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The World Trade Center Tragedy and the *Aguna* Issue

Rabbi Jonas Prager

In contrast with the more publicized quandary of the *aguna* who is not permitted to remarry until the delivery of a *get* (bill of divorce) from a recalcitrant husband, the *aguna* issues that have arisen subsequent to the World Trade Center disaster do not involve conflicts of personalities or financial friction. They revolve, instead, upon evidence of the husband's death and the halachic treatment of that evidence. In some instances, the evidence is clear and adjudication by a *bet din* is straightforward. But in some cases, especially where the husband's corpse is either missing entirely or where only body fragments exist, halachic judgments are more complex. As the millennia of Jewish history are replete with episodes of missing husbands leaving *agunot* in limbo, the volume of halachic efforts that such cases have engendered provides current *batei din* with a wealth of precedent.[1]

These precedents – their exposition and occasional conflicting analyses – are the subject of this article. Although

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1. It should be clear that only a competent *bet din* can deal with specific *agunot* questions. This article is designed to familiarize the reader with the overall issues and not to substitute for consulting with a qualified rabbinic authority.

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space limitations mandate that the review be selective, the article will highlight the major points of contention that have arisen in halacha in the past and relate these rulings and debates to the contemporary, post-9/11 tragedy.[2]

Specifically, the article focuses upon a number of scenarios that are keyed to the World Trade Center collapse in those instances where no visually-identifiable corpse has been discovered: (a) when body fragments are available, (b) when, despite the absence of body remnants, evidence exists that the missing person was in the WTC near or above the location of

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2. The death certificates issued by New York City to the families of those missing, presumed dead, will likely play a marginal role in an Orthodox Jewish court of law, although the decisors for Reform Jewry have accepted such state-sanctioned death certificates as acceptable evidence for remarriage. This despite the expedited process for issuing death certificates (detailed at www.nyc.gov/html/em/dth_cert.html), which enables the nearest next-of-kin to file an affidavit attesting to his/her belief that the missing person was at the WTC on September 11, '01, after which the authorities may provide a death certificate within two weeks instead of the typical three years. As of February 7, '02, nearly 2,000 victims were in this "missing, presumed dead" category, a number that was expected to decline as evidence was found to establish a positive determination of death. (In such instances, the victims' names would be recorded as dead rather than as presumed dead. Telephone conversation with the New York City Office of Emergency Management, February 9, '02.) Since the courts would be involved in the process and the criterion used by the judiciary to establish death is unclear, it is impossible at this time to determine the role such rulings would play in a halachic decision. At times, secular court statements will be accepted by religious authorities to affirm death. But those cases appear to involve knowledge of death rather than merely the absence of a living person. Thus, in a responsum by R. Ovadia Yosef (*Yabia Omer*, v. 7, *Even Haezer*, no. 14) in which a wife was officially notified by the Soviet government that her husband had been killed in battle, R. Yosef cites a copious volume of rabbinic precedent to warrant relying upon this official statement as one of the bases for declaring the wife a widow.

impact so that death was virtually certain,[3] (c) when the missing person was in the general WTC area and death was possible but not inevitable, and (d) where information as to the missing person's proximity to the WTC is itself uncertain.

It will be useful to distinguish procedural issues from substantive ones, and it is to the former that we turn first.

I. Procedural Issues – Whose Testimony is Legally Binding?

A wife becomes an *aguna* when her husband is missing and either no valid *get* was delivered or where evidence of the husband's death has not yet been halachically corroborated. In the latter instance, someone must testify that the husband indeed died. That simple statement contains two presumptions that must be accepted by the *bet din*. First, the person or persons who testify must be halachically acceptable as witnesses; this is the procedural question. Second, the substance of the testimony – the demise of the husband – must be believed. Failure of either qualification, of course, means that the court cannot cancel the *aguna* status.

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3. Data reported by *Newsday* (February 3, '02, p. A37) indicate that of the 2,262 victims of the two Trade Center towers, the vast majority were located at or above the floors of impact. In Tower One, where the point of impact was floors 93-98, 1,240 lives were lost at and above the impact point and 176 below, while in Tower Two, where the impact was located between the 78th and 84th floors, 582 dead were at and above the impact floors and 41 below. (In presenting these numbers, *Newsday* included those victims whose floor location could not be determined in the lower floor totals. The tower location of the remaining 263 deaths could not be determined.) The New York City Police Department estimates that approximately 20,000 people escaped death, but that only a few of those had been above the points of impact. (Telephone conversation, February 9, '02).

Halacha was exceptionally lenient in the procedural aspect of the *aguna* quandary.[4] Basically, Jewish law dispenses with the typical rules of evidence that are required by a court of Jewish law – two unrelated (to each other and to the litigants) Jewish adult male witnesses who testify on the basis of their own direct knowledge. The final two chapters of the Babylonian Tractate *Yevamot* are replete with leniencies with respect to *agunot*, while the 17th chapter of *Shulchan Aruch Even Haezer* codifies these tolerances. Among those permitted to testify are women, the wife herself, a child, a non-Jew, and a single witness.[5] Even hearsay evidence is acceptable.[6] Moreover, when the normal rules of evidence concerning the status of witnesses are rejected, the next halachic step is not too astonishing – a disembodied voice (*bat kol*) is also valid.[7] In fact, the Mishnah accepts a person's self-testimony as he anticipates his imminent demise, even though no identifiable remains are found afterwards.[8]

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4. *Yevamot*, 88a. All page references unless otherwise noted are from this Tractate.

5. 121b, 114b, and 115a. *Shulchan Aruch Even Haezer* (henceforth, *Shulchan Aruch E.H.*), 17, 3.

6. 122a, *Shulchan Aruch E.H.*, ibid. The language of *Shulchan Aruch E.H.*, para. 4, is worth citing: "All [individuals] are believed when testifying with respect to this type of testimony [viz. a husband's demise]." (Author's translation. All translations from textual sources in this article are by the author, and are not always literal but meant to provide the intent of the statement.)

7. 122a, *Shulchan Aruch E.H.*, 17, 10. This ruling applies to urban areas, not to fields, pits, wrecked buildings, or wherever demons (i.e., *shadim*) are to be found.

8. 122a, *Shulchan Aruch E.H.*, 17, 23. Although *Shulchan Aruch E.H.* accepts both the *bat kol* and the self-testimony cases as normative, the Rambam's ruling is unclear – he only cites the latter case in the *Laws of Divorce*, 13, 23 – and is subject to differing interpretations. See the classical commentaries to the Rambam *ad locum* as well as the *Bet*

These leniencies represent a clear-cut exception to the stringencies that normally pervade court cases relating to marital issues. In fact, the Talmud itself deals with the implicit rejection of the two-witness rule when musing on the acceptability of a single witness. Is a single witness admissible, asks the Talmud, because no witness will lie when his false testimony would be exposed? Or is the *aguna* case a special one, because we expect the bereaved wife to take extraordinary steps to verify the testimony?[9] After all, consider the dire consequences should she remarry only to have her husband turn up later, including that her progeny from her second husband would be *mamzerim*.[10]

Although the Talmud does not resolve this quandary, the *Bet Shmuel* cites both reasons as binding.[11] A more overarching and perhaps revolutionary decision is that of the Rambam, who at the end of his *Laws of Divorce* writes:

> Do not be concerned that the rabbis permitted the remarriage of an *aguna* through the testimony of a woman, a slave [etc.]... because the Torah did not demand two witnesses and the other laws of witnesses except in an instance where one could not achieve certainty except through the witnesses and their testimony.... But in circumstances where certainty is possible without the testimony of a specific witness and

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Yosef on the *Tur Even Haezer*, 17, *s.v., Umai shena lesadeh*.

9. 115a.

10. The Mishnah cites a number of other difficulties that her remarriage would cause. See 87b. However, also see note 32.

11. *Shulchan Aruch E.H.*, 17, 3 and 10. He raises the question, can a single witness be relied upon against the *hazaka* (*status quo ante*) that she is a married woman? (The *Aruch HaShulchan* adds a second *hazaka* -- that the husband is alive. See *Even Haezer*, 17, 19.) The *Bet Shmuel's* response is that the leniency of *takanat agunot*, which entailed both considerations, overrides the *hazaka.* See also the Ravad on Rambam, *Laws of Divorce*, 13, 29.

> the witness will not be able to extricate himself [with his reputation intact] if the testimony were false as in this case, where the witness testified that a specific person was dead, then the Torah was not unduly concerned with him. For it is farfetched that this witness will render false testimony....[12]

In this unqualified ruling, the Rambam seems to generalize from the more local case of *aguna* to all instances where testimony is required.[13]

Whether one accepts this sweeping ruling or not, clearly all agree that a broad net is cast as to the acceptability of witnesses in *aguna* cases. Anyone – Jew or non-Jew, male or female – who saw a particular husband in the Trade Center buildings that were directly impacted by the exploding aircraft can present acceptable testimony to a *bet din*. Moreover, phone conversations by the presumed deceased that place the person in the midst of the collapsing buildings – as was the case with Mr. Shimmy Biegeleisen, an Orthodox Jewish husband[14] – would seem to lie within the parameters of the case cited earlier concerning one's own affirmation of imminent death despite the absence of a recognizable corpse.

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12. Ibid. A statement in Tractate *Rosh Hashana* (22b) that "people will not lie about matters that will ultimately be exposed" supports this view.

13. Such is the interpretation of the *Magid Mishneh ad locum*. Tosafot, 88a, *s.v. Metokh* seem to disagree, although the *Lechem Mishneh* (Rambam, *ad locum*, 29) attempts to reconcile the two views.

14. *The Wall Street Journal*, in a page one article (October 11, '01), recorded the known circumstances surrounding the death of Shimmy Biegeleisen. Mr. Biegeleisen stated via a phone conversation to a friend, "Dovid, I'm not coming out of this." After an ill-fated attempt to reach the stairs, he and a coworker tried to break a window. A minute before 10, again on the phone, he said, "'I'm looking out the window now....' Then he screamed, 'O G-d!' The line went dead."

II. Substantive Issues

What precisely must be the contents of the testimony? An individual attesting unequivocally that he or she witnessed the death of the husband poses few problems.[15] The only issue that might surface is the credibility of the testimony – did the witness actually confirm the demise or did the witness *believe* he or she observed the death? BT *Yevamot* notes a number of instances where belief rather than objective certainty is likely and therefore the testimony requires additional support. Thus, a wife claiming to have witnessed the battlefield death of her husband is doubted; her fear or haste in the confusion of war may have misled her to mistakenly claim her husband perished along with his comrades.[16]

A case cited by the *Mordechai* drives home the point that the Talmud is concerned with a principle – the credibility of the wife's testimony when she is under stress. The battlefield scenario of the Talmud merely comes to illustrate that a witness, even in good faith, might testify without having full knowledge of the circumstances, and that a *bet din* must consider the

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15. A non-Jew's testimony must be without ulterior motives (*Shulchan Aruch E.H.*, 17, 3), and it is up to the court to rule that such candor existed. A fascinating decision by R. Ovadia Yosef (*Yabia Omer*, v. 7, *Even Haezer*, no. 19) hinges around the apparently innocent question by a non-Jewish member of the criminal underworld to the brother of a missing Jew: "How is Harry's *widow* doing?" (emphasis in original). Harry had been missing for a number of years and this was the first intimation that his disappearance was terminal. R. Yosef's responsum is much concerned with the presence or absence of ulterior motivation.

16. 114b. Whether under such circumstances the wife's testimony that she buried her husband would be accepted is disputed in *Shulchan Aruch E.H.*, 17, 48.

particular details in reaching its decision.[17] A party of Jewish travelers had departed town during wartime and had been beset upon by gentiles, who left the males for dead. The women remained with their husbands until the end and later testified to the gruesome circumstances. The *Mordechai* ruled that the particular woman he was asked about could certainly remarry.

The World Trade Center disaster involves more complex *agunot* issues resulting from the lack of evidence of death either because no one actually witnessed the death itself or because, in the absence of witnesses, the body, if there is one, is not in a condition that permits visual identification. However, body fragments might be accessible. In a more intricate halachic scenario, no physical remains are available, but there is an overwhelming probability that the missing person is dead. Finally, while witnesses place the missing person in the vicinity of the event that is presumed to have caused his death, it is possible, if not likely, that the missing person did escape. Each of these situations is discussed in turn.

A. Unidentified Remains

Two late 20th-century cases highlight the issue of unidentified remains. In 1975, a Jewish man on a business trip in the Congo was swept underwater by a swift current and quickly disappeared from the view of his colleagues. Searches in the immediate vicinity were fruitless. Nine or ten days later, a body was washed onto some rocks and was identified as the missing man, even though the body itself had become distended and a leg and some parts of the torso were missing. Relatives later confirmed the identification after having viewed the victim's unusually large toe. Dental records also were used to match the teeth of the body with those of the presumed

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17. *Mordechai, Yevamot*, no. 123.

husband.[18]

R. Moshe Feinstein deals with a case of a corpse that was found some months after an Eastern Airlines plane overshot the runway at LaGuardia airport in Queens (1954). The face was unrecognizable from the lengthy stay in the water, but there were a number of indications (including dental matching) that the body was indeed that of the Jewish husband who had been on that flight.[19]

Two crucial problems arise in such cases: the impact of the environment on the body and the nature of identification. Environmental concerns themselves focus on two questions: (a) How much time elapsed between the last time the person was sighted and the time the body was found? (b) How did the physical conditions impact upon the body during that interval? With the physical conditions known, halacha must consider the confidence that might be placed on the evidence presented.

Insofar as overall environmental conditions during the interval involved, the Mishnah states:

> One may testify [to free an *aguna*] only where the full face including the nose [is identifiable, but not] where identification comes through the body or clothing.... One may not [accept testimony] beyond three days. R. Yehuda ben Baba states, "Not every man nor every place nor every time is identical."[20]

This Mishnah sets visual facial recognition as the primary method of identification, albeit with some qualifications, and apparently rejects other identification methods. The talmudic

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18. R. Ovadia Yosef, *Yabia Omer*, v.7, *Even Haezer*, no. 15.

19. *Iggerot Moshe*, *Even Haezer*, IV, no. 57.

20. 120a.

analysis *ad locum*, however, clarifies the Mishnaic approach by distinguishing between a clear-cut identification mark (*siman muvhak*) and a more suggestive type of indication. Later authorities, notably R. Yosef Karo, develop a tri-partite classification scheme – conclusive (*muvhak beyotayr*), indicative (*muvhak*), and suggestive (*geruim*).[21] Halacha takes a pragmatic approach in employing these categories, accepting the first, as the name implies, as definitive evidence for identification, the second as requiring additional support, and the suggestive as unreliable.[22] Similarly, when it comes to gaps between the time that a person disappeared and a body was discovered, it would appear that conclusive identification is the determining criterion. The talmudic statements are taken to refer to prototypes rather than to inflexible principles.[23] Hence, both R. Yosef and R. Feinstein are willing to accept conclusive evidence even though the bodies had not been found within the three days mentioned in the Mishnah and indeed had been submerged for days and months.

When it comes to more precisely defining conclusive body identification, the Israel Police Rabbinate list three definitive tests, any of which suffices, albeit with the proviso that the

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21. See *Kesef Mishneh* on Rambam, *Laws of Divorce*, 13, 21 and *Shulchan Aruch E.H.*, 17, 24. The terms used by the Israeli Police Rabbinate are "definitive," "intermediate" and "poor." See their publication, *Aspects of Disaster Victim Identification In Jewish Law, Part 1: Recognition and Marks* (1999), p.31. Their definitions are, for the first, a body "mark that is found in only one in 1000 people," for the second category, "one in 200 people," and the final category, "found on many people." Note that the "one out of a thousand" is apparently based on the *Teshuvot Masat Binyamin* cited by the *Bet Shmuel* in *Shulchan Aruch E.H.*, 17, no. 72.

22. *Shulchan Aruch E.H.*, 17, 24, 25 and ibid.

23. Rabbenu Tam (120a, s.v. *Ayn meidin*) already qualifies the three-day limit as well as the nature of physical identification.

comparisons be performed by a qualified professional: fingerprint, odontology, and DNA.[24]

It would appear that a *bet din* could permit an *aguna* to remarry even according to the more stringent standard of R. Wozner. A positive DNA match between a sample DNA obtained from personal effects (such as hair from the victim's hairbrush) and body parts belonging to the husband found at the WTC site would have to be verified by forensic experts. In addition, the *bet din* would have to be provided with some reason to believe that the husband was likely to have been at

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24. *Op. cit.*, pp. 31 - 32. On dental records, fingerprinting and other types of identification such as dog-tags related to war casualties in Israel, see *Yabia Omer*, v. 6, *Even Haezer*, no. 3. R. Yosef cites an article by R. Dov Burstein, the *Av Bet Din* of Tel Aviv-Yafo *(Hapardes, Tammuz* 5713) that accepts fingerprint matches as conclusive without the need for any additional confirming evidence.

On DNA: R. S. Wozner, a well-respected Bnei Brak decisor, was asked by the Israeli police rabbinate a series of questions about the halachic consequences of DNA testing. His authorized answers are to be found in a letter dated 4 Shevat 5761 that has now been reproduced in *Techumin*, vol. 21 (5761), pp. 121 - 123. In the paragraph relating to the *aguna* issue, Rabbi Wozner writes that "a comparison of [DNA samples] taken from the victim himself with the sample from the victim's personal effects is *more than an intermediate identification mark and is close to a conclusive sign*. However, one may not rely only upon this examination unless there is a support (*raglayim ladavar)* and there are additional halachic reasons" (p. 123; emphasis added). It should be noted that while R. Wozner's ruling is in the nature of an *obiter dictum*, not a lengthy and documented responsum, it is now the practice of the Israeli police. One may wonder why DNA matches are less reliable than are fingerprints, which are accepted by the Israeli police rabbinate as conclusive. Indeed, scientists at the New York Office of the Medical Examiner accept nuclear DNA matches of the complete DNA profile as 100 percent accurate, and need additional support only when samples are matched for mitochondrial DNA.

the site.[25] Alternatively, those willing to accept the classic rules of halachic identification as spelled out in the Israeli Police Rabbinate publication on disaster victim identification could rely exclusively on a positive DNA match along the lines being conducted under the supervision of the New York City Office of Medical Examiner.[26]

B. No witnesses to the highly-probable death of the husband and no body remains available

Many of the Holocaust responsa center upon this particular circumstance, since the witnesses to the death of an individual typically perished alongside that person. Similarly, in the WTC case, it is probable that all the eye-witnesses to the demise of a husband did not survive either.

R. Moshe Feinstein published a number of responsa that dealt with Holocaust *agunot* issues. For instance, consider a decision headed, "In the case of witnesses that the Nazis led the sick husband to the gas chamber to be exterminated there. [Further] it was known that similarly ill individuals were exterminated."[27] Rav Moshe finds his resolution in a text in *Gittin*, which is centered around an individual condemned to death.[28] The Talmud mentions two variations as to whether

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25. The Israeli Police Rabbinate pamphlet does not distinguish between the source of the DNA sample, so that it would seem to make no difference whether the DNA sample was taken from a parent or sibling or from the personal effects of the victim. It simply states that "if a DNA expert is of the opinion that the results are found in fewer than one person in 1000, that is sufficient for identification" (p. 32).

26. As of February 8, '02, 134 of the missing had been identified through DNA alone. (*The New York Times*, February 9, '02, p. B4)

27. *Iggerot Moshe, Even Haezer*, I, no. 44.

28. 28b - 29a.

this scenario deals with a Jewish or gentile court. In either case, it deliberates on the inevitability of death. Might even a condemned individual be freed by virtue of the judicial process itself? Might he escape execution either by fleeing or by bribing the authorities? In the Nazi circumstance where one could not even contemplate a judicial process, Rav Moshe reasons that escape from the extermination camps was most improbable and that bribery was ineffective.[29] Hence, he rules that death was certain and the *aguna* may remarry.

In the WTC cases, especially at and above the point of impact where escape was virtually impossible, the Holocaust responsa might be used as precedent. Nevertheless, in one sense, the Holocaust cases differ since the presumed victim was typically known to have been in dire circumstances prior to his alleged demise. In the WTC situation, there may well be instances where there is no clear-cut evidence placing the presumed victim at ground zero above the points of impact. Such cases will be considered in the next section.

C. Evidence of victim's presence in the initial stages of the disaster, but escape was possible

Witnesses may have seen the husband on a lower floor of the towers or in the general WTC vicinity, where death was not inevitable. Consequently, their testimony would be limited to verifying the presumed victim's presence during the initial stage of a process that might lead to death as the towers

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29. He writes: "Escape was not conceivable since the Nazi's policing was extremely effective. Nor was bribery possible for it was known that [the Nazis] had already taken all the prisoners' possessions. Moreover, bribery would not have been effective, since had there been any assets left to give, the Nazis would have taken the money and killed the prisoners anyway."

collapsed. But the witnesses could not testify beyond that, as they did not view the death itself nor did they see the missing husband escape the collapsed buildings. These cases are dealt with in the Talmud under the heading of *mayim sheayn lahem sof*, literally, infinite waters. The paradigmatic case involves someone swept into a body of water with no trace ever found.[30] The Talmud contrasts this model with one in which an individual falls into a finite body of water, defined as one where an observer has a clear view of all the banks (e.g., a small lake). The rabbis ruled that in the latter case, the wife may remarry, for had the husband surfaced, he would have been noticed. In contradistinction, the presumption of drowning in infinite waters is no more than a supposition. The husband may have surfaced beyond the sight of the observer and, for whatever reason, may not have wished to return home. A *bet din* may not relieve the wife from her *aguna* status.

Because it will become crucial for understanding the implications of the "missing person, presumed dead in infinite waters" case, it is worthwhile to elaborate a bit on the talmudic discourse. The Talmud (ibid.) notes two instances in which a person of renown was aboard a ship that had gone under in infinite waters but the individual had been swept to shore by the waves. In one such instance, R. Akiva proclaimed, "How prescient are the words of the Sages who proclaimed that in finite waters, the wife is free to remarry, but in infinite waters, the wife may not." But would not the information about a

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30. 121a. The Talmud (121a and b) mentions additional cases that are treated similarly, including falling into a snake pit and a furnace. However, an individual falling into a lion pit or one who was crucified is not considered dead until the death is verified. *Shulchan Aruch E.H.*, in citing these cases in 17, 29 - 32, notes the operative concern -- "whenever it is impossible that the individual will live but will perish immediately [or] shortly thereafter, one can testify [that he did not survive]." (30)

missing person's survival become known? R. Ashi distinguishes between a famous rabbi, for whom that implication is correct, and the average person. The Talmud, apparently unequivocally, rejects that distinction, and reiterates that on the next page in the following episode:

> Someone proclaimed, "Is there anyone here of Chasa's family? Chasa drowned." Said Rav Nachman, "By G-d! The fish have eaten Chasa." Based upon Rav Nachman's words, Chasa's widow remarried and no one protested. Said Rav Ashi, "This leads to the conclusion that the Sages had initially prohibited the wife from remarrying when her husband has fallen into infinite waters. But if she remarried, the rabbis did not require that she leave the second husband." Others state [the case somewhat differently, that] Rav Nachman himself performed the marriage ceremony for Chasa's widow. He said, "Chasa was a prominent person, and had he survived, it would have been known." But it is not so. It makes no difference whether the person is prominent or not. If it happened [that the wife remarried], fine, but she is not permitted to marry *ab initio*.

Two conflicting strands of thought pervade this Chasa episode. On the more stringent side, Chasa's wife is technically ensnared by her *aguna* status and is prohibited from remarrying as long as her husband, albeit presumed dead, is not found. On the other hand, when Chasa's wife remarried on her own initiative (as indicated in the Talmud's first version), the marriage was rabbinically valid. This tension, which is reflected in the normative halacha,[31] may well represent the irreconcilable strain between two rabbinic attitudes. One, noted earlier, seeks to ease the plight of the *aguna* by eliminating virtually all procedural constraints on testimony. In contrast, since the

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31. *Shulchan Aruch E.H.*, 17, 34.

consequences of error are so horrifying to contemplate – even in the case of rabbinic authorization to remarry, the personal aftermath such as the *mamzerut* of the children from the second marriage is still borne by the family[32] – the rabbis felt the need to demand extra precautions. This duality is reflected in a cryptic talmudic statement about the judicial process in *agunot* cases: "When were the rabbis lenient – at the end, but they were not lenient in the beginning."[33] Rashi *ad locum* interprets the statement to mean that once the deceased had been clearly identified, the rabbis were lenient in accepting otherwise inadmissible witnesses.[34]

These two strands demand either a reconciliation or a resolution when it comes to the practical issues of a specific

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32. Ibid., 56. A more lenient view is suggested by R. Eliyahu Klatzkin in his introduction to *Dvar Halacha*.

33. *Bechorot*, 46b. Note, however, that the *Tosfot Yom Tov* (*Teshuvot Hageonim Batrai,* no. 8) claims that this talmudic view is not halachically authoritative. He accepts an alternate view of the Talmud *ad locum* that does not distinguish procedural from substantive issues, so that this source cannot be used to legitimate the more stringent approach to substantive areas. Hence, an overall lenient attitude is justifiable.

34. For further elaboration, see *Aruch HaShulchan, Hilchot Ishut*, 17, 18 - 20. In 17, 20, he suggests that the motive underlying the far-reaching stringency concerning the substance of the testimony lies in the repercussions of *mamzerut* on the fabric of the Jewish people. He further mentions a contemporary case in the suburbs of Magenza in which a husband, missing for 15 years and presumed dead, turned up. A cogent rebuttal is fashioned by R. Ovadia Yosef (*Yabia Omer*, *Even Haezer*, v. 7, no. 14, para. 7). R. Yosef mentions a responsum of R. Simcha Zelig, the Brisker *dayan*, who notes that the mother of the Chacham Tzvi was permitted to remarry after a *bet din* accepted the testimony of witnesses that her husband was killed. The dead husband turned up later. Asks R. Simcha Zelig, "Should the sages no longer release other *agunot*? It is clear from the great *Acharonim* that the *Geonim* of earlier times freed *agunot* and were not concerned with such singular events."

aguna whose husband is missing. What are the rabbis to advise her? The Rambam interprets the Talmud in a straightforward manner:

> A witness who informs a woman that her husband drowned in the ocean or in infinite waters and that he [i.e., his body] did not surface prevents the wife from remarrying on the basis of that testimony, even if [so much time had elapsed that] the memory of the husband was no longer recalled and his name was forgotten.[35]

Moreover, the Rambam rules that a sage who permits the alleged widow to remarry is to be excommunicated, a position that is accepted by the *Shulchan Aruch*.[36]

An alternate view sees the Talmud open to further interpretation. One such opinion is shared by R. Eliezer of Vardun and R. Avraham b. R. Moshe, who focus on an apparent omission in the text of the Talmud.[37] The text in the case of an *aguna* whose husband fell into infinite waters does not state that she may *never* remarry, only that she may not remarry. Hence, in their view, contemporary rabbinic authorities could permit an *aguna* to remarry depending upon the particular circumstances of the case. This novel interpretation, which provides significant flexibility to contemporary *batei din*, was strongly rejected by the *Mordechai* and by many notable other authorities, especially R. Yosef Karo, the author of the *Shulchan Aruch*.[38]

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35. *Laws of Divorce,* 13, 20. Note that the Talmud never uses the phrase "even if ... was forgotten."

36. According to both the *Hagahot Maimuniot* and the *Magid Mishneh*, the source for the Rambam's ruling is a discussion between Rav and Shmuel on 121a; *Shulchan Aruch E.H.*, 17, 34.

37. See *Mordechai, Yevamot*, no. 92.

38. See *Bet Yosef* on *Tur Even Haezer*, 17, *s.v. Nisayt al yedei shehayeedo*.

A second alternative legitimatizes a lenient ruling by focusing attention on the flow of information that is implicit in R. Ashi's view and is buttressed by the second version of the Chasa episode quoted above. The *Terumat Hadeshen* argues that in the times of the Talmud, information flowed sporadically. Hence, one could never be certain about the broad community's knowledge of even a prominent person's survival.[39] However, claims the *Terumat Hadeshen*, in his times – the late medieval period – information circulated far more rapidly even about the average person than for a rabbinic scholar in the days of the Talmud. Therefore, it is possible to rule more leniently in permitting an *aguna* to remarry, which he does. The Chatam Sofer rules similarly, arguing that "nowadays, times have changed from what they were then. Nowadays, every village has a postal connection ... so that mail can reach us in a very short time. Had the individual survived the drowning, then from wherever he was, he would have let his family know via a letter...."[40] The Chatam Sofer buttresses his argument by mentioning the presence of newspapers and the presumption that a *bet din* itself would publicize the survival.[41] Similarly, R. Moshe Feinstein accepts this line of reasoning as warranting a permissive ruling.[42] It would appear that this justification is

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Shulchan Aruch E.H., 17, 34 as mentioned, reiterates the Rambam's position, even quoting the phrase "even if ... was forgotten." See also *Tzitz Eliezer*, v. 3, no. 25, para. 4, who cites additional protagonists on both sides of the debate.

39. *Pesakim Umichtavim*, no. 139.

40. *Responsa*, no. 58. The Chatam Sofer also points to a Rashi in *Ketubot*, 22b, *s.v. Beomeret*, in which Rashi mentions as a claim for remarriage an *aguna*'s statement: "I am certain that if he [her first husband] were alive, he would have turned up."

41. R. Ovadia Yosef in his usual encyclopedic style summarizes much of the literature in *Yabia Omer, Even Haezer*, v. 7, no. 14.

42. *Iggerot Moshe, Even Haezer*, IV, no. 58, para. 7.

even stronger in contemporary society given the global reach of modern telephony.[43]

R. Yaakov Reischer in his *Shvut Yaakov* suggests a further reason for leniency.[44] He agrees with a decision of a *bet din* headed by his brother-in-law, R. Dovid Oppenheim, that permitted the remarriage of a woman whose husband was missing in infinite waters. Given that the woman was young and that further factual clarification was remote, this decisor reasoned that the case could be classified as an emergency situation *(shaat hadechak*). Since halachically an emergency is equivalent to *ex post facto* (*bedi-eved*), the prohibition against *ab initio* marriages in infinite waters circumstances is not applicable, and the *aguna* may remarry.[45]

Thus, any *bet din* dealing with WTC-related *agunot* where no trace of the husband has been found, but it is clear that the husband had been present at the WTC around the time of the disaster, has ample legal precedent for either the stringent or the lenient view.

There is yet one additional issue that needs to be addressed, namely, a situation in which the husband is missing but there is no evidence that the husband was present at the WTC at the time of its collapse. A crucial issue in evaluating such a case is

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43. The responsa cited in this article deal with husbands who had been missing for years. Could a contemporary *bet din* decide that nowadays the passage of a few weeks or months without hearing from the missing husband would suffice for assuming his death?

44. Vol. II, no. 110.

45. But see the *Otzar Haposkim* (*Shulchan Aruch, E.H.*, 17, 32 at 25) for opposing as well as supporting views. The *Tzitz Eliezer* (v. 15, no. 59), who was asked to render an opinion concerning the same *aguna* case as was R. Yosef (see note 15), accepts the rationale of the *Shvut Yaakov* as an additional reason to free the *aguna*.

the interpersonal relationship between husband and wife.

D. Missing husbands and marital relationships

In all the cases dealt with until now, someone witnessed the presence of the husband in the danger zone – the plunge into the water, the snake pit, or the clutches of the Nazis. Other forms of evidence such as telephone or E-mail records might be similarly accepted as supporting evidence of presence. Yet, how does a *bet din* rule in a situation where, as may well have been the case on September 11, not only is the husband missing, but so is the evidence that he was at the site of the collapse? Can the court rule out the possibility that the husband was never there and still have disappeared? In that case, the infinite waters analogy and the leniencies deriving therefrom may not be relevant.

Perhaps the pertinent question, if indeed the husband was not there in the first place (or if there, had escaped), is – why did he not contact anyone? The Talmud deals with a similar scenario in which the analysis hinges upon whether the marital relationship was peaceful or strife-torn. The wife's assertion of her husband's death is not believed in the latter instance either because she would lie or because her wishful thinking would lead to inaccurate testimony.[46] Perhaps the same could be applied to the husband and even broadened. Are there ulterior motives that might lead the court to suspect disappearance rather than death? Might the husband have sought a way out of the marriage, but for personal, financial, or social reasons had hitherto remained with his wife? If so, it might be difficult

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46. 114 b and 116a, b, *Shulchan Aruch E.H.*, 17, 48. The *Shulchan Aruch* assumes the wife will lie to such an extent that the court should not even accept a witness that supports her testimony. She might have gone so far as to suborn the witness.

to release the wife from her *aguna* status. On the other hand, if the fundamental bond between the couple was strong, then perhaps the absence of contact would point to the husband's tragic demise and could set into play the more lenient halachic rulings.

A case discussed by R. Feinstein might speak directly to this question.[47] During the Nazi occupation of Belgium, a husband residing in Brussels was ordered to report for a work detail. That was the last heard of him. After the war, the wife testified that her husband was transported from Brussels. She further informed the *bet din* of a notification that she had received from the Belgian government after the war stating that the cohort was taken to Auschwitz. R. Moshe writes that the Belgian authorities decided that her husband "had died, and they determined the date of death to be three days immediately after the deportation."

The wording of this brief responsum is somewhat opaque. Did the wife actually see the husband join the work detail, or did she merely know that he left home with the work detail as his destination?[48] Did the Belgian government reach its decision about the husband's death based on specific evidence (e.g., his name recorded in Auschwitz camp records) or did it have general evidence about the fate of that particular cohort? In short, did R. Moshe permit the widow to remarry without conclusive evidence of the husband's presence in the cohort? If so and in light of R. Moshe's explicitly mentioning healthy marital bonds, this responsum could provide a precedential path in those WTC cases where the husband is still missing and nothing is known other than his daily pattern – he left

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47. *Iggerot Moshe, Even Haezer*, IV, no. 58, para. 7.

48. No mention is made that others in the work detail attested to the presence of the husband.

home at his usual time and he was expected to be at work during the time of the building collapse.[49]

A less ambiguous outcome in a similar poor-evidence situation may be drawn from a responsum of R. Yehoshua Baumohl, a contemporary of R. Moshe Feinstein. He considers the plight of *agunot* whose husbands were still missing years after the Holocaust, including those for whom it was unsure whether their husbands were ever in the clutches of the Nazis.[50] R. Baumohl suggests a permissive decision by combining the lenient positions of R. Eliezer of Vardun and the *Terumat Hadeshen*, the analysis of the *Tosfot Yom Tov*, and the reasoning of the *Shvut Yaakov*. He argues that a *bet din* could permit remarriage of the widows *even initially*, given that the husbands had not contacted their wives these many years even though communication was possible and absent the belief that family relations were so gloomy that the husbands would not have contacted their families. "There is no greater emergency than [a situation that would] leave widows bound up all their lives without hope of obtaining testimony about the fate of their

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49. The halachic importance of pattern in *aguna* cases can be inferred from the *Chaim Veshalom,* who cites the *Mabit* as accepting a flexible definition of *avad zichro* ("the memory [of the missing husband] was forgotten"), namely, "If someone who has not returned home at his usual appointed time and it was said that he died, that suffices." See *Otzar Haposkim* (*Shulchan Aruch, E.H.*, 17, 32 at 20).

R. Moshe D. Tendler, R. Moshe Feinstein's son-in-law, claimed in a personal conversation with this author that his father-in-law required at a minimum that the husband be known to have fallen into the hands of the Nazis. If so, the precedential value of this responsum is negated.

50. *Emek Halacha*, vol. II, no. 40. This discussion is not based on a particular case, but is rather an overall conceptual analysis of the issue. R. Baumohl stresses the need for each *bet din* to consider particular circumstances and not to use his responsum as a blanket source of leniency.

husbands."[51]

III. Conclusion

As horrific as the death of Mr. Shimmy Biegeleisen was, the halachic issues concerning his wife's status were relatively simple. On that eventful morning, telephone contact had been made between Mr. Biegeleisen and his family. Moreover, the home phone's caller ID registered his office at the WTC as the source of the calls. Further, the timing of his last call and the collapse of the building coincided. The Belzer *bet din* who ruled on the status of Mrs. Biegeleisen took all these circumstances into consideration in deciding that Mr. Biegeleisen had indeed tragically perished and that Mrs. Biegeleisen was not an *aguna*.[52] However, the cases of other Jewish women whose husbands were presumed to have died in the WTC disaster may be more complicated for a variety of reasons. Is there physical evidence proving both the presence of the husband and his demise? How conclusive is that physical evidence? Is there evidence of presence even if there is no physical evidence that would indicate death? If there is only a presumption that the husband was in mortal danger, what was the relationship between husband and wife?

Most, if not all, of these questions can be addressed, even if not resolved, by turning to precedents in halacha outlined in this article. Halacha was lenient in *aguna* cases insofar as the technical requirements of the witnesses are concerned. Single witnesses, women, and non-Jews are among those who could legitimately testify before a *bet din* dealing with *aguna* issues.

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51. See also *Tzitz Eliezer*, v. 15, no. 59, para. 5.

52. Details are from *The Wall Street Journal*, October 11, '01, page B1.

As to the substance of their testimony, rabbinic authorities debated the fundamental approach – is a lenient stance equally appropriate or, given the potential irreparable damage, should a more stringent attitude be adopted?

In any case, the least controversial evidence is visual identification of the corpse. When only fragments of the body remain, halachic issues center around the validity of identifying marks on the fragment. The identification technique favored in the World Trade Center situation by the New York City Medical Examiner's Office is DNA comparisons. According to some halachists, such comparisons by themselves suffice to establish identity; other contemporary decisors require additional support. The halachic challenge becomes even more intricate when not even fragments of the presumed deceased have been found. In such instances, halachic precedent is not unanimous, even were witnesses to testify that the missing husband had been in the WTC at the time of its collapse. Contemporary Jewish courts can find ample precedents in either direction – to release the *aguna* or to maintain the uncertain status quo.

Finally, great halachic acumen will be required if there is no obvious way to connect the missing husband to the WTC itself. The *bet din* will have to inquire into possible ulterior motives for the husband's disappearance. Death might have been the most plausible explanation. But even then, the members of the court might feel that the probability of the husband's demise is not sufficiently high to pass the halachic threshhold and thereby release the bereaved wife from her uncertain status.

Of course, every *aguna* situation must be dealt with individually as the circumstances, while similar, are rarely identical. Often the outcome lies in the details.

May *Hakadosh Baruch Hu* comfort the grieving widows and the families of the innocent victims. May He guide the paths of the various *batei din* involved in these heart-rending issues so

that they arrive at the true and proper decision in each and every case. Were it not so, the WTC tragedy would be compounded.

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Confronting Child Abuse

Steven Oppenheimer, D.D.S.

Child abuse is increasingly in the news. Not only are the number of incidents increasing, but the occurrences are receiving more attention. Child abuse has dominated the front pages of newspapers from *The New York Times* to the *Jewish Week*.

According to the Third National Incidence Study of Child Abuse and Neglect (NIS-3), more children are now being abused than in 1986 and the injuries are far more serious. The study reported that there was an 83% increase in the estimated number of sexually abused children from 1986 to 1993. Girls were sexually abused three times more often than boys. Children of single parents had a seventy-seven percent higher risk of suffering physical abuse than children living with both parents. The majority of all children who suffered physical abuse were maltreated by their birth parents. For sexual abuse, males clearly dominated as the perpetrators.[1]

One internet site on pedophilia reports that 1 out of 6 boys before the age of 16 and 1 out of 3 girls before the age of 18 are the victims of sexual exploitation.[2] Experts are not really sure what causes pedophilia and although it can be treated, there is

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1. *Third National Incidence Study of Child Abuse and Neglect* (NIS-3), http://www.calib.com/nccanch/pubs/statinfo/nis3.cfm# national.

2. www.webistry.net/jan/ibld2001.html. Pedophilia comes from: **pais** (Greek) child, + **philos**, love for. In psychiatry, the term implies the love of children by an adult for sexual purposes. (Stedman's Medical Dictionary, 22nd edition).

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no evidence that the treatment produces a cure. While it is not illegal to *be* a pedophile, it *is* illegal for a pedophile to carry out his fantasies. Nevertheless, treatment does appear to lower the incidence of repeat offenses. One study suggests as many as 3 million men in the US have been victims of incest.[3]

In 1998, Child Protective Services (CPS) investigated three million reports of child maltreatment and determined that more than 900,000 children were victims of child maltreatment. More than half of all reports came from professionals, including educators, medical, mental health and social service professionals. Twenty-two percent suffered physical abuse and twelve percent suffered sexual abuse. An estimated 1,100 children died as a result of abuse or neglect in 1998, according to CPS.[4]

Alarmingly, allegations of child abuse have begun to emerge in the observant Jewish community. In the past, people may have been reluctant to speak about these occurrences. Today, however, more and more health care professionals are dealing with these issues. A recent Jewish mental health care conference, Nefesh, devoted a program to this issue. Education and heightened awareness have enabled community professionals to be better able to recognize abused children.[5]

Physicians, dentists, nurses and other allied health care providers as well as teachers and school officials are required by state laws to report child abuse. This obligation even extends

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3. http://walterdemilly.com/pedo.htm

4. U.S. Department of Health and Human Services, *Child Maltreatment 1998: Reports from the States to the National Child Abuse and Neglect Data System* (Washington, D.C.: US Government Printing Office, 2000).

5. Third National Incidence Study of Child Abuse and Neglect (NIS-3), *loc. cit.*

to suspicion of child abuse. If family members or friends are aware of child abuse, what course of action should they take? How does halacha guide us in these circumstances?

If a child is brought to a doctor with evidence of battered child syndrome, is it halachically permissible for the doctor to contact the authorities? If there is a chance that the authorities might take the child out of his home and place him in a non-Jewish foster home, would that influence the halachic response?

Signs of battered-child syndrome include multiple skull or limb fractures, internal hemorrhaging secondary to trauma induced by physical beating, or severe burns secondary to fire, electricity or scalding liquids. Professor Avraham-Sofer Avraham states in the name of Rabbi S. Z. Auerbach, *zt"l*, that a child who is brought to the hospital or a doctor's office with signs of battered-child syndrome may *not* be allowed to return home if it can be ascertained that these injuries were sustained as a result of the intentional actions of one or both parents.[6] Allowing the child to be returned home would endanger the child's welfare. The doctor must notify the authorities, who will then transfer the child to a foster facility.[7] Since we are dealing with a life-threatening situation, the parents are considered to be *rodfim* and the laws of *moser* do not apply.[8] All efforts should be made to ensure that the child be placed in an observant foster home.[9] However, even if there is a possibility

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6. *Nishmat Avraham* by Prof. Avraham-Sofer Avraham, volume 4, page 208.

7. Ibid.

8. Ibid. A *rodef* is someone who pursues another in an attempt to harm him. *Moser* refers to the prohibition for a Jew to inform on his fellow Jew to the secular authorities.

9. Ibid.

that the child will be placed in a non-Jewish home, the doctor is permitted to inform the secular authorities, reports Prof. Avraham in the name of Rabbi Y. Sh. Elyashiv.[10] Should the child be placed in a non-Jewish facility, an attempt should still be made to have the child transferred to an observant environment.[11]

When the doctor informs the authorities that he has a child with evidence of severe physical abuse, it is the authorities who investigate and determine what actions are necessary to ensure the physical welfare of the child. Since the doctor is only reporting on the situation, he is only indirectly involved, and he is not responsible should the child be taken and placed in a non-Jewish facility, explains Rabbi E. Y. Waldenburg.[12]

In a case of rape, where a father has raped his minor daughter on repeated occasions, the father is considered a *rodef* and the halacha, states Rabbi Waldenburg, would be as mentioned above in the case of *chashash pikuach nefesh,* possible endangerment to life.[13] Rabbi Waldenburg equates the law of *rodef achar chaveiro lehorgo,* attempting to kill someone, with the law of *rodef achar ha'ervah,* attempting to have illicit relations.[14] Rabbi Auerbach agrees.[15] We are required to prevent a person from doing this, writes Rabbi Waldenburg. This is in addition to the requirement to protect the young girl from physical and emotional trauma.

What would the halacha prescribe if the young girl were

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10. Ibid.

11. Ibid.

12. *Tzitz Eliezer,* Vol. 19, *siman* 52. Also see *Nishmat Avraham, loc. cit.*

13. Ibid.

14. A father who has relations with his daughter is punished with *karet.*

15. *Nishmat Avraham, loc. cit.*

not prohibited because of *ervah*? In other words, what if the perpetrator were not the father, but another relative or family friend? One must report the perpetrator to the authorities, states Rabbi Waldenburg, in order to protect the girl from further harm and, additionally, to save the perpetrator from his wickedness.[16]

The *Shulchan Aruch* states that it is forbidden to surrender a person or his property into the hands of non-Jews, even if the person is wicked. It is also forbidden to inform on him even if he continually verbally harasses you.[17] Ramo adds that whoever acts as an informer has no share in the world to come.[18] If this is indeed the case, how can we inform the authorities about this perpetrator?

Rabbi Waldenburg explains that this does not apply in our case, since we are attempting to save the perpetrator from his wickedness. The *Shulchan Aruch* is commenting on a case where the intended purpose of informing on the perpetrator is to denigrate him because he is a wicked person. That would be prohibited. In our case, however, we are attempting to save him from carrying out his odious intentions, and consequently, it is permitted to report him to the authorities.

Moreover, asserts Rabbi Waldenburg, our case differs from

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16. This may be based on the Mishnah in *Sanhedrin*, 73a, where Rashi explains that we are permitted to kill a pursuer who wants to kill a person or who wants to sodomize a male or who wants to violate a *na'arah*(young female), because we will be saving him from sinning.

17. *Shulchan Aruch, Choshen Mishpat*, 388:9. *Minchat Yitchak* (8:148) explains that the harassment is verbal, as does *Pitchei Choshen*, Vol. 5, page 140. Also, see Rashi (*Gittin* 7a), *d.h. ha'omdim*, where he explains that we are talking about verbal abuse.

18. Ibid.

the case mentioned in the *Shulchan Aruch* which addresses the issue of someone who verbally harasses an individual. Our case goes beyond that and deals with physical and emotional harm. Ramo states that someone who is being hit by another may complain to the non-Jewish authorities even if the resultant punishment will cause great harm to the person who did the hitting.[19] Similarly, the *Shach* comments that one is allowed to inform in order to prevent further beatings.[20] We are dealing with a much more serious issue than hitting, declares Rabbi Waldenburg. Therefore, we may certainly inform the authorities.[21]

Rabbi Y. Y. Weiss, *zt"l,* was asked whether it is permitted to report a reckless driver to the police since the reckless driver is a menace to pedestrians and other vehicles. Rabbi Weiss answered that someone who speeds and, therefore, could potentially injure pedestrians or other vehicular traffic is considered a *rodef*. Consequently, if this individual is warned to refrain from driving in this manner, yet continues to do so, it is permitted to report him to the police. Furthermore, if a driver repeatedly fails to stop for a red light or a stop sign or engages in any manner of driving that endangers pedestrians or other vehicular traffic, or if the driver does not have a valid driver's license, he is considered a *rodef* who poses a threat to himself and others around him. This is so even if he had no intention of causing any harm. Rabbi Weiss extends this designation to someone who parks in an unsafe manner, or blocks the sidewalk with his car, thereby causing pedestrians to walk into the street where they could be in danger. Rabbi Weiss insists, however, that before going to the secular authorities, since the offender must have prior warning, it would

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19. *Shulchan Aruch*, *loc. cit.*, 388:7.

20. Ibid., 388:45.

21. *Tzitz Eliezer*, *loc. cit.*, and *Nishmat Avrohom*, *loc. cit.*

be best if this were done by competent halachic authority.[22] If time is of the essence, or if it is known that the offender would not appear before *beit din* and the offense is happening now, then it is permitted to go directly to the secular authorities.[23]

We see from here that someone who imperils public safety can be reported to the authorities, after consultation with proper halachic authority. The *Shulchan Aruch* says that one may inform on a person to the secular authorities if he harasses the public and causes them distress.[24]

If a teacher or a *Rebbi* is found to have sexually molested students, male or female, what should be done?

Rabbi Waldenburg says that we are permitted to report this person to the authorities since the *Shulchan Aruch* permits reporting a person who harasses the public, and this is certainly more serious.[25] Professor Avraham writes that the teacher is considered a *rodef*, and if a doctor uncovers evidence of this molestation, he is required to contact the authorities to prevent the teacher from committing further acts in this or any other school. The doctor must ascertain the facts and must consult with competent halachic authority, cautions Professor Avraham.[26]

The Talmud relates a story about Rabbi Elazar, the son of Rabbi Shimon bar Yochai.[27] Rabbi Elazar, who was known for his perspicacity, was appointed by the Roman authorities to be

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22. *Minchat Yitzchak*, volume 8, *siman* 148.

23. *Pitchei Choshen*, volume 5, chapter 4.

24. *Shulchan Aruch, Choshen Mishpat*, 388:12, as emended by the *Shach* and the Vilna Ga'on.

25. Ibid., and *Responsa Tzitz Eliezer*, *loc. cit.*

26. *Nishmat Avraham*, *loc. cit.*

27. *Bava Metzi'a*, 83b.

a marshal and arrest Jewish thieves. He was admonished, however, by Rabbi Yehoshua ben Korchah, "Vinegar, son of wine, how long will you hand over *HaShem*'s people to be killed?"[28] Rabbi Elazar answered, "I am eliminating the thorns from the vineyard" (I am weeding out the wicked from among the Jewish people). Rabbi Yehoshua replied, "Let the Master of the vineyard get rid of his own thorns!" (Let *HaShem* take care of the wicked without your assistance). Rabbi Elazar, however, continued his job as a marshal.

The Gemara recounts that Rabbi Yishmael bar Rabbi Yosei also served as a marshal and turned over thieves to the authorities until Eliyahu HaNavi protested to him, "How long will you continue to hand over *HaShem*'s people to be executed?" When Rabbi Yishmael protested, "What can I do? I'm just following the king's order," Eliyahu HaNavi answered, "You should have run away, as your father did."[29]

Ritva explains that Eliyahu HaNavi criticized Rabbi Yishmael's actions because the government punished thieves without taking testimony from witnesses, contrary to halacha. If it is contrary to halacha, how could Rabbi Elazar and Rabbi Yishmael, pious *Tannaim*, have behaved in this fashion? *Beit Yosef* explains in the name of Rashba that Rabbi Elazar and Rabbi Yishmael were criticized not because the halacha prohibits turning the thieves over to the authorities, but very pious people should refrain from such behavior.[30] Therefore, when Rabbi Yehoshua ben Korchah scolded Rabbi Elazar and called him "vinegar, son of wine," he meant that Rabbi Elazar was not as

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28. Rashi interprets "Vinegar, son of wine" as "evil son of a righteous father".

29. *Bava Metzi'a*, 84a.

30. *Sh. Aruch, Choshen Mishpat*, end of *siman* 388.

pious as his father Rabbi Shimon bar Yochai.[31] Similarly, when Eliyahu HaNavi scolded Rabbi Yishmael, he declared he should have run away as did his pious father. The halacha, however, allows someone who is directed by the government to report thieves to do so.

Rabbi Y. Sh. Elyashiv cites the above as proof that one is certainly allowed to report a teacher to the school principal, and if nothing is being done, one may report the teacher to the police. Our case is much more serious than thievery, says Rabbi Elyashiv, and it makes no difference whether the student is male or female.[32]

Rabbi Dovid Cohen writes that there is no prohibition of *mesirah* in these cases, as the *Shulchan Aruch* points out that one may inform on a person to the secular authorities if he harasses the public and causes them distress.[33] It is permitted to kill someone who is pursuing and attempting to kill another person, says Rabbi Cohen, and it is for this reason that it is permitted to injure someone who is pursuing another person to injure him. Rabbi Cohen says the rulings brought by Professor Avraham in his *Sefer Nishmat Avraham* are well known, and he has heard that Rabbi Moshe Feinstein, *zt"l,* and Rabbi Mordechai Gifter, *zt"l,* instructed accordingly. He also reports that this is the opinion of Rabbi A. L. Steinman.[34]

When a person was found murdered, the *Tzemach Tzedek* (Nicholsburg) ruled that the relatives must report the suspect to the secular authorities even if it would incur monetary cost

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31. *Beit Yosef* and Rashba interpret "vinegar , son of wine" differently than Rashi.

32. *Nishmat Avraham*, *loc. cit.*, page 210.

33. Written communication. See *Shulchan Aruch, loc. cit.*, 288:12

34. Rabbi Aharon Leib Steinman is the Rosh HaYeshiva of Gaon Ya'akov in Bnei Brak.

to them to pay the court or the police.[35]

A *talmid chacham* (Torah scholar) died suddenly, and foul play was suspected. Suspicion fell upon the *talmid chacham*'s wife, who was thought to have poisoned him. Maharam Shick, *zt"l*, was asked if it was permitted to turn the wife over to the authorities. Rabbi Shick, citing Rambam, permitted turning her over to the authorities, because Jewish law recognizes that the secular government has the right to make laws to protect society.[36]

We see from the above cases that the *poskim* historically have permitted informing the secular authorities when a serious crime has been committed.

Rabbi Y. I. Liebes, *zt"l*, observes that Jews are not allowed to go to secular courts to adjudicate disputes.[37] However, reporting someone to a governmental agency is different, maintains Rabbi Liebes. The agencies are directed to follow clear guidelines and do not adjudicate the law on their own. The government agency has the authority and means to force compliance with the law, while *beit din* does not. This is not a violation of adjudicating disputes in a secular court, maintains Rabbi Liebes, since the guidelines are spelled out. The governmental agency is merely facilitating compliance with

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35. *Tzemach Tzedek, siman* 111, cited by *Pitchei Teshuva, C.M.*, 426:1 and as explained by *She'arim Metzuyanim BeHalacha, chelek* 4, page 260.

36. *Responsa Maharam Shick, Choshen Mishpat, siman* 50, based on *Mishneh Torah, Hilchot Rotze'ach. perek* 2, *halacha* 5. Rabbi Shick advises that an especially pious person should personally avoid informing the secular authorities as we see from *Beit Yosef* cited in the text above.

37. *Shulchan Aruch, C. M., siman* 26.

the law.[38]

If we accept Rabbi Liebes' position, then perhaps reporting an incident of child molestation to an agency such as HRS or CPS would not relate to the prohibition of adjudicating cases in secular courts, since the agencies involved follow set guidelines and do not determine the law. Rabbi Ephraim Greenblatt observes that it would be preferable if these matters could be decided in *beit din*, which would then assume control of the situation. For the most part, laments Rabbi Greenblatt, *beit din* does not have the power enforce the law, the child continues to suffer, and the offender continues with his repulsive behavior. In such a case, one must contact the secular authorities, states Rabbi Greenblatt. Most of the time, observes Rabbi Greenblatt, it is found that the offender has emotional problems and the judge places him in a hospital for treatment so that he may be helped.[39]

Rabbi Waldenburg observes that regarding secular courts, there are differences between uncivilized and enlightened countries. He quotes the *Aruch HaShulchan* who maintains that the laws of *moser* mentioned in the Talmud and the *poskim* are referring to those lawless countries where people have no confidence in their physical or monetary safety, such as certain African countries, while this is not the case in European countries.[40] Therefore, in civilized and law-abiding societies we need not fear that the government will act in a wanton manner, and it would be permitted to report someone under the conditions mentioned.

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38. *Beit Avi, chelek* 3, *siman* 154.

39. Written communication. Rabbi Ephraim Greenblatt is the author of *Rivevot Ephraim*.

40. *Aruch HaShulchan, C.M., siman* 388:7, cited by *Tztitz Eliezer, chelek* 19, *loc. cit.*

If the law requires reporting incidents of child abuse to the authorities, must one do so because of *dina de'malchuta dina*? Should a doctor not report such an incident, he could lose his license. Is he required to jeopardize his livelihood?

Dina de'malchuta dina literally means "the law of the kingdom is the law". Basically it may be explained that the law of the non-Jewish government is the law and binding on Jews even should the law differ from the laws of the Torah. The Talmud quotes this aphorism in the name of the Babylonian *tanna*, Shmuel.[41] For the most part, this dictum is limited to *dinei mamanot* – real-estate, civil and monetary laws. *Dina de'malchuta dina* does not mean the law of the land is the law unequivocally. If secular law would supercede Torah law whenever it conflicted with it, Judaism would be diminished to merely the practice of rituals and a significant portion of the *Shulchan Aruch* would be nullified.[42]

Ramo states that *dina de'malchuta dina* is operative in matters that serve to safeguard the people.[43] *Beit Yitzchak* explains that *dina de'malchuta dina* is applicable in matters of *harchakat nezikin*, avoiding bodily injury and physical damage.[44]

The *Shulchan Aruch* states that it is prohibited to walk four *amot* without a head-covering.[45] The *Gilyonei Mishnah Berurah* states that one must go bareheaded before officers and judges

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41. *Gittin*, 10b; *Bava Kama*, 113a; *Nedarim*, 28a; *Bava Batra*, 54b.

42. Ramo, *Choshen Mishpat* 369:11. For a detailed discussion of *dina de'malchuta dina*, see Rabbi Hershel Shachter, *Journal of Halacha and Contemporary Society*, Volume 1, pages 103-132, Spring, 1981.

43. Ibid.

44. *Beit Yitzchak, C. M., siman* 77, cited in *Pitchei Choshen, loc. cit. Beit Yitzchak* brings proof from *Bach, siman* 145 and *Chatam Sofer, siman* 44.

45. *Shulchan Aruch, O.Ch.*, end of *siman* 2.

when this is required and *dina de'malchuta dina*.[46]

It seems, therefore, that *dina de'malchuta dina* extends beyond *dinei mamanot*. None of the authorities I queried, however, felt that *dina de'malchuta* was a determining factor in requiring a person to report a child abuser. Rabbi Moshe Sternbuch and Rabbi Yitzchak Silberstein maintain that one must first consult with competent halachic authority before proceeding.[47] Rabbi Hershel Schachter opines that one is not required to jeopardize one's livelihood to protect someone who has committed such an offense. A doctor may report to the authorities that he has examined a child who exhibits signs of abuse.[48] Rabbi Yehuda Henkin submits that it is uncertain whether *dina de'malchuta dina* compels a person to report such behavior to the authorities, but if one is subject to sanctions such as loss of license, one is not required to refrain from reporting an incident. Rabbi Henkin comments that one should report the findings without concluding who is guilty. For example, a doctor may report that he has found physical evidence of abuse without mentioning a suspect by name, even though it is understood that the authorities will conduct an investigation.[49]

It is very important to ascertain the facts and be sure that the individual being accused, in fact, committed the act. We are not allowed to name an individual without establishing the facts and without direction by competent halachic authority to do so. Obviously, if the perpetrator admits his actions, there

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46. Ibid. Rabbi Hershel Schachter explains that since covering one's head is *minhag chasidut*, the government can require its citizens to uncover their heads in court, for example, because of *kevod hamalchut*.

47. Written communication.

48. Verbal communication.

49. Written communication. Rabbi Henkin is the author of *Responsa B'nai Banim*.

would be no doubt. What could be done, for example, if a student accused his *rebbe* of molesting him, and the *rebbe* denied the accusation? Would it be permitted to demand that the *rebbe* take a lie detector test? Rabbi Hershel Schachter asserts that a *rebbe* is an important community figure. Allowing such a charge to go unresolved would be a *chilul HaShem*. The school principal would be permitted to request that the *rebbe* take a lie detector test to clear his name. Should he refuse, the principal would be permitted to threaten to go to the authorities. Should the *rebbe* still refuse, Rabbi Schachter says the principal may report the incident to the authorities.[50]

Rabbi Waldenburg writes that when the situation warrants, and at *beit din*'s discretion, testimony may be taken from relatives, wives and even minors. *Beit din* may even act without giving the offender prior warning (*hatra'ah*).[51]

Is a doctor permitted to reveal information about a patient? If the doctor discovers information about a patient that the patient might not want revealed, but that information could impact upon the community, is the doctor halachically permitted to reveal this information to the authorities?

Rabbi Waldenburg was asked whether a doctor, who examined a patient's eyesight and found the patient's vision poor, would be allowed to inform the Motor Vehicle Bureau, since a driver with poor eyesight may be more likely to be involved in accidents.[52] If the doctor feels that this person may be prone to more accidents as a result of his condition, is the doctor required to maintain patient confidence?

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50. Verbal communication.

51. *Tzitz Eliezer, chelek* 19, *siman* 51, quoting *Rashba chelek* 4, *siman* 311; *Ramban siman* 279 and *Levush, Choshen Mishpat, siman* 2.

52. *Tzitz Eliezer, chelek* 15, *siman* 13.

Rabbi Waldenburg declares that the doctor must inform the Motor Vehicle Bureau and/or the person's employer regarding the person's health limitations. If the patient requests that the doctor not reveal any information, would that make a difference? No, insists Rabbi Waldenburg, if the doctor remains unconvinced that the person will not drive and, therefore, constitutes a potential danger to others, he *must* report the information. If the doctor is summoned by the authorities to report his findings, he must do so. Any oaths or promises that he may have made not to reveal patient information are not binding, because this would be an oath to abrogate a mitzvah, and such an oath is not binding, asserts Rabbi Waldenburg. Even if the doctor is not summoned to report findings, says Rabbi Waldenburg, he must do so of his own volition and inform the authorities, because this person's condition may jeopardize others. Should the doctor not do this, he violates the commandment *lo ta'amod al dahm rei'echa*, do not stand idly by while your neighbor's blood is shed.

Even if revealing such information may cause social or monetary harm to the patient, insists Rabbi Waldenburg, the doctor must report the information, because *pikuach nefesh*, endangerment to life, supersedes everything. Rabbi Waldenburg quotes *Pitchei Teshuva,* who writes,

> All the *mussar* books admonish people regarding the sin of *lashon ha'ra*. I admonish the world about a greater, more prevalent sin, namely, not speaking up when necessary to protect the oppressed from the oppressor.... [By not speaking up], you violate the commandment *lo ta'amod al dahm rei'echa.* Similarly, in monetary matters, we are obligated by *hashavat aveida*, returning a lost article to its owner. If you see that someone's employees are stealing from him, or a person's partner is taking advantage of him, someone is being misled in a business transaction, or an individual seeks to borrow money

> and he is someone who doesn't pay his debts, and similarly, in matters of matchmaking, if you possess knowledge that this person has a bad character, all these are examples of *hashavat aveida*.[53]

These words of *Pitchei Teshuva* underscore the importance of revealing information to the proper authorities as long as there is no intention to purposely harm this individual, but the motivation is to help another and protect the public. Then, proclaims Rabbi Waldenburg, you will have fulfilled a great mitzvah.[54]

Rabbi Waldenburg also quotes *Chelkat Ya'akov,* who was asked about a man who was engaged to be married. The man had cancer, but neither he nor his family were aware of the illness. The doctor estimated that the man had at most two years to live. If the doctor were to inform the bride's family, the wedding would most likely be canceled. The *Chelkat Ya'akov* decreed that the doctor must inform the bride. Otherwise the doctor would be in violation of *lo ta'amod al dahm rei'echa*.[55] Certainly in our case, proclaims Rabbi Waldenburg, where we are dealing with public safety, should the doctor not reveal the information, he would be in violation of *lo ta'amod al dahm rei'echa*. Therefore, the doctor is halachically required to inform.[56]

While doctor-patient confidentiality may not be operative halachically as it relates to community endangerment issues and under the conditions mentioned above, there may be other

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53. *Pitchei Teshuva, Orach Chaim, siman* 156, cited in *Responsa Tzitz Eliezer*, ibid.

54. *Tzitz Eliezer, chelek* 15, *siman* 13.

55. *Chelkat Ya'akov, chelek* 3, *siman* 136. See also Rambam, *Mishneh Torah, Hilchot Rotzei'ach,* chapter 1 and *Shulchan Aruch, C. M., siman 426.*

56. *Tzitz Eliezer*, ibid.

secular legal ramifications that are beyond the scope of this article.

How can we be sure that if the teacher is dismissed from his present employment, he will not seek employment elsewhere and commit similar acts? Is it permitted to contact organizations that provide employment referral services such as Torah U'Mesorah so that they may place this person's name on a "not recommended" list? Is it permitted to reveal the details of the offender's behavior?

Rabbi Moshe Sternbuch declares that after the facts have been ascertained, it is a mitzvah to let all places know.[57] Rabbi Yitzchok Silberstein agrees that it is permitted to place the teacher's name on a list stating that "he is unfit to be a teacher," with the proviso that we also state that the teacher was only suspected of inappropriate behavior, unless clear evidence of his guilt was presented to a Jewish court.[58]

Is it permissible to publicize the offender's conduct in order to ensure that there will no more victims? There is research that suggests that there is a appreciable recidivism rate.

Rabbi Moshe Sternbuch rules that should there be any suspicion that the abuser may do this again, *mechuyavin le'farsem*, one *must* publicize the matter.[59] If publicizing the matter will help to ensure that the abuser will not harm anyone in the future, it may be publicized, agrees Rabbi Ephraim Greenblatt However, if it is unlikely that there will be further problems,

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57. Written communication. Rabbi Moshe Sternbuch is author of *Moa'dim U'Zemanim* and *Teshuvot V'Hanhagot.*

58. Written communication. Rabbi Yitzchok Silberstein is the author of halachic works such as *Torat HaYoledet* and *Shabbat Shabbaton*.

59. Written communication.

one may not publicize the matter, cautions Rabbi Greenblatt.[60] Rabbi Yitzchak Silberstein admonishes that under no circumstances may one publicize an incident without the permission of *beit din*. The person's family may suffer extreme distress, and how can you punish them without clear evidence and testimony before a *beit din*, questions Rabbi Silberstein.[61]

In the final analysis, one must consult with competent halachic authority, cautions Rabbi Sternbuch. He is concerned that if we were to give blanket permission to do as one feels, then a person who had a grudge against someone could slander or besmirch a person's character. Since we are dealing with *dinei nefashot*, people's lives, we must be very thorough in our clarification of the matter, advises Rabbi Sternbuch. Therefore, one must have available to him a competent rabbi or *beit din* whom he can ask and inquire as to the proper procedure, insists Rabbi Sternbuch. The primary point to remember, concludes Rabbi Sternbuch, is that child molestation is a very grave matter, and he who remains silent and refrains from doing anything carries a tremendous responsibility to the point that he is considered, G-d forbid, as one who has transgressed.[62]

Our rabbis tell us that when *B'nei Yisrael* stood at Mount Sinai, preparing to enter into the covenantal relationship with *HaShem* and receive the Torah, *HaShem* demanded that *B'nei Yisrael* provide a guarantor who would assure that the precepts of the Torah would be faithfully observed.

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60. Written communication. For guidelines on how one may publicize an issue, see this author's article, "Journalism, Controversy and Responsibility: A Halachic Analysis," *The Journal of Halacha and Contemporary Society*, Volume 41, Spring 2001.

61. Written communication.

62. Written communication. See *Shulchan Aruch, C.M., siman* 426 where we are told that a person who stands idly by transgresses *lo ta'amod al dahm rei'echa.*

> "Master of the Universe, proposed *B'nei Yisrael*, "let our forefathers, Avraham, Yitzchak and Ya'akov be our surety."
>
> "Your forefathers don't qualify, for they themselves have outstanding debts with me," countered G-d.
>
> "Then let our Prophets serve as our collateral," suggested *B'nei Yisrael*.
>
> "They, too, have outstanding debts with me," answered G-d. "Bring me reliable security and I will give you the Torah!"
>
> G-d finally accepted our children as our bond to secure our covenantal relationship.[63]

Our children are our most precious legacy and assure our future. We must do all we can to protect them from anyone who would do them harm.

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63. *Shir HaSirim Rabah, parasha aleph, d.h. moshcheini*; *Midrash Tanchuma, Parashat Vayigash*; *Otzar HaMidrashim* (Eisenstein), page 150, *d.h bachodesh hashlishi.*

Brushing Teeth on Shabbat

Rabbi Aryeh Lebowitz

I. Introduction

Brushing one's teeth on Shabbat or Yom Tov raises a number of halachic issues, with several misconceptions regarding both their significance and practical implications. Surveying the responsa literature, one finds no fewer than eight issues addressed by the *poskim*. For the purpose of this essay we will divide these issues into three basic categories: issues relating to the use of toothpaste, issues relating to the use of a toothbrush, and ancillary issues that arise when brushing teeth. We will also outline the opinions of a variety of *poskim* and provide some practical guidance.

II. Issues Relating to Toothpaste

A. Mimarayach

The Mishnah lists *mimachaik* as one of the thirty-nine *avot melachot* of Shabbat.[1] Rambam defines *mimachaik* as the removal of hair or wool from the hides of an animal in order to smooth out the hide.[2] It is clear from the Gemara that *mimachaik* applies

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1. *Shabbat* 73a.
2. *Hilchot Shabbat* 11:5.

Rebbe, Davis Renov Stahler Yeshiva High School for Boys, Woodmere, N.Y.; Rabbinic Intern, Congregation Sha'aray Tefillah, Lawrence, N.Y.

when any surface is smoothed by scraping or sanding.[3] Rambam writes that a *toladah (*derivative*)* of *mimachaik* is *mimarayach*.[4] *Mimarayach* refers to smoothing soft, pliable substances that may be pressed or molded to a shape. Although the biblical prohibition of *mimarayach* applies only to pliant, solid substances, it is rabbinically forbidden to smooth semi-solid substances that have enough density to hold together as a mass.[5]

1. The stringent view: Many *poskim*, most notably Rabbi Moshe Feinstein *zt"l,* argue that spreading dense, semi-solid toothpaste over the surface of teeth, violates the rabbinic prohibition of *mimarayach*.[6] (Squeezing the

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3. *Shabbat* 75b.

4. *Hilchot Shabbat* 11:6.

5. *The 39 Melachos,* Rabbi Dovid Ribiat, based on *Shabbat* 146b and Rambam *Hilchot Shabbat* 23:11. One may argue, however, that a substance such as toothpaste would actually be subject to the biblical prohibition of *mimarayach*. The Gemara ibid. specifically refers to a substance called *mishcha* when discussing *mimarayach m'dirabanan*. Rashi there defines *mishcha* as a type of thick oil. Based on Rashi it seems that only thick liquids would be *mimarayach m'dirabanan*, whereas any type of solid would be *mimarayach mi'doraytah*. Although Rambam clearly says that *mishcha* is a type of fatty substance (*"shumen"*), *Nishmat Adam* 34-35:1 states that there is a printing error in our texts of the *Mishnah Torah* and it should read *"shemen"* (oil) instead of *"shumen"* (fats). (email correspondence with Rabbi Aharon Silver *shlit"a* of Jerusalem.).

6. *Iggerot Moshe, Orach Chaim* 1:112. Rabbi Feinstein writes that the prohibition is an "obvious" one. Although Rabbi Feinstein writes in this responsum that the problem is one of *mimachaik*, it is clear that he really means *mimarayach.* (See subsequent responsa where Rabbi Feinstein clearly refers to *mimarayach* as *mimachaik.*) Rav Soloveitchik *zt"l* explained that cleaning the plaque off the teeth, which smooths out the surface of the teeth, would not constitute *mimachaik* because removal of plaque from the surface of an item is not categorized as "smoothing". Only smoothing an item by removing part of its own surface is categorized as smoothing. He proved this assertion from

toothpaste out of the tube is not prohibited on Shabbat because one does not intend to reshape the toothpaste when pushing it out of the container.[7])

2. The lenient view: Rabbi Ovadia Yosef *shlit"a* writes that there is no problem of *mimarayach* when one uses toothpaste because there is no intention for the toothpaste to remain on the surface over which it is being spread.[8] The intention is merely for the toothpaste to aid in removing unwanted plaque or other food substance from the teeth after which both the toothpaste, and plaque and food substance, are washed away. Rabbi Yosef references two similar cases to support this assertion. First, Ramo prohibits washing one's hands with *"borit"* (a type of soft soap) because of a problem of *nolad*.[9] Since Ramo only raises the problem of *nolad*, which by all accounts is intrinsically only rabbinic in nature, and does not mention a problem of *mimarayach* that is biblical in nature, Rabbi Yosef suggests, there must not be a problem of *mimarayach* when the intention is to immediately wash away the substance being spread.[10] Second, the *Magen Avraham* writes that one may rub saliva into the ground since *mimarayach* only

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the Gemara in *masechet Shabbat* 50a. Rabbi Soloveitchik was reported to have said that if brushing teeth were really a problem of *mimachaik*, one who brushes his teeth many times should be left without any teeth. For a similar confusion of this point see Responsa *Eretz Tzvi* 70. See *Nefesh Harav,* page 168, for further elaboration of this point.

7. Based on *Shemirat Shabbat Ki'hilchata* 11:14 in the name of Rabbi Shlomo Zalman Auerbach *zt"l*.

8. Responsa *Yabia Omer* 4:*Orach Chaim*:27-30.

9. 326:10. See later in this essay for further explanation of this concept.

10. See, however, Responsa *Iggerot Moshe* 1:113 who clearly assumes that "*borit*" does present a problem of *mimarayach*.

applies when one rubs an applied substance in order that it remain as a coating. However, one's intention with saliva is for it to disappear into the ground and it is thus permissible.[11] Similarly, Rabbi Yosef argues, one may rub toothpaste on teeth since the ultimate goal is to wash the toothpaste away. Rabbi Eliezer Waldenberg *shlit"a* rejects the applicability of this case, distinguishing between the case of saliva and the case of toothpaste. Whereas the entire act of rubbing saliva into the ground serves no purpose other than merely disposing of it, toothpaste is rubbed onto teeth to serve a valuable function.[12]

Rabbi Joseph B. Soloveitchik *zt"l* also maintained that one violates *mimarayach* only when the newly smoothed layer remains on the surface. Since toothpaste is immediately washed away, leaving no residue on the surface of the teeth, there would be no issue of *mimarayach*.[13] When Rabbi Soloveitchik was told by a student that toothpaste advertisements claim that the toothpaste provides a protective coating lasting for twenty four hours, he said that he was not convinced that there was any truth in these advertisements.[14] Furthermore, he pointed out that even if the advertisements were true, an invisible layer is not substantial enough to be recognized by the halacha.[15]

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11. 316:24.

12. Responsa *Tzitz Eliezer* 7:30:8.

13. *Nefesh Harav,* pages 168-169, based on *Taz* 318:6, cited in *Mishnah Berurah* 318:32.

14. In fact fluoride does cause a molecular level ion transfer on the surface of the teeth.

15. See *Aruch Hashulchan Yoreh Deah* 83:15.

B. Molid

The Gemara states that one may not crush or squeeze ice or snow so that water flows.[16] *Rishonim* approach this prohibition in two ways.[17] Rashi explains that the rabbis decreed that one may not perform any creative acts on Shabbat because creative activity resembles a *melacha*.[18] Changing the form of a substance is considered creative and thus prohibited. This is what is commonly referred to as *molid*. Rambam and Rashba, however, understand the nature of the prohibition of squeezing ice differently. They explain that squeezing ice is rabbinically prohibited because it resembles *sechita*.[19] Squeezing ice so that water flows is prohibited just as squeezing juice from olives and grapes is prohibited because it causes a liquid to flow from a solid. One major practical difference between the two explanations would be the permissibility of changing a liquid into a solid. While clearly bearing no resemblance to *sechita*, it should certainly be considered an equally creative act. The *Mishnah Berurah* seems to indicate that we should follow the

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16. *Shabbat* 51a.

17. In truth there are three basic approaches to this Gemara. The *Sefer Hatrumot*, cited by the *Rishonim* ad. loc., believes that there is an issue of *nolad* (causing a significant change in an item even indirectly). However, for the purposes of this essay it is not necessary to explain this opinion and how it differs from Rashi. For a full discussion of this matter see Responsa *Yabia Omer* 4:28.

18. In general, rabbinic decrees are made because a certain activity is either likely to lead to the violation of a *melacha* or closely resembles a particular *melacha*. The concept of *nolad* is unusual in that it has no connection to any particular *melacha*. *Nolad* is rabbinically prohibited because the very notion of *melacha* is defined as creative activity. Therefore, engaging in very creative activities bears close resemblance to the entire concept of *melacha*. See Responsa *Maharil Diskin* 66.

19. As explained by *Magid Mishnah*, *Hilchot Shabbat* 21:13.

stringencies of both opinions.[20]

1. The stringent view: Many *poskim*, including Rabbi Yitzchak Ya'akov Weiss *zt"l*, do not allow the use of toothpaste on Shabbat on the grounds of *molid*.[21] Brushing with toothpaste changes the paste-like substance into a foamy substance, thereby creating a new entity.

2. The lenient view: Rabbis Ovadia Yosef[22] and Hershel Schachter *shlit"a* do not believe that the change from a squishy paste-like substance to a squishy foam-like substance is a significant enough change to be classified as *molid*. One only violates *molid* when changing a solid into a liquid or vice versa, but changing a quasi-solid into a quasi-liquid does not violate *molid*. Rabbi Yosef, however, believes that this is the subject of a debate between the *Shulchan Aruch* and the Ramo.[23] He is therefore only willing to be lenient for Sephardic Jews, but believes that Ashkenazic Jews, in keeping with their own customs, should not use toothpaste on Shabbat.

Obviously, both the problems of mimarayach *and* molid *can easily be avoided by using liquid toothpaste.*

C. Refuah

One of the thirty-nine *avot melachot* of Shabbat is the *melacha* of *tochain*.[24] *Tochain* is defined as grinding a larger mass into

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20. 320:33.

21. Responsa *Iggerot Moshe* 1:112, and *Minchat Yitzchak* 3:50.

22. Responsa *Yabia Omer* 4:28, and cited in *Yalkut Yosef* 326:13.

23. 326:10. See *Biur Hagra* ad. loc. who supports the opinion of the *Shulchan Aruch* based on a *Tosefta*.

24. Mishnah, *Shabbat* 73a.

many tiny particles. Since it was common in talmudic times to grind herbs in the preparation of medications, *Chazal* decreed that one may not use any medication on Shabbat,[25] lest one come to grind his own medicine and violate *tochain*.[26]

1. The stringent view: Rambam writes that one may not rub an ointment on his teeth if his intention in doing so is for medicinal purposes. If, however, the intention is only to gain fresh smelling breath it is permissible.[27] Most brands of toothpaste that can be purchased in stores today contain fluoride and some contain a type of desensitizing agent. Fluoride serves to strengthen the teeth and protect them from future decay. The desensitizing agent serves to make the teeth less sensitive to heat, cold, and sweets. Since there is a medicinal effect to toothpaste, and the purpose of using toothpaste is not to merely freshen the breath, Rabbi Moshe Yonah Zweig *shlit"a* prohibits the use of toothpaste on the grounds that it is a *refuah*.[28]

2. The lenient view: The overwhelming majority of *poskim* who discuss the issue of brushing teeth on Shabbat do not raise the issue of *refuah* at all. There are two reasons

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25. *Shabbat* 53a, and codified in *Shulchan Aruch* 328:1.

26. In terms of why this decree should still apply today when people do not commonly grind up their own medications, see Rambam *Hilchot Mamrim* 2:2. See, however, Ra'avad ad. loc. See also Responsa *Tzitz Eliezer* 8:15:15:4. Even though the decree clearly remains intact, many *poskim* treat it more leniently due to the fact that the reason for the decree no longer applies. See *Ketzot Hashulchan* 134:7. For possible explanation of this phenomenon see Responsa *Iggerot Moshe, Orach Chaim* 2:100.

27. *Hilchot Shabbat* 21:24.

28. Responsa *Ohel Moshe* 2:98.

that one can suggest to support a lenient view.[29]

a. In general, preventative therapy is not included in the ban on taking medicine on Shabbat.[30] One who is currently healthy generally does not feel any sense of urgency when taking preventative treatments, making it far less likely that he would act on impulse and do a *melacha* to prepare a medicinal substance in order to provide relief.[31] As mentioned, the function of fluoride is prophylactic and not therapeutic. Thus, there is no problem of *refuah* with the use of toothpaste, as it has no therapeutic medicinal value. If one has a carious lesion (a cavity in the vernacular), for example, toothpaste does not provide any relief nor does it help to treat the problem.[32]

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29. One may also suggest that there is no problem of *refuah* because toothpaste is a form of therapy never achieved through a pill (see *Chayei Adam* 69:5 and *Mishnah Berurah* 328:130). For example, one may wear a dental brace or an orthopedic brace on Shabbat because the positive effects of the brace can never be achieved through medicinal means. Similarly, it may be argued that there is no way to achieve the positive results of brushing teeth with toothpaste through a medicinal means, and toothpaste should therefore not be considered a *refuah*. However, one can take issue with such a leniency for a number of reasons. First, the *Mishnah Berurah* 328:130 indicates that this leniency only applies when *none* of the beneficial effects of the therapy may be achieved through medicinal means. When some of the effects may be achieved through medicinal means, however, the prohibition of *refuah* still applies. It may be that some of the effects of toothpaste may be achieved through other means. Second, some of the ingredients of the toothpaste itself are ground up, making the toothpaste no different than a pill in this regard.

30. See *Shulchan Aruch* 328:27 and Responsa *Iggerot Moshe* 3:54.

31. *Magen Avraham* 328:31 and *Mishnah Berurah* 328:86.

32. *Ketzot Hashulchan* 7:page 99, Responsa *Yabia Omer* 4:29, *Yalkut Yosef Shabbat:*4:page 73. It should be noted that at various times

b. Even if one would argue that a desensitizing agent has a minor therapeutic effect, and is not merely a prophylactic treatment, there is yet another reason not to consider toothpaste a *refuah*. The Gemara clearly states that *Chazal* only prohibited forms of therapy that are associated or appear to be associated with medication.[33] To ingest something that is common for healthy people to ingest (known as *ma'achal bri'im*, a healthy person's food) would be perfectly permissible. For example, if somebody has a cold he may drink hot tea or chicken soup for therapeutic purposes because it is perfectly normal for a healthy person to drink hot tea or chicken soup.[34] Since even people with perfectly strong and healthy teeth brush regularly, toothpaste would be classified as a *ma'achal bri'im* and would not violate the prohibition of taking medicine on Shabbat.[35]

III. Issues Relating to the Toothbrush

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toothpaste companies have claimed that their products can have minor current medicinal effects. Most dentists that I have spoken to do not believe that these effects have any substantial significance.

33. *Shabbat* 109b, codified in *Shulchan Aruch* 328:37.

34. Rabbi Joseph B. Soloveitchik *zt"l* was reported to have permitted the use of aspirin on Shabbat for this reason. Since it is normal for healthy people to take aspirin to prevent heart attacks, he categorized aspirin as a *ma'achal bri'im*. Rabbi Yonasan Shteif *zt"l* was reported to have allowed aspirin for the same reason. See Responsa *Be'er Moshe* 6:39 and *Sefer V'chai Bahem* page 209. See, however, Responsa *Minchat Yitzchak* 3:35 who does not consider aspirin to be *ma'achal bri'im*. In terms of the permissibility of taking vitamins on Shabbat see *Iggerot Moshe* 3:54 and *Shemirat Shabbat Kehilchata* 34:20.

35. Rabbi Aharon Silver *shlit"a* pointed out that brushing teeth should be no different than washing one's skin in this regard. Just as there is no prohibition to wash one's skin, even though one who doesn't wash would probably develop dermatalogical problems, one

A. Sechita

Squeezing a liquid out of a solid in which it is absorbed is a violation of the prohibition of *sechita*. Most *poskim* understand that *sechita* is related to the *av melacha* of *dosh* (threshing). *Dosh* entails the removal of an inedible attachment from produce by means of treading. The Gemara mentions that *mefarek* is a *toladah* of *dosh*.[36] Rashi explains that *mefarek* refers to unloading. For example, one who strikes the branch of a tree, thereby causing fruits to fall from the tree, violates *mefarek* because he causes the tree to unload the fruit.[37] The *Aruch Hashulchan* explains that any separation of an item from within another item would constitute a *toladah* of *dosh*.[38] Along the same lines, Rambam writes that squeezing fruits in order to extract the juice also constitutes *mefarek*.[39]

The Gemara states that squeezing absorbed liquids from a wet cloth violates a *melacha*. *Rishonim* differ on precisely which *melachot* are involved. Tosafot explains that squeezing liquids absorbed in a fabric is a *toladah* of *dosh*.[40] Tosafot also acknowledges that there is an additional prohibition of *melabain* when squeezing liquid from a garment. However, the prohibition of *melabain* would only apply to clear liquid that is useful for cleaning. Squeezing juices and other unclear liquids would not constitute a violation of *melabain*.[41] Rambam

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who brushes his teeth has not violated a prohibition of *refuah*.

36. *Shabbat* 73a.

37. Ibid. See, however, Ritva and Tosafot ad. loc. who both disagree with Rashi. Ramban there writes that it is only a problem of *mefarek* if the fruit comes out of its shell as a result of the impact on the ground.

38. *Orach Chaim* 320:3.

39. *Hilchot Shabbat* 8:10.

40. *Ketubot* 6a. See Rambam *Hilchot Shabbat* 9:11 who understands that squeezing liquid from a garment is a problem of *melabain*.

maintains that squeezing liquid from a wet cloth is not *mefarek* at all (probably because the absorbed liquids are foreign to the cloth). According to Rambam only the *melacha* of *melabain* is applicable to wet cloths or fabrics.[42]

The Gemara clearly states that the prohibition of *sechita* does not apply when one squeezes liquid out of hair since hair is not an absorbent material and, therefore, the liquid is never really absorbed into the hair.[43] The liquid merely appears to be absorbed because the hair is so tightly packed that the liquid becomes trapped between the strands. According to most *poskim*, the Gemara is to be interpreted as *Patur avol Assur* (exempt from punishment, but forbidden to do).[44] According to this interpretation, squeezing liquid from hair does not violate the biblical prohibition of *sechita* (*mefarek*), but there remains a rabbinic prohibition since to the naked eye squeezing a non-absorbent substance like hair appears similar to *sechita*.

1. The stringent view: The (nylon) bristles of a toothbrush are made from a non-absorbent material, and are therefore not subject to the biblical prohibition of *sechita*. However, Rabbi Moshe Feinstein *zt"l* rules that one should not use a wet toothbrush since the bristles of

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41. See, however, Responsa *Avnei Nezer* 159:20 who, in the course of explaining the opinion of the Ramban, suggests that *sechita* may be a problem of *melabain* because any absorbed liquid is undesirable in a fabric. A wet garment (even with a clear liquid) does not have an acceptable appearance, and expelling the liquid improves the garment.

42. *Hilchot Shabbat* 9:11. Rambam seems to assume that there is no problem of *mefarek* when squeezing liquid out of a garment. This is evidenced by the fact that he does not mention the prohibition of squeezing liquid from a garment in the eighth chapter of *Hilchot Shabbat* where he talks about the *melacha* of *dosh*.

43. *Shabbat* 128b. See, however, *Aruch Hashulchan* 320:35 who suggests that perhaps there is reason to rule in accordance with the opinion of Rav Ashi in the Gemara there who maintains that there is

the toothbrush are densely packed (similar to hair). When brushing with a wet toothbrush, one presses the brush against the teeth, thereby releasing water that appears to have been absorbed in the brush.[45]

2. The lenient view: Rabbi Yechiel Yaakov Weinberg *zt"l* offers a number of reasons that counter the issue of *sechita* when using a wet toothbrush.[46]

a. First, he argues, since the person using the toothbrush has no intention to squeeze out water, there is no prohibition to do so. Even though we generally forbid a *pesik reisha*, a certain but unintended violation of a *melacha*,[47] the *Terumat Hadeshen*[48] cited by the *Magen Avraham*[49] writes that when the violation in question is only rabbinic in nature, we allow even a *pesik reisha*.[50] It is important

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a biblical prohibition of *sechita* with hair.

44. Rambam *Hilchot Shabbat* 2:11 and *Kesef Mishnah* ibid., *Hilchot Shabbat* 9:11 and *Magid Mishnah* ibid., *Beit Yosef* 330, *Magen Avraham* 320:23, and *Mishnah Berurah* 330.

45. *Iggerot Moshe, Orach Chaim* 1:112. This view is shared by Rabbi Yitzchak Yakov Weiss *zt"l* in his responsa *Minchat Yitzchak,* 3:48 and by Rabbi Moshe Stern *zt"l* in his responsa *Be'er Moshe.*

46. Responsa *Seridei Eish, Orach Chaim* 30.

47. This is the concept known as a *pesik reisha.*

48. Responsa *Terumat Hadeshen* 64.

49. *Orach Chaim* 253:41.

50. Rabbi Weinberg does acknowledge that the *Machatzit ha'shekel* limits this leniency to the rabbinic prohibition of *amira l'akum* (asking a non-Jew to perform a *melacha* for you), and does not apply this leniency to other rabbinic prohibitions. However, he still believes that the reasons to be lenient with use of a toothbrush are so overwhelming that one need not be concerned with the opinion of the *Machatzit ha'shekel*. Rabbi Ovadia Yosef in his responsa *Yabia Omer* 4:30:19 gives an additional reason to be lenient. He points out that

to point out that the view of the *Terumat Hadeshen* is not accepted by most *poskim*. Ramo prohibits violating a *pesik reisha*, even on a rabbinic prohibition.[51]

b. Second, as we have already explained, squeezing liquid out of a garment poses an issue of *mefarek* as well as *melabain*. The prohibition of *mefarek*, however, does not apply if the extracted liquid is immediately rendered useless. Thus, *mefarek* would not apply to the water extracted from the bristles of a toothbrush.[52] With regard to the prohibition of

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some *Rishonim* (Rashba, *Shabbat* 128b; Ritva ibid.) say that the statement of the Gemara that *sechita* does not apply to hair (or to other non-absorbent materials) should be taken at face value, that there is not even a rabbinic prohibition to squeeze liquids from non-absorbent materials. Although we would certainly view the opinions that there is a rabbinic prohibition as normative, we can use the opinion of the Rashba to create a *sfek sfeika* as follows: Perhaps the halacha is in accordance with the *Terumat Hadeshen* who says that a *pesik reisha* is permitted on a rabbinic prohibition, and even if the halacha is in accordance with those who maintain that a *pesik reisha* is even prohibited on a rabbinic prohibition, perhaps the halacha is in accordance with the Rashba who maintains that there is no prohibition of *sechita* with non-absorbent substances. See, however, *Shach, Yoreh Deah* 110 at the end of *Kuntros Sfek Sfeika* who says that one may not use any *sfek sfeika* not mentioned explicitly in the Gemara.

51. 314:1. See Ramo 316:3 and *Sha'ar Ha'tziyun* 316:18 who acknowledge that when there is an action that depends on two rabbinic prohibitions, it would be permissible to perform a *pesik reisha*. See, however, Responsa *Be'er Moshe* 1:34:7, 2:101-103, and 6:133:2 who cites many *Rishonim* who permit a *pesik reisha* even with only one rabbinic prohibition, and concludes that we may rely on these *Rishonim*. See also *Chazon Ish:Orach Chaim:*61:1 and Responsa *Yabia Omer* 4:38.

52. One may argue that the liquid extracted from a toothbrush is not rendered useless upon extraction because it does actually help in the cleaning of the teeth. (For a fuller discussion of squeezing a liquid that aids you for only a few seconds see Responsa *Har Tzvi, Orach*

melabain, even if the extracted liquid is rendered useless, one still violates the prohibition of cleaning the object, the toothbrush in this case. However, if an object's normal function involves the absorption of liquid, one does not violate *melabain* when using the object in its normal fashion because there is no concern that this will cause him to launder the garment.[53] Clearly a toothbrush is meant to absorb liquid and hence there is no issue of *melabain* with the extraction of that liquid.

c. Third, we may be lenient because the *Shulchan Aruch* clearly states that it is permissible to use a sponge connected to the end of a handle.[54] However, this depends on how we understand the basis for treating a sponge with a handle more leniently. Rambam maintains that the reason for the leniency regarding a sponge on a handle is that it is not inevitable that one will squeeze liquid out of such a sponge (i.e. it is not a *pesik reisha*).[55] If this explanation is accepted it would seem that it should not be permissible to use a wet toothbrush even though it has a handle, because the extraction of some liquid is inevitable. However, Ra'avad does not agree with the explanation offered by the Rambam. Ra'avad suggests that there is no problem of *sechita* when the sponge is on a handle because we view the

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Chaim 190 and *Harerei Sadeh* there.) One may argue further that squeezing the liquid out is in fact an intended result of the action (and not a *davar she'eino mitkavein*) because you wet the toothbrush in the first place so that the water may be extracted and help in the teeth cleaning process. This would especially be true if one has applied liquid toothpaste to the toothbrush, because the extracted toothpaste certainly aids in the cleaning process. Indeed, Rabbi Shlomo Zalman Auerbach *zt"l* (in a responsum sent to Rabbi Weinberg, printed both in the *Seridei Eish* and in *Minchat Shlomo* 2:35:3) does argue that these reasons to be lenient are unacceptable.

inevitable extraction of liquid as if it were being poured from a pot (which is obviously not a violation of *sechita*).[56] According to Ra'avad's explanation it would be permissible to use a wet toothbrush, as the mere presence of a handle permits its use.

d. Rabbi Weinberg's fourth reason to allow a wet toothbrush is certainly his most creative reason. The Gemara allows drying oneself with a towel.[57] The commentators explain that the rabbis decided not to forbid this practice on the grounds that it may lead to *sechita*[58] because the standard practice was to dry oneself with a towel after washing.[59] To prohibit drying with a towel would be equivalent to prohibiting washing altogether. It was not considered feasible to prohibit washing altogether because people become extremely uncomfortable when they do not wash. Rabbi Weinberg suggests that the same logic could apply to brushing teeth. Since many people consider it to be an absolute

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53. *Shulchan Aruch* 320:15 and *Magen Avraham* ibid.19.

54. 320:17.

55. *Hilchot Shabbat* 22:15.

56. Ibid. See Responsa *Minchat Yitzchak* 3:50:1 who cites the *Chazon Ish*, *Hilchot Shabbat* 56:5, who limits the explanation of the Ra'avad to situations where the sponge was originally made for the purpose of soaking and extracting liquids. In such a situation the liquid is never considered to be one unit with the sponge, and the separating of the two entities will therefore not violate *dosh*. It is similar to opening and closing a door on Shabbat which is not a violation of *boneh* (building).

57. *Shabbat* 147b.

58. Cited in *Magen Avraham* 301:58.

59. See Rashi to *Eruvin* 88 that this is referring to a case of one who bathed in cold water, as bathing in warm water (even if heated before Shabbat) is prohibited. See also *Mishnah Berurah* 326:21, *Shulchan Aruch*

> necessity to brush their teeth, it would not be feasible to apply the prohibition of *sechita b'se'ar* (squeezing liquid out of a non-absorbent substance) to a toothbrush.

Although Rabbi Shlomo Zalman Auerbach *zt"l* does not agree with all of the reasons offered by Rabbi Weinberg,[60] he does agree with the conclusion that we do not have sufficient grounds to prohibit the use of a wet toothbrush based on a problem of *sechita*. Rabbi Auerbach acknowledges that many God-fearing people view this as a real prohibition, but he considers it to be among the things that are really permissible that people have come to treat as forbidden.

Any potential sechita *problem may easily be avoided by simply not wetting the toothbrush before using it, and not rubbing the brush as water runs over it after use.*

B. Uvda D'chol

Chazal prohibited engaging in certain otherwise permissible activities on Shabbat on the grounds that they are categorized as *uvda d'chol* – "weekday activities".[61] The exact parameters of "weekday activities" are not clearly delineated by *Chazal* or *Rishonim*. As a result it is difficult to classify which activities should be categorized as "weekday activities".

In order to delineate the exact parameters of *uvda d'chol*, one would have to analyze each case considered by the *Chazal*. Such an analysis is beyond the scope of this essay. Instead we will mention some of the theories relevant to brushing one's teeth mentioned by contemporary *poskim*.

Harav 326:6, and *Aruch Hashulchan* 326:9 who all cite an ancient custom not to bathe even in cold water on Shabbat. Interestingly, Rabbi Moshe Feinstein in *Iggerot Moshe, Orach Chaim* 4:74:*Rechitza*:3, strongly questions whether this custom applies to showering as well as bathing.

60. See footnote 52 above.

Rabbi Shlomo Zalman Auerbach *zt"l* expresses significant uncertainty on how to classify certain activities as "weekday activities", but offers a general rule that works in most circumstances. If the normal way of doing a certain activity typically involves something that one may not do on Shabbat, that activity will be classified as a "weekday activity" even when done in a completely permissible fashion. If, however, the activity is normally performed without the involvement of any *melacha* it would be permissible to engage in that activity on Shabbat.[62] Based on this definition, it would seem that whether or not using a toothbrush is categorized as *uvda d'chol*, depends on whether any of the *other* issues raised in this essay are determined to be problematic.

Rabbi Moshe Feinstein *zt"l* defines *uvda d'chol* as any action that resembles an action that is normally done *exclusively* on weekdays and is easily recognizable as a *weekday activity*, even if it does not involve any Shabbat prohibitions.[63]

1. The stringent view: Some *poskim* view the use of a

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61. See *Shabbat* 143b, where gathering fruits that have spilled is prohibited on the grounds that it is a weekday activity. See, however, Rambam *Hilchot Shabbat* 21:11, who explains this halacha differently.

62. *Me'or Hashabbat, michtavim* 2:2.

63. Responsa *Iggerot Moshe, Orach Chaim* 4:74:*tochein*:4. See there where Rabbi Feinstein explains many applications of *uvda d'chol* based on this definition. Gathering spilled fruits is clearly prohibited in *Shulchan Aruch* 335:5 on the grounds of *uvda d'chol* because gathering fruit into a basket is something that is generally done during the picking of the produce from the field on weekdays. *Mishna Berurah* 314:41 prohibits chopping wood with an ax on the grounds of *uvda d'chol* because chopping wood is normally exclusive to weekday work. *Bach* 337 prohibits cleaning the house with certain cleaning utensils on the grounds of *uvda d'chol* because cleaning the house is a chore that is always done before Shabbat in preparation of Shabbat. It remains unclear how Rabbi Feinstein deals with the *Mishnah Berurah* 303:87

toothbrush as being a problem of *uvda d'chol*.[64] There is a precedent for such a ruling in the *Mishnah Berurah*, who rules that one who brushes his hair on Shabbat must be careful to designate a special brush for Shabbat so as not to violate *uvda d'chol*.[65] Interestingly, Rabbi Ovadia Yosef indicates that *uvda d'chol* is the *only* problem with brushing teeth on Shabbat. Since Rabbi Yosef raises no other Shabbat prohibition, it would seem clear that he is working with a different definition of *uvda d'chol* than Rabbi Auerbach. Furthermore, since brushing one's teeth is hardly an easily recognizable weekday activity, Rabbi Yosef is also not using Rabbi Feinstein's definition.

2. The lenient view: Most *poskim* do not raise the issue of *uvda d'chol* in relation to brushing teeth at all. Since the issue is never addressed by these *poskim*, we can only speculate as to why there is no problem of *uvda d'chol*. Rabbi Hershel Schachter has said that while he does not have a clear definition of *uvda d'chol*, he intuitively believes that there is no problem of *uvda d'chol* with a toothbrush.[66]

It is important to point out that all of the previously mentioned poskim *agree that the problem of* uvda d'chol *is easily avoided by designating a special toothbrush specifically for Shabbat use.*

(citing *Magen Avraham*) prohibiting the use of a normal hair brush, as use of a hair brush is hardly recognizable as a weekday activity.

64. See *Ketzot Hashulchan* 7:138 in *Badei Hashulchan* 30, Responsa *Minchat Yitzchak* 3:48 and 3:50, and Responsa *Yabia Omer* 4:30.

65. 303:87. Brushing hair on Shabbat is normally a prohibition of *gozez*, but if done with a soft bristle brush in a way that one might not remove hair while brushing one does not violate *gozez*. It is interesting to note, however, that the *Mishnah Berurah* does not explicitly prohibit the use of a weekday brush. He merely says that many people have the *custom* of using a special Shabbat brush.

66. See *The 39 Melachos*, Rabbi Dovid Ribiat, Introduction to Shabbat, endnote 522, who says that the Chazon Ish believed that the specific halachot of *uvda d'chol* are the province of the *poskim* and qualified

C. Removing the bristles

Some *poskim* raise the issue of accidentally removing the bristles of the toothbrush when brushing.[67] These *poskim* point to the Ramo who forbids the use of a brush used to clean clothing out of a concern that some of the bristles will be detached.[68] This statement of the Ramo is the basis for much halachic literature trying to define exactly which prohibition is violated when bristles are pulled off, and understanding why an inadvertent destructive act should be prohibited at all.[69] For the purposes of this essay, it is not necessary to discuss this issue further, because most (if not all) modern toothbrushes do not lose any bristles in the course of normal brushing.

IV. Ancillary Issues

A. Hachono

The Gemara forbids one to wash dishes that were used late on Shabbat afternoon if they will not be used again until after Shabbat.[70] Rashi explains that in this circumstance washing dishes is effectively preparing the dishes for weekday use.[71] This rabbinic ordinance was meant to preserve the restful nature of Shabbat and Yom Tov by refraining from activities that are

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Rabbonim of each generation.

67. See *Yalkut Yosef, Hilchot Shabbat* 326:24:4 and Responsa *Minchat Yitzchak* 3:48 and 50.

68. *Orach Chaim* 337:2.

69. For further details see *Taz* 337:3, *Mishnah Berurah* 337:14, *Sha'ar Hatziyun* 337:10, *Biur Halacha* 337 "*shelo*", Responsa *Minchat Yitzchak* 3:48 and 50, *Minchat Shabbat* 80:117.

70. *Shabbat* 118a. See *Shulchan Aruch* 323:6 and *Mishnah Berurah* 323:28.

71. Ibid.

not necessary for the day itself.[72] For this reason the *Mishnah Berurah* forbids making a bed on Shabbat if it will not be slept in until after Shabbat.[73]

1. The stringent view: Rabbi Moshe Feinstein *zt"l*,[74] Rabbi Ovadia Yosef *shlit"a*,[75] and Rabbi Benzion Abba Shaul[76] point out that even if one devises a permissible way to use a toothbrush on Shabbat, he must be careful not to wash the toothbrush after using it, unless he plans on using it again on Shabbat.[77]

2. The lenient view: There are two possible reasons for allowing one to wash a toothbrush after its final Shabbat use.

   a. Rabbi Shlomo Zalman Auerbach *zt"l* states that routine, effortless activities that people do as a

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72. See Ra'avad, *Hilchot Shabbat* 23:7 and *Magid Mishneh* ibid.

73. 302:19 citing *Magen Avraham.*

74. Responsa *Iggerot Moshe* 1:112.

75. Responsa *Yabia Omer* 4:30:20.

76. Responsa *Ohr Li'Tziyon* volume 2 page 253.

77. Interestingly, Rabbi Yitzchak Yosef *shlit"a* (Rabbi Ovadia Yosef's son) writes that the problem with washing a toothbrush after use is not one of *hachono,* but one of *sechita*. Although he permits the use of a wet toothbrush to actually brush the teeth, he only does so because extracting water while brushing is an undesired automatic result on a material that is only subject to *sechita* on a rabbinic level. This same leniency cannot apply to extracting water from the bristles when washing the toothbrush because one certainly desires the extraction of the liquid when attempting to clean his toothbrush. Rabbi Yosef (the son) believes that this was in fact the intention of his father in prohibiting washing the toothbrush after use. However, a thorough reading of Rabbi Ovadia Yosef's responsa reveals that his reasoning for prohibiting washing the toothbrush was in deference to Rabbi Feinstein who clearly prohibited it on the grounds of *hachono* alone.

matter of course are not a violation of *hachono* even when intended for post-Shabbat needs.[78] For this reason it is permissible to return a *sefer* to the shelf after use,[79] or to return food to the refrigerator after use[80] One may argue that washing off a toothbrush after use is included in the category of permissible commonplace activities. It is an act that is done unconsciously without any thought to prepare for post-Shabbat use.[81]

b. Rabbi Hershel Schachter *shlit"a* believes that people generally do not wash off their toothbrushes with the intention of having a clean toothbrush for later use. Rather, people normally wash their toothbrushes because it is considered unappealing to leave a dirty toothbrush lying around.[82]

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78. Cited in *Shemirat Shabbat Kehilchata* 28:81. See also *Yalkut Yosef, Dinei Hachono B'Shabbat*:12 for a similar idea.

79. *Shemirat Shabbat Kehilchata* 28:81.

80. Ibid.

81. See *Yalkut Yosef* 326:footnote 27, who makes this very point.

82. Personal conversation with the author in 1999. *Yalkut Yosef* 326:footnote 27 makes this point as well. Rabbi Schachter pointed out that this would be especially true for someone with a large family where there will be many dirty toothbrushes lying around in close proximity to each other. *Mishnah Berurah* 302:19 applies this logic to making beds on Shabbat when having unmade beds lends an unseemly appearance to the house. See, however, Responsa *Tzitz Eliezer* who states that if one does not spend time in his bedroom it would be prohibited to make a bed. It seems that this is not a *machloket* in halacha as everyone would agree that if the action is done for post-Shabbat preparation it would be forbidden. Similarly, everyone would agree that something done to enhance *oneg Shabbat* would be permissible. The entire discussion depends on one's personal motivation. In a home that people are always careful to keep every corner neat and clean it would seem to be permissible to wash a toothbrush or make a bed on Shabbat. In a home where cleanliness

B. Chavalah

One of the thirty-nine *avot melachot* of Shabbat is *shochait* (slaughtering). The *melacha* of *shochait* is not limited to the act of slaughtering. Any form of *netilat neshama* (taking life), whether it be through poisoning, drowning etc., is a violation of *shochait*.[83] Some *Rishonim* maintain that to cause bleeding, even if no life is taken, is also considered to be a violation of *shochait*.[84] Rambam, however, understands the prohibition against causing bleeding to be entirely unrelated to the *melacha* of *shochait*.[85] He maintains that one only violates *shochait* when actually killing something. Instead, Rambam explains that causing bleeding is considered to be a form of *dosh*, because the blood becomes extracted from the blood vessels.

There are two practical differences relating to this controversy. First, according to those who consider it to be a problem of *shochait,* there is no minimum amount of blood that must be drawn in order to violate the *melacha*. If, however, the problem is one of *dosh,* one does not incur punishment for the *melacha* unless he extracts an amount equivalent to a *grogeres.* Second, if the problem is one of *shochait*, one can violate the *melacha* even if there is no need for the blood, and it is immediately rendered useless upon extraction. However, if the problem is one of *dosh*, the *melacha* is violated only when the blood itself is needed for some purpose (see *Sechita* 2b above).[86]

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and neatness is not a priority, all would agree that it would be forbidden to wash a toothbrush or make a bed.

83. Rambam *Hilchot Shabbat* 11:1.

84. See *Yerushalmi Shabbat* 7:2, Tosafot *Ketubot* 5b "*dam*", *Biur Halacha* 316:8 "*hachovel*" in the name of Ramban, Rashba, Ritva, and Meiri, and see also *Mishnah Berurah* 316:29.

85. *Hilchot Shabbat* 8:7.

86. *Bi'ur Halacha* 316:8 "*chavalah*". Whether there is any practical difference if one incurs a punishment or not may depend on whether

1. The stringent view: When brushing, it is very common for people to inadvertently cause themselves to bleed. This is especially true if one uses a dry toothbrush (as many *poskim* require one to do because of problems of *sechita*). In general one is supposed to stay away from activities that will cause him to bleed.[87] A number of *poskim* suggest that one not brush on Shabbat because of the likelihood that he will cause bleeding.[88]

2. The lenient view: There are two basic reasons that one would not be concerned with the possibility of causing bleeding.

a. Rabbi Ovadia Yosef *shlit"a* points out that we need not be concerned unless dealing with a person who will *definitely* bleed when he brushes. If, however, there is a likelihood that the person will not bleed, causing bleeding during the act of brushing is considered a *davar she'eino mitkavein* (unintended result),[89] which is permissible.[90] Only one who rarely

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or not *chatzi shiur* (violating a prohibition with less than the prescribed measure) is biblically prohibited or only rabbinically prohibited. See Ritva and Meiri *Shabbat* 74a, who maintain that even a *chatzi shiur* is biblically prohibited. See, however, Ramban *Shabbat* 94b who maintains that *chatzi shiur* is only rabbinically prohibited. For further details see *Encyclopedia Talmudit, Chatzi Shiur* pgs. 638-640.

87. See, for example, *Magen Avraham* 328:33.

88. Responsa *Minchat Yitzchak* 3:50, Responsa *Ohel Moshe* 2:98.

89. People used to believe that it was beneficial for the gums when one bled during brushing. If that were the case we would not be able to classify the bleeding as an unintended result, since the overall dental hygiene is clearly the intended result of the brushing. However, I have been assured through conversations with many dentists that there is absolutely no benefit to the teeth or the gums when there is bleeding. That being the case, we can surely classify the bleeding as a *davar she'eino mitkavein*. It should be pointed out that people who bleed excessively from brushing are highly likely to bleed excessively

brushes his teeth, and is therefore very likely (or almost definitely) going to bleed may not brush because even though he may not intend to bleed, this is in the category of *pesik reisha*, which is prohibited. Thus, only one who does not always bleed may use a toothbrush on Shabbat.

b. Even if we are dealing with a person who always bleeds when brushing, there may still be a basis for leniency. We mentioned the concept of a *pesik reisha.* Although most *poskim* would view a *pesik reisha d'lo nicha lei* (an act that inevitably leads to a *melacha* that is not desired) as a rabbinic prohibition, the *Aruch* maintains that it is entirely permissible.[91] Since bleeding during brushing would be an undesired result, the *Aruch* would clearly permit the brushing even if the bleeding is inevitable. Although we generally do not follow the *Aruch*'s opinion[92] there is an additional lenient consideration in this case. According to Rambam (who understands the prohibition of causing one to bleed to be associated with *dosh*) one does not violate any *melacha* if he has no use for the blood. When combining the opinion of Rambam with those who permit a *pesik reisha d'lo nicha lei* there may be sufficient grounds to be lenient.

V. The Practical Opinions

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from heavy chewing as well. Somebody with this condition should seek dental care.

90. Responsa *Yabia Omer* 4:29:17.

91. Cited in Tosafot *Shabbat* 103a "*d'ka'avid*" and Tosafot *Ketubot* 6a "*Hai*". See also *Shulchan Aruch Orach Chaim* 320:18 and *Mishnah Berura* 336:27.

92. See *Shulchan Aruch* and *Mishnah Berurah* ibid. See also *Biur Halacha* 320:18 and 277:2.

Given the number of distinct issues involved in brushing teeth, theoretically, there could be numerous opinions regarding which issues we must be concerned with and which issues are not of concern to us. However, leading *poskim* split into four basic camps. We will list the most prominent practical opinions starting with the most lenient and ending with the most stringent.

A. The opinion of Rabbi Yosef Dov Halevi Soloveitchik *zt"l* and *yibadel l'chaim tovim*, his student, Rabbi Hershel Schachter *shlit"a*: According to these *poskim* it is absolutely permissible to brush teeth on Shabbat with a wet toothbrush and toothpaste. It is also permissible to wash the toothbrush after brushing.

B. The opinion of Rabbi Ovadia Yosef *shlit"a*: Rabbi Yosef maintains that one (specifically referring to *Sefardim*) may brush with a wet toothbrush and toothpaste. However, one must set aside a separate toothbrush specifically for Shabbat use due to the concern of *uvda d'chol*. It is also preferable not to wash the toothbrush after brushing due to concerns of *hachono.*[93]

C. The opinion of Rabbis Yechiel Yaakov Weinberg and Shlomo Zalman Auerbach *zt"l*: One may not use regular toothpaste on Shabbat due to concerns of *mimarayach*. However, it is perfectly permissible to use liquid toothpaste on the toothbrush, and brush normally.[94]

D. The opinion of Rabbi Moshe Feinstein *zt"l*: One should not use toothpaste due to a problem of *mimarayach*, and should not wet the toothbrush before using it due to a problem of *sechita*. The toothbrush should also not be washed off after brushing due to problems of *hachono*.[95] The best method of brushing, according to Rabbi Feinstein, is to put mouthwash

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93. Responsa *Yabia Omer* 4:30.

94. Responsa *Seridei Eish, Orach Chaim* 30.

95. Responsa *Iggerot Moshe, Orach Chaim* 112.

or liquid toothpaste directly into the mouth. One may then take a dry toothbrush and brush normally (provided that he is not certain to bleed). One should also be careful not to wash the toothbrush after brushing (due to concerns of *hachono*).

VI. Conclusion

It is clearly not the purpose of this essay to recommend the opinions of some *poskim* over others. We have outlined the major issues that pertain to brushing teeth on Shabbat and given reasons to be stringent or lenient with each issue. It goes without saying that one should consult his *Rav* or local halachic authority to find the most appropriate method of maintaining dental hygiene on Shabbat.

Halachic Aspects of Visiting the Temple Mount

Rabbi Daniel Stein

Introduction

Discussions of the Temple Mount have long been overshadowed by political considerations, relegating them to the political arena as opposed to the world of halacha. Political factors obviously play a vital role as well, but for the sake of perspective and general knowledge, it is important to be aware of the halacha. This paper will briefly address some of the halachic aspects of visiting the Temple Mount in our day.

While all of the biblical land of Israel enjoys a unique status in Jewish law, the Temple Mount has been further singled out as the only site for the performance of certain mitzvot. For example, the Temple may be erected only on the Temple Mount.[1] Likewise, the sacrificial order may only be enacted on the Temple Mount. For reasons beyond the scope of this article these two mitzvot have little or no practical import today.[2] Nevertheless,

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1. Rambam, *Sefer Hamitzvot* (Positive Commandment 20) and Ramban (Beginning of *Parshat Trumah*).

2. Rabbi Dovid Friedman, *Kuntrus Drishat Tzion Ve'yerushalyim*, and Rabbi Yaakov Ettlinger, *Binyan Tzion* (Sec. 1) prove from the Gemara (*Megillah* 18a) that the Davidic lineage must be restored in order for the obligation to build the Temple to set in. Rabbi Joseph Dov Soloveitchik and Rabbi Moshe Nachum Shapiro, *Har Hakodesh*,

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we are not permitted to neglect them; rather we are compelled to anticipate their completion. The Gemara in *Rosh Hashana* (30a) cites the verse "for this is Zion for whom no one cares" and infers that one is required to be concerned with the rebuilding of Zion.

Tearing *Keriyah* on the Cities of Judea and Jerusalem

The Gemara in *Moed Katan* (26a) states that when seeing the cities of Judea in a state of destruction for the first time, one is obligated to tear one's clothing (*keriyah).* Upon seeing (the old city of) Jerusalem one must again tear *keriyah,* and upon seeing the Temple Mount one must tear *keriyah* a third time. The obligation to tear *keriyah* when visiting the Temple Mount is an expression of mourning over the loss of the Temple and the departure of the divine presence. Therefore, the practice today is to tear *keriyah* when visiting the original site of the Temple, which is still in a state of destruction.[3]

Page 159, have also suggested that the mitzvah to build the Temple is not applicable in the modern situation, based on the Gemara in *Sanhedrin* (20b), which states that we may only build the Temple after first establishing a Jewish government and eradicating *Amalek*. In addition, Rashi (*Sukkah* 41a) asserts that the third Temple will not be built by man, but will rather descend from the heavens, indicating that we have no obligation to concern ourselves with its construction. However, Rabbi Shlomo Zevin, *Machanayim* Vol. 96 page 14, limits Rashi's statement specifically to an instance of a premature arrival of the Messiah; but if the Messiah will indeed arrive at the fixed and designated time, then the Temple will have to be man made. [See also Rabbi J.David Bleich, *Benitivot Ha'halacha* (Vol. 1, p. 270)].

3. Generally, the laws of tearing *keriyah* are practiced only upon the loss of a parent or close relative. The laws pertaining to *keriyah* over the loss of a parent are more stringent in a number of ways. [See *Shulchan Aruch* (*Yoreh Deah* Sec. 340)]. For example, when tearing *keriyah* for a relative, one tears privately only one layer of an outer garment on the right side of the body, either by hand or by using a

The *poskim* discuss which specific site most potently recalls the loss of the Temple. The majority view is that the Dome of the Rock effectively represents the destruction of the Temple Mount and would warrant tearing *keriyah*. Most *poskim* also assume that seeing the Western Wall warrants *keriyah,* even though the wall itself is not currently in a state of destruction.[4] Others claim that since the Western Wall is currently standing it does not represent the destruction of the Temple Mount.[5]

Even though it is universally accepted that the Temple Mount evokes an obligation to tear *keriyah,* there is a dispute whether the obligation to tear *keriyah* when visiting the cities of Judea is still operative. This dispute centers around determining the differentiating factor between the cities of Judea and the rest of Israel. If the singularity of these cities emanates from their proximity to the Temple Mount and their partaking

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cutting medium. But upon the loss of a parent, one tears publicly, and specifically by hand, all the outer layers of clothing on the left side exposing the heart. The Rambam and the Raavad (*Hil. Taanit* 5:7) have a dispute whether the laws of tearing *keriyah* when visiting the cities of Judea, Jerusalem, and the Temple Mount are to be compared to the *keriyah* for the loss of a parent, or to that of another relative. Rabbi Akiva Eiger in his glosses to *Shulchan Aruch* (*Orach Chaim* Sec. 561) points out that the *Shulchan Aruch* has contradictory rulings regarding this issue. Rabbi Shlomo Zalman Auerbach as well as other *poskim* have concluded that we should be lenient in this regard [*Minchat Shlomo* (Sec. 73). See Also the biography of Rabbi Y.Y. Kanievsky, *Orchot Rabbeinu* (Page 318)].

4. Rabbi Moshe Feinstein (*Iggerot Moshe, Orach Chaim* Vol. 4 Sec. 70 Part 11), Rabbi Y.Y. Kanievsky and the Chazon Ish (*Orchot Rabbeinu* 318).

5. Rabbi Tuchatzinsky quotes an original opinion that only when seeing the floor of the Temple grounds in a state of destruction does one experience the sorrow of the destruction and become obligated to tear *keriyah*. This is also reported to have been the opinion of Rabbi Yitzchok Zev Soloveitchik (Rabbi Shternbuch, *Teshuvot Ve'hanhagot* Vol. 1 Sec. 335).

of a partial measure of the Temple sanctity, then the obligation of *keriyah* should apply as well.[6] If, however, the cities of Judea represent the seat of the Jewish government in Israel, then during a period which we have regained sovereignty it should not be necessary to tear.[7] The *Levush* maintains the first view,[8] while the majority of authorities adopt the latter.[9]

Along these lines there is a dispute among contemporary *poskim* whether there is an obligation to tear *keriyah* when visiting present-day Jerusalem. Rabbi Moshe Feinstein contends that

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6. The Rambam, *Hil. Kiddush Hachodesh* (4:12), distinguishes in such a fashion in explanation of the Gemara *Sanhedrin* 11b, which states that the leap year may only be declared in the cities of Judea. [See Rabbi Menachem Ziemba, *Otzar Hasifri*, (page 140)].

7. Rabbi Seraya Dablitski, *Zichron Betzalel*, p. 144, raises the possibility that perhaps since the present Israeli government does not operate under the rubric of halachic principles, it does not qualify as a "Jewish government." However, Rabbi Hershel Schachter, *Be'ekvei Hatzon* (Sec. 18), refers to the fact that at the time of the building of the Second Temple some of the leaders of the government were also not persuaded by the halacha, and nonetheless the Second Commonwealth was viewed halachically as a Jewish government, thereby setting a precedent for the present situation.

8. See Rabbi Moshe Nachum Shapiro, *Har Hakodesh* (p. 1) in application of the opinion of the *Levush* (*Orach Chaim* Sec 561). The *Shaarei Teshuvah* (*Orach Chaim*, 561:1) quotes conflicting opinions whether the city of Hebron is to be included in this obligation, because Hebron was one of the cities designated for settlement by the tribe of Levi and was never a formal part of the section designated to Judea, even though geographically it lies within its borders. [See Rabbi Betzalel Zolti (*Mishnat Yaavetz*, sec. 48)].

9. *Bach* (*Orach Chaim* Sec. 561), *Pe'at Hashulchan* (*Hilchot Eretz Yisrael*, Chapter 3 part 1), *Beit Yosef, Magen Avraham* and *Taz* (to *Orach Chaim* Sec. 561). Based on this reasoning, some *poskim* have extended the obligation to tear *keriyah* to the cities of Benjamin as well, since the monarchy rested partially in the section belonging to Benjamin (Rabbi Seraya Dablitski, *Zichron Betzalel*, 142).

the obligation to tear *keriyah* when visiting Jerusalem emanates from the fact that Jerusalem is the capital city of the Jewish government, and tearing *keriyah* is a demonstration of mourning over the loss of the Jewish government. It would therefore follow that the obligation to tear *keriyah* is no longer operative.[10] Rabbi Joseph Dov Soloveitchik argued that the source for the obligation to tear *keriyah* when visiting Jerusalem arises from the loss of the unique Temple sanctity, which also elevates the sanctity of the city. Therefore, Rabbi Soloveitchik claimed that there is an obligation to tear *keriyah* when visiting the old city of Jerusalem nowadays.[11] Rabbi Shlomo Zalman Auerbach maintained that the obligation to tear *keriyah* when visiting Jerusalem derives from other considerations.[12] He posits that since the Israeli government does not have complete control over the Arab sections of Jerusalem, it is not to be viewed as a reigning Jewish government in Jerusalem.

Due to the fact that this issue is under dispute, we apply the rule "*Halacha kedivrei hameikil b'avel"* [*Moed Katan* (26b)] and assume the more lenient opinion, and therefore refrain from tearing *keriyah* when visiting Jerusalem.[13]

Methods of Avoiding the Obligation to Tear *Keriyah*

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10. *Iggerot Moshe* (*Orach Chaim*, Vol. 5 Sec 37 Part 1).

11. The opinion of Rabbi Soloveitchik is quoted in *Be'ekvei Hatzon*, ad loc.

12. *Minchat Shlomo* (Sec. 73), *Har Hakodesh* (page 26).

13. It is not advisable to tear two *keriyot* because that might be a violation of needlessly wasting useful garments. Ramo (*Yoreh Deah*, Sec.402, 4) and *Pitchei Teshuvah* (*Yoreh Deah*, Sec. 340 Part 1). [The authorities discuss whether it is advisable to tear one composite *keryiah* for both the city of Jerusalem and the Temple Mount together in order to satisfy both opinions. See Rabbi Moshe Nachum Shapiro, *Har Hakodesh*, page 62, *Orchot Rabbeinu*, page 318, and *Be'ekvei Hatzon* (Sec. 18 Part 2)].

Generally, the laws of *keriyah* are associated with the loss of either a parent or a close relative. On these unfortunate occasions, one is obligated to tear *keriyah* in addition to the rest of the laws of mourning. However, the Gemara in *Moed Katan* (20a) comments that the obligation to tear *keriyah* is slightly different from the rest of the laws of mourning in that the nature of tearing *keriyah* is limited to an expression of sudden grief upon hearing of the immediate loss of a relative. For this reason the Gemara (*Moed Katan* 24a) adds that it is not applicable if one hears only after the fact. The Gemara in *Yevamot* (43b) adds that all mourning over the destruction of the Temple is considered to be "mourning after the fact," but nevertheless there is an obligation to tear *keriyah*. This leads the Chazon Ish to categorize tearing *keriyah* over the loss of the Temple as within the obligations of mourning and not within those of *keriyah* in general.[14]

Therefore, the rule in determining which days are exempt from the obligation to tear *keriyah* should correspond to those days that are likewise exempt from the laws of mourning.[15] Consequently, the practice has developed to visit the Temple Mount specifically on a Friday (after midday) in order to avoid the obligation to tear *keriyah*. This is based upon the assumption that there is no obligation to tear *keriyah* so close to Shabbat.[16] The Chazon Ish, and more recently Rabbi Elyashiv, have

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14. *Har Hakodesh*, page 20.

15. See also Rabbi Hershel Schachter, *Be'ekvei Hatzon* ad loc, where he also links this obligation with the laws of mourning in general, and not with those of *keriyah*. Rabbi Shlomo Zalman Auerbach, *Minchat Shlomo* (Sec. 73) differs slightly in that he suggests that this obligation to tear *keriyah* is to be linked with the obligation to tear *keriyah* upon exhuming the remains of a relative for the purpose of transportation.

16. Rabbi Tuchatzinsky, *Ir Hakodesh Ve'hamikdash* (Vol. 3, Chapter 17 Part 4).

opposed this practice based upon the reasoning of the *Pitchei Teshuvah* (*Yoreh Deah* Sec. 400 Part 1) that the laws of mourning continue through Friday until the actual onset of Shabbat.[17] For this reason, the Chazon Ish was of the opinion that if one visits the Temple Mount for the first time on *chol hamoed,* he would indeed be exempt from the obligation to tearing *keriyah*, since the laws of mourning are suspended on *chol hamoed*.

A similar tactic employed in avoiding the obligation of *keriyah* is by means of transferring ownership of one's shirt to a friend, based on the assumption that one is exempt from *keriyah* when wearing a borrowed garment. Others have the practice of actually trading garments with a friend, to enforce the impression that this is a borrowed garment. Rabbi Shlomo Zalman Auerbach and Rabbi Y.Y. Kanievsky expressed their distaste for this practice, as they are altogether not in favor of avoiding the obligation to mourn the loss of the Temple.[18] Others have advanced the claim that the whole ruse might not be effective, because one is obligated to obtain a garment with which to fulfill the obligation of *keriyah.*[19]

If one visits the Temple Mount on Shabbat or the Festivals, there is no obligation to tear *keriyah.* Some *poskim* have raised the possibility that one who did so, should subsequently be obligated to tear *keriyah* following the conclusion of the Sabbath

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17. The opinion of the Chazon Ish is cited in *Har Hakodesh* (page 8), and the opinion of Rabbi Elyashiv is cited by Rabbi Yechezkel Bloi, *Tal Talpiyot* (Page 76). See also Rabbi Moshe Feinstein (*Iggerot Moshe, Yoreh Deah* Vol. 3 Sec. 52 Part 4, *Orach Chaim* Vol. 5 Sec 37) where he distinguishes and exempts only those who have already donned Shabbat clothing. He does point out that if this practice of going on Friday and not tearing *keriyot* becomes widespread, it would take on a new halachic significance. .

18. *Tal Talpiyot,* Chapter 13.

19. Ibid, and Rabbi Shternbuch, *Moadim U'zmanim* (Vol. 7 Sec. 257).

or Festivals.[20] They reason that since it is prohibited to mend the torn garment in any way until the next day, this might indicate that the obligation of *keriyah* extends until the next day.[21] But most contemporary *poskim* have ruled that one would not be obligated to tear *keriyah* the night after visiting the Temple Mount for the first time on Shabbat or Festivals.[22]

The Prohibition of Entering the Temple and the Temple Mount

The Mishnah in *Keilim* (1:6-7) lists ten regions surrounding the Temple of increasing exclusivity, as a result of their progressive contiguousness to the Temple. The Temple Mount itself is more limited than the preceding zones in that those individuals who are contaminated with certain unique forms of ritual impurity ("*tumeah*") are prohibited from entering. The list includes a *zav* (a man who experiences an unusual emission), a *zava* (a woman who experiences menstrual bleeding at unusual times), a *niddah* (a woman during her period of menstruation), and a *yoledet* (woman who gave birth). The common denominator among these four is that they are all the source of their own ritual impurity. In general, *tumeah* is transferable from a primary to a secondary source, and the potency of the

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20. This suggestion was first raised by Rabbi Yehoshua Leib Diskin in the collection of his responsa (Addenda Part 185). Rabbi Shapiro, *Har Hakodesh* (page 10), refers to a similar question raised by the *Pitchei Teshuvah* (*Yoreh Deah* Sec. 340 Part 15), which is left unresolved; he therefore recommends to avoid visiting the Temple Mount for the first time on Shabbat.

21. See *Mishnah Berurah* (Sec. 561 Part 15).

22. Rabbi S.Z. Auerbach, *Minchat Shlomo*, Rabbi Tuchatzinsky, *Ir Hakodesh Ve'hamikdash* (Vol. 3 Sec. 17 Part 4), and Rabbi Aryeh Peromchek, *Eimek Beracha* (*Hil. Aninut* Part 6). Rabbi Auerbach does add, though, that it is not proper to cause undue grief on Shabbat or Festivals, by visiting the Temple Mount for the first time.

tumeah is weakened with each translocation.[23] All of these individuals differ in that they are not secondary sources of impurity, rather their *tumeah* emanates from themselves.[24] The Temple compound itself is additionally prohibited to all ritually impure individuals, including *tumeah* resulting from contact with a dead person.[25] (Only the prohibition of entering the Temple itself carries with it the divine death penalty (*karet*), while the Temple Mount area is enforced by the routine prohibitive punishments).[26]

The Gemara in *Shevuot* (16b) delineates two basic parts to the prohibition of entering the Temple in a state of *tumeah*. The first is the very "entering" into the Temple while in a state of defilement, and the second is remaining in the Temple in such a state. This means that even if one manages to enter into the Temple in a permissible fashion while *tamei*, there is still an additional prohibition to remain on the Temple grounds.[27]

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23. Mishnah *Oholot* 1:1.

24. It is a reasonable assumption that the list is not exclusive, rather all primary sources of *tumeah* are prohibited from entering the Temple Mount (the exception to the rule is that it is permissible to bring a dead person onto the Temple Mount). See *Rosh* to Mishnayot *Keilim* (1,2), where he refers to the Gemara in *Pesachim* (67b) which additionally precludes a *baal keri* (a man who experiences a seminal emission) from entering the Temple Mount. The *Mishneh Lemelech* (*Hil. Biat Mikdash* 3:3) points out that the Rambam did not record this prohibition, in contradiction with the Gemara in *Pesachim*. [See Rabbi Yechezkel Abramsky, *Chazon Yechezkel* (*Pesachim* 67b) and Rabbi Yehudah Edil, *Mei Naftoach* (Sec. 17 Part 3).].

25. *Nazir* (56b).

26. *Bamidbar* (19: 13), and Rambam, *Sefer Hamitzvot* (positive 31, negative 77).

27. See *Chiddushei Rabbi Chaim Soloveitchik* (*Hil. Biat Mikdash* 3:21), Rabbi Henoch Eigesh, *Marcheshet* (Vol. 1, Sec. 2, Part 3), and the Chazon Ish (*Choshen Mishpat*, collection of essays, Sec. 24), who suggest reasons as to why it was necessary to have both prohibitions

Regarding the prohibition of "entering", the Gemara in *Shevuot* (17b) states that this prohibition is not violated if one enters the Temple in an abnormal fashion, for example, via the roof or in an enclosed or elevated box.[28] Based on this, some have suggested that it should be permitted to enter the Temple area in a helicopter. However, Rabbi Ovadia Yosef points to the fact that even though it is permissible for one to enter the Temple in an unusual fashion while *tamei*, nonetheless the prohibition against remaining in the Temple area still remains.[29]

Modern Application of the Prohibition to Enter the Temple Mount

All these guidelines are based on the assumption that the sanctity of the Temple grounds is intact even after the destruction of the Temple. There is a dispute in the Mishnah *Eiduyot* (8:6) and Gemara *Zevachim* (107b), whether the sanctity of the Temple grounds was dissolved when the Temple was destroyed, and the Rambam and the Raavad disagree which opinion should be accepted.[30] Rambam rules that the sanctity of the Temple grounds is immutable, while the Raavad argues that the sanctity was endowed only for the duration of the

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considering that presumably every case of "entering" the Temple will also be covered under the prohibition of "remaining" in the Temple.

28. Rambam, *Hil. Biat Mikdash* (3:19).

29. *Yabia Omer* (Vol. 5, *Yoreh Deah*, Sec. 26), see also *Mishneh Lemelech* (*Hil. Biat Miksah* 3:19). See also Gemara *Shevuot* (17a), that the airspace of the Temple grounds is included in the prohibitions of entering and remaining in the Temple while *tamei*.

30. Rambam and Raavad (*Hil. Beit Habechira* 6: 15-16). The Ramban (to *Avoda Zara* 52b) subscribes to the conclusion of the Raavad but offers a different reasoning. He explains that the conquest by enemies is what removed the sanctity from the Temple areas.

Temple existence.[31]

This dispute has obvious ramifications regarding whether it is permitted for someone who is *tamei* to enter the Temple grounds after the destruction of the Temple. If one assumes like Rambam that the sanctity of the Temple endured, then all prohibitions remain. But according to Raavad none of the prohibitions would still apply. We know that historically the halacha was originally assumed to be like the Rambam, but in the latter period of the *Rishonim* the opinion of the Raavad became more accepted.[32] More recently the consensus among all *poskim* has been to be cautious and to prohibit entrance to the Temple Mount while in a state of *tumeah*.[33]

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31. This has a direct practical application with regards to the sacrificial order, namely, that only if the sanctity of the Temple was everlasting would one be able to offer sacrifices at the location of the Temple Mount. In the late eighteenth century, Rabbi Tzvi Kalisher, *Drishat Zion,* suggested a possibility of bringing sacrifices in modern times that would satisfy both the Rambam and the Raavad. He proposed to establish an altar on the exact location of the original one. According to the Rambam it would serve as a replacement for the Temple altar, and even according to the Raavad it would be no worse than a private altar which is presumably permitted on the Temple site. See, however, Tosafot to *Megillah* 9b. He limited his proposal to the sacrifices listed in *Yoma* 50a which may be brought in the Temple even while in a state of *tumeah*.

32. Meiri to *Shevuot* (15a). The Chazon Ish is quoted as saying that these words of the Meiri are a typing error. The Raavad implies that it is not completely permitted to enter the Temple in a state of *tumeah* even after the destruction, and Rabbi Yaakov Ettlinger, *Binyan Tzion* (Vol. 1 Sec. 2) understands that the Raavad was himself unsure which opinion is to be accepted practically and therefore did not want to explicitly permit entrance to the Temple.

33. *Magen Avraham* (*Orach Chaim*, Sec 561), *Mishnah Berurah* (*Orach Chaim,* Sec. 561 Part 5). See also Rav Kook, *Mishpat Kohen* (Sec. 96), *Avnei Nezer* (*Yoreh Deah* Sec. 450), and *Yabia Omer* (Vol. 5, *Yoreh Deah* Sec. 26).

It is a reasonable assumption that everyone today has been in a room with a dead person at some time or another, rendering us all *tamei* and prohibiting us all from entering the Temple proper. Even for those individuals who have ascertained that they are free of any of the unique forms of *tumeah* prohibited on the Temple Mount, nonetheless the traditional ruling of the Israeli Rabbinate has been to prohibit all Jews from walking on the entire Temple Mount.

The reason for this ruling is in one sense precautionary – namely, to prevent wide-scale uncensored entrance to the Temple Mount by those who are in fact prohibited from entering.[34] Others claim that it is also halachically prohibited to enter the Temple Mount today (even while in a state of purity from *tumeah*), due to a rabbinical decree declaring every *am haaretz* (person ignorant of the halacha) to be treated as a *zav* with regard to the laws of *tumeah*.[35] This would prohibit them from entering the Temple Mount. The *poskim* write that in modern times, since we do not practice the laws of ritual impurity (*tumeah*) and purity (*taharah*) on a routine basis, we all have the status of *amei haaretz* in this regard, prohibiting us all from entering the Temple Mount.[36]

Rabbi Ovadia Yosef raises another reason to prohibit needless entrance to the Temple Mount,[37]which is the requirement to have a special level of respect for the sanctity of the Temple Mount (*morah mikdash*).[38] The Rambam adds

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34. Rabbi Y.Y. Kanievsky and Rabbi Eliezer Shach, *Orchot Rabbeinu* (Page 328).

35. See Tosafot to *Shabbat* 15b.

36. Rabbi Tzvi Pesach Frank, *Mikdash Melech* (page 35) citing the *Chazon Nachum* (page 19).

37. *Yabia Omer* (Vol. 5, *Yoreh Deah* Sec. 26).

38. *Berachot* 54a. It is also prohibited to wear shoes on the Temple

that any purposeless entrance to the Temple Mount would also be prohibited under this heading.[39] Therefore, Rabbi Yosef asserts that since no one will be entering the Temple Mount for the purpose of performing the Temple service, it is prohibited to enter the Temple Mount based on this prohibition of *morah mikdash*.[40]

The Herodian Extension to the Temple Mount

Even though the accepted position today is not to allow Jews in the Temple Mount area, nevertheless, theoretically certain sections of the present day Temple Mount might be accessible. The Mishnah (*Middot* 2:1) states that the *Har Habayit* (Temple Mount) is a perfect square, 500 *ammot* by 500 a*mmot*. Even according to the largest reasonable estimation of the *ammah*, the measurements of the physical Temple Mount in present-day Israel are approximately double that size.[41] Josephus in fact documents that Herod doubled the size of the physical Temple Mount.[42] The *Rishonim* also record that the physical Temple Mount was known to have been larger than

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Mount in order to show respect for the holy grounds. The *Minchat Chinuch* (Sec. 254 part 2) and Rabbi Tuchatzinsky, *Ir Hakodesh Ve'hamikdash*, Vol. 4 pages 27-28, write that this is limited only to leather shoes. [See also Rabbi J. David Bleich, *Contemporary Halachic Problems*, Vol. 1 Pages 23-25, with regards to the permissibility for soldiers to wear shoes while guarding the Temple Mount].

39. *Hil. Beit Habichira* (7:2).

40. The *Turei Even* to *Megillah* (28a) writes that if the sanctity of the Temple grounds vanished when the Temple was destroyed, then it follows that the mitzvah of *morah mikdash* is no longer active. However, *Minchat Chinuch* (Sec. 254 Part 15) suggests that even according to Raavad this mitzvah is still intact.

41. See British map archives, 1944, quoted by Rabbi Shmuel Weingarten, *Torah Shebeal Peh*, Vol 11, Page 150.

42. *Wars of the Jews*, page 88.

the dimensions recorded in the Mishnah.[43]

The additional area added by Herod did not acquire the sanctity of the rest of the original *Har Habayit,* because that sanctity can only be extended in the presence of a Jewish king, a prophet, the *sanhedrin* (high-court) of seventy-one judges, and the *urim v'tumim* (the breast-plate worn by the high priest), as well as other prerequisites listed in the Mishnah in *Shevuot*(14a).[44]

Therefore, it is theoretically permissible to walk on the Herodian addition but the problem remains in determining exactly where that portion is. Determining the exact location of the original Temple on the large plateau which is currently labeled the "Temple Mount" is a daunting challenge which has engaged the efforts not only of halachists but of archaeologists as well. Despite a great deal of speculation, the exact parameters are not universally accepted. [45]

The Western Wall

It is generally assumed that the Western Wall (*Kotel Ha'maravi*) that exists today is a remnant of the wall that surrounded the Temple Mount and not that of the Temple

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43. *Piskei Tosafot* to *Middot* (part 5).

44. Later authorities assert that the Mishnah only refers to Jerusalem and the Temple courts, but the Temple Mount can never be extended at all; see *Ohr Sameach (Beit Habechira* 6:10), *Mikdash Dovid* (sec. 27), and Rashash to *Sanhedrin* (2a).

45. For further information on this unusual issue, see this author's article in *Beit Yitzchak*, vol. 34, as well. *Tosfot Yom Tov* and *Shiltei Hagibborim* to *Middot* (chapter 2); Rabbi Tuchatzinsky, *Ir Hakodesh Vehamikdash*; R. Ovadia Yosef, *Yabia Omer*, Vol. 5, sec. 26; Rabbi Zalman Koren, *Har Habayit U'gevulotav*; Dr. Leen Ritmeyer, *Biblical Archaeology Review,* Mar/Apr 1982, pp.26-45; he has also written other articles on this topic.

itself, and therefore it is permissible to approach the Western Wall. Some *poskim* were concerned that perhaps the Western Wall is a remnant of the Temple itself, thereby deeming the area in front of the Wall as the Temple Mount which is prohibited grounds.[46] However, this suggestion has been proved incorrect based upon the length and positioning of the Wall, and the accepted practice today is to approach the Western Wall without reserve.[47]

A practical issue in connection with the *kotel ha'maravi* is whether it is permitted to insert one's fingers or notes into the crevices of the wall.[48] The Gemara in *Zevachim* (32b) states that there is a rabbinical prohibition against even a partial body entrance to the Temple, because we view it as if the entire person entered the Temple.[49] However, Rabbi Avrohom of

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46. *Radvaz* (Vol. 2 Sec. 691). Rabbi David Willenski, *Beit Ridvaz* (Sec 38). However, they reason that the sanctity of the *Har Habayit* is protected by a secondary layer of dirt and rocks, gathered over the years, separating between the sanctified ground underneath and the ground level above. See Rabbi Tzvi Pesach Frank (*Mikdash Melech* Page 123) and Rabbi Menachem Ziemba, *Zera Avraham* (Sec. 8 Part 20) who discuss the latter point.

47. *Avnei Nezer* (*Yoreh Deah* Sec. 450-451), *Mikdash Melech* (Page 126), *Orchot Rabbeinu* (Page 319, 321) in the name of Rabbi Y.Y. Kanievsky and the Chazon Ish. See *Har Hakodesh* (Page 143-145) where he proves based on the length and elevation of the wall, as well as other facts about the wall which clearly demonstrate that it is the wall of the *Har Habayit*, and not that of the Temple itself.

48. The first record of the practice of placing notes into the Western Wall is noted in *Mas'ot Yerushalayim*. He records a tradition that the author of the *Or Hachaim* used to put notes into the cracks of the *kotel*. Others have argued that since this pollutes the *kotel*, and there is no halachic reasoning for this practice, that it is not proper to allow it to continue.

49. *Kehilat Yaakov* (*Zevachim* Sec. 24), and *Marcheshet* (Vol. 1 Sec. 2 Part 4). The Gemara refers to a similar halacha in the laws of

Sochachov argues emphatically that a partial entrance is only prohibited with regards to the walls of the Temple itself, and does not apply to the walls of the *Har Habayit*. The accepted practice is to be lenient in this regard based primarily on his ruling.[50]

A related issue is leaning against the *kotel*. In general it is prohibited to benefit from all sanctified objects; therefore, some have suggested that it should also be prohibited to receive any form of benefit from the *kotel* as well, including leaning against the Wall.[51] Other *poskim* have argued that the walls of the *Har Habayit* were built using special funds that are not subject to this prohibition.[52]

Conclusion

In *Bava Bathra* (60b) the Gemara states that whoever does not mourn the loss of Jerusalem and the Temple will not merit

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transmission of *tumeah*. If one comes in contact with someone else who possesses a transmissible form of *tumeah*, then even though they only came partially in contact with the *tamei* person, their whole body acquires the *tumeah*. The same is true here, even though only part of the body entered the prohibited area, we view it as if the entire body had entered the area. [See Rabbi Elchonon Wasserman, *Kovetz He'arot* (Sec. 19 Part 1) and Tosafot to *Yevamot* (7b)].

50. This has also been the ruling of other *poskim* as well, see *Har Hakodesh* (Page 265). However, see *Mishkenot L'abir Yaakov* and *Ir Hakodesh Ve' hamikdash* who argue that there is a prohibition to partially enter the Temple Mount. Rabbi Shlomo Zalman Auerbach has been quoted as saying that the practice is to be lenient [*Tal Talpiyot*, Page 27].

51. *Mishkenot L'abir Yaakov*. See also Rabbi Hershel Schachter, *Nefesh Harav* (Page 101) that this was also the opinion of Rabbi Yosef Dov Soloveitchik.

52. *Har Hakodesh* Page 268, See also Rabbi Moshe Feinstein in *Sefer Hazikaron L' Harav Zolti*, Page 351, who discusses this topic at length.

rejoicing in its restoration. This seems to contradict the halacha that it is prohibited to mourn the loss of any relative for longer than twelve months,[53] considering the fact that the Temple was destroyed some two thousand years ago. The answer to this anomaly lies in the *Midrash* that when the mourned individual is really alive, but is only temporarily absent, the mourning period can extend indefinitely. This is our predicament. We mourn the loss of the Temple and Jerusalem indefinitely, because we believe they are alive and await their return. May we merit that *Hashem* consummate our mourning and prayers with the coming of the Messiah and the return of the Holy Temple in our days.

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53. *Shulchan Aruch* (*Yoreh Deah* Sec. 394).

Letters

Editor's Note:

Dr. Singer's article, "Understanding the Criteria for the Chilazon" appeared in this journal, Fall 2001 (number XLII). Subsequently (Spring 2002, number XLIII), Dr. Sterman of the P'til Techelet Foundation wrote a counter-article, maintaining that murex trunculus is the bibilical chilazon. Dr. Singer's response follows.

Criteria from the *sugya* of *techelet*

Dr. Sterman prefaces his comments with the rather startling assertion that we can essentially ignore the descriptions brought by *Chazal* in *Menachot*(44a) because many *Rishonim* do not cite these criteria or omit one of them. There is only one *sugya* in the entire Talmud that deals explicitly with the details of *techelet*. How can these statements of *Chazal* not be important?

Dr. Sterman has said that the writings of the Radzyner Rebbe and Rabbi Herzog must form the foundation of any halachic discussion of *techelet*. These talmudic criteria are the heart of Rabbi Herzog's criteria, essential to the Radzyner Rebbe's criteria, and have been considered of unquestioned importance even in most, if not all prior writings by supporters of the *murex trunculus* theory. How can Dr. Sterman now claim they are not essential? It is not surprising that when writing about *techelet*, some *Rishonim* may mention that *techelet* must come from a *chilazon* without describing the *chilazon*. Nonetheless, the *chilazon* must possess the characteristics that *Chazal* have ascribed to it. Rashi brings down all of these criteria in multiple places, and it would be presumptuous to assume that those who omit one ("rises once in seventy years") did so because they felt it could be ignored. Indeed, the Radzyner

Rebbe explains [1] why some omit the seventy-year criterion. Let us briefly examine these criteria.

"Its body resembles the sea": Dr. Sterman's argument as to how *murex trunculus* meets these criteria is based on three false premises, namely, that the expression *domeh l'yam* can mean green, that the expression *gufo* ("its body") can refer to external organisms living on the shell of the *chilazon*, and that the resemblance is to the living organisms in the sea and not the sea itself. Regarding *domeh l'yam*, the same expression is used just a few lines earlier in the Gemara to refer to the color of *techelet*. Dr. Sterman is asserting that "resembles the sea" can mean blue in one phrase and a few lines later, dealing with the same subject, mean green. This is both illogical and groundless. Rambam clearly indicates otherwise since he writes that the *chilazon* itself resembles *techelet*, i.e. blue.[2] Similarly, the *braita* of *tzitzit* states that the color of the body of the *chilazon* is similar to the sky.[3] Dr. Sterman suggests *gufo* cannot mean the soft body since it would be impractical to describe the color of the body which can only be viewed by the careful breaking of the shell and extraction of the soft body. Of course, this presupposes the *chilazon* is completely enclosed by a hard exterior shell. Also, it would only be necessary to check the color of the body to identify the correct species. It would not be necessary to check every animal that is used.

While Dr. Sterman's claim that *gufo* could refer to the shell is not entirely unreasonable, it is quite a different matter to say that "its body" means the external organisms covering the shell. Whereas it would indeed make sense to describe the outward

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1. Rabbi Gershon Leiner, *Eyn HaTechelet*, published in *Sifrei HaTechelet Radzyn* (Bnei Brak, 1999), p.387.

2. *Hilchot Tzitzit* 2:2.

3. *Masechtot Ketanot Masechet Tzitzit* Ch. 1 Halacha 10.

appearance, it would hardly be helpful to describe the external sea fouling if it looks like everything else. While *murex trunculus* does blend in with its surroundings due to the greenish sea fouling, this means it resembles the sea fouling and plant life living in the sea, but not the sea itself.

"*Its form is like a fish (dag)*": Dr. Sterman's response is that according to halacha, *murex trunculus* is a fish, therefore this statement is true by definition. This renders meaningless the statement of *Chazal.* Why would *Chazal* say "the *chilazon,* which is a fish, resembles a fish"? Clearly the intent is to inform us that the form of the *chilazon* has some similarity to what is characteristically true of fish. No such argument can be made for the *murex trunculus* snail.

"*Comes up once in seventy years*": Dr. Sterman admits that there is no characteristic of the *murex trunculus* that would meet this criterion. Dr. Sterman's unfounded speculation about the replenishing of the snail population suggests a steady pattern of increase in the population and not an unusual abundance. Rabbi Herzog cites a 3-6 year cycle for his candidate species.[4] As for the Radzyner Rebbe's choice of *sepia officinalis*, since the Rebbe's death a periodicity has been noted and there have been rare reports of mass "invasions" and "strandings" of cuttlefish.[5]

"*It is expensive*": The Gemara states the dye is expensive because of the lack of abundance ("comes up once in 70 years"). One of the reasons Rabbi Herzog rejects *murex trunculus* is because of the minute dye quantity it produces.[6] The Gemara

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4. Herzog, ibid., p. 73.

5. David H. Tompsett, *Sepia* (Liverpool, 1939), p. 143, citing the work of Grimpe; *Transactions of the Royal Society of Edinburgh*, Vol. 61, Part I, 1943-1944. (No. 9), pp. 247-260.

6. Rabbi Isaac Herzog, "Hebrew Porphyrology", in Ehud Spanier,

clearly states that the reason *techelet* is expensive is because of its infrequent appearance or abundance and not because of the minute dye quantity. *Murex* dye was not expensive due to scarcity but due to the work involved in extracting the dye from exceedingly large quantities of snails to produce small amounts of dye.

Chemical test for K'la Ilan

Rabbi Herzog, with the aid of renowned dye chemist Dr. A.C. Green, recognized that the Gemara's tests have the aim of chemically reducing indigo. In this state indigo is yellow, thus the Gemara's stipulation that if the color fades, it fails the test and is suspected to be *k'la ilan*. Since snail indigo and plant indigo are the exact same chemical, *murex* indigo should also fail this test. Indeed, *murex* indigo would be expected to fail *any* chemical test that plant indigo fails, let alone the Gemara's test which is clearly designed to detect indigo.

Dr. Sterman posits that it is theoretically possible that some snail meat remaining in the *murex* indigo could keep it from failing the test. Since the Gemara's test only requires the color to fade, not to be entirely reduced, the snail meat would have to completely inhibit the chemical reduction in order to pass the test. Dr. Sterman offers no reason why the snail meat might have this effect. In fact, the one statement he makes is that snail meat may have played an important role in aiding reduction. Dr. Sterman suggests that Nobel chemist Dr. Roald Hoffman has deemed his explanation plausible. I contacted Dr. Hoffman, and he merely maintains that the presence of bits of snail meat makes it theoretically possible to develop chemical tests to distinguish snail indigo from plant indigo, not that it was at all likely for the snail meat to have any

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ed., *The Royal Purple and the Biblical Blue: Argaman and Tekhelet* (Jerusalem, 1987), p. 70.

impact in the chemical test of the Gemara.

Even Dr. Irving Ziderman, the chemist who did so much of the pioneering work on the *murex trunculus* theory, acknowledges that snail indigo would fail this test. Although Dr. Sterman says that he has recreated the Gemara's tests and *murex* indigo passed, he then acknowledges that regular indigo also passed, thereby proving that he had not recreated the test correctly. Thus we are left with sound scientific reason to suggest *murex* indigo would fail the Gemara's tests versus the unfounded speculation that it is a theoretical possibility it would pass.

Equivalence of murex techelet with k'la ilan(indigo)

Dr. Sterman makes the assertion that both the Radzyner Rebbe and Rabbi Herzog are of the opinion that if one finds a candidate for the *chilazon* that produces a dye that is sky-blue and is a fast dye, then it is automatically kosher *techelet*. The statement from the Radzyner Rebbe is taken out of context.[7]

As for Rabbi Herzog, he places great importance on the criteria from *Menachot,*[8] and dismisses *murex trunculus* because it fails to meet any of the criteria from that *sugya.*[9]

As for the problem with the Gemara needing to warn us about *murex* indigo as it did for *k'la ilan,* this poses no difficulty for several reasons. First, the Gemara doesn't need to warn us about anything that did not happen. Whereas counterfeiting *techelet* with *k'la ilan* was a real problem, counterfeiting with *murex* indigo is a theoretical problem with no indication that *murex trunculus* was ever used to dye blue in any context. Even if the ancients did make *murex* indigo, why would people

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7. Leiner, ibid., pp. 14-17.
8. Herzog, ibid., p. 65.
9. Ibid., p. 70.

have used it to counterfeit *techelet* when they could achieve the same results more cheaply with readily available plant indigo? However, there is an even stronger answer. Since *murex* indigo is equivalent to plant indigo, it would also fail the Gemara's tests, so there was no need for a special warning. However, the Gemara's need to warn us of other counterfeit dyes does pose a problem for P'til. The process used by P'til will produce indigo from any of the purple-giving mollusks. If *murex trunculus* indigo was true *techelet*, why doesn't the Gemara warn us of the perfect imitations that could be produced by related species?

Dye is superior if extracted from a live chilazon

The Gemara speaks explicitly about the case where a live *chilazon* is squeezed or crushed to get the dye out, and the person tries not to kill the *chilazon* in the process because the dye is better, or clearer, if taken while the *chilazon* is still alive.[10] How long does it take to extract the dye from the *chilazon*? Seconds? Minutes? Yet, if the *chilazon* dies during this short process, the dye will not be as effective. Dr. Sterman's argument that *murex* dye loses its power over several hours hardly satisfies this condition. This time frame ignores the fact that the Gemara speaks of the *chilazon* dying during the extraction process, a matter of minutes, not hours. Even more troubling is Dr. Sterman's misrepresentation of Pliny and Aristotle. In my article I correctly state, as Rabbi Herzog also does, that Pliny and Aristotle warn that the dye should be extracted from the *murex* while it is alive because it discharges its dye when it dies.[11] Dr.

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10. *Shabbat* 75a and Rashi ad loc.

11. Herzog, ibid., pp. 74-75; Aristotle, *Historia Animalium*, Book V, Ch. 15; Pliny the Elder, *Naturalis Historia*, Book 9, Ch. 60. For a picture of a *murex* snail discharging its dye upon death, see Nira Karmon, "The Purple Dye Industry in Antiquity" (Hebrew), in Chagit Sorek and Etan Ayalon, eds., *Colors from Nature: Natural Colors in Ancient*

Sterman cites the first half of their statements, but then ignores the reason they explicitly state and instead supplies his own reason. In fact, these classical sources do not say anything about the dyeing power of the *murex* diminishing after death, their reason being at odds with the Gemara's explanation regarding the *chilazon*.

Ancient blue dyes

Dr. Irving Ziderman states that it would be absurd to think the ancients would use *murex* indigo when they could make the same dye cheaper and easier by using plant indigo.[12] Dr. Sterman responds with a series of unsupported statements claiming that Egyptians used *murex* for blue dyeing but not indigo, that *murex* dyeing in the Mediterranean dates back to the days of Avraham *Avinu* whereas indigo reached the region only 1,500 years later.

There is absolutely no record of *murex* being used to dye blue in ancient times. All of the archeological evidence cited in P'til writings merely demonstrate it was used for purple dyeing, as is well known. In the classic work, *The Art of Dyeing*, by Franco Brunello, we find four sources of blue dye in ancient Egypt – none of them are *murex*.[13] On the other hand, Brunello and others cite sources that conclude that indigo was used in Egypt over 1,000 years before Yosef's arrival there, long before shellfish dyes were ever used.[14] As for Dr. Sterman's claims,

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Times (Tel Aviv, 1993), p. 85.

12. I.I. Ziderman, "On the Identification of the Jewish Tekhelet Dye", *Gloria Manis* [Antwerp] 24(4): 77-80.

13. Franco Brunello, *The Art of Dyeing in the History of Mankind*, translated by Bernard Hickey (Venice, 1973), p. 43.

14. Brunello, ibid, p.43; Helmut Schweppe, "Indigo and Woad", in Elisabeth West FitzHugh, ed., *Artists' Pigments: A Handbook of Their History and Characteristics*, vol. 3 New York, 1986), p.83.

they might be based on the work of late 19th /early 20th century Austrian Egyptologist, Alexander Dedekind, of whom P'til speaks highly. Dr. Dedekind's claims about Egyptian use of shellfish dyes has been completely refuted and even ridiculed at length.[15] Dr. Gillian Vogelsang-Eastwood is probably the world's leading expert on Egyptian textiles and has analyzed ancient Egyptian clothing from many eras, including those found in the tomb of King Tutenkhamun. In a personal communication she confirmed that the only blue dye she has found on Egyptian clothing is indigotin (from the indigo or woad plant), and that she has not found any evidence of purple shellfish dye in Egypt until the Roman era, about 1,000 years after the exodus from Egypt. There has been evidence of rare use of purple dye in Pharaonic Egypt, but this was found to be a mixture of indigo(blue) and alizarin(red).[16]

Techelet, purpura and the color of purpura

Dr. Sterman brings an assortment of different sources that purportedly equate *techelet* with *purpura*. Some of these statements make no mention of *purpura*, such as the statement he cites from the Radzyner Rebbe. The Ramban's statement that even in his time only the king was allowed to wear *techelet* hardly equates *techelet* with *purpura*.[17] [18] One must also be careful when dealing with the word *techelet* since it may at times indicate a color with no specific origin. This is clear from the cited

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15. Meyer Reinhold, *History of Purple as a Status Symbol in Antiquity*, (Bruxelles, 1970), pp. 13-14.

16. Gillian Vogelsang-Eastwood, "Textiles", in Paul T. Nicholson and Ian Shaw, eds., *Ancient Egyptian Materials and Technology* (Cambridge, 2000), p. 279.

17. Ramban, *Shemot* 28:2.

18. Daniel V. Thompson, *The Materials of Medieval Painting* (New Haven, 1936), p. 127.

Ramban, since there was no kosher *techelet* in the Ramban's lifetime, yet he used the word *techelet* to discuss contemporary blue dye. Other statements cited by Dr. Sterman are merely examples of *purpura* being used to connote royal attire, as is commonly found in the *Midrashim*, and is used to refer to Mordechai's royal clothing of *techelet*, where the color of *techelet* is implied, but not necessarily *chilazon* origin.[19] This is the simple explanation of Dr. Sterman's quotes from the *Aruch* and *Midrash HaGadol*. Since the *Midrash Hagadol*, like Rambam, says that the color of the blood of the *chilazon* is "black like ink", it would not make sense to suggest that it supports the notion that a *murex* snail is the *chilazon*.[20]

Dr. Sterman cites the *Mekor Chaim* (by the author of the *Chavot Yair*) and the *Shiltei HaGiborim* as explicitly stating that the *purpura* is the *chilazon shel techelet*.[21] There are several problems with this. Both of these *seforim* are from manuscripts that were discovered hundreds of years after they were supposedly written. Aside from possible issues concerning authenticity, and the more likely problem of the integrity of every word, in both cases the statements about *purpura* appear in isolation, i.e. there is no discussion of *chilazon* and *techelet*, just a single statement. Both of these sources, especially the *Baal Chavot Yair* ("*dam chilazon* is not blue, but purple"), seem to be of the opinion that *techelet* is purple, hence their conclusion as to the origin. Unfortunately, there is no discussion of how this species fits *Chazal*, or how the color of the blood contradicts the writings of Rashi and Rambam. Could there be errors in transcription? The *Baal Chavot Yair* seems clear, but the *Shiltei HaGiborim* would read quite naturally with *argaman* instead of

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19. Esther 8:15; *Midrash Esther Rabbah* 10:12; *Chidushei Radal, Bamidbar* 13:18.

20. *Midrash HaGadol,* ibid.

21. *Mekor Chaim* 18:2; *Sefer Shiltei HaGiborim,* ch. 79.

techelet. Seeing as how the notion of *argaman* coming from a mollusk was not well known, could an editor or copyist have inserted the word *techelet* after seeing the word *chilazon* used in conjunction with dyeing?[22] In light of the fact that at the times they would have been written it was not known that blue dye could be made from *murex* snails, the simplest explanation is that they held the position that *techelet* is purple and then made the natural corollary that the source was the famous purple-fish. Unfortunately, there is no evidence that either sage ever pursued his hypothesis in treatise or practice.

In my article I refuted efforts by P'til to demonstrate that *murex* snails were used to dye blue in antiquity. Dr. Sterman has not responded to my refutations, but instead offers another possibility. Vitruvius writes that depending on the location, *murex* purple could come out one of four different shades: black, red, blue and violet.[23] From the context it is clear that he is speaking of shades of purple, and is not suggesting that *murex* was used to dye blue or black. This is consistent with modern writings citing this work, as well as with Rabbi Herzog's understanding of Vitruvius' remarks.[24] Rabbi Herzog also demonstrates that Vitruvius was not speaking about *murex trunculus*, but of other *murex* snails.[25] Additionally, according to Vitruvius, the shade of purple associated with Tyre and Israel is red, not blue.

Dr. Sterman's new set of criteria

Dr. Sterman proposes a new set of criteria. As stated earlier, Dr. Sterman says that Rabbi Herzog and the Radzyner Rebbe

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22. Josephus, ibid.
23. Vitruvius, *De Architectura*, Book 7 Chapters 7-14.
24. Thompson, ibid., p. 156-158; Herzog, ibid., p. 26.
25. Herzog, ibid., p. 34.

form the basis of any halachic discussion of *techelet*. Their writings, as well as virtually all prior P'til writings, were based largely on the *sugya* in *Menachot* and other talmudic sources. Dr. Sterman now dismisses those sources as *aggadata* and offers his own set of four criteria. They not only form a peculiarly small and arbitrary set of criteria, but two of these criteria are not even valid.

"*Techelet* is the color of *k'la ilan*": Indigo was used in ancient times to produce a wide range of blues, from light to dark blue. The fact that indigo can imitate *techelet* does not tell us the color of *techelet*. It merely tells us that one of the many colors produced by indigo is that of *techelet*.

"*Techelet* is a fast dye that does not fade": Dr. Sterman's quotation from the Rambam is appropriate and merely states that the dye is fast. The Radzyner Rebbe discusses this issue and understands it to mean that the mere passage of time in and of itself will not cause the dye to fade, though certain chemicals or repeated prolonged exposure to the sun could cause the dye to fade.[26]

"*Techelet* dyes on wool, but does not take to other fabrics": Dr. Sterman's sources do not support this statement. The Gemara does not say or imply that *techelet* dye cannot dye other fabrics.[27] That *techelet* can dye linen is clear from the Ibn Ezra who states that *techelet* can be wool or linen.[28] Why Dr. Sterman proposes this criterion is especially surprising since indigo can dye linen, so *murex* indigo should also be able to dye linen.

"The dye from the *chilazon* is more potent if taken from a

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26. Leiner, ibid., *Sefunei Temunei Chol*, p. 10, written before he produced his first batch of *techelet*.

27. *Yevamot* 4b.

28. Ibn Ezra, *HaPeirush HaKatzar*, *Shemot* 25:4.

freshly killed *chilazon*, but one must kill the animal in order to extract the dye…": This is puzzling. The Gemara states that the dye is better if extracted from the *chilazon* while it is still alive, as discussed earlier. The *chilazon* may die from being crushed, but the desire is to extract the dye while it is alive. As demonstrated earlier, *murex trunculus* fails to meet this criterion.

Objections to the Radzyner Rebbe's position

Dr. Sterman raises three objections to the Radzyner Rebbe's *techelet*:

"Radzyner *techelet* is not the color of the sky": Prussian Blue, the pigment formed by Radzyner *techelet*, can be either royal blue or sky blue depending on the proportions of the ingredients.[29] Further, it is hardly obvious what the color of *techelet* should be. It is likened to the color of the sea, the sky and the sapphire. Dr. Sterman himself states that the term "*domeh*" only indicates a similarity in property, and the Ibn Ezra says the color of *techelet* slightly resembles the sky.[30] [31]

"It fades when washed with soap": While this sounds at first like a strong criticism of Radzyner *techelet*, this appears to be a known characteristic of true *techelet*! As cited by Rabbi Herzog, Rabbeinu Gershom states explicitly that *techelet* fades in the wash.[32] The Radzyner Rebbe also quotes the Tosafot who state that *techelet* fades in soap, and that *k'la ilan* does not.[33]

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29. J.N. Liles, *The Art and Craft of Natural Dyeing*, (Knoxville, 1990),p. 49.

30. Ibn Ezra, ibid.

31. Schweppe, ibid., p. 94.

32. Rabbeinu Gershom, *Menachot* 43a.

33. Leiner, ibid., *P'til Techelet* p. 82; *Baba Kama* 93b; Tosafot *Zevachim* 95a; *Nidah* 62a.

"The dye can be obtained from dead *sepia officinalis* (and not exclusively from live organisms):" The Gemara merely states that the dye is superior if taken while the *chilazon* is alive. The fact that it is possible to extract cuttlefish ink from *sepia officinalis* after it is dead is irrelevant:[34]

Murex trunculus meets virtually none of the known characteristics of the *chilazon*. There is no evidence that *murex trunculus* was ever used to dye blue until recent times. P'til writings have suggested that people wear *murex* indigo based on the principle of *sofeik d'oraita l'chumra*. Given the overwhelming evidence against *murex trunculus*, there appears to be little *sofeik*.

DR. MENDEL E. SINGER

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To the Editor,

The article titled "Journalism, Controversy, and Responsibility" by Dr. Steven Oppenheimer in the Spring 2001 issue (number XLI), offered an interesting perspective on this very timely topic of the halachic approaches to revealing information about individuals in a public forum.

He quotes (p. 113) a *pesak* about a school principal found to have abused children. As this article does not state the form of abuse, I am assuming it refers to sexual abuse and not physical abuse. The rabbi quoted advised the Yeshiva day school administration to hire an assistant principal to monitor this individual's behavior to prevent further abuse and not to publicize this individuals's name and actions. This *pesak* was given since the principal agreed to leave after the following year.

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34. Leiner, ibid., *P'til Techelet* p. 54.

As a mental health professional, I find this *pesak* quite troubling. Individuals who abuse children are prone to further abuse. What is preventing this individual from seeking another position that involves contact with children? This individual will most likely abuse children in the future. What about concern for the pain and anguish of the child? This abuse will emotionally affect the abused child for many years after.

I am required by law to report any knowledge of child abuse, or else I can be forbidden to practice and face possible conviction in court. Most states in the US require educators and clergy to report child abuse. If educators or clergy do not, they or their organization can be sued for failure to report this abuse.

Individuals who abuse children need mental health treatment. One study of 4,381 individuals who committed acts of pedophilia[35] showed that their psychological treatment was mostly successful. Over a 20 year follow-up period, 9% relapsed. Almost half of these relapses occurred after 5 years. This study shows the effectiveness of treatment for sexual offenders, yet demonstrates that for those at risk for relapse, it is a chronic problem.

It is important to be cautious when hiring these individuals for jobs allowing them contact with children. As allowed by secular law, those accused of sexual offenses against children should have their profiles disseminated to prevent further abuse. As is demonstrated by this article, halachic rulings have not approached the situation of sexual abuse and I feel that the halachic approach may rely on *dina demalchuta dina.*

Furthermore, any halachic *pesak* should consider the

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35. Maletzky, M.B. (1993), "Factors associated with success and failure in the behavioral and cognitive treatement of sexual offenders,"*Annals of Sex Research*, 6, 241-258.

possibility of repeated offenses by these individuals. I doubt that any *beit din* has the ability to monitor these individuals over a long-term basis. Only through guidelines established by the court system can these individuals be monitored to prevent further incidents of child sexual abuse.

Excluding the issues of *dina demalchuta dina* in those states requiring clergy to report suspected abuse, are any of these rabbis monitoring and treating this individual who abused children? Are they ensuring that there is weekly treatment that will occur on a consistent basis? Without this being done, this individual is most likely to continue to take advantage of and abuse children – without anyone stopping him.

It is our moral conscience, and a possible legal obligation, to report this individual to the proper authorities, so that this individual receives appropriate mental health treatment. This will help prevent further child abuse in the Jewish community.

JOSHUA FOGEL
Psychology Intern
Queen Elizabeth II Health Science Centre

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Author's response:

Joshua Fogel raises some very important points of concern. Obviously, further actions in consultation with rabbinic authority need to be taken to protect abused children. My article, however, dealt specifically with halachic imperatives pertaining to journalism and not specifically with those halachic questions that relate to communal responses to child abuse issues. Nevertheless, I would like to address some of the concerns which the letter writer raises.

Schools and organizations that deal with children and young people need to be well versed in both secular and religious laws as they pertain to issues of abuse and misconduct.

Professor Avraham Sofer Avraham in his *Nishmat Avraham* quotes Rabbi Y.S. Elyashiv, *shlit"a*, Rabbi E.Y. Waldenburg, *shlit"a,* and Rabbi S.Z. Auerbach, *zt"l,* that the child-abuser should be considered a *rodef* and, as such, the restrictions of *moser* do not apply. One would, therefore, be allowed and perhaps even obligated to contact the secular authorities regarding such abuse.

The *poskim* require that the facts be thoroughly investigated to ascertain their veracity and that any action taken be with the guidance of a competent halachic authority.

Perhaps information regarding an abusive teacher should be forwarded to organizations such as Torah U'Mesorah, for example, that provide referral and placement services to schools and other educational institutions (so that implicated educators would not be able to simply leave their present employ and move on to new schools – and possibly new victims).

The problem of child abuse is a serious matter and deserves a more detailed analysis than can be accomplished in this brief response. Perhaps a future article on this very timely topic will help clarify the issues more fully.

Sincerely,

STEVEN OPPENHEIMER, D.D.S.

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To the Editor:

At the end of his article on "Informing on Others to a Just Government", Rabbi Michael Broyde maintains that New York State Domestic Relations Law Article 3, Section 17 (DRL 3:17), which prohibits a rabbi or other clergyman from performing a religious wedding without a civil license being presented, is "of debatable constitutionality", since he believes (in the footnote), that the only governmental interest would be to prevent out-of-wedlock fornication, and would not survive a

strict scrutiny test in a court.

I disagree and believe the government could win in a case regarding this law under a strict scrutiny standard, since the governmental interest would not be to prevent out-of-wedlock sex, but rather to prevent potential future fraud upon the government. In theory, if a Jewish couple marries according to halacha but not civilly, and then have children, the mother could obtain single-mother benefits from the government. As a Domestic Relations attorney, I have heard of many cases where otherwise *frum* couples engage in this practice, which is no doubt illegal and a *Chilul Hashem.* Using this as the reason to uphold DRL 3:17 under a strict scrutiny standard, Rabbi Broyde's example becomes more like the earlier example in the article of a *frum* Jew cheating on his/her taxes (Example #5).

Furthermore, it is well known according to matrimonial attorneys that, for a variety of reasons including the forum of a court (Family as opposed to Supreme Civil), non-working women will obtain higher awards of maintenance (alimony) and child support from a civil court if they were married and the children were of the marriage civilly (since all children born to halachically but not civilly-married couples are considered non-marital children in the eyes of the law). Thus, the government would have a further compelling interest to uphold DRL 3:17, as it could contend that ensuring that all New York State marriages are recognized by the government help protect non-working spouses (usually women with children) from potential fraud and economic abuse by their spouses if the "marriage"' falls apart.

It is hoped that no Torah-observant and heaven-fearing rabbi would ever perform such a wedding even without DRL 3:17. Notwithstanding Rabbi Broyde's contention, however, the law is not of debatable constitutionality and should be enforced in order to avoid *Chilulai Hashem.*

NATHANIEL H. WEISEL, ESQ.

Great Neck New York

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Rabbi Broyde responds:

Attorney Weisel raises two points in his discussion of unmarried individuals who wish to marry according to Jewish law but not civilly, both worthy of response. A final note is also proper.

Attorney Weisel claims that a law requiring that all religious ceremonies also be civilly valid is constitutional. I disagree and am far from convinced that this law is constitutional. For better or for worse, New York state makes no attempt to regulate or restrict or even discourage motherhood by those women who are not married. Because of that, a couple who chooses to marry halachically, but not civilly, are simply not married in the eyes of the state and thus *the mother actually is entitled to unmarried mother benefits as a matter of secular law.* Indeed, New York does not prevent a couple from even entering such a religious marriage, only from having one performed in New York state. Many have told me that the purpose of this statute is only to insure that couples that want to be married *civilly* are not denied that right by their rabbi.

This is, thus, not a fraud at all. Rather, this is a lawful benefit that our just government permits, no different than a host of other benefits that go to people in different situations, not all of whom appear entitled as a matter of justice, but are entitled as a matter of law. The obligation to obey the law of the land – an ethical, moral and religious imperative for all Jews – does not require that one turn away a benefit one is entitled to as a matter of statutory law. Women who are not married in the eyes of secular law are single parents and entitled to benefits as a matter of law.

State of New York abolished common law marriages more than 50 years ago and recognized that people who share a

residence are not married unless and until they desire to be civilly married and have a civil marriage license. If New York State had wished to adopt the policy Mr. Weisel thinks it has, it would have adopted a different rule, to wit, "anyone religiously married is automatically civilly married." Such was not done as it was not desired.

(This case is readily distinguished from the case of a man who is religiously [but not civilly] divorced from his wife, and now wishes to religiously (but not civilly) marry another woman. In that case, there are many more serious grounds for prohibiting such a religious ceremony – two are readily apparent. First, secular law that is being violated in that case is the adultery (and maybe bigamy) statute, whose validity is without contest in halacha through *dina demalchuta.* Secondly, such conduct is a *chilul Hashem* in that the man and woman who are religiously married to each other are conducting an adulterous relationship in the eyes of secular society, which still views such conduct as immoral.)

Having said all of this, I, too, am deeply bothered by the possibility that even lawful conduct can be construed by others as a *chilul Hashem,* a desecration of our Creator's mandate to us as Jews for higher ethical conduct. In light of that fact, I too, agree that this conduct – since it can be misunderstood as illegal and brings Jews to be disrespected – ought to be frowned on, discouraged, and not done.

My article, however, did not address this issue at all. It was discussing whether one may inform on a rabbi or couple that engage in such conduct. The answer to that question remains "no", for the reasons stated in the article and elaborated on in the response.

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To the Editor:

In Rabbi Perr's letter regarding the identification of the

species *chilazon,* one of the reasons he rejects the murex trunculus as the *chilazon* is based upon the Gemara *Shabbat* (75a) which says that one who cracks or shatters (*potzea)* the *chilazon* on Shabbot is culpable for threshing (*dosh*). Rashi explains that this refers to the process of extracting the dye from the fish. The Rambam (*Hilchot Shabbat* - 8:7) rules that the minimum volume to be culpable for threshing is the volume of a *grogrit* (dried fig). Thus the murex trunculus which only produces a few drops of dye per snail cannot be the *chilazon*. On the surface it would seem to be a valid point. Indeed the *Yerushalmi* maintains that one is not culpable for threshing the *chilazon* and perhaps the reason is because it is lacking in the *shiur.*[1] But if the murex trunculus is the *chilazon,* how can we maintain the position of the *Bavli*?

The Raavad takes issue with the Rambam and maintains that the *shiur* of *dosh* varies with each individual food as regards the prohibition of carrying. Thus according to the Raavad the *shiur* for extracting the *techelet* dye is the same as the *shiur* for carrying the *techelet* dye.

Let us see then what <u>is</u> the *shiur* for carrying the dye of *techelet*. The Gemara in *Shabbat* (90a) tells us that the *shiur* for carrying *argaman* (purple dye) is the smallest imaginable amount. P'til maintains that the *argaman* dye and the *techelet* dye are really one and the same except that they are processed differently. The *shiur* for carrying the *techelet* dye is therefore also the smallest imaginable amount. Hence it follows that according to the Raavad the *shiur* for extracting the dye from the *chilazon* is just one drop!

Furthermore, the *Avnei Nezer* (*Orach Chaim, dosh, siman* 49) maintains, that even according to the Rambam if the purpose of one's threshing is <u>not for food</u>, the *shiur* is not a *grogrit*.

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1. See the *Chatam Sofer* in his commentary to *Shabbat.*

Again, since the threshing of the *chilazon* is not for food purposes, the *shiur* will not be a *grogrit* but rather just one drop. However, the Chatam Sofer maintains that the Rambam's *shiur* of *grogrit* is applicable even in non-eating situations.[2] Rabbi Perr's objection is thus valid only according to Chatam Sofer's interpretation of the Rambam.

Let us see further. Do we have a viable *p'shat* in the Gemara *Shabbat* if the murex trunculus is the *chilazon* according to Chatam Sofer's interpretation of the Rambam? Indeed there is, and let us point out that the Rambam is not beholden to Rashi's commentary.[3] Since the murex trunculus has an outer shell

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2. See the Chatam Sofer in his commentary to *Ketubot* (*mahadura tinyana* page 5b) in regard to *dam brit* and *dam betulim*. It is perhaps possible to learn that the original argument between the *Bavli* and *Yerushalmi* of whether one is culpable for threshing the *chilazon* is this very argument of the *Avnei Nezer* and *Chatam Sofer* of whether the *shiur* of a *grogrit* has to be maintained even when threshing for non-food purposes.

3. Rashi himself can maintain the Raavad's or the *Avnei Nezer's* position. One must point out, though, that it is nonetheless problematic to assume that according to Rashi the murex trunculus is the *chilazon.* In the Gemara *Menachot* (44) he explains that the *techelet* was expensive because the *chilazon* emerges only once in seventy years. The *techelet* of the murex trunculus is expensive because it requires 8000 snails to produce a gram of dye. Furthermore, Rashi in Gemara *Megilla* (6) explains that the *chilazon* is both a land and aquatic creature, while the murex trunculus only inhabits the sea. It is thus clear that Rashi's tradition is that a creature other than the murex trunculus is the *chilazon.* Or possibly we can assume the position of the *Radzyner Rebbe,* Hagaon Rav Gershon Henech Leiner, that the *Rishonim* were not familiar with which species was the *chilazon*. (Although Rabbi Perr maintains that Tyrean dye was manufactured in Constantinople until May 29, 1453, it can very well be that they manufactured the color purple and not the color blue. Furthermore, since most of the *Rishonim* lived in Western Europe, they probably were not aware of the production in Turkey.)

which must be broken in order to squeeze the gland for its mucus, we can easily learn that the prohibition of threshing which the Gemara is referring to is breaking the shell to gain access to the snail proper (which is comparable to breaking the husk to gain access to the kernel) and surely some snails are the size of a *grogrit*.

Indeed, the *Eglei Tal* cites this very *p'shat* (*melechet dosh,* page 96) in the name of a scholar but refutes it because he maintains that if something has two shells and one removes only the outer shell, he is not culpable for threshing until he removes the inner shell as well. However even if we grant this point to the *Eglei Tal,* he himself concedes (page 117) that both Rabbeinu Saadya Gaon and Rabbeinu Chananel maintain that removing the outer shell alone is sufficient to be culpable for threshing. We thus have, according to their position, a viable *p'shat* (even according to the Chatam Sofer's interpretation of the Rambam) to explain why one is culpable for threshing the *chilazon* although there is no *shiur* in the dye proper of the murex trunculus. It follows that the murex trunculus may indeed be the *chilazon*.

Ha'emet Yoreh Darko.

Sincerely,

YISROEL YOSEF TAUB
(Author of *Dorshei Reshumos)*