Judea or Samaria — or, for that matter, of the Golan Heights or Gaza — would not mitigate the danger but would increase the danger exponentially. Although, if it is correct, there are indeed halachic consequences which follow from that proposition, the proposition itself is not a halachic one. The determination is one to be made not by a contributor to a halachic journal, but by those who have the information and expertise upon which to form an informed opinion. And most significantly, since it is not a halachic proposition, it is not immutable but subject to change with the shifting vicissitudes of security considerations, *realpolitik* and the like.