Journal of Halacha and Contemporary Society

Number IV

Published by
Rabbi Jacob Joseph School

Journal of Halacha and Contemporary Society

Number IV
Fall 1982 / Succos 5743

Published by
Rabbi Jacob Joseph School

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

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

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

For subscription information contact Mrs. Rhoda Scheiner, Room 820, 299 Broadway, New York 10007, (212) 233-8333.

TABLE OF CONTENTS

Halachic Aspects of Family Planning

Rabbi Herschel Schachter

In order to be certain that our Journal falls well within the parameters of the halacha, it was decided from the outset that all articles published herein would receive the scrutiny of Gedolei Yisroel.

In a discussion last year with one of the outstanding Roshei Yeshiva regarding certain articles for inclusion in the Journal, we were strongly urged by him to print an article on M'niat HaHerayon (Birth Control). Not only did this Godol request this article, but he also specifically requested that it include all Heterim available. His feeling was that it is important for people to have knowledge, so that they will be able to approach their Rov for advice.

The Editor

Introduction

The halacha forbids public lectures on matters of *Gilui Arayot,* for fear that some of those attending such *Drashot* will misunderstand the fine points of the law and do forbidden acts thinking that they are permissible.[1] Many years ago, Rabbi

1. Chagiga 11b.

Rabbi Herschel Schachter, Rosh Yeshiva and Rosh Hakollel, Yeshiva University

Feinstein ruled in a responsum[2] that the issue of family planning is included under the broad heading of *Arayot*, and therefore may not be treated in journals available to the public.

Nevertheless, over the past twenty years this topic has been dealt with at length in both public forums and popular journals. Its treatment, unfortunately, has been less than satisfactory, with presentations often being incomplete and inaccurate. Several Gedolim felt that a new halachic paper on this subject in English would be appropriate, and it is upon their insistence that this paper is being written.

The halachic issue involved in family planning touch on many areas; this paper will introduce the reader to these various areas, without attempting to exhaust the halachic discussion involved.

It should be stressed that this essay is not intended to be a source of practical halacha; each family situation is different, and questions must be referred to a qualified Rabbinic authority.

Piryah V'rivyah

With the words *"Pru U'rvu,"* the Torah charges every Jewish male to be fruitful and multiply. The exact number of children one must have in order to fulfill the mitzvah is debated among the Tannaim, with the accepted view being that of Bais Hillel, who require at least one son and one daughter.[3] According to the Talmud Yerushalmi, Bais Hillel actually agrees with Bais Shammai, that even one who has two sons has fulfilled his obligation. The mitzvah, says the Yerushalmi, consists of having either two sons or a son and a daughter. The Talmud Bavli, however, clearly disagrees, and its opinion is accepted by the *Shulchan Aruch*, which lists a son and a daughter as the minimum requirement.[4]

But it is not sufficient to have given birth to these two children. They themselves must be capable of having offspring.[5]

---

2. *Igrot Moshe*, Even Hoezer Vol. 1, pg. 163.
3. Yevamot 61b.
4. *Shulchan Aruch*, Even Hoezer (1, 5). See, however, *Avnei Nezer* (Even Hoezer, 1 and Choshen Mishpat, 127) who tends to accept the opinion of the *Yerushalmi*, based on a passage in the *Zohar*.
5. Even Hoezer (1, 5).

Therefore, if they should die before having had children of their own, it will turn out retroactively that their father has not fulfilled his obligation of *P'ru U'rvu*[6].

Underlying the mitzvah is the idea that every male Jew should participate, at least partially, in the perpetuation of Klal Yisroel.[7] This, however, was not always the rationale. Until *Mattan Torah*, *P'ru U'rvu* was required of all nations.[8] At that time, the nature of the mitzvah clearly was to personally participate in the perpetuation of the human race.[9] Since *Ma'amad Har Sinai*, the

---

6. Yevamot 62a.
7. The Talmud (ibid.) states that a convert who has had non-Jewish children before converting, has thereby fulfilled the mitzvah of *Piryah V'rivyah*. When the Rambam quotes this statement of Rabbi Yochanan (Ishus 15, 6) he qualifies the halacha: The convert only has fulfilled his mitzvah provided the children convert as well. The *Magid Mishna* points out that this condition is obvious since today, after *Mattan Torah*, the mitzvah no longer is to perpetuate the human race, but rather to perpetuate Klal Yisroel.

   It is with this understanding of the mitzvah in mind that several contemporary *Gedolim* have pointed out that in our particular generation, with such a large portion of the Jewish people having been annihilated during the war years, it is more important than ever for couples to have larger families, in order to help perpetuate Klal Yisroel. (See *Chelkat Ya'akov* Vol. 3, no. 62.)
8. *Mishneh Lamelech* (Melachim 10.7). This is not in accordance with the opinion of Maharsha (Sanhedrin 59B) that both before and after *Mattan Torah*, this mitzvah did not apply to other nations. See *Avnei Nezer* (Even Hoezer, 79) for a discussion of this point.
9. According to the *Bach* (beginning of *Hilchot Sukkah*), whenever the Torah commands us to perform a mitzvah and explicitly gives the reason, we can only fulfill it if the performance of the act of the mitzvah *(ma'aseh hamitzvah)* is accompanied by *Kavana* (intention) for the reason given. According to Rabbi Hersh Melech Shapiro of Dinov *(Derech Pikudecha* pg. 39), the mitzvah of *Piryah V'rivyah* is one such mitzvah, as the Torah explicitly spells out its reason (Bereishis 1:28): the preservation of mankind.

   One could argue with Rav Hersch Melech's analysis, based on the Gemara mentioned above: Until *Mattan Torah*, one can argue, the mitzvah applied to all nations, and the nature of the mitzvah was indeed to preserve mankind. But after *Mattan Torah*, the nature of the mitzvah shifted. When G-d commanded the Jewish men that "they must all return to their wives" (Devorim 5, 27), no reason was mentioned. It can be argued that this verse, which cites no reason, is the basis of our observation of the mitzvah today, and the reason given in Breishis - the perpetuation of mankind - is no longer the true rationale of the mitzvah. Therefore, the mitzvah of *Piryah V'rivyah* would not fall into the category of mitzvot described by the *Bach*, where the reason for the mitzvah is specified.

nature of the mitzvah has changed: it now applies only to the Jewish people and consists of perpetuating Klal Yisroel.

If one is physically unable to have children, some *Poskim* feel that the act of adopting a boy and a girl and raising them as Jews can serve as a secondary form of fulfilling the mitzvah.[10] This view is based upon the Talmudic statement that "the Torah considers one who raises another's child as if he himself had given birth to that child."[11] The Talmud obviously does not mean to say that a non-Jewish child can become a Kohen, Levi or Yisroel in this manner; the remark is limited, rather, to the mitzvah of *Piryah V'rivyah.*

The mitzvah of *Pru U'rvu* is considered by the Talmud to be more important than most other mitzvot. Thus, although one is not allowed to sell a Sefer Torah, if it will enable someone to marry and start a family, the sale is permitted.[12] Likewise, although ordinarily a Kohen living in Israel may not set foot outside the land, (the Rabbis having declared *Chutz Lo'oretz* to be a place of *Tumah,)* nevertheless, for the purpose of marrying and raising a family he may leave.[13] Furthermore, *Pru U'rvu* is one of the rare instances in the Talmud where the Rabbis actually advocate the commission of a minor sin in order to gain the ability to observe a very great mitzvah. Tosafot labels *Pru U'rvu* as a *"Mitzvah Rabbah"*[14] because it involves the perpetuation of Klal Yisroel.

A couple who decide not to have children are in clear violation of this most fundamental biblical mitzvah. Moreover, if a wife refuses to have any children, her husband has the right, and even the obligation, to divorce her, and he need not pay her *Kesuba.*[15] Since having children is considered one of the essential components of a marriage - *"Ein Isha Ella L'Bonim"*[16] the wife, with her

---

10. *Chochmat Shlomo* (of R. Shlomo Kluger) to Even Hoezer (1, 1).
11. Sanhedrin 19b.
12. Megillah 27a.
13. Avodah Zarah 13a.
14. Gittin 41b, and Tosafot.
15. See K'subos 72a regarding the wife who does not keep her *nedarim,* and *Rosh, ibid.*
16. *Lev Aryeh* (Grossnass), Vol. 1, #30 in the name of R. Boruch Ber Leibowitz.

refusal, is therefore at fault for the breaking up of conjugal life,[17] and consequently forfeits her monetary privileges.

The same idea is the basis of another mishna. If a man marries, and later discovers that his wife is an *Eilonis* (unable ever to bear children), the marriage is considered to have been based on error, and is null and void with no *Get* required.[18] Thus, the inability of the wife to have children is considered a great enough blemish to annul the entire marriage.

Putting Off The Mitzvah

The more common situation confronting us today is not so much the case of a couple desiring not to have any children at all, but rather that of the couple who haven't yet completed their schooling, or are financially insecure and therfore are interested in postponing the starting of a family. What is the halacha's opinion on putting off the fulfillment of a mitzvah for a year or two? Obviously, with respect to mitzvot like *Tefillin* and *Lulav* which have prescribed times, the person who waits until an entire day passes has irretrivably lost his opportunity to perform the particular mitzvah. But regarding *Piryah V'rivyah*, where the Torah does not stipulate any time, one might think that the couple who have their children a year or two later fulfill the same mitzvah as if they had begun their family at the start of their marriage.

There is a rule governing the performance of all mitzvot that, as a biblically-derived recommended enhancement of the mitzvah, one should zealously perform the mitzvah at the earliest opportunity. This is known as the *Hiddur Mitzvah D'oraiso* of *Zrizim Makdimin L'Mitzvot*.[19] Were this the only issue involved in delaying the raising of a family, there might be ample ground to allow postponement, based on the consideration of inconvenience. Because of pressing circumstances we often postpone a *Bris* or a *Pidyon HaBen* to a later hour in the day,[20] foregoing this *Hiddur Mitzvah D'oraiso* of *Zrizim Makdimin*.

---

17. Taanit 31a.
18. Yevamot 2b and Tosafot.
19. Pesachim 4a.
20. We are assuming that just as a *bris* done on the eighth day is a more enhanced

It should be noted, though, that once the designated day for the mitzvah has passed, with no secondary time having been set by the Torah, many *Poskim* rule that it is implicit in the obligation of the mitzvah that it be taken care of as soon as possible. This is no longer merely a *Hiddur Mitzvah*, but rather an essential condition of the biblical command.

A case illustrating this point is recorded in the responsa of Rabbi Yechezkel Landau, the *Nodah B'Yehudah*. In Rabbi Landau's time, first-born Jews used to avoid fasting on Erev Pesach by attending a *Seudah* of a *Bris*. Even if no baby were born a week before Yom Tov, the last boy born during that season of the year whose *Bris* had to be delayed, would have his *Bris* held over until Erev Pesach for the benefit of the first born.

The *Nodah B'Yehudah*[21] opposed this practice. He pointed out that when the *Bris* cannot be performed on the eighth day proper for medical reasons and must be delayed, one may not postpone it for an additional day unnecessarily. Such a *Bris* must be performed on the earliest possible day.

A possible source for the *Nodah B'Yehudah's* opinion can be seen from the Gemara in *Makkos* (13b): If a person unintentionally violates a commandment whose intentional transgression carries the punishment of *"Kareth,"* he is required to

---

mitzvah than the *bris* which is postponed, so too the *pidyon haben* done on the thirty-first day constitutes a more enhanced mitzvah. This is clearly the opinion of the *Geonim* (quoted by Ramban to Bechoros 63a) that if the *pidyon haben* is done after the thirty-first day, the father must add one-fifth extra. They obviously feel that just as there is a special mitzvah of having the *Bris* on the eighth day *(bizmano)*, so too there is a special mitzvah of having the *pidyon haben* on the thirty-first day. Other *Poskim* disagree and feel that the mitzvah of *pidyon haben* is really the same, whether done on the thirty-first day or afterwards, the only difference being that *Zrizim Makdimin L'mitzvot* dictates that it be done on the earliest possible day. (See *Imrei Yosher*, Vol. 2, no. 132.) This question is a most relevant one in the instance of a baby born on a Thursday, whose *pidyon haben* should take place on Shabbos. Do we allow a *pidyon haben* on Shabbos? If the thirty-first day is the proper time of the mitzvah (similar to a *milah bizmanah*, whose time is the eighth day), then it should be permitted to do the *pidyon* even on Shabbos. See *Orach Chaim* (339,4); *Yoreh Deah* (305, 11) and *Likutei Pinchos* (Schwartz).

21. *Yoreh Deah*, Vol. II, no. 166.

bring a special sin offering *(Korban Chatos)* to the Temple. The Talmud derives from a verse that this special sacrifice is not brought by one who unintentionally failed to circumcise himself, although the sin of not observing *Bris Milah* is punishable by *Kareth*. The difficulty in understanding this Talmudic passage is obvious: If we are discussing the bringing of a *Korban Chatos*, clearly the one bringing it is alive, for no *Chatos* may be brought on behalf of a dead person. In that case, how can we say that, by mistake, this person has not fulfilled the mitzvah of *Bris Milah*? As long as he is alive, he can always rectify the situation by having the *Bris* performed upon himself! The simple reading of this Gemara has led several *Rishonim*[22] to conclude that if one delays the performance of the *Bris Milah*, even if only for a short period of time, and even though he ultimately does fulfill the mitzvah later on in life, the *mere postponement* constitues an act of *Bitul HaMitzvah*.

If we accept this premise, we might then logically extend it to apply to all mitzvot with no biblically-specified time of performance. It would be self-understood that the proper time for the performance of a mitzvah is the earliest available opportunity, and one who delays doing a mitzvah, but ultimately does perform it, has been both *m'vatel* and *m'kayem* the mitzvah. Hence it should follow that if one postpones having a family after already having had the opportunity, even if he were later to fulfill the mitzvah, the delay itself would constitute a *Bitul HaMitzvah*.

However, one could still argue that there is a major point of distinction between these cases. In the situation of *Bris Milah*, there originally was a set time for the mitzvah. Having failed to do the mitzvah at the proper time, we are obligated to make it up at the earliest opportunity. But in the case of *Piryah V'rivyah*, there never was a fixed time for the mitzvah. Perhaps in such a case the only problem involved in postponing the mitzvah would be that of *Zrizim Makdimin L'Mitzvot*.

---

22. See Rambam and Ravad, Hilchot Milah, (I, 2).

Chazon Ish

Nevertheless, a further complication arises from the Chazon Ish's interpretation of a Gemara in *Moed Katan* (7b). The Gemara there derives from a verse that the mitzvah of *Re'iyas Negaim* (showing suspected cases of *Zora'as* to a Kohen) may be postponed in certain special cases. The mitzvah of *Re'iyas Negaim* is similar to that of *Piryah V'rivyah* in that both have no biblically-set time for their performance. The implication of this Gemara is clear: if not for the special verse, we would not have allowed the postponing of the mitzvah. The Chazon Ish writes[23] that he is unsure just what violation such a delay would have constituted. Does the Gemara mean to say that whereas in other mitzvot we insist that *Zrizim Makdimin L'Mitzvot,* here, with respect to *Re'iyas Negaim,* the Torah never required *Zrizus* even as a *Hiddur L'chatchilah*? Or perhaps the Gemara meant something more significant - that whenever the Torah requires us to do a mitzvah, but mentions no specific time, it is understood that the proper time for the mitzvah is the earliest opportunity, and only with respect to *Re'iyas Negaim* has the Torah made an exception.

The Chazon Ish prefers the second interpretation. According to his opinion, then, a young married man would not be allowed to postpone the raising of a family, as such a delay would constitute a *bitul* of the mitzvah.

Maharam Schick

Another major objection is raised by the Maharam Schick. Biblically, he writes[24], a person need not fear that he will die before he has a chance to do the mitzvot required of him. But rabbinically it is ruled that such a fear is in place when a long time interval is involved. This is the rabbinic principle that *"Chaishinon L'miso L'zman Merubah."*[25] A married person who delays having his

---

23. Commentary to the end of Negaim.
24. Responsa, Even Hoezer, no. 1.
25. The Torah allows one to wait until the next Yom Tov to bring the previous Yom Tov's sacrifices to the Temple, and no fear is expressed that the individual may not live that long. But rabbinically we do not allow postponement for seven days or more, as this is considered *"zman merubah."*

family for a year or two would clearly violate this principle; he must take into account the chance that he may die in the interim and forever forfeit his opportunity to fulfill the mitzvah.

But whatever the source of the prohibition be, whether biblical according to the Chazon Ish or rabbinic according to the Maharam Schick, the halacha is stated quite clearly, in both the Rambam[26] and *Shulchan Aruch:*[27] Postponing the mitzvah of *Piryah V'rivyah* is not allowed.

Spacing

If the couple's first pregnancy resulted in a set of twins, a boy and a girl, then the husband has fulfilled his mitzvah of *Piryah V'rivyah.* However, if only one child is born first, the question now becomes whether the same two considerations mentioned previously (of the Chazon Ish and the Maharam Schick) still apply to prohibit any delay in having the next child.

Of course, if it is medically feared that the wife may become ill if she has the second child too soon after the first, there is no question that one is permitted to postpone fulfilling the mitzvah. It is a generally-accepted rule[28] that one is not obligated to do any mitzvah that will be hazardous to his health.

However, if the wife is perfectly healthy, and the couple is interested in delaying having their next child for non-health reasons, what could possibly be a reason to negate the two considerations mentioned above?

In the collection of Responsa entitled *Bnai Bonim,*[29] Rav Yosef Henkin is quoted as having allowed a wait of even four years or more between children. According to the suggestion of his grandson, Rabbi Herzel Henkin, the reason for this lenient decision runs as follows: In the Talmud we find[30] that a woman may nurse

---

26. *Ishus* (15, 1).
27. *Even Ho'ezer* (76, 6).
28. See *Sha'arei Teshuva* to Orach Chaim, chap. 640, end of section 5, *Igrot Moshe* Orach Chaim, vol. I, no. 172.
29. Jerusalem, 1981, no. 30.
30. Ksubos (60a).

her child for up to four or even five years. In Talmudic times a nursing mother would be unable to conceive. Why didn't the Rabbis forbid this practice of nursing for such an extended period of time on the grounds that it prevents the husband from fulfilling his mitzvah of *Piryah V'rivyah* ealier? Obviously, the answer must be that since the extra-long period of nursing is beneficial to the baby, we do not insist upon rushing to do *our* mitzvot at the expense of well-being of the child. So, today as well, if the mother is interested in delaying having her next child so that she will be able to take better care of her first child, and devote more attention to him, then the situation might be comparable to a mother nursing her baby for four years in Talmudic times. If, however, the mother plans to go to work, or to school during the free time, and is not delaying having her second child for the benefit of the first child, then Rabbi Henkin sees no justification for allowing the husband to delay the fulfillment of his mitzvah.

Others claim that the practice in Lithuania before the war was to allow for a pause of up to two years between the birth of one child and the conception of the next.[31] The rationale for this time period seems to be based on the following reasoning: the Talmud tells us[32] that a nursing mother does not fully regain her strength until a full two years after having given birth. Therefore the nursing mother has a partial status of a *Choleh She'ein Bo Sakonoh* - a sick person whose life is not in danger. Whereas with respect to more serious rabbinic laws we are not lenient on her behalf, and therefore require the nursing mother to fast on Tisha B'av and other serious fast days, regarding less serious rabbinical laws we assign this woman the status of a *Cholah*, and allow her to eat on Shiva Asar B'Tamuz and other minor fast days.[33]

The Talmud in another concept awards the same status to all mothers who have given birth within the last two years, whether they are nursing or not.[34] According to the Maharsham, quoted by

---

31. Quoted in *Igrot Moshe*, Even Ho'ezer vol. I, beginning of no. 64.
32. Niddah (9a).
33. Taanis (14a); *Orach Chaim* (550, 1; and 554,5).
34. Niddah (9a). See *Igrot Moshe*, Yoreh Deah, vol. III, pg. 287, that this is no

Chief Rabbi Ovadia Yosef in his responsa,[35] this is also true, regarding the woman's status as a semi-*Cholah*. Hence, he rules, any woman who has given birth need not fast on minor fast days for two years, even if she is not nursing. This ruling affirms that a woman is a partial-*Cholah* for two years after childbirth.

Chaishinon L'misoh MideRabbanan

Let us return now to the aforementioned principle *Chaishinon L'misoh MideRabbanan:* the Rabbis ruled that a person must fulfill a mitzvah at the earliest opportunity for fear that he might die unexpectedly and be unable to perform it at a later date. Assuming that the only problem involved in postponing having a family is the issue of *Chaishinon,* as presented by the Maharam Schick, one might argue that if we were to divide all rabbinic laws into two general groups of (a) the more serious laws and (b) the lighter ones, then this principle of *Chaishinon L'misoh MideRabban* would belong to the second category. The fact that we allow a Yeshiva student to postpone his marriage in order to advance in his Torah studies,[36] although this means foregoing the rabbinic

---

longer true today. Obviously Rabbi Feinstein would also not accept the lenient view of Maharsham regarding fasting on *Shiva Asar Be'Tamuz.*

35. *Yechaveh Da'as,* vol. I, #35.

36. Kiddushin (29b). According to the Chazon Ish, that postponing any mitzva constitutes an act of *bitul hamitzva,* we must understand why the yeshiva student is allowed to delay getting married in order to advance in his Torah studies.

    Perhaps the idea behind this is, that since the whole mitzva of *piryah v'rivyah* is for the purpose of perpetuating klal yisroel, the ultimate purpose of which is *masores ha-Torah,* passing Torah from one generation to the next, and his learning is also for the purpose of perpetuating Torah for klal yisroel, it may be permissible to delay marriage on that ground. Indeed the gemara tells us (Sanhedrin 19b) that one who teaches someone else's child Torah is considered as if he fathered him. In his writings, the Chofetz Chaim urged childless couples to support yeshivot, in order to have this partial fulfillment of the mitzvah of *piryah v'rivyah.* And in fact, in a certain sense, those who teach others Torah or support yeshivot have fulfilled this mitzva of perpetuation of *masores ha-Torah* in a much greater fashion than others who merely biologically give birth to a son and a daughter. In the words of the prophet Yeshaya, 56:4,5, "So speaks

principle of *Chaishinon L'Misoh*, would seem to indicate that the principle is of a less serious nature.

By combining the two assumptions — (a) postponement of the fulfillment of the mitzvah is a rabbinic law of a lesser degree, and

---

Hashem to the childless who ... support Torah: 'And I shall give them in my home a ... name which shall be greater than sons and daughters.' "

If the yeshiva student feels that by marrying early his ability to transmit Torah to future generations will be weakened, then in his situation the mitzvah of *piryah v'rivyah* would dictate postponing marriage for the sake of learning Torah.

According to the *Bais Shmuel* (beginning of Even Hoezer) this is the reason for the delay of this mitzva from the age of 13, the usual age when one becomes obligated to fulfill all other mitzvot, until the age of 18. If young boys would be obligated to marry at 13, their ability to transmit Torah to future generation would be hampered, and the entire goal of this mitzva would be undone. We wait until the age of 18, at which time we assume the young man has already had a chance to become sufficiently oriented in Torah learning.

In connection with this point, it is interesting to note that although the mishna in Avot (סוף פרק ה') requires that a man marry at 18, the gemara in Kiddushin mentions the age of 20 (29b). The רש"ש (in כתובות ג.) suggests that perhaps this discrepancy reflects a fundamental dispute the *Tannaim* had as to how long it might take one to develop an approach to Torah learning. In Chulin 24a, the gemara quotes a controversy among the *Tannaim* regarding this point, whether three years or five years might be required. Since the mishna in Avot recommends that boys only begin study of Talmud at age of 15, then it should take either until 18 or 20 to pick up the *derech halimud*, depending on the views of the individual *Tannaim*.

A completely different approach to this problem is presented by the N'ziv (in his commentary to the *Sheiltot*, 5:4) and after him by Rabbi Elchanan Wasserman (*Kovetz Shiurim* II, no. 19). Both understand that it is permitted for the *talmid chacham* to postpone *any* mitzva, not just *priyah v'rivyah*, if he feels that observing the mitzva sooner would interfere with his learning. The gemara in Moed Katan 9a derives from a *posuk* that one should interrupt his Torah studies only to perform a mitzva which cannot be taken care of by others. Regarding such mitzvot that can be attended to by others, the *talmid chacham* is instructed not to interrupt his Torah studies.

Here, although the mitzva of *piryah v'rivyah* cannot be performed for him by anyone else, nevertheless the ability to delay the mitzva until a later time puts it into the same category as a mitzva which the *talmid chacham* need not do now, and which may be taken care of by others; and the halacha says that in such a case, the *talmid chacham* need not interrupt his learning, and may rely on his intention to perform the mitzva later, just as in the other case he may rely on others to do the mitzva.

(b) all new mothers within two years of childbirth, whether they are nursing or not, have the status of *Cholah* with respect to this lesser category of rabbinic laws — we may conclude that if a woman chooses to postpone having her next children for two years, feeling that she would like to first regain her full strength, she may do so.

However, if we assume, as the Chazon Ish does, that postponing the fulfillment of any mitzvah is regarded biblically as an act of *Bitul Hamitzvah*, (nullifying the mitzvah) even if one ultimately does fulfill the mitzvah, then this explanation for allowing the two-year delay would not be valid.

Despite the two views outlined above, which allow spacing at either two or four year intervals, Rabbi Moshe Feinstein, in a responsum,[37] vehemently opposes the practice. He denies that it was ever the common practice in Lithuania to allow up to a two-year pause.

Al Tanach Yodecha

It is now several years into their marriage, and our couple has already been blessed with a son and a daughter. What now? The Talmud tells us[38] in the name of Rabbi Yehoshua that even after one has fulfilled the biblical obligation of *Pru U'rvu*, he is still required to continue to have children in his later years. This idea is derived from the words of Koheles (11:6) בבוקר זרע את זרעך ולערב אל תנח ידך, *v'loerev al tanach Yodecho* - 'In the morning you should plant your seed and in the evening, as well, you should continue to do the same.'' The consensus among the *Poskim* is that this law of Rabbi Yehoshua is not biblical in nature, but only rabbinic.[39]

According to the *Aruch HaShulchon*,[40] the Rambam's view is that לערב אל תנח ידך does not constitute an *independent* rabbinic mitzvah, but is rather a *Hiddur Mitzvah Min Hamuvchar* (a very

---

37. see above, note 31.
38. Yevamot (62b).
39. See *S'dei Chemed*. חלק ה עמוד 141.
40. Even Hoezer (1, 8).

desirable enhancement) of *Piryah V'rivyah.* Hence it follows, as the Ramban has pointed out,[41] that although one who violates any rabbinic law is considered wicked (a *Rosho)* and may be referred to by other people as such[42], one who refuses to observe this ruling of Rabbi Yehoshua regarding *Lo'erev al tanach yodecha* would not be considered a sinner. And although Beth Din could force someone to get married even if he did not want to, Beth Din would not force one to observe this mitzvah of having more children than the minimal two. This principle of Rabbi Yeshoshua is a statement of the proper mode of behavior *(derech eretz)* rather than an official rabbinic enactment *(takkanah).*

In fact, the Talmud relates that when the Romans intensified their religious persecutions against the Jewish people, there was a popular feeling among the pious Jews that it would be proper for our nation to refrain from having families. Why bring more Jews into this world just to be persecuted and prevented from observing the laws of the Torah? But the Rabbis felt that it would be much too difficult to impose such a rabbinic prohibition on all the Jewish people, and therefore they refrained from instituting this *Gezaira* (decree).

Exactly what were the Rabbis thinking of forbidding? According to Tosafot,[44] they never had any thoughts of doing away with the biblical mitzvah of *Piryah V'rivyah.* Although the Rabbis do have the authority to require of us that we not perform biblical mitzvot,[45] nevertheless, any rabbinic decree aimed at completely abolishing and negating an explicit mitzvah in the Torah is beyond the scope of their authority.[46] Therefore, Tosafot explains, the discussion in the Talmud revolved about instituting a *Gezaira* that no one should have more than a son and a daughter. In other words, the Rabbis considered this mitzvah of *Lo'Erev al Tanach Yodecha.*

---

41. *Rif,* Yevamot (62b).
42. Shabbos (40a).
43. Bava Bathra (60b).
44. ibid. starting "din". See *P'nai Shlomo.*
45. Yevamot (90b).
46. See *Taz,* Orach Chaim end of תקפ"ח

Other *Rishonim*[47] disagree with Tosafot and interpret the Gemara according to its literal meaning: The Rabbis were actually contemplating enacting a *Gezaira* to completely abolish the mitzvah of *Piryah V'rivyah.*

In actuality, however, the Rabbis never did enact this decree. As previously mentioned, they felt it would be practically impossible for the masses to observe such a strict prohibition. "It is preferable for the people to violate the laws unintentionally rather than knowingly and on purpose." Based on the terminology used by the Gemara, there is a minority opinion quoted in *Shulchan Aruch*[48] that runs as follows: Since refraining from having a family is the more proper thing to do, therefore, any individual who chooses to do so by never marrying at all or by not having more than the bare minimum of one son and one daughter (depending upon the two interpretations mentioned above), should not be faulted, since he is really acting in the more proper fashion. And certainly the Beth Din may not force that individual into observing the mitzvah which he refuses to fulfill.

This opinion of the Mordechai has only been accepted by the *Shulchan Aruch* with respect to the inability of the Beth Din to enforce the observance of the mitzvah. However, it is assumed by the majority of the *Poskim* that since the Rabbis have in fact not enacted any prohibition against raising a family, large or small, both of the basic mitzvot, *Piryah V'rivyah* of biblical origin, and *Lo'Erev al tanach yodecha* of rabbinic origin, still remain in full force, and must be totally and properly observed by all Jewish men.

Postponing Lo'Erev

Our young married couple, who has already had a boy and a girl, would now like to know if they must have the rest of their family at the earliest opportunity, or whether they may postpone fulfillment of the mitzvah of *Lo'Erev al tanach yodecha.*

---

47. See *Biur Hagra* to Even Ho'ezer, Chap. 1, section 10.
48. Even Ho'ezer (1,3) in Ramo.

In response to this question, the *Birkai Yosef*[49] cites a clear implication from the Rambam that, in this mitzvah, *temporary* postponement *is* allowed provided that the couple does not plan to completely discontinue having children.

Hastening the Coming of Moshiach

According to one opinion in the Talmud,[50] the reason for the mitzvah of *Piryah V'rivyah* is to hasten the coming of Moshiach: "The son of David will not come until all of the souls in heaven (in the *'Guf'*) have been born." Every time another child is born to Klal Yisroel, the coming of Moshiach is thereby hastened.

Although this opinion has not been accepted insofar as it explains the nature of the mitzvah of *Piryah V'rivyah*, the other two premises upon which it is based are indeed accepted: a) Every individual has an obligation to do whatever is in his power to hasten the coming of Moshiach and b) the birth of each new child into Klal Yisroel is considered another step towards the coming of Moshiach.

Having Children

The Talmud stresses the importance of the mitzvah of rejoicing at a Jewish wedding. If one rejoices properly, it is considered as if he had rebuilt part of the ruins of the destroyed city of Jerusalem. But what is the connection between the two?

When a young couple gets married, we assume that they will soon be having children. Every new child born into the Jewish people hastens the coming of Moshiach. The halacha tells us that there is a special mitzvah to celebrate upon the occasion of the building of the Temple.[52] Even in advance of the actual building, on the occasion of a significant historical event which will lead up

---

49. Even Ho'ezer, chap. 1.
50. Yevamot (62a).
51. Brochos (6b).
52. Ramban to Bamidbar, end of *Parshas Noso*. See *Or Hamizrach 5734, "Regarding Megillat Ta'anit."*

to *binyon habayis*, it is also proper to celebrate the *aschalta d'geula*[53] (beginning of the Redemption).

It is for this reason that every Jewish wedding is considered, in a sense, an *Aschalta D'Geulah*, for we know that the young couple will soon be having children, and will thus hasten the coming of Moshiach and the rebuilding of the Temple.

Based upon the combination of these ideas, some *Poskim*[54] have pointed out that even one who has already fulfilled his basic mitzvah of *Piryah V'rivyah* should still try to raise a larger family for the sake of hastening the coming of Moshiach. This, too, is our responsibility and obligation.

Sirus

Our couple has already been blessed with a number of children and now decide that they would not like to have any more. What may they do to prevent having additional children?

The common American practices of "tying the tubes" of a woman or performing a vasectomy on the man are biblically forbidden.[55] A Jew may not surgically sterilize any human, animal, or even insect.[56] Not only is this prohibited when the actual operation is performed by a Jewish doctor, but also when a non-Jew is engaged to do the act of sterilization. The Talmud states[57] that if a Jewish person brings an animal to a non-Jewish veterinarian to be sterilized, the Rabbis penalize the violator and force him to sell his animal to someone else so that he does not benefit from his sin. Both the Gemara and the *Shulchan Aruch*

---

53. Commentary of *Nesivos* to Megillat Esther (9-19); *Sfas Emes*, Chanukah 5644; *Or Hamizrach*, mentioned in note 52.
54. *Mishneh Halachot* (R. Menashe Klein), vol. 5, no. 210.
55. Shabbos (110b).
56. Rabbeinu Gershom to Bava Bathra (80a).
57. Bava Metzia (90b).
58. The Gemara in Bava Metzia tries to determine exactly what prohibition has been violated in this situation. One opinion suggests that just as *Amirah L'nochri* (asking a non-Jew to perform a prohibited act for a Jew) was forbidden by the Rabbis on Shabbos, Yom Tov, and Cholo Shel Mo'ed, it was similarly proscribed for all Torah prohibitions. According to Ravad, Hilchot Kilayim (1;3) one would also not be allowed to ask a non-Jew to plant *kilayim* for him in his

rule[59] that it is forbidden to engage a non-Jew to perform any act of sterilization.

The Torah verse[60] forbidding sterilizing animals speaks specifically about male animals. Although the *Sifro* there comments that this prohibition does not apply to female animals, the Rambam states[61] clearly that the *Sifro* only excluded the sterilization of female animals from the *punishment* of *malkot* (lashes) but that the *act* itself is nevertheless prohibited. According to the Vilna Gaon,[62] this prohibition, applying even to female animals, is biblical in nature.

When the sterilization is effected through the taking of medication, orally or by injection, the Rambam and the *Shulchan Aruch* distinguish between a male and a female animal. To cause a

---

field, or according to Tosafot Rosh Hashanah 24b, have a non-Jew make a sculpture of a human figure.

The other view in the Talmud is that the Rabbinic edict forbidding *Amirah L'nochri* is limited to Shabbos, Yom Tov, and Cholo Shel Mo'ed, but the Torah law forbidding *Sirus*—castration of animals—applies even to non-Jews in accordance with the view of the *Tanna* Rabbi Chiya. Therefore, a Jew asking the non-Jew to perform the act of sterilization for him constitutes a violation of *Lifnai Eveir*, inasmuch as the Jew abets the non-Jew in the commission of a sin.

The Rambam has a unique opinion on this matter. He explicitly allows having a non-Jew plant *Kilayim* in one's field. This obviously indicates that *Amirah L'nochri* is only forbidden in the areas of Shabbos, Yom Tov, and Chol Ha-Moed. At the same time, the Rambam seems to assume that asking a non-Jew to castrate an animal may possibly constitute a biblical violation. According to the Rambam, the Gemara in Bava Metziah drew a comparison between the two prohibitions of *Sirus* (castrating animals) and *chasimah* (the law forbidding one to muzzle an animal while it threshes grain). In both instances the Torah forbids the *result* brought about *(Issur Chalot)* and not merely the actual act itself *(Issur P'eulah)*. (See *Beis Efraim*, Orach Chaim no. 56, *Tshvos Zofnas Paneach*, N.Y., no. 131 and 233). Because of this distinction, even *Gromo* (indirectly bringing about the result) would also be forbidden in these two cases. It is for this reason that the Talmud raises the possibility that even asking a non-Jew to muzzle one's animal and thresh with it for him, or to castrate one's animal, may also be *Gram-Sirus* and *Gram-Chasimah* which would be biblically forbidden.

59. Even Ho'ezer (5:14).
60. Vayikra (22, 24).
61. *Issurei Biah*, (16, 11).
62. Even Ho'ezer end of chap. 5, nos. 25 and 28.

male to become sterile is forbidden even by non-surgical methods, while such methods are permissible with a female. However, the permissibility of sterilizing a woman through medication is explained by the Talmud[63] to apply only in such a case where the husband will not be prevented thereby from fulfilling his mitzvah of *Piryah V'rivyah*. Even in that case, the *Acharonim* debate the nature of this permissibility. Most feel[64] that non-surgical forms of sterilization are not forbidden for women. Some, however, rule that there still exists a rabbinic prohibition which may only be lifted if the woman is known to suffer unusual pain at childbirth. According to this view, this *Heter* (lenient ruling) is similar to the law allowing violation of *rabbinic* prohibitions on Shabbos for the sake of a sick person *(Choleh She'ein bo Sakona)* even though there is clearly no danger of life or limb. "In a situation of pain *(tza'ar)* the Rabbis did not insist upon the observance of their prohibitions."[65]

The Talmud relates[66] that the wife of Rabbi Chiya suffered unusual pain during childbirth. She drank a special potion of herbs to make herself sterile, without the previous consent of her husband. The Chasam Sofer[67] points out that such action would only be allowed in Talmudic times, when her husband would have the option of marrying another wife if he desired more children. The wife's causing herself to be sterile did not interfere with his ability to fulfill his mitzvah. Today, however, since we no longer allow polygamy or divorce without the wife's consent, it is understood that when a couple marries, the wife obligates herself to assist her husband in fulfilling both his mitzvot of *Piryah V'rivyah* and *Lo'Erev al tanach yodecha.*[68] She may therefore not

---

63. Shabbos (111a).
64. See *Otzar Haposkim* to Even Ho'ezer in note 77.
65. Ksubos (60a).
66. Yevamot (65b).
67. Quoted by *Pischei Teshuvah* to Even Ho'ezer (5, 11; and 232). See also *Avnei Nezer*, Choshen Mishpot, no. 127. where the same distinction is made.
68. See *Lev Avraham* (#99) where this point of the Chasam Sofer is explained at length. See also *Avnei Nezer*, Even Ho'ezer, no. 79 where he assumes that even during Talmudic times the same was true.

cause herself to become sterile or practice any form of contraception without the consent of her husband.[69]

Temporary Sirus

Modern medicine has developed an oral medication to be taken by the man which causes temporary sterility. Since causing sterility in the male is forbidden even by "drinking a potion," would causing temporary sterility also be included under this prohibition? Dayan Ehrenberg has written a lengthy responsum,[70] concluding with a lenient decision. Rabbi Moshe Feinstein assumes[71] that causing sterility is only forbidden when the potion the male drinks affects the reproductive organ directly. But to cause even permanent sterility by affecting other parts of the body would not be prohibited.

Other contemporary *Poskim* question the validity of both of these lenient decisions.

Chavoloh

It should be borne in mind that the case specifically mentioned in the Talmud allowing non-surgical sterilization of a woman was in a situation where this was medically recommended. Rabbi Chiya's wife sufferd great pain during childbirth. However, if the non-surgical sterilization is done for non-medical considerations, some *Poskim*[72] have pointed out that this would constitute a separate violation of *Chavoloh* — one is not allowed to mulitate his own body.[73] Even the slight act of self-mutilization involved in donating blood to the Red Cross is a serious question dealt with by contemporary *Poskim*.[74]

---

69. Regarding *temporary* use of contraceptives by the wife, without the permission of her husband, see *Chavazelet Hasharon*, Even Ho'ezer pgs. 229-231.
70. *D'var Yehoshua*, vol. III, Even Ho'ezer, no. 7.
71. Even Ho'ezer vol. III no. 15. See Chazon Ish, Nashim 12.
72. See *Torat Chesed*, Even Ho'ezer, no. 44, section 41.
73. Bava Kamma (91b).
74. See *Igrot Moshe*, Choshen Mishpot, no. 103; *Pischei Teshuvah* to Yoreh Deah chap. 157, section 15.

Hashchosas Zera And Contraceptives

The Halacha forbids *Hozoas Zera L'vatola* — the needless emission of semen. Not only does this prohibition apply when no cohabitation takes place at all, but even when a man has had relations with his wife and interrupts the act in middle so that the emission of the semen will not take place in the vagina.[75]

It is generally accepted that both of these forms of *Hashchosas Zera* (the wasting of semen) are biblically prohibited,[76] notwithstanding a strong minority opinion[77] that this law is only rabbinic in origin. Even in situations of danger to the life of the woman should she become pregnant, the accepted view among the Tannaim is to forbid coitus interruptus.[78]

This does not mean that *Tashmish* (intercourse) is allowed only when there exists a possibility of its leading to pregnancy. Tosafot[79] points out that even when a woman is pregnant or is too young or too old to conceive, her husband is permitted to have normal relations with her. The *Igrot Moshe*[80] points out that even if a woman has had a hysterectomy, her husband may still continue to live with her. Whenever *Tashmish* is performed in a normal fashion, even though it is clear that no pregnancy can

---

75. Yevamot (34b). There is, however, a difference between the two examples of "השחתת זרע". In the case of masturbation, the violation is more severe, and is considered a form of "*niuf*." In the second case of coitus interruptus, however, the violation is less severe, and consists only of wasting the seed. (In the first case there is really a double violation — a) *niuf*, and b) השחתת זרע). The difference would be in a case where the doctors insist on making sperm tests, to see how to enable the husband to become fertile. We would only allow the second form, for in this type of situation the seed is not being wasted at all; this test will lead to the possibility of having children. The *Poskim* have very detailed guidelines regarding these cases. See אחיעזר כ"ג כר"ז"ה: and *Igrot Moshe* אה"ע־ח"א, and others in אגר"מ.
76. *Igrot Moshe*, Even Hoezer.
77. See *Otzar Haposkim* to Even Ho'ezer chap. 23; *Torat Chesed* no. 43; *Chavatzelet Hasharon* (pg. 230) quoting *Ezer Mikodesh* (to chap. 23); *Mishneh Halachot* vol. 5, pg. 315.
78. See *Igrot Moshe*, Even Ho'ezer Vol. I, pg. 155.
79. Yevamot (12b) beginning "*shalosh*".
80. Even Ho'ezer, vol. I, no. 66.

possibly result, this does not constitute "wasting of the husband's seed".

The hysterectomy case is a most significant one. We consider the act one of *Tashmish kiderech kol ho'oretz*, marital relations performed in a normal fashion, even though the semen cannot possibly enter the woman's womb for she has no womb to speak of. Based on this case, many *Poskim* have concluded that women who so choose may insert a cloth *(Moch)* in their body before *Tashmish* to prevent pregnancy. If the *moch* is inserted deeply enough so that it doesn't interfere with the act of *Tashmish*,[81] and, in the words of Maharshal,[82] "the bodies derive pleasure one from the other," this too is considered *Tashmish kiderech kol ho'oretz*, and would therefore not constitute a violation of *Hashchosas Zera.*

One could still argue the point and distinguish very simply between the cases: Only in the situation of the pregnant wife and the woman too young or too old to have children, etc., where the *Tashmish* on its own will not lead to pregnancy, is it considered *Tashmish Kiderech Kol Ho'oretz*. But when the woman inserts a *moch* and the obstruction blocking the semen from entering the cervical canal is an unnatural one, perhaps then relations would not constitute *Tashmish kiderech kol ho'oretz*, and would therefore be forbidden?

This point of distinction, however, does not seem to be valid. We know that even if a woman caused herself to become sterile by drinking a potion of herbs, she may continue to be with her husband. Clearly then, even an intentional and unnatural induced inability to become pregnant would not automatically label the *Tashmish* as *Hashchosas Zera.*[83]

It is based on this line of reasoning that Maharshal,[82] Rabbi Shneur Zalman of Lublin,[83] and many other great *Poskim* ruled that use of a *moch* during *Tashmish* to prevent pregnancy is allowed.

---

81. *Igrot Moshe*, Even Ho'ezer vol. I, no. p. 163.
82. *Yam Shel Shlomo*, Yevamot, chap. 1, section 8.
83. See *Torat Chesed* (pgs. 116d-117a).

In the words of the Chazon Ish,[84] "Use of a *Moch* during *Tashmish* is allowed for all women (even when pregnancy would pose no danger to their lives) ... This was the decision of our great teachers who attained divine inspiration, Maharshal of blessed memory ...

The issue of the use of the *moch* is based on an interpretation of the Gemara in Yevamot (12b): in three special cases, when there exists a possibility that pregnancy may occur and cause danger to the life of the mother, Rabbi Meir allows the woman to use a *Moch*. The contemporaries of Rabbi Meir disagree and argue that "heaven will have mercy" and that "G-d will protect the foolish people who do not look after themselves."[95]

According to Rashi, the Rabbis (whose opinion was accepted in their argument with Rabbi Meir) forbid the use of a *moch*, even though the woman's life is in danger. Other *Rishonim* ask how this can possibly be the view of the Rabbis? Do we not know that even in a doubtful case of danger to human life *(safek sakanat nefashot)* we are allowed to violate almost all Torah laws?

Rashi obviously holds that use of a *Moch* during *Tashmish* is forbidden under normal circumstances. In these three situations the Rabbis disagree with Rabbi Meir, disregarding the possible danger to life. Since the threat to life is not even considered a 50/50 possibility,[86] and the general attitude of people is not to worry about the danger involved in these special situations,[87] therefore the Rabbis did not consider these cases as constituting *sofek sakana* to permit the violation of any prohibitions.

Were the danger more obvious (50/50 or a greater probability) or were it the general reaction of people to be concerned even about a minimal threat to life, then even the Rabbis would agree

---

84. Even Ho'ezer, chap. 37.
85. Tehillim 116, 6.
86. See *Ahiezer* vol. I, no. 23; *Zemach Zedek* quoted there; *Torat Chesed*, no. 44; *Avnei Nezer*, Even Ho'ezer, vol. I, no. 81. It is surprising that Rabbi Moshe Feinstein *(Igrot Moshe* Even Ho'ezer, vol. I, no. 64) rejects this widely-accepted opinion. See also next note.
87. *Mishneh Halachot*, vol. 5, pg. 314. See also *Pe'er Hador* (biography of Chazon Ish) vol. 3, pg. 184, that this was also the view of the Chofetz Chaim and the Chazon Ish.

with Rabbi Meir in permitting the use of a *moch* during *Tashmish.*

Most other *Rishonim*[88] disagree with Rashi's understanding of Rabbi Meir. They feel that Rabbi Meir not only allows the use of a *moch,* but *requires* it. Since Rabbi Meir considers this a situation of *sofek sakana,* he rules that one is *not allowed* to be stringent. If the doctors assess someone's condition as dangerous and think that he must eat on Yom Kippur, that person is *not allowed* to fast.[89]

It is a bit unclear exactly how much of Rashi's interpretation of the Gemara is rejected by the other *Rishonim.* The Maharshal (and his group of *Poskim)* understand that the other *Rishonim* hold that use of a *moch* during *Tashmish* is always allowed, and in this case of the far-fetched *sofek sakanah,* Rabbi Meir and the *Chachomim* only disagree as to whether the *moch* is obligatory.

Rabbi Chaim Ozer Grodzensky[90] (and his group of *Poskim)* understand that the other *Rishonim* also agree with Rashi that use of a *moch* during *Tashmish* would normally be forbidden, for since it does partially interfere with the *Tashmish,* this would not be considered *kiderech kol ho'oretz* and would therefore constitute *hashchosas zera.* Only in the situation where the wife's life is in danger did the other *Rishonim* mean to say that there is no violation of *hashchosas zera.* In this situation, it is most natural for the husband to do something to protect his wife from any possible danger resulting from the *Tashmish,* and therefore use of the *moch* is considered *kiderech kol ho'oretz.*

Even the Chazon Ish, who assumed the Maharshal's view to be more correct, in practical application only allowed use of the *moch* during *Tashmish* in the case of *sakana.*[91] "And even if we

---

88. Quoted by *Shitta Mekubetzet* to Ksubos (39a).
89. *Be'er Heitev* to Orach Chaim chap. 618, section 3; *Torat Chesed* pg. 112c. See, however, *Avnei Nezer,* Choshen Mishpat, no. 193, who questions this premise.
90. *Ahiezer* vol. I, no. 23; vol. III, no. 24, 5.
91. According to the *Pischai Tshuva,* (Even Hoezer 23:2) two great *Poskim,* Rabbi Akiva Eiger and the Chasam Sofer, forbid the use of any *moch* during *tashmish* even when the woman's life would be endangered in the event of a pregnancy. The overwhelming majority of the later *Poskim* have not accepted this view, and have attempted to explain away the two responsa as being misunderstood by the *Pischai Tshuva:*

should choose to be more strict regarding all healthy women, and forbid the use of a *moch* during *Tashmish* just as we forbid its use after *Tashmish*, still in a situation of hazard we should allow the use of the *moch* only during *Tashmish* and not after." And thus he concluded his *Psak:* (ruling) "According to the Din it would appear that in an instance of hazard to the woman's life, we may allow the use of a *moch* during *Tashmish*.[92]

The case dealt with by Rabbi Akiva Eiger in his responsum did not really concern a woman whose life was in danger, but rather one who would suffer extreme pain during childbirth. Rabbi Akiva Eiger apparently felt that with respect to our issue, this woman should be treated the same as any other normal healthy woman and, therefore, not be permitted to use a *moch*. But in the event that there would be a real threat to a woman's life if a pregnancy were to result, even Rabbi Akiva Eiger would allow use of the *moch* during *tashmish*. (*Igrot Moshe*, Even Hoezer, Vol. I, no. 64.)

The Chasam Sofer, in his responsum, dealt with a case where the husband had not yet fulfilled his mitzva of *piryah v'rivyah*, and the doctors forbade this woman from every having normal relations (non-contraceptive). If one were to follow the logic of R. Chaim Ozer, that only in an instance of *sakana* is the *tashmish* with a *moch* still considered *kederech kol ho-oretz*, then in this case, where the husband has no children and his wife is medically unable ever to bear him any children, since the halacha would require the husband to divorce his wife and marry another woman who would be able to bear children, we no longer have the right to declare this as תשמיש כדרך כל הארץ. See p.230 הבצלת השרון חלק אבן עזר. But in a case where the husband does have some children, and the halacha would not require him to divorce his wife (even if he had not yet fulfilled *pirya v'rivya* (See פתחי תשובה אבן העזר קנד ס"ק כ"ו אבני נזר אה"ע ס' א) or in a situation where the doctor temporarily forbid her from becoming pregnant, then even the Chasam Sofer would probably have allowed use of the *moch* during *tashmish*.

See however חבצלת השרון volume 3 p. 101 that Rabbi Babbad himself feared to issue a *psak* against the simple reading of the decision of the Chasam Sofer, although he was really convinced that the Chasam Sofer would have agreed to allow use of the *moch* in his special case.

92. Rabbeinu Tam disagrees with Rashi's interpretation of the gemara. He understood that the *moch* spoken of was to be used *after* tashmish, to wipe away all the semen and thereby prevent pregnancy. Since according to Rabbeinu Tam all women may do this (even if pregnancy would not pose a danger to their lives), and this type of *moch* is sufficient to prevent pregnancy, Rabbi Meir would never allow the woman whose life is in danger to use a *moch* during *tashmish*, as this would be a violation of *hashchosas zera*. We only allow violation of Torah laws in a situation of *sakanas nefashos*, if the goal of saving the life can not be accomplished in a permissible fashion. (See Ahiezer Vol. 1, no. 23.)

Nowadays, instead of a *moch,* a diaphragm is used. The diaphragm is placed in front of the cervical opening and prevents the sperm from entering. Since the diaphragm interferes virtually not at all with *Tashmish,* it might follow that its use should be allowed even according to Rabbi Chaim Ozer and his group of *Poskim.* This case should certainly be considered *Tashmish kiderech kol horetz.* Such indeed was the view of Maharsham.[93]

It should be noted, however, that use of a diaphragm may cause a new problem in *Hilchot Niddah:* The inexperienced woman may scratch her body either with her fingernails or with the plastic disc, and may later be unable to ascertain whether the blood before her is *dam makoh,* from a cut, or *dam niddah.* In such instances, a competent Rabbi must be consulted.[94]

Even Maharsham however, practically speaking, *halacha l'maaseh,* only allowed use of the diaphragm in a situation where the woman's life would be placed in danger in the event of pregnancy.

What about use of a condom? Is this considered a normal act of *Tashmish* since "both bodies derive pleasure one from the other,"[92] or, since the semen does not even enter the vaginal area at

---

The majority of the *Rishonim* disagree with Rabbeinu Tam, and interpret the gemara as Rashi, that the *moch* spoken of is used *during* tashmish. Exactly what aspect of Rabbeinu Tam's *p'shat* do they reject?

Most *Poskim* assume that the other *Rishonim* felt that the medical facts were not correct. The use of the *moch* after *tashmish* would not suffice to protect the woman's life. The use of the *moch during tashmish* would be much safer. But even according to the other *Rishonim,* use of a *moch* after *tashmish* would be allowed by all women, even where pregnancy would pose no danger to her life. *(Toras Chesed,* no. 42; *Avnei Nezer, Even Hoezer* no. 79 and 81).

The Chazon Ish disagrees and is of the opinion that, although Rabbeinu Tam felt use of a *moch* during *tashmish* was forbidden even in the situation where pregnancy would pose a danger to the woman's life, and use of a *moch* after *tashmish* is *always* allowed, the other *Rishonim* held just the opposite — that use of a *moch after tashmish* is always forbidden, even in the situation of danger to life. This controversy has practical relevance today regarding use of a douche after coitus.

93. Responsa vol. I no. 58

94. See *"Halochos of Nidd'ah,"* Shimon Eider, pg. 122, quoting Rabbi Moshe Feinstein.

all, this certainly is not *Tashmish kidarko* and therefore a violation of *hashchosas zera?*. Rabbi Chaim Ozer is quoted[95] as having assumed that even this case is considered *kiderech kol ho'oretz*. But the overwhelming majority of *Poskim*[96] following him have *not* accepted his view. According to the majority opinion, even if the woman's life would be endangered in the event of pregnancy, we would not allow the husband to use a condom.

In reality, even the lenient view of Rabbi Chaim Ozer has probably been quoted out of context. In his responsum,[97] he deals with a special case where the woman's life would be in danger if she were to become pregnant again. According to his opinion (as explained above), use of a diaphragm during *Tashmish* in such circumstances is considered *kiderech kol ho'oretz*. To this Rav Chaim Ozer adds that even use of a condom under such circumstances would also be considered *kiderech kol ho'oretz*. However, if the woman is perfectly healthy, Rabbi Chaim Ozer would most probably agree that a condom would not be allowed. If, according to Rav Chaim Ozer, use of a diaphragm is not *kiderech kol ho'oretz* (if the wife is healthy), even though the sperm enters the vagina since it is artifically blocked from passing through the cervical canal, certainly he would agree that use of a condom, which artifically prevents the sperm from even entering the vagina, would not be considered *kiderech kol ho'oretz*.

According to Rabbi Menachem Manesh Babbad of Tarnapol[98] and Rabbi Meir Arik[99] and many other *Poskim*, spermicidal jellies or foam sprays do not constitute a violation of *hashchosas zera*. The act of *Tashmish* is completely normal *kiderech kol ho'oretz*.[100] According to *Igrot Moshe*,[101] the same is true of the use of the Pill.

---

95. *Igrot Moshe*, Even Ho'ezer, vol. I, end of responsum 63.
96. See *Dover Meisharim* (by Chebiner Rov), vol. I, end of no. 20. Even Maharsham, who was known to be most lenient in his decisions, did not accept this point of view. See also *Igrot Moshe* in note 95.
97. *Ahiezer* vol. III, no. 24,5.
98. *Chavazelet HaSharon*, p. 231.
99. Vol. I, no. 131. See also *Igrot Moshe* Even Ho'ezer, vol. I, no. 62.
100. The opposing minority opinion is recorded in *Mishneh Halachot*, vol. 5, pgs. 287, and 316-317.

There is no problem of *hashchosas zera* since the *Tashmish* is not affected in the least.

Use of the Pill, however, poses two additional halachic problems:[101] 1) staining will often result from the change of hormone levels in the woman's body. This will cause the woman to become a *Niddah.* Although the bleeding does not relate to a normal menstrual cycle, the halacha still considers this to be a regular din of *Niddah,* and 2) use of the pill has been ascertained to be dangerous. It should therefore be forbidden on the basis of *V'nishmartem me'od l'nafshoseichem,* the biblical command enjoining us to protect our health.[102]

As medical science improves the Pill, the above hazards may disappear or diminish; thus in the future, these considerations may become minor in arriving at a halachic determination of the permissibility of this form of contraception.[103]

The author wishes to thank Moshe Rosenberg for his assistance in the preparation of this essay.

---

101. Even Ho'ezer vol. I, no. 65.
102. Devorim (4,15). See Brochos (32b).
103. "Update on Oral Contraceptives", by E. Conneil M.D., in *Current Problems in Obstetrics and Gynecology* Vol. II no. 8, April 1979. p. 28.

"The oral contraceptive is the most effective method of birth control ever developed. It does not satisfy all the criteria of the "ideal contraceptive" but it comes closer to it than any other technique in the history of mankind. Its use is accompanied by the development of a number of side effects, both major and minor. The precise incidence of each of these is still a matter of debate, but it appears that earlier estimates may perhaps have been too high. In addition, as more and more woman move to the lower-dose preparations, even these new estimates may again prove to be too high. Continued study has also pointed out many ancillary beneficial side effects of the pill."

Cigarette Smoking and Jewish Law

Dr. Fred Rosner

Tobacco was first implicated as a cause of cancer in 1761[1]. There is no longer any doubt that cigarette smoking is a hazard to health. Overwhelming medical evidence has proved that cigarette smoking is associated with a shortened life expectancy. In January 1964, an Advisory Committee appointed by the Surgeon General of the United States Public Health Service issued its report[2] on the relationship between smoking and health. The conclusions of that report were summed up in the sentence: "Cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action."

1. Redmond, D.E. Jr. "Tobacco and Cancer: The First Clinical Report, 1761." New Engl. J. Med. *282:* 18-23, 1970.
2. *Smoking & Health,* Report of the Advisory Committee to the Surgeon General of the Public Health Service, 387 pp. U.S. Gov't. Printing Office, Washington, D.C. 1964.

This article is an expansion by the author of a theme which he first developed in "Modern Medicine and Jewish Law,", published in 1972.

Director, Department of Medicine, Queens Hospital Center Affiliation of the Long Island Jewish-Hillside Medical Center; and Professor of Medicine, Health Sciences Center, State University of New York at Stony Brook.

Nearly four years later, after reviewing more than 2,000 research studies published since the 1964 report, the U.S. Public Health Service published its follow-up report[3]. The report concludes that: "epidemiological evidence derived from a number of prospective and retrospective studies, coupled with experimental and pathological evidence, confirms the conclusion that cigarette smoking is the main cause of lung cancer in men." Other findings include the fact that cigarette smoking is the most important cause of chronic obstructive lung disease (emphysema) in the United States. It is also a significant risk factor contributing to the development of coronary heart disease, cancer of the larynx and probably cancer of the bladder. Pregnant women who smoke have smaller babies and greater fetal complications than those who don't smoke.

In the United Kingdom, the Royal College of Physicians of London followed its first report on smoking and health[4] with another report[5] restating the medical hazards of smoking. The reports claim that cigarette smoking has become as important a cause of death as the great epidemic diseases such as typhoid, cholera and tuberculosis.

By act of Congress, the following warning appears on every pack of cigarettes manufactured for sale in the United States on or after November 1, 1970:

> "The Surgeon General Has Determined That Cigarette Smoking is Dangerous to Your Health."

Television advertising for cigarettes was abolished by government decree as of January 1. 1971. Complete or partial bans on cigarette advertising are in effect in England, Holland, Norway,

---

3. *The Health Consequences of Smoking*. A Public Health Service Review: 1967. 199 pp. U.S. Gov't Printing Office, Washington, D.C. 1968.
4. *Smoking & Health*. Royal College of Physicians. Pitman Medical Publishing Co., London. 1962.
5. *Smoking & Health Now*: A Report of the Royal College of Physicians. Pitman Medical Publishing Co., London. 1971.

Sweden, Italy, Poland, Russia, Switzerland and probably other countries[6].

Yet in Brazil, the Secretary of Federal Revenue recently suggested to cigarette companies that they should organize an even more massive sales campaign than previously to increase the income to the Brazilian government from taxation on industrialized products[7].

The U.S. Public Health Service's 14th report on the health consequences of smoking appeared in 1981[8] and concluded that there is no such thing as a safe cigarette. The report states that "the smokers of lower tar and nicotine cigarettes who compensate by smoking more or by inhaling more deeply might thereby increase their risk of developing obstructive airway disease." In addition, lower tar cigarettes do not decrease the risks among pregnant women of spontaneous abortion, premature birth, or low-weight babies. Filtered cigarettes are no safer. A new concern relates to the use of new additives for tobacco processing for flavoring, some of which may give rise to carcinogenic substances when burned thus offsetting the potential benefit from lower tar and/or nicotine content of cigarettes.

There are new alarms for women who smoke. Deaths from lung cancer among women have increased dramatically in the past twenty years and may soon overtake breast cancer as the leading cause of cancer death in women. Also worrisome is the sharp increase in smoking among teenage girls who are entering their childbearing years. Babies of smokers weigh less than those of non-smokers and show slower rates of physical and mental growth. Prematurity, miscarriage and fetal death are also more common in smokers.

An earlier report in 1979 had already emphasized an array of other warnings to smokers:

---

6. Best, E.W.R. *A Canadian Study of Smoking & Health.* Dept. of National Health and Welfare. Ottawa. 1966.
7. Barros, F.C. A Government that Encourages Smoking. *Lancet 2:* 366, 1981.
8. *The Health Consequences of Smoking: The Changing Cigarette.* Report of the Surgeon General, Public Health Service (Dept. of Health and Human Services) 1981, U.S. Gov't Printing Office. 252 pp.

a) A smoker has a seventy percent greater risk of death in any given year than a non-smoker. For two-pack-a-day smokers, the risk is one hundred percent greater.
b) Smoking poses a major heart-attack risk in both men and women. The danger of heart attck for women who both smoke and take birth-control pills containing estrogen is ten times higher than for other women.
c) Smoking can be especially hazardous to workers in certain occupations, including the asbestos, rubber, textile, uranium and chemical industries. Substances in smoke may act synergistically with chemicals to greatly increase a smoker's chances of contracting lung cancer.
d) To further emphasize the value of quitting cigarette-smoking, the report noted that after fifteen years, the mortality ratio for former smokers is nearly as low as for people who never smoked[9].

Yet people continue to smoke. To some people, cigarette smoking is the greatest single public health problem this nation has ever faced. The present essay is an attempt to show that in light of the overwhelming medical evidence proving the causal relationship of cigarette smoking to cancer of the lung, heart disease and chronic bronchitis, Jewish law absolutely prohibits this practice, notwithstanding several Rabbinic opinions to the contrary *(vide infra).*

The Torah tells us not to intentionally place ourselves in danger when it states *take heed to thyself, and take care of thy life* (Deut. 4:9) and *take good care of your lives* (Deut. 4:15). The avoidance of danger is exemplified throughout the Bible, Talmud and Codes of Jewish Law in the positive commandment of making a parapet for one's roof (Deut. 22:8) so that no man fall therefrom. R. Moses Maimonides (Rambam), in his classic *Mishneh Torah,* enumerates a variety of prohibitions, all based upon the consideration of being harmful to life. They are quoted verbatim *(Hilchoth Rotze'ach,* chapter 11:4ff) since they eloquently illustrate the point under discussion:

---

9. Clark, M. & Hager, M. Slow-Motion Suicide. *Newsweek.* Jan. 22, 1979. p. 83-84.

"It makes no difference whether it be one's roof or anything else that is dangerous and might possibly be a stumbling block to someone and cause his death — for example, if one has a well or a pit, with or without water, in his yard — the owner is obliged to build an enclosing wall ten handbreadths high, or else to put a cover over it lest someone fall into it and be killed. Similarly, regarding any obstacle which is dangerous to life, there is a positive commandment to remove it and to beware of it, and to be particularly careful in this matter, for Scripture says, *Take heed unto thyself and take care of thy life* (Deut. 4:9). If one does not remove dangerous obstacles and allows them to remain, he disregards a positive commandment and transgresses the prohibition: *Thou bring not blood* (Deut. 22:8).

"Many things are forbidden by the Sages because they are dangerous to life. If one disregards any of these and says, 'If I want to put myself in danger, what concern is it to others?' or 'I am not particular about such things,' disciplinary flogging is inflicted upon him.

"The following are the acts prohibited: One may not put his mouth to a flowing pipe of water and drink from it, or drink at night from rivers or ponds, lest he swallow a leech while unable to see. Nor may one drink water that has been left uncovered, lest he drink from it after a snake or other poisonous reptile has drunk from it, and die ...

"One should not put small change or *denar* into his mouth lest they carry the dried saliva of one who suffers from an infectious skin disease or leprosy, or lest they carry perspiration, since all human perspiration is poisonous except that coming from the face.

"Similarly, one should not put the palm of his hand under his arm, for his hand might possibly have touched a leper or some harmful substance, since the hands are constantly in motion. Nor should one put a dish of food under his seat even during a meal, lest something harmful fall into it without his noticing it.

> "Similarly, one should not stick a knife into a citron or a radish lest someone fall on the point and be killed. Similarly, one should not walk near a leaning wall or over a shaking bridge or enter a ruin or pass through any other such dangerous place."

This quotation from Maimonides certainly emphasizes the point that placing one's health or life into possible danger is absolutely prohibited. Hence, the smoking of cigarettes, which constitutes a definite danger and hazard to life, should *a fortiori* be prohibited. The subterfuge of "it is no concern of others if I endager myself" is specifically disallowed by Maimonides.

Similar prohibitions against endangering one's life are found in most later Codes of Jewish Law including R. Yosef Karo's *Shulchan Aruch*. The latter devotes an entire chapter *(Choshen Mishpat* #427) to "the positive commandment of removing any object or obstacle which constitues a danger to life." Elsewhere, *(Yoreh Deah* #116), R. Karo reiterates the prohibitions against drinking water left uncovered, putting money in one's mouth, putting one's hand or a loaf of bread under the armpit, leaving a knife in a fruit. He further states *(Orach Chayim* #170:16) that two people should not drink from the same cup, and *(ibidem* 173:2) that one should wait between eating fish and meat because of danger.

Rabbi Moses Isserles, known as Ramo, in his glossary on R. Karo's *Shulchan Aruch (Yoreh Deah* 116:5) concludes:

> "... one should avoid all things that might lead to danger because a danger to life is stricter than a prohibition. One should be more concerned about a possible danger to life than a possible prohibition. Therefore, the Sages prohibited one to walk in a place of danger such as near a leaning wall (for fear of collapse), or alone at night (for fear of robbers). They also prohibited drinking water from rivers at night ... because these things may lead to danger ... and he who is concerned with his health (lit.: watches his soul) avoids them. And it is prohibited to rely on a miracle or to put one's life in danger by any of the aforementioned or the like ..."

Ramo thus prohibits reliance on miracles when one's health is at stake. The fact that so many Jewish people smoke is no justification for this dangerous and life-threatening practice. If many Jews commit a transgression, others should certainly not follow; rather they should try to teach the sinners to repent from their evil ways. The "pleasures" of adultery are not condoned by even the most liberal-minded Jew. Why then should the pleasures of smoking which also involve biblical prohibitions *(vide supra),* be relegated to an inferior status, to be treated more leniently?

Not only is the intentional endangerment of one's health or life, such as by smoking, prohibited in Jewish law, but also wounding oneself without fatal intent is also disallowed. The Talmud (Baba Kamma 91b) quotes Rabbi Elazar Hakapar Berabbi who maintains that a man may not injure himself. He learns this point from the Scriptural phrase *And make an atonement for him, for that he sinned regarding the soul* (Numbers 6:11) which refers to a Nazarite who is called a sinner because he deprived himself of wine. Certainly, says Rabbi Elazar Hakapar, a person who deprives himself of his health by injuring himself is considered a sinner. One can extend this reasoning to include smoking.

Maimonides, in his *Mishneh Torah (Hilchoth Melachim* 6:10) states that he who smashes household goods, or destroys articles of food, with destructive intent, transgresses the commandment *Thou shall not destroy* (Deut. 20:19). Our Sages (Shabbath 140b) deduce from this phrase a prohibition against the wanton destruction of anything useful to man. Rabbi Solomon Luria *(Yam Shel Shlomoh,* Baba Kamma 8:59) extends this prohibition to the willful destruction of one's own body. An example of this is described in the Talmud (Shabbath 129a) where a footstool was broken up for Rabbah, whereupon Abaye said to Rabbah: "But you are not infringing on *Thou shalt not destroy*?" He retorted: "Thou shalt not destroy in respect of my own body is more important to me."

The prohibition against intentionally wounding oneself is codified by both Rambam in his *Mishneh Torah (Hilchoth Chovel Umazik* 5:1), and R. Karo in his *Shulchan Aruch (Choshen Mishpot* #420:31 and *Orach Chayim* #571). Not only can smoking be considered to constitute wounding oneself or intentionally

injuring one's health, but it may in fact constitute a slow form of suicide. Suicide, itself, whether slow or rapid, is absolutely prohibited in Jewish law[10] based upon the biblical phrase *And surely your blood, the blood of your lives, will I require* (Genesis 9:5).

Some argue that the following two Talmudic principles mitigate against the imposition of a Rabbinic ban against cigarette smoking:

a) we must not impose a restrictive decree upon the community unless the majority of the community will be able to endure it (Baba Kamma 79b).

b) it is better that they should transgress inadvertently rather than be deliberate sinners (Shabbath 148b).

Both arguments can be rejected[11] since neither is applicable in the face of *Pikuach Nefesh* or danger to life. Furthermore, the smoking of cigarettes is not an inadvertent act (although the sin or transgression may be inadvertent), but an intentional practice of oral gratification which can lead to serious illness and even death.

Nearly a century ago, Rabbi Israel Meir Ha-Kohen Kagan (1838-1933), popularly known as the *Chofetz Chayim*, wrote a small treatise entitled *Kuntres Zechor Le Miriam* which is appended at the end of many editions of his famous book *Shemirath HaLashon*. In this treatise (Chapter 10, p.16), he points out that the smoking of cigars and cigarettes is "not only harmful to the body as is well known, but also causes harm to the soul" in that it causes one to neglect one's study of Torah. He therefore concludes that one should refrain from smoking for these two reasons.

On the other hand, very few Rabbis have to this day issued a prohibition against smoking, though most condemn the practice as foolhardy and dangerous. Rabbi Moshe Feinstein, in his famous responsa[12], asserts that althout it is proper not to begin smoking,

---

10. Rosner, F. "Suicide in Biblical, Talmudic and Rabbinic Writings." *Tradition 11* (2): 25-40 (Summer) 1970.
11. Aberbach, M. "Smoking and the Halakhah." *Tradition 10(3)* 49-60 (Spring) 1969.
12. Feinstein, M. *Responsa Iggrot Moshe. Yoreh Deah* Section 2. New York, 1973, Balshon. Responsum 149.

one cannot say that it is prohibited because of the danger since many people smoke and the Talmud (Shabbath 129b and Niddah 31a) states that: *The Lord preserveth the simple* (Psalms 116:6). Rabbi Feinstein also points out that many rabbinic scholars from previous generations as well as our own era smoke. Furthermore, even to those who are strict and do not smoke because of their concern about possible danger to health and life, there is no prohibition in lighting the match for those who smoke. Rabbi Feinstein has recently reconfirmed his opinion in writing[13].

Rabbi Feinstein does admit, however[14], that if the exhaled smoke is harmful to others in close proximity to the smokers, the smokers would be obligated to smoke in private or far removed from other people. There is considerable controversy in the medical literature on this point. There is no doubt that maternal smoking affects fetal development, being associated with low birth weight[15,16], prematurity[17], birth defects[18], increased spontaneous abortions[19], and long-term growth deficiency in the offspring[20]. Thus, in Jewish law, a pregnant woman should be prohibited from smoking because she is endangering the health and life of her child. The suggestion that healthy adult non-smokers may be

---

13. Feinstein, M. Unpublished responsum dated June 10, 1981 addressed to Dr. Fred Rosner.
14. Feinstein, M. Unpublished responsum dated Oct. 6, 1980 addressed to Mr. Reuben Soffer. (Lacking the text of the responsum, we cannot know why Rav Feinstein did not apply the principle "G-d preserveth the simple" to those non-smokers inhaling the smoke.-Ed.)
15. Comstack, G.W., Shah, F.K., Meyer, M.B., Abbey, H. Low birthweight and neonatal mortality rates related to maternal smoking and socioeconomic status. *Amer. J. Obstet. Gynecol. III:* 53-59, 1971.
16. Davies, D.P., Gray, O.P., Ellwood, P.C. Abernethy, M. Cigarette smoking in pregnancy: Association with maternal weight gain a fetal growth. *Lancet I:* 385-387, 1976.
17. Meyer, M.B., Tonascia, J.A. Maternal smoking, pregnancy complications, and perinatal mortality. *Amer. J. Obstet. Gynecol. 128:* 494-502, 1977.
18. Andrews, J., McGarry, J.M. A community study of smoking in pregnancy. *J. Obstet. Gynecol. Br. Commonw. 78:* 1057, 1972.
19. Kline, J., Stein, Z.A., Susser, M., Warburton, D. Smoking: a risk factor for spontaneous abortion. *N. Engl. J. Med. 297,* 793-796, 1977.
20. Butler, N.R., Goldstein, H. Smoking in pregnancy and subsequent child development. *Brit. J. Obstet. Gynecol. 4:* 573-575, 1973.

seriously harmed by other people's smoke is based on four studies, summarized in a recent editorial in the prestigious medical publication LANCET[21]. Each of the studies can be criticized for a variety of statistical reasons[22]. At present, the state of the art seems to be that, although suggestive, the evidence is not sufficient to definitively conclude that passive or involuntary smoking causes lung cancer in non-smokers.

Rabbi J. David Bleich[23] is of the opinion that smoking does not involve an infraction of Jewish law. He explains that certain actions which contain an element of danger, such as crossing the street or riding in an automobile, involve a certain danger yet are certainly permissible because "the multitude has trodden thereon", i.e., these dangers are accepted with equanimity by society at large. Therefore, an individual is granted dispensation to rely upon G-d who "preserves the simple". Rabbi Bleich also quotes Rabbi Yaakov Etlinger *(Binyan Zion* #137) who distinguishes between an immediate danger which must be eschewed under all circumstances, and future danger, such as that related to cigarette smoking, which may be assumed if, in the majority of cases, no harm will occur. Two correspondents[24] take strong issue with Rabbi Bleich's analysis of the Jewish legal permissibility of smoking. The five points in Jewish law raised by these correspondents are rebutted by Rabbi Bleich[25]. In spite of the technical inability of Rabbi Bleich and others to promulgate a formal binding prohibition against smoking, he does urge Rabbis to use their extensive powers of moral persuasion and exhortation to urge "the eradication of this pernicious and damaging habit"[23]

Dr. Abraham S. Abraham quotes Rabbi Shlomo Zalman Auerbach and Rabbi Ovadiah Yosef as being in agreement with the thesis that smoking cannot be prohibited in Jewish law for the

---

21. Editorial. Passive Smoking: Forest, Gasp, and Facts. *Lancet 1:* 548-549 (March 6) 1982.
22. Lee, P.N. Passive Smoking. *Lancet 1:* 791 (April 3) 1982.
23. Bleich, J.D. Survey of Recent Halakhic Periodical Literature: Smoking. *Tradition 16(4):* 121-123 (Summer) 1977.
24. Hendel, R.J. and Weiss, Z.I. Smoking. *Tradition 17(3):* 137-140 (Summer) 1978.
25. Bleich, J.D. *ibid.* p. 140-142.

reasons cited by R. Feinstein and Rabbi Bleich. Nevertheless, "one should do one's utmost to avoid smoking, since this has been proven medically to be injurious to well being, and dangerous to life"[26].

In regard to marijuana smoking, mounting scientific evidence shows that it is a threat to brain function as well as a respiratory hazard[27]. Acute intoxication impairs learning, memory, intellectual performance and driving ability[28]. Marijuana also has adverse effects on the body's immune, endocrine and reproductive systems.

Because of the above, Rabbi Feinstein prohibits the smoking of marijuana by stating the following: Firstly, marijuana is harmful to the body. Even those people who suffer no physical damage may suffer mental harm in that marijuana confuses the mind and distorts one's abilities of reasoning and comprehension. Such a person is thereby not only preventing himself from studying Torah but also from performing other precepts. Marijuana use, continues R. Feinstein, can also bring on extreme and uncontrollable lusts and desires. Furthermore, since the parents of marijuana users are usually opposed to its use, the users violate the biblical commandment of honoring one's father and mother. Other prohibitions may also be involved in marijuana use and, therefore, concludes R. Feinstein, one must use all one's energies to uproot and eliminate this pernicious habit[29].

Other Rabbis also consider marijuana smoking to be prohibited in Jewish law[30,31] but very few prohibit cigarette

---

26. Abraham, A.S. *Medical Halachah for Everyone.* Jerusalem, New York. Feldheim. 1980, p. 6.
27. Dupont, R.L. Marijuana Smoking - A National Epidemic. *Amer. Lung. Assoc. Bull.* 66(7): 2-7 (Sept.) 1980.
28. Willette, R.E. Editor. *Drugs and Driving.* National Institute on Drug Abuse Monograph II. DHEW Pub. No. (ADM) 77-432. National Institute on Drug Abuse, 1977.
29. Feinstein, M. *Responsa Iggrot Moshe. Yoreh Deah.* Section 3, B'nei Brak, Israel. 1981. Yeshiva Ohel Yosef. Responsum #35.
30. Brayer, M.M. Drugs: A Jewish View. in *Jewish Bioethics* F. Rosner and J.D. Bleich (Editors). New York. Sanhedrin Press (Hebrew Pub. Co.) 1979 pp. 242-250.
31. Landman, L. (Editor) *Judaism and Drugs.* New York. Federation of Jewish Philanthropies. 1973. 265 pp.

smoking. Some Rabbis are finally speaking out on the evils of cigarette smoking and the possible prohibitions involved. Rabbi Moses Aberbach" writes that

> "the medical and statistical evidence demonstrates that smoking is hazardous to health, and can lead to fatal diseases. The idea that smoking is liable to shorten a person's life is virtually undisputed. It follows, therefore, that the numerous *halachic* rules prohibiting dangerous activities should be extended to include smoking. This extension should be enacted by the leading Rabbinic authorities of our times, preferably acting jointly, and with due publicity. A general Rabbinic injunction against smoking has every chance of being gradually accepted, at least in strictly Orthodox circles. Thus, many Jewish lives would be saved, and the health of our people would substantially improve. Finally, not the least fringe benefit would be a demonstration of the relevance of Judaism — and especially *halachic* Judaism — to our own times."

Rabbi Nathan Drazin[32] asks "why, indeed, have the great *halachic* authorities of our generation been silent concerning the prohibitions of Jewish law in regard to cigarette smoking?" Citing a variety of biblical and Talmudic sources, Rabbi Drazin concludes that

> "it is therefore high time, before more irreparable damage is done, that the great *halachic* authorities of our time come out openly and declare that the use of narcotic drugs and even cigarette smoking are evil practices that are certainly forbidden by Jewish law ..."

In 1976, the Sephardic Chief Rabbi of Tel Aviv, Rabbi David Halevy, declared cigarette smoking to be a violation of Jewish law. His prohibition on smoking was widely publicized and was

---

32. Drazin, N. Halakhic Attitudes and Conclusions to the Drug Problem and its Relationship to Cigarette Smoking. In *Judaism and Drugs* (Leo Landman, edit.) New York. Federation of Jewish Philanthropies. 1973. pp. 71-81.

reported on page 2 of the December 11, 1976, issue of the New York Times.

It is my fervent hope that more Rabbis will follow this example and ban smoking. Physicians should urge their patients to stop smoking. Rabbis should deliver sermons urging their congregants to stop smoking, or non-smokers not to begin this evil practice. Physicians and Rabbis must themselves give up smoking in order to practice what they preach and teach by example. Leading Rabbinic authorities should speak out on this subject without timidity. The Jewish community of this nation must marshal its forces in an attack on the promotional activities of the tobacco industry. Judaism must appeal to its people and educate them in the ways of our Torah which regards life and health to be sacred and their preservation a Divine commandment.

Ribis: A Halachic Anthology

Rabbi Joseph Stern

את כספך לא תתן לו בנשך ובמרבית לא תתן אכל

Do not charge interest *(Ribis)* while lending money or food.[1]

Do not cause your fellow Jew to charge interest (i.e. do not *pay* interest in return for a loan — a prohibition against the debtor paying interest).[2]

לא תשיך לאחיך נשך כסף נשך אכל נשך כל דבר אשר ישך.

Do not act as an accomplice to the charging of interest (an injunction against even consigning or certifying any usurious financial transaction).[3]

הא למדת שהמלוה ברבית עובר על ששה לאוין.

A usurious creditor violates six biblical prohibitions.[4]

כל המלוה ברבית כאילו כופר באלקי ישראל.

Usury — charging interest — is equivalent to atheism.[5]

---

1. ויקרא כה, ל"ג
2. דברים כ"ג, כ
3. שמות כ"ב, כ"ד
4. רמב"ם, הלכות מלוה ולוה פ"ב הלכה ב
5. ירושלמי ב"מ פרק ה' הלכות ח

Rabbi, Cong. Ohav Shalom (New York); Assistant Professor of Business, Trenton State College

כל המלוה ברבית נכסיו מתמוטטין.
An entrepreneur who lends money with interest will suffer financial reverses.[6]

חיו לא יחיה זה המלוה ברבית.
The usurer will not experience Resurrection.[7]

The above verses and rabbinic dicta express the *issur* of *Ribis* — the giving or receiving of any sort of profit for the loan of money or food.

Few committed Jews would deliberately lend (or borrow) money in violation of the injunction against charging interest. And yet some very commonplace business transactions pose serious halahic problems. This article will suggest some contemporary applications of the *Ribis* principle and discuss proposed remedies for each situation. A second section will focus on the status of banks, corporations, and other organizations that may be exempt from the *Ribis* prohibition. A third and closing section will discuss the evolution of the *Heter Iska* (a document structuring a loan as an investment proposal) and its feasibility for modern business exigencies. The purpose of this paper is to explore the parameters of the *Ribis* laws, rather than to offer authoritative *psak*. Any halachic verdict must be rendered by competent rabbinic authorities.

PART I

Contemporary Business Applications

A. Terms of Trade

One of the most common business practices is to offer a discount for early payment. Perhaps the most popular procedure is to allow a 2% discount for payment within 10 days. If such prompt payment is not possible, the full amount is due within a month (2/10 net 30).

The basic halachic principle concerning terms of trade can be

---

6. ב"מ עא
7. שמות רבה לא, ו

derived from Tosafot's resolution of two dichotomous Talmudic statements:

Rav Nachman seems to prohibit any type of consideration for early payment or penalty for delayed payment.[8] In affect, it is paying a premium for use of his funds, a form of *Ribis*. A charge for the debtor's use of the creditor's fund in the course of trade is *Ribis*.

אמר רב נחמן כללא דרביתא כל אגר נטר אסור

As an example of a forbidden transaction, Rav Nachman suggests the following scenario:

Someone prepays a peddler of wax. As a result of this advance infusion of funds, the grateful merchant offers 5 cases of wax for the price of four. This transaction is prohibited unless the vendor is currently in possession of the merchandise (but is unwilling or unable to provide for immediate delivery).[9]

אמר רב נחמן האי מאן דיהיב זוזי לקיראה וקא אזלי ד׳ד׳
וא״ל יהיבנא לך ה׳ה׳ איתנהו גביה שרי ליתנהו גביה אסור.

However, the following mishna seems to limit Rav Nachman's ruling: אין מרבין על המכר (ב״מ סה).

One is not permitted to discount a commodity's selling price (because of early payment).

כיצד מכר לו שדהו ואמר לו אם מעכשיו אתה נותן לי הרי
היא שלך באלף זוז אם לגורן בשנים עשר מנה אסור.

For example, a field is sold for 12 *maneh* if payment is delayed until the harvest season. If, however, immediate payment is rendered, the seller *specifies* that 1000 *zuz* (a lesser amount) would be sufficient. Such a practice is considered to be usurious. The text seems to imply that discounting is only prohibited when the terms of trade are *explicitly* mentioned. To compound the problem, Rav Nachman himself, commenting on the mishna, says טרשא שרי.[10] It is permitted to charge more for delayed payment (or

---

8. ב״מ סג:
9. שם
10. שם ע״ה

to deduct for early payment), provided these conditions are only implied, not explicitly mentioned.

Tosafot resolves the apparent contradiction by distinguishing between commodities bearing a set (fixed) market price and those having no set value. Items bearing a set market value (in contemporary times, gold, platinum, anything traded on a commodity exchange) may not be discounted on the basis of early payment. On the other hand, anything that has no precise price (Tosafot's example — a cow, a cloak) may be implicitly discounted. Under no circumstances may the terms of trade be explicitly mentioned.[11]

Tosafot's formulation assumes the form of normative halacha (הלכה למעשה) in the *Shulchan Aruch's* ruling.

> מכר לחבירו דבר ששוה עשרה בי"ב בשביל שממתין לו אסור ... בד"א בדבר שיש לו שער ידוע או דבר ששומתו ידוע כמו פלפל או שעוה אבל טלית וכיוצא בו שאין לו שער ידוע ואין שומתו ידוע מותר למכרו ביוקר.

In essence, one may only discount items (or charge a premium for late payment) that have no set market price.

Even then, the terms of trade may not be specified.[12] Are all terms of trade acceptable? The *Shulchan Aruch* (citing the Ramban) only tolerates a small amount of consideration מעלהו מעט granted for early payment. If it is apparent to all that the debtor pays less מעלהו הרבה — that would be prohibited. Rabbi Yaakov of Lisa suggests that a discount or premium greater than 1/6 would be excessive.[13]

Rabbi Mordechai Yaakov Breish, in a special section of his responsa *(Chelkas Yaakov)* devoted to contemporary *Ribis* applications, considers the halachic status of 2/10 net 30. Seemingly, such explicit consideration (even if not verbalized, the terms are at least written on the invoice) would be *Avak Ribis*, אבק רבית (a rabbinic form of usury). If at all possible, a *Heter Iska*

---

11. שם סג: תוספות ד"ה ואמר
12. שו"ע יורה דעה קע"ג סעיף א
13. חוות דעת קע"ג ס"ק ג

should be arranged or the vendor should avoid writing down the credit terms.[14] Rav Breish's "Mechuten," Rabbi Yaakov Yitzchak Weisz (author of the responsa *Minchas Yitzchok),* proposes restructuring the business transaction to overcome the *Ribis* problem. Basing himself on the opinion of the *Chavas Daas,* he suggests that the vendor first price the commodity on the assumption of immediate payment. If the customer then insists on delayed payment, cancel the initial deal and arrange for a new transaction, this time at a premium. Similarly, if the customer desires a discount for each payment, withdraw the first proposition (e.g. 150 at the conclusion of the month) and substitute a new offer (130 for immediate cash).[15]

Too often, the above suggestions are not feasible, nor is the customer (a non-observant Jew) willing to abide by a *Heter Iska.* Cognizant of the need for business credit, Rav Breish[15a] cites the opinion of the *Imrei Yosher,* who considers a premium for delayed payment to be no more than a hedge against inflation, not *Ribis.* He draws an analogy between borrowing money and renting utensils. The renter is permitted to pay a fee for depreciation — why not allow a debtor to pay for currency's depreciation? (In a marginal note, Rav Breish's sons[15b] dissent, noting that the debtor is not liable to reimburse his creditor for inflation — nor should he. Compensating the lender $120 for a loan of $100 (even assuming a 20% inflation rate) would be tantamount to רבית קצוצה, (a biblical prohibition of *Ribis*). Only if a particular currency has been removed from circulation (e.g. Confederate money) must the debtor pay his creditor according to current market values.[16] Rav Breish himself offers an ingenious solution to the problem. He draws an analogy between renting real estate and contemporary terms of trade. The mishna permits a discount for prepayment of rent.

---

14. שו"ת חלקת יעקב ח"ג סימן כ"ב
15. שו"ת מנחת יצחק ח"א סימן כ
15a. אמרי יושר ח"ג קצב
15b. חלקת יעקב ח"ג קפ"ט
16. שם סימן ר"ב

> מרבין על השכר כיצד השכיר לו את חצירו ואמר לו אם מעכשיו אתה נותן לי קח הוא לך בעשר סלעים לשנה, ואם של חודש בחודש סלע לחודש, מותר.
>
> If the year's rent is paid in advance, 10 selaim is sufficient. On the other hand, if you pay on a monthly basis, the rent will be one sela per month.[17] This is permissible.

Why is this permissible? Rent is only due at the end of every month. Charging more for not paying in advance is not a premium — *Ribis* — for use of the renter funds, but rather a free market price. It is the landlord's prerogative to waive some of the rent (מחילה) for early payment. Most business transactions — at least in Talmudic times — were payable *immediately*. Any price differential for later payment would be, in effect, charging the purchaser for temporary use of the seller's fund — *Ribis*. According to the above reasoning, it *may* follow that in today's business environment, terms of trade would no longer pose halachic problems. Few if any transactions are immediately payable. Credit is an accepted part of the business milieu. 2/10 net 30 is not a fee for 20 days borrowing, but rather a partial waiver of the purchase price, a rebate granted for early payment. *Ribis* only exists if an *obligation* to pay is delayed in exchange for some consideration to the creditor. Here no financial obligation exists till the end of the month. Yet, despite all possible justifications for the practice, Rav Breish advocates use of the traditional *Heter Iska* wherever possible.

B. Mortgages

Real estate transactions can be structured in several formats. The most common occurrence is for a bank to finance the purchase of a house. The bank receives regular interest payments as well as the gradual return of the principal. Generally, this type of transaction poses no halachic problems, especially if a bank controlled by non-Jewish interests is utilized. (The status of a financial institution controlled by Jews will be discussed in a subsequent section.) Occasionally, however, the financial

---

17. ב"מ סה:

intermediary is bypassed, and a mortgage agreement is contracted directly between the parties. Rav Moshe Feinstein[17a] considers such a transaction to be *Ribis K'zuza* (a biblical violation). He considers this to be analogous to the Talmud's case, קנה מעכשיו ווחי ליהוי הלואה גבך "I am selling you a field. Take title now and pay me later."

Under those circumstances, the seller may not consume any of the field's produce nor may he derive any benefit from the purchaser.[18] Any consideration rendered to the seller would be in effect a reward for temporary use of his funds and, consequently, *Ribis*. Rav Breish agrees that any mortgage agreement contracted between Jews is prohibited without a *Heter Iska*, differing only slightly to assert that the *Ribis* involved would be *mid'rabbanan*,[19] of rabbinic origin.

He then considers the halachic ramification of a further sale of the property, a second mortgage. A sells a house to B, utilizing a *Heter Iska*. Now, B proceeds to sell the house along with its mortgage to non-committed Jew C. C refuses to accept (to comply with) a *Heter Iska*. Rav Breish considers the possibility that the original *Heter Iska* between A and B would apply to C as well. This hypothesis is only tenable if one maintains that A and B have a unique relationship, that A in effect has a שעבוד הגוף, personal lien, against B as well as the right to foreclose the house if payments are not met. If such a personal obligation exists and if one postulates that B maintains that relationship even after he has sold the house (e.g. if C can't meet his obligations B might be responsible to reimburse A), the original document of *Heter Iska* between A and B might devolve upon C as well. However, the *Chelkas Yaakov* proves conclusively that a separate *Heter Iska* is required between A and C, especially in light of *dina de'malchusa dina* (civil law), which asserts that B's obligation to A only exists while B is in possession of the home.

In a marginal note, Rav Breish's children question the

17a. שו"ת אגרות משה יו"ד ח"א סימן עט

18. ב"מ סה:

19. חלקת יעקב ח"ג סימן קצ"ה

permissibility of a far more frequent transaction. A's mortgage is financed by a bank. He then sells the home complete with the mortgage to B. Wouldn't this be analogous to the following case cited in the Talmud?

> ישראל שלוה מעות מעכו"ם ברבית וביקש להחזירם לו ואמר לו חבירו ישראל תנה לי ואני אעלה לעכו"ם.
>
> A, who had borrowed money from a Gentile, is now ready to pay his debt. His colleague B proposes to take over the debt and eventually pay the Gentile. This transaction is prohibited.[20]

Despite the Gentile's presence in the deal, our Rabbis consider such an arrangement to be אבק רבית. Similarly, the presence of the non-Jewish bank should matter little. The mortgage is being transferred from Jew to Jew and should be prohibited rabbinically, if not biblically. Rav Breish strongly differs, noting that selling a mortgaged house from Jew to Jew was a very common practice even amongst the most devout.

> דבר זה נהוג מקדמת דנא גם בערי פולניא וכל מקומות מושבותם של יהודים חרדים.

This practice is not analogous to the above Gemara but rather to a similar case cited in that context.

> העמידו אצל עכו"ם ואמר העכו"ם הניחם ע"ג קרקע.

Jewish debtor A presents his colleague B to the Gentile creditor, who instructs the debtor to place the money on the ground. Only then does B take title to the money.[21] The *Chelkas Yaakov* argues that so long as no money is transferred from Jew to Jew (even if the Gentile doesn't instruct the debtor to place funds on the ground), no *Ribis* prohibition exists.[22]

C. Penalty Fee

May a fee be levied for late payment? Unlike the ordinary *Ribis* construct, the interest involved is only conditional. Only if

---

20. ב"מ עא
21. שם
22. חלקת יעקב ח"ג סימן קצ"ו

the funds are not returned by a certain date, is a surcharge imposed. Arguably, this payment could be considered a fine (קנס) rather than *Ribis*. This question, discussed at some length in the responsa *Chelkas Yaakov*, was in actuality already a matter of controversy among medieval commentators *(Rishonim)*.[23] Both Rav Yosef Karo and Rabbi Moshe Isserles (codifiers of the Sephardic and Ashkenazic viewpoints in *Shulchan Aruch*, respectively) prohibit such an arrangement.[24] However, the *Sma*[24a] not only tolerated penalty fees but actually saw the practice as a preferred manner of structuring all loans so as to overcome *Ribis*. The *Sma's Heter Iska* was designed as a penalty fee in case prompt payment was not received.

Rav Breish suggests a compromise, proposing that if the creditor insists on payment of the penalty, the debtor should arrange for an agent's involvement.

The agent's primary function is to persuade the creditor not to sue in court. As compensation for his efforts, he is paid a sum equivalent to the penalty fee. If, despite the agent's best efforts the creditor still insists upon payment of the *Ribis*, the middleman is permitted to give this sum to the lender. In this instance, no *Ribis* is being transferred from the creditor to the debtor. Rather, the agent is giving his own funds to the creditor.[25]

D. Installment Plans

One of the most popular forms of consumer credit is the installment plan. Monthly interest fees are charged. Rav Breish notes that such a credit arrangement poses more serious problems than ordinary terms of trade. Here, the *Ribis* is specified on a monthly basis, not merely implied. Whenever possible, a *Heter Iska* should be used. In emergency situations, it *may* be possible to invoke the *Chavas Daas's* suggestion mentioned previously (i.e. to

---

23. עיין ברמב"ם פ"ו הלכות מלוה ולוה הלכה יג דרוקא בקצץ וע"ש בראב"ד ובהגהות מרדכי הובא בב"י סימן קע"ז
24. יו"ד סימן קע"ז סעיף ט"ז
24a. הובא בספר לחם הפנים קונטרוס אחרון אות ב
25. חלקת יעקב ח"ג סימן ר"ג
26. שו"ת הר צבי יו"ד סימן קל"א

include the interest charges in the item's initial price). Even if a lower price had been agreed upon, the vendor may cancel the deal upon being informed of the need for financing and then insist upon this new price).[27]

E. Purchasing Securities from a Jewish Bank

Most transactions involving *Ribis* can be restructured as an investment deal, היתר עיסקא. However, according to the *Chelkas Yaakov*, one could argue that purchase of securities from a Jewish bank may not even be suitable for a שטר עיסקא. Ordinarily, a fixed percentage of the stock's price is paid immediately to the bank, while the rest is financed at market interest rates. This procedure is similar to other *Ribis* contingencies with one important exception. Unlike all other transactions where the borrowed funds are at least in the debtor's temporary possession, here the borrower never obtains access to the money. It is difficult to set up an investment company without an investor.

On the other hand, many extenuating factors exist. Firstly, purchases of stock are דרך מקח וממכר, structured as a sale, not as an outright loan, and consequently are *Avak Ribis*. Furthermore, as previously discussed, commodities without a set market price are permitted to be sold at a small premium (up to 1/6 for delayed payment). Beyond that, the exact halachic status of a Jewish bank is not quite clear, as will be discussed. Rav Breish concludes that while these extenuating factors are not sufficient to permit stock purchases without a *Heter Iska*, they are potent enough to allow an investment structure to be established.[28]

F. Prepayment of Goods and Services

A very popular means of "beating inflation" (especially in countries with triple-digit inflation) is to prepay, a pay-now-buy-later scheme. This very innocous gambit may involve serious *Ribis* problems.

אין פוסקין על פירות כל זמן שלא יצא שער שלהם

One may not pay in advance for fruit (or virtually any other

27. חו"ד קע"ג ס"ק ב
28. חלקת יעקב ח"ג סימן ר"ל

commodity) in the hope of guaranteeing oneself a stable price.[29] The buyer is receiving a discount (today's price for tomorrow's commodities) in return for allowing the seller the use of his funds. If, however, the vendor already has this merchandise in stock or at least if the commodity is at the final stages of the manufacturing process, it is permissible to arrange prepayment. (According to some authorities, even under these circumstances, the goods may not be sold below cost).[30] In addition, if the commodity has a fixed price, one may pay in advance for future delivery but only at that price. It is debatable, however, if prices that commonly fluctuate (market prices in urban areas) can be considered as fixed for purposes of this halacha.[31]

As a practical example of the above principles, Rabbi Shlomo Englander, author of כללא דרביתא, discusses the common practice of paying in advance for Tefillin. The *sofer* (scribe) doesn't have the merchandise in possession and can't even guess the market price at the time of the completion. Without a *Heter Iska* it may not be feasible halachically to pay in advance.[32] Buying futures contracts at commodity exchanges may pose similar problems.

Similarly, it is not permitted to pay workers in advance and then obligate them to this (lower) pay scale later in the season (when wages have risen).[33] Rav Breish however suggests that this restriction applies only to a day laborer (שכיר יום) who is not contractually obligated to work. According to Jewish law, a laborer may withdraw at any time. Thus any funds advanced to him can not be construed as wages but merely as a loan and would be subject to *Ribis* laws. However, it is permitted to prepay a contractor (who according to halacha may not withdraw and is contractually obligated to complete his job) in exchange for submitting to a lower wage scale. In this case, any advance funds are interpreted as a prepayment of wages, not as a loan and are exempt from *Ribis* restriction. Rav Moshe Soloveitchik (of

---

29. עיין בטור ריש סימן קע"ה
30. עיין בכללא דרביתא סימן ח הערה י"ט
31. יו"ד סימן קע"ה סעיף א וברמ"א שם
32. כללא דרביתא בהקדמה
33. יו"ד סימן קע"ו סעיף ח

Switzerland) in a counter responsum disagrees, arguing that no distinction exists.[34]

G. Rental Contract

It is permitted to rent utensils even though the renter is receiving consideration for the use of his property.[35] Why is renting (שכירות) different than lending money (הלואה)? Two explanations are suggested. Firstly, the renter (שוכר) shares responsibility with the vendor, whereas total responsibility for reimbursement of a loan devolves on the debtor. For example, if the funds were destroyed by fire the borrower would still be obligated to pay back his debt. On the other hand, the renter wouldn't be liable for any accident (אונס) occurring to the goods. Another approach views the rental fee as a form of reimbursement for the depreciation of the renter's equipment. If neither of these extenuating circumstances applies (i.e. rental of silver or gold utensils, renting coins to a trade show) and if the renter bears full responsibility for damages and no depreciation is likely, any charges levied for renting would be *Ribis*.[36]

H. Leasing with Purchase Option

Several questions appearing in contemporary שאלות ותשובות (Responsa) are clearly the results of an increasingly sophisticated business milieu. Rav Weisz was asked by a Rabbi in Gibraltar about a "hire-purchase" scheme (the British equivalent of leasing with an option to purchase). The contract provided for the lease of a car for a specified period of time. The lessee would be required to pay a down payment as well as a monthly fee. If the monthly payment was not received promptly, a penalty would be levied. In addition, the contract obligated the renter to insure the car, pay all taxes, and pay for any depreciation and all damages.

Rav Weisz recommended that the penalty fee be deleted from the contract (following the opinion of Rav Karo and the Ramo in opposition to the stance of the *Sma*, as previously discussed). In

---

34. חלקת יעקב ח"ג כ"ב-כ"ה
35. יו"ד קע"ו סעיף ב
36. עיין בשו"ת הר צבי יו"ד סימן קל"ו

addition, he urges that the contract be amended to provide for at least partial liability on the lessor's part. If not, any rental payments could be construed as *Ribis* (as in the previous section).

Concerning the core issue, the lessee paying more in monthly installments than he would on a lump sum basis (isn't that a form of *Ribis*, rewarding the lessor for temporary use of his funds?), *Minchas Yitzchok* offers an ingenious solution, an approach which not only permits paying more for monthly installments but actually requires it. Title (at least on a halachic basis) to the car remains with the lessor until the lessee has completed all payments. In a similar case, a field sold on installment basis, the Talmud prohibits the eventual purchaser from deriving any benefit until all payments have been completed.[37]

לכ' מיתית זוזי ליהוי גבך

If the buyer were allowed to benefit prior to full payment, he would be receiving special consideration for an advance of money to the seller, hence *Ribis*. Here too, the lessee has no legal title to the vehicle. The installment extra charges are not *Ribis* but rather compensation to the lessor for the lessee's use of his property prior to completing payment.[38]

I. Discounting Notes

The *Shulchan Aruch* explicitly permits discounting notes, provided that the seller (who in effect is borrowing money from the buyer) does not agree to reimburse the purchaser if the original debtor (who drafted the I.O.U.) does not pay.[39] If the seller accepts full responsibility for damages to the purchaser (e.g. non-payment by debtor) the transaction would be structured exactly as a loan and any discount for immediate cash would be *Ribis*. Rabbi Englander, however, maintains that notes may only be discounted if they are written according to proper halachic format and if they are sold according to Talmudic Law (i.e. a contract must be written for the sale of the note. In addition, the note must be transferred from seller to purchaser). In the introduction to his work כללא

---

37. ב"מ סה
38. שו"ת מנחת יצחק ח"ד סימן כ
39. יו"ד קע"ג סעיף ד

דרביתא, he opposed the discounting of checks inasmuch as they are not valid documents from a legal standpoint.[40]

J. Inflation Effects

The Jewish State has been subjected in recent years to ravaging, often triple-digit, inflation. As a result, Torah authorities have concerned themselves and written extensively about the feasibility of indexing (tying all debts to the inflation rate). Is it permissible to pay three shekels if I initially borrowed only one shekel and the current shekel is only 1/3 of its former value? Most authorities, among them the *Minchas Yitzchok*[41], prohibit such an arrangement. The *Minchas Yitzchok* bases his assertion on a responsum from the Chasam Sofer[43] and on the following assertion of *Chavas Daas*.

> רוקא שהתנה לתת לו מטבע והמטבע הראשונה נפסלה לגמרי שאז אין שם מטבע עליו כלל... אבל אם רק פיחת המלך מכמות שהוא כגון שהיה הדינה זה בכ"ה דינרים והעמידו על עשרים ודאי דאנן משלד רק המטבע שהלוה לו דהא עדיין שם מטבע עליו רק שהוזל
>
> Only if currency has been taken out of circulation must the debtor pay with the new currency. If the currency has been devalued and certainly if no official devaluation has taken place but merely its purchasing power has decreased as a result of inflation, even if a specific indexing clause was inserted into the contract the debtor may pay according to the old exchange rate.[44]

In an article in נועם, Rabbi Yitzchok Glickman concludes that without a *Heter Iska*, indexing a loan (i.e. tying payment to the cost of living index) would be inadvisable.[45]

---

40. כללא דרביתא בהקדמה (בסוף דבריו)
41. מנחת יצחק ח"ו סימן קס"א
42. יו"ד סימן ע"ד ס"ק ח ע"ש
43. שו"ת חתם סופר חו"מ סימן ע"ה
44. חו"ד קס"ה ס"ק א
45. נועם טז שנת תשל"ג קנ"ג-ק"ס

In times of economic instability black markets thrive, often to the point of rendering obsolete legitimate foreign exchange markets. Rav Breish rules that a debtor who borrowed 3.5 Israeli Lira (equal to one dollar at the official exchange rate) should not give his creditor one American dollar in return if the black market exchange rate is 4 Lira for one dollar. Any payment beyond the official exchange rate would be *Ribis*.[46] In an appendix to the responsum, he discusses the case of a borrower who pays a debt of 4 Lira with one dollar. In effect, he pays off his debt at the black market rate, whereas according to official exchange rate, one dollar would bring less than 4 Lira. He leans to the conclusion that it would be sufficient to pay the black market rate but does not decide the issue definitely.[47]

K. Insurance Schemes

The *Shulchan Aruch* rules clearly that a straightforward insurance contract (i.e. with no investment portfolio attached) is not *Ribis*.

הנוסע עם סחורות ששווין ק דינרים מעבר לים ונתן כ׳ דינרים למי שמבטיח את סחורתו מותר.

It is permissible to pay an agent 20 Dinars to accept liability for a cargo worth 100 Dinars, despite the appearance of impropriety (i.e. if the cargo is damaged, the insurer pays out 100 Dinars in exchange for the 20 Dinars he received as an advance) Nonetheless this transaction is structured as a sale of liability, not as a loan.[48]

L. Regional Price Differentials

A producer may give his agent merchandise worth 20 dollars and ask him to sell it on his behalf in another town for 24. However, two conditions must be met: (a) the producer must bear responsibility for all damages (unlike the typical loan where the debtor is liable) and (b) the agent must receive compensation for

---

46. חלקת יעקב ח״ד סימן ל
47. שם
48. יו״ד סימן קע״ג סעיף יט

his efforts. (If not, he is transporting the merchandise *gratis* in exchange for temporary use of funds, a form of *Ribis*).[49]

M. Non-Monetary Consideration

A creditor may not benefit from his debtor in any manner, even non-pecuniary favors. For example, he may not reside in the debtor's house even if he had done so previously. In general, anything ostentatious, even if the arrangement had existed prior to the loan, may not be performed by the borrower for the lender. A debtor may not purchase an *Aliyah* (opportunity to be called to the Torah) for his creditor. The creditor may not borrow the debtor's car. The debtor may not promise that any contracting work he needs will be done under the creditor's aegis. However, favors that would not be widely known may be performed, but only if the debtor had done so previously for the creditor. Thus, a debtor who previously taught Torah to his creditor may continue doing this.[50]

Even "verbal appreciation", expression of gratitude for the loan, is prohibited. The debtor may not even greet the creditor (*Shalom Aleichem*) unless he was accustomed to doing so before the loan. He may not even thank the creditor for lending him money.[51]

Rav Moshe Feinstein[52] as well as Rav Ovadia Yosef[53] agree that the author of a book may not thank those who loaned him funds for its publication. Rav Yosef permits public gratitude only if the creditor raises part of the debt. Rav Feinstein permits a blessing "May G-d Bless You" "יברכך מן השמים" but no direct thanks for the loan.

PART II

Exemptions from the *Ribis* Laws

The following sections consider some of the categories that *may* be exempt from the *Ribis* prohibition.

---

49. שם סעיף ט"ו

50. עיין שו"ע סימן ק"ס סעיף י וביש"ש ב"ק פ"ט סימן י"א ובשו"ע הגר"ז הלכות רבית סעיף י"ב

51. שו"ע סימן ק"ס סעיף י"א ובשו"ע הגר"ז סעיף ט

52. שו"ת אגרות משה יו"ד סימן פ

A. Deal consummated through a broker

The medieval commentator Mordechai,[54] quoting Rashi[55], permits *Ribis* if the loan was conducted through an intermediary (שליח). Although Ramo cites this opinion, most authorities disagree with Rashi's assertion, and *at the most*, consider the use of a broker when other mitigating factors exist (i.e. *Ribis* is being charged on behalf of a charitable institution). They opine that under no circumstances should a usurious deal be sanctioned merely by virtue of a broker's presence.[56]

B. A Partnership

Virtually all authorities agree that the *Ribis* provisions apply to a partnership as well as a single proprietor.[57]

The ט"ז[58] stipulates that any funds obtained on behalf of a partnership from a non-Jew (subject to interest payments) must be borrowed by all partners equally. (For example, if an IOU note is utilized, it must be signed by all.) He reasons that if only one partner were to negotiate directly with one Gentile, he would not be permitted to invest the borrowed funds in the business. In effect, the Gentile intended to lend money to only one Jew. For this Jew to now share the money with his partners, would be tantamount to a Jew's lending another Jew money while charging *Ribis*.

Corporations - Banks

With the emergence of a Jewish State and financial intermediaries operated by Jews, questions arose as to the permissibility of these institutions' imposing interest on loans and paying any interest to depositors: The larger implications of the question were if commercial banks in Eretz Israel (or Jewish-owned

---

53. שו"ת יביע אומר ח"ד
54. מרדכי פ"ה דב"מ סימן של"ח הובא בשו"ע ק"ס סעיף טז
55. בתשובות ורוב האחרונים (ובכללם העט"ז והט"ז והגר"א) חולקין ע"ז וגם הב"י דחה שיטה זו.
56. וכן היא מסקנת רוב האחרונים אבל הרב בד"מ וברמ"א והש"ך קיימו שיטת רש"י
57. ודלא כדעת הבאר עשק (הובא בשו"ת שבות יעקב ס"ס קס"ו ובחלקת יעקב ח"ג סימן קס"א) שהתיר רבית ע"י שותפות
58. ט"ז סימן ק"ע ס"ה יג ועיין בשו"ת מלמד להועיל יו"ד סימן נ"ט

banks in the Diaspora) may operate in a manner similar to their counterparts worldwide, or if a *Heter Iska* were necessary for every transaction.

Almost a century before the establishment of the State of Israel, Rav Shlomo Ganzfried[59] (author of the popular *Kitzur Shulchan Aruch)* and the author of שואל ומשיב, Rav Nathanson,[60] debated the merits of this issue, the former prohibiting not only *Ribis* levied by a Jewish bank but even depositing funds in any financial institution with Jewish stockholders, while the latter strongly disagreed (invoking such Talmudic principles as *"Rov"* and *"Breira"*), urging Rav Ganzfried to retract and in future editions of the *Kitzur* to delete his decision. However, both authorities seemingly agreed that a bank wholly owned by Jews would be subject to the *Ribis* laws.

However, some contemporaries of these scholars, most notably the Maharam Schick[61] and Rav Shlomo Greenfeld[62] (שו"ת מהרש"ג), considered a bank's unique status as a corporation; its owners are not personally liable for any debts incurred on their part. Thus any *Ribis* would not pass from creditor to debtor, but rather from a lifeless entity to real people. This unique state they perceived as a mitigating, but not totally exonerating, factor. They allow a corporation to collect אבק רבית (*Ribis* that is of rabbinic origin) or permits *Ribis* if the organization is also a charity or acting on behalf of an estate.

Proponents of the unique halachic status of a corporation cite an interesting argument of the Talmud.[63] The Gemara allows a farmer to advance a Kohen or Levi money and then collect the loan by withholding the tithe (תרומות ומעשרות) that they would ordinarily have been entitled to. According to Rav Greenfield's interpretation of the Gemara, the case involves granting an advance in exchange for a guaranteed price on commodities, a rabbinic prohibition of *Ribis*. Yet, it is permitted on the basis כיון דכי ליח

---

59. עיין בקש"ע סימן ס"ה סעיף ב"ח
60. עיין בשו"ת שו"מ (מהד"ק ח"ג סימן ל"א)
61. שו"ת מהר"ם שיק יו"ד סימן קנ"ח
62. שו"ת מהרש"ג יו"ד סימן ה
63. גיטין ל:

ליה לא יהיב ליה כי אית ליה נמי. Since if the farmer experienced such a calamitous harvest that no produce was harvested he needn't give that tithe; even if he can tithe, he is not subject to the *Ribis* laws. He argues that a corporation is analogous to the above situation; the *Ribis* prohibition only applies in case of a personal obligation to pay, שעבוד הגוף, not where the corporation's liability is limited to its business assets. Modern authorities, notably the *Minchas Yitzchak*,[64] dispute the מהרש"ג analysis of the law and stress that even according to him only an איסור דרבנן of *Ribis* may be suspended for a corporation.

Modern responsa dealing with the corporate status in the eyes of halacha (a topic with ramifications for other areas of Jewish life as well, especially Sabbath observance and חמץ שעבר עליו הפסח), frequently cite the insight of the renowned Talmudic exegetist Rav Yosef Rosen (Rogatchover Rav).[65] He notes that a *Tzibbur* (corporate entity) has historically been treated differently than a syndicate of individuals, no matter how numerous. For example, *S'micha*[66] (laying of hands on a sacrifice prior to slaughter) and *T'murah*[67] (transference of the sacrificial status of one entity to another) apply only to individuals and not to corporations. However, the *Minchas Yitzchak*[68] disputes this assertion and maintains that a bank may not collect or pay out interest without benefit of a *Heter Iska*. He reasons that if individuals retain their statutory rights in a corporate entity (e.g. one is permitted to sell or to bequeath a reserved place in a Shul), surely a *Tzibbur* never loses its own very personal identity. He notes that a Synagogue congregation conducts the search for Chometz[69] and that it may not pay interest.[70] Evidently corporations are considered as individuals in the eyes of halacha. Rav Pesach Tzvi Frank suggests that although state-owned bank may be exempt from *Ribis*[71] problems, a privately-owned bank is certainly not.

---

64. שו"ת מנחת יצחק ח"ג סימן א
65. שו"ת צפנת פענח סימן קפ"ד
66. עיין מנחות צב.
67. תמורה יג:
68. שו"ת מנחת יצחק ח"ג סימן א
69. ירושלמי פ"ה דפסחים ה"א
70. יו"ד ק"ע סעיף כ"ב
71. שו"ת הר צבי יו"ד סימן קכ"ו

Other authorities (notably the *Darchei Teshuva*[72] and Rav Yosef Henkin[73]) justify borrowing money from a Jewish bank despite any interest charges. They argue that *Ribis* can be construed as a fee to help defray the bank's administrative expenses incurring from the loan. Despite the lively theoretical controversy concerning the status of banks and corporations in practice, few if any authorities permit these institutions to charge *Ribis*, without obtaining a *Heter Iska*.

D. Charitable Institutions; Estates

In the interests of benefiting philanthrophic institutions and of protecting the rights of heirs not legally competent (generally children), our Rabbis permitted estates and *Zedaka* (צדקה) organizations to lend money and charge interest if the infraction is *mid'rabbanan* (of rabbinic origin). Under no circumstances may these institutions engage in deals involving *Ribis d'oraitha* (prohibited by the Torah) even if the deal is arranged with a broker's assistance.[74]

E. State of Israel Bonds

One of the most popular and efficacious means of financing the State of Israel's burgeoning needs is the sale of bonds. Is a *Heter Iska* required for every transaction? Rav Pinchas Teitz, writing in *Hapardes*[75] some 30 years ago, rationalizes the practice of selling Israeli bonds without a *Heter Iska* on the basis that *Ribis* implies a known creditor and debtor. Here, however, one cannot identify the individuals backing the bonds. Nor at the time of the transaction does the lender know the debtor's identity. Furthermore, it could be argued that all bonds are sold through a broker, invoking Rashi's opinion that רבית על ידי שליח is not prohibited. He also raises the corporate status of the Jewish State, the fact that the *Ribis* involved in each bond is less than a *Perutah* (the halachic equivalent of a penny) per citizen of Israel, and interestingly enough, the argument that Arabs are also issuers of

---

72. דרכי תשובה ק"ס ס"ק ט"ו
73. עדות לישראל דף קס"ט-קע"ב
74. יו"ד סימן ק"ס סעיף י"ח
75. פרדס תשי"א דף א-ד

Israeli bonds, thus involving a non-Jewish partner in the transaction. However, a respondent in the periodical *Hamaor* (Jubilee Volume) strongly disputes Rav Teitz's assertion and requires a *Heter Iska* for bonds.[76]

PART III

The היתר עיסקא — Its Development and Structure

Rabbinical leadership, cognizant of the need for a steady flow of funds and a healthy investment climate so that Jewish businesses might thrive, always sought to structure business deals so as to obviate any *Ribis* concerns.

A. Penalty for Late Payment

The Mordechai proposed structuring every loan as a straightforward transfer of funds, where the creditor can only demand that the principle be repaid. However, if the loan is not paid promptly, then a penalty (equivalent to the amount of the *Ribis*) may be levied. This scheme was not widely accepted because of the widespread opinion (shared by the *Shulchan Aruch*) that even a penalty is a biblical violation of *Ribis*[77].

B. *Heter Iska* — Half Loan, Half Investment

This approach called for establishing an investment company whereby the debtor serves as a trustee for half the funds while the other half is granted as a loan. The profits and losses are divided equally. However, it is mandatory to pay the debtor at least a token fee for his services as a trustee. If not, he is managing the creditor funds in return for a loan, a clear incidence of *Ribis*. Often, clauses are inserted in the contract (שטר עיסקא) concerning the debtor's management of the funds. The contract further stipulates that the debtor must swear in case of any dispute regarding the amount of profit earned and two witnesses must certify any losses. However, if the debtor forwards to the creditor a certain sum (equivalent to

---

76. המאור שנת תשכ"ז דף שנ"ד
77. יו"ד סימן קע"ז סעיף ט"ז

the amount of "interest"), the above requirements are waived.[78] (Some authorities permit specifying a sum to be paid monthly,[79] others only a fixed lump sum payment[80].) This format, with minor variations, serves as the basis for most contracts of *Heter Iska* in contemporary times. Rav Englander insists that if specific sums are mentioned in an *Iska* document, only those sums may be collected by the creditor. For example, the creditor depositing money in a Jewish bank (assuming a bank requires a *Heter Iska*) may not accept gifts offered by the bank unless they are specified in the *Heter Iska*.[81]

C. A Revolving Fund

The *Chochmas Adam* favors another format of *Heter Iska*. He advocates a contract structuring the transaction as a deposit - whereby the "debtor" would be no more than a trustee and after the desired "interest" would be earned, the funds would be converted into an outright loan. As in the previous instance, the trustee must receive compensation for his efforts. However, the Vilna Gaon and Rabbi Yaakov of Lisa opposed this procedure.[82]

D. Trusteeship or a Rental of Fund

Rav Breish, while defending the traditional *Heter Iska* structure for transactions between individuals, feels that it is not feasible for lending operations of Jewish banks. Firstly, it is impractical for every borrower to receive a fee for his trusteeship of the bank's funds. Furthermore, the interest is paid in monthly or quarterly installments, rather than in a lump sum, a controversial procedure.

C. *Heter Iska* for a Mortgage

Rav Moshe Feinstein suggests an עיסקא form specially designed for financing a mortgage. He advocates that the seller

---

78. עיין שם סעיף ב וסעיף ז
79. יו"ד קע"ז סעיף ט"ז ובנקודת הכסף שם
80. שם ט"ז ס"ה כ"א
81. כללא דרביתא בהקרמה
82. עיין יו"ד קע"ז סעיף א ובביאור הגר"א שם
83. שו"ת חלקת יעקב ח"ג סימן קפ"ח

retain partial sovereignty over the home and merely rent out that part. The "interest" then will be construed as rental payments, not as *Ribis*.[84]

D. Contemporary Concerns

As business conditions change, questions have arisen regarding the practicality of the traditional היתר עיסקא. The *Chelkas Yaakov*[85] defends this practice and answers effectively most concerns that have arisen.

1) *Isn't the* היתר עיסקא *a* הערמה *— a devious scheme to counteract the Ribis law?* Rav Breish responds that we find ample precedent for such a הערמה in the sale of *Chametz* and of a first-born animal (בכור) to a Gentile. On the contrary, even those who dispute some aspects of the sale of *chametz* (e.g. selling animal feed along with the animals)[86] will accept the היתר עיסקא.

2) *Often the debtor or creditor are not observant Jews and don't intend to comply with the terms of the* עיסקא. Despite the opinion of many authorities that both parties must observe the *Ribis* laws for an עיסקא to be effective, Rav Breish and the *Minchas Yitzchak*[86a] permit it if necessary even for non-observant Jews (Rabbi Breish[87] refers to the famous statement of Rambam[87a] that ultimately every Jew seeks to do right, it being only temporary passion that causes him to disregard halacha.)

3) *Few, if any, deals are true investment deals, but rather outright loans.* Often, the money is lent to people who are not even remotely familiar with financial matters (e.g. teachers, domestic help). Rav Breish proves that not all of these factors invalidate a היתר עיסקא.

4) *May a* היתר עיסקא *be written once and apply for all forthcoming transactions (an approach favored by many Polish rabbinic authorities)?* The *Minchas Yitzchok* opposes any such advance היתר עיסקא, requiring a separate contract for each deal.[88]

---

84. שו"ת אג"מ יו"ד ח"ג סימן ס"ב
85. חלקת יעקב ח"ג סימן קפ"ח-קצ"ב
86. דעת הבכור שור בחידושיו לפסחים
86a. מנחת יצחק ח"ד סימן ט"ז
87. רמב"ם פ"ד הלכות גירושין הלכה כ
88. מנחת יצחק ח"א סימן כ

Conclusion

Several salient themes should be gleaned from our discussion.

1) Virtually any type of financing scheme, if conducted between Jew and Jew, may involve *Ribis*. Careful consideration should be given to the *Ribis* ramification prior to structuring a transaction.

2) If at all possible, היתר עיסקא should be sought for any commercial transaction that may involve *Ribis*.

3) Where such an arrangement is not feasible, rabbinic counsel must be sought.

כספו לא נתן בנשך ... עושה אלה לא ימוט לעולם.

> He who never collects interest will never suffer financial reverses.[89]

---

89. תהלים ט״ו, ה

May Women Wear Pants?

Rabbi David Friedman

The author of the *Sefer Hachinuch* tells us repeatedly in his famous work that

> האדם נפעל לפי פעלותיו ולבו וכל מחשבותיו תמיד אחר מעשיו שהוא עוסק בהם אם טוב ואם רע

> Man is unavoidably affected by his actions; his heart and all of his thoughts always follow the activities he is involved with, be they good or evil.

This is an important basis for understanding the wide scope of halacha and its concern with seemingly mundane matters.

Fashion has always been a powerful force, this being especially true in our society. It is not surprising then, that clothing style is a matter of halachic concern, and that our choice of apparel must be tempered by the criteria of this concern. It is my hope to help clarify here one aspect of the Torah's criteria, namely the biblical prohibition against the donning of clothing styles associated with one sex by members of the other. In light of the constant, even radical changes in clothing styles we currently are witnessing, clarification of this matter is indeed a timely topic.

Instructor of Talmud and Jewish History at Hebrew Academy of the Five Towns and Rockaway

However, the determination of normative Jewish law - הלכה למעשה - is not a clearcut process. Many questions of halacha present a multi-faceted problem to the researcher. Before one can even hope to find a solution, he must first establish the halachic areas to be evaluated. The panorama of Jewish thought has to be explored with regard to fashion — does it meet the requirements of *tz'niut*, does it involve the *issur* of *chukat ha'akum*, etc.? A further issue, which is the topic of this paper, is whether certain styles may represent the *issur* of *"lo yilbash"*, the prohibition of a person's wearing the clothing of the opposite sex.

It is not my intent herein to arrive at a *psak halacha*, for this essay does not claim in any way to be a full exposition of the permissibility of a woman's wearing pants. Rather I wish to zero in on one, and only one, of many questions involved in the wearing of such clothing. Much has been written[1] both in Hebrew and in English, on other aspects of the total question. I choose to address only this one question — if all other problems were resolved, would it be permissible for a woman to wear pants?

The interdiction against the wearing of clothing by the opposite sex is stated in Deuteronomy 22:5:

> לא יהיה כלי גבר על אשה ולא ילבש גבר שמלת אשה, כי תועבת ה' אלקים כל עשה אלה

> The article of a man should not be on a woman, nor should a man don woman's clothing, for whoever does these, it is an abomination before G-d.

The wording of the verse poses some difficulty, since it seems

---

1. For a further discussion of *tz'niut* as it pertains to the wearing of slacks by women, see
יביע אומר, חלק י', סימן י"ד
מנחת יצחק חלק ב' ס"ק ח
ציץ אליעזר חלק א' ס"ב

repetitive. Why state that a man's "articles should not be on a woman" if the plain intent is conveyed by the phrase — A woman should not wear man's clothing?

Both the Talmud[2] and *Sifri*[3] quote a Tannaitic dispute in the Braitha as to the exact definition of the biblical prohibition:

„לא יהיה כלי גבר על אשה" מאי תלמוד לומר? אם שלא ילבש איש שמלת אשה, ואשה שמלת איש הרי כבר נאמר „תועבה היא", ואין כאן תועבה. אלא שלא ילבש איש שמלת אשה וישב בין הנשים, ואשה שמלת איש ותשיב בין האנשים. ר' אליעזר בן יעקב אמר, מנין שלא תצא אשה בכלי זיין למלחמה, ת"ל „לא יהיה כלי גבר על אשה" „ולא ילבש גבר שמלת אשה" - שלא יתקן איש בתקוני אשה.

A man's article should not be upon a woman. . ." What is this informing us? If (it simply tells us) that a man may not wear a woman's garment, nor a woman (wear) a man's garment, it is already stated (at the end of the verse) "For all that do so are an abomination, etc.", and there is no abomination here (per se). Rather, a man should not dress in a woman's garment and sit among women, nor a woman don a man's garment and sit among men.
Rabbi Eliezer Ben Ya'akov said, "From where (do we derive) that a woman may not go out to war with weapons? The Torah states 'A man's article should not be upon a woman. . . And a man should not don a woman's garment. . .' That a man should not adorn himself as woman do."

The exact nature of the dispute is not clear. Is Rabbi Eliezer Ben Ya'akov simply extending the scope of the prohibition beyond that understood by the *Tanna Kamma*, (first opinion stated), or is he actually in full disagreement with the *Tanna Kamma's* perception of the *issur*? What is meant by Rabbi Eliezer Ben

---

2. נזיר נט
3. דברים כב:ה

Yaa'kov when he speaks of prohibited תקוני אשה, women's adornments?

Although these may seem to be purely technical issues, in reality the resolution of these questions hinges on the various approaches adopted by rabbinic authorities; and there are major practical halachic ramifications deriving therefrom. As we shall see, it is of major importance to understand whether the Torah forbids only the actual wearing of clothing appropriate to the opposite sex, or whether the *issur* includes, as is implied, the mixing of the sexes or acting in a manner which is associated with the other sex.

Rabbi Eliezer's Approach

The *Smag*,[4] after quoting the Braitha and deciding the halacha in favor of Rabbi Eliezer Ben Ya'akov, concludes, ". . . and I say that Rabbi Eliezer Ben Ya'akov agrees in this matter with the *Tanna Kamma*, because אין מקרא יוצא מידי פשוטו the biblical text never loses its simple meaning."

The *Bach*[5] explains the *Smag's* comments as follows: The *Tanna Kamma* equates man's articles (כלי גבר) and women's clothing (שמלת אשה) with any article of clothing worn by a man (or woman) and understands the verse as prohibiting the donning of such clothing with promiscuous intent. Rabbi Eliezer defines both כלי גבר and שמלת אשה (תקוני אשה) as that which is worn, or done, by the sexes specifically for beauty and adornment, to the exclusion of items worn for utilitarian purposes. The *Smag* informs us that Rabbi Eliezer agrees that even utility items, when worn in order to promote promiscuity, are also forbidden.

The *Bach* concludes that in light of our acceptance of Rabbi Eliezer Ben Ya'akov's ruling, the wearing of items of clothing not specifically intended for נוי וקישוט - beauty and adornment — would be permitted, when no ill intent accompanies it.

Another element which may be relevant is the intent of the person involved, and based on this, the *Bach* also formulates a second *heter* (leniency). Items for beauty and adornment are

---

4. סמ"ג, לאו ס'

5. יורה דעה קפ"ב

themselves only forbidden when the intention of the wearer is to pass as a member of the opposite sex: איש להתדמות לאשה, אשה להתדמות לאיש. However, the wearing of such items to protect from rain and cold is permitted. The *Taz*[6] concurs and cites proof for this opinion.

He notes that the *Shulchan Aruch* forbids a man to look at himself in the mirror since this is תקוני אשה, a female cosmetic practice. However, the *Shulchan Aruch* does permit it when the man is looking in the mirror for some other motive — such as health, shaving, or hair cutting.[7]

The Rambam[8] also rules in favor of Rabbi Eliezer Ben Ya'akov, defining tweezing hair (מלקט שערות) or dyeing gray hair, צובע שערות, spoken of in *Makkot* 20 and *Shabbat 94b*, as being תקוני אשה, a woman's practice. Clearly, the Rambam understands Rabbi Eliezer Ben Ya'akov's opinion as an extension of the first opinion cited in our Braitha, in that he also forbids donning בגדי צבעונין, colored clothing and כלי זהב, gold jewelry, by a man. No mention is made of the intention of the wearer, and the prohibition exists under all conditions.

Using this information, we can explain the dispute in the Braitha, according to the Rambam's understanding, as follows: The *Tanna Kamma* (first opinion) limits the prohibition to the wearing of clothing and only to situations of promiscuous intent. Rabbi Eliezer extends the prohibition to any cosmetic function customarily done by women. But the intention of the transgressor is not a factor. The Rambam's ruling in favor of this latter opinion is particularly cogent in light of his explanation of the reason for the interdiction, in both *Sefer Hamizvot*[9] and the *Moreh*[10] as related to idolatrous and magical practices, not simply to sexual immorality as one classically tends to think. Therefore, promiscuous intent is not, to the Rambam's thinking, a factor in transgression of the prohibition - the *mere act* is sufficient.

---

6. יורה דעה קפ״ב:ד
7. שולחן ערוך, יורה דעה: קנו ס״ק ב
8. משנה תורה, הלכות עבודה זרה יב:י
9. לאו מ׳
10. מורה נבוכים ג:ל״ז

Similarly the *Sefer Hachinuch*[11] does not consider intent as a factor in the transgression.

This approach is further borne out by a responsum of the Rambam, quoted by the *Ma'aseh Rokeach,* in which the Rambam strongly deplored, and eventually abolished, the prevalent wedding practice of the bride's donning a helmet and sword, and dancing before the guests. Clearly, no intention other than entertainment exists here, and yet the Responsum states:

ולא יעלה בדעת שמפני היותה כלה הותר לה איסור תורה וכו'

"One could not think that her being a bride would permit her to transgress a Torah prohibition."

If our analysis of the Rambam is correct, then the verbatim quotation of his words by the *Shulchan Aruch*[12] would preclude the leniencies of the *Bach,* cited above. The Ramo [13], however, defends the custom of men's dressing in women's clothing on Purim, on the grounds that no intention other than levity and entertainment exists.

Various commentators to the *Shulchan Aruch*[14] quote numerous *Rishonim* and *Acharonim*[15] who object to the lenient rulings of the Ramo and the proofs of the *Bach.*

Changing Styles

We have shown that, at least according to some decisors, intent is an operative factor in deciding if a garment or practice is forbidden due to the *issur* of *lo yilbash.* Others, as mentioned, deny that intent plays any role in arriving at such a determination.

A further factor to be evaluated is change in the prevailing style: If many years ago, a garment was worn by women only, but now it is worn by everyone, or by men only, will this affect the

---

11. מצוות תקמ"ב - ג
12. יורה דעה קפב:ד
13. אורח חיים: תרצ"ו ס"ק ח
14. See משנה ברורה תרצו ס"ק ל, and ש"ך קפב:ד
15. של"ה; כנסת הגדולה; יראים

halacha? Or ought we to say that once forbidden, it is always forbidden? Is there flexibility in applying the standard?

Indeed, it would seem that this halacha does vary with time and place. For example, although at one time it was forbidden as תקוני אשה, a woman's practice[16], the Rambam, *Tur*, and *Shulchan Aruch*[17] permit a man to remove hair from his private parts, if this is the accepted practice among men of the region. An act which has become accepted as the social norm (מנהג המקום) may subsequently be permitted. According to one opinion quoted in the *Perisha*, the custom of the non-Jew in the locality is used to define "social norm".

However, two factors must be considered before this particular leniency can be employed as a general rule in appraising clothing style.

A. The interdiction of a man's removing his body hair is of rabbinic and not biblical origin, at least according to these authorities and that may account for the lenient ruling.

B. The *Perisha* himself offers a second opinion that gentile practice does not set the standard for Jewish dress (this being particularly true if the *lo yilbash* prohibition is related, as stated by the Rambam, to idolatrous practice.)

In addition to the aforementioned points, the entire *heter* has itself been called into question by the Rashba[18] who, after quoting this lenient opinion in the name of the "early Geonim", strongly objects with the argument:

ומי שהרגיל בדבר האסור ונמשכו רבים בכך, אין האיסור חוזר להיתר

". . . And one who accustoms himself in a forbidden matter, with others following after him, does not change the forbidden into the permitted."

---

16. נזיר מח:, מט.
17. יורה דעה קפב סק"א;
18. שו"ת הרשב"א חלק ד' סימן צ

In more recent times the opinion of the Rashba has been used by Rabbi Yitzhak Ya'akov Weiss שליט"א, who argues

> עוד באמת המה בכלל כלי גבר ממש דעדיין שם מכנסיים עליהם, והגם שהם משונים קצת מ"מ שמם עליהם.
>
> ". . . They (women's slacks) are still in the category of men's clothing, because they are still called 'pants', and although they differ somewhat (from the male variety) they are still considered pants."[19]

Similarly the שו"ת אבני צדק[20], although permitting the wearing of slacks by women in order to protect against the cold, simultaneously forbids the wearing of man-tailored hats (קאפעליש) or jackets (מענער־ראק) because the style is intended to mimic a man's manner of dress.

It should be noted that Rabbi Ovadiah Yosef שליט"א, proposes that the Rashba's objection may only be applicable to removal of body hair, which he argues is by its very nature a feminine habit. Clothing styles, though, are liable to change due to popular practice.[21].

Rabbi Eliezer Wohldenberg שליט"א[22] emphasizes that the leniency of the *Bach* and שו"ת אבני צדק can only be applied in such instances where the general appearance of the woman's apparel is clearly feminine, such as wearing the slacks under a dress or skirt.[23] Furthermore, he notes that no halachic authority, in offering a *heter*, has ever seriously considered the style of women's slacks now in vogue, where the motivation for the style is not purely functional.

---

19. מנחת יצחק חלק ב' ס' ק"ח
20. חלק יו"ד ס' ע"ב
21. שו"ת יביע אומר חלק י', סימן י"ד אות ו'
22. שו"ת ציץ אליעזר חלק י"א ס' ס"ב
23. See הגהות רמ"א יו"ד קפ"ב סעיף ה' וש"ך שם, בשם יראים

A lenient opinion is developed by Rabbi Ovadiah Yosef,[24] who argues that any clothing style no longer unique to either sex cannot be included in the *lo yilbash* prohibition.[25] Female slacks, differing in style and color from the male variety, would certainly be included in this category. The basis for this ruling is the Talmud's statement[26] that R. Yehudah's daughter made a cloak which she used to wear to the market place and that R. Yehudah used to wear for prayer; the Maharsha notes that only items *uniquely* for male or female use would be prohibited to the opposite sex by virtue of the *issur "lo yilbash"*.

Support for Rabbi Yosef's limitation of the issue can be found in the writings of the *Rishonim:*

Rashi[27] notes that the inhabitants of Mehoza wore garments closely resembling a woman's. Also, the language of the *Tur* bears out this approach, as he states; לא תלבש אשה בגדים המיוחדים לאיש וכו' "A woman should not wear apparel *unique* to a man."

In summation, we can conclude that our rabbinic authorities do not agree on the question of how or if changing styles affect the halacha about wearing garments of the other sex, nor is there common acceptance of intent as a criterion in determining the law.

Beyond that, it should be clear, as we stated earlier, that the *issur* of *lo yilbash* is only one aspect of the problem.

Although we have not raised the issue here, it is quite apparent that women should not wear pants due to the prohibition of *tz'niut*, immodest dress. It is, nevertheless, relevant to explore the question of pants with respect to the *issur* of *lo yilbash* for there may be situations where the wearing of pants would *not* be immodest — say, wearing pants under a skirt while skiing or mountain climbing. Would it still be forbidden then to wear pants due to *lo yilbash*? This is the problem we have sought to elucidate.

---

24. Ibid, שו"ת יביע אומר
25. It should be noted that Rav Ovadia Yosef does *not* permit the wearing of slacks by virtue of questions of modesty and gentile practices. The question posed to him was a "lesser of two evils" situation in a school setting where girls would otherwise attend in far less appropriate skirts and dresses.
26. נדרים מט:
27. שבת יב. ד"ה

Torah Education of the Mentally Retarded

Rabbi J. David Bleich

One of the happier developments in contemporary society is an enhanced awareness of, and concern for, the needs of the disabled and disadvantaged. Of late, this phenomenon has been paralleled in the Jewish community by intensive efforts to provide for the religious and educational needs of the handicapped, particularly of children suffering from serious learning disabilities and mental retardation. Such endeavors are certainly to be applauded. Quite apart from religious imperatives which may be involved, maximalization of educational opportunities within a Torah-oriented framework serves to promote the social integration of such children with their peers within the observant Jewish community. This, in turn, can only lead to greater happiness and emotional stability. Apart from these significant considerations, which in themselves generate halachic imperatives, the nature and extent of the formal obligation vis-a-vis the Torah education of such children merits examination.

The Gemara, *Sukkah* 42a, declares: "A minor who knows how to shake (the *lulav*) is obligated with regard to the *lulav*; (a minor who knows) how to cloak himself is obligated with regard to

---

Rosh Yeshiva, Rabbi Isaac Elchanan Theological Seminary; Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University

tzitzit; (a minor who knows) how to watch over *tefillin*, his father must purchase *tefillin* for him; (a minor) who knows how to speak, his father must teach him Torah and the reading of the *shema*."

The focal principle giving rise to these provisions, as Rashi carefully points out, is the rabbinic obligation of *chinuch* or training. Although performance of *mitzvot* becomes obligatory only upon achieving the age of halachic majority, viz., thirteen years and one day, rabbinic edict requires that a child be trained in the performance of *mitzvot* at an earlier age. The Gemara, in this statement, seeks to indicate the age at which the rabbinic obligation comes into effect. It is clearly established that there is no single, uniform age at which the father is required to introduce the child to the performance of all *mitzvot*; nor is there a specified chronological age at which training in any particular *mitzvah* becomes obligatory for all children. The age of obligation varies in accordance with the individual child's development and maturation and with regard to the nature of the *mitzvah*. With regard to any specific *mitzvah* the child must be initiated into its performance upon reaching the developmental stage at which he may perform the *mitzvah* in the prescribed manner.

As noted, Rashi and other commentators indicate that the obligation of *chinuch* is rabbinic in character. It may therefore be assumed that with regard to each of the specific examples presented in *Sukkah* 42a the obligation is rabbinic rather than biblical. Accordingly, it may be inferred that a father is under rabbinic obligation to teach Torah to a child who "knows how to speak," but has no biblical obligation to do so. This conclusion is expressly affirmed by Tosafot, *Sukkah* 28b. Citing this statement of the Gemara, Tosafot remarks that the obligation of *chinuch* with regard to Torah study commences when the child "knows how to talk."

This inference, however, seems to be contradicted by a statement recorded in *Kiddushin* 29a. The Gemara posits a number of responsibilities which a father must fulfill on behalf of his son: "A father is obligated vis-a-vis his son: to circumcise him, to redeem him, to teach him Torah, to arrange for his marriage and to teach him a trade. Some say that he is also [obligated] to teach him

to swim in water." The Gemara seeks a scriptural source for each of the enumerated obligations. In establishing an obligation to teach a son Torah the Gemara adduces the verse "And you shall teach them to your sons...." (Deuteronomy 11:19).

The obligation to teach a son Torah, as posited by the Gemara in *Kiddushin*, is clearly biblical in nature. Moreover, there are strong grounds for assuming that the father's obligation in this matter is not in the nature of *chinuch* or training, i.e., the obligation is not instrumental in nature as a means of preparing the child for adulthood, but is intrinsic to the *mitzvah* of Torah study itself.

R. Baruch Ber Leibowitz, the Rosh Yeshiva of Kaminetz, in his *Birkat Shmu'el, Kiddushin,* no. 27, cites an analytic query posed by his renowned disciple and son-in-law, R. Reuven Grozowsky, concerning the nature of a father's obligation with regard to teaching his son Torah. Circumcision and redemption of the first-born are, in their essence, obligations incumbent upon the child. Nevertheless, the father is charged with performance of these commandments because the child cannot perform the requisite acts independently. Accordingly, the father is charged with an obligation to act on behalf of his son. R. Reuven Grozowsky queries: Is the father's obligation to instruct his son in Torah to be regarded in the same manner as his obligation regarding circumcision and redemption or is it to be regarded in a different light? It might be argued that the obligation is similar to the father's obligation to circumcise and to redeem his son, i.e., the son is obligated to become proficient in Torah, but since it is impossible for a child to do so on his own initiative, the father is charged with providing instruction so that the son may fulfill this obligation. Alternatively, the obligation to teach one's son Torah may not be engendered by the son's obligation to acquire proficiency in Torah, but may constitute a personal obligation incumbent upon the father which is quite independent of the child's obligation to study Torah.

Birkat Shmu'el demonstrates that the obligation is in the nature of the father's personal responsibility. In doing so, R. Baruch Ber bases himself upon a ruling recorded in *Shulchan*

Aruch, Yoreh De'ah 245:6 and the explanatory comment of R. Elijah of Vilna, *Bi'ur ha-Gra, Yoreh De'ah* 245:15. *Shulchan Aruch* rules that a father who is not competent personally to act as instructor for his son, or a father who does not have the leisure necessary to teach his son, is required to engage a tutor in his stead. *Bi'ur ha-Gra* remarks that the obligation to hire a tutor to teach one's son is identical with the obligation to hire a tutor for oneself if one is incapable of studying Torah without a teacher. The implication is that the two obligations are two sides of the same coin. The obligation to engage in Torah study and the obligation to teach Torah to one's son are two facets of a single *mitzvah*, both of which constitute a personal obligation.

To this writer, the identical concept appears to be reflected in a problem posed by the Gemara, *Kiddushin* 25b, and its accompanying resolution. Recognizing that education of a child may conflict with the father's own Torah study, the Gemara questions whether the father may give priority to his son's study over his own. Specifically, in the event that the father does not have sufficient funds to engage a tutor both for himself and for his son, should priority be given to the father or to the son? Despite a general obligation to teach Torah to "the son of one's fellow" as well as to one's own children, no such query is posed regarding a situation in which teaching another person's child would interfere with one's own study. The implication is that the question arises only with regard to one's own son because the commandment "And you shall teach them to your sons" is intrinsic to an individual's personal obligation with regard to Torah study. The notion that the obligation is incumbent upon the child himself but is discharged on his behalf by the father is dispelled by the Gemara's resolution of this question. The Gemara declares that the son's studies have priority over those of the father only if the son is a more proficient student.

Were the father's personal obligation to study Torah and his responsibility to provide instruction for his son to be viewed as separate and distinct obligations, the question of priority between conflicting obligations would be germane; however, analyzed in this vein, the cogency of the Gemara's resolution is not at all clear.

Every person, whether bright or dull, is obliged to study Torah. Similarly, a father must teach his son, regardless of the latter's intellectual capabilities. Consideration of varying acumen does not appear to be relevant to the ordering of priority between diverse obligations. If, however, it is understood that the obligation to teach one's son is intrinsic to fulfillment of one's personal obligation of *talmud Torah*, the Gemara's resolution of this problem is entirely cogent. A *mitzvah* is always to be performed in the most enhanced manner possible. Torah is certainly to be studied in a manner which leads to the highest degree of proficiency. If it is assumed that, from the vantage point of the father's *mitzvah*, the son's study and that of the father constitute fulfillment of one and the same obligation, it is readily understandable that priority is assigned to whichever of the two is the more proficient student. Should the son be the more proficient of the two, the father's *mitzvah* is fulfilled in a more enhanced manner than through the latter's own study.[1]

As earlier noted, if, as postulated by the Gemara, *Kiddushin* 29a, a father's obligation to teach Torah to his son is biblical in nature and encompassed in the biblical *mitzvah* of *talmud Torah*, its inclusion by the Gemara, *Sukkah* 42a, in a catalogue of rabbinically imposed obligations of *chinuch* is incongruous. In context, *Sukkah* 42a seems to imply that the obligation described is rabbinic in nature, rather than biblical.

A related question is raised by *Bi'ur ha-Gra, Yoreh De'ah*, 245:19. Ramo, *Yoreh De'ah* 245:8, rules that immediately upon attaining the age of three a child is to be taught the "letters of the Torah so that he accustom himself to read the Torah." *Bi'ur ha-Gra* comments, "I do not comprehend [Ramo's] words since immediately when he begins to speak [the father] is obligated." *Bi'ur ha-Gra* is obviously referring to *Sukkah* 42a which posits an obligation to teach a child Torah as soon as he begins to speak.

---

1. See *Shulchan Aruch ha-Rav, Hilchot Talmud Talmud Torah* 1:7, who explains this halacha by stating, "*she-be-limud beno gam hu mekayem mitzvah shel Torah kemo be-limud atzmo*" for in the study of his son he also fulfills the *mitzvah* of Torah [study] just as [he fulfills the *mitzvah*] in his own study."

That level of maturity is generally reached sometime before the age of three. Hence, argues *Bi'ur ha-Gra*, it should logically follow that the father is obliged to begin to teach his son the alphabet and to read even prior to the age of three.

In order to resolve the apparent contradiction between *Sukkah* 42a and *Kiddushin* 29a and in order to explain Ramo's ruling, it may be postulated that there exist two separate and distinct *mitzvot* with regard to teaching Torah to one's children. "And you shall teach them to your children" quite obviously constitutes a biblical command. Rambam, *Hilchot Talmud Torah* 1:7, and *Shulchan Aruch, Yoreh De'ah* 245:6, declare that a father must teach his son the entire Written Law, including the Prophets and the Hagiographa; according to Rashi, *Kiddushin* 30a, the father's responsibility is limited to instruction in the *Chumash*. However, once the child has become proficient in the designated subject matter, the father is relieved of all further obligation. The commandment "And you shall meditate thereon day and night" (Joshua 1:8) does indeed establish an ongoing obligation to study Torah even if the subject matter has been totally mastered, and, as recorded by Rambam, *Hilchot Talmud Torah* 1:10, the verse "and lest they [the precepts] depart from your heart all the days of your life" (Deuteronomy 4:9) establishes an obligation to review the material one has already mastered since "whenever one ceases to engage in study, one forgets." Nevertheless, the subject matter in which a father must cause his son to become proficient is clearly circumscribed.

In fulfilling the biblical obligation both to study Torah oneself and to teach Torah to one's son, a father might well choose to devote all available time to his own study for a period of time rather than to divide the available time between engaging in his own study and instructing his son. The father might do so on the plea that it is possible for him to impart a requisite knowledge to his son at a somewhat later time since the material he is obliged to teach is, relatively speaking, somewhat limited. Indeed, he might claim with some justification that such a procedure would reflect a more efficient allocation of time since the more mature the child, the less time need be expended in assisting him in mastering a

given curriculum. There is little question, for example, that a child of six can learn to read in a fraction of the time it would require for a child of three to attain the same degree of proficiency. Since, in contradiction to one's personal obligation of *talmud Torah*, a father's obligation vis-a-vis his son is to impart knowledge rather than to devote time to the teaching process, the father might devote himself exclusively to his own study for a significant period of time and delay his son's instruction anticipating that he would be capable of causing his son to become proficient in the Written Law in a relatively short period of time. Insofar as the father's biblical obligation is concerned there would be no barrier to fulfilling the *mitzvah* of *talmud Torah* in this manner.

However, the Sages were well aware that education must consist of more than mere book-learning. In order to mold character and personality, values and attitudes must be imparted at a very early age. Even from a purely scholastic standpoint, the likelihood of attaining the desired proficiency is vastly enhanced if study habits are developed an an early age.

It may be argued that the Sages accordingly established a second, more encompassing obligation. By virtue of rabbinic decree they obligated the father to begin the process of instruction at as early an age as conceivable, viz., immediately upon the child's acquiring the ability to speak. As defined by Rambam, *Hilchot Talmud Torah* 1:6, this obligation is quite specific in terms of the extent of instruction which must be provided and the time-frame in which it must be provided. When the child begins to talk the father must teach him the verse, "*Torah tzivah lanu...*," then, "*Shema Yisra'el,*" and thereafter he is obligated to teach the child additional verses on a regular basis in accordance with the child's ability to absorb instruction. Finally, when the child reaches the age of six the father must provide the services of a full-time teacher who will provide an intensive regimen of study.

The rabbinic obligation is rooted in the principle of *chinuch* i.e., training and habituation, in a quite literal sense. To be sure, in actually teaching a biblical verse to his son, the father fulfills the biblical commandment, yet the mandatory nature of the duty to seek the fulfillment of the biblical *mitzvah* at a particular stage of

the child's development is rabbinic. The fact that a certain act, when performed, constitutes *"kiyum,"* or fulfillment, of a biblical commandment does not necessarily entail that there exist a mandatory obligation to seek an opportunity for such fulfillment. In this case, the rabbinic ordinance specifies that the biblical obligation may not be delayed and prescribes that a child be taught Torah in a regular and ongoing manner.

Ramo's statement with regard to the age at which a child must be taught to read can now be placed in proper perspective. Ramo declares that a child must be taught the letters of the Hebrew alphabet at the age of three, implying that prior to the age of three, there exists no such obligation. To be sure, as *Bi'ur ha-Gra* points out, a father must begin to teach his son Torah as soon as the child is able to speak. However, the obligation to provide instruction at so early an age is rabbinic, rather than biblical, in nature. The rabbinic obligation, as defined by Rambam, requires instruction in a limited but increasing number of biblical verses until the child reaches the age of six.

Ramo declares that even a child of three should be taught the letters of the alphabet "so that he accustom himself to read the Torah," i.e., as part of the rabbinic obligation of *chinuch*. The age at which the child reaches a degree of development and maturity which renders study of the alphabet a meaningful springboard in his educational development is set by Ramo as three. There is thus no contradiction between establishment of the age at which the alphabet must be taught as the age of three and the requirement that biblical verses be taught orally at a much earlier age. The rabbinic obligation of *chinuch* requires the Torah be taught in a manner commensurate with the child's ability to learn. A child is capable of rote repetition of biblical verses at an early age but cannot readily master the reading of the alphabet until the age of three. The essence of the rabbinic obligation is to teach the child Torah in progressively more demanding stages in accordance with his developing abilities.

The distinction drawn between the biblical obligation to teach a son Torah as a goal in and of itself and the rabbinic obligation of *chinuch* as it pertains to the teaching of Torah yields yet other

possible disparities. *Chinuch* is rooted in the need to train a child in the performance of *mitzvot* so that he will continue to fulfill them upon reaching the age of halachic maturity. Accordingly, there is cogent reason to question whether the rabbinic obligation of *chinuch* extends to a child who is a "*treifah.*" A *treifah,* roughly defined, is a person suffering from an abnormality or trauma such that his normal life expectancy is less than twelve months. Hence, for example, a ten-year old who has experienced an accident which has damaged a vital organ and who is not expected to survive for a full year may be considered to be a *treifah.* Since it is not anticipated that he will survive until the age of *bar mitzvah,* he will never be subject to a biblical obligation with regard to *mitzvot.* Is the father of such a child under formal rabbinic obligation to train him in *mitzvot* which he unfortunately will never be able to fulfill as an adult?

An analogous but more limited question arises in regard to *aliyah le-regel,* the thrice-yearly pilgrimage to Jerusalem which was mandatory during the days of the Temple. A cripple is specifically exempted from this biblical commandment. Hence, the father of a crippled minor is exempt from the rabbinic obligation of *chinuch* with regard to this *mitzvah.* What is the father's obligation in the case of a minor child facing imminent amputation of a foot subsequent to the festival? Is the father obligated to "train" the child to make the pilgrimage to Jerusalem since he is not yet disabled, or is he exempt from doing so since "training" in the performance of this *mitzvah* is, under the circumstances, bereft of meaning?

A negative answer to these questions would be entirely logical. Although, to this writer's knowledge, neither question has been addressed directly in earlier sources, some support for the conclusion that no obligation of *chinuch* exists in such circumstances can be found in the comments of Rashba, *Megillah* 19b. The Mishnah declares that a minor cannot read the *Megillah* on behalf of an adult. Tosafot and other early authorities point out that "a minor who has reached the age of *chinuch*" is obligated to hear the reading of the *Megillah* by virtue of rabbinic decree. Noting that the *mitzvah* of reading the *Megillah* on Purim is

rabbinic, these commentators proceed to query why it is that a minor cannot read the *Megillah* on behalf of an adult since both adult and child share an identical rabbinic obligation. To this question Rashba responds by declaring that the *mitzvah* of *chinuch* is intrinsically different from other rabbinic obligations, viz., the *mitzvah* of *chinuch* is designed *"le-hargil kodem zemano kedei she-yehe ragil be-mitzvot ke-she-yagi'a zemano"* to accustom him before the time [of obligation] so that he be habituated in [the performance of] *mitzvot* when the time [of obligation] arrives." Since the intrinsic nature of their respective obligations is entirely dissimilar, a minor cannot act on behalf of an adult. In essence, Rashba declares that, unlike other rabbinic commandments, the *mitzvah* of *chinuch* is not an end in itself but is entirely instrumental in nature. According to Rashba's distinction between the qualitative nature of the *mitzvah* of *chinuch* and other rabbinic commandments it would be entirely logical to assume that, absent the possibility of eventual biblical obligation with regard to a specific *mitzvah*, there exists no instrumental rabbinic obligation with regard to training and habituation.

The question of a father's obligation with regard to the rabbinic obligation of *chinuch* vis-a-vis a child who is mentally incompetent as defined by Jewish law, is discussed by two latter-day authorities. *Minchat Chinuch*, no.5, sec.2, albeit without quoting the previously cited comments of Rashba, nevertheless employs much the same line of reasoning in stating that no obligation of *chinuch* devolves upon the father of a *shoteh*, i.e., a mentally incompetent person, or a deaf-mute "for they will not enter the category of *mitzvot.*" *Pri Megadim, Orach Chayyim, petichah kollelet*, part II, sec. 9, rules in a like manner, but for a different reason, viz., "for [a *shoteh* or deaf-mute] will not obey him as they are not at all possessed of reason."[2]

2. Elsewhere, in *Eshel Avraham* 343:2, *Pri Megadim* voices a tentative feeling that there may be an obligation of *chinuch* with regard to a deaf-mute. Similarly, *Aruch la-Ner, Yevamot* 113a, opines that such an obligation does exist with regard to a deaf-mute. See *Encyclopedia Talmudit*, XVI, 169, note 104. If Rashba's comment is accepted as a source for this determination, it would follow that no distinction should be made between a *shoteh* and a deaf-mute. However, for a halachic definition of *cheresh* or deaf-mute and an analysis of the status of a deaf-mute in Jewish law see *Tradition*, Fall, 1977, pp. 79-84.

According to the definitive ruling of these authorities, a father has no obligation of *chinuch* with regard to a *shoteh* and hence it follows that he need not "train" a *shoteh* in the study of Torah. However, in light of the earlier presented analysis of paternal obligation with regard to Torah study, it appears to this writer that it cannot be concluded that a father of a mentally incompetent child is entirely exempt from teaching his son Torah.

As has been shown, a father is obliged to teach his son Torah by virtue of a two-fold obligation: one rabbinic, the second, biblical. The rabbinic obligation encompassed withing the general obligation of *chinuch* does not include a *shoteh*. However, with regard to the biblical obligation to teach Torah there does not appear to be any ground for distinguishing between a *shoteh* and a child of normal mental capacity. The commandment "And you shall teach them to your sons," as demonstrated earlier, is not at all predicated upon the capacity of the child to perform the *mitzvah* upon reaching the age of halachic capacity. A father is obligated to instruct his son in the biblical passages concerning *Shabbat* and *tefillin*, not in order that he become a Sabbath observer and don *tefillin*, but by virtue of the intrinsic *mitzvah* of *talmud Torah*. The father is biblically obligated to teach Torah to his son just as he is obligated to study Torah himself. The paternal duty of *talmud Torah* is not predicated upon the mental competence of the child and is limited in extent solely by the child's ability to absorb instruction.

The halachic definition of a *shoṭeh* is beyond the scope of this endeavor.[3] Suffice it to say that the halachic definition of a *shoteh* is technical in nature and that many individuals who are encompassed within the category of *shoteh* are certainly capable of at least elementary Torah study. By the same token, many children classified as mentally retarded are not encompassed within the halachic category of *shoteh*. Such children are fully obligated with regard to *chinuch* as well as to fulfillment of *mitzvot* upon reaching the age of halachic maturity. Nevertheless, as pointed out by R. Moses Feinstein, *Am ha-Torah*, Vol. II, no. 2 (5742), the

3. For an analysis of the definition of *shoteh* in Jewish law see J. David Bleich, "Mental Incompetence and its Implications in Jewish Law," *Journal of Halacha and Contemporary Society*, Vol. I, no. 2 (Fall, 1981), pp. 123-143.

parents of such children are not obligated to train them in the various *mitzvot* at the same age as they would be obligated to train normal children since the age of *chinuch* is predicated upon the development and maturity of the child.

The obligation of teaching Torah to a child is primarily a personal obligation which devolves upon the father. However, as recorded in *Shulchan Aruch, Yoreh De'ah* 145:4, in the event that the father is himself not capable of teaching his son, either due to his own ignorance or becuase of lack of leisure, he is obligated to engage the services of a tutor.

Communal obligation with regard to the Torah education of the mentally retarded requires further elucidation. The Gemara, *Baba Bathra* 21a, relates that in early days "One who had a father, [the father] taught him Torah; one who did not have a father did not study Torah." This situation was rectified by means of a series of ordinances establishing a network of schools culminating in the ordinance of R. Joshua ben Gamala who ordained that classes be established in every district and city and that children be enrolled in these schools at the age of six or seven. The Gemara praises R. Joshua ben Gamala in the most laudatory terms for promulgating this ordinance "for if not for him Torah would have been forgotten by Israel."

An early authority, Ramah, in his commentary on *Baba Bathra* 21a, observes that pursuant to promulgation of the edict of R. Joshua ben Gamala the financial burden of educating the youth became a communal rather than a personal responsibility. Ramah believes this conclusion to be self-evident. How, queries this authority, could R. Joshua ben Gamala have decreed that the community provide teachers unless as part of the selfsame ordinance the community was made responsible for paying their hire?

The matter of communal responsibility for educational expenses is also discussed by Ramo, *Choshen Mishpat* 163:3. Quoting Rabbenu Yerucham, Ramo rules that the community is obligated to defray educational expenses only when the parents are not able to afford the expenses themselves. Under such circumstances, the resultant deficit is to be financed by levying an

assessment of tax upon each member of the community in accordance with his net worth.

Tosafot, *Baba Bathra* 21a, maintains that the community is required to implement the decree of R. Joshua ben Gamala and to engage a teacher only if there are a minimum of twenty-five students requiring instruction. Since the *mitzvah* of teaching Torah to children extends to the mentally retarded as well, it would follow that where there are a minimum of twenty-five such children in a community the community is required to establish a class for their instruction. If the financial expenditure is too onerous for parents to assume themselves, as is likely to be the case in light of the special educational requirements of such children, the financial burden must be borne by the entire community.

However, pedagogically, retarded children cannot be taught properly in classes of twenty-five students. R. Moses Feinstein, in the above cited responsum, opines that while there may be no halachic grounds for establishing a compulsory tax in order to engage additonal teachers to cater to the needs of such students, nevertheless, charity funds should be utilized for such purposes. The obligations of charity mandate support of Torah study and such children are indeed worthy beneficiaries of charitable support.

It should be noted that the community has the right and the duty to compel its members to contribute funds for charitable purposes. Although, as Rabbi Feinstein points out, the expenses involved in the education of such children may be in excess of the obligation incumbent upon the community by virtue of the edict of R. Joshua ben Gamala, the community may nevertheless be duty-bound to provide such services by virtue of the general obligation of charity. As noted earlier, apart from purely educational considerations, such children require educational opportunities within a Torah-oriented environment in order to foster emotional stability and well-being. Satisfaction of those needs is a matter entirely separate from obligations with regard to education *per se*. The latter, as mandatory requirements, are predicated entirely upon the edict of R. Joshua ben Gamala; the former flow from the general obligation of charity. The community's power to compel its member to fulfill obligations of charity by providing funds to assure the well-being of members lacking sufficient independent

financial resources is entirely distinct from any obligation incumbent solely by virtue of the edict of R. Joshua ben Gamala. Surely, a community blessed with uncommon affluence should not find its obligations of charity inordinately onerous.

Various Aspects Of Adoption

Rabbi Dr. Melech Schachter

"Whosoever rears an orphan in his own house is considered by Scripture as if he fathered the child... Whosoever teaches Torah to the son of his companion, Scripture considers him as if he begat him."[1] These statements are corroborated by quotations from Scripture. Bathiah, the daughter of Pharaoh, saved and reared Moses, and was therefore called his mother.[2] Michal, the daughter of King Saul, reared the children of her sister Merab, and was therefore considered their mother. Ruth's child was also called the son of Naomi[3] by virtue of the fact that he was reared by Naomi. For the same reason the Psalmist called the children of Jacob also the children of Joseph[4] because he fed them.

These and other similar statements may be quoted to prove that adoption, rearing, and teaching someone else's children are most meritorious virtues for which one is honored as a parent.

Horav Yosef Dov Soloveitchik has been quoted regarding the

1. סנהדרין יט ב
2. דברי הימים א, ד יח
3. רות ד יז
4. תהלים עז טז

Member of Faculty of Yeshiva University and Former Co-ordinator of the Beth Din of the Rabbinical Council of America

positive[5] aspects of raising someone else's child as one's own (e.g. adopting), thereby partially living up to the commandment of reproduction *(Piryah v'rivyah)*. The Rov bases it upon the word of the Rambam that he who is seized by the desire for learning so that there remains no room for the earthly desire of being married, as did Ben Azai who remained a bachelor, is considered no sinner,[6] because his Torah disciples will be considered his offspring. Similarly, adopting a child and raising him in a Torah-true atmosphere and giving him a Torah-true education in a traditional yeshiva will be considered as if he partially abided by the mitzva of reproduction. This is also the opinion of R. Shlomo Kluger.[7] The lofty practice of rearing someone else's child with parental devotion is moral conduct on the highest level. Consequently, the adopted child is ethically bound to display the highest regard for his adoptive parents and hold them in the highest esteem, possibly even surpassing the one displayed by children towards their own parents.[8]

However, from the viewpoint of Jewish Law, adoption does not constitute natural relationship. Should the adopted child smite or curse his adoptive parents, he will not be subject to the stern punishment reserved for a child acting this way toward his natural parents.[9] All forbidden incestual relationships apply only to relatives by nature, not by adoption.[10] If the adoptive father is a Kohen or a Levi it does not make the adopted child also a Kohen or a Levi. When the adoptive parent dies, the adopted child should obviously mourn the loss in a proper fashion, including the

---

5. In a lecture, "Adoption in Jewish Law," given by Rabbi Herschel Schachter, son of the author and Rosh HaKollel of R.I.E.T.S. of Y.U. A synopsis appeared in *Chavrusa*, Nissan 5742, published by Rabbinic Alumni of R.I.E.T.S.
6. רמב"ם הלכות אישות פ' ט"ו הלכה ג
7. חכמת שלמה, אבן העזר ס"א ס"א
8. שמות רבה פרק ד שכל הפותח פתחו לחברו חייב בכבודו יותר מאביו ואמו
9. שמות כא טו ובחולין יא ב "דלמא לאו אביו הוא, אלא ..." הרי שבכל מקום שכתוב בתורה אביו ואמו הכוונה להורים הטבעיים דוקא.
10. באבן העזר סימן טו סעיף יא: מותר אדם בבת אשת אביו שיש לה מאיש אחר ואפילו... הגדלה בבית בין האחין. "הרי שאיסור עריות תלוי בלידה טבעית ולא בגידול ביחד עם שאר הבנים.

recitation of the kaddish.[11] But he is not subject to all the minute regulations governing the mourning of a child for his natural parents.[12] Nor does an adopted child free his adoptive mother from *"chalitzah"* in case his adoptive father dies without issue.[13]

When there is an established custom to have only one mourner recite the kaddish, the adopted child should not take this privilege away from one who mourns his natural parents.[14] Obviously, the same preference would apply to "davening" before the *omud* and leading the congregation in prayer throughout the eleven months and on the subsequent anniversaries of their demise, their yahrzeits.

In case a boy infant is adopted right after his birth, he should be circumcised on the eighth day.[15] The infant may, of course, be named after a deceased parent of any one of the adoptive parents. In case the boy infant is the first child of his natural Jewish mother, and neither one of his natural parents is a descendant of Kohanim or Levites, the adoptive parents should have a *Pidyon Haben* celebration on the 31st day after the infant's birth, irrespective of the status of the adoptive parents, whether or not they are descendants of either Kohanim or Levites. Later in this article we shall discuss this law in greater detail.

As for the question of inheritance, in the absence of a will, no one has a right to inherit the estate of an adoptive parent in preference to blood relations. However, everyone has a right to bequeath his possessions to anyone he desires. Adopting a child through a civil court may be considered equivalent to the writing of a will, bequeathing to the adopted child his entire estate or a proportionate percentage thereof.[16]

---

11. דין קדיש יתום באו"ח סי' קלב ס"ב בהגה, והמג"א בס"ק ב מאריך ברינים אלו ומסיק שלא רק בן הנפטר אומר קדיש אלא "שאפשר גם להשכיר אחד לומר קדיש במקומו". ועיין בביאור הלכה בסוף הסימן "ואם בעה"ב מגדל בביתו..." ועיין שדי חמד אבלות קנו שהמאומץ צריך לומר קדיש לכבוד המאמצים אותו על פי מ"ר המצוטט לעיל אות ט.
12. פתחי תשובה ביו"ד שם סק"ז
13. דברים כה ה: "ובן אין לו" וביבמות כב ב "עיין עליו", ולפיכך "כל שיש לו בן מכל מקום ואפילו ממזר פוטר את אשת אחיו מן היבום" שם במשנה בעמוד א. "אפילו ממזר" ובלבד שהוא בן טבעי, דבלא"ה אינו נקרא בן.
14. שו"ת חת"ס חאו"ח סי' קסד
15. קידושין כט א
16. עיין שדי חמד אות מ כלל לח

All this, moreover, does not in any way affect the rights of the adopted child with respect to his inheritance from his *natural* parents. Rambam[17] writes that the language of the Torah[18] "and the law of inheritance shall be unto the Children of Israel a statute of judgment" implies that this has a religious connotation and is not merely a civil matter. Consequently, his legal adoption would not diminish his religious rights as the son of his natural parents.

Knowledge of adoption should not be concealed

Should a child be told that he is adopted? For various reasons, it is wise for the child to know his true status. There is the consideration of the possible consequences should the child, when he or she grows up, wish to marry someone who halachically is forbidden. An adopted girl, who was converted, would not be permitted to marry a Kohen. If the antecedents of the child are known, he would have to avoid marrying a close natural relative; if the antecedents are not known, he would have to avoid marrying someone with a similar problem, such as another adopted child.

There is an additional factor to be kept in mind when adopting a child. The Lubavitcher Rebbe raised the problem of *yichud v'kiruv basar*. According to Jewish Law, a man and a woman, not married to each other, are forbidden to hug and kiss one another or even to be alone together except when they are closely related, e.g. mother and son, father and daughter, etc. This prohibition is especially stringent when the woman is married to another man. How do we allow the adopted son, after he matures, to embrace his adoptive mother and kiss her or even to sleep with her in the same room all alone?[19]

Rabbi Eliezer Wohldenberg, a great sage of the Holy Land, tends to be lenient in this respect if the adopted child is ignorant of the status that he is adopted. It seems that Horav Soloveitchik of Boston also tends to be lenient because in the course of all the years during which the adopted child was raised the relationship was that of mother and son or father and daughter.

---

17. ריש פ"ו מהלכות נחלות
18. במדבר כז יא: והיתה לבני ישראל לחוקת משפט
19. אוצר הפוסקים לאה"ע סוף חלק ט, עמ' קל, והערה ארוכה עמ' 263

However, the late Rabbi Joshua Ahrenberg, head of the Beth Din in Tel Aviv and author of *Dvar Yehoshua*,[20] vehemently disapproved of such a lenient attitude. The Chazon Ish[21] likewise sided with the stringent opinion.

Whether to adopt a Jewish child

For the prospective parents, a major question is whether to adopt a Jewish or non-Jewish child. There are special problems arising from either course of action. We will now proceed to examine the halachic questions aising from adoption of either type of child.

The possible illegitimacy of the adopted Jewish child

A very important aspect in connection with Jewish children offered for adoption is the problem of illegitimacy. Should the adopted child be an offspring of an adulterous relationship, i.e. the mother being married to one and having the child from another, then it is illegitimate (*mamzer*) and is biblically forbidden to intermarry with legitimate Jewish children.

Halachically, the child of an immoral woman, who still lives with her husband, is not considered a *mamzer* because we attribute the fatherhood to the one who cohabits with the mother most of the time. This decision falls into the category of "majority rules" or "majority prevails."[22]

In the case of an unmarried girl giving birth to a child, this majority principle is obviously not applicable.[23] There is reason to fear that the child is the product of an incestuous relationship which renders him a *mamzer*. (Even though the majority of men are not related to the mother of the child, yet there is the possibility of the mother making the advances and approaching the man in which case the principle of *kovua* negates the principle of majority.)

---

20. ח"ג אה"ע סימן טז
21. אוצר הפוסקים שם, פאר הדור חלק ג עמוד מ
22. אבן העזר ד כו
23. שם

In the case of a child born out of wedlock, the law prescribes a thorough investigation. If the father of the child is not a relative, then both mother and child are permitted to be married to fellow Jews. If the father turns out to be a close relative, the mother is termed a *zonah* and is not allowed to be married to a Kohen, and the child is a *mamzer* and is not allowed to be married to a legitimate child.

Most of the children offered for adoption are born to unwed mothers. If the mother refuses to cooperate in the investigation, the mother is not permitted to marry a Kohen, and the child in question is termed a *"shetuki"* — a possible *mamzer*. If the mother's identity is unknown and the question is centered exclusively on the child, the *"kovua"* principle may be ignored, and on the basis of the majority principle — most men are not related to the mother — the child is considered legitimate and permitted to marry other legitimate Jews. This is the view of Rabbi Ezekiel Landau.[24] There are, however, many scholars who differ with him because at the time when the child was born the doubtful aspect of the child's father, involving the subsequent marriageability of both the mother and the child, immediately arose. The disappearance of the mother can therefore not alter the negative decision for both of them.

Whenever a child from a Jewish mother is up for adoption all these possibilities must be taken into consideration.

Adoption of non-Jewish children

The aspects of adoption discussed hitherto are all valid if the natural mother of the adopted child is Jewish. Should the mother be non-Jewish, most of the above problems are eliminated. Yet, the adoption of non-Jewish children inescapably presents an acute problem. Non-Jewish children are adopted by Jewish couples and are raised as Jews. Some of the boys go through a bar-mitzva ceremony, and like all their Jewish friends, they declare themselves as full-fledged members of the Jewish congregation, without

---

24. שו"ת נודע ביהודה קמא חלק אבן העזר סימן ז
25. פתחי תשובה, אבן העזר ד מא

"circumcision and immersion for the sake of conversion"[26] Sometimes these children even assume the status of Kohen and Levi. These adopted children later intermarry with children of Jewish parentage — all under the assumption that they are Jewish.

However, there is a very serious halachic problem involved — is it possible to perform a valid conversion on a Gentile infant? And if conversion cannot be valid until the child is mature, how can we assume that the child at that point will want to be Jewish?

There is one Talmudic source in favor of such practice. Rav Huna maintains that a minor can become a proselyte "in accord with the Beth Din."[27] The knowledge of the three rabbis, constituting the Beth Din, is potent enough to bestow Jewishness upon the child. One may wonder: since the responsibility of so tremendous a change, a change of faith, obviously necessitates the mature consent of the party involved — how then could a minor, a small child and at times only an infant, be converted to Judaism without his consent? The answer to this question is to be found in the basic assumption that to be a Jew is a *z'chus*, a privilege, and one can perform a meritorious deed in behalf of another without consulting him.[28] Hence, the minor's consent is not necessary.

It is on this basis that many rabbis, and sometimes even *mohalim* alone, participate in the circumcision of newly adopted non-Jewish children with the assumption that in due time proper immersion will also take place and thus consecrate them in their new faith. Such practice is to be severely criticised, because even on the basis of this Talmudic passage, there is need of immersion in the presence of a Beth Din and, unfortunately, this *absolutely essential* procedure hardly ever takes place. The very same rabbis or *mohalim* do not pursue the matter any further, and the adopted child is raised as a full-fledged Jew without further ado. This practice could perhaps be followed in a well-organized Jewish community like the *Kehillas* of yore. In those days, every Jew was registered as such and the status of every individual was scrutinized and carefully followed. In American Jewish life this is obviously not possible.

---

27. כתובות יא: גר קטן מטבילין על דעת בית דין
28. בכתובות שם: "מאי קמ"ל דזכות הוא לו וזכין לאדם שלא בפניו כו'"

After an analysis of conditions nowadays, we must come to the conclusion that Rav Huna's statement is not altogether applicable today. Many Jewish couples who adopt non-Jewish children are non-observant themselves. These adopted children that are officially converted to Judaism are brought up in an atmosphere of Sabbath violation and total disregard for kashruth and all other precepts of the Torah. Can this kind of Judaism be considered a *z'chus*, a privilege, that would give us the right to perform the conversion ceremony without their mature consent? (We are all aware of the celebrated statement that doing a mitzva under command is greater than doing it voluntarily, but it would be preposterous to assume that not doing a mitzva which we were commanded to do is greater than not doing it when not commanded to do it.) Even when the consent of the child's natural parents is obtained to have him adopted by Jews and reared in the Jewish faith, the predominant view of most early Talmudic scholars is that the Beth Din's accord is still required, and all on the assumption that this change of faith constitutes a *z'chus*, a privilege. Obviously, the way conditions are today, it is by far a greater *z'chus* to remain a non-Jew than to become a Jew and violate every commandment.

It is also important to note with reference to the concept of Jewishness as being a *z'chus*, a privilege, that the *Avnei Nezer* maintains that the entire privilege concept applies only when the recipient of the benefit is aware of it. This is an additional reason for not concealing the fact of adoption from a child. According to the *Avnei Nezer*, should the non-Jewish child be raised in ignorance of the beneficial status bestowed upon him, the entire conversion ceremony is ineffective and in vain.[28]

One could argue that the adopted child may in due time join the *baale tshuvah* movement and thus the conversion will retroactively be a privilege. Aside from the fact that this is unlikely, in the Responsa of Rabbi Elya Pruzhiner we find that if the privilege aspect is not evident at the time of conversion and is based only on the possibility thereof in the future, the conversion

---

28a. אבני נזר, אה"ע, קצד אות ד

is not valid.[29]

The question may still be raised in the case of a genuinely observant Jewish couple that wishes to adopt a non-Jewish child and have him or her immersed for the sake of conversion in the presence of a Beth Din in accord with Rav Huna's statement — are we justified to do it?

Before we answer this question there is yet another point to be considered. Rav Yosef added his remark to that of Rav Huna that when the non-Jewish minor, who was converted to Judaism in the presence of a Beth Din, matures, that is when he grows up, he can nullify the conversion ceremony and go back to his former status and remain a non-Jew.[30] There is a difference of opinion among the early scholars as to the exact interpretation of this statement. With reference to the case discussed in the Talmud of a non-Jewish girl who was converted to Judaism in the presence of a Beth Din, then married and divorced while still a minor, we do not grant her the *Kesubah* immediately, lest upon maturity she rejects Judaism and nullifies the act of conversion.[31]

How and when does this rejection take place? Some maintain: a day before her maturity, before her twelfth birthday, she begins to behave demonstratively in a non-Jewish manner; she eats *trefa* food or violates the Sabbath and so she continues to behave several days after she reaches maturity.[32] On the other hand, Tosafot and other *Rishonim* emphasize the aspect of her consent upon maturity to remain a Jewess. The *kesubah* is granted to her when she matures and demonstratively behaves like a Jewess.[33] The difference between the negative and the positive interpretations imply a difference in the concept of the conversion performed *"al daas* Beth Din." Does this kind of conversion in accord with the Beth Din immediately go into effect in full force, with only this

---

29. שו"ת הליכות אליהו האה"ע סי' לא
30. כתובות יא א: אמר רב יוסף הגדילו יכולין למחות
31. בכתובות שם: "יהבינן לה כתובה דאולה ואכלה בגיותה? לכי גדלה ... כיון שהגדילה שעה אחת ולא מיחתה שוב אינה יכולה למחות."
32. עי' שיטה מקוצבת: כגון שהתחילה מנהג גיות יום לפני גדלותה, וכן נהגה יום או יומים לאחר גדלותה.
33. תוספות שם ד"ה לכי: לכי גדלה ונהגה מנהג יהודית

weakness that it could be rejected upon maturity, or is this conversion conditioned upon the child's subsequent consent? The difference in halacha is obvious.

Suppose the converted child registers neither a confirmative consent nor a definite rejection, what then? If we assume that the conversion went into effect in full force and can only be nullified by a definite rejection, as long as this rejection was not forthcoming, as long as the converted child did not flagrantly and demonstratively behave in a non-Jewish manner when he or she reached maturity, the conversion stands and remains irrevocable. If, on the other hand, we are to assume that the original conversion is conditioned upon the child's subsequent consent, that is upon a positive, demonstrative Jewish behavior at the time of maturity, as long as this consent was not forthcoming the child remains non-Jewish. And so from this viewpoint, even if the child met all other requirements, namely, it went through the entire procedure of conversion in the presence of a qualified Beth Din and it has been reared in an observant atmosphere, as long as the child fails to demonstrate upon maturity a definite Jewish behavior, such as putting on *t'fillin* or observing the Sabbath, the original conversion remains ineffective.

In connection with Rav Huna's statement that since to be a Jew is a privilege, a non-Jewish child can be converted to Judaism in the presence of a Beth Din on the principle that the rabbis may perform a meritorious deed in behalf of the child without his mature consent — in connection with this statement there is a difference of opinion as to whether its validity is biblical or only rabbinic. If it is only rabbinically valid, then only to the extent of rabbinic laws, such as the wine touched by a non-Jew that becomes *"nessech,"* we consider the child Jewish. But we do not permit such a minor to marry one from Jewish parentage, nor do we consider the *"shechita"* of such a minor valid, even if adult *shochtim* watch him — all because biblically the child's status is that of a non-Jew, a non *"Bar Zvicha."* (This is so unless we assume that the Rabbis sometimes have the power to set aside a biblical law even when active violation is in involved.[34]) If, on the

34. יש כח ביד חכמים לעקור דבר מה"ת אפילו בקום ועשה. עיין יבמות צב. ועי' תוס' כתו' שם ד"ה מטבילין.

other hand, Rav Huna's statement is biblically sound, we consider him a full-fledged Jew in every respect even insofar as to marry a Jewess or to slaughter in the presence of others.

It seems that the above question, as to whether the child's rejection upon maturity nullifies the conversion or his affirmation confirms it, depends upon this problem. If we assume that the conversion is biblically sound and we allow the child to marry a Jewess, apparently the conversion is not conditioned on something that is yet to happen. As to the question, how do we allow such a marriage since the child could possibly reject Judaism upon reaching maturity, the answer is that in all likelihood the child, raised in a genuinely religious atmosphere, will continue to be observant after it matures.[35] On the other hand, if we assume that the conversion is not biblically sound, it is because it depends upon the child's *positive* consent retroactively at which time we probably interrogate and warn him regarding the difficulties involved in the observance of Torah and mitzvot,[36] in the same spirit as Naomi warned Ruth. Since this procedure is rarely followed, the conversion of non-Jewish children is often of questionable validity.

Although Rabbi Moshe Feinstein is usually quite definitive in his halachic decisions, in the course of a lengthy responsum on the subject of whether to adopt a non-Jewish child, he fails to come to a conclusion. He does, however, append the following comment:

> *I would add this note of advice, that there is no need or purpose in accepting a minor (for conversion) and only when an adult non-Jew himself comes for genuine reasons should one accept him.*[37]

To recapitulate briefly the points we have outlined:

1. Civil adoption does not constitute conversion to Judaism.
2. Unless the adoptive parents are observant, there can be no conversion on the assumption of a *z'chus* that is in reality a great disadvantage.

---

35. בשט"מ שם: שמן הסתם כשנתחנך מקטנותו בתורת ישראל לא יסור ממנו, ומלתא דלא שכיח היא ולא חיישינן לזה אף בדאורייתא.
36. קלות וחמורות. עיין יבמות מז א ויו"ד רסח ב ועי' שט"מ בכתו' שם
37. אגרות משה יורה דעה קס"ב

3. Even if the above requirements are met, there is need for a positive consent on the part of the adopted child when it reaches maturity, without which the conversion may not be valid halachically.
4. If all the above conditions were to be met, there is yet special precaution to be taken in the case of a girl that she should not marry a Kohen.

Whose "son" is the adopted child?

In Jewish tradition a person is identified by his or her father. This is the way an infant is called at the time of naming it at the circumcision ceremony or at the synagogue, e.g. Isaac son of Abraham, Dinah daughter of Jacob. This is the way a man is called up to the Torah, and this is the way a person is identified in a *kesubah*, (the marital document read under the canopy) and also in a *Get*, the biblical divorcement paper nullifying the marital bond. An adopted child presents a problem in this area. Is the child to be known as the son or daughter of the adoptive father or of the natural father, or the "son of Abraham our ancestor" in case of non-Jewish parentage, as a convert is usually called? How can we call a person the son or daughter of Mr. B, the adoptive father, when he is really not the father?

A. When a *Get* is written

This problem is particularly acute in writing a *Get*, where the slightest deviation from the truth may invalidate the document. According to one authority, mentioning a grandfather as the father renders the *Get* ineffective, even though grandchildren are usually identified as children.[38] How much more so should the *Get* be invalidated when a totally unrelated man is ascribed as the father of the person! (Perhaps in a case like this when an adopted child grows up, marries and divorces, his father's name should be omitted altogether. Indeed, a *Get* in which a father's name is omitted is valid,[39] while a wrong name renders the *Get* invalid.)[40]

38. בית שמואל אבה"ע סי' קכט ס"ק יט
39. אה"ע קכט פתחי תשובה סק"כ
40. עי' בב"ש שם ס"ק ה. דשינוי גרע טפי

In our Responsa literature we have recorded a case when a man who divorced his wife used his adoptive father's name and then disappeared. There was no way of having him give another *Get* and the woman was faced with the bleak future of remaining an *aguna* — never to remarry again. Ri Halevi[41] validated the *Get* on the basis of the Talmudic dictum that "whosoever rears an orphan in his house is considered as if he fathered the child."[42] However, Tosafot maintains that we find nowhere in the Torah "a wife's child to be called as his child."[43] Rabbi Moshe Sofer differentiates between one who has children of his own — to which case Tosafot's statement refers — and one who has no children of his own when he could be identified as the father of the adopted child.[44]

Rabbi Aaron Gordon likewise took a lenient view and rendered a similar *Get* aceptable.[45] He added an additional source, namely the verse in Joshua XV, 17, where Caleb's father is mentioned by the name of Kenaz erroneously, to which the Talmud[46] answers that he was Kenaz's stepson.

Many Rabbinic scholars oppose this lenient view because the above statements are Aggadic in nature and there is an established principle that no halachic decisions can be made on the basis of Aggada.[47] How would it be if a devout disciple of a great scholar would indicate in his *Get* the name of his revered mentor as his father? Obviously that *Get* would not be valid notwithstanding the Aggadic statement that "whosoever teaches Torah to the son of his companion is as if he begat him."[48]

A famous controversy of a similar case is recorded in detail in *Pischei Tshuva*.[49] The author of *Avodas Hagershuni*[50] took a lenient view in a case where the woman's father's name was

41. שו"ת אמירה נעימה סי' קכד
42. סנהדרין יט א וכמו שמצוטט לעיל בהערה 1
43. פסחים נד.
44. שו"ת חת"ס אבן העזר ע"ו
45. בריש ספרו אבן מאיר על שמות גטין
46. תמורה טז א
47. ירושלמי פאה פ"ב ה"ו, ועיין אנציקלופדי' תלמודית ח"א ריש עמ' כב
48. סנהדרין יט ב וכמצוטט לעיל בהערה 1
49. אה"ע קכט כא
50. סימן נח

written in the *Get* erroneously. His contention was that any item, which, if omitted would not invalidate the *Get*, then an error in that item is insufficient to render the *Get* invalid.[51] However, the author of *Zemach Zedek*[52] and others point out that this assertion refers exclusively to an item which used to be included in the *Get*, namely, the birthplace of each one of the couple. If leniency could at all be applied to a false paternal name, it could perhaps be only if the husband hands the *Get* over directly to his wife. But if it is done through the medium of an agent who was ordered by the husband to hand over the *Get* to "my wife X the daughter of Y" and he hands it over to X the daughter of Z, the divorce is definitely not valid. This great scholar concluded that even if the husband hands the *Get* directly over to her she is not divorced, because the document was written by the scribe under false instructions and therefore is totally worthless. A host of other great Sages are recorded to coincide with this stringent opinion.

What follows is that no adopted child may use his adopted father's name in a *Get* unless it is indicated that he is only his adopted father, as for example, "X, called X the son of Y who raised him" or "who adopted him."[53]

B. When called up to the Torah

A man, the identity of whose father is wrapped in mystery, is to be called up to the Torah as the son of his mother's father.[54] The Taz[55] opposes this decision for fear that should he ever divorce his wife, he will use his grandfather's name as his father and thus render the *Get* invalid. He prefers the man to be called up as is a convert to Judaism, namely, "son of Abraham" since we all are descendants of Avrohom Avinu.

R. Moshe Feinstein[56] writes that a child can be called up to the Torah without any reference to his adoption - for example, simply

---

51. תוס' גטין פ"א ד"ה ושם
52. סימן פג
53. "פלוני דמתקרי פלוני בן פלוני המגדלו" או "המאמצו"
54. או"ח קלט ג בהגה
55. שם ס"ק א
56. אגרות משה יורה דעה קס"א

as Reuven son of Yaakov. R. Feinstein sees no reason to fear that his origins will thereby be obscured or forgotten. This is also the accepted practice of the British Beth Din, although they caution that this practice should be followed only if there are no other children of the couple, whether natural or adopted.[57]

It should be noted that in the case of a convert who divorces his wife, "the son of Abraham" will not do. It must be stipulated which Abraham is referred to — "the son of Avrohom Avinu."[58] The Taz probably meant to have the adopted son called up as "the son of Avrohom Avinu."[59]

If he prefers to be called up by his adoptive father's name, the word *"hamegadlo"* should be added to make sure that should he ever have to go through a divorce proceeding the *Get* would be valid. The additional *hamegadlo* (who raised him) is particularly essential if the adoptive father is a Kohen or a Levi. Without *hamegadlo* he will be considered a Kohen and be called up to the Torah first as is his adoptive father. Furthermore, the people may send him up to *"duchan"* along with his "father" or use him in the ceremony of *Pidyon Haben*. If the adoptive father is a Levi, he may be called up next to the Kohen, and when he marries the daughter of a Yisroel and is blessed with a son, he may be given erroneous information that there is no need for a *Pidyon Haben*. The same holds true of an adopted girl whose adoptive father is either a Kohen or a Levi.

Above all, *"hamegadlo"* will prevent the serious violation of his adoptive mother's ever remarrying without *chalitza* after his adoptive father's demise.

Should the family have other sons of their own and later in life should one die and his wife would need *chalitza*, the adopted brother is not the one to go through with this procedure. *"Hamegadlo"* added to his name will make sure that such a mistake shall never come to pass.

---

57. Dayon Meyer Steinberg, *Responsum on Problems of Adoption in Jewish Law*, Office of the Chief Rabbi, London, 1969, p. 12.
58. אה"ע קכט כ
59. הרב משה פינדלינג בנועם ח"ד עמ' עז

C. When the name is written in the *kesuba*

When the adopted boy or girl is getting married, the name in the *kesuba* "son or daughter of Mr.X" should also be accompanied with the word *"hamegadlo"* indicating that Mr. X is the adoptive father for the same reasons enumerated above. According to the author of the *Nachlas Shivoh*[60] the names in the *kesuba* must be written with the same care as in a *Get*, because should ever that marriage terminate in a *Get* the names of the kesuba will probably serve as guidelines. However, in order that no one should be embarrassed in public, when the *kesuba* is read at the marriage ceremony, the officiating Rabbi should not read aloud the word *hamegadlo*.[61]

D. Naming the adopted baby

When naming the adopted baby at the time of circumcision or in the synagogue, the word *"hamegadlo"* should accompany the name of the adoptive father for the above reasons. Some synagogues issue special documents in which the name of the baby is recorded. This is especially done at the time of bar-mitzva. These documents are framed and kept for future reference. Surely, the word *"hamegadlo"* should be added for subsequent purposes.

At the circumcision ceremony

"Blessed are Thou...Who...Hast commanded us to make (the son) enter into the covenant of Avrohom Avinu." This benediction is recited by the father at the time of his son's circumcision.[62] If the father is not present at the time, the benediction is recited by someone else, customarily by the *"Sandik"* - the one who holds the infant at the circumcision.[63] According to Rabbi Akiva Aiger[64] the grandfather — especially so if he is the *"Mohel"* — should be the one to recite this benediction rather than the *Sandik*, because he, like the father, is obligated to see to it that his grandchild receives a

---

60. סימן יב אות טז
61. *Responsum on Problems of Adoption in Jewish Law*, p. 20.
62. יורה דעה רסח א
63. ברמ"א בשם הטור
64. שו"ת רעק"א סימן מב

Torah-true education, the spiritual implication of ushering him into the covenant of Avrohom Avinu.

In the case of an adopted son, the adoptive father, by virtue of his obligation as such, has obligated himself to give him a Torah-true education. Consequently, preference should be given to him as far as the recitation of this benediction is concerned. Far more preferable is to have the adoptive father act as the *Sandik* and thus avoid all possible argumentation.[65]

Obviously, in the concluding prayer, naming the child, it is reasonable to omit the words *"beyotzei chalotzov"* and *"befree vitno"* and amend the text thus: "...preserve this child to his adoptive father and mother, and let his name be called in Israel — the son of — *hamegadlo*. Let the adoptive father rejoice and the let the adoptive mother be glad..."[66]

At the *Pidyon Haben*

There are two alternatives in the redemption of a first-born son: First and foremost the father is obligated to redeem his son from the Kohen. Secondly, if the father fails to abide by this commandment, then the boy, when he grows into maturity, redeems himself from the Kohen.[67]

In the case of an adopted Jewish child the question begs itself as to whether the adoptive father could perform this redemption. Rabbi Moshe Isserles (Ramo)[68] maintains that, unlike circumcision, no one can act as an agent of the natural father, nor does the Beth Din redeem him without his father. Rabbi Sabbattai Cohen (Shach)[69] differs, maintaining that the principle of agency is applicable to this mitzva as well. Some scholars differentiate between an agent directly ordered by the natural father to represent him at the *Pidyon Haben*, which is valid, and when no such demand was made by the natural father and the adoptive father

---

65. הרב פינדלינג שם בנועם עמ' פח
66. קיים את הילד הזה להמגדלים אותו, ויקרא שמו בישראל פלוני בן פלוני המגדלו. ישמח האב המגדלו ותגל אמו המגדלתו...
67. יו"ד סי' שה סעיפים א וטו
68. יו"ד שם סעיף י
69. ש"ך שם ס"ק יא

wishes to act in his behalf voluntarily, which is not valid. Still others claim that one can voluntarily act in behalf of the natural father as his agent, only that he is not obligated to do so unless he so chooses.[70] The British Beth Din expressed a novel thought on this subject:[71]

> With regard to an adoption case... it could be argued that the adoptive father is able to redeem his adopted son because he is his legal guardian. Proof for this can be adduced from Mamonides [משנה תורה הלכות נחלות יא:י] who states that all affirmative commandments may be performed by the legal guardian on behalf of the child. In this respect, an adoptive father who accepts the responsibility for educating and rearing the child is a legal guardian [מלמד להועיל, יורה דעה, צז, צח]. Rabbi D. Hoffman mentions the case of a Jewish woman who gave birth to a first-born son where the father was non-Jewish. He decides that the Jewish legal guardian may redeem the child without reciting the benediction. [אגרות משה, יו"ד קצח] Rabbi Weinberg [שרידי אש II, צז] considers the case of a Jewish unmarried mother who gives birth to a child and raises doubts as to whether it is the duty of the Beth Din to redeem the child. He quotes authorities who give varying views on this point. [בנין ציון, קד, קה, מנחת אליעזר IV, כד]
>
> It is recommended that the redemption should take place without the usual benediction being recited. Where, however, the Beth Din definitely established that the adopted child is a first-born, without the doubts referred to above, then the adoptive father may recite the usual benediction and should conclude with the words על פדיון הבכור instead of על פדיון הבן.

Because of these different opinions it would be advisable to have the adoptive father perform the *Pidyon Haben* without the recitation of the benedictions — since the validity of any mitzva is

70. צדה לדרך והג' צבי לצדיק ביו"ד שם

71. *Responsum on Problems of Adoption in Jewish Law*, pp. 25,26.

not affected by the omission of the *brocha*. When the boy grows up, he should redeem himself again, lest the original redemption was not valid on account of the natural father's not ordering anyone to represent him. Obviously, the benediction should again be omitted lest the first redemption was valid. (However, the opinion of the author of the *Aruch Hashulchan*[72] coincides with the *Shach*, to have the *Pidyon Haben* with the benedictions take place on the thirty-first day, and "this seems to be the prevalent custom.")

Parenthetically, in case the natural father of the child dies before the thirty-first day when the ceremony of *Pidyon Haben* is due, there is ample reason to doubt the above procedure of two redemptions. According to the Taz,[73] no one can act as the agent of the infant because the concept of agency is inapplicable to minors.[74] Therefore, he must wait until he matures and redeem himself. While the Shach[75] offers a method to circumvent the problem of agency, a host of scholars agree with the Taz, including the Chazon Ish.[76] In such a case, some tangible sign should be made to serve as a reminder to the child to redeem himself when he grows up. In *Shulchan Aruch*[77] it is suggested to have a silver amulet suspended from his neck to serve as a reminder. If this is impractical, some other method should be undertaken to assure that the child will be aware of the obligation of *Pidyon*.

At Bar Mitzva

Rabbi Elazar's opinion is quoted in the Midrash[78] to the effect that until the son attains the age of thirteen, the father must busy himself with guiding him in the right direction. Henceforth, the father proclaims: "Blessed be He Who Hath freed me from the responsibility for this (child)."[79]

---

72. סימן שח סעיף יד
73. שם ס"ק יא
74. אין שליחות לקטן היכי שיש קצת חוב כבנידון דידן שיקיים המצוה בגופו כשיגדיל
75. נקודות הכסף שם
76. בהוצאה חדשה חאבה"ע דף רפה ע"ב
77. סימן שה סעיף טו
78. בראשית רבה סג יד
79. ברוך שפטרני מענשו של זה

Ramo quotes the custom of having the father of a bar mitzva recite this benediction, usually at the time the son is called up to the Torah.[80] Since this benediction is not mentioned in the Talmud, the name of G-d and His all-pervasive Kingdom[81] are omitted.[82] According to Rabbi Mordecai Jaffe the meaning of the benediction is the exact opposite of the above explanation. It is the bar-mitzva boy who recites this benediction, because according to an Aggadic statement minor children die on account of their parents' sins.[83] Once he reaches bar-mitzva, he is relieved of this responsibility.[84]

Whether this benediction should be recited when the adopted son reaches his bar-mitzva depends upon these two opinions. Assuming the adoptive father has accepted all responsibility for his minor adopted son's misbehavior and that he adopted him on this condition, he could very well recite it when the "son" reaches his bar mitzva. If, however, the adopted son is to recite it, then certainly there is no place for him to say it, because he was never held responsible for his adoptive parents' misdeeds.

As long as the name of G-d and His Kingdom is omitted, there is no reason for a possible violation of a wrong benediction and the adoptive father could recite it without hesitation.

Mutual obligations and rights

Whether or not the acquisitions of the adopted child, either by sheer luck (found treasures) or by the dint of labor (earnings), rightfully belong to the adoptive parents is a matter of serious debate. From a strictly halachic view, raising someone else's child implies one-sided obligations from the adoptive parents to the child but not the other way around.[85] This is so because as a minor, the child cannot be subjected to responsibility and obligations. Yet, these mutual obligations are of supreme importance for the normal

---

80. או"ח רכה ב
81. השם אלוקינו מלך העולם
82. עין בערוך השלחן רכה ד. דנוטה לומר הברכה בשם ומלכות
83. ספרי דברים כד טז: איש בחטאו יומתו. גדולים מתים בעון עצמם; קטנים מתים בעון אבותם.
84. מגן אברהם שם ס"ק ח
85. אבה"ע קיד ב, ורמ"א בחו"מ סי' עב ס"ב

and psychological development of the child as an integrated member of the family unit. Consequently, we have to resort to another legal principle, namely, the Beth Din has a right to declare someone's possession ownerless,[86] because of which the adoptive parents may appropriate the child's earnings since they are considered ownerless.[87]

Sitting in judgment or rendering testimony

Persons related to one another are disqualified from sitting in judgment or rendering testimony for one another.[88] The disqualification of a relative from rendering testimony is considered a biblical law not necessarily rational, because the testimony is rejected under all circumstances whether rendered in favor or disfavor of the relative. Furthermore, even relatives are not suspected to lie and distort the facts.[89] However, disqualifying a relative from sitting in judgment is quite rational. It is assumed that relationship subconsciously motivates the judge to interpret the law one-sidedly. It is for this reason that one should disqualify himself from acting as a judge in a case in which he may have a far-fetched interest in the outcome.[90]

Insofar as adoptive parents and their adopted child are concerned, it stands to reason that neither may act as judge for the other, but may render testimony to establish the facts the way they occurred.[91]

Marrying an adopted brother or sister

Rav, the founder of the Sura Academy, was Rabbi Chiya's nephew from both sides of his family — both his father and his mother were the brother and sister of Rabbi Chiya. Rav's father was Rabbi Chiya's half-brother on his father's side; and Rav's mother was Rabbi Chiya's half-sister on her mother's side.[92] To be

86. חו"מ ריש סי' ב הפקר ב"ד הפקר
87. שער עוויאל ח"ב דף קפד; הרב פינדלינג בנועם שם
88. חו"מ סי' ז סעיף ט, וסי' לג סעיפים ב-ט
89. חו"מ שם סעיף י
90. חו"מ ז"ז
91. הרב פינדלינג שם
92. סנהדרין ח סוף ע"א

more explicit, when Rabbi Chiya's parents married each other, they each had a son and a daughter, respectively, from previous marriages. Those two children were allowed to marry each other since they were not related at all. [93] They were later blessed with a son who turned out to be the famous Rav. Whether Rav's parents were raised in the same home after their parents married (for the second time) is not known. However, it is assumed that even when they are raised together there is no reason to fear that they would be considered brother and sister.[94]

Is an adopted son allowed to marry the natural daughter of his adoptive parents? From a strict biblical viewpoint it is permissible, as is evident from Rav's parents. This seems to be the opinion of the celebrated Rabbi Moshe Sofer,[95] "the Hungarian Groh."[96] The reason he gives is that the two step-children, parents of Rav, were known not to be natural brother and sister. However, on this basis we should not allow the adopted son, who bears the family name of his adoptive parents and is always identified with them, to marry their natural daughter because it is generally not known that they are not natural brother and sister. Furthermore, according to Rabbi Yehuda Hachosid, even two step-children should not marry each other for fear of being identified as brother and sister, the story of Rav's parents notwithstanding.[97] As a matter of fact there is even a Tannaitic opinion to this effect. [98] Consequently, an adopted son should not marry his adoptive parents' natural daughter.[99]

* * *

An additional consideration is the treatment of adopted children by their parents and teachers. Reb Herschel Schachter points to the fact that an adopted child, forsaken by his natural

---

93. עיין אה"ע טו יא
94. עיין שו"ע שם
95. שו"ת חת"ס אה"ע ח"ב סי' קכה
96. כידוע מה שהגר"א הי' לבני ישראל מליטא הי' החת"ס לבני ישראל מארץ הגר
97. צוואת רבי יהודה החסיד אות כט
98. ראב"י בסוטה מג סוף ע"ב
99. ככה דעת הרב יצחק ווייס בהערותיו לספר ליקוטי מאיר של הרב מאיר הלוי שטיינבערג. אמנם לדעת הרב משה פינדלינג בנועם ח"ד עמ' צ יש לב"ד לפרסם הדבר שאינם אח ואחות כדי לבטל המראית עין שבזה.

parents or orphaned by them, is usually more sensitive than children under normal conditions. There is a special biblical command not to vex a widow or an orphan[100] or anyone who feels inferior to others and is therefore very sensitive to the slightest derogatory remark. "One must be careful with orphans and widows because their souls are downcast and their spirits low, even if they be wealthy...one must speak to them kindly and respect them...He, by Whose Words the World was called into existence made a covenant with them, their prayers will be answered. For it is said:...'If he cries unto Me, I shall hearken unto his cry.'[101]

"All this applies to a case where he afflicts them for his own advantage, but when he afflicts them for the purpose of teaching them the Torah or a trade, or to lead them upon the right path, it is permitted. Nevertheless, one must...lead them with kindness, great mercy and with respect as it is said: 'The L-d will plead their cause'..."[102]

Reb Herschel concludes: "When parents or teacher scold an adopted child or stepchild for purposes of *chinuch*, they must be very careful not to be harsh with them as they would naturally be with other children."[103]

---

100. שמות כב כא
101. שם כב
102. רמב"ם הל' דעות פ"ו ה"י
103. *Chavrusa*, Nissan 5742.