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# **Journal of Halacha and Contemporary Society**

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Rabbi Alfred S. Cohen**

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

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# **The Journal of Halacha and Contemporary Society**

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# Late For Shabbat

*Rabbi Alfred Cohen*

It is a nightmare all too familiar to many a commuter – it is late on Friday afternoon, there's a traffic jam, the bridge is closed, the toll booths are not working, there was an accident on the freeway which is still causing delays, bad weather is forcing the plane to divert its course – a multitude of scenarios which, unfortunately, may or do result in the frantic traveler finding himself still in mid-trip when Shabbat inexorably arrives. What to do? Must one remain in the airport for 24 hours? Should one get off the train at an earlier stop and just start walking? Should one abandon the car, or stay in it? What to do with the wallet, the briefcase, the pocketbook, etc.? This study will address these questions and seek to delineate the many halachic issues involved as well as to suggest possible solutions.<sup>1</sup>

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1. There is essentially no difference between *Erev Shabbat* and *Erev Yom Tov*. *Biur Halacha*, 529:1, and the *Sha'agat Aryeh* write that one should not do work on the day before Yom Tov after *mincha* time, just the same as before Shabbat.

*Beit Yosef* (O.C. 495) rules that the only forbidden activities on Yom Tov are the 39 *avot melacha*, i.e., the major categories of "work" biblically proscribed on Shabbat (with the exclusion of those dealing with food preparation and carrying). Since *techum* (see later in text) is not in one of these 39 categories, one might expect that there is no problem with that on Yom Tov. However, the halacha is that this principle does apply on Yom Tov.

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Our inquiry will include not only searching for permissible ways that the delayed traveler might reach his destination within the permitted parameters of the halacha, but also investigating whether the traveler ought to seek alternate solutions, such as spending Shabbat in a motel<sup>2</sup> or stopping along the way in a Jewish neighborhood and looking for someone to take him in.

There is something which needs to be said at this point, and it is a sad comment on our generation that it has to be said at all: For a Jew dedicated to his faith and to G-d, Shabbat is everything. It is disingenuous to be discussing *heterim* for a person who is so callous in his Sabbath observance that he often arrives home in the nick of time – or perhaps later. This is not the way a G-d-fearing Jew acts. Everyone knows that planes are delayed, that in rush hour one cannot travel at optimal speed, that arriving home in the last minute inevitably leads to oversights and lapses. A person for whom the will of G-d is paramount will make sure not to be caught in such a situation, fraught with danger to the holiness and tranquillity which uplift the Sabbath.

Before we embark on this extensive study, I admit to a certain measure of trepidation. My hesitation arises from the possibility that some people may abuse the information gleaned herein and become more relaxed about setting out on time to get home on a Friday afternoon. In truth, it is proper for a Jew to be so awestruck by the majesty of Shabbat

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2. Spending Shabbat in a motel may raise a whole host of other questions which will not be addressed at all in this study – including problems with lack of wine or Sabbath foods, electronic doors and keys, etc. Many of these topics are discussed by Rabbi Ort in his *Yosheiv Ohel*, which contains excellent halachic sources in the Hebrew section.

that he would virtually *never* allow himself to get into such a predicament. Yet the sad truth is that it does happen, and my hope is that the present study may help in an emergency to avoid undue *chilul Shabbat*.

We find in the Gemara<sup>3</sup> a reluctance at times to issue lenient rulings, for fear that it might lead to more sinfulness. I am mindful as well of the words of the sainted Chafetz Chaim in his famous *Sefer Shemirat Halashon*, wherein he teaches and explains all the laws regarding permitted and prohibited speech. The Chafetz Chaim admits his hesitation about writing this book, realizing that there might be those who would seize upon certain *heterim* to excuse their spreading gossip about others, covering their sin by claiming that "the Chafetz Chaim allowed it." Moreover, he feared that some might not fully understand his words and end up drawing the wrong conclusions from what he wrote about *lashon hora*. Nevertheless, he decided to set down the laws carefully and concisely for those honestly seeking the truth. In this decision, he says, he relied upon an incident recorded in the Talmud:<sup>4</sup> R. Yochanan ben Zaccai had become aware of devious business practices engaged in by some merchants. If he denounced these practices publicly, he feared that some heretofore honest persons would learn how to cheat; but if he remained silent, people would lose respect for the rabbis, accusing them of being oblivious of the realities of life. Rabbi Yochanan decided to speak out, mindful of the verse "for the ways of G-d are straight: the righteous will follow these [paths], and the wicked will stumble on them."

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3. "*Halacha v'ain morin kain*" (although this is the law, it is better not to publicize it) is an admonition which appears in the Talmud. See *Shabbat* 139a and *Tosafot to Beitza* 7a.

4. *Bava Bathra* 89a.

## Halachic Problems

Sabbath observance is a centerpiece of Judaism, and its rules are many and complex. Before we can begin to explore solutions to the various predicaments encountered by a stranded traveler, it is essential to have an understanding of what halachic problems may confront him, as well as to define the technical terms we will be using throughout this study:

*D'oraitha and Derabbanan* (Biblical and Rabbinic Law): In the scale of severity, a biblical law (*d'oraitha*) is considered far more severe, in most cases. Many of the rabbinic enactments are intended to help a person avoid transgression of a biblical law; however, the rabbis themselves limited the applicability of their strictures, as we will see. Sometimes these strictures are waived if the person needs to do a mitzvah, or if the stricture would be counterproductive. For every predicament the stranded traveler encounters, an essential factor in arriving at a solution will be determining whether he is faced with a biblical or a rabbinic problem.

*Reshut Hayachid* – a "private domain", an area surrounded by walls or partitions, like a house.

*Reshut Harabbim* – a "public domain"; it has to be an area at least 16 *amot* wide, with no covering (roof), and not surrounded by walls. The dimensions of an *ama* are a matter of dispute: either 18.9 inches or 22.7 inches. Another dispute is whether or not 600,000 people have to traverse this domain daily, with the lenient opinion being that this number are required in order to render the area a *reshut harabbim*.<sup>5</sup> Since this opinion generally prevails, it has the

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5. *Shulchan Aruch, Orach Chaim* 345:7 (all references hereinafter

effect of rendering most large, open areas outside cities as not qualifying as *reshut harabbim*. This means that a traveler stranded on the road between two cities, for example, would not find himself in a *reshut harabbim* (but rather a *carmelit*, see below) and, as we shall see, that classification affords him many more options and leniencies.

**Carmelit** – This area is neither a *reshut harabbim* nor *reshut hayachid*. An example would be the sea, or a field, which, although a large open area, do not meet the definition of a *reshut harabbim*.

**Carrying** – The Torah forbids the transfer of objects from a *reshut harabbim* to a *reshut hayachid*, and vice-versa. It is also biblically forbidden to transport an object 4 *amot* in a *reshut harabbim*. Rabbinic law forbids the transfer to and from either of these two domains to a *carmelit* or vice-versa, and also forbids carrying an object 4 *amot* in a *carmelit*. Here again, it will make a big difference to the traveler if he is considered as being in a *reshut harabbim* or in a *carmelit*.

**Kil'achar Yad** – The only times one violates the biblical laws of carrying is when it is done in the manner in which

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to the *Shulchan Aruch* are always to *Orach Chaim* unless otherwise indicated). There is disagreement whether 600,000 people must pass through a particular thoroughfare in order to render that avenue a *reshut harabbim*, or whether there must be 600,000 passing through the entire city. See *Iggerot Moshe* O.C. 139. There is also a question about how bridges within the city affect the status. The *Mishnah Berurah* *ibid.*, no. 23, writes that we cannot fault someone who relies on the lenient opinion since there are a considerable number of accepted *poskim* who rule that way. *Aishel Avraham*, *ibid.*, writes that non-Jews are to be counted among the 600,000 daily inhabitants.

it is usually done on weekdays.<sup>6</sup> When one carries in an unusual manner, which technically the Torah permits, it is called *kil'achar yad*; the rabbis, however, forbid it.<sup>7</sup>

**Muktzah** – The rabbis forbade handling or moving on Shabbat any articles which, at the onset of Shabbat (*bein hashemashot*; see later for definition of this term) one did not intend to use on Shabbat. The reasons why one would not intend to use them may vary. The following brief survey does not make any pretense of being a comprehensive survey of this topic, but is included herein so that the dimensions of the halachic problems facing a stranded traveler can the better be comprehended:

A) *Kli shemelachto l'issur* – an item whose use is forbidden on Shabbat, such as car keys or a ball point pen or writing paper. However, if one needs to use it for a permitted activity – like wiping dirt off his hand with the writing paper – then he may move it (*letzorech gufo*). Also, he may move it if he needs the space it is occupying (*letzorech mekomo*). Furthermore, if it is a valuable item and the

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6. The Gemara in *Shabbat* 128b rules, "As far as it is possible to change [the manner of performing the work on Shabbat], one should change." This does not mean that one should adopt a change which might be dangerous, such as driving with the left foot instead of the right.

7. S.A. 301:7. The *Mishnah Berurah* 330:5 rules that medical emergencies, however, should be treated directly without any need for a change in the manner of performing the life-saving act; he writes that the imperative for *kil'achar yad* applies only in the case of childbirth, which is essentially a natural occurrence with a relatively small chance of danger to life. Yet, in 328:46, the *Mishnah Berurah* rules, in the case of a sick person who can avoid Sabbath desecration without endangering his life, "one should avoid it."

person is afraid he will lose it, it may also be handled.<sup>8</sup> If the person is holding the *muktzah* item, then he may hold on to it until he reaches his destination, or until he reaches a place where he is willing to deposit it. Tefillin fall into this category of *muktzah*. However, if one is concerned lest they be treated disrespectfully if abandoned, he can surely wear or carry them.<sup>9</sup>

B) *Muktzah machmat chisaron kis*. An expensive, specialized object which is used only for a special task is considered *muktzah*, an example being the knife used for a *milah*, or a craftsman's tools, or even items which are to be sold. These cannot be moved even if one needs their space or wants to use them for another purpose (*letzorech gufo oh mekomo*).

C) *Muktzah machmat gufo* – This is an object which is neither a utensil nor a food fit for consumption, even of animals; basically, it has no value, such as sand or stones. These also cannot be carried *letzorech gufo oh mekomo*.

D) *Basis ledavar ha'assur* – this refers to an object which is in itself innocuous but which has something *muktzah* resting on it or in it. This *basis ledavar ha'assur*, however, may also contain permitted objects. An example would be a bag containing jewelry and money. The factor which determines whether the container is considered *muktzah* (*basis ledavar ha'assur*) or not is that it depends which of the items it contains is more valuable – if the *muktzah* items are more important, then the case too is *muktzah*.<sup>10</sup>

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8. *Orach Chaim* 308:5, and in *Sha'ar Hatziyun* No. 24.

9. *Mishnah Berurah*, 31:5.

10. O.C. 310:8. *Shabbat* 47a speaks of a pan holding some dirt and also wood chips. "*Gabbei kinura agav kitma*" – If the pan with the dirt is needed for some permissible use, the pan can be



Thus, a person may have with him on Friday afternoon an attache' case, which in itself is permissible to handle. But were he to put his pen and money into that case, it might become *muktzah*, depending on what else is in the case. This is one part of the problem the traveler has to face in deciding what to do with his belongings.

**Amira le'akum** – It is forbidden to tell a Gentile to do something for a Jew on Shabbat or Yom Tov which would be forbidden for the Jew to do,<sup>11</sup> and this prohibition applies whether one tells him during the week to do it on Shabbat or whether one tells him on Shabbat to do it or even if one tells him on Shabbat to do it after Shabbat. This type of rabbinic prohibition is termed a *shvut*. In addition, it is prohibited on Shabbat to have any benefit or pleasure from work performed by a non-Jew for the sake of a Jew.<sup>12</sup> However, there are exceptions to this rule, which will be discussed hereinafter.

**Techum** – There are two types of *techum*, one of 12 *mil* (a *mil* is 2000 *amot*) and one of 2000 *ama*. A person is not permitted to go more than 2000 *ama* (roughly 7/10 mile) past the last house in the town. This is going "outside the *techum*", the halachically-defined place of residence (i.e., his town) where he was at the beginning of Shabbat.<sup>13</sup>

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moved, even with the *muktzah* woodchips in it.

11. See *Beit Yosef* 244 for the reason for this law.

12. This stricture exists because the rabbis feared that if the Jew were able to benefit from the Gentile's labor, he might be tempted next time to ask him to do work for him.

13. In *Sotah* 27b there is a disagreement between Rabbi Akiva on the one hand, who terms this a biblical proscription, while the rabbis (*chachamim*) see it as rabbinic in origin. Furthermore, the early medieval rabbis (*Rishonim*) disagree as to the intent of the *chachamim*. Some say that *chachamim* consider all questions



An individual's *techum*, the halachically-bounded area in which he is considered to be residing on any particular Shabbat, is determined by where that individual is at the onset of Shabbat, during *bein hashemashot*. If he is in a town, he can walk freely within the entire town, which is considered his *techum*.<sup>14</sup> However, if he starts Shabbat not in a town but in an open area, such as a field or on the road between cities, his movement is restricted. Obviously, someone stuck out in the open for an entire Shabbat, not able to be with his family nor to pray with a minyan, is going to suffer considerable distress. All these are going to be factored into the decision as to what he can or should do. (See *oneg Shabbat*, below).

***Bein Hashemashot*** ("twilight") – There is a complex debate in rabbinic literature as to the precise moment when Shabbat begins. Until the sun sets, it is Friday; even when the sun has set, however, it does not instantly become dark.

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of *techum* to be of rabbinic nature, but others contend that *chachamim* would agree that the *techum* of 12 *mil* is biblical and are only disagreeing with Rabbi Akiva about the 2000 *ama techum*. Rambam 27:1 and *Smag* consider it biblical, but *Ba'al Hamaor*, Ramban, and Rosh disagree. Ramo 404:1 cites the strict view, but in a manner which is ambiguous as to his conception of the normative practice.

14. *Shlomo Hamelech* instituted a device called an *eruv techumin*, which enables an individual to go another 2000 *amot* beyond his original *techum*. There are two ways such an *eruv techumin* can be established: (a) the individual can go to the desired location on Friday and remain there until Shabbat begins, at which time he may declare "This spot is where I live", and that permits him to walk on Shabbat itself another 7/10 of a mile beyond that point. Or (b) he can go outside the town before Shabbat (but less than 2000 *ama* from town) and deposit a certain amount of food there, and this permits him to walk another 2000 *ama* beyond the food on Shabbat.

When it is dark enough so that three stars are visible, it is certainly Shabbat. The interim period, between sunset (*sh'kia*), when it is still certainly Friday, and the emergence of the stars (*tzeit hakochavim*), when it is definitely Shabbat, is called *bein hashemashot*. The debate concerns the precise time during this interval when Shabbat starts, and the halachic rulings on this point will be of prime significance in our study.

**Oneg Shabbat** – The "joy of Shabbat" is a very important aspect of Sabbath observance.<sup>15</sup> If a person has to spend Shabbat in a lonely motel, without food or companionship, he will obviously be totally lacking in any *oneg Shabbat* (not to mention that he will be fasting on Shabbat, which is proscribed), and this situation also figures heavily in halacha. Nevertheless, Sabbath observance is one of Judaism's primary directives. Consequently, the option of spending Shabbat in a Jewish community, even if it is not his own home, may be a much better option than employing numerous *heterim* in order to reach his desired destination.

**Accident or Negligence** – An essential question we will have to address is whether it makes a difference, in deciding the ultimate halachic solution, whether the delay encountered by the traveler was foreseeable or resulted from a sudden, unpredictable situation. Is the normative ruling (*halacha lema'aseh*) affected in any way if the delay could

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15. In *Eruvin* 63b, the Gemara writes that "anyone who sleeps in a room where a man and his wife are sleeping, about him the verse says 'the wives of my people you have expelled from their homes of pleasure'" (since his presence prevents their engaging in conjugal relations). This applies even if the woman is *niddah* and they are prohibited from engaging in marital intimacy. The rabbis consider that just the reality of spending time together constitutes *oneg Shabbat* for them.

have been foreseen and avoided, or does it stay the same regardless of whether the delay arises from a sudden calamity or from a predictable situation? Furthermore, if this predicament is a not-unusual one for this particular commuter, who always races the sun home on Friday afternoon, should that habit also impact upon the halachic conclusion?

### Leaving Early On *Erev Shabbat*

Ensuring that one is able to observe Shabbat properly is of paramount importance. This consideration was definitely in the minds of the rabbis when they taught, in *Shabbat* 19a, that "it is forbidden to set sail on a trip already three days prior to Shabbat" with the exception that "to travel from Sidon to Tyre by boat, it is permitted to embark even *erev Shabbat*."<sup>16</sup> The reason for this exception, given

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16. The Rif, *ibid*, explains that since sea sickness usually occurs within the first three days of travel, it is forbidden to put oneself in a situation where he will not be able to enjoy Shabbat. The *Baal Hamaor* opines that since some danger might arise in the first few days, it is wrong to put oneself in a situation where possibly he will have to desecrate Shabbat in order to save his life. In a similar vein, the *Iggerot Moshe O.C. I*, 131 rules that if a doctor is fairly certain that his patient will be in mortal danger on Shabbat, it is the doctor's obligation to be at the patient's bedside from before Shabbat, so as not to have to desecrate Shabbat by riding on Shabbat to save a life.

However, *Shemirat Shabbat Kehilchata* 40:22 quotes Rabbi S.Z. Auerbach as disagreeing with this ruling of Rav Moshe. He reasons that on the one hand, the doctor has a mitzvah to be home on Shabbat with his own family, and on the other hand the doctor has not done anything to bring about the need for *chilul Shabbat*. Thus, he allows him to remain at home until he is called to the hospital.

The *Shulchan Aruch* 248 permits one to embark on a sea voyage

by both *Beit Yosef* 148 and *Magen Avraham*, *ibid*, no.5, is that it is a short trip, doable in a day if the wind is favorable; even in the absence of such a wind, it is permissible.

Nevertheless, the Talmud in *Pesachim* 50b praises the inhabitants of a certain town who were careful not to travel from Tyre to Sidon on *erev* Shabbat. Rashi explains that even though the trip could be done within the day, and even though that day was the market day, they refrained from going so that they would not be distracted from preparing for Shabbat. In this vein, the *Shulchan Aruch*<sup>17</sup> rules that "in a place where there is a custom not to sail at all on *erev* Shabbat, even for a short distance, one may not sail." In talmudic times, it was the custom to blow the shofar on Friday afternoon, to warn the townspeople that it was time to leave work and head for home.<sup>18</sup>

The Gemara in *Succah* 44 further rules: "One does not go on *erev* Shabbat more than three *parsaot*."<sup>19</sup> Since in the talmudic equation a person was able to walk 9 *parsaot* in a day, effectively this dictum is telling us that a person cannot leave for his destination on Friday later than 1/3 of the day. When people were traveling on foot, the measure was how long it takes to go 3 *parsaot*; today, using modern vehicles of transportation, the measure of how much one can travel would still be 1/3 of a day. Consequently, the traveler has to take into consideration not only the distance

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within three days of Shabbat if he is going for the purpose of a mitzvah. Even though he might end up lacking in the mitzvah of *oneg Shabbat*, he will be performing another mitzvah, and "one engaged in a mitzvah is absolved from performing another mitzvah."

17. 148:1.

18. *Shabbat* 35.

19. See also *O.C.*249:1.

and the length of time it takes to travel, but must also factor in weather or other conditions which might affect his ability to reach the goal on time.<sup>20</sup>

This teaching clearly illustrates the Gemara's concern that all Jews be able to spend a pleasant Shabbat. Leaving late on Friday afternoon flies in the face of this talmudic desideratum. All commuters and travelers have the responsibility to leave for their destinations in plenty of time to arrive safely and without anxiety. This imperative is reflected in the halachic ruling by *Shemirat Shabbat Kehilchata* (42:24) that one has to be careful not to travel by car after 1/3 of the day has passed.

The words of *Mishnah Berurah* 248:2 are significant:

The later rabbis (*Acharonim*) have written that in any case one must be careful (*lechatchila*) that he should not go or travel close to evening time since at times people come to transgress because of this and come to a situation of Sabbath desecration....and also sometimes it happens that he doesn't arrive at his home while it is still daylight until it is virtually dark, and there is considerable Sabbath desecration in carrying and bringing in....and he should hasten to spend Shabbat even in a village [along the way] and let his "evil inclination" (*yetzer*) not incite him to sin by saying "There's still plenty of daytime left,

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20. The *Aruch Laner Succah* 44 notes that Chazal set down a blanket time, without taking into consideration the changing conditions during the seasons. They did not differentiate between summer and winter, between rainy or sunny seasons, simply ignoring these factors. Their rule is "*lo p'lug*", across the board – one should not travel more than the time it takes to go 3 *parsaot*.

and the road is good...."<sup>21</sup>

Since many persons are constrained, due to their need to earn a living, to leave their work later than 1/3 of the day, the *Aruch Hashulchan* (251:4) tries to find a way to excuse their behavior. He reasons that in talmudic times, preparing for Shabbat was a lengthy process in which all participated. Nowadays, however, since generally it is the women who prepare at home while the men are at work, perhaps the men don't need to leave as much time as previously. Nowadays, actually, it is not so much the preparing for Shabbat which poses a problem, but rather the travel time.

After discussing various laws about what can or cannot be done on Friday, the *Aruch Hashulchan* (249:3) adds:

And certainly with a train, one must carefully calculate [the time]....and therefore if the arrival time of the train is close to sunset, he should be careful to get off at the previous stop, for very often the Satan "accuses" (*mekatreg*) on *erev* Shabbat [i.e., Satan puts the person in a situation where he is likely to sin]...and let him be one of those who sanctify the Shabbat and not G-d forbid one of those who desecrate it.

There is a distinction evident in the rabbinic attitude towards someone who rarely finds himself stranded and someone who habitually finds himself racing the sun on

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21. See *Biur Halacha* 248 s.v. "*Ain*", who writes that if a person is going to perform a mitzvah, he may travel all day on Friday. See also *Ramo* 248:4, "Any place that a person goes to do business or to visit a friend, is all considered to be a matter of mitzvah and not just an optional matter. Only if he is going for a stroll [is it considered not a mitzvah]."

Friday afternoon. As far as the *Shulchan Aruch* is concerned, relying on a statement in Gemara *Pesachim* 50a, someone who does work *erev* Shabbat after *mincha* time "will not see a sign of blessing" in his efforts.<sup>22</sup> The Ramo considers that this applies only to someone who habitually works this late on Friday, but not to someone who occasionally does it.

It is the opinion of many *poskim* that all the above *heterim* (dispensations) may be utilized only if the person found himself in this predicament on Friday afternoon by sheer, unforeseeable accident. He may not avail himself of these leniencies if he is delayed through his own fault – i.e., he left his office late, etc., as is clearly spelled out in the *Shulchan Aruch* 266:8: "However, someone who set out from his place close to sunset," the rabbis did not offer him any of the lenient options.<sup>23</sup> For the person who is genuinely caught in an unusual situation which he could not normally have foreseen, the rabbis were ready to relax their strictures, but not for someone who neglected to leave himself enough time.

Nevertheless, the *Mishnah Berurah*,<sup>24</sup> citing *Eliahu Rabbah* in the name of Rashba, does reluctantly allow even one who left late and is stuck through his own fault to utilize the leniencies.<sup>25</sup>

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22. 251:1. He also brings two opinions whether the talmudic text refers to *mincha gedola* or *mincha ketana*.

23. Of course, it is necessary to define "he left in time." Does one have to include in this time the possibility of a flat tire, or a missed connection, or an accident on the road?

24. Ibid, no. 22.

25. The Ramo in 266:12 allows a person who suddenly realizes on Shabbat that he has money in his pocket to go to any room in the house and deposit the money (which is *muktzah*) there, since



### When Does Shabbat Start?

Having defined in broad terms some of the halachic questions which may impact on the traveler's dilemma, let us now turn to the specifics of the situation:

According to Jewish law, a person is supposed to stop all work at sunset. (It is a popular misconception that Shabbat starts at sunset. In fact, it starts a short while thereafter; the exact time of Shabbat onset is a matter of dispute, which will be explained later in the text). However, the Torah actually permits one to work until the stroke of Shabbat (less *tosefet Shabbat*), and it is the rabbis who ruled that from sunset until the biblically-mandated onset of Shabbat, work is forbidden.<sup>26</sup> This interim is called *bein hashemashot*. In times of emergency or great need – such as the dilemma of our stranded traveler – the rabbinic laws can often be waived. Biblical law is never waived unless it is a matter of life and death (*pikuach nefesh*). Thus, it

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the rule of *muktzah* is that the person who is holding *muktzah* is permitted to put it away. *Kaf Hachaim* no.58 rules that since today no one finds himself ever in a *reshut harabbim* – even the outdoors is considered a *carmelit* – that person can continue walking outside with money in his pocket until he reaches his final destination, and then deposit the *muktzah* there. This leniency of course only applies if he doesn't feel safe leaving his possessions with a non-Jew.

The *Mishnah Berurah* 301:33, s.k. 123, writes that "they [the rabbis] permitted biblical prohibitions [done] *kil'achar yad*." *Nishmat Avraham*, *Hilchot Shabbat* 338, derives from that the logical conclusion that if a person is concerned about his money, "certainly then, he would be upset where it concerns his body; furthermore, because of pain to his body, [the rabbis] permitted [certain types of] work."

26. They did this since there is a requirement for *tosefet Shabbat*, adding some time to the Sabbath day, both before and after the strict delimitations of the day.



becomes of paramount importance to define how much leeway there is after sunset, when certain activities may still be permissible in this emergency.

The essential question is to pinpoint when day ends and night starts, and this will determine when we can be lenient and when we must be strict. In a nutshell, Rabbenu Tam holds that day ends 40 minutes after the *sh'kia* (sunset), while the Gra maintains it ends approximately 10 minutes after *sh'kia*. In the following discussion, we will examine how each arrived at his conclusion, and consider the differences which result from each of the respective halachic positions.

The Gemara (*Shabbat 34b*) learns that "it is questionable whether *bein hashemashot* is day or night." Therefore, the Gemara concludes, one must practice all the stringencies of both Friday and Shabbat during that questionable period. This means that on Friday, we consider *bein hashemashot* to be nighttime, meaning that this period is treated as Shabbat. By the same token, on Shabbat we treat that interim as Shabbat (which is why Shabbat is not considered over until after *bein hashemashot* – i.e., *tzeit hakochavim*).

Furthermore, the Gemara asks, when does *bein hashemashot* start? "From sunset" is the answer of Rabba, that is when *bein hashemashot* starts. Rabbi Yosef, however, opines that *bein hashemashot* begins later, when the sky near the eastern horizon has darkened. This controversy is further complicated by the opposing opinions of the Vilna Gaon (Gra) and Rabbenu Tam about the definition of "sunset", "*sh'kia*". According to the Gra,<sup>27</sup>

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27. *Orach Chaim* 261:2. See *Biur Halacha* there for a complete summary of all the opinions.

sunset is when the sun sinks below the horizon. But Rabbenu Tam maintains that there are *two* sunsets: the first, when the sun sinks below the horizon and the second, when the rays of the sun no longer give light, which will occur a considerable time after the ball of the sun is no longer visible.

How long the *bein hashemashot* interval lasts is a function of their respective positions: According to Rabba, explaining the teaching of Rabbi Yehudah, the duration of *bein hashemashot* is no longer than it takes to walk  $3/4$  of a *mil*.<sup>28</sup> However, in a different discussion in the Talmud, in *Pesachim* 94a, Rabbi Yehudah expresses his opinion that actual "nightfall" is not until after *bein hashemashot*, which he defines as the time it takes a person to walk 4 *mil*. This apparent contradiction is resolved by Rav Sherira Gaon, Rav Hai Gaon, and the Gra in the following way: they opine that originally Rabbi Yehudah thought that night doesn't begin until after the time it takes a person to walk 4 *mil*, but that subsequently he changed his mind and concluded that it was only the time for walking  $3/4$  *mil*. Consequently, they consider the text in *Shabbat* declaring it to be  $3/4$  *mil* to be his authoritative opinion.

Rabbenu Tam, however, views the contradiction between the two statements of Rabbi Yehudah as arising from the fact that there are two different types of "sunset". When Rabbi Yehudah says sunset and night are separated by an interval of time which it takes to walk 4 *mil*, he is referring to the sunset when the sun slips below the horizon. When he says that it is the amount of time it takes to walk  $3/4$  *mil*, he is referring to the interval after the "second sunset",

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28. There is a difference of opinions about how long it takes to walk a *mil*: 18, 22, or 24 minutes.  $3/4$  of a *mil* would therefore be between 13 to 18 minutes.

when even the sun's rays have ceased lighting up the sky. The western horizon will appear red at this time, and it is at this moment that *bein hashemashot* begins, according to Rabbenu Tam.

According to the *Geonim*, Rif, Rambam, and the Gra, *bein hashemashot* ends 13 minutes after sunset.<sup>29</sup> According to Rabbenu Tam (followed by Ramban and Rashba), from sunset (the "first *sh'kia*") until the amount of time it takes to walk  $3\frac{1}{4}$  *mil*, which is about 58 minutes, is totally day. At that point, *bein hashemashot* begins, and continues for the amount of time it takes to walk  $\frac{3}{4}$  of a *mil*. According to Rabbenu Tam, night begins approximately 72 minutes after sunset.<sup>30</sup>

Further complicating the issue is the fact that this interval between sunset and night varies:<sup>31</sup> the further one is from the equator, the longer it takes for full darkness to descend. It also depends on the time of year, for in the summer it takes longer than in the winter. According to the Gra, all the calculations cited in the Gemara apply only to the Land of Israel and only on the vernal and autumnal equinoxes. At any other time and in any other place, the times will have to be adjusted.

Additionally, there is a universal practice to add some

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29. *Aruch Hashulchan* 261:5. He says there is yet another opinion, of the *Yereim*, who holds that *bein hashemashot* begins before sunset, an opinion universally rejected (261:6).

30. Rambam, in *Pirush Hamishnayot, Shabbat*, writes "from sunset until one star is seen is day." However, in *Mishneh Torah, Hilchot Shabbat* 5:4, he writes that *bein hashemashot* begins immediately after sunset.

31. See *Biur Halacha*, where he discusses whether an "hour" in this context is always a 60-minute hour or whether it is a "halachic hour".

time before and after Shabbat and Yom Tov, and consider it part of that day. This is called *tosefet Shabbat*.<sup>32</sup> Although Rambam is of the opinion that "*tosefet Yom Tov* is only on Yom Kippur but not for Shabbat or Yom Tov,"<sup>33</sup> the normative practice is to add some time before and after Shabbat; even a very small amount of time is sufficient.<sup>34</sup>

The *Shulchan Aruch* writes that *tosefet Shabbat* begins "from the beginning of sunset, when the sun is no longer seen on land until the time of *bein hashemashot* and this [amount of] time is [the time it takes to walk] 3 1/4 *mil*."<sup>35</sup> Clearly, in the controversy about when Shabbat starts, the *Shulchan Aruch* has ruled in line with the view of Rabbenu Tam. Nevertheless, the *Mishnah Berurah*, no. 23, in explaining that "the measure of *bein hashemashot* is 3 1/4 *mil*" (about 58 minutes), adds that many rabbinic opinions conflict with that of Rabbenu Tam and, therefore, he rules,

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32. See *Yoma* 81b and *Orach Chaim* 261:2. Since we have mentioned the practice of adding to Shabbat at its onset, it is proper to note that one should add on at the end of Shabbat as well. According to Rabbenu Tam, Shabbat does not end until 72 minutes after sunset. His calculation is based on how long it takes to walk 3 1/4 *mil* after sunset, at which time *bein hashemashot* begins, and then the time for walking 3/4 *mil*, which brings us to nightfall. This same calculation, of course, works on Friday afternoon as well, which means that according to Rabbenu Tam one could technically do work until 1/4 *mil* time before the stars are visible.

33. *Hilchot Shevitat Assor* 1:6; *Hilchot Shabbat* 5: 3.

34. *Tosafot Beitza* 31, s.v. "Deho"; *Rosh, Rosh Hashanah* 9a, s.v. "VeRabbi Akiva"; *Rosh*, beginning of chapter 8, *Yoma*, note 8.

35. *Shulchan Aruch* I, 245; see *Yabia Omer* 2:21; see also the Siddur of the author of *Shulchan Aruch Harav, Seder Hachnasat Shabbat*, who discusses the seeming contradiction between this ruling of *Shulchan Aruch* and that of the *Shulchan Aruch, Yoreh Deah* 261:9. See further footnote 10 in *Shemirat Shabbat Kehilchata* 58.

One should be very careful not to do work after the sun is not visible to our eyes, not even an activity for a mitzvah such as lighting the candles...and it is preferable (*lechatchila*)...that one should light candles from the time that the sun is [visible] at the top of the trees...One who is strict with himself and distances himself from work a half hour or at any rate  $1/3$  of an hour before sunset is praiseworthy....<sup>36</sup>

After this necessarily condensed survey of the complex question of when Shabbat really starts according to the Torah as well as the rabbinic position, let us try to define the "bottom line." Rav Moshe Feinstein, after citing all the opinions, concludes as follows:<sup>37</sup>

Certainly we should follow the stringencies of both views...and indeed this was our custom in our places [in Europe]...and therefore there are those who have the custom to light the candles about a quarter of an hour [before *sh'kia*] and some a third [of an hour]. And at the conclusion of Shabbat one has to wait 72 minutes after sunset...But not all places are equal on this point...[There are places] where 50

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36. Ibid. See also *Aruch Hashulchan* 261: 8.

37. *Iggerot Moshe, Orach Chaim* IV:62. He also applies this principle to the question of a mourner and rules that if one begins sitting *shiva* up till 40 minutes after sunset, that time counts as the first day. Additionally, if a woman makes a *hefsek taharah* until nine minutes after sunset, it is acceptable. To end a fast day, Rav Moshe says one can wait 41 minutes after sunset if there is a great need, but others should wait 50 minutes. For a review of all the views on these matters, see *Sefer Habrit*, pp. 78-100, who reviews these questions insofar as they determine when to make a *brit* on a baby born during this disputed interval.

minutes after sunset the entire sky is already full of stars and it is as dark as the middle of the night...and because of this, one should permit people who have a need [to end Shabbat] after 50 minutes [after *sh'kia*]. And as far as the leniency of *bein hashemashot*...things which the rabbis prohibited do not apply during *bein hashemashot*... Therefore, one may be lenient during the time when it is still a weekday according to Rabbenu Tam....inasmuch as in a situation of doubt on rabbinic law we find that in a time of stress one can rely even upon the opinion of only one rabbi<sup>38</sup>...and we may assume that they would permit [it] during the time that it is weekday according to Rabbenu Tam.

This ruling of Rav Feinstein, allowing one to follow a minority opinion due to the difficult situation he is in, takes into account a principle which can be found throughout Jewish jurisprudence – what to do *beshe'at hadechak*.

### ***She'at Hadechak***

In a society geared to following the strict dictates of halacha, there will inevitably arise situations wherein the individual needs to find a *heter*, a lenient opinion which assures him that he will still be acting within the purview of the law, even if not at the optimal level. When a person is in such a situation, it is called "*she'at hadechak*", a time when he is under pressure. A question which arises in all areas of Jewish practice is, how far can the halacha be

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38. *Shach, Yoreh Deah* 242, writes that sometimes one may rely on the opinion of a single rabbi who is in the minority, when it is a rabbinic question. See further, in the text.

stretched and yet be legitimate? In *Parashat Mishpatim* the Torah bids us "follow the majority"; yet there are times when we find the talmudic debate concluding that "Rabbi X is worthy of being relied on, in a time of pressure,"<sup>39</sup> meaning that even though he is in the minority, or perhaps even the only one expressing this idea, he is of such outstanding stature that, in a pinch, it is permissible to rely on his singular view.

But we cannot therefore assume that we can automatically rely on the minority. The Ramo<sup>40</sup> and the *Schach*<sup>41</sup> probe this issue and lay down an important rule: In a situation where "later" rabbis (*Acharonim*) dispute the ruling of "earlier" rabbis (*Rishonim*), if these later rabbis were aware of the earlier opinion and yet rejected it, we follow the later rabbis. The Ramo explains his ruling as follows:

And if it concerns ruling on prohibition or permission of something forbidden by the Torah (*d'oraitha*), the decision should tend toward the stricter view; but in a ruling concerning a rabbinic enactment, he [the decisor] should follow the lenient opinion...and also [in a case of] one [opinion] against many, we follow the many in every situation. But we don't rely on the words of a minor rabbi (*katan*) even in a situation of great pressure unless it is also a [question of] great [financial] loss [or similar

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39. See, for example, *Niddah 9b*. *Sdei Chemed*, part IV, p. 419, questions whether this rule applies only to debates within the Gemara or may be utilized in other situations as well. See also *Baer Heitev Even Haezer* 127:1.

40. *Choshen Mishpat* 25:2.

41. 242:73.



great need].<sup>42</sup>

This ruling is a quote from Rashba, a major halachic authority of the Middle Ages (*Rishon*).<sup>43</sup> There is considerable debate among later rabbis about the intent of the Rashba in this statement. Did the great rabbi intend to state that in times of great need one can indeed reject the majority opinion<sup>44</sup> and follow only one voice, even on a question of a biblical imperative<sup>45</sup> – or was he merely allowing us to do so on rabbinic questions?<sup>46</sup> The preponderance of *poskim* has concluded that we can rely on the minority opinion only in a case of rabbinic law and

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42. Ramo, *ibid*. He does add that the minority and majority opinions have to be expressed by rabbis of the same stature in their wisdom and importance. One cannot rely on the opinion of a rabbi of insignificant stature.

43. *Shut Rashba*, I:253.

44. The Chazon Ish, *Kelaim I*, s.v. "Amnam" and *Iggerot I*, 32, is of the opinion that the only time we follow the majority is in a *beit din* setting; but we cannot consider a majority of written opinions, inasmuch as we do not know how many rabbinic books might have been lost, which would alter the balance of majority/minority. Additionally, many *poskim* did not consign their opinions to print.

45. This is the view of Bach, cited by Schach (*Orach Chaim* at end of 242). See also the Bach, *Orach Chaim* 244, where he relies on the opinion of Rabbenu Tam in a post fact situation, "since it already happened." This is also the ruling of Gra, *Choshen Mishpat* 25; see also *Chochmat Betzalel*, *Niddah* 9b, who opines that reliance on a single rabbi's opinion in times of great need is only acceptable post facto.

46. Shach, *Yoreh Deah* (end); *Idem*, *Orach Chaim* 242, s.v. "Vechi tomar". He reasons that if we must always follow the majority opinion, there would be no purpose in listing the minority opinion, yet the Talmud always does so. He notes that this point is made by the Talmud itself, in *Horiot* 11.



only where there is a great need.<sup>47</sup> Furthermore, *poskim* hold that one can only rely on a minority opinion cited in *Shulchan Aruch*; if the *Mechaber* (author) of *Shulchan Aruch* did not see fit to include this minority position, then we cannot rely on it even in *she'at hadechak*.

The upshot of this debate, insofar as it affects the situation we are studying, is that on a question of rabbinic law it is possible to rely even on a minority opinion in case of great need. But we do not have that permit when dealing with a biblical ordinance.<sup>48</sup> In practical terms, it appears that if someone is enroute, Rav Moshe Feinstein

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47. See *Pitchei Teshuva, Even Haezer*, 169:24, on the question of how a left-handed person performs *chalitza*. Rabbi Akiva Eiger (205) also relied on a minority opinion in the case of a woman who had remarried after the death of her husband, thinking she did not need *chalitza* since her husband had fathered a child although it had died. He struggles with the decision, "for although it is right and proper to search for a leniency so that this woman would not need to leave her [new] husband, I find it difficult to be lenient against the *Shulchan Aruch*." Ultimately, though, he concludes, "Rabbi X is worthy of being relied on [to be lenient] on a rabbinic matter in times of great need." A similar inclination is found in the *Noda Biyehudah (tanina, Orach Chaim 33)*, where the author refused to rely on the opinion of only one rabbi on a question of Sabbath violation. It is difficult to understand this responsum for two reasons: In responsum #29 he writes that the entire Jewish people rely on the opinion in question; furthermore, he notes, that even if one wants to rely on the single opinion for telling a Gentile to do work on Shabbat, "*milta zutrata he*," it is a minor matter and it is in a situation of great need concerning a rabbinic law.

48. As far as the rule of jurisprudence that "the law follows the lenient opinion concerning an *eruv*," which is applied even when we are dealing with a minority opinion, that does not apply here, inasmuch as the Gemara in *Eruvin* 46b indicates that this rule applies only to an *eruv chatzerot*, not an *eruv techumin*.

considers that he may continue in his conveyance for a maximum of 40 minutes after sunset, since Rabbenu Tam considers that this interval is still day. Although this ruling will be helpful for someone who is really quite close to home as Sabbath approaches, for those further away, another solution must be sought.

### *Amira Le'akum*

Since we live in a culturally diverse society, an obvious solution to the problem of a Jew's being caught in mid-trip as Sabbath approaches is to ask a non-Jew to drive him the rest of the way home. Alternately, a passenger on a bus might rationalize that since a non-Jew is driving the bus, he may stay on it. Let us investigate the validity of these assumptions.

The standard rule is that a Jew may not ask or tell a non-Jew to do work for him on the Sabbath, nor generally may he benefit from such work. Nor may a Jew tell a Gentile before Shabbat to do the work on Shabbat.<sup>49</sup>

It is necessary to define the parameters of this principle. *Shulchan Aruch* O.C. 307:5 discusses when a Jew may ask a non-Jew to do work for him on Shabbat, and concludes that "something which is not a 'Sabbath labor' (*melacha*) and is only forbidden on Shabbat because of a *shvut* (a rabbinic stricture), it is permitted for a Jew to ask a non-Jew to do for him on Shabbat,<sup>50</sup> but only if he feels a little ill or

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49. *Orach Chaim* 244.

50. See *Eruvin* 67a: It is permitted to tell a non-Jew to bring warm water which is needed for a *milah*, carrying it through an unenclosed yard. Rambam, *Hilchot Shabbat* 6 teaches that the precedent cited in *Eruvin* is the rule for any mitzvah, applied to a "*shvut*" of the rabbis.. Tosafot in *Bava Kamma* 80b, however,

because he has great need for that thing, or because it is necessary for the performance of a mitzvah."<sup>51</sup>

There are a number of factors which mitigate the severity of asking a non-Jew to do work for one on Shabbat:

- 1) If the Gentile's work was performed for a sick person or for a Jewish child, others are also permitted to benefit from it. This means that if there are Jewish children on the bus, it becomes easier to find an excuse for using non-Jewish labor.
- 2) If the majority of people who will benefit from the Gentile's action are not Jewish, then we consider that the work is not being done for the sake of a Jew; consequently, Jews may benefit from this action. This leniency also applies if the Gentile is doing the work for his own sake – the Jew may also benefit. (An example would be if a non-Jewish driver drives a bus to the end of the route, which is something he wants to do so that he can finish his day's work. It is not considered that he is driving the bus to benefit a Jew who happens to be on it.)
- 3) If the benefit to the Jew is indirect, it is permitted, since he benefits not from the prohibited act but from derivatives of it. An example would be if a Gentile opened a can in a prohibited way on Shabbat, the Jew could eat its contents, for he benefits from the food, not from the opening.
- 4) If the Gentile performs an action for the benefit of a Jew which is only rabbinically prohibited, then in

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limit the permit only to override a *shvut* concerning the mitzvah of *milah*.

51. In O.C.331:

case of great need, the Jew may benefit from it.

5) A non-Jew may even be asked to do an act which is biblically forbidden in order to prevent a group of Jews from violating the halacha. An example would be asking a Gentile to fix a broken *eruv* on Shabbat.

6) During *bein hashemashot*, one may ask a Gentile to do any activity provided that it is necessary for Shabbat and that it is for a mitzvah.

7) If the non-Jew performs the act for his own benefit (*ada'atei denafshei*), it is permissible to ask him to do it. (As an example, if someone brings a suit to the cleaner's an hour before Shabbat and asks for it to be ready right after Shabbat, it is forbidden because the Gentile is doing work for him on Shabbat. But if he takes the suit in on Friday morning and says he'll pick it up on Monday, then even if the Gentile cleans it on Shabbat, it is acceptable, because the Gentile is doing it when it is convenient for him, not to accomodate his Jewish customer.)

8) It is the opinion of the *Baal HaIttur*, cited by Ramo in 266:2, that one can instruct a non-Jew to do even a biblically prohibited action for the sake of a mitzvah. The Ramo writes that there are those who permit telling a non-Jew even to kindle lamps for the Sabbath meal, but he counsels being strict on this "unless there is a great need," inasmuch as most *poskim* disagree with this contention. In 276, the Ramo notes that there are those who are lenient on this matter (of asking assistance from a Gentile) "even where the action is biblically forbidden," and he rules that this is normative practice. Following this ruling, it would be permitted to ask a non-Jew

to drive a car home for the Jew.<sup>52</sup> (Elsewhere, the Gemara speaks about giving one's possessions to a non-Jew to take home for him, which is violation of the rabbinic rule against telling a non-Jew to do work on Shabbat. But here the case is of a person stranded on the road, and the Ramo seems to be permitting him to have the non-Jew drive him home [which is a *d'oraita*, burning gas] so that he can fulfill the mitzvah of *oneg Shabbat* for his family.)

If a Jew is riding a bus which is still enroute when Sabbath approaches, when is it legitimate to rationalize that the bus is being driven for non-Jews, not for him? There is a difference whether the majority of passengers are Jews or Gentiles. If the majority are not Jewish, then the halacha does not consider that the bus is being driven for the sake of the Jew, which makes it easier to allow the Jew to stay on it. Moreover, if the bus has a standard, published schedule to which it adheres, regardless of how many passengers are on it, then even if the majority of the passengers happen to be Jewish<sup>53</sup> or even if he is the only one on the bus, nevertheless, the halacha considers that the bus is being operated for non-Jews (assuming we are speaking of a standard bus company, not one that is operated primarily by and for Jews), and the Jew may stay on it even as Sabbath approaches.<sup>54</sup>

A practical application of this principle would be for a

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52. See *Mishnah Berurah* note 24, who cites various opinions about the propriety or desirability of asking one Gentile to ask another Gentile to do the act; as an example, asking a dispatcher to call a taxi to drive one home.

53. S.A. 276:2.

54. *Chelkat Yaakov* I 35:7; *Shemirat Shabbat Kehilchata*, 30:50, note 4.

traveler on the subway between Manhattan and Brooklyn, or the commuter on a bus from the city to Monsey – they could stay on the bus without being concerned that they are benefitting from labor done on Shabbat by a Gentile for the benefit of a Jew.<sup>55</sup> Even if the Jew is the last one on the bus, it is still not considered that the bus is being operated for his benefit, for the driver is doing it for his own sake – he cannot return to the garage until he deposits all the passengers.

Furthermore, the *Shulchan Aruch* O.C. 308:18 rules that "in a situation of damage for many people, the rabbis did

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55. It is reported (in *Emet leYaakov*, *Shulchan Aruch* 266) that Rav Yaakov Kamenetzky was asked in 1947 about what to do in the following situation: A man wanted to spend Shabbat in a Jewish neighborhood in New York, but he would have to get there by subway train after sunset; the alternative was to spend Shabbat by himself. Rav Yaakov answered that as long as he got on the train before candle lighting time (perhaps the author meant, before sunset?), without carrying anything with him, he could stay on the train until he reached his destination, regardless of the number of other passengers. He saw no violation in the extra weight since the Jew would have entered before Shabbat, nor did he think that the conductor would be doing anything extra because of the Jew; furthermore, he felt there was no problem of *marit ayin* (misleading appearances) because we are unable to add to the areas of *marit ayin* which our early rabbis stipulated. However, Rav Moshe Feinstein (*Iggerot Moshe Yoreh Deah* I, 43) writes that he definitely considers this situation as falling within *marit ayin*, and "*chas veshalom*" it is forbidden.

In *Iggerot Moshe* O.C. II:95, p.288, s.v. "*Ubadavar*": Rav Moshe Feinstein rules that if a Gentile enters an elevator, then technically a Jew could ride in it too, but it shouldn't be done because of *marit ayin*. He adds that he spoke with engineers who told him that every extra person causes more electricity to be used, which in turn may make it *assur* to ride the elevator even if other passengers are not Jewish. It would then be more serious than only *marit ayin*.

not legislate a *shvut*." This seems to imply that if a non-Jew is driving the bus (which is a *shvut*) and all or most of the passengers are Jewish, it should be permitted to continue on that route, since otherwise there would occur loss for a substantial number of people (*hezek de'rabbim*).

But what if the driver of the bus or taxi is himself a Jew? Certainly one is precluded from benefitting from work done by a Jew on Shabbat. Does that mean that the Jewish passengers have to get off? We can find guidance from a statement in the Gemara: R. Meir says that if a Jew deliberately cooks on Shabbat, another Jew is not permitted to eat it, but if the cooking is done accidentally, he may eat. By extension, this applies to all forbidden activities which are deliberately performed.<sup>56</sup> However, Rabbi Yehuda holds that if the food was cooked accidentally on Shabbat, a Jew may eat it after Shabbat, but if done deliberately, it is forever forbidden. Although the *Shulchan Aruch* agrees with the statement of R. Yehuda,<sup>57</sup> the Gra follows R. Meir, allowing one to benefit from Sabbath work performed unintentionally. The *Mishnah Berurah* concludes that in case of great need, one may rely on the Gra's position.<sup>58</sup>

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56. *Chullin* 15a. Ramo, 318:1 extends this to all forbidden work done on Shabbat. *Iggerot Moshe Orach Chaim* II, 63, responds to a question about a house owned by a Jew and rented out to non-observant Jews. He rules that it would be forbidden to hire a Gentile to heat up water for the tenants on Shabbat unless the worker also has an apartment in the building; if the janitor does not live in the building, then the Jewish landlord should tell him he is not obligated to heat up water on Shabbat. If he decides to do it on his own, in order to get tips from the tenants, that is permissible, since it is "*ada'atei denafshei*" done for his own benefit.

57. Ibid. *Mishnah Berurah* note 7.

58. Ibid. See *Iggerot Moshe Orach Chaim* I 33 and *Even Haezer* II 20; *Binyan Tzion* 23.



We may assume that if a Jew is driving the bus, he is in the category of someone who is not deliberately transgressing: the majority of non-observant Jews today fall into the category of *tinok she'nishba*, that is, a person who was brought up in a secular environment and does not know the laws of Shabbat nor the requirements of Judaism. He does not knowingly violate the Sabbath, nor consciously intend to make a statement thereby that he does not believe in G-d's creation of the world in six days. Thus, if there is a great need, one can even stay on a bus being operated by an ignorant, non-observant Jew.<sup>59</sup>

Consequently, what to do depends on the situation: if the bus is being driven by an Orthodox Jew (as is the case in Jewish-operated bus lines) and due to unforeseen circumstances, the bus is delayed, he certainly cannot continue driving beyond the time we have indicated. If the driver is a non-Jew (or perhaps, as explained above, a non-observant Jew ignorant of the laws), who wants to finish his route so that he can return home, it would be permissible for the Jew to stay on the bus until *bein hashemashot* or perhaps even until they reach their destination.

### Additional Expenditure Of Energy

This brings us to the question of whether it is permissible for a Jew to be sitting in a bus on Shabbat – even with all the *heterim* we have noted – and possibly causing it to burn more fuel by his added weight?

The *Tiferet Yisrael*,<sup>60</sup> writing about ships in the modern

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59. *Iggerot Moshe Yoreh Deah* I:160. However, in *Even Haezer* I:82:11, Rav Moshe Feinstein is not so sure that children of non-believers nowadays should be accorded the status of *tinok shenishba*.

60. *Kalkelet Shabbat*, 9; *Minchat Yitzchak* 3:70; *Yechave Da'at* 6:16;



age, notes that they travel on a schedule and sail whether there are passengers or not, and rules therefore that all labors done on the ship on Shabbat are not done for the benefit of the Jew on board, but for the sake of the ship owner who wants his vessel to operate a certain way. Therefore, he permits a Jew to travel on such a ship, and the same logic would apply to a scheduled bus, plane, or train.

However, this ruling is disputed by the author of *Sho'eil Umaishiv*<sup>61</sup> who reasons that the motivation for the Gentile's work is irrelevant – the more passengers, the more fuel consumed, and therefore the Jew on the bus is causing more fuel consumption on Shabbat, which is not permitted.<sup>62</sup>

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*Techumin* V:58-74.

61. *Tanina* 1:3. As he sees it, this is not simply a case of an *issur derabbanan*. In this instance, we are dealing with two instances of *shvut* – having a Gentile do work for the Jew as well as traveling outside the *techum*. A double infraction of *shvut* is forbidden, according to the Rav MiBartenura's commentary to *Eruvin*3, as well as the opinion of Rashi, *Eruvin* 35a; see also the Rashash there and *Chatam Sofer Yoreh Deah* 214. The *Shulchan Aruch Harav* 248:6 opines that even if the Gentile is working for a fixed salary (*kablanut*), nevertheless if the Jew is benefiting from his actions, it is forbidden. See also *Chelkat Yaakov* 1:35 and *Har Tzvi Yoreh Deah* 293, where R. Tzvi Pesach Frank expresses his approval of all these theories.

62. This is comparable to the ruling in *S.A.* 325:10: if a non-Jew is carrying water for himself, a Jew is not allowed to drink from it, "lest the Gentile add on for him."

For an expert opinion on whether an extra passenger on the bus causes more fuel consumption, see *Shemirat Shabbat Kehilchata*, chapter 40, footnote 155. If a person is not considered *chayav* even if he causes extra electricity to be consumed, this might be grounds for a *heter* to use an elevator on Shabbat if a non-Jew gets on first. See *Shearim Hametzuyanim Behalacha*, who quotes Rav Henkin as

The lenient opinion on this question argues that if the driver wanted to, he could use the same amount of fuel as if there were no additional Jewish passenger sitting on the bus – by going slower, the bus would use less. It is the *driver's* wish to go at a certain speed which is the cause of additional fuel consumption. Furthermore, one could argue that by the Jew's sitting on the bus he is not in any way causing the driver to do work, nor is he actually doing work himself because the bus uses fuel on its own and the driver does not have to push the pedal any harder to accomodate the additional passenger.<sup>63</sup>

It is possible to argue that the Jew's presence doesn't impact on the fact that the driver is moving his vehicle along the route anyway, and is actually doing it for his own sake (*ada'atei denafshei*) because he wants to finish and get home. The Jew is not in any way influencing his actions and should therefore be permitted to stay where he is on the bus.

It seems therefore, in view of the lenient opinions on this matter, that a passenger stuck on a bus as Shabbat approaches could find a *heter* to remain on it until he reaches his destination.

### What To Do With Wallet, Keys, Etc.

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permitting this for sick people; on the other hand, he notes, the Satmarer Rov considered it *assur*.

63. This is similar to the Ramo's comments to the ruling cited in the previous footnote: if the Jew could walk to the water himself, then even if the Gentile adds on more water for him, it is permissible, since it is not considered "benefit". Also, in O.C. 276:4, the ruling is that if a Jew is reading in a room where it is light enough to read and a Gentile puts on some lights, that is not considered "benefit" which is forbidden. This is the same

The Gemara *Shabbat* 153a, discussing what the traveler who inadvertently finds himself on the road on Shabbat can do, indicates that he may give his possessions to a Gentile to carry for him.

Someone who is traveling on the road and it gets dark [i.e. Shabbat], gives his wallet to a Gentile; and if there is no Gentile with him, he leaves it on the donkey [which he was riding].

The rationale for this, the Gemara explains, is that were the halacha not to permit him to do this, he might not be able to withstand the temptation not to suffer the monetary loss of abandoning his possessions and might carry them himself on Shabbat.<sup>64</sup> Since asking a non-Jew to do work on Shabbat is a rabbinic prohibition, while carrying on Shabbat is a Torah transgression, it is preferable to have him violate the rabbinic rule rather than the Torah one.<sup>65</sup>

The Gemara further enumerates other alternatives, if there is neither a Gentile nor an animal which might carry his property. He could give them to certain persons, such

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issue involved in entering an elevator in which non-Jews are riding.

64. The halacha forbids carrying objects on Shabbat in a *reshut harabbim*. The *Shulchan Aruch* 345:7 defines a *reshut harabbim*, and the *Mishnah Berurah*, *ibid*, questions whether today anyone is ever likely to find himself in a *reshut harabbim*. (For technical reasons, most public areas are considered *carmelit*, not *reshut harabbim*). See further, in *Kaf Hachaim* 266:8, whether the existence of a *reshut harabbim* is relevant to our question of carrying on Shabbat.

65. One wonders why there is a need to formulate a rationalization for this permit in this case, since the Gemara in *Ketubot* 60 has stated the rule that "in a situation of [monetary] loss, the rabbis did not place a prohibition." In other words, since there is potentially considerable loss to the traveler who would have to abandon his possessions, it is arguable that there exists no rabbinic

as a [Jewish] deaf/mute, a "mentally defective individual", or a minor,<sup>66</sup> for all of whom it would not be a biblical sin to carry on Shabbat.<sup>67</sup>

In line with the concern that if halacha leaves a person no options, he might transgress Sabbath law, the Ramo<sup>68</sup> permits a person to walk in the street (in a situation where he is afraid of being robbed) with his money sewn into his clothing, for fear that were this option not open to him, he might dig a hole to hide his valuables, which is a biblical transgression. The *Magen Avraham*<sup>69</sup> explains that the reason carrying the money in this way is less of a sin than digging a hole is that money sewn into clothing is not the

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66. The *Biur Halacha* 266, s.v. "Let him give it to whomever he wishes..." quotes the *Pri Megadim* who says that if the only child available is his own, he should rather give it to a deaf/mute or a mentally deficient person.

67. See *Shabbat* 153a. At the end of a lengthy discussion of the options, the Gemara adds: "Rabbi Yitzchak said, 'There is yet another [option], but the rabbis did not want to reveal it.'"

There is lack of consensus concerning how far this leniency, of giving one's possessions to someone else to carry, extends: The *Tur* 334 quotes the *Baal Haterumot* who reasons that just as the rabbis permit certain leniencies for a person who is delayed in his travel late on Friday afternoon, so too, when there is a situation of potential loss to the individual, the rabbis relax certain laws of *muktzah*. The *Tur* disagrees, and the *Shulchan Aruch*, *ibid*, records both opinions, citing the lenient one first. The *Beit Yosef*, *ibid*, does feel that if the potential loss is due to negligence on the part of the traveler, then no leniencies are available to him at all.

The same question is addressed by the Ramo in 311:33; the *Shaar Hatziyun* 152 surely permits the traveler to carry his *muktzah* possessions in an unusual manner (*kil'achar yad*); this is also the opinion of *Magen Avraham* s.k. 46.

68. 301:33.

69. *Ibid*, No. 46.

normal or usual way of carrying money, taking this action out of the category of biblical infraction, since carrying *kil'achar yad* is only a rabbinic prohibition.

We can derive from this that all prohibitions which are rabbinic in nature are waived in a situation where a person is afraid he will lose his money (for fear that if he does not have these options he might transgress a biblical prohibition). Thus, a person running late on Friday afternoon may pay a taxi driver to take him home. Or if in order to entrust his possessions to someone he needs to sign a document, he can sign *kil'achar yad* (in an unusual manner, such as with his left hand).<sup>70</sup>

The Mishnah in *Shabbat* 153b writes:

Someone who is traveling on the road and it gets dark [i.e. Shabbat], gives his wallet to a Gentile; and if there is no Gentile with him, he leaves it on the donkey [which he was riding]. When he gets to the outside courtyard [of his home], he takes those objects which may be carried on Shabbat; those which may not be carried on Shabbat, he loosens the ropes [which bind them to the donkey] and the objects fall off by themselves.

Rashi notes that he should give his money to the Gentile "while it is still day." In other words, it is the opinion of Rashi that the leniencies herein enumerated apply on Friday only. (Technically, one may not tell a Gentile, even on Friday, to do work [carry money] for him on Shabbat). Rambam<sup>71</sup>

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70. See 266:8.

71. *Hilchot Shabbat* 20:6. The *Aruch Hashulchan* 266:1 records all the rabbinic opinions on this point. He argues that even Rashi would permit giving the articles to the Gentile on Shabbat, but

and *Shulchan Aruch*, however opine that this leniency applies even once it has gotten dark. In any case, the Jew is not permitted to take his possessions from the Gentile once they reach their destination; rather, the Gentile should be asked to deposit them somewhere inside the house, and only thereafter may the Jew take them (if they are not *muktzah*).<sup>72</sup>

Since the mishnaic teaching of giving one's money to a Gentile to carry has been understood by rabbinic authorities to include permission to override not only this but many other rabbinic strictures as well (in an emergency situation), this ruling has a very broad significance, for it potentially is a far-reaching *heter* (as will be seen hereinafter).

Summing up, we conclude that a person who is caught on the road and has no time to reach his destination before Shabbat may give his possessions to a non-Jew to carry or, barring that, to a Jew to whom the halacha does not apply (*cheresh*, *shoteh*, *kattan*); or he can carry his possessions *kil'achar yad*, such as tucking his keys into his shoe, since the *heter* to carry applies only if it is not done in the customary manner, and this includes *muktzah*. "It is permissible to move *muktzah* by kicking it, since it is done in an unusual manner and this is not called moving."<sup>73</sup> Our traveler, therefore, should carry his possessions, including *muktzah*, "*kil'achar yad*",<sup>74</sup> in an

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considers it preferable to do it on Friday, if possible.

72. The *Biur Halacha* 372, s.v. "*shema yetaltel*" rules that if his possessions were brought into the house even when they were not supposed to be – such as exceeding the *techum*, nevertheless, once they are in the house he can carry them throughout the house.

73. *Ramo*, 308:3.

74. *Mishnah Berurah* 276:31.

unusual manner.

### Loss

We have noted that *Chazal* were afraid that a person would not be able to withstand the hardship of losing his possessions if he had to abandon them as Sabbath falls. Consequently, they permitted the traveler to do actions which are rabbinically proscribed in order to save his property, for fear that otherwise he might even do biblically-prohibited acts.

*Aruch Hashulchan* speculates that since this dispensation (*heter*) is a function of the person's unwillingness to lose his property, it is proper to ask whether the *heter* applies to any and all property which he has with him on his trip, or perhaps only to objects which would constitute a significant loss.<sup>75</sup> He argues that since the rabbis did not make any such stipulation when enacting their lenient ruling, we must assume that any financial loss would be included. As far as he is concerned "once they permitted it, they permitted it [totally]." The *Magen Avraham*, however, does not see it that way, opining that only in the case of significant monetary loss is a person entitled to utilize the *heterim*.<sup>76</sup>

### Other Losses

It is also necessary to clarify whether the rabbinic leniencies apply only to financial loss, or whether they include other "losses" as well, such as the loss of Jewish

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75. 266:18. He compares the man's property to any object which a person might find on Shabbat, for which no *heter* exists to take it.

76. 266:7.



companionship if he would have to spend Shabbat in a motel by himself, depriving him of his *oneg Shabbat*, joy of the Sabbath. What about the loss of all the mitzvot attendant upon Sabbath observance, such as lighting candles, eating a special meal, praying with a minyan? Does it logically follow that if the rabbis did not waive rabbinic strictures for the stranded traveler, he would be so distraught that he would transgress biblical prohibitions in order to avoid such "losses"?

There are indeed many instances where rabbinic strictures are lifted in order to enable a Jew in difficulty to have a better life. Thus, Rav Moshe Feinstein permitted a widow not to cover her hair when she was out on a date, due to her fear that doing so would preclude her being able to remarry. He also permitted her not to cover her hair at work if she could not get a job wearing a hat. He explains his reasoning: since covering the hair is a positive commandment and one is not obligated to spend more than 20% of one's wealth to fulfill a positive commandment, he felt it would be permitted. Since getting married or keeping a job is worth more than 20% of her income, he considered it permissible.<sup>77</sup>

It could be argued, however, that the rabbis were lenient only for money or valuables which, once lost, are lost forever. *Oneg Shabbat*, however, would be lost only this one Shabbat, and therefore the two situations are not analogous. Some rabbis consider the positive experience of spending a pleasant Sabbath (*oneg Shabbat*) to be so important that they are prepared to waive certain rabbinic strictures for its sake. Their rationale appears to be that loss of a mitzvah is as important to a Jew as loss of money;

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77. *Iggerot Moshe, Even Haezer* I:57.

and when it is a case of many people losing their chance to keep a mitzvah, they are even more prepared to extend that leniency.

The Ramo writes,

There are those who would permit telling a Gentile to light a candle for him for the Sabbath meal, since these rabbis opine that one can directly ask a Gentile to do anything, even a biblical prohibition, if it is for a mitzvah....but [I say] to be strict in a situation where there is no great need, inasmuch as most decisors do not agree with this position [that for a mitzvah it is permissible to engage a Gentile].<sup>78</sup>

*Mishnah Berurah*<sup>79</sup> writes that the *Sh'lo* was strict about this, even when there was a "great need." However, in a situation where it is needed for a mitzvah of the group, even he would be lenient. An example of such a group mitzvah might be a bus full of Jews which broke down on the road going home for Shabbat, where they may get a Gentile to drive them home.

*Shulchan Aruch* 306 rules that it is improper to ask a non-Jew to do work for a Jew; but *Aruch Hashulchan* expresses the opinion that if there is a great need one can rely on asking a Gentile even to do an act which is biblically prohibited for the Jew.<sup>80</sup> Thus, if a Jew is stuck on the road with no place to sleep and nothing to eat, Ramo would permit his asking a non-Jew to drive him home. A similar *heter* is found in *Iggerot Moshe*,<sup>81</sup> where R. Feinstein permits

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78. 276:2.

79. Ibid. No. 24.

80. Ibid. No. 13.

81. O.C. II 68.

a Jew to ask a Gentile to open the refrigerator for him, even though the light inside will go on. Since virtually all the Shabbat food is in the refrigerator, he writes that "in a case of great need, even a biblically proscribed act is permitted."

Furthermore, if either a child or a sick person is present when the traveler is stranded, that would automatically permit any leniencies,<sup>82</sup> since "any child [is considered to be in the same category] as a sick person [who is not deathly ill]."<sup>83</sup>

### **Paying The Non-Jew For His Assistance On Shabbat**

It is forbidden to pay for work done on Shabbat, even by a non-Jew.<sup>84</sup> However, if the work was a permitted activity, such as having the Gentile drive home the person who was delayed, then it is permitted to pay him for his labor after Shabbat.<sup>85</sup> If there is no alternative and the

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82. Ramo, 276:1. What age child is included here? *Ketzot Hashulchan* 134 thinks only one who still eats baby food; *Minchat Yitzchak* I:78 thinks it is a child up to the age of nine; *Tzitz Eliezer* VIII:15, 12,7, holds one can be lenient until the child is age 6; *Mor U'ketziyah* 328:8 thinks that it is only a child who still needs his mother, while *Shemirat Shabbat Kehilchata* 37:2 rules that it applies to a child of age 9 or 10.

83. *Shulchan Aruch* 328:17. For a (not seriously) sick person, certain rabbinic laws are suspended if he is in pain. For an understanding of what kind of "pain" is included, see *Tosafot* to *Ketubot* 60a, s.v. "Goneach". The question is whether it includes only acts which, if not done, would make the child or patient get sick, or perhaps even those which speak to his comfort, such as going hungry. See Ramo 404, where he is lenient if it is raining or if the person needs to use the bathroom.

84. O.C. 137, no. 44, in the *Mishnah Berurah*.

85. 334:1 in the *Mishnah Berurah*, as well as 325:19.

need is great, says the Gemara, there is a way he can even pay him on Shabbat, as is evident from the talmudic discussion there.<sup>86</sup> In the course of discussing the topic, the Gemara there allows purchase of land [in Israel] from a non-Jew on Shabbat, by allowing the non-Jew to write and sign the bill of sale. Although it is forbidden to ask a Gentile to do work on Shabbat, since there is a mitzvah from the Torah to own and inhabit the Land, in this case the rabbinic law does not apply. But what about paying for the land on Shabbat? "How can he do this? He shows the Gentile his purse full of dinars, and the Gentile signs and takes the document to the court [to be registered]."<sup>87</sup>

Perhaps we can employ this ruling as a precedent for a traveler stranded on the road on Shabbat: let him show his money to his non-Jewish driver and allow him to take his payment himself, rather than paying him, as it says, "but it is forbidden to hand him the money."<sup>88</sup>

### *Techum*

86. *Gittin* 8b; *O.C.* 306:11.

87. Note to Chapter 2, *Moed Katan*; *Mishnah Berurah* 306, No. 45.

88. *Magen Avraham* 306, no. 20. Since all *poskim* have rejected the *heter* of the Ramo in 306:11, who opines that nowadays writing is only rabbinically but not biblically forbidden, we do not suggest paying with a check *kil'achar yad*. See *Iggerot Moshe Even Haezer* I:82:11.

*Terumat Hadeshen* 63 distinguishes between a rabbinic infraction which involves a person's doing an action, and a rabbinic infraction which does not involve any activity. He considers the former to be a more serious infraction, but is prepared to be more lenient in the latter. An example of an infraction with an action would be doing something forbidden, but doing it *kil'achar yad*; an example of an infraction with no action would be asking a Gentile to do it.

In our inquiry so far, we have seen that there are opinions which permit a Jew to remain on a bus or train driven by a Gentile for a certain amount of time; there is also a degree of latitude in determining how much time the traveler has after sunset. But there is one more issue to be dealt with, and it is a formidable one: *techum*.

On Shabbat, one is not permitted to go outside his "place"; as the Torah commands in *Shemot* 16. The rabbis define one's place as the *techum*, the boundaries of where one may go. Any inhabited area, whether it is a town or village or city, is considered a unit.<sup>89</sup> In addition, the area 2000 *ama* beyond the city limits is also included as part of the *techum*. On Shabbat anyone in that place at the onset of Shabbat may walk around freely within the entire *techum*, including the 2000 *ama* extension.<sup>90</sup>

In *Eruvin* 52, the Gemara rules that someone who is outside the *techum* ("boundaries") of the city at the onset of Shabbat is not permitted to enter the city on Shabbat; he is an outsider. However, if a person was within the city at the outset of Shabbat and due to some accident or emergency found himself outside the *techum* in the course of Shabbat, and then was somehow returned to the city, the Gemara allows him to walk around the whole city,

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89. How the boundaries of a town are determined is the topic of an extensive discussion in the Gemara *Eruvin* 55a. Briefly, if the houses are arranged in a circle, we draw an imaginary square around that circle, and that is the boundary. If the houses are in a crescent shape, we draw an imaginary line from one end of the bow to the other end of the crescent, and consider that as enclosing the city. If all the houses are in a row, but one protrudes, we extend the boundaries to enclose it. (Obviously, an aerial view or a map will be helpful for making the determination.)

90. Tosafot, *Eruvin* 47b, s.v. "Dekulehon".

just as any other person who was within the *techum* at the onset of Shabbat may do.<sup>91</sup>

What should a person do who finds himself outside the *techum* at the onset of Shabbat? This can (and does) happen to someone who is driving from the city on Friday afternoon to reach his vacation home or to attend a *simcha* some 50 miles away. It might even happen to someone who is driving home within the city and has to cross a bridge or a tunnel which would put his destination beyond the *techum*. Moreover, he may find that he is not within the *techum* of any town, for his bungalow or hotel itself might be outside the *techum* of any town. The *Shulchan Aruch*, O.C. 405:3 writes, "someone who is outside the *techum* of the city when Shabbat starts may not enter [the city] to be as one of its inhabitants."<sup>92</sup>

All modern *poskim* base themselves on Ramo,<sup>93</sup> who states the following rule: "It is forbidden to ride in a wagon driven by a non-Jew because he will be making use of the animal [pulling the wagon] and also because one might pull a branch off a tree [to hit the animal]." Since the Ramo does not seem to be in the least concerned about violation of *techum* and since obviously nowadays we are

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91. Ibid, 41. See also *Sh'ut Harosh* 22:12.

92. One suggestion for this predicament, which will work only if he is relatively close to his destination (less than 4000 *ama*, about 1 1/3 miles) is for him to get out of his vehicle, stand at the side of the road, and orally declare that this spot is his "home" for Shabbat. He would then be permitted to walk 2000 *ama* from that spot, which would put him within 2000 *ama* of his desired destination; since he entered that space legitimately, he could continue to travel within that space.

93. 305:18.

not generally concerned about the animal<sup>94</sup> and the whip, we may take this precedent as justifying concluding that if the majority of the passengers as well as the driver in a bus are non-Jews, or in a car operated by a non-Jew, one may stay on it.<sup>95</sup>

### Twelve Mil

The suggested remedies discussed above will only be helpful for someone relatively close to his destination as Shabbat approaches, and who is not outside the *techum*. What about someone who finds himself still miles and miles away? His situation has to come to terms with other complexities of the halacha: Rambam is of the opinion that there are two types of *techum*:<sup>96</sup> One starts 2000 *mil* from the outskirts of the city until 12 *mil* and it is forbidden to go here by virtue of rabbinic edict. The other one is the area past 12 *mil*, and here one violates a biblical prohibition. Other authorities maintain that all laws of *techum* are rabbinic. There is a tremendous difference for the traveler if the halacha follows the Rambam or the other rabbis, inasmuch as one is able to find *heterim* in a rabbinic situation, but it is very difficult to waive a biblical law.

The *Shulchan Aruch*<sup>97</sup> rules that it is a violation of a

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94. *Beit Yitzchak*, *Yoreh Deah* 2:31 draws a parallel between the horse pulling the wagon and an electric train, in that more passengers will cause more electricity to be expended, and therefore it is considered *uvda dechol* and therefore forbidden. See also *Shoel Umaishiv tanina* 1:3; *Har Tzvi Yoreh Deah* 293 however, feels that a bus and a wagon are not the same – the bus is *muttar* but the wagon is not.

95. However, *Tzitz Elizer* I:21 disagrees with this thesis.

96. Rambam, *Hilchot Shabbat* 27, based on *Yerushalmi Eruvin* 3-4.

97. O.C. 397; *Aruch Hashulchan*, *ibid*, 2; see *Sdei Chemed* IV, p.



rabbinic ordinance to walk beyond the 2000 *ama techum*, but that going beyond 12 *mil* would be transgressing a Torah law. In this, he is following the opinion of Rambam. Most other *Rishonim*<sup>98</sup> disagree, holding that even going past 12 *mil* is also only a rabbinic infraction.<sup>99</sup>

### Above Ten Tefachim

Another point which may play a role at times is a question raised in the Gemara whether beyond the height of 10 *tefachim* there is any *techum*.<sup>100</sup> The Talmud ponders whether someone who is traveling in a conveyance and sits 10 *tefachim* above the ground is considered as violating the *techum*; perhaps the same rationale which renders the question of *reshut harabbim* moot above 10 *tefachim* applies for *techum* as well.<sup>101</sup> Since the talmudic inquiry does not come to a resolution, the *Shulchan Aruch* rules that in

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537. The *Mishnah Berurah* 404:7 note 5 seems to lean toward the opinion that it is *d'oraitha*, although he cites the Gra who ruled it is *derabbanan*. In *Biur Halacha*, s.v. "*Leman de'amar*" he also seems to lean toward its being *derabbanan*. See also *Mishnah Berurah* 397:1. The source of this opinion is in *Eruvin* 17.

98. As recorded in *Mishnah Berurah*, *ibid*; he also writes that the Gra considers it be a rabbinic transgression; see also *Minchat Chinuch*, *mitzvah* 24:1.

99. O.C. 404:7; *Beit Yosef* 302, s.v. "*Yesh techumin*". *Shemirat Shabbat Kehilchata* 40:142 cites the opinion of Rav S.Z. Auerbach that most *Rishonim* agree with Rambam, that 12 *mil* is a *d'oraitha*, but that Rambam also holds that the question of *techum* arises only in a public domain; see further *Biur Halacha*, s.v. "*Ho'il efshar*."

100. *Eruvin* 43a. The theory is that a *reshut harabbim* /*carmelit* do not extend above 10 *tefachim*, only a *reshut hayachid* does that. See *Aruch Hashulchan* 404:1.

101. *Mahari Assad* in O.C.61 opines that 10 *tefachim* below ground (a tunnel) would be the same as 10 above.

any situation above 10 *tefachim* where a question arises that is only rabbinic, we should rule leniently, but if the question concerns a biblical law, we must be strict.<sup>102</sup>

To put the question in modern terms, if someone is traveling home from the city to the suburbs in a bus (which would place him higher than that distance from the ground), would he be violating the *techum* by riding on that bus on Shabbat?<sup>103</sup> If he is more than 2000 *amot* but less than 12 *mil* outside his destination, everyone agrees that would be only a rabbinic violation. One might conclude, therefore, that this is a *heter* for our bus traveler to continue, but that is a mistaken assumption. That is because the Gemara, further in its discussion, adds a caveat: if the person is sitting in a conveyance which is more than 4 X 4 *tefachim* and that conveyance rests on the ground, the entire conveyance and its contents are considered as being on the ground, and consequently as being within the *techum*.<sup>104</sup> Thus, the rule about 10 *tefachim* above the ground would not apply in this case.

### A Possible Leniency

Various approaches to the question of *techum* are evident in rabbinic literature. One element involves how we view the prohibition – is it forbidden for a person to be outside his *techum* or is he only in violation if he does an action which takes him outside the permitted precincts? Rashbam

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102. Ibid, no.5.

103. *Mishnah Berurah* 404:1 explains that the doubt exists since most people travel on the ground, not above it.

104. *Tzitz Eliezer* I:21 posits the rule applies only to something touching the ground, which would exempt an airplane from this rule. In note 12 he cites a responsum of Rambam, who ruled that in a *carmelit* there is no law of *techum*.

rules that a person may board a ship for a journey on Friday, even if the ship will be traveling beyond the *techum* on Shabbat.<sup>105</sup> He explains that the ship is moving anyway, and the Jew is not doing anything to make it go. Being outside the *techum* is not the issue, he feels, but rather what the Jew is doing. Since the Jew is not traveling by foot outside the *techum*, he has not incurred any Sabbath violation. Rashbam goes so far as even to allow the person to board the ship on Shabbat.<sup>106</sup>

As an extension of his approach, Rashbam would therefore permit a person to enter a wagon or some other conveyance and have a Gentile take him beyond the *techum*. It is only extraneous circumstances that prevent Rashbam from ruling this way (such as fear that bandits might attack the wagon, forcing the people off).<sup>107</sup> In theory, however, we see that Rashbam does not appear to forbid *entering* a new *techum* but rather *walking* into it. Although the *Shulchan Aruch* does not cite the opinion of Rashbam (indicating he does not accept it), perhaps in difficult circumstances, one could rely on the opinion of Rashbam to remain on a bus or other conveyance (on which there are non-Jews, so that the driving would not be done for the benefit of a Jew), which would take him to his

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105. This is a surprising ruling, inasmuch as it seems to contradict directly the explicit teaching of the Gemara that one may not embark within 3 days of Shabbat. Tosafot, *Eruvin* 43a, s.v. "*Halacha*", explain why it is not really a contradiction, because the talmudic text is the opinion of *Beit Shammai* but not the accepted talmudic ruling. This position of Rashbam is also the opinion of Ritzba, cited by Tosafot, and the Rif. For others who have opinions on this matter, see *Kaf Hachaim* 305:73.

106. Tosafot, *Eruvin* 45a.

107. I am unable to find a source for his ruling.

destination.<sup>108</sup>

Note, however, that this suggestion, relying on a minority opinion, is helpful only if we assume the laws of *techum* are rabbinic, which is not universally accepted, as we have already mentioned.

In virtually all cases when a traveler is traveling and finds himself outside the *techum* as Shabbat approaches, he is surely not in a big city. (The entire city is considered one *techum*). Even if there does exist today an entity called a *reshut harabbim*, which most *poskim* discount, there is virtually no chance that the traveler will be in *reshut harabbim*, but will almost certainly be in a *carmelit*. In this case, since it is a rabbinic stricture, we can be somewhat lenient.<sup>109</sup>

A further factor in ruling leniently in cases where a person might have to violate a rabbinic ordinance arises from the principle "*Gadol kevod habriot*," which means that personal human dignity takes precedence over rabbinic enactments.<sup>110</sup> Consequently, if a person would be in great discomfort, such as being exposed to extreme heat or cold, or need to use the bathroom,<sup>111</sup> or would have to spend the night with nowhere to sleep, etc., rabbinic restrictions would be waived to make it possible for him to maintain his dignity. In the Yeshiva of Nehardea, they taught "if he is

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108. *Korban Netanel*, no. 2.

109. The Ran to *Shabbat* 122 offers a further reason for ruling leniently: he argues that since *techum* varies for each individual, and there is no set *techum*, we can generally be lenient on questions of *techum*. See also *Mishnah Berurah* 515:66.

110. *Eruvin* 41b.

111. Rabbeinu Chananel and the Rosh, in their commentaries, bring varying opinions about this; see also O.C. 406.

smart, he will go [to fulfill these needs] into the *techum*, and once he is there, he is permitted to stay there."<sup>112</sup> In other words, once he has entered the town legitimately, he may then remain there throughout Shabbat and move around freely.

All these *heterim* notwithstanding, the most desirable option for a stranded traveler in most cases is to attempt to find a pleasant Sabbath atmosphere in the immediate neighborhood or close by, and stay there for Shabbat, rather than risk all the alternatives we have suggested, which should only be utilized when there is no other choice.

### Some Practical Applications

The question of riding on a wagon as Shabbat approaches is a question discussed by numerous *poskim*. *Mishnah Berurah*<sup>113</sup> cites the responsum of Chatam Sofer mentioned above (*Yoreh Deah* 214), which expresses the opinion that the laws of *techum* definitely apply. Consequently, wherever the wagon drops off the traveler coming from outside the *techum*, the person would have to stay and not be able to leave.

After discussing why one may not board a ship within three days of Shabbat,<sup>114</sup> Rav Waldenberg turns to the question of riding a train. Discussing the opinion of Chatam Sofer, he comes to the conclusion that a ship and a train are not really comparable. On a ship, each person has his

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112. *Eruvin*, *ibid*; *Orach Chaim*, *ibid*.

113. 404, *Biur Halacha* s.v. "Ve'ain".

114. The question of traveling on Shabbat on a ship owned and operated by Jews has been raised in modern times, with the establishment of the Zim Lines, an Israeli shipping line. *Iggerot Moshe* O.C. I:92 and *Tzitz Eliezer* IV, 5:1 and 2, forbid it.

own berth, he sleeps in a bed and eats at a table, all in all a comfortable experience. Not so on a wagon, where the traveler is jostled to and fro, unable to relax; this would not be compatible with the tranquillity required on Shabbat. Therefore he rules that riding in a wagon, even within the *techum*, is forbidden on Shabbat and Yom Tov.<sup>115</sup>

Although this is a very complex issue, what does emerge from a study of *techum* is the opinion of a large group of *poskim* who rule that nowadays all *techumim* are only rabbinic, based on clear statements in the Talmud.<sup>116</sup> If that is so, then if one comes from outside the *techum*, above 10 *tefachim*, it will be a situation of a doubt concerning a rabbinic rule; in such a case of doubt, we are lenient and therefore would rule that the person has not violated the *techum*. Furthermore, since the question of 12 *mil* is itself a matter of dispute, and add to that the questionable status of our cities today (whether they are *carmelit* or not), there is certainly ample grounds for allowing a delayed traveler riding on a bus to continue his trip, regardless of the issue of *techum*.

### Airplanes

With a few exceptions, all that we have discussed so far would apply generally to airplanes as well.<sup>117</sup> Even if one assumes that a plane in the sky is above the *techum* (ten *tefachim*), nevertheless when it lands, it taxis a while on the runway, which certainly places it within a *techum*, which might create new problems (see below). Although

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115. *Tzitz Eliezer*, I:21. See also R. Akiva Eiger's notes, end of No. 13.

116. *Eruvin* 43a.

117. See also *Minchat Yitzchak* 2:106.

the Gemara<sup>118</sup> holds that a person in a moving object does not have any fixed location which defines his *techum*, nevertheless there is still the reality that the passengers cannot get off until the plane does come to a stop, at which point they now have a *techum*. Thus, even if the passengers don't have a *techum* when on the plane, but as soon as it comes to a stop, they do have one.<sup>119</sup> Therefore, the question would shift to the airport, whether that is considered to be within the precincts of the city or whether it is its own *techum*. If the ruling is that the airport is within the *techum* of the city, the arriving passenger could then walk throughout that city on Shabbat. If not, he would be constrained to remain within the airport the entire Shabbat. Sometimes the plane even has the passengers disembark far from the terminal, which itself might be further than the permissible distance a Jew may go on Shabbat. The same theory would apply to a train which is traveling non-stop between cities.

### ***Davening With A Minyan And Other Oneg Shabbat***

One other motive for being lenient is that if the delayed traveler has to stay in a motel, away from other Jews, he

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118. *Eruvin* 45, s.v. "Mainad naidi"; *Biur Halacha* 404, s.v. "Mimakom shepaga."

119. *Iggerot Moshe*, O.C.III:96. (The plane's wheels are the determining factor). However, we should note that Rav Moshe Feinstein was writing decades ago, when indeed planes would land out on the airfield and buses would transport the passengers to the terminal, or they would walk there themselves. Nowadays, the standard procedure is for the plane to taxi right up to the terminal, and for a portable walkway to be attached to the plane, through which the passengers enter the terminal directly. This new reality will impact on the permissible activities of a traveler arriving in such a manner.



will not be able to perform some of the mitzvot of Shabbat, such as praying with a minyan, hearing the Torah read aloud, making *kiddush*, etc. In this matter, as with so many of the questions we have examined in this study, there is a broad array of rabbinic opinion.

The *Shaarei Teshiva*<sup>120</sup> brings two opinions, one lenient and one tending towards strictness. The lenient approach reasons that just as it is permitted to embark on a trip within three days of Shabbat if it is in order to perform a mitzvah<sup>121</sup> (even though the Gemara said ordinarily one should not do it), similarly if one would not be able to

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120. O.C. 248 and 339; *Mishnah Berurah* 639:1; *Sh'ar Hatziyun* 2. In addition, see *Shu't Besamim Rosh* 375, where the question was posed about a traveler "who is unable to reach a place [before Shabbat] where he knows anyone...and he will have no choice but to throw himself upon charity", may this traveler have a Gentile drive him in a wagon to his home or to a place where he is known? The answer given (possibly by the Rosh, who may be the author of this work) is that there is no instance of "*kevod habriot* [human dignity] greater than this [which will] override a *shvut*, for there is nothing worse nor a greater shame than for an honored individual to have to throw himself upon [the mercy of] people...and therefore without doubt he may be driven in a wagon...or go beyond the *techum*. A few scholars permit riding on an animal on Friday evening because of monetary loss [of leaving the animal behind], but I do not agree with them. But as far as this is concerned [being driven by a non-Jew], there is no doubt [he may]."

121. Commenting on the *Shulchan Aruch* 339, both *Aruch Hashulchan*, no.6, and *Mishnah Berurah*, no.36, permit a person to board and travel on a ship on Shabbat if it is a question of losing a great deal of money. (For example, a Gentile owes him a great deal of money, and he is not sure that he will be able to reach the Gentile if he starts out later), reasoning "also someone who relies on those who are lenient has a 'tree to hang it on', and similarly for a mitzvah which will pass."

perform mitzvot on Shabbat unless one continued to travel on the bus, plane, or train in which he was riding, it should be permitted.<sup>122</sup> He does, however, add that this permit would apply only if they are traveling within the *techum*.

This suggestion, that it might be permissible to continue riding, is striking inasmuch as it proposes violation of a *biblical* prohibition in order to enable the traveler to pray with a minyan. Some suggest that support for this position may be found in the precedent of Rabbi Eliezer, cited in the Gemara *Berachot* 47a, who emancipated his Canaanite slave (a clear violation of the Torah) in order to be able to count the now-free individual as the tenth to a minyan!

But *Mahari Assad* responds with horror ("*Hass mi'lehazkir!*") to the suggestion that biblical laws might be waived for communal prayer.<sup>123</sup> Furthermore, he would forbid even violation of *techum*, which is only a rabbinic enactment. He explains that when R. Eliezer freed his slave, he thereby benefited the entire group who could now pray with a minyan. But in the case of the traveler – the minyan exists without him, just this one individual cannot participate. Nevertheless, we are left with the impression that if the traveler were indeed the tenth man needed to form a minyan, or else the only *ba'al koreh* or *ba'al tokeah* available, there would be less objection to permitting his continued travel (under the conditions enumerated above).

This last point is not universally accepted,<sup>124</sup> for the

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122. *Magen Avraham* 248:15 considers even traveling to Israel for a visit to be a mitzvah. However, *Shiltei Hagibborim*, *Shevuot* 3 objects that this would be true only if one were going to settle in Israel permanently. See also O.C. 405:88.

123. O.C. 91, quoted in *Shearim Hametzuyanim Behalacha* 98:6.

124. Maharam Schick, O.C. 121; *Pitchei Teshuva* 415.

Mishnah (*Rosh Hashanah* 32a) explicitly writes that if there is no shofar available locally, it is not permitted to go outside the *techum* to hear it blown elsewhere. This ruling prevails despite the fact that hearing the shofar on Rosh Hashanah is a biblical imperative, which takes precedence over communal prayer with a minyan.<sup>125</sup>

Although there are some rabbis who might permit using a row boat, raft, or even a bicycle<sup>126</sup> on Shabbat in order to be able to perform mitzvot, the preponderance of opinion apparently considers that the desire to pray with a minyan is not sufficient grounds to sanction one to continue travel on a bus, plane, or train.

### Conclusion

Let us take stock of what has been discussed in this inquiry. It is quite evident that this is a multi-faceted issue,

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125. The Gemara in *Rosh Hashanah* 34a explicitly says that if one has a choice of *davening* with a minyan or hearing shofar, one should go to hear the shofar. *Magen Avraham* 446:2 rules that even if one is needed to blow the shofar for a group, he still may not go outside the *techum*. *Chatam Sofer* 149 similarly forbids it in order to have wine for kiddush. See also *Teshuvot R. Akiva Eiger* 13.

*Nishmat Avraham*, O.C. 585:3 brings a question which was asked about a person who lived high up in his apartment building and would not be able to hear shofar blowing unless he went into an elevator. The author discusses whether using electricity is a biblical or rabbinic prohibition. If it is biblical, then it is forbidden to ask a Gentile to operate the elevator for him, but if using electricity is a rabbinic ruling, then it would be permitted. He also touches on the topic of *zilzul*, disrespect for the sanctity of the Sabbath or Holyday by riding an elevator, but rules that it is only *zilzul* if it is done publicly. See also *Yam shel Shlomo*, *Beitza* 3:14, and *Noda Biyehudah* *Kamma* 11, and Rashi, *Beitza* 28b.

126. *Kaf Hachaim*, *Orach Chaim* 403:8.

and the tardy traveler should not blithely continue, thinking that he has plenty of lenient options, because in truth it is a very complex problem.

In view of the appalling reality that every week many many people find themselves still enroute as Shabbat approaches, it is most important to emphasize, first and foremost, that every conscientious Jew needs to break the habit of leaving late. Not only that, but given the usual snarl of traffic during rush hour, every traveler must leave much earlier than he thinks is necessary, in order to avoid even a remote possibility of *chilul Shabbat*.

If a totally unpredictable calamity nevertheless strands him midway, there are a number of options open to him, most of them controversial. Probably the best choice, if it is possible, is to pull off the road in time to find a Jewish home where he can spend the Sabbath, rather than pushing on in order to reach his own home, inasmuch as many questionable actions will have to be taken to accomplish this.

If this too is not an option, the traveler has at most 58 minutes after *sh'kia* to reach his destination. And if this too does not bring him home, his last and least desirable option is to have a non-Jew drive him home, preferably on a regularly-scheduled bus rather than a private conveyance. He should give his *muktzah* articles to his driver and ask him to bring them into the house for him.

We cannot over-emphasize that the possibility of *chilul Shabbat* should fill the heart of every Jew with such dread that he will always allow himself much more time than he needs to get home on Friday afternoon. The present study is written only for the rare instance when, despite his best efforts, an individual finds himself still on the road as the sun sets. Our true hope is that the advice included herein will never have to be utilized.

# The Use of Hearing Aids on Shabbat

*Rabbi Elysha Sandler*

## Preface

The preservation of human dignity is considered of such a high priority that the Tosafot declare: "And if the sole pain experienced is one's shame to mingle with others... there is no greater pain!"<sup>1</sup> This is especially significant for those who suffer from any type of physical handicap that is readily noticeable. Great strides have been made in modern technology, ranging from prostheses and transplants to hearing aids and cochlear implants, which not only help the well being and day-to-day functioning of the handicapped individual, but also enable him to take his place in society free of any embarrassment.

Today, through modern technology and advanced therapy, hearing-impaired children are mainstreamed in regular yeshivot and schools. They can hear and speak quite normally, and do not learn sign language. However, to function normally they are dependent on the use of their hearing aids. Being deprived of their use is akin to being condemned to a world of total silence. This in turn has a major effect on their functioning in society.

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1. *Shabbat* 50b s.v. *Bishvil*.

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This study discusses the issues involved in the use of hearing aids on Shabbat, drawing on the halachic decisions of contemporary authorities who explain the rationale behind the accepted practice of their use. The issues have been divided into four categories:

1. Activating a hearing aid
2. Speaking to a person wearing a hearing aid
3. Handling a hearing aid (*muktzah*)
4. Wearing a hearing aid in a public domain (*hotza'ah*)

### 1. Activating a hearing aid and adjusting the volume

Before determining the halachic ramifications of activating a hearing aid on Shabbat, one must first determine the nature of the change being effected in the hearing aid upon activation. Four possible prohibitions may be involved:

Like most electrical appliances, a hearing aid prior to its activation serves no purpose. Some authorities therefore consider the initial activation of a hearing aid to be the "completion of its construction" and in possible violation of one of two biblical precepts:

- a. *Makeh Bepatish* (The prohibition of completing the formation of an object on Shabbat),<sup>2</sup> or
- b. *Boneh* (The prohibition of building on Shabbat).<sup>3</sup>
- c. Others, on the assumption that sparks are ignited upon activation, feel that it violates the biblical prohibition

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2. Tzitz Eliezer 6:6; Minchat Yitzchak 3:41.

3. Ibid. The Tzitz Eliezer bases his opinion on the position of the Chazon Ish Orach Chaim 50:9.

of *mav'ir* (not to kindle a flame on Shabbat).<sup>4</sup>

Numerous authorities consider hearing impairment to be a form of sickness as far as halacha is concerned.<sup>5</sup> With regard to tending to the needs of the sick on Shabbat, biblical prohibitions may be performed by a non-Jew on behalf of a sick Jew.<sup>6</sup> Rabbinic prohibitions may be done in one of two ways: (a) By enlisting the services of a non-Jew,<sup>7</sup> or (b) they are performed in a "backhanded" manner (כלאחר יד).<sup>8</sup> It is therefore suggested that even if the initial activation of a hearing aid is forbidden, it may be activated in a time of need by one of these methods.<sup>9</sup>

d. The fourth suggested prohibition is the rabbinic prohibition of *molid* ("creating") on Shabbat.<sup>10</sup> The Talmud states that "scenting" (permeating a garment or object with a fragrance) is considered tantamount to "recreating" the

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4. *Chelkat Yaakov* 2:41; *Tzitz Eliezer* 7:11 quoting Rabbi D. B. Weidenfeld, the Tchebiner Rav; *ibid.* 6:6. See also *Tzitz Eliezer* 6:6, and *Yesodei Yeshurun* on the 39 *Melachot* 2 pg. 138.

5. For a sampling see *Iggerot Moshe Orach Chaim* 4:85; *Minchat Yitzchak* 2:18 and *Minchat Shlomo* 2:18. While *Tzitz Eliezer* 6:6 clearly disagrees, *Minchat Yitzchak* 3:41 maintains that even Rabbi Waldenberg (author of the *Tzitz Eliezer*) would concur that a hearing-impaired minor is considered "sick". This is based on *Ramo Orach Chaim* 328:17, that the developmental needs of a minor have the halachic status of the needs of the sick.

6. As per *Shulchan Aruch Orach Chaim* 328:17 and *Mishnah Berurah*.

7. As per *Shulchan Aruch Orach Chaim* 307:5.

8. *Ibid* 328:17 and *Mishnah Berurah*.

9. Based on a ruling of Rabbi David Cohen of Brooklyn, N.Y.

10. According to *Beit Yitzchak* in an addendum to the table of contents, *Yoreh Deah* 2:31.



garment, as it now assumes a different presence.<sup>11</sup> Similarly, the passing of an electric current through an appliance changes the otherwise dormant object into a functioning appliance.

However, other authorities suggest that none of these prohibitions are relevant to the activation of a hearing aid. They maintain that merely switching on a hearing aid cannot be considered building nor completing the formation of the aid. By way of example: It would never cross one's mind to prohibit opening and closing a door on Shabbat because it is effectively "demolishing" and "rebuilding" part of the wall.<sup>12</sup> This is merely using the door in accordance with its normal function. Similarly, one cannot define the completion of an electric circuit as building or completing the construction of a hearing aid, as one is merely using it as intended.<sup>13</sup>

As for ignition of sparks, it has been suggested that since the life span of these sparks is insignificant, this is not classified as "kindling".<sup>14</sup> Moreover, this is of no concern with modern hearing aids. Technicians involved in the manufacture of hearing aids have indicated that no sparks

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11. *Beitza* 23a. For a more detailed understanding of this concept see the beginning of section 2 of this article.

12. This illustration is also cited by the *Mishnah Berurah* 340:17 to explain the position of the Ramo that a person may open and close a book with words written on the edges of the paper, even though he is effectively writing and erasing those words.

13. *Minchat Shlomo* 1:11 and 2:17, both of which contain a correspondence between the author and the Chazon Ish on this topic. Also see responsa *Chelkat Yaakov* 1:53 that disputes the position of the Chazon Ish as far as *makeh bepatish* is concerned.

14. *Eidut Leyisrael* chapter 20.

whatsoever are emitted upon activation.<sup>15</sup> As for consumption of battery fuel, the very premise that the mere consumption of a substance is in violation of *mav'ir* does not have a solid foundation.<sup>16</sup>

Concerning the issue of creating, the comparison between "scenting" a garment and creating a current flow is questionable. The prohibition of "scenting" and thereby "recreating" the garment may apply only if the garment is *not* usually "scented" in such a manner. But a hearing aid, which only functions when the current flows, cannot be considered "recreated" when activated.<sup>17</sup>

Nevertheless, it is important to note that all authorities agree that, when feasible, one should switch the hearing aid on prior to the commencement of Shabbat and leave it that way for the duration. Even those who are lenient recommend that in practice one should try to turn it on before Shabbat.<sup>18</sup>

Many rabbinic opinions maintain that the stringency of activating a hearing aid does not include adjusting the

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15. As per conversations of this writer with technical engineers from Telex, Phonac, and Phonic Ear.

16. *Tzitz Eliezer* 7:11 quoting Rabbi S. Z. Auerbach.

17. *Minchat Shlomo* 1:9. Also see an elaboration on this topic in *Tzitz Eliezer* 1:20:10.

18. *Minchat Shlomo*, *ibid.* pg. 74, writes that although he personally finds no prohibition involved when activating hearing aids, one should nevertheless avoid doing so unless it is a time of great need. Two reasons prompt this ruling: a. In deference to the opinion of the *Beit Yizchak*, and b. to avoid confusion amongst the masses who will not distinguish between the activation of these appliances and appliances containing a light bulb (which is certainly forbidden).

volume of an already active hearing aid.<sup>19</sup> Based on *Shulchan Aruch Harav*, that one may add to the aroma of an already fragrant garment if the added scent is the same as the original,<sup>20</sup> they permit raising the volume even though it may increase the intensity of the current flow,<sup>21</sup> since the current flow is already in existence.<sup>22</sup>

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19. *Shemirat Shabbat Kehilchata* 1:34:28; *Minchat Shlomo* 1:9 pg. 74; *Lev Avraham* 1:6:132 and *Be'er Moshe* 1:17 who adds that since ignorant people may look askance at this, it would be better to refrain from adjusting the aid publicly.

20. *Orach Chaim* 511:7.

21. This leniency should only be applicable to the conventional hearing aids whose volume is adjusted with a dial volume control. However, adjusting the volume of digital hearing aids with electronically programmed settings (usually worn by adults with relatively mild hearing losses) entails more than merely increasing the intensity of the already active current flow, and would therefore be forbidden. A competent halachic authority should be consulted.

22. *Minchat Shlomo*, *ibid.* Interestingly, *Ma'aseh Choshev* 2:5 disagrees and forbids adjusting the volume based on this very ruling of the *Shulchan Aruch Harav*, as in his opinion, the increase in current flow generated by the change in volume is not considered more of the same. In a recently published work, *The 39 Melocho's*, 4 pg. 1238, Rabbi Dovid Ribiat states, "it appears that a large consensus of *Poskim* rules that the volume controls (of a hearing aid) may not be adjusted on *Shabbos* ... however some permit adjusting the volume..." The source of those adopting the stricter view is *Eidut Leyisrael* section 20. There, Rabbi Y. E. Henkin permits wearing (the old-fashioned) hearing aids if they were activated prior to the onset of Shabbat and sewn into the pocket in which they will worn, "so that one will not come to turn them on or off." Rabbi Ribiat assumes that there is no distinction between the activation of a hearing aid and the adjustment of its volume. However, the above rationale clearly distinguishes between the two, and there is therefore no inference that Rabbi Henkin disagrees. Additionally, this lone source hardly justifies declaring it the view of a "large consensus" of *Poskim*.

The above discussion deals with activating a hearing aid with its battery already in place. The question arises whether it is permissible to replace the battery when the old one no longer works, which is a common problem with batteries used in the large speech processors of cochlear implants and bodily-strapped hearing aids worn by little children. These batteries often do not last more than 25 hours and will certainly not endure a two-day *Yom Tov*. Based on the position cited above that activation of a hearing aid involves violation of *molid*, it would be possible to replace the battery either by a non-Jew or in an unusual manner.<sup>23</sup> Others maintain that replacing a battery is similar to the biblical prohibition of threading a shoelace on Shabbat, which is considered as completing the formation<sup>24</sup> of the shoe.<sup>25</sup> According to this opinion the battery may only be replaced by a non-Jew.

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23. Ruling of Rabbi David Cohen of Cong. G'vul Ya'avetz, Brooklyn N.Y.

24. See *Mishnah Berurah Orach Chaim* 317:16.

25. *Minchat Shlomo* 2:17. This point of view begs clarification, for the *Beit Yosef*, end of *Orach Chaim* 317 (quoting *Teshuvot Ashkenaziot*), distinguishes between inserting a shoelace into a shoe and a belt into a pair of pants. Shoelaces remain where inserted and in effect become an integral part of the shoe. Since their insertion is thus the finishing touch of the shoe, doing so is forbidden. A belt, however, which is removed after each use, is considered a separate entity and therefore not considered as the completion of the pair of pants. Since batteries are replaced daily (or weekly), they are seemingly comparable more to a belt than to a shoelace. One might suggest that since batteries are left to stay for as long as they are still functional, they are indeed comparable to shoelaces that also remain in place for as long as they are still functional. A belt, on the other hand, is removed following its use, despite the fact that it is still in perfect working condition.

## 2. Speaking to a person wearing a hearing aid

At the outset let us point out that many significant authorities permit direct conversation with a person wearing a hearing aid. Among them: Rabbi Yitzchak Yaakov Weiss,<sup>26</sup> Rabbi Eliezer Yehuda Waldenberg,<sup>27</sup> Rabbi Yoel Teitelbam,<sup>28</sup> Rabbi Shlomo Zalman Auerbach<sup>29</sup> and Rabbi Ovadia Yosef.<sup>30</sup> Even Rabbi Moshe Feinstein, who feels that a biblical prohibition may be involved, cannot pinpoint exactly which one it is.<sup>31</sup> As a result, he is reluctant to forbid speaking to a person wearing a hearing aid since the need is so great.<sup>32</sup> This section will demonstrate the bases behind this conclusion.

With regard to speaking to a person wearing hearing aids, three possible prohibitions should be considered:

A. *Molid*

B. *Hashma'at kol*

C. *Gezeira shema yetakein*

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26. *Minchat Yitzchak* 3:41.

27. *Tzitz Eliezer* 6:6:15 and 9:12:1.

28. The Satmar Rav, quoted in responsa *Nishmat Shabbat* 6:360.

29. *Minchat Shlomo* 1:9.

30. *Yabia Omer* 1:19. *Minchat Yitzchak* 2:17 cites this responsum in *Yabia Omer* but quotes him as remaining inconclusive due to the problem of "creating". After examining the text, this writer found no indication of this inconclusiveness. Perhaps there was an earlier edition that was subsequently revised.

31. *Iggerot Moshe Orach Chaim* 4:84 and 85.

32. Rabbi Feinstein maintains that if possible one should refrain from directly addressing a person wearing a hearing aid. He does state though, that little children, who obviously need to be communicated with in a direct manner, may be spoken to directly.

### A. *Molid* (Creating)

The Talmud states that smoking fruit with spices on top of a hot piece of earthenware is prohibited on Shabbat, since the earthenware becomes permeated with that scent; this is considered *molid*. This prohibition is also applied to the "scenting" of silk garments.<sup>33</sup> In explaining the rationale behind this prohibition, Rashi comments that creating something new is similar in nature to *melachot* (creative forms of work) which the Torah prohibits on Shabbat.<sup>34</sup> Accordingly, this prohibition should not be limited to the creation of a scent. Rather, it should be an all-encompassing requirement to abstain from creating anything new on Shabbat.

In this vein, *Beit Yitzchak* says that completing an electrical circuit is rabbinically forbidden since a current flow is created. He adds that a person may not speak into a telephone on Shabbat, because the voice generates an increase in the current flow.<sup>35</sup> Since the identical phenomenon takes place when speaking to an individual wearing a hearing aid, it appears such an act should be in violation of this precept.

However, while the activation of electrical appliances may involve the violation of various prohibitions (see section I of this article), none of these seem to be applicable when speaking into a hearing aid. Even *Iggerot Moshe Orach Chaim* 4:84:85, who contends that one is possibly violating one of these precepts, cannot pinpoint exactly which one it is, and as a result is reluctant to rule that it is forbidden to speak into a hearing aid, since the need is

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33. *Beitza* 23a; *Ramo, Orach Chaim* 511:4.

34. *Beitza* *ibid.* s.v. *Molid*.

35. See above note 7.

so great. Rather, *if possible*, he feels that it is preferable to avoid speaking directly to the wearer. However, *Minchat Yitzchak* 3:41, *Tzitz Eliezer* 6:6:15 and 9:12:1, *Minchat Shlomo* 1:9, *Nishmat Shabbat* 6:360 quoting Rabbi Yoel Teitelbaum (the Satmar Rav), and *Yabia Omer* 1:19 all permit speaking to one wearing hearing aids regardless of the level of necessity.

Of similar concern is the small red L.E.D. light on the speech processors of cochlear implants, which lights up and flickers in accordance with the intensity of the sound it is processing.<sup>36</sup> Although the production of this form of light incurs no biblical prohibition, nevertheless, it would appear to involve the rabbinic restriction of *molid*, because the speech is, in effect, creating new light.<sup>37</sup> (This writer suggests that all the arguments advanced to permit the increase in current flow are equally applicable to L.E.D.s.)

However, there is a significant difference between the issue of speaking into a hearing aid and the "scenting" of a garment. One of the criteria for *molid* is that the "creation" has permanence. While the fragrance in a garment is not permanent, it is still deemed a new creation, because the evaporation of the scent is gradual. On the other hand, the increase in current created by a person's speech has no permanency, as it terminates abruptly and is subsequently reproduced. Additionally, this phenomenon is repeated countless times over the course of a mere minute, and can

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36. See *Ma'archei Lev* chapter 4 for a detailed analysis of the halachic status of L.E.D.s.

37. This issue was specifically addressed and permitted in a statement issued by Rabbi L. Y. Heilpren, dated 14 Tevet 5757/December 24 1996, as well as in *Nishmat Avraham* 5 pg. 230, quoting Rabbi Y. Y. Neuwirth.



therefore not be classified as a "new creation".<sup>38</sup>

Another approach to the issue of *molid* is that when scenting a garment it is not the creation of the scent itself that is forbidden, because the scent is not tangible. Rather, since the scent "changes the nature" of the already existing garment, one is considered to have recreated that particular garment. This restriction is therefore limited to a garment that is usually not scented, because it is precisely for this purpose that it is considered recreated. If this approach is applied to the current flow in hearing aids, the problem of *molid* is absent since the sole purpose of a hearing aid is to operate with a current flow.<sup>39</sup>

A further proposal advanced to demonstrate that *molid* is of no concern is that the prohibition of *molid* is limited to instances explicitly discussed in the Talmud. All other new creations of this sort, although similar in nature, are excluded.<sup>40</sup>

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38. *Minchat Shlomo* 1:9; responsa *Minchat Yitzchak* 3:41 quoting Rabbi E. Y. Waldenberg. The *Minchat Yitzchak* himself takes issue with this thesis although it is underscored by *Ginat Veradim Hasefaradi klal* 3:14, since responsa *Maharsham* 1:140 and responsa *Chacham Tzvi* 92 disagree. However, see *Minchat Shlomo* *ibid.*, pp. 73-74, where it is clear that neither the *Maharsham* nor the *Chacham Tzvi* pose any challenge to our discussion (although he doesn't mention them by name).

39. *Minchat Shlomo* *ibid.*

40. *Ibid.* This novel idea is actually underscored by the following three examples: a) Food may be warmed up on Shabbat (in a way that is not deemed cooking) despite the fact that the Talmud itself refers to this phenomenon as "creating" heat. b) Juice may be squeezed from a fruit that is intended for eating purposes, despite the fact that liquid is being "created." c) Food may be colored even though the new appearance should render it a "new creation." Similarly, with regard to hearing aids, "creating"

### **B. Hashma'at kol (Producing sound)**

The Talmud states that one may begin grinding with millstones on a Friday only if the process will end prior to the onset of Shabbat, because the grinding of millstones emits a noise.<sup>41</sup> Rashi explains that since the noise draws public attention, this constitutes a demeaning of Shabbat for it might be erroneously assumed that one has violated the biblical prohibition against grinding on Shabbat.<sup>42</sup> This restriction, adopted by the Ramo,<sup>43</sup> is one of the arguments advanced to forbid the use of a microphone on Shabbat, even if it were activated before Shabbat, because it is customary to activate it immediately prior to use.<sup>44</sup> This leads to inquiring why conversation with an individual wearing a hearing aid is permitted, since it also produces sound and is also usually activated every morning prior to use.

Some suggest that comparing a hearing aid to a microphone in this regard is erroneous, because the sound emitted by a microphone is heard by the public and thus

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increases in current should not be in violation of the prohibition of "creating."

In *Cross Roads* 5, pg. 21, Rabbi Y. Rosen asserts that speaking as usual to a person wearing a hearing aid, with no extra effort, cannot be considered a transgression of a *melacha*. This is because sound waves should seemingly be no different than body heat or any other form of energy radiated from the body, which has never been rendered a culpable action.

41. *Shabbat* 18a.

42. Ibid. s.v. *Yitcheno* as per the *Darchei Moshe Orach Chaim* 252:7.

43. *Orach Chaim* 252:5.

44. *Iggerot Moshe, Orach Chaim* 3:55 and 4:84 and *Yoreh Deah* 2:5.

constitutes a demeaning of Shabbat. However, the sound emitted by a hearing aid is heard by no one other than the wearer himself, who is well aware that it was activated before Shabbat.<sup>45</sup>

However, a close examination of the text reveals that the Ramo actually cites two opinions regarding the matter of the millstones: the first permits the use of the millstones, while the second prohibits it. Although the Ramo leans towards the second opinion, he himself rules that if a person would otherwise sustain a significant financial loss, the lenient opinion may be relied upon. Similarly, since hearing-impaired people will certainly incur feelings of humiliation and embarrassment if they are unable to respond appropriately when spoken to, the loss of a person's dignity should be no less significant than the loss of his assets.<sup>46</sup>

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45. Ibid, *Orach Chaim* 4:85; *Minchat Yitzchak* 3:41; "Hearing Aids On Shabbat" by Rabbi Moshe Heinemann in *Am HaTorah* 5740 vol. 13. If the hearing aid is already activated and set to the desired volume, it is almost inevitable that feedback, a shrill high-pitched sound, will emanate from the hearing aid while the ear mold is not tightly secured in the ear. In an essay entitled "Halacha concerning Jewish deaf and hard of hearing" published by NCSY, Rabbi Mordechai Shuchatowitz points out that this may present a problem as far as *hashma'at kol* is concerned and therefore suggests two practical solutions to this dilemma: a. Plugging the opening of the ear mold with a round toothpick, rolled tissue or thin cotton swab immediately upon removing the hearing aid from the ear. b. Lowering the volume to its lowest setting, preferably prior to the removal of the hearing aid. Either method should eliminate the sound of the feedback.

46. *Am Hatorah*, ibid. In truth, there is a distinction between the leniency of the Ramo and hearing aids, for the Ramo bases this leniency on a similar ruling of his at the end of *Orach Chaim* 244:6. There, the *Taz*, note 6, explains that where a person will incur a substantial financial loss, the Sages were concerned that if left without a permitted alternative, he might violate a "strict

### C. *Gezeira shema yetakein* (Lest one make repairs)

The *Shulchan Aruch* rules that on Shabbat "it is forbidden to produce sound with a musical instrument."<sup>47</sup> The reason given is that it may lead to the repair of musical instruments, in violation of the biblical prohibition against completing the construction of an object.<sup>48</sup> Although the Talmud seems to limit this prohibition to the production of a "sound of song," the wording of *Shulchan Aruch* clearly indicates that in his opinion this prohibition includes the production of any sound on a musical instrument.<sup>49</sup> Ramo takes it a step further and prohibits the production of sound on any instrument designed for that very purpose (such as a doorknocker) even if it is not used to play music. As a result, numerous authorities prohibit speaking into a microphone on Shabbat since sound is being produced on an instrument whose function is to produce sound (and is

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prohibition". They therefore waived the "lighter prohibition" in order to ensure the observance of the more strict. Accordingly, this provision should be made only for the individual incurring the loss, since it is he who is at risk of violating the stricter prohibition. In our instance, though, the speaker producing the sound and the hearing-impaired person incurring the loss are two separate individuals. Accordingly, there seems to be no proof that even under such circumstances one may produce sound.

47. *Orach Chaim* 338:1.

48. *Mishnah Berurah* 338:1. *Tzitz Eliezer* 3:16:2 suggests that the production of these sounds is inherently forbidden due to one's "creating" a sound, and not merely as a safeguard for a biblical prohibition.

49. The Talmud in *Eruvin* 104a records a dispute whether the Sages prohibited the production of all sounds, or if they limited it to sounds of song. The *Shulchan Aruch* adopts the lenient ruling of the Rif that it is limited to sounds of song or at least sounds produced by musical instruments.

often used to accompany sounds of song).<sup>50</sup> Since a hearing aid and microphone are identical in terms of their operation,<sup>51</sup> it must be determined whether there is any distinction<sup>52</sup> between them with regard to this *gezeira shema yetakein*.<sup>53</sup>

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50. *Iggerot Moshe, Orach Chaim* 3:55 and 4:84 and *Yoreh Deah* 2:5; *Tzitz Eliezer* 3:16:3.

The Ramo 338:1 is of the opinion that producing a sound without doing any action, e.g. whistling, is permitted. There should thus be no restriction regarding speaking into a microphone, since no action is involved. However, *Tzitz Eliezer*, *ibid*, explains that the Ramo only intended to permit instances where no instrument is enlisted in the production of sound. Where an instrument is involved, even if no action is incurred, it is still forbidden. (Also see *Ma'aseh Choshev* 3:16:2 for an identical interpretation of the Ramo.)

51. Although *Iggerot Moshe Orach Chaim* 4:85 was not convinced of the validity of this premise, anyone familiar with contemporary hearing aids will realize that Rabbi Feinstein could not have been referring to these. Firstly, he suggests that it is illogical to entertain the possibility that the sound emanating from the hearing aid is a reproduction and not the original sound itself. Numerous technicians have advised this writer, that since there is a regular microphone operating within the hearing aid, it is certainly a reproduction of the original sound. Secondly, he writes that it possibly does not amplify any sound at all. Rather, it merely brings the sound closer to the inner ear, thus enabling hearing-impaired people to hear. This is certainly not true of today's hearing aids that (a) have a volume control and (b) even when not inserted into the ear canal, produce a loud sound.

52. *Nishmat Shabbat* 6:360 quotes the Satmar Rav as offering an intriguing differentiation between the use of hearing aids and that of a microphone. In his opinion, the primary reason behind prohibiting the use of a microphone on Shabbat was to in response to the desire of the Reform movement to instate a microphone as a standard feature in synagogue service. Since this is obviously a non-issue concerning hearing aids, he permits their use on Shabbat.

53. In truth, there is a major discrepancy between a microphone

Some authorities suggest that the proscription of the Sages was never intended to include an item such as hearing aids, for the following two reasons:

a. Whenever the Sages enacted restrictions to safeguard a biblical precept, they were concerned only with cases that are normative and not with aberrations. Since the hearing impaired are a very small minority of the general population, items whose usage is limited to their specific needs are not to be included in the general restriction.

b. The Sages never enacted restrictions which could result in the potential endangerment of a life. Were hearing-

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and a hearing aid in this regard, for while a microphone serves the function of accompanying sounds of music, a hearing aid never serves that purpose. This holds true even according to the Ramo who forbids knocking on a door with a doorknocker, since the *Mishnah Berurah* 338:4 understands this to be because one might knock to a tune. Yet, *Iggerot Moshe Orach Chaim* 4:84 does compare the two. In explanation of his opinion, two possible theories may be advanced. First, since the technical makeup of the hearing aid and microphone are identical, we do not distinguish one from the other. Second, this comparison may be predicated on the *Levush*, who explains that Ramo's concern is that a person might come to repair the doorknocker, and not that he might knock to a tune.

There is a novel interpretation of the *Biur Halacha* 338:1 s.v. *Ho'il* on this ruling, who maintains that the reasoning behind the restriction of Ramo is due to its being considered an *Uvda Dechol* (a weekday chore). The Ramo himself, in *Orach Chaim* 333:1, implies that one may do an *Uvda Dechol* in times of great need. Speaking to an individual wearing a hearing aid should therefore certainly be permitted, for were people to refrain from involving the hearing impaired in regular conversation, they would feel isolated from society (see preface).

Another suggestion is that this restriction was only enacted regarding items that produce sound. It is therefore inapplicable to the sound produced by hearing aids since it is only heard by the wearer of the aid. (Rabbi M. Shuchatowitz)



impaired people to refrain from wearing their hearing aids, they could run the risk of endangering their very lives due to their inability to be alerted to hazards on the street<sup>54</sup>

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54. This premise (which appears numerous times in this article) requires further clarification:

a. Hearing-impaired people have the option of remaining at home, thereby not encountering these dangerous situations. One must conclude that due to the deep anguish they will surely experience at being isolated from the rest of society, remaining at home is not a viable solution. This reasoning, however, seems to be contested by the ruling of the Ramo, *Orach Chaim* 301:33, that a person who is afraid to leave his money, gold, or silver at home without supervision, may sew them into the clothing he will wear and go out to a public domain if it is absolutely necessary. If, however, it is not of utmost necessity, he is required to remain at home. It is evident that the fact that he is now confined to his home and unable to associate with others is not enough of a reason to permit his going out with them. This question is posed by *She'arim Hametzuyanim Behalacha* 80:81, who explains that Ramo is discussing a one-time occurrence, where the individual happened to have valuables in his home over a particular Shabbat. Being confined to one's home under such circumstances is obviously not being isolated from society. Confining hearing-impaired people to their homes on the other hand, is something they would be forced to deal with week after week.

b. As is often the case, individuals with an impairment find methods of compensating for that deficiency. Being unable to rely on auditory measures when crossing the street, hearing-impaired people will probably visually compensate and thus avoid being hurt by the hazards of the road. It may be suggested, though, that since hearing-impaired people wear hearing aids all week long and are used to relying on their hearing, they will not necessarily compensate for their hearing loss with their eyesight.

Moreover, there are other instances, such as alerting a person to a fire, in which auditory assistance – and not merely visual compensation – can be crucial even in one's own home. Accordingly, neither objection is really of much concern. I am grateful to my colleague Rabbi B. Rabinowitz for this insight.



through hearing.<sup>55</sup>

Others permit the use of hearing aids based on the position of Rabbi Moshe Feinstein that transistor-operated devices are not to be included in the restriction *gezeira shema yetakein*.<sup>56</sup> His view is based upon Tosafot's ruling that items whose repair requires professional expertise were not included in this restriction.<sup>57</sup> Since transistor-operated devices must be facilitated professionally, their usage is not forbidden. Accordingly, one may speak to an individual wearing a hearing aid, since all hearing aids nowadays are transistor operated.<sup>58</sup>

An additional approach to permit the use of hearing aids is based on the novel understanding that this restriction was only enacted lest one come to repair

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55. *Iggerot Moshe Orach Chaim* 4:85.

56. Rav Heineman, based on *Iggerot Moshe, Orach Chaim* 3:55. However, *Tzitz Eliezer* 3:16:4 and 9:21:4 quotes numerous *Acharonim* in disagreement with this conclusion.

57. *Beitza* 30a s.v. *Tnan*, quoted by the *Ramo Orach Chaim* 338:2 and 339:3.

58. "Hearing aids on Shabbat" by Rabbi Moshe Heinemann. It remains to be explained why Rabbi Feinstein himself does not employ this line of reasoning when he differentiates between a microphone and hearing aids. Perhaps it is because this rationale holds true only concerning the technical repairs of the hearing aid, which require professional expertise. The possibility remains of a hearing aid inadvertently being switched off, a mishap that can easily be rectified by anyone. Perhaps this is why he explores other avenues to distinguish between the two. (Merely taping over the controls to avoid such a mishap is unsatisfactory according to Rabbi Feinstein (*Iggerot Moshe Orach Chaim* 4:85), if the enactment of the Sages would be applicable to hearing aids. Only after he is able to explain that it is inapplicable does he permit taping over the controls to avoid a mishap.)

additional instruments to accompany one's song. Indeed, this appears to be underscored by the Mishnah's ruling that one may not clap one's hands to accompany song on Shabbat, lest it lead to repairing musical instruments to further accompany that song.<sup>59</sup> But if one already possesses a perfectly functional instrument, there is no reason to assume that something might go awry, resulting in the need to repair it. Accordingly, if a hearing aid is in perfect working order, there should be no reason to restrict its usage on the chance that it might break and require repair.<sup>60</sup>

A further theory to permit hearing aids can be suggested: The Mishnah states that "a person may not read by the light of a candle lest he come to adjust the wick."<sup>61</sup> The Talmud applies this restriction only when an individual is alone. If, however, two people are reading a text together, there is no restriction.<sup>62</sup> The reason for this distinction, Rashi explains, is that should one of them attempt to adjust the wick, the other will immediately draw his attention to the prohibition.<sup>63</sup>

*Gezeira shema yetakein* always applies to the person making the sound – and there is no danger that the speaker will ever himself mistakenly repair the hearing aid, and he will also be able to warn the wearer not to tamper with it. As explained above, concerning such instances the Sages

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59. *Beitza* 36b.

60. When explaining the position of the Ramo O.C. 338:1, the *Levush* clearly does not accept this. He explains that a person may not produce sound with an item intended for that purpose, lest he come to repair these very items, if they cease to function properly.

61. *Shabbat* 11a.

62. *Ibid.* 12b.

63. *S. v. Ha trei*.

never imposed restrictions. However, this approach would not suffice when speaking to an individual unfamiliar with Jewish law, who, unaware that repairing is forbidden, will not remind the wearer of this fact.<sup>64</sup> Speaking to a young child should also be forbidden according to this reasoning, as he too will not remind the speaker that repairing the hearing aid is forbidden. Upon further examination though, it becomes evident that children are the exception to the rule. This is based on the position of the *Ramo Orach Chaim* 328:17, that requirements for the development of a child have the same halachic status as the needs of one who is sick. Therefore, just as a person may violate a rabbinic precept to help a sick individual, so too is he permitted to do so for the aforementioned needs of a child.<sup>65</sup>

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64. The *Aruch HaShulchan* 338:5 rules that a radio may not be activated before the onset of Shabbat to continue playing on Shabbat. Similarly, the wearer of a hearing aid might be constrained by this restriction, since he is benefiting from the sound and may "come to repair it." This conclusion might negate this final reason to permit the usage of hearing aids (not so the previous theories) since the speaker will not necessarily be attuned to remind the wearer to avoid making the necessary adjustments.

It is important to point out though, that not everyone is in agreement with this ruling of *Aruch HaShulchan*. The *Minchat Shlomo*, 1:9, pg. 67, contends that the Sages only forbade actions that produce sound "lest one come to repair" and were not concerned with instances in which one is passive. Although *Tzitz Eliezer* 9:21 clearly adopts the position of *Aruch Hashulchan*, in 3:16:3 he quotes Rabbi S. Z. Auerbach in the name of Maharsham and "other *Acharonim*" as being in disagreement with this ruling. Even *Iggerot Moshe Orach Chaim* 4:84, *Minchat Yitzchak* 1:107, and *Shemirat Shabbat Kehilchata* 2:42:43, who prohibit the activation of a radio prior to the onset of the Shabbat to be used on Shabbat, do so based on other considerations.

65. The *Chayei Adam*, "Laws of Shabbat" 69:12, contends that although some permit violating a rabbinic precept to help a sick

Although this restriction does not apply to hearing aids, practically speaking, there still exists the possibility of accidental tampering with the controls. Therefore, numerous contemporary authorities rule that the on/off switch should be taped over before Shabbat.<sup>66</sup> Others maintain that this is not necessary since we never find the Sages concerned lest one come to deactivate or switch off something that is working, their concern being only to prevent a constructive act (e. g. "lest one tilt the wick" or "lest one come to repair").<sup>67</sup>

Even if speaking into a hearing aid were classified as forbidden under one of the three restrictions mentioned above, in the event that the wearer is not being specifically addressed, but just happens to be present, there is certainly no concern, for the following two reasons:

a. Tosafot maintain that a *pesik reisha delo nicha lei* (the unintentional violation of a rabbinic restriction, even where the outcome is inevitable) does not constitute a transgression.<sup>68</sup> Therefore, since the speaker is not

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person, many require it to be done either indirectly or by a non-Jew. He does add though, that if these options are not feasible, a fellow Jew may indeed meet these needs. Since the child is sure to suffer great distress were he not to be communicated with in a direct manner by his fellow Jews, all would agree that this rabbinic precept may be violated in order to satisfy his need. See *Minchat Yitzchak* 3:41, who applies this very ruling to children wearing hearing aids.

66. *Iggerot Moshe Orach Chaim* 4:85, *Tzitz Eliezer* 6:6. In *Eidut Leyisrael* chapter 20, Rabbi Y. E. Henkin required the bodily-worn hearing aid of old to be sewn into one's clothing so that it will not come to be switched on or off.

67. *Minchat Shlomo* 2:18 in Rabbi Auerbach's letter to Rabbi Henkin.

68. *Shabbat* 103a s.v.Lo.

specifically addressing the person wearing the hearing aid, he may continue speaking.<sup>69</sup> In fact, even those in disagreement with Tosafot<sup>70</sup> may possibly concur concerning the transgression of "creating", since it is of a more lenient nature than the average rabbinic restriction.

b. The Ran, quoting Rashba, states that a gate may be closed to protect a person's property even if a deer that happened to have roamed into the enclosure is thus trapped. Although trapping an animal is biblically forbidden on Shabbat, nevertheless, since this very act of "trapping" by closing the gate is also serving a permitted function, it is permitted.<sup>71</sup> Similarly, many permit a person to address individuals not wearing hearing aids despite the fact that he is simultaneously causing an increase in the current flow to the hearing aids (and intends also to address those wearing the hearing aid),<sup>72</sup> since that very speech is

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69. *Iggerot Moshe*, *ibid*, suggests that even when speaking in close proximity to a hearing aid, a person's speech is not always necessarily causing an increase in current flow. His premise is that the wearer does not always hear every word being spoken. In reality, with contemporary hearing aids, the sound is constantly causing an increase in current flow, but hearing-impaired people sometimes experience difficulty in processing that information. This will at times result in their missing a few words here and there.

*Minchat Yitzchak* 3:41:6 and *Tzitz Eliezer*, 6:6 and 9:12, maintain that this rationale permits even directly addressing a lone person wearing a hearing aid.

70. See *Magen Avraham* 316:8; *Mishnah Berurah* 316:16.

71. *Shabbat* 38a (pages of the Rif).

72. *Ma'aseh Choshev* 2:5 pg.105. There it is pointed out that the *Mishnah Berurah* 316:25 clearly rules that we do not follow this lenient ruling of the Rashba; rather, we adopt the stringent ruling of the Ran and Ritva. Nevertheless, he maintains that our case is unique in the following two respects: a. The transgression in

concurrently serving a permitted function.<sup>73</sup>

If the speaker is unaware of the consequences of his speech, there certainly would be no need to point it out to him, since he is considered a *mit'asek* (one who inadvertently violates a prohibition while preoccupied) and therefore not held responsible for his actions.

### 3. Handling a hearing aid (*muktzah*)

The Sages generally prohibited the handling of all items that were not designated for use prior to the onset of Shabbat, as *muktzah* (lit. set apart). Included in *muktzah* is the prohibition of handling items whose primary function is forbidden on Shabbat, lest one come to use them for the prohibited use.<sup>74</sup> In order to determine whether the prohibition of *muktzah* includes hearing aids, it is necessary to consider the several categories of *muktzah*.

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question is merely rabbinic. Therefore, since its enactment would result in potential distress to hearing-impaired people, one may rely on the lenient position of the Rashba. b. The Ran himself, who takes issue with the Rashba, happens to agree with the aforementioned Tosafot that an unintentional violation of a rabbinic prohibition is permitted even if the outcome is inevitable. (See Ran *Beitza* 19a, pages of the *Rif*). Hence, it should be permitted either way.

73. There seems to be some difficulty in applying the leniency of the Rashba to our case, for in the instance discussed by him, the "forbidden act", closing the door, is in and of itself also a permitted act and is therefore permitted. However, "creating" an increase of current flow, if forbidden, is always forbidden. The fact that the forbidden act of "creating" results from one's speech, which happens to also have a permitted function, hardly justifies the comparison, for it is the "act of creating" that is forbidden, not one's speech.

74. Rambam, *Hilchot Shabbat* 24:12 and 13.



a. *Kli shemelachto l'issur*, an item whose function is forbidden.

It is important to note that even if a hearing aid is deemed a *kli shemelachto l'issur*, this form of *muktzah* is unique in that handling it is permitted if one of the following conditions are met:

- 1) the item is being handled for its permitted use, or
- 2) the item is being moved to make the place which it occupies available for use on Shabbat.

Such items may not be handled, however, to spare them from being damaged, stolen, or for any other purpose.<sup>75</sup>

Since the activation of hearing aids could possibly entail the violation of a prohibition (see section 1), its *muktzah* status would appear to be comparable to that of an electric fan or clock activated before Shabbat. Some maintain that since a *kli shemelachto l'issur* is *muktzah* only to prevent one from performing the forbidden act, in the event that the act was already performed before Shabbat, it may be handled, since there is no longer a prohibition to safeguard.<sup>76</sup> Similarly, one should be permitted to handle a hearing aid under all circumstances, provided it has already been activated before Shabbat.<sup>77</sup> Others disagree and consider a

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75. *Shulchan Aruch Orach Chaim* 308:3.

76. Although the fan can still be deactivated, which is also prohibited, nevertheless, this does not render it a *kli shemelachto l'issur*. As the *Biur Halacha* 308:3 s. v. *kli* points out, an item is only considered a *kli shemelachto l'issur* if its primary use is prohibited. Since the primary function of the fan is its activation, not its deactivation, it is not considered to be a *kli shemelachto l'issur*.

77. *Minchat Shlomo* 1:9 pg.75; *ibid.* 2:18; *Am Hatorah* 5740 vol. 13.



fan and clock that are operating to be in the category of a *kli shemelachto l'issur*.<sup>78</sup> They reason that since their operation is the constant product of the current flow resulting from the forbidden act, this is sufficient grounds for it to be deemed a *kli shemelachto l'issur*. If so, one would be permitted to handle a hearing aid only to benefit from the hearing aid itself or its place.<sup>79</sup>

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78. *Iggerot Moshe Orach Chaim* 3:49.

79. This ruling is adopted by *Tzitz Eliezer* 6:6 and *She'arim Hametzuyanim Behalacha* 80:81. Upon concluding his remarks, however, the *Tzitz Eliezer* declares that hearing aids may indeed not have the status of a *kli shemelachto l'issur*, but does not divulge what prompted that comment. This conclusion is not universal, for the aforementioned position of Rabbi Feinstein regarding a fan seems to be in direct conflict with a different ruling of his, quoted in *The Halachos of Muktza*. There he is quoted as classifying an electronic watch/clock as a *kli shemelachto l'heter*. One solution (suggested to this writer by a son of Rabbi Feinstein) is that the issue in *Iggerot Moshe* concerned a fan or clock that was connected by a cord to the electricity, while the clock mentioned in *The Halachos of Muktza* was battery operated and thus assumed a different halachic status. It would follow that a hearing aid that is battery operated should also be deemed a *kli shemelachto l'heter* even according to Rabbi Feinstein. However this solution seems highly questionable, as in *Iggerot Moshe Orach Chaim* 4:85 it is apparent that in his opinion, battery operated appliances – specifically hearing aids – involve the same possible biblical prohibitions as appliances connected to the electricity.

Rabbi Bodner (author of *The Halachos of Muktza*) advised this writer that the distinction between the cases lies in the fact that the activation of a watch is not an integral part of its use, since a watch is virtually always bought with the battery already in it. Accordingly, its ongoing operation is not considered to be an extension of the forbidden act of activating an electrical appliance. The activation of an electric fan or clock, on the other hand, is part of their use and thus their ongoing operation is considered an extension of a forbidden act. (In a recently published work on the laws of *muktzah*, *Nachalat Yisrael* pp. 131-132, the author raises our very

Practically speaking, both opinions would allow a hearing aid to be handled in order to wear it, as this is its use.<sup>80</sup> It may also be removed before going to sleep, for one is entitled to vacate the space that it occupies when needed and it is certainly more comfortable to lie down without it. The difference between the two views would be the removal of the hearing aid so that it will not be ruined by the elements, damaged, or stolen, which is not permitted in the case of a *kli shemelachto l'issur*.<sup>81</sup>

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question and resolves it as stated.) Since the activation of a hearing aid is certainly part of its use, according to Rabbi Feinstein, it should be considered a *kli shemelachto l'issur*.

80. Once the hearing aids are already worn, there is further reason to permit their handling. The *Shulchan Aruch* 311:8 rules that moving an object with one's body is permitted. This is explained by the *Mishnah Berurah* (note 30) to mean that the restrictions of *muktzah* were never enacted where the person touches the object with a part of his body other than his hands. This point is of importance regarding an instance in which the battery dies while the hearing aid is worn, rendering the now functionless hearing aid *muktzah machmat gufo* (inherently *muktzah*). Although such items may not be handled at all, the hearing aid may continue to be worn, since the wearer is not handling it with his hands. Its removal, however, will need to be facilitated in either a backhanded manner or through the services of a non-Jew.

81. It is highly questionable whether they may indeed be handled for their own use or place should they be deemed *kli shemelachto l'issur*, as there is a debate amongst the authorities concerning the status of a *kli shemelachto l'issur* that has no alternative permitted function. The *Beit Meir Orach Chaim* 310:7 permits handling these items for their use or place, while the *Pri Megadim* (*Eishel Avraham* 308:12), and the *Aruch HaShulchan* 279:1 forbid doing so under all circumstances. Accordingly, if we adopt the opinion of the *Iggerot Moshe* that a hearing aid is a *kli shemelachto l'issur*, as well as that of the *Pri Megadim* and the *Aruch HaShulchan*, it would be forbidden to handle a hearing aid at all on the Shabbat.

b. *Muktzah machmat chisaron kis* – *muktzah* due to a potential monetary loss:

These are items that the owner will use for nothing other than their intended use out of fear that it may result in a financial loss.<sup>82</sup> Since hearing aids certainly meet this criterion, it seems handling them should be forbidden on Shabbat. However, this assumption is erroneous, for this category only prohibits handling for purposes other than their primary use, but not for their intended permitted use.<sup>83</sup> If so, handling hearing aids would be permitted solely for the purpose of using them, but removing them should be forbidden, since this is seemingly not their primary

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Interestingly, the *Iggerot Moshe* and *Minchat Shlomo* have actually taken sides in this very dispute. Rabbi S.Z. Auerbach (author of *Minchat Shlomo*) is quoted in *Shemirat Shabbat Kehilchata* 20:80 as siding with the *Pri Megadim*, whereas Rabbi Feinstein (author of *Iggerot Moshe*), is quoted in *The Halachos of Muktza* 2:2 (as well as in the section titled "Responso of Hagaon Rabbi M. Feinstein," *kli shemelachto l'issur* note 9), as accepting the view of the *Beit Meir*. Accordingly, Rabbi Feinstein, who considers a hearing aid as a *kli shemelachto l'issur*, happens to be of the opinion that it may still be handled for its use or the use of its place. Rabbi Auerbach, who would indeed forbid its handling were it to be considered a *kli shemelachto l'issur*, still permits it to be handled, as he deems it a *kli shemelachto l'heter*.

82. *Shulchan Aruch Orach Chaim* 308:1, according to the understanding of the *Mishnah Berurah*, note 2. The *Tehila Ledavid* in his opening remarks to section 308 suggests that an item is only considered *muktzah machmat chisaron kis* if it is also a *kli shemelachto l'issur*. According to the view of the *Minchat Shlomo* therefore, there is no reason to forbid handling a hearing aid as far as this form of *muktzah* is concerned.

83. Rabbi Auerbach's letter to Rabbi Y. E. Henkin, dated 5703, quoted in *Minchat Shlomo* 2:18; Rabbi M. Heinemann (see above note 58), who supports this premise from the halachic status of a slaughtering knife.

function. It may be suggested that perhaps the removal of a hearing aid when it is no longer desired is indeed an aspect of its intended use and therefore permitted. If the hearing aids will again be worn at a later point on that same Shabbat their removal would certainly be permitted.<sup>84</sup>

c. *Muktzah machmat gufo* – items inherently *muktzah* due to their uselessness:

Broken glass is an example of this category of *muktzah*. Yet the Ramo rules that "if a glass breaks in an area in which it can cause harm, the broken pieces may be removed in order to prevent potential injury."<sup>85</sup> Based on this rule, wearing hearing aids on Shabbat is permitted, for were they withheld, hearing-impaired people could face possible injury due to their inability to hear signals warning of potential danger.<sup>86</sup>

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84. *Tehila Ledavid* 308:5.

85. *Orach Chaim* 308:6.

86. *Tzitz Eliezer* 6:6 points out that this support only carries weight according to the opinion of the *Pri Megadim* (*Eishel Avraham* 308:37, quoted by the *Mishnah Berurah* 308:77) that the prohibition of *muktzah* is waived to spare even a single person from potential injury. The *Shulchan Aruch HaRav* 308:28 and *Aruch HaShulchan* 308:20, on the other hand, both contend that the prohibition is waived only if it is a group of people who stand the chance of getting hurt. In support of his lenient conclusion, he quotes the *Tashbatz* 1:137, who concurs with the opinion of *Pri Megadim*.

Two issues beg clarification:

a. According to this understanding, hearing aids should only be allowed to be handled in order to hear with them. Removing them before going to sleep would be forbidden, as this act does not prevent one from getting hurt. This may be resolved with the position of the *Tehila Ledavid* 308:5, who maintains that an item which will be needed "for its own use" at a later point on that particular Shabbat, may be handled (even to protect it from the elements etc.), so that it will be available for use later on.

Another approach to permit the handling of hearing aids is based on the ruling of the *Shulchan Aruch* to suspend the prohibition of *muktzah machmat gufo* to preserve human dignity, such as the use of stones or similar items to cleanse one's self on Shabbat.<sup>87</sup> Since the Sages did not impose their restrictions in instances that could result in an individual's humiliation or embarrassment, the handling of hearing aids should certainly be permissible.

There is no greater preservation of human dignity than removing the shame and indignity otherwise experienced by the hearing impaired due to their inability to hear when spoken to. One cannot describe the humiliation, shame, and awkwardness that is inevitable upon their entering the synagogue amidst a multitude of people, yet all alone. They are unable to hear that which is transpiring nor are they always able to respond when spoken to...<sup>88</sup>

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Similarly, if the hearing aids stand a chance of becoming damaged as a result of one's movements while sleeping, they may be removed beforehand, provided one is still planning on wearing them on that particular Shabbat. If one is planning on leaving them off until after Shabbat, their removal would not be justified according to this reasoning. Although not always practical, the assistance of a non-Jew can be enlisted to remove them (*Mishnah Berurah* 279:14).

b. There is a seeming discrepancy between a hearing aid and broken glass. Broken glass is the *muktzah* item itself, and thus, as a potential hazard, may be handled despite its *muktzah* status. However, a hearing aid is not the potential cause of injury in and of itself, but rather a mere deterrent from being injured by something else. Perhaps concerning such instances the prohibition is still in force. It would seem, though, that since potential injury takes precedence over the *muktzah* prohibition, no distinction is made.

87. *Orach Chaim* 312:1.

88. *Tzitz Eliezer* 6:6.

In summary, then, we may conclude that the prohibition of *muktzah* does not preclude the wearing or handling of a hearing aid.

#### 4. Wearing a hearing aid in a public domain (*hotza'a*)

It is biblically forbidden to carry items in a public domain on Shabbat.<sup>89</sup> From the verse "You shall not take out a load from your houses on Shabbat,"<sup>90</sup> we infer that only items described as a "load" are forbidden to be carried out. Clothing or ornamentation (such as jewelry) are certainly not regarded as a "load" and may be worn.<sup>91</sup> Can hearing aids be equated with clothing and ornamentation?

A comparison can be drawn between wearing hearing aids and wearing eyeglasses, and the rationale permitting wearing eyeglasses in a public domain should apply equally to hearing aids.<sup>92</sup>

The *Shulchan Aruch* rules that an individual who is unable to walk without the assistance of a cane may use one in a public domain. However, if he is able to walk without it, the cane may not be used.<sup>93</sup> There is some debate concerning the rationale behind this ruling. The *Levush* maintains that since the cane is assisting one's walking, it cannot be considered a "load". He therefore suggests that

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89. Mishnah *Shabbat* 73a.

90. *Yirmiyahu* 17:22.

91. *Aruch Hashulchan Orach Chaim* 301:48.

92. For a comprehensive treatment of this matter, see *Binyan Tziyon* 37; *Minchat Shabbat* on the *Kitzur Shulchan Aruch* 84:6, citing numerous leading authorities such as Rabbi Shlomo Kluger and Rabbi Yechiel Michel Epstein, who concur with the permissive ruling; *Minchat Elazar* 3:4.

93. *Orach Chaim* 301:17.



this prohibition is rabbinical, the reasoning being that since it is feasible to walk without the cane, the person might come to carry it.<sup>94</sup>

*Tosefet Shabbat* acknowledges the rabbinical prohibition of the *Levush*, but says that it is also biblically prohibited, because in his opinion the cane is to be considered "a load".<sup>95</sup> The *Chayei Adam*, based on the aforementioned prohibition, rules that one is forbidden to go out with spectacles on one's nose lest they come to be carried.<sup>96</sup> But many *Acharonim* contend that the *Chayei Adam's* ruling was limited to eyeglasses without temples (like pince-nez), since they may fall off and come to be carried (perhaps equivalent to reading glasses, which are not worn all the time). However, regular eyeglasses that are secured with temples behind the ears and do not tend to fall off, may indeed be worn on Shabbat.<sup>97</sup>

Similarly, hearing aids are worn every day, all day long, and there is no concern lest they come to be carried.<sup>98</sup>

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94. Quoted in *Pri Megadim*, *Eishel Avraham* 301:27, who appears to share the same point of view, as he does not contest this argument.

95. 301:38.

96. "Laws of Shabbat" 56:3.

97. Ibid.

98. It is important to point out that some hearing aids (especially cochlear implants that run on a single battery) tend to run out of power before the culmination of Shabbat. On a weekday, the natural course of events would be to remove the hearing aid and replace the battery. Since there is room for concern that they might come to be carried, wearing them in a public domain might not be permitted. It may be suggested though, that even where there is cause for concern that they might come to be carried, hearing aids may still be worn outdoors on Shabbat, based on the following two principles: a. Regarding items that may not be



According to the reasoning of *Levush*, *Chayei Adam* and others, it is permissible to wear them in a public domain.<sup>99</sup>

taken out lest they come to be carried, the *Elya Rabba* 301:35 (quoted in *Eishel Avraham* of the *Pri Megadim* 301:25) rules that *b'dieved*, if a person forgot and went outside with them, he may continue on his way. b. There is a frequently used rule in halachic literature, that "a time of great need" is classified as *b'dieved*. The permissibility of wearing hearing aids is certainly definable as "a time of great need", and therefore initially should be no different.

99. *Minchat Yitzchak* 1:37. In *Be'er Moshe* 1:17, Rabbi Stern permits going out with the hearing aids of old that were attached to a battery pack secured in the person's pocket. *A fortiori*, if a person is permitted to go out wearing eyeglasses even though they can possibly fall off and come to be carried, he may certainly wear these hearing aids, since there is no way for them to fall. This would be equally applicable to speech processors of cochlear implants and bodily-worn hearing aids (usually worn by young children) that are secured in a pocket, harness or a belt.

However, in *Har Tzvi Orach Chaim* 1:173, we find a diametrically opposed point of view. He contends that if a component of the hearing aid is placed within a pocket, it cannot be considered a form of ornamentation and may not be worn on Shabbat. A similar view is expressed by Rabbi Y. E. Henkin (in a letter to Rabbi S. Z. Auerbach subsequently published in *Minchat Shlomo* 2:8), who also contends that it is illogical to define items worn inside a pocket as ornamentation. He therefore suggests (both in the aforementioned letter as well as in *Eidut Leyisrael* chapter 20), that the part of the hearing aid in the pocket be sewn in before Shabbat, so that one may go out with it. In *Minchat Shlomo*, *ibid*, Rabbi Auerbach disagrees with this suggestion as being insufficient grounds to eliminate this concern, but nevertheless permits it anyway due to a host of other reasons.

Concerning the hearing aids of old that were built into eyeglass frames, *Har Tzvi*, *ibid*, as well as *Minchat Yitzchak* 2:112 (quoting Rabbi Tz. P. Frank, author of the *Har Tzvi*) contend that the hearing aids are deemed *tafel* (negligible) to the eyeglasses and may thus be worn. This rationale is contested by Rabbi S. Z. Auerbach (quoted in *Shemirat Shabbat Kehilchata* 34:109), who finds

According to the *Tosefet Shabbat*, although there is no reason to suspect that they might fall off, hearing aids should still be forbidden to be worn outside as they would be considered a "load", since one is physically capable of walking without them. However, it may be suggested that eyeglasses and hearing aids are not comparable to a cane (unlike the premise of the *Chayei Adam*), because a cane is held (carried), while eyeglasses and hearing aids are worn. Accordingly, the *Tosefet Shabbat* might consider only the cane to be a "load" because it is held, whereas eyeglasses and hearing aids that are worn would indeed be permitted.<sup>100</sup>

Alternatively, we can argue that although hearing-impaired people are obviously capable of walking without their hearing aids, nevertheless, if their impairment is so severe that they are unable to hear effectively without them, their status may be likened to a person who is unable to walk without a cane.<sup>101</sup> This approach is based on the Rosh, the source of the above-mentioned ruling of the *Shulchan Aruch*. He explains that if a lame individual is physically incapable of walking without his cane, the cane is "likened to his shoes" and may thus be used even in a public domain.<sup>102</sup> By the same token, anything which compensates for the deficiency of any other limb should also be considered to be an extension of that limb, and may thus be carried on Shabbat. This rationale clearly would permit wearing a hearing aid outside on Shabbat.<sup>103</sup>

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difficulty in deeming hearing aids inferior to eyeglasses.

100. This may be inferred from responsa *Be'er Moshe* 1:17 and *Minchat Shlomo* 2:18.

101. See above note 58.

102. Rosh, *Beitza* 3:5.

103. According to this understanding, it is unclear why the Rosh likened a cane to a shoe, for since it fills the void created by the

An additional rationale is based on a ruling by the *Shulchan Aruch* expanding the definition of permitted ornamentation.

One may go out with a pad or sponge on a wound, since they have a healing effect and are considered to be a form of ornamentation.<sup>104</sup>

One who has a coin tied to a wound on the sole of his foot so that it won't get hurt and will become healed, may go out with it on Shabbat.<sup>105</sup>

Hearing aids play a similar role as they prevent hearing-impaired people from potential injury due to their inability to hear signals of caution. They may therefore be worn on Shabbat.<sup>106</sup>

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foot's inability to walk, it should have been likened to the foot itself.

104. *Orach Chaim* 301:21.

105. *Ibid.*, 301:28.

106. *She'arim Hametzuyanim Behalacha* 80:81. The *Sha'ar Hatziyun* 301:131 records a dispute among the authorities whether the pad and sponge are considered secondary due to their lack of inherent value. The *Chayei Adam* maintains that if the item used to protect the wound is of value, it cannot be deemed secondary to the wound. The Gra disagrees and contends that anything protecting a wound is deemed secondary to that wound, regardless of its worth. Since hearing aids are of great monetary value, this theory is seemingly limited to the position of the Gra.

It may be suggested that this basis has merit even according to the *Chayei Adam*, for the intrinsic value of the items he was discussing arises from the reality that they serve functions other than merely protecting a wound and can therefore not be considered secondary to the wound. A hearing aid, on the other hand, while also of great monetary value, serves no function other than enabling the wearer to hear. Thus, it may be considered secondary to the body it is protecting. (A possible flaw in this reasoning is that

Others say that hearing aids may be worn in a public area on Shabbat based on the ruling of *Shulchan Aruch* that one may go into a public domain with pepper in one's mouth to rid it of a foul odor. The reason given is that doing so "benefits the body" and spares one humiliation.<sup>107</sup> Wearing hearing aids is certainly "beneficial to the body" and thus should be permitted.<sup>108</sup> However, the *Shulchan Aruch* applies this leniency only when the peppers were already in the person's mouth prior to the onset of Shabbat. If they were placed in the mouth on Shabbat itself, going out in such a manner would appear to be prohibited. If this ruling is applied to hearing aids it would seem that to go out with hearing aids on Shabbat, they would have to be worn from prior to the onset of Shabbat.

However, after examining the rationale behind this limitation it becomes evident that it is irrelevant to the wearing of hearing aids. Tosafot explain that placing pepper in one's mouth and then going out could give the impression that this is being used as a pretext to transfer the peppers from a private domain to another domain, and is therefore forbidden. However, where the legitimate motive behind taking the peppers out is evident, going out with them in one's mouth would be permitted even if they were put there on Shabbat itself.<sup>109</sup> Since the motive behind wearing hearing aids is clearly not a mere pretext to transport them from place to place, they may be worn in a

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the sole function of a hearing aid is not merely to protect hearing-impaired people, but rather to facilitate communication in general.)

107. *Orach Chaim* 303:15.

108. *Be'er Moshe* 1:17.

109. Tosafot *Shabbat* 64b s. v. *Uvilvad*. It is important to note that this is the second explanation in Tosafot. The first would possibly have different ramifications.

public domain even if they were put on after the onset on Shabbat.

An additional reason to permit the wearing of hearing aids in public is the ruling of the *Shulchan Aruch* that one may go out on Shabbat with an "expert amulet" (whose efficacy has been established three times). This applies regardless of whether the wearer's sickness is life threatening or not.<sup>110</sup> Since an amulet enabling the hearing impaired to hear would certainly have been allowed, hearing aids should be no different, as they serve that very purpose.<sup>111</sup>

A final suggestion for the permissibility of wearing hearing aids is based on the ruling of *Shulchan Aruch* that a prisoner with chains bound to his feet may walk in a public domain on Shabbat.<sup>112</sup> The *Me'iri*, who shares the same point of view, explains that any item whose purpose is to protect a person cannot be categorized as a "load".<sup>113</sup> Similarly, the wearing of hearing aids in a public domain should certainly be permitted, since they also serve the purpose of protecting the wearer from accidents that may result from his inability to hear. *A fortiori*, if a captive is permitted to go out with his chains despite his not wanting

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110. *Orach Chaim* 301:25.

111. *Shemirat Shabbat Kehilchata* 1:34:108; *Minchat Shlomo* 2:18; *Am Hatorah* 5740 vol. 13. A seeming difficulty with this support is that the permissibility of wearing an amulet seems to be limited to where the amulet renders some sort of healing effect. While hearing aids do fill the void created by the hearing impairment, they do not possess any healing quality. Nevertheless, *Minchat Shlomo*, *ibid*, implies that since practically speaking the impairment no longer impairs as a result of the hearing aids, they are considered to heal temporarily. *Har Tzvi Orach Chaim* 1:173 and *Be'er Moshe* 1:17 disagree.

112. *Orach Chaim* 301:19.

113. *Shabbat*, chapter 6, Mishnah 7.

them, how much more so should hearing-impaired people be permitted to go out with hearing aids that are certainly desired and needed!<sup>114</sup>

### Conclusion

There are differences of opinion regarding the initial activation of a hearing aid and the replacement of its batteries. Both should be avoided. If this is not possible, there are significant authorities who permit these actions (preferably by a non-Jew or in a backhanded manner). One may speak directly to people, especially children, wearing hearing aids and certainly to an audience that is only partially composed of such individuals. The handling of a functioning hearing aid is unanimously permitted if this is done to use the hearing aid itself or the place upon which it was placed. Handling a hearing aid for any other purpose will be subject to how its *muktzah* status is categorized. Hearing aids may be worn in a public domain according to many authorities since they are not regarded as a load and will not come to be carried.

Sound plays a vital role every day of our lives, especially on Shabbat. Communal prayer and melodious *zemirot* sung at festive Shabbat meals have always been the hallmark of the Shabbat experience. It is my hope that this essay will firmly establish the permissibility of wearing hearing aids on Shabbat and afford hearing-impaired people the opportunity also to be inspired and uplifted by the sounds of Shabbat. To quote the wisest of all men, "Hear my son, accept my words and your years will be increased!"<sup>115</sup>

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114. *Be'er Moshe*, *ibid.*

115. Proverbs 4:10.



# **Journalism, Controversy, and Responsibility: A Halachic Analysis**

*Steven Oppenheimer, D.D.S.*

Recently, a major exposé appeared in a Jewish newspaper regarding a rabbinic figure working for a leading Jewish organization. Serious allegations were made regarding inappropriate behavior, and as a result, this person resigned his position. The newspaper articles spanned several weeks, and caused quite a stir nationally and even internationally in the Jewish world. The repercussions from these stories are still being felt, and people's lives have been affected by these newspaper reports far beyond the principal parties involved.

It is not the intention of this author to discuss the details of this particular case. I would, however, like to discuss whether there are halachic guidelines involved in newspaper reporting. How should a Jewish newspaper conduct its investigative reporting? For that matter, what is our obligation as readers? Does halacha take a position on whether and how stories should be reported in the press? This article will explore these issues.

## **News Media: A Public Forum**

One of the most important functions of a newspaper is to serve as a forum to examine social, political, and ideological issues important to public welfare and education. Often, the presentation of issues will take the form of a debate, with opposing sides presenting their views. Debate, however, should

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not be confused with controversy (*machloket*), which we are commanded to avoid. When Moshe Rabbeinu was challenged by Datan and Aviram, it was Moshe who went to them, attempting to avoid controversy.<sup>1</sup> Reish Lakish says that we learn from Moshe Rabbeinu's actions "*she'ain mach'zikin be'machloket*," that one should not persist in *machloket*. Rav says whoever persists in *machloket* violates the Torah prohibition, "*lo yi'hi'yeh cheKorach ve'cha'ahdato*," he should not be like Korach and his assembly.<sup>2</sup> It is forbidden to persist in *machloket* even if you are in the right and the other individual is behaving improperly.<sup>3</sup> Therefore, while newspapers serve as a forum for public debate and discussion, newspaper articles that encourage or promote *machloket* are contrary to halacha.

*Machloket* leads to hatred, *lashon hara*, and at times irrational behavior fueled by anger.<sup>4</sup> Once the involved parties embark on the path of *machloket*, it becomes difficult to stem the discord. Rashi explains that when a river overflows its banks, it starts as a small stream of water. If this is not blocked immediately, it becomes impossible to stop. Similarly, if a dispute is not quelled in its early stages, it will escalate out of control.<sup>5</sup> Therefore, it is vital that a newspaper serve as a medium to clarify actual issues and not encourage and promote strife between people. Articles that are written to inflame people's emotions in the hope of creating an issue, or that pit two

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1. *Bamidbar* 16:25.

2. T.B. *Sanhedrin* 110a.

3. *Chamra Ve'Chayei*, *Sanhedrin* 110b, cited in *Ohr Yechezkel* by Rabbi E. M. Korngut, *Machon Ohr Yechezkel*, Israel, 1993, page 346.

4. See T.B. *Shabbat* 105b. A person who in anger tears his clothes, smashes his utensils or scatters his money should be viewed as an idol worshiper.

5. See Rashi, *Sanhedrin* 7a, d.h. *le'tzinora d'bidka*. See also d.h. *le'guda d'gamla*.

personalities against each other to create controversy are inappropriate. Moreover, interviews that selectively quote to create sensationalism have no place in the Jewish press.

The very process involved in preparing a newspaper article should, in theory, avoid the pitfalls of succumbing to unbridled passion. The journalist conceives of a story, investigates the issues and then commits the story to writing. He reviews the article so that the words and sentences are phrased just right. The editor reviews the piece so that the ideas are expressed correctly and any unnecessary provocation is removed. The final article is informative, coherent and designed to address the issues and not attack an individual or an institution. The journalist should not be politically motivated but should strive for the truth. By standing on the political sidelines, the journalist can often see things that are hidden from those who are too closely involved in the issues to properly evaluate them.

In actual practice, this is not always the case. Some newspapers and magazines serve as a forum to advance certain agendas and even vilify people and institutions in a manner not consistent with Jewish law. This is wrong, and we shall see why.

The performance of institutions and individuals who serve the public is subject to examination and critical review. Even the *Kohanim* in the Temple were examined. In order to maintain the upkeep of the Temple and provide for public sacrifices, *machtzeet hashekel* was collected from every Jew.<sup>6</sup> The collection began on *Rosh Chodesh* Adar. The *shekalim* were kept in a special office called a *lishka*, from where the funds were disbursed to be used for public sacrifices. *Chazal* tell us that a *Kohen* who came to serve in the *lishka* had his clothing searched upon

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6. *Shemot* 30:12.

entering and departing the *lishka*. Furthermore, he was engaged in conversation the whole time he was working in the office to ensure that he had not concealed any money in his mouth. This was done in observance of the commandment, "*Ve'he'yitem ne'kiyim mei'HaShem u'mi'Yisroel*," and you shall be "clean" before G-d and (the people of) Israel.<sup>7</sup> The intention was not to embarrass the individuals but to instill confidence in the people that those who served the public were above suspicion.<sup>8</sup> In order to maintain public confidence and to comply with the dictum *Ve'he'yitem ne'kiyim mei'HaShem u'mi'Yisroel*, it is proper for charitable organizations to issue reports of their activities to the public.<sup>9</sup>

Mahari Weil, z"l, was asked about a community leader who had served the public for twenty years and now was being accused of inappropriate behavior. Was it appropriate to have a public investigation and give a detailed accounting to the public? He answered that an investigation should be conducted by a committee of trustworthy individuals appointed by the public. If this is not feasible, a *dayan*, a rabbinic judge, should appoint such a committee. The *dayan* should thoroughly investigate the matter so that the truth should emerge and justice prevail in this world. Unfortunately, he lamented, many communities are victimized by unscrupulous leaders who act more to serve their own interests rather than the interests of the community. These dishonorable leaders shirk their responsibility and further burden those who already suffer. The details of the investigation should not be discussed publicly, so as not to cause undue embarrassment to other involved

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7. *Bamidbar* 32:22.

8. *Tosefta Shekalim* 2:3 with the commentary of *Minchat Bikurim*.

9. *Tur*, Y.D. 257 with explanation of the *Bach*.

parties.<sup>10</sup>

We see that it is incumbent upon the community to appoint representatives from within its midst to examine the behavior of those who serve the public lest the weak and the vulnerable in the community suffer the consequences. In fact, based upon the responsum of Mahari Weil, the Ramo states that in order to be innocent before G-d and Israel, all people who deal with the community must give an accounting of their actions.<sup>11</sup> Any questionable behavior must be promptly investigated under the guidance of recognized *poskim*. While the details of the findings may not be revealed to the public, the public must be given assurance that the matter has been corrected properly and that the public interests have been protected.<sup>12</sup> Detailed revelation of the investigation may only serve to cause additional, unwarranted pain and embarrassment and this serves no public need.<sup>13</sup>

Rabbi Ephraim Greenblatt, *shlit"a*,<sup>14</sup> tells of a meat plant that he visited. The *chalafim*<sup>15</sup> that were used for *shechita* were all unfit because the blades were nicked. Rabbi Greenblatt spoke to *shochetim* but they refused to listen to him. He contacted the supervising rabbi in Israel and, after he reported the problems to him, all the *shochetim* were fired. Had the supervising rabbi not agreed to take action, Rabbi Greenblatt said it would have

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10. Responsa Mahari Weil, *siman* 173. See also *Darchei Moshe*, Y.D., 257:1.

11. *Shulchan Aruch*, *Yoreh De'ah* 257:2.

12. Responsa Mahari Weil, *op. cit.* and *Darchei Moshe*, *op. cit.*

13. Responsa Mahari Weil, *loc. cit.*

14. Rabbi Ephraim Greenblatt is the author of Responsa *Rivevot Ephraim*. His rulings, as recorded in this article, are personal communications to this author.

15. Knives used for slaughtering.

been permitted to go to the newspaper and have them write the story.<sup>16</sup>

There are limits, however. This particular meat company had plants in other cities. The *shochetim* in the other locations were exemplary. Therefore, in order not to cast aspersions on the other company locations, only the city could be named in the article, but not the company name. This would ensure that the reputations of the other *shochetim* would not be harmed. Had the company only had one location, then the company's name could have been used since there would be no need to protect the reputations of uninvolved parties.<sup>17</sup>

This instruction to be innocent before G-d and Israel is clarified by Rabbi Chaim Halberstam, z"l, the founder of the Zanz Chasidic dynasty, who testifies that he has seen with his own eyes travesties that have occurred, while the actions were proclaimed as being in the pursuit of noble causes. It is incumbent that a tribunal of judges investigate any questionable behavior, says Rabbi Halberstam, and not be swayed even by local rabbis who may be pursuing their own best interests. One may not attempt to bring proof from past generations, cautions the *Zanzer Rav*, when most community leaders were righteous and had a sense of shame. Today, however, the community leaders are not automatically considered righteous, laments Rabbi Halberstam, and shameful behavior abounds, especially in those areas that deal with the welfare of the community. Instead, declares Rabbi Halberstam, they have adopted the ways of Sodom while declaring the purity of their

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16. This is based on Rambam, *Hilchot De'ot*, 6:8. See further in the text (the Mitzvah to Admonish).

17. One is clearly not allowed to damage the reputation of an innocent person. In this case, Rabbi Greenblatt felt effective pressure could be brought upon the guilty parties in a manner that would not harm the innocent.

actions. It is therefore appropriate, insists the *Zanzer Rav*, to conduct thorough investigations into the behavior of community leaders.<sup>18</sup>

Whenever there is evidence of impropriety, it must be investigated. While local rabbis have an important role in their communities, the decision to publish an exposé about individuals or organizations must be made in consultation with recognized *poskim*.<sup>19</sup>

It is common for a newspaper to seek the advice of legal counsel before publishing an important story. They don't want to get sued because of improperly worded stories or unsupported facts. The newspaper may want to know how far it can go in reporting certain elements of the story. There are legal boundaries that the editor and the reporter know they cannot cross. The lawyer counsels them on the proper limits. Jewish newspapers need to consult with halachic authorities. The newspaper should choose a *posek* and consult with him regularly to ascertain the propriety of the stories they print. Do their stories exceed halachic guidelines? The rabbinic authority with whom they consult will help them avoid a *chilul HaShem*.<sup>20</sup>

### The Mitzvah to Admonish

We are commanded to admonish our fellow Jew if he has acted inappropriately, as the Torah commands, "*hochei'ach*

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18. Responsa *Divrei Chaim*, *Choshen Mishpat*, *siman* 25.

19. See footnote 16. Mahari Weil required one *dayan*, and the *Zanzer Rav* wrote of the need for a tribunal of judges. Rabbeinu Yonah (*Sha'arei Teshuva*, *sha'ar shlishi*, 221) wrote that incidents *bein adam le'chaveiro* such as theft, robbery, damage, the causing of pain, shaming and wrongdoing with words, may be revealed to others.

20. Ibid. See also *Sha'arei Teshuva*, 218, 219.



*tochee'ach et ahmitecha velo tisah alav cheit,"* you shall admonish your fellow Jew and do not bear a sin because of him.<sup>21</sup>

The Talmud explains that should one see his fellow Jew behaving improperly, he must rebuke him privately, even multiple times.<sup>22</sup> The rebuke must be done in a gentle manner, and one should inform the person that it is being done with his best interests at heart.<sup>23</sup> Rambam contends that in matters *bein adam laMakom* (between man and G-d), after unsuccessful attempts at private coercion, one may publicize and embarrass the individuals until they change their behavior.<sup>24</sup> *Sefer HaChinuch* (mitzvah 240) says it is a *mitzvah* to do this and *Minchat Chinuch* (mitzvah 240) concludes that one is required to do this.

In matters *bein adam la'chaveiro* (between man and man), *Minchat Chinuch* asserts that one directly involved may not publicly embarrass someone. However, if you are aware that someone is sinning against someone else, you are permitted to publicize the offense and embarrass the individual if there is no other way to stop the offensive behavior. *Minchat Chinuch* explains that Rambam and *Sefer HaChinuch* are talking about a case where the individual is involved with the sinner. In this case, it is preferable that the aggrieved person forgive the sinner. However, if one is not directly involved, he may go public, as we see from numerous examples in the books of the prophets.<sup>25</sup>

There is even a requirement to rebuke a person who is greater than the one giving rebuke. Therefore, even a student

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21. *Vayikra* 19:17.

22. T.B. *Bava Metzia* 31a and *Arachin* 16b.

23. Rambam, *Mishneh Torah*, *Hilchot De'ot*, 6:7.

24. *Ibid*, 6:8.

25. The example of the prophets is brought by Rambam, *Sefer HaChinuch* and *Minchat Chinuch*.



is required to rebuke his teacher if the latter has acted inappropriately.<sup>26</sup>

The requirement to give rebuke applies to spiritual as well as mundane matters. Therefore, if you see someone mistreating, exploiting or stealing from another individual, you must, if you are able, rebuke the perpetrator and prevent him from committing this transgression.<sup>27</sup>

While it is now clear that some action must be taken, can a newspaper publicize the inappropriate actions of an individual or an organization? There are times when the Torah commands us to take public action to warn against and prevent certain behavior. If someone entices others to go astray and engage in idol worship, he is executed by *Beit Din*, led by the person he attempted to entice. If he is not able to do so, then all the people are charged with carrying out the execution. The nature of the offense is so grievous that the enticer's punishment must be as public as possible so as to serve as a deterrent to others.<sup>28</sup>

Rabbi Akiva holds that he is not killed immediately after the trial, as is normally the case, but is taken to Jerusalem and executed during the time of the next pilgrimage festival. According to Rabbi Yehuda, the sentence is carried out immediately, but the court sends messengers throughout the country to publicize the crime and the sentence received.<sup>29</sup> Similarly, regarding *eidim zomemim*, conspiring witnesses, the punishment must be announced publicly, so that it will deter

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26. T.B. *Bava Metzia*, 31a. Ritva observes that although a student must rebuke his teacher, he must do so with respect.

27. *Ohr Yechezkel*, loc. cit., page 337, based upon Rambam, *Mishneh Torah*, *Hilchot De'ot*, 6:7 and *Yerei'im*, Vilna, *siman* 223(37), *chelek aleph*, page 98.

28. *Devarim* 13:10,12.

29. *Sifrei*, *Devarim*, *Re'eh*, #70, on *Devarim* 13:12.

others from a similar conspiracy.<sup>30</sup>

Our prophets also engaged in public rebuke when necessary. For example, Yeshayahu scolded Achaz, the king of Judah, "Is it not enough that you scorn the prophets, you even scorn my G-d?"<sup>31</sup> And Yirmiyahu sent a message to the elders in the Babylonian exile in which he publicized the transgressions of Achaz, Tzidkiyahu and Shemayahu.<sup>32</sup> Therefore, regarding spiritual matters, says Rambam, if the person does not respond to private rebuke, we embarrass him publicly and publicize his transgression until he returns to proper behavior, as all the prophets of Israel have done.<sup>33</sup>

This public rebuke is not limited to spiritual matters but also involves matters *bein adam le'chaveiro*, between man and his fellow man. A person is required to provide for his children. Should he refuse, he is pressured, scolded and embarrassed. If this is not effective, a public announcement is made that this person is cruel and despicable.<sup>34</sup> Similar action is taken against a son who refuses to take care of his parents,<sup>35</sup> or a father who refuses to provide for his sickly daughter. If the father has means, he is forced to provide for his daughter. If he is not affluent, he is publicly embarrassed until he complies.<sup>36</sup>

In previous times, when people lived in small towns and newspapers were not as accessible, the public embarrassment

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30. *Devarim* 19:19, 20.

31. *Yeshayahu*, 7:13.

32. *Yirmiyahu*, 29:24:32.

33. *Hilchot De'ot* 6:8. See also Responsa *Rashba*, *chelek aleph*, #414 and *Aruch HaShulchan*, *Even HaEzer* 22:3.

34. *Shulchan Aruch*, *Even HaEzer*, 71:1.

35. *T.J. Pe'ah* 1:1. See also Responsa *Rashba*, *chelek dalet*, #56.

36. *Mordechai*, *Kiddushin*, *simanim* 556-557.

might have taken the form of an announcement from the pulpit. Today, newspapers are readily accessible and can serve as a means of coercion should private attempts fail. In consultation with appropriate halachic authority, the publishing of articles may be quite effective in convincing the recalcitrant miscreant to change his behavior. However, there are significant restrictions in this matter, and it cannot be done without strict halachic supervision.

### Halachic Guidelines

In order to avoid unnecessary embarrassment to any person or family, a person (or a newspaper) may only reveal this information if the following guidelines, established by the Chafetz Chaim, are followed:<sup>37</sup>

- 1) One must be sure that the information is accurate.
- 2) One must first confront the individual privately, attempting to gently persuade him to make amends.
- 3) The nature of the offense should not be exaggerated.
- 4) The motivation in writing a story should be to pursue the truth and to assist those in need of help. The intention should never be to harm anyone.
- 5) Should it be possible to correct a situation without publicity, it is prohibited to publicize the matter.
- 6) Should the subject of the investigative story suffer harm greater than he deserves, it is forbidden to publish the story in such a way that the damage would not be reversible.
- 7) Even if all the above requirements have been met, prior

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37. *Ohr Yechezkel*, loc. cit., pp. 357-8, based upon Chafetz Chaim, *Hilchot Lashon Ha'Ra*, klal 10:2 and *Hilchot Rechilut*, klal 9:12.

to publicizing the information, the reporter must carefully review his motives and intentions since peoples' lives and reputations are at stake.

If these criteria are met and publication of the information will result in a service to the community, rabbinic authority may decide that the reporter is permitted and indeed obligated to publish the information.<sup>38</sup>

What constitutes improper behavior that would warrant an investigation? If an officer in a Jewish organization, for example, is accused of stealing funds, is an investigation warranted? How about if he beats his wife, mistreats his children, doesn't pay his bills or cheats in business? All of the above, declares Rabbi Greenblatt.<sup>39</sup> If the allegations are substantiated and yet the individual refuses to submit to private pressure, the story should be printed in the newspaper, affirms Rabbi Greenblatt, as long as this is done in consultation with a *posek*.<sup>40</sup>

Incidents involving theft, robbery, damage, infliction of pain, shaming, and slander may be revealed to others if he refuses to respond to private rebuke.<sup>41</sup> Even a solitary observer should reveal what he has seen in order to assist the aggrieved party and protect the truth.<sup>42</sup> If you see an individual commit a sin against someone else, you are allowed to publicly embarrass him if he does not correct his actions. We learn this from the books of the prophets that are replete with examples of our prophets who publicly rebuked individuals guilty of

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38. *Ohr Yechezkel*, loc. cit., page 358.

39. See *Sha'arei Teshuva*, loc. cit., 221.

40. See Mahari Weil, *Responsum Divrei Chaim*, *Minchat Chinuch*, and *Sha'arei Teshuva* all cited above.

41. *Sha'arei Teshuva*, sha'ar 3, oht 221.

42. Ibid.

transgressions *bein adam le'chaveiro*.<sup>43</sup>

Those directly involved in the dispute are prohibited from embarrassing the individual. However, if this individual has also sinned against others, the involved parties may publicly embarrass him, should private efforts prove fruitless.<sup>44</sup>

If a journalist has a personal agenda or ulterior motive in reporting a story, Rabbi Greenblatt maintains that the story cannot be written by that individual.<sup>45</sup>

### Public Enlightenment

The public revelation of an impropriety can result in a lesson for others in the greater community, even if the transgressor refuses to mend his ways. The Talmud tells us that we should expose the hypocrites, i.e. those people who pretend to be righteous. Otherwise, people might emulate such an individual, believing his flawed behavior to be proper. Moreover, when he is punished, people would incorrectly surmise that his "righteousness" didn't protect him. This would result in a *chilul HaShem*, a desecration of G-d's name.<sup>46</sup> For this reason, Rabbi David ben Chaim HaCohen (Radach) wrote a public criticism of a rabbi who acted inappropriately in the bestowal of a *Get* and refused to concede his wrongdoing.<sup>47</sup>

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43. *Minchat Chinuch*, mitzvah 240.

44. *Ibid*.

45. See *Sha'arei Teshuva*, loc. cit., 219, d.h. *ki af al pi*.

46. *Yoma* 86b.

47. *Responsa Radach*, siman 7. Rabbi David ben Chaim HaCohen (Radach) was an early *Acharon* and a disciple of Mahari Mintz. He lived in the sixteenth century, studied in Padua, Italy, and served as rabbi of the Jewish communities of Corfu and Patras. Radach wrote a book of responsa, and corresponded on halachic matters with other great rabbis of his generation. He died in 1530.

The prohibition of *lashon hara* does not apply where the information is needed for a reason. It also does not apply when the subject of the information is a wicked person.<sup>48</sup> The Chafetz Chaim writes that if there are persistent rumors about an individual's transgressions, and if the general public opinion is that this person is suspected of being guilty of these transgressions, he may be considered a wicked person and it is permitted to shame him.<sup>49</sup> Similarly, the Talmud tells us that it is permitted to embarrass someone who is reputed to be an adulterer.<sup>50</sup> It is even permitted to embarrass his parents.<sup>51</sup> Since the purpose of the embarrassment is to effect a change in the wrongdoer's behavior, embarrassing the person's parents has the effect of bringing additional pressure to effect this change. This ruling applies only when a person repeatedly transgresses and deservedly has a reputation for this behavior.<sup>52</sup>

The Talmud<sup>53</sup> relates that there was once a young rabbi who developed a distasteful reputation. Ritva writes that it involved his meeting privately with unmarried women.<sup>54</sup> Even

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48. *Sha'arei Teshuva*, loc.cit., 218,219. *Chafetz Chaim* 4:7, 8:5-7, with *Be'er Mayim Chaim*.

49. *Hilchot Lashon HaRa*, *Be'er Mayim Chaim*, 7:8, d.h. d'nireh pashut.

50. *Megillah* 25b. The Talmud brings the example of an adulterer, but the Chafetz Chaim's explanation (ibid.) does not limit the halacha to this example.

51. Rashi, ibid. Character flaws in parents can manifest themselves in children, and consequently the behavior of children can be to some extent attributed to the parents. Accordingly, parents bear some responsibility for the actions of their children. See, for example, the story of Miriam bat Bilgah (*Sukkah* 56b), *Targum Yonatan ben Uziel* on *Shemot* 20:13 and *Michtav Mei'Eliyahu*, Vol. 4, page 197. Rashi (*Megillah* 25b) also presents an alternative approach.

52. Chafetz Chaim, *kelal* 7, *Be'er Mayim Chaim*, 8.

53. *Mo'ed Katan* 17a.

54. Rashi (*Megillah* 25b) writes that he was reputed to be an adulterer.

though the community needed this young rabbi's Torah instruction, Rabbi Yehuda concluded that it would be a *chilul HaShem* to allow a reputed sinner to teach Torah to those who are aware of his alleged transgressions. Furthermore, suggests Ritva, covering up the transgression and allowing him to continue to teach would also constitute a desecration. Rabbi Yehuda, therefore, excommunicated him, even though the community would be deprived of the young rabbi's talents.<sup>55</sup> We see from here that even if a person performs an important community function, if his behavior is offensive, he may not continue in his community position.

Rabbi Greenblatt told this writer that there was a Yeshiva Day School principal who was abusive to children in his school. The incidents were investigated and found out to be true. The principal had a year to go in his contract and agreed to go quietly after the year would be up. An assistant principal was hired for the specific purpose of supervising the behavior of the principal. This solution was recommended by the *posek* to whom the problem was referred. What would have happened had the principal refused to go along with this solution? Rabbi Greenblatt said it would then have been appropriate to go to the newspaper and write an article saying there was a principal who was accused of mistreating children. The name of the principal should not be mentioned so that there should not be further embarrassment to him. If he still refuses to accept the *posek's* decision, then his name and more details can be written because the rights of the community supersede the rights of the individual who is threatening the welfare of the community, according to Rabbi Greenblatt. Once the principal agrees to the plans for his departure, no other articles specifically referring to him may be written since that would cause needless

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55. *Mo'ed Katan*, loc. cit.



embarrassment.

Rabbeinu Yonah writes that it is a mitzvah to publicize the misconduct of habitual offenders so that people will be revolted when they hear of the miscreants' misconduct.<sup>56</sup> The laws of *ona'at devarim*, verbal wrongdoing, and embarrassing someone publicly do not apply to dishonest and unscrupulous people whose actions are the antithesis of Torah prescribed behavior. The *Nimukei Yosef* writes that the Torah only prohibited *ona'at devarim* regarding *yir'ei shamayim*, G-d fearing people.<sup>57</sup> Ramo codifies this as the halacha, and adds that someone who, by his actions demeans himself, is allowed to be disparaged by others.<sup>58</sup> The *Sm"a* explains that the term *yir'ei shamayim* refers to people who conform to community standards of behavior, *klal benai hayishuv vehaderech eretz*.<sup>59</sup> Therefore, if a miscreant refuses to mend his ways after being approached privately, a newspaper, in consultation with its halachic advisor, may publish an article to pressure him to change.

It is obvious that there is inherent danger in an approach that could find fault with anyone who does not belong to a particular group. The end result could be catastrophic. It is, therefore, of the utmost importance that any investigation and publication be done according to halachic guidelines. The *Netziv* blamed the destruction of the Second Temple on excessive "righteousness" in the vigorous investigation of imperfections in righteous and G-d fearing Jews. There were righteous individuals, says the *Netziv*, who were not always straight in their everyday dealings and, because of *sin'at chinam*, suspected

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56. *Sha'arei Teshuva*, loc. cit., 218.

57. *Nimukei Yosef*, *Bava Metziah*, *Perek HaZahav*, *dapei HaRif*, 32b (toward the end of the page).

58. *Shulchan Aruch*, *Choshen Mishpat*, 228:1.

59. *Sma*, *ibid.*, 228:4.

individuals who did not conform to their ideas of correct behavior, as being *apikorsim*. This erroneous persecution of these individuals led to the destruction of the *Beit HaMikdash*, because G-d does not tolerate this kind of "righteous" person, asserts the *Netziv*. Righteousness, says the *Netziv*, means conducting oneself in a straightforward manner in everyday behavior.<sup>60</sup>

The proper Torah approach is to refrain from personal attacks in attempting to redress a situation. It is the negative behavior or the inappropriate actions that should be criticized. One should not needlessly denigrate another individual, for G-d protects the honor even of the guilty, admonishes the *Zohar*.<sup>61</sup> The Chatam Sofer wrote that he was always exceedingly careful never to quarrel with any individual. When disagreeing with someone or criticizing a certain position, he would never mention an individual by name. He would rather let veracity combat mendacity.<sup>62</sup> Personal attacks provoke needless suffering and do nothing to strengthen one's position. As in the case of the school principal and also in the case of the *shochetim* cited above, a newspaper should not mention names unless absolutely necessary.

Newspapers serve a vital function in society, informing and guiding the public during economic, social, and political crises. The public relies upon the newspapers for fair and accurate information. Journalists can wield tremendous power, since so many people rely upon this information in their everyday lives.

However, the journalist is also in the "business" of journalism. He needs to sell newspapers. This can pressure

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60. *Ha'amek Davar, Bereishit, amud aleph*, introduction to *Sefer Bereishit*.

61. *Zohar, Bereishit*, 164:1; *Zohar, Vayikra*, 86:1.

62. *Responsa Chatam Sofer, Likutim, chelek 6*, no. 85.

him to look for excuses to allow breach of confidence, humiliation of individuals and *lashon hara*. The proliferation of newspapers that contain *lashon hara*, gossip, slander, divisiveness, impiety and apostasy exists only because the readership is only too willing to accept this fare, chastises the Chafetz Chaim. There is such a powerful desire to read this sensationalism, that for many, a day cannot go by without reading this type of "news." They, the journalists and the readership, warns the Chafetz Chaim, do not appreciate that they will be held accountable before G-d.<sup>63</sup>

We see from the words of the Chafetz Chaim that it is not only forbidden for newspapers to write *lashon hara* and promote divisiveness,<sup>64</sup> it is forbidden to read such newspapers. If we, the readers, write to the newspaper editors and object to unsuitable reporting, changes will be made. If changes are not made, we must ask ourselves why we are reading these newspapers.

We know that *lashon hara* is prohibited, both to the speaker (writer) and the listener (reader). There is a story of a man who approached a group of people with a fresh bit of juicy gossip. "You know that it is *assur* to repeat *lashon hara*," said the man, "so pay attention, I'm only going to say this once." Newspapers that continue to run a story and, as a result, continue to inflame a volatile situation do a disservice to the community and can cause great harm to individuals, families, and institutions.

There are times when the needs of the community outweigh the individual's right to privacy. For example, a person must

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63. *Sefer Chafetz Chaim*, Jerusalem, 5734 at the end of *michtavim ve'takanot, michtav bet*, cited in *Ohr Yechezkel*, *loc. cit.*, page 344.

64. Information that serves a constructive purpose for the previously mentioned reasons is not *lashon hara*.

reveal to the court information given in confidence, even if he promised not to reveal the information.<sup>65</sup> Once a person tells another individual, it is no longer a secret, contends Rabbi Greenblatt.<sup>66</sup> If a person has information that would be helpful to a *beit din* conducting an investigation, he must come forward.<sup>67</sup>

Revelation of privileged information, publication of potentially embarrassing reports or public discussion of the actions of an individual can cause repercussions not only to the individual directly involved but also to families and other associates. When reporting on the actions of an individual, do we take into account the effect that this report will have on that person's spouse? How will it affect his or her children? Will it prevent them from getting *shidduchim*?

Even assuming that it is appropriate to write about the individual, the article will likely have an effect upon that person's family. The article should, therefore, attempt to limit itself to the goal of correcting the situation. The initial coercion should be done privately. If all subtle attempts fail, the bottom line is, with the consent of the halachic authority, the article may be published. The harm that may befall the family, friends, and associates, comments Rabbi Greenblatt, is the responsibility of the wrongdoer, and it is he who will have to answer to the *Ribono Shel Olam*. However, continuing to publish embarrassing stories after the resignation of an individual is wrong, because it causes needless punishment.<sup>68</sup> A newspaper that continues to prominently display a story on its website weeks and months after resolution of a problem causes needless harm to the

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65. Responsa *Mahari Weil*, *siman* 42.

66. See *Sha'arei Teshuva*, *loc. cit.*, 228. See also *Chafetz Chaim*, *Hilchot Lashon Ha'Ra*, 2:3 with *Be'er Mayim Chaim*.

67. See *Sha'arei Teshuva*, *loc. cit.*, 221.

68. See the halachic guidelines of the *Chafetz Chaim* cited above.

individual, his family, associates and friends.

In situations where *lashon hara* and *rechilut* (gossip) are permitted, and even when it is a mitzvah to speak and write of these matters, discretion should be exercised so that only that which is absolutely necessary is divulged. Subtlety is to be preferred. When Shaul *HaMelech* decided to kill David *HaMelech* (who would later succeed him as king), it was Shaul's son Yehonatan who warned David of the plot against him. Instead of telling David directly that Shaul wanted to kill him, Yehonatan devised an elaborate message using arrows to inform David of the danger to him.<sup>69</sup> Why, asks the Vilna Gaon, didn't Yehonatan just tell his friend David that Shaul wants to kill you? After all, there is no greater justification than to help save David's life. We see from here, explains the Vilna Gaon, that if subtlety is sufficient, it is preferred.<sup>70</sup> *Divrei chachamim benachot nishmaim*, the gentle words of the wise are heard above the shouts of a king over fools.<sup>71</sup>

## Conclusion

The power of the written word is awesome. Unlike the spoken word, which is formidable in its own right, the written word lingers before our eyes, and continues to irritate and provoke. One might subsequently claim, "I didn't say that." It is much harder to protest, "I didn't really write that!" Rabbi Yisroel Salanter once observed that not every thought need be verbalized, not every utterance need be written down, and not everything written need be published, for it is quite easy to

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69. I *Shmuel*, 20:18.

70. *Ta'am VaDa'at*, Rabbi Moshe Sternbuch, *parshat Kedoshim*, page 111. Also see *Tuvcha Yabiu, chelek rishon*, page 474.

71. *Kohelet* 9:17.

write but far more difficult to erase.<sup>72</sup>

Agendas, rather than truth, at times motivate the publication of a story. The journalist must play the role of the impartial observer, attempting to draw attention to those conditions that need reform. This is very difficult to accomplish when one is directly involved. It is for this reason that the Belzer Rebbe, z"l, did not join Agudath Yisrael. He felt that it was important for someone to be outside the organization and be perceived as impartial. In this way he might be more effective in his attempts to improve social and community standards.<sup>73</sup>

All the news that's fit to print? Hardly. Not all the news is fit to print. Halacha demands discretion and responsibility. Limitation is an essential part of journalism. Media that seek truth and justice while promoting peace and harmony will strengthen the community and serve as an invaluable and precious resource.

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72. *Tenuat HaMussar*, Jerusalem, 5742, sixth edition, Vol. 1, page 309.

73. *Sefer Mitzvat HaShalom*, by Rabbi Y. Epstein, New York, 5730, page 388, cited in *Ohr Yechezkel*, loc. cit., page 353.





## Letters To The Editor

To the Editor:

Although Dr. Shaul Weinreb's article about the halachic permissibility of cutting and tying a woman's Fallopian tubes ("Tubal Ligation and the Prohibition of *Sirus*," Fall 2000) is informative and clearly written, his concluding suggestion of a possible קולא (leniency) strikes this reader as quite unreasonable.

Dr. Weinreb's argument consists of three essential steps:

1) The חלקת יעקב holds that cutting the vas deferens in the male does not constitute active סירוס and does not result in a status of פצוע דכא. The prohibition of סירוס, he says, applies only to mutilation of organs outside the main trunk of the body – the testes and epididymus – because only they contribute to the production and maturation of sperm; the vas deferens, which loops inside the body, serves only as a conduit for transport.

2) חז"ל never defined which procedures constitute סירוס in the female, and even the ראשונים mention only hysterectomy (based on a Gemara regarding animals). So, we must ourselves induce what is prohibited; considering parallels between the male and the female seems like a reasonable approach. Obviously, we cannot distinguish between inside and outside the body trunk for the female, because all of her reproductive organs are inside. We can, however, adopt the חלקת יעקב's criterion of functionality. Mutilation of an organ that contributes materially to the development of ovum or embryo should be forbidden, while mutilation of an organ that provides only transport should not be considered active סירוס.

3) The Fallopian tubes' function is to transport ova from the ovaries to the uterus. Based on #2, then, tubal ligation is not active סירוס, and should be permitted whenever

circumstances permit "passive" סירוס (i.e., sterilization by a method other than direct damage to reproductive organs). The author does not discuss in detail what these circumstances are; The author does not discuss in detail what these circumstances are; פתחי תשובה – *poskim Acharonim* and most שולחן ערוך אה"ע ה"יב – actually rule that there is no prohibition of "passive" סירוס for women at all.

Let us now address the argument:

Step 1: Is the חזון איש's position normative? The חזון איש and the מנחת יצחק both distinguish between organs inside and outside the male body without reference to their functions; this approach does not allow for any comparison with the female. The functionality argument is, however, indeed accepted by the אגרות משה explicitly and by the אליעזר implicitly. Dr. Weinreb certainly has qualified precedent here, but his presentation is misleading. He begins by quoting the חזון איש at length, and cites R. Feinstein, R. Waldenberg, and Dayan Weiss as having adopted his position. Then: "Interestingly, the *Chelkat Yaakov* also came to the same conclusion as the Chazon Ish, albeit from a slightly different angle" – followed by the argument outlined above. The rest of the article ignores the differences among the פוסקים, making it seem as if the suggested קולא is based on the authority of all of them, when in reality it could follow only from the "slightly different angle" which is not accepted universally.

Step 2: Trying to use the halachic discussion of the male anatomy as a model for the female anatomy does seem reasonable, despite the lack of one-to-one correspondence between the male and female reproductive organs.

Step 3: Far from being a mere path of transportation from the ovary to the uterus, the Fallopian tubes are the site of fertilization – hardly a minor event in the reproductive process. The author of course knows this, and dismisses it with the following: "Although the actual fertilization – the meeting of the sperm and the ovum – usually happens in the tubes

themselves, it can happen outside of the tubes. It can occur within the uterus itself, or even in a test tube." Numerous objections may be raised against this argument.

First, it is simply not reasonable to define the Fallopian tube as an organ of mere transportation because fertilization *can* occur elsewhere, when in the overwhelming majority of cases it does occur there. Moreover, not only are the tubes the *site* of fertilization, they *assist* fertilization as well. Dr. Weinreb writes (in a discussion relegated to a footnote!): "Although it is true that the ampullary region of the Fallopian tubes secretes various substances which create an environment that is conducive to fertilization of the ovum and important for the development of the embryo's first few days before implantation, recent research has shown that the Fallopian tubes are *not absolutely essential* organs for the woman to become pregnant" (emphasis added). We have leaped from the *חלקת יעקב*'s exclusion of the vas deferens because it never does anything but transport sperm, to an exclusion of the Fallopian tube because once in a while fertilization succeeds in occurring elsewhere without its assistance.

Particularly troubling is the author's contention that the availability of in vitro fertilization allows us to redefine which organs are considered essentially necessary for reproduction. Since a woman who has undergone tubal ligation could still conceive and carry a child by using a test tube as the site of fertilization, the ligation, he claims, does not constitute active *סירוס*. To this reader, however, a woman's ability to have a child without enlisting the help of her Fallopian tube by undergoing a complicated, invasive, expensive procedure does not change the functional character of the tube; the tube remains a significant, active organ in the reproductive process. In fact, a point that Dr. Weinreb raises in a different context effectively undermines his contention here. Near the end of the article, he mentions the argument that tubal ligation should be permitted

because it is reversible. One of the reasons given by פוסקים for rejecting this suggestion is that "it would require another operation to repair the tubes, and without another operation the individual is permanently infertile.... Only if it would heal on its own would it be considered a temporary סירוס." If infertility due to cut tubes was considered halachically permanent before the advent of IVF because it could only be overcome with surgery, then the availability of IVF – itself a surgical procedure – does not allow us to consider the tubes reproductively unnecessary.

Furthermore, if we take the test tube argument seriously, we would be forced to draw other conclusions which presumably even Dr. Weinreb would not accept. Other reproductive technologies could have a similar effect on the practical halacha. In many cases of male infertility, for example, sperm are extracted directly from the epididymus and transferred by a doctor into the woman's uterus or used for IVF. Does this mean that the penis is now a non-essential reproductive organ, and damaging it would not be considered סירוס?!<sup>1</sup> Currently, in fact, research is being done investigating

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1. Actually, the article overlooks the status of the urethra/penis altogether, as Dr. Weinreb's summary of the חלקת יעקב ignores the complexity of the תשובה. The portion of the analysis which he does present cannot stand alone, because it leads to the conclusion that, regardless of modern reproductive technology, damaging the male's urethra should not be considered סירוס, as the urethra too, like the vas, only transports the sperm; such a פסק is obviously impossible, as damaging the גיד is the paradigmatic סירוס, and a man with a damaged גיד is the paradigmatic שפכה ברות. In אות ה' of his תשובה, חלקת יעקב circumvents this problem by positing that mutilating the penis is prohibited for a different reason, *viz.*, that it is the organ that directly activates the reproductive process by engaging in sexual relations ("להוציא אל הפועל בהזדווגו להאשה להוליד ולעשות פרי").

The חלקת יעקב's somewhat confusing upshot may be summarized as follows. A male organ is included in the prohibition of active סירוס

the possibility of achieving fertility even by extracting undeveloped sperm cells from the testes; (a procedure known as ROSNI (Round Spermatid Nuclei Injection). Following Dr. Weinreb's line of reasoning, then, if the clinical success of this procedure is confirmed, the epididymus as well will no longer be subject to the biblical prohibition of סירוס, as it will have been shown to be "not absolutely essential" for reproduction.

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if it meets either of two conditions: A) It contributes to the production or maturation of sperm. B) It is a sexual organ ("אבר המשגל") that activates reproduction, even if it only transports sperm. Category A comprises the testes and epididymus, which coincidentally are found outside the body trunk; category B includes the penis. Where does this leave the vas deferens? While the vas clearly does not meet the first criterion, its status with regard to the second criterion requires a clearer definition of אבר המשגל (the חלקת יעקב himself admits that the vas is הזרע אל הפועל להוליד). The חלקת יעקב does not provide a definition, but does emphasize that the vas is בחדר הבטן. He probably means to include only an organ which participates in the sexual act to the extent that it actually comes into contact with the woman. This added complexity does not affect Dr. Weinreb's application of the חלקת יעקב's analysis to a woman, though, as the Fallopian tubes – which do not come into contact with the man – are not sexual organs under this definition.

This fuller picture of the חלקת יעקב actually provides a possible solution for the challenge we pose in the text. Dr. Weinreb could argue that only those organs which are included in the prohibition of סירוס due to their function – category A – would subsequently be excluded once science has produced an alternative; an organ included by virtue of its status as a sexual organ – category B – would be unaffected by new science, as it remains an אבר המשגל. Of course, one could also argue on the contrary, that according to the author's line of thought, the very possibility of pregnancy without sexual relations would erase category B *in toto*. Also, see העור ד:כח. Also, see אגרות משה אבן העזר ד:כח. Also, see חלקת יעקב's analysis of the urethra issue – on this point different from the חלקת יעקב – does not leave an opening for a solution.

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Dr. Weinbreb responds:

I would like to thank Rabbi Berger for his comments. I appreciate this opportunity to clarify some of the points that I made in my original article. Allow me to attend to the most serious charge first. Rabbi Berger writes that he is troubled by my contention that the availability of in vitro fertilization allows us to redefine which organs are considered essential for reproduction. I never claimed in my article that we are "redefining" the essential reproductive organs according to halacha. In fact, I repeated several times in my article that the female reproductive organs are never clearly defined by *Chazal*. Rabbi Berger himself concedes that it is reasonable to extrapolate these rules from the halachot of the male organs, which are clearly defined in halacha.

Furthermore, let me remind the reader, that it was the *Chelkat Yaakov* who drew upon modern science to prove that the vas deferens is not essential for reproduction. On page 20, I quoted his *teshuva* where he quotes a physician who described to him modern procedures of extracting sperm from the epididymus and achieving successful fertilization without the aid of the vas deferens. Surely the *Chelkat Yaakov* does not mean to change any halachot because of a new procedure. He is only using the newly revealed knowledge in order to better understand what the halacha is regarding the male *eivarei zera*. My thesis is simply that we should apply the same logic to the female organs. The availability of IVF has in no way changed what the halacha has always been.

Rabbi Berger then proceeds to carry my argument to some admittedly absurd conclusions. I purposely avoided going into the full complexity of the *Chelkat Yaakov's teshuva*, as I quoted only those portions which were necessary to make my point. The *Chelkat Yaakov* clearly states that there are two criteria which define what is an *eivar zera*. The first criterion is that the



organ is involved in the production of the sperm. The second is that it is the principal organ of sexual reproduction, i.e. it carries out the actual act of reproduction. The penis is considered a reproductive organ because it meets the second criterion, whereas the epididymus is included in the first category. The vas deferens, however, is neither a sexual organ, nor is it involved in the production of sperm; therefore it is not included in the *issur* of *sirus*. The Fallopian tubes, I think I have proved in my article, are also not involved in the production of the female "zera", and, I think even Rabbi Berger would agree, are definitely not involved in the act of sexual intercourse, and therefore should be excluded from the *issur* of *sirus* as well. To attempt to extend my argument to the penis and epididymus, and to claim that according to my reasoning they would be exempt from the *issur* of *sirus*, is simply misleading.

Rabbi Berger also questioned whether the *Chelkat Yaakov's* position is normative halacha. The Chazon Ish, R. Moshe Feinstein, R. Waldenberg, and Dayan Weiss all accept the difference between the internal and external male organs. The basis of my argument is not completely dependent on the "functionality" explanation of the *Chelkat Yaakov*. The very fact that the major *poskim* overwhelmingly accept that not all organs that are part of the male reproductive system constitute *sirus*, presents us with the dilemma of how to define the reproductive organs of the female. Although it is true that not all of the *poskim* mention the *chiluk* of function, it is certainly reasonable to use the *Chelkat Yaakov's* distinction in order to define the female *eivarei zera*. My conclusion is based on the authority of all of these *poskim* – to the extent that they all agree that cutting the vas deferens does not constitute *sirus*. The Chazon Ish does not even attempt to explain why there is such a *chiluk*, and I have no reason to assume that he would disagree with the *Chelkat Yaakov's* explanation – especially since they both agree *halacha lema'aseh*.



It also appears that Rabbi Berger misunderstood my claim regarding the function of the Fallopian tubes. Of course the tubes are not just an "organ of mere transportation," and of course fertilization generally occurs there. I stated that twice (in the text of the article – not "relegated to a footnote"), on page 6 and again on page 23. Surely, fertilization normally occurs without the aid of modern reproductive technology with a functioning vas deferens in the male and a functioning Fallopian tube in the female. Surely, the Fallopian tubes do much more than just act as a conduit, as they secrete substances which nurture the embryo. However, the prostate gland itself also secretes substances which nurture the sperm and help them eventually to fertilize the ovum, and the prostate itself is not considered an *eivar zera* according to all of the *poskim* we have mentioned. I did not just compare the vas deferens to the Fallopian tubes, I compared all of the internal male reproductive organs that are not considered *eivarei zera* according to halacha to the tubes of the female.