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

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

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

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Halacha and the Conventional Last Will and Testament

By Judah Dick

Jacob Adler passed away, leaving an estate of $450,000. He expected that in accordance with Jewish law his wife, Jenny, and Dana, his unmarried daughter, would be provided for from a special fund of $50,000. The remaining funds would be divided into four equal portions. Two would be awarded to Rubin, his oldest child, and one portion each (of $100,000) to Simon and Levi his other two surviving sons.

But Mr. Adler did not leave a written will, so the disposition of his estate will probably be quite different. Instead of his expectations being fulfilled, one-third of his estate will be awarded to his wife and the remaining two-thirds divided equally among his four children — in accordance with the State law.

Michael Zoberstein was disappointed with his oldest son, Kenneth, who had become a sculptor. He did not want his handbag business to end up in Kenneth's hands, so Mr. Z. wrote a will leaving him a token inheritance, designating the rest of his estate to be divided equally among his widow, Ruth, his other son, Ralph, and his two sons-in-law, who had joined him in his business.

Mr. Zoberstein's wishes will be carried out by the executor of his will, but failure to adhere to the halachic requirements of

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disposition of a person's legacy may invalidate such legacy insofar as Jewish law is concerned. Could something have been done to have his wishes implemented without contravening Torah law?

What are Mr. Zoberstein's heirs to do? Are they obligated to follow Torah law in disposition of his funds, giving his eldest son a double portion, etc., or are they required to "harken to the wishes of the deceased"?

Old Dave Samsonoff was an invalid during his last years. Of all his sons and daughters and their children, only Faige, the oldest child of his daughter Sima, devoted an hour every day to keeping him company. He would like to leave her a share of his fortune, but daughters — and surely granddaughters — do not inherit according to Torah law when sons are present.

Mr. Samsonoff would also like to leave several thousand dollars to the yeshiva, where he was founding president. How can this be achieved?

In the following pages we will seek to elucidate the areas where a will written in accordance with secular law may conflict with the dictates of the halacha; furthermore, we will try to explain what the solutions to these conflicts might be, and the possible difficulties of accepting these solutions:

- ☐ How may a person dispose of his assets after death in a manner both in accordance with halacha and civil law?
- ☐ What are the rights of the surviving wife and daughters to the estate of the deceased head of the family?
- ☐ Are there any ways in which a person can write a legal will, modifying the Torah's prescribed disposition of one's estate, without violating Torah law?
- ☐ How inviolable are the rights of the *bechor* — the first born — to a double portion of the estate?
- ☐ What is the halachic status of wills written according to civil law?

The Basic Rules

The Torah devotes six verses to the laws of inheritance *(Bamidbar* 27:5-11), setting forth the procedure for disposition of estates:

* When male offspring exist, they are invariably the exclusive heirs of their father's estate.

* The Torah awards women no rights of inheritance as long as there are male heirs in the same class. (Daughters do not inherit if there are sons, nor sisters if there are brothers. Also, only paternal relatives can be considered heirs.)[1]

* In the absence of sons, daughters (and their offspring) are exclusive heirs.

* Children who die before their father are replaced by their qualified heirs.

When a decedent leaves no children, his father is the exclusive heir to his estate.

If his father is no longer living, *his* children (the decedent's paternal brothers) inherit his estate.

* When the first born is a male, he is entitled to two shares of the tangible assets of the estate, by rule of *bechora* (progenitor).

Originally a widow was only entitled to her *kesuba* of 200 silver pieces. By rabbinical ordinance dating to pre-Talmudic times, her needs and living facilities must be provided for from her husband's estate until the time that she claims the lump sum due under the *kesuba,* or until she remarries.

* The Rabbis also made provision for support and maintenance of unmarried daughters (up to physical maturity at the age of 12½), and for a dowry at their time of marriage — which may run as high as ten percent of the total assets left by the decedent.[2] But this does not leave options for changes of the type Mr. Zoberstein or Dave Samsonoff had wanted to offer in their wills.

The Torah concludes this discussion with the term *chukas mishpat* (a statute of judgment). From the use of the word *chuka,* which implies inalienability, the *Rambam* derives a maxim that a person cannot change the order of inheritance described in the Torah — neither *to bequeath a legacy* to a person not entitled to

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1. *Bava Bathra* 110b; *Rambam,* Laws of Inheritance, Ch. 1(6), *Tur* and *Shulchan Aruch* 276(4).
2. *Kesubos* 52b; *Rambam,* Laws of Marriage, Ch. 20(1) etc. *Tur* and *Shulchan Aruch,* Even Ho'ezer 113(1).

inherit, nor *to disinherit* a person entitled to inherit. In this respect, inheritance differs from the general rule in monetary matters, which allows people to stipulate any conditions or rules of conduct of business they choose *(kol tenai shebemamon kayom)*[3]. The only modification permitted by the halacha is to provide a greater share, or even one's complete estate, to any of the persons entitled to inherit, even though this would disinherit others in the same class, *providing* that a first-born *(bechor)* is not deprived of his right to a double share.[4]

The Sages were generally not in favor of any disinheritance or diminution of inheritance among one's children, even in favor of one child who is a Torah scholar over another who does not conduct himself properly, and they counseled against participation in any such disposition of assets.[5]

So the problem remains: How can a man direct the way his assets will be distributed *after* he has died — at a time when he no longer "owns" his possessions?

The Gift Approach

Talmudic scholars have demonstrated that, by utilizing the laws of gifts and inter-vivos trusts (trusts made during one's life-time), a Jew can create a halachically acceptable will-substitute. The Torah laws of inheritance only apply to property owned by the

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3. *Bava Bathra* 139b; *Rambam,* Laws of Inheritance, Ch. 6(1), *Tur* and *Shulchan Aruch,* Ibid, Ch. 290.

   Interestingly, although several ancient civilizations recognized the power to devise property by will, especially Roman Law, English Common Law prior to the enactment of the Statute of Wills in the reign of Henry the Eighth (32 Henry VIII Ch. 1) did not permit devises of real property and restructure devises of personal property. Thus, the courts have held that a state may regulate the disposition of property after death and prohibit devisors to certain classes such as aliens, corporations, and even the United States government. The U.S. Fox 94 U.S. 315, 320 (1876); U.S. Perkins 163 U.S. 625, 628 (1895); see also Bigelow Theory of Post Mortem disposition; Rise of the English Will, II, Harvard Law Review 69 (1897).

4. Ibid, Halachos 2-3, based on *Bava Bathra* 130b; *Tur* and *Shulchan Aruch,* Choshen Mishpat, Ch. 281 (1).

5. *Bava Bathra* 133b; *Rambam,* Ibid, *Halacha* (II).

person at the time of his death; however, one can made a gift to absolutely anyone — heir-apparent or otherwise — until the last conscious moment of one's life. Thus, if the person gave away or otherwise disposed of his property *during his lifetime,* the restrictions limiting the inheritance would not have any effect.

(The discussion here will not include *matnas she'chiv me'ra:* a special rabbinical enactment that permits a person on his death bed to distribute his assets as he sees fit regardless of laws of inheritance. The only proviso is that he use the terminologies of "gift-giving" rather than a "bequest" — or at least use both terms, in which case it will be presumed that he had intended to give a gift. Such gifts take effect in the case of death, but are revocable if the person recovers from his illness.[6] We are primarily interested in a person of normal health, who desires to draw up a will or document with the general characteristics of a will recognized by secular civil law.)

There is a drawback in making an ordinary outright gift, since the testator (maker of a will) does not wish to part with his possessions during his lifetime; but halachically one cannot give a gift during his lifetime to be effective *after* death, since death divests the testator of title and vests title in his legal (halachic) heirs.[7]

What we seek here, then, is a means by which the gift-giver presents the items in his will to his intended heirs while he is still living; yet he retains full control and possession of his property during his entire lifetime and the power to revoke or change his will as long as he lives.

The Method & The Drawback

The technique generally utilized so as the conform both to halacha and the wishes of the testator is a revocable inter-vivos trust: technically, the beneficiary takes immediate title to the property, but the donor retains the right of all income during his

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6. *Bava Bathra* 148b; *Rambam,* Laws of Bestowals and Gifts, Ch. 8-12.
7. *Bava Bathra* 135b.

lifetime, and may revoke the trust if and when he so desires.[8] The drawback to this method is that a majority of *poskim* (halachic authorities) require a *kinyan* — a formal immediate transfer of title to the property, which is done by the witnesses giving their garment symbolically to the donor. A significant problem inherent to this method is that the *kinyan* is only effective in transferring property (other than currency) which is in the possession of the donor *at the time* of the *kinyan.* It has no effect whatsoever on property yet to be acquired[9]. Yet, a conventional will generally deals with future holdings as well.

There are other methods of transferring currency, such as through *agav,* whereby a movable item — like silver, china, or furniture — can be transferred simultaneously with an interest in real property, which can be accomplished with *kinyan,* but there is no universally accepted means for transferring something which is not as yet in existence *(davar shelo bo le'olam)* or not presently in the testator's possession *(davar she'eino bi'reshuso)*[10]. Thus, if a person acquires new possessions after making his inter-vivos trust, these possessions are not covered by the *kinyan.* His will based on this device is totally ineffective as far as these newly acquired possessions are concerned. Worse yet, the beneficiaries carry the burden of proof to show that the items transferred — that is, covered by the will — were in existence and in possession of the donor at the time the trust was made.[11]

This burden of proof may be difficult to meet and could readily serve to frustrate the intention of the donor. Thus, the inter-vivos trust approach (standing alone) gets poor marks as an all-purpose method of transferring property through the conventional will.

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8. *Bava Bathra, Tosafos* 136b; *Tur* and *Shulchan Aruch,* Ibid, Ch. 257.
   Our proposed sample will is based in part on text suggested by Rashba in responsum #106 attributed to Ramban.
9. *Bava Metzia* 46a, *Tur* and *Shulchan Aruch,* Choshen Mishpat 203, 209.
10. *Shulchan Aruch,* Choshen Mishpat, Ch. 204(4).
11. Choshen Mishpat 251(2) and 211(6).

"Harken to my wishes ..."

Another technique for making a will is based on the maxim of the rabbis: *"Mitzva lekayeim divrei ha'mes* — It is a *mitzva* to fulfill wishes expressed by a person since deceased." Under this rule, although title to the property descends to the legal heirs, as per Torah laws of inheritance; nevertheless, the heirs are under an obligation to carry out the wishes of the decedent and dispose of the property as he indicated.[12] Thus, any intended disposition of assets expressed in a legal will become "the wishes of the deceased," and the heirs are obligated to carry them out.

The drawback to this technique is that it applies only where the decedent addresses his wishes directly to his heirs *in their presence* in regard to existing property, or when he transfers possession to the property during his lifetime to a trustee, with directions on how it should be distributed.[13] In the ordinary will situation, the testator often does not wish to inform his legal heirs of his testamentary wishes in order to avoid undue pressure and hostility, nor to part with title during his lifetime. Moreover, according to many views this rule applies only to a she'chiv mera[13a].

Creating an Indebtedness

A most original and effective technique of bequeathing one's possessions halachically is to create a theoretical indebtedness in favor of the chosen heirs (such as "Faige," Mrs. Samsonoff's granddaughter). This debt (to Faige) becomes a lien on all the testator's (Mr. Samsonoff's) property — both current and future holdings.

A person may create an indebtedness even if none previously existed, even if no loan or other consideration was ever given,

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12. *Shulchan Aruch*, Choshen Mishpat 252, based on Kesubos 69b.
13. *Shulchan Aruch*, Choshen Mishpat, Ibid. See also extensive discussion on this subject in Responsa, *Maharsham*, Vol. 2, 224.
13a. See responsa *Binyan Zion* of Rabbi Jacob Ettlinger, addendum #24, and discussion in note 29a intra.

merely by executing a note in favor of another person.[14] In the will situation, a debt for a huge sum well in excess of the total value of the estate is created, but does not mature and is not payable until one hour before death. The huge sum is not going to be paid, but will be used as leverage for carrying out the terms of the will: the note, by its terms, gives to the halachic heirs (Mr. Samsonoff's sons) the option of paying the debt *or* a stated legacy in lieu of such debt. This legacy is the amount willed to the chosen legatee (Faige).

This technique was primarily used to give daughters a half share or full share in one's estate and is known as *shtar chatzi zachor* (half share) or *shtar zachor shaleim* (full share). Such a document was often drawn up and delivered to a daughter at the time of her marriage, and generally excluded real property and holy books.[15] A fictional debt (a personal obligation not subject to the restrictive rules of *kinyan*) was utilized in preference to a direct *chiyuv* since there are problems in dealing with a specific item not yet in existence or in the possession of the donor at the time the *chiyuv* was created. In such case, there is a difference of opinion among authorities as to whether the *chiyuv* is binding on the donor's legal heirs.[16] On the other hand, in the case of fictional debt, the debt is absolute, and the giving of the bequest or legacy is an optional method of satisfying the debt: this technique is definitely binding on the donor's heirs, since non-compliance would trigger the full monetary obligation of the note.

The Charity Bequest

When someone bequests a portion of his estate to a charity, this does not impose a legal (i.e. halachic) obligation on the donor's heirs to carry out this bequest. This is because a bequest is only a personal obligation of the donor, but does not constitute a lien on

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14. *Shulchan Aruch*, Choshen Mishpat 257(7).
15. *Shulchan Aruch*, Even Ho'ezer 108(3), Choshen Mishpat 281(7).
16. See Tumim, *Kesos Hachoshen* and *Nesivos Hamishpat* on *Shulchan Aruch*, Choshen Mishpat, Ch. 60(6).

his assets (the inheritance).[17] There is a difference of opinion among authorities, however, when the donor makes a bequest of a specific object or a set amount of funds to charity. This is because of a rabbinic rule whereby "a pledge to Heaven (i.e. the Temple) is as if delivered to the recipient," which according to some authorities applies to charity pledges also.[18] The most accepted way of making a charitable legacy enforceable would be in the same manner as an ordinary legacy — such as creating a debt to the charity, as outlined above.

Incidentally, while a person is generally not permitted to contribute more than twenty per cent of his property or income to charity during his lifetime, most authorities agree, one may leave as much as he chooses to charity after his death.[19] People in a high estate-tax bracket may find it advisable to consider a charitable bequest as a means of reducing the estate tax, as well as a benefit for their *neshama.* This can be accomplished by creating a direct charitable bequest or a trust fund with income (and/or principal ultimately) payable to yeshivos and other worthy institutions* which can be named in the will or left to the executor's discretion. One would be well-advised to pursue this matter with one's legal and financial advisors ... The charity bequest should, of course, be made with due consideration for the needs of the survivors.[20]

The Non-Halachic Will

"Law of the Land"

What, indeed, happens when someone (like Mr. Zoberstein, in the opening anecdote) ignores all halachic requirements, and simply writes a will in accordance with civil law? There is a rule that *dina*

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17. *Ramo,* Choshen Mishpat, Ch. 352(2) and *Kesos Hachoshen,* Ibid.
18. See *Kesos Hachoshen* and *Nesivos Hamishpat,* Ibid., and *Tur,* Yore De'ah 258(13).
19. *Kesubos* 61b; *Ramo,* Yore De'ah 249.
20. *Bach,* on *Tur,* Yore De'ah, Ch. 249, *Aruch Hashulchan,* Choshen Mishpat, 282(3).

*Henry Ford was able to keep Ford Motor Co. in the family by leaving most of the (non-voting) stock he owned to a charitable foundation which perpetuated his name.

d'malchusa dina (the law of the land has halachic validity). One might wonder why this rule would not supersede any halachic requirements for validity of a will and make it effective halachically. Most opinions maintain that this principle pertains primarily to transactions between Jews and the government and/or non-Jews, and does not govern purely intra-Jewish affairs such as family inheritance where no public policy considerations are involved.[21] Therefore, according to this opinion the principle of *dina d'malchusa dina* cannot supersede the *halachos* of inheritance.

It should be noted, however, that Rabbi Moshe Feinstein שליט"א maintains that where the transaction (in this case the will) were only lacking a *kinyan*, then *dina d'malchusa dina* would apply and all of the halachic requirements would have been satisfied.[22]

All would agree, though, that one should pursue all feasible means to write a will incorporating halachically-sanctioned methods of distributing one's property.

"Situmta" — the Prevailing Communal Custom

Others have suggested that the related principle of *situmta*, or custom of the merchants, may resolve the problem. Under this principle, the commercial customs prevailing in a particular city or area supersede any halacha in civil law, since in money matters, people are free to make any agreements as long as they are based on express or implied consensual relationship between the participants.[23] Thus, it has been suggested, where the common practice of the Jewish community is to make wills in accordance

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There are some who would limit charitable requests to fifty percent or thirty-three percent — Sheiltot 64, Sheira Knesset Hagedola, Yore De'ah 249. In any event something should always be left for the legal heirs — Shita Mekubetzes, *Kesubos* 50, in the name of Disciples of Rabbi Jonah, and *Meiri, Kesubos* 50a.

21. Beth Yosef on *Tur*, Choshen Mishpat 27, citing response of Rashba; *Shach*, Choshen Mishpat, 73(39). See also *Beth Yosef* on *Tur*, Choshen Mishpat 369.
22. *Igrot Moshe*, Even Ho'ezer, 109 (Volume 1).
23. Talmud Yerushalmi, *Bava Metzia*, on Ch. 7, Talmud Bavli, *Bava Metzia*, 74a; *Tur* and *Shulchan Aruch*, Choshen Mishpat, 201(2).

with the legal system of the place where they live, such wills shall be deemed to be in accordance with the rules of wills in halacha, as a transfer by inter-vivos trust effective prior to the testator's death.[24]

The objection to this approach is that the role of *situmta* is actually limited: it can create a substitute mode of *kinyan;* it may create contractual obligations or a *chiyuv;* or it may even, in the view of many authorities, effectively transfer ownership of something not yet in existence;[25] but there seems to be no valid basis for converting the very nature of a legal will, which takes effect only after death, into a *kinyan* that takes place during one's lifetime — which is the element that must be fulfilled.

In other words, although *situmta* may operate to give legal validity through custom and usage to any act which people can voluntarily implement between themelves, it should not be effective to validly change the laws of inheritance, which are designed to take effect immediately upon death, since even an heir cannot waive his future rights to his inheritance.[25a] It seems to be beyond the capacity of *situmta* to effect the transfer of property within one's lifetime with the use of a transaction designed to take effect only *after* death.

The "Death-bed Gift" — Alive and Well

Another possible saving feature of legal wills is based on the view of *Maharam Rotenberg* and the *Mordechai:*[26] that halacha

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24. Responsum 21 of Rav Yecheskel of Laveda in *Sefer Ikre Hadat* on *Shulchan Aruch,* Orach Chaim. See critique of this view in Responsa Maharsham, Vol. 2 #204. See also responsa of Maharam Mintz, #66.
25. Responsa, *Chasam Sofer,* Choshen Mishpat, 66; Responsa, *Radvaz;* Vol. 2, Ch. 278; Responsa, *Rosh* 13(2); Maharam Rotenberg in *Notes of Mordechai* on Sabbath 472-3.
26. Maharam Rotenberg cited in *Mordechai* on *Bava Bathra,* 591. See also lengthy discussion in Responsum 21, *Ikre Hadat,* Supra. See also responsa Maharil (Rabbi Yaakov Molin) 75, who suggests that Maharam distinguishes between terminology used by testator. In his view, a request for a third person such as "he shall take or receive" is valid, whereas a directive to an agent to give or deliver to a third person is not valid in a will, but may be valid under the rule of *mitzva lekayeim divrei ha'mes.* Maharsham, responsum #224, concurs with this interpretation.

does make provision for a conventional will prepared by a healthy person *(bari),* allowing it to take effect in the same manner as a *matnas she'chiv me'ra* — the bequest spoken by a person on his death bed. According to their view, the Talmudic reference to a gift by a *bari,* similar in operation to one made by a *she'chiv mera (Bava Bathra* 135b), was intended to permit anyone to make an oral or written will in the presence of witnesses without need for a *kinyan.* All that is required is that the gift announcement be made in contemplation of death and that it dispose of all of the person's possessions.[27] (If any possessions are left out of the disposition, it cannot be a *matnas she'chiv mera).* True, this view is not accepted by most Rishonim and Acharonim, but it may well be that the general custom of treating legal wills as valid may establish this minority view as the halachic norm in those communities. This may be so, because a *minhag* (custom) can generally determine a conflict among *poskim,* especially in monetary matters.[28]

If this approach is relied upon, it would be preferable that the witnesses to the will be halachically competent (kosher), i.e., observant males over thirteen years of age and not related to each other or to any of the parties affected by the will. It should be noted that if the legal heirs do not challenge the signature on the will, the signature in and by itself may be sufficient, dispensing with the need for "witnesses."

Under the laws of New York and many other states, a holographic will which is not witnessed by two persons is not generally accepted. But if there are witnesses who are not "kosher," and the will is legally proper, the will may nevertheless pass the *halachic* standard because of the testator's own signature.[29] Other theories have been advanced to validate legal (non-halachic) wills in accordance with liberal views of some Rishonim, who rule that *mitzva lekayeim divrei ha'mes* is applicable to all situations,

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27. Ibid.
28. Responsa, *Perach Mate Aharon,* Vol. 1, 60; Responsa, *Ikre Hadat* 21, Supra; See generally, *Magen Avraham,* Shulchan Aruch, Orach Chaim, Ch. 690(22) and Responsa, *Chasam Sofer,* Orach Chaim 159.
29. Responsa, *Rashba,* Vol. 3, 67, and Vol. 4, 7; *Tur* and *Shulchan Aruch,* Choshen Mishpat 250, (3) based on *Bava Bathra* 149a; Ibid 113(2) and 207(16).

including healthy persons, especially where the testator is a parent and the respect of parental wishes may be considered as *Kibud Av ve'Em.* This is espeically so where the executors or legatees under the will are in actual possession of the estate's assets.[29a]

The Bottom Line

In conclusion, it should be said that it would be far preferable — and likely be more proper — if a will is prepared in a manner that meets the strict requirements of halacha, in keeping with the views of all *poskim.* A sample of such a will is available from this author upon request. [It should be noted that since the sample refers to a *kinyan,* it was best implemented if the witnesses made a symbolic *kinyan* by giving a handkerchief or other chattel of theirs to the testator before he signed the will. By making such *kinyan,* they are considered as agents of the legatees mentioned in the will.[30] Money cannot be transferred by such a *kinyan* but may be transferred by a *kinyan agav.* This means that the testator symbolically transfers a piece of real property he owns or rents to the legatees and, together with it, any money or other chattel he wishes to transfer.

It is technically possible to avoid the need for any type of *kinyan,* by acknowledging that a proper *kinyan* has taken place, even if it did not in fact occur.[31] The sample will contains such an acknowledgement so that the omission of an actual *kinyan* would not invalidate the will. Such an acknowledgement may also resolve the difficulty of transferring any debt whether oral *(milveh ba'al peh)* or evidenced by a note *(shtar).*]

Post facto, if one has made a legal will without conforming to halachic requirements, it would probably be sanctioned by a *Beth*

29a. See responsa Maharsham, Supra, who collected views of all predecessors and suggested novel views on the subject, as well as Responsa *Binyan Zion,* Supra. Maharsham also suggests that *Kibud Av* may be considered independent grounds for enforcing a will where the legal heirs are the testator's children. He also rejects the contention that failure to deliver a will during one's lifetime to a third party is fatal to its validity, since that rule only applies to a will signed by a scribe and witnesses, on behalf of the testator, but not to one signed by the testator himself.

30. *Shulchan Aruch,* Choshen Mishpat, 195(3).

31. *Shulchan Aruch,* Choshen Mishpat, 81(17); 1 Piske Din, Rabbanon, pg. 112.

Din (rabbinical court) in which the will's validity is questioned, on the basis of custom supported by the view of a minority of *poskim.*[32] There is still one stipulation — that the term "give" be utilized rather than only "leave" and "bequeath," because any attempt to interfere directly with the order of inheritance prescribed by the Torah is *ipso facto* invalid, and it is only by way of a "gift" that the halacha permitted even a *shechiv me'ra* to alter the order of inheritance prescribed in the Torah.

Circumventing the *Bechor*

The use of a gift is also an effective means of avoiding the rights of an eldest son *(bechor)* to his additional share, since the rules of *bechora* only govern inheritance and not gifts.[33] Some maintain that it would be best to leave some amount of money or property outside the will, so that the Torah's rules of inheritance apply to at least a portion of one's estate.[34] This can be accomplished by including a special paragraph in the will so stipulating.

For a do-it-yourself-er, a legally valid will can be drawn up by a layman, as long as it is properly signed and witnessed by two persons who are not named in the will as legatees. Thus, anyone writing a will according to one of the halacha forms (such as those in *Otzar Hashtoros* or *Nachlas Shiva)* can make it legally valid. It may be written in any language, but would have to be translated into English before it could be probated in a state court. Wills drafted by laymen have been the source of much litigation and are not recommended for the uninitiated.

In summary, it is important that we explore all aspects of our personal and business lives to rediscover the myriad broad areas and countless fine points that have clearcut halachic requirements and guidelines. Then we must endeavor to change our lives to conform with the halacha ... to bring the *Choshen Mishpot* off the shelf and make it an active source of our conduct, as it is meant to be.

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32. See published letters of Rabbi Chaim Ozer Grodzinsky, (Michtevei Achiezer) vol. 1, no. 25.
33. *Shulchan Aruch,* Choshen Mishpat 282, based on *Bava Bathra* 133a.
34. Responsa of *Tashbaz,* Vol. 3 No. 147, cited by *Ksos Hachoshen,* 382(2). See also Responsa, *Chasan Sofer,* Choshen Mishpat, 151.

The Sale of a Synagogue

By Rabbi Israel Poleyeff

Introduction

Changes that have occurred in the demographic make-up of Jewish communities, often with unexpected suddenness, have transformed a question that was in the past more often than not discussed only in theory into a vexing and difficult problem very common in our day. The departure of Jewish populations from once proud and vibrant Jewish communities has left these communities with once thriving institutions standing empty. Investments of millions of dollars are in danger of being lost, and in many cases have already been lost.

Synagogue buildings, the centers of religious life in their respective communities, present an even greater problem, for as *devarim she-bekedusha* (articles of inherent sanctity) the simple solution of selling these buildings to the highest bidder for whatever purposes the buyer wanted to make of them, could not so easily be implemented, if at all. What then shall be done with these old, yet functional, synagogue buildings? Left alone and abandoned, they would represent a massive financial loss. Does *halacha* permit their sale? If so, in what way? And for what uses?

In generations past, movement of Jewish communities was in no way as rapid as it is today. Children tended to remain in the

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towns in which they were born and raised. If they did leave their birthplace for marriage or to earn a living, quite often it was to relocate in a nearby town not far from their original home. Jewish communities tended to remain in their same locations, often for centuries. When their populations did in fact depart, it was invariably a precipitous flight resulting from persecutions and expulsions. Under these circumstances there was little thought given to the possibility of salvaging anything from the physical structure of the synagogue. The synagogue buildings were lost, and that was it.

But in America, movement of Jewish populations is primarily by choice. Community pressures and changes that may contribute to this choice do not, however, force the Jews into a precipitous departure leaving all behind. Sometimes these changes begin to take shape even while the synagogue is in the process of being built! Nonetheless, the possibility of recouping much of the losses from these abandoned synagogues by their sale does in fact exist. Can it be done?

The Sanctity of a Synagogue

Whether and under what circumstances a synagogue may be sold falls under the broader question regarding the permissibility of selling any article of special, inherent holiness (דברים שבקדושה). Though it appears obvious that a synagogue is a *davar shebekedusha*, the *gemara* nonetheless makes this abundantly clear when, for example, in regard to the possible sale of a "public" synagogue (של רבים) for use as a "private" synagogue (של יחיד), the question involves the fact that מורידין אותו מקדושתו,[1] there is a decrease in the synagogue's sanctity by virtue of its diminished use.

What the source of this *kedusha* may be is a matter of dispute. Many suggest that this *kedusha* is biblical in origin.[2] They

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1. מגילה דף כ"ז ע"ב.
2. רמב"ם מנין המצוות ל"ת ס"ה ועיין שו"ת מהרש"ם שנתברר כל השיטות בעורך.

point out, among other comments, that the passage in *Vayikra*[3] which reads ומקדשי תיראו ("and you shall revere my sanctuary") refers to the sanctity not only of the *beth-hamikdosh*, the holy Temple, but of every *beth-medrash* (study hall) and *beth-knesses* (synagogue) as well. Others,[4] however, maintain that a synagogue's sanctity is only rabbinic in nature and results from the fact that it is a place where declarations of the holiness of G-d are made on a regular basis. Still others[5] equate the sanctity of a synagogue to that of any other of the many תשמישי מצוה, articles of sanctity, such as a *lulav* or a *succah*. This might be described as a קדושה של כבוד, a sanctity deriving from an inherent respect we have for all religious articles, and does not equal either of the previous two levels of *kedusha*.

These differing opinions in regard to the source of a synagogue's sanctity will have a crucial effect on the *halacha* of its sale. Obviously, only extremely cogent reasons would have to be present to permit this sale if the *kedusha* is biblical in origin. If it is rabbinic, then the *chachomim* could build into their *halacha* any conditions, lenient or otherwise, they deem necessary and appropriate. If, further, it is merely a קדושה של כבוד, no different from any other *tashmishei kedusha*, then its sanctity would automatically terminate with the completion of its use.

The question before us is, in reality, a two-fold one. Firstly, may a synagogue be sold only for use as another synagogue (or *beth-medrash)* by its new owners, or may the purchaser use the property for whatever he chooses? Secondly, does any sanctity attach to the money realized from the sale? Perhaps a third question may be added: when sale of a synagogue *is* permitted, are there any requirements as to the manner of the sale, or can it be accomplished in the same manner as any other business transaction?

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3. ויקרא פרק י״ט פסוק ל׳.
4. ר״ן מגילה כ״ו ע״ב ד״ה ומאן, פרי מגדים על אורח חיים משבצות זהב סי׳ קנ״ג סק״א.
5. רמב״ן הובא בר״ן מגילה דף כ״ו ע״ב ד״ה ומאן.

Talmudic Background

The first *mishna* in the fourth chapter of the *gemara* Megillah, dealing with the conditions under which a *davar shebekedusha* may be sold, reads:

> If the people of a town have sold its town square (or open space) they may purchase a synagogue with the proceeds thereof; a synagogue, they may purchase an Ark; an Ark, they may purchase mantles; mantles, they may purchase books; books, they may purchase a scroll of the Law. But if they sold a scroll of the Law they may not buy books; books, they may not buy mantles; mantles, they may not buy an Ark; an Ark, they may not buy a synagogue; a synagogue, they may not purchase a town square.[6]

Clearly, the underlying principle in this *mishna* is that the money realized from the sale of any article of *kedusha* be used only for the purchase of another article of greater *kedusha.* Thus for example, a *taivah* (an *aron kodesh)* may be sold only if the funds will be used to purchase coverings for the Torah, *neviim* in scroll form (what the *mishna* calls *seforim* - books), or a *sefer* Torah itself, but not the reverse. In this *mishna* a synagogue has a degree of sanctity between the street of a city, where occasional prayers were offered, such as on fast days — equivalent, perhaps, to what in Eastern Europe was called the "Shul hoif" - and an *aron kodesh.* Thus a synagogue may be sold to purchase an *aron kodesh,* but not the street. The well-known rule of מעלין בקודש ולא מורידין, in matters of sanctity we reach towards higher plateaus and not lower levels, is clearly applicable throughout the *mishna.*[7]

But what of the sale of an article for the purpose of

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6. מגילה דף כ"ה ע"ב.

7. רמב"ם הלכות תפלה פרק י"א הלכה י"ד. A well-known application of this rule is the decision of the rabbis to accept Hillel's opinion to light one candle on the first night of Chanukah and increase the number to eight on the last night, rather than Shamai's view of beginning with eight and decreasing the number daily until one.

purchasing an article of *equal* sanctity? There are those of the opinion that such a sale is inappropriate since there is no increase in sanctity as required by the *mishna.*[8] Others maintain that our *mishna* is concerned only lest there be a *decrease* in *kedusha,* therefore sale of an article with the intent of using the funds to acquire another article of equal *kedusha* is permissible.[9]

These limitations regarding the use of funds realized from the sale of a *davar shebekedusha* apply only when the sale is made without the approval of the seven most distinguished personalities of the town in a convocation of the community's citizens, שבעה טובי העיר במעמד אנשי העיר. If such approval *is* forthcoming, however, then the funds may be used for any purpose whatsoever, even for the drinking of beer.[10]

Actually there are additional purposes for which articles of *kedusha* may be sold that are not recorded in this *mishna* and which do not require approval of either the community's leaders or citizens. The Orach Chaim, drawing on a responsum of the Rosh, states that a synagogue, and so too any article of *kedusha* including even a *sefer* Torah, may be sold for the purpose of supporting students learning Torah or to assist orphans in finding an appropriate mate for marriage.[11] Still another valid purpose for the sale of articles of *kedusha,* is to use the funds to ransom Jewish prisoners.[12] The reason for this latter purpose is the overwhelming sacredness of Jewish life and thus the extreme importance of rescuing Jews from the hands of their captors, who too often had no hesitation to putting their Jewish prisoners to death. Yet in spite of this, the Yoreh Deah declares that a synagogue is not sold for the purpose of ransoming prisoners, unless it is sold for use by

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8. אורח חיים סי' קנ"ג סעיף ד'.
9. טור הובא במג"א או"ח סי' קנ"ג סעיף ד' סק"ד. Based on a deduction on the statement that one cannot *lower* its sanctity, implying that where equal sanctity is involved, the sale is permitted. Also Rambam, Hilchos Tefila, perek 11, halacha 17. The Chofetz Chaim in Mishna Brura maintains that this is only בדיעבד, after the fact, ex post facto.
10. מגילה דף כ"ו, ע"א וע"ב.
11. או"ח סימן קנ"ג סעיף ו'.
12. מג"א שם סק"ט.

others as a synagogue so that there is no change in its level of sanctity.[13]

All this assumes the permissibility of a synagogue's sale. Yet a number of factors must be seriously considered before the proposed sale of a synagogue may take place, even if the funds will be used for the purpose of erecting another synagogue. The first concern is expressed in the term איבא למיחש לפשיעותא, the possibility that between the time of the sale of the first synagogue and the purchase or building of the second, something unexpected may occur that may prevent the acquisition of the second synagogue, leaving the community without an appropriate place for *tefila.*[14] When such a possibility does not exist, such as if the second synagogue has already been built, then the opinions just mentioned would apply. Where the possibility of leaving a community bereft of a place of *tefila* does in fact exist, then the original synagogue may not be sold or torn down. In our day, this possibility is usually of no concern to us since members of a Jewish community invariably leave an area to become part of other communities long before the contemplated sale. The sale of the synagogue usually marks the final act in the history of that community, with the money from the projected sale earmarked for various charities and institutions, but not for the relocation of the original synagogue.[15]

The *gemara* sets another general restriction upon the sale of a synagogue, even for something of greater *kedusha* and, therefore, obviously even for something of equal *kedusha.* This restriction relates to the extent of the original use of the synagogue. If it is

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13. יו"ד סי' רנ"ב סעיף א' על פי פירוש הש"ך.
14. מגילה דף כ"ו ע"ב.
15. Some communities have used their funds to sponsor synagogues in towns and *kibbutzim* in Israel, sometimes on the condition that the original synagogue's name be maintained, an admirable practice. On the other hand, a practice severely condemned by Rabbi Elyahu Henkin (Hapardes, Iyar 5722) was one where proceeds from a synagogue's sale were divided amongst its members. He ruled that the money should be returned and distributed according to halachic principles.

של כפרים, located in small towns with limited use of its synagogue facilities, then it may be sold according to the rules already stated in the *mishna*. If, however, it is של ברכים, located in cities with a large Jewish population, then the sale is prohibited.[16]

The *gemara* offers the explanation that since worshippers come from far and wide, the synagogue "belongs to the masses" (דהוה ליה דרבים). This is understood to mean that even Jews who may live far from the town have a share in the synagogue's ownership, either by virtue of their participation in *tefila*[17] or by their contributions,[18] and it would be virtually impossible to gain the agreement of the entire *rabim* (masses) for the contemplated sale. In addition, sale of a "public" synagogue, built for the use of Jews both within and without the immediate community, no matter where they may live, would deprive them of a place of prayer in that community.[19]

What standards, however, are to be applied in determining whether a synagogue is indeed של כפרים, a village shul, or של ברכים, the synagogue of a metropolis? Merely the fact that large numbers of individuals from different areas often travel to the town does not automatically designate it as של ברכים. The *gemara*[20] offers the statement of Rav Ashi who declared that the synagogue of Masa Mechasya is not של ברכים, since the public travels to this town only because of Rav Ashi, to be in his presence and to learn Torah from this scholarly giant, and not because of the town itself. Apparently the designation of a synagogue as של ברכים must result from the inherent popularity of the town itself and not because of a distinguished individual who may live there. Yet notwithstanding this *gemara*, the Mogen Avraham declares that if large numbers are attracted to a *chacham* of whom they have great need, then the

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16. מגילה דף כ"ו ע"א.
17. תוס' שם ד"ה כיון.
18. Ibid. Based on this explanation, if it is clearly known that no contributions at all were accepted from outside the community then it has the status of של כפרים (או"ז ח"ב סי' שפ"ה).
19. רמב"ם הלכות תפלה פרק י"א הלכה ט"ז.
20. מגילה דף כ"ו ע"א.

synagogue of that town shall be considered של כרכים.[21] Albeit the Mogen Avraham declares that those "masses" must come to the town with regularity and not on an occasional basis.[22]

Nor does the physical size of a community affect its status as either של כרכים or של כפרים. The rules of של כפרים would apply also to a synagogue in a large city if it happens to be a rather small place of prayer. Such was the case of the synagogue of the Tarsians (or bronze workers, according to Rashi) that was located in no less a city than Jerusalem, yet because of its small size was considered של כפרים.[23] This concept has great significance for our discussion, for most of the abandoned synagogues being considered for sale are located in large cities, but each served its own limited community.

From what we have seen so far, the *mishna* and *gemara* require certain prior conditions to be considered, each of which limits the possibilities of the sale of a synagogue: the availability of another place or prayer after the sale, its prior designation as של כפרים, and proper disposition of the funds realized from the sale.

There is yet another consideration with which prospective sellers must be concerned: the synagogue building itself. May it be sold to a buyer who will make use of the property in a manner that would not be considered honorable for a synagogue? Does any sanctity still attach to synagogue property after its sale?

It is to this that the third *mishna* in this same chapter of Megillah directs its comments:

> A synagogue may not be sold except with the stipulation that it may be bought back (by the sellers) whenever they desire. So R. Meir. The *chachamim*, however, say that it may be sold in perpetuity except for four purposes: for a bath, for a tannery, for a

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21. מג"א או"ח סימן קנ"ג ס"ק י"ז.
22. שם.
23. מגילה דף כ"ו ע"א.

> *mikveh*, or for a laundry. R. Yehuda says it may be sold as a courtyard, and the purchaser may do as he likes with it.[24]

The four activities listed are evidently too degrading for a building that once housed a place of prayer.[25] Nonetheless, R. Yehuda is of the opinion that no pre-conditions whatsoever can be made, and the purchaser may make use of the property in any way he wishes. The explanation offered for R. Yehuda's view is that once the synagogue is sold as a courtyard the sanctity of the synagogue effectively ends, and thus it may subsequently be used for any purpose whatsoever.

The *halacha* as codified in the Rambam[26] and in the Orach Chaim[27] follows the views of the *chachamim*. But what of the שבעה טובי העיר במעמד אנשי העיר, the town's seven chief scholars with the consent of its citizens? Does *halacha* permit them to change this basic stipulation as to the use of the property, as they were empowered to do in regards to the use of the funds? The Rambam adds that they do indeed have this power: accordingly, if they wish, they may add a proviso giving the purchaser the right to use the property even for the four restricted activities mentioned in the *mishna*.[28] The Oruch Ha-shulchan goes one step further and declares in no uncertain terms that with the sale of a synagogue, the sanctity of the building and of the funds received for the sale effectively ends (פקע הקדושה לגמרי). Both buildings and money may be used for whatever purposes the people involved choose.[29] However, the Chofetz Chaim forbids any such sale on the grounds that it would be a *bizayon*, an act of disgrace, to a place of sanctity.[30]

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24. מגילה דף כ"ז ע"ב.
25. משנה ברורה על אורח חיים סי' קנ"ג ס"ק נ"ה, adding that these restrictions apply even if the synagogue were reduced to rubble.
26. רמב"ם הלכות תפלה פרק י"א הלכה י"ז.
27. אורח חיים סי' קנ"ג סעיף ט', ורא"ש על מגילה פרק ד' סק"א, ועוד.
28. רמב"ם הלכות תפלה פרק י"א הלכה י"ז.
29. ערוך השלחן סימן קנ"ג סעיף כ"ז.
30. ביאור הלכה על אורח חיים סי' קנ"ג סעיף ט'.

There is one set of circumstances worth noting where even the consent of the community's citizens and leaders is not specifically required for a synagogue's sale. The statement above of Rav Ashi concerning the synagogue in Masa Mechasya, not only informs us that this synagogue was to be treated as של כפרים, but also tells us that it may be sold at the discretion of Rav Ashi alone. Since the community built the synagogue solely because of him, they implicitly agreed that Rav Ashi would have complete control over the synagogue and that he might sell it without any further consultation with the community's leaders.[31] This would be true even if the synagogue had the status of של כרכים,[32] unless contributions were accepted from outside the community.[33]

Modern Implications

The weight of halachic literature appears to lean towards the permissibility of the sale of a synagogue, as long as two fundamental requirements are fulfilled: 1) the synagogue must be determined to be של כפרים, and 2) the sale must be approved by the טובי העיר ז' with the consent of its citizens, במעמד אנשי העיר. In regard to the former requirements the preponderance of opinion considers almost all our modern day synagogues as של כפרים. In addition to reasons already offered, a number of other reasons have been suggested. One rather unusual reason is that synagogues in the time of the Talmud, even those של כפרים, served a broader Jewish population than any of their modern counterparts, even those located in large centers![34] Moreover, if each member of a synagogue has his own reserved seat, a very common practice, then the synagogue's status is again that of של כפרים.[35] Rabbi Gedalia Felder adds that the של כפרים status is achieved when a synagogue is built exclusively by members of a particular congregation, who

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31. מגילה דף כ"ו ע"א, רמב"ם הלכות תפלה פרק י"א הלכה י"ט, אורח חיים סי' קנ"ג סעיף ז'.
32. אורח חיים סימן קנ"ג סעיף ז'.
33. משנה ברורה על או"ח סי' קנ"ג סעיף ז' ס"ק ל"ה.
34. שו"ת מהר"ח או"ז סי' ס"ה.
35. מאירי ריש פרק ג' מגילה, ריטב"א על מגילה דף כ"ו ע"א.

raise all the funds necessary for its construction[36] This, too, is a very common practice today.

R. Yitzhak Liebes suggests that synagogues in large cities like New York are not של ברכים even if they *did* raise money from people outside the community. He reasons that those who make their contributions do so with the implicit understanding that the synagogue membership may do what they wish with the money (and therefore the synagogue) and that they thus relinquish any rights they may have in this matter.[37]

If a synagogue was at one time classed as being של ברכים, it can lose that status under the weight of certain major demographic shifts. R. Moshe Feinstein[38] maintains that the של ברכים status is lost when a synagogue is no longer used for prayer,[39] or even if it *is* still so used, if by less than a *minyan* with no hope of regeneration: and even if it is used by more than a *minyan*, if its members can no longer maintain it with the care it properly deserves. Synagogues considered for sale today almost always fit into one of these categories, and thus would be של כפרים.

Even if the synagogue retained its של ברכים status, it is the opinion of R. Yehiel Weinberg that the synagogue may still be sold when it can no longer be maintained in a proper manner. The problem of של ברכים, as we stated earlier, is that all contributors have a share in the synagogue's ownership, and it would be virtually impossible to gain their total agreement to the sale. However, R. Weinberg argues, their explicit consent is not necessary since they would certainly not stand in the way of such a sale when the synagogue stands virtually empty.[40]

R. Weinberg nonetheless suggests that to satisfy the requirements of all scholarly opinions the membership should contribute some of the money realized from the sale for the

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36. הדרום אלול תשי"ח דף 59.
37. שו"ת בית אבי, חלק ג', סימן ל"ג.
38. איגרות משה (ניו יורק, תשי"ט) אורח חיים סימן נ'.
39. Based on מג"א אורח חיים סי' קנ"ג סקי"ב.
40. שו"ת שרידי אש, סימן ט"ז.

purpose of repairing a *sefer* Torah, assisting in the marriage of a poor orphan, or for any other activity for which sale of a synagogue is permitted.[41]

An interesting question was once directed at R. Yechezkel Landau (Nodah Biyehuda), regarding the status of a synagogue in a small European town which periodically conducted a *"yerid"*, regularly scheduled market days. On those days numerous farmers converged on the town from outlying districts to present their wares for sale to an even larger number of buyers who also came to the town from far-flung areas. The town on those days gave the appearance of being a large, bustling commercial center. The local synogogue, nonetheless, was declared to be של כפרים, since these visitors did not travel to the town for the specific purpose of using its synagogue for prayer.[42] This concept is also a significant factor in our discussion. In a city like New York, for example, although a synagogue may have many visitors from outside the synagogue's immediate community, these visitors come for business or other purposes, but not specifically to attend services at the local synagogue, however distinguished its *rov* may be.

But what of the second requirement? The consent of the שבעה טובי העיר, the seven distinguished persons; who are they today? And what of the מעמד אנשי העיר, the convocation of the citizens, how do we achieve that? Modern *poskim* seem to agree that, taking into account the administrative structure of our synagogues today, duly-elected synagogue officers are the שבעה טובי העיר and a properly convened membership meeting the מעמד אנשי העיר. Considering that the requirement of the שבעה טובי העיר is based on their superior knowledge and expertise in analyzing the needs of the synagogue entrusted to their case, and considering that the function of the מעמד אנשי העיר is to assure that any proposal will get the widest possible public notice,[43] the administrative body of today's synagogue does in fact perform these functions. Thus,

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41. שם.
42. נודע ביהודה תניינא אורח חיים סי' י"ט.
43. שו"ת מהר"ח או"ז סי' ס"ה.

when the proposed sale is presented for a vote to the membership, the requirement of שבעה טובי העיר במעמד אנשי העיר is properly fulfilled.[44]

There are rare occasions when the requirement of במעמד אנשי העיר is not specifically needed. One such situation, presented for decision to the author of the *Mishpat Shmuel*,[45] dealt with a synagogue that was completely destroyed. The community wanted to know if they were permitted to sell the land on which the synagogue stood in order to build another synagogue from the funds realized. No other funds were available. The decision rendered was that they could, which probably elicits little surprise. Most instructive, however, was the reason: all those individuals who contributed to the construction and maintenance of the original synagogue and who therefore must be consulted, would undoubtedly agree to this move, and thus their consent can be assumed. This would be true even if the synagogue were של כרכים.[46] It is a significant statement because this reasoning is used by several *poskim* (such as R. Yechiel Weinberg mentioned earlier) in arriving at a decision regarding today's abandoned and ravaged synagogues.

The larger problem facing those who must make the decision on the sale of a synagogue is the fact that in most cases the buyer is an organization that wishes to convert the building into a church. Often this group is either the only buyer or the only one willing to pay a fair-value price for the building. The four activities listed in the *mishna* as being of a degrading nature cannot compare in their unpleasantness to this one activity that is the absolute antithesis of the cardinal principle of the Torah, the oneness of

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44. איגרות משה (ניו יורק, תשכ"ד) אורח חיים סי' מ"ה.
45. משפט שמואל סימן י"ד הובא בשדי חמד מערכת בית־הכנסת סי' ט'.
46. Not directly related to our discussion is the case of an individual who wanted to sell his house, one room of which was used as a place of public prayer. Two reasons to allow its sale are offered in שו"ת מנחת יצחק חלק א' סי' ק"כ. Firstly, at best it is a "private" synagogue, thus under the complete control of its owner. Secondly, it is only a temporary synagogue and therefore has no lasting *kedusha*. The latter reason is based on או"ח סימן קנ"ד סעיף ב'.

G-d. Perhaps procedures may exist to permit the sale of synagogue property for use as a tannery or any of the other three degrading activities. But can halachic consent be found for its sale as a church?

The *mishna* in Talmud Avoda Zara[47] reads:

> One may not rent houses to them (idol-worshippers) in the land of Israel ... in Suria one may rent them houses .. outside the land of Israel one may even sell them houses ... This is the opinion of R. Meir. R. Yose says: in the land of Israel one may rent them houses ... in Suria one may sell them houses ... outside the land of Israel one may sell both (houses and fields). However, even in such a place where the renting of a house is permitted, it is not meant for the purpose of a residence, since he will bring idol worship into it ...

The Rambam[48] formulates the *halacha* in accordance with the views of R. Yose, as does the Yoreh Deah.[49] The Ramo, however, adds a very significant comment when he declares that "today our practice is to rent (to the non-Jew) even for the purpose of a dwelling since there no longer exists the practice of bringing into their houses any form of idol worship."[50]

It should be pointed out that the *mishna* and the early *poskim* speak only of the prohibition of *renting* one's house. Doing so runs the risk of violating the Torah's injunction "thou shalt not bring any form of abomination into your house,"[51] for the new owner might introduce idol worship into the house, which, by virtue of the fact of rental, still belongs to the Jew. It follows that this prohibition ought not to apply should the house be *sold* to a non-Jew, since the house no longer is owned by the Jew.

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47. עבודה זרה דף כ' ע"ב.
48. רמב"ם הלכות עבודת כוכבים פרק י' הלכה ג'.
49. יורה דעה סימן קנ"א סעיף ח' וי'.
50. רמ"א שם.
51. לא תביא תועבה אל ביתך (דברים פרק ז', פסוק כ"ו).

Nonetheless, the restriction is extended even to the sale of a house.[52]

Considering that these restrictions deal with the sale of a house to a non-Jew on the *possibility* that he may introduce idol worship into the house, how much more so should we be concerned when we sell a *synagogue* for the *specific* purpose of introducing into it a foreign mode of worship! Indeed, the author of the Minchas Yitzchak[53] follows this exact line of reasoning. Nonetheless, he declares, it seems that the majority opinion allows such a sale if agreement is forthcoming from the leaders and citizens of the community. Perhaps their reasoning is based upon the view that Christian practices and services are not similar to ancient pagan practices and therefore cannot be classified as idol worship.[54] Therefore, the sale of a synagogue for a church, from a halachic point of view, is the same as if it were sold for one of the four prohibited activities enumerated in the mishna. As was explained previously, even the sale for these uses is permitted as long as the community's leaders and citizens are in agreement.

Prospective sellers of a synagogue for use as a church would do well, however, to be guided by the directions of R. Moshe Feinstein. In a responsum on the question of the sale of a synagogue to a Seventh Day Adventist group,[55] R. Feinstein points out that in most cases a bank holds a mortgage on the synagogue. It would be advisable, therefore, that the *bank* actually effectuate the sale. The officials of the synagogue are nonetheless permitted to give full cooperation and offer timely advice to the bank so that the community may realize the greatest financial return on its property. If this is not possible, then the sale should be arranged through a *sirsur,* (a third party) preferably a non-Jewish broker.[56]

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52. תוס' ע"ז דף כ"א ע"א ד"ה אף, שהביא מדבר הרא"ש שחולק, עיין שו"ת מנחת יצחק חלק א' סי' ק"כ.
53. שו"ת מנחת יצחק חלק א' סי' ק"כ.
54. מאירי על עבודה זרה דף י"א ע"ב, באר הגולה חו"מ סימן תכ"ה סעיף ה' ס"ק ש' עיין נודע ביהודה סי' קמ"ח יורה דעה תניינא.
55. איגרות משה (ניו יורק, תשי"ט) אורח חיים סימן נ'.
56. אגרות משה אורח חיים סימן כ"ח.

This should not be understood to imply that blanket permission exists for the sale of every synagogue for use as a church, and that there is no dissent from this opinion. R. Yitzhak Liebes, in the strongest of terms, prohibits the sale of a synagogue for use as a church. No suggestion is even offered to use the bank or some individual as a go-between.[57]

In a recent celebrated case, the famous Pike Street Shul on the East Side of New York was sold to a church organization. This sale was later successfully challenged both legally and halachically. Perhaps the fact that the synagogue was still being used regularly and that the *mispallelim* were able to maintain it, albeit minimally, were factors in the halachic decision against its sale.[58]

Even R. Moshe Feinstein himself, in another responsum on this subject,[58] writes, "In regard to the sale of a synagogue for use as a church, I see no grounds to permit it ... even through the use of a third party". Because the questioner sought advice on a secondary issue relating to our subject, we are not told in this responsum the circumstances of the question which led to the negative decision.

What this responsum does tell us, however, is that there is no one clear *psak* that applies to every situation, and that all the facts of each case must be presented to a *gadol* for his advice, guidance and halachic decision before any action is undertaken.

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57. שו"ת בית אבי, חלק ג', סימן ל"ג.
58. Unfortunately, the author does not have a copy of the *psak* at this time.
59. איגרות משה (ניו יורק תשכ"ד) או"ח סימן מ"ה.

Litigation in Secular Courts

By Rabbi Simcha Krauss

The Shmona Esrai, which a Jew says three times a day, contains our innermost and most profound prayers. In it we express and articulate our most basic needs — we pray for national liberation, the rebuilding of Jerusalem and the redemption brought by Mashiach. And in practically the same breath, we pray "restore our judges as of yore."

The juxtaposition of the rebuilding of our people and the restoration of our judges is not haphazard, but expresses rather an important concept: we believe that the sanctity of Jerusalem and the Beth Mikdash derive from the Shechina, the Presence of the Almighty which dwells therein eternally.[1] Now there exists another institution of which we also say that the Shechina is there — that institution is the Court of Jewish Law, the Beth Din.

Rambam states so openly:

> כל ב"ד של ישראל שהוא הגון, שכינה עמהם לפיכך צריכים הדיינים לישיב באימה ויראה ... "The Shechina is with every proper Jewish Beth Din. Therefore, the judges should sit with awe and fear ..."[2]

We may actually draw the analogy between the sanctuary and the Beth Din further. Of Batei Din too it can be said that, "even

1. רמב"ם פרק ו' בל' ט"ז מהל' בית הבחירה.
2. רמב"ם פרק ג' הל' ז' מהל' סנהדרין.

Rabbi, Young Israel of Hillcrest

though they are desolate, the Shechina is there.'' It is true that Batei Din and Dayanim with full, complete, total and absolute authority in all areas of Jewish life ceased to exist with the end of the traditional Semicha[3]. Still, throughout history Batei Din judged, adjudicated, heard litigation and decided in accord with Torah law. Dayanim, though their area of jurisdiction was circumscribed and limited, still saw themselves as, and indeed were, carrying out the שליחות - the commission of the original Sanhedrin[4]. Wherever a Beth Din judges in accord with the canons of the halacha, wherever halacha comes to life, wherever you have a ''proper Beth Din'', there you have the Shechina.

This may be the underlying motif for the extreme stringency with which the Halacha views going to a non-Jewish court, generally called Arkhaoth Shel Nochrim, to settle litigation.

We shall explore here the question of whether, or to what extent, it is permitted for Jews to sue other Jews in the secular courts maintained by the countries in which they live. Ancillary questions are whether a Jew may practice law in such courts, or act as a witness therein.

It is best to begin with the Braitha in Maseches Gitin.

> ""היה ר''ט אומר כל מקום שאתה מוצא אגוריות של עכו''ם אע''פ שדיניהם כדיני ישראל אי אתה רשאי להזקק להם שנאמר ואלה המשפטים אשר תשים לפניהם לפניהם ולא לפני עכו''ם, ד''א לפניהם ולא לפני הדיוטות'' [5]

> ''R. Tarfon used to say: 'In any place where you find gentile courts, even though their law is the same as the Israelite law, you must not resort to them since it says, ''These are the judgments which thou shalt set before them.'' (Ex. 21:1) this is to say, ''before them'' and not before gentiles. Another explanation,

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3. מס' גיטין דף פ"ח ע"ב — אביי אשכחיה לרב יוסף דיתיב וקא מעשה אגיטי א"ל והא אנן הדיוטות אנן...
4. א"ל אנן שליחותייהו קעבדינן ... מידי דהוי אהוראות והלואות.
5. דף פ"ח ע"ב.

however, is that it means, "before them" (i.e. judges) and not before laymen"[6]

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6. The term used in the Braitha is "courts of Akkum" or "ovdei Kochavim." I have translated it as the broader "gentiles" because the halacha is not restricted to idol worshippers alone. See the Tshuvat Hatashbetz חלק ד' סי' ו where he says that the halacha applies to Muslims too.

We have taken the position in this paper that the issur of Arkhoath Shel Nochrim is not limited to idol worshippers alone but to all "goyim." We also would like to point out that the issur of Arkhoath is not limited to those "goyim" who take bribes. Rather, the issur of going to Arkhoath Shel Nochrim is an all-encompassing, general issur embracing all and any "goyim."

We have referred to the Tashbatz that the issur includes not only idol worshippers but that it is כולל דת אומה זו — that is, members of the Islamic faith. The Tashbatz, in another tshuva (חלק ב' סי' ר"ך) also has an additional source for the issur, the verse of מגיד דבריו ליעקב חוקיו ומשפטיו ישראל לא עשה כן לכל גוי ומשפטים בל ידעום" (Psalms 147). This passuk is, obviously, all-inclusive and not limited to idol worshippers or, for that matter, corrupt judicial systems.

Indeed, the very גזיה"כ of לפניהם ולא לפני עכו"ם, cannot be limited to heathens alone. For the passuk excludes from Dayanus anyone who is not included in לפניהם. The truth, of course, is that even Hedyotos (laymen) are excluded by this verse. Certainly then, the goyim that are excluded are all goyim.

This, however, creates a problem. Why is it that kabbala of hedyotos is valid and the kabbala of goyim is not? If the issur is derived from the same verse how can we say that the halacha of kabbala is different with regard to goyim?

The explanation of the Netziv (העמק שאלה משפטים סק"א) follows, in approximate terms:

The passuk of אשר תשים לפניהם is also used in another sense. שתשים לפניהם כשולחן ערוך — the halacha has to be set before them, prepared for them like a set table ready to eat (Sanhedrin 6b). Moshe Rabbeinu was told that the Dayanim have to be taught Torah in such a manner that they should be so absolutely clear in their decision that when asked they should be prepared to defend their decision without hesitation. In other words, at the first instance, the passuk אשר תשים לפניהם speaks of teaching the Dayanim Torah. On this comes now the גזיה"כ of לפניהם ולא לפני עכו"ם — for goyim may not be taught Torah. There is an issur to teach Torah to goyim because of משפטים בל ידעום. Obviously, there is no issur to teach Torah to hedyotos. On the contrary, let us teach them, and let them learn. Of necessity then, imbedded in the passuk itself, we find the difference between hedyotos and goyim. And that is why kabbala helps for hedyotos and not for goyim.

If the issur of לפניהם ולא לפני עכו"ם is related to the issur of teaching them Torah, it goes without saying that in this issur there is no distinction between

This Braitha actually contains two prohibitions. First there is the issur against resorting to gentile courts. Second, there is an issur against resorting to Beth Din Shel Hedyotes (laymen). The Braitha itself, however, does not spell out the severity of going to gentile courts.

Rashi spells out the severity of this prohibition. " ... for he who brings Jewish law to be adjudicated before gentiles desecrates G'd's name and makes dear (or gives value) to idols, for it is written 'For their rock is not our Rock, even our enemies are judges.' When our enemies are judges, it is a testimony to the superiority of their idol."[7]

This stringency is also expressed in the codes of the halacha. Rambam states:

> ""כל הדן בדיני עכו"ם ובערכאות שלהן אע"פ שהיו דיניהם כדיני ישראל הרי זה רשע וכאלו חרף וגדף והרים יד בתורת משה רבינו שנאמר ואלה המשפטים אשר תשים לפניהם. לפניהם ולא לפני עכו"ם, לפניהם ולא לפני הדיוטות."[8]
>
> "Whoever submits a suit for adjudication to gentile judges in their courts, even if the judgement rendered by them is in accord with Jewish law, is a wicked man. It is as though he reviled, blasphemed and rebelled against the law of Moses, our teacher, for it is said, 'Now these are the ordinances which thou shalt set before them.' (Exod. 21:1) - 'before them', not before heathens, and not before laymen."

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idol-worshippers or any other gentile, between corrupt judicial systems or ethical ones.

One can go even further. The Or Zarua (in ב"ק סי' ג) holds, as opposed to the Shulchan Aruch, that when both parties accept the Arkhaoth, their judgment is valid. His argument is based on the fact that since Bnei Noah are commanded in Dinim, their Din is valid even for two Jews. The point I would like to make is that even the Or Zarua speaks only about the validity of such going to Arkhaoth. But he also admits that in having chosen these Arkhaoth the parties have transgressed the issur of לפניהם ולא לפני עכו"ם. Were the Or Zarua speaking only of a corrupt system, it is hard to say that he would grant such a system any validity.

7. Shmos 21:1.

The Shulchan Aruch too, reiterates and quotes Rambam's strong words that one who brings suit before gentile judges "blasphemes" and "rebels" against the Torah of Moshe Rabbeinu. But the Shulchan Aruch goes even further. The prohibition according to the Shulchan Aruch exists even if "both have agreed (to settle) before the gentile courts."[9] The halacha against going to Arkhaoth is clear cut.

However, there are many difficulties that exist in living with the practical implications of this issur. Does the law forbid employing non-Jewish courts even if no Jewish court exists, or even if the government does not sanction the settlement of litigation by Jewish courts? Is there no redress then for a Jew in the absence of a Jewish court? And what if one of the parties will not accept the discipline of the Beth Din? These and other difficulties need to be cleared up as to the nature and character of the issur.

We know of the generally accepted principle that Dina Demalchusa Dina - the law of the land is the law.[10] Jews are subject to the laws of the country in which they reside. Of course, Dina Demalchusa Dina[11] is limited and, obviously, issues of *issur v'heter* do not fall under the aegis of Dina Demalchusa Dina. But going to court, litigation with another Jew regarding dinei mammonoth (monetary issues) should be permitted. Why is going to gentile courts, where both Jews, i.e. the plaintiff and defendant, agree to abide by the decision of the court, an issur of such magnitude?

Still another question: In money matters we know of another operative principle - בדבר שבממון מתנה על מה שכתוב בתורה תנאו קיים [12] - a condition can be made even against Torah law and

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8. פרק ב"ו מהל' סנהדרין הל' ז'. Some versions have it as דייני גוים, instead of דייני עכו"ם. The Halacha applies to both. See note 6.
9. שו"ע חו"מ סי' כ"ו סעיף א'.
10. This is the מימרא of Shmuel in, among others, בבא קמא קי"ג and גיטין י'.
11. For discussion of the parameters of Dina Demalchusa Dina see article by Rabbi Herschel Schacter — Journal of Halacha and Contemporary Society, Vol. 1, no. 1.

such condition is valid. Why then may two Jews not elect to decide that their differences in this commercial transaction should be decided by the gentile court?

And yet a third question: Does not the prohibition of going to Arkhaoth contradict the Mishna in Maseches Sanhedrin which states that one may accept as judges people who are otherwise unfit? Does not the Mishna state that one may accept upon himself "three cowherds" and that having accepted these he may not renege on this?[13]

Every one of these questions was, in one way or another, anticipated by Rishonim. Let us see how they solve this problem. Let us begin with this last question. Rambam says,

> ""ואע"פ שהזכירו חכמים שתי הכתות האלה כאחת. יש הפרש ביניהם שאם רצו בעלי הדין לבוא לפני ההדיוט שבישראל מותר הוא **ובדקבליה עילויה** דינו דין. אבל לפני הכנענים אסורים הם לבוא לפניו שידון ביניהם לעולם ואפילו היו דיניהם כדינינו באותו ענין"[14]

> "Even though the Sages have mentioned these two groups (the layman and the Canaanite) together, there is a difference between them, in that if the two litigants are willing to come before an Israelite who is a layman, and accept him upon themselves, it is permissible for them to do so, and they must abide by his decision. But to come before the Canaanites to act as judges between them is forbidden under all circumstances, even if the Canaanite laws are in that particular case the same as our laws."

The same position is taken by the Ran in the beginning of Maseches Sanhedrin, where he states that the prohibition of Arkhaoth exists even after accepting them - being mekabel - on

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12. מס' בבא מציעא צד, ב"ב קכ"ו, אספתא קידושין פ"ג.
13. סנהדרין כד.
14. רמב"ן עה"ת שמות כא:א. הוצאת הרב ח.ד. שעוועל.

themselves.[15] The Rishonim state the prohibition. What is, however, the nature of the prohibition?

It is best to begin with a responsum of the Rashba quoted by the Beth Yosef:

> "Know that the principle of Dina Demalchusa Dina is said only in matters ... relating to the laws of the kingdom. For just as we have our laws of kingdom ... other gentile nations have ... laws for kings and on these we say Dina Demalchusa Dina. But other laws that are adjudicated in the courts ... are not the laws of the kingdom, but the courts judge on their own as they find in the book of judges ... Otherwise you are nullifying (heaven forfend) the laws of Israel."[16]

Actually the Ramo follows this ruling. We say Dina Demalchusa Dina only in cases where the law is for "Takanas Hamedinah" (institutions and laws of State) but not, "that they should judge by gentile laws. For if so, then all Jewish laws will be nullified."[17] What we see here is, I believe, the beginning of a pattern. The prohibition of going to non-Jewish courts is rooted in the fear that Torah laws will become forgotten and hence, for practical purposes, nullified.

Yet another responsum of the Rashba gives a more precise definition of how this "nullification" of Jewish law takes place. Rashba was asked about one whose daughter had died, and the father sued his son-in-law in Arkhaoth for return of the dowry. Halachically, the husband inherits his wife's property. In that particular area, however, the custom was to follow the "laws of the gentiles" and to return the dowry to the father. Hence, it was

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15. אכן דברי הרמב"ן נראים — לכאורה — כסותרים א"ע. דהכא הרי סובר בפירוש דקבלה מהני גבי הדיוטות. ושם בחי' הר"ן ד.ה. ובדין בא"ד מביא הר"ן בשם הרמב"ן ,,שאסור לבוא לפני ההדיוטות ואע"פ שקבלו עליהם בעלי דינין את דינן **כדרך שאסור לבוא לפני הכותים**."
16. בית יוסף חו"מ סי' כ"ו.
17. רמ"א חו"מ סי' שס"ט סעיף י"א.

agreed, any marriage taking place there has within it an implicit contract to that effect; as we mentioned earlier, in money matters a contract contrary to the Torah is valid. Rashba, in disallowing the claim of the father, answers:

> " ... A condition in money matters (contrary to the Torah) is valid. And in truth such a condition would have been sustained. But to rule that way because this is the law of the gentiles ... is forbidden ... and that is what the Torah warned us about 'before them and not before (the courts of) the gentiles,' even though both want it and it is a matter of money. For the Torah did not allow the people that is its inheritance (the Jews) to give worth to the laws of the gentiles and to stand in judgment before them even when their laws are like ours ... And to learn ... to go in the ways of the gentiles and their laws, heaven forfend for a holy people to behave thus ... And I further say whoever relies on this because of Dina Demalchusa Dina is mistaken and is a thief. And even if he returns (the money robbed) he is still a Rasha (wicked person) and in general uproots all the laws of the whole complete Torah. And why do we need all the holy and sanctified Sefarim written for us by Rebbi and after him, Ravina and Rav Ashi? Let them teach their children the laws of the gentile ... in the academies of the gentiles! Heaven forfend, this shall not be in Israel ..."[18]

As the Rashba clearly states, neither Dina Demalchusa Dina nor Matneh Al Mah Shekatuv BaTorah (agreeing on a condition to supersede the Torah) will make a difference in this case. It is one thing for two individuals to stipulate a condition (in money matters) that contravenes halacha. To do so individually, on an *ad hoc* basis where the act of and by itself is not tantamount to any public declaration of policy, is one thing. It is quite another thing

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18. בית יוסף חו"מ סי' כ"ו.

to institutionalize the "law of the gentiles", to give it force and worth. The halacha of "before them and not before the courts of the gentiles" tell us not to give credence, stature and credibility to the laws and courts of gentiles. To go to Arkhaoth and, hence, give them recognition and worth, accept them as a bona fide institution, will thus lead to Torah being forgotten and nullified.

This last idea will become clearer from another source.

The Shulchan Aruch says that one may accept upon oneself (one may be mekabel) a gentile as witness just as one may accept upon oneself any other person technically barred from being a witness (pasul l'edut). Still one may not accept an akkum (gentile) as judge.[19] The Shach immediately qualifies this halacha. There is a difference, says the Shach, between accepting to be judged by a gentile court, where acceptance is of no effect, and agreeing to be judged by a particular individual akkum (gentile), which is no different than the acceptance of any unqualified person.[20]

In other words, what one may not be mekabel (accept) and indeed kabbala does not help, is the *institution* of Arkhaoth. The institution of gentile courts, the institution of gentile law, the acceptance of the gentile judicial system is something we cannot accept. The acceptance of the system of Arkhaoth is pure issur, and hence making a condition to contravene the Torah will be of no avail, because with issurim, obviously, his condition has no validity.[21]

This may be the meaning of a seemingly strange equation posited by R' Yosef B'khor Shor who says the following:

> ""רבותינו פירשו לפניהם ולא לפני גוים שכשם שנאמר
> מקרב אחיך תשים עליך מלך ולא תוכל לתת עליך איש
> נכרי כך מזהיר שלא תעשה גוי שופט לישראל" [22]

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19. שו"ע חו"מ סי' כ"ב סעיף ב'.
20. שך חו"מ שם ס"ק ט"ו.
21. ועיי' היטב ביאור הגרא שם ס"ק ט"ו.
22. Quoted in Torah Shleimah by Rav Menachem Kasher, Volume 17, pages 9-10.

> "Our Rabbis interpreted be judged 'before them' and not 'before the judges of the gentiles.' For just as it is written 'from amongst your brothers you shall appoint to yourself a King,' (Deut. 17:15) likewise the Torah warns not to appoint a gentile judge on Israel."

In other words, the halacha puts the stress on not accepting the institution of nochrim (non-Jews). Whether we deal with political institutions or judicial institutions - Arkhaoth - it is the *institution* of *Nochrim* that we may not accept upon ourselves.

II

As we indicated earlier, the blanket issur of going to Arkhaoth leaves many difficulties in practical terms. The halacha is not blind to these impediments and has made provisions for them. When the defendant is a person who does not respond to, and cannot be forced to come to the Beth Din, then the plaintiff may take the defendant to Arkhaoth.[23] The source of this is the Gemara in Bava Kama 92b which states:

> ""קרית לחברך ולא ענך רמי גודא רבה שדי ביה"

> "If you call your friend and he does not answer, you throw the wall on him."

Rosh quotes Rav Paltoi Gaon:

> ""מכאן ראובן שיש לו תביעה על שמעון ומסרב לבוא לדין שרשאי להביאו לערכאות של נכרים כדי להוציא את שלו מתחת ידו" [24]

> "From here (we derive) ... Reuven has a complaint against Shimon and he (Shimon) refuses to come to court, then he is allowed to take him to the courts of the gentiles in order to take what belongs to him."

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23. רמב"ם פ' כ"ו מהל' סנהדרין הל' ז', שו"ע חו"מ סי' כ"ו סעיף ב'.
24. רא"ש ב"ק פ"ח סי' י"ז.

This permission to go to Arkhaoth where the defendant does not heed the call to go to a Din Torah needs some clarification.

First there is simply the practical matter. At what point in time may the plaintiff turn to Arkhaoth for alleviation of his claim? Is there a blanket "heter" (permit) to turn to Arkhaoth after the defendant refuses to comply with the Beth Din, as implied in the *psak* of Rav Paltoi Gaon, or are there certain steps and conditions which the plaintiff must follow?

Second is the conceptual problem as raised by the Kli Chemdah.[25] The halacha of לפניהם ולא לפני עכו"ם is a לאו הבא מכלל עשה[25a]. Hence going to Arkhoath is a לאו. While one must not spend one's money in order to perform a mitzvat asei, one still is enjoined from transgressing a לא תעשה even at the cost of forfeiting one's possessions. Why then, asks the Kli Chemdah, is it permitted to go to Arkhaoth simply to prevent financial loss?

> "ואמאי יהיה מותר כיון דהוא לאו הבא מכלל עשה לפניהם ולא לפני עכו"ם אמאי יהיה מותר לעבור על זה במקום פסידא. והא מחויב אדם ליתן כל הונו שלא לעבור בלא תעשה"

Let us begin with the first issue. Ramban was asked whether one may take to Arkhaoth a "borrower", a "strongman" who did not respond to the summons of the Beth Din. The questioner apparently quoted the Geonim who permitted going to Arkhaoth in this instance. Says Ramban:

> ""היתר זה איני יודע גאונים הללו איני מכיר אבל לוה אלם שלא רצה לבוא לב"ד אסור להביאו לפני גוים לדון אלא ב"ד של ישראל כותבין אדרכתא על נכסיו ואם הוצרך לכך לדון לפני גוים והם מורידון [מכריחים] אותו למה שידונו לו דייני ישראל מותר בהכי דבכה"ג ליכא משום לפניהם ולא לפני גוים"[26]

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25. עיי' כלי חמדה פ' משפטים פסוק א'.

25a. A negative command derived from a positive one. The issur of Arkhaoth is not couched explicitly in negative language, i.e. Thou shalt not ... It is implied in, and derived from, the positive mitzva of going only to Jewish courts. The status of such a halacha is that of a "Lav," a negative commandment.

26. תשובת הרמב"ן סי' ס"ג, הוצאת הרב ח.ד. שעוועל.

According to Ramban, there is first the judgement of Beth Din. After Beth Din decides the case according to Jewish law, the Arkhaoth are used to implement the decision of the Beth Din. Only when these steps are of no avail may one take the next step and go to Arkhaoth because, as Ramban says, one may use either Jews or non-Jews to save and protect one's property.[27]

Rambam does not go so far. Rambam requires only that before going to Arkhaoth one should get the permission of Beth Din.[28] Shulchan Aruch too follows the same position. Either way, however, the institution of Beth Din is not rejected. Beth Din does play a role in the litigation, albeit not an active role.

As to the question of Kli Chemdah mentioned above, perhaps the answer may be simple. As Rashi, quoted in the beginning of this article, states, the prohibition of going to Arkhaoth is rooted in giving worth and value to the institution of Arkhaoth. Indeed when one chooses Arkhaoth over Beth Din, one shows disregard for the institution of Beth Din. The free, unembarrassed, unapologetic, uncompelled choice of Arkhaoth gives them the necessary and requisite "esteem" that is truly forbidden. But having first gone to Beth Din, having first attempted a Din Torah and then, because the defendant does not want to adhere to Dinei Torah, going to Arkhaoth, does not show any regard for the institution of Arkhaoth. It does not grant them, nor show them any esteem on our part. One does not esteem the Arkhaoth when they are second choice.

III

The issur of לפניהם ולא לפני עכו"ם is at first instance an issur against initiating litigation at a court of gentiles. One may not give the Arkhaoth any value and worth by going to them to settle

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27. Ramban, ibid. It is interesting to note that Ramban uses a different source for going to Arkhaoth when no other recourse is available. He uses the Sugya in Bava Kama 27b — Avid Inish Dinah L'Nafshei — not the source used by Rosh. Kli Chemdah — without alluding to this Ramban — also contends that the Bava Kama 27b is a better source.

28. רמב"ם פרק כ"ו מהל' סנהדרין הל' ז'.

litigation. May a Jew however, testify before Arkhaoth? Two Jews brought their case to Arkhaoth. May a Jew be witness and testify before Arkhaoth in this case?

The Ramo in his Responsa says that it is forbidden.[29] His argument is that there is the rabbinic prohibition of מסייע ידי עוברי עברה - helping a person commit a sin. The witnesses do, after all, support the plaintiff in his transgression of going to Arkhaoth, and therefore such testimony is forbidden.

The Shaar Hamishpat takes strong exception to this psak of the Ramo. First, he argues the issur of going to Arkhaoth consists of selecting the Arkhaoth for litigation, instead of going to Beth Din. By selecting Arkhaoth, the plaintiff and defendant give value to Arkhaoth and the idolatry they represent. Once this selection has taken place, in what way do the witnesses who now testify aid in this issur of giving worth to Arkhaoth? That is already a *fait accompli*.

Second, argues Shaar Hamishpat, the issur of abetting a wrongdoer is a rabbinic issur. But to give testimony is a mitzvah from the Torah, which overrides a rabbinic ruling. Further, by testifying and returning money to its rightful owner, one fulfills the mitzvah of returning a loss, while by not testifying one helps to keep money from its rightful owner. For these reasons, Shaar Hamishpat takes issue with the Ramo and holds that it is permitted — or rather, it is an obligation — to testify in this case.[30]

The position of Shaar Hamishpat is very difficult to sustain. He asserts that by testifying before Arkhaoth, witnesses perform the mitzvah of giving testimony. Of course, it is a mitzvah to testify. And one who knows testimony and neglects to testify transgresses אם לא יגיד ונשא עונו (Leviticus 5:1). But this mitzvah applies to a halachic Beth Din.

The Rambam says: "העד מצוה להעיד בבית דין" [31]. "It is a mitzvah to give testimony in *Beth Din*."

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29. שו"ת הרמ"א סי' נ"ב, הוצאת הרב דר. א. זין.
30. שער המשפט חו"מ סי' כ"ו ס"ק א'.
31. רמב"ם פ"א מהל' עדות הל' א'.

Do Arkhaoth have the status of Beth Din? Certainly not. The Mechilta states in Parshat Mishpatim:

> ""אמר ראב"ע הרי דייני עכו"ם שדנו כדין ישראל שומע אני שדיניהם קיימין. ת"ל ואלה המשפטים אשר תשים לפניהם. אתה דן את שלהם ואין הם דנין את שלך"

> R' Eliezer Ben Azariah said; "Now then when heathen judges judged according to Jewish law would I think that their judgement stands? [Since it is written] 'And these are the laws that you shall set before them,' you may judge what is theirs but they may not judge what is yours."[32]

Hence if they do not have the status of Beth Din, how can one argue that in testifying before the Arkhaoth one performs the mitzvah of giving testimony? The other contention of the Shaar Hamishpat, too, is tenuous. Of course, returning a loss is a mitzvah. But this mitzvah cannot be performed in the face of issurim![33] If it is prohibited to go to Arkhaoth, there is no permission to testify before the Arkhaoth even for the purpose of returning a loss.

This discussion is only a point of departure for the contemporary questions regarding Arkhaoth. For example — is it permissible to give an opinion as an expert to the Arkhaoth? In the course of litigation, the court needs an expert opinion; may one testify before Arkhaoth in such a case?[34]

For that matter, the whole status of practicing law - when both parties in litigation are Jews - would need re-examination.[35] We only mention these as some consequences of the halacha of Arkhaoth.

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32. מכילתא דרבי ישמעאל משפטים פרשה א'.
33. This is evidenced by the text in Bava Metzia 31a that פעמים שאחה מתעלם, there are times when one can look away from seeing an Aveidah — for example — a Kohen in a cemetery or זקן ואינו לפי כבודו.
34. See Noam vol. 9 — Article by Rav C.D. Kaplin.
35. See Mishne Halachot by Rav Menashe Klein, vol. V.
See also Rav Ovadiah Yosef, "Yechaveh Daas" vol. IV #64 in footnote.

IV

With the establishment of Medinat Yisrael a new, and painful, development occurred in the halacha of Arkhaoth. The question arose as to the status of the secular court system in Israel vis-a-vis the halacha of Arkhaoth.

The judicial system, as indeed the political system in Israel is a secular one. Israeli courts rule, hear litigation, adjudicate issues on the basis of laws passed in the Knesset, the Israeli parliament. Indeed the whole authority of the courts is derived from the Knesset — a secular institution. Though at times the civil law passed in the Knesset incorporates and makes reference to halachic precedent, the law itself is laic and secular in character. The state is, alas, a מדינת החוק and not a מדינת ההלכה. Hence, the issue arises whether litigants who voluntarily choose an Israeli secular court to settle an issue, before having gone to a Beth Din, transgress the prohibition against going to Arkhaoth.

Much of the question depends on the understanding of the system known as ערכאות שבסוריא "The courts of Syria."[36] The Gemara speaks of a system of Batei Din that are clearly not on par with others. Regarding the text in the Mishna which speaks of one judge disqualifying another, "זה פוסל דיינו של זה וזה פוסל דיינו של זה", the Gemara asks how one can disqualify a Dayan. The Gemara answers that this refers to "Syrian courts" and in further discussion it becomes clear that these judges were appointed and accepted by the community. These courts, unlike other Batei Din, cannot impose their authority without prior acceptance by both parties. When both parties, however, do accept them, their decision is binding.

On what basis do ערכאות שבסוריא make their decision? Rashi clearly states that they are not knowledgeable in Dinei Torah.[37] Although not knowledgeable in Dinei Torah and, apparently basing their decision on common sense, common custom, and

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36. סנהדרין כ"ג ע"א.
37. שם ד.ה. בערכאות שבסוריא.

customary practice, these courts do not carry the stigma of Arkhaoth Shel Nochrim and the issur of Arkhaoth does not apply to them. Likewise, the argument is being put forward, the secular courts in Israel, though not based on Torah law, ought not be worse than the ערכאות שבסוריא.[38]

The Chazon Ish, however, points to one fundamental and important distinction.[39]

The ערכאות שבסוריא, argues the Chazon Ish, are comprised of people who are illiterate in Torah. Hence they judge not according to the rules of the halacha but rather according to what we call common sense, the prevailing norms of equity, fairness and justice. Indeed the halacha recognizes instances where, because of the dearth of qualified Dayanim, people who are not learned in Torah are appointed as Dayanim by the community. These non-qualified Dayanim, argues Chazon Ish, basing himself on a Rashba,[40] are better than Arkhaoth. Arkhaoth Shebsuryia then, are non-qualified Dayanim, who, in the absence of people who know Torah law, judge by general standards of fairness and equity. But for the Jewish polity to rule, to legislate, to make "new" law that is not Torah law and for Jewish judges to interpret and adjudicate this law is something else. For the Jewish judicial system, for the political and legal system as such to leave aside the Torah law and make its own law is indeed the issur of Arkhaoth. Arkhaoth Shel Nochrim are prohibited because by going there we show their value and their worth. How? By contrast. We leave our own Dayanim and Dinim and follow the system practiced by others. That is the Chilul Hashem that both Rambam and Shulchan Aruch refer to in their strictures against going to Arkhaoth. In other words, when two Jews make a choice of Arkhaoth over a Beth Din, preferring the laws of others to the laws of Torah, then there is

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38. For a powerful and eloquent statement of this position see: Menachem Alon *Hamishpat Haivri*, and in particular page 22, note 80 and page 121-122 note 174.

39. חזון איש סנהדרין סי' ט"ז ס"ק ד.

40. מובא בב"י חו"מ סי' ח.

Chilul Hashem; halachically, that is expressed in the issur of Arkhaoth. Certainly, therefore, when the Jewish state judicial system rules and adjudicates formally and officially, without regard to halacha, the result is Chilul Hashem. Here too, the halachic response to this choice of other law above Torah law results in the issur of Arkhaoth.

Actually, all the points made by Rashba[41] can easily be applied to the secular court system in Israel. The Rashba can be paraphrased: "Why do we need all the holy and sanctified Sefarim by Rebbi, Ravina and Rav Ashi? Let them teach their children the secular laws in Israel ... heaven forfend! This should not happen ..."

The essence of the issur of Arkhaoth, the prohibition of resorting to a secular judicial system, is the deinstitutionalization of Torah law and its subsequent nullification by atrophy and neglect, through the conscious choice of criteria other than Torah law. That this "other law" is made by Jews in the Knesset and interpreted by Jews in the Israeli judicial system does not alter the fact that a conscious choice was made to forego Torah law for other law. That is the issur of Arkhaoth.[42]

Actually, there is one opinion that defines the concept of Arkhaoth Shebsuryia somewhat differently. The Meiri states that Arkhaoth Shebsuryia.

„דנין לאומד הדעת ובחקים ונימוסים"[42a]

In other words, they follow not only custom and common sense, but also positive law and legislation which is not Toraitic in character. Nevertheless, the issur of Arkhaoth does not apply. Why then would the issur of Arkhaoth apply to the Israeli secular court system?[43] The difference seems to be quite simple. Arkhaoth

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41. See the quotes in section I of this article.
42. Rav Ovadiah Yosef in Yechave Daas, op.cit., quotes the opinion of Harav Herzog and Harav T.P. Frank as holding too, that the secular courts in Israel are Arkhaoth. For another interpretation, though, of Rav Herzog's position see Alon, op.cit.

42a. עיי' מאירי לסנהדרין דף כג, הוצאת הרי א. סופר.

43. Alon op.cit.

Shebsuryia are not instituted for the peopie as a whole. When there is no recourse available but to judge by אומד הדעת or חקום ונומוסים, then, the Meiri states, the issur of having secular courts does not apply. But for the Jewish state to create institutions — legislative and judicial — that will, heaven forfend, lead to the atrophy and neglect of halachic institutions — that certainly would fall within the scope of the prohibition against Arkhaoth. If you will, it is analogous to the position of Tosafot,[44] that Rabbis should not make regulations which, though in themselves may be justified, uproot mitzvot commanded by the Torah.

The Torah teaches: "And thou shalt not turn aside from any of the words which I command you this day (to the) right, or (to the) left, to go after gods to serve them."[45]

Sforno comments:

"שלא ישנו את מצות האל יתברך בפרט בענין המשפט"

"They should not change the commands of G-d and particularly in matters of Mishpat (judgement)."

He further attributes the length of Galuth to this neglect of Mishpat and to Jews declining to be ruled by the Dinei Torah but rather going to Arkhaoth.

We can add another nuance to the issur of going to Arkhaoth:

"כל דיין שדן דין אמת לאמיתו נעשה שותף לקב"ה במעשה בראשית" The simple translation of this Rabbinic dictum is that the judge who judges truly becomes a partner to G-d in the act of creation. But what is the expression Emes L'Amiso? Is there a truth that is not L'Amiso?

There are two kinds of truth. There exists a relative truth and there exists an absolute truth. For example, a person is sentenced to six months in jail for stealing. The sentence is, of course, a true sentence. Truth, that is, based on the law. It is legally a true

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44. תוס' גיטין דף לו, ד.ה. מיאיכא.
45. Deuteronomy 28:14.

sentence. But what is the relationship between the six months in jail and the crime? Why not three months or two years? Obviously, the law that is based on social and other human conditions can, and certainly will, change with changing conditions. This law is true. But it is not אמת לאמיתו.

Torah is otherwise. Torah law is total, whole and absolute. The punishment and the crime, the total outcome, all are fully and totally integrated. It is not a relative but an absolute truth.[46] When we will reinstitute this absolute and totally true Torah law, the Ribbono Shel Olam will fulfill His promise in the words of the Midrash, "If you will judge without resorting to the nations of the world, I will build for you the Beth Hamikdash; and the Sanhedrin will sit in there as it is written, 'And I will return your judges as of yore ...' and further ... do justice and righteousness, for My salvation is soon in coming."[47]

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46. See L'Torah Ulmoadim, by Rav S.I. Zevin P'Vayishlach.
47. Midrash Tanchuma, Mishpatim, quoted by Torah Sheleimah, op.cit.

Chodosh: Is It Applicable in America?

Rabbi Alfred S. Cohen

The spectacle of hundreds of disgruntled farmers driving their tractors down the avenues of Washington, D.C., one spring morning, focused national attention suddenly on the agricultural problems of this country. Having viewed the farmers' protest on TV, millions of Americans began to hear and read about their complaints — grain reserves, surplus crops, wheat exports, and other unfamiliar terms were aired for public scrutiny.

The average citizen observing the tumult had a purely pragmatic interest in it — how much will all this raise our bread prices, can we expect shortages, etc. After a brief flurry of news media interest and a number of Congressional meetings, the farmers were temporarily placated, and their concerns ceased to capture any attention. Americans once again forgot the farmer.

The Jew, however, has always had to have an intimate understanding of the agricultural lifestyle and a sympathy for and interest in its problems and their solutions. Numerous mitzvot in the Torah derive from the agricultural cycles of various crops, and our religious Festivals also have an agricultural significance. It probably strikes one as incongruous to learn that medieval Rabbis living in the mercantile atmosphere of the European Diaspora

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concerned themselves with the study of agricultural mitzvot, or that even modern Talmudic scholars in America's highly industrialized cities are equally involved in such studies. Nevertheless, this has always been the case.

At this particular moment in American Jewish development, there is one agriculturally-related mitzva in particular — Chodosh — which is experiencing a dramatic revival. The mitzva of Chodosh is the subject of this paper, and it is our intent to clarify first of all what the mitzva is; furthermore, we will seek to determine whether this commandment, which has been virtually forgotten and neglected for millenia, ought to become part of the daily lifestyle of the observant Jew once again.

In the Torah, we find the directives for Chodosh in Leviticus 23:14, whereby it is forbidden to eat bread or grain derivatives "until this very selfsame day, until you bring the offering to your G-d; this is an eternal statute for all your generations in all your dwelling places." The Torah prohibits using grain prior to the bringing of the Omer offering in the Beit Hamikdash, which took place on the second day of Passover. Applying to wheat, barley, rye, oats, and spelt,[1] this rule meant that any grain of these species which had grown at any time during the past year (since the previous Passover) was "Chodosh" — "new" — and could not be used until the Omer sacrifice was brought. After the Beit Hamikdash was destroyed, our Rabbis ruled that since it was no longer possible to bring the Omer sacrifice, the *day* when it was supposed to be offered [the second day of Passover] would hereafter have the same effect of permitting the use of new grain as the offering had previously had.[2]

Almost two thousand years have passed since that time and since the period when most Jews were involved in agricultural pursuits. Thus, the mitzva of Chodosh has for very long ceased to have the immediacy or the wide practical application which it once had. Nevertheless, Chodosh has had a surprisingly controversial

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1. חלה, פרק א:א.
2. מנחות סח.

history. Some mitzvot or customs come down through the ages with virtually not a murmur being raised against them — how many serious attacks have there been on the practice of Shiva, for example? Yet, both before and even after the destruction of the Temple in 70 C.E., Chodosh has aroused strongly partisan clashes and sharp invective, even between scholars.

In the bitter animosity which divided the Sadducee and Pharisee parties in the later centuries of the Second Temple, Chodosh was one of the areas of strong disagreement. Challenging the supremacy of the traditional Rabbis in determining the mitzvot, the Sadducees argued with them about the Omer offering. This led the Rabbis (the Pharisees) to rule that even on the Sabbath, three people might go out to the fields to cut the grain for the Omer. Although one person could have cut the grain by himself, and it was not necessary to allow more people to transgress the Sabbath by cutting grain, yet in order to underscore the major importance of the Omer sacrifice and the subsequent proper observance of Chodosh, the Rabbis sent three men out to the fields.[3]

That was two thousands years ago, but the controversy over Chodosh has continued unabated over all those centuries. Only two hundred years ago, the gentle and saintly Rabbi Eliyahu, Gaon of Vilna, wrote a very strong criticism of those who took the mitzva of Chodosh lightly. In an uncharacteristically personal attack, the Gaon wrote about the Behag's leniency on this issue: "His words are simply a total error and not even worthy of comment ... he would have been wiser had he remained silent!" Similarly, the Gaon characterised another Rabbi's lenient ruling on Chodosh as "this folly."[4]

The Vilna Gaon notwithstanding, the mitzva of Chodosh has for centuries remained in the realm of scholarly controversy, and even if there were individuals who took care not to eat Chodosh, they were but a handful; the overwhelming majority of religious

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3. משנה מנחות: פרק י, משנה ג.
4. תורה תמימה ויקרא כג אות מ"ח.
גר"א יורה דעה רצ"ג ס"ק ב.

Jews not only did not observe, they did not even know about the concept of Chodosh. The great Rabbinic guide, Rabbi Moshe Isserles (Ramo), termed observance of Chodosh as a *"chumro be'almo"*,[5] an uncalled-for strictness, and taught that even those people who wished to be careful with Chodosh should not teach others to do likewise.

In the past few years, however, that situation of "benign neglect" has altered dramatically. Currently, there are "Chodosh Clubs" being formed in high schools, printed guides in English are available to those who are interested, and bakeries in Brooklyn, Monsey, Chicago, Los Angeles, and Detroit now advertise that they carry baked goods in accordance with the laws of Chodosh. Housewives who once checked box labels for ingredients or price have now learned to decipher manufacturers' product codes, to determine if the box of cookies or cereal contains flour that might be Chodosh!*

We cannot lightly dismiss all this activity as a passing fad, nor as a fringe movement attracting religious fanatics, for some of the most illustrious names in Jewish law and learning in America today are involved in the new movement to re-awaken Jews to an almost forgotten mitzva. As more and more yeshiva-educated young people and other observant Jews undertake the new lifestyle, it is the responsibility of all thinking Jews to become familiar, at the very least, with the background, demands, and halachic status of this controversial command.

It is our purpose herein to explore the concept of Chodosh and to trace its history in Rabbinic lore over the centuries so that we may appreciate what the arguments are all about. In order to resolve the question of whether the requirements of Chodosh must be observed in America today, one must first determine if the

*For the curious, here is one code, as explained in a Chodosh Guide: On General Mills' products, for example, D81541 can be read as follows: the first letter represents the month, with "A" for June, "B" — July, etc.: 8 — for 1978; 15 — day of the month: 41 — the particular plant where this container was packed.

5. שו"ת רמ"א קל"ב and באר היטב אורח חיים ת"צ אות כ"ד.
רמ"א יורה דעה רצ"ג.

mitzva of Chodosh was ever intended for grains grown outside the Land of Israel; furthermore, it is necessary to inquire if the laws of Chodosh apply to the grain of a non-Jew. In addition to these two *halachic* facets of the question, there is a starkly *practical* feature that we must also probe — what are the realities of grain production in America today? Are there any grain or cereal products available to the consumer which would fall into the category of "Chodosh"? If there is no possibility of "Chodosh" grains being sold on the market, then we need probe no further. Variations in climate and agricultural patterns in different countries may make "Chodosh" a moot question in America.

The prohibition of Chodosh, as we have seen, applies only to the "new" grain each year; i.e., that grain which grew after the Omer offering had been brought. Now that it is no longer possible to bring the Omer sacrifice in the Temple, our Rabbis have ruled that the *day* on which it would have been brought to the Temple (the 16th day of Nissan, second day of Passover, and outside the Land of Israel, the 17th day of Nissan) has the same efficacy as the sacrifice used to have. That means that any grain which grew during the year or which has become rooted to the ground at least three days[6] before the Omer day, will be permissible for use as soon as the Omer day has passed. But any grain which grew at any time thereafter, cannot be eaten until the next Omer-offering day (the next Passover).

In order to determine the actual practical implications of this halacha in America today, one would have to find out when each kind of grain is planted, when it is harvested, and far more to the point — when it is brought to market for commercial use. With food production having become "agribusiness", a multi-million dollar undertaking interlaced with many government programs aimed at manipulating the grain price in a variety of ways, it is not

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6. According to the Trumat Hadeshen קצ"א. However, many later Rabbis seriously questioned this ruling, contending that two-weeks' rooting is needed. רע"א גר"א. Aruch HaShulchan ס"ק ז,ח,ט followed the 3-day rule, as did the ש"ך. For those grains planted in early spring, this ruling would have great significance.

always a simple matter to trace the crops from the farm to the marketplace. Grain production is such a huge undertaking in this country that it is spread over millions of acres of farmland in many states. However, the Department of Agriculture publishes a wealth of information about its national grain policies which makes it theoretically possible, with a measure of diligence, to trace the "career" of a variety of grain species and discover whether indeed the flour or cereals produced for sale contain "Chodosh".

The U.S. Dept. of Agriculture charts which follow are intended to illustrate how one could determine if there is a possibility of Chodosh in a consumer product. The charts indicate the major planting and harvesting seasons of the five grain species in America in those states where the majority of the crops are raised, which are typical of planting and harvesting patterns throughout the country. The value of this data is that if we can be reasonably certain that a crop was planted in February, for example, but does not come to harvest until May, then we know that there is no possibility of its every being Chodosh — for it was rooted before Passover, and as soon as Passover passed, it became permitted (i.e., "old") grain.

However, we must note that the Jewish calendar does not always coincide with the secular one, and the date of Passover will fluctuate relative to the planting or harvesting season (Passover can start as early as March 27 or as late as April 25). This means that in some years there will be more of a problem about Chodosh than in others. For example, spring wheat is planted in South Dakota starting April 1st. If Passover is very late that year, there is a good chance that the wheat will have become rooted by the time the crucial Omer day (second day of Passover) arrives. However, if Passover was very early that year, then without doubt all the spring wheat of that year would be Chodosh until the following Passover.

Further complicating the picture are the vagaries of weather: an exceptionally icy winter or wet spring obviously affect the planting and harvesting of crops.

RYE

Rye is usually planted in the fall and harvested during the late spring and early summer months. Most of the rye is produced in the Northern and Central Plains, with four states having 54 percent of the harvested acreage.

State	Usual Planting Dates	Usual Harvesting Dates
North Dakota	Sept. 1 — Oct. 1	July 25 — Aug. 20
South Dakota	Sept. 1 — Oct. 1	July 15 — Aug. 10
Nebraska	Aug. 15 — Sept. 25	July 1 — Aug. 1

The above information shows that rye flour in America will always be "yoshon", "old", and never fall within the Chodosh class. However, in order to give a loaf of rye bread better consistency in the baking, there is an admixture of 25 - 30% of spring wheat. Since the blending of grains is done prior to grinding the kernels into flour, and the majority of the flour is of rye derivation, the addition of other grains would have no significance *(batail berov).*[7] This same principle would apply whenever the majority of the mixture is known to come from grains rooted prior to Passover.

BARLEY

Nearly 10 million acres of barley were harvested in 1969, and yields have been increasing steadily. The major barley-producing states are North Dakota, California and Montana, which account for 50% of the national acreage. Only minor acreages are grown in the East and South.

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7. טור יורה דעה בשם אביו.
ערוך השלחן ס"ק כ"ח.
חכמת אדם כלל נ"ג ס' כח.
מגן אברהם אורח חיים תפ"ט ס"ק י"ז.
For discussion of why the crops are not considered דבר שיש לו מתירין and are not *batel* at all, see באר היטב יורה דעה רצ"ג אות ד. Furthermore, since all kernels are soaked in water and many show signs of fermenting, it would not be considered יש לו מתירין.

State	Usual Planting Dates	Usual Harvesting Dates
North Dakota	April 20 — June 1	August 10 — Sept. 5
Montana	April 10 — May 30	Aug. 5 — Sept. 15

Although most barley is fed to livestock, one-fourth of the crop is used for malting. Barley is used in soups and other foods, but most barley which is consumed in this country by humans is first processed into malt, and it is used in the production of beer. Old barley seems to produce better malt than new barley, and therefore it predominates in the malt mixture.

Nevertheless, a perusal of the above chart shows clearly that virtually all the barley *grown* in this country falls into the category of Chodosh. That does not mean that all of the barley *used* is in that category, but the question needs clarification, especially for the consumption of beer.[8]

OATS

Oats, the second major small grain produced in the United States, is an important feed for livestock. Minnesota and North Dakota are the leading producing states, but it is also grown extensively throughout the Corn Belt, Great Lakes States, and the Northern Plains. As is evident from the information below, most oats grown in the country would usually be considered Chodosh.

State	Usual Planting Dates	Usual Harvesting Dates
Wisconsin	April 15 — May 5	July 25 — Aug. 25
Minnesota	April 10 — May 25	July 25 — Sept. 10
Iowa	April 5 — May 1	July 15 — Aug. 15
North Dakota	April 15 — June 1	Aug. 5 — Sept. 5
South Dakota	April 5 — May 15	July 15 — Aug. 15

SPRING WHEAT

Spring wheat accounts for about 23 percent of total U.S.

8. Whether Chodosh would apply at all to beer is in itself a subject of controversy. To see whether the laws of Chodosh apply to grain extracts, see ש"ך ס"ק ו and ערוך השולחן ס"ק כ"ג.

wheat acreage. Durum wheat, used in making macaroni and spaghetti, represents nearly one-third of the spring wheat crop. Spring wheat, as indicated below, is planted in the late spring and harvested in the summer. Therefore, virtually all spring wheat is "Chodosh" until the following Passover.

State	Usual Planting Dates	Usual Harvesting Dates
DURUM		
North Dakota	April 15 — June 1	August 10 — Sept. 15
OTHER SPRING WHEAT		
North Dakota	April 15 — May 25	Aug. 5 — Sept. 10
South Dakota	April 1 — May 5	July 20 — Aug. 20
Montana	April 10 — May 25	Aug. 5 — Sept. 15

WINTER WHEAT

Winter wheat is widely grown throughout the United States, with the heaviest concentration in the central and southern parts of the Great Plains. Winter wheat is planted in the fall of the year, and harvested in late spring and summer.

State	Usual Planting Dates	Usual Harvesting Dates
Nebraska	Aug. 15 — Oct. 5	July 1 — July 30
Kansas	Sept. 10 — Oct. 25	June 15 — July 15
Oklahoma	Sept. 5 — Oct. 25	June 5 — June 30
Texas	Sept. 1 — Oct. 30	May 20 — July 5
Montana	Aug. 25 — Oct. 15	July 25 — Sept. 5
Colorado	Aug. 20 — Aug. 10	June 25 — Sept. 5

The above information shows clearly that winter wheat is never "new", since it is always well rooted before Passover but not harvested until after the Omer day has passed.

However, wheat still presents practical problems in the observance of the laws of Chodosh, for the various varieties of wheat are not used separately. Rather, spring wheat flour and winter wheat flours are blended prior to use. The proportion of winter to spring wheat in the blend is dependent on a number of factors — economic as well as practical. A different blend is used

for baking breads than is desirable for cakes and cookies, and every bakery has its own preferred combination. Thus, wheat products cannot be separated into disparate spring wheat or winter wheat derivatives.

Perusal of the above charts indicates that agricultural schedules in this country do indeed result in "Chodosh" grains each year. However, for each specie there is a "safe" period, when the grain product cannot possibly be considered "Chodosh". For example, since durum wheat is harvested in the middle and late summer, and it does take a few weeks, at the least, for the wheat to be translated into macaroni on the grocery shelves, then a person who wants to be careful about consuming Chodosh products would still not have to worry about what macaroni he should use until around September. From September until Passover, the noodle products on the supermarket shelves could presumably contain "new" grain.

However, there are other factors complicating the picture. As the charts show, many states are involved in the huge grain crops which are produced yearly in this country. Consequently, the political influence of the grain-producing states is extremely powerful and has won for the farmers many benefits, some of which are most relevant for our study. Since the end of World War II, the United States Government has been building up a huge reserve of grain. The Farm Storage Facilities program has been in existence since 1949, and has a capacity now of over 2.9 billion bushels. There is also a Grain Reserve Program, whose objective is to insulate millions of bushels of grain from the marketplace, in order to maintain a certain price level. The producers (farmers) hold their crops in reserve, but they may rotate their reserve stocks so as to maintain quality.[9]

In consequence of these national agricultural policies, many of the grains products sold in this country are not necessarily from the current crop. However, whether new or old grain is used is a

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9. Data issued by the United States Department of Agriculture.

variable for each manufacturer, and has to be checked by the Chodosh-conscious consumer.

Let us now return to our consideration of the halachic status of Chodosh. In questioning whether Jews have indeed been remiss over the centuries in their virtual disregard of the strictures of Chodosh, we will first have to determine whether the law of Chodosh applies everywhere in the world, or only in the Holy Land. For the answer to this fundamental question, we start with the Torah, wherein it is written "...this statute [of Chodosh] is forever, for your generations in all your dwelling places." Accepting the literal dictates of Scripture, the Mishna (in Orla, 3:9) rules that the law of Chodosh applies even outside Israel. However, another Mishna (in Kiddushin 1:) records disagreement between the majority of the Rabbis, who said that Chodosh does not apply outside the Land, and Rabbi Elazar, who said that it does. In the Talmudic debate following the Mishna, (Kiddushin 37a) the rationale is expounded. Albeit the verse says "in all your dwelling places", this is taken to mean that the mitzva of Chodosh becomes operative only after the conquest and division of the entire territory of Israel from the Canaanites.

Other reasons have also been offered for the position that Chodosh does not apply outside Israel. "In all your dwelling places" is explained as teaching that it is forbidden to eat the new grain which was grown in Israel, even if one takes it outside the land of Israel. New grain of Israel is forbidden in whatever places in the world a Jew may live.[10]

Yet another Rabbinic view is that the Torah's command regarding Chodosh never was intended to apply to the grain of lands other than the Holy Land; however, the Rabbis of later generations extended that ban to other lands. Consequently, if there is any prohibition at all concerning the eating of "new" grains, it is of rabbinic and not biblical origin, and this would have important ramifications as far as the practical observance of the mitzva, as we shall discuss later on.

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10. קידושין ל"ח.

However, to return for the moment to the question of whether the laws of Chodosh are in effect today, the resolution of this question would not seem at first to constitute a major problem. In Jewish law, there are traditional determinants regarding Talmudic debates. Specifically, the rule is "when an individual expresses an opinion [in the Talmud] and a majority opinion is expressed, the halacha is according to the majority." Thus, when Rabbi Elazar disagreed with the Mishnaic teaching, his opinion that Chodosh does indeed apply outside Israel would not be the accepted view, for the majority dissented. However, we are left with the dictum of the Mishna in Orla, wherein it is stated that Chodosh *does* apply.[11] Obviously, the contradiction is a great puzzle. How do we reconcile the two opposing teachings? And what was the purpose of the Mishnaic editors in recording the two opposing views without indicating which of the equally authoritative dicta we should accept?

Predictably, the split between scholars concerning Chodosh has continued unabated through the centuries of classical Jewish jurisprudence. On the one hand, the 11th-century Torah giant, Rabbi Yitzhak Al-Fasi (Rif),[12] Rambam in the 12th century,[13] and Rabbenu Asher (Rosh)[14] in the 14th, ruled that Chodosh applies even outside Israel, and the author of the Code of Jewish Law, Rabbi Yosef Karo, did so rule in the Shulchan Aruch.[15] However, in the writings of the Tosafists[16] and in Sefer Hatrumot,[17] we find the other opinion dominating. In his critique of the Shulchan Aruch, Rabbi Moshe Isserles (Ramo) also disagreed with Rabbi Karo.[18]

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11. Although the general rule is that we accept the ruling of an "anonymous" Mishna (where the ruling is not attributed to a specific person) *(stam Mishna)*, here the "anonymous" Mishna is followed by a Mishna which records a controversy on that issue — סתם ואחר כך מחלוקת.
12. קידושין ל"ח.
13. הלכות מאכלות אסורות, פרק י.
14. תשובות הראש כלל ב'.
15. ש"ע יורה דעה רצ"ג ס' ב.
16. קידושין שם.
17. שם.
18. יורה דעה שם.

Since the Ramo is one of the major Rabbis whom Ashkenazic Jewry follows, it is proper to note his reasoning: The Shulchan Aruch has it that "one is forbidden to eat the new crops even today, until the 18th day of Nissan, and in Israel, until the beginning of the 17th". On that ruling, Ramo adds, "However, actually all grains are permitted [to be eaten, although they may be "new"], by virtue of the fact that there exists about this a "double doubt"[19] *[sfek sfeka]* — perhaps the grain is from last year's crop, and perhaps it took root in the ground prior to Passover. However, if one is certain that the grains are imported [into that place], one should be careful not to eat." Nevertheless, concludes Ramo, even if one is sure that most of the flour used is definitely from the current crop, "do not tell the people about this, for since it is not possible for the public to live [in accordance with this law], it is preferable for them to err unwittingly rather than to err intentionally.[20]

Although Jewish law is characteristically very precise and exacting, there exists within our tradition an underlying understanding of human nature. Sometimes a law has become so difficult in its demands that the majority of observant Jews find that, even with the best intentions, they are unable to meet the requirements of halacha. In that case, there is no point in insisting that they follow rules which they find overwhelmingly difficult. In such cases our Rabbis often ruled as did the Ramo in this instance, that it is better to follow the lenient opinion that Chodosh does not apply, even if that lenient opinion is the minority one.[21] As long as there are *some* outstanding halachic authorities who rule leniently, let us rely on them, reasoned the Ramo, so as not to put the majority of sincerely pious Jews into the position of having to flout

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19. But Rabbi Akiva Eger (Ibid.) is puzzled how this is a "double doubt." He contends that there exists only one doubt — were the crops rooted prior to Passover — or not?

20. רמ"א ש"ע יורה דעה רצג.

21. ט"ז ס"ק ד' based on the Gemara נדה ט. The Taz concludes that wherever the Talmud has given no clearcut guideline for a decision, then if the need arises, one may rely on the minority view. In Gittin 19 we find the same idea. However, the Vilna Gaon (שם, ס"ק ב) disagrees with Taz.

the law, which they would have to do since they cannot meet its demands.

Furthermore, we may also rely on the Rabbinic view that the ancient Sages only legislated Chodosh outside Israel, to apply to *neighboring* countries. According to this view, since actually Chodosh applies only to Israel but our Rabbis were afraid that some "new" Israeli grain might be taken to nearby countries, they instituted the ban there as well. However, since there was no fear that one would bring Israeli grain to America, the ban does not apply here at all.[21a]

This leads us to an especially relevant feature of the Chodosh controversy which has to be resolved next: Did the Torah forbid only "new" grain of a Jew, or "new" grain anywhere in the world? If the Torah intended only to prohibit Jews from eating from their crops prior to offering the Omer, then the entire question outside Israel today would be merely a Talmudic polemic, with only the slightest relevance to us in America. Thus, it is crucial to determine the halachic requirements in this regard.

Surprisingly, the Babylonian Talmud is silent on that question. After the Talmudic period, Rabbinic opinions have been sharply divided. A major medieval scholar, the Meiri,[22] cites the Palestinian Talmud to support his contention that the prohibition of Chodosh does apply to any grain, even that of a non-Jew. Reasoning along the same lines, the Tosafists and the Mordechai,[22a] as well as many other illustrious scholars, have ruled that Chodosh applies to all grains, and as a matter of fact, it is the approach accepted by Rabbi Yosef Karo in the Shulchan Aruch: "It is applicable both to crops owned by a Jew and a non-Jew alike."[23]

However, the opposite point of view — that Chodosh does not

21a. ערוך השלחן רצג ס"ק כ'.
22. סוף פסחים.
22a. קדושין לח.
23. יורה דעה רצג.

refer to the crops of Gentiles - has a compelling rationale, and the Meiri felt obliged to engage in an elaborate refutation of that view. Among those great scholars who held the lenient view was Rabbi Joel Sirkes (Bach),[24] who lived in Poland during the 17th century, and his lenient ruling has become the basis for later Rabbinic writers who exempted grains of Gentiles from the limitations of Chodosh. Rabbi Sirkes based his response on a text in the Babylonian Talmud, and his logic is that the law differentiates between crops raised in the Land of Israel and those outside. In Israel, any grain grown, whether by a Jew or non-Jew, would fall under the prohibition of Chodosh; however he presumes that outside the Land the prohibition applies only to grains of a Jew.

In reviewing the various aspects of Chodosh, we are struck by the wide range of halachic opinion regarding its religious requirements. Since ancient times, the law has been surrounded by controversy, and adherence to its dictates has been difficult and surrounded by conjecture and disagreement. It is not easy to know what is right to do; persons of good will may find themselves sincerely divided as to which path to follow.

Notwithstanding the impressive halachic authorities who are lenient on the question of Chodosh, it is an undeniable fact that a greater number of halachic authorities ruled that Chodosh does apply, in all times and in all places. Moreover, this latter group includes those whose opinions are generally decisive in fixing normative Jewish law. It is therefore a stunning reality to realize that through all the centuries of our Diaspora, despite the weight of halachic opinion, the majority of observant Jews have not adhered to the strict requirements of the law.

This footnote to the Chodosh polemic — the fact that the masses of pious Jews have neglected the mitzva — can afford us a fascinating insight into the workings of Jewish law, as well as illustrate the high regard in which our Torah always held the Jewish people. In the Gemara, we often find the expression "let us

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24. טור, יורה דעה רצג ס"ק ג'.

go and see what the people are doing",[25] because in addition to fine points of logic and precedent, Jewish leaders also have to take into account the customs and needs of the Jewish people.

Furthermore, even if at times individuals did stray from the Torah path, even then the Rabbis tried to find some justification, however so minor, to excuse their behavior. Sixty years ago in Europe, the Chafetz Chaim, who opposed Eruvim on halachic grounds, nevertheless did not berate those who erected them, but found excuses for them.[26]

A similar trend is evident in the Rabbinic writings on Chodosh; the Turei Zahav (Taz) writes, "We do see that the great majority of our sages are not careful about it [Chodosh] ... and therefore it seems to me that we must find merit in those who are lenient ..."[27] In the Aruch HaShulchan we find a similar approach: The author expresses his delight at the recent discovery of a famous medieval manufscript, the "Ohr Zarua", wherein that sage showed that the prohibition of Chodosh no longer applied. The Aruch HaShulchan was most gratified that by virtue of this leniency, "Therefore all of the Jewish homes are pure and their actions are in accordance with the law, and no violation is incurred."[28] In summary, we cite the writings of Rabbi Sirkes, the Bach:

> It is clearly the custom in our countries to be lenient, and even the Torah greats of the past, Rabbi Shachna and Rabbi Shlomo Luria (Maharshal) and their students did not prohibit [it], and used to drink the whiskey which was made from "new" grain. Only a few very pious individuals lately were careful about this prohibition. I myself, in my youth, when I learned Tractate Kiddushin some thirty years ago, took it upon myself to delve into this question, and I saw that it is not a clearcut halacha. I asked that Great

25. ברכות מ"ה.
26. The proper halachic term is "צורת הפתח".
27. יורה דעה רצג.
28. שם.

> Light, the Maharal of Prague about it, and I showed him what I had gleaned on this matter, and neither he nor the other sages to whom I showed [my conclusions that the law is lenient] could contradict my proofs ...

Within the past generation, American Jewry has witnessed a dramatic resurgence of Orthodoxy, and the trend shows no sign of waning. On the contrary, more and more young people choose to be more strict in their observance of Jewish law than their parents were, and the phenomenon of Chodosh-observance is growing primarily among the young. While the willingness to take on more and more religious burdens is most laudable, it must be tempered with mature judgment. Those giving serious consideration to the prospect of accepting upon themselves and their families the strictures of Chodosh should take to heart the following caution of the Bach:

> No Torah leader ought to teach that it is forbidden [to eat Chodosh] in contradiction of the customs which Jews have adopted according to the teachings of great leaders of Israel to be lenient. Whoever wishes to be strict upon himself, that is an attribute of the extremely pious *(midat chasidut)*, and he should not teach others that they ought to do this, for there is no such command. And only such a person who is accustomed to other ascetic practices and is well-known as an exceptionally pious individual (Chasid) is permitted to practice this prohibition of Chodosh as well."[29]

I append this caution for it is an unhappy fact that extremism does have the potential for causing serious divisiveness. It would be tragic if young men and women, motivated by a desire to follow the Torah strictly, found that they could not eat in their parents' or in-laws' homes.[30] Or it might lead to parents becoming defensively

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29. טור, יורה דעה שם.

30. T'shuvot HaRamo קל"ב and Mishna Brura אורח חיים תפט אות מ"ח. Even if one

angry at young people who are "trying to show off." We certainly do not need any more sources of friction within the Jewish community; let us hope that this will not become one.

Rabbi Chaim Shmuelevitz, z'l, of the Mirrer Yeshiva gave a beautiful lecture once on *"m'sirat nefesh"*, the willingness to dedicate oneself wholly to a cause. Total dedication to a cause, while an admirable attribute, can easily be misguided. We find in the Gemara[31] stories about Sadducees, who were as rabidly fanatic in support of their beliefs (which were heretical) as were the Pharisees, whose beliefs were true to the Torah. Despite his *"m'sirat nefesh"*, the Sadducee was surely punished for his heresy. Why? Did he not believe truly in his cause? And how is one supposed to know whether his *"m'sirat nefesh"* is misdirected? Rabbi Chaim Shmuelevitz answered that the solution is simple. The verse says "Her ways (the Torah's) are pleasant, and all her paths are peace." A person can know if his cause is good and within the Torah way if it is an approach which increases peace and good fellowship between Jews. But if his beliefs lead to argument and enmity, to divisiveness and contempt, then he has gone wrong somewhere.[32] Let us take this lesson into our hearts.

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is careful not to eat Chodosh, he need not be concerned about using the utensils or eating other foods cooked in homes where Chodosh is not observed.

31. יומא י"ט.

32. קובץ שיחות, תשל"א, פ' נצבים.

Violating Shabbat for Suicide Emergency: A Halakhic Explication

By Rabbi Moshe Halevi Spero, MSSW, MA

The permissibility of transgressing Shabbat for the emergency management of threatened suicide concerns physicians, mental health professionals, interns engaged in field placements or clerkships which require "on call" responsibilities even on Shabbat, and related service-providers such as emergency rescue squads, and so forth. Readers will already view with interest my raising this "problem" because of the apparently obvious halakhic response: since threatened suicide involves the probable termination of or serious injury to life (*sakanat nefashot)* then one may violate as necessary even biblical prohibitions, including Shabbat prohibitions.

While this problem can, in one sense, be resolved by appealing immediately to the halakhic decisors who in fact permit the transgression of Shabbat in order to save the life of a threatened suicide[1] — to be discussed below — it is actually a deceptively

1. Resp. *Helkat Yaakov,* vol. 1, no. 72; Resp. *Ziz Eliezer,* vol. 8, no. 15(4), vol. 9, no. 17(2):14, vol. 10, no. 25 (17):13; Resp. *Duda'ei ha-Sadeh,* no. 39; Resp.

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simple problem. Indeed, at least two authorities have ruled that one may *not* transgress Shabbat in order to save the life of an individual willfully intent on *ibud azmo* or self-destruction.[2] There would thus seem to be some kind of halakhic "problem" with the application of the standing principle *"pikuah nefesh doheh Shabbat"* to the case of *m'abed azmo le-da'at*, and this problem merits detailed examination.

I

An analysis of this problem begins with considering the talmudic debate whether one is permitted to personally transgress even a minor *isur* or injunction in order to save one's fellow from even a major transgression. The search for a definitive principle is discussed regarding the case of an individual who placed dough in an oven on Shabbat, either by accident (*shogeg*) or intentionally (*meizid*).[3] The Talmud states that as long as the dough has not yet formed a crust (indicating the completion of *melakhah*) the individual himself may remove the dough from the oven. This permission is granted in order that, in the case of *shogeg*, he may not be required to offer a *korban hatat*, or, in the case of *meizid*, that he not incur the grave penalty of *skilah* (stoning). However, bystanders are not permitted to remove the dough, establishing the principle that one is not allowed to transgress in the effort to prevent one's fellow from transgression.

Tosafot addends two qualifications to this principle in the effort to resolve an apparent contradiction between the above ruling and the law concerning freeing a slave. For it would seem from the case of the slave, that one is indeed permitted to "transgress" for the sake of one's fellow. *Tosafot* responds that the

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Shoel u-Meishiv, M.K., vol. 3, no. 127; Resp. *Maharil* Diskin, vol. 1, no. 34; Resp. *Igrot Moshe* Y.D. vol. 3, no. 90 קינטרוס אחרון: see also *Shiurim Mezuyanim be-Halakhah: O.H.*, 201, no. 1 and in his *Kuntres Aharon*, vol. 2, no. 92(1), vol. 4, no. 201(1).

2. *Hakhmat Shlomo* 329:1, and according to the superficial interpretation of *Magen Avraham: O.H.*, 247, no. 14 (*"ve-al pi zeh somkhin ..."*), but cf. Resp. *Igrot Moshe: O.H.*, vol. 1, no. 127. See also note 14 below.

3. *Shab.* 3b-4a (R. Bibi bar Abayeh).

Talmud only forbids such transgressions when the other's potential transgression is the result of negligence (*p'shiah*), and hence only the potential transgressor himself may remove the dough from the oven, but no one else.[4] *Tosafot's* second qualification is that when a great *mizvah* (*mizvah rabba*) may be gained, one may transgress for another's sake — and thus the rabbis permitted the slave owner to free his slave so that the new freeman could fulfill the obligation to propogate (*p'ru u-re'vu*). The halakhic codes formally rule that one is permitted to incur a violation in order to prevent one's fellow from grave transgression so long as the transgression under focus has not been the result of *meizid* or *p'shiah*.[5]

The relevance of this discussion to our topic of threatened suicide on Shabbat is that the parasuicide, in contemplating and certainly in successfully carrying through suicide, transgresses the biblical prohibition against self-injury *(havalah)* and suicide. That is to say, the catastrophic path selected by this individual is inherently sinful, and is presumably the result of "ethical negligence" or willful disregard for halakhah. Thus, applying *Tosafot's* first qualification, it would appear that one is not permitted to transgress in order to save persons from even suicide inasmuch as this is a consequence of their own *p'shiah*! On the other hand, the implication of *Tosafot's* second qualification is the opposite of the first: that in order to fulfill a *mizvah rabba* — *pikuah nefesh* in our case — one may surely transgress in order to redeem one's fellow. An important question, however, is whether *Tosafot's* second approach intended that even a *mizvah rabba* allows one to transgress in cases involving negligence? We shall return to this question.

A second major precedent relevant to the current problem concerns the permissibility of transgressing Shabbat in order to save an individual who is being compelled to commit sins or apostasy. Here, again, apparently contradictory rulings further elaborate the extent to which one may transgress Shabbat in order

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4. *Tos.*, s.v. *ve-khi*, *Shab.* 4a; see also *Arukh ha-Shulhan: O.H.* 254.
5. *SMaG*, Neg. 65; Rambam, *M.T. Hil. Shab.* 9:5; *Sh. A., O.H.* 254:6, and see *Mishnah Berurah*, no. 40.

to save one's fellow from iniquity. Rabbi Moshe Isserles, in his emendations to *Sh. A., O.H.* 328:10, citing *Bet Yosef,* rules that one may not violate Shabbat in order to prevent an individual from transgressing even a relatively major transgression. However, he also states in this location, "See [*O.H.*] 306 [:14]." At this second location, the law, in fact, states that one is obligated to save an individual captured by heathens who are intent on apostasizing the victim; and here, too, R. Isserles refers the reader "to [*O.H.*] 328." Various halakhic commentaries have suggested that there are actually two distinct applications involved in these problematic rulings. One may not violate Shabbat to redeem an individual who is being compelled to transgress a *single* transgression (*Sh. A., O.H.* 328), but one is obliged to transgress Shabbat to save someone who is danger of being compelled into apostasy for indefinite and possibly perpetual duration (*O.H.* 306.) Relevant, too, is that in this second application, one may violate (a) even biblical prohibitions, (b) even where there is merely a chance of success, (c) for any person (not just one's child as in the proof-case), and (d) even bystanders may do so.[6]

By analogy to this second ruling, parasuicide could be viewed as initiating "perpetual apostasy" in the ultimate sense, and thus Shabbat could be transgressed in order to save the individual. However, additional observations attend this tentative conclusion. (1) The *Mishnah Berurah,* commenting on the stricter application of *O.H.* 328, opines that when heathens are compelling the individual to transgress one of the three so-called cardinal sins — in which case there is reason to fear that the victim may be prepared to die rather than transgress — one may *("efshar")* be obligated to transgress in order to save the individual's *life.*[7] That is, in such a case one is not saving the victim from his transgression *per se* but rather from death. On the other hand, (2) according to many decisors, the lenient application of *O.H.* 306 does not apply to

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6. *TaZ* to *O.H.* 306, no. 5 and *Magen Avraham,* ad loc, no. 29; *Mishneh Berurah* at *O.H.* 306:14, no. 58; *Kaf ha-Hayim: O.H.* 306:14, no. 110; *Arukh ha-Shulhan: O.H.* 306:25.
7. No. 31; see also *Kaf ha-Hayim: O.H.* 306, no. 111, citing *Levush* and *Eliahu Rabba.*

potential transgression resulting from negligence,[8] although some have wondered whether one may at least transgress rabbinic prohibitions even in cases induced by negligence. Indeed, we shall see that others permit even bibilcal transgressions, *even* when negligence-induced, in order to redeem life.[9]

R. Moshe Feinstein, defending his ruling that one may in fact transgress Shabbat in order to prevent suicide, states that the stringency of *O.H.* 328 does not apply to *pikuah nefesh* even in cases where potential death is due to ethical negligence.[10] Indeed, with the problem of negligence in mind, R. Eliezer Waldenberg rules that as long as the parasuicide is currently in a state of actual *sakanah,* one may transgress even biblical prohibitions to save the *poshe'ah* or the *meizid.* However, if this individual's negligence resulted in his being merely a *holeh she-eyn bo sakanah* (e.g., he attempted suicide but was unsuccessful and sustained only minor injury), then one may not transgress even rabbinic prohibitions.[11]

II

It emerges at this point that an important factor in permitting transgression of Shabbat to save the life of a parasuicide is whether the *mizvah* of *pikuah nefesh* prevails over the general principle that one does not transgress in order to save another from transgressing as a consequence of *meizid* (sinful intent) or *p'shiah* (negligence)?

I mentioned that *Tosafot*'s qualification of this general principle suggested that any *mizvah rabba* such as *pikuah nefesh* would prevail, allowing one to transgress for the benefit of one's fellow. Yet, in the cases referred to by *Tosafot* there is also no evidence of wanton intent or negligence on the part of any party.

It seems, however, that there are two possible solutions to this problem: (1) to find precedent that *pikuah nefesh* does in fact

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8. See *Arukh ha-Shulhan: O.H.* 306: 25 who discusses the question without arriving at a conclusion, and Resp. *Shevut Yaakov,* vol. 1, no. 16.
9. Resp. *Nahalat Shevah,* no. 83.
10. Resp. *Igrot Moshe: Y.D.,* vol. 3, no. 90 (end).
11. Resp. *Ziz Eliezer,* vol. 8, no. 15(4), vol. 9, no. 17(2):14, vol. 10, no. 25(17):3.

apply even to negligently-induced *sakanah* (danger), and (2) to suggest that suicide is not necessarily an act of willful negligence or *meizid*.

A

Addressing the question of whether one can transgress Shabbat in order to save an individual who had willfully fled to convert to Islam, R. Shmuel ben David Halevi refers to a responsum of *Rashba* who in a similar case declined permission to transgress based on the "negligence" principle.[12] The author then cites *Bet Yosef* who ruled that if such an individual were *compelled* to apostasy, one must certainly transgress even Shabbat prohibitions, which again implies that if such catastrophe had been the result of negligence one would not have been permitted to transgress. R. Shmuel ben David then offers his own novelum to the effect that *Tosafot*'s second qualification *(mizvah rabba)* means that *pikuah nefesh* or *pikuah dat* in fact prevails over even negligence-induced *sakanah*. Although this ruling establishes an important precedent, it was rejected by Resp. *Shevut Yaakov*, while others would only permit transgressing rabbinic prohibitions in the case of negligence.[13] Nonetheless, applying R. Shmuel ben David's ruling to the present case, since suicide potentially involves *pikuah nefesh* and *pikuah dat*, it would be permissible to transgress Shabbat to save such an individual even when such *sakanah* is a consequence of *p'shiah* or *meizid*. This basic approach is accepted by R. Waldenberg (and others) who adds, as noted above, that when negligence is involved *and* there is no actual or probable *sakanah*, then one may not transgress even rabbinic prohibitions.[14]

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12. Resp. *Nahalat Shevah*, no. 83; *Rashba* cited in *Bet Yosef* to *Tur Sh.A., O.H.* 306.
13. vol. 1, no. 16.
14. see notes 1 and 13. Rabbi D.Z. Hoffmann (Resp. *Melamed le-Ho'il*, vol. 1, no. 61), dealing with a case of threatened suicide in peculiar circumstances, firmly maintains that *hilul Shabbat*, even *hilul Shabbat de-rabbonon*, cannot be allowed when the individual wantonly (*be-zadon*) puts his (in this case, her) life in danger. He cites for support Resp. *Yehudah Ya'aleh, E.H.*, no. 140 who did not permit a *haluzah* to marry a *cohen* even though she protested that without

R. Feinstein also suggests that *pikuah nefesh* prevails over negligence-induced *sakanah*.[15] In support of this opinion, R. Feinstein notes that although one is rabbinically forbidden from electing a journey or surgical procedure 3 days prior to Shabbat (since by so doing one initiates the possibility of *hilul Shabbat* either through the "pain" to be incurred or actions that will have to be performed on Shabbat itself[16]), the prohibition implies that *post facto*, we would of course transgress Shabbat if there were *sakanah* and even though this need to transgress Shabbat was negligence-induced.[17]

B

Offering a third perspective on this problem is an aside in a recent paper by R. Shlomo Y. Zevin. R. Zevin observes that the *Minhat Hinukh* rules that there is no obligation to save the life of the *ma'abed azmo le-da'at*, (parasuicide) which would also mean that one may certainly not transgress Shabbat for this purpose.[18] The reasoning is that since the parasuicide wantonly endangers his life, the obligation to save him is no different than in the law regarding one who willfully leaves his possessions in a place where

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such permission she would leave her faith. Hoffmann argues that Shabbat cannot be violated when "mere" threat to physical life is involved (however, cf. *Ikrei ha-Dinim: O.H.*, 10:22).

15. see note 12.

16. *Shab.* 19a; *Sh. A., O.H.* 248 (for exemptions from this rule, see Bleich, J. David, "Elective Surgery Prior to Shabbat," *Tradition* 17, no. 4 (1979): 94-97.

17. *Sh. A., O.H.* 248:4; see also Resp. *Maharam Galanti*, no. 110. Rabbi Feinstein interprets the words of *Magen Avraham (O.H.* 248, no. 14) as not referring to actual *sakanah*, for, as in R. Feinstein's view, we would certainly violate Shabbat in such cases. Rather, R. Gombiner means that there are some characteristically anxious persons who may be prone to perceive exaggerated danger during their journey three days prior to Shabbat, who might thereby put themselves into a position to have to transgress Shabbat unnecessarily. *Magen Avraham* warns only that this tendency must be checked, so that, given certain other conditions, even such anxious persons may embark upon travel 3 days prior to Shabbat.

18. *"Ha-Im Mutar Latet Reshut le-Aher li'Hbol Bo?"* in M. Hershler (ed.), *Halakhah ve-Refuah*, vol. 2 (1981): 96-97, regarding *Komez Minhah* to *Hinukh* 237.

these will surely become lost (*avedah mi-da'at*). In this case, as the Talmud and codes rule, the finder bears no obligation to return such properties.[19] In our case, since the parasuicide by his actions or expressed intentions has revealed that he considers his life forfeit, his fellows have no obligation to "restore him *to himself*" *(ve-ha-shevoto lo).*

Regarding the obligation to "not stand idly by the blood of your brother," which is the second halakhic rationale for saving life,[20] the Minhat Hinukh would appear to accept the strict interpretation of *"rey'ekha"* ("your fellow"); i.e., one is only obligated to save the life of a fellow Jew who acts as one ought to under Jewish law. And the parasuicide does not.

R. Zevin rejects this ruling, and states that while the parasuicide's behavior may not *obligate* others to save him, we may still be obligated to "draw him away from transgression" *(le-hafrisho me-isura).*[21] However, R. Zevin does not discuss what we now know to be an important question: since the focus according to R. Zevin's interpretation of the Minhat Hinukh is not to save life but to "avert transgression," does *this* obligation prevail when such transgression is negligence-induced? (Rabbi Zevin may hold that since this particular transgression may have irreversible consequences, we are in effect following *O.H.* 306, sparing the individual from *pikuah dat olamit*).

R. Zevin offers another approach which directly challenges the Minhat Hinukh's conceptualization of suicide as a case of *aveidah mi-da'at.* R. Zevin notes that the obligation to return lost property can only be suspended when there has been legal ownership in the first place that has subsequently been renounced. However, Judaism does not truly consider man the master of his body and soul, but rather a caretaker.[22] Thus, one cannot forfeit any

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19. (Although such property is not exactly *hefker,) B.M.* 25b; *BaH* to *Tur Sh. A., H.M.* 237; see also *SHaKH* to *Sh. A., H.M.* 261:3.
20. *Sanh.* 73a to Lev. 19:16.
21. see *Rashi,* s.v. *isura, B.K.* 28a; *Tos.* and *Rashi, Shab.* 3a; see also *Turei Even* in *Avnei Miluim* to *Hag.* 13a.
22. Ezek. 18:4, see also *Radbaz* to *M.T., Hil. Sanh.* 18:16.

property "rights" over one's body, soul, or health. From this perspective, even wanton disregard for life demonstrated by a parasuicide cannot suspend the obligation of bystanders to save him.[23]

Motivated in part by R. Zevin's approach, I would suggest further qualification of the view of Minhat Hinukh, drawing precisely from the analogy between parasuicide and the laws of *aveidah mi-da'at.* Not every instance of apparent disownership is regarded as *aveidah mi-da'at.* Specifically, the Talmud rules that the obligation "to return" is not suspended in the case of an owner who throws property from a roof in public domain, due to the following logic: since he assumes others know that there is a prohibition against unnecessary waste *(bal tash'hit),* he also assumes that others will realize that he does *not* intend to forfeit his rights of ownership.[24] Another explanation is offered by Rabbi Joseph Ber Soloveitchik of Brisk, who explains that in this case the owner is indicating through his actions that he for some reason actually wants the property *to be broken,* and hence others may not automatically presume that he had forfeited his rights to the disposed property.[25] The parasuicide, of course, can also be considered intent on damaging his body, and quite literally does not relinquish ownership of his body and health *until* he succeeds in destroying himself. Precisely up until this moment, too, do others sustain an obligation to save his life.

Indeed, the Talmud also rules that parents who heap clothing or property on a coffin about to be buried (so as to accompany the deceased) — which would ordinarily become forbidden to use as *tashmishei ha-met* — is not considered an instance of *aveidah mi-da'at.* In this illustration, the actions of parents are clearly the

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23. R. Zevin offers a brilliant interpretation of the term *edrosh* ("I will seek") in the passage upon which is derived the prohibition against self-destruction (Gen. 9:5). Generally, *poked* is the term utilized to indicate that God will "extract punishment" from transgressors, whereas the term *edrosh* suggests that the transgressor has abused something which is in fact not his.
24. *Rashi, B.K.* 26b; *Netivot Mishpat* 261, but cf. *Rosh.*
25. *Bet Halevi,* vol. 1, no. 24.

result of psychological anguish.[26] Here, too, others are obligated to return these properties to their owner (*"... ve-eyn alekha aveidah gedolah mi-zu"*). When suicide *qua* cry for help occurs in public or following an effort on the victim's part to reveal his intentions, and so forth, one's obligation to save life can be devolved from either Rabbi Soloveitchik's rationale or by comparison to the law of *ha-zorek mahmat za'aro*.

C

Throughout the preceding analysis, I have not challenged the assumption that the parasuicide is to be viewed as having either negligently or intentionally transgressed the ban against self-destruction. I would now suggest an alternative view that might obviate the need to pit the concepts of *pikuah nefesh* and *p'shiah* against each other. This approach is actually an amplification of the halakhic model of *ha-zorek mahamat za-aro* mentioned above.

First, one recalls that halakhah does not consider an act of self-destruction suicide *per se* unless there has been both a prior expression of suicidal intention as well as a linked witnessing of the suicidal act. Until suicide has occurred, we need not yet describe the penultimate behavior as suicide per se! Indeed, if there is any basis upon which to dispute a causal relationship between prior statements or intentions and subsequent acts of self-destructiveness, such acts are not considered *m'abed azmo le-da'at*.[27] Further, full warning is necessary in Jewish law before an act can be considered fully reprehensible or punishable.[28]

More important, it is well-known that many authorities have accepted in cases of alleged suicide that one may exert every effort to attribute such behavior on even the slightest grounds to antecedent states of psychological disorder or other compelling influences, thereby eliminating the critical element of *da'at*[29] In

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26. *Rashi, Sanh.* 48a; see also *Drishah* to *Tur Sh. A., H.M.* 261; see also *Sh. A., Y.D.* 349:3.
27. *Arukh ha-Shulhan: Y.D.* 345.
28. *Darkei Mosheh, Y.D.* 345, no. 3; also Resp. *Zapihit be-Devash,* no. 69 (p. 168a).
29. *Arukh ha-Shulhan, Y.D.* 345, nos. 4-5.

halakhic literature, the list of such antecedent states includes fear, panic, depression, excessive pain, confinement,[30] and drunkenness (and probably any delusional state).[31] Studies have also shown that the thinking processes of the parasuicide undergo a tendency toward concretization, and utilize one-sided, compellingly negativistic logic, making communication between the parasuicide and others particularly difficult.[32] This cognitive constriction might also be included as a "compelling" factor. This general approach is best expressed in the view ascribed to the *Rosh*, that self-destruction is by its very nature an act of psychological disorder or *za'ar* even in the absence of more dramatic indicators of mental illness.[33] (However, this view is considered to suffer questionable authorship).

Further leniency is provided by the view which presumes that perhaps the parasuicide has had second thoughts about his intentions and has recanted.[34] Armed with both of these traditions in this area of Jewish law, it can be suggested that the obligation to save the life of the parasuicide, even if it involves transgressing Shabbat, does not necessarily confront the principle which

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30. *Kol Bo al Aveilut*, vol. 1, p. 319-320; *Gesher ha-Hayim*, vol. 1, pp. 272-273; *Hidushei R. Akiba Eger*, Y.D. 345; *Shem Gedolim (Birkei Yosef)* 10:17, Resp. *Levushei Mordekhai: M.T.*, Y.D., no. 134; Resp. *Parashat Mordekhai*, nos. 25-26; *Sedai Hemed*, vol. 5, p. 54; cf. Resp. *Hayim She'al*, no. 46; see also Resp. *Even Shoham*, no 44. Also Resp. *Yaabia Omer* vol. II no. 24 and *Even Yaakov* no. 3 who state that suicide caused by *yirah* or *za'rot rabot* is still considered *le-da'at* unless the "fear" in question was in the context of forced apostasy.
31. *Kol Bo*, vol. 1, p. 320. *Sedai Hemed* cites Resp. *Ma'asei Avraham: Y.D.* no. 60 who rules that *shikrut* (drunkenness) only nullifies legal transactions but cannot exonerate an individual from the crime of taking his or her own life. *Sedai Hemed*, however, offers precedent indicating that the drunk is indeed exempted from punishment (e.g., *Eruv.* 65a) and then opines that self-destruction consequent to intoxication "on the level of Lot's drunkenness" would not be considered bona fide suicide.
32. Tripodes, P., "The Logics of Suicide," NIMH Contract no. 23-5120-1930, unpublished, 1968; E. Schneidman & N. Faberow, "Suicide and Death," in H. Feifel (ed.), *The Meaning of Death* (New York, 1959), p. 284; C. Neuringer & M. Levenson, "Time Perception in Suicidal Individuals," *Omega* 2, no. 4 (1971): 247-251 and *Omega* 3, no. 3 (1972): 181-186.
33. Resp. *Besamim Rosh*, no. 345.
34. Resp. *Maharam Shik: Y.D.*, no. 346; Resp. *Duda'ei ha-Sadeh*, no. 39; Resp. *Shevut Yaakov*, vol. 2, no. 111.

disallows bystanders from preventing negligence-induced *sakanah* or "transgressions." As in the case of one who runs away on Shabbat while under the influence of *"ru'ah rah"*, an obligation to save life remains.[35]

A final issue: in categorizing the parasuicide as something akin to a *shoteh* as regards his psychological imbalance, does this not imply that he is excluded from the category of "fellow" *(rey'akha)* and, therefore, from *"lo ta'amod"*? Two responses are suggested: (1) One is in fact no less obligated to save the life of even a complete *shoteh* or a *katan*, even if this necessitates transgressing Shabbat,[36] and (2) halakhah establishes in many instances that we may exempt an individual from the stigma of suicide, in viewing his behavior as due to *onnes* or *tiruf da'at*, while at the same time limiting this categorization to his intentions regarding self-destruction but not to other *mizvah* obligations.[37]

III

Summarizing the above, one may, according to most authorities, transgress Shabbat or any other prohibition in order to save the life of the parasuicide, and even if one must view such behavior as negligence-induced. In all likelihood, suicide need not be considered an act of negligence. According to R. Waldenberg, one may not transgress even rabbinic prohibitions on Shabbat if the parasuicide has only brought upon himself non-life-threatening danger or has become through his actions a *holeh she-eyn bo sakanah*. In instances of *sakanah*, one would be permitted to violate (1) even biblical prohibitions, (2) even if there were only a probability of *sakanah*, (3) for a non observant Jew, (4) even for a child or a *shoteh*, and (5) even where such *sakanah* has been induced through negligence or wanton intent.[38]

35. Resp. *Admat Kodesh: Y.D.*, no. 6; Resp. *Nezer Mata'ai*, no. 8.
36. Resp. *Ziz Eliezer*, vol. 8, no. 15(3): 11-12, vol. 9, no. 28(11).
37. i.e., *onnes* is not necessarily the equivalent of *lav bar hiyuvah;* and *TaZ* to *O.H.* 108:1, *Y.D.* 341:5.
38. Two remaining issues are whether one is obligated to place one's own life into danger in order to save another's life (see Rabbi M. Hershler, *"be-Din Im Hayav le-Hakhnis Azmo le-Safek Sakanah Kedey le-ha'Zil Haveiro*, in *Halakhah ve-Refuah*, vol. 2 (1981): 52-57, and that one must recite *birkat ha-gomel* upon being saved from suicide (see Resp. *Ziz Eliezer*, vol. 12, no. 18(8) and M.H. Spero, *"Birkat ha-Gomel le-Ahar Hahlamah mi-Mahalat Nefesh," Assia* 6, no. 3 (1979): 40-42.

TO THE EDITOR:

Rabbi Alfred Cohen's article, "Vegetarianism From A Jewish Perspective" was perhaps long overdue and should be welcomed by Jewish vegetarians. For in the pages of a halachic journal, perhaps for the first time, a learned Orthodox Rabbi dispels many myths about Judaism's view of vegetarianism and indicates several reasons and values.

With all the pluses Rabbi Cohen enumerates from a Jewish vegetarian point of view, why the need for a response to his article? Respectfully, but frankly, because he hedges. While he gives many reasons why Jews should switch to vegetarianism, he puts enought "buts" in, that any meat eater can find rationalization to continue his or her diet.

In his article, Rabbi Cohen has provided arguments for both vegetarians and non-vegetarians. If one wishes to abstain from meat, there are ample justifications in Judaism. On the other hand, if one wishes to continue eating meat, many reasons can also be found. No one need have a guilty conscience no matter what his eating habits. I believe that this can only be justified if we ignore the tremendous negative effects current animal-raising practices have on such Jewish concerns as animal welfare, our health, the world's hungry people, the earth's ecosystems, conservation of natural resources, and the potential for stability and peace. Hence this response to what is overall a very welcome article from the Jewish vegetarian point of view.

There may be "nothing new under the sun" as King Solomon has stated, and Judaism has dealt with vegeterian issues millenia ago, but modern technological methods have changed the picture completely. It is important to realize that modern "factory-farming" methods of raising animals for slaughter have led to widespread violations of Jewish mandates to show compassion to

animals, guard our lives and health, help feed the hungry, preserve the environment, conserve resources, and seek or pursue peace.

Certainly Shechita provides for the most humane slaughter, but can conscientious Jews consider only the final seconds of an animal's life and ignore months and perhaps years of terribly cruel conditions? Can our religion ignore widespread violations of *tsa-ar ba-ale chayim,* the command to avoid inflicting pain on living creatures? Rabbi Cohen amply illustrated in his article the dreadful treatment of steers destined for slaughter.

Furthermore, several recent investigations have found a strong correlation between heavy meat consumption and incidents of heart disease, arteriosclerosis, various forms of cancer, kidney problems, and other diseases.

Because of blockades, Denmark, during World War I, and Norway, during World War II, sharply reduced their meat consumption. In both cases there were large decreases in mortality rates; they rose again when the wars ended and the people were able to resume their normal diets. Unlike these short wartime experiences, many Seventh Day Adventists have followed a vegetarian diet for many years. Recent studies of their health have shown incidents of cancer related to the digestive system over fifty percent lower than that of the general public. Many more examples could be cited, but it is hoped that this will be sufficient for the purpose of this letter.

There are two interesting examples in the Tanach which are related to this discussion. Chapter 5 of Genesis tells of the long lives of people in the generations from Adam to Noah (when it was forbidden to eat meat). The book of Daniel (1:8-16) relates how Daniel and his companions were sustained on vegetarian food and water when they were detained in the court of Nevuchadnezzar, the king of Babylon (they refused to defile themselves with the king's meat and wine). "At the end of ten days their countenances appeared better and fuller in flesh than that of all the lads who ate the food of the king."

There are many reasons why eating meat is harmful to

people's health. Perhaps most important is that people were not designed to eat meat (recall the original vegetarian diet mandated in Bereshit 1:29). Our intestinal system is four times longer than that of carnivorous animals. Thus meat passes very slowly through the human digestive system; during this time the disease-causing products of decaying meat are in contact with digestive organs. In addition, human hands, teeth, saliva, secretions, kidneys and liver, are vastly different from those of carnivorous animals. This has led many scientists to conclude that human beings are not naturally suited for a diet which includes flesh.

The horrible conditions under which animals are raised today lead to unhealthy animals, which result in poor health for people. The build-up of pollutants and pesticides in food chains also has serious consequences for human health. The concentration of environmental poisons is much greater in meat and fish than in vegetarian foods. Vegetarian mothers have been found to have far lower levels of pesticides in their breast milk.

Rabbi Cohen properly points out that one who is concerned only with animal welfare but is not concerned about human beings can be labled a hypocrite. But vegetarianism is not only best for animals - it is also the diet which does least harm to the lives of people, especially the millions who lack adequate food.

Although we state in *Bircat Hamazon* that G-d provides enough food for everyone, nearly half the world's people lack an adequate diet today. It is estimated that ten to twenty million people die annually due to hunger and its effects. About a half a billion human beings are considered chronically and severely malnourished. Yet in the United States, eighty percent of the grains produced are fed to animals to fatten them for slaughter. Nearly half of the United States farm acreage is devoted to feed crops. The average American eats about five times the grain annually that is eaten by a person in a poor country. This is largely due to meat-centered diets; it takes about ten pounds of grain to produce one pound of beef in a feed lot. Because of this, two hundred and twenty million Americans are eating enough food to feed over one billion people in poor countries! One observer has stated that

feeding tremendous amounts of grain to animals while millions starve is equivalent to machine-gunning defenseless people.

In addition to wasting grain, a flesh-centered diet wastes land, water, energy and other agricultural resources such as pesticides and fertilizer. This tremendous waste of land and resources is in sharp contrast to the Torah mandate of *bal tashcit* (the commandment not to waste or unnecessarily destroy anything of value, based on Deut. 20:19-20).

Jewish vegetarians are not placing so called vegetarian values before Torah principles. What they are saying is that basic mandates and teachings of Judaism (to be compassionate to animals, to guard our health, to share with the hungry, to protect the earth, to conserve resources and to seek peace) point strongly to vegetarianism, especially in view of the harm done by modern methods of raising animals. They are certainly not saying that Torah values are immoral, but rather, why don't we put these splendid values into practice?

Jewish vegetarians believe that their diet is consistent with G-d's desires. The first dietary law was clearly vegetarian (Bereshit 1:29; Sanhedrin 59b). Many Jewish commentators, including Rabbi Abraham Kook, believed that permission to eat meat was a concession to people's weakness. Rav Kook felt that the many restrictions related to meat were designed to keep alive a sense of reverence for life and eventually to bring people back to vegetarianism.

There is much emphasis on vegetarian foods in the Tanach. Flesh foods are often mentioned with distaste and associated with lust. In the Song of Songs, King Solomon pictures the Divine bounty in terms of fruits, vegetables, and nuts. It is significant that no special *b'racha* is recited before eating meat or fish, as there is for other foods, such as, bread, wine, fruits and vegetables.

Rav Kook and R. Joseph Albo believed that in the days of the Messiah, people would again be vegetarians. As Rabbi Cohen indicates, Rav Kook wrote that in the Messianic time, sacrifices will consist only of vegetation, and this will be pleasing to G-d.

In view of the strong Jewish mandates to be compassionate to animals, preserve health, help feed the hungry, preserve and protect the environment and natural resources, and seek and pursue peace, and the very negative effects flesh-centered diets have in each of these areas, many Jewish vegetarians wonder how Jews who take Torah values seriously can justify not becoming vegetarians.

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RABBI COHEN REPLIES:

Dr. Schwartz raises some interesting points in his letter. Albeit the volume of material is impressive, I am afraid that it does not warrant the conclusions he has drawn. I think we both agree, however, that an excessive amount of meat consumption can be shown to be quite undesirable.

Dr. Schwartz presents many statistics to buttress his argument that eating meat is unhealthy and should therefore be halachically prohibited. However, we could equally well conclude from his data that it would be wise to *moderate* one's intake of meat. It does not follow that it would necessarily be wise to cut out *all* meat intake. Just as doctors tell us that cholesterol is probably responsible for some degree of high blood pressure and heart disease, even they do not recommend cutting *all* cholesterol out of one's diet. We definitely concur with the reasoning that since too much meat can be harmful, therefore moderation is desirable or perhaps even required by Jewish law. But in no way does that lead to the necessity that it is *forbidden* to eat meat.

Let us examine the arguments that the production of meat results in many pollutants being poured into the environment, and that the end result is fear and anxiety. Is Dr. Schwartz suggesting that if we were all vegetarians, the environment would be cleaner? Would chemical factories producing plastics and electronic

components suddenly stop dumping into streams? Would nuclear wastes suddenly disappear? Would fear and hostility between nations decline? To suggest positive answers to these questions seems to me to be a somewhat oversimplified approach to complex problems.

As for the argument that too much of our land and effort are devoted to raising crops to feed animals which will be slaughtered — is it not a well-known fact that the United States government pays farmers *not* to plant crops or spare land? Do we not stockpile unbelievable quantities of grain rather than sell them? People are not starving because there is not enough grain produced in the world. Rather, greed and selfishness are major factors in the world food supply picture, and I cannot see that that will be significantly altered by vegetarianism.

As for the suggestion that the human digestive system is not equipped to handle meat, I am just not prepared to accept that the Ribono Shel Olam would tell mankind that they might eat meat, knowing that it was harmful and that they would not be able to digest it properly, thus leading them to disease and unhappiness. Scientists who study cancer and other illnesses do not necessarily attribute these diseases to the consumption of meat but rather to the improper diet which is typical of wealthy countries — refined sugars, refined grains, too little natural fibers such as bran, too many artificial additives. We would undoubtedly benefit from a modification of this too-rich diet and from cutting down on fats, alcohols and sweets, as well as tobacco and coffee. Again, abstaining from meat will not solve the multiple problems of the American life style.

As for the argument that Judaism finds something distasteful in meat and thus there is no special *bracha* for it — I beg to differ. "Shehacol" is the *bracha* designated for meat, and it has such status that our Rabbis teach that this blessing is even sufficient as a *bracha* for *bread*. The *bracha* of "Shehacol" is scarcely a "low-quality" *bracha (kivyachol)* grudgingly granted to meat. Meat was given the *bracha* that is of such importance, it can even replace the blessing for bread, the staff of life.