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Rabbi Alfred S. Cohen**

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

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Hasagath Gvul

Rabbi Simcha Krauss

In Western societies, competition in business is looked upon as economically desirable. Competition leads to equalization of prices, better products, more accessible items for the consumer, a whole array of benefits to the consuming public.

Rabbinic opinion (*Chazal*), too, seem to encourage competition. Specifically, they consider that it creates a benefit to the public at large. An example of this positive attitude is reflected in the Mishnah:

מתני' רבי יהודה אומר לא יחלק החנוני קליות ואגוזין לתינוקות מפני שהוא מרגילן לבא אצלו וחכמים מתירין

R. Yehuda said: A store owner should not distribute parched corn or nuts to children, because he accustoms them to come to him [rather than to others]; *Chachamim* say it is permitted.¹

The Gemara explains the reasoning of *Chachamim*, the other rabbis:

גמ' מא' טעמיהו דרבנן דאמר ליה אנא מפליגנא אמגוזי ואת פליני שישקי:

Because he [the store owner] can tell the other [store owner]: "I will give them nuts; you may give them plums."²

1. *Bava Metzia* 60a.

2. *Ibid.*

Here is an example where competition benefits the consumer.

The same mishnah further states that while Rabbi Yehuda holds that the store owner "may not reduce the price", the *Chachamim* say that the store owner who reduces the price is "to be remembered for good".

Hence, competition where the "playing field" is level, is encouraged.

On the other hand, competition often leads to one person's loss. One of the competing parties may even lose his livelihood. Can there be a balance between competition that is good, healthy, and economically desirable, and the need to make a living, which is a social and economic necessity?

In this paper we will investigate the nature of the balance which Judaism seeks to establish between these two legitimate but sometimes conflicting desiderata.

In halachic literature, the limits to competition, the balance between laissez-faire free and untrammelled market forces, and the needs of the individual to be protected in his livelihood are discussed. Various terms such as *Hasagath Gvul* and *Yored L'Toch Umenato Shel Chavero* are used – at times interchangeably – in counterbalancing the competitive urge. Let us analyze the terms and see how these halachot affect the issues under discussion.

No term is more popular in defending the right of the entrenched store owner, for example, than "*Hasagath Gvul*." Yet even a brief analysis of the term will show that *technically* the use of *Hasagath Gvul* in this instance is problematic.

It is best to begin with the verse in Torah:

לא תסיג גבול רעך אשר גבלו ראשנים בנחלתך אשר תנחל בארץ
אשר ה' אלהיך נתן לך לרשתה:

You shall not remove thy fellow person's landmark, which they of old have set in your inheritance, which you shall inherit in the land thy G-d giveth thee to possess.³

From the simple translation, we see that the prohibition of *Hasagath Gvul* technically applies only in Eretz Yisrael.⁴ In any case, it is halacha related to land; specifically, to the stealing of land by removing a border. Indeed, *Sifre* says so openly:⁵

והלא כבר נאמר לא תגזול ומה ת"ל לא תסיג מלמד שכל העוקר תחומן של חבריו עובר בב' לאווין. יכול אף בחו"ל ת"ל בנחלתך אשר תנחל, בא"י עובר בב' לאווין בחו"ל אינו עובר אלא על לאו אחד.

It is already written "do not steal." Why must it state "do not remove the boundaries?" To teach us that one who uproots the border of his friend transgresses two negative commandments. Does this apply outside of Eretz Yisrael? It is written "in the land that you inherit." In Eretz Yisrael you transgress two negative commandments, outside of Eretz Yisrael you transgress only one negative commandment.

Rambam in *Mishneh Torah*⁶ and in *Sefer Hamitzvot*⁷ and the *Chinuch*⁸ also understand this mitzvah as related to "stealing" land in Eretz Yisrael.

3. Deuteronomy 19:14.

4. Or, as *Minchat Chinuch* notes, "to that land that has *Kedushat Eretz Yisrael*." Mitzvah 522.

5. *Sifre*, *Devarim Piskah* 188.

6. *Hilchot Geneiva*, 7:11.

7. Negative Mitzvah 246.

8. Mitzvah 522.

However, there is another *Pasuk* where *Hasagath Gvul* is mentioned.⁹

ארור מסיג גבול רעהו

"Cursed be he who removes his neighbor's landmark."

According to *Chazal*, this verse has many interpretations. First, Rashi states that it refers to moving boundaries between fields. Second, *Sifre*¹⁰ interprets the phrase to mean that one may not change boundaries, in Eretz Yisrael, from those set by the division of Yehoshua. In other words, *the land*, that was divided amongst the tribes, may not be reddivided with different boundaries. Yet another meaning of *Hasagath Gvul* is the prohibition to plant a tree near a bordering field. The tree in my field will "steal" its nutrition from the adjacent field, thus weakening my neighbor's land.¹¹ The prohibition against planting *Kelaim*, mixed seeds, is also hinted at in this verse.¹²

Thus far *Hasagath Gvul* relates to "stealing" land, in one form or another. Our rabbis however, use *Hasagath Gvul* also to denote another kind of stealing *i.e.* stealing the words of another. For example, *Sifre*¹³ derives from the verse the prohibition to misquote scholars, attributing the words of R. Eliezer to R. Yehoshua, or vice versa. Indeed, R. Yehuda Hechasid¹⁴ writes that it is important for authors of manuscripts to put their names on their books, lest someone else claim title to their work.

9. *Devarim* 27:17.

10. *Sifre*, *Shoftim*, *Piska* 188.

11. *Shabbat* 85b - Rashi, *D.H. Gvul Reacha*.

12. *Tosafot*, *Ibid*, *D.H. Lo Tasig*.

13. *Loc. cit.*

14. *Sefer Chasidim* 586.

So far, we have seen the concept of *Hasagath Gvul* expanded from stealing land in Eretz Yisrael by removing borders to perhaps "stealing" ideas. The application of *Hasagath Gvul* as a technical term to uphold one's rights against economic intrusion and competition by another has not yet been introduced.¹⁵

In fact, however, *Acharonim* do apply it that way, albeit in a limited sense only.

For example, Maharshal presents the following case: A person leased from a feudal lord the right to collect taxes, and for many years he held that lease unchallenged. Now someone else paid a higher price to the feudal lord and thus usurped his right to collect taxes, causing the first lessee loss of money and loss of financial security.

Maharshal rules in favor of the first lessee for the following reason:¹⁶

על כן באתי לפרש שיכלה עסקו וחייב ואפילו הוא גרמא לחור,
והיינו טעמא מאחר שמצד הדין אינו כראוי לותר להם מה שקנאו
המכס, וקפחו מחייתם של חבריהם שדינא הוא דמעכב עליו, מדינא
נמי הוא בכלל רשע כמו המהפך בחררה ובא אחר ונטלה, ואפשר
שהוא נמי בכלל ארור כמ"ש הרוקח כל המקפח מחייתו של חבירו
הוא בכלל ארור מסיג גבול רעהו, ורבים תמדהו על דבר זה הלא
הלאו דלא תסיג גבול כו' איירי בגזול תחומו ובא בא"י ועובר אף על
לא תגזול, וכמו שהביא הסמ"ג ויש מפרשים שלאזהרה בעלמא בא
החרם, והסמיכו על המקרא דהשגת גבול ומכל מקום קשה לפי זה
ה"ל לומר הרי הוא עובר בלא תשיג גבול.... אלא נראה בעיני שכך
הוא מקובל מרביתו דארור משיג גבול רעהו בא להרבות השגת
גבול של משא ומתן, ודומה לזה מצינו שאשת חמיו הוא בכלל

15. For a fuller and more exhaustive discussion, see *Hasagath Gvul* in *Encyclopedia Talmudit* Vol. IX.

16. *Shealot Utshuvot Maharshal* #89.

ארור שוכב עם חותנתו כדאיתא בירושלמי, ואף שאינה תורה להיות נידון בה משום חמותו שהרי דוד נשא רצפה בת איה כמו שהביא הסמ"ג מפי רבותינו בעלי תוספות, הכי נמי אף שאינה תורה להיות משיג גבול ממנו, מכל מקום מרבין לאיסור מארור משיג גבול ממנו.

It is included in the case of the poor person who "casts about a piece of cake" and *perhaps* he is included in being cursed, as Rokeach says, that whoever encroaches on his friend's livelihood is included in "cursed be he who removes the border of his friend." Many have asked, isn't this prohibition limited to "stealing" the border [of land] in Eretz Yisrael?... but thus it seems in my eyes that thus it was transmitted to him [the Rokeach] by his teachers, that "cursed be he who removes the border of his friend" also includes removing of borders of business activities.

Maharshal has difficulty in using the technical term *Hasagath Gvul* as a rationale for limiting sharp business practices. He says "perhaps" he, Rokeach, must have received the tradition from his *Rebbeim*, extending "stealing borders" to include breaking barriers which protect business ventures.

However, the regulation of economic competition, limiting activity that interferes with another's livelihood, need not be "squeezed" into the reading of a verse. There is virtually an entire unit in Tractate *Bava Batra* whence one can derive norms and guidelines regarding business competition and interfering with another's source of livelihood.

The Gemara quotes a *Braita* as follows:

כי עושה אדם חנות בצד חנותו של הבירו ומרחץ בצד מרחצו של הבירו ואינו יכול למחות בידו מפני שיכול לומר לו אתה עושה בתוך שלך ואני עושה בתוך שלי.

A person may set up a store adjacent to the store of his

friend and a bathhouse adjacent to the bathhouse of his friend and he [the friend] cannot object, because he can say "I do what I want on my property and you do what you want on yours."¹⁷

The Gemara then goes on to state that this principle is not universally accepted. There exists a disagreement between R. Shimon ben Gamliel and the other Sages whether the owner of a store may stop a second one from opening the same kind of store adjacent to him. Indeed, on the same page in the Talmud, R. Huna says that a person who opened a mill may stop another from opening and competing with him because the second will "interfere with my livelihood" (יורד לתוך אומנותו).

The Gemara objects to Rav Huna's position based on our mishnah in *Bava Metzia* 60a which states that Rav Yehuda forbids a store owner from distributing nuts because he attracts the children, but *Chachamim* permit. Apparently, argues the Gemara, the *Chachamim* would also disagree with Rav Huna. However, the Gemara makes a distinction. The store owner may distribute nuts because the other store owner has the option of using another type of promotion, such as distributing plums. But opening up a new store adjacent to an existing one would be forbidden, argues Rav Huna, even according to *Chachamim*, because "it interferes with my livelihood".

The Gemara then proceeds to state the position of Rav Huna brei d'R. Yehoshua, who states:

אמר רב הונא בריה דרב יהושע פשיטא לי בר מתא אבר מתא
אחריתי מצי מעכב ואי שייך בכרגא דהכא לא מצי מעכב בר
מבואה אבר מבואה דנפשיה לא מצי מעכב בעי רב הונא בריה

17. Much of the second chapter in *Bava Batra* is relevant to our discussion. We will concentrate on the discussion on 21b.

דרב יהושע בר מבואה אבר מבואה אחרינא מאי תיקו.

It is certain that the resident of one town can prevent the resident of another town [from setting up a competing store] – but not if the [outsider] pays local taxes – and the resident of an alley *cannot* prevent another resident of the same alley [from opening up a competing store]. R. Huna the son of R. Yehoshua asked: Can the resident of one alley prevent the resident of another alley [from opening a competing store]? This is unresolved.

In other words, R. Huna brei d'R. Yehoshua states with certainty that he disagrees with Rav Huna. He maintains that when both protagonists are on equal footing – they both pay taxes to the polity – the *Braita* stating that “a person may open a store adjacent to another” is indeed normative halacha. That is also in conformity with *Chachamim*, as against Rabbi Shimon ben Gamliel, that a person may not stop another from opening a shop in one's own neighborhood.

In fact Tosafot point out this equation.¹⁸

Rav Huna the son of R. Yehuda holds like the rabbis.....
And so we rule against Rav Huna.... [Like Rav Huna,
the son of R. Yehoshua] against Rav Huna.

Rav Huna the son of R. Yehuda advocates freedom of economic activity for people of the town. His position seems to be the dominant one.

Rambam,¹⁹ too, decides the halacha according to Rav Huna the son of R. Yehoshua, as does the Rosh, who states:

18. D.H. *Peshita*.

19. *Shecheinim* 6:1, Rambam interprets the Gemara somewhat differently. But the point regarding competition is unchanged.

וליתא לדר"ה חדא דקם לי כי יחידאי ועוד דר"ה ברב יהושע סבר
כרבנן.

We do not hold like Rav Huna.... because his position follows an individual opinion... and also because Rav Huna, the son of R. Yehoshua maintains as do the Rabbis²⁰ [i.e., the majority].

At this stage, it seems to be clear that competition, *laissez faire*, the free market rule. The words of *Braita*, "A person may open a store adjacent to that of his friend..." are accepted as the *halacha*. The *Gemara* stating that a mill may not be opened near another mill because the second "interferes with my livelihood", follows Rav Huna's position, but is not the law. Those who reject this and do not follow Rav Huna, obviously adopt the principle "I do what I like on my property and you do what you like on yours".

The sharpest formulation of this position sanctioning free competition is that of *Chavot Yair*, who states:

יורד לתוך אומנות חבירו ק"ל דמותר לכתחל' אם לא בבר מתא
אחרית' וכמבואר סי' קנ"ז ואף דהוי מלתא דתוהו בי' אינשי בודאי
הכי הוא והכי נהוג בכל תפוצות ישראל.

It is permitted to enter [to compete] the trade of your friend except if you are a member of another town [and hence do not pay taxes to the local authorities]... so is the custom all over Israel.²¹

His proof is from the following text in *Makkot*.²²

בא דוד והעמידן על אחת עשרה דכתיב מזמור לדוד "ה' מי יגור
באהלך . . . הולך תמים ופועל צדק לא עשה לרעהו רעה" שלא

20. *Bava Batra* 21, #12.

21. *Responsa Chavot Yair*, *Siman* #42.

22. 24a.

ירד לאומנות חבריו.

David came and reduced [righteousness] to eleven principles... "nor doth evil to his fellow" that is one who does not set up in opposition to his fellow craftsmen.

What David praises in *Tehillim*, argues *Chavot Yair*, is the *Midat Chasidut*, the exceptional piety exhibited by not "setting up in opposition to one's friend," that is, by not entering into the same craft as his friend and competing with him. There is, however, no halachic prohibition, and it is permitted, even לכתחילה, ab initio. According to *Chavot Yair*, then, avoidance of competition is a display of sensitivity and piety, but is not required by Jewish law.

At this stage, we might assume that the opening of a new bakery, a new pizza shop or a new restaurant on Main Street, U.S.A., where such stores already exist, is totally permissible. In each of these cases the argument "I do what I want in my property and you do what you like in yours" is the operative halachic principle.

Things are not so simple however. A hint of the complexity of this issue is found in *Mordechai*.²³

Mordechai, seconded by *Hagahot Maimoniot*,²⁴ states in the name of *Aviasaf* (Ravan) as follows:

מבוי הסתום מג' צדדין רק בצד אחד יכנסו לו ודר ראובן אצל סופו
הסתום ובא שמעון לדור כנגד הצד הפתוח שאין העובד כוכבים
יכול לילך אם לא ילך תחלה לפני פתח שמעון נראה דיכול לעכב
עליו כדרך הונא.

If there is an alley closed on three sides and the one remaining side is the entrance, Reuven lives at the end

23. *Bava Batra*.

24. *Shecheinim* 6.

and he has a store in his house – and Shimon comes to live at the open end, in such a manner that an outsider cannot go to Reuven without passing Shimon, it seems to me that Reuven may stop Shimon from opening [a store] as Rav Huna ruled.

In opposition to most *Rishonim*, *Mordechai*²⁵ rules like Rav Huna. Indeed, that is the way *Beit Yosef* explains the *Mordechai* although he adds that since we *do not* follow Rav Huna, but rather Rav Huna brei d' R. Yehoshua, this halacha is incorrect – Shimon *does* have a right to establish his shop at the entrance of the closed alley.

Ramo, too, seems to follow the opinion of *Beit Yosef*:²⁶

דבעל האומן אינו יכול למחות ולומר אתה פוסק חיי

A tradesman may not prevent another's coming in by saying "you interfere with my livelihood."

Again, Ramo indicates that "interfering with my livelihood" is no obstacle to opening a shop adjacent to another.

The problem, however, begins with Ramo himself. In his *Responsa*, he himself takes the position of *Mordechai*, contradicting his own statement in the Law Code.

In his responsum, Ramo discusses the case of R. Meir of Padua who, together with Aloizi Brogodin of Venice, published a corrected edition of Rambam's *Mishneh Torah* in 1551. A third Venetian publisher, Marcos Antonio Ostinian, angered that R. Meir of Padua did not include him as a partner in the venture, went ahead and published his own edition of *Mishneh Torah* and, adding insult to

25. *Mordechai*, *ibid.*

26. *Shulchan Aruch*, C.M. 156.

injury, sold it at a lower price. The question discussed by Ramo was whether the latter has a right to do so. Is it not a case of *Yored L'toch Umenato Shel Chavero*, destroying someone's livelihood by direct competition?²⁷

Ramo rules that indeed it is. Furthermore, he explains that this is because *we rule according to Rav Huna*, and, therefore, the second publisher had no right to publish his edition of *Mishneh Torah*. He urges the public not to buy the Ostinian edition.

But now Ramo goes further. He states that although Rosh and others follow Rav Huna brei d' R. Yehoshua, *Mordechai* says in the case of the "closed alley" that the halacha follows Rav Huna. Ramo then both expands and restricts his original position by proposing that under certain circumstances *everyone* follows Rav Huna. The case of the closed alley is decided according to Rav Huna because "ברי היקא", there is certainty of damage. Whoever passes the first store, at the opening of the alley, will not even think of going to the original store situated at the end of the alley. In such a case where there is "definite damage" for the first owner, Rav Huna's position prevails.

In the case of Maharam of Padua whose competitor announced that he would lower his price, the issue of ברי היקא did exist. Maharam of Padua would lose his entire investment and, therefore, says Ramo, all are enjoined from buying the second edition of *Mishneh Torah* until all of Maharam of Padua's copies are sold out.

Chatam Sofer²⁸ expands on this position and goes on to show that indeed the Gemara does follow Rav Huna.

27. Ramo, *Responsa* 10.

28. Chatam Sofer, *Responsa Choshen Mishpat* 71.

The Gemara says:²⁹

אמר ר' יוסף ומודה ר"ה במקרי דרדקי דלא מצי מעכב

R. Yosef said, Rav Huna agrees that a teacher of children cannot stop [another teacher] from entering.

Chatam Sofer (as well as others) asks, why is it important to know that Rav Huna agrees? After all, isn't Rav Huna's position rejected? Apparently, argues Chatam Sofer, Rav Huna's position is *not* rejected. Indeed it is Rav Huna's position, strongly limiting competition, that sets the standard for normative halacha!

Does it not seem from the whole talmudic debate that Rav Huna and R. Huna brei d' R. Yehoshua disagree? Not really, says Chatam Sofer. Rav Huna with his stringency regarding *Yored L'Toch Umenato Shel Chavero*, that it is not permitted to set up a mill where another one already exists, deals with a case of *פסקו לחיותה* – when the livelihood of the first mill owner is totally destroyed by the existence of the competing mill. Likewise, *Mordechai*, in name of *Aviasaf*, presents the case of the *Mavui Satum*, the closed alley. In that case, someone who opens a store at the entrance of the alley totally destroys the business of the first owner who is in the back of the alley.

Rav Huna brei d' R. Yehoshua, who is more permissive towards setting up a competitive business, speaks in a case of *ממעט לחיותה*, i.e. the new store will cause the first store owner some loss of income but will not totally destroy his livelihood.

Not all *poskim* agree with Chatam Sofer that competition should be limited. There are many *Acharonim*³⁰ who uphold

29. *Bava Batra*, *ibid.*

30. Quoted by Chatam Sofer himself, *ibid.*

the simple reading of the text in *Bava Batra* 21b. They rule that in a "level playing field", where the second store owner does not physically interfere with the first, the argument, "I do what I like on my property and you do what you like on yours" prevails – against Rav Huna.

Earlier we mentioned the position of *Chavot Yair*, that *Yored L'Toch Umenato Shel Chavero* is permitted. That position, in a different context and with an eye to the changes in today's society, where people do not open stores or shops in "alleys" but in the public streets, is also echoed by *Divrei Chayim*:³¹

בזמנינו ליתא אצלינו מבוי קנוי לבעלין וכל העיר ומבואותיה אחד
ורשות כולן שוה בודאי מי שנותן כרגא יכול לעשות מלאכתו בכל
מקום שירצה.

In our days there is no alley reserved for its owner, [and] the entire city and its alleys are one and everyone is equal. Certainly one who pays taxes may do his work wherever he pleases.

In truth the Gemara³² in *Bava Batra* hints at this possibility:

הנהו דיקולאי דאייתו דיקלאי לבבל אתו בני מתא קא מעכבי
עליהו אתו לקמיה דרבינא אמר להו מעלמא אתו ולעלמא ליזבנו.

Certain basket makers brought baskets to Babylonia to sell. The townspeople stopped them. So they came to Ravina. Said he, "They have come from the outside and they sell to outsiders."

31. *Shealot Utshuvot Divrei Chayim, Choshen Mishpat Siman* #35.

32. 22a. The Ri MiGash explains that implicitly, one is saying to the other, "you receive what Heaven allocates to you, I receive what Heaven allocates to me."

Rashi explains: "People come to buy from the market," and all agree the market is free for all.

*Beit Ephraim*³³ also takes strong exception to Chatam Sofer. His position is that there is no difference between פסקי חיותיה and ממעט לחיותיה. Competition (*Yored L'Toch Umenato Shel Chavero*) is always permitted. He says that since the halacha is according to Rav Huna brei d' R. Yehoshua, there is no prohibition of *Yored L'Toch Umenato Shel Chavero*, setting up a rival business.

Beit Ephraim introduces another factor in favor of full laissez faire:

His view is that essentially there is no rabbinic dispute. In the issue of whether a person may or may not open a store adjacent to another, the disagreement arises only when the second store offers no tangible benefit to the consumer. But, when the consumer would benefit from the second store, by lower prices for example, argues *Beit Ephraim*, then all agree that the concern for the first owner's livelihood, *Yored L'Toch Umenato Shel Chavero*, does not apply.

Indeed, Ri Migash³⁴ states as follows:

אלא מיהו מסתברא לך דהני מילי כלהו היכא דליכא פסידא על הלוקחים הוא כגון דשוו דמים אהדדי ושויין עסקי נמי אהדדי דלא מרווחי לוקחים מידי עבדו רבנן תקנתא לבני מתא כי היכי דלא לשהיין עסקיהו ולא תפסיק להו לחיותיהו. . . הלכך כיון דאיכא הרווחה ללוקחים לאו כל כמיניהו דמוכרים דמתקני לנפשיהו ומפסדי לאחרני וכן נמי הא דאמרינן (בסמוך) עושה אדם חנות בצד חנותו של חברו.

All these restrictions exist only when the buyers will not have any loss, as when the prices are equal... then

33. Responsa *Beit Ephraim Choshen Mishpat*, *Simanim* כ"ו, כ"ז.

34. *Chidushei Ha'Ri Migash*, *Bava Batra* ad locum.

the Rabbi's made *Takkanot* [regulations] so that their businesses not suffer... But if the prices are unequal... it is logical [to say] *that to make a Takkana for the sellers at the expense of the buyers we have no right...* and likewise in the case of a person opening a store adjacent to another store.

Thus far we have tried to show that Jewish law is not restrictive in cases of competition – *Yored L'Toch Umenato Shel Chavero*. However, there are two exceptions. The first is a case of *Yored L'Toch Umenato Shel Chavero* as it relates to the establishment of Shuls where one already exists in a community; the second is for *Maarufia*.

Rav Moshe Feinstein strenuously objects to a breakaway Shul that opened in competition to the local *Shtiebel*.³⁵ The *Rebbe* of the original *Shtiebel* argued that his livelihood had been diminished and his own Shul building had lost most of its value. Rav Feinstein writes that it is absolutely prohibited and totally wrong for the “breakaway” to open another Shul in the area. He bases his ruling on the following:

First, he follows Chatam Sofer's argument that when an area cannot sustain two stores, or two synagogues, the prohibition of *Yored L'Toch Umenato Shel Chavero* is applicable.

Second, Rav Feinstein uses a novel argument. The Gemara says that one may open store adjacent to an existing one because the second owner is entitled to claim, “You do what you like in your property and I do what I like in my property.” This claim, argues *Iggerot Moshe*, cuts two ways. First, as we worry about the livelihood of the first store

35. *Iggerot Moshe, Choshen Mishpat* #38.

owner, we also worry about the livelihood of the second (competing) store owner. And, indeed, the first has no right to exert a veto power on the second owner's source of livelihood. If the second store owner finds that he can make a living in this particular place, the first store owner has no right to stop him.

But in the case where a second Shul opens and thereby diminishes the livelihood of the original rabbi, states *Iggerot Moshe*, the argument does not hold. Why? Because the second Shul opens not as a business venture. No one, at this point in time, is making a living out of the Shul. As we should say, the Shul is non-profit and the original rabbi loses his source of income. In such a case, everyone would agree that the original rabbi has a right to stop the other Shul from opening.

The second exception to the general permissiveness of competition is the case of *Maarufia*. The term itself is difficult.³⁶ Some commentators relate it to the verse יֵעָרַף כְּמָטָר לִקְוֵי (Deut. 32:2). In medieval times, in certain cases a person bought from his feudal lord the rights to sell whiskey, collect taxes, lend monies, etc. The "flow" of the business belonged to him – i.e. he had the monopoly (*Maarufia*). In such a case, Ramo rules:³⁷

אדם שיש לו עבודת כוכבים מערופיא יש מקומות שדנין שאסור
לאחרים לירד לאומנתו ולעסוק עם העכו"ם ההוא ויש מקומות
שאינן דנין.

A person who has a non-Jew as *Maarufia*, there are

36. Some scholars see it as Arabic, others as a Syrian term denoting friend or acquaintance.

37. *Choshen Mishpat*, *Siman* 156.

places where we hold that it is forbidden to go into his livelihood and other places where we don't [forbid it]. And others permit a Jew to go to the non-Jew and do business with him... and bribe him... and others forbid.

The concept of *Maarufia* is not mentioned, to my knowledge, in Gemara, but appears first in *Rishonim*.³⁸ *Maarufia* is a unique concept. The "owner" or possessor of the *Maarufia*, in general, bought or bribed the feudal lords for his rights to sell certain items. The question is now whether another Jew may go and, by offering a higher price, disposes the original "owner" of the *Maarufia*. In such a situation Rabbenu Gershom³⁹ says that it depends on the custom of the place. Somewhat later, *Or Zarua* writes⁴⁰

ואותן הלואות שמלוים לעכום ויש לו לישראל גוי מערופיא שלו
שרגיל תמיד ללות ממנו, אסור לו לישראל אחר להרגילו אצלו
ולסלקו מישראל הרגיל אצלו

And those lenders who loan to non-Jews – if a Jew has a non-Jew as a *Maarufia*, who constantly borrows from him, it is prohibited for another Jew to go to him and to take him away from the first [who is his regular customer].

Or Zarua goes even further. He states that even according to Rabbenu Tam's position זכה הקודם וכל כהפקר ה"ה עכום נכסי "The possessions of a non-Jew are considered *Hefker* (ownerless) and anyone may obtain them" – it is still forbidden to dispossess someone from his *Maarufia*.

We should spell out, more clearly, how the law of *Maarufia* differs from previous cases of *Yored L'Toch Umenato Shel Chavero*. In the cases discussed above, a store owner

38. *Shealot Utshuvot R. Gershom Meor Hagolah, Siman #8.*

39. *Ibid.*

40. *Bava Metzia, Siman #28.*

opened beside another existing store, or an artisan opened his shop beside an existing shop. In such cases we can say that the deciding factor is that each person can say, "I do what I want on my property and you do what you want on your property".

In the case of *Maarufia*, however, the facts change. By upping the price or the bribe to the non-Jew, the second person literally snatches from the first owner the "flow" of his livelihood. There is a direct snatching or taking away that which "flows" to the person. It is, after all, one thing to "set up a store adjacent" to another. It is something else to go to another's store and take it away. In such cases the issue of *Yored L'Toch Umenato Shel Chavero* is at its sharpest.

This may be compared to the following dictum in *Bava Bathra*:⁴¹

מרחיקין מצודת הדג מן הדג כמלא ריצת הדג וכמה אמר רבה בר
רב הונא עד פרסה

Fishing nets must be kept away from the hiding place
of the fish [which was sighted by another fisherman]
the full length of the fish's swim.

The Gemara says this is different from the case where one is permitted to set up a mill next to another because "Fish are different, they look for their food."

Rashi adds:

נותנים עין בהבטם להיות נוהגין [רגילין] לרוץ למקום שבאו שם
מזונות הלכך כיון שהכיר זה חורו ונתן מזונות בתוך מלא רציתו
בטוח הוא שילכדנו דה"ל כמאן דמטא לידיה ונמצא חבירו מזיקו
אבל הכא מי שבא אצלי יבוא ומי שבא אצלך יבוא.

Fish... generally run toward their source of food... Hence...

41. 21.

since he put his bait there... he is certain that he will catch it and it is considered as if it came to him and is in his possession. Therefore, his friend [who comes to put his own bait] truly damages him. But here, whoever comes to me, comes to me, and whoever comes to you, shall come.

In other words, by buying the right to the "flow of the services", the original owner has acquired the rights and he may not be dispossessed.⁴²

Even those who are lenient in such an instance do so because of another consideration. They argue that the grantor of the *Maarufia*, the non-Jew, can be approached by another non-Jew not bound by considerations of *Yored L'Toch Umenato Shel Chavero*. Therefore they would not restrict a Jew either.

Practical Applications

Broadly speaking what we have seen thus far are two kinds of considerations.

The first is for example, opening a pizza parlor, bakery, etc. next to an existing one. Assuming all things are equal (they are both equally accessible, they both pay their taxes, etc.) the argument, "I do what I want in my property and you do what you want in yours" is operative, and opening the second store is permitted. Where it can be reasonably predicted that opening the second store will totally destroy the first store's business, there are some who prohibit (*Chatam Sofer*) while others permit it even then (*Chavot Yair*, *Beit Ephraim*).

The other consideration, *Maarufia*, presents us with a novel problem. The second person does not really compete.

42. See also *Hagahot Maimoniot*, *ibid*.

Rather, the second party “snatches” or “steals” the flow, the monopoly, that the first party established for himself. In such a case those who forbid the second party from “stealing” the monopoly of the first do so because of the first party’s expectations. The certitude that the “flow” of benefits will continue is so strong, that the owner has a claim on these benefits. Interrupting these benefits is like going *into* his store and taking away his livelihood.

This leads us to discuss, albeit briefly, the concept of *Chazaka* or tenure for a particular position.

In *Iggerot Moshe*,⁴³ Rav Moshe Feinstein z”l discusses the following situation: A group of rabbis have been supervising a particular slaughterhouse for a long time. Now, another Kashruth certification agency approaches the owners of the slaughterhouse and asks that they be given the supervision. They threaten that if they will not be given the *Hashgacha* they will not allow their customers to use the products of this slaughterhouse.

Rav Moshe first discusses issues of *Rechilut* and *Lashon Hara* (slander, tale-bearing) and then says:⁴⁴

והרי הוא דבר פשוט וברור שאיכא איסור הסגת גבול אף בדברים
שלא קנו ממש אלא בהבטחה וכדומה.

It is certain and quite simple that the prohibition of *Hasagath Gvul* exists even when there was no formal *Kinyan* [acquisition], just a promise.

Consequently, *Iggerot Moshe* forbids the other group from seeking the Kashruth supervision because the promise was made to the first group of rabbis and they have the *Chazaka*, the “tenured right.”

43. *Choshen Mishpat*, II, *Siman* #40.

44. *Ibid.*

In a similar case, *Iggerot Moshe* ruled that the *Chazaka* rights of one group which has its slaughtering done in a particular slaughterhouse may not be revoked by fiat without good reason. Here again we see that when a person or a group have certain rights which, all things being equal, they expect to continue, one may not "steal" these rights.

I believe this explains why *Chazakot* in public positions, e.g. the rabbinate, have such strong backing among *Poskim*.

It is interesting that the laws relating to *Hasagath Gvul* and *Yored L'Toch Umenato Shel Chavero* are relaxed when it is related to *Talmud Torah*.⁴⁵ Still, it is prohibited for a rabbi to come to a congregation which has a functioning rabbi and offer his services. The first rabbi has the *Chazaka*, and no one may interfere with his services. This is true, asserts Rivash, even when the second rabbi is greater in learning than the first.⁴⁶ Later this principle was extended to other public positions. In addition to rabbis, the laws of *Chazaka* apply to *Chazanim* and *Shochtim* as well.⁴⁷

Contemporary *Poskim*, too, have backed the *Chazaka* for *Rabbanim*. *Iggerot Moshe*⁴⁸ states as follows:

It is quite simple and certain that whoever was elected as rabbi in any synagogue... *cannot ever* be removed from his position ...*even if the contract stipulates a specific time period.* [italics added]

45. *Hasagath Gvul* as it relates to *Talmud Torah* is beyond the scope of this paper. The discussion in *BB* 21b, and note 30 will be a good beginning for anyone interested in pursuing this matter.

46. *Shealot Uteshuvot Rivash* #272.

47. *Mabit*, II #2.

48. *Choshen Mishpat*, #34.

In another responsum, Rabbi Isaac Liebes,⁴⁹ goes further and states that none of the "honors" that the rabbi had may be revoked.

As an example of the stringency relating to community-held *Chazakot*, we cite a letter written by Harav Yitzchak HaKohen Kuk z"l. In it he decries with concrete and palpable pain the effort to pressure a Rav to resign his long-held position.⁵⁰

... על עצם הענין נעניתי השבוע ולולא דחוינא הדברים יוצאים מפורש מפי גברא רב' דכוותי לא הייתי מאמין לשמועה, אשר לא נראה ולא נשמע דבר כזה וכיוצא בזה במחנה ישראל גם בנוגע לאיזו משרה קטנה שבצבור, וכ"ש בעטרת הרבנות בעדה קדושה וגדולה בישראל, והרי הלכה רווחת היא, שכל השררות שבישראל ובפרט בענין קדושה יש להם אפילו תורת ירושה, וזהו גם לאחר אריכות ימיו של המחזיק בשררות כמבואר בדברי הרמב"ם בפ"ד מה' כלי המקדש הלכה ב' המיוסדים ע"פ ברייתא וספרי דכל פרנסי ישראל דין ירושה נוהג בגדולתם, ואפילו ליורשיהם הרחוקים אמרי' כל הקודם בנחלה קודם לשררה, ומה דמות נערך בשערורי' כזאת, לפחות ח"ו בשררות רב גדול בישראל המורה ודאין ומובהק לרבים ומנהל עדת ה' ע"פ התורה והמצוה זה עשרות שנים, בעורו בחיים עמנו לאוי"ש, להדפו מכסא כבודו על ידי איזה לחץ וכפי' שבעולם. ופשיטא שכל הדברים שנעשו בענין זה לכופ' ע"י איזה צל של איום את כ"ג שיסכים לדבר נורא כזה אין בהם ממש וכלא חשיבי, ואם אין אדם מוחל על ראשי אברים כדקיי"ל ב"ק צ"ג, א', וכ"כ הרמב"ם....

ואפילו אם היה מקבל מהם איזו טובה או שכר בעד המחילה אינם כלום ולא דמיה כלל בזה לזבינא, וכד' ההגה בשו"ע אה"ע סי' קל"ד ס"ח דאפילו קבל מעות על נתינת הגט לא אמרי' משום זה נתרצה שזה שייך לומר רק בזבני דיודעין להעריך את הדבר בדמים משא"כ בגיטין כשאינו רוצה לגרש, ופשיטא דה"ה במחילת שררה

49. *Shealot Uteshuvot Beth Avi*, Vol. I #156 and Vol. II #149.

50. *Techumin*, Vol. V, pp. 285-6.

של קדושה שאין לה כלל הערכה בדברים גשמיים כמו פרס וכיו"ב. ובפרט שהפרס המובטח הוא היה ראוי הוא לקבל יחד עם השררות המוחזקת ופשוט הוא שאין בזה שום אחיזה לומר שתהיה המחילה דבר שיש לתלות עליו שום צד להיתר הסגת גבול הרבנות.

ודבר ידוע שהצער הזה שיראה אדם את גדולתו ניטלת ממנו לעיניו ונתנת לאחרים, שהוא גדול ועצום מאד, עד שחז"ל במד"ר ס"פ וילך אמרו על משה לגבי יהושע ואמר מאה מיתות ולא קנאה אחת, וזהו אפילו בתלמידו שאין אדם מתקנא בו, וק"ו שיראה אדם שלוקחין את כבודו ומעמד הדרו ונותנים לאחר לעיניו בלא צדק ומשפט שהצער הוא נורא מאד, ואין לנו חומת אנך גדולה מזו שהמחילה המפוקפקת של הדבור שיצא מפני ההכרה לית בה ממשא ונמצא שכל זמן שלא הברר הענין הזה ע"פ בד"צ בדין תוה"ק ודאי ברור הדבר כשמלה שאסור לשום רב לבא בגבולו.

ובטוח אני כי הרב הזה יחוש לנפשו ויעצור ברוחו שלא להשתמש בשום דבר של רבנות והוראה, בלא הסכמת כ"ג הברורה או אחר שתצא החלטה מבוררת מב"ד גדול הראוי להוראה גדולה וכללית כזאת לתווך בדברי רבות שבשערי בית ישראל להביא שלו' בעולם לרבנן ולכל ישראל.

...On the basic issue...had I not seen these words uttered...I would not have believed ... it has not been seen nor heard in the Jewish community even in relation to a minor position, and certainly not as it relates to the crown jewel of the rabbinate in a great and holy congregation in Israel. It is, of course, a widely held halacha that all publicly-appointed officers, and certainly in matters of sanctity, carry within themselves the aspect of inheritance even after the life of the office holder...and how can we allow such travesty to diminish, G-d forbid, the position of a great Rav in Israel who leads his community in the path of Torah and mitzvot for decades...to remove him from his post through pressure.

It is certain that all things that are being done to pressure you to agree and submit to this awful step

have absolutely no validity and are considered like naught ... And even if you receive some favor or compensation for giving up your rights it is meaningless...

For it is well known that the pain of a person to see his honor and dignity taken away and given to others... is a terrible thing to behold... And the pain certainly is great when one's dignity is taken away without any cause...

And I am certain that the rabbi [who is trying to usurp] will withdraw.

Conclusion

Let us sum up briefly the main points of this paper:

1. *Hasagath Gvul* relates, most basically, to land in Eretz Israel.
2. In an economic sense, *Hasagath Gvul* or *Yored L'Toch Umenato Shel Chavero* does not apply when we can argue "I work in my property, you work in yours."
3. *Hasagath Gvul* does not apply to "Main Street, U.S.A." except, perhaps, according to Chatam Sofer, when it can be *predicted* that the new store will totally destroy the original store's business.
4. Where there are existing *Chazakot*, *poskim* are very stringent with *Hasagath Gvul*.

Minhag

Rabbi Alfred S. Cohen

Sources And Reasons

In the twentieth century the world has become, in effect, appreciably smaller. That is to say, the vast distances which used to separate communities or countries can now be spanned in mere days or even hours. Consequently, it is common for a community to include among its members persons of widely differing background, education, and custom. Although diversity has given unique richness to the fabric of American communities, it has also given rise to many novel situations which Jewish law has to address. One major area of concern is how to determine what customs a community or an individual should follow.

This paper will explore the weight which Jewish law and tradition give to customs, whether communal or private, be it in personal behavior or public policy. Our investigation will lead us also to consider some fascinating ancillary concepts which are implicit in Jewish thinking.

Much has been written and spoken about the power of *minhag* (custom). An idea of how deep the commitment to *minhag* is may be gleaned from the commentary of *Torah Temimah*, quoting R. Sherira Gaon, on the biblical verse,

Do not remove the boundary of your friend, which the early ones established as a boundary. (*Devarim* 19:14)

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The plain interpretation of this command is that it is an exhortation not to tinker with markers which were set long ago as boundaries between neighboring farms. However, the *Torah Temimah* comments, "from here we learn that *minhag* is a matter of consequence."¹ In other words, established customs ought not to be neglected or changed.² Citing the

1. The same is quoted in the *Yalkut Shimoni* to *Mishlei* 22:28: "If you have observed a custom that our forefathers did, do not change it; for example, Abraham instituted morning prayer." See also the *Chatam Sofer, Orach Chaim* 51, where he emphasizes the importance of *minhag* by the fact that on the second day of every Yom Tov we recite *berachot* even though the observance is only a custom.

However, in *Masechet Sofrim*, 14:18, we find "but this which [our rabbis] said, that 'a custom annuls the halacha' [refers only to] an established custom, but a custom which has no proof from the Torah, is nothing other than a mistake in judgment."

In *Choshen Mishpat* 331, the Ramo writes, "Only something which occurs often and is done many times can be called 'custom', but something which is done only one or two times is not called a custom."

See also *Aruch Hashulchan, O.C.* 696:4.

2. The medieval scholar Ran writes how far one must go to uphold a custom:

Thus we learn that every custom...which exists in a city, which is not a *minhag* founded on error but rather [a practice] that people undertook to be strict upon themselves, in order to "make a fence around the Torah," or concerning something which is under contention by the Sages of Israel and they [the townspeople] instituted a custom to follow the opinion of those who are more strict, all the people of the city are required under law [to follow] it. (*Pesachim* 50b).

For a very interesting analysis of various *minhagim*, see Maharam Schick, *Orach Chaim* 259. See also *Yechave Da'at* 6:9, about the custom of removing the *parochet* from the *Aron Kodesh* and 2:3, about an Ashkenazi Jew's using *tefillin* written by a Sephardi in the Sephardi manner.

Tur, he continues "...Certainly, a person is obligated ... not to change the custom...and the language that he [the *Tur*] uses indicates that this [prohibition] is a biblical command."

The requirement to follow an established custom is also stated by Rambam.³

Whoever goes against any one [of the regulations of the rabbis] is transgressing a negative commandment, inasmuch as it says [in the Torah]: "[...You must follow] according to all that they [the rabbis] teach you." These include the amendments, decrees, and customs that they teach to the multitudes, in order to strengthen their minds and improve the world.

Thus, according to Rambam, it is a biblical prohibition to disregard the established custom.⁴

In *Iggerot Moshe*,⁵ R. Moshe Feinstein reiterates the overwhelming authority of custom:

And know...that whatever we see even one large Jewish community doing, [it] is not a matter of error, for assuredly this [custom] was instituted by a Sage, since [it is being done] by a community of people who observe the Torah and mitzvot...However, if there is a custom which all Israel follows, [everyone] must do as they do, even one

3. *Hilchot Mamrim* 1:2.

4. *Ibid*, 2:2. Rambam permits changing an established custom only by a Rabbinic Court (*beit din*) which is "greater in wisdom and in number" than the one which made it. This is not the place to discuss the prerogative claimed by the Reform movement, to make changes in hoary Jewish practices, as discussed in the writings of *Chatam Sofer*, part I, 12; by R. Akiva Eiger; and others. The motivation and rationale of Reform leaders sets that chapter quite apart from our topic.

5. *Orach Chaim* 4:90:17.

who thinks that it [the custom] is a mistake, for he must know that the community of Israel acts according to the Law.⁶

Our sages have summed it up: when the Jewish people have a custom, it has to be right, "for even if they are not prophets, they are the children of prophets."⁷

This statement may strike one as charming – but is it meant to be taken literally? Can one really accept that all Jewish customs are correct, that they have a sound origin? If that is so, why did the prophets constantly reprimand the Jewish people and criticize their practices? What about the many customs throughout the ages which have disappeared or been modified or just plain changed?

Obviously, we must look for a deeper understanding of the dictum that Jews are "children of prophets" and therefore all their customs are good. Moreover, there are frequent references to customs which are based on a mistaken or flawed understanding of the law, and one is often prompted to abolish them.⁸

The purpose of the present study is to take a closer look at the status of an established custom, how much authority it should be given, how we determine if it might be a "*minhag*

6. The overarching principle in rabbinic reactions appears to be to try and justify a prevailing custom, even if it appears to be contrary to Jewish law. Among the customs explained by *poskim* are shaving on *Chol Hamoed*, drinking wine touched by non-Jews, lending money at interest, and the ways women cover their hair. *Sdei Chemed, maaracha* 40, Vol. IV, p. 78, has an extensive list of such customs, including anomalies in Shabbat and *Get* practices.

7. *Pesachim* 66a.

8. See *Sdei Chemed, Ma'aracha* 40.

ta-ut" (a mistaken custom). Additionally, we will examine many questions which arise in connection with *minhag*: How to proceed when there are conflicting *minhagim*, what to do in a community whose members have equally valid although different customs, how to proceed when one's *minhag* differs from that of the community, and related problems. We will examine a variety of scenarios wherein conflict of customs is likely to surface.

Jews With Different Traditions

One of the most common instances where the Jewish law on custom comes into play is in the differences between Jews in Israel and those living outside the Holy Land. One that arises very often relates to Americans visiting Israel. What should they do on the second day of a Yom Tov, which is observed as a holiday by Jews everywhere in the world except in Israel? Does the American follow his own custom, to keep the second day as Yom Tov, or does he follow the custom of the place – Israel – while he is there? What if he intends to return to America? What if he *doesn't* intend to return – is he permitted to switch customs in midlife? What parameters will inform the decision?

This is a complicated issue which has been discussed by *poskim* for hundreds of years, involving not only laws of customs, but also laws of Festivals, *berachot*, *tefillin*, and more. We mention it here only to highlight how many areas of life are touched by the issue of *minhag*.⁹

Nor is it only a modern problem. Almost five hundred years ago, R. Yosef Karo already had to contend with this

9. For a full discussion of the questions and the solutions offered for visitors to Israel on Yom Tov, see *Journal of Halacha and Contemporary Society* VI, p. 79.

problem. In the wake of the expulsion of Sefardic [Spanish] Jews in 1492 and due to increased traveling of all people, it often happened that Ashkenazi and Sefardi Jews lived together in one community. Sefardic Jews used to eat meat after an animal was slaughtered, without further checking, but the Ashkenazic custom was to require additional checking. What should an Ashkenazic Jew do if he lived in a Sefardic community – was he allowed to eat their meat? Rav Karo, author of *Shulchan Aruch* and virtually the greatest *posek* of his time, ruled that a person must accept all the customs of the place where he resides. *Even if he wants to be strict and retain the stricter customs he had before, he is not permitted to do so,*"because of the calumny and the dissension [which it might arouse]. For peace is great, because the world exists upon peace."¹⁰

His ruling is based upon a talmudic discussion in *Pesachim* 50a:

In a place where the custom is to do work on *Erev Pesach* until midday, people may do it...Someone who goes from a place where they do [work on *Erev Pesach*] to a place where they do not, we place upon him the strict rulings of the place he came from and the strict rulings of the place he comes to. But let a person not act differently, [than the group] because of [fear of] controversy.

However, the Gemara then proceeds to record that it was the custom in Eretz Yisrael to eat a certain food, but in Babylon it was not eaten. When Rabba bar R. Chana came to Babylon from Israel, he ate the fruit. This seems to contradict what we have just learned, that one should follow the restrictions of both his place of origin and his place of current residence. Abaye tries to solve the disparity by positing that

10. *Avkat Rochel* 212.

since Babylon is subordinate to Israel, it is proper to continue following Israeli custom. But Rav Ashi is of the opinion that the determining factor is if one plans to remain in the second place; if so, he must follow their custom. The Rosh¹¹ and *Shulchan Aruch*¹² agree. We can sum up, briefly, that apparently, "when in Rome, do as the Romans..."¹³

The *Shulchan Aruch* concludes that one must accept all customs of the country in which he lives if he plans to remain. If he does not plan to remain, he must retain his own customs and also the strict ones of the place where he finds himself temporarily. Moreover, he adds, it is in all circumstances important to act in such a way as to avoid *machloket*, dissension.

People In One Place Following Differing *Minhagim*

Is it permissible for a group to follow one custom but for an individual within the group to act according to his own, different custom? In the Torah we find a command, "Lo

11. *Pesachim* 4:4. See also *Iggerot Moshe Orach Chaim* 4:34.

12. *Yoreh Deah* 214:2. See the *Schach*, *ibid*, who explains this ruling in light of a different rule in 554. See also *Mishnah Berurah* 468 and *Shulchan Aruch Harav*, *ibid*. Some exceptions exist: Rambam and Tosafot maintain that a person should always follow the stricter custom, even if he plans to stay in a place where the community is more lenient. Radvaz in 4:73 also rules this way.

13. Despite what we have seen earlier, about having to undertake the stringencies of both one's old and new abodes, the Mordechai suggests that if a person comes to a town where they are more lenient than he is accustomed, but they explain their reasoning to him and he agrees, he is permitted to follow their lenient practices, regardless of his previous custom. (*Yevamot* 13b, although he concedes that this is contrary to what the Gemara writes in *Pesachim*.)

Titgodedu,¹⁴ whose literal translation is that it is forbidden to tear the flesh as a sign of mourning. However, our rabbis gave it an additional interpretation: "*Lo titgodedu – lo ta'asu agudot agudot*", "do not make yourselves into separate groups."¹⁵ Rashi there explains that it should not look as if the Jews have two Torahs; therefore, in any one place, we should all follow the same practices.

In the talmudic discussion, the question is raised what this principle means in practical terms. Abaye is of the opinion that if two Jewish courts in the same city issue differing directives, that is a violation of *Lo Titgodedu*; however, if the two courts are in two different cities, there is no violation. Rava, on the other hand, finds no problem with courts in the same city issuing opposing rulings; but if within one court (*beit din*) there are two groups, each issuing its own ruling, that is the violation.¹⁶

Rambam accepts Abaye's position that within one city there must be uniformity and adds, "for this thing [conflicting judgments within one city] leads to great controversy."¹⁷ Nevertheless, there are those who maintain that the need

14. *Devarim* 14:1.

15. *Yevamot* 13b. Whether this teaching counts as a negative commandment or is an *asmachta*, see the *Gur Aryeh* and the *Mizrachi* on *Devarim* 14:1.

Pitchei Teshuva, 248:3, writes on the rule that a woman should not give large amounts of money to *tzedaka* without her husband's permission. However, if she comes from a family whose custom it is to give charity so that prayers will be recited for a pregnant woman to have an easy labor, it is possible that her husband is obligated to give such donations for her when she is expecting.

16. See Meiri to *Yevamot*, who explains how the court should resolve its internal differences.

17. *Hilchot Avoda Zara* 12:14. *Kesef Mishneh* explains why Rambam follows Abaye instead of Rava.

for uniformity applies only to legal judgments but not to custom, where diversity may exist.¹⁸ The Ramo, whose opinions are virtually definitive for the Ashkenazi community, writes,

In one city, there should not be some following one custom and others following another custom, because of [the *issur* of] *lo titgodedu*.¹⁹

18. See *Sdei Chemed*, *Ma'aracha* 30:29, and *Magen Avraham* 493:6.

19. *Orach Chaim* 493:3. See also *Chatam Sofer* 10:86, who considers that Rif and Rosh concur with this. However, it appears from the Talmud in *Yevamot* 13b that the prohibition of *lo titgodedu* does not apply to variations in custom. When one rabbi mentioned a custom in a debate, the other responded, "I'm speaking about a biblical law (*lo titgodedu*), and you respond with custom!!" The implication is clear: *lo titgodedu* does not apply to custom.

The *Magen Avraham* 493:6 agrees that *minhag* is not included in the prohibition to split into groups. *Magen Avraham* speculates that the Ramo was discussing something that is *assur* (forbidden), even though it is only forbidden due to *minhag*. See *Iggerot Moshe*, *Orach Chaim* IV, 34, where R. Feinstein writes that anyone who deviates from an accepted custom in a synagogue violates *lo titgodedu*. If he has an official position in the congregation but refuses to conform, he is to be sent away. Yet, R. Feinstein does permit certain unusual practices, such as donning *tefillin* during *mincha*, if it is done in such a way as not to draw attention, and people are unaware of it.

In *Iggerot Moshe*, O.C. II, 29, Rav Feinstein rules that a *chazan* who usually *davens* according to the Ashkenazi mode, must nevertheless recite the *Shemoneh Esrei* according to the Sefardi mode if he is leading services in a Sefardi shul. In *Yechave Daat* III:10, Rav Yosef cites *Sefer Shevil David* that a Sefardic Jew praying in an Ashkenazi shul should recite "*keter*" in the *kedusha* of *Mussaf*.

In *Shearim Metzuyanim Behalacha*, I, 26:3, we find that if a person usually follows a *nusach* in prayer different from the one in the shul where he is presently *davening*, then if he is acting

With these rabbinic values in mind, we can more readily understand the various opinions expressed regarding questions of custom.

Marriage

Marriages between persons of differing cultural antecedents are not at all uncommon. A Chasid may marry a non-Chasid, a Sefardi may marry an Ashkenazi, a man from Yemen may end up with a girl from Los Angeles, an Israeli girl can marry a boy from South America. What kind of home will they establish – whose customs should prevail?

What if the man has a custom which is more strict than the norm, is he entitled to expect his wife also to act that way? What if an Ashkenazi marries a Sefardi, with both having venerable customs which are quite different – should each continue as before? (She might eat rice on Pesach, he will use a different Siddur than she, etc.) And if we do determine that the man's practices should set the standard for their home – does this mean only once they are married? Is she supposed to follow his different customs even before the wedding?

Based on numerous indications in rabbinic literature that a woman is considered as functioning within her husband's orbit ("kafuf"),²⁰ there is one body of opinion that a woman

as the *shaliach tzibbur* (prayer leader), he must use the shul's version when he is leading the prayers but use his own version when he is praying silently before the repetition of *Shemoneh Esrei*. The same approach is also found in the *N'tziv*; *responsa Shoel U'maishiv*; and Rav Landau, the son of the *Nodah Biyehuda* in the name of the Ramo.

20. For example, in *Kiddushin* 30b, the rabbis exempt a woman from certain aspects of honoring her father and mother, since she has to fulfill her husband's wishes.

should accept the laws and customs as practiced by her husband.²¹ This is analagous to the relationship between the Jewish communities of Israel and Babylon, where Abaye concedes that his own Babylonian customs have to be set aside when they conflict with those of the Land of Israel, "for we are subordinate (*kafinan*) to the people in Eretz Yisrael."²² All the rules about a person's retaining his own customs even when he comes to a new town, are intended to apply only to situations where the status of both is equal. However, the community in Israel is considered as having greater authority than the one in Babylon, and where they clash – the Israeli custom prevails. So, too, according to this body of *poskim*, where a husband's and wife's customs conflict, his are considered to have more authority.²³

To buttress this opinion, we find throughout our literature numerous instances of the basic rabbinic understanding that a husband and wife form one entity. "*Ishto keGufo*" our rabbis said, "a man's wife is like his own self."²⁴ "How can two people eat from one plate, and for one the food is permitted while for the other it is forbidden?"²⁵ There can hardly be a greater impediment to *shelom bayit*, serenity in the home, than the two partners

21. Rabbo Yehuda Segal, *Hatorah Vehamedinah*, II, p.252.

22. *Pesachim* 51a.

23. However, the author of *Hatorah Vehamedinah* indicates that if upon marriage a woman does abandon certain practices which she always followed, she needs to make *hatarat nedarim*, a ceremony releasing her from her "vows." Rav Ovadia Yosef also makes this provision, in *Chazon Ovadia, Mitzrechei Mazon* 3. But *Iggerot Moshe, Orach Chaim* 158, sees no need for the procedure.

24. *Berachot* 35a, and *Piskei Harosh, Makkot* 1:13.

25. *Tashbetz* III, 179.

marching to different drummers!²⁶ Thus, the ruling is that a woman should adopt her husband's *minhag*.

As simple as this rationale seems, it is nevertheless not the approach taken by a significant corpus of *poskim*. Their policies concerning *minhag* are not straightforward but actually quite complex; it is somewhat difficult to derive broad principles from their rulings, to delineate clear rules about whose *minhag* takes precedence. Probing their reasoning on these matters may help "finetune" our understanding of the qualities of *minhag*.

This second body of *poskim*, which does not accept the primacy of the husband's *minhag* in all cases, draws a distinction between "private" and "public" customs. Idiosyncratic practices which a husband has accepted upon himself, privately, cannot be forced upon his wife. However, when one functions as part of a group, he or she must accept all customs of the group; therefore, in their lives as part of a group, it is the husband's group with its customs which they must both follow.

Following this general line of thinking is a responsum of the Rashba,²⁷ where he opines that if a man and woman getting married have conflicting traditions, they *both* have to follow the customs of the town they are moving to. Even in matters that arise prior to their marriage, they should follow the customs of the town in which they plan to reside.

An example of this rationale appears in the responsa of R. Moshe Feinstein:²⁸ A man didn't want his wife to wear a *sheitel*, but rather to cover her hair in a different manner. R.

26. Introduction to *Ish Veishto*, quoting *Tashbetz* III:179.

27. V:562.

28. *Iggerot Moshe, Even Haezer* 2:12.

Moshe Feinstein ruled that the woman could wear a *sheitel*, as most of her friends did, "for even if he wants to be more strict, he is not entitled to impose his stringencies upon her, because this rule [covering the hair] concerns only her." If a man wants to be more strict than most, that is up to him, says R. Feinstein, but he cannot make his wife follow these personal proclivities.

Elsewhere, R. Feinstein rules that if a husband decides to *daven* early on Friday evening (to start Shabbat before the official time), his wife does not have to abstain from work if she chooses not to.²⁹ He cannot force her also to accept Shabbat early.³⁰ But if they belong to a community³¹ where all start Shabbat early, then of course she, too, would have to go along,³² even if her personal preference would be to wait until the proper time for Shabbat. Furthermore, even if they live in a community where some congregations accept Shabbat early and some at the regular time, she would have to join in the custom of the shul where her husband *davens*.³³ Where he *davens* is his choice, and she is bound by the

29. Ibid, *Orach Chaim* 3:38.

30. Rav Feinstein advised that she not do work for him at this point, since he has already accepted Shabbat for himself.

31. For example, a bungalow colony.

32. *Orach Chaim* 263:12.

33. Without adducing any halachic source, R. Feinstein then proceeds to limit this ruling only to those instances where the group has accepted Shabbat early for reasons of mitzvah. However, if they want to make an "early" Shabbat just for pragmatic reasons, the ruling does not apply. Thus, if the group starts Shabbat early during the summer months, in order to be able to eat the Shabbat meal earlier, and not because they want to have more Shabbat, she would not have to go along. One wonders why he apparently does not consider having the young children be able to participate in the Sabbath meal as a mitzvah.

public customs of that group; however, his personal strictures, as we have noted, do not bind her.

In another responsum dealing with a married couple, R. Feinstein examines a case where she came from a group where the married women all shaved their heads, but it was not the accepted practice in his community.³⁴ In this instance, R. Feinstein writes that a woman getting married is analogous to a newcomer to a community, who does not intend to return to his previous abode. Thus, the woman now has to accept her husband's community's customs. It is no longer a private custom but rather the communal mode he is asking her to adopt.

A contemporary *posek*, Dayan Weiss, accepts the foregoing principles, with an exception: his opinion is that the couple should follow the customs of the husband's group, but only after they have married and joined that group. His thinking is that the customs of the group affect only the people actually living in that community and not those who plan ultimately to join it.³⁵ Dayan Weiss cites the precedent set by Chida,³⁶ in discussing a marriage between an American woman and an Israeli man. Since they were getting married in America, the Chida writes that "until she arrives in the Land [of Israel], she has to observe two days of Yom Tov [even though Israelis observe only one day, and the Israeli groom, even when in America, keeps only the one day]."

Dayan Weiss adds an interesting caveat: his ruling applies only if the husband has no strong feelings on the matter; but if it will interfere with *shelom bayit*, she should go along with his customs even before it is mandatory. Dayan Weiss

34. *Even Haezer* I:59.

35. *Minchat Yitzchak* 4:83. He does not cite the Rashba V:562.

36. *Responsa Chaim Sha'al* I:55.

does distinguish between the couple marrying in America, who will eventually go to a place with a consistent *minhag*, and a couple getting married in a town which already has a variety of *minhagim*, in which case he rules that the wife should adopt her husband's customs as soon as they are married. He is writing about those practices which are more stringent than the communal ones; as for the more lenient ones, he is somewhat hesitant.³⁷

In the writings of former Chief Rabbi Ovadia Yosef, we find great difficulty in discerning clear guidelines. At one point he rules that an Ashkenazi wife, whose custom has always been not to eat rice on Pesach, should continue this way but may prepare rice for her Sefardi husband.³⁸ He adds that if she wishes to switch to her husband's customs, she must first make *heter nedarim* (release from vows). This seems to indicate that in R. Yosef's opinion the choice is up to her.

37. His position has practical repercussions: Sefardic and Ashkenazic Jews have different customs about reciting the *bracha* when a woman immerses in the mikvah. When a man and woman from each of these communities gets married to the other, whose custom should she follow when immersing prior to the wedding ceremony? How about a Sefardic newly-married woman staying with her Ashkenazic in-laws for Pesach, prior to moving into her own home—what about her customs concerning *kitniyot*, egg matzoh, and other matters, which are different than the Ashkenazim? And Sefardic women do not generally fast on their wedding day, while Ashkenazic women do...

If his opinion is accepted, the rule in all these cases would be that she should not follow her future husband's *minhag* until they are married.

38. *Chazon Ovadia, Mitzrechei Mazon* 3. This is in accord with the *Chida*, 467:6, but differs from the *Knesset Hagedola*. See his footnote 9 for other sources which allow or disallow her to cook food which she may not eat. See also his *Yabia Omer* 5:37.

Yet in his *Responsa Yabia Omer*³⁹ we find a different approach:

There is no doubt that a woman is included with her husband in all his obligations, for "his wife is like himself" in all his obligations..."and it is an obvious matter that two cannot be sitting at one table but differing in what they eat, that what is forbidden for one be permitted for the other."⁴⁰

Moreover, he writes, "the husband is able to insist (*lachuf*) that his wife be lenient when he is."⁴¹

What emerges is that all *poskim* agree that husband and

39. 5:37.

40. The only question left unresolved, according to R. Yosef, is what happens if the marriage is terminated. It is a rule of Jewish law that if one accepts a *cherem*, he must keep it forever, even if moving to another community which does not have that *cherem*. For example, if one lives in a place where the *cherem* of Rabbeinu Gershom (not to have two wives) is accepted, he cannot change, even if he moves to a community which has not accepted this prohibition. Does the same rationale apply to a custom which was instituted as a "fence and a withdrawal"?

Sefer Get Pashut 129 discusses what to do if a *get* (Jewish divorce) is written for a Sefardi and Ashkenazi who are married. Since the Torah says that "he writes [a *get*] for her", we ought to follow his practices in writing the *get*. It is difficult to understand why it was necessary to base this ruling on a special verse in the Torah, rather than relying on our general rules about customs.

41. However, at the end of his responsum, Rav Yosef writes, "the rule which emerges [from our discussion] about the law of an Ashkenazi woman who is married to a Sefardi—*she must follow her husband's customs, whether strict or lenient.*"

Perhaps the explanation of the apparent inconsistency is that he believes that changing her customs to those of her husband is not an automatic step. It may depend on other variables, such as his feelings about the matter. If he doesn't care that she continues following the customs of her father's house when she visits there, then she may do so.

wife should do everything they can to avoid dissension between them. Unity in their customs is one aspect of this harmony, although uniformity is not always required. However, in communal customs, it is considered that a woman is part of her husband's community and therefore they are mutually bound by these communal practices. Many *poskim*, however, grant her the leeway to follow personal customs as she wishes.

Parent/Child

The family is an extension of the husband and wife; as a unit, they have one custom for all. To what extent are children bound by the customs of their parents? Is a person obligated to keep the customs he was brought up with? What if, for example, a Sefardic man decides to live in an Ashkenazi community and wants to follow their customs when he gets married?

Maharam Schick⁴² records a question asked by a yeshiva student who left home to attend yeshiva, where the meals included "fatted goose," a food which his family would not eat. Was he permitted to partake of the dormitory meals anyway? This type of situation is also discussed by Rav Ovadia Yosef,⁴³ the members of whose Sefardi community often encounter the problem when their young men go to study in Ashkenazi yeshivot. In these yeshivot, the students follow customs which are to some extent alien to the Sefardic tradition: they pray differently, they don't cut their hair during the Three Weeks, etc. Should the Sefardic student conform, or should he continue with his own community's customs?

42. *Orach Chaim* 259.

43. *Yechave Da'at* 4:36.

There are two talmudic texts which touch on this situation, with apparently contradictory teachings: In *Chullin* 105a, the Gemara discusses how long one must wait after eating meat before eating dairy foods. Mar Ukva is quoted as calling himself "*chometz ben yayin*" "vinegar the son of wine," i.e., an unworthy descendant of his father. His father, he relates, would not eat dairy foods for an entire day after consumption of meat, but Mar Ukva used to wait only until the next meal. This anecdote seems to be telling us that it is permitted for an adult child to deviate from the custom of his father.

However, in *Pesachim* 51b we read about the *bnei Beishan*, the townspeople of Beishan, whose established custom it was not to travel on Friday afternoon, even so short a distance as from Sidon to Tyre. Years later, their children came to R. Yochanon for permission to desist from this stringency, claiming that their parents had been wealthy and could afford to miss doing business on Friday afternoons, but the children found it economically difficult.⁴⁴ Nevertheless, Rav

44. Rashi, *ibid.* Why didn't R. Yochanon suggest that they have their "vow" (the custom) released through *hatarat nedarim*? The Jerusalem Talmud asks this question and responds that *hatarat nedarim* is efficacious only to release one from a custom, which is like a vow. However, in this instance the practice was rooted in halacha, and there can be no release from a law.

See also Maharam Schick, *Orach Chaim* 259, discussing an incident that occurred in the yeshiva of the Chatam Sofer. He concludes that the efficacy of *hatarat nedarim* for a custom is disputed. See further Maharashdam, *Yoreh Deah* 40 and *Pri Chadash*, *Kuntres Haminhagim*, note 2. See also *Beit Yosef*, *Yoreh Deah* 214, discussing the opinions of Rosh and Rashba, whether *hatarat nedarim* requires all the townspeople to agree to change, or whether one person can make it for himself. *Chatam Sofer* in *Orach Chaim* 122 maintains that each person may do it individually.

Yochanon refused to permit it, for "your ancestors accepted this upon themselves [and therefore you must also] because it says "Hearken my son to the teachings of your father..." Thus, we find the Talmud in this instance stressing that a son may not depart from his family's tradition.

In *Shulchan Aruch* we find the principle of following the family traditions encoded into law,⁴⁵ particularly if it concerns an exemplary custom, such as fasting on the day before Rosh Hashana or not drinking wine during the first Nine Days of Av. A person who wishes to depart from these fine customs would need *hatarat nedarim*, according to *Shulchan Aruch*.

The acceptance of the group is binding upon them and their children, and even in matters where they did not accept upon themselves with a [verbal] agreement, but only follow this practice in order to "make a fence" [around a prohibition] and as a barrier [to sin].

Once again, we perceive the insistence upon conformity with the group – if the group institutes a custom, all are bound by it, and their children after them. When the Gemara writes about "*bnei Beishan*," it is not referring to the children of a family named Beishan, but rather to all the people of the town of Beishan. Thus, their custom is binding on future generations.

For a full discussion of the question, see *Sdei Chemed*, *Ma'aracha* 40:37.

45. *Yoreh Deah* 214:2. In responding to a question whether one may eat cake made with non-*chalav yisrael*, (*Yoreh Deah* 107) the Chatam Sofer gives his opinion that children have to follow in the customs of their parents, this obligation being equivalent to a vow and therefore a biblical requirement. However, Chida *Yoreh Deah* 214:1 does not see it as a biblical obligation, since no verbal vow was uttered.

However, this is not an automatic process. If a person individually follows a particular custom, his children do not have to do it unless they voluntarily maintain the custom themselves.⁴⁶ Acceptance of the custom is binding only if the person willingly did it after his marriage or upon living independently of his family.⁴⁷ It is only when the community as a whole has adopted a practice that it becomes binding upon the children.⁴⁸

Food

When a guest is invited to eat at the table of someone who has differing customs concerning foods, the guest should

46. *Pri Chadash*, *Kuntres Haminhagim* 7; *Mateh Ephraim* 589 says it is not binding until he observes the custom three times.

47. Rav Ovadia Yosef, *Hilchot Mitzrechei Mazon* 2, quoting Maharam Schick, *Orach Chaim* 259. In footnote 5, Rav Yosef rules that if a son followed the custom because he thought he was obligated to do so, but upon finding out that he has a choice wants to abandon it, he may do so without *hatarat nedarim*.

48. In a situation where there are two distinct communal customs, a person would probably be bound to accept his father's community's custom. See *Iggerot Moshe Orach Chaim* 3:38. However, if only some of the people in the group are strict about the matter, a person need not follow. *Responsa Rav Pe'alim*, *Yoreh Deah* 2:23 writes about a married woman whose mother had the custom of not going to the mikvah after childbirth, for 40 days after a boy and 80 days after the birth of a girl. *Rav Pe'alim* maintains that the daughter does not have to adopt this private stringency of her parent. See also *Minchat Chinuch* 365 in *Kometz Mincha*.

The *Sdei Chemed*, *Ma'aracha* 40:37, p. 78, s.v. *minhag*, distinguishes between a *minhag* that has no basis in *din* and one in which the father accepted a particular halachic opinion as binding. For example, if the father customarily dons *tefillin* on *Chol Hamoed*, relying on the halachic decisors who mandate it, but the son does not want to follow this halachic direction, he is free to do as he wishes.

retain his own customs.

Someone who is accustomed to consider a certain thing forbidden, either because he thinks that that is the law or because he has undertaken to be strict for himself, is permitted to dine with others whose custom it is to be lenient, for certainly they would not give him to eat something that he considers forbidden.⁴⁹

This principle extends not only to food but to any other practice which a person adopts – if he considers it forbidden, no one is allowed to cause him to act contrary to his established principles. This is evident from two talmudic sources:⁵⁰ In *Yevamot* 14, the Gemara records that even though the Academy of Hillel and the Academy of Shammai held sometimes radically different views on Jewish law, they allowed their children to marry one another, confident that if there were any halachic impediment (which only one group accepted) to the marriage, the others would certainly inform them (*modia lehu*). And in *Chullin* 111b, one of the rabbis remarks, "Heaven forbid, that the children of Aba bar Aba would ever serve me anything forbidden." We rely on the assumption that no Jew will violate "do not put a stumbling block before the blind," by knowingly causing someone to violate something which he considers forbidden.⁵¹

49. Ramo to *Shulchan Aruch*, *Yoreh Deah* 119:7. Of course, the host has to know about his guest's custom. See *Shach*, *ibid*, 20.

50. *Gra* 119:21. It seems that this rule applies only if the person following the strict opinion is not making a mistake. However, if he is mistaken in thinking something is forbidden, then we rule, "force him to eat it." (*Chullin* 111).

However, neither of the sources have anything to say about the person retaining his custom, however mistaken. They simply speak about an outsider's responsibility to be careful about it.

51. *Shach*, *ibid*, 20.

In practice, then, one may eat at someone's home even if that person does not observe the same *chumrot*,⁵² and even if the host is not a learned person, for we rely on the basic goodwill of an observant Jew not to cause others to transgress.⁵³

An issue which is not really specific to the topic of *minhag* but which is germane here and in many other instances is the prohibition of "*mecheze keyehora*", which is a general disapproval of exhibiting unusual piety in public.⁵⁴ Judaism has a distaste for showing off, particularly for showing off with one's piety. Doesn't adherence, publicly, to an extra-strict custom, smack of showing off one's piety? On the other hand, there is the imperative to abide by one's established custom. Does this principle apply even to observing a strict custom while in the presence of a distinguished person who is more lenient? Should one defer to the greater person's custom out of respect?

The Meiri makes an apt observation:

It is not proper to [practice a stringency] before someone who is greater in wisdom, at a time when the greater

52. *Orach Chaim* 496:23. As for the utensils, see Ramo, *Yoreh Deah* 64 and 115:1; Magen Avraham *Orach Chaim* 489; *Mishnah Berurah Orach Chaim* 489:48; Shach, *Yoreh Deah* 119–20. The consensus is that if the guest believes his strictness is required, he is nevertheless permitted to eat from the ordinary utensils, if others are eating too. However, if the food is being prepared especially for him, there may be a problem with the utensils.

53. *Pri Chadash*, *ibid.*

54. See the *Shulchan Aruch Harav Orach Chaim* 32:8, which explains when it is laudable to adopt strict behavior and when it is considered undesirable. His position is predicated on the Rambam's *Commentary to Mishnah, Sota* 3. Rambam explains the term "*Chasid Shoteh*", a foolish pious person.

person follows the more lenient procedure, because it is as if he is showing off how great he is...and not only that, but if he does act this way, the greater person has the right to excommunicate him.⁵⁵

According to the Mordechai,⁵⁶ a person should not act ultra-pious before a greater man, even if the latter doesn't mind. He brings proof from an incident where Rav Avuha, a leading Babylonian *Amora*, modified his practice in deference to Rabbi Yochanon, whom he revered as his teacher.⁵⁷ Although he acted more leniently than he usually would have, out of respect for his teacher, he would not act differently than he.

It appears from the foregoing that in the presence of a superior Torah personality, one should act in accordance with that person's behavior. However, Meiri⁵⁸ does append an exception – if it is a matter of something that is "*hetero pashut*" (a widely-known and practiced leniency) one may continue even if the prominent Torah scholar does not act that way.⁵⁹

55. *Bava Kamma* 41b.

56. *Yevamot* 13b.

57. *Shabbat* 46a. Rashi, however, maintains that it is permissible to change and be more strict, but not to be more lenient.

58. He adds that if the person is "well-known for piety and purity of intent", he is permitted to continue. See *Bach, Yoreh Deah* 293 and *Magen Avraham Orach Chaim* 62:2; also, *Iggerot Moshe, Orach Chaim* IV, 34, opines that any custom being followed because it was the tradition in one's place of origin, is not to be considered *mecheze kiyehora*.

59. *Yam Shel Shlomo, Bava Kamma*, Chapter 7:41, writes in the same vein: "And if he acts strictly in front of his teacher, who acts leniently, we excommunicate him, even if he is doing it 'for the sake of heaven,' unless he can bring proof to overturn [the practice of his teacher]." In general, *Yam Shel Shlomo* objects to

Erroneous Customs

We find mention in rabbinic literature of customs which are definitely undesirable, for they are based on error. The rabbis generally dismissed such customs, *minhag beta'ut*. Thus, the Rivash advised, "this is a custom [instituted] in error, and it is nothing..."⁶⁰ in commenting on the custom in a certain town to observe only one day of mourning (the burial day) for a first baby who died. The Rashba, too, tried to abolish certain customs attendant upon *kapparot* on the day before Yom Kippur. "It is a custom in error...and it ought to be abolished."⁶¹

Despite these sensible reactions to practices based on a mistaken concept of what Judaism requires, the truth is that while there are numerous citations recommending eradication of mistaken practices, nevertheless, there are also many many places where we find the principle that every custom is to be retained.

Numerous talmudic texts attest to the inviolability of *minhag*:

In *Yevamot* 102b, the Gemara discusses the shoe which is used in the release-ceremony of *Chalitza*. There the Gemara comments, "and even if Elijah the Prophet tells us not to make *chalitza* with such a shoe, we won't listen to him, for the people have already accepted the custom [to do it] with this [kind of] shoe."

any *chumrot* (strictnesses) being added after the redaction of the Talmud, unless a person has a personal experience where he made a serious error, and accepts the restrictive behavior as atonement for his sin. *Chullin*, chapter 8:6 and chapter 5:11. See also *Shach*, *Yoreh Deah* 89:17.

60. *Responsa Rivash* 256.

61. *Responsa Rashba* 1:395.

In *Ta'anit*, perek *bathra*, it relates that when Rav came to Babylon and saw that the people recited Hallel on *Rosh Chodesh*, he was quite astonished because he was unfamiliar with such a practice. Nor is this a simple thing to accept, because with Hallel there is recitation of a *bracha*; if it is not the proper time to recite Hallel, that becomes a *bracha levatala*, an unnecessary blessing. Nevertheless, once he had ascertained that it was an old established custom, he allowed it, for it had the sanction of *minhag*. In this case, it seems that Rav allowed a *minhag* to override a halacha.⁶²

A further example is to be found in the Ramo (*Orach Chaim* 680:17), who gives instructions not to stop people from making noise when Haman's name is mentioned during the reading of the megillah, even though the noise might prevent the listeners from hearing every word, and thus should actually be forbidden.⁶³

Just as many references can be summoned to prove that a custom which is contrary to halacha must be done away with, as the Gemara itself queries: "And in an instance of prohibition, where [people] have a custom [to do it], should we permit it?"⁶⁴

Thus, when Rav Yosef heard that people in a town were separating *challah* from rice (which is not a grain from which the Torah said to give *challah*), he immediately put an end to it.⁶⁵ In the course of its discussion of the incident, the

62. If *bracha levatala* is only a rabbinic rule, then it is permissible for rabbis to permit it. See Radvaz 73, and *Hatorah Vehamedinah*, II, p. 240.

63. See *Magen Avraham*, *ibid*. See also in *Sdei Chemed*, *maaracha* 40, for more examples.

64. *Rosh Hashana* 15b.

65. *Pesachim* 50b.

Gemara posits that if the mistaken custom results in people doing something forbidden, it must be abolished. Note that the mitzvah of *challah* nowadays, since the Temple is destroyed, is only of rabbinic status, and yet even violating a rabbinic order caused the custom to be stopped.

Also in the Ramo⁶⁶ we find a ruling that "in a place where it is the custom that the first born does not get a double share of the inheritance [which the Torah expressly grants him], it is not proper to follow the custom inasmuch as it is against a law of the Torah."

How to resolve the apparent dichotomy in Jewish thinking? Perhaps we can suggest a number of ways:

A) It may depend on how the custom came into being. If it is a *minhag* which was established by venerable accepted authorities,⁶⁷ such as the Sanhedrin or other Great Court,⁶⁸ it should never be changed. Even if all leading rabbis consider the custom to be wrong, if it was initiated by great leaders of Israel, we allow it to stand.

An example of such a custom is the recitation of the *krovetz*, which are certain prayers added to the regular prayers, in the middle of the blessings attendant upon the *Shema*,

66. *Choshen Mishpat* 281:4. In *Yechave Daat* II, 7, Rav Yosef rules to abolish the custom of reciting *piyyutim* for a *chatan* or a *milah* after the prayer of *nishmat* on the Sabbath. In VI, 17, he urges stopping the custom of lighting candles on Friday evening in the shul.

67. *Mordechai*, at the beginning of the chapter *Hapoalim*. However, *Pri Chadash*, *Hilchot Minhagim*, *Orach Chaim* 496, writes that if there is a mistaken *minhag* to be lenient, even if it was instituted by the greatest people in the world, we pay no attention to this custom.

68. Rambam, *Hilchot Mamrim* 1.

where technically no interruption of the flow of blessings is permitted. It is certainly an interruption, and the *Tur* wrote that "it is good and proper to abolish" the custom.⁶⁹ Not only do the liturgical poems of the *krovetz* interrupt the flow of the prayers, but moreover, people were in the habit of talking during the recitation of these poems, which is unquestionably wrong. Yet the *Bach* writes, "One sage tried to abolish their recital, and did not live to the end of the year..."⁷⁰

B) In Jewish law, we always follow the majority; if a law is disputed, a vote is taken and the decision of the majority becomes the rule. If before the vote is taken, a custom has already arisen which eventually becomes the minority in a vote, or if no vote is ever taken on the matter, we can surely follow the prevailing custom.⁷¹ This may be the reason for the Gemara in *Shabbat* 130 praising those who followed the opinion of Rabbi Eliezer, mentioned there, although it is clearly contrary to normative law.

C) What effect will abolishing the custom have? If it will create dissension within the community, perhaps it is better to leave the custom undisturbed.

If a person comes from a place where it was the custom to be strict, to a place where they are lenient, and an argument arises due to his strictness, he should abandon his good custom because of dissension, because certainly it was not the intent of those who instituted the custom, that argument

69. *Orach Chaim*. This and other examples are brought in the *Sdei Chemed*, part 4, p. 102.

70. *Ibid*. Obviously, a change did occur, for today we no longer recite these prayers.

71. *Shevut Yaakov* 2:6.

should arise because of it.⁷²

Consequently, at times rabbinic opinion considers it prudent to tolerate a diversity of customs within one community, rather than have the issue degenerate into arguments. Thus, there are synagogues where some people put on *tefillin* on *Chol Hamoed*, while others do not.⁷³

What if the majority of the group is willing to change the custom and there would be no argument – may they do it? R. Yosef Karo testifies that for many many years, it had been the custom to don *tefillin* on *Chol Hamoed*. However, when the *Zohar* was published negating the practice, the community decided to change its custom.

After an exhaustive investigation of this matter, with citations from all the rabbis who discussed it, the *Sdei Chemed*⁷⁴ adds the following caveat:

One should not lightly abolish any *minhag*, for if there is the ability to abolish a custom which was instituted by our forefathers...then we would do away with many Jewish customs, which are Torah. And Rav did not want to abolish recitation of Hallel on *Rosh Chodesh*, even though they were making a blessing which in his opinion was unnecessary.

D) Sometimes the erroneous custom is not abolished out of respect for those who started it. Basing his view on

72. Rosh, chapter *Makom Shenahagu*. However, see *Mishnah Berurah* 32, who feels that if two customs are being observed in one place, it is a violation of the prohibition *lo titgodedu*.

73. *Yechave Da'at* 4:36 permits it, but the *Mishnah Berurah Orach Chaim* 31:8 does not. See also *Magen Avraham Orach Chaim* 493:6.

74. Part 4, pp. 98–103.

Rashi in *Chullin* 18b, the *Eishel Avraham*⁷⁵ contends that changing an established practice casts aspersion on the wisdom of the one who instituted it, the inference in change being that up to now, it was being done improperly.

However, there are occasions when a custom may have had relevance, but that situation no longer applies – should the custom be maintained? There have been times when rabbis felt it was necessary to be very lenient; should the community therefore always continue this way? As a very pertinent example: thirty or forty years ago kashruth observance in America was very difficult. In order to make it easier for many, and thus encourage multitudes to keep kosher, national kashruth organizations utilized many *heterim* (leniencies) to make kosher food widely available. But nowadays, in those large Jewish communities where kashruth is so much more easily and widely observed, perhaps the standards should be raised?⁷⁶

E) Acceptance by all: The Maharshal rules that a custom which has spread throughout the Jewish community can never be set aside.⁷⁷ Thus, the *Iggerot Moshe* writes succinctly:

75. *Orach Chaim* 68. The *Noda Biyehuda Yoreh Deah* 141:54 takes the position that any custom, no matter how wrong it may appear, must have been instituted by some knowledgeable authority, and therefore should not be annulled without the acquiescence of the Rav in the city. If these guidelines were not followed, we nevertheless do not reprimand anyone who chooses not to follow the custom.

76. *Erev Pesach SheChal BeShabbat*, Chapter 8:3, cites a similar situation regarding the practice of some to eat Egg Matzo on Erev Pesach, even though the Gemara says to eat *chametz*. Many rabbis felt that since people were not being careful enough, problems could arise; therefore they considered that eating Egg Matzo was preferable. However, other rabbis opposed this innovation.

77. *Responsa*, #66, citing *Pri Chadash Orach Chaim* 496:6.

However, something that all Jews are accustomed to do, all are required to do as they do. Even one who thinks that it is mistaken must know that the community of Israel does that which is halachically correct. And even if he has a question about it and cannot find the answer, it doesn't matter.⁷⁸

But if only some observe it, it is possible to annul a wrongly-based custom.

In Times Of Sickness

The authority of a *minhag* cannot be greater than a prohibition instituted by our rabbis, and in the case of rabbinic regulations, there is a principle, "The rabbis did not intend their decrees to apply in cases of distress or sickness." This is the reasoning of *Shiurei Tahara*⁷⁹ in permitting cutting the hair during the *sefira* period, when the accepted custom is not to cut. However, if it is causing a person pain or he is sick and it bothers him, he should cut it.⁸⁰ We may therefore extrapolate that if distress or problem might arise through

78. *Orach Chaim* IV: 60:17. If the inhabitants all leave the town but later come back to resettle, the *Magen Avraham Orach Chaim* 493:6, discusses whether they have to continue with their previous customs or may change. See also *Chok Yaakov Orach Chaim* 468:8 and *Biur Halacha*, *ibid*, s.v. *vechumrei hamakom*. Also, see *Avkat Rocheil* 212.

79. P.95, note 49, cited in *Sdei Chemed*, *ibid*.

80. It is possible that this requires "release from a vow", *hatarat nedarim*. See *Mishpat Tzedek* 47 who disagrees with *Shiurei Tahara* on this. See also *Dagul Mirevavah*, *Yoreh Deah* 214, who maintains that if the person is not going to follow the *minhag* once but intends to return to it, he needs no release. In many places, R. Yosef relies on this leniency.

adherence to a *minhag*, it would be advisable to forego it.⁸¹

Conclusion

The traditions of the Jewish people have developed over the millenia; they are precious repositories of our history and experiences. Thus, our people have always strived to preserve them, respecting their significance.

In ordinary circumstances, *minhag* has great force, sometimes even modifying law in order to accomodate idiosyncracies of custom. Nevertheless, as we have noted, as important as adherence to *minhag* is, we have to be even more concerned that observance of custom does not lead to *machloket*, strife and dissension, as persons of differing traditions compete to have their customs enshrined in communal practice. Anything which weakens the love and support each Jew is required to feel for all other Jews would indeed be a tragedy. Fearing that strict adherence to certain laws might cause friction or even hatred within the community, the rabbis at times permitted questionable practices, in order to preserve the unity of the group. Thus, the Chazon Ish writes,

It appears to me that the reason *Chazal* ruled leniently in this matter although it would seem that they should have been *machmir* ...is because they anticipated the inevitable results of such a *chumra*. Instead of removing a stumbling block, many additional ones appear, since though

81. *Noda Biyehuda*, *Yoreh Deah* I, 54. This is also cited in *Pitchei Teshuva*, *Yoreh Deah* 194:1, based on a text in *Pesachim* which relates that the custom of separating *challah* from rice was abolished because it would lead people to make mistakes in related laws. See also *Ba'er Hetev* 669; *Divrei Chachamim* 60:131; *Yabia Omer* III *Yoreh Deah* 11.

they [the persons involved in this exchange] are ignorant of Torah law, we are nonetheless commanded to support and benefit them [the *Amei haAretz*] as we would any other Jew. Certainly we are forbidden to bring about hatred and suspicion between our mutual groups and thereby violate the *issur* of "You shall not despise" as well as many other negative prohibitions which are no less important than the *issur* [which he was asked about] that we are trying to avoid. Therefore, *Chazal* weighed with great care the alternatives and taught us how to avoid as many *issurim* as possible. In order to do this, they ruled that in a case of a doubt, [we should be lenient so as to avoid friction]. This is the moderate and straight path.⁸²

Keeping a *minhag*, the *Chazon Ish* reminds us, cannot outweigh the need to maintain harmony within our homes and our community. Sometimes, in setting aside his own particular *minhag* for the sake of peace and good fellowship, a person is accomplishing a greater mitzvah.

82. *Chazon Ish*, *Shevi'it* 12:9, cited by Rabbi Moshe Weinberger in an article on *Chumra* in *Jewish Action*, Fall 1988, p.15.

The Use of Elevators and Escalators On Shabbat and Yom Tov

Rabbi Michael Broyde & Rabbi Howard Jachter

I. Introduction

This article will discuss the halachic issues involved in using elevators on Shabbat and Yom Tov and is divided into two parts. The first section reviews the general halachic principles related to using elevators. The next section will focus on five different practical cases. The first of these involves using an automatic elevator set to stop on preselected floors;¹ the second discusses using an elevator to go to whichever floor the elevator is summoned to (by the person who calls the elevator); the third is whether a Gentile may be instructed to summon and direct the elevator; the fourth discusses escalators; and finally, the fifth section explains the special "Shabbat elevators" one occasionally

1. In America this is commonly called a "Shabbat elevator."

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encounters in Israel.

An understanding of how elevators work is helpful to grasp the halachic issues involved. Elevators operate like complex pulleys, with an elevator cab on one end and a counter-weight on the other. The motor, functioning like a pulley wheel, determines whether the elevator goes up or down by whether the motor turns clockwise or counter-clockwise. In many elevators, the counter-weight is equal to the weight of the empty elevator cab, so that when a person enters the elevator cab and wishes to ascend, the motor has to produce enough force to lift that person. Descending needs no assistance from the motor.² In many other elevators the counter-weight is equal to the weight of the cab plus 40% of its rated cab weight (its maximum number of passengers). In such an elevator, when a single person enters an empty elevator and wishes to ascend, no assistance from the motor is needed. Assistance is needed, however, to descend in such circumstances.³

II. Elevators: The Basic Halachic Issues

Four seminal *teshuvot* (responsa) were published in the early 1960's on the use of elevators, each of which addressed

2. And indeed the motor might be needed to function as a brake, as discussed *infra* at note 7.

3. For more information on elevators, see *Encyclopedia Britannica*, "Elevator" 4:443-445 (15th ed., 1991) and a slightly different (and more complete) article in *Encyclopedia Britannica*, "Elevator" (14th ed., 1971).

There was a time when most elevators were hydraulically powered. They no longer are, and except for flight decks on aircraft carriers and other very short hauls elevators (one or two stories) where very heavy loads are lifted, they no longer exist, and are not discussed in this article.

the issue from a different perspective. Two prominent rabbinic authorities ruled that one is forbidden to use all elevators on Shabbat, even automatic elevators. On the other hand, two significant decisors ruled that one is permitted to ride on an elevator on Shabbat so long as one does not push any buttons.⁴

Rabbi Yitzchak Weisz⁵ and Rabbi Yaakov Breisch⁶ both adopt the view that it is prohibited to ride even an automatic elevator on Shabbat. Rabbi Weisz argues that – even on a fully automatic elevator – an individual's additional weight in the elevator car causes the elevator motor to work harder and thus its motor to draw more current, and it is prohibited to use any such elevator.⁷ Rabbi Breisch rules that one may

4. Pushing buttons in an elevator is forbidden according to nearly all opinions because it involves completing electric circuits (see generally Broyde & Jachter "The Use of Electricity on Sabbath and Holidays According to Jewish Law", *J. Halacha & Contemporary Society* 21:4-47 (1991) at pp. 12-23). Rabbi Halperin notes (*Maaliot B'Shabbat*, pp. 32-33) that all would agree that pushing the buttons in an elevator involves only a rabbinic prohibition since the completed circuit will be automatically broken shortly after it is completed (since the trips on an elevator are short, the circuits are completed and opened very frequently). A prohibited activity whose result will last only briefly is forbidden only rabbinically (see Broyde "Modern Technology and Sabbath Observance: Some Observations," *J. Halacha & Contemporary Society* 23:63-100 (1992) at pp. 91-92).

5. *Minchat Yitzchak* 3:60. This is agreed to by Rabbi Binyamin Zilber, *Brit Olam*, *Mechabe Umavir* #2.

6. *Chelkat Yaakov* 3:137.

7. This is true, in his opinion, whether the elevator is going up or down. Rabbi Weisz states that when the elevator is going up, the increase in weight certainly increases the current draw. It is unclear what rationale Rabbi Weisz accepts to prohibit descent in an elevator. However, it appears that Rabbi Weisz' analysis accepts the ruling of Rabbi Halperin that actions caused by one's weight is

not ride an elevator on Shabbat because it is a weekday type of activity which is not in keeping with the spirit of Shabbat (*uvdah dechol*). He cites as a precedent Rabbi Yitzchak Schmelkes' ruling⁸ that the Talmud's⁹ prohibiting one from being transported in a chair carried by others is because it is not in keeping with the spirit of Shabbat,¹⁰ and this teaches that it is not keeping with the spirit of Shabbat to ride a subway or trolley on Shabbat. Rabbi Breisch argues "what is the difference between riding horizontally or vertically" – both are prohibited.¹¹

Rabbi Yosef Henkin¹² and Rabbi Yehuda Unterman¹³

considered an action (discussed in II:A), and thus would generally prohibit descending on elevators. Rabbi Weisz states "He, himself, by the very act of standing [in the elevator] causes an increase in current flow;" *Minchat Yitzchak*, 3:60.

In addition it appears that the factual correctness of Rabbi Weisz' assertion that there is increased electrical activity even when ascending depends on the type of elevator. As noted in the introduction, there are some elevators where the weight of the counter-weight is equal to the cab weight plus 40% of the rated passenger weight. In such an elevator, the presence of the person is causing the elevator to draw less -- rather than more -- current when it is ascending, as the presence of every passenger up to 40% of the rated elevator weight increases the balance between the weight and the counter-weight, thus decreasing the motor's load.

It is unclear whether Rabbi Weisz would rule differently on Yom Tov than he would on Shabbat.

8. *Beit Yitzchak* 2:30 in the index.

9. *Beitza* 25b.

10. See Rashi ad. locum. *s.v. ein hasuma yotzei*.

11. Rabbi Breisch is the only authority who draws an analogy between a train and an elevator. Apparently, all other decisors do not believe that riding in an elevator violates the spirit of Shabbat.

12. *Kol Kitvei Hagaon Harav Henkin* 2:59.

13. *Shevet Yehuda* xx; *Torah Shebal Pe* 5727 page 13 and *Encyclopedia*

permit riding in an automatic elevator on Shabbat since the elevator, and not the passenger, is doing work. These authorities must argue that the mere weight of a person does not constitute prohibited work from the perspective of halacha.¹⁴ Rabbi Unterman adds¹⁵ that "I have personally witnessed eminent Torah sages entering an elevator and traveling to the floor for which a Gentile passenger pushed the button, and they never raised the possibility of their added weight posing a halachic problem."¹⁶

A. The View of Rabbi Halperin

Were the dispute between these two groups of authorities the only halachic issue involved in the use of elevators, it is fairly clear that the normative halacha would have allowed the use of elevators in accordance with the opinion of Rabbis Henkin and Unterman, as the mere increase in current is

Talmudit 18:695-6.

14. This is explicit in Rabbi Unterman's writings and implied by Rabbi Henkin.

15. *Shevet Yehuda*, p. 315. This is agreed to by Rabbi Shlomo Zalman Auerbach; see *Shemirat Shabbat Kehilchata* 23:49.

16. Agreement to this rule can be implied from *Iggerot Moshe Orach Chaim* 2:80 that Rabbi Feinstein agreed with the ruling of Rabbi Henkin, and permitted the use of an elevator when the elevator was not operated by a Jew, and the *amira lenachri* problems have been overcome. This is also agreed to by Rabbi Ovadiah Hadaya, in *Yaskil Avdi Orach Chaim* 4:16.

Rabbi Unterman relates that he was present one Shabbat when Rabbi Israel Meir Kagan (the Chafetz Chaim) was discussing communal issues and he needed something brought to him. Rabbi Kagan asked one of the rabbis to bring him that item and the rabbi retrieved it by riding the elevator along with a Gentile passenger, and none of the rabbis who were present, Rabbi Kagan included, objected to his actions.

generally thought to be permissible on Shabbat and Yom Tov by a broad variety of halachic authorities.¹⁷ This would be even more true in the case of an elevator, where the increase in current is caused indirectly,¹⁸ and is an unintended side effect of a person's actions from which perhaps the person derives no benefit from.¹⁹ However, Rabbi Levi Yitzchak Halperin, the director of the Department of Halacha of the Institute for Science and Halacha in Jerusalem, has argued that in fact the halachic issues relating to elevators are much more complex than realized by many

17. See "The Use of Electricity", *supra* note 4, at 35, and *Yabia Omer* 1:19; *Shemirat Shabbat Kehilchata* 23:52. In addition, given the factual uncertainty concerning whether the counter-weight on the elevator is weighted at the cab weight or at the cab weight plus 40% of the rated passenger weight (see introduction), there is doubt as to whether added current really is drawn when one enters an elevator with passengers whose total weight is less than 40% of its rated weight. Indeed, in that circumstance, one causes less current to be drawn. Rabbi Halperin adds to this the fact that the increase in current in an ascending elevator is caused by a *grama*, (through indirect causation); *Ma'aliot B'Shabbat*, pp. 72, 172-174.

18. *Sof chama lavo*; see text accompanying note 46 for an explanation.

19. As the increase in current effects only the speed of the elevator, which is of little concern to a person in the cab. This action is a *pesik resha delo necha lei* and since it involves what is apparently an indirect act, a *pesik resha delo necha lei begrama*. Since no light and heat is generated, there would only a rabbinic prohibition, even if done directly; see "Modern Technology and Sabbath Observance", *supra* note 4, for a review of why this type of conduct is permitted.

It is worth noting that a *pesik resha delo ichpat lai (o delo necha lai) beden derabanan* is permissible according to many Ashkenazi authorities and most Sefardi ones; see "Modern Technology and Sabbath Observance", pp. 79-80. Rabbi Mordechai Willig, Assistant Rosh Kollel Lehoraah at Yeshiva University, notes that it is proper to rule permissively in this case; see Rabbi Mordechai Willig, "Shabbat Laws related to Tractate Beitza", *Beit Yitzchak* 23:56,77. Other factors also incline one to rule this way.

authorities of the previous generation. His recent work,²⁰ entitled *Maaliot B'Shabbat* (Elevators on the Sabbath), concludes that it is always forbidden (according to all authorities) to ride on a descending elevator (unless special modifications have been made to the elevator) and that it is permitted to ride on an ascending elevator.²¹

In *Maaliot B'Shabbat*²², Rabbi Halperin explains why one is permitted to ride on an ascending elevator, despite the fact that the passenger's added weight will increase the current flow. Rabbi Halperin agrees that normative halacha does not forbid causing an increased current flow in an already live circuit and he points out that the possibility of the added weight causing increased fuel consumption at the power station is quite remote. Rabbi Shlomo Zalman Auerbach²³ agrees with this assertion of Rabbi Halperin.

Riding a descending elevator is an entirely different matter according to Rabbi Halperin. He asserts, as a matter of technical fact, that elevator motors utilize passenger weight to assist in the descent of the elevator car. More particularly, he advances two different arguments. First he states that the weight of the passenger on the elevator assists in the descent

20. In the introduction to this work, Rabbi Halperin writes that he and his staff have dedicated more than sixteen years to the study of elevators and that they travelled on numerous occasions to the United States and Europe to meet with engineers from the major elevator manufacturing firms to learn first-hand precisely how elevators work.

21. Provided that the elevator is not equipped with electronic weighing devices, which will be discussed in part I:C.

22. Chapters six and thirteen.

23. *Minchat Shlomo*, p. 110 and *Shemirat Shabbat Kehilchata* 23:(n.137). For a summary of this issue see "The Use of Electricity on Sabbath and Yom Tov", pp. 33-35, especially footnote 81.

of the elevator – it is not the motor alone, but rather the motor and the weight of the person that cause the descent of the elevator cab. He writes "if the passenger is responsible for the descent, he is responsible also for illuminating the various lamps, connecting the door motor, the brakes, and numerous other electrical circuits" which are activated during the descent.²⁴ Thus descending would be rabbinically prohibited, as the person's weight is itself causing the various lamps, motors and brakes to function.

Rabbi Halperin then seeks to demonstrate that the elevator passenger is halachically responsible for the effects of his weight on the descent of the elevator – it is as if the passenger himself is directly lighting the lamps and operating the motor.²⁵ Among Rabbi Halperin's most significant proofs is a mishnah in *Kilayim* 8:3 which is quoted in *Baba Metzia* 8b. The mishnah states:

One who drives a team of mixed animals [*kilayim*] is punished with forty lashes [a Torah prohibition] and he who rides in the wagon [which causes the animals to plow] is also punished with forty lashes [a Torah prohibition]. Rabbi Meir excuses the individual who sat in the wagon from punishment.

Both Rambam²⁶ and *Shulchan Aruch*²⁷ rule that the one who sits in the wagon is responsible for causing the animals to move, in accordance with the Sages' ruling.

Rabbi Halperin understands the mishnah to be teaching that even if the one who is sitting is absolutely passive and

24. *Maaliot B'Shabbat* at page 11 of the English section.

25. Chapters seven, ten, eleven, and twelve of *Maaliot B'Shabbat*.

26. *Hilchot Kilayim* 9:9.

27. *Yoreh Deah* 297:12.

it is merely his weight that causes the animals to move, the passenger is halachically responsible for the actions caused by his weight. Similarly, although the passenger in an elevator is entirely passive and it is merely his weight that causes the elevator to descend, the halacha holds the person responsible for the actions caused by his weight. Thus, Rabbi Halperin concludes that, although one may ride in an ascending elevator,²⁸ one is forbidden to ride in a descending elevator, unless special modifications are made to the elevator to prevent the generation of current or its disbursement.²⁹

28. Since one's weight only causes an increased current draw, which is permitted.

29. See chapter 16 of *Maaliot B'Shabbat*. Rabbi Halperin has created an institute which besides its halachic activity also manufactures such elevators and certifies those as proper for use on Shabbat; See Part II:5 and "What's Up in Israel? Elevators, Thanks to a Special Institute; Engineer-Theologians Solve Conflicts of Ancient [Jewish] Law and Modern Technology", *Wall Street Journal*, December 3, 1990, A1, which states:

Nothing has so captivated his theological concern as the problem of the elevator. It is a pressing question in Israel, where the suburbs of Tel Aviv and Jerusalem are filled with apartment blocks. "It is central to the problem of modern life," he says. Today, after 17 years of research, Rabbi Halperin is probably the world's leading authority on how to make elevator use on the Sabbath permissible under halacha.

He has written a 200-page book on this, complete with diagrams. He has journeyed twice to New York to consult with secular experts at Otis Elevator. "The first time, I went there to learn," he says. "The second time, I felt I was teaching."

Rabbi Halperin also presents a second reason. He states:

When the car is descending with a heavy passenger load it may speed up to a point where the counter-force developed in the motor is greater than the force of the electric power station. When this condition occurs, the motor, rather than aiding the descent, is used to brake the car thus preventing dangerous over-speed. When the speed of a motor increases to a value about that for which it is designed, it automatically becomes a generator. Instead of

Automation solved the obvious problem of pushing the button: Elevators simply stop at every floor on the Sabbath. So going up is no problem; people just step in and step out, without doing anything or making any demands on energy. But there is still a problem with going down. Millions of elevator riders aren't aware of this, but Rabbi Halperin learned that if the elevator and its passengers weigh more than the elevator's counterweight, an automatic restraining system slows it, preventing it from plummeting to the ground.

But in most elevators, this action creates energy. In most efficient buildings, that energy usually is channeled through electrical wires to power other functions in the building. Thus, he concluded, by stepping into a down elevator on the Sabbath, an Orthodox Jew is directly contributing to the creation of energy that may be turning on lights or operating machines -- all things forbidden by halacha.

What to do? The institute's engineers designed a system that automatically prevents this new energy from being used elsewhere on the Sabbath. Such elevators now are widely used.

consuming electrical energy it generates power which is fed into the electric company lines to be used by consumers in the immediate vicinity."³⁰

B. Criticism of Rabbi Halperin's View

Numerous decisors have disagreed with the basic assertion of Rabbi Halperin's work that a person is responsible for the actions caused by his or her mere weight.³¹ There are five basic arguments to permit riding on a descending elevator even though the passenger's weight plays a significant role in the elevator's descent. First, Rabbi Auerbach suggests that:

Since the passengers did not cause any change in the pace of the elevator,³² either quicker or slower, for even without the passengers everything would have occurred precisely

30. *Maaliot B'Shabbat* p. 19 of the English section. This argument is replied to in text accompanying notes 47 to 49.

31. See generally, *Encyclopedia Talmudit* 18:691-704. Rabbi Shlomo Zalman Auerbach's criticism of an early presentation of Rabbi Halperin's views is presented in *Shemirat Shabbat Kehilchata* 23:n.140 and *Teshuvot Minchat Shlomo* 91:10. The Torah journal *Techumin* contains essays by Professor Zev Lev and Rabbi Yisrael Rozen which criticize Rabbi Halperin's work *Maaliot B'Shabbat*; see Professor Zev Lev, "Using Automatic Elevators on Shabbat" *Techumin* 5:58 (5744) and Rabbi Yisrael Rozen, "Automatic Elevators on Shabbat" *Techumin* 5:75 (5744). These authorities all argue that one is permitted to ride not only on an ascending elevator but even a descending elevator.

32. See *Maaliot B'Shabbat*, chapter 12, where he points out that the passengers cause the elevators to descend a very little bit faster and that in hydraulic elevators the change is somewhat significant as a result of the passenger's weight. See note 3 for a discussion of hydraulic elevators.

the same, it is considered that the passenger's actions are irrelevant and halachically insignificant.³³

Second, Rabbi Auerbach, Professor Lev, and Rabbi Rozen seek to demonstrate that a person is not halachically responsible for the actions that occur purely as a result of his weight. For example, Professor Lev³⁴ argues that the mishnah in *Kilayim* discussed above, which states that one who sits in the wagon is responsible for causing the animals to move, does not prove Rabbi Halperin's contention. Professor Lev argues that *the act of* sitting down in the wagon (rather than merely being seated) is what causes the animals to move, and not the weight of the passenger. Professor Lev also points out the fact that many eminent Sages travelled on steam powered ships on Shabbat despite the fact that they were aware that the more weight carried by the ship, the more fuel it consumes.³⁵ Apparently, they believed that the passengers are not responsible for the actions caused by their weight.

33. *Minchat Shlomo* 91:10. Rabbi Auerbach seeks to prove this suggestion from many sources and Rabbi Halperin in *Maaliot B'Shabbat*, chapter 9 vigorously disputes Rabbi Auerbach's proofs.

34. Professor Lev, *supra* note 31, at 63.

35. The correctness of this analogy could be factually disputed. As noted by Rabbi J. David Bleich, *Contemporary Halakhic Problems* 1:137, in his discussion of using cars on Shabbat for medical emergencies, it is not at all clear that the number of violations increases at all when weight is added to a vehicle. (The same should be true for ships.) Rather it is related to a host of independent factors, which even if fixed at a constant, would make it impossible to predict whether increased weight would in fact lead to increased kindlings. Indeed, in cars, Rabbi Bleich quotes an expert who asserts that an increase in weight, can "under certain conditions" lead to fewer prohibited acts.

A third argument is presented by Rabbi Rozen.³⁶ He writes that even if one is responsible for the action performed as a result of his weight, one could argue that a person is not responsible when another is utilizing his weight for the other's purpose. For example, Tosafot write that if someone throws another person on a baby and kills the child, only the one who threw the person is responsible.³⁷ The person who was thrown would be excused from punishment, Tosafot explain, because "he is not considered to have performed an act." Similarly, argues Rabbi Rozen, one is not using his weight to cause the elevator to descend. Rather, the elevator's motor is utilizing the passenger's weight to cause the elevator to descend, and according to Tosafot the passenger should be considered as not performing an act.³⁸

A fourth argument is presented by Rabbi Auerbach. The basis for this argument is the talmudic discussion in *Shabbat* 92b-93b concerning the law when two people perform prohibited work which could have been accomplished by one person. The Talmud rules that if each person was unable to do the action without the aid of the other,³⁹ then each person is responsible for the action which was performed. However, if one was able to accomplish the act without the aid of the other,⁴⁰ then only the stronger person is responsible for having done the prohibited work. The person who aids is regarded by the Talmud "as an aider whose actions have

36. Rabbi Rozen, 85-86.

37. *Sanhedrin* 72b s.v. *v'ha Esther*.

38. The essence of this proof demonstrates that a person is not responsible for actions caused by his mere weight.

39. *Zeh yachol v'zeh yachol*.

40. And the aider cannot do the act alone.

no substance".⁴¹ Authorities disagree as to whether the aider is in violation of a rabbinic prohibition with his assistance, or no prohibition at all.⁴² Most authorities rule that the aider does not violate even a rabbinic prohibition.⁴³ Based on this, Rabbi Auerbach states that "it is considered as if the elevator is able to accomplish the task alone, and the passenger is merely an aider. This is so because the elevator is set to ascend and descend regardless of whether anyone enters it."⁴⁴ So too, the mere weight of the passenger – absent the electrical assistance of the motor – would not be sufficient to allow the elevator to descend.

One last argument is suggested by Rabbi Auerbach. The argument is based on the concept of "*grama*", that on Shabbat one is responsible only for direct results of one's actions and not indirect actions.⁴⁵ Rabbi Auerbach posits that since the elevator's descent occurs after the passenger enters the elevator and only as a result of electric current that flows after the passenger enters the elevator, the passenger would be considered to be only "indirectly" causing the descent.⁴⁶

41. *M'sayaiah ein bo mamash*.

42. Compare *Turei Zahav* (*Taz*), *Yoreh Deah* 198:21 and *Nekudot Hakesef* (Shach), commenting on id.

43. See *Mishnah Berura* 328:11 and *Aruch HaShulchan* OC 328:20.

44. In chapters 10 and 11 of *Maaliot B'Shabbat*, Rabbi Halperin vigorously seeks to disprove this contention of Rabbi Auerbach. Professor Lev and Rabbi Rozen, in turn, seek to defend Rabbi Auerbach's assertion. All three of these discussions are excellent and provide outstanding, albeit varying, understandings of this important area of halacha.

45. See "Modern Technology and Sabbath Observance", pp. 95-100, and *Encyclopedia Talmudit* XVIII:701-02.

46. *Encyclopedia Talmudit* 18:701-02. The analogy appears to be to the case of "*grama*" presented in *Sanhedrin* 77a, that "if someone ties another outside while it is dark and afterwards the sun rises

Finally in his response to Rabbi Halperin's argument⁴⁷ that sometimes during descent the motor develops a counter-rotation that turns it into a generator which powers the elevator, Professor Lev asserts that any power that is generated by the elevator is dissipated in the surrounding electric wires and is of no use.⁴⁸ The authors' research indicates that in America for small elevators Professor Lev's assertion is correct, but in large elevators in very tall buildings Rabbi Halperin's assertion holds true. In any case Professor Lev appears to be entirely correct that even if Rabbi Halperin's facts are correct, the creation of this energy involves only a rabbinic prohibition.⁴⁹

and the person subsequently dies of sun stroke" (*"sof chama lavo"*) the perpetrator is not considered to have directly murdered the person he tied up. This is indirect because the sun was not present when he tied up the victim. The elevator situation is analogous because the motor is not operating when the passenger enters the elevator car.

In addition, as with all situations where a person is doing prohibited work unintentionally and is completely unaware that he is causing the work, the leniencies of *mitasek*, (completely uninvolved), are present, which exempt one from liability; see "Modern Technology and Sabbath Observance", pp. 89-91. The person who steps onto the elevator is completely unaware of the prohibited activities, which are unintended. This argument is first noted by Professor Lev.

47. See text accompanying note 30.

48. Professor Lev, p. 72.

49. Ibid page 65 n.1. Since it is a "*melacha sh'eina tzricha l'gufa*" (see "Modern Technology and Sabbath Observance", pp. 86-88). Professor Lev asserts that "the results of the elevator trip which have no connection to the essential functioning of the elevator ride, such as creation of electric current which may enable various acts of Shabbat violations which have no connection to the elevator ride per se and to its purpose, are indeed considered to be a "*melacha sh'eina tzricha l'gufa*." Rabbi Halperin's attempt to demonstrate

C. Weighing Mechanisms in Newer Elevators

One additional factor needs to be addressed. Most newer elevators are equipped with electronic weighing devices which pose an additional halachic problem. Depending on the elevator, the weighing mechanism – whose purpose is to determine the weight of the passengers in the car so as to optimize the motor's speed and efficiency – involves completing a circuit or increasing current in an already completed circuit.⁵⁰

Rabbi Halperin rules that if these weighing mechanisms have not been turned off one is forbidden to ride the elevator, even if it is ascending.⁵¹ It should be noted, however, that our research reveals that most older elevators and all smaller elevators are not equipped with these weighing mechanisms. If one is uncertain whether an elevator is equipped with weighing mechanisms, one has encountered the situation of a possible secondary act (*safek psik reisha*).⁵² While there are authorities who prohibit such actions,⁵³ both *Mishnah*

that it is not a "*melacha sh'eina tzricha l'gufa*" (*Maaliot B'Shabbat*, pp. 65-69) appear not to be at all convincing.

50. *Maaliot B'Shabbat* chapter 15. If an elevator is being specially prepared for use on Shabbat, these weighing mechanisms should be turned off. Rabbi Rozen writes (p. 76) that this can be done without compromising the safety of the passengers or the proper functioning of the elevator. Both *Tzomet* and the Institute for Science and Halacha have the weighing mechanisms turned off on Shabbat in the elevators they modify for use on Shabbat.

51. *Maaliot B'Shabbat* p.187.

52. This refers to a situation in which one is uncertain if an unintended, though forbidden, act will occur and the result depends on a condition in existence prior to his actions about which he is uncertain; See "Modern Technology and Sabbath Observance", pages 84-86.

53. Rabbi Akiva Eiger, commenting on *Yoreh Deah* 87:6.

*Berurah*⁵⁴ and Rabbi David Tzvi Hoffman⁵⁵ are inclined to rule leniently regarding this issue.⁵⁶ Hence, it appears that one may use an elevator if one simply does not know and cannot determine if these weighing devices are in place.⁵⁷

Moreover, even if an elevator has an electronic weighing mechanism, it may still be possible to ride the elevator. At least two factors incline one to rule leniently. Some of these weighing mechanisms involve completing an electric circuit, which is forbidden, and others work by increasing current to an already completed electric circuit, which is permitted according to most authorities.⁵⁸ Hence, riding in such an elevator may be only a case of possible unintended violation – a *safek p'sik reisha* – on a rabbinic prohibition⁵⁹ which, as

54. *Biur Halacha* 316:3 s.v. *ein mino nitzod*.

55. *Melamed Le'hoil* 3:102.

56. See "Modern Technology and Sabbath Observance", pp 84-86.

57. While at first glance it would appear that if one wishes to use a particular elevator on Shabbat on a regular basis, it is proper to investigate whether the elevator has an electronic weighing mechanism, such need not be the case. It is true that *Shach* states (*Yoreh Deah* 98:9) that "an uncertainty dependent on a lack of knowledge is not a doubt;" however, that rule is limited to cases where the doubt can be resolved with relative ease. Determining whether a particular elevator model has weighing devices and how they work, is not a simple task, and even when one finds an expert who will address these issues, one is frequently confronted with the fact that company representatives – when discussing their product with people technologically unfamiliar with it – sometimes represent their elevators as containing all of the modern accoutrements of the most technologically up-to-date elevators, even when, in fact, they do not. Weighing devices are such items.

58. See note 17. The current trend in technology is to have continuously open circuits.

59. On a rabbinic prohibition (see note 4), as no incandescent light is involved; see "The Use of Electricity on Sabbath and Yom Tov",

noted above is generally considered permissible.⁶⁰ In addition, frequently one is completely unaware of the fact that one is being weighed. In such a situation one is also *mitasek* (completely uninvolved), which is also exempt from liability according to most opinions.⁶¹ While it is true that normally, being completely unaware only works once, as one soon realizes that one is causing prohibited work, in this case, however, a person might never be aware of this prohibited work done through his action, particularly as many elevators do not even have these weighing devices or work solely through increased current flow.

These rationales perhaps explain why many books of normative halacha (such as *Shemirat Shabbat Kehilchata*, *Yalkut Yosef*) – all of which are familiar with Rabbi Halperin's work – simply do not concern themselves with these weighing devices and do not rule that the presence of these weighing devices prevent one from using elevators.

III. Practical Issues

A. Using an Elevator Set to Stop Automatically on Preselected Floors

In light of the multiple disputes discussed above, which are present when using automatic elevators and particularly Rabbi Halperin's novel analysis concerning causation from a person's weight, many halachic authorities are hesitant to permit the use of an automatic elevator in all circumstances for both ascending and descending.

pp. 12-23.

60. See text accompanying notes 53 to 56.

61. See "Modern Technology and Sabbath Observance", pp. 89-91.

For example Rabbi Auerbach is cited⁶² as ruling that "one need not rebuke one who is lenient and rides a descending elevator." Rav Ovadiah Yosef is also cited as permitting use of an elevator both for ascending and descending, although noting that it is better to be strict on this matter.⁶³ Professor Lev adds that one is permitted to be completely lenient in case of need, such as an aged person, a child, pregnant woman or in a very tall building.⁶⁴ Rabbi Neuwirth is inclined to permit the use of elevators both to ascend and descend, although, he too indicates that it is better to be strict.⁶⁵ However, all agree that – when possible – it is best to modify the elevator to eliminate non-essential prohibited actions, such as the lights which display the floor number, out of concern for Rabbi Halperin's view.⁶⁶

A review of the halachic literature inclines one to believe that all of the concerns except Rabbi Halperin's are not significant halachic concerns.⁶⁷ A thorough review of the current halachic literature indicates that, besides Rabbi Halperin himself,⁶⁸ there are apparently no halachic authorities who accept as correct the basic argument that a

62. *Shemirat Shabbat Kehilchata* 23:n.140 (end).

63. *Yalkut Yosef* 4:192 (and particularly note 4).

64. Professor Lev, p. 74 and Rabbi Rozen, page 127.

65. *Shemirat Shabbat Kehilchata* 30:54.

66. See Rabbi Rozen, pages 94-96 for a detailed description of how Tzomet (an Israeli firm which publishes *Techumin* and produces halachic-technical equipment such as Shabbat-phones) modifies elevators for use on Shabbat in accordance with Rabbi Auerbach's views. Of course, the Institute for Science and Halacha modifies elevators for Shabbat use in accordance with Rabbi Halperin's views on this issue. For more on this, see part II:5.

67. See text accompanying note 17.

68. And perhaps Rabbi Weisz; see source cited in note 5.

person is himself directly responsible for the actions caused by the descent of the elevator since his weight contributes to (and partially causes) the descent. However, many authorities do discuss his opinion, and when possible and not difficult, it is appropriate to be strict. However, the *consensus* view of halacha is not in accordance with his rule.⁶⁹

B. Elevator Roaming

The next issue concerns whether it is permissible to go onto a non-automatic elevator, push none of the buttons, and simply ride the elevator to whatever floor the elevator goes to or to whatever floor the passengers who have pushed the buttons go.⁷⁰

Rabbi Neuwirth rules that one is permitted to ride an elevator which is being directed by a Gentile, in a case where he does not operate the elevator on behalf of the Jew, and the Jew will enter and exit the elevator on the floors where the Gentile enters and exits.⁷¹ The same should be true when one steps into an empty elevator which will be summoned

69. In addition, the fact that in some elevators the counter-weight is balanced against 40% of the passenger weight, rather than simply the weight of the cab, would mean that the elevator motor is actually in its ascending mode when the cab is descending with only a few passengers. In that case, even Rabbi Halperin would permit the descent.

70. This is a particularly common problem in many hotels where the stairs are locked for security to prevent people from getting from the lobby to the guest quarters without using the elevators. May one simply take the elevator to whichever floor it goes (and walk the rest of the way)?

71. *Shemirat Shabbat Kehilchata* 30:54. However, he writes that it is preferred that one should be concerned for Rabbi Halperin's view and not ride on a descending elevator at all.

to a different floor by a Gentile (even though the car is now empty).⁷² In essence, both of these cases are the same as an automatic elevator.⁷³

The basic rationale for permitting such conduct is that the Gentile is doing the action solely for himself, and in cases where a Gentile does a prohibited act solely for his own benefit, a Jew may also benefit.⁷⁴ Of course, if one accepts either the argument of Rabbi Weisz or Rabbi Halperin, one

72. As in both cases the Gentile is doing the action solely for himself.

73. There is one difference. In the case of the automatic elevator, which is marked as such, there is no problem of *chashad* or *marit ayin*, whereas when one simply rides a regular elevator, these two issues are present. We have found no halachic discussion of these principles in the context of elevators; it is our opinion that while there is a possibility of both *chashad* and *marit ayin*, in fact everyone recognizes that electrical appliances can run without intervention in the modern era, and there is in fact no real problem of *chashad* or *marit ayin* -- just as one may place one's lights on a timer, without the fear that others will see this and think either that one may turn lights on Shabbat or that the person with the timer is actually a sinner. (*Chashad* (suspicion) is the halachic rule that prohibits a person from doing something that leads others to think that this person is sinning (when they are not) and *marit ayin* is that rule which prevents a person from doing something which is permissible, but which resembles something which is prohibited, and those who watch will think that the prohibited act is really permitted.) Rabbi Neuwirth, in *Shemirat Shabbat Kehilchata* 30:54, indicates that because of this reason, it is best to avoid all elevators except for the case of needing to do a mitzvah.

74. See generally, *Shulchan Aruch Orach Chaim* 325:10-11. In a situation where the Gentile knows the Jew and pushes the button for the Jew's floor as a favor for the Jew, even if not asked, a Jew may not get off at that floor, as that action is for the Jew's benefit (unless this is a case where asking a Gentile is permitted, which is discussed in section II:4. For more on these general issues, see *Orach Chaim* 325:11-12.

concludes that such tagging along is prohibited, as the Jew's presence on the elevator increases the prohibited work done, even if the Jew pushes no buttons or does any other prohibited work.⁷⁵

The case of an elevator operated by a non-observant Jew on Shabbat is complex, as the question that has to be addressed is whether the violations committed by this person have the status of *shoggeg* (unintentional), *maizid* (intentional) or *ones* (duress) violations. Furthermore, we must establish the status of modern day secular Jews – are they *tinokot shenishbu* ("captive children") or not?⁷⁶ If their violations are considered unintentional, then another Jew may derive benefit from their actions since only a rabbinic prohibition is violated.⁷⁷

On the other hand, if their violations are considered deliberate, then one may not.⁷⁸ In addition, a case can be made that even if the violations are intentional, since it involves no permanent change in the item itself (the elevator will return to its place later none the different) maybe all the rules of "prohibited benefit" do not apply.⁷⁹ This is

75. Rabbi Unterman remarks (*Shevet Yehuda*, p. 315,) that "I have personally witnessed eminent Torah sages entering an elevator and traveling to the floor for which a Gentile passenger pushed the button, and they never raised the possibility of their added weight posing a halachic problem." This also indicates that the practice is to be lenient on this issue.

76. Compare Rambam *Shegagot* 2:6 and the remarks of *Kesef Mishneh* and *Lechem Mishneh* with Rashi, *Kritut* 2a and *Chut Meshulash* (Rav Chaim of Volozhin) 13. See also *Shabbat* 68b.

77. See *Biur Halacha* 318:1 (*hamevashel*). See Rabbi Chaim David HaLevi, *Aseh Lecha Rav* 5:53 (short *teshuvot*).

78. *Ibid.*

79. See generally *Shemirat Shabbat* volume 3 2:11(7) and n.41;

explicitly stated to be the rule concerning electricity by Rabbi T.P. Frank,⁸⁰ but apparently disputed by Rabbi Neuwirth⁸¹ in the context of elevators.⁸² This matter requires further analysis.⁸³

C. Asking a Gentile to Operate the Elevator

Generally speaking, one may not ask a Gentile to do work on one's behalf on Shabbat.⁸⁴ However, in certain cases, such as for the sake of performance of a mitzvah or for the

Mishnah Berurah 257(8) and *Shulchan Aruch HaRav* 405:9; but see *Iggerot Moshe* OC 2:77 and compare this with *Shemirat Shabbat Kehilchata* 18:56. It is important to understand that Rabbi Feinstein rules that it is prohibited to derive benefit from a prohibited action, even when the benefit is secondary. Thus, Rabbi Feinstein rules that one may not enter a house whose door was opened with a key that was carried (through a biblical violation), whereas Rabbi Auerbach permits that type of benefit. Rabbi Auerbach would appear to permit a person to ride an elevator that was brought to one's floor because a Jew rode up to the floor, and one merely wished to ride it down.

80. *Har Tzvi* OC 181.

81. *Shemirat Shabbat Kehilchata* 23:51.

82. But affirmed in other context; see *ibid.* 18:n.244.

83. Indeed, before one permits this, one would have to consider the *chillul hashem* (desecration of God's name) issue, lest one appear to be encouraging a violation of Jewish law. In terms of *chillul hashem*, a distinction is possible between the case of a Jew who rides an elevator up to your floor and then leaves to go to his residence (providing you with an elevator that will go down) and actually joining a Jew in an elevator cab when that person had summoned the car in violation of Jewish law. For an example of this, see Rabbi Shmuel David, *Shealot Uteshuvot Merosh Tzurim* p. 509.

84. *Shulchan Aruch* OC 307:3-5.

needs of even a mildly sick person or great need, one may ask a Gentile to perform a rabbinically forbidden activity.⁸⁵ Therefore, since pressing a button summoning an elevator involves only a rabbinic prohibition,⁸⁶ it would appear that one is permitted to ask a Gentile to press an elevator button in order to facilitate a mitzvah such as going to synagogue or participating in a Shabbat meal (or returning from any of these).⁸⁷

In a case where a Jew boards an elevator that has a Gentile on it and the Jew intends merely to go to whatever floor the Gentile leaves, and the Gentile asks the Jew which floor he wants, it is prohibited (absent great need, the needs of a sick person, or the fulfillment of a mitzvah) for the Jew to reply by asking the Gentile to press the button of the Jew's floor.⁸⁸

85. Ibid.

86. See above notes 4 and 7. The fact that the lights which display the floor numbers are usually incandescent lights, which are biblically forbidden, does not constitute a problem since the Gentile does not intend to cause the lights to turn on. Even though it is inevitable (*psik reisha*) that the lights will turn on, the prohibition of requesting a Gentile to do work does not obtain when the Gentile does not intend to do the activity which is forbidden for the Jew (*Mishnah Berurah* 253:99); see Rabbi Mordechai Willig "On the Topic of Asking a Gentile on Shabbat," *Beit Yitzchak* 22:90-91 (5750).

87. See *Shulchan Aruch Orach Chaim* 613:5 and comments of *Mishnah Berurah* on 613:15 for an explanation of why returning from a mitzvah has the same status as going to a mitzvah.

88. There is more room to be lenient on Yom Tov, than on Shabbat, and some rule that it is permissible to ask a Gentile to summon the elevator. First, there are those authorities who rule that the mitzvah of a joyous Yom Tov is sufficiently important that this case becomes one of a double rabbinic prohibition in a case of mitzvah (*shevut deshevut bemakom mitzvah*) which is permissible; see Rabbi Ovadiah Yosef, *Yabia Omer* OC 2:26 which concludes that it is generally

D. Escalators⁸⁹

Escalators pose fewer halachic issues than elevators. American escalators lack the elaborate feedback mechanism found in modern elevators. The motor operates at a fixed speed independent of the number of people on it and there is no weighing mechanism. So, too, current flow appears to neither decrease nor increase based on the number of passengers.⁹⁰ Thus, it appears permissible to use escalators

permissible to ask a Gentile to turn on electrical appliances on Yom Tov; but see *Mishnah Berurah* 510:23 and *Shaar Haztiun* 510:24 who indicates that it is better to be strict.

In addition, it is possible to add that there are halachic authorities who maintain that the operation of electrical lights and appliances are permitted even by a Jew on Yom Tov (see "The Use of Electricity on Sabbath and Yom Tov", at 23-27). Rabbi Neuwirth rules (*Shemirat Shabbat Kehilchata* 30:n.47) that there is no prohibition to ask a Gentile to do an action whose propriety for a Jew to do is in dispute. Thus one might be able to ask a Gentile to summon an elevator on Yom Tov.

While one could question why one could not ask a Gentile even on Shabbat to turn on electrical appliances, as there is an extremely well reasoned opinion that argues as a matter of theory that when there is no generation of light and heat, there is no prohibition (See Rabbi Shlomo Zalman Auerbach, *Minchat Shlomo* page 74, 84 and "The Use of Electricity on Sabbath and Yom Tov", pp. 20-21) the answer is that since even Rabbi Auerbach concedes that the custom is to treat the use of electricity (when no light and heat is generated) as a rabbinic prohibition, that custom applies equally well to the case of asking a Gentile to do a prohibited action.

89. For more information on escalators, see *Encyclopedia Britannica* "Escalators" 4:553-554 (15th ed., 1991).

90. Rather, experts have told us that the speed of the escalator changes ever so slightly based on the number of passengers. While it is probable that Rabbi Breisch would prohibit escalators for the same reasons that he would prohibit elevators, it is possible to distinguish escalators from elevators, since escalators do not move from one point to another at all (but merely rotate), which would

on Shabbat, providing that the escalator is already functioning before the Jew steps on it.⁹¹ It is important to note that Rabbi Halperin's argument, which distinguishes between ascending and descending, is inapplicable to escalators, since escalators are closed systems on a rotating power wheel.⁹² This fact seems to have eluded some authorities who apparently counsel observing Rabbi Halperin's strictures for escalators also.⁹³

There are authorities who rule that escalators and elevators are identical.⁹⁴ It has been suggested that, given the vastly higher cost of electricity in Israel, escalators built in Israel contain feedback mechanism that moderate motor speed based on passenger traffic.

E. Israeli Shabbat Elevators

One who lives or vacations in Israel will occasionally see elevators in Israel which have certificates attesting that they can be used on Shabbat. Two different certifications are available; one is provided by the Machon Letechnology Vehalacha (The Institute for Technology and Jewish Law) and conforms to the standards of Rabbi Halperin, and the other is provided by Tzomet, and conforms to the standards

not be prohibited even by Rabbi Breisch's argument that elevators are analogous to trains.

91. See *Shemirat Shabbat Kehilchata* 23:52 which permits the use of escalators in all circumstances.

92. Whose rate of descent is determined simply by motor speed. This is in contrast to elevators, which are on a pulley system.

93. See *Menuchat Ahava* 1:24(18).

94. See *Yalkut Yosef Shabbat* vol. 4, pp. 195-196, and *Menuchat Ahava* 1:24(18), which both analogize escalators to elevators, and rule that one should try to avoid escalators when possible.

of Professor Lev and Rabbi Shlomo Zalman Auerbach. As discussed above, each of these two standards aims to solve different things. Both organizations modify the elevator so that the weighing mechanism does not operate on Shabbat.⁹⁵ An elevator certified by Rabbi Halperin has its circuitry modified so that when it is descending the electricity generated is completely dissipated, rather than being returned to the power grid of the hotel. So too, these elevators are modified so that the effect of the passenger's weight is neutralized and their descent itself does not cause any lights to go on or off.⁹⁶ On the other hand, Professor Lev's certification does not require this.⁹⁷

IV. Conclusion

The issue of riding an elevator on Shabbat is complex. While it is true that some halachic authorities permit one to use an elevator both for ascent and descent, it is clearly better to avoid putting oneself in a situation where one will need to routinely rely on lenient opinions.⁹⁸

95. It is worth noting that neither organization changes the method of operation of the elevators so that the number of people on the elevator does not directly effect the current drawn by the motor to eliminate the objection to all elevators posited by Rav Weisz.

96. For a detailed description of the various modifications, see *Maaliot B'Shabbat*, at chapter 16.

97. See Rabbi Israel Rozen, pages 94-96.

98. See *Shemirat Shabbat Kehilchata* 23:50-51 and 30:54. For example, it would be better not to move into an apartment on a high floor with the intent of regularly relying on the lenient opinions of both using a Gentile to go home from synagogue and the opinions that it is completely permissible to regularly use an elevator to descend.

"Your Camp Shall be Holy": Halacha and Modern Plumbing

Rabbi Ari Z. Zivotofsky

Introduction

The 20th century is characterized by its many high tech innovations that confront the halachic community with new and interesting challenges. Indoor plumbing is a relatively low tech innovation that has nevertheless re-vitalized many age-old halachic questions and raised new "modern" ones. Possibly the most significant improvement is the disappearance of the communal restroom or outhouse that was shared by an entire courtyard of people. Each family now has its own facilities, usually (at least in the USA) in the same room with the sink and bath/shower. In addition to being private, it is much more sanitary and odor free than in the past because the waste is immediately flushed out and removed from the room and the house. This room that combines a toilet, sink and bath/shower is commonly referred to as a *bathroom*. In some places, homes also have a room with just a shower/bathtub and a sink. This room will be referred to as a *washroom*.¹ The modern rooms referred to by these terms are distinct from the *beit*

1. A room with just a sink, medicine cabinet, etc. but no bath/shower or toilet, even if it is adjacent to a room with a toilet, has few of the questions raised in this article. This room will be briefly discussed in the conclusion.

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ha'merchatz and *beit ha'kisay* that are dealt with in the traditional halachic literature, and a distinction between the four terms will be preserved in all discussions in this article.

The status that halacha accords the modern bathroom has bearing on many questions. In order of increasing "cleanliness", some of these questions include: Is there a requirement to wash one's hands if one has merely entered the room and done nothing else? May one fulfill one's obligation to wash for ritual purposes (e.g., upon awakening,² before *davening*, before eating bread, after relieving oneself) by washing in a bathroom? May one think Torah thoughts in such a room? May one verbalize *davening*, the *shema* or Torah thoughts there? May one wear *tefillin* there?³ Additional issues include: Is there a requirement of *Kavod Harav* in the bathroom? Is a modern bathroom required to have a *mezuzah*? These questions, as well as several others relevant to the modern bathroom, will be discussed in this article.

Because the modern bathroom functionally replaces two distinct facilities of the past, it will first be necessary to understand the halachot of these two entities. They are a *beit merchatz* – a "bathhouse", and a *beit kisay*, literally a "house of the chair" – an outhouse. These two rooms or buildings have clear and well-defined halachot. The task will then be to fit the modern bathroom or washroom into

2. *Shut ha'Radbaz* 1:38 states that if one sleeps in pajamas there may be no need to wash before saying *berachot* upon arising in the middle of the night.

3. Today, when *tefillin* are not worn all day, this question is less relevant than in the talmudic period. However, its importance is that the laws of putting on and removing of *tefillin* are often used in the traditional literature as a barometer of the "cleanliness" of a room.

the classical categories. This paper will, therefore, first examine the classical definitions and halachot, and then discuss the contemporary issues.

Beit Ha'merchatz

In talmudic times a standard *beit ha'merchatz* consisted of three rooms,⁴ each governed by its own set of laws. In the outer room people were almost completely dressed and were never completely undressed. It was a place for people to complete dressing and to relax before leaving.⁵ In this room there are no restrictions on "higher order activities", and one is permitted to say the *shema*, to *daven*, to don *tefillin*, etc.⁶

The middle room was entered upon leaving the actual bath to begin dressing.⁷ In it one may not *daven*, say the *shema*, nor don *tefillin*. However, it is permissible to think Torah thoughts⁸ or greet someone with the word "*shalom*"⁹

4. *Shulchan Aruch* OC 45:2.

5. Rashi on *Shabbat* 10a; *Shulchan Aruch* OC 45:2; *Mishnah Berurah* *ibid*, s.k. 4.

6. *Tosefta Berachot* ch. 2; *Shabbat* 10a; Maimonides, *Mishneh Torah*, *Hil. Tefillin* 4:22; *Shulchan Aruch* OC 45 and 84.

7. Rashi, *Shabbat* 10a.

8. Ran on *Avodah Zara* 44b; Ramo, *Shulchan Aruch* OC 84; *Shach* YD 246 s.k. 28, *GRA* OC 84 s.k. 2. (Tosafot, *Avodah Zara* 44b, disagree and say that the statement in *Shabbat* 150a (see below) applies to the middle room, and that there too it is prohibited to think Torah thoughts.) The permissibility of thinking Torah thoughts exists even if there are undressed people present, since that does not add any further restrictions as far as the *beit ha'merchatz* is concerned. It simply adds regulations that standardly pertain to an exposed *ervah*, and *hirhur* (thought) is permitted in the presence of an *ervah* (*Shabbat* 150a; *Mishnah*

in the middle room. Since the room *per se* is not unseemly, if there is currently nobody undressed in the room there are some *poskim* who permit reciting *berachot*¹⁰ and putting on *tefillin*.

The third room is the inner room. This is where the actual bath was located. In it most people were fully unclothed and would perspire heavily.¹¹ In this room it is forbidden even to think Torah thoughts,¹² to greet someone with the word "*shalom*", or to wear *tefillin*.¹³

The classic *beit ha'merchatz* was not considered a

Berurah OC 84 s.k. 2). (Thus, one may think Torah thoughts while naked.) The Meiri (*Shabbat* 10a) seems to disagree and maintains that these leniencies apply only if there is presently no one undressed.

9. Considered to be one of G-d's names. See: *Sefer Shoftim* 6:24; *Shabbat* 10b; *Tosafot, Sota* 10a; *Teshuvot ha'Rosh* III:15; *Ramo, YD* end of 276; *Radvaz, Teshuvot* 202; *Iggerot Moshe, OC* IV, 410:3; *Mishnah Berurah* 84:6; *Torah Lodaat*, XVII:44, English side.

10. *Mishnah Berurah* OC 84 s.k. 3 in the name of *Beit Yosef*; however, the *Bach* and the *Prisha* disagree.

11. *Rashi, Shabbat* 10a. See note 64 for the two possibilities of what the deciding factor is regarding the *halachot* of the inner room of a *beit ha'merchatz*.

12. *Shabbat* 150a. This is true even according to those who maintain that thought is not the equivalent of speech (*hirhur lav k'dibbur damei*). See *Yabia Omer* 6:OC:15, who quotes *Shut Zecher l'Avraham Avigdor* as saying that the inner room is equivalent in halacha to a *beit ha'kisay* and therefore, among other things, it is prohibited to think Torah thoughts in there. For discussion as to the types of *p'sak* one may give while in a *beit ha'merchatz* and *beit ha'kisay* and under what conditions see: *Avodah Zara* 44b; *Ran, ibid.*; *Tosafot, ibid.*; *Ramo Shulchan Aruch* OC 85:2; and *Baba Kama* 17a.

13. See sources in note 5.

dignified place (lit. place of honor).¹⁴ Since the Gemara¹⁵ understands the verse (*Leviticus* 19:32) that teaches the mitzvah of *kimah v'hiddur* (honoring a wise/old person) to be applicable only in a dignified place, a *beit ha'merchatz* is excluded. This exclusion applies to the inner room but not to the outer room.¹⁶

Similar reasoning is used to exempt a *beit merchatz* from the obligation of *mezuzah*. The verse (*Deuteronomy* 6:9) that teaches the commandment of *mezuzah* states "your house", which the Gemara interprets to mean that just as your house is designed for honor, so too any place designed for honor requires a *mezuzah*. This excludes a *beit merchatz*.¹⁷

There are two principles operating here: One that governs the laws relating to *mezuzah* and *kimah v'hiddur* stems from a subjective assessment of the *beit ha'merchatz* as a place devoid of honor. The other, that limits activities of *kedushah* in the *beit ha'merchatz*, is derived from the verse

14. See Rashi *Baba Kamma* 86b, s.v. *beit ha'merchatz*.

15. See *Kiddushin* 32b and 33a for some stories relating to this. This is cited as the halacha in *Mishneh Torah, Hilchot Talmud Torah* 6:2 and *Shulchan Aruch YD* 244:4.

16. *Kiddushin* 33a; *Ramo* op. cit. Maimonides omits this law. see *Kesef Mishneh*, op. cit. Cf. *Pitchei Tshuva* (244:3) on the inner room. On differing opinions regarding the middle room see: *Shach, Shulchan Aruch YD* 244:3; *GRA OC* 84:2; *Aruch HaShulchan* 244:6.

17. *Yoma* 11b; Maimonides, *Mishneh Torah, Hilchot Mezuzah* 6:9; *Shulchan Aruch, YD* 286:4; *Sifri* on *Deuteronomy* 6:9. The hall leading to a *beit ha'merchatz* or *beit ha'kisay* is exempt for a different reason (*Drisha* 286:6; *Piskei Uziel, She'elot Hazman*:30).

"your camp shall be holy",¹⁸ and has additional ramifications that will be explained in the following section.

None of the above stated restrictions relating to a *beit ha'merchatz* are to be construed in any way as denigrating the role of the *beit ha'merchatz*. Despite all the criticism it received from the rabbis, Rome¹⁹ was praised for building *batei merchatz* in Israel (*Shabbat* 33b), and Hillel told his disciples that bathing is a religious duty (*Lev. Rabbah* 34:3). In talmudic times, it was forbidden for a scholar to live in a city that did not have a public *beit merchatz* (*Sanhedrin* 17b).

"Your Camp Shall Be Holy"

The verse "your camp shall be holy"²⁰ is the source of the biblical prohibition against reciting the *shema*, praying, speaking or thinking words of Torah if one's "camp" is not "holy". Both of these terms ("one's camp" and "holy") require clarification. Lack of holiness results, for example, from the

18. *Deuteronomy* 23:15. See *Sifri*, *Deuteronomy* 6:9 and *Shabbat* 150a. The preceding verse, "You shall have a place outside the camp, where you shall withdraw yourself: and you shalt have a spade among your weapons, and it shall be, when you will ease yourself outside, you shall dig with it, and shall turn back and cover your excrement" (*Deuteronomy* 23:14) also teaches the importance of having a "bathroom" outside of the camp and maintaining purity and cleanliness even while in a military camp. This verse and the preceding one are treated as two distinct biblical commandments in the compilations of the 613 commandments, highlighting the importance of this area of halacha. See *Sefer ha'Chinuch* 566 and 567.

19. See *Megillah* 6b regarding bathhouses in Rome.

20. See introduction of *Mishnah Berurah* to OC 79 for this and the next group of laws. See also: *Encyclopedia Talmudit* entries on *beit ha'kisay* (3:206–210) and *beit ha'merchatz* (3:242–244) for discussions of many of the laws found in these first few sections.

presence of *tzo'ah* (excrement)²¹ within the person's "camp" or domain. Four *amot* (cubits) is generally considered the size of a person's "private camp". Hence, this verse teaches that there must be no *tzo'ah* within a four *amah* radius to be permitted to engage in religious activities.

If *tzo'ah* is in front of a person, in the same domain and visible, even if it is outside the immediate four *amot*, the recitation of holy matters is forbidden. In addition, the type of *mechitzah* (separation) required for *tzo'ah* is different than that required for *ervah*. Two distinctions are noteworthy. Unlike *ervah*, where a glass partition is not sufficient to permit holy matters (e.g., a man may not recite the *shema* or *daven* while observing women in a pool even through a glass partition), it is sufficient with regard to *tzo'ah*. The reason for this is that *tzo'ah* needs only to be covered in order for it to not prohibit.²² However, water, which in

21. *Tzo'ah* of an infant does not fall in this category. The age that one is no longer an infant for these laws is defined as the time that a child can really start eating solid food (grains). The *Kaf ha'Chaim*, quoting the *Migdal Oz* and others, notes that in practical terms this means at about *one year of age* (OC 81:6) (cf. *Beit Yosef* YD 265 and GRA s.k. 39).

Animal excrement has a different set of laws and is in general less problematic. Assuming there is no foul odor, one may recite holy matters in its presence, with the exception of excrement or urine from a donkey recently returned from a journey, or excrement of a cat, leopard or "red" chicken (*Shulchan Aruch*, OC 79:4-7, MB 79:25).

NOTE: An important consequence of this is that if not everything in a cat litter box is covered over, it would have the law of human *tzo'ah* and one may not recite *birchat ha'mazon*, *daven*, etc., while the litter box is within four *amot* to the side or back or in visual range in front. On owning a cat, see *Baba Kamma* 80b.

22. See Rav Avraham M'Sokotchov, *Shut Avnei Neizer* 19, for a discussion of why a glass *mechitzah* is sufficient. Since the

general is a good partition with regard to *ervah*,²³ is not sufficient for *tzo'ah*.²⁴ Thus, *tza'ah* fully submerged in water but visible would prohibit one from praying, etc. However, if the water used is cloudy or colored it is considered a sufficient covering even for *tzo'ah*.²⁵

Under the rubric of this prohibition is also included the prohibition of prayer, etc. in the presence of foul odors.²⁶ Foul odors fall into two categories: those with a specific, discernable, present source, and those without. If a foul odor has a source, it is categorically identifiable with *tzo'ah* with respect to the biblical laws. One must, therefore, be beyond four *amot* from the place where the smell terminates, and if not, the prayer must be repeated. If the foul odor is

tzo'ah only has to be covered it can even be covered by a part of the body (OC 76:1-2,4).

An interesting proof may be brought from *Nedarim* 49b: R. Yose and R. Yehuda were eating out of the same bowl and one of them was eating with his fingers. The other said to him: "How long will you make me eat your *tzo'ah*?" [that was under his fingernails]. It must be assumed that they both made *brachot* and yet did so with *tzo'ah* under one of their nails! (However, the statement may have been merely a sharp, insulting retort and not a statement of fact, in which case no proof can be brought.)

23. See *Berachot* 25b; *Shulchan Aruch* OC 74; *Magen Avraham* s.k.. 8. See also *Mishnah Berurah*, *ibid*, s.k. 7 who points out that this is only in so far as not being in the presence of the exposed *ervah*. However, it is still necessary that one not look at the *ervah* and, as such, water is not like an actual *mechitzah*.

24. OC 76 *Magen Avraham* s.k.. 9. Thus, one needs to be careful around children's soiled clothes when they are soaking in water. This is opposed to *mei raglayim* to which one can add water and "nullify" it (*ibid* 77:1) (see *Aruch HaShulchan*, OC 77:4).s.k.

25. *Aruch HaShulchan* 76:4; *Sha'aray Halacha* by Rabbi H. Myski, Vol. 1, 7:4:8.

26. See *Shulchan Aruch*, OC 76 and 79 and commentators.

(halachically) sourceless, then biblically it is not a problem, and rabbinically one need only remove oneself from the actual area of the odor before reciting holy matters. This discussion includes any source of foul odor, not only *tzo'ah*. A garbage pail, decaying foodstuffs, or carcasses that are producing a foul odor would biblically prohibit one from reciting holy matters.

Mei raglayim (urine) only removes the "holiness" from one's "camp" and causes a biblical prohibition at the time that it is in a steady stream from the body. If it is only dripping, and certainly once it is on the ground, it only raises a rabbinic concern.²⁷ Rabbinically one is required to treat it as *tzo'ah*.²⁸ Distancing only helps if the *mei raglayim* does not omit a noxious odor. If it does, then like any other foul odor with a source, it causes a biblical prohibition.

27. *Shulchan Aruch* OC 76:7. See also *Minchat Chinuch*, Mitzvah 567 and *Iggerot Moshe*, OC:1:27. A person with urinary incontinence is permitted to perform his religious duties provided he does not sense the actual passage of urine and his outer garments are clean. Such a person can receive an *aliyah*, and, if he is a *kohen*, may *duchan* (*Tzitz Eliezer* 11:7). Similarly, a person with a urinary catheter through which urine passes continuously may perform his religious duties (*Tzitz Eliezer* 8:1; *The Comprehensive Guide to Medical Halacha*, Abraham S. Abraham, Feldheim, 1990).

28. The *Aruch HaShulchan* (OC 76:21) contends that this rabbinic enactment is not specific to *mei raglayim* and that any "disgusting" item has the same laws. Thus, the laws that apply to *mei raglayim* would also apply to vomit, large quantities of phlegm, etc. *Ben Ish Hai* (1:Toldot:9) adds that water that one used to wash and that is now sitting in another utensil is even more "*tamei*" than *mei raglayim* and hence prohibits at least as much.

Mei raglayim is considered especially lacking in *kavod*. For example see *Kritot* 6a on not using *mei raglayim* in the preparation of the incense in the Temple, and *Aruch HaShulchan* OC 586:37 on not using it in cleaning out a *Shofar*.

The foregoing summary of the laws directly related to *tzo'ah*, *mei raglayim* and foul odors have relevance in many areas of practical halacha. In addition to the cases already mentioned, other areas of concern include the permissibility of *davening* in rooms with dirty diapers or in hospital rooms, and questions regarding people with colostomies²⁹ or urine bags *davening*, saying *berachot*, putting on *tefillin*, etc.

In a discussion of the modern bathroom two additional ramifications of "your camp shall be holy" are relevant. These are a *g'raf shel re'i* and an *avit shel mei raglayim*. These are loosely translated as chamber pots, respectively for excrement and for urine,³⁰ and will henceforth be referred to simply as *g'raf* and *avit*.

Both a *g'raf* and an *avit* generate the above stated biblical prohibitions, even if they are at present empty of all offensive matter.³¹ However, this is only if they are made of pottery or wood, i.e., materials that are considered porous and absorbent. If they are made of metal, glass³² or lined pottery it is permitted to recite holy passages in their presence so

29. A person with a colostomy or ileostomy may engage in religious duties if the external opening is clean and covered (*Tzitz Eliezer* 9:6; *Minchat Yitzchak* 6:11-12).

30. Rashi, *Berachot* 25b, indicates that they are similar items but have different names based on their different functions.

31. *Berachot* 25b; *Shulchan Aruch* OC 87. Rabbi Akiva Eiger on *Shulchan Aruch*, OC 87, points out that an *avit* carries biblical prohibitions even though its offensive content, *mei raglayim*, is only prohibited rabbinically.

32. The *Aruch HaShulchan* (OC 87:2) says this is true even according to those who say that glass cannot be kashered. (On kashering glass see: H. Jachter, "May Glass Utensils be Kashered?", *The Journal of Halacha and Contemporary Society*, XXVI, Fall 1993.)

long as they are washed out well.³³ The rationale for this prohibition, even for a clean *avit*, as well as for a clean *beit ha'merchatz* and *beit ha'kisay*, is based on their designation for a specific, "unclean" purpose. This similarity in rationale is important since some of the lenient halachot pertaining to an *avit*, presented next, might prove useful in analyzing a modern bathroom.

The *Magen Avraham* provides two possibilities³⁴ (other than that of non-porous materials) when an *avit* might not carry the usual prohibitions. The first is a vessel that has an additional use beyond serving as an *avit* for *mei raglayim*. Thus, it is no longer specifically designated only for the "unclean" purpose and does not acquire the status of an *avit*. Rather, it is like any other neutral receptacle; if it is clean from *tzo'ah* and *mei raglayim* and has no foul odor it would not prohibit. The second case occurs if whenever the *avit* is used a *revi'it* of water is immediately poured into it as well.³⁵ In presenting the rationale for this, the *Biur*

33. These rules have ramifications for a person who uses a bedpan or a urine bottle. If it is made of wood or unglazed pottery it is treated like *tzo'ah*. If it is made of metal, glass, glazed pottery or plastic and is clean and odorless, no distancing from it is required.

34. OC 87. Both of these are discussed in the *Mishnah Berurah* *ibid*, s.k. 2. and the second in the *Biur Halakhah* s.v. *g'raf* as well, where the Chofetz Chaim seems to accept both possibilities. *Zkan Aharon* (1:1) posits that the *Bach* and the *Prisha* would disagree.

35. Most modern toilets contain more than a *revi'it* of water in the bowl at all times, and then upon flushing additional water, also more than a *revi'it* is added. However, no distinction seems to be made between adding the water second or having it originally present.

*Halacha*³⁶ explains that this too prevents it from taking on the unique designation of an *avit* (and, as will be seen later, possibly this would prevent a room from taking on the designation of a *beit ha'kisay*).

Beit Ha'kisay

An additional application of the verse "your camp shall be holy" is a *beit ha'kisay*. It should be kept in mind that this discussion applies to the *beit ha'kisay* in use in the talmudic period. It may be that some of it does not apply to the modern bathroom.

In a permanent *beit ha'kisay*³⁷ it is prohibited to read the *shema*, pray, say words of holiness, think about such matters, or wear *tefillin*³⁸ even if there is no *tzo'ah* present.³⁹

36. Ibid.

37. There are two types of *beit ha'kisay* discussed by Chazal. A *beit kisay kavua* (a permanent *beit ha'kisay*), was a designated area that was regularly used as a place to relieve oneself. The wastes all remained in that area. In modern terms it is most similar to a permanent outhouse, as is found on some hiking trails. In addition, something like a "Port-o-John" which is found at construction sites and parades might have a similar status since the waste is not removed. (Although since it is covered over it might not be identical to a *beit kisay kavua*. It would probably not have the status of a "mini-*beit ha'kisay*" (see text accompanying note 42) due to its greater permanence.)

The second type was a *beit kisay arai* (a temporary *beit kisay*). This was not an area designated as a place to relieve oneself, but a place where someone who needed to use the facilities picked an isolated area and used it as a *beit kisay*. By virtue of using it he created a *beit kisay arai*. This is less common today, at least in populated areas, but the condition does sometimes arise in the army or while one is camping.

38. For details on *Tefillin* and various activities in and around

The prohibitive effect of a *beit ha'kisay* is so strong that it is even forbidden to recite the *shema* outside but opposite a *beit ha'kisay*.⁴⁰ It is also prohibited to carry *tefillin* into a *beit ha'kisay*. If, however, they will be endangered by being left outside, one may wrap, or in some cases double wrap them, and take them into the *beit ha'kisay*.⁴¹

Whether a "mini-*beit ha'kisay*" (i.e., a portable "pottie") is categorized as a *beit ha'kisay* is the subject of a dispute. The *Aruch HaShulchan* (OC 83:10) determines that it is,⁴² and he, therefore, states that if people have portable "potties" for children who are of the age when their *tzo'ah* makes a

a *beit ha'kisay* see: *Berachot* 23a; Rambam, *Mishneh Torah*, *Hilchot Tefillin* 4:17; *Shulchan Aruch* OC 43 (specifically 43:1, 43:5) and 62: *Mishnah Berurah*, *ibid* (specifically 43:12 and 62:5); *Aruch HaShulchan* OC:43:6.

A person in a hospital room who has *tefillin* with him should be careful to keep them double wrapped (and one of the wrappings should be other than its usual wrapping, such as a desk drawer) if he relieves himself in that room. (R. Shimon Eider, *Halachos of Tefillin*, p.128)

39. *Berachot* 26a; Rambam, *Mishneh Torah*, *Hilchot Kriat Shema* 3:2-4, *Shulchan Aruch*, OC 83:1.

40. *Ibid*.

41. *Shulchan Aruch*, OC 43:6,7; *Mishnah Berurah*, 43:24; *Aruch HaShulchan* 43:13; *Sefer ha'Trumah* 213; *Rabbenu Yeruchum* 19:5. On practical applications such as in an airport or train station (where one should wrap his *tefillin* bag in a coat or place them in another bag and then hold it while using the bathroom) see R. Eider, *op cit*. p. 136.

42. This is against the *Shulchan Aruch*, OC 83:5, who says that these items do not have the status of a *beit ha'kisay*. The *Kaf Hachaim* (83:13) brings many opinions on both sides of the debate and concludes strongly that one should be stringent in this matter, and not follow the *Shulchan Aruch*. (See also *Taz* OC 83:3; *Biur Halacha* 83:Ein Hag'raf and *Minchat Yitzchak* 1:60:6.)

location "unclean",⁴³ all the laws of a *beit ha'kisay* apply to them and these potties need to be removed from the room or be covered to *daven*, etc. in that room. This also applies to portable toilets used by the elderly. These items are like a *beit ha'kisay* and, therefore, even when clean still carry the relevant prohibitions.

Most of the laws regarding a *beit ha'kisay* take effect as soon as it has been designated as such, even if it has never been used. Thus, if a room has been set aside as a *beit ha'kisay*, even if it has never been used, it is prohibited to recite the *shema* in that room, as it is no longer within the category of a "holy camp".⁴⁴ Additionally, upon leaving a *beit ha'kisay* one must wash one's hands.⁴⁵ From these last two halachot

43. At about one year old. See note 21 for details.

44. *Shulchan Aruch* OC 83:2. This is debated in *Berachot* 21a and decided stringently by, among others, Rambam, *Mishneh Torah*, *Hilchot Kriat Shema* 3:3; *ha'Itur*, *Tefillin* 6; Ravya, *Berachot* 77; *Ohr Zaruah* 1:134; *Rosh Berachot* 21a. There are, however, some who rule leniently, such as the Raavad on the *Mishneh Torah*, *ibid*. This halacha does not apply to a *beit ha'merchatz* (*Shabbat* 10a, *Shulchan Aruch* OC 84:1).

45. *Shulchan Aruch* OC 4:18. *Mishnah Berurah* s.k. 40 adds that this is true even if a person merely entered a *beit ha'kisay*, did nothing, and walked out. However, see discussion of this below.

This halacha applies equally to a *beit ha'merchatz*. However, the *Shulchan Aruch* does not specify which room in the *beit ha'merchatz*. It seems that it refers only to the inner room. (See *Shut Zkan Aharon* 1:1 who discusses whether it applies also to the middle room.)

This law of requiring one to wash one's hands is originally found in the *Zohar* (*Bereishit* 10b) and mentioned by the Chida on *Sefer Chassidim* 823, and is based on the idea of a *ruach ra* within the *beit ha'kisay* and *beit ha'merchatz*. See also *Sukkah* 46a and *Baba Kamma* 17a with regards a *beit ha'kisay* (and

– that mere designation causes the prohibitions associated with *tzo'ah*, and that mere entry requires a handwashing – we can sense the severity of the prohibitions related to a *beit ha'kisay*.

There are, however, also examples of what appear to be leniencies regarding even a *beit ha'kisay*. Although it is forbidden to think words of Torah in the *beit ha'kisay*, if a person is so involved with learning that he cannot help himself, it may be permitted.⁴⁶ Another, more relevant leniency, relates to what the Talmud refers to as a Persian *beit ha'kisay*. The special feature of this *beit ha'kisay* was that the refuse was always technically covered or not present within that room. Specifically, if a room is constructed with the hole into which the waste falls at an angle, such that the *tzo'ah* and urine always roll away, and with this drainage hole at least four *amot* long, it does not have any of the above stated laws of a *beit ha'kisay* and one is permitted to read the *shema* therein.⁴⁷ This very important leniency will be discussed again in regard to possible ramifications for the modern bathroom.

The Talmud, just as it does for the *beit ha'merchatz*, stresses the importance of a *beit ha'kisay*. Commenting on

where it seems that this washing is not linked to a *ruach ra*), and the *Avudraham* (quoted in the *Beit Yosef*, OC 4) with respect to a *beit ha'merchatz*. This *ruach ra* may be less potent than other *ruchot ra'ot*. (*Ben Ish Hai* 1:Toldot:16)

46. *Beit Yosef*, OC 85, based on *Zevachim* 102b. The *Prisha* there goes so far as even to permit verbalizing the words. However, the *Mishnah Berurah*, *ibid*, s.k. 8, disagrees and forbids verbalizing the words in a *beit ha'kisay*.

47. *Berachot* 26a; *Shulchan Aruch* OC 83:4. This assumes that one always makes use of the aforementioned hole and that there is no foul odor present in the room.

the verse in *Psalms* 32:6, the Talmud (*Berachot* 8a) offers many possibilities as to what the verse refers to when it speaks of a "time of finding". These include finding Torah, a good wife, etc. Mar Zutra proposes that it refers to finding a *beit ha'kisay*, and the Talmud concludes that: "This interpretation of Mar Zutra is the best of all".⁴⁸

The importance of the *beit ha'kisay* is further illustrated by the story told in *Berachot* 55a: "A certain matron said to R. Yehudah b. R. Ill'ai: 'Your face is [red] like that of pig-breeders and usurers [both of whom lived well].' To which he replied: 'On my faith [I swear], both occupations are forbidden to me, but there are 24 *batei kisay* between my lodging and the *beit ha-midrash*, and when I go there I test myself in all of them.'"⁴⁹

The Mishnah (*Tamid* 1:1, *Tamid* 26a) sometimes even attaches the word "honor" to a *beit kisay* and refers to the facilities in the *Beit ha-Mikdash* as a *beit kisay shel kavod*. Its status of honor was due to the fact that it could be locked, and thus one would know if someone else was in the room.

48. See also in *Baba Metzia* 107a, R. Yochanan's explanation of *Deuteronomy* 28:3, "Blessed shall you be in the city," that a *beit ha'kisay* should be near your table, and Rashi's explanation there.

49. This story is found also in *Nedarim* 49b. There the questioner is a *min*, the questioned is R. Yehuda, and he replies that, corresponding to the 24 *batei kisay*, he visited one an hour. The same story seems to be repeated in *Yerushalmi, Pesachim* 10:1, with a very different answer. The questioner there is a matron, the questioned is R. Y[eh]uda b. R. Ilai, and the question includes a third option, that he was drunk. In the answer he curses her, and then tells her it is neither of those three options, but rather that he is always studying Torah, as the verse (*Kohelet* 8:1) states: "A man's wisdom makes his face shine."

Summary: Laws of Pre-Modern Times

Before attempting to examine the laws relating to a modern bathroom, we have summarized the sources relating to the classical situations. The issues center around a number of concerns. The primary one is the need for "your camp to be holy." This verse teaches that in the environs of *tzo'ah*, *mei raglayim*, a foul smell, or any utensils customarily used with any of them, one may not occupy oneself with holy matters. In addition, this prohibition places certain restrictions on a *beit ha'kisay* and a *beit ha'merchatz*. There are specific laws relating to the various rooms within a *beit ha'merchatz* and to various constructions of the *beit ha'kisay*. Finally, there are two other properties ascribed to the *beit ha'merchatz* and the *beit ha'kisay* – the presence of a *ruach ra*, necessitating handwashing, and a designation as a place used for an undignified function, exempting the room from *mezuzah* and certain other laws.

The questions with regard to the modern bathroom and washroom to be considered now include: Which, if any, of the three rooms in a *beit ha'merchatz* do they parallel? Does a bathroom have all the laws of a *beit ha'kisay*? Do they contain a *ruach ra*? Are they rooms whose functions are deemed to be undignified? It is important to keep in mind that the majority of this discussion centers around a clean bathroom/washroom. While one is performing one's bodily functions, all of the above stated laws regarding *tzo'ah*⁵⁰

50. The fact that the *tzo'ah* is fully covered with water is not sufficient, as discussed above. Questions regarding bringing items like Columbia University's logo (on a sweatshirt) which contains G-d's name (in Hebrew letters) into a bathroom while using the facilities are therefore not dependent on the status of the room, but would depend on whether the Name written by a non-Jew with no holy intent has holiness. This is an entirely separate

and *mei raglayim* are fully applicable, no matter what kind of bathroom one is using.

Ruach Ra

Before discussing whether one is allowed to use a modern bathroom for ritual purposes, such as washing one's hands before *davening* or eating bread, a broader question needs to be asked: Does merely entering a *beit ha'merchatz*, *beit ha'kisay*, or bathroom and then leaving without using the facilities still convey a *ruach ra* that necessitates washing one's hands? The *Shulchan Aruch* cited above does not address this issue, and the opinion of *Mishnah Berurah* that a handwashing is required is not universally accepted. Rav Shalom Mordechai b. Moshe Shvadron (*Maharsham*⁵¹) cites a strong proof from *Magen Avraham*⁵² that simply entering and leaving a *beit ha'kisay* does not require washing. Based on this *Magen Avraham*, *Match Efrayim* rules that if one

question, and will not be discussed here.

51. *Sefer Da'at Torah* OC 4, quoted in *Yabia Omer* 3:OC:1, and *Tzitz Eliezer* 7:2.

52. *Siman* 227. The *Shulchan Aruch* (based on *Yerushalmi*, *Berachot* 9:2) states: "If one is sitting in the *beit ha'kisay* and hears thunder or sees lightning, if one can get up and out [within the time allotted to say the *beracha* (*toch k'dai dibbur*)] one should do so, and say the *beracha* then." The *Magen Avraham* explains that this refers to a situation where the person can either wash or where he has not yet used the facilities or touched unclean parts of his body. Thus, according to the *Maharsham*, it is clear that the *Magen Avraham* was of the opinion that just entering a *beit ha'kisay* did not necessitate washing one's hands. (The *Mishnah Berurah*, 227:11, who holds that just entering a *beit ha'kisay* requires a handwashing, rejects this proof and explains that in this case we make an exception so that the person does not forfeit the opportunity to say the *beracha*.) See *Yabia Omer* 3:OC:1 for a lengthy discussion of this topic.

merely entered and then exited a *beit ha'kisay* on Yom Kippur, one should not wash one's hands.⁵³ *Tosafot Yeshanim* in *Yoma* 30a also indicate that one is not required to wash for only entering a *beit ha'kisay*. Among the reasons for this, Rav Ovadia Yosef (*Yabia Omer* 3:OC:2) quotes *Eliyahu Rabbah* (1:4) that the *ruach ra* of the morning does not apply today, and therefore certainly the *ruach ra* of a *beit ha'kisay* does not apply, and the *Magen Avraham* (OC 173:1) suggests that maybe "nature has changed" and *ruach ra* in general no longer poses the same danger it once did. The *Lev Chaim* quotes a list of authorities who concur and also do not require a handwashing but adds that since it is disputed, one should nonetheless always wash one's hands.⁵⁴

The same question can be asked with regard to a traditional *beit ha'merchatz*: If one enters for a purpose other than to bathe, is one required to wash one's hands upon exiting? *Shem mi'Shimon* and *Yavetz*⁵⁵ both exempt washing in this situation. Even those who would be stringent with regard to a *beit ha'kisay* might be more lenient in the

53. *Mateh Efraim* 613:7. *Elef L'Mateh* elaborates and says that all that can be learned from the *Magen Avraham* is that the *ruach ra* does not preclude one from saying a *beracha*. But there still might be a requirement to wash one's hands at the earliest opportunity. The problem with this is that the *Zohar* seems to equate washing and the prohibition of saying a *beracha*.

54. This is the standard practice, following the *Mishnah Berurah*, the *Chida* (*Sefer Brit Olam* on *Sefer Chassidim* 823), the *Pri Megadim*, the *Malbim* (*Artzot Ha'Chaim* 4:75), the *Ben Ish Hai* (1:Toldot:16), and others. This stringent view is a leniency on Yom Kippur.

55. OC 9 (although *Tzitz Eliezer* quotes others who say OC 8) and in his *Siddur*, section on rising:19, respectively. Cited in *Tzitz Eliezer* 7:5.

case of a *beit ha'merchatz*.⁵⁶

Although many authorities are lenient, it is our custom to require a washing for merely entering a *beit ha'kisay*, and if possible also for merely entering a *beit ha'merchatz*, unless there is a good reason not to, such as its being Yom Kippur, and the washing is a matter of dispute. Regarding modern bathrooms, the story is a little different. The *Zkan Aharon* (1:1) rules that any room not used solely for a degraded purpose does not acquire a *ruach ra*, and because our bathrooms and washrooms are not used exclusively for those purposes there is no *ruach ra* present. Hence, there is no need to wash if one entered there for another purpose. Rav Aryeh Tzvi Frumer (*Shut Eretz Tzvi* 110 and 111), using that argument, as well as others, concurs. In summary, most authorities agree that simply entering a modern bathroom does not necessitate a handwashing.⁵⁷

There is no disagreement, however, that one is required to wash one's hands after using the facilities, bathing, or showering, even in today's clean environment. A corollary question then arises: After one has flushed or when the

56. See the comment in the *Shut Afarsaksa Da'Aniya* 133 (quoted in *Tzitz Eliezer* 7:5) with regard to the Chida's position.

57. Rav Ovadia Yosef, *Yechave Daat* 3:1 disagrees with this, and in the name of *Chelkat Ya'akov* 1:205 as well, compares a modern bathroom to a *safsal nakuv* (OC 83:5). Rav Yosef maintains that a modern washroom would certainly not have a *ruach ra*, but, a bathroom does. He would thus require washing one's hands even if one entered a bathroom only to get a tissue or the like. I do not know what he would rule regarding Yom Kippur – whether he would require washing of one's hands – for merely entering a bathroom. However, see *Sefer Ta'amei ha'Minhagim u'Mkorei ha'Dinim* (Eshkol, Jerusalem, 1982) p. 335, that cites the *Mikdash Melech* on *Parshat Truma* that the *ruach ra* (at least in the morning) is much attenuated on Yom Kippur.

room is not steamed from the shower, may one perform the requisite washing in the bathroom/washroom itself? Actually, the question is whether any ritual washing may be done in these rooms, and that is the topic of the next section.

Washing Hands For Ritual Purposes

There are numerous circumstances which require ritual washings of the hands. These include: upon rising, before eating, before *davening*, and a Kohen before *duchaning*. Each of these has its own reason and has to be analyzed separately.⁵⁸ Rav Moshe Feinstein (*Iggerot Moshe, Even Haezer* 1:114), in discussing a bathroom that is clean of all wastes and has no foul odor, rules that one can wash there only for *davening* but not for eating. He says that washing for *davening* is less strict than for eating and that he is unsure whether our bathrooms have the status of a Persian *beit ha'kisay* or not, but gives no further rationale for his position. Even with regard to washing for *davening*, he maintains that it is only permissible if no other choice exists and that the hands should be dried outside the bathroom.⁵⁹ He therefore urges that

58. All of these washings need to be done with a utensil. Whether paper bathroom cups may be used see: *Tzitz Eliezer* (12:23) (yes); *Shraga Hameir* (55) (no); *Iggerot Moshe*, OC 3:39 (may not use a paper cup for kiddush, does not address the washing issue); *Tvilat Kelim* by R. Zvi Cohen, p. 58, footnote 10.

59. Rav Moshe Feinstein does not seem willing to use the procedure of drying the hands outside of the bathroom, when washing for bread. Rav Moshe Sternbuch (*Moadim U'zmanim* 8:249) quotes the Chazon Ish to the effect that washing in a *beit ha'merchatz* and then drying them outside would be of no avail. Rav Sternbuch is hesitant about this position and quotes *Ayelet Hashachar* that such a procedure may be effective. This discussion is independent of the *beracha* issue; it is simply a question of whether having wet hands in a place where washing is permissible will effectuate

shuls be careful to provide a place to wash other than the bathroom.

A possible problem with washing in the bathroom, not mentioned by Rav Moshe Feinstein, is raised by the *Shem Mi'Shimon* (OC 9) with respect to washing in a washroom, and leads him to forbid it. Because this washing is a mitzvah, one might (or should!!) be cognizant of its purpose, and thus it will be as if he is thinking about Torah in an inappropriate place.⁶⁰ In addition, it may simply not be proper to do a mitzvah in an "unclean" place.

Rabbi Eliezer Yehuda Waldenberg (*Tzitz Eliezer* 7:5) concludes that the problems raised by the *Shem mi'Shimon* are not applicable to the issue of washing in an "unclean" place and permits ritual washing in a washroom.

Rav Waldenberg proceeds to further analyze a washroom. He quotes Rav Aharon Walkin (*Zkan Aharon*, 1:1)⁶¹ who determined that a modern washroom is the equivalent of a middle room in a *beit ha'merchatz*. In addition, he cites *Shut Yaskil Avdi* OC 6:13 and *Yabia Omer*, 3:OC:1-2 who permit washing in a washroom. They reason that the room is not used solely for bathing and unclean purposes,⁶² and

a "new" washing. *Har Tzvi* OC:1:50 is also of the opinion that it is of no avail.

60. This assumes that a bathroom or washroom is a place where it is prohibited to think words of Torah. Those who regard modern facilities otherwise will not have this problem.

61. See *Taz*, OC 84:2 for a precedent to this.

62. It seems from this that a room used solely for bathing or showering, i.e., a military style shower, would indeed have the status of an inner room of a *beit ha'merchatz* and, for example, *hirhur* would indeed be prohibited. This would be true if the sole problem with an inner room is that it is used for naked bathing (Rashi, *Avodah Zarah* 44b; one opinion in Meiri, *Shabbat* 10a).

therefore does not acquire the status of a *beit ha'merchatz*.⁶³ Rav Waldenberg, therefore, concludes that a modern washroom is not like a *beit ha'merchatz* and one may wash there for bread, and, according to the letter of the law, even say the *beracha* in there. But he maintains that it is best not to rely on this and, where possible, to avoid washing in a washroom. In addition, he stresses that all of this is not applicable to a bathroom and apparently forbids washing in there.

Harav Yosef Eliyahu Henkin (*Eidut L'Yisroel* 1) takes Rav Walkin's logic one step further and, based on the two facts that modern bathrooms expel the waste immediately and that they have other functions, maintains that our bathrooms have the actual status of a middle room of a *beit ha'merchatz*. Therefore, *shema* and prayer are prohibited there, but washing for *davening* or eating is permitted.

This question is also discussed by Rav Mordechai Ya'akov Breisch (*Chelkat Ya'akov* 1:205, 2:162) who uses similar logic, which he applies to the bathroom as well, and says that one may perform ritual washings there.⁶⁴

Going one step further, the *Levushei Mordechai* (OC:1)

If sweat and grime are also problematic, then this would not be true. Meiri (*Berachot* 26a), Rav Manoach (cited in *Kesef Mishneh*, *Hilchot Kriat Shema* 3:3) *Magen Avraham* (OC 45:2) and *Zkan Aharon* (1:1) all seem to follow the latter option. (See also *Tzitz Eliezer* 7:5 and *Yabia Omer* 5:11 regarding saying a *beracha* in a *mikvah*.)

63. This logic is based on the *Magen Avraham*, discussed above, with regard to an *avit*.

64. *Chelkat Ya'akov* 1:205 discusses the more extreme case of the halacha with regards to bathrooms on trains, which are less clean than a bathroom in a house, and yet he permits washing there.

uses the logic that since our toilets immediately expel the waste, they are even better than a Persian *beit ha'kisay* (which is "cleaner" than a "middle room") and he therefore permits washing in a bathroom. Taken at face value this conclusion results in a tremendous leniency, for, as discussed above, one is even permitted to read the *shema* in a Persian *beit ha'kisay*.

Rav Ovadia Yosef (*Yabia Omer* 3:OC:1-2, *Yechave Daat*, 3:1) analyzes the issues of washing in a bathroom and washroom separately. He quickly reaches the conclusion that a mere presence in a *beit ha'merchatz* (and certainly a washroom) does not require one to wash unless one bathed there. Based on this, and eight concurring authorities,⁶⁵ he concludes that one may wash in a washroom before *davening*, eating, and upon awakening. However, since there are others who disagree with his arguments, he concludes that one should preferably not wash in a bathroom if it can be avoided; but if there is no other choice and the bathroom is always kept clean, he allows it.

The Chazon Ish⁶⁶ similarly differentiates between our bathrooms and a Persian *beit ha'kisay*, but offers an alternate rationale to be lenient; our toilets are made of porcelain and are rinsed out after every use. It is possible that just as the innovation of the Persians prevented their bathrooms from acquiring the legal status of a *beit ha'kisay*, so too our "innovations" would prevent our bathrooms from acquiring that status. Nonetheless, he concludes that one should be stringent because of doubt.

65. *Shem Mi'Shimon* OC:9, *Chelkat Ya'akov* 1:205, *Zkan Aharon* 1:1, *Maharam Brisk* 3:39, *Tzitz Eliezer* 7:5, *Yeshuat Moshe Aharonson* 31, *Yaskil Avdi* 6:OC:13:8, *Netzer Matai* 2.

66. *Hilchot Kriat Shema* 17:4, end of 17:11 and OC 14:4.

Shut Ohel Moshe,⁶⁷ Rav Yitzchak Ya'akov Weiss (*Minchat Yitzchak*, 1:60), *Shut Eretz Tzvi* (110–111) and Rav Henkin have no doubt, and all conclude that one may wash one's hands in a bathroom, certainly when there is no other choice, for both *davening* and eating.⁶⁸

The *poskim* cited in this discussion selectively deal with the issues of washing one's hands upon awakening, for *davening*, for eating, or after using the bathroom.⁶⁹ Each *posek* has omitted certain types of washing from his discussion. In addition, there are various religiously mandated washings that were not discussed by any of those cited. It therefore might be useful to "rank order" the different washings.

Washing after using the facilities is included in a long list of required washings (OC 4:18) that are needed to remove a *ruach ra*.⁷⁰ The *Shulchan Aruch* also informs us (OC 4:12) that there are types of washings that may suffice for *davening* but not for removing a *ruach ra*. In the ranking, therefore, the rules for any washing for *ruach ra* should be more

67. Rav Moshe Yonah Halevi Tzvig, second volume 126:3, in the name of Rav Yosef Eliyahu Henkin in *Sefer Eidut L'Yisrael* 1.

68. This does not imply that they are like any other room. Rav Henkin concludes that it is still prohibited to recite the *Shema* or to *daven* in them, and the *beracha* for washing hands must be said outside.

69. The issues discussed in connection with washing would also apply to the not uncommon situation of someone washing for *hamotzi* on *Shabbat* and, while waiting for others to wash, getting a tissue from the washroom/bathroom. In such a situation, certainly according to the more stringent opinion, the person probably should wash again, although without a *beracha*.

70. *Mishnah Berurah*, OC 4:38.

stringent than those for washing before *davening*.⁷¹ In addition, the requirements for washing for bread serve as a set of sufficient though not necessary requirements for washing in the morning (*Shulchan Aruch* OC 4:7). Hence, the order of declining stringency is as follows: before a meal, for *ruach ra* (including after using the facilities and upon awaking), and in preparation for *davening*. It is not clear whether those who permit washing for *davening* but not for bread would permit washing in a bathroom upon rising. Finally, one of the types of washing that was not discussed at all by the *poskim* is the washing of *Kohanim* in preparation for *duchening*. It seems that this is probably comparable to washing for *davening* and, in a situation where a shul is inadequately equipped with sinks, most *poskim* would permit washing for *duchening* even in a bathroom just as they permit washing before *davening* in a bathroom.

Reciting *Berachot*

As a rule, it is prohibited to recite blessings opposite a *beit ha'kisay*, or even opposite the walls of the *beit ha'kisay*. However, Rav Moshe Feinstein (*Iggerot Moshe, Even Haezer* 1:114) writes that since the walls of our bathrooms are also an integral part of the house, we can ascribe the same status to the door and doorframe as to the walls and consider them to be part of the structure of the house and not part of the bathroom. Therefore, he rules that although one may not wash for a meal in a bathroom, much less recite the *beracha* there, one may recite a *beracha* opposite and outside a

71. This proof is not irrefutable since it is possible that each type of washing has stringencies (*chumrot*) that the others do not. But it is clear that there are stringencies to *ruach ra* washings that do not apply to washing for *davening*.

bathroom even when the door is open.⁷² This issue has also been considered by Rav Tzvi Pesach Frank (*Har Tzvi* OC:1:48) who reached a similar conclusion.

As stated above, some *poskim* liken a bathroom to the middle room of a *beit ha'merchatz* or to a Persian *beit ha'kisay*. It is therefore conceivable that when a bathroom is clean they would actually permit *berachot* to be recited there!⁷³ However, *Minchat Yitzchak*⁷⁴ quotes the *Zkan Aharon* as maintaining that one may not speak holy matters in a bathroom. The *Eretz Tzvi*,⁷⁵ however, notes that theoretically one may indeed recite holy matters in a clean bathroom, but in practice one should refrain from doing so.

The Rosh (*Berachot* 3:36) cites Rabbenu Tam who used to simply make a separation between his upper and lower

72. This is true even if there is someone using the facilities and there is *tzo'ah* present. As far as the *tzo'ah* is concerned it is in a different domain. This is important in the case of a child using the bathroom who leaves the door open. This would not preclude someone in the hall or a facing room from *davening* or saying *berachot*.

However, shuls should be designed so that this question does not arise. And if the situation does exist that a bathroom faces the room in which the *davening* occurs, the bathroom door should always be closed, and preferably there should be a double door. In this responsum, Rav Moshe Feinstein was clearly referring to modern bathrooms since it was written in 1959, and yet he advises that synagogues be careful in their construction regarding the placement of bathrooms. Regarding the problem of a shul bathroom within which one can still hear the *davening*, see *Tzitz Eliezer* 13:1:2, where he permits using them and gives suggestions to minimize the problem.

73. See text accompanying note 11.

74. Op. cit.

75. Op. cit.

body while in a hot bath and then make a *beracha* and take a drink.⁷⁶ That was presumably stated with regards to a *beit ha'merchatz*; the halacha would be at least as lenient with regards to a washroom. As such, *Shut Netzer Matai* (2) actually permits one to recite a *beracha* in a washroom. Rav Ovadia Yosef (*Yabia Omer* 5:OC:11) does not go as far, but equates a washroom to the middle room of a *beit ha'merchatz* wherein Torah thoughts, but not speech, are permitted. One may, therefore, bring a radio or tape recorder into the washroom and listen to *divrei Torah* while showering or bathing. Listening to these devices involves only *hirhur* – thought – which is permitted, and not speech, which is prohibited.⁷⁷ However, he stresses that if the room is a *bathroom*, rather than just a washroom, it is more restrictive than a middle room of a *beit ha'merchatz* and thinking Torah thoughts is prohibited. In fact, even if the bathroom is clean and one is only showering, one may still not think about matters of Torah.⁷⁸

76. This is cited as the halacha in *Shulchan Aruch*, OC 74:2, minus the hot water. It may be therefore that this did not take place in a *beit ha'merchatz* and the only issue was one of *ervah*, and there was no inherent problem of saying a *beracha* in the particular room used by Rabbenu Tam. This seems unlikely, however, since a bath would usually be in a *beit ha'merchatz*, and if it was not and the circumstances are thus unusual ones, then the Rosh or the *Shulchan Aruch* should have mentioned that.

77. This is assuming one agrees with Rav Ovadia Yosef's position regarding radio and tape recordings that maintains that they are not usable for *megillah*, *berachot*, etc. One who disagrees with that opinion would also disagree with his permissibility of bringing these items into the washroom.

78. This is similar, he notes, to *Chelkat Ya'akov* 205 and *Yaskil Avdi* OC:6:13.

Food In A Bathroom

Assuming that one may not make the *beracha* in the bathroom, may one recite the *beracha* outside and then drink water from the bathroom sink, or is there a problem of *ruach ra*? Based on *Shabbat* 41a and the *Sefer Ha'agadah*,⁷⁹ where it is noted that one may make a *beracha* outside a *beit ha'merchatz* and then drink even within the inner room, it seems that in a washroom it is certainly permitted to do so.⁸⁰ In addition, if one accepts either the position that our bathrooms are equivalent to a middle room of a *beit ha'merchatz* or that regardless of their classification they do not have a *ruach ra*, as discussed above, then it also would not be a problem and one would be permitted to drink in the bathroom after having said the *beracha* outside.

If one is permitted to eat or drink in a bathroom then the next set of questions is irrelevant. However, according to those opinions that a bathroom does have a *ruach ra*, can one take a cup into the bathroom, draw water from the sink and then take it out of the bathroom to drink? Is this considered exposing food to a *ruach ra* or not? Similarly, may one bring wrapped food into the bathroom, either when using the bathroom or when merely entering the room? How many coverings, if any, are required? Rav Tzvi Pesach Frank (*Har Tzvi* OC:1:50) declares that we find nowhere that *ruach ra* of a *beit ha'kisay* can affect food. Therefore, one may certainly take water out of a bathroom⁸¹ and use it to

79. This is quoted as the halacha in the *Magen Avraham*, end of *siman* 166, and discussed by *Kaf HaChaim* 84:12.

80. Based on this, it seems that even in talmudic times it was only prohibited to eat in a *beit ha'kisay* where there was a strong *ruach ra*. See *Shabbat* 10a for this distinction between a *beit ha'kisay* and a *beit ha'merchatz*.

81. Although preferably not in a utensil specifically designated

wash or drink. Furthermore, food brought in certainly does not become prohibited.

Rav Shalom Yitzchak Halevi (*Divrei Chachamim* OC:65) discusses whether meat may be soaked for kashering in a bathtub (in a washroom). He concludes that preferably it should not be done because of *ruach ra*, but it would not prohibit the food *post facto*.

Rav Ovadia Yosef (*Yabia Omer* 4:OC:5) also discusses the issue of bringing food into a bathroom and concludes that if the food is wrapped in plastic or is in one's pocket, it does not become prohibited. If, however, the food is such that it will not be ruined by washing, it should be rinsed three times before use. This halacha applies as well to food that one touched after emerging from the bathroom but before washing the hands.

Rav Waldenberg (*Tzitz Eliezar* 14:2), permits bringing medicines into a bathroom and also deals with the issue of food. He demonstrates that there is little basis for a prohibition of bringing food into a bathroom, even among the kabbalistic sources. The only problem might possibly be that of *ba'al t'shaktzuh* (treating food in an inappropriate or disgusting manner). Hence, while not a good idea to bring covered food into a bathroom, it is certainly not prohibited, and even when brought in, uncovered, does not become prohibited.⁸²

for use in the bathroom because of the problem of *ba'al t'shaktzuh*.

82. A time when almost all authorities permit bringing food into the bathroom is when *erev pesach* falls out on *Shabbat*. Most authorities say that one may flush leftover crumbs down the toilet (*Mishnah Berurah*, OC 444:21), although some authorities prefer other solutions, for reasons not related to this discussion (*Chazon Ish*, *Laws of Pesach*, 116:16 and 118:3).

Books In The Bathroom

It has been noted above that it is in general prohibited to bring *tefillin* into a *beit ha'kissay*. This also applies to any book containing the name of G-d, although some opinions only require a single wrapping for other books.⁸³ A *Sefer Torah*, as well as any of the books of *Tanach* when written as scrolls, may never be brought into a *beit ha'kissay*, even with many coverings; they require a complete *mechitzah*.⁸⁴ That this rule may apply to other "religious texts" is clear in the Talmud.⁸⁵ It is, therefore, important to clarify which materials may not be brought into a *beit ha'kissay*, and then decide whether the rules may be relaxed for a bathroom.

First, it is clear that simply because something is written or printed in a particular language (i.e. Hebrew) or script (i.e. *Ktav Ashurie*) does not necessarily give it a level of holiness that would preclude its being brought into a *beit ha'kissay*.⁸⁶ Conversely, written material may have a level of holiness even if printed on paper and not written as a Torah on parchment.⁸⁷ Thus, any book containing G-d's name, such as a siddur, *chumash*, etc., cannot be brought into a *beit ha'kissay* without a single, and according to some authorities a double, cover.⁸⁸ This would apply to a bathroom while in use. If it is clean and empty, the same issues as discussed above would apply. If it is halachically compared

83. *Mishnah Berurah* OC 43:25, 240:29.

84. *Sanhedrin* 21b; *Mishneh Torah*, *Hilchot Sefer Torah* 10:6; *Shulchan Aruch* YD 282:3; *Mishnah Berurah*, 240:28.

85. *Berachot* 23a last few lines, *Yerushalmi*, *Berachot* 2:3. But see *Tzitz Eliezer* 12:11:2.

86. *Tzitz Eliezer* 15:6:1.

87. *Mishnah Berurah* 240:29; *Iggerot Moshe* YD 2:75 and 76.

88. See Eider, op. cit., p.130 and 137 for sources and details.

to a middle room of a *beit ha'merchatz* or a Persian *beit ha'kisay*, then such books may be brought in; if it is like a *beit ha'kisay*, they may not.

The situation is quite different if G-d's name does not appear in the text. After a lengthy discussion, the *Tzitz Eliezer* (11:5) concludes that it is permitted to enter a bathroom, even to relieve oneself, while carrying written Hebrew *divrei Torah* as long as the material is covered, even minimally, such as in a pocket. Thus, most Anglo-Jewish newspapers, such as the Jewish Week, Jewish Press, or Jerusalem Report, probably may be brought into a bathroom without creating a problem. Although normally the cover of a book is not considered sufficient coverage for a book⁸⁹ because it is an integral part of the book, in this case it is not the magazine per se that requires covering, just several of the pages; hence the cover together with the other pages may suffice.⁹⁰ Of course it is not permitted to read those *divrei Torah* while using the facilities because just thinking about Torah is then prohibited.

Biblical verses (in Hebrew) or parts of verses in any form, even those that do not contain G-d's name, such as the popular necklace inscribed with the words⁹¹ "If I forget thee O Jerusalem ..." (*Psalms* 137:5) may not be brought into a *beit ha'kisay* unless properly covered.⁹² Therefore, it should

89. *Mishnah Berurah*, 40:4.

90. A case could be made for being stringent since the cover and the pages are all part of one unit and are not separate, distinct items.

91. Having such a necklace even not in the bathroom may also be a problem. *Taz*, YD 283:3 and *Aruch Hashulchan* 283:13 maintain that it is a problem to write biblical verses on non-holy objects.

92. *Tzitz Eliezer* 16:30 based on YD 282:6 and 283:4. cf *GRA*, YD 283:5.

not be worn uncovered while one is using the facilities or showering in a washroom or bathroom. Wearing it in a clean empty bathroom may not be a problem if the room is deemed a middle room of a *beit ha'merchatz*. However, to avoid having to remove these trinkets every time one uses the facilities, their wearing should be discouraged.

Secular magazines (such as Reader's Digest) that sometimes contain an English translation of a biblical verse can also present a problem, even if the isolated word "G-d" is not a problem.⁹³ This is based on the *Gilyon Maharsha* (YD 283:4), who cites a number of sources who maintain that the translation of a verse may not be brought into a *beit ha'kisay*.

Mezuzah

The Gemara in *Yoma* excludes⁹⁴ a *beit ha'kisay* and *beit ha'merchatz* from the mitzvah of *mezuzah*, based on the halacha that a *mezuzah* is only affixed in a place that is designated for dignified purposes. This exclusion is not specific to a *beit ha'kisay* and *beit ha'merchatz*, nor is it immutably applied to them; rather it requires a current objective assessment that a particular room is not dignified.⁹⁵

93. Since most authorities agree with this, it also explains why it is not a problem to bring US currency containing the phrase "In God we trust" into a bathroom. See however: *Shach*, YD 179:11; *Pitchei Teshuva*, YD 276:10-12; and *Shut Achiezer* 3:32.

94. There are really three levels of requirement with regard to *mezuzah*: obligation, (applies to most rooms in a house); exempt but permitted, (such as a synagogue); and exempt and prohibited, (such as a *beit ha'kisay*) (*Chovat Ha'dar*, Chap. 2, footnote 33 and 46). In this paper, "excludes" refers to this final category.

95. For a discussion of what removes the label of *dirat kavod* – dwelling of honor – see the explanation of *Piskei Uziel*, *She'elot*

The Gemara and *Shulchan Aruch* include other rooms in this category, such as a tannery and a *mikvah*. The inclusion of a tannery was due to the odor caused by the use of dog excrement in the tanning process in ancient times. Today, when dog excrement is no longer used, if the tannery does not have a vile odor, there are *acharonim* who maintain that it would require a *mezuzah*.⁹⁶ There are other rooms not included in the original talmudic list, that contemporary authorities have ruled are exempt from *mezuzah*. These include a room used exclusively for washing clothes⁹⁷ and a slaughter house, even one used only for fowl.⁹⁸

On the other hand, there are rooms that one might have thought were exempt but in fact are not. These include a room where women wash themselves while undressed (*Taz*, YD 286:5) and a bedroom where marital relations take place.⁹⁹ In addition, a room that has been used as a *beit ha'kisay*, though not specifically designated as such, and is subsequently cleaned out (*Da'at Kedoshim* 286:10), and even an actual *beit ha'merchatz* or *beit ha'kisay* that was transformed into

Ha'zman:30 of *Tur*, YD 286. The mere fact that a bathroom is now located in the house and used for "dwelling" may qualify it as not lacking in dignity in this regard and give it the quality of *dirat kavod*.

96. *Emek Halacha* OC 30. cf the *Chayei Adam* and others cited in *The Complete Mezuzah Guide* by R. Moshe Elefant and R. Eliezar Weinbaum, Fink Graphics, 5:15, p.55.

97. See *Kuntros Mezuzah*, 286 10, *Beirurei Halacha* p. 173.

98. See *Mezuzat Melachim* s.k. 147.

99. Although possibly affixed without a *beracha*. See YD 286:2; *Mikdash Me'at* s.k. 13 and 14; and *Chovat Ha'dar* 2:12 and note 44. In these two cases it is required that the *mezuzah* be covered with a non-transparent cover and/or be affixed on the outside of the door.

a dwelling room, require a *mezuzah*.¹⁰⁰

It is clear from the above that the overriding concern with regard to a *mezuzah* is totally different from that which governs *davening*, etc. in a bathroom, i.e., that of "your camp shall be holy".¹⁰¹ A *mezuzah* is certainly permitted, and often required, even if men and/or women will use that room while unclothed. In that case it is simply required that the *mezuzah* be properly encased. Rather, the exemption from *mezuzah* applies to rooms in which undignified activity takes place.¹⁰²

To determine whether modern bathrooms are permitted to have, or may even require, a *mezuzah*, it is not only necessary to evaluate their cleanliness, but also whether or

100. *Pitchai Teshuva siman 286 s.k. 6.*

101. The Gemara in *Yoma 11a* does cite the problem of *Zuhama* – uncleanness – in its discussion of which rooms are exempt from *mezuzah*. However, the conclusion relies solely on the textual reference that exempts undignified rooms. The *Shulchan Aruch* YD 286:4 actually quotes this reason when stating that a *beit ha'merchatz*, *beit ha'kisay*, tannery, and *mikvah* are exempt from *mezuzah*. The Meiri on that Gemara states that there are four or possibly five conditions that a room must satisfy to require a *mezuzah*. One of the requirements is that its purpose not be an undignified one. Conspicuously absent from the list is anything relating to *zuhama* or nakedness.

102. It seems to this author that there may be a question whether a doctor's examining room, particularly such specialties such as OB/GYN and proctology should have a *mezuzah*. Those rooms are designed for people to be undressed and in undignified positions and be subjected to undignified treatment. In addition, they are not used as dwelling rooms. I have not seen this discussed anywhere, but those *poskim* I have discussed it with have concurred. *Chovat ha'Dar* 2:12 also seems to imply this; cf Rav Yonah Metzger, *Mi'yam haHalacha* 4:14 who requires a *mezuzah* on an operating room.

not they are considered "honorable" rooms. In modern America it would seem that some bathrooms may very well be considered "honorable" rooms. Quality hotels invest as much money and glitter in the bathroom as in the suite. In many private homes as well, the bathroom is treated as a room like any other with respect to pride in its decor and interior design. In talmudic times one would not include the outhouse in a tour of the premises, but today many people would include the bathroom. The *Da'at K'doshim* (YD 286:10) required only that the excrement always be covered with dirt to transform the status of the room and qualify it for a *mezuzah*. The *Mezuzat Melachim* (s.k. 147) makes the logical extension and maintains that any bathroom with modern plumbing should require a *mezuzah*. *Mikdash Me'at* concedes that this logic has some validity, but finds it puzzling since the original exclusion was not related to *tzo'ah* but to the undignified function for which the room was used.¹⁰³ Our custom currently is to not place a *mezuzah* on a bathroom, and *Mikdash Me'at* concludes we should not deviate from this custom. It seems also that the custom is not to put a *mezuzah* on a washroom, but to place one on a laundry room.¹⁰⁴

Shabbat

There are a number of questions that arise with respect to Shabbat and the modern bathroom. The first, and potentially most significant, is the question whether pouring water down a drain or flushing the toilet is permissible on

103. See *Chovat ha'Dar*, chap. 2, footnote 35.

104. With regard to a laundry room there may be a difference whether or not it is used for dirty diapers and the like and therefore has a foul odor. In such a case a *mezuzah* would not be affixed.

Shabbat since these acts cause water and its contents to flow from a private domain (*reshut ha'yachid*) to another private domain through a *carmilit* (neutral; non-private, non-public domain) via pipes. Similarly, turning on the faucet or flushing the toilet causes water to flow into the private domain through pipes.

The question of acquiring and disposing of water on Shabbat has existed in all time periods, and the Talmud, particularly in the eighth chapter of *Eruvin*, devotes considerable discussion to the topic. In summing up the laws derived from these sources, the *Aruch HaShulchan* (OC 357:8) states:

And in big cities in our time [late 19th century] that have pipes under the ground that go from a river outside the city to every house and courtyard... it is obvious that there is absolutely no problem. Since the pipes are far underground and wide [hence a private domain], [the water] is going from a private domain to another private domain by indirect action, and then to the river, and there it is his [the person's] power [*koach*] acting in a *carmilit*, and it is permitted.¹⁰⁵

Miscellaneous

An interesting question raised in *Iggerot Moshe* (YD 2:97) concerns the permissibility of even having bathrooms and washrooms in the house. Rav Yehuda he'Chassid in his final directive (*tza'va'ah*) stated that one should not put a *beit ha'merchatz* in one's house.¹⁰⁶ Rav Moshe Feinstein

105. See also *Minchat Yitzchak* 5:75 and 6:29 (second to last paragraph) who discusses the issue of flushing a toilet on *Shabbat* and concludes that it is not a problem.

106. Interestingly, the Jerusalem Talmud, *Pesachim* 7:12, makes

discusses whether this prohibition applies to a *mikvah* and to a modern bathroom. He concludes that it does not, and that it is not contrary to the *tza'va'ah* to have modern bathrooms and/or washrooms in every house.

An issue that comes up frequently in shuls is the problem of wearing a *tallit gadol* into a bathroom. This issue is discussed in the context of wearing a *kittel* into a *beit ha'kisay*. The *Mishnah Berurah* (610:18) rules that since the *kittel*, like a *tallit*, is a garment designated for prayer,¹⁰⁷ one should not enter a *beit ha'kisay* wearing it. However, one is permitted to urinate (not in a permanent *beit ha'kisay*¹⁰⁸) while wearing it. The *Mateh Efrayim* (610:12) is more lenient and rules that one may enter even a permanent *beit ha'kisay* while wearing a *kittel* if it is only to urinate, and *Hayei Adam* (11:37) and *Elef laMagen* (s.k. 18) extend this leniency to a *tallit*. The *Shach* (YD 283:6) and the *Taz*¹⁰⁹ both seem to have no problem with wearing even a *tallit gadol* into a *beit ha'kisay*. With respect to a *tallit kattan* (i.e., *tzitzit*) it would seem that there is no problem wearing a *tallit kattan* and little problem wearing a *kittel* or *tallit gadol* in a clean bathroom and even while urinating, since there are many who permit this even in a permanent (pre-plumbing) *beit ha'kisay*. However, if one can be stringent, it seems that it would be consistent with the dignity due these articles of clothing that

it clear that there would be nothing wrong with putting a *beit ha'kisay* in a consecrated area of the *Beit Hamikdash*.

107. Based on the *Taz*, O.H. 610:21.

108. This is my reading of the *Mishnah Berurah*. The *Kaf ha'Chaim* (610:37) understands the *Mishnah Berurah* to be saying the same thing as the *Mateh Efraim*, cited next.

109. YD 283:3. However, the *Taz* in *Orach Chaim* 21:3 does not prohibit it, but simply advises that it is not proper, implying that initially one should not enter with a *tallit*, but that, in fact, it is not strictly forbidden.

are designated for prayer not to wear them in a bathroom.

The issue of bringing Jewish texts into a *beit ha'kisay* and bathroom was discussed above. A less problematic issue is that of "Jewish tapes", even those containing blessings with G-d's name. It is certainly forbidden to play such tapes or CDs in an "unclean place" because that would lead to thinking Torah thoughts.¹¹⁰ Carrying such tapes, even unwrapped, in an "unclean" place does not present a problem. G-d's name that is produced when they are played is not in actuality written on them.

Conclusions

1) Halachic issues with regard to a modern bathroom and/or washroom include their potential classification as a *beit ha'kisay* or a *beit ha'merchatz* and that they might have a *ruach ra*.

2) There are reasons to be more lenient with a modern bathroom and washroom than a *beit ha'kisay* or a *beit ha'merchatz*.

3) Modern bathrooms and washrooms do not contain the same kind of *ruach ra* as a traditional *beit ha'kisay* and *beit ha'merchatz* and, therefore, do not require one to wash one's hands merely because one entered there; nevertheless, a conscientious person should be stringent after leaving a bathroom. However, if one used the facilities, showered, bathed or immersed in a *mikvah*, a handwashing is required.

4) According to many opinions if the room is in a clean state it is permitted to perform all ritual washings in a *washroom*. Most authorities permit washing for *davening*,

110. *Iggerot Moshe*, YD 1:173 and YD 2:142.

and many authorities permit all ritual washings, in a *bathroom*. Some of the most prominent *poskim* of our time, however, are equivocal about washing in a bathroom for the purpose of eating and other ritual purposes.

According to all opinions, if there is a foul odor in the bathroom, or if the toilet is not fully clean all halachot relating to *tzo'ah* and foul odor would apply.

5) The current practice is to not place a *mezuzah* on a modern bathroom or washroom.

6) A separate room abutting a bathroom and containing only a sink does not fall into any of the above-discussed categories.

All of these laws point to a clear halachic advantage of the Israeli/European arrangement of having a separate bathroom/washroom/sinkroom.

Finally, although it is debated in the *Yerushalmi*,¹¹¹ the halacha is clear that, alas, this article can also not be read in a *beit ha'kisay* or a room with *tzo'ah* since the Ramo¹¹² has ruled that the "laws of the bathroom" are no different than any other halachot and should not be studied wherever other Torah thoughts are prohibited.

111. *Yerushalmi*, *Shabbat* 3:3. See Gra OC 85:6 and commentators to B. *Shabbat* 40a.

112. OC 85:2. This is based on Ran, *Shabbat* 40b, who cites the Ramban who maintains that the *Bavli* disagrees with the *Yerushalmi* on this issue.