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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, 5 Fox Lane, Spring Valley, New York, 10977. 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

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Understanding the Heter Mechira

Rabbi Yitzchok Gottlieb

There is perhaps no greater divide in the religiously observant community of Israel today than the one which results from the two, very divergent, paths taken by its members at the advent of the Sabbatical Year, the *shemita*. In the Holy Land, each seven year cycle (Septennate), closes with an entire annum wherein, generally speaking, all agricultural cultivation is either severely limited or entirely proscribed by Jewish law. One element of the Orthodox population follows the dictates of *shemita* in more or less classical form, leaving their orchards but minimally maintained, and their fields fallow. The second group continues, with varying degrees, normal working of the soil. The direction taken by this second category and the halachic approaches upon which they rely, are the subject of this paper.

In the latter half of the nineteenth century, with the resurgence of settlements in what was then Palestine, a number of Jewish activists approached various rabbinic leaders to see if there was some way of avoiding the restrictions of *shemita*. Meeting with little success from the Holy Land sages in Jerusalem, the issue was moved to the

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European forum. There, while still encountering stiff opposition from many of the major Torah authorities, it also found great rabbis who, based on the circumstances in Palestine as presented to them, saw a means of solution. What emerged, together with numerous evolutions, is referred to in a general way as the *Heter Mechira* — literally, permissibility through sale.

The basic theory behind the *Heter* is that, by sale of the land to a non-Jew, the laws of the Sabbatical year will be removed from it. The contract of the sale embraces adequate clauses and conditions to insure that (A) the Jewish holders of the land will be able to continue their profitable activities on it during the term of the non-Jews' "ownership" and (B) the Gentile "purchaser" will not in fact keep the land permanently.

By the Sabbatical year of 1888-1889, the debate concerning the *Heter Mechira's* validity had achieved a vociferous level. Then, as now, a plethora of publications appeared, pro and con, dealing not only with the halachic questions involved, but with relevant ideological and emotional issues as well. It would be fair to state that virtually all of the greatest scholars and halachic decisors of the last hundred plus years have applied themselves diligently to this matter, thereby benefiting us with a vast body of Torah literature on the subject. We shall herein limit ourselves to the halachic issues and, while in no way doing justice to the length and breadth and depth of the subject, discuss the views taken by various positions on the major elements of this controversy.

We shall begin with a short introduction to the laws of the Sabbatical year and then address the following questions:

1. Is the current *shemita* obligation of Torah origin, of rabbinic source, or otherwise?

2. To what degree, if any, does land sold to a Gentile

become modified, insofar as its inherent *kedusha* (holiness) is concerned, thereby affecting its legal status?

3. Are we permitted to make use of *Ha-arama Nikeret*, a blatant and conspicuous artifice?

4. Can the Torah law forbidding the sale of any parcel of the Holy Land to a Gentile be avoided?

5. Is a land sale, not recognized by any official government organ, effective in religious matters?

6. What significance is given to *she-at hadechak* (extenuating circumstance) and *pikuach nefesh* (mortal danger) in this issue?

7. What is the post facto impact of the *Heter Mechira* for those who accept it — and for those who reject it?

Introduction

> And G-d spake unto Moses on Mount Sinai, saying: Speak unto the children of Israel and say unto them: When ye come into the land which I give you, then shall the land keep a Sabbath unto G-d. Six years thou shalt sow thy field and six years thou shalt prune thy vineyard and gather in its produce. But in the seventh year, there shall be a Sabbath to be celebrated by a cessation of work for the land, a Sabbath unto G-d, thy field shalt thou not sow and thy vineyard not prune. The aftergrowth of thy harvest thou shalt not harvest and the grapes of thy vine which has been left to itself, thou shalt not gather in, a year of cessation of work shall it be for the land... (Lev. 25:1-7)

The *Shemita* year affects two major concepts: the soil in Israel may not be worked and all debts are cancelled *(shemitat kesafim)*, but the latter is not our concern here.We will now briefly mention precepts of *shemita* relevant to this paper.

Works forbidden by the Torah are sowing, harvesting, pruning, cutting grapes, plowing, and planting. Activities forbidden by the Sages include watering, clearing stones from a field, weeding, manuring, and hoeing.

By Torah law, anything which grows by itself during the *shemita* year is permitted for consumption, such as fruit of the tree. Grains and vegetables which came about through discarded seeds, aftergrowth, and the like, known as *s'fichin*, fall equally into this category; however, to remove the temptation of illegal planting and marketing, a rabbinic injunction proscribes them.

Fruits of the *shemita* year are invested with *Kedushat Shevi-it*, "Holiness of the Seventh," and must be treated reflective of that unique status. They must be consumed in a manner of optimum utility and in general treated in dignified fashion. Additionally there is an *issur se-chora*, trade prohibition; one cannot market, sell, or distribute fruit of the Seventh in any way similar to regular commercial practice; rather, it should be left ownerless with free unrestricted access for all.

Persons in possession of *shemita* fruits may store and eat them at their discretion for so long a time as that type is freely available to others in the open field. At the calendar date when it is determined that, for the most part, this type of fruit is used up in the open terrain, the holder of such fruits must expunge them from his possession. This is known as *"bi-ur"*.

1. Is the current shemita obligation of Torah source, rabbinic origin, or otherwise?

It is undisputed that when the entire Jewish nation lives in the Holy Land with the Temple, the law of *shemita* is in effect with full force, as was in fact the case during certain eras of Jewish history. At present, however, matters being

other than optimum, there exists a basis from which to posit that in fact the Torah law of *shemita* is no longer relevant. *The crucial importance of whether it is or is not the Torah which addresses itself to the present status of the land cannot be overestimated.* Although in practice almost no differentiation is made between laws of Torah and those of rabbinic nature, when a decision needs be made in an area of *safek*, doubt, the difference is vast. A Torah law is always dealt with in stringent fashion, while a rabbinic question, generally speaking, leaves room for leniencies. Were *shemita* today of clearly Torah origin, the issue of *Heter Mechira* would not exist; there would be no leeway for the multiple leniencies upon which it is based, as will be shown.

In *Gittin*, we find the opinion of Rebbe that *shemita* these days is not of Torah origin. Rashi presents two rationales for the position of Rebbe:

A. He is of the opinion that the holiness of the land, brought about by the conquest of Ezra, did cease when the second Temple was destroyed by Titus. (We should note, in preface, that it is through conquest by the Jewish Nation that the Land of Israel became consecrated, requiring all the obligations in the laws of the Torah referring specifically to the Land of Israel.)

B. The Torah declares that following seven *shemita* cycles there shall be a Jubilee year, *yovel*. The applicability of this *yovel* is dependent on the proper settlement in the Holy Land of all the tribes of Israel, something clearly not germane at present. Since *yovel* is currently not of Torah nature, likewise *shemita* cannot be.

Although Rebbe is a strong source for an opinion that *shemita* today is of rabbinic nature, we must see if the *Rishonim* chose to adjudicate accordingly, or if they perhaps followed a different school.

Collecting Rishonim

When a determination is made by the *Sanhedrin,*[1] discerning between two opposing positions, the losing side becomes completely invalidated. Not so when a later halachist (*Acharon*) adjudicates; the full weight of the opposing opinion still stands. The *Acharon's* decision suffices for the specific situation addressed. However, should a different question arise, the other *Rishonim* must be accounted for.

In our subject of *shemita,* therefore, regardless of whether the practicable resolution of this controversy is to the side of Torah or rabbinic, there is still a vital labor in collecting *Rishonim* for one side or the other. Should a new challenge be brought to the fore on the question of *Heter Mechira,* all of the legitimate positions must be newly weighed and reckoned. We therefore find both the opponents of the *Heter Mechira* and its advocates "collecting" as many *Rishonim* as possible in support of their respective positions while at the same time taking pains to minimize those that can be attributed to the opposing side.

> Rabbi S.J. Zevin,[2] an outspoken *Heter* proponent, writes,
>
> It appears that Rashi himself is of the opinion that the law is according to Rebbe [i.e. rabbinic]... as well as Ritva, Rashba, Smag, Yereim, Chinuch, and Tur. In addition many later decisors have conclusively determined that Rambam is of the same stance. Furthermore, the only clearly opposing view that we can find is Ramban, and he himself writes elsewhere to the contrary.

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1. A great gathering of sages. Conditions have rendered such a gathering impossible since the destruction of the Temple.

2. *Leor Hahalacha* (1957) p. 110.

Contrast that with the words of an opponent, Rabbi Soloveitchik.[3]

> In conclusion we have the following opinions that *shemita* is Torah law: Ravad, Rashi, Tosafot, *Ba-al Ha-itur,* and Ramban.

Razah

With this background we introduce a *Rishon* who holds a third view, Razah.[4] He connects *shemita* and *yovel* to the extent of stating that, since there is virtually no *yovel* presently, likewise there is no obligation of *shemita* whatsoever, not even of rabbinic nature. Those who observe it are only fulfilling a pious custom. Clearly, if the opinion of Razah were accepted, there would be no grounds to be stringent in a question of *shemita.*

Razah's position, however, is a singular one, which normally would not be reckoned with in determining halacha.

Initially, proponents of the *Heter Mechira* responded to the weak position represented by Razah with precedents that one may indeed utilize a singular view under certain circumstances (see section on *sheat hadechak*). More recently, however, especially with the publication of heretofore unknown manuscripts, there have been attempts to strengthen the position of Razah.

R. Zevin[5] generates no less than six *Rishonim* about whom there is warrant to say that they share the view of

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3. *Ibid,* Par. 5.
4. R. Zerahia ben Isaac Halevy Gerondi.
5. *Ibid,* p. 111.

Razah, and R. Ovadia Yosef[6] brings the total to eight. Others have questioned these additions, finding little basis for them.[7].

A Curse and an Oath

We have described two rationales for *shemita* being of rabbinic origin; either because the sanctity of the Second Temple era departed with its destruction, or because the Torah level of *shemita* is dependent on the phenomenon of *yovel.* Should the latter be the case, it must be understood that even during the era of the Second Temple, *shemita* was not a Torah commandment. Although the land was reconsecrated by Ezra, since the entire nation did not dwell there with him, *yovel* could not properly be observed. Keeping the Sabbatical year required an original resolution, one that, naturally, could only have the force of a rabbinical decree, since it was made by the sages who were then present. This decision by the emigrés who accompanied Ezra to the Holy Land is recorded in Nechemiah 10 in the following manner: "And we come with a curse and an oath to walk in [the ways of] the Torah of the Lord...and to desist in the year of the Seventh."

Rabbi Soloveitchik argues as follows: the above verse teaches us that *shemita* cannot be categorized as a standard rabbinic decree upon which one can exercise leniencies. A law, even though rabbinic in nature, which was accepted "with a curse and an oath" has the weight of Torah law and must be dealt with in an equally stringent manner. [8]

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6. *Yabia Omer, Y.D.,* 19.

7. See K. Kahane, *Shnat Ha-shemita* p. 134; also *Divrei Yoel* 98-2; also see R. Y. M. Yedid Halevy, *She-eirit Yosef, Kuntres Ha-shemita* p. 97

8. See *Nodah Bi-Yehudah,* first gloss 77. There he records a

R. Kook[9] takes issues with this argument on several points. In the very same section, in the oath of Ezra, the chapter finishes with the words "and we shall not forsake the house of our Lord." It may well be that the entire body of the oath was only in the context of the Temple; but nowadays, there is nothing to mark this decree as being unusually severe. Furthermore, the power of an oath is never in the initiation of an obligation; rather, it can only come to strengthen a pre-existing law. Obviously then, the oath of Ezra cannot be taken as an indication to be more severe with *shemita* than with any other rabbinic law. [10]

R. Teitelbaum adds another question into the discussion. Albeit that many hold the position that *shemita* is rabbinic, nevertheless, so long as some are of the opinion that it is of Torah nature, we are relegated to the position of deciding in a situation of questionable Torah law, as perhaps that other side is correct. If so, it reverts back to the normal stringencies applicable when there is doubt concerning any Torah commandment. He supports his argument with a distinct statement of Rabbeinu Nissim[11] that wherever there is doubt if something is rabbinic or of Torah source, it must be considered as a doubt in Torah law and be decided accordingly.

Summing up, we have a large number of *Rishonim* of

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responsum of Rabbeinu Nissim that even the later decrees of Rabbeinu Gershom, made with the added empowerment of *cherem*, a type of excommunication, have the full stringent quality of Torah law. The example given is the decree forbidding a man to divorce his wife contrary to her wishes.

9. *Shevet Ha-aretz*, introduction.

10. See R. Zevin, p.112, who takes issue with R. Kook on this point; also see *Responsa Zichron Yonatan*, sect. 2, *Devar Hashemita*, who differs with R. Soloveitchik on other grounds.

11. See *Turei Zahav Y.D.* 342-1.

the position that *shemita* is a rabbinic obligation, a disputed number who attribute it to Torah source, and Razah, maintaining that there is no legal obligation at all. All agree that the last position, whether bolstered by the find of concurring *Rishonim* or not, ultimately can only be figured as a singular view that has been excised, insofar as normative halacha is concerned.

2. Does Kedusha (holiness) of land sold to a Gentile become altered, impacting upon its legal status?

The operative objective of the *Heter* is removal of the land's *kedusha* (sanctity) as that will likewise clear away the *shemita* prohibitions. Perhaps if the land in Israel is owned by a non-Jew, the fruits there will have no sanctity — only the fruits of Jewish land are bound by the laws of *Shemita*.

Sefer Haterumah

In *Gittin* 47a there is a disagreement whether change in *kedusha* status occurs by transferral of property ownership to a non-Jew. Most early and later halachists are of a mind that no change takes place; whatever obligations or restrictions of the soil existed before, continue.[12] Understandably, had there been no subsequent recourse, the discussion of *Heter Mechira* would have stopped right there.

Here we introduce the all-important statement of *Sefer Ha-terumah*[13] which forms the base of the *Heter Mechira*. Being that the sanctity of the land is currently only rabbinic, we can rule leniently, that purchase by a Gentile will indeed abolish any sanctity invested in the land. This has been

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12. *Shulchan Aruch Y.D.* 3313.
13. R. Baruch of Worms, *Hilchot Eretz Israel*, Venice 1523.

accepted and expounded upon by R. Israel of Shklov[14] and by R. D. Karlin.[15] The reasoning is as follows: Adjacent to the land conquered by the Jews following their exodus from Egypt, is a territory known in Talmud as "Syria". The land was acquired by King David in a conquest that is considered individual, relative to the national character of Joshua's campaign. Consequently, "Syria" is limited to a quasi-*kedusha* of rabbinic nature, one that can easily be eliminated by sale to a Gentile. Therefore, if the holiness of Israel proper today is also only of rabbinic nature, perhaps we can equate it with "Syria."

Rabbi A. I. Karelitz[16] argues against this, pointing out that Rambam is clearly of a different mind. In *Yad Hachazakah,* Rambam devotes almost the entire first chapter of *Laws of Terumah* to the halachic differences between Israel proper and Syria. If indeed in present times they were equivalent, as in *Sefer Ha-terumah's* position, the entire disquisition of the Rambam would be contrary to real law. We cannot suppose that Rambam was engaged in academic casuistry, "for the goal of Rambam is but to teach Israel their actual obligations." In addition, R. Karelitz states that Rambam's stand is also that of two other critical *Rishonim,* Rif and Rosh.

A challenge was posed to R. Kook, who strongly favored the *Heter Mechira:* if the entire *Heter* is based on an approach of removing *kedusha* from the land so as to enable it to be worked, then it is self-defeating!! Efforts to create a *Heter* are only an appendage to the over-all goal of settling the Holy Land, a positive commandment. If the *kedusha* is expunged,

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14. *Pe-at Ha-shulchan* 16-40.
15. *Sh-eilat David Chidushim Be-inyanei Shevi-it* p. 42.
16. *Chazon Ish, Zera-im* 20-7.

what is holy about the Holy Land?

R. Kook responded that the holiness of the Land of Israel and the holiness that engenders specific obligations are completely separate, and one is not affected by the other. [17]

From a different angle he continues, that the *Heter Mechira* is a temporary measure, and the intent of the commandment of settlement is a long-term one, for generations. Thus "it is better to violate one Sabbath [year] in order that the nation be enabled to keep many Sabbaths [years]."

Sanctity of Fruits

There is another famous controversy directly relevant to the question of *Heter Mechira,* one centered not on the status of the land but rather of the fruit which grew on it.

The question whether fruit grown on a Gentile's land has *kedushat shevi-it* (holiness of the seventh, resulting in the limitations thereof) is not necessarily identical to the earlier issue of whether the Gentile, through purchase, can remove the sanctity of the soil. Rabbi C. Soloveichik[18] discusses that, even if the fruit grown on Gentile land were not holy, the land may still be (and therefore forbidden to work). Conversely, R.A. Bornstein of Sochotshev[19] states that, although we might accept that holiness has departed from the *land,* it may still be conjoined to its *produce.* Whatever the case, for *Heter Mechira* to operate, there must be an opinion that there is no *kedushat shevi-it* in Gentile-grown fruit, for if there were, the prohibition of trading and marketing would appertain, hence rendering the *Heter* largely

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17. *Kaftor Va-ferach,* chap. 10.
18. *Chidushei Rabbenu Chaim* P. 38.
19. *Avnei Nezer Y.D.* 458.

useless.

Rav Yosef Karo (1488-1575), famed author of *Shulchan Aruch* penned such an opinion in his Responsa.[20] Outspoken in opposition to R. Karo was Mabit (1505-1585).[21]

He assails R. Karo with a puissant argument taken directly from Rambam, who permits consumption of non-Jewish grown fruit not because they are not infused with the holiness of the Seventh, but for a technical reason, that the rabbinic prohibition of *s'fichin*, aftergrowths, does not apply.

More problematic to the ruling of R. Karo, however, than how to reconcile Rambam's position, are the indications that R. Karo himself retracted.

R. E. Askari, author of *Sefer Chareidim*, and R. I. Horowitz, known as the *Sheloh*, author of *Shenei Luchot Habrit*, contemporaries and neighbors of R. Karo in the city of Safed, both testify that he abjured from this ruling in his later years, and acceded to Mabit that the Gentile's fruit does have the *kedusha* of *shemita*. R. C. Y. D. Azulai, the Chida,[22] challenges this testimony, pointing out that the responsum in question is dated 1574 and R. Karo passed away in 1575, leaving little time for change. R. Karelitz (the Chazon Ish) rejoins that one cannot rely on that which is printed, as it was published many years later and has quite a number of errors. In fact, he continues, the entire book may not have been written by R. Karo but rather compiled later from hearsay. The testimony of R. Askari and R. Horowitz, his contemporaries, is irrefutable, he concludes and that which

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20. *Avkat Rochel*, chap. 24.

21. R. Moses ben Joseph di Trani, sect. 1, chapters 11,21,217,336, and sect. 3 chapt. 45.

22. *Birchei Yosef* 331:10.

is printed loses all validity before them. Countering this, we have the testimony of R. Azulai[23] concerning the custom of Jerusalem in the day, "we never saw or heard of even a saintly person" who handles a Gentile's fruit with *kedushat sehvi-it*.

In conclusion, those who support the *Heter* rely on *Sefer Haterumah*, that the purchase of a non-Jew extirpates the *kedusha* of the land, while those against point to other *Rishonim* that it does not, adding that *Sefer Haterumah* himself never decided conclusively. On the issue of a Gentile's produce possessing *kedusha*, R. Karo says that it does not, Mabit disagrees, and the final stand of R. Karo is a subject of dispute. It ought be pointed out that of all the leniencies upon which the *Heter* relies, this last one of R. Karo is the least troublesome. There is no question that today in Israel great segments of the population have a most certain custom not to treat Gentile fruit with *kedushat shevi-it*.

3. Are we permitted to make use of Ha-arama Nikeret, (a blatant and conspicuous artifice)?

When, prior to *shemita*, a contract is drawn up and signed between the representative of the landowners and a Gentile, selling him all of the fields and orchards, there is no one who believes even for a moment that it is a normal transaction. For financial, social, and ideological reasons the owners would never part with their holdings under these circumstances; the sale is clearly but a legal device to side-step a prohibition. This is known in talmudic jurisprudence as *Ha-arama*. When it is as transparent as with our subject, it receives the added designation of *Ha-arama Nikeret*, lit. an obvious artful evasion.

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23. Ibid.

In Jewish law, some types of *Ha-arama* are permitted, and even encouraged, and others are disallowed.[24] We therefore find the protagonists of the *Heter Mechira* seeing precedent for allowing this *Ha-arama* from the permitted types, and the opponents distinguishing and, paying particular attention to the blatancy of this *Ha-arama*, maintaining that it would never have been sanctioned by the Sages.[25]

The primary correlation to *Heter Mechira* is the common practice of selling one's *chametz* to a non-Jew prior to the Passover holiday, to avoid having to destroy the *chametz* as would be required by Torah law. This is done with the full knowledge that it will be returned after the holiday.

Rabbi Tzvi Pesach Frank[26] explains that the sale of *chametz* is not *Ha-arama*, but rather a protection against *Ha-arama*, and so too the *Heter Mechira*. His logic begins with a question — why bother selling? Since the *chametz* prohibition is limited to what is Jewish-owned, let the Jew simply declare the *chametz* ownerless *(hefker)* and absolve himself of all responsibility! Perforce we must conclude that the Rabbis did not wish to rely on *hefker* alone, lest someone claim he made it *hefker* when in fact he did not, a type of *Ha-arama*. They therefore instituted a determinant action, selling. Likewise, although *hefker* would effectively remove land

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24. See *Ma-aser Sheni* ch. 4, Mishnah 4-5; *Tem.* ch. 5 Mishnah 1; *Nedarim* 48a; *Beitza* 17a; *Bava Metzia* 62a.

25. Two primary disqualifiers, *Ha-arama* of a Torah law and *Ha-arama* conducted by the unlearned — see tractate *Shabbat* 139b — are seemingly excepted here, as the *Heter* is based on its being of rabbinic nature, and is conducted exclusively by an ecclesiastical court.

26. *Har Tzvi*, printed in *Kerem Tzion* on *Shevi-it*, p. 42.

prohibitions of *shemita*[27] it would be prone to a similar type of *Ha-arama*, and one must safeguard with the explicit action of sale.

Rav Moshe Sofer[28] lays a strong groundwork for allowing this *Ha-arama* as long as it is a real sale. He writes "that which is not explicit in Talmud is not in our hands to forbid [on the basis of its artifical quality alone]." But R.I. Weiss[29] is of the opinion that R. Sofer is not referring to a case such as *Heter Mechira* in light of how formidable an issue it is.

Willful Intent for Sale

Others point not to a rabbinic objection to deception, but to inherent flaws in the validity of a transaction under such conditions, vis-a-vis *chametz*. For successful transfer of any ownership, Jewish law requires in addition to a form of tangible transaction, the knowledge and willful consent of both parties, buyer and seller. R. Yedid[30] argues that when a Jew sells his *chametz*, we can argue that above all other considerations, he wants to keep the law of the Torah. Although it may seem that he is engaged in artifice, we should presume that in the final analysis he indubitably wants a substantive sale, so as not to transgress the formidable prohibitions of *chametz*. This is not so with *shemita*. On the contrary, the only correct assumption should be that ultimately he does *not* want the deal to be actual, as doing so would make him liable in the Torah law of *"Lo Te-chanem"* (see next section).

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27. For a thorough development of this important subject see *Har Tzvi* p. 41; R.J. Babad, *Minchat Chinuch* 329; and R.N.T.Y. Berlin, *Meishiv Davar — Kuntres Ha-shemita.*

28. *Chatam Sofer,* ibid, 62.

29. *Minchat Yitzchak* 96.

30. *She-eirit Yosef, p.* 30.

Working further with this logic (that the observant Jew ultimately desires only that which is divinely correct), R. Yedid brings another argument to show that the owner disavows any substance to the sale. The Rabbis decreed contemporary *shemita* as a memoriam of Torah *shemita;* abrogation thereof would be completely contrary to their will.

R. Weiss[31] challenges the *Heter's* legality from the side of the buyer. *Machatzit Ha-shekel* (448-4) questions our custom of selling *chametz.* In earlier times, he writes, when *chametz* was sold infrequently, the Gentile assumed that it was a genuine sale. Today, however, it being a routine practice, he already knows that it is a bogus sale and thus has no intent of purchase. R. Sofer counters that it matters not what he thinks but what he does and says. We have a rule *"devarim she-belev einam devarim",* that is, thoughts in the mind are not reckoned with. So, as long as he participates fully in the body of actions that make up a purchase, the sale is complete.

R. Weiss points out that the rule of *devarim she-belev* applies only when there is no indication to others of a major gap between deed and will, but certainly does not appertain when it is evident to all that there is contrary intent.[32] Such being the case with *Heter Mechira,* the *Machatzit Hashekel's* logic concerning the buyer's intent would be appropriate even according to the Chatam Sofer, as there would be no *devarim she-belev.* R. Weiss then quotes a purported statement of the Chazon Ish *"Dos afilu zol kumen an Einglisha lord"* lit. "This is so [that there is clearly no intent] even if an English lord would come [to buy]." That is to say, even if all social and financial barriers would be removed, it is clear

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31. Ibid p. 186.

32. *Devarim Ha-mochichin,* see *Nedarim* 28 with Rosh and Tosafot.

that there does not exist even the contemplation of a genuine land sale, for ideological reasons.

In conclusion, while all agree that *Heter Mechira* is *Ha-arama*, there is no consensus whether it can be compared to permissible types or not.

As serious a hurdle as the issue of *Ha-arama* can be, it does not compare in magnitude to the problem dealt with in the next section.

4. Can the Torah law forbidding the sale of any parcel of the Holy Land to a Gentile be avoided?

Another major hurdle is presented by certain biblical directives.

> Thou shalt not show them any favor. (Deut. 7-2)
>
> They shall not remain dwelling in thy land lest they bring thee to sin against me. (Num. 23-33)
>
> It is forbidden to sell to them real estate in the Land of Israel... Why can you not sell to them? For it says "Thou shalt not show them any favor." [The Hebrew word for favor is similar to the word for settling].[33] We therefore derive, do not give them a place to settle in the land, for if they have no land, their dwelling will be temporary.
>
> Likewise it is forbidden to tell of their praise... [for] they should have no favor in your eyes, for it will cause you to cleave to him and learn from his bad deeds. (Rambam, *Avodat Cochavim* 10:3&4).
>
> At a time when the hand of Israel is powerful over them it is forbidden to allow worshipers of stars amongst us even temporarily.... until he accepts on

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33. *Avoda Zara.* 20a.

> himself the seven Noahide laws[34] as it is written "They shall not remain dwelling in they land," even temporarily. And if they accept the seven laws, this is a "*ger toshav*" [sojourner who dwells with you]. A *ger toshav* is not to be accepted except when the Jubilee year is conducted. (Ibid, 10:6)
>
> I do not agree with him [that *ger toshav* requires a time when Jubilee is applicable] in regard to settling the land. (Ravad, critique on above Rambam text.)

The *Heter Mechira,* purposed to avoid the rabbinic prohibitions of *shemita,* is in essence the sale of land in Israel to a non-Jew. Is the gain dwarfed by the enormity of a Torah transgression? "They have fled the wolf and encountered the lion." Such is the assessment of the N'tziv, Rabbi Naftali Yehuda Tzvi Berlin,[35] as well as most other opponents of the *Heter.*

Rationales of R. Robbio

On this weighty issue, many angles have been pursued to show that *Heter Mechira* is no violation of *'lo techanem,'* the Torah prohibition of selling Holy Land to a Gentile. The cornerstone, and what purportedly[36] was pivotal in the assent of Rabbi Yitzchok Elchanon Spector (see sec. 6) to a *Heter,* is the responsum of Rabbi M. Robbio,[37] a seventeenth century luminary who lived in Hebron. He writes,

> It was asked: An Israelite who purchased a vineyard in Hebron, and it was arranged that a Gentile work and guard it for such and such portion of the fruits

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34. Ibid 64b.
35. *Meishiv Davar Kuntres Devar Ha-shemita.*
36. See R.Y.T. Halevy, *Hora-at Sha-ah* p. 31.
37. *Shemen Hamor,* reprinted in *Kerem Tzion Shevi-it.*

> thereof, for in this city it is impossible except through non-Jews, for their hand is powerful and they would steal and completely destroy if there were not a Gentile central to the operation. In light of this, the man asks what to do in the year of *shemita* that the work the Gentile employee will certainly do in the Jew's field should not cause said Jew to have sinned.

Analyzing the query, we find few options available to the questioner. He cannot sell the property to a Gentile lest he transgress the prohibitions delineated at the beginning of this section. Nor can he sell to an Israelite, as it is forbidden to place a fellow Jew in a position of sinning. It appears that the only alternative is to disengage the worker and allow desolation of the field.

In his lengthy response, R. Robbio draws a distinction, suggesting that what the Torah forbids is the sale of a field solely in the Jew's possession. However, "in this time that the hand of the nations is in control, and all the fields are liened to the king of the Gentiles to give him his portion, even the owners are perhaps considered as sharecroppers."

> That which the Torah forbids and insists on is only at a time when Israel dwells on their land, that the nations should not have a settlement in the land, but it is not so now, in our iniquity, for the settlement of Israel has been uprooted, it is full of Gentiles and to them alone the land is given, and our presence in the Holy Land next to them is miniscule, one in ten thousand, as sojourners in a foreign land.

R. Robbio is not entirely satisfied with these two rationales. Therefore, in conclusion, he proposes an additional safeguard,

> to sell the vineyard to the Gentile a complete and decided sale, the actual body of the land, with a clear contract, stating for two years, that is, one year prior

> to *shemita* and the year of Seventh itself, for that which the vineyard is worth...that he should be the master and controller in it as if he made an eternal purchase, and it should be returned immediately after two years.

To understand the logic of this leniency, let us again examine Rambams words, "...for if they [Gentiles] have no land, their dwelling will be temporary." It would seem that any sale not resulting in their permanent residence is perhaps not forbidden.[38]

From the above we can deduce that in our situation of *Heter Mechira* there is also no *"chaniya"*, no settling non-Jews in our land. Firstly, the sale is constructed to be temporary; further, since in the context of real finance the sale is artificial (see previous section), it will clearly never result in any non-Jewish settlement.[39] R. Kook[40] also makes use of the logic of R. Robbio, that due to the way we are taxed by the colonial government (circa 1909), the land can hardly be considered ours.

The opposition's response to the above arguments was one of complete rejection. R.D. Karlin[41] referring to the point that the land is not really the Jews' possession since it is subject to pervasive taxation, says,

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38. R.E. Haparchi (*Kaftor Vaferach* chap. 10) also sees the prohibition limited to where an invasive residence will be afforded to the non-Jew and, with much the same logic as the second rationale mentioned from R. Robbio, states,

"A Jew who dwells in a city that is entirely Gentile, and wishes to move to a different place but he has a house there, [in the Gentile city] he may sell it to a Gentile." This, he explains, is not granting any new *"chaniya"*, dwelling, to the Gentile, as they are already there, completely settled.

39. R. Kook, *Mishpat Kohen* #60; R. Frank, *Har Tzvi* pp. 34-38.

40. Ibid.

41. *She-eilat David* p. 43.

> Most fields were taxed by non-Jewish governments in the time of the Talmud [where in a nondiscriminatory fashion this prohibition of selling land is taught] as well.

Focusing on the second rationale, R. Yedid[42] points out that, by extrapolation, there could never be a general prohibition of selling land to a Gentile unless the population were entirely Jewish. A Jew could legally sell to whichever remaining non-Jew he chooses, for no new settlement will have been afforded. And yet, he continues, this highly improbable scenario is never even hinted at by all the codifiers of the law. In addition, a good number of Gentiles owned land in the Holy Land at the very time this prohibition was being recorded in the Talmud.

Furthermore, he continues, the first reason dictates that the applicability of the law is limited to a time when the majority are free from government taxes, and if so, the entire subject is *"hilchot le-misheecha"* a law for Messianic times.[43] This concluding remark is a method of showing the paucity of the opposition's argument, for laws which have no applicability prior to the Messiah's advent need to be clearly labeled in that way, and here there is no such designation.

R. Yedid also dismisses the inference made from the words of Rambam that a sale with no permanency would be permitted. We must rather understand that "any sale, however conducted, causes some mesure of increase in their dwelling."

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42. *She-eirit Yosef, Kuntres Ha-shemita.*

43. It is of interest to note that he considered an entirely Jewish population remotely possible, but freedom from taxes only "in the hands of the Messiah."

R. Karelitz[44] reflects this view, stating that it is forbidden to sell to a Gentile any parcel of land in Israel "in all times under any circumstances" as is clear in Talmud and Rambam, the reason being, "for this is our land." He then continues with the halchic dictum *"Torah lo nitna le-shiurin,"* literally, "the Torah is not given for us to measure." It matters not at all if to the vision of our eyes it appears that we are not granting any new settlement; that which is forbidden, is forbidden.

R. Frank[45] disagrees with the Chazon Ish, seeing in the Torah itself an indication of this law being subject to our analysis. Rather than writing "Do not sell," the Torah chose the expression "Do not give a dwelling." Hence, there is no source for an indiscriminate restriction to all selling. He adds that the "Genius of Lublin", Rabbi S. Z. Ashkenazi, in his work *Torat Chesed,*[46] concurs with this scriptural treatment.[47]

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44. *Chazon Ish Shevi-it* 24-1.

45. *Har Tzvi* p. 38.

46. Printed in R.S.H. Bamberger's *Zecher Simcha* 215.

47. As to the question of a two-year sale, R. Karelitz supports his negation thereof with the following argument. It is clearly indicated in *Avoda Zara* 14b that due to the *issur* of land sale, it would also be forbidden to sell a tree in the Holy Land to a Gentile. Although that would only be a temporary sale, for a tree does not last nearly as long as soil, yet it it still forbidden by the Torah.

R. Frank responds that one cannot compare a tree to our subject, the former lasting significantly longer than a two-year sale. He in turn bolsters his rebuttal with Aggadic literature from the verse "as a shadow are our days on the Earth." On this the Midrash remarks "If only it would be as the shadow of a wall or as the shadow of a tree, but rather it is as a passing shadow, as the shadow of a bird that passes and its shadow with it." It is evident, says R. Frank, that a tree has considerably more

Rabbi Karlin[48] reasons that a two-year sale is certainly no better than a rental, and on this premise he comes against that kind of transaction for *Heter Mechira* with two challenges. Firstly, regardless of the question whether sale of the land removes its inherent *kedusha* (see sec. 2), all agree that a rental would not remove it, in which case the *Heter* would be valueless. Furthermore, as there exists an explicit rabbinic *issur* (prohibition), forbidding real estate rentals to a Gentile,[49] so that one should not come to sell to them, certainly a two-year sale would be no better in that regard, and would therefore likewise be forbidden.

As to the first point, the protagonists[50] utilize Rambam[51] who writes that the difference between a sale of land for its produce and a temporary sale is that in the latter the purchaser is allowed also to effect earth changes such as building and leveling "as one who made a permanent purchase." Likewise, they say, it is sufficiently powerful to remove the *kedusha*.

R. Kook[52] feels that there is no compelling argument to forbid a temporary sale by including it in the prohibitive decree made for rentals. The Rabbis forbade a rental and only a rental; and "it is not for us to initiate new rabbinic edicts." Supplying a rationale as to why the Rabbis would forbid something less similar to a real sale—rental—and

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permanence than even the life of man. (Authors note: If human life is analogous to a flitting bird, than in the same analogy a tree is certainly permanent, but where is the evidence that a real-life tree is reckoned as permanent?)

48. *She-eilat David* p. 43.

49. *Avoda Zara* 20b.

50. See *Sefer Ha-shemita*, R.Y.M. Tuchechinsky, p.110.

51. *Mechira* 23-6.

52. *Mishpat Kohen*, p. 131.

permit something more similar—a temporary sale—R. Kook employs the talmudic principle *"milta delo she-chicha, lo gazru bah Rabbanan,"* a situation which rarely occurs is not included in the rabbinic decrees.

Power of Attorney to Sell the Land

Generally, even if one sold Holy Land to a non-Jew in violation of the Torah law discussed above, insofar as the actual sale is concerned, the sale is valid. Such is not necessarily the case with *Heter Mechira.*

The Talmud[53] derives from a Torah source the concept of *"shelichut"*, the ability of one Jew to delegate to another the power of attorney. When the *"shaliach"* (agent) performs a financial or religious act on behalf of the one who assigned him the task, it is often considered tantamount to the sender's having done it himself. An exception is where the assigned task involves the commiting of a sin. A rationale for this is the rhetorical question: *"Divrei harav ve-divrei ha-talmid, divrei me shom'im."* (The words of the Master [G-d] and the words of the student [man], whose words should he [the agent] listen to?)

In practice, contracts are distributed to landowners participating in the *Heter,* wherein they assign power of attorney to a rabbinical court to sell the land as it sees fit. If the sale involves the aforementioned sin of "giving dwelling to a Gentile," then the assignment to the court will be ineffective, everything the court does will be invalid, and the land will still be owned by the Jews. With this logic, the Chazon Ish concludes that it is to the sellers' benefit that their appointment is invalid "for in this way they are saved from the sin of selling."[54]

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53. *Kiddushin* 41.

54. *Chazon Ish,* ibid.

The defenders of the *Heter*[55] point to the opinion[56] that where the agent is not aware of any wrongdoing, as is the case of this rabbinic court who believe this sale to be permissible, the *shelichut* is valid, as there is no intentional trespass of the "Master's words." While it is true that this is not a universally accept position — many halachists considering that even if the agent is truly ignorant of any wrongdoing the *shelichut* is still invalid — nevertheless supporters of the *Heter* feel it is sufficient to be relied upon.

R. Kook[57] advises a foolproof method to preclude the possibility that the sales be rendered invalid due to any shortcoming of the agent's prerogatives. As the rabbinic court was given power to sell, without any provision being made as to whom, let them first sell all of the properties to a Jew, an undeniably permissible transaction, and then that Jew shall personally, without the use of *shelichut*, sell what is now his own property to a Gentile.

Halachic Position of Muslims

Returning to the Torah prohibition of selling Holy Land to a Gentile, there are those who pursue a different tack to extricate the *Heter Mechira* from this dilemma. Rambam permits sale of land to a *ger toshav*, a non-Jew living in the land of Israel, who accepts the Seven Noahide Laws, at a time when the Jubilee year is conducted. Consequently, it is argued, since it is Muslim practice to keep these laws, they can be considered *gerei toshav* and it would be permissible to sell them land.[58]

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55. See R. Frank, ibid; also R. Zevin, ibid p. 122.
56. *Tosafot, Kiddushin 42B.*
57. *Mishpat Kohen.*
58. This position is taken by R. Kook, Ibid. #63.

R. Kook continues on this premise to explain why, although the *Heter* was always feasible, it never before was implemented.[59] In ancient times it was difficult to find a Gentile who was not polytheistic and, even if one could be found, the Rabbis disallowed a sale to him lest the population err in a subsequent time and sell to an idol worshipper. Today, however, when the Muslim world is monotheistic, there are no grounds for such angst.

But the N'tziv,[60] followed by the Chazon Ish[61] is not taken by these arguments. The latter states that, not only would it be forbidden to sell land to any Gentile, regardless of belief or practice,[62] but even Ravad's leniency allowing Gentiles who already live there to remain, would not apply to today's Muslims. Ravad's granting of semi-*ger toshav* status is when the Gentile accepts the Seven Laws because of the Jewish faith, not if that happens to be the moral system of his own religion.

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59. For a different approach offered by R. Kook, see sec. 6.

60. *Meishiv Davar, Kuntres Devar Ha-shemita.*

61. Ibid.

62. Of special interest on this subject is a treatment by Dayan Grunfeld (*The Jewish Dietary Laws*, pp.201-203) of the medieval and post-medieval tampering of Jewish literature by censors. He explains that there was an indiscriminate substitution of the word "Gentile" with the word indicating "star worshipper" (*akum*), and consequently it is difficult to determine which law applies only to the latter and which also includes the former. He then brings the Cambridge manuscript of Maimonides' *Commentary on Mishnah A. Z.* Chap. 1, which does not use the word *akum* but Gentile, in reference to the prohibition of selling real estate, a clear support of the position of R. Berlin and R. Karelitz, as opposed to R. Kook who understood Rambam's Code to be limited to *akum*. However, see also R. Karelitz (*Iggerot Chazon Ish*), where he writes to exercise considerable caution before granting any credence to heretofore uncirculated manuscripts.

It is interesting to note that, although the arguments of R. Kook on this issue of *ger toshav,* as well as other approaches of leniency, figured relatively prominently in the glosses of the early proponents of the *Heter,*[63] the later generation of protagonists[64] downplay its importance, taking other courses to dismiss the problem of selling land, primarily R. Robbio's recommendation of a two-year sale. This may be due to the fact that removal of the prohibition of land sale to a Muslim for the *Heter* also implies a permissibility to do so in general, something the latter group wanted more to eschew.

A *Heter Mechira* Sale Without Selling Land

There is an additional device, of relatively recent implementation, used to avoid the prohibition of selling land to a Gentile.[65]

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63. Namely R. Yitzchak Elchanon Spector, *Iggeret Ha-shemita,* R.J. Trunk of Kutno, *Yeshuat Malko,* and R.Y. Engel of Karkow, *Otsrot Yosef.*

64. R.Y.M. Tuchechinsky *Sefer Ha-shemita,* R. Zevin *Le-or Ha-halacha.*

65. The exact origin of this innovation is unclear. *Sefer Ha-shemita* p. 61, records that the idea was introduced by R.Y.L. Diskin, in a conversation with R.N. Hertz, then Rabbi of Jaffa, and that this strategem was the cause of R. Diskin's change of heart to support the *Heter,* contrary to his earlier stand of fierce opposition. See R.J.D. Willowsky, *Beit Ridvaz,* on *Pe-at Ha-shulchan* in the introduction, for a copy of R. Diskin's statements. R.Y. Halevy however, son-in-law to R. Hertz and successor to the rabbinate in Jaffa, in the back of his *Hora-at Sha-ah,* printed correspondence to the effect that his father-in-law created the plan, R. Diskin approved it, and therefore came around. In *Kerem Tzion,* p. 27, it states that the thought indeed came from R. Hertz, but although R. Diskin saw in it academic value, it was not to be applied in real practice *(le-halacha velo lema-aseh).* R. Teitelbaum, *Divrei Yoel* 97-19, rejects any notion that R. Diskin (or R.S. Salant, another subject of controversy) retracted at all, and brings arguments of

> The Mishnah *Avoda Zara* 19b states,
>
> One may not sell to them that which is still attached to the ground, but one may sell to them from when it [the fruit] is severed. R. Yehuda says, one may sell on condition that he cut.

In recording this law, Rambam finishes with the words "on condition that he cut, and he does cut."[66]

Based on this Mishnah, the proponents of the *Heter* arranged for the contract of sale for the *Heter* to include, not the field or orchard, which would encroach on the problem of selling land to a Gentile, but only the trees and plants, on condition that the purchaser cut them all down. In this way, at least according to R. Yehuda, there has been no transgression. As was discussed in section two, the *Heter* is based on the opinion that sale of land to a Gentile removes its inherent sanctity. Although there is basis for that in regard to land, no one is of that mind when it comes to a sale of produce; *kedusha* of the fruit does not evanesce if a non-Jew becomes its owner. In this case, however, the problem of *kedusha* has been solved. The trees and plants, it is contended, since they are as yet uncut, would have the halachic designation of the ground to which they are attached (*"karka"*), and thus, their *kedusha* of the *shemita* year would be removed, just as effectively as if the entire field had been sold.

Forestalling another problem concerning that which grows subsequent to the sale, the transaction was stipulated to include not only the plants and trees, but also the soil which sustains them as well, on condition that it all be

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support. See also R. Kook, *Mishpat Kohen* 70, further supporting R. Teitelbaum's version.

66. *Akum* 10-4.

uprooted by such and such time. The contract continues with the proviso that, should the purchaser not fulfill his obligations according to the above terms, if he does not do any uprooting, the sale should still be valid and the plants and their nourishing soil sold. In this way, the prohibition of selling to a Gentile is avoided according to one opinion in the Mishnah, and at the same time enough is sold to achieve the objectives of the *Heter.*

R. Yedid[67] dismisses all such presumptions as mere casuistry. The unmistakable condition of Rambam is "and he does cut." Anything else is just a tangled land sale to a Gentile, incurring the full responsibility of an explicit negative commandment.

Focusing not on the prohibition but on the purpose of this sale, R. Karelitz[68] states his disagreement with any possibility, according to any opinion, of *kedusha* being removed by anything less than a land sale from the core of the earth to the heavens above. Sanctity does not inhere in the fruit through the channels that supply its vitamins. If a tree is on that section of Earth known as the Land of Israel, if it is but bathed in its air, it becomes saturated with *kedusha,* holiness.

In implementation, those charged with executing the actual *Heter* desired to combine the effectiveness of both approaches — a temporary sale and selling just the trees — to avoid the Torah prohibition of selling land to a non-Jew. They therefore amended the consequence of defaulting on the condition that the Gentile uproot everything so that ultimately the transaction reverts to being a straight sale of

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67. *She-eirit Yosef* p. 103.
68. *Shevi-it* 21-9.

the entire field and orchard for a period of two years.[69]

We have shown how the supporters of the *Heter Mechira* feel that the prohibition of selling land in Israel to a Gentile has been adequately dealt with, while the opponents are of the opinion that the problem has not been eased in the least way. We shall now discuss one more hurdle, one which will evoke much the same net result.

5. Is there validity to a land sale not recognized by any official government organ?

As in most countries, there is an Office of Land Registry in Israel, designed to regulate property ownership. Known as *Tabu,* a Muslim legal term, any land sale lacking proper registration with them is not recognized by the government. When the *Heter Mechira* is enacted, it is done so entirely out of the confines of *Tabu.* To do otherwise would be prohibitively expensive, impossibly difficult, and unacceptably risky. Can a sale of real estate conducted outside the pale of government have any validity?

There is contained herein a lesser and a greater problem. The former we will deal with quickly, as even R. Yedid, a principal opponent of the *Heter,* does not see in it much difficulty. As mentioned in sec. 3, a transaction requires

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69. Should one ask, as it is entirely obvious that the condition will be defaulted on, and the sale will revert to its uncontrived form, why bother with all the convolutions? R. Tuchechinsky in *Sefer Ha-shemita,* p. 115, replies that since the active sale that the Jew himself engages in is not of the field, but only of the trees and such, he avoids all prohibitions. What happens later, when the Gentile's defaults result in a real land sale, can be considered entirely of the Gentile's initiation, and not the Jew's action at all, further exculpating him of any religious liability. The wording of the contract, circa 1903, designed by R. Halevy, reflects this schema.

"*semichat da-at*", cognizant assent from both parties.[70] Where all such sales are done through *Tabu*, and this one is not, we assume that at least one of the parties will not take it seriously.[71] To this R. Yedid notes the simple solution of articulating at the time of sale that it shall be valid although unregistered.

However, Judaism follows the basic premise, *dina de-malchuta dina*, "the law of the land is law." In monetary matters, legal principles of the secular government are binding upon the Jewish residents, in most cases.

For this reason, R. Yedid considers the sale of the *Heter* a charade. Land cannot be considered sold if the government does not consider it so, for they have the right to make that determination. R. Willowsky[72] is of the same mind, challenging the reader to make his own decision.

> Think yourself, if the Rabbi of Jaffa wrote on a piece of paper a contract of sale to a barefoot Arab, that all Jewish land holdings in Israel belong to him, with this does the Arab become owner and remove holiness from the Land of Israel? This paper is of value only to stuff a bottle.

However, there is some discussion among halachists whether the principle "the law of the land is law" applies to a government in Israel, or especially to a Jewish government in a Jewish state of Israel.[73] Some permit the sale on these grounds.

Correlation to the Sale of *Chametz*

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70. See *Kiddushin* 26b.
71. See *Shulchan Aruch C.M.* 190-7.
72. Ibid.
73. See Ran to *Nedarim* 28a, and *Kerem Zion* p. 26 and p.33.

Relevant to our topic is a responsum of R. Sofer,[74] discussing the sale of *chametz*. He records an incident where an informer notified the government that the Jews were selling *chametz* without affixing the proper stamps required at that time on all sales. The government office charged with enforcement of this stamp law replied that they were only concerned with sales of economic significance, not in religious matters. R. Sofer then writes the opinion of R.B. Frankel that such an attitude on the part of the government does not suffice; the sale must be conducted entirely as in any real financial situation, with full government approval. R. Sofer writes that he is in disagreement with R. Frankel. In our law it is a valid sale, and in secular law as well; only, when he wishes to claim his purchased property, he will first have to go pay for the missing stamps.

This strongly implies that, even according to Chatam Sofer, a religious transaction is not valid if done only according to the Torah but not within secular law, unless the latter can be satisfied at the purchaser's option.

We find this conclusion reflected in the language of the contract drawn up by R. Kook for the *Heter Mechira* of 1916.

> ...permission being granted in the hand of the master, the purchaser mentioned above, to certify the validity of this sale in any government that he chooses, particularly the validation of the government of Palestine, the government of the land, and to transcribe with any language that he chooses, and with all circumstances which are beneficial which he chooses to certify through them, all shall be pursued on behalf of upholding and certifying this contract.

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74. *Chatam Sofer O.C.* 113.

Divrei Chaim[75] apparently differs with the Chatam Sofer on this. The question was put to him concerning a contract for the sale of *chametz* written in the Holy Tongue at a time when local law required that, to be valid, all contracts had to be in the state language. He replied that, if such is the criterion, the contract would be invalid even if it had been written in their language, for by their law, any sale not *"intabliert"* (officially certified) may be legally resold, effectively making the contract spurious. Rather, he concludes, we decide validity according to our laws, both for stringency or leniency.

Rabbi Frank[76] essentially follows the same line of reason as the one initially suggested by the Chatam Sofer.

The view of the Chazon Ish on this matter is a subject of dispute. R. Zevin[77] maintains that, although the Chazon Ish opposed the *Heter* on other grounds, he did not consider non-registration with *Tabu* to be an impediment. But R.K. Kahane[78] states that he did invalidate on those grounds. In a letter,[79] the Chazon Ish writes that the *Heter* in question is not valid because "it was not registered with *Tabu*, and, if the Arab would endeavor to uphold the sale, they would tell him 'such is our law, that without *Tabu* registration it is not valid.'"

It would seem that according to R. Karelitz, non-registration alone is not the problem; rather, only because it can never be certified does he invalidate it. If it were arranged as in R. Kook's above-mentioned contract, where the

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75. *O.C.* sec. 2-37.
76. Ibid p. 43.
77. Ibid p. 121.
78. *Shenat Hasheva* p. 210.
79. *Chazon Ish Shevi-it* 27-7.

purchaser's options are secured, it seems likely that R. Karelitz would have no objections on grounds of *dina de-malchuta.*

We now turn our attention to other aspects supporting the *Heter Mechira,* as well as to a discussion of the driving motives behind the entire institution.

6. What is the effect of *Sheat hadechak* (extenuating circumstances) and *pikuach nefesh* (mortal danger)?

One of the great challenges in determining *p'sak* (final halachic ruling) is the correct application of *"Kelalim"*, dictates of priority.

A cornerstone rule is *"Yachid ve-rabim, halacha ke-rabim."* "[Where an argument exists between] an individual and a group, the halacha is decided according to the many." We have discussed the singular opinion of Razah, that *shemita* has no legal actuality in modern times, it being only an optional praxis exercised by the very pious. According to the above-mentioned rule, Razah would, practically speaking, remain a matter for the halls of academia.

But there is another factor that figures quite significantly in determing *p'sak* — a situation of strained or extenuated circumstance *(sheat hadechak),* which also impacts upon the final ruling.

The entire subject of *Heter Mechira* arose in just such circumstances: tenuous arguments that in non-pressured environments would never be advanced for actual rulings, now require thoughtful consideration. R. Kook,[80] in an instance of justifying his reasoning for *Heter Mechira*, succinctly captures the spirit of his approach.

In determining the law in emergency circumstances,

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80. *Mishpat Kohen* p. 141.

we are bound only to bring the opinions of those who are lenient, to commence with salvation.

Utilizing Razah

R. David ben Samuel Halevy, author of *Taz,*[81] writes that in a case of emergency, we can rely on a lenient opinion that has otherwise not been accepted as practicable. We note further the opinion of R. Shabtai Kohen, known as *Shach,*[82] that *Taz's* principle is not to be used except where the issue is a rabbinic prohibition, not one of Torah origin.

R. Y. Engel[83] applies this concept to *shemita,* stating that under the given circumstances, we can turn to the opinion of Razah, that currently there is no prohibition at all. R. Kook,[84] reflecting this attitude, adds that it is even less problematic to go with Razah in our case of *Heter Mechira* than in other emergency situations, as there are so many decisors who ultimately have concluded that *shemita* is of rabbinic nature. The position of Razah, and this method of lending him credence in practical application, is utilized by every *Heter* protagonist, either in a basic fashion or as an ultimate fallback.

The Chazon Ish[85] asserts that there is no basis for the law as found in our copies of *Shach,* concluding that there must have been an error in transcription. Where the halachists simply differed as to how they should conclude, he writes, if a majority determined one way, that is considered

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81. *Turei Zahav,* Y.D. 293-4.
82. *Y.D.* 242.
83. *Otsrot Yosef* p. 46.
84. *Mishpat Kohen* p. 127.
85. *Chazon Ish* 23-4.

definitive and the minority is completely excluded. In our situation, where there was a virtual consensus contrary to Razah, there is certainly a definitive conclusion to work with, and no ground whatever to reckon with that which has been debarred.

Another direction taken by the *Heter's* opponents is a rejection of the claim that *sheat hadechak* status is relevant in our situation. There were always poor landowners in Israel, yet there is nary a mention in the entire tractate dealing with these laws of anything other than the classical prohibitions. R. Soloveitchik[86] continues with this argument, stating that never in our law do we find strained circumstances to be reckoned with unless they come from an outside source, something apart from the obligation being dealt with. Here, however, the constraint on earnings in the seventh year is the very substance of the mitzva, the commandment itself. By definition, there cannot be a special *sheat hadechak* designation to the normal setting of this commandment. If you say otherwise, he continues, we should allow rabbinically forbidden usury to one who has no other means of livelihood!

In a similar vein but from a different perspective, R. Yudelevitch[87] negates use of Razah for the *Heter* with the following case: If in every instance of great loss we decided leniently according to minority opinions, then entire bodies of Torah law dealing with matters of life and death would be their exclusive domain. We, however, find no such system. Rambam, in codifying such laws as martyrdom and capital punishment, lends no particular favor to a minority view which would spare human life in a given situation. Where

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86. Ibid 8-1.
87. *Kerem Tzion* p.25.

the defining character of the law is loss, *sheat hadechak* is a misplaced consideration.

The Call of R. Yannai

There is an enigmatic episode in the Talmud which has a powerful bearing on our subject, but depending on how it is analyzed, can argue forcibly for either side.

We find recorded in *Sanhedrin* 26a that at a certain time "it was declared by R. Yannai 'go forth and sow in the Seventh Year because of the crop tax' (*arnona*)." Rashi tells us that, at that time, the Jewish farmers were forced to deliver to the Roman legions a certain measure of grain per annum and, due to the fact that *shemita* in our day is only of rabbinic nature, R. Yannai instructed them to work their fields. The Tosafot commentary, in the first of two interpretations, concurs with this construction to justify R. Yannai's allowance, that granting permission is legitimate since it is only a rabbinic *shemita* law. As an alternative explication, Tosafot limit R. Yannai's leniency to a life-threatening situation, where tax evaders were imprisoned in dungeons from which few, if any, emerged. They then add that the Jerusalem Talmud supports this second approach.

The latter interpretation of Tosafot aside, we see a clear leniency in times of need to do major agricultural work during the rabbinical *shemita* year, according to both Rashi and Tosafot. This has been applied to our modern issue of *shemita* in one of two forms. There are those[88] who implement this directly, pointing out that today as well, many must pay a near-crushing tax burden, and this allowance should appertain. R. Tuchechinsky[89] is unmoved by this

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88. See Y. Wahrfol in *Hatzofeh* 1945.

89. *Sefer Ha-shemita* p. 65.

case, arguing that it is inconceivable for a Jewish government, which itself is obligated in the commandments, to cause abrogation of *shemita* through its taxes.[90]

The second form uses a simple extrapolation. If for tax we can be lenient, so too, and perhaps even more so, where an entire income is at stake.[91]

Two rationales are offered which would negate using this talmudic passage for the purposes of allowing *Heter Mechira.* The first is from R. Soloveitchik, who argues that the leniency, even if ruled because *shemita* is rabbinic, was purely a matter of maintaining the peace with a potentially hostile regime. Rambam[92] states, "They permitted sowing in the seventh only things which are required by the king's men," clearly excluding other needs.

R. Kook[93] offers an explanation of R. Yannai's ruling which would also enjoin any application to a state of duress not originating from a government onus. The king's ability to tax, he explains, indicates that the soil is in fact not the possession of the owner at all; it belongs to the king who demands his share in return for allowing the "owner" to remain. Thus, only where it is the tax burden of the king that is weighing heavily on the Jewish property owner, can we say that the Jew is not working his own land but rather that of the Gentile sovereign.

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90. It seems to the author that it is quite irrelevant what the abstract position of the government is. The facts are that right now they are imposing a very real tax, no different than if it originated from any other monarch or government.

91. See *Otsrot Yosef* pp. 45-48.

92. *Shemita Ve-yovel* 1-11.

93. *Mishpat Kohen* p. 127.

R. Karlin[94] has a different understanding of the above-quoted Rambam. Work is allowed only to produce the amount required by the king, nothing additional.[95] Even that, R. Karlin asserts, is only when nonpayment will result in the field's expropriation by royal forces, in which case we can indeed consider the land already to be as the king's property. The proof that a less menacing tax would not qualify as *arnona,* he continues, can be found at the very core source of present-day *shemita.* In the rededication to a Torah way of life declared by the returnees to the land of Israel from Babylonia, where amongst a list of other things there is an acceptance to observe *shemita,* we find in the preamble the following statement:

> Behold today we are servants, and the land which you gave our fathers to eat its fruit and goodness, behold we are slaves on it. And our grain in large amounts [we give] to kings whom you have put on us, in our sin, and on our backs they rule and in our animals, as they please, and we are in great suffering. Nevertheless, we hereby forge a covenant...

It it clearly evident that even as onerous a tax as the one described in these passages, is not of itself grounds to work the land in the Seventh Year.

R. Kook,[96] not disagreeing with the above, feels that the opinion of *Tur,*[97] who allows in an *arnona* situation all types of work, not limited by the amount of the actual tax, is sufficient to rely upon considering the pressing need for a *Heter.*

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94. *She-eilat David* p. 35.

95. See *Sefer Ha-teruma,* 12, who also limits *arnona* in this way.

96. Ibid.

97. *Sefer Hilchot Eretz Israel.*

Rendering the entire leniency of *arnona* moot, R. Soloveitchik[98] brings the opinion of Ravad[99] that R. Yannai's call was never issued for the Land of Israel proper but only for the territory never reconsecrated by the Babylonian returnees.

Reiterating one of the original attacks on the entire notion of a *Heter,* R. Weiss[100] asks an uncomplicated question: We find repeatedly in the Talmud that extreme efforts were expended to keep *shemita* in its classic form. If indeed the facile solution of *Heter Mechira* is a possibility, why did the ancients not pursue that course?

R. Kook[101] handles this question in a comprehensive fashion. During the entire length of time in which these episodes are recorded, the period up to and including the time of the Talmud, the majority of the land brought under cultivation was Jewish owned. As a result, the Rabbis decreed that the laws of *shemita* would apply to Gentile produce, feeling it worthy to do so in order to prevent Jews from erring and perhaps considering Jewish-grown fruit also to be unrestricted. This is called a *"gezeira meuta otu ruba deshel Yisrael,"* a decree on the minority (the Gentile-owned fields) to protect the Jewish majority. Consequently, there was virtually nothing to be gained by selling the land to a non-Jew, as the produce would still have all of the *shemita* restrictions. This decree ended with the collapse of that Jewish presence in the Holy Land. Today (his day), with only a tiny Jewish settlement amongst the vast Arab farm holdings, it is the

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98. Ibid. p. 62.

99. Gloss on Rambam, *Shemita Ve-yovel* 1-11.

100. *Minchat Yitzchak* p. 187.

101. Introduction to *Shabbat Ha-aretz* sec. 14, also *Kuntres Acharon* on Chap. 4 sec. 29.

first time ever that it has become relevant to conduct such a sale.

He then reinforces this stand to include the possibility of positive demographic fluctuation and writes that, regardless of how the situation might change, this decree is an item of the past, and does not of itself become reinstated. The upshot of that is, that even though nowadays there is only a minority of Arab farmers, their produce has no restrictions and the *Heter* can achieve its goals.

Working to attenuate the opinion of Rashi (that R. Yannai was lenient in light of there being only a rabbinic prohibition), R. Grunfeld[102] brings historical support for the Tosafist explication on the *arnona* issue. Historians[103] are of the opinion that the year of R. Yannai's famous proclamation was 216, a Sabbatical during the Roman-Parthian war. As Auerbach points out, no Emperor who cared for his own personal safety could have risked letting his soldiers go hungry, especially at a time when the Roman legions were the real rulers of the Empire. Indeed, the Roman Emperor Caracalla, who fought against the Parthians, was assassinated by his own bodyguard in 217. Caracalla, a cruel tyrant who put to death an estimated 20,000 persons of his own countrymen, had his armies encamped in Palestine in 216. It was not a time to be well disposed to persons who, for religious reasons, did not provide the required food. Such a setting clearly bespeaks a direct danger to life, Tosafot's second approach.

This also reconciles another difficulty. R. Yannai's

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102. *The Jewish Dietary Laws*, pp.217-218.

103. H. Graetz, *Geschichte der Juden*, Vol. 4,3, p.213; and Moses Auerbach, *Jahrbuch der Juedische-Literatischen Gesellschaft*, Vol. 5, pp.162-162.

statement was made in the form of a command, "Go out and sow" as opposed to the form of an allowance "one is permitted to sow." In light of the explained circumstance, the imperative is easily understood.

Doubt as to the Proper Year in which to Observe *Shemita*

There is another area where, because of the dire circumstances in question, R. Kook[104] brings to bear the system of highlighting a minority view. The exact year in which to observe *shemita* is a matter of considerable discussion among the early halachists. Both Rambam[105] and *Shulchan Aruch*[106] are in agreement on this point and make a clear determination, thus establishing the accepted majority opinion. However, says R. Kook, Ravad's[107] differing stance, although a minority view, can be reckoned on to place the entire *shemita* issue in a state of incertitude. The year in which we are accustomed to keep *shemita* may not be the *shemita* year at all. This additional *safek* (doubt) makes it that much easier to be lenient with *shemita*. R. Kook continues that there is an even greater basis for uncertainty, that in fact four distinct years of every seven lie in question, rendering any given one seriously indeterminate.

Developing the subject at length, R. Soloveitchik[108] states unequivocally that the law is according to Rambam and, on the contrary, if we would create doubt as to the correct year, it would necessitate strict observance of each year in question.

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104. *Mishpat Kohen* p. 127.
105. *Shemita Ve-yovel* chap. 10.
106. *Y.D.* 331.
107. Gloss on *Rambam*, ibid.
108. *Beit Halevi*, sec. 3, 9-4.

In conclusion, he says, there is nothing to this line of logic at all, not even a shred to lean on.

Degree of *Sheat Hadechak*

In determining whether or not to make use of the *Heter Mechira* in any given era, critical study must be given to compare and contrast the nature of the *sheat hadechak* that existed when, and for which, the *Heter* was first created, vis-a-vis the current situation in question. If matters have experienced considerable amelioration, extrapolation of the original *Heter* to the present becomes an inexact science. R. Willowsky[109] records a testimony of R. Yitzchok Elchanan Spector, the most influential of all the *matirim,* that he supported the *Heter* only because it was represented to him as a matter of mortal danger.[110] This is reflected in the wording of R. Spector's well-known statement of *Heter:* "And if we shall not seek counsel and [method of] allowance, it is possible that the land will be laid waste, G-d forbid, and it shall be a destruction to the colonies, may it not happen, and this is relevant to saving hundreds of lives..."

R. Kook as well, who, more than anyone else, maintained and fostered the *Heter,* developing and broadening all aspects of its halachic platform, mirrored the same attitude as the above-mentioned rabbis. His letters and writings are filled with the justification that the current situation is one of awsome terror and desperation, that the bare survival of the settlements, as well as many persons' lives, are dependent on finding a *Heter,* one that will be dispensed with as soon as the current emergency condition has passed.[111]

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109. Introduction of *Beit Ridbaz* to *Peat Hashulchan.*

110. As to why a life-threatening situation would require a legal decision and not simply override the prohibition, see *Nodah Biyehudah, M. K.* 210.

111. For examples see *Mishpat Kohen,* letters 58, 63, 70, 76.

Although the situation now bears no resemblance to those pioneering days, we find the present protagonists of the *Heter* drawing on these and other early *matirim* as their basis. R. Ovadia Yosef[112] writes "those who rely on the *Heter Mechira* are going according to the numerous and the mighty illustrious ones of Israel." Different approaches have been taken in extending the early *Heter* to contemporary times.

In summation, while there is no question that observance of *shemita* engenders significant hardships to those who live by working the soil, to what degree that can be reckoned on to justify implementation of the *Heter* today is still under debate, along the same lines as the disputes discussed earlier. Additionally, we have mentioned some of the rationales for extending implementation of the *Heter* to our day.

7. What is the Post Facto impact of the *Heter Mechira* for those who accept it and for those who reject it?

After having centered our attention on the construction of the *Heter*, let us now focus on some of the halachic questions which arise after the *Heter* has been executed. We shall take a brief look at the primary issues facing the farmer who wishes to be heedful of *shemita* within the context of the *Heter*, and subsequently discuss points relevant to the corpus of observant Jewry who dismiss the *Heter Mechira*.

Working the Land

The *Heter Mechira*, when issued by the early *matirim* (permitters) over a century ago, was far from a carte blanche to allow all *shemita* prohibitions. Two major limitations were firmly made part and parcel of the *Heter* as proposed in its original form. The first constraint categorically interdicted any labor forbidden during *shemita* by the Torah, allowing

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112. *Yechave Daat* 53.

only types of work in the field that were proscribed by the Sages. The second stated that even those works which were permitted, may only be performed by non-Jews. It is in this area, of which work is permitted and by whom, more than any other, that the *Heter* underwent an evolution over the years. Today, in many agricultural settlements operating under the *Heter*, the conduct during *shemita* is almost indiscernible from that of other years.

The restrictions on field work were perceived as untenable from the outset. When the non-Hebrew speaking agents of Baron Edmond de Rothschild, in charge of administrating the colonies he supported, received the French translation of the original *Heter*, the words "and the work in the vineyards and fields shall be by the hand of non-Jews" had been conveniently deleted.[113] Since that time, R. Kook and others developed approaches to ease the plight of the farmer working under the *Heter* in ways that are more conventional than those utilized in the early pioneering days. We shall briefly discuss some of these halachic accretions.

We find already in the statement of *Heter* issued by R. Spector an inclination toward leniency vis-a-vis the constraint on Jewish labor in a situation of want.

> . . . However, the impoverished who lack the wherewithal to hire Gentile laborers, as to whether they will be permitted to work themselves will be deliberated, G-d willing, with the great sages...

Writing in 1909, R. Kook[114] expresses an interest in maintaining the observance of *shemita* only at a Torah prohibition level after the *Heter* sale is effected, allowing

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113. *Chavatselet* 1889, vol. 6, recorded in *Peulat Tzadik* by R. M. A. Schlesinger.

114. *Mishpat Kohen* 67.

complete abrogation on the rabbinic level. Translating that into real terms, he permits even types of labor forbidden by the Torah, so long as they are performed by non-Jews, as that would entail nothing beyond a rabbinic prohibition.

Taking a quantum leap beyond that, with a circumstance that is critically more relevant today than even in his day, R. Tuchechinsky (circa 1952), after discussing the allowance of a poor man to work the soil himself, writes, "and in our era, when most of the agricultural settlements find it impossible to aquire Gentile laborers, [we should consider them in this respect no different than the impoverished farmer, and therefore] we should issue permits to all of them to do any rabbinically–forbidden work."[115]

This facilitates matters significantly, but only insofar as rabbinic restrictions are concerned.

Purchasing Produce of the Seventh Year

For an individual who accepts the ruling of those who permit the *Heter Mechira,* the land is considered sold, the labor and activities performed thereon completely permissible (when done according to the guidelines and restrictions of the Chief Rabbinate executing the *Heter),* and, most important to the present discussion, the fruits, vegetables, and grains produced to be usable as in any other year.

Someone, however, who abides by the decision of those who completely reject the *Heter,* views this produce as the yield of forbidden work, done on land fully infused with the sanctity of *shemita.* We shall discuss here if the latter group, working with the premise of *shemita* having been violated, is permitted to benefit from the fruits of Jewish

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115. *Sefer Hashemita* p. 94.

labor. The deliberations of the different positions will be concerning if these fruits are permitted for consumption within the limitations of *kedushat shevi-it,* the sanctity of the Seventh, since by rejecting the *heter,* they reject the concept that *kedusha* is removed.

Let us refer back to the introduction where a distinction was drawn between fruit of the tree, an item which grows without the yearly intervention of man, and vegetables and grains, which require annual cultivation, such as plowing, seeding, etc. In the former group, although it is possible that the trees were planted, grafted, or in some other way directly worked on to produce fruits, it is also likely that nothing at all was done to them for the production of that year. Nevertheless, simply by securing his fruits, and not making them free for all to take, the owner of the orchard transgresses a serious prohibition, and the fruit is designated as *"shamure"*, guarded. Vegetables and grain involve a more serious issue in that, besides being *shamure,* an entire list of prohibitions were directly involved in their production. These vegetables and grains are referred to as *"ne-evad"*, worked on.

It follows, therefore, that a decision allowing vegetables and grains to a consumer who does not recognize the *Heter Mechira,* would certainly allow fruits, whereas the reverse, a decision allowing fruits, would in no way intimate a like decision with vegetables and grains.

In R. Yedid[116] we find an opinion of leniency even with produce that was *ne-evad.* Reminding us that all the restrictions of fruits infused with the sanctity of the Seventh Year (such as method of consumption and *bi-ur*) would still apply, he asserts that there exists no basis to forbid them,

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116. *She-eirit Yosef* pp. 117-125.

and then adds, "I myself also am careful not to eat [this produce] and it is fitting to be stringent in this so as to fence in the matter, not to give strength to those who transgress in sin."

Although R. Yedid discourages the use of such produce, he stops short of stating any circumscription. This is not the general view amongst adversaries of the *Heter*. In the introduction, we mentioned the edict levied to prohibit *s'fichin*, incidental and accidental vegetable and grain growths. R. Karelitz[117] considers products that were *ne-evad* on Jewish land to be included in that decree and thus forbidden, but only on a rabbinic level.

R. Tzvi Pesach Frank[118] draws our attention to a *Perisha* on *Tur*[119] who writes that in a case where someone "...plowed and sowed in the Seventh, the produce is forbidden because of the Torah directive, 'do not eat any abomination, all that I have made abominable to you.' "

The discussion of *ne-evad* has great relevance to those who do not accept the *Heter*, not only for the consumer in Israel, but for anyone presented with the plentiful array of Israeli food products distributed worldwide. There is another area, however, one dealing primarily with the issue of *shamure* which, at least for one season a year, has an even more profound impact.

Etrog

On the first day of Succot, we are instructed by the Torah to take four species, one of which is the *etrog* (citron).

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117. *Shevi-it*, 3:25.

118. *Har Tzvi* in *Kerem Tzion* p. 38.

119. *C.M.* 141-13.

Additionally, there is a rabbinic obligation to continue this commandment for the remaining days of the Holiday. As it is the citron orchards in Israel which service the majority of this religious market, a question facing the observant Jew who does not abide by the *Heter* is if he is allowed to purchase an *etrog* from an orchard where the fruits were *shamure* (secured by the owner and not made open to all creatures of the earth).

The rule relevant to our subject, established by the Talmud,[120] is that in order for one to discharge his obligation of taking the Four Species, the *etrog* used must have been permitted for consumption at the time of his fulfilling of the commandment.

The Talmud[121] teaches that it permissible to purchase an *etrog* from one who is marketing them in the Seventh Year, (an illegal activity), if it is done using *havla-ah,* lit. "swallowing." This is accomplished by paying an inflated sum for a different item, one that does not encroach on a *shemita* problem, so as to receive the *etrog* gratis, its cost "swallowed up" in the money given for the other object.

The Talmud continues with the reason why this method is necessary. Money spent on fruit of the Seventh acquires sanctity of the Seventh, engendering the obligations mentioned in the introduction. The Talmud permits giving a person who engages in illicit marketing only a minimal sum of this money which will gain *kedusha,* as we are fearful that, if given an excess, he will not attend to its special restrictions. With the *havla-ah* method, however, the monies do not become infused with any holiness, as they were not exchanged for something consecrated. The Talmud then states,

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120. *Succah* 35.

121. Ibid. 39.

> The above discussion is only where the seller gathered the *etrog* from an orchard whose fruits had been properly declared ownerless; however, had he taken them from a protected orchard, it is forbidden to give him even the smallest amount of money in payment.

As to why the Talmud is so strict with a citron taken from *shamure,* we have a difference of opinion among the *Rishonim.* Rabbenu Tam, and those with him, tell us that fruit which is *shamure* carries a Torah proscription; it can neither be eaten nor used for the Four Species. Rashi, and those with him, are more lenient. The fruit is essentially permissible, but we cannot allow purchase from him as that would encourage and support his wicked behavior.

R. Teitelbaum[122] applies this section of Talmud in straightforward fashion — both R. Tam and Rashi clearly forbid this *etrog*. He further establishes that, by purchasing from this marketer of contraband, one transgresses the biblical prohibition of "placing a stumbling block before a blind person," that is, facilitating a fellow Jew to sin. He concludes[123] that it is altogether forbidden to buy or use such an *etrog*.

In his *Jewish Dietary Laws,*[124] R. Grunfeld seems to consider an *etrog* that is *shamure* as problematic, writing, "In the seventh year one should make sure of buying only an *etrog* which was picked before Rosh Hashanah [the time when *shemita* begins] of that year. In the eighth year it is best to buy an *etrog* which was grown in a non-Jewish orchard or from a Jew who can be trusted to observe the laws of *shemita* properly."

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122. Ibid. p. 331.
123. Ibid. p. 342.
124. Ibid. p. 155.

But R.M. Feinstein[125] is of a decidedly different opinion. According to Rashi, he explains, the Talmud never forbids an etrog that was *shamure,* it only forbids a direct payment for it. The system of *havla-ah* would be an adequate and admissible method of acquiring an *etrog* that was *shamure,* in Rashi's view. He then goes on to show that the majority of *Rishonim* side with Rashi against R. Tam, in sufficient numbers to be relied upon even for the first day of Succot, when the obligation of the Four Species is of Torah nature.[126]

Continuing with a law that is relevant also to one who acquires his *etrog* from an orchard that is not *shamure,* R. Feinstein advises that the issue of *bi-ur* (see introduction) be looked after. He recommends that the *etrog* purchased for Succot in the year after *shemita* be publicly made ownerless prior to the Jewish New Year (since that might be its cutoff point for *bi-ur),* and then subsequently repossessed for use.

Repeating that an *etrog* that was *shamure* must be acquired by method of *havla-ah,* R. Feinstein disagrees with any concern that one transgresses "placing a stumbling block" before the seller by buying this citron, for one who does

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125. *Iggerot Moshe O.C.* 1, 186.

126. Aware that the opinion in opposition of Rashi, that of R. Tam and those who agree with him, is still a formidable one, R. Feinstein continues to assuage the questioner's doubt by focusing on the specificity of the query. The year about which the question was asked had a situation where the *etrog* would be used only for a rabbinic obligation. This occurs when the first day of the Holiday, the only day of Torah requirement, coincides with Sabbath, a time when it is forbidden to take the Four Species. Thus, the *etrog* will first be handled on day number two of Succot. In such a situation, R. Feinstein writes, there is most certainly no doubt that a citron that was *shamure* can be taken, for many are of the opinion that the rabbinic obligation can be fulfilled even with an *etrog* that is forbidden to eat.

according to a rabbinic decision [that of the *Heter Mechira]* has virtually no sin, even if the halacha is not according to that decision, so long as the time has not come when all the sages of the generation gather and decide by vote against it.

Conclusion

Having discussed the more basic issues of the *Heter Mechira,* we close with the wish, universally expressed by every writer on the topic, that the time quickly come when *shemita* will be observed in its ideal form.

Teaching Torah to Non-Jews

Rabbi Shlomo Borenstein

Introduction

With assimilation and inter-marriage on the upswing, and conversions often performed not according to the letter of the law, more and more non-Jews are making their way into the Jewish community.[1] Whether it be in day schools, youth groups, shuls, or even at our dinner tables, the problem of non-Jews blending in with *Klal Yisrael* is a growing one.

Aside from the many obvious problems that have thus been created, there are many other problematic situations of which the public may not be aware. One such is that of teaching our Torah to non-Jews. The Talmud, *Rishonim*, and *Acharonim* deal with this issue; their conclusions are

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1. Although this is primarily a problem outside Eretz Yisrael, due to dramatic changes in the former Soviet Union, Eretz Yisrael is now feeling the impact of a new crisis. With the floodgates open for immigration from the former Soviet Union, investigations have found that large numbers of new immigrants are not halachically Jewish. It is a growing problem which the *poskim* there are going to have to deal with.

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the topic of this article. Our interest herein is not to discuss the question of "Who is a Jew", but rather to examine the problem after that question has already been resolved.

This article should not be used to render a *psak* on any cases whatsoever; only a competent halachic authority is qualified to make the final ruling.

The Prohibition for a Non-Jew to Learn Torah

The Gemara in *Sanhedrin* reads:

ואמר ר' יוחנן עובד כוכבים שעוסק בתורה חייב מיתה שנאמר תורה צוה לנו משה מורשה לנו מורשה ולא להם.

Rabbi Yochanon said "A non-Jew who learns Torah is deserving of death, for the verse reads 'Moshe commanded the Torah to us, as an inheritance.' For us an inheritance and not for them."[2]

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2. The Gemara explains: If the word מורשה is read as written (*morashah*), it means the Torah was given to us as an inheritance; the use of it by a non-Jew is then considered גזילה, theft. If the word מורשה is not read as written but rather as מאורסה (*me'orasah*), it means the Torah is like a betrothed bride to us, and a non-Jew taking it is like one who takes another's bride, which is among the prohibited relations even for a non-Jew.

The *Turei Even* in *Chagiga* 13 introduces a novel idea which warrants mentioning. If the reason is because the Torah is like a betrothed bride to *Klal Yisrael*, there is no *heter* for a non-Jew to learn Torah, as it would be like his taking another's bride. However, if the problem is that the Torah is an inheritance, and a non-Jew learning it is "stealing," then if the teacher doesn't mind the non-Jew's "taking" the Torah, there would be no problem of theft. Although there may still be a problem of "לא עשה כן" for the teacher, the *issur* of לפני עור would not apply. And, for the non-Jew, not only the Seven Mitzvot would be allowed but perhaps the rest of the Torah would also be permitted. See *Ein Yaakov* in *Sanhedrin*, who follows the *Turei Even*.

The Gemara then cites a seeming contradiction:

ר"מ אומר מניין שאפילו עובד כוכבים ועוסק בתורה שהוא ככהן גדול שנאמר וכו'

Rabbi Meir says, "From where do we know that even a non-Jew who learns Torah is like the High Priest? As it is written... etc."

The Gemara resolves this contradiction by explaining that when Rabbi Meir uses the term "Torah" in this context,

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The commentary *Ahavat Eitan* on *Ein Yaakov,* however, objects to this explanation of *Turei Even.* He maintains that the two opinions in *Sanhedrin* are not arguing at all. The opinion which considers a non-Jew's learning Torah to be stealing is referring specifically to *Torah Sheb'al Peh* (oral tradition). The other opinion, which states it is a problem of taking a bride, refers to *Torah Shebiktav* (written Torah). Since the problem of stealing is referring only to that part of the Torah which is transmitted orally, there is a much greater fear of the non-Jews' claiming the Torah was given to them as well. We have nothing in our hands to prove differently. Therefore, says the *Ahavat Eitan,* certainly it is prohibited to teach a non-Jew *Torah Sheb'al Peh,* unlike the *Turei Even's* opinion.

R. Moshe Feinstein, (אגרות משה יו"ד חלק ג' סי' צ) asks a more basic question on the *Turei Even.* The "inheritance" was not given to any one individual. It was given to *Klal Yisrael* as a whole. Even if one person doesn't mind the non-Jew's taking the Torah, how does he have a right to give away the inheritance of everyone else? He concludes that "further investigation" is needed.

The *Sefat Emet,* in *Chagiga* 13, adds a very important part. The *Turei Even* brings proof for his opinion by showing that *Chazal* quite often answer non-Jews with *pesukim* and other *divrei Torah.* Obviously, then, there is no problem of teaching them if we don't mind. The *Sefat Emet* refutes this by saying that when the non-Jews misunderstand the meaning of a *pasuk* or a different part of the Torah and therefore accuse us of being incorrect, we have a right to answer them with whatever information we need to clear up the matter. Defending ourselves and our Torah is not the same as going out and teaching it.

Seridei Eish (סימן צב', חלק ב'), does not accept this.

he is referring to the Seven Mitzvot that a non-Jew is commanded. From this explanation we may infer that the Talmud agrees that the Torah was given specifically to the Jewish people, to the exclusion of other nations. Their attempt to learn Torah is an act deserving death.[3]

Thus, the Rambam[4] records the law:

> עכו"ם שעסק בתורה חייב מיתה לא יעסוק אלא בשבע מצוות שלהן בלבד . . . ומודיעין אותו שהוא חייב מיתה על זה אבל אינו נהרג.
>
> A non-Jew who studied Torah is deserving death. He should study only their Seven Mitzvot. . . And we make known to him that he is deserving death — however he is not put to death [by a court].[5]

Regardless of the actuality that he is not put to death, the offence of a non-Jew's learning Torah (other than the Seven Mitzvot) is of the greatest severity and, according to the Rambam, requires us to warn him of his transgression.

The question which needs to be asked is, why did *Chazal* find it so terrible for a non-Jew to learn Torah? Wouldn't learning it make them better people? Wouldn't it foster a better understanding of what a Jew stands for and is striving to attain?

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3. עיין רשב"א ב"ק לח. ד"ה אפילו גוי.

4. הלכות מלכים פרק י' הלכה ט.

5. The *Lechem Mishneh* explains the Rambam differently. The Gemara in *Sanhedrin* 59 states that there is nothing that a Jew is permitted to have which is not permitted to a non-Jew. Thus, argues the *Lechem Mishneh*, something that is a mitzvah for a Jew, cannot be forbidden for a non-Jew. Consequently the Rambam comes to teach that it is the Rabbis, and not the Torah, who decreed the death penalty for a non-Jew's learning Torah. Although it is an offence warranting death, the courts cannot execute it.

The Meiri[6] explains the danger which the Sages anticipated and tried to prevent: If a non-Jew were to learn Torah, not in order to convert and observe the mitzvot, but rather just to obtain knowledge and gain ideas, Jews might mistakenly assume this person is Jewish. They might follow him and be led astray by his example and teachings. In order to protect *Klal Yisrael* from this potential calamity, non-Jews were prohibited from learning Torah.[7]

The Prohibition of Teaching Torah To A Non-Jew

In *Chagiga* 13a the Talmud states:

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6. סנהדרין נט.

7. The *Seridei Eish* seems to disagree with the reasoning of the Meiri. The prohibition of teaching Torah to a slave is because he might begin to act like a free Jew and come to marry a free Jewish girl. This fear is realistic only with respect to a slave, who is already observing the mitzvot that a woman must observe. A non-Jew, however, who is not engaged in mitzvot, would not be able to pass himself off as a Jew.

Ahavat Eitan, ibid, writes that a non-Jew's learning Oral Torah involves a greater problem of theft because through his learning, people might come to say that the Torah was given to them also.

The *Besamim Rosh*, Responsum #327, explains differently than the Meiri. It is a severe prohibition, he claims, to give away that which makes us holy and unique and which separates us from the other nations of the world. The Torah is the heart of our people and to give it to others will take away our uniqueness. Rav Ovadia Yosef, (*Yabia Omer* 2 *Yoreh Deah* #7) cites a text in *Sotah* 35b, stating that non-Jews had an opportunity to nullify the prohibition. When the Jews crossed the Jordan and came to Mount Eival, they wrote out the entire Torah on stones in order to give the other nations a chance to read and accept it. This was a special time in which no prohibition existed for them to learn the Torah. Because they didn't learn the Torah then, the previous prohibition of a non-Jew's learning Torah was reinstated and, so too, the prohibition to teach them.

ואמר רב אמי אין מוסרין דברי תורה לעובד כוכבים שנאמר לא עשה כן לכל גוי ומשפטיו בל ידעום

Rav Ami said "Do not give over the words of the Torah to a non-Jew, as it is written: 'He did not do so to any other nations and his laws they were not informed.'"

Tosafot question why the Gemara needed to cite a verse as the source for the transgression of teaching Torah to non-Jews. Since the Gemara itself in *Sanhedrin* teaches that a non-Jew is liable for death if he studies Torah, the text here should say that the prohibition involved in teaching is לפני עור, "placing a stumbling block" in front of someone — one may not cause anyone to sin, even a non-Jew. Tosafot answer that in the case in point there is another non-Jew ready to teach this person if the Jew won't. Since it is possible for the non-Jew to transgress (learn Torah) without the Jew's help, there is no problem here of לפני עור. The Gemara consequently informs us that there is nevertheless another *issur* based on the verse cited.

Thus from Tosafot we see clearly that it is forbidden to teach Torah to non-Jews: because of לפני עור[8] if he cannot

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8. עיין בתוס' רי"ד ב"ק לח which concurs with Tosafot.

Whether the prohibition of לפני עור applies here is of considerable debate. The *Seridei Eish* and *Maasei Ish, Y.D.* Responsum #7, claim that since there are many non-Jews today who read, speak, and understand Hebrew, and since the entire Old Testament has been translated into many different languages, it is possible for non-Jews to learn Torah without our help; therefore, no prohibition of לפני עור exists.

The *Besamim Rosh* argues that the fact that non-Jews need to come to Jews to learn Torah is an indication that their other opportunities are not sufficient for them to understand it. Consequently, it is certainly לפני עור to teach them.

The *Sedei Chemed,* (מערכת האל"ף כללים ק"ב) adds from *Yad Eliyahu*

learn it through other means, or because of לא עשה כן if he can acquire this knowledge from other sources.[9]

Yet another text in *Bava Kama* seems to pose a problem. There it says that the Roman government sent two officials to the Jews, to have them learn the Torah. The Jews taught them until they had gone through all the Torah three times! If it is forbidden to teach Torah to non-Jews Torah, how could they teach these two Romans? One explanation is that the two came posing as Jews. Since there was no reason to assume they weren't Jewish, they were taught the Torah. Tosafot suggest two other possibilities: Even if it was known that the two were not Jewish, it could be that since the government decreed it, the Jews were required to obey. The prohibition of teaching is not so severe that a Jew must die for it.

Tosafot offer a second explanation: Possibly, the two officials converted and thus there would certainly be no problem in teaching them.[10] *Yam Shel Shlomo*[11] comments

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#48, that even if they can find other sources from which to learn, there still exists a rabbinic prohibition. In מערכת הויו"ו אות כ"ו סק"ג וי"א *Sdei Chemed* writes there may be a problem of assisting someone in doing a prohibition.

9. Tosafot in *Bava Kamma* 38a ד"ה קראו write that one who teaches Torah to a non-Jew violates a positive commandment, based on the Gemara in *Chagiga*. The מהר"ץ חיות points out that the Gemara does not use this term but rather says "אין מוסרין" (we do not give over). It is interesting to note that Tosafot choose the *pasuk* "מגיד דבריו ליעקב" and say it is a violation of a positive mitzvah, and do not mention the *pasuk* brought in the Gemara, לא עשה כן, and say it is violation of a negative command. See *Ein Yaakov*.

10. עיין שו"ת באר שבע חלק באר מים חיים סי' יד'.

11. The *Yam Shel Shlomo* learns very important points from Tosafot's first answer. Since the Jews knew that these two men

that we may infer that since they felt constrained to offer another answer, Tosafot felt that the first answer wasn't sufficient. Maybe it is forbidden to teach Torah to non-Jews even at the expense of keeping peace with the government. Furthermore, he adds, it is certainly forbidden merely for the sake of additional revenue.

Teaching non-Jews is not a one-time sin. It has far-reaching repercussions which not only do not promote peace and *Kiddush Hashem*, but may even lead to heresy and *Chilul Hashem*.

Nevertheless, there may be times when it is permitted to teach Torah to non-Jews. The *Seridei Eish*[12] (citing Ramo, *Y. D.* 291:2,) says it is permissible to give a *mezuzah* to a non-Jew if one is afraid what he may do if one doesn't. Although not all mitzvot are equal in this regard, we see that Judaism is concerned about arousing the anger of non-Jews by the performance of mitzvot.[13]

Despite the talmudic texts we have cited, and the rabbinic discussions thereon, none of the *poskim*, including the Rambam and the *Shulchan Aruch*, list teaching Torah to non-Jews as a transgression.[14]

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were non-Jews sent by the government, why did they tell them the truth about the Torah and halacha?

12. Citing Ramo, *Y. D.* 291:2.

13. The *Besamim Rosh* agrees with this idea of not arousing anger, especially when one's job deals with these matters. The *Yad Eliyahu* and *Yabia Omer* add that it is permissible to answer questions to avoid a *Chilul Hashem* or to create a *Kiddush Hashem*, The *Yabia Omer* puts this in the category of "knowing what to answer *apikorsim*."

14. The *Be'er Sheva*, ibid., is bothered by this omission and suggests that perhaps the talmudic discussions are not the final halacha. After a short discussion on the matter, he cites the

The Extent of the Prohibition

Rav Ovadia Yosef was asked if it makes any difference if the non-Jew is a child.[15]

He concluded that a child who really doesn't comprehend what he is being taught or from where it comes, may be taught Torah.

As we have noted, a non-Jew who learns the Seven Mitzvot that were commanded to him is considered like the High Priest.[16] Tosafot in *Chagiga* write that although it is forbidden to teach them other parts of the Torah, it is a mitzvah to teach them the Seven Mitzvot. Since every individual is obligated to learn that part of the Torah which pertains to him, we do have a mitzvah to teach them their

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Talmud in *Shabbat* 87 and *Yevamot* 62 which says that Moshe Rabbenu did three things on his own that *Hashem* approved. One of the three was to break the tablets when he saw the Jews worshipping the Golden Calf. Since they were acting like non-Jews, they were not fit to receive the Torah. Based on this, the *Be'er Sheva* writes, one who is careful should refrain from teaching Torah to a non-Jew.

Yad Eliyahu claims that really there is no omission of this law in the Codes. The Rambam, *Hilchot Talmud Torah* 3:1, and the *Shulchan Aruch, Yoreh Deah* 246:7 bring the halacha that a teacher should not teach a student who is not "worthy." *Yad Eliyahu* maintains that certainly this means one should not teach a non-Jew.

Rav Moshe Feinstein (*Iggerot Moshe, Y. D.* III 89) answers similarly, citing the Rambam, *Hilchot Avodim* 8:18 and the *Shulchan Aruch, Yoreh Deah* 267:71, that it is prohibited to teach a slave Torah. See also *Minchat Chinuch,* mitzvah 232, #3.

15. *Yabia Omer.*

16. The reward a non-Jew receives for his learning is discussed in *Bava Kama* 38a, which concludes that although a non-Jew is compared to the High Priest if he learns, he receives only the reward of "one who is not commanded and performs." This is a lesser reward than "one who is commanded and performs."

obligations.[17] [18]

The *Yabia Omer*, citing *Yaffe Lelev* offers reasons why it might be prohibited to teach even the Seven Mitzvot to non-Jews. But he concludes that since through observance of these precepts, society is improved and the world becomes a better place in which to live, it is permissible to teach these laws to non-Jews.

Rav Yosef also rules that since it is forbidden for non-Jews to transgress these mitzvot, it cannot be forbidden for us to teach them.

The author of *Dvar Moshe* addresses the issue similarly. In Jewish law, women have no obligation to learn Torah, and one is discouraged from teaching them. However, women are obligated to learn those laws which apply to them. This learning doesn't fall under the mitzvah of "learning Torah" but is rather part of the obligation of

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17. The *Be'er Sheva* (loc. cit.) writes that the prohibition of a non-Jew's learning refers only to the Torah and its mitzvot which *Klal Yisrael* were commanded, but does not include the Prophets and Writings. These discuss the vengeance *Hashem* takes for the sake of *Klal Yisrael* and also gives appropriate teachings for those who deny the Torah.

18. In the *Sefer Ein Yaakov* on *Chagiga*, Tosafot and their question are cited, but another answer is given which does not appear in our texts. Tosafot state that it was a mitzvah to teach non-Jews the Seven Mitzvot only before the Torah was given at Sinai. After Sinai, however, we learn from the *pasuk* brought in the Gemara that it is forbidden to teach even the Seven Mitzvot. See אגרות משה יו"ד חלק ג' סי' פט who does not have this version in Tosafot.

The *Yad Eliezer* brings an opinion, and the *Divrei Yissachar* also writes, that although if a non-Jew learns and keeps the Seven Mitzvot, he is considered to be like the High Priest, it is still prohibited to teach him these mitzvot.

fulfilling the mitzvot. So, too, a non-Jew needs to learn those mitzvot which apply to him; therefore, there is no prohibition to teach him.[19]

But what it is that can be taught is not so clearcut. The Maharsha[20] limits the teaching to the basic law themselves — what may or what may not be done. An individual teaching these laws would have to make it clear from the start that only questions regarding the actual performance of the mitzvot will be explained. Questions of "why" or "from where do we know" would have to be discouraged.[21]

Not all the *Rishonim* are this stringent. The Rambam seems to hold that the only prohibition for non-Jews is to learn as if the very learning is itself a mitzvah, but just to give him the knowledge and wisdom of the Torah in a casual fashion would be permissible.[22] [23]

The Meiri seems to be even more lenient than the Rambam. He begins by saying that only "סתרי תורה", the hidden secrets or reasons of the Torah, are forbidden to teach to non-Jews. He then goes on to define the "non-Jews" whom

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19. Rav Yosef also uses such a reasoning citing the *Sefer Chasidim*, 313.

20. *Chagiga* 13.

21. It should be noted that there are opinions (and some say even in the Maharsha himself) that the reasons of the Seven Mitzvot and a thorough investigation of these mitzvot would be permissible. A competent Rav should be consulted.

22. See *Sedei Chemed* who learns from a Responsum of the Rambam that only the Seven Mitzvot are permissible for him to learn and for the Jew to teach.

23. The N'tziv in his *Meromei Sadeh* on *Chagiga* writes that the *issur* on the non-Jew is only if he learns it "בעיון", in great depth. The *Seridei Eish* cites a *Taz, O. C.* 47:1 that supports the N'tziv's opinion. The *Machaneh Chaim* also agrees with the N'tziv.

the Gemara includes in the ban as only those people who are idolatrous and deny the basic belief in the existence of Hashem. To such a person, one may not teach Torah. This definition of "non-Jew", if accepted, has very broad implications, and in today's world, it is very possible that according to the Meiri there would be no problem of teaching Torah to a typical non-Jew.

The Written Torah

Although all seem to agree that one may not teach the Oral Law to a non-Jew, the question of the written Torah is subject to debate.

The MaHaRatz Chiut writes that *poskim* differentiate between teaching Oral Law, which is forbidden, and the written law, which is permissible to teach.[24]

But *Sedei Chemed* is at a loss as to who these *poskim* are. He lists many who disagree with the MaHaRatz Chiut, and one of them is the *Shiltei HaGiborim* (first *perek* of *Avoda Zora)*, who says one may teach the Prophets and Writings to non-Jews in order to show them the salvations the Jews have had and in order to answer the questions of those who deny Hashem. But only the Prophets and Writings are permissible, nothing else.

The *Yabia Omer* also doesn't know who these *poskim* of the MaHaRatz Chiut are, and claims that it is certainly forbidden to teach Torah, both written and Oral.[25]

Despite the strong objection to the MaHaRatz Chiut, there

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24. שו"ית סי' לב חגיגה יג., סוטה לה:. The MaHaRatz Chiut cites the *Shita Mekubetset* in *Ketubot* 21A as also holding this opinion.

25. Other opinions who hold *Torah Shebiktav* follows under the prohibition include *Be'er Sheva* and *VaYomer Yitzchak.*

are a number of opinions who side with him. The *Seridei Eish* mentions the view of Rabbenu Gershom in *Baba Batra* 21b which appears to permit teaching the Oral Law. R. Y. Emden,[26] the N'tziv,[27] and the *Responsa Yehuda Yaale* also concur with the MaHaRatz Chiut. The N'tziv reasons that since Hashem commanded Joshua to write the Torah into seventy languages it must be permissible to teach it. *Yehuda Yaale* has a different proof. The Gemara states it is prohibited for a non-Jew to "delve" ("עוסק") in Torah. It is only through the Oral Law that one can "delve". Therefore, study of the written Torah must be permissible.

Converts

May one teach Torah to a person who is interested in converting to Judaism? Although this person may have the best intentions, the fact remains that he or she is still not Jewish. This question has aroused debate, beginning with an argument between the Maharsha and Rabbi Akiva Eiger.

The Gemara[28] tells about a non-Jew who came to Hillel to convert, with one provision — he would convert only if he could be the *Kohen Gadol* (High Priest), which is, of course, impossible. Nevertheless, Hillel taught him Torah until the man himself realized he could never become *Kohen Gadol*. From here the Maharsha learns that when someone comes to convert, it is permissible to teach him Torah even before he becomes Jewish.

Rabbi Akiva Eiger,[29] however, cites Tosafot who, in two

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26. הגהת יעב"ץ סנהדרין.
27. מרומי שדה, חגיגה, משיב דבר ח"ש סי' ע"ז.
28. שבת לא.
29. שו"ת רעק"א סי' מ"א.

different places, ask how Hillel could have done what he did. Tosafot (*Yevamot*) answer that Hillel was confident the non-Jew would ultimately accept his conversion לשם שמים, with no ulterior purpose. Rabbi Akiva Eiger explains that Hillel converted him immediately and thereafter taught him Torah. Consequently, we cannot adduce any proof from the Gemara. His conclusion is that one may not teach Torah to a non-Jew before his conversion.

In support of Rabbi Akiva Eiger, *Yabia Omer* notes that at various times gentiles came to Hillel to convert and he converted them. First came the conversion, and then the various problems were taken care of. For his part, the Maharsha counters by saying that the Gemara doesn't really mean he converted but rather that, as soon as he was ready to convert, it became permissible to teach him Torah.

In *Yevamot*[30] the Gemara states that when a potential convert comes, one should make known to him a "few of the lighter mitzvot and a few of the more severe ones." It seems clear from here that we must teach him some Torah before he converts. The *Shulchan Aruch*[31] brings this as the halacha. This is in direct negation to the position of R. Akiva Eiger.

Yabia Omer answers by saying that this is not the same as teaching Torah. There is no other way to determine if a person is sincere in his conversion if he doesn't know what is involved. Perhaps once he hears about how many mitzvot there are and what goes into them, he will reconsider. Thus, it is a necessary part of the conversion process to inform him of Torah requirements.[32]

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30. מז:.

31. יו"ד רס"ח ס' ב.

32. The *Machane Chaim* (*Y. D.* 45) answers a little differently

Rabbi Moshe Feinstein[33] explains the whole disagreement between the Maharsha and Rabbi Akiva Eiger in a different manner. He writes that even R. Akiva Eiger would agree with the Maharsha to teach Torah to a non-Jew before conversion. That is how we determine if he is sincere or not. What then is the argument? What if the country has a law against converting to Judaism? The only way to convert would be to travel to another country, and the gentile would never be able to return to his homeland. May one teach Torah to such a person, knowing that under such circumstances he might very well change his mind? In such a case, Rabbi Akiva Eiger held one could not teach him, but the Maharsha would permit it. If Hillel could teach the non-Jew even though he might change his mind when he found out he couldn't be the *Kohen Gadol*, then it is permissible to teach a person even though he might change his mind for other reasons.[34]

It seems clear from Rabbi Moshe Feinstein and Rabbi Ovadia Yosef[35] that to teach a non-Jew a few of the mitzvot, as the *Shulchan Aruch* prescribes, is no problem. For more than those few mitzvot, however, further investigation is

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than the *Yabia Omer*. Since the *Bet Din* is making these mitzvot known to him against his will, he is not held responsible for learning them. If he is not held responsible for learning them, then *Bet Din* is not transgressing לפני עור.

33. אגרות משה יו"ד ח"ג ס' צ.

34. On this question, the *Kuntrus Zichron LeRishon* holds if the potential convert will have to wait a long time to convert, it is not permitted to teach him Torah because in truth he is still a gentile. The *Tzemach Tzedek* (*Y. D.* 200) is even more stringent, making learning Torah dependent on having a *bris*. From the text in *Yevamot*, we assume he means that he must be ready for the *bris* immediately.

35. See the proof he brings for the Maharsha from the Meiri.

needed. Also, according to Rabbi Feinstein there is a reasonable doubt that the person might change his mind because of outside influences after learning the mitzvot. It is questionable if it is permitted.

Selling or Handing out *Sefarim*

An interesting question was posed to Rav Ovadia Yosef. The rabbinate of Cairo handed out booklets to prospective converts telling them about Judaism and some mitzvot. Is this permissible? As we mentioned, there is no problem in *telling* converts about some of the mitzvot in order to determine their sincerity. But what about actually *handing* something to them?

The language in the Gemara is "אין מוסרין," "do not give over Torah to a non-Jew." From here the *Ein Yaakov*[36] learns that although one may teach the Seven Mitzvot to a non-Jew, one may not give him anything written. All the letters of our Torah are names of God and have holiness in them. They do not belong in the hands of non-Jews.[37]

The MaHaRatz Chiut[38] argues that the only problem with a non-Jew is teaching him. There is no problem with selling him *sefarim,* and it is not לפני עור. Rav Ovadia Yosef concludes that the rabbinate has sources to rely on, and it is a good custom; therefore, they may continue. Whether Rav Ovadia Yosef would extend this to other cases of teaching converts is not certain.

Another question is whether the ban, if it exists, applies

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36. חגיגה יג.

37. יו"ד רמ"ו סי' ו.

38. Rashi, מלכים ב' כ: י"ג "וישמע עליהם חוקיהו...", seems to forbid even showing a *Sefer Torah* to a non-Jew.

to books about Judaism printed in other languages. Although it seems from the *Ein Yaakov* that the problem is just if the *sefer* is in Hebrew, from Rav Yosef's case we see he understood that it may be a problem in any language. (The booklets in that case were in Arabic).

Non-Jews who Listen in

As noted earlier, due to an increase in inter-marriage and an alarming number of conversions being performed not according to halacha, non-Jews are no longer uncommon in Jewish communities. It is not a rarity to find a family where one child is learning in Yeshiva and siblings are married out of the religion.

R. Moshe Feinstein[39] was asked to rule in the following case: A young man was returning home from yeshiva for Pesach, where he would recite the Haggada and explain it to his parents and relatives. At the seder, however, would be one relative with his non-Jewish wife. Should he be concerned with teaching Torah to non-Jew in such a circumstance?

R. Moshe Feinstein answers that when the Gemara said it is forbidden to give over Torah to non-Jews, it is referring to one who directs his teaching specifically to the non-Jew. If, however, his intent is to teach other Jews, and the non-Jew is among those present, certainly there is no problem. The prohibition of placing a stumbling block in front of someone applies when one places it in front of the blind person. But if the person does it on his own, there is no prohibition. (Here the woman doesn't have to come at all, and even when there she doesn't have to listen.)

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39. שו"ת מהר"ץ חיות סי' לב.

A similar case may occur if a group of non-Jews wish to visit a synagogue on Shabbat to observe the services. May the Rav give his sermon with the non-Jews present? It seems from R. Moshe Feinstein's Responsum that since the Rav is directing his sermon to his congregants, and the spectators are coming of their own volition, there would be no problem involved. However, actually to invite a non-Jew to come to the sermon (or to the seder as in the previous case) may pose a problem and, therefore, a competent authority should be consulted.

Non-Jews in Day Schools.

A more difficult question arose[40] regarding a Jewish day school that had a number of children enrolled who were not actually Jewish. Because of various members on the school board, and because of the financial situation of the school, it was impossible for these children to be asked to leave. Would a teacher, whose entire livelihood is dependent on his teaching at this institution, need to give up his job?

R. Moshe Feinstein tries to find leniencies to allow the teachers to keep their jobs. He writes that it is difficult for him to give a definitive *psak* on a matter which involves people's livelihood, when the matter is not mentioned among the *poskim* and thus the finer points are not known to us. It could be, he says, that since these children think they are Jewish and are going to the school in order to learn about Judaism, there is no *issur* involved. Also, since the teachers are primarily teaching the other children and these children are only listening, perhaps that too makes it as if we are not teaching them. Furthermore, it could be that the problem of a stumbling block doesn't apply in this case,

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40. אגרות משה יו"ד חלק ב' סי' קלב.

because they are children. Also, the Gemara which says a non-Jew should not learn Torah may not be referring to a teacher and his students. Therefore, he is unwilling to instruct the teachers to leave their jobs, even though it may be the proper thing to do.[41]

It should be noted that R. Moshe Feinstein was replying to a case where the teachers were already employed by the school. For a person who is still looking for a teaching position, the ruling might be different. In each case, a competent rav should be consulted.

Other questions on this subject which need further investigation include: What is one allowed to answer to inquisitive neighbors? Is there a problem of "placing a stumbling block" to have a *sefer* published in English by a non-Jewish publishing firm? Can the Jewish viewpoint on issues of medicine, law, ethics, etc. be presented and explained at non-Jewish symposiums?

Conclusion

The purpose of this article is not to offer legal rulings, but to make the reader aware of a problem which is becoming more common every day. Intentions of creating peace between the Jewish community and its non-Jewish neighbors, and of teaching mankind its biblical obligations are most noble and praiseworthy, but must be carried out within the framework of halacha. Our holy Torah was given to us to learn and live, and advice should be sought before transmitting any of it to those to whom the Torah was not given.

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41. אגרות משה אה"ע חלק ד' סי' כו.

May Glass Utensils Be Kashered?

Rabbi Howard Jachter

I Introduction

There is considerable confusion in the observant community whether glass may be "*kashered*" (made halachically usable after it was forbidden) and whether it may be used for both milk and meat. We will survey the many opinions regarding these issues and attempt to outline halachic decisions.

II Talmudic Sources

The Babylonian Talmud does not contain a source which unambiguously states the halachic status of glass regarding *kashering*. However, the Talmud does contain sources from which the commentaries infer the Talmud's position. How these sources are to be evaluated and what inferences are to be drawn from them is a matter of debate among the commentaries, which we will outline in the next section.

In *Shabbat* 15b the Talmud states that the Rabbis declared that glass can become impure. The basis for this declaration is that glass's material composition is similar to pottery since glass is produced from sand. The Torah rules that pottery may become ritually impure, and because of their similar composition the Rabbis assigned glass the halachic status of pottery.

On the other hand, the Talmud in *Avoda Zora* 75b states that glass utensils which were once owned by a non-Jew

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Dayan, Beit Din of Rabbi Melech Schachter; Associate Rabbi, Congregation Beth Judah, Brooklyn; musmach, Rabbi Isaac Elchanon Theological Seminary, Y.U.

must be dipped in a mikvah prior to use with food. This rabbinic decree stems from the Torah's[1] requirement that metal utensils once owned by a non-Jew must be immersed in a mikvah. Here the Talmud compares glass to metal. Like metal, glass can be repaired after it breaks (Rashi notes that the repairing process is identical; both metal and glass are melted down and refashioned).[2]

The Meiri (*Shabbat* 15b) explains that these two talmudic passages do not contradict each other. Both metal and pottery are viable analogs for glass, and the Talmud chooses the analog which leads to a stringent ruling in each of these cases.

The third source is *Avot de-Rabbi Natan* 41:6, which states that "glass utensils do not absorb or exude." According to this statement, it would appear that glass cannot be placed into any of the halachic categories since it is qualitatively different than earthenware and metal.

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1. There exists a debate whether the requirement for metal utensils acquired from a non-Jew to be dipped in a mikvah is of biblical or rabbinic origin. The consensus is that it is of biblical origin; see *Taz, Yoreh Deah* 120:16, *Biur Hagra, Yoreh Deah* 120:36, and *Aruch Hashulchan* 120:4.

2. Rabbi David Zvi Hoffman (*Melamed Lehoil* 2:49) suggests that this decree pertains exclusively to glass and not to all utensils which may be repaired by melting. This suggestion seems to have been adopted by the halachic community as evidenced by the fact that most observant Jews do not immerse plastic utensils acquired from a non-Jew in a mikvah. See *Tzitz Eliezer* 7:37 and 8:26, *Chelkat Yaakov* 2:163, and *Yabia Omer* 6: *Yoreh Deah* 68. Even Rabbi Yitzchak Yaakov Weisz (*Minchat Yitzchak* 3:76-78) who rules that plastic utensils must be immersed, takes Rabbi Hoffman's suggestion into consideration and rules that one should not recite a blessing when immersing plastic utensils. See, generally, Rabbi Alfred Cohen, *Journal of Halacha and Contemporary Society*, XIX, pp. 53-57.

III Rishonim

Four categories of opinion appear in the *Rishonim* concerning our issue. [3] Tosafot (*Avoda Zora* 33b *s.v. koonya*), Raavya (chapter 464) and Ran (*Pesachim* 9a in the pages of the *Rif*), are among the *Rishonim* who rule that glass utensils are smooth and nonporous. [4] (Rashba (*Teshuvot*, number 233) states that glass does not absorb even if hot food or drink is placed in it. These authorities base their ruling on empirical evidence ("*hachush meid*") and on the passage in *Avot de-Rabbi Natan* which explicitly states that glass utensils do not absorb. Accordingly, these authorities rule that one is not required to *kasher* glass that came in contact with non-kosher food and that glass utensils may be used for both milk and meat, even for cooking.

The second category includes Rabbenu Yechiel from Paris (cited in *Mordechai, Pesachim*, chapter 3, section 574) and *Smag* (cited in *Terumot Hadeshen* no.132) who adopt an entirely different approach.

They rule that the Rabbis assigned glass utensils the status of earthenware utensils (*Shabbat* 5b). This comparison is asserted generally and is not limited to the issue of ritual impurity. Just as earthenware cannot be *kashered*,[5] so, too, glass utensils cannot be *kashered*, and certainly may not be

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3. For a summary of these opinions see Rabbi Gedalia Felder, *Yesodai Yeshurun* 6:166-168. Rabbi Felder writes that the majority of *Rishonim* subscribes to the view that glass utensils do not absorb at all.

4. A precedent for this ruling from the Babylonian Talmud is the Talmud's (*Pesachim* 74b) assertion that "the heart is smooth and does not absorb." We see that the Babylonian Talmud believes that some objects do not absorb. See, however, Tosafot ad. locum *s.v.Shani*.

5. *Pesachim* 30b.

used for both milk and meat. In generalizing the equation between glass and earthenware in *Shabbat* 15b, these authorities contradict the position of *Avot de-Rabbi Natan* which defines glass as non-absorbent. One may resolve this problem in a number of ways. First, they might consider the passages in *Avot de-Rabbi Natan* as *Aggadic* and not halachically binding.[6] Second, perhaps *Avot de-Rabbi Natan* simply states a property of glass but does not draw any halachic implications.[7]

This passage is part of a list of phenomena which are characterized in this chapter in general terms, without mention of halachic implications.

Alternatively, since glass does not absorb, the Torah ruled that glass cannot become impure and never requires *kashering*; however, the Rabbis declared that since its composition is similar to earthenware, it can become ritually impure and can never be *kashered*.[8]

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6. For a discussion of whether *Aggadic* statements are halachically binding, see Jerusalem Talmud *Peah* 2:4, *Pitchei Teshuva, Even Haezer* 119:5, and Rabbi Melech Schachter "May a Proselyte Circumcise Himself?", *Yevul Hayovlot* (Yeshiva University 1986), pp.341-345.

7. In addition, see *Biur Hagra* 451:2 and *Minchat Yitzchak* 1:86 for alternative explanations of *Avot de-Rabbi Natan.*

8. According to the authorities, even if one demonstrates that glass is nonporous, glass would still retain the halachic status of "earthenware" which may not be *kashered.* This is similar to the debate concerning porcelain which Rabbi Eliezer Waldenburg (*Tzitz Eliezer* 4:6) summarizes succinctly as follows: "Look at all the ink spilled in an attempt to rule that since porcelain is nonporous it need not be *kashered.* Nevertheless, the consensus of halachic authorities and the accepted practice among the observant is to treat porcelain as earthenware which may not be *kashered*". The fact that porcelain is nonporous is seen by most authorities as irrelevant.

The question remains, though, why these authorities chose to follow the talmudic comparison of glass to earthenware in *Shabbat* 15b over the comparison of glass to metal in *Avoda Zora* 75b. The answer might be that the comparison to earthenware is more compelling since it relates to the essential nature of glass — its composition — rather than to the more incidental issue of how it is repaired.

The third set of opinions adopts the position of the Talmud *Avoda Zora* 75b and assigns glass to the halachic category of metal. Consequently, these authorities consider glass to absorb food but also permit it to be *kashered*. *Or Zarua* (*Pesachim* no. 256) and Ritva (*Pesachim* 39b) citing the opinion of Raah[9] are among the proponents of this view. The Torah presents the laws of *kashering* and immersing utensils in the same verses (Numbers 31:22-23); therefore, it is reasonable to draw some parallels between the two processes. Just as the Rabbis assigned glass utensils the halachic status of metal in the context of immersion of utensils, they did so in the context of *kashering* utensils as well.[10]

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9. Raah rules, however, that since glass may break when placed in boiling water, one may not *kasher* glass since it is too likely that one will not *kasher* it properly. Raah fears that one may believe that he has *kashered* glass properly when he truly has not. *Shaar Hatziyun* (451:196) notes that most authorities have not adopted this position since one is required to *kasher* a utensil only at the temperature at which it absorbed forbidden food. Since one does not place glass in exceedingly hot water one is not required to *kasher* glass with water that is so hot that one would fear that the glass would break.

10. For a discussion of the linkage of the laws of *kashering* and immersion, see Ritva *Avoda Zara* 75b, *Chatam Sofer, Yoreh Deah*, no. 2120, and Rabbi J. David Bleich, *Contemporary Halachic Problems*, II pp. 46-47.

Rabbenu Yonah (*Issur V'Heter* 58:50) presents a fourth opinion. He concludes that it is uncertain whether glass utensils are assigned the status of earthenware or of metal. He concludes that since the matter is in doubt, one must rule stringently — that glass, like pottery, cannot be *kashered.*

IV Shulchan Aruch — Passover

Rabbi Joseph Karo (*Shulchan Aruch, Orach Chaim* 451:26) rules that a glass utensil does not absorb even if hot food was placed in it; his ruling follows the description of glass outlined in *Avot de-Rabbi Natan*. The fact that Rabbi Karo's lenient ruling appears in his laws of Passover is especially significant, in light of the overall tendency of halachic decisors to rule more stringently regarding Passover issues than in other halachic contexts. *Pri Chadash*, a premier Sephardic authority, echoes Rabbi Karo's view and writes, "it is correct and this is our accepted practice." *Sdei Chemed* (5:29) and Rabbi Ovadia Yosef (*Yechave Daat* 1:6) write that common practice among Sephardim is to follow Rabbi Karo's ruling even if hot food was placed in a glass utensil and even on Passover.[11]

Ramo, on the other hand, comments on Rabbi Karo's ruling, "there are those [authorities] who rule stringently and assert that glass may not be *kashered*, and this is the practice in Germany and these [Eastern European] lands." The Vilna Gaon (*Biur Hagra* to *Orach Chaim* 451:50), *Mishnah Berurah* (451:154), and *Aruch Hashulchan* (451:50) all explain that the Ramo is following the opinion of the *Rishonim*

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11. Rabbi Shlomo Kluger (*Tuv Taam V'Daat* 3:2:25) and Maharam Shick (*Yoreh Deah* no. 141) write that Rabbi Karo's ruling does not apply if hot food was placed in a glass utensil. Both *Sdei Chemed* and Rabbi Ovadia Yosef reject this interpretation of Rabbi Karo's ruling.

who rule that glass utensils have the status of earthenware in the context of *kashering* as well as ritual impurity. Rabbi Ovadia Yosef (*Yabia Omer* 4: *Yoreh Deah* 5:31), though, adopts the approach of Rabbi Yaakov Emden (*Mor Uketziah* 451) who explains that Ramo follows the opinion of Raah cited by Ritva, that in principle glass, like metal, may be *kashered*, but in practice we forbid it. Since glass is delicate we possibly may not kasher it properly. For example, we may not heat the water sufficiently or we may not cover the entire utensil with boiling water. Raah, therefore, rules that we may not *kasher* glass lest we believe we have *kashered* it properly, when in fact we have not.

V Ramo — Prohibitions Other Than Passover

Ramo records his stringent ruling concerning glass in the context of the laws of Passover. Some authorities (*Knesset Hagedola, Yoreh Deah* 121; *Kehal Yehuda, Yoreh Deah* 121; and *Zera Emet* 2: *Yoreh Deah*:43) believe that Ramo's stringent ruling applies exclusively to Passover. These authorities point out that halachic authorities generally rule more stringently on Passover issues relative to most other areas of halacha. They also believe that this distinction may be inferred from Ramo's glosses to *Shulchan Aruch*. In the laws of wine (*Yoreh Deah* 135:8), Rabbi Karo rules that glass utensils used for storing non-Jewish wine may be used, and Ramo makes no comment. These authorities interpret Ramo's silence as signaling agreement with the ruling that glass does not absorb, in halachic contexts other than Passover.

Magen Avraham (451:49) disagrees. He writes that Ramo's silence in the context of the laws of wine should be understood as the exception, rather than the rule, since drinking non-Jewish wine is one of the less stringent rabbinic prohibitions. Thus, in kashrut issues other than wine, Ramo would rule that glass utensils cannot be *kashered*. This also appears to be the opinion of *Taz* (*Orach Chaim* 87:2). *Pri Megadim* (*Orach*

Chaim, Mishbitzot Zahav no. 30), and *Aruch Hashulchan* (*Orach Chaim* 451:50) distinguish between utensils which have absorbed hot food and those which have absorbed only cold. Biblically, absorption takes place only with hot items; the Rabbis added that absorption will take place even with cold items if they remain in a container for twenty-four consecutive hours. *Pri Megadim* and *Aruch Hashulchan* rule that one can be lenient regarding "cold absorption" in the case of glass. According to this approach, Ramo did not comment on Rabbi Karo's ruling in the laws of of wine because Rabbi Karo is not speaking of glass that absorbed hot non-kosher food. However, *Mishnah Berurah* (451:156) rules that one may not *kasher* glass even if it absorbed only cold non-kosher food, except for exceptional circumstances.[12]

VI Contemporary

It is generally accepted that Sephardim follow Rabbi Karo's ruling that glass does not absorb even hot food and need not be *kashered* even for Passover. Similarly, it is generally accepted that Ashkenazim do not *kasher* glass for Passover save for exceptional circumstances. However, there is an active debate whether one may *kasher* glass utensils for use other than for Passover. Rabbi Waldenburg (*Tzitz Eliezer* 9:26) cites Rabbi Yehudah Leib Zirelson who believes that the accepted practice is never to permit glass utensils to be *kashered*. This is also the opinion of Rabbi Shmuel Wosner (*Shevet Halevi Yoreh Deah* 1:43). On the other hand, Rabbi Aaron Felder (*Oholei Yeshurun* p. 87 n. 82) cites Rabbi Moshe Feinstein who accepts the opinion that glass utensils do not absorb even hot foods and need not be *kashered* for non-

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12. See the distinction made by *Aruch Hashulchan* (*Orach Chaim 451:50*).

Passover use.[13]

Many authorities adopt a compromise position. They rule that glass absorbs hot foods and yet may be *kashered.* Adherents of this views include Rabbi Waldenburg (*Tzitz Eliezer* 6:21), Rabbi Yosef (*Yechave Daat* 1:6 — regarding Ashkenazim), Rabbi Yechiel Yaakov Weinberg (*Seridei Eish* 2:36), and Rabbi Weisz (*Minchat Yitzchak* 1:86). These authorities, generally speaking, do not base their ruling on the Talmud's comparison of glass to metal. Rather, it is a compromise between the opinions which rule that glass *may* not be *kashered* and those who rule that glass *need* not be *kashered* because it does not absorb.

Rabbi Menachem Genack, Rabbinic Administrator of the Kashruth Division of the Union of Orthodox Jewish Congregations of America, reports that his organization inquired of Rabbi Moshe Feinstein whether one may wash glass utensils in a non-kosher dishwasher. Rabbi Feinstein ruled that one is permitted to do so.[14] When his organization posed this question to Rabbi Joseph B. Soloveitchik, however, the Rav ruled that it is forbidden to do so.[15]

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13. A number of prominent Rabbis have expressed their opinion to this author that common practice reflects this opinion (see Rabbi Shimon Eider, *Halachos of Pesach*, p. 139).

14. Rabbi Genack related this incident at a lecture for Rabbinical students at Yeshiva University.

15. A similar question may be raised whether one may wash dairy glass utensils in a "meat" dishwasher and vice versa. Rabbi Feinstein would rule that this is permissible because he rules that glass does not absorb and because he rules that meat and dairy dishes may be washed in the same dishwasher if different racks are used. Moreover, it would appear that Rabbi Feinstein would not require the racks to be changed when glass utensils are washed, in light of his ruling that glass is non-asorbent.

Even if one does not accept Rabbi Feinstein's lenient opinion

Accordingly, it appears that the majority of the outstanding contemporary rule that glass is not considered to be nonporous, even for non-Passover use, but may be *kashered*. Rabbi Hershel Schachter, Rosh Kollel of Yeshiva University, rules that glass may be *kashered*; however, he requires it to be *kashered* three times.[16] Similarly, one should not use glass utensils for both meat and milk if either type of food is hot.[17]

VII Pyrex and Duralex Utensils

Rabbi Waldenburg (*Tzitz Eliezer* 9:26) and Rabbi Yosef (*Yabia Omer* 4:41) adopt opposing views regarding pyrex and duralex utensils. Rabbi Waldenburg believes that Rabbi

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regarding use of a dishwasher for both meat and dairy utensils (it is reported that Rabbi Joseph B. Soloveitchik did not accept this ruling of Rabbi Feinstein; see generally Rabbi Yisrael Rozen "Washing Meat and Dairy Dishes in the Same Dishwasher," *Techumin* 11:13-136 and *Badei Hashulchan Hilchot Basar Bechalav* p. 309), the question remains whether one may wash milk glass utensils in a meat dishwasher and vice versa. The answer depends on how one resolves the issue of whether halacha regards glass as nonporous regarding non-Passover issues.

16. Rabbi Schachter requires this to accommodate the opinion of *Baal Haittur* (*Shaar Hechsher Habasar)* that earthenware may be rendered kosher by placing it in boiling water three times.

Although *Baal Haittur's* opinion is not accepted as normative halachic practice, it is used as a consideration in rendering halachic opinions; see *Aruch Hashulchan, Yoreh Deah* 121:26-27; *Melamed Lehoil* 2:52; and *Iggerot Moshe* 3:26-29). Accordingly, Rabbi Schachter wishes to use the opinion of the *Baal Haittur* as a consideration (*"Snif l'hakel"*) to rule that one may *kasher* glass.

17. Halacha's standard for determining whether something is hot is whether it is *"yad solet bo"* — the temperature which causes one's hand to be with drawn spontaneously for fear of being burnt; (see Rabbi Shlomo Zalman Auerbach, *Minchat Shlomo* 91:8, and Rabbi Shimon Eider, *Halachos of Shabbos* p. 243 n. 19.)

Karo's lenient ruling regarding glass does not apply to pyrex and duralex since these materials differ significantly from conventional glass. Rabbi Waldenburg feels that Rabbi Karo's ruling pertains specifically to conventional glass and we may not extend it to other materials despite its great similarity to conventional glass. Rabbi Yosef, on the other hand, suggests that Ramo's strict ruling is limited to conventional glass which may break when placed in exceedingly hot water. This interpretation of Ramo follows Raah, who believes glass can be *kashered* in principle but not in practice. Since pyrex and duralex are designed to withstand heat and boiling water, Ramo's reasoning would permit utensils made of these materials to be *kashered* even for Passover. We should recall, however, that the *Gra*, *Mishnah Berurah*, and *Aruch Hashulchan* disagree with this interpretation of Ramo. Interestingly, though, Rabbi Waldenburg at the conclusion of his responsum cites Rabbi Zvi Pesach Frank's ruling that pyrex may be *kashered* even for Pesach if it is *kashered* three times.[18]

Nevertheless, these authorities would agree that Ashkenazim should not use pyrex and duralex for both meat and milk, since most authorities agree that glass absorbs and we have no reason to view pyrex and duralex as exceptional.

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18. It is important to note that Rabbi Waldenburg does not write that Rabbi Frank limits his ruling to instances of great need. Rabbi Waldenburg, though, does not state the reasoning of Rabbi Frank. One may suggest that it is based on a combination of three considerations: 1) the authorities who rule that glass is nonporous, 2) Rabbi Yosef's reasoning regarding pyrex, 3) the opinion of *Baal Haittur* regarding earthenware.

The Chronic Vegetative Patient: A Torah Perspective

Fred Friedman, M.D.

The Mishnah in tractate *Sanhedrin* states[1] "כל המקיים נפש אחת מישראל. . . כאלו קיים עולם מלא — He who saves a single life is as though he has saved an entire world." As is well known, *Pikuach Nefesh*, saving a life, is considered a great mitzvah and with the exception of three prohibitions — murder, idolatry and adultery — overrides all other mitzvot in the Torah. With the advent of modern medical technology, however, the initial straightforward command of saving another's life acquires new and unforeseen challenge. In previous generations only a few limited measures were

1. סנהדרין לז.

מאמר זה נקדש לזכר נשמת אמי
גיטל פשה בת רב נפתלי חיים ע"ה
תנצב"ה
This article is dedicated in loving memory of the author's mother
PEPA FRIEDMAN

Member, Yeshiva University Chaver Program 1988-90; Faculty Member, Albert Einstein College of Medicine; Doctor of Internal Medicine.

available to the medical practitioner to prolong life and occasionally heal the infirm. Today, medical technology with its many strides and accomplishments has created a new and unforeseen situation: After sustaining near-fatal trauma, individuals can be maintained in a prolonged state of unconsciousness, referred to in the medical literature as a chronic vegetative state. They are technically alive and therefore receive the full armamentarium that medical science has to offer.

The questions that physicians encounter in these situations often place them in a moral and ethical dilemma. Does the Torah obligate one to prolong life under all circumstances? Is care-giving in this situation an act of healing despite the small likelihood of returning the patient to a functional life-style? Or is it an act traumatizing both body and soul, preventing both from returning to their origins?

Besides the emotional and philosophical dilemma created, the cost to society to maintain such patients is staggering. Currently costs of one thousand dollars per day are common, and such patients can survive up to two or three years in this state. Total costs for one patient can exceed one million dollars. This article will attempt to define the extent of the obligation to heal in the chronic vegetative patient as it is found in halacha, and the parameters around which it functions.

In order to facilitate the discussion, the following case scenario is provided:

Mr. C is an 87-year old nursing home resident who has had two strokes in the past with a progressive dementia. He is unable to feed or care for himself, and his speech is unintelligible. He was brought to the hospital after suffering a massive stroke requiring that he be placed on a mechanical ventilator (a machine to assist him in breathing) and medication to artificially maintain his blood pressure. The

patient is transferred to the Intensive Care Unit, where his condition slowly but steadily deteriorates. He has failed numerous attempts to be weaned from the mechanical ventilator and remains dependent upon it to sustain his life. His kidneys have ceased functioning and he will require dialysis to maintain his life functions. He cannot eat and requires that a tube be inserted through which liquid food is instilled through his nose into his stomach. His body develops frequent skin ulcerations and requires multiple surgical procedures to debride dead infected skin. Over time, these lesions will grow in size and develop into large, gangrenous sores which eventually — perhaps in one to three years — cause the demise of the patient.

To simplify the discussion, the following questions will be addressed:

1) Is this person considered halachically alive or dead?

2) If he is alive, can he recover?

3) If medical science feels the patient cannot recover, will the halacha accept this as fact? Or will halacha require that we consider even the smallest likelihood of recovery? Perhaps one individual out of a million might regain consciousness and therefore society must care for the remainder, lest we deny that single individual the life he might have had?

4) If he is alive, is the obligation to provide medical care still in force? Does the Torah mandate the physician to minister to this man, and would failure to do so violate a Torah law? If so, which one?

5) Specifically, which modalities or treatment can be withheld and which cannot?

Alive Or Dead

Often, when discussing the chronic vegetative state, the discussion devolves to a debate on the acceptability of "brain death" before halacha. The issue of "brain death" however, is not strictly relevant to this discussion. In order to meet the current criteria for "brain death" a portion of the brain called the brainstem must be demonstrated to be without blood supply, and therefore not functioning. When this occurs, the patient will not survive longer than seven days. Our discussion, however, as will be explained shortly, is referring to patients who survive more than two weeks. After this period of time, the prognosis of the patient is better determined. The issue of "brain death," therefore, is not related to our discussion, and the chronic vegetative patient is considered alive halachically. (Note: Most contemporary *poskim* today do not accept "brain death" as sufficient to define an individual as dead in halacha.)

Chances For Recovery

This entire discussion is predicated upon the assumption that the patient in a chronic vegetative state will never regain consciousness. How certain are we that this is true? Several large studies appear in the medical literature which have investigated the prognosis of chronic vegetative patients. One investigator followed one hundred and ten patients in a chronic vegetative state for up to three years without any of them able to regain activity as a social human being.[2] Another investigator[3] followed 500 patients with coma from

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2. Higashi, K. et al: "Epidem. Stds Veg. State" *J Neurol Neurosurg Psychiatry* (1977) 4-" 876-885.

3. Levy, D.E.; Bates, D.; Caronna J.J. et al: "Prognosis in Nontraumatic Coma" *Annals of Internal Medicine* 94: 293, 1981.

nontraumatic causes for up to one year. He found that the prognosis for recovery from coma was function of time and cause of the coma. Patients who failed to demonstrate specific neurologic signs — i.e., absence of: eye opening, pupillary light reflexes, corneal reflexes, spontaneous eye movement, oculocephalic and oculovestibular reflexes — at seven days never regained any independent function after one year of observation. Although different criteria were used in these various studies, all of them conclude that if a patient, after two weeks of being comatose, fails to regain independent functioning, he will essentially never do so. This conclusion has been corroborated by other investigators and by the personal experiences of many physicians. Reports of people recovering from a coma are generally limited to an early recovery within the two-week period as mentioned.

Concern For The Improbable

There is a principle in halacha called אין הולכין בפיקוח נפשות אחר הרוב "One does not follow the rule of majority in cases of life and death."[4] This rule is generally applied in cases where evidence based on the principle of רוב (majority) will influence the adjudication of a case involving the life or death of an individual. It would seem, therefore, that if this principle is applied to our case, we cannot rely on the medical data mentioned above, as these studies are limited in their scope. One could argue that all medical studies are intrinsically limited by the size of their study population, and if a sample a thousand times larger were used, perhaps another result would be obtained.

This issue of the applicability of רוב was discussed by

4. יומא פד:.

Rabbi Moses Sofer.[5] The case he discussed involved the custom in one city of delaying burying the dead for up to three days, until the body began to decompose, in order to be certain that the person was not in a coma and would not regain consciousness.

The Chatam Sofer stated unequivocally that the principle of אין הולכים בפיקוח בנפשות אחר הרוב does not apply to situations that are beyond reasonable doubt. Even though one such episode had occurred in Europe in the recent past, such occurrences are very rare and do not influence the halacha. It therefore seems that with regard to our discussion the halacha would accept the medical statistics as fact, and that one should not be concerned about the finite possibility, however small, of potential recovery of the chronic vegetative patient.

Obligation To Heal

The source in the Torah for the obligation to care for the sick and infirm is twofold. Often, the verse regarding compensation for damage — "He must pay for his [neighbor's] lost work and healing, and he shall be healed"[6] — is cited as the source for the obligation to heal. However, the Gemara[7] clearly states that this verse only gives permission to the physician to heal[8] lest he be seen as interfering in the execution of G-d's will by preventing this person from enduring his illness as G-d had intended. The Gemara[9] gives two sources for the obligation to heal. One

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5. שו"ת חתם סופר יו"ד סימן של"ח.
6. שמות כא', יט'.
7. ב"ק פה.
8. רש"י שם.
9. סנהדרין עג.

is a negative command — "Do not stand by your neighbor's blood."[10] The second is the positive command of returning a lost object.[11]

The mitzvah of "do not stand by" is interpreted in different ways in the Talmud. In *Sanhedrin* 73a, the Gemara applies this command to the case of a man being pursued by a murderer, or mauled by a wild beast, or drowning in the sea. The Gemara concludes that one must do everything in one's power directly or indirectly to see to it that no harm befall his neighbor.

The Midrash *Torat Kohanim* applies the verse to a situation in which one knows testimony beneficial to another, whether in regard to life or property. If he fails to testify, he would violate the prohibition of "standing on his neighbor's blood" ("Blood" in the verse refers to a general sense of physical or material harm. One cannot stand idly by while harm befalls another person. In *Shulchan Aruch*[12] the law is even extended to include the outlay of funds to appease potential troublemakers of one's friend.

According to some authorities[13] one is even obligated to place oneself in possible, but not certain, danger to save one's fellow Jew.

The mitzvah of השבת אבידה (returning a lost object) is extended by the Gemara to include caring for the sick. The Gemara states[14] ממונו גופו לא כל שכן - " [If one must restore] another's lost property, most certainly [one must restore] his

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10. ויקרא יט, טז.
11. דברים כב, ב.
12. חו"מ תכ"ו.
13. הגהות מיימוניות הל' רוצח פרק א'.
14. סנהדרין עג.

health!" In this analogy, the sick person is seen as having lost his health, and the physician, by curing him, as returning it. Of course, one might challenge this analogy by insisting that it seems ludicrous to compare returning a nickel to saving a life. However, the Torah's intention is not to assert that both acts are of equal worth, but rather to set a minimum standard which must be followed. The Torah is teaching us that each individual must be concerned not only with the physical health and safety of his neighbor, but that even his material well-being is one's concern.

The mitzvah of returning a lost object has several components.[15] When the lost object first comes into view, one may not look away from it or ignore it. As it says[16] "לא תוכל להתעלם — one may not ignore a lost object." Once the object reaches the hand of the finder, he then becomes obligated in the positive command of returning it. If the owner of the article loses hope of recovering his lost object (יאוש), it becomes ownerless and there is no longer any obligation to return it; the finder may keep it.

As described, the obligation of a physician to heal is two sided — a positive command to return a person's health and a negative command not to stand idly by and watch harm befall another. It would follow then, that if one believes that under specific circumstances there is no obligation upon an individual to seek medical treatment (a concept to be elaborated upon) there should consequently be no obligation upon the physician to treat the patient. This might be compared to an object which the owners have abandoned and therefore no obligation exists upon the finder to return it.

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15. חו"מ רנ"ט.

16. דברים כב, ג.

With respect to the chronic vegetative patient, what is the extent of a physician's obligation to care for him? Must all means available be utilized to prolong the life of this person? Does the obligation to heal extend even to chronically vegetative patients? Or can one argue that there is no obligation upon the patient himself — and therefore certainly not upon the physician — to continue treatment as no cure can be effected? The most that can be achieved is the prolongation of pain and suffering. On this issue there are several opinions as will be discussed below.

In addition to the obligation to heal, the Talmud also discusses the obligation of the patient to pursue being healed. The Gemara[17] distinguishes between חיי עולם (long-term life) and חיי שעה (short-term life). חיי עולם is understood by *poskim* as the possibility of living longer than one year[18] and חיי שעה as less than one year. The Gemara concludes that במקום חיי עולם אין חוששין לחיי שעה — "when considering long-term life one does not take into consideration short-term life." Consequently, a person is obligated to undergo surgery if that can effect a cure — or prolong life for one year — if the operative risk is small. Rabbi Moshe Feinstein[19] and others have ruled that one is even obligated to endure pain and suffering in order to prolong life, when long-term life will be obtained. As the risk to the patient grows and the probability of cure diminishes, this halacha becomes more controversial. (The reader is referred to other sources for further details.[20])

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17. עבודה זרה כז:.

18. אגרות משה יו"ד חלק ג' סימן ל"ו דף ער.

19. שם חו"מ חלק ב' סימן עג' אות ה'.

20. נשמת אברהם יו"ד סימן קנ"ה סעיף קטן ב' - הוא מביא דעות של ספר החיים או"ח ס' שכ"ח ושו"ת לב אריה חלק ב' סימן לה' ודעת רב ש. ז. אויערבעך שהמבחר מצטט.

The extent of a person's obligation to undergo pain and suffering in order to prolong life for a short while is less clear. The Gemara[21] relates the following story:

On the day that R. Yehuda the Prince lay dying, in great pain and distress, a fast was proclaimed and everyone prayed for mercy. The maidservant of Rebbe ascended to the roof and proclaimed, "The heavenly ones want Rebbe and the mortals want Rebbe. May it be Thy will, O L-rd, that the mortals should persuade the heavenly ones." But when she saw that Rebbe continued suffering, placing and removing his Tefillin to go back and forth to the toilet, she pleaded that the angels should persuade the mortals (and allow him to die), but still to no avail. Finally, she then ascended to the roof and threw some dishes to the ground; when the crowd stopped praying for an instant due to the distraction, Rebbe died. The Gemara elsewhere describes the maidservant of Rebbe, known for her wisdom in Torah; often a halachic dispute was resolved based on her practices. Thus, her deeds are recorded with approval.

Another talmudic text which sheds light on the normative law is the comment in *Nedarim* 40a, describing the importance of visiting the sick — here the Gemara notes that if one fails to visit the sick, he will not be able even to achieve the smaller mitzvah, of praying for the death of the ill person.

Based upon these two sources in the Talmud, Rabbenu Nissin (the Ran) and modern day *poskim* such as R. M. Feinstein conclude that there are instances where praying for death is permissible.[22] Rabbi Feinstein[23] extends the

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21. כתובות קב.

22. אגרות משה חו"מ חלק ב' סימן עד' אות ד',
Rabbi Feinstein qualifies this statement and limits it to individuals

intent of the Gemara to apply even to acts of healing, stating explicitly that a patient with a terminal illness whom the physicians are unable to heal or to ameliorate his suffering, but can only prolong his life as it now is with pain and suffering, should not be treated. Rather, he should be left as he is and only medicines to relieve his pain should be given. This opinion coincides with previous opinions from Rabbi Feinstein[24] that permit a patient to refuse medical therapy in certain instances. The specific applications of R. Feinstein's ruling will be elaborated upon later.

This position, however, is not universally held. Rabbi Shlomo Z. Auerbach[25] is of the opinion that one may not withhold "routine medical care or natural human needs" (e.g. nutrition) from a person who is suffering greatly from a terminal illness, despite the fact that this will prolong his suffering. Consequently, he requires that "antibiotics be administered to patients with infections even if this prolongs their illness without hope of cure; that intravenous insulin be maintained to control high blood sugars; that blood transfusions be given to maintain the blood count and similar measures regarded by physicians as standard medical practice in the case of ill patients." However, he does not endorse cardio-pulmonary resuscitation in these patients and does allow the administration of morphine despite the risk of causing a cardio-pulmonary arrest. This can be done, according to him, only if the intention of the physician is to relieve pain and not to shorten the patient's life.

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with outstanding piety whose prayers G-d attends fervently. In practical terms, our generation does not include such pious people, and Rabbi Feinstein therefore discourages praying for death.

23. סימן עג' אות א'.

24. שם, יו"ד חלק ג'סימן ל"ו דף עה.

25. נשמת אברהם יו"ד סימן של"ט סעיף קטן ג' דף רמה.

The rationale of Rabbi Auerbach seems to be that even with respect to short-term life there is still an obligation upon the patient (and consequently the physician) to prolong life despite suffering. A person, however, is only obligated to seek standard medical therapy and not unconventional treatments. This approach differs markedly from Rabbi Feinstein's, who feels that no obligation to prolong short-term life exists in the presence of pain and suffering.

With regard to the case of the chronic vegetative patient, another factor must be considered. The Talmud uses the term "*Goses*" to describe a person who is on his death bed. A *Goses* is described as a person whose death is imminent but unpredictable and who "because of the narrowness of his windpipe brings up secretions."[26] (The current pathophysiological explanation would be a person who is asphyxiating on his own secretions which accumulate in the airway.) It is prohibited to move a *Goses* or hasten his death by even a moment, and if it is done, such an act is considered a form of murder.

However, the Ramo[27] rules that one is allowed to remove an "impediment to death" and allow the *Goses* to die naturally. The case the Ramo describes is of a *Goses* being kept alive by the sound of a nearby woodchopper chopping wood. He states explicitly that one may tell the woodchopper to stop chopping, despite the fact that this will indirectly hasten his death. Clearly then, one can conclude that there is no obligation to prolong the life of the *Goses*. If there were, the woodchopper would have to continue endlessly his wood chopping to sustain the life of the *Goses*!

The relevant question to our discussion then becomes,

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26. רמ"א אה"ע סעיף ז, ס"ק כ"א.

27. רמ"א יו"ד סימן של"ח.

what is the status of the respirator-dependent chronic vegetative patient? Is he a *Goses*? If so, can medical therapy be withheld under the provision of removing an impediment? Or, should we consider a respirator-dependent chronic vegetative patient to be in a state different than a *Goses*, in which case the ruling of the Ramo is not applicable?

Another alternative suggested[28] is that the Ramo would also permit removal of an impediment to death in a patient who is suffering, even if he is not a *Goses*, but has only a short life expectancy. The fact that the ruling of the Ramo is found in the context of a *Goses*, according to this view, only reflects the limited diagnostic and therapeutic abilities of the sixteenth century. This argument is essentially the opinion of R. Feinstein, extended into the Ramo.

This issue is highly controversial and as yet unresolved in the halachic literature. Arguments supporting the application of the status of *Goses* to the respirator-dependent vegetative patient often proceed as follows: The vegetative patient is dependent on a machine to breathe for him. If that machine were removed, the patient would, in a matter of minutes, turn blue and die. Therefore, one cannot conceive of a greater pre-morbid situation. In fact, the Talmud describes a *Goses* who can talk and effect legal transactions,[29] implying that the *Goses* is likely healthier than the chronic vegetative patient.

Opponents of these arguments counter that the Talmud states that the overwhelming majority of *Gosesim* can live no longer than three days[30] and that our patient, by surviving

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28. רב צ. שכטר בית יצחק (הוצאת ישיבת ר' יצחק אלחנן) תשמ"ט כרך כא.

29. גיטין כח., עיין תוס' ד"ה לא צריכא קידושין עח:, וטור ושו"ע אבן העזר סימן קכ"א סעיף ז'.

30. טור, שו"ע יו"ד של"ט סעיף ב'.

much longer, disqualifies himself from the status of *Goses*. Other *poskim*[31] acknowledge that had artificial ventilation been available in the days of the Talmud, perhaps such a statement might not have been made. Nevertheless, one may still only consider the respirator-dependent vegetative patient a ספק גוסס — a possible *Goses* — and according to talmudic law the more stringent rules of each possible status apply. (That is, if labeling him a *Goses* would prohibit moving him, then that rule applies; if it would permit withholding therapy, then it does not.)

Another authority[32] suggests that the functional integrity of the vital organs should be the determining factor. This author employs the concept of organs which are essential for life (אברים שהנשמה תלויה בהם (אשהנת"ב)) — to define death and the status of *Goses*. The author quotes a discussion in *Shulchan Aruch*[33] regarding the definitions of animal death in which the debate centers around whether the loss of one or only the loss of all vital organs is required to define death halachically. For instance, if the liver, brain, lung and heart are אשהנת"ב (vital organs which are life sustaining), is the loss of one organ, or all of them, required by halacha to define death. This question is unresolved in halacha and therefore the more stringent opinion in each individual case must be followed. (That is, in most situations loss of all אשהנת"ב would be required to declare the animal dead.) Furthermore, this authority contends that the loss of an organ can be determined by the blood flow to that organ. That is, if it can be determined that blood flow to an organ has ceased, then that organ can be considered "dead"; and if blood flow is severely diminished such that an irreversible process has

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31. רב י. ש. אלישיב, נשמת אברהם חלק ד' דף קל"ח

32. רב צ. שכטר, בית יצחק כרך כא 120-123.

33. פתחי תשובה יורה דעה סימן מ' סעיף קטן א.

begun which will lead to organ death, that situation, if extended to a sufficient number of אשהנת"ב, would correspond to a state of *Goses*. The application of this concept to the clinical situation requires further discussion and study.

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The nature of the obligation to care for the chronic vegetative patient is complicated and controversial. Proponents of the view that the Torah does not obligate one to care for the chronic vegetative patient argue as follows: Such patients, as described earlier in the case scenario, are without hope of recovery and can be considered as having only a short-term life filled with pain and suffering.[34] According to the opinion of Rabbi Feinstein, one is only obligated to relieve pain and not institute therapeutic modalities. Alternatively, one can also argue that the respirator-dependent vegetative patient is a *Goses* and therefore no obligation to prolong his life exists.

Proponents of the view that the obligation to heal is still in force argue as follows: An individual is obligated by the Torah to sustain himself in this world and even endure pain and suffering to prolong even short-term life. They further reject the application of the status of *Goses* to the respirator-dependent vegetative patient and consequently hold that failure to care for this patient would be a violation of לא תעמוד על דם רעך (do not stand idly by...).

Discontinuation Of Treatment

As mentioned, a body of opinion exists that places limits on the obligation to heal the chronic vegetative patient. Which therapies can be withheld or even discontinued

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34. אגרות משה חו"מ חלק ב' סימן ער' דף שא.

according to this position? For simplicity, three categories of interventions will be discussed: therapeutic, nutritional, and life-sustaining.[35]

Therapeutic modalities include (A) antibiotics for infections that frequently develop in the vegetative patient, such as pneumonia, skin infections, or generalized asepsis, (B) surgical procedures to correct potentially serious problems such as internal bleeding or gangrenous bowel, (C) dialysis to maintain the body's chemical equilibrium. (Although dialysis is also life-sustaining over several days, discontinuation of dialysis generally will not result in the immediate death of the patient and is therefore classified as therapeutic rather than life-sustaining.)

Nutritional modalities include (A) liquid feeding via a nasal-gastric tube, (B) intravenous fluids.

Life-sustaining modalities include (A) a mechanical ventilator to breathe for the patient, (B) blood pressure medications, such as dopamine, to maintain an adequate blood circulation.

According to the opinion of R. Feinstein mentioned earlier, there is no obligation to treat the underlying illness but rather only to relieve the suffering of the patient. This would seem to imply that all therapeutic interventions listed need not be administered. Rather, alternatives can be found to relieve the patient's pain or discomfort without prolonging life.[36]

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35. These categories are the author's own classifications which are presented as illustrative examples.

36. There appears in the *Iggerot Moshe* (חו"מ חלק ב' סימן עה') a Responsum from Rabbi Feinstein which may seem to contradict the conclusion just mentioned. It concerns the treatment of a patient with two concurrent illnesses. Rabbi Feinstein discusses the case

Rabbi S. Z. Auerbach[37] is of the opinion that one has a religious obligation to prolong even short-term life under all circumstances even if this happens to prolong a person's pain and suffering. However, he acknowledges that there is no obligation upon others to compel or strongly persuade the patient to fulfill his religious obligation. Therefore, if a patient suffers greatly from an illness and refuses the above-mentioned therapies, one is not obligated to persuade him to accept them.

With regard to the vegetative patient, the situation is more complicated. If the patient himself has expressed a desire not to have his life prolonged in such a manner or the family states that he would have expressed such a desire under these circumstances, would it then be permissible to withhold therapy? Rabbi S. Z. Auerbach has written that the halacha requires that therapies which do not entail great pain to the patient, such as intravenous antibiotics, insulin, or blood transfusions, must be instituted. However, surgical procedures which are inherently painful need not be done

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of a patient with a terminal illness who, in the estimation of his physicians, will likely live only seven days, but has contracted another illness — such as pneumonia — which may shorten his life even more. Rabbi Feinstein ruled that one must unequivocally treat the patient with antibiotics despite his poor prognosis, and even expresses consternation at the question. This seems at odds with what has been stated above. However, it is clear that these two cases are different. This case is referring to a patient who has short term life, חיי שעה, without great pain and suffering, consistent with previous rulings of Rabbi Feinstein that one must prolong short-term life if it will not impose on the patient a terrible burden of pain and suffering. The case of the chronic vegetative patient involves short-term life with pain and suffering and therefore no obligation to heal exists (אגרות משה חו"מ חלק ב' דף שא סימן עד).

37. מנחה שלמה סימן צא' אות כד' תקנ"ז.

against the will of the patient although he has a religious obligation to undergo them.

The administration of liquid feeding enterally (i.e. via the digestive tract) or parenterally (via intravenous) poses a different set of halachic issues. One author[38] compares the withholding of nutritional support to an act of premeditated starvation, quoting the Gemara in *Sanhedrin*[39] which discusses the case of a man who was tied up and left to die of hunger, or left in the shade and later died of sun exposure. The Gemara concludes that this is an indirect form of murder. Although the case of the chronic vegetative patient is not completely analogous to this situation, as no mortal act of physical restraint exists, the failure to provide appropriate access to food is construed by this author to be similar to an act of indirect murder, גרם רציחה.

This opinion, however, is viewed by many as extreme. Although all authorities[40] agree that no patient or physician has the right to refuse to accept or provide feeding and that they must be given to the patient even against his will, most authorities would not label such a refusal to be an indirect form of murder. Rabbi Feinstein, in his responsum, refers to nutrition as "a natural biological need" which is understood to refer to the need of all living creatures to have access to nutrition and their consequent obligation to sustain themselves in this world. Failure to avail oneself of sustenance can thus be construed as a challenge to creation and the Creator.

The discontinuation of life-sustaining medical treatment involves several issues. As mentioned earlier, the status of

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38. רב מ. הרשלר, הלכה ורפואה חלק ב' דף ל'-לה'.
39. סנהדרין עז.
40. אגרות משה חו"מ חלק ב' סימן עד' אות ג'.

Goses may apply to the respirator-dependent chronic vegetative patient. If so, treatment that classifies as removal of an impediment to death (הסרת המונע) can be discontinued according to the Ramo. Thus, if one considers the mechanical ventilator or drug infusions for blood pressure control as removal of an impediment to death, one would be allowed, according to the Ramo, to discontinue such modalities. To date, however, only one halachic authority[41] has assumed this position in writing (with many qualifications) and this ruling has not, as yet, been applied to a real-life situation. Thus, whether one considers the respirator-dependent chronic vegetative patient to be a *Goses* or not, discontinuation of life-sustaining treatment, which will undoubtedly cause the rapid demise of the patient, at present is not sanctioned by most halachic authorities and may constitute a form of murder.

The case of withholding life-sustaining treatments (i.e. failure to initiate treatment as opposed to discontinuing it once begun) is a different issue. In general, Jewish Law does distinguish between failure to perform a specific act (שב ואל תעשה) as opposed to actively carrying out a certain deed(קום ועשה). Frequently, when faced with a halachic dilemma, a *posek* will rule in favor of שב ואל תעשה — "sit and do not act." With regard to withholding life support from the chronic vegetative patient, each modality listed above involves its own special circumstances and will be discussed separately.

The first case to be discussed involves withholding mechanical ventilation from the patient. Occasionally, the plastic tube in the patient's windpipe, which connects the patient to the mechanical ventilator, may become dislodged from its place. If the tube is not replaced within several

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41. שו"ת ציץ אליעזר חלק יג, סימן פט, וחלק יד, סימן פ, פא.

minutes, the patient will certainly die. If it is replaced, the pain and suffering of the patient which might have ended at that point will be prolonged indefinitely. What is the nature of the obligation to heal in this scenario?

An argument in support of not re-intubating the patient (replacing the tube) would proceed as follows: This patient once disconnected from the respirator will certainly die imminently and should be considered a *Goses*. Since there is no obligation to prolong the life of a *Goses*, there should be no obligation to reconnect the respirator.

Opponents of this argument counter that there is no obligation to prolong the life of a *Goses* such that he will remain a *Goses*. However, if one can treat the *Goses* and help him to regain his former חיי שעה (short-term life), one must do so. Also, one can argue that the pain of being unable to breathe is great, and in the interest of alleviating the suffering of the patient he should be reconnected to the mechanical ventilator. Others will counter that the pain and suffering to be endured by the vegetative patient over the next one to three years far outweigh the fifteen minute ordeal of being unable to breathe.

Rabbi Feinstein wrote several responsa which deal with this issue. In a responsum on heart transplants[42] Rabbi Feinstein does compare the respirator-dependent patient (the organ donor) to a *Goses* and does agree that no obligation to prolong the life of a *Goses* exists. However, in other responsa[43] Rabbi Feinstein emphasizes the need to alleviate the pain of a patient who cannot breathe, by administering oxygen. Rabbi Feinstein explicitly writes[44] that, "if it [the mechanical

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42. אגרות משה יו"ד חלק ב' סימן קע"ד אות ג'.
43. שם חו"מ חלק ב' סימן עג' אות א'.
44. שם יו"ד חלק ג' סימן קל"ב .

ventilator] stops working for it has run out of oxygen, one should not return it to his mouth until a period of approximately fifteen minutes has elapsed. For, if he is not alive anymore, he will stop breathing and we will know that he is dead. If he is alive, we will see him breathe without the machine, albeit with great difficulty, and the machine should be reconnected." Rabbi Feinstein clearly states that the presence of spontaneous respiration is a sufficient criterion by which life or death can be determined.

This responsum of Rabbi Feinstein must be reconciled with his previously-stated ruling that a patient may forego medical treatment if it only prolongs pain and suffering. The case mentioned here of a patient whose mechanical ventilation is interrupted due to a malfunction in the machine, does not involve the issue of right of refusal of treatment and is not mentioned at all in the responsum, which deals entirely with the definition of death in individuals who are comatose for a variety of reasons. Rabbi Feinstein emphasized the need to assess the patient's respiratory status in order to determine whether he is halachically alive or dead. However, if after the patient was originally connected to the ventilator it became known that this was against the patient's wishes, would Rabbi Feinstein then permit withholding the ventilator if it malfunctioned or the tube became dislodged? Or perhaps the obligation to alleviate the respiratory distress of the patient takes precedence? On this issue there is no clear decision found among Rabbi Feinstein's responsa.

The second case to be discussed involves the vegetative patient whose blood pressure drops precipitously and who requires medication (such as dopamine) to maintain blood perfusion to his vital organs. Unlike the previous case, this patient does not experience any *additional* pain or suffering with the drop in blood pressure. Therefore, if one considers the vegetative patient to be a *Goses* by virtue of his imminent

death, and also believes that no obligation to prolong the life of a *Goses* exists, it would be permitted to withhold such medication and allow the patient to die. Alternatively, one may argue that no obligation exists to prolong short-term life, dominated by pain and suffering, and he may withhold treatment on that basis. It would seem then that Rabbi Feinstein would permit withholding of medications such as dopamine in the chronic vegetative patient. Whether Rabbi Auerbach would require institution of artificial blood pressure control in this situation is unclear and will not be speculated upon.

In conclusion, the halachic issues involving the care of the chronic vegetative patient have been presented. Based on the opinions of contemporary *poskim*, arguments for and against placing limits on the obligation to heal have been outlined. The halachot involved clearly are complicated and controversial. Besides the legal ramifications involved, the emotional turmoil that family members experience is considerable. Physicians also often find themselves in an emotional and philosophical quandary. The Torah-observant physician is fortunate that he can turn to the halacha for guidance and reassurance. Whichever body of opinion outlined above he is advised by his rabbi to follow, he can be reassured that כל העוסקים עם הצבור לשם שמים, זכות אבותם מסיעתם — those who toil in the needs of the community for the sake of Heaven, the merits of their forefathers will assist them.

Erev Pesach On Shabbat

Rabbi Alfred Cohen

Probably the busiest and most hectic day of the year in every Jewish household is *erev Pesach*, the day preceding Passover, for it entails getting rid of the last smidgen of *chametz* as well as preparing for the Seder. Moreover, it is a day during most of which one may not eat *chametz*, yet matzoh is likewish forbidden, straining the ingenuity of the food preparer. This year there will be an added complication, as this year *erev Pesach* occurs on the Sabbath, which has requirements and restrictions of its own. This paper will explore the problems which may arise from these dual requirements and advance various solutions.

Before we begin, let us note the happy circumstance that the additional complication of observing the Sabbath on this so-busy day prior to Pesach brings with it some unexpected rewards: Having spent the day before Pesach resting, and refreshed by the Sabbath tranquillity, all will be able to participate in the Seder at night with true appreciation.[1]

Eating Chametz

As noted, for most of *erev Pesach* it is forbidden to eat bread (*chametz*), and yet matzoh is also not allowed. The

1. *Chok Leyisrael* p. 71, cites a custom to eat dairy foods on this Shabbat so as to induce drowsiness; sleep will enhance one's ability to enjoy the Seder at night. However, *Sefer Chassidim* 266, cited in *Be'er Hetev* 290, warns that one should not specifically state that he is sleeping on Shabbat so that he can be rested for the Seder after Shabbat. See also *Radvaz* 780.

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Shulchan Aruch rules that "it is forbidden to eat bread [on *erev Pesach*] from the tenth hour and on."[2] How then can we fulfill the Sabbath obligation to partake of three meals, each of which is accompanied by two loaves of "bread"?[3] Whether the "bread" be *chametz* or matzoh, when can it be eaten?[4]

There are a number of ways to meet this requirement. We can suggest a few, all of which have variations and permutations, briefly summarized as follows: We can eat challah at all three meals; we can use egg matzoh for all the meals; we can use challah Friday night and early Shabbat morning, and egg matzoh for the third meal in the afternoon; or (if we don't want to use egg matzoh), we can use challah Friday night and early Shabbat morning, and skip the third meal. As we shall see, each of these solutions has its own problem, yet there are various reasons to recommend each one.

Using Chametz

One solution is to get up very early, *daven*, and then before the tenth hour, eat a meal at which two loaves of

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2. *Orach Chaim* 471:1. For the halachic definition of "hour", see *Mishnah Berurah, Orach Chaim* 443:7,8.

3. It is interesting to note that *Mishnah Berurah, Orach Chaim* 470:11, totally dismisses the obvious option of forgoing having "bread" at these meals altogether, since having any type of bread raises so many problems. Even if one would argue that by skipping having substantial meals this Shabbat, the person will be able to appreciate eating all the more at the Seder, it cannot be countenanced. See also *Yechave Daat* VI:27.

4. There are additional questions which arise on *erev Pesach* which is Shabbat, such as which *haftorah* to read and when to gather for the *derasha* of *Shabbat Hagadol*. However, these and similar questions are of a communal nature, and we will not discuss them here.

bread or challah are served.[5] Indeed, this is the counsel of the *Shulchan Aruch*:

> When *erev Pesach* occurs on Shabbat, we search the house [for *chametz*] on the 13th [Thursday night] and destroy all [*chametz*] before Shabbat, but we leave over food for two meals which are required on Shabbat, but the time for the third meal is after Mincha [and, as we shall see, there is a halachic problem in eating a meal after Mincha before the Seder].[6]

Although this scenario takes care of the problem of having a meal on Shabbat with two breads, it does introduce the problem of getting rid of *chametz* on Shabbat. The usual ways of disposing of *chametz*, by burning or by sale, cannot be employed on Shabbat. Large pieces of *chametz* which are

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5. Together with the meal eaten Friday night, this will take care of two Sabbath meals. What to do about the third meal will be discussed later in the text. *Chok Leyisrael*, p.70, advises what a person should do if he forgot to leave over bread for this last meal. May he use matzoh instead?

In order to keep the *chametz* confined to as small an area as possible, some people may decide to eat the bread in one room, and then adjourn to the dining room to eat the rest of the meal, using Passover dishes. Where should *birkat hamazon* be recited? Where they washed and ate bread, or where they ate the majority of the meal? See solutions offered by *Erev Pesach Shechal BeShabbat*, p. 62.

There may also be a need to make new *berachot* when continuing the meal in this fashion in another room. See *Orach Chaim*,, 177:2.

It is also questionable whether one can make *kiddush* or eat part of the meal in a room where the Sabbath candles are not lit. This is a situation which arises not only on this particular Sabbath but also when a family goes to a hotel for Shabbat, where usually all the women light candles in a separate place, not in the dining room. For a full discussion of the halacha, see Ibid, p.104.

6. *Orach Chaim* 444:1.

difficult to destroy may be given to a non-Jew or else deposited in the garbage by a non-Jew. Cleaning the dishes and putting them away[7] is also a problem. In a modern vein, Rav Sternbuch has suggested that it would be desirable to use paper or plastic dishes which could be discarded after the meal, thus obviating the need to get the regular dishes clean on Shabbat and put them away.[8]

If for some reason, none of these options is feasible, the person should declare he is disowning any remaining *chametz*, cover it so that it is not visible, and burn it on *Chol Hamoed*.[9]

It is a mitzvah to eat warm foods on Shabbat, but the *Shulchan Aruch* warns that one should be careful not to cook *chametz* foods which will stick to the pot, since it will not be possible to clean it properly before Pesach.[10] Further nuances at this unusual meal include serving cold food which won't stick, so that it will not be necessary to scrape out the plates or pot. Then, later in the day, one can fulfill the mitzvah

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7. Preferably by a non-Jew or with a *shinui* (an "unusual" way of doing an action), *Mishnah Berurah, Orach Chaim* 444:15. *Shearim Metzuyanim Behalacha, kuntres acharon* 115:2 discusses what to do with the candelsticks which may be on the tablecloth. In *Erev Pesach Shechal BeShabbat*, which is probably the most exhaustive study of these laws, Rabbi Zev Cohen suggests that a child could remove the *chametz* (p.130), and offers suggestions for removal of the candlesticks if it is necessary to change the tablecloth (p.99). The question is also discussed in *Sedei Chemed* 7, pp. 160 and 429.

8. See *Mishnah Berurah, Orach Chaim* 444:18.

9. The *Chayei Adam* permits one to sell it to a non-Jew on Shabbat, but *Pri Megadim* and Graz do not. See *Shearim Metzuyanim Behalacha* 115:4 for further opinions on this.

10. *Shulchan Aruch, Orach Chaim* 444:3. Whether it is permissible to give the remainder to animals is discussed by *Moadim Uzemanim*, 7:160.

of eating warm food by eating food cooked in Passover utensils, on dishes which will be utilized for the rest of the Passover holiday. According to the *Mishnah Berurah*, this is the way they used to do it in Europe.[11]

Some of these practices are minor, but others involve severe biblical infractions. Rav Ovadia Yosef records that what to do on this Shabbat has long been a problem; an earlier rabbi of Alexandria, Egypt, had already bemoaned the mistakes arising out of ignorance, when

> ... *Erev Pesach* fell on the Sabbath, and how much anguish I have in my heart at the prohibitions and errors that occurred on this Sabbath due to the eating of *chametz*, because they were unable to be careful properly concerning crumbs of *chametz* and cleaning the house and the like, aside from the lack of Sabbath joy, inasmuch as they had to eat between the oven and the stove; furthermore, many were late in reciting the prayers on Shabbat, and it is possible that they ate after the time when it is prohibited.[12]

There are those who advise being scrupulous to rinse out the mouth very well, so that no *chametz* remains.[13]

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11. *Orach Chaim*, no. 14. See also *Erev Pesach Shechal BeShabbat*, p. 65.

12. *Yechave Daat* 91, n.11, based on *Responsa Taalumot Lev* I, 4. Rav Yosef wonders why the rabbis concerned themselves with the disposal of crumbs, inasmuch as the Gemara rules that "crumbs [are negligible] and 'nullify' themselves." The *Mishnah Berurah*, *Orach Chaim* 444:15 does too. *Eliahu Rabbah* 444 states that singing *z'mirot* should be skipped this Shabbat, in order to avoid possible delay in completing the meal on time.

13. *Ben Ish Chai, perashat Tzav*:8. He tells a story of an extremely pious individual to whom it was revealed in a dream that he was eating *chametz* on Pesach — and that it was due to inadvertently leaving some *chametz* between his teeth!

What about false teeth? Rav Ovadia Yosef sees little reason to do anything special with the teeth: since the food that one eats is not hot enough to be a problem halachically (otherwise he wouldn't be able to take it into his mouth) and since the teeth are not porous, little more than cleaning them well is required.[14] In an aside, he wryly mentions an individual who was unwilling to accept this lenient ruling and proceeded to deposit his false teeth in boiling water to "*kasher*" them — cracking them, and making it impossible for him to eat all Pesach![15] However, *Chok Leyisrael* does take a stricter view of the matter.[16]

Using Matzoh

One way to avoid all the problems attendant upon using *chametz* at the meal is simply to use matzoh for *lechem mishneh*. But the Jerusalem Talmud denigrates a person who eats matzoh on the day before Pesach "as if he had relations with his fiancée[17] in his father-in-law's house."[18] Does that mean that it is forbidden to eat matzoh during the entire day? What is the law? Actually, there are three opinions as to when the prohibition of eating matzoh begins:

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14. *Yechave Daat* 1:91, 8.

15. See *Beitza* 36b; *Yam Shel Shlomo*, ibid.

16. P. 66. See also *Moadim Uzemanim, Haggada*, p. 7. *Erev Pesach Shechal BeShabbat*, p.51, discusses whether it is necessary to "*kasher*" false teeth; if one pours boiling water over them on Shabbat, ostensibly to clean them but really with the intention of rendering them usable for Pesach, is this a permissible *haarama* or not?

17. The Hebrew term *Arusa* has no precise translation which conveys its halachic connotations.

18. *Pesachim* 10:1 and *Orach Chaim* 471:1.

(A) *From Six Hours and On.*[19] This time limit coincides with the time when eating *chametz* is forbidden on *erev Pesach*. In effect, whenever I may not eat *chametz* I may also not eat matzoh. If we accept this understanding of the rule, it would be permitted to use matzoh at the Friday night meal and also for the meal (or meals) very early on the morning of the Sabbath, but not for a meal later in the day.

(B) *The Entire Day.* This view holds that for the entire 24-hour period before Pesach, eating matzoh is precluded.[20] In this case, we could not use matzoh at any of the Sabbath meals before Pesach. The *Magen Avraham* considers this to be the proper view.

(C) *During the Day Only.* Although one could use matzoh on Friday night, it would not be permissible any time during the daylight hours.[21] Many accept this as the proper rule to follow.

In point of fact, R. Moshe Feinstein forbids eating matzoh during the day of *erev Pesach* and discourages its use even for the Friday night meal preceding.[22] However, he cautions that one should not reprimand someone who does employ the matzoh option on Friday evening. Furthermore, if there is cause for concern that by using *chametz* on Friday night and Shabbat morning it will raise serious difficulty in removing all the *chametz* properly before Pesach (in a hospital, for example), one may certainly use egg matzoh throughout the day of *erev Pesach* and recite all the usual blessings thereon.

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19. *Baal Hamaor Pesachim* 83. *Nimukei Yosef* and *Rosh* to *Pesachim*, chapter 3:7, concur.

20. Ramban at the end of chapter 3, *Pesachim*. Rambam, *Hilchot Chametz Umatzoh*, 6.

21. Meiri, *Pesachim* 13b; Ran, end of chapter "*elu ovrim.*"

22. *Iggerot Moshe, Orach Chaim* I, 155.

In addition to these strictly halachic criteria, there are also certain customs which are observed by many: some people stop eating matzoh from the beginning of the month of Nissan, while others stop after Purim.[23] However, no custom can ever be instituted which would have the effect of barring performance of a mitzvah. Therefore, if there were no other way for them to carry out the requirement to have three meals with *lechem mishneh* on this Shabbat, these persons, too, could use matzoh.[24]

Which Matzoh Is Forbidden

Considering the opposition of *Chazal* to eating matzoh before the proper time, it becomes essential to define precisely what qualifies as "matzoh" under the rubric of halacha. In the context of the rabbinic dictum, it is clear that only that product which is worthy to be eaten at the Seder is included in the category of matzoh which may not be eaten on the day preceding Pesach.[25] The only matzoh which can be used at the Seder to fulfill the mitzvah of matzoh is "a poor man's bread" — flat bread which is made from a mixture of flour and water only. If juice or eggs are added to or substituted for the water in the mix, it is called "*matzoh ashira*"[26] (egg matzoh), and is not suitable for the Seder. Similarly, plain

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23. *Mishnah Berurah*, *Orach Chaim* 470:11. See *Chok Leyisrael* p. 46, no.16, about eating matzoh on Friday afternoon before *erev Pesach* which is on Shabbat.

24. See *Erev Pesach Shechal BeShabbat*, p.111. In note 9, he adds that although generally in order to alter one's custom, *heter nedarim* is required, that is not the case here. See also p.112.

In the writings of the Chatam Sofer on Pesach, he rules in #444 that it is better to forego *lechem mishneh* altogether rather than eat matzoh on *erev Pesach*.

25. *Orach Chaim* 471:2.

26. Ibid, 472, and *Magen Avraham* 441:2.

matzoh which has subsequently been cooked or fried does not qualify for the mitzvah of "matzoh" at the Seder.[27] Thus, all these, which are technically not "matzoh" according to the halacha, are exempt from the stricture against eating matzoh on *erev Pesach*. Accordingly, egg matzoh could be used for *lechem mishneh*, the two breads at the Sabbath meals.

There is a halachic difficulty attendant upon using egg matzohs as the two loaves of bread required for the meals on Shabbat: According to many rabbis, egg matzoh cannot technically be classified as "bread" requiring washing the hands, reciting the blessing *hamotzi*, and followed by *birkat hamazon*, since unlike real matzoh, it is made with eggs and/or juice instead of just plain water with the flour. Nevertheless, even if egg matzoh is not "bread" within the definition of the term, it can still take the place of bread at a meal, provided that it is used instead of bread and that a sufficient amount is consumed.[28] This is the rule any time cake, crackers, or any baked goods are eaten in sufficient quantity to qualify as a meal.

How much egg matzoh is required so that it can substitute for real bread? Here, there is a difference of opinion among the *poskim*: (a) Some say that "one who eats a volume of cake equal to four (or three) eggs...must treat the cake as bread." (b) There are those who "conclude that the amount of one meal equals somewhat more than the volume of

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27. Ibid, 464:4. However, *Chok Yaakov* 471 discusses other opinions with respect to re-cooked matzoh. One could argue that once the dough was baken into matzoh, it became forbidden for consumption on *erev Pesach* and the subsequent cooking cannot remove the *issur*. *Responsa Haelef Lecha Shlomo* 322 also considers that matzoh cooked after baking may still not be consumed on *erev Pesach*.

28. Rabbi Binyamin Forst, *The Laws of B'rachos*, Mesorah Publications, New York, 1990, p.244.

twenty-one eggs," and only someone who eats this equivalent of cake should recite *hamotzi*. (c) Most *poskim*, however, reject both these opinions, one as being too meager, the other as being far too large. In their opinion, cake or egg matzoh "is measured in terms of the quantity that is generally eaten during the course of a full meal."[29] This is the opinion of Rav Moshe Feinstein[30] and most other *poskim*.

According to some authorities, another type of matzoh which might be considered permitted for use on *erev Pesach* is matzoh which is not *matzoh shmura*.[31] The reasoning here is that since at the Seder we must use *matzoh shmura*, any other type of matzoh is disqualified and consequently could not have been intended by the rabbis castigating those who eat matzoh on *erev Pesach*.

In summation, Rav Ovadia Yosef, whose decisions are generally accepted by Sephardic Jews, rules that

> ...it is proper to destroy the *chametz* before Shabbat...and to use for Shabbat only utensils that are fit for Pesach...and on Shabbat to use only food and utensils reserved for Pesach, and one should fulfill the precept of meals for Shabbat with matzoh which is cooked in chicken or meat soup, in the following manner: after the food is wholly cooked, let him remove it from the fire,and while the food in the pot is still extremely hot, let him put into the pot several

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29. Ibid., pp.246-7.

30. *Iggerot Moshe Orach Chaim* 3:32.

31. Meiri, *Pesachim* 99; *Rabbenu Manoach*, *Chametz* 6; *Avnei Nezer* 380 - *Marcheshet* 11. *Yechave Daat* 3:26 would allow a hospital or hotel which have already removed all *chametz* before Shabbat to serve this type of matzoh on Shabbat *erev Pesach*. But he does suggest that it would be better to use matzoh fried or cooked in oil rather than plain.

pieces of matzoh, as much as he needs, in such a way that the matzoh thoroughly soaks up the flavor of the food, and then he can use this to fulfill the mitzvah of three meals.[32]

He prefers the use of re-cooked or fried matzoh to egg matzoh, since the halacha is not clear as to how much egg matzoh must be eaten for the blessing *hamotzi* and for Grace after Meals.[33]

However, if one decides to adopt the option of using egg matzoh as the "bread" at the three meals on that Shabbat, which is an option permitted or even suggested by some,[34] it is evident that this would solve the problem for all three meals; furthermore, it would not be necessary to get up early to *daven* so as to eat *chametz* before the time when it is no longer permitted.

Seudah Shelishit

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32. *Yechave Daat* p.279. In footnote 11 he explains why refraining from eating *chametz* on *erev Pesach* is not considered "adding a mitzvah" (*bal tosif*). However, in *Nezer Hakodesh* no.52, Rabbi Rosen does count not eating matzoh on the day before Pesach as *bal tosif*. Although he disagrees with the reasoning, Rav Ellenberg does agree with the conclusion of Rav Rosen (*Shlomei Simchai* 18 and part 5, 36-7), that one should not use matzoh for the meal on *erev Pesach*. *Moadim Uzemanim, Haggada* p.5, concurs.

33. *Kaf Hachaim* 168:45. See also *Yechave Daat*, ibid, note 12. *Noda Biyehuda* 141:21 and *Aruch Hashulchan* 444:5 discuss the egg matzoh option for Ashkenazim, who generally refrain from using egg matzoh altogether on Pesach. However on *erev Pesach*, they feel it may be used. However, *Shoel Umeishiv*,175, does not allow eating egg matzoh on *erev Pesach*. See *Shearim Metzuyanim Behalacha* 115:5, who tries to explain how two rabbis from the same city could have disagreed as to the custom in their city.

34. *Iggerot Moshe Orach Chaim* I, 155.

Till now, we have discussed the ways in which it is possible to meet the requirement to eat the first two meals on Shabbat — the one on Friday night and the one on Shabbat morning. As for the third meal, that has its own unique questions.

Mishnah Berurah raises the option of dividing the early morning meal (before the tenth hour) into two, by making a blessing on two challahs of bread, eating, reciting Grace, then washing again, eating from another two challahs, and reciting Grace again.[35] This solution, although ingenious, may not be halachically feasible. First of all, the third meal of Shabbat should really be eaten after Mincha. Secondly, it is questionable whether it is permitted to break up what is essentially one meal by reciting *birkat hamazon* and then immediately washing and making another blessing on bread. This may be a case of *beracha she-aina tzericha*, reciting blessings for no reason, which is quite a serious matter. There would have to be an interval between the end of one meal and the beginning of the next. Considering that we are very pressed for time so early on the morning of *erev Pesach*, leaving a sufficient interval between these two early meals may be problematic. Thirdly, it may be possible to dispense with bread altogether and fulfill the requirements of the third meal by eating something else:

> [The third meal] has to be eaten with "bread", but there are those who say that one can make the meal with those things which accompany bread, such as meat or fish, but not with fruit. And there are those who say that one can make [the meal] out of fruit. But the first opinion is the major one, i.e., that one should make a meal with bread unless he is too full, or in a situation where it is impossible for him to eat bread, such as on *erev Pesach* which comes out on

35. *Orach Chaim* 444:8.

> Shabbat, when it is forbidden for him to eat bread after Mincha.[36]

The *Mishnah Berurah, Orach Chaim*,[37] maintains that it is preferable to eat one meal that really satisfies the hunger, and is a true meal, rather than breaking up the meal into two. However, other authorities, including the Vilna Gaon, advise that the early morning meal should be interrupted and followed by another meal.[38]

It is the decision of the *Shulchan Aruch* that for the third meal, one should use egg matzohs for the two loaves. But the Ramo does not permit this choice for Ashkenazi Jews, opting instead for a meal without bread of any type:

> In our [Ashkenazi] countries, where it is our custom not to eat *matzoh ashira*...one should fulfill [the obligation to have] a third meal with various types of fruit or with meat and fish.[39]

This ruling by the Ramo is the source of considerable discussion among the rabbis. Here he categorically rejects the option of using egg matzoh, yet, when the *Shulchan Aruch*, as quoted above, suggests that on *erev Pesach* which

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36. *Orach Chaim* 291:6. Before *any* holiday or Shabbat, it is a mitzvah not to eat a meal with bread late in the afternoon since it will detract from enjoyment of the food one eats that evening in honor of the holiday.

37. 291:17.

38. *Shearim Metzuyanim Behalacha, kuntres acharon* 115:7; *Nimukei Yosef*, end of chapter on Shabbat; and *Radvaz* 489 say that one should skip the third meal altogether. *Aruch Hashalchan* 444:6 concurs. See also *Erev Pesach Shechal BeShabbat* p.158.

39. *Orach Chaim* 444:1. See *Erev Pesach Shechal BeShabbat*, pp. 64 and 161, about eating matzoh balls (*kneidlach*) or gefilte fish made with matzoh meal, on this day, and whether this is included in the ban on eating matzoh on *erev Pesach*.

falls on Shabbat, it might be a good idea to use egg matzoh — the Ramo makes no demurrer![40] In the face of conflicting directives by this major *posek*, many authorities conclude that the Ramo means to be strict about egg matzoh only for Pesach itself, and not on *erev Pesach*.[41]

It is a custom to recite the Torah portion dealing with the Paschal sacrifice at the conclusion of this third meal.[42]

Handling the Matzoh

If a person decides to use regular challah for the meal, but is afraid that he will be unable to consume the entire two loaves (and have difficulty disposing of them on Shabbat), he might want to employ the option of substituting a well-wrapped matzoh instead of the second loaf of challah. Indeed, this is the advice given by the Chazon Ish.[43] This would seem to present a good solution – except that we possibly run into the problem of *muktza*.

Muktza may not be moved on Shabbat. Generally, something is considered *muktza* if it cannot or will not be used on Shabbat (for example, a carpenter's hammer, a telephone). Can we use matzoh for the second bread at the meal on Shabbat, when on this Shabbat we are certainly not allowed to eat matzoh? The rabbis make an interesting

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40. This contradiction between texts is questioned by *Chelkat Yoav Orach Chaim* 16, in the note.

41. *Erev Pesach Shechal BeShabbat*, p.111. Rav Moshe Feinstein *Orach Chaim* 155:1, seems to be following the Ramo in allowing egg matzoh to be used for the first two meals on Shabbat which is *erev Pesach* but not for the third one.

42. *Moadim Uzemanim, Haggada* p. 14, in the name of the Gra.

43. *Iggerot Chazon Ish* I, 188. See *Moadim Uzemanim, Haggada*, p. 5, note 5, and *Chok Leyisrael, hosafot*, p. 126. *Erev Pesach Shechal BeShabbat*, p.86, discusses whether the *marror* is *muktza*.

distinction in this regard: *matzoh shmura*, which is what people will be eating at night at the Seder, is certainly *muktza* on the Shabbat of *erev Pesach*. However, regular matzoh can be given to a young child to eat even today, and therefore it is not *muktza*; it can be moved, it can be placed on the table and subsequently removed.[44]

Setting The Table For The Seder

On a Sabbath or Festival, it is not permitted to make any preparation for after the Sabbath, even if it will be a Festival at night. Therefore, one should not set the table for the Seder nor make any other preparations until the conclusion of Shabbat. However, the *Shulchan Aruch*[45] makes an exception on Shemini Atzeret, which is the last day people eat in the

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44. *Yechave Daat* 1:91, 13. See *Chidushei Anshei Shem, Pesachim*, chapter 1; *Pri Megadim* 444:1. Rabbi Yosef enters into an explanation of why matzoh is different from *tevel*, which is rabbinically forbidden, which cannot be given to a child. Also, in his *Haggada*, p. 95:6, he points out that since technically matzoh may be eaten on Friday night, at the beginning of the Sabbath, it doesn't become *muktza* thereafter (*ein muktza lechatzi Shabbat*). See furthermore the *Kaf Hachaim* 471:24. *Erev Pesach Shechal BeShabbat* p. 107, n. 3, discusses whether an object rendered unusable on Shabbat due to custom should actually be considered *muktza*.

45. *Orach Chaim* 667. Some people have the custom to bake matzoh for the Seder on the afternoon of *erev Pesach*. Obviously, that is not feasible this year, and will be done instead on Friday afternoon. However, *Chok Leyisrael*, p. 48:16, reports that the Chatam Sofer used to bake matzoh for the Seder on *Saturday night*, because that was the tradition he received from his teachers. This tradition is difficult to understand: the reason for the custom of baking matzoh in the afternoon of *erev Pesach* to be used that night at the Seder is that that was the time of offering the paschal lamb. How can baking them on Saturday night serve that purpose? Surely the sacrifice was not brought then! See also *Erev Pesach Shechal BeShabbat* p.70.

succah. The next day is Simchat Torah, and the *Shulchan Aruch* permits removal of utensils from the succah on Shemini Atzeret, to be brought into the house. The Ramo cautions that although the utensils may be brought in from the succah, the table should not be set in the house until after nightfall.

Why does the halacha permit removing objects from the succah, when it appears that it is in preparation for using them in the house on the next day? According to the *Chayei Adam*,[46] this is only a concession because it would be very difficult to clean up the succah at night, in the dark. Furthermore, if one has not completed the preparations, it is not considered preparing.

Apparently, it is permitted to do anything which will be very difficult to undertake later on (for example, the wine is in the cellar, which is very dark). Not only that, but if bringing in the utensils from the succah or the wine from the cellar will make the house look sloppy, it would even be permissible to put them away in their proper place. This is not done in preparation for the next day but in honor of the Sabbath itself.[47]

Although there are some lenient opinions, most rabbis do not permit one to change into clothing for the Seder on Shabbat. But having a non-Jew set the table for the Seder is permitted.[48]

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46. Rule 153.

47. *Shearim Metzuyanim Behalacha, kuntres acharon* 115:7.

48. *Chok Leyisrael*, p. 81. *Erev Pesach Shechal BeShabbat*, p. 142, cites various opinions which he explains in detail. On p. 96 he deals with the custom some men have of going to the mikvah before a holiday. If a man goes on Shabbat, in honor of Pesach which will be that evening, is it considered "preparing"?

The Seder Plate

In the special situation when *erev Pesach* occurs on Shabbat, all preparations for the Seder should be completed on Friday. Since Ashkenazim do not actually eat the egg and the shankbone on Pesach (since they are roasted), they should also be prepared before Shabbat, not on the holiday. However, if one forgot, they should be roasted on Saturday night and eaten during the day on Sunday. And if one forgot to make the *charoset*, it may be done on Saturday night, albeit with a *shinui* (modification of technique).[49] Somewhat different is the case of *marror*, for we do not want it to lose its bitter taste; therefore, we make it on Saturday night, with a *shinui*,[50] or else make it on Friday and store it in a sealed container.

Bedikat chametz

When *erev Pesach* falls on Shabbat, we search the house for *chametz* on Thursday evening, since we are not able to go around with a candle on Friday night. What if one forgot to do it on Thursday? It has been suggested that one should do it on Friday night, having a non-Jew carry the candle.[51] But others object, claiming that the person will be so concerned lest a fire begin, he will not have his mind on searching for *chametz* properly. Therefore, Rav Braun rules that he should just not do the search; undoubtedly, the house has been thoroughly cleaned and checked already.[52]

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49. *Magen Avraham* 473:8.

50. *Chok Leyisrael* p. 93:63. He also explains how to check for insects in the romaine lettuce on Yom Tov.

51. *Avnei Tzedek*, 50, quoted in *Shearaim Metzuyanim Behalacha*, 115:1.

52. Ibid. He also debates conducting the search using the electric lights which are already kindled in the house

Fast Of The Firstborn

In remembrance of their miraculous salvation when all the firstborn of Egypt were smitten, it is the practice for the firstborn to fast on *erev Pesach*. What is to be done this year, since they cannot fast on Shabbat? *Terumat Hadeshen*[53] and *Maharil*[54] rule that the fast should be observed on the previous Thursday, but others [55] maintain that since the fast is only a custom, and the custom cannot be observed on the proper day — it should not be done at all. In citing this law, the *Shulchan Aruch* records both opinions:

> If *erev Pesach* occurs on Shabbat, there are those who say that the firstborn should fast on Thursday, and there are those say that they do not fast at all.[56]

It is interesting to note that, in a departure from the established practice of Sephardic Jews to follow the *second* option when two are listed, in this case Rav Ovadia Yosef rules that the firstborn should fast on Thursday.[57] For Ashkenazim, Rav Moshe Feinstein has issued the same ruling based on the Ramo.[58]

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53. 126. For a summary of all the opinions, see *Erev Pesach Shechal BeShabbat* pp.26-7, footnote 1. On p. 28, the author discusses what a firstborn should do if he inadvertently ate, and on p. 30 he discusses what to do on Thursday if it is known that a Bris is scheduled for Friday (which would obviate a fast on that day).

54. 106, and *Chavot Yair*.

55. *Agur* in the name of his father, as quoted in *Chazon Ovadia*, p. 100:10.

56. *Orach Chaim* 470. See *Mikraei Kodesh* 2:23, and note 6 thereon, where Rabbi Frank advises leaving over a piece of the food from the *siyyum* on Thursday, to be eaten by the firstborn on Friday.

57. *Chazon Ovadia* p.100.

58. *Iggerot Moshe O.H.* 4, 69:4. See also *Chok Leyisrael* p. 24:33.

Working On Friday

In general, it is forbidden to go to work after midday on any *erev Pesach*.[59] Two reasons are given for this stricture: (1) to prepare for the Festival and (2) this is the time when the paschal sacrifice was brought, which makes it a holy time, when work is forbidden.[60] If we accept the first reason as the true rationale, then going to work should be forbidden on Friday afternoon in our case, since that is the time one should prepare for Pesach. However, if the second reason is really the central one, there would be no reason to desist from work on Friday — the paschal lamb was sacrificed on *erev Pesach* even when it was a Sabbath. Thus, no special restrictions attend Friday afternoon. Following this second line of thought, Rav Yosef permits work on Friday afternoon.[61]

There is one mitzvah of *erev Pesach* which we have not discussed in this paper — how the Passover lamb was sacrificed if it occurred on a Shabbat. Unfortunately, this is one mitzvah of Pesach which we do not yet have the *z'chut* of experiencing. May the Redeemer come speedily and bring us all back to our glorious Temple, where we will be able to fulfill this as well as all the other mitzvot of Pesach, the Festival of our Redemption.

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59. *Shulchan Aruch* 468.

60. Rashi to *Pesachim* 50; *Tosafot Rosh*; *Ran*; Rambam, *Hilchot Yom Tov* 8:17.

61. *Yechave Daat* 1:91. See *Chok Leyisrael* p. 46:44, who concedes that one may be strict and refrain from work; however, on the next page he permits taking a haircut on Friday afternoon.