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Rabbi Alfred S. Cohen

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The Journal of Halacha and Contemporary Society is published twice a year by the Rabbi Jacob Joseph School, Dr. Marvin Schick, President. The Rabbi Jacob Joseph School, located at 3495 Richmond Road, Staten Island, New York, 10306, welcomes comments on this issue and suggestions for future issues.

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.

Manuscripts which are submitted for consideration must be typed, double-spaced on one side of the page, and sent in duplicate to the Editor, Rabbi Alfred Cohen, 1265 East 108th Street, Brooklyn, New York, 11236. Each article will be reviewed by competent halachic authority. In view of the particular nature of the Journal, we are especially interested in articles which concern halachic practices of American Jewish life.

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Advertising and Promotional Activities As Regulated In Jewish Law

By Rabbi Dr. Aaron Levine

Advertising plays a key role in the everyday functioning of the modern market economy. Its positive function consists of improving the information channels of the marketplace. Promotional activities make consumers more aware of alternatives open to them and allow firms who satisfy consumer wants to expand their sales and profits.

The objective of modern advertising clearly goes beyond an informative purpose. Sophisticated techniques are regularly employed today to persuade and cajole people to buy products and services they would not otherwise buy. Likewise, favorable terms of credit allow consumers to effectively attain for themselves a much higher standard of living than would be possible if they were forced to live within their own means.

This article will investigate the ethics of persuasion from the perspective of Jewish law. Two areas of inquiry will be pursued.

A Musmach of Rabbi Jacob Joseph School; Professor of Economics Yeshiva University; former Editor (1967-76) of Kol Yaakov Journal of Jewish law, published by Rabbi Jacob Joseph School

The first area of investigation will identify the responsibilities and constraints Jewish law imposes on the seller to insure that his representations and promotional activities would not be regarded as deceptive or otherwise generate a detriment of some form to the buyer. Specific selling techniques popularly employed today will then be analyzed in light of the criterion developed.

Perceived deception, misrepresentation or detriment on the part of the buyer does not, however, form the only basis for constraining promotional activity in Jewish law. *Normative* judgments in Jewish law deem certain voluntary exchanges as not serving the best interests of the buyer, despite the latter's eagerness to enter into the transaction. Identification of these circumstances forms the substance of our second area of investigation.

The Seller's Disclosure Obligation

Jewish law requires parties to a transaction to deal with each other in an open and forthright manner. Conveying a false impression (*genevat da'at*) by means of word or action¹ is strictly prohibited.²

The biblical source of the *genevat da'at* interdict is disputed by Talmudic decisors. R. Yom Tov Ishbili of Seville (*Ritva*, ca.

1. An example of creating a false impression by means of an action, discussed in the Talmud, is the merchant practice of painting old utensils for the purpose of passing them off as new (*Bava Mezia* 60b). Giving the appearance of a readiness to provide testimony in a litigation, when in fact no evidence will be offered, provides another example of prohibited misleading conduct. Accordingly, A may not appear in court at the moment plaintiff produces his only witness that B owes him a hundred dollars, even if the purpose of the appearance is merely to frighten the defendant into admitting on his own accord his debt to the plaintiff. Since A has no real evidence to offer in the matter, he may not create a false impression that he has testimony to offer. Such conduct is prohibited by force of the verse: "From a false matter keep far" (Exodus 28:7) see *Shebu'ot 31a*.
2. Maimonides (1135-1204), *Yad, Mekhirah* XVIII:1; R. Jacob b. Asher (1270-1343), *Tur, Hoshen Mishpat* 228:5; R. Joseph Caro (1488-1575), *Shulhan Aruch, Hoshen Mishpat* 228:6; R. Jehiel Michael Epstein (1829-1908), *Arukha-Shulhan Hoshen Mishpat* 228:3

1250-1330) places such conduct under the rubric of theft.³ R. Jonah b. Abraham Gerondi (ca. 1200-1263), however, regards *genevat da'at* as a form of falseness.⁴

Proceeding from the *genevat da'at* interdict is a disclosure obligation for the seller. Proper disclosure requires the seller to divulge to his prospective buyer all defects in his product which are not visibly⁵ evident.⁶ Disclosure responsibility extends even to a flaw whose presence does not depreciate the article sufficiently to allow the vendee a price-fraud claim.⁷

The Good Faith Imperative in Jewish Law

In connection with the biblical prohibition against false weights and measures, the Torah writes "Just balances, just weights, a just *ephah*, and a just *hin* shall ye have" (Leviticus 19:36). Since the *hin* is a measure of smaller capacity than the *ephah*, its mention is apparently superfluous. If accuracy is required in measures of large capacity, it is certainly required in measures of small capacity. This apparent superfluity leads Abaye (4th cen.) to exegetically connect *hin* with the Aramaic word for yes, *hen*, giving the phrase the following interpretation: Be certain that your "yes" is just (sincere) and (by extension) be certain that your "no" is just (sincere). The phrase "a just *hin*" hence forewarns against hypocritical behavior. If an individual makes a commitment or offer he should fully intend to carry it out.⁸

Market Behavior Causing Needless Mental Anguish

Admonishment against dealing deceitfully in business transac-

3. R. Yom Tov Ishbili, *Ritva*, *Hullin* 94a

4. R. Jonah b. Abraham Gerondi, *Sha'arei Teshuvah*, sha'ar 3, ot 184

5. R. Binyamin Rabinowitz - Teomim, *Hukat Mishpat* (Jerusalem, Harry Fischel Foundation, 1957) p. 90

6. *Yad*, op. cit.; *Tur*, op. cit.; *Sh. Ar.*, op. cit.; *Ar. haSh.*, op. cit.

7. See R. Joshua ha-Kohen Falk (1555-1614) *Sma*, *Sh. Ar.*, op. cit. 228 note 7; *Ar. haSh.*, op. cit., 228:3

8. Abaye, *Bava Mezia* 49a; *Yad*, *De'ot* VI:2

tions appears twice in the Pentateuch. The first mention of the interdict occurs in Leviticus 25:14: "And if thou sell aught unto thy companion, or buy aught of thy neighbor's hand, ye shall not be extortionate to one another." Reiteration of the warning occurs shortly afterward in verse 17: "Ye shall not therefore be extortionate one to another, but thou shalt fear thy G-d for I am the Eternal your G-d." Rather than being taken as a repetition of the warning against fraud in monetary matters, verse 17 is exegetically interpreted in *Bava Mezia* 58b to prohibit causing someone needless mental anguish.⁹ Referred to in the rabbinic literature as *ona'at devarim*, this prohibition extends to a variety of contexts.¹⁰

Ona'at devarim in a commercial setting is illustrated when an individual prices an article while having no intention to buy it.¹¹ What is objectionable here, according to R. Menahem b. Solomon of Perpigman (1249-1316), is that pricing an article creates an anticipation on the part of the seller that he will make a sale. This anticipation is dashed when the inquirer decides not to pursue the matter further.¹² While the prospective buyer need not concern himself with the disappointment a vendor may experience should his price inquiry not consummate into a purchase by him, pricing

9. *Rif*, *Bava Mezia* 58b; *Yad*, *Mekhirah* XIV:12; *Rosh*, *Bava Mezia* IV:22; *Tur*, op. cit., 228:1; *Sh. Ar.*, op. cit., 228:1; *Ar. haSh.*, op. cit., 228:1

10. Examples of behavior in a noncommercial context that are interdicted on the basis of *ona'at devarim* include reminding a repentant person of his past misdeeds, soliciting technical advice from someone whom the inquirer knows lacks the necessary expertise, and telling someone that his suffering is due to his evil deeds. In all these instances the behavior causes needless pain and is therefore prohibited.

11. *R. Judah*, *Bava Mezia* 58b; *Rif*, ad locum; *Rosh*, loc. cit.; *Tur*, op. cit., 228:3; *Sh. Ar.*, op. cit., 228:4; *Ar. haSh.*, op. cit., 228:2

12. R. Menahem b. Solomon, *Beit ha-Behirah*, *Bava Mezia* 59a. Pricing an article with no intention to buy it is prohibited, according to R. Samuel b. Meir (ca. 1080-1174), *Rashbam*, *Pesahim* 114b, on account of the possible financial loss this behavior might cause the vendor. While the vendor is preoccupied with the insincere inquiry, serious customers may turn elsewhere.

an article he has *no intention* of buying causes the vendor *needless distress* and is hence prohibited.¹³

The *ona'at devarim* interdict, according to R. Judah b. Samuel He-Hasid of Regensburg (ca. 1150-1217), disallows the vendor to conduct his business by soliciting a bid for his article by a potential customer. Rather, the vendor must quote to the interested party the price he demands for his article. The former method is objectionable on the grounds that it may cause the buyer needless disappointment in the event his bid is rejected.¹⁴

Bait-and-Switch

Blatantly violating the good faith imperative, the *ona'at devarim* interdict, and the *genevat da'at* prohibition is the bait-and-switch advertising technique.

In its basic form, bait-and-swicth involves the advertising of a popular article at a ridiculously low price simply for the purpose of luring customers into the store. The deception becomes apparent when the bargain bait cannot be purchased, for one pretext or another, and salesmen, after disparaging the advertised product, attempt to switch customers to higher priced substitutes.

Since the vendor has no intention of selling the bait item, the advertisement is clearly an insincere offer as well as deceptive and hence violates the "good faith" imperative and the *genevat da'at* prohibition. The *ona'at devarim* interdict is also violated here. Notwithstanding that use of the bait-and-switch tactic may *eventuate* in the satisfaction of the customer, nothing removes the fact that the latter is filled with a sense of disappointment and annoyance *at the moment* he is advised the item is not available.

A variant of the above case occurs when the vendor is in possession of the advertised item but only in limited supply. Suppose the offer for the attractive item is made for a specific period of time, and crude estimates of the demand for the product

13. See commentary of R. Solomn b. Isaac (Rashi) of Leviticus 25:17

14. R. Judah B. Samuel He-Hasid, *Sefer Hasidim*, *siman* 1069

at the attractive price indicate that the supply of the advertised item will be exhausted considerably before the expiration date of the offer. Given the totally unrealistic duration of the offer, the advertisement remains insincere and violates for the advertiser both the "good faith" imperative and the *ona'at devarim* interdict.

Attaching a warning to the advertisement that supplies are limited and are available on a "first-come-first-served" basis may, however, be sufficient to satisfy the "good faith" imperative and free the advertiser from the *ona'at devarim* interdict. In the final analysis, whether the above caveat does in fact make the advertisement morally acceptable depends, in our view, on the interpretation the majority of people attach to the advertisement. Consumer surveys could prove very helpful here.

Undeserved Good Will

Good will in the form of a reputation for fine customer service, low prices, or a high quality product represents an important factor accounting for business success and expansion. Generating good will on the basis of deception and illusion violates Jewish business ethics. Such conduct is prohibited under the *genevat da'at* interdict.

An illustration of generating undeserved good will, discussed in the Talmud, involves the sale of meat originating from an organically defective animal, to a non-Jew. Duping the customer into believing he is getting a bargain by misrepresenting the meat as originating from a healthy animal constitutes *genevat da'at*. While price fraud may not be involved, as the non-Jew is charged a fair price for what he actually receives,¹⁵ the transaction is, nonetheless, prohibited on account of the undeserved sense of obligation the customer is left with for the storekeeper. This sense of appreciation is, of course, undeserved as the bargain is imaginary.¹⁶

15. *Ar. haSh.*, op. cit., 228:3

16. Samuel, *Hullin* 94a; *Rif*, ad locum; *Yad*, op. cit., XVIII:3; *Rosh, Hullin* VII:18; *Tur*, op. cit. 228:6; *Sh. Ar.*, op. cit., 228:6; *Ar. haSh.*, loc. cit.

A variant of the above case occurs when the storekeeper offers the misrepresented meat as a gift to his non-Jewish friend. Authorities are in dispute as to whether this practice is objectionable.¹⁷

Violation of the *genevat da'at* interdict, according to R. Joseph D. Epstein (contemporary), does not stand pending until the duped party actually performs an undeserved favor for the offender, but rather is transgressed immediately by dint of the "stolen" feeling of indebtedness the offender secures by means of his ploy.¹⁸

Genevat Da'at in the Passive Case

Another circumstance involving possible violation of *genevat da'at* law occurs when A, by means of neither action nor word, inspires B with a false impression. Does A's *passivity* in the matter free him of an obligation to correct B's misconception? An analysis of the following Mishnaic passage of *Makkot* II:11 provides an insight of the treatment of the above case in Jewish law:

Similarly, a manslayer, if on his arrival at the city of his refuge, the men of that city wish to do him honor, should say to them, "I am a manslayer!" And if they say to him, nevertheless (we wish it), he should accept from them (the proffered honor), as it is said: And this is the *word* of the manslayer - (Deut. 19:14)

One critical detail essential in identifying the precise

17. Generating undeserved good will in the gift case is permitted according to R. Asher b. Jehiel (*Rosh*, loc. cit) and *Tosafot, Hullin* 94b, on the interpretation of R. Joel Sirkes (*Bah, Tur*, loc. cit.)

Members of the school of thought prohibiting such action include R. Jacob Tam (quoted in *Rosh, Hullin* VII:18); R. Solomon Adret (*Rashba, Hullin* 94a), R. Isaac b. Jacob Alfasi, Maimonides, and R. Moses of Coucy on the interpretation of R. Solomon b. Jehiel Luria (see *Yam-shel Shelomo, Hullin*, 7 Siman 19)

18. R. Joseph David Epstein, *Mizvot ha-Shalom* (New York: Torat haAdam 1969) p. 243

circumstances the Mishna refers to is the nature of the presumption the townspeople are operating under when they proffer the manslayer the honor. Does the Mishna speak of the case where the townspeople are ignorant of the fact that the individual they desire to honor is a manslayer? Within this line of interpretation the gesture is entirely mistaken, i.e., had the townspeople only known of his status, they surely would not have tendered their offer. Or, is the Mishna speaking of the case where the townspeople are fully aware that the individual they desire to honor is a manslayer? The former interpretation would squarely place the manslayer case within the framework of *genevat da'at* law.

Supportive of the former interpretation is the following point in *genevat da'at* law the Jerusalem Talmud derives from the above Mishna: Suppose the townspeople assess A to be proficient in two tractates, when, in fact, he is proficient in only one. Notwithstanding A's passivity in inspiring the community's bloated assessment of him, he is, nonetheless, obligated to correct their misconception. This lesson is derived by the Jerusalem Talmud from the refusal obligation of the manslayer discussed above.¹⁹ With the bloated-assessment case derivative in nature, parallel structure requires the parent case to involve a mistaken offer of honor.

The above approach to the Mishna makes it abundantly clear why the manslayer's refusal obligation must be established by force of the verse: "And this is the *word* of the manslayer." With the refusal obligation rooted in *genevat da'at* law, it may well be argued that given the *passive* role the manslayer assumed in inspiring the false impression in the community, he is free of any obligation to correct their misconception of him. Interjection of the verse "And this is the *word* of the manslayer" is therefore necessary to broaden the corrective obligation to even the passive case.

19. *Jerusalem Talmud Makkot* II:6; *Jerusalem Talmud Shevi'it* X:32

Broadening the corrective obligation to even the passive case apparently does not follow from Ritva's discussion of the introductory clause of the above cited Mishna in *Makkot*. Introducing Mishna 11 with the word *similarly*, points out Ritva, indicates a definite link with Mishna 10. In Mishna 10 we are told that in the event the manslayer is a Levite and he already resides in an official city of refuge, he may not serve his punishment of "exile" in his own city of residence, but rather must be banished to another city of refuge. The underlying purpose of banishment, explains Ritva, is to humble the manslayer by isolating him from his familiar surroundings. Allowing the Levite the convenience of serving his exile in his *own* city of residence would therefore defeat the whole purpose of banishment. Now, the link between Mishna 10 and 11 becomes abundantly clear. The point of law discussed in Mishna 11 is also rooted in a desire to humble the manslayer so as to effect his atonement. Accordingly, should the townspeople of his city of refuge offer to honor him, the manslayer must humble himself and initially refuse the honor, so as to say "on account of the heinous crime I committed I am not worthy of honor.²⁰

With the manslayer's refusal obligation stemming from his atonement need, extending the corrective responsibility to the bloated-assessment case discussed above would not appear valid. What follows from Ritva's view is that a *compelling* case cannot be made for imposing corrective responsibility in the passive case.

The Corrective Obligation in the Case of Self-Deception

While misleading someone by word or action is prohibited, an individual is not obligated to correct an erroneous impression when it is the result of self-deception. The following episode, recorded in *Hullin* 94b, illustrates this point.

Mar Zutra the son of R. Nahman was once going from Sikara to Mahuza, while Rava and R.

20. R. Yom Tov Ishbili, *Ritva, Makkot* 12b

Safra were going to Sikara, and they met on the way. Believing that they had come to meet him he said, "Why did the Rabbis take this trouble to come so far (to meet me)?" R. Safra replied, "We did not know that the master was coming; had we known of it we should have put ourselves out more than this." Rava said to him, "Why did you tell him this? You have now upset him." He replied, "But we would be deceiving him otherwise." "No. He would be deceiving himself."

Talmudic decisors regard Rava's reaction as appropriate. Since Mar Zutra had no basis for presuming that his fortuitous meeting with his colleagues constituted a welcoming party, Mar Zutra was guilty of self-deception. Consequently, the group was under no obligation to correct the erroneous impression.²¹

While the judgement that Mar Zutra was a victim of self-deception provides the rationale for relieving R. Safra and Rava of an obligation to divulge to him the fortuitous nature of their encounter, the appropriateness of this course of action apparently follows from a different standpoint as well. Examination of the details of the incident reveal that had R. Safra and Rava only known of Mar Zutra's impending arrival they would have gladly formed a greeting party in his honor. Why then would failure on their part to correct Mar Zutra's misconception violate for them the *genevat da'at* interdict?

This incident is apparently analogous to a wine barrel hospitality case discussed in Hullin 94a. Here, we are told that a host should not delude his guest into believing that he conferred him with a magnanimous hospitality gesture, when in fact he did not. Opening a barrel of wine in honor of a guest usually constitutes a magnanimous gesture of hospitality, as the exposure of the remaining contents is subject to may reduce its quality. The

21. *Rosh*, loc. cit., *Tur*, op. cit.; 228:7; *Sh. Ar.*, op. cit. 228:6; *Ar. haSh.*, op. cit., 228:3

magnanimity of the gesture is, however, considerably reduced when the host happened to have sold the barrel of wine to a retailer just prior to the arrival of his guest. Opening a barrel of wine for a guest without informing him of the sale violates the *genevat da'at* interdict, as the non-disclosure generates for the host an undeserved sense of indebtedness. Nonetheless, the Talmud relates that R. Judah opened a barrel of pre-sold wine for his guest Ulla. While one version of the incident reported that R. Judah made disclosure of the pre-sale to this guest, another version insists that he did not. The second version is defended by the Talmud on the ground that Ulla was very dear to R. Judah and consequently he would have extended him the hospitality gesture even if it entailed considerable expense.

Tosafot reject the above analogy. In the wine barrel hospitality case, R. Judah's *action*, i.e., the opening of the barrel, involved no element of deception, as it was clearly done in honor of Ulla. The only element of possible infringement of *genevat da'at* consists of the false impression conveyed that the act of hospitality entailed considerable expense. Since R. Judah was quite certain that he would have honored his guest Ulla by opening a barrel of wine for him even if it entailed considerable expense, non-disclosure does not amount to *genevat da'at*. In sharp contrast, R. Safra and Rava's journey to Sikara was clearly not undertaken for the purpose of honoring Mar Zutra. Given the fortuitous nature of the encounter, relieving R. Safra and Rava of an obligation to correct Mar Zutra's false impression of tribute cannot be defended on the basis of the certainty that these scholars would have formed a greeting party for Mar Zutra had they only known of his arrival.²²

It should be noted that the point of leniency in *genevat da'at* law emergent in the R. Judah-Ulla incident is conspicuously omitted by Maimonides (Rambam) and R. Jacob b. Asher (Tur) in their treatment of the wine-barrel hospitality case. Noting the curious omission, R. Aryeh Judah B. Akiba (1759-1819) posits that

22. *Tosafot Hullin* 94b

the aforementioned codifiers regard the Talmudic incident as lacking general applicability. Vicarious assessment of a selfless devotion toward the guest frees the host of an obligation to correct the latter's false impression of magnanimous hospitality only when the host is a man like R. Judah, i.e., an individual of exceptional moral character. Here, the host's self-assessment that he would confer his guest with a generous gesture of hospitality even if it entailed a considerable expense is completely reliable. Such an assessment would not, however, free an individual of ordinary moral character from his disclosure obligation. For an ordinary person such an assessment amounts to *self-delusion*. Confronted with an *actual* opportunity to confer the friend with a generous gesture of hospitality only at a considerable expense, the average person would find many convenient excuses not to do so. With the point of leniency in *genevat da'at* law emergent in the R. Judah-Ulla incident not having general applicability, Maimonides and R. Jacob b. Asher omit mention of it.²³

Freeing a host from an obligation to correct his guest's false impression of hospitality on the basis of his self-assessment of readiness to incur the necessary expense to provide the latter with whatever he imagined he was bestowed with, follows, in our view, only if the source of the *genevat da'at* interdict is regarded to be a form of falseness. Should the *genevat da'at* interdict be regarded, however, to be a form of theft, it is difficult to see why an assessment of selfless devotion toward the guest frees the host of correcting the latter's false impression of lavish hospitality. Given that the sense of indebtedness a guest feels towards his host is based on the basis of what he *perceives* the host actually did for him and not on what the host is certain in his *own* heart he would do for him, not correcting the false impression of hospitality would generate for the host an undeserved sense of indebtedness.

Proceeding as a corollary from the above analysis is that the two versions of the R. Judah-Ulla incident are rooted in the source

23. R. Aryeh Judah b. Akiba, *Lev Aryeh, Hullin* 94a

of the *genevat da'at* interdict. Following the line that *genevat da'at* is a form of theft, Maimonides and R. Jacob b. Asher rule according to the version which held that R. Judah corrected Ulla's false impression of hospitality.

We will now turn to advertising, setting applications of the various nuances of *genevat da'at* law discussed above.

Weasel-Word Stratagem

Modern advertising, as documented by Carl Wrighter, often avoids making direct and forthright product claims. From a legalistic standpoint, use of "weasel words" transforms an advertising message into gibberish and hence makes it immune from possible challenge, but at the same time conveys the desired effect. To illustrate, a manufacturer of ammonia claims that his product "cleans like a white tornado." Use of the above metaphor avoids for the manufacturer a direct claim of superiority over competing brands and hence frees him from possible challenges from rivals. Comparing a bottle of ammonia to a tornado is, of course, ludicrous, as the appearance of a tornado would undoubtedly not only lift dirt from the kitchen floor, but would at the same time uproot the entire house from its foundations as well. The metaphor, however, serves well to conjure up in the mind of the housewife an image of something much more glamorous than the odious job of scrubbing a floor. Catapulted into the world of fantasy, the housewife is made to imagine by means of ingenious animation that the whirlwind activity of the tornado will replace the whirlwind motion of her arm.²⁴

Weasel words, as Wrighter documents, often create false impressions. One example will be cited to illustrate this problem:

24. Carl P. Wrighter, *I Can Sell You Anything* (New York, Ballantine Books), pps 23-28

Suppose airline A offers two types of accommodations, first class and economy class. A calls its first class accommodations Ambassador Service and proceeds to copyright this name. Now, A proceeds to advertise that it is the only airline that offers Ambassador Service. Promoting its service in this fashion avoids for A the making of any direct superiority claim over the first class accommodations offered by competing airlines, but at the same time creates a definite impression of an exclusivity claim.²⁵

Avoidance of infringement of *genevat da'at* law requires, in our view, the pilot testing of advertising messages making use of weasel words. The use of such advertising messages would be given legitimacy only if the pilot testing found that false impressions were not created.

Discount Sales

Discount sales, through the medium of advertising, often go beyond merely informing the public that the customary selling price of a particular product has been reduced. What is often attempted is no less than the creation of a strong impression that the lower price represents a *bargain opportunity*, available only for a limited time. Projecting discount sales in the light of a *bargain opportunity* generates for the firm not only a sense of appreciation from those who purchase the sale item, but, in addition, earns for them a favorable reputation from the general public.

Assimilating the reduced price with a *bargain opportunity* may, however, not always be justified.

A frequent motive behind discount sales is a desire on the part of the firm to increase its profits. To illustrate, suppose carpet dealer A assesses that by reducing his price, he can expand his sales volume and thereby increase his profit.

In a similar vein, a multi-product firm may find it advantageous to discount one of its popular items, even below cost. The good will the firm captures thereby will hopefully allow the discounted item to

25. Wrighter, op. cit., p. 72

assume the role of a "loss leader," generating an expansion of sales for the firm in its various *other* lines.

Notwithstanding the selfish motive behind the aforementioned discount sales, no moral issue is involved in characterizing the discounted price as a bargain opportunity for the consumer. This conclusion, in our view, is valid irrespective of the operational market structure. Within the framework of competitive conditions, the discounted price represents a bargain simply because the said article is available elsewhere only at a higher price. Assuming a monopolist market structure, i.e., the discounted article is unavailable elsewhere, does not change the bargain feature of the discounted price. Given that the effective demand the seller faces for his product has not diminished, protecting his present profit-loss position in no way requires him to lower his price. Automatic market forces hence have not worked here to reduce the *objective* value of the subject product. Quite to the contrary, it is the *voluntary* action of the seller that is *entirely* responsible for the discounted price of the article. With the price cut affording consumers the opportunity to purchase the article below its *objective market value*, characterizing the discounted price as a bargain opportunity involves no moral issue.

Generating Undeserved Good Will

Modern advertising techniques have perfected to an art the ability of the firm to fully exploit the good-will potential inherent in any action it may undertake. Projecting a business policy in a manner that allows the firm to capture more good will than is warranted may, however, violate Jewish business ethics from several standpoints. To illustrate, suppose A advertises that he is reducing the regular price of his item, stressing the bargain opportunity the new price represents. To this, A adds that his motive in running the sale is his deep concern for the crippling effect inflation has on the consuming public. Provided it is not, in fact, adverse market conditions that force A to reduce his price, no objection would be found in allowing him to focus attention on the bargain aspect of the discount sale. Such promotional activity merely allows A the opportunity to exploit the

good will inherent in the price cut. Injecting an altruistic impulse as the motive behind the discount sale is, however, another matter. Drawing attention to his altruistic motive, while making no mention that the move is designed to increase his profit level, effectively projects the price reduction in a more favorable light than is merited.

Besides capturing undeserved good will, playing up the altruistic motive, while making no mention of the profit consideration motive behind the discount sale, could very well amount to a form of falseness. This occurs when the profit consideration is the *primary* motive behind the price reduction and the altruistic impulse is at best only a *secondary* motive. Revealing to someone the secondary purpose behind one's action, while concealing its primary purpose, is regarded in Jewish law as deceptive behavior and is a form of falseness.²⁷

Finally, R. Aryeh Judah b. Akiba's comments regarding the difficulty of assessing the *authenticity* of an individual's *untested* feeling of altruism toward his friend is, in our view, very relevant here. Does A's humanistic impulse independently account for the price reduction, or is the feeling of altruism entirely inspired by the happy prospect that the price discount will increase his profits?

Projecting a price reduction in a humanistic framework when the altruistic impulse is in fact either a derivative motive or an incidental consideration, is not only a form of falseness but generates for the firm a measure of good will beyond what it merits.

Disparagement of a Competitor's Product

Disparaging a competitor's product presents a moral issue in Jewish law even when no misrepresentation of fact is made and the motives of the disparager are sincere. Falsey maligning a competitor incurs for the offender violation of the biblical interdicts against slander²⁸ and falsehood.^{29,30}

27. R. Samuel Eliezer b. Judah ha-Levi Edels (1555-1631), *Maharsha*, *Yevamot* 65b

28. R. Eleazar derives the warning against slander from Leviticus 19:16. R. Nathan derives the admonishment from Deuteronomy 23:11 (see *Ketubbot* 46a)

29. Leviticus 19:11

30. The complicated moral issues involved in warning customers about a

Comparative Merit Stratagem

An aspect of the disparagement tactic concerns the ethics of the comparative merit stratagem. In one variant of this tactic the seller (A) demonstrates to a prospective buyer (B) the superiority of his product by drawing his attention to the deficiencies of rival models. Motivated by a desire to forestall B from engaging in comparative shopping, A, while careful not to impugn the integrity of his competitors, tries to persuade B that rival models are *inferior* in various ways. To illustrate, suppose A provides B with a demonstration of his vacuum cleaner. At the conclusion of the demonstration, A mentions that lower-priced competitor C's model operates very noisily. In addition, B is informed that D's lower-priced model is very cumbersome and difficult to maneuver. With the rival models cheaper than his product, forestalling comparative shopping by pointing out to B the deficiencies present in these models cannot be given legitimacy on the ground that the report averts financial loss for B.

Moreover, insofar as B's favorable attitude toward A's product is secured by means of impressing him with the deficiencies of rival models, the stratagem, in our view, violates Jewish business ethics. While A has the legitimate right to point out to everyone the fine qualities of his product, *magnifying* the attractiveness of these qualities by pointing to the deficiencies of rival models amounts to elevating himself at the expense of his neighbor's degradation. Such conduct was severely condemned by the Talmudic Sages, as evidenced by R. Yose b. Hanina's dictum: "Anyone who elevates himself at the expense of his friend's degradation has no share in the world to come." (Jerusalem Talmud, *Hagigah* II-1)

Concretely illustrating the nature of the above objectionable conduct is the following Talmudic passage:

competitor or his products are addressed by R. Yisroel Meir ha-Kohen in *Hofetz Hayyim, Hilkhot Issurei Rekhilot*. For a detailed discussion of this issue, see, *Journal of Halacha and Contemporary Society*, Vol. I, No. I, pg. 73-77.

R. Nehunia b. Ha-Kaneh was asked by his disciples: In virtue of what have you reached such a good old age? He replied: Never in my life have I sought respect through the degradation of my fellow . . . as illustrated by R. Huna who once was carrying a spade on his shoulder when R. Hana b. Hanilai wanted to take it from him, but he said to him, if you are accustomed to carry in your own town, take it, but if not, I do not want to be paid respect through your degradation.³¹

Why R. Huna's behavior is regarded as exhibiting extraordinary moral character is explained by R. Samuel Eliezer b. Judah ha-Levi Edels, (Maharsha, 1555-1631) as stemming from the fact that R. Huna did not merely refrain from requesting R. Hana to carry his spade for him, but *rejected* the latter's offer to do so.³² Refraining from making such a request is presumably a normal behavioral expectation, not meriting particular praise, as demanding honor at the expense of a fellow's degradation constitutes contemptible behavior. Akin to the latter case, in our view, is the salesmanship tactic of demonstrating the superiority of one's product by means of pointing up the defects of *lower*-priced competing models.

A variation of the above case occurs when A demonstrates the superiority of his product by drawing attention to the defects of competing models priced at or above his product. Since the report averts for the buyer the mistake of paying the same, or more, for a product *inferior* to A's model, the conduct is apparently legitimized.

The Exclusivity Claim — Another twist of the comparative merit stratagem is the exclusivity claim. Providing a case in point is A's advertising message that his vacuum cleaner is the only one in the market place featuring detachable parts. Since the absence of a detachable part feature does not render a vacuum cleaner defective, A's exclusivity claim amounts to nothing more than pointing out

31. *Megillah* 28a

32. R. Samuel Eliezer b. Judah ha-Levi Edels, *Maharsha*, *Megillah* 28a

an *advantage* his model has over competing models. With A not guilty of enhancing the attractiveness of his product by means of pointing up the *defects* of competing models, the advertising message does not, in our view, violate Jewish business ethics.

Superiority Claim — Another variant of the comparative merit stratagem is the superiority claim. Superiority claims take the form of either limited or unrestricted assertions. The limited superiority claim often appears in connection with the multi-purpose product. To illustrate, A advertises that his aspirin compound is more effective in relieving arthritic pain than competing brands. Insofar as aspirin is used to relieve an assortment of pains and aches, A's claim amounts to nothing more than an exclusivity claim. Since A does not enhance the attractiveness of his product by means of pointing out *defects* in competing brands, the tactic, in our view, does not violate Jewish business ethics.

Providing a case in point of an unrestricted superiority claim is A's general claim that his aspirin compound is the most effective non-prescription drug in relieving aches and pains. Given that the superlative claim implicitly concedes adequacy to competing brands and certainly does not degrade them, the tactic, in our view, would be given legitimacy in Jewish law.

Supportive of the view that the general superiority claim does not violate Jewish ethics is the ruling of R. Hayyim Hezekiah Medini (*Sedei Hemed*, 1832-1904) that voicing an opinion that A is a greater Talmudic scholar than B does not amount to degrading B and is therefore a permissible statement.³³

Puffery

Extolling the qualities of a product in an exaggerated manner, called puffery, has proven to be an effective promotional device. Defenders of the practice point out that exaggeration makes advertising more memorable. The more memorable advertising is, the more efficiently it can perform its informative role. Detractors

33. R. Hayyim Hezekiah Medini (1832-1904), *Sedei Hemed* IV K'lal 86

of the practice, however, assert that exaggeration misleads and therefore makes the firm guilty of false claims.

In this section we will develop a guideline for the use of puffery as a promotional device from the standpoint of Jewish law. Puffery manifests itself either in the aesthetic — sensual — or performance dimensions of the product. We will deal with each in turn.

Assessments regarding the aesthetic and sensuous impact a product will have on a customer fall into the realm of the subjective. In Jewish law, majority opinion does not establish fact or truth in a subjective matter relating to aesthetics. Examination of the following Talmudic text bears this point out:

Our Rabbis taught: How does one dance (what does one sing or recite) before the bride? Bet Shammai say: The bride as she is. And Bet Hillel say: 'Beautiful and charming bride!' Bet Shammai said to Bet Hillel: If she was lame or blind, does one say of her: 'Beautiful and charming bride?' Whereas the Torah said, 'Keep thee far from a false matter.' Said Bet Hillel to Bet Shammai: According to your words, if one has made a bad purchase in the market, should one praise it in his eyes or deprecate it? Surely, one should praise it in his eyes. Therefore, the Sages said: Always should the disposition of man be pleasant with people.³⁴

Talmudic decisors rule in accordance with Bet Hillel's view.³⁵ Why this school of thought does not regard an invariable bridal praise formula as a form of falseness, as Bet Shammai would have it, requires explanation. Rationalizing Bet Hillel's view, R. Judah Loew b. Bezalel (Maharal, c. 1525-1609) posits that while

34. *Ketubbot* 17a

35. *Tur, Even ha-Ezer*, 65:1; *Sh. Ar., Even ha-Ezer*, 65:1; *Ar. haSh., Even ha-Ezer*, 65:1

characterizing the bride as beautiful and charming may, at times, run counter to popular sentiment, the description presumably conforms well with the bridegroom's feelings in the matter. If he did not find his prospective bride beautiful and charming, he presumably would not have married her. Given that what constitutes beauty is a *judgmental* matter, pronouncing the bride beautiful and charming does not amount to a mischaracterization of reality, notwithstanding majority opinion to the contrary. Similarly, approving the buyer's glowing characterization of his "unseemly" purchase does not amount to falseness, as a sales transaction creates a presumption of buyer satisfaction.³⁶

Before implications for the business practice of puffery can be drawn from Bet Hillel's bridal-praise formula, further clarification of the latter case must be made.

Aside from the issue of falsehood Bet Hillel's formula raises, calling for the wedding guest to regale the bridegroom that his bride is beautiful and charming even when this sentiment runs counter to his own feelings, amounts to outright hypocrisy and insincerity. Maharal's analysis removes the falsehood issue, but the insincerity question appears to remain.

The insincerity question, in our view, is somewhat attenuated in consideration of the fact that the Sages suspended the biblical injunction against lying when the purpose of the untruth is to bring about reconciliation. Classically illustrating this dispensation is the message Joseph's brothers sent him after Jacob's death "And they commanded some to go unto Joseph saying, Thy father did command before his death, saying, 'So shall ye say unto Joseph, Forgive, pray, the trespass of thy brethren, and their sin; for they did unto thee evil and now, pray forgive the trespass of the servants of the G-d of thy father . . .' (Genesis 50:16-17). Fearing Joseph harbored ill feeling toward them for selling him into slavery, the brothers presented Joseph with a fabricated conciliatory plea from their father. Because their behavior was

36. R. Judah Loew b. Bezalel, *Maharal*, *Ketubbot* 17a

motivated to achieve reconciliation, legitimacy is found with the use of a lie to further the end.³⁷

Analagously, the behavioral requirement of absolute sincerity was apparently relaxed by the Sages in connection with the biblical precept of gladdening the bride and bridegroom. An essential feature of this precept apparently consists of elevating the spirits of the bridegroom by means of complimenting him that his bride is beautiful and charming. Note, however, the limited nature of the dispensation. With a reconciliation motive inoperative here, complimenting the bridegroom by means of mischaracterizing reality is not permitted. What is relaxed here is only the behavioral requirement of absolute sincerity.

What follows from this interpretation of Bet Hillel's view is the impermissibility for the wedding guest, who does not feel that the bride is beautiful and charming, to relate the bridal-praise formula to anyone but the bridegroom himself or to someone else in the bridegroom's presence. Similarly indicated is a restrictive interpretation of the "bad purchase" case. With A's true feeling toward the article very negative, approving B's purchase would appear proper only in direct response to B's solicitation for his opinion or as a spontaneous reaction to the latter's glowing self-appraisal of his article of purchase.

We will now turn to the implications of the above discussions for the business practice of puffery. Of primary relevance is the finding that in a subjective matter relating to the realm of aesthetics, majority opinion does not establish fact to the extent that an individual's contrary opinion must be regarded as invalid. Accordingly, the seller would be entitled to advertise his or other people's judgments regarding either the aesthetic quality of his product or the sensuous impact the product had on him or on the endorser. Aesthetic judgments are, however, subject to the sincerity constraint and may not be made in a manner that creates an

37. *Yevamot* 65b

impression that the judgment is shared by a larger group than the case may be.

Another ethical issue for the advertising practice of puffery is the admissibility of making aesthetic claims based on the product's popularity. Without conducting a survey to determine the reason(s) people are buying the product, the aesthetic claim remains unsubstantiated and therefore is misleading.

Puffery In The Performance Domain

In sharp contrast to puffery in the aesthetic domain, puffery in the performance realm effectively exaggerates the objective qualities of the product. Hyperbolic statements regarding the performance of the product amounts therefore to false and misleading claims. Notwithstanding the deceptive potential of hyperbole in the performance realm, such statements do not mislead when they are not taken literally. Provided the public deflates the puffery in the advertising message to such an extent so as not to interpret the advertiser's claim as ascribing qualities to the product beyond its objective properties, the message would be free of any element of deception. Puffery here serves a useful purpose in the form of creating a memorable message, thereby improving the information flow to the market place.

Jewish law's attitude toward non-deceptive generating puffery can, in our view, be derived from its treatment of vows of *incitement* (*nedrei zeiriezin*) made in a commercial setting: Suppose A and B are locked in a price negotiation. A asks \$4 for his article. B counters with an offer of \$2. Upon hearing B's bid, A proclaims "If I accept anything less than \$4, let bread be forbidden to me by force of a vow." B then counters "If I offer anything more than \$2, let bread be forbidden to me by force of a vow." Though each party fortified his negotiating position by means of a vow, the vows are not regarded to be the result of firm resolution. With the

vows lacking legal force, the deal may be concluded at \$3 and both parties may eat bread without prior resort to the absolution process.³⁸ Common business practice, *Tosafot et alia* point out, makes the intention of the parties clearcut. Rather than intending to convey intransigence in regard to his asking price, as the formulation indicates, A merely intends to convey his seriousness of not accepting B's original offer. B's intentions are similarly interpreted. Though unverbalized thoughts are usually of no account in Jewish law, A and B's unverbalized thoughts regarding their intentions are *universally* shared, i.e., anyone hearing the vow would interpret each party's intentions to consist of merely forewarning his opposite number to adopt a more favorable position. Given that the unverbalized thoughts of each negotiating party are universally shared, it is legally regarded as if A and B *verbalized* an *addendum* to their explicit vows, explaining their true intentions.³⁹

Notwithstanding that vows of incitement are not legally binding, an individual is forbidden to utter such a vow. This lesson is exegetically derived from the verse "He shall not break (*yahel*) his word (Num. 30:3), i.e., he shall not make profane (*hullin*) his own words.³⁹

Jewish law's treatment of vows of incitement provides, in our view, a criterion for the use of puffery in the performance realm as

38. *Nedarim* 21a; *Rif ad locum*; *Yad, Nedarim* IV-3; *Rosh, Nedarim* IV-1; *Tur, Yoreh De'ah* 232-1; *Sh. Ar., Yoreh De'ah* 232-2

Given the negotiating intent of both the buyer and the seller, some authorities take the view that the respective vows are not legally binding even in regard to the original positions which prompted the vows. Hence, the buyer would not be prohibited by force of his vow to finally agree to conclude the transaction at the initial \$4 asking price of the seller. Similarly, the seller's vow would not prohibit him from concluding the transaction at the initial \$2 bid of the buyer. Other authorities regard the vows as legally not binding only in respect to some compromise sum. By force of these vows, each party, however, would be prohibited from concluding the transaction at the initial price of his opposite number. (see R. Nissim b. Abraham Gerondi, *Ran, Nedarim* 21a and R. Moses Isserles, *Rema, Sh. Ar., Yoreh De'ah* 232-2) R. Joel Sirkes (*Bah, Tur, loc. cit.*) points out that common practice is in accordance with the lenient view.

39. *Tosafot Nedarim* 21a; *Ritva Nedarim* 21a

a promotional technique. Provided the puffery statement is not in the form of an oath or vow and does not generate deception, the advertising message would not violate Jewish business ethics. Certainty on the part of the advertiser that his hyperbolic claim does not have the effect of misleading the public does not appear, in our view, as sufficiently reliable to safeguard against deception. Avoidance of violation of *genevat da'at* law requires the seller, prior to the release of his advertising message, to confirm that his judgment of non-deception is shared by the general public. Conducting a survey to assess public reaction to the message accomplishes this.

The Testimonial Technique

A seller's comparative merit claim is often catapulted to a heightened level of credibility when it is accompanied by professional or expert endorsement. Expert opinion confers credibility and an aura of objectivity to an otherwise entirely subjective assertion.

Illustrating the testimonial technique is the Sa'am Drug Company's claim that a certain reputable independent laboratory determined that its aspirin tablet relieves arthritic pain more effectively than competing brands. Providing another example of the use of this technique is the Anavim Wine Company's announcement that a well-respected wine connoisseur found their concord grape wine to be superior to competing brands.

Should the objectivity image the testimonial message generates be misleading, *genevat da'at* law would be violated. This occurs when the professional or expert opinion cited is in fact biased.

What constitutes bias in Jewish law can, in our view, be derived from an examination of its judicial code of conduct.

Jewish law safeguards the integrity of the judicial decision-making process by means of both preventive measures and corrective action.

Preventive measures take the form of prohibiting the judge of a law suit from submitting to any influence that might have the

effect of tainting his integrity and calling for him to disqualify himself on the basis of bias.

By force of the verse "Thou shalt not wrest judgment" (Deut. 16:19) the judge of a lawsuit is forbidden to accept a payment to acquit the guilty or to condemn the innocent. What constitutes a corrupting payment is considerably broadened by force of the verse "And thou shalt take no gift." (Exodus 23:8). Exegetical interpretation of this verse prohibits the judge from accepting payment from one of the opposing litigants even with the instruction to acquit the innocent or to condemn the guilty.⁴⁰ Rava's (d.352) rationalization of the latter point of stringency is very telling:

What is the reason for (the prohibition against taking) a gift? Because as soon as a man receives a gift from another he becomes so well disposed toward him that he becomes like his own person, and no man sees himself in the wrong. What (is the meaning of) *shohad?* *She-hu had* — he is one with you.⁴¹

Fully recognizing that bias may be created by means other than the acceptance of money, Jewish law prohibits the judge from submitting to even a bribe of words (*shohad devarim*).⁴² Illustrating *shohad devarim* is the following Talmudic incident:

Amemar was once engaged in the trial of an action, when a bird flew down upon his head and a man approached and removed it. 'What is your business here?' (Amemar asked him) 'I have a lawsuit,' the other replied. 'I,' came the reply, 'am disqualified from acting as your judge.'⁴³

40. *Tosefta Nedarim* IV-4; *Yad*, op. cit., IV-4; *Tur*, op. cit., 232-20; *Sh. Ar.*, op. cit., 232-13

41. *Ketubbot* 105a; *Yad*, *Sanhedrin* XXIII-1; *Tur*, *Hoshen Mishpat* 9-1; *Sh. Ar.* *Hoshen Mishpat* 9-1; *Ar. haSh.*, *Hoshen Mishpat* 9-1

42. *Ketubbot* 105b

43. *Ketubbot* 105b; *Yad*, op. cit., XXIII-3; *Tur*, op. cit., 9-4; *Sh. Ar.*, op. cit., 9-1; *Ar. haSh.*, op. cit. 9-1

The stringency of *shohad devarim* applies even to words of greeting. Accordingly, in the event A did not make it a practice to anticipate judge B's greeting with his own greeting, initiating this practice just prior to the time his lawsuit will come up in B's docket amounts to *shohad devarim*. With B regarded as being biased toward A on account of the latter's new found friendliness toward him, B is disqualified from serving as judge in his lawsuit.⁴⁴

A close friendship or enmity with one of the litigants similarly disqualifies an individual from serving as judge in their lawsuit.⁴⁵

Judicial verdicts rendered under the influence of *shohad* are null and void.⁴⁶ With the *shohad* payment regarded as a forbidden receipt, the judge is legally bound to return the illicit fee. Though the Jewish court will not force the judge to return the *shohad* unless the claimant demands repayment,⁴⁷ the former is, nevertheless, ethically bound to make restitution even in the absence of claimant's petition.⁴⁸

Recognition that professional judgment is susceptible to even subconscious biases leads, in our view, to the necessity of regulating the use of the testimonial technique in advertising.

Bolstering his comparative merit claim by means of expert testimonial achieves for the seller heightened credibility. The heightened credibility the testimonial affords him may, however, be undeserved. This occurs when the expert opinion secured is in fact tainted, but is presented in a manner that effectively conceals the biasing influence involved. To illustrate, suppose Sa'am Drug Company contracts Emet Laboratories to conduct research to determine which of several pain relievers, including their own brand, most effectively combats arthritic pain. The arrangement calls for Sa'am to review the research progress every month and

44. *Ketubbot* 105b

45. R. Joshua ha-Kohen Falk, *Sma*, *Sh. Ar.* op. cit. 9 Note 4; *Ar. haSh.*, loc. cit.

46. *Sanhedrin* 29a; *Rif* ad locum; *Yad*, op. cit., XXIII-6; *Rosh, Sanhedrin*, III-23; *Tur*, op. cit. 7-8, 10; *Sh.*, *Ar.*, op. cit. 7-7; *Ar. haSh.*, op. cit. 7-9-10.

47. *Yad*, op. cit. XXIII:1; *Tur*, op. cit. 9:2; *Sh. Ar.*, op. cit. 9:1; *Ar. haSh.*, op. cit. 9:1

48. *Ar. haSh.*, a loc. cit.

allows it the option of terminating the agreement within a week of each progress review. Another provision of the contract calls for Sa'am to pay Emet an escalating monthly fee for the lifetime of their contract. After eighteen months of research, Emet concludes that among the competing brands tested, Sa'am tablets are most effective in combating arthritic pain.

Given the above arrangement, bias could very well be expected to enter Emet's judgment both in its selection of research design and in its interpretation of data. Accordingly, the significance of its finding should be appropriately discounted. Reporting the finding without disclosing the nature of its arrangement with Emet, catapults Sa'am's comparative merit claim to a level of credibility it does not deserve. Use of the testimonial hence violates for Sa'am the *genevat da'at* interdict. Emet's presumed awareness at the outset that disclosure of its arrangement with Sa'am would not accompany any eventual commercial use of its findings makes them guilty of complicity in Sa'am's crime. Receipt of its fees, nonetheless, does not constitute *shohad* as Emet assumes here merely the role of Sa'am's employee, taking on no judicial role whatsoever.

Avoidance of *genevat da'at* infringement requires, in our view, pilot testing of any testimonial message prior to its commercial use. The purpose of the pilot would be to ascertain the assumptions the public makes regarding the relationship between the sponsor and the endorser. Should the survey indicate public presumption of the absence of certain biasing factors which are in fact operative, the testimonial message would have to be either entirely discarded or modified accordingly.

Installment Plans Allowing the Buyer to Live Beyond His Means

Successful promotion frequently requires the seller not only to present his product in an attractive manner, but also to arrange favorable terms of payment for his customer. Installment plans may violate Jewish business ethics even if the plan does not call for

a premium payment above the cash price.⁴⁹ This occurs when the credit terms effectively allows the buyer to live beyond his means.

Halachic disfavor with living beyond one's means can be derived from an analysis of the sliding-scale sacrifice and Jewish charity law.

In the times of the Temple, the offering of sacrifices often formed a part of the expiation process for the transgressor seeking atonement. Sacrificial requirements in connection with certain classes of offenses allowed the penitent to offer a sliding-scale sacrifice. To illustrate the nature of the sliding-scale sacrifice we will describe its application in connection with a particular qualifying offense, i.e., the false oath of testimony case. This offense consists of A falsely swearing to B that he is not privy to information relevant to his case. The sacrificial aspect of A's atonement process requires him to offer a female sheep or goat. Should A's means not suffice, he may substitute the animal sacrifice with two turtledoves or two young pigeons. If his means do not suffice for birds, he offers a tenth of an *ephah* of fine flour.⁵⁰

The means criterion, according to *Torat Kohanim*, translates into allowing the penitent to move down the sliding scale if bringing the more expensive sacrifice would put him into debt.⁵¹

Noting the means criterion, R. Aaron ha-Levi of Barcelona, (1235-1300), *Sefer ha-Hinnukh*, advances the opinion that if the poor man offers the rich man's sacrifice, he does not fulfill his obligation. This ruling is rationalized on the grounds that since the All-mighty shows compassion to the poor man by allowing him to

49. Installment credit calling for a premium above the cash price as well as pre-payment discount schemes may violate the rabbinical extensions of the rabbit law (*avak ribbit*). For a discussion of these cases with the applications for modern business practices, see Aaron Levine. *Free Enterprise and Jewish Law: Aspects of Jewish Business Ethics* (New York, Ktav - Yeshiva University Press, 1980) pp. 95-97, 110-112

50. Leviticus 5:1-13; Keritot 10b; *Yad, Shegagot* X:1-4

51. *Torat Kohanim* 5:7

bring a sacrifice according to him means, it would not be proper for the poor man to reject the gesture by incurring an expense for his sacrifice beyond his means. Sound practical advice regarding living standards, continues *Sefer ha-Hinnukh*, should be derived from the sliding-scale sacrifice case: An individual should not live beyond his means. Such conduct could lead the individual to unethical aggrandizement as a means of sustaining his habit of high living.⁵²

Halachic disfavor with living beyond one's means can also be inferred from its ordinance against donating charity in excess of 20% of income. The basis of the interdict is the fear that overgenerosity in giving charity could make the donor himself vulnerable to poverty.⁵³ With restraint prescribed for alms giving, disfavor would certainly be directed against maintaining a standard of living beyond one's means.

What follows from the judgment that living beyond one's means constitutes wreckless conduct is restrictions in the use of installment credit.

Offering a reluctant customer an installment plan as a means of inducing him to purchase an item he feels he cannot afford clearly violates Jewish business ethics. To illustrate, suppose crystal dealer A shows B an exquisite crystal chandelier. B reacts with

52. R. Aaron ha-Levi of Barcelona, *Sefer ha-Hinnukh* 123. R. Joseph b. Moses Babad (1800-1874), however, finds the position that the poor man who offers the rich man's sacrifice as not fulfilling his obligation to be contradicted from *Mishnah Nega'im* XIV:12. See *Minhat Hinnukh* ad locum

53. *Ketubbot* 50a; *Rif* ad locum; *Yad Arakhin* VIII:13; *Ketubbot* IV:15; *Rema*, *Sh. Ar.*, *Yoreh De'ah* 249:1; *Ar. haSh*, *Yoreh De'ah*, 249:1. The interdict against over generosity in charity giving has been variously interpreted. Some authorities understand it as a restriction on the proportion of his income that an individual may devote to a charity fund in the *absence* of requests for assistance. Should an individual be confronted, however, with pleas for assistance, no maximum restriction on the amount of his aid is prescribed. Other authorities suspend the interdict only in relation to bequests and to situations where the aid would avert loss of human life. (see R. Ezra Basri, *Dinei Mamonot* vol. 1, Jerusalem; Reuben Mass, 1973) p. 405

excitement and admiration, but turns ashen when informed of its price. Eager to make a sale, A offers B the opportunity to pay out the purchase over a year in monthly installments. B remains reluctant, admitting that while the installment plan would make it feasible for him to make the purchase, his budget in consequence would suffer considerable strain. Reminding B once again of the aesthetic qualities of the chandelier, A repeats his offer, exclaiming an exuberant confidence that B will somehow make ends meet, the chandelier purchase notwithstanding. B is now persuaded and proceeds to conclude the purchase. With the purchase allowing B to live beyond his means, A's *persuasion* clearly amounts to ill-suited advice and violates for him the *lifnei Iver* interdict.

Advertising Inciting Envy

In a pecuniary culture where personal worth is often measured by invidious distinction, maintaining an ostentatious life style beyond the means of ordinary people secures status for the individual. Within this cultural milieu, successful advertising strategy for luxury items often dictates that the seller project for his product an exclusivity image. The more inaccessible the luxury article is thought to be, the greater the status symbol will be attached to it.

Promotional messages relating to luxury products, designed to create an image that the acquisition of the subject product is beyond the means of ordinary people, presents a moral dilemma in Jewish law.

Conduct having the effect of generating envy, as the following Talmudic text indicates, is strictly prohibited in Jewish law:

Our Rabbis taught:

If one journeys from a place where they do not fast to a place where they do, he should fast with them. . . . If he forgot and ate and drank, let him not make it patent in public nor may he indulge in delicacies, as it is written, "And Jacob said to his sons, why should you show yourself?" (Gen. 42:1) —

Jacob conveyed thereby to his sons, "when you are fully sated do not show yourselves before Esau or before Ishmael that they should not envy you."⁵⁴

Differential living standards inevitably produce feelings of inadequacy, embarrassment and envy among those of limited means. With the aim of reducing the intensity of these ill feelings, the Sages in Talmudic times regulated the life style of the wealthy in various ways. Mourning customs provide a case in point:

Formerly they were not to convey (victuals) to the house of mourning, the rich in silver and gold baskets and the poor in osier baskets of peeled willow twigs, and the poor felt shamed: they therefore instituted that all should convey (victuals) in osier baskets of peeled willow twigs out of deference to the poor.

Formerly, they were wont to serve drinks in the house of mourning, the rich in white glass vessels and the poor in colored glass, and the poor felt shamed: they instituted therefore that all should serve drinks in colored glasses out of deference to the poor

.....⁵⁵

Out of concern that conspicuous consumption would ignite both internal discord and envy among neighboring non-Jews, the autonomous Jewish communities in the Middle Ages regulated living standards. Legislation typically imposed limitations on the type of dress residents could wear, and restricted expenditures for weddings and other social occasions.⁵⁶

54. *Ta'anit* 10b; *Rif* ad locum; *Yad*, *Ta'anit* I:15; *Rosh Ta'anit* I:7; *Tur*, *Orah Hayyim* 574:1; *Sh. Ar.*, *Orah Hayyim* 574:2-3; *Ar. haSh.*, *Orah Hayyim* 574:2-3

55. *Mo'ed Katan* 27a; *Rif* ad locum; *Yad Avel* XIII:7; *Tur*, *Yoreh De'ah* 378:12; *Ar. haSh.*, *Yoreh De'ah* 378:7

56. R. Bezalel Landau, "Takonot Neged ha-Motrot," *Niv ha-Medrishah*, 1971, p. 213-226

Application of the aforementioned principles to commercial advertising disallows, in our view, use of the exclusivity stratagem for mass media promotion of luxury articles. While such messages are primarily directed to potential buyers, mass media advertising allows the message to reach huge audiences, including many who cannot possibly afford the product. For the latter group the impact of the promotional message is to stir up in them feelings of envy. Given that the greater the intensity of envy the advertising message generates among the non-buyers, the more attractive the luxury product becomes to the potential buyers, the generation of envy is, at the very least, a welcomed consequence of the advertising message from the standpoint of the seller. Since Jewish law interdicts envy generating conduct, such advertising messages violate Jewish business ethics.

Vegetarianism From A Jewish Perspective

By Rabbi Alfred S. Cohen

"Animals should be seen but not hurt" was the message on the red T-shirt worn by Marcia Pearson, a fashion co-ordinator from Seattle. "For professional athletes, a vegetarian diet can't be beat" was the message of Peter Burwash, a top-ranking tennis player from Canada. Sporting a variety of banners and mouthing numerous slogans, hundreds of vegetarians convened for the fourth annual congress of the North American Vegetarian Society.

The Vegetarian Society is not just another conglomeration of assorted oddballs. As the New York Times reported, there are well over 10 million vegetarians in this country. New York alone is supporting 35 vegetarian restaurants for about 100,000 strict vegetarians, and there are perhaps half a million who are part-time vegetarians. As one said, "There is more glamour and respectability now to vegetarianism, and we love it."

The vegetarian phenomenon is rapidly winning adherents all over the world. Where once a non-meat-eater might be viewed as an anomaly, or possibly be suspected of following some exotic

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Eastern cult, vegetarianism today scarcely merits a raised eyebrow. Not only is it an increasingly familiar phenomenon, but more and more we also find vegetarians putting meat-eaters on the defensive.

A surprising gamut of motives brings individuals to renounce meat and adhere to a diet which is far removed from the American ideal of "a chicken in very pot" or "meat and potatoes" as the typical dinner. The motives include health-consciousness, figure-consciousness, belief in macro-biotics, fear of pollution, and moral, even religious reasons. As with so many other social and ideological movements which sweep American society, Jewish people, particularly young people, are caught up in the wave of enthusiasm. There are many, many Jewish vegetarians, and more than a few are quite Orthodox in the full sense of the word. It therefore becomes a subject of considerable interest to investigate vegetarianism vis-a-vis Judaism and to determine if there is anything in Judaism which might oppose the practice of vegetarianism; conversely, can we find within Judaism positive reinforcement for this way of life?

A cursory appraisal of two thousand years of Jewish literature reveals that our Sages and thinkers have often considered the ethics of meat-eating, and their conclusions have been varied. The Gemara censures Rabbi Judah the Prince for his apparent callousness towards an animal, and more than a thousand year later, Rabbi Moshe Isserless (Ramo) displayed a heightened sensitivity to making a blessing on garments made from animal hides. More recently, the Baal HaTanya had a surprising argument for applauding the consumption of meat, while Chief Rabbi of Israel, Avraham Isaac Kook, shrank from that practice.

It is our intent herein to examine the many references to meat-eating found in our halacha and other religious writings, so that we may arrive at an understanding of how this concept fits in with traditional Jewish teachings. Additionally, and perhaps most important of all, we shall examine the reasons why people adopt a vegetarian regimen, and see if there is anything in these philosophies which is antagonistic to the Jewish *Weltanschauung*.

Vegetarianism and The Sabbath

The suggestion that refraining from eating meat might in any way be contrary to Jewish law may at first seem absurd. However, there are in fact certain times when the Jew is *bidden* to eat meat. The question therefore becomes, how to interpret these halachic indicators — as imperatives or possibly only as permissives. In other words, does it say "Thou shalt eat meat" or maybe only "Thou may"?

The weekly Shabbat is a prime example of how vegetarianism might be proscribed by Jewish law, for there is a particular mitzva of *Oneg Shabbat*, pleasure of the Sabbath. Rambam describes the mitzva: "Eating meat and drinking wine on Shabbat are considered *Oneg Shabbat*."² Since it is clear that a person must celebrate the Sabbath with food and drink — specifically meat and wine — can a vegetarian fulfill the halachic requirements of this mitzva?

Clarifying the mitzva of *Oneg Shabbat*, the Shulchan Aruch goes so far as to note that it is forbidden to fast on the Sabbath,³ with some saying that this stricture derives from the Torah itself⁴. However, the Shulchan Aruch questions whether a person who feels pain due to eating must in fact eat heartily on Shabbat. For him, the pleasure is in *not* eating rather than in indulging. If that be the case, the Shulchan Aruch determines that such a person does not have to eat much on the Sabbath.

In the Shulchan Aruch, Rabbi Yosef Karo further probes the ruling that one should eat on Shabbat as part of the mitzva of *Oneg Shabbat*:

A person who fasts each day, and would have pain from eating during the Sabbath day, since it would be a change in his normal eating schedule — there are those who say that they have observed several pious persons and men of deeds, who used to

2. הילכות שבת פרק ל — הלכה י.

3. אורח חיים רפ"ח ס' א.

4. תשובה הרשב"א תרי"ד.

fast on the Sabbath for just that reason, and they say that this is what Rabbi Judah the Hasid used to do...⁵

If it is even permissible to *fast* on the Sabbath under these circumstances, certainly it would be permissible to abstain from eating meat if there is an aversion to it. Further substantiation for this can be found in the commentary of Rabbenu Yonah on the Talmud. In discussing the laws of a mourner, the Gemara teaches that one whose close relative has died but has not yet been buried, (called an *Onen*) may not eat meat or drink wine. However, on the Sabbath the *Onen* eats meat and drinks wine. On this teaching, the Rabbenu Yonah writes: he is *permitted* to eat meat and drink wine, if he so wishes, but he is not obligated, for an *Onen* has to observe all the mitzvot of Shabbat, and eating meat and drinking wine are not mitzvot of Shabbat...⁶

Later authorities also accept this view.⁷ Thus, there seems to be little halachic controversy concerning vegetarianism and the Sabbath. If a person is more comfortable not eating meat, there would be no obligation for him to do so on the Sabbath.

YomTov

The application of the halacha of vegetarianism with respect to YomTov is somewhat more complex than that regarding Shabbat. Whereas we have shown that on Shabbat one is not obligated to eat meat if he derives no pleasure from it, that is not sufficient reason to excuse one from eating meat on YomTov.

On Shabbat, the Jew is bidden to enjoy *Oneg Shabbat*; however, on YomTov the Torah specifically indicates "*vesamachta bechagecha*", "you shall rejoice on your Festivals." Consequently, the Rambam wrote:

A person is obligated to rejoice and be of good

5. Ibid.

6. רבנו יונה מועד קון.

7. דרכי משה, יורה דעה שמ"א.

spirit during the Festival, he, his wife and children, and all those who are with him ... How is this done? He gives sweets and nuts to the children ... and the adults eat meat and drink wine ... and there is no *simcha* (joy) except with meat and wine.⁸

Following the Rambam's view, therefore, we would have to state unequivocally that an observant Jew must eat *some* meat during the Festivals. However, not all halachic authorities accept the Rambam's explanation. The *Beit Yoseph*, as a matter of fact, cites a Talmudic text which specifically counters the Rambam. He writes:

"Our Rabbis taught that a person is obligated to bring joy to his wife and children and members of his household during the Festival. He rejoices with wine ... Rabbi Judah ben Betairah says, in the days when the Temple was in existence, there was no rejoicing without meat ... but now that there is no longer the Temple, there is no rejoicing without wine..."⁹

Following the original text in the Talmud, therefore, the *Beit Yoseph* rejects the reading of the Rambam. In his authoritative Code of Jewish Law (*Shulchan Aruch*), he omits any mention of the obligation to eat meat on a Festival, as a factor of the mitzva of "simcha." Bringing the halacha up to date in our own time, the *Chafetz Chaim* briefly notes that while the *Beit Yoseph* does in fact reject the opinion, other halachic authorities try to bridge the gap between them.¹⁰ Rabbi Joel Sirkes (the *Bach*) agreeing that the

8. טור אורה חיים תקכ"ט.

9. פסחים קה.

10. אורה חיים תקכ"ט. A study of the first Mishna in *Nedarim* 66 shows that the Rambam once again maintained that one is obligated to eat meat on Saturday and Holidays — whereas the other commentaries including the *Shulchan Aruch* only saw fasting as being forbidden.

It would be interesting to ascertain how the Rambam reconciled his opinion with the talmudic text *Hullin* 11B where it is stated that one is obligated to eat meat on one Holiday only — namely Passover — when one is obligated to partake of the Paschal Lamb.

See also Rambam *דעתות דעות* פרק ג הלכות דעות.

requirement "to rejoice" is fulfilled by drinking wine alone, nevertheless maintains that someone who also eats meat in rejoicing on the Festival has fulfilled a positive mitzva of the Torah.

A further support for the view that eating meat is not necessarily a mitzva on YomTov may be derived from a different source in the Talmud. In Bava Bathra 60b, the Gemara records that after the destruction of the Beit Hamikdash, the Sages were so overcome by the enormity of the disaster which had befallen the Jewish people, that they contemplated forbidding people from getting married or eating meat, as a sign of mourning for the Destruction. (For a number of reasons, these ordinances were not later enacted). Studying this text, the Tosafot ask a simple question — how could the Sages consider forbidding people from getting married, when it is a mitzva in the Torah? The answer to that question need not concern us here; however, from the mere fact that Tosafot *does not ask the same question* concerning the prospective prohibition upon eating meat, we may clearly infer that eating meat, even on a Festival, is not mandated by the halacha.¹¹

In summing up this point, it is only proper to note that while in truth the Shulchan Aruch, which is the foundation for normative law for Jews today, does not insist upon the necessity to eat meat as *simchat YomTov* — nevertheless, there are many equally illustrious halachic authorities who maintain that it is certainly desirable, even if not strictly required, and that it is a mitzva to mark the joy of the Jewish Festivals with special meat and drink. In that sense, vegetarianism would be antagonistic to the *spirit* of Jewish thought on YomTov, even if not to the actual letter of the law.

Moral Considerations

The most sensitive area of our inquiry concerns the many per-

11. A more definite proof that one is not obligated to eat meat on the Holidays can be found in *תולין יא*: This proof is in fact recorded in *פתחי תשובה יורה דעה י'ח'יט*.

sons who adopt a vegetarian regimen not from any convictions of its supposed benefits, whether physical, emotional, or psychological, but rather on moral or philosophical grounds. These moral considerations are generally expressed in one of two forms: Either that it is morally wrong to take the life of an animal for so trivial a purpose as eating its flesh; or that it is inhumane for a human being to inflict pain upon another creature.

As we address either of these arguments, let us bear in mind the concomitant question of whether a religious Jew may accept moral values which are not found within Torah or halacha, or approve standards which might oppose the Torah's standards or which imply, at the very least, that the Torah's standards are inferior or less humane. Is it not presumptuousness bordering on blasphemy, to call an act sanctioned by the Torah (and perhaps mandated by halacha), an act of cruelty, of inhumanity? We must first of all respond to this challenge to Jewish tradition, for if there is indeed any *lése majesté* in accepting the vegetarian credo, that would automatically preclude acceptance of that system for an observant Jew. Where the standards of vegetarianism condemn the values of the Torah or denounce its mitzvot as immoral or distasteful, we must categorically reject vegetarian ideology as aberrant philosophy. We believe that the Torah's ways "are paths of pleasantness" and righteousness; any belief which seeks to negate the Torah's truths is misguided.

Yet Jewish vegetarians often claim that "All the reasons that people become vegetarians are Jewish reasons", claiming two Chief Rabbis of Israel as vegetarians,¹² to quote Jonathan Wolf, leader of

12. In response to my telephone inquiry as to the identity of the chief Rabbis, I was told that these are the present incumbent, Rabbi S. Goren, and the first Chief Rabbi, Rav Kook. However, when asked to substantiate this last, Mr. Wolf responded only that it was "common knowledge". I have questioned a number of people who were peripherally involved with Rav Kook and none of them were aware of his alleged vegetarianism. Mr. Wolf then referred me to Rabbi Ben Zion Bokser, who recently published a book on Rav Kook. Rabbi Bokser informed that, as a matter of fact, he had been in direct contact with Rav Kook's son, and the son categorically denied that his father had been a

the North American Jewish Vegetarian Society, whose 300 members are an affiliate of the London-based Jewish Vegetarian Society with members worldwide (New York Times, September 14, 1977).

Jewish vegetarians often quote Rabbinic literature and the Torah for religious legitimacy, and to some extent they are justified. Albeit the Torah mandates animal slaughter in the Temple service, Rav Avraham Isaac Kook wrote that in the Epoch of the Messiah, "the effect of knowledge will spread even to animals ... and sacrifices in the Temple will consist of vegetation, and it will be pleasing to G-d as in days of old..."¹³ The implication is that if there will be no animal sacrifice in the Temple, then there will be no animal slaughter whatsoever.

Our Rabbis teach that consumption of meat was not part of the original Divine plan at the world's creation. After the creation of Heaven and Earth and all living creatures, the All-Mighty instructed Man as to his proper relationship with the rest of Creation: (Genesis 1:29) "Behold I have given to you all vegetations ... for food." Since there was a bond interrelating all living things, life was sacred, and Man was not permitted to take life, even for his own sustenance.¹⁴ Ramban explains this stricture "because creatures which possess a moving soul have a certain superiority and in this respect are somewhat similar to those who possess intellect (Man), and they have the power of affecting their welfare and their food and they flee from pain and death."¹⁵ There is a measure of kinship between man and beast, and according to the original design of the world, the beast was to serve and assist mankind, but not to be his food.

vegetarian. Those vegetarians who look to Rav Kook as a mentor seem to be relying on a false rumor.

13. *שולח ראייה חלק א* P. 292.

14. See *תוי"ס סנהדרין גו*: which is of the opinion that Adam was in fact permitted to consume meat; Adam was only forbidden to kill the animal — if the animal however died by itself, then the meat was permitted.

15. *בראשית פ' נח*.

Now while it is true that the above sources certainly accord with vegetarian claims, it is simply not accurate to base Jewish thought only on the experiences of Adam. There is the entire Torah which has to be considered, and what emerges from that presents a somewhat different picture. A few chapters after the Creation account, the Torah records a major upheaval of the original world-society, in the Deluge wherein all that had been was wiped away. The post-Diluvian world had different standards. Speaking to Noah after he emerged from the Ark, G-d specifically permitted him and his descendants to kill animals in order to eat their flesh (Genesis 9:3). However, even in this permission, there were restrictions, as the Ramban points out: "Although He gave them permission to slaughter and to eat ... yet He did not give them permission regarding the animal's soul and forbade eating a limb cut off from an animal that was still alive, nor the blood of the animal."¹⁶

We see therefore that although eating meat was now definitely sanctioned,¹⁷ that dispensation was hedged about with limitations. Animal life did not become something negligible; man still had to maintain some respect for the dignity of the animal's life. That obligation still applies to all mankind. As for the Jewish people, the Torah later added many more restrictions upon them, further limiting their ways of eating meat.

In his mystical writings, Rav Avraham Isaac Kook sees the transformation of the relationship between the animal and human kingdoms as a diminution of the spirituality which was in each:

The free movement of the moral impulse to establish justice for animals generally and the claim of their rights from mankind are hidden in a natural psychic sensibility in the deeper layers of the Torah. In the ancient value system of humanity ... the moral

16. Ibid.

17. Ramban (in Bereshis) and other Torah commentaries explain that after the Flood man's nature was changed and became weaker; therefore he was permitted to eat meat in order to give him more strength.

sense had risen to a point of demanding justice for animals. "The first man had not been allowed to eat meat" (Sanhedrin 59b) ... But when humanity, in the course of its development suffered a setback and was unable to bear the great light of its illumination (i.e. the Flood) ... it was withdrawn from the fellowship with other creatures ... The long road of development, after man's fall, also needs physical exertion, which will at times require a meat diet, which is a tax for passage to a more enlightened epoch, from which animals are not exempt.¹⁸

If a person tends toward vegetarianism because he sees it as a lifestyle consonant with the way the All-Mighty really wanted the world to be, there can be no denying that he has a valid point of view. However, to claim that the Torah and Talmud share with vegetarianism an abhorrence to animal slaughter as a cruel and inhumane act, is simply false. A truer understanding of Jewish law and tradition would indicate that many Rabbis viewed the Torah's license to eat meat as a necessary dispensation, a reluctant permission as it were, not as an indication that eating meat was a desirable pursuit. On the other hand, it is quite wrong to view this reluctance as arising out of a feeling that slaughter is cruel. The reasoning is quite different. Let us proceed to examine it.

* * *

A talmudic passage often cited in support for the vegetarian contention that Judaism disapproves of eating meat is found in Bava Metzia 85a: Rabbi Judah the Prince was a great Rabbi and supreme teacher, who compiled the Mishna, the basis of the Talmud and the fundamental redaction of the Oral Law. For many years of his life, Rabbi Judah suffered from a variety of intestinal problems which caused him great pain. What had this sainted scholar done to merit so much pain in his life? The Gemara found the answer in an episode where Rabbi Judah was walking in the

18. אורות העלה.

marketplace, and suddenly a calf that was being led to the slaughter fled its keepers and ran to hide behind him. However, Rabbi Judah pulled the calf out from its shelter behind his legs and returned it to the slaughterers, admonishing the calf, "Go, for you were created for this purpose." For this callous lack of pity for the animal who was afraid of dying, Rabbi Judah was punished with years of pain.¹⁹

However, it would be fallacious to interpret this text as indicating that Rabbi Judah was at fault because he condoned the slaughter of an animal. In fact, many Talmudic commentaries are puzzled by the story — after all, what did Rabbi Judah do wrong? Was he not correct in telling the animal to go willingly to its end, for in truth it exists for the benefit of man? The Geonim, however, indicate that while his conclusions cannot be faulted, his *attitude* was lacking in compassion. Here was an animal who had fled to him personally for help — his failure to be moved by its distress bordered on hardness of heart, unbefitting a person suffused with so much Torah knowledge. In a similar vein, the Maharshah notes that the text tells us it was a *calf* being led to its slaughter, not a mature animal. It is one thing to see a mature animal, which has lived a number of years, being taken to slaughter to provide meat for men to eat. It is quite another thing for a tender young calf, who has not even had time to taste of life's joys, to be summarily taken to the slaughter. No, he was not "created for this purpose."²⁰ Thus, Rabbi Judah erred in lacking pity for the young animal which ran to him for safety.

Let us not misread this episode as an indictment of those who eat meat, for it is not that. On the other hand, it is an excellent illustration of the high level of thoughtfulness for all living creatures which Judaism expects from its adherents.

Elsewhere the Talmud discusses the consumption of animal

19. His suffering continued for many years, until by an act of great kindness to a cat, Rabbi Judah evidenced that he had attained a higher level of compassion.

20. *רבנן מציעין פון*.

flesh in the light of the Torah's permission to eat it:

The Torah teaches one the proper way to act: That a person should not eat meat except in certain circumstances ... he should only eat it with appetite. One might think that he should go out to the marketplace to buy meat — but the Torah writes "from your flocks" (i.e. not to go out and seek it and spend extra money for it, but only if it is available from your flocks). The Torah says 'you may slaughter from your flock and from your herds' — this teaches us that *some* of the animals may be slaughtered, but he should not slaughter *all* of them.²¹ Rabbi Elazar ben Azariah learned from this that there is a proper proportion of a man's flocks which might be slaughtered, so that only occasionally would a person use his animals for food, and not on a regular basis.

Furthermore, the Hida, writing on this passage, notes: Our Rabbis taught us proper behavior, that a person should not eat meat except in certain circumstances, which means that if he does not have a strong and healthy constitution, then he may take money to buy meat.²² Furthermore, the Maharshal writes that Rabbi Yochanan and Rabbi Nachman taught that one should eat meat for the strengthening of his body and ought not to hurt his body through excessive abstentions; however, he should not do it only for pleasure.

In Bina Bamikra we find a beautifully sensitive citation from Sefer HaChasidim: "And that which the Torah permitted the eating of meat to those who study Torah and observe the mitzva of Tfillin, it is because the Torah and the Tfillin are formed from the hide and the sinews of the animals, and after we have used parts of the animal in order to fulfill the needs of the mitzva, therefore we

21. חולין פר. ח.

22. חיים שאל סיכון מ' אות ר'.

may find therein justification for using the rest of the animal for the eating of flesh.²³

The Torah bids us "Be holy" (Leviticus 19:2), and our Rabbis have found many ways to understand this mitzva. Perhaps the most famous lesson was taught by the Ramban: "Be holy by abstaining from those things which are permitted to you ... For those who drink wine and eat meat all the time are considered 'scoundrels with a Torah license'."²⁴ Again we find reinforcement for the view that albeit the Torah permitted the eating of animal flesh, this was always understood within the teachings of Jewish tradition as permission for occasional indulgence, but certainly not as something to be sought after.

We may therefore conclude that when a vegetarian is loath to eat meat because he does not want to take an animal's life merely for his own pleasure, that person is acting well within the spirit of Jewish belief and philosophy. He is not denigrating a Torah value, for the Torah does not establish the eating of meat as a desirable activity, only as something which is not forbidden to do. Moreover, the less meat eaten, the better, and one who indulges himself by eating meat too often is "disgusting", though he be within the technical limits of the Torah.

* * *

Let us now give serious attention to other considerations which are factors for those who opt to become vegetarians, some of which stem from what might be termed "spiritual worldviews". An exponent of such ideas, writing in *Vegetarian Times* (March/April 1978) declares:

"In Buddhism the first precept is "not to kill but to cherish life." To eat the flesh of animals, then, is to encourage their slaughter, to be an accessory after the fact of their killing. How can anyone who professes to abhor violence and the suffering it causes

23. בינה במקרא P. 203.

24. רמב"ן פ' קדושים.

inflict them on others — in this case animals — either by directly destroying them through so-called sport or hunting, or indirectly sanctioning their killing by buying their flesh and consuming it? We pride ourselves on being beyond the low level of morality of “might is right,” which is universally condemned, yet we condone it every time we put into our bellies the flesh of helpless animals — animals that for the most part have served us and have every right to life as we on this planet.”

Obviously, Judaism shares this aversion to animal suffering, for the admonition to have respect for the sensitivities even of animals is a basic tenet of our faith, having its origin in the Torah; as our Rabbis teach, the prohibition of causing pain to a living creature derives “*d’oraitha*”, from the Torah itself, and not only from Rabbinic decree. Furthermore, the Torah which forbids destroying a fruit tree even in war time, would never sanction the sheer *waste* (not to speak of the barbarism) of hunting animals simply for the “sport”. Commenting on hunting as a sport, Rabbi Yechezkel Landau, the world-famous Nodah BiYehudah, wrote, “I am amazed at the very concept ... we never find such a thing in the Torah other than Nimrod or Esau (both hunters, both infamously wicked), and this is not the way of the children of Abraham, Isaac, and Jacob.”²⁵

Concern for animal life is a hallmark of Jewish thinking, evident in any number of legal dicta in many areas. For example, Rabbi Moshe Isserles (Ramo) notes that although it is a mitzva to make a blessing when putting on a new garment for the first time, to thank G-d for his bounty, there are those who refrain from reciting the blessing if the garment or shoes are made out of leather, for the verse says “G-d’s mercy it upon all his creatures.”²⁶ Although the Ramo notes that this is not a conclusive argument

25. נורע ביהדות יורה דעה שאללה י.

26. אורה חיים רכ”ג.

for omitting the blessing (since the animal might have been dead anyway, and not been killed for that purpose), yet he stresses that there are many²⁷ who will not recite the blessing in such an instance. Ramo seems to approve of the rationale, for "how can a Jewish person kill, with his own hands, a living thing without any purpose and only for beauty or pleasure"?²⁸

In embodying the concept of compassion for all living things into actual practice, I do not think there is anywhere a legal or religious system which can compare to the Torah's teachings. According to the Torah, it is forbidden for a person to slaughter an adult animal and its offspring on the same day — it would be just too cruel to wipe out two generations at one time; although the Torah permits taking animal life when it is needed for the benefit of man — yet man may not do this with viciousness. And even if the *animal* cannot be aware that its calf will die on the same day — yet the *Jew* must not allow himself to become callous about spilling blood.

And therefore the essence of the prohibition is not in not killing that animal and its offspring on one day ... but rather ... the most important is that we should not become cruel...²⁹

* * *

Some vegetarians espouse their cause as being the only humane way to act, maintaining that slaughter of an animal is necessarily painful to the creature, and thus always cruel. In *Vegetarian Times* (March/April 1978) we find:

According to research involving hypnotism even the fast death of decapitation causes pain that lasts for some time after the killing. Years ago at an

27. In some editions the word "many" is not found.

28. Ibid.

29. רמב"ן דברים כ"ב פסוק ו.

execution in Paris a hypnotist had his subject experience the pain of the condemned man; reportedly it went on for a long time after the head rolled, just as a chicken runs about for some time when her head has been cut off. Similarly, alligators which are dead to all appearances are cut open and their hearts are still beating; fish which have been cleaned of all internal organs are known to snap at those who pass too close. The implications are that immense suffering goes on in the nervous systems of animals not only before the slaughter and during it, but also afterwards.

I do not see why we have to accept these "implications" as truth, nor act upon them. The fact that animal muscle tissue moves even after the head is severed is simply the automatic reaction of the nerve endings. There is no reason to assume that "immense suffering" is taking place, when the animal is already dead; whatever movement there is, is just that — automatic movement, and not the expression of pain.

Nevertheless, Jewish law is extremely careful to assure that even a momentary pain which might ensue at the instant of slaughter, be reduced as far as possible.

"The regulations of slaughter, in special prescriptions, to reduce the pain of the animal registers a reminder that we are not dealing with things outside the law, they are not automatons devoid of life, but with living things."³⁰

All the laws of Shechita stress the absolute necessity of severing the trachea and esophagus so rapidly that the animal can have no awareness; the slaughter is as painless as it is possible to make it. That is why shechita requires severing the jugular "for this is where most of the blood will come out, and also since the prohibition of causing pain to an animal is proscribed by the

30. *הירש* "Loc Cit".

Torah; and therefore also the knife may not have any nicks, lest it cause any pain to the animal.”³¹

In trying to clarify what the Jewish point of view is on the question of a vegetarian way of life, we have to understand that there is a distinction between supporting a certain point of view and making that point of view the cornerstone of our moral code. In every mitzva, in countless teachings, the Jew is taught to have compassion for all living things — yet that compassion does not override other values which are also fundamental to Judaism.

For all the 613 commandments of the Torah, there is no mention of any reward. The only exceptions are honoring one's parents — and the mitzva of “sending the mother bird from the nest.” Certainly this must be one of the most unusual precepts of any religious code:

If you chance upon a bird's nest on the road, in a tree or on the ground, and there are fledglings or eggs, and the mother is roosting on the fledglings or on the eggs — do not take the mother together with her children. You shall surely send away the mother, and you may take the fledglings for yourself; so that it may be good for you and you will have long life.
(Deut. 22:6-7)

What is the reason for this commandment, which apparently ranks in importance with the command to honor one's father and mother, which is one of the Ten Commandments? The Gemara debates the question: one view is that just as G-d has pity upon his creatures, so, too, must man emulate Him. Send away the mother bird so that she will not suffer the pain of seeing her chicks taken away from her. There are those who disagree, saying that it is not possible to assert that this is the primary purpose for the command to send away the mother bird. However, even the latter group agrees that while compassion for the bird might not be the *primary*

31. פְּרִי מְגַדִּים end of Preface to the Laws of Slaughtering.

consideration for the mitzva, it is undoubtedly one of the reasons why we were so commanded.

Compassion for an animal's pain is an important aspect of the Divine commandments; yet it is not the overriding feature of the mitzva. As the Rambam wrote, "If someone cries out in prayer — O, You Who had pity on the mother bird and commanded us not to take the fledglings while the mother is watching; O, You Who forbade us to slaughter an animal and its calf on one day; O, G-d, have mercy on us in the same way" — then, *we silence that person*, because these commandments are simply the decree of the Torah, and are not commanded to us out of pity for the animals, since if it were out of compassion for the animal, the Torah would *not have allowed us to slaughter the animal at all.*"³²

It would be intellectually dishonest to maintain that Judaism shares with vegetarianism an abhorrence to eating the flesh of animals. We have to treat animals humanely, but as Rambam points out, compassion for animals cannot be the most important aspect of our mitzvot, for were that truly so, we would not be permitted to slaughter them at all. What we are in fact commanded to do is to reduce to the barest possible minimum any measure of pain which may be necessary to inflict upon them.

Nevertheless, a person who feels an emotional or intellectual distaste for the concept of killing an animal in order to satisfy one's appetite, will find support in the writings of our great Rabbis.

Rabbi Kook, the first Chief Rabbi of Israel, approved of many vegetarian attitudes. One time he was asked to comment upon a recommendation to split the two functions involved in animal slaughter between two separate people — the checking of the knife, inspection of the lungs and liver for disease would be carried out by a Rabbi learned in this field, while the actual physical slaughter would be carried out by another man. He applauded the

32. רמב"ם פרוש המשניות ברכות לג: משנה תורה הלכות חטלה פרק ט הלכה ז.

suggestion, "for this finds great favor in my eyes, and I believe that it accords with the spirit of Israel. For that a learned individual, a spiritually-inclined person, should at the same time be involved with the slaughter of living creatures and taking their souls, does not accord with the sensitivities of a refined heart. Although slaughter and eating of living creatures still has to be accepted in the world, nevertheless it is proper that this kind of work be performed by those people who have not yet reached the level of refined sensitivity. And learned people, men of ethics, knowledge, and religion, they are fit to be supervisors of the technicalities, so that killing the animal should not become barbaric."³³

* * *

Rabbi Shneur Zalman of Liady, the towering scholar and mystic who founded the major Hasidic movement, Chabad (Lubavitch), expressed his opinions on the slaughter of animals also. However, his view reflects an understanding of the man-animal relationship totally different from what we have discussed heretofore. He writes that all the world exists for the greater glory of the Creator. "If a G-d-fearing individual eats ... meat or drinks wine ... in order to broaden his heart to G-d and His Torah, or in order to fulfill the mitzva of pleasure on Shabbat and YomTov ... then that flesh has been affected by a measure of radiance, and goes up to the All-Mighty as a sacrifice."³⁴ In other words, if a cow lives and dies a normal life, then — it was just a cow. But if it is slaughtered and then eaten by a G-d-fearing person in the performance of a mitzva, or to give him strength to perform mitzvot, then that cow has been transformed into part of something higher than itself; in giving its life to become food, the cow has been elevated to a higher plane of Divine service. From this point of view, there is no cruelty whatsoever involved in taking the animal's life. On the contrary.

* * *

33. Letters of Rabbi A.I. Kook Vol. II P. 230

34. תנייא פרק ז

In summation, I think our investigation well demonstrates that Judaism is a religion which places great emphasis on justice and compassion for all G-d's creatures. The Torah and all our teachings forbid the causation of the slightest unnecessary pain to anyone or to any thing, and include many strict regulations to assure that the slaughter of animals will be carried out in this spirit. And as Judaism seeks at all times to reduce our involvement with the physical and turn our hearts to spiritual pursuits, it recommends reducing the frequency of eating meat. On the other hand, animal sacrifice and consumption of animal flesh are at times mandated by halacha, and we cannot therefore find these activities morally unjust. If we had the wisdom to perceive the mystical unity of all Creation as expressed in the Torah's teachings, in the way Reb Shneur Zalman did, we would appreciate the beauty and compassion of the mitzvot.

In a subjective aside, I wish to concur with the comment of the *Vegetarian Times* (Nov./Dec. 1977, p. 38) that "although many feel that the vegetarian diet is more spiritually oriented than one containing meat, a vegetarian is not necessarily more spiritual or involved than his or her meat-eating neighbor." How painfully true! Let me direct the reader's attention to an ancient Rabbinic dictum: "He who takes pity on the cruel, ends up being cruel to those who ought to be pitied." Vegetarian ideologues who spout allegedly superior moral sensitivities often lack consistency in their ethical beliefs. Unfortunately, there are too many people today who are very much concerned with animal welfare, but who are not in the slightest bit moved by the lack of proper children's shelters, or at the thought of thousands of fetuses aborted annually. Is their pity for life not somewhat misplaced? The Psalmist praises G-d, "for His compassion is upon *all* His creatures." Someone who finds himself committed to a vegetarian regimen out of moral considerations ought to carry that super-sensitive moral refinement into all areas of human activity, and not confine it to the animal kingdom. If he can do that, then he is truly an admirable and ethical human being; otherwise, should we not label him a hypocrite?

Health Motives

Thousands of people become vegetarians for reasons which have nothing to do with the supposed immorality of taking animal life. On a far more pragmatic level, they renounce meat out of a conviction that meat offered on the market today is irretrievably contaminated with chemicals and additives, and that cattle are raised in such a way that meat is an odious, potentially dangerous food to eat. Some of the proof tendered to support this contention paints a truly gruesome picture of the meat-producing business in America, enough to make the most confirmed meat-and-potatoes man blanch at the thought of what he is consuming:

The life expectancy of a steer, once two to four years, is now eighteen months. A steer is born. The moment he is dry from the womb, he is taken from his mother. The cattleman places him on a "Calf starter ration" consisting of milk powder, synthetic vitamins, minerals, and antibiotics — because suckling temporarily reduces the amount of salable milk produced by the mother. Just 25 pounds of calf food replaces the 225 pounds of milk he would normally drink. The drug-spiked food also reduces the calf's natural desire for activity, thus reducing his need for more energy-sustaining food.

When the steer arrives at the commercial feedlot, he is forced off the boxcar and through a tank filled with pesticides that cleanses him of worms and flies. He is then confined in a pen continuously lit to encourage him to feed around the clock. Several times a day, his trough is refilled with a feed mixture computer-blended that morning. In addition to starchy, high-protein grains, these ingredients may include urea carbohydrate mixtures and artificial roughage such as ground-up newspaper mixed with molasses, tasteless plastic pellets, feathers, or treated wood mixtures. In fairness, we must state that this is

not a common practice, though it does exist.

Sometimes, the force-feeding of a steer will create a painful liver abscess which can slow his rate of weight gain. But this is no longer a problem for feedlot owners; cattle with abscessed livers are simply treated with 75 milligrams daily of the antibiotic oxytetracycline. During his marathon feeding our steer gains upwards of three pounds of muscle and fat a day.

By now, our steer more resembles a test tube than an animal, but his chemical diet isn't quite complete. He is sprayed and dusted with pesticides from time to time, and he eats the insecticide with his feed. It passes through his digestive system and is eliminated in his manure, where it serves the purpose of keeping flies from breeding. Charcoal may be added to dairy feeds to absorb the pesticide, preventing their excretion into the milk.

After four months of ingesting the equivalent of three huge dinners a day, the steer weighs about 1200 pounds, almost enough for slaughter. During the last three to five days, he is fed a booster of 1,000 milligrams of oxytetracycline or chlortetracycline a day, and given one last shot of streptomycin for the road to the slaughter house.

Meat packers used to hang beef in a refrigerated room for fourteen to twenty-one days to tenderize it. But this lengthy process took up warehouse space, and caused both meat and profits to shrink. Now meat is tenderized on the hoof or dipped in a solution of enzymes prior to freezing.

McClure also describes how meat managers use sodium sulfite, a powerful chemical illegally used to hold the color in meats, to change the color of rotten meat from green to red. Treated ground meats like chuck, round, sirloin, and sausage are especially

dangerous because the chemical is mixed throughout to completely disguise the rotten odor and color.

The increase of environmental contaminants and the rise of cancer has made scientists more concerned with the investigation of long-range toxins — substances which are toxic over a long period of time. The damage from some of these toxins may not show up for twenty or thirty years, while others may wreak havoc after a year or two. The F.D.A., more concerned about substances that can cause immediate damage in humans or in laboratory animals, is shortsighted about the restriction of chemicals that may be long-term toxins.³⁵

If the nauseating depictions of the vegetarians are indeed true and the meat we are ingesting is as dangerous to our health as they claim, it may well be that Jewish law would require us to cease consuming this dangerous substance.

It is well known that Jewish law places the highest priority upon the preservation of life; virtually every mitzva of the Torah can be ignored, if that will save a life. Eating on Yom Kippur, driving on the Sabbath — almost anything is permitted in order to preserve life.³⁶ What is possibly less well-known is the corollary to that principle of the supreme importance of human life — namely, that one is forbidden to take any action which can put one's life in danger, whether immediately or over a long term.³⁷ The Talmud warned that it is forbidden to drink from water that was left uncovered, since it might have been poisoned by a snake. Even if it is doubtful whether the snake actually deposited its venom in the water, one must refrain from taking a chance and drinking it.³⁸

Similarly, Rabbinic law forbids drinking directly from a

35. New Vegetarian P. 72.

36. יומא פב.

37. עבורה זרה ל: — בבא קמא קטו: .

38. זורה דעה קט"ז ס"ק ה — חולין ט: .

stream of water, lest he swallow a dangerous insect. Even if others had drunk from the stream before him, without harm, he could not take a chance. Our Rabbis further decreed it a violation of a religious precept to walk near an unsteady wall or enter a ruined building, due to the danger of collapse.

Following the many precedents prescribed in the Code of Jewish Law, we would have little difficulty in arriving at the conclusion that, if indeed eating meat is injurious to one's health, it is not only permissible but possibly even mandatory³⁹ that we reduce our ingestion of an unhealthful product to the minimum level.

Kashruth

A uniquely Jewish reason for becoming a vegetarian is the motivation to follow the laws of kashruth properly. Volumes upon volumes of Jewish Law books detail the myriad requirements involved in observing the kashruth laws. Not only are there minute regulations for the slaughter and preparation of the animal, but there are also many laws forbidding the combination in any way of meat and milk, or the dishes used therefor, or the utensils, etc., etc. A person who avoids eating meat, avoids many of the problems involved in its preparation. Interestingly enough, there is a clear historical precedent for such a course of action:

The Midrash tells us that it is customary for Jews to eat foods prepared with milk on Shavuot, because on the first Shavuot in the

39. However, it would be mistaken to conclude that the Jewish law would forbid people from eating these foods altogether. Based on the Talmudic dictum "Shomer Petaim Hashem", "G-d watches over simpletons," our Rabbis have come to the conclusion that, although an act should actually be forbidden because it poses a danger to the individual — yet, if many people do engage in it, we can rely on the fact that the All-Mighty watches over those people, who are not wise enough to watch out for their own welfare. *Nidah* 31a, *Yevamot* 72A and *Shabbat* 129B. Also see *Trumat Hadeshen* #211.

In our own generation, Rabbi Moshe Feinstein has written that one could not forbid smoking, although smoking may pose a danger to health, following the same reason we have noted. See *Iggerot Moshe, Yoreh Deah* II, #49.

desert, the Jews ate only dairy foods. On that day, Shavuot, the Children of Israel received the Torah from Mount Sinai; however, while they were aware of the prohibitions of kashruth, they were not yet versed in the details of the law. Therefore, since they were not sure if they would be preparing the meat in accordance with halacha, and wished to avoid any doubt, they refrained entirely from any meat, thereby avoiding any possible transgression, even if only inadvertent.

A growing dilemma on the American Jewish scene is the increasing unreliability of kashruth supervision, or, more correctly, the increasing *implications* of such unreliability. It is rumored that even the former bastions of unimpeachable kashruth have had their mishaps and their slip-ups. Rival kashruth-supervisory organizations hurl accusations at one another, seeking to register their reliability by casting doubt upon that of others. Conscientious observant Jews worry about the hundreds of chickens one *shochet* is called upon to slaughter within an hour, about the thousands of tongues and livers which the slaughtering industry must provide to kosher caterers and butchers in seemingly endless quantities.

Disconcerted by all the accusations, and apprehensive about the true kashruth of what they eat, not a few observant Jews have opted to avoid all the problems, like the Children of Israel at Sinai, by avoiding meat altogether.

In Pesachim, the Gemara tells us that Rabbi Judah the Prince taught, "it is forbidden for an ignorant person (*Am Haaretz*) to eat meat since the Torah writes,⁴⁰ 'This is the Torah law concerning the (slaughter of) animals ... whoever is involved in learning Torah may eat the flesh of an animal or fowl, but whosoever does not learn the Torah may not eat the flesh of an animal or fowl.'"

Expounding upon this passage, the Maharshah comments that since there are so many laws involved in rendering an animal suitable for consumption, and an *Am Haaretz* is ignorant of the law, he may mistakenly eat meat which is not kosher, and

therefore must avoid that possibility.⁴¹ (Apparently, in those days, people did not go to butcher stores to purchase kosher meat, but rather had to see to the animal's *shechita* and kosher-rendering personally. Obviously, there would be many occasions where a person ignorant of the law would mistakenly assume the meat was kosher). The Ramo agrees with this opinion, in stating, "The reason that an *Am Haaretz* may not eat meat is that he is not conversant with the laws of Shechita..."⁴²

Thus, there is ample precedent for refraining from eating meat in a situation where there is doubt whether that meat is truly kosher within the meaning of halacha. If a person sincerely doubts whether he can rely upon either the knowledge or trustworthiness of the kashruth supervisor, he is then certainly well-justified in deciding not to eat meat at all. In this aspect of his decision, he would not in any way be acting contrary to Jewish law.

However, I do not wish in any way to suggest that this decision is a moral imperative for a conscientious, kashruth-observing Jew. While there are undoubtedly areas of kashruth supervision which could be improved, nevertheless, there are enough kashruth supervisions of sufficient reliability in this country to allow strictly-observant Jews to eat meat without qualms. If this be the rationale for a person's decision to stop eating meat, it seems to have no real justification.

That wises of all men, King Solomon, noted that there is nothing new under the sun. Although vegetarianism has the glamor of a new fad for many people, our research shows that Judaism dealt with these "modern ideas" millenia ago. Once again we are awed by the scope, perceptiveness and sensitivity of our great Sages.

41. Ibid.

42. תשובות רמ"א שאלה סה

Chukat Ha'Akum: Jews in a Gentile Society

By Rabbi Zvi Y. Teichman

Many years ago, America was introduced to the Jewish consciousness as the faraway "goldene medinah", a mecca of freedom and opportunity which beckoned to all who aspired for a better life. To a remarkable degree, that dreamt-of promise has been kept—Jews in America have achieved great success, enjoying complete freedom to integrate into the society and economy.

This freedom is in sharp contrast to the millenia of persecution and deprivation in the Diaspora. Given the enforced separation of the Jew from general society, living in ghettos and restricted in the professions he might enter, there was little need to be concerned with the Biblical injunction "*Bechukosehem lo tailaichu*", "You shall not follow the Gentile customs". However, modern life brings its own dilemmas, and the thinking Jew in America now needs to devote serious thought to this injunction.

In the following pages, we shall examine the classic interpretations of this verse and seek to measure our customary practices by its standard. Are Thanksgiving and Mother's Day observances which a Jew may join, or are they proscribed by "*Bechukosaihem*". . .? Does the verse preclude our acceptance of

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each new whim of fickle fashion? Should it affect the manner in which we act or dress, cut our hair, or call our children?

Even a cursory study indicates that many areas of behavior which we take for granted are indeed within the purview of this *issur*.

It is adherence to mitzvot which insures the uniqueness of the Jewish people, and some were given to us specifically for the purpose of preserving this uniqueness. It is no coincidence that in regard to the covenant of *Milah*, circumcision, the *Sefer haChinuch* writes:¹ "Of the fundamentals of this command is the desire of G-d to affix to the nation, which is separated by being called in his name, a particular sign in their bodies to separate them from other nations in the form of their bodies, just as they are differentiated from them in the form of their souls." With the very first mitzva given to the Jew, the Torah wished to insure our preservation as a unique people.

Rambam writes:² "The Jew should be distinguished from them and distinct in his dress and his actions just as he is distinguished from them in his knowledge and his understanding."

In commanding us "*Bechukosaihem lo tailaichu*" (Vayikra 28:3) the Torah did not specify which habits or customs of the Gentile are intended. What then is the nature of this law?

The root of the word "*Bechukosaihem*" is "*Chok*" which usually would be understood to apply to statutory enactments. In this instance, however, it is not referring to those laws that are duly legislated but rather to customs and practices which are validated by convention.³ However, this surely is not a sufficient clarification of the term "*Bechukosaihem lo tailaichu*", for indeed we do share many modes and manners with other nations. We must therefore discern what are those customs that are regarded as

1. חינוך מצוה ב'

2. רמב"ם פ"י הלכות עירין ה"א

3. The Targum translates "chok" as "nimusin", which is Aramaic for "customs".

"their laws", also referred to by the Talmud as "*Darkei Ha-Amori*", ways of the Amorite.

It would be beneficial to offer a brief summary of two texts in the Talmud that deal with this prohibition. The differences of opinions concerning these texts form the various criteria upon which the prohibition is based.

The Gemara in *Avoda Zora* (11a) relates that it was customary for Gentiles to burn the beds and artifacts of their kings after their demise. Initially, the Gemara was under the impression that this was an idolatrous act, but the question is then asked —

How can this be? For we learned in a Braitha that the burning of articles at (Jewish) kings' funerals is permitted, and there is nothing of the ways of the Amorite about it? If it is an act of idolatry, how could such a burning be condoned? Is it not written "And you shall not walk according to their laws?"

The Gemara then proceeds to answer, "The burning is not an idolatrous act, but is merely a mark of high esteem for the deceased."

In *Sanhedrin* (52b), the Mishnah states:

The death penalty of beheading by sword was performed thus: the condemned man was decapitated by the sword, as is done by the civil authorities. Rabbi Yehuda said, "This is a hideous disfigurement; rather, his head was laid on a block and severed with an axe." They replied: "No death is more disfiguring than this." Whereupon the Gemara continues - "We learned in a Braitha; Rabbi Yehuda said to the Chachomim" (Sages): 'I, too, know that this is a death of repulsive disfigurement, but what can I do, seeing the Torah has said - "*You shall not walk according to their laws*"! (Therefore the method used by the Civil Authorities cannot be followed.)' To this the Chachomim responded: 'Since the Torah already

decreed the method of the sword, we did not derive this practice from them, and if you will not agree to this, then how about that which was taught: "The burning of articles at a king's funeral is permitted, and there is nothing of the ways of the Amorite about it?" But since this burning is referred to in the Torah, as the prophet Yirmiyah said to King Zedkiah (Yirmiyah 34:5): "You shall die in peace, and as with the burnings of your fathers, the former kings that were before you, so shall they make a burning for you." It is not from them (Gentiles) that we derive this practice, and hence, it becomes permissible'."

*Tosafot*⁴ notice an inconsistency between the two texts. The Gemara in *Avoda Zara* seems to indicate that this (the burning) is not considered a custom to be prohibited by the laws of *Chukat Ha'akum*, since it was an honorable rite customarily administered to those kings, rather than a practice directed at their idols. On the other hand, the text in *Sanhedrin* seems to indicate that it is by virtue of the fact that it is prescribed in the Torah, albeit possibly an act accepted by idolators, that it becomes permissible.

To clarify these conflicting passages, *Tosafot* conclude that these are two types of customs that are prohibited by the Torah: Firstly, those customs that are related to idolatrous religion, *Chok L'Avoda Zora*, and secondly, those customs that, although not related to idolatry, are performed for foolish or vain reasons. *Tosafot* go further and state that those customs which fall in the category of *Chok L'Avoda Zora*, even if they are sanctioned by the Torah, nevertheless, if subsequently they are adapted by the Gentile nations as idolatrous rituals, they become prohibited. To prove this point, *Tosafot* refer to the usage of a *Matzeva*, a single stone upon which sacrifices were brought. The book of *Bereshith* is replete with the usage of the *Matzeva* by our forefathers; yet, the

4. ע"ז שם בר"ה וαι חוקה ובשנהדרין שם בר"ה אלא

Torah in *Devarim*⁵ prohibits its use, since it was eventually adopted by the Gentile world.⁶

However, those customs which are not related to their religion, but rather are practices which are based on their own attitudes, if they are warranted by the Torah, do not become prohibited. It is for these reasons that the Gemara in *Avoda Zora* must first establish the nature of a custom to be unrelated to idol worship. Similarly, in *Sanhedrin*, the Sages first must state that execution by means of a sword is preferred for its more humane administration, rather than for idolatrous reasons. After this is established, the Gemara in *Sanhedrin* can then state that since the rite is sanctioned in the Torah, even if it is practiced by other nations, it remains permitted.

The *Ran* and the *Maharik* take exception to *Tosafot*'s understanding of the Gemara in *Avoda Zora*. The *Ran*⁷ sees the prohibition of following *Chukat Ha'Akum* as including *only* those customs which are idolatrous in nature - i.e., customs that are obviously related to idol worship as well as those practices which have no apparent reasons, for they too are suspect of having an idolatrous relationship. Therefore, the acceptance of the burning ritual among the Jewish people is contingent on the fact that its origin is honor, and not idol worship. It is allowed even without being specified as permissible in the Torah. Apparently, the *Ran* concurs with the views expressed in *Avoda Zora*⁸, rather than with the text in *Sanhedrin*.

The *Maharik*⁹, in a responsum, offers a unique insight. He says that any practice which we adopt, which makes us appear to be following the ways of the Gentile, serves as an acknowledgment of them, and is for this reason prohibited. The *Maharik* postulates

5. דברים טו:ככ

6. See רmb"ן וקרא יח:ג who discusses *Matzeva* as opposed to an altar and sacrifices which are also customarily found amongst the nations.

7. על הריב"ף בע"ז שם וע"ע בחוי הרכ"ן לסתנהדרני

8. בך העלה בתשו' מהרמ"ש שיק - חיידר סי' קסלה בחירוץ א'

9. שו"ת מהרי"ק שורש פ"ה

two categories by which we define those customs that are prohibited: Firstly, those practices which have no inherent justification, as is understood from the usage of the word "chok", which denotes those laws which are given without a logical explanation. These practices are prohibited, not because they are suspect of being related to the religion of the Gentile as the *Ran* explains, but rather because by practicing these customs we appear to be imitating the Gentiles who initiated them. Why else would we do something that makes no sense, if not for the sake of conforming?

The second category of prohibited acts includes those practices which depart from the modest or humble ways in which a Jew should conduct himself. This idea is derived from *Sifre's*¹⁰ commentary on the verse: — **השמר לך פן תנקש אחריהם** (דברים ייב:ל). "Take heed lest you be ensnared by them", where it is written: "One should not say - just as they go with red garments, so will I; just as they go with *kilusin*, so will I; just as they go with *avtiga*, so will I." The *Maharik* explains that all these are garments arrogant and haughty in nature, and therefore not characteristic of the Jewish attitude in dress, which is one of humility and modesty. (The *Maharik* is discussing customs related to manners of dress. The same idea, however, can be applied to any practice which departs from our moral codes of behavior.)

Inasmuch as the definition of "humble" or "modest" is a subjective classification, the *Maharik* clarifies that there must first be a decision by the community as a whole to depart from a specific mode of dress or practice, for reasons based on our principles. It is only after the community has decided to differentiate itself from a specific mode, that one who decides to dress as the Gentiles do is deemed to be "acknowledging" them. Furthermore, if the departure from Gentile customs was not based on religious mandates, but evolved for other reasons, although it is not our way to implement these customs, they are not prohibited.

10. ספרי - פרשת ראה - פיסקא, כת.

As the *Maharik* writes - "and the Jew is not *obligated* to be different from the Gentile at all."

A further rationale for Jews' diverging from the Gentile mode is that we are required to separate ourselves from immodest colors or fashions.¹¹

Conversely, the *Maharik* states that because the essence of the prohibition is not to imitate and thereby acknowledge the ways of the Gentile, if there is a custom that does have an apparent reason for it, it is not prohibited. By adopting these customs, we are not acknowledging the Gentile, but rather accepting the *concept*. He goes further to state that even in regard to a custom that would commonly fit the requirement of being of Gentile nature, if the Jew's intention is not solely to imitate the Gentile, but rather for lucrative or other reasons, it, too, would be permitted. He applies this rule to the following question:

An inquiry was made in regard to a local custom: a physician used to wear a specific type of cape, in order to denote his profession. The inquirer questioned whether a Jewish doctor was permitted to use this garment, although its usage originated with the Gentiles. The *Maharik* answered that, firstly, there was no decision on the part of the community at large not to dress in such a fashion, and secondly, even if there were reasons not to dress that way, since the Jewish doctor's intention in doing so is not to imitate, but rather to be associated with his profession, it is permitted.

It would then seem that the *Maharik* understands the text in *Avoda Zora* that "burning of the king's possessions is an act of honor and therefore not prohibited" to mean that since it is a custom that is done for rational purposes, in adopting it we have acknowledged not the Gentile but rather the underlying concept. It would then appear that the *Maharik*, too, is accepting the Gemara in *Avoda Zora* in preference to the text in *Sanhedrin* which requires the custom to be warranted by the Torah.

ר' י' סנהדרין עדר:א. רשי' שם, בפירוש ערכטה ומסאנא, וע"ע ברכבי הלכות יסודין.
התורה פיה ה"ב ובכטף משנה שם, ובחשובת המהרי"ק.

Taking the *Maharik*'s principle even further, *Maharam Schick* rules that even the appearance of accepting Gentile customs is proscribed.¹² It should be implicit that the Jew is following a custom for his own reasons and not as an acknowledgement of Gentile standards; otherwise, the practice would be prohibited *de facto*.

The *Bach*¹³ also seems to concur with the *Maharik*, in his interpretation of a text in *Baba Kama* (83a). There it is related that in a certain era, there was a hairstyle that was common and inasmuch as it was characteristic of the Gentile, it should have been prohibited by the laws of *Chukat Ha'Akum*. Nevertheless, it was permitted for one Avtulmus Bar-Reuven to cut his hair in that style because he was influential in the ruling circles. The *Rambam*¹⁴ implies that had he *not* cut his hair in such a manner, the Gentiles would have shunned him for not appearing as one of them. The *Beit Yosef* explains that saving Jewry overrides the prohibition of *Chukat Ha'Akum*, so that what would be prohibited under normal circumstances may be permissible to those who need to associate with Gentiles for the security of the Jewish community. On the other hand the *Bach* explains that a practice is permissible not only in extreme cases, but even under normal circumstances, provided that it is motivated by intentions to have an influence on the authorities rather than a desire to acknowledge them.

The Vilna Gaon¹⁵, in his commentary on the *Shulchan Aruch*, is not satisfied with the synopsis presented by the *Maharik*, because of its inconsistency with the *Gemara* in *Sanhedrin*; and similarly, he rejects the explanation offered by the *Ran*. He then states his own understanding of the term *Chukat Ha'Akum*: The Gaon "states that the two texts concerning "Bechukosaihem", although technically different, share a common denominator, i.e., customs which could possibly evolve in Jewish circles without the

12. שות' מהראם ש"ק חי"ד סי' קפסה

13. ב"ח י"ד סי' קעח בריה מי שקרוב

14. רמב"ם פ"יא הלכות עכ"ם ה"ג בוגנע לקרוב למלכות

15. בפייאר הנגיד י"ד סי' קעח ס"ק ז

initiation of Gentile influence. The Gaon says that this *alone* is the prerequisite for a custom to be sanctioned, regardless of other factors. This is drawn from the phrase cited in the Gemara - "We did not derive it from them (the Gentiles)." His point is well seen in the reasons offered in the texts. Burning of a king's possessions is a symbol of honor, an idea possibly conceived on our own, and as such, permitted. The second reason, the Torah's explicit sanction of the custom, is further proof that its practice by us has its origin in the Torah, our own source of concepts, rather than in the Gentile code of behavior. As the Gaon sees it, the case brought to the attention of the *Maharik* about the physician's cape would be prohibited, since we would never have devised that particular mode of dress of our own accord.

We should note that in discussing the Gentiles, the vast preponderance of the *Poskim* assume that the term connotes all non-Jews.¹⁶ Halacha apparently does not consider Islam as idolatry, and therefore Muslim customs are not subject to the prohibitions of *Chok L'Avoda Zora*.¹⁷ However, regardless of whether or not Christianity is classified as idol-worship (due to belief in the Trinity), acceptance of Christian customs would certainly come within the scope of the issur "*Chok L'Avoda Zora*".¹⁸

In summation: Albeit there is a plethora of controversy as to the intent of "*Bechukosaihem* . . .", normative Judaism is guided by the *Psak* of the *Shulchan Aruch* and the gloss of the *Ramo*.¹⁹ The latter rules in accordance with the principles expressed by the *Ran* and *Maharik*:

16. יראים טימן (פ"ח) — וע"ע הגהות מימיוניות פ"יא הלכות עכו"ם ס"ק א.

The *Yeraim* argues that since the Torah specifically mentions the seven nations and Egypt, the injunction was only applicable to their ways. The commentary עבדות המלך on the *Rambam* reasons that since the Torah includes (three verses later) "And I have separated you from the other nations" we can clearly see that the prohibition was intended to all nations.

17. שורת תשבי"ץ ענין צג, ענין קליג.

18. הרב ד.צ. הופמן — "מלמוד להועיל", אורח חיים ט"ז

19. שלחן ערוך יורה דעתה ס"ק א

... אבל דבר שנהגו לתועלת כגון שדרבן שכלי מי שהוא רופא מומחה יש לו מלובש מיוחד שניכר בו שהוא רופא אומן, מותר ללבשו וכן שעושין משום כבוד או טעם אחר, מותר.
ברכי יוסף יורה דעתה קע"ח

Those things which were adopted for a benefit, such as the custom that any one who is an expert doctor wears a distinctive garment which indicates that he is a professional doctor, it is permitted to wear it. And also those things that are done for respect or some other reasons, are permitted.

* * *

We will now turn to specific areas of behavior where these principles might be applied.

Dress

An obvious area of concern for the principle of "do not follow the ways of the Gentile" is the manner in which we dress.

Even as far back as the era of the sojourn in Egypt, Jews were already distinguished from other nations. The well-known Midrash is often quoted: "In the merit that they did not change their names, clothing and language they were redeemed." The *Meshech Chochma*²⁰ points out that Jacob foresaw the danger of assimilation during the long exile, and to assure the preservation of *Klal Yisroel*, devised this plan of being distinct in name, clothing and language, which was passed down throughout the generations.

The prophet Zephaniah admonishes the Jewish nation: "And it will be on the day that G-d will slaughter, and I will take notice of the officers and the princes, and of all those who wear alien dress." (Zephaniah 1:8) Rambam, writing in *Sefer Hamitzvot* on the prohibition of *Chukat Ha'Akum*, directs us to this verse.

20. משך חכמה בחוקתי כו:מד

Similarly, Yirmiyah refers derogatorily to the Jews' acceptance of the Gentile dress. "And you...what do you accomplish when you wear red garments, when you adorn yourselves with gold ornaments, when you cover you eyelids with blue shadows..." (Yirmiyah 4:30).

Despite these negative indications, *Maharik* points out that even in Talmudic times, there does not seem to have been any distinction in dress between Jew and Gentile.²¹ Apparently, this was not required by Jewish law, as long as no breach of modesty or humility was involved. An incidental question is whether immodest dress, although it is naturally forbidden by halacha in its own right, might possibly also be in violation of the issur "Bechukosaihem lo tailaichu".²²

Of particular interest in the context of our discussion is the question of distinctive "Jewish" clothing, such as a frockcoat or special style hat. Rabbi Moshe Feinstein in a responsum²³ deals with this issue, basing his conclusions on the principles set forth by the *Maharik*. He first establishes that in America there is no prohibition to dress in the secular fashion, since the mode of clothing is not any more designed for the Gentile than for the Jew; styles are set for everyone without distinction. Even following the strict interpretation of the Vilna Gaon, it would be permissible, since the clothing styles are not a derivative of Gentile mores, and could equally be regarded as Jewish style rather than Gentile styles.

21. **מעיליה יז:א** - The incident under discussion was as follows: A decree was issued that Jews must abstain from *Milah*, *Niddah* and *Shabbos*. Rabbi Reuven ben Istromboli cut his hair in the style of the Gentiles in order to gain entree in government circles so that he might plead the case for the Jews. Since the Gemara does not relate that he changed his garments to those of the Gentiles it would seem that their garments were identical. (See also *יסוף יורה דעה* קע"ח ברכבי). The Gaonim wrote: "We are scattered in the four corners of the earth. And every corner is different in their clothing, their deeds, and their adornments. Therefore whatever people of that place do, is also permitted to the Jews who dwell among them." 200, *אוצר הנזונים לניר*.

22. **שווית רבבי חיים חיו"ד ח"א סי' ל** ויעוין שם שהבן בדעת המ Mits בקרית ספר שאף באין כוונתו להתרומות עובר על לאו. **שווית אגרות משה**, חיו"ד ח"א סי' טא.

23. **שם**

24. **שבת קנו**

Furthermore, although it may be historically true that Jews in Europe did adopt special styles based on their moral principles (black, simple) and on their wish to be different from the rest of society, however, once a Jew has left that European community and moved to a new community where the Jews dress differently, he is free to follow the customary Jewish style in his new abode.

Kippa

Another area of distinction in our clothing is the custom of wearing a yarmulka (kippa.) The underlying principle in covering the head is to show our constant cognizance of the Divine Presence above us, as the Gemara tell us,²⁴ that the mother of Rabbi Nachman bar Yitzchok instructed him always to cover his head in order to have the fear of G-d upon him. (The word yarmulka is a contraction of two words 'yorei malka' - fear of the king (G-d).)

In Shulchan Aruch²⁵ there is much discussion as to whether this is a *midas chasidus* (pious characteristic) which would not be obligatory, or whether it is mandatory, and, if mandatory, under which circumstances. The *Taz*²⁶ seems to settle at least part of this dispute with his interjection that this custom pertains to the laws of *Chukat Ha'Akum*. He explains that although in earlier times there was room for debate, this question took on a different nature later, when it became customary among the Gentiles to purposely remove one's head covering when sitting.

The Chasam Sofer claims that covering the head is an indication of humility.²⁷ If this is so, then its initiation is motivated by a desire to be distinct in a manner based on the principle of humility. And citing a responsum from *Mahari Bruna*,²⁸ the *Maharsham*²⁹ learns that wearing a kippa should be considered as a

25. או"ח סי' ב סע' ו, או"ח סי' צ"א סע' ג, או"ח סי' עד סע' ב, או"ח סי' ח סע' ב

ט"ז או"ח סי' ח ס"ק ג בסוף

26. עיין בשורת חותם סופר חח"מ בהשומות סי' קצ"א ובספר צמה דוד חלק שני אלף הרביעי,
— לקוטים בשורה חותם סופר בסוף חאה"ע סי' ב, וע"ע שדי חמד מערכת ה"חית" כלל
כל"א

27. תשובות מהרי"ז ברונא סי' לה
28. בדעת תורה או"ח סי' ב

In reference to the evolution for the custom of going with an uncovered head.

Dat Yehuda (Jewish religious practice). One who does not follow a *Dat Yehuda* is as if he were "following the way of the Gentiles". Perhaps this case of *Dat Yehuda* would also fulfill the requirement of the *Maharik*, inasmuch as it is a conscious departure by the Jewish community from societal norms, even if not related to areas of modesty or humility.

For whatever reason covering the head became the accepted Jewish mode (in the Ashkenazic community) — if an uncovered head qualifies as "following the ways of the Gentiles", we need to address a problem which arises therefrom. There are many offices and institutions that either require or intimate their desire that a Jew not wear his yarmulka while at work. This problem existed previously too, when it was obligatory to remove one's yarmulka in courts and government offices in deference to their institutions. Is it permissible to accept a job or attend a place where it is necessary to remove the yarmulka?

Rabbi D. Z. Hoffman cites various sources on this topic.³⁰ His inquiry is in regard to swearing in court without a head covering which, in addition to the aspect of *Chukat Ha'Akum*, involves the prohibition of pronouncing G-d's name with an uncovered head. In regard to the aspect of *Chukat Ha'Akum*, he implies that since our motive is not to imitate them but rather to follow their laws in deference to them, as it is common knowledge that we are just adhering to their rules, it would be allowed. The *Mishnah Brura*³¹ in an annotation and the *Aruch Hashulchan*³² state clearly that when going to court or in the audience of a government official, one may defer to the law of the land. This idea also follows the guidelines of the *Maharik*, that if one's motive is not to imitate but rather for monetary or other acceptable gain, it does not serve as an acknowledgement of the Gentile way. Thus we can extend the approach with respect to jobs as well; if a person feels he would lose the job if he persists in wearing a head-covering, then he is

30. מלמד לחויל תורה דעתה סי' נו

31. אוח"ח סי' ב

32. שם

adopting their ways not for the sake of acknowledging them but for his own financial benefit, and this is permitted.

In a letter written to this author, Rabbi M. Feinstein, *shlita*, expresses his opinion that it is obvious that nowadays men all over America and Europe go around with uncovered heads, whether at home or in the office or even in the street, and that they do this as it suits their comfort and not for any ideological reason or religious motive. Consequently, a Jew who uncovers his head during his hours on the job, regardless of the motives of the employer in requiring it, is not transgressing the prohibition of "Bechukosaihem lo tailaichu" even according to the *Taz*.

Hairstyles

The Midrash in *Shir HaShirim*³³ states that Jews are distinguished by the way they cut their hair.

The Gemara and *Sifra* refer to two hairstyles that were characteristic of the Gentile - the *Kumi* and the *Bluris*. In the first style, the hair was cut short in front, leaving the other half of the head towards the back uncut. The second style could have taken either of two forms: the hair was cut around the head in a circular shape, and the central area of the head was uncut,³⁴ or maybe only the very sides were cut.³⁵ Both categories of styles were adopted by the Gentile with respect to their idols.³⁶ The *Bach* also includes in this prohibition growing hair long and loose to appear attractive in a vain and haughty manner. The *Chida*³⁷ categorizes the long and loose hairstyles of the soldiers in his time as being of such a nature, and admonishes the contemporary Jewish youth not to copy it, saying that this style is prohibited not because it is a form of worship to idols, but rather because growing long hair for the sake of vanity is associated with the Gentile manner.

33. איכה רבה פרשה ב:ו

34. כן נראה מהב"ח י"ד סי' קעח בר"ה ומ"ש ולא ינדל

35. כן נראה מהב"י י"ד סי' קעח בר"ה ומ"ש ולא יגדל

36. שם

37. ברכי יוסף י"ד סי' קעה

In regard to cutting the beard, the Rambam³⁸ says that the reason for the Biblical prohibition of shaving with a razor is because it was a custom of the idolatrous priests.

The *Minchat Chinuch*³⁹, however, points out that whether or not shaving the beard is considered imitation of the Gentile depends on the nature of the Gentile practice in each generation. Although at the initiation of this custom by the priests, it might have been prohibited according to the laws of *Chukat Ha'Akum*; but if in the meantime the custom changed and Gentiles now do wear beards, shaving one's beard cannot be considered an adoption of their way. He draws a parallel between the custom of shaving and of dressing: as we are permitted to dress in a style that at one time was popular among Gentiles but is now outdated, so too with hairstyles. He goes further to state that if in fact it is a habit of Gentiles to purposely shave their beards, even if a Jew shaved without a razor (or in any manner which does not qualify for the prohibition of "Lo Tashchit") it could still be prohibited under the law of *Chukat Ha'Akum*, since one looks like the Gentile regardless of how the beard was shaved.

In an interesting historical aside in his lengthy responsum about shaving the beard, the Chasam Sofer traces the custom of being clean-shaven to an era when there was a eunuch king who could not grow a beard. In a desire to make his deficiency less noticeable, the king decreed that his subjects should all remove their beards. Continuing, he states that shaving is a common practice and no longer serves as a distinction between Jew and Gentile; therefore, one who shaves will not be considered as following a style which is distinctly Gentile, and it is not prohibited.

In America, the practice of shaving would be analogous to wearing the prevalent styles of dress, and would be no more indicative of the Gentile than of the Jew.

38. פ"ב מהלכות עכ"ם ה"א

39. מנחת חינוך מצווה רנ"א ס"ק א

Thanksgiving Day Celebration

Some halachic questions arise regularly in each generation: finding solutions for familiar problems is relatively easy — one studies the writings of our predecessors. However, when a new situation develops, it is difficult to know what is right, since often the current situation is not analogous to one of the past.

Such a quandry exists with the halachic status of observing national holidays such as Thanksgiving or Mother's Day, and there are scarcely any responsa on this topic. At first glance, we might think that there would be no problem about Thanksgiving, which was instituted as a token of thankfulness for the success of the early colonies. Since it is a custom that was undertaken for a reason, then following the guidelines of the *Maharik*, it should be permissible to participate in this observance.

However, Rabbi Moshe Feinstein himself is not altogether certain that this is so. He questions whether indeed we can say that since a few colonists decided to celebrate their success, this is a valid enough reason for there to be a holiday for years thereafter. If it is not a valid reason, then the custom would be considered *Chukat Ha'Akum*.

Perhaps one would argue that the Thanksgiving feast is similar to that recorded in *Kiddushim 76a*, where the Jews participated in a meal tendered by King Yannai in celebration of a massive victory. The Thanksgiving Day feast is also a celebration for living in a free country. However, Rabbi Feinstein counters that the Jews in the time of Yannai held a feast only that one time, when they had the victory. However, to enact a yearly celebration on the basis of the actions of a few colonists may be a questionably valid source for this custom, as far as halacha is concerned. In his set of (as yet) unpublished responsa, Rabbi Feinstein expresses his hesitation on the subject, and recommends that one should not observe Thanksgiving and eat turkey each year. However, he notes that eating turkey then, without making a party, is certainly permissible; he also states that he does not consider Thanksgiving in any way a religious holiday, since it is not mentioned in their

religious books. Yet he does feel that it is appropriate to be strict in this matter, and surely not to look upon it as a mitzva.

Names

We have previously cited the Midrash that in the merit that Jews did not change their names, they were redeemed.

The Midrash continues:⁴¹ "Reuven and Shimon they went down and Reuven and Shimon they came up; they did not call Yehuda-Leoni, and not Reuven-Rubino..." (Rabbi D. Luria explains that these are the Roman translations of the meanings of the Hebrew names.)

There is a dispute between the *Maharshdam*⁴² and the *Maharam Schick*⁴³ as to whether the adoption of Gentile names is prohibited by the laws of *Chukat Ha'Akum*. The *Maharam Schick* states forcefully that this is clearly prohibited, since those who call themselves by Gentile names do so specifically to imitate the Gentiles. (This practice seemingly does not fit the prerequisite of the *Maharik*, inasmuch as it is not a custom without reason, nor a breach of humility or modesty.) He relates an interesting experience which sheds some light on the significance of a Jewish name. He was once involved in a community transaction which brought him to the office of a governmental official. There, the official told him that he was a bit puzzled by an apparent enigma and asked for clarification. He did not understand why the Jews called themselves by Gentile names. All the other nations deem it an honor to use the names associated with their nationality, and would never contemplate changing them. Yet the Jews, one of the most ancient nations, shame themselves when they consider it an embarrassment to retain their ethnic names.

The *Maharshdam*, who preceded the *Maharam Schick*, states clearly that it is not prohibited. He cites a Gemara in *Gittin* (11b)

40. שווית חת"ס חאו"ח סי' קנת בסוף

41. יקריא רבה פרשה לב'

42. שווית מהרשד"ם חיו"ד סי' קצט

43. שווית מהר"ם שיק חיו"ד סי' קסט

which records that most of the "gittin" (divorce papers) from outside of Israel were signed by witnesses who had Gentile names (even so outstanding a Gentile name as Lucas). Since those who customarily adopted Gentile names nevertheless remained unquestionably valid witnesses, it is clear that this practice was not prohibited.

Manner of Speech

The *Smag*⁴⁴ is the only authority who includes the aspect of *dibur* - manner of speech - in his discussion of the laws of *Chukat Ha'Akum*.

What is meant by *dibur* is unclear.

We do find that the Midrash previously cited ascribes the Redemption in part to the merit that they did not change their language.

The Mishnah in *Shabbat* (13b) tells us that there were "eighteen decrees" that the pupils of *Beit Shamai* and *Beit Hillel* decided to implement. They were prohibitions which would serve as extra precautions in preserving the laws of purity, and some in preventing the Jews' assimilation with the Gentiles. Among those in regard to assimilation were such prohibitions as not to partake of the Gentile's wine or bread. In the *Yerushalmi*,⁴⁵ the prohibition against adopting the language of the Gentile is also listed among the eighteen, as this, too, would serve as a precaution against becoming too close to the Gentile.

The *Chasam Sofer*,⁴⁶ in fact, writes, that in light of the decree made against adopting the language of the Gentiles, many revisions were deliberately made by Jews in the German dialect, which became known as the Yiddish language. However, the historical fact that Gentile language was banned is a clear indication that it is

44. סמ"ג ל"ת נ'

45. פ"ק שבת

46. שווי"ת חת"ס חאה"ע ח"ב סי' יא

not originally included in the Biblical prohibition of *Chukat Ha'Akum*. It is thus difficult to know exactly what is meant by "Gentile speech." Rabbeinu Hillel, in his commentary to *Sifra*, suggests that it may refer to incorporating avant-garde parlance into our speech, meaning the "with-it" words and phrases which deviate from the standard vernacular — i.e. to avoid 'lingo' or 'jargon'.⁴⁷

Rituals

In practice, *Chok L'Avoda Zora* has diverse applications and is always a factor to be reckoned with in any undertaking. As we noted previously, *Tosafot* even go so far as to recommend cessation of a Jewish practice if it is later adopted by Gentiles as an expression of their religious worship, and halachic decisors do attempt to meet this additional criterion.

A famous controversy arising from the issue of *Chok L'Avoda Zora* centered upon the introduction of the organ into the synagogue, which was one of the many innovations the Reform movement tried to implement in the nineteenth century. Defending the use of an organ during prayer services, the Reformists cited the precedent of musical instruments which were played in the Beth Hamikdash, and even attempted to identify the organ with the *Ugav* or *Magrepha* which were played by the Levites there. Alternately, the Reformists defended musical accompaniment to the prayers as not being *Chok L'Avoda Zora* since it was neither a mindless practice nor a breach of modesty. However, in attacking the innovation (on many grounds), the Orthodox camp also proved that it definitely *was Chok L'Avoda Zora* since it was a form of worship employed in the church, which *ipso facto* made it impermissible in the synagogue.⁴⁸

As for the issue of using music, whether in conjunction with

47. רכינו הלל בפירושו על ספרא, אחרי מות פרשṭא ט הל' ט. וכן שמעתי מהגריד' עפשתין והגריד' קאהן בביור כוונתו.

48. מלמד להועיל אורח חיים סימן ט"ז

tfilla or for other occasions, there are those who warn that we must refrain from using songs that might be considered in the Gentile mode or identified with their worship;⁴⁹ however, others disagree as to the impermissibility of adopting music of the Gentiles, if it was not used for their religion. In writing on this question, the *Chida* cites an authority who wrote that he himself "set most of his poems to the music of the Arabs, and although some of the sages were displeased with this practice, the law is not with them and there is absolutely nothing wrong with doing so."⁵⁰

Some people may be surprised to discover that a fiery polemic was also aroused by a custom which is practiced in a large percentage of shuls - adorning the shul on Shavuoth with flowers, branches, and greens, in commemoration of the miraculous sprouting of foliage on Mt. Sinai at the time of the giving the Torah on Shavuoth. No less a personage than the Vilna Gaon ordered that this custom be abandoned,⁵¹ for he identified the practice with the Christian custom of decorating their churches and homes with greens at holiday time. Albeit decorating the shuls was an ancient *minhag*, he objected to it with the contention that in the interim it had become *Chok L'Avoda Zora*. Although there were those who took exception with the conclusion of the Gaon,⁵² in a responsum sent to this writer, Rabbi M. Feinstein notes that the *Aruch Ha-Shulchan* also agreed that previous generations had decided to accept the dictum of the Gaon and abolished the practice.

Within the laws of *Chukat Ha'Akum* we find a sub-category, *Darkei Ha'Amori*, which includes giving credence to superstitions or good-luck and healing charms (even *kemayot* or *segulot*) which have not been proven effective.⁵³

The limitations placed upon us by the principle of *Chukat*

49. מעשה רוקח על הרמביים בפ"ח מhalbכות תפללה ה"יא בהבנת תשובה היב"ח סי' קכז.
50. חיד"א בברבי יוסף או"ח סי' חקס

51. חכמת ארם כלל פט ס"ק א

52. דעת תורה להמהרשים או"ח סי' תצה, יוסף דעת בחירושים על יוד לסימן שמח

53. Also see *Encyclopedia Talmudit*, *Darkei Ha'Amori*.

Ha'Akum are sometimes difficult to delineate with specificity. The Rambam in *Sefer Hamitzvot*⁵⁴ writes, "We are warned from following the ways of the Gentile and from accustoming ourselves to their customs even in regard to their clothes and their assemblies in their places." Elaborating on this halacha in *Mishneh Torah*, Rambam notes "...and one should not construct edifices similar in structure to their temples, for the purpose of assembly."⁵⁵ It would appear from here that the prohibition is in regard to imitating them, even in the style in which we construct our buildings. In writing on this halacha, the *Taz* adds that not only building as they build, but even calling Jews to assembly as they do is prohibited.⁵⁶ According to some, that is why shuls were never constructed with a bell tower to summon Jews to prayer.⁵⁷

Based on the Rambam's understanding of *Chukat Ha'Akum*, Jews have always taken care that the forms of our synagogues do not resemble the style of churches, and also that we do not place the *Bimah* in the front of the synagogue as they do.⁵⁸

* * *

In studying the particulars of the injunction of *Chukat Ha'Akum*, it is difficult to escape the conclusion that the Torah wants the Jewish people to maintain an exclusive and distinct identity among the family of nations. Rather than viewing this as a restriction upon our freedom, we might approach it as a philosophical desideratum, an ideal to inspire our beliefs and imbue our lives with worthy goals.

The prophet Yirmiyah compared the Jewish nation to an olive.⁵⁹ Clarifying the analogy, the Midrash notes that all liquids blend with one another except for oil of the olive, which remains

54. ספר המצוות להרמב"ם ל"ת ל.

55. פ"א מהלכות עכרים סוף הל"א

56. ראב"ד טוי יוד סי קעה ס"ק ג. Based on the opinion of the

57. שבילי דוד אות ב', הובא ברכבי תשובה סי קעה

58. ברכבי תשובה שם ספר רוח חיים אות ב' ברכוי

59. ירמיהו יא:טו.

by itself. So, too, are the Jewish people, who stand apart and do not blend with other peoples.⁶⁰

At the conclusion of his discussion on the topic *Chukat Ha'Akum*, the *Sefer ha-Chinuch* notes that it is in our best interest to remain distinct.

One who separates himself from all foreign behavior and mannerisms and applies all his thought and his heart to G-d, to understand his wondrous ways, is rewarded in that his soul will abide with all that is good, and his seed will inherit the earth.

It would be appropriate to close with the words Rabbi Yaakov Emden chose in addressing his community regarding following the Gentile ways:⁶¹

"And what else can I add to my words, in quest for their good, to save their lives from destruction.

Who will give that they will heed me, and I will find solace that my efforts were not in vain.

That it is befitting to Israel to be outstanding in their customs and in all their concerns.

So that the Legion of the King should be known throughout the nations.

His seed, his glory, his honor

So that when he will come, the true Shepherd (*Moshiach Tzidkanu*) he will recognize his flock.

Who will supply us with the day of the arrival of the master for whom we yearn.

And how, then, will the people be recognized?"

60. רביה לר'א שמות

61. המשרוי עמו רמי הל' תשעה באב שער הולך חלון השבעי (חלון המצרי)

Are Women Obligated to Pray Daily?

By Rabbi Menachem M. Kasdan

It is almost an axiom of Jewish historical experience that whatever currents move the secular world will eventually be felt also in Jewish society. As women in America aspire to equal status with men, so also have many Jewish women begun to examine seriously their role in our religious practices, in the synagogue as well as in the home. One area which is receiving renewed attention is prayer: What does the halacha require of a woman regarding prayer—does she have to daven daily? Although this may seem to be a straightforward enough question, a study of the many writings of our Sages on this topic indicate it is not a question which can easily be answered with a simple "yes" or "no". In part this is because there are different daily prayers, each of which is obligatory by virtue of different criteria. Whether or not those criteria effect an obligation for women despite the general

Note: This article is an edited excerpt from a more comprehensive work which, please G-d, will be published in book form in the coming year.

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exemption of women from time bound mitzvot forms the basis for the halachic discussion of this issue. In this article we will note the gamut of *halacha lemaseh* opinions concerning a woman's Shmoneh Esrai, Shema, & Psukei d'Zimrah obligations while explicating some of the criteria which determine those opinions.

The Mishnah in Berachot declares that women are obligated in (daily) tefilla:¹

נשים ... פטורין מקריאת שמע ומון התפילין וחיבין בתפילה ובמצוות
... וברכת המזון ...

Women are free from the obligation of reciting the Shema and putting on Tfillin and are obligated in Tefilla, Mezuza, and Grace after meals.

The term "Tefilla" in the Mishnah can mean either prayer in general, or the specific Shmoneh Esrai liturgy.

While a majority of Rishonim interpret the phrase as referring to Shmoneh Esrai — and therefore understand this ruling as obligating women to daily recite Shmoneh Esrai — a minority opinion argues that the correct interpretation is the general one, i.e. the Mishnah obligates women in the daily recitation of *any* verbalized prayer; women, according to this view, are not obligated to daily recite Shmoneh Esrai. They may choose any already existing formal liturgy, or may informally compose a prayer in fulfilling the Mishnah's Tefilla requirement.²

This dispute will serve as the starting point for our first topic of study.

1. *Berachot* 20 a,b.

2. This is the position popularly ascribed to the Rambam. See *Magen Avraham* 106:2. See also *Sefer haMeorot* on *Berachot* 20b. The *Magen Avraham* notes that his interpretation is only a possible interpretation of the Rambam. Nonetheless it is the popular one. See however, *Shaagat Aryeh* no. 14, *Mishneh Torah* 6:10, and the Rambam's *Perush haMishnayot* on *Kiddushim* 1:7 sub *umitzvat aseh she'hazman gerama*.

The Rambam's Approach

According to the Rambam, the Torah itself legislated daily prayer.

To pray daily is an affirmative precept, as it is said: "and you shall serve the L-rd your G-d" (Exodus 23:25). The service here referred to according to the teaching of Tradition is prayer, as it is said: "And to serve Him with all your heart" (Deuteronomy 11:13) on which the Sages commented, "What may be described as service of the heart? Prayer." The number of prayers is not prescribed in the Torah. No form of prayer is prescribed in the Torah. Nor does the Torah prescribe a fixed time for prayers.³

Biblical prayer according to the Rambam is thus the unfettered spontaneous expression of the individual person who prays. One may offer as terse or as extended a prayer, as often or as infrequently, as one desires. The only requirement is that *some* verbalized prayer be offered *some* time each day.

Accepting the Rambam's view that Biblical prayer is free from all time restraints, women should be held responsible for its observance, and, indeed, they are.

. . . the Torah does not prescribe a fixed time for prayer and women are therefore under an obligation to pray (daily), this being a duty, the fulfillment of which is independent of set periods.⁴

The Biblical mitzvah of daily prayer is ever-present. It exists twenty four hours each day, seven days each week. Since there is no time when the obligation lapses, it is not a time-bound precept

3. *Mishneh Torah Tefilla* 1:1. With slight emendations, translations of *Mishneh Torah* are from Isadore Twersky's *A Maimonides Reader*.

4. *Ibid.* 1:1,2.

and women are included in its compass. According to the Rambam this is the Tefilla obligation which the Mishnah imposes upon women.

So far we have discussed the Tefilla requirement which, according to the Rambam, is a Biblical command. There is however another Tefilla requirement which is a Rabbinic creation. It is Shmoneh Esrai.

According to the Rambam, two kinds of prayer requirement exist. One, whose characteristics we just described, is a Biblical command.⁵ The second, Shmoneh Esrai, is a Rabbinic formulation.⁶ As we noted in the Rambam, the Torah's daily prayer duty is not time-bound. By contrast, the Rabbinic institution of daily prayer, Shmoneh Esrai, is time-bound. (For example the obligation to recite the Shacharit Amidah is ushered in at dawn, departs at midday, and does not return again till the following morning, while the afternoon Amidah obligation is allotted only a few hours for its realization after which time it disappears, re-emerging only at the succeeding midday.)

In order for the Mishnah mandating "Tefilla" for women to be consistent with the general rule exempting women from time-bound duties, it seems that the decision obligating women in "daily prayer" must refer to the Biblical duty of expressing any daily prayer rather than to the time-restricted Rabbinic mitzva of Shmoneh Esrai. Such a reading would obligate women in some kind of prayer, but would exempt them from Shmoneh Esrai. Although this reasoning seems straightforward it is the minority opinion.

The majority of Rishonim, including Rashi, Tosafot, and the Ramban, all deny the existence of a Biblically-mandated daily prayer duty.⁷ They interpret the Mishnah's statement that

5. *Ibid.*

6. *Ibid. 1:4,5.*

7. *Berachot 20b*, Rashi sub *hachi garsinan*, *Tosafot ad. loc. sub b'tfillah*, Ramban on *Sefer haMitzvot*, the First Principle, sub *v'hapliah*, and his comments on mitzvot aseh no. 5.

"women are obligated ... in daily prayer" as meaning that women are obligated in daily *Rabbinic* prayer, i.e. *Shmoneh Esrai*. *Rabbinic* prayer, i.e. *Shmoneh Esrai*.

Of course this interpretation results in a dilemma since it simultaneously upholds two mutually exclusive propositions. On the one hand, these *Rishonim* contend that the *Mishnah* imposes the daily time-bound *Amidah* requirement upon women, while on the other hand they certainly support the general proposition that women are *exempt* from just such time-bound *mitzvot*.

Considering who the *Rishonim* are who grasped the seemingly contradictory positions, it is obvious that each group found a basis for its approach. What is it?

The *Meiri* tries to answer this question by arguing that the two opinion groups had before them two different versions of the *Talmudic* text which deals with our problem, and that one text justifies one view, while the other supports the opposing view.⁸

He shows that according to all texts, the *Gemara* in *Berachot* initially understood the *Mishnah* obligating women in daily prayer as imposing *Shmoneh Esrai* upon them. Recognizing that such a ruling clashes with the general rule exempting women from time-bound *mitzvot*, the *Sages* asked why the time-bound *Amidah* should devolve upon them.

According to *Rashi*'s text — the majority one — they answered that the *Shmoneh Esrai* duty is so exceptionally important that the *Rabbis* refused to invoke the time-bound exemption rule when they created the daily *Amidah* requirement. Since all of G-d's creation exists only by virtue of His continuous, sustaining grace, and since the very essence of *Shmoneh Esrai* is a plea for the many forms of that Divine help,⁹ it was imperative that men and women, alike, be included in the *Shmoneh Esrai* *mitzvah*.

The *Rambam*'s text — the minority one — was different. While

8. *Meiri* on *Berachot* 20b sub *machloket*.

9. *Mishneh Torah Tefilla* 1:1, 2; 4:16. See also *Rav Bar-Shaul's Mitzvah vaLev* the chapter on *Tefilla*.

there, too, the sages initially interpreted the Mishnah as obligating women in the daily Shmoneh Esrai routine and were troubled by its apparent divergence from the general exemption rule, the resolution is different. In the Rambam's version the Sages maintained halachic consistency by retreating from their initial, problematic, explanation of the Mishnah, and, in the end, upholding the supremacy of the exemption rule. When the Mishnah obligated women in daily prayer, concludes this reading of the Gemara, it referred to *Biblical*, not Rabbinic prayer. Women, concedes the Gemara, are indeed exempt from the daily Shmoneh Esrai.

The logical halachic conclusion to be drawn from Rashi's approach is that, insofar as individual daily prayer is concerned, the obligations of men and women are identical. If men must rise early each morning in order to recite the Shacharit Shmoneh Esrai by a certain hour, so must women. If men must set aside time for reciting Mincha each afternoon, so must women.

By contrast, according to the Rambam's text, there is one similarity and one difference in the daily individual prayer obligations which devolve upon men and women. Both are equally bound by the Biblical daily prayer duty. However, only men must, in addition, fulfill the daily *Rabbinic* prayer requirement *as their way of discharging the Biblical prayer duty*. Women are not so restricted. They are not bound to follow Shmoneh Esrai forms, time limitations, or number (i.e. two or three recitations daily, an extra Amidah on Shabbat, etc...) in order to fulfill their Biblical commitment to pray daily.

Having outlined the two trends in Rishonim concerning a woman's daily prayer obligation, we must now fill in some of the contents of these trends. First, we will more clearly explicate Rashi's view. Following that, we will describe and analyze just what the Rambam's Biblical prayer obligation consists of.

Mincha and Maariv

When the Mishnah obligated women in daily prayer, it was

clear to Rashi that what was meant thereby was Shmoneh Esrai. Since we are familiar with three different kinds of daily Amidah prayers recited by us — Shacharit, Mincha, and Maariv — we would automatically assume that the Mishnah's ruling includes all three kinds of Shmoneh Esrai, and that, as a result, women must recite all three prayers every day. We would be right insofar as Shacharit and Mincha are concerned. Rashi sees the Mishnah's ruling as unquestionably referring to those Shmoneh Esrais, and women must certainly recite the Shacharit and Mincha prayers each day at their proper time. Whether or not Maariv is included in the Mishnaic dictum however, is subject to a dispute.¹⁰

In what practical way is Maariv of inferior importance? Rishonim proposed two answers.

One is that while the recitation of Shacharit and Mincha are obligatory, recitation of Maariv is entirely optional. This means that when the Rabbis initially created the daily prayer institution it included two *mandatory* prayers (Shacharit and Mincha), and one, perhaps recommended, but entirely *voluntary* service, Maariv. Thus, when the Mishnah instructs women to observe the Shmoneh Esrai routine according to Rashi it could only impose the *obligatory* recitations, Shacharit and Mincha.

Based on this approach, the Shulchan Aruch haRav¹¹ and the

10. When the Rabbis formulated the Shmoneh Esrai institution, they related certain of its halachot to the daily sacrificial service in the Temple. All authorities agree that, just as there were two daily obligatory communal offerings in the Temple, one in the morning and one in the afternoon, there are at least two daily *obligatory* Amidah prayers to be recited at similar times. In fact, the very names of these two prayers, Shacharit and Mincha, are directly borrowed from the daily Tamid sacrifices.

Maariv however, does not correspond to any Tamid sacrifice. Rather, it is related to a secondary sacrificial process which went on every night on Temple grounds, the burning on the altar of the limbs and fat of those animal offerings upon which the primary sacrificial processes had been carried out, but whose remains had not been burned during the daylight hours. Since Maariv does not have an actual *korban* (sacrificial offering) correlate, and since it is related only to a secondary cultic practice, its liturgical status is inferior to its morning and afternoon counterparts.

11. *Shulchan Aruch haRav* 106:2.

Mishnah Brura¹² require women to daily recite Shacharit and Mincha, but absolve them from the recitation of Maariv.

Against them however, are poskim who agree that the Mishnah does *not* mandate a Maariv recitation, yet they *do* require its recitation by women.¹³ How can this be so?

Bear in mind that if the initial Shmoneh Esrai legislation did not command a Maariv recitation, this held true for men as well as women. Yet it is unanimously agreed that in practice today (*halacha lemaaseh*), men *are* halachically bound to recite the Maariv Shmoneh Esrai every evening. This unexpected obligation derives from the force of *minhag*, custom. Apparently, men so regularly, and so universally, recited the Maariv Amidah that it became for them an obligatory custom.¹⁴ The Poskim who disagree with the Shulchan Aruch haRav and Mishnah Brura claim that the identical process occurred in the ranks of women, i.e. a large enough number of women so regularly recited the Maariv Amidah that its daily recitation by them became obligatory for all women by force of *minhag*.

A second opinion denies that Maariv is an optional prayer. While it is clear from other sources that the Maariv obligation is "weaker" than the Shacharit and Mincha ones in certain unusual contexts, nonetheless it is as obligatory in normal daily contexts as its morning and afternoon counterparts. According to this approach, when the Mishnah ruled that women must observe the daily Rabbinic prayer routine it included Maariv. The net result of this approach is that men and women must recite all three Shmoneh Esrais daily by force of imposed Rabbinic legislation, not voluntarily accepted practice.¹⁵

To sum up so far: The Mishnah in Berachot obligates women

12. *Mishnah Brura* 106:4.

13. See *Aishel Avraham* no. 16 on *Magen Avraham* 299:16.

14. *Mishneh Torah* *ibid.* 1:6.

15. *Aruch haShulchan* 106:7, 47:25, *Shaagat Aryeh* No. 14. They presuppose the opinion of *Tosafot* sub *ta'ah* in *Berachot* 26a.

in the recitation of "daily prayer". According to Rashi and the majority of the Rishonim, women must therefore recite Shmoneh Esrai every day. This approach bore two practical *halacha lemaaseh*, derivative opinions:

- 1) Women must recite Shacharit and Mincha every day at their appropriate times, but are exempt from Maariv.
- 2) Women must recite Shacharit, Mincha, and Maariv, either because the Mishnah itself mandates all three, or, even if the Mishnah does not include Maariv in its ruling, Maariv must be recited by force of obligatory custom.¹⁶

Of course, as was just pointed out, all these opinions start with Rashi's assumption that the Mishnah obligates women in the Rabbinic form of daily prayer. However, those who rely on the Rambam's text contend that the Mishnah does *not* impose Rabbinic prayer upon women. According to them it only imposes the less structured *Biblical* prayer requirement. Assuming that they are correct, what is the nature of the Biblical requirement for prayer?

Elements Of Prayer

The Rambam lists the elements of Biblical prayer as including praise, petition, and thanksgiving, in that order.

16. It is most likely that the *Hayyei Adam* requires a daily triple Amidah recitation by women.

In the laws of Sabbath candle lighting (*Shabbat* 5:9) he writes "... and they (women) must also recite Mincha first [i.e. before lighting the Sabbath candles] since [by lighting the candles] she would have thereby accepted the advent of the Sabbath [and, no longer being able to recite the weekday Amidah,] she would be required to recite two Maariv Shmoneh Esrais."

Since the *Hayyei Adam* writes about a "make-up" (*tashlumim*) for Mincha the implication is that some requirement has been missed. Conceivably we are dealing with an individual woman (or that special class of women) whose Amidah recitation is obligatory by voluntary acceptance (*neder*). In that case, the *Hayyei Adam*'s ruling has no bearing on our problem. However, given the *Hayyei Adam*'s blanket statement it is more likely that the woman he refers to is representative, and the Mincha recitation which she must make up is obligatory upon all women. In such a case the conclusion is that, according to the *Hayyei Adam*, women must recite at least the Shacharit and Mincha Amidot.

The obligation of the Biblical prayer is that every person daily should offer up supplication and prayer, first uttering praises of G-d, then with humble supplication and petition asking for all that he needs, and finally offering praise and thanksgiving to the Eternal for the benefits already bestowed upon him in such rich measure. This should be done each according to his ability.¹⁷

It appears that while the *text* of Biblical prayer is composed spontaneously by the individual, the *structure* for that prayer has been pre-determined and is imposed by the Torah.¹⁸ Unquestionably this order — praise, request, and thanksgiving — is required at the outset.¹⁹

In any case, since Shmoneh Esrai is already arranged in a praise-petition-thanksgiving format, a woman could rely upon recitation of a single Shmoneh Esrai as a means *par excellence* of fulfilling her daily Biblical prayer requirement. Indeed there is one authority who, just for this reason, recommends a single daily recitation of Shmoneh Esrai as the most preferable way for a woman to fulfill her Biblical obligation.^{20,21}

17. *Mishneh Torah ibid.* 1:2.

18. *Berachot* 32a, Rav Simlai's exegesis. See the *Kesef Mishneh* (*Mishna Torah ibid.*) who quotes Rav Simlai as the Rambam's source, indicating that the source is Biblical. However, compare to the *Tur*'s understanding of the exegesis (*Tur Orach Hayyim* 51) as relating to *Psukei d'Zimrah* (and hence unavailable for determining the contents of the Amidah requirement).

19. In light of the above it is difficult to understand the Magen Avraham's popular suggestion that a woman could fulfill her Biblical prayer obligation according to the Rambam by petitionary prayer alone. Since such a prayer lacks praise and gratitude it is clearly deficient *lechatchila*, and even *bidieved* it may not suffice. See *Magen Avraham* 106:2.

20. Rav Ovadiah Yosef, *Yabia Omer ibid.* no. 17, paragraph 3.

In *Yabia Omer* VI, *Orach Hayyim* section no. 18, and in an untitled article no. 118, paragraph 6 in *Or Torah*, Adar 5731, Rav Ovadiah Yosef rules - against other acharonim whom he cites - that a woman who forgets to recite *ya'aleh v'yavoh* etc. in Shmoneh Esrai must repeat the Amidah even according to the *Magen Avraham*, providing she initially recited the Amidah with the intention of reciting a proper Amidah.

21. However, there would be a difference between the laws applying to a woman

In summation, a number of possible combinations of *psak* have been proposed by various authorities. Starting from the most stringent through the most lenient they include:

- a) an obligation to recite three Shmoneh Esrais daily,
- b) an obligation to recite two Shmoneh Esrais daily (Shacharit and Mincha),
- c) an exemption from any Amidah obligation, but a recommendation that a single daily Shmoneh Esrai recitation be the means of discharging the Biblical prayer duty,
- d) finally, an exemption from all Amidah recitations, but a requirement that women recite some other prayer which they may either choose from classical sources or individually compose, providing such a prayer contains elements of praise, petition, and thanksgiving, and in that order.

Shema: Morning and Evening

The same Mishnah which obligated women in daily prayer explicitly absolved them from the Shema recitations, Shema being a time-bound positive precept. Each morning shortly after dawn the Shema obligation commences and continues through the first quarter of the day, after which it disappears until nightfall when the evening Shema obligation begins.²² On its face the mitzvah is obviously non-continuous and women are exempted from its fulfillment.

who recites the Amidah *only* to fulfill her Biblical obligation (following the Magen Avraham) and a woman who, like a man, recites Shmoneh Esrai because she is Rabbinically required to do so (following Rashi, the Shulchan Aruch haRav, etc.). If the former altered the Amidah text, e.g. by deleting such phrases as "mashiv haruach u'morid hageshem", "ya'aleh v'yavoh" or "hamelech hakadosh", the Biblical obligation would certainly have been discharged and no new repetition of Shmoneh Esrai would be required. However, for one who is duty bound to recite the prayer, a text flawed by such deletions would not conform to the Rabbinic requirement for Shmoneh Esrai and the prayer would have to be repeated. Rav Yosef disagrees.

22. *Berachot* 20a,b. *Orach Hayyim* 70:1; 235:1, 3. The evening Shema requirement is also time bound being limited to *zeman shechiva*. See *Orach Hayyim* 235:3, 4.

The Bach, however, interpreted the Mishnah (and its attendant Gemara) in such a way as to distinguish within the Shema requirement two different obligations, the one to recite the three paragraphs of Shema and the other to "accept the yoke of the Kingdom of Heaven" (*kabbalat ol malchut shamayim*). This last obligation is encapsulated in the first verse of Shema and the mitzvah is fulfilled by reciting that one verse. According to the Bach's interpretation, women are exempted only from the three-paragraph obligation but not from the first verse *kabbalat ol* obligation. Consequently, a woman must recite the verse *Shema Yisrael* every day.²³ Although the Mechaber in the Shulchan Aruch accepted unqualifiedly a woman's exemption from all aspect of the Shema obligation (against the Bach), he nonetheless very strongly encouraged women to recite the *Shema Yisrael* verse mornings and evenings.²⁴ (Note: Whenever the *Shema* verse is recited it should immediately be followed by *baruch shem* etc.).²⁵

Shema She'al haMitta

While the authorities unanimously agree that women are exempt from the daily Shema recitations the issue is clouded insofar as the *Shema she'al hamitta* (at bedtime) is concerned.

The Magen Avraham writes that to his knowledge women do not customarily recite this Shema. He is uncertain about why they don't and suggests that they probably considered it time-bound since it is an evening — and therefore non-continuous — mitzvah.²⁶

However, it is not at all certain that, just because this Shema

23. Bach on *Tur Orach Hayyim* 70, sub *nashim*. See also *Aruch Hashulchan* 70:1, 2. He claims that women customarily recite all of Shema every day. See also *Masechet Sofrim* (18:4) that on the Sabbath women came to the synagogue before sunrise in order to recite Shema with the *vatikin* at sunrise.

24. *Orach Hayyim* 70:1.

25. *Ateret Zekainim* on *Orach Hayyim* 70 sub *nashim*, and the *Ramo* on *Orach Hayyim* 46:9.

26. *Magen Avraham* 239:2.

is recited only in the evening, it is therefore time-bound. Whether or not it is depends upon understanding the precise halachic definition of the *z'man gerama* (time-bound) concept. There are two possibilities as to what that precise definition is.

If *z'man gerama* means that the time available for a mitzvah fulfillment is restricted, then *Shema she'al hamitta* which is limited to evenings does indeed qualify as time bound, and women should be exempt from its recitation. However, if the precise definition of *z'man gerama* means that the devolvement of a specific time is the halakhic "cause" or "trigger" of the mitzvah obligation - e.g. the first instant when the rim of the emerging sun can be glimpsed against the horizon on the first of Tishrei "triggers" the *lechatchila* halachic obligation to listen to the shofar blasts, and the remaining daylight hours sustain that obligation²⁷ - then *Shema she'al hamitta* is not time-bound. For the fact is that it is not the nighttime which obligates this *Shema* recitation; it is the *going-to-sleep* at night which is the halakhic "obligator" (*mehayyev*).²⁸ If it was the nighttime which created the obligation then even one who remained awake should be required to recite *Shema she'al hamitta*. In fact, one who remains awake all night is exempt. Thus, according to this second definition of *z'man gerama*, *Shema she'al hamitta* is not time-bound, women should be obligated in its nightly recitation (before retiring) and we must look elsewhere to uphold the reasoning of those poskim who accept this second definition of *z'man gerama*, yet exempt women from the *Shema* recitation.

This leads us to the rather fundamental dispute over *what* precisely is the obligation. There are two Talmudic sources which are relevant to answering this question. One states that before going to sleep at night, Rabbi Yehoshua ben Levi would recite certain verses "for protection".²⁹ These verses are a part of the

27. *Orach Hayyim* 588:1.

28. Obviously only the *going-to-sleep at night* obligates this *Shema*. Nonetheless it is not the nighttime which is the *mehayyev* (halakhic obligator).

29. *Shevuot* 15b.

Shema she'al hamitta liturgy. Thus, one possibility is that the entire *Shema she'al hamitta* liturgy is essentially a *prayer* for Divine protection during that period of extreme vulnerability which we call sleep.³⁰ Since both men and women require protection, this source would suggest a universal obligation.

However, the other source can support a different understanding which would exempt women from *Shema she'al hamitta*.

The second source quotes Rabbi Yehoshua ben Levi as saying that "even though one has recited the *Shema* in the *synagogue*" (i.e. during *Maariv*) it is obligatory to recite it again at home before retiring.³¹ Why link the two recitations? What is the meaning of "even though *Shema* was recited in the *synagogue*"?

One explanation understands Rabbi Yehoshua to be saying: "Don't think you have discharged your entire evening *Shema* responsibility in the *synagogue*. Even though you have recited *Shema* during *Maariv*, your *mitzvah* fulfillment is Rabbinically adjudged to be incomplete until you repeat it at home before going to sleep."

According to this interpretation the Rabbis legislated an *extension* of the Biblical evening *Shema* obligation. Thus, rather than being a *prayer* obligation, *Shema she'al hamitta* must be recognized as a *Shema* obligation whose *outcome* is, happily, "protection". However, that outcome does not change the basic halachic nature of the obligation which is a Rabbinic extension of the evening (Biblical) *Shema mitzvah* that relates the *Shema* to sleeping.³²

(The Sages held that sleep is a foretaste of death and that during the night our souls are in His hands. When sleep overtakes us there is no guarantee that our consciousness will return and that

30. For some opinions as to the nature of the *mazzikim* from which protection is sought see the *Meiri* on *Berachot* 4b sub *af al pi*, and the *Kaf haHayyim* 239:3.

31. *Berachot* 4b.

32. See the *Otzar haGeonim* on Rabbi Yehoshua's statement in *Berachot* 4b.

we will awaken on the morrow. Rather than let sleeping be merely an involuntary and, ultimately, uncontrollable physiological reaction which overpowers man and beast alike, the Sages enacted the prior recitation of Shema. By this enactment they transformed and elevated what would otherwise be a merely involuntary physiological sleep reaction into an intentional spiritual action of voluntarily giving ourselves over into His care. According to this understanding, *Shema she'al hamitta* is like the Biblical Shema obligation; it is essentially a *kabbalat ol mitzvah*.³³⁾

If it is accepted that *Shema she'al hamitta* is technically a Rabbinic extension of the (time-bound) evening Biblical Shema requirement, then, just as women are exempt from the essential, or "core" Biblical Shema requirement, so too they are exempt from any of its extensions.

If however, the *Shema she'al hamitta* obligation is understood to be (as was suggested earlier) a separately legislated prayer for protection at a moment of helplessness which just happens to use the *Shema-kabbalat ol* format as being especially appropriate, then women too are obligated, for as the the Eliyahu Rabba asks, "Are not women also in need of protection?"³⁴

In summation: Women are exempt from the Biblical Shema obligation. The Rabbinic *Shema she'al hamitta* has characteristics of both the Biblical Shema mitzvah as well as of a prayer for protection. If its primary halachic status is as a Shema obligation, women are definitely exempt. If its primary halachic status is as a prayer for protection, then many *poskim* hold that women are obligated even if this Shema is time-bound. The Magen Avraham indicates, however, that if it is time-bound, women may indeed be exempt.

33. The notion of transforming the involuntary sleep reaction into a voluntary act of *kabbalat ol* by the Shema recitation was developed in a shiur by Rav Joseph B. Soloveitchik. The Meiri loc. cit. also talks of a *kabbalat ol* element in protecting from the *mazzikim*.

34. See the analysis of the *Shema she'al hamitta* obligation in *Magen Avraham* 239:2.

Birchot Shema

Insofar as *birchot Shema*, the blessings attending the Shacharit and Maariv Shema are concerned, women are, according to most authorities, exempt.³⁵ The reasoning is rather simple. Since *birchot Shema* were created to accompany the Shema, they too are time-bound. Women, who are exempt from Shema, are also exempt from *birchot Shema*. This is the view of the majority of the *poskim*. A minority view however qualifies this exemption.

The minority view distinguishes between the first two blessings which precede the Shema and the one which follows it. While the first blessings were conceived by the Rabbis only in relation to Shema, the last blessing, *ga'al yisrael* and at night, *ga'al yisrael* and *hashkivenu*)³⁶ was formulated as a means of satisfying an already existing Biblical requirement of *zechirat yetziat mitzraim*, the required daily verbal recollection of the redemption from Egypt.³⁷ The recitation of *ga'al yisrael* is thus of twofold consequence. On the one hand recitation of this bracha fulfills a Rabbinic Shema obligation; on the other hand, by reciting *ga'al yisrael*, the Jew discharges his (or her) Biblical *zechira* obligation.

The *poskim* who claim that women must recite *ga'al yisrael* reason that, since the mitzvah of *zechirat yetziat mitzraim* applies every morning and every evening, with the morning and evening obligations following upon each other's heels in an endless, continuous sequence, the obligation is never shackled by the chains of time. Women are therefore obligated to observe it. Since the Rabbis ordained a particular formula for its fulfillment (the blessing *ga'al yisrael*), women must daily recite this one Shema blessing.³⁸

Against this view however, two arguments may be presented. First, argues the adversary position, the obligation of *zechirat yetziat mitzraim* is a time-bound mitzvah. According to this view

35. *Mishneh Brura* 106:2.

36. *Ibid.*

37. *Shulchan Aruch haRav* 70:1.

38. *Ibid.*, *Mishnah Brura* 70:2, 106:4.

the Torah mandated two different *zechira* obligations, one whose fulfillment is restricted to (or caused by) the daytime, the other whose fulfillment is restricted to (or caused by) the nighttime. The first is obligatory only during the day, the second, only during the night. Since each *zechira* obligation is individually time-bound, women are exempt from both of them. Consequently, they are also exempt from the *ga'al yisrael bracha*.³⁹

Second, even if we accept the former position that *zechirat yetziat mitzraim* is a duty which the Torah does require of women, it does not follow that fulfillment of that requirement is restricted to the particular Rabbinic formulation *ga'al yisrael*. The approach of Maimonides which was mentioned earlier concerning daily prayer is applicable here as well. Even though the Biblical prayer obligations of men and women are identical, only men are required to discharge their obligation by reciting the Rabbinically formulated *Shmoneh Esrai*. Women may fulfill their responsibility through improvisation. Similarly here, the mere fact that a woman must fulfill the *zechira* mitzva does not *ipso facto* necessitate her to use Rabbinic forms. An improvised statement should be just as valid as recitation of *ga'al yisrael* for the fulfillment of her obligation.

Without attempting to resolve the issue, let us just note that proponents of the view that women must recite both *ga'al yisrael* and *Shmoneh Esrai*, also require that (as is required of men) the two be juxtaposed.⁴⁰ (The general rule is that, at least in the morning, the redemption blessing should be followed as immediately as possible with the *Amidah*).⁴¹ According to this view

39. *Shaagat Aryeh* no. 12, *Mishnah Berura* *ibid*. The *Pri Megadim* advances a third opinion. He claims that only the morning *zechira* mitzvah is Biblically ordained; the evening recitation is of Rabbinic origin. Insofar as being time-bound is concerned, this one Biblical, one Rabbinic obligation formulation is conceptually identical to the *Shaagat Aryeh*'s two Biblical obligation formulation. Women are exempt. See *Aishel Avraham* 67:1, 70:1.

40. *Shulchan Aruch haRav* 70:1, *MB* 70:2.

41. *Orach Hayyim* 66:8, 111:1.

ga'al yisrael was created - at least in part - as a prologue to Shmoneh Esrai. In addition to relating Shema to Shmoneh Esrai and incorporating the *zechira* mitzvah, the redemption blessing has an independent relationship to Shmoneh Esrai. Apparently the memory of G-d's grace at the time of the Egyptian exodus and its whispered implication of future redemption is a uniquely proper introduction to the Amidah prayer, which itself is a plea for G-d's grace in the present and the future.

In summation: The authorities unanimously exempt women from daily recitation of the three Shema paragraphs. One view obligates, and the Shulchan Aruch strongly encourages, the recitation of the first verse of Shema each day. All opinions exempt women from the first two blessings accompanying Shema. The majority position maintains that the third blessing is also not obligatory while a minority view is that it is obligatory. According to the minority view, the Amidah prayer should immediately follow recitation of *ga'al yisrael*. With the exception of the current Sefardi Chief Rabbi, Rav Ovadiah Yosef,⁴² all opinions would permit women to recite all three Shema blessings if they so desired.

Psukei d'Zimrah

Psukei d'Zimrah always precede, and are conceptually related to, the Shacharit Amidah. The relationship is as follows: Before any human being has the right to plead his personal or even communal requests before G-d — the basic function of Shmoneh Esrai — he must first impress upon himself Whose throne it is he wishes to approach, and in Whose Presence he wishes to appear. Through recitation of Psukei d'Zimrah the pray-er evokes this awareness.⁴³

42. Rav Ovadiah Yosef, *Yabia Omer* II *Orach Hayyim* section, Responsum no. 6.

43. For a very thorough analysis of the halakhic and philosophical foundations of Psukei d'Zimrah see Yitzchak Kasdan's "An Appreciation of T'filah" in *Hamevasser*, vol. 14, no. 3, published by the The Jewish Studies Divisions of Yeshiva University (New York, 1975).

Recognizing this relationship, the Mishnah Brura argues that if women are deemed obligated to recite Shmoneh Esrai (following Rashi etc.), they are then also obligated to recite Psukei d'Zimrah every morning before the Shacharit Amidah.⁴⁴

The Shulchan Aruch haRav⁴⁵ and Aruch haShulchan⁴⁶ disagree, arguing that, since Psukei d'Zimrah is time-bound (since it is only recited in the morning) it can only be an optional prayer insofar as women are concerned. If a woman wishes to recite Psukei d'Zimrah she may; if not, Shmoneh Esrai may be recited without a prior Psukei d'Zimrah recitation.

Apparently the Mishnah Brura feels that *lechatchila* it is forbidden to recite Shmoneh Esrai before reflecting upon and reciting the themes developed in Psukei d'Zimrah.⁴⁷ Hence, if women are obligated to recite the morning Amidah, they must recite Psukei d'Zimrah beforehand. On the other hand, the other authorities, who also accept the principle of required reflection before Shmoneh Esrai, feel that the specific recitation of Psukei d'Zimrah is only a desired, but not a necessary, prologue to Shmoneh Esrai. Hence, even if women are obligated to recite the morning Amidah, they are not *ipso facto* required to recite Psukei d'Zimrah as an introduction.

Baruch Sheamar and Yishtabach: The Obligation

Psukei d'Zimrah are bounded by two blessings. The first is Baruch Shemar, the second, Yishtabach. If the Mishnah Brura is right about women having to recite Psukei d'Zimrah every day,

44. *Mishnah Brura* 70:2.

45. *Shulchan Aruch haRav* 70:1.

46. *Aruch Hashulchan* 70:1, 47:25. In the latter citation there is the implication that women regularly recited Psukei d'Zimrah.

47. In technical jargon, Psukei d'Zimrah is a *matir* for the Shacharit Amidah. This is consistent with his ruling in *Mishnah Brura* 52:6 against the Mechaber, that one should recite Psukei d'Zimrah even if, as a result, *tefilla b'tzibbur* would thereby be lost. The *Aruch Hashulchan* (52:7) and *Shulchan Aruch haRav* (52:1) agree with the Mechaber.

then such a recitation should begin with Baruch Sheamar and end with Yishtabach because the Psukei d'Zimrah *obligation* embraces the complete unit of recitation. By contrast, the Shulchan Aruch haRav and the Aruch haShulchan who claim that recitation of the Psukei d'Zimrah unit is optional for women, rule that the Baruch Sheamar and Yishtabach recitations are also only optional, i.e. if a woman decides to recite the Psukei d'Zimrah, she may recite them with or without the accompanying blessings; the choice is hers.⁴⁸ Since in their opinion there is no recitation-*obligation* at all, a woman may recite all, or only part, of the Psukei d'Zimrah unit as she so desires.

A third opinion *prohibits* women from reciting these (or, as was mentioned earlier, the Shema) blessings even though they are permitted to recite the rest of Psukei d'Zimrah. The major contemporary proponent of this opinion is Rav Ovadiah Yosef, the Sefardi Chief Rabbi, who has published his views in a number of recent responsa.⁴⁹

The basis for Rav Yosef's ruling is his interpretation of the Rambam's definition of *bracha levatala* in such a way as to categorize the recitation of Baruch Sheamar and Yishtabach (and the Shema blessings) by women as *brachot levatala*. He therefore forbids women to recite them. The practical consequences of his ruling are, by his own admission, subject to two limitations:

- 1) It is binding *only* upon Sefardi, not Ashkenazi, women,
- 2) Even Sefardi women may recite the Baruch Sheamar and Yishtabach texts providing they delete G-d's name from the *bracha* formula, *Baruch ata Hashem*. That deletion cancels the *bracha* status of these prayers and therefore their recitation by women can

48. *Shulchan Aruch haRav* 70:1, *Aruch Hashulchan* 70:1. The *Aruch Hashulchan* presents an interesting though strained argument that, since women, led by Miriam the Prophetess, were as involved as men in the first equivalent of Psukei d'Zimrah, *az yashir*, and since *az yashir* is today recited within the Psukei d'Zimrah framework, there can be no objection to women reciting the Psukei d'Zimrah blessings.

49. Rav Ovadiah Yosef, *Yabia Omer* II *Orach Hayyim* responsum no. 6.

neither be considered to be *levatala*, nor can they be forbidden.

It should be noted that most authorities — including Sefardi *poskim* — do not accept Rav Yosef's interpretation of the Rambam and therefore permit women to recite those *brachot*.⁵⁰

In summation: According to the Mishnah Brura women must daily recite P'sukei d'Zimrah and their accompanying blessings, Baruch Sheamar and Yishtabach. All other authorities agree that recitation of P'sukei d'Zimrah is only optional for women. The vast majority of these latter *poskim* consider the Baruch Sheamar and Yishtabach recitation to also be only optional.

50. See *Kaf haHayyim* 70:1. See also *Tzitz Eliezer* VII no. 2 especially sections 4-6. Rav Yosef's rejoinder is in *Yabia Omer* V *Orach Hayyim* section no. 43.

Natural Childbirth: May The Husband Attend?

By Dr. Avraham Steinberg

A. Introduction

Throughout history, women have suffered the pangs of childbirth, almost as a law of nature. The Torah teaches that this was Eve's punishment for eating from the forbidden fruit: בעזב תלי בני, "You will bear children in pain."¹

The Catholic church regarded this dictum as an imperative, so that human beings were not allowed to change it under any circumstances. Rabbi I. Jakobovitz quotes a historic fact that "before the discovery of anesthesia, a woman in France was detected in an attempt to ease the pain of childbirth with the help of another woman. This was construed as a blasphemous attempt to thwart the curse which G-d had laid upon Eve and both women were burnt to death."² It was not, in fact, until 1949 that the Holy Office announced papal sanction for painless births.

1. בראשית, ג, ט"ז.

2. I. Jakobovits, Jewish Medical Ethics, 2nd Ed., New York, 1975, p. 104.

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Among Jewish scholars this problem is never raised. The reference regarding Eve never presented any difficulty, as she was *cursed*, not commanded, to suffer birth pains. Zimmels³ remarks that the prohibition of analgesics for pangs of birth would, in fact, contradict Jewish ideology, since the ways of Torah "are ways of pleasantness and all her paths are peace"⁴.

Since pain of labor and delivery is so great, one would not be surprised to find — from time immemorial — various attempts to reduce and alleviate this suffering. We encounter in all cultures and throughout human history the usage of medical-anesthetic devices as well as psychological attempts to relieve the pain of birth and encourage the woman at her difficult time of parturition (labor and delivery). In all but one of 150 cultures studied by anthropologists, a family member or friend, usually a female, remained with a mother during labor and delivery.⁵ In Jewish tradition the onlookers at labor used to encourage her, saying: "The L-rd who answered your mother in her time of need, will also answer you in your time of need"⁶.

Several scientific articles have been published recently, pointing out the importance of human companionship during birth. One of these studies⁷ proved that when there was a companion to the woman during her labor, the length of time from admission to the hospital until delivery was shortened. Furthermore, mothers who had a companion present during labor were more awake after delivery, smiled and talked to their babies and were more alert and active compared to control mothers without companions. The frequency of development of certain problems that require intervention during labor and delivery was lower for mothers who had a supportive companion. This — and other previous studies — suggest that there may be a major perinatal benefit of constant human support during labor.

3. H.J. Zimmels, *Magicians, Theologicians and Doctors*, London, 1952, p. 7..

4. *משלי*, ג, יג.

5. R. Rosa et. al., *New Engl. J. Med.*, 303: 597-600, 1980.

6. *מדרשי תהילים*, כ, ד.

7. R. Rosa et al, *loc. cit.*

In the past three decades, an extended birth psychoprophylaxis has developed. This is a psychologic method of preparation during pregnancy designed to prevent — or at least to minimize — pain and difficulty during labor. The pregnant woman is taught in various modes to use her natural brain processes to her advantage. The basic principles and methods of psychoprophylaxis were developed by Russian obstetricians. In 1951, Dr. Lamaze, a French obstetrician, visited Russia and saw women trained in psychoprophylaxis deliver without pain. Upon his return to Paris, Dr. Lamaze adapted this method for use in the Western world. This technique — as well as some other variants — have spread to many countries all over the world.

Most of these methods include training programs during pregnancy together with a companion — usually the husband — who continues to accompany the woman at labor and delivery, encouraging and reminding her to use the psychotherapy and relaxation exercises learned and practiced during pregnancy. These include learning how to relax the muscles via various breathing exercises. The husband is also trained to ease his wife's pain by applying pressure to painful areas, mopping her brow, and massaging or rubbing her as needed to relieve tension.

B. The Halachic Problems

From the halachic viewpoint, there are two aspects to the issue of the husband's participation at parturition. On the one hand a woman in labor and delivery is considered a Nidah, and therefore the husband is prohibited to touch her and to look at certain parts of her body. On the other hand a woman giving birth is considered a dangerously sick person for whom many prohibitions are permitted. The question now is — which halachic definition should be operative? May he try to alleviate her distress by implementing the Lamaze techniques, or is he forbidden to touch her as she is Nidah?

(a) The Status of Nidah

In Shulchan Aruch we find the following *Din*⁸:

יולדת, אפילו לא ראתה דם, טמאה כנדה, בין ילדה חי בין
ילדה מת ואפילו נפל.

"A woman giving birth, even if she did not see any blood, is 'unclean' as a *Nidah*, whether she bore a live child or a dead child, or even had a miscarriage." According to this halachic definition, all laws of *Nidah* are applicable to a woman in parturition. The definitions of various stages of labor were discussed by *Chazal* in reference to the woman's status as a dangerously sick person — see further in section (b). These definitions are valid to her *Nidah* state as well. As soon as regular contractions commence, she should be regarded as "*safek Nidah*" (possibly a *Nidah*)⁹, unless it is proven that those were false contractions. Of special relevance to our discussion are two *Dinim*: (1) The prohibition to look at certain parts of one's wife's body during her period of *Nidah*; (2) The prohibition to touch her at that time.

(1) Regarding observation — the following *Psak* is cited in Shulchan Aruch¹⁰:

„מותר לאדם להביט באשתו, אפילו כשהיא נידה והיא ערוה
לו, אך פ' שיש לו הנאה בראייתה, הווא מותר לו
לאחר זמן אינו בא בוח לירוי מכשול, אבל לא ישחוק ולא
יקל ראש עמה.“

"It is permitted for a man to look at his wife, even if she is a *Nidah* and is (sexually) forbidden to

8. שו"ע, יו"ד, קצ"ד, א'.

9. סדר"ט, קצ"ד, סק"ה; שו"ת אגרות משה יו"ה דעה ב שאלה ע"ה.

10. שו"ע, אה"ע, ס"א, ד'.

him, and even if he derives pleasure from seeing her, for since she will be permitted to him later on, he will not (by looking at her) come to do a sin. However, he should not joke around or be light-headed with her."

Although according to this statement, one might argue that it is permitted to look at all parts of a *Nidah*-wife, elsewhere the Shulchan Aruch limited this permission¹¹, and subsequent *Poskim* have followed this ruling¹². Some have forbidden looking at genital organs, whereas others have expanded the prohibition to all parts of the woman's body which are ordinarily covered¹³. Therefore the husband is forbidden to look at the actual delivery — whether directly or through a mirror; nor may he take pictures or movies of the delivery, etc.

(2) Regarding touching the *Nidah* — The *Rishonim* are in dispute whether this prohibition is Biblical¹⁴ or Rabbinic. The leading *Posek* who rules that the prohibition to touch a *Nidah* is *mi'd'oratha* (Biblical) is the *Rambam*¹⁵:

„כל הבא על ערוה מן העריות, או שחיבק ונישק דרך תאوة וננהנה בקידוכ בשר — הרי זה לוקח מן התורה, שנאמר, לא תקרבו לגלות ערוה, כלומר לא תקרבו לדברים המבאים לידי גילוי ערוה.“

“Whoever has relations with a woman prohibited to him, or embraces or kisses her in an affectionate manner and derives pleasure from the closeness of flesh — he is punishable according to the Torah, since it is written 'you shall not come near to uncover

11. יורה דעה ק"צח ס"ק ז: „לא יסתכל במקומות המכוסים שבה.“

12. Based on the following: „כל המסתכל בעקבה של אשה, הויין לו

בנים שאין מותגנים, אמר ר' יוסף, ובאשתו נודה“ — נדרים, כ', א'.

13. See in detail: אוזה"פ, אה"ע, ס' כא, סקל"ב —

14. This is based on the verse: „איש איש אל כל שאר בשרו לא

תקרבו לגלות ערוה“ — ויקרא, יח, ו'.

15. רמב"ם, איסורי ביאה, כא, א'.

nakedness', meaning do not come close to those things which lead to forbidden relations.

Most *Rishonim* are in agreement with the Rambam. The leading representative of the opinion that the prohibition of touching a *Nidah* is only Rabbinic, is the Ramban¹⁶, and some of the *Rishonim* agree with him¹⁷. Most *Acharonim* confirm the halacha to be in accordance with the Rambam¹⁸.

However, another problem pertinent to the prohibition of touching a *Nidah* is whether it is only contact in a way of affection and passion which is proscribed ("ךך תאוה" in Rambam's language), or even when the touch is for the wife's immediate need. Some *Poskim* forbid the husband to touch his *Nidah*-wife even when she is sick and needs his help to get out of bed¹⁹. Others maintain that when there is no one else to assist her in the above-mentioned circumstances, then the husband is allowed to touch her for her sake and need, even if she is not dangerously ill. The Ramo adds²⁰: "And this is the custom when she needs it very much." Of similar relevance is the halachic dispute whether a physician is allowed to palpate the pulse of his sick wife when she is *Nidah*.²¹⁻²²

16. רמב"ן, ספר המצוות, מצות ל"ת, שני ג.

17. See summary of these opinions: אווצה"פ, אווה"ע סי' ב, סק"ה, אות א', אנטיקלופריה תלמודית ערך גלי עריות, כרך י, עמי קי"א-קי"ב.

18. See note 17. Also שדי חמה, כללים, מערכת קו"ף, כלל ז; ובאספת דיןדים, מערכת דיןדים, חתן וכלה, אות יב; תורה תミימה, ויקרא, י"ח, אות ב.

19. המחבר, ש"ע, יז"ד, קעה, טז.

20. רמ"א, שם, וראה דרבינו בפת"ש, שם, סקטיו.

21. מחלוקת המחבר והרמ"א, שם, סעיף י. וראה בהרחבה אווצה"פ, סי' ב, סק"ג, אות א'; אנטיקלופריה תלמודית, ערך חולה, עמי רפ"ב — ומקורות שצינו שם.

22. See note 17.

Others relate this same logic to the question of shaking hands with a woman. It should be pointed out that all opinions agree that touching another woman is forbidden; the argument is only whether it is or דרבנן. In our case, we are following the opinion that touching a woman is an *issur derabbanan* only, and since she is sick, it would be permitted. In order to permit shaking hands with a woman, it would be necessary to find a similar justification for abrogating the *issur derabbanan*.

Nevertheless, in the context of our discussion, I would tend to define the husband's touch of his wife in labor closer to "affection and passion", since it cannot seriously be stated that such a touch is of immediate medical need and help.²³ Therefore, the husband is forbidden to hold the hands of his wife during labor and delivery, to support her head, or to touch any other part of her body.

(b) The Definition of Parturition as a Dangerous Condition

The Shulchan Aruch gives us the following *Din*²⁴:

„הילוד היא כחולה שיש בו סכנה ומחלין עליה את השבת לכל מה שעריכה.“

"A woman in labor and childbirth is like a person who is dangerously sick, and we transgress the Sabbath for her for whatever she needs."

Regardless of whether medical opinion is in agreement with the above assessment, the halachic status of a woman in labor is that she is dangerously ill (*חוולה שיש בו סכנה*). When a person is in mortal danger, we are commanded to do virtually anything which is required to save his life, without giving thought even to desecration of Shabbat. Generally, one need not even seek a Gentile to drive that sick person to the hospital, but should himself immediately do so, and personally perform any other required service. Thus we see that the needs of a dangerously ill person set aside almost all the laws of the Torah.

However, since parturition is a natural occurrence and the

23. From the Mishna *אהלות*, ז, ד one cannot deduct the assumption that a woman in labor was carried in a prohibited way — since most likely this was done by girlfriends, as we find a similar expression in 'ק'ב"ט, שבת, קב"ט — "At at time when her girlfriends carry her under her armpits."

24. 'ק'ב"ע, או"ח, ש"ל, נ.

great majority of women in this situation do not die, our Rabbis found it necessary to set more stringent regulations regarding her care than in other dangerous conditions. They recommend that every action needed for the woman in labor on Shabbat be performed in a manner somewhat different from the usual (שינוי). (If activity forbidden on Shabbat is done differently (בשינוי), it is not considered as a Biblical transgression but rather as disregarding a Rabbinic law, which is less severe). Nevertheless, this recommendation holds true only if no delay in the treatment is anticipated due to the deviation. Otherwise, one is encouraged to do everything necessary in mode and manner to save her life.²⁵

Our Rabbis have defined three manifestations of labor, from which time on the woman is considered "dangerously sick":²⁶

משתשב על המשבר או משעה שהדם שותח וירד, או
משעה שהברותיה נושאות אותה בורוותיה שאין בה כח
להלך.

From the time when she sits on the birthing stool or from the time that blood comes forth, or from the time that her friends have to support her arms and hold her up since she cannot walk.

Although for most purposes these stages define the status of labor, there are some actions which are permitted on Shabbat even before the onset of one of the above-mentioned signs.²⁷

25. מגן אברהם ס' ש"ל אות ג.

26. שו"ע, או"ח, ש"ל, ג' — עפ"י שבת, קכ"ט, א'

These 3 stages can be defined in modern situation as follows: (a) Sitting on the birthstool — coming into the delivery room; (b) Blood running down — would probably include the stage of rupture of the membranes; (c) Friends carrying her — is probably very close to delivery.

The meaning of **משבר** is discussed by J. Preuss, Biblical and Talmud Medicine, trans. by F. Rosner, 1978, pp. 395-396.

27. משנה ברורה, ש"ל, סק"ט. ראה גם: שו"ת צפנת פנח, (ח"ב), ס' רל"ג.
שו"ת אגרות משה, ח"א"ח, ס' קל"ב.

(c) Peace of Mind as a Reason for Concession

Since a woman in labor is considered a dangerously sick person, all laws of *pikuach nefesh* (a life-or-death situation) are applicable. Any action necessary for immediate treatment is permitted, even if it is a desecration of the Shabbat under ordinary conditions. But is one permitted to perform an action on Shabbat which is done only for the peace of mind of the patient, even if medically it is unnecessary? In other words, the action is done for the sole aim of preventing the patient from "losing his mind" (טירוף הדעת) if things will not be performed according to his wishes.

If טירוף הדעת is a viable basis for Sabbath desecration, might it also be considered as sufficient grounds for permitting a husband to comfort his wife in labor by touching her? Although his touch is obviously not medically essential, if *she feels* it is necessary, would the halacha permit it so as to prevent טירוף הדעת?

We find several examples in which the patient's psychologic state of mind was taken into consideration to enact a lenient *Psak*: (1) If a person is on his death bed (*שכיב מרע*), certain otherwise forbidden acts may be done for him, so that he should not become upset and perhaps die more rapidly due to his distress.²⁸ One such ruling refers to his giving a *Get* (religious divorce) on Shabbat. If he wishes to divorce his wife on Shabbat before he dies, so that she will not become a *Yevama**, he is allowed to do so.²⁹

* A *Yevama* is a woman whose husband died childless. According to the Torah, she must marry her dead husband's brother, or else obtain a release from him prior to marrying anyone else. However, if she were divorced, she would not be his widow (*yevama*) and would thus be free of any restrictions in remarrying.

28. בבא בתרא, קניין, ב'.

29. שו"ע, או"ח, של"ט, ר'.

„ו אין מגרשין [בשבת] אלא אם כן הוא גט שכיבב מרע דתקיף
ליה עלמא.“

“A divorce may not be issued (on the Sabbath) except in the case of a deathly-ill person.” The Mishna Brura appends the following:³⁰

„כדי שלא תיתרכף דעתו עליו אם לא יעשו כרצונו.“

“...so that he will not become upset if they do not do as he wishes.”

(2) A further example regarding peace of mind and hilchot Shabbat is the following:³¹

„חולה דתקיף ליה עלמא ואמר שישלחו بعد קרוביו —
וראי שרי.“

“A sick person who is failing rapidly and requests that his relatives be sent for — it is certainly permissible.” This is to say that one is permitted (or even obliged³²) to hire a Gentile who will travel beyond the limit of Shabbat (תחום שבת) in order to inform the relatives of the sick man’s condition. This is done only for the purpose of keeping the patient calm and reassured.

(3) The above examples indicate the extent to which Rabbinic

30. משנה ברורה, שם, סקכ"ט.

The situation is such that the Get was written prior to Shabbat, and the wants to hand it to his wife on Shabbat, which involves a prohibition דאורייתא but not דרבנן.

31. שו"ע, או"ח, שו, ט.

32. ערוך השולחן, או"ח, שו, ב.

prohibitions may be lifted as a concession to the peace of mind of a dangerously sick person. But we also find indications that even a Biblical prohibition can be set aside to assure the peace of mind of the dangerously ill.³³⁻³⁴ Of special relevance to our discussion is the classic example of this principle, as recorded in Tractate Shabbat:³⁵

ומילדין את האשה בשבת ... ומחללין עליה את השבת ...
לאתוויי היא דתנו רבנן, אם היה צריכה לנר חבירתא
מרלקת לה את הנר ... פשיטה, לא צריכה בסומא, מהו
רתימה כיוון שלא חזיא — אסור, קא משמע לנו איתובי
מיתבה דעתך, סברא אי איכא מידי חזיא חבירתא ועכדה לי.

We assist a woman to give birth on Shabbat ... and for her sake we desecrate Shabbat ... as our Rabbis taught: If she required a light, her friend may kindle a light for her ... Now it is obvious that a blind woman in labor does not need light, and we might think that since she cannot see, it would be forbidden to kindle a light for her (on Shabbat) — this passage comes to inform us that we set her mind at ease, for she believes that if there is anything required, my friend will see it and do it for me.

In Mishna Brura, it is stressed that the major consideration here is not the *medical* efficacy of the act, but its psychological impact.³⁶

ואעפ' רהדרקת הנר עיקרה אינה לרפואה, אעפ' ב' מחלلين,
דקיים להו לרבען דיתובי דעתך דילולת הוא מילחה
דמיסתכנא בה בלאו הכי.

33. רמב"ם, עבורה ורבה, יא', יא'.

34. שות"ת הרשב"א, ח"ר, ס"י רמ"ה; מנחת חינוך, מ' תק"יב; נפש חייה על
או"ח, ס"י רע"ה.

35. שבת, קכ"ח, ב. וכן הלכה: רמב"ם, שבת, ב' יא', טושו"ע, או"ח, של', א'.

36. משנה ברורה, של', אות ד.

And even though kindling the light is not primarily for therapeutic reasons, nevertheless we desecrate the Sabbath since the Rabbis considered that setting the woman's mind at ease during childbirth is something which, if it is lacking, could be a dangerous matter.

This clear-cut permission to violate even a prohibition *d'oraitha* for the peace of mind of a woman in labor is expanded by some *Rishonim* to include all dangerously sick patients, the woman in parturition being only an example of this type of patient.³⁷

It is somewhat surprising to find that some of our contemporary Rabbis try to differentiate between various conditions of danger and apply limiting and more strict ruling towards different types of patients.

For example, Rabbi Neuwirth³⁸ distinguishes between patients who ask for certain actions which have no direct implication on their condition — for which only a prohibition *derabbanan* may be violated — as opposed to a patient whose chances of improving depend on his psychological strength — for which even a prohibition *d'oraitha* is permitted.³⁹

Rabbi Y. Henkin⁴⁰ (grandson of Rabbi Eliyahu Henkin ז"ל) distinguished between the "טירוף הדעת" of a woman in labor and

37. הרמב"ן, חורת הארים; מסוגיא דילודת קמ"ל יתובי דעתה וחוללה בעלמא מחולין שבתא במנידי ומטחכנאה; שורת החשבץ, תא' סי' נ"ד: "שאפילו מפני שוב דעתו של חוללה ואפלו אינו צריך לדטואתו אלא שוב דעתו, מדריקת את הנר ע"פ שהוא סמא ואינו נהנה מן האור, והיה לשאר לילאותה שהחוללה מתרישב בהן שעושין אותן בשבת". וע"ע בשווית הרדביין, ח"ד, סי' ס"ו; פמ"ג, סי' ש"ו בא"א סק"ח; שורת חלקת יעקב, ח"א, סי' ס"ה.

38. שמירית שבת כהלבתה, מהדורה חortha, תשל"ב, סכ"ה-יסכ"ו.

39. The implication from the blind woman in labor who wants a light seems to contradict this distinction. Also, Rabbi Neuwirth's remark (in note 82) against *חמק"ז* is unjustified according to the *תשב"ז* (see note 37 above).

40. הרב י.ה. הנקן אסיא י"ט תשל"ח ע"מ 52-44.

that of other dangerously sick persons. The woman has to be active during her labor — to expel and deliver her baby. Therefore her peace of mind is an important component of her "cure". However, another sick person has only to be passive and quiet — for which maximum peace of mind is not of such importance.

In my opinion one cannot formulate rigid rules regarding the importance of the peace of mind of a dangerously sick person, but rather judge and evaluate each patient and situation individually, and ask Rabbinic advice accordingly.

This was best summarized by Rabbi Weiss⁴¹ who concluded that *הכל לפי הענין*, it depends on each situation.

Moreover, I would like to stress a responsum of Rabbi Feinstein, which is of great importance in defining and applying the concept of *חדרת טירוף הדעת*. Rabbi Feinstein was asked whether a husband is allowed to accompany his wife in labor in a taxi on Shabbat. His answer was positive, for the reason of keeping the wife's mind at ease. Although there might be different types of fear, Rabbi Feinstein disregarded these variations and concluded:⁴²

„אבל מכל מקום לדינה, כיוון שמצוינו ביוולדת שעוללה להסתכן מחלת פחד, מי הוא שיכל לטמוך על חילוקים בחשש פיקוח נפש. ולכן אם היא אומרת שהיא מתחדרת אף אחרי שמסבירין לה שאין מה לפחד לישע עצמה — יש בזה חשש פקוח נפש וצריך הבעל או האם לישע עצמה. ואף אם נוטעת להאسفיטאל בשעריו אין זה צעקה בחבליה, אם הוא במקומות רחוק יש לו גם כן לישע עצמה, דאך שעטה לא תסתכן, אבל הוא אפשר ב_amp;םצע הדרך יתווסף לה החבליה, לידה, עד השיעור שתעצק בחבליה שאין יש לחוש שמא תסתכן מחלת פחדותה.“

But in any case, according to the law since we have found regarding a woman giving birth that she

41. שווית מנהת יצחק ח"ד ס' ח.

42. שווית אגרות משה או"ח ס' קל"ב.

Other Poskim also stress the importance of escorting the wife in labor to the hospital on Shabbat. The Chazon Ish (אגראות החזון איש, ח"א, אגרת קמ"א) wrote: *„בענין נסיעת יולדת בשבת — הדבר בהיפוך, מורה אני שישטו עמה.“*

may be endangered due to fear, who can rely on minute differentiations when there is a possibility of danger to life? Therefore, if she says that she is afraid, even after they explain to her that there is nothing to fear in riding by herself — there is here a possibility of a life-threatening situation, and the husband or the mother must ride with her. And even if she has to go to the hospital while she is not yet crying from her pains, if it is far, then he should likewise go with her, for although at this point she is not in danger, but since it is possible that during the trip the pains will progress to the extent that she will cry out due to her pangs, since then one must be concerned that she might be endangered due to her panic.

In the above discussion, we have shown how seriously the *Poskim* considered the possibility that a fearful psychological state might endanger the welfare of the patient. Despite this, it does not appear that in the case of a woman giving birth we would generally allow apprehension for her peace of mind to outweigh the prohibitions concerning physical contact between a *Nidah* and her husband. This is evidenced by the following short and concise responsum of Rabbi Moshe Feinstein:⁴³

ובאם הבעל יכול להיות שם [בעת הלידה] להשגיח
שתעשה הדבר בסדר הנכון, וגם לחזק אותה ולא מץ לבה
הנה אם יש צורך איני רואה איסור ואף بلا צורך איני
רופא איסור, אבל אסור לו להסתכל ביציאת הולד ממש.
אך כשיזהר שלא להסתכל ליכא איסור.

And if the husband can be there at the time of the birth to supervise that everything is being done

43. שווית אגרות משה יורה דעה ב שאלה ע"ה.

properly, and also to strengthen her and encourage her — If there is a need for this, I cannot see any prohibition, and even if there is no need for him to be there, I do not see any prohibition in his being there, but it is forbidden to watch when the baby emerges. But if he is careful not to look, then there is no prohibition.

לحلכה – לא למעשה

1. A woman in labor is considered a *Nidah*.
2. The husband is not allowed to touch his wife in parturition; he is not permitted to look at parts of her body which ordinarily have to be covered.
3. The fear, anxiety and apprehension of a woman in labor is a significant factor — scientifically and halachically.⁴⁴
4. For alleviation of this fear and in order to keep her mind at peace, one may be permitted to violate some prohibitions *d'oraitha*, but each case must be judged individually.
5. A private companion to the woman in labor and delivery is of significant importance.
6. The preference is for this companion to be a woman, who can be effective and who involves no halachic problems.
7. If the woman in labor insists that her husband should stay with her to alleviate her fears and encourage her — he is obliged to do so.
8. The husband should be taught and warned not to touch his wife

44. Rabbi Weiss in שורת מנהת יצחק ח"ה סכ"ז makes the following statement: נשים דעתן קלות ויש לחוש שטבקשין כן [הינו נוכחות הבועל] מושום קלות הדעת ולא מושום טירוף הדעת. Similarly, Rabbi Halberstam (in Assia 21:5738, p. 18) makes the following statement: טענות אלו הנשים שרווחת שבעליהם ישארו בניםוק של פחד ובעג בעקבו מחר בקשת נוחות יתרה. These statements are in dispute with the scientifically proven evidence cited in note 5. Also relevant to the halacha, note Rabbi Feinstein's statement and definition (note 42 above).

during labor and delivery (unless needed medically) and not to look at parts of her body which usually have to be covered.⁴⁵

45. Rabbi Halberstam (in Assia) objects to the husband's participation in parturition, lest he touch his wife or look at forbidden parts of her body. In my opinion, this can be explained to the husband, and one should not assume that in spite of the explanation he would violate these prohibitions. People who care enough to ask a Shailah do not have to be suspected of violating a halachic ruling *אטו ברשיע עסקין*. On the other hand, to formulate a new law to forbid an act which is permitted, lest one perform another act which is forbidden, is a procedure which we do not have the power to enact nowadays. See ב. גורה שות' יחות דעתה רעת ח"ג ס' ב.

Mental Incompetence and Its Implications in Jewish Law

Rabbi J. David Bleich

One of the most basic issues of concern to persons involved in the mental health care professions is formulation of the criteria which mark the distinction between mental competence and mental incompetence for purposes of Halakhah. The problem is hardly a novel one. In times gone by the issue was primarily the question of legal capacity for purposes of executing a religious divorce in situations in which a wife sought a divorce from a husband who was mentally disturbed. At present, when so much more can be done on behalf of the mentally ill, the question arises most frequently in the context of the therapist's obligation to encourage performance of *mizvot* and his concomitant obligation to caution against infraction of Jewish law. These obligations may, at times, be of paramount significance in determining the mode of therapy which may be undertaken in consonance with halakhic norms. In virtually all cases the possibility of undertaking to provide a truly value-free therapy can be contemplated only when, by virtue of his mental condition, the patient may be deemed to be absolved from the obligations and constraints imposed by Jewish law.

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Any analysis of this question must begin with an elucidation of the term *shoteh*. The term is a general one and is employed in rabbinic sources to denote a person who is mentally incompetent either by reason of insanity or mental retardation. Diagnosis of this mental state is by means of overt behavior patterns. The criteria of a *shoteh* are formulated in the *Tosefta, Terumot 1:3*, and cited by the Gemara, *Hagigah 3b*, in a somewhat different form:

Our Rabbis taught: Who is a *shoteh*? One who goes out alone at night; one who spends the night in a cemetery; and one who tears his garments.

The Gemara continues its discussion by adducing a dispute between two Amoraim with regard to the meaning of this dictum. Rav Huna considers the list of symptoms presented as indicative of mental incompetence to be conjunctive in nature. According to Rav Huna, a person is not considered to be a *shoteh* unless he manifests each of the three forms of bizarre conduct described by the *Tosefta*. Rav Yohanan disagrees and asserts that the criteria are listed disjunctively. According to Rav Yohanan a person is deemed a *shoteh* if he manifests any one of the three forms of erratic conduct depicted in the *Tosefta*.

The Gemara, however, is fully cognizant that virtually any mode of conduct may, at times, be entirely rational. Hence, the Gemara is not prepared to accept bizarre conduct in and of itself as arbitrarily establishing mental incompetence. On the other hand, if a person's actions are manifestly irrational it is difficult to perceive why Rav Huna insists that lack of mental competence be evidenced in three diverse types of activity. Accordingly, the Gemara queries:

What is the case? If he does them in an irrational manner, even one is [sufficient to establish mental incompetence]; if he does not do them in an irrational manner, even all of them [establish] nothing. Indeed [the *Tosefta* refers to a case in which] he does them in an irrational manner. But if he [only] spent the

night in a cemetery, I might say: He did [it] in order that the spirit of impurity might rest upon him. If he [only] went out alone at night, I might say: He was seized by *ganderipos* (melancholy or heat: Rashi). If he [only] tore his garment I might say: He was lost in thought. But since he did all of them he becomes like [an ox] which gores an ox, an ass and a camel, and becomes [thereby] a forewarned gorer [*mu'ad*] with regard to all animals.

Several principles emerge from this discussion: 1) Erratic conduct, no matter how bizarre it may appear, is not indicative of mental incompetence if there exists a rational basis for such conduct. 2) Irrational behavior, even if limited and manifest in only one type of activity is a sufficient criterion of *shetut* or mental incompetence provided that no rational explanation for such conduct may be advanced. 3) The controversy between Rav Huna and Rav Yohanan is limited to situations in which no obvious explanation for aberrant behavior presents itself but in which such an explanation, albeit one which is farfetched, is conceivable. According to Rav Huna, manifestation of what is *prima facie* an irrational pattern of behavior in one or two areas of conduct may be dismissed by ascribing unlikely but rational explanations; but aberrant behavior in three areas of conduct cannot be rationalized in this manner. According to Rav Yohanan even a single form of behavior which is *prima facie* irrational in nature is sufficient to establish mental incompetence.

This dispute between Rav Huna and Rav Yohanan is considerably modified by the Gemara, *Hagigah* 4a. The Gemara cites a further tannaitic dictum: "Who is [deemed to be] a *shoteh*? One who destroys all that is given to him." This form of behavior in and of itself is deemed by the Gemara to constitute absolute evidence of mental incompetence even according to Rav Huna and, accordingly, the Gemara concludes that, "tearing one's garments," since it is but a form of "destroying all that is given to him", is in itself sufficient evidence for establishing mental incompetence. The

Gemara remains in doubt with regard to whether Rav Huna would have completely retracted his earlier stated opinion and would agree that a pattern of going out alone at night or of spending the night in a cemetery is alone sufficient evidence of *shetut* or whether he would continue to disagree with Rav Yohanan in maintaining that the latter criteria cannot individually establish mental incompetence.

The Gemara, then, presents a total of four different criteria of mental incompetence but is silent with regard to other forms of aberrant activity. Quite obviously, some persons may suffer from various forms of mental illness manifesting themselves in various forms of bizarre behavior which are quite different from those enumerated by the Gemara. Is a person who manifests such behavior to be categorized as a *shoteh*? Rambam, *Hilkhot Edut* 9:9, declares:

The *shoteh* is disqualified by biblical law from serving as a witness because he is not subject to the commandments. Not only a *shoteh* who walks around naked, who breaks utensils and throws stones [is disqualified], but anyone who is mentally deranged with the result that his mind is constantly confused with regard to some matter, even though he converses and asks questions to the point with respect to other matters is disqualified [from serving as a witness] and is considered to be among the *shotim*.

The commentaries on Rambam's *Mishneh Torah* raise the obvious question. Rambam, in formulating the disqualification of witnesses on the basis of mental incompetence, ignores the criteria enumerated by the Gemara and presents his own, viz., walking naked, breaking utensils, throwing stones and mental confusion. R. Joseph Karo, *Bet Yosef*, *Even ha-Ezer* 121, asserts that Rambam seeks to emphasize that the criteria presented by the Gemara are not intended to be exhaustive in nature; those criteria are illustrative and designed to indicate that any form of irrational behavior serves to establish that the individual behaving in such a

manner is mentally incompetent. For this reason, explains *Bet Yosef*, Rambam chose to list a number of examples of aberrant behavior not specifically mentioned by the Gemara.

Bet Yosef argues that the cogency of Rambam's position is readily apparent upon an examination of the earlier cited talmudic discussion. The first definition adduced by the Gemara, *Hagigah* 3b, lists three criteria of a *shoteh*; a second dictum, which is cited subsequently, presents a fourth criterion but fails to mention the three criteria enumerated in the first dictum. From the context of the talmudic discussion it is readily apparent that the Gemara does not perceive these two definitions to be in conflict with one another. Accordingly, argues *Bet Yosef*, it may be deduced that neither definition is exhaustive in nature since, in actuality, *any*, form of irrational behavior is evidence of mental incompetence. The behavior patterns are mentioned in each of the tannaitic statements by way of example only and neither separately nor collectively do they constitute exhaustive criteria of *shetut*. Accordingly, Rambam rules that any form of conduct which is manifestly irrational, even if limited to one aspect of human behavior, is sufficient to establish that the individual is a *shoteh*.

A similar explanation of Rambam's position is offered by R. Aryeh Leib of Metz (*Sha'agat Aryeh*) in his classic responsum concerning the *get* of Cleves, a halakhic *cause célèbre* of the eighteenth century. This responsum originally appeared in *Or ha-Yashar*, a collection of responsa dealing with the controversy edited by R. Aaron Simon of Copenhagen, and was republished in *Sha'agat Aryeh*, addenda, no. 2. The case involved a young man who exhibited signs of paranoia and erratic behavior shortly after his marriage. During this period he executed a bill of divorce on behalf of his wife under the supervision of the chief rabbi of Cleves. A controversy with regard to the validity of the *get* arose among many of the most prominent rabbinic authorities of the day. The issue in dispute was whether or not the husband's erratic behavior was of a nature which rendered him a *shoteh* lacking legal capacity to execute a *get*. *Sha'agat Aryeh*, together with most of the authorities consulted, upheld the validity of the *get*. In the

course of his lengthy and erudite responsum, *Sha'agat Aryeh* explains Rambam's comments in *Hilkhot Edut* and, in particular, addresses himself to the question of why it is that the Gemara presents four particular examples of aberrant behavior if, in Rambam's opinion, any form of irrational behavior constitutes sufficient evidence of *shetut*. *Sha'agat Aryeh* points out that the Gemara recognized that the examples enumerated in *Hagigah* 3b are indeed usually indicative of mental incompetence but that, nevertheless, the conduct described could, under certain conditions, be explained in a perfectly rational manner. A person who spends the night in a cemetery may seek to have "the spirit of impurity rest upon him"; a person who goes out alone at night may suffer from *ganderipos*, etc. Nevertheless, since *prima facie* such conduct is irrational in nature, a person behaving in this manner is presumed to be a *shoteh*. However, declares *Sha'agat Aryeh*, if another form of erratic behavior is exhibited which is manifestly irrational and cannot be explained in any manner, there is, *a fortiori*, no question that such behavior is a sufficient indication of mental incompetence. Rav Huna, no less than Rav Yohanan, would agree that even a single form of aberrant behavior for which no rational explanation may be found is sufficient to establish that the person is a *shoteh*. The Gemara, in presenting specific examples, seeks to demonstrate only that even forms of behavior which allow for unlikely rational explanation must also be deemed to be manifestations of mental incompetence. Accordingly, Rambam rules that any form of bizarre behavior which does not readily admit of rational explanation is an indication of mental incompetence.

Rambam's position is opposed by at least three early authorities. *Bet Yosef*, *Even ha-Ezer* 119 and *Even ha-Ezer* 121, cites the opinion of Rabbenu Simchah of Shapira, R. Shalom Shimshon ben Abraham and R. Joseph Kolon, *Teshuvot Maharik*, no. 19, who maintain that the criteria enumerated by the Gemara are exhaustive in nature. According to the position espoused by these authorities, a person may be deemed to be a *shoteh* only upon manifestation of the particular types of behavior described by

the Gemara. Any other form of bizarre behavior, even though manifestly irrational, does not constitute a criterion of *shetut*. However, *Shulhan Arukh, Hoshen Mishpat* 35:8, in describing a *shoteh* who is disqualified from serving as a witness, quotes the language of Rambam verbatim. Similarly, R. Moses Isserles, *Darkei Mosheh, Even ha-Ezer* 119:5, citing *Teshuvot Mahariv*, no. 42, apparently maintains that Rambam's opinion is normative.

II

However, acceptance of Rambam's position that any form of irrational behavior is sufficient evidence that the individual comporting himself in such a manner is a *shoteh* does not fully resolve the issue. The question which remains to be clarified is the delineation of the areas of Jewish law in which this operative definition of *shoteh* is applicable.

In his commentary on *Hagigah* 3b, Rashi carefully spells out the ramifications of the definition presented. Rashi states that the definition of *shoteh* formulated in *Hagigah* is universal in nature. The *shoteh* thus defined, declares Rashi, is the *shoteh* "to whom reference is made in every place as being exempt from the commandments and from penalty, whose acquisition is not an acquisition and whose sale is not a sale." According to Rashi the criteria of mental incompetence presented in *Hagigah* serve to define every occurrence of the term in talmudic writings.

It is remarkable that although the term *shoteh* occurs repeatedly throughout the *Mishneh Torah*, Rambam seeks to define this concept only in *Hilkhot Edut* in conjunction with the disqualification of the *shoteh* from serving as a witness. Rambam's definition of the term in this context is at once both puzzling and illuminating. Rambam makes it clear, albeit in an indirect manner, that the definition of *shoteh* formulated in *Hilkhot Edut* serves also to define the *shoteh* who is exempt from *mizvot*. A *shoteh* is incompetent to serve as a witness, Rambam tells us, not, as we might have anticipated, because his mental condition renders his testimony unreliable, but because "he is not subject to the

commandments." Implicit in this statement is a ruling that a person defined as a *shoteh* in *Hilkhot Edut* is exempt from the obligation of fulfilling the *mizvot* of the Torah. Indeed, the latter exclusion, according to Rambam, is halakhically antecedent to the exclusion of the *shoteh* from the class of acceptable witnesses.

The fact that Rambam makes the disqualification of a *shoteh* as a witness contingent upon his exemption from *mizvot* is conceptually problematic. Much more obvious grounds for excluding the testimony of a *shoteh* may be found in the fact that his testimony is simply not reliable. Indeed in the very next section, *Hilkhot Edut* 9:10, Rambam himself rules that mental impairment of a degree which falls short of categorization as *shetut* suffices to disqualify a person from serving as a witness simply because of the inherent unreliability of such testimony. Accordingly, Rambam rules:

The inordinately foolish who are unable to discriminate between contradictory matters and who do not comprehend matters as other people do and similarly those who are mentally disoriented and impulsive and those who are excessively deranged [in conduct] are included in the category of *shotim*. This matter [is to be determined] in accordance with the perception of the judge for it is impossible to be precise in writing.

The categories of the mentally impaired defined in *Hilkhot Edut* 9:10, in contradistinction to those described in *Hilkhot Edut* 9:9, include individuals who are considered to be *shotim* solely for purposes of disqualification from serving as witnesses but are deemed to be "normal" for all other purposes. The feeble-minded are bound by the commandments although their testimony may not be accepted. Their testimony is excluded by reason of the fact that they "do not comprehend matters" and hence are not competent to testify to matters before the court. If so, the persons described in *Hilkhot Edut* 9:9, since their competence is diminished even beyond that of those described in *Hilkhot Edut* 9:10, should

logically be disqualified from serving as witnesses for that reason alone. Hence the reason posited by Rambam, viz., that the *shoteh* "is not subject to commandments" seems to be superfluous.

A number of suggestions have been offered for resolving this difficulty, some of which have important halakhic ramifications. One such explanation is offered by R. Moses Feinstein, *Iggerot Mosheh, Even ha-Ezer*, I, no. 120. Rabbi Feinstein describes the first divorce proceeding at which he presided while yet a young man serving as rabbi of Luban in Byelorussia. The husband insisted that he was the Messiah. In addition, he exhibited rather erratic forms of behavior which he explained by claiming that it was his mission to bring the universe to perfection. On occasion he was wont to parade in the nude. In all other matters the young man was entirely normal. The question, of course, was whether the husband possessed the legal capacity necessary in order to execute a valid *get*. Rabbi Feinstein ruled in the affirmative. The principal reason advanced by *Iggerot Mosheh* is that a person's conviction that he is the Messiah, although erroneous, is not necessarily irrational. The other forms of bizarre conduct manifested by the young man flowed from this belief and hence could readily be assumed to be rational. Even the man's nudist practices are explained by *Iggerot Mosheh* as being entirely rational. The same exaggerated notion of self-worth which causes an individual to believe that he is the Messiah may also lead him to believe that he enjoys the exalted moral status of Adam prior to the sin of the Tree of Knowledge and that he may therefore walk about unclothed.

In the course of this responsum *Iggerot Mosheh* elucidates an interesting ramification of Rambam's ruling in *Hilkhot Edut* 9:9. Rambam declares that a person who is "constantly confused with regard to some matter" is a *shoteh* even though he is entirely rational with regard to all other matters. Rambam declares that such an individual is not only disqualified from serving as a witness but is also exempt from all commandments. Why, queries *Iggerot Mosheh*, should a person be exempt from all *mizvot* if absence of rationality is limited to one specific area of conduct?

Absent Rambam's ruling, it would be assumed that a person is obligated to observe any and all *mizvot* with regard to which his mental state does not constitute an impediment. Mental aberration which is limited in nature need not cause general diminution of mental capacity. *Iggerot Mosheh* answers that, according to Rambam, the Torah does not establish partial obligations with regard to *mizvot*. A person is either "subject to commandments" or he is not subject to commandments; a person cannot be obligated with regard to some *mizvot* and exempt from others. A deranged person is clearly exempt from the *mizvot* for which he lacks mental competence; hence he must be exempt from all *mizvot*. Since such a person is exempt from *mizvot* he is disqualified from offering testimony even pertaining to matters with regard to which he is entirely lucid and fully competent. Accordingly, Rambam advances the reason "he is not subject to the commandments" in order to justify absolute exclusion of any testimony of such an individual even though his testimony may concern matters with regard to which he is entirely rational. However, concludes *Iggerot Mosheh*, for all other purposes of Jewish law, and specifically with regard to legal capacity to execute a *get*, Rambam would agree that a person who behaves irrationally in a limited area of conduct is not to be considered a *shoteh* with regard to other matters in relation to which he manifests no irrationality. It is only insofar as obligation regarding fulfillment of *mizvot* is concerned that, according to Rambam, a person who exhibits irrational conduct in one aspect of human behavior is exempt from fulfillment of all *mizvot*.

However, this analysis of Rambam's position is not accepted by all authorities. Rambam, *Hilkhot Hamez u-Mazah* 6:3, rules that a person who suffers an epileptic attack and eats the required quantity of *mazah* on Passover eve while mentally incompetent as a result of that affliction must again partake of *mazah* after the attack has subsided and he has returned to a normal cognitive state. The reason advanced by Rambam is that the *mazah* consumed by the epileptic during the course of a seizure was eaten "at a time when he was exempt from all commandments" by virtue of mental incompetence. The exemption of a *shoteh* from *mizvot*, it

should be noted, is categorically distinct from the exemption of an *anus*, i.e. a person prevented from fulfilling a *mizvah* by virtue of physical inability, force or the threat of force. Although *force majeure* and physical incapacity similarly relieve a person from the fulfillment of commandments they do not constitute an intrinsic exemption from *mizvot* but simply an exemption from responsibility or culpability. A person who is physically incapable of swallowing is exempt from eating *mazah* only in the sense that he cannot be held responsible for doing so. A *shoteh* is exempt for the more fundamental reason that he is not at all bound by the obligation (*lav bar hiyuga*). Hence consumption of *mazah* while in a state of mental incompetence cannot satisfy an obligation which devolves upon the individual only subsequently, i.e. upon his regaining mental competence. A person who eats *mazah* while suffering an epileptic attack has fulfilled no obligation. Upon recovering he becomes obligated to perform the *mizvah* which he has as yet not fulfilled.

R. Ezekiel Landau, author of *Teshuvot Noda bi-Yehudah* employs this premise in explaining Rambam's position. *Noda bi-Yehudah's* elucidation of Rambam's position is formulated in the course of a responsum dealing with the divorce of Cleves. This responsum is also published in *Or ha-Yashar*, no. 27. *Noda bi-Yehudah* maintains that, even according to Rambam, a *shoteh* is exempt from *mizvot* only to the extent that his mental impairment interferes with rational fulfillment of such obligations. A person who is irrational in even a limited sense is exempt from any *mizvah* requiring an act which he cannot perform in a rational manner. Moreover, as noted earlier, any *mizvah* performed in an irrational manner is not deemed to constitute the fulfillment of an obligation. Nevertheless, such a person remains bound by any commandment which he can perform in a rational manner. However, a person who is to any extent exempt from *mizvot* by virtue of mental incompetence is excluded entirely from the category of qualified witnesses. The Gemara, *Baba Kamma* 88a, in establishing categories of qualified witnesses cites the verse "and behold, if the witness be a false witness and has testified falsely

against his brother" (Deuteronomy 19:18). The phrase "his brother" (which certainly cannot be understood in a literal manner since no person's testimony is accepted for or against his brother) is understood by the Gemara as denoting "a brother in *mizvot*," i.e., a person equally bound by the commandments. Accordingly, the principle is established that a person who is not subject to the commandments is disqualified from serving as a witness. *Noda bi-Yehudah* argues that even if he behaves irrationally with regard to only one specific type of conduct a *shoteh* is disqualified from serving as a witness even though he is exempt only from *mizvot* with regard to which such behavior serves as an impediment. Since such a person is bound by only a limited obligation regarding commandments he is not "a brother (i.e., an equal) with regard to commandments." According to *Noda bi-Yehudah*'s analysis of Rambam's position, as distinct from that of *Iggerot Mosheh*, a person suffering from a limited form of mental incompetence is fully bound by those commandments whose rational fulfillment is not affected by his mental condition.

A similar, yet somewhat different, explanation is advanced by *Teshuvot Hatam Sofer, Even ha-Ezer*, II, no. 4. *Hatam Sofer* agrees that a mentally ill person is obliged to fulfill *mizvot* to the extent that he is capable of doing so in a rational manner. *Hatam Sofer* asserts that in describing a person who manifests only a limited form of irrational behavior as not bound by commandments Rambam means that such a person cannot be held culpable should he commit perjury since he may plead that his false testimony was the product of his dementia. The general rule is that any testimony for which a witness cannot be held accountable should the testimony prove to be false (*edut she'i atah yakhol le-hazimah*) must be excluded.

Thus, according to both *Noda bi-Yehudah* and *Hatam Sofer*, a person who manifests irrational conduct of a circumscribed nature is disqualified from serving as a witness and is exempt from *mizvot* which he cannot fulfill in a rational manner but is nevertheless obligated to perform any *mizvah* whose fulfillment is not

compromised by diminished mental competence, while according to *Iggerot Mosheh* such a person is entirely exempt from all commandments. According to *Noda bi-Yehudah* and *Hatam Sofer*, Rambam concedes that the criteria of a *shoteh* which serve to establish total mental incompetence for all purposes of Halakhah are restricted to those enumerated in *Hagigah*. Rambam's broader definition is limited to disqualification from serving as a witness and to exemption from performance of specific commandments. *Iggerot Mosheh* reaches the same conclusion save that in his opinion such an individual is, according to Rambam, exempt from all *mizvot*.

The comments of *Tosafot*, *Hagigah* 3b, are also of significance with regard to this question. The Gemara states that a person who acts in an aberrant manner, and whose actions cannot be explained rationally even in a farfetched manner, is judged to be a *shoteh* on the basis of but a single form of irrational conduct; three forms of aberrant behavior are required according to Rav Huna only when such conduct can be rationally explained in a possible, but unlikely, manner. *Tosafot* challenges this assumption and offers a possible alternative interpretation of the tannaitic dictum cited by the Gemara. Perhaps, queries *Tosafot*, irrational behavior must be evidenced in three diverse areas of conduct in order to establish that a person is mentally incompetent with regard to all matters, just as an ox is declared to be a *mu'ad* with regard to all animal species only upon goring animals of three different species. Otherwise it may be assumed that the ox has a predilection for goring only one or two species. Similarly, it may well be the case, argues *Tosafot*, that a person is classified as a *shoteh* with regard to all matters only if he manifests irrational behavior in three aspects of human conduct; otherwise there may be grounds to assume that the individual's lack of mental competence is limited to the areas in which he has exhibited irrational behavior. To this query *Tosafot* responds that if a person is a *shoteh* with regard to one type of conduct "he must certainly be presumed to be a *shoteh* in all matters" (*vadai yesh le-hahaziko be-hezkat shoteh le-kol davar*).

The grounds for this presumption are not immediately clear since it is indeed certain that a person may suffer from a limited form of mental aberration. *Tevu'at Shor*, *Hilkhot Shehitah* 1:51, explains that *Tosafot* asserts that the human mind cannot function in an irrational manner with regard to one matter and remain entirely rational in all other areas. According to this analysis, *Tosafot* declares, in effect, that a person whose mental incompetence is manifest in any mode of conduct must be deemed to be mentally incompetent with regard to all matters. It would then follow that, according to *Tosafot*, a person who manifests irrationality in some form is exempt from all *mizvot* since all actions of such an individual are governed by an irrational mind. There is, however, no direct evidence which would serve to indicate *Tosafot*'s position with regard to the question of whether any form of patently irrational behavior constitutes a sufficient criterion of *shetut* or whether the criteria indicative of this state are limited to those specifically enumerated in *Hagigah*.

Iggerot Mosheh, however, disagrees with the analysis of *Tosafot* advanced by *Tevu'at Shor* and argues that *Tosafot* employs the term *hazakah* in the sense of presumptive evidence. Thus, the fact that a person behaves irrationally with regard to one area of conduct serves to establish a presumption of irrationality with regard to other matters as well. However, since this is only a presumptive conclusion it is subject to rebuttal if it can be established that the individual is mentally competent with regard to other matters. *Iggerot Mosheh* adds that although, according to his understanding of *Rambam*, a person exempt from any *mizvah* by virtue of mental incompetence is exempt from all commandments, there is no reason to ascribe a similar view to *Tosafot*. Hence, according to *Tosafot*, a person of diminished rational capacity is nevertheless obligated to fulfill all *mizvot* which he can perform in a rational manner.

III

All authorities are, however, in agreement that a person who

is entirely irrational in his conduct is not obligated to fulfill *mizvot*. If so, is it permissible to provide therapy for such patients which involves acts which constitute transgressions? May such persons be institutionalized for custodial purposes if such a procedure involves providing the patient with non-kosher food? Granted that the patient himself is under no restriction by virtue of mental incompetence, it is nevertheless not clear that others may cause him to engage in acts which are proscribed by Jewish law. A halakhic parallel exists with regard to minors. The Gemara, *Yevamot* 114a, states that although minors are exempt from *mizvot*, nevertheless, by virtue of biblical law, an adult is forbidden to feed children non-kosher food (*bal ta'akhilum*). By the same token an adult may not directly or overtly cause a minor to commit any forbidden act. Since, for purposes of Halakhah, a *shoteh* and a minor are regarded in a like manner the same restrictions are applicable with regard to a *shoteh* as well. [Cf., *Likutei He'arot al Teshuvot Hatam Sofer*, I, no. 83, sec. 1.]

The classic responsum commonly cited in discussions of this question is *Teshuvot Hatam Sofer*, *Orah Hayyim*, no. 83. The inquiry directed to *Hatam Sofer* involved a child of approximately seven years of age. *Hatam Sofer* was asked whether it would be permissible to send the child to a school in Vienna specializing in the treatment of such youngsters with the anticipation that the boy's problems would be ameliorated. However, kosher food was not available in that institution. *Hatam Sofer* replied that, at least in terms of normative Halakhah, it would be permissible to enroll the child in such a school since the parents, in delivering the child into the custody of the school authorities, would merely be making it possible for others to serve him non-kosher food but would not do so themselves. He cautioned, however, that the child should be removed from the institution upon reaching the age of *Bar Mitzvah*.

Hatam Sofer also presents a novel argument demonstrating that a Jew might even feed the child forbidden food directly if a cure would be effected thereby and, as a result, the child would become capable of fulfilling *mizvot* upon reaching religious maturity.

The Mishnah, *Pesahim* 87a, describes an orphan who is the ward of a multiple number of guardians and rules that each of the guardians may acquire a Paschal sacrifice on his own behalf and on behalf of his minor ward. The orphan may then, at his option, partake of whichever sacrifice he desires. The general rule is that a person may eat only of a Paschal sacrifice "on which he has been counted", i.e., in which he has acquired a proprietary interest. An ancillary principle is that a person may not acquire such an interest in, and partake of, more than a single Paschal offering. Nevertheless the Mishnah rules that the child may partake of whichever Paschal sacrifice he chooses.

Tosafot, *Pesahim* 88a, raises an obvious question. Since the child may legitimately acquire an interest in only one such animal, how may the guardian serve the meat of the Paschal offering to the child? In doing so, the guardian transgresses the commandment against causing a minor to eat a forbidden food. *Tosafot* answers that this prohibition does not apply to actions which are designed to train a child in the performance of *mizvot*. Accordingly, argues *Hatam Sofer*, it would be permissible to cause a child to eat forbidden food or to commit some other infraction of Jewish law if, by doing so, he would regain mental competence and thereby be enabled to fulfill *mizvot* at some future time.¹ Such an act would

1. In presenting this analysis of *Tosafot*'s position *Hatam Sofer* evidently follows the interpretation of *Tosafot* advanced by *Magen Avraham*, *Orah Hayyim* 343:3. According to *Magen Avraham*'s understanding of *Tosafot*, a minor may be caused to commit even a biblical transgression when incidental to *hinnukh*. This interpretation of *Tosafot*'s position is however challenged by *Minhat Hinnukh*, no. 7. *Minhat Hinnukh* argues that since *hinnukh* is literally a matter of "training" it would be inconsistent to encourage a minor to perform an act — even if the act itself constitutes fulfillment of a *mizvah* — even if the same act would be forbidden to an adult because of an attendant prohibition. *Hinnukh* or "training" of such a nature constitutes training and habituation in the performance of a forbidden act rather than of a meritorious one. Thus, argues *Minhat Hinnukh*, it would be incongruous to present a child with flesh of the Paschal sacrifice which has been cooked in liquid subsequent to roasting or with meat which has been defiled since, as an adult, such meat would be forbidden to him. On the contrary, proper training would require that the child be taught that such meat is forbidden.

be no different from "training" (*hinnukh*) in the performance of *mizvot*.² *Hatam Sofer's* reasoning would be equally applicable to similar conduct vis-a-vis an adult who might be cured of mental incompetence which renders him a *shoteh*.

Minhat Hinnukh contends that *Tosafot's* statement is limited in application. This scholar views the principle formulated by *Tosafot* as applicable only in a situation in which the act of the minor involved a transgression which, in a comparable set of circumstances, would not attend upon the selfsame act when performed by a person who has reached the age of hakakhic capacity. In the case described by *Tosafot* the minor is not among the *minuyim*, i.e., among those "counted" upon the Paschal sacrifice because of the actions of his guardians. As an adult competent of acquiring a share in the animal on his own behalf, such a difficulty would not arise. In such a case — and in such a case alone — argues *Minhat Hinnukh*, *Tosafot* permits the child to be given a portion of the *korban Pesach* for reason of *hinnukh* despite the attendant transgression. Such "training" is entirely valid since, were the child to repeat the same act as an adult, it would entail no prohibition. A similar explanation is presented by R. Naphtali Zevi Yehudah Berlin, *Meromei Sadeh*, *Haggigah* 2a.

See also R. Akiva Eger, *Drush ve-Hiddush R. Akiva Eger, ma'arakhah* 8, who rules that for purposes of *hinnukh* a minor may be caused to commit a rabbinic infraction but not a biblical transgression, e.g., a minor may be given a *shofar* to blow on *Rosh Hashanah* even when *Rosh Hashanah* occurs on *Shabbat* since the prohibition against use of musical instruments on *Shabbat* is not biblical in nature.

2. *Hatam Sofer's* position is apparently contradicted by R. Isaac Blazer (known as Reb Itzele Peterburger), *Pri Yizhak*, I, no. 11. *Pri Yizhak* asserts that *Tosafot's* ruling is limited to situations in which a minor is caused to transgress in the course of the actual performance of a *mizvah*, e.g., while engaged in eating the Paschal sacrifice. However, *Tosafot* does not explicitly sanction an act causing a minor to transgress for the sake of fulfillment of a *mizvah* at some future time even though the act may be preparatory to the fulfillment of a *mizvah*.

In support of this distinction *Pri Yizhak* cites a statement found in *Eruvin* 82a to the effect that a child of less than six years of age does not require an independent *eruv* but may enjoy the benefits of an *eruv* prepared by his mother on her own behalf. The general principle is that an *eruv* may be utilized only for the sake of fulfilling a *mizvah*, e.g., visitation of a mourner or participation in post-nuptial festivities (cf., *Tosafot, loc. cit.*, s.v. *katan*). Since an *eruv* may be prepared only when required for the purpose of fulfilling a *mizvah* it should then follow that a minor has no need whatsoever of an *eruv*. A minor may be caused to transgress for the sake of *hinnukh* in performance of a *mizvah*. It then follows that a minor may journey to the home of a mourner or to a wedding feast without benefit of an *eruv* while for a purely discretionary journey the *erev* is of an avail. Thus, the Gemara's statement indicating that a minor may utilize his

This argument notwithstanding, in practice, *Hatam Sofer* strongly advises against such a course of action even if, as a result, the child would become fully competent. *Hatam Sofer* advises that the child not be permitted to eat forbidden foods even if he would thereby ultimately be restored to normalcy and be enabled to fulfill *mizvot*. He reasons that as long as the child is mentally afflicted he is exempt from all commandments. A person who is exempt from *mizvot* is not obligated to seek ways and means of becoming obligated to fulfill *mizvot*. [Cf., however, *Magen Avraham*, *Orah Hayyim* 340:29, to whom this is a matter of doubt. See also R. Iser Yehudah Unterman, *Shevet me-Yehudah*, I, 49 and 64.] Such a course of action is actually contraindicated, argues *Hatam Sofer*, if in order to accomplish this objective a person must partake of forbidden foods even though no actual transgression is involved thereby. The Gemara states that the eating of forbidden foods, quite apart from any transgression which may be incurred, causes *tumtum ha-lev*, i.e., the food consumed has an adverse effect upon the person's moral character and spiritual well-being. Such an individual may later in life succumb to temptation and be led to all manner of transgression. Accordingly, advises *Hatam Sofer*, "Better

mother's *eruv* appears to be problematic since for purposes of fulfilling a *mizvah* a minor, according to these premises, should not require an *eruv*.

Pri Yizhak contends that a distinction must be made between causing a minor to transgress in the actual fulfillment of a *mizvah* and causing him to transgress in performing an act which is merely preparatory to the fulfillment of a *mizvah*. The former, as is evident from the comments of *Tosafot*, is permissible; the later is not. According to *Pri Yizhak*, it would then follow that a minor (or a mentally incompetent adult) may not be fed forbidden foods in the course of therapy in order that he may become competent to fulfill *mizvot* since consumption of forbidden foods under such circumstances is not intrinsic to the actual fulfillment of a *mizvah* but is merely preparatory in nature. It should be noted that *Teshuvot R. Akiva Eger*, no. 15, permits an adult to give a prayer book to a child on the Sabbath for the purpose of carrying the prayer book to the Synagogue. In order that the child may be able to participate in communal prayer. This is permitted by R. Akiva Eger even though carrying the prayer book is merely preparatory to prayer but does not, in itself, constitute the fulfillment of a *mizvah*. This ruling, although contradicted by *Pri Yizhak*, is entirely compatible with the position espoused by *Hatam Sofer*.

that a person be a *shoteh* all his days rather than be wicked a single moment in the eyes of G-d" (see *Idiyut* 5:6).

Iggerot Mosheh, Orah Hayyim, II, no. 88, offers diametrically opposed advice in the case of a mental patient who has been pronounced incurable. Such a person, declares *Iggerot Mosheh*, may without question be committed to a mental institution where he will be given non-kosher food. *Iggerot Mosheh* maintains that *Hatam Sofer* would have agreed with this advice. *Hatam Sofer* refused to counsel such a course of action, argues *Iggerot Mosheh*, only because a reasonable possibility existed that the child might be cured. The *timtum ha-lev* engendered in the course of effecting a cure might then lead him to transgression. However, in the case of an incurable patient, argues *Iggerot Mosheh*, there is nothing to fear. Since the patient will not be cured he will never be bound by the commandments and therefore will never be in a position to transgress. If by chance, adds *Iggerot Mosheh*, the patient is indeed cured such a cure can only be miraculous in nature. In such circumstances one need not fear that the patient will be adversely affected by the non-kosher food which he has eaten since G-d, it may be presumed, will not work an imperfect miracle.

A grandson of *Hatam Sofer*, R. Simchah Bunim Sofer, *Teshuvot Shevet Sofer, Even ha-Ezer*, no. 21, indicates that *Hatam Sofer* was not addressing himself to a situation involving a mentally ill person but to a case involving a feeble-minded child who would become subject to commandments upon reaching the age of thirteen. This appears evident from the fact that *Hatam Sofer* ruled that as a matter of normative Halakhah the child must be removed from the school upon reaching the age of *Bar Mitzvah*. However, rules *Shevet Sofer*, even according to the opinion of *Hatam Sofer* a person who is totally incompetent may be committed to a mental institution in the hope of achieving a cure which will render the patient capable of performing *mizvot*. *Shevet Sofer* reasons that if no cure is achieved there is no reason to be concerned with regard to *timtum-ha-lev*, while if a cure is achieved the gain to the patient in being able to perform *mizvot* far

outweighs any negative effect which may arise from *timtum ha-lev*. [See also *Teshuvot Bet Yizhak, Even ha-Ezer*, no. 39, sec. 6.]

Curiously, none of these authorities takes note of a positive obligation to cure the mentally ill. It would stand to reason that the obligations which mandate extension of therapeutic aid (including the commandment "And you shall return it to him," Deuteronomy 24:26, which is understood by Rambam as mandating restoration of health no less than of property) would apply to restoration of mental, no less than of physical, health. If so, it may well be argued that, in the absence of a prohibition against permitting a *shoteh* to partake of forbidden foods, the immediate obligation to provide health care is not set aside for reason of the uncertain future effects of *timtum ha-lev*.

IV.

It is clear that insanity which poses a threat to the life of the patient or to the life of others is to be regarded no differently from any other threat to life. Accordingly, infractions designed to cure the illness and thereby remove the threat to life are warranted according to the general regulations governing *pikuah nefesh*. *Isur ve-Hetter he-Arukha* no. 59, sec. 35, records a query addressed to an earlier authority, Maharam, concerning an epileptic who sought advice regarding the permissibility of partaking of a forbidden food believed to possess medicinal properties capable of curing this disease. Maharam responded that, under the circumstances, such food would be permissible provided that the efficacy of the remedy has been established. This decision is predicated upon a determination that epilepsy constitutes a threat to life since the patient may endanger himself by "falling into fire or water." This decision is cited by many latter-day authorities in ruling that insanity constitutes a danger to life for the self-same reason.

The sole authority who differs with regard to this ruling is R. Iser Yehudah Unterman, *Ha-Torah ve-he-Medinah*, IV, 27, and *Shevet me-Yehudah*, IV, 27, and *Shevet me-Yehudah*, I, 49 and 297. Rabbi Unterman distinguishes between epilepsy (which is a

neurological illness) and psychiatric illnesses in presenting the rather strange-and indeed counterfactual-argument that the instinct for self-preservation is so deeply ingrained and suicidal tendencies are so rare that mental illness cannot be considered as falling within the category of diseases which imperil life. In support of his position Rabbi Unterman quotes the above cited responsum of *Hatam Sofer*, *Orah Hayyim*, no. 83. Rabbi Unterman argues that *Hatam Sofer* could not have counseled against institutionalizing the child in question if mental illness were deemed a threat to life. However, as shown earlier, in point of fact, *Hatam Sofer's* responsum deals with a case of feeble-mindedness rather than with a form of mental illness. In any event, Rabbi Unterman's position is contradicted by numerous rabbinic scholars who deem insanity a threat to life. These authorities include R. Israel Meir Mizrahi, *Pri ha-Arez*, III, *Yoreh De'ah*, no. 21; R. Yehudah Leib Graubart, *Havalim ba-Ne'imim*, IV, no. 13; R. Mordecai Winkler, *Levushai Mordekhai*, I, *Hoshen Mishpat*, no. 39; Waldenberg, *Ziz Eliezer*, IX, no. 51, chap. 3, sec. 9; *Iggerot Mosheh*, *Even ha-Ezer*, I, no. 65; and R. Yitzchak Ya'akov Weisz, *Minhat Yizhak*, I, no. 115.