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

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

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

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The Journal of Halacha and Contemporary Society

Pesach 5753
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TABLE OF CONTENTS

Protest Demonstrations

Rabbi Alfred S. Cohen

There is perhaps no group of Jews "held in as much disdain by their fellow Jews in both Israel and the United States" as the ultra-Orthodox "*Haredim*."[1] At the same time, many have praise for their spiritual courage which never wavers in confrontation with those they believe to be secular non-believers.[2] There is no question, however, that they arouse tremendous hostility, especially when they throw stones at Sabbath-desecrators or make other volatile objections to activities they perceive as unacceptable.

Whether or not one finds their behavior embarrassing is not the issue. What is of utmost importance is to know whether their public protests have intrinsic value, or whether, on the contrary, they are causing more harm than any good they might achieve and could even be a causing a *chilul hashem*.

The "Ultra-Orthodox," or *Haredim* as they are known in

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1. Murray Polner in a book review in *The New York Times*, June 1992.

2. See Norman Lamm, "The Ideology of Neturai Karta according to the Satmar Version," *Tradition* XIV, Fall 1971.

Rabbi, Young Israel of Canarsie;
Rebbe, Yeshiva University High School for Boys

Israel, have for many years been perceived by the overwhelmingly secular Jews of the State of Israel as a thorn in their collective side. There is resentment at the "religious coercion" they are accused of perpetrating as the price for their political allegiance, and anger at the stone-throwing for Sabbath desecration, as well as other efforts to prevent people from following a secular lifestyle.

To what extent does the Jewish religious law approve public protests against desecration of Jewish law? This is the question we will explore herein.

In the Talmud (*Shabbat* 54b), we are taught:"Whoever could have protested or prevented [a sin] and made no protest, will be punished for that sin."[3] This declaration arises from

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3. This is the reason the Gemara gives for the death of the wife of R. Chanina b. Tradyon (*Avoda Zara 17b*). Furthermore, in *Shabbat* 119a, we are told "Jerusalem would not have been destroyed had it not been that they did not protest or prevent each other [from sinning]."

For a full discussion of this point and many issues relating to the mitzvah of *hocheach tochiach*, see *Sedei Chemed*, part 6, 381. Some of the topics discussed there include the following:

A) Does this mitzvah require an individual to go out and look for opportunities to perform it, or is it sufficient that when one sees someone doing the wrong thing, he reprimand him?

B) Is the "*gadol hador*" the same as all other individuals with respect to this mitzvah, or is he under a special obligation to seek out evil so that he may eradicate it?

C) The mitzvah of reprimand applies also to rabbinic decrees (*derabbanan*). What if the sinner is not aware that what he is doing is forbidden? Does it matter if the action is inherently permissible, but is forbidden only by a *gezera* of the rabbis? See also *Birkei Yosef*, 608:1.

D) Does *tochacha* (reproof) apply if the sinner is violating a positive commandment, or only a negative one? See *Sefer Chasidim* 5, footnote 1.

the rabbinic understanding of the biblical verse, *hocheach tochiach*, "you shall surely reprove" a fellow Jew whom one sees in the commission of a sin (*Vayikra* 19:19).

The Midrash relates that three individuals were involved in advising Pharoah what to do with the Jews: Bil'am, Job, and Jethro. Bil'am advised Pharoah to throw all newborn Jewish boys into the Nile, Job maintained silence, and Jethro fled. The Midrash continues that G-d punished Bil'am for his evil advice, and he was eventually put to the sword by the Jewish people. Job, for remaining silent, was punished with dreadful maladies, while Jethro, who opposed the plot, was rewarded that his descendants were among the wise men who sat on the Jewish High Court in the Temple.

The Brisker Rav asks a pointed question on this Midrash – why was Job punished? What did he do wrong? Certainly he did not bring any harm upon the Jews? But, responds the Brisker Rav, he kept silent, and that in itself makes him somewhat culpable. Because, when it hurts, a person screams. If Job remained silent, it is a sign that the iniquity being perpetrated did not bother him. [4]

So, too, we may draw the analogy to the present question: if a person does not protest a sin's commission, it means that the defiance of G-d's will doesn't bother him, or else he would not be able to remain silent.

Rambam permits the Beth Din to "temporarily uproot" some religious requirements "in order to strengthen the

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E) To what extent does the concept of *kavod habriot* (respect for individuals) impact on the performance of the mitzvah of *tochacha*, if at all?

F) If the sinner repents and is forgiven by *Hashem*, will the person who failed to protest also be forgiven retroactively?

4. *Sefer Batei Halevi'im* p. 86, #218.

faith" or "in order to bring the public back to the religion or to save them from making a grave error."[5] Does this license to suspend a Torah law apply only to the Supreme Beth Din, or can private individuals also decide that it would be advisable not to follow a biblical directive in a certain situation? In view of the express dictate of the Torah to rebuke a Jew whom we see committing a sin, does Jewish law *permit* us to look aside in silence when we see fellow Jews acting contrary to the clear demands of Jewish law? Perhaps those Jews who cast stones at people riding in cars on the Sabbath are doing the right thing. Perhaps those of us who look by idly are actually doing the wrong thing. Is our silence tantamount to acquiescence?

Simply put,the question is – must one thunder in protest against all public transgressions, regardless of the consequences, irrespective of the hostility for religion which it might engender? Does one have to consider the likelihood of success? May one, or must one, take into account the negative effect that protest might arouse?[6]

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5. *Hilchot Mamrim* 2:5. In *Divrei Yoel, I, Yoreh Deah* 35:4, the author says it is forbidden to tell someone to violate a rabbinic stricture in order to get him to fulfill a biblical imperative.

6. The following story is told in the name of the *Chafetz Chaim*: A Jew who had been careful to observe mitzvot all his life passed away, and stood before the Court of Divine Judgment. The accuser called out – "This man transgressed the Sabbath."

"No, no, he protested, I was very careful to keep even the smallest detail of every stringent law."

"This man did not observe the laws of family purity."

"No, no, how can you say that, I was very careful to do exactly every thing I was required."

"This man ate non-kosher food."

"What a lie! I ate only *mehadrin*.." How could he be accused so falsely when he had been so diligent to keep every detail, he demanded to know.

The Parameters of *Tochacha*

It is difficult to know just what the commandment of *tochacha* includes: is it a purely functional[7] directive, which is concerned only with helping the sinner mend his ways, or can it be that there are other motives or reasons for voicing protest – perhaps so that others will not think the sinful action is acceptable, or even to impress upon the sinner that his action is wrong, even if there is no hope that he will change his ways at this time?[8]

Furthermore, we need to clarify which means are valid in performance of this mitzvah. Is it sufficient to utter a verbal protest? Must one be galvanized into action and prevent the sin at all costs, perhaps even to prevent it physically or by calling in the legal authorities of the city?[9]

"Ah, " the answer came back, "but you didn't trouble to do anything to influence others, to get them to keep the laws too."

Perhaps that is something else we have to keep in mind – that part of our responsibility as Jews is to uplift the entire Jewish community, not only our own selves.

7. Rambam, *Hilchot Deot* 6:9, praises the person who forgives and overlooks an injustice done to himself. How does this accord with the obligation to make known to the sinner his transgression?

8. How should a person react to a sinner who refuses to change his wrongful behavior? Is it permitted to dislike him, even though we are bidden not to hate another Jew? See Rambam, *Hilchot Rotzeach 13:14* and *Avail 14:1, Sefer HaChinuch 238, Hagahot Maimuniyot Hilchot Deot 1, Tanya, chapter 32.*

9. See *Avnei Nezer Yoreh Deah* 461, who sanctioned and even encouraged the use of government agents to close down a brothel. Earlier, the Rashba had allowed Jewish communities in Spain to employ whatever powers they had, in order to stop a sinner, "whether in administering lashes, or to cut off a hand or a foot, or even to kill him." (*Teshuvot HaRashba* 5, 238.)

The Satmarer Rebbe advocated public demonstrations in America to put pressure on the Israeli government to change political and

Over and above the requirements of the mitzvah to reprove and reprimand a sinner, to try to restore him to proper behavior, there arises the very serious question of public protest – is it the same as a private admonition, or do other criteria arise? This will be the main focus of our study herein – what are the proper limits of *tochacha* in the public arena, and what factors should be taken into account before speaking out publicly to protest an action perceived as sinful?

Giving *tochacha*, reproof, is a very delicate matter. One fears to raise a hue and cry in a situation which does not warrant it. The Gemara in *Sanhedrin* 101a writes that Yeraveam (king of Israel) was punished "because he criticized Solomon in public," indicating that it was a severe infraction to take the king to task in front of other people. On the other hand, the Rambam writes in *Hilchot Deot* 6:8,

> But pertaining to matters between man and G-d, if the person did not repent in private, he is to be shamed in front of many people, and we publicize his sin and disgrace and curse him until he returns to the good, just as all the prophets of Israel did.

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social policies. He was of the opinion that public pressure would embarrass the Israeli government and possibly cause them financial harm, thus forcing them to desist from those policies to which he objected (*Vayoel Moshe* 113.) Although he does not spell it out precisely, it is possible that the Rebbe felt it was necessary to demonstrate against religious transgression particularly in the Land of Israel, since in the minds of many people, Israel represents the Jewish people and Judaism. He might also have been of the opinion that a sin committed in Israel is more serious than one committed elsewhere, since it is a holy place and a sin there is more sacrilegious, and therefore requires public denunciation.

For further details on this mitzvah, see *Sefer Chasidim* 5 , *Terumat Hadeshen* 276 (as quoted in *Shaarei Chaim* #1, p.5. However, this text does not appear in the standard version of *Terumat Hadeshen*), and the *Netziv, Ha'amek She'ela, Bereishit* 27, no. 6.

At times, however, the prophet tempered his criticism of the Jewish people. We find in the Torah that when the Jews sinned, Moshe turned on them angrily with the challenge, "How long do you intend to keep on angering G-d?" Yet, when addressing the Almighty on the same occasion, Moshe played down the incident, mildly asking, "Why, O Lord, are You getting angry with Your people?" It seems that at one and the same time, it is necessary to admonish the sinner, yet to try and minimize his transgression in the eyes of Heaven. One must follow the example of our great teacher, and search for mitigating circumstances.

Nevertheless, love for Jews cannot erase the necessity to castigate. If children or young people constantly hear us excusing sinners and sin, how will they know that they should not follow suit? Will they not similarly find excuses for themselves as well?

Our Sages constantly reiterate that the most important quality, the highest desideratum, is peace; a person must always be cognizant of the ill will his criticism may engender, perhaps even to the extent of holding his tongue rather than sowing hatred. Yet we do not necessarily believe in peace at any price. In his Code of Law, Rambam rules that a judge ought to pick a fight with the person who deserves to be argued with, even "cursing him or pulling out his hair."[10] Apparently, then, truth need not be sacrificed on the altar of peace.

Looking Away

By now, many people may have reached the conclusion that it might be more prudent to look away rather than

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10. *Hilchot Sanhedrin* 24:8.

constantly confront non-observant Jews with the culpability of their behavior. Some may even argue, quite convincingly, that if we truly wish to effect a change in the behavior of sinners, we cannot be successful with a policy of confrontation. Love, acceptance, moderation are counseled as being far more effective.

They may be right. But before we can experiment with various methods of "outreach" we have to be sure that, halachically, we are permitted simply to ignore the commandment of *tochacha* just because it puts us in an embarrassing position or even because it will not be effective. We have to be sure that our premonition that *tochacha* might be counter- productive, is a sentiment we can act upon. After all, *hocheach tochiach*, the Torah tells us, "you shall surely rebuke" a fellow Jew whom you observe sinning. What gives any person the right to second-guess the Torah, if *tochacha* is what the halacha specifically requires? And what gives any Jew the right to abrogate a mitzvah because he feels it will not be efficacious?

Consequently, it behooves us to look more carefully at the actual dictates of the mitzvah of *tochacha* and develop insights which will enable all Jews to establish contacts with each other on a basis firmly sanctioned by the halacha. We shall do this presently.[11]

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11. The question of looking away rather than rebuking is especially important now that there are so many non-observant Jews who are gradually finding their way back to religion (the *Ba'al Teshuva* movement). Must one tell a newly-observant Jew all the things he is doing wrong right away, or is it permissible to wean him gradually from his former lifestyle?

These issues are discussed in a pamphlet about dealing with *Baalei Teshuva* and their unqiue problems, *Shoalim BiTeshuva.* The author advises going gradually to habituate the newly observant in observance of mitzvot. However, once he is well grounded in

Hundreds of years ago, the Rashba already reflected on this problem. Basing his conclusions on a talmudic text in *Avoda Zara* 16a, the Rashba counsels that "it is not possible to treat all people the same."[12] Therefore, he counsels

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his belief,one must not allow him to transgress any commandment.

However, it seems to this writer that this does not quite accord with the approach of the Rashba. For example, if a man has decided to become observant and his wife does not go along with his new thinking, should the religious counselor advise him to divorce her, or is he permitted to keep silent about her lack of observance and work slowly towards the possibility that she, too, will repent? It seems to me that the Rashba might not necessarily counsel such a strongly affirmative approach, but might advocate going slowly,before urging the man to divorce his wife.

In the Gemara *Sota* 48, a similar sentiment is voiced: faced with two bad situations, the rabbis advised trying to tackle one before taking on the other. Head-on confrontation is not always the wisest solution.

R. Moshe Feinstein used the above text very often in ruling on practical issues arising from the *Baal Teshuva* movement. His general advice was to try and avoid making any situation worse.

See also *Tenuat Hamussar* I, p. 164, where the author relates the phenomenal success of R. Yisrael Salanter in bringing an entire Jewish community back to observance of mitzvot, by employing a very gradual and "laid-back" approach.

Rabbi Ovadia Yoseph refers to all these sources in a responsum published in *Yabia Omer* 6:14, debating whether one should advise a woman who wears mini-skirts that it is preferable to wear pants.

12. See *Responsa of Radvaz* I:187, who displays considerable flexibility on the matter. See *Yoreh Deah, Hilchot Nidui VeCherem*,and the *Shach* and *Taz* there.

But the Rashba's position is difficult to defend, based on the conduct of King Shaul, who was silent when detractors insulted his kingship. The Gemara criticizes the king for this (*Yoma* 22b). Despite this, the Rambam also clearly advocates a person's forgiving the one who has wronged him, rather than confronting him with reproof (*Hilchot Deot* 6:9).

prudence and forethought rather than an automatic response.[13] The Rambam, too, says that one should "look away" when he sees his friend doing the wrong thing.[14] The Rambam does not explain how this conforms with the requirement to chastise a fellow Jew who is sinning, but nevertheless, we see that the rabbis do consider it permissible at times not to fulfill the mitzvah of *tochacha* immediately.

The same approach is evident in the *Tiferet Yisrael*,[15] who comments that at times it is not wise to seek a confrontation. "Let him not fight with them, because not only won't it help, but it may actually cause harm."

Why *Tochacha*?

Leaving aside, for the moment, the thorny question of whom to rebuke or when or if to rebuke, let us turn to another side of the question – what is the purpose of *tochacha*? Is it only to prevent a sinner from continuing his actions? Possibly we can adduce an alternate or additional goal: to make a public protest, to set the record straight. In this latter scenario, it is not necessary for the reproof to be success-oriented in order to succeed in its true purpose, which is to make a public statement about what is right. Our rabbis have expressed varying opinions on this.

In *Hilchot Deot* 6:7, the Rambam states that "if someone sees his friend sinning or following an undesirable path, it is a mitzvah to return him to the good [path]." So, too, the *Sefer HaChinuch* (239). These rulings indicate that *tochacha* is to be viewed as a mitzvah with a specific purpose, namely,

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13. *Responsa Rashba* V: 238.
14. *Hilchot Deot* 5:7.
15. *Tiferet Yisrael, Pirkei Avot* 4:18.

preventing further transgression.

But other scholars do not view the mitzvah simply as one defining relations between man and man,[16] but rather as a mitzvah between man and God. Thus, *Nimukei Yosef* insists that one must admonish a sinner "even if it is clear to him that he will not listen."[17] The putative success of the reproof has no bearing on the requirement to voice it. Other *Acharonim* concur, noting that although one does not receive punishment for those he rebukes who do not mend their ways, nevertheless, the responsibility to rebuke remains.[18]

Protest Demonstrations

There can be little question that over the years the protests, the demonstrations, the rocks thrown at Sabbath desecrators, have had virtually no success in stopping the activities being protested. At best, the rock-throwers have been able to push Sabbath desecrators into neighborhoods other than their own, to pursue their activities. At worst, it is highly likely

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16. The Gemara in *Erechin* 16 and the Rambam in *Deot* 6:9 concur that if a person is sinned against, he should forgive the transgression. How does this jibe with the imperative to give reproof and to help a fellow Jew to mend his ways? If I forgive his wrongdoing, how will he learn not to do it again? Furthermore, the *Sefer HaChinuch* in no. 239 opines that in addition to the positive exhortation to rebuke the sinner, there is also a negative prohibition, "do not stand by while your friend is in mortal danger" "*lo ta'amod*." In other words, if I don't rebuke him, I am letting him cause himself mortal (spiritual) damage, and therefore I am obligated to rebuke him. However, if the sinner is not willing to accept rebuke, the negative commandment does not apply.

17. *Nimukei Yosef* to *Yevamot* 65.

18. See *Ravya*, brought in *Hagahot Maimuniyot* to Rambam, *Deot* 6. Also *Magen Avraham* 608:3.

that the demonstrators have aroused much hostility towards the very system of beliefs they are trying to defend. Why do they persist? Is there justification for what they are doing?

An article in the Israeli periodical *Techumin* remarks on this very point:

> Demonstrations are not mounted for the sake of "separating the sinners from sin" nor because of the laws of the mitzvah of *tochacha*, but rather for the reason that the matter should not become a problem in future generations ...and the Sabbath will, God-forbid, be trampled in public...[19]

Here we find an important reason for demonstrations taking place: to try and make sure that certain Jewish concepts and values not be relegated to oblivion, to keep alive in the minds of the public that traditional Jewish practices still demand our observance.

There are other motives as well, which would amply justify the protests of the demonstrators, even if not necessarily their tactics. First of all, no Jew should have to tolerate seeing a violation of Jewish law take place in front of him. R. Moshe Feinstein makes this point in a responsum to a *mohel* who asked if he was obligated to perform a *brit milah* on the Sabbath in a place where he would have to see them violating Sabbath law.[20]

In addition, we should consider the other side of the coin – if people desecrate the Sabbath openly in a public place, or otherwise publicly flout Jewish law, and there is no reaction, it might give the impression that there is nothing wrong with their behavior. Perhaps it is very important that

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19. *Techumin* 7, p. 118.
20. *Iggerot Moshe, Yoreh Deah* 156.

demonstrators publicly exhibit their anger and their protest at the evil which is being perpetrated, at least to make the point that this behavior *is* evil, that it *is* an abomination in the eyes of G-d. Otherwise, it appears as if flagrant disregard of G-d's word is no cause for pain or anger in the hearts of other Jews. As King Solomon observes in *Mishlei* 24," "Someone who tells a wicked person (*rasha*), 'You are righteous (*tzaddik*), deserves to be cursed ." A public rejection of Torah ethics calls for a public affirmation that such action is reprehensible.[21]

Perhaps the most convincing argument, halachically, is that since all Jews are considered "*arevim zeh bezeh*," jointly responsible for one another, it follows that each Jew bears part of the responsibility for the transgressions of his fellows, and that he must do all he can to prevent another person from sullying their common heritage.

A seminal issue which has fundamental relevance for this question is the nature of the Jewish people. Is the Jewish people one organic entity, or do all Jews, taken collectively, constitute "the Jewish people?" The Radvaz sees all the Jews together "as one body" sharing a common source for its soul.[22] The *Zohar* (Chapter 32) compares the Jewish people to travelers on a ship. If one starts drilling a hole in the floor of his cabin, he endangers all the passengers on the vessel. Thus, one person's sin devolves upon the entire nation, lowering its spiritual status. Alternatively, however,

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21. *Ba'al Akeda, parshat Vayera.*

22. *Mamrim* 2:4. The same view is held by the *Avnei Nezer, Yoreh Deah* 16. The Rambam similarly considers that we are all one (*Sefer HaMitzvot, positive command* 205.) At the end of his book on *Taharot*, the *Chazon Ish* writes that *klal yisrael* is one unit; when a person gives *tochacha* to improve the conduct of others, he is in reality helping himself.

one could view the Jewish people as being made up of many individuals, each one with his own spiritual level reflecting his own personal achievements.

The decision as to when or if to make a public protest in the face of open disobedience to Jewish law has to come to grips with this question. For if we constitute one "body," each person has the right and obligation to stop any and all persons from harming their mutual "body." However, if we are only an aggregate of individuals, we might well arrive at a different approach to public protest.

Maharam Schick advances two compelling reasons why Jews must rebuke one another for public wrongdoing:[23] First he points out that the mitzvah of *tochacha* requires us to try to bring the sinner to repentance. Since that is the purpose of reproof, he advocates employing pleasant tactics, which have a far greater chance of success. Secondly, he finds the principle of *arevut*, mutual responsibility which all Jews have for each other, as a major reason for demonstrating to transgressors that their behavior is intolerable. It harms not only the individual sinner, but the entire Jewish people as well.[24]

We are obligated to try to prevent [the transgression]

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23. Maharam Schick, *Or HaChaim* 303. He tries to resolve the apparent contradiction between the Ramo in *Yoreh Deah* 157 and 334 and *Choshen Mishpat* 12. The question discussed by the Ramo is whether one is required to give *tochach*a if it will result in his losing money. The *Avnei Nezer, Yoreh Deah* 15, commenting on this point, holds that losing one's job is not considered as losing money--it is only losing income, which is not the same. This is deduced from *Kiddushin* 30a.

24. See *Techumin* 5, p. 283. Rav Kook's views on this matter are also elucidated there, including his discussion of the responsibility of women in this regard.

> in any way that will be effective...and who would dare to say that we ought to keep silent ...when we see the danger to our souls.

If nothing else, when a person openly protests at the wrong that is being perpetrated, he removes himself from the group which is jointly responsible.[25] Therefore, no one can challenge a demonstrator – why are you butting in, what's it your business? The obvious answer is, No, it is very much my business (and if I don't try to stop you, I too will be punished for your sin.)

Lack of Success

One must admit that most demonstrations mounted by the Ultra-Orthodox have made little impact on the actual behavior of secular Jews. The almost instinctive reaction, then, is to blame the methods of the protesters, with the concomitant assessment that had they employed other means, they would have been more successful. However, this may be analagous to killing the messenger when one dislikes the message. We ought to consider the possibility that there is no way Sabbath-desecrators in this day and age are going to stop riding on Shabbat, just because some "religious fundamentalists" object.

It may even be that the anti-desecration demonstrators are fully aware of the futility of their protest but feel obligated, nevertheless, not meekly to accept wholesale public contempt

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25. In *Techumin* 7, p.127, note 4, the approach of the *Biur Halacha* is explained. See the commentary of *Or Hachaim* at the end of *parashat Kedoshim*, who maintains that people who are themselves righteous will nevertheless be expelled from the Land of Israel due to their silence when others commit sins. Some interesting comments on this situation appear in "Jew and Jew, Jew and Non- Jew," by R. Aaron Soloveichik.

for the Torah and its values. There may be overwhelming value in that alone, in their anguished defense of beliefs which the majority of Jews have rejected but which, despite this, remain the word of G-d. There is something very admirable and noble in people who feel pressed to uphold the dignity and sanctity of the Torah despite the callous rejection of the secular majority. According to the Maharal[26] the act of giving *tochacha* is evidence of a person's pride in the value system he is defending.

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On a practical level, how should we respond to the relative failure of protest to make a significant positive impression upon those towards whom it is directed? Is the flaw in the techniques or personalities of the demonstrators, or the callousness of the sinners?

There are many rabbinic writings which indicate that *tochacha* has never been a very popular or successful undertaking. In the Gemara, Rabbi Tarfon remarks that if someone would turn to his fellow man and say, "Remove the splinter from between your teeth," he would get the retort, "Remove the beam from between your eyes."[27] People did not then, nor do they now, appreciate having their faults pointed out to them, and the response is often a defensive turning against the one pointing out the fault.[28]

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26. *N'tiv Hatochacha,* chapter 2.

27. *Erechin 16b.* The Maharal discusses whether this retort has validity or whether it is just said as an excuse.

28. The Maharal exalts the one who can accept rebuke (*N'tiv HaTochacha*), but evidently not everyone is able to live up to the standards of the Maharal. See also *Rabbenu Bachaya*, beginning of *parshat Shemot*.

In analyzing this phenomenon, the Gemara notes[29] that rebuke has little chance of succeeding, for the recipient almost always responds with hatred for the one pointing out his shortcomings. This analysis seems to put the burden on the recipients of rebuke.

Elsewhere in the Gemara[30] the opinion is expressed that no one today (1500 years ago!) is capable of giving *tochacha* properly. Rashi explains that it must be "with respect, so as not to cause his [the recipient's] face to change." The Maharsha also notes that it is a rare art to discern which person is susceptible to reproof and who will be turned off by it. All this suggests that the failure of protest to make any discernible impact on the public arises from shortcomings of the protesters.

In the view of the Chazon Ish, the talmudic appraisal has a profound effect on normative Jewish law. Thus he writes,

> ...It is a mitzvah to love the wicked... because nowadays [all persons are considered] as if they have not yet received rebuke, since we do not know how to reprimand [properly] and therefore all sinners are considered to be like those who are coerced [into doing evil – i.e., they are not responsible for their actions].[31]

This benevolent view of the sinner is potentially a crucial element in determining the proper attitudes toward and

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29. *Erechin* 16b.

30. *Bava Bathra* 16b.

31. *Chazon Ish, Yoreh Deah* 2:28. There has been much debate in rabbinic literature on how to deal with the non-observant. See Maharam Schick *O.H.* 303-313; *Binyan Zion* 2:23; *Melamed LeHo'il* 1:29; *Seridei Eish* 2:156; *Iggerot Moshe, Even Haezer* II 20 and *O.H.*I,33, *Yabia Omer* 6:14.

treatment of Jews who are deficient in their performance of mitzvot. We shall return to this topic more extensively later.

Making Things Worse

The *Sefer Chasidim* makes a very interesting and important comment about the performance of *tochacha*:[32]

> But if there is a person who, if chastised, will come to hate him, or if his intention is to make people angry, or if he is an evil-doer and will take revenge until he does worse things, then one should not chastise him.

This speaks most directly to the situation which prevails nowadays. There are many who fear that religious demonstrations to protest *chilul Shabbat* and other mitzvot not only do not convince anyone to observe these mitzvot but, perhaps far worse, arouse hatred and antagonism towards religious people and ultimately towards the religion itself.

Another mitzvah in the Torah, aside from *tochacha*, which might have bearing on this dilemma, is the admonition not to "set a stumbling block before the blind," i.e., not to do something which will cause another person to sin. This concept, *lifnei iver*, has obvious relevance to our question. Rabbi Shlomo Zalman Auerbach[33] rules that one should definitely offer food to a guest, even if it is known that he will not wash his hands before eating nor recite a blessing. This is not a case of "putting a stumbling block" because the intention is not to cause harm but rather to

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32. *Sefer Chasidim* 413.

33. *Minchat Shlomo* 35:1. In his article noted earlier, R. Aaron Soloveichik cautions against acting in such a way as to cause heterodox Jews to dislike observant Jews. However, he has often spoken out against inviting a non-observant Jew to one's house for Shabbat if that guest will ride home afterwards, on Shabbat.

help the guest and prevent his transgressing a far greater sin – hating his fellow Jew (which he would certainly do if the religious Jew refused to serve him food.)

The Chazon Ish, however, is not willing to give such a blanket permit; although recognizing that failure to offer food to a guest carries much potential harm, he would permit it only if there is some doubt whether the man would fail to make a blessing. But if we are certain he will not, the Chazon Ish would not agree to offer him food, thereby causing him to sin.[34]

The Mitzvah of *Tochacha*

Having briefly sketched the variables which need to be considered in implementing the biblical directive of chastising a sinner, let us turn now to a more intensive study of the halachic dicta defining the mitzvah, before we consider the avenues of behavior which the halacha seems to prescribe.

There is a biblical imperative for every Jew to reprimand his fellow Jew should he see him engaging in a religiously forbidden or undesirable activity. This is the mitzvah of *hocheach tochiach* (*Vayikra* 19:17).

> From where [do we know] that if a person sees his friend doing something despicable he is required to chastise him? Because it says "You shall surely reprimand your fellow man." To what extent is reproof [required]? Rav says, "until he hits him;" Shmuel says "until he curses him." And Rav Yochanan says, "until he rejects him."[35]

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34. *Chazon Ish, Shevi'it* 12:9.

35. *Erechin* 16b. For a most interesting explanation of these

At this point, we run into some trouble, because the rabbinic explication of when, how, and to what extent a person is required to protest the actions of his fellow man is ambiguous. We find rabbinic guidelines which seem to contradict other rabbinic dicta, leaving considerable room for perplexity and speculation.

In Gemara *Shabbat* 54b we are told that whoever is in a position to prevent the members of his household from transgressing, and fails to do so, is punished for (the sins of) his household. Similarly, one who could prevent the people of his city from sinning and does not do so, is punished for their acts; and one who could stop "the whole world" and does not – is punished for all of them. Clearly, the implication is that one should speak up to stop others from doing the wrong thing.

The Gemara continues on the next page to relate a conversation between two rabbis, where the first directed his colleague, Rav Simon, to chastise the Exilarch (the "Prince of the Jews" in Babylon) about his conduct. But, countered Rav Simon, he won't listen to me! Nevertheless, the rabbi continued, you must reprimand him.

However, in *Beitzah* 30b, the Gemara seems to be of a different mind. There the Gemara notes that it is biblically mandated (*d'oraitha*) to extend the time of fasting on Yom Kippur, by adding some minutes before sunset prior to Yom Kippor and also adding some time after the sun sets at the end of Yom Kippur (this is technically known as *tosefet Yom Kippur*). Nevertheless, the rabbis note, many women continue to eat and drink before Yom Kippur until it actually becomes dark, which is clearly a violation. Yet the rabbis

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opinions, see the Maharal, *N'tiv Hatochacha* , Chapter 2, and the *Magen Avraham* 608.

caution that one should not tell the women to stop eating earlier. "Leave the Jews alone; it is better that they sin mistakenly rather than sinning intentionally."[36]

Again in *Yevamot* 65b, the Gemara echoes this sentiment by stating the famous principle: "Just as it is a mitzvah for a person to say something that will be listened to, so it is a mitzvah for a person not to say that which will not be listened to."

What then is the position of our rabbis in the Talmud – should one speak out against evil lest he bear the consequences of the sins of others, or should one keep silent when it seems evident that criticism will not be accepted? The dilemma is not resolved in the Talmud, and is reflected in conflicting directives of the *Rishonim* in the medieval era.

The Rosh,[37] citing the *Baal Halttur*, makes a distinction between laws which are explicitly written in the Torah and those which are only derivative or inferred. Only if something is specifically forbidden in the Torah, must one protest until the sinner ceases his violation. The *Shulchan Aruch*[38] formulates the law in accordance with this view.

The author of *Nimukei Yosef* draws the line elsewhere: He notes that the Gemara has indicated it is a mitzvah to chastise someone who accepts criticism, even a hundred times, but not to criticize someone who won't listen. How do we reconcile that with the rabbinic dictum that he should chastise – even someone who apparently is unwilling to

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36. See the Ramo, *Yoreh Deah, Laws of Chadash; Sefer HaChassidim* 39 and 262, and the commentary thereto.

37. Rosh, *Beitzah* 30a

38. *Orach Chaim* 608.

listen – until he beats him? Here, the *Nimukei Yosef* makes the following distinction: In the first case, the Gemara is speaking about an individual; if he seems willing to accept rebuke, one should continue to rebuke him whenever he does wrong, up to the point where he beats the rebuker. However, it is different with a group; it is better to keep silent if it appears they will not listen.[39] This, too, is the law as formulated in the *Shulchan Aruch*.[40]

As for the talmudic text wherein Rav Simon was exhorted to chastise the Exilarch, *Nimukei Yosef* explains that a leader, or a group, has to be chastised at least once, so that they would not be able to claim immunity on the grounds of ignorance of the halacha. Therefore, "it is necessary to reprimand him at least one time."[41]

The position of the *Nimukei Yosef* has direct application to the practice of certain *Haredim* in Israel who stage demonstrations and other public acts in order to protest open violation of Torah law. The thrust of his teaching seems to be that "it is better to remain silent if it appears they will not listen." To understand why they persist in their apparently futile efforts to prevent Sabbath-desecration and the like, we need to look further in the writings of *Rishonim* who express

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39. But the *Shulchan Aruch Harav* 608, no. 5, interprets the text about a group a bit differently: He says the Gemara holds that one should in all cases rebuke an individual who is sinning, until he beats the rebuker. However, one must be careful not to rebuke him in front of a group, but only privately.

40. *Orach Chaim* 608.

41. Ibid. See also the Ran there, who adds that if a person knows his protest will have no effect, he should not reprove a public figure more than once in front of others; however, one is required to protest a private individual's sinful actions until he beats or curses him.

a somewhat different understanding.

For a possible answer, we can turn to the commentary of *Akedat Yitzchak*,[42] who makes the following distinction: When an individual sins privately, the aforementioned rules of *tochacha* apply – if he is not going to listen, we do not rebuke him. However, this cannot be the case when an entire group, or society, commonly commits a transgression, even if it be a minor one. It may even have reached the point where the mistake is so established that no one even bothers to point out that it is wrong. In that case, writes the *Akedat Yitzchak*, it is absolutely essential to mount a public protest, even if no one listens, but at least one does not allow a mitzvah of the Torah to be totally discarded, as if it did not exist.

It seems that at a certain point, it ceases to be a question of whether or not to give reproof, and becomes instead a threat to the continued existence of a biblical command. Then, the major concern need not be the fate of the sinners (better that they sin mistakenly rather than intentionally...) but has to be the continued viability of the Torah as an irreducible entity. Thus, the rules of *tochacha* would be suspended, and the issue of preserving the Torah would come to the forefront.

On the other hand, there are many eminent *Rishonim* who take a notably different attitude. The *Mordechai*[43] differentiates between a sin which people have become so accustomed to committing that they believe it to be a permissible action, and one that arises from an honest error. In the former case, the dictum of the Gemara applies, that "it is better for them to sin mistakenly rather than to sin

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42. *Parshat Vayera, Sha'ar Ha'asarim*, and also Sefer *Chasidim*, 262, no. 5.

43. *Beitzah* 30a.

intentionally." In other words, if people are brought up in a certain way so that they believe that what they are doing is right, even if actually it is wrong, there is no point in rebuking them about it because they are not going to change, seeing as they believe their action to be a permissible tradition.

However, if people are sinning due to ignorance,[44] it is proper to tell them so, in order to guide them on the proper path, "for perhaps they will listen, since [their sinful action] is not a tradition they received from their parents." For him, the distinction arises from the attitude of the sinner. If people sin because they don't know something is *assur*, we must tell them it is wrong. Even if they sin deliberately, we have the mitzvah of *tochacha*, reproof. The only time one should not criticize the actions of people is when they act out of a conviction that their behavior is acceptable, since that is the tradition they were brought up with.

The Rosh, also, distinguishes between a sin which is committed out of ignorance that the act is forbidden, and a sin which is specifically mentioned in the Torah. We apply the principle "better that they should sin mistakenly rather than intentionally" except in a case where the action is specifically forbidden by the Torah. In that case, one must protest, regardless.[45]

Tosafot, however, do not equivocate on the matter:[46] They contend that a person should continue to be reprimanded only if there is some possibility that he will accept the rebuke. But if one is sure that he will not accept, it is better to remain silent, for it is preferable that they sin mistakenly rather than sinning intentionally...

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44. See *Rabbenu Bachaya, parshat Shemot.*

45. Rosh and Ran, *Beitzah* 30a.

46. Tosafot, *Shabbat* 55a, *Bava Bathra* 60, and *Avoda Zara* 4a.

To summarize: the majority of rabbinic opinions appears to consider rebuke mandated if it will effect some improvement in the sinful behavior of individuals. If there seems to be no chance that the rebuke will be effective, or perhaps might even be counter-effective, the majority would counsel silence. However, there is a minority view which sees *tochacha* as necessary in order to remind the public what the Torah view is, and that it has not been cancelled due to neglect. Here the objective is *kavod haTorah*, the honor of the Torah, not necessarily the repentance of the sinner.

Who Should be Rebuked?

Another factor which limits the scope of the mitzvah of *tochacha* may be the personality of the sinner. It is the view of the *Aruch Hashulchan*[47] that the entire concept of chastisement pertains only "to a Jew who believes [in the Torah] but whose "*yetzer*" (evil inclination) gets the best of him." Such a person might repent when he is rebuked for his behavior. But one who rejects the words of our Sages – there is no point in rebuking him, for he is a heretic, and one should not enter into debate with such a person. The *Biur Halacha* agrees with this assessment, following the reasoning of many earlier authorities.[48]

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47. 608, no. 7. This question is a source of much controversy between the *poskim*. See *Schach, Yoreh Deah* 157; *Dagul Merevavah*, there; and *She'elot Uteshuvot Divrei Yoel, Orach Chaim* 59, which discusses the question of building a mikvah in a non-religious community. Many of the sources we have cited are discussed therein.

48. See, for example, the Meiri and the *S'mag*, who opine that if a person sins deliberately, one is not required to reprimand him.

When the Lubavitch movement began a campaign to have all Jewish men don *tefillin*, the Satmar Rebbe objected, in a pamphlet entitled *Al Hageulah ve'al Hatemurah*. In his response, the

However, this is not the view of the *S'mak*, who rules that even if a person sins intentionally, and not out of ignorance or lust, it is necessary to protest his action. In arriving at a definitive answer, the Ramo rules in accordance with the opinion of the Ran that in the case of an intentional sin, it is still necessary to protest at least once when a group is involved; as for an individual, one should rebuke him over and over.

Writing more than 600 years ago, the Ritva concluded that exemptions from the mitzvah of *tochacha* could be justified "in the old days," when all people were basically committed to Jewish law. However, in his generation, he felt that people were already so lax in their observance of Torah standards that it was always necessary to make a public protest, in order to keep people aware of what is really right.

Certainly this is a principle which is operative today. For many people, protest represents not primarily an attempt to change the attitudes and behavior of the multitudes who have abandoned a Torah lifestyle but rather a determination that, at the very least, one must voice some opposition to the wholesale disregard of our heritage. Most protesters recognize that their demonstrations might not have an immediate impact; nevertheless, they believe that it is their responsibility not to allow Torah values to be consigned to oblivion in the public mind.

This sense of the futility of *tochacha* to effect a change in the behavior of sinners is already evident more than a century ago in the writings of the *K'tav Sofer*:[49]

Lubavitcher Rebbe alludes to many of the questions mentioned above to defend his undertaking (*Sichot Shabbat, Parshat Bereishit*, 5728).

49. Responsa *K'tav Sofer, Even Ha'Ezer* 47.

> But all this [*tochacha*] can be only at a time when scholars are respected by the people, who recognize their value, and [who sin] only because their evil inclination prevailed upon them to transgress the mitzvot of *Hashem*. In this case, there is hope that [they will repent]....But if they deride the sages who follow in the light of the Torah, and turn light into darkness, then [these people] will also have contempt for them and certainly will not accept their words...

The Chazon Ish, too, took cognizance of the changed attitude of the multitude of Jews and gave serious thought to how to relate to them. Living only one generation ago, the Chazon Ish's evaluation of the situation is of particular immediacy for our own troubled times; perhaps his approach will prove to be the most helpful in helping bridge the gap between observant and non- observant Jews.

As far as the Chazon Ish was concerned, non-observant, even non-believing Jews today should not be categorized as "wicked", i.e., as deliberate sinners. He opined that all teachings in the Talmud and later rabbinic writings about wicked or heretical Jews must not be applied to wayward Jews in our own day, because *nowadays we do not know how to give tochacha properly*. Thus, people who sin do so because they are not truly aware of the enormity of their transgression. Lacking understanding of the Torah and its values, they are comparable to lost and ignorant Jews, not evil ones.

> Because in our time, it is [as if] they have not yet been rebuked, for we do not know how to give reproof [properly].[50]

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50. *Chazon Ish, Yoreh Deah* 2:28. See also, *Hagahot Maimuniyot, Hilchot Deot* 6:3; *Chinuch* 238; *Tanya*, chapter 32.

Chilul Shabbat

An article appeared in *Techumin*[51] contending that it is wrong to throw stones at Sabbath-desecrators, because that in itself causes further violation of the Sabbath when the police respond to the hullabaloo, with cars racing through the streets and sirens blaring. He draws an analogy between the Sabbath demonstrators and a case discussed by R. Moshe Feinstein.[52] Rav Moshe was asked if one may invite guests to a Bar Mitzvah on Shabbat, if the guest will have to ride to get there. Rav Moshe forbade such an invitation, which he saw as *hasata*, inciting a person to sin. Similarly, argues the article in *Techumin*, demonstrators create situations which engender more *chilul Shabbat*.[53]

Another rabbinic responsum cited to convince demonstrators that they are wrong to instigate a riot on Shabbat is one penned by R. Tzvi Pesach Frank. The question was whether an Israeli religious agricultural settlement may jointly purchase a large wheat thresher together with a non-religious settlement. Neither of them qualified for such a

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51. *Techumin* 7 , p. 112.

52. *Iggerot Moshe, Orach Chaim*, 99.

53. In *Techumin* 2, p.66, the author deals extensively with the question if the police in Israel are actually violating the Sabbath when they respond to a riot. Is it *chilul Shabbat* to stop people from hurting one another? The Ran to Gemara *Shabbat* 42 permits removal of a burning object from the public domain because "damage for many people is *pikuach nefesh*." In *Orach Chaim* 334 we find the rule that serving the public is not *chilul Shabbat*. The author also discusses the use of microphones and writing materials.

Others who deal with the vital issue of employing a police department in Israel on Shabbat include Rav Herzog, *Hatorah Vehamedinah*, 5-6, pp. 25-33; Rav Eliezer Waldenberg, as brought in *Sinai*, 22, pp. 155-178; and *Tzitz Eliezer* 4, pp.14-22; also R. Saul Yisraeli and R. Y. Levin.

purchase individually, since the government would only sell a combine to a large group. However, the two groups would split it so that the religious ones could use it during the week, and the others would use it also on Shabbat. Rav Frank forbade such an arrangement, which would have had the effect of encouraging the non-religious group to work on Shabbat in order to meet their needs.[54]

The real question is whether someone has to modify his behavior in order not to cause someone else to sin.[55] According to the sources mentioned above, it would seem that a person does indeed have to take into account that his protest might cause *chilul Shabbat*. However, this is not at all the conclusion of Maharil Diskin[56] who finds no reason

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54. *Har Tzvi,Orach Chaim* 125. The author of the *Techumin* article wonders why it should be forbidden, since the *chilul Shabbat* is not certain. However, a careful reading of the responsum shows that Rav Frank was well aware of this, yet added succinctly, "but in this non-religious *moshav*, they desecrate the Sabbath openly and are accustomed to do all kinds of work on Shabbat; thus it is difficult to contend that there exists a true doubt" as to whether or not they would use the combine.

55. The *Mishnah Berurah* 329:16 does make such a suggestion—if the victim of a holdup gives the robber what he wants, there would be no *chilul Shabbat*. However, the *Mishnah Berurah* is not suggesting that a person forego his property in order to save the thief from *chilul Shabbat* but rather to save the *victim* from *chilul Shabbat*. If he gives up the money, there will be no problem; the *Mishnah Berurah* considers this as a viable option.

56. *Kuntress Acharon* 145, based on the talmudic text at the beginning of *Ketubot*. The *Sedei Chemed* II, 56, note 7, seems to be saying the same thing. It is possible to find a precedent for this line of reasoning in the Ritva, *Avoda Zara* 63, who says that, while it is *assur* to give a person a forbidden object (such as non-kosher meat) to enable him to sin, it is *not* forbidden to give him money with which he can go out and buy non-kosher food. Also, *Seridei Eish* II, 56, rules that it is permissible to hand a

why a person should not go ahead with living his life the way he feels is right, and if others choose to violate the law in response – that is not his concern. Nor can it be considered a violation of the prohibition of "setting a stumbling block" and causing others to sin.[57]

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Our brief survey indicates that for most rabbinic decisors, the mitzvah of *tochacha* is goal oriented – its primary purpose is to effect a positive change in the behavior of an errant Jew. However, a significant number of authorities also consider it highly necessary, not only for the immediate observer but even more for the Jewish people as a whole, that the eternal truths of our Torah not be forgotten nor be trampled upon without at least some demurrer. Particularly when a large group embarks on a course of action contrary to Torah law, there is a need to speak out – even if futilely – against such transgression of our national mission.

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writing pad to a doctor on Shabbat, even though it is clear that he will use it to write on Shabbat. He also permits someone to rent rooms to a person despite knowing that the tenant will use the rooms to give haircuts on Shabbat (no. 184). The *Binyan Zion* 16, allowed an author to give his manuscripts to a printer, even though Jews will typeset the book on Shabbat. For further instances, see Responsa *Yeshuot Moshe* 3:32.

57. This ruling was challenged–the halacha is that a parent is not permitted to strike his mature child, even though it is a parent's mitzvah to train his child, for fear that the child may hit him back–an action which warrants the death penalty in Jewish law. The parent is not permitted to act in a way to make it likely the child will do this terrible sin. Yet Rav Diskin counters that that is because when a parent is trying to help a child, he is not permitted to cause harm.

Nevertheless, the *Sedei Chemed (ma'aracha lifnei iver)* cites several texts to counter this argument. The Maharsha in *Moed Katan* asks the same question.

Someone must tell the world that there are still Jews who respect and revere God's word as the living constitution for our lives. Someone must take pride in our heritage and cry out in pain when it is thrown aside. Moral outrage must be expressed so that, at a minimum, our children will know that it is wrong to violate the dictates of the Torah.[58] And if all else fails, at least our protest shows that we should not be held accountable for the sins of our fellowmen which we were unable to prevent.

Tochacha can be an important tool in bringing our diverse co-religionists together, but rebuke is most desirable if it is effective, if it succeeds in awakening people to an awareness of their destiny and responsibilities under the Torah. We can learn how best to implement this from the teachings of the *Tanya*, who quotes Hillel to the effect that in seeking to bring people back to our tradition, "it is necessary to draw them with thick coils of love..."[59]

The Chazon Ish counsels not giving rebuke if it will not be effective; yet he does not want people not to react when they see evil practices. Rather,

> Since our entire being [seeks] to fix [the transgressions], the law [of *tochacha*] does not apply at a time when it does not effect an improvement. Therefore, we must bring them back [to doing good] with ropes of love..[60].

In reviewing the multiple variables which have to be factored into the decision whether or not to chastise evildoers, whether or not to react to public disregard of mitzvot, we

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58. See *Chochmat Shlomo, Orach Chaim* 608.

59. *Tanya*, chapter 32.

60. *Hilchot Shechita 2:16*. See also essay by Rav Kook, *Mecha'ah neged Chilul Shabbat Vechag* part II, p. 451, and *Techumin* 7, p.116.

see that there is a broad spectrum of rabbinic opinion. Some counsel strong, even violent protest, while others caution that such action might engender hostility. What seems quite clear is that no one sanctions *ignoring* the mitzvah of *tochacha*. The question is rather, what is the best method to use in order to return our brethren to observance of mitzvot. But nowhere is there an excuse for failure to react to transgression. There is justification , perhaps, for strong protest (although that is the view of a very small minority), but there is an even stronger mandate for intensive and continued outreach to our fellow Jews. What is undeniable, however, is that we may not choose to do nothing, to act as if wholesale desecration of Torah values warrants no response.

Physicians' Strikes And Jewish Law

Fred Rosner, M.D., F.A.C.P.

Introduction

In 1975, writing about the immorality of a strike by resident physicians (housestaff) in New York City,[1] I pointed out that "for a physician to strike, for whatever reason, is unconscionable and totally contrary to every standard of medical ethics and morality." Although sympathetic to the demands of the housestaff, I argued that to leave patients without direct medical assistance and attendance put the striking physicians in an untenable moral position.

In 1983, a lengthy strike by physicians took place in Israel which ended only after both sides agreed to submit disagreements on salaries and other unresolved issues to binding arbitration. Since many of the striking physicians

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1. Rosner F., "Immorality of New York Physicians' Strike," NY *State J. Med.* 1975; *75*, pp. 1782-1783.

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were Torah-observant Jews, they turned to rabbinic authorities for guidance on this matter. The rabbis were unanimous in their condemnation of physicians who withheld their services from patients by striking. The Jewish legal reasoning upon which this halachic ruling is based is the substance of this essay. A brief review of the physician's religious license and obligation to heal and physicians' fees is also presented as background for the rabbinic ruling which follow.

Physicians' license and obligation to heal

One could argue that since a person becomes sick only through Divine Providence, it might be forbidden to try to oppose "G-d's will" by seeking therapy. However, the biblical verse "and heal he shall heal"[2] is interpreted by the talmudic sages to mean that authorization is granted by G-d to the human physician to heal.[3] In Jewish law, a physician is not merely allowed to practice medicine but is in fact commanded to do so if he has trained to become a physician.

This biblical mandate is based upon two scriptural precepts: "And thou shalt restore it to him"[4] refers to the restoration of the lost property. In his *Commentary on the Mishnah*, Rambam states that "it is obligatory from the Torah for the physician to heal the sick, and this is included in the explanation of the scriptural phrase 'and though shalt restore it to him.'"[5] Thus, Maimonides, following the Talmud,[6] states that the law of restoring lost property includes also

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2. Exodus 21:19.
3. *Baba Kamma* 85a.
4. Deuteronomy 22:2.
5. Maimonides, M., *Mishnah Commentary* on *Nedarim* 4:4.
6. *Nedarim* 38b.

the restoration of health. If a person has "lost his health" and the physician is able to restore it, he is obligated to do so.

The second scriptural mandate for the physician to heal is based on the phrase "neither shalt thou stand idly by the blood of thy neighbor."[7] The passage refers to the duties of human beings to their fellow men: One may not stand by and allow a fellow man to die without offering help. A physician who refuses to heal, thereby resulting in suffering and/or death of the patient, is also guilty of transgressing this commandment.

Some scholars, notably Maimonides, claim that healing the sick is not only allowed by Jewish law but is actually obligatory. Rabbi Joseph Karo, in his *Code of Jewish Law*, combines both thoughts:

> The Torah gave permission to the physician to heal; moreover, this is a religious precept and it is included in the category of saving life; and if he withholds his services, it is considered as shedding blood.[8]

If one asks why G-d granted physicians license and even mandate to heal the sick, one can offer the following explanation. A cardinal principle of Judaism is that human life is of infinite value, as is evident in the fact that preservation of human life takes precedence over all commandments in the Bible except three: idolatry, murder, and forbidden sexual relations. In order to preserve a human life, the Sabbath and even the Day of Atonement may be desecrated, and all other rules and laws save the aforementioned three are suspended for the overriding

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7. Leviticus 19:16.

8. *Shulchan Aruch, Yoreh Deah* 336.

consideration of saving a human life. A person who saves one life is "as if he saved a whole world."[9] This obligation to save lives, moreover, is an individual as well as a communal obligation. Certainly a physician, who has knowledge and expertise far beyond that of a layperson, is obligated to use his medical skills to heal the sick and thereby preserve and prolong life.

Physicians' Compensation and Fees

The biblical verse "and heal he shall heal" actually relates to compensation for medical expenses arising from personal injuries; it is usually translated "he shall cause him to be thoroughly healed." This is an obvious reference to the payment of medical expenses by one who inflicts an injury on his neighbor. Healing expenses are one of five items of compensation due by law to an injured party. [10] (A more detailed analysis of physicians' fees is provided elsewhere.[11]) Briefly summarized, the physician is entitled to reasonable fees and compensation for his services. In talmudic times, when physicians, rabbis, teachers and judges served the community but also had other occupations and trades, their compensation was limited to lost time and effort. Nowadays, however, when physicians have no other occupation, they can charge for their expert medical knowledge and receive full compensation.

Excessive fees are discouraged but not prohibited if the patient agrees to the fees in advance. Indigent patients, however, should be treated for reduced or no fees at all.

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9. *Sanhedrin* 8:1.

10. *Baba Kamma* 8:1.

11. Rosner F., Widroff J. "Physicians' fees in Jewish law," *The Jewish Law Annual,* Vol 12, 1993, in press.

Physicians' Strikes and Jewish Law

The Israeli physicians' strike of 1983 led to a series of rabbinic pronouncements on the impropriety and illegality of the strikes. The strike took place in stages.[12] At first, physicians reported for duty as usual at government hospitals but charged fees for patients who sought care at hospital clinics. Stage two was a partial strike of doctors at hospitals and the establishment by physicians of their own clinics where they treated patients on a fee-for-service basis. Stage three was the refusal of nearly all physicians throughout the country (except for military doctors) to report for duty at government hospitals and clinics. Doctors simply went on vacation or did not appear. This went on for three days at which time partial services were resorted (stage four). The fifth stage consisted of a hunger strike by physicians, beginning at Soroka hospital in Beersheba and spreading to most hospitals throughout the country. The final stage was the continued hunger strike as the parties were agreeing to submit the dispute to binding arbitration. This stage lasted less than two days.

On the day that the main strike of stage three began (May 22, 1983), a rabbinic ruling by Rabbis Yitzchok Yaakov Weiss and Shlomo Zalman Auerbach was widely publicized throughout Shaare Zedek hospital and elsewhere in Israel. In a letter addressed "to the hospital administration and its physicians," the rabbis wrote:

> We have heard that there are doctors who have abandoned their work in the hospital and have forsaken their patients. The situation is such that the

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12. Halperin, M. "Halachic rulings during the physicians' strike at Shaare Zedek Hospital," *Assia*, Vol 5, Schlesinger Inst. Rubin Mass, Jerusalem, 1986, pp. 30-33.

> number of physicians available in the hospital is even less than usually present on the Holy Sabbath. Assuming that the latter is the minimum needed for the saving of life which is permissible on the Sabbath, the halacha is clearly spelled out in the *Shulchan Aruch* (*Yoreh Deah* 336:1): "a physician who withholds himself from healing is guilty of shedding blood."
>
> Therefore, the obligation is upon you to assure the presence of an adequate medical staff in the hospital no less than on a regular Sabbath. All the physicians are obligated to fulfill the aforementioned. We ask that this ruling of ours be transmitted to all the physicians in the hospital.[13]

This rabbinic ruling was not issued in the early stages of the strike but only with regard to stage three, which involved possible immediate danger to patients' lives. About a month later, the hunger strike began. Physical weakness of the physicians, and thus their compromised ability to care properly for patients, became the next Jewish legal question.

In a letter dated 8 Tammuz 5743 addressed to Professor Rosen, Administrator of Shaare Zedek Hospital, Rabbis Weiss and Auerbach wrote:

> We heard that there are physicians whose view is to go on a hunger strike. We hereby inform you that, according to the Torah, no man is allowed to do any act which might lead to human harm, such as a partial hunger strike which is being spoken of for a long time period, all because of [the demand for] increased wages. It is written: "it is prohibited for a person to wound either himself or his fellow man." (Rambam, *Chovel Umazik* 8:1).

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13. Ibid.

> Certainly, any physician who does so and weakens himself so that he cannot function and heal properly – in addition to the above – needs to consider the following law: "A physician who withholds himself from healing is guilty of shedding blood" (*Shulchan Aruch, Yoreh Deah* 336). The obligation not to withhold oneself from healing is valid even if the physician is pressured [to act] because his colleagues are doing so contrary to halacha. We ask that this ruling of ours be transmitted to all the physicians in the hospital.

Nearly all physicians at Shaare Zedek hospital followed rabbinic rulings and reported for duty. They sent a telegram to their national medical organization, which was negotiating the disputed issued with the government, expressing their anguish over the prolonged red tape in trying to resolve the issue. The physicians called for binding arbitration and stated that they, including the hunger fasters, would continue to care for patients who presented to their hospital in need of urgent medical attention.

During the last stage of the strike, a rabbinic ruling was issued by the two Chief Rabbis of Israel, Abraham Kahana Shapira and Mordechai Eliyahu, as follows:

> To the request of the physicians who turned to the Chief Rabbis of Israel to learn the ruling of halacha in regard to the physicians' strike, we ruled that if their demand was to settle the dispute by binding arbitration, they were justified in their interruption of medical services to certain patients. However, since the parties have now agreed to settle the financial issues by binding arbitration, it is strictly forbidden for the physicians to cease medical treatment to patients who need their help, and the aforementioned permissive ruling is not valid.
>
> Therefore, all the physicians are obligated to stop the

> strike, including the hunger strike, and to return to work immediately so that they not violate the negative precept, "Thou shalt not stand idly by the blood of thy fellow man..."

Halperin interprets the Chief Rabbis' ruling to mean that the agreement by the disputants to binding arbitration required the physicians to return to work. Prior to that time, however, the strike may have been permissible.[14]

Other rabbis have also voiced their opinions on this issue. Rabbi Yitzchok Zilberstein states that the community is obligated to provide a physician with sufficient income so that he can live comfortably with honor, and is thereby encouraged to care for seriously ill patients. On the other hand, it is strictly forbidden for a physician to refuse to care for such patients, even if he is dealt with deceitfully in regard to his wages. No one would ever dream that a worker deprived of his wages would be justified in refusing to put on phylacteries or not returning a lost object or eating pork. Similarly, no one would dream that a physician who is biblically commanded to heal may refuse to do so.[15]

Rabbi Moshe Halevi Steinberg states that since a Jewish physician is obligated to heal the sick, it is illogical to suggest that he should be allowed to strike for financial reasons. A physician may not set aside this biblical commandment. They may certainly ask for equitable and appropriate wages in fees, but financial demands cannot ever sanction a strike which might endanger lives.[16]

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14. Ibid.

15. Zilberstein, Y. "Physician payment in Jewish law. Question and answer," *Assia,* Vol 5, 1986, Falk Schlesinger Inst. Jerusalem, Rubin Mass, pp 24-29.

16. Steinberg, M. H. "Physicians' strikes in the light of Halacha,"

The most extensive rabbinic discussion of the Israeli physicians' strike is presented by former Chief Rabbi Shlomo Goren.[17] Rabbi Goren does not object to the first stages of the strike, when doctors established their own clinics and charged patients a fee for each service. However, he prohibits striking physicians from refusing to provide care to hospitalized patients and considers such refusal to be a violation of both the positive biblical commandment to "restore a lost object" (i.e., the patient's health) and the negative biblical precept against "standing idly by the blood of one's fellow man." Therefore, Rabbi Goren instructed the physicians to return to their duty stations and not to withhold their services either in the hospital or in the out-patient clinics. On the other hand, Rabbi Goren firmly states that physicians are entitled to specify the salaries they expect to obtain from their hospitals and/or the government in exchange for their returning to work. According to Jewish law, physicians are allowed to establish their own level of compensation and the government is obligated to honor and agree to that request.

Unfortunately, as pointed out by Rabbi J. David Bleich, the striking physicians had no reason to believe that their employer, the Israeli government, would abide by the provisions of Jewish law in meeting their demands for compensation.[18] Rabbi Bleich also qualifies Rabbi Goren's statement that if the physician stipulates his fee in advance,

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Assia, Vol 3, Rubin Mass, Jerusalem, 1983, pp 341-342.

17. Goren, S. "Physicians' strikes in the light of Halacha," *Assia*, Vol 5, Rubin Mass, Jerusalem, 1986, pp. 41-54 (originally published in *Hatzofeh*, 15 and 22 Sivan 5743, i.e., May 27 and June 3, 1983).

18. Bleich, J. D. "Physicians' strikes," *Tradition*, New York, Fall 1984, Vol 21, No 3, pp. 80-84.

he may compel payment in full. This halachic principle applies only if there are other equally competent physicians available. If no other physician equally competent to treat the illness is available, concludes Bleich, the doctor cannot collect the stipulated fee if it is exorbitant.[19]

Obviously, where potential danger to life may occur by physicians' withholding their medical services, all rabbis agree that the physicians are halachically obligated to provide those services, even at great personal financial loss. Rabbi Bleich quotes a latter-day authority, Rabbi Yehudah Leib Zirelson, Responsa *Atzei ha-Levanon* no. 61, who argues that the physician's obligation to heal applies under non-life-threatening circumstances no differently than in life-threatening situations.

It is not clear whether the striking physicians were under contract with their employers and, if so, whether the contract contained a "no-strike" clause. It is also not clear whether such a clause, if present, could be legally enforced. In halacha, it may not make a difference. Jewish law grants workers the right to abrogate labor contracts unilaterally, although under certain circumstances the workers may have to pay for damages or financial losses resulting from their actions.[20] Physicians, however, are figuratively under contract with G-d because of their biblical mandate to heal. Hence, the presence or absence of a contract between physicians and their employers seems irrelevant. Physicians are not allowed to strike, since by doing so they are refusing to fulfill the biblical injunctions of "heal he shall heal" and "thou shalt restore it to him." Striking physicians may also be violating the negative precept "Thou shalt not stand idly by the blood

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19. *Teshuvot Radbaz*, Part 3 #556.

20. *Shulchan Aruch, Choshen Mishpat* 133:3.

of thy fellow man."

Does that mean that physicians are obligated always to be available for their patients? Are vacations not permitted? Even assuming that other equally competent physicians are available, some patients may insist on their own physician in whom they have more faith, trust, and confidence. The Talmud declares that "not by every person is an individual privileged to be cured."[21] According to Jewish law, a physician is permitted to travel on the Sabbath in order to treat a patient who specifically asks for him, even if another physician is locally available who need not desecrate the Sabbath. Yet physicians must be allowed, within the boundaries of halacha, to devote some of their time to rest and relaxation, to continuing medical education, to their families, and to other non-medical interests and pursuits. This question requires additional deliberation and consultation with competent rabbinic authorities.

Summary and conclusion.

A cardinal principle of Judaism is that human life is of infinite value. In order to preserve a human life, the Sabbath and even the Day of Atonement may be desecrated, and most other rules and laws are suspended. As noted, this obligation to save lives is an individual as well as a communal obligation. Certainly a physician, who has knowledge and expertise far beyond that a layperson, is obligated to use his medical skills to heal the sick.

In the context of a nation-wide refusal of doctors in Israel to practice their medical profession, it was the overwhelming consensus of rabbinic opinion that it is illegal and immoral for physicians to refuse to report for duty or to deny their

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21. Jerusalem Talmud, *Nedarim* 4:3.

healing skills to patients who need them, financial considerations notwithstanding. Physicians are entitled to receive appropriate compensation for their work and their employers, governmental or otherwise, are obligated to provide them with appropriate wages and fringe benefits. Physical weakness induced by fasting compromises physicians' ability to properly discharge their duties. Hence, hunger strikes by physicians are also prohibited.

It still remains to be clarified what steps would be sanctioned by Jewish law to enable physicians to receive the compensation they consider appropriate, when confronted by a recalcitrant governmental employer.

The Early Shabbat

Rabbi Israel Schneider

On the Jewish communal scene, the arrival of spring and summer is heralded, not by the budding of crocuses, but by the proliferation of congregations fielding *minyanim* which accept the Shabbat early. The long summer days make the early Shabbat a particularly appealing option for many Jewish families. The purpose of this article is to analyze a range of the attendant halachic issues that pertain to this practice.

In reality, the popular terms "early Shabbat" and "late Shabbat" are, in a manner of speaking, misnomers. Those who accept the late Shabbat are not tardy, God forbid, in their weekly Shabbat observance. Moreover, we shall soon see that even the late Shabbat mode incorporates the element of the early Shabbat as well. Technically, the late Shabbat is also early, it merely is not as early as its counterpart. Hence, the two approaches would be described more accurately by the terms: earlier Shabbat and later Shabbat. However, in this paper I will defer to the colloquial, and refer to the early and late Shabbat.

Researcher, Ofeq Institute

This article is dedicated to the memory of my revered mother, Mrs. Fayga Gittel (Fanny) Schneider, who profoundly influenced me before making the ultimate early Shabbat – the day which is entirely Shabbat – on 12 Adar, 5738.

The Obligation To Add To The Shabbat

There is a fundamental difference between the Shabbat and the Jewish holidays. The Shabbat, occuring with regularity every seven days, is Divinely sanctified; the holidays, however, are sanctified by Israel, by means of the Sanhedrin which fixed the date for every new month. This distinction is reflected in the respective wordings of the Shabbat and Yom Tov *Amidah* blessings (for Shabbat: Lord who sanctifies the Shabbat; for *Yom Tov:* Lord who sanctifies Israel and the festival seasons). However, even in regard to the Shabbat, there exists an element of human sanctification.

The Talmud states

> "And you shall afflict your souls on the ninth of the month [Tishrei] in the evening" (*Leviticus* 23:32). It is possible [to think that one should fast] on the ninth. The verse [therefore] states "in the evening" [implying that the fast does not start the previous day]. If [only for the verse] "in the evening" it is possible [to think that one should begin to fast] after it gets dark. The verse [therefore] states "on the ninth." How is it [possible, then, to reconcile these two verses]? He begins to fast while it is yet day.[1]

The Talmud establishes that there is a commandment to add from the profane (weekday) to that which is sanctified (Yom Kippur). The Talmud proceeds to deduce that this commandment applies to the conclusion of Yom Kippur just as it does to the beginning. Just as one is obligated to begin the fast while it is yet day (9th of Tishrei), one is instructed to extend the fast into the night following Yom Kippur. Furthermore, the Talmud deduces that this same

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1. *Rosh HaShanah* 9a.

obligation exists in regard to Shabbat and Yom Tov as well. One is obligated to bracket the Shabbat with supplementary periods. Thus, although the Shabbat is Divinely ordained, it is incumbent upon every Jew[2] to personally sanctify it by extending it both beforehand and afterwards. According to most opinions, this obligation is biblical in nature.[3]

The Method

How does one go about supplementing the Shabbat? There seem to be various opinions in the *Rishonim*. Ritva holds that there are only two legitimate methods by which one can accept the Shabbat early – 1) *Kiddush* and 2) the Friday night *Amidah*.[4] Accordingly, one who wishes to

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2. Man and woman alike (according to *Pri Megadim, Mishbetzot Zahav* 608:1). However, *Minchat Chinuch* sec. 313:9 opines that women are not obligated in the commandment of "adding from the weekday to the Shabbat."

3. There is some controversy as to the position of the Rambam on this matter. *Maggid Mishneh (Hilchot Shvitat Assor* Chap. 1 sec. 6) and *Kessef Mishneh (Hilchot Shabbat* Chap. 5 sec. 3) concur that from the Rambam's omission of any mention on this matter, it may be derived that there is a biblical obligation only to extend the fast period of Yom Kippur, not the abstinence from any prohibited work, on Yom Kippur, Shabbat, or Yom Tov. They disagree (according to Rambam), as to whether there is a rabbinical obligation to extend the Shabbat and Yom Tov (See *Biur Halacha* 261:2 s.v. *yesh omrim* for further clarification). In any event, *Eliyahu Rabbah* sec. 261 writes that the ruling opinion is in accordance with those who biblically mandate the extension of the Shabbat and Yom Tov.

4. See *Chiddushei Ritva* to *Ta'anit 12a, Shabbat 35a,* and to *Eruvin* 40a. Although Ritva does not mention it, it would seem that he would agree that the kindling of the Shabbat candles with the appropriate blessing is also a valid method for accepting the Shabbat early.

perform the mitzvah of adding to the Shabbat, must either recite *Kiddush* or the Friday night *Amidah* prior to sunset. Others disagree and reason that the supplementing of the Shabbat need not be accomplished by a specific liturgy. Rather, a mere acceptance of Shabbat suffices. Thus, one who wishes to perform the mitzvah of adding to the Shabbat, should accept the Shabbat upon himself prior to sunset.

The nature of this acceptance is also questionable. It is the opinion of some that this acceptance must take the form of a verbal declaration (e.g. I accept upon myself the holiness of the Shabbat). Others opine that a mental declaration is sufficient. The *Mishnah Berurah*[5] seems to indicate that although a verbal declaration is preferable, an unspoken commitment to accept Shabbat is also binding.[6]

In addition to a verbal or unspoken explicit acceptance, there are several acts of implied acceptance of the Shabbat. They are: 1) the aforementioned examples of the Friday night *Kiddush* or *Amidah*, 2) the woman's kindling of the Shabbat candles,[7] 3) the recitation of the Friday night *Barechu*,[8] 4) the recitation of *Mizmor Shir Le-yom HaShabbat*,[9] and 5) the recitation of the last stanza of *Lecha Dodi*, which concludes *Bo'i Chalah (Enter, O Bride)* with which one ushers in the Shabbat Bride. In some congregations, the prayer timetable is arranged so that the congregants will recite one or more

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5. Sec. 261 no 21.

6. For additional sources discussing the means of the early Shabbat acceptance and an analysis of the differing opinions see R. Joseph S. Glick, *Pnei Shabbat* Vol. 1, *Beirurim*, no. 14 pps. 224-228 (Brooklyn, 5745).

7. See *Orach Chayyim* sec. 263:10.

8. Ibid sec. 261:4.

9. Ibid.

of these prayers before the Friday night sunset. In this manner, it is guaranteed that those in attendance will perform the mitzvah of adding to the Shabbat. One who is unable to do this, should, at least, accept the holiness of the Shabbat before sunset in order to perform this mitzvah.

How Early?

What is the amount of time that one is obligated to add to the Shabbat? By how much should the Shabbat be extended? In this matter as well, there is no unanimity amongst the commentators.

Tosafot suggest that only a minute amount of time must be added to the Shabbat.[10] Presumably, one who knows the exact moment of sunset would have to accept the Shabbat only several seconds beforehand. However, Rosh argues that a more significant amount of time must be supplemented to the Shabbat. He writes, however, that the exact span of time to be supplemented to the Shabbat is not explicitly defined in the Talmud, and as such, remains unclear.[11] Several authorities attempt to quantify this time, and the opinions range from 1-1/2 minutes through half an hour.[12] A consensus does not seem to emerge from all the varying viewpoints. However, *Mishnah Berurah* lauds the one who accepts the Shabbat and refrains from prohibited work twenty minutes before sunset.[13]

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10. To *Rosh HaShanah* 9a s.v. *ve-Rabbi Akiva.* This is also the opinion of *Ritva* ad loc.

11. To *Berachot* Chap 4 sec. 6; to *Yuma* Chap. 8 sec. 8.

12. See Glick, *Pnei Shabbat* Vol. 1 pps. 93-94, for an overview and discussion of the various opinions.

13. Sec. 261 no. 23; Sec. 263 no. 15.

The Too Early Shabbat

Although it has been established that according to most authorities there is an obligation to accept the Shabbat early, nonetheless, there is a limit as to how early the Shabbat may be accepted. This time is called *pelag mincha.* It is defined in the Talmud[14] as eleven hours less a quarter of an hour from the beginning of the day. A note of explanation is in order. The hours which the Talmud speaks of are not necessarily sixty-minute hours. They are, rather, units of time — each one encompassing a twelfth of the day (as distinct from the night). For example, in the winter months when there is less daylight, each "hour" would be only approximately fifty minutes. During the summer months, when the days are longer, the "hours" would be about 70 minutes each. In any event, the *pelag mincha* is defined as 10 3/4 "hours" from the beginning of the day. Prior to that time, it is too early to accept the Shabbat and say the evening prayers.

There is a disagreement, however, as to how the hours should be calculated. According to the Gaon of Vilna[15] and the *Levush,*[16] the day period, which is divided into twelfths, starts at sunrise and ends at sunset. Thus, *pelag mincha* is 10 3/4 "hours" after sunrise (or: 1 1/4 "hours" before sunset). Other authorities opine that the day period is reckoned from dawn until the appearance of the three stars. Thus, *pelag mincha* is 10 3/4 "hours" after dawn (or 1 1/4 "hours" before the appearance of the stars). To the best of my knowledge, the *Mishnah Berurah* treats this disagreement evenhandedly

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14. *Berachot* 26b.
15. Gloss to *Orach Chayyim* sec. 559.
16. Gloss to *Orach Chayyim* sec. 267.

and does not issue a definite ruling.[17]

From my experience, it is the opinion of the *Levush* and Gaon of Vilna which is followed. Their approach yields a slightly earlier *pelag mincha* time. To illustrate this matter, I will use an actual summer Friday, June 18, 1993, as an example. The times that follow are for Cleveland Heights, Ohio, and are taken from the Nautical Almanac which is published by the United States Naval Observatory. On that day, the sun will rise at 5:52 a.m. and will set at 9:00 p.m. The total time between sunrise and sunset is 15 hours and 8 minutes. To derive the seasonal hours, that amount is divided into twelfths. Thus each "hour" of that day is, in reality, 1 hour and 15 2/3 minutes. *Pelag mincha* which is 1 1/4 of such hours before sunset, will be at 7:25 p.m.

According to the *Levush* and the Gaon of Vilna, one would have to recite the *Mincha Amidah* no later than 7:25 p.m., and one could not accept Shabbat earlier than that time. According to the other opinion, however, the day period to be divided into twelfths is from dawn to nightfall (the appearance of the stars). Dawn (which is ordinarily computed as 72 minutes before sunrise) on that day will be 4:40 a.m. Nightfall (which according to some opinions is 60 minutes after sunset) will be 10:00 p.m. Accordingly, the day span to be divided is 17 hours and 20 minutes. Each seasonal hour will then be one hours and 26 2/3 minutes. *Pelag mincha*, which is 1 1/4 of such hours before nightfall, will be at 8:12 p.m. According to these opinions, the time of demarcation would be 8:12. *Mincha* would have to be recited not later than 8:12 p.m.; Shabbat would have to be accepted no earlier than that.

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17. See *Mishnah Berurah* sec. 233 no. 4; sec. 261 no. 25; sec. 263 no. 19; sec. 267 no. 4. In all the aforementioned places, both opinions are cited, but no conclusive ruling is issued.

As stated earlier, the normative practice of early *minyanim* accords with the opinion of the Gaon of Vilna and the *Levush*. I have heard, however, of some congregations that attempt to follow both opinions. That is, they *daven Mincha* before the earlier *pelag mincha* (in our example: 7:25), and accept Shabbat after the later *pelag mincha* (in our example: 8:12). In this way, they are assured of not *davening Mincha* too late, nor accepting Shabbat too early.

This issue is of great practical concern. Many women, accustomed to kindling the Shabbat candles before their husbands' departure for the Friday night synagogue service, continue that practice in the season in which they accept the Shabbat early. Since the menfolk, as a rule, leave home before *pelag mincha* (to be in time for *Mincha),* it is actually too early for the women to light the Shabbat candles. Duing these weeks, the household should be cognizant of the *pelag mincha* time, in order that the candles should be lit in their proper time. If the Shabbat candles were lit before *pelag mincha,* they must be extinguished and rekindled after *pelag mincha*. Even the woman who originally lit the candles is permitted to do so, because her original acceptance of the Shabbat (before *pelag mincha)* is null and void.

The Nature of The Early Shabbat

Once a person has accepted upon himself the sanctity of Shabbat, he is prohibited to do any type of work that he is not permitted to do on Shabbat proper. However, there is a distinction between one who accepts Shabbat early individually, or a congregation that accepts the Shabbat early en masse. An individual who accepts the early Shabbat (before the congregational acceptance) is permitted to do any rabbinically-prohibited work for the purpose of a mitzvah. For example, a woman who lit Shabbat candles (which is the equivalent of a personal acceptance of the Shabbat) is permitted to do any rabbinically-prohibited work for the sake

of the Shabbat until the congregation accepts the Shabbat.[18] However, a congregational acceptance is more stringent. Upon such time, one is prohibited from doing absolutely any form of work that is prohibited on Shabbat.[19]

Is a person who has accepted the Shabbat early permitted to ask someone who has not yet accepted Shabbat to perform work for him? If this case is comparable to the case of one who asks a non-Jew to do work on Shabbat, then it would be generally prohibited. Or is there a distinction between these cases?

The *Shulchan Aruch* cites an opinion that it is permitted for one who accepts the early Shabbat to ask someone who has not yet done so to perform work for him.[20] The commentators provide two reasons to distinguish this case from the case of one who requests a non-Jew to do work for him. The *Magen Avraham*[21] writes that the prohibition to ask another person to do work exists only where the one requesting the work is forbidden to do it absolutely and unconditionally. For example, since a Jew is absolutely and unconditionally prohibited to do work on the Shabbat, he may not ask a non-Jew to do it in his stead. In this case, however, the one who accepted Shabbat early is not

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18. It would be technically permitted, then, for a woman to shower after lighting the candles (and until the congregation's acceptance). However, from a practical standpoint, the act of showering includes many activities which may be biblically prohibited, (e.g., boiling of water, usage of soap, combing of hair). If care were taken, however, to circumvent any biblical prohibitions, it would be permitted. (See Rabbi Yehoshua Y. Neuwirth, *Shemirat Shabbat Ke-Hilchatah*, Vol. 2, pps. 45-46 [Jerusalem, 5749]).

19. See *Mishnah Berurah* sec. 261 no. 28.

20. *Orach Chayyim*, sec. 263 no. 17.

21. Ibid. no. 30.

unconditionally prohibited to do work. In fact, he had the option of not accepting Shabbat at that time. Since his prohibition is not unconditional, but is predicated upon his prior acceptance, there is no interdiction against his asking someone who has not yet accepted the Shabbat to do work for him.

Turei Zahav[22] provides another reason. On Shabbat proper, it is forbidden to request a non-Jew to do work, because it is Shabbat for all those concerned – Jew and non-Jew alike. Since both parties exist within Shabbat's framework, it is prohibited to instruct the non-Jew to do work. In this case, however, the Shabbat is not being experienced universally. One person's Shabbat is the other's Friday! For this reason it is permitted for one who has already accepted the Shabbat to instruct one who has not to do work for him.[23]

The Majority of The Congregation

There are instances in which an individual has not yet accepted the Shabbat but is nonetheless bound by the Shabbat restrictions. The *Shulchan Aruch* writes

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22. Ibid. no. 3.

23. The ramifications of this difference of approach amongst the commentators may extend far beyond the early Shabbat issue. May a Jew, on one side of the International Date Line, for whom it is Shabbat, ask another Jew, on the other side, for whom it is not Shabbat, to do prohibited work for him? According to *Turei Zahav* it would be permitted since, in this case as well, all the participants are not within Shabbat's framework. According to *Magen Avraham*, however, since the Jew for whom it is Shabbat is bound unconditionally by its sanctity, it would be prohibited to ask another Jew to do prohibited work. (See R. David Palmer, *Journal of Halacha and Contemporary Society*, no. 21 p. 80, for a slightly different analysis of this subject.)

אם רוב הקהל קבלו עליהם שבת המיעוט נמשכים אחריהם בעל כרהם

If a majority of the congregation has accepted the Shabbat, the [remaining] minority is drawn after them, against its will.[24]

Thus, acceptance of the Shabbat on the part of the majority is binding upon the others as well.

This rule holds true, however, only for the majority and minority segments of any particular congregation. For example, if there is one synagogue in a city, and a majority of its members accepts Shabbat early, the other members are obligated (against their will) to accept upon themselves the sanctity of Shabbat. However, if there are two or more synagogues, then members of each group are viewed as a separate community. The acceptance of Shabbat on the part of a larger synagogue does not bind the members of its smaller counterpart(s) who accept Shabbat later.[25] Moreover, even two regular *minyanim* (earlier and later), under the roof of one synagogue, are viewed as two separate congregations. Accordingly, the numerical superiority of the early *minyan* cannot deprive the minority of their prerogative to accept Shabbat later. It should be noted that the only valid counterweight to a community majority accepting the Shabbat early, is a synagogue *minyan* which accepts the Shabbat late. However, a *minyan* that gathers in a private home, even if it does so regularly, is of insufficient significance to "balance out" the community majority. Thus, its members must accept the Shabbat early against their will along with the majority of the community.[26]

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24. *Orach Chayyim* sec. 263 no. 12
25. See *Mishnah Berurah* sec. 263 no. 51.
26. *Derech ha-Chayyim* cited in *Mishnah Berurah* ibid.

These distinctions lead us to some questions about prevalent cases. What is the rule in regard to one who usually accepts the Shabbat together with an early *minyan* but wishes (for whatever reason) to switch temporarily, and accept Shabbat later? Does his regular attendance at the early *minyan* preclude him from temporarily switching or not? The answer seems clear. On any given Shabbat, one may choose to align himself with the congregation of his choice.

What about someone who ordinarily accepts the early Shabbat, but is unable to align himself on a particular Shabbat (due to poor health or other extenuating circumstances) with the later congregation? Is he obligated to accept the Shabbat early with the majority of the city, because he is unable to attend the later services, or may he rely upon the later minority congregation even without actually attending? It seems that, in this case, the individual is obligated to accept the sanctity of the Shabbat early, together with the majority of Jews in the city. Since he is unable to join actively the later minority congregation, his fate is determined by the majority's decision.

This ruling may be inferred from the wording of the *Shulchan Aruch ha-Rav:*

> An individual who did not attend [services] at a synagogue which accepted the Shabbat [early] even though he prays regularly at that synagogue, is permitted to do work, providing the majority of the city has not yet accepted the Shabbat.[27]

It is clear that he permits the individual to do work only if the majority of the city has not yet accepted Shabbat. If however, they have done so (as is the case in many

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27. *Orach Chayyim* sec. 263.

contemporary Jewish communities) then the individual who ordinarily attends early services would be bound by the early acceptance. It is not clear, however, as to the rule concerning one who ordinarily attends late services, but is unable to do so on a particular Friday night. Is he judged according to the early majority of the city, or may he stake his claim with his regular "crowd," the late *minyan* (without actually attending)?

There is one consideration that may, for the most part, render these distinctions moot. Rabbi Moshe Feinstein suggests that these rules of subordination apply only to a congregation that accepts Shabbat early for the sake of enhancing the sanctity of Shabbat (by extending its duration, and in that manner decreasing the possibility of the performance of prohibited work on Shabbat proper). However, if the motivation is strictly utilitarian, i.e., that the Shabbat meal should not be eaten later than usual, then the acceptance of the majority is not binding upon the minority. In our times, where the early *minyanim* are purely seasonal, it is clear that convenience, not principle, fuels the desire for the early Shabbat. According to Rabbi Feinstein's line of reasoning, in these situations, even an individual would not be bound by the dictates of the community. However, Rabbi Feinstein himself writes that he is undecided about the matter and that the distinction needs further analysis.[28]

The Shabbat Meal

There are two halachic issues that arise in regard to the early Shabbat meal. The first pertains to the beginning of the meal; the second involves the meal's duration. We will

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28. See *Iggerot Moshe, Orach Chayyim* Vol. 3 no. 38.

proceed chronologically and examine first the dispute concerning the proper time for starting the meal.

The Ramo rules:

> ובפלג המנחה יכול להדליק ולקבל שבת בתפלת ערבית ולאכול מיד
>
> And in the *pelag ha-Mincha* one may light [the Shabbat candles] and accept the Shabbat with the evening prayer and eat immediately afterwards.[29]

The Gaon of Vilna[30] writes that this ruling is based upon the talmudical ruling of Shmuel which permits one who has said the Shabbat prayers early to likewise recite the *Kiddush* early.[31] As *Yad Ephraim*[32] explains, Shmuel's dispensation to recite the early *Kiddush* implies, as well, the permissibility of the eating of an early Shabbat meal. Since *Kiddush* is only valid if it is recited in close proximity to when[33] and where the meal is held,[34] it stands to reason that an early *Kiddush* may and should be closely followed by an early Shabbat meal.

Rabbi Yosef Caro questions this ruling. He cites the general rule that one is prohibited to start a meal half an hour before the proper time for reciting the *Shema*. The Sages enacted this rule as a safeguard for the *Shema*. Otherwise, one may get involved in his meal, forget about the *Shema* obligation, and go to sleep without having said the *Shema*. Since the obligation to recite the *Shema* (in contradistinction to the

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29. *Orach Chayyim* sec. 267:2.
30. Ibid.
31. *Berachot* 27b.
32. *Orach Chayyim* sec. 267.
33. Ibid sec. 273 no. 1.
34. Ibid no. 3.

Shabbat prayers), cannot be fulfilled until nightfall, it stands to reason that one who has accepted the Shabbat early should not be permitted to partake of the Shabbat meal until he recites the *Shema* after nightfall.

Based on this argument, the *Mishnah Berurah* rules that one must be careful not to begin *Kiddush* and the Shabbat meal in the half hour left until night time. Rather, one must wait until nightfall, reread the *Shema*, and only then may he begin the meal.[35] However, it should be stressed that even according to this opinion, one may begin the meal before the half-hour period prior to nightfall, even though the meal will extend through the half-hour period and later.[36] However, the *Mishnah Berurah* adds that one need not protest against anyone who commences the meal in the half-hour period before nightfall, since such a person has an authority (i.e., Ramo) upon whom to rely. He proceeds to stress that even one who is lenient in this matter and begins the meal in the half-hour period prior to nightfall should be careful to reread the *Shema* after nightfall.

In the final analysis, therefore, there exist two opinions. The more stringent opinion (which the *Mishnah Berurah* seems to favor) is that the meal may begin either prior to the half-hour period before nightfall, or upon the recitation of the *Shema* after nightfall. It may not begin in the half-hour prior to nightfall. According to the more lenient opion, which the *Mishnah Berurah* finds non-objectionable, the meal may begin in that half-hour period. According to both opinions, the *Shema* should be recited upon the completion of the

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35. Sec. 267 no. 6.

36. It should be pointed out that in this case, where the meal begin permissibly, one does not have to interrupt the meal to say the *Shema* upon nightfall. Rather, one may wait until after the meal's completion to recite the *Shema* (see *Orach Chayyim* 235:2).

meal.

It seems to me that there exists a simple solution that would permit the meal to begin, according to all opinions, in the half-hour period prior to nightfall. It is based on the *Mishnah Berurah's* ruling elsewhere that permits a meal to begin in the half-hour prior to nightfall, if the one eating asks someone else to remaind him to recite the *Shema* after the meal.[37] Under ordinary circumstances, it would be impractical to employ this strategy in our situation, because the other household members themselves are participating in the meal, and as such, cannot be relied upon to convey the reminder.[38] However, it is possible to insure an automatic reminder (which is no less reliable than its human counterpart!) by setting a timer or an alarm clock to ring at a predesignated time, upon which the *Shema* will be recited.[39] If this action is taken, one may begin the meal from the half-hour prior to nightfall and onward without being concerned that his dining will cause him to forget the obligation to recite the *Shema*.

Another similar concern in regard to the early Shabbat meal is one that presents itself on the seven Friday nights

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37. Sec 235:18.

38. See *Mishnah Berurah* sec. 235 no. 18, *Shulchan Aruch ha-Rav* sec. 432 no. 11.

39. Ordinarily, according to *Ashkenazic* custom, it is prohibited to start an action on Friday that will result in the causing of noise on Shabbat. However, Ramo *(Orach Chayyim* 252:5) permits the setting of a clock on Friday in order that it should ring on Shabbat because it is well-known that such clocks are ordinarily set on the previous day. It is unclear whether this rationale applies to timers and modern-day alarm clocks. Even if it doesn't, it would still be permitted to set such timers, provided that they are not audible beyond the confines of the house or apartment in which they are found.

during the course of *sefirat ha-omer*. Namely, it is prohibited for one who has not counted the *omer* to begin a meal in the half hour prior to nightfall out of a concern that his participation in the meal will cause him to forget to count the *omer* before he goes to sleep. Accordingly, one who has accepted Shabbat early should be obligated either to start the meal before the half-hour zone, or to wait until nightfall to recite the *Shema* and count the *omer*. In fact, even those who are lenient in regard to starting a meal before the recitation of the *Shema*, would agree that it is prohibited to do so before performing the *sefirat ha-omer*.[40] However, the usage of a timer would alleviate this difficulty, as well.

The second issue that relates to the early Shabbat meal is its duration. In opinion of many codifiers, the Shabbat meal may be completed while it is still day: since the period of time has been sanctified, it assumes the characteristics of Shabbat proper. By adding to the Shabbat, one is able to eat the "Friday night" meal while it is still day! Others, however, contend that it is important for at least part of the meal (a *kezayit)* to be eaten during Shabbat proper (at night). They reason that since the rabbinical obligation to eat three meals on Shabbat is derived from the threefold mention of the word "today" in the verse (Exodus 16:25) "And Moshe said, eat it today for today is Shabbat for the Lord, today you will not find it in the field," the meals must be eaten during the course of the actual *day* of Shabbat, not the supplementary period.

Thus, one should be careful to extend the early Shabbat meal until the night. The *Mishnah Berurah* writes that one should preferably follow the second opinion, and insure that

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40. This distinction is based on the line of reasoning suggested by *Bet Yosef* cited in note 35.

at least a *kezayit* be eaten after nightfall.[41] If waiting that long is difficult, the *Pri Megadim* proposes another solution. He suggests that three meals may be eaten the following day.[42] Aside from for being sound halachic advice, this idea seems quite pragmatic for the long Shabbat summer afternoons.

Conclusion

This survey is an attempt to introduce some of the halachic issues and principles that pertain to the early Shabbat. This study is obviously incomplete inasmuch as it does not cover every relevant facet of the early Shabbat, nor does every subject that was covered get an extensive treatment. An all-encompassing analysis of the topic would be beyond the scope of these pages.[43] It is hoped, however, that this article will serve as an outline for those who wish to further familiarize themselves with this topic and its practical application.

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41. Sec. 267 no. 5.

42. *Mishbetzot Zahav* sec. 267.

43. See Rabbi E. Shlesinger, *Techumin*, Vol. 10 pps. 391-404 (*Alon Shevut*, 5749) for a detailed overview of the pros and cons of the early Shabbat.

Secular Law Enforcement of the *Heter 'Iska*

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I. Introduction:

A Jew is prohibited from charging interest (*ribit*) to another Jew.[1] The *Heter 'Iska* was developed by the Rabbis in order to structure business transactions in such a manner as to avoid running afoul of the prohibitions against *ribit*.[2] The *Heter 'Iska* principle is based upon the borrower and lender agreeing to be partners in a business venture, whereby one partner invests money and the other uses his entrepreneurial skills to manage the venture. The investor-partner can thereby earn "profit" attributable to his portion of the joint business venture, and the sharing of such profit by the manager-partner would not constitute payment of interest upon a loan. The arrangement thus has characteristics of both a loan and a trust.[3]

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1. *Shemot* xxii, 24; *Vayikra* xxv, 36-38; *Devarim* xxiii, 20.

2. *See*, e.g. J. Stern, "Ribis: A Halachic Anthology", IV *J. Halacha & Contemp. Soc'y* 46 (Fall 1982), at 66 - 69.

3. *Baba Metzia* 104b.

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Ideally, the business transaction is successful for all concerned parties. Realistically, such is not always the case, and disputes often arise as the parties to the unfortunate deal seek to enforce their rights and protect their property. The reality is that Jewish parties to ill-fated *Heter 'Iska* arrangements sometimes resort to the secular courts, a course of action fraught with halachic issues.[4] As detailed in this article, actual resolutions of disputes involving *Heter 'Iska* in the normative secular American court system can and do leave something to be desired from a halachic perspective. In addition to the usual propensities for litigants to disparage one another unnecessarily, parties to *Heter 'Iska* disputes in secular courts can easily make contentions in the heat of the dispute which, in the given context, can be perceived as minimizing the validity of halacha. Furthermore, there is the risk that interest can be imposed by the secular courts in a manner contrary to halacha.

The purpose of this article is to explore and analyze the American legal system in its approach to situations involving a *Heter 'Iska*, with an eye towards formulating a *Heter 'Isk* a that the American courts can be expected to enforce in a manner as nearly consistent as possible with halachic parameters. *Heter 'Iska* enforcement by courts in Israel, a land of diverse and often discordant legal systems,[5] is beyond the ambit of this article.[6] Prior to directly discussing the

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4. *See Gittin* 88b; *see also* S. Krauss, "Litigation in Secular Courts", III *J. Halacha & Contemp. Soc'y* 35 (Spring 1982).

5. *See, e.g.* B. Lifshitz, "Israeli Law and Jewish Law -- Interaction and Independence", 24 *Israel L. Rev.* 507 (1990).

6. The often severe inflation that has historically plagued Israel's economy has further complicated legal matters with respect to cases having possible *ribit* issues. *See, e.g. Rosenbaum v. Zeger*, 9 Piskei Din 533 (1955); *see generally* A. Levine, "Inflation Issues in

Heter 'Iska per se, this article covers two essential background topics, the American law concepts of interest and the American courts' approach to the Beth Din as a form of arbitration.

The examples and citations of American secular law in this article will be drawn largely, though not exclusively, from New York state law, a function more of the fact that the author lives and practices law in New York than of any superiority of the New York law over that of other states. Emphasis upon the law of New York does not necessarily detract from the utility of this article, however. For one thing, New York is disproportionate among the states in its numbers of people, Jews, and Jewish religious institutions.[7] Furthermore, the New York courts are respected as precedent-setting tribunals by numerous other courts in the United States, which often cite New York court decisions as authority for their own.[8] From a practical standpoint, the secular law

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Jewish Law", V *J. Halacha & Contemp. Soc'y* 25 (Spring 1983).

7. *See, e.g.* 91 *American Jewish Yearbook*, table at 207, which shows New York in 1990 ranking second among the States in total population (17.9 million), first in Jewish population (1.8 million) and first in percentage of Jews in the total population (10.3%). *See also* Tillem, ed., *The 1987 -88 Jewish Almanac*, "yellow pages" section, *passim* (New York entries for various Jewish institutions, including *mikvaot* and Orthodox synagogues, decidedly outnumber those from other states).

8. *See, e.g. Jones v. Approved Bancredit Corp.*, 256 A.2d 739, 742, (Del. 1969), 6 U.C.C. Rep. Serv. (Callaghan) 1001, 1005; Ford v. Ford, 592 So.2d 698, 701 (Fla.App. 3 Dist. 1991); *Lambeth v. Lewis*, 114 Ga.App. 191, 150 S.E.2d 462, 463; *First Bank & Trust Co., Palatine v. Post*, 10 Ill.App.3d 127, 293 N.E.2d 907, 910 (1973); *Graves v. John Wunder Co.*, 205 Minn. 163, 286 N.W. 235, 236 (1939); *State v. Dreher*, 251 N.J.Super 300, 598 A.2d 216, 221 (App.Div. 1991); *PICPA Foundation v. Commonwealth*, 598 A.2d 1078, 1083 (Pa. Comwlth 1991). New York court decisions are also cited by

in New York is therefore usually relevant to most situations involving Jews in America.

II. The Legal Concept of Interest:

Lest the obvious be overlooked, it must be noted that the American legal system is not grounded in the immutable Torah values of halacha. Though the Torah and the Jewish people have no doubt had a salutary influence upon the law as it exists in America, the American system does not and cannot consistently render judgments that comport in all respects with Torah values. Though the American system of government is not necessarily unrighteous,[9] its courts' rulings do not necessarily correlate with Torah principles and values. That is not to say that the American secular legal system necessarily abhors Torah principles and values. To the contrary, there are numerous instances where the secular law accommodates and defers to halacha, both in the prescribed statutes[10] and in the court decisions.[11]

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tribunals in other nations, including Israel, see, e.g. *Kossoy v. Bank Y. L. Feuchtwanger, Ltd.*, 38(3) Piskei Din 253 (1984).

9. See, e.g. *Iggerot Moshe, Choshen Mishpat* 29.

10. *See, e.g.* N.Y. Gen. Bus. Law 13 (malicious service of process on Saturday upon a person who observes Saturday as a Sabbath is a misdemeanor); N.Y. Relig. Corp. Law 207 - 209 (1990)(relating to Jewish congregations); N.Y. Agric. & Mkts. Law §§ 201-a - 201-j (1991)(New York Kosher Enforcement laws); N.J.S.A. § 2C:21-7.2 et seq. (1988)(New Jersey Kosher Food Law); 18 Pa.C.S.A. § 4107.1 (1978)(Pennsylvania criminal prohibition against 'kosher food deception).

11. *E.g., Estate of Berkman v. Commissioner*, T.C. Memo 1979-46, 38 TCM (CCH) 183 (United States Tax Court held that stone erection and setting was an integral part of funeral service for the Jewish decedent); *Matter of Feifer*, 151 Misc. 54, 270 N.Y.S. 905 (Sur. Ct. N.Y. Co., 1934) (Expense of paying someone to say Kaddish for decedent not allowed as an expenditure from Estate funds

Nonetheless, it cannot be overemphasized that the secular system is not driven by the halacha objective, and can produce results which would be impossible under halacha.

American secular law does not view interest from a halachic perspective. Civil usury laws are couched in terms of permissible rates of interest,[12] in contrast to the Torah's general prohibition against the charging of interest.[13] Interest as a compensation for the use, forbearance or detention of money is omnipresent throughout American secular law.[14]

III. The Beth Din in American Secular Law:

In American secular law, the normative method for resolving disputes is for disputing parties to take the matter to the secular court system, which will apply the law of the jurisdiction to impose a settlement. The parties can choose to circumvent the normative method by specifying that the dispute will be resolved by the application of alternate law and/or resolution by alternate tribunal. Parties to a

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inasmuch as Kaddish was an obligation personal to the Estate's administrator, the decedent's surviving son).

12. *See, e.g.* N.Y. Gen. Oblig. Law §§ 5-501 et seq.

13. *Shemot* xxii, 24; *Vayikra* xxv, 36-38; *Devarim* xxiii, 20.

14. *See, e.g.* I.R.C. §§ 6601 et seq. (interest on taxes imposed by Internal Revenue Code); I.R.C. § 7872 (interest imputed to certain below-market loan transactions); N.Y. Civ. Prac. Laws & Rules §§ 5001 - 5004 (interest on judgements); N.Y. Tax Law § 991 (interest on New York taxes); 41 Pa.C.S.A. §§ 101 et seq. (Pennsylvania interest statutes); *see also Milbrandt v. A.P. Green Refractories Co.*, 79 N.Y.2d 26, 580 N.Y.S.2d 147 (1992) (Clarifies rules for imposition of pre-verdict interest in wrongful death awards); *Banks Estate*, 8 Pa. Fiduc. 2d 338 (Orph. Ct. Phila. Co. 1988), *aff'd* 127 Pa.Comwlth 394, 561 A.2d 1298 (1989), *appeal denied* 525 Pa. 586, 575 A.2d 116 (1990) (Deductibility of interest expenses for Federal and Pennsylvania Estate Tax purposes).

contractual agreement can and often do specify that the laws of a particular state shall govern the contract.[15] New York and other states will readily apply the law of a sister state when such is prescribed as the governing law by the parties.[16] Where the law of a foreign nation is specified as applicable, however, the courts in New York and other states are not necessarily so quick to apply such law, and impose certain burdens upon the party seeking to have the foreign law applied.[17] Parties claiming applicability of a foreign nation's law must often specifically request the court to do so,[18] and must sufficiently set forth the substance of the foreign law they seek to have the courts apply.[19]

When parties to a contract specify halacha as the law governing the contract, the secular courts do not necessarily apply the halacha in the same sense as they would the laws of a typical foreign jurisdiction.[20] The courts will, however,

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15. *See, e.g. Woodling v. Garrett Corp.*, 813 F.2d 543, 551 (2d Cir. 1987); *see also* N.Y. Gen. Oblig. Law § 5-1401.

16. *See, e.g.* N.Y. Civ. Prac. Laws & Rules § 4511(a) (Courts required to take judicial notice of the law in sister states).

17. *See, e.g.* N.Y. Civ. Prac. Laws & Rules §§ 3016(e) and 4511(b).

18. *Schedlmayer v. Trans Intern. Air Lines*, 99 Misc.2d 478, 483, 416 N.Y.S.2d 461, 465 (N.Y. Civ. Ct., N.Y. Co. 1979).

19. *Cf. Dresdner Bank AG v. Edelmann*, 129 Misc.2d 686, 493 N.Y.S.2d 703 (Sup. Ct. N.Y. Co. 1985) (Plaintiff sufficiently set forth the law of Germany in its pleadings) *with Elghanayan v. Elghanayan*, 148 Misc.2d 552, 560 N.Y.S.2d 955 (Sup. Ct. N.Y. Co. 1990) (Substance of Iranian law not specified in the pleadings nor otherwise reasonably ascertainable by the Court).

20. *See Hurwitz v. Hurwitz*, 216 A.D. 362, 215 N.Y.S. 184 (2d Dept. 1926). (In an action where decedent's children sought to evict their stepmother, the decedent's widow, from the decedent's residence, the court declined to apply the "Laws of Moses and

apply secular law to enforce a contract that comports with the secular law, notwithstanding that the contract might coincidently be in a halachic format, such as a *ketubah*.[21]

Parties to civil disputes can circumvent the normative court system and its associated formalities, procedures, rules of evidence, time delay and paper work (and, of course, the inherent monetary expense). The American secular law provides for various alternate dispute-resolution methods, most notably, arbitration.[22] Even within the normative secular court system the parties often agree to dispense with many of the courtroom formalities by having their case decided by a court arbitrator.[23]

American law does not weigh lightly the court system access rights accorded the citizenry, rights necessarily waived in the arbitration process. Therefore, the American secular courts will only enforce most arbitrations when the disputing

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Israel" per se to enforce the widow's *ketubah*. Nevertheless, the *ketubah* itself was found to be a valid contract under New York law to the extent that it related to the widow's rights in New York real property by virtue of the fact that it was properly executed in New York by or on behalf of two New York residents.).

21. *Avitzur v. Avitzur*, 58 N.Y.2d 108, 459 N.Y.S.2d 572, 446 N.E.2d 136 (1983), *cert. denied* 464 U.S. 817, 104 S.Ct. 76, 78 L.Ed.2d 88 (1983); *Hurwitz v. Hurwitz, Id.*

22. *See generally* Abramson, "A Primer on Resolving Disputes: Lessons from Alternate Dispute Resolution", N.Y. St. Bar J., March/April 1992, at 48 (Brief overview of alternate dispute resolution techniques); see also D. Siegel, New York Practice 607-09 (2d Ed. 1991).

23. *See, e.g.* N.Y. Unif. District Court Act § 1804-A, which provides for arbitration of small commercial claims in District Court. (The author has served as a Court Arbitrator for such claims in the District Court of Suffolk County, New York). *See also* N.Y.C. Civil Court Act § 1804-A (applies same provisions to the New York City Civil Court).

parties expressly agree to resolve their differences through arbitration.[24]

As the secular court systems become increasingly plagued by work overloads and scarce resources,[25] one can expect arbitration to be increasingly favored by the courts and disputant parties as a means of resolving differences.[26]

Because halacha looks with very strong disfavor upon Jews' bringing their disputes with one another before non-Jewish or secular courts (*arcaot*),[27] Jewish communities,

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24. *Thos. Crimmins Contracting Co., Inc. v. City of New York*, 74 N.Y.2d 166, 171, 544 N.Y.S.2d 580, 582, 542 N.E.2d 1097, 1099 (1989); *Schubtex, Inc. v. Allen Snyder, Inc.*, 49 N.Y.2d 1, 424 N.Y.S.2d 133, 399 N.E.2d 1154 (1979). There are certain "compulsory arbitration" exceptions to the law, for which the arbitrations are enforceable regardless of whether the parties specifically agree to arbitration. *See, e.g.* N.Y. Insurance Law § 5105(b); N.Y. Labor Law 716.

25. *See, e.g.* Gary Spencer, "$963 Million Sought for Courts in 1992-93", *N.Y.L.J.*, December 2, 1991 at 1. On each of the next three days, the *New York Law Journal* similarly featured a front page article by the same writer on different aspects of the fiscal crisis affecting the New York courts. *See also* Letta Tayler, "Civil Courts Bogged Down," *Newsday* (Long Island, NY), January 3, 1992, page 4 (describes overloaded condition of the Nassau and Suffolk County (NY) court systems). Similar conditions proliferate throughout New York and other states.).

26. *See, e.g.* Meisels v. Uhr, 145 Misc.2d 571, 573-74, 547 N.Y.S.2d 502, 505-06 (Sup. Ct. Kings Co. 1989) (dictum), aff'd 173 A.D.2d 542, 570 N.Y.S.2d 1007 (2d Dept. 1992), rev'd on other grounds 79 N.Y.2d 526, 583 N.Y.S.2d 951, 593 N.E.2d 1359, (1992).

27. *Gittin* 88b; *Cf. Kilstein v. Agudath Council of Greater N.Y., Inc.*, 133 A.D.2d 809, 520 N.Y.S.2d 189 (2d Dept. 1987), *lv. to appeal denied* 71 N.Y.2d 805 (1988). (Observant Jew declined to bring matter before secular courts while the matter was pending before a Beth Din).

wherever domiciled, have traditionally established rabbinical courts, known as *Batei Din*, to resolve differences between members of the community.[28] The institution of the Beth Din has been characterized in one New York court decision as follows:

> [The Beth Din] method of arbitration has the imprimatur of our own judicial system, as a useful means of relieving the burdens of the inundated courts dealing with civil matters.[29]

The secular courts thus view the *Din Torah* process of the Beth Din as a type of arbitration, and are strongly disposed to enforcing the decisions regarding commercial matters rendered thereby.[30] Indeed, arbitration is given great

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28. *See, e.g.* E. Goodenough, *The Jurisprudence of the Jewish Courts in Egypt*, (Yale Univ. Press, 1929); N. J. Laski, *The Laws and Charities of the Spanish and Portuguese Jews of London* 68 (1952); D. M. Shohet, *The Jewish Courts in the Middle Ages* (1931), *reprinted* in III *Studies in Jewish Jurisprudence* (1974).

29. *Mikel v. Scharf*, 105 Misc.2d 548, 551, 432 N.Y.S.2d 602, 605 (Sup. Ct. Kings Co. 1980), *aff'd* 85 A.D.2d 604, 444 N.Y.S.2d 690 (2d Dept. 1981). Certain procedural irregularities in this particular matter led the Court to vacate the *Din Torah* award; however, the Court indicated its respect for and approval of the *Din Torah* institution in general. The case is also noteworthy because the parties, both observant Jews, who apparently faced the prospect of arbitration before a secular Court Arbitrator, opted for a rabbinical court instead.

30. *See Tugendrajch v. Heifetz*, 560 F.Supp. 906 (S.D.N.Y. 1983); *Elmora Hebrew Center, Inc. v. Fishman;* 125 N.J. 404, 593 A.2d 725 (1991); *Meisels v. Uhr*, 79 N.Y.2d 526, 583 N.Y.S.2d 951, 593 N.E.2d 1359, (1992). *Kilstein v. Agudath Council of Greater N.Y., Inc.*, 133 A.D.2d 809, 520 N.Y.S.2d 189 (2d Dept. 1987), *leave to appeal denied* 71 N.Y.2d 805 (1988); *Kingsbridge Center of Israel v. Turk*, 98 A.D.2d 664, 469 N.Y.S.2d 732 (1st Dept. 1983); *Berman v. Shatnes Laboratory*, 43 A.D.2d 736, 350 N.Y.S.2d 703 (2d Dept. 1973);

preference in halacha over any formal court system as a means of resolving disputes among individuals.[31] As with any other type of arbitration, however, a Beth Din decision will be vacated by the secular courts if the threshold secular law requirement of a written arbitration or submission agreement is not demonstrated.[32] Similarly, a *Psak Beth Din* (ruling) will also be vacated upon the showing of such substantial injustices as arbitrator partiality for or against a party to the dispute,[33] decisions beyond the scope of the arbitration,[34] refusal to allow a party to present valid witnesses or evidence,[35] failure to set forth a definite and final record of the award,[36] or failure to include interested and necessary parties in the arbitration proceeding.[37] Notwithstanding such exceptional events, the secular courts will usually uphold an arbitration decision, including one handed down by a Beth Din.

Rosenbaum v. Drucker, 346 Pa. 434, 31 A.2d 117 (1943); see also *Zyskind v. Hebrew Academy of the Five Towns & Rockaway*, ___ Misc.2d ____, ___ N.Y.S.2d ____, N.Y.L.J., March 20, 1992 at 27 (Sup. Ct., Nassau Co.). (Court effectively preserved the status quo pending *Din Torah* resolution of a dispute between the parties.).

31. *See* D. Bressler, "Arbitration and the Courts in Jewish Law", IX *J. Halacha & Contemp. Soc'y* 105 (Spring 1985).

32. *Hellman v. Wolbrom*, 31 A.D.2d 477, 298 N.Y.S.2d 540 (1st Dept. 1969).

33. *See, e.g. Mikel v. Scharf*, 105 Misc.2d 548, 551, 432 N.Y.S.2d 602, 605 (Sup. Ct. Kings Co. 1980), aff'd 85 A.D.2d 604, 444 N.Y.S.2d 690 (2d Dept. 1981). Cf. *Devarim* i:16-17, xxiii: 6-9.

34. *See, e.g. Mikel v. Scharf, Id.*

35. Ibid.

36. *Kozlowski v. Seville Syndicate, Inc.*, 64 Misc.2d 109, 314 N.Y.S.2d 439 (Sup. Ct. N.Y. Co. 1970).

37. *See, e.g. Levovitz v. Yeshiva Beth Henoch, Inc.*, 120 A.D.2d 289, 508 N.Y.S.2d 196 (2d Dept. 1980).

IV. Secular Courts' Treatment of the Heter 'Iska:

Disputes involving *Heter 'Iska* arrangements have on occasion been brought before the secular courts. A sampling of postures of the various secular courts towards the *Heter `Iska* is instructive.

In a footnote to a decision, the United States Court of Appeals for the Ninth Circuit (which covers the western United States) characterized a *Heter 'Iska* as "... a religious document purporting to characterize the bank and those to whom the bank charges interest as a 'venture' in order to avoid violation of religious law."[38]

In the case of *Barclay Commerce Corp. v. Finkelstein,*[39] the Appellate Division of the New York Supreme Court found the *Heter 'Iska* to be "... merely a compliance in form with Hebraic Law...", and went on to find that the defendant's counterclaim of a joint venture raised what was "... at best a 'phantom' issue [which was] clearly without merit."[40] The same Court maintained its stance more than thirty years later, when it cited its own *Barclay* opinion in *Arnav Industries, Inc. Employee Retirement Trust v. Westside Realty Associates,*[41] another dispute involving a *Heter 'Iska*.

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38. *Barclay's Discount Bank, Ltd. v. Levy,* 743 F.2d 722, note 2 at 724 (9th Cir. 1984).

39. *Barclay Commerce Corp. v. Finkelstein,* 11 A.D.2d 327, 205 N.Y.S.2d 551 (1st Dept. 1960). *Iv. to appeal denied,* 11 A.D.2d 1019, 207 N.Y.S.2d 995 (1960). The plaintiff in this case is not to be confused with the plaintiff in the case cited above in the prior footnote.

40. *Id.* at 328.

41. *Arnav Industries, Inc. Employee Retirement Trust v. Westside Realty Associates,* 180 A.D.2d 463, 579 N.Y.S.2d 382, (1st Dept 1992).

In the *Arnav Industries* case, one of the defendants had executed a mortgage note in secular format, and had written above his signature the Hebrew phrase "*Al Pi Heter 'Iska*."[42] No *Shtar 'Iska* document was ever executed, however, and furthermore, the mortgage note specifically provided that:

> [nothing herein or in the mortgage is intended to create a joint venture, partnership, tenancy-in-common or joint tenancy relationship between Borrower and Lender, nor to grant Lender any interest in the Mortgaged Property other than that of creditor or mortgagee.[43]

Presented with a written agreement that appeared complete and unambiguous on its face, the Court was constrained to rule as it did in the *Arnav Industries* case because it could not consider oral evidence to contradict the terms of the written document.[44] The result might arguably have been different if the parties had in fact executed a *Shtar 'Iska* in written form.

In *Leibovici v. Rawicki*,[45] the issue before New York City Civil Court in New York County (Manhattan) was whether the transaction between the parties was usurious under the New York secular law (if it was "usurious", then the plaintiffs' claim would be defeated). As noted earlier, the concept of "usury" in the American secular law is dependent not upon whether interest is charged, but rather, upon the rate of the

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42. *Id*.

43. *Id*.

44. *See Helmsley v. Pannick*, 131 A.D.2d 940, 516 N.Y.S.2d 804 (3d Dept. 1987).

45. *Leibovici v. Rawicki*, 57 Misc.2d 141, 290 N.Y.S.2d 997 (N.Y.Civ. Ct., N.Y. Co. 1968), *aff'd per curiam* 64 Misc.2d 858, 316 N.Y.S.2d 181 (N.Y. App. Term, 1st Dept. 1969).

interest. The Court found that the defendant could not raise the defense of usury because he himself had promoted the investment given to him by the plaintifs.[46] While the Court did view the transaction to be in the nature of a joint business venture rather than a loan, the resulting decision was based upon the terms set forth in the relevant document, regardless of whether the transaction could be characterized as loan, joint venture, or anything else. Applying the terms of the written document, the Court found that the plaintiff could withdraw the principal with three-months' notice, and therefore, the Court awarded the plaintiffs their principal investment of $5,000.00, plus interest from what ostensibly was the would-be withdrawal date.

In a similar case, *Bollag v. Dresdner,*[47] the Court found that the defendant could not interpose the defense of usury and awarded the plaintiff his $15,000.00 investment. The Court further found that the plaintiff's own admission that his religious beliefs forbade the charging of interest precluded any recovery of interest on the loan, but did not bar the plaintiff from recovering interest after the court entered its judgment.[48] The *Bollag* decision effectively enforced the halachic prohibition against *ribit*, but only up to the date of the Court's decision. Following the entry of the Court's decision, the court specifically applied the secular statutory interest to the debt.[49]

In light of the *Leibovici* and *Bollag* decisions, it seems

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46. *Id*. at 145, 290 N.Y.S.2d at 1001.

47. *Bollag v. Dresdner,* 130 Misc.2d 221, 495 N.Y.S.2d 560 (N.Y. Civ. Ct. Kings Co. 1985).

48. *See* N.Y. Civ. Prac. Laws & Rules § 5002, which provides for interest from date of judgment until actual payment.

49. *Bollay v. Dresdner, supra* at 226.

that the secular court decisions involving a *Heter 'Iska* would ultimately impose interest even under the most favorable circumstances when the secular courts affirmatively attempt to respect or defer to halacha. Those courts that do not give regard to halachic considerations can be expected to render decisions that comport all the less with halachic norms.

A most blunt and revealing secular court attitude towards the *Heter 'Iska* is set forth in a decision handed down by the New York Supreme Court of Kings County (Brooklyn) in the case of *Berger v. Moskowitz*:[50]

> Defendants, if they chose, may call this instrument a business transaction and the ten percent owing on the principal, profit, not interest, but the intent as well as the end result is still the same: the subject agreement is an instrument for the payment of money only and the ten percent represents interest. Despite all of defendants' objections, the note itself requires the defendants to make certain payments and nothing else.

In the *Berger* case, the plaintiffs presented to the Court a document written in Hebrew entitled "*Shtar 'Iska*", which was signed by the defendants, along with an uncontroverted English translation of the same.[51] On the document, one of the defendants had signed his name beneath a statement that all "Laws of Guarantee" ("*dinei arevut*" in the operative Hebrew document signed by the parties) were applicable.[52]

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50. *Berger v. Moskowitz*, ___ Misc.2d ____, ___ N.Y.S.2d ____, N.Y.L.J., October 30, 1991 at 25, Index No. 15601-91 (Sup. Ct. Kings Co. 1991).

51. Exhibits 1 and 2 to Affidavit of Plaintiff, *Berger v. Moskowitz*, *Id*.

52. *Id*.

The defendants argued that the phrase "Laws of Guarantee" referred to Jewish law and that Jewish law should therefore be applied by the Court,[53] but that contention was apparently disregarded in the Court's ruling.[54] There is no indication in the record that the parties attempted to resolve the matter before a Beth Din, and apparently no specific written agreement between the parties that disputes arising in the course of the deal be submitted to arbitration, Beth Din or otherwise. One of the defendants did contend that the phrase "Laws of Guarantee" referred to the Jewish laws of guarantee and that the phraseology was used with the express purpose that any dispute would be resolved before a Beth Din,[55] but the Court apparently ignored that contention.[56] Had a provision for resolution of disputes by a Beth Din been set forth with specificity in the *Shtar 'Iska* document the Court probably would have enforced the provision.[57]

In the *Leibovici* case discussed earlier,[58] the extent of any joint venture relationship between the parties was not particularly relevant to the Court's decision. It further must be noted that *Leibovici* was decided in the New York City Civil Court, one of the lowest tribunals New York State court system (albeit one of the busiest in the world). The American federal courts are required to apply the law of the state, and must defer to the highest court in the state in

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53. Affirmation of John J. Hayes, Esq. at 3, Affidavit of B. Moskowitz at 5, *Berger v. Moskowitz, Id.*

54. *See* notes 17 through 21, *supra,* and accompanying text.

55. Affidavit of Israel Joseph Stern at 2, *Berger v. Moskowitz, supra,* note 50.

56. *See* notes 24 and 32, *supra,* and accompanying text.

57. *Ibid.*

58. *See* notes 45 and 46, *supra,* and accompanying text.

determining state law.[59] Federal agencies, including and especially the Internal Revenue Service, must likewise defer to the rulings of the highest court in a state over those of a lower court.[60] Weighing the court decisions according to the ranks of the courts, the secular American law clearly views the *Heter 'Iska* arrangement as a loan transaction, according little if any significant recognition of any joint venture relationship between the parties.

Should the courts' postures ever shift towards recognition of a joint venture in the *Heter 'Iska* transaction, there would be potential implications that could further complicate the secular law's approach to enforcing such a transaction. For one thing, American secular law regards partners and other joint venturers as fiduciaries with respect to one another, and imposes upon such fiduciaries a standard of undivided loyalty, a higher standard of conduct than the standard of simple honesty that is imposed upon parties to common marketplace transactions.[61] Joint venturers may not exploit for themselves a business opportunity that rightly belongs to the joint venture unless the co-venturer is informed and gives approval. Such an "opportunity" may consist of nothing more than a "tangible expectancy" of a business advantage, and might even be usurped in certain situations by one co-venturer acquiring property in the same "line of business"

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59. E*rie R.R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

60. *Commissioner v. Estate of Bosch,* 387 U.S. 456, 87 S.Ct. 1776, 18 L.Ed.2d 886 (1967).

61. *Birnbaum v. Birnbaum,* 73 N.Y.2d 461, 541 N.Y.S.2d 746, 539 N.E.2d 574 (1989); *Meinhard v. Salmon,* 249 N.Y. 458, 164 N.E. 545 (1928); *Cialeo v. Mehlman,* ___ Misc.2d ____, ___ N.Y.S.2d ____, N.Y.L.J., June 18, 1992 at 24, 25 (Sup. Ct. N.Y. Co.); Plotch v. Plotch, ___ Misc.2d ____, ___ N.Y.S.2d ____, N.Y.L.J., June 11, 1992 at 25 (Sup. Ct. Bronx Co.).

engaged in by the joint venture.[62] Thus, if the secular law would ever seriously view a *Heter 'Iska* arrangement as a joint venture, the parties to the arrangement might conceivably be saddled with responsibilities and liabilities above and beyond those placed upon borrowers and lenders.

Complicating the situation all the more is the fact that in a *Heter 'Iska* arrangement, the borrower is designated as the managing partner and the lender the silent partner. The fiduciary responsibilities imposed upon partners by the secular law are particularly applicable to managing partners.[63] In most business ventures the managing partner tends to occupy the position of strength and power with respect to the silent partner. In most loan transactions, however, the borrower typically tends to be in a weaker position than the lender. If the secular courts were ever to emphasize the joint venture aspects of the *Heter 'Iska* arrangement, then there could potentially be a situation where the weaker party is treated at law as the stronger party would normally be treated, and vice versa.

Other implications could potentially arise from the secular courts' treatment of the *Heter 'Iska* arrangement as a joint venture, including tax implications dependent upon the characterization of the property interests and liabilities of the respective parties to the transaction. For example, in the context of the Estate Tax, deductions of debts from the gross estate are only allowable to the extent that the debt is enforceable at law.[64] If, arguendo, under state law the

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62. *Plotch v. Plotch*, ___ Misc.2d ____, ___ N.Y.S.2d ____, N.Y.L.J., June 11, 1992 at 25 (Sup. Ct. Bronx Co.).

63. *Birnbaum v. Birnbaum*, 73 N.Y.2d 461, 465, 541 N.Y.S.2d 746, 747, 539 N.E.2d 574 (1989); *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545 (1928).

64. *Treas. Reg.* § 20.2053-4.

borrower is not obligated to pay the "profit" to the lender because the *Heter 'Iska* arrangement was a joint venture in which the lender assumed the risk, the debt would not be enforceable and therefore not available as a deduction from the gross estate.

V. Conclusion:

The secular governments construct and maintain many public works for the general welfare, ranging from bridges and highways to court systems. Just as Jewish individuals can derive benefit from bridges and other public works of the secular governments,[65] so too should the Jewish community as a whole make fair use of the secular justice systems in order to maintain and enforce Jewish laws and principles.

We have seen that any dispute involving a *Heter 'Iska* arrangement will very likely be resolved contrary to halacha if the matter is decided by the secular courts, regardless of how well the arrangement initially conformed to halachic requirements. The secular American courts simply can not be relied upon to render decisions that comport with halacha. On the other hand, the secular courts are quite disposed towards enforcing *Din Torah* decisions of a Beth Din, provided that such decisions are rendered pursuant to the secular law requirements of any other arbitration proceeding.

In America, a *Heter 'Iska* arrangement that does not provide for resolution of disputes by a Beth Din is of questionable value because of the risk that it may be enforced by the secular courts in a manner at odds with halacha. On the other hand, a *Heter 'Iska* arrangement that explicitly provides for resolution of disputes by a Beth Din in a manner

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65. *Baba Kama* 113b.

consistent with proper arbitration procedures has an excellent chance of being enforced by the secular courts in the sense that the courts will effectively uphold the Beth Din decision.

A *Heter 'Iska* arrangement should therefore entail a written *Shtar 'Iska* document,[66] which should be signed by the parties.[67] The document should explicitly provide that disputes or disagreements between the parties that concern the transaction be submitted to a Beth Din for resolution according to halachic principles, and that the parties agree to be bound by the decisions of the Beth Din. One lesson from the *Berger case*[68] is that the American secular courts do not exegetically interpret written contracts in the manner that is inherent to the elucidation of Torah from written Torah texts.[69] The provisions for resolution by the Beth Din should therefore be plain and explicit, and not arcanely hidden in the use of a phrase such as "laws of guarantee."

For their part, the *Batei Din* should (and usually do) ensure that all of their proceedings are conducted in a manner that would not give the secular courts cause to vacate or modify their judgments. This includes having impartial

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66. The document need not be in the English language, but if it is presented to a secular court there will be a need for an English translation and an affidavit of the translator. See, e.g. N.Y. Civ. Prac. Laws & Rules 2101(b).

67. See Appendix to this article for a specimen document. The document set forth in the Appendix is essentially in the nature of the witnesses memorializing the fact that the borrower and lender made an agreement. Signature upon the document by the parties themselves will render the document into a valid and enforceable arbitration agreement for purposes of the secular law. See N.Y. Civ. Prac. Laws & Rules § 7501.

68. Discussed *supra, see* notes 50 through 57 and accompanying text.

69. *Baraitha d'Rabbi Yishmael — Sifra, P'tichah.*

arbitrators who allow all parties to participate in the proceedings, and whose decisions do not stray from the subject matter of the disputes at issue. The proceedings and decisions of such *Batei Din* can and should fulfill the requisites of a secular arbitration without compromising halacha.

Heter 'Iska arrangements and other business dealings can be structured so that any ruling of a Beth Din that might affect such transaction would be enforced by the secular courts in a manner consistent with halacha. The secular court systems are not themselves driven by a halacha imperative, but, as described above, will enforce decisions of a Beth Din if the parties to the agreement properly agree to having the Beth Din as their arbitrator. The parties to such arrangements, knowing that a secular court would uphold the Beth Din, would have little incentive to resort to the secular court system in derogation of the Beth Din, and would likely abide by the rulings of the Beth Din. The potential halachic problems inherent in representation by Jewish lawyers of Jewish litigants in secular courts[70] would also be lessened. Thus, one who is party to such transactions ultimately fosters peace between man and his fellow, an "investment" that pays "interest" in this world, yet leaves the "principal" intact in the world to come .[71]

Appendix: A Model Shtar 'Iska Document:

The following model document is an English adaptation from a text found in *Ginat Veradim*. It also includes

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70. M. J. Broyde, "The Practice of Law According to Halacha", XX *J. Halacha & Contemp. Soc'y* 5, 6-16 (Fall 1990); S. Krauss, "Litigation in Secular Courts", III *J. Halacha & Contemp. Soc'y* 35 (Spring 1982).

71. *Peah* I:1; *Shabbat* 127a.

provisions, inserted by the author, for resolution of disputes by a Beth Din. The model document is provided for informational purposes only as an illustrative specimen for the accompanying article, and is not necessarily the appropriate form to use for all occasions. Different *Shtar 'Iska* texts appear elsewhere, including Chapter 40 of *Nachlat Shiva* and Chapter 143 of *Chochmat Adam*. Individual *rabbanim* may have compelling reason to prefer one specific text over another in any given situation; therefore, a competent authority should be consulted and advised of all relevant facts whenever such a document is drafted.

In our presence, A, the manager-borrower, acknowledged receipt from B, the investor-lender, of the sum of $1,000.00 as an investment agreement for a period of 12 months. A and B have agreed that A will undertake to do business with said sum during the said period using any type of investment opportunity in order to make a profit and prevent a loss, heaven forbid. All profit that *Hashem*, blessed be He, confers upon this investment during the said period will be divided equally between the two. Similarly, all losses, heaven forbid, will be borne equally by both parties, may they be blessed. A acknowledges having received $1.00 as wages, paid in advance, as compensation for his effort and work during said period.

The two parties have agreed that A will protect the money by keeping it in a place safe and protected from loss, fire, theft, etc. Should he violate that condition, he shall assume responsibility for any misadventures that may befall the investment, even its taking by armed thieves.

The parties further agree that the profit to which B, the investor-lender, is entitled will not exceed $100.00. Any further sum will belong to A, the manager-

borrower, in addition to the share to which he is entitled. Should the profit to which B, the investor-lender, is entitled be less than $100.00, A, the manager, agrees to take a severe oath at the request of B, the investor-lender, that to his knowledge the investment has not earned enough to entitle B to $100.00. If the manager-borrower, from time to time, uses small amounts of the investment capital for his own needs, he is not to be considered as a thief, even if the money is not returned at the designated time.

A and B have formalized all of the above by act of contract. They state that this agreement is not "*asmachta*" or a contract written for practice. They both agree to complete and satisfy all the aforestated particulars.

A and B agree that any and all disputes relating to or arising from this agreement or the performance or nonperformance thereof shall be submitted to a Beth Din for resolution in accordance with Halacha or Jewish Law. The decision of the Beth Din shall be binding upon the parties, and, once rendered, fully enforceable in all courts. This provision for resolution of disputes shall survive the agreement and continue to apply, regardless of whether the period of the agreement has expired.

Dated:
Investor-Lender:
Manager-Borrower:
Witness:
Witness:

Electrically Produced Fire or Light in Positive Commandments

Rabbi Howard Jachter
and Rabbi Michael Broyde

Introduction

Advances in technology require halacha* to apply previously developed principles to new settings. Frequently, in the process of drawing distinctions based on advances in technology, it is necessary to distinguish between terms that the classical texts did not explicitly separate. For example, the Talmud contains no words that clearly distinguish between light or heat generated by combustion or without combustion. When the Talmud states that a candle, fire, or light be used, it frequently is not clear which particular aspect is desired. Until the late 1800's this absence of clear definition was of little halachic significance for obvious technological

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* *In the absence of any specific reference to a multi-section work, all references are to* Orach Chaim.

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reasons: there was no mechanism to generate light without heat or heat without light. However, within this century, technology has developed many devices that can generate light without heat or heat without light, and can do both without combustion. This development has occasionally produced some disagreement among the authorities as to what are the basic characteristics according to halacha of "fire" and "light."[1]

Five significant applications are discussed in this article, each of which shares the common factor that a "candle" or "fire" is required for the action. According to most authorities, in two instances "light" is what is essentially needed, in another "fire" is what is required, in the third a particular type of "fire" with "light" is needed, while in one case all that is needed is heat.

Part I of this article discusses the use of electrically produced light for Sabbath candles; part II considers their use as *havdala* candles, and part III examines the use of electric Chanuka menorahs. Parts IV and V discuss the use of electrically produced light and heat when searching for *chametz* or broiling meat. The conclusion to this article touches on some of the broader issue of the relationship between tradition, technology, and change within halacha.

I. Shabbat Candles[2]

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1. These authors have already addressed those issues related to the production of light and heat in the context of prohibited work on Shabbat and Yom Tov; see Broyde and Jachter "The Use of Electricity on Shabbat and Yom Tov," *Journal of Halacha and Contemporary Society* 21:4 (1990).

2. There is no difference vis-a-vis the use of electricity between Yom Tov candles and Shabbat candles.

The Sages of the Mishnah record that on Shabbat and Yom Tov there is an obligation upon every household to have a light burning[3] so that people spend Shabbat in comfort and pleasantness.[4] Rambam states the obligation as follows:

> The lighting of a candle on Shabbat is not merely permissive – i.e., one may light or not light as one wishes; so, too, it is not a good deed (mitzvah) – i.e., one does not have to run after it to insure it is done, like *eruv chatzerot* – rather, it is an obligation. All people, men and women, must have a lit candle in their house on Shabbat. . . One must recite a blessing over the candle prior to lighting it.[5]

This ruling is codified in the *Shulchan Aruch* without disagreement.[6]

There are two essential issues relating to the use of incandescent lights for Shabbat candles. The first is whether a fire is needed and whether these incandescent lights are considered fire (אש) according to halacha. As explained

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3. For a discussion of whether the obligation is best fulfilled in the dining room or in other rooms, and what the particular rationale for the obligation is, see *Aruch Hashulchan* 263:2 and *Shemirat Shabbat Kehilchata* 43:n.6.

4. This obligation supersedes even the obligation of kiddush. Thus, one who does not have enough money to purchase both wine for kiddush and Shabbat candles should purchase only candles; *Shulchan Aruch, Orach Chaim* 263:3.

5. Rambam, *Shabbat* 5:1. The blessing is not, in fact mentioned in the Talmud, and some authorities (see *Tur, Orach Chaim* 263) maintain that no blessing is required.

6. *Shulchan Aruch* 263:5.

elsewhere,[7] the overwhelming consensus of rabbinic opinion maintains that a glowing hot filament is a form of "fire" according to Jewish law and that one who starts such a fire violates the biblical prohibition of starting a fire on Shabbat. This rule is accepted by nearly all modern decisors.[8]

While a few authorities do not share this view and believe that an incandescent bulb may not be used as Shabbat candles,[9] their opinion on this matter is not generally accepted. Since most authorities reject this view, the minority view alone would not constitute grounds to discourage the use of incandescent lights as Shabbat candles.[10] However,

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7. Broyde and Jachter "The Use of Electricity on Shabbat and Yom Tov," *pp.* 21:4, 6-10.

8. See sources cited in notes 10 and 14.

9. Rabbi Tzvi Pesach Frank in his responsa, *Har Tzvi, Orach Chaim* 2:114:2, in the context of discusssing Chanuka candles, states that a glowing filament

> is not fire. Rather, it appears to the eyes as if it gives off light and appears similar to a brilliant gem that gives off light in the dark, which has no similarity to a lit candle. Therefore, it is impossible to say that one can use [an incandescent light] to fulfill any mitzvah which requires the lighting of a candle since no light is lit; rather, it is merely metal which glows when it is heated considerably.

Rabbi Frank also discusses this issue in *Har Tzvi, Orach Chaim* I:143; *Mikra'ei Kodesh* I:47; *HaMa'ayan*, Tevet 5732, and *Moriah*, Cheshvan-Kislev 5732. For a similar suggestion, see also Maharshag 2:107.

10. Rabbi Ovadia Yosef, *Yechave Daat* 5:24. It is worth noting that even Rabbi Yosef, who has a very strong inclination to avoid situations where there is just a possibility of one's uttering blessings in vain (see *e.g. Yabia Omer* 1:29,11; 4:42-43; *Yechave Daat* 1:66, 2:32, 4:4, and 4:41) permits one to use incandescent lights for Shabbat candles and recite the blessing. The possibility of one's

there are other factors to be considered as well.

It has been argued that even though incandescent lights clearly are "fire" for the purposes of halacha, they cannot be used for Shabbat candles since they lack a "kindling process," which is required for Shabbat candles.[11] This argument reasons that turning on incandescent lights generally may only be a form of indirect action (*gerama*) and Shabbat candles – like all mitzvot – must be directly lit. [12]

This approach is not accepted by most authorities for either of two reasons. A number of authorities have asserted that Shabbat candles do not require an act of kindling. *Magen Avraham* rules that one who delays candle lighting until after sunset may ask a Gentile to light the candles and then the Jew should recite the blessing.[13] It would appear in

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uttering a blessing in vain motivates Rabbi Yosef to reach a contrary result when discussing the use of incandescent lights for *Havdala* candles; see text accompanying notes 37 and 39. This ruling is consistent with *Yabia Omer* 1:19 where Rabbi Yosef rules that incandescent lights are undoubtedly fire, and cites *Dovev Mesharim* 1:87 who denies that the contrary opinion can even be used as a consideration in halacha.

11. The blessing one recites states "to kindle Shabbat candles."

12. See *e.g.*, Rabbi Tzvi Pesach Frank, *Har Tzvi, Orach Chaim* I, 143, discussed in Broyde and Jachter, *supra* note, 1 at 25-26. See also *Pekudat Elazar* 22 and *Yabia Omer* 2:17.

Other authorities rule that Shabbat candles must be kindled in the classic sense that a candle is lit, which incandescent lights are not; see *Devar Halacha* 36; *Kochvai Yitzchak* 1-2 (possibility); *Levushai Mordechai Orach Chaim* 2:59; see *Mishpetai Uziel, Orach Chaim* 1:7 for a full explanation of this approach and *Yabia Omer* 2:17 for a reply.

13. *Magen Avraham, Orach Chaim* 263:11. This issue derives to a great extent from a dispute recorded in Tosafot, *Shabbat* 25b (s.v. "*chova*"). There, Tosafot quote differing opinions as to whether

explaining this ruling that according to this view no particular act of kindling is required. All that is needed is that the candle be illuminating on (and for) Shabbat. This argument is accepted by Rabbi Eliezer Waldenburg.[14] However, many authorities clearly argue with this approach and disagree with the ruling of the *Magen Avraham* on this topic.[15]

Rabbi Ovadia Yosef states, however, that even according to those who rule that an act of kindling is required, the turning on of incandescent lights is considered by the overwhelming consensus of authorities to be an act of kindling.[16] Thus, according to most authorities, whether or not an act of kindling is required need not be relevant to this discussion, since even an incandescent light is "kindled."

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one must make a blessing over Shabbat candles, and if they are already lit, whether one needs to extinguish them and relight them for Shabbat. Rabbenu Tam rules that a blessing must be recited. Even if a candle is already lit on Friday, one may not recite the blessing over it but rather must extinguish the candle and relight it for the sake of Shabbat; see also note 25. This dispute is explained in great length in Rabbenu Tam's *Sefer Hayashar*, #44-47, which contains the exchange of letters between Rabbenu Tam and Rabbenu Meshulam concerning whether Shabbat candles need a fire or an act of kindling; *Tur* quotes an opinion that states that one can fulfill the obligation of Shabbat candles on an already lit candle, even if it was not lit for the sake of Shabbat; *Tur, Orach Chaim* 263. This opinion must maintain that no act of kindling is required.

14. *Tzitz Eliezer* 1:20:11; see also *Har Tzvi* 2:114:2; but see *Yabia Omer* 2:17(11).

15. See e.g. Comments of Rabbi Akiva Eiger on *Magen Avraham* 263:11; *Mishnah Berurah* 263:21.

16. *Yabia Omer* 2:17; *Yechave Daat* 5:24; *Beit Yitzchak Yoreh Deah* 1:120; *Achiezer* 3:60; *Melamed Lehoil, Orach Chaim* 49; *Tzitz Eliezer* 3:17; *Meorai Aish* chapter 3 and many other authorities cited in Broyde and Jachter, *supra* note 1 at 25-26.

Rabbi Shlomo Zalman Auerbach is quoted as stating that Shabbat lights must contain an independent fuel supply. Thus, while in theory he allows electric Shabbat candles, he insists that this is only permissible when the power source come from a battery. Standard electric lights may not be used, he is quoted as saying, because "one is considered to be lighting without fuel since ... at every moment new electric current is being generated at the power station."[17] This argument, though, seems difficult since, as Rabbi Ovadia Yosef notes

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17. *Shemirat Shabbat Kehilchata* 43:n.22. A similar argument may be found in *Levushai Mordechai* 3:59. Rabbi Neuwirth explains that a flashlight may be used for Shabbat candles since "current is already stored within the battery." This statement appears to be factually incorrect, since a battery does not "store" electric current, but rather is a self-contained cell which converts potential chemical energy into electric current.

Rabbi Dovid Cohen, of *Gvul Yavetz*, has communicated to these authors an alternative understanding of Rabbi Auerbach's ruling. He states that since the electric current is not under the control of the one doing the mitzvah, one should not recite a blessing. This rationale appears to be based on a pronouncement of Rashba (*Teshuva* 18) and Ravad (commenting on Rambam, *Ishut* 3:23) that one may not recite a blessing over a mitzvah when performance of the mitzvah is dependent on the future actions of others. Since the ongoing production of electrical current is dependent on those people working in the power station, one may not recite a blessing over a light powered by such current. (Such an argument is also cited by Rabbi Yosef, *Yabia Omer* 2:17(10). If this rationale is accepted as normative, one could use electricity produced not only by a battery but also by a generator under one's own control. Moreover, since power plants in the United States operate automatically (without the active participation of workers in the production of electricity except to repair equipment that ceases to function), it is not unreasonable to argue that the ongoing production of electric current is not contingent on the actions of others (but merely can be curtailed through the action of others).

(*Yabia Omer, Orach Chaim* 2:17), there is no talmudic source which indicates that a fuel supply is necessary for Shabbat candles. In fact, Rabbi Waldenburg demonstrates that no fuel supply is necessary. (Rabbi Waldenburg's argument is written in regard to Chanuka candles, but applies equally to Shabbat candles.)[18] The purpose of Shabbat candles is to promote *shelom bayit* – domestic tranquility – (*Shabbat* 23b) by helping family members avoid stumbling over furniture. Accordingly, since ample lighting is provided, the fact that when one lights an electric bulb no fuel supply is present should be irrelevant. It is possible, however, to limit the requirement of a battery – powered flashlight to those areas of the world where electric power is only supplied sporadically and is curtailed without notice; in that circumstance it is reasonable that only battery – powered lights should be permitted.[19]

Rabbi Waldenburg[20] raises another possible objection to the use of an incandescent bulb for Shabbat candles, based

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18. *Tzitz Eliezer* 1:20:12:2; see however *Meorai Aish* p. 95.

19. *Yabia Omer, Orach Chaim* 2:17(10) and *Tzitz Eliezer* 1:20:11:8. Rabbi Moshe Stern (*Baer Moshe* 6:58:5) advances another rationale for excluding electric Shabbat candles and Chanuka candles. He states that "with an electric light one has nothing substantial in front of him – on what can one bless? In addition, the flow of electricity through the wires of an electric bulb is something spiritual which has no substance. It is one of the miracles of the Creator that He put the power in nature that is impossible to understand. Even though it is in front of us, after it is lit, it is just a dream without an interpretation." One could argue with the relevance of this analysis.

20. *Tzitz Eliezer* 1:20:11:10. *Mishpetai Uziel, Orach Chaim* 2:34:2, makes a similar argument.

on Ramo's ruling[21] that Shabbat candles may not be arranged in a circle. Rabbi Waldenburg suggests that since most filaments are "arc-shaped" they may be disqualified from use as Shabbat candles. Based on a comment by *Mishnah Berurah*, Rabbi Ovadia Yosef (*Yabia Omer* 2:17(13)) rejects this suggestion of Rabbi Waldenburg. *Mishnah Berurah*[22] limits Ramo's ruling to a situation where one places the Shabbat candles so close to each other that they cause each other to melt. This, of course, does not apply to an electric bulb. Additionally, it could be argued that this ruling is inapplicable to a single circular filament, and should be limited to a collection of candles or lights.[23]

The status of fluorescent or neon lights as Shabbat candles appears to be subject to some dispute. Some have stated that they may not be used for Shabbat candles since they do not constitute a fire according to halacha and no biblical violation occurs when one lights them on Shabbat.[24] One could perhaps disagree with this line of reasoning. Unlike other instances when the term "fire" (אש) is used, here only the term "candle" (נר) is used in the blessing. It is possible to argue that any light – emitting item (that can be kindled, according to those authorities who require kindling) suffices. One could argue that for the purpose of Shabbat candles – whose goal is to

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21. *Orach Chaim* 671:4.

22. *Mishnah Berurah, Biur Halacha* 671:4 *s.v. afilu.*

23. As incandescent lights are comparable to circular wicks, rather than to candles arranged in a circle, which all permit.

24. Rabbi Shmuel Yudlovitz, *Chashmal Leor Hahalacha* 3:6. For a further discussion of why fluorescent lights do not violate the biblical prohibition of lighting a fire, see Broyde and Jachter, *supra* note 1 at pages 6-9 and *Encyclopedia Talmudit* "Electricity" 18:182.

illuminate so as to increase Shabbat enjoyment – any form of illumination suffices.[25] In fact, two recent codifications of the halacha in this area make no distinction between incandescent and fluorescent lights when it comes to Shabbat candles.[26]

Thus, an examination of the responsa literature leads one to believe that most authorities allow the use of incandescent lights for Shabbat candles and that position is persuasive. Rabbi Yehoshua Neuwirth, in *Shmirat Shabbat Kehilchata*, states the rule as follows:

> One who uses electrically produced light for Shabbat or Yom Tov candles, has halachic support for his practice, and may recite a blessing on this lighting.[27]

This ruling is supported by the view of most authorities, including Rabbi Chaim Ozer Grodzinsky, Rabbi Yosef Henkin, Rabbi David Tzvi Hoffman, Rabbi Aharon Kotler,

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25. Such a position is found explicitly in the commentary of *Moshav Zekainim* on Leviticus 24:2 in the name of Rabbenu Meshulam, where he asserts that one who has a reflecting and illuminating gem does not need to light Shabbat candles (even though there is no fire present). This position seems to be quoted by the *Tur* in *Orach Chaim* 263; see *Encyclopedia Talmudit* 18:182 (n.308) which cites the *Moshav Zekainim* to indicate that fluorescent lights might be permissible.

26. See *Shemirat Shabbat Kehilchata* 43:4 and *Yalkut Yosef* 263:5. This is even more significant since both these works explicitly discuss the difference between incandescent and fluorescent lights in the context of *havdala* candles; see *Shemirat Shabbat Kehilchata* 61:32 and *Yalkut Yosef* 298:5.

The distinction drawn by these authors can also be found in *Piskei Teshuva* 298:3(n.11); but see *Har Tzvi* 2:114:2 which appears to identify the term *ner* with the term *aish*.

27. *Shmirat Shabbat Kehilchata* 43:4 (notes omitted).

Rabbi Yitzchak Schmelkes, Rabbi Moshe Shternbach, Rabbi Binyamin Silber, Rabbi Joseph B. Soloveitchik, and Rabbi Ovadia Yosef.[28]

However, it is important to note that all regulations and restrictions which apply to wax or oil Shabbat candles apply equally to incandescent lights. Thus, one should light them intending that they be Shabbat lights; one should not bless already lit candles or lights.[29] So, too, it is preferred that it be clear to the observer that these lights or candles are lit specifically in honor of Shabbat.[30]

Some authorities argue that it is best to turn off the incandescent lights in the area when one is lighting Shabbat candles so as to make it clear over which "light" one is

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28. *Achiezer* 4:6; *Luach Hayovel* 81:20; *Melamed Lehoil* 47; Rabbi Aharon Kotler, cited in *Kochvay Yitzchak* p.20; *Beit Yitzchak Yoreh Deah* 120; *Teshuvot Vehanhagot* 2:157; *Oz Nidberu* 3:1; Rabbi Joseph B. Soloveitchik, quoted by Rabbi Hershel Schachter; *Yabia Omer* 2:17.

Rabbi Simcha Bunin Cohen quotes Rabbi Moshe Feinstein as ruling that one should not recite a blessing on incandescent lights when they are used as Shabbat candles; this appears to be at tension with Rabbi Feinstein's statement that a glowing filament is fire according to halacha (*Iggerot Moshe Y.D.* 2:75), but perhaps in harmony with his suggestion (*Iggerot Moshe* 3:350) to the contrary.

Rabbi Ovadia Yosef states that one should not bless incandescent lights when they will be powered by electricity produced by a Jew in violation of Shabbat. Although he does not provide a source for this ruling, it is presumably based on *Sanhedrin* 6b where the Talmud writes that one who steals wheat and processes it and recites a blessing over it has "insulted" (so to speak) God. This issue requires further analysis and is beyond the scope of this article; see also *Shulchan Aruch* 298:5.

29. Ramo, *Shulchan Aruch* 263:4.

30. *Shulchan Aruch* 263:4.

making the blessing.[31] Others have argued that this practice is not necessary,[32] and this does not seem to be the common practice among observant Jews in the United States.

One could, in fact, argue just the opposite. One could claim that a person should turn *on* all the lights he expects to use on Shabbat, prior to lighting Shabbat candles, and then light the candles with a blessing and have in mind that the blessing should be on all the lights turned on for the sake of Shabbat. Such an approach presupposes that these lights can be (at least possibly) used for Shabbat candles.[33]

II. Havdala Lights

According to Jewish law, *havdala* lights must be ı fire. The text of the blessing explicitly mentions fire and it seems clear that a fire is actually needed. At first glance it would appear that an incandescent bulb could be used for *havdala* lights since the consensus of authorities regard incandescent lights as fire,[34] and many of the possible problems associated

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31. Implication from *Zichronut Eliyahu* 50:6 quoted in *Yabia Omer* 2:16(14); *Tephila LeMoshe* 1:1; and *Shemirat Shabbat Kehilchata* 43:34.

32. *Yabia Omer* 2:16(14) and *Yalkut Yosef* 263:8(n.15). Rabbi Auerbach also is quoted as indicating that perhaps such a practice is not needed; see *Shemirat Shabbat Kehilchata* 43:n.171.

33. *Oz Nidberu* 1:79. This is recorded to have been the practice of Rabbi Moshe Feinstein also; see *Teshuvot Vehanhagot* 2:157 and Rabbi Simcha Bunim Cohen, *The Radiance of Shabbos* page 20 (n.3). *Shemirat Shabbat Kehilchata* 43:34 records variations of this custom.

34. See text accompanying notes 1 to 10 and the sources cited therein. Rabbi Frank rules that incandescent lights may not be used for *havdala*, since they are not a fire; see note 9.

with the use of Shabbat candles are not relevant to *havdala* candles. *Havdala* candles do not require an act of kindling, no prominent authority believes that a fuel supply is necessary, and the *havdala* candles may be arranged in a circle. However, two objections have been raised regarding the use of incandescent bulbs for *havdala* lights.

The *Shulchan Aruch* (*Orach Chaim* 298:15), based on a statement in the Jerusalem Talmud (*Berachot* 8:6), states that it is prohibited to recite the *havdala* blessing over a fire that one sees through an *aspaklaria* (a mirror or glass)[35] or in any situation in which one sees only diffuse light but not a fire. Based on this ruling, there are authorities who rule that a *havdala* light may not be covered even by see-through glass since it constitutes a *hefsek* (blockage) from the light.[36]

From this insight, Rabbi Ovadia Yosef rules that one should not use an incandescent bulb for *havdala* since the blessing recited over the incandescent light would be in vain, as it is covered by a glass case.[37] Most authorities disagree with Rabbi Yosef for two different reasons. First, Rabbi Uziel,

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35. *Mishnah Berurah* translates *aspaklaria* as "clear glass;" *Biur Halacha* 298:15 *oh betoch aspaklaria*; *Aruch Hashulchan* translates it as a mirror; *Aruch Hashulchan* 298:18.

36. *Mishnah Berurah*, *Biur Halacha* 298:15 *s.v. oh betoch aspaklaria.*

37. *Yabia Omer* 1:17-18; see also note 10. *Mikra'ei Kodesh*, *Chanuka*, 20 (page 47); *Toldot Shemuel* 3:4(#7) (in doubt). Even these authorities admit that if the bulb were not covered by a glass case, it would be permissible to recite the blessing over it. Thus, for example, the element in an electric stove could, even according to these authorities, be used for *havdala* if it were specifically turned on for the ceremony; see, however, *Shemirat Shabbat Kehilchata* 61:27,87.

Rabbi Waldenburg,[38] as well as many other authorities,[39] rule in accordance with the authorities who permit using a light covered by glass, provided the glass is transparent. Second, Rabbi Waldenburg cogently argues that even according to those who rule to the contrary and prohibit blessing a fire covered in glass, the outer case of an incandescent bulb does not constitute a blockage since it is an integral component of the bulb and cannot be removed.[40]

Rabbi Auerbach[41] adds that even if one were to accept this analysis that the glass covering is not a blockage, it would

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38. *Mishpatai Uziel, Orach Chaim* 9 and *Tzitz Eliezer* 1:20:13.

39. See also *Aruch HaShulchan* 298:18; *Ketzot Hashulchan* 99:4; *Mishnah Berurah* (*bede'eved* permissible); *Shermirat Sabbat Kehilchata* 61:31 (same); *Shoneh Halacha* 298:17 (same); but see *Meorai Aish*, 5:1 who questions whether a lamp cover need ever be removed.

Rabbi Ovadia Yosef criticizes Rabbi Uziel for dismissing the opinions of those authorities who are strict on this matter, especially since according to these rabbis a blessing over a glass covered light would be uttered in vain. Rabbi Yosef's criticism is surprising, since halacha allows for an eminent scholar to decide which position among differing opinions one should follow (see *e.g.*, Ramo, *Choshen Mishpat* 25:2; *Shach, Yoreh Deah* 242, *Kitzur Behanhagat Horaot*, no. 4; and *Aruch Hashulchan, Yoreh Deah* 242:64). It is possible that this reflects Rabbi Yosef's strong inclination to avoid even possibly uttering a blessing in vain; see also note 10.

40. See *e.g. Yevamot* 78a-b, which clearly indicates that any impediment which is an intrinsic part of an item (or person) is not considered a blockage (*hefsek*).

41. *Meorai Aish* 5:1. Rabbi Auerbach additionally suggests a novel interpretation of the Jerusalem Talmud to exclude a light which requires a glass to function properly. Only an independently functioning fire can be used for *havdala*. Thus, he argues that an incandescent light may not be used for *havdala*, since it needs a glass case to function.

only permit use of an electric bulb through which one can see the filament glowing. The *Shulchan Aruch* (*Orach Chaim* 298:15) states explicitly that in any situation where one only sees the light (but not the fire), one may not recite the blessing. *This limitation is critical; frosted light bulbs may not, under any circumstances be used for havdala candles.* Even according to those authorities who permit the use of incandescent lights, they must be of the transparent variety that one can clearly see the filament glowing.[42]

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42. Rabbi Moshe Stern (*Baer Moshe* 6:61(15) speculates that incandescent lights may not be used for *havdala* candles since they are similar to the dying coals which the Talmud (*Berachot* 53b) states should not be used for *havdala* candle. The Talmud's criterion for how "bright" dying coals must be in order to be used for *havdala* candles is if "one places a splinter on them, the splinter ignites independently." Rabbi Stern believes that the term "independently" is synonymous with "immediately"in this case. Thus he suggests since a splinter placed on a glowing filament does not immediately ignite, incandescent bulbs should be disqualified for use as *havdala* candles. Rabbi Stern's argument seems incorrect for three reasons: First, it is contra- factual, as splinters do ignite immediately when they touch a glowing filament; second, he provides no proof that the term "independently" means immediately; third, the Talmud's criterion is not intended to provide a broad definition of what "fire" is sufficient for *havdala*, but only to provide a test for when coals are considered to be "dying." Neither the contemporary nor the classical decisors have cited this Talmudic text as a general test of what constitutes fire according to halacha. A similar critique of Rabbi Stern's arguments appears in Rabbi Feitel Levin "The Electric Menorah" 1 *Or Hadarom* 12, 21 (1984). In his conclusion, Rabbi Stern, however, defers to the rulings of the many authorities cited in note 45 and permits the use of incandescent lights as *havdala* candles in case of need.

Rabbi Shlomo Zalman Auerbach[43] himself, however, argues that one may not use even an incandescent light for *havdala*. He cites the Talmud (*Pesachim* 54a) which relates that on the Saturday night following Creation, God provided Adam with the knowledge to make fire by rubbing two stones together; the Sages decreed that it is proper to light a fire at the *havdala* ceremony to commemorate Adam's discovery. Rabbi Auerbach asserts that the fire used for *havdala* must be halachically identical to the fire that Adam discovered. Accordingly, he states that even an incandescent light may not be used for *havdala* because of both its physical and halachic dissimilarity to the fire discovered by Adam.[44]

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43. *Meorei Aish* 5:1; *Kochavia Yitzchak* 11. It is reported that Rabbi Moshe Feinstein also prohibited the use of incandescent lights for *havdala* candles; see Rabbi Bunim Cohen, *The Radiance of Shabbos* p.137.

44. Among the physical dissimilarities is that an electric bulb requires a glass covering to function, unlike the fire that Adam produced. The halachic difference is more complex. While both incandescent lights and a fire are biblically prohibited, halacha considers an incandescent light to be violative of a *tolada* (derivative biblical prohibition) and not of the *av melacha* (primary biblical prohibition), since no combustion takes place. This is why the Rambam (*Hilchot Shabbat* 12:1) classifies heating a metal until it glows as only a derivative biblical prohibition. Rabbi Auerbach states that the critical difference is whether combustion of fuel is present. Only in circumstances where fuel combustion is present is there a primary biblical prohibition (*av melacha*); in all other circumstances there is only a derivative biblical prohibition.

Rabbi Stern (*Baer Moshe* 6:65(29) appears to argue factually with Rabbi Auerbach and assert that there would have been actual combustion in the lights were there not a vacuum seal around the filament. These authors are at a loss to explain his understanding of how incandescent lights works. In addition, even if he were factually correct, Rabbi Auerbach could reply that it

Many rabbinic authorities disagree with Rabbis Auerbach and Yosef and accept that an incandescent light may be used for *havdala* candles.[45] In fact, there was a practice in Europe, dating back to the invention of incandescent lights, to deliberately use these bulbs for *havdala* candles so as to demonstrate that one may not use them on Shabbat.[46] This

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is the presence of actual combustion that is needed, and not merely the possibility of combustion; see also, Levin, *supra* note 42, at 12, 21.

It is, however, possible to disagree with Rabbi Auerbach's halachic analysis by noting that nowhere in the talmudic or post-talmudic literature is there ever stated a requirement that the fire used for *havdala* must be violative of the primary biblical prohibition, and not a derivative biblical prohibition. In fact this assertion seems contrary to Rambam's rule (*Hilchot Shabbat* 7:7) that there is only one distinction between a secondary and primary biblical violation and that difference relates to sacrifice issues. Rabbi Dovid Cohen, of Congregation Gvul Yavetz, has commented to these authors, that that statement can be limited to issues relating to prohibited work, and not positive commandments.

45. *Mishpetai Uziel, Orach Chaim* 1:8, 2:38; *Tzitz Eliezer* 1:20:13; *Shaarim Metzuyanim Behalacha* 96:6; *Machaze Avraham, Orach Chaim* 41; *Luach Hayovel* (R. Henkin) 18:20 (some permit); *Yesodai Yeshurun* 5:494; *HaChashmal Leor Halacha* 3:8; *Zichron Yaakov* 14:2; *Beit Yisrael, Orach Chaim* 21. Rabbi Aharon Lichenstein recounts that Rabbi Joseph B. Soloveitchik ruled that one fulfills (at least minimally) the obligation of *havdala* candles with incandescent lights. Nearly all authorities do not consider as normative the position of the Ravad, commenting on Rambam, *Shabbat* 12:1, that a glowing red-hot metal is not a fire; see note 10 and *Minchat Shlomo* 105-7, but see *Meorai Aish* 5:1.

46. Halacha requires that the fire used for the candle must be a prohibited form of fire; see *Shulchan Aruch, Orach Chaim* 298:5. For this reason, fluorescent lights may not be used for *havdala*; for a further discussion of why fluorescent lights are not "fire" according to halacha, see Broyde and Jachter, *supra* note 1 at 10-11.

practice has been attributed to many of the eminent rabbinic authorities of the previous generations of Europe, including Rabbi Chaim Ozer Grodzinsky, Rabbi Yosef Rozen (the Rogachover) and Rabbi Chaim Soloveitchik of Brisk.[47]

However, even those authorities who permit the use of an incandescent light for *havdala* lights concede that they are not the most preferable form of fire. The *Shulchan Aruch* (*Orach Chaim* 298:2) states that it is preferable that a candle of more than one wick be used for *havdala*. An incandescent bulb consists of one filament and, therefore, does not constitute the optimal way of reciting *havdala* according to all opinions. It is possible, however, that a series of electric bulbs placed together (such as a chandelier) may be comparable to a candle with more than one wick.[48]

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47. For a historical recounting of the various rabbinic figures who used to recite the havdala blessing over incandescent lights, see *Zichron Yaakov* 14:2; *Chashmal Leor Hahalacha* 3:8; *Nachalat Simon* 16; *Shaarim Metzuyanim Behalacha* 96:6; *Aishel Avraham, Chullin, Kuntres Peirot Ginosar* no. 21. Indeed Rabbi Joseph B. Soloveitchik recounted a number of times that he witnessed Rabbi Grodzinsky recite *havdala* on an incandescent light.

48. *Kochavai Yitzchak* #11 notes that many of the traditions of the *havdala* ceremony are contingent on there being a flame present. Thus the *Shulchan Aruch* (298:4) states it is best to have a multi-wick candle; to extinguish it in the wine (Ramo 296:1); and to have a designated candle used only for *havdala* (*Kaf HaChaim* 298:12). All of these additional customs are dependent on the presence of a candle. The latter objection can be overcome through the use of a designated electric *havdala* light; see *Tzitz Eliezer* 1:20(13), based on *Shulchan Aruch* 298:2 and *Aruch HaShulchan* 298:6. In addition, *Magen Avraham* 298:3, *Aruch Hashulchan* 298:5 and *Mishnah Berurah* 298:5 note that a wax candle should be used for *havdala*, and common practice reflects this custom.

Kaf Hachaim (*Orach Chaim* 673:19), however, indicates that even a single incandescent light has the status of multiple fires.

Shemirat Shabbat Kehilchata summarizes these rules as follows:

> It is prohibited to use a fluorescent light for *havdala*, since there is no fire present;[49] so too, one may not use a regular incandescent bulb whose filament is not visible. Concerning those bulbs whose filament is visible, there is a dispute; some authorities prohibit and some authorities permit.[50]

In situations where a candle is unavailable (or impractical) and the choice is between reciting *havdala* without a candle[51]

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49. It is interesting to note that he does not exclude fluorescent lights for Shabbat candle lighting, but only for *havdala*; see also text accompanying notes 24 to 26 for a discussion of why this might be so.

Rabbi Moshe Stern (*Baer Moshe* 6:63:22) states "One may recite *havdala* over an electric light since one can see the actual fire through the glass. However, one may not recite the blessing over fluorescent lights since the glass is opaque." Nearly all other authorities who address this issue rule that fluorescent lights may not be used since they are not fire according to halacha, rather than because the bulb is opaque; see *Chashmal Leor Hahalacha* 3:8; *Yabia Omer* 1:17-18; *Shemirat Shabbat Kehilchata* 61:32.

50. *Shemirat Shabbat Kehilchata*, 61:32 (notes omitted). "According to those authorities who rule permissibly, one may recite the blessing over an incandescent light turned on via a timer;" *id*.

Many agree, however, that incandescent lights may not be used for *havdala* after Yom Kippur. The light used for *havdala* after Yom Kippur must be lit the entire fast (*Shulchan Aruch, Orach Chaim* 624:5). It is possible that an incandescent light, even if it has been on the entire fast, is not considered to be lit the entire fast since at every moment the electricity used by the light is being newly generated; see *Tzitz Eliezer* I:20:13 and *Yabia Omer* I:18; see, however, *Mishpetai Uziel, Orach Chaim* 8.

51. While the use of a candle is a mitzvah (*Mishnah Berurah* 298:3, *Chazon Ish, Orach Chaim* 35:7) one who cannot find one

or using an incandescent light, most authorities rule that an incandescent light should be used and a blessing recited; since an incandescent bulb has the halachic status of a "fire", at least minimally, it fulfills the obligation.[52]

III. Chanuka Lights[53]

Unlike Shabbat candles or *havdala* lights, Chanuka lights unquestionably require an act of kindling,[54] and nearly all rabbinic authorities assert that a "fire" of some sort is needed.[55] If either of these two elements are lacking one cannot fulfill the commandment. A clear majority of rabbinic decisors who have addressed the question of whether one

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need not delay *havdala* in order to find a candle; *Shulchan Aruch* 298:1.

52. As explained above, numerous rabbinic authorities of the last fifty years – including Rabbis Grodzinsky, Henkin, Soloveitchik, Uziel, Waldenburg and others – have affirmed the practice that permitted or even encouraged reciting the *havdala* blessing over an incandescent light. The two significant rationales for prohibiting such a blessing are analytically debatable. Rabbi Ovadia Yosef's reasoning, that the glass covering is a blockage – which he himself labels only a possibility – has not been accepted by most authorities (see notes 38 and 39) for a broad variety of reasons; Rabbi Auerbach's novel insight, which distinguishes between primary and secondary prohibited fire, can be questioned (see note 44) and creates a distinction between types of fire unsupported by authorities, past or present.

53. For an excellent analysis of the many issues summarized in this section, see Rabbi Feitel Levin "The Electric Menorah" *Or Hadarom* 1:12-67 (1984). This essay has been translated into Hebrew also; see *Idem, Techumin* 9:317-340.

54. *Shulchan Aruch, Orach Chaim* 675:1.

55. Since Chanuka lights commemorate the miracle related to the fire-burning candelabrum in the Temple, it is intuitive that fire is needed in the commemoration.

can fulfil the commandment to light Chanuka candles with an electric menorah conclude that one cannot. The reasoning employed by these many decisors is varied, and no single rationale attracts the approval of a majority of the decisors.[56] A minority of decisors[57] have ruled that one does minimally fulfil the obligation of lighting a Chanuka menorah with an incandescent electric menorah.[58] It clearly is the tradition in observant homes not to use electric menorahs to fulfill the commandment of lighting a menorah (except perhaps under exceptional circumstances).[59]

Three minority opinions that are raised to object to the use of electric menorahs are ones that have been raised elsewhere in the context of incandescent lights. Thus, Rabbi

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56. *Yabia Omer* 3:35; *Yam HaGadol, Orach Chaim* 32; *Devar Eliyahu* 63; *Mishpatai Uziel* 1:7; *Levushai Mordechai* 3:59 *Maharshag* 2:107; *Yaskil Avdi* 2:9; *Har Tzvi* 2:114; *Meorai Aish* 5:2; *Kaf Hachaim* 673:19; *Luach Hayovel* (R. Henkin) page 81 (and many others).

57. See note 79 for such a list.

58. *I.e,* a specially designed menorah that operated on electrical current.

Beit Yitzchak, Y.D. 120, claims that one does not fulfill the obligation with a regular hanging incandescent light since it is not clear to the observer that this relates to Chanuka; the publicizing of the miracle (*parsumai nesa*) is intrinsic in the obligation.

59. Rabbi Levin, *supra* note 53, page 12 and page 16(n.19). There is, of course, nothing wrong with publicly turning on an incandescent menorah as a way of publicizing the holiday of Chanuka so long as this "lighting" is followed or preceded by a lighting of a proper menorah. For reasons explained in the final portion of this section, it is appropriate to have in mind that one is not fulfilling one's obligation to light Chanukah candles when one lights an incandescent menorah prior to lighting an oil or candle one; see *Mishpetai Uziel* 1:7.

Tzvi Pesach Frank states that one may not use an incandescent menorah to fulfill the obligation because turning on an incandescent light may not be an act of kindling and an incandescent bulb is not a form of fire.[60] As explained above, both of these positions are rejected by the consensus of halachic authorities.[61] So too, continuing his analysis discussed above, Rabbi Waldenburg raises the possibility that an incandescent bulb is unsuitable for use as Chanuka lights since the light filament is shaped like an arc and all agree that Chanuka lights may not be arranged in a round shape.[62] As we have noted above, this contention is not beyond dispute. Rabbi Yitzchak Schmelkes[63] states that one may not use incandescent lights since they are so common and lighting them would not publicize the miracle of Chanuka. This argument is not applicable, as Rabbi Ovadia Yosef notes, to an electric Chanuka menorah which is lit, built, and designed specifically to publicize the miracle of Chanuka.[64]

The argument, though, which has attracted the greatest number of adherents, albeit with variation, is the contention that electric lights differ – even though they are halachically "kindled fire" – so significantly from the menorah which

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60. *Har Tzvi, Orach Chaim* 2:114:2; see *supra* note 9.

61. See supra, text accompanying notes 1 - 10.

62. See *Shulchan Aruch* 671:4; *Tzitz Eliezer* 1:20:12.

63. *Beit Yitzchak, Yoreh Deah* 1:120.

64. *Yechave Daat* 4:38. In addition, as Rabbi Yosef argues, one can minimally fulfill the mitzvah in a way that does not publicize the mitzvah; see *Shulchan Aruch* 671:7; in times of old when people used wax candles for both illumination and for Chanuka purposes, halachic authority generally did not prohibit such candles lest it not publicize the miracle; rather they insisted that such candles be lit in a special place indicating their unique function; but see note 58.

was lit in the Temple that they cannot be used to fulfill the rabbinic commandment of commemorating the miracle with the menorah that occurred in the Temple. Chanuka lights commemorate the lights in the Temple, and one cannot fulfill this mitzvah by lighting something which differs so greatly from the Temple menorah, even if it is halachically defined as fire. Among the prominent differences are that electric lights do not have a flame, no fuel is consumed, no fuel supply is present at the time of lighting, and that electric bulbs contain a glowing filament which is not a conventional fire. Among the secondary differences between a conventional menorah and an electric one are the absence of a wick and oil and the dependency on not-yet produced fuel.[65] While each of these differences alone might not be significant according to most authorities, the sum-total of these differences motivates most authorities to prohibit the use of an electric menorah.[66]

Rabbi Shlomo Zalman Auerbach focuses on the absence of a flame in an incandescent light and the fact that it is an unconventional "fire".[67] He states that even though heat

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65. Rabbi Levin in his article, *supra* note 53, lists 17 factors which are not present in a electric menorah according to various authorities. Some argue that a fuel supply is always required in the definition of a candle, independent of any issue relating to the Temple Menorah; see *Meorai Aish* 5:2.

66. It is important to note that, with the exception of *Mayim Chaim* 1:279, all the authorities who permit the use of an incandescent menorah admit that it is far short of the ideal, since certainly it is no better than a menorah which does not use oil or an oil based fuel, which *Shulchan Aruch* 673:1 explicitly classifies as non-ideal.

67. *Ma'amarim Be'inyanei Chashmal* p.87-88; *Meorai Aish* 5:2. In fact, Rabbi Auerbach here states that metal heated until it glows

and light production without the presence of a flame or combustion suffices to violate the Shabbat rules, it does not necessarily follow that it suffices to fulfill a positive commandment. He notes that Rambam classifies flame-less and combustion-less light and heat as only a derivative form of fire.[68] Furthermore, Rabbi Auerbach notes that a strong case can be made that even if these lights were a full "fire" for the purposes of Shabbat rules, the menorah is designed for a completely different purpose – to commemorate and publicize the miracle – and to commemorate the miracle, it would seem clear that one needs a flame and fuel consumption.[69]

The same argument can be advanced for the absence of combustion. As Rabbi Feitel Levin explains, "fire without combustion may be adequate to incur liability for fire-lighting on Shabbat, but not adequate for the performance of a mitzvah."[70] Two counter arguments have been advanced. Rabbi Yitzchak Sternall replies that it is clear that the Chanuka menorah does not have to resemble the menorah in the Temple; our Chanuka menorah differs in many other forms. There is no talmudic support for the proposition that combustion is required.[71] In addition it has been argued that it would seem appropriate to commemorate the miracle

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hot is not a *ner*; but see text accompanying note 17.

68. See note 44 for a further explanation.

69. *Meorai Aish*, p. 190; Rabbi Eliyahu Klatzkin advances this argument in a slightly different form. He states that the Chanuka menorah must resemble the Temple menorah (*Devar Eliyahu* 63), while Rabbi Auerbach thinks it has to resemble the Chanuka miracle; see generally, Rabbi Levin, *supra* note 53, at page 23.

70. Rabbi Levin, *supra* note 53 at 24 and *Meorai Aish* 5:2.

71. *Kochavai Yitzchok* 7-8.

– there was light and heat emitting from the menorah in the Temple without any fuel consumption – precisely through a menorah that consumes no fuel.[72]

So, too, it has been argued that the halachic requirement that a fuel supply present in the menorah to last the requisite time it needs to burn cannot be fulfilled, since the menorah is powered by continuously produced electricity, none of which exists at the time of "lighting."[73] Some have replied that in our modern era when power disruptions are so infrequent, the inevitability of the power production suffices.[74] Others have sought to solve this problem with a battery-operated menorah, since its fuel supply is present at the time of lighting.[75]

Various secondary objections have also been raised. Among the secondary objections raised are that a menorah must have a wick.[76] A number of halachic authorities clearly disagree with this rule, however, including both Rabbi

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72. *Mayim Chaim*, *Orach Chaim* 279; Rabbi Yakov Holtzberg, "Electric Chanuka Candles," *Hameasef* 9:2 (391) Nissan 5664.

73. *Devar Halacha* 63. This argument is advanced in a different form by *Har Tzvi* 2:114:2 who implies that fuel need not be present at the time of lighting, but must be provided by the lighter of the menorah.

74. Rabbi Shlomo Levin, *Hapardes* 24:5:27

75. See, *e.g.*, comments of Rabbi Chayim David Halevi, *Aseh Lecha Rav* 6:57. It is clear scientifically that "current" is no more present in a battery than in the fuel supply stored in the power station. Rather, the virtue of a battery is that the fuel supply is under the control of the one making the blessing, which is not true of electricity produced at a generating station; see footnote 17. According to this analysis, a generator under the control of the one making the blessing is halachically identical to a battery.

76. Rav Henkin, *Luach Hayovel* page 81.

Auerbach and Rabbi Shmelkes,[77] both of whom approve of wick-less menorahs. So, too, some later authorities, based on a discussion in the Maharal, note that it is important for a menorah to have a container that holds the fuel, although this requirement is not accepted by all rabbinic decisors. Rabbi Feitel Levin has noted that an electric menorah might not have a fuel base according to halacha and thus be unacceptable to those authorities who require one.[78]

In summary, while the reasons advanced differ, it is the opinion of most rabbinic authorities that have addressed this issue that one may not fulfill the commandment of lighting Chanuka candles with an incandescent menorah.

A minority of authorities have, on the other hand, permitted the use of incandescent lights for Chanuka candles.[79] Their argument is that while there are many

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77. *Beit Yitzchak Y.D.* 1:120 and *Meorai Aish* 5:2. Rabbi Schmelkes' rationale for permitting wickless menorahs is that the obligation to resemble the Temple menorah is only a *lechatchela* (ideal) obligation. Rabbi Auerbach is uncertain if Rabbi Schmelkes' approach would apply even for an absence of a fuel supply, since the focus of the miracle was with the fuel supply. In addition, Rabbi Levin suggests that maybe the filament should be considered the wick; Rabbi Levin, *supra* note 53, at n.140.

78. Levin, *supra* note 42 at 40-42. See *Avnei Nezer, Orach Chaim* 500, for a discussion of this issue citing the various opinions relating to the requirement of a fuel base; see also *Ba'er Hataiv* 673:1 who in passing, citing *Shevot Yakov* 137, permits one to light candles without any base holding the candles. Rabbi Joseph B. Soloveitchik agrees with *Baer Hataiv's* ruling and permits this practice.

79. *Achiezer* 4:6 (clear implication); *Kochavai Yitzchok* 5; *Mayim Chaim* 1:279; *Tzitz Eliezer* 1:20(12) (possibility); *Ohr Chadash* p. 36; such a position can also be inferred from *Beit Yitzchak Yoreh Deah* 1:120(5) & 2:31. For a list of articles found in rabbinic

differences between incandescent lights in a menorah and a classical oil-burning menorah, all of these differences only have the status of preventing one from ideally fulfilling the obligation. These authorities would generally assert that any single "fire" for which one would be biblically liable for lighting on Shabbat suffices to minimally fulfil the obligation to light Chanuka candles. As Rabbi Chaim Ozer Grodzinsky states:

> On the matter of whether it is permissible to turn on or off electric lights on Shabbat and Yom Tov, it is obvious that one who does so violates the biblical prohibition of lighting or extinguishing a fire . . . It is permissible to recite the blessing over electric Shabbat candles; on the issue of electric menorah lights, olive oil is the preferred form. This is particularly so in light of Ramo's rule that one should light on a place that makes it clear that one is lighting for Chanuka.[80]

According to this approach, it clearly appears that one would fulfill the minimal obligation to have Chanuka candles lit with a specially designated electric menorah. This position, although it has not attracted a great deal of support among decisors of our generation, cannot be dismissed. Since there is nearly no discussion in the Talmud or *rishonim* of what aspects of a menorah are vital to minimally fulfill the obligation, it is very difficult to prove (wrong or right) the assertion of those authorities that any menorah which

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journals that support this position, see Encyclopedia Talmudit "Electricity" 18:187 (n.384) and Levin, *supra* note 53, table 4.

80. *Achiezer* 4:6. All of the responsa found in volume four of *Acheizer* were not published until many years after Rabbi Grodzensky's death, and were unavailable to all but the most recent discussion of this topic.

produces a form of light which violates the biblical commandment of burning on Shabbat,[81] suffices for Chanuka menorahs.

Rabbi Chayim David Halevi discusses the situation of one who is on an airplane[82] on Chanuka and thus unable to light a conventional Chanuka candle. He recommends lighting a battery-powered electric menorah without a blessing.[83] From his responsa it is clear that Rabbi Halevi does not believe that one has fulfilled the mitzvah of lighting Chanuka lights with a battery-powered light, since he rules that if one has the opportunity to light with candles before dawn, one should do so and *recite the blessing*. The reason he urges one to use the battery-powered light is simply to publicize the miracle of Chanuka and not to fulfill the mitzvah of lighting.[84]

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81. It is however, clear that a fluorescent LCD or LED menorah would not fulfill the commandment, since such lights are not considered fire according to halacha; See Rabbi Levin, *supra* note 53, at 18 and Broyde and Jachter, *supra* note 1, at pages 10-11.

82. For an excellent discussion of whether one is obligated to light a menorah on an airplane and other possible solutions to this problem, see Rabbi J. David Bleich, *Contemporary Halakhic Problems* III:54-58 ("Chanuka Lights for Travelers").

83. The advantage of a battery-operated light over a light which draws its power from a generator is that the former has a fuel supply present at the time of candle lighting. Thus, one obstacle to permitting the use of electric lights is eliminated by the using a battery-operated light.

84. *Aseh Lecha Rav* 6:57 and *Yechave Daat* 4:38; see also *Yalkut Yosef* 5:p.215 for a similar analysis. Rabbi Uziel rules that one may recite the blessing of *she'asa nissim*, deleting God's name, on an electric menorah even though one does not fulfill the obligation of lighting Chanuka candles therewith; see *Mishpetai Uziel* 1:7(3). Most disagree with this rule; see *Yalkut Yosef* 5:205(n.50).

The final portion of Rabbi Halevi's ruling can be considered debatable. A number of premier authorities, including Rabbis Grodzinsky, Massas, and perhaps Waldenburg[85] and Schmelkes,[86] accept that one can fulfill the commandment with an incandescent menorah. According to these authorities, reciting a blessing the second time one lights candles (if that opportunity arises) would be prohibited. It would seem more proper to avoid this problem and light a second time without a blessing.[87]

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85. Rabbi Waldenberg (*Tzitz Eliezer* 1:20(12)) leaves the matter in doubt, as he thinks it is possible that most incandescent lights are torches, and cannot be used as Chanuka lights. However, an incandescent menorah could be designed to use a straight single filament bulb, which Rabbi Waldenburg would rule acceptable.

86. Rabbi Schmelkes' ruling is unclear. He states that incandescent lights may not be used as Chanuka candles, since they do not publicize the miracle. Rabbi Yosef, *Yabia Omer* 3:35, understands Rabbi Schmelkes as prohibiting incandescent menorahs in all circumstances. Rabbi Grodzinsky, *Achiezer* 4:6, indicates that he understands Rabbi Schmelkes as stating only that incandescent lights do not ideally fulfill the commandment, and such an understanding of Rabbi Schmelkes is also found in Levin, *supra* note 53, at 33 ("Rabbi Schmelkes, who essentially permits the use of electric lighting for *Ner Chanukah*..."). *Encyclopedia Talmudit* indicates that from Rabbi Schmelkes' work one can derive that incandescent lights might be permissible; see *Encyclopedia Talmudit* "Electricity" 18:187 (n.384 & 396).

87. This assumes that it is not proper to recite the Chanuka blessing in circumstances where no one certainly fulfills the commandment of lighting Chanuka candles (except in a synagogue during services). Such a position is accepted by most authorities; see *Moadei Yeshurun* page 18 and n.273 (in the name of Rabbi Feinstein); *Miztvat Ner Ish u'Baito* 2:9; *Minchat Yitzchak* 6:65; Rabbi Joseph B. Soloveitchik, *Mesorah* 4:12-3; but see *Noam* 19:290,

IV. Searching for Chametz

The first mishnah of *Pesachim* states that "on the evening of the fourteenth of Nissan one must search for *chametz* by candlelight."[88] The Sages felt that since this search should be a particularly thorough one, it was necessary to be done by candlelight.[89] While a light source must be used during the search, certain types of light sources are deemed unacceptable. Thus, *Shulchan Aruch* recounts that a torch (a multi-wick candle) is unacceptable.[90] The Talmud[91] gives four reasons prohibiting the use of a torch:

> 1] A torch is so large that one will not closely examine the corners of the house since the torch is too large to go there.
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> 2] A torch [because of the way it is carried] illuminates

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where it has been argued that one may recite the blessing any time a proper menorah is lit.

88. *Pesachim* 2a. In addition, one recites a blessing which concludes with "that one commanded us to destroy *chametz*;" *Pesachim* 7b; *Shulchan Aruch* 432:1. Rabbi Yosef notes that from the fact that the blessing recited does not make mention of the candle (unlike Shabbat, Chanuka and *havdala* blessings), one can derive that any light source is sufficient; *Yabia Omer* 1:40. It has been argued that the Talmud (*Pesachim* 7b), when discussing the biblical allusion for the need for a candle, seems to require specifically a "candle" in this ritual, although, as noted in text accompanying note 97, this requirement is not reflected in the various halachic codes and this talmudic passage could be interpreted as merely requiring a light source and not specifically a candle..

89. *Pesachim* 2a.

90. *Shulchan Aruch*, 433:2. One who searches with a torch must search again according to most authorities; *Aruch HaShulchan* 433:2; *Mishnah Berurah* 433:10; but see *Turei Zahav* 433:3.

91. *Pesachim* 8a.

behind a person, whereas a candle illuminates in front.

3] A torch emits so much heat that one will not search closely, lest the flame from the torch set the house on fire.

4] A torch, unlike a candle, provides an unsteady flame that jumps and flickers, which is poor to search with.[92]

None of the reasons advanced to prohibit a torch are applicable to a battery-powered flashlight, and in fact nearly all[93] authorities permit the use of a flashlight for *chametz* searching.[94] Thus, in this case, even though the term "candle"

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92. So, too, one should not use an oil lamp or a candle made from animal fat, since one might not search closely lest the oil or animal fat drip on utensils and render them non-kosher; *Shulchan Aruch* 433:2.

93. The authors are aware of only one work that rules to the contrary; *Hillel Omer, Orach Chaim* 231 prohibits the use of electric lights for the search. He states, writing more than 50 years ago, that electric lights are dangerous, come on too short a cord and are so valuable, that people who search with them will not search closely, just like the torch in the time of the Talmud. His reasons certainly are not applicable today, as has been noted by Rabbi Felder, *Yesodai Yeshurun* 6:339, and Rabbi Yosef, *Yabia Omer* 1:40.

94. Rabbi Ovadia Yosef *Yabia Omer* 1:40; Rabbi Gedalia Felder *Yesodei Yeshurun* 6:338-339; Rabbi Salomon Braun, *Shearim Mitzuyanim Behalacha* 111:4; Rabbis Moshe Feinstein and Aharon Kotler cited by Rabbi Shimon Eider *Halachos of Pesach* I:86 n.81; Rabbi Abraham Isaiah Karelitz (*Chazon Ish*) cited in *Yechave Daat* 1:40; Rabbi Shmuel Halevi Wosner, *Shevet Halevi, Orach Chaim* 136, and many others.

Rabbi Yosef is the only prominent authority who is hesitant to permit this conduct on technical halachic grounds. *Shulchan Aruch* 433:1 cites the talmudic rule permitting one to search an area illuminated by sunlight without a candle; Magen Avraham 433:4

(נר) is used, the overwhelming majority of decisors rule that only the "light" aspect of the candle is required.

In fact, Rabbi Moshe Feinstein is cited as maintaining that it is *preferable* to use a flashlight rather than a candle.[95] It seems to these authors that since the consensus opinion acknowledges that a heated filament is the equivalent of a fire, a flashlight fulfills the rabbinic requirement to check for *chametz* "by the light of a candle." Futhermore, the essential requirement of the light that should be used while checking for *chametz* is that it be effective, particularly in enabling the search for *chametz* in various nooks and crannies.[96] Flashlights or incandescent bulbs on long extension cords are considerably more effective and safer than a candle in allowing one to search.

It is unclear if in fact a "fire" is actually even required according to halacha in this case. *Shulchan Aruch* (codifying the statement of the Talmud, *Pesachim* 8a) states that a porch

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adds, however, that one may not search a room illuminated through a window that has a glass pane on it. Rabbi Yosef, asserting that the glass covering the flashlight is like the window pane, states that it is best to avoid this situation; see also notes 10, 37 and 39.

Rabbi Yisrael Weltz (*Chok Liyisrael* p. 16), however, rules in accordance with Maharsham's statement (*Da'at Torah* 11:3) that the *Magen Avraham's* rule is limited to those situations where the glass is cloudy and thus does not allow sufficient light to pass. He cogently argues that since the glass covering the bulb of the flashlight is transparent, use of a flashlight for searching for *chametz* should be permitted. This also appears to be the opinion of *Aruch Hashulchan* 433:2, especially as interpreted by Rabbi Yosef, *Yabia Omer* 4:40(4).

95. *Halachos of Pesach* I:86 n.81. The reasons advanced are our own and not Rabbi Feinstein's.

96. See *Shulchan Aruch, Orach Chaim* 433:1-2.

may be inspected without a candle so long as sun-light is available; the rationale for this is that natural light provides enough illumination. This rule is accepted by all authorities.[97] It would seem from this rule that any form of illumination, whether it is definitionally a "fire" or not according to halacha, suffices for the search for *chametz*. Thus, one could use a fluorescent flashlight for the search, since it too illuminates.

The most significant objection to the use of a flashlight for *bedikat chametz* is that it is a deviation from the custom of earlier generations. For example, Rabbi Braun, writing in *Shearim Metzuyanim Behalacha* 111:4, ends his discussion of this topic by stating:

> Thus, there is no reason or rationale to prohibit the use of electric lights for *bedikat chametz*. Nonetheless, the Jews are holy, and a mitzvah that comes only once a year, it is best to do in the tradition of our parents, with a wax candle. Rabbi Aharon Kotler *zt"l* when he saw this statement in the first edition [of this work] stated that this is correct and the halacha is like it.[98]

V. Broiling Meat

Halacha requires that meat either be salted or broiled prior to consumption,[99] and that livers always be broiled

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97. *Shulchan Aruch* 433:1 and commentaries *ad locum*.

98. Similar sentiments can be found in *Yechave Daat* 1:4. This issue will be discussed in more detail in the Conclusion of this article.

99. *Shulchan Aruch, Yoreh Deah* 73:1. For an overview of this issue, see *Aruch Hashulchan, Yoreh Deah* 73:1-14.

prior to consumption. This regulation is designed to remove blood from within the meat.

There has been considerable discussion of the permissibility of broiling meat in an electric broiler. (This discussion involves only meat which *has not been salted* and is being broiled in order to fulfill the halachic requirement to remove the blood). Nearly all authorities permit the use of an electric broiler, since the hot filament is the halachic equivalent to a fire.[100] In this context, almost all halachic authorities agree that the requirement is that the meat be roasted with an external cooking source that radiates heat; in this case, even though the phrase fire (אש) is used, the critical factor is the generation of heat capable of broiling.[101] Thus, it is the accepted practice that meat roasted over an electric oven has the same status as meat roasted over a wood or charcoal fire.[102] It would therefore seem that

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100. See, *e.g.*, See *Da'at Sofer Y.D.* 13; *Yeshuot Yaakov Y.D.* 1:47; *Mishneh Halachot* 6:132 (quoting many authorities); *Hamaor* 21:6 p.19 (5729) (*Teshuva* of Rabbi Dov Ber Weinfeld permitting electric broilers); *Hapardes* 25:4 (#33) (*Teshuva* from Rabbi Henkin permitting electric broilers); *Hapardes* 26:2 (#13) (*Teshuva* from Rabbi Menachem Mendel Kasher permitting electric broilers). *Tzitz Eliezer* 11:53; *Chelkat Yakov* 2:141; *Hakashrut Kehilchata* 26:33. But see *Mishnat Avraham* 2:5 and *Shearim Metzuyanim Behalacha* 36:8 (opinion of Rabbi Yonatan Schteiff prohibiting electric broiling).

101. *Darkei Teshuva* 73:3. *Aruch HaShulchan* (*Y.D.* 76:11) and *Darkei Teshuva* (in the name of nearly all authorities), for example, state, that one can roast meat over a very hot piece of metal that is made hot through a fire source that is no longer present; but see *Tzlach, Pesachim* 74a. This is permissible according to many authorities, only if the gravy produced flows away from the roasting meat; see *Tzitz Eliezer* 11:53.

102. There is, however, a dispute as to whether the fire or element must be below the meat, or can even be above it; *Shearim*

liver cooked in a microwave oven would not have the status of "roasted meat", since a microwave oven does not have an external heat source, which is what is needed to "roast" meat according to halacha.[103] This ruling does not necessarily mean, however, that livers cooked in a microwave oven may not be eaten.[104]

Metzuyanim Behalacha 36:7-8. A majority of authorities rule that even if the element is above the meat, it is permissible; see *Kashrut Kehilchata* 26:32 (n.9). This issue involves factors beyond the scope of this article.

103. "The external heat source draws the blood from the meat," *Shulchan Aruch Yoreh Deah* 69:21. A microwave oven has no external heat source, but rather generates heat by producing microwaves that increase the speed of vibration of the water molecules within food and thus heat the food internally. Unlike a conventional oven, the walls of a microwave oven get hot only through heat radiating from the food in the oven.

104. *Shulchan Aruch* (*Yoreh Deah* 73:2) notes that one may pickle livers in vinegar if the livers are properly de-veined; however, the *Geonim* decreed that one may not cook these livers again in a pot, but rather one must eat them "uncooked" (only pickled). It is possible to argue that livers "cooked" in a microwave oven (in a way that the blood drips away from the livers) are halachically analogous to pickled livers, and may not be recooked over a flame, but may be eaten "as is." In fact, such a ruling has been reported in the name of Rabbi Ben-Tzion Aba Shaul; see *Kashrut Kehilchata* 26:39 (one may "cook" liver in a microwave oven providing one does not recook the liver again).

It is possible that the appropriateness of Rabbi Ben Tzion Aba Shaul's rationale is related to how one resolves the dispute between Rabbi Feinstein and Rabbi Auerbach as to whether heating something in a microwave oven has the status of "cooking" (*bishul*) according to halacha. If one accepts Rabbi Auerbach's ruling that heating food in a microwave oven is not considered halachically as cooking, it would seem plausible that the livers would be permissible, similar to "uncooked" or pickled livers and may be eaten after they are washed, but may not be reheated over a

Conclusion

Merely because something is permissible according to halacha does not mean that it ought to be immediately implemented and adopted in observant homes. On the other hand, when an advance in technology allows one to upgrade one's ability to fulfill a commandment, one should not freely turn away that opportunity simply because such opportunity was not available to previous generations. There is a balance. Halacha prefers ritual observance performed in a manner similar to that done in previous generations and in other observant homes. On the other hand, technical improvements in ritual can and do occur[105] and many of

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flame; if one accepts Rabbi Feinstein's ruling that heating food in a microwave oven is halachically considered cooking, livers cooked in such a manner would be prohibited. It is possible to argue that even Rabbi Feinstein would permit the eating of livers cooked in a microwave oven if the blood drips away, since the blood would not have an opportunity to be reabsorbed into the liver, as it does in the conventional cooking process; for a similar argument see Rabbi Henkin, *Hapardes* 25:4. For a detailed discussion of the dispute between Rabbis Feinstein and Auerbach, see Rabbi J. David Bleich, "Microwave Ovens on Shabbat," 25:2 *Tradition* 68 (1990).

105. This, of course, assumes that a determination has been made that a particular change is, in fact, halachically permissible. For a discussion of this issue in a different context, see Rabbi *Chaim Twersky*, "The Use of Modern Inks for Sifrei Torah," *Journal of Halacha & Contemporary Society* 15:68,76 (1988) where it is noted that "the use of a modern binding agent [for inks] ought not be proscribed by the halacha, and should be sought to improve the longevity of *sifrei torah, t'fillin* and *mezuzot*." Advances in technology have allowed the reformulation of the ink used by scribes to increase the number of years the letters in a Torah scroll will last. See also Rabbi Uri Dasberg, "Identification of a Sefer Torah," *Techumin* 1:491 (1979) where the author discusses the permissibility of marking a Torah with an invisible code so

them are driven by advances of technology. If in fact, a flashlight provides better light, it is not inappropriate to encourage people to use a flashlight instead of a candle when searching for *chametz* or when lighting Shabbat candles that will be left unattended; this is even more true in light of the safety problems associated with lit candles and small children.[106]

Rabbi Yechezkel Landau (*Nodah BiYehuda, Orach Chaim* 2:18) provides a paradigmatic example of how halacha resolves this balance. Rabbi Landau was asked if one may construct a synagogue in a shape other than a rectangle, which had been the way synagogues were designed for many years. He replied that even though halacha has no particular requirement regarding the shape of a synagogue, "it is best not to deviate from the venerated practices [of the Jewish people]." However, he adds "if the reason [a deviation is desired] is that the proposed plan will allow for more available seating area, there is no reason why this plan should not be implemented." The question of using a flashlight to search for *chametz* is analogous to changing the shape of the synagogue for a valid reason. Unnecessary deviation from

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as to prevent its theft. Indeed, Rabbi Feinstein uses a very similar type of argument – a change in technology leading to a change in ritual observance – to strongly discourage funerals on the second day of Yom Tov; see *Iggerot Moshe, Orach Chaim* 3:76.

106. Nor is this concern merely theoretical. See, e.g., "Mother and Two Sons Hurt in Fire Started by Candle" *New York Times* April 18, 1992, Page 23 col.5. ("As [a man] and his family performed the symbolic search for the leaven, a final preparation for Passover, a candle ignited a fire that swept their Brooklyn home late Thursday night ... [The fire] left his wife ... and their two youngest boys critically injured and their home destroyed.") This type of event should incline one to encourage the use of flashlights instead of candles.

custom is frowned upon; however, if the reason for the deviation is legitimate – and safety reasons certainly fit into this category – and there are no other halachic objections, then there is no objection to the change.[107]

107.There is a fundamental difference between a custom involving a mitzvah, and other traditions. For example, having established that it is halachically permissible to broil meat in an electric oven (see section V), there is no mention among the decisors that it is best to broil meat in a manner similar to that done in previous generations. The sense that traditions of ritual observance ought to be kept and not changed (all else equivalent), is limited to those situations where there is a mitzvah involved, like searching for *chametz*, or lighting Shabbat candles. (Broiling meat is not a mitzvah, but only a procedure one follows to avoid a prohibition). To apply it in other contexts is uncalled for, and not found among the decisors.