

# Journal of Halacha and Contemporary Society

Number XXXIII

Published by  
Rabbi Jacob Joseph School

# **Journal of Halacha and Contemporary Society**

Number XXXIII  
Spring 1997 / Pesach 5757

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Rabbi Jacob Joseph School**

**Edited by  
Rabbi Alfred S. Cohen**

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

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Pesach 5757  
Spring 1997

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# Medical Confidentiality in Judaism<sup>1</sup>

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

## Introduction

Medical confidentiality is the obligation to maintain in confidence all information provided by a patient to the physician or other health care provider. Personal and professional information is communicated by patients with the expectation that such information will remain confidential and not be disclosed to third persons or parties. Confidentiality, like privacy, is valued because it protects individual preferences and rights. Yet privacy and confidentiality are not the same. Confidentiality requires a relationship of at least two persons, one of whom exposes or discloses private information to the other.<sup>2</sup>

Medical confidentiality is an ancient concept and is incorporated in the Hippocratic Oath which states that:

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1. See also Rabbi Alfred Cohen, "On Maintaining a Professional Confidence" in *Journal of Halacha and Contemporary Society*, VII, as well as Rabbi Cohen's article in Vol. I of this *Journal*, "Privacy: A Jewish Perspective."

2. Winslade, W.J. "Confidentiality," *Encyclopedia of Bioethics* (W.T. Reich, ed.), revised edition, New York, McMillan, 1995, Vol. 1, pp. 451-459.

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What I may see or hear in the course of the treatment or even outside of the treatment in regard to the life of men, which on no account one may spread abroad, I will keep to myself, holding such things shameful to be spoken about.

Judaism also places stringent restrictions upon disclosure of confidential information, regardless of how that information is obtained. However, Jewish law acknowledges that in certain circumstances even professional confidences must be revealed.<sup>3</sup>

### Classic Jewish Sources

There is no specific term in Jewish law for professional confidentiality, since this topic is subsumed under the general prohibition against talebearing (Lev. 19:16) and evil gossip (Psalms 34:14). The Talmud (*Yoma* 4b) asks:

How do we know that if a man says something to his neighbor, the latter is not allowed to repeat it unless the neighbor specifically tells him "Go and say it." From the scriptural text, *And the Lord spoke to him out of the tent of meeting saying (leymor) (Lev. 1:1).*

Rashi, in his commentary *ad locum*, explains that the word *leymor* (to say or saying) here means *lo emor* (do not say) unless one's neighbor gives his consent. Rabbi Samuel Edels, known as Maharsha, in his talmudic commentary *ad locum* asserts that the word *leymor* here seems to be superfluous; it therefore teaches us that one is not allowed to reveal confidential information without permission.

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3. Bleich, J.D. *Judaism and Healing, Halakhic Perspectives*. New York, Ktav, 1981, pp. 34-36.

The biblical commentator known as *Or Hachayim* asks why Scripture is redundant in the verses: "*And the Lord spoke to Moses saying; speak unto the children of Israel*" (Exod 25:1-2). *Or Hachayim* answers that God first spoke to Moses in confidence. In the second verse, *speak to the children of Israel*, God gave Moses permission to reveal His words.

Another reference to the prohibition against revealing confidential information is the talmudic discussion about judges who have just adjudicated a case (*Sanhedrin* 31a). The talmudic Sages ask:

Whence do we know that when a judge goes out [of court] he should not say, "I was for acquittal while my colleagues were for conviction, but what could I do seeing that they were in the majority?" Scripture therefore says: "*Thou shalt not go up and down as a talebearer among your people*" (Lev. 19:16), and further, "*He that goes about talebearing reveals secrets*" (Prov. 11:13).

Thus, it is prohibited for judges to reveal the confidential discussions that take place behind closed doors. The prohibition against talebearing is here interpreted to include revealing information, even if it is the truth and is not slanderous or evil gossip at all. The Hebrew word for talebearer, *rachil*, literally refers to a merchant. Although most merchants or peddlers sell merchandise, some people peddle information and they are the ones about whom Scripture says "*He that goes about talebearing reveals secrets.*"

The Talmud even cites the case of a rabbinical student who was expelled from the Academy or House of Study because he revealed a secret after twenty-two years (*Sanhedrin* 31a). The commentary known as *Etz Yosef* explains that although information in the House of Study is often common knowledge, one is still prohibited from revealing it. So, too,

judges in a *Bet Din* or court of law where the arguments of both sides are usually known and public, may not reveal those arguments. The talmudic commentary known as *Margoliyot Hayam* explains that the expelled student thought that in the biblical narrative of Joseph and his brothers, the brothers, who swore each other to secrecy about what they did to Joseph, revealed it to their father Jacob twenty-two years later. The student reasoned that the statute of limitations expired after twenty-two years. He was mistaken and was therefore expelled from the House of Study for revealing a secret.

The author known as *Semag*, who enumerates and comments on the 613 biblical commandments, defines the word *rachil* or talebearer (precept #9) as follows: "Who is a *rachil*? He who reveals [to a third party] information told to him by his friend in secret." He cites the above talmudic discussion (*Sanhedrin* 31a) in support of his position. *Semag* seems to imply that revealing confidences is a biblical prohibition.

In his *Mishneh Torah* (*Deot* 7:2), Maimonides defines a talebearer as "one who carries reports and goes from this one to this one and says: 'so and so said this; I heard such and such about so and so;' even if it is true. Such a person destroys the world."

Thus, the severity of the prohibition of violating someone's confidence by revealing private and confidential information is emphasized in the Talmud and the codes of Jewish law. The privileged nature of communication in Judaism, whether between physician and patient or attorney and client, is far broader than in other moral and legal systems. However, "the privilege is neither all-encompassing in scope

nor is the privilege, when it does exist, absolute in nature."<sup>4</sup> Since the prohibition against revealing secrets is part of the prohibition of talebearing, wherever talebearing is allowed, revealing secrets is also allowed. Such situations include the saving of life, the saving from financial loss, and the prevention of inappropriate marriage which might end in divorce or nullification.

An example of saving lives which requires the suspension of the prohibition of revealing secrets is vividly portrayed in the Talmud (*Avodah Zarah* 28a). Rabbi Yochanan suffered from scurvy and was treated by a heathen woman on Thursday and Friday. He asked: "What about tomorrow?" She said: "You will not need the therapy." "But what if I need it?" he asked. She replied: "Swear to me that you will not reveal the remedy." Said he: "I swear by the God of Israel that I will not reveal it." She then told it to him, and he promptly revealed it the next day during his public discourse.

This story clearly establishes the fact that the prohibition against revealing secrets is superseded by the need to treat other patients with scurvy. The obligation to heal the sick and to save lives requires that one "*not stand idly by the blood of one's fellow man*" (Lev. 19:16). Hence, it is mandatory to breach a confidence if human health or life are at stake. Interestingly, the prohibition against talebearing and the duty to save lives are both found in the same biblical verse (Lev. 19:16).

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4. Bleich, J.D. "HIV screening of newborn infants", *Tradition*, 1994, Vol. 29, pp. 76-86.

### Modern Rabbinic Rulings

Rabbi Israel Meir Hakohen of Radin, popularly known as Chafetz Chayim, wrote an entire book, first published in 1873, dealing with the prohibitions of talebearing and of evil gossip.<sup>5</sup> Chafetz Chayim writes that sometimes a person is not only allowed to set aside the prohibition of talebearing but is obligated to do so. For example, if one's friend is about to go into business with an unreliable person, one must forewarn him to prevent him from suffering serious financial losses. "Lest the reader think that I am being lenient," continues Chafetz Chayim, "be advised that it is a matter of *not standing idly by the blood of one's fellow man* (Lev. 19:16) as discussed in the Talmud (*Sanhedrin* 73a) and as codified by Maimonides (*Rotzeach* 1:14)." The word "blood" here refers not only to physical harm but also to financial loss, as evidenced by Maimonides' statement in his *Book of Commandments* (Precept #296): if one sees one's friend in danger of his life or [in danger of] financial loss [one must forewarn him to avert that danger].

However, Chafetz Chayim requires five conditions to be fulfilled in order to allow the revealing of a secret or confidential information to save one's friend from physical or financial harm: (a) one must be absolutely certain of the potential harm and should not jump to hasty conclusions; (b) one may not exaggerate the information being revealed in any way; (c) the sole motivation for disclosing the information must be altruistic and for the benefit of the person who may otherwise be harmed; one may not reveal

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5. Hakohen, I.M., *Sefer Chafetz Chayim*, Vilna, Ravarsetz, 1873.

facts about the potential harmer out of hatred for that person; (d) if one can prevent the potential harm in another way, without having to disclose confidential information, one should do so; (e) the danger should be averted without permanently damaging the person about whom one is revealing information. One example is where A wishes to hire B to serve him or to work for him. If C knows that B previously stole from his employer, it is permissible for C to privately inform A of that fact, but not to publicly announce that B is a robber since his reputation and employability would be permanently impaired thereby. Perhaps he repented.

Chafetz Chayim continues with lengthy discussions of other examples of situations, including the seeking of confidential medical information about a prospective marriage partner, where the prohibitions against talebearing and evil gossip may or must be waived. He also sets conditions similar to the aforementioned ones before allowing breaches of confidentiality.

Rabbi Mordechai Yaakov Breisch (Responsa *Chelkat Yaakov*, Part 3 #136) was asked by a physician whether or not he was obligated to tell a bride that her prospective groom suffers from incurable cancer and is not expected to live for more than a year or two. Rabbi Breisch answered that the doctor is obligated to reveal that information to the bride for two reasons: (a) otherwise, the doctor violates the prohibition against *standing idly by the blood of one's fellow man* (Lev. 19:14); (b) if he fails to give the bride the appropriate information, the doctor also transgresses the prohibition against *placing a stumbling block before a blind person* (Lev. 19:14). Maimonides clearly states in his *Mishneh Torah* (*Rotzeach* 12:14) that to give someone improper or inadequate advice is a violation of this prohibition.



In a series of responsa dealing with medical confidentiality, Rabbi Eliezer Yehuda Waldenberg establishes the principle that in spite of the privileged and confidential nature of information provided by patients to their physicians, the physician's overriding obligation is to prevent or eliminate danger.

In one inquiry, Rabbi Waldenberg was asked four questions: Is a physician summoned to a court of law (*Bet Din*) allowed to testify against his patient? Does the physician's Hippocratic Oath to maintain medical confidences have any bearing on Jewish law? Is there a breach of confidentiality when medical students listen in at a patient's bedside? Must a physician tell the Motor Vehicle Bureau about his epileptic patient? Rabbi Waldenberg answered (*Responsa Tzitz Eliezer*, Vol. 15 #81:2) that the doctor must testify in court if he is summoned and that the Hippocratic Oath has no bearing on this. He also states that students may stimulate the physician caring for a patient to consider certain diagnostic tests or therapeutic options, which may benefit the patient. Nevertheless, one should ask the patient's permission to have students examine them. If the patient objects, the students should not do so. Finally, Rabbi Waldenberg rules that a physician is obligated to tell the authorities about his patient with epilepsy, who may harm himself or others if he drives.

On another occasion, Rabbi Waldenberg was asked by an ophthalmologist about a patient with abnormal visual acuity, visual fields, night or color vision, who might have an accident while driving or at work. The patient did not want to stop driving nor change his job and pleaded with his physician to maintain the confidence and not reveal the eye illness or abnormality to the authorities. Rabbi Waldenberg

ruled (Responsa *Tzitz Eliezer*, Vol. 15 #13:1) that the ophthalmologist is obligated to tell the authorities in order to avoid harm to others and in order to avoid transgressing the prohibition against *standing idly by the blood of one's fellow man* (Lev. 19:16). Furthermore, telling one's friend about danger or about a bad business deal or about an inappropriate prospective spouse is encompassed in the commandment of returning a lost object (Deut. 22:2), which includes restoring [or preventing loss of] another person's health, prosperity or emotional well-being.

On yet another occasion, Rabbi Waldenberg was asked by a gynecologist about a girl born without a vagina or uterus but with ovaries, who had surgery to create a vagina to enable cohabitation. Rabbi Waldenberg ruled (Responsa *Tzitz Eliezer*, Vol. 16 #4) that the physician must tell the prospective groom even if she objects. The reverse would also be true, i.e., if the boy is sterile, the physician must reveal that fact to a prospective bride. The main reasons for his ruling are the two biblical precepts of *not standing idly by the blood of one's fellow man* (Lev. 19:16) and *restoring a lost object* (Deut. 22:2) as described above. Furthermore, it may be prohibited for him to live with her because he is emitting semen for naught. In addition, if the marriage is consummated, the man may become emotionally distraught and have great difficulty in divorcing her. Rabbi Waldenberg concludes by suggesting that the doctor should first try to convince the girl to tell her fiancé. If she refuses, the physician must do so.

Rabbi Moshe David Tendler, quoting his father-in-law Rabbi Moshe Feinstein, states that a disability which may impact negatively on an individual's functioning as spouse

or parent must be revealed to a prospective spouse.<sup>6</sup> Such disabilities include impairment of sexual functioning, household management, or care of children. Strong marriage bonds which depend on mutual trust and confidence between husband and wife would be seriously impaired by a failure of full disclosure of all matters of interpersonal concern.

### Summary And Conclusion

The prohibition in Judaism against talebearing requires that professional confidences between patient and physician be maintained forever. Whether the physician obtains such confidential information from the patient or from others, he is forbidden to disclose that information or share it with anyone including his family and even professional colleagues, if no benefit to the patient would result therefrom.

However, if the maintenance of confidence might cause serious physical, financial, or emotional harm to another person, the latter may be informed. The disclosure must be factual, accurate and not exaggerated. The teller must have first hand knowledge of the information. The sole intent of the disclosure should be to prevent harm to the other person who will heed the information and take necessary steps to prevent danger or preserve health and property. If harm can be prevented without disclosing the privileged information, it should not be done. Where disclosure is permitted, it matters not whether the person who may be harmed asks for the information or whether it is volunteered

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6. Rosner, F.; Tendler, M.D., *Practical Medical Halachah*, 3rd revised edition, Hoboken, NJ, Association of Orthodox Jewish Scientists and Ktav, 1990, p. 166.

by the person who knows it.<sup>7</sup>

In fact, the law of the “pursuer” (*rodef*) may be applicable, whereby the pursuer must be stopped in order to protect the pursued.<sup>8</sup> If no danger exists, or if the danger can be averted by other means, confidential information may not be revealed.

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7. Steinberg, A., *Encyclopedia Hilchatit Refuit*. Jerusalem, Schlesinger Institute of the Shaare Zedek Medical Center, Vol. 4, 1994, pp. 613-642.

8. *Sanhedrin* 72a-73b; Maimonides, *Mishneh Torah Rotzeach* 1:9; *Shulchan Aruch, Choshen Mishpat* 425:2.



# Magic Shows

*Rabbi Moshe A. Bleich*

Schools often provide various forms of entertainment in conjunction with parties and holiday celebrations. Among the most popular forms of entertainment, especially for younger pupils, are magic shows featuring magicians who perform a variety of parlor tricks. Often unnoticed, however, is the fact that the halachic propriety of such entertainment is a matter of concern. Principals and administrators who are responsible for arranging such events should be aware of the relevant issues and their resolution. Worthy of particular attention is the fact that such performances can indeed be modified so that they may be conducted in a manner in which halachic problems are avoided.

The focal issue is whether or not contemporary performances of magic constitute a form of magic or sorcery. Those practices are biblically proscribed, and the parameters of the applicable prohibitions are delineated in the Mishnah and Gemara. An understanding of the prohibitions, as analyzed by early-day authorities (*rishonim*) and latter-day decisors (*acharonim*), involves subtle technical distinctions and possible rabbinic extensions which must be understood in an effort to appreciate the views of contemporary decisors who have ruled on the permissibility of magic shows in present-day society.

## The Sources

Sorcery is prohibited by virtue of the biblical commandment "There shall not be found among you anyone

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that makes his son or his daughter to pass through the fire, one that uses divination, an observer of times, or an enchanter, or a sorcerer." (Deut. 18:10). In delineating the ambit of that prohibition, the Gemara, *Sanhedrin* 65b, records three opinions:

Our Rabbis taught: *Me'onen* – R. Simeon said: That is one who applies the semen of seven male species to his eyes [in order to perform witchcraft]. The Sages said: It is one who seizes people's eyes. R. Akiva said: It is one who calculates the times and hours saying, "Today is propitious for setting forth; tomorrow for making purchases; wheat ripening on the eve of the seventh year is generally of high quality; let the beans be pulled up [instead of being harvested in the usual manner] to save them from becoming spoiled."

Each of those opinions is based upon a different etymological analysis of the meaning of the term "*me'onen*" that occurs in the formulation of this biblical prohibition. R. Simeon regards the term as being derived from the word "*ayin*," meaning "eye," and accordingly associates the power of the "*me'onen*" with a particular substance placed upon the eyes. The Sages similarly relate the term "*me'onen*" to "*ayin*," but for them the eyes to which reference is made are not the eyes of the practitioner, but those of his clients. Thus the *me'onen* is one who "seizes people's eyes." Rashi comments that "seizing people's eyes" connotes causing a person to become convinced that his eyes perceive phenomena that have not occurred, i.e., the practitioner causes the onlooker to believe that he has performed wondrous things but, in reality, he has done nothing. Thus the eye is "seized" and made to "see" that which is not there. R. Akiva, who defines "*me'onen*" as one who determines propitious times and hours, understands the term "*me'onen*" as being derived from the word "*onah*" meaning "time" or "occasion."



It is noteworthy that Rambam rules that the prohibition of "*me'onen*" encompasses both a prohibition against calculating propitious times as well as a prohibition against "seizing people's eyes."<sup>1</sup> Rambam thus maintains that the positions of Rabbi Akiva and the Sages are complementary rather than mutually exclusive. Apparently, he maintains that the term "*me'onen*" has the connotation of both "eye" and "time" and accepts the majority view of the Sages over that of R. Simeon in their conflicting elucidations of the term's interpretation in the sense of "eye."

The crucial question that must be addressed is whether or not the biblical prohibition against "seizing people's eyes" is limited to "seizing" their eyes by means of acts associated with witchcraft or whether it includes "seizing" their eyes by other means as well. A literal reading of the text of the Mishnah (67a) and the Gemara (67b) leaves the question unresolved. The Mishnah declares:

A sorcerer who actually performs magic is liable [to the death penalty], but not if he merely creates illusions [i.e., he merely seizes people's eyes]. R. Akiva said in R. Joshua's name: Of two who gather cucumbers [by magic] one may be punished and the other exempt. The one who really gathers them is punished; the one who produces an illusion is exempt. [See Rashi, s.v. *shenayim*, who comments that those acts are performed by means of witchcraft.]

The Gemara further states in the name of Abbaye:

The laws of sorcerers are like those of the Sabbath: some actions are punished by stoning; some are

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1. See Rambam, *Hilchot Avodat Kochavim* 11:8-9 and *Kesef Mishneh*, *ad locum*. See also *Chiddushei ha-Ran*, *Sanhedrin* 65b.

exempt from punishment yet forbidden; and some are entirely permitted. One who actually performs magic is stoned; one who merely creates an illusion is exempt, yet [the act] is forbidden. What is entirely permitted? Such as was performed by R. Chanina and R. Oshaia who studied the "Book of Creation" every Sabbath eve and [by applying the Kabbalistic prescriptions contained therein] created a third-grown calf for themselves and ate it [on *Shabbat*].

R. Chanina and R. Oshaia certainly did not engage in witchcraft. Rashi explains that their study of "The Book of Creation" involved combining letters of the Divine Name in a particular manner. Thus the calf must be deemed to be the product of sacred, divine power rather than a creature of profane, occult powers.<sup>2</sup> Witchcraft, by definition, is limited to harnessing and manipulation of profane powers.

The statement of the Gemara to the effect that creation of an illusion, although it is not a capital offense, is nevertheless prohibited, is ambiguous. It is unclear whether the illusory act is prohibited only when performed by means of, or with an intimation of, witchcraft or whether such acts are prohibited even if an illusion is created without any intimation of witchcraft whatsoever. Rashi (65b), in elucidating the prohibition against creating an illusion, makes no reference to occult practices, thereby implying that sleight of hand is included as well, while in his comments on the Mishnah (67a) he implies that the prohibition is attendant only upon acts of witchcraft. In light of this disparity in Rashi's comments, R. Betzalel Stern, *Teshuvot be-Tzel ha-Chochmah*, IV, no. 13, asserts that Rashi's position with regard to this question is inconclusive.<sup>3</sup> However, from the comments of *Semag*, lo

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2. See Rashi, s.v. *aski*.

*ta'aseh* 53, and from the remarks of Rash mi-Shantz and Rabbenu Hillel in their respective commentaries on the *Sifra* (Leviticus 19:26), it is clear that those authorities maintain that the prohibition against performing an act of illusion is attendant only upon acts of sorcery. According to that view, contemporary magic shows, since they involve sleight of hand rather than sorcery, are entirely permissible.<sup>4</sup>

### Rambam's Rulings and Attendant Difficulties

Rambam's position with regard to this question appears to be contradictory. In *Hilchot Avodat Kochavim* 11:9 Rambam rules, "And also one who seizes the eyes and makes it appear in front of the viewers as if he did some wondrous act but in reality he did not do so, this is included in the category of *me'onen* and he [is punished by] lashes." In this ruling Rambam apparently maintains that performance of illusory acts is biblically prohibited but is punished by lashing rather than by stoning. However, in the same chapter, 11:15, Rambam writes:

One who engages in witchcraft is liable to stoning provided that he has actually engaged in an act of witchcraft. However, one who merely seizes the eyes [i.e., performs an act of illusion] that is, he appears to do something but in reality he does not do so, is punished by "lashes of rebellion" [i.e., rabbinically imposed] because the negative commandment

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3. Cf. R. Chaim David Halevi, *Aseh Lecha Rav*, II, no. 44, who asserts that Rashi maintains that acts of illusion are prohibited only if they are performed by means of witchcraft.

4. Cf. the comments of R. Ovadiah Yosef, *Yabi'a Omer*, V, *Yoreh De'ah*, no. 14, who argues that *Semag* might concede that illusory acts not performed by means of witchcraft, although they are biblically permissible, may nevertheless be prohibited by rabbinic decree.

regarding witchcraft is included in the prohibition "there shall not be found in you" and since that prohibition serves to admonish with regard to capital punishment as it is said "a witch you shall not let live" (Exodus 22:17) one does not administer [biblical] lashes [for its violation].

This statement seems to be in direct contradiction to Rambam's earlier stated view in 11:9 that the performance of acts of illusion is biblically prohibited and punishable by biblical lashes as a matter of biblical law.

*Kesef Mishneh*, *Hilchot Avodat Kochavim* 11:15, resolves the difficulty by pointing out that an individual who actively performed an act of sorcery, but who has produced thereby nothing more than an illusion, is, in principle, twice liable to the penalty of lashes, viz., for transgressing the prohibition against performing an act of a "me'onen," i.e., one who misleads others by creating an illusory phenomenon, and also for being a "mechashef," i.e., one who engages in witchcraft. However, due to the fact that the negative commandment prohibiting witchcraft serves as an admonition against committing a capital transgression, lashes cannot be administered for the violation of that prohibition; lashes are, however, administered for violation of the prohibition against being a "me'onen." This analysis of Rambam's prohibition is also offered by the same author in his commentary on the *Tur Shulchan Aruch*, *Bet Yosef*, *Yoreh De'ah* 179.

*Kesef Mishneh* also presents two further distinctions that might resolve the apparent contradiction in the position of Rambam. R. Joseph Colon, *Teshuvot Maharik*, no. 76, distinguishes between phenomena that are merely illusory but appear to be quite natural and phenomena that are illusory but also appear to be supernatural. An example of the latter is reported in *Sanhedrin* 67b:

Rab said to R. Chiyya, "I myself saw an Arabian traveler

take a sword and cut up a camel; then he rang a bell at which the camel arose." R. Chiyya responded, "After that was there any blood or dung? But that was merely an illusion."

Employing witchcraft, the Arabian traveler generated an illusory phenomenon in which he appeared not only to kill, but also to resurrect, a camel. The creation of an illusion of a supernatural event, declares *Maharik*, is prohibited by virtue of the admonition "*lo te'onenu*" and is punished by lashes (as recorded by Rambam in 11:9). However, argues *Maharik*, generation of an illusory perception of a natural event that has not actually taken place, e.g., the illusion of growing cucumbers, when, in reality, there are no cucumbers, is not prohibited by virtue of the commandment "*lo te'onenu*" and is not punishable by lashes. Nevertheless, *Kesef Mishneh*, *ad locum*, and *Bet Yosef*, *Yoreh De'ah* 179, rejects *Maharik's* distinction because of the absence of any Talmudic text from which this distinction might be inferred. Similarly, R. Solomon Luria (Maharshal), as the interlocutor in *Teshuvot Ramo*, no. 67, also comments that there are no grounds to distinguish between different forms of illusory perceptions. *Bach*, *Yoreh De'ah* 179, also rejects *Maharik's* distinction. *Maharik's* position is, however, accepted by *Mabit*, *Kiryat Sefer*, *Hilchot Avodat Kochavim*, ch. 11, *Azharah*, no. 47 and by *Teshuvot Ramo*, no. 67.

In drawing a second distinction, *Kesef Mishneh* also cites the position of Rabbi Yehoshua [ha-Nagid], a descendant of the Rambam, who distinguishes between illusions that are merely "baffling" ("*timahon*") and illusions that are "works of witchcraft" and adds that the distinction "cannot be comprehended other than by one who is familiar with these practices." The former are presumably merely sleight of hand and punishable by lashes precisely because no violation of a capital transgression is involved; the latter involve transgression of an admonition against committing a capital (and hence more serious) transgression but the punishment

is abated because of the failure to accomplish anything of substance. As noted by *Minchat Chinuch*, no. 250, the position of *Sefer Ha-Chinuch* is similar to the position advanced by R. Yehoshua ha-Nagid. Both the position adopted by R. Joseph Karo in his *Bet Yosef* and that of *Maharik* seem to assume that there is no violation either of the prohibition of *me'onen* or of the prohibition of *mechashef* (witchcraft) unless an act of witchcraft is involved. R. Yehoshua ha-Nagid and *Sefer Ha-Chinuch* apparently maintain that violation of the prohibition of *mechashef* entails witchcraft, whereas violation of the prohibition of *me'onen* does not require an act of witchcraft.

*Bach*, *Yoreh De'ah* 179, explains the discrepancy in Rambam's position in a manner similar to R. Yehoshua ha-Nagid and *Sefer ha-Chinuch*, but points to Rambam's own comments in his *Sefer ha-Mitzvot* in doing so. In discussing the prohibition of *lo te'onenu*, Rambam, *Sefer ha-Mitzvot*, *lo ta'aseh* no. 32, declares:

In the terminology of our Sages (*Sanhedrin* 65b): "Me'onen – These are [individuals] who seize people's eyes [create illusory perceptions]," i.e., [by means of] a large category of trickery that is associated with movements of the hand so swift that it appears to people that the person has performed actions that are not veridical, as we see them constantly doing [e.g.], they take a string and place it in the corner of their garments and take out a snake, or they throw a ring in the air and afterwards they remove it from the mouth of one of the persons standing before them...

*Bach* maintains that such sleight of hand does not involve witchcraft and is biblically prohibited according to Rambam by virtue of the prohibition of *lo te'onenu* and, accordingly, is punishable by lashes. [See *halacha* 9.] However, acts associated with occult practices resulting in illusory perceptions are prohibited as a form of witchcraft but, since the commandment

proscribing occult practices also serves as an admonition prohibiting capital forms of sorcery, that commandment cannot serve as a basis for the administration of corporal punishment. Thus, *Bach* maintains that, according to Rambam, generation of illusions produced by sleight of hand, although not a violation of the prohibition against witchcraft, nevertheless constitutes a violation of the biblical prohibition of *lo te'onenu*.<sup>5</sup> *Bach* notes that *Semag, lo ta'aseh* 53, disagrees with Rambam and maintains that even this prohibition does not encompass sleight of hand unless accompanied by witchcraft as well. As noted previously, this is also the opinion of *Rash mi-Shantz* and *Rabbenu Hillel*.

R. David ibn Zimra (*Radvaz*), *Sefer Metzudat David, mitzvah* 61, cites Rambam's comments and rejects them with the statement, "Far [be it] from me to accept that the Torah would mandate lashes for one who merely engages in tricks and sleight of hand." It is thus readily apparent that *Radvaz* understood Rambam's ruling as indicating that such acts are biblically prohibited.<sup>6</sup> A similar view is also advanced by *Radvaz* in his responsa, vol. V, no. 585 (*Li-Leshonot ha-Rambam*, 1,695).<sup>7</sup>

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5. As noted by *Gilyon Maharsha* (comment on *Shach, Yoreh De'ah* 179:17), *Sefer Ha-Chinuch* no. 250 similarly maintains that it is prohibited to create an illusory perception by sleight of hand. *Sefer Ha-Chinuch* emphasizes that such an act is punishable by lashes only if the act is not performed through witchcraft. Cf. *Teshuvot ha-Radvaz*, V, no. 585, and the comments of R. Chaim Heller, *Sefer ha-Mitzvot*, no. 27, as well as the notes appended to *Sefer Ha-Chinuch*, Machon Yerushalayim edition (Jerusalem, 1988), no. 250, note 3.

6. See also *Yechaveh Da'at*, III, no. 68 and *Yabi'a Omer*, V, *Yoreh De'ah*, no. 14, who observe that *Radvaz* may concede that these acts are rabbinically prohibited.

7. See below, note 10.



Although, as cited by *Bach*, Rambam does state that acts of illusion are included in the prohibition of *lo te'onenu* and indeed offers as examples of such illusion the placing of a piece of string under a garment and then drawing out a serpent and the throwing of a ring in the air and subsequently removing the ring from a member of the audience, Rambam then proceeds to add a further comment. Rambam adds that "one who engages in these acts is called 'one who seizes the eyes' and it is a form of witchcraft and therefore one is punished by lashing." Rambam's terminology seems to reflect the view that even the illusory acts to which he refers constitute a form of witchcraft. Rabbi Chaim David Halevi, *Aseh Lecha Rav*, II, no. 44, and Rabbi Moshe Feinstein, writing in a memorial volume, *Shem Olam*, (Wickliffe, 5743), pp. 411-415,<sup>8</sup> both argue that Rambam maintained that the sleight of hand practiced in antiquity was invariably associated with some form of witchcraft and, accordingly, Rambam's references are entirely to illusory acts performed in conjunction with witchcraft. If so, it follows that illusory acts that are performed without witchcraft are permissible even according to Rambam's comments in his *Sefer ha-Mitzvot*.

It should be noted that Rambam, in his *Sefer ha-Mitzvot*, adds a comment to the effect that a person who engages in sleight of hand for the purpose of generating illusory perceptions is also guilty of a completely different transgression, viz., of "stealing the minds of people" ("*gonev da'at ha-beriyot*"). That prohibition is, of course, general in nature and broadly prohibits acts of deception. Radvaz, in his earlier-cited responsum, agrees that sleight of hand is biblically prohibited as an act of deception. Rabbi Ovadiah Yosef, *Yechaveh Da'at*, III, no. 68 and *Yabi'a Omer*, V, *Yoreh De'ah*, no. 14, cites R.

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8. This responsum is reprinted in *Am ha-Torah*, third series, no. 12 (1995), pp. 7-12.

Chaim Beneveste, *Dina de-Chayyei, lo ta'aseh* no. 53, who maintains that, according to Rambam, any form of illusory deceit is biblically prohibited.<sup>9</sup> However, it should be noted that R. Dov Berish Gottlieb, *Yad ha-Ketanah*, II, *lo ta'aseh* no. 46, in his notes, *Minchat Ani*, no. 33, maintains that the prohibition against generating an illusory perception by means of sleight of hand may be rabbinic rather than biblical in nature.

### Rulings of Latter-Day Authorities

*Shach*, *Yoreh De'ah* 179:17, cites the comments of *Bach* who maintains that, according to Rambam, creation of illusory perceptions is prohibited even if such acts are not generated by means of witchcraft and, accordingly, even parlor tricks performed by sleight of hand are prohibited. *Shach* further notes that this is also the position of *Hagahot Maimuniyot*, *Hilchot Avodat Kochavim*, chap. 11, and of *Teshuvot Ramo*, no. 67. Similarly, *Chochmat Adam* 89:6 also prohibits all forms of sleight of hand. *Chochmat Adam* further observes that jesters who perform magic tricks at weddings (obviously, without employing witchcraft) are in violation of this biblical prohibition and that it therefore follows that one who directs

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9. See also R. Moshe Sternbuch, *Teshuvot ve-Hanhagot*, I, no. 455, who reports that his father-in-law was told by Chazon Ish that if the audience knows that the illusory perceptions are not generated by means of witchcraft, the act is not biblically prohibited. On initial analysis, this statement would appear to be at variance with the position of Rambam. Nevertheless, it is entirely consistent with *Yad ha-Ketanah's* analysis of Rambam's position. See *Yad ha-Ketanah*, II, *lo ta'aseh* no. 46, appended notes, *Minchat Ani*, no. 33. *Yad ha-Ketanah*, however, regards all illusory perceptions generated by sleight of hand, whether or not that fact is known to the audience, as biblically permitted. It must, however, be noted that careful reading of R. Sternbuch's full discussion demonstrates that Chazon Ish's reported oral statement is somewhat ambiguous.

an individual to perform a magic trick violates the prohibition of *lifnei iver* (placing a stumbling block before the blind). Moreover, declares *Chochmat Adam*, one who has the power to prevent such acts is obligated to do so. In addition, *Chochmat Adam* declares that a bystander is forbidden to watch such performances. *Chochmat Adam*'s position is accepted by *Kitzur Shulchan Aruch* 166:4 and *Pitchei Teshuvah*, *Yoreh De'ah* 179:7. *Darkei Teshuvah*, *Yoreh De'ah* 179:37, cites *Mishnat Chachamim*, *mitzvah* 47, who also prohibits such actions. *Yad ha-Ketanah* maintains that such acts are rabbinically proscribed. Following those authorities, Rabbi Shmuel ha-Levi Vosner, *Shevet ha-Levi*, V, no. 129, and Rabbi Ovadiah Yosef, *Yechaveh Da'at*, III, no. 68 and *Yabi'a Omer*, V, *Yoreh De'ah*, no. 14, both prohibit contemporary magic shows on the grounds that such performances entail the generation of illusory phenomena.

### Contemporary Performances of Magic

Despite the plethora of sources tending to establish that contemporary performances of parlor magic run afoul of Jewish law, a number of contemporary authorities have asserted that, based upon the manner in which such performances are executed, there are indeed grounds for leniency.

Although, as previously noted, *Chochmat Adam* and others decry the engagement of jesters to perform tricks by means of sleight of hand, at least one authority explicitly permits such performances. Commenting on the statement of the Mishnah, "A sorcerer, who actually performs magic is liable [to the death penalty], but not if he merely creates illusions," *Tiferet Yisra'el*, *Sanhedrin*, chapter 7, note 102, remarks that, although creation of an illusion, albeit not a capital transgression, is nevertheless prohibited, such an act is prohibited only if it is accompanied by witchcraft; however, absent witchcraft, such an act is entirely permissible. *Tiferet Yisra'el*'s comment appears to be contradicted by the previously cited statement of Rambam in

his *Sefer ha-Mitzvot*. Nevertheless, *Tiferet Yisra'el*'s statement is entirely consistent with the opinions of *Semag*, *Rabbenu Hillel* and *Rash Mi-Shantz* who clearly maintain that all acts of illusion that are not accompanied by witchcraft are permissible. Moreover, the analysis presented by *Kesef Mishneh* and *Bet Yosef* clearly does not serve to resolve the discrepancy between Rambam's statements in *Sefer ha-Mitzvot* and in the *Mishneh Torah*. Thus, the author of those works apparently maintains that illusory acts unaccompanied by witchcraft are entirely permissible. In fact, Rabbi Betzalel Stern, *Teshuvot be-Tzel ha-Chochmah*, IV, no.13, expresses puzzlement that *Chochmat Adam* decried the practices of jesters of his day since, despite the fact that their actions may not have been consistent with the position of Rambam, those performers would nevertheless have been justified in relying upon the opinions of the earlier cited authorities who permit illusory acts when not accompanied by witchcraft. *Tiferet Yisra'el*'s comments are also consistent with the position of those authorities.

Moreover, as cited earlier, Rabbi Halevi notes that *Tiferet Yisra'el*'s comments are consistent with the position of Rambam even as expressed in the latter's *Sefer ha-Mitzvot*<sup>10</sup> if Rambam's statements in the *Sefer ha-Mitzvot* are understood as referring only to illusory acts that constitute a form of witchcraft.

Nevertheless, it must be noted that as indicated earlier, *Radvaz*, in his commentary on *Sefer ha-Mitzvot*, as well in his *Teshuvot ha-Radvaz*, V, no. 585, understood the Rambam as prohibiting all acts that are illusory in nature.<sup>11</sup> Moreover, as

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10. Cf. *Be-Tzel ha-Chochmah*, IV, no. 13, sec. 5.

11. However, in his responsa, *Radvaz* notes that Rambam's statement in *Sefer ha-Mitzvot* indicating that illusory acts are punishable by lashes contradicts Rambam's position in the *Mishneh Torah* where he rules that when one engages in non-capital forms of witchcraft one is exempt from lashes since the applicable

has been stated earlier, *Bach*, *Chochmat Adam* and all other later authorities understand Rambam's comments in the *Sefer ha-Mitzvot* as prohibiting all illusory acts even when they are not performed in association with witchcraft.

It should be further noted that *Shach*, *Yoreh De'ah* 179:17, in accepting *Bach*'s statements as authoritative and in prohibiting even illusory acts that are not performed in conjunction with witchcraft, remarks that this position is also maintained by *Hagahot Maimuniot*, *Hilchot Avodat Kochavim*, chap. 11, and by *Teshuvot Ramo*, no. 67. Rabbi Moshe Feinstein, *Shem Olam*, p. 413, notes that no statement to that effect is to be found in the published editions of *Hagahot Maimuniot*. Rabbi Feinstein further interprets *Teshuvot Ramo*, no. 67, in a manner such that *Ramo* and his interlocutor, *Maharshal*, both maintain that illusory acts not carried out in conjunction with witchcraft are permitted. Rabbi Feinstein maintains that *Shach* is in error in reporting that the position of *Ramo* as expressed in his responsa is similar to that of *Bach*. Accordingly, Rabbi Feinstein maintains that *Bach*'s opinion is a minority one. However, due to the fact that *Chochmat Adam* and *Shach* both maintain that illusory acts are prohibited, Rabbi Feinstein writes that he would seek to avoid ruling on this issue. He nevertheless adds that, if he could not find it possible to avoid ruling on this matter, he would permit such performances even though that ruling would be contrary to the opinion of *Chochmat Adam*, provided that it is clear to all that the magic tricks are accomplished entirely by means of sleight of hand.<sup>12</sup>

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prohibition serves as a warning regarding capital punishment. *Radvaz* suggests that, in the *Mishneh Torah*, Rambam may have reversed his earlier statement. It should be noted that *Bach* fails to note that, according to his analysis, Rambam's comments in *Sefer ha-Mitzvot* contradict his comments in the *Mishneh Torah*.

12. It should be noted that Rabbi Feinstein seems to understand

### Further Possible Grounds for Leniency

R. Israel Joshua Trunk, *Yavin Da'at*, in his novellae on *Shulchan Aruch*, notes that *Shach's* ruling prohibiting even illusory acts is limited and circumscribed in nature. He asserts that the performance of parlor tricks is permissible provided that the magician announces to his audience that he is engaging

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*Bach's* position in a novel manner. He seems to assume that the restrictive authorities prohibit any extraordinary act not attributable to normal physical prowess lest one assume that the act was done through witchcraft. Accordingly, Rabbi Feinstein objects that their position is contradicted by the aggadic report (*Sotah* 13a and *Bereshit Rabbah* 98:22) declaring that the sons of Jacob sent Naphtali to Egypt with a document attesting to Esau's sale to Jacob of his interest in the Cave of Machpelah. Naphtali was entrusted with this mission because he was extraordinarily fleet of foot and could complete the journey in a phenomenally brief time. Similarly, we find that Samson was permitted to use his extraordinary strength against the Philistines (*Judges* 15:14-15). Rabbi Feinstein, in these queries, seems to assume that, according to *Bach's* understanding of Rambam, any extraordinary feat should be prohibited since people may erroneously assume that witchcraft is employed in carrying out such acts.

It would, however, appear that *Bach* understands Rambam as prohibiting only illusory acts. The paradigms provided by Rambam and cited by *Bach*, e.g., causing a serpent to emerge from a piece of string, appear to be occult acts although in reality they are produced by sleight of hand. Such acts of deceit are prohibited by virtue of the admonition "*lo te'onenu*" which serves to forbid leading the eyes to err in their perception. Moreover, Rambam concludes that one who engages in these acts is a "*gonev da'at ha-beriyot*," one who "steals the mind of people" and hence such acts are also forbidden simply because they are deceitful. However, the acts of Naphtali and Samson were born of extraordinary physical prowess and were not at all illusory in nature. Since those acts were both natural and veridical they were entirely permissible. See also *Teshuvot be-Tzel ha-Chochmah*, IV, no. 13, sec. 5, who underscores precisely this point.

in sleight of hand for the sole purpose of amusing the onlooker. If the audience is so informed, *Yavin Da'at* regards the performance to be permissible even if the audience is incapable of properly understanding the manner in which the feat is accomplished. *Yavin Da'at* asserts that the jesters of yesteryear who performed magic tricks at weddings and the like did, in fact, explain to their audiences that those acts were illusory in nature. A similar conclusion to that of *Yavin Da'at* is independently reached by Rabbi Moshe Sternbuch, *Teshuvot ve-Hanhagot*, I, no. 455. Rabbi Sternbuch remarks that such performances are undoubtedly permissible in instances in which the magician does not merely announce that his tricks are based on sleight of hand but also demonstrates how they are performed.<sup>13</sup>

Nevertheless, as correctly noted by Rabbi Ovadiah Yosef, *Yabi'a Omer*, *Yoreh De'ah*, V, no. 14, the consensus of latter-day authorities is not in accordance with the opinion of *Yavin Da'at*. In particular, R. Samuel ha-Levi Vosner, *Shevet ha-Levi*, no. 128, although he fails to cite *Yavin Da'at*, explicitly rejects the distinction made by that authority. It would appear to this writer that, in his *Sefer ha-Mitzvot*, Rambam posits two distinct prohibitions with regard to deceptive acts involving sleight of hand. Rambam rules that these acts are prohibited both by virtue of the prohibition of "*lo te'onenu*" and also because one is thereby "*gonev da'at ha-beriyot*," i.e., engaging in an act of deception. It is indeed the case that, when the magician clearly indicates that his acts are illusory in nature there is, almost by definition, no element of deception and hence the performer cannot be categorized as a person who "steals the minds" of his audience.<sup>14</sup> However, with regard to the prohibition of

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13. See also *Aseh Lecha Rav*, II, no. 44, p. 162, who makes a similar distinction but in the context of a somewhat different analysis.



"*lo te'onenu*" which forbids illusory acts, it may well be argued, that, since the prohibition is attendant upon acts that are intrinsically illusory, such acts are prohibited even though the observer knows that they are illusory. It would appear that this is the position of the many authorities who do not draw *Yavin Da'at's* distinction.

Several writers have noted that perhaps current magic shows differ from those of an earlier era in other ways as well.<sup>15</sup> Of these writers, Rabbi Betzalel Stern, *Teshuvot be-Tzel ha-Chochmah*, IV, no. 13, articulates the distinction that, from the halachic perspective, is most cogent. He notes that the essence of the prohibition of "*lo te'onenu*" is an admonition against the performance of illusory acts designed to deceive the observer. Thus, the magician claims to perform acts which, in reality, do not occur. For example, the person who conceals a rope in his clothing and draws out a serpent has not transformed the rope into a snake. The audience is merely deluded into believing that such a phenomenon has occurred. As Rashi comments, the prohibition "*lo te'onenu*" forbids one to be "*soger einei ha-beriyot*," i.e., "to seal the eyes of people." However, in contemporary times, argues Rabbi Stern, many tricks of "magic" do not even create an illusion. Turning a stick into a snake or sawing a woman in half do indeed involve the generation of a false perception. However, when a magician points to two rings on his hand and a second later shows that he is wearing only one ring, no false perception is created; the

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14. It should be noted that Radvaz, *Teshuvot*, V, no. 585, although he rejects Rambam's position with regard to "*lo te'onenu*" accepts it with regard to "*gonev da'at ha-beriyot*." Thus, prior explanation that the trick is to be performed by sleight of hand would render the act entirely permissible according to Radvaz.

15. See Rabbi Daniel Yehudah Neustadt in his query to Rabbi Feinstein, *Shem Olam*, p. 411; *Aseh Lecha Rav*, II, no. 44; and R. Betzalel Stern, *Be-Tzel ha-Chochmah*, IV, no. 13.

magician, with fleet and deft movements has simply hidden one ring and the beholder perceives only the reality of a single remaining ring. Thus, argues Rabbi Stern, tricks involving sleight of hand which yield no apparition are not deceptive by nature and, accordingly, even Rambam would agree that such acts are permitted. Nevertheless, Rabbi Stern notes that from the comments of *Chochmat Adam* it would appear that that authority regards even such acts as prohibited.<sup>16</sup>

### Conclusion

Among present-day rabbinic writers, the only author who unequivocally permits contemporary magic shows is Rabbi Chaim David Halevi. Rabbi Wosner and Rabbi Yosef clearly prohibit such performances. Although Rabbi Feinstein is willing, in theory, to permit contemporary magic shows and Rabbi Stern concurs at least with regard to most parlor tricks, both authorities are hesitant to do so in practice, in face of the negative rulings of earlier authorities. Indeed, any contemporary scholar assessing the published material would be hard-pressed to sanction magic shows in light of the fact that it was the consensus of earlier authorities that such practices are to be decried. That would be true even if the magician were to explain how the tricks are performed, since even an accompanying explanation would not satisfy the qualms of the majority of the halachic authorities who have issued negative rulings with regard to this matter.

However, one solution does present itself. *Chochmat Adam*

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16. Rabbi Neustadt, *Shem Olam*, p. 411, notes that *Chochmat Adam*, *Pitchei Teshuvah*, *Kitzur Shulchan Aruch*, *Darkei Teshuvah* and *Yad ha-Ketanah* apparently maintain that there is no distinction between the tricks of magicians of yesteryear and those of contemporary magic performers. See also *Aseh Lecha Rav*, II, no. 44, for a somewhat different analysis.

notes that a non-Jew, who is not bound by the prohibition of *lo te'onenu*, may engage in the performance of tricks of magic and that a Jew may attend the performance. That ruling of *Chochmat Adam* is accepted by *Kitzur Shulchan Aruch* and *Pitchei Teshuvah*. *Darkei Teshuvah* does, however, cite the comments of *Maharam Schick al Taryag Mitzvot, mitzvah 251*, who notes that according to *Seder le-Mishnah*<sup>17</sup> it is prohibited for a non-Jew to engage in witchcraft, since such conduct can readily lead to heresy. Thus, such acts are considered to be a form of idol worship and, as such, are prohibited even to non-Jews. Nevertheless, *Maharam Schick* concedes that, even according to *Seder le-Mishnah*, only illusory acts performed in association with witchcraft are prohibited to a non-Jew, whereas an illusory act performed by a non-Jew through sleight of hand without any semblance of witchcraft is permitted.<sup>18</sup>

Accordingly, a school that wishes to present a magic performance for the entertainment of its students could readily engage a non-Jewish performer for this purpose and thus avoid halachic pitfalls. However, a word of caution is in order. Rambam, *Sefer ha-Mitzvot, lo ta'aseh* no. 32 and *Hilchot Avodat Kochavim* 11:15, explains that the rationale underlying the prohibitions of *me'onen* and *mechashef* is the need to prevent Jews from being led astray by being encouraged to believe that there is potency in occult forces. Thus, even if the performer is a non-Jew and the performance halachically permissible, it

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17. Cited by *Maharam Schick*, *ibid.*, *mitzvah 250*.

18. This point is missed by R. Ovadiah Yosef, *Yabi'a Omer*, V, *Yorah De'ah*, no. 14, who argues that for *Maharam Schick* it is forbidden even for non-Jews to engage in contemporary performances of magic. However, Rabbi Yosef fails to note that acts that are illusory in nature and not accompanied by witchcraft are permitted to non-Jews even according to *Maharam Schick*. It should be noted that *Darkei Teshuvah* underscores this distinction in his presentation of *Maharam Schick's* ruling.

might well be argued that it is pedagogically unsound to present such performances before an audience of impressionable youngsters who might be led to believe that the performer is indeed endowed with some supernatural gift.<sup>19</sup> If the non-Jewish magician explains that his tricks are not truly magical but merely sleight of hand, even though such explanations may not be sufficient to circumvent the prohibition of *lo te'onenu* devolving upon a Jewish performer, nevertheless, when presented in the context of a permissible performance by a non-Jew, such an explanation would serve to demonstrate to the students that the acts are not the product of some supernatural force. Accordingly, religious schools would be well advised to engage non-Jewish performers who agree to explain the true nature of their act.

It might also be appropriate to explain to the student body that Jews contemplating the performance of such acts confront significant halachic problems and that, accordingly, choosing the performance of magic as a profession is not an appropriate career choice for an observant Jewish boy or girl. Such an event also presents a unique opportunity to explain to students the philosophical basis for prohibitions against witchcraft and sorcery, with particular emphasis upon the negation of deception reflected in those commandments. A skilled educator can thereby seize upon a function designed as entertainment and utilize it as a vehicle to teach that deceit in any shape, manner or form, even when designed solely for purposes of entertainment, is problematic and to be shunned by G-d-fearing Jews.

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19. For a somewhat similar objection in a different context see the comments of *Yad ha-Ketannah* cited in *Minchat Ani*, no. 33.

## Taking Risks

*Rabbi Dovid Cohen*

*The Wall Street Journal* recently reported a preliminary study showing that heart monitors used in hospital Intensive Care Units are actually responsible for 4-5% of patients' deaths.<sup>1</sup> Yet, using the monitor is considered essential for a patient's medical care. How would Jewish law regard this situation: should a doctor continue use of the monitor based on his need for the crucial medical information it supplies? How can he ignore the risk that this procedure represents for his patient?

In a similar vein, after years of research scientists have discovered a group of drugs which apparently can bring AIDS under control. Due to the significance of these protease inhibitors, they were tested on humans without the usual preliminary animal trials. The question for Jewish law (halacha) is whether someone suffering from the disease would have been permitted to take the medicine when it was only in an experimental stage. It turned out that even as scientists confirmed the efficacy of the drugs, they noticed a disturbing feature of the treatment: in order for the drugs to be effective, the patient had to take multiple pills each day at very specific intervals. Once treatment was begun,

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1. *The Journal of the American Medical Association* 276:11, pp. 889-897, as reported in *The Wall Street Journal*, Sept. 18, 1996, p. B1.

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any slackening of this grueling regimen would cause a catastrophic relapse which could swiftly kill the patient. Knowing that once treatment begins any stoppage will be fatal, is a Jewish patient halachically permitted to assume the risk of taking these protease inhibitors, even if they might extend his life significantly? Is he permitted *not* to take such a risk?

This paper will examine the principles and guidelines which *poskim* (halachic decisors) follow in determining if and when a person is allowed to take risks. The first section will consider situations where risk in one form or another is unavoidable, and the question is one of choosing options. The second section of this study deals with situations where one of the choices involves no health risks at all; such a situation can therefore be classified as an avoidable risk.

### Unavoidable Risks

Not so long ago, the world collectively held its breath as Boris Yeltsin considered undergoing coronary bypass surgery. Although in that situation there were international ramifications, it is a choice which many families must face, and not an easy one. While the surgery provides hope for longer life and better quality of life, it has inherent risks which cannot be ignored. The dilemma presents itself in three distinct circumstances.

#### I. Risking *chayei sha'ah* for *chayei olam*

Based on the Gemara,<sup>2</sup> the *Shulchan Aruch*<sup>3</sup> rules that a *choleh she'yesh bo sakana*, a person gravely ill, in possible danger of dying, may not receive medical treatment from a

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2. *Avodah Zara* 27b.

3. Y.D. 155:1.

non-Jew.<sup>4</sup> (The Gemara was of the opinion that due to the fierce hatred between idolators and Jews, there was a danger that the non-Jew would be likely to take advantage of the patient's state and kill him.<sup>5</sup>) However, in the case of a patient facing certain death, he may allow the non-Jew to treat him. The Gemara's reasoning in this case is central to our understanding of the permissible parameters of risk-taking: if the patient *might* survive without treatment, he cannot risk his life by allowing the non-Jew to treat him, i.e., he is not entitled to risk one chance at *chayei olam* (permanent life) – his illness might not be fatal – in order to open up a different chance at *chayei olam* – the Gentile might cure him. But if he surely cannot survive without intervention, then he is considered to have only *chayei sha'ah*, "temporary life". In a situation where he is dying anyway, given the possibility that he may recover his health permanently because the non-Jew may succeed in saving his life, one "need not even consider" the risk of losing the short time he would otherwise have left to live.<sup>6</sup> In short, *chayei olam* is so valuable that one may put his *chayei sha'ah* at risk even for a small chance at *chayei olam*.

The Gemara deduces this principle from an incident related in *Sefer Melachim*<sup>7</sup> about four *metzora'im* (people

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4. As explained in the *Shulchan Aruch*, *ibid*, this does not apply to a professionally-licensed doctor. The halacha applies only to a layman who offers his assistance.

5. Although Rashi, *ibid.*, *s.v. Safek*, says that the non-Jew will surely kill the Jew, it is clear from the ensuing text that Rashi's intent is to say that he will almost surely kill him.

6. This is true even though *chayei sha'ah* is in itself so valuable that one may even violate the Shabbat for the possibility of saving it. (*Shulchan Aruch* O.C. 329:4).

7. II *Melachim* Chapter 7.



suffering from a skin lesion, in which case biblical law requires they be banished from the city). They, as well as the residents of their city, were suffering from starvation caused by the siege of the Aramean army which surrounded the city. Seeing no hope of receiving food from the equally desperate residents of the city, the four outcasts decided to risk approaching the Aramean encampment to beg for food. Obviously, there was a strong possibility that the soldiers of Aram would kill them on sight and they would lose even the brief time they still possessed before they died of starvation. Still, they risked their *chayei sha'ah* in the hope of gaining *chayei olam*. This story serves as the precedent for the aforementioned talmudic rule that one may risk *chayei sha'ah* if taking that chance opens up the possibility for gaining *chayei olam*.<sup>8</sup>

The literal translation of this crucial term, *chayei sha'ah*, is "life of an hour," yet the *Achiezer*<sup>9</sup> tells us not to define the term so literally. He says that one may be able to live for days or months and yet be considered as having only *chayei sha'ah* – temporary life. Accepting this premise, Rav Moshe Feinstein<sup>10</sup> reasons that the maximum life expectancy that can still be considered *chayei sha'ah* would be 12 months, corresponding to the maximum life expectancy that an animal may have and still be classified as an "animal which can live only temporarily" (*treyfa*).<sup>11</sup> Rav Feinstein adds

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8. See *Tiferet Yisrael Yoma* 8:3 (Boaz) who, based on this principle and the Gemara in *Nedarim* 22a, suggests a rather interesting ruling with respect to one whose chance for *chayei olam* is dependent on sacrificing someone else's *chayei sha'ah*.

9. Vol. II 16:6.

10. *Iggerot Moshe Y.D.* III 36.

11. Gemara *Chullin* 57b. Rav Feinstein also finds it hard to imagine that someone could have a potential life expectancy of



another condition: The person must have a disease or be in a condition that could potentially kill him at any moment. Therefore, although he may survive for 12 months, he is still living minute-by-minute, and that is what is meant by the term "life of an hour."

The *Sh'vut Yaakov*<sup>12</sup> applies the Gemara's ruling to the case of a patient who, due to his medical condition, cannot live for more than a day or two. A specific drug offers him his last hope for a full recovery. However, the medicine also has the potential of immediately ending his life. Based on the principle that one may risk his "temporary life" in an attempt to acquire "permanent life", the *Sh'vut Yaakov* allows the patient to take the medicine, but stipulates that a strong majority<sup>13</sup> of doctors must recommend the medicine and that the local rabbi be consulted. Surprisingly, he does not clarify which criteria the doctors and rabbi should use in determining whether to recommend the medicine or not.

Rav Moshe Feinstein<sup>14</sup> feels that one may risk taking such a medicine only if there is at least a 50% chance that the medicine will not kill the patient. However, a person has no right to risk his *chayei sha'ah* if in most circumstances the medicine proves fatal. That is to say, one has no right to take such a long shot with his *chayei sha'ah* even to possibly gain *chayei olam*. This may be the criterion that the *Sh'vut Yaakov* was referring to when he intimated that one is not always allowed to risk his precarious life for a chance at a longer life.

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more than one year and still meet his second condition.

12. Vol. III, 75, quoted in *Gilyon Maharsha to Shulchan Aruch* Y.D. 155:1. See also *Binyan Tzion* 111.

13. With a 2:1 ratio (*Melamed Lehoil* II Y.D. 104).

14. *Ibid.*

The *Achiezer*<sup>15</sup> differs with Rav Feinstein on this point. It is his opinion that one is permitted to endanger *chayei sha'ah* in an attempt at getting *chayei olam*, even if he is likely to die as a result. He sees this as the simple understanding of the Gemara, which states that when faced with a question of *chayei olam* one is "unconcerned" with *chayei sha'ah*. Furthermore, the Gemara allowed one to receive treatment from a non-Jew who would almost certainly kill him, because of the potential for *chayei olam*.<sup>16</sup> This would indicate that in the face of any odds one may risk his temporary life to try to have a full recovery. Although Rav Moshe Feinstein argues with this conclusion, he feels that the *Achiezer's* opinion carries enough weight so that none can object to those who choose to follow it.

One further point warrants discussion: Rav Moshe Feinstein<sup>17</sup> infers from the Gemara's choice of words that one has the *right* to risk his *chayei sha'ah* for *chayei olam* but is not *obligated* to do so.<sup>18</sup> He further deduces this idea from the fact that the Gemara proves its principle from the story of the four *metzora'im*. He questions using that story as proof because another Gemara<sup>19</sup> tells us that these four men were Gechazi and his three sons, whose affliction was a punishment meted out to them by the Prophet Elisha, due to their transgressions. If so, how can we derive a halachic principle based upon their behavior, for they were so wicked that the Gemara identifies Gechazi as not having a share in

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15. Ibid.

16. See *Iggerot Moshe*, *ibid*, where he presents his alternate understanding of these talmudic texts.

17. Ibid.

18. In effect, this is saying that one may also give up his chance at *chayei olam* in order to be certain of having *chayei sha'ah*.

19. *Sanhedrin* 107b.

the World to Come?<sup>20</sup> The answer must be that the Gemara independently arrived at this principle and only used the story of the four *metzora'im* to demonstrate that people do in fact value *chayei olam* more than *chayei sha'ah* and would take such a risk. For such a portrayal of human nature, anyone can serve as the example, even outcasts. And thus, he argues, this story helps us better understand the principle itself; the very fact that after having stated the principle, the Gemara then searched for an example to show that people would choose a chance at *chayei olam* over guaranteed *chayei sha'ah*, is an indication that it does in fact depend on each person's preference. One is entitled to opt for the chance at *chayei olam*. One is equally free to choose to live his remaining *chayei sha'ah* and not risk it for a chance at extended life.<sup>21</sup>

Rav Shlomo Zalman Auerbach<sup>22</sup> challenges this deduction, arguing that the story in the Prophets does not refer by name to the four *metzora'im* and gives no indication that what they did was incorrect. Although we may know that it was Gechazi and his sons, the Gemara can still prove its principle from the story as it is presented in Scripture. Rav Auerbach, however, has a more fundamental disagreement with Rav Feinstein.<sup>23</sup> A person must do anything in his power to save his life within the constraints of the halacha. Therefore, Rav Auerbach argues that if the

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20. Ibid, 90a.

21. This applies only in cases where there is a 50%-or-less chance of *chayei olam*. If more than 50% of people regain *chayei olam* from this medication, one is obligated to take the medicine and risk his *chayei sha'ah* (*Iggerot Moshe*, *ibid.*) It is not clear how this limitation can be reconciled with Rav Feinstein's own opinion quoted in footnote 14.

22. Quoted in *Nishmat Avraham* II, 155, note 15.

23. Ibid, note 29.

halacha allows one to risk his life in order to gain a chance at *chayei olam*, he should have no choice but to take the risk.<sup>24</sup> Since the option of taking a risk in this case is sanctioned by Jewish law, Rav Auerbach argues that one is surely obligated to do so.

## II. Risking *chayei sha'ah* for *chayei sha'ah*

Unfortunately, there are times when it is clear to a doctor that the patient will surely never regain his *chayei olam*. However, the doctor proposes a risky treatment which he hopes will somewhat lengthen the life or improve the quality of life for that patient. May the patient agree to undergo such treatment if it also carries with it the possibility of ending his life? In other words, can a patient risk his *chayei sha'ah* for the chance of acquiring longer or better *chayei sha'ah*?

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24. It would seem that their argument depends on the following: Both Rav Feinstein and Rav Auerbach agree that a person must do anything to save his "life", and that both *chayei sha'ah* and *chayei olam* are considered "life" in this context (see *Shulchan Aruch* O.C. 329:4. However, see Rav Auerbach's opinion, quoted in *Nishmat Avraham* Y.D. 155:2 p. 48, regarding *chayei sha'ah* in general.) With regard to the Gemara that states that in questions of *chayei olam* one need not concern oneself with *chayei sha'ah*, Rav Auerbach understands that to mean that faced with a question of *chayei olam*, it must be that *chayei sha'ah* is not considered life because if it were, we would never choose one form of life over another. Therefore, he holds that one must risk his *chayei sha'ah* for *chayei olam*. Rav Feinstein understands the Gemara to mean that *chayei sha'ah* is life even in such situations, but in this case we are to consider one form of life as more valuable. However, since both *chayei sha'ah* and *chayei olam* are life for all purposes, no one can be required to choose *chayei olam* and thereby "save his life". This reasoning is in line with Rav Feinstein's opinion which is quoted at footnote 14.

Rav Akiva Eiger<sup>25</sup> says that one may surely risk a patient's life to save him from immediate and unquestionable danger. Thus, even if a person is so gravely ill that moving him might kill him, we would nevertheless unquestionably have to evacuate him from a burning building! The more typical case involves patients who, if left untreated, can live for just a few more days, but a proposed treatment might hopefully extend their lives for an extra few months. Although this question is not uncommon, we will see that the major *poskim* are not clear as to what the halacha is.

In two responsa, Rav Moshe Feinstein<sup>26</sup> restates the principle that one may risk his *chayei sha'ah* for a potential gain of *chayei olam*. However he finds no basis for allowing one to risk his *chayei sha'ah* to potentially gain longer or more fulfilling *chayei sha'ah*. However, in a third responsum,<sup>27</sup> he rules that although one may not undergo unnecessary surgery because of the inherent risks<sup>28</sup> – yet such surgery would be permitted in order to relieve pain. His reasoning is that freed of the pain, the patient will have the strength to hold unto life somewhat longer. In essence, this amounts to allowing the patient to risk his *chayei sha'ah* in an attempt to have more *chayei sha'ah* (in contradiction to what he writes elsewhere)! Inasmuch as all three responsa deal with patients who will surely never regain *chayei olam*, we are left with a lack of clarity in reconciling these contradictory opinions.

Rav Shlomo Zalman Auerbach's opinion is equally

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25. On *Shulchan Aruch* Y.D. 339:1 s.v. *v'chol*.

26. *Iggerot Moshe* Y.D. III 36 (dated 1972) and C.M. II 75:3 (dated 1984).

27. *Ibid.* C.M. 73 number 9 (dated 1982).

28. *Ibid.*, number 7.

vague. In the case of a person who had only days left to live, he ruled that the patient was entitled to make the choice not to undergo a recommended amputation, because he feared the pain and risk involved.<sup>29</sup> Rav Auerbach therefore ruled that he had no obligation to have the amputation, even if it might grant him longer life. The implication is clear that while the patient did not have to undergo the surgery, he would be allowed to assume the risk if he so desired.

In response to a different question, Rav Auerbach writes that one may not give a deathly-ill patient a dose of morphine which may be lethal. Nevertheless, it is permitted to prescribe morphine in such amounts that each dose by itself is not deadly, although the cumulative effect might be.<sup>30</sup> In allowing a patient to receive morphine in this manner, he is in effect saying that this patient may risk his *chayei sha'ah* for pain relief; but he may not take a dose which could be deadly. This ruling, forbidding taking possibly-deadly doses of morphine, seems to contradict his other ruling, permitting an amputation which also carried the possibility of immediate death. Once again, we are left with no clearcut principles for dealing with this very pressing problem.

### III. Risking *chayei olam* for *chayei olam*

We have referred to the Gemara<sup>31</sup> which states that even a "*choleh she'yesh bo sakana*" (a person in imminent danger of dying) may not be treated by an unlicensed non-Jewish person (a licensed doctor is excluded from this limitation) unless he will certainly die without the treatment. The

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29. Quoted in *Nishmat Avraham* Y.D. 155:2 pp. 47-48.

30. *Ibid*, 339:4.

31. *Avodah Zara* 27b.

talmudic reasoning is that even a person whose life is in danger may not save himself by subjecting himself to the greater danger that the non-Jew will almost certainly kill him.

Let us try to apply this rationale in a cognate situation: What if the medicine to cure an illness won't "almost certainly" kill the patient, but is nevertheless quite dangerous – may the patient take it? This situation is different from those discussed previously in that this person, although dangerously ill, does have a chance of surviving even if left untreated. This forces him to be more cautious in deciding to take a risk.

Rav Moshe Feinstein sets the following guidelines for allowing one to take medicine in such a situation:<sup>32</sup>

A. The drug has been tested for side effects on patients who are in a similar state of health. (If the drug was tested only on healthy people, we cannot correctly gauge its toxicity for those who are ill.)

B. Only a very small minority of those tested did in fact die as a result of taking the drug.

C. More than 50% of patients with this condition will die if they don't receive the drug.

D. The patient understands the possible outcomes and agrees to take the medicine.

In effect, Rav Feinstein is saying that one may take such a chance only if the risk from the medication is considerably smaller than from of the illness. Even in this case, it is only permissible with the patient's consent.

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32. *Iggerot Moshe C.M.* II 73:5.

After considering the above guidelines, another ruling of Rav Feinstein is more easily understood: A person had a heart disorder which confined him to bed and caused much suffering, although it did not pose any short-term risk to his health. Were he to undergo (risky) heart surgery, he would be relieved of his pain and regain full mobility. Rav Feinstein expresses amazement that anyone could even contemplate the surgery, risking his life just to improve his quality of life!<sup>33</sup>

Perhaps the guidelines we have indicated above may make this surprisingly strict ruling more understandable. Even a deathly-ill person may risk his life only if the cure is considerably less risky than the illness. Surely someone who is not presently in any immediate danger cannot undergo heart surgery with its inherent risks. (In order to maintain perspective, it might be necessary to note that Rav Feinstein wrote this responsum a number of years ago, when open-heart surgery was less advanced than it is today.)

### **Taking a risk to save someone else**

Up until this point, we have focused on guidelines for deciding between choices where each option carries some degree of risk. Actively treating the patient was potentially hazardous, yet passively not treating the patient did not immunize him from risk either. We now turn to a different scenario, of an unavoidable risk.

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33. Ibid. Y.D. II 36. Rav Feinstein does not discuss whether the surgery might be permitted if an extended bed rest would affect the patient's ability to earn a living. We will discuss at the end of this paper the allowances that might be made based on such a consideration.



The *Tzitz Eliezer*<sup>34</sup> discusses the heart-wrenching dilemma of a pregnant woman who *rachmana litzlan* has cancer. Does she have the right to choose to save her baby by continuing the pregnancy, if the doctors warn her that doing so puts her at greater risk of succumbing to her disease? Is she obligated to continue the pregnancy, or might she even be strictly forbidden from doing so? Continuing the pregnancy is in effect taking a personal risk to save the unborn fetus. Knowing the facts, is she allowed to take that personal risk to benefit someone else? Similarly, may one donate one of his kidneys to someone dying of kidney disease?<sup>35</sup> The donor will obviously have no personal gain from undergoing surgery and being left with only one kidney, but the recipient's life may be contingent on receiving the transplant.

There is a very fine line between bravery and stupidity. Where does the Torah draw that line? When is such an act commendable and when is it deplorable? Let us see how the *Poskim* utilized the sources which serve as the foundation for such a discussion.

The *Beit Yosef*<sup>36</sup> quotes a text in the *Yerushalmi*<sup>37</sup> and relates it to our question. The *Yerushalmi* tells of a time that Rav Imi was captured by gangsters who were certain to kill him, but Reish Lakish risked his life and rescued him. The

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34. Vol. 9, *Siman* 51, end of the third *Sha'ar*.

35. The question is only where the medical procedure, such as donating a kidney, involves a true risk. Thus, *Nishmat Avraham* Y.D. 349:3 at 3:2, brings the opinion of Rav Shlomo Zalman Auerbach that one must surely donate marrow for a bone marrow transplant because there is no risk involved. The risk of the total anesthesia necessary for this procedure leaves him unconcerned.

36. On *Tur* C.M. 426, quoting *Hagahot Maimoniot* (Kustantina edition) *Hilchot Rotzeach* 1:15.

37. *Terumot* 8:4.

*Beit Yosef* explains that the reason Reish Lakish was right to endanger himself was that Rav Imi faced certain death, while Reish Lakish was only faced with possible death. Thus, Reish Lakish was obligated to undertake the risk. This text clearly indicates that one is required to take steps to save someone facing certain death, even if those measures involve personal risk.<sup>38</sup>

The *Acharonim*<sup>39</sup> point to the anomaly that although the author of *Beit Yosef* (Rabbi Yosef Karo) quotes the *Yerushalmi* without a dissenting opinion, he does not include it in the *Shulchan Aruch* which he wrote thereafter. Similarly, the Rif and Rambam do not cite this *Yerushalmi* text as representing the normative halacha. *Ohr Sameach* goes so far as to say that Rambam explicitly argues with the *Yerushalmi*,<sup>40</sup> when he rules<sup>41</sup> that an accidental murderer whose penalty is that he must be exiled to the Refuge City,<sup>42</sup> must remain there even if he could save another Jew's life by leaving the city.<sup>43</sup>

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38. The *Beit Yosef* does not discuss risking one's life to save someone who is not sure to die, but is in a very precarious situation. An example of that case was the rescue of the hostages at Entebbe.

39. *S'MA*, C.M. 426:2; *Pitchei Teshuva*, C.M. 426:2 and Y.D. 157:15.

40. *Hilchot Rotzeach* 7:8. See also in his *Sefer Meshech Chochmah*, *Sh'mot* 4:19 where he brings scriptural proofs to his opinion. Rav Shlomo Zalman Auerbach, quoted in *Nishmat Avraham* Y.D. 252:2, refutes one of his proofs.

41. *Hilchot Rotzeach* 7:8.

42. As a result of his accidentally killing someone else.

43. The basis for the Rambam's ruling is a Mishnah in *Makkot* 2:7, which rules that an accidental murderer (*rotzeach*) may not leave his "exile" (*Galut*) in a number of cases. However, the Mishnah does not mention any case where he has to leave the city in order to save the life of someone else who could not otherwise be saved. (The case in the Mishnah of a general who needs to lead the

The *Ohr Sameach* explains the Rambam's reasoning, that if the murderer leaves the city, he might himself be killed by his victim next-of-kin, who is permitted to attack him outside the walls of the Refuge City. Therefore, the ruling is that the accidental murderer cannot risk his own life by leaving the city, even to save someone else's life.

The *Tiferet Yisrael*<sup>44</sup> disagrees with this interpretation for three reasons. First, he says there is no connection between the ruling that the murderer may not leave the Refuge City and the ruling that if he does, the next-of-kin can kill him. He infers that the reason the murderer must remain in the city is unrelated to the risk involved in leaving it. Secondly, the Rambam does not allow the murderer to leave the city even to save all of *Klal Yisrael*. Isn't it more than obvious that one must risk his life to save all the Jewish people? So why can't the murderer do it?<sup>45</sup> Thirdly, if the only reason for his not leaving the city is fear of the next-of-kin, why doesn't the *Beit Din* simply incarcerate the next-of-kin for the duration? This would allow the murderer the freedom to save all of *Klal Yisrael*! Obviously there must be an alternate explanation why the murderer may not leave the city even to save someone else.<sup>46</sup> Consequently, the *Tiferet Yisrael* concludes that the halacha for an accidental murderer has

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Jewish Army in war simply states that he is the best general, but not that he is irreplaceable.) It is not clear how the Rambam knew to add that even in cases where his leaving the city was crucial to saving a life, he still could not leave. It is these added cases that are seemingly the focus of the *Ohr Sameach*.

44. *Makkot* 2:2 (Boaz).

45. See *Iggerot Moshe Y.D.* II 174:4 (quoted later in footnote 67) who rules similarly. He bases this on the story brought in Rashi *Ta'anit* 186 s.v. *B'diludkia*.

46. The *Tiferet Yisrael* does not explain what that alternate suggestion might be.

no bearing on our discussion.

We have seen that it is debatable whether the Rambam does or does not explicitly argue with the view of the *Yerushalmi*. Yet it is clear that the principal codifiers of Jewish law do not quote that text in the *Yerushalmi*, and the question remains, what could be their basis for not accepting the *Yerushalmi*?<sup>47</sup>

The *Netziv*<sup>48</sup> suggests that the opinion expressed by the *Yerushalmi* was not as universally accepted as one might think, for the Babylonian Talmud (*Bavli*) records a difference of opinion on the matter.<sup>49</sup> The following question is discussed in the *Bavli*:<sup>50</sup> Town A has just enough water for its drinking and laundry needs. Nearby, Town B does not even have enough water to drink. Does Town A have to give the water it intended to use for laundry to Town B so that they will at least have drinking water? (It is important to note that the Babylonian Talmud considers not having clean clothing as being potentially life-threatening). In other words, do the people in Town A have to put themselves at risk by giving up their laundry water in order to save the

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47. This is implicit in their not quoting the *Yerushalmi*. The anomaly is particularly strong with regard to the *Shulchan Aruch* who does quote the *Yerushalmi* in the *Beit Yosef*.

48. On *She'iltot* 147:4. See also his comments to *She'iltot* 129:4, where he says that Reish Lakish did not have an obligation to risk his life but had a choice to do so. This opinion is a rejection of the *Beit Yosef's* view that Reish Lakish was obligated.

49. We will quote only this one text from the Babylonian Talmud, although the *Netziv* himself quotes other Babylonian texts that argue with the *Yerushalmi*. See also the *Tzitz Eliezer* Vol. 9 # 45, who brings another two texts that also disagree with the *Yerushalmi*. See also *Aruch HaShulchan* C.M. 426:4.

50. *Nedarim* 80b - 81a.

people of Town B from dying of thirst? The correct answer to this question is in fact argued in the *Bavli*; the *She'iltot* rules that Town A does not have to give up its laundry water.

What emerges from this is that the *Yerushalmi*, in holding up the behavior of Reish Lakish as the proper model to follow, agrees with one opinion expressed in this discussion in the *Bavli*. However, the actual halacha is according to the other opinion, as recorded in the *She'iltot*. This explains why the *Yerushalmi* is not quoted by Rif, Rambam or *Shulchan Aruch*.

One could also offer an alternate explanation of the incident recorded in the *Yerushalmi*. In *Ketubot*<sup>51</sup> the Gemara cautions against coming in close contact with those who are "*Ba'alei Ra'aton*" (afflicted with a certain contagious disease). Nevertheless, the Gemara praises Reish Lakish, who used to embrace such people and teach them Torah. The Ritva<sup>52</sup> questions how Reish Lakish could risk his life by coming in such close contact with these people. The answer he gives is that the Gemara<sup>53</sup> maintains that anyone who learns Torah is protected from harm even when not learning, and the great scholar Reish Lakish therefore had nothing to fear when coming in contact with these people. Perhaps this would also explain the story in the *Yerushalmi* that this same person, Reish Lakish, risked his life to save Rav Imi – he knew his Torah learning would protect him and thus he had nothing to fear on his rescue mission. This analysis differs from that of the *Beit Yosef* in explaining why Reish Lakish was right to

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51. *Ketubot* 77b.

52. *Ibid*.

53. *Sotah* 21a. We will discuss this text once again towards the end of this paper.

risk his life to save Rav Imi.

The Ritva adds a crucial comment. The Gemara in *Sotah*, which tell us that learning Torah is protective, applies only for one who learns Torah *Lishmah* – Torah for its own sake and not for honor or advancement. This would explain why the Gemara as a rule tells us to distance ourselves from those people who are *Ba'alei Ra'aton*. Since not everyone learns Torah *Lishmah*, the general rule must be to avoid contact with them, unlike Reish Lakish who was confident that his learning Torah *Lishmah* would protect him. But the rabbis would not promulgate a principle across the board based on the behavior of an atypical individual. Similarly, one cannot adduce general principles based on the story of Reish Lakish in the *Yerushalmi*, because only someone on the spiritual level of Reish Lakish is permitted to take great risks to help others, but not an ordinary person. That explains why the story of the *Yerushalmi* does not serve as a precedent for the halachic decisors.

### The Radvaz

The Radvaz is the major source adduced by the *Acharonim* on the question of risking one's life to save someone else.<sup>54</sup> Unfortunately, his opinion is often misconstrued, based on statements quoted out of context. A careful reading and analysis of the two relevant responsa by Radvaz will be enlightening.

The Radvaz<sup>55</sup> cites the *Yerushalmi* we have mentioned, but limits that precedent to situations where the risk to the

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54. Although the Radvaz does not explain why the *Yerushalmi* is not brought in the *Shulchan Aruch*, he does limit its scope.

55. 1582 (218). The Radvaz is quoted in *Pitchei Teshuva* C.M. 426:2 and Y.D. 157:15.

rescuer is small.<sup>56</sup> If the chances are that the risk will probably cost him his life, or even if there is a 50/50 chance of his dying, the Radvaz says there is no such obligation.

In another responsum,<sup>57</sup> he returns to this issue: a person was able to save someone's life by having one of his own limbs removed. For reasons unrelated to our discussion, the Radvaz rules that one is never obligated to sacrifice a limb in order to save a friend's life. He adds, however, that since people can live without that limb and the chances of his bleeding to death during the operation are slim, if he elected to do it, that person would be considered a *chassid* (pious). That is to say, one is not obligated to risk his life for someone else, but does have the right to do so. However, if there is a real danger that he might die by having the limb amputated (in serious *sakanah*), then he earns the derogatory title of "*chassid shoteh*" – a pious fool.

The criterion for determining whether one is a *chassid* or a *chassid shoteh* in any given situation of risk-taking is obvious. Based on the first responsum of the Radvaz, we can see that if the risk is minimal, he is permitted<sup>58</sup> to risk his life and is considered a *chassid*. If the risk involved is more than 50%, then choosing to take the risk is foolish and not the act of a true *chassid* at all.

The *Tzitz Eliezer*<sup>59</sup> applies the Radvaz's criteria to a

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56. The *Tzitz Eliezer*, vol. 9 45:9, quotes the Maharam Schick who explains the *Yerushalmi* in a similar manner.

57. 1052 (627).

58. As mentioned previously, in this case he is never obligated to give up the limb (for unrelated reasons). In a typical case, the Radvaz (*Teshuva* #1582(218)) says that in fact one is obligated to take the small risk in order to save his friend.

59. Vol. 8 *Siman* 15 10:13. However, in Vol. 9 17:5, he rules



practical scenario. If a patient has a life-threatening communicable disease, a doctor would not be allowed to treat the patient for fear of becoming infected himself, even to save the patient's life.<sup>60</sup> (According to the rules laid down by Radvaz, this is true only in cases where the risk of infection is more than 50%).<sup>61</sup> However, diseases such as AIDS or Hepatitis B are contagious only through blood contact, for which the doctor can take precautions. Thus, he would be obligated to treat those ill with such diseases, since the risk of infection is, in effect, minimal.<sup>62</sup> Similarly, other health workers may treat these patients, even though occasionally they may prick themselves with bloody needles.

In summary, the Radvaz is saying that in a typical case<sup>63</sup> of minimal risk, one is obligated to take the risk. But if the danger is great, not only is one not obligated to take the risk, but doing so earns him the opprobrium of *chassid shoteh*. Consequently, one must carefully and honestly evaluate the facts in deciding on a correct course of action.<sup>64</sup>

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differently on this same question.

60. An unrelated but practical question was discussed in *Nishmat Avraham* 155:2:4. He brings an argument between Rav Shlomo Zalman Auerbach and the *Tzitz Eliezer* as to why and when a student can "learn" to be a surgeon on live patients. Wouldn't the patients be less at risk if a professional performed the surgery?

61. However, see *Teshuvot HaRamo* 20, quoted in part in *Shach* C.M. 312:2, who says that aside from those who are *Ba'alei Ra'aton* (as outlined in *Ketubot* 77b) one should never refrain from visiting with any ill person for fear of becoming infected.

62. All this is with respect to treating such a patient to save his life, and not for other care.

63. See footnote 58.

64. See *Pitchei Teshuva* C.M. 426:2 and Y.D. 157:15, *Aruch HaShulchan* C.M. 426:4 and *Mishnah Berurah* 329:19.



Rav Moshe Feinstein<sup>65</sup> disagrees with the Radvaz on both his points. Rav Feinstein<sup>66</sup> challenges the assertion that there exists an obligation to save someone else's life; it is not one of the three cardinal sins for which one is obligated to give one's life. How then could one ever be required to risk his life to save someone else? This leads Rav Feinstein to conclude that there is never such an obligation.

The second point of the Radvaz is that there are situations where one is considered a *chassid shoteh* if he chooses to risk his life. Regarding this, Rav Feinstein argues<sup>67</sup> that saving someone else's life is a uniquely different situation. Although typically one must violate almost any halacha in order to save one's own life, in a situation where it is possible to save someone else, a person may always choose to save either his own or the other's life. According to Rav Moshe Feinstein, then, there is never a time that one may not risk his life to save someone else. Rav Shlomo Zalman Auerbach<sup>68</sup> also rules this way, in writing that a woman may choose to undergo the risks of a Caesarean section in order to try to save her unborn child, even though she is not obligated to do so.

### Avoidable Risks

Until now, we have discussed the question of making

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65. *Iggerot Moshe Y.D.* II 174:4.

66. As does the *Minchat Chinuch* 237:2.

67. Based on Rashi, *Sanhedrin* 74a s.v. *Sevarah*. This applies only if the one taking the risk has a chance of survival. If he will surely die in the attempt, he cannot take the risk unless it is to save all of *Klal Yisrael*. See footnote 45.

68. As quoted in *Shemirat Shabbat Kehilchata* 36:3, footnote 4. See *Chidushei Chatam Sofer, Ketubot* 61b, who brings a proof against the Radvaz.

decisions about risk. In each case, both choices involved hazards, the only decision being which one to take. The next section will discuss situations where in truth the risk is fully avoidable. One option in each scenario will involve some loss but no physical danger. Here it is not a question of choosing between risks, but rather a question of whether one even has the option to follow the unsafe path.

A first reaction to the question of taking an avoidable risk is that it should obviously be prohibited. Since human life is a supreme value, one can hardly imagine that halacha sanctions risking it unnecessarily. On the other hand, there is no limit to the extremes that one can go in the name of safety. Cars are now available with front and side air bags, day-time running lights, crumple zones and anti-lock braking systems. Must every believing Jew run out and buy the newest and safest car? For that matter why do we have a right to ride cars and fly airplanes in the first place? Isn't there an element of risk involved?

So, what is one to do? The Torah expects us to take every necessary precaution – yet there must be sensible limitations to this proviso. We will examine the major justifications for not always choosing the most cautious approach.

### *Shomer Peta'im Hashem* (שומר פתאים ה')

The Gemara<sup>69</sup> was of the opinion that an 11-year old girl would surely die if she became pregnant. Therefore, Rav Meir says she should<sup>70</sup> have relations with her husband

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69. *Yevamot* 12b. See also *ibid* 72a, *Shabbat* 129b, *Niddah* 31a, *Avodah Zara* 30b.

70. As explained by *Tosafot* to *Yevamot* 12b s.v. *Shalosh*. Rashi there, s.v. *M'shamshot*, understands the argument differently.

only if she uses a *Moch* (a method of birth-control used in ancient times). The Sages (*Rabanan*) argue that there is no such need because "*Shomer peta'im Hashem*"<sup>71</sup> – "G-d protects the fools." That is to say, there is divine protection for someone who foolishly endangers himself. Other citations in the Talmud<sup>72</sup> clarify that we can apply the rule *Shomer peta'im Hashem* for all unsafe or foolish activities which may have become common practice.

There are three ways we can understand this rabbinic opinion:

1- Rav Akiva Eiger<sup>73</sup> (whose opinion we follow) takes the Rabbis at face value – they are saying that although there is great danger for a young girl not to use a *Moch*, even so, since it is common for many girls not to do so, we can apply the dictum "G-d preserves the foolish." In practice, this means that one can rely on this principle and not take extra precautions even if the risk is great.

2- The *Achiezer*<sup>74</sup> is perplexed by this interpretation of the Rabbis' teaching. How could it be that a person is allowed to enter into a clear and present danger and rely on G-d's grace to save him, rather than taking precautions? He therefore understands the Sages as saying that it is only in

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71. *Tehillim* 116:6.

72. *Shabbat* 129b, *Yevamot* 72a.

73. Vol. I 71, 72 as explained in *Pitchei Teshuva* E.H. 23:2. See *Iggerot Moshe* E.H. I 63:5 who has an alternate explanation of Rav Akiva Eiger's opinion. See also *Chatam Sofer* Y.D. 172, *Binat Adam Sha'ar Beit Hanashim* #36. The *Avnei Nezer* E.H. 80 has a novel approach to the ruling of *Rabanan*.

74. E.H. I 23. See also *Divrei Malkiel* E.H. 70 and *Tzemach Tzedek* E.H. I 89; *Iggerot Moshe* E.H. I 63:1 comes to a conclusion similar to that of the *Tzemach Tzedek*.

this specific case that the girl is allowed *not* to use a *Moch*. Since it is biologically unlikely for a minor to become pregnant, she is allowed to forgo use of a *Moch*. Although typically we should concern ourselves with even remote chances of danger in a case of life and death, yet, since not using a *Moch* is common practice, we can rely on *Shomer peta'im Hashem* in this case. Others<sup>75</sup> who agree with the *Achiezer* do, however, arrive at a slightly different conclusion: For acts which have become common practice but which carry with them a small risk, G-d removes the threat of danger completely and makes it not dangerous at all.

3- The *Binyan Tzion*<sup>76</sup> is bothered by the same question as the *Achiezer*, but is unsatisfied with his answer. He finds no basis for treating smaller degrees of danger differently than those of a larger degree.<sup>77</sup> He poses a further question about another common practice. The halacha is that one makes *Birchat HaGomel* after crossing the ocean or the desert<sup>78</sup> because of the danger involved.<sup>79</sup> If such trips are truly dangerous, how does one have the right to take such a trip at all?<sup>80</sup> A third question he raises is based on a text in

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75. See previous footnote.

76. 137. The *Tzitz Eliezer* Vol. 15 # 37 accepts this opinion.

77. See *Yabia's Omer* Vol. 6 Y.D. 13:13, s.v. *Im*.

78. *Shulchan Aruch* O.C. 219:1.

79. This is the common understanding for the *bracha*. See *Iggerot Moshe* O.C. II 59, who offers a novel approach which will also answer the upcoming question.

80. In fact, the *Avnei Nezer* O.C. 39:4 deduces from the *bracha* that one is not permitted to take such trips. However, the *Noda Biyehuda* II Y.D., which we will discuss later, allows one to take such trips for business purposes. Both of those opinions answer the *Binyan Tzion's* question. See also *Tzitz Eliezer* vol. 15 37:2, quoted later in footnote 88, who offers a different answer.

Gemara *Berachot*.<sup>81</sup> The Gemara teaches that if a snake approaches a person who is *davening*, there are times that he is not permitted to disturb his prayers to remove it from his ankle, unless it is a snake which usually bites. However, if it is the type which usually does not bite people,<sup>82</sup> he must not interrupt his *davening*. In the context of our discussion, how can we understand that ruling? Just because most of the time it will not bite him, he must continue *davening*! How can he ignore the fact that sometimes indeed these snakes do bite? It is not even possible to explain this forced unresponsiveness based on the dictum that "G-d watches out for fools," since that principle applies only to activities which have become common practice. Clearly, it is not an everyday occurrence to find a snake wrapped around one's ankle – and ignore it!<sup>83</sup>

The *Binyan Tzion* sees all of these questions pointing towards a new concept.<sup>84</sup> As he sees it, one who is already in a dangerous situation must take all possible measures to avoid even the minutest degree of that danger. In this particular, the obligation to protect one's life is different from all other mitzvot. Whereas in all other halachot, one is required only to consider the likely outcome of an action, in a case of danger to life one must be wary for even the smallest

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81. 33a.

82. As explained by Rashi, *Berachot* 33a, s.v. *Aval*, and the Rambam in his *Pirush HaMishnayot*.

83. However, see Kovetz *Shiurim Pesachim* # 32, who answers that the person *davening* is protected because he is doing a mitzvah (a concept we will discuss later). See Rav Shlomo Zalman Auerbach, quoted in footnote 109.

84. The fact that the *Binyan Tzion's* suggestion is novel in itself makes the *Achiezer* (I 23) apprehensive. He finds it hard to allow someone to risk his life based on an idea that was not mentioned by any early authorities.

danger.

However, if one is not yet in the dangerous situation, but is merely approaching a situation that may turn out to be dangerous, the regular guidelines of the Torah apply. A person need not concern himself with remote possibilities of danger, and need only consider dangers that will probably occur. Therefore, he concludes, the 11-year old girl will not be in any danger until she is pregnant and, until then, she has nothing to be concerned about. Since it is unlikely that she, as a minor, will become pregnant, she need not use a *Moch*. This is true even though using the *Moch* is her only opportunity to avoid the danger. If she becomes pregnant as a result of not using the *Moch*, it will be too late to save her. Even so, since at this point the chance of danger is less than 50%, she has nothing to be concerned about. The same is true for someone who is considering crossing the ocean or who has a snake on his ankle. He is not at danger until he gets lost at sea or until the snake bites him. Therefore, he has no need to worry about the small chance of danger.<sup>85</sup>

In summary, a person is protected when doing an act which is commonplace but is seemingly dangerous. However, this is true only if the danger is not yet at hand and there is less than a 50% chance that it will occur, for in such a case he may rely on the maxim that *Shomer Peta'im Hashem*.<sup>86</sup>

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85. Only in a case such as that of a person who is buried under rubble, who is already in a precarious predicament, do we search for even the smallest chance to save his life. *Shulchan Aruch* O.C. 329:2-3.

86. It is not clear how the *Binyan Tzion* will explain the role of *Shomer Peta'im Hashem* in allowing such acts. That is because the aforementioned Gemara in *Berachot* allows one to leave the snake on his foot, even though we pointed out that the principle *Shomer*

We can appreciate the difference in actual practice resulting from these three differing explanations of the Gemara if we consider the following scenario. Let us imagine that a doctor tells a woman that becoming pregnant will surely kill her. According to Rav Akiva Eiger, even though the risk is great, she can rely on the Almighty's protection and not use a *Moch*. According to the *Achiezer*, one may rely on this principle only in cases where the chance of danger is small, but in the above case, since there is a great chance of danger, the woman definitely should use a *Moch*.<sup>87</sup> According to the *Binyan Tzion*, the woman would be required to use the *Moch* for a different reason. Just as for all mitzvot, she needs to concern herself with the likely outcome of her actions. Since pregnancy and its concomitant danger are likely to happen, she would be required to use a *Moch*.

In actual practice, then, we can see that the alternate explanations of the *poskim* can result in widely different halachic rulings.

Many *poskim*<sup>88</sup> (with slight variations) follow the guidelines of the *Achiezer*, although their rulings are not limited to his opinion. The consensus seems to be that anything which people do not commonly consider to be dangerous falls under the general rubric *Shomer peta'im*

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*peta'im* Hashem does not apply in that case.

87. See *Avnei Nezer* E.H. 80; *Divrei Malkiel* E.H. 70; *Achiezer* Vol. I E.H. 23:2; *Kovetz Shiurim Ketubot* #136; and *Iggerot Moshe* E.H. I 63:2, who explain why she may use a *Moch* and is not obligated to avert the risk by getting divorced.

88. *Divrei Malkiel* *ibid*; *Kovetz Shiurim* *ibid*; *Iggerot Moshe* C.M. II 76; *Tzitz Eliezer* Vol. 10 25:17:1, Vol. 15 37:2 in the name of early *Acharonim* and Vol. 9 17:2:9 in the name of Rav Shlomo Zalman Auerbach. It is not clear why the *Tzitz Eliezer* argues with Rav Auerbach in Vol. 9 and yet himself seems to say this same idea in Volumes 10 and 15.



*Hashem*. As an example, 20 years ago it was not considered important to wear a seat belt when driving. Therefore, based on *Shomer peta'im Hashem*, the halacha did not require wearing one. Nowadays, few doubt their necessity and efficacy in saving lives; therefore, not wearing a seat belt would be considered not properly protecting one's life.

Thus, we can understand why Rav Moshe Feinstein<sup>89</sup> allowed someone to have elective plastic surgery and did not even mention the risk involved as a factor. Rav Shlomo Zalman Auerbach<sup>90</sup> follows this reasoning to explain why even someone whose life is not at risk may elect to undergo surgery. He says that the patient is not undergoing any risk, because when people consider such an operation to be risk-free, the maxim *Shomer pet'aim Hashem* informs us that it is in fact safe. The *Tzitz Eliezer*<sup>91</sup> broadly states that any standard medical procedure is permitted based on the dictum, and we need not concern ourselves with the dangers involved.

One last comment on this question: In a by-now famous *Teshuva* dated 1963,<sup>92</sup> which he reiterated in 1981,<sup>93</sup> Rav

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89. *Iggerot Moshe C.M.* II 66. The *Minchat Yitzchok* VI 105 and *Tzitz Eliezer* Vol. 2 41:9 argue on this opinion. See the *Avnei Nezer* Y.D. 321 who also does not allow elective surgery because of the risk involved; it is unclear, however, how risky such surgery was in his days.

90. Quoted in *Nishmat Avraham* Y.D. 155 2(2). There is a proof to this from the Ramban (*Torat Ha'adam*, *Inyan HaSakanah* pp. 42-43 in the Chavel edition) which is quoted in the *Beit Yosef* Y.D. 241, s.v. *Umah shekatav v'davka* (pg. 171a), that part of a doctor's heavenly license to heal is the understanding that he will not always be successful.

91. See footnote 88.

92. *Iggerot Moshe* Y.D. II 49.

Moshe Feinstein wrote that based on *Shomer peta'im Hashem*, one is permitted to smoke. He does advise refraining from such behavior, but says that since smoking is common practice one can rely on divine protection.

The *Tzitz Eliezer's*<sup>94</sup> response to Rav Feinstein's opinion is relevant to more than just the question at hand. He says that this principle, *Shomer peta'im Hashem*, is a guarantee that in certain situations we will be protected from risks of which we are ignorant. But if the time comes that we see that we are not being protected when we commonly act like "fools", that is a sign that the principle no longer applies in this case. Consequently, as evidence mounts that smoking is not just a theoretical danger but is actually killing people, it tells us that we can no longer rely on G-d's protection in this situation. For this reason, he considers smoking prohibited nowadays.<sup>95</sup> This limitation on the "safety net" of *Shomer peta'im Hashem* must be kept in mind in determining which behavior it permits.

Up until this point our discussion has focused on people who are willing to take a risk and want to rely on the talmudic adage that they will be protected. However, let us pause and think for a minute. The Rabbis teach that G-d protects those who are foolish. Surely that implies that it is not clever to

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93. Ibid, C.M. II 76. In this second responsum, he brings proof for his opinion from the wording of a number of citations from Rambam. However, Rav Shlomo Zalman Auerbach, quoted in *Nishmat Avraham* C.M. 155:2, takes issue with this proof.

94. Vol. 15 #39, s.v. *Le'or Zeh*.

95. Rav Feinstein's opinion is not a rejection of the *Tzitz Eliezer's* idea per se. Rav Feinstein claims (C.M. II 76) that relatively few people die of smoking, and he therefore does not have to contend with the *Tzitz Eliezer's* limitation on applying *Shomer peta'im Hashem*.

do such an act. Is one permitted not to be such a "fool" and choose the less risky option, even if everybody does do the "foolish" thing? This is not meant to be a foolish question – it has genuine halachic implications, as we shall see.

The Gemara is of the opinion that it is dangerous for a baby to be circumcised on a cloudy or very windy day.<sup>96</sup> However, since it is common practice to perform a *brit milah* even in inclement weather, it is permissible because of *Shomer peta'im Hashem*. The Ritva, however, says that if one prefers not to be a fool, he may delay the *brit milah*, even though performing a *brit milah* on the correct day is a mitzvah.<sup>97</sup> Perhaps his reasoning is as follows: Since only fools are protected, if you do not consider yourself a fool, you are not going to be protected; logically, then, you have no right to do the *brit milah* under dangerous circumstances!<sup>98</sup> The *Beit Yosef*<sup>99</sup> quotes the Ritva but also notes the conflicting opinion of Rabbeinu Yerucham.<sup>100</sup>

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96. *Yevamot* 72a.

97. *Ibid.*, s.v. *shomer*. This is also the opinion of Radvaz Vol. 3 596.

98. The *Tzemach Tzedek*, E.H. I, explains that the Ritva holds that one who knows better may choose not to be a fool, but is allowed to act like a fool if he so desires. His reasoning may be that if you are not a fool, you are not protected. But if you know better and yet choose to perform the *brit milah* anyhow, then that act in itself shows that you are a fool – and you are once again protected. He understands the *Terumat Hadeshen* 211, quoted at footnote 101, in the same way.

99. Y.D. 262. The *Divrei Malkiel* E.H. 70 provides a list of all those who argue with the Ritva.

100. The *Chidah* (*Chaim Sha'al* Vol. 1 59) attempts to prove which opinion the halacha will follow, but rejects his own proof.

The *Terumat Hadeshen*<sup>101</sup> considers a situation similar to that of the Ritva. He wonders if a *Talmid Chacham* who is familiar with the Talmud's evaluation of an act as being dangerous can nevertheless claim to be a fool and rely on the dictum that G-d protects the foolish. The Chatam Sofer<sup>102</sup> accepts the words of *Terumat Hadeshen* as the correct view and rules that a *Talmid Chacham* may not rely on the protection afforded fools in a situation which the Gemara identifies as dangerous.

This concludes our discussion of the broad permit to take a risk which is avoidable. Although it is far reaching, nevertheless the rabbis have indicated that there are limitations to its scope, and one should by no means consider it an unrestricted license. Undoubtedly it serves as the rationale for our freedom to drive in cars and do other such "dangerous" acts. The next sections will deal with other justifications for taking avoidable risks.

### While performing a mitzvah

The Gemara takes up the question of performing *Bedikat Chametz* (searching for *chametz* the night before Pesach) in an area that may be infested with snakes.<sup>103</sup> Although there is danger involved, we invoke the principle of "*Sheluchei mitzvah einan nizakin*," one involved in the performance of a mitzvah will not be harmed. The Gemara limits the scope of this protection by stating that a person performing a mitzvah is protected only from dangers that do not occur frequently.<sup>104</sup> However, inasmuch as *Bedikat Chametz* is only

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101. 211.

102. *E.H.* I 23.

103. *Pesachim* 8a - 8b. See also *Kiddushin* 39b.

104. *Lo she'chiach hezeka*. The Gemara only disallows such a

a rabbinic law, it is clear that the Gemara understood this protection as extending to all persons involved in mitzvah performance, whether biblical or rabbinic.<sup>105</sup>

Let us return to the text in *Sotah* 21a<sup>106</sup> in which the Gemara seems to expand this protection, so that a person performing a mitzvah "*lishmah*" (for its pure sake) is protected even from dangers which are common. Furthermore, if one learns Torah *lishmah*, he is protected from such dangers even when not actually involved in learning Torah.<sup>107</sup> Inasmuch as performing a mitzvah purely *lishmah* is a life-long goal rather than a daily occurrence, this level of protection is uncommon; to my knowledge, it is not mentioned in the *Shulchan Aruch*.

Rav Shlomo Zalman Auerbach<sup>108</sup> applies the principle "a person involved in performance of a mitzvah will not be harmed" to a real-life situation. As noted, this protection is generally understood as protecting only for uncommon dangers, which Rav Auerbach defines as any danger that does not occur most of the time.<sup>109</sup> Therefore, he concludes

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*Bedikat Chametz* because he may continue searching for other objects once he finishes the *Bedikat Chametz*, at which time he is no longer protected.

105. *Pri Megadim* O.C. 433:7 (*Mishbetzot Zahav*). The *Tiferet Yisrael* (*Berachot* 1:3 #25) proves this from *Eruvin* 21b where Rabbi Akiva risked his life for *Netilat Yadayim*. See also the first *Teshuva* of the *Chacham Tzvi*.

106. At footnote 51. The coming explanation is based on *Ketubot* 77b, as explained by the *Ritva*, and its reconciliation with the aforementioned general rule.

107. This is probably related to the rule of the Gemara in *Bava Bathra* 7b -8a *Rabanan lo tzeriche netiruto*.

108. Quoted in *Shemirat Shabbat Kehilchata* chapter 39 footnote 4.

109. He bases this definition on *Kovetz Shiurim Pesachim* 32. He

that if one is sick, there is still only a small risk of dying from fasting on Yom Kippur. Consequently, he may choose to fast, inasmuch as it is a mitzvah,<sup>110</sup> and he will be protected.<sup>111</sup>

The *Avnei Nezer*<sup>112</sup> makes a similar ruling, but adds a proviso. In all the examples brought in halachic literature about a person in danger being protected, the one in danger is also the one choosing to do the mitzvah. He is the one at risk, and no one else can make that decision. But doctors of a patient who is not alert or the parents of a sick baby who needs a *brit milah* have no right to invoke this rule. Rather, they must go to any extreme to safeguard the life of the person placed in their trust.

### For one's livelihood

Lastly, the Gemara<sup>113</sup> notes the verse in *Devarim*<sup>114</sup> which almost matter-of-factly remarks that workers occasionally risk their lives in the line of duty. The *Noda Biyehuda*<sup>115</sup> relies

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rules this way notwithstanding his own questioning of this definition in *Shemirat Shabbat Kehilchata* chapter 25 footnote 15.

110. This is surely the halacha, although it is unclear why. The *Mishnah Berurah* (455:19 in the name of the *Taz*) notes that one who is protected based on this rule cannot ignore the protection and attempt to avert the risk. This is because doing so would be a denigration of that rule. If so, if one who is protected may fast on Yom Kippur, why isn't he required to?

111. Since the permit to fast is dependent on the risk of fasting being small, one who is sick should never opt to fast on Yom Kippur without consulting a competent doctor and a Rav.

112. O.C. 454:2.

113. *Bava Metzia* 112a.

114. 24:15.

115. Vol. II Y.D. 10

on this text to allow a Jew to become a professional hunter. Although that line of work involves risk, since it is necessary for one's livelihood, it is permitted to take the chance. Rav Moshe Feinstein<sup>116</sup> similarly permits taking considerable risks for business purposes. Although this cannot be interpreted as a license to be oblivious to hazards in the workplace, nevertheless the exact limitations are unclear. Does this permit one to work in obviously quite dangerous lines of work such as nuclear-waste disposal or coal mining? How much effort must one make to find alternate employment? Further study is still needed to clarify these points.

Let me conclude by paraphrasing the final words of the *Shulchan Aruch* (C.M. 427:10):

One who ignores the advice of *Chazal* and says "I will endanger my life and of what concern is it to others," or one who says "I am unconcerned with endangering myself," that person is deserving of whipping by a Court (*Makot Mardut*). And one who is cautious for those things that *Chazal* warned us about will be blessed.

The *Be'er Hagolah* (#90) comments:

The reason we are commanded to protect our lives is as follows: G-d created this world to allow humans to recognize His greatness, do His mitzvot, and follow His Torah, and thereby merit reward. One who endangers his life is showing disregard for G-d's will and a lack of interest in His mitzvot or His reward.

Conversely, one who is motivated to safeguard his health in order to serve G-d better is affirming his belief in this divine will and will merit much blessing.

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116. *Iggerot Moshe* C.M. I 104.



# Shaving on the Intermediate Days of the Festivals

*Rabbi Michael J. Broyde*

## I. Introduction

The Sages of the Talmud frequently enacted rabbinic decrees in order to prevent certain types of activity which they felt were deleterious to the spirit or the observance of a particular holiday. Indeed, as noted by Nachmanides in his biblical commentary, absent these decrees one would find it very difficult to keep the holidays or Sabbath sacred.<sup>1</sup> This article will explore one such set of decrees: the prohibition to shave one's face<sup>2</sup> or cut one's hair on the intermediate days of the festivals (*chol hamoed*).<sup>3</sup> In particular, this article will focus on the application of the prohibition to shave for people who are generally clean-shaven and who are residing in a society

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1. Nachmanides (Ramban), *Commentary to Leviticus* 23:24.

2. Of course, even when shaving is permissible, it must be done without a razor in accordance with the requirements of halacha; see generally *Shulchan Aruch* Y.D. 181.

3. This prohibition is equally applicable to men and women; see *Pri Megadim* OC 546:9 and *Gra* 546:5, each of whom accept that men and women are both governed by this law, but for different reasons; see also Maharsham, *Da'at Torah* 531:2 who notes a practical difference between these two approaches.

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where Jews who observe the commandment (and the general society at large) <sup>4</sup> frequently are clean-shaven, as that is the cultural norm in modern-day America.<sup>5</sup> As has been noted

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4. One author writes:

There exists in our culture a subtle yet pervasive prejudice against those who choose not to shave their faces, perhaps best evidenced by our language. The term used to describe those males who adhere to the preferred standard is "clean-shaven." The reasonable inference, if not the clear implication, is that the unshaven must also be unclean.

Anti-beard sentiment seems to be a relatively recent phenomenon, at least in America, perhaps due in part to the post-1960s association of beards with nonconformity or rebellion, as well as to the perceptions that beards are unclean or that their wearers are trying to hide something. Before the invention of the safety razor, beards were more socially acceptable, largely because few men were willing to use the dangerous "straight razor." Professionals, able to pay the daily cost (in terms of both time and money) of a shave at a barber shop, and not as likely as laborers to benefit from the protection from the elements that facial hair provides, probably fostered the development of the association between "clean-shaven" faces and professionalism that survives to the present day.

James M. Maloney, *Suits for the Hirsute: Defending Against America's Undeclared War on Beards in the Workplace*, 63 Fordham L. Rev. 1203, 1205 (1995) (footnotes omitted).

5. Historically this was very difficult, because there was no simple permissible manner for a person to shave without violating the prohibition of shaving with a razor, found in *Shulchan Aruch* Y.D. 181:1-2. The recent invention of electric shaving has changed that reality, and thus many completely observant individuals are clean-shaven or shave only part of their face (such as a goatee). Nearly all rabbinic authorities permit shaving with an electric shaver, and this is the custom in all but Chassidic communities; see *Iggerot Moshe* OC 4:111, *Har Tzvi* YD 143, and Rabbi Ovadia Yosef, *Or Torah* (Tevet 5749), but see comments of

by halachic decisors, this cultural phenomenon seems to be unique to America.<sup>6</sup>

## II. Talmudic Basis for the Decree Prohibiting Shaving

The Mishnah in *Moed Katan* recounts:

The following are permitted to shave on the intermediate days of the festivals: one who comes from far away or is released from prison or one who was excommunicated and whose excommunication was removed on the intermediate days or one who took a vow not to shave and his vow was rescinded by a rabbi on the intermediate days or one who is a *nazir* or a *metsorah* and who goes from uncleanness to cleanliness.<sup>7</sup>

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*Biur Heteiv* on *Yoreh Deah* 181:5 and *Chelkat Ya'akov* 3:79. The reason many observant Jews wear beards is undoubtedly that suggested by *Chatam Sofer, Orach Chaim* 159. (For a modern "scientific" confirmation of one of Chatam Sofer's observations concerning beards, see Michael S. Wogalter & Judith A. Hosie, *Effects of Cranial and Facial Hair on Perceptions of Age and Person*, 131 J. of Soc. Psychol. 589, 590 (1991).)

As noted by Ralbag (and Radak) commenting on 2 Samuel 2:26, this custom dates from biblical times; but see *Rav Pe'alim* 4:5.

6. Rabbi Feinstein, *Iggerot Moshe* OC 163, makes repeated mention of the fact that his approach is limited to "this country [America] and this particular time." Rabbi Feinstein's approach is discussed in section V. For a similar example of the unique issues raised by societal norms concerning shaving, see Rabbi Aharon Lichtenstein, "Shaving in Honor of Shabbat during Sefirat ha-Omer [for clean shaven men]," *Daf Kesher* 2(133):54-56 (5748). As noted by Rabbi Feinstein (*Iggerot Moshe* OC 2:96), the rules related to shaving on *chol hamoed* and the rules concerning shaving during *sefira* are unconnected; but see *Mishnah Berurah, Biur Halacha* 493, s.v. *nohagim*.

7. *Moed Katan* 3:1.

The Mishnah continues and states:

The following may wash their clothes on the intermediate days: one who comes from far away and is released from captivity or prison, or one who is excommunicated and is now released on the intermediate days, or one who swore not to wash his clothes and his vow was lifted on the intermediate days...

The Talmud, in explaining the rule of the Mishnah, states that a decree was enacted by the Sages that one should groom oneself and wash one's garments prior to the onset of the holiday so as to insure looking dignified and neat for the festival.<sup>8</sup> The Talmud adds that in order to give this decree some "teeth" and assist in compliance, the Sages further decreed that one may not shave or wash one's clothes during the intermediate days, so as to insure that all would be careful to shave and wash on the eve of festivals.<sup>9</sup> The rules mentioned in the Mishnah concerning people who were granted a dispensation to shave in the intermediate days are limited to cases of people who could not shave prior to the holiday.

The Talmud questions the rule by asking:

One who loses an object [which he is looking for] prior to the holiday so that he is duressed into not shaving prior to the holiday [because he is looking for his object], may he shave on the intermediate days? Or perhaps since it is not apparent to others why he could not shave, it is not permissible for him to shave? Abayeh replies to this question by stating:

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8. See *Shulchan Aruch Orach Chaim* 531:1, where it states that "it is a mitzvah to shave on the eve of a holiday."

9. *Moed Katan* 14a.

"Can we say that all of the garments may not be washed except for a particular person's garment?"<sup>10</sup>

While the Talmud is not categorically clear that the normative halacha follows Abayeh, almost all early and late authorities accept his opinion and limit the dispensation to shave not merely to those who were duressed, but mandate that only those who were publicly duressed so that their special status would be known to all may shave on the intermediate days. All others may not.<sup>11</sup>

However, there are two basic ways to understand this talmudic discourse. The overwhelming majority of the *rishonim*<sup>12</sup> rule that a rabbinic decree was enacted and the nature of the decree was as follows:

1) One may not shave during the intermediate days of the holidays. The reason for this decree was in order to induce a person to shave prior to the onset of the holidays.

2) An exception to this decree was made for those who could not shave prior to the holidays due to duress or a compelling circumstance and the duress or compelling circumstances were obvious to the casual observer, such as a person released from prison. A person who was duressed, but in a private way that would be unknown to others, is

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10. Ibid. 13b-14a.

11. See *Shita Mekubetzet* on *Moed Katan* 14a as well as *Tur* and *Beit Yosef* on 531. The Ravya (836) resolves this matter leniently, as apparently does Rabbeinu Chananel on *Moed Katan* 14a. *Bach* OC 534 also appears to resolve this matter leniently. The crucial question is whether this is a case of doubt as to a biblical prohibition or doubt as to a rabbinic prohibition; that seems to be the disagreement between *Bach* and *Beit Yosef*.

12. See *Beit Yosef* and *Tur* on *Orach Chaim* 531 in the name of many *rishonim*.

prohibited by rabbinic decree from shaving.

Rabbenu Tam, however, provides a different framework for discussing this dispute.<sup>13</sup> He rules that the decree was as follows:

1) One who does not shave in preparation of the holidays may not do so on the intermediate days, as the Sages penalize this person for not preparing himself for the holidays.

2) This penalty provision *was waived* for a person who – it is clear to the casual observer – could not shave prior to the holidays due to public duress.

3) This penalty provision *was inapplicable* to a person who, in fact, does shave prior to the holidays.

Thus, Rabbenu Tam ruled that one who does shave in preparation for the holidays may shave again during the intermediate days of the holidays. Rabbenu Tam argues that there is no point in preventing a person who had shaved in preparation for the holidays from also shaving during the intermediate days.

While apparently logical, Rabbenu Tam's position can be challenged – as noted by *Tur* – since if Rabbenu Tam were right, the Mishnah would have included in its list a person who did shave in preparation for the holiday. In addition, *Tur* notes that Rabbenu Tam's reasoning would defeat one of the purposes of the Sages' decree – to create a significant encouragement to shave on the eve of a holiday by preventing one from shaving for a week after that day – for who would

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13. Rabbenu Tam's opinion is not found in the works of the *Ba'ale Tosafot*. It is, however, recorded in *Tur* O.C. 531, *Hagahot Maimoniyot Yom Tov* 7:40, and *Hagahot Ashre, Beyah* 14a; this also appears to be the opinion of Maharam Me'Rothenberg, in his *S'machot* 9.

know who shaved and who did not? Bearded people could then shave on the intermediate days of a festival and claim that their conduct is permissible, by stating that they shaved on the festival eve.<sup>14</sup>

### III. The Opinion of the Codifiers

While there are some authorities who attempt to demonstrate that both Rambam's and Rashi's opinions were, in fact, in agreement with the opinion of Rabbenu Tam,<sup>15</sup> the overwhelming majority of authorities rejected his approach based on the *Tur's* critique. Rabbi Jacob ben Asher, author of the *Tur*, states the law as follows:

One may not shave on the intermediate days of the festival and the reason is that one should not enter the festival un-groomed; the explanation for that is that if one could shave on the intermediate days of the festivals, people would not be careful to shave on the eve of the festival, and there is an obligation upon all to shave prior to the festival in its honor. Since it is prohibited to shave on the intermediate days, one will be careful to shave on the eve. Rabbenu Tam asserts that since this is the reason, one who does shave on the eve of the festival can shave during intermediate days. It is very difficult to accept this as permissible and it also does not appear to be correct from the text of the Gemara, since if this had been true, it would have been appropriate to list this

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14. See comments of *Tur* quoted in text and comments of *Taz*, *Shulchan Aruch* 531:1.

15. See, e.g., Rabbi Aaron Pinchik, "Shaving on Chol Ha-Moed," *Noam* 12:82 (5729) and Rabbi Yitzchak Pacha, "Shaving on the Intermediate Days," *Techumin* 2:116, 133 (note 35) (5741).



exception in the Mishnah . . . Also, who will know if one shaved prior to the festival . . . Thus it appears that one should not permit shaving except to those listed in the Mishnah explicitly.<sup>16</sup>

Both *Beit Yosef* and *Bach* discuss this issue and indicate their agreement with the opinion of the *Tur*.<sup>17</sup>

The *Shulchan Aruch* does not even mention the opinion of Rabbeinu Tam but rules as follows:<sup>18</sup>

- 1) It is a mitzvah to shave on the eve of the festival.
- 2) It is prohibited to shave on the intermediate days even if one shaved on the eve of the holiday.
- 3) Even one who is duressed and thus cannot shave on the eve of the holiday, cannot shave on the intermediate days.

Rabbi David Halevi (*Taz*) explains the rationale for rules two and three by stating that it is prohibited because "who will know that one shaved prior to the festival?"<sup>19</sup> Indeed, *Shulchan Aruch* itself expands on the list in the Mishnah of those who may shave, to include other people who cannot shave in preparation for the festival and whose reason for being unable to do so is obvious and apparent to all. The classic example of this is the Ramo's ruling that one who abandons apostasy and returns to Judaism – which in earlier times was demonstrated by shaving and haircutting – may do so even on the intermediate days, since such a person could

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16. *Tur* OC 531.

17. *Beit Yosef* and *Bach*, *ibid*.

18. *Ibid*, 531:1-3.

19. *Taz* O.C. 531:2. Similar sentiments are found in *Magen Avraham* 531:2 and *Aruch Hashulchan* 531:1-4.

not have cut his hair prior to his return to tradition.<sup>20</sup> A similar example might also be the *Shulchan Aruch's* ruling that a minor may be given a hair cut on the intermediate days; the rationale is that all will know from looking at this small child that he or she is not obligated in the commandments.<sup>21</sup>

In sum, the overwhelming majority of classical decisors reject the opinion of Rabbenu Tam and prohibit a person from shaving on the intermediate days even if they shaved prior to the festival; indeed, the classical commentaries mention Rabbenu Tam's approach only to assert that it is not accepted.<sup>22</sup> However, they accept the principle of the Mishnah and rule that a person who has a widely-known excuse for being unable to shave in preparation for the holiday – even if it is not one elaborated explicitly in the Mishnah – may shave on the intermediate days. Indeed, examples of such cases abound.<sup>23</sup>

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20. *Ramo* OC 531:7. For more on the custom of cutting one's hair when one returns to observance, see *Ramo* YD 268:2; *Shach* YD 268:17 and *Terumat Hadeshen* 86.

21. *Shulchan Aruch* OC 531:6. This also explains *Magen Avraham's* statement that a child who looks like he or she is past bar- or bat-mitzvah age should not publicly be given a haircut, lest people misinterpret that activity; *Magen Avraham* 531:9 quoted by *Mishnah Berurah* 531:16; *Aruch Hashulchan* 531:6 and *Kaf Hachaim* 531:29.

22. See comments of *Magen Avraham*, *Taz*, *Kaf Hachaim*, *Aruch Hashulchan* and *Mishnah Berurah*. Rabbenu Tam's approach is also rejected by *Yalkut Yosef* 5:516 and *Shemirat Shabbat Kehilchata* 66:23.

23. For example, see *Shita Mekubetzet*, *Moed Katan* 14a (s.v. *de'ika lemamar*) who asserts that one who is publicly involved in redeeming captives on the eve of the holiday and thus cannot shave, may do so on *chol hamoed*; *Meiri*, *Moed Katan* 14a permits shaving for a merchant whose business is widely known and who cannot shave because he is looking for a lost object and everyone

The reverse is also true. One exempted by the Mishnah, but whose travels in modern times would not cause public discussion, is not exempt. Thus, one who arrives from overseas is no longer exempt, since crossing international boundaries and oceans is now a common event unlikely to inspire people to widely discuss that person's travels or prevent him from shaving.<sup>24</sup>

#### IV. Shaving as a Prohibited Form of Work

Having addressed the parameters of the rabbinic decree, one other fundamental issue needs to be discussed: does shaving<sup>25</sup> violate the prohibition to work ("*melacha*") on the intermediate days of the festivals?

The Talmud recounts<sup>26</sup> the general rule that work is prohibited on the intermediate days, and there is a dispute as to whether that prohibition is biblical or rabbinic.<sup>27</sup> Whatever the nature of the prohibition, the rule is that work that is prohibited on the festivals is also prohibited on the

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knows about it. For more such cases, see *Encyclopedia Talmudit*, "Chol HaMoed" 13:209-210.

24. *Mishnah Berurah* 531:13; *Shemirat Shabbat Kehilchata* 66:26 n.119.

25. For the purposes of this article, it is assumed that a person who shaves does so in the privacy of his own home using an electric shaver and does not go to a barber or other skilled professional for assistance while shaving.

26. *Chagigah* 18a; *Moed Katan* 29a; Rambam, *Laws of Yom Tov* 7:1; *Shulchan Aruch* 530:1.

27. According to those who consider the prohibition biblical, it is different from other prohibitions in that its precise boundaries were given to the Sages to define; see *Shulchan Aruch* O.C. 530 and *Biur Halacha* 530, s.v. *umytar*, and *Encyclopedia Talmudit* "Chol Hamoed" 13:104-113.

intermediate days unless one of five (relatively broad) exemptions are present. They are:

(1) If the work is not done, it will lead to a significant financial loss.<sup>28</sup>

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28. The precise definition of financial loss varies from society to society and person to person (*Mishnah Berurah* 544:6). Notwithstanding that fact, certain guidelines can be given. Loss of (significant) capital is almost always considered a financial loss. On the other hand, mere loss of interest or profit is not considered a true financial loss, and thus only allows for the deferment of rabbinic prohibitions. One who owns a store that sells items of use on *chol hamoed* (food, for example) may unquestionably remain open on *chol hamoed*. One who is not selling any such items may keep the store open only if the good-will necessary to run the business requires that it be open each day during the general work week.

A person who is an employee should strive to take vacation on *chol hamoed* if possible, if it will not jeopardize one's job. There is an interesting dispute between contemporary decisors whether a worker who wishes to take his vacation in order to do a specific vacation activity that cannot be done on the intermediate days (for either halachic or practical reasons) must nonetheless take them on the intermediate days, and forsake that vacation. Rabbi Moshe Feinstein, in a responsum published in *Sefer Zichron Shlomo* #18, states that such conduct is permissible (and merely the pious avoid it). In the same volume (responsum 41) Rabbi Moshe Stern avers that such conduct is prohibited, and states that employees must save up vacation days to use on the intermediate days whenever possible. Rabbi Neuwirth, writing in *Shemirat Shabbat Kehilchata* 67:(n.47) suggests a compromise. He states that an employee who has a finite number of vacation days in the year need not save them to use on the intermediate days, but if he has them available during the intermediate days, he must take them. Rabbi Neuwirth observes that if one were to accept this ruling, a person whose vacation days accrue at the beginning of the secular year must use these days for the intermediate days of Passover, but may then take a summer vacation with the understanding that he will have no choice but to work

(2) Work done to produce food for the sake of either the intermediate days or the holidays.<sup>29</sup>

(3) Work where the action is of benefit to many people.<sup>30</sup>

(4) Work done by an amateur, rather than a professional, or in an amateurish way rather than in a professional way, for the sake of the holiday.<sup>31</sup>

(5) Work done by a person who does not have money to buy food or other necessities.<sup>32</sup>

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on the intermediate days of Sukkot.

29. The parameters of the exception permitting work for the sake of the holiday include any actions – lighting fires, harvesting plants or turning on lights – needed either for *yom tov*, *chol hamoed* or the upcoming Shabbat's food needs; O.C. 533:1-3; *Shemirat Shabbat Kehilchata* 66:6. This exception permits every activity needed for food preparation, provided that it could not be done prior to the *moed*; *Shemirat Shabbat Kehilchata* 66:17 and note 78 of that work.

30. *Shulchan Aruch* OC 544:1. The rationale for this exception is that public works are best done at a time when many are available; see *Mishnah Berurah* 544:1. Most rule that amateurish work of benefit to many is permitted even if not for the sake of the holiday, and that skilled work is permitted only for the sake of the public and the needs of the holiday; *Shemirat Shabbat Kehilchata* 65:1-4.

31. Amateurish work of any type may be done for the sake of the needs of the holiday or the Shabbat that follows; thus, for example, one may turn on a light during *chol hamoed* when one needs light to read, or turn on the radio to listen to recreational music for pleasure on that day.

32. A person who has no money to pay for the basic needs of himself or his family (*Biur Halacha* 542, s.v. *al yedai*) may work even in otherwise-prohibited work, and it is preferable to do such work rather than to accept charity (*Ashel Avraham* 542). It is preferable that such work be done in a private, rather than a public, way.

Thus, a discussion of shaving or haircutting as a form of prohibited work involves a discussion of the various possible exceptions which permit work on the intermediate days.

Tosafot, addressing the issue of haircutting, state that "even though this action [shaving and haircutting] is work [and thus should be prohibited] the Sages would have permitted it for the sake of the holiday [if not for the rabbinic decree]."<sup>33</sup> Tosafot also give an alternative answer and state that "there are some forms of work that involve no real effort or exertion, like *prakiamatri*;<sup>34</sup> nonetheless, that which is done for the sake of esthetics, it is appropriate to permit it on the intermediate days." According to both approaches, shaving with an electric shaver is not a form of prohibited work on the intermediate days when done in the privacy of one's own home in the manner that all adults groom themselves nowadays (as opposed to prior times, when people were shaved by a barber). As noted by Rabbi Moshe Feinstein,<sup>35</sup> it seems that the final insight of Tosafot creates nearly a new category of permissible work – prohibited activity done merely for aesthetic reasons, which then becomes permissible. Elsewhere, Tosafot appear to rule that shaving one's facial hair is generally a permitted form of work and is prohibited only because of the rabbinic decree discussed above.<sup>36</sup>

Although this issue might seem unimportant – what difference does it make whether shaving is prohibited by both

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For an excellent review of the principles used to determine if work is permissible, see Rabbi Shlomo Aviner, "Chol Hamoed on Agricultural Settlements," *Techumin* 2:79 (5743).

33. *Moed Katan* 14a, "veshar kol adam."

34. A form of traveling salesman.

35. *Iggerot Moshe* O.C. 163.

36. Tosafot s.v. *shar*.

a rabbinic decree **and** as a form of prohibited work, or merely as a form of rabbinic decree – the consensus of halachic authorities accepts that shaving is not a prohibited form of work, or if it is, it is typically covered by one of the enumerated exceptions to prohibited work.<sup>37</sup> A small minority of halachic authorities rules that shaving is forbidden work, even in a case where the rabbinic decree is not applicable.

#### IV. The Controversy between Rabbi Landau and his Colleagues

Rabbi Yechezkel Landau, writing in *Nodah Biyehuda* 1:13, adopts a novel interpretation of the dispute between Rabbenu Tam and his colleagues. Indeed, he completely reinterprets and harmonizes Rabbenu Tam's view with that of other *Rishonim* and concludes that there are many circumstances in which it is completely permissible to shave on the intermediate days of the festival.<sup>38</sup>

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37. Particularly since shaving is no longer a skilled activity, but is done by almost all people in the privacy of their own homes without any specialized training, one is very much inclined to rule that – in cases not covered by the rabbinic decree prohibiting shaving – there is no "prohibited work" problem. Indeed, even those modern authorities who are absolutely firm in their ruling that the norm of a clean-shaven society has no impact on the prohibition to shave during the intermediate days of the festival, concede that shaving is not a prohibited form of work (except because of the rabbinic decree); see Rabbi Ovadiah Yosef, *Yalkut Yosef* 5:526 and Rabbi Shalom Masas, "Shaving on *Chol Hamoed*," *Techumin* 3:517-528.

38. There is some discussion as to what motivated this responsum by Rabbi Landau, particularly as he initially noted that the reason for its publication would remain concealed. However, in *Nodah Biyehuda Orach Chaim* 2:101, he states that the rationale for this ruling was to insure that Jews who shaved did so from a Jewish barber. He notes that Jewish barbers shaved people in a



Writing in the *Nodah Biyehuda*, Rabbi Landau accepts the position of Tosafot that hair cutting is a forbidden form of work on the intermediate days which would have been permissible in theory as a matter of Torah law if done for the sake of the holiday.<sup>39</sup> The rabbinic decree, according to this analysis, essentially returned hair cutting on the intermediate days to the status of work that is not needed on the festival, and therefore biblically prohibited. Thus, according to Rabbenu Tam as explained by Rabbi Landau, hair cutting or shaving is biblically forbidden to all, whether one did or did not shave on the eve of the holiday.

However, there is a crucial difference between the case of one who has taken a haircut or shave prior to the festival and

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manner permitted by Jewish law, but on the intermediate days of the festival, when these barbers were closed, some Jews surreptitiously would use the services of Gentile barbers, who shaved them with a razor. Thus, permitting a poor Jewish barber to remain open prevented some Jews from sinning. (In that era "shaving with a razor was – tragically – so common for many that they did not ever consider it really prohibited;" Rabbi Akiva Eiger, *Responsum* 96.)

*Chatam Sofer Orach Chaim* 154 suggests a different rationale, that casts the *Nodah Biyehuda's* ruling in a very different light:

I will recount a tale and reveal a secret. Because of the sins of our generation, there are many who shave with a razor regularly, and if they do not shave on the intermediate days, there will be enough facial hair on these people that their hair can be doubled over [the minimum amount of hair needed to violate the biblical prohibition of shaving with a razor] and after *yom tov* these people will shave with a razor, and violate many biblical prohibitions; thus it was better to permit these people to violate the rabbinic prohibition of shaving on *Chol Hamoed* [than the biblical prohibition of shaving with a razor].

39. See section III.

one who has not, according to Rabbi Landau. The one who has shaved already is only prohibited to shave as it is "biblically prohibited work"; one who has not shaved prior to the holiday is caught between two separate problems: the prohibited work rule and the decree of the Sages penalizing one who has not shaved.

Rabbi Landau then adds that one who is in the category of one permitted to do any work – such as a poor person who has no money for food – may cut hair during the intermediate days of the festival, and one who has had his hair cut prior to the festival may have such a person cut his hair or shave his face. Rabbi Landau defended this ruling a number of times in his responsa<sup>40</sup> and while it has been reported that he retracted this decision later in life, that assertion is difficult to defend.<sup>41</sup>

A number of preeminent authorities disagree with the premise of Rabbi Landau and thus reject his conclusion. The most forceful is Rabbi Moshe Schreiber (*Chatam Sofer*)<sup>42</sup> who states clearly that Rabbi Landau's basic analysis is incorrect. *Chatam Sofer* maintains that the true issue is the nature and scope of the rabbinic decree prohibiting shaving, and not whether that physical activity is a form of prohibited work or the intermediate days of the festival.

To prove this, he notes that the model used by the Talmud for the decree concerning the intermediate days was the ancient decree that priests who work in the Temple may not have their hair cut or be shaven during their tour of duty in the

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40. See also *Nodah Biyehuda* O.C. 2:101 and 2:99.

41. See *S'dei Chemed*, *Chol Hamoed* 8:5. To accept such a proposition would be to posit that the responsa published posthumously by his son in *Nodah Biyehuda* 2:101 – which contain a defense of this liberality – are inaccurate.

42. O.C. 154.

Temple, so as to prevent them from entering their service period unkempt (*i.e.*, if they needed to be groomed, they had to do it prior to the start of their service). This decree has no basis at all as a form of prohibited work – and, *Chatam Sofer* states, neither does the rabbinic decree concerning grooming oneself during the intermediate days. Thus, he rules that the rabbinic decree prohibits shaving and haircutting by all, regardless of whether one is or has found a poor person in need of work, since the crucial issue is not "work". Most authorities appear to agree with the approach of the *Chatam Sofer*, although a number agree with Rabbi Landau.<sup>43</sup> As noted by Rabbi Neuwith:

One does not cut one's hair or trim one's beard on the intermediate days, not even on the eve of the final days of the holiday, even if one had one's hair cut or removed one's beard prior to the festival.<sup>44</sup>

Even if one were to accept the insights of Rabbi Landau (and most do not), its applicability in America would be limited to extremely poor people or people who know extremely poor Jewish barbers.<sup>45</sup>

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43. See *Mishnah Berurah* 531:2; *Aruch Hashulchan* 542:2; *Orchot Chaim* 531:1 *She'arim Metzuyanim Behalacha* 104(13) and the authorities cited in *S'dei Chemed*, *id.* There are those who agreed with Rabbi Landau's ruling, however; see, for example, *Olat Shmuel* 72, who permits shaving for the last days of *yom tov*, based on Rabbi Landau's analysis.

44. *Shemirat Shabbat Kehilchata* 66:23.

45. An alternative rationale that would generally permit shaving on *chol hamoed* can be found in *Machatzit Hashekel* 531:10 who appears to rule that the talmudic decree prohibiting shaving is limited to the head, and is completely inapplicable to the facial area. Such a rationale perhaps can also be found in *Magen Avraham* 531:12. However, both *Mishnah Berurah* (*Biur Halacha* 531, s.v. *kol adam*) and *Kaf HaChaim* (531:39-42) indicate that the analysis

### V. Clean-Shaven Men in a Clean-Shaven Society

Modern secular society has changed, to some extent, the social reality concerning shaving. While there was a time when most observant people were not clean-shaven – and indeed it was difficult to remain clean-shaven and function in accordance with halacha – such is no longer true.

A clean-shaven person in a clean-shaven society creates a new halachic question vis-a-vis shaving on the intermediate days of the festivals. A person who has no beard, even if he shaves in preparation of the holiday, *nonetheless* will look unkempt during the holiday, and it will be visibly apparent to all that this person shaved in preparation of the holiday and yet still needs to shave again. The fact that he shaved prior to the holiday does not, in any way, insure that he will look proper during the intermediate days. The only way to look neat during the intermediate days is for him to shave then. Furthermore, the presence of many such people insures that this fact is common knowledge.

In light of the change in societal norms, an examination of the rabbinic literature indicates three different approaches that have been taken to this issue in modern times.

A number of authorities, including Rabbi Ovadiah Yosef, adopt the position that the decree made by the Sages of the Talmud has only the delimited exceptions given in the Mishnah and cases identical to them. Thus, even if it might have been logical for the Sages in the time of the Mishnah to exempt a clean-shaven person in a clean-shaven society, for whatever reason they chose not to do so, and enacted a broad decree without any exemption – except for one who is clearly duressed *and did not shave on the holiday eve out of duress*.

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of the *Machatzit Hashekel* is not correct.

Rabbi Yosef states:

Even if one shaved his beard on the eve of the festival it is prohibited to shave again on the intermediate days of the festival; this is true even if one is accustomed to shaving every other or third day. There was one who permitted one who shaved prior to the festival to shave on the intermediate days through a poor Jewish barber who has nothing to eat. Most authorities argued with him and the consensus is that it is prohibited.<sup>46</sup>

This approach is also found in *Shemirat Shabbat Kehilchata*, stating that it is prohibited even for a clean-shaven person to shave on the intermediate days of the holidays.

However, all authorities admit that a person who will suffer a significant financial loss (certainly the loss of his job) if he does not shave himself may do so, as the Sages did not prohibit either haircutting or shaving in the case of significant

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46. Rabbi Ovadiah Yosef, "Laws of Chol Hamoed," *Kol Sinai* 7:2(181-192), at pp. 186-187 (5723); see also Rabbi Yitzchak Yosef quoting his father Rabbi Ovadia Yosef, *Yalkut Yosef* 5:516 in which nearly the same rule is cited. Similar such sentiments can be found in Rabbi Shalom Masas, *Tevuot Shemesh* 1:55-56 and *Likutei Halachot al Chol Hamoed* 12-13. So, too, these authorities rule that the minority opinion of Rabbenu Tam (and to a lesser extent *Nodah Biyehuda*), since rejected by normative halacha, may not be relied on even in circumstances where such an opinion might be logical to follow.

In the case of nail cutting – which is not mentioned in the Talmud as something mandated on the eve of *yom tov* out of respect for the holiday, but which many *rishonim* strongly encouraged (see *Ramo* 532:1) – the halacha accepts the approach of Rabbenu Tam and rules that one who cut his/her nails in honor of the holiday may also cut them on the intermediate days; *Magen Avraham* 532:3.

loss.<sup>47</sup>

The second approach, which is found in the responsa of Rabbi Moshe Feinstein, rules that it is permissible for a clean shaven person to shave on the intermediate days if the person does so regularly, in a society where many others are also clean-shaven, and the person shaved on the festival eve.<sup>48</sup> Essentially, Rabbi Feinstein argues that since it is common knowledge and visibly apparent that people who do not wear beards shave frequently and regularly and have certainly shaved on the eve of the festival (this can be verified in a glance), such a person is the equivalent of the visibly dressed person who may shave. Just as one who is publicly released from prison may shave, since his plight is widely known, so too the bearded person recognizes that the un-bearded person is in a visibly different situation and will not be confused with the bearded person. This is similar to the assertion of the Ritva that women are permitted to adorn themselves on the intermediate days with jewelry, since

this is needed for one's body and is like food preparation since it is normally done with little effort. It was not prohibited by the Sages under the rubric of "lest one enter the festival disheveled" as this activity is done daily and it is not the custom of people to

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47. See *Shita Mekubetzet* on *Moed Katan* 18a. This rationale is used by the *Mishnah Berurah* (531:21 and *Biur Halacha*, s.v. *kol adam*) to justify shaving in the case of a health need, which is itself only permitted because all health needs are considered a *davar ha'avad* – an item which if not acted on now, is lost – just like a financial loss; see also *Shulchan Aruch* OC 534:2 which permits the washing of an item (linen) on *chol hamoed* that will be destroyed if not washed immediately.

48. *Iggerot Moshe* O.C. 163.

delay it.<sup>49</sup>

Rabbi Feinstein adds that the objection by the *Tur* that this category of clean-shaven people is unmentioned in the Mishnah or Talmud is not relevant to a society where many are clean-shaven, as that society was unknown in the time of the Mishnah.<sup>50</sup> The new social reality would, according to Rabbi Feinstein, eliminate the possible problems of suspecting a person of not shaving on the eve of the holiday, as anyone can tell when a clean-shaven person last shaved.

However, the two final paragraphs of Rabbi Feinstein's responsum state:

Thus, it is clear that, in my opinion, in our era and in this country – where those who shave their face do so every day or every other or third day – there is no prohibition [to shave on the intermediate days]...

Nonetheless, my custom is not to permit shaving on the intermediate days except for one in significant need or great pain. If one wishes to rely on this line of reasoning for mere aesthetic reasons alone, one should not rebuke him, since the halacha is in accordance with that conduct in my opinion.

According to this analysis, shaving is permitted but not encouraged on the intermediate days of the festival.<sup>51</sup>

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49. Ritva, *Moed Katan* 8b.

50. *Iggerot Moshe* O.C. 163. Finally, Rabbi Feinstein disagrees with the analysis of Rabbi Landau concerning whether shaving is work, and rules that shaving is prohibited exclusively by the rabbinic decree, which he feels is not applicable to a clean-shaven person. Particularly when facial shaving is so routine and requires no particular skill, states Rabbi Feinstein, there is no problem of prohibited work.

51. An approach similar to Rabbi Feinstein's can be found in



The third position is taken by Rabbi Joseph B. Soloveitchik. Based on an analysis similar to that of Rabbi Feinstein discussed above, Rabbi Joseph B. Soloveitchik and his son-in-law, Rabbi Aharon Lichtenstein, rule that since it is permissible to shave during the intermediate days it would seem logically compelling that one who is clean-shaven must shave on the intermediate days, and particularly on the last day of the intermediate days since there is an upcoming festival.<sup>52</sup> Shaving during the intermediate days, for a clean-shaven person, is a fulfillment of the rabbinic commandment to look dignified and proper during the intermediate days and on the final days of the festival.

Rabbi Hershel Schachter, in his intellectual biography of Rabbi Soloveitchik, *Nefesh HaRav*, recounts Rabbi

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Rabbi Yekutiel Greenwald's *Kol Bo al Avelut* 2:131. The position of Rabbi Shlomo Zalman Auerbach is unclear; 66:23(n.107) states that Rabbi Shlomo Zalman Auerbach is uncertain about "a king who shaves every day if Rabbi Landau would permit such a person to shave, since Rabbi Landau only permitted shaving through a poor Jew who does not have what to eat." Although his words are unclear, it is quite possible to understand Rabbi Auerbach as being in agreement with Rabbi Feinstein, and that the only problem is one of the technical issue of prohibited "work," which Rabbi Auerbach suggests can be solved without any difficulty in the case of a king. Indeed, other have related to this author that Rabbi Auerbach indicated that Rabbi Feinstein's responsum was persuasive on this issue. This understanding of Rabbi Auerbach also explains the sequence of ideas discussed in the *Shemirat Shabbat Kehilchata*, where the approaches of both Rabbis Feinstein and Auerbach are presented after the phrase ען ען, which in the *Shemirat Shabbat Kehilchata* means "for an alternative view, see."

52. As with many of the rulings of Rabbi Soloveitchik, this one was never placed in writing by him. These rulings are recorded in Rabbi Yitzchak Pacha, "Shaving on the Intermediate Days," *Techumin* 2:116, 133 (5741) and Rabbi Shmuel Sprecher, "Shaving on the Intermediate Days," *Noam* 21:252-253 (5738).

Soloveitchik's reasoning as follows:

To those who shave every day, it is obvious that they may shave on the intermediate days too, since it is clear from the explanation of the Mishnah given in *Moed Katan* 14a that every case where it is obvious to all that a person is duressed, and thus cannot shave, that person may shave on the intermediate days. All know that a clean-shaven person cannot on the eve of a holiday shave those hairs that have not yet appeared. [Thus, this person's unkempt appearance is considered a product of duress, and he is permitted to shave.]<sup>53</sup> One can also add that in the case of a person permitted to shave on the intermediate days that he must shave, so as not to be disgusting on the intermediate days and so as to avoid entering the last days of the festival looking repugnant.<sup>54</sup>

These authorities argue that once one accepts that the rabbinic decrees found in *Moed Katan* 13b-14a are inapplicable to a clean-shaven person, there is no choice but to rule that one who is clean-shaven *must* shave at least in honor of the final days of the festival, just as for any other festival.<sup>55</sup>

It is important to understand that the approaches of Rabbis Feinstein and Soloveitchik are not predicated on the correctness of either Rabbenu Tam or Rabbi Landau, but rather maintain that all would agree that shaving is permissible on the intermediate days in a case where it was obvious that the clean-shaven person had shaved in preparation for the holiday, and yet was still unkempt because of the growth on new hair

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53. See the reasoning cited in note 56.

54. *Nefesh HaRav* 189-190.

55. For an approach similar to Rabbi Soloveitchik's, see Rabbi Moshe Malka, *Mikveh Hamayim* 2:20.

which could not be removed prior to the holiday. Those who argue with this reasoning would assert that the talmudic leniencies found in *Moed Katan* 14a concerning those who may shave on the intermediate days are limited to those who did not shave in anticipation of the holiday, unless one accepts the rulings of Rabbi Landau or Rabbenu Tam.

## VI. Conclusion

Both the technology of shaving and the sociology concerning when one shaves have changed considerably in the last century. Until recently it was unusual to encounter an observant Jew who was routinely clean-shaven, and finding a halachically acceptable way to remain clean-shaven was no easy task. Certainly, until very recently there were no societies where most of the observant Jewish community was generally clean-shaven. This has changed. Technology has created a halachically permissible way to shave; for social and economic reasons, many religious Jews choose to be clean-shaven. This article has explored the responses of halacha to the changed realities of our lives.

# Talking During Tefillah: Understanding The Phenomenon

*Irving N. Levitz Ph.D.*

For the majority of Orthodox Jews, social conversation during synagogue services is an indigenous part of *tefillah be'tzibur*, communal prayer. Talking in *shul* has become the de-facto norm to such a degree, that in the minds of many an Orthodox worshipper it is precisely this casual combination of prayer and camaraderie that differentiates the "warm" Orthodox *davening* from the cold decorous temple service of their non-Orthodox coreligionists.

The widespread practice of combining prayer with social camaraderie, however, is an enigma. Orthodox Jews do not, as a rule, blatantly violate or openly ignore halachic imperatives. Commitment to halacha is, after all, Orthodoxy's most distinguishing characteristic. Orthodox Jews are, therefore, particularly conscientious about halachic standards pertaining to the sanctity of their synagogues and are fastidious about such matters as the height of the *mechitzah*, the placement of the *bima*, the prescribed order of the liturgical service, the flawless precision with which the Torah is read and the exacting requirements with which the scroll is written. Yet, despite the most decisive halachic prohibitions against talking or socializing during the synagogue service itself, the vast majority of Orthodox Jews

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see nothing disturbing or incongruous about praying in a social environment.

Why, despite centuries of rabbinic censure and halachic prohibition, has socializing become so embedded into the fabric of Jewish communal prayer? How is it that Jews who so value prayer jeopardize its very performance by engaging in social talk during services? The answers are rooted not only in historic precedents, but in several salient psychosocial factors as well.

The purpose of this paper is to explore these questions from an historical, halachic and psychological perspective. The intention here is not to formulate a definitive strategy for solving what is known as "the problem of synagogue decorum," but rather to describe, conceptualize, and understand the dynamics of this puzzling enigma – the phenomenon of talking during *tefillah*.

### The Halachic Perspective

Halachic literature is unequivocal in its universal condemnation of socializing during prayer.<sup>1</sup> The halachic posture with regard to one who engages in social talk during prayer is not only exceptionally harsh and uncommonly critical, but suggests grievous consequences as well. The *Zohar*, for example, compares the synagogue talker to a *kofer be-ikar* (infidel), while the *Rokeach* asserts that one who talks in shul

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1. Tractate *Megillah*, 28a ; *Shulchan Aruch*, *Yoreh Deah*, 246:7; *Ibid*, *Orach Chaim*, 124:7; *Mishnah Berurah*, 151:1; *Rambam*, *Hilchot Tefillah*, 11:6; *Zohar*, *Parshat Terumah*, 131a. See *Sefer Dover Shalom*, chapter 13, R. Avrohom Meshi Zahav, Jerusalem, 1980, for a compendium of rabbinic commentary on the issue of talking in the synagogue during *tefillah*.

violates the sanctity of G-d's domain (*masig gvul*).<sup>2,3</sup> The synagogue talker has also been likened to a *choteh umachti*, (one who is both a sinner and catalyst for the sins of others), culpable not only for his own transgressions but for those he provokes in others,<sup>4</sup> denounced for causing a *chilul hashem* (desecration of the Divine name), and preventing the ultimate *geulah* (redemption).<sup>5</sup>

The *Kaf Hachaim* suggests, therefore, that for the habitual synagogue talker incapable of controlling his social urges it is better for him not to come to the synagogue at all, and to pray at home instead.<sup>6</sup> Given the harsh rabbinic characterization of the synagogue talker, praying at home certainly seems the more prudent option.

With regard to the synagogue precinct itself, the *Mishnah Berurah*, reflecting the prevailing rabbinic view, warns that grievous consequences are destined to befall synagogues rife with talking, in that they will ultimately be destroyed.<sup>7 8</sup>

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2. Zohar, Parshat Terumah, 131a.

3. Rokeach, Hilchot Teshuvah, siman 26.

4. The severity of this classification is underscored by the belief that a *choteh umachti* loses his portion in the world to come. "Veharai zeh bivchinat chotai umachti et harabim, she-ain lo chelek le-olam habah," Kuntrus Shomer Emunim, 63, as cited in Sefer Dover Shalom, p.80, ibid.

5. Derech Moshe, Hanispach le-sefer Hagan, bema-amar leyom 26.

6. Kaf Hachaim, Orach Chaim, 151:8.

7. Mishnah Berurah, ibid.

8. In a similar vein, the Chatam Sofer, noting the talmudic opinion (Megilla 28a) that synagogues of the diaspora will one day be established in Eretz Yisrael, added the proviso that this is true only if they are sanctified by prayer. If, however, they are desecrated by idle talk they will become *Tamei* (impure),

During the tragic years of the Chmielnicki persecutions of 1648-1649, for example, the renowned sage Rav Yom-Tov Lipmann Heller, known as the *Tosafot Yom Tov*, introduced a *mi shebairach* prayer into the synagogue service which was not only meant as a special blessing for those who refrained from talking during synagogue prayers, but was also a reaction to the Chmielnicki massacre itself.<sup>9</sup> The massacre and destruction of hundreds of synagogues and houses of study was apparently viewed as Divine reproof for the widespread practice of talking during *tefillah*.

Yet, despite centuries of rabbinic censure, talking during *tefillah* has remained. This is the crux of the enigma, an understanding of which requires not only an exploration into the history of the synagogue, but insight into the psychology of the worshipper, and the social dynamics of Jewish communal life itself.

### Prayer in a Social Milieu: Historical Perspective

The synagogue may have always combined both sacred and social functions, even from its very inception. One of the earliest prototypes of synagogue life was the *beit ha-am*, "house of the people," where Jews would gather to pray, discuss communal affairs, and listen to the words of the Prophets.<sup>10</sup> These institutions were evidently not used exclusively for

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and simply lose their sanctity.

9. May He who bestowed blessings on our forefathers Abraham, Isaac and Jacob....bestow His blessings on everyone who guards his tongue and refrains from talking during the time of *tefillah*. ...May he merit to see his children grow up and flourish, and may he raise them to Torah, marriage, and good deeds....and let us say Amen.

10. Jeremiah, 39:8, refers to the *beit ha-am*, which both Rashi and Radak interpret to mean Synagogue.



worship, but as communal meeting places and social centers as well.

Whereas at the time of the Prophets the *beit ha-am* appeared to be a sanctioned institution, over time it underwent a negative transformation and came to be viewed by most rabbinic authorities as an halachic anomaly.<sup>11</sup> In talmudic times it had already become a contemptuous reference to a place of social vulgarity, where the multitudes would gather primarily for social purposes and engage in lascivious behavior.<sup>12</sup> The *Maharsha* not only censured the *beit ha-am* as an halachically-defective institution, but depicted it as an antithetical model for the synagogue whose prototype is the *kodesh hakodoshim* (the great sanctuary).<sup>13 14</sup>

For the vast majority of halachic authorities, in fact, the synagogue is unquestionably rooted in the *kodesh*

11. See also *Melo HaRoim*, R. Yaakov Zvi Yollish (d.1825).

12. See Rashi's comment on *Beit Ha-am, Shabbat* 32a.

13. *Maharsha*, (R. Shmuel Eliezer HaLevi Edels, 1555-1632), Tractate *Shabbat* 32a,

"... it was as though it were designated [only] for the people and their needs, [and that] there was no divine element in it. ... these people were punished for perceiving no distinction between a 'people's house' and a synagogue--that the latter is a House of G-d, a sacred place, while a 'people's house' designates a secular place, where men and women gather for all occasions, but not for prayer. These ignorant men made a people's house out of the synagogue."

14. Rav Menachem Kasher in underscoring the contention that the *Beit Ha-am* was the halachic antithesis of the synagogue, wrote that those responsible for its creation, "destroyed the basic character of the House of G-d, and substituted in its place a house of the people." Kasher, Rav Menachem M., "The Hallowed House of Worship," in *The Sanctity of the Synagogue*, Chapter VI, p. 258.

*hakodoshim*, and not in the *beit ha-am*.<sup>15</sup> Yet, in the sense that it typically combines both sacred and social functions, most contemporary Orthodox synagogues have apparently retained some of the most fundamental characteristics of the *beit ha-am*.

The casual, seemingly irreverent social ambience of today's Orthodox synagogue, however, is clearly not unique to the twentieth century.<sup>16</sup> A social environment for synagogue prayer already existed in talmudic times, soon after the destruction of the Temple. In recounting the glory of the great synagogue of Alexandria, the Talmud notes that it was organized into homogeneous groups according to occupation.<sup>17</sup> Goldsmiths, silversmiths, blacksmiths, metalworkers, and weavers each sat in their own designated sections. If anyone sought employment in a specific trade he would simply go to the synagogue section specified for that particular occupation and inquire.

Synagogues were not only organized by occupation, but by country of origin as well. The Talmud frequently makes reference to the separate synagogues of the Roman Jews of Machoza, the Babylonian Jews, the Alexandrians and the Tarsians. This trend toward homogeneous grouping indicates that even the most ancient of synagogues considered social compatibility to be an important component of communal

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15. See *Mishnah Berurah* 151:1 – “*Ki haim nikraim mikdash me-at, kemo dicitiv, 'va-ehi lahem lemikdash me-at.'*”

16. In 1663 Samuel Pepys, an eminent non-Jewish diarist, visited a synagogue during holiday services and made the following entry into his famous diary: “Lord: to see the disorder, the laughing, sporting and lack of attention, ...there is such confusion in all their service...” Samuel Pepy's six volume diary was written between 1660-1669, and translated between 1819-1822.

17. *Sukkah*, 51b.

prayer. These early synagogues were apparently formed not only for the purpose of prayer, but also to meet communal social needs as well. This explains the requirement of social compatibility.

Over the centuries, the synagogue not only served as a communal center, but under the insufferable conditions of ghetto life, punctuated by frightful episodes of persecution and exile, assumed an even greater role in providing an all-embracing and supportive social function. The 18th-century rise of Hasidism even further reinforced the social component of synagogue life. The Hasidim dispensed with much of the traditional synagogue formality, stressing instead spiritual excitement and devout fervor. The venue for prayer changed, as well. Instead of conducting prayer in a traditional synagogue building, Hasidim created the *shtibl*, a small room or house. This informal physical arrangement, usually smaller, more spartan, spatially cramped, and furnished with tables and benches in place of formal pews, tended to both encourage and enable easy social interaction. Intense prayer became interwoven with casual conversation, creating a combination of sacred fervor and social warmth.<sup>18</sup> In addition to prayer, the *shtibl* served as a community meeting place and *beit midrash*. Communal meals with the *rebbe*, *seudot mitzvah*, especially the *seuda shelishit* and *melaveh malka* meals, were also held there. The whole atmosphere which blended impassioned prayer with social camaraderie added yet another powerful historical precedent to the practice of conducting prayer in a social context. A common expression, in fact, for a synagogue that is particularly tumultuous, is that "it is just like a *shtibl*."

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18. Minkin, Jacob S., *The Romance of Hasidism*, Thomas Yosseloff Publishing, 1955, pp.321-323.

The prototype of the synagogue as a social center, from talmudic times to the present, undoubtedly serves as a striking model for the Orthodox synagogue today. In a sense, the longstanding historical precedent helps explain the widespread perception that talking in *shul* is not only of minor consequence, but may in fact be an indigenous component of *tefillah betzibur* itself.<sup>19</sup> Furthermore, the memory of cherished parents and grandparents talking during *tefillah* is difficult to discredit, and in the traditional mindset of the Orthodox worshipper, the way things have always been, is the way they must continue.

### Hierarchy of Authority

The fact that synagogues have always needed to rely upon the benevolence of community patrons for their sustenance and survival is another critical factor which affects the social milieu of the traditional synagogue. There were times when it was prevalent for individuals to own personal synagogues and control every nuance of synagogue life. Although it is more common today for synagogues to be communally owned, an individual Jew could still develop a sense of proprietorship by purchasing his own seat or block of seats in the synagogue.

A contemporary form of ownership, albeit less overt, is that of synagogue membership. Given the appreciable costs of annual dues, building funds, and frequent appeals, members tend to develop a sense of proprietorship along with a perception that the synagogue is a democratic rather than a theocratic

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19. This prompted the rabbinic comment: "*yesh kama aveirot shebizmaneinu she-ainom necheshavim le-aveirot klal, kegon seechat chulin bevait haknesset*" – "There are some transgressions in our times that are not even considered transgressions at all, such as (non-sacred) talking in the synagogue." *Hayashar Vehatov, daf 26*.

institution. There is a sense that not only do members belong to the synagogue, but the synagogue belongs to its members, who are therefore entitled to determine whether the ambiance of their synagogue should be sacred or social. The effect of this perception has more often than not weakened the halachic authority of the rabbi.

The prayer environment is entirely different, however, when rabbinic authority is empowered to enforce halachic standards. Prayer in a yeshiva *beit midrash*, for example, tends to be both spiritually endowed and religiously inspired. The context of prayer is halachically prescribed and enforced by the worshippers under the compelling guidance of the *rebbeim* and *rosh yeshiva*. Typically, when worshippers in a yeshiva setting come together for *tefillah*, they become socially disengaged and remain so until the end of the service. Should anyone attempt to socialize during *tefillah*, his behavior is viewed as aberrant. *Davening* in a yeshiva setting tends to be a model of a sacred prayer context, not only because its worshippers are generally more attuned to the halachic requirements of prayer and therefore more inclined to follow halachic standards, but also because they do not have a sense of proprietorship as do *baalei batim*. Empowerment of the *rosh yeshiva* to implement the halachic standard within his domain is implicit and unchallenged.<sup>20</sup>

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20. Another example of where synagogue standards tend to be based on halacha rather than on the social needs and preferences of community members has been in those instances when the community was organized under the aegis of a *kehillah*. At those times when a *kehillah* had administrative responsibilities for all synagogues within its precinct and would administratively appoint rabbis, establish synagogue standards, and insist on halachic guidelines for *tefillah* in all its congregations, talking in the synagogue was generally not countenanced. Like the yeshiva setting, the prayer environment tended to be sacred and decidedly

The result of generations of lay control over synagogue life may have led not only to the establishment of the synagogue as a social center and a frivolous prayer environment, but to halachic disregard, and as some rabbinic authorities assert, even sacrilege.

### Common Beliefs and Assumptions

Several commonly held assumptions help sustain the belief that talking in *shul* is, at most, no more than a minor halachic infraction. One of these beliefs is that one is, in fact, permitted to socialize in the synagogue except for times of *hefsek* (when it is strictly forbidden to interrupt the service for any reason).<sup>21</sup> The popular conception is that socializing at other times is halachically permissible.<sup>22</sup> Halacha, however, does not support this contention.

The *Mishnah Berurah*, for example, decisively rules that socializing is prohibited even at times other than *hefsek* periods.<sup>23</sup> The types of social intercourse most commonly observed in Orthodox synagogues include every variation of halachically prohibited engagement: *Kalut Rosh*— jesting, laughing, playful taunting, joking; *Sicha Betaila* — idle chatter (e.g. sports, politics), *Diburim Asurim*— gossip, rumor, derisive

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non-social. The German Jewish *Kehillah* is a case in point.

21. For example, during the silent *Shemoneh Esrai*, *Kedusha*, after *Boruch Sheomar*, etc..

22. The reasoning is reminiscent of the dictum "*mitoch lav atah shomea hain*"— one is able to learn (by inference) what is permissible by knowing what is prohibited.

23. "Therefore a G-d fearing person should commit himself never to engage in *devarim betailim* while in the synagogue or study hall. That place should be exclusive for prayer and Torah study only." *Mishnah Berurah*, 151:2

arguments, and *Divrei Chol*— business discussions.<sup>24 25</sup> These are at all times halachically prohibited within the precincts of the synagogue.<sup>26</sup> In the milieu of the Orthodox synagogue, however, where social intercourse has been the accepted norm for generations, halachic rulings seem at times to be eclipsed by the entrenched social norm.

Another common belief frequently promulgated in support of praying in a social environment is that “ a *shul* is not a church.” The synagogue service does not necessitate passivity, silence, or prim formality from its worshippers as does the traditional Catholic or Protestant church. The synagogue, this rationale maintains, unlike the church, is not merely a sanctuary for solemn prayer or passive silence, but a gathering house for communal purposes as well.<sup>27</sup> It is, in fact, its very

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24. Heilman, S., *Synagogue Life: A Study of Symbolic Interaction*, University of Chicago Press, Chicago 1976. In his classic study of synagogue life, Heilman observed that gossip, personal anecdotes, joking and humorous remarks, constituted a significant portion of the social interactions within the synagogue.

25. Laughter as an important component of social intercourse, acts to create a bond between individuals, and influences the tenor of a group by synchronizing the mood of those present. This helps explain the pervasive mirth and laughter among congregants in socially-oriented Orthodox synagogues. *Kalut Rosh* may be halachically prohibited, but from a psychological perspective, it is an integral part of social bonding .

See Robert Provine's study on laughter in the *American Scientist*, Feb. 1996.

26. *Shulchan Aruch*, 151:1; see also: *Mishnah Berurah*, ibid. Rambam, *Hilchot Tefillah* 11:6.

27. The conspicuous difference in the prayer environments of church and synagogue are even reflected in the etymology of “Church” and “Synagogue”. Whereas Church is derived from the Greek *kyrakon* meaning “lord’s house”, the Greek word for synagogue is based on the Hebrew *Beit Knesset* - [house of]



informal social milieu that not only differentiates it from both the church and the non-Orthodox temple, but is the distinguishing characteristic of the Orthodox synagogue itself.

That "a *shul* is not a church" is apparently a longstanding argument frequently quoted and rebutted in rabbinic literature.<sup>28</sup> One typical rabbinic retort to this longstanding argument asserts that those who talk in *shul* should, in fact, "take example from the Gentiles who... in their houses of worship stand in awe of their false gods... We who stand before the King of Kings, should *certainly* do so in awe and fear."<sup>29</sup>

According to the *Derech Moshe* it is precisely because in comparison to the Gentiles, Jews do not respect their houses of worship, that Satan, the prosecuting angel, can successfully accuse the Jews of sacrilege before G-d.<sup>30</sup>

*For every satanic accusation leveled against the Jews, the Holy One with a measure of mercy is able to silence him. For example, if the Satan says that Jews are thieves, the Holy One responds to him "who says that if the nations would have received the Torah that they would not have been worse thieves than the people of Israel?" But if the accuser says the people of Israel are disrespectful and talk in their synagogues, to this the Holy One (figuratively) does not have a response, because, indeed, the Gentile nations do, in fact, stand in awe and respect during their worship.*

The *Derech Moshe* further suggests an allusion to this

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"assembly".

28. *Sma'k*, mitzvah 11; *Sefer Chasidim*, siman 11.

29. *Sefer Chasidim*, Ibid.

30. *Derech Moshe*, *Hanispach le-Sefer Hagan*, *be-maamar le-yom* 5.

dialogue between G-d and the Satan in the biblical passage "*Hashem yilachem lachem, ve-atem tacharishun*" – "The Lord will go to war on your behalf [against the *Satan* and his allegations] but you will need to be silent [in the synagogue]." <sup>31</sup>

### Psychological Factors

For many an Orthodox congregant the primary value derived from synagogue attendance, and the essence of the *shul* experience, is the camaraderie, fellowship and esprit de corps derived from being part of the social collective. As such, *tefillah betzibur* has evolved as the social touchstone of Jewish communal life. The ceremonial trappings of ritual and liturgy are often no more than a legitimizing framework, which allows community members to meet, socialize, and reaffirm their sense of belonging while under the guise of a commitment to shared religious objectives.

Most worshippers have a distinct but muted sense that talking in *shul* is not in accordance with halachic standards. This awareness, however, tends to remain vague, because individuals need a way of psychologically protecting themselves from feelings of discomforting guilt that arise when beliefs and behaviors conflict. Were the religiously committed synagogue talker more fully cognizant of the halachic ramifications of his behavior, he would likely experience what is known to psychologists as "cognitive dissonance" – a form of psychic conflict which would require the individual to find a way of reconciling both his belief in the efficacy of halacha and his halachically antithetical behavior. <sup>32</sup>

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31. Exodus 14:14.

32. Festinger, L., *A Theory of Cognitive Dissonance*. Stanford, Calif.: Stanford University Press. 1957. According to this theory, when a person has inconsistent perceptions or conflicting beliefs,

Even a muted awareness of halachic prohibitions still arouses some degree of inner conflict necessitating a strategy of psychological defense. An habitual synagogue talker might, for example, choose to minimize the seriousness of talking in *shul* by rationalizing it, joking about it, justifying it, or simply avoiding halachic study of the topic altogether. One could also reduce the psychological tension of cognitive dissonance by changing one's behavior in the synagogue to conform with the halachic standard. Avoiding conscious awareness of these halachot or minimizing their significance, however, is a strategy more comfortable psychologically than changing one's behavior. To change one's behavior from social talker to one who is non-compliant with the synagogue's established social norms is to risk isolation and rejection from fellow congregants. For most individuals, conforming with the group norm while maintaining no more than a vague awareness of the halacha is simply the path of greatest psychological comfort and least social risk. The alternative, which is to view one's own behavior as halachically aberrant, or more ominously, as an act of sacrilege (*Chilul Hashem*) and a desecration of the synagogue's sanctity, is as unsettling as it is threatening.

### Motivational Factors

One of the reasons that socializing has become such an indigenous component of synagogue life is because it meets so many essential social, psychological, and communal needs. Worshippers, however, are not always conscious of all the factors that motivate them to specifically socialize in the sacred precincts of the synagogue.

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he will experience a psychological state of tension called "dissonance." This tension creates a state of discomfort which motivates the individual to reduce or eliminate it.

These motivating factors exist on three distinct psychological levels of awareness. There are *explicit* motivations that are both conscious and easily revealed to others, *implicit* motivations that are conscious but socially concealed, and motivations that are for the most part *unconscious* even to the individual himself.

Since *tefillah betzibur*, congregational prayer, is one of the most fundamental tenets of Jewish life, the most *explicit* motivation for attending synagogue is evidently to pray. This motivation is both in the worshipper's conscious awareness and is readily shared with others. It is, after all, axiomatic that one goes to *shul* to *daven*.<sup>33</sup>

Attending synagogue for reasons other than prayer or study would not be in keeping with the synagogue's *raison d'être*, or the community's explicit religious standard. One is less likely, therefore, to acknowledge going to synagogue primarily for reasons other than prayer. Yet, for many congregants a primary motivation for attending synagogue is, in fact, simply to meet friends and socialize.

This may be especially true for those who harbor doubts about the efficacy of traditional prayer, or who are unable to connect with either its meaning or motifs. Inner skepticism, spiritual detachment from *tefillah*, and the need to attend synagogue primarily for social reasons, however, are not readily shared with others, for there is a tacit communal understanding

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33. There are times when this motivation is particularly evident. When a congregation deems a moment to be of special sacred significance, (e.g. during the silent *Shemoneh Esrai*, *Kol Nidre*, *N'eilah*, *Aicha*, etc.) the synagogue atmosphere becomes both decorous and spiritual. Talking during those times even in the most social of synagogues is perceived as deviant. It is at these times that worshippers' behavior tends to be most congruent with their explicit motivation and expressed beliefs.

that the primary purpose of the synagogue is for prayer and other sacred matters. To admit candidly that one attends synagogue primarily to socialize is to betray the synagogue's sacred purpose. Since this would not reflect positively on the individual's religious commitment, his social motivations need to be concealed. Individuals might spend their entire time in the synagogue engaged in social conversation and nevertheless insist that they have come to *shul* to *daven*.

Halachic standards aside, the power of this social drive is compelling. In a time-pressured world, where opportunities for socializing with friends tend to be limited, the social component of synagogue life serves as a bulwark against alienation and isolation by providing communal affiliation, emotional support, and a social presence. One entering a socially-oriented Orthodox synagogue eager for social contact has a ready environment to meet these psychosocial needs.

In addition, a supportive social network can effectively assuage the many life stresses that individuals normally experience as part of their daily lives. Any social situation that allows individuals to vent, laugh, share concerns, derive encouragement and become momentarily distracted from personal pressures not only helps to relieve stress, but prevents it as well.<sup>34</sup> A socially-oriented synagogue is likely to provide just such a stress reducing potential.

### Unconscious Motivations

There are also unconscious factors that motivate individuals to talk in *shul*. There are some individuals, for example, for whom talking in *shul* is a manifestation of

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34. Smith, J., *Understanding Stress and Coping*, Macmillan Publishing Company, New York, 1993. pp.23-25

unconscious anger.<sup>35</sup> Coming to a sacred setting in order to socialize is for them an unconscious act of defiance connected to past hurtful experiences associated with religious life. There is a particularly oppositional quality to their behavior in the synagogue. For these individuals talking during prayer is an unconscious acting out against seemingly harsh restrictions imposed by past authorities, punitive teachers, critical *rebbe*s, or overcontrolling parents. It is a motivation rooted in past hurts and the powerlessness of childhood when one could not stand up to imposing authority figures. Despite the regressive adolescent-like quality of this defiance it may nevertheless be a significant driving force for some of the most recalcitrant and incorrigible synagogue talkers.

Talking in synagogue may also be unconsciously motivated by a need to avoid the intense emotional investment required for authentic prayer. At times of personal crisis, individuals tend to be very conscious of the need to pray for Divine intervention and solace. At other times, however, when life is seemingly tranquil and crisis free, it is disconcerting to become conscious of one's essential vulnerability, for this can evoke the discomforting feelings of existential anxiety. It is an anxiety aroused by an awareness that man is inherently lonely, finite, and that his life and those of his loved ones is always precarious. According to Rabbi Joseph Soloveitchik it is precisely because uncertainty and vulnerability is a constant, and life itself a time of perpetual crisis, that Maimonides decreed prayer to be biblically mandated, for man is perpetually in need of Divine intervention.<sup>36</sup>

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35. Based on clinical information derived from the author's patients in psychotherapy.

36. There is a controversy between Maimonides and Nachmanides regarding the question of whether prayer is a rabbinic injunction or biblically mandated. Maimonides regarded prayer as biblically

The genius of traditional Jewish prayer lies in its ability to simultaneously evoke both an awareness of existential vulnerability and a sense of comfort in experiencing the Divine presence. Intense and authentic prayer not only tends to assuage anxieties emanating from existential loneliness and vulnerability but also move the worshipper toward a more spiritual and meaningful perspective of life and purpose.

The mind-set for authentic Jewish prayer (*tefillah*), however, is difficult to achieve. *Tefillah* not only requires a focussed concentration (*kavanah*) on what one is saying and to Whom one is praying, but a heightened consciousness of one's vulnerability and dependence on Divine providence.<sup>37</sup> When not in crisis, however, individuals often find it difficult to evoke the deep emotions required for authentic *tefillah*. To socialize with friends and enjoy a sense of personal confirmation, community affiliation, a perception of well being and even a temporary respite from vulnerability, however illusory, is yet another way of keeping existential anxiety at bay.

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ordained whereas Nachmanides considered it a special privilege. Nachmanides conceded, however, that *be'ait tzarah*, at times of distress, the duty to pray is a Torah-mandated obligation.

Rabbi Joseph Soloveitchik, in an attempt to reconcile these disparate views, pointed out that both Maimonides and Nachmanides commonly believed that prayer is rooted in a sense of *tzarah* – distress. Maimonides, on the other hand considered man inherently vulnerable, his life always precarious, his condition essentially lonely and every moment of his existence a state of perpetual *tzarah*. He is therefore always obligated to pray. See Besdin A., *Reflections of the Rav*, Alpha Press, Jerusalem, 1979, p.80.

37. Rambam, *Hilchot Tefillah*, 4:15. "Kol *teffilah she-ainah bekavana ainah tefillah*."



### Breaking the Cycle of Rebuke, Resistance, and Resentment

Several halachic authorities assert that it is the responsibility of the congregation to self-manage the environment in which it prays. Based on the premise that idle talk during *tefillah* is a public transgression (*chait rabim*) which desecrates the sanctity of the synagogue, each worshipper bears responsibility to deter others from talking, and help foster a sacred rather than a social prayer environment. Thus, Rabbenu Yonah maintains that one is required to admonish a talker in *shul* for it is "the obligation of the entire congregation to reproach him," and prevent him from violating the sanctity of the synagogue.<sup>38</sup> The *Shulchan Aruch* similarly entreats others to rebuke one who talks during the cantor's recitation of the *Shemoneh Esrai*, "for his sin is too great to bear."<sup>39 40</sup>

In a context that defines itself as essentially social, however, even the most diplomatically couched expressions of disapproval tend to be viewed as socially inappropriate and are at best ineffective. At worst they are seen as intrusive, offensive and provocative. Attempts at religious instruction or moral entreaty (*mussar*) similarly tends to be viewed as condescending. So long as the implicit social contract of the

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38. Rabbenu Yonah, *Iggeret Hateshuva* – *Yom Rishon*.

39. *Shulchan Aruch*, *Orach Chaim*, 124:7.

40. The Gaon Rav Zelig Reuven Bengis z'tzl suggests, however, that the rebuke given the talker needs to be instructive rather than simply harsh or punitive reprimand.

"...each and every person has the obligation to eradicate this transgression of talking in synagogue from among those who fail to observe its prohibition. This should be done in order to make them aware of the need to say 'amen', and so that they not engage in idle talk."

Kuntrus Shomrai Emunim, p. 26, *Michtevai Hagaon Rav Zelig Reuven Bengis z'tzl*.

synagogue is social, any personal appeal, in fact, aimed at restricting the socializing of fellow worshippers tends to evoke either a humorous dismissal or an angry rejoinder.

In most Orthodox synagogues, when the cacophony of noise from adult socializing and the clamor of children playing, crying and scampering about has reached some unacceptable decibel level, rabbis and synagogue presidents will stop the service in order to scold, admonish, and even threaten the offending worshippers. Protests from the pulpit tend to affect no more than a temporary respite, however, and within moments, the congregation resumes its social agenda.

Recurrent admonitions from the pulpit to be decorous seem no more effective than the myriad strategies attempted by synagogue Decorum Committees charged with the challenging task of bringing order to chaos. Ushers appointed to control fellow congregants either find themselves succumbing to the lure of socializing themselves, or run the risk of social censure. Ushers who rebuke fellow worshippers for talking often suffer the consequences of angry retort, or become the target of mocking resentment. Unequal relationships in a social context are not well tolerated, and the burnout rate of ushers as well as decorum committees is notoriously high. Successive failures to create decorum often bring despair, anger, and increased reprimand which in turn leads to an even greater resistance on the part of congregants to change. Worshippers resent being lectured to, yelled at, or chastised from the pulpit by those who themselves engage in social conversation when not in positions of leadership. Anger from the pulpit begets anger from the pew as congregations become embroiled in a cycle of rebuke, resistance and resentment.

### **The Process of Change**

The social milieu of the contemporary Orthodox synagogue may differ little from the 17th century synagogues at the time

of the *Tosafot Yom Tov*, who introduced his special blessing for those who refrained from talking during *tefillah*. "The problem of decorum," as it has come to be known, continues unabated. The many attempts by synagogues to effect a change in their social milieu so as to create an halachically conducive environment for prayer, generally end in failure and lead to a sense of despair. Frustrated rabbis and lay leaders, in their struggle to create decorum, all too often become ensnared in a tense pattern of anger, rebuke, and resistance. Ultimately, the will of the congregation to maintain a social environment prevails.

To change the social milieu of a synagogue into a spiritually conducive environment for prayer requires not only good intent, but a clear understanding of the psychological dynamics of how people change. It is particularly important to understand that congregants cannot be coerced from without, only enabled to change from within. It is akin, in many respects, to the change process that occurs during *teshuva* or psychotherapy. Talking in *shul* is, after all, an act driven by dynamic internal factors. It is psychologically motivated, socially reinforced, historically modelled, conceptually rationalized, and halachically misunderstood. Individuals are not likely to change their pattern of behavior if admonished from the pulpit, coerced by decorum committees, controlled by ushers, or rebuked by fellow congregants. These are external forces against which individuals will psychologically defend themselves. Change, when it does occur, takes place as an internal process.

This is not to say that behaviors cannot be temporarily suppressed by external control. Unless internally motivated, however, the individual will soon default to his previous pattern of behavior. This is why a congregation can be momentarily quieted from the pulpit, but as soon as pressure from the pulpit is suspended, there is a return to the previous level of talk and turbulence.

Change is a process of several sequential phases.<sup>41</sup> The first phase of change requires a degree of discomfort with an existing situation or condition. It is often a troubling recognition that a given situation is problematic, or a current state of affairs intolerable. This is always the driving force that precedes change, for without discomfort, change would be unnecessary.

During the second phase of the change process one gains insight into the nature of the problem, understanding why it evolved, how it is being maintained, and that there are options and choices. Insight alone, however, does not suffice in bringing about change. There needs to be a wilful commitment to make change happen, or one is simply left with an understanding of the problem and nothing else. The third phase of change, therefore, requires a will and determination to change.

When determination is followed by action, change begins to occur. The addict stops taking drugs, the overeater begins a diet, the couple stops bickering and starts communicating, the synagogue membership agrees to change its prayer environment from social to spiritual, and decisively takes upon itself the commitment to refrain from talking during *tefillah*.

Since individuals tend to fall back on old habits, the final phase of change is that of *maintenance*. Ingrained behaviors are always subject to regression. It is only after an appreciable period of time, during which a new norm has been created and stabilized, that one can say with some degree of certainty that change has actually occurred.

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41. For a fuller understanding of the processes of change, see Whellis A., *How People Change*, Harper and Row Pub., New York, 1973, and Prochaska, J., *Systems of Psychotherapy: A Transtheoretical Analysis*, Brooks/Cole Pub. Pacific Grove, Cal., 1994, pp.11-19.

In the context of synagogue life, any attempt to change the prayer environment from social to sacred must similarly go through these sequential phases of the change process. A congregation cannot even begin a process of change unless it is sufficiently uncomfortable with its social milieu during *tefillah*. So long as talking in *shul* is perceived as an acceptable norm there is no cause for distress. For congregants unfamiliar with the relevant halachot, there is no reason to expect either psychic discomfort or inner conflict when there is talking during *tefillah*. For those able to rationalize talking in *shul* as being of only minor halachic import, there, too, conflict or guilt would be an unlikely consequence of synagogue socializing. It is only where a congregation is both religiously committed and fully conscious of the halachic imperative and its gravity, that discomfort can lead to a new group ethic. If a congregation is to change its prayer environment, therefore, enough of its members need to experience a sense of crisis and uneasiness about the discrepancy between halacha and their existing social milieu. It is here that the role of the rabbi as teacher and discomforter par excellence becomes central.

That a synagogue is supported by patron members does not preclude a rabbi from moving his congregation to a higher spiritual plane. The power of the pulpit lies in a myriad of factors which include a congregation's respect for its rabbi's scholarship, his skill as a teacher, his personal relationship with the members of his congregation, and his perceived integrity as a person. The reverence and affection with which a congregation holds its rabbi can render him immensely powerful in affecting his synagogue's prayer environment. Provided that he does not diminish himself by becoming a minister of angry rebuke, a rabbi can most effectively launch a process of change from his role as respected teacher and halachic authority.

In a variety of settings, from the pulpit to the classroom, through the written word, halachic discourses, small group

discussions, and special learning programs, a rabbi can create myriad opportunities to teach the relevant halachot pertaining to synagogue deportment, raise community consciousness, and create the psychic discomfort necessary for change. Additionally, congregants would need to be made aware, in a sensitive, non-judgmental way, of the psychological (implicit and unconscious) motivations for talking during services. Making the unconscious conscious has always been a psychoanalytic catalyst for change.

A skillful harnessing of the communal will and the kindling of group determination to change the synagogue's prayer environment characterizes the next stage of the change process. Only if change is perceived as a manifestation of the communal will, rather than the imposed dictates of a select few, can it have a chance for general acceptance. If change in a synagogue's prayer environment is informed by halacha and psychological insight, driven by discomfort, manifested in a communal will, and implemented by a congregation's desire to establish an halachic standard for prayer, its chances for success are high. Once a prayer environment is established and a new set of expectations for synagogue behavior is in place, the majority of congregants tend to conform.

In synagogues that have successfully created spiritual prayer environments, it has generally been the result of a determined rabbi skillfully working in concert with informed and committed *baale batim*. The critical role of a rabbi able to impart halachic knowledge with a sensitivity for group dynamics and an adeptness for community organization is a *sine qua non* for successful change.

Few Orthodox rabbis, however, are formally trained in these requisite skills. With the understandable emphasis that rabbinic schools need to place on imparting Torah knowledge, there is often little room in the *smicha* curriculum for the formal study of psychologically based courses. Despite the clear need

for a more formal knowledge base in pastoral psychology, community organization, and group processes, most Orthodox rabbis assume rabbinic positions depending for the most part, on their own intuitive sense alone. Unfortunately, despite the innate intelligence, scholarship, and idealistic inclination of most Orthodox rabbis, intuition alone rarely suffices when it comes to skillfully affecting change in such a deeply rooted norm as talking during *tefillah*. The task becomes overwhelming, and frustration often leads to either anger or capitulation. Once a rabbi capitulates, his acquiescence itself becomes tacit confirmation that talking in *shul* is of only minor halachic consequence.

The enigma of the Orthodox synagogue, then, is a function of many dynamic forces with historical, psychological, and social factors coalescing to create a norm that is self-perpetuating. Although the psychological principles of how people change have long been understood, their effective implementation within the framework of synagogue life is still a rarity.

For those who believe that the Final Redemption is dependent on halachic standards of communal prayer, redemption itself may have to wait until the collective conscience of the Orthodox community can be awakened to feel a discomfort with the current norm, and a determination to change it.





## Letters To The Editor

To the Editor;

It was with eager anticipation that I read the article "Gambling and Jewish Law" in your issue XXXI (Spring '96), because the beginning seemed to promise to examine the "halachic attitude" towards gambling's current respectability in its modern forms.

Unfortunately, my disappointment at the end almost equaled my enthusiasm at the beginning. Most of the text dealt with an opinion that could be construed as irrelevant to the stated application for "contemporary society," and perhaps, for that very reason, could be misleading. In fact, if I were a partner in a casino, or a publicist for a government lottery, I would seize the opportunity to use parts of the article to drum up business from the Orthodox communities.

What Rabbi Clark unfortunately ignored in his review of the *sugiyot* is that in the case of gambling casinos and government lotteries, to say that gambling is prohibited on the basis of the "*asmachta*" payments of the losers is to introduce great leniency! That is because there is no *asmachta* here, not even a trace. The lottery and casino winners are not getting their money from the other gamblers, nor are they even playing against them in lotteries and most casino games. Everyone is betting against the "house." And the house not only does not resent paying off, it loves it. The lottery administrators publicize the big jackpot hitters in the newspapers, and the casinos treat their winners to free food and other kinds of "perks." And they are sincere. It's good for business. It attracts more suckers, and meanwhile they are still raking it in, thanks to the generous (in their favor) house percentages.

At least the "*yishuv olam*" argument prohibits full-time gambling and (at least by implication) discourages getting into it for more than you can afford. (This latter point about limitations, even if permitted, would have been worthwhile to discuss; the problem of compulsive gambling is a serious one today.)

One paragraph, presented almost as an aside, i.e. "a third approach of the Tosafist R. Eliyahu of Vienna," seemed to fit the casino/lottery situation exactly, but the (to me, anyway) obvious connection was never made. Instead, after its tantalizing introduction, it was dropped altogether, apparently along with any desire for a **practical** discussion.

By devoting so much space to a discussion of *asmachta* in situations that are clearly not parallel, the author is in reality encouraging modern gambling, since this reason to forbid is inapplicable even rabbinically. Potential gamblers will see right through it.

I understand how your authors don't want their articles to be considered authoritative in a halachic sense, but if you are going to bring up an issue because of its "contemporary relevance," then deal with it in a relevant way. Rabbi Clark quotes almost nothing more recent than two hundred years ago, and except for one referral to *Aruch HaShulchan* and another to *Encyclopedia Talmudit*, there is not much in the notes either. Perhaps a follow-up article would be appropriate.

With heartfelt blessings for continual and increasing success,

YRACHMIEL TILLES  
Editor, Ascent Quarterly

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Rabbi Clark responds:

Mr. Tilles appears to raise two different objections to the article "Gambling and Jewish Law." Primarily, he criticizes the article's analysis as overly focused on the halachic issue of *asmachta* (conditional obligation). Second, he faults the article's general failure to quote *poskim* from the last two centuries. I shall try to address both issues in detail.

Briefly, an *asmachta* is a condition imposed on an obligation. Where an individual promises to make a payment, but conditions that payment on some eventuality that the individual regards as unlikely, the promise is halachically invalid. With respect to *asmachta*, Mr. Tilles argues as follows: (1) Modern gambling generally involves no *asmachta*. (2) The issue of *asmachta* may therefore be "construed as irrelevant" to a discussion of contemporary gambling. (3) By focusing on this inapplicable issue, the article is effectively "encouraging modern gambling."

I agree with Mr. Tilles that a number of modern forms of gambling, such as lotteries and casino gaming, do not involve *asmachta*. Does this make *asmachta* irrelevant to the discussion? Hardly. Most *Rishonim* and *Acharonim*, in ruling upon the forms of gambling current in their day, based their decision upon whether or not *asmachta* was involved. In short, the general halachic consensus holds that gambling which does not involve *asmachta* is permissible on an occasional basis. As Mr. Tilles is no doubt aware, the sources for this proposition are cited in the article. Far from being irrelevant, then, *asmachta* is the key issue for determining the permissibility of gambling, whether modern, ancient or medieval.

While this conclusion emerges ineluctably from the sources, I do not believe that restating it constitutes an encouragement of gambling. The article chronicles in detail the concerted efforts of halachic authorities throughout

history to prevent Jews from gambling. Among other sources, the article cites the pronouncement of Rivash that gambling is "disgusting, abominable and repulsive." However, I think it important to recognize that a distinction sometimes exist between activities which are foolish and irresponsible and those which are prohibited by halacha.

Mr. Tilles evidently hoped for an explicit statement that modern gambling is indeed forbidden. For this reason, he expresses disappointment that the article did not further explore the opinion of R. Eliyahu of Vienna. This opinion holds that gambling is only permitted where the stakes of the bet rest on common property of the gamblers; otherwise, the winner will have no mechanism of acquiring the money (i.e., no *kinyan*). Mr. Tilles suggests that this opinion may "fit the casino/lottery situation exactly." I disagree.

Most casino gaming involves no money of any kind but special "chips" that are issued by the casino. When a gambler lays a bet in a casino, he puts forward a number of these chips. Yet, the gambler does not own these chips, nor if he wins the bet, does he own the chips which constitute his winnings. In short, there is no intention on the part of either the gambler or the casino to engage in a formal act of acquisition (*kinyan*). Therefore, R. Eliyahu's point that a lack of *kinyan* renders gambling forbidden would not apply to most casino gambling.

The lottery situation is even further removed from the concerns of R. Eliyahu. Lotteries do not involve inchoate bets. Rather, lotteries involve a sale and purchase transaction, in which a person pays money to acquire a lottery ticket. There is no lack of *kinyan*. The ticket entitles the purchaser to a (small) chance of receiving a large sum of money. This analysis is not my own, but was stated in an oral lecture by R. Aharon Lichtenstein in the name of R. Yosef Ber Soloveitchik.

Finally, Mr. Tilles suggests that, for the article to analyze gambling in "a relevant way," it should have quoted more authorities from the last two hundred years. The implication of this statement, no doubt unintentional, is that the rulings of the Gemara, *Mishneh Torah* and *Shulchan Aruch*, as well as every *posek* who lived before 1796, are somehow lacking relevance. I am certain that neither Mr. Tilles nor any halachic Jew would agree with such a statement.

As for the small number of recent authorities cited in the article, the explanation is simple. First, as a matter of principle, the article is limited to citations of published halachic opinions. Second, gambling involves neither quantum mechanics nor genetic engineering; in other words, it has changed precious little since the days of Ramo and R. Yosef Karo. As a result, modern *poskim* have not been much called upon to reevaluate older rulings in light of new developments. Nevertheless, I am open to education from any quarter. If Mr. Tilles has uncovered a significant number of authorities from the last two hundred years, who have published rulings on gambling which introduce fresh analysis or new halachic issues that were absent from the article, I would be happy to fashion those sources into the follow-up article Mr. Tilles requests.