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The Law of Defamation vs. Rabbinic Prerogatives

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Editor's Note: This past summer, the Federal Court in New Jersey issued a ruling exonerating members of the Rabbinic Court (Beit Din) of Monsey on charges that they had slandered and defamed a man for marrying a second woman while refusing to grant his first wife a get. The implications of that ruling are potentially momentous, as they are discussed herein by the attorney who successfully defended the rabbis.

An individual whom we will refer to as "Husband", for many years refused to comply with the *psak* of a well known *beit din* that he grant his wife a *get* (Jewish divorce). To make matters worse, he remarried, without producing a *heter meah rabbonim,* although he claims he received such a dispensation. (A *heter meah rabbonim* is a document which permits a man to remarry when his wife is unable or unwilling to accept a Jewish divorce.) He has also not written the *get* which inevitably accompanies a valid *heter meah rabbonim.*[1]

The remarried Husband moved with his new wife to Monsey, New York. His children from his first marriage

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1. See *Iggerot Moshe, Even HaEzer,* Vol. 4, no. 3 (*heter meah rabbonim* without a *get* given to a third party is invalid).

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protested to local *rabbonim*,[2] in their capacity as the local rabbinic council (*Va'ad Ha-Rabbonim)*, that their father was openly and notoriously violating the *cherem d'Rabbeinu Gershom*, a thousand-year old ban forbidding a man to have more than one wife at a time. They requested the *rabbonim* to enforce the *cherem* in the very community in which Husband was then living. After offering Husband an opportunity to refute the charges, the *rabbonim* decided to post a notice in each of their synagogues saying the following:

> Husband has taken up residence in the Monsey/Spring Valley community. After numerous conversations with Husband the following facts are clear to us:
>
> 1. [Husband] has never given a Jewish divorce to his [Wife].
>
> 2. [Husband] has since remarried, claiming that he has the necessary permission from a rabbinical court to do so.
>
> 3. [Husband] has refused to tell us the name of the Rabbi who performed the marriage with his second wife.
>
> 4. [Husband] has refused to show us the claimed written rabbinic permission allowing him to remarry.
>
> 5. The issues between [Husband & Wife] were addressed by a reputable *Beit Din* which ordered [Husband] to give a Jewish divorce to his [Wife]. [Husband] has not complied with the order of that *Beit Din*.

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2. One of whom is the editor of this journal, Rabbi Alfred Cohen. The writer was the attorney for the *Va'ad* and most of its individual members.

> 6. [Husband] has refused to inform us of the name of his designated representative to a new *Beit Din* to adjudicate any outstanding property issues between him and [Wife].
>
> 7. [Husband] has repeatedly threatened the *Va'ad Harabbonim* with the bringing of legal actions in a civil secular court.
>
> In light of all of the above it is obvious that [Husband] is not entitled to any honors or participation in synagogue services and that all possible social sanctions should be placed against him until he complies with the orders of *Beit Din* and grants a Jewish divorce to his Wife.

53 F.Supp.2d 732, 735-36, (D. N.J. 1999).[3]

The text of this notice was also placed on the Internet, but it is not clear by whom. (The *rabbonim* insist that they did not do so.)[4] Copies were also distributed at various locations in the neighborhood by others.

Husband responded by suing the *rabbonim*, both individually and as members of the *Va'ad Ha-Rabbonim* (Rabbinic Council). His former wife was also listed as a defendant. Husband alleged that the statements in the poster were false and defamatory and damaged his reputation in the Orthodox community, of which he was part. He sought damages for injury to his reputation in that community.

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3. *Klagsbrun v. Va'ad Ha-Rabbonim.*

4. Affidavits of Rabbis Moses Tendler, Alfred Cohen, Avrohom Pessin and the late Hersch Chapler) filed in *Klagsbrun v. Va'ad Ha-Rabbonim,* 53 F.Supp.2d 732 (D. N.J. 1999).

There are many defenses to a defamation law suit,[5] including, most importantly, truth – which is an absolute defense no matter what the damage to reputation and no matter what the speaker's intent – and a qualified privilege for reporting damaging information to other persons with a common need to know the allegedly defamatory information. The qualified privilege applies only if the statements were made in good faith, and not with any malicious purpose.

In deference to the protection of truthful speech embodied in the First Amendment, the plaintiff in a defamation suit has the burden of proving that the statement of which he or she complains is false. The defendant need not prove truth.[6]

The defense of truth is absolute;[7] if the statements are true they may be repeated with impunity, at least so long as the

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5. It should be emphasized that although there is a substantial constitutional overlay to the law of defamation and privacy, which is more or less uniform across the United States, each state has its own substantive laws of defamation. These differences will likely not matter much in most cases, but will in some. Confronted with the question of whether a particular statement will be actionably defamatory, rabbis should consult a local lawyer – preferably before speaking, not after.

6. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986).

7. Some states recognize a cause of action for the disclosure of purely private facts which are of no public interest. The classic case, still studied in law schools, involves the disclosure that a famous actress had years earlier been a prostitute. She had long since abandoned that trade, and was now a woman of deservedly high repute in the community. None of the facts at issue in the case under discussion here were of this sort, but one could easily imagine hypothetical disclosures by a rabbi or other religious functionary that would implicate such a cause of action, say a *mikveh* attendant disclosing which women went to the *mikveh*. The statement would be true and therefore not defamatory, but it would be private and perhaps actionable. See text at n. 21, *infra*. Let me hasten to add that the discretion of *mikveh* attendants is, as far as I know, exemplary.

facts are not private, even if the speaker repeats the statement with the purpose of harming the subject. On the other hand, the qualified privilege requires both a showing of good faith – that is, that the statement was made without malicious purpose – and is not disclosed to a broader audience than is necessary to effect the salutary purposes of the disclosure.

The defense of truth and the claim of qualified privilege require a factual showing, which may or may not require the burden of a full trial. At the very least, successful invocation of these defenses is likely to engender intrusive discovery into the rabbi's knowledge, beliefs, and purpose in making an allegedly defamatory statement. The burden of proving truth, the entitlement to a qualified privilege, can be substantial both in terms of legal costs and time. No doubt that burden could be borne, but at the likely cost of discouraging other *rabbonim* in other cases from stepping forward and speaking out to correct injustices and/or halachic breaches.

Although qualified immunity and defense of truth were available to the defendants in this case, they chose at the outset to challenge the power of the court to adjudicate a defamation case in which the truth or falsity of religious statements was the crux of the plaintiff's case. That is to say, they argued that because the heart of an action for defamation is the falsity of the statement – in this case that Husband was violating religious law – a secular court could not decide whether a statement about religious practice was false without intruding into religious matters beyond the competence of federal courts.

Pointing to numerous judicial decisions, the defendants argued that the court would necessarily have to decide quintessentially religious questions, such as whether Husband had violated the *cherem d'Rabbeinu Gershom*, whether the failure to write a *get* was relevant, in order to decide if the flyer was false, and therefore defamatory. Deciding those religious questions would have been a breach of the guarantee of the

religion clauses of the Constitution, which have been construed to prohibit government officials, including judges, from deciding what is orthodox in religion.[8]

From the defendants' perspective, this motion had the advantage of not requiring a detailed process of fact finding and discovery. The motion was made under a procedural rule which essentially takes the complaint at face value and asks whether under any circumstances it could lead to a verdict for the plaintiff. If it could not, the complaint is dismissed at the outset and the case goes no further.

The trial court granted the defendants' motion to dismiss:

> To make out their claim, the plaintiffs must prove, inter alia, that the statements made by the defendants concerning his alleged bigamy were in fact false. To determine whether the statements were false, however, this court would be required to inquire into areas of clear ecclesiastical concern. There is no dispute between the parties that the [Husband & Wife] received a civil divorce in May, 1995. The statement concerning [Husband's] alleged bigamy, therefore, was plainly made in the context of the Orthodox Jewish faith. For example, this court would need to inquire into the nature of a *get*, how and under what circumstances it may or may not be given, and who has the authority to grant a *get*. In addition, this court would also be called upon to inquire into the nature and propriety of any special dispensation concerning a person's right to remarry without first giving a *get* to his wife. Determining whether the special dispensation [Husband] allegedly

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8. *West Virginia Bd. of Education v. Barnette*, 319 U.S. 624 (1943). It should be emphasized that in the Court's opinion, "orthodox" is printed with a lower case "o."

> received permitting him to remarry was valid and proper would clearly involve this court in questions of religious doctrine. This court finds that an inquiry concerning [Husband's] alleged bigamy would entail judicial intrusion into ecclesiastical doctrine and practice, which is unquestionably forbidden ground under the First Amendment.

53 F.Supp.2d at 741. Plaintiff has appealed this decision, but there is no reason to anticipate a reversal.[9]

Without question, the decision in this case is an important one for the rabbinate. It is based, first of all, on the federal Constitution, not the vagaries of state defamation law. Although not technically binding upon other courts, it is likely to prove highly persuasive, because it rests on federal constitutional grounds. Second, although not the only modern decision refusing to countenance a defamation suit against a clergyman, it is the first modern one involving the rabbinate. It is also the first, and so far only, case involving the lingering and embarrassing problem of the *Agunot* (wives whose husbands will not give them a religious divorce). One can only hope that the court's holding that the judiciary will not second guess the rabbinate on halachic matters will embolden rabbis to speak up more loudly on behalf of women against whom halacha is invoked as a device for imposing unjustifiable pain.

While the freedom to speak out which follows from the Court's opinion is important, it is equally important to recognize

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9. Husband has also sued another Monsey area *Beit Din* for its determination that he had violated the *cherem d'Rabbeinu Gershom*. That case, *Klagsbrun v. Rabbinical Court, et al.*, Civil Action 97-5003 (D. N.J.), is still pending, but a motion to dismiss on the same grounds as in the first *Klagsbrun* case, and relying on the Court's decision in the case against the *Va'ad*, is pending

the limitations, express and implied, on the Court's holding. In particular, the court did not hold that the guarantees of the Constitution immunize anyone holding a clerical position from the working of laws allowing persons defamed to sue for damages. It may not even reach all religious claims made by members of the clergy which damage the reputation of others. Whether any such total defenses should be recognized (and I am not sure they should or will be), they do not follow from the decision on behalf of the *Va'ad*.

To borrow [parody?] the terminology of Brisk, the holding in this case is not one about the *gavra* of the clergyman, it is about the *cheftsa* of religious statements. That is to say, what made this lawsuit constitutionally defective was not that the defendant rabbis made an *ex cathedra* statement about Husband, believing themselves to be under a religious duty to make those putatively defamatory statements. Such a claim, though plausible, runs up against the current interpretation of the Free Exercise Clause which does not afford special protection to religious practices against enforcement of religiously neutral, generally applicable laws, such as those involving defamation.[10] Rather, the problem was that the statements were intrinsically religious, and their truth or falsity depended on religious judgments. To decide the truth of those statements a judge or jury would have to become a sort of *beit din ha-gadol*, a rabbinic court of last resort. The Supreme Court has made clear that secular courts are constitutionally barred from serving in that capacity.[11]

Consider, however, what would have happened if instead

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10. *Employment Division v. Smith*, 494 U.S. 872 (1990).

11. *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976) (refusing to review decision of church authorities deposing a clergyman).

of pronouncing on Husband's violation of the *cherem d'Rabbeinu Gershom*, the defendants would have insisted that, in their view, a person who beats his wife should be placed in *cherem* and then announced that such and such beat his wife and was in *cherem*. What is likely to be defamatory (if anything) about this statement is the assertion that X beats his wife, not that he is or is not properly subject to a *cherem*. The truth or falsity of a statement about wife beating can be passed upon by a civil court without deciding any religious question whatsoever. Plainly, a spouse falsely accused of domestic violence could sue for defamation. Why should that result be different for a rabbi than for anyone else?

In the end, the statement may not give rise to a claim for damages because it was true, or because it enjoyed the protection of some other privilege. But it would not be thrown out of court under the *Va'ad* decision.[12] On the other hand, if an abusive husband placed under such a ban sued the rabbi for placing him under ban because the rabbi erred in asserting that religious law required a *cherem* under the circumstances, that case would be thrown out under the decision in favor of the *Va'ad* in this

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12. An interesting variant of this problem – what if a *beit din* decides that X is guilty of wife beating and rabbi Y, not a member of the *beit din*, accurately repeats that finding in *shul*, reporting only that the *beit din* has found X guilty of wife beating? That statement is literally true, because the *beit din* had found that wife beating had occurred, although public attention will plainly be on the issue of spouse abuse, not the report of what the *beit din* did. But what if the *beit din* was wrong? The answer to this question goes deeper into the law of libel than is probably helpful here. See, *e.g.*, B.W. Sanford, Libel and Privacy (2d Edition 1997) at § 6.5. At least some protection for "neutral reporting" of false statements of others exist in many, but not all, jurisdictions. See *Greenbelt Cooperative Pub. Ass'n v. Bresler*, 398 U.S. 6 (1970); *Edwards v. National Audubon Society*, 556 F.2d 113 (2d Cir. 1977). See also, text at n. 17 and 18, *infra* (discussing need for negligence by defendant).

case.

Or consider the following variations on a case actually litigated a number of years ago: A merchant sues a *shatnez* laboratory for defamation after the lab announced that the store sold *shatnez*. No suit for defamation could be brought, because a court would have to decide the truth of a variety of religious questions more properly within the competence of the rabbinate than the judiciary. But the case would be much closer, and probably on a different side of the line, if the lab announced that the store owner switched labels showing that a suit contained wool and linen for a label saying that the garment was all wool. The *Va'ad* decision clearly aborts the first suit; it almost certainly leaves the second suit unscathed, even though the Orthodox Jewish listener would react the same way to both pronouncements from the pulpit.

Consider *kashruth*: About fifty years ago in Kentucky, a rabbi discovered that a butcher was washing unsalted chickens in hot water.[13] He announced to his congregation that the butcher was not reliable for *kashruth* and was sued for slander for his efforts. The court threw out the lawsuit without inquiring whether it was true that the chickens were washed in hot water. A rabbi could opine on such matters without being second guessed by the courts.[14] But what if the rabbi said that the butcher was passing off pig meat as beef? While I know of no case on point, this case would present a far closer question because, on its face, it does not require deciding a religious question.

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13. See *Wolff v. Benovitz*, 301 Ky. 661, 132 S.W.2d 730 (1945). See, to the same effect, *Cohen v. Silver*, 277 Mass. 230, 178 N.E. 508 (1931).

14. This case was decided long before the Supreme Court constitutionalized the law of defamation in *New York Times v. Sullivan*, 376 U.S. 254 (1964).

In another *kashruth* case, a butcher was accused of short-weighting packages, and the local *kashruth va'ad* decided it would not certify an establishment which engaged in such illegal (and religiously unacceptable) practices.[15] The butcher sued, alleging, *inter alia*, that the *va'ad* had defamed him. While a court is probably prohibited from ordering the *va'ad* to pronounce the store kosher,[16] this libel suit would probably not be barred under the decision in favor of the *Va'ad*. Whether a package weighs a full pound or only 15 ounces requires resolution of no theological question, and the *Va'ad* case is probably no bar to the defamation suit, although, of course, truth and other defenses remain.

When one reads defamation suits against clergymen, even where the courts refuse to adjudicate the truth or falsity of religious claims, one senses a sense of disquiet. Judges no doubt know, for example, that a proclamation by a rabbi or *va'ad ha-kashruth* that a butcher is selling non-kosher meat can destroy a butcher's livelihood. They are left to speculate whether the proclamation is made for legitimate motives and with due care; or whether it is based on nothing more than rumor and innuendo; or is motivated by a selfless desire to aid a competing butcher who is a member of the rabbi's congregation; or, less admirably, whether the statement may have been motivated

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15. *Bloss v. Va'ad HaRabbonim of Riverdale*, 203 A.D.2d 36, 610 N.Y.S.2d 197 (1st Dept. 1994). The court did not address any constitutional issue, since the issue before it was the validity of a release against further litigation. There are also other contractual issues pending before the court.

16. There is, however, one dubious case in which a theological seminary was ordered to confer degrees (and therefore ordination) on candidates the faculty considered morally unfit, because the school did not abide by contractually obligatory procedural safeguards before imposing the sanction of refusing a degree. See *Babcock v. New Orleans Baptist Theological Seminary*, 554 So.2d 90 (1994).

by personal pique or for the purpose of furthering the speaker's personal pecuniary interest.

Refusing to inquire into such decisions is the price of religious liberty, but courts will be more confident if they are shown that the "target" of the pronouncement had an opportunity to challenge the claim of improper religious conduct before it was publicized, and that the speaker was not motivated by a corrupt motive.[17] Since halacha, too, generally requires an opportunity to be heard, and, of course, forbids the taking of bribes, it is painful to read of allegations that *batei din* have made pronouncements about people's religious behavior – allegations which can turn a person's entire life upside down – without giving them a meaningful opportunity to be heard.

Those claims are often controverted, but there should never be room for question on this score, not only as a matter of halacha and fundamental fairness, but simply as a way of insuring that religious prerogatives of *batei din* will be respected by the courts. Moreover, if the parties are given an opportunity to be heard, and agree to resolve their dispute before a *beit din*, as either mediator or arbitrator, the judge of the *beit din* would enjoy immunity from suit conferred on all mediators and arbitrators.[18]

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17. While the Supreme Court has held that church authorities' disciplinary actions can generally not be reviewed by secular courts, it has reserved the question of whether that rule would apply in a case in which it was shown that the actor was motivated by personal financial gain. In *Eastern Serbian* there was also an opportunity to be heard; the Court refused to consider the further claim that the removed bishop had not had all the process the denomination's own rules provided. The Supreme Court saw no evidence of corrupt motive in that case. A claim that a *Beit din* accepted a bribe to issue a decision unfavorable to the plaintiff is, however, made in *Sieger v. Union of Orthodox Rabbis*, Index No. 605639/98 (Sup. Ct. N.Y. County 1999).

18. See, *e.g.*, *John Street Leasehold v. Brunjes*, 234 A.D.2d 26, 650

If this is not enough, there is another self-protective reason for taking these steps. The Supreme Court has held that even in a defamation suit against a purely private party, that is, someone who is not a well-known public figure, the states may not allow liability in a defamation suit to arise without fault of the defendant.[19] That is, the bare fact that a statement is false is not enough to give rise to liability. There must be at least some fault, some negligence, some dereliction, on the part of the defendant, some failure to make a reasonable attempt to ascertain whether the statement is true. In many states, simple negligence is enough for a plaintiff to win a defamation suit. In others, including New York, a higher standard of fault is necessary, for example, "gross irresponsibility."[20] Giving a target of a defamatory statement a pre-publication opportunity to respond, and then soberly investigating his or her claims, is likely to be sufficient to satisfy either standard and provide yet another defense against a defamation action.

Another issue not reached in the *Va'ad* case bears consideration. In that case, the plaintiff alleged in his complaint

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N.Y.S.2d 649 (1st Dept. N.Y. 1996); *Austern v. Chicago Bd.*, 898 F.2d 882 (7th Cir. 1988); *Cimijotti v. Paulsen*, 230 F.Supp. 39 (D. Ia. 1964), aff'd 340 F.2d 613 (8th Cir. 1965) (ecclesiastical tribunal); *Comins v. Sharkansky*, 38 Mass. 37, 644 N.E.2d 646 (App. Ma. 1965). Whether a formal consent to mediation is necessary or whether the test is a functional one is at issue in another case involving a *Beit din*, *Sieger v. Union of Orthodox Rabbis*, *supra.*

19. Assume a statement, made pursuant to a legitimate halachic objective, is one of fact ("this store buys from supplier X, who is concededly unreliable on *kashruth* matters"). Unfortunately, this statement turns out to be mistaken. Again, if a responsible investigation was undertaken, and there was no negligence in its making, there will be a constitutional defense of the absence of fault. *Gertz v. Robert Welsh, Inc.*, 418 U.S. 223 (1974); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976).

20. *Chapadeau v. Utica Observer-Dispatch*, 38 N.Y.2d 196, 341 N.E.2d

that he was an Orthodox Jew. There was no claim in the case – which involved a declaration that Husband would not be allowed to participate in the religious, social and economic activities of the local Orthodox community – that the defendants had not promiscuously spread the allegedly false statements beyond what reasonably might be necessary to carrying out the legitimate role of the rabbinate. (The announcement was posted by someone on the Internet, but Husband did not allege, and the defendant rabbis all denied, that they had anything to do with this posting.)

But what if the rabbis had not so limited themselves? What if they had spread the word by taking out an ad in *The New York Times* or *People Magazine*? What about the *Jewish Press*, or *Yated*? Would that make a difference? The simple answer on the facts and rationale of the decision is that it would not. Even if the rabbis had broadcast their condemnation of Husband to the world, a court could not find the publication defamatory without determining the truth of religious propositions, which the *Va'ad* decision correctly held was beyond its power. But in a case not controlled by this decision – say an allegation of spousal abuse – the scope of dissemination of the libel may be crucial.

The common law of defamation recognizes another defense to a defamation action – that the communication was only to interested parties who have a need to know. As one treatise on the law of defamation puts it, a publication, even if false, will be privileged if it is made "where under ordinary social standards a reasonable man would feel called upon to speak,"[21] a rubric that should include clergy warning congregations about,

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569 (1975).

21. B.W. Sandford, Libel & Privacy, 2d Ed. (1997) at 10.5, p. 522.1. For an interesting application, see *Rude v. Nass*, 79 Mass. 321, 48 N.W. 555 (1891), cited *id.* at n. 285 (clergyman asked about character

for example, the behavior of a merchant dealing in ritually unacceptable items.

To claim this privilege, the statement cannot be broadcast to the whole world, but only to persons with a common interest. In today's mobile Orthodox community, cabining the exact scope of this privilege will be difficult. In those cases where a rabbi or *va'ad kashruth* feel obligated to speak out to the detriment of an identifiable individual, they should give careful consideration to the extent to which they disseminate their statements.

If life were so simple as to only include defamation actions, the world would need far fewer lawyers. Defamation suits are not the only possible threats. Invasion of privacy claims are also a real possibility. Take a case in which allegations are made in the middle of a divorce that the wife has had an affair. The rabbi summons all the relevant parties and the woman, Hester Prynne, concedes the truth of the allegation.[22] The rabbi subsequently informs his congregation that Prynne is an adulteress, and that she will be expelled from membership in the congregation for her sins. Before this announcement is made the woman resigns as a member of the congregation. The announcement is nevertheless made.

Prynne then sues the rabbi for disclosing purely private facts. The rabbi's defense is that the congregation had a common interest in knowing which of its members is an adulteress, perhaps so that others will not marry this woman. Result? On almost identical facts, the Oklahoma Supreme Court held that

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of potential suitor).

22. It is at least arguable that halacha precludes giving credence to this confession, see Mishnah *Nedarim* 80b. Be that as it may, the halachic point has no bearing on the civil law consequences. A civil court cannot decide whether halacha bars or permits certain

since the woman had resigned her membership in the congregation (there, a church), the minister had no right to disclose private facts after her resignation, even though such disclosure was part of the church's ordinary disciplinary policy.[23]

I am not entirely persuaded that the result reached by the Oklahoma Supreme Court's decision was correct. The minister (and church elders) had a legitimate interest in demonstrating to fellow congregants that they acted responsibly in excluding the plaintiff adulteress from membership. Friendships formed in church were likely to continue even after plaintiff's resignation unless it became known why the member resigned. And, of course, there is the interest in letting other believers know that the church takes adultery seriously, will not allow it to go unremarked, and that the consequences of sin include exclusion from the church.

The court believed, however, that a judicial decision allowing the statement to be made was at odds with the idea that religious affiliations are voluntary and can be unilaterally terminated at any time. For better or worse, my views of what Oklahoma law should be do not count for much. A prudent rabbi should probably give more weight to the views of the Oklahoma Supreme Court than to my critique of it.

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confessions to be believed.

23. *Guinn v. Church of Christ*, 777 P.2d 766 (Ok. 1989). *Cf. Alberts v. Devine*, 395 Ma. 59, 479 N.E.2d 113 (1985) (holding bishop liable for obtaining priest's psychiatric records). The issue is, of course, raised in a rabbinic context in *Lightman v. Flaum*, New York Law Journal, November 24, 1998, p. 29; 687 N.Y.Supp.2d 562 (1998), appeal pending. *Lightman* is made more complicated because of allegations of a breach of confidence.

Gramma in Halacha

Rabbi Tzvi Sendler

A number of significant halachic issues have arisen with the increasingly wide-spread use of new technologies in every facet of the modern world, along with the corresponding advances in the complexity of such technology. One such issue is defining the border between *ma'aseh adam* – an action considered to be directly performed by man – and that of *gramma* – an indirect (halachically-speaking), or simply causative accomplishment of a given action. The examination of this issue requires a knowledge of both the exact operation of the technology in question, and even more importantly an understanding of the underlying halachic principles which define and classify such actions as being in one category or the other. This article will focus primarily on this topic in regard to *melechet Shabbat* ("work" on the Sabbath). Many other areas of halacha however, are also pertinent to this discussion.

From the fact that the Torah proscribes *melacha* on Shabbat with the words *lo ta'aseh kol melacha*, "you shall do no work", the Gemara derives that a Torah prohibition (and punishment) occurs only when there is direct action on the part of man in accomplishing a specific *melacha*.[1] The Gemara brings an example of *indirect* causation of *melacha* (*gramma*): if one intentionally set up vessels filled with water which break open upon the arrival of an oncoming fire and thereby extinguish it

1. *Shabbat* 120b.

Rosh Kollel, Yeshiva of Hamilton, Ontario.

– the dousing of fire is an action which if done directly would be a violation of Torah law,[2] yet when done in this indirect fashion (*gramma*) is not similarly culpable.

It is important to note that what is included in the Torah definition of *gramma* does not necessarily correspond to our intuitive perception of what may be considered indirect, and conversely an outcome which may appear to be a very direct consequence of an individual action may in fact be classified by the Torah as *gramma*. In addition, there are many differing categories of *gramma* as expressed by halacha, with the parameters of each category drawn from cases in a variety of differing halachic areas in addition to *hilchot Shabbat*, including *nezikin*, murder, *yayin nesech*, and *shechita*. The comparison, contrast, and halachic equivalence of these different sources provides much discussion among *Rishonim* and *Acharonim*.

Although there is no Torah prohibition insofar as Shabbat is concerned for those actions which are indeed viewed as *gramma*, there nevertheless exist differing rabbinic strictures which limit the extent of permissibility of *gramma*. As will be discussed below, there are categories of *gramma* which are rabbinically forbidden under all circumstances, others which are permitted in order to avert *hefsed* (loss), while still others which are completely *mutar* (permissible). It is thus important not only to clarify, but also to classify the respective types of *gramma* according to their specific parameters.

I) Categories of Direct/Indirect Action

1) Gufo (Direct Action) – The most direct form of individual action is that where the action is accomplished through the force exerted concurrently and without physical separation from the body (*guf*), or extension of body, of the individual. Examples

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2. Assuming *melacha she'ain tzorech legufo* to be *chayav* on Shabbat.

would be:

• Damage resulting from anything attached to, or held by, the body of the individual. [3]

• Pulling an object with rope.[4]

2) Kocho (Force) – A force which is produced or initiated directly from physical action of individual, even though spatially or temporally removed from that initial action, is referred to as *kocho.* Examples would be:

Blowing air at, or throwing a stone, to break an object.

Shooting an arrow or dropping an object and causing damage – even though the action of the individual is simply one of release. Since potential force already exists, release of such is considered *kocho.*[5]

With the exception of *nezikin* (damages), where a specific Torah exception is made in certain cases, one is as responsible for those actions accomplished through *kocho* as through *gufo.* Thus any *melacha* achieved through *kocho* (e.g. igniting a burning ember by blowing upon it), is viewed the same insofar as Shabbat is concerned.[6]

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3. *B.K.* 17b; *Teshuvot HaRosh* 101:5.

4. *B.K.* 17b. See *Tosafot Rabbeinu Peretz* that even though distanced from the animal itself, still a cart pulled through a rope tied to the animal is considered *gufo.* See also Raavad, who implies that anytime there is a connection to the animal, even though the attached object is not continuously pushed or pulled by the animal but even kicked, it is still considered *gufo*.

5. *Chazon Ish, Baba Kamma* 1:2.

6. A separate issue exists as to *kedarcho* – that a *melacha* must be performed in the normal fashion in order for the Torah to consider one liable. A *melacha* accomplished with *kocho* (for instance throwing a knife to kill an animal rather than doing it by hand), or for that

3) ***Aish* (Fire)** – Fire is a force which is created by man, which may act upon an object removed from its initial source of creation through movement by an outside force. Examples of *aish* mentioned in the Gemara insofar as liability for damages (*nezikin*) include:

- Fire which is driven by commonly present wind.
- An object which is set upon a roof (creation of potential force), and blown off by wind to cause damage.

Tosafot [*B.K.* 56a] add that there is no difference between setting the fire itself, and placing an object in the path of an oncoming fire, insofar as responsibility for resulting damage is concerned.

Concerning damage (*nezikin),* the Gemara concludes that *aisho mishum chitzav* – the damage caused by a fire set by an individual is as if he caused that same damage by releasing an arrow – a direct performance of action. *Rishonim* disagree as to whether this conclusion would apply similarly to other areas of halacha.[7] Whether a given action accomplished through fire set by a person would be considered a full *melacha* or merely *gramma* on Shabbat would be similarly dependent upon this dispute. Some examples of such actions would be:

- Moving a lit candle to a location where an oncoming

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matter any type of *gramma,* might therefore be *patur* (exempt) as a result of this halachic exception apart from any question of *gramma* itself. See however, *Eglei Tal* (*Melechet Tochen* 5), who limits the extent to which the exemption of *kedarcho* may be applied in cases of non-direct action.

7. *Nimukei Yosef (B.K.* 21a) questions why it should be permissible to light a fire on *Erev Shabbat*, since the continued burning on Shabbat itself is considered as if completely done by man. Ran however (*Sanhedrin* 77a) states that the results of *aish* (fire) are only considered *ma'aseh adam* (human action) by *nezikin*, but not elsewhere.

wind will subsequently extinguish it.

• Putting a combustible in the path of an oncoming fire (or perhaps equivalently, installing a light bulb in a socket where the current will be automatically turned on at a later time)[8].

• Putting grain kernels to be ground in water or a wind mill, where the mill will later be turned by the approaching wind or water.[9]

It is important to note that the very fact that a *melacha* is accomplished only after a delay of time from the initial action of the individual is not necessarily a determinant as to whether the action is ultimately considered *ma'aseh adam* or *gramma.* Thus, one who spreads a net in the path of an oncoming animal (in a manner such that the animal is sure to be caught – see Tosafot *Shabbat* 17b s.v. *aleh)* is culpable even though the actual capture does not occur until after a lapse of time from the original action.

4) ***Koach Kocho (*Secondary *Koach)*** – If a primary force (*kocho*, as above) does not itself result in a final consequence, but rather initiates a second force which leads to the end result, this chain of action is referred to as *koach kocho.*[10] Examples of

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8. Since however, the current is not even in existence yet, this example may be more similar to the Gemara's example of one sinking the teeth of a snake into the limb of another , where the damage (or death) caused is considered only *gramma*, as the venom is not produced without a further action on the part of the snake. See Tosafot *B.K.* 56a.

9. This case is also dependent on the issue of *koach acher m'urev bo* – see (6) below. See also *Eglei Tal* (*Melechet Tochen* 5).

10. A chain of actions however, where one force is mechanically transferred to other components as one continuous force (e.g. set of gears where turning first gear simultaneously moves others in chain),

this given in the Gemara are:

> • Throwing an object into a tree and thereby breaking off a clump of fruit, which then falls and kills one standing on the ground beneath. (*Makkot* 8a)
>
> • Kicking one object into another and breaking it (*kocho*), with a fragment of the broken object going on with the energy imparted to it through the collision to damage a third. (*B.K.* 18a).

In the first example (accidental homicide) the Gemara rules that one is exempt from the punishment of exile for such an action – i.e. that *koach kocho* is not equivalent to *kocho*. The second case is subject to a dispute among *Rishonim*. Rosh rules that accidental murder is an exceptional case, but generally *koach kocho* is identical in halachic liability to *kocho* alone.[11] Ritva on the other hand (and also Tosafot as brought by Rosh), seem to understand that *koach kocho* is not technically considered *ma'aseh adam* (human action) at all.[12]

Most authorities seem to accept this more lenient opinion for *melechet Shabbat*, considering *koach kocho* on Shabbat to be

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is considered *kocho*, not *koach kocho*. See *Chazon Ish (B.K.* 2).

11. *B.K.* 2:2.

12. *Makkot* 8a. See Rambam (*Peirush haMishnayot*) who explains that *koach kocho* in such a case is considered *ones* (completely non-negligent) and is thus exempt from culpability. By extension, it would seem according to Rambam that if one intentionally performed any action (including *melechet Shabbat*) through *koach kocho*, there should be no such halachic exemption from responsibility for that action. See *Tevuot Shor* [3] who is unsure whether Rambam would deem an act of *shechita* which is intentionally accomplished through *koach kocho* to be considered as *ma'aseh adam* or not– *ma'aseh adam* being a requirement for a kosher *shechita*.

gramma and not true *ma'aseh adam*.[13] Some contemporary examples (see below (II) for possible limitations) of the concept of *koach kocho* are:

- Thermostat control of oven – Upon opening oven door, cooler air enters (*kocho*), eventually activating thermostat to open valve or circuit to light fire (*koach kocho*). (See below III (3) for greater detail).

- Electric bell – Depressing switch closes circuit and allows current to flow (*kocho*). Current magnetizes bell, drawing clapper close to it to make sound (*koach kocho*).[14]

Although generally *gramma* is permissible on Shabbat only to avoid loss, there are authorities who are lenient concerning an action accomplished through *koach kocho* in all circumstances where the *melacha* itself is only rabbinically prohibited.[15]

5) ***Koach Sheni* (Continuation of Primary, or Secondary Force)** – *Koach sheni* refers to continuation of a force which was initiated by an individual, where the initial imparted energy is spent, yet a secondary action continues as a result of sustained momentum or some other tangential source of energy. The prime example of this concept provided by the Gemara is that of *bidka demaya* – a barrier to hold back water, which when removed by human hand allows the previously standing water to rush forth. The first surge of water is considered to be *koach rishon*, a primary force of man, equivalent to *kocho*.[16] The secondary flow of water (i.e. the water which

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13. *Ohr Sameyach* [*Hilchot Shabbat* 9:2]; *Achiezer* [3:60]; *Avnei Nezer* [*Orach Chaim* 230].

14. *Tzitz Eliezer* 1:20.

15. Ibid; *Minchat Shlomo* 9.

16. Although there are some authorities who consider even this first surge to be no more than *gramma* insofar as Shabbat is concerned,

continues its flow after the initial surge, or the water which does not rush forth immediately with the removal of the dam) is referred to as *koach sheni*, and is not considered by the Gemara to be a direct action of man, at least as far as strict liability for an ensuing death is concerned.[17]

Although the terms *koach sheni* and *koach kocho* often seem to be used interchangeably, there are in fact significant differences between the two. *Koach sheni* is more removed from *ma'aseh adam* than is *koach kocho*, and as such, is viewed with even greater leniency on Shabbat. Thus, even those authorities who may be stringent and regard *koach kocho* on a par with *kocho* insofar as Shabbat is concerned, might well agree that *koach sheni* is indeed to be considered as a *gramma*.[18] Some examples of *koach sheni* relevant to Shabbat are:

- One may pour water into a privat domain (*reshut hayachid*) on Shabbat (*kocho*), even though the water will surely roll afterwards into the public domain (*koach sheni*).[19]

- Completing an electrical circuit with the physical connection of wiring (e.g. turning on a conventional light switch). The first flow of electricity would be considered *kocho*, but the continuing flow of current

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most authorities nevertheless equate *koach rishon* with *kocho*. See *Chazon Ish B.K.* 2:16.

17. *Sanhedrin* 77b. See Tosafot *B.K.* 4b s.v. *vaima* who extend the exemption of *koach sheni* also to *nezikin.*

18. *Mishpetei Uziel* Vol. 2, *Orach Chaim* 32.

19. Rashi *Eruvin* 88a s.v. *hatam taimi maya*. *Orach Chaim* 357. See *Shemirat Shabbat KeHilchata* 12:18 for similar examples. Even though generally even *gramma* is forbidden except in cases of loss or other great need, perhaps since there is no desire that the water travel to a different area (*davar she'aino mitkaven*) in such a case *gramma* is entirely permissible. See below II -2(3).

should apparently be considered *koach sheni*.[20]

6) ***Koach Acher M'urav Bo* (Assistance of Outside Force):** Generally, if *melacha* is accomplished on Shabbat through the joint action of two individuals, where each would be unable to accomplish the action unilaterally, both individuals are independently responsible for that *melacha*.[21] Thus, two individuals who carry a heavy load together outside are both guilty of the transgression. A *melacha* performed with the assistance of an outside force instead of that of another individual is not comparably viewed as a partnership, and may well have a different status in halacha.[22]

The *melacha* of *zoreh* (winnowing) is commonly accomplished by throwing trampled grain into the air, and allowing the wind to separate and blow away the lighter chaff from the heavier kernels of grain which fall to the ground.

The Gemara (*B.K.* 60a) questions the difference between evaluation of *zoreh* insofar as liability for damages is concerned, where the individual who throws the grain into the air is apparently not liable for damages incurred by the scattered

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20. Although one might differentiate between the removal of a barrier (*bidka demaya*)and the creation of a bridge (i.e. creation of circuit), it would seem from the aforementioned example (continuation of movement of water) that this is not so. See *Pitchei Choshen – Nezikin* 3:1 [3].

21. Rambam *Hilchot Shabbat* 1:16. See Tosafot *Shabbat* 93a s.v. *amar mar*, that even if the individual has the ability to do the *melacha* alone, but is doing it in such a way that his action is not sufficient (e.g. he is only using one finger to carry a load, and is thus not able to carry it alone), it is still considered as *aino yachol* – that he alone could not do the *melacha*.

22. See *Eglei Tal – Melechet Choresh* (beginning), *Melechet Zoreh* 4:3. See however, Tosafot, *B.K.* 60a s.v. *vahacha*, who seem unsure about this differentiation.

chaff, and the laws of Shabbat where the thrower is culpable for the *melacha* of *zoreh*. The final opinion, of Rav Ashi, explains that the action of *zoreh*, since it is accomplished only with the assistance of an outside force, is considered as *gramma* only and is thus exempt from (strict) financial liability for damage. The Torah criterion for *melechet Shabbat,* however, is based on deliberate accomplishment of action, (*melechet machshevet assra Torah).* One is therefore liable even for an act which would otherwise technically be classified only as *gramma.*

How to apply the dictum *melechet machshevet assra Torah* is the subject of a very basic difference of opinion among halachic authorities. Rosh understands this stringency to apply exclusively to a *melacha* such as *zoreh*, where the standard accomplishment of that *melacha* is performed in such a manner. The Torah here elevates an action of *gramma* to that of *ma'aseh*. Generally, however, a *melacha* which is only accomplished with the aid of an external force would in fact be viewed as *gramma* on Shabbat. *Even HaOzer* however, views the standard of *melechet machshevet* to be met in any instance where there is intention that a given action be accomplished, even though it may have the technical characteristics of *gramma*.[23] Examples where this distinction arises are:

- Putting grain in a mill to be ground, where the movement of the mill derives from wind or water, and not human power. According to Rosh, since this is not the standard manner in which the *melacha* of grinding is performed, and since the grinding is accomplished only through *koach acher m'urev bo*, this action would in

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23. *Orach Chaim* 328. Although *Even HaOzer* states his limitation of *gramma* specifically in cases of *koach acher m'urev bo,* later authorities discuss whether these limitations (i.e. where there is intent that the *melacha* should occur) would apply in other cases (described above) of *gramma.* See below (II-3).

fact be merely *gramma*.[24] Since the action of grinding is one's primary aim and is being done with full intention, however, *Even HaOzer* would classify this as a true *melacha*.

• Placing a leech on the skin of an individual to draw blood – *Even HaOzer* brings this case as another example of an action which would otherwise be classified as *gramma*, but where one is in fact culpable, being that the drawing of blood through the aid of the leech is one's intended action (and is a certain consequence of the placement of the leech on the flesh).

Later authorities are divided as to the acceptance (and extent of application) of the stringency of *Even HaOzer*,[25] as will be discussed hereinafter.

7) **Removal of Barrier to Allow Not-Yet-Present Force to Act** – Even though according to many it is forbidden on Shabbat to create a force which will perform a *melacha* (see *aish* above), or even to place an object in a manner to be acted upon by an oncoming force, the situation may well be viewed

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24. *Magen Avraham* 252:20. One must explain why *zoreh veruach mesiayo* (threshing accomplished through aid of wind) is not comparable to *aish* – where an external force also completes the action (the movement of the fire towards the combustible). See Tosafot (*B.B.* 26a) who differentiate between *aish,* where the agent of action is fully created by man and simply moved by the wind, and *zoreh*, where the whole *melacha* is accomplished only through the assistance of the wind.

25. *Achiezer* 3:60, and *Magen Avraham* op. cit. do not follow the position of *Even HaOzer*, while *Biur Halacha* 252 s.v. *lehashmaat kol* is inclined toward the more stringent opinion. Even *Biur Halacha* however, expresses doubt when the action is even more removed from *ma'aseh adam* – i.e. the wind is not yet present to move the mill, or the grain does not go immediately into the grinding area.

differently if one's action does not affect the *poel* (acting force) or *nif'al* (item to be acted upon) directly. The Gemara (*Sanhedrin* 77b) writes that one who removes a barrier shielding another from an oncoming arrow (even if the arrow was originally released by that same party!) is not strictly liable for an act of murder. Similarly, one who removes pillows from the ground in the path of a falling object is not liable for subsequent breakage of that object (*B.K.* 26b). Unlike the case of *bidka demaya*, where a force (*koach rishon*) is released concurrently with one's removal of the barrier and is indeed considered to be a direct act of man (see above), here no direct manner of action nor release to either the *poel* or the *nif'al* is accomplished with one's action. Examples of such actions relating to Shabbat would include:

- Opening a window situated in front of a candle at a time when wind is not blowing, but is expected to come at a later time.[26]

- Moving a light switch to the on position at a time when current will not flow (and light will not go on) due to timer setting, but which will allow light to turn on later, when the timer activates.

- Opening a skylight allowing rain to come through at a later time and water plants.

Just as in other areas of halacha, one is not strictly liable for damage resulting from removal of a barrier (where the active force is not released immediately), so, too, for Shabbat, authorities consider such actions to be categorized as simple *gramma* and not full *ma'aseh adam*.[27]

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26. See *Orach Chaim* 277:1 that there is special *gezerah* in this case lest one come to mistakenly open it at the instant that wind begins to blow.

27. *Minchat Shlomo* 41; *Yechava Daat* 5:29; *Shmirat Shabbat Cchilchata*

8) **Action to Maintain Current Status/Prevent *Melacha* from Occurring** – In all categories of action heretofore discussed, some manner of *melacha* was indeed accomplished through human action, albeit through indirect means of a greater or lesser degree. Generally speaking, even those actions which are in fact classified as *gramma* are not deemed wholly (i.e. rabbinically) permissible on Shabbat. An action though which does not accomplish a positive act at all, but simply forestalls or prevents the occurrence or negation of a *melacha*, is not viewed as a forbidden act in any way and is completely permissible. [28] Some examples of this category of non-action are:

- Closing the window in front of a flame and thereby not allowing wind to extinguish it.[29]

- Removing a clock which is set to turn a light switch off with movement of clock hand, thereby allowing light to remain on beyond time that it would otherwise go off.[30]

II) Possible Limitations In Application Of Gramma

Although there a number of categories of action described above which may technically meet the criteria for being considered *gramma*(indirect causation), rather than *ma'aseh adam* (direct human action), insofar as Shabbat is concerned, there are still a number of limitations which must be examined before

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13:28 (103*).

28. *Minchat Shlomo* 10; *Tzitz Eliezer* 8:12.

29. *Mordechai, Shabbat* 400; *Terumat HaDeshen* 59.

30. *Shmirat Shabbat Kehilchata* 13:(103). Since a clock may be considered *muktzah* to the extent that it should not be moved other than for its own sake, perhaps one should only move it *k'lacher yad* (with change in movement). See also *Iggerot Moshe Orach Chaim* 4:60.

any leniencies regarding Shabbat strictures are applied:

1) Ramo states that to deliberately accomplish *melacha* through *gramma* on Shabbat is permissible only in order to avert property loss (*hefsed)*, such as the talmudic example of placing water-filled containers to extinguish oncoming flames.[31] Contemporary authorities extend this decision of Ramo to apply in any case of great necessity (*tzorech gadol)*, sickness (even non-critical), or for the purpose of fulfillment of mitzvah.[32] Although these restrictions are not as severe as that of other rabbinic prohibitions of Shabbat, nonetheless some level of probhibition would still apply.

2) Many times, especially with the advances of modern technology, an action may occur which superficially may appear to be a direct action of man, yet upon closer inspection is seen to be composed of many discrete and separate activities. For instance, the motion of an automobile is perceived to be a direct and concurrent result of the control, via the gas pedal, of its driver. In reality though, the depression of the accelerator is simply the beginning of a chain of individual events (depression of gas pedal widens opening of valve, which allows more gas to be drawn into compression chamber with addition of regulated quantity of air, which upon downstroke of piston is ignited via separately timed sparking device to produce explosion which further drives individual pistons...) which ultimately produces the movement of the wheels of the auto. If examined in detail, such a chain of actions might well fall under the parameters of *koach sheni* or *koach kocho* – actions which on Shabbat are deemed by many authorities to be only

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31. *Orach Chaim* 334:22. . See however, *Taz*, 514:6 (brought in *Shaarei Tzion* 514:31) that *gramma* is permissible in all circumstances.

32. R. Shlomo Zalman Auerbach (brought in *Shemirat Shabbat Kehilchata* 13:(91)).

gramma.[33]

How we view modern mechanical devices, which essentially consist of a black box whose inner working may be unknown to the user, yet which accomplish *melacha* (burning, in the example of the internal combustion engine) as a result of human action, is critical to the application of *gramma* in halacha. All cases of *gramma* cited in the Gemara are actions in which the indirect nature of accomplishment is clearly distinct and readily perceived (e.g. an object is thrown which strikes a second object which goes on to achieve the final result). Whether the guidelines of *gramma* apply equally in a situation where the indirect nature of an action is not readily apparent is open to question.[34]

All would agree that on a most basic level the exact mechanism of a given action must sometimes be overlooked when viewing the action as a whole. (For instance, the breath of a person is considered *kocho* and not *koach kocho*, even though in actuality it is made up of separate molecules which serially strike and impart their energy to one another, creating what is perceived by the observer as the continuous motion of air.) Beyond that most basic level, however, most authorities do

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33. See article by R. S.Z. Auerbach in *Ateret Shlomo* (*Sefer zikaron*) vol. 2 on production of electricity via a diesel engine, where he concludes that the operation of such an engine is, strictly speaking, *gramma* in nature.

34. See *Teshuvot HaRosh* 101:5, who considers the rider of a horse liable for all damage caused by the animal itself, seemingly because the movement of the horse is perceived as completely and inseparably directed by and connected to the rider. See *Chazon Ish* (*B.K.* 4:8). See also *Pitchei Choshen – Nezikin* 3:1 who discusses this issue regarding liability for damages caused through such means. A similar idea is found within other areas of halacha, for instance the halachic lack of concern with (apparently) non-kosher microscopic animals, where the human observer's perception (or lack thereof) of a given situation is the prime determinant of its halachic status.

take into account the inner workings of a given device in terms of determining whether its operation constitutes *gramma* or *maaseh adam*.[35]

3) As mentioned above, the Gemara's statement of *melechet machshevet assra Torah* limits the extent to which *gramma* applies to *melechet Shabbat*. According to the more strict understanding of this limitation, that of *Even HaOzer*, any action intentionally accomplished with the aid of an external force is deemed *ma'aseh adam* and not *gramma*. Later authorities extend this stringency to varying degrees. R. Chaim Ozer explains *Even HaOzer* to mean that any mechanism which is designed specifically to perform a given act (*melachto bekach*), even though its operation may technically be *gramma*, is considered *melechet machshevet* (intentional action) and therefore fully *ma'aseh adam*.[36] Any device which is built to perform a specific function (such as the automobile engine described above), regardless of specifics of its operation, could not qualify for this action to be deemed, leniently, as *gramma*. Only a more singular act of *gramma* would, in fact, be considered *gramma* according to this definition.

Others go even further in limiting the applicability of *gramma*. *Yeshuot Yaakov* considers no action to be mere *gramma* unless it is an unintentional consequence of some other act.[37] Setting up vessels to douse the fire as it progresses is *gramma* because one's primary intention in placing the vessels is to create a barrier between the fire and one's possessions – not to extinguish the fire. Similarly, the flow of water into the public domain is not the objective of one's pouring that water into the private sector (see I-(4) above) – even though the secondary

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35. Rav Auerbach op.cit.; *Iggerot Moshe Even HaEzer* 4:73; *Tzitz Eliezer* 1:20:10.

36. *Achiezer* 3:60.

37. *Yeshuot Yaakov* 344; *Shiltei Giborim Shabbat* 120b.

flow may be a certain consequence of the initial action.

The explanation of *Even HaOzer* according to both *Achiezer* (R. Chaim Ozer Grodzensky) and *Yeshuot Yaakov* (R. Yaakov Ornstein) would significantly curtail the applicability of *gramma* in many contemporary situations. However, contemporary authorities do not seem to accept these more narrow definitions of *gramma*, at least insofar as Torah law is concerned.[38] Some authorities do, however, apply a more basic rabbinic prohibition (without the leniencies of standard *gramma*) with those devices whose standard method of operation is through *gramma* (i.e. *melachto bekach*). Our automobile engine therefore, even though (perhaps) strictly satisfying the requirements to be considered *gramma*, would nonetheless be rabbinically prohibited without exception.[39]

4) As with any apparently new or far-reaching halachic leniency, *gramma* must be examined in light of its overall potential effect on the spirit of Shabbat. Actions which might be deemed technically permissible on Shabbat because of *gramma* (in those cases where even *gramma* is permissible on Shabbat) might nevertheless be frowned upon, or even forbidden by halachic authorities, because of the concern that they might lead to *zilzul Shabbat* – a lessening of the proper Shabbat atmosphere. Although it might well be possible to develop a *gramma* phone or even a *gramma* car for use on Shabbat (see discussion of *gramma* switch below), one can only imagine the effect on the spirit and purpose of Shabbat that such inventions would engender. In addition, halachic decisions based on specific mechanisms of operation would be highly sensitive to differing technologies – a situation certain to lead to great confusion and mistaken impressions by the public.

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38. *Tzitz Eliezer* 1:20; *Iggerot Moshe Even HaEzer* 4:73.

39. *Ateret Shlomo*, 1st essay.

These concerns have been raised by contemporary authorities in regards to numerous issues, and would surely be applicable to broad leniencies involving *gramma* too.[40]

III) Applications

With an understanding of the different categories of *gramma*, and an awareness of some general limitations in application thereof, we may examine the halachic standing of some common devices in regards to their use on Shabbat.

1) "Shabbat clock" – Although the setting of a timer from before Shabbat to operate electrical appliances or lights on Shabbat itself is commonly accepted practice,[41] the question of adjusting such timers on Shabbat itself is less clear:

a) Moving the setting on a timer on Shabbat in order to delay turning off a light would apparently be equivalent to [I-8] above – simply preventing (or delaying) a *melacha* from occurring – an action which is completely permissible on Shabbat.[42] If however the timer mechanism was such that the off-setting was not just rotated to a new position, but instead entailed the removing and subsequent reinsertion of the peg which turns the light off, this would be equivalent to a new action of setting the timer, with the differing halacha of this case described below. This situation is one example of how authorities might well be reluctant to permit a given action of *gramma*, for fear that the permission might easily be misapplied to halachically dissimilar cases.

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40. *Minchat Shlomo* 9.

41. See however *Iggerot Moshe Orach Chaim* 4:60, who frowns on the use of Shabbat clocks for any appliance other than lighting, because of possible *marit ayin.*

42. See note 28 above regarding issue of *muktzah.*

b) To place a peg initially in the timer (which is already in place and merely lacks the on/off settings around its dial) on Shabbat in order to cause a later act of turning on of an electric light, would at least on the surface be analogous to the case of *aish* (or *chitzav*) described above (category (I-3)). Just as an object set upon a roof to be blown off by an oncoming wind is considered *chitzav* (one's arrows) in terms of its potential to cause damage, so too one could view the peg placed in a position to move with the continuous rotation of the dial until it reaches the point of actually turning off the light as a "slow arrow". This is a category of action on Shabbat which is considered by many authorities true *ma'aseh adam*, (forbidden) and not merely *gramma*. However, a difference does in fact exist between the two cases. By *aish* the acting force affects the *nif'al* (object acted upon) directly, while the peg of a timer does not itself perform the *melacha*, but rather opens an electrical switch which allows current to flow and the light to go on. Thus, the operation of a Shabbat clock is in effect a combination of two actions – the movement of the timer setting (*chitzav*), and the subsequent completion and operation of an electrical circuit, an action which by itself would be considered *kocho* (see (I-2) above). The net result would be halachically equivalent to *koach kocho*, a class of action considered *gramma* by many authorities (see (I-4) above), and thus permissible in cases of great need or to avert loss.[43]

2) Security devices – Ever more commonly encountered in today's security-conscious world are a variety of increasingly sophisticated mechanisms for protection of one's person and home. The issues raised on Shabbat by one such device, the motion sensor, are pertinent not just to the owners of such

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43. See *Shemirat Shabbat KeHilchata* 13:25 who permits such an action under these circumstances. The author does not explain however, why in fact he considers such an action as *gramma*.

systems, but even to guests in their homes or even unwitting passers-by. Motion sensors commonly work by sensing the change in some signal (usually sound or infra-red radiation) reflected off an object (or person) which comes into its range. Within the house such sensors are usually linked to a security system whose central circuitry treats activation of such a sensor as a sign of illegal entry and sounds an alarm. Often, however, even with the central system disarmed, the sensor still operates, and will turn on an LED (light-emitting diode) light upon sensing movement within its range. Outdoor detectors are frequently set up to activate a security light upon sensing movement at some distance from the building itself, sometimes with the activation of the light coming even from those strolling by on the public sidewalk in front of the house.

How we view such devices in relation to potential Shabbat prohibitions is dependent on several of the issues raised above. The actual mechanism of operation of such sensors is made up of several separate stages – the physical body of the person reflecting the rays of radiation or sound (*chitzav* – no worse than if he threw an object), the circuitry which detects and measures the rays, and the ultimate closing of a circuit to turn on the LED or incandescent light. Technically, this action might well be considered *koach kocho* and therefore *gramma* – if we may examine the inner workings of such a device to determine its halachic status, and if we may indeed regard as *gramma* even a device whose whole design is to operate in such a fashion. Even though *gramma* is generally still rabbinically prohibited on Shabbat, a number of important leniencies would nevertheless result from the sensor being viewed in this way:

a) According to the *psak* of Ramo, an action accomplished through *gramma* is permissible in cases of *hefsed* or great need. Thus, if one was trapped in a location where the only way out would necessarily activate a motion sensitive light, if necessary (e.g. to leave for *tefilla* with a *minyan*, or even if it would be very difficult to remain in that location for the remainder of

Shabbat) one could nevertheless exit in the normal fashion even though the light would thereby be turned on.

b) There are some authorities (above (3)) who are more stringent concerning a mechanism which by its very function acts through *gramma;* they rabbinically prohibit operation of such a device on Shabbat without exception, even for *hefsed* or great need. These authorities would not accept the previously-mentioned leniency. The activation of an LED light itself on Shabbat, however, is not *biblically* prohibited according to many authorities.[44] If indeed considered only a rabbinic prohibition, there is significant room to be lenient.[45] Thus even in this more stringent type of *gramma* (i.e. where the device operates specifically in this fashion), where the activated light is only LED and not incandescent, there still remains significant opinion to rely upon in cases of need.

c) The activation of the LED or incandescent light through the motion sensor may, depending upon the circumstances, be considered a *psik raisha delo ichpat leih* – an unintentional or even undesired consequence of an altogether permissible act – i.e., walking or even just moving.[46] In general, *Rishonim* dispute

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44. Unlike an incandescent light where there is actual heat and burning of the filament to produce its light (which may be considered *havara* or *bishul* on Shabbat) an LED produces light through an entirely different process. *Chazon Ish* considers any completion of an electrical circuit to be biblically prohibited as *boneh*, and turning on an LED would be no different. Most authorities, however, disagree with the *Chazzon Ish,* and consider the use of electricity itself no more than a rabbinic prohibition (because of its similarity to *molid*).

45. *Machtsit HaShekel* 265:2 in explaining *Magen Avraham*.

46. For the owner, the turning on of both the incandescent light (for security) and the LED (to indicate proper operation of the sensor) would be considered *nicha leih* – an intended or desirable action (even though on Shabbat itself he would rather it not go on due to halachic problems – see Tosafot *Pesachim* 26b *s.v. aleh*). For another individual,

the permissibility on Shabbat of an action which is *psik raisha delo ichpat leih.*[47] Such an action, where the unintentional result is accomplished through *gramma,* is viewed still more leniently.[48] Certainly in a case where the resultant action is only rabbinically prohibited (such as perhaps an LED), the status of the action as a *gramma* combined with the unintentional nature of the act in general would be sufficient to permit it according to all authorities.[49]

3) Thermostat – Another device whose operation entails a number of the considerations mentioned above is that of a thermostatically-controlled appliance. Air conditioners, refrigerators, ovens, and central heating are all commonly regulated through this type of mechanism, whereby a change in the ambient temperature above or below a set degree activates a small electric current, which in turn closes a relay which allows the main heating or cooling element to go on. A major question regarding Shabbat is whether one is allowed to hasten the activation of such an appliance, be it the flame of a oven or the cooling compressor of a refrigerator, by opening a door and letting the surrounding and relatively warmer or cooler air enter – an act certain to bring the thermostat closer to its

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the LED indicator light on the sensor would almost certainly be *lo ichpat leih,* while the incandescent light, which might provide some added sense of security even to the individual passing by, might or might not be considered *nicha leih* depending on its location and other local factors.

47. *Orach Chaim* 320; *Mishnah Berurah* 53, *Biur Halacha* s.v. *yesh* and *delo.*

48. *Minchat Shlomo* 10 and 41; see Rashi *Eruvin* 88a s.v. *hatam taimi maya.*

49. *Orach Chaim* 316:3; *Mishnah Berurah* 15; *Chazon Ish* 52:15. See also *Yechave Daat* 5:29. R. Ovadiah Yosef brings numerous opinions that permit even *psik reisha denicha leih* when there are two *issurei rabbonon.*

point of activation (assuming that the appliance is presently off).

Most authorities consider activation of an appliance through a thermostat mechanism (at least technically) *gramma* in nature.[50] Usually it is not the first surge of surrounding air which enters to set off the thermostat but the subsequent continuation of incoming air, a result similar in process to *koach sheni*. Even if the thermostat was on the threshold of its temperature setting and the initial surge of outside air was enough to activate it, still the chain of action which in fact ultimately turns on the appliance (warm/cool air enters causing new ambient temperature and allowing initial thermostat circuit to close, which in turn closes relay which completes final circuit to power appliance) is composed of multiple *kochot* – certainly enough to be considered the equivalent of *koach kocho* or *koach sheni*.[51]

The specific action of a heater or of an oven (be it electric or gas) is included under the Torah prohibition of *havarah* (burning). Thus, even if viewed as *gramma*, the hastening of operation through a thermostat of such an appliance would still be rabbinically prohibited (according to *psak* of Ramo, above). The cooling action of a refrigerator or air conditioning unit is accomplished through the operation of a compressor motor – an operation which according to some authorities does not entail any Torah prohibition.[52] According to these opinions,

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50. *Minchat Shlomo* 10; *Tzitz Eliezer* 8:12; *Mishpetei Uziel* (2) *Orach Chaim* 37; *Minchat Yitzhak* 2:16; *Chelkat Yoav* 1:54.

51. *Minchat Shlomo* 10:10.

52. Most authorities do not accept *Chazon Ish's* stringency to view the very completion of any circuit a *melacha d'oraita* of *boneh*. Sparks or incidental heating which may be produced through the motor action may well be considered *davar she'aino mitkaven* and thus exempt from a Torah prohibition. Use or generation of electrical current in and of itself is considered by many opinions to be rabbinically

there is room to be lenient for the opening of a refrigerator door at a time when the motor is not running, even though it will hasten the activation of its motor, as it entails only a potential rabbinic infraction and is accomplished through *gramma*.[53]

Other authorities disagree with this *psak*, albeit agreeing in principle to view the thermostatic action as being *gramma* in nature. Inasmuch as the thermostat is constructed to routinely accomplish its function in a manner of *gramma*, its halachic status is determined not by its inner mechanism but rather by its net result.[54] This difference of opinion as to how to view such mechanisms, which operate through *gramma* yet do so in a regular fashion, is at the crux of the issue of how halacha views the use of many modern devices on Shabbat.

4) *Gramma* switch – The potential halachic ramifications in the application of the full scope of *gramma* on Shabbat are made readily apparent by a newly-developed item of technology – the *gramma* switch. Although there are variations of this device constructed or suggested, the basic idea of all such switches is the same – to construct an electrical on/off switch which can effectively control the operation of any appliance, yet whose internal mechanism is halachically considered an absolutely permissible form of *gramma* on Shabbat. One such device, developed by the Jerusalem-based Institute of Science and Technology in Halacha, is based upon the premise that doing an action which simply allows a pre-existing situation to assume its normal state, even though that normal state might allow for the action of a *melacha* to occur, does not even have the status of the rabbinically forbidden category of *gramma* and would

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prohibited because of the *gezerah* of *molid* (perceived creation of new entity).

53. *Minchat Shlomo* 10; *Tzitz Eliezer* 8:12; *Mishpetei Uziel* (2) *Orach Chaim* 37.

54. *Chelkat Yoav* 1:54.

(in theory) be completely permissible on Shabbat. The switch is shown schematically below.

An appliance is connected to a base unit (B), which without outside interference will be in the closed (default) position (1) and allow the current to flow and the appliance to operate normally. Unit B also has on it a light-sensitive receiver, which registers regular pulses of light (several per second) sent by a separate modulated light source (L). During the time that unit B registers these light pulses it moves the actual switch (S) from its default position (1) to a new position (2), a position which corresponds to the primary circuit being open and the appliance off. When an individual wishes to turn on the appliance from this setting, he physically interposes an opaque barrier to block the light pulses from reaching the detector, and thus consequently restores the switch to its regular on position. This switch may be constructed in such a way that its working mechanism is basically transparent to the user.[55]

Those who developed this type of *gramma* switch believe its action to be essentially like closing an open window, with the result of allowing a flame to continue burning without being extinguished by a future wind. Interposing the barrier to stop the light pulses is similar to closing the window, and the consequent return of the switch to its normal "on" position is comparable to the continued burning of the flame. If viewed in

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55. *Encyclopedia Talmudit* Addendum to topic *Chashmal* 1:6.

this way, the operation of any appliance through the means of a such a switch would in theory be entirely permissible on Shabbat. The intention behind the creation of the *gramma* switch was not, however, to turn Shabbat into a virtual weekday in terms of permitted activities. Rather, the switch was designed in order to facilitate Shabbat usage of essential, though perhaps non-critical appliances (for instance, a phone needed by a doctor to assist a non-critical patient), or even to minimize the Shabbat prohibitions routinely encountered in a critical-care (i.e. hospital) situation.[56]

Two basic points of contention with the intended halachic leniencies of the *gramma* switch may be raised: First, unlike the example of closing a window and allowing a flame to continue burning, here a new *melacha* is initiated – albeit through a very indirect path. Thus, perhaps the operation of such a switch is still included in the standard rabbinic prohibition applying to *gramma* in general. Secondly, and more fundamental to our overall discussion, is the basic question of whether a device whose whole operation is integrally implemented through a mechanism of *gramma* can truly be viewed as *gramma* (or in this case, perhaps even less than *gramma*) in nature.[57] The significance of this question is made even more clear by the extent of activity on Shabbat that such applications of *gramma* could potentially allow.

The halachic challenges which present themselves in the determination of the true extent to which *gramma* may be practically applied are considerable in nature. The relevance and application of many of the basic issues discussed in this article will certainly only increase in the coming years. The

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56. See *Sefer Ma'aseh Choshev (Machon Mada'ai Technologie l'Inyanei Halacha*) for greater detail regarding design and practical application of this type of *gramma* switch.

57. See R. Z. Leff, *Halacha v'Refuah* pg. 229.

halachic scrutiny itself of new situations and technologies often yields not only a greater awareness of the specific topic at hand, but perhaps even more importantly a much clearer understanding of underlying halachic principles which are significant to a very broad range of contemporary halachic issues.

Scientific Evidence in Jewish Law

Rabbi Alfred Cohen

The essence of the Jewish people is the Torah, which has set us apart and determined our lifestyle for millenia. "Torah" is variously translated as "law" or "teaching", reflecting the reality that everything we do is influenced and guided by the divine law, which Moshe Rabbenu taught to the Jewish people.

From the very first day of Moshe's teaching, he was confronted with all kinds of questions that required not only definition – how are the laws to be observed – but also adjudication of controversies between individuals, which had to be settled according to Torah principles. Thus, right from the beginning, the Jewish people needed the dual phenomenon of a Rav to "*pasken*" (rule) on applying the halacha to everyday life, as well as a *Beit Din*, a court to settle differences between individuals.

The Torah's guidelines for judges and rabbis are simple: "*al pi shenayim eidim yakum davar*" (*Devarim* 17:9) – the testimony of two witnesses establishes something as fact in the eyes of Jewish law. But what about situations where the requisite witnesses are non-existent – does that mean that the courts are powerless to act? Such a conclusion would result in paralysis of the judicial system, and certainly would not lead towards

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establishment of a just society.[1] From the outset, then, rabbis have had to grapple with ways of arriving at a halachic decision even in less than ideal circumstances, for they have always realized that the major responsibility of judges and rabbis is to arrive at rulings based on the truth, and to apply Torah guidelines accordingly.

In this study, we shall explore the elements which a *Beit Din* or a Rav may legitimately take into account in arriving at a decision. Of course, the most desirable evidence is the testimony of two witnesses. But what about circumstantial evidence? What about persons technically unqualified to be witnesses in a Jewish court who are nevertheless undoubtedly telling the truth and who are the only source of needed information?

In the modern era, we can add further questions to this list: scientific research and medical technology have recently made astounding strides in unlocking the secrets of the world and of our bodies. The question therefore arises to what extent does halacha, the process of Jewish law, accept and employ these new capabilities in arriving at a decision of Jewish law? After all, the halacha operates within its own principles and rules of evidence. To what extent can new technologies be incorporated within this system? Should *batei din* give any weight to evidence based on microscopic findings such as DNA, which were

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1. Rambam, in *Hilchot Sanhedrin* 24:4-10, discusses the prerogatives of *Beit Din* vis-a-vis their responsibility to maintain a proper Jewish society. If necessary, they are empowered to go far beyond the ordinary guidelines of the court's jurisdiction: "And inasmuch as *Beit Din* sees that the people have broken the bounds [of the Torah], they are to act boldly and to strengthen the religion..." Consequently, if they find it necessary, the judges can condemn people to death even for transgressing the rabbinic enactment of *muktzah*, a relatively minor offense.

unknown in centuries past? Is there any mechanism within the halachic process for accepting new procedures of adducing evidence?[2] These are the questions to be explored in this paper.

In our inquiry, we will see how the Gemara, the *Rishonim*, and the *Acharonim* have consistently confronted this complex issue, which goes to the heart of the desideratum of the Torah, that truth and justice prevail in the lives of the Jewish people.

The entire discussion hinges on determining the criteria for evidence which *Beit Din* uses to arrive at a decision. The same dilemma faces a Rav who is asked to make a ruling in an individual case. How can judges know what the true "facts" of the case really are, if they were not on the scene? This is a problem for any judicial body, but especially for Judaism, for the Torah has set definitive guidelines – a matter is established by the testimony of two witnesses. What "facts" does Jewish law permit a Rav or a judge to take into consideration as the basis for arriving at a halachic decision?

The Gemara tells of an incident[3] involving Rabbi Shimon ben Shatach, the rabbinic leader of his generation, who reported that one time he saw a man with a knife chasing another person:

> I ran after him and found him with the knife dripping blood and the dead man expiring. I said to him, "You wicked man, who killed this victim – you or I? But what can I do, since your fate is not in my hands, for the Torah has said 'by the testimony of two witnesses he shall be put to death.' "[4]

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2. Rambam expresses the opinion (quoted by his son R. Avraham in the *Introduction to Ein Yaakov)* that in every generation, one should follow the best advice that doctors are able to give. Would this apply as well to other areas of scientific knowledge?

3. *Sanhedrin 37b.*

4. Tosafot claim that there was a second witness, but since the

As we will see later in our study, it is possible that this strict construction of the rules of evidence applies only in a capital case, where *Beit Din* cannot execute a murderer without the requisite two eyewitnesses. But in all other circumstances, halacha has a much broader scope for evidentiary acceptability. Just how broad that scope is, we will seek to determine.

Obviously, there are going to be times when judges can know something is true, even without having witnessed it (*yediah belo re'iya*). In such a case, they can proceed based on their "knowledge", even without two witnesses.[5] Although this may sound revolutionary, it is actually a concept inherent in rabbinic thought; an example can be found in a conclusion of the Tosafot[6] regarding the conversion of a female convert. Surely the rabbis cannot be present when she is immersing herself in a mikvah as part of the conversion ceremony! Yet, even though they are standing outside, they can be confident that the immersion took place properly; as the Tosafot explain, this is equivalent to their having witnessed it, and therefore they can complete the conversion accordingly.

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witnesses didn't actually see the act of murder, the Court could not execute the defendant. The Ritva *(Shevuot 34)* understands the Gemara to be relating two legal principles: a logical circumstantial assumption cannot be adduced as evidence in a capital case and, furthermore, with only one witness it is not possible to convict someone.

5. In *Ketubot* 16a, the Gemara states that "testimony which contradicts the majority (*rov*) is false testimony." Rambam, *Gerushin* 13:29, and *Mishnat Avraham* to *Sefer Chassidim* 291 write as follows: Witnesses are required only when it is necessary to clarify something. If no clarification is needed, no witnesses are needed.

See also the Gemara *Shevuot 34a; Iggerot Moshe Yoreh Deah I 47* employs this rationale as the determining factor in permitting Jews to use milk which is certified pure under the inspection of the US Government. And *Chelkat Yaakov* II:31 relied on "*yedia belo re'iya*" in a responsum permitting an *agunah* to re-marry.

6. *Yevamot* 45.

Other examples of a Jewish court's using "unorthodox" methods abound: For example, technically only adult male Jews are qualified to testify in a Jewish court, yet the Gemara did not feel constrained to let this rule limit their ability to arrive at the truth. Thus, it once happened that three women gave birth at the same time in the same place: one was the wife of a *kohen*, one was the wife of a Levite, and the third child was a *mamzer*. The only competent person who could establish which child was which was the (non–Jewish) midwife. The Gemara ruled that the midwife is to be believed to identify the children.[7]

To the Ran, a leading *Rishon*, the point of this episode is obvious: the rabbis' primary objective is to arrive at the truth; since she is their only avenue of determining the facts, the judges have to rely on her.[8] This is a clear expression of the leeway granted judges and *rabbonim* in their need to seek the truth and apply Torah principles accordingly.

In his comments on *Arba'a Turim*, the Ramo also sees a broad judicial prerogative, "based on the rulings of the early rabbis,[9] since the days of Rabbenu Tam." In his view, if there are no technically qualified witnesses available, judges should seek the testimony of reliable, albeit unqualified, persons to inform them of the true facts of the case. He concedes that although there are many who agree with this principle, others, including the Rambam and the Rashba, do not.[10]

Another example of the expansion of the body of evidence

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7. *Kiddushin* 73a. See also *Kiddushin* 66a, where the Talmud takes up the question of a man who was told by one witness that his wife had committed adultery.

8. Ibid. See *Pitchei Teshuva, Even HaEzer* 64, who qualifies this conclusion somewhat.

9. *Terumat HaDeshen* 353.

10. *Darchei Moshe, Choshen Mishpat* 35.

which is acceptable to a Jewish court is found in the Mishnah, which rules that documents signed and processed in non–Jewish courts can be accepted in evidence in a Jewish court, since even secular courts are careful to preserve their integrity, and we may accept their documents as valid.[11] How far to extend the implications of this Mishnah is a further source of controversy: the *Chatam Sofer* wants to use it not only in monetary matters, but also to apply to an *agunah*, albeit he is aware that others disagree with him.[12]

In general, we can posit that Jewish courts are often prepared to accept somewhat "unorthodox" evidence, beyond the biblical two adult Jewish eyewitnesses, if they are convinced that the information is true and necessary to arrive at a just resolution of the situation. We will proceed now to explore a number of areas which illustrate this principle.

How Far An *Umdenah* Can Extend

One of the judicial prerogatives recognized by the Talmud has a direct bearing on the question of incorporating scientific findings into the halachic process.[13] This device is "*umdenah*",

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11. *Gittin 10a.*

12. *Chatam Sofer, Even HaEzer* 43.

13. The Gemara itself (*Bava Bathra 58a*) relates an incident where an *Amora* resorted to "scientific" evidence in order to arrive at the truth: A man's wife attested that only one of her ten children was really the son of her husband, while the others were the offspring of adulterous affairs. When the man died, his will specified that only the true son should inherit, while the others would get nothing. When Rav Buna was asked to determine which of the ten claimants was the real son, he instructed each of them to go, individually, and spit on the father's grave. Each of the children did so, except one, who declared that he was prepared to forego his inheritance, but would not disgrace his father thus. "That is the true son!" declared Rav Buna. Whatever the

which may be defined as an assumption or conditon which, although not verbalized, nevertheless is taken as so obviously implicit that we accept it as fact.[14] For example, if a person

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true meaning of the test, one thing is certain – the Talmud here considers "psychological" or "scientific" evidence as sufficient *by itself* to determine the truth of a situation.

A similar kind of reliance on "scientific" evidence is reported by the *Sefer Chassidim* 232 concerning an inheritance question which came before Rav Sa'adya Gaon.

14. There are many practical issues arising daily, where the concept of *umdenah* plays a role in determining the halacha:

Let us assume a case where an individual is in his friend's house, but the friend is not there. May he take a cup of soda or eat a piece of cake, if he is sure that his friend would want him to take it?

In *Bava Metzia* 22a, the Gemara relates that Amemar, Mar Zutra, and Rav Ashi were once offered food by a sharecropper. The food which a sharecropper raises on his farm belongs partially to him but partially to his landlord. The question then was, could the three eat from the food which belonged in part to someone else (the landlord), whom they knew to be a friend of theirs? The Gemara relates that some of them ate but others did not. Tosafot, in dealing with this text, comes to the conclusion that if someone finds himself in another person's house in his absence, he may eat nothing. (Since we rule *"yiush shelo mida'at lo haveh yi'ush"*, which in practical terms means that although the owner were he there, would certainly have given him permission to eat, nevertheless since he is absent, one cannot eat his food). However, the *Shach*(358:1) writes that were it not for this ruling of Tosafot, he himself would see no reason why the person couldn't eat the food in his friend's house.

The *Oneg Yom Tov 111* does in fact rule that eating the food is permissible, if one is certain that the homeowner would surely not object to his guest's eating.

See *Shulchan Aruch Harav, Choshen Mishpat*, *Hilchot She'ela*, par.5, for insights on a related question dealing with "assumption" (*umdenah)* and "certainty in his mind" (*umdenah demuchach*).

Also qualifying the power of an *"umdenah"* is the ruling of Rav Moshe Feinstein in the following situation: It happens sometimes that tourists in Europe come to an old shul and find scholarly books which no one uses. Is the tourist entitled to assume that since the

sells his property because he is planning *aliya*, but then suddenly has a change of plans, halacha would accept it as *umdenah* that the sale was predicated on his future plans and that, when these fail to materialize, the sale is similarly nullified (*Kiddushin* 49a).

There is a further level of *umdenah* which is even more definitive: *umdenah demuchach*, a totally obvious and logical assumption which is overwhelmingly apparent.

The question of using an *umdenah* to arrive at a halachic conclusion arises in a multitude of situations in modern life. For example, there are many communities in America where there are not enough observant Jews to support a *Shomer Shabbat* store. Is it permissible to grant kashruth supervision to an honorable person, an individual who can be trusted not to lie, who promises to follow the rabbi's instruction but does not himself observe the Sabbath? How trustworthy is such an individual?[15] The power of an *umdenah* is ultimately what will determine the acceptability of such an arrangement.[16]

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books were purchased or donated so that people would learn from them, and such people no longer live in the community, it would be permissible to take these old books for one's own use? Rav Moshe categorically forbids it, calling it *gezel* (theft), based merely on an assumption (*Iggerot Moshe, Choshen Mishpat* 39).

However, *Chelkat Yaakov* I, 136, opines that if the abandoned books were in a synagogue in Germany, whose Jews fled leaving everything behind, it would certainly be permissible for an individual to take the books now.

15. *Iggerot Moshe, Yoreh Deah* 54,and part II, 43. Rav Feinstein cautions that the reliability of a non-*Shomer Shabbat* owner does not always stay the same and must be kept current inasmuch as it is subject to change. Also, he must be *very* reliable.

16. Rav Weisz, a leading *posek* of the latter half of this century, can often be seen employing the *umdenah* device, although not broadly. He was once questioned by a man who had pledged a certain amount

An example of employing this legal principle arose in a situation presented to Rav Moshe Feinstein: elderly parents had to live in their child's house. The parents were *Shomer Shabbat* but the child was not, yet the parents were absolutely sure that their child would never feed them non-kosher food. Were they permitted to eat in his house?

In his responsum,[17] Rav Moshe cites a text in *Ketubot* 85, where Rava relied on his wife's statement to disqualify a witness (she told him that the prospective witness was a thief). This is certainly surprising – why was Rava prepared to accept his

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towards the building of a shul in his neighborhood. After donating some of the funds, the man realized that he didn't really like the people or the neighborhood, and he moved. Now he wanted permission to donate the remainder of the pledge toward construction of a shul in his new neighborhood. Rav Weisz ponders the question of whether an *umdenah* – in this case, the logical assumption that had he known he wouldn't like the people, he wouldn't have promised them money – has to be in existence at the time he made the pledge, or whether it can operate retroactively, based on the fact that now he feels this way. Citing various opinions for both sides of the argument, Rav Weisz rules that the man can switch his pledge, but only after he has been absolved from his vow (*hatarat nedarim)*.

In another case presented to Rav Weisz (ibid, IV, 29), an older woman, who was getting married for the second time, gave all her assets to a grandchild from her first marriage, since she didn't want them to belong to her new husband. Ultimately, she divorced him, and the question arose if the grandchild had to return the money to her. In this instance, Rav Weisz distinguishes between different types of *umdenah*, and elucidates the rules applying in each case:

1) A good *umdenah demuchach*, where the matter is self understood in its essence and doesn't entail anyone's making mental reservations nor does it have to be verbalized to make it effective.

2) An assumption which is not obvious to all, since the matter is not evident from itself. In this case, regardless of any mental reservations someone might have had at the time, it is necessary to verbalize them in order to make them effective.

17. *Iggerot Moshe Yoreh Deah* 34.

wife's word without corroboration, to reject an individual in court? He did so, writes Rav Moshe, because witnesses are required only when doubt exists; but when a person is certain about the character of the other, he does not require witnesses to prove it. Rava so trusted his wife that he was 100% sure that if she said a man was a thief, then he was, and no further proof was needed. And therefore, in the case of parents who know they can completely trust their child, that is sufficient to permit their eating the food.[18]

The willingness to rely on *umendah* is evident in many other halachic decisions rendered in the modern age.

In a case of a woman whose husband had disappeared and been missing for years, *Minchat Yitzchak* I,1, p.3, maintained that the inventions of the modern age, such as the telephone and telegraph, make communication from any part of the world readily accessible. Thus, the fact that the husband had not contacted any members of his family must surely mean that he is dead, for otherwise he would surely have availed himself of the opportunity to get in touch with someone he knew. And "this is a great *umdenah*, which is even better [proof of his death] than [the rule of] majority and can be used [to arrive at a halachic decision]." What he means is that "assuming that the

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18. Despite his lenient ruling, it is evident that Rav Feinstein gave it only reluctantly, for he concludes the responsum,

> ...and it is permitted to eat what she [the child] cooked for him and told him that she did it properly; but one should be strict not to give it to others nor to eat it unless out of dire necessity nor to let healthy people eat from it.

The same idea is expressed by Rav Moshe in *Even HaEzer* III, 32, in the case of a rabbi executing a Jewish divorce, taking information from the husband who did not understand the language of the rabbi. However, the rabbi relied on the translator who sat between them, and this was considered sufficient.

See also his *Iggerot Moshe, Yoreh Deah* 52, par. 2.

majority will act in a certain way" is a classical *umdenah* tool which a judge is supposed to use in judging cases.

> And it logically follows that since an obvious conclusion (*umdenah gedolah*) is effective in deciding a question of money, and we are stricter in the laws of evidence for money than we are concerning an *agunah* [where we try to find leniencies], then certainly this *umdenah demuchach* (obvious conclusion) will apply in the case of an *agunah.*

Albeit there are numerous examples of rabbinic use of *umdenah* and *umdenah demuchach,* it remains to determine whether these are acceptable in all cases of Jewish law or whether there is a difference between civil and criminal law with respect to the types of evidence which can be admitted.

Circumstantial Evidence

It is quite clear from the talmudic tale mentioned earlier about R. Shimon ben Shatach, who saw a murderer chasing his victim, that circumstantial evidence, no matter how compelling, is not acceptable in a murder case. But that does not mean that circumstantial evidence is never acceptable in a court of Jewish law. Perhaps in a case involving financial matters, which is a different area of the law, circumstantial evidence might be permissible to assess monetary damages?

The same verse which R. Shimon ben Shatach quoted in the murder case (*al pi shnayim eidim*) appears elsewhere in the Torah, in connection with monetary fines to be assessed against a perpetrator. This repetition might lead us to assume that the rules of evidence are the same in criminal and civil cases. However, that is not true. Based on the Rambam (*Hilchot Sanhedrin* 20:1 and *Sefer HaMitzvot, Lo Ta'aseh* 290), it appears that such evidence cannot be used to *execute* someone, based on the specific biblical verse "Do not execute an innocent or righteous person" (i.e., one whose guilt was not proved by two

witnesses).[19] However, that does not necessarily preclude its use in other cases.

In *Hilchot Sanhedrin* 20:1, the Rambam rules that a *Beit Din* cannot whip a defendant nor execute him unless he was clearly seen performing the crime. Probable or even overwhelmingly probable guilt is just not sufficient; absent specific evidence, the court cannot punish the accused.

However, in *Hilchot Sanhedrin* 24:1, Rambam rules that "the judge must rule in monetary cases according to what his mind tells him is true...even absent an eyewitness." As long as the judge feels certain that he knows the truth, he may rule accordingly, even without specific proof.[20] Paradoxically, in the very next ruling, Rambam more or less takes back the leeway he granted the judges, by writing:

> However, all these matters [which he explained in 24:1, above] are really the essence of the law. However, now that there have proliferated courts which...are not sufficiently smart nor men of wisdom, the majority of Jewish courts have accepted not to overturn an oath

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19. *Shemot 23:6.* However, this does not mean that Jewish law is powerless and that murderers were allowed to go free on a technicality. *Aruch Laner, Sanhedrin 21A, s.v. "Eidut"* explains that where there is circumstantial evidence which would be acceptable in a monetary suit, then that type of evidence is sufficient to place the perpetrator into a *"kipa"* (cell), where he was effectively starved to death. For further discussion of the acceptability of circumstantial evidence, see *Minchat Chinuch 82.*

20. The *Shulchan Aruch* records that when the Rosh, the pre-eminent scholar of his day, used to listen to judicial cases and perceived, by virtue of his clear logical understanding (*umdenah demuchach*) that one of the litigants was obviously lying, he used to issue a letter to the other party, to the effect that no Jewish judge should accept this case for litigation.*Choshen Mishpat, 15:3.*

> [i.e., the defendant has to swear that he does not owe the money] except if there is specific eyewitness testimony [to the contrary]....And therefore in all cases, the judge should not rule by relying on his own understanding.

Ultimately, the Rambam's position is that nowadays, the judge cannot reach a decision based on his own understanding of the situation, but only based on eyewitness testimony.

Despite the pre-eminence of the Rambam, many halachic decisors have not adopted his rationale. Seeing the need to maintain an ordered and just society, they also focus on the many avenues people employ to subvert the truth. Therefore, they grant considerable leeway to judges; many *poskim* hold that judges can and should rely on *umdenah* to arrive at a halachic decision which is consistent with justice.

The Rosh certainly opines that an *umdenah*, a logical conclusion, is acceptable for arriving at a decision in a monetary dispute.[21] Based on numerous instances in the Talmud as well as the biblical story of King Solomon who, with his wisdom was able to determine which claimant was the true mother of the baby, Rosh concludes that *umdenah* is a device which is operative in Jewish law for monetary questions. Thus, in a case where an individual borrowed a considerable sum of money and thereafter transferred all his assets to someone else, so that he was unable to pay his debt to the lender, Rosh ruled that the transfer of assets was obviously done so as to evade repayment (*umdenah demuchach*). Consequently, he ruled that the transfer was invalid and the lender could collect from the borrower's assets.[22]

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21. *Ketubot 78b, "hahu iteta"; Bava Bathra 146b, "shechiv mera shekatav";* ibid*, 138, "umdinan da'ateh";* ibid *48a, 58a,* among other places.

22. *Kellal* 78:3. The same is to be found in *Aruch HaShulchan Choshen*

In a different departure from Rambam, however, Ramban considers circumstantial evidence invalid even in monetary cases.[23] It is interesting to note that *poskim* on both sides of the argument cite the same proof text from the Talmud but reach opposite conclusions: In *Bava Bathra* 93a, the Gemara discusses what happens when two camels are mating in the midst of other camels, and one of the camels is found dead. Based on circumstantial evidence, the Gemara brands the one standing next to the killed camel as "definitely (*beyadua*)" the one responsible for the death.[24] The Gemara proceeds then to record a debate between Rav Acha and the other rabbis as to the rationale: Rav Acha reasons that certainly that camel killed the other one and therefore [his owner] is liable. But the rabbis argue that he is free of liability.

Based on this text, Ramban claims that the halacha follows his position, which is that circumstantial evidence is not acceptable in a Jewish court of law. The Rosh, however, retorts that everyone agrees that circumstantial evidence *is* acceptable. The only question is whether this situation qualifies as circumstantial evidence.[25] And although the Rambam does not specifically state this, the Rosh considers that *umdenah* is acceptable in court for a monetary question.

The *Pitchei Teshuva* also rules that nowadays we surely rely on *umdenah*:

> In those instances where there is a good presumption and the judge is confident in his heart and he is the expert in his generation and universally held to be an

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Mishpat 15:4.

23. MaHarik agrees with Rambam, see *Maharik, Shoresh 129*.

24. See Rashi in *Sanhedrin 37b* for a variant translation of the term *"ochair"*.

25. See *Teshuvot HaRosh* 8:4 and *kelal* 34.

> upright person who does not practice favoritism [in his judgments], he is permitted to judge according to his assumption...And if he sees legal chicanery (*din merumeh*), he can also follow his logical understanding [rather than the legal technicality].[26]

Normative Halacha

What is the "bottom line"? How does the halacha rule about accepting logical argument and circumstantial evidence as the basis for adjudicating a dispute? The *Shulchan Aruch*[27] is quite firm in ruling,

> If witnesses saw a person entering [a place] with his friend, and he was "whole" [i.e., in good health] but then he came out wounded, but they did not see him at the moment he was being wounded...if there is [logical] evidence that the other one injured him, as for example the wound was in such a place that it would not be possible for the person to injure himself, then we consider the other person guilty.

Despite this apparently definitive statement, elsewhere the *Shulchan Aruch* seems to take the opposite approach:

> Those who have suffered a damage cannot collect for their loss without [its having been] clearly seen and with qualified witnesses.[28]

Seeking to find resolution of this apparent contradiction,

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26. No. 9.

27. *Choshen Mishpat* 4-6 and l6. But see R. Elchanan Wasserman, *Kovetz Shiurim* II, 38, who comes to the conclusion that *umdenah* is not acceptable evidence in halacha. See also *Avkat Rochel* 87.

28. *Choshen Mishpat* 408:1.

the *Pitchei Teshuva*[29] cites *Shevut Yaakov*,[30] who distinguishes between different types of circumstantial evidence. At times the circumstantial evidence is logically persuasive, but other times it is overwhelmingly convincing. In the latter instance, particularly in monetary cases, Jewish law generally accepts it.

Scientific Evidence

Let us consider for a moment some modern examples of scientific findings which might be considered circumstantial evidence: The polygraph (lie detector), fingerprints, and DNA evidence. In a polygraph test, the subject is wired to a machine which measures respiration, relative blood pressure and pulse rate, and changes and responses in skin. The lie is detected by physiological changes that take place in the body when a person decides to lie. If the proper questions are asked and the operator of the machine is expert, he will be able to detect an untruth. However, the data may be misinterpreted by poorly trained or inexperienced examiners; alternatively, a clever individual can "beat" the machine by controlling his responses.[31]

Every human being has a unique genome, with a unique DNA sequence (other than identical twins, who have the same). Thus, the likelihood that DNA evidence which matches a defendant's could actually belong to someone else is so remote that it is virtually one in a hundred million, if not less.[32]

With a lie detector results, the judge is presented with

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29. No.2.

30. I, 113.

31. From the internet: Truth or Lie Polygraph Examination Agency, http//www.truthorlie.com.

32. Internet information, http://esgwww.mit.edu:8001/esgbio/rdna/landerfinger.html.

umdenah, a probable conclusion. But DNA evidence which could only fit one out of myriads of people would be *umdenah demuchach*, overwhelmingly convincing, which is why the latter might be accepted while the former probably would not.

Marriage, Divorce, and Rules of Evidence

Modern technology has raised all kinds of interesting halachic questions which could not have been tackled before. In trying to resolve these questions, it is necessary to apply the rabbinic rules which best fit the novel situation.

Let us consider some hypothetical situations, which are actually not uncommon, and examine how Jewish law might categorize them. For example, if a Jewish man and woman get married, but not in the presence of two "kosher" Jewish witnesses – and later on, two valid witnesses view the video of their ceremony, are they now married in the eyes of Jewish law? Or, what if a plane crashes and explodes, and only body parts are found, can the DNA therein serve as proof that an individual is indeed dead, thereby permitting his wife to re-marry? Imagine a different scenario – a person is so sick that he cannot speak; may a lie detector (or some other electronic device which might gauge his reactions) be hooked up to him to find out if he really agrees to grant his wife a *get*?

Let us turn first to the question of "circumstantial evidence" as it affects the validity of a marriage ceremony:

The Mishnah[33] teaches that marriage is effected in one of

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33. *Kiddushin* 1. *Nishmat Avraham, Yoreh Deah,* p.95, allows a girl getting married to take a pill which will prevent her menstruating at the time of her marriage. Based on the attestation of the medical professional that the pill will absolutely prevent menstruation, the marriage could be consummated even though she would ordinarily have had to "be *choshesh*" for her period. For a different opinion, see

three ways: by giving a woman money or its equivalent, by giving her a marriage contract, or by consummation. According to the Talmud, in the presence of witnesses, the man gives his bride a ring or a coin and recites the prescribed formula, or she accepts a marriage contract in the presence of witnesses. If sexual consummation was the chosen option,[34] then the witnesses had to stand outside the room where the marriage was being consummated. To serve as witnesses for the marriage, obviously they did not observe the act itself. It was sufficient to see the couple closeted in a room by themselves and to presume that consummation had occurred. In the words of the Gemara, "*Hen hen eidei yichud, hen hen eidei bi'ah.*"[35]

We see here that the rabbis were prepared to accept an *umdenah*, an obvious assumption, and give it the force of eyewitness testimony. The halachic question that needs to be clarified is whether this precedent can serve as an indication that the rabbis in the Talmud were willing to accept "circumstantial" evidence, in resolving questionable issues of marriage and divorce, or if this should be considered a unique ruling, limited to this specific situation.

The truth is that it is difficult to know exactly how the rabbis felt about alternative types of evidence, for there is contradiction and ambiguity and lack of agreement, both among the *Rishonim* and the later *Acharonim*.

Minchat Yitzchak I, 127.

34. The Gemara in *Kiddushin* 5b forbids using this option nowadays.

35. See *Makkot* 7a: in order to testify that an immoral act took place between a man and a woman, one need only see the couple under compromising circumstances, but need not witness any actual forbidden act. The *Minchat Chinuch, mitzvah* 82 explains that once a couple is seen together in a compromising situation, we can be certain that they were not able to withstand the temptation, and therefore the halacha accepts that an immoral act occurred.

As a case in point, a major early rabbinic authority, the *Mordechai*, has two opinions which contradict each other. In his commentary to *Kiddushin*,[36] he discusses a case where a couple was getting married: the man recited the proper formula and put the ring on the girl's finger – but one of the two witnesses didn't see the actual placing of the ring. Nevertheless, rules the *Mordechai*, the marriage is valid. Despite this, we find in *Gittin*[37] that in virtually the same circumstance, the *Mordechai* rules the marriage not valid! We realize, consequently, that the status of circumstantial evidence is ambiguous and subject to a number of considerations.

The ambiguity continues in the writings of later rabbis: In his gloss to the *Shulchan Aruch*,[38] Ramo writes,

> The witness must see the actual giving [of the ring]...and if he did not see the actual giving, it is not valid unless he sees the actual giving.

One might conclude that Ramo's position is that, absent the witness' seeing the actual placement of the ring, the marriage is not valid. However, Ramo continues,

> Someone who married a woman through a wall [i.e., they were on opposite sides of a barrier, with an opening between, and she put her finger through the opening] but the hole is narrow and it is not possible to see her at the time of *kiddushin* (marriage)...[it is valid.]

This time, Ramo seems to have taken the opposite position: *Poskim* have followed either one or the other of his rulings, which understandably has left the whole issue further

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36. 531.

37. 451.

38. *Even HaEzer* 42:4. For more sources on this, see *Otzar HaPoskim* 42, No. 32.

beclouded.

Beit Shmuel follows the first ruling of Ramo cited above, opining that if the witness didn't see the act of *kiddushin* (giving the ring), then the marriage is not valid. However, the Chatam Sofer disagrees,[39] writing that the witnesses do not have to see the actual transference of the ring. The question arose when the rabbi and the *Shamash* of the synagogue served as witnesses at a wedding. A few days later, the *Shamash* told the rabbi that he was actually related to one of the two getting married, which fact rendered him unqualified to serve as a witness. Nevertheless, the Chatam Sofer ruled that the nuptials were definitely valid, for he considered all the other people sitting in the audience as valid witnesses, albeit they obviously could not have seen the actual giving of the ring. Having seen the groom and bride individually march down the aisle to the *chuppah*, and seeing them thereafter coming back side by side, they all "know" that the marriage took place. As far as the Jewish law is concerned, people's "knowing" establishes the marriage as factual and valid. But to what extent this rationale can be extended to other situations is a matter of controversy among *poskim* till our day.

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39. *Even HaEzer* 100. Rav Moshe Feinstein apparently concurs with this opinion. See *Iggerot Moshe, Even HaEzer* IV:13, which discusses the import of this ruling by the Chatam Sofer in the case of a Reform rabbi who performed a marriage ceremony where the witnesses were unqualified. He asks, what about the guests in the audience – if they are "kosher" to be witnesses, would the marriage be considered valid? In *Iggerot Moshe Even HaEzer* p. 178, Rav Feinstein writes that even if there are qualified people in the audience, inasmuch as the Reform rabbi does non-halachic acts in the ceremony, they are unable to testify that there was a valid marriage ceremony. However, on p. 180 he seems to have changed his mind, for he maintains that *all* the people in the audience would have to be unqualified as witnesses in order to invalidate the marriage.

Returning to our earlier question about the validity of a video to establish that a couple is married, one might claim that although it is circumstantial evidence, nevertheless it should be acceptable. But since the witnesses do not view the marriage as it is actually being performed, it seems that Jewish law would not consider it a valid ceremony.

In another example of modern technology impacting on halacha, we find a responsum by R. Moshe Feinstein[40] which permitted the granting of a *get* by a person who was not verbally able to instruct the rabbi writing the document, but who was hooked up to a polygraph machine which indicated his positive response to granting the divorce. In this ruling, once again, we see that the halacha has accepted a probable conclusion–*umdenah*–as sufficient evidence.

Rav Moshe Feinstein's responsa include a number of instances where a woman was permitted to remarry, even in the absence of her husband's body being found. Where it is possible to adduce a strong probability, verging on certainty, R. Feinstein and others[41] are prepared to accept *umdenah* as sufficient grounds for declaring the man dead. Modern decisors have evinced a willingness to accept alternate forms of evidence, even absent actual eyewitnesses, as sufficient in cases of doubt. They proceed from the guidelines set by *Shulchan Aruch*:[42]

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40. *Iggerot Moshe, Even HaEzer* IV 94. Rav Moshe does not give a blanket permit to use the results of one test; rather, he indicates that the test should be given a few times, to assure that the responses are being read correctly. Additionally, he suggests that other types of tests, if available, should also be done to verify the man's wishes.

41. Such as the ruling of *Minchat Yitzchak,* cited earlier, concluding that a man was certainly dead because, if alive, he would certainly have availed himself of the myriad forms of electronic communcation which could have made his whereabouts known.

42. *Even HaEzer* 17:24.

> If an [unidentified corpse] was found with distinguishing objects (*simanim muvhakim*)[43] in his possession [i.e., the unique objects are known to belong to a certain missing person] nevertheless, they do not count at all, because it is possible they were borrowed [from their owner by the unidentified dead person].

The Ramo adds that a "specific distinguishing mark" would be sufficient to establish that a corpse is indeed the missing person. However, a physical anomaly "such as something extra short or long [such as a finger] cannot be considered a '*siman muvhak*'... But a missing or extra physical feature [such as four fingers, or six]," can serve as sufficient evidence to establish his identity.

Thus, in one instance, Rav Moshe permitted a woman to remarry after the plane in which her husband was flying crashed into the English Channel, but his body was not found.[44] He based his ruling on the logical conclusion that virtually all people who are in a plane crash into the sea die upon impact and, even if some survive for a short while, almost all die anyway.

In another plane crash, into the East River, the man's body was not found, only body parts and artifacts. The woman testified to *Beit Din* that her husband wore a ring with the initials "A.D." on it. After a man's hand was found with such a ring, and after his dentist testified about a gold tooth in his mouth, which was also found, as well as his belt, wallet, and

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43. See *Otzar HaPoskim* for an extensive discussion of what makes a mark "distinguishing" or "unique" (*muvhak*). The *Minchat Yitzchak* I, No. 1:3, reasons that "knowing, even without seeing it", is evidence which can help free an *agunah* from her limbo.

44. Ibid, I,48.

papers, Rav Moshe granted the woman permission to remarry.[45]

The former Sephardic Chief Rabbi, Rav Ovadya Yosef, also uses logical reasoning to free a woman from her limbo status: in the case of a man who has been missing for ten years, Rav Yosef, relying on the logic of the medieval *Terumat Hadeshen*,[46] reasons that the missing man would surely have resorted to telephone, radio, mail, or some other means of modern communication even from far away places, to somehow get in touch with his family. Terming it an *umdenah demuchach* – an overwhelmingly convincing conclusion – he permits the wife to remarry.[47]

Review of these cases indicates that *poskim* are prepared to

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45. Ibid., IV, 57. And in a case where a man was taken away by the Russian police in the middle of the night, Rav Moshe considered that by itself a clear sign that he would be executed summarily, and therefore permitted the wife to remarry (Ibid, IV, 53).

In another case, involving a soldier in a Polish army brigade which had been captured by the Germans, who had not been heard from in the ensuing ten years, Rav Moshe permitted the wife to remarry. (Ibid, IV, 58).

These are not the only examples of *umdenah* being accepted as the basis for a ruling. Rabbi Y. Weisz is even prepared to allow a woman to remarry based on the *umdenah* that the man must surely be dead, for if he were alive he would never have left his wife in the limbo status of *agunah.* (*Minchat Yitzchak* I, 100 and II, 63, as well as I, 99, note 3.) See also *Chelkat Yaakov I, 146*, where a man was permitted to remarry even though his wife's body was not found, based on the *umdenah* that she had died.

46. No. 139.

47. *Yabia Omer, I, Even HaEzer* 4:9. See also *Ba'er Heitev, Yoreh Deah 322:6: Pitchei Teshuva 3; Even Ha'Ezer 6; Ba'er Heitev 2; Pitchei Teshuva 3.* Evidently, Jewish law does not even seriously weigh the possibility that the man willingly ran away just at the time of the accident; the likelihood of such a coincidence occurring is so remote that it is not taken into consideration.

rely on overwhelmingly convincing circumstantial evidence even in cases of marriage and divorce. These precedents may be relied on to serve as guidelines in those tragic instances where it is difficult to establish conclusively the identity of body parts culled from the charred wreckage of major accidents.

Kohanim

The Torah accords exalted status and special regulations for *kohanim*, many of which still apply today. In times past, every *kohen* had a "*Sefer Yuchsin*",[48] a document authenticating his lineage, which was attested either by his parent or witnesses. This vital tool having been lost, the subject of every *kohen's* authentic genealogy is a source of controversy among rabbinic authorities. Ramo in the sixteenth century wrote that nowadays no *kohen* can have definitive status as such, and therefore we do not give any of them "*challah*", one of the presents which *kohanim* receive.[49] Even if the *kohen* can prove his patrilineal descent, the *Magen Avraham*[50] argues that it is possible that he had a grandmother or earlier ancestress who might have been forbidden to marry a *kohen*, which would cast a doubt upon all her descendants. Thus, in his view the status of all *kohanim* nowadays is questionable.

Biur Halacha takes exception to this argument, writing "Heaven forbid that one should impugn the genealogical purity of *kohanim in* the present time!"[51]

The repercussions of this debate are manifold, taking in a

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48. See Rambam, *Hilchot Issurei Bi'ah* 2.

49. *Orach Chaim* 457:4.

50. No.9.

51. 128:3. See also *S'dei Chemed, ma'aracha* 20, no. 92, for an extensive list of both sides of the debate.

variety of halachic situations:

(a) May a person claiming to be a *kohen* go up to recite the priestly blessing?[52]

(b) How is it possible to perform a *pidyon haben*, where the firstborn son is redeemed by his father from a *kohen*?[53] And if it is performed, does that mean that the *kohen* performing the ceremony should return the five silver pieces to the father, since he may not be an authentic *kohen*?

(c) The Torah forbids a *kohen* from marrying a number of women, including a divorcee, a convert, the daughter of a forbidden marriage, or a *chalutza*(a widow whose husband died without children and who requires "release" (*chalitza*) by his brother). If a *kohen* nowadays, whose status, according to some is questionable, unwittingly married a *chalutza*, would he have to divorce her upon ascertaining the truth, or could he

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52. According to *Pitchei Teshuva, Even HaEzer,* beginning of No. 3, the only time a *kohen* of questionable lineage would be barred from reciting the blessing were if the Ineffable Name (*shem ha'meforash*) were pronounced in the blessing. Since this Name is not pronounced nowadays by anyone, that issue would not be a problem. However, there still remains the question of the *kohen's* making a *beracha* "in vain" for the mitzvah of reciting the priestly blessing, which is forbidden. However, he argues that this in itself would not present an impediment to the *kohen*, for we also allow women to make a blessing upon the performance of a mitzvah, even when halachically they are not required to perform that mitzvah and it is only optional. Nevertheless, it would seem from *Mishnah Berurah se'if katan* 4 that a non-*kohen* reciting this blessing has violated one of the Ten Commandments, not to take the name of G-d in vain. See also *Minchat Chinuch, parashat Naso.*

53. See *Minchat Yitzchak* 2:30, who examines the question if perhaps even the first-born son of a *kohen* might need *pidyon*, due to his questionable status.

rely on the premise that he may not be a *kohen* at all?[54]

(d) What about a *kohen's* being in the same room as a non-Jewish dead person?[55]

(e) According to the halacha, a *kohen* is entitled to be the first for any privilege or honor in a group. People are generally not careful about this nowadays. Could the questionable status of all *kohanim* be a factor?

Given these halachic questions, and many others like them, it would be highly desirable to find a way to establish definitively the reliability of a *kohen's* lineage. Recently, genetic research has uncovered startling scientific evidence that the majority of men claiming to be *kohanim* do indeed share a unique set of markers on their Y chromosome (the chromosome which every male receives unchanged from his father), leading to the conclusion that "the tradition of the Jewish priesthood, or *kehunah*, has a genetic basis that does point to a single ancestor–possibly Aaron."[56]

While this is an intriguing bit of information, it cannot be

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54. See Rivash, *Yoreh Deah*, 94; *Yaavetz 1; Mabit I-219; Birkei Yosef, Even Haezer 6:3.*

55. Although a *kohen* is forbidden to be in same building or room as a dead body, there is some question whether that prohibition extends to non-Jewish bodies as well. Thus, if his own status as *kohen* is in doubt, perhaps it is possible to be lenient in this case of "double doubt"?

However, *Chatam Sofer* 338 does not accept this suggestion. See also the *Pitchei Teshuva, Yoreh Deah* 339, who explains that since the possibility that a *kohen* is not really a *kohen* was not raised by earlier rabbis, evidently this suggestion is not taken as being a factor. This omission is apparent also in three responsa of R. Moshe Feinstein concerning the status of a *kohen (Iggerot Moshe Even HaEzer* I:5, II:4 and IV:12).

56. *The Jerusalem Report,* May 10, 1999, p.30.

employed to disqualify any putative *kohen*, because only about 70% of all *kohanim* have the common marker. Furthermore, a small tribe in Africa also has many men carrying the marker![57] For halachic purposes, the genetic finding is also invalid, because at best it only confirms that a man's father was a *kohen*, but in no way indicates if his mother was fit to be married to a *kohen* (the limitations were noted above). Consequently, although someone may demonstrably be descended from the first *kohen*, Aaron, that fact by itself cannot prove that he is a "kosher" *kohen*. In this case, the genetic evidence is interesting, but ultimately irrelevant to the halachic process.

Scientific Tests

Employing the latest findings in DNA and other genetic and blood research could very possibly establish the truth in paternity suits and other areas. But introduction of these data hinges upon the crucial issue of whether this type of evidence is acceptable in a Jewish court. Before we address that question, it might be well to take a moment to reflect if reliance on scientific information which can reveal things which are usually hidden is necessarily a good thing. From the standpoint of *hashkafa* (theological philosophy), rather than halacha (legal considerations), it might not be totally desirable.

In 1973, Rav Moshe Feinstein was asked about the propriety of young men and women being tested, prior to marriage, to determine if they were Tay-Sachs carriers. If both prospective partners were carriers, their marriage would be extremely ill advised. In his responsum, Rav Moshe writes that although most people are not carriers and one could (and maybe should) follow the dictum "*tamim tiheyeh im Hashem...*", living with simple trust in *Hashem's* goodness,

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57. Ibid., p. 34.

> ...Nevertheless, since now this testing can easily be done, we have to conclude that if one does not test oneself it is akin to closing one's eyes so as not to see that which can be seen.[58]

Furthermore, Rav Feinstein adds that since terrible pain and damage can ensue if two carriers do get married, he is in favor of publicizing to all young Jewish people that such testing is available and the importance of being tested.

This should not lead us to the conclusion that Rav Moshe Feinstein was in favor of conducting a broad spectrum of medical tests to uncover other dire possibilities. In general, his responsa bespeak an attitude that since everything comes from *Hashem*, one should learn to accept the divine decree. With respect to having amniocentesis performed to determine whether a fetus was a victim of Tay–Sachs (and presumably to abort the fetus), Rav Moshe writes numerous reasons for precluding such a procedure. Then he adds,

> And in general, one has to know that medical tests by which doctors can determine [the medical status of] such a fetus is only a probability (*umdenah be'alma*) and one cannot rely on such things.[59]

However, Rav Eliezer Waldenberg disagrees with the conclusions of Rav Feinstein, for a number of reasons.[60] He argues that it is not only permissible, but even obligatory for a person to seek healing for his ills. If one maintains that everything which happens is the result of G-d's will and therefore man dare not interfere with G-d's handiwork (a

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58. *Iggerot Moshe, Even HaEzer* IV, 10.

59. Ibid. *Choshen Mishpat* II 71, written in 1971.

60. *Tzitz Eliezer* 14:101-102, as well as 18:81, p. 160. Also *S'dei Chemed, Maaracha* I, 95.

position which indeed Rav Moshe does take)–then, first of all, this is kabbalistic thinking and should not be introduced into the halachic process. Secondly, it is G-d's will that the world function according to certain natural rules. If there exist in nature certain elements or medications which can heal a sickness, then it is the nature of the world as *Hashem* has made it that these procedures will cure the sickness. For a person not to be healed in this natural way means that it would require *Hashem* to perform a miracle to cure him without his taking medication. We cannot rely on a person's being such a saint that *Hashem* will save him from sickness in a supernatural way. Therefore, according to the *Tzitz Eliezer*, one must seek out and take advantage of any means that medicine has discovered to alleviate pain or cure illness.[61]

The Impact of Scientific Advances on the Halachic Process

While there seems to be a consensus of rabbinic opinion that one should avail oneself of the new scientific tests, there is lack of consonance on the key question of the validity and reliability of scientific conclusions in determining halachic decisions. Furthermore, how will this impact on normative halacha?[62]

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61. In *Parshat Mishpatim, Chatam Sofer* raises the question and discusses the permissibility of a doctor to heal the sick (*verapoh yerapeh*) since it was the will of G-d that this person become sick. For further insights on this issue, see the excellent survey of *Nishmat Avraham 14, siman 336* on the obligation to seek medical attention.

62. See the responsum where Rav Waldenberg disagrees with the view of Rav Feinstein on whether an abortion can be performed, in a case where tests show the fetus to be greatly malformed. In *Tzitz Eliezer Yoreh Deah 101, 102; XV-3; IX, 51*, he writes: "One should go back and ask an expert doctor who is qualified and honorable and true to our tradition." But see *Tzitz Eliezer XIII* 81, #3, where the

A survey of halachic opinions reveals that the *posek* considers many factors and religious principles as he ponders an issue, not only whether scientific evidence is determinative.

In his commentary to *Bava Bathra* 58, where the Gemara opposes a certain way of testing blood which would reveal legitimate or illegitimate children, the Rashash expresses his opinion that the Gemara did not want to be involved in exposing the *mamzerut* status of persons who were considered acceptable.[63] This is in line with the rabbinic dictum, "*mishpacha shenitme'a, nitme'a*", "a family which has been absorbed [i.e., whose illegitimate status is forgotten] let it remain absorbed."[64]

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author expresses his view that a stain should not be subjected to chemical or other scientific tests to determine if it is blood and rule that the womean is *niddah.*

63. Jewish law is reluctant to besmirch someone's legitimacy, even "bending over backwards" in order not to brand someone a *mamzer*. In *Shulchan Aruch Even HaEzer* 4, we find that if a man has been abroad for twelve months, and then his wife gives birth, the child is not branded a *mamzer*, on the outside chance that the mother had an unusually long pregnancy.

64. Rav Ovadya mi-Bartenura, *Commentary to Mishnah*, *Ediot* 8:7.

Modern *poskim* have not dealt with the question of forcing a person to undergo a scientific test (assuming *arguendo* that it would be acceptable evidence in a *Beit Din*). Generally speaking, although Judaism respects the individual's right to privacy, this right is set aside in a number of instances. For example, if lack of this knowledge will cause harm to others. (For a more thorough discussion, see my article on "Privacy" in *Journal of Halacha and Contemporary Society*, Volume I, No. I). However, if the test results would cause the individual to lose his job or if the information would cause harm to others, he cannot be forced to forego his privacy.

Pitchei Teshuva Even HaEzer 124-29, explains the rationale of *Beit Din's* not forcing someone to undergo tests which would reveal detrimental information, "because it is better that one life should be lost rather than that disaster should occur in Israel."

Rabbi D. Frimer (*Sefer Assia* Vol. 5, p. 196) cites *Tzitz Elizer* VII:48,

In other words, if a person's lineage is questionable, we do not necessarily rush to expose this. Exposure of the truth is not the only desideratum of Jewish law, and discretion must be employed when delving into super-sensitive areas.

Paternity

On the biblical verse "Avraham gave birth to Yitzchak" (*Bereishit* 25:19), Rashi comments that "since scoffers of that generation were saying that Sarah became pregnant from Avimelech [King of the Philistines, in whose palace she had been held hostage], therefore, what did the Almighty do [in order to stop the slander]? He made the appearance of Yitzchak's face similar to that of Avraham." Evidently, the striking physical likeness between the two was taken as proof of paternity.

In actual practice, would physical likeness be acceptable proof of paternity in a Jewish court?

When Maharsham was asked whether a child's physical appearance could be introduced as a factor in determining whether his mother had committed adultery,[65] he responded that the *midrash* cited above was never intended to teach a principle of Jewish law. Rather, when people observed the

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concerning testing a man to see if he is capable of fathering children. According to Rabbi Frimer, Rav Waldenberg rules that the man can be forced to take the test. However, it seems that Rabbi Frimer is taking a phrase out of context; actually, Rav Waldenberg rules that if the man is giving some lame excuse for not taking the test, obviously he doesn't want his possible sterility to be revealed, and therefore he should not be coerced to do so. Dr. Abraham Steinberg, writing on paternity questions in an article in the *Journal of Halacha and Contemperory Society* (translated by Dr. Fred Rosner), Vol. 27, p. 84, reports that *batei din* in Israel do not force individuals to undergo blood or other tests in paternity cases.

65. Part III, 161.

striking physical similarity between Yitzchak and Avraham, they spontaneously declared that obviously they were father and son.

Rav Waldenberg has ruled that blood samples cannot establish paternity, citing the Talmud in *Niddah* 31a[66] which teaches that every human being is the product of three "partners": father, mother, and the Almighty. The Talmud teaches that the mother contributes the "red'" elements of the child. According to Rav Waldenberg, this includes the blood; perforce, no ruling regarding the father can be established through testing the baby's blood, inasmuch as it emanates from the mother.[67] Furthermore, he opines, there are matters which the medical profession today declares to be true but which may, in twenty years, be found to be incorrect. Consequently, he is not prepared to accept these conclusions as evidence in a

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66. See *Avnei Miluim, Even HaEzer 4, ot 20, se'if 26*, who rules that not only does a Jewish court believe a man who claims that a child is his, but the man is also believed when he disclaims a child, and he would not be constrained to provide support for that child.

67. *Tzitz Eliezer* 13:104. Rav Waldenberg arrives at his conclusion despite the fact that it is based on aggadic material, and generally we do not arrive at halacha based on aggada. However, that rule applies only when the aggadic material is contradicted by halachic statements in the Babylonian Talmud. Since there is no contradictory indication in the Talmud, he considers this an appropriate source for his ruling. See Tosafot, *Berachot 48a, s.v. "velet"; Pitchei Teshuva, Even HaEzer 119:5; S'dei Chemed, Maaracha ha'alef, se'if katan 95, 150.*

Let us assume that a blood or DNA test would indicate that a child, who has been raised for years as the child of a certain father and mother, could not possibly be their child. What about the halachic principle of *chazaka*, which holds that something which has been accepted as true for a long time has a presumption (*chazaka)* that it is so. Could DNA evidence uproot the *chazaka?* It is an intriguing question; for insights into this situation, see *Shulchan Aruch, Yoreh Deah* 185:2. and *Shach*, ibid., no. 3, as well as *Sidrei Tahara*, ibid.

Jewish court.[68]

Many rabbis do not share this approach, among them the late Chief Rabbi I. Herzog, who wrote,

> Things which are well known do not need proof. It is too bad that while science is progressing and conquering worlds and revealing the deepest secrets, albeit they do occasionally err...we stick our heads in the sand like that well–known bird...[69]

Other rabbis are similarly prone to utilizing relevant scientific findings: *Nishmat Avraham*[70] cites authorities who incline towards accepting Rambam's view, that although the medical profession undoubtedly errs occasionally, nevertheless we ought to follow their new discoveries, even when they appear to be contrary to classical rabbinic opinion (*chazal*). A case in point arose when two newborn babies were possibly switched in the hospital and it became necessary to determine who the true mothers were. Rav Shlomo Zalman Auerbach ruled,

However, if this scientific investigation is known and

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68. Rav Uziel agrees that we follow *chazal* even if the medical profession disagrees, *"Baruch shebachar bahem uvemishnatam", Sharei Uziel II, sha'ar 40."*

What to do if the Gemara disagrees with medical opinion, see Rambam, *Moreh Nevuchim 3:14; Idem, Hilchot Kiddush HaChodesh 17: 24; Introduction to Ein Yaakov,* by the son of the Rambam; *Chazon Ish, Yoreh Deah, Hilchot Tereifot* 5:3; *Responsa Rashba* 3: 204; as well as *Sefer Assia* 5, pp. 192-3, footnotes 45-46.

Tzitz Eliezer XV, 44, also discusses this question, relevant to the Gemara's opinion that it is great mitzvah for a man to marry his niece, in view of the medical opinion that marriage between close relatives can result in birth defects to their children.

69. *Sefer Assia,*ibid.

70. *Even HaEzer* IV, p. 32.

> accepted in the entire world through many clear tests which [show] it to be true and clear, then it is reasonable that also from the viewpoint of halacha we can rely on it.[71]

Perhaps we may adduce reinforcement of this thesis in a statement of Rambam:[72]

> The Torah did not insist on the testimony of two witnesses...except in a matter that you cannot clarify except from the words of the witnesses' testimony...but something that one can know clearly without a witness [is permissible]...and therefore the rabbis were lenient on this matter.

Although Rambam makes this ruling in connection with the laws of an *agunah*, he elaborates and expands this approach to all areas of testimony, as he continues,

> If this is so [as above], why then did the Torah require two witnesses? [That is] so that whenever two witnesses come before the judge, he should judge in accordance with their testimony, even if he is not sure whether they told the truth or are lying.

The thinking of Rambam is clearly that if facts are so well known that they are accepted by all, the judge can accept them as such; only when there is some doubt as to the true facts of the case, is the testimony of two witnesses essential.

Relying on a non–Shomer Shabbat

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71. Ibid, p. 37.

72. *Hilchot Gerushin 29.*

A further point which needs to be clarified is the weight given to evidence or testimony coming from a person who does not observe Torah and mitzvot.[73] Statements made by such a person are generally given less credence than those made by a *Shomer Shabbat*, whose word is considered totally trustworthy. How trustworthy does halacha consider the opinions and conclusions of the expert who is reading and interpreting scientific tests? Are the evaluations of a polygraph expert admissible as "evidence" which will impact upon the halachic decision? Are lab reports on a DNA sample totally objective, or does their significance need to be interpreted by an expert – and would it make any difference if the expert were an observant Jew or not?

The general attitude of the *Shulchan Aruch* toward the testimony of non–Jews before a Jewish court is that it can be relied upon only in a situation where their exposure as perjurers is feasible and, furthermore, they would suffer financially or otherwise if their deliberate falsehood were discovered, inasmuch as their reputations would be ruined. In the words of the *Shulchan Aruch*,[74] "since [the consumer of the item being

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73. Regarding the testimony of non-Jews (not necessarily experts), there is a difference of opinion between the Tosafists (*Bava Kamma* 88) and the *Mordechai* (*Gittin* 10). The latter writes that "idolaters who are known as non-liars are acceptable to give testimony" in a Jewish court. His ruling is based on a Mishnah which rules that documents processed by idolaters in a Jewish court are accepted as evidence, since we take it as given that the courts are careful to preserve their integrity and will not issue spurious documents. Tosafot, however, do not agree with that evaluation; they rule that non-Jews are certainly forbidden from testifying in a Jewish court except about monetary questions. For all other cases, Jewish witnesses are required.

74. *Yoreh Deah 114; Orach Chaim 20:1; Yoreh Deah 98:1* – but here the Ramo notes that we [Ashkenazi Jews] no longer rely on the word of Gentiles. But *Minchat Yitzchak* 1:11 qualifies this statement to mean

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that Gentiles are suspect only in cases where their reputations will not suffer even if they are exposed. The same can be found in *Yoreh Deah 118:2*; see the Gra for the sources of this ruling. In *Yoreh Deah* 98:1, the Ramo rules that nowadays we no longer rely on non-Jews, and the rationale is to be found in *Badei HaShulchan* p. 16. See also *Shach 98:29*, and *Pitchei Teshuva No. 3*. It is quite possible that the Ramo was speaking about a case where the information is available without relying on evidence given by a Gentile; but if his testimony is essential, it would be admissible.

This is probably why R. Moshe Feinstein – in a case where it was necessary to know what the law is concerning a tenant renting an apartment – insisted that only an *"adam kasher*", an honest person should be asked. He did not want to rely on the attorney who, since he had nothing to lose, might not be careful about expressing the law and might make a mistake. *(Choshen Mishpat 172).*

Shevet HaLevi, IV:83, discussing expert opinions on a case concerning kosher fish, writes that if "*yesh raglayim ladavar"* (we have good cause to believe this) then the experts could be believed. In this case again, he hesitated to trust the scientist's word alone, because if it turns out to be mistaken, the expert can simply claim that he was employing the best science known at the time.

The *Nodah Biyehudah 146:31* offers a novel suggestion: when the case involves an *issur derabbanan* (rabbinic prohibition), a Gentile's word should be accepted by the judge if there "are *raglayim ladavar"*, even in a situation where his information is not a chance remark (*mayseach lefi tumo*). As proof, he cites *Yoreh Deah* 69:10 and 187:8. However, he adds, "This is a thought which has occurred to me, but "heaven forbid one should rely on this [suggestion], because I have not studied it well and this is only my first impression."

Yoreh Deah 21:4 rules that if a mikvah is owned by a Gentile, who gets paid when it is used, his word cannot be trusted when he testifies about it. Only if the mikvah is locked (and therefore he could not have had access to it), do we accept his word. This clearly shows that if a Gentile has a vested interest in a subject, we cannot accept his unsubstantiated word about that subject as evidence in halacha.

Chelkat Yaakov II, 98, was asked about relying on the word of a non-Jew in order to render a mikvah "kosher". He writes, "Anytime there is any suspicion that the Gentile is doing something for some benefit [to himself], we have to be concerned. Only when he has no

sold] insists specifically [that he wants a product of a certain type], then no [craftsman or professional artisan] would jeopardize his livelihood" by substituting a different product or lying about that object. The Ramo acquiesces, adding "and similarly whenever one buys from a skilled craftsman, who would not jeopardize his reputation..."

Recent headlines make one wonder whether nowadays we can blithely accept this rabbinic premise as still being an accurate predictor of commercial or professional behavior. When one hears that a universally respected baby food company has for years been passing off a mixture of sugar, water, and flavoring as "apple juice" to its loyal customers, there is reason for concern. And when it becomes known that doctors often permit technicians to use their machines to operate on patients, there is cause for alarm. This paper is not the venue for deciding this question, but it certainly bears pondering.

If a person's professional credibility would be compromised were he to lie, Jewish law is inclined to rely on his word.[75] The

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personal interest in the matter, then we do not need to worry that he would lie just for the sake of misleading us."

See also II, 37,38, about subjecting milk to a chemical test to see if any pig's milk was added to it and whether one may rely on this test to rule on its kashruth.

The author of *Minchat Yitzchak* (I, 125:6) writes about a bizarre case where a woman, whose doctor attested that he had performed a hysterectomy on her, continued to menstruate. Rabbi Weisz concludes that the doctor was lying and refused to accept his claim that he had performed a total removal of the uterus. He writes that we can rely on doctors only when they have a *yedia berurah*, not only *umdan da'at.*

75. Rav Moshe Feinstein was asked whether it was acceptable to have non-Jews clean the containers in a factory where margarine was produced, and to accept their word that they used boiling water (this would in effect *kasher* the utensils). He ruled that we can rely on their word, because it is good for their business and they would be fined by the state if it turns out that the water was not hot enough.

rationale is quite simple: the non–Jew's own self interest will lead him to tell the truth, and therefore it can be accepted by the Jewish court. Understandably, this applies only when the expert is working for the court. When the expert has been hired by one of the parties to a lawsuit in order to provide "expert testimony", Jewish law considers that testimony essentially worthless. His personal vested interest in having the court accept his view invalidates his objectivity, and hence also his testimony.

Thus, weighing the validity of a non-Jew's word depends on evaluating the self-interests of the parties involved and judging accordingly. Accepting the scientific opinion of a non-Jewish expert cannot be categorically endorsed, but must be evaluated in context. The responsa literature give evidence that this principle is employed frequently.[76]

This issue extends to the question of *Beit Din's* relying on the testimony of a non-Jewish doctor.[77] Is it possible that only

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(Although Rav Feinstein does not raise the point, they could possibly also be sued if they failed to remove some residue to which a person is allergic.)

76. *Iggerot Moshe Yoreh Deah* II, 52.

A manufacturer of fruit juice adds grape juice to his product, but maintains that, prior to its being added and before anyone touches it, the grape juice is heated to at least 180 degrees (which would make it totally acceptable from a kashruth standpoint). Rav Moshe Feinstein was asked whether the manufacturer could be believed and the juice considered acceptable for kosher consumption. The answer given was that if it is possible to taste the difference between grape juice heated to a full 180 degrees and juice heated to a lesser point, then one can rely on the manufacturer's say so, "since he would not jeopardize his good professional name."

77. See *Niddah 22b; Aruch HaShulchan 188-75; Chidushei Chatam Sofer, Niddah 22b. Chelkat Yaakov* I, 213, relied on the technical information supplied by a doctor who was "slightly religious", to

the word of an observant Jewish doctor would be acceptable to rabbis in determining the halacha?

As a common example of where this problem arises, let us consider the case of a woman who is staining. Ordinarily, this would render her a *niddah*; however, if she has some cut or wound to which the bleeding could be attributed, she remains *tahor*. What if her doctor is not Jewish – can his diagnosis that there is a wound causing the bleeding be accepted by the rabbi ruling on this case? It is the view of *Avnei Nezer*[78] that a professional would not risk his reputation as an expert doctor, endangering his status and livelihood; therefore, his word is acceptable. However, the *Chatam Sofer* adopts a different rationale: since in this situation there is very little likelihood that a wrong diagnosis would ever be exposed, and virtually no chance that it could be shown to be a deliberate falsification, therefore the Gentile doctor's word in this case should not be accepted.[79]

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permit a man to continue marital relations with his wife even after prostate surgery which might have rendered him *petzua daka* and therefore forbidden to engage in marital relations.

In matters of life and death, we would certainly give some credence to the opinion of a non-Jewish doctor. Even if the normative Jewish law would be not to accept that doctor's word in evidence, nevertheless, certainly it qualifies as an expert opinion which might be true. And in the case of even a doubtful threat to life (*safek pikuach nefesh)*, the law directs us to be careful to avoid even the doubt. Thus, his word would be accepted as at least creating a doubt.

78. *Avnei Nezer* 235. See *Pitchei Teshuva, Yoreh Deah* 187:30, for various opinions. See also *Chazon Ish* 82.

79. 175 and 160. *Maharsham* 13 extends this ruling to include a non-observant Jewish doctor as well. In *Tzitz Eliezer* VII 48:8, Rav Waldenberg adds this caution: "You have to know to turn with a question ... also to a religious doctor, or at least to a serious doctor who approaches the laws of the Torah with respect and seriousness."

It is important to note this significant limitation, adopted by many *poskim*, about implicit acceptance of a doctor's or other expert's word. The Maharik is prepared to employ an *umdenah* to explain the *intent* of someone's actions, but he will not use it to establish that something *did* happen.[80] The *Chatam Sofer's* rulings indicate his position that halacha is prepared to accept objective dicta of medicine and science about scientific realities, but draws the line at accepting their *interpretation* of these data; or, to put it differently, the halacha accepts the truth of scientific or expert conclusions in a general sense, but is not prepared to accept implicitly the word of a scientific expert as to the realities of the specific case before the judge.[81]

An example of this is Rav Moshe Feinstein's willingness to accept the report by farming experts that commercial egg production in America today occurs virtually exclusively on chicken farms where there are no roosters at all. Based on this general fact, which he accepted as true, Rav Moshe ruled leniently about commercial products produced without the eggs being checked for bloodspots (since bloodspots in non–fertilized eggs are (a)rare and (b) possibly not forbidden).[82]

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80. *Responsa Maharik shoresh 129.*

81. *Chatam Sofer, Niddah* 22.

82. *Iggerot Moshe Yoreh Deah 136.*
There are many instances where Rav Moshe Feinstein was asked to render a decision on a matter which involved evaluating information culled from non-halachic sources:
Iggerot Moshe Even HaEzer IV 26:1: A girl was raised by people who were not her parents, and when she wanted to get married, the rabbi asked for proof that she was Jewish. A non-observant Jewish doctor who knew the family history sent a letter to the rabbi, attesting to her Jewish birth. The rabbi, in turn, asked Rav Feinstein if he could accept the doctor's statement as true. Rav Feinstein responds in the negative. However, he adds, "if one finds corroborating evidence in his files, which can be recognized as not being recently added...and

Conclusion

The principles of halachic jurisprudence have their origin in the Torah, which is eternal. In this study, we have explored the various ways in which rabbinic scholars, in the course of

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there are no erasures in the figures before or after [the relevant date], then it can be taken as proof that is true." Rav Moshe adds his amazement that the rabbi would have been willing to perform the marriage merely on the doctor's say so, "since it is a common occurrence that [doctors] give letters to deceive [others], for payment or just as a favor to acquaintances."

Iggerot Moshe, Even HaEzer IV 58:2: Rav Moshe accepted the testimony of government documents that a man had died. (This was not for the purpose of allowing the wife to remarry, but rather to allow the children to observe the *yahrzeit).* In this case, we can posit that Rav Feinstein was prepared to accept the government's statement because there was no reason to suspect an untruth. However, that assumption cannot always be counted on. It is now known, for example, that the "unknown soldier" from the Viet Nam war who was buried in the Tomb of the Unknowns, was actually identified and known by certain persons in the government. Nevertheless, the government had a vested political interest in honoring Viet Nam veterans, and therefore buried a soldier as "unknown", thinking that the ruse would never be discovered.

Yoreh Deah 118:10: Rav Moshe rules that if a non-Jewish worker is left alone in a Jewish home, but the owner comes and goes at random, we can rely on the food in the house being kosher, inasmuch as the non-Jew would be afraid of being caught were he to mix up the food in any way. This is true even if making the change would somehow benefit the Gentile, still we can rely on his being afraid of being caught. And in a case where he would derive no pleasure or benefit from making a switch, it is totally permissible. If the Gentile has no reason to prevaricate or to mix up the foods, we don't need to assume that he would do it maliciously.

Yoreh Deah 114:5: The same approach is reflected in this ruling, which permits a Jew to buy pomegranate juice from a Gentile vendor, without being concerned that he added some (non-kosher) wine, even though the wine is cheaper than the juice of pomegranate. That is because this type of juice is sold for medicinal purposes, and "the craftsman [i.e., the pharmacist who prepares this mixture] will not

centuries, have applied and expanded these principles, to ensure the viability of the judicial and halachic processes. In our century, science has made quantum leaps in uncovering the wonders of the universe. The modern challenge is to incorporate these marvelous new technologies and capabilities within the ancient principles of the Torah, and to formulate approaches which will continue to guide our people in the ways of truth and justice.

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threaten his reputation as an expert" by adulterating his medicines.

Halachic Responses to Sociological and Technological Change

Rabbi Michael J. Broyde and Avi Wagner

I. Introduction

In responding to changes in social or technological reality, Jewish law takes timeless principles and applies them to prevailing situations. Although halacha appears to change, insofar as the answer provided to an identical question might be different in different generations or locations, it is actually the same principles now being applied to new circumstances.

This paper addresses social and technological changes related to the observance of one aspect of Yom Tov: the concept of *shaveh lechol nefesh*, which is best translated as work which is "of benefit to every person." In particular, we will address three distinctly different social and technological changes that have occurred in the last seventy-five years in the United States of America, and see how they have impacted on Jewish law.

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1. Daily showering has grown very common. Many, if not most Americans shower every day, and it is viewed as unprofessional not to do so.[1]

2. Cigarette smoking grows increasingly uncommon. Nearly every year the percentage of people who smoke declines, and in the United States in 1998 less than 23 percent of the adult population smoked; this is half the percentage of smokers thirty-five years ago.[2]

3. Hot water is readily available through automatic hot water heaters located in every home and apartment, which instantly provide hot water without any effort. Hot water is available and heated around the clock, and does not entail any one person's heating water for another.[3]

None of these three conditions were historically true in the past; daily showering was uncommon until the middle of the twentieth century, cigarette smoking was engaged in by more than half of the adult population until the mid-1960's, and

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1. See e.g. Jane E. Brody, "Personal Health" *New York Times* March 3, 1993 C12, which notes that "our national cleanliness fetish calls for a daily bath or shower", or the *Common Sense Etiquette Dictionary* which notes that the American practice is to "take a bath [shower] every day." The classical work *Physician Evaluation of Mental Status* notes that one of the evaluation terms for ability to function is whether a person can engage in "Activities of Daily Living," which it defines as "the things that one has to do to get through each day, i.e. bathing, dressing, eating, toileting, etc." For more on this, see text accompanying note 79. Whether this is true in other countries is unclear; as noted by Hubert B. Herring, "The French, Now Sniffing at Themselves" *New York Times*, November 29, 1998, Section 4, page 2.

2. For nationwide smoking statistics, "Kentucky's Smoking Rate Leads Pack," *Akron Beacon Journal*, November 6, 1998, at page A4.

3. "Bedroom, two car garage: Survey describes Typical New Home", *Associated Press Wire Service* February 28, 1993.

instant hot water was uncommon until the end of the Depression, and even later in rural areas. Undoubtedly there are places in the world where these facts are still untrue.[4]

Before proceeding to discuss the particular issues which are the focus of this paper, it is vital to conceptually distinguish between changes in the *principles* used by halacha and differences in *results* provided by halacha to questions based on novel social or technological situations. This paper addresses the latter case, which should not be confused with the former.

Few would deny that halacha's response to any given question depends on the factual reality of the times even as the halachic principles remain the same. For example, it was the custom in many communities, when speaking to one's teacher directly, to address that person in the third person as a mark of respect. Indeed, to this day that is the practice in many countries. However, because the construct of English grammar makes this very awkward, it is not the general custom in English-speaking communities when addressing eminent people, and thus is not the general custom in the observant Jewish community either.[5]

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4. The smoking rate is the one that is most clearly so. See "Overseas, Smoking is one of Life's Small Pleasures" *Akron Beacon Journal*, September 7, 1997 G3. (In Vietnam, an estimated 73 percent of men smoke. In China ... the percentage is over 60 percent").

5. Thus, when speaking to the Chief Justice of the Supreme Court of the United States during oral argument, if one did not understand the question that he posed, one might say "Chief Justice, I did not understand the question." However, one would not turn to the Chief Justice and say "What did the Chief Justice ask?" The first question is actually in the second person, and the second question is in the third person. This is consistent with the requirement of the *Shulchan Aruch YD* 242:16 which permits speaking to one's teacher in the second person, as long as the appropriate honorific is used.

Changes of this type do not demonstrate a change in the principles used by halacha, which require that one speak reverentially to one's teacher. Rather, it demonstrates the consistent application of a principle – the need to speak in a respectful manner – to diverse factual settings. Responses to change – linguistic, social or technological – inevitably entail applying classical principles to new situations and are not a matter of controversy.

This paper is divided into five sections. In Section II general rules regarding activity which is prohibited on Shabbat but permitted on Yom Tov are explained; the term *shaveh lechol nefesh* ("of benefit to all") is explained as the crucial term. Section III examines whether the application of the term *shaveh lechol nefesh*is a variable based on social or technological concerns (and concludes that it does). Section IV discusses smoking on Yom Tov, and Section V discusses showering on Yom Tov. There is a short Conclusion.

II. Permitted and prohibited work on Yom Tov

Categories of work prohibited on Yom Tov are generally the same as those prohibited on Shabbat.[6] But one major exception to this rule exists, as the Torah itself states regarding Pesach:

> וביום הראשון מקרא קדש וביום השביעי מקרא קדש יהיה לכם כל מלאכה לא יעשה בהם אך אשר יאכל לכל נפש הוא לבדו יעשה לכם:
>
> The first day shall be called holy and the seventh day shall be called holy; no work may be done [on the holidays] except for what is edible by all people, that

6. *Shulchan Aruch Orach Chaim* 495:1.

alone may be done for you.[7]

Thus, at the minimum, any activity prohibited on Shabbat is permitted on Yom Tov if that work is necessary for daily sustenance (*ochel nefesh*).[8] Some authorities translate the word *ochel nefesh* to mean food needs only.[9] Others offer a broader explanation that *ochel nefesh* includes all bodily needs and desires.[10]

Whatever the precise boundaries of the permissible rule in the Torah itself, the Talmud further extends this to include other types of work:

> Rav Pappi responded to Rav Pappa: Are you of the opinion that since wounding is permitted in a case of need [a case of *ochel nefesh*] it is also permitted even if there is no need [for food]? Are you then of the opinion that it is permitted to burn spices [this surely should be prohibited], because burning is permitted in a case of need and should therefore be permitted even if there is no need? Rav Pappa responded: Regarding this, the verse states: "Except for what is *ye'achal lechol nefesh*

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7. Exodus 12:16.

8. See Mishnah, *Beitzah* 36b and *Megillah* 7b and *Shulchan Aruch OC* 495:1. See also Tosafot *Beitzah* 3a s.v. *gezeirah* for a listing of which categories of work are necessary for *ochel nefesh*, but also note, however, Ran's comments *ad loc.* Whether a category of work is permitted for *ochel nefesh* if the work desired is not generally primarily used for the creation of food but is so being used here (such as tearing aluminum foil), is a dispute among the decisors and might depend on whether such an activity could be done prior to Yom Tov; see *Magid Mishnah Yom Tov* 1:4, *Teshuvot Michtam L'David OC* 19, both of whom aver that Rambam prohibits such actions. This matter is well discussed by Ramo *OC* 509:1 and commentaries *ad locum*.

9. See sources cited in text accompanying note 20.

10. See sources cited in text accompanying note 17.

> [literally: edible by all people] that alone may be done for you;" **only something which is of benefit to all** [*shaveh lechol nefesh*] may be done. Rav Acha the son of Rav asked Rav Ashi: Are you of the opinion that one who finds a deer on Yom Tov may not slaughter it because it is not *shaveh lechol nefesh*? Rav Ashi responded: What I mean to say is that the object to which the work is done must be *shaveh lechol nefesh* and a deer is *shaveh lechol nefesh*.[11] (emphasis added)

This talmudic text establishes a principle that any type of activity that is applicable to *ochel nefesh* is permitted even when that activity is not being used for the sake of food,[12] provided that (a) it is for the use of the holiday and (b) it is *shaveh lechol nefesh* (of benefit to all). This principle and its expansion generally goes by its talmudic name of "*mitoch*," from the talmudic statement "In the course [*mitoch*] of permitting work

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11. *Ketubot* 7a. See also *Beitzah* 12a-b.

12. Tosafot *id.* s.v. *mitoch* based on other sources interpret this to mean that work is permitted for "needs of the day or the fulfillment of a mitzvah." Rashi in *Beitzah* 12a *s.v. elah* seems to indicate that even for no need whatsoever this form of work is permitted. Rabbi M. Auerbach, as cited in *Imrei Binah Hilchot Yom Tov*, and Rabbi S.Y. Zevin in *HaMoadim BeHalacha, Yom Tov* 1:4 explains Rashi as understanding that categories of work permitted on Yom Tov were never included in the dictum "and all work shall not be done on them," which prohibits work on Yom Tov; see also Ramban on Lev. 23:7. According to this view, on a biblical level, it is irrelevant whether the work is done for a reason or not. However, Rashi does agree that unnecessary work is rabbinically prohibited; see *Biur Halacha* 518 *s.v. mitoch*. Tosafot disagree, and understand *ochel nefesh* not as a categorical exclusion, but rather as a specific allowance which accommodates *simchat* Yom Tov and other needs of the day. See also *Pnei Yehoshua Beitzah* 12b *s.v. vekasha*. *Biur Halacha* concludes that the majority of decisors agree with Tosafot and one should act in accordance with Tosafot's view; but see *Encyclopedia Talmudit Ochel Nefesh* 1:275.

for the sake of food, work even not for the sake of food was permitted."[13]

The concept of *mitoch* is difficult to understand jurisprudentially. On what basis can the talmudic Sages extend the permission of work for activities that are not *ochel nefesh*? R. Eliezer of Metz in the *Sefer Yeraim* provides the classical explanation:

> The Torah's permitting work on Yom Tov is not restricted to *ochel nefesh*; rather it includes all bodily needs,[14] ... the words *lo ye'achal* include both eating and other forms of enjoyment. Thus, all bodily needs are permissible because of the Torah's wording, even without the principle of *mitoch*.[15]

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13. *Beitzah* 12b. Rambam (*Yom Tov* 1:4,16), following the view of Rif, makes no mention of *shaveh lechol nefesh* at all. Different *Acharonim* offer varied explanations of the Rambam's opinion. Most simply, R. Moshe Schreiber (*Chatam Sofer* O.C. 146) suggests, as a possibility, that when Rambam permits activities on Yom Tov he implicitly means that the objects for which such actions are necessary must be *shaveh lechol nefesh*. Other authorities (*Biur HaGra*, O.C. 518:2; *Teshuvot Maishiv Davar* 1:37-38 and *Aruch HaShulchan O.C.* 495:19-21, 511:3) explain that Rambam rejects the necessity of *shaveh lechol nefesh* as a precondition for permitted work, and the reasoning of *mitoch* is, in the view of Rambam, enough to permit all work, even that which is not of benefit to all, to be permitted. All Ashkenazic *poskim* reject the view of Rambam and certainly require the concept of *shaveh lechol nefesh* for non-food related work.

14. The words in ellipses make reference to a related dispute found in *Pesachim* 21b-24b.

15. *Sefer HaYeraim* sec. 304. *Yeraim's* comments are according to the opinion of *Beit Hille*l (*Beitza* 21b), which is normative. Rambam there in his *Commentary to the Mishnah* explains *Beit Hillel* as of the opinion that the Torah's use of the phrase *ach asher ye'achel lechol nefesh* includes all bodily needs, indicating that Rambam follows this line of reasoning too. (However, any theory advanced in Rambam will have to be

R. Eliezer of Metz, and most other *Rishonim*,[16] explain *mitoch* not as a rule of extension, but rather as a method of explanation which comes to demonstrate that work necessary for any mitzvah, including holiday enjoyment, is permitted.[17] Tosafot and other authorities disagree with this explanation; they rule that the term *ochel nefesh* is restricted to the preparation of food product alone. Other needs are permitted only because of the rabbinic insight grounded in *mitoch*, which thus permit non-food preparation.[18] However, activity permitted because of *mitoch* alone must be *shaveh lechol nefesh*, according to all Ashkenazic and many Sefardic authorities.[19]

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consistent with the Rambam's larger view of *mitoch* and *shaveh lechol nefesh*). *Kolbo* 58 defines *ochel nefesh* to be "bodily needs, because they are *shaveh lechol nefesh*;" *Kolbo* is succinctly expressing the *Yeraim's* idea, even though *Yeraim* does not explicitly relate *ochel nefesh* and *shaveh lechol nefesh*. See also *Aruch HaShulchan* 511:1, *Mishnah Berurah* 511:1 and *Shaar Hatziun* 511:1,2. With regards to the *Shaar Hatziun*'s comments on Rambam, see *Tzitz Eliezer* (1:20:3).

16. See *Encyclopedia Talmudit*, *Ochel Nefesh* 1:275n.12.

17. Thus the Talmud on *Ketubot* 7a only means to allow wounding not for the sake of food, but only because it is a mitzvah; see Tosafot *ibid. s.v. amar* for a discussion of the difficulties with this approach. Other authorities (see the sources cited above) appear to translate the word *mitoch* as "since" or "because". Based on this translation, *mitoch* is a construct in and of itself, separate from *ochel nefesh*. *Yeraim* explains the word *mitoch* as meaning "within" or "in the course of" such as "*mitoch*-Within the verse itself in which the Torah allows bodily needs it allows other needs also . . ." See also *Tosafot Ream's* glosses on the *Sefer HaYeraim* (316:15-8) and the sources cited there.

18. Tosafot *Beitzah* 21b *s.v. lo*. See also Ran and Meiri on *Beitzah* 21b; See also Ritva and Ramban to *Shabbat* 39b. Rabbi Ovadiah Yosef, in *Yabia Omer* OC 5:39:1, indicates that Ritva and Ramban agree with *Yeraim*.

19. Rambam and perhaps *Shulchan Aruch*, do not agree, see note 15. Indeed, even in the *Beit Yosef* it is unclear whether he ever accepts the relevance of *shaveh lechol nefesh*, which he never uses anywhere in

Before turning to the question of whether the concept "of benefit to all" can change from time to time and place to place, it is important to understand what the principle means. Based on the talmudic incident in *Ketubot* 7a quoted above, the use of the phrase *shaveh lechol nefesh* denotes an activity that people view as desirable to them; thus eating venison is "of benefit to all" even though most people do not have the opportunity to

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Shulchan Aruch. In this view, *mitoch* alone is enough. See *Yabia Omer* OC 5:39(5) for a collection of Sefardic decisors who do consider the term *shaveh lechol nefesh* as relevant.

The question of whether food preparation activity which is a *melacha* on Shabbat must be permitted on Yom Tov because of *ochel nefesh* only when it is *shaveh lechol nefesh*, or even when it is not, seems to be disputed. This becomes relevant when a person is cooking something that most people do not wish to eat (such as peanut butter-marshmallow-banana flavored hamburgers) but which the person in question does wish to eat.

R. Zerahiah Halevi, in his commentary to *Beitzah* 23a, states that even prepared food must be *shaveh lechol nefesh*, as is the simple understanding of *Ketubot* 7a. Thus it follows that the requirement of *shaveh lechol nefesh* applies even to direct *ochel nefesh*, and this statement is reinforced in the *Shulchan Aruch HaRav* (*O.C.* 511:8) which writes that anything that is not *shaveh lechol nefesh* is prohibited on Yom Tov. *Shaar HaTziun* 511:12 notes that according to R. Zerahiah that which is not *shaveh lechol nefesh* is not only excluded from the categorical permission of *mitoch*, but also altogether excluded from being called *ochel nefesh*, even though the person cooking it certainly expects to eat it. Alternatively, *Teshuvot Darchei Noam* (O.C. 9) understands Rav Ashi's reply at the end of *Ketubot* 7a as rhetorical, and thus is of the view that all food is considered *lechol nefesh*, even if most people do not eat it, and would not want to. A similar result can be found in *Teshuvot Michtam L'david* (O.C. 19) where he states that all food is by definition *shaveh lechol nefesh*, since a starving person would eat any food, and this makes all food useful and therefore *shaveh lechol nefesh*. This is very difficult to understand, as *shaveh lechol nefesh* would seem to denote a pleasant experience. For more on this, see also Meiri (*Beitzah*) 21b who writes that with regard to food, *ochel nefesh* is not a concern and Rashba *ad. loc.* who appears to disagree.

do so regularly. When given the chance, people engage in the activity.

As noted by many, the principle of "of benefit to all" does not really requires "all," even though the word *kol* in Hebrew is literally translated as "all,". With most matters of Jewish law, it is sufficient that "most" desire this activity.[20] Just as there must be some people who are violently allergic to venison or find it extremely distasteful, it is sufficient that most people would eat venison. The same is true for all applications of *shaveh lechol nefesh*. This explains why Tosafot state that washing hands, feet and face is *shaveh lechol nefesh* – most people do so, or would like to do so, regularly.[21]

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20. See *Peri Megadim Ashel Avraham OC* 511:4 who explicitly notes this in the name of many commentators. This can also be implied from Tosafot *Beitzah* 21b *s.v. lo,* and *Aruch HaShulchan OC* 511:12.

21. Tosafot, *Shabbat* 39b s.v. *uvet hillel materim*.

There are at least three other definitions of *shaveh lechol nefesh* that are presented as possible by various decisors. Each of them, however, seem fraught with conceptual difficulty.

(1) In *Hilchot Hamoadim* 16:1 the possibility is raised that *shaveh lechol nefesh* has nothing to do with whether it is of benefit to most people, but whether people really need to engage in this activity or not. Indeed, the author speculates that when even a very small number of people need something very badly, that is called *shaveh lechol nefesh*, and even when most people do something regularly it is not *shaveh lechol nefesh* if they really do not need it. This seems deeply inconsistent with the talmudic discussion in *Ketubot* 7a, Tosafot *Shabbat* 39b *s.v. b"h* and Tosafot's assertion that a steam bath is *shaveh lechol nefesh*.

(2) *Chazon Yechezkel Beitzah* 1:7 seems to adopt the view that *shaveh lechol nefesh* requires that this be an activity that most people want to do all the time; an activity that most people want to do once or twice a day does not suffice. This, too, does not seem so logical, as it flies in the face of Tosafot's view found in *Shabbat* 39a that a steam bath is permitted but regular bathing not. So, too, it is hard to imagine that most people wish to eat venison for breakfast.

(3) *Beit Meir YD* 197:3 seems to accept that *shaveh lechol nefesh* depends

III. Does Shaveh Lechol Nefesh Change?

Before one can address whether any particular activity is considered currently "of benefit to all" one preliminary question must be addressed: Does the concept of *shaveh lechol nefesh* change from time to time and place to place, or maybe the talmudic Sages fixed the concept through rabbinic decree to denote specific activities, and even if these activities are not longer currently "of benefit to all," halacha treats them as if they are.[22]

The answer to this question is clear. Halacha recognizes that the concept of *shaveh lechol nefesh* is determined by a societal and social norm and not by a fixed and immobile rabbinic decree. For example, consider that *Mishnah Berurah* discusses whether washing feet nowadays is *shaveh lechol nefesh* even though many *Rishonim* explicitly state that hands, feet and face are halachically equivalent and washing all are *shaveh lechol nefesh*. He states:

> Maybe nowadays washing feet is not *shaveh lechol nefesh*, **and this has changed from their times**, since they used to walk extensively without shoes [and nowadays our feet do not get dirty, since we wear shoes].[23] (My

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on an activity being done by most people, and that even the minority that does not do it, generally wishes to do so. If the majority is doing an activity because most people are finicky, *Beit Meir* avers that this is not called *shaveh lechol nefesh*.

For more on this, see Rabbi Yisroel Nadoff, *Yom Tov in Halacha* at page 134 note 3.

22. Indeed, one can certainly find rabbinic decrees that "fixed" the halacha grounded in the reality of talmudic social norms. For a long discussion of a similar issue see my piece concerning shaving on *Chol haMoed*, in this journal , vol. XXXIII, pp. 71–94.

23. *Biur Halacha* 511 s.v. *yadav*. This question clearly demonstrates that the view of *Mishnah Berurah* is that *shaveh lechol nefesh* is a social

emphasis)

An identical discussion occurs about whether babies can be washed on Yom Tov. Ramo states (*OC* 511:2) that one may bathe an infant on Yom Tov, indicating that this conduct is *shaveh lechol nefesh*, whereas *Magen Avraham* (511:5) avers that such conduct is actually not permitted because "nowadays, even on a weekday, we bathe infants only every second or third day and it is thus prohibited on Yom Tov." Their disagreement reflects their understanding of social realities, rather than a pristine halachic principle. If infants are regularly bathed, then both Ramo and *Magen Avraham* agree that such conduct is permitted on Yom Tov; if they are not, then it is prohibited.[24]

Another example of the context-driven nature[25] of *shaveh lechol nefesh* is the discussion among contemporary decisors with regard to the immersion of women in a heated mikva on Yom Tov. Even though bathing was not generally viewed as *shaveh lechol nefesh*, perhaps in a situation where a woman **must** fully immerse, hot water is *shaveh lechol nefesh*, and indeed the general rabbinic prohibition accepted by Tosafot against bathing in hot water may not even apply to a mikva.[26]

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assertion which is subject to change. Similar cultural distinctions are made in *Noda BiYehuda Mahadura Tiniana* O.C. 140 and are discussed by *Tzitz Eliezer* 6:20 regarding washing one's feet in the morning.

24. See *Aruch Hashulchan* OC 511:5 for this exact analysis.

25. Being context-driven is not the same as personally subjective, as in the concept of *shaveh lechol nefesh* there are different answers given in different eras, but only one correct answer in each time and place.

26. See *Noda BiYehuda* (*Tiniana O.C*. 25) and *Chatam Sofer OC* 146, 148. *Chatam Sofer* suggests that during the era of the Talmud hot mikvaot were technologically unavailable. This seems to imply that *shaveh lechol nefesh* is a social assertion grounded in the reality that

Mishnah Berurah writes that immersion in the mikva cannot take place when water temperature exceeds lukewarm, even if the water has been heated before Yom Tov, because *Mishnah Berurah* is hesitant to categorize hot water as something which is *shaveh lechol nefesh*, as a matter of social fact.[27] Even he concedes that removing the chill from water, however, is *shaveh lechol nefesh*.[28] In this view, women have no preference between hot water and body temperature water. On the other hand, *Aruch Hashulchan* rules more leniently, permitting the heating of water for Yom Tov in a mikva as "to pour hot water in a mikva nowadays when it is impossible for women to immerse in a cold mikva, it is obvious that such is *shaveh lechol nefesh*."[29]

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people can only really want what they reasonably can expect to have. Alternatively it is possible that *Chatam Sofer* means that in reality every woman has always preferred a hot mikva and that preference has always rendered immersion in a hot mikva *shaveh lechol nefesh* even in talmudic times – except that it was nearly impossible to do such.

27. *Mishnah Berurah* 511:19.

28. *Shaar Hatziyun* 511:25.

29. *OC* 511:6. One might ask why *Aruch Hashulchan* does not state the same rule even by regular bathing, too. I suspect that the answer is rooted in technology and sociology. In the era of the *Aruch Hashulchan*, public bathhouses, including mikvaot, had large and expensive coal fired heaters, which created an expectation that a mikva would be heated. Private houses did not have such, and thus heating water in a private house was expensive, difficult and complex, which meant rarely done. Thus, in one's own house people took cold baths, as hot water was not available. Showers generally were unavailable, as there was no standard water pressure, a requirement for a shower. *Aruch Hashulchan* and *Mishnah Berurah* are thus writing about mikvaot at the cusp of a technological change (easy hot water production). Seventy years earlier even mikvaot could not be heated, and seventy years later, even a bathtub could be heated.

Indeed, but for one *teshuva*,[30] this author is unaware of any assertion that *shaveh lechol nefesh* cannot and does not change. As one can see from the next sections, the discussion of the halachic permissibility of cigarette smoking or showering that is found in the classical *poskim* clearly indicates that there is a disagreement as to whether smoking or showering was or is *shaveh lechol nefesh*.

IV. Smoking on Yom Tov

Much debate among halachic decisors has focused on the permissibility or prohibition of smoking on Yom Tov.[31] *Magen Avraham* writes that smoking tobacco is prohibited on Yom Tov as "it is not *shaveh lechol nefesh*".[32] He equates it with incense (*mugmar*)[33] which was prohibited as not *shaveh lechol nefesh* – just as a majority of the people did not use the incense (*mugmar*) discussed in the Talmud and thus it was prohibited to burn it on Yom Tov, so , too, cigarettes should be prohibited inasmuch as the majority of people (in his day) did not smoke, although cigarettes were ready available.

Rabbi Jacob Falk, writing in *Pnei Yehoshua*,[34] advances an argument which permits smoking on Yom Tov; he states that

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30. *Be'er Moshe* 8:158-159 insists that *shaveh lechol nefesh* cannot change, although he advances no proof to that view. Indeed, he quotes sources indicating that it can change, as proof that it cannot.

31. This article assumes, without necessarily agreeing, that smoking is generally halachically permissible.

32. *OC* 514:4. *Chayei Adam* 95:13 concurs with this ruling as does *Korban Netanel Beitzah* 2:20.

33. See *Beitzah* 22b and *Shulchan Aruch OC* 511:4.

34. *Pnei Yehoshua Shabbat* 39b commenting on Tosafot *Beitzah* 21b *s.v. matirin*. See also *Pri Megadim* cited in *Eishel Avraham* on *Magen Avraham id*., and in *Mishbetzot Zahav* 514:2 who cites and concurs with the *Pnei Yehoshua*.

because so many people smoke, and smoking is viewed as of benefit to food digestion, and smoking contributes to one's overall health, it is therefore permissible as *shaveh lechol nefesh*.[35] Rabbi Jacob Emden agrees with this reasoning and adds an even weightier concern: he notes that many people are nauseous at the sight of food if they do not first smoke – therefore, if halacha were to prohibit smoking on Yom Tov, it would severely dampen such people's *simchat Yom Tov*.[36] Similarly *Teshuvot Darchei Noam* [37]writes the following:

> It is obvious that those who smoke enjoy it. The majority of people smoke, only an insignificant minority does not, and as with all Torah law a majority is treated like a unanimous consensus . . . Furthermore smoking is nearly in the category of *ochel nefesh*. This assertion holds true not only for the Rambam[38] who is of the opinion that bathing is included in the same category as eating,

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35. These arguments are based on Tosafot's view (as opposed to Rambam or *Yeraim*) that anything permitted because of *mitoch* must be *shaveh lechol nefesh*. In these writers' opinion it seems that *Pnei Yehoshua* means that because smoking aids in digestion and health it is universally desired; anything that promotes health is *shaveh lechol nefesh* when people actually use it. This reasoning is evident in *Aruch Hashulchan* 511:11. Even though, retrospectively, we now know that smoking is not beneficial to one's health, the fact that people smoked because they thought that it was beneficial made this activity *shaveh lechol nefesh*.

36. *Mor Uketziyah* 511.

37. *OC* 9. Subsequently he advances the same argument as Rabbi Falk. Similar sentiments are expressed in *Teshuvot Rav Peilim OC* 2:59. *Tzitz Eliezer* 1:20(3) and *Ktav Sofer OC* 66 both note that a majority of decisors are lenient, and allow smoking with some practical constraints relating to extinguishing and lighting cigarettes; for more on this, see note 56.

38. *Zemanim, Yom Tov* 1:16. See also *Aruch Hashulchan* 511:1 and the sources cited above in note 8.

> but even those who exclude bathing from the category of *ochel nefesh* would include smoking because it stimulates the palate in a manner similar to eating.[39]

Rabbi Yisrael Meir Kagan (*Mishnah Berurah)* in his *Biur Halacha*[40] ponders the permissibility smoking on Yom Tov based on an observation that in his time, most or many[41] people smoked. *Aruch Hashulchan* also permits smoking, and he does so after a lengthy discussion of why most people do not mind cigarette smoke and enjoy smoking.[42] So too, Rabbi Neuwirth in *Shemirat Shabbat Kehilchata*[43] quotes both lenient and stringent opinions with regard to smoking on Yom Tov for one who is accustomed to it.[44] Rabbi Ovadia Yosef concludes that in practice

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39. This approach assumes that *ochel nefesh* is distinguished as a category because of the taste sensation of eating. This assumption seems to be the basis of disagreement between *Darchei Noam* and *Michtam L'david* (see above note 21). *Michtam L'david* understands *ochel nefesh* to be categorized by inherent necessity, *Darchei Noam* typifies it by intrinsic appeal.

40. *Biur Halacha* 511 *s.v. ain*. Interestingly, he does not cite Rabbi Falk's arguments.

41. It is not clear why **many** people are sufficient grounds to permit smoking. Seemingly a majority should be necessary, based on the principle of halacha that a majority is dealt with as if it is a unanimous consensus. Alternatively *Biur Halacha* may be interpreted to mean that many more than a simple majority smoke, nearly everyone does. This is consistent with the fact that he cites *Darchei Noam* as a basis for leniency.

42. *Aruch Hashulchan OC* 511:11.

43. *Shemirat Shabbat Kehilchata* 13:7.

44. Ostensibly, Rabbi Neuwirth means that one who is not accustomed to smoking does not enjoy it, and it is therefore not a *need of the chag*. It seems logical that according to this view anyone who enjoys smoking, even on an irregular basis, would be permitted to smoke. Alternatively it is possible Rabbi Neuwirth is basing himself in part on Rabbi Emden's view that those accustomed to smoking

one who does not usually smoke should abstain from smoking; however, "we are lenient so as to allow smoking for those whose Yom Tov would be darkened were they not permitted to smoke. For someone who does not normally smoke, it is best not to smoke on Yom Tov."[45] Similarly ambivalent sentiments are expressed by Rabbi Moshe Feinstein who states "it is logical that smoking cigarettes nowadays has become not *shaveh lechol nefesh*, although it is difficult to rule definitively against the practice of the community."[46]

It would seem that, as the statistics relating to smoking become clearer and clearer, the case for prohibiting smoking on Yom Tov grows stronger and stronger as such activity is clearly not *shaveh lechol nefesh* anymore in the United States. Only one in five adults smoke in America.[47] Indeed, even further than that, not only is smoking a practice most people do not do, it is a practice that most people affirmatively do not wish to do.[48] As noted by Rabbi Ovadia Yosef, the fact that people

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will not enjoy Yom Tov if not allowed to smoke.

45. *Yabia Omer OC* 5:39(5).

46. *Iggerot Moshe OC* 5:34. Interestingly, Rabbi Feinstein speculates that maybe a common practice, even if not done by the majority of the population, might be *shaveh lechol nefesh*. He concludes by ruling that "Thus, one can rule with certainty that *ba'alei nefesh* should be strict about this; by the technical halacha it is difficult to prohibit it."

47. See www//cdc.gov/tobacco/who/israel.htm about smoking rates in Israel:

According to a 1990 survey of adults aged 18-40 years, smoking prevalence was 28% among Jews and 48% among Arabs. Smoking appears to be almost as common among Orthodox Jewish males as among other Jewish males in Israel. Smoking is extremely rare among Orthodox Jewish women.

48. Thus, it is not like the talmudic discussion of venison, which most people would like to eat although they seldom have the opportunity. People who do not smoke are glad of that; most people

find an activity unpleasant makes it even clearer that such conduct cannot possibly be called *shaveh lechol nefesh*.[49] This is even more so true given the state of modern scientific knowledge about smoking, which makes it clear that smoking is not healthy, does not aid in digestion, and is not even an appetite enhancer.[50]

For halacha to permit the practice of smoking on Yom Tov in America, one would have to accept one of three arguments, none of which appear persuasive, at least *lechatchila*(*ab initio*).

> (1) One could argue that even activities that are not *shaveh lechol nefesh* are nonetheless permissible for the sake of *simchat Yom Tov* when not permitting them would drastically reduce *simchat Yom Tov*.

While that argument could perhaps be read into the view of Rambam, who has no notion of *shaveh lechol nefesh*, that argument is rejected by almost all halachic authorities, and all Ashkenazic ones.[51]

> (2) One could argue that smoking is halachically considered a form of eating as the smoke goes in one's mouth, and, as noted in note 21, food activities are not governed by the *shaveh lechol nefesh* limitation according

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who smoke wish they could stop.

49. *Yabia Omer* 5:39(3).

50. Whether a moderately sick patient (*she'ain bo sakana*) who is smoking to assist in digestion and reduce nausea can smoke on Yom Tov might depend on the dispute among the *poskim* as to whether preparing drugs for a moderately sick person is called *shaveh lechol nefesh* or not. For more on this, see *Shemirat Shabbat Kehilchata* 19:3. See also *Avnei Nezer OC* 394:8.

51. One could buttress this argument by noting that the status of suffering (*mitztaer*) does generate leniencies in a number of areas; see Rabbi Akiva Eiger *OC* 326:4 and *SSK* 14:1&11. To those addicted to smoking, depriving them of smoke probably does make them suffer considerably.

to many decisors.

While one can find this argument hinted at in the words of *Darchei Noam*,[52] this argument is not found in, and implicitly rejected by, nearly all decisors.[53]

(3) One could argue that smoking is still *shaveh lechol nefesh*.

While only 23 percent of adult Americans smoke now, *shaveh lechol nefesh* perhaps should not be determined by examination of the smoking statistics over a single year, or even decade, and the trend concerning smoking would not rise to the level of categorically prohibiting smoking on Yom Tov until this pattern of decreased smoking continues for a number of years.[54] In the alternative, this argument could rely on one of the minority definitions of *shaveh lechol nefesh*.[55]

None of these arguments are fully persuasive, and certainly should not be relied on *ab initio*, as all contemporary decisors note.[56]

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52. See text accompanying note 39. This is also hinted at in *Biur Halacha OC* 511 *s.v. ain* who uses the word *shetiyat tutin* to denote smoking tobacco. However, *Biur Halacha* does not explicitly advance this argument.

53. Who use the modern word *le'ashen* to denote smoking.

54. This argument is hinted at in *Iggerot Moshe OC* 5:34.

55. See note 23 for a list of them.

56. For example, *Iggerot Moshe, Yabia Omer, Tzitz Eliezer, Shemirat Shabbat* all, at the least, hesitate to permit smoking on Yom Tov as such conduct is not *shaveh lechol nefesh*. There are three secondary issues that need to be noted, if one is to smoke on Yom Tov. The first is that one can only light a cigarette from a pre-existing flame; the second is that according to some authorities one should not burn cigarettes that have letters or writing on them; finally, according to many authorities one may not intentionally clear the ash off of a

V. Showering on Yom Tov

Discussion on the question of bathing or showering dates back to a dispute among the *Rishonim* which revolves around a mishnah in *Beitzah:*

> Beit Shammai says a person may heat water for his feet only if it is drinkable and Beit Hillel permits [even the heating of non-potable water].[57]

Tosafot,[58] followed by most Ashkenazic authorities,[59] explain Beit Hillel as permitting the heating of water for the hands, face and feet, based on the principle of *mitoch*, deeming them *shaveh lechol nefesh*. Conversely, bathing was not *shaveh lechol nefesh*[60] according to Beit Hillel; therefore heating water for a bath was prohibited according to Torah law, and bathing in pre-heated hot water by rabbinic decree, lest one come to heat water. Tosafot, in the same paragraph, however, aver that a steam bath (in Hebrew, *ze'ah*) is considered *shaveh lechol nefesh* and permitted even on Yom Tov, even to cook water for it on Yom Tov, because such activity is deemed "healthy"; thus it is *shaveh lechol nefesh* because most people want it. Bathing, Tosafot aver, is a form of recreation, and not done by most people, and thus not *shaveh lechol nefesh*.[61]

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cigarette on Yom Tov.

57. *Beitzah* 21b.

58. See Tosafot *Beitzah* 21b *s.v. lo yichamem.*

59. See *Tur* and *Beit Yosef* on *OC* 511 for a fuller list.

60. Tosafot *Shabbat* 39b *s.v. matirin* writes that it is not *shaveh lechol nefesh* and is merely a form of indulgence. Similar opinions are expressed by many other *Rishonim*; see *Tur* and *Beit Yosef OC* 511.

61. One could note that the major element that made hot water bathing not *shaveh lechol nefesh* in pre-modern times was the great effort it took to arrange for large quantities of hot water to be moved into a bathtub from the stove; this entailed so much effort that few

Ramban in his commentary to *Shabbat* 39b rejects Tosafot's view, asserting that Beit Hillel considered bathing *shaveh lechol nefesh* and only rabbinically prohibited for other reasons. Ramban writes:

> We have a question. Since washing one's whole body and having a steam bath are all permitted, even to heat the water on Yom Tov, why did the Sages decree to prohibit it on Yom Tov? What prohibition is there? If one states that the Sages prohibited this lest one come to do so on Shabbat, that cannot be, as one generally does not prohibit activities on Yom Tov because of Shabbat in the areas of *ochel nefesh*... Tosafot state that bathing one's whole body is not for the needs of all, and thus prohibited according to Torah law and is analogous to *mugmar* [incense, which is not *shaveh lechol nefesh*] .... These are words of prophecy! Washing one's whole body should be prohibited, but a steam bath permitted, and washing part of one's body permitted; rather benefit to the whole body [from washing it] is yet more pleasurable [and is *shaveh lechol nefesh*]?

It seems clear that Ramban holds that in a society where bathing in hot water is *shaveh lechol nefesh* there is no prohibition against heating water for the purpose of bathing.

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people ever took a hot bath (and few took cold baths either). Bathing limb by limb (which most *poskim* rule to be permitted on Yom Tov) was *shaveh lechol nefesh* precisely because large amounts of hot water did not have to carried from the kitchen to the bath area and thus this was commonly practiced. Babies, because of their size could be washed much more easily, and thus bathing infants was *shaveh lechol nefesh*. One can now understand why a steam bath was much more common in pre-modern times as well. Even a small amount of water can generate a lot of steam, and this can be done easily even without running hot water.

Rambam,[62] Rif[63] and other *Rishonim*[64] understand the talmudic discussion completely differently. They are of the view that the whole talmudic discussion of bathing with water heated prior to Yom Tov is limited to the prohibition related to bathing in a commercial bathhouse, and that one may bathe the whole body on Yom Tov with water heated prior to Yom Tov, so long as not in a commercial bathhouse situation.

May one bathe, in a place other than a bathhouse,[65] in water heated before Yom Tov? According to Tosafot, while there has been no transgression of a biblical prohibition (because the water was heated before Yom Tov), there is a broader rabbinic prohibition on all hot water bathing on Yom Tov, as bathing is not *shaveh lechol nefesh*.

Rabbi Yosef Karo, in *Shulchan Aruch* (OC 511:2), follows the view of Rambam and Rif:

> It is permitted to heat water on Yom Tov to wash one's hands, but not one's whole body; however with water that was heated before Yom Tov one may wash one's whole body at once. However, this is only permitted outside a bathhouse; in a bathhouse, it is prohibited.

Ramo, following the view of Tosafot adds:

> There are those who prohibit washing [one's whole body]

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62. *Zemanim,* Yom Yov 1:16.

63. On *Beitzah* 21b.

64. See *Beit Yosef OC* 511 for a fuller list.

65. Some have suggested that any tub should have a status of a bathhouse according to Jewish law, and even Rabbi Karo would not permit bathing in a tub in a private bathroom. This seems incorrect, as the text of the *Shulchan Aruch* (511:20) seems to explicitly permit bathing in a private bathtub which is not in a bathhouse; see *Yalkut Yosef* 5:483 (n.5). I am aware of no decisors who label our bathrooms as a talmudic bathhouse for the purpose of this decree.

> under any circumstances with hot water, and such is the custom.

Thus, even when bathing or showering was not *shaveh lechol nefesh*, Sefardim, who generally follow the approach of Rabbi Karo, could shower or bathe in their own house on Yom Tov, as our modern hot water systems have already heated the water prior to Yom Tov and private showers do not have the status of bathhouses. This is recounted as the normative Sefardic halacha by Rav Chaim David Halevi[66], in *Yalkut Yosef*,[67] and in *Kaf Hachaim*,[68] all of whom permit bathing on Yom Tov. On the other hand, classical Ashkenazic *poskim*, such as *Mishnah Berurah*[69] and *Aruch Hashulchan*[70] accepted the view of Tosafot and Ramo as normative, and prohibited bathing on Yom Tov even with water heated prior to Yom Tov.

The question thus to be asked is whether showering in our modern society – in which almost everyone bathes every day and we have little tolerance for a cold bath or shower – is considered of benefit to all, such that it would be permitted on Yom Tov even according the Ashkenazic tradition.[71]

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66. *Mekor Chaim* 1:29.

67. *Yalkut Yosef* (volume 5) in 511:10.

68. *OC* 511:2.

69. 511:18. Even according to this stringent view one is allowed to wash each bodily limb individually in water heated prior to Yom Tov.

70. *OC* 511:4.

71. If this analysis is correct, a most interesting change also is produced. According to Sefardic decisors, bathing on Yom Tov is only permitted with water heated prior to the holiday. However, according to the view of Tosafot, if bathing is *shaveh lechol nefesh* then it can be done even with water heated on Yom Tov; See *Sha'ar Hatziyun* 511:14 which notes this about a steam bath, which Tosafot views as permitted.

The modern classical work *Shemirat Shabbat Kehilchata*[72] ponders this question at some length **and rules negatively**. While in the text of the work Rabbi Neuwirth indicates that showering remains prohibited on Yom Tov, in his footnotes he repeatedly indicates that the rationale for permitting it is very strong.[73] Indeed elsewhere in *Shemirat Shabbat Kehilchata*, the late Rabbi Shlomo Zalman Auerbach is quoted as ruling simply that "showering certainly is considered of benefit to all nowadays."[74] A similar approach can be found in the writings of Rabbi Efraim Greenblatt[75] and can also be implied from the writings of Rabbi Eliezer Waldenberg.[76]

This is not a small issue. If showering is *shaveh lechol nefesh*, then the issue of whether the water is heated before or after Yom Tov is not really relevant, according to Tosafot or Ramo. The reason according to Tosafot that one cannot heat the water on Yom Tov to bathe is because it is not *shaveh lechol nefesh*, and then, Tosafot argues that there was a *gezera* from water heated on Yom Tov to water heated before Yom Tov. There is no category of bathing according to Tosafot that is permitted to do on Yom Tov only with water heated prior to Yom Tov. (According to Tosafot, when bathing is not *shaveh lechol nefesh*, bathing with water heated on Yom Tov is a Torah prohibition, and bathing with water heated prior to Yom Tov is a rabbinic prohibition.)

72. Chapter 14, Halacha 7.

73. *SSK* 14(21) and (25). In addition he quotes the late Rabbi Shlomo Zalman Auerbach to the effect that it is quite possible all would agree that one who is sufficiently dirty may wash his whole body. In our society, many aver that anyone who did not shower the previous night fits that description upon waking in the morning.

74. Chapter 19 Note 3. Furthermore, he writes, even if one were to reject the assertion that showering is *shaveh lechol nefesh,* most homes operate on a heating system where the hot water that supplies the shower comes from the same boiler that heats the water in sinks, and sinks are used to wash individual limbs, making Tosafot's fear remote.

75. *Rivavot Efraim* 6:265.

76. *Tzitz Eliezer* 11:64. See also *Noda Biyehuda* 2:25 who notes that it

There is considerable halachic and factual basis for one to argue that taking hot showers on Yom Tov is considered of benefit to all in America, and should no longer be prohibited on Yom Tov, even with water heated on Yom Tov itself. This is even more true for failing to shower over a three-day Yom Tov/Shabbat combination, and even a regular two-day Yom Tov. [77]

To prohibit hot water showering (and perhaps bathing) on Yom Tov one would have to advance one of three arguments.

(1) One could argue factually that showering is not really *shaveh lechol nefesh* even in America even over a two day period.

This argument is difficult, given the fact that almost all people regularly shower, and enjoy it. Washing one's whole body is so common in America that in *Thomas vs. Allsip*[78] the Texas Court of Appeals notes that Texas prison regulations – Texas is not a state known for expansive prisoner rights – mandate that **even prisoners be allowed to shower daily**.

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is obvious that when one bathes, hot water is good for all, and what Tosafot meant was that most people do not bathe at all, generally, and thus any prohibited work designed to make bathing nicer was prohibited.

77. See for example the discussion about the more lenient status of the second day of Yom Tov concerning smoking in *Biur Halacha OC* 511 *s.v. ain*. The rationale for permitting showering (or in previous times smoking) on the second day of Yom Tov only would be that abstaining from this conduct for two days is certainly not *shaveh lechol nefesh*. In that sense, showering is very clearly analogous to the steam bath discussed by Tosafot, which was considered "*lebriot*," "for health," as opposed to "*letanug*", "for pleasure." People who shower daily feel uncomfortable or disgusting when they do not shower daily, which is the criterion used in *Moar Uketzia* 511 for things permitted *lebriot*.

78. 826 S.W.2d 825 (Texas Ct. App., 1992).

Perhaps one could draw a distinction between bathing and showering in this regard, as most adults shower daily but bathe much more irregularly.[79]

> (2) One could argue that our practice of not bathing or showering on Yom Tov is grounded in "lest people confuse Yom Tov with Shabbat" and even though bathing or showering might be permitted on Yom Tov currently, one should not engage in this practice.

This argument runs in the face of Ramban's often quoted assertion that "one generally does not prohibit activities on Yom Tov because of Shabbat in the areas of *ochel nefesh*." There is no more reason to prohibit bathing or showering on Yom Tov than there was to prohibit adding wood to the fireplace when people were cold in pre-modern times.

> (3) One could argue that there is an old custom recorded in *Magen Avraham* not to bathe even in cold water (which is clearly permitted), lest one come to squeeze out one's hair, an independent prohibition. Indeed the custom is widely recounted that one should refrain even from cold bathing or showering on Shabbat except in a case of need or, perhaps, suffering.[80]

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79. This argument is perhaps analogous to Tosafot's view concerning a steam bath as opposed to a regular bath, with the former being *shaveh lechol nefesh* and the latter not.

80. *Magen Avraham* 326:8, *Mishnah Berurah* 326:21, *Aruch Hashulchan OC* 326:9 *Kaf Hachaim* 326:(25) and *Shemirat Shabbat Kehilchata* 14:11 all record this practice. For a more severe recounting of the this *minhag,* see Rabbi Shimon Eider, "Halachos of Shabbos" at page 393. But see *Iggerot Moshe OC* 4:74(3) who was asked, "given the custom in our community not to bathe on Shabbat even in cold water, and whether one could shower when it very hot outside?" He responded "Other than in a case of difficulty, one should be strict, even though one does not find this custom [not to bathe in cold water] in the

However, the threshold question in addressing this issue is whether this custom was ever applied to Yom Tov as well. *Shemirat Shabbat Kehilchata* states that this custom applied to Yom Tov as well as Shabbat.[81] However, neither *Mishnah Berurah* nor *Aruch Hashulchan* nor *Kaf Hachaim* indicate that this custom applies on Yom Tov as well as Shabbat.[82]

A review of the origins of the custom of not bathing on Shabbat leads one to understand why this custom should not logically apply on Yom Tov. The custom of not bathing even in cold water on Shabbat originates in *Maharil* and *Terumat Hadeshen*[83] both of which ground the custom in the possibility that people will walk around wet outside after they bathe and thus carry water or because they will squeeze out the water after bathing, both of which are, in some circumstances, biblical violations of Shabbat. On Yom Tov neither of these activities rise to the level of a biblical prohibition, and might not even be

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works of our teachers. When one is suffering (*mitztaer*) from the heat, one can be lenient." For more on this, see *Iggerot Moshe OC* 4:75.

81. *Shemirat Shabbat Kehilchata* 14:11. See also *Ketzot Hashulchan, Badai Hashulchan* note 8. The only other source that I am aware of that perhaps implies this is the *Kolbo* 86 quoted in the *Beit Yosef YD* 199:6. However, *Beit Yosef* clearly disagrees with this assertion. *Shach YD* 199:12 discusses the issue, although it is unclear what his conclusion is.

82. See sources cited in note 2. *Iggerot Moshe* twice discusses this custom (*EH* 2:13 and *OC* 4:74(3)) and both times limits the custom to Shabbat, rather than "Shabbat and Yom Tov." *Kaf Hachaim* 326(25) notes even further that many authorities do not even accept this custom for Shabbat, and permit bathing in cold water on Shabbat. Some want to derive from the precise language in the *Mishnah Berurah* in 326:24, permitting mikva immersion on Shabbat and Yom Tov, that *Mishnah Berurah* does extend the custom of not bathing even to Yom Tov, although this is not obvious from the context.

83. *Shut Maharil* 139 and *Terumat Hadeshen* 1:255.

prohibited at all,[84] and thus the custom of not bathing in cold water was never applied to Yom Tov.[85] Indeed, neither *Maharil* nor *Terumat Hadeshen* nor *Magen Avraham*, the earliest quoters of this custom, mention it as applicable to Yom Tov. It is also worth noting the view of Rabbi Feinstein that there is a clear halachic distinction between showering and bathing with regard to the custom. Rabbi Feinstein states that the custom in Europe was only to refrain from bathing in cold water and that showering in cold water was never historically included in the custom of not bathing even on Shabbat.[86]

Thus, it is possible that there is no custom to refrain from bathing and showering in cold water on Yom Tov; However, even a person with a clear custom not to bathe or shower on Yom Tov, who is uncomfortable on Yom Tov – because of the heat or because of uncleanliness – is permitted to shower on Yom Tov, rather than to spend Yom Tov feeling uncomfortable.[87] One who is ill certainly may take a hot bath or shower on Yom Tov, if that will make him feel better. There appears to be no more of a reason nowadays for a sick person to take a cold shower than a hot one, given that bathing in hot water is clearly *shaveh lechol nefesh*.[88] It should be noted that when showering

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84. Ibid.

85. See *Shulchan Aruch OC* 495:3, which explicitly states that neither carrying nor squeezing can ever be a biblical violation on Yom Tov. While there is some discussion among commentators as to whether this is really correct for squeezing, it is clear that one who squeezes out the water from his hair on Yom Tov even with a highly absorbent towel – which might be a Torah prohibition on Shabbat – has violated a only rabbinic prohibition on Yom Tov, as such squeezing is clearly for the sake of the day, and could not be done earlier.

86. *Iggerot Moshe OC* 4:75.

87. See Rabbi Akiva Eiger *OC* 326:4 and *SSK* 14:1&11.

88. Even *Shemirat Shabbat Kehilchata* concedes this in 19:(3).

or bathing or even only washing the face, one must be careful not to squeeze water out of one's hair, nor use solid soap.[89]

VI. Conclusion

As the technological and social realities change, application of halachic rules may change as well. This article has explored that theory with respect to the fixed halachic principle of *shaveh lechol nefesh*.

This paper further explores the possibility that social and technological changes may have altered the application of these principles in two areas – smoking and showering on Yom Tov. Two hundred years ago most *poskim* permitted smoking on Yom Tov because most people enjoyed smoking and they that thought smoking was a healthy activity. In that same era regular bathing or showering in hot water was not viewed as of benefit to all and was technologically difficult to do, and thus rabbinically prohibited on Yom Tov. Today in America, smoking is viewed as hazardous and is clearly not "of benefit to all"; on the other hand, daily showering is a normal activity. We have explored the halachic rationale for concluding that perhaps the normative halacha today might opt for prohibiting smoking on Yom Tov while permitting showering.

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89. See *Mishnah Berurah* 326:25.

Letters To The Editor

To the Editor:

I enjoyed reading Rabbi Cohen's article in the Fall 1999 issue, concerning *Tumtum and Androgynous.*

On page 67, note 11, he cites the *Magen Avraham* quoting the Rif as maintaining that an *Androgynous* is a person who sometimes would be considered a male and sometimes be a female (i.e., the same person, at different times, exhibits characteristics which would render him a male or a female). He additionally cites the *Ba'er Heitev,* who notes that the Rif, as quoted by *Magen Avraham*, is not found in our standard version of the commentary of the Rif.

It should be noted, however, that the *Chatam Sofer*, in his comments on *Shulchan Aruch,* resolves the problem as follows:

וז"ל גמרא ורי"ף מילת ריף נסגר עכ"ל:

Accordingly, the *Magen Avraham* should read as follows:

אבל לא את שאינו מינו (גמ' ורי"ף). פי' דאע"פ שחבירו ג"כ אנדרוגינוס אם באותו פעם שהוא נקיבה הוי חבירו זכר אינו מוציאו. ע"כ.

According to the *Chatam Sofer*, it is the *Magen Avraham* who introduces his own novel explanation of the Gemara and the Rif, as to what "אינו מינו" means. But the Rif himself was only quoting the Gemara which says that an *Androgynous* cannot "מוציא את שאינו מינו".

Incidentally, according to the *Magen Avraham,* that an *Androgynous* has the laws of a woman when [exhibiting characteristics of] a woman, it may be permitted to perform surgery [at that time], to change that *Androgynous* into a woman. This avoids the person being involved in a homosexual relationship.

Rabbi Cohen also notes in his article that an *Androgynous* is

a phenomenon that occurs more frequently than many people realize. It is interesting to note that the *Tiferet Yisrael, Mishnayot Shabbat*, chapter 19, mishnah 3, already challenges the then-prevalent opinion of the doctors, who denied the existence of an *Androgynous. Tiferet Yisrael* writes rather emphatically against such a blatant denial of the facts. He notes that he himself served as a *mohel* for a child that had both male and female genitalia.

Thank you again for your excellent survey of the issues involved with a person who is a *Tumtum* or *Androgynous.*

Rabbi Yisroel Hoffman
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