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

Manuscripts which are submitted for consideration must be typed, double-spaced on one side of the page, and sent in duplicate to the Editor, Rabbi Alfred Cohen, 5 Fox Lane, Spring Valley, New York, 10977. Each article will be reviewed by competent halachic authority. In view of the particular nature of the Journal, we are especially interested in articles which concern halachic practices of American Jewish Life.

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The Journal of Halacha and Contemporary Society

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Gambling And Jewish Law

Rabbi Eli D. Clark

I. Introduction

The activity of gambling dates back to the earliest chapters of human history. A number of biblical passages refer to gambling,[1] as do sources from other ancient cultures. Historically, gambling was usually associated with the lowest classes of society. More recently, that image has changed, and certain forms of gambling became acceptable entertainment for the upper classes. This rehabilitation of gambling has reached its peak in contemporary America, where state and local governments are themselves the sponsors of lotteries, riverboat casinos, and the like. A movement has also begun in Israel to bring legalized gambling to that country. In such a context, a review of the halachic attitude toward gambling becomes especially important.[2]

II. Gambling: Illegal or Immoral?

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1. See, *e.g.*, Judges 14:12-13.

2. For an historical survey of Jewish sources on gambling, see L. Landman, "Jewish Attitudes Toward Gambling," *Jewish Quarterly Review* 57 (1966-67), pp. 298-318, and 58 (1967-68), pp. 34-62; Y. Bazak, "*Mesahakei Kubbiya Ke-Baayat Beriut Nefesh Ba-Halakhah*," *Sinai* 48 (1961), pp. 111-27.

Rabbinic Advisor, ATARA Institute, Washington, D.C.;
Associate, Galland, Kharasch, Morse & Garfinkle,
Washington, D.C.

A. Judicial Disqualification of the Gambler

The Mishnah does not outlaw gambling, but states that dice-players are disqualified from serving as judges or witnesses in Jewish court.[3] The Mishnah also states, in the name of R. Yehudah, that the disqualification applies only to one who has no other occupation, in other words, a "professional" gambler.

With respect to dice-players, two *Amoraim* dispute the basis for their disqualification. Rami b. Hama states that dice-playing involves an *asmachta*, *i.e.*, a conditional offer to pay made with the conviction that the condition will not come to pass. In other words, when a dice-player bets money, he genuinely believes that he will win the bet. As a result, when he loses and is forced to pay, he is giving up money that he never intended to part with. This lack of intention (*gemirat da'at*) renders the transaction invalid. Thus, the winner of the bet, who accepts an *asmachta*-payment, takes money that is not rightfully his; such a dice-player is, therefore, a thief, albeit only by rabbinic definition.[4]

R. Sheshet disagrees, however. He says that dice-playing does not involve *asmachta*. Rather, dice-players are disqualified because they are not engaged in *yishuvo shel 'olam* (lit. "the settlement of the world"), that is, they make no constructive contribution to the functioning of society and its development. In R. Sheshet's view, gambling is not necessarily a criminal activity, merely an immoral one. Consequently, the Gemara points out, R. Sheshet would not disqualify a part-time gambler who engages also in

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3. *Sanhedrin* 3:3; cf. *Rosh ha-Shanah* 1:8. The Mishnah also disqualifies the pigeon-tender who, according to one *Amoraic* opinion, would bet on pigeon races. See *Sanhedrin* 25a-25b.

4. *Sanhedrin* 24b and Rashi, *ad loc.*, s.v. *asmachta*. See also *Mishneh Torah, Gezelah va-Avedah* 6:10.

On *asmachta*, see below, n. 7 and, more comprehensively, *Encyclopedia Talmudit*, vol. II, pp. 108-115.

some constructive occupation.[5]

The Gemara does not explicitly rule in favor of either Rami b. Hama or R. Sheshet. However, the Gemara does note that R. Sheshet's opinion is supported by R. Yehudah's statement in the Mishnah that only full-time gamblers are disqualified from serving as judges or witnesses.[6]

Thus, whether or not gambling is illegal is the subject of *Amoraic* dispute. Note, however, that Rami b. Hama's opinion assumes that gambling involves *asmachta*, while R. Sheshet rejects that assumption. Their dispute, in other words, turns on the larger question of what constitutes *asmachta*.

B. Does Gambling Involve Asmachta?

There are three classic cases of *asmachta* discussed in the Talmud.[7] In all three, an individual promises to make a payment

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5. Ibid. According to Rashi, *ad loc.*, s.v. *she-ein lo omanut ela hu*, one who is not involved in *yishuvo shel olam* is inexpert in matters of law and business and does not fear sin. See also Rambam, *Commentary to the Mishnah, Sanhedrin* 3:3.

6. Ibid. The Gemara reasons as follows: R. Yehudah restricts the disqualification of gamblers to those who have no other occupation. This accords with R. Sheshet's theory that gambling *per se* is legal, but gamblers who engage in no constructive occupation should nevertheless be disqualified. According to Rami b. Hama, however, gambling does constitute theft. Anyone who gambles is therefore a thief and should be disqualified from serving as a witness or judge, whether or not he also pursues a more savory career.

7. The three classic talmudic cases of *asmachta* are:

1) A borrows money from B, who subsequently repays a portion of the debt. The loan document is then placed in the hands of C. A promises to pay C the balance of the debt by a certain date. But if A does not pay the balance by that date, C will return the loan document to B, obligating A to repay the entire debt, including that portion that

on the fulfillment of some condition; but he does not believe that condition will come to pass. As a result, the promise is not sincerely made, but mere hyperbole (*guzma*).[8] For this reason, the halacha states that an *asmachta*-promise does not create a valid obligation to pay.[9]

At first glance, gambling would appear to meet the definition of *asmachta*. A gambler's bet is a promise to pay that the gambler believes he will not have to keep. This is Rami b. Hama's position.

Why then does R. Sheshet declare that gambling is not an *asmachta*? Rashi explains that, in the case of *asmachta*, the person making the conditional promise believes it in his power (*be-yado*) to determine whether the condition will occur. The gambler, in contrast, knows he is playing a game of chance that he may either win or lose.[10]

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he had already paid off (*Baba Batra* 168a).

2) A and B agree to engage in a transaction. A deposits a security with B and promises that, if he should renege, B may keep the security. B promises that, if he should renege, he will return A's security and pay A an amount equal to the value of the security (*Baba Metzia* 48b, 77b).

3) A tenant farmer promises that, if he neglects and does not work the land, he will pay the landowner one thousand *zuz* (*Baba Metzia* 104b).

8. Rashi, *Baba Metzia* 48b, s.v. *asmachta kanya*.

9. *Baba Batra* 148b; *Mishneh Torah, Mechirah* 11:2-6; *Shulchan Aruch, Choshen Mishpat* 207.

10. See Rashi, *Sanhedrin* 24b, s.v. *kol ki hai gavna*. In *Sanhedrin* 25a, the Gemara discusses whether dice-playing and pigeon-racing are more games of chance than games of skill. On the one hand, winning at dice depends solely on the player, whereas winning with pigeons depends also on the pigeon; this suggests that dice involve more skill and pigeons involve more chance. On the other hand, racing pigeons may be trained to respond to certain signals, while dice, of course,

R. Yitzhak of Dampierre ("Ri") refines Rashi's comment slightly. A conditional promise constitutes an *asmachta* where the fulfillment of the condition is partly in the person's power and partly dependent on the actions of others. Where the condition's fulfillment is entirely in one's control, a promise that is clearly hyperbolic is also an *asmachta*.[11] But where the fulfillment of the condition is totally out of one's power, as in gambling, no *asmachta* occurs.[12]

Rabbenu Tam suggests a third view: *asmachta* is limited to a case in which one makes a promise, not with any intention of earning a profit, but solely to induce another person to rely on one's word. Gambling, by contrast, involves the exchange of mutual promises, in which each gambler promises to pay if he loses, and receives a promise to be paid if he wins.[13]

C. Does the Halacha Follow R. Sheshet or Rami b. Hama?

In interpreting the Gemara, many *Rishonim* rule in accordance with R. Sheshet: gambling does not involve *asmachta*. Therefore, only professional gamblers who do not participate in the development of society are disqualified from serving as judges and witnesses. Occasional gambling is permitted.[14] This is also

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cannot; from this perspective, dice-playing is the game of chance, and pigeon-racing the one of skill.

11. However, where the promise is simply to compensate for a financial loss that one may cause, the promise is not an *asmachta*. See *Baba Metzia* 74a, 104a-b.

12. Tosafot, *Sanhedrin* 24b-25a, s.v. *kol ki hai gavna*, and *Eruvin* 82a, s.v. *amar R. Yehudah ematai*.

13. Ibid.

14. See, *e.g.*, R. Yitzhak al-Fasi ("Rif"), *Sanhedrin* 4b; Tosafot, *Eruvin* 82a, s.v. *amar R. Yehudah*; R. Eliezer b. Yoel and R. Yaakov of Chinon, cited in *Mordechai, Sanhedrin*, chap. 3, 690; cf. *Mishneh Torah, Edut* 10:4.

the conclusion of many *Acharonim*.[15]

However, a substantial number of authorities adopt the opposite holding: all gambling is rabbinically prohibited. This position follows Rami b. Hama's opinion that gambling does involve *asmachta* and therefore constitutes rabbinic theft (*gezel mide-rabbanan*). This view draws support from the following Mishnah in *Shabbat* (148b):

> One may cast lots [on Shabbat] with one's children and members of one's household with respect to [distributing portions] at the table, as long as one does not intend to make a [lottery of] a large portion against a small portion.

In short, one may distribute by lottery equal portions of one's family's dinner without violating the Shabbat. But, where the portions are unequal, distribution by lottery is forbidden, because it may lead to forbidden activities such as weighing and measuring. The Gemara, in discussing this rule, draws a distinction between lotteries involving family members and those involving outsiders. Family members are unlikely to object to variations in the sizes of portions, but outsiders may object, leading to weighing or measuring in violation of Shabbat. Therefore, only lotteries involving outsiders are forbidden on Shabbat. Moreover, says the Gemara: "[A lottery of] a large portion against a small portion should be forbidden even during the week to

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Rashi may also rule in accordance with R. Sheshet. Commenting on the Mishnah's statement that dice-players and the like are disqualified from serving as witnesses and judges, he writes: "They are all quasi-thieves (*me-ein gazlanin*)." This implies that their activity resembles theft, but does not technically constitute theft.

15. See, *e.g.*, *Tur, Choshen Mishpat* 34; R. Moshe Isserles (Ramo), *Shulchan Aruch, Choshen Mishpat* 207:13, 370:3; *Hagahot Maimuniyyot*, *ad loc.*, n. 5; see also below, n. 22. More recently, see R. Yehiel Mikhel Epstein, *Aruch Ha-Shulchan, Choshen Mishpat* 207:25.

strangers. What is the reason? Because [it constitutes] dice[-playing]." In other words, on a weekday, though one may weigh and measure portions, such lotteries should nevertheless be forbidden because they constitute gambling.

This statement implies that gambling, even when done on an occasional basis, is prohibited. Such is the conclusion, for example, of R. Yosef Tov Elem in a *teshuvah* dealing with money lost by a gambler in a game of "nuts." R. Yosef concludes that a court may force the winner to return his winnings, because: 1) such games involve *asmachta*; 2) constitute rabbinic theft; and 3) disqualify even occasional players from serving as judges and witnesses.[16] It is readily apparent that, on the issue of gambling, R. Yosef follows the opinion of Rami b. Hama, as opposed to that of R. Sheshet.

Thus, some authorities rule according to R. Sheshet and permit occasional gambling, while others follow Rami b. Hama and prohibit all gambling. A third approach approach is quoted in the name of the Tosafist R. Eliyahu of Vienna. R. Eliyahu argues that gambling may or may not involve *asmachta*, depending on the circumstances of the location of the money at stake. Where the money is not with the gamblers, such a bare bet constitutes *asmachta*, because there is no formal mechanism of acquisition (*kinyan*) which transfers the money to the winner of the bet. However, where the gambling stakes are sitting on the table, and both gamblers own an interest in the table, the winner acquires his winnings by virtue of its location in his domain (*kinyan hatzer*). In such case, the money is acquired legally, and the gambling

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16. Cited in *Hagahot Mordechai, Sanhedrin*, chap. 3, 722. Cf. R. Isaac b. Sheshet Perfet, *Teshuvot Rivash*, no. 432: "Dice-playing is prohibited rabbinically as is recorded in *Sanhedrin*;" R. David ibn Zimra, *Teshuvot Radbaz*, no. 214: "We follow the opinion of the one who says that dice[-playing] involves theft."

activity is therefore permitted.[17]

Rambam's position on this question has generated many questions, and understandably so. In *Hilchot Edut*, Rambam states that the disqualification of dice-players applies only to

> one who has no occupation other than this. Because he is not engaged in *yishuvo shel olam*, he is presumed to support himself through dice which has a residue of theft (*avak gezel*).[18]

Rambam here appears to adopt the reasoning of R. Sheshet. Gambling is merely "*avak gezel*," which falls somewhat short of being actual theft. Hence, the judicial disqualification applies only to a full-time gambler.

However, in *Hilchot Gezelah va-Avedah*, Rambam rules that dice-playing does constitute rabbinic theft (*gezel mi-divreihem*), apparently in accordance with the opinion of Rami b. Hama.[19] As an afterword, he adds:

> One who plays dice with Gentiles does not engage in prohibited theft, but in the prohibited act of engaging in wasteful activity (*devarim betelim*), as it is improper for a person to engage all his life in anything other than matters of wisdom and *yishuvo shel olam*.[20]

Rambam here seems to draw a distinction between gambling with Jews, which constitutes rabbinic theft and disqualifies even the occasional gambler, and gambling with Gentiles, which is not theft and disqualifies only the full-time gambler. Of course, this distinction seems to conflict with Rambam's statement in *Hilchot Edut*.

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17. Cited in *Mordechai, Sanhedrin*, chap. 3, 691.
18. *Hilchot Edut* 10:4.
19. *Hilchot Gezelah va-Avedah* 6:10.
20. Ibid. 6:11.

R. Vidal Yom Tov of Tolosa, in his *Maggid Mishneh*, notes the apparent contradiction, but does not resolve it.[21] R. Yaakov *Ba'al ha-Turim* cites Rambam's distinction between Jews and Gentiles, then writes that his father, R. Asher b. Yehiel ("Rosh"), rejected such a distinction, disqualifying only those who gambled full-time, whether with Gentiles or Jews.[22] Rabbenu Nissim ("Ran") explains that Rambam rules in accordance with R. Sheshet that gambling is not theft. Nevertheless, Ran suggests, Rambam holds that gambling is prohibited rabbinically, as indicated by the Gemara in *Shabbat*. However, if one violates such a prohibition on a part-time basis, one will not disqualify oneself from serving as a judge or witness.[23]

In contrast, R. Yosef Karo and R. David ibn Zimra ("Radbaz") assume that the statement in *Hilchot Gezelah* reflects Rambam's true position, and view Rambam as following the opinion of Rami b. Hama that gambling involves *asmachta* and constitutes rabbinic theft.[24]

In his *Shulchan Aruch*, R. Yosef Karo rules that dice-playing

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21. *Maggid Mishneh, ad loc.*

22. *Tur, Choshen Mishpat* 370.

23. *Chiddushei ha-Ran, Sanhedrin* 24b, s.v. *Matnitin elu hen ha-pesulin*. Cf. R. Avraham di Boton, *Lechem Mishneh, Edut* 10:4, s.v. *ve-khen mafrihei yonim*. Other *Acharonim* who interpret Rambam as following R. Sheshet include: *Hagahot Maimuniyyot, ibid.*, n. 5; R. Yehoshua Falk, *Sefer Me'irat Enayim, Choshen Mishpat* 34, n. 40; R. David b. Shemuel ha-Levi, *Turei Zahav, ad loc.*, s.v. *ha-Tur holek*.

24. See *Kesef Mishneh, Edut* 10:4, s.v. *ve-chen mesachek be-kubbiya; Gezelah va-Avedah* 6:11, s.v. *veha-mesachek be-kubbiya; Bet Yosef, Choshen Mishpat* 370, n. 7. R. Yosef Karo reconciles the conflict by explaining that Rambam's statement in *Edut*, that gambling is only *avak gezel*, relates to the case of gambling with gentiles or playing dice without money. Cf. Radbaz, *Commentary to Edut* 10:4, s.v. *ve-chen mesachek be-kubbiya; Teshuvot Radbaz*, nos. 214, 1446.

is rabbinic theft. He notes that "there is one who says" that gambling with Gentiles is not actual theft, but merely an abstention from *yishuvo shel olam*. However, some argue that such gambling is objectionable only when engaged in to the exclusion of other occupations. R. Moshe Isserles ("Ramo") then comments:

> If he has another occupation, then even if he plays [dice] with Jews, he is not disqualified . . . . And the custom has already spread in accordance with the latter opinion to [permit] playing dice."[25]

Over time, the general halachic consensus has followed Ramo, that a Jew is not prohibited from gambling on an occasional basis.[26] Nevertheless, many authorities denounced gambling. R. Yitzhak b. Sheshet Perfet ("Rivash"), for example, writes that, even if gambling is legal, it is "a disgusting, abominable and repulsive thing."[27] Hence, a number of ways were found to restrict gambling, especially that of the compulsive gambler.

III. Vows Against Gambling

A. Nullification of Anti-Gambling Vows

Many compulsive gamblers sought to restrain themselves by making a vow (*neder*) to refrain from gambling. This raised the halachic issue whether a rabbi may nullify such a vow.

The question first surfaces in an instance described by the *Talmud Yerushalmi*:

> A man vowed not to profit [from gambling]. He came before R. Yudan b. Shalom [to have the vow nullified]. He asked him: What did you swear to refrain from? He said: [I swore]

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25. *Choshen Mishpat* 369:3.

26. See above, nn. 15, 22.

27. *Teshuvot Rivash*, no. 432.

> not to profit. He said: Would a man vow not to profit? Perhaps [you meant to profit] from dice? [The man assented.] He said: "Blessed be He who chose the Torah and its scholars who ruled that one [who wishes to nullify a vow] must describe the vow!"[28]

On the basis of this Gemara, a substantial number of *Rishonim* conclude that one may not nullify a vow against gambling.[29] Many *Acharonim* have issued similar rulings.[30] The apparent rationale of the Gemara is that anti-gambling vows should not be nullified because gambling is forbidden.[31] For example, Rashba writes:

> One who vows not to play dice, who comes to ask that his vow [be nullified], saying he fears that his desire will overcome him and he will not be able to restrain himself, leading to two evils, the gambling and the violation of his vow – it appears that we do not accede to him, because gambling is a sin, and we do not release a person from a vow [allowing him] to sin.[32]

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28. *Talmud Yerushalmi, Nedarim* 5:4.

29. These include Rabbenu Tam, cited in *Mordechai, Shevuot*, chap. 3, 736; R. Yitzhak b. Asher ("Riva"), cited in *Mordechai, Shevuot*, chap. 4, 787; R. Meir of Rothenburg, cited in *Sefer Mitzvot Katan, Yom Sheni*, 81; R. Shelomo ibn Adret ("Rashba"), *Teshuvot Rashba*, vol. I, no. 756; R. Mordechai b. Hillel, *Mordechai, Gittin*, chap. 4, 374; and Rivash, *Teshuvot Rivash*, no. 432.

30. See, *e.g.*, R. Shemuel de Medina, *Teshuvot Maharashdam, Yoreh Deah*, no. 84; R. Binyamin b. Matityahu, *Binyamin Ze'ev*, nos. 267, 281; R. Yosef Karo, *Beit Yosef, Yoreh Deah* 228, s.v. *katav ha-Mordechai; Shulchan Aruch, Yoreh Deah* 228:15.

31. See, *e.g.*, R. David Frankel, *Korban ha-Edah* to *Talmud Yerushalmi, Nedarim* 5:4, s.v. *she-amru tzarich lifrot et ha-neder*.

32. *Teshuvot Rashba*, vol. I, no. 756. This statement of Rashba's

However, in special circumstances, such vows might be nullified. Thus, R. Hayyim *Or Zaru'a* was once asked to nullify the vow of a gambler who swore that, if he should ever gamble, he would never again eat any earthly produce, except for wheat. R. Hayyim rules that, because the gambler was evidently incapable of keeping his vow, it would be preferable to nullify it and eliminate the additional harm of violating one's vow.[33]

Others expressed an even greater willingness to be more lenient on gamblers' vows. Thus, *Shiltei Gibborim* quotes a statement of *Tosafot* in the name of Rif that such vows should be nullified, because "the desire to gamble is great among those who do so regularly."[34] Similarly, R. Toviyah b. Eliyahu of Vienna is quoted as follows:

> Nowadays one may nullify a vow [against] gambling, because it is like an unintentional act, in that they cannot restrain themselves and control their spirit; thus said Rif.[35]

Such leniency should not be confused with a permissive attitude toward gambling in general. Rather, even some who viewed gambling as a sin, thought it preferable to nullify a vow that would undoubtedly be violated. In this vein, Rabbenu Nissim

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could be interpreted to mean that he follows the opinion of Rami b. Hama that gambling involves *asmachta* and constitutes theft. However, none of the authorities who follow Rami b. Hama cite as proof the passage in *Yerushalmi Nedarim* or such statements as the Rashba's. Moreover, Rabbenu Tam, who concurs with Rashba that anti-gambling vows should not be nullified, also holds that gambling does not involve *asmachta*. See above, n. 13. Therefore, the statement of Rashba that gambling is a sin may mean simply that it is immoral, although it may not strictly qualify as an illegal act.

33. *Teshuvot R. Hayyim Or Zarua*, no. 70.

34. *Shiltei Gibborim* to *Mordechai, Shevuot*, chap. 3, n. 1.

35. Cited in *Hagahot Mordechai, Shevuot*, chap. 4, 787.

writes:

> We should not nullify his vow [against gambling], because it is a sin, as is proven by the *Yerushalmi*. Nevertheless, they have written that if it is clear to us that he will not keep his vow, it is better to absolve him so that he will not violate his vow.[36]

An intermediate position on nullification invokes the familiar distinction between full-time and occasional gamblers. R. Meir of Rothenburg permits nullifying a vow against gambling, as long as the gambler engages in some constructive occupation. But a professional gambler's vow may not be nullified.[37]

B. Scope of Anti-Gambling Vows

Besides seeking nullification, gamblers who regretted swearing off gambling also sought to find loopholes in their vows. Thus, Rashba discusses an individual who vowed never to gamble except for fruit and wanted to know whether he could play *kuta'ah*, a game played for eggs. Rashba replies:

> The term "fruit" includes a great deal; it is a collective term that includes many things. The particular meaning depends upon the location and context [of its usage]. But in cases of vows and swearings, everything follows the intention of the one who made the vow.[38]

A comparable question was addressed to Rosh, who writes:

> One who accepts as a vow not to play any game [of chance], is betting included in such games? Know that the essence of playing dice is the betting . . . and the primary intention of

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36. *Teshuvot ha-Ran*, no. 51; cf. Rema, *Yoreh Deah*, 228:15.

37. *Teshuvot, Pesakim u-Minhagim*, Vol. II *Yoreh Deah*, *pesak* no. 179. Cf. R. Yoel Sirkes, *Bayit Hadash, Yoreh Deah*, 228:6, s.v. *u-nedarim*.

38. *Teshuvot Rashba*, vol. III, no. 305.

> the vow was to refrain from [playing] any game which leads to loss of money.[39]

Another ploy to evade the anti-gambling vow was to appoint a substitute to gamble on a person's behalf. The permissibility of such a tactic was raised before Radbaz, who dismisses it on several grounds. First, according to those who rule that gambling is theft, "what is the difference between stealing in person or through another?" Second, the object of the vow is to prevent the oath-taker from losing money, which presumably includes losing money through the gambling of another. Third, any act that one is forbidden to do, one is similarly forbidden to instruct another to do. Fourth, the Mishnah in *Shabbat* prohibits lotteries, even though those who bet on a lottery do not themselves cast the lots. This indicates, concludes Radbaz, that betting on the play of another constitutes prohibited gambling.[40]

C. Punishing the Violation of the Vow

In many cases, an individual who swore off gambling was caught or admitted to breaking his vow. This raised the question of how to punish such a violation. Rosh pronounces a severe punishment for a gambler whose violation of his anti-gambling vow led him to be taken into custody by the local authorities:

> He should be fined in the amount that will appease the government. In exchange for the money you pay the governor, you should negotiate for the right to beat him extensively and harshly with rods, even unto death. And pay the government as much as necessary to obtain the right and power to beat him as I said, and through you will God's

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39: *Teshuvot ha-Rosh, kelal* 11, no. 9.

40. *Teshuvot Radbaz*, no. 214. Cf. *Shulchan Aruch, Yoreh Deah* 217:48; *Bayit Chadash, Yoreh Deah* 216, s.v. *u-mah she-katav ve-im amar konam zetim va-anavim sh'ani.*

> Name be sanctified. Henceforth, he must pay a fine to the governor, that if he should play dice before his vow expires, he must pay a large amount in accordance with his wealth. Even if [the fine] obligates him to sell himself, such is a permissible punishment, given that the law dictates that one may beat him until death to maintain his vow.[41]

In contrast to this unstinting ruling, Rivash deals with a similar case in a more lenient fashion. A person who violates his vow, he writes, should be "rebuked, afflicted and whipped with a lash." But such a punishment should be administered in private, so as to minimize the disgrace. Moreover, Rivash states,

> You may be lenient in this, because gambling overcame his will, such that one who transgresses acts almost under duress .... And many commoners have taken such an oath, violated it, and not been punished. Hence, I have seen many pious and saintly scholars who refrain from subjecting gamblers to oaths.[42]

Where the gambler himself admitted to breaking his vow, Rivash goes further in relaxing the punishment:

> If you wish to be more lenient in your punishment of him, he should afflict himself in fasting for a certain number of days and distribute money to charity, in order to absolve himself from [receiving] stripes.[43]

As with nullification, then, some authorities demonstrated a willingness to take into account the addictive quality of gambling in meting out punishment for the violation of vows not to gamble. This approach reaches its height in the practice cited – though

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41. *Teshuvot Rosh, kelal* 11, no. 8.

42. *Teshuvot Rivash*, no. 432.

43. Ibid., no. 281.

not explicitly advocated – by Rivash, which avoided oaths altogether as a method of curbing gambling.

IV. Communal Legislation Against Gambling

Instead of administering oaths, many communities issued decrees (*takkanot*) prohibiting gambling within their precincts. In the course of one *teshuvah*, Rivash writes:

> It is now about four years since the entire community of Calir [Calahorra?] gathered in the great synagogue and agreed to impose a total ban of excommunication, that no man or woman should play any game involving dice, not for himself, not for another, nor another for him. And he who violates this, will bear his sin alone, and the rest of Israel will be innocent.[44]

In 1223, the Rhine cities of Speyer, Worms and Mainz ("*Shum*") adopted a similar, though less absolute, prohibition, allowing gambling for food – as opposed to money – on *Chol ha-Mo'ed* and at weddings, provided the food was not later exchanged for money. In 1418, the Italian communities of Bologna and Forli decreed that, for a ten-year period, no Jew may gamble with dice, cards or in any other game, except in time of trouble or illness, "as a balm to their distress."[45]

An especially severe *takkanah* was imposed in 1650 in Moravia:

> Every person, whoever he may be, is forbidden to play cards;

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44. Ibid, no. 171.

45. *Jewish Self-Government in the Middle Ages*, pp. 60, 228, 283. Other such *takkanot* are described in R. Eliyahu Mizrahi, *Teshuvot Mayyim Amukim*, no. 14; *Teshuvot Maharashdam, Yoreh Deah*, no. 84; R. Yehudah Aryeh di-Modena, *Teshuvot Ziknei Yehudah*, no. 78; R. Yaakov Reischer, *Shevut Ya'akov*, vol. II, no. 79. See also R. Yitzhak Lamperonti, *Pachad Yitzhak*, s.v. *herem*.

> not only cards or dice, but every other kind of game that the mouth may utter or the heart conceive or consider, even on *Rosh Chodesh*, Chanukah, Purim, *Chol ha-Mo'ed*, and other days on which *tachanun* is not recited, even with a woman in labor (*yoledet*) or a person whose blood is being let. In general, one may not gamble in any earthly manner. Everyone, whoever he may be, whether master of the house, boy or girl, manservant or maidservant, shall be punished if he should (Heaven forfend) transgress and gamble. Thus shall be the treatment of the offender: if he is wealthy, he shall pay for every offending act two silver coins, unconditionally, half for [the support of] Torah study and half for the poor of Jerusalem. If he is not wealthy, such that he cannot be punished monetarily, he shall be punished by imprisonment and afflicted by iron chains as befits such offenders.[46]

However, such *takkanot* were not always accepted without dissent. In response to an anti-gambling *takkanah* issued in Venice, R. Yehudah Aryeh of Modena wrote a *teshuvah* in 1628, utterly opposing the decree. R. Yehudah Aryeh argues first that gambling is permitted, citing the opinion of Ramo and others. Furthermore, he notes that those who prohibit gambling forbid only games of skill, not games of chance, a distinction not made by the Venetian *takkanah*. Finally, he cites a *teshuvah* of R. Eliezer Ashkenazi opposing a similar *takkanah* against gambling issued in Cremona in 1575.[47] Despite his opposition to such *takkanot*, R. Yehudah Aryeh published a number of pamphlets attacking the immorality

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46. *Takkanot Medinat Mehrin*, I. Halpern ed., p. 92, cited in M. Elon, *Ha-Mishpat Ha-Ivri*, vol. II, pp. 664ff.

47. *Teshuvot Ziknei Yehudah*, no. 78; cf. no. 122, opposing an anti-gambling decree issued in Mantua. Unfortunately, some may consider his arguments tainted by the fact the he himself was a compulsive gambler and gambled away the money he earned as a teacher, preacher, and cantor.

of gambling, one of which, *Sur me-Ra*, he wrote at age thirteen.

Some *takkanot* reflected R. Yehudah Aryeh of Modena's view that gambling, though immoral, was technically legal. Therefore, the decrees permitted gambling on certain occasions. The Cremona decree of 1575, for example, allowed gambling on days on which *tachanun* is not recited, at weddings, and at the homes of the ill and women in labor.[48] Similarly, a 1589 *takkanah* against gambling by students in Yeshivat Shalom in Ancona, Italy, contained an exception for Chanukah.[49] Similarly, R. Yaakov Weil writes in a *teshuvah* of a husband accused by his wife of gambling, who claimed that he "did not gamble at all in an improper fashion, except on Chanukah, as is the custom."[50] Even R. Yosef Tov Elem states that gambling is permitted on the first day of Pesach, but only for children.[51]

In essence, these sources confirm the halachic position that emerges from the Mishnah and Gemara: gambling is a dissolute activity which, when engaged in constantly, breeds immorality. Nevertheless, the halacha technically permits gambling, and one may therefore gamble within reasonable limits.

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48. Ibid.

49. Cited by D. Kaufman, in *He-Assif*, vol. 3, p. 214.

50. R. Yaakov Weil, *Teshuvot Mahari Weil*, no. 135.

51. Cited in *Hagahot Mordechai, Sanhedrin* 722.

The Recital Of Kaddish By Women

Rabbi Reuven Fink

The kaddish, long associated with death and mourning, conjures up the image of a solitary figure reciting the *yitgadel ve-yitkadesh* at graveside or as a mourner in the synagogue. However widespread this practice, it is not reflected in the original use or purpose of the kaddish. The kaddish is and always has been a part of the daily liturgy, with an intrinsic value of its own not in any way associated with any extraneous occurrence.

As a prayer, the kaddish is an ancient paean to the hallowed Ineffable Name of G-d, and contains within it a hope for the future aggrandizement of that Name. Additionally it contains a call to the faithful to acknowledge and venerate what that name of G-d represents. Composed after the destruction of the First Temple, by the sages and prophets of the Great Assembly, it is a response to the desecration of G-d's name that resulted from the destruction of the Holy Temple, with the attendant destruction of the land of Israel and the dispersion of the Jewish nation to the four corners of the earth. We pray that G-d's Great Name be magnified and sanctified and restored to its pristine state in this world.[1]

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1. *Aruch Ha-Shulchan, Orach Chaim* 55:1 (See *Yalkut Shimoni Isaiah 296*. For variations on this theme see, for example, *Levush, Hilchot Berachot* 56:1. The kaddish itself has many forms. Parts and themes were composed in different eras and serve different functions. The most ancient formula of the kaddish is the יהא שמיא רבא מבורך formulation. This is the essence of the kaddish prayer. Its source is cited in the *Targum Y. ben Uziel* (בראשית מט:א) as Yaakov Avinu.

Rabbi, Young Israel of New Rochelle

Originally, kaddish was recited seven times each day – three recitations during *Shacharit*, one after *Yishtabach*, one after *Tachanun*, and one after *U'vah le-zion*.[2] It was only at a later time that the kaddish after *Aleinu* was added, ostensibly because of the proliferation of orphans.[3] Be that as it may, the kaddish in the minds of most Jews is the prayer for the dead. It is recited by the children of the deceased as a means of elevation of the soul of the dearly departed.

The matter of a daughter saying kaddish for her father first appears in halachic literature in the 17th century. Rav Yair Chaim Bachrach, author of *Chavot Ya'ir*, writes that he was confronted with the following circumstance:

> Something very strange occurred in Amsterdam and was highly publicized there. A person died leaving no sons. Before he died he left instructions in his will that during the year of mourning a *minyan* should be hired to learn *mishnayot* in his house; after the learning his daughter should recite the kaddish. (*Chavot Ya'ir*,# 222)

Before rendering his own decision on the case Rav Bachrach reports how the matter was handled in Amsterdam.

The rabbinic scholars and the lay leaders of the city did

(See משאת כפי by Rav Dovid Cohen for parallels between this sentence and ברוך שם כבוד מלכותו לעולם ועד). Also see *Berachot* 3a, *Shabbat* 119a and *Sifrei, Ha'azinu* 32:3. The association of kaddish and mourning is indeed found in a number of early sources. The most often quoted source is a story of Rabbi Akiva (other versions have Rabbi Yochanan ben Zakkai, which makes the source much earlier) and a spirit in *Kallah Rabbati* chapter II.

2. *Levush, Hilchot Berachot* #55:1. It is based upon a tradition found in the *Sefer Ha-aggur* #98 who quotes the *Ra'avad*, who explains the placement of the kaddish at those breaks in the service.

3. *Magen Avraham, Orach Chaim* #55:4.

not protest the girl's recitation of the kaddish.

He goes on to say that the girl's recitation of the kaddish might be justified on the grounds that kaddish is a prayer associated with קידוש השם, the sanctification of G-d's name, and therefore women are also included in that precept. Moreover, the fact that there are ten men present creates a *bona fide* circumstance under which the kaddish might be recited. He goes on to support the theoretical thinking of the Amsterdam rabbinate by stating that even though the association between kaddish and the dead is based upon the story of Rabbi Akiva and the son of a dead man, one could successfully argue that a daughter, too, could achieve for the parent the same that a son does.

However, after making that case, he rejects the ruling of the Amsterdam rabbinate and explains that a negative by-product of allowing the daughter to say kaddish will be the weakening of Jewish custom in general. Since heretofore daughters did not say kaddish after their parents, the novelty of this girl's saying kaddish will create an environment whereby,

> Each individual will build his own altar – based upon his own whim [logic] – and all rabbinic matters will become debased and people will denigrate them.

Based upon this consideration, the author of *Chavot Ya'ir* objects to the recitation of the kaddish by the daughter and declares that it should be stopped.

In the next century, the case of a girl saying kaddish appears again in the responsa literature (*Shevut Yaakov #93*). Rav Yaakov Reischer was asked by another rabbi how to handle the situation, where a man died leaving two young daughters, the older one four years old. Before he died he asked the rabbi to see to it that the older daughter say kaddish, albeit not in the synagogue.

However, the father of the deceased laid claim to the right to say kaddish at synagogue services for his son. Since only children have the right to demand their share of the recitation of

the kaddish at the synagogue, how should the claim of the deceased's father be handled?

Rav Reischer first analyzes the appropriateness of a father's saying kaddish for his son, and his relationship to the other mourners who are reciting kaddish for their parents. He comes to the conclusion that only where there is an established custom allowing a father to recite kaddish among the mourners is it permissible. However, in the absence of such a custom, as in the case at hand, the father may not recite the kaddish in shul. He cites, however, a ruling of his brother-in-law (*Eliyahu Zutah, Orach Chayim*) that a father should be given a kaddish at the end of the services "להפיס דעת המתים ח"ו בלי בנים" in order to "assuage the grief of one who dies leaving no children." He ends the discussion by commenting that in the case in question there is no need to appease troubled minds, because

> שכבר הניח בת שאומרת קדיש בבית אצל מנין אבל בנידון שלפנינו (כי בבית הכנסת אין להניח לה לומר קדיש כלל) אם כן כבר יש לו פיוס דעת בזה ונראה גם לענין התפלה יש לאביו גם להתפלל רק בבית אצל המנין שאומרת הבת קדיש.
>
> In our case, where there is a female child reciting the kaddish at home in the presence of a *minyan* (because in the synagogue she is not allowed to say kaddish at all), there is no longer any need to appease the deceased [by the father saying kaddish]. Therefore the father should only recite the kaddish at the same *minyan* together with his granddaughter.

It is obvious from this responsum that the idea of the young girl saying kaddish at home was not a point of contention for the author of *Shevut Yaakov*. The recitation of the kaddish in the synagogue by a girl, even a very young girl, was, however, not seen as an allowable option. The fact that Rav Reischer does not quote the objection of the *Chavot Ya'ir* can be attributed either to his not being aware of the latter's position or to the possibility that young girls saying kaddish in their own homes was not seen as an issue.

Rav Elazar Fleckeles, the prime disciple of Rav Yechezkel Landau, author of the *Nodah Bi-Yehudah*, makes the following observation in his *Teshuvah Me-Ahavah* (229:10): although the *Chavot Ya'ir* does not permit a daughter to say kaddish, in the city of Prague there developed a custom by which the only daughters of a deceased person would go to the area where older men and women and others who did not work remained in shul after *shacharit* until noon and recited the entire book of Psalms, and afterwards the girls would recite the kaddish.

ואומרים בכל יום כל ספר תהילים ונוהגים מי שלא הניח אחריו בנים כי אם בנות קטנות חמש ושש שנים אומרים שם הקדיש אבל בבית הכנסת המיוחד לתפלה לא ראיתי זה מעולם ואינו נכון וכו'.

Rav Chaim Chizkiyahu Medini in his work *Sedei Chemed* (*Ma'arechet Aveilut #160)* cites both the opinions of *Chavot Ya'ir* and *Shevut Yaakov* and sides with the decision of Rav Bacharach that a girl is forbidden to recite the kaddish not only in the synagogue but even at home. He comments that the lenient decision of R. Reischer was a solitary opinion and should be disregarded.[4]

The literature is silent about the matter of a woman saying kaddish until the mid-20th century.

In 1942, the then Sephardic Chief Rabbi of Israel, Rav Ben-Zion Meir Chai Uziel, was asked his opinion about a person who leaves behind only daughters to say the kaddish. His answer is

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4. The *Ba'er Heitev, Orach Chaim,* 132:2, note 5, cites the *Knesset Yechezkel* about the propriety of a girl reciting kaddish. He notes that a woman may not recite kaddish in Shul but, "ואם רוצים לעשות לה מנין רשות בידם". However, the *Sedei Chemed, Ma'arechet Aveilut,* no. 160, writes that the actual responsum of the *Knesset Yechezkel* states that a girl may not recite kaddish under any circumstance. Thus the only source that permits a girl to say kaddish at a private *minyan* in a home is the *Shevut Yaakov.*

based upon his understanding of the efficacy of reciting kaddish after a deceased parent. He explains that the practice of reciting kaddish after a parent is based solely on Rabbinic tradition, without which one would never have associated the kaddish with mourning. This being the case, we are not in a position to change that tradition or create our own new models in the matter. It is obvious, he writes, that kaddish and the dead have a mystical connection, and therefore arriving at a decision by means of logical extension is out of place. Hence,

הלכך אין לחדש מנהג זה של הגדת הקדיש מפי הבנות.

One should not introduce the custom of daughters reciting kaddish.

This is not to say that daughters do not have the ability to accrue merit for their departed parents, he asserts. On the contrary, women have great ability in that area. It is merely regarding kaddish that they are limited because the tradition limits the benefits of kaddish to recital by the son.

ואולם אעפ"י שאין לנו יד בנסתרות יש למצוא טעם בדבר על יסוד מה שאמרו רז"ל ברא מזכה אבא" (סנהדרין ק"ד).

He explains that the reason the Rabbis say, "a son can accrue merit for the father" but do not include daughters in this category, is that the kaddish is a means of *kiddush Ha-Shem*, sanctifying G-d's name. When a person recites the kaddish he calls out to the assembled to pray for the name of G-d to be sanctified. When they respond to his call, the reader is credited with bringing about the *kiddush Ha-Shem*. The father (or mother) who bore him are in turn credited with having raised one of their offspring to the level where he is the means by which G-d's name has been sanctified.

Rav Uziel draws a conclusion from this idea that since a woman can never be considered one of those who makes a quorum whereby a kaddish will be recited, she was not included in the practice of saying kaddish.

ודבר זה כמובן אינו מתמלא אלא על ידי הבנים שהם מצטרפים לעדה מישראל ולא על ידי הבנות ולכן אינן אומרות קדיש בציבור.

However, he does suggest that where there are no sons, only daughters, the girls should accrue merit for their parents by doing acts of charity and kindness. Additionally, writes Rav Uziel, a person who has no sons should support a Torah-learning institution and lend his name to it so that the merit of the Torah shall be his and in that way his soul will ascend in the world to come.(*Piskei Uziel, She'elot Ha'zeman*,3)

Rav Yosef Henkin, the great decisor of Jewish law, published a monograph in the rabbinic journal *Ha-Pardes* in Adar 1963 in which he wrote that a girl may say kaddish in the following fashion:

ותחפוץ לומר גם קדיש בפני הנשים בזמן שאומרים קדיש בבית הכנסת של האנשים אפשר שאין קפידא.

If she would like to say kaddish in front of the women when kaddish is being said in the men's shul, perhaps there is no objection.

In a an earlier article on the same subject, written in 1947 and first published in 1989 in a collection of writings of Rav Henkin entitled *Teshuvot Ibrah*, he addresses the question of a young girl saying the kaddish. He says that although the latter rabbis have discussed this matter (and frowned upon a girl's saying kaddish) he recalls in his youth that a girl said kaddish in a congregation of saintly and pious men. Furthermore, he writes to the questioner that in theory anyone who recites the kaddish has to qualify as a שליח ציבור (delegate of the group) – and if not, it is questionable if he may recite it. But ultimately, he argues, whoever recites the kaddish is *ipso facto* a שליח ציבור and must meet the requirements of that function. Yet we are not strict in this regard and do not demand that one have the worthiness of a שליח ציבור before we allow him to say kaddish. This is because we want the people to come to shul to say kaddish. We know

that were it not for the kaddish, many people would not bother to teach their children how to *daven*, and they would never come to shul. By coming to shul to say kaddish, the mourners are drawn to Judaism. The same logic might be applied to a girl, who could be drawn to Judaism by coming to shul for the purpose of saying kaddish.

He stipulates, however, that the girl must stand behind the *mechitzah*. Unlike earlier times when only one person recited the kaddish, we now have the custom that many people say the kaddish, and therefore if a girl says the kaddish together with the men, there is no reason to object.

Rav Shlomo Wahrman in his *She'eirit Yoseif* (volume 2, 1981 pp.296-300) discusses the question of women saying kaddish. When he cites the decision of Rav Henkin, he is bothered by a halachic objection and a philosophical-sociological problem.

First, if Rav Henkin maintains that the girl may recite the kaddish before the women in the women's section while the men are saying the kaddish, it turns out that the girl is saying the kaddish without the benefit of a *minyan*. He explains that the *ezrat nashim*, (the women's section), is considered as a separate domain from that of the men's section. The girl is therefore saying kaddish in front of the women, which does not constitute the requisite quorum for the kaddish to be recited.[5]

Rav Wahrman has another objection to Rav Henkin's position, which is a sociological evaluation of contemporary social political forces within Judaism. He asserts that even if Rav Henkin is

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5. Rav Yitzchak Weiss, in the his *Minchat Yitzchak* vol.IV #30, disagrees with Rav Henkin's thinking. He writes that that even though a case can be made for the mourner's kaddish to be recited by many people so that its purpose is not to include the entire congregation in the fulfillment of their obligation, (להוציא את הרבים ידי חובתם), even so to recite kaddish before the women only is an anomaly.

correct in theory for allowing women to say kaddish, we still must contend with the egalitarian movement within Orthodoxy that has put on trial the traditional Torah attitudes and laws concerning women. He contends that within that movement there exists a negative philosophy that seeks to usurp the tradition and replace the Torah values with the values of Western civilization. Consequently, once kaddish will be recited by women, the next move will be to count women for a *minyan* or at least allow them to have a *minyan* of women where kaddish and *kedusha*, *borchu*, and *kriat ha-Torah* will be recited. Furthermore, Rav Wahrman says that he discussed this matter with Rav Eliezer Silver זצ"ל, who concurred with him and shared with him a conversation that he had with Rav Henkin, where Rav Silver had expressed his disagreement with his ruling on women saying kaddish.

Rav Yechiel Michel Tukachinsky, in his work on the laws of mourning, *Gesher Ha-Chaim*, writes that many places will allow a young girl, less than 12 years old, to recite the kaddish.[6]

The Sephardic Chief Rabbi of Tel Aviv, Rav Chaim Halevi, writes in *Aseh Lecha Rav* (vol. V p. 234-6) that he does not allow a girl to say the kaddish. Even though he maintains that the idea of a daughter reciting the kaddish does indeed have efficacy in purely theoretical terms, however, practically speaking, there exists the complication of the girl being of necessity in the presence of men, which is problematic from the standpoint of the Jewish laws of modesty.

והטעם פשוט ביותר שלא יתכן לעסוק בדברי קדושה ובמקום קדוש בצורה

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6. See chapter 30, no. 5. He cites a custom that he says many places have, where a young girl less than twelve years old says kaddish after *aleinu* or after *korbanat*, before *baruch she-amar* of *shacharit*. He says however that no place allows an older girl or woman to recite the kaddish in shul.

ובררך העלולים לגרום הרהור עבירה אפילו קל שבקלים. ובבית הכנסת מצויים כל מיני בני אדם כמובן מאליו.

Based upon this reasoning, Rav Halevi does allow a girl to say kaddish in the presence of a *minyan* consisting of family members only. Even in a house of *shiva* he does not permit the daughter to say kaddish since non-family members usually make up the *minyan* in the mourner's house.

Rav Eliezer Yehudah Waldenberg (*Tzitz Eliezer* vol.XIV:7) has an interesting response to the request of an author of a book on modesty and Jewish law for an approbation. Rav Waldenberg does not grant him his request, pointing out what he feels are errors in the author's halachic approach. One area where Rav Waldenberg takes issue with the author is the matter of girls reciting the kaddish. He cites the opinion of Rav Efrayim Zalman Margolis of Brod in his monumental work, *Matey Efrayim* (*dinei kaddish yatom* שער ד סעיף ח), in the case of one who had only a daughter and requested before he died that ten men should be hired to learn Torah in his house after he died, and that his daughter recite the *kaddish d'Rabbanan* afterwards. The *Matey Efrayim* ruled that one should not accede to this request. He cites the commentary of *Elef La-Mateh* who adds that in this generation of great promiscuity one should not allow these kinds of practices.

In addition, he cites the decision of Rav Yosef Chaim Al Chakkam of Baghdad (*Ben Ish Chai*) in his work *Torah Li-Sh'mah (#27)*. He was asked the question about a young woman (over 12 years old) whose father asked that she recite the kaddish after the learning that would take place in his house after his demise. He ruled that this could not be done because this might lead to some confusion on the part of those present who might quite naturally assume that if it is permissible for her to recite the kaddish, it must also be that she can be included in making up the *minyan* required for the recitation of kaddish.

הכא גבי קדיש דצריך צירוף הנה הרואה אותה אומרת קדיש חושב שהיא משלמת לעשרה גם כן ומצטרפת עמהם וא"כ יחשוב דהיא שייכה בקדיש

וממילא מוציאה האנשים גם בחיוב קדיש דתפלה.

Looking at all the cumulative evidence, it would seem beyond a shadow of a doubt that a woman's saying kaddish is a practice that is frowned upon, if not outright forbidden. However, one writer endeavors to mitigate all of the evidence in favor of a woman saying kaddish, without any reservations at all.

In his work, *Benei Banim(vol II #7)*, Rav Yehudah Herzl Henkin (Rav Yosef Henkin's grandson) argues that all of the rabbis from the 17th century onward were operating on the assumption that only one person in the synagogue says kaddish at any given time. This was indeed the practice in earlier times, and was the basis by which all of the halachic decisors concluded that a woman's recitation of kaddish *as the solitary voice in the men's minyan* is incorrect. However, our contemporary custom, whereby all of the mourners recite the kaddish together, casts the woman and her voice into the background as it were, and does not constitute a breach in Jewish modesty or shul etiquette.

Furthermore, Rav Henkin shows that this was the reasoning employed by his grandfather, Rav Yosef Henkin, when he permitted a girl to say the kaddish. Moreover, when this analysis was first published in the rabbinical journal *Hadarom*, vol. 54, Sivan, 1985, a letter to the editor appeared in a subsequent issue from a reader who wrote that indeed the practice of a woman saying kaddish had its adherents in the most pious circles in Eastern Europe where, with the approbation of Rav Chaim Ozer Grodzinski, women who had lost their parents in the first World War recited the kaddish in shul. He also cites an additional piece of anecdotal evidence, that he spoke to an unnamed rabbi of the Mirrer Yeshiva who also witnessed the recitation of kaddish by women in front of prominent rabbis who approved of this practice.

The writer cites his own experience of receiving a decision from Rav Joseph B. Soloveitchik (through a third party), affirming his assent to the practice of a woman's saying kaddish. Allegedly, Rav Soloveitchik expressed the opinion that it made no difference

if the woman said kaddish together with a man (men) or recited the kaddish alone.[7] Subsequently, however, in 1995 in the journal of the Conservative movement, the same writer identifies the sources of his statements. He writes that it is all second-hand information and therefore all hearsay evidence.

In reference to Rabbi Yehudah Herzl Henkin's assertion that all of the early negative decisions regarding a woman's saying kaddish were based solely upon the different practice than that of today, his contention would certainly be enhanced by scholarly evidence showing the historical era and regions where the new custom, of many people saying kaddish in unison, began. If he could demonstrate that when the decisions against a woman saying kaddish were rendered, the local custom was for only one person only to say the kaddish, he might then have a tenable argument.

However, it is important to realize that among the Oriental Jews, (*Sefaradim*), the custom has always been for a group of mourners to recite the kaddish in unison. As early as 1746 Rav Yaakov Emden, in his commentary on the *Siddur*, speaks about the Sephardic custom where many people recite the kaddish together, and he lauds that custom.

Now, while one might make the case that the decision of the Ashkenazic *poskim* was based upon one person reciting the kaddish, this cannot be said for the Sephardic *poskim* who decided

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7. These oblique references are being made rather than citing the names and quotes, because this writer spoke with *Roshei Yeshiva* who studied in the Mir in Europe, who denied that women said kaddish in the manner described. Perhaps what everyone really saw was young girls below the age of twelve who recited the kaddish. See note #6. Furthermore, renowned students of Rav Soloveitchik told me that this was *not* his position on the matter. These contradictory reports at the very least force one to rely upon the written evidence.

against the recitation of the kaddish by a woman. It cannot be said of the *Sedei Chemed*, an eminent Sephardic halachist who was undoubtedly acquainted with both the Sephardic and the Ashkenazic kaddish traditions, and who nevertheless cites the Sephardic and Ashkenazic *poskim* interchangably as if they had one position. He never differentiates between the two traditions on the basis of two different kaddish models: one person versus many people reciting the kaddish. Certainly then, the *Sedei Chemed* did not see the variation in customs as a factor in forbidding women from reciting the kaddish. The same can be said for the Sephardic rabbis, the *Ben Ish Chai*, Rabbi Uziel and Rabbi Halevi, who do not render a lenient decision based upon the custom of many reciting the kaddish in unison.

Furthermore, if one examines the position taken by Rav Yosef Henkin, one realizes that he did not make one statement on the matter but rather two statements. First, in 1947, he wrote a responsum to the question, if a *young girl* (my emphasis) might recite the kaddish in shul. His first and apparently main consideration was that coming to shul to say kaddish serves an educational purpose whereby the child might develop warm feelings for Judaism and thus be drawn to Judaism (note: it seems obvious that Rav Henkin is addressing a situation where alienation from Judaism is part of a problem that needs to be addressed from a larger perspective, and the recitation of kaddish is only part of a solution being addressed). For that reason alone, he says one should not push away young girls (just as one would not push away young boys from the opportunity to get closer to Jewish practice).

He adds, however, that the girl should *daven* and recite the kaddish while standing in the women's section. It is only after his initial recommendation that he speaks about what was obviously a peculiar possibility that could occur in a loosely run or in an informal prayer situation, or because of the young age of the girl. What would happen, he asks, if the girl were to push her way into the men's section during the recitation of the kaddish?

He answers that

> עכשיו שכל אחד אומר בממקומו ורבים הם האומרים אין לדחות זה בשתי ידים וכבר כתבתי שנכון שתעמוד אחורי המחיצה.
>
> Now that everyone recites the kaddish in his place and there are many of them, one should not absolutely disallow the practice, rather it is proper for her to stand behind the partition.....

It is clear that his historical insight about the change in the synagogue kaddish customs is being employed only in dealing with a negative situation, and only *post facto*. The reasoning here mitigates the fact that the girl, incorrectly, is in front of the *mechitzah*, where because of being with the men her voice is audible. To that Rav Henkin says that her voice is neutralized by the others saying kaddish, and therefore there is no reason to rebuff the girl.

In his 1963 written statement about the recitation of kaddish by a girl, Rav Henkin speaks only about the usual situation where the girl is standing behind the *mechitzah*, and he permits her to recite the kaddish.

Here he does not speak about the custom of kaddish changing from being recited by one person to being recited many people. The reason is that it does not need to be addressed, since no one would be hearing the girl say kaddish because she was in the women's section, which in Rav Henkin's context means either that she was upstairs in the balcony or in the back behind the *mechitzah* where her voice could not be heard. Even under these circumstances he states "*perhaps* there is no objection."

> ותחפוץ לומר גם קדיש בפני הנשים, בזמן שאומרים קדיש בבית הכנסת של האנשים, אפשר שאין קפידא.

This would explain the subsequent reaction to Rav Henkin's decision by the other *poskim*, who could not understand the source that would allow the kaddish to be recited in front of women.

They obviously understood that the woman was totally separated and apart from the men, so that her kaddish could be heard exclusively by the women. There remains therefore no source among the *poskim* that would allow for a woman to recite the kaddish in the synagogue in front of men.[8]

Conclusion

There is a long history documented in our halachic and responsa literature that deals with the topic of a woman reciting the kaddish. The *poskim* dealt with the matter in their usual sensitive and thoughtful manner. Their collective conclusion was that a woman may *not* recite the kaddish for the host of reasons given above.

It would therefore seem that an attempt to "improve" or alter our sacred traditions and halachic precedents is in reality not a positive move but a negative one. Given the *zeitgeist* that prevails today, which serves as the impetus to change our time-honored laws concerning modesty, identity, and role differentiation, this change is both pernicious and dangerous. The synagogue is an institution that has always served as an educational tool to teach our people authentic Jewish philosophy, cultural attitudes, and behavioral norms. Tampering with the synagogue's customary practices is clearly a step fraught with great danger.

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8. However, see *Od Yisrael Yosef Beni Chai* by Rav Aharon Soloveitchik no. 32, where he argues that in the battle for equal rights for women in synagogue participation the demand is currently for women to be called up to the Torah for *aliyot*. Therefore, if the rabbis do not concede the recitation of the kaddish to women, the women then might come under the influence of non-traditional rabbis. The lesser of the two evils is to allow women to recite the kaddish.

As recently as 1992 the Ashkenazic Chief Rabbi of Israel, Rav Yisrael Meir Lau, in *Yacheil Yisrael*, vol II, no. 90, writes that one cannot rely upon the ruling of Rav Henkin. He says under no circumstances is a woman permitted to recite kaddish.

Shinuy Hatevah:
An Analysis of the Halachic Process

Rabbi Dovid Cohen

Societal norms, styles, and even basic structure are constantly changing. Nevertheless, these changes make little impact on normative Jewish practice. Jewish life based on Torah values rests on the bedrock of halacha, the unchanging standard of behavior outlined in the Torah. Although modern societies may have adopted practices and beliefs diametrically opposed to previous mores, Jewish law has remained steadfast in its principles and practices. It is not changed by modern philosphies which herald a new vision of the world.

And yet – Jewish practice is, in fact, not as unchanging as one might think. While indeed it is not subject to influence by the currents of modern thought, nevertheless, there are changes which *do* at times play a significant role in halacha – changes in the nature of people or in the physical properties of certain objects, which have occurred since the halachic principles were formulated. Since some halachic principles are based on or affected by physical realities, then to the extent that these physical realities change, it would seem that halacha might also be affected and, possibly, revised to conform to the new realities.

This paper will discuss various circumstances in which changes which have occurred in nature are – or are not – perceived as impacting upon halachic issues and normative conclusions.

Although discussion of changes in the physical world and

Member, Kollel Avreichim of Yeshiva Darchei Torah, Far Rockaway, New York

their possible effect in halacha is to be found mostly in the writings of later authorities (*Acharonim*), there are some clear and concrete examples of changes in the physical realm which are already cited in the Gemara. Thus, the Gemara[1] refers to the fact that in previous generations women could give birth even as young as 6 years old, and even 8-year old males could father a child, but by talmudic times, things had already changed. The Gemara[2] also notes that originally people were always required to learn Torah standing up, but "sickness came to the world" and now people are too weak to stand continuously, and may learn sitting down.

Even though the Gemara has clearly conceded that physical changes do occur, *poskim* are divided as to the effect which these physical changes should have on halacha. There does not appear to be a consensus on this crucial question: if the halacha is based on a physical fact, and the facts have demonstrably changed, how will or should that affect the final legal ruling? We will explore a number of specific areas of Jewish law in which this situation arises, and examine the reactions of various *poskim* to the "new reality".

In order to get a better understanding of how the realities of change can have a major effect on normative Jewish practice, let us turn first to the topic of *Hilchot Treyfot* and examine in depth the opinions of major *Rishonim* – and *Acharonim* – on the topic of change. Their fundamental positions have influenced the writings of *poskim*, as we shall see.

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1. *Sanhedrin* 69b.

2. *Megilla* 21a. Similarly, the *Sefer Hatanya Iggeret Hateshuva* chap. 3 says that although the early Kabbalists encouraged people to fast in atonement of their sins, we are physically weaker than they were and should therefore find alternate means of atonement. See also *K'raina D'iggrata* I 17.

The Torah[3] forbids eating an animal which is a *treyfa* (defective or damaged in a life-threatening way). The Gemara[4] defines "defective" as an animal's potential to survive for 12 months – if it will live for 12 months, it is not a *treyfa*, but if the defect will kill it within 12 months, it is a *treyfa*. Based on this definition and a tradition "going back to Sinai" (*Halacha leMoshe Misinai*), the Rabbis of the Gemara[5] compiled a list of the different defects which render an animal *treyfa*. Furthermore, the Gemara[6] states that we do not want to add to the list of *treyfot* that the Rabbis gave.

Based[7] on this last dictum, the Rambam[8] writes that even if we determine that a specific defect listed as a *treyfa* no longer actually kills within 12 months, or if we find that a defect not listed as a *treyfa* does in fact kill within 12 months nowadays, nevertheless we still adhere to the list of *treyfot* as given. In other words, *we ignore the changes*! Although the biology of the animal has changed,[9] even so the list of *treyfot* should not be modified.

This ruling by Rambam is more than mildly perplexing. How can we consider an animal that we know will live for more than 12 months a *treyfa?* Even more difficult to understand is how we can permit eating an animal with a defect that we know would kill it within 12 months – just because it is not on the list of the

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3. *Sh'mot* 22:30.

4. *Chulin* 57b.

5. Ibid. 42a.

6. Ibid 54a; however, not in connection with the upcoming question. The inference is that we do not detract from the "list" of *treyfot* either, for this reason.

7. As explained by both the *Kesef Mishneh* and the *Lechem Mishneh.*

8. *Hilchot Shechita* 10:12-13.

9. *T'vuot Shor* Y.D. 30:8 and *Chulin* 57a.

Gemara!

The Chazon Ish[10] offers an explanation: he writes that, in truth, all sicknesses have cures; however, at each point in history some cures are known and some are hidden. Similarly, sicknesses have different effects at different times in history. What was life-threatening in one era may not be as serious at a different time. Furthermore, the Gemara says[11] that Ravina and Rav Ashi, the redactors of the Gemara, were the final decisors of the halacha. Consequently, says the Chazon Ish, *Hashem* arranged that those animals that he wanted to be considered *treyfot* would be unable to live for 12 months at the time that the Gemara was compiled, in order that the Gemara would qualify them as *treyfot*.

The Steipler Gaon[12] further explains that when the Torah verse says that one should not eat a *treyfa*, it is referring to the animals that *Chazal* will designate as *treyfot*. Once Ravina and Rav Ashi defined what animals are *treyfot*, it is as if the Torah had written, "Do not eat an animal with defect A, B, ..." In other words, when our Rabbis explain a *pasuk* in the Torah, their words become an extension of the *pasuk* and should be approached on that level, never to be altered even if certain facts change.[13] And, he concludes, that is what the Rambam meant when he said that we do not change the list of *treyfot* "because the Torah directs us to follow whatever the Rabbis tell us."[14] However, if the Rabbis

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10. *Y.D.* 5:3 and *E.H.* 27:3.

11. *Bava Metzia* 86a. He also quotes the Gemara *Avoda Zara* 9a as relevant.

12. *Shiurin Shel Torah* 1:14-16.

13. See also *Tzofnat Paneiach K'lalei HaTorah V'Hamitzvot* III 333.

14. He applies this logic to the requirement that a *Mikveh* contain 40 *S'eah* of water, the quantity of water which the Gemara considers necessary to cover the average person. For him, the import of the *pasuk* is now "Immerse yourself in 40 *S'eah* of water". However,see

were not making a ruling based on their explanation of a verse, we may modify their ruling if it is based on facts which no longer pertain.[15]

Rav Moshe Feinstein[16] offers a different approach to explain the Rambam's statement that we do not change the halacha. In his opinion, the Gemara's definitions of a *treyfa*-rendering defect, as one that will cause the animal to die within 12 months, should be basis enough for our Rabbis to determine which animals are *treyfa*. Therefore, he questions the necessity of positing "*Halacha LeMoshe Misinai*"[17] (a rule declared as fiat, emanating from Sinai) regarding *treyfot*, since it seems redundant. He concludes that obviously, since the Rabbis did employ the device of *Halacha LeMoshe Misinai,* it was in order to teach us a specific point: Although to qualify as *treyfa* the animal must be incapable of living 12 months, even so, those that are listed as *treyfa* by virtue of *Halacha LeMoshe Misinai* are the *treyfot* for all time, even if they do not pass the "12 month test" anymore.[18]

Thus we see that, although differing in their understanding

Shiurei Tzion(Rav A.C. N'ah) 13:1-2, who fails to grasp his reasoning.

15. This last point will help us understand the Rambam, *Hilchot Rotzeiach* 2:8, in regard to the halacha that if one kills a human *treyfa*, he is spared the death penalty. There, he says that we ask the doctors to judge for us which defects will kill within 12 months, and he does not direct us to follow the "list". The explanation is that this halacha is not based on a *pasuk*; thus, we can follow the reality and not the "list".

16. *Iggerot Moshe, E.H.* II 3:2.

17. See footnote 5.

18. This leaves the "12-month rule" as merely indicating how or why these animals were included in the *Halacha LeMoshe Misinai* initially. This explanation can also be found in *Responsa of Maharam Shick* Y.D. 244. Rav Moshe Feinstein answers the question addressed in footnote 15 in *Iggerot Moshe, C.M.* II 73:4.

and explanation of the underlying reasoning, both Rav Feinstein and the Chazon Ish are prepared to accept the traditional list of *treyfot* as given in the Gemara, even though they realize that the facts upon which the Gemara apparently based its ruling may no longer fit the circumstances.

Nevertheless, their differences in explaining the underlying rationale operating in the area of *treyfa* do lead to differences in actual practice in other spheres of Jewish law. As a case in point: Rav Moshe Feinstein was approached by a couple who were not able to conceive; the doctor wanted to perform a procedure on the husband to determine the cause. However, according to the Gemara, this specific procedure would cause a man to be a *Petsua Daka* (rendered sterile), and the Torah forbids marrying a *Petsua Daka*.[19] Nowadays, however, this procedure does not render a man sterile. Could they therefore remain married?

Rav Moshe Feinstein answered that because the Gemara explained the *pasuk* of *Petsua Daka* to include the mentioned procedure, but did not base this decision on a *Halacha LeMoshe Misinai,* (a received teaching which cannot be questioned), we are not bound by its ruling if the basis of the decision has changed. Therefore, although in the times of the Gemara such a man became sterile, if nowadays the procedure does *not* render him sterile, then this man cannot be considered a *Petsua Daka* now, and can remain married.

Thus we see that Rav Feinstein, in the absence of a categorical *Halacha LeMoshe MiSinai*, is prepared to follow the implications of changes in human or medical realities to their logical conclusion, and to apply the halacha in accordance with changed circumstances. In contrast, however, if we follow the reasoning of the Chazon Ish, since the Gemara defined the verse of *Petsua Daka* in terms of this procedure, this explanation itself becomes

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19. *Devarim* 23:2

an extension of the *pasuk* and must be followed, even though the procedure no longer results in the same physical damage. (The Chazon Ish did not actually make a ruling in this case, but apparently that is the implication of his reasoning.)

A totally different approach to the apparent inconsistency between the talmudic list of *treyfot* and the actual facts is taken by the Rashba.[20] He quotes various instances where the Gemara[21] recounts stories of people who claimed that they experienced circumstances which contradicted the rules of the Gemara. The Rabbis were persistent that the people were obviously lying about their stories and, in each case, the people finally admitted that they had told the stories inaccurately. The Rashba concludes, therefore, that a statement made by the Gemara must always be considered true. Their teachings are all based on the teachings of Moshe Rabbenu; we are prepared to say even that one thousand people are lying rather than reject one word of the Gemara.

Applying his reasoning to our topic, the Rashba did not seem willing to concede that the nature of animals has changed in order to explain why they seem to live longer; rather, he felt that whatever the Gemara says was and remains true always.[22] However, Rav Moshe Feinstein[23] claims that even Rashba would have to admit that things have changed, in certain cases where it

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20. *Responsa of Rashba* I 98. Similarly, see *Responsa of Rivash* 447. The *Yam Shel Shlomo, Chulin* 3:55, accepts the Rashba. *Terumat Hadeshen* 271 also takes a strict approach in the question of *Shinuy Hatevah*, although he is not as strict as the Rashba.

21. *Yevamot* 34b and 75b.

22. The *Shach,* Y.D. 57:48, based on a text in *Chulin* 43a, says that the Rashba means to say that if a *treyfa* lives more than 12 months, it is obviously a miracle. It is not clear how he reads that into the words of the Rashba.

23. *Iggerot Moshe* E.H. II 3:2

is strikingly apparent. For example, the Rambam writes that after delivering a baby by Caesarean section, a woman is physically unable to have another child.[24] This is manifestly untrue today.

We have seen that when dealing with *treyfot*, the Rabbis are not prepared to change the halacha even when the nature of animals seems to change. And yet, through their explanations on *treyfot*, we can extrapolate that there are times when halachot do change, following specific guidelines.

Let us turn now to three topics in Jewish law, wherein a modification of halacha seems called for, based on perceived changes in physical facts. Our discussion will include I) *Niddah* and Childbirth, II)Health-related issues, and III)*Shiurim* (measurements).

I) *Niddah* and Childbirth

A) Hargasha

According to the Torah, when a woman menstruates, she becomes *niddah*.[25] However, the Torah considers her a *niddah* only if she simultaneously has a "*hargasha*", a sensation of the flow. If she menstruates without a *hargasha*, it is technically referred to as a *ketem*. Nevertheless, the Rabbis declared that even menstruation without *hargasha* (i.e., a *ketem*) also renders her a *niddah*, albeit *miderabbanan*.[26] The rabbinic status of *niddah*

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24. Rambam, *Pirush Hamishnayot, Bechorot* 8:2. See *Iggerot Moshe* Y.D. II 74. For other examples, see *Niddah* 31a, which states that boys are born face down and girls, face up; *Bechorot* 44b, relating to anatomy.

25. *Vayikra*, 15:19-33.

26. *Shulchan Aruch* Y.D. 190:1. See Rambam *Hilchot Issurei Biah 9:1*, as explained by *Chavat Daat* 190:1,that in fact *most* menstruation is accompanied by a *hargasha*.

has many leniencies, as compared to the biblical status (*mid'oraitha*).[27]

There are differing opinions as to what is considered a *hargasha*,[28] but all agree that the woman must be cognizant of the blood leaving her uterus.[29] Nowadays, it does not seem to be common for women to experience such a sensation. What then is the halachic status of most menstruating women – are they never to be considered as *niddah* according to the Torah?[30] This is a question whose solution has far-reaching implications in many cases of daily behavior in myriads of Jewish homes. If most women today have the status of being *niddah* only by rabbinic decree, the halachic rules governing their status and behavior will be quite different than if we are dealing with a situation mandated by the Torah.

In confronting this problematical status of women, the *poskim* evince a variety of responses, ranging from total denial to total acceptance. In all cases, however, they also demonstrate an extreme reluctance to transfer a theoretical argument into the realm of actual change in the normative ruling.

In the Gemara[31] it is written that it is possible for a woman

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27. For example, the minimum size of spotting to render a woman *niddah* differs, and if the *ketem* is not found on white garments there will also be a difference in her status. Many other examples are cited in *Shulchan Aruch* 190:2,5,10,18,19,54.

28. See *Pitchei Teshuva* Y.D. 183:1 who quotes the three opinions.

29. Which is when she is halachically considered a *niddah* although the blood has not yet left her body, Gemara *Niddah* 40a.

30. Even assuming this is true in general, what will be the halacha in a case where she menstruates after an activity that might "conceal" a *hargasha*, as discussed in *Sidrei Tahara* 183:2 and *Chavat Daat* 190:1 ?

31. *Niddah* 57b.

to forget that she had a *hargasha.*[32] One response, therefore, to the apparent "change" in women's bodily functions might conceivably be to posit that women in our day really always do menstruate with a *hargasha,* but they forget them. In other words, they should be categorized as *niddah* according to the Torah, because there really is no change.[33] Should we carry this rationale so far as to say that it is true even in the case of a woman who just stains but does not have an actual period? Or should we compromise and say that her regular period makes her a *niddah* according to the Torah, but staining only makes a woman a *niddah miderabbanan,* with the attendant leniencies?

Poskim have varying views on this. The *Aruch Hashulchan*[34] asserts that if *Chazal* state as fact that a woman has a *hargasha* as she menstruates, then she undoubtedly does. He reasons that women who claim that they do not have *hargashot* are not paying attention to this physical sensation; were they attuned to their "body rhythms", they themselves would discover that in truth they do feel something.[35]

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32. As explained by *Tosafot,* ibid, s.v., *Haroeh Ketem,* who caution that only as a last resort will we assume that this occurred.

33. In his *Responsa,* Y.D. 145, the Chatam Sofer concludes that *hargasha* is just a sign of a typical menstrual cycle (based on the Gemara *Niddah* 21b-22a and *Ran* ibid, s.v. *Tarti*). In that case, if nowadays a typical menstruation is not accompanied by *hargasha*, would it still require a *hargasha* to render her a *niddah mid'oraitha* ?

34. Y.D. 183:61-62.

35. He does not explain how we should decide which *niddot* should be classified as having "missed" their *hargasha* and which women should be considered as not actually having had any sensation. It does seem paradoxical to claim that a woman didn't feel her *hargasha* (which after all is a feeling)!

A similar approach is taken by Rav Wosner,[36] who writes that women nowadays are not as cognizant of their *hargashot* as they used to be, but if a woman were questioned enough she would remember the *hargasha*. Therefore, she is always a *niddah* according to the Torah unless she can say with certainty that she had no *hargasha*.[37]

Rav Moshe Feinstein[38] states that most women experience menstrual symptoms before they actually observe blood, and this qualifies as a *hargasha* for them.[39] He defines a woman as *niddah miderabbanan* only if she bleeds without any symptoms.

While some *poskim*, such as Rav Moshe Feinstein, are of the opinion that women today do have *hargashot*, others maintain that women have changed and do not always have or recognize their sensations. Although there are *rabbonim* who have rendered such decisions in practice, they have not as yet written extensively on this issue. Their recognition of *shinuy hatevah*, a change in women's nature in regard to sensations of menstruation, has major implications in the halacha, inasmuch as the laws pertaining

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36. *Shiurei Shevet HaLevi* 190, 1:2.

37. Furthermore, although the Gemara *Niddah* 3a says that a *hargasha* would awaken a woman, he says that nowadays it would *not* awaken her. Therefore, he concludes that any stain found immediately after sleep renders her a *niddah mid'oraitha* since we will assume that she had a *hargasha* but slept through it. See Rambam, quoted in footnote 26.

38. In *Teshuva* #12, in the appendix to *Halachos of Niddah* [sic] Vol. I, by Rav Shimon Eider.

39. Which he obviously sees as the *hargasha* described by Rambam, see footnote 28. The menstrual symptoms which Rav Feinstein describes are actually the *Vestot Haguf* listed in *Shulchan Aruch* Y.D. 189:19. For further explanation, see *Pardes Rimonim*, Introduction, p. 24a.

to a woman who is *niddah* by virtue of rabbinic ruling, rather than because of a biblical standard, are often more lenient.[40]

B) *Vestot*

1) *Veset Kavua*

Although a woman is not considered a *niddah* until her menstruation begins, she nevertheless has to practice certain restrictions at the time she "suspects" that her period will come, i.e., acting like a *niddah* during that suspect time.[41] This time is called the day(s) of her *veset*.

A *veset kavua* is defined as the case in which a woman menstruates at very regular intervals. It is halachically significant to know if a woman has a *veset kavua*, for if she knows almost certainly when she will menstruate, there will be relatively fewer times when she needs to practice the restrictions attendant upon the "suspected" times.[42] The *Shulchan Aruch*[43] says that *most* women have their periods at very regular intervals (*veset kavua*). Therefore, if a woman was unsure whether she was regular, the halachic presumption was that she had a *veset kavua*. However, the *Badei Hashulchan*[44] writes that nowadays women do not menstruate at such regular intervals,[45] and we can therefore

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40. However, this is not always the case. Thus, if a woman is considered as having *veset kavua*, the law may be more strict if she neglected to make an inspection on the day of the *veset*. See *Badei Hashulchan* 187:5 *Biurim*: ד"ה ד"אלב, who points out another change in halacha for women nowadays.

41. *Y.D.* 184.

42. See *Shulchan Aruch Y.D.* 184:9, 186:1-2, 187:4-5, 189:1,4 and 191.

43. *Y.D.* 184:1.

44. 184 *Biurim* ד"ה רוב.

45. I.e., with even less predictability than is noted in the *Shach*, as

make no such assumption.[46] Based on his understanding that a change has gradually transpired, he has modified the ruling of the *Shulchan Aruch.*

The *Shach*[47] emphasizes this point in stating that in the times of the Gemara most women had their period at such regular intervals that they could even predict in which part of which day or night it would begin. In his time (some 300 years ago), this ability to predict with such accuracy no longer existed and women could only predict the specific day or night it would begin. Based on that change, he explains that nowadays a woman must follow the restrictions connected with a day of *veset* for a full day, rather than only half a day, as had previously been the rule. We see here that the *Shach* changed the rule in accordance with a perceived change in nature.

2) *During pregnancy and after giving birth*

There are times in a woman's life when she does not have a period. During these times, a woman does not have to follow the restriction of a *veset* on the days that, based on her previous periods, would have been days of her *veset*. The *Shulchan Aruch*[48] cites two of these times as (a) from the time a woman is 3 months pregnant until delivery and (b) for 24 months after birth or miscarriage. The question that arises is how should the halacha regard women in the present, who differ from the description in the Talmud, in that typically they stop menstruating close to the start of pregnancy, and only in rare cases is menstruation postponed for a full 24 months after giving birth.

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explained in the text hereinafter.

46. The *Badei Hashulchan,* ibid, presents another difference in the halacha for women nowadays, based on this change.

47. *Y.D.* 184:7. He more clearly clarifies this opinion in *N'kudat Hakesef* 184:2.

48. *Y.D.* 184:7 , 189:33 , 190:52.

Writing in the late eighteenth and nineteenth centuries, Rav Akiva Eiger[49] and the *Avnei Nezer*[50] reason that, although everyone knows that women nowadays stop menstruating as soon as they are pregnant and may resume menstruation any time after birth, we can not rely on "our assumptions" to change the halacha in a case like this where none of the earlier authorities mention this change in nature.[51]

Rav Moshe Feinstein, however, finds their position difficult – conceding that change has occurred, but insisting that the halacha has not changed accordingly![52] He notes that almost 400 years ago, the *Bach*[53] based a halachic ruling on the very fact that menstruation is a sure sign that a woman is not pregnant (ie. women do not menstruate during pregnancy). Nevertheless, Rav Feinstein concludes his responsum in a somewhat equivocal fashion: although the *Bach* says that we may consider the fact that nature has changed in determining the halacha, however, in deference to the resistance of Rav Akiva Eiger and the *Avnei Nezer* to changing the halacha, we should change the halacha only where it results in a stringency; but "change in nature"

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49. Vol.I, 128. A careful reading of his ruling reveals that he is using the halacha as we have it in *Shulchan Aruch* to be lenient (in a case of *mamzeirut*). See *Noda BiYehuda* II *Y.D.* 88 and 93, who follows the guidelines of the *Shulchan Aruch* in a case of *roah machmat tashmish*, such that the guidelines are a stringency.

50. *Y.D.* 238:3.

51. The *Badei Hashulchan* 184:39, footnote 53, accepts this opinion. See also *Mishnah Berurah* 550:3. The *Noda BiYehuda E.H. 69* is similarly perplexed as to why no one mentions this change in nature, as it is relevant to many other halachot as well.

52. *Iggerot Moshe* Y.D. III 52.

53. *Responsa of the Bach* #100.

should not be utilized as the rationale to render a lenient ruling.[54]

Rav Wosner[55] agrees with Rav Moshe Feinstein's rulings concerning a woman after she has given birth. In regard to a pregnant woman, however, Rav Wosner is inclined to remain with the guidelines of the *Shulchan Aruch*. The *Nishmat Avraham*[56] asserts that even in the time of the Gemara the nature of most women was that their period stopped at the onset of pregnancy; nevertheless, despite their awareness of this phenonemon, the rabbis of the Talmud stated the halacha as written.[57] Therefore, he concludes, inasmuch as there has been no change in nature since that time, there should be no reason even to consider changing the halacha.

C) Harchakot

The *Shulchan Aruch*[58] outlines the restrictions (*harchakot*) that must be observed by a husband and wife while she is a *niddah*. The Ramban[59] says that the practice used to be for Jews and even non-Jews to avoid physical or verbal contact with a woman

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54. Although in the aforementioned *Teshuva*, it is unclear that this is Rav Moshe Feinstein's conclusion, see his *Teshuva* printed in the appendix to *Halachot of Niddah* (Rav Shimon Eider) 1-2, where he says so specifically. Rav Shlomo Zalman Auerbach, quoted in *Nishmat Avraham Y.D.* 189:2, reaches the same conclusion.

55. *Shiurei Shevet Halevi* 184:7 ס"ק 1 and 4.

56. *Y.D.* 189:3 in the name of *Chatam Sofer Y.D.* 169.

57. Possibly because during a period of time that even *some* women will continue menstruating, all women must be cautious for their *vestot*.

58. *Y.D.* 195.

59. *Bereishit 31:35, Vayikra* 12:4. He is quoted in part by Rosh, *Niddah* 10:2, as explained by *Madanei Yom Tov*, ibid #7, and by *Beit Yosef Y.D.*, end of sec. 193.

who was menstruating because contact with such a woman was "damaging". Today, we no longer do this. The *Chatam Sofer*[60] explains that such contact is no longer "damaging", as the nature of men[61] has changed and they are no longer adversely affected. Consequently, these extra restrictions no longer apply.[62] [63]

D) Childbirth

Contrary to society's attitude towards the value of life, Judaism teaches that life is infinitely precious, and we must go to extremes to preserve it. Thus, if a premature baby has even a slight chance of long-term survival, the halacha mandates that we spare no effort to give the baby its best chance. However, in the sad case when a baby is not viable, we have no halachic license to violate biblical prohibitions for a premature baby that will *surely* not live more than a few *days.*[64]

This ruling presents a clear problem: the *Shulchan Aruch*[65] states that a baby that was born in the eighth month will surely not live more than a few days; therefore, the *Shulchan Aruch* rules that one may not violate the Shabbat to try and save it.[66]

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60. *O.C.* 23.

61. As explained by *Shiurei Shevet Halevi* on page 2 of his Introduction, *s.v. "V'Eiyen She'eilot U'teshuvot Chatam Sofer.*

62. See *Halachot of Niddah* II pg. 194 footnote 296, who says that some of the restrictions are still followed to this day.

63. Although some may feel that this discussion was not germane, inasmuch as these restrictions were only customs and not halacha; see footnote 58 for a list of *sifrei halacha* who quote these practices.

64. Based on Rav S.Z. Auerbach quoted in *Shemirat Shabbat Kehilchata* 36:12, footnote 24.

65. *O.C.* 330:8 based on Gemara *Shabbat* 135a.

66. However, the Ramo *Y.D.* 266:11 presents a logical basis to permit performing a *Brit Milah* for such a baby on Shabbat.

However, writing in the past generation, the Chazon Ish[67] concluded that the nature of premature babies has changed and that nowadays even "eight-month" babies can survive. Therefore he rules that every effort should be made to save them.

By contrast, Rav Shlomo Zalman Auerbach[68] approaches the entire issue from a different perspective. It is not the baby's natural viability that concerns him. As far as he is concerned, since hospitals today are far better equipped with modern facilities and machinery to facilitate neonatal care, that is reason enough to devote ourselves to saving such children. In other words, his position is that the earlier rabbis were merely drawing conclusions based on the abilities of medical science in their time, and we similarly need to consider what medical science can do nowadays, and rule accordingly. The halacha remains the same: to do everything possible to save a life which can realistically be saved.

The topic of change in the potential survivability of premature babies is again discussed within the context of *chalitza*. A woman whose husband died childless is required to participate in the *chalitza* procedure with her husband's brother. However, if her husband had had a child that was developed enough to live, even if the child did not in fact survive, she is exempt from *chalitza*.[69]

The *Shulchan Aruch*[70] cites a talmudic text which explains that only babies born after a full nine months are developed enough to live, and only with such a child will a woman be exempt from the *chalitza* ceremony. Moreover, as we have seen, the Gemara held that a child born before the end of the ninth

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67. *Y.D.* 155:4

68. Quoted in *Shmirat Shabbat Kehilchata*, 36:12, footnote 24.

69. *Shulchan Aruch E.H.* 156:1,4.

70. Ibid, 156:4.

month could not be viable. Thus, if a woman were to give birth to a premature infant which died, she would need *chalitza*.

However, in his gloss to *Shulchan Aruch,* the Ramo[71] counters that "nowadays things have changed." His position is that a child born any time during the ninth month is viable. Therefore, he rules that such a child does exempt a widow from *chalitza*. Here is a clear instance of an outstanding *posek* (and the Ramo is virtually *the* authoritative halachic voice for Ashkenazi Jewry in the past four hundred years) altering normative Jewish practice due to a perceived change in the facts. This opinion is widely quoted as an example of a change in halacha as a result of a change in nature, even where that results in a leniency, i.e. the woman is exempt from *chalitza*, a biblical directive.

E) Brit Milah

There are other instances of the Talmud's describing as fact a condition which no longer seems to be true. Thus, the Gemara[72] states that washing a baby before and after his *Brit Milah* is potentially so crucial to the child's survival that it must be done, even if it involves violation of the Shabbat. Yet, the author of *Shulchan Aruch*[73] observes that in his day, people were not scrupulous to do this bathing and yet the babies did not seem to be adversely affected. Based on this seeming *Shinuy Hatevah*, change in nature, he rules that one may no longer violate the Sabbath in order to perform this washing.[74]

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71. Ibid.

72. *Shabbat* 134b.

73. *O.C.* 391:9.

74. For a discussion whether *Metzitzah* is required nowadays, based on current medical opinion, see *Journal of Halacha and Contemporary Society*, Vol. XVII Pp. 100-102.

II) Health Issues

The Gemara is replete with lists of medicinal herbs which are efficacious for a wide variety of illnesses, as well as lists of behaviors or foods that should be avoided lest they cause bodily injury. Once we have overcome the difficulty of correctly translating these texts and assuming that we understand their directions and warnings,[75] must we or should we follow them nowadays?[76] Or, absent scientific or even anecdotal evidence in correlation, may we argue that nature has changed and therefore there is no need to observe these restrictions? The Chatam Sofer[77] cautions that in order to conclude that ancient rabbinic warnings no longer apply in our day, we must first test them on Jews, (tests performed on non-Jews are considered inconclusive for changing the halacha).[78]

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75. See Rabbi Akiva Eiger on *Shulchan Aruch Y.D.* 336:1, who rules that we should ignore all such talmudic texts. His reasoning is that it is impossible for us to understand them fully, and misconstruing them may cause more harm than good.

76. Rav Avraham ben HaRambam in his *Ma'amar al Ha'agadot s.v. "Da ki ata"* (printed in *Ein Yaakov* Volume 1) claims that *Chazal* gave these instructions based on the medical knowledge of their time and that these medical rules have no basis in the Torah. As such, even in the times of the Gemara, they carried the weight of a doctor's advice only, and not the usual weight of the words of the Rabbis. See *Kesef Mishneh Hil. Issurei Biah* 21:31, who quotes a *Teshuvat HaRambam* to the effect that *Chazal* themselves did not give credence to some of these directives and only meant to say that those who fear such superstitions should be cautious.

77. *Y.D.* 101, based on *Avoda Zara* 31b.

78. This only underscores the level of certainty that nature has in fact changed, which one must reach before discussing its effect on halacha. See *Terumat Hadeshen* 271 and Ramo on *Shulchan Aruch Y.D.* 316:3 (as explained by *Magen Avraham O.C.* 173:1 and *Pitchei Teshuva*

The consensus of opinion is that much of the medical advice recorded by the Gemara was only for the people in that time but is ineffective today. For example, *Tosafot*[79] point out that although the Gemara[80] was of the opinion that a fish tastes best just before it rots, current medical advice contradicts that statement – and one should follow the current medical advice. The *Kesef Mishneh*[81] notes that this conclusion of the Tosafists accords with the attitude evinced by Rambam,[82] whose instructions about the practice of bloodletting contradict the advice of the Gemara. *Pilpulei Charifta*[83] takes this one step further, postulating that, based on his own advanced medical knowledge, the Rambam considered most of the talmudic dicta on health issues to be largely ineffective. In his view, that is the reason why the Rambam does not cite *any* of this medical advice in his compendium of Jewish law, the *Mishneh Torah*.

The Maharshal[84] adds that the "earlier authorities" established a *cherem* (ban) on anyone who uses these talmudic cures. Their reasoning was that since many people do not realize that there have been changes in nature, they might be led to a general rejection of rabbinic teachings when they see that their medical advice is "not true". Therefore, the earlier authorities considered

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E.H. 156:10) .They both claim that the rule set out in Gemara *Bechorot* 20b is no longer applicable, as the nature of animals has changed. However, they reach that conclusion based on personal observations of changes, yet their observations are diametrically opposed to each other!

79. *Moed Katan* 11a *s.v. "kivra."*

80. Ibid.

81. *Hil. De'ot 4:18.*

82. Ibid.

83. *Avoda Zara* section 10:5.

84. *Yam Shel Shlomo, Chulin* 8:12.

it better to refrain from using any of these cures, even those which might be effective, rather than risk arousing heretical responses among the unlearned.

The *Magen Avraham,*[85] too, rules that restrictions in the Gemara based on medical advice which is no longer valid need not be followed. The *Chatam Sofer,*[86] on the other hand, has a very different approach to changing rabbinic strictures based on apparently non-effective "scientific" observations. He introduces the idea that even in cases where we realize that food which the Rabbis considered dangerous no longer presents a risk, we are sill enjoined from eating it, for it has become our *minhag* (custom) to avoid that food. Nevertheless, the acceptance of a change in nature does create a difference in the impact of the law: Something that is prohibited because it is dangerous has stricter rules than something prohibited by halacha per se. Consequently, if now it has been "downgraded" to a *minhag,* it is more lenient than it formerly was.[87]

This brief survey indicates that, with respect to the medical advice proposed by the Talmud, later rabbis were generally prepared to rationalize disregarding directives which they considered to be ineffective, due to a change in nature.

Maharam Shick,[88] however, has a unique opinion regarding the health-related warnings of *Chazal*: We have a rule that in matters of life and death, we have to consider even remote possibilities of danger. Furthermore, we must recognize that

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85. *O.C.* 173:1 and 179:8.

86. *Y.D.* 101 regarding eating meat and fish together.

87. However,the *Shulchan Aruch Y.D.* 116:2 seems to say that it retains the level of strictness associated with an act prohibited because it is dangerous.

88. *Y.D.* 244.

medical research can never predict with *certainty* what the results of an action might be – science can only suggest the typical or most likely result. Consequently, *Maharam Shick* holds that we cannot reject the warnings of *Chazal* regarding health issues, because we can never ascertain with certainty that we are out of danger. Only in matters that do not relate to bodily danger may we consider changing the halacha based on a *shinuy hatevah.*

Ruach Ra'ah

We will consider one final aspect of *shinuy hatevah* as it pertains to health issues – the warnings about *ruach ra'ah,* loosely translated as "evil spirits" which come upon an object as the result of a certain action (or inaction). An example that is familiar to all is the halacha of washing one's hands three times each morning in order to remove the *ruach ra'ah* that rests on them during sleep.[89] Many *poskim*[90] write that generally these halachot no longer apply, for *ruach ra'ah* is no longer in existence. They base their conclusion on a text in the Gemara[91] which states that Abaye "banished all such spirits" from this world. For this reason, we need be concerned with *ruach ra'ah* only where the *Shulchan Aruch* explicitly tells us, such as washing one's hands in the morning.

III) *Shiurim* (Measurements)

The *Shulchan Aruch*[92] describes two ways to measure the

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89. *Shulchan Aruch O.C.* 4:2.

90. Tosafot *Yoma* 77b s.v. *Mishum; Yam Shel Shlomo-Chulin* 8:12; *Lechem Mishneh Hil. Sh'vitat Asar* 3:2; *Turei Even Chagiga* 3b; *Sh'mirat HaGuf V'hanefesh* 8:4, in the name of Rav Chaim Kanievsky and the *Chazon Ish.* However,see *Likutei Halachot (Chofetz Chaim) Niddah* 7a *Ein Mishpat* #7.

91. *Pesachim* 112b-113a.

92. *Y.D.* 324:1.

amount of flour one must knead into dough in order for that dough to require the separation of *challah*. One method involves displacing water with eggs to find the necessary volume, and is based on the Gemara in *Eruvin* 83b. The second method, that of the Rambam,[93] provides a specific weight for the required amount of flour. The Ramo[94] offers yet a third method, based on the Gemara in *Pesachim* 109, which involves measuring the container that will hold the flour with *etzba'ot*, the width of an average adult male thumb. The determination of the requisite amount (*Shiur Challah)* is important not just for the homemaker, but also serves as the basis for all other *shiurim*.

Approximately 200 years ago, the *Tz'lach,*[95] experimenting with methods of ascertaining *shiur challah*, found that the method using *etzba'ot* yielded twice as much flour as the egg method! Rejecting the notion that *etzba'ot* had gotten larger, he concluded that the average egg had decreased in size over time and was no longer as large as eggs in the days of *Chazal*. The *minhag* in his time was to follow the smaller *shiur* (calculated by the egg method), undoubtedly because people had always used the egg method. Since the average size of eggs had decreased, the *shiur,* in effect, had slowly become smaller. Therefore, he recommended that from now on, the "egg measurement" be abandoned, in favor of using only the larger, "finger" method. However, since the *minhag* (custom) was different from his finding, he recommended following the new and larger *shiur* only in cases where doing so would be a stringency.

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93. *Hil. Bikurim* 6:15, see *Kesef Mishneh.* The Rambam arrived at this *shiur* by following the methods of the Gemara and then weighing the results.

94. Ibid.

95. *Pesachim 116b*. The author of *Tz'lach*, R. Yechezkel Landau, is also known by the name of his other great work, *Noda Biyehuda*.

The reaction of Rav Landau to his newly-discovered discrepancy is very instructive – but it is important not to jump to the wrong conclusion about what he did. In changing his method of calculation, Rav Landau was *not* changing the halacha due to a change in the nature of eggs. On the contrary! He maintained that the halacha does not change, and the amount of dough required for *challah* to be taken has also never changed, since the days of Moshe Rabbenu. *Shiurim* do not change. If it turns out that *eggs* have changed – then it is necessary to change our method of calculation. But in changing this, he was actually acting to preserve, not to modify, the halacha. The bottom line – the quantity – has to stay the same, he felt. It is only the means to that end which have to be changed in light of the change in the nature of eggs.[96]

This is a singular reaction to the question of *shinuy hatevah*, change in nature, and yet it typifies the spirit of all the *poskim* who have had to confront apparent changes in the "givens" laid down by those who developed the principles of Jewish law. There is a fundamental reluctance to tinker with the finished product. Thus, various rationalizations have been advanced to circumvent either the necessity to change the halacha or the necessity to recognize a change from the world as it was known to the Sages of the Talmud and the early decisors.

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96. We have mentioned only those discussions relating to *shiurim* which are relevant to the present topic. In truth, the subject of *shiurim* requires a far more detailed discussion. Hopefully, the *Ribono shel Olam* will enable me to discuss this topic more fully in a separate study.

Matanot L'Evyonim and *Mishloach Manot* in the Modern Environment

Rabbi Asher Bush

The mitzvah of giving *Matanot L'evyonim* requires that each Jew give money to at least two poor Jews on Purim[1]. However, due to circumstances often beyond our control, it is not always possible to do this. In many communities, especially the more affluent or suburban ones, it is not common to encounter any poor people on Purim. While this dilemma is by no means a new one, it is quite clear that in our generation there may be far more alternatives to dealing with this problem. The purpose of this article is to discuss each of the various possible solutions, their merits and problems, in light of the classical sources.

Giving After Purim

The *Shulchan Aruch*[2] states that "In a place where there are no poor people [found on Purim] one should hold on to the money and give it to a place of his choosing." This is explained by the *Chayei Adam*[3] to mean that it may be given afterwards to the poor and may be used for any purpose. However, this ruling of the *Shulchan Aruch* is clearly not stating that if one cannot find any poor people on Purim, it is possible to fulfill

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1. *Orach Chaim* 694:1.
2. Ibid. 694:4, based on the *Mordechai* in the 1st chaper of *Megilla.*
3. *Chayei Adam* 155:28.

Rabbi, Utopia Torah Congregation, Queens, N.Y.

the mitzvah by giving the money later.[4] Rather, the *Shulchan Aruch* addressed this point because otherwise, one might well think that it is necessary to save these funds for the following Purim. This understanding is borne out by the words of the *Mishnah Berurah*[5] who writes that the funds referred to are those which "were already collected, but a poor person cannot be found" and "it seems to me that these are sums that he is accustomed to give each year to the poor."[6]

Had the *Shulchan Aruch* intended to rule that one indeed does fulfill the mitzvah in this manner, it would have stated "one must set aside money to give later" and not "one may hold on to this money [until one finds a poor person to give it to]." Similarly, the *Eishel Avraham*[7] writes that "if one sent money to the poor and it was lost along the way, one does not fulfill the mitzvah of giving *Matanot L'evyonim*, as the entire obligation depends upon the recipient's having joy;" the joy he refers to is being able to use the money on Purim. Accordingly, it would make no difference whether it was lost or simply given later, in neither case does one actually fulfill the mitzvah.

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4. Rather, it is in reference to a prior statement made by the *Shulchan Aruch* (694:2) that "One may not divert money set aside for the poor on Purim, even for other charitable causes." This prohibition of diverting funds applies only when one can in fact give the money on Purim, so that it can assist with the Purim meal, but in our case where the chance has already passed, there are no longer any such restrictions.

5. *Orach Chaim* 694:4; *Mishnah Berurah* no. 13.

6. This would be an obligation based on his prior meritorious conduct, which in many regards is treated like a *Neder* (vow), as is seen in *Yoreh Deah* 214:1.

7. *Orach Chaim* 694:1.

Giving Before Purim

The mitzvah to give *Matanot L'evyonim* (gifts to the poor) is a requirement only on Purim day (and not even on the night when there is a mitzvah to read the Megilla), as the Rambam[8] writes: "A person is obligated to give to the poor on Purim day." This idea is further borne out by the fact that some *Poskim*[9] mention that when the *Bracha* of *Sh'hechianu* is recited on Purim morning before the reading of the Megilla, one should also have in mind that this *Bracha* refers to the other mitzvot of the day – giving *Matanot L'evyonim, Mishloach Manot* to friends and neighbors, and the festive Purim meal, as this is the proper time for each of these mitzvot to be performed.

Based on these sources, it would certainly seem that one cannot perform this mitzvah before Purim day. The *Magen Avraham*[10] writes that "one should not give the *Matanot L'evyonim* before Purim lest they be used up before Purim day arrives." At least in theory, it would seem that according to the *Magen Avraham*, there is essentially nothing wrong with giving the *Matanot L'evyonim* before Purim; however, because of the very real possibility that the money will be spent before Purim, we do not allow such a course of action. It is quite likely that if one did so (by mistake), the mitzvah has indeed been fulfilled since the money was in the hands of the poor recipient on

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8. *Hilchot Megilla* 2:16.

9. *Chayei Adam* 155:27; it should be noted that the *Magen Avraham* 69222:1:1 and the *Mishnah Berurah* no. 1 state only that one should intend that the *Bracha* include the *Mishloach Manot* and the Festive Meal. The fact that they do not include *Matanot L'evyonim* in the *Bracha* is most likely a reflection of the fact that ordinarily a *Bracha* is not recited when giving *Tzedaka*, and it is not a matter of the timing of the mitzvah of *Matanot L'evyonim*.

10. *Magen Avraham* 694:1 no. 1.

Purim.

In a similar vein, the *Eishel Avraham*[11] rules that "One who sent gifts to a distant land, and they arrived on Purim day, the mitzvah has been fulfilled, even though at the time the gifts were sent, it was not yet the proper time to perform the mitzvah." While their cases are somewhat different, both the *Magen Avraham* and the *Eishel Avraham* seem to indicate that as long as the money is in the hands of the recipient on Purim, the mitzvah has been fulfilled regardless of when the money was sent.

In direct contrast to this opinion, the *Aruch Hashulchan*[12] writes that,

> One is obligated to give exclusively on Purim day, but if one gave beforehand, even if it was stipulated that it should be for Purim, one has not fulfilled the mitzvah, as this is an obligation (*Chovat Hayom*) that must be performed on that day.

His line of reasoning is quite compelling, as we do not find any mitzvah that relates to a specific day *(Chovat Hayom)* for which the halacha does not care when it is done.[13] Perhaps it

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11. *Eishel Avraham* 694:1.

12. *Aruch Hashulchan* 694:2.

13. While the mitzvah to read the Megilla seems to disprove this rule (as the Sages decreed, *Megilla* 2a, that the Megilla can be read from the 11th through the 15th, depending on circumstances) such is not the case. Rather, it should be noted that the mitzvot relating to Pesach, Chanukah and Purim have a certain unique level of obligation because they are in direct commemoration of events of national salvation *(Af Hein Hayu B'oto Haneis).* Even though they are time-bound positive mitzvot, women are fully obligated *(Orach Chaim* 472:14, 689:1); similarly, even a poor person who cannot afford to perform the mitzvah is still obligated *(Orach Chaim* 472:13, 671:1). It therefore

was for this reason that the *Machatzit Hashekel*[14] wrote, when explaining the previously-mentioned comment of *Magen Avraham,*[15] that "the common practice is to give before Purim, even though the mitzvah of *Matanot L'evyonim* applies only on Purim day, [we do this because] the case must be that gifts will also be given to two poor people on Purim day, and also because there are many poor individuals who will be collecting door to door on that day." The *Machatzit Hashekel* apparently reads the *Magen Avraham* to be ruling that even if one did give before Purim, this would not be the mitzvah of giving to the poor on Purim. Perhaps, he would explain, the original reason for this halacha was because of the fact that the money might not last until Purim; nevertheless, once the halacha was established, its original intent no longer plays a role.

Even though it is quite likely that one has not fulfilled the mitzvah by sending *Matanot L'evyonim* before Purim, the *Aruch Hashulchan*[16] rules that "it is obvious that one need not give personally and can do so via a messenger *(Shaliach),* and this messenger can even be appointed before Purim to deliver to the poor on Purim day." As will be seen, this ruling of the

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follows that just as the Sages included women and the poor, even though there was good reason not to include them, so too they created an opportunity for even the illiterate country farmers to hear the Megilla.

It is also worth noting that from the words of Rabbeinu Chananel (*Megilla* 2b) it is clear that when Megilla was read early, the *Matanot L'evyonim* were not given until the correct date. It is this fact that may well have led to the abolition of the early readings, as the poor would often lose out on their much-needed and eagerly-anticipated funds.

14. *Machatzit Hashekel* 694:1, no. 1.

15. 694:1, no. 1.

16. *Aruch Hashulchan* 694:2.

Aruch Hashulchan may become quite significant, as it could provide a means to fulfill the mitzvah even for those who expect in advance not to encounter any poor people on Purim.

There is a significant practical difference between the two approaches. According to the *Eishel Avraham,* if one gave the *Matanot L'evyonim* before Purim, or if it was delivered by a Gentile or even in the mail, the mitzvah has still been fulfilled as long as the money will be in the hands of recipients on Purim day. According to the *Aruch Hashulchan,* however, the *Matanot L'evyonim* must be sent and received on Purim day, unless one appoints a messenger *(Shaliach)* before Purim to deliver on one's behalf on Purim.

In recent years it has become increasingly common for collections to be made in many Shuls by the *Gabbai* on Purim; more commonly these collections are begun and even completed beforehand. Additionally, instead of actually sending the money, the *Gabbai* calls another individual (usually in Israel), informs him of the amount collected, and he in turn distributes the money, either himself or through other volunteers. Based on the halachic opinions considered above, it is necessary to examine whether one can indeed fulfill the mitzvah in this manner.

It would certainly seem that according to the opinion of *Eishel Avraham* (who wrote that even if the money were sent before Purim, as long as it arrives on Purim, one has fulfilled the mitzvah), it would follow that even if one gave in the somewhat circuitous manner that has become common, that would constitute fulfillment of the mitzvah. This is true because the poor person has received that measure of joy, and according to *Eishel Avraham's* understanding, there is no requirement that the act of giving actually take place on Purim, either directly or through a messenger.

Even according to the more stringent interpretation of the *Magen Avraham* – which states that under all circumstances the

money must reach the hand of the poor person on Purim day – this would by no means preclude sending it prior to Purim knowing that it would not arrive until the correct time. Similarly, it is possible to suggest that just as it does not matter when the money is sent, so, too, the manner in which it is sent may not matter much, so that even this circuitous fashion would be acceptable.[17]

However, the opinion of the *Aruch Hashulchan* requires further clarification. He ruled that only if one appointed a messenger to deliver the money on Purim day, is it possible to fulfill the mitzvah without being personally involved. Accordingly, the question would then arise whether the person who ultimately delivers the money in our case can legitimately be considered a *Shaliach*. Ordinarily, a *Shaliach* is only able to pass on his mission as a *Shaliach* to another if he actually physically hands over the money, wedding ring, *Get*, or whatever the item in question would be, to the person who is to take his place.[18] In our case, as stated before, the money does not yet change hands, and will only be sent some time after Purim to compensate the one who laid out the money in Israel on behalf of the community in America. Nevertheless, it does seem that even in this fashion one can fulfill the mitzvah. *Chelkat Mechokeik*[19] and the *P'ri Chadash*[20] both ruled that in matters other than marriage and divorce, a *Shaliach* can in fact

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17. The fact that the time the money is sent does not matter, seems to indicate that the specific act *(Ma'ase Mitzvah)* is not the determining factor, rather the results are most important. Accordingly, this indirect manner of giving should be acceptable.

18. *Even Ha'ezer* 120:4, writes that a *Shaliach* may not just give over his charge, such as the command to write a *Get*. He can, given the proper circumstances, hand over the *Get* with the charge to deliver it.

19. Ibid., no. 12.

20. Ibid.

be appointed *in absentia*. Accordingly, it would seem possible to understand that in our case, the *Gabbai* who actually collects the money never becomes a true *Shaliach*, as from the very beginning that status is reserved for the one who delivers the money to the poor. This is true even though the people who give the money have no idea who will be delivering their money for them.[21]

Different Time Zones

When money is collected in America to be distributed in Israel, one of the issues that arises is that there is usually a time difference of six hours or more, with the result being that there are a number of hours when it is Purim in one location but not in the other. While this does indeed limit the amount of time that the money could be distributed, there are certainly at least several hours when it is Purim day in both America and in Israel. However, many of the individuals and charitable organizations that distribute these monies wish to do so with the greatest of sensitivity, doing it in private so as not to embarrass the poor.[22] In order to best avoid any embarrassing encounters, the money is often distributed just at the break of dawn, when most people are still asleep; at this time it is still night in America, not yet the proper time to give *Matanot L'evyonim*. Whether this method is acceptable would depend upon the aforementioned debate between the *Eishel Avraham* and the *Aruch Hashulchan* about sending the money before Purim.

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21. This is because the law of *Breirah*, meaning that a legal status can be set to take effect retroactively, does exist in laws of rabbinic origin. Rambam, *Hilchot Eruvin* 7:8, *Orach Chaim* 413.

22. Ibid, *Hilchot Matanot Ani'im* 10:8 "The next highest level is to give to the poor and not know to whom he is giving, and the poor person does not know from whom he is receiving."

Sending To The Poor of Jerusalem

When money is sent from America to Israel, it is quite common that it is sent to the poor of Jerusalem. This introduces a new question, as the inhabitants of Jerusalem observe Purim on the 15th day of Adar, while in America and even in most cities in Israel, it is observed on the 14th of Adar.

Consistent with his prior ruling,[23] the *Eishel Avraham*[24] writes that "a person who observes Purim on the 14th, who sent *Matanot L'evyonim* to a person who observes the 15th, fulfills his mitzvah when the money arrives on the 14th, provided it is still in the poor person's possession on the 15th, since everything depends on the joy of the recipient." According to this opinion, one can even fulfill the mitzvah by sending to the poor of Jerusalem, provided that the money is saved until the 15th, which is Purim for the recipient.

It is quite likely that even the *Aruch Hashulchan*[25] would agree with this ruling, as his primary concern seems to have been the fact that the mitzvah should be performed on Purim day. In this case the money is given or sent on the 14th, which is Purim as far as the giver is concerned.[26]

A proof to this practice may be found in a ruling given by the *Shulchan Aruch*[27] regarding a visitor in Jerusalem who was intending to return home on before dawn of the 15th. This

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23. See note no. 11.

24. See note 23.

25. See note 12.

26. The early arrival of the money seems to be a problem only in the giving; as the mitzvah was placed upon each Jew to be sure to give on Purim day, the status of the recipient never seems to have been a factor.

27. *Orach Chaim* 688:5.

person was instructed to read the Megilla on the 14th even though he was in Jerusalem on that day. While it is not specified by the *Shulchan Aruch*, presumably he would also have to observe the other obligations of Purim on the 14th (otherwise he would never give *Matanot L'evyonim* since he does not plan to remain in Jerusalem on the 15th which is Purim there). Accordingly, this individual gives his money on the 14th to residents of Jerusalem, to be used on the 15th.

However, the question of a person who observes Purim on the 14th and gives to a person who observes the 15th is further complicated by the time differential of six hours or more between Israel and America. Due to this time difference, the money given (or more precisely, money laid out based on instructions given over the telephone to distribute a certain sum with a promise to repay later) will not arrive until the 15th, when it is no longer Purim for the giver of the money. In this case it is quite likely that since the day has passed for the giver and he has not yet given any money to the poor, he has failed to perform the mitzvah. It is also possible (according to the *Eishel Avraham)* that even though the money arrives after Purim has ended for the giver, nevertheless, he does fulfill his mitzvah, inasmuch as the whole obligation is to bring joy to the heart of the poor on Purim through his gift or to assist in providing for the Purim meal of the poor – and this has indeed been done, since it is still Purim for the recipient.

Sending "Collective" *Mishloach Manot*

While traditionally perparing for Purim was a busy and exciting time in the Jewish home, in recent years it has become even more busy, as in many communities it has almost become a matter of course that one will be sending *Mishloach Manot* to each and every friend, acquaintance, and fellow congregant. While this show of friendship and communal spirit is admirable and is consistent with the purpose of the mitzvah, nevertheless

the Rambam[28] writes "It is better for a person to give extra *Matanot L'evyonim* than to spend extra on the Purim feast or on the *Mishloach Manot.*" Perhaps for this reason, and perhaps due to the time and expense involved in the preparation of such large numbers of packages, it has become quite common in many communities for Yeshivot or Shuls to offer to send collective *Mishloach Manot* baskets for those who contribute a certain sum, including a list of the many participants attached to the package. Through this communal effort, not only has the time-consuming process been pared down, but much needed money is raised for worthwhile causes.

Due to the popularity of this practice, it is necessary to examine whether it is actually possible to fulfill the mitzvah of *Mishloach Manot* in this manner.

The *Shulchan Aruch* and other *Poskim* do not directly address the question as to whether one may collectively give *Mishloach Manot*. Nevertheless, it is possible to suggest that from the very origins of the decree this possibility was excluded. The text of the Megilla itself states "and the sending of portions, each man to his friend."[29] The simple reading of the text tells us that each and every Jew should be sending to his friend, and not that we should do so collectively, even if the gifts would be very significant. This idea becomes particularly meaningful for the explanation of the *Manot Halevi,*[30] who states that the purpose of this mitzah is to increase love and friendship among Jewish people, something which is best accomplished with personal gifts and not by merely participating in a communal gift.

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28. *Hilchot Megilla* 2:17.

29. *Esther* 9:22.

30. See note no. 5.

There is one instance where it does appear that *Mishloach Manot* might be given collectively. The *Shulchan Aruch*[31] states that "a woman is obligated to give *Matanot L'evyonim* and *Mishloach Manot,* and it is proper that a man should give to another man and woman should give to another woman." The *Magen Avraham*[32] wrote that "a woman who is married need not send her own, as her husband sends on her behalf." Presumably, this husband has not sent a separate portion on behalf of his wife; rather, he simply gives one gift on behalf of the two of them. Accordingly, this might provide a precedent allowing *Mishloach Manot* to be sent in a collective fashion.

Nevertheless, this case may not shed light on our question, since in many areas of halacha[33] husband and wife are considered as one unit *(Ishto K'gufo).* Additionally, during the duration of the marriage, her assets are bound up with her husband's,[34] leaving her no alternative other than to participate with him.

If there is any proof to be found in this scenario, it is based on the opinion of the *Aruch Hashulchan*[35] who wrote "even a married woman cannot fulfill this mitzvah through her husband's gift, as this is a personal obligation that she must do herself." Certainly, if it were possible to perform this mitzvah

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31. *Orach Chaim* 695:4, Ramo.

32. *Magen Avraham* 695:14.

33. It is noteworthy that even for the mitzvah of lighting the Chanukah Menorah, which can be properly fulfilled by having one per family, while the ideal *(Mehadrin)* way is that each person should light for himself, nevertheless, the *Mishnah Berurah* 671:9 states that this does not apply to a woman whose husband lights, as we say *"Ishto kegufo"* (that they are considered as one unit).

34. *Even HaEzer* 80 and 85.

35. *Orach Chaim* 695:18.

collectively, there would be no greater example of partners than a married couple, yet it is a possibility that he does not allow.

The Size of the Gift

Based on the Talmud *Yerushalmi*, the *Chayei Adam*[36] ruled that if a person were to send a minimal gift to a wealthy person, he would not be fulfilling the mitzvah of *Mishloah Manot*. In a similar vein the *Aruch Hashulchan*[37] ruled that,

> It seems to me that it is not sufficient to give only a *k'zayit* [olive size] or *rivi'it* [liquid measure of approximately 3 or 4 ounces]; rather, a significant portion is required, as the word *"Manot"* implies a dignified piece that is considered special, and those individuals who send small portions have not fulfilled their obligation.

It is clear that according to both the *Aruch Hashulchan* and the *Chayei Adam*, who actually mentions the term "wealthy", this requirement to give gifts of significance applies not only to wealthy recipients, but that in all cases the gift must be befitting for the recipient.

This requirement to send *Mishloach Manot* of some significance makes even more sense when the basic reasons for the mitzvah are understood. The *Terumat Hadeshen*[38] explained that we are bidden to send gifts of food to fellow Jews on Purim in order to make sure that everyone will have enough to enjoy a proper and festive *Se'udat Purim*. It follows, then, that these gifts should be worthy of forming a significant portion of a Purim meal. Even according to the opinion of the *Manot*

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36. 155:31.

37. *Orach Chaim* 695:15.

38. No. 111.

Halevi,[39] who explained that the purpose of the mitzvah is to show love and fellowship among Jews, it would seem that one hardly shows love and fellowship by presenting undignified gifts. On the contrary, a minimal gift can well be taken as an insult and serve to negate the purpose of the mitzvah.

Based on all of the above, in many cases when a number of families join together in one collective *Mishloach Manot,* there is not a signficiant portion being given by each person or family, and possibly one does not fulfill the mitzvah in this fashion. In those communities where the size of the *Mishloach Manot* depends upon the number of participants, this problem is likely avoided.

Needless to say, ordering, purchasing, and packing large numbers of *Mishloach Manot* takes quite some time, and the arrangements must be made a number of days before Purim. But this does not present a problem, as the *Aruch Hashulchan*[40] writes that "if one appoints another as his agent before Purim to deliver his *Mishloach Manot* to his friend on Purim, he has fulfilled his mitzvah, because the agent of a person is just like him." When the *Shaliach*/agent delivers the gift on Purim, it is as if he has given it himself on that day.

Conclusion

Based on our inquiry, it seems there are good reasons to question the practice of sending collectively. If children would no longer see their parents personally preparing *Mishloach Manot,* it is possible that this beautiful mitzvah, designed to increase love and friendship amongst Jews, could well be forgotten.

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39. Quoted in *Teshuvot Chatam Sofer, Orach Chaim* no. 196.

40. *Orach Chaim* 695:16.

S'char Shabbat

Rabbi Yeshai Koenigsberg

In order to preserve the Shabbat Laws, both in letter and in spirit, the rabbis instituted a series of rabbinic prohibitions. The system of these prohibitions, collectively known as *Shvut*, encompasses a wide range of activities and has far-reaching consequences in terms of Shabbat observance. One of these prohibitions, that of *S'char Shabbat*, will be explored here.

I. Definition, Source, and Rationale

S'char Shabbat prohibits the earning of money on Shabbat or Yom Tov. Even when the service rendered in and of itself involves no violation of the Shabbat laws, it is nonetheless prohibited to derive financial gain for such services. Furthermore, to derive such gain is prohibited even if the payment agreement for the service provided was concluded before Shabbat and actual payment is not made on Shabbat itself. This becomes evident upon examining the *Tosefta (Shabbat* 18:16), which serves as the source for the *S'char Shabbat* prohibition, and which is quoted in *Bava Metzia* (58a) in the context of determining the extent of liability of a watchman *(shomer)* who has been hired to guard personal property:

> One who hires a worker to watch a cow, an infant, or a planted field is not [permitted] to pay him wages[1] for [services

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1. The *Tosefta* addresses the one who is *making* payment. In reality, however, the primary focus of the prohibition is the recipient of the

Rebbe, Yeshivah Ohr Yerushalayim, Israel.

provided on] Shabbat; therefore he is absolved of responsibility [in case of theft or loss occurring on Shabbat].

In other words, since the watchman is precluded from receiving wages for services provided on Shabbat, his responsibility is limited to that of a *shomer chinam*, a non-paid watchman; and he is not treated as a paid watchman, *shomer sachar*, whose liability does include theft and loss. This case confirms the above three points. The service being performed is one that is permitted on Shabbat; the parties entered the agreement beforehand; and the wages are not be paid on Shabbat itself. Nonetheless, the prohibition of *S'char Shabbat* applies.

In order to establish the parameters of *S'char Shabbat* and to appreciate fully the nature of the prohibition, it is necessary to explore its rationale. What prompted *Chazal* (rabbis) to prohibit earning wages on Shabbat?

The primary source for defining the reason behind the *S'char Shabbat* prohibition is the commentary of Rashi in *Masechet Ketubot* 63a. The Mishnah there fixes the penalty imposed on a recalcitrant husband (one who refuses the court's demand that he give his wife a divorce) as three *dinarim* per week, based on a calculation of one half *dinar* per day. The Gemara (64b) explains

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wages and not the payer. This is borne out by the fact that one is prohibited from receiving payment from a non-Jew as well. (See *Shulchan Aruch, Orach Chaim* 246:1.) Conversely, under given conditions one may hire and pay a non-Jew to perform certain services on Shabbat. (See *Shmirat Shabbat Kehilchata* Chapter 28, paragraph 57.) In a case of paying *S'char Shabbat* to a Jew, the payer is, however, in violation of *lifnei iver*, being that he is causing the recipient to violate the *S'char Shabbat* prohibition (*Mishnah Berurah* 306, note 21). It is interesting to note that, whereas the Rif, Rambam, and *Shulchan Aruch* (*Orach Chaim* 306:4) follow the wording of the *Tosefta*, the *Tur* (*Orach Chaim* 306) and the *Chayei Adam* (60:8) explicitly formulate the prohibition in terms of the recipient of the wages.

that the fine is only three *dinarim* per week because the husband is penalized for only six days each week, to the exclusion of Shabbat. To fine the husband for a seven-day week would present a problem of *S'char Shabbat*, for the wife would be "earning" money from her husband on Shabbat as a result of his refusal to grant her a divorce.[2]

Rashi comments that the rationale for the *S'char Shabbat* prohibition is a *gezerah*, a rabbinic ordinance instituted because of the act's resemblance[3] to *mekach u'memkar* – conducting of business (literally buying and selling) – which is prohibited on Shabbat.[4] This comment, however, is highly problematic, inasmuch as the prohibition of conducting business is itself only a rabbinic one. Conducting business on Shabbat violates none of the thirty-nine types of activity proscribed by the Torah. Rather, it was a precaution instituted by *Chazal* due to their

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2. Note that the wife is totally passive, and yet the very fact that due to the particular circumstances she would be earning money on Shabbat involves a violation of *S'char Shabbat*. Rabbi S.Z. Auerbach (as quoted in *Shmirat Shabbat Kehilchata*, chapter 28, note 110) however, maintains that this is not a bona fide case of *S'char Shabbat* but merely *resembles S'char Shabbat*.

3. In general, *Chazal* were guided by two principles when enacting *gezerot* on Shabbat. Either a given act may *lead* to another prohibited act, or a given act *resembles* another prohibited act. See Rambam, *Hilchot Shabbat* 21:1. It would seem reasonable that in this instance when Rashi states that it is a *gezerah* because of business *(mishum mekach u'memkar)*, he means the latter. See also *Tosafot*, *Shabbat* commentary on *Orach Chaim* 306, note 9.

4. Whether the Rambam concurs with this reasoning is questionable. The prohibiting of *S'char Shabbat* appears in Chapter 6 of *Hilchot Shabbat*, whereas conducting business is not mentioned until Chapter 23, the implication being that the former is independent of the latter.

concern that one doing business may easily be led to write and erase, as is commonly done in the normal course of business (see Rambam, *Hil. Shabbat* 23:12). Since writing and erasing are activities prohibited by the Torah, there is ample justification for such a *gezerah*. But to carry this line of reasoning one step further and prohibit *S'char Shabbat* because of its resemblance to conducting business is inconsistent with the well-established principle of *"Ayn Gozrim Gezerah L'Gezerah"* – the Rabbis do not enact a *gezerah* to safeguard another *gezerah*.[5] This difficulty is first raised by the *Beit Yosef (Orach Chaim* 585) and presents a serious challenge to Rashi's explanation for the reason of *S'char Shabbat*.

There are three possibilities proposed by the *Poskim* to resolve this difficulty.

1. *"Kula Chada Gezerah"* - The Gemara[6] often responds to the challenge *"Ayn Gozrim Gezerah L'Gezerah"* with the reply *"Kula Chada Gezerah"*. In other words, despite the fact that it appears that the *gezerah* in question is two steps removed from the Torah-based prohibition, essentially it is one all-encompassing *gezerah*. Thus, *Eliyahu Rabba* (306:14) suggests that *S'char Shabbat* is one of these instances when the rule of *"Ayn Gozrim Gezerah L'Gezerah"* does not apply for this reason. The original *gezerah* of conducting business, enacted because of writing and erasing, encompassed *S'char Shabbat* as well.[7]

2. According to some authorities there are certain activities

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5. See *Beitza* 3a and elsewhere. Rashi *(Beitza* 2b *D.H. VeHaTanya)* maintains that this is derived from the verse *"U'Shmartem Et Mishmarti" (Vayikra* 18:30) - Make a safeguard for the Torah, and not a safeguard for a safeguard *(Mishmeret L'Mishmeret).*

6. *Beitza* 3a and elsewhere.

7. For a similar application, see Rashi *Beitza* 37a *D.H. Mishum mekach u'memkar.*

which, although they cannot be categorized under any of the thirty nine types of *melacha*, are nonetheless prohibited by the Torah. Thus, it is quite conceivable that, at least in some instances, it is Torah law that forbids one to engage in business on Shabbat.[8] Rabbi Menashe Klein[9] suggests that *S'char Shabbat* was enacted as a *gezerah* in order that one not conduct business in a manner that is prohibited by the Torah.

3. The *Beit Yosef* resolves the difficulty that he himself raised by proposing a rather novel definition of the nature of the *S'char Shabbat* prohibition. *S'char Shabbat* is not a bona fide *gezerah*. Rather it is merely a *"ch'shash"*, quasi-prohibition.[10] Based on the problem of conducting business on Shabbat, *Chazal* voiced concern about earning money on Shabbat, without enacting an actual *gezerah*. Since it doesn't carry the weight of an actual *gezerah* but merely has the status of *"ch'shash"*, the principle of *Ayn Gozrim Gezerah L'Gezerah* does not apply.[11]

The approach of the *Beit Yosef* is significant insofar as *S'char Shabbat* is qualified as being more lenient in nature than an actual *gezerah*, which consequently provides for more allowances. This will be developed further herein, when the

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8. Rambam *VaYikra (23, 24). Teshuvot Chatam Sofer* (*Even HaEzer* 2:173 and *Choshen Mishpat* 195) explains that this refers to one who engages in business on a regular basis. Casual involvement is rabbinically prohibited because of the *gezerah* of writing and erasing. See also Rashi ibid. and *Beitza* 27b *D.H. Ayn Poskin.*

9. *Teshuvot Mishneh Halachot* vol. 4 No. 33. See also *Shmirat Shabbat Kehilchata* Chapter 28 note 110.

10. See also *Mishneh Halachot* (vol. 5 no. 45) who in certain instances terms it *"Issur Kal"* – a minor or low-level prohibition.

11. See for example *Taz (Yoreh Deah* 198:4) that to prohibit something only *le'chatchilah* does not contradict the rule of *Ayn Gozrim Gezerah L'Gezerah.*

heter of *d'var mitzva* is explored.

II Heterim

There are basically three allowances *(heterim)* discussed by the *Poskim* in connection with *S'char Shabbat*. Each one will now be examined.

A. *Havlo'ah* - literally "swallowing up" or "absorbing". Whenever the earnings are for a period of time other than just for the day of Shabbat itself, the prohibition of *S'char Shabbat* does not apply. *S'char Shabbat* is avoided due to the fact that no earnings can be specifically attributed to services rendered on Shabbat. The halacha views the sum total of wages as being earned for services provided for the entire term and not as wages earned on a daily basis. This concept is based on the conclusion of the above-mentioned *Tosefta*, as quoted in *Bava Metzia* (ibid.):

> If the watchman was a weekly, monthly, or yearly... wage-earner, he is paid wages for [services provided on] Shabbat; therefore he is responsible [for the theft or loss occurring on Shabbat].

Thus, one is permitted to render services on Shabbat and receive payment, provided such services are a part of a term agreement requiring services be rendered at times other than Shabbat as well.

The *Shulchan Aruch (Orach Chaim* 306:4), when citing this halacha, adds an important stipulation: One may not demand his Shabbat earnings specifically.

> He is not permitted to say, "Pay me [wages of] Shabbat;" rather he should say, "Pay me wages of the week."

Designating Shabbat wages as a separate entity nullifies

the *havlo'ah* mechanism.[12]

However, many agreements are ambiguous in nature; these are also dealt with by the *Poskim.* Two such types of contracts will now be examined:

1. The Double-Closure Contract: The wages in this contract are delineated in two ways. One clause delineates the total wages for the entire term, while a second clause specifies the daily earnings. For example, a contract states that someone is being hired for a weekly wage of $700, for which he is earning $100 per day. Does such a contract qualify as *havlo'ah* by virtue of the first clause, or does the second clause specifying the daily wage define this as a daily contract, invalidating the *havlo'ah?* This question is addressed by the Ramo in a gloss to the above-mentioned ruling of the *Shulchan Aruch:*

> If he stipulates to pay him such and such per day [after having agreed to a given sum for a given period], he is considered to be a daily wage earner [and is in violation of *S'char Shabbat*].

Ramo, however, does not consider that this constitutes *havlo'ah* merely because mention was made of a daily wage. In and of itself that would not have prompted the Ramo to classify this type of contract as daily in nature. Rather, it is the implication of the daily earnings clause that is significant. By defining this agreement based on a daily wage, each party has established his right to terminate the contract prematurely. This would then necessitate calculating wages based on the number of days that the agreement was upheld and services performed. As such, even if ultimately the agreement is upheld for the entire term and not terminated prematurely, it is nonetheless classified

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12. The Gra points out that this is based on the concluding statement of the full text of the *Tosefta.*

as a daily agreement and not a term one. The potential for a reassessment of the wages based on a daily calculation negates the *havlo'ah* and violates *S'char Shabbat*.[13]

This ruling of the Ramo is not shared by all *Poskim*. The *Shvut Yaakov*[14] draws a distinction based on the likelihood of the agreement being terminated prematurely. If there is a strong likelihood, then the Ramo is correct in classifying the contract as a daily one. However, for the most part such agreements *are* upheld for the duration of the term and are only infrequently terminated. Since the possibility of a wage assessment on a daily basis is a remote one, such a contract can justifiably be classified as a term one and the *havlo'ah* mechanism is valid.

2. A term contract which carries a penalty for daily absence: On the one hand, actual wages are paid on a term basis. However, since wages are deducted on a daily basis due to absence, there exists an element of a daily contract. *Chayei Adam* (60:8) rules that such a contract is classified as daily and the *havlo'ah* mechanism is invalid. The deduction of wages for services not provided on a given day is in effect tantamount to receiving wages on a daily basis. The *Mishnah Berurah* (306:18) disputes this ruling and allows such a contract. The penalty, he argues, is justifiable in light of the fact that services were not provided for the entire period of time called for by the contract. In no way, however, is this a reflection of the essential nature of the agreement, that of term. The *havlo'ah* remains valid in spite of the daily penalty clause.

In summation: If a term contract merely includes a daily wage figure but the agreement cannot be terminated prematurely and there is no deduction for absences – then, according to all opinions, it satisfies the conditions of *havlo'ah*

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13. *Mishnah Berurah* (306:19) and *Biur Halacha D.H. Mikri S'chir Yom.*

14. *Teshuvot Shvut Yaakov* (1:6) cited in *Mishnah Berurah* (306:20).

and is permissible. A daily wage clause which implies a right to terminate the agreement prematurely would be prohibited by the Ramo, whereas the *Shvut Yaakov* would permit it as long as premature termination is unlikely. A clause that provides a deduction for absences would be prohibited by the *Chayei Adam* but allowed by the *Mishnah Berurah.*

In practice, then, many problems of *S'char Shabbat* may be avoided by employing the *havlo'ah* method. Thus, private teachers, babysitters, hotel employees, waiters, etc., may receive earnings for services rendered on Shabbat provided their employment includes non-Shabbat days as well[15] (and that their contracts satisfy the above conditions).

It should be noted that the *havlo'ah* is valid in such cases even if there is no inherent need for services other than on Shabbat and the sole motive for including non-Shabbat time is purely in order to create a *havlo'ah* as a means of circumventing *S'char Shabbat.* This is apparent from the ruling of the *Mishnah Berurah* 306:21 (quoting *Chayei Adam)* that a traveller who is lodging in a given place for Shabbat and is in need of hiring a Jew to guard his wagons on Shabbat, may not hire him just for Shabbat as this would entail a violation of *S'char Shabbat.* Instead, he should additionally engage him to guard the wagons "for a few hours on *Erev Shabbat* and *Motzaei Shabbat."* Doing this achieves *havlo'ah,* as the wages are for the entire time period and not just for Shabbat. Apparently, the wagon owner does not genuinely need to hire a guard for the non-Shabbat periods. Yet, the *Mishnah Berurah* recommends the practice.[16] This

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15. See *Shmirat Shabbat Kehilchata* Chapter 28, paragraphs 58 and 59.

16. Two important elements characterize the formulation of this *heter* by the *Mishnah Berurah.* Firstly, the term must include a significant time period that is non-Shabbat *("Kama Sha'ot"* – a few hours).

indicates that *havlo'ah* is valid even when it has no other purpose other than serving as a means to avoid *S'char Shabbat.*

An expanded form of the *havlo'ah* mechanism, which greatly broadens the scope of its applicability, is introduced by the *Noda B'Yehudah.*[17] He bases his ruling on a distinction drawn between services rendered and goods purchased in regard to *S'char Shabbat.* It is apparent from various rulings of the *Shulchan Aruch* (323 and 307:11) that one who receives goods on Shabbat is obligated to pay for such goods after Shabbat. The fact that the recipient is entitled to accept such reimbursement altogether, indicates that *S'char Shabbat* precludes only earning wages for services rendered; but reimbursement for goods is not classified as *S'char Shabbat.* Based on this, the *Noda B'Yehudah* argues that accepting payment for both goods and services together conforms with the *havlo'ah* principle. Since the total sum includes payment for goods, for which one is allowed to receive payment, it is analogous to wages which are paid for non-Shabbat days. Thus, a new form of *havlo'ah* has been established. *Havlo'ah* need not include a *time period* other than Shabbat – it need merely include *any* payment not subject to the prohibition of *S'char Shabbat.*

The *Noda B'Yehudah* employs this form of *havlo'ah* in allowing a mikvah to charge a fee for immersion on Shabbat. In addition to providing a service, the mikvah also provides goods – i.e. the fuel used to heat the mikvah – for which it is entitled to reimbursement. Charging a fee that includes goods as well as services conforms with the principle of *havlo'ah.*

Secondly, the term must include a period of time both before and after Shabbat. This second requirement, that Shabbat be "sandwiched", has not necessarily been adopted by contemporary *poskim,* as demonstrated by the rulings cited further.

17. *Teshuvot Noda B'Yehudah, Orach Chaim* 2:26.

This form of *havlo'ah* has wide application on a practical level. For example, when hiring waiters for an affair on Shabbat, one is confronted with the problem of *S'char Shabbat.* The standard form of *havlo'ah,* to hire them additionally for work before or after Shabbat (set up, clean up, etc.) is not always practical. The *Noda B'Yehuda's* form of *havlo'ah,* though, could be employed by arranging for each waiter to personally purchase some goods that will be used (foodstuffs, paper goods, drinks, etc.) at the affair. Thus, payment will include reimbursement for goods in addition to wages and will qualify as *havlo'ah.* Similarly, a babysitter whose service includes only Shabbat could be requested to provide snacks, etc. The one fee paid would thus include services and goods and would be permitted.

B. *D'var Mitzvah:* A second *heter* associated with *S'char Shabbat* is that of *D'var Mitzvah.* Whether or not the *S'char Shabbat* prohibition is suspended when the services provided relate to a mitzvah is in fact a dispute among the *Rishonim.* The *Tur (Orach Chaim* 585), quoting his brother, reports that whereas in the Ashkenazic communities many were eager to serve as a *ba'al tokeah* (gratis) on Rosh Hashana, in the Sefardic community they "run away from the mitzvah", thus necessitating the hiring of an outsider to blow shofar. The *Tur's* brother, however, challenges this practice as a flagrant violation of *S'char Shabbat.*

In the same vein, Rabbeinu Baruch, as quoted in the *Mordechai (Ketubot* 189), questions those *chazanim* who are employed on Shabbat, as being in violation of *S'char Shabbat.* On the other hand, the *Mordechai* cites Rabbeinu Shmuel who justifies the practice on the grounds that when the payment is for the performance of a mitzvah (i.e. prayer) the prohibition of *S'char Shabbat* does not apply. This would appear to be the position of the Sefardic Community as well in regard to shofar.

The rationale for this view, however, presents a difficulty. What precedent is there to allow a practice that is clearly a violation of Shabbat, simply on the grounds that it is a mitzvah?

In regard to no other prohibition, including those of a rabbinic nature, does consideration of a mitzvah provide for an allowance.[18] The resolution of this difficulty lies in the position of the *Beit Yosef* mentioned previously. Being that *S'char Shabbat* is not classified as a bona-fide prohibition *(gezerah)* but rather has the status of a quasi-prohibition *(ch'shash)*, it is of a less severe nature and an allowance is made for the purpose of mitzvah.[19]

Thus it would appear that the debate as to whether *d'var mitzvah* is a *heter* for *S'char Shabbat* actually depends on one's view regarding the essential nature of the prohibition. The position of Rabbeinu Shmuel and the Sefardic community that allows *S'char Shabbat* for a *d'var mitzvah* adopts the analysis of the *Beit Yosef* – *S'char Shabbat* is a quasi-prohibition and thus more lenient. The position of the *Tur's* brother and Rabbeinu Baruch, that rejects *d'var mitzvah* as a consideration, adopts one of the other analyses mentioned above and thus regards *S'char Shabbat* with the same severity as all other Shabbat prohibitions.[20]

What is the halacha in regard to this dispute? There is conflicting evidence as to the *p'sak* of the *Shulchan Aruch* on

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18. Even the *Ba'al HaItur,* who maintains that the rabbinic prohibition of *"Amira L'Akum"* (instructing a non-Jew to perform work) is permitted for a *D'var Mitzvah* (see Ramo *Orach Chaim* 276:2), concedes that this is an exception. See *Mishnah Berurah* there, note 21. Another possible exception is the somewhat vague rabbinic prohibition of *"Uvda D'Chol"* (activity not consistent with the spirit of Shabbat). See *Biur Halacha* 333:1 *D.H. V'kol Sh'vut.*

19. *Beit Yosef, Orach Chaim* 585.

20. For alternative interpretations of the view that allows *S'char Shabbat* for *d'var mitzvah,* see *Chidushei Anshei Shem* on *Mordechai, Ketubot* note 40 and *Teshuvot V'Hanhagot* (Rabbi M. Shternbuch) 1:214, citing Rabbi Isser Zalman Meltzer.

this matter. In regard to *chazanim* the *Shulchan Aruch* (306:5) records both views as follows:

> It is prohibited to hire *chazanim* to lead the services on Shabbat [because the *chazan* is receiving *S'char Shabbat*]. And some [authorities] permit this.

It is generally accepted that whenever the *Shulchan Aruch* cites a ruling and follows with a dissenting opinion ("some authorities"), his ruling is in accordance with the first opinion cited.[21] Thus, here the *Shulchan Aruch* is indicating that *d'var mitzvah* is not a *heter* for *S'char Shabbat.* However, in regard to shofar the *Shulchan Aruch* (585:5) states the following:

> One who receives wages to blow shofar on Rosh Hashana [or] to lead services... will not reap reward from those wages (literally: will not see signs of blessing).

As a rule this reservation expresses the fact that the practice is not viewed favorably, but is not formally prohibited.[22] Hence, the position adopted here by the *Shulchan Aruch* is that *S'char Shabbat* is permitted for *d'var mitzvah.*

The resolution of this contradiction is subject to lengthy debate among the *Shulchan Aruch* commentaries,[23] yielding opposing conclusions.[24] The prevalent practice is to adopt the

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21. See *Machatsit HaShekel* 306:8 and 585:12; See also *Shach, Yoreh Deah* 242 *"Horaot Issur V'Heter"* para. 5.

22. *Magen Avraham* 585:12. See for example *Shulchan Aruch Orach Chaim* 554:24.

23. See *Machatsit Hashekel* 306:8, *Aruch HaShulchan* 306:12, and others.

24. Those who prohibit *S'char Shabbat* even for *d'var mitzvah* include *Pri Chadash* 585:5, *Tosafot Shabbat* 306:12, and *Machatsit Hashekel* 585:12. Among those who adopt the lenient view are *Magen Avraham* 585:12 and *Bach* 306. In addition, *Be'er Heitev* 306:5 reports that this was the position of the *MaHaRiL.* The *Sha'ar HaTzium* 306:21 also infers from

lenient view which allows *S'char Shabbat* for a *d'var mitzvah*.[25] In light of the fact, though, that even this view considers it to be an undesirable practice, it is in any case best to employ *havlo'ah* whenever possible.[26]

The precise parameters of *d'var mitzvah* in this particular context need to be defined. Does *d'var mitzvah* encompass a wide range of activities that can loosely be termed *d'var mitzvah?* Or does *d'var mitzvah* perhaps assume a more narrow definition in one way or another? In examining the classic cases of *d'var mitzvah* mentioned above (shofar and *chazan),* three important features can be identified which may play a role in this determination:

1. The mitzvah being performed is of a public nature. Without the services of the *chazan* or *ba'al tokeah,* the entire congregation will be prevented from fulfilling a mitzvah. It could be argued that only a public mitzvah – *mitzvah d'rabbim* – is grounds for allowing *S'char Shabbat,* but not an individual's mitzvah. Such a distinction has precedent in halacha.[27]

2. The service provided is a mitzvah-act per se, versus a *"hechsher mitzvah"* – that which merely facilitates the performance of a mitzvah. Thus, if for some reason it was

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the *Biur HaGra* that he too concurs with the lenient view.

25. *Mishnah Berurah* 306:24 based on sources cited in previous footnote.

26. The widespread custom that the *chazan* for *Yamim Noraim* also leads the first *Selichot* service would appear to be based on this consideration. When advance preparation and/or travel is necessary, the *havlo'ah heter* is also satisfied. See *Tzitz Eliezer* 7:28 and *Shmirat Shabbat Kehilchata* 28:61.

27. See, for example, *Berachot* 47b where R. Elazar freed his slave in order to complete a *minyan* because of *mitzvah d'rabbim.* See also *Tzitz Eliezer,* ibid.

necessary, for example, to hire someone to bring the shofar to shul, the *heter* of *d'var mitvah* conceivably would not apply. This distinction is common in many areas of halacha.[28]

3. The performance of the mitzvah is essential for the proper observance of that particular Shabbat or Yom-Tov. Perhaps only then is *S'char Shabbat* allowed. However when the mitzvah does not in any way relate to Shabbat, there is not enough justification to suspend the prohibition. This is the position of the *Taz,* who proposes this distinction.[29]

A valid argument could be made to limit the *heter* of *d'var mitzvah* in any or all of these ways. The general consensus of the *poskim,* though, is to apply the *heter* of *d'var mitzvah* in the broadest of terms. Those *poskim* who adopt the lenient view with regard to *d'var mitzvah* mention it in general terms without qualification. Additionally, many *poskim* explicitly disregard

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28. A careful reading of the *Mordechai* who states "to fulfill a mitzvah" strongly suggests this distinction. See also *Shmirat Shabbat Kehilchata* Chapter 28 note 142, quoting Rabbi S.Z. Auerbach.

29. See *Taz* 585:7, who bases this distinction on the Gemara in *Bava Metzia* quoted above, that prohibits *S'char Shabbat* in the case of the watchman despite the fact that the service provided relates to the Temple Service (e.g. the cow is a *Para Adumah,* etc.), as Rashi explains. This indicates that not all mitzvot are grounds for allowing *S'char Shabbat,* but rather only ones related to that Shabbat. It should be noted that although this argument follows the interpretation of Rashi and some other *Rishonim,* there are *Rishonim* who do not interpret the Gemara this way. See *Shita Mekubetzet, Bava Metzia* there. (See also *Chazon Yechezkel* - commentary on *Tosefta* who demonstrates that these interpretations depend on the variant readings of the *Tosefta.)* In addition, the acceptance of the previous distinction mentioned would also resolve the Gemara (guarding is *hechsher mitzvah* and not a mitzvah itself). This would alleviate the need to introduce this distinction, and the argument of the *Taz* would no longer be compelling.

these distinctions in their rulings in these matters.[30]

C. Medical Treatment: *Mishnah Berurah,* based on earlier authorities, rules that a physician, mid-wife, or other health-care provider is permitted to collect a fee for services rendered on Shabbat.[31] There are two reasons put forth by the *poskim* for this allowance: *Teshuvot MaHari Bruna* (No. 114) maintains that this is a *pikuach-nefesh* consideration. If a health-care provider knows that there will be no renumeration, he or she may be less diligent in coming to the aid of a patient. In order to avoid a potential life-threatening situation, the prohibition of *S'char Shabbat* is suspended. *Pikuach Nefesh* is only a consideration, however, in regard to a Jewish patient. Therefore, according to this line of reasoning one would not be permitted to collect a fee for treating a non-Jewish patient on Shabbat.[32]

An alternate reason for this allowance is that administering medical treatment is a mitzvah and would thus fall under the *heter* of *d'var mitzvah* discussed previously. *Teshuvot Pekudat Elazar*[33] argues that this consideration applies to a non-Jewish patient as well. There is a mitzvah to treat a non-Jewish patient because of *"Aivah"* ("hatred"). (To withhold medical treatment may lead to resentment against Jews.) Therefore, the *heter* of *d'var mitzvah* allows a fee to be collected from both Jewish and non-Jewish patients.[34]

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30. See for example *Noda B'Yehuda* who (in addition to the *heter* of *havlo'ah* already mentioned) allows the collection of a mikvah fee because immersion is *d'var mitzvah.* See also notes 37, 39.

31. *Mishnah Berurah* 306:24. See *Shmirat Shabbat Kehilchata* 28:67.

32. *Shmirat Shabbat Kehilchata,* ibid. note 147, based on Ritva *Avoda Zara* 26a.

33. No. 29, cited in *Shmirat Shabbat Kehilchata,* ibid. See also *Har Tzvi Orach Chaim,* no. 204.

34. For an additional reason allowing the collection of fees from

III. Other areas of *S'char Shabbat*

The concept of *S'char Shabbat* is not limited to payment for services provided by the person himself, but extends also to services provided by his property. Thus, any rental agreement is also subject to the prohibition of *S'char Shabbat*. In this connection the *Mishnah Berurah* (306:19) cites two important rulings of the *Magen Avraham*. The first ruling deals with renting out accommodations for Shabbat. The *Magen Avraham* prohibits this as the owner is receiving payment for the accommodation provided. This would seem to preclude paying (a Jew) for hotel accommodations or the like when spending Shabbat away from home.

Contemporary *poskim* point out, however, that today (for the most part), the *heter* of *havlo'ah* in either form usually applies.[35] Firstly, accommodations for Shabbat usually are not strictly for Shabbat but include a time period both before and after Shabbat (at least to allow for check-in and check-out). Secondly, the fee includes meals as well which satisfies the other form of *havlo'ah*, that of goods and services. In a case where both these factors were absent (e.g. a private room or apartment that is made available only immediately prior to Shabbat and must be vacated immediately afterwards and meals are arranged elsewhere) then the prohibitive ruling of the *Magen Avraham* would indeed apply. There are others who maintain that even under such circumstances *havlo'ah* still applies.[36] The accommodations must be cleaned before and after Shabbat,

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non-Jewish patients, see *Teshuvot Rabbi Yitzchak Elchanan Spektor* no. 15 in *Sefer Hazikaron LeMaran Ba'al Pahad Yitzchak*.

35. *Mishneh Halachot* 5:45. *Shmirat Shabbat Kehilchata* 28:63.

36. *Shmirat Shabbat Kehilchata* 28:62. See *Da'at Torah* 306:4, who entertains the possibility that providing accommodations constitutes *hachnosat orchim* and is permissible because of *d'var mitzvah*.

which constitutes the first form of *havlo'ah*. Additionally, if linens are provided, the second form of *havlo'ah* is also applicable.

The second ruling of the *Magen Avraham* deals with financial assets which are also considered one's property. One who receives interest on a loan may not receive it on a daily basis for he is receiving payment for services provided on Shabbat. Rather, the interest must be calculated on a weekly (or other term) basis, thus qualifying as *havlo'ah*. As most banks currently pay daily interest on accounts, contemporary *poskim* discuss the permissibility of holding such accounts.[37] (An account in a bank owned by non-Jews is equally problematic since it is the receiving of such payment that is the primary concern of *S'char Shabbat*. See above note 1.) Here, too, the *poskim* employ the *heter* of *havlo'ah*. The 24-hour period based on which daily interest is calculated is either the calendar day (midnight to midnight) or the business day. In either case any period for which daily interest is accrued includes a portion that is not Shabbat. This constitutes *havlo'ah* and therefore involves no violation of *S'char Shabbat*.[38] Most rental arrangements, avoid *S'char Shabbat* for the same reason.

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37. A related issue is that of daily penalties for late payments on loans or utility bills. See *Minchat Yitzchak* 9:59. This, however, would apply only to Jewish-owned banks and utilities.

38. *Minchat Yitzchak* ibid., *Mishneh Halachot* 5:45. (*Minchat Yitzchak* permits earning interest if the proceeds are earmarked for yeshiva tuition, and the like, as this constitutes *d'var mitzvah.)*

It should be noted that this *heter* is not sufficient in resolving the issue of interest which is paid daily over two days of Yom Tov or when Yom Tov occurs on Friday or Sunday. In such a case, invariably there will be a 24 hour period, whether calendar day or business day, that is exclusively Shabbat or Yom Tov. See *Brit Yehudah* (considered the definitive work on the laws of interest) 35:18:62.

Mechirat Chametz

Rabbi Steven Gottlieb

The lengthy and difficult task of cleaning for Pesach is a time-honored tradition among the Jewish people. Months before the approach of the Yom Tov, houses are turned upside down in a relentless search for those ever-elusive little crumbs of *chametz* which invariably fall from whatever morsels of food have been snuck from the kitchen area. Soon the edict comes down from on high (that would be Mom in most households) that no more food will be allowed out of the kitchen. Walls and even ceilings are washed in our zeal to ensure that we are free from all *chametz* on Pesach, far in excess of the halachic requirements.[1] Yet, despite all our efforts and hard work, many Orthodox Jewish households have large caches of *chametz* which remain in their homes throughout the duration of Pesach!

This little revelation is less alarming than it first seems, when we realize that what we are referring to is the prevalent practice of selling one's *chametz* to a non-Jew for the duration of the holiday. Many of us have somewhat expensive collections of liquors and whiskeys which are distilled from *chametz* grains. Others own stores whose shelves are stocked with inventory, much of which is *chametz*. Still others simply store an overabundance of food in our pantries. What is common among

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1. As far as the halacha is concerned, only those places where *chametz* may have been brought need to be checked for *chametz*. See *Mishnah Pesachim* 2a, *Shulchan Aruch O.C.* 433:3.

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these three types is the excessive hardship which they would endure if forced to physically destroy all their *chametz*. Therefore, the custom developed to sell our *chametz* to a Gentile for the duration of Pesach, after which we repurchase it.

The purpose of this article is to explore the origins of this custom and its basis in halacha.

Interestingly enough, there is no source in the Talmud for our custom.[2] The earliest source which allows for a sale of *chametz*, with the knowledge and intent to repurchase the *chametz*, is the *Tosefta*,[3] which states:

> A Jew and a Gentile who are travelling on a boat and there is *chametz* in the possession of the Jew, he sells it to the Gentile or gives it to him as a gift, and then retakes it from him after Pesach, provided that he gives it as a complete gift.

The *Tosefta* seems to allow for the sale of one's *chametz* to a Gentile, the only purpose of such sale being to circumvent the prohibition against the possession of *chametz* on Pesach. The *Rishonim*, however, have varied approaches as to how far reaching is the rule laid down by the *Tosefta*.

The *BeHaG*

The *BeHaG* has a slightly different version of the *Tosefta*

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2. There is a Mishnah in *Pesachim* (21a) which permits selling one's *chametz* to a Gentile. Our customary sale differs from the case of the Mishnah. The Mishnah contemplates a complete and permanent sale to a non-Jew, while our custom involves selling the *chametz* to a Gentile who we know will sell the *chametz* back at the end of eight days. Both parties know at the outset that the sale will be reversed at the conclusion of little more than a week.

3. *Tosefta, Pesachim* 2:6

than the one which appears in the edition which we have.[4] But that slight variation makes a tremendous difference in the halacha.

The *BeHaG's* edition of the *Tosefta* ends with one additional caveat, "as long as he does not deceive." What does the *Tosefta* mean by this final statement? The answer is found in the commentary of the Ritva, who apparently understood that the *Tosefta* permitted this type of sale only as a measure of last resort. Really, one is supposed to dispose of all *chametz* prior to Pesach. If, however, due to some extenuating circumstance, one was unable to dispose of it before the approach of the Yom Tov, then the *Tosefta* gives him this "out" of selling his *chametz* to a Gentile whom he trusts to sell it back to him. The deception to which the *Tosefta* refers is a person who on a yearly basis somehow finds "extenuating circumstances" which prevent him from destroying his *chametz* and therefore sells his *chametz* to a Gentile year after year. Taking advantage of this sale device on a regular basis is an impermissible deception. The Ritva concludes that one who does deceive and sells his *chametz* to a Gentile on a yearly basis is penalized (we forbid him to use that *chametz* after Pesach).[5]

According to the *BeHaG* and Ritva, the *Tosefta* is not only not a source for our present day custom, but is diametrically opposed to our practice of selling our *chametz* every year.

The *Beit Yosef*,[6] however, has an entirely different understanding of the *BeHaG*. He has a basic question which leads him to his variant interpretation: We know that it is permissible for one to give his *chametz* to a non-Jew as a gift

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4. It seems the Rashba also had the *BeHaG's* version of the *Tosefta*. See *Teshuvot Harashba* 70.

5. Ritva to *Pesachim* 21a.

6. *Beit Yosef O.C.* 448.

and subsequently to retake it from him after Pesach. There is no greater deception than that, yet it is permissible, since over Pesach the *chametz* is technically not in the possession of the Jew. How then could a sale of *chametz* which is repurchased after Pesach be any worse? The *Beit Yosef* therefore interprets the deception to which the *BeHaG* refers to mean that one may not deceive by giving or selling his *chametz* expressly conditioned upon its being returned.[7] The *Beit Yosef* himself rules that a gift or sale conditioned upon its return is invalid.[8][9]

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7. Many of us are familiar with this type of transaction, a gift conditioned upon its being returned, in a different context. A condition of the mitzvah of Lulav on the first day of Succot is that the person must own that Lulav. One who does not have a Lulav of his own cannot simply borrow one from a friend, for borrowing does not give him ownership. Instead, what is done is that the owner of the Lulav "gives" it to his friend on the express condition that it be returned. In that manner the "borrower" technically owns the Lulav in the interim.

8. *Shulchan Aruch O.C.* 448:3.

Whereas in all other aspects of Torah law, a gift conditioned upon its being returned is considered a valid gift, regarding *chametz* the Rabbis were more stringent because of the very serious nature of the prohibition against owning *chametz*. (*Hagahot Maimoni, Hilchot Shabbat* 6:1).

If one did sell his *chametz* conditional upon its being returned, there is a debate whether that *chametz* may be used after Pesach. See *Sha'ar HaTziyun* 448:59.

9. It should be noted as well that there are two types of conditions which one can attach to this sale of *chametz*, one of which is not permitted, but doing so will not automatically lead to the seller's violating the prohibition against possession of *chametz* over Pesach, and one which, if done, will result in the seller's violating the prohibition. These two conditions are best described by the technical terms of a "condition precedent" and a "condition subsequent."

A condition precedent operates in such manner that the fulfillment of the condition is a prerequisite to the transaction's occurring. In our case, if one sells his *chametz* to a Gentile subject to a condition precedent, until such time as that condition is fulfilled the *chametz* remains in the possession of the Jew and he will violate the prohibition of owning *chametz* if the

According to the *Beit Yosef* then, the *BeHaG* is in no way opposed to our present custom. That leaves only the opinion of the Ritva opposed to our pactice.

The majority of *Rishonim* do not attach any condition to the rule of the *Tosefta;* Rambam[10] and the Rosh[11] both quote the *Tosefta* verbatim, while the *Tur* brings down the rule of the *Tosefta* but leaves out the introduction that the Jew and Gentile were on a boat.[12] The ruling of the *Shulchan Aruch* is in accordance with the *Tur,* that it is permissible under all circumstances for one to sell his *chametz* to a non-Jew with the understanding that he intends to repurchase the *chametz* after Pesach.[13]

Having traced the source for and established the validity of our custom, let us now explore some of the major issues

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condition is not fulfilled before the start of Pesach. Language in the transaction such as "If you do this, then the *chametz* will be yours," is a condition precedent.

The second type of condition, the condition subsequent, is the one which the *Beit Yosef* refers to here. That condition operates by immediately transeferring ownership of the *chametz* to the non-Jew, subject to that ownership being divested if the purchaser does not fulfill the attached condition. Here, since ownership is transferred immediately, the Jew does not violate the prohibition. (If the condition remains unfulfilled, however, the Jew may be in violation of the prohibition of owning *chametz* since the sale now is retroactively invalid. See *Shaar Hatziyun* 448:58).

10. *Hilchot Chametz U'Matzah* 4:6l.

11. Rosh to *Pesachim,* Chapter 2:4.

12. *Tur O.C.* 448.

Presumably the Rambam and Rosh would also agree that the *Tosefta* is not limited to a case where the Jew was on a boat. The relatively simple economic lives in the times of the *Rishonim*, before the advent of supermarkets as well as preservatives and refrigeration, simply made it difficult to fathom a different case where a Jew would find it difficult to dispose of his *chametz* before Pesach.

13. *Shulchan Aruch O.C.* 448:3.

which arise in connection with the sale of *chametz*.

One of the greatest difficulties in the sale of *chametz* arises from the language of the *Shulchan Aruch* based on a text in *Terumat Hadeshen*:[14]

> *Chametz* belonging to a Jew over Pesach is forbidden [to derive any benefit from it]...if he sold it or gave it to a non-Jew outside of his house before Pesach... it is permitted.

What does the *Shulchan Aruch* mean by "outside of his house?" The *Acharonim* are all of the opinion that the intent is not that the non-Jew must be outside the house, but that the *chametz* must be taken out of the house.[15] Clearly this is not the prevalent custom–we sell our *chametz* but leave it locked away in our own homes. The question then confronting us is whether we can reconcile our custom with the ruling of the *Shulchan Aruch*.

The *Taz* disagrees with the *Shulchan Aruch's* understanding of the *Terumat Hadeshen*. He explains that the *Terumat Hadeshen* could not have meant that one must remove the *chametz* from his house. Once the *chametz* is sold it belongs to the non-Jew. The halacha is clear, from the Gemara *Pesachim*, that if one has set aside a corner of his house in which there is *chametz* belonging to a non-Jew, he is not required to remove it. Therefore, the *Taz* understands that this was the intent of the *Terumat Hadeshen* as well: that the seller must simply designate a specific place in his home where he will store this *chametz*, which now belongs to a non-Jew.

The Radvaz, however, is of a different opinion. He explains that while normally it is permissible for one to keep the *chametz*

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14. Ibid. The *Shulchan Aruch* derives this halacha from the *Terumat Hadeshen*, questions 119 and 120.

15. *Bach, Taz.*

of a non-Jew in his house over Pesach as long as he sets it aside, here the halacha is more stringent. The reason we do not let the *chametz* remain in the Jew's house in this case is that, since this very *chametz* until now belonged to him, we are afraid he may mistakenly come to eat from it.[16]

Others explain the requirement that the *chametz* be removed so that it does not appear that the Jew has *chametz* in his possession over Pesach,[17] or that the Jew has accepted a bailment of *chametz* from a Gentile over Pesach.[18]

Still others[19] say that the only reason that the *chametz* must be removed is so that the Gentile, by removing the *chametz*, can acquire possession through a *Kinyan Meshicha*.[20]

However, the *Acharonim*[21] are in agreement that if it would be too burdensome to remove the *chametz* from one's house before Pesach, he may instead sell to the non-Jew not only the *chametz* but the room in which the *chametz* is kept as well.[22] If one sold not only the *chametz* but the entire room as well, he

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16. *Radvaz* 240.

17. *Pri Chadash*.

18. *Magen Avraham*. It is forbidden for a Jew to hold a bailment containing *chametz* for a non-Jew over Pesach if the Jew has accepted any liability for loss or theft of the bailment. (See *Shulchan Aruch* O.C. 440:1).

19. *Chok Yaakov O.C.* 448:14.

20. There are various methods within the halacha for acquiring possession. *Meshicha*, one of those methods, involves the actual physical taking of the item. The *Chok Yaakov* is of the opinion that the method by which a non-Jew acquires possession is by a *Kinyan Meshicha*. We shall soon see that this is a matter subject to debate.

21. *Bach, Magen Avraham*.

22. Presuming the same would apply to selling not the whole room but the cabinets or pantries in which the *chametz* is kept. That would seem to be what we rely on in locking our *chametz* away in a particular cabinet and selling just that cabinet.

will be forced to avoid that room[23] and will not come to eat the *chametz*. Furthermore, by selling the room where the *chametz* is kept, one avoids the appearance of having *chametz* in his possession or of having accepted a bailment of *chametz* from a non-Jew. In addition, by acquiring the place in which the *chametz* rests, the non-Jew can then take possession of the *chametz* through a *Kinyan Agav*,[24] rather than a *Kinyan Meshicha*. What emerges from these *Acharonim* is that the *chametz* must be set aside in a place which can be sold together with the *chametz*.

This leads us into another difficulty in the world of *Mechirat chametz*, namely the manner in which the non-Jew should acquire possession of the *chametz*. The basic problem underlying this transaction is that the seller and buyer operate under two different systems of law. The seller, being Jewish, is bound in all of his transactions by Jewish law, while the non-Jew is bound by the precepts of the secular law. The problem is how to effectuate a transfer which will satisfy both legal systems.[25]

There is considerable debate among the *Rishonim* on this point. Rashi is of the opinion that a non-Jew acquires possession through the transfer of funds,[26] while *Tosafot*, on the other

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23. Or that cabinet, if all he sold was the cabinet.

24. A *Kinyan Agav* is another one of the methods for transferring possession. The term *Agav* means incidental. When one acquires possession of real property (land) through one of the accepted methods of acquiring real property (money, contract, or physical possession) he can acquire chattels incidental to the acquisition. Therefore, here the non-Jew buys the room and incidentally the *chametz* in it.

25. Of course the simplest solution is an actual physical transfer of the *chametz*, but that is impossible when the rabbi is selling the *chametz* for an entire shul to one Gentile.

26. Rashi to *Bechorot* 3a.
Thus, if a non-Jew has paid for an item, even if the item has not yet been delivered to him, he is considered the owner of the item and the seller cannot return the money and refuse delivery.

hand, (as well as the majority of the *Rishonim)*, hold that a non-Jew acquires possession only through actually taking physical possession of the item.[27] The Rambam rules that a non-Jew can effect a transaction either through the transfer of funds or the transfer of the physical item.[28] Still others maintain that even those authorities who claim that a non-Jew can acquire possession only by the physical taking of the object, would nevertheless agree that where this would be difficult or impossible, the non-Jew can acquire possession through the transfer of funds.[29]

When dealing with a large volume of *chametz* owned by many different individuals, it is impractical, if not impossible, for the non-Jew to whom the Rabbi sells the *chametz* to take actual possession. Therefore the *chametz* is sold in exchange for a specific monetary fee in reliance upon those who hold that a non-Jew can acquire ownership through money. The non-Jew does not pay the entire price for the value of the *chametz*. Instead, he gives an initial down payment, and the remainder of the purchase price is viewed as a loan from the Jew to the Gentile.

Since not all *Poskim* agree that a non-Jew may acquire possession through a transfer of money, the *Acharonim* suggest that it is best to do other methods of transfer as well.[30] The

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27. *Tosafot* to *Avodah Zara*h 71a.

Thus, according to *Tosafot* even after a non-Jew has given money for an item, the seller has the right to return the money and not complete the transaction.

American common law binds the seller to complete the transaction as long as adequate consideration has been given by the purchaser. The law seems to follow Rashi's opinion.

28. Rambam, *Hilchot Z'chia U'matana* 1:14.

29. *Hagahot Ashri* to *Bava Metzia* chap. 4.

30. *Aruch Hashulchan* 448:21; *Mishnah Berurah* 448:19.

Noda BiYehuda[31] was of the opinion that the best way to transfer ownership of the *chametz* to a non-Jew is through a *Kinyan Sudar*.[32] However, he notes that one should not rely on this method inasmuch as the *Shach* questions whether a non-Jew can acquire possession in such a manner.[33] While one should not use a *Kinyan Sudar* therefore as the exclusive method of transferring ownership, it is certainly sound advice to use that method along with the monetary method.[34]

Another way to acquire the *chametz* is through a *Kinyan Agav*, mentioned earlier. Since the non-Jew is buying the room in which the *chametz* is located, he can acquire the *chametz* incidental to that sale. The sale of the room must be effective, however, in order for the incidental sale to be effective. The proper method of selling real property to a non-Jew is through a written contract.[35] But if the Jew is afraid to commit the sale to writing, lest the Gentile resort to a court with the bill of sale and keep the property, he may sell the land in exchange for money as long as that method is agreed upon prior to the

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31. *Dagul MeR'vavah* 448:3.

32. A *Kinyan Sudar*, otherwise known as a *Kinyan Chelipin*, is a form of acquisition which we learn from the Book of Ruth. It is a formalistic method of *Kinyan* in which the purchaser gives the seller an object of nominal value as consideration for the item being sold, thereby acquiring that item in exchange. The custom is that the seller then gives the object back to the purchaser.

33. *Shach C.M.* 123:30.
It should be noted that most courts under the current law would also find a sale invalid when it is made for a nominal consideration which is exceptionally disproportionate to the value of the item being sold.

34. While the *Shach* did not believe that a non-Jew could acquire ownership through a *Kinyan Sudar*, many others, including Rabbeinu Tam, disagreed. See *Tosafot* on *Kiddushin* 3a.

35. In American law as well, a sale of land which is not reduced to writing is invalid under the statute of frauds.

sale.[36]

Once the non-Jew has acquired ownership of the room which contains the *chametz*, another method of *Kinyan* becomes available to him, known as *Kinyan Chatzer*. This allows a person to acquire anything which is on his property without any further act of acquisition. Since the non-Jew owns the property where the *chametz* is, as soon as the Jew relinquishes possession of the *chametz* it belongs to the non-Jew.[37]

There is one additional theory of acquisition which may be very helpful in this area. That is known as a *Kinyan Situmta*. This is not a specific method of acquisition, but rather an acknowledgement that any method of transferring ownership which has become the accepted practice of those in the business, rises to the level of a valid *kinyan*.[38]

Since each of the aforementioned methods of *kinyan* have those in favor of them as well as those against, it is preferable to use all of the methods of *kinyan* to satisfy all opinions. Combining all of these methods of acquisition will ensure that the *chametz* is transferred from the possession of the Jew to the possession of the non-Jew.[39]

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36. *Shulchan Aruch* and *Ramo C.M.* 194:1.

37. There are those who hold that a non-Jew cannot acquire possession through a *Kinyan Chatzer*. See *Aruch Hashulchan C.M.* 194:12.

38. There is considerable debate as to whether this is a valid *kinyan* on a Torah level or not. See *S'dei Chemed* vol. 5 p.287.

39. The *Mishnah Berurah* (448:17) brings down a novel theory that even if one used only one of the available methods for transferring ownership of his *chametz*, and even if that method were really an invalid transfer, he would still not violate the prohibition against owning *chametz* on Pesach, and the *chametz* would not be forbidden after the holiday. This follows from the fact that the *Rishonim* in the beginning of *Pesachim* explain that *Bittul* (nullification of) *chametz* works to remove *chametz* from one's possession since one does not really own *chametz* on Pesach anyway. One

The standard custom among the Jewish people is for the Rabbi of the town to sell the *chametz* on behalf of all the members of the town after the individual owners appoint him as their agent to sell their *chametz*. It is important that the Rabbi be appointed to sell not only the *chametz* which one owns at the time he appoints the Rabbi, but also any *chametz* which he may acquire between the time of appointment and Pesach.

With the *chametz* of an entire town or congregation being sold at one time, it becomes impossible to give the non-Jew a specific inventory of all the items being sold (even an individual household may find it impossible to compile an exact list of all the *chametz* being sold). The question which then arises is how exact does one have to be in specifying the type and quantity of the *chametz* being sold?

The *Shulchan Aruch* rules that if one sells an unspecified item to another, for example if one sells all that he has in a particular container or closet, without divulging the contents of the container, the sale is not a valid sale.[40] The buyer does not have the true intent to purchase blindly and is therefore not bound. Thus it would seem to follow that merely selling an unspecified bundle of *chametz* would not constitute a binding sale.

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is not allowed to derive any benefit from his *chametz* on Pesach. The Gemara explains that even though one does not own his *chametz* on Pesach, the Torah views it as though he owns the *chametz* for the purposes of violating the prohibition against owning *chametz* on Pesach. If one nullifies the *chametz* he is simply revealing his desire to conform to the intent of the Torah not to own *chametz* and therefore the Torah does not view the the *chametz* as his for any purpose. Here, too, once the owner of the *chametz* has attempted to sell his *chametz*, even though without his knowledge the sale may be invalid, he has revealed his intent to conform to the Torah's desire to remove the *chametz* and he is therefore not in violation of the prohibition against owning *chametz* on Pesach.

40. *C.M.* 209:2.

There is a debate amongst the *Acharonim* whether in fact the *chametz* must be specified. Rav Yitzchak Shmelkes seems to hold that the *chametz* being sold should be specifically listed.[41] The Maharam Schick[42] and the *Chatam Sofer*[43] both agree that it is enough to simply sell all *chametz* which one owns. This is distinguishable from the ruling of the *Shulchan Aruch* mentioned earlier, since here the nature of the item is being specified.[44]

Since there is a difference of opinion regarding this matter, it is preferable to list all of the *chametz* being sold to satisfy all opinions. It is necessary only to list the various types of *chametz* being sold, but not the specific quantities of each type.[45]

What if the non-Jew wants to take the *chametz*?

One of the more famous questions dealt with in the writings on *Mechirat chametz* is what one can do if, on Pesach, the non-Jew comes to take the *chametz* which he has purchased. At the time of the original sale the non-Jew must be given access to the *chametz*, either a key to the room in which the *chametz* is being stored or assurance that at any time he wishes, he will have access to the room. It is certainly forbidden to lock up or otherwise seal off access to the *chametz*. If one does so at the time of the sale, then the sale itself is invalid. Once the sale has been completed, it is still not allowed to deny access to the *chametz*, but doing so will not invalidate the sale.[46]

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41. *Beit Yitzchak, Y.D.* vol.2 *Kuntres Acharon* 12.
He does, however, allow a *Kinyan* in which a specific amount is sold and along with that specific amount a lump sum is sold as well.

42. *Responsa Maharam Schick* 232.

43. *Responsa Chatam Sofer O.C.* 109.

44. See *S'dei Chemed* vol. 8 p. 340, 358.

45. *Aruch Hashulchan O.C.* 448:28.

46. *Mishnah Berurah* 448:12.

The *Sha'arei Teshuva* relates an occurrence in his town, where a Jew had sold a valuable collection of liquor to a Gentile; each day of Pesach the Gentile would come by and drink his fill. The *Sha'arei Teshuva* writes that he advised the man to wait until the non-Jew feel asleep from his drunkenness, and then have one of his servants take the key from him. He will assume that he lost the key. Also it would be permissible, according to the *Sha'arei Teshuva*, for this gentleman to have one of his servants borrow the key from the Gentile and then tell him that she lost it. The *Sha'arei Teshuva* also relates that he heard that a certain rabbi was approached with this very same problem. He did not answer the questioner at all. Instead, when the man who posed the question left, he contacted the non-Jew in question and hired him to deliver a letter a few days journey away. By the time he returned, Pesach was over and the problem was avoided.[47]

What must be sold?

There is considerable confusion as to what things must be sold and what possibly should not be sold. Only that which one is not allowed to possess over Pesach must be sold; that includes items made from the five grains (wheat, barley, rye, spelt and oats.) Ashkenazi Jews, who do not eat *Kitniyot* on Pesach, are permitted to have it in their possession over Pesach and to derive benefit from it.[48] A mixture which contains *chametz* and is unfit for human consumption may remain in one's possession over Pesach.[49] Likewise, *chametz* which remains unmixed, such as a loaf of bread that has become spoiled, or was burnt to the point where it became unfit for a dog to eat,

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47. *Sha'arei Teshuva* 448:3.

48. *Ramo O.C.* 453:1 and *Magen Avraham.*

49. *Shulchan Aruch O.C.* 442:4.

does not have to be disposed of before Pesach.[50]

There is a custom which some people have not to sell actual *chametz*. They rely on the sale of *chametz* only if the *chametz* is part of a mixture. The source for this custom seems to be based on a combination of various opinions regarding the sale of *chametz*.

The *Tevuot Shor* writes in his commentary to *Pesachim* that although we rely on selling our *chametz* to a non-Jew and we sell him our animals, it is forbidden for the non-Jew to feed the animals *chametz* over Pesach. The reason is that, in regards to selling *chametz*, everyone nullifies his *chametz* anyway, thereby removing the Torah prohibition. Therefore we may rely on this sort of "deceptive" sale (where everyone knows it is only a sale for eight days) if it is only to circumvent a rabbinic prohibition.[51] But having one's animals fed *chametz* on Pesach is a form of direct benefit from the *chametz*, which is prohibited according to the Torah; we cannot rely upon this type of a ritual sale to circumvent a Torah law.[52]

The *Tevuot Shor* himself permits the regular sale of *chametz*, since when the *bittul* (nullification) is performed, it removes any Torah prohibition on the *chametz*. Many of the later *Acharonim*, however, sharply disagree with his premise, asserting that that which one sells is not included in the *chametz* which he nullifies. Even if he does intend to include in his

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50. Ibid, 442:9.
There seems to be much confusion on this matter, with people selling shampoos and deodorants, etc.

51. Even *chametz* which has been properly nullified is still prohibited after Pesach, *Mid'Rabanan*.

52. *Bechor Shor* to *Pesachim* 21a.
The *Tevuot Shor* seems to be of the opinion that a *Ha'arama* operates only to circumvent a rabbinic prohibition.

bittul the *chametz* which is sold, it will not help, for if he nullifies his *chametz* before he sells it, and then sells the *chametz* — it must be that he retook possession of the *chametz* prior to the sale (a person cannot sell what he does not own)! Selling the *chametz* first and performing the *bittul* afterwards will not help either, for once he sells the *chametz* it is no longer his to nullify. One cannot nullify that which does not belong to him![53]

When one combines the opinion of the *Tevuot Shor* that this sale does not operate to circumvent a Torah prohibition with those *Acharonim* who hold that *chametz* which is sold is not included in the *bittul*, the sale of *chametz* becomes forbidden. However there are certain types of *chametz* which are only prohibited rabbinically, and those types of *chametz* would still be permissible to sell. Certain mixtures containing *chametz* fall into this category.[54] This seems to be the only source for the custom of selling only mixtures containing *chametz*, but not pure *chametz*.

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53. *Pri Megadim, Shulchan Aruch Harav* 448. See *S'dei Chemed* vol. 8, p. 397.

It may be possible to reconcile the opinion of the *Tevuot Shor* by applying a premise which we brought down from the *Mishnah Berurah* earlier (see note 39). What emerges from that *Mishnah Berurah* is that there are really two aspects to every sale of *chametz*. There is the actual sale, which removes the *chametz* from the possession of the non-Jew, but there is also the fact that the Jew, by attempting to sell his *chametz*, is revealing his desire to conform to the Torah's wishes, and this in itself works as a form of *Bittul*. Therefore since every sale of *chametz* contains an inherent *Bittul*, the sale aspect of the transaction is only being used for the rabbinic prohibitions.

54. A mixture of *chametz* with something of its own kind (*Min Bimino*) i.e. *chametz* wheat flour mixed with non-*chametz* wheat flour would be permitted according to the Torah as long as there is a majority of non-*chametz*. If it is a mixture not with its own kind (*Min Bishe'aino mino*) i.e. *chametz* flour mixed into a recipe, then it would be permissible according to the Torah if there were 60 times as much non*chametz* as *chametz*. The Rabbis, however, forbade even the smallest amount of *chametz*.

All the *Acharonim* who disagree with the premise of the *Tevuot Shor* and feel that *bittul* does not affect the *chametz* which is being sold, still allow the sale of *chametz*. That is because all of them strongly disagree with the second premise of the *Tevuot Shor* and feel that this sort of sale operates even to circumvent a Torah prohibition. We find a law in relation to the first born of an animal that there is a mitzvah today to sell a share of the mother prior to the birth, to a non-Jew, so that the first born will not have the sanctitity of a first-born animal of a Jew.[55] Here is a clear example of using the means of a sale to circumvent a Torah prohibition.

The *Tevuot Shor* himself holds that it is permissible to sell actual *chametz*, as do those who disagree with him. They disagree only with the reasoning which makes the sale permisssible. To say otherwise would be counter to the plain meaning of the *Tosefta*,[56] which does not distinguish between actual *chametz* and a mixture containing *chametz*. Therefore, to combine these variant opinions to create a theory which forbids the sale of actual *chametz*, contrary to the plain meaning of the *Tosefta*, is a stringency which is not binding on those whose custom it is to sell actual *chametz*.

Another very difficult question which arises in the "what to sell category" is the ownership of corporate stock.[57] If one owns stock in a corporation which has holdings in *chametz* assets, or shares in a mutual fund which may invest in companies which do business in *chametz*, must those shares be sold?

The problem in dealing with corporate stock is that the

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55. *Shulchan Aruch Y.D.* 320:6.

56. Quoted above.

57. Corporate stock is an equity security and represents an ownership interest in the corporation. It is to be distinguished from corporate bonds which as debt securities are simply loans to the corporation and do not present any difficulties regarding *chametz*.

concept of a corporation does not exist in halacha. A corporation is a legal fiction, existing separately and distinctly from those whose capital is invested in it. The law views the corporation as a person, who can buy and sell assets, can own property, and has the power to sue or be sued. A corporation is also characterized by limited liabilty, which means that the liabilty of any investor for the debts of the corporation is limited to the amount of his investment.

In Jewish law only a real person can own property. Thus the question arises, since according to halacha the corporation can apparantly not own anything, who does own the assets of the corporation? More importantly for our purposes, do the shareholders own the assets of the corporation?

Various approaches are taken by the *Acharonim* on how to view a corporation. Most of the responsa deal with banks which are owned by both Jewish and non-Jewish shareholders and whether those banks may lend money at interest to Jews. The Maharam Schick concludes that the shareholders do not own the assets of the corporation, based on the fact that no individual shareholder has the right to take any sum of assets equivalent to his investment. Instead, the investment of all of the shareholders is viewed as a loan to the partnership, which is considered the owner of the assets.[58] Rav Shaul Weingart reaches almost the same conclusion as the Maharam Schick, basing his conclusion on the halachic principle of "*Dina D'malchuta Dina*".[59] Since the secular law recognizes the existence of a corporation as a separate entity and regards the corporation as the owner of its assets, the halacha will do so as well.[60]

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58. *Responsa Maharam Schick Y.D.* 158.

59. "The law of the land is binding law."

60. *Yad Shaul,* quoted in *Minchat Yitzchak* vol. 3,1.

The Maharshag, a student of the Maharam Schick, disagrees with his Rebbe's assessment. He asserts that for a loan to exist there must be both a lender and a borrower. A partnership is not a person and can therefore not be a borrower. The Maharshag concludes that the owners of the corporate assets are the shareholders.[61]

Rav Yizchak Yaakov Weiss disagrees with both these assessments. He maintains that just because the law views the corporation as a separate entity, does not mean that it strips the shareholders of all ownership rights. He distinguishes between stock which has voting rights, which he maintains constitutes ownership in part of the assets of the corporation, and stock without voting rights, which is regarded as merely a loan to the corporation, since the investor does not have a say in the running of the corporation. He concludes that a holder of stock with voting rights would have to sell his shares before Pesach.[62]

Rav Moshe Sternbuch has an insightful analysis in which he attempts to find a justification for the practice of not selling one's shares of stock (he, personally, is of the opinion that one should sell them). The nature of the shareholder's interest must be defined either by the secular law or by Jewish law. If the secular law is binding, then the corporation exists as a separate entity and it owns all of the *chametz*. If, on the other hand, we apply the principles of Torah law to define the relationship of the shareholder to the corporation, we find that the corporation does not exist. Therefore the investment of the Jewish shareholder in the corporation operates as a loan to the directors of the corporation. Either way, the shareowner is not the owner

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61. *Responsa Maharshag Y.D.* 3.

62. *Responsa Minchat Yitzchak* vol. 3, 1.

of the assets of the corporation.[63] [64]

Another difficulty in selling one's shares in a corporation is the method of sale. In order to sell shares in a corporation, the seller must meet the strict requirements of the corporation and the stock exchange. Merely including the shares of stock in the contract of *Mechirat chametz* does not constitute a valid sale of stock. Dayan Weiss says that for this sale, since there is no other choice, we rely on those *poskim* who validate the sale of *chametz* even if it is valid only according to Torah law but an invalid sale by the law of the land.[65]

Rav Sternbuch points out as well another complexity in the selling of one's corporate stock: Many large corporations have holdings worldwide, and they may own *chametz* in a different time zone, so that by the time the *chametz* is sold, it is already past the time of prohibition where the *chametz* is located. This leads us to our next issue:

Time zones and Mechirat *chametz*:

With the proliferation of modern faster methods of

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63. *Moadim U'Zmanim* vol. 3 p. 160.

64. It is unclear why this investment must be afforded any status at all in Jewish law. It is entirely possible to have a transaction which is valid according to one system of law, yet totally invalid within a different system of law. For example, according to Jewish law anything which a slave acquires belongs to his master. If a Jew were to own a slave and live in a jurisdiction which allowed slaves personal property, and someone were to give that slave a gift, according to Jewish law the master owns the property, while according to the secular law the slave is the owner. If someone were to buy that property from the slave, he now owns the object according to secular law but not according to Jewish law. The same should apply to a corporation. The Jew has bought a right which exists only in the secular law, but as far as the Torah law is concerned, perhaps he has actually purchased nothing.

65. *Responsa Minchat Yitzchak* id. See *S'dei Chemed* vol. 8 p. 403.

transportation, a new question has arisen regarding the sale of *chametz*. Many people fly to Israel from America or to America from Israel for Pesach. This poses a difficult problem. One cannot sell his *chametz* after the sixth hour on *Erev Pesach* (from which time *chametz* is already prohibited according to Torah law), but the standard practice is for the Rabbi to sell the *chametz* on the morning of *Erev Pesach* so that people can still use their *chametz* until then. If one is in Israel on *Erev Pesach*, with the seven-hour time difference between the two countries, by the time the rabbi sells his *chametz* here in America it will already be past the sixth hour for him. If he chooses to sell his *chametz* through a rabbi in Israel, he will have a problem at the conclusion of Yom Tov, when the rabbi will buy back the *chametz* while it is still Pesach where the *chametz* is located. Conversely, if one had come to America from Israel for Pesach and in Israel had authorized a rabbi in Israel to sell his *chametz* for him, then his *chametz* will be bought back while it is still Pesach for him in America. If he chooses to use an American rabbi, he will find his *chametz* being sold on *Erev Pesach* in America after the time at which *chametz* is prohibited in Israel where the *chametz* is located.[66]

Probably the first one to discuss this question is the *Oneg Yom Tov*.[67] He concludes that the prohibition of *chametz* follows after the place where the *chametz* is, not where the owner of the *chametz* is. Support for his position is brought from a Gemara in *Pesachim*: One who mistakenly eats *terumah* must pay back the principal plus a fine of one fifth. The Gemara asks whether that payment is the value of the *terumah* plus one fifth, or if it means that he must repay the same amount as what he ate

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66. The question basically boils down to whether we decide based on where the *chametz* is or where the person is. (In the language of the Yeshivot, is *chametz* an *issur Gavra* or an *issur Cheftza?*)

67. *Oneg Yom Tov O.C.* 36.

plus an extra fifth. The Gemara then cites the Mishnah in *Pesachim* that one who mistakenly ate *terumah* which was *chametz* on Pesach, must pay back the principal plus one fifth. But *chametz* on Pesach from which all benefit is prohibited has no value! Therefore it must be that the requirement to pay back refers to the amount he ate, not the value. But the Gemara refutes that proof, by stating that the Mishnah is the opinion of R. Yose Haglili, who maintains that one is permitted to benefit from *chametz* on Pesach and therefore it does have value.[68]

The *Oneg Yom Tov* says that if the rule of *chametz* is determined by the location of the owner, the Gemara could have refuted the proof while leaving the Mishnah as a universal opinion. (The Gemara could have said the Mishnah is talking about a case where the one who ate the *terumah* did so towards the end of the last day of Pesach and the owner of the *terumah* was in a different time zone, where Pesach had already ended. For the owner, then, the *chametz* does have value since now he can use it and sell it where he is.) From the fact that the Gemara does not bring down this possibility, the *Oneg Yom Tov* concludes that the prohibition is determined by the owner and not by the location of the *chametz*.

Others, however, have concluded differently. R. Betzalel Zolti concludes that the operative factor is where the owner of the *chametz* is and not where the *chametz* is, and dismisses the *Oneg Yom Tov's* possibile scenario as too outlandish.[69] The *Chesed L'Avraham* as well concludes that we follow the location of the owner of the *chametz*.[70]

Rav Moshe Feinstein's view is in the nature of a compromise between the two sides. He concludes that as far as the prohibition

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68. *Pesachim* 32a.

69. *Mishnat Ya'avetz O.C.* 13.

70. *Responsa Chesed L'Avraham O.C.* 35.

against owning *chametz* is concerned (as well as the requirement to destroy it), we have to consider the place where the person is. However, regarding the prohibition against deriving benefit from *chametz,* whether on Pesach or afterwards, we follow the location of the *chametz.*[71]

Therefore, in order to satisfy all opinions, it is best for one going to Israel for Pesach either to find a rabbi in America who will sell his *chametz* the night before *Erev Pesach,* or to sell his *chametz* through a rabbi in Israel but instruct him not to repurchase his *chametz* until after Pesach has ended in America. Likewise, one who has come from Israel to America for Pesach should either find a rabbi in America who will sell his *chametz* the night before, or, if he chooses to sell through a rabbi in Israel, should instruct him not to repurchase the *chametz* until *Yom Tov* has ended in America.

These are only some of the many issues which arise in relation to the seemingly simple ritual of *Mechirat chametz.* It is the hope of this author that this articles serves to give the reader a more informed and enlightened *chag kasher v'sameyach.*

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71. *Iggerot Moshe O.C.* vol. 4, 94.

Letters To The Editor

Dear Rabbi Cohen:

The Pesach 5754 issue of the *Journal of Halacha and Contemporary Society* (Number XXVII) contained an article concerning the obligation to set aside *t'rumot* and *ma'asrot* from Israeli produce located in *Chutz la'aretz*. My extensive involvement in *mitzvot hateluyot ba'aretz* in the Beit Midrash Gavohah for Halacha in Agricultural Settlements and my many years of practical field experience lead me to believe that a number of the author's conclusions are not entirely valid. I will limit myself to three crucial points:

1. The author raises the question of whether produce, whose *gemar melachah* took place in Eretz Yisrael and then was taken to *Chutz la'aretz*, is still subject to the laws of *t'rumot* and *ma'asrot*, or whether it is exempt because it is now located in *Chutz la'aretz*.

The source of the exemption from *t'rumot* and *ma'asrot* of Israeli produce taken to *Chutz la'aretz* is, as pointed out by the author, the mishnah in *Challah* which deals with wheat which was grown in Eretz Yisrael and taken to *Chutz la'aretz* where it was made into dough. In such a case, the dough is exempt from the obligation of *challah*. The Rambam extends this law to *t'rumot* and *ma'asrot*.

In the case of *challah*, the time of obligation is the kneading of the dough and the mishnah's exemption from *challah* in *Chutz la'aretz* is in a case where the kneading took place in *Chutz la'aretz*. However, since the mishnah does not speak of a case where the kneading was done in Eretz Yisrael, we cannot use it as a proof that there is an exemption in such a case.

As a parallel, in the case of *t'rumot* and *ma'asrot*, the time of obligation is the time of *gemar melachah* and we may assume

that produce whose *gemar melachah* took place in *Chutz la'aretz* is exempt from *t'rumot* and *ma'asrot*. But to conclude on the basis of this that Israeli produce whose *gemar melachah* took place in Eretz Yisrael and was only then taken to *Chutz la'aretz* should be exempt from *t'rumot* and *ma'asrot*, is a *chiddush* which goes against the majority of opinions. The *Bach*, who subscribes to this *chiddush*, expresses what is actually a minority opinion and not a majority opinion, unlike what the author would lead us to believe.

2. The author also bases his tendency towards leniency on his claim that many types of produce exported to *Chutz la'aretz* are harvested and shipped out of Eretz Yisrael before they ripen, i.e. before they reach *onat hama'asrot* (the time at which they become liable to have *t'rumot* and *ma'asrot* set aside from them), and, as such, they may be considered produce whose *gemar melachah* did not take place in Eretz Yisrael. Through consultations with exporters and from my own personal knowledge, I know that this is not the case and, in actuality, only ripe produce is exported. The concept of *onat hama'asrot* is explained in *Ma'asrot* 1:1-4, Rambam, *Hilchot Ma'aser* 2:3-5, *Rosh Hashanah* 12b and *Tosafot ad locum, Rabeinu Chananel* ad locum, and others. These sources all indicate that *onat hama'asrot* occurs at the beginning of the ripening process (also referred to as one-third of its growth). For example, the *onat hama'asrot* of all produce which is black when totally ripe (such as carob) is when black spots appear, and *onat hama'asrot* of all produce which is red when totally ripe is when it begins to become red.

Therefore, since in actuality, all the fruits and vegetables exported to *Chutz la'aretz* are picked and packed in Eretz Yisrael *after* reaching their respective *onat hama'asrot*, their *gemar melachah* has, in fact, taken place in Eretz Yisrael.

3. It is important to note that fresh produce that is exported is, in general, not under any rabbinical supervision concerning

the setting aside of *t'rumot* and *ma'asrot*. A letter to this effect from the Chief Rabbinate of Israel is even reproduced in the article written by Rabbi Yaakov Luban in *Jewish Action*, cited by the author in footnote number 6.

Therefore, *t'rumot* and *ma'asrot* have not been set aside, except in a case where the produce was raised by an observant Jew. Unfortunately, these religious agriculturists make up only a small minority of the total population. (However, because of their existence, the produce does come under the category of *safeik tevel; t'rumot* and *ma'asrot* should, therefore, be set aside without a *bracha.)*

In conclusion, may I suggest that Jews in America purchase Israeli produce and take advantage of this golden opportunity to fulfill the *mitzvot* of setting aside *t'rumot* and *ma'asrot*, rather than rely on possible leniencies.

Respectfully,

(Rabbi) SHAUL REICHENBERG
Jerusalem

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Rabbi Broyde responds:

The letter writer makes three points, each of which is worthy of response.

A. His first assertion is that those authorities who rule that produce that leaves Israel after *g'mar melacha* is not obligated in *teruma* and *ma'aser* are a minority of authorities. The counting of opinions and decisors, and the evaluation of their respected authority is not a job I undertook in this article. Indeed, nowhere in my article do I indicate which approach is a majority or a minority opinion. However, certainly, the lenient approach is a significant one found among major normative halachic decisors and plays an important role in the

determination of the final halacha.

Thus, one finds a large number of halachic authorities who accept that produce that leaves Israel is never obligated in *teruma* or *ma'aser* no matter where *g'mar melacha* occurs, in addition to the opinion of *Bach,* and the simple understanding of Rambam, *Teruma* 1:22 and *Shulchan Aruch, Yoreh Deah* 331:12. A review of the article and the sources cited in notes 31 to 42 reveals at least twenty modern authorities who accept this leniency as a component of the ruling that *ma'aser* need not be separated in America. On this list is Rabbi Yitzchak Isaac Liebes, *Beit Avi* 1:85-86; Rabbi Isser Zalman Meltzer, *Kerem Tzion, Otzar Haterumat* 2:128; Rabbi Moshe Malka, *Mikve Mayim* 6:34; Rabbi Solomon Braun, *Shearim Metzuyainim Behalacha* 173:4 and many others.

Indeed, the letter writer simply misreads my article when he states that I believe the lenient opinion to be the majority opinion. Rather, I conclude in my article that:

> One who carries unseparated produce *(tevel)* directly out of Israel proper and thus knows that the produce comes from a Jewish farmer in halachic Israel should separate *teruma* and *ma'aser,* since many authorities rule that to be rabbinically required and that is the custom.

It is only in the case of multiple doubts *(sefek sefaka)* that I use these lenient opinions as grounds to reach the final ruling that no separation is mandated. It is precisely as one factor in a case of multiple doubt that Jewish law uses opinions whose normativeness is questioned.

In addition, while the letter writer claims that the lenient position is a *chiddush* (novel insight), in fact, the contrary is true. As noted on pages 90-96 of my article, the lenient position is the only one found in the Jerusalem Talmud, which is the authoritative source for halachic rules in this area, and is codified as the rule in the *Shulchan Aruch* and Rambam.

B. The letter writer's second assertion is that Israeli produce is in fact shipped ripe, and that thus *g'mar melacha* occurs in Israel. This is a factual matter which I leave to the various experts and about which I can voice no personal opinion. However, I have spoken to Professors S. Meyers and R.L. Shewfelt of the Agriculture School at the University of Georgia, and consulted with the classical textbook of this topic, Stanley J. Kays, *Postharvest Physiology of Perishable Plant Products* (Reinfold, 1991), at pages 266-273, about tomatoes, bananas, oranges, persimmons and grapefruits, the primary Israeli produce sold in America. I have been told that tomatoes, bananas and persimmons – as climacteric produce – are shipped inedible and not ripe (the tomatoes and bananas are green and the persimmons are hard and very bitter) and that oranges and grapefruits – as non-climacteric fruits – are shipped with discoloration, but with normal sugar count. *Postharvest Physiology*, at page 267, states:

> This later class of fruit, which can ripen normally after harvest, has been widely studied... If harvested unripe and held under conditions that prevent ripening, the ripening process can then be induced, allowing synchronization of ripening and marketing. The quality attributes that make up the aesthetic appeal of the ripe fruit are not present during the storage period...

I have been told that this is done with much Israeli produce for marketing reasons. Of course, as I note in footnote 65 of the article, since this issue is a factual matter, it can change from year to year.[1]

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1. The question of when precisely *g'mar melacha* (or *onat hama'aser)* takes place is a crucial one. As noted by *Aruch HaShulchan He'Atid Ma'aser* 95:2-8, in some cases color change is crucial, in other cases size is the deciding factor, and in yet other cases edibility is the key. Thus, the measure of "ripeness" *(g'mar melacha)* is different for tomatoes,

C. The letter writer's third point is correct. As I note in the article, the Chief Rabbinate's policy is not to supervise for the separation of *teruma* and *ma'aser* for produce marketed for export. That does not, however, mean that separation of *teruma* never occurs; indeed the letter writer concedes the possibility that it does and this is one the many doubts I rely on to support a lenient ruling. (His parenthetical assertion, that it is because of the small number of religious Jew who do separate that no blessing is recited, is simply incorrect. As noted by Rabbi Sternbuch, *Teshuvot Vehanhagot* 1:668 (revised edition), the reason no blessing is recited is because many authorities rule as a matter of halacha that no separation is needed for Israeli produce outside Israel no matter where *g'mar melacha* occurs.)

The letter writer also avoids discussion of any of the other grounds – beyond the three he discusses – that incline one to rule that there is no obligation to separate, including:

(1) The possibility that the fruit originated from farms owned or harvested by Gentiles and is thus exempt from the obligations of separation of *teruma* and *ma'aser:*

(2) The possibility that the fruit originated from areas outside of halachic Israel that are part of Israel's political boundaries, and thus exempt from the obligations of separation of *teruma* and *ma'aser;*

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persimmons, cucumbers and oranges respectively.

This issue is made much more complex by the common practice of deliberately exposing unripe fruit to the plant hormone ethylene, which hastens ripening, and thus induces a much speedier *g'mar melacha* and a higher sale price. As noted by *Postharvest Handling,* at 283, a fruit can go from no visible signs of ripeness to complete ripeness in a day upon exposure to the right combination of chemicals. This chemical manipulation increases the likelihood that these items will be shipped unripe, and ripening will be induced.

(3) According to some authorities, fruits produced for export do not need to have *teruma* separated from them;

(4) For the year 5754 and parts of 5755 (1993-1995) there might be no obligation because it is a *shemita* year or *shemita* produce.

Thus, seven different factors (the four mentioned above, and the three discussed by the letter writer) incline one to rule leniently.

I do, however, agree with a portion of the letter writer's final comment: Jews in America should purchase Israeli produce when they are available in the supermarket. One who wishes to separate *teruma* and *ma'aser* after purchase of this produce in the supermarket and be strict against these various doubts is blessed for so doing ברכה המחמיר תבוא עליו. No blessing should be recited if this is done and this is not required by halacha, as the obligation to separate *teruma* for Israeli produce in America is at most a rabbinic obligation, and this rabbinic obligation is, in fact, subject to multiple factual and halachic doubts as to its applicability, thus producing a situation which permits a lenient ruling.

RABBI MICHAEL J. BROYDE

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To the Editor:

The halachic issues involved in defending the *minhagim* of a community that has now nearly disappeared is a complex one, and a task not to be taken lightly.

One such issue was recently touched on by Rabbi Meyer Schiller in his excellent article entitled "The Obligation of Married Women to Cover their Hair" *JHCS* 30, pp. 81-108 (1995):

> It is fairly well known that among Lithuanian Jews and their leaders after World War I many married women uncovered their hair. This was common even among rabbinic families. .

I question one phrase: the words "after World War I." It is quite clear from both the halachic and historical literature that this uncovering was the practice of the community in Lithuania 100 years before World War I, when Orthodox observance and culture was at its strongest. For proof of this, one need only examine the fact that many *poskim* note this uncovering in the 1870s as already being well established; see *e.g.* Rabbi Yosef Chaim (*Ben Ish Chai*) Parshat *Bo* 12 (writing around 1870). Rabbi Yechiel Epstein's remarks on the commonness of this practice (*Aruch HaShulchan OC* 75:7) were published in 1903, and *Mishnah Berurah OC* 75:2 in 1881; both of them are clearly referring to what was then already a well-established practice.

If that is the case, and what is being dealt with is a well-developed custom of the established Orthodox community of Lithuania – a community that many now perceive as the idealized paradigm for non-Chasidic Orthodoxy – one has no choice but to disagree with Rabbi Schiller's final remarks on this custom:

> The Lithuanian practice is probably best seen as an aberration which, when the time became more receptive, was quickly abandoned. It may be understood in the context of the general laxity which enveloped East European Orthodoxy concerning this halacha in the post World War I era.

This *minhag* was not a product of the "general laxity" of religious observance in Lithuania in the years when this "practice" was developed; nor was this *minhag* abandoned. It came to an end with the nearly complete destruction of the Lithuanian Jewish community during the Holocaust.

What then is the halachic basis for this widespread custom emanating from this venerated Torah community? Both the *Tur* and the *Shulchan Aruch* (based on a wealth of *Rishonim*) codify the prohibition for a woman to completely uncover her hair as *dat yehudit*. *Dat yehudit* is the term used for the socially-determined customs of modesty of Jewish women, which according to most *poskim* is not immutable but can and does change with the customs

of Jewish women (see *Iggerot Moshe EH* 4:32(4), *Yabia Omer* 3:21, and many sources cited by Rabbi Schiller).

Thus, the simple understanding of the *Shulchan Aruch's* and *Tur's* discussion of why even fully uncovered hair violates halacha places the prohibition in a halachic context that indicates it to be dependent on the local custom of "modest Jewish women," which certainly was, historically, to cover their hair. This would, however, imply that in a society where the normative custom of observant Jewish women is to go without their hair covered, such conduct may be permitted. (As Rabbi Schiller notes, the *Beit Shmuel* disagrees with the *Shulchan Aruch* and *Tur's* classification of the prohibition of full uncovering as *dat yehudit*.) So too, in a society where many women do not cover their hair at all, the secondary reasons for covering cited by Rabbi Schiller (pages 93-94) – licentiousness and Gentile practices – also disappear. These insights perhaps justify the *minhag* of the Lithuanian community.

While one will not find *teshuvot* from the Lithuanian Torah community defending this *minhag*, this perhaps reflects the nature of Torah scholarship and discourse by the Lithuanian *poskim*, which generally did not focus on *halacha le-ma'aseh*. With notable exceptions, it focused its intellectual energies on abstract talmudic study, methods of categorization and conceptual analysis of Torah precepts. Not surprisingly, within the Lithuanian Torah community writings one can find quite a number of authorities, who provided forms of categorization for the obligation of women to cover their hair, indicating that there is no Torah obligation for a woman to cover her hair in a society where uncovering is not perceived as immodest.

One must also note the well-known school of thought which rules the Torah obligation for women's hair is limited to disheveled, not uncovered hair (see *Shevut Yaakov* 1:103). Indeed, many other limiting forms of analysis from Lithuanian *poskim* can also be cited related to woman's obligation to cover their

hair; see *Minchat Ani*, s.v. *Gilui Se'ar Benashim*; *Sedeh Chemed* 4:19 *s.v. Deoraita*; *Shut VaYashav Yosef YD* 1-3; *Chidushai Hafla, Ketubot* 72a; *Chidushai Mahardam al Sefer Hamitzvot LeHarambam*, 175.

The custom of Lithuanian Orthodoxy is not unique either. At least one other devout Orthodox community also accepted that halacha does not require married women to cover their hair when modest Gentile women do not; this was the practice of the Algerian (and Moroccan) Orthodox community from well before 1900 also. The *poskim* of this community explicitly defended its custom in this matter, and one can find a number of *teshuvot* on this topic from leaders of their community sanctioning this practice. Indeed, to this day, the halachic leadership of this North African Jewish community in Israel maintains that hair covering is not required; see Rabbi Moshe Malka, *VaHashiv Moshe* 1:34 and 35 and Rabbi Yosef Massas, *Mayim Chaim* 2:110.

Lithuanian Jewry, like many other European communities of its time, had customs and practices that some in America no longer consider "normative" halacha. That does not in any way imply "laxity in observance of halacha" by that venerated Orthodox community. Casting aspersions on the fidelity to Jewish law and tradition by now-destroyed Jewish fortresses in Europe is uncalled for – and also not supported by the halachic sources.

RABBI MICHAEL J. BROYDE

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Rabbi Schiller responds:

The entry of Rabbi Broyde with his erudition and open mindedness into any halachic discussion is certainly welcome. In order to clarify the issue, a few observations are in order.

1) I accept the correction as to when the practice of married women uncovering their hair became common in Lithuania.

2) However, I remain unconvinced that this was sanctioned

by the *poskim* of that community. Rabbi Broyde's argument, that the lack of a Lithuanian halachic literature defending this practice was due to a preoccupation with abstract talmudic analysis, is purely speculative.

3) Having said this I feel that more weight should have been given in my article to the acceptance in post-WWI Lithuania of this practice even among rabbinical families and to the continuation of this practice in America until the fifties and later. Rabbi Broyde has told me in private conversation of several individuals who told him that brides were instructed in their pre-marriage classes in Lithuania prior to WWII that hair covering was not required. (At times this was taught with the proviso that hair be kept short, braided or rolled into a bun.) A case does seem to emerge that this was considered halachically acceptable under one of the two possibilities suggested by Rabbi Broyde.

What then are we to make of the failure to articulate this position in print (the *Iggerot Moshe* being a typical case in point) and its eventual total abandonment in America among Lithuanian leaders? Perhaps it was a lenient practice which was linked to a particularly difficult period in Jewish history when halachic Judaism was on the retreat and the Lithuanian consensus was that this was not the issue about which to make a stand. Hence, due to the lack of enthusiasm brought to this *heter* it remained unmentioned in halachic literature and was transmitted word-of-mouth. Nonetheless, it was not a position easily reached and when the spirit of the times began to change it was laid to rest.

4) The *Aruch haShulchan*'s view, it seems to me, is somewhat clearer than Rabbi Broyde believes. In addition to the phrase *be'avonotanu harabim* (which Rabbi Broyde suggests R. Epstein employs when describing undesirable but halachically justifiable conduct) he also describes uncovered hair as *"avon zeh"*. The suggestion that combining the *Aruch haShulchan*'s view as expressed in *OC75* with *EH* 21 will yield the notion that the "prohibition was limited to cases of disheveled, and not uncovered

hair" seems to me to be excessively speculative. In *EH* 21 R. Epstein merely states the law and actually describes it as *"min haTorah,"* while in *OC* 75 he vigorously denounces uncovering.

5) I am grateful to Rabbi Broyde for pointing out that Rabbi Massas' *heter* was not merely his own, but the common practice among the Moroccan and Algerian Jewish communities.

6) In conclusion, I think that Rabbi Broyde and myself are essentially in agreement that a) a halachic case can be made for uncovered hair and b) the near unanimous consensus of halachic literature rejects this case. Further, it remains unclear how the *poskim* of the Lithuanian community viewed the practice of uncovering, although we may all speculate on what remains almost an intriguing question now veiled by the mists of time.

RABBI MAYER SCHILLER