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Bankruptcy — A Viable Halachic Option?

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Introduction

American bankruptcy law offers people the opportunity to avoid repaying their debts, even if they later become wealthy. This is accomplished by granting debtors a "discharge" of their debt, which permanently eliminates their legal responsibility to pay. Debtors are increasingly seizing this opportunity. In calendar year 1991, almost a million bankruptcy petitions were filed in the United States alone.

Obtaining a bankruptcy discharge raises serious halachic problems. First, halacha requires repayment of debt. Second, halacha generally prohibits litigation between Jews in secular courts. This article explores whether, despite these obstacles, Jewish debtors may take advantage of a bankruptcy discharge.

PART I
Importance of Paying One's Debt

Halacha considers the repayment of debt to Jewish creditors as a moral and religious imperative. Most authorities agree

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that the payment of one's debts is an affirmative biblical commandment.[1] Rabbi Yisroel Meir HaCohen (the Chafetz Chaim)[2] states that if a debtor who can pay refuses to do so, he also violates a negative biblical commandment not to oppress ("*lo ta'ashok*") his neighbor.[3]

The Mishnah declares someone an Evildoer ("Rasha") in any of four categories.[4] Quoting *David HaMelech*,[5] it says that one of these is a person who borrows but, although financially able, does not repay. To such persons the sages apply the verse "[t]hose who acquire wealth in violation of halacha, in mid-life it(they) will leave them(it)." The phrase "if(they) will leave them(it)" has two meanings. Sometimes the wealth leaves the people (i.e., they become impoverished while still young). In other instances, the people leave the wealth — by dying prematurely.[6]

There is no halachic equivalent to a bankruptcy discharge.[7] Instead, if property collected from a debtor is not sufficiently valuable to pay off his debts, the debtor remains personally liable for any unpaid amounts. If and when the debtor acquires

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1. I.e., a *mitzvat a'seh*. See Rashi, *Ketubot* 86a (citing *Vayikra* 19:36). See Rabbi Yaakov Yeshaya Blau, *Pitchei Choshen, Dinei Halva'ah*, chapter 2, halacha 1, note 1 (citing various views).

2. (1838-1933), *Ahavat Chessed*, part 2, chapter 24.

3. I.e., *"mitzvat lo ta'aseh."* Id.

4. *Avot* chapter 2.

5. *Tehillim* 37:21.

6. *Ahavat Chessed*, supra note 3, citing *Mesechta Derech Eretz Zutra*.

7. The general cancellation of debt ("*shmittat kesafim*") associated with the Jubilee (*Yovel*) year differs from a bankruptcy discharge in two important ways. First, *shmittat kesafim* cancels debts owed by the rich as well as those owed by the poor. Second, *shmittat kesafim* only applies to liabilities which are totally unsecured and which are treated as "debt." See, *Rambam, Hilchot Shmittah and Yovel*, chapter 9, *halachot* 11-14.

additional assets, he is obligated to pay, and this obligation is enforceable by rabbinic court (*beit din*).

PART II
"Yeush" and The Bankruptcy Discharge

First let us consider whether one's debts may be halachically discharged without reference to bankruptcy law. This may occur through a creditor's "despair" (*yeush*).

Where a person believes he will not recover his lost object, there is *yeush*. If the object is found after *yeush*, it belongs to the finder. Arguably, if a creditor believes that he will never be paid, there is *yeush*, and the debt "belongs" to the debtor, who is thereby freed from his obligation to pay.

There are three principal views as to whether a creditor's *yeush* cancels a borrower's debt. Rabbi Yosef Caro (the *Mechaber*)[8] broadly declares that *yeush* does not discharge a debt. Rabbi Yaakov Yeshaya Blau states that most *poskim* agree with the *Mechaber* that the mere fact that a debtor appears to have become impoverished does not discharge his debts.[9] Rabbi Moshe Isserles (Ramo) explains that although lenders always know a debt may not be repaid, we do not say that all creditors despair of repayment.[10]

On the other hand, Rabbi Blau explains that many *poskim* conclude that where circumstances would lead any reasonable creditor to despair, such as where the debtor's fields are ruined by floods, there is *yeush* and the debt is discharged.[11] According to Rabbi Aryeh Leib HaKohen Heller (the *Ketzot*

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8. *Shulchan Aruch, Choshen Mishpat* 98:1.

9. *Pitchei Choshen, Hilchot Halva'ah,* chapter 2, halacha 29, note 73. See also *Chacham Tzvi,* Responsa no. 144.

10. *Shulchan Aruch, Choshen Mishpat* 262:5.

11. Ibid.

HaChoshen),[12] this is the view of Rabbi Yosef Colon (the Maharik)[13] and the Ramo.

The third view is offered by Rabbi Meir Auerbach (*Imrei Bina*). He states that a debt is generally discharged whenever the creditor despairs of repayment, even if this is because the debtor becomes impoverished. The only exception is that a debtor cannot extinguish his debt if his own purposeful, wrongful act caused the owner's *yeush*, such as where a debtor simply refuses to pay.[14]

According to the *Ketzot*, and even more so the *Imrei Bina*, a debtor's financial woes may cause debts to be discharged without resort to bankruptcy law. If so, the halachic impact of a bankruptcy discharge would be moot.

But assume for a moment that a bankruptcy discharge works as to non-Jewish or irreligious Jewish creditors, but not as to religious Jewish creditors.[15] Assume also that most of a debtor's obligations are to non-Jewish or irreligious Jewish creditors. If a bankruptcy discharge were halachically invalid, a religious Jewish creditor might despair of repayment, and, according to the *Ketzot* or *Imrei Bina*, the debtor's obligation to pay him might be discharged.

If, however, the debtor is entitled to discharge the bulk of his debt, the monies owed to non-Jews or irreligious Jews, there may be a meaningful chance for the debtor's financial recovery. If so, the religious Jewish creditor may not despair of ultimate payment, and bankruptcy discharge law could ironically prevent the halachic discharge of debts to religious Jews.

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12. On *Shulchan Aruch, Choshen Mishpat* 163:3.

13. In *Shoresh* 3.

14. Volume 2, *Hilchot G'viyat Chov*, no. 4.

15. See Part VII, infra.

PART III
How One Obtains A Bankruptcy Discharge

Assuming that a debtor's impoverishment does not extinguish a debt through the creditor's *yeush*, it becomes necessary to examine whether a bankruptcy discharge is halachically valid. It is important to understand how a debtor obtains a secular bankruptcy discharge.

Bankruptcy law, in its current form, basically allows a debtor to be released from his financial obligations in either of two ways. Neither requires that all, or even a majority, of the debtor's creditors agree.[16]

First, a debtor may deliver to the court all of his property (except for certain "exempt" property which the debtor is allowed to keep) for distribution to creditors. In "exchange" for the surrender of such property, the debtor is relieved of personal liability for any unpaid debt.[17] This type of bankruptcy is called a "liquidation."

Alternatively, the debtor may propose a plan to make payments to creditors over a number of years. Various rules apply to determine the minimum amounts of such payments. Upon completion of the proposed payments, even though the creditors have not been paid in full, the debtor is discharged from any further liability.[18] This type of bankruptcy is called a "reorganization."

Under certain circumstances, a debtor's creditors may force him into one of these two types of bankruptcy proceedings against his will. A debtor in such an involuntary bankruptcy

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16. See, generally, Robert E. Ginsberg et al., *Bankruptcy: Text, Statutes*, Rules (Prentice-Hall 2d ed. 1989), vol. 1, chapters I, II, XI, and XII , and vol. 2, chapters XIII and XV.

17. See, generally, Title 11, United States Code, 701 et seq.

18. See, generally, 11 U.S.C. 1101 et seq. and 1301 et seq.

is still eligible for a discharge of his debt.[19]

PART IV
Custom/Implied Agreement and The Bankruptcy Discharge

Although halacha prescribes certain rules regarding commercial transactions, halacha allows individuals to alter these rules by agreement or custom.[20] Therefore, bankruptcy discharge law may be halachically valid if it is found that when the parties agreed to deal with each other they did so on the understanding that, if he qualified, each had the right to seek bankruptcy relief.

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19. See, generally, 11 U.S.C. 303. A debtor may only be involuntarily forced into one of the two possible types of reorganization proceedings.

20. See, e.g., Rabbi Dr. Isaac Herzog (1888-1959), *The Main Institutions of Jewish Law* (Soncino Press, London 1965); Menachem Elon, The Principles of Jewish Law (Keter Publishing House, Jerusalem Ltd., Jerusalem 1975), column 97 (hereafter "Principles"). Halacha may require that such agreements be phrased in certain ways so as to avoid direct contradiction of Torah law. See, e.g., *Shulchan Aruch, Choshen Mishpat* 67:9, 227:21. Some halachic authorities have considered whether a creditor's explicit agreement (as opposed to the custom or implied agreement discussed in this article) to forgive the debt in exchange for a partial payment would be enforceable against the creditor once the partial payment was made. See, e.g., *Piskei Choshen, Dinei Halva'ah,* chapter 2, halacha 26, note 63; Ezra Basri (contemporary), *Dinei Mamonot,* volume 2, pp. 76-77, note 21. The question involves complicated issues such as: (1) whether the creditor's explicit consent was voluntary or coerced and, if coerced, whether the creditor was halachically required to take specific steps to document such coercion; and (2) whether, to be binding, the creditor's agreement had to be formalized through a specific halachic act (a "*kinyan*"). These issues fall outside the scope of this article. In any event, in most cases modern bankruptcy law discharges debts without the respective creditors' express consent.

A. General analysis

There are at least two interrelated reasons for finding that debtors and creditors implicitly agree that a bankruptcy filing is a viable option. The first is based on commercial custom, *"minhag HaSocharim."* The second is based on the fact that the parties contracted in light of secular law.

1. Informally established commercial practices

Halacha recognizes that commercial transactions are governed by custom. The first Mishnah of *"HaSocher es HaPoalim,"* Talmud *Bavli, Bava Metzia* 83a, states that

> One who hires laborers and tells them to come early or stay late: in a place where the custom is not to come early or stay late, the employer is not allowed to force them [to do so]. . . All [such terms] are governed by local custom."

In fact, *minhag* prevails over what would otherwise be the halacha.[21]

Moreover, the majority view is that as to commercial matters, such customs need not have been established by halachic or communal authorities, nor even by Jews.[22] Parties are simply presumed to have implicitly made applicable customs part of their agreement. Rabbi Moshe Feinstein explains:

It is entirely obvious that all of these rules which

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21. See Talmud *Yerushalmi, Bava Metzia* 27b, statement of Rav Hoshea, "*Minhag* supersedes halacha." See also, e.g., *Principles,* supra note 20, columns 97-98.

22. Maharik, *Responsa* no. 102; Rabbi Shmuel di Medina (Maharashdam, 1506-1589), *Responsa,* no. 108 (the questioner makes this argument, and Maharashdam comments approvingly); Rabbi David Chazan (19th century), *Nediv Lev,* no. 12; Rabbi Yisroel Avraham Alter Landau (20th century), *Beit Yisroel,* no. 172; Rabbi Moshe Feinstein (1895-1986), *Iggerot Moshe, Choshen Mishpat,* part 1, no. 72.

> depend on custom . . . do not have to be customs established by Torah scholars, and not even by Jews specifically. Even if these customs were established by Gentiles, if they are the majority of the inhabitants of the city, the halacha is in accordance with the custom [unless the parties specify otherwise] because [it is deemed that] the parties conditioned their agreement in accordance with the custom of the city [unless they specify otherwise].[23]

There are many examples where custom prevails over what would otherwise be the halachic rule. For instance, where persons on a caravan hire a guide, halacha prescribes a formula for determining how much of the guide's fee each person should contribute. That formula takes into consideration both a per capita and a property component so that a person who brings more property pays more. If, however, there is a custom to determine payment based solely on the amount of property each person has with him, then the custom governs.[24]

Similarly, although halacha provides that one may become contractually liable only through certain formal procedures (*kinyanim*), the Gemara, *Bava Metzia* 74a, states that where people in business use a different method (*"sumtah"*), such as a handshake, this method is halachically valid.[25]

2. Custom established by secular law

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23. *Iggerot Moshe, Choshen Mishpat*, part 1, no. 72. See also Rabbi Yosef Iggeres (*Divrei Yosef*, 18th century) no. 21 (stating that this is the view of the Rambam and the Rashba); *Aruch HaShulchan, Choshen Mishpat*, no. 73, note 20 (citing *Sefer Urim V'Tumim*).

24. *Principles*, supra note 20, column 103, citing *Ba'alei Tosafot, Bava Metzia* 7:13-14, *Bava Kama* 116b and Talmud *Yerushalmi, Bava Kama* 6:4, 11a.

25. See also *Shulchan Aruch, Choshen Mishpat* 201:1. For other examples, see, e.g., *Pnei Moshe*, Talmud *Yerushalmi, Bava Metzia* 27b; Rabbi Asher b. Yechiel (Rosh), *Responsa*, no. 64:4.

A custom is frequently based on the fact that secular law requires such action. Many *poskim* have stated that this fact does not detract from the custom's halachic status. For example, Rabbi Yosef Iggeres argues:

> One cannot cast doubt upon the validity of this custom on the basis that it became established through a decree of the King that required people to so act. Since people always act this way, even though they do so only because of the King's decree, we still properly say that everyone who does business without specifying otherwise does business according to the custom.[26]

Similarly, Rabbi Blau states in the name of Chacham Yosef Chaim Pealim (*Ben Ish Chai*)[27] that even where the separate doctrine *dina d'malchuta dina*, to be discussed by us in Section IV, does not apply, if people act in accordance with the secular law, the custom has halachic validity as custom.[28]

Rabbi Moshe Feinstein has arguably gone further, suggesting that secular law may have the same effect as *minhag*, even if people do not always act in accordance with the secular law.Thus, in one case, Rabbi Feinstein was told that applicable landlord-tenant law prohibited the landlord from evicting a tenant at the end of the lease, even if the landlord wanted to

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26. Iggeres, *Divrei Yosef*, no. 21; See also David Chazan, *Nediv Lev*, no. 12; Rabbi Eliyahu Chazan *Nediv Lev*, no. 13; *Maharia Halevi*, volume 2, no. 111; *Devar Avraham*, volume 1, no. 1; *Beit Yisroel*, no. 172. Shmuel Shilo, *Dine De'malchuta Dina* (Hebrew University Press 1974)(hereafter "Shilo,") p. 163, states that Rabbi Iggeres bases his conclusion not only on *minhag* but also on *dina d'malchuta dina*. This does not seem to be correct.

27. (1832-1909).

28. See Blau, *Piskei Choshen, Dinei Halva'ah*, chapter 2, halacha 29, note 82. In *Piskei Choshen, Hilchot Geneiva*, chapter 1, note 4, p. 13, Rabbi Blau explains that, according to the *Ben Ish Chai*, all disputes between Jews which are adjudged based on secular law are really done so because of *minhag*, not *dina d'malchuta dina*.

use the property himself. Although Rabbi Feinstein was asked whether the law was halachically valid because of *dina d'malchuta dina,*[29] he chose not to rule on this ground. Instead, he declared that the landlord agreed to the secular law at the time of the lease:[30]

> [C]ertainly the law of the land is no worse than *minhag* and unless the parties agree otherwise it is deemed as if they agreed according to the secular law, and a fortiori when the *minhag* is in accordance with the secular law.[31]

B. Application to bankruptcy law

When people do business in the United States, a strong argument can be made that they implicitly agree that their transactions are subject to secular law, which includes bankruptcy discharge law. To determine if this argument is valid, we must examine halachic precedents.

1. Early *poskim*

A number of *poskim* have discussed whether a creditor's rights against an impoverished debtor may be limited or annulled through *minhag*. Most of these *poskim* refer to responsa of Rabbi Moshe HaKohen (Maharshach), an authority in sixteenth century Salonika.[32]

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29. *Iggerot Moshe, Choshen Mishpat,* part 1, no. 72.

30. Although the lease specified a duration, Rabbi Feinstein found that this was not inconsistent with the creditor's having agreed to the secular law. The duration provision in the lease was not thereby rendered superfluous. This provision obligated the tenant to perform under the lease for at least the duration of the lease.

31. *Iggerot Moshe, loc. cit.*

32. *Responsa,* volume 2, no. 113; volume 3, no. 8. In his classic work, the *Shem HaGedolim,* Rabbi Chaim Yosef Azulei (Chida, 19th century) quotes Rabbi Yaakov Alfandari as saying: "To us, Mahari ibn Lev [Rabbi Yosef ibn Lev], Maharashdam [Rabbi Shmuel de Medina] and

The Maharshach was asked about a case in which a majority of creditors agreed to give a debtor an extension of time to pay his debts.[33] One creditor objected and sought to enforce his halachic rights in *beit din*. Local custom entitled a majority of creditors to force minority creditors to a compromise with the debtor. Citing the Gemara which made *sumtah* a halachically valid form of *kinyan*, the Maharshach stated that custom controls financial transactions, even where custom is inconsistent with the usual halachic provision, and ruled against the dissenting creditor.

This view of the Maharshach has been cited favorably by many halachic authorities.[34] Moreover, a question sent to the Maharashdam made the Maharshach's argument, and the Maharashdam commented on it approvingly.[35]

Although some of the *poskim* citing the Maharshach dealt with compromises which merely extended the debtor's time to

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Maharshach are to be considered like Rif, Rambam and Rosh."

33. *Responsa*, volume 2, no. 113.

34. Rabbis Yehuda Lirme (*Pleitat Beit Yehuda*,) nos. 21 and 22; Chasdei HaCohen Prachya (*Torat Chessed*), no. 225; Moshe Yisroel (*Mases Moshe*), *Choshen Mishpat*, no. 62; Akiva Eger (1761-1837), *Shulchan Aruch*, *Choshen Mishpat* 12:13; Iggeres, *Divrei Yosef*, no. 21; Avraham Tzvi Hirsch Eisenstadt (*Pitkei Tshuva*, 1813-1868), commentary to *Shulchan Aruch*, *Choshen Mishpat* 12:19; Yitzchak b. Yosef HaCohen (*Ohel Yitzchak, 19th century*), no. 33; David Chazan, *Nediv Lev*, no. 12; Eliyahu Chazan, *Nediv Lev*, no. 13; Chaim Aryeh Kahane (*Divrei Gaonim*), *Klal* 14, no. 18; Chaim Azulai (*Birkei Yosef*), no. 12, note 14; Chaim Eshel (*Som Chaye*), no. 33; Landau, *Beit Yisroel*, no. 172; and Basri, *Dine Mamanot*, volume 1, p. 71. Other authorities are also cited as to the halachic power of custom. *Divrei Yosef*, No. 21, for instance, cites a *teshuva* of Rashba, stating that [e]veryone who does business does so, absent specific agreement to the contrary, based on local custom, and it is as if they so explicitly agreed . . . even if the custom contradicts the halacha. *Responsa HaRashba*, volume 2, no. 268.

35. Maharashdam, *Choshen Mishpat*, no. 108.

pay or altered the creditors' respective rights regarding the distribution of the debtor's current assets,[36] none of these poskim conclude that the Maharshach's logic was limited to such cases.[37] Most *poskim* explicitly or implicitly addressing this issue apply the Maharshach broadly, ruling that, if consistent with local custom,[38] a majority of creditors may force a minority to a compromise.[39]

In discharging part of the debtor's debt, these compromises operated substantially like secular bankruptcy discharges. Indeed, for a number of years, in order for a debtor to obtain a discharge of debt in a "liquidation bankruptcy"[40] under various

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36. See, e.g., Lirme, *Pleitat Beit Yehuda*, nos. 21 and 22; Prachya, *Torat Chessed*, no. 25; Eshel, *Som Chaye*, no. 33.

37. Rabbi David Chazan, *Nediv Lev*, no. 12, and his father, Rabbi Rafael Chazan (quoted by his son) dealt with compromises discharging part of a debtor's debt and criticized the *poskim* that assumed that the Maharshach applied to such cases. Nevertheless, although the view of Rabbis Rafael and David Chazan are somewhat confusing, they, too, support the notion that where the *minhag* is of non-Jews to whose law Jews are subjugated, the *minhag* is binding because it is as though the parties agreed thereto. See Part VC1, infra. But see also Eshel, *Som Chaye*, no. 33 (language suggesting that the rule enforcing the compromise is based on the expectation that the debtor will ultimately pay the debt).

38. Actually, Kahane, *Divrei Gaonim, klal* 14, halacha 18, fails to mention the requirement that there be a preexisting *minhag*. See text associated with notes 101-103, infra.

39. See, e.g., Moshe Yisroel, *Mases Moshe*, no. 62 (compromise involving discharge of debt); Yitzchak HaCohen, Ohel Yitzchak, no. 33 (same); Azulai, *Birkei Yosef*, 12:14 (broad statement); Kahane, *Divrei Gaonim, klal* 14, *halacha* 18(broad statement); Eliyahu Chazan, *Nediv Lev*, no. 13 (compromise involving discharge of debt); Avraham Yisroel Alter Landau, *Beit Yisroel*, no. 172 (same). See also Shilo, supra note 26, pp. 163-164; Basri, *Dinei Mamanot*, vol. 1, p. 71.

40. See Part III, supra, for the difference between a liquidation

federal bankruptcy laws, a debtor had to obtain the consent, or at least avoid the dissent, of a majority of his creditors.[41] In "reorganization bankruptcies," the consent of some creditors is still required.[42]

As noted in Part III, above, current bankruptcy discharge law differs from the compromises discussed in the *teshuvot* citing the Maharshach in two ways: (1) where the debtor's nonexempt assets are insufficient, a discharge may be obtained even where creditors receive no distribution; and (2) the discharge may be obtained without the consent of the debtor's creditors. Nonetheless, it is unclear whether these factors make any halachic difference so long as the current *minhag* is to provide a discharge wherever the debtor otherwise qualifies under secular bankruptcy law.

2. Modern authorities

Rabbi Blau and Professor Shmuel Shilo seem to be the

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bankruptcy, where all the debtor's non-exempt assets are sold and the proceeds distributed to creditors, and a reorganization bankruptcy, where a plan is proposed through which the debtor keeps his property but pays off his debt with future income.

41. See, e.g., American Bankruptcy Act of 1800, ch. 19, 36, 2 Stat. 19, 31, 36 (1800)(repealed 1983)(discharge only with consent of 2/3 of creditors in number and in amount of debt; only creditors owed at least $50 counted); Bankruptcy Act of 1841, ch. 9, 4, 5 Stat. 443-44 (repealed 1843)(need majority of creditors in number and in amount of debt to be non-dissenting); Bankruptcy Act of 1867, ch. 176, 33, 14 Stat. 51, 533 (one who voluntarily files for bankruptcy more than 1 year from effective date of Act must pay creditors at least 50% and need consent of creditors holding 50% of debt in order to obtain a discharge)(amended in 1874). Either some minimum payment or consent of some minimum percentage of creditors was required in liquidation bankruptcies until the Bankruptcy Act of 1898, ch. 541, 30 Stat. 548.

42. The confirmation requirements regarding creditor consent are too extensive to discuss here.

only modern authorities who explicitly discuss one or more of the *Maharshach Teshuvot* in connection with bankruptcy discharge law.

Professor Shilo addresses this question briefly in his comprehensive work on *dina d'malchuta dina*. He describes most of the *Maharshach Teshuvot* as based on *minhag HaSocharim* and states that they support secular bankruptcy law.[43]

Rabbi Blau mentions that *minhag HaSocharim* may justify bankruptcy discharge law. He does not mention all of the *Maharshach Teshuvot*. Instead, he notes that Rabbi Akiva Eger cites the *teshuva* of Rabbi Moshe Yisroel, which, citing the Maharshach, holds that a discharge of debt obtained through an agreement with a majority of creditors is valid even as to creditors who objected. Although Rabbi Blau concludes that bankruptcy law should be effective as to corporate debt, his position regarding individual bankruptcies is less clear.[44]

Rabbi Ezra Basri relies on the *Maharshach Teshuvot* in ruling that a discharge pursuant to an agreement with a

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43. Shilo, supra note 26, at pp. 163-164.

44. Rabbi Blau states that a rare custom is not halachically valid. Yet this Ramork seems inapt, because, at least in America, bankruptcies are everyday occurrences. Rabbi Blau parenthetically refers to Rabbi Shabtai HaKohen (*Shach*, 1621- 1662) and Rabbi Rafael Chazan, who Rabbi Blau believes, limit the halachic validity of the customs of non-Jews. But, as we have already seen, many authorities, including Rabbi Feinstein, argue that such customs are halachically valid. See the text associated with notes 22 and 23, supra. Moreover, Rabbi David Chazan, *Nediv Lev*, no. 12, explains the view of Rabbi Raphael Chazan, his father, as allowing a halachically binding custom to be derived from non-Jews where the custom would be enforceable against Jews under secular law. See text associated with notes 97 through 100, infra.

majority of creditors is binding on objecting creditors.[45] Nevertheless, although Rabbi Basri comments on various halachic ramifications of bankruptcy law, he does not specifically opine as to whether someone who is poor may seek or rely on a secular bankruptcy discharge.[46]

However, in denouncing those who exploit bankruptcy law despite the fact that they are wealthy, Rabbi Basri seems implicitly to approve bankruptcy relief for those who are genuinely impoverished:

> Those who go bankrupt while their homes are full of valuables and do not pay their creditors, even if they do so through secular courts, have stolen merchandise in their hands. They will ultimately have to give an accounting. There is not enough space to expound upon the enormity of their guilt, especially if they do so with respect to non-Jewish creditors, because they profane G-d's name and cause non-Jews to say "This is what Jews do." One cannot describe the extent of their punishment.[47]

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45. Basri, *Dinei Mamanot*, vol. 1, p. 71.

46. See, e.g., Idem, pp. 68, 71, 72, 87; volume 2, pp. 82, 87, 254, 282, 302; volume 3, pp. 252, 308; volume 4, p. 68. The closest Rabbi Basri comes to expressing a view on this precise issue seems to be at the end of note 21, at page 77 of volume 2.

47.Ibid., volume 1, p. 68, n. 4. See also volume 2, pp. 76-77 (text and note 21). Rabbi Basri, however, does not specifically conclude whether one who was poor but subsequently becomes wealthy may rely on bankruptcy discharge law.

Other *poskim* emphasize that fraudulent use of secular bankruptcy law will surely not be halachically effective. See, e.g., Blau, *Pitchei Choshen, Dinei Halva'ah*, chapter 2, note 63; Klein, Mishne Halachos, volume 6, no. 277 (corporate officers personally liable if assets wrongfully diverted from corporate debtor prior to bankruptcy). See also Sternbuch, *Responsa Teshuvot V'hanhagot*, vol. 2, no. 701 (settlement fraudulently obtained is ineffective).

The prohibition against profaning G-d's name applies to those who are really rich and, therefore, renders their assets "stolen goods."[48] By contrast, the poor may be entitled to file bankruptcy without their relatively insignificant exempt property being considered stolen.

Rabbi Moshe Heinemann, in an interview on March 13, 1992, stated that the central question is whether people, when they enter into transactions, have in mind that they are negotiating subject to the bankruptcy law.[49] If they do, then the bankruptcy discharge would be halachically valid. He stated that he believed that bankruptcy law would be valid as to corporate debtors, but that he was uncertain ("*mesupak*"), as to whether or not individual Jews, when they enter into transactions, have in mind secular bankruptcy law.

It may be that the circumstances surrounding a transaction can indicate whether parties expect to be bound by secular

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48. Rabbi Basri's reference to those whose homes are full of valuables is somewhat vague and fails to provide precise guidance as to whom he means to criticize. For example, there may be many persons whose limited assets exceed those which halacha would allow a debtor to keep, but who are nonetheless suffering financially.

American bankruptcy law, as applied in many jurisdictions, allows such abuse. Persons who file bankruptcy may exempt certain properties and keep them, while obtaining a discharge of their debts. 11 U.S.C. 522. The types of properties one may keep depends on the law of the state in which he legally resides. Some states allow debtors to exempt properties, such as their homes or ranches, worth enormous amounts of money. See, e.g., Tex. Prop. Code Ann, chapter 41, 41.001 (exempts a debtor's homestead), 41.002 (defines a homestead used as a rural home for a family as consisting of not more than 200 acres).

49. It seems irrelevant whether the particular parties involved actually had such matters in mind. There is no hint in the *poskim* that someone can avoid the effect of *minhag* merely by proving his own ignorance of the *minhag*. Rather, the question is whether the average person would be aware of the *minhag* at the time of the transaction.

law. For instance, where parties to a commercial transaction consult non-Jewish or non-observant attorneys, they may intend secular law to apply.[50] Indeed, whenever a party applies for a business loan, he may expect secular law to apply. On the other hand, when one obtains a consumer loan, the parties may expect the loan to be governed by halacha.[51]

As discussed in Part IV, below, at least one relatively recent *posek*, Rabbi Mordechai Yaakov Breisch (*Chelkat Yaakov*),[52] explicitly ruled that secular bankruptcy law is not halachically effective to discharge debts between Jewish debtors and creditors. Among other things, it is noteworthy that he did not discuss the *Maharshach Teshuvot*.

PART V
Dina D'Malchuta Dina and The Bankruptcy Discharge

The principle *dina d'malchuta dina* (the law of the land is the law) provides that the law of the secular state is halachically binding.[53] The principle, where applicable,

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50. This factor was suggested by Professor Michael Broyde.

51. This distinction was suggested by Rabbi Shmuel Fuerst (*Dayan*, Agudath Israel of Chicago).

52. Responsa, volume 3, no. 160.

53. See, generally, Shilo, supra note 26; Dayan I. Grunfeld, The Jewish Law of Inheritance (Targum Press 1987)(hereafter Grunfeld) pp. 17-46; R. Hershel Schacter, "*Dina De'malchuta Dina*: Secular Law As a Religious Obligation," *Journal of Halacha and Contemporary Society*, Vol. 1, No. 1, p. 103 (1981); *Encyclopedia Talmudit*, " *dina d'malchuta dina*;" Responsa Rabbi Ovadia Yosef , *Yechave Da'at*, vol. 4, no. 65; Responsa Rabbi Eliezer Waldenburg Tzitz Eliezer", vol. 16, no 49; *Maharik*, no. 66, 187; Responsa Rabbi Moses Teitelbaum (*Heshiv Moshe*), no. 90.

For modern academic theories of how *dina d'malchuta dina* operates, see, e.g., Professor Aaron Kirschenbaum and Jon Trafimow, "The

supersedes the results halacha would otherwise prescribe. If applicable to all of bankruptcy law, *dina d'malchuta dina* would allow religious Jewish debtors to enjoy the advantages of a bankruptcy discharge.

A. Principal views of *dina d'malchuta dina*

We will refer to the three principal versions of *dina d'malchuta dina* as the *Mechaber's* view, the Ramo's view and the *Shach's* view. These approaches broadly agree, based on dicta of the Babylonian *Amora* Shmuel, that *dina d'malchuta dina* halachically legitimizes taxes, currency regulation and other secular laws which relate directly to the government's financial interests.[54] The *Mechaber's* view is that these are the only areas to which *dina d'malchuta dina* applies. The Ramo views dina *d'malchuta* more comprehensively. The Shach, in turn, imposes a restriction on the Ramo's approach.

This controversy reflects a difference of opinion among *Rishonim* regarding a passage in *Mesechta Gittin*.[55] The Mishnah, in relevant part, says the following:

> All documents accepted in non-Jewish courts, even if the witnesses who signed them are non-Jews, are halachically valid, except writs of divorce and emancipation. Rav Shimon says that even these are valid; they were only declared invalid when prepared by unauthorized persons.

The Gemara asks why the Mishnah does not differentiate between documents of only evidentiary value and documents which actually effectuate legal changes, such as those

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Sovereign Power of the State: A Proposed Theory of Accommodation in Jewish Law," 12 Cardozo L.Rev. 925 (1991); Professor Chaim Povarsky, "Jewish Law v. the Law of the State: Theories of Accommodation," 12 Cardozo L.Rev. 941 (1991).

54. See Talmud *Bavli, Bava Kama* 113a; *Nedarim* 28a.

55. Talmud *Bavli, Gittin* 10b.

purporting to transfer property. The Gemara questions how the latter types of documents could be halachically valid. Two answers are given. The first answer is because of *dina d'malchuta dina*. Then the Talmud says, "If you like, I could say that the phrase 'except writs of divorce and emancipation' means 'except documents like writs of divorce,' i.e., except documents which themselves change legal status."

Some early Talmudists (*Rishonim*) interpret these two answers as exclusive alternatives, the second answer acknowledging that *dina d'malchuta dina* is limited to matters directly affecting the government's financial interests.[56] Secular documents pertaining to other matters could be considered for evidentiary purposes, but could not themselves effect legal changes. The *Mechaber* adopts this view.[57]

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56. *Rishonim* so ruling include, without limitation, Rabbi Yitzchak Alfasi (Rif, 1013-1103), reported by Rashba, commentary on this passage; the majority of the *Geonim* (various authorities from 6th through early 11th centuries), reported by Rabbi Vidal Yom Tov of Tolosa (*Maggid Mishna*, 14th century), commentary on *Mishneh Torah, Hilchot Malveh V'loveh*, chapter 27, *halacha* 1; the *Ba'alei HaTosafot* (various scholars in 12th and 13th centuries), reported by *Maggid Mishnah*; Rabbi Yehoshua Boaz ben Shimon Baruch (*Shiltei Giborim*, 16th century), commentary on Talmud *Bavli, Bava Batra*, end of chapter 3; Rabbi Samuel Hasardi (*Ba'al HaTrumot*, 1190-1256), *Sha'ar* 46, part 8, no. 5; Rav Mordechai Hillel (1240-1298), reported by Maharik, supra), and the Maharik. This is also the view of the Rambam, according to the *Maggid Mishnah*'s interpretation of the Rambam. Others construe the Rambam's words differently. See, e.g., Rabbi Avraham ben Moshe of Boton (*Lechem Mishneh*, 16th century), commentary on *Mishneh Torah, Hilchot Malveh V'loveh*, chapter 27, *halacha* 1.

57. This ruling is implicit in the fact that the *Mechaber* only cites *dina d'malchuta dina* in connection with matters which directly affect the government. *Shulchan Aruch, Choshen Mishpat*, no. 369, subparts 6 - 11. The Ramo refers to the view of the other *Rishonim* as a contrast to the halacha stated by the *Mechaber*. *Shulchan Aruch, Choshen Mishpat*, no. 369, subpart 8.

Other *Rishonim* construe the two talmudic answers as supplementary, not exclusive.[58] According to this approach, the first answer, that *dina d'malchuta dina* broadly applies to all types of civil law, remains valid. The Ramo so rules, adding the restriction, mentioned by many *Rishonim*, that

> We only apply *dina d'malchuta dina* where [the secular law] benefits the king [government] *or where it is for the benefit of the people of the land. . .* (Emphasis added).[59]

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58. For a more complete interpretation of the Gemara based on this second approach, see Grunfeld, supra note 54. Although differing on certain issues, *Rishonim* interpreting *dina d'malchuta dina* as comprehensively applying to such subjects include, without limitation, Rashi and Rabbi Mordechai b. Hillel HaKohen , reported in *Amudei HaYimini*, no. 8); Rabbi Shmuel b. Meir (Rashbam,), Talmud *Bavli, Bava Batra* 54a; Meiri (commentary to Talmud *Bavli, Gittin* 10b), Ran, supercommentary to commentary of Rif, *Gittin* 10b; Rabbi Shimon Duran (*Tashbatz*), *Responsa*, part 1, no. 158; (Rivash), *Responsa*, numbers 142, 203; Rabbi Shlomo b. Luria (Maharshal), *Yam Shel Shlomo*, chapter 1, no. 22). The Rashba also seems to have shared this view. See, e.g., Rashba's commentary to *Gittin* 10b and *Responsa*, part 3, no. 63:5, 198. But see *Yechave Da'at*, volume 4, no. 65, for a discussion of an apparently conflicting view expressed by the Rashba in *Responsa*, part 3, no. 2.

Rabbi Moshe b. Nachman (Ramban), believed that *dina d'malchuta dina* applied even more broadly to all types of secular law, even if they were not enacted for the "public good." Nevertheless, he applied *dina d'malchuta dina* only to laws of ancient origin. See discussion in Rabbi Chaim b. Israel Benveniste (17th century), *Kenesset HaGedolah, Choshen Mishpat*, second printing, no. 169:58. Bankruptcy discharge law, in one form or another, has been the law in the United States for over 100 years.

59. *Shulchan Aruch, Choshen Mishpat* 369:11. Actually, there are arguably two variations of the Ramo's view. At an earlier point in the *Shulchan Aruch*, the Ramo seems to say that *dina d'malchuta dina* simply applies to all areas of law. He states:

Some believe that *dina d'malchuta dina* applies only to taxes and charges on real estate . . . Others disagree and believe that *dina d'malchuta dina* applies to all areas of law . . . and this is correct.

The *Shach* argues that even the *Rishonim* who apply *dina d'malchuta* broadly do not apply it to contradict an explicit halachic rule.[60] The Ramo agrees as to halachic rules, such as inheritance laws, which cannot be altered by the parties or by custom,[61] but disagrees as to most monetary rules, which halacha allows to be so changed.[62]

B. Application of *dina d'malchuta dina* to bankruptcy discharge law

Each of the three views states that whether *dina d'malchuta dina* validates a bankruptcy discharge depends, in part, on the purpose of the discharge law. Yet none of the

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Nevertheless, most *poskim* consider the more restrictive language cited in the text as more accurately representing the Ramo's view.

60. See *Shach*, No. 39 to *Shulchan Aruch, Choshen Mishpat* 73:14.

61. See, generally, Grunfeld, supra note 54.

62.Proponents of the Ramo's view cite examples where *dina d'malchuta dina* changes express halacha regarding financial matters. Halacha prescribes, for instance, that a person who rescues another's property from a lion, a bear, a tidal wave, or a flood may keep the saved property himself. Even if the original owner is standing by and shouting that he does not despair of getting the property back, the halacha says that his disclaimer is meaningless. *Shulchan Aruch, Choshen Mishpat*, number 259:7. Nonetheless, the Ramo specifically states that if the king decrees that a person must return such property, then the person must do so because of *dina d'malchuta dina*. Id.

The *Shach's* adherents argue that these examples are not inconsistent with the *Shach*'s view because they require conduct - return of the lost or stolen object - which is anyway approved, albeit not required, by halacha. See, e.g., Maharik, no. 187; *Chelkat Yaakov*, volume 3, number 160. Other examples are either disputed or distinguished. See, e.g., id. (certain secular methods to effectuate a transfer of property ownership are valid because, in light of the dina *d'malchuta*, when Jews use such methods their intent to fully effectuate the transfer is evident).

poskim who have written about this subject have identified or discussed bankruptcy law policies. Therefore, it is important to survey such policies.

1. Purpose(s) of bankruptcy discharge

The federal bankruptcy code does not expressly declare the purpose of the bankruptcy discharge. Indeed, the many rules regulating and limiting the availability of a discharge, suggest the operation of various, sometimes conflicting and ever evolving, purposes and assumptions.[63] Explanations suggested in Congressional hearings, academic literature and judicial decisions include the following:

a. By offering a discharge to a debtor who honestly identifies and surrenders his property in accordance with bankruptcy law requirements, the discharge, at least in part, encourages such cooperation and promotes the goal of equitably distributing the debtor's assets.[64]

b. The discharge serves a social welfare purpose[65] by freeing the debtor from the "weight of the oppressive indebtedness"[66] and allowing the debtor "a new opportunity in life . . ., unhampered by the pressure and discouragement of

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63. See Charles G. Hallinan, "The 'Fresh Start' Policy in Consumer Bankruptcy: A Historical Inventory and an Interpretation," 21 U.Rich.L.Rev. 49, 96 (1986)(". . . the idea of the 'fresh start' has long incorporated and been shaped by a complex multiplicity of policy concerns, which have been founded in turn upon equally complex and often shifting combinations of assumptions about creditors, debtors, credit markets, and the social function of bankruptcy.")

64.J. MacLachlan, *Bankruptcy* 20-21, 88 (1956), quoted in United States v. Kras, 409 U.S. 434, 447 (1973).

65. See, e.g., Anthony T. Kronman, "Paternalism and the Law of Contracts", 92 Ysle L.J. 763, 785-786 (1983).

66.Williams v. Fidelity, 236 U.S. 549, 554-555 (1914).

preexisting debt."[67]

c. Similarly, the discharge minimizes the likelihood that a debtor denied a discharge will resort to immoral conduct in order to survive financially.[68]

d. The discharge also helps prevent a distraught debtor from committing antisocial or criminal acts which have adverse practical, as opposed to purely moral, consequences.[69]

e. The discharge inspires the debtor to become economically productive, benefitting the national economy[70] and reducing the likelihood that the debtor, or his dependents, will have to be supported through government welfare programs.[71]

f. The law allows debtors and creditors to know from the outset, while the debtor is financially sound, that should the debtor fail, his debts may be discharged. By placing the risk of bankruptcy upon creditors, it is argued that credit will be extended in a more economically efficient manner, and that the national economy will benefit.[72]

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67. Local Loan Co. v. Hunt, 292 U.S. 235, 244 (1934).

68. Frank R. Kennedy, "Reflections on the Bankruptcy Laws of the United States: The Debtor's Fresh Start," 76 W. Va. L.Rev. 427, 441 (1974).

69. Margaret Howard, "A Theory of Discharge in Consumer Bankruptcy," 48 OHIO L.J. 999, 1061 n. 99 (1987), citing Joslin, "The Philosophy of Bankruptcy - A Reexamination," 17 U.Fla.L.Rev. 189, 191 (1964).

70.See, e.g., Luthor Zeigler, Note, "The Fraud Exception to Discharge in Bankruptcy: A Reappraisal," 38 Stan.L.Rev. 891, 910 (hereafter "Zeigler") n. 81, citing Weistart, "The Costs of Bankruptcy," 41 Law & Contemp. Probs., Autumn 1977, at 107, 111.

71. Id., at 910 n. 82 (1986), citing Discussions of the Economics of Bankruptcy Reform, 41 LAW & CONTEMP. PROBS., Autumn 1977, at 142 (comment of D. Logue).

72. For a thorough discussion of this argument, see, e.g., Howard,

g. Finally, the availability of the discharge may be required to encourage people to undertake entrepreneurial activity or to personally guarantee corporate debt. The prospect of unlimited and nondischargeable debt could harm the national economy by severely deterring private enterprise.[73]

The government obviously believes that the policy of providing a discharge is of great importance because even some debts to the government are discharged. Moreover, bankruptcy law makes it impossible for someone to waive his right to discharge at the time a debt is incurred.[74] Although a debtor may "waive" the discharge of particular debts after they are incurred, the ability to do so is extremely restricted.[75] Even where the proper procedures are followed, the court may veto the "waiver" if it finds that the agreement conflicts with the best interests of the debtor or the debtor's dependents.[76] Once a discharge is obtained, there can be no waiver.[77]

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supra note 70, pp. 1063-1068.

73. In a phone interview on March 13, 1992, Rabbi Moshe Heinemann mentioned this possible argument as one which "might" establish that the discharge law was intended for the general benefit of citizens, allowing *dina d'malchuta* to apply. Rabbi Heinemann concluded by telling me that he was uncertain ("*mesupak*") as to whether to accept this policy reason. I have not seen this point precisely expressed in print by secular bankruptcy scholars.

74. 11 U.S.C. 524(a).

75. 11 U.S.C. 524(c). The bankruptcy code refers to this as a "reaffirmation" of a debt.

76. 11 U.S.C. 524.

77. Prior to adoption of the Code, if a debtor renewed, in writing, its promise to repay discharged debt, state law often made such promise enforceable. Although the obligee provided no new consideration in exchange for the debtor's promise, these states found that the debtor was morally obligated to pay and that this moral obligation constituted "consideration."

The right to enjoy the discharge is also protected by rules which prohibit creditors to take any collection actions as to discharged debts[78] and prevent certain discrimination against persons based on their having participated in the bankruptcy process.[79] Nonetheless, a debtor is permitted, even after a discharge is granted, to voluntarily pay the discharged debt. Bankruptcy law merely prevents the debtor from obligating himself to pay the debt.

2. The three views

According to the *Mechaber*, a bankruptcy discharge would be valid under *dina d'malchuta dina* only if the discharge were regarded as directly benefiting the government. The policies discussed above suggest only indirect or speculative benefits. In fact, as already mentioned, the discharge may do immediate financial harm to the government through the discharge of debts owed to the government. According to the *Shach, dina d'malchuta dina* does not validate the bankruptcy discharge, because discharge law violates the explicit halachic obligations surveyed in Part I.[80]

The Ramo's view, which some authorities declare is the majority view,[81] is much more hospitable to bankruptcy law.

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78. 11 U.S.C. 524(a)(2), (3).

79. 11 U.S.C. 525(a), (b).

80. Interestingly, at least one halachic authority has suggested that a discharge based on a settlement agreed to by a majority of creditors may in fact be entirely consistent with halacha, which would allow *dina d'malchuta* to apply even according to the *Shach*. Nevertheless, as discussed below in Part IVC, this opinion seems incorrect.

81. See, e.g., Rabbi Dov Berish Weidenfeld (*Dovev Mesharim,*), Responsa, no. 76 (states that virtually all *poskim* agree that *dina d'malchuta dina* applies to a secular law enacted for the general good); Shilo, supra note 26, p. 157 (stating that the Ramo's view is the majority view and providing a list of *poskim* ruling in accordance with the Ramo).

Two of the most prominent American halachic authorities, Rabbi Moshe Feinstein and Rabbi Yosef Eliyahu Henkin, seem to have endorsed the Ramo's view in print.[82] Still other authorities concede that one may rely on the Ramo's view, as opposed to the *Shach's* view, in certain circumstances.[83]

Furthermore, some of the authorities who have endorsed the *Shach's* view have done so as to matters arising in Israel, which may be a "special" case. There are particular reasons why, according to some commentators, *dina d'malchuta dina* may not apply to laws enacted by a secular Israeli government.[84] Consequently, it has been questioned whether the opinions applying the *Shach's* view to issues in Israel are relevant to *dina d'malchuta dina* questions out of Israel.[85]

Assuming the halacha is in accordance with the Ramo, two problems[86] arise in determining whether the bankruptcy discharge in fact is "for the benefit of the people of the land." First, it is necessary to clarify what the phrase "for

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82. See, e.g., *Iggerot Moshe, Choshen Mishpat*, part 2, no. 62; *Tshuvot Ivra*, volume 2, p. 176. Each of these sources are discussed later in the text.

83. See discussion regarding "*kim li*," below, in Part VD.

84. See Rabbi Ovadia Yosef , *Yechave Da'at*, volume 4, no. 65, and *Yabia Omer*, volume 6, no. 1, note 8. See, also, Schachter, supra note 54, at p. 115 n. 26.

85. Shilo, supra note 26, p. 157. Similarly, see Henkin, *Teshuvot Ivra*, p. 176 (limiting *Shach*'s view to context in which there are organized Jewish communities with their own communal leaders, a situation which may exist in parts of Israel).

86. Additional objections might be raised, but most are easily answered. For instance, the majority of halachic authorities conclude that *dina d'malchuta dina* applies to any legitimate form of government and not merely to a monarchy. See, e.g., Schachter, supra note 54, citing Rabbi Avraham Schatchover (*Avnei Nezer*) and Avraham Duber Kahane-Shapiro (*Devar Avraham*)

the benefit of the people of the land" means. It appears this language applies to general government regulations to promote the economy or to control anti-social conduct. The possible discharge policies we identified would seem to satisfy this standard.[87]

The second problem is whether, in determining if bankruptcy discharge law is for the public good, we examine the government's subjective purpose for the statute and/or we evaluate how the statute actually operates. Because there seems to be no discussion of this issue in responsa, we will consider the difficulties in ascertaining subjective intent and objective effect.[88]

Evaluation of the government's subjective intent in enacting the statute is problematic. The American legislative process involves the participation of many individual legislators, who may vote for a law for entirely different reasons. Some legislators may be motivated by the narrow interests of a particular constituent or lobbyist, rather than by a more expansive public policy ground. Others may merely trade their votes on a given statute in exchange for the votes of their colleagues on another matter. Still others may vote without even properly understanding the statute at all. Perhaps there should be a presumption that a majority of the legislators supported the statute for the policy reasons cited in Congressional hearings, academic literature and judicial

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87. Although a question might be raised regarding the second policy, the government's social welfare concern for the debtor's emotional well-being, there is little reason to distinguish between a government's concern for its residents' economic well-being and its concern as to their emotional well-being. Each such factor, if not improved, could lead to anti-social conduct.

88. In a phone interview with me on March 13, 1992, Rabbi Moshe Heinemann told me that both the government's intent and the law's effect are critical.

decisions. If so, as already discussed, the bankruptcy discharge law seems to have been enacted for the public good.

On the other hand, evaluating a law's objective effect is not easy either.[89] Because of the complexities of the national economy, it seems impractical, if not impossible, to design or conduct an effective study to determine whether various policies are in fact being satisfied. When secular law is presented with similar questions, such as whether particular statutes comply with constitutional constraints, courts in some instances approve the statutes if they are "rationally related" to a legitimate legislative objective.[90] Perhaps this type of test would be appropriate regarding *dina d'malchuta dina.*

3. Miscellaneous minority views

Unlike secular law,[91] halacha attributes formal importance to minority views among *poskim.* Several minority views can be used together to form an authoritative conclusion in particular cases. Moreover, under certain circumstances, one may directly rely on minority views.[92] For these reasons, we will briefly review two, of many, minority perspectives.

Rabbi Yosef Eliyahu Henkin limited the *Shach's* view to organized Jewish communities with leaders possessing both

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89. Incidentally, assuming *dina d'malchuta dina* would not halachically legitimize the discharge of all debts, one would presumably have to ensure that the arguably valid part of the law was still capable of objectively fulfilling the law's proper public purpose.

90. In certain contexts, secular courts apply more demanding standards.

91. In American law, such minority views among jurors or judges in a particular case may be aligned together to reach binding conclusions of law. On the other hand, a court considering a legal question will not ordinarily group its conclusion upon a coalition of divergent, conflicting minority opinions in other cases.

92. See Part VC4.

authority and power to govern. Because such communities did not exist in the United States, Rabbi Henkin held that the Ramo's view applied and that *dina d'malchuta dina* broadly governed commercial transactions between Jews, at least where the secular law was for the benefit of the people of the land.[93] Pursuant to this view, *dina d'malchuta dina* may halachically validate the bankruptcy discharge.

Rabbi Yosef Yehuda Bloch, Rosh Yeshiva of Telz, argued that the Ramo's view was generally correct. Nevertheless, he agreed with the *Shach* in one respect. He argued that a secular rule could not totally uproot an express halachic principle. For example, a secular government could, for the public good, reduce the amount a debtor had to pay his creditor, but it could not totally eliminate the debt.[94] If all debtors were forced to pay something to their creditors in order to obtain a bankruptcy discharge, Rabbi Bloch's analysis may validate bankruptcy discharge law.[95]

C. Specific statements by *poskim*

93. He argued that *dina d'malchuta dina* applied a fortiori to a constitutional government such as that of the United States.

94. Shilo, supra note 26, at p. 155-156, describing the position of Rabbi Bloch , as expressed in *Shiurei Halacha*, volume 1, page 57.

95. A possible problem arises because of the fact that in many cases, a debtor's nonexempt assets, if any, may be totally consumed by bankruptcy administrative expenses, and the debtor's general creditors may receive no payment at all. This fact could arguably affect application of Rabbi Bloch's view in at least three ways. First, the possibility of payment may validate all bankruptcy discharges, even where no general creditor is paid. Second, the mere possibility of non-payment may render all bankruptcy discharges invalid, even where creditors are paid. Finally, perhaps whether a particular discharge is valid would depend upon whether payments to creditors were or were not made in the particular bankruptcy proceeding.

Relatively few *teshuvot* ask whether *dina d'malchuta dina* applies to discharge debt. Most of the authorities discussed in Section IV, above, citing the Maharshach, rely essentially on custom. *Dina d'malchuta dina* is usually referred to in describing how the minhag was established.

1. Views arguably "favorable" to discharge law

Rabbi David Chazan and Rabbi Avraham Yisroel Alter Landau dealt with compromises, agreed to by at least a majority of creditors, which required the debtor to make partial payments to creditors and discharged the remaining debt. One authority interprets Rabbi Chazan's *teshuva* as holding that such an agreement was enforceable because of *dina d'malchuta dina.*[96] A close reading of the *teshuva* suggests that this interpretation may be wrong. At the very least, Rabbi Chazan surely did not apply traditional *dina d'malchuta dina* reasoning.[97]

Rabbi Chazan dealt with a historical oddity, in which the "bankruptcies" of French citizens in Turkey were ruled by French law, not by Turkish law. One of the questions Rabbi Chazan wrestled with was whose customs were halachically valid. He concluded that the custom of non-Jews generally had halachic significance only where the custom did not specifically contradict halacha. Enforcement of the debtor's discharge would contradict halacha.

On the other hand, he held that the customs of non-Jews whose legal authority applied to Jews were halachically binding, even where they contradicted halacha. Although in articulating his holding, Rabbi Chazan refers a few times to *dina d'malchuta dina,* he also repeatedly refers to *minhag.* Moreover, he cites Rabbi Iggeres, cited above,[98] and other

96. Shilo, supra note 26, at p. 163.

97. See Part IV, infra.

98. See text associated with note 26, supra.

poskim who rely on *minhag*, not *dina d'malchuta dina*. Rabbi Chazan explains that if the debtor is French and the discharge is part of French custom, the discharge is enforceable, even if the Jewish creditor is Turkish. The reason he gives is that if the Jewish creditor takes property from the Frenchman in violation of the French minhag, the French authorities in Turkey will repossess the property. Consequently, he says:

> If so, how can one say that the [Jewish] creditor can claim payment from the debtor in accordance with *din* Torah [halacha] given that this is the custom and it is with this custom in mind that they he [the Jewish creditor] did business with the debtor?

As explained in Part III, above, the argument that "it is with this custom in mind the parties transacted business" is the rationale for *minhag HaSocharim*.[99] In any event, Rabbi Chazan's *teshuva* is support for the validity of the bankruptcy discharge *minhag* in America which is backed by secular law.

In his *teshuva*, Rabbi Landau announced that:

> Since secular court decreed that creditors should only receive 40% [of their respective claims], they are required to accept this secular judgment because from the outset when they gave the debtor firm merchandise, they gave the merchandise on the understanding that the *minhag* would apply. They [the creditors] knew that if the debtor firm would become insolvent they could be forced to accept only 40% according to the *minhag*, because all lenders lend according to the *minhag*. It is appropriate to apply *dina d'malchuta dina*, because also in Jewish law the same rule applies. Even if the debtor firm had not gone to court, but the creditors had gone together to *beit din*, and *beit din* would have verified that the debtor firm really could not pay all of its debts to them, and the debtor asked

99. Rabbi Chazan's view seems similar to that of the *Ben Ish Chai*, discussed in text associated with notes 27 and 28, supra.

> the creditors for a reduction in debt, and a majority of the creditors agreed to reduce the debt by 60% and a minority of creditors disagreed, *beit din* could overrule the minority and enforce the compromise of the majority . . . as the *Divrei Gaonim* [Rabbi Kahane] says in the name of the *Birkei Yosef* [Rabbi Chaim Azulai] and the Maharshach.[100]

The fact, however, is that the Maharshach never said that a compromise reached by a majority of creditors is always halachically enforceable against dissenting minority creditors. The Maharshach held that such a compromise was enforceable because such agreements were enforceable according to the prevailing local custom. When citing the *Birkei Yosef* and the Maharshach, the *Divrei Gaonim* fails to mention this requirement.[101] This seems to have caused Rabbi Landau to believe that such an agreement is halachically enforceable independent of custom.

According to Rabbi Landau's belief, *dina d'malchuta dina* would apply even according to the *Shach*. Thus, Rabbi Landau's teshuva is of no significant help in choosing between the Ramo and the *Shach*.[102] Nevertheless, even the Ramo requires that for *dina d'malchuta dina* to apply, the law must be "for the benefit of the people of the land." Thus, to the extent Rabbi Landau purports to rely on *dina d'malchuta dina*, he supports the proposition that a discharge law could be characterized as "for the benefit of the people of the land."

Rabbi Moshe Feinstein was asked whether *dina d'malchuta dina* applied to Swiss bankruptcy law.[103] The debtor was a corporation. Around the time it filed bankruptcy, the debtor's

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100. Landau, *Beit Yisroel*, no. 172.

101. Kahane, *Divrei Gaonim, klal* 14, halacha 18.

102. Although Shilo, supra note 26, at p. 164 states that Rabbi Landau's *teshuva* favored the *Shach*'s view, the *teshuva* is ambiguous.

103. Feinstein, *Iggerot Moshe, Choshen Mishpat*, Part 2, number 62.

directors paid $36,000 to a Jewish creditor who was owed $62,000. Under Swiss law, as Rabbi Moshe explains it, once a bankruptcy petition is filed, creditors are forbidden to take any of the debtor's assets. Instead, a three-person panel is appointed to distribute the debtor's assets to creditors on a pro rata basis in accord with the amount of the creditors' respective claims.

While acknowledging that the scope of *dina d'malchuta dina* is very complicated, Rabbi Feinstein declares that, pursuant to the Ramo's view, *dina d'malchuta dina* applies to make these Swiss bankruptcy laws halachically valid. He states that *dina d'malchuta dina* applies a fortiori to a corporate debtor with many shareholders, because the debtor's affairs could affect non-Jews as well. He states that halacha has a similar rule where a *beit din* knows that a particular debtor has insufficient money to pay his debts. In such a case, *beit din* does not allow creditors to seize the debtor's assets. Instead, it distributes the debtor's assets to the creditors on a pro rata basis. Finally, he ruled that if the Jewish creditor had been given the $36,000 after the bankruptcy filing, the creditor was halachically obligated to deliver the $36,000 to the three-person panel responsible for distributing the debtor's assets.

Whether or not Rabbi Feinstein provides direct guidance as to the halachic validity of a discharge,[104] his *teshuva* does

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104. Professor Michael Broyde, in his excellent article, "On the Practice of Law According to Halacha," *Journal of Halacha and Contemporary Society* XX:5, 14-15 (1990), initially suggested that Rabbi Feinstein's ruling, by denying creditors access to the debtor's assets unless they obtain bankruptcy court approval, implicitly upheld the halachic validity of bankruptcy discharge law. His reasoning was that

(1) once a bankruptcy discharge was granted, secular law would never give creditors permission to pursue the debtor's assets; and (2) without such permission, according to Rabbi Feinstein, creditors could not halachically go after such assets. Because of certain specifics of

rule in accordance with the Ramo, not the *Shach*. The secular distribution formula differs from that of halacha. By nonetheless validating the law, Rabbi Feinstein demonstrates that *dina d'malchuta dina* can contradict what would otherwise be the halachic rule and that at least some bankruptcy law rules are "for the benefit of the people of the land."

Rabbi Sternbuch[105] addressed the type of compromise discussed in the *Maharshach Tshuvot*. The creditor contended that the compromise was economically coerced, and that he did not actually have any intention of forgiving any part of the original debt. Rabbi Sternbuch stated that if the debtor had deceived the creditor about his financial ability to pay as of the time of the compromise, the creditor would prevail. If the debtor had been forthright, however, a *beit din* could not require him to pay.

Rabbi Sternbuch stated that the halachic principle of *migo* supported the notion that the debtor was truthful at the time of the compromise. Rabbi Sternbuch argued that if the debtor had wanted to, he could have filed a secular bankruptcy and had his financial obligation discharged "entirely."

Swiss bankruptcy law, Professor Broyde subsequently questioned the implications of Rabbi Feinstein's opinion as to bankruptcy discharges. Id., at its note 19.

But even aside from the particulars of Swiss law, one could argue that Rabbi Feinstein's opinion does not support the validity of discharge law. Rather, one could interpret Rabbi Feinstein's *teshuva* as focusing only on assets which under the secular system are supposed to be distributed by the three-person panel. Any effort to interfere with this secular distribution procedure would be halachically prohibited. Rabbi Feinstein does not specifically offer guidance as to situations in which a debtor has, or subsequently acquires, assets not subject to any secular distribution system. It is possible that Rabbi Feinstein would allow creditors to pursue such assets.

105. Sternbuch, Responsa *Teshuvot V'Hanhagot, Choshen Mishpat*, volume 2, number 701.

Rabbi Sternbuch's purpose in referring to this *migo* is not entirely clear.[106] Ordinarily a *migo* exists if the debtor, had he acted dishonestly, could have accomplished his purpose in an easier or more effective way than he did. It seems that Rabbi Sternbuch assumed that had the debtor been dishonest, he could have accomplished better results for himself by filing bankruptcy than by consummating the compromise.[107] By foregoing the bankruptcy option, the debtor therefore had a *migo* that it honestly negotiated the compromise.

Rabbi Sternbuch's reference to a *migo* implicitly assumes that a secular bankruptcy discharge would be halachically valid. Otherwise, there is no *migo* in not filing the bankruptcy. Consummation of a compromise, whereby the debtor appeared to be acting in a halachically valid manner, not the halachically improper filing of a bankruptcy petition, would have appeared the more attractive course.

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106. Because a person is ordinarily entitled to a presumption of trustworthiness, in the absence of at least an unqualified charge that the debtor acted fraudulently, the debtor would not need a *migo*.

107. It is far from clear why Rabbi Sternbuch would have held this belief. A debtor filing a liquidation bankruptcy also has to give up his assets in order to obtain a discharge. Therefore, the debtor in bankruptcy is no more "entirely" discharged than the debtor who entered into the compromise Rabbi Sternbuch discusses. In addition, either liquidation or reorganization bankruptcy might have other negative ramifications. For instance, there may be greater adverse publicity and possible harm to the debtor's reputation as a result of a public bankruptcy filing than through private agreement with one's creditors. Moreover, the secular officials who would have been involved in bankruptcy might have thoroughly examined the debtor and his affairs and might have discovered the debtor's deceitfulness and the debtor might not have been granted a bankruptcy discharge. Interestingly, Rabbi Sternbuch also does not explain why, if the debtor could have obtained better results for itself by filing bankruptcy, the debtor did not choose to do so.

2. Rabbi Heinemann's view

Rabbi Moshe Heinemann has stated that the halacha is like the Ramo's view, and that if bankruptcy discharge law was enacted and operates for the benefit of the residents of the land, *dina d'malchuta dina* would apply to make the discharge halachically effective. Nonetheless, he is in doubt whether bankruptcy discharge law meets this standard. He does believe that the bankruptcy rules regarding distribution of a debtor's assets are for the public good and that *dina d'malchuta dina* does apply to them.[108]

3. Views hostile to bankruptcy discharge law

Rabbis Breisch, Blau, Weiss and Auerbach have arguably held that *dina d'malchuta dina* does not validate bankruptcy discharge law. Rabbis Breisch[109] and Shlomo Zalman Auerbach[110] agree with the *Shach*, unlike the American *poskim* we have cited. The others, who seem to agree with the Ramo, have identified or discussed why the specific policies behind bankruptcy law are not "for the benefit of the people of the land."

Rabbi Blau states:

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108. Phone interview with author on March 13, 1992.

109. Breisch, *Chelkat Yaakov*, volume 3, number 160. Nonetheless, without discussing the purposes of bankruptcy law, and although he holds like the Shach, Rabbi Breisch simply declares that there is no basis on which the bankruptcy law could be considered "for the benefit of the people of the land."

110. At a seminar for lawyers sponsored by Agudath Israel of America, Rabbi Feivel Cohen reported the unwritten view of Rabbi Auerbach that a bankruptcy discharge is not halachically valid. The program, "The Legal Profession Today," was held in New York City on November 5, 1989. Audio tapes of Rabbi Cohen's lecture are available for sale from Agudath Israel of America. Shilo, supra note 26, at p. 157, cites Rabbi Auerbach's written view that the halacha is as the *Shach*, not the Ramo.

> It seems that if the secular law is *l'to'ellet bnei HaMedina* [for the benefit of the people of the land], such as price controls or commercial matters between one person and another, the opinion of most poskim is that *dina d'malchuta dina* applies, apparently even between one Jew and another. Thus we find in many, many halachot, such as in *hilchot schirut* [employment law], etc., that *poskim* judge according to *dina d'malchuta dina* or *minhag HaMedina*.[111]

Thus, Rabbi Blau seems to acknowledge that the Ramo's view is the majority opinion.

Yet, when specifically addressing bankruptcy law, Rabbi Blau comments:

> [T]here is some doubt in our times whether secular bankruptcy law is enforceable because of *dina d'malchuta dina*. It appears from the words of poskim that in such a case where there is no *"inyan l'malchut," dina d'malchuta dina* is inapplicable.[112]

The expression *"inyan l'malchut"* is ambiguous. Based on the fact that Rabbi Blau acknowledged that the Ramo's approach is the majority opinion, it seems that his point here is that bankruptcy law is not for the benefit of the people of the land. If so, his conclusion is unsupported by any explicit evaluation of the various alleged purposes of bankruptcy law.

Only one of the *poskim* Rabbi Blau names, Rabbi Weiss,[113] dealt with a bankruptcy scenario. In a very brief responsum, Rabbi Weiss considered a case in which a debtor filed bankruptcy, and the court ordered that each creditor be paid 30% of its claim with the rest discharged. In stating the question, the *teshuva* specifically indicates that the court order could be entered only if no creditor objected (*"v'im ayn*

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111. Blau, *Pitchei Choshen, Hilchot Geneiva*, chapter 1, note 4, p. 13.

112. Ibid, *Dinei Halva'ah*, chapter 2, note 63, p. 27.

113. Weiss (*Minchat Yitzchak*), vol. 3, no. 134.

m'cha'ah"). The creditor in the case had not objected. The creditor contended that its failure to object was irrelevant because: (1) it did not know that its particular loan would be affected by the bankruptcy order; and (2) the reason it did not object was that it did not wish to interfere with the debtor's ability to obtain bankruptcy relief, if halachically permissible, from its other creditors.

Rabbi Weiss did not rule whether a bankruptcy discharge is per se invalid.[114] Rather, he announced that the court's ruling was halachically invalid because of a procedural ground — that a court may not rule against someone simply because he does not appear to assert his claims.[115]

That this interpretation of Rabbi Weiss' *teshuva* is more reasonable than the one implicitly suggested by Rabbi Blau is suggested by another of Rabbi Weiss' *teshuvot*. In the other teshuva, Rabbi Weiss seems to have held that the Ramo's view of *dina d'malchuta dina* was correct.[116] Consequently, it would have been odd for Rabbi Weiss, in the *teshuva* cited by Rabbi Blau, to have held a bankruptcy discharge halachically ineffective without mentioning the Ramo or the *Shach* or stating that the law was not for the benefit of the people of the

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114. Had the creditor's silence been construed as consent to the court order, there would have been an issue as to whether or not such consent was the product of economic duress. Consideration of this issue might have led to discussion of *dina d'malchuta dina*. Nevertheless, Rabbi Weiss did not discuss the merits of the economic duress argument, because the creditor had not satisfied the formal preconditions necessary to have raised the issue.

115. Of course, if a creditor could block a secular bankruptcy discharge by objecting but failed to object, according to Rabbi Weiss, any resultant discharge would apparently be invalid.

116. Rabbi Weiss at least he ruled that a litigant was entitled to assert the Ramo's view was correct and to rely thereon successfully against an adversary invoking the *Shach*'s view. *Minchat Yitzchak*, volume 2, no. 86:3.

land.

Rabbi Auerbach, Rabbi Weiss and Rabbi Blau made their statements while residing in Israel. As mentioned above, there are special reasons for not applying *dina d'malchuta dina* in Israel, and it has been suggested that opinions issued by Israeli *poskim* regarding *dina d'malchuta dina* may not be persuasive authority outside of Israel.[117] In fact, it is not certain whether Rabbi Auerbach — or Rabbi Weiss, assuming he meant to rule on *dina d'malchuta dina* — even intended their views to apply outside of Israel.

4. Reliance on *"Kim Li"*

In Jewish civil law, where a plaintiff is attempting to collect money from another, the plaintiff ordinarily bears the burden of proof, and the party from whom an asset is sought to be extracted is considered the *"muchzak."*[118] Thus, a Jewish creditor who goes to a *beit din* to collect from a debtor who has received a bankruptcy discharge, may bear the burden of proving his halachic right to collect. The defendant will presumably raise *dina d'malchuta dina*, based on the Ramo's view as a defense.[119] If the *beit din* is composed of members who agree with the defendant, the defendant should prevail. But what if the members of the *beit din*, while agreeing that *dina d'malchuta dina* applies to bankruptcy discharge law according to the Ramo, feel that the majority rule among

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117 See note 86, supra.

118. According to some authorities, there may be situations in which a creditor may be considered halachically to be in "possession" of a debt, even before the debt is collected. In such instances, the burden of proof would be borne by the debtor. A discussion of these various views is beyond the scope of this article.

119. Of course, the facts can be reversed. A creditor may have collected from a discharged debtor's assets, and the debtor may go to rabbinical court to recover the property. In this case, the defendant will argue that *dina d'malchuta dina* does not apply.

halachic authorities is in accordance with the *Shach*? Does this mean that the defendant necessarily loses? Not necessarily.

Where there is a significant dispute among halachic authorities on a particular issue, under certain circumstances a defendant may assert that he believes ("*kim li*") that the halacha is in accordance with one side of the debate, even if the side he selects is the minority view.[120] If the defendant is indeed entitled in a particular case to make this assertion, the plaintiff can only win if he proves his case according to the view chosen by the defendant.[121]

As already discussed, the Ramo's view may well be the majority view, especially in the United States. Nonetheless, according to *poskim* who disagree, it may be crucial to determine whether one may say "*kim li*" with respect to whether *dina d'malchuta dina* applies to a bankruptcy discharge. Rabbi Chaim iben Israel Benveniste, a seventeenth century authority, ruled that wherever there is a dispute among halachic authorities as to whether *dina d'malchuta dina* applies, the party who is *muchzak* can say *kim li* that *dina d'malchuta dina* applies. Most *poskim*, especially Ashkenazi *poskim*, who have addressed this issue seem to agree.[122] Consequently, if it

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120. See, generally, Benveniste, *Kenesset HaGedolah*, second printing, no. 25, "Principles of *Kim Li*"; Azulai, *Birkei Yosef, Choshen Mishpat*, no. 25; Rabbi Yaakov Reisha, *Shevut Yaakov, Choshen Mishpat*, no. 25, "Principles of *Kim Li*."

121. Of course, sometimes the two litigants need something from each the other. In such a case, a negotiated settlement may be achieved.

122. See Shilo, supra note 26, at p. 158, who cites the views of numerous *poskim*. Rabbi Moshe Shreiber (*Chatam Sofer*), *Responsa, Choshen Mishpat*, no. 65, for instance, specifically states that *kim li* can be used with respect to the argument that *dina d'malchuta dina* applies to any rule for the benefit of the people of the land. See also *Orchot HaMishpat*,

can be established that *dina d'malchuta dina* in fact validates bankruptcy discharges according to the Ramo,[123] a debtor who obtains a bankruptcy discharge should be able to say *kim li* to avoid paying discharged debts.[124]

Of course, where *kim li* is asserted, it is essential in specific instances, to determine who, halachically, is considered the party who is *muchzak*. In many cases both the facts and their halachic significance may be uncertain.[125]

Although a *kim li* defense prevents a *beit din* from forcing the defendant to pay, there is some question as to whether the defendant is obligated on some religious level ("*lotzet yedei shomayim*") to nonetheless pay the plaintiff. Where, as in a bankruptcy discharge context, there is no doubt that a

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additional note to Principal 25 (one may say *kim li* that the halacha is like the Ramo's view and not the *Shach*'s view); Weiss, *Minchat Yitzchak*, volume 2, no. 86:3 (one may successfully rely on Ramo's view against his adversary's assertion of the *Shach*'s view).

Some Sephardic *poskim* go to the other extreme and argue that not only is the *Mechaber*'s view correct, but one cannot use *kim li* to rely on the Ramo's or *Shach*'s view. See, e.g., Rabbi Ovadia Yosef, *Yabia Omer*, volume 5, no. 1:6; *Chacham Yosef Chaim Pealim*, volume 2, *Choshen Mishpat* no. 15 (cited by Shilo, supra note 26, at p. 158).

123. This will turn on whether bankruptcy law is for the benefit of the people of the land.

124. Whether someone may file bankruptcy in order to say *kim li* is a complex question which goes somewhat beyond our scope. It should be at least noted, however, that this issue may not always arise. For instance, a debtor may obtain a discharge after having been involuntarily forced into bankruptcy. See also note 19 and associated text, supra.

125. Ironically, this question itself may involve on *dina d'malchuta dina* issues. See, e.g., Feinstein, *Iggerot Moshe, Choshen Mishpat*, part 2, no. 62 (states that ownership of land is not transferred unless secular law standards are fulfilled); But see Rabbi Shlomo Zalman Auerbach, *Ma'adenei Eretz*, no. 18.

liability was originally created, but the defendant uses *kim li* to "establish" that the liability was extinguished, the answer is unclear.[126]

PART VI
Special Factors — Comparison and Contrast of *Dina d'malchuta Dina* and Customs

It may be that some *poskim* will conclude that *minhag HaSocharim* validates a bankruptcy discharge, but that *dina d'malchuta dina* does not, while other *poskim* reach the opposite conclusion. Because *minhag HaSocharim* and *dina d'malchuta dina* do not apply equally to all situations, whether a bankruptcy discharge will be halachically valid according to particular *poskim* may depend upon the context in which the question arises. Let's consider just a few examples.

1. Changes in the bankruptcy law

Assume a particular debtor is entitled to a discharge only because of a change in the bankruptcy statute which was enacted after the parties entered into their transaction. In such a case, one could hardly argue that the debtor and creditor had agreed to the statute.[127] *Dina d'malchuta dina*, however,

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126. See, e.g., Blau, *Piskei Choshen, Hilchot Halva'ah*, chapter 2, no. 34, note 83 (cites Rabbi Chaim ben Israel Benveniste as saying the *kim li* would allow the *muchzakh* to succeed in court, but that one may have to voluntarily pay "to fulfill one's duty toward heaven;" cites the *Shevut Yaakov* as saying that *kim li* works even with regard to one's "duty toward heaven").

127. One might argue that the amendment process was part of preexisting bankruptcy law to which the parties could be deemed to have agreed, and that, thereby, the parties agreed indirectly to the amended law. In the context of secular law, the Supreme Court has questioned the validity of a similar argument raised as a defense against an alleged constitutional violation of the "takings" clause. See United States v. Security Industrial Bank, 459 U.S. 70 (1982).

does not presuppose the parties' agreement to the secular law. Thus, even a bankruptcy discharge based on a subsequent amendment to the bankruptcy law may be effective.

2. Nonconsensual creditors

Many creditors have claims against a debtor which do not arise out of consensual agreements. Tort victims, for instance, never enter into any contract with the debtor. Custom, because it is based on the assumption that parties implicitly agreed to make the custom part of their contract, is inapplicable to such nonconsensual transactions. In contrast, *dina d'malchuta dina*, not being based on any assumed agreement, could render a bankruptcy discharge halachically valid even as to nonconsensual creditors.[128]

3. Halachically non-waivable debts

Halacha may not always allow parties to avoid, by agreement, creation of a debt. Thus, even if the parties had attempted to agree explicitly that the debtor would not be liable, the agreement would be ineffective, and the debtor would be liable. The implicit agreement which arises from custom can be no more effective than an express agreement. Therefore, where halacha would not allow parties to avoid creation of a debtor by agreement, minhag should not operate to discharge the liability.[129] For reasons already mentioned, *dina d'malchuta dina* could apply.

4. International transactions

A variety of explanations are given for the *dina d'malchuta*

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128. It should be noted, however, that even some *poskim* who follow the Ramo's view of *dina d'malchuta dina*, may believe that it is inapplicable to certain areas of law. See, e.g., Feinstein, *Iggerot Moshe, Choshen Mishpat*, no. 72 (*dina d'malchuta dina* does not apply to damages by one's animals or to responsibilities of bailees, neighbors or agents).

129. See, e.g., Herzog, supra note 20, vol. 1, pp. 21-24.

dina principle.[130] Whether *dina d'malchuta dina* applies in a particular situation may depend on which theory is correct.[131]

Some, if not all, of these justifications break down if the creditor is not a resident of the United States.

Suppose, for instance, the debtor, an American citizen, borrows money from a French creditor, in France. Subsequently, the debtor obtains a bankruptcy discharge in America. Under *dina d'malchuta dina*, the United States government may have

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130. Some argue, for instance, argues that the residents of a land are bound to follow the commands of the government, because the government could deprive them of their right to Ramoin on the land. See, e.g., Rabbi Schachter, supra note 66, p. 115, n. 26, discussing among other things, the Ran, Talmud *Bavli, Nedarim* 28a. Others maintain that any government has inherent authority to enact regulations, based, for instance, on the biblical discussion regarding authority of kings. See, e.g., Meiri, *Bava Kama* 113a; Rabbi Yom Tov b. Avraham Ishbili (Ritva), commentary to Talmud *Bavli, Bava Batra* 5a. Others contend that the authority of a non-Jewish government to promulgate regulations arises out of the Noachide mitzva to establish a system of laws. See, generally, Nahum Rakover, "Jewish Law and the Noahide Obligation to Preserve Social Order," 12 Cardozo L.R. 1073 (1991). Still others declare the authority emanates from the power of a government to declare one's property ownerless ("hefker bais din hefker"). See, generally, Encyclopedia *Talmudit*, entry " *dina d'malchuta dina*;" Menachem Elon , *HaMishpat Halvri*, vol. 1, pp. 51-59.

131. For example, at least one *posek* has informally suggested to me that *dina d'malchuta dina*, to the extent it is based on the secular government's ability to expel Jewish residents, would not apply to Jewish citizens in the United States. Because of its form of government, the United States could not, he argued, expel such citizens. Professor Broyde, however, has argued that the issue is not whether the United States government, under its present rules, could exile its citizens. Rather, the issue is whether the United States government has the right, halachically, to change its rules to allow for such expulsion. So long as it has this halachic right, Jewish citizens must comply with secular law, pursuant to *dina d'malchuta dina*.

no authority to deprive the French creditor of his right to collect on the debt. Nevertheless, *minhag HaSocharim* may make such a discharge halachically valid.

5. Choice of law clauses

Contracts often contain clauses identifying which law governs the transaction between the parties. In an international transaction, the contract may specify which country's laws will control. In interstate commerce, the agreement may designate which state's laws apply.

Where a contract specifies that United States law governs, the parties seem to be agreeing to United States bankruptcy law as well. But even where the choice of law clause specifies the law of a different country, or the law of a state, by using such a clause, the parties seem at least to demonstrate that they intend secular law, not halacha, to apply. In such cases, a bankruptcy discharge may be effective.

PART VII
Jewish or Non-Jewish Identity of The Parties

Where a debtor or creditor is a corporation, or is a partnership consisting of religious Jews, irreligious Jews and non-Jews, there are especially solid reasons why a secular bankruptcy discharge may be halachically effective. For example, Rabbi Blau argues that because a corporation is a fictional "entity" created by secular law, people doing business with it are assumed to do so in accordance with all of the rules of secular law.[132] Similarly, Rabbi Feinstein states that there is even more of a reason to apply *dina d'malchuta dina* to a corporation than to an individual because of the presence of non-Jewish shareholders.[133] Nonetheless, instead of

132. Blau, *Pitchei Choshen, Hilchot Halva'ah,* chapter 2, note 63. See also Klein, *Mishne Halachot*, volume 6, no. 277.

133. Feinstein, *Iggerot Moshe, Choshen Mishpat*, part 2, no. 62.

discussing these cases in depth, we will consider situations involving parties who are individuals.

Our analysis thus far is sufficient if both the debtor and creditor are religious Jews. Let's briefly consider three other cases, where: (1) the debtor and creditor are both non-Jews; (2) either the debtor or creditor, but not both, is Jewish; and (3) the debtor is a religious Jew, while the creditor is an irreligious Jew.

1. Non-Jewish debtor and creditor

Important consequences for Jews may arise out of the way halacha views transactions between non-Jews. Consider a simple example. Assume there are two non-Jews, A and B, and A sells B a sewing machine on credit. B obtains a bankruptcy discharge and refuses to pay A. A repossesses the sewing machine and tries to sell it to a Jew, who is aware of the dealings between A and B. If the bankruptcy discharge is valid, the sewing machine is stolen property, and the Jew may be halachically prohibited from buying it.

Both the argument based on custom and the argument based on the validity of secular law apply even more strongly to transactions between non-Jews than they do between Jews. Indeed, when American non-Jews transact business with each, it is undoubtedly their expectation that the transaction will be governed by secular law and not by halacha.

Moreover, one of the seven Noachide commandments obligates non-Jews to establish a system of law which, among other things, regulates their commercial transactions. According to most halachic authorities, this commandment infuses laws so established with halachic authority at least between non-Jews, even where the rules differ from those prescribed for use between Jews.[134] Thus, secular law is said to be especially

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134. See, e.g., Rabbi Yechiel Michael Epstein , *Aruch HaShulchan HeAtid, Hilchot Melachim* 79:15; Rabbi Yeshaya Karelitz (*Chazon Ish*,

valid between non-Jews.

2. Jew and non-Jew

A bankruptcy discharge should release a debtor from any obligation to pay debts to non-Jews. Bankruptcy law prohibits a creditor from trying to collect the debt under secular law. Of course, a non-Jewish creditor could sue a Jewish debtor in *beit din*. The Gemara, Talmud *Bavli, Bava Kama* 113a, explains that in such a case, if the creditor would lose according to secular law, the *beit din* tells him "Such and such is the result according to your law, and we adjudicate your claim accordingly." The Rambam interprets the Gemara as stating that in litigation between Jewish and non-Jewish litigants, secular law generally applies, irrespective of whether the secular law favors or disfavors the Jewish litigant.[135] Although commentators disagree as to possible exceptions to this rule, none of the proposed exceptions would prevent a Jewish debtor from obtaining a discharge.[136]

Moreover, in America, when a Jew transacts business with a non-Jew, the Jew undoubtedly must assume that in the event of a dispute, the non-Jew would insist on enforcement in secular court in accordance with secular law. Thus, unless the parties specify otherwise, both parties surely expect secular law to apply. Consequently, the custom/implied agreement argument would also support the halachic efficacy of a bankruptcy

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1878-1953), commentary on Rambam, *Hilchot Melachim* 10:10. Ramo, in his Responsa, no. 10, interprets Ramban, commentary on Genesis 34:13, as asserting a contrary, minority view. According to this view, the Noachide commandment actually requires non-Jews to observe the monetary rules halacha applies to Jews. See, generally, Rackover, "Jewish Law and the Noahide Obligation to Preserve Social Order," 12 CARDOZO L.R. 1073 (1991).

135. *Hilchot Melachim, perek* 10, *halacha* 12.

136. See, generally, Schacter, supra note 26, at pp. 127-128; Sternbuch, *Teshuvot V'Hanhagot*, volume 1, no. 795.

discharge.

3. Religious Jewish debtor and Jewish creditor

Even if a bankruptcy discharge were not valid between two religious Jews, there are strong reasons to believe it would be valid to discharge debt of a religious Jew to an "irreligious" Jew. First, just as in the case of a Jew and non-Jew, when a religious Jew and an irreligious Jew do business in America, it seems clear that they expect non-Jewish law to apply and it is as if they so specified.

In addition, according to some authorities, irreligious Jews are not entitled to any special financial rights conferred by halacha.[137] Thus, if secular bankruptcy law discharges a debt, the irreligious Jew is not allowed to collect it from a religious Jew. Of course, it is far from clear which Jews, if any, would in our times be considered "irreligious" for these purposes.[138] A full discussion of this issue is beyond our scope.

PART VIII
Halachic Permissibility of Filing For Bankruptcy

The Torah says "These are the laws that you shall place before them."[139] Based on a *braitha* in *Gittin* 78b, Rashi explains that this verse prohibits people from bringing their disputes before non-Jewish courts, even if secular law is identical to halacha.[140] Pursuing such litigation is considered an improper glorification of secular laws and an insult to the halacha and

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137. Kahane, *Divrei Gaonim, Klal 77, halacha* 9; Sternbuch, Ibid .

138. See, e.g., Ovadia Yosef, *Yabia Omer*, volume 2, *Yoreh Deah* no. 11 (comprehensive listing of rabbinic views regarding halachic status of irreligious Jews). Cf. Feinstein, *Iggerot Moshe, Choshen Mishpat*, part 2, no. 50:3.

139. *Shemot* 21:1.

140. See, generally, Rabbi Simcha Krauss, "Litigation in Secular Courts," 2 JH&CS 35 (1982).

to *HaShem* who gave us the halachic system.[141] Consequently, even where *dina d'malchuta dina* applies, the general rule is that one must seek relief in a *beit din*, which would apply the *dina d'malchuta*.[142]

Most *poskim*, however, would allow a Jew to sue a non-Jew in secular court.[143] Therefore, if the debtor has only non-Jewish creditors, he should be allowed to file in bankruptcy court. Moreover, there are several reasons why filing a bankruptcy petition may not violate the ban (*"issur"*) on litigating in non-Jewish courts even if the debtor has Jewish creditors. First, a bankruptcy is technically an "in rem" proceeding, i.e., the debtor does not affirmatively sue anyone in court. Instead, the debtor merely appears before the court and seeks its relief. At least where there is no dispute as to the debtor's eligibility for a discharge, the secular court arguably does not adjudicate legal issues between "parties." In such cases, by filing for bankruptcy relief, the debtor is essentially applying to a government office for a special permit or benefit, not submitting to a "court" for the resolution of a dispute.[144]

There are situations, however, in which the bankruptcy filing will lead to actual adjudication in the bankruptcy court. In order to be at least partially paid when the debtor's non-exempt assets are distributed to creditors in the bankruptcy

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141. See, e.g., Rashi; *Shulchan Aruch, Choshen Mishpat* 26:1.

142. See, e.g., Weidenfeld, *Dovev Mesharim*, no. 76. It is always preferable to consult with a *posek* prior to filing a suit against another Jew or, if one has Jewish creditors, a bankruptcy petition.

143. But see Klein, *Mishne Halachot* vol. 7, no. 255, and vol. 3, no. 214; Rabbi Shimon ben Tzemach (*Tashbatz*), vol. 2, no. 290. See, generally, Professor Broyde, "On the Practice of Law According to Halacha, JH&CS XX:5 (Fall 1990), pp. 6-16.

144. Even if a debtor with religious Jewish creditors were halachically allowed to file bankruptcy, this does not mean that any discharge would be halachically valid against such creditors.

case, a Jewish creditor may be forced to litigate his claim against the debtor in the bankruptcy court. Bankruptcy law prohibits any collection action, even in a rabbinic court, once the bankruptcy petition is filed.[145] Although a court might make an exception and allow the creditor to have the amount of its claim determined by a rabbinic court,[146] it also might not. Similarly, the bankruptcy court may be called upon to adjudicate issues between the parties if the creditor argues that the debtor should not receive a discharge. These possibilities raise the question as to whether the creditor pursuing such actions, or the debtor whose filing indirectly caused such creditor action, violate the issur archaos.

If the debtor has non-Jewish creditors, or at least mostly non-Jewish creditors, an argument could be made that the issur archaos is not thereby violated. The debtor is entitled to relief against non-Jewish creditors and, according to our assumptions, the only way to get the relief is to file in a secular bankruptcy court and follow its procedures. Doing so therefore seems neither a slight to halacha nor praise of the secular system.

145. 11 U.S.C. 362(a).

146. 11 U.S.C. 362(d)(1).

Moving from a Changing Neighborhood

Rabbi Gershon Eliezer Schaffel

Are there possible halachic indicators which a Jew must consider when contemplating moving from his current neighborhood? Even raising such a question may strike many as presumptuous - we tend to look upon freedom of movement as such a basic right that the possibility of limiting it strikes at the very heart of our sense of individual freedom. Yet, Torah law - halacha - encompasses every aspect of a person's existence, his actions, deeds, thoughts, and beliefs. Thus, it stand to reason that there might even be religious guidelines governing one's desire to move from one neighborhood or city to another.

The Jewish law pertains not only to the individual and his obligations to his Maker, but equally to the mutual obligations between individuals, between family members, business associates, communities.

In relationships between a person and others outside his family circle, there are three levels or categories of behavior to which the halacha speaks:

(a) *Shutfut* (partnership) or social contracts, which are

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generally initiated by the involved parties;

(b) *V'asita Hayashar Vehatov,* "proper and good" behavior, fulfilling the dictum of the verse in *Devarim* 6:18;

(c) *Deracheha Darchei Noam* (*Mishlei* 3:17), a Scriptural directive to assure that in following the letter of the law, we do not lose sight of the principle that "the ways [of the Torah] are pleasant...and peaceful."

Each of these principles needs to be weighed before undertaking any action which might impact on other people's interests within the community. In classical Jewish law, the "community" does possess certain rights, does have the power to bind or obligate its members, whether to each other or to the community at large, as we shall see.

Before we can proceed to probe the extent and nature of these mutual obligations, however, we will need to define certain terms. What is "the community?" Can it be said to "exist" in America, in the sense that it was an entity in medieval Europe? And if there is a community, what rights does the community, as an entity, have - what constraints does membership in the community place upon the individual? What mutual obligations, if any, obtain between the individual and the community? Quite importantly, we must determine how one becomes a member of a community, and how binding that membership is. It is essential to understand whether membership is optional or mandatory, whether the member may withdraw at will from the community - or not. That is the crux of the issue.

However, the exact nature of communal relationship in late twentieth century America is an issue which remains to the elucidated. The question is addressed to some extent by the Lubavitcher Rebbe, Rabbi Menachem Mendel Schneerson, and by Rabbi Moshe Feinstein in related *teshuvot* (responsa),[1]

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1. Rabbi Feinstein's *teshuva* was written as a letter to the

which were prompted by massive "white flight" which was decimating older urban neighborhoods at that time. Although this phenomenon may have prompted the question, the two *poskim* addressed the larger issue - to what extent can a community demand the loyalty and support of its residents? Are individuals constrained from "abandoning" their old neighborhood in pursuit of their personal ambitions or desires, if in so doing they will weaken the viability of communal organizations or assets (such as shuls, mikvehs, kosher bakeries, etc.), or perhaps even of the community itself? Once a person has become a member of a larger group - his "Jewish neighborhood" - can he unilaterally decide to end that relationship?

Let us examine each of the three forms of communal relationships in turn, beginning with the form of *shutfut* (partnership). A cogent (although perhaps somewhat bold) explanation of this social contract may be found in Rabbi Shimon Shkop's *Sha'arei Yosher* (5.2). He sees *shutfut* as a contractual obligation wherein logic, not Scripture, serves as the basis and determines the nature of the partners' relationships.[2] The *Shulchan Aruch*[3] discusses financial claims of and against partnerships. The Ramo adds a note to that discussion (all translations in this article are free translations) "..and the inhabitants of a city in regards to municipal matters are considered partners." Therefore, if one inhabitant of a city files suit on behalf of the city, no other inhabitant can subsequently re-initiate this suit.

Lubavitcher Rebbe, supporting the latter's position; the two responsa appeared in back-to-back issues of *Hapardes* in 1969, Vol. 453, nos. 7, 8. See also *Contemporary Halachic Problems*, Vol. 1, p.182.

2.. It is analogous to the concept of *shibud*, i.e., a lender's lien on the borrower's self and property. *Shibud*, states Reb Shimon, is not derived from any verse in the Torah but is rather a logical construct - if I take money from you, I must return money to you.

3.. *Choshen Mishpat* 176:25.

Maharam Schick[4] elucidates this point:

> Each and every community of the Congregation of the House of Israel is regarded as a partnership and, therefore, each and every inhabitant has rights and authority in all communal matter as in any partnership. However, in order that this situation not be similar to a pot of food which belongs to a partnership [a saying mentioned in *Eruvin* 3a, roughly analogous to "Too many cooks spoil the broth"] this one pulling this way, and this one pulling this way...therefore, the custom is to choose *tovei ha'ir* [aldermen] and to grant them authority to execute all the communal matters.

R. Moshe Feinstein was once asked if a person can still be considered a member of his community in America if he has lived for a considerable time in Israel. The issue concerned a certain individual who returned from Israel to protest a decision taken in his community in his absence. But the community claimed that since he had been living in Israel for some time - and especially in light of the fact that he observed only one day of *Yom Tov* when in Israel, indicating that he considered himself to be an Israeli - he had lost his right to express an opinion in matters relating to his former American community. Rav Feinstein's response[5] is that the factor which determines one's status in this regard is the maintenance of one's primary residence in the community, regardless of the actual time spent living therein.

Neither the Lubavitcher Rebbe nor Rav Feinstein define what constitutes a *kehilla* (official Jewish community) in halacha. The sources which deal with this subject seem to indicate that a *kehilla* is considered to exist any time ten Jews form a united entity. The earliest source which makes this point is the *Mordechai, Bava Bathra* no. 478, where Maharam

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4.. Responsa, *Choshen Mishpat* 19; see also *Techumin* III, p.300.

5.. *Iggerot Moshe, Choshen Mishpat* II, no.20.

Rottenberg is quoted as ruling that Jews who live in a community may require one of their number to remain in town in order to make up a *minyan*. (That individual may, however, hire someone to take his place.) Maharam also considered other communal obligations, such as *tzedaka* and *hachnassat orchim*, as mandatory obligations upon each member of the community. In other words, the community could require each of its members to contribute to the expenditures of the *kehilla* in these areas.[6]

How is a *kehilla* created? The ten Jews who comprise the *kehilla* must be permanent residents, not transient dwellers, although the definition of "resident" is not precisely clarified in the legal codes. *Shulchan Aruch* and the Ramo[7] note several possible approaches. While all agree that anyone who has bought a home in the city or dwelled therein for twelve months with the intention of remaining becomes a resident, the Ramo qualifies this with the observation that if a local custom (*minhag*) has been established, it supercedes any other halachic norm.[8]

Thus, we see that prevalent accepted behavior overrules any other halachic considerations which might otherwise govern the situation. This is a crucial factor in determining what are the true religious limitations, halachically, for any person considering moving from his Jewish community. However, this factor, notwithstanding its apparent centrality, does not seem to have been given serious weight by the Lubavitcher

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6. Maharam further indicates that even a group of less than ten men may obligate one another to participate in a fund to hire the requisite amount of people for a *minyan*. However, *Terumat Hadeshen, P'sakim U'Ketavim* no. 243, clarifies that this ruling applies only to the High Holidays; throughout the remainder of the year, communal obligations apply only once the community consists of at least ten members. See *Hagahot Maimoniyot, Hilchot Tefilla* 11:1.

7. *Choshen Mishpat* 163:2.

8. See *Biur HaGra* 163:23.

Rebbe in discussing the issue.

It seems to this lecturer that freedom of action is the implicit "*Minhag America*". In other words, a community and its individual residents are not considered as one and the same in our society, unless an explicit social contract has been formed between some central organization (such as a shul or a yeshiva) and the individual resident, whether tenant or homeowner.

An alternate form of affiliation with a community may derive from the rabbinic figure whose authority is accepted by a group of individuals. The Ramo[9] notes the authority of a Rav to formulate regulations for his students. In addition, the *Shulchan Aruch* and Ramo[10] discuss the authority of a Rav within his community. There is some question whether his authority derives from his position or from his erudition.[11]

If the communal relationship is viewed as a partnership, the logical conclusion would be that just as a partnership may be dissolved at will, so too any inhabitant may pull out of the communal partnership by moving out of the city.

We turn now to the form of communal relationship based on the biblical verse, *"v'asita hayashar vehatov,"* "you shall do that which is upright and good," which includes many directives not explicitly stated in the Torah, but elucidated by the Rabbis. In *Shulchan Aruch*[12] we find:

> If one sells or rents to a non-Jew, he is excommunicated until he accepts upon himself any damage caused by the non-Jew or until the non-Jew agrees to abide by Jewih law in dealing with his neighbors. If the non-Jew subsequently violates the agreement, the seller must

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9.. *Choshen Mishpat* 156:6.

10. Ibid, 231:38.

11. See *Dvar Avraham* 1:1:2 and *Tzitz Eliezer* 2:23 and 3:29.

12. *Choshen Mishpat* 175:40.

> pay for the damage. If the violation occurred during the lifetime of the seller, then even if the seller dies, his son must pay out of the estate. If the damage occurred only after the seller's death, there is an opinion that the son is not required to pay.[13]

Now, to what extent is this restriction binding upon Jews in a community - is it an absolute restriction, so that if one does sell to a non-Jew, he has violated the biblical imperative to "do that which is upright and good," or is it a more amorphous situation, which may take into consideration other factors and thereby render sale of a home to a Gentile quite permissible?

The very next legal ruling in the *Shulchan Aruch*, No. 41, states that the directive is binding when one can find a Jewish buyer who pays as much as a non-Jew, not when a Jew is only prepared to pay less than others. The only exception to this rule is when the Gentile's intent may be to destroy the Jewish community, in which case a *dayan* (judge) must rule on the specific situation.

Another exception to the rule is pointed out by the *S'ma*:[14] even if the non-Jew is prepared to pay an inflated price for the property, the seller must sell to the Jew for fair market value. In no. 74, the *S'ma* also defines the destruction of the community as a case where the non-Jew could just as easily have acquired a home in a non-Jewish neighborhood. In his commentary to *Shulchan Aruch*, the *Kesef Kodashim* writes that even when the Gentile states taht his intention is to

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13. The Lubavitcher Rebbe decried the maneuver employed by certain Jews in order to circumvent this problem. They - the sellers - would sell their homes to a Jewish real estate broker for a token sum, and it would be the broker who would turn around and sell the home to a non-Jewish buyer. The Lubavitcher Rebbe wrote that this stratagem does not avoid the halachic problem involved.

14. *S'ma* no. 73.

abide by the halacha, if the neighborhood will be negatively affected despite his assertion, it remains forbidden to sell him a house in the community.

It is true, of course, that these applications of the biblical directive *v'asita hayashar vehatov* are in the nature of *asmachta* - a rabbinic ordinance related to a biblical verse, and not directly a biblical prohibition. Nonetheless, it goes without saying that *issurei d'rabbanan* (rabbinic strictures) cannot be taken lightly. But there do not seem to be specific guidelines to answer the question: Just how much does the individual have to sacrifice his own will, or his monetary benefit, for the public good?

Let us now explore the third legal construct defining communal relationships, that of "*deracheha darchei noam*." The *Shulchan Aruch*[15] states that if one of the residents of an "alley" (a *mavoi*) wants to practice as a doctor, a bloodletter, a weaver, a scribe, or a teacher of secular subjects, the others residents of this enclosed alley can prevent him from doing so because the number of outsiders visiting the alley will increase, disrupting the normal flow of life. Even if all the residents but one agree to the individual's taking up his profession, that one resident alone can prevent him from opening a practice in their neighborhood.

It is noteworthy that this halacha serves as the basis of a controversy among contemporary *poskim* concerning the right (or lack thereof) of a dentist to open a clinic in his apartment building. The original *p'sak* in this scenario was given by Rabbi E.Y. Waldenberg[16] and subsequently taken up in a different case discussed by the Beth Din of Ashdod, in which the dentist in question wanted to open a "strictly Orthodox"

15. *Choshen Mishpat* 156:7.

16. *Tzitz Eliezer* 10:25, chap. 30

clinic - with separate sections for men and women.[17] The major issue discussed by all these responsa is the applicability of this halacha to the case in question.

The *Shulchan Aruch* concludes that one who owns a house in a common courtyard may not rent it to an individual involved in the above-mentioned professions. The Ramo states that to sell the house to such an individual is permissible. It is the responsibility of the remaining residents, not the seller, to deal with problem. Ramo does add, however, that this is true only if the seller sells to a Jew, but not if he sells to a non-Jew, who will not abide by Jewish law.

Based on these rulings, the Lubavitcher Rebbe posits a *kal v'chomer* - a logical conclusion: if renting to a member of an objectionable profession is prohibited because it detracts from the neighborhood's standards, how much more so to sell to a non-Jew who will detract from the community's standards! (He does not elaborate on how the non-Jew will detract from neighborhood standards; perhaps just the presence of more non-Jews in itself diminishes the Jewish character of the community. Perhaps it is because there will now be fewer people utilizing and supporting institutions and services vital for the Jewish community. Possibly, he refers to non-desirable or criminal elements? These considerations might limit the impact of his views.)

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In our discussion thus far, we have explored three forms of communal relationships in ascending order of severity: *Shutfut*, social contract, which has no basis in Torah or rabbinic decree; *V'asita hayashar vehatov*, which derives from rabbinic decree; and *Deracheha Darchai Noam*, which is biblical in nature (*d'oraitha*).[18]

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17. *Techumin* III, pps. 255-274.

18. See *Sukkah* 32b.

Let us return now to our original question: May a Jew living in a "Jewish" community sell his home to a non-Jew?

Rabbi Schneerson cites another halacha as relevant to this issue: In *Choshen Mishpat* 155:22, the Ramo writes about a case concerning a certain duke who decreed that the Jews under his jurisdiction must convince other Jews, living under the hegemony of minor lords, to move into his sole jurisdiction (apparently for tax purposes). If the decree were not fulfilled, all Jews would be expelled. It is the ruling of Ramo that the possible mortal danger awaiting Jews faced with expulsion requires that Jews from other communities respond to the threat and transfer their dwellings to the area controlled by the more powerful duke, regardless of the monetary consequences. The question of monetary losses would have to be dealt with separately.

In the view of Rabbi Schneerson, the ramifications of this ruling, as applied to the present question, would require that Jews who have moved out of their "old" neighborhood might be required to return, in order to stabilize the community! Although it might be more practical in a case where the old neighborhood has been severely decimated, to subsidize the emigration of the remaining Jews, the fundamental point manifested by the Ramo's teaching, according to the Lubavitcher Rebbe, is the mandate of communal responsibility even in the face of potential financial loss.

Without wishing to second-guess the Lubavitcher Rebbe, it still remains to be shown that a "Jewish neighborhood" in America can be equated with the "Jewish community" of the Middle Ages as understood by *Rishonim* and *Acharonim*, who were dealing with a demographic, economic, political, and social reality vastly different from the "community" of today. Can it be argued that the situation of Jews living in American urban enclaves is analogous to that of Jews dwelling under the tenuous protection of medieval societies where they were despised, abused, and scarcely tolerated? And, of course, in

medieval times Jewish communities were accorded legal status and obligations by the governments of the lands wherein they resided, which is hardly the situated today.

Another factor to be weighed in considering the permissibility of one's departure from a Jewish neighborhood concerns the shuls left behind. The issue of the sale of abandoned shuls is a well-known one.[19] Besides the apparent problem, another, less apparent one, presents itself: Reb Moshe Feinstein[20] discusses a case in Scranton, where four shuls wanted to merge into one. Rav Feinstein responded in the negative, citing the view of *Magen Avraham*[21] who states that it is forbidden to impede a new shul's opening in a city, even if a shul already exists in that community, because the more shuls there are, the more likely it is that people will fulfill the mitzvah of *tefilla betzibbur* (communal prayer). Thus, leaving a neighborhood and possibly causing its shuls to have to close, may constitute a further category of *issur*.

Furthermore, the Lubavitcher Rebbe seeks to prove the halachic imperative of preventing exodus from a Jewish community by demonstrating the overwhelming importance Jewish law gives to preserving the viability of a Jewish community. He points to the law that in frontier cities, it is permitted for Jews to desecrate the Sabbath if they are threatened by non-Jews besieging it, even if their demand is only for money or some such commodity.[22] He considers the dangerous inner city neighborhoods as being analogous to the frontier towns mentioned in the law codes, and therefore surmises that preservation of the community (even outside the Land of Israel) is a value which involves *pikuach nefesh*, a

19. See the *Journal of Halacha and Contemporary Society* III, pp. 19 – 30.

20. *Iggerot Moshe, Orach Chaim* 2:46.

21. *Orach Chaim* 154-23.

22. *Orach Chaim* 329:6-7.

mortal danger, thus sanctioning Sabbath desecration. The halacha which he cites in *Orach Chaim* is based on *pikuach nefesh* considerations - danger to property being regarded as an extension of danger to life in certain situations. On the other hand, our issue herein actually centers on the distinct question of communal responsibilities.

Although Rabbi Schneerson sees *pikuach nefesh* as a determinant compelling people to stay within a community, he does not give credence to the argument that *pikuach nefesh* considerations might be sufficient cause for a person to flee a neighborhood which he perceives as being too dangerous to live in. Essentially, he writes, misfortune can strike anytime, anywhere. Thus, he sees no excuse for abandoning a neighborhood. On the contrary, he feels that a person becomes more vulnerable to misfortune by leaving the "dangerous" neighborhood, for in so doing he has transgressed numerous halachic directives, thereby incurring divine displeasure.

Recent events in beleaguered neighborhoods such as Crown Heights may, however, lead to a reassessment of this approach. In any event, it seems certain that if an entire Jewish community could be relocated in an orderly fashion, it would be permissible for them to abandon a dangerous neighborhood. Others, of course, may and do hold radically divergent opinions.

Rav Moshe Feinstein, however, does express complete agreement with the Lubavitcher Rebbe's conclusions, as we have mentioned.[23] So complete is his agreement, he writes, that had the Rebbe not written the responsum, he would have done it himself!

In a responsum which he penned on a related subject,[24] Rav Feinstein forbids any Jew from assisting government authorities to construct a proposed low-income housing project,

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23. See letter to *Hapardes*, dated 25 Iyar, 1969.

24. *Iggerot Moshe, Choshen Mishpat* 2:22.

which it was feared would have a drastic impact on the quality of life in the community. The "white flight" which; it was alleged, the housing project would cause, would decimate the community and destroy or diminish the viability of numerous Jewish facilities therein. In any event, he continues, no Jew may leave the neighborhood, as this causes great damage to those who remain.

In summary, an interesting concept seems to be formulated by the *poskim* who address the issue of exodus from a Jewish community. Although they concede that such a community possesses no inherent *kedusha* (spiritual qualities), they nevertheless do want to grant this community all the legal perquisites, privileges, and powers which Jewish *kehillot* possessed throughout the ages.

The question arises as to the density of Jewish population required in order to qualify a place as specifically a Jewish community. Such a question was a moot point in the medieval times when most of the rabbinic literature dealing with communal obligations was being formulated. Usually, such communities were demographically tiny or, even when quite extensive, usually compressed into a ghetto or clearly delineated *Judengasse*. Obviously, we are dealing with a radically different reality today; the Jewish population may be spread out over large areas of urban and suburban sprawl.

What boundaries delineate modern communities? It seems that it would make most sense to follow the accepted halachic practice of referencing the prevailing custom. What is "*Minhag America*"? In this and all other free countries, the voluntary affiliation of an individual with a communal grouping defines that person's communal identity, regardless of geographical proximity or distance. The community, freely chosen by its members, possesses the right to require all of its members to abide by its regulations. If a commitment to remain in the physical neighborhood is either explicit (i.e. by contract or covenant) or implicit (by virtue of the legal decision of a

rabbinic authority accepted by the group), that commitment would be binding. If that is the discipline of the group, the individual member may not subsequently leave the neighborhood without the consent of his fellow members or the leadership of the community.

The fact that such discipline is not enforceable in America does not detract from the religious obligation involved, if the position of the Lubavitcher Rebbe and Rav Moshe Feinstein on this matter is accepted as the normative Jewish law. This "if" obviously carries tremendous implications. Moreover, we have not herein discussed halachic opinion about the right of an individual freely to opt for membership in a different group than the one to which he presently belongs.

Despite the limited nature of our inquiry, however, it is evident that halachic considerations may regulate the manner or option of an individual's separation from a community wherein he has become a member. His own personal considerations may have to be balanced by his responsibilities to the larger group.

May A Jew Purchase Stock In McDonalds? (And Related Questions)

Rabbi George M. Lintz

Preface

The material in this essay is intended to provoke thought and discussion regarding currently relevant topics in Jewish Law. In all cases, an expert in this area of Jewish Law should be consulted before acting on any of the ideas brought out in this essay.

Introduction

Jewish laws and commandments can be categorized as either "Humanistic" – *Bein Adam L'Chaveiro* or "Spiritualistic" – *Bein Adam L'Makom*". In other words, the laws govern either man's relationship with his fellow man, or his relationship with God. Most laws governing business practices fall under the heading of "Humanistic Laws". However, there are certain laws which govern business practices which do not stem from the ethical or humanistic teachings of the Torah or Talmud.

While these laws do not have any direct instructive value with respect to ethical behavior, they do possess a sublime lesson which influences the underlying ethical attitude of their adherents. That is, when halacha controls one's ability

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to profit or limits the use of one's assets even where no other person would be adversely affected, it impresses upon a person that God owns and controls all material wealth. When one conducts business with the background knowledge that his affairs are directly handled by his Partner in Heaven, he is not likely to justify monetarily injuring other parties for his own benefit.

The Midrash explains (*Yalkut Shimoni, B'Shalach* 258) that the food of the Jews in the desert, the manna, used to come every day instead of yearly so that the Jewish people would constantly turn their eyes toward Heaven. The Gemara (*Yoma* 76a) illustrates this point with the following allegory: A king used to give his son an allowance once per year. The prince would only visit his father when his funds were depleted. The king then changed his arrangement to distribute only enough money for one day at a time so that he would see his son every day. Similarly, the Gemara implies, God provided the manna in daily portions to keep every Jew's eyes focused toward Heaven.

The Midrash and the Gemara teach that people will forget who provides for them and to whom all wealth belongs unless they are reminded on a regular basis. Humans are inclined to give themselves credit for attainment of wealth and to forget that all is in the hands of God. Hence, God has given laws to human beings which govern every aspect of their lives and cause them to reflect upon His Divine providence regularly.

Background and Sources

A particular set of laws which constrain business dealings for reasons purely spiritual is found in the *Shulchan Aruch*.[1] There Rabbi Joseph Caro writes that it is prohibited to deal

1. *Yoreh Deah, Chapter 117.*

in commodities which are forbidden to eat, but qualifies the halacha in that it is permissible on a temporary basis to profit from forbidden foods if the opportunity presents itself, as long as one does not intentionally bring about the circumstance. For example, if a fisherman puts out his nets to catch kosher fish and by chance non-kosher fish are caught in the net, it is permissible to profit from the non-kosher fish. However, the fisherman is prohibited from casting his net with the intention of catching non-kosher fish.[2] Similarly, a Jewish slaughter-house may sell animals of a kosher species which inadvertently became non-kosher, but may not intentionally cause animals to

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2. The Mishnah (*Shviit* 7:3) writes that Rabbi Yehudah says that if one happened upon a non-kosher commodity while on his way, he may acquire it and sell it for profit as long as he does not do it professionally. The *Chachamim* say that only someone in the business who inadvertently acquires a non-kosher product, such as a trapper who finds a non-kosher animal in his trap, may sell it. According to the *Beit Yosef*, the *Tur* and the Rambam (in their codifications) mention a trapper only because they rule according to the *Chachamim*. The *Beit Yosef* adds that the *Yerushalmi* attributes the reason for the *Chachamim's* leniency with respect to trappers or fisherman to the fact that in certain places the government imposed a tax on all fish and game that was caught. Hence, the *Chachamim* allowed the trappers and fisherman to sell even their non-kosher catches in order to pay the tax.

The *Bach* and the *Prisha* point out that the *Tur*, who seemingly quotes the Rambam as the source of his ruling, departs from the actual text of the Rambam when speaking about inadvertently-trapped animals. The Rambam writes "non-kosher and kosher animals which become trapped are permissible to sell." However, the *Tur* writes "one who traps non-kosher and kosher animals together may sell them". The commentaries explain that the words of the *Tur* imply an added leniency, that even if one intentionally catches the non-kosher with the kosher animals, he may sell the non-kosher. The *Prisha* further explains that as long as the non-kosher animals came into his possession in a permissible fashion (e.g. he was attempting to catch kosher animals), then it is permissible to sell them.

become non-kosher by slaughtering them improperly.

The basis for this halacha is a Mishnah:[3]

> ...We may not trade in non-slaughtered animals nor in blemished (*treife*) animals..
>
> ..trappers of game, fowl, and fish that inadvertently catch non-kosher species are permitted to sell them.

The Talmud *Yerushalmi* says that this Mishnah refers only to animals which are raised for the purpose of eating and not to animals which are raised for the purpose of working. It further states that the law applies only to items which are prohibited by the Torah but not to items which are prohibited by rabbinic decree. Accordingly, it would be permissible to raise horses for riding, but not for eating, since they are "raised for the purpose of working"; and it would be permissible to trade in *g'vinat akum*, cheese that is forbidden to eat only by rabbinic decree.

According to the *Yerushalmi*, this halacha is derived from the repetition of the words "They shall be impure to you" (*Vayikra 11*), which teaches that not only are non-kosher foods prohibited as food but also it is prohibited to derive benefit from them. "Deriving benefit" in this case means that one cannot even conduct business with these commodities.

The Talmud *Bavli*, however, arrives at the prohibition in another way.[4]

The Gemara states that whenever the Torah says "they shall not be eaten", it implies that it is prohibited to derive benefit from that type of creature. In the case of non-kosher animals the Torah also says "they shall be detestable to you." Since the Torah wrote the extra phrase "to you" instead of simply "they are destable," there is an implication that

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3. *Shevi'it*, Chapter 7, Mishnah 3.

4. *Pesachim* 21B.

you may derive benefit from them. The word "*yihyu*" which means "they shall be" is also extra and therefore implies that these non-kosher animals "shall remain in their state." That is, you may not seek to transact business with them; however, if they are obtained inadvertently, you may sell them.

Several post-talmudic scholars (*Rishonim*), including Tosafot and Rabbenu Asher (the Rosh)[5] maintain that the prohibition of conducting business with non-kosher food is a Torah prohibition.

Rabbi Shlomo ben Aderet (the Rashba), however, states that the prohibition is of rabbinic origin only,[6] and the *Terumat Hadeshen*[7] concurs. The Rashba states that the law is a rabbinical injunction to prevent people from inadvertently eating non-kosher food. Some later scholars (*Acharonim*) say that the Rashba really agreed with Tosafot that the prohibition was of Torah origin; his wording means that the Sages were given a mandate to define where and when the prohibition should apply. Therefore, they applied it to any circumstance which could lead to inadvertent consumption.[8]

The *Aruch Hashulchan*[9] sums up, however, that although the Ramo appears to rule in accordance with the Rashba and

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5. *Bava Kamma* 79b and *Pesachim* 23a.

6. Rashba *Responsa*, 3:223.

7. *Terumat Hadeshen* 200.

8. See *Taz*, *Yoreh Deah* 117 and Bartenura *Shevi'it* 7:3. Note: One could make this argument from the part of the Rashba which is quoted in the *Beit Yosef*. However, upon inspection of the actual responsum of the Rashba according to the text which is available, the Rashba states unequivocally that the prohibition of trading in non-kosher commodities is of rabbinical origin. Perhaps, since the Rashba quotes verses from the Torah in connection with this question, one may say that it is unclear what the Rashba meant.

9. 117:20.

the *Terumat Hadeshen*, the majority of *Rishonim* rule that it is of Torah origin.[10]

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10. The passage *in Pesachim* which deals with this topic seems to indicate that the source of the law is of Torah origin. When the Gemara asks "If the verse "to you" teaches us that one may derive benefit, why then can we not trade in them in the first instance?" the answer should be: "Because it is prohibited by rabbinical decree." Since the Gemara answers that the word *"Yihyu"* teaches us that we may only trade in these commodities if we come upon them inadvertently, it indicates that the source for the law is the Torah and not the sages. (Possibly the Rashba had a different text.)

There is a basic disagreement between the Rashba and Tosafot, which at first inspection does not seem to be explained by the fact that the two *Rishonim* derive the prohibition from different sources. In cases where a particular type of animal is usually raised for food but an individual wishes to raise it for purposes other than food, the Rashba says that the law views the animal according to its usual use and therefore prohibits raising it even for other purposes. However, Tosafot maintain that the prohibition of raising non-kosher animals depends on the owner's intended use.

At first glance it seems peculiar that Tosafot, who maintain that the prohibition is of Torah origin, are more lenient than the Rashba who maintains that it is only a rabbinical injunction. The *Aruch HaShulchan* explains this anomaly in that when the Torah prohibits one case, the prohibition cannot be extended to another case without either a rabbinical injunction or a proof that the Torah intended to include more than the specific case that is mentioned. However, when the Rabbis decreed that one should not sell non-kosher animals it was with the express intent to prevent Jews from inadvertently eating prohibited food. Hence it makes no difference if a person raises or sells the animal for food or for work, if the animal is usually used for purposes of eating.

Even with the *Aruch Hashulchan's* explanation, it seems implausible that while the Torah prohibits raising a commodity to sell for food, the Torah does not prohibit raising that same commodity if it is not for sale, or, if it was for sale, for purposes other than for food. Even if one attempts to answer that since the prohibition stems from a verse in the Torah which says "it shall not be eaten" and therefore only

According to the *Shach*[11] the reason for the prohibition is a rabbinical decree "lest one come to eat non-kosher food." Moreover, the *Shach* holds that it is not prohibited to deal in

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activities which have a connection to eating are prohibited, why should the connection depend on the intention of the individual more than the usual use of the item? And furthermore, why should buying and selling non-kosher livestock lead to eating more than actually raising the livestock, albeit for purposes other than eating? Even if one uses the argument of the *Shach* that merchants taste their wares, this would not apply to live animals. And furthermore, as Rabbi Shlomo Kluger points out (brought in *Darchei Teshuva* 117:6), it is not the style of the Torah to make a decree to prevent people from transgressing another prohibition.

Rabbi Natan Shulman (of Slabodka, Bnei Brak) offered an explanation to the opinion of Tosafot. The Torah prohibits deriving benefit from certain items completely (such as *Chametz* on Pesach). However, deriving benefit from certain otherwise forbidden foods is prohibited by the Torah on a limited basis. Only the highest form of benefit is included in the limited prohibition. The highest form of benefit, in the opinion of the Talmud *Yerushalmi,* is eating. According to Tosafot, selling for the purpose of eating is tantamount to actually eating with respect to the amount of benefit that one derives. Merely selling a commodity for any purpose does not have the same benefit to the individual as selling it for the purpose of eating. Hence, the question as to why the Torah's prohibition would be dependent on the individual's reason for selling the product is answered. Since the prohibition is in deriving a form of benefit, the determination of whether that benefit exists depends on the mindset of the individual.

The question still remains, however, why one is allowed to sell a commodity for purpose of consumption if he obtained it inadvertently? Since the Torah only prohibits deriving benefit in the highest form, if any component of the benefit is lacking, it is not included in the Torah's prohibition. Accordingly, when one sells a commodity that he obtained unintentionally, he does not derive as much benefit as one who actually raises the commodity or purchases it with the intention of selling it for a profit, and hence it is permissible.

11. 117:2.

non-kosher animals for purposes other than for sale as food. When one sells non-kosher meat, he may inadvertently come to taste it, or possibly people will suspect him of eating it, but if he is not selling non-kosher animals for food, there is no reason to prohibit their trade.[12]

Practical Applications

Taking the issue one step further, the question arises whether a Jew can intentionally profit from non-kosher foods when he himself does not handle the animal or food. For example, may one invest in a stock or partnership of a company that sells non-kosher food. While it seems that a Jew should not actually own and operate a McDonalds restaurant, would it be prohibited to buy McDonalds stock or to invest in a syndicated franchise which a non-Jew operates?

Before marshaling other sources to answer this question, one can begin to analyze it from the sources that have been cited above. According to Tosafot and those who maintain that the prohibition stems from the Torah, it is difficult to ascertain whether the definition of "trading" in non-kosher foods includes merely owning a security or partnership interest in a business which profits from non-kosher food items.

According to the Rashba and those who maintain that it is a rabbinical injunction, one may argue that the prohibition

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12. In support of the *Shach*, one may cite the opinion that allows one to feed his workers non-kosher food (brought in *Shach* 117:3). It is obvious from this opinion that handling non-kosher food, even that which you own, is not what is prohibited. The prohibition is only doing business with the non-kosher food. (It is interesting to note that the *Binat HaAdam* writes that *all* of the *Rishonim* and *Acharonim* maintain that the prohibition is of Torah origin. It appears that he even refers to the *Shach* who is an *Acharon*. This view is perplexing in light of fact that the reason of the *Shach* is *"marit ayin"* which is clearly a rabbinical concept.)

applies only to activities which will either bring a person to eat non-kosher food or which may lead others to believe that he eats non-kosher food. Merely owning an interest in a business that you never operate in a hands-on fashion may not have been included by the Sages in their prohibition.

Hence, if the halacha is according to those who see it is a Torah prohibition, it may be a "*Safek D'oraitha*" (a doubt of Torah Law) and it would therefore be prohibited. If the halacha is according to those who hold that it is a rabbinical decree, it may be permissible where the decree does not apply.

There exists, however, a concept called "*Lo plug rabanan*" which means that when a rabbinical decree is instituted, it applies in all instances, even cases that do not possess the characteristics which motivated the original decree.

Rabbi Shlomo Eiger[13] states that engaging in a parternship with a non-Jew to conduct business with non-kosher food is definitely prohibited. He says:

> Even according to those who say it is a rabbinical decree to prevent people from coming to eat non-kosher food, it is prohibited because when the Rabbis issue a decree they make no distinction between cases where their reasoning would apply to cases where their reasoning would not apply (*lo plug rabanan*).

One may still argue that even according to Rabbi Eiger a limited partner or a stockholder who has no authority in the running of the business and does not even have the right to inspect the business without consent of management is not included in the injunction. The act of owning a limited partnership or share of stock may not fall under the category of *Sechora* (trading). A non-active partner may be considered to be "in the business," but a mere shareholder or limited partner might be considered an investor rather than actually

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13. *Gilyon Maharsha, Y.D.* 117, quoting *D'var Shmuel.*

"in the business." Accordingly, we cannot adduce proof from this source.

Rabbi Moshe Feinstein[14] indicates that he concurs with Rabbi Eiger with respect to non-working partners. He does not, however, address stock or limited parnership ownership directly.

Rabbi Tzvi Hirsch Shapiro in *Darchei Teshuva* (117:2) cites the *B'rit Yaakov* who poses the question of whether or not it is permissible to give money to a *kohen* (priest) to buy *truma* (food only allowed to be eaten by priests) from a priest and to sell it to another priest. He hypothesizes that since the food never goes to the house of the *Yisrael* (the non-priest) he will never come to eat it and it should therefore not be prohibited according to the Rashba. He concludes, however, that since the *Yisrael* may enter the priest's house to eat, it is prohibited. By contrast, in our case of a stockholder or limited partner if there is virtually no chance that the investor may go to the place of business and eat the wares, maybe even the *Brit Yaakov* would rule that it is permissible. The *Brit Yaakov* does not seem to hold that "*lo plug rabanan*" applies, otherwise he would have mentioned it in his responsum.

Rav Shlomo Zalman Braun posits that if an owner has *no* say in the operating of the business, there is no prohibition of "dealing in non-kosher foods."[15]

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14. *Orach Chaim* 2:65.

15. *Kuntrus Acharon, Shearim Metzuyanim Behalacha* 64:4. In a section dealing with owning *chametz* on Pesach he quotes the responsum of the Mahari Halevy (Vol. 2:124) which says:

"Since the stockholder has no right to do anything in the plant on his own accord, and certainly he has no right to destroy *chametz*, he is not in violation of owning *chametz*, and it is not prohibited to consume that *chametz* after Pesach; and one cannot argue that even so, all business is transacted on the shareholders' liability (and hence it should be considered his ownership), because it is no worse than a

Rabbi Braun then cites the opinion of *Minchat Yitzchak*, that if the shareholder has even a limited say in the running of the business, (for example, if he can attend shareholder meetings from time to time and present his opinion), it is not permissible to own the shares during Pesach.[16] It is not clear how this ruling of *Minchat Yitzchak* applies in practice, because the By-laws of most corporations give shareholders the right to attend meetings and to present their opinion if they follow proper procedures. Perhaps the ruling in practice applies only to non-voting classes of equity. Nevertheless, it is hard to believe that a person who owns one share of voting stock out of several million shares outstanding could be considered to be in that business. However, since *Minchat Yitzchak* does not require the shareholder to have a controlling interest in order to fall under the prohibition of owning *chametz*, it is impossible to set a determinate percentage of ownership that is considered substantial enough in all cases to be included in the prohibition.

The Maharam Chalva,[17] a *Rishon*, states explicitly that brokerage of non-kosher commodities is permissible. In the *Kitzur Shulchan Aruch* (64) Rabbi Shlomo Ganzfried rules that one may use an agent to sell non-kosher foods that happened

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Jew who accepts responsibility for *chametz* which is in the house of a non-Jew, which the *Magen Avraham* writes is permitted on Pesach."

The Mahari Halevy's argument is difficult to understand because even if two partners own a business, neither partner has the right to destroy *chametz* without the consent of the other partner. Yet, it is not likely, that the Mahari Halevy would allow a general partner to retain his ownership in a business which owns *chametz* on Pesach. Perhaps the emphasis of his argument is on the part where he writes that the shareholder "has no right to do *anything* in the plant on his own accord." In that case, a shareholder could be distinguished from a general partner who, even though he is not a managing partner, has the right to perform some function in the business.

16. Ibid, 64:4 and 114:28.

17. *Pesachim* 23.

to come into his possession, even if the agent profits from the transaction, so long as the agent did not actually take possession of the goods. But if the agent takes possession of the goods, it is considered *sechora* (trading) with respect to him.[18]

Rabbi Braun quotes several sources in commenting on this passage. In summary Rabbi Braun says:

1) According to some, brokerage is permissible as long as the broker does not take ownership of the commodity.

2) According to some, the ability of the broker to eat the goods is the determining factor.

3) According to some, the act of transacting with the commodity is the determining factor.

In each case, the broker, supervisor, or agent has more direct contact with the non-kosher commodity than merely profiting from it. Hence, the argument may be made that a limited partner or non-active shareholder is allowed to own an interest in a company which deals with non-kosher commodities if the halacha is according to those who maintain that it is a rabbinical injunction and if *lo plug rabanan* does not apply. However, if one argues that ownership of the merchandise is the determining factor, and not whether the owner could come to eat the merchandise, then one can

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18. It can be inferred possibly that even if an agent was regularly in the business of selling non-kosher foods he not be violation of this halacha unless he takes possession of the goods. Otherwise, if the *Kitzur Shulchan Aruch* did not mean that the agent regularly did this, it would be *"nizdamen"* and even taking possession would be permitted. However, the *Kitzur Shulchan Aruch* does not say this explicitly, and there is a strong argument to say that he did not intend to imply that an agent may regularly seek non-kosher goods. To the contrary, one may read the *Kitzur Shulchan Aruch* to mean that the broker may only see the non-kosher food when he is acting as the agent of someone who is allowed to sell the food because he acquired it by chance *(nizdamen)*.

distinguish the case of the broker from the investor; accordingly, an investment would be prohibited.[19]

Rav Moshe Feinstein cites a responsum of the *Chatam Sofer*, which discusses whether a Jew may work for a non-Jew in dealing with non-kosher foods and if a non-Jew may work for a Jew in dealing with non-kosher foods.[20] He questions whether the underlying prohibition includes A) *ma'aseh* hamischar – the actual *act* of dealing in non-kosher foods, which would mean that a Jew could hire a non-Jew to work for him but he could not work for the non-Jew; or B) *eisek hamischar* – the *business* of dealing in non-kosher foods, which is the profit and liability for loss, in which case it would be permissible for a Jew to work for a non-Jew but not vice versa. The *Chatam Sofer* rules according to the stricter aspects of both sides of the analysis. That is, a Jew may not own a non-kosher business and hire a non-Jew to run it for him; conversely, a Jew may not personally deal in non-kosher foods on behalf of a non-Jewish owner.

Clearly, passive ownership stock or limited partnership shares would not fall under the category of "*ma'aseh hamischar.*" It is questionable, however, whether the *Chatam Sofer* would

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19. The question still remains, that even if one rules according to those who maintain that only business which can lead to consumption is prohibited, why does "*lo plug rabanan*" not apply? A possible explanation is that "*lo plug rabanan*" dictates that even business which is not likely to lead to consumption is prohibited; however, activity such as brokerage is not even contained in the definition of "doing business with". That is, the act of "doing business" is defined as owning the merchandise and selling it. Merely introducing a buyer and seller and exediting the transaction is not considered "doing business" according to halacha. Hence, the Rabbis did not prohibit this act even though they prohibited acts of doing business which could not lead to consumption. (This argument requires further deliberation.)

20. *Iggerot Moshe Y.D.* I, 51.

categorize owning stock or limited partnership shares as "*eisek hamischar.*"

The *Chatam Sofer* posits that a Jew who puts up money for non-kosher products but does not actually handle the products or acquire them halachically (*kinyan*) is equivalent to a Jew who guarantees prohibited commodities which are in the house of a non-Jew. Merely guaranteeing the products is not considered owning them and is permissible.

On the one hand, the case of a passive investor in a corporation may be compared to the case of the *Chatam Sofer.* On the other hand, a shareholder actually owns a portion of the corporation which owns the products and houses them in its facilities. Hence, a *kinyan* is made on behalf of the Jew in contradistinction to the *Chatam Sofer's* case where the *kinyan* is made only as a proxy (*shaliach*) of the ultimate non-Jewish purchaser. However, one may say that if the Jewish shareholder really cannot handle the merchandise or use the facility for any purpose, he would not be considered in halacha as having effectively made an acquisition (*kinyan*) of the merchandise. However, if one considers the management and employees to be working directly on behalf of the shareholders, then their *kinyan* of the merchandise might serve to distinguish our case from the one permitted by the *Chatam Sofer.*[21]

A related question dealt with by Rav Moshe Feinstein in an early responsum is whether or not one may engage in the business of transporting non-kosher foods.[22] Rav Feinstein ruled that the business of transporting non-kosher foods is not comparable to dealing in the non-kosher food itself. One of his reasons is that even though a Jew may inadvertently come to eat his own wares, he is certainly above the suspicion of stealing other people's food. Since the transporter would in

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21. See *Responsa of Chatam Sofer,* 104-106 and also *Darchei Teshuva* 117:50 for further discussion of this issue.

22. *Iggerot Moshe* I, 51.

fact be stealing if he consumed any of the goods that he transports, and since his livelihood would be endangered, Rav Feinstein ruled that the prohibition did not apply.

Following are arguments, based on the sources quoted above, which support a lenient ruling regarding the permissibility of investing as a shareholder in a corporation or as a limited partner in a company that deals in non-kosher commodities:

1. As a shareholder or limited partner, one does not have a right to enter the premises, let alone eat the wares of the business, without obtaining prior permission of the management. It is unlikely that a stockholder of a major corporation would even be able to obtain such permission. (However, a shareholder or limited partner of a small business who knows the management personally may likely obtain permission.) According to Rav Moshe Feinstein's reasoning cited above, that a delivery agent is not suspected of stealing and therefore not suspected of eating the non-kosher commodities that he delivers, one could argue that a stockholder or limited partner would also not be suspected of stealing and eating the wares. However, since the delivery agent has his job to lose if he is caught, whereas a shareholder partner does not have the same fear, Rav Feinstein's argument may not apply.

2. Owning a business that deals in non-kosher commodities is not the same as transacting with the commodity personally because the non-kosher products which are owned by the company are owned by a separate legal entity. Even though there are strict opinions such as the *Gilyon Maharsha* (cited above) which maintain that one may not engage in a business which deals with non-kosher commodities even when a non-Jewish partner runs the business, since a corporation or a limited partnership is the legal entity that owns the merchandise and not the shareholders or partners directly, even the stricter opinions may not apply. As long as the owner never really acquires the non-kosher products himself and merely acquires a portion of the profits derived from the products, an argument

could be made that he is not in violation. If the investor does not deal directly in the business of the company, he never acquires the products according to halacha (unless one claims that the managers are acting as his agents).

3. The two concerns that the *Shach* (cited above) expressed do not apply;

A. A merchant usually tastes his wares – but in a corporation or partnership where managers are hired to run the business, the owner would never taste his wares unless he is involved somewhat in the management of the business.

B. A merchant is suspected by others of eating what he sells – in the case of a limited partner or shareholder, it is not apparent to the public that he is an owner, and he is above suspicion because he does not directly deal with the commodity.

In summary, if ownership is the determining factor, the separate legal entity argument might permit investing in a corporation which deals in non-kosher comodities. If halacha does not view the legal status of a corporation or limited partnership as separating the investors (stockholders or limited partners) from the owners (the legal entity), then the argument that ownership is only prohibited where it may lead to consumption still applies. Furthermore, owning a small amount of stock where one has no say in the running of the business may not even be considered ownership according to halacha (as in the *Minchat Yitzchak* or the *Mahari Halevy* quoted above).

If the act of transacting is the determining factor, then a limited partner or stockholder who does not directly get involved with the management or policymaking of the company would not be in violation of transacting. Even if an investor might get involved on a limited basis in management by attending meetings occasionally, one may argue that only transacting that can lead to consumption or suspicion of consumption is prohibited. In light of the multiplicity of doubts

that exist with regard to this question, and the number of branches of arguments which imply leniency, one may conclude that there is a basis for leniency to invest in limited partnerships or stock of companies that deal with non-kosher foods. (In practice, however, one must consult a *posek*.)

When asked this question, Rav Dovid Feinstein posited that the determining factor is whether or not the investor is involved in the running of the business. He made no distinction between the various investment structures such as partnerships, limited partnerships, or corporate stock. According to Rav D. Feinstein, if an investor owns a substantial enough amount of stock of a corporation to involve himself in the voting or management of the company, even if he is a minority shareholder, he is subject to the prohibition of trading in non-kosher products. He added that the same criteria apply to determining whether a stockholder may retain his ownership of a company which owns *chametz* on Pesach.[23] He also said that working for someone else in a business which deals with prohibited foods is permissible as long as you do not actually come into contact with the food.

Rabbi Reuven Feinstein added that in his view the intention of the stockholder is a determining factor in the question. If, for instance, a shareholder with only one share intends to get involved in dictating policy of the company by speaking at shareholder meetings or contacting other shareholders, then even that limited amount of ownership would be prohibited. On the other hand, if a person's intention is just to profit from short term market moves, then even a large block purchase

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23. As commented above with respect to the ruling of the *Minchat Yitzchak* regarding owning shares of a corporation which owns *chametz* on Pesach, it is impossible to set a determinate percentage of ownership that would be considered in all cases the minimum amount to render the ownership substantial enough to include it in the prohibition. See also, *Ha'elef Lecha Shlomo, O.H.* 238.

would be permissible. Rabbi R. Feinstein said it was questionable whether a small percentage of a company which is intended to be held for a long time (e.g. for a retirement plan) is permissible.

Rabbi Moshe Feinstein, writes in a responsum that it is permissible to purchase shares in a company that does business on Shabbat. His reasoning is that the purchaser does not intend to purchase a right to contribute to the operations of the business; rather, his intentions are merely to purchase a portion of the profits of the company. Even though the shareholder has a right to vote for the directors of the corporation, that right is really worthless with a small quantity of shares. On the other hand, if a person purchases a large quantity such that his vote would be meaningful, it is definitely prohibited unless, from the outset, he enters into the same type of agreement that would enable him to engage in a partnership with a non-Jew who intends to work on Shabbat. It appears that according to Rabbi Dovid Feinstein and Rabbi Reuven Feinstein, as quoted above, the arguments set forth in this responsum apply to the prohibition of doing business with non-kosher commodities as well as the prohibitions regarding business on Shabbat.

Owning a Grocery Store

A topic which is much discussed among the *poskim* is whether or not a Jewish grocery store owner may sell non-kosher items. The *Aruch HaShulchan*[24] tries to understand why Jewish store owners customarily stock non-kosher fish in their inventory. He writes that possibly, since some customers will not come to the store to buy even kosher items if they could not find all of their needs in one place, it can be compared to the case of the Mishnah, where non-kosher fish are caught by a Jewish fisherman along with kosher fish. He reasons that

24. *Yoreh Deah* 117:27.

since the fisherman's intention was primarily to catch the kosher fish, so, too, a store owner whose primary intention is to sell kosher items may sell non-kosher items as well in order to secure the sale of the kosher items.

The *Bach* and the *Taz* stress the idea that a Jewish fisherman may catch non-kosher fish along with kosher fish if that is what is required to catch the kosher fish.[25] Although Rav Moshe Feinstein[26] strongly disagrees with the proof brought by the *Bach*, he nevertheless rules in accordance with the *Bach* because none of the other *poskim* seem to disagree. Rav Feinstein further disagrees with the *Darchei Teshuva*, which qualifies the *Aruch HaShulchan's* ruling by requiring that the non-kosher items be purchased by the store owner along with the kosher items.

In practice, however, Rav Feinstein disagrees with the ruling of the *Aruch Hashulchan* and does not permit a Jewish store owner to stock non-kosher items regularly in anticipation of the possible customer who will buy only from a store which carries both kosher and non-kosher items. But he states that a store owner may, for the reason given by the *Bach* and *Taz*, purchase non-kosher inventory specifically for existing customers who have requested it in order not to lose their business.[27]

Consultant to a Non-Kosher Business

May a Jewish consultant enter into a contract with a company which deals in non-kosher products when his fee is based on the increased profits that he causes the client to realize? The consultant may be compared to the broker, who some *poskim* permit to deal in non-kosher items if his function does not

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25. Ibid.

26. *Iggerot Moshe Y.D.* II, 38.

27. *Yoreh Deah* 117:26-28.

require him to actually own the animals or food. The comparison to the broker comes from the fact that both profit from someone else's non-kosher commodity. The consultant may even have an advantage over the broker in that the consultant charges a fee for advising the client how to conduct the business himself, while the broker earns a fee for acting as the agent of the seller or buyer in actually conducting the business. Agency is arguably more closely associated with being in the business than consultancy. Those who are lenient with the broker argue that if he does not take possession of the commodity, it is not called "trading" in the halachic sense of the word.[28] So, too, the consultant does not take possession of the commodity and therefore may not be considered "trading" in non-kosher commodities.

However, one may distinguish the case of the consultant from the broker because the broker introduces two parties to conduct business with each other, whereas the consultant actually takes on the business of the principal. As mentioned above, there are opinions that do not permit brokering non-kosher commodities as well as some which permit it where it cannot lead to eating the commodity. The same stringencies may apply to a consultant, according to those *poskim*.

The case of a transporter of non-kosher items has some similarity to the case of the consultant in that in both cases the person deals with non-kosher food which is not his own. However, the leniency cited above by Rav Moshe Feinstein with regard to a transporter may not apply to the case of a consultant. The transporter is not considered to be in the business of trading in non-kosher commodities, but rather is in the transport business. The fact that he happens to be transporting non-kosher commodities is not considered a determining factor. However, the consultant actually takes on the business of

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28. See *Maharam Chalva, Pesachim* 23, and *Aruch Hashulchan* 117:28.

dealing in prohibited foods for the temporary period that he has contracted to work for the non-kosher food company.

There are two aspects of the case of the consultant which would lead to a stringent ruling: 1) he is involved in the action of dealing in non-kosher commodities and 2) he is tantamount to an owner in that his compensation is profit-based. If he works on a flat fee or hourly wage, he would not have the aspect of ownership; then, it would depend on his function in the business. For instance, if his function were in the accounting or systems departments, it would seem to be permissible. However, if his function is in the marketing or purchasing of the non-kosher commodities directly, it might be prohibited.

In summary, where the consultant's work is not directly in marketing or purchasing the commodities, it seems that one might be able to apply a lenient ruling to this occupation. In the case where the consultant comes in direct contact with the food, or purchase or sale of the food, one might deem it appropriate to take the stricter view and prohibit the function, especially when his compensation is based on profits of the company. (Once again, this is intended only for the sake of discussion and to motivate the reader to discuss specific cases with a *posek*.)

Investment Bankers: Financing For Non-Kosher Companies

A common practice among investment bankers is to receive their compensation in the form of equity in the company. If the company is one which does business with non-kosher commodities, is it permissible for a Jewish investment banker to take his fee in the form of equity when there is not enough cash available to pay him?

It would appear from the Ramo (117) and the *Terumat Hadeshen* (200) that it is not permissible to take equity as a form of payment for financing a business which deals in non-

kosher commodities if no extraordinary circumstances exist. They write that it is prohibited to take pigs as collateral for a loan to a non-Jew. Even though the main business of lending with interest to a non-Jew is permissible, and the lender has no intention of ever taking possession of the collateral, the *poskim* do not permit it since there is a chance that he may come to own it. Similarly, in the case of an investment banker, one might think that since his main business is financing and he takes ownership of stock only incidentally, it would be permissible. However, as we see from the Ramo and the *Terumat Hadeshen*, even where there is only a remote possibility that he will come into possession of non-kosher commodities as a result of his otherwise permissible business of lending or financing, it is prohibited.

The Ramo (in the name of the Rashba) and the *Terumat Hadeshen* (in the name of the *Hagahot Maimoniyot*) both stipulate that one is permitted to collect on a debt in the form of non-kosher products from a non-Jew once the debt has been incurred. Similarly, it would seem that a Jewish investment banker (or other professional) could collect his fee in equity in a business which deals with non-kosher food once he has performed a service and there is no cash forthcoming for his compensation. Just as in the case of the lender, the investment banker, it would seem, would be required to sell his equity as soon as he is able to recover his fee.[29]

Assuming for the sake of argument that it is not permissible to receive an investment banking fee in the form of equity in a company which deals in non-kosher commodities, is it required of an investment banker to pass up a business opportunity of this type? This case has some of the same attributes as the case of "*nizdamen*", where the trapper inadvertantly traps non-kosher animals and is permitted to sell them.[30] As in the

29. *Shach*, *Y.D.* 117:11 in the name of *Rama MiPanu*.

30. *Taz*, *Y.D.* 117:4.

case of the fisherman who knowingly catches non-kosher fish in order to catch kosher fish as well, or the store owner who buys non-kosher items to secure the sale of kosher items as well, the financier intentionally takes equity in the company that he finances in order to secure the completion of his otherwise permissible business of financing. In the case of an existing client who might thereafter use another investment banker for all of his business, it seems clear that there exists a parallel to the case of a store owner who is permitted by some authorities to purchase non-kosher items to assure that he keeps his customers for his kosher items.

An argument can be made to permit an investment banker to take his fee in equity even intentionally, because of the following reasons:

1) If we say the halacha is according to those *poskim* who hold that the prohibition stems from the Torah, and the prohibition is not to profit from trading in non-kosher commodities, then the investment banker, if he sells his shares as soon as he is able to recover his fee for services, does not profit from the business itself. He engaged in his permissible business of financing and he did not keep his stock long enough to profit over and above his normal and customary fee.

2) If we say that the halacha is according to those who maintain that it is a rabbinic injunction, and the prohibition is to prevent a person from coming to consume the product or to prevent people from saying he consumed the product, then as long as he does not receive a controlling interest in the company and he does not work in the business hands on, there is no problem. This case is distinct from the case of the lender who takes pigs as collateral, since the lender may come into possession of the non-kosher collateral itself. In contrast, the investment banker will own only a passive interest in the non-kosher commodities and will not have to deal with or sell them directly.

Rabbi Reuven Feinstein agreed that it should be permissible for an investment banker to take shares in a company, when cash is not available, as long as the intention of the banker is merely to hold it until he can get his money out. But if the investment banker takes a seat on the board of directors or is actively involved in the running of the company, it would seem not permissible. Rabbi Feinstein also considered a halachic distinction between a lender taking collateral and an investment banker taking stock as valid, since the lender may come to deal directly with the pork, whereas the investment banker only sells his shares.

Rabbi Reuven Feinstein also added that an underwriting of securities would have the same characteristics in halacha as holding a stock just for short term investment. For instance, if a company which trades in non-kosher products sells stock through an underwriting broker/dealer, the broker/dealer may purchase all of the shares of the stock if his intention is to resell it immediately to profit from the underwriting discount. Even if the broker/dealer must retain some shares for a longer period than expected due to adverse market conditions, it qualifies as "*nizdamnu*".

Jewish Landlord, Non-Kosher Business

Can a Jewish landlord rent his property to a non-kosher restaurant or the like if the rent is based on the revenues from the business? It would seem logical to answer that the landlord's business is really real estate, and the revenue from non-kosher food is merely a way of determining the rent, but does not make the landlord into someone who deals in non-kosher foods. Even if one argues that by sharing in the revenues of the business he is tantamount to a partner, he is a partner only with respect to revenues but has no voice whatsoever in the running of the business. Furthermore, the landlord, unlike an owner, has no potential liability for the business; he merely has profit potential. On the other hand, since as landlord he

does have some limited degree of authority to dictate policy of how the business is run as it relates to its physical plant, he may be more like a partner than an investor who has no connection at all to the operations of the business. Accordingly, there are some *poskim* who do not permit such revenue-based lease arrangements.[31]

Money Manager

May one invest money with a non-Jewish money manager who has the prerogative to purchase businesses that deal in non-kosher commodities? Rav Avraham Danzig[32] entertains the notion that engaging a non-Jew to invest one's money without specifying what the investment should be may be considered as "*adaita d'nafshe avad*." That is, there is a concept that even though a Jew may not hire a non-Jew to perform work for him on Shabbat, under certain conditions if the non-Jew on his own decides to do the work on Shabbat but was given the option not to, it is permissible. He performs the work on Shabbat for his own reasons rather than at the instruction of the Jew. Similarly, Rav Danzig writes, if a non-Jew who works for a Jew is given the option of investing in permissible items as well as non-kosher foods and he chooses to invest in non-kosher foods, it is considered as if the non-Jew invested for his own reasons. Hence it might be permissible for the Jew to allow this scenario to occur. Rav Danzig leaves this case undecided.

If one invests in a mutual fund where the fund manager has the right to invest in whatever securities he deems appropriate, there is the possibility that the fund will invest

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31. See *Responsa* of Rabbenu Menachem Azaria of Panu (30) regarding a Jew who enters into a sharecropping arrangement *(Arisut)* with a non-Jew who raises non-kosher animals lon the property. His points may be relevant to the topic discussed in this section.

32. *Binat HaAdam* 69.

in companies which do business with non-kosher products. It seems, however, that since the owners of the shares of the mutual fund do not even have the right to vote at the shareholders meetings of the underlying companies (because the fund manager reserves that right), the mutual fund investor would therefore not be considered in violation of the prohibition of doing business with non-kosher products.

Future Markets

Is a Jew permitted to trade in the futures markets when the underlying commodity is not kosher?[33] According to Rabbi Reuven Feinstein, since the trader never takes possession of the actual commodity, it is permissible. If the prohibition is in owning the commodity, the trader owns only a contract to purchase it in the future and in fact does not intend ever to take possession of the physical goods. If the prohibition stems from a rabbinical injunction to prevent coming to eat non-kosher food, the trader never comes into direct contact with the

33. When one purchases a futures contract, he promises to buy a certain quantity of a commodity at a set price on a set date in the future. For instance, one could contract to purchase, through a futures exchange, a certain number of pounds of pork bellies at a guaranteed price on a date three months from now. The owner of the futures contract may decide to sell his contract to someone else through the exchange before the contract expires. If expectations of the price of pork bellies have risen, the owner will make a profit, and if expectations have fallen, he will incur a loss. The participants in the futures market do not expect ever to take delivery of the underlying commodity. Their purpose for buying and selling the contracts may be to hedge a position that they have in the "spot" market, or to lock in the price of raw materials that they may need to price an order of finished products, or to profit through speculation. When one owns a contract on its expiration day, he either receives his profit if prices are higher than expected or he pays the difference between his contract price and the spot price if prices are lower than expected.

commodity.[34] Rabbi Feinstein adds that in the remote case where a contract holder actually takes possession of the commodity because market conditions force him to, it qualifies as *nizdamnu*, inadvertent procurement, and hence it is permissible to sell.

Gifts of Non-Kosher Food

Can a Jewish person purchase non-kosher food to give as a gift to a non-Jew? The *Shach* (117:3) quotes the *Beit Yosef* that since people give gifts for something they have received or in anticipation of receiving something, gifts are therefore tantamount to sales, and hence are prohibited. However, based on the responsum of the *Chatam Sofer* quoted above,[35] it may be permissible to order a non-kosher gift and have it sent

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34. Even though the trading of commodity futures may be permissible with respect to the prohibition of doing business with non-kosher commodities, there are other issues of the futures markets that must be analyzed from a halachic standpoint. For instance, a forward contract between two Jews may involve a rabbinical extension of the prohibition of charging interest. A forward contract, like a futures contract, obligates the purchaser to purchase a certain quantity of goods in the future at a set price. However, forward contracts are not standardized and are not traded on an exchange. They represent a private agreement between two parties. Accordingly, if the two parties are Jews, and one agrees to sell a product to the other at a future date at a price which is higher than the price it can be bought for today (the spot price), if the spot price is known, the transaction could violate the laws of charging interest. Furthermore, questions of how the contract must be written to avoid halachically problematic issues such as acquiring an object that has not yet come into existence *(davar shelo ba l'olam)* and incomplete intention to transfer title *(asmachtah)* must be treated. Perhaps these questions are not even at issue since according to some *poskim*, both *davar shelo ba l'olam* and *asmachtah* are overriden by the local custom of *kinyan* (see *Pitchei Teshuva, Choshen Mishpat* 201:2).

35. 104.

directly. The *Chatam Sofer* says that it is permissible for a Jew to take an order from a non-Jew for non-kosher fish and ask another non-Jew to purchase it and ship it to the buyer. He allows this because a) the Jew never comes into contact with the non-kosher item, and hence, there is no suspicion of his coming to eat it, and b) the Jew never really acquires the non-kosher fish since he pays for it but does not take it into his possession (which is a required component for a halachic acquisition).

The case of ordering the gift and having it sent directly has even more lenient qualities than the case raised by the *Chatam Sofer*, because in the case of a gift which is ordered, the sender is not responsible for the goods during shipping. This argument does not apply when the sender actually goes to pick out the gift before sending it, in which case his designating the gift is probably considered acquisition in halacha. Furthermore, this argument does not apply to non-kosher food which the Jew acquired unintentionally such as through a gift, since this case is analogous to *nizdamnu*, where the trapper or fisherman is permitted to sell non-kosher species which he inadvertently procured.

DEDICATION

This article is dedicated to the memory of Stanley and Audrey Lintz, of blessed memory.

Substituting Synthetic Dye for *Hilazon:* The Renewal of *Techelet*

by Rabbi Bezalel Naor

Over the past decade, great strides have been made in the research of *techelet*, the blue dye the Torah mandates be used in the *tzitzit*.[1] This renewed impetus enfolds all aspects of the subject – rabbinic, biological and chemical – and may even augur the practical implementation of *techelet* during our lifetimes. One of the most basic questions to be prompted by this inquiry is whether the traditional source of the blue dye, the *hilazon* (a type of snail), is a sine qua non in the eyes of the halacha, or may be dispensed with in our age of synthetic dyes. Must *techelet* be a dye made from *hilazon*, or must it only be the color of the dye made from *hilazon*? It is upon this problem that we shall focus our attention, leaving other aspects of the manifold discipline of *techelet* (or to use Rabbi Herzog's term, "Hebrew Porphyrology") for separate discussions.

At the outset, it would be appropriate to define the term *techelet* of the Torah. In all, three types of colored wool were used in the Tabernacle and sacerdotal vestments or *bigdey kehunah*: *techelet*, *argaman* and *tola'at shani*. The hyphenated *tola'at-shani* refers both to the color and the dyestuff. *Shani* is

1. See B. Naor, *Ba-Yam Derekh* [„In the Sea - A Way„] (Jerusalem, 5744) pp. 98-104; Isaac Herzog, *The Royal Purple and the Biblical Blue* (Editor: Ehud Spanier, Jerusalem, 1987); Israel Ziderman, *„Le-hiddush mizvat techelet ba-sisit.„* ("The Mizvah of Techelet.„) *Techumin* (5748) 9:423-446; Menahem Burstin, *Ha-Techelet* (Jerusalem, 5748).

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the color – scarlet. And *tola'at* is the worm or insect which is the source of that scarlet color. As Maimonides writes in *Mishneh Torah*: "*Tola'at* are the very red grains which resemble the seeds of carob; they are like sumac, and there is a worm or insect in each grain."[2] (The reference is to kermes, the source of the color "carmine.") *Argaman*, purple, on the other hand, refers strictly to a color designation and not to any specific dyestuff. Neither the Written nor the Oral Law stipulates the use of a specific dyestuff for *argaman*.[3] The question now arises, what is the status of *techelet*? Does *techelet* by definition include the dyestuff as well, as in the case of *tola'at-shani* (in this instance the dye being *hilazon*, a snail), or only the color (blue) as is the case with *argaman*? This is a difficult question and one which sparks controversy in halachic literature.

The Tosafot[4] understood that *techelet* is defined in terms of *hilazon*. The fourth century *amora*, Rav Shmuel bar Rav Yehudah, had described the actual dyeing of *techelet*: "We bring the blood of *hilazon* and chemicals, and throw them into the vat and boil them." Tosafot were puzzled at the thought that any extraneous matter other than *hilazon*, the snail itself, be used for *techelet*. "How is it possible to mix anything together with the *techelet*?!" Their answer is that the entire ensemble of *hilazon* together with the requisite chemicals is what the Torah refers to as *techelet*. It is apparent from this line of reasoning that for the Tosafot, the definition of *techelet* is not restricted to a color or appearance, but rather addresses the dyestuff itself. And in fact, we do find explicitly in the

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2. *Hilchot Parah Adumah* 3:2.

3. See *Tosefta, Menahot* 9:6-7 and *Mishneh le-Melech, Hil. Klei ha-Mikdash* 8:13. Rabbi Herzog's (Ibid., p. 56) explanation for the *Tosefta's* non-legislation of *argaman* is difficult to follow.

4. *Menachot* 42b, s.v. *we-samemanim*.

Tosefta[5] the law: "*Techelet* is valid only from *hilazon*; if *techelet* was produced other than from *hilazon*, it is invalid."

Given this definition of *techelet*, there would be no room for any discussion of a synthetic substitute for *hilazon*. However, several rabbis of the last century ostensibly found latitude for such an eventuality in the halachic definition Maimonides gives to *techelet*. In the beginning of the second chapter of *Hilchot Tzitzit*, Maimonides writes:

> The *techelet* mentioned throughout the Torah is the wool dyed a toned-down blue. This is the appearance of the sky viewed against the sun where the sky is clear.
>
> *Techelet* mentioned in *tzitzit*, must be dyed with a known dye whose beauty endures and does not change. If the *techelet* were not dyed in that manner, it is invalid for *tzitzit*, though it be the hue of heaven. For example, if it were dyed with *isatis* (woad) or indigo or other bluing dyestuffs, it is invalid for *tzitzit*.

Based on a precise analysis of this passage, certain rabbis[6] understood Maimonides to say that the Torah has no intrinsic concern for *hilazon*. The snail is only a means to an end, which is, a resilient and unfading color blue. Therefore, in his definition of *techelet*, Maimonides makes no mention of *hilazon*. Only later,[7] when he moves from the level of theory to the level of actual practice, does he talk of *hilazon*. In other

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5. Ibid 9:6.

6. See R. Zevi Hirsch Kalischer, *Derishat Zion, Ma'amar Kadishin* (Mossad Harav Kook: Jerusalem, 5724) p. 137. Many years later, R. Yosef Dov Soloveitchik *shelita* of Boston would make the identical inference from Maimonides' phraseology in *Hilchot Tzitzit*. (Lecture notes by R. Herschel Schachter, published in *Mi-beit Midrasho shel Ha-Rav*, p. 68.) See also R. Yehiel Mikhel Tuckachinsky, *'Ir Ha-kodesh Ve-ha-Mikdash* V, p.44, who pursues Rav Kalischer's line of reasoning.

7. *Hil. Tzitzit* 2:2.

words, Maimonides has provided us with a rationale for *hilazon*. *Hilazon* is not a law without a reason, but rather, tradition has specified *hilazon* for the reason that its color endures, where other dyestuffs – woad and indigo, for example – fade. But how does Maimonides know that this is the reason for *hilazon*?

It would appear[8] that Maimonides arrived at this understanding after studying the passage in Tractate *Menachot* (42b-43a) which details several chemical tests to ascertain that *tzitzit* have been dyed with authentic molluscan *techelet* and not with its cheap counterfeit, indigo or *kala-ilan*. In these tests, the genuine *techelet* survives, while its indigo counterfeit fades. Evidently Maimonides understood these tests as being more than a pure indicator. To his thinking, they provide the key to understanding why the halacha insisted on the molluscan dye over vegetable dyes, namely its superiority as a dyestuff, its permanent character. Maimonides' perception of *techelet's* specialty in terms of superior resilience would have been reinforced by consulting dyers of his time,[9] as well as classic works on the subject by Greek authors who universally characterize the molluscan purple as being superbly permanent.[10] In fact, in *Hilchot Tzitzit*, Maimonides does refer to conventional dyeing practice, "the way dyers do."

But once again, the question returns, why did the halacha concern itself that the color of *techelet* be immutable? What would be so wrong if the blue were not of an unchanging character? [For instance, we find no such stipulation regarding the black ink with which *sifrei torah*, *tefillin* and *mezuzot* are

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8. See *Kesef Mishneh*, ibid.; R. Yisrael Lifschitz, *Tiferet Yisrael*, introduction to *Seder Mo'ed;* R. G.H. Leiner, *Ma'amar Sefunei Temunei Chol*, Second Argument *(ha-ta'anah ha-sheniyah);* and R. Hayyim Kanievsky, *Kiryat Melech* to Maimonides, ibid.

9. Cf. *Kesef Mishneh, Hil. Zizit* 2:2 s.v. *keitzad tzov'in*.

10. See R. Isaac Halevy Herzog, ibid., p. 34.

written. With the passage of time, the ink does grow fainter, yet the halacha seems unperturbed in this regard.]

The Rebbe of Radzyn[11] suggested that this insistence on durability and permanence has something to do with the fact that the Torah employs the expression *kelil techelet*[12] or "whole *techelet*," but this suggestion is difficult to understand, for if such were the case, Maimonides would insist on the permanence of general *techelet*, as the expression *kelil techelet* occurs in the context of the *me'il* of the high priest, as well as the cover for the Tabernacle. But as we have seen, for Maimonides, permanence is a property of the special *techelet* of *tzitzit*, not that of the priestly garments[13] or Tabernacle).

However, it might be possible to contend, quite the contrary, that the tests to distinguish between *techelet* and *kala-ilan* or indigo, are exactly that, differential analyses, and no more. They are not the raison d'etre of *hilazon*. *Hilazon* is a halacha, a hoary tradition without a reason. The imitations of *techelet* may not have been as inferior in quality as one generally imagines. The color of the fake *techelet* dyed with indigo which Professor Yadin discovered in the so-called Bar Kokhba

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11. R. Gershon Hanoch Hench Leiner, *Ibid.*

12. *Ex. 28:31, 39:22, Num. 4:6.* See also *Menachot* 42b and *Tosafot*, ibid., s.v. *mishum she-ne'emar kelil techelet.*

13. See *Tiferet Yisrael*, intro. to Mishnah, *Mo'ed;* R. Shelomo of Chelmo, *Merkevet ha-Mishneh, Hil Tzitzit* 2:1; R. Yehiel Mikhel Halevi Epstein, *'Aruch ha-Shulhan he-Aud, Hil. Klei ha-Mikdash* 28:9-11. [Also cf. R. Ya'akov Hazan of Londres' paraphrase of Maimonides, in *'Etz Hayyim* (Ed. Israel Brody, Mossad Harav Kook: Jerusalem, 5722).] All of the above sources reject the *Mishneh le-Melech's* contention *(Hil. Klei ha-Mikdash* 8:13) that Maimonides would require *hilazon* for the *techelet* of the priestly raiment as well. Though we now know that exactly that position was held by R. Abraham Maimonides in his *Commentary to Genesis and Exodus* (London, 5719), beg. *Terumah*, we are forced to conclude that the son's opinion in this matter is not that evinced by his illustrious father in *Hil. Tzitzit* 2:1.

caves survived all these thousands of years. There are examples of Coptic or Egyptian purple dyed with indigo which are almost as old and still holding their own. In the Talmud itself there is a contraindicative passage in *Bava Kamma* 93b which states that *kala-ilan* or indigo could not be removed by washing with soap. There is room for debate here as to the merits of molluscan *hilazon* versus vegetable indigo, but the point remains: It makes perfect sense to say that the reason indigo is invalid is because it is not from the *hilazon*, not because it cannot match the *hilazon* in quality.

Even if we were to accept Maimonides' rationale, in principle there is a problem here, and that is, Jewish law does not render juridic decisions based on reasons early codifiers – even the great Maimonides – have given to halachot.

Here, let me digress for a moment in order to provide an illustration. In the 1870s, a citizen of Jerusalem, R. Hillel Moshe Meshel Gelbstein attempted to reinstitute the mitzvah of *shemirat ha-mikdash*, ritual guarding of the Temple Mount by appointed Levites. In a lengthy responsum,[14] the Gaon of Sokhatchov, R. Avraham Bornstein, analyzed the problem from various perspectives: According to the reason for the mitzvah given by Maimonides,[15] namely, as a sign of respect to the Temple, it would not apply today. But according to the alternate explication of this commandment,[16] that we are to

14. *Avnei Nezer, Yoreh De'ah*, no. 449.

15. Commentary to Mishnah, *Tamid* 1:1; *Sefer ha-Mitzvot*, positive commandment 22; *Yad, Hil. Beit ha-Behirah* 8:1. In *Sefer ha-Mitzvot*, Maimonides cites as his source, the *Mechilta*. However, as R. Hayyim Heller pointed out in his edition of *Sefer ha-Mitzvot*, the quotation occurs nowhere in our version of *Mechilta*, but rather in *Sifre Zuta, Korah*. See also *Yalkut Shim'oni*, end chapt. 752 and *Kesef Mishneh, Hil. Beit ha-Behirah*, ibid.

16. See *Numbers Rabbah* 3:12; Rashi, Num. 3:6; R. Elijah of Vilna's commentary to *Tamid* 1:1; paragraph 21 of R. Hillel Moshe Meshel

watch so as to prevent the entry of forbidden persons, the mitzvah is still applicable today.

The Assistant Rabbi of Jerusalem, R. Avraham David Rabinowitz-Teomim, (ADeReT) sought to question this entire approach which would make the *pesak halacha* subject to the various *ta'amei ha-mitzvah*. In response to Rabbi Gelbstein's query, he writes simply:

> His honor has engaged in dialectic (*pilpul*) according to all the reasons. To my humble thinking, this was unnecessary. On the contrary, without any reason, why should the mitzvah of *shemirat ha-mikdash* be inferior... as it is a foregone conclusion in the entire Torah that we do not interpret reasons of the verse, at all (*lo darshinan ta'ama di-kera kelal*). The Torah writes plainly here, so we must guard the Temple. Since even in the Temple's state of destruction, its name is yet upon it, from whence does one derive that we should be released from guarding it?![17]

We might apply the ADeReT's logic to our own discussion of *hilazon*. The case for insisting on *hilazon* is both weaker and stronger than that for *shemirat ha-mikdash*. Weaker, because the Temple is a written commandment, whereas *hilazon* is but an oral tradition. Stronger, because the reasons the *Rishonim* give regarding *Shemirat ha-mikdash* are taken from ancient sources of *Chazal*, whereas Maimonides' rationale for *hilazon* occurs nowhere in the early sources of the Rabbis. This is one of many passages in *Mishneh Torah* where Maimonides provides

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Gelbstein's *she'elah* (query), *Mishkenot le-Abir Ya'akov* [Jerusalem, no date] 2f (no pagination); R. Hayyim Zimmerman, *Igra la-Yesharim* (Jerusalem, 1983) 2a.

17. Published in *Mishkenot le-Abir Ya'akov* II (R. Yisrael Dov Frumkin, publisher *Ha-Havazelet:* Jerusalem, 5654) 10a (incorrectly paginated 9a). See also R. Moshe Sternbuch, *Mo'adim u-Zemanim* 8:349 (p. 87). I am indebted to Rabbi Y.Y. Rominek *she-yihyeh* for the latter reference.

a rationale for a halacha. Later decisors felt in no way bound by these original rationales of Maimonides, the prime example being the *Tur's* reaction to Maimonides' rationale for not rounding the corners of the head nor marring the corners of the beard.[18]

Accepting Maimonides' rationale for *hilazon* as plausible is one thing; opting for leniency in the matter based on that rationale is quite another. Just as we are not exempted of the obligation to watch over the Temple Mount by the reason provided by Maimonides – a la ADeRet – so too we cannot be disencumbered of *hilazon* by the rationale provided by Maimonides. Furthermore, it is probable that Maimonides himself would not render a substitution of *hilazon* by a synthetic dye to be halachically permissible based on his rationale. (Just as the commentators on the *Tur* are quick to point out that Maimonides himself had no intention of his rationale impacting the laws of *hakafat ha-rosh* and *hashchatat ha-zakan.*)

By way of summary, a *posek* called upon to decide the permissibility of a synthetic substitute for the secretion of *hilazon,* finds in the early literature three germane sources: A) the Tosafot (*Menachot* 42b) who indisputably opine that *techelet* by definition means *hilazon;* B) the *Tosefta* (*Menachot* 9:6) which *seems* to disqualify any substance other than *hilazon* as the dyestuff of *techelet;* and C) Maimonides' ruling which may open the door for synthetic dyes capable of simulating both the appearance and durability of the molluscan dye.

Both sources B and C are open to interpretation. R. Gershon Hanoch Leiner[19] already pointed out that logically the *Tosefta* need not contradict Maimonides' definition of *techelet.* Rabbi Leiner felt the *Tosefta* itself should be read against the backdrop of Maimonides' rationale: "*Techelet* is valid only from *hilazon,*

18. See *Tur, Yoreh De'ah,* beg. chapter 181.

19. *Ma'amar Sefunei Temunei Chol, ha-ta'anah ha-sheniyah; Ma'amar Petil Techelet, sha'ar ha-teshuvah,* 5.

producer of a durable blue; if *techelet* was produced other than from the durable dye of *hilazon*, it is invalid." If we follow Rabbi Leiner's assertion, then the *Tosefta*, rather than contradicting Maimonides' statement, would actually serve as its source, coming as it does to invalidate less than permanent dyestuffs. The *Tosefta* could support such a reading if it were to occur in the context of the special *techelet* of *tzitzit*, which Maimonides singles out for durability. But, the *Tosefta* occurs within the context of the *bigdey kehunah* or sacerdotal vestments.[20] As the *bigdey kehunah* do not warrant *hilazon* in Maimonides' system, we must conclude that the *Tosefta* and Maimonides disagree.

Based on this and the fact that our own finding that the permissiveness of Maimonides is only alleged and may not be real (his rationale being consigned to the realm of *ta'amey ha-mitzvot*), I think it becomes clear, in terms of *pesak halacha*, that the actual *dam hilazon*, the snail secretion, remains a sine qua non for the practical reinstitution of *techelet*.

There is yet another method which *poskim* are known to adopt, and that is recourse to the later responsa literature of the *Acharonim*. The *kat ha-matirim*, or permissive party, includes Rabbis Zevi Hirsch Kalischer,[21] Yisrael Lifschitz,[22] Yehiel Mikhel Tuckachinsky,[23] and Joseph Baer Soloveichik

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20. See R. Bezalel Hakohen of Vilna, *Reshit Bikkurim* II, 2 and R. Isaac Halevy Herzog, in R. Y.M. Tuckachinsky's *'Ir ha-Kodesh ve-ha-Mikdash* V, p. 56. The attempt by Rabbis Kalischer (*Derishat Zion* [Mossad Harav Kook, 5724] p. 170) and Tuckachinsky (ibid., p. 45) to relocate the *Tosefta* in *hilchot tzitzit* is difficult.

21. *Derishat Zion, Ma'amar Kaddishin* (Mossad Harav Kook: Jerusalem, 5724) p. 137.

22. *Tiferet Yisrael*, introduction to *Seder Mo'ed*.

23. In *'Ir ha-Kodesh ve-ha-Mikdash*, vol. V, pp. 43-46, Rabbi Tuckachinsky pursues the line of Rabbi Kalischer.

(of Boston).[24] All these believed that a synthetic substitute for *hilazon* would be halachically permissible, provided it satisfied Maimonides' two conditions of sky-blue appearance and unfading durability. In the roster of the *kat ha-osrim*, or rejectionist party, would appear the names of Rabbis Akiva Eiger,[25] Bezalel Hakohen of Vilna,[26] David Friedman of Karlin,[27] and Yitzhak Schmelkes of Lemberg[28] (the last three basing their decision on the *Tosefta*).

Rabbi Herzog[29] expresses ambivalence, allowing synthetic *techelet* according to Maimonides' rationale for *hilazon*, but himself differing with Maimonides as to the halachic raison d'etre of *hilazon*.

Rabbi Gershon Hanoch Leiner of Radzyn[30] is of the opinion that *techelet*, though not necessarily from *hilazon* per se, must nevertheless be from a *ba'al chai*, an animate creature. The source for this allegation is a certain interpretation of the *Yerushalmi*.[31] Needless to say, contemporary synthetic dyes

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24. *Shiur* delivered at Yeshivat R. Yitzchok Elchanon, New York, recorded by *talmidim*. See note 6 above.

25. Letter to his disciple R. Zevi Hirsch Kalischer, published in the latter's *Derishat Zion, Ma'amar Kaddishin* (Mossad Harav Kook ed., p. 131).

26. *Reshit Bikkurim* II, 2.

27. *She'eilat David, Kuntress Derishat Zion vi-Yerushalayim, ma'amar gimmel*.

28. *Beit Yitzchak, Yoreh De'ah*, II, 83.

29. Responsum published from manuscript by R. Menahem Burstin, *Ha-Techelet*, p. 378, 380; and *Ir ha-Kodesh ve-ha-Mikdash* V, 56-57.

30. *Ma'amar Petil Techelet, Kuntress Sha'ar ha-Teshuvah*, 5; *Ma'amar Eyn ha-Techelet* chapt. 46.

31. *Kilayim* 9:1: *"Techelet, argaman* and *tola'at shani* (Exodus 25) - Just as *sheni tola'at* is a thing which has in it the spirit of life, so the other thing must have in it the spirit of life." Rabbi Leiner interpreted

would not satisfy this condition.

Given the above, it would certainly be a difficult task for any *posek* today to allow synthetic *techelet* in *tzitzit*. The *techelet* for *bigdey kehunah*, the priestly vestments, is quite another matter. There, one has the express permission of Maimonides to use any substance which will provide a skyblue color.

Since as far as *tzitzit* is concerned, there appears no halachic alternative to *dam hilazon*, the snail secretion, researchers in the field who are attempting to cultivate the snails en masse with the express purpose of dyeing *techelet – le-shem mitzvat tzitzit*, should be encouraged to continue their efforts in just that direction.

> And those that bring many to righteousness shall be like the stars, for ever and ever (Daniel 12:3).

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the *Yerushalmi* to mean that just as the dye *tola'at shani* is from a living thing (i.e. an insect), so the dyes of *argaman* and *techelet* must also be obtained from living creatures. (So, too, R. Elijah of Fulda in his commentary to *Yerushalmi*.) R. Moshe Margalit in his commentaries *P'nei Moshe* and *Mareh ha-Panim*, interpreted the passage as license to dye *tola'at shani* from living creatures other than the kermes insect, exegesis which, by his own admission, pits the *Yerushalmi* against the *Sifra, Metzora'* and the *Sifre Chukkat*. The recently published manuscript of Rabbenu Hillel's commentary to *Sifre Chukkat* to *Sifre'* places in our possession an early authority's perception of the *Yerushalmi*. Commenting on the *Sifre', Chukkat, 82b*, s.v. *ve-lo she-shinato davar aher*, Rabbenu Hillel writes; "We read in the *Yerushalmi... Techelet argaman* and *tola'at shani* are of wool. Just as *shani tola'at* is a thing which has in it the spirit of life, namely the worm, so *techelet* and *argaman* are from a thing which has in it the spirit of life, namely lambs' wool which has in it the spirit of life.„ Thus the point of the *Yerushalmi* is, that just as *tola'at shani* employs woolen fabric, so too *techelet* and *argaman* definitionally are dyed wool and not a vegetable fabric.

Carrying People On Shabbat

by Rabbi Nahum Spirn

Introduction

Carrying on Shabbat is forbidden by the Torah. As we shall see, however, this is the case only when carrying objects, not when carrying people. This essay will explore the following questions: Why is human cargo different than inanimate cargo? To which human beings does this special law apply? What are the exceptions? And finally, what are the practical consequences of this interesting halacha?

Chai Nosei Es Atzmo

The Mishnah in *Shabbat* (93b) teaches that one who carries a living person is *patur*, exempt from culpability. (As usual in the Talmud, *patur* means *"patur aval assur*[1] – although exempt from biblical restriction, a rabbinic prohibition remains.) The Gemara (94a) says that this ruling is unanimous. However, regarding carrying a living animal, a dispute arises between the Sages and R. Natan: R. Natan holds that one who carries an animal is also exempt, while the Sages – whom the halacha follows[2] – consider him culpable. [3] The distinction between an animal and a person is that regarding a person, we say *"chai nosei et atzmo"* ("a living thing carries itself"), whereas regarding an animal we do not. Animals are different, say the Sages, because they *"mesharveti nafshayhu"* (literally, "stiffen themselves"). This requires explanation.

Rashi explains that an animal being carried does not

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1. שבת ק"ז.

2. ע' תוי"ט פסחים (ד':ג'), חוו"א או"ח (מ"ה:ג').

3. "חייב" (culpable) always means חייב מיתה if violated intentionally (with warning, witnesses, etc.) and חייב קרבן if violated בשוגג.

help make its carrier's job easier; rather, it tries to get down and "makes itself heavier." By contrast, Rashi implies that a human being who is being carried positions himself in a way that facilitates his being carried; he "makes himself lighter." Tosafot, as explained by the *Korban Nitanel,* add that in the Tabernacle, only things which did *not* "make themselves lighter" were carried. Since the *melachot* (actions forbidden on the Sabbath) are derived from activities connected with the Tabernacle *(mishkan),*[4] we consequently have no source from which to derive a biblical prohibition for carrying things which *do* aid in being carried.

But what if the person being carried is *not* helping out? If we look at our Mishnah (93b), the Mishnah actually exempts one for carrying a human being *even if he is in a bed.*[5] It is difficult to see how such a person is aiding in his own carriage!

Rav Moshe Feinstein has explained[6] that the exemption of *chai nosei et atzmo* indeed applies even if the person being carried is not helping out and even if he is being carried against his will. Since the *nature* of human beings is that they "make themselves lighter," they are not included in the category of "objects whose carriage is biblically proscribed." Similarly, carrying animals, who by nature "make themselves heavier," would be forbidden by the Torah even if a particular animal were to aid in its own carriage.

Rav Feinstein's explanation serves to clarify our Mishnah as well. Even though the particular human being referred to in the Mishnah cannot help in his own carriage, as he is lying on a bed, nevertheless, since he is potentially able to carry himself (and is therefore presumed generally to aid in

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4. שבת צ"ו:, ב"ק ב:.

5. The Mishnah explains that there is no culpability for carrying the bed since it is ancillary to the person.

6. אגרות משה יו"ד ח"א סי' ב'.

his own carriage), he is in the category of things which "make themselves lighter," and the exemption of *chai nosei et atzmo* applies.[7]

How old does a human being have to be for us to say that he *"nosei et atzmo,"* i.e. that he is capable of aiding in his own carriage? The Gemara in *Shabbat* (141b) says explicitly that a baby is not considered *nosei et atzmo* according to the Sages. But at what stage is a baby no longer a baby, so that we can say he does "carry himself?"

According to most *Rishonim*,[8] a child who is old enough to walk, at least with help, is old enough to be *nosei et atzmo*. This is derived from the Mishnah in *Shabbat* (128b) which permits a woman to help a child walk on Shabbat by holding his arms. Rashi explains that this is permissible because even if the woman were to forget herself and carry the child, the violation would be only rabbinic in nature since, biblically speaking, *chai nosei et atzmo*. The Rabbis therefore did not institute such a prohibition *(gezeira)*, for it would constitute a *gezeira l'gezeira*[9] a "double prohibition." By contrast, the

7. R. Natan, on the other hand, holds that an animal, too, is *nosei et atzmo*, and one who carries an animal is therefore exempt. The simple explanation of R. Natan's view is that a living creature is easier to carry then a dead one of equal weight, a point which is generally recognized. (Hence the expression in our vernacular, "dead weight.") This is sufficient, in R. Natan's opinion, in order to say *chai nosei et atzmo* in reference to animals [*Iggerot Moshe* (ibid)].

8. כן רשב"א, רמב"ן, ור"ן (בחידושים המיוחסים לריטב"א) שבת (קמ"א:). ומפורש שם ג' חילוקים: אם התינוק כבר נוטל אחת ומניח אחת, לכ"ע אמרינן חי נושא את עצמו. אם גורר, בזה נחלקו רבנן ור' נתן, דלרבנן חייב ולר' נתן פטור. ואם אינו מכיר בהילוך כלל, גם לר' נתן חייב ע' רשב"א.

9. The term *"gezeira"* refers to a rabbinic decree enacted to protect a Torah law. A *gezeira* thus prohibits an activity lest one come thereby to violate a Torah law. But *gezeirot* were not formulated to protect [other] rabbinic laws, and any *gezeira* whose purpose would be to prevent violation of a rabbinic law, would be labeled a *"gezeira*

Mishnah continues, if the child is too young to support its own weight on one leg at a time (as one does while walking), it would be forbidden, for the mother is then dragging the child, which is equivalent to carrying.[10]

We see from this Mishnah that once a child is old enough to walk with adult help, we say *"chai nosei et atzmo,"* such that carrying the child would be forbidden only rabbinically.[11] This is the halacha.[12]

Exceptions

There are a number of exceptions to the principle of *chai nosei et atzmo:* 1) If the person being carried is tied up, he is unable to aid in his own carriage; here *"chai nosei et atzmo"* does not apply. One who carries such a person is biblically culpable.[13]

2) If the person being carried is too sick to walk, he lacks the ability to carry himself, and it would be a biblical violation to carry him.[14]

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l'gezeira" and would not be instituted *[Beitza* 3a].

10. כן איתא ברש"י ור"ן על המשנה. וע' בה"ל (ש"ח:מ"א) בדעת הר"ן על הגמ' שגרירה אסורה בשבת רק מחמת גזירה שמא ישא. ואף שלא ידעתי לפרש את דברי הר"ן בטוב טעם, קשה טובא לומר דאין בגרירה איסור תורה דהוצאה, ע' שבת (צ"א:) "היה מגרר ויוצא וכו'" ומגיד משנה הל' שבת (י"ג: י"א). וראיתי במאמר מרדכי שהביא גם הוא ראיה מהתם, והוסיף עוד ראיה משבת (ח:) ותוס' שם. (ותימה שמ"מ הסיק כדברי הבה"ל). וע' חזו"א (מ"ה:ד') שכתב שאף לר"ן שגרירה גמורה היה כנשיאה ממש בשבת.

11. כן ס"ל לראשונים הנ"ל. אך ע' בעה"מ (קמ"א) ומאירי (שם וקכ"ת:) שסוברים שאין אומרים דזז נושא את עצמו אלא בקטן הרגיל ללכת בעצמו, וע"ש שהסבירו את המשנה (קכ"ת:) דלא כרש"י. ונחלקו האחרונים בשיטת התוס', ע' חכמת שלמה (צ"ד.), שו"ת רע"א סי' כ"ח, ומ"א סי' ש"ת ס"ק ע"א.

12. מ"א ורע"א הנ"ל (הערה 10); מאמר מרדכי (ססי' ש"ח).

13. שבת (צ"ד.) ורש"י שם.

14. כן איתא יומא (ס"ו:) בדעת ר' נתן לגבי בהמה, והעירו הראשונים בכן הדין לגבי בני אדם לפי רבנן דר' נתן. כן רמב"ם הל' שבת (י"ח:טז), מאירי שבת (צ"ד.), ותוס' שבת (ק"ל.).

3) Similarly, if one knows that a given individual cannot carry himself, it would be biblically forbidden to carry him. A theoretical example of such an individual is a person who is so heavy that he never walks on his own.[15]

Summary

To summarzie what we have learned: in the Torah, there is no prohibition to carry someone who has the potential to aid in his own carriage. This includes any child old enough to walk with adult help, and certainly anyone older. Even if the person being carried is not actually helping the one who carries him – e.g. he is sleeping; he is being dragged; he is on a bed; or even if he is kicking and screaming – *chai nosei et atzmo* applies. (A rabbinic prohibition of course remains.) However, if the person being carried lacks even the potential to aid in his own carriage – e.g. he is too sick or is otherwise unable to walk, or he is tied up – then *chai nosei et atzmo* does not apply and carrying him would constitute a biblical violation.

Practical Applications

The obvious question must now be raised: We have explained that even where *chai nosei et atzmo* applies, a rabbinic prohibition remains. Practically speaking, then, is there any permissible way to carry a person on Shabbat? (Note: We are not discussing here a situation where someone's life is in danger, when of course even biblical prohibitions are waived, nor even a case of potential loss of a limb, when all rabbinic prohibitions – certainly including the one under discussion

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וע' אג"מ או"ח ח"ד סי' צ' שסובר דכיון דכמעט כל חולה יכול ללכת קצת, צ"ל דדין חולה דחייב שייך אף ביכול ללכת מעט מעט, כיון שגופו מכביד מחמת חוליו. וק"ק דא"כ נתת דבריך לשיעורים.

15. מאירי שם, שהסביר הא דהני פרסאי דלא כרש"י.

here – are waived.) [16]

The answer is that there are mitigating circumstances under which, though a rabbinic violation would still be prohibited, a *shvut d'shvut,* or "double *d'rabbonon,*" would be permitted. In other words, when the rabbis made restrictions, they specified that these restrictions need not be heeded in certain situations. Also, they did not apply rabbinic restrictions to other rabbinic restrictions. This would be a *"shvut d'shvut,"* a double rabbinic restriction, which is not valid. We shall shortly discuss what this means in practical terms. But first, let us note four examples of "mitigating circumstances" given by the *Shulchan Aruch.*[17] They are as follows:

a) When one is in pain *(m'kome tza'ar).* This includes emotional anguish.[18]

b) In a situation of great[19] financial loss.

c) When one wants to fulfill a mitzvah.[20]

d) In general, when there is any pressing, urgent need *(tzorech gadol).* Our guiding principle, then, is: If one has to carry a human being for one of the above four reasons, one is permitted to do so – but only in a way which constitutes a *shvut d'shvut.*

Example: Perhaps the most common example of this issue is when a child is crying *(m'kome taz'ar* – (a) above) and insists on being carried. Can this be done?

If the child is old enough to carry himsef, as defined above, we already have one *"d'rabbonon"* (rabbinic stricture),

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16. או"ח שכ"ח: י"ז

17. או"ח ש"ז:ה

18. ע' תוס' שבת (נ':)

19. מ"א ש"ם ס"ק ז'; מ"ב סי' של"ד ס"ק ח'

20. ע' רמ"א שם בשם העיטור שאפילו שבות אחת מותרת במקום מצוה. וכתב הרמ"א סי' רע"ו: ב' שאין לסמוך על זה אלא במקום צורך גדול.

because the Torah actually permits him to be carried; we need "add" only one more to create a *shvut d'shvut* and permit this act of carrying. How do we accomplish this?

There are various methods of performing an action in such a way as to reduce the halachic severity; thus, one can do something in such a way that instead of being biblically prohibited, it is only rabbinically forbidden. Similarly, it is possible to do an act in such a way as to make it a "double rabbinic prohibition" – *shvut d'shvut* – and therefore *not* forbidden.[21]

1) *Amira L'Nochri* – Telling a Gentile to do any *melacha* which, for a Jew, would constitute a biblical prohibition, is only forbidden rabbinically.[22]

2) *Sh'nayim She'asa'uhu* – If two people together do a *melacha* which either one could have done by himself, they are both exempt, because neither is doing a complete *melacha*.[23]

3a) The minimum distance for culpability for carrying on Shabbat is four *amot*.[24] Carrying less than four *amot* is permitted.[25] Can a person, then, carry something three *amot*

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21. אינני מביא כאן את השבות דכלאחר יד (שבת צ"ב.) כי אינו מעשי בניד"ד.

22. ע' רמב"ם הל' שבת (ו':א'); רש"י שבת (קנ"ג.) ד"ה מאי טעמא; טעם שלישי בערוה"ש (סי' "ז: י"ב).

23. משנה שבת (צ"ב:), רמב"ם הל' שבת (א': ט"ו).

24. ב'-ג'. ע' טור סי' שמ"ט, שו"ע שם:
According to R. Moshe Feinstein (*Orach Chaim* I:136), this is equivalent to 85 inches, or just over 7 feet.

25. כ"כ הרמב"ם (י"ב: ט"ו) ומ"מ שם בשם תוס' ורשב"א. (ומובא המ"מ בפתיחה הכוללת של הפמ"ג להל' שבת.) דלא כראב"ד האומר שמותר רק במקום הדחק. וע' שמירת שבת כהלכתה פרק י"ז ס"ק מ'. וע"ל הערה 32. ולענ"ד יש להוסיף דלכאורה קשה טובא לומר שגזרו חכמים לאסור טלטול פחות מד"א, דא"כ בנפל כובעו מעל ראשו יהיה אסור להחזירו לראשו דהא נושאו כמה אינשע"ז [דהא דאינו מזיז רגלים אינו מעלה, ע' שבת (ח': - ט'.)], וזה לא שמענו, ואדרבה איפכא שמענו מדברי המ"ב סי' ש"א ס"ק קנ"ג, ע"ש.

and stop, go another three *amot* and stop, etc., thus transporting an object as far as he wants? This is called *pachot pachot me'dalet amot* and was forbidden by the Rabbis.[26] Therefore if one were to carry an object *pachot pachot me'daled amot* (instead of carrying it continuously in the usual fashion), one would be violating only a rabbinic, rather than a biblical, prohibition.

3b) Besides carrying four *amot* in a *reshut harabim* (loosely translated, a public domain), one is also culpable for carrying on Shabbat if one carries from a *reshut hayachid* (loosely translated, a private domain) to a *reshut harabim* (or vice versa). Crossing that threshold from one domain into another – even if the actual distance carried is minute – constitutes a biblical violation. Method (3a) is therefore not applicable.

But this prohibition, too, can be mitigated by using the following principle: In order to be culpable, one must move the entire object (which is being carried or dragged) across the threshold.[27] If a person stops moving the object when it is still partially in the domain from which he started, even if he subsequently carries it the rest of the way, he has violated only a rabbinic prohibition.[28]

We are now ready to create the *shvut d'shvut* necessary to carry our crying child. Since he is old enough to walk with help, he is *nosei et atzmo* (one *d'rabbonon).* We then use one of the above methods to turn the single *d'rabbonon* into a double *d'rabbonon:* 1) A Gentile can be employed to do the carrying; 2) two Jews, each of whom is capable of carrying the child by himself (for example, the father and mother), could carry the child together; or 3) the carrying may be done in spurts of less than four *amot,* with care being taken that the threshold between public and private domains (and vice versa) be crossed

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26. שו"ע סי' שמ"ט: ג'. וע"ע בה"ל שם.

27. שבת (צ"א:), רמב"ם הל' שבת (י"ב: י"א).

28. מ"מ שם בשם רש"י.

in stages.

Carrying the crying child using any of these methods is permissible. Similarly, a baby carriage may be used, following the same guidelines.[29] If the child is not crying, however, and the parent is merely impatient to walk at the child's pace, there would be no justification to carry the child, with or without the above methods.[30]

Example: Until now we have dealt with carrying a child who is *nosei et atzmo*. But what if the child is too young to walk (even with adult help), in which case *chai nosei et atzmo* does not apply? Is there a way of carrying him in a permissible fashion (assuming, of course, that a great need exists, as above)?

Example: The same question applies to carrying an adult who is unable to walk. We have already learned that *chai nosei et atzmo* does not apply to one who is tied up or is too sick to walk. We must now add that it similarly does not apply to one who cannot walk without a cane or crutches; nor does it apply to one who is bound to a wheelchair.

Now if a person cannot walk without a cane or crutches, these are considered by Jewish law to be equivalent to the shoes of a disabled person, or like clothing, and thus are considered part of him.[31] The same applies to a wheelchair.[32] Accordingly, the disabled person may certainly transport

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29. ק"ו ממטה הטפלה לאדם במשנה (צ"ג:), דכאן עדיף טפי ("baby carriage") דהלא נקראת העגלה על שם התינוק

30. אג"מ או"ח ח"ד סי' צ"א.

31. תוס' ערא"ש שם; תוס' יומא ע"ט.; שו"ע סי' ש"א: ט"ז-י"ז.

32. אג"מ או"ח ח"ד סי' צר; וכן דעת השואל בשו"ת מנחת יצחק ת"כ סי' קי"ד. רק המנ"י נסתפק שם דאולי כסא עם אופנים דינו כמטה ולא כקב כיון שאינו נותן לחולה הכח ללכת. ולא הבנתי מאי נ"מ, דאף אם נימא הכי (וע"ש במכתבו הנדפס בסוף הסימן מה שהשואל השיב לו), מ"מ מטה טפלה לאדם, וכמו שאין איסור בנשיאת עצמו, כמו כן אין איסור בנשיאת המטה, וכמש"כ המנ"י עצמי שם (אות ה').

himself by means of the crutches or wheelchair.[33] But for someone else to carry (or wheel) this person would constitute a biblical violation of carrying since *chai nosei et atzmo* does not apply.[34]

Let us say, then, that the baby in our example is crying. Or that the wheelchair-bound person would suffer anguish in not being able to attend a *simcha* (*m'kome taz'ar*[35]). What can be done?

The principles we have delineated come into play: We will try to render the biblical prohibition inapplicable by creating a situation of *shvut d'shvut*. This can be accomplished by employing *combinations* of the methods enumerated above. (I will focus here on the wheelchair bound person, but these solutions apply equally to the infant et alia.)

One solution is to have a Gentile wheel the disabled person in spurts of less than four *amot* [(1))-((3a)]. Another solution is for two Jews, each of whom is capable of wheeling the person by himself, to wheel him together, and again, in spurts of less than four *amot* [(2)-(3a)]. (In either case, the threshold between public and private domains should be crossed in stages [(1) or (2) with (3b)]).[36] Alternatively, if one can find two able-bodies Gentiles to wheel the person together, the Gentiles can walk in the usual fashion [(1)-(2)].[37] All of these combinations create a *shvut d'shvut* situation which is

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33. Ibid. If there is difficulty navigating curbs, someone else can help him, because it is permissible to carry less than four *amot [Iggerot Moshe* (ibid)].

34. אג"מ שם.

35. שם

36. ק"ל מש"כ באג"מ (הנ"ל) להביא נכרי שני לגמור את ההכנסה או ההוצאה דלכאורה א"צ לזה, ע"ל הערה 27.

37. ע' מאירי ב"ק (ס'.) דלא שייך פטור שנים שעשאוהו אלא בבני חיובא. אבל המנ"י לא הביאו ולא חש לזה בהצעתו הוא בנשיאת הכסא עם אופנים, ע"ש (אות י').

permitted in cases of great need.

Chai Nosei Et Atzmo – In a *Carmelit*

Everything we have said until now has been assuming a biblical prohibition of carrying. Where *chai nosei et atzmo* applies, the prohibition becomes only rabbinic in nature.

What is the halacha, however, regarding a *carmelit*, where carrying is only proscribed rabbinically in the first place?[38] (Examples of a *carmelit* include a bungalow colony, an open field, a village street, or a body of water.)

It is clear that carrying an infant (or one who is too sick to walk, etc.) in a *carmelit* is rabbinically forbidden, because any carrying which is biblically proscribed in a *reshut harabim* is rabbinicaly proscribed in a *carmelit*. What is less clear is the halachic viability of carrying an older child (or adult) – where *chai nosei et atzmo* applies – in a *carmelit*. This issue is the subject of debate in the *Acharonim*, and it depends on the nature of the rabbinic enactment of *carmelit*.

Was it formulated as a *gezeira*: Don't carry in a *carmelit* lest you come to carry in a public domain? If that was the formulation, carrying a person who can carry himself in a *carmelit* would be permitted – even in the absence of any mitigating circumstances – because forbidding it would amount to a *gezeira* on a *gezeira*. (Don't carry one who is *nosei et atzmo* lest you come to carry in a situation where *chai nosei et atzmo* does not apply; and don't do this in a *carmelit* lest you come to

38. A *carmelit* is neither a *reshut hayachid* nor a *reshut harabim*. Even though biblically it is permitted to carry in a *carmelit*, the Rabbis prohibited it. (The nature of this prohibition will be discussed below.) They similarly prohibited carrying from a *carmelit* into a *reshut hayachid* or *reshut harabim*, as well as the reverse (from these domains into a *carmelit*). For a full definition of the various domains, see R. Herschel Schachter's "Laws of Eruvin," transcribed by R. Moshe Rosenberg in the *Journal of Halalcha and Contemporary Society* (Vol. 5, Num. 5).

carry in a public domain.) This is the opinion of the *Pri T'vuah*,[39] and, despite R. Akiva Eiger's objection to the above reasoning,[40] it is his conclusion as well that one may be lenient.

The *Magen Avraham*[41] and *Chafetz Chaim*[42] disagree. The concept of *carmelit* was not formulated as a *gezeira* (lest one come to carry in a public domain), but rather, the Rabbis declared that a *carmelit* is a rabbinic *reshut harabim*. Thus any type of carrying forbidden in a public domain, even if only rabbinically, is forbidden in a *carmelit* as well. Therefore, carrying a person who is *nosei et atzmo* is forbidden in a *carmelit*, for it would constitute a *shvut d'shvut*, a double *d'rabbonon*, which is prohibited, and not a *gezeira l'gezeira*.[43]

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39. מובא בשו"ת רע"א קמ"א סי' כ"ח.

40. R. Akiva Eiger agrees that the enactment of *carmelit* was formulated as a *gezeira*. (In a striking parallel, R. Akiva Eiger argues with the ruling of the *Shulchan Aruch* (349:5) and permits carrying פחות מד' אמות in a *carmelit*; see his gloss there.) But he challenges the assertion that *chai nosei et atzmo* was similarly formulated. The Rabbis forbade carrying a person, not as a *gezeira* last one come to carry where *chai nosei et atzmo* does *not* apply, but rather simply because a person, still in all, is a "load." Thus carrying a person in a *carmelit*, while certainly involving two *d'rabbonons*, cannot be labeled a *gezeira l'gezeira*. (see footnote 43) It would thus be prohibited, except under such mitigating circumstances as described above.

41. סי' ש"ח ס"ק ע"א.

42. בה"ל סי' ש"ח:מא.

43. The term "*shvut*" is a generic label for any rabbinic prohibition when two such prohibitions come into play together in a given case, we have a *shvut d'shvut*, which is also prohibited. Though it seems reasonable to adopt this stricter position regarding a *carmelit* (given R. Akiva Eiger's own hesitancy to be lenient), regarding an apartment building (חצר שאינה מעורבו) - halachically more lenient than a *carmelit* (*Sh.A.* 303:18) - it seems that one may be lenient. Thus, carrying a child who is old enough to walk with help would be permitted in an apartment building even in the absence of mitigating circumstances.

Of course, where a great need exists, we have learned that a *shvut d'shvut* is permitted. Therefore, to go back to an earlier example, if a child is old enough to walk with help, and he is crying (*m'kome tza'ar*), it is permitted to carry him in a *carmelit*,[44] no less than in a *reshut harabim*.

Conclusion

We have seen that *chai nosei et atzmo* applies to anyone who has the potential to aid in his own carriage, and that carrying such a person is not forbidden by the Torah, although it is rabbinically proscribed. Where great need exists, the person may be carried by performing the act of carrying in such a manner as to render it *shvut d'shvut*, or "double *d'rabbonon*," using one of the methods enumerated. Even where *chai nosei et atzmo* does not apply, a *shvut d'shvut* can be created, using combinations of those methods. Finally, according to some *Acharonim*, *chai nosei et atzmo* is completely permissible in a *carmelit*. According to others, a *shvut d'shvut* exists, and such carrying is prohibited, barring great need.

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44. אג"מ או"ח ח"ד סי' צ"א.

The Living Will

Rabbi A. Jeff Ifrah

Introduction

From the moment the public realized that much of medical technology is utilized not only to sustain life but also to prolong the dying process, the public has demanded the means to limit such "high-tech" interference according to personal discretion and beliefs. New technology has created unforseen ways of prolonging life. Consequently, for both Jewish law [halacha], and the state, the parameters of a long-standing presumption mandating the preservation of life in virtually any situation have been complicated.[1]

The opportunity to exercise the right to terminate life-sustaining treatment tends to occur when a patient is unable to express his desire to do so; therefore, courts have advised patients to express their wishes regarding medical treatment before they are rendered incompetent.[2] The expression of one's wishes constitutes a "living will."[3] The document which embodies a person's decision to appoint an agent to carry out his/her wishes is called a "health care proxy."

In order to ensure that a patient's wishes are given legal effect, states are encouraged to promote legislation providing

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1. See, "Comment, Balancing the Right to Die with Competing Interests: A Socio-Legal Enigma," 13 *Pepperdine L. Rev.* 109 (1985).

2. *Matter of Weschester County Med. Center (O'Connor)*, 72 N.Y. 2d 517 *reversing* 139 A.D.2d 344 (1988). The *O'Connor* court declared, "[t]he ideal situation is one which the patient's wishes were expressed in some form of a writing, perhaps a 'living will,' while he or she was still competent." *Id.* at 531.

3. For a library of information on articles, books and state statutes relating to living wills, see Burgalassi, *Living Wills - The Right to Die: A Selective Bibliography with Statutory Appendix*, 45 Rec. of the Assoc. of Bar Of City of N.Y. 816 (1990) [hereinafter Burgalassi].

for a patient's advance directive.[4] Many states have legislation either validating living wills or establishing durable powers of attorney.[5] Living will legislation specifically authorizes competent adults to prepare, in advance, a document authorizing the withdrawal or requiring the withholding of "specified medical treatments in the event of a catastrophic illness or condition which renders the declarant incompetent to make such a decision personally."[6] Durable power of attorney legislation, which permits establishing a health care proxy, allows an individual to appoint a friend, relative, legal or religious adviser to make medical decisions in the event that the individual is no longer competent to make them him/herself.

Notably, once the living will is given effect, or the agent is appointed, powers to execute the provisions of the living will or to execute the wishes of the agent are not absolute.

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4. In states, such as New York, task forces have been established by the governor "to develop recommendations for public policy on a range of issues arising from recent advances in medical technology: the determination of death, the withdrawal and withholding of life-sustaining treatment . . . ." The New York State Task Force was charged by Governor Cuomo "to present its recommendations in the form of proposed legislation, suggested regulations or a report describing its conclusions." *Life Sustaining Treatment: Making Decisions and Appointing a Health Care Agent*, The New York State Task Force on Life and the Law, at i, (1987) [hereinafter Task Force].

5. Twenty-Five states and the District of Columbia have elected to enact durable power of attorney statutes which permit a patient to appoint another agent to carry out the patient's wishes. A durable power of attorney "is the agent who 'stands in the shoes' of the patient. It defines the agent's obligations to the patient and the agent's authority in relation to others: health care professionals, medical institutions and the patient's family members." Task Force, *supra* note 4, at 91.

6. Gelfand, "Living Will Statutes: The First Decade," 1987 *Wisc. L. Rev.* 737, 740 (1987) [hereinafter Gelfand].

Indeed, advance directive legislation does not circumvent judicial criteria establishing when treatment can be terminated. In some cases that time occurs when the patient has suffered brain death. Whether or not brain death occurs at the time the patient suffers an irreversible coma as a result of permanent brain damage or whether it occurs at the time of irreversible cessation of all functions, or of circulatory and respiratory functions, of the entire brain, including the brain stem is a question subject to legal, medical and ethical debate.[7]

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7. "Brain dead" is the definition of death constructed by the Ad Hoc Committee of the Harvard Medical School. See, "Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Brain Death, A definition of Irreversible Coma," 205 *J.A.M.A.* 337 (1968). According to the Committee, death occurs when an individual sustains irreversible coma as a result of permanent brain damage. The committee argued that brain death could be diagnosed by satisfying the following three conditions known also as the "Harvard criteria":

1. Unreceptivity and Unresponsivity - the patient exhibits a total unawareness to externally applied stimuli and inner need and complete unresponsiveness even when exposed to intensely painful stimuli.

2. No Movements or Breathing - total absence of spontaneous breathing or muscular movements or response to stimuli.

3. No Reflexes - absence of elicitable reflexes, e.g., the pupil of the eye is fixed and dilated and does not respond to bright light from a direct source.

The Harvard criteria have come under attack from both ethicists and theologians. See articles on the subject in *Journal of Halacha and Contemporary Society* Vol. 19. See Isaacs, "Death, Where is thy Distinguishing?," 8 *Hastings Cent. Rept.* 5 (Feb. 1978); Bleich, "Establishing Criteria for Death," reprinted in *Jewish Bioethics*, 277-295 (ed. Rosner & Bleich 1979) [hereinafter Criteria for Death]. A. Soloveichik, "The Halachic Definition of Death," *Jewish Bioethics*, 296-302 (ed. Rosner & Bleich 1979). Further, proposals have been made to correct the deficiencies of the definition, *see e.g.*, President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Defining Death* (Washington:

Thus, advance directive legislation does not necessarily provide that a patient's wishes regarding termination of life before the onset of brain death, by any definition, will be upheld. However, to the extent that a patient's wishes conform to state standards, advance directive legislation does provide a vehicle to ensure that the incompetent patient's medical decisions are executed. Thus, advance directive legislation allows both relatives and physician to avoid the cumbersome, costly, and time-consuming judicial process that is characteristic of health-care cases where the wishes of the patient are uncertain.[8]

1981) (recommending the adoption of the Uniform Determination of Death Act ("UDDA") [hereinafter President's Commission] which defines death as occurring when;

1. irreversible cessation of circulatory and respiratory functions, or

2. irreversible cessation of all functions of the entire brain, including the brain stem.)

Id.

Over ten states and the District of Columbia have enacted the UDDA by statute. *See, e.g.*, Cal. Uniform Determination of Death Act, amending Health and Safety Code # 7180-7183, 1982 New Laws 4451; Colo. Rev. Stat. # 12-36-136 (Supp. 1981) and D.C. Code Ann. # 6-2401 (Supp. 1982).

8. Notably, while patients have the right to refuse extraordinary means of artificial life support, and while states have enacted living will legislation to permit the patient a means to communicate that desire, courts are always open to hear about circumstances caused by disagreement or misplaced motives or allegations of malpractice. See *John F. Kennedy Memorial Hospital, Inc. v. Bludworth*, 452 So. 2d 921 (Fla. 1984) (reversing a lower courts ruling which held that the guardian of a comatose terminally ill patient did not need to obtain court approval before removing that patient's feeding tube in order for consenting family members, physicians and the hospital to be relieved of civil and criminal liability).

Recently, both New York[9] and New Jersey[10] have joined their sister states in promulgating rules regarding the appointment of health care proxies and the validity of living wills. However, both judicial and legislative action have sparked moral and ethical debate, particularly among those with very stringent religious views.

In this article, the writer will discuss the evolution of the right to privacy. That discussion will serve as a springboard to the legal aspects involved in the honoring of living wills and health-care proxies and the ethical aspects involved in terminating life-sustaining treatment.[11] Finally, this article will briefly review religious response to advance directive legislation and highlight the areas of halachic significance.

The Evolution of the Right to Privacy

The constitutional right to privacy evolved from the seminal case *Griswold v. Connecticut*.[12] In *Griswold*, the Supreme

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9. New York Public Health Law # 2960 to -2994 (McKinney 1990) which took effect January 18, 1991, provides for the appointment of health care agents and proxies.

10. New Jersey recently approved S-1211, the Advance Directives for Health Care Act, over many religious objections. See e.g. "Right to Die Is Approved By Assembly in Trenton," *New York Times*, June 11, 1991, # B, at 1, col. 2.

11. See generally, *Deciding to Forego Life Sustaining Treatment: A Report on the Ethical, Medical, and Legal Issues in Treatment Decisions*, President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research (1983) [hereinafter President's Commission]; see also, Doudera & Peters, *Legal and Ethical Aspects of Treating Critically and Terminally Ill Patients* (1982) [hereinafter Doudera & Peters].

12. 381 U.S. 479 (1965). *Griswold* involved the constitutional right of a married couple to use contraceptives. As a matter of law, *Griswold* held that zones of privacy are created from specific guarantees in the

Court declared that "the First Amendment has a penumbra where privacy is protected from governmental intrusion."[13] The right to privacy as established in *Griswold* was extended to protect a woman's autonomy regarding her decision to carry her unborn fetus to term in *Roe v. Wade*.[14] In *In re Quinlan*,[15] the New Jersey Supreme Court relied upon the *Griswold* doctrine to "recognize that a right of personal privacy exists and that certain areas of privacy are guaranteed under the Constitution."[16] The Court went on to conclude, "[p]resumably

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Bill of Rights. *Griswold* relied upon precedent created in cases such as *Pierce v. Society of Sisters*, 268 U.S. 510 (1924) (establishing that the right to educate one's children as one chooses is grounded in the First and Fourteenth Amendments); and *NAACP v. Alabama*, 357 U.S. 449 (1958) (asserting that freedom of association is a peripheral First Amendment right).

13. 381 U.S., at 483. This right existed at common law as well. The most frequently quoted formulation of the self-determination doctrine at common law is that of Justice Benjamin N. Cardozo in *Schloendroff v. Society of New York Hospital*, 211 N.Y. 125, 105 N.E. 92 (1914):

> In the case at hand the wrong complained of is not merely negligence. It is trespass. Every human being of adult years and sound mind has a right to determine what shall be done with his own body; a surgeon who performs an operation without the patient's consent commits an assault, for which he is liable in damages.

Id. at 129-30.

14. 410 U.S. 113 (1973). Unlike *Griswold*, the right to privacy in *Roe* involved a more careful balancing, for *Roe* involved a strong State interest in protecting fetal life and maternal health. Nevertheless, the Court found that under certain circumstance a woman's constitutional right to privacy outweighs the State's interest in fetal life and maternal health.

15. 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976).

16. 355 A.2d at 663 (citations omitted). The Court has interdicted judicial intrusion into many aspects of personal decision making,

this right is broad enough to encompass a patient's decision to decline medical treatment under certain circumstances . . . ."[17]

The *Quinlan* case involved a family acting as guardians for a patient in a persistent vegetative state. The family believed that their daughter, Karen Ann, would, if able to communicate her wishes, request the termination of life-sustaining treatment. The doctors retorted that Karen Ann did not meet the definition of brain dead, and thus terminating her life-sustaining treatment would be a form of active euthanasia, and, therefore, prohibited. The Supreme Court of New Jersey concluded that,

> [u]pon the concurrence of the guardian and family of Karen, should the responsible attending physicians conclude that there is no reasonable possibility of Karen's ever emerging from her present comatose condition to a cognitive, sapient state and the life-support apparatus now being administered to Karen should be discontinued, they shall consult with the hospital "Ethics Committee" . . . . If the consultative body agrees . . . the present life-support system may be withdrawn . . . without any civil and criminal liability . . . .[18]

In so holding, the court wrestled with definitions of death, active and passive euthanasia and other religious and ethical considerations.[19] Thus, the general public became aware of

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sometimes basing this restraint upon the conception of a limitation of judicial interest and responsibility.

17. *Id.* (citations omitted).

18. 355 A.D. 2d at 671.

19. For ethical arguments for and against *Quinlan*, see "The Quinlan Decision: Five Commentaries," 6 *Hastings Cent. Rept.* 8-19 (Feb 1975); Annas, "In re Quinlan: Legal Comfort for Doctors," 6 *Hastings Cent. Rept.* 29 (June 1976). One consideration of the *Quinlan* court was to determine the true motives of the appointed guardians. For, while a guardian is instructed to merely substitute his or her

the issues regarding withdrawing or withholding treatment from incompetent patients.

The *Quinlan* case in concert with several other related cases, such as *Cruzan v. Harmon*,[20] *Superintendent of Belchertown v. Saikewicz*,[21] *In the Matter of Storar*,[22] and *In Re Conroy*,[23]

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judgment with that of the patient, some argue a guardian may have ulterior personal, religious and ethical motives. See e.g.,"Family Wishes and Patient Autonomy," 10 *Hastings Cent. Rept.* 21 (Oct. 1980); Gutheil & Appelbaum, "Substituted Judgment: Best interest in Disguise," 13 *Hastings Cent. Rept.* 8 (June 1983). Further, case studies reveal that often a patient facing terminal illness makes clinically inappropriate decisions precisely because sound clinical evaluation and judgment are suspended. Jackson & Younger, "Patient Autonomy & Death with Dignity" 299 *New Eng. J. Med.* 404 (1979). This leads ethicists to question whether dying requests are truly indicative of the patients true desires. See e.g., Boorstin, "When Suicide Is Not a Choice," *New York Times*, Aug. 22, 1991, p. 27, (discussing the effect of depression on the choice to die).

20. 760 S.W. 2d 408 (Mo. banc 1988).

21. 373 Mass. 728, 370 N.E. 2d 417 (1977). *Saikewicz* involved a judicial determination to withhold treatment for a conscious incompetent on the basis that the incompetent would not understand the purpose of his pain from the treatment, when there was no guarantee that the treatment would extend his life and there existed the possibility that it might serve to shorten his life.

22. 52 N.Y. 2d 363, 438 N.Y.S. 2d 266, 420 N.E. 2d 64, *cert. denied* 454 U.S. 858 (1981). *Storar* basically involved the same facts of *Saikewicz*. However, in *Storar* the New York Court of Appeals held that treatment should be administered against the wishes of the guardian because the necessary blood transfusions were likened to providing food and drink. Notably, the blood transfusions would not have cured the cancer but would have prevented premature death from another cause.

23. 98 N.J. 321, 486 A. 2d 1209 (1985) (holding that artificial feeding through a nasogastric tube is analogous to supplying air artificially through a respirator and, therefore, it can be removed in accordance with the patient's desires *Id.* at 373). For a criticism of the *Conroy*

have demonstrated the need for legislation in the area of termination of life-sustaining treatment. This has prompted over forty states to enact legislation regarding the termination of life-sustaining treatment and the validity of health care proxies and living wills.[24]

Honoring A Patient's Advance Directive

Whether one advocates the removal of life-sustaining treatment or not, most agree that a living will is desirable.[25] A living will can direct a doctor to withhold treatment or encourage a doctor to take all the means possible to avert death at any cost. A living will may determine whether decisions regarding the patient's treatment are left to members of his family, his faith, or his physician. While the absence of a living will will usually result in the presumption on the side of life, at least one case has revealed the misfortune which results when a physician opts to terminate treatment, in the "best interests of the patient" against the interests of that patient's family.[26]

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decision, see Annas, "Do Feeding Tubes Have More Rights Than Patients?" 16 *Hastings Center Rpt.* at 26 (Feb. 1986); Annas, "Non-feeding: Lawful Killing in California, Homicide in New Jersey," 13 *Hastings Cent. Rept.* 19-20 (December 1983).

24. For states with living will legislation, see Burgalassi, *supra* note 3.

25. One writer erroneously asserts that "[i]n essence, Judaism is opposed to the concept of the living will in that the patient may not have the 'right to die'." Rosner, "Jewish Perspective On Issues of Death and Dying," 11 *Journ. of Hal. and Con. Soc.* 50, 68 (1986). Of course, Judaism may be adverse to a living will which advocates early withdrawal of life-sustaining treatment, but a living will properly drawn could be vital for those who wish that their body be given the fullest possible chance of survival.

26. See, "Judge Reject Request by Doctors to Remove a Patient's Respirator," *New York Times*, July 1, 1991, #A, at 4, col. 4 (discussing a

What Advance Directive Legislation Provides

A generic directive is described in the notes below.[27] In

husband's fight to prevent a Minneapolis doctor from removing the respirator from his 87 year-old wife).

27. To my family, doctors and all concerned with my care:

I, -----, being of sound mind, make this statement as a directive to be followed if I become unable to participate in decisions regarding my medical care.

If I should be in an incurable or irreversible mental or physical condition with no reasonable expectation of recovery, I direct my attending physician to withhold or withdraw treatment that merely prolongs my dying. I further direct the treatment be limited to measures to keep me comfortable to relieve pain.

These directions express my legal right to refuse treatment. I especially do not want: -----

(Here list specific treatment not wanted. Examples include: respirator support, intravenous or nasogastric feeding or fluids, cardiac resuscitation, organ transplantation, dialysis, surgery, or psychosurgery.)

Other Instructions: -----

(Here list care that is desired, e.g. pain medicine.)

Proxy Designation Clause: Should I become unable to comunicate my instructions as stated above, I designate the following person to act in my behalf:

Name: -----

Address: -----

If the person named above cannot act in my behalf, I authorize the following person to do so:

Name: -----

Address: -----

Signed: ----- (name of person writing the living will)

Date: -----

Witness: ----------

Date: -----

Witness: ----------

Date: -----

(Generic will available from the Society for the Right to Die, New

most states, a living will can be drafted in substantially the same form as below. However, patients may include specific directions which, if later declared invalid, will not affect other directions of the declaration which can be given effect without the invalid direction.[28] In fact, "Do-it Yourself" living will kits are available in local bookstores.[29]

In general, all states with living will statutes, including New York and New Jersey, require that the person executing the document be competent.[30] In addition, because "the objective of living will statutes was to allow for the euthanatizing of patients with little or no remaining life,"[31] most states require that the patient be diagnosed and certified to be in a terminal condition, or be permanently unconscious.[32] A terminal condition is generally defined as "an incurable or irreversible condition from which, in the opinion of the attending physician, death will occur without the use of life-sustaining procedures."[33]

York City).

28. *See e.g.*, Ala. Code #22-8A-4(c); Ariz. Rev. Stat. Ann. #36-3202C;Ark.Stat. Ann. #20-17-202 (b);Colo. Rev. Stat. #15-18-104;Fla. Stat. Ann. #765.05; Mo. Ann. Stat. #459.015(3) and N.Y. Pub Hea. L. # 2981 (5) (e).

29. Goodson, How To Prepare Your Own Living Will (1991).

30. See e.g. Ala. Code #22-8A-7; Ark. Stat. Ann. #20-17-202(a); Colo. Rev. Stat. #15-18-104(1); Fla. Stat. Ann. #765.04(1); Mo. Ann. Stat. #459.015; N.Y. Pub. Hea. #2981(1).

31. See Gelfand *supra* note 6, at 744.

32. Some states require that the terminal condition of the patient be certified in writing by two physicians, both of whom have personally examined the patient, and one of whom is the actual attending physician. *See e.g.* Ala. Code. #22-8A-3(5).

33. Ariz. Rev. Stat. #36-3201(6). The use of terms such as incurable or irreversible are heavily criticized as ambiguous. For example, "[c]onditions such as diabetes are currently incurable, but are reversible through treatment with insulin . . . ." See Gelfand, *supra* note 6, at 745. The term "unconscious" adds further complexities, as Gelfand

Furthermore, most states, such as New York, require that the documents be signed by two witnesses who are neither related to the patient, responsible for the care and expenses of the patient, nor would benefit from the death of the patient.[34]

Unlike other states, New York and New Jersey have language in their statutes which absolves doctors, following a patient's directive, from criminal and civil liability.[35] In some states, such as New York, the doctor and hospital retain the option of transferring the patient to another physician or hospital to perform the required treatment or desired course of action should the dying request violate the hospital's code of ethics, or the physician's sense of morality.[36] Additionally, though not in New Jersey, a doctor is also not required to abide by a living will or health proxy which would permit the death of a pregnant[37] woman.[38] Aside from these two

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asserts, "[t]he problem is that not all conscious patients are competent; losing consciousness is not the only way to lose competence." *Id.* at 745.

34. *See e.g.* Ala Code. #22-8A-4; Ariz. Rev. Stat. Ann. #36-3202A; Cal. Health & Safety Code #7188; Fla. Stat. Ann. #765.04(1); New York Pub. Hea. L. #28981 (3); Tex. Rev. Civ. Stat. 459Oh, #3.

35. *See e.g.* Ala. Code #22-8A-9; Ariz. Rev. Stat. Ann. #36-3205C; Ark. Stat. Ann. #20-17-208(b); Cal. Health & Safety Code #7190; Colo. Rev. Stat. #15-18-110(b); Fla. Stat. Ann. #765.10(1); Mo. Ann. Stat. #459.045(1); N.Y. Pub. Hea. #2986; Tex. Rev. Civ. stat. 49Oh, #6.

36. *See e.g.,* Ala. Code #22-8A-8; Ariz. Rev. Stat. Ann. #36-3204; Ark. Stat. Ann. #20-17-207; Fla. Stat. Ann. #765.09; Me. Rev. Stat. Ann #5-708; Mo. Ann. Stat. #459.030.

37. This issue has sparked great debate among legal scholars. While it would seem that the Supreme Court's decision in *Roe v. Wade* declared a woman's interest in her maternal health paramount to the state's interest in fetal life, a patient's interest in maternal health, when terminally ill, is insignificant. Thus, some argue that the state's interest becomes compelling. *See e.g. Note,* "A Matter of Life and Death: Pregnancy Clauses in Living Will Statutes," 70 *Bost. U. L.*

exceptions, a doctor is required to abide by a patient's living will in all circumstances, and in the event that he or she does not, some states will impose criminal penalties.[39] Finally, should a physician decide to give effect to a patient's directive once that patient has lapsed into permanent unconsciousness or lacks the ability to make health care decisions, that physician is required under New York and New Jersey law to consult with at least one other physician.

An advance directive may be revoked at any time by the author of the directive, even if at the time of revocation that patient's decision-making faculties have diminished.[40] New York and New Jersey recognize oral revocations as well.[41] In

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Rev. 867 (1990); Note, "The Constitutionality of Pregnancy Clauses in Living Will Statutes," 43 *Vand, L. Rev.* 1821 (1990).

38. The Colorado statute, for example, provides that if the qualified patient be diagnosed as pregnant, "a medical evaluation shall be made as to whether the fetus is viable and could with reasonable degree of medical certainty develop to live birth with continued application of life-sustaining procedures. If such is the case, the declaration shall be given no force or effect." Col. Rev. Stat. #15-18-104(2) (emphasis added). See also, Conn. Gen Stat. #19a-574;Fla. Stat. Ann. #765.08.

39. Various states impose varied penalties, Ala. Code #22-8A-8(c) (Class C Felony); Ark. Stat. Ann. #20-17-209 (Class A misdemeanor); Some states, such as California, Missouri, and Texas, merely refer to the physicians refusal as "unprofessional conduct" but impose no penalty. Cal. Health & Safety Code #7191(b); Mo. Ann. Stat. #459.045; Tex. Rev. Civ. Stat. 490h, #6, #7.

40. It is not necessary for the patient to be declared competent in order for the revocation of any directive to be considered legally valid.

41. Oral revocations are somewhat more complicated but permitted in most states when made in the presence of a witness 19 years or older who signs and dates a written confirmation that such expression of intent was made.

the event that a physician is presented with an unrevoked declaration executed by the terminal declarant before him, the physician may be required to: certify the patient's medical record that such a determination to withdraw or withhold life-sustaining treatment has been made; make a reasonable effort to contact patient's spouse and family or contact the patient's durable power of attorney if assigned.[42] One state provides that "[i]f no action to challenge the validity of a declaration has been filed within forty-eight consecutive hours after the certification is made by the physicians, the attending physician shall then withdraw or withhold all life-sustaining procedures pursuant to the terms of the declaration."[43]

Termination of Life-Sustaining Treatment

The public's disdain for the unwarranted prolongation of the dying process belies the fact that virtually all states now provide for advance directives. Notably, legislation has not gone so far as to permit advance directives to take effect when an unconscious patient is not terminally ill.[44] Indeed, "[e]very existing living will act requires that the patient's physical condition or prognosis be "terminal" or sufficiently poor in order to bring the provisions of a living will into effect."[45] However, new definitions and procedures in living

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42. In Connecticut, consent of next of kin is not merely suggested but is required. In addition, an oral or written advance directive, must be presented to, or in the possession of the attending physician before life-sustaining treatment can be removed. See, Conn. Gen Stat. #19a-571.

43. Colo. Rev. Stat. #15-18-107.

44. However, judicial decision making has recently reached this point. See e.g., *Bouvia v. Superior Court of Los Angeles*, 179 Cal. App. 3d 1127, 225 Cal. Rptr. 297 (1986). For a discussion of the *Bouvia* decision see *infra* notes 72-76 and accompanying text.

45. Gelfand, *supra* note 6, at 740. See, for example, New York

will legislation have prompted both Right-to-Die-advocates, as well as ethicists and religious groups, to advocate changes in present living will legislation.

Death With Dignity

Any discussion of life-sustaining treatment involves the use of many codes and slogans, including "right to die", "quality of life", and "death with dignity." However, these terms are misunderstood as often as they are used.

Advocates of the right to die generally assert that wishes of the patient are paramount in the event they are declared terminally ill, and must take precedence.[46] Originally this implied that life need not be prolonged; however, medical technology has complicated the definition of prolonging life and denying death.[47]

The death with dignity movement does not believe that all patients have a right to die an aesthetic and peaceful death. This is clearly beyond reach, given the amount of nausea, confusion, and delirium many dying patients experience. Certainly, some uncomfortable situations are unavoidable, and advocates of the right to die do not suggest that patients experiencing such discomfort be provided the opportunity to take their own lives. Rather, death with dignity means that once a patient is terminally ill, he should not be subjected to any medical procedures or treatments which merely prolong the dying process against his will.

The death with dignity movement has, therefore,

Public Health Law #2989(3).

46. Notably, organizations, such as the Society for the Right to Die, no longer advocate active euthanasia. The Society's handbook asserts, "passive euthanasia...[is] the basis of the Society's program today." *The First Fifty Years*, Society for the Right to Die, at 1 (1988).

47. *Id.*

advocated legislation such as living wills and durable powers of attorney statutes. In doing so, advocates seek to provide patients with the freedom to supervise their own health-care decisions. Currently, the main problem confronting right-to-die advocates is the threat that the rights already afforded patients will be diminished.[48] One such right of concern to advocates is the refusal of some states, such as New York, to permit a patient to refuse nutrition and hydration.[49]

Religious and Ethical Views

While the public maintains that its right to autonomy guarantees its right to make life and death decisions, theologians disagree. For many theologians the decision to make life and death decisions is not personal in nature. For example, Rabbi J. David Bleich asserts, "Judaism recognizes no right to privacy insofar as termination of human life is concerned. Such right is vested solely in the Creator."[50]

In addition to moral offensiveness, some religious groups are opposed to terminating life-sustaining treatment on other grounds. Rabbi J. David Bleich asserts that terminating a patient's life may deny that patient invaluable time for penitence.[51]

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48. *Id.* at 6.

49. While *Cruzan* seemed to indicate that it would be unconstitutional to force a patient to continue nutrition and hydration against her will, the existence of legislation denying such a right has yet to be challenged before the Supreme Court.

50. Bleich, "The Quinlan Case: A Jewish Perspective," reprinted in *Jewish Bioethics* 266, 276 n.2, (ed. Rosner & Bleich 1979) [hereinafter Jewish Perspective].

51. See "Jewish Perspective," *supra* note 50, at 273 (citing Me'iri at *Yoma* 85a) "although the moribund patient may be incapable of any physical exertion he may be privileged to experience contrition and utilize the precious final moments of life for the achievement of true

Finally, because all these issues are on a spectrum, it is argued that permitting 'A' will lead to permitting ethically reprehensible action 'B'. Thus, some ethicists fear early termination will result in Darwin-like applicability or God-like decision making.[52] Moreover, the mentally and physically disabled fear society will soon render value judgments regarding the quality of their lives.[53] However, one writer responds that many arguments may similarly fall victim to this broad "slippery slope" argument, for virtually all worthwhile issues involve the attempt to draw a legitimate black line on a continuum. Thus, he argues, we should not disqualify a position which allows for the termination of life-sustaining treatment merely because it is not based upon a clear black line.[54] To ensure that a patient's wishes are carried out in accordance with his/her religion, some religious groups have formulated

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repentance." *Id.).*

52. Bleich asserts, "if the comatose may be caused to 'die with dignity,' what of the mentally deranged and the feeble minded incapable of 'meaningful' human activity? Withdrawal of treatment leads directly to overt acts of euthanasia; from there it may be but a short step to selective elimination of those whose life is deemed a burden upon society at large." "Criteria for Death," *supra* note 7, at 291.

53. Lewin, "Despite Daughter's Death, Parents Pursue Right-to-Die Case," *New York Times,* July 28, 1991, p. 14, col.2 (discussing the case of a disabled child who, brain-damaged since birth, was rendered unconscious after a fall in 1987. After an Indiana Superior Court ruled that the child's parents had the authority to order the removal of their daughter's feeding tube, the National Legal Center for the Medically Dependent and Disabled intervened declaring the court's ruling "as a form of unacceptable discrimination against the handicapped." *Id.* at col. 4. An attorney for the Right to Life Committee explains, "[y]ou wouldn't let them starve a child who wasn't disabled, so it is simply discrimination against the disabled to let them do it here." *Id.* at col. 5).

54. President's Commission *supra* note 8, at 29 n. 52.

their own proxies.[55]

Religious Response to Advance Directive Legislation

Within Orthodox Judaism,[56] two versions of advance directives have evolved.[57] While the Rabbinical Council of America [RCA] expounds a very specific position and advises its followers to make a living will following its mandates, Adugat Israel merely gives general guidelines as to what one should do and reserves ultimate decision-making to the individual's pre-selected rabbi. Other differences between the two reflect the difference of opinion regarding the actual time death occurs. According to both Agudat Israel and the RCA, the cessation of respiratory activity is required before life-sustaining treatment can be removed. However, Agudat Israel also requires cessation of cardiac activity before a patient is

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55. Some religious denominations, such as Reform Jews, are satisfied with personal decision-making regarding life-sustaining treatment. See the comments of Rabbi Dayle A. Friedman, Cong. Rec., Oct. 17, 1989 (asserting "[w]e Reform Jews champion the right of individuals to make choices regarding their conduct . . . . We reject imposition of specific choices from external authorities, either contemporary or historical." *Id).* Both Jewish and Christian organizations have produced their own versions of living wills. These living wills differ from the more generic ones advocated by the state, insofar as they reflect the religious concern for the sanctity of life. In doing so, the circumstances permitting life-sustaining treatment are limited.

56. As of the date of this article there has been no formal response from the Conservative movement.

57. Agudat Israel revealed its *Halachic Living Will* in late 1990, which was followed by the Rabbinic Council of America's *Health Care Proxy* in mid-1991. The Halachic Living Will is reprinted in Zweibel, "The Halachic Health Care Proxy: An Insurance Policy With Unique Benefits," *Jewish Observer,* at 20-21 (Sept. 1990) [hereinafter Zweibel].

pronounced "halachically" dead.[58] Because the brain stem controls respiratory functions, the RCA asserts that the presence of cardio-pulmonary activity is not dispositive. Therefore, the RCA has devised a health care proxy, which permits a patient in a comatose or persistent vegetative state, or a brain-damaged patient, the choice to refuse life-sustaining treatment, even if that patient is not terminally ill. The one exception exists when there remains "small likelihood of recovering fully, a slightly larger likelihood of surviving with permanent brain damage, and a much larger likelihood of dying . . . ."[59]

Halachic Considerations

As a result of federal legislation, requiring that patients be informed of their rights to make health care decisions; state legislation, in favor of patient autonomy; and judicial decisions, favoring the right to privacy as above and beyond any state interest, many halachic complexities arise. Indeed, many of these have been discussed at length by Jewish scholars; hence, I will attempt to highlight the most problematic of these complexities and the various approaches of these scholars. Furthermore, other issues which have yet to receive full attention will be discussed in detail.

Violating the Will of the Patient

Physicians and hospitals will continue to face dilemmas concerning a patient's advance directive. This is especially true when a patient directs to terminate or withhold treatment which will certainly save that patient's life. While some states refuse to prosecute a physician for violating a patient's

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58. See generally, *Criteria for Death, supra* note 7; Soloveichik *supra* note 7.

59. RCA Health Care Proxy-B (Detailed Directive).

advance directive, especially when the patient has asked to remove naso-gastric feeding, there is a popular lobby calling for criminal prosecutions.[60] This is troubling halachically since most authorities assert that "*lo ta'amod*" (Do not stand by idly), (Deut. 19:16) and "*lifnei iver*" (do not put a stumbling block) (Lev. 19:14) obligate a physician to force feed or force treat a patient when that patient refuses to be fed or treated.[61]

While halachic authorities assert that there is little, if any, room for right to privacy concerns in determining health care decisions,[62] the parameters of "Do not stand idly by" are not always so broad as to require a doctor to risk his life or livelihood to fulfill its requirements. For example, the Ramo in *Yoreh De'ah* 336:3 asserts that a doctor can charge money to heal a patient, even though healing the sick is an obligation, because the obligation to heal is on the public at large. To be sure, the Vilna Gaon in his commentary to the Ramo makes it clear that a doctor can choose whether or not to heal a patient even if that doctor is the only person in the area who can save that patient.[63]

Similarly, according to Rabbi Moshe Hirschler in his *Halacha Urefua*,[64] the obligation to heal is composed of both private and public elements. Rabbi Hirschler cites the

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60. See Note, "The California Natural Death Act: An Empirical Study of Physicians' Practices," 31 *Standford L. Rev.* 913, 945 (May 1979) [hereinafter Note].

61. The *Tzitz Eliezer* asserts that even one who screams, "go away, I do not want to be treated", must be ignored. IX, no. 47, sec. 5.

62. R. Moshe Feinstein, for example, asserts that a physician can treat a patient even if the patient refuses the advice of that physician and asks to be transferred elsewhere for treatment. *Iggerot Moshe, C.M.* II, no. 74.5.

63. For this proposition the Vilna Gaon cites a passage in *Kiddushin* 8b.

64. Hirschler, *Halacha Urefua*, Vol. 3, no.3, at 45 (Jerusalem:1988).

responsum of a 16th century rabbi, Moshe ben Joseph di Trani, asserting that when the people of Pisa were faced with meeting a heavy ransom,[65] it was not obligatory for the community to choose members who would meet that ransom.

Thus, the public has the obligation to heal everyone; the private individual should heal one who will most certainly die without his or her help, but does not have to incur financial loss to do so. Thus, while the doctor is often chosen because of his proximity to the patient, his duty to heal should never be self-detrimental. Indeed, at that point the doctor's obligation of *Lo Ta'amod* might be limited to voicing his protest. The obligation to heal that patient then "reverts" to the public from which it originated. It is up to the public at that point to violate judicial decision or, in the alternative, protest such decision.

However, the potential financial and professional cost to the doctor which may offset his obligation to heal, the threat of which exists in some state statutes, has never been enforced.[66] In fact, studies indicate that doctors in some states such as California[67] and New York have systematically refused to

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65. Ibid., at 49.

66. Although the court in *Bartling* submitted a final order instructing the hospital to release the patient, the patient had, by that time, already died. *Bartling* illustrates that while some courts do assert that doctors are obligated to assist patients, against any moral convictions, they have not yet taken any action against disobedient doctors. The final order submitted in *Bartling* read:

ORDERED AND ADJUDGED that William Francis Bartling, in the exercise of his right to privacy, may remain in defendant hospital or leave said hospital free of the mechanical respirator now attached to his body and all defendants and their staff are restrained from interfering with Mr. Bartling's decision.

67. The California study revealed the following information; % of Doctors Who Would Administer Treatment in Violation of The Patient's Wishes

enforce ethically suspect advance directives. As a result, doctors,[68] ethicists,[69] and courts are split over the issue

	Wishes of Patient's Family		
Patient Has No Family		Family Acquiesces in Patient's Request	Family Wants Everything Done to Save Patient
Form of #	73.6	26.8	20.8
Patient's Request *	36.3	16.7	11.5

#= Patient requests orally that treatment be withheld
*= Patient executes a binding directive.
Note, *supra* note 61, at 936 n. 100 (table 6).

68. *See e.g.* Wanzer et. al., "The Physician's Responsibility Toward Hopelessly Ill Patients," 310 *New England Jour. of Medicine* 955 (April 1984) [hereinafter Wanzer]. All agree that the patient's right to make decisions regarding his or her personal care is paramount. However, many questions arise when a patient's decision making capacity becomes diminished or when a patient refuses treatment capable of saving that patient's life. In the former case, doctors are generally advised to "rely on the presumed or prestated wishes of the patient." *Id.* But, because it often happens that patients are rendered incompetent prior to having informed anyone of their wishes regarding life-sustaining treatment, doctors are often forced to consult with and often to seek judicial decision regarding the withdrawing or withholding of life-sustaining treatment. In order to avoid the complexities of litigation, doctors are advised to take the initiative while the patient is competent enough to make such a decision. *Id.* at 956. See also, Task Force, *supra* note 4, at 9-12. Whether or not it is possible for a competent person to appreciate the gravity of his or her decision, is outside the scope of this article.

Wanzer asserts that a physician often fails to respect a patient's wishes because "[p]hysician's are strongly influenced by their personal values and unconscious motivations." He suggests that, "they should guard against ...[the] tendency to equate a patient's death with professional failure, or unrealistic expectations." Wanzer, *supra.* Perhaps more troubling in Wanzer's assertion that although the patient's welfare always remains paramount, a doctor should not ignore the high cost of patient care. "Financial ruin of the patient's family, as

regarding the disobedient doctor.

The court in *Bartling v. Glendale Adventist Medical Center*[70] and *Bouvia v. Superior Court of Los Angeles County*[71] ordered a hospital to forego its moral and religious beliefs and favor a patient's health care decision holding that "the right [to die] . . . include[s] the ability to enlist assistance from others, including the medical profession."[72] However, both New York and New Jersey have enacted legislation dissenting from this view and have adopted a standard similar to that announced in *Brophy v. New England Sinai Hospital, Inc.*, asserting:

"There is nothing . . . [which] would justify compelling

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well as the drain on resources for treatment of other patients who are not hopelessly ill, should be weighed in the decision making process . . ." *Id.* at 957. As a result, some advocates of patient autonomy argue that legislation calling for criminal prosecution is necessary to force a doctor to comply with a patient's desire to withhold or withdraw treatment. Note, *supra*, 61, at 945; see also, Steinberg, "California Natural Death Act (A Failure to Provide for Adequate Patient Safeguards and Individual Autonomy," 9 *Conn. L. Rev.* 203, 216 n. 18 (1977).

69. See generally, Annas, "Transferring the Ethical Hot Potato," 17 *Hastings Cent. Rept.* 20 (Feb. 1987)

70. 184 Cal. App. 3d 961, 229 Cal. Rptr. 360 (1986). For information regarding tort claims arising out of a physician's failure to remove life-support systems, see 58 A.L.R. 4th 222.

71. 179 Cal. App. 3d 1127, 225 Cal. Rptr. 297 (1986); See also, *N.Y. Times*, May 23, 1986, A, at 18, col. 5.

72. 179 Cal. App. 3d at 1147, 225 Cal. Rptr. at 307 (Compton, J., concurring). Similarly, the *Bartling* court declared, "if the right of the patient to self-determination as to his own medical treatment is to have any meaning at all, it must be paramount to the interests of the patient's hospital and doctors." 163 Cal. App. 3d 186, 194, 209 Cal. Rptr. 220, 225 (1984). A recent New York case cited a similar opinion, see, *Elbaum By Elbaum v. Grace Plaza of Great Neck*, 544 N.Y.S. 2d 940, 847 (2d Dept. 1989).

> medical professionals . . . to take active measures which are contrary to their view of their ethical duty toward their patients. There is substantial disagreement in the medical community over the appropriate medical action. It would be particularly inappropriate to force the hospital, . . . to take affirmative steps to end the provision of nutrition and hydration . . . A patient's right to refuse medical treatment does not warrant such an unnecessary intrusion upon the hospital's ethical integrity . . ."[73]

This suggests that at this point there does not exist an imminent fear of criminal prosecution which would outweigh the obligation of "Do not stand idly by" and, therefore, a doctor remains obligated to save a patient's life even if in doing so the doctor violates the patient's will.

Transferring Patients

It has been recently made very clear that an individual's right to privacy may outweigh a hospital's, physician's or state's interest in maintaining the ethical integrity of the medical profession.[74] Therefore, not only have physicians in some states been required to make full accommodations for a patient who desires to withhold or withdraw life-sustaining treatment, but some courts have read state statutes to require, under certain circumstances, the assistance of the physician or hospital even when such assistance violates religious and ethical beliefs.[75] While a physician in New York is afforded the opportunity to transfer a patient who desires a given treatment withheld or withdrawn, courts in other states have refused to allow for the transfer of such a patient asserting

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73. 398 Mass. 417, 441, 497 N.E. 2d 626, 639 (1986) (citations omitted).

74. 76.*See supra* notes 71-73.

75. *Id*.

that such a transfer may cause severe emotional and psychological distress.[76] However, because transferring the patient to another hospital or physician will certainly result in that patient's death prematurely, since the latter will surely honor the patient's directive, thus violating halacha, the halacha-abiding doctor, in doing so, may violate the *issur* of *Lo Ta'amod* and perhaps also the violation of *Lifnei Iver*.

Simply, the doctor and hospital could avoid the bulk of halachic problems by informing the patient beforehand that under certain circumstances that patient's directive will not be honored. For example, if the patient requests upon admission to the hospital that should it become necessary to be fed through a naso-gastric tube, he would rather forego such feeding, the physician or hospital administrator could state hospital policy to the contrary. Indeed, refusal to treat the patient on these grounds can be likened to refusal to treat the patient who refuses to pay for the physician's services, which halacha clearly permits.[77] Thus, if the hospital or doctor were to inform the patient ahead of time, halachic problems could be avoided. Moreover, legislation in New York and New Jersey, and judicial decisions in other states, suggest that early explanation of hospital or doctor policy will help prevent prosecution for failure to enforce the patient's advance directive.

However, in the event that the doctor did not have the opportunity to inform the patient of hospital or personal policy, a different problem arises. While it is certain that the doctor in charge of enforcing hospital policy could never halachically be permitted to withhold nutrition and/or hydration,[78] whether the doctor may invite another doctor to perform the

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76. See, *In the Matter of Reguena*, 213 N.J. Super. 475, 482, 517 A 2d 886, 893 (1986).

77. See *supra* notes 63-66.

78. According to all authorities this would constitute *rezicha* (murder).

removal may raise halachic concerns, but in effect raises the same issues involved in violating the patient's will. Simply, a doctor acting as an administrator of hospital policy does not have to risk criminal prosecution or financial loss by refusing to transfer the patient to another hospital even though that patient's life will be terminated prematurely.

Timing of Death

Indeed, the distinction between the RCA and the Agudat Israel's position rests upon differing views of when death actually occurs. Obviously the actual time death occurs has enormous repercussions.[79] For example, if one asserts that death does not occur until the cessation of respiratory and cardiac activity, then pulling the plug on a patient who is merely brain dead but whose heart continues to beat is murder.[80]

While there are few discussions in the Talmud on the timing of death, modern halachic scholarship on the topic is abundant.[81] Indeed, virtually all discussions have evolved from various understandings of *Yoma* 85a and the Mishnah in *Oholot* 1:6.

Yoma 85a involves the limits regarding the removal of fallen debris on the Sabbath from an individual who may or may not be alive. *Oholot* 1:6 asserts that an animal whose head has been cut off is unclean. Further, *Oholot* asserts that

79. For a full examination of the halachic opinions on this crucial topic, see *Journal of Halacha and Contemporary Society*, Vol. 17, Spring 1989, pp. 7-69, wherein a number of articles addressed the problem from a wide variety of positions

80. For a criticism of the RCA Health Care Proxy on this point see Zweibel, "A Matter of Life and Death: Organ Transplants and the New RCA 'Health Care Proxy'," *Jewish Observer* (Summer 1991 [hereinafter Life and Death].

81. See note 80, above for a discussion of halachic sources and interpretations.

any movements or convulsions following that decapitation are not to be considered as evidence of life.

In light of these texts varied opinions emerge. The majority interpret *Yoma* 85a as an appropriate standard for defining death. In doing so, they assert that death occurs shortly after the cessation of both cardiac and respiratory activity. Others add that cessation of brain activity is also required.[82]

Conversely, the minority asserts that *Yoma* 85a focuses only on the circumstances which warrant desecrating the Sabbath to save a life.[83] The minority, therefore, rely heavily upon *Oholot* 1:6 for the halachic determination of death. In doing so, they liken decapitation to the termination of brain stem activity and compare human cardiac and muscle activity following brain death to that of the animal convulsions. For as Maimonides asserts, an organism should no longer be considered to be alive when "the power of locomotion that is spread throughout the limbs does not originate in one center, but is independently spread throughout the body."[84]

Whether or not such convulsive movements are similar to those movements of one who is decapitated or not is an issue of medical[85] and religious debate. Certainly, some argue, one

82. See Soloveichik, *supra*, note 7, at 300.

83. Rabbi Tendler and Dr. Rosner, for example, assert, "[i]n the case of the Talmud *[Yoma* 85a] . . . the interest focuses on any sign of residual life to warrant desecrating the Sabbath to dig [the one entrapped] out. It has no relevance to a patient lying in an [ICU] whose every function is monitored and whose status is open to full evaluation. In such a case, the issue is truly one of definition, not confirmation." Tendler & Rosner, *Practical Medical Halachah*, at 64 (3rd ed. 1990) [hereinafter Tendler & Rosner].

84. Commentary on *Oholot* 1:6.

85. *See* Winkler & Weisbard, "Appropriate Confusion Over Brain Death," 261 *J.A.M.A.* 2246 (1989); see also, Tendler & Rosner, "Brain Death" 262 *J.A.M.A.* 2834 (Nov. 1989); see also, Oro, *id.* at 2835.

may distinguish between one who is decapitated from one who is brain-dead.[86] For example, two physicians recently responded to the analogy, asserting, "unlike decapitated bodies, [patients who are brain dead are in intensive care units and] maintain integrated function of their vital organ systems for days and even weeks."[87]

Rabbi Tendler retorts that brain death can be thought of as a physiological decapitation.[88] He asserts, "[t]here is not a more accurate definition of death today . . . Brain death objectively affirms death better than any other standard. If the circulation of the brain has ceased totally, the brain is divorced from the rest of the body no differently than if it were by the action of a guillotine."

The minority proposition also claims to find support in an alternative reading of a *teshuva* by Rabbi Moshe Feinstein in his *Iggerot Moshe.*[89] In Responsa *III Yoreh De'ah*, no. 132, Rabbi

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86. Rabbi Bleich asserts, "[r]ejection of 'brain death' as an acceptable criterion of death is entirely compatible with recognition that decapitation does serve as incontrovertible indication of death even if spasmatic muscular movements persist after the head is severed. . . . Cessation of circulation to the brain cannot, in itself, be equated with total cellular destruction of the brain." Bleich, *Judaism & Healing: Halakhic Perspectives*, at 155 (1981) [hereinafter *Judaism & Healing*].

87. Winkler & Weisbard, 262 J.A.M.A. 2835 (Nov. 1989) (replying to the criticism of Drs. Tendler and Rosner regarding an earlier editorial).

88. Tendler & Rosner, *supra* note 84, at 64-5.

89. Notably, despite speculation to the contrary, very few halachic authorities have previously sanctioned brain death as an acceptable halachic definition of death. But see, Rabinowitz & Koenigsberg, *Ha Darom*, Vol. 32, at 59, 1971 (equating brain death with decapitation). Further, the reliance upon Rabbi Moshe Feinstein is grounded more in Rabbi Moshe Tendler's personal exchanges with Rabbi Feinstein than it is upon Rabbi Feinstein's actual writings. Notwithstanding,

Feinstein recognizes that because the brain stem controls respiratory activity, it is necessary that it too cease to function before death can be halachically pronounced. Further, Rabbi Feinstein asserts that when one is decapitated he should be declared dead, subsequent convulsions and spasms notwithstanding. In both statements Rabbi Feinstein omits the cessation of cardiac activity as a criterion, thereby, suggesting that brain death alone constitutes a halachic criteria of death.

However, the addition of brain death in the first example may also be explained as an added stringency to the halachic definition of death. The second example is a case of a non-person (for one who is decapitated loses his status as a person), therefore, it is less persuasive as proof of halachic acceptance of the brain death criterion by Rabbi Feinstein. Finally, such a reading cannot be reconciled with various other *teshuvot* by Rabbi Feinstein. For example, in *II Yoreh De'ah* 179.5, Rabbi Feinstein asserts that one who has removed the heart of a brain-dead patient is a murderer.

Rabbi Tendler responds to the above inconsistencies by providing documentation of a letter to the Chairman of the New York State Assembly's Committee on Health, sent by Rabbi Feinstein asserting that "[t]he sole criterion of death is the total cessation of spontaneous respiration."[90] Second, Rabbi Tendler understands Rabbi Feinstein's rejection of heart transplants in *Y.D.* 179.5, as limited to those situations when the patient is only partially brain dead, and may therefore remain breathing spontaneously. Therefore, Rabbi Tendler asserts that R. Feinstein's writings should not be interpreted as rejecting the whole brain death position. It needs to be

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Rabbi Feinstein's various other *teshuvoth* on the subject which declare brain death as unacceptable, are problematic and suggest that his *teshuvoth* do not reflect his acceptance of brain death as an acceptable criterion of death.

90. Tendler & Rosner, *supra* note 84, at 63.

repeated that this interpretation of talmudic and rabbinic sources is a minority opinion and does not comform in certain crucial aspects with the majority of rabbinic rulings.

Organ Transplants

Organ transplants are most viable while the patient's heart continues to beat.[91] Thus an organ transplant is viable under the brain death definition, because cardiac activity need not be arrested in order for death to be pronounced. The halachic validity of many organ transplants is moot under the Agudat Israel position, for death requires cessation of cardiac activity, at which time organs are not as viable for transplant.

Generally, once a patient is dead, several halachic interests arise which, at first glance, seem to conflict with sanctioning an organ transplant; first, the dead must be buried without delay;[92] second, one may not generally derive benefit from a

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91. "Vital organs are . . . candidates for harvest only during that period when brain stem function has irreversibly ceased yet the heart continues to beat." "Life and Death," supra note 81, at 11. The Halachic Living Will asserts that "[w]hether there exist exceptional circumstances that would permit an exception to the general prohibition under Jewish law against the performance of an autopsy or dissection of my body" is to be determined in accordance with strict orthodox interpretation and tradition (emphasis added). The RCA asserts that the commandment of "Do not stand idly by" is strong enough to outweigh that general prohibition and thereby permits transplants. The source for the RCA's position is disputed. While the RCA maintains that R. Moshe Feinstein, z"l, stated his high regard for organ transplants in his *Iggerot Moshe,* advocates of Agudat Israel disagree. Zweibel asserts, "Rabbi Feinstein employs extraordinary strong langugage to condemn heart transplants as . . . the murder of both the recipient and the donor," "Life and Death," *supra* note 81, at 12 (citing *Iggerot Moshe, Y.D.* II 179).

92. Deut. 21:22-23; *San.* 47a; *BB* 154a.

dead body.[93] Therefore, unless there exists a countervailing halachic interest such as *pikuach nefesh*, one cannot interfere with the corpse.[94]

In his famous response on this subject, Rabbi Ezekel Landau stated the guidelines for post-mortem procedures.[95] Accordingly, it is not sufficient that the organ be removed merely for future use, nor is it permitted that a non-essential organ be removed even for immediate use. Rather, what is permitted is the removal of essential organs, such as the heart, liver, kidney and some assert the corneas as well,[96] which will be utilized immediately for (a *choleh lefaneinu*) transplant.

While organ transplants are permitted under limited circumstances, they are still not yet favored by all members of the halachic community. Many fear that because organs may only be harvested immediately after cessation of cardiac activity, physicians or their assistants may become overzealous in preparing the patient for transplant and serve to hasten that patient's death before his or her time. In addition, because the probability of success is slim, some believe that such a procedure is not strong enough to outweigh the prohibition of benefiting from a corpse (*met assur behanah*). Still others assert that by not making provisions for halachically permitted organ transplants one may transgress *lo ta'amod*.[97]

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93. *AZ* 29b; *Ned.* 48a; see, Rabbi Jacob Emden, *Responsa She'elat Yavetz*, sec. 1, no. 41 (1734).

94. For a fuller discussion of the halachic permissibiliqy of organ transplants, see the article by Reuven Fink in *Journal of Halacha and Contemporary Society*, Vol. 5, 45.

95. *Noda BeYehuda, Mahadura Tanina, Y.D.* no. 210 (1947); see also, Rosner, "Autopsy in Jewish Law & The Israeli Autopsy Controversy," *Tradition* (Spring 1971).

96. *Judaism & Healing*, *supra* note 86, at 129-132, and 133, n.8 (citing R. Unterman, *Shevet me-Yehudah*, I, 313).

97. See generally, Tendler & Rosner, *supra* note 83.

Conclusion

Living will legislation has been enacted in over forty states, while the remainder of the states have legislation pending. But there are problems which require attention. Studies in both California and New York reveal that doctors are either not familiar with the legislation or may for personal reasons fail to honor a patient's living will. While this may not be a concern for many religious Jews who desire to be kept alive at virtually any cost, it may prove to be a problem should doctors choose to dismiss religious views which favor life-sustaining treatment at any cost as "outdated." Indeed, a recent story of a doctor who assisted a patient in her quest to commit suicide, as well as the success of suicide self-help techniques, indicates society may be heading that way.[98]

Finally, different definitions in different states create different presumptions concerning terminating life-sustaining treatment of a patient without an advance directive. While New York has a presumption encouraging the doctor in doubt to err on the side of life, other states do not. Thus, while authorities debate how and when treatment may be terminated, one thing that appears advisable is for an individual to have a living will or a health-care proxy based on sound halachic principles and supervised by an accepted halachic authority.

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98. Altman, "Jury Declines to Indict a Doctor Who Said H Aided in a Suicide," *New York Times*, July 27, 1991, # A, at 1, col. 2.

From Our Readers

Editor's Note:

In the Pesach 1992 issue, the *Journal* printed an article concerning drafting Yeshiva men into the army, which cited the position of Rav Shlomo Yosef Zevin, as being strongly opposed to the practice of deferring Yeshiva men from army duty, and strongly in favor of the Hesder program of dividing the time between learning and army service.

A reader sent in the following excerpt from the Israeli paper *Erev Shabbat* (or *Yom Hashishi*), dated July 22, 1988, featuring an interview with the grandson of Rabbi Shlomo Yosef Zevin, who denies that his grandfather ever took such a negative position or that he even authored the anti-Yeshiva deferment tract. His grandson claims:

> It is frightening to hear things that never happened. On the contrary, aside from what I, as his grandson, know that his opinion was identical with that of all *gedolei Yisrael,* that one should defer the army service of the Yeshiva students, in addition to that, when the Mifdal decided in 1973 to draft Yeshiva students, he [Rav Zevin] published a strong article on the issue in *Hazofeh* and in *Panim el Panim...* from which one can clearly see his position... Here is a typical paragraph:... We have nothing, G-d forbid, against the local Hesder yeshivot, (which worked out a special arrangement with the army.) On the contrary, let them be strengthened. They have saved a large segment of the youth who, were it not for the Hesder yeshivot, would mostly have gone "to pasture in altogether different fields." But a mitzvah cannot extinguish an *aveira.* This has nothing to do with the great yeshivot in which students devote all their time and effort to the study of Torah on a very high level. As far as the high yeshivot are concerned, we say, "Do not touch My anointed, and do no evil to My prophets!"

> My grandfather of blessed memory, in whose house I grew up and with whom I learned, published in his lifetime tens of books and hundreds of essays, none of which appeared anonymously... If he were hiding behind [the name] "one of the rabbis" [the author of the anti-yeshiva deferment essay], why did no one mention this to him at the time of the great controversy which was aroused when he published his essay "Do not touch My anointed", an essay which is well known?

I thank the reader for sending this article to my attention. However, let me point out that the article in *Tradition* (Fall, 1985), which I cited as the source for various remarks by R. Zevin, is prefaced with an Editorial note which reports that the views contained in the article appeared "as a monograph in 1948,... under the pseudonym of 'One of the Rabbis.' *It was republished under his name in Talmud Torah veSherut Tzeva'i* (1980, HaKibbutz haDati – Ne'emanei Torah va'Avodah.)" (emphasis added). Quite clearly, they were aware of the history of this opinion.

Rav Zevin's grandson's passionate disclaimer is difficult if not impossible to verify. His colleagues, who knew Rav Zevin well, felt confident that he had penned those words; his grandson, who loved him well, cannot believe that he could have held such a position. Obviously, the best way to determine the truth would be to examine Rav Zevin's other writings. But there's the rub – in his definitive work on war, *Or Hahalacha*, Rav Zevin does not discuss the topic *at all*. The omission of this highly volatile question in a comprehensive study of war is, in itself, a most puzzling circumstance which cannot be adduced as proof for either a pro- or anti- deferment position.

In my article, I sought to focus on the rationale for both sides of the argument, citing the rabbinic sources which serve as halachic guidelines. However, we Jews have been brought

up to believe that it is not only the cogency of the argument which counts, but also whether it was accepted by outstanding rabbinic leaders. If Rav Zevin's grandson is right, it means that there was no major rabbinic figure of that generation who accepted the arguments for drafting yeshiva students; that fact alone diminishes the strength of that position.

Rabbi A. Cohen

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To the Editor:

In the Pesach 1992 edition, you presented a discussion on the topic of yeshiva men serving in the army. I commend your effort to present a balanced presentation though I feel that you haven't really succeeded in doing so.

I find it odd that you didn't bother to mention at least some of the better known *roshei yeshiva* and other *manhigim* and *poskim*, whose influence and opinions went beyond their particular yeshivot. Let me mention here just a few, though the list is much longer. The Chazon Ish, the Brisker Rav, the Tshebiner Rav, the Ponivez Rav, the Rabbis of Ger, Viznitz, Slonim, Rav Eliezer Finkel, and Rav Chaim Shmuelevitz of the Mir etc., etc. All these and more were certainly of the opinion that yeshiva students should be deferred as long as they are learning, and their opinion was sought concerning matters of *pikuach nefesh*, etc. Perhaps you did not mention them because you thought that their opinion on this matter is well known and obvious.

What is probably not commonly known and should have been mentioned, is the opinion of Rabbi Zvi Yehuda Kook, the Rosh Yeshiva of Yeshiva Mercaz Horav, which is probably the largest yeshiva of what is known as the *Dati Leumi* camp, and the "mother" of all such yeshivot.

Rabbi Kook told me personally that he is opposed to the Hesder arrangement, and that his yeshiva does what most other yeshivot do and that is to get a deferment for its students. My discussion with him was concerning a twenty year old student who was learning in a Chassidic yeshiva and decide to transfer to a a Hesder program. Rabbi Kook's reply to him was, that at the young age of twenty he should not even consider leaving the yeshiva, and in a few years time should he decide to leave, only then is he to join the army, but under no condition is he to participate in a Hesder program. The reason he gave for his opposition to Hesder is similar to what you quote in the name of Rav Shach on page 27 in the footnote.

On page 16 you quote from Rav Zevin who is against exemption, and his halachic basis (aside from his emotional plea, which the author states is not to be dealt with in this discussion) is the mishnah in *Sota* 44b. The mishnah deals with those people who were exempt from military duty such as a newlywed person etc. and the mishnah concludes "במה דברים אמורים במלחמת הרשות, אבל במלחמת מצוה הכל יוצאין אפילו חתן מחדרו וכלה מחופתה"

The Rambam brings this in *Hilchot Melachim* 7:4 and says במה דברים אמורים שמחזירין אנשים אלו מעורכי המלחמה במלחמת הרשות אבל במלחמת מצוה וכו'. From this Rav Zevin would like to infer that as in a מלחמת מצוה even yeshiva students are not exempt.

I fail to see the "proof" from this halacha. Did שבט לוי participate even in a מלחמת מצוה? Obviously the mishnah is dealing only with those specific people that were normally exempt such as the newlywed, etc., and so it would seem clearly from what the Rambam stresses and says "אנשים אלו" for these are the only ones mentioned in that mishnah, but see no indication whatsoever from this, that in a מלחמת מצוה yeshiva students would not be exempt as Rav Zevin would

like to assume. (As to the *kallah* leaving her *chupah*, see the explanation of the Radvaz there).

On page 23 you write about the negative effect that the exemption of the few might have on those going to war. You bring for this the new and novel explanation that the *Netziv* gives to the statement made to Joshua, that "whoever rebels against your word will be put to death." The *Netziv* would like to explain that this deals specifically with the two tribes of ראובן and גד, should they refrain from joining their brothers in the war for the capture of Eretz Yisrael. The reason he gives for this is that their non-participation might demoralize the rest.

I fail to see how this can be included in a halachic discussion. The halachic meaning of this statement is explained by the Rambam in *Hilchot Melachim* 3:8, that this refers to a person who is a מורד במלכות (rebels against the monarchy) whom the king has the right to kill, regardless of what that particular rebellion may have been. From the Rambam it is clear that this statement had nothing to do with that specific case of the two tribes, and therefore there is no room to give specific reasons as above.

But even if we were to accept the *Netziv's* explanation and reason, again we ask, did this apply to the tribe of Levi as well? Did their non- participation in war cause a demoralization of the rest? The obvious difference is that in the case of the two tribes, who did go to war for their own share in Trans-Jordan, yet might refrain from joining their brothers in the capture of Eretz Yisrael, such action might be demoralizing. Whereas the tribe of Levi, who were totally committed to learning and sacred service and did not partake in any personal material endeavor, they would certainly not be a demoralizing force on the rest of the *Klal*.

Allow me at this point to ask the author a question. If you consider the wars being fought in Israel as a מלחמת מצוה,

is this mitzvah not binding on all Jews regardless of where they live? Is the safety and the importance of defending Israel and retaining it under Jewish control, not an obligation on all Jews, even those living in America or the Diaspora? Is there not a demoralizing effect on those going to war, by the fact that American Jews reside comfortably and safely in their homes, paying no more than lip service (and perhaps some money) as to their concern? Why don't American Jews send their sons (at least those not learning in yeshiva) to fulfill this great mitzvah? Can we not apply the same statement made by Moshe Rabbenu to the men of Gad and Reuven – האחיכם יבואו למלחמה ואתם תשבו פה?

As to the impassioned plea made on page 17 by Rabbi A. Lichtenstein and I quote - "Can anyone... confront a mirror and tell himself that he ought not go to the army because he is *Kodesh Kodoshim* etc. Can anyone with even a touch of vanity or a concern for *kovod* contend this?" To this I can only agree, yet I would think that this is certainly a personal decision to be made only by the person who has to confront his mirror. I for one will not pass judgment on others, as I would not want them to pass judgment on me. If they truly feel that they are scarificing material things and aspirations so that they can dedicate themselves totally to learning then only ה' יראה ללבב! [only G-d sees what is in the heart]!

I would like though to add something which might apply to the majority of yeshiva students, especially in their formative learning stage. The Tosafot in *Ketubot* 17b ד"ה מבטלין brings the opinion of Rabbi Yehudah of Corbeil who states, that the reason the teacher of R. Akiva scolded him for spending time and effort in the burial of a *met mitzvah*, is because he was still in his initial learning stage, and גדול שימושא יותר מלימודא (see explanation of this in the הלכות תלמוד תורה – אור שמח) and at that time he was not to partake in any endeavor other than learning, even something as

important as a *met mitzvah* which supersedes the *kedusha* of the *kohen gadol*.

I definitely feel that most yeshiva students can certainly be categorized as being in this initial stage of שימוש תלמידי חכמים, which means undergoing their basic understanding of learning, and thus be exempt at this time from participating even in great and important mitzvot which might cause harm to their development. As to those who may have mastered learning and wish to continue growing in this area, both in yeshiva and kollel, they should be given the respect of looking into their mirror by themselves, in the solitude of their conscience, without anyone peering over their shoulders and deciding for them what they should be seeing, or projecting onto them what might possibly be someone's personal aspirations.

As to the naive suggestion made by Rabbi Shear Yashuv Cohen to the government of Israel, that before they engage in any military action they should stop to consider whether this might result in a *chilul Hashem* to the nations of the world: May I suggest that just try and get the official Israeli government to recognize that there is a *Hashem* in the world, for only then might they be capable of dealing with the question of *chilul Hashem*! But I would like to ask Rabbi Cohen, would he have advised King David and the Sanhedrin, who sanctioned a purely expansionist and economic war, (see ברכות ג: and סוטה מד:) that first they find out from those people against whom the war was waged, if they didn't mind losing their countries, for perhaps this may result in a *chilul Hashem*?

Allow me to conclude with what the Maharal explains as to the text in *Nedarim* that you mention on page 14.

"לפיכך סובר רבי אבהו שנראה באברהם שלא היה בוטח בה' לגמרי שהרי עשה אנגריא בתלמידי חכמים ולקחם למלחמה מיראתו, ואילו לקח הראוי למלחמה אין זא חטא שאין סומכין על הנס, אבל לקח ת"ח מורה שהיה ירא והיה לו לבטוח בו ית' ולא ליקח למלחמה אשר אין ראוי ליקח,

לפיכך נשתעבדו בניו ד' מאות שנה, שיראו גבורותיו אשר עשה ובזה יקנו אמונה שלימה". [גבורות ה' פרק ט'].

Rabbi Avrohom Gurewitz

P.S. on page 7 you state that King David was rejected from building the Beth Hamikdash, because he waged many wars and caused bloodshed, and though this was necessary, yet a certain opprobrium clung to them.

This may be the simple understanding of the verse, but our Sages understood this completely differently, and we were taught to believe that theirs is the only true explanation: the ילקוט שמעוני (שמואל ב' רמז קמ"ה) says the following:

לא תבנה בית לשמי כי דמים רבים שפכת כיון ששמע דוד כך נתייירא, אמר הרי נפסלתי מלבנות בית המקדש, א"ר יהודה בר אילעאי אמר לו הקב"ה דוד אל תירא חייך כי הם לפני כצבי וכאיל, לכך נאמר שפכת ארצה, ואין ארצה אלא צבי ואיל שנאמר על הארץ תשפכנו כמים, דבר אחר אין שפכת אלא קרבנות וכו'. אמר לו אם כן למה איני בונה אותו, א"ל הקב"ה אם אתה בונה אותו הוא קיים ואינו חרב, א"ל והרי יפה, א"ל הקב"ה גלוי וצפוי לפני שהם עתידים לחטוא, ואני מפיג חמתי בו ומחריבו והם ניצולין וכו' יעו"ש.

It is clear from the *medrash*, that the wars that David *Hamelech* waged and all the killing, were considered as a *zechut* for him, comparable to the bringing of *korbanot*, and the reason given in the verse for his not being allowed to build the Beth Hamikdash, is that his *zechut* was so great, that should he build it, it would never be destroyed. The way our Rabbis understood it, there is certainly no basis whatsoever to assume that there is anything negative in waging those wars that are sanctioned by the Torah, but on the contrary, it is rather a very great mitzvah and *zechut* to do so.

Editors's note: Rabbi Gurewitz is the Rosh Yeshiva of Yeshivat Ner Moshe, Jerusalem.