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TABLE OF CONTENTS

A Boy or a Girl? The Ethics of Preconception Gender Selection Rabbi Joshua Flug.....	5
Cosmetic Surgery in Halacha Dan Geisler	29
Issues in Jewish Education Rabbi Alfred Cohen.....	45
When Tefillin are not Readily Available: A Question of Priorities Rabbi Moshe A. Bleich.....	81
Art or Idolatry? The Laws of Forbidden Images Rabbi Michoel Zylberman.....	109
Letters to the Editor	127
Aryeh Brueckheimer	

A Boy or A Girl? The Ethics of Preconception Gender Selection

Rabbi Joshua Flug

Introduction

The key to gender selection has been sought since ancient times. A couple's ability to choose the gender of their child has been valued dearly in many different cultures over the course of history. Many different hypotheses have been presented over time to attain this cherished goal.¹

Today, modern technological advances allow people to choose the gender of their child at levels of accuracy never previously witnessed. Two methods used today which guarantee high levels of accuracy are the preimplantation genetic diagnosis (PGD) method and the flow cytometry separation (FCS) method. (The FCS method is patented and registered under the name MicroSort® and will be referred to as the MicroSort method for the remainder of the article.)

The PGD method uses in vitro fertilization (IVF). The male partner contributes spermatozoa (sperm cells), while the female partner contributes some of her ova (eggs). These ova are fertilized in a laboratory to form embryos. The embryos can then be diagnosed for various genetic features including the impending gender of the embryos. Upon selection of the desired features, the embryo(s) are then implanted into the woman

1. See Fred Rosner, "Sex Preselection and Predetermination," in Rosner, *Biomedical Ethics and Jewish Law* (Hoboken, 2001): 165-173, for a description of prior techniques, including those mentioned in rabbinic sources.

Fellow, Bella and Harry Wexner Kollel Elyon, RIETS

who will carry and deliver the desired baby.² The accuracy of the PGD method is near perfect, subject primarily to human error.³ The cost of using the PGD method can range from \$10,000⁴ to 18,000⁵ per attempt.⁶

The MicroSort method attempts to separate the X-chromosome-bearing sperm from the Y-chromosome-bearing sperm. A human being has twenty-three pairs of chromosomes that carry the genes for all genetic features of a human. One pair of those chromosomes is the sex chromosomes that determine the gender of that human being. Both the male and the female contribute one chromosome. A combination of two X-chromosomes will result in female offspring, while an X-chromosome combined with a Y-chromosome will produce a male offspring. Being that the female has two X-chromosomes, she will automatically contribute an X-chromosome. However, a male can contribute an X-chromosome or a Y-chromosome. If he contributes an X-chromosome the offspring will result in

2. Marcos Meseguer et al., "Gender Selection: Ethical, Scientific, Legal and Practical Issues," *Journal of Assisted Reproduction and Genetics* 19 (2002): 443.

3. See C.M. Lewis et al., "Controlling Misdiagnosis Errors in Preimplantation Genetic Diagnosis: A Comprehensive Model Encompassing Extrinsic and Intrinsic Sources of Error," *Human Reproduction* 16 (2001): 43-50.

4. Aaron Zitner, "A Girl or a Boy, You Pick," *Los Angeles Times* July 23, 2002: A1.

5. Claudia Kalb "Brave New Babies," *Newsweek* Jan. 26, 2004: 45.

6. There is another fertility method known as intracytoplasmic sperm injection (ICSI). ICSI is a form of IVF, with one difference. In ICSI, one spermatozoon is injected directly into the cytoplasm of the ovum. Being that ICSI is only used in cases of male infertility, the presentation will not address ICSI, as it is not used for elective purposes. Practically, the halachic issues in using ICSI for gender selection do not differ from those of IVF.

a female (XX). If he contributes a Y-chromosome, the offspring will result in a male (XY). Thus, the gender of the offspring is totally contingent on whether the ovum is fertilized by a spermatozoon bearing X-chromosome or a spermatozoon bearing Y-chromosome.

The MicroSort method attempts to sort the spermatozoa based on the fact that X-bearing sperm have 2.8% more DNA. A fluorescent dye is applied to the sperm and then passed through a flow cytometer. The flow cytometer measures the amount of fluorescent light given off by the DNA. The X-chromosome-bearing sperm give off more light than their Y chromosome counterparts due to the additional DNA. The flow cytometer can then separate the X-chromosome-bearing sperm from the Y-chromosome-bearing sperm. The desired spermatozoa can then be used to fertilize the ova using either intrauterine insemination (IUI, also known as artificial insemination) or IVF.⁷ The accuracy of the MicroSort method can be as high as 93%.⁸ The base cost of using the MicroSort method including the IUI is \$9,800.⁹ Some recommend combining both methods in order to achieve an accurate result at a lower cost.¹⁰

7. U.S. Patent no. 5,135,759 (issued August 4, 1992).

8. E.F. Fugger et al., "Births of Normal Daughters after MicroSort Sperm Separation and Intrauterine Insemination, In-Vitro Fertilization, or Intracytoplasmic Sperm Injection," *Human Reproduction* 13 (1998): 2367-2370. Microsort.com/results.htm, advertises a lower rate of accuracy. The accuracy of procedures for X-bearing sperm achieved 88% accuracy, while the Y-bearing sperm achieved 73% accuracy.

9. See Givf.com/GIVFMicroSortCyclePrices.htm. If the procedure is done through IVF, the base cost is \$14,215. The cost for combining MicroSort with PGD is \$15,845.

10. Meseguer et al., loc. cit. The cost is diminished because the MicroSort method will produce the desired embryo at 93% accuracy, therefore reducing the amount of embryos tested until achieving the

Gender selection has both medical and non-medical benefits. If one of the parents of the potential child is a carrier of a genetic disease linked to one of the sex chromosomes, use of gender selection would constitute a form of gender selection used for medical purposes. If, however, the couple desires to give birth to a baby of one specific gender for cultural, religious, or convenience purposes, that would constitute a use of gender selection for non-medical purposes.

The issue of use of gender selection for non-medical purposes is "quickly becoming the most controversial development in high tech reproduction."¹¹ As with most topics in medical ethics, a halachic analysis of the topic reveals issues that are relevant exclusively to Jewish law as well as issues that concern the general community.

In analyzing the ethics of gender selection from a halachic standpoint, the foremost issue to address is the mitzvah of *P'ru Ur'vu*, the positive commandment to bear children.¹² As the *Shulchan Aruch, Even HaEzer* 1:5, clearly states, one is not in fulfillment of this mitzvah until one bears a son and a daughter. Suppose a couple bore numerous progeny, all of the same gender. The couple now desires to bear a child of the opposite sex in order to fulfill the mitzvah of *P'ru Ur'vu*, knowing that their ability to fulfill the obligation in the natural manner is questionable, if not unlikely. Is the use of modern day gender selection techniques for this purpose permitted, prohibited or

amount of embryos desired for implantation by 46%. As noted above, the cost for this combined procedure is \$15,845.

11. Zitner, loc. cit.

12. It should be noted that women are not obligated in the mitzvah of *P'ru Ur'vu*; see *Shulchan Aruch, Even HaEzer* 1:13. However, *Teshuvot HaRan* no. 32 notes that while women are not obligated in the mitzvah, they are certainly in fulfillment of the mitzvah should they choose to perform the mitzvah.

obligatory?

One must then address the use of gender selection for non-medical and non-mitzvah purposes. There are numerous halachic questions that arise from these techniques. Does the desire for gender selection warrant use of the methods involved – intrauterine insemination or in-vitro fertilization – to achieve that result? Do the benefits of gender selection outweigh the various risks involved in implementing these procedures? Is there a concern that selection of gender will have a deleterious effect on society, either in the destruction of the one-to-one male / female ratio, or in leading to a trend of selecting even more non-essential features? Is there any violation in tampering with G-d's creation in using these methods?

The Mitzvah of *P'ru Ur'vu*

Any claim that fulfillment of the mitzvah of *P'ru Ur'vu* justifies gender selection presupposes that one is in fulfillment of the mitzvah of *P'ru Ur'vu* using these methods, albeit that the fertilization is accomplished in a non-conventional manner. However, this assumption is by no means universally accepted. The ability to conceive an embryo through non-conventional methods is not a recent phenomenon. The Gemara, *Chagigah* 15a, describes the case of a woman who is impregnated in the bathhouse, *nitabra b'ambati*.¹³ Ostensibly, there were

13. See *Mishneh LaMelech, Hilchot Ishut* 15:4, who cites numerous sources that seem to contradict the idea that a woman can become pregnant in the bathhouse. Rabbeinu Chananel, in his commentary to *Tractate Chagigah* (printed on 16a in the standard Talmud), writes that *nitabra b'ambati* is considered a *ma'aseh nissim*, an act of miracle, and concludes that one who is impregnated through *nitabra b'ambati* does not convey *tumat leidah*, ritual impurity of childbirth. Based on the comments of Rabbeinu Chananel, R. Shlomo Zalman Auerbach, *Minchat Shlomo Tinyana* 124, questions whether a male child conceived

spermatozoa in the bath that entered into the woman's uterus using water as a conduit. *Chelkat M'chokek, Even HaEzer* 1:8, questions whether the contributor of the spermatozoa fulfills the mitzvah of *P'ru Ur'vu* if a woman is impregnated in this manner. He leaves the issue as an open question.

Beit Shmuel, Even HaEzer 1:10, attempts to answer the question based on the comments of Rabbeinu Peretz (cited in *Bach, Yoreh Deah* 195). Rabbeinu Peretz rules that a woman should not sleep on sheets that a man other than her husband has slept on. His concern is that she might become pregnant from the spermatozoa embedded in the sheets and this child may end up marrying a sibling, as it is not known who fathered the child. It is implicit from the comments of Rabbeinu Peretz that the contributor of the spermatozoa is halachically considered the father of the child. *Beit Shmuel* concludes that it would then follow that the contributor is also in fulfillment of the mitzvah of *P'ru Ur'vu*.

Taz, Even HaEzer 1:8, claims that there is no proof from the statement of Rabbeinu Peretz that one fulfills the mitzvah of *P'ru Ur'vu* in the case of *nitabra b'ambati*. While one must be concerned about the paternity of the contributor of the spermatozoa to the extent that the offspring is prohibited from marrying the natural children of the contributor, nevertheless, the paternity is not definitive. The contributor might only be considered the father of the child as a matter of stringency. However, one cannot apply a leniency to claim that the contributor is in fulfillment of the mitzvah of *P'ru Ur'vu*.

It would seem logical to compare *nitabra b'ambati* to the modern

through *nitabra b'ambati* can receive a *brit milah* on Shabbat being that the Gemara, *Shabbat* 135a, states a principle that if a woman gives birth to a child and does not convey *tumat leidah*, the *brit milah* is not performed on Shabbat.

day cases of IUI and IVF. This would call into question the fulfillment of the mitzvah of *P'ru Ur'vu* in cases of IUI and IVF. However, some *Poskim* make a distinction. These *Poskim* claim that the reason why there may be no fulfillment of the mitzvah of *P'ru Ur'vu* in the case of *nitabra b'ambati* is because the contributor did not actively participate in the conception of the child. However, if a man were to contribute spermatozoa for the purposes of producing a child, as is the case in IUI and IVF, the mitzvah would certainly be fulfilled.¹⁴

Rabbi Moshe Feinstein, *Iggerot Moshe, Even HaEzer* 2:18, concurs with this latter reasoning. However, he claims that the notion that one could fulfill the mitzvah of *P'ru Ur'vu* by means of *nitabra b'ambati*, IUI or IVF, is predicated on a questionable assumption; namely, that the nature of the mitzvah of *P'ru Ur'vu* is result oriented. Those who claim that the mitzvah of *P'ru Ur'vu* is result oriented are of the opinion that fulfillment of the mitzvah of *P'ru Ur'vu* is not accomplished by one's actions in producing a boy and a girl, but rather the fulfillment of the mitzvah lies in the fact that one is the parent of one boy and one girl. This perspective of the mitzvah of *P'ru Ur'vu* is espoused by *Minchat Chinuch* 1:14.¹⁵ *Minchat Chinuch* proves this idea from the law that if a person bears children and those children subsequently die without bearing children of their

14. See R. Yehoshua Baumohl, *Teshuvot Emek Halacha* 1:68, R. Yitzchak Weiss, *Minchat Yitzchak* 1:50. See however, R. Eliezer Waldenberg, *Tzitz Eliezer* 3:27:3, who contends that the reason why *nitabra b'ambati* is questionable is not because of the lack of action but because the conception was not achieved in a natural manner. Therefore, there is no distinction between *nitabra b'ambati* and IUI or IVF.

15. R. Yitzchak Blazer, *Pri Yitzchak* no. 42 also concludes that the mitzvah of *P'ru Ur'vu* is result oriented. See also, *Teshuvot Ginzei Yosef* no. 83 who brings numerous proofs to this opinion.

own, there is no longer a fulfillment of the mitzvah.¹⁶ This law is indicative of the fact that the mitzvah is not to bear children, but rather the mitzvah is fulfilled when one is the parent of living children. Therefore, if the children are no longer alive, the fulfillment is nullified.

Rabbi Feinstein himself suggests that the mitzvah of *P'ru Ur'vu* is not result oriented. The *ma'aseh hamitzvah*, the action demanded by the mitzvah, is to perform marital relations. This action itself is the fulfillment of the mitzvah. The requirement that one bear a boy and a girl does not address the fulfillment of the mitzvah, but rather, the time frame of the obligation. The obligation to perform marital relations applies until one has borne a boy and a girl. Once a person has borne a boy and a girl, he is no longer obligated in the mitzvah of *P'ru Ur'vu*. This understanding – that the mitzvah of *P'ru Ur'vu* is action oriented – is espoused by other *Poskim* as well.¹⁷

Assuming that the mitzvah of *P'ru Ur'vu* is action oriented, there is no added fulfillment of the mitzvah of *P'ru Ur'vu* by employing IUI or IVF. Therefore, one who employs PGD or MicroSort as a method of gender selection will not fulfill the mitzvah of *P'ru Ur'vu* any more than one who forgoes these treatments and attempts to bear a boy and a girl in the conventional manner. The mitzvah is fulfilled only through marital relations. At most, one will exempt oneself from the mitzvah of *P'ru Ur'vu*.¹⁸

16. See *Shulchan Aruch, Even HaEzer* 1:6.

17. See R. Tzvi Pesach Frank, *Har Tzvi, He'arot V'Chidushim Al Sefer Minchat Chinuch* no. 1, R. Elchanan Wasserman, *Kuntrus Divrei Sofrim* 3:25.

18. Even if one were to assume that the mitzvah of *P'ru Ur'vu* is result oriented, there are two other factors that must be considered in establishing modern day methods of gender selection as a valid fulfillment of the mitzvah of *P'ru Ur'vu*. Firstly, *Knesset HaGedolah*,

The Extent of One's Obligation

Assuming that the mitzvah of *P'ru Ur'vu* is result oriented, and one can fulfill the mitzvah by means of IUI or IVF, is there an obligation to use these techniques? The Gemara, *Babba Kama* 9b implies that one does not have to spend more than one-third of one's assets in order to purchase a *lulav*. Ra'avad, ad loc., asks: why shouldn't one have to spend his entire fortune in order to fulfill a mitzvah. Ra'avad than answers that due to concern that one might become impoverished by performing a mitzvah, the rabbis did not obligate one to spend a large fortune in order to perform a positive commandment. Furthermore, one is prohibited from spending more than one-fifth of one's assets on any given mitzvah, lest one become impoverished from this expense. Ramo, *Orach Chaim* 656:1, cites the opinion

Even HaEzer, B.Y. 2, suggests that if one's progeny are all of the same gender, and one of those children gives birth to a child of the opposite gender, one is in fulfillment of the mitzvah. Based on this suggestion, one whose children are all of the same gender should not view gender selection as a last resort of fulfilling the mitzvah definitively. Secondly, although it is implicit from the Gemara that the requirement for the mitzvah of *P'ru Ur'vu* is fulfilled upon having one boy and one girl, the Talmud *Yerushalmi*, *Yevamot* 6:6, records that one can also fulfill the requirement by having two boys. This leniency – albeit the minority opinion – is adopted by some Rishonim. See Meiri, *Yevamot* 61b quoting *Gedolei HaDorot*, and *Teshuvot HaRashba* 3:339. See also R. Avraham Borenstein, *Avnei Nezer*, *Even HaEzer* no. 1 who claims that Maharit, whose children were all boys, relied upon this leniency in not remarrying despite the fact that he had no daughters. [See however, *Knессет HaГедолах*, op. cit., who claims that Maharit relied on the fact that he had a granddaughter from one of his sons.] While this leniency does not help for a couple who has borne only females, there are some grounds for leniency for the parents of an all-male family to assume that the mitzvah has been fulfilled, at least vis-à-vis gender selection.

of Ra'avad as normative. Rabbeinu Yerucham, 13:3, adds that while one does not have to spend a large fortune, one should spend one-tenth of one's earnings in order to fulfill a mitzvah. *Magen Avraham* 656:7, cites this opinion as normative.

One can argue that in certain situations there is an obligation to spend the requisite money to perform gender selection in order to fulfill the mitzvah of *P'ru Ur'vu*.¹⁹ Rabbi Shlomo Zalman Auerbach, *Minchat Shlomo*, *Tinyana* 124 (no. 98 in the three-volume edition), already addressed this issue with regards to whether a couple suffering from infertility is required to undergo IUI in order to fulfill the mitzvah of *P'ru Ur'vu*.²⁰ He concludes that even though there is a potential fulfillment of the mitzvah of *P'ru Ur'vu*, one is not obligated to perform tactics (*tachbulot*) in order to perform the mitzvah. However, he does not explain the reason behind his conclusion. Why is one required to spend a significant amount of money to perform the mitzvah of *lulav*, but one is not required to perform tactics in order to fulfill the mitzvah of *P'ru Ur'vu*?

There are numerous reasons why one is not obligated to use these techniques in order to fulfill the mitzvah of *P'ru Ur'vu*. Firstly, there is a dispute whether the mitzvah of *P'ru Ur'vu* is result oriented or action oriented. If the mitzvah is action oriented there is no obligation to undergo IUI. Therefore, the obligation to perform IUI could only stem from the principle

19. The only way to suggest this is to assume that there is a potential fulfillment of the mitzvah of *P'ru Ur'vu*. Additionally, this argument would only be valid in a situation where the couple sees no other means of giving birth to the desired gender. Furthermore, the procedure must be within the financial means of the couple based on the criteria set forth by Ramo and *Magen Avraham*.

20. At the time the article was written, 1958, IUI was the most advanced fertility technique and was the only fertility option for many couples.

of *Safek D'oraita L'Chumra*, in cases of doubt of biblical commandments, one must be stringent. However, this case differs from an ordinary case of *Safek D'oraita L'Chumra*. In the ordinary case, when one follows the stringent approach, one covers all grounds and the doubt no longer exists. In this situation, one cannot cover all grounds, for even if the mitzvah is result oriented, the *Poskim* were still in doubt whether one fulfills the mitzvah through *nitabra b'ambati*.²¹ Therefore, one who undergoes IUI in order to satisfy the opinion that the mitzvah is result oriented, will still be in doubt whether he fulfilled the mitzvah subsequent to the childbirth. Some *Acharonim* ruled that in such a situation the principle of *Safek D'oraita L'Chumra* does not apply.²²

21. It should be noted that the question of whether there is a fulfillment of the mitzvah of *P'ru Ur'vu* through *nitabra b'ambati* and the question of whether the mitzvah of *P'ru Ur'vu* is action oriented or result oriented, are not contingent on each other. *Beit Shmuel* makes this clear in stating that the question of the fulfillment of the mitzvah of *P'ru Ur'vu* through *nitabra b'ambati* is a question of whether the contributor of the sperm is considered the actual father. The assumption of *Beit Shmuel* is that the mitzvah is result oriented, and, nevertheless, the fulfillment is still in question.

22. See *Pri Megadim*, Introduction to the Laws of *Berachot* no. 16. This opinion is also the opinion of R. Chaim Soloveitchik as cited in R. Herschel Schachter "Dikdukim B'Hatalat HaTechelet HaChadasha," in *Tekhelet: The Renaissance of a Mitzvah*, ed. R. A. Cohen (New York, 1996): 33-42. See however, R. Gershon Henoch Leiner *Ein HaTechelet* pp. 170-215, who disputes the opinion of these *Acharonim* and maintains that the principle of *Safek D'oraita L'Chumra* does apply in this situation. Rabbi Schachter sides with the opinion of R. Leiner in his article. See also *Gur Aryeh Yehuda, Teshuvot* 7 and 8 for an analysis of this question.

Nevertheless, even if one assumes that *Safek D'oraita L'Chumra* applies, one can suggest that when the fulfillment of the mitzvah is in doubt, one does not have to spend money for this potential fulfillment. This reasoning is even more applicable to IUI where there

Secondly, one can suggest that one who is unable to bear children is exempt from the mitzvah of *P'ru Ur'vu* altogether based on the principle of *Ones Rachmana Patrei*, the Torah exempted those who are in situations beyond their control. One who does not own a *lulav* and has the wherewithal to purchase a *lulav* is not exempt based on *Ones Rachmana Patrei*. However, a couple suffering from infertility is exempt from the mitzvah of *P'ru Ur'vu* altogether based on the principle of *Ones Rachmana Patrei*. Therefore, one does not have to spend money to undergo IUI and remove himself from the status of *Ones*.²³

Thirdly, one can suggest that while one is required to spend

is not only a doubt as to whether one can halachically fulfill the mitzvah, but there is also a doubt as to whether the IUI will actually result in a viable offspring.

23. This idea can be explained based on the comments of R. Meir Simcha of Dvinsk, *Ohr Same'ach, Hilchot Yesodei HaTorah* 5:6 who explains that one does not invoke the principle of *Ones Rachmana Patrei* in cases where the situation is favorable to the subject under duress. The Talmud *Yerushlami, Pe'ah* 1:1 states that if one cannot afford the cost required to perform the mitzvot, one is exempt. This exemption seems to be based on the principle of *Ones Rachmana Patrei*. One can then suggest that, in principle, one should never be required to spend money to perform a mitzvah, and when the time for the mitzvah arrives and the person doesn't have the item required to perform the mitzvah, he will be exempt based on the principle of *Ones Rachmana Patrei*. However, based on the comments of *Ohr Same'ach*, the claim of *Ones Rachmana Patrei* will not be valid in situations where one can afford the required item. One who can afford to perform the mitzvah and does not make the requisite expenditures is under duress by his own volition. Where the situation is favorable to the subject, *Ones Rachmana Patrei* does not apply. A couple that has difficulty bearing children is not in this situation by their own volition, nor is the situation favorable to this couple. Therefore, *Ones Rachmana Patrei* applies and they are exempt from the mitzvah of *P'ru Ur'vu*.

money in order to perform a mitzvah, one is not obligated to subject oneself to uncomfortable situations in order to perform a mitzvah.²⁴ Since IUI is an invasive procedure, and can cause discomfort to the couple, there is no obligation to undergo such a procedure in order to fulfill the mitzvah of *P'ru Ur'vu*.

Since the benefits of gender selection vis-à-vis the mitzvah of *P'ru Ur'vu* are highly questionable, and the given procedures are not obligatory, the claim of a couple desiring to undergo these procedures for mitzvah purposes is not much greater than the claim of a couple desiring to undergo these procedures for non-medical, non-mitzvah purposes. Therefore, the remainder of this article will address the permissibility of gender selection for elective purposes, equating those who have mitzvah intentions with those with non-mitzvah intentions.

The Permissibility of IUI and IVF for Gender Selection

The first issue that must be addressed is the permissibility of IUI and IVF. When these technologies were popularized, many responsa were written on the subject. The primary issue that was addressed was the issue of *hashchatat zeraḥ*, wasting of "seed." In order to collect sperm cells from the male contributor, the sperm must be emitted in a manner normally prohibited

24. See *Teshuvot Binyan Shlomo* no. 47, who suggests that subjecting oneself to discomfort is tantamount to spending more than one-fifth of one's assets, and one would not be obligated to subject oneself to discomfort in order to perform a mitzvah. See also *Teshuvot Chazon Ovadia, Hilchot Pesach*, no. 33, who quotes opposing viewpoints on the matter and concludes in accordance with the suggestion of *Teshuvot Binyan Shlomo*. It should be noted that *Chaye Adam, Nishmat Adam* 68:3, suggests that one does not have to travel to another city in order to perform a mitzvah. This might be relevant to a situation where the desired assisted reproductive procedures are not available in the city in which the couple resides.

on the grounds of *hashchatat zerah*. Many *Poskim* permit IUI on the basis that emission of sperm for the purpose of producing a child does not constitute violation of the prohibition of *hashchatat zerah*.²⁵ Others prohibited IUI on the basis that it constitutes *hashchatat zerah*.²⁶ With regards to IVF, R. Ovadia Yosef, *Yabia Omer*, *Even HaEzer* 8:21, equates the permissibility of IVF to the permissibility of IUI. However, R. Eliezer Waldenberg, *Tzitz Eliezer* 15:45, rules that while IUI is permitted, IVF is not.²⁷

For the purposes of this discussion one must address the issue whether the permissibility of IUI and IVF is limited to those who have difficulty bearing children, or if there is a *carte blanche* leniency to perform these procedures as there is no violation of *hashchatat zerah*. Many *Poskim* clearly rule that the permissibility of IUI is limited to those who have difficulty bearing children.²⁸ According to these *Poskim*, it would be prohibited to perform current methods of gender selection, as the permissibility of IUI and IVF does not extend to those who don't suffer from infertility and use these procedures for elective purposes.

Furthermore, implementation of PGD may entail a form of *hashchatat zerah* not apparent in standard implementation of

25. R. Shalom Schwadron, *Teshuvot Mahersham* 3:268, R. Aharon Walkin, *Z'kan Aharon* 2:97, R. Moshe Feinstein, *Iggerot Moshe*, *Even HaEzer* 1:7, R. Shlomo Z. Auerbach, *Minchat Shlomo*, *Tinyana* 124, R. Ovadia Yosef, *Yabia Omer*, *Even HaEzer* 2:1. See *Otzar HaPoskim* 23:17, for a comprehensive list of those who are lenient on the matter.

26. R. Malkiel Tannenbaum, *Divrei Malkiel* 4:107, R. Ben-Tzion Uziel, *Mishpitei Uziel*, *Even HaEzer* 1:19,

27. See R. Avigdor Nebenzahl "Hafraya B'Mivchana – He'arot," *Assia* 34 (1982): 5, for a rejoinder to *Tzitz Eliezer*'s responsum.

28. Mahersham loc. cit., *Yabia Omer*, loc. cit., R. Eliezer Waldenberg, *Tzitz Eliezer* 9:51 (4), R. Yitzchak Weiss, *Minchat Yitzchak* 1:50.

IVF. There are *Poskim* who have ruled that destruction of a viable embryo is a violation of *hashchatat zeraḥ*.²⁹ R. J. David Bleich asserts that according to those who consider destruction of an embryo as a violation of *hashchatat zeraḥ*, there is no difference whether the embryo is destroyed in-utero or ex-utero.³⁰ A standard IVF procedure generally entails the creation of more embryos than the amount required for the implementation.³¹ The remaining embryos are frozen, and used if the first implantation fails, or for a future pregnancy. Being that each embryo serves to produce a child – either in the form of the actual child, or as a backup – there would be no violation of *hashchatat zeraḥ* even if the embryos are never used. However, a couple who has no history of infertility, and is only attempting IVF for the purposes of gender selection, has no intent of using the embryos of the undesired gender for any purpose. Therefore, one will inevitably create embryos – the embryos of the undesired gender – that have no chance of ever being implanted. This might constitute *hashchatat zeraḥ*.³²

29. R. Isser Yehuda Unterman, "B'inyan Pikuach Nefesh Shel Ubar," *Noam* 6 (1963): 1-11, R. Aharon Vider, "Hapala B'toch Arba'im Yom," *B'Shvilei HaRefuah* 8 (1979): 42-49.

30. R. J. David Bleich, "Survey of Recent Halakhic Periodic Literature: Stem Cell Research," *Tradition* 36 (2002): 72. See however, R. Chaim Dovid HaLevi "Al Dilul Ubarim," *Assia* 47-48 (1990): 14-18, who maintains that there is no prohibition in destroying embryos prior to implantation. See also, R. Moshe Shternbuch, "Tinok Mivchana," *B'Shvilei HaRefuah* 8 (1987): 29-41.

31. A. McLaren "Supernumerary Embryos: Some Social Issues," *In Vitro fertilisation in the 1990s: Towards a Medical, Social and Ethical Evaluation*, eds. E. Hildt and D. Meith (England, 1998): 217-220.

32. It should be noted that if this logic is correct, one who performs PGD for medical purposes would also be in violation of *hashchatat zeraḥ*. However, there is room to differentiate between elective gender selection and PGD performed for medical purposes. Firstly, R. Shlomo Zalman Auerbach (cited in *Nishmat Avraham* Vol. III pg. 70), rules

Risk

The next issue that must be addressed is the issue of risk. Use of IUI and IVF produce a higher rate of multiple pregnancies.³³ Multiple pregnancies pose a risk to the mother³⁴

that there is more room for leniency regarding the prohibition of *hashchatat zeraḥ* in cases where the intention is to prevent the birth of a child with serious disabilities. See however, *Iggerot Moshe, Even HaEzer* 1:62, who writes that there are no grounds for leniency if the motive is to prevent the birth of a child with disabilities. Secondly, R. Yair Bachrach, *Teshuvot Chavot Yair* no. 131, suggests that there are grounds for leniency with regards to aborting a fetus with a gestational age of less than forty days. This mitigating factor has been cited by R. Chaim Ozer Grodzenski, *Achiezer* 3:65, and R. Eliezer Waldenberg, *Tzitz Eliezer* 7:48:1. Furthermore, R. Chaim Dovid HaLevi, op. cit., rules that the prohibition of destroying an embryo is only in-utero, not ex-utero. The combination of these mitigating factors might constitute sufficient grounds for leniency in allowing PGD for medical reasons, especially considering the fact that by definition the case is a *she'at had'chak*, a pressing situation. However, in dealing with gender selection done for non-medical reasons, there is no pressing need to rely on lenient opinions, and perhaps one should follow the stringent opinions.

33. See Egbert R te Velde and Bernard J Cohen, "The Management of Infertility," *New England Journal of Medicine* 340 (1999): 224-227. It should be noted that the higher incidence of multiple pregnancies is due to ovarian stimulation (IUI) or multiple embryo implantations (IVF) in order to increase the success rates of the procedure. A couple undergoing IUI or IVF has the option to attempt these procedures without the increased risk of multiple pregnancies that will result in much lower success rates and invariably increase the cost for the procedure.

34. A Conde-Agudelo et al., "Maternal Morbidity and Mortality Associated With Multiple Gestations," *Obstetrics and Gynecology* 95 (2000): 899-904. These risks include: preeclampsia, postpartum hemorrhage, puerperal infection, anemia, urinary tract infection and caesarian delivery.

as well as the fetuses.³⁵ While these risks are not deterrents for those who are unable to conceive naturally, they should be factored in when dealing with risks posed for elective procedures. The risk-benefit ratio is greater in elective procedures than in infertility procedures due to lower value of the benefit in elective gender selection compared to the benefit of treating infertility. In fact, physicians warn of a general trend of premature diagnosis of infertility that ultimately leads to unnecessary risks in the administration of assisted reproductive technologies.³⁶

Additionally, each method entails its own unique risks. The MicroSort method is still in its early stages of experimentation. There are various unknown risks in partaking in treatments that have undergone only preliminary testing. The PGD method in employing IVF requires the harvesting of ova from the mother using laparoscopic surgery. This procedure entails various risks including infection, bleeding and ovarian hyperstimulation syndrome.³⁷

One might argue that although the Torah prohibits self-

35. M. Dhont et al., "Perinatal Outcome of Pregnancies After Assisted Reproduction: A Case-Control Study," *Journal of Assisted Reproduction and Genetics* 14 (1997): 575-580.

36. R te Velde and Cohlen, loc. cit.

37. Anonymous, "Eggs Shared, Given and Sold," *The Lancet* 362 (2003): 413. It should be noted that this procedure may also entail a violation of *chavala*, unnecessary infliction of wounds. Rambam, *Hilchot Chovel Umazik* 5:1, writes that one who inflicts a wound on himself or on others in a derogatory manner is in violation of the prohibition of *chavala*. R. Moshe Feinstein, *Iggerot Moshe, Choshen Mishpat* 2:66, concludes that a wound that has a medical or direct tangible benefit to the recipient of the wound is permitted. Otherwise, the prohibition of *chavala* applies. While treatment of infertility might constitute a medical or tangible benefit, it is much more difficult to make this case for elective gender selection.

endangerment,³⁸ it is nevertheless permitted to place oneself in situations of risk that the general population does not avoid. This is based on the principle of *Shomer P'taim Hashem*, G-d watches over the simpleton.³⁹ Being that couples that experience infertility undergo these procedures routinely and are not hampered by the associated risks, it should likewise be permitted for anyone to undergo these procedures based on this principle.

However this argument is questionable. The Talmud only applies this principle to cases where there is a necessity to allow for risk. These cases include health⁴⁰ or mitzvah purposes.⁴¹ However, this principle is never applied to assuming risks for elective purposes.⁴² Being that gender selection is done

38. The Gemara, *Berachot* 32b, seems to imply that self-endangerment is a violation of the verses *hishamer l'cha ush'mor nafshecha me'od*, guard yourself and greatly guard your soul (*Devarim* 4:9), and *v'nishmartem me'od l'nafshoteichem*, you shall greatly guard your soul (*Devarim* 4:15). See however, Maharsha, *Berachot* ad loc. who opines that the prohibition of self-endangerment is only rabbinic in nature. See R. Dov Ettinger, *Pe'er Tachat Efer*, pp. 57-92, for a lengthy discussion of this topic.

39. *Tehillim* 116:6.

40. *Shabbat* 129b.

41. *Yevamot* 72a. R. Yechezkel Landau *Noda B'Yehuda*, *Yoreh Deah* 2:10 notes that one is allowed to assume a greater risk than normal for one's own livelihood. This ruling is based on the comments of the Gemara, *Baba Metzia* 112a.

42. See R. Ovadia Yosef, *Yabia Omer*, *Yoreh Deah* 3:7 (3) who cites various *Acharonim* that *Shomer P'taim Hashem* only applies to cases of mitzvah or cases of *tzorech*, need. See also, *Noda B'Yehuda*, *ibid*, who prohibits taking unnecessary risks for "elective" purposes. Perhaps the reason behind this opinion is that the principle of *Shomer P'taim Hashem* might be limited to defining the normalcy of a person's risk assessment of a situation where the risk is otherwise undefined. If the situation is obviously dangerous, the situation is considered an absolute risk even to those who are not concerned, as those who are

for elective purposes, perhaps the prohibition of self-endangerment would preclude one from assuming these risks.

Ethical Considerations

There is an additional concern that gender selection might lead to trends that can have serious detrimental effects on the Jewish community. Suppose gender selection became popular and inexpensive. If a significant percentage of couples select one gender over the other, the one-to-one male to female ratio would be skewed. This problem would be compounded in the Orthodox Jewish community, as the subset of people one may marry, or are willing to marry, is relatively small compared to the general population. Throwing off the male to female ratio by even one percent (51:49) would guarantee that two percent of the males won't be able to marry.

A study done in Germany shows that there is no concern about altering the male to female ratio. Majority of the respondents said that they were not interested in undergoing these procedures even at no cost. Additionally, the respondents chose males and females at very similar frequencies.⁴³

not concerned are beyond the pale of normalcy, (*batla da'atam*). If the situation is obviously not dangerous, even those who are concerned of some remote danger may not violate Torah law in order to alleviate this remote danger, as they too are beyond the pale of normalcy. However, if the risk is not absolutely defined, the risk assessment is left to the individual to decide. If the individual is concerned about the risk he may treat the situation as *safek sakana*, questionable danger, and violate Torah prohibitions to alleviate the danger. His assessment would be considered normal. A person who is not concerned may treat the situation as non-dangerous as the principle of *Shomer P'taim Hashem* allows one to assess the situation as non-dangerous. This explanation is based on the analysis of the principle of *Shomer P'taim Hashem* by R. Herschel Schachter, *B'Ikvei HaTzon* no. 34.

43. E. Dahl et al., "Preconception Sex Selection for Non-Medical Reasons: A Representative Survey from Germany," *Human*

Nevertheless, it is difficult to rely on such a survey to assure that the ratio will remain unadulterated. The primary concern is that of a trend that certainly cannot be predicted by a survey done prior to the popularization of the trend. Moreover, the values of the average German differ greatly from that of the average American, and certainly that of an Orthodox Jew. Therefore, *Poskim* will also consider the possible societal outcome in ruling on gender selection.

Additionally, there is a concern that use of PGD for gender selection may lead to selection of other genetic features, such as intellect, athletic ability, or anything else mapped on the human genome. While some ethicists encourage PGD to select embryos that are "higher valued" than others,⁴⁴ other ethicists feel that selection of non-medical genetic features is unethical.⁴⁵ The concern that allowance of gender selection may lead to selection of other features does not deter some ethicists from gender selection.⁴⁶ Other ethicists proscribe gender selection basing themselves on this concern.⁴⁷

It seems that the concern that gender selection for non-medical purposes may lead to selection of other features using PGD is not to be taken lightly. A trend that leads to people forgoing natural means of reproduction for "designer babies" can have damaging effects on society, as depicted in Huxley's *Brave New World*. The Jewish community has to take responsibility on

Reproduction 18 (2003): 2231-2234.

44. Julian Savulescu "Procreative Beneficence: Why We Should Select The Best Children," *Bioethics* 15 (2001): 413-426.

45. See J. Robertson "Extending Preimplantation Genetic Diagnosis: Medical and Non-Medical Uses," *Journal of Medical Ethics* 29 (2003): 213-216.

46. *Ibid.*

47. See Jerome Groopman, "Designing Babies," *Wall Street Journal*, March 4, 2002: A14.

this matter, not only as a means of protecting its own community, but also in serving as a light unto the nations on matters of morality.

Nevertheless, the concern that gender selection may lead to the selection of other features is not as strong in the Orthodox Jewish community as it is in the general population because *Poskim* have the authority to permit or prohibit these practices on a case-by-case basis. In the general community, once a certain trend commences, it is extremely difficult to control it.

The question of whether there is a prohibition to tamper with G-d's creation has been discussed in the context of IVF.⁴⁸ Those who permit IVF don't seem to be concerned with this issue. However, gender selection for non-medical purposes may in fact entail a prohibition of tampering with G-d's creation. R. Moshe Feinstein, *Iggerot Moshe, Orach Chaim* 3:90, writes that there might be a prohibition of using medical treatments for non-medicinal purposes. The license for a physician to practice medicine is only for the purpose of healing, and if this is misused, it might entail violation of tampering with the decrees of G-d's. Based on this ruling, it would be prohibited to use IUI and IVF for non-medical purposes.

Conclusion

The ethical debate surrounding gender selection differs greatly between the general community and the Jewish community in that the mitzvah of *P'ru Ur'vu* plays a central role in the discussion. However, before a *Posek* can allow gender selection, he must weigh the highly questionable benefit of the mitzvah of *P'ru Ur'vu* against the potential prohibitions of *hashchatat*

48. See "Hafraya Chutz Gufit," in *Encyclopedia Hilchitit Refu'it*, ed. A. Steinberg, II, (Jerusalem, 1991): 124-128, for a lengthy discussion of this topic.

zeraḥ, self-endangerment, deleterious effects on the community, and the potential contradiction of Jewish values. It is difficult to give definitive guidelines on the matter as every case has nuances that might affect the ruling of the *Posek*.⁴⁹ Every question has to be handled on a case-by-case basis. If the issue remains in the hands of the *Poskim* – who can control and prevent the deleterious effects – these procedures can provide a benefit to those who really are in need, without providing a detriment to the Jewish community at large.

49. See T. Traubman and H. Shadmi, "Couple Allowed to Choose Baby's Gender to Avoid Halakhic Dilemma," *Haaretz* Oct. 18, 2002, who report of a case of a couple, of whom the husband was a Cohen, who suffered from male infertility. In order for the wife to bear a child, it was necessary for her to receive sperm from an outside donor. Being that the child would not be considered a Cohen, the couple desired to have a girl in order to avoid embarrassment. This case is one in which gender selection is used for non-medical purposes, yet there is a consideration that doesn't exist in ordinary non-medical gender selection. This case illustrates the importance of dealing with each situation on a case-by-case basis, while factoring in all of the issues.

Additionally, there can be cases where the couple has to undergo IVF to treat infertility and desires to select the gender of the child using PGD. Moreover, a couple may choose to use PGD to prevent non-gender-based genetic diseases, and would like to select the gender of the child while undergoing these procedures. In these situations, some of the issues no longer apply. This further illustrates the need to deal with every situation individually.

Cosmetic Surgery in Halacha

Dan Geisler

In the last quarter century cosmetic surgery has become extremely popular in the United States.¹ Advances on all fronts of cosmetic surgery have made procedures more accessible and less invasive.² With the rapid advancement in this area of medicine and the likelihood that its prevalence will only increase, it is worth investigating the halachic perspective with regards to plastic surgery and its permissibility.³

The Source For Practicing Medicine And Surgery

The Gemara in Baba Kama,⁴ expounding on a passage in Mishpatim states "Verapoh Yerapheh- mekan sheneetna

1. According to the American Society of Plastic Surgeons (ASPS), 6.6 million people had cosmetic surgery in 2002. All ASPS statistics can be accessed online at www.plasticsurgery.org
2. More than 4.9 million people had non-surgical cosmetic procedures in 2002-ASPS.
3. Although cosmetic surgeries declined slightly in 2002, reconstructive plastic surgery increased-ASPS, online.
4. 85a. Another possible source for the practice of medicine may suggest an obligation to heal, as opposed to simply giving permission to a doctor to practice. The Gemara in Sanhedrin 73a quotes the obligation to return a lost object to its owner and assumes that if a person is obligated to return property, certainly he is obligated to return a person's health. This is quoted by the Ran in Nedarim, 41b.

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reshut larofeh lerapote", "And he shall certainly be healed – this is the biblical source that gives permission for the doctor to heal." Why is a biblical source needed to render medicine permissible, what is the original prohibition? Rashi and Tosafot in **Baba Kama** both agree that the need to permit the practice of medicine is because one might think that we should not attempt to cure a disease brought on by G-d, as this may be seen as contradicting His will that the afflicted person be sick.⁵ Ramban adds another reason, explaining that the Torah wants to encourage the practice of medicine so that doctors should not refrain from treating patients out of a concern that their actions might inadvertently increase the patient's suffering.⁶ These understandings would apply to all forms of practicing medicine, even those considered non-invasive. A third explanation can be suggested – though it is limited to surgical intervention. Perhaps in reality surgery is a violation of the biblical prohibition of **chovel**, or physically injuring another Jew.⁷ Since it would therefore be prohibited to operate, the Torah had to grant a special dispensation to a doctor who has made a **chavala** (injury) in the course of healing.

The approach of Rashi and Tosafot do relate to the question of surgery as well, especially when the procedure is elective. **Tzitz Eliezer** in his responsa was asked about the permissibility of a person undergoing cosmetic surgery.⁸ He concluded that

5. S.v. **sheneetna**.

6. **Torat Haadam**, also quoted by **Tur**, **siman 348**.

7. The issur of **chovel** is learned from the passage "Lo yoseef lehacoto", literally you shall not continue to strike him. (**Devarim**, 25:3) This passage is an injunction against continuing to lash a criminal beyond the mandated limit of 39. This is the source quoted by the **Rambam** (**perek 5 of Hilchot Chovel Umazeek**) as well as by the **Chinuch** (**mitzvah 595**).

8. **Cheilek 11, siman 41**.

it was not permissible since it involves a person changing what is essentially his G-d-given appearance. Since this is not for the sake of healing a malady, the Torah's allowance does not apply and the original concern of Rashi and Tosafot once again become valid.

Despite the stringent opinion of the *Tzitz Eliezer*, we may well be able to differentiate between various motivations for cosmetic surgeries. Elective surgery to enhance appearance seems to be prohibited according to this approach. Surgery undertaken to correct an injury or as a remedy to an acquired disfigurement, such as breast reconstruction after lumpectomy or mastectomy may still be permitted. Rav Shlomo Zalman Auerbach dealt with this question in his responsa. He was asked about the permissibility of having plastic surgery to repair an injury, and he ruled that cosmetic surgery to correct this disfigurement is permitted.⁹

The Prohibition Of Chovel

The opinions of Rashi and Tosafot leave little room for the possibility that elective surgery is permitted. The issue of *chovel*, on the other hand, may leave more room for leniency. First we must address the basic question of what exactly is the prohibition of *chovel*, and where does it apply? The *Rishonim* argue as to when this prohibition has been violated. The Gemara in *Ketubot* assumes that the making of a *chavala* is considered prohibited on *Shabbat*.¹⁰ Into what category of *melacha* does the prohibition fall? Rashi assumes that *chovel* is considered a form of *tzoveah*, or coloring.¹¹ Tosafot hold that since the soul is represented in the blood, extracting blood is a violation of

9. *Siman 86:3.*

10. *6a.*

11. *Shabbat 107a s.v. vehachovel.*

the prohibition of **netilatnishama**, or killing.¹² Rambam believes that **chovel** is not permitted on Shabbat because it violates the proscribed action of **dosh**, removing liquid from solid.¹³ Perhaps the greatest distinction among these opinions is the question of what constitutes a **chavala**. According to Tosafot and Rambam, in order to be considered a **chavala**, blood must be shed. Rashi, on the other hand, explicitly considers even a bruise to be a form of **tzoveah**, since the skin does change color.¹⁴

Classification Of Procedures

This difference may prove critical as we examine various forms of cosmetic surgeries. Many cosmetic surgeries can be generally classified as either selected corrections or complete reconstruction. Selected corrections are best represented by rhinoplasty, the classic "nose job". These can require only a small incision. Complete reconstruction may involve auto-grafts (grafts from one part of an individual to another part of the same individual) where cartilage is removed from the ear lobe or rib and used in the reconstruction (other procedures may require soft tissue grafts from other regions, and an ever-increasing number of operations now involve the use of synthetic grafts). Many reconstructions involve multiple incisions that are often deep, and selected corrections also require at least superficial incisions. It is these types of procedures, where blood is withdrawn and bruising ensues, that poskim refer to as being violations of **chovel**. In addition to these, however, other forms of cosmetic "surgery" include more cutting-edge medical breakthroughs which are less invasive. Rashi's more stringent opinion regarding what

12. *Ketubot* 5b s.v. *dam*.

13. *Hilchot Shabbat* 8:7,8.

14. *Ibid.*

constitutes a **chavala** would leave any procedure that even leaves a bruise as halachically problematic.

An example of these less radical procedures are Botox injections.¹⁵ Botox is a diluted form of the Botulism toxin produced by certain bacteria that have a paralyzing effect on skeletal muscles. When injected into the muscles of the face, the toxin causes a paralysis of these muscles, smoothing out wrinkles and resulting in a youthful appearance. Whether injecting Botox is permissible directly relates to the definition of **chavala** discussed above. Botox is administered by subcutaneous injection, and the question of whether injection constitutes a forbidden **chavala** has long been a discussion among poskim for its relevance to the laws of Shabbat and the halacha of **chovel beaviv ve'emo** (wounding one's father and mother), both of which are punishable by death. The **sefer Gesher Hachaim**, discusses the opinions of Rav Shlomo Zalman Auerbach and Rav Tzvi Pesach Frank regarding the question of whether a child may give injections to his parents, or whether this constitutes a prohibited **chavala**.¹⁶ Rav Auerbach suggests that this is not a **chavala**, while Rav Frank rules that it is.

Another opinion is that of Rav Yechezkel Abramsky, quoted in **Shmirat Shabbat Kehilchita**, who also permitted giving non-IV injections (subcutaneous included) on Shabbat since they do not constitute **chavala**.¹⁷ This opinion would appear to be in line with that of Rambam, that the prohibition of **chovel** is transgressed only if blood is removed from circulation. It seems then, at least according to those who would forbid reconstructive surgery based on the prohibition of **chavala**,

15. Botox was the most popular plastic surgery procedure in 2002 with more than 1.1 million injections performed – ASPS, online.

16. *Cheilek 2, perek 1, teshuva 2 and 3.*

17. **Perek 32, siman 58**, footnote 151.

Botox would be permissible according to many poskim.

Cosmetic Surgery As Treatment

It is clear that the majority of classic cosmetic surgeries are indeed violations of the prohibition of *chovel*. The question then becomes: does the Torah's lifting of the ban on *chavala* in cases of medical necessity apply here? *Chelkat Yaakov* writes that despite the fact that the cosmetic surgery patient is not clinically ill and that the surgery is an elective one from a medical perspective, if the patient's appearance is debilitating psychologically, the operation is considered a medical necessity.¹⁸ The ruling of the *Chelkat Yaakov* assumes that halacha equates psychological illness with actual somatic illness, and that the biblical leniency of prohibitions in cases of medical need applies to psychological illness as well. This assertion requires exploration.¹⁹ There is a disagreement among the

18. *Chelkat Yaakov* 3:11.

19. If a psychological disease is actually of physical danger, then this falls under the rubric of *pikuach nefesh*, or mortal jeopardy, and almost all things are permitted. Paradoxically, this leniency can be seen from a Gemara in *Sanhedrin* 75a which at first glance presents a stringent opinion. The Gemara presents the case of a man who becomes so sexually obsessed with a particular woman that he actually shows somatic symptoms. In this case the patient's physical health is in jeopardy from a psychological stress, as is clear from *Rashi* *ibid* (s.v. *heeleh leebo*) who clearly identifies this as an emotional disorder (*timtum halev*). The Gemara is stringent despite the danger involved and forbids the man from speaking with the object of his obsession even from behind a fence. The *Ran* in *Pesachim* 25a explains this stringency by asserting that even this seemingly benign act, due to its sexual nature, falls under the rule of *yehareg ve'al yaavor*, that is to say that the general rule that one may transgress a prohibition to save a life does not apply here. If the prohibition that must be transgressed to cure the patient's suffering is not sexual in nature, we would be lenient and would permit the patient to transgress it.

classical biblical commentaries regarding the exegesis of the passage that permits medical treatment. Ibn Ezra writes that the allowance for doctors to practice medicine applies only to external illness "that can be seen", but internal medical conditions are not permitted to be treated.²⁰ I would suggest that with the advent of modern-day radiology and widespread laboratory evaluation of otherwise imperceptible internal medicine diseases, even internal medicine maladies can be considered to be "seen", and their treatment permitted. Psychological illness, however, as of this writing cannot be verified by any established radiological or laboratory screening, and would not be viewed halachically in the same context as physical disease.²¹ Conversely, Rabbi J. David Bleich, in his discussion of plastic surgery, quotes a Tosafot in **Shabbat** that writes that the psychological stress known clinically as agoraphobia, or a fear of public places, does amount to the halachic definition of pain, equivalent to physical pain.²² Rabbi

This issue is very pertinent to our discussion. There are many recognized psychological diseases that have physical components, and present a risk to the patient's health. The Diagnostic and Statistical Manual of Mental Disorders 4th Edition, the official diagnostic nomenclature of the American Psychological Association, recognizes Anorexia and Bulimia Nervosa as well as Body Dysmorphic Disorder as psychological disorders despite the fact that they often have severe physical manifestations. These specific examples are especially relevant to our topic since they deal with body image. Often those who subject themselves to plastic surgery do have some problems with body image.

20. *Shemot*, 21:19.

21. See *Nishmat Avraham*, siman 336, who quotes Kraitee Uplaitee who confirms this view of Ibn Ezra. *Nishmat Avraham*, however, rejects this reasoning and holds that all forms of medicine are permitted.

22. See *Judaism and Healing*, J. David Bleich, KTAV Publishing 2002, page 160. The Tosafot quoted can be found in **Shabbat** 50b,

Bleich extrapolates from this Tosafot that psychological pain amounts to actual pain, and may be treated.

Is Surgery A Proscribed Chavala?

While Chelkat Yaakov permits cosmetic surgery only as treatment for psychological illness, Rav Moshe Feinstein in his responsa offers a more broad approach.²³ Rav Feinstein was asked about a woman who was having difficulty getting married, and believed that cosmetic surgery to alter her appearance would improve her chances of finding a mate. Rav Feinstein allows her to have the procedure based on the Rambam's approach to **chavala**. The Rambam writes that only those **chavalot** that are done for vengeance (or according to a different variation, those done for the disgrace of another), such as punching someone, are forbidden.²⁴ Perhaps we can understand this to mean that it is part of the definition of **chavala** to be destructive. Consider the fact that on Shabbat all types of **melacha** are permitted if they are done in a destructive fashion (**mekalkel**) – with two notable exceptions, **chovel**, wounding, and **maveer**, starting a fire. This is understandable when we consider the destructive nature of **chovel** as part of its definition. If, however, a **chavala** would be constructive, such as with plastic surgery, it would not satisfy the definition of **chavala** and might be permissible, both on Shabbat and as an operation.²⁵

where Tosafot claim that the “**tzar**”, or pain of being too ashamed to go out in public is as great a **tzar** as any other.

23. *Choshen Mishpat*, II, siman 66.

24. Rambam, *Hilchot Chovel Umazek*, 5:1.

25. Rambam, *Chovel Umazeek*, 4:8, gives a different explanation why **chovel** is forbidden on Shabbat although it may seem destructive. He understands that being violent can have a cathartic quality and releases anger. This is considered constructive since one can remove

Having established that elective cosmetic surgery may violate the prohibition of **chovel**, we must still clarify to whom this prohibition applies. If a patient goes to a Jewish doctor for elective surgery, does the prohibition of making a **chavala** relate to the doctor as well as to the patient? What considerations must a surgeon make when deciding if an operation is permissible? In this context, we should consider the Gemara which questions whether as is the prohibition of **chovel** applies when a person injures himself, the case of our patient.²⁶ The Gemara quotes a dispute among two **Taaniam** regarding this issue. Rav Eliezar Hak'far learns that it is forbidden for someone to injure himself from the fact that a **nazir** is called a sinner. What sin did the **nazir** commit? The Gemara says that the **nazir** has caused himself pain since he refrained from drinking wine. If someone who causes himself such a mild discomfort is called a sinner, then certainly someone who injures himself physically falls into that category. Despite this, even R. Eliezer does not subject someone who has injured himself to any kind of punishment. In accordance with this opinion, Rambam rules that in fact it is prohibited for people to injure themselves.²⁷

Does this prohibition also apply to the doctor performing

his angst and return to a more serene mindset.

26. **Baba Kama** 91b.

27. **Hilchot Chovel Umazeek**, 5:1. Rav Joseph Dov Soleveichik, quoted in **Mesora** volume 2, questions this, based on the Rambam text brought above by Rav Moshe Feinstein, namely that only those **chavalot** made out of vengeance are proscribed. If one injures himself, upon whom is he taking vengeance? The Rav left this question unanswered. It is possible that the Rav assumed that injuring oneself is part of the Torah prohibition of **chovel** and is subject to that definition. The **Lechem Mishneh** in **Hilchot De'ot** 4:1, however, posits that injuring oneself is only a rabbinic prohibition. We may suggest that since it is rabbinic in nature, this **issur** does not require all of the specific details that the Torah prohibition of **chovel** requires.

the operation? Rashi assumes from the Gemara above that although injuring oneself is not a punishable offence, another person wounding someone who subjects himself to that damage will be liable.²⁸ A doctor, therefore, who performs an operation on a person who is willing to acquiesce to the procedure, will still be violating the prohibition of **chovel**.

This question of whether people can annul the ban on injuring by subjecting themselves to harm takes on heightened importance in the realm of the prohibition of injuring one's parents. Does forgiveness on the part of a parent negate the prohibition of **chovel beaviv veemo** and the subsequent death penalty? It would appear from the above Rashi that it would not. This is the understanding of the Netziv, who assumes simply, from the fact that people are not allowed to injure themselves, that forgiveness is not relevant for the proscription of **chovel**, since injuring yourself suggests a degree of forgiveness.²⁹ The **Minchat Chinuch**, however, asserts that if another person, including a parent, overlooks the prohibition of **chovel**, then absolutely no prohibition applies.³⁰ **Minchat Chinuch** relies mostly upon the **Rambam** mentioned above, that only a wound inflicted in vengeance is considered a prohibited **chavala**. If the person willingly subjects himself to the injury, then this would be permitted. These opinions would be applicable to the question of plastic surgery, as well, since

28. **Baba Kama** 91b, s.v. **ella**. See **Baba Kama** 93a, where the Gemara deals with a similar question regarding payment. The Gemara seems to conclude that for a simple **chavala** that does not involve amputation, "Shimon can" injure "Reuven" if "Reuven" consents. See **Tosafot Baba Kamma** 91a, that for an amputation a person would get lashes because he transgresses the prohibition of debranching a viable tree.

29. **Ha'amek S'he'eilah** 60, *siman* 14.

30. **Mitzvah** 48, *siman* 3.

there the violation of *chovel* is less severe and does not carry the death penalty.

Sakkana

A final issue to consider is that of *sakkana*, or the dangers inherent in surgery. Even the most benign operations carry with them a degree of risk. This is also the case with cosmetic surgery. One study of 400,000 procedures performed showed the rate of adverse outcomes to be less than half of 1%. Rate of mortality was only 5 in 7000 operations.³¹ The question then becomes whether a person is permitted to place himself in a situation of even this low risk. Generally we would rely on the concept of *rov* (majority) to decide the issue. Since a majority of surgical cases survive without adverse effects, the procedure should be permissible. However, since this is a question of *pikuach nefesh*, literally mortal jeopardy, the talmudic principle of *ein holchin bepekuach nefesh achar harov* would apply (where a person's life is at stake, we do not rely on mere majorities as halachic deciders).³² Accordingly, Rav Wosner in his responsa held that cosmetic surgery was an impermissible endangering of a person's life.³³ Yet, Rav Shlomo Zalman Auerbach in his responsa assumed without question that plastic surgery is permitted despite the risks involved.³⁴ To understand this, it would be beneficial to further investigate the issue of *sakkana* as it relates to our topic.

In the first perek of *Chulin*, the Gemara states that in the realm of *safek*, "chamura sakkana me'esura" – one must be

31. ASPS, online.

32. See the Gemara in *Yoma* 85.

33. *Cheilek* 6, *siman* 198. This is also the reason the *Minchat Yitzchak* considers prohibiting plastic surgery.

34. *Cheilek* 2, *siman* 34, s.k. 33.

more stringent regarding **safeik sakkana**, or questions of safety, than **safeik issur**, questions of legality. Yet, despite this, there are cases where we are more lenient with regards to **sakkana**. An example of this is pregnancy. Tosafot in **Ketubot** write that all pregnancies are considered **sakkana**.³⁵ The obvious question is how then do we allow women to get pregnant if it endangers their lives.³⁶ The Gemara in **Nida** when dealing with a similar issue may clarify this issue somewhat.³⁷ The Gemara brings the opinion of R. Meir, quoted by Rav Bebe, that girls between the ages of 11 and 12 are allowed to use contraception when engaged in marital relations since it is dangerous for them to conceive at that age. The Rabbis disagree, and although they believe it is indeed dangerous for her, they say she can take the risk and rely on Hashem to protect her from harm. This is inferred from a pasuk in **Tehillim**, **Shomer petayim Hashem**, literally Hashem protects the foolish.³⁸ Rav Moshe

35. 83b, s.v. **meeta**.

36. R' Akiva Eiger in his **Gilyon Hashas** refers us to **Shaar Hamelech Hilchot Sukkah**, perek 4, halacha 16, who explains this Tosafot. According to him Tosafot only believe that women are at increased risk for death in the long term due to the physiologic stress of pregnancy.

37. 45a.

38. The Gemara in **Shabbat** 129b applies this rule to blood letting, and they add the condition that we can rely on G-d taking care of the foolish only if the masses engage in the dangerous action. The prevalence of plastic surgery in society at large, despite its rarity among those in religious circles, would fulfill this requirement. This can be seen from a responsum written by the **Terumat Hadeshen**, **chelek I**, 211, where he dealt with the uncommon practice among sages in his day of marrying women who were twice widowed. The Gemara in **Ketubut** proscribes this, since it presents a threat to the life of the third husband. But **Terumat Hadeshen** applies the rule of **shomer pitayim Hashem** and allows these widows to get remarried. He goes on to mention the condition brought above, that the practice

Feinstein in his responsa suggested that smokers can rely on the concept of **shomer petayim Hashem** despite the established risks of smoking. This reasoning for permitting plastic surgery despite its dangers is used by the **Chelkat Yaakov** quoted above.

Another possible approach for the problem of **sakkana** can be seen in an interesting responsum of the Chatam Sofer,³⁹ who pondered when it is permissible to bury a person who has stopped breathing and is by all overt signs dead. There was a case quoted in **Masechet Smachot** of a person who initially appeared dead but actually survived for 25 years.⁴⁰ Should we not apply the rule that in cases of mortal danger, we do not rely on the majority? The Chatam Sofer answered that since this case was incredibly rare, a **rov** of that magnitude can be relied upon even in cases of **pekuach nefesh**. Perhaps this is also the case with plastic surgery. As the statistics quoted above suggest, the risk of serious morbidity or mortality from plastic surgery is quite small. Perhaps this kind of overwhelming **rov**, where the possibilities for adverse outcomes are minuscule, would be sufficient to rely on in even in **pekuach nefesh**.

Although there are many poskim upon whom to rely when considering plastic surgery, there are certainly those who frown upon it. In our society, so caught up with beauty and image, it is often very difficult to resist the promise of quick fixes offered by cosmetic surgery. It would behoove anyone thinking about

being permitted is engaged in by the masses. He includes this despite the fact that he himself admits that the practice is uncommon among the religious.

39. Y.D. siman 338.

40. Perek 8, mishnah 1. This case was quoted as support for the halacha that one should pound on fresh graves for the first three days after burial to ensure the person buried is actually dead. The Chatam Sofer rules that this practice is not the halacha.

these procedures to consider the **Medrash** in **Megillat Esther** on the verse that describes Esther as being beautiful to all who saw her.⁴¹ The **Medrash** says that the true meaning of "all who saw her" had nothing to do with her outward beauty, rather that she was beloved in heaven because of her purity and piety. It is incumbent upon us all to recognize what is truly important in our lives. There may even be consequences for losing this focus, as Rashi tells us on the verse that describes Yosef's beauty.⁴² There Rashi writes that as Yosef became successful, he began to pay more attention to his appearance, and this led **Hashem** to punish Yosef by bringing upon him the advances of Potifar's wife. These issues are rather weighty, and one should put in time, preferably with a qualified Rabbi, carefully considering this decision.

41. *Esther*, 2:16.

42. *Rashi Bereshit* 29:6.

Issues In Jewish Education

Rabbi Alfred Cohen

It has become abundantly clear over the past few decades that the key to survival of Judaism on American soil lies in the Jewish day schools/yeshivas. Over and above the centrality of education in Jewish cultural and religious values, it is recognized that virtually the only hope for combating the powerful influence of American secular (and increasingly hedonistic) society lies in inculcating Torah values in our children early in life and nurturing these teachings in a Torah environment. Moreover, just as in the secular society there is great pressure exerted by (and on) parents to enroll their children in the "right" schools – those which will optimize their chances for success in their adult lives – so, too, is this drive mirrored in Jewish, and Orthodox Jewish, society.

Consequently, the decision to expel a student from a yeshiva or day school is a step fraught with momentous consequences and one not to be taken without a great deal of soul-searching. Nevertheless, there are times when school administrators feel strongly that it is necessary to remove a student. Is such a decision ever defensible, according to the standards of halacha (Jewish law)? If so, what are the guidelines or criteria for arriving at such a conclusion?

Additionally, there are other issues concerning education of our youth which beg for resolution based on Torah ethics, standards, and guidelines. Principals, teachers, and parents need to understand the spectrum of responsibility for maintaining Torah continuity while serving the needs of the community as well as of the individual.

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To illustrate the seriousness of our inquiry, we cite a *teshuva* (responsum) of Rav Moshe Feinstein.¹ Rav Moshe emphasizes that there is a seminal difference between teaching a student in a secular school and teaching Torah: In every other classroom, it is the teacher's job to make certain that the student knows and understands the subject matter, but the student's activities outside the classroom are not his concern. Not so with the Rebbe in a yeshiva/day school setting; it is his responsibility that the student accept the teachings to such an extent that "he [the student] will accept in his heart that this is the essence of his life and that it is the true purpose of a person in this world."

While one cannot argue with these lofty goals, the truth is that there are times when they do not seem to be achievable – certainly not with every student. A common example is an unruly student whose behavior may be so disruptive that it becomes impossible for the teacher to teach the rest of the class. Or there might be a mischievous child who instigates others to act up. If this child is expelled, there is a reasonable certainty that he/she will develop a deep dislike for the religion, even if that student is accepted into another Jewish school. After all, rejection hurts, and the natural response will almost certainly be anger at, and rejection of, the school's teachings. There are even times that an expelled student will end up going to public school, where the chances of his remaining religiously observant are exceedingly slim. On the other hand, if the student is not removed, it will undoubtedly harm all the other students—either they will not be able to learn as they should, or perhaps they may even imitate the negative behavior.

If measures short of expulsion are to be contemplated, what kind of punishment is considered effective? And is "mere" punishment deemed sufficient or acceptable in the face of

1. *Iggerot Moshe, Yoreh Deah* III:71.

egregious misbehavior?

Education, particularly religious education, is a matter of vital concern not only to parents but also to anyone involved in furthering our Jewish heritage and inculcating our values. In trying to clarify the issues, it is important to realize that the topics are not disparate; often, they impact reciprocally on each other. An understanding of how best to approach any one issue can emerge only by coming to grips with the many halachic principles which may somehow play a role in the situation, as well as weighing which principles properly take precedence over others. Consequently, it is difficult, if not at times impossible, to establish concrete rules which will apply equitably in all situations. “One size fits all” does not lend itself to real-life problems involving something so precious and delicate as the minds and lives of our children. In this study, as we examine the multiple facets of sensitive issues, we will suggest only tentative conclusions, if at all.

Discipline

The educational philosophy of the Gemara² displays a thorough understanding of a child’s mentality, while focusing on the primary objective of Jewish education – to teach the young person how to live as a good Jew.

The Talmud³ offers the following very perceptive advice: if the child is learning, let him learn, and if he is not learning, let him at least be with his friends. The Gemara recognized that many children are “late bloomers”, to use a modern term, and that in any case they will benefit from associating with other good children; they may ultimately “come around”.⁴

2. *Bava Bathra* 21b.

3. *Ibid.*

4. Rav Moshe Feinstein rules that one is not permitted to punish

The Gemara also addresses the topic of a child who is not capable of much academic development: “Even a child who cannot learn to read, don’t send him away [from the class],⁵ but rather let him sit with the others, perhaps he will understand.”⁶ Elsewhere,⁷ we are told of a certain Rabbi who had to teach his student the subject matter 400 times[!] before he grasped it. The point seems to be that even weak students need to know Torah, and if it takes a great deal of repetition, then that’s what the teacher needs to do.

Rav Moshe Feinstein defines basic concepts which are fundamentals of teaching.⁸ He cautions the teacher “not to despair when he sees a student who is not learning properly or even behaving properly.” A Rebbe must never give up on his student, or think that “he’ll never amount to anything.” Rather, “in any case, remaining for a number of years in yeshiva, together with teachers who are G-d-fearing and together with

a child by not letting him attend Hebrew studies classes, “inasmuch as the damage is certain while the benefit is doubtful, and at times highly doubtful; therefore, one must seek other punishments, and not punish through nullifying Torah study.” (*Iggerot Moshe Yoreh Deah* II:103). Rav Feinstein does say that this ruling applies only to a child who is not learning well, but not to a student who is disruptive or a bad influence on others. For him, expulsion may be necessary.

5. *Shulchan Aruch* 245:9, says that it is not clear whether this talmudic text is mandatory or only a suggestion. Rashi explained it as “you do not have to [expel him]”, but *Nimukei Yosef* in his commentary to *Bava Bathra* 21 writes that “you do not have permission to expel him.”

6. The Maharsha has an interesting twist to this text: he explains that the Gemara is concerned that if the weak student is expelled, maybe the others will see him outside playing and they in turn will want to follow suit and join him. Therefore, let the weaker one stay, in order to enable the stronger students to learn better.

7. *Eruvin* 54.

8. *Iggerot Moshe, Yoreh Deah* III:71.

friends who are attentive to the teacher will certainly have an effect on him.” As hard as it may be to implement such a mindset, the teacher’s responsibility is to elevate each student as far as possible, make him better in some way. One has to develop the long view, seeing how the educational experience will enhance the child’s life in the long run, not focusing only on the present.

Dealing with a weak student presents one type of challenge, but it is another case with a child whose presence is detrimental. If a student is having a negative effect on others, then “certainly one must expel him.”⁹ As he wrote this, Rav Feinstein added an important reminder: “But one must judge [this expulsion] with great gravity and with much introspection, for it is equivalent to a life-and-death decision.”¹⁰ בַּיּוֹא כָּדִינִי נְפִשּׁוֹת (בג).

On the question of expelling a troublesome student from yeshiva, Rav Yitzchak Hutner, z”l, is quoted as opining, “Even if I thought that tomorrow this student will leave the fold—if that student would be harming others [by staying], I would expel him....We are not allowed to harm the others” in order to save him.¹¹ The author of *Aseh Lecha Rav* similarly rules that a teacher may strike a student who is lax in his studies; however, if the student is ridiculing the Rebbe and preventing the class from progressing in their studies, hitting will be of no value. The only option in such a case is to remove him from the classroom.¹²

In summary, generally a weak student should be encouraged,

9. Ibid.

10. See note 4.

11. Quoted in *Techumin* 17, p. 151.

12. The obligation to educate this Jewish individual remains – the teacher or principal should certainly make an effort to find an alternate yeshiva for the child.

a lazy student may have to be pressured to do better, but a student who disrupts the class to the point where it impacts on others' learning, or one who might cause others to go astray—must be discharged.

Punishment

Our Sages readily accepted the teaching of the wisest of all men, that to spare the rod is to spoil the child (actually, King Solomon wrote that one who spares the rod hates his child).¹³ The Mishnah even rules that a father who strikes his child and accidentally kills him does not face the standard punishment meted out to accidental murderers, so long as he was chastising his child in order to get him to learn Torah or a trade.¹⁴ Jewish law applies this principle also to a Rebbe, who is acting *in loco parentis*. However, it is important to emphasize that this pedagogical principle, of physically striking a student, applies only to a young child; Jewish law forbids striking an older child, even if he deserves punishment for outrageous behavior.¹⁵

Rambam sternly cautions a Rebbe not to permit frustration with a slow-learning student to bring him to anger.¹⁶ If the student didn't grasp the material the first time, explain it to him again.¹⁷ Furthermore, the Rebbe is advised to present the lesson in the easiest mode possible and to teach it patiently. However, this gentle and patient approach is counseled only in the case of a weak but willing student, or if the subject matter is difficult.¹⁸ But if the failure to comprehend arises

13. *Mishlei* 29:17.

14. *Makkot* 8a; see also Rambam, *Hilchot Rotzeach* 5:5.

15. *Moed Kattan* 17a; *Yoreh Deah* 208:19-20.

16. *Hilchot Talmud Torah* 4.

17. *Eruvin* 54.

18. Rambam, *Hilchot Talmud Torah*, 5:5. See *Aseh Lecha Rav*, Vol.

from the student's failure to make sufficient effort or due to laziness, the teacher should show his displeasure, verbally if possible.¹⁹ Beyond that, Rambam cites the talmudic exhortation that the teacher should "instill fear into the students."²⁰ Rambam further seems to fly in the face of current pedagogical theory, instructing the teacher that he is not his students' "pal" and should not be playing ball with them, etc.²¹

We have already seen²² that Jewish law permits a father to hit his child in reproof or to get him to learn better, and the same is true for a teacher. This stands in contrast to the halachic prohibition against striking another Jew; even the *Bet Din* which is mandated to inflict lashes upon a sinner is admonished by the Torah, "do not strike [any] extra blows."²³

Trying to resolve the apparent contradiction between the two laws, the author of *Terumat Hadeshen* notes that the only one who has license to strike another Jew is the person who is

2, *loc cit.*, who advocates hitting a student who isn't attentive; but a student who is disruptive should be expelled, not hit, and let the father then teach his son himself. Using an alternate pedagogical method, Rav Yosef Ber Soloveitchek would at times publicly reprimand (older) students who were not able to properly answer questions during the *shiur*, since he felt that this kind of pressure would spur them to prepare better.

19. Rav Moshe Feinstein echoes this attitude when he writes that a child should not be punished by the teacher for failing to learn, "unless according to his abilities, he could be learning better, but he is too lazy to study well." (*Iggerot Moshe Yoreh Deah* II:103).

20. *Ketubot* 103b.

21. See also *Iggerot Moshe Yoreh Deah* II:103.

22. *Yoreh Deah* 208:19-20.

23. Rambam, *Hilchot Chovel Umazik* 5:1. An example of the severity of this prohibition is that when Moshe Rabbenu in Egypt witnessed a Jew beating up another Jew, he characterized the aggressor as "rasha", wicked.

responsible for his welfare, such as a father or Rebbe or Jewish court, and only when or if it is required.²⁴ If we accept this definition, it would preclude a teacher in schools such as we have today from striking his student. That is because when the Gemara referred to a Rebbe, it was dealing with a teacher to whom the child was entrusted for a certain period of time, and it was his obligation to teach this child Torah. Nowadays, the child is in the classroom only for a relatively brief period of the day, and the obligation to look out for the child's progress, religiosity, and devotion to studies remains the father's.²⁵

Yam shel Shlomo has a more expansive view: it is his position that every Jew is existentially responsible for his fellow Jew and has the obligation (or the permission) to prevent a sin from being committed, by force if no other means prevail. *הוּא חָדֵין כִּל בֶּן יִשְׂרָאֵל יִכּוֹל לְהִכּוֹת חֲבִירוֹ כִּי לְאַפְרוֹשִׁי מֵאַיִלּוֹרָא*.²⁶ Apparently, if the person is hitting not for his own benefit or to further his own agenda, but is, in a sense, "striking a blow for Judaism," physical force is permitted, if no other means are effective. *Yam shel Shlomo* does add an important proviso: only an "outstanding individual" (known for his uprightness and that he acts only "for the sake of Heaven") is permitted to act in this manner. As the author himself concedes,

24. *Terumat Hadeshen* 218. See also *Shvut Yaakov* 3:140 and *Ramo*, *Choshen Mishpat* 421:13. (Another exception where force is acceptable is for a homeowner to forcibly eject a person from his home, if he refuses to leave upon request.)

25. Albeit many parents, especially those who have to work long hours, are under the [mistaken] impression that the religious development of their children has been entrusted to the yeshiva/day school, Jewish law does not accept this proposition. Certainly in the current American practice, where the child remains in his parents' home, they retain responsibility for his welfare in all areas, including religious observance.

26. *Bava Kamma* 3:9; *Rosh*, 3:13; *Gra, Choshen Mishpat* 421:2.

were there no limitation, chaos would ensue, for everyone would feel entitled to use force against others!

If we seek to apply this standard to a yeshiva classroom situation, we would have to posit that (a) the Rebbe must not only be highly qualified academically, but also outstanding in character and (b) he is striking the student "for the sake of Heaven", and not because he has lost patience or because this is his first line of discipline and not the last. In truth, we would have to admit that many instructors fall far short of this narrow definition; many a teacher is simply not adept at classroom management, or may be using physical discipline because he is angry or frustrated. Obviously, Jewish law does not countenance his striking a student, and doing so would be a violation of the halacha. Similarly, even though a parent is given broad latitude in disciplining a child, the excuse that "I lost it" is not an acceptable permit for striking the child; it is a serious breach of Torah law.

It seems that the cardinal issue, for both a teacher and a parent, is the *intent*: is the action coming out of anger and frustration, or does it arise from a conviction that there is no other way to prevent the child from transgressing the Torah? Only in the latter instance is physical force (reluctantly) warranted.²⁷

The extreme rabbinic reluctance to employ force may strike us as odd, given that King Solomon warned in *Mishlei* against "sparing the rod ("shivto"). Some rabbinic commentaries note that the word "shevet" does not necessarily mean only stick, or rod. The same word, "shevet", also appears in the verse, "the

27. See *Kovetz He'arot*, *Yevamot* 70; *Iggerot Moshe Yoreh Deah* II:103; but see also *Taz*, *Choshen Mishpat* 421:13. Rambam opines that hitting is forbidden only when it is "fighting" (רָצֶן) or "winning"; see *Iggerot Moshe Choshen Mishpat* 1:3 and 11:66.

shevet will not depart from Judah,”²⁸ which is interpreted to mean “control” or “mastery”, signifying that the king will come from the tribe of Judah and has the responsibility to discipline and control the nation. Furthermore, the end of the oft-quoted verse about sparing the rod continues: “and the one who loves [his son], teaches him *mussar* (ethics and good behavior).” What King Solomon is actually recommending is love and firm direction, to teach a child, starting from his early youth, the good and proper ethics which will set him on a lifelong path of positive values and actions.

When we take into account the full range of Jewish thinking, we come to the conclusion that bringing up a child is the sacred responsibility of parents, who should employ love and care in instilling positive values in their offspring. The Rebbe, in turn, should adopt the same quasi-parental standards. Hitting should be avoided and employed only as a last resort, if at all.²⁹

There is a delicate line between being too lax and being too strict with students. Sometimes the wise teacher will “look away” from an infraction, perceiving a greater benefit in not taking the student to task. On the other hand, there is a danger that absent protest, students may get the wrong impression that mischievous behavior is acceptable. In the words of the

28. *Bereishit* 49:10.

29. To present a more accurate picture of the rabbinic position on punishment, we should note that generally their view is that punishment (not necessarily physical) can have a positive effect on a student who is not performing up to his abilities; in the long run, it may do much good. However, threat of punishment to be meted out later is always to be avoided. If a child needs to be disciplined, it should be done on the spot, the child should never be told, “Just wait till your father comes home, he’ll.....to you.” Dread of future punishment can have a terrible effect on a child. See the report of such an incident, in *Semachot* 2:6.

Gemara,³⁰ the teacher's "left hand should be pushing the student away, but with his right hand he should be drawing him close." (Note that the right hand, the stronger one, draws the student closer to his Rebbe; the chastisement is done with the "weaker" hand.)

Similarly, Ramo writes, "it is customary nowadays not to make a strong protest against sinners, for there is danger [that they will abandon the religion altogether]," and he cites the Talmud: "One should always push away with the left but draw closer with the right."³¹

Talmid sh'eino hagun

Despite the undisputed centrality of Torah study in Jewish values, there are certain exclusions mandated by halacha. In *Chullin* 133a, the Talmud teaches in the name of Rav Yehudah quoting Rav, that "anyone who teaches a student who is not fit, falls to perdition (Gehinnom)." This principle is codified by Rambam, with a slight variant:

We do not teach Torah except to a qualified student [who is] pleasant in his deeds, or to one who is "tam" [a person who is not known to be good or bad³²]; but if a person is following a bad path, we bring him back to the good and lead him on the upright path, and check into him and [only] then let him enter the *Bet Midrash* and teach him...³³

How do we define an "unworthy" student (*talmid sh'eino*

30. *Sanhedrin* 107b. See also *Shu"t Rashba* 5:328.

31. *Choshen Mishpat* 12:1.

32. *Lechem Mishneh*, commentary to Rambam, *Hilchot Talmud Torah* 4:1.

33. *Hilchot Talmud Torah* 4:1.

hagun)? According to the Meiri, this refers to a person who has bad character traits,³⁴ while Rashi regards him as a “bad student”,³⁵ a person who does not want to learn Torah in order to have knowledge but only to acquire ammunition to deride the Rabbis or Torah teachings. Tosafot similarly distinguish between someone who wants to learn for personal benefit or knowledge and someone who only wants to use that knowledge in a contentious manner (and such a student, “it would have been better had he not been created”).³⁶

Radvaz addresses the topic in a lengthy *teshuva*, and concludes that such a Jew may be instructed in Scripture but not in Mishnah and Talmud, fearing that “he will taunt and deride” the words of the Rabbis, since his only objective in learning is to be able to make fun of them.³⁷

What all these definitions have in common is that despite the supremacy of Torah study in the Jewish scale of values (תורה כנגד כלם), the Rabbis ruled that Torah should not be taught to someone who intends to use it for negative purposes. Some typical “negative” uses of Torah knowledge which spring to mind include becoming a rabbi of a Conservative or Reform congregation, certifying food as kosher when it is not, performing invalid conversions, issuing divorce papers which are not proper, or even allowing women to re-marry without a valid *get* having been issued.

The reality is that it is not unusual to find students with “negative” traits applying to study in yeshivas. Many parents

34. In his commentary to *Pirkei Avot* 1:1.

35. *Chullin* 133.

36. *Berachot* 17a; see also *Pesachim* 50a; *Nazir* 23a; *Maharsha, Chullin*, “holech ve’oseh ra’ot”, *ibid*.

37. *Responsa*, II:796, near end; a similar sentiment is expressed in *Sh”ut R. Eliyahu Mizrahi*, 57.

who are only peripherally observant of Torah law nevertheless want their children to have a Jewish education. What to do with these children from non-observant (or mildly observant) homes? Do the halachic reservations about teaching an “unqualified student” apply to children and teenagers, or only to adults?

The Chazon Ish was asked if students who “hang out” in places inappropriate for yeshiva students would fall into the category of “unworthy” students. His reply in essence was,

That halacha does not apply today...the youth of today, who come of their own free will and seriously want to learn, even though they do not yet keep all of the mitzvot, are not considered *תלמיד שאינו חנוך*, and one should teach them Torah.³⁸

The *Shulchan Aruch Harav* (IV:17) writes that in a case where the student is anxious to attend despite his unworthy character, he should be accepted reluctantly (“*tehei semol docheket v'yemin mekarevet*”).³⁹ But in his *sefer*, *Aseh Lecha Rav*, the former Chief Rabbi of Tel Aviv Rabbi Chaim David Halevi writes that if it is clear that this person’s behavior is not going to be changed, he should not be allowed to attend classes.⁴⁰ The rationale is simple: such a student can wreak incalculable harm upon the other children, who will befriend him and become influenced by his ways. Here we find a clear directive fortifying the principle

38. Reported in *Jewish Observer*, Nov. 1999, p.14.

39. It is not clear whether Rav Shneur Zalman, the author of *Shulchan Aruch Harav*, considers the student’s great push to learn as a sign that there is a potential for change to the better. The *Shulchan Aruch Harav* is trying to determine why a person with no religious interest would want to study Torah, and concludes that it might be only for intellectual reasons.

40. Volume VI:60.

espoused by many parents not to allow their children to attend a yeshiva where they may mingle with non-observant students, which policy Rav Halevi strongly applauds:

There is no doubt that they are liable to “damage” their classmates, for the friendship of students does not end in school [they will play together after school, etc.], and who can judge beforehand the harm that this friendship may cause... Therefore in my humble opinion those parents who are very insistent that their children do not go to school together with children whose parents do not observe Torah and mitzvot are doing the right thing.⁴¹

It is certainly not a new problem. As long as two thousand years ago, the disciples of the Academy of Hillel debated with the students of the Academy of Shammai⁴² the propriety of setting yeshiva acceptance standards. The former group took

41. Ibid. One wonders if the segregation of Orthodox children from less observant ones should be regarded as an absolute requirement or whether a mitigating factor might be the ratio of non-observant to observant. It is reasonable to surmise that if there are 5 students out of 500 who are not religiously observant, it would be different than if there were 50 or 100 out of 500. We do have an obligation to all Jewish children to bring them closer to Torah observance, and obviously they will learn this best by being exposed to it in a positive manner; in the proper environment, a non-observant youngster will almost certainly adopt the more religious lifestyle of his/her peer group. The difficult question to assess is where to make the cut – how many (if any) non-conformists should be allowed into the group? In this regard, I have heard that Rav Pam was once told about ten “difficult” girls who had applied but not been accepted into any Jewish high school; he promptly picked up the phone and cajoled five different schools into accepting two apiece.

42. See *Sdei Chemed, ma’aracha* I:244, p. 68, citing the *Chida*, in his commentary *Petach Einayim* to *Avot d’Rabbi Natan*, end of chapter 2.

the position that anyone who wanted to should be taught Torah, for it will ultimately restore them to a good path, while Shammai's students held to the view that an unworthy pupil should not be accepted.⁴³

Modern rabbinic attitudes similarly span a broad range, seeking to find the modicum which will ensure the most good (or the least harm).

Rav Kook, famed for his open and loving approach to all Jews, including the non-observant, advocated opening the doors of yeshiva to all Jews—with conditions. He did insist that all students be required to exhibit respect – the males must wear a head covering and the women should be instructed to dress properly:

It is forbidden to prevent any Jew who comes to learn Torah [from doing so], as long as he is not confirmed as an "unworthy" student...and the light which is in the religion [may] bring them back to the good; and we have to search for ways to bring the light of Torah [to them] in any way possible....but only if they accept upon themselves the proper behavior [attitude?] for holy studies.⁴⁴

43. It is not clear how *Bet Hillel* took this position, in view of the talmudic teaching that one should not learn with an unworthy student.

44. Cited in *Techumin* VI: p.257.

See Rashi to *Berachot* 17a, ה"ה העושה לשמה לאשׁר. A common situation where the problem of teaching Torah to "unworthy" students arises is when Orthodox instructors are hired to teach in Reform or Conservative institutions. *Sh"ut Kol Mevasser* 2:17 forbids teaching in a Reform rabbinical seminary, inasmuch as the knowledge gleaned by the students will be used in a negative way, to further the Reform movement. However, this does not preclude an occasional lecture; it is only continued instruction which is to be avoided. Rav Moshe Feinstein makes a similar distinction in his *Iggerot Moshe Yoreh Deah*

Rav Kook's conviction is that if there is no respect for the subject matter, no positive effect can ensue, so what is the point of taking them in?⁴⁵

Limited objectives

Although it is wonderful to set high goals and try to enforce optimal standards, the realities of the world today often preclude achieving these goals and enforcing these standards in the educational setting. Since we understand that expulsion or exclusion are drastic measures which are properly utilized only as a last resort, what should educators faced with recalcitrant students do – accept them as they are? Rav Ovadia Yosef once received a letter requesting guidance on this thorny question. The problem presented to Rav Yosef was that in a state-sponsored religious high school in Israel, the girls persisted in coming to school wearing mini skirts, and despite their best efforts, the faculty was simply not able to get them to desist. Would it be permissible to tell the girls to wear pants rather than mini skirts? In his response (which has often been misquoted), Rav Yosef writes that wearing mini skirts is

I:139 and II:106, 107, regarding the permissibility of teaching children in a Conservative Talmud Torah. If the teacher is given the freedom to teach Torah-true Judaism to the children, he feels that only good can come of it. However, since there exists the possibility that the teacher or principal might be influenced by the atmosphere or people in the Conservative synagogue, it is a practice to be avoided; consequently, Rav Moshe reluctantly permits it only for those who need the income.

45. In his *Responsa* (#57), R. Eliyahu Mizrachi (16th century) qualifies his permission to teach Karaites (a heterodox sect who rejected the Oral Law) the Torah, requiring that they must exhibit respect for the Rabbis and at least observe Jewish holidays in public. But if they are lacking in the fundamental respect, they are not to be taught, for they will "scoff and deride [the Rabbis'] words." See also *Menachem Tzion* 3:98.

dreadful, but girls wearing pants is also *assur* (forbidden). He concludes with a pithy statement that can serve as an important guideline for school personnel struggling with the right way to inculcate Jewish values in youngsters whose upbringing is foreign to these concepts:

We have to choose the lesser evil...it is comparable to what is written in *Sotah*⁴⁶ [where there was one situation in which men were leading the singing, and women sang responsively—which they [Rabbis] declared an obscenity—and another instance where the women were leading the singing, and the men sang in response—which they compared to “fire in flax”.] What is the difference [since both are forbidden]? Rashi explains that if they won’t listen [to the admonition] to abolish both choirs, then [we should at least know to] ban the [choir of women leading the singers] first.

In conclusion, Rav Yosef writes, the girls should be told to wear pants to school, for that is the lesser of the two evils.⁴⁷

We may have to accept at times that we cannot create a perfect environment all at once; rather than give up altogether on certain students, it may be more beneficial to try and remove at least the most egregious practices, in order to be able to teach positive Torah values.⁴⁸ Through love and tolerance, we

46. 48a; see also *Avoda Zara* 16a; *Sefer Chassidim* 176; *Sh"ut Rashba* 5:238.

47. *Yabia Omer*, *chelek 6, Yoreh Deah* No.14.

48. There is a major exception to this flexibility: If the only Rebbe available is a person who is not observant, then it is better to close down the yeshiva rather than expose children to such an influence, according to Rav Elchanan Wasserman, reporting the response of the Chafetz Chaim to an actual question which was sent to him. See *Kovetz Ma'amarim* p. 71.

may succeed in the long run.

Understandably, it is difficult to implement this “lesser of two evils” policy in practice, because there are often other factors to be considered. When Rav Moshe Feinstein was asked whether it was permissible for a day school not to accept a boy whose mother refused to let him wear *tzitzit* to school, he chose that opportunity to elaborate his position on certain educational policies. Rav Moshe recognizes that there are two distinct approaches: some maintain that children from diverse backgrounds and levels of observance ought to be accepted, and over time, hopefully the school will be able to effect a change. Others take the position that if the parents refuse to adhere to the yeshiva’s standards, their children should not be accepted. He goes on to state his own view:

And what is correct [in my eyes] is that certainly we ought to teach this child whatever we can, for he is entirely blameless...but that is only insofar as teaching him privately; however, to accept him into the yeshiva where there are many students is not feasible. Even if he [acts] in such a way that others will not be adversely affected by him, nevertheless it is intrinsically a bad thing, for every one else will [also] want to have opinions about educational and administrative policy.... And furthermore, most of the time it will have a detrimental effect on the other students. (Emphasis added)

This is a profound and subtle understanding of human nature: once the school starts allowing parents to decline to meet some school requirement, there will be no limit to the demands of other parents also to get special treatment for their children. If this special treatment is accorded, then the entire structure of school discipline and ideology will be damaged. Rav Feinstein finds this principle so important, that he goes on to elaborate,

and even if it is known that [the mother] will not hire a teacher to study privately with her child...and this boy will [grow up] with [no Jewish education], nevertheless, the damage to the other students and the damage to the yeshiva itself take precedence [over the needs of that one child].

We may conclude from the above discussion that a student whose behavior or attitude is having a deleterious effect on others must be asked to leave. However, it may be that if many of the students are similarly deficient in mitzvah observance, it might be necessary for a while to tolerate some infractions in the hope that the school will be able to effect some improvement.

Are the non-observant in the category of “unqualified students?”

In *Masechet Pesachim*, the Gemara states, “a person should always be involved with Torah and mitzvot [even] not for their own sake [*lishmah*], for out of [doing it] not for its own sake, one comes to [the level of] doing it for its own sake.”⁴⁹ Conversely, in *Berachot* the Talmud teaches, “anyone who [learns Torah or does mitzvot] not for their own sake – it would have been better for him not to have been born.”⁵⁰ Seeking to resolve

49. 51b, and *Sotah* 22b. We should note that the Rambam in his *Pirush Hamishnayot*, at the end of *Sanhedrin* indicates that the *only* way to reach “*Talmud Torah lishmah*”, study of Torah for its own sake, is by way of “*lo lishmah*”, by first studying Torah for ulterior reasons. Thus, he advises a teacher of young children to introduce them to Torah studies by giving them candies and other treats. Only after the child has come to associate Torah study with sweet and good things will he gradually arrive at the desire to study Torah for its own sake, and not just to get the candy.

50. 17a, and *Taanit* 7a.

this dichotomy, *Tosafot*⁵¹ define the “*lo lishmah*” learning as involvement in Torah studies not for the sake of understanding the will of G-d or knowing how to perform mitzvot, but rather as seeking erudition in order to be able to argue with those who uphold the Torah, or else to discover loopholes to avoid observing mitzvot. This is Torah learning not for the sake of Torah, but actually for a negative, destructive purpose.⁵²

The strongly negative rabbinic statements precluding Torah instruction for a “wicked” person, defined as one who has no intention of observing the mitzvot about which he is learning, are generally interpreted as a barrier to teaching Torah to Reform Jews, or to scoffers and atheists.⁵³ The question arises whether one is permitted to teach in a Conservative temple’s Talmud Torah. Rav Meshulam Roth ruled in the negative,⁵⁴ but Rav Moshe Feinstein issued a carefully nuanced responsum giving qualified permission to take on such a job. Rav Feinstein opines that if the teacher is assured that he or she will be able to teach Torah in the proper manner, and that the prayers will be taught properly, it is permissible.⁵⁵

51. *Sotah*, *ibid*.

52. See *Ran, Pesachim* 51, s.v. “*kan le’osin lishmah*.”

53. Nevertheless, Rav Chaim ben Attar, author of *Or HaChaim*, is quoted in *Rishon LeTzion*, p.102, that “even a person who is studying [Torah] for the purpose of being able to argue against it (*lekanter*) [should be taught, for] the illumination that is in the Torah will bring him back to being good.”

54. *Sh”ut Kol Hamevasser* 2:17.

55. *Iggerot Moshe Yoreh Deah* I:139 and II:106-7. However, Rav Feinstein does draw the line at a Rebbe in a yeshiva also teaching in a Reform Talmud Torah, for he cautions that “the rabbis were not comfortable” with it, inasmuch as the non-religious environment might have an effect on him, which conceivably could be transmitted to his other students. Moreover, the yeshiva students, seeing their Rebbe teaching in a Reform temple, might erroneously conclude that it is

Dayan Yitzchak Weiss, author of *Minchat Yitzchak*, writing to a correspondent who wanted to know if it was permissible to teach Torah to the child of a Jewish father and non-Jewish mother (since that might be considered teaching a *talmid sh'aino hagun*), sets out a broad perspective:

When the intention is to bring them to repentance, there is no prohibition [to teach Torah to an unworthy individual].⁵⁶

He then quotes *Avot deRabbi Natan* that

...he [the teacher] should teach every person, for there have been many sinners in Israel who drew close [to Judaism] through learning Torah, and from them came righteous, pious, proper individuals.

Furthermore, continues Dayan Weiss, we ought to recognize that teaching children from non-observant homes involves both an advantage and a drawback: the advantage is that they are young and impressionable and therefore can readily be molded to accept our teachings. The drawback, however, is that they are young and impressionable and their parents control them and will not readily allow them to change. Despite this, he concludes, experience has shown not only that we can sometimes be successful with these children themselves, but often they will even bring their parents closer to Torah as well. Therefore, we should certainly make the effort to help them.

In summary, we may conclude that rabbinic opinion tends to

permissible for them to attend such a school or temple, inasmuch as their Rebbe is doing so. See *Avoda Zara* 17. In fact, Rav Feinstein limits his permit to teach in a Reform environment only to those who have no other means of support; as for those who are interested in teaching children about Judaism, he advises them to volunteer in their own local shuls to help teach young children.

56. III:98.

encourage teaching Torah even to children from non-observant homes, with the proviso to be careful about possible negative influences on the other students. However, caution is called for in teaching more mature teenagers or adults. If it becomes evident that they are studying the Torah only to insult, ridicule, or neglect its teachings, it cannot be countenanced.⁵⁷

Entrance Requirements

With the proliferation of yeshivas and day schools all over America, we have become aware of a new phenomenon: the "elitist" school. In contrast to past generations, when one school served all the children of a community, many locales now boast not only a number of schools but also ones that are geared towards a particular clientele. Consequently, they now have "entrance requirements", both academic and personal, [even for kindergarten(!)] so that the school can select only those applicants whom they perceive to fit their desired profile. Although this practice may strike one as antithetical to the spirit of Torah education, it actually echoes some customs of the past.

57. In this vein, several *poskim* address the question whether one may teach Torah to a man who is not wearing a head covering. The *Mishnah Berurah* II:12 forbids it; Rabbi David Z. Hoffman in *Melamed Leho'il Yoreh Deah* 56, reports that in the Rabbinic Seminar in Germany where he taught, secular studies were done with bare heads, but when Torah studies were involved, they covered their heads. This question is discussed also in *Noam* Vol. 17, p. 75, and *Yabia Omer chelek 6 Orach Chaim* 15:7. *She'eilat Moshe Orach Chaim* 22 permits it in a specific case where the instructor was very poor and teaching Gemara to this group of people who did not cover their heads while learning was the only way he could make a living. This very narrow lenient ruling, furthermore, was predicated on the reality that they would otherwise hire a teacher who would fill them with atheism and rejection of Torah, so this was the lesser of two evils.

In *Berachot*⁵⁸ the Talmud contrasts the differing approaches of two Presidents (*Nasi*) of the central Talmudic Academy. At first, when Rabban Gamliel was the *Nasi*, he appointed a guard who barred any prospective student whose "inside is not like his outside [i.e., he is not sincere]." Subsequently, Rabban Gamliel was deposed and Rabbi Elazar ben Azariah was elevated to that position. Unlike his predecessor, Rabbi Elazar opened the doors of the yeshiva to anyone who wanted to learn, and they had to put up many benches to accommodate the overflow.⁵⁹ Since the Gemara appears to approve the latter situation, we may conclude that our Sages were not altogether in favor of rejecting anyone who wants to learn, even if he cannot meet high standards.⁶⁰

Nevertheless, at first glance, it seems that Rambam does opt for an elitist solution, when he writes that one should not learn with an "unworthy" student (תלמיד שאינו הוגן).⁶¹ But a more careful study clarifies that Rambam intends these qualifications to pertain specifically to **character**, not to intellectual or academic abilities.

58. 28a.

59. Some say 400 new students entered, others place the number at 700.

60. The comparison between then and now is an imperfect one: obviously, Rabban Gamliel's yeshiva had plenty of room for the hundreds who wanted to attend; that is not usually the situation in modern times, where each school has only limited space to accommodate a set number of students in classrooms, dorms, cafeterias, etc. Although an argument can be made that students should be accepted on a first-come-first-served basis, the Talmud does not seem to accept that standard: In *Kiddushin* 31a, the Gemara rules that if a family only has enough money to send one person to yeshiva (either the father or his son), the better and brighter student should be chosen.

61. *Hilchot Talmud Torah* 4:1.

Similarly, rabbinic commentaries explain that the disagreement between Rabban Gamliel and Rabbi Elazar ben Azariah was not as great as we might surmise from a cursory reading of the talmudic text.⁶² Both were in consonance that a person of unwholesome character should not gain entrance to the Yeshiva; however, they did differ with respect to an unknown candidate. Rabban Gamliel would not accept someone whose upright character was not vouched for, while Rabbi Elazar was prepared to admit anyone, as long as he did not have a blemish on his reputation. Apparently, that is Rambam's understanding of their views, as is evidenced by his ruling.⁶³

It seems, therefore, that being selective in student admissions is not such an arcane or negative proposition. Furthermore, there can be desirable goals other than weeding out "bad influences". *Sefer Chassidim* is one of those who counsels that not all children belong in one classroom together:

מי שמלמד תינוקות ואחד חריף מחייב... צריכין רב לבדו... אע"פ
שיפסיד אם יפרידום

If one student is sharper than the others...he needs a special Rebbe, even though [the teacher] will lose money if they are separated.⁶⁴

This clearly speaks to the principle of separating students according to their ability, rather than having a mix.

62. See *Kesef Mishneh*, *Lechem Mishneh*, *Aruch Hashulchan Yoreh Deah* 246:21.

63. *Hilchot Talmud Torah* 4:1. According to this interpretation, "tam" refers to a person whose character is unknown; others interpret it to refer to a student of neutral moral character.

64. 308. It would seem elementary that diversity among a community's yeshivot might be desirable. Modifications in curriculum, tailored to the student body in a particular institution (or classroom), would undoubtedly enhance the educational experience for all students.

Tuition Obligations

In order to provide good education, it is axiomatic that the schools have to hire qualified teachers. And the more qualified a teacher is, generally the more he/she is going to want to be paid.⁶⁵ Tuition payments can represent a heavy if not staggering burden upon parents, in particular those parents who seek an outstanding education for their youngsters, as well as (and including) those with many children to send to yeshiva or day school.

We have to ask a question that, unfortunately, is not usually addressed: whose responsibility is it, anyway, to see that all Jewish children get a fine education appropriate for their needs, whether at the top or bottom of the spectrum of achievement? Whose job is it to assure that special needs are met? The parents'? The community's? The Rabbis'?⁶⁶

65. In *Emet Le'yaakov, parashat Vayishlach*, Rav Yaakov Kaminetsky expresses the view that passionate spirit is also an excellent criterion for a teacher; according to him, this is part of the reason that Yaakov *Avinu* allocated to his sons Shimon and Levi the roles of teachers and *kohanim*.

66. An ancillary issue is whether the community must raise funds to provide Jewish education for mentally retarded youngsters; how far do we take the notion that every Jewish child is entitled to a quality education, regardless of the strain on the community budget? See further in text.

What also needs to be addressed is what type of education should be offered in every yeshiva. In the *Jewish Observer*, November 1999, p. 12, the Chazon Ish is cited as opposing the establishment of special yeshivas for certain types of students. Apparently, he felt that every yeshiva should offer the same curriculum, geared to the assumption that every Jewish boy can potentially become a *gadol* (a great scholar). Even a child who does not appear to be blessed with great intellectual capacity might in the future develop into a person of formidable achievement. Yet, in the same issue of *Jewish Observer*, on p. 26, another Rosh Yeshiva is quoted as favoring separate schools for children

The Torah places an obligation on every Jew personally to study Torah daily (והנית בם יומם ולילה), but also requires a father to assure that his son is conversant with the Torah (ושננתם לבניך). This was the way our tradition was transmitted for about a thousand years, from father to son. However, during the Second Temple era, when economic and social conditions were at times difficult, many parents were not equal to the task. The Gemara records,

...remember that man for good, Yehoshua ben Gamla, for had it not been for him, Torah would have been forgotten from Israel.⁶⁷

At that time, Yehoshua ben Gamla,⁶⁸ realizing the disaster which was developing from the general inability of fathers to link their sons in the chain of tradition, enacted an innovation

with specific needs. *Sefer Chassidim* 318 seems to disagree with Chazon Ish.

67. *Bava Bathra* 21a. Although in this context it is clear that the Talmud is speaking only about boys' education, the Chafetz Chaim, in his commentary to *Sotah* 21a, appends the following:

And it seems that all this was only specifically in past ages, when every one used to live in the same locale as his ancestors and the ancestral tradition was very strong...[but in the present day, when this is not true, and young people are forgetting the old ways, it is important to teach girls as well]. It is certainly a mitzvah [to teach girls] *Chumash* and also Prophets, for if not, they are likely to deviate totally from the path of G-d and transgress every fundamental of the religion, G-d forbid.

We see a similar approach in *Sh"ut Meoznaim Lemishpat* 42; *Torah Temimah*, *Devarim* 11, No. 48; Chazon Ish, as reported in *Jewish Observer*, Nov. 1999, p.14; in the twentieth century, the obligation to provide Torah instruction to all children, both boys and girls, has been generally acknowledged. See, however, *Vayoel Moshe, ma'amar* 3, No. 30 until the end.

68. Acting with the approval of the rabbinic luminaries of his time (Meiri to *Bava Bathra* 21a).

which was revolutionary at the time – he established local schools (eventually to be located in every town), wherein all Jewish boys could be instructed by professional scholars in the rudiments of the religion. Specialized schools of higher education were also eventually instituted for gifted students.

Establishing schools (note that this innovation predates the public school system by about two thousand years) did not absolve the father from his obligation to teach his son, it only transferred the actual *teaching* function to the teacher, but the responsibility for providing the child's education remained the father's. Consequently, we find the halacha providing that "the father is to be forced [by the authorities] to pay for the instruction, inasmuch as it is actually his own mitzvah [to teach his child]."⁶⁹ Nevertheless, the Gemara⁷⁰ adds that the Sages also required the community taxes to pay for hiring teachers for all the children in the town; and any father who could not pay, the group had to pay for him.⁷¹ It seems, therefore, that there was some kind of dual system of payment and responsibility – the community had to hire teachers, but the parents also had to pay on an

69. *Aruch Hashulchan Yoreh Deah* 245:7; *Sh"ut Minchat Yitzchak* 10:84.

70. *Bava Bathra* 21.

71. A very interesting question arises as to whether the community has an obligation to provide for secular studies as well, within the parameters of R. Yehoshua ben Gamla's enactment. The answer will depend on how "secular studies" are viewed: if the study of science, math, etc., is necessary in order for the individual to fully appreciate the wisdom of the Torah (see Ramo, *Sheilot u'Teshuvot* #7 and footnotes thereto [in Mosad Harav Kook edition]), then it is part of the enactment that the community has to provide a Torah education for all its children. On the other hand, if we consider that the secular studies are needed in order for the child to be able to earn a living when he grows up, then the communal obligation to provide Torah teaching does not apply in this case; see *Choshen Mishpat* 156:3.

individual basis.⁷²

Class size and Special classes

We are thankful that the American Jewish community has grown and developed to the point that yeshivas are proliferating throughout the country. Not only are there many more yeshivas serving a community than in previous times, but there also seem to be a multitude of schools serving some special need: there are “teenagers at risk”, there are learning disabled, there are hearing-impaired children, etc. While all our children are precious and need Jewish instruction, the issue arises, to what extent is the Jewish community obligated to maximize the opportunities for special-needs students by creating “boutique” schools to service a particular problem. In other words, if the parent of a child with special needs feels that the child’s development will be enhanced in a learning environment specially geared to his particular needs, rather than having a special class (or special attention) for that student in the context of a larger, regular school – is the parent entitled to expect the Jewish community to create this special yeshiva? Obviously, the cost of maintaining a special program within a larger school will be far less than the cost of establishing a separate school.

There is a fundamental difference of opinion among *Rishonim* regarding a talmudic dictum which is relevant to these issues: In *Bava Kamma* 21a, the Gemara states that the number of students in a classroom should be twenty-five. If there are 50 students, the Gemara indicates that there should be two teachers hired for them; but if there are 40 students, the Gemara says

72. *Shulchan Aruch Harav, Hilchot Talmud Torah* 1:3 rules that even people who do not have children attending yeshiva have to pay this education tax; it is even levied on Torah scholars, who are generally exempt from most communal taxes. *Kuntrus Acharon* No. 3 (in the footnotes) ponders why this is no longer the common practice.

there should be one teacher, plus an assistant, adding that it is up to the community to raise the money for the Rebbe to be able to pay his assistant.⁷³

Regarding this talmudic passage, the Rosh and Tosafot⁷⁴ explain that a community is not obligated to employ a teacher unless there is a minimum of 25 students. Furthermore, since the Talmud does not require an assistant unless there are 40 students, it seems that if there is no significant need, the extra expense is not mandated. On the other hand, Rambam,⁷⁵ Rashba,⁷⁶ and Ritva's⁷⁷ approach to this passage is that the *maximum* number of students assigned to a Rebbe should not exceed 25; more than 25 requires an assistant, and 50 students require a second teacher.

The *Shulchan Aruch*⁷⁸ rules in accordance with the latter authorities, and in his notes, the Ramo adds that there is even an opinion that if there are not 25 students, the townspeople are not required to hire a teacher. However, the *Pitchei Teshuva*,⁷⁹ noting that nowadays "the hearts have become diminished" (i.e., today's teachers and students are not on the level of the past), feels that a Rebbe may not be able to teach 25 students properly, and therefore the community should hire a teacher even for 10 or 12 youngsters.

Penalizing children for parents' failure to pay tuition

73. Since the assistant is actually an apprentice learning pedagogy from the teacher, he does not receive the standard salary.

74. *Ibid*, s.v. "sach".

75. *Hilchot Talmud Torah* 2:5.

76. *Bava Bathra*, *ibid*.

77. *Bava Bathra*, *ibid*.

78. *Yoreh Deah* 245:15.

79. *Ibid*, no.8; see also *Gilyon Maharsha*.

It is, unfortunately, not unusual for parents to be very late in paying tuition and sometimes not to pay at all. Desperate yeshivas have sometimes threatened not to admit the child for the new term if all tuition debts are not paid up, or even to bar a child from continuing attendance due to the parent's recalcitrance. The question arises, is this permissible, even if distasteful, or should the philosophy be that children cannot be punished for the misdeeds of their parents?

The rationale for taking steps against a child in order to pressure the parent is not a modern innovation. The *Nimukei Yosef*⁸⁰ records a fascinating debate on this topic, dating back more than a thousand years. It seems that Rav Palti Gaon (in the Geonic period, 638-1038 C.E.) instituted a penalty for individuals who refused to pay fines or debts that the Bet Din had imposed:

We write to all Jewish communities about this person, and announce that he was ordered [by the court to do something] and he refuses and does not heed, and therefore we have "ostracized" (*hecheramnu*) him: he may not pray with ten [other men in a minyan]....and you are not to circumcise his son nor bury his dead,⁸¹ and take his children out of the school, until he accepts upon himself the judgment of the court. (emphasis added)

Although this procedure was apparently employed for centuries, the Maharshal (R. Shlomo Luria), author of *Yam shel Shlomo*, in the sixteenth century challenges the ruling: he argues that circumcising a son is the father's obligation, and therefore we can refuse to help him, penalizing the father as a means of

80. *Bava Kamma* 39b, in the "dapei haRif"; see also *Yoreh Deah* 334:6.

81. Burial of the dead is inherently an honor for the family.

pressuring him to comply with the court's decree. But the child's education cannot become a pawn in dealing with the father's recalcitrance and "it is abundantly clear that there is no rationale for such a ruling."⁸² Rav Luria adds that he had once been instructed by a certain rabbi, a respected scholar who ruled on important issues, that he should expel from school the son of a certain "excommunicated" individual, but he adds, "I didn't pay any attention to him." We have to conclude that Maharshal felt that although the father's religious obligation to provide his son with a Jewish education may be used as a "stick" to force him into paying tuition, ultimately it is the responsibility of all Jews in the community to assure that children will be properly taught. Maharshal refused to penalize the child because of the recalcitrance of his parents.⁸³

82. *Bava Kamma*, chapter 10:13, cited in *Taz, Yoreh Deah*, 334:6.

83. The Gemara in *Taanit* 24a relates an incident regarding praying for rain during a drought. The great *tanna* Rav, considered the outstanding scholar of the generation, led the prayers, but the rains failed to come. Thereafter, another individual prayed, and the rains began to fall. Curious as to this person's extraordinary merit, Rav asked him, "Tell me what you do." The man answered, "I am a [private] teacher of young children, and I take in poor children as well as rich, even without pay." Thus we see that educating the children of the poor who cannot afford tuition, is a great merit.

Sometimes parents can afford to pay, but are simply not willing to spend the money. After World War II, when new yeshivas were started in many Jewish communities, it was not unusual to take in children whose parents would have been willing to send them to public school and who were unwilling to pay tuition for their offspring (especially girls). To the great credit of the American Jewish community, yeshivas were established and funded by individuals and communities, drawing in thousands of youngsters who would otherwise not have gotten a Jewish education – and the great flowering of Judaism in our generation is certainly, at least in part, a direct consequence of their determination and dedication. Sometimes, we have to be prepared to go beyond the minimal requirements of the

Diversity in curriculum

Perhaps it is appropriate to ask why there are (relatively) so many children not succeeding in their yeshiva studies and becoming candidates for expulsion. A possible source of the problem may lie in our current system of mass-produced education, where almost all yeshivas adhere to the same standards and compete for the same students. Unfortunately (or fortunately), children come in all shapes, sizes, temperaments, and capabilities. When there is pressure on the school to strive for "excellence", it usually means increasing the workload or the hours of study, or both. Not all children can sustain the workload that is piled upon them; for example, many schools have instituted *mishmar*, requiring boys to stay in yeshiva after completion of their daily secular studies courses, to continue Torah learning at night. This can be a wonderful challenge for an ambitious 10-year old, but a dreaded burden for a playful 10-year old.⁸⁴

As an example of our failure to address the real lacunae in the Jewish educational system, I might point out that there are virtually no vocational yeshiva high schools, where boys who are not intellectually gifted might still learn how to live an

law.

84. Maharal, commenting on the well-known Mishnah that the proper age for starting study of Scripture is five years old, while the Mishnah should not be studied until age ten (*Pirkei Avot* 5:21), advises against advancing a bright student too quickly to the next level; as an example, a boy doing well at *Chumash* should not be introduced to *Gemara* too early. It is far more important for the child to feel successful and masterful at his studies than to start on material which is too hard and where he will not get the same feeling of pride and satisfaction. His self-esteem will be an important factor in his love of studies; in the long run, keeping him excelling at his appropriate level will be far more productive than moving him on to material where he can only do moderately well.

observant lifestyle while also learning a trade.⁸⁵ Even modifications of the rigorous standard Jewish studies curriculum are met with suspicion and scorn, thus discouraging innovation.

Unfortunately, perhaps for reasons which have less to do with education than with social policy, most schools are not inclined to offer diversity in curriculum. They generally follow a rather rigid program of studies, emphasizing deep scholarship and difficult intellectual concepts for all, even though many students find the regimen too challenging. It is instructive to find in the Gemara that Rav, the leading Torah scholar in the world at the time and head of the Yeshiva in Sura, advised his own son to leave the yeshiva and go out to work, since he was not succeeding in his studies.⁸⁶ Although it would seem elementary that offering a variety of ways of learning Torah, to suit the variety of student abilities would be beneficial, this does not reflect actual practice. The possibilities of modifying some aspects of Torah education to make it more appropriate for a wide variety of individuals have not been well explored in this country.

Conclusion

85. In the *Jewish Observer*, November 1999, an article quotes the Chazon Ish as ruling that every yeshiva must have the identical curriculum; apparently, it was his thinking that we have to hope that "late bloomers" will want to catch up on their studies, and they have to be given the opportunity. (The same theory appears in *Shulchan Aruch Harav*, chapter 2, nos. 9,10.) Perhaps we need to differentiate between the obligation of a yeshiva, which has to offer a standard curriculum for all Jewish children, and the responsibilities of a parent, who has to guide his child to follow the path which is optimal for his/her abilities.

86. *Pesachim* 113b.

In a moving essay on the importance of a yeshiva,⁸⁷ Rav Elchanan Wasserman ponders why Esav, the archenemy of the Jewish people, did not rebel against Avraham or Yitzchak, but directed his enmity towards Yaakov. His response is that Avraham represented *chesed*, kindness, and even though that is a wonderful trait, the Jewish people could survive even without it. Yitzchak's strength was prayerful devotion; as essential as this is, the Jewish people could manage even without this. However, Yaakov's essence is Torah, and Esav knew that without Torah, there can be no Jewish people. It is analogous, continues Rav Wasserman, to two armies at war. There are numerous battles, and one side or the other can win a battle here or there. But if one army is able to confiscate the weapons of the other side – the war is over. That is Torah; for us, it is our ultimate weapon, and without it, the Jewish people is simply—over.

In this brief study, we have tried to focus on a number of educational issues which require our careful thought and attention. Letting matters slide is not a worthy option, for the quality of our lives and our Judaism are at stake.

87. *Kovetz Ma'amarim* p. 87, note 6.

When Tefillin Are Not Readily Available: A Question of Priorities

Rabbi Moshe A. Bleich

Among the fundamental lessons that yeshivot and day schools endeavor to impress upon their students is not simply the obligation to engage in statutory prayer three times daily but also the importance of *tefillah be-tzibbur*, i.e., of fulfilling those obligations by means of participating in public prayer as part of a communal entity. Schools generally organize *minyanim* for those *tefillot* that take place during school hours. On occasion, a student may forget to bring his *tefillin* to school in the morning and is then confronted with the question of whether it is appropriate to recite the morning prayers with the *minyan* without donning *tefillin* or whether it is preferable for him to delay his own prayers until after the public service has been completed and then borrow a pair of *tefillin* from a fellow student in order to be able to recite the *shema* and the *shemoneh esreh* while wearing *tefillin*. Choosing the latter option would mean perforce that the student must pray as an individual (*be-yechidut*) without benefit of a *minyan* (*tefillah be-tzibbur*).

In addition to the treatment of the underlying issues in classic halachic compendia and in the commentaries on *Shulchan Aruch, Orach Chayim*, this very practical question is addressed in the responsa of a number of contemporary decisors. The reader's attention should also be drawn to the flurry of newly published monographs devoted exclusively to the laws of prayer in which this problem is analyzed.

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I. Sources for the Requirement of Wearing *Tefillin* while Reciting *Shema* and *Shemoneh Esreh*

The Gemara, *Berachot* 14b, quotes Ulla, one of the *amora'im*, as having declared that a person who does not wear *tefillin* while reciting *shema* is deemed to have offered false testimony regarding himself. The Gemara further quotes R. Chiyya bar Ablok as having declared in the name of R. Yochanan that a person who conducts himself in such a manner is considered as if he had brought a burnt offering without its complementary meal offering and its accompanying wine libation.

There is some controversy with regard to the reason why recitation of the *shema* without *tefillin* is deemed tantamount to false testimony. Rashi, *ad locum*, s.v. *ke-ilu me'id sheker be-atzmo*, comments that this term is employed as a "lishna me'alya," i.e., a delicate way of indicating that the individual is blaspheming against God. R. Yom Tov Lippman Heller, in his commentary on the *Rosh*, *Ma'adanei Yom Tov* 2:10, sec. 9, explains that recitation of the *shema* represents reiteration of the acceptance of the yoke of Heaven that is inherent in the proclamation that God is One. Failure on the part of a person to fulfill a divine obligation that is incumbent upon him at the very moment that he recites the *shema* is antithetical to acceptance of the yoke of Heaven. Accordingly, failure to don *tefillin* prior to reciting the *shema* demonstrates a lack of sincerity in accepting divine commandments; hence the recitation of *shema* by that person is rendered hypocritical and even an act of blasphemy. According to that interpretation of the Gemara's statement, recitation of even the initial verse of the *shema* without *tefillin* constitutes false testimony and is therefore inappropriate.

Bach, *Tur Orach Chayim* 25, interprets Rashi's comment in a somewhat different manner. Bach, too, observes that the recitation of the *shema* constitutes acceptance of the yoke of

Heaven and adds that acceptance of the yoke of Heaven can be demonstrated in a tangible manner by means of fulfilling the mitzvah commanded in the first section of the **shema**, namely, by wearing **tefillin**, since the very function of **tefillin** is to demonstrate acceptance of the sovereignty of the one God. Accordingly, a person's failure to don **tefillin** while reciting that verse, is, in effect, an indication that he does not really seek to affirm the unity of God. Hence, recitation of the biblical verse declaring the oneness of God without **tefillin** is tantamount to an act of blasphemy.¹

Rabbenu Yonah, in his commentary, *ad locum*, observes that an individual who recites the verse "And you shall bind them for a sign upon your hand, and they shall be as frontlets between your eyes" (Deut. 6:8), yet fails to perform the acts mandated by that verse, offers false testimony regarding himself since he declares that there is an obligation to wear **tefillin** but effectively contradicts the binding nature of that assertion by not engaging in the commanded act. According to the latter two explanations, the inappropriateness of reciting **shema** without wearing **tefillin** is limited to recitation of the first section of the **shema** or, more accurately, to recitation of the penultimate verse of that section which constitutes the commandment with regard to **tefillin**. Consequently, according to Bach and Rabbenu Yonah, if a person who is not wearing **tefillin** recites only the first verse, or the first several verses, of the **shema** but does not continue with the verse containing the mitzvah of **tefillin**, there is no cause for reproach.

Ben Ish Chai, Shanah Rishonah, Parashat Va-Yeira, no. 2, appears to assert that recitation of even the first verse of the

1. This analysis is also reflected in the comments of *Tosafot, Berachot* 14b, s.v. *u-maniach tefillin u-matzli*. See also *R. Ovadiah Yosef, Yabi'a Omer*, I, no. 4, sec. 1 and *Kaf ha-Chayim, Orach Chayim* 25:27.

shema without **tefillin** is inappropriate and constitutes a form of false testimony. Similarly, *Kaf ha-Chayim*, *Orach Chayim* 25:27, rules that, in deference to the opinion of *Divrei Chamudot*, one should preferably (*le-chatchilah*) not recite even the first verse of the **shema** without **tefillin**. Expressing a conflicting view, Rabbi Ovadiah Yosef, *Yabi'a Omer*, I, no. 4 and *Yechaveh Da'at*, VI, no. 2, seeks to demonstrate that, in agreement with Rabbenu Yonah, the overwhelming majority of halachic authorities maintain that concern with regard to false testimony applies only to recitation of the verse containing the obligation to don **tefillin** and therefore recitation of only the first verse of the **shema** without **tefillin** is entirely permissible.²

Although only recitation of the **shema** without **tefillin** is regarded as a form of false testimony, the Gemara, *Berachot* 15a, further indicates that appropriate acceptance of the yoke of Heaven requires wearing **tefillin** during recitation of the **shemoneh esreh** prayer as well.³ Accordingly, *Shulchan*

2. The discussion of the Gemara is limited to the situation of an individual who recites the **shema** without wearing **tefillin**. However, the Gemara does not discuss a possible requirement of a person to recite the **shema** simply because he is wearing **tefillin**. *Magen Avraham* 66:12 rules that donning **tefillin** does not generate a need to recite the **shema**. *Mishnah Berurah*, *Orach Chayim* 66:40 also indicates that, in such circumstances, the recitation of the **shema** is not necessary. See also *Mishnah Berurah* 555:5. Cf., however, the sources cited in *Piskei Teshuvot* 555:3. See also R. Zevi Schachter, *Mi-Peninei Harav* (Jerusalem, 2001), p. 117, who writes that Rabbi Joseph Ber Soloveitchik reported in the name of R. Chaim Soloveitchik that if one dons **tefillin** without reciting the **shema** one has not fulfilled the mitzvah of **tefillin** in the appropriate manner. For a fuller discussion of R. Soloveitchik's view see R. Menachem Genack, *Gan Shoshanim*, no. 1.

3. The principle that a person should wear **tefillin** while reciting **shemoneh esreh** is based upon the statement of the Gemara, *Berachot* 15a, declaring that "Any person who... dons **tefillin**, recites **shema**

Aruch, *Orach Chayim* 25:4 and 37:2, rules that a person should wear tefillin not only while reciting the shema but also during the shemoneh esreh prayer.

II. Tefillah be-Tzibbur

Prayer with a *minyan* serves to assure that one's *tefillot* will be accepted. (See, for example, *Rambam, Hilchot Tefillah* 8:1.) Accordingly, prudence dictates that a person should offer prayer as part of a *minyan* in order to maximize the likelihood of a favorable response. There is significant controversy among halachic decisors with regard to whether it is obligatory (*chiyyuv*) to pray together with a *minyan* or whether it is merely preferable and optional (*hiddur* and *ma'alah*), but not mandatory, to pray as part of a *minyan*.⁴

Furthermore, it would appear that, quite apart from the propitious nature of *tefillah be-tzibbur* as a means of evoking the desired divine response, such *tefillah* is considered to be an enhanced form of *tefillah* in a qualitative sense as well. The Gemara, *Rosh ha-Shannah* 18a, states that the Almighty accepts communal repentance at all times and that during the ten days of penitence He treats an individual's repentance in a like manner. (See also *Rambam, Hilchot Teshuvah* 2:6). Maharsha, *Chiddushei Aggadot, Berachot* 7b, s.v. *mai de-ktiv va-ani tefillati*, remarks that, in a similar fashion, during the ten days of penitence an individual's prayer is accepted in a manner

and prays is considered by Scripture as if he built an altar and offered a sacrifice thereupon."

4. For a summary of halachic opinions regarding this issue see R. Ya'akov Yitzchak Fuchs, *Ha-Tefillah be-Tzibbur* (Jerusalem, 1978), Introduction, chap. 4, pp. 30-37; Rabbi Meshullem Zishe Gerlitz, *Sefer Tefillat Rabbim: Inyanei Tefillah be-Tzibbur* (Jerusalem, 1995), chap. 13, pp. 141-144; and Rabbi Yisra'el Taplin, *Orach Yisra'el*, chap. 19, *Milu'im*, secs. 3-6, pp. 534-538.

comparable to divine acceptance of communal prayer at other times. Hence, if the entire purpose of **tefillah be-tzibbur** is to assure that one's prayers will be accepted, it should follow that during the ten days of penitence there is no need to engage in **tefillah be-tzibbur**. Since one searches the halachic literature in vain for even a hint of such a conclusion, it is quite evident that there must be some **hiddur** or enhancement of the quality of prayer when it is offered as part of a community. Any enhancement of the quality of prayer that occurs when prayer is offered as part of a **tzibbur** is certainly present during the ten days of penitence as well.⁵

Rabbi Ya'akov Yitzchak Fuchs, **Ha-Tefillah be-Tzibbur**, p. 30, asserts that the debate with regard to whether or not a person is obligated to pray with a **minyan** is limited to the issue of whether or not a person is obligated to recite the **shemoneh esreh** prayer with a quorum, but that there is a general consensus with regard to a rabbinic obligation for an individual to participate in communal service for an entirely different reason, *viz.*, in order to join the **minyan** in **devarim she-be-kedushah**, such as **kaddish**, **kedushah** etc.⁶

5. See also **Tefillat Rabbim**, chap. 18, pp. 168-176.

6. This writer has found at least one source who does not regard participation in **devarim she-be-kedushah** as mandatory. One of the authorities cited in the literature in support of the thesis that there is an obligation to pray with a **minyan** is R. Yair Chaim Bacharach, **Teshuvot Chavot Ya'ir**, no. 115, who is cited in this regard by Rabbi Fuchs, p. 34. **Chavot Ya'ir** was asked whether it is permissible for a Jew to have a non-Jew transport him across a river by ship on the Sabbath in order to be enabled to hear the reading of the Torah and to pray with a **minyan**. **Chavot Ya'ir** ruled that although the prohibition against directing a non-Jew to transport a Jew across a river is at worst a **shvut de-shvut** that is ordinarily suspended for purposes of fulfilling a **mitzvah**, it is not permitted to do so in order to pray with a **minyan** because the obligation to pray with a quorum "is not so much of a **mitzvah**." **Chavot Ya'ir** would certainly have

Persons who are present at minyan have the opportunity to participate in *devarim she-be-kedushah* whether or not they recite *shema* and *shemoneh esreh* with the *tzibbur*. Thus, students who have forgotten to bring their *tefillin* should certainly participate in the *minyan* for purposes of reciting *devarim she-be-kedushah*. Students who fail to bring their *tefillin* are faced only with a question of ordering priorities with regard to recitation of the *shacharit* service: Should priority be assigned to wearing *tefillin* while reciting the *shema* and *shemoneh esreh* or to recitation of the *shemoneh esreh* with benefit of a *minyan* albeit without *tefillin*?

III. When Recitation of Shema without Tefillin Does not Constitute False Testimony

permitted a *shvut de-shvut be-makom mitzvah* (see *Shulchan Aruch, Orach Chayim* 307:5) but felt that *tefillah be-tzibbur* does not rise to the threshold level of a mitzvah. Rabbi Fuchs notes that the rationale underlying this position is that *Chavot Ya'ir* maintained that prayer with a quorum is merely optional (*ma'aloh* or *hiddur*) but does not constitute an actual obligation. However, if Rabbi Fuchs' statement that participation in *devarim she-be-kedushah* is a rabbinic obligation is correct, *Chavot Ya'ir* should have ruled that it is permissible for a Jew to direct the non-Jew to transport him across the river for the sake of *devarim she-be-kedushah*, which represents a mitzvah *de-rabbanan* with regard to which it could not be said that it is not a "mitzvah kuli hai." Thus, contrary to the argument of Rabbi Fuchs, at least according to *Chavot Ya'ir*, not just *tefillah be-tzibbur* but also recitation of *devarim she-be-kedushah* with a quorum does not constitute a mandatory obligation.

Cf., however, R. Ya'akov Breisch, *Chelkat Ya'akov, Orach Chayim*, no. 211, who rules that the obligation to travel the distance of a *mil* in order to pray with a *minyan*, recorded in *Shulchan Aruch, Orach Chayim* 90:16, does not apply to a person who has already recited the requisite *devarim she-be-kedushah* with a quorum and has need of a *minyan* solely for *tefillah be-tzibbur*.

The categorization of recitation of the **shema** without **tefillin** as false testimony may not be blanket in nature. **Levush, Orach Chayim** 58:5, declares that such a categorization is apt only when **tefillin** are readily accessible but the person intentionally (**be-mezid**) chooses not to wear them. However, in instances in which the unavailability of **tefillin** is beyond the person's control (**ones**), recitation of the **shema** without **tefillin** is not considered to be false testimony. Accordingly, **Levush** rules that, if the time period during which the **shema** must be recited (the first three astronomical hours of the day) is drawing to a close and the individual does not yet have access to **tefillin**, he should hasten to recite the **shema**. Since, in such situations, failure to don **tefillin** is due to circumstances beyond the person's control, he is not considered to be offering false testimony. **Levush's** ruling is followed by **Mishnah Berurah** 25:14, 46:33 and 58:5.

It would similarly appear that, if the motivating consideration for reciting the **shema** without waiting for **tefillin** to become available is a desire to pray with a quorum, failure to wear **tefillin** while reciting the **shema** should not be considered to be intentional (**be-mezid**) but rather comparable to the category of **ones** and hence, according to **Levush**, such recitation would not constitute false testimony.

Levush's ruling is reflective of the comments of **Me'iri**, **Berachot** 14b. **Me'iri** qualifies the **Gemara's** statement, categorizing a person who recites the **shema** without **tefillin** as committing perjury, as limited to a person who acts "in the manner of those who cast off [the yoke of] commandments or with disdain — *derekh porekei mitzvot o derech zilzul*." Thus, according to **Me'iri**, it would follow, as it does according to **Levush**, that one who has legitimate cause to recite the **shema** without **tefillin** (e.g. in order to fulfill the mitzvah of **shema** by reciting it at the proper time or in order to participate in communal prayer) is not to be regarded as offering false testimony.

A further reason why recitation of the **shema** in such circumstances may not be considered tantamount to perjury lies in the fact that the individual fully intends to don **tefillin** as soon as he has the opportunity to borrow a pair of **tefillin**. As noted, the Gemara also compares a person who recites the **shema** without **tefillin** to a person who offers a sacrifice without its accompanying meal offering (**minchah**) or wine libation (**nesachim**). An animal sacrifice offered without its complementary **minchah** or **nesachim** is incomplete; recitation of the **shema** without the fulfillment of the mitzvah of **tefillin** is a similarly incomplete act. However, **nesachim** need not necessarily be brought simultaneously with the sacrifice; rather, as recorded by the Gemara, *Menachot* 15b, offering the **nesachim** may be delayed for a significant period of time. Similarly, if the parallelism is precise, it would appear that recitation of the **shema** without **tefillin** is problematic only if one recites the **shema** with no intent to don **tefillin**. If, however, the individual anticipates that he will put on **tefillin** later in the day, recitation of the **shema** without **tefillin** would present no problem. This argument is advanced by R. Joseph Saul Nathanson, *Sho'el u-Meshiv, Mahadura Tinyana*, III, no. 72 and by R. Yitzchak Schmelkes, *Teshuvot Bet Yitzchak, Orach Chayim*, no. 17.⁷

However, the view that intention to wear **tefillin** at a later time obviates the problem inherent in reciting the **shema** without **tefillin** is contradicted by R. Yehezkel Landau in his comments on *Magen Avraham* 46:16, incorporated in his glosses to *Orach Chayim, Dagul me-Revavah*. *Magen Avraham* cites *Teshuvot Maharshal*, no. 64, in which Maharshal reports that it was his custom to recite the first section of the **shema** in its entirety in conjunction with recitation of the sacrificial order

7. Cf., however, Rabbi Shlomo Kluger, *Ha-Elef Lecha Shlomo*, no. 354, who rejects this line of reasoning.

(korbanot) as part of the preliminary section of the morning prayers. In disagreement with Maharshal, Magen Avraham rules that a person should recite the entire first parashah of the shema in the course of reciting korbanot only if he has reason to fear that he may not reach the recitation of the shema in the morning prayers proper until after the appropriate time for its recitation has elapsed. Otherwise, rules Magen Avraham, he should recite only the first verse of the shema together with the verse "Baruch shem kevod malchuto le-olam va'ed."

Dagul me-Revavah, ad locum, recommends an alternative practice. Dagul me-Revavah rules that the individual may recite the first section of the shema in entirety even if he has not yet donned tefillin but that he should have intent to disclaim fulfillment of the mitzvah of shema. Dagul me-Revavah is of the opinion that recitation of the shema without tefillin is tantamount to false testimony only if the recitation is undertaken for purposes of fulfilling the mitzvah of recitation of the shema, but not if it is recited simply in the form of reading a section of the Torah. It is, however, clear that Dagul me-Revavah does not agree that intention to don tefillin prior to commencing the actual shacharit service following the recitation of korbanot would obviate the problem.

Similarly, Yeshu'ot Ya'akov, Orach Chayim 47:10, reports that, due to the fact that it was the common practice in his day not to don tefillin before reciting korbanot, it had become customary to recite only the first verse of the shema rather than the entire first parashah in order to assure that one not be guilty of offering false testimony. Of course, a person who recites the shema together with korbanot before donning tefillin fully intends to put on tefillin before commencing the morning service proper. According to Sho'el u-Meshiv, such intention completely negates the consideration of false testimony. It is therefore clear that Dagul me-Revavah and Yeshu'ot Ya'akov both maintain that, even if a person plans

eventually to put on **tefillin**, nevertheless, if he does not wear **tefillin** while reciting the **shema**, he is deemed to have offered false testimony. **Dagul me-Revavah**'s position is espoused by **Mishnah Berurah** 46:33 and **Aruch ha-Shulchan** 46:15.⁸

8. **Mishnah Berurah** 46:33 states that R. Akiva Eger, in his gloss to **Magen Avraham**, **Orach Chayim** 46:16, is in agreement with **Dagul me-Revavah**. However, a careful reading of R. Akiva Eger indicates that such a conclusion is not self-evident. R. Akiva Eger observes that if one is afraid that the **z'man kri'at shema** will expire before the **tzibbur** reaches the recitation of the **shema**, the **shema** should be recited in conjunction with **korbanot** in a conditional manner, i.e., the person should stipulate that, should the congregational recitation of the **shema** be delayed beyond the **z'man kri'at shema**, his obligation with regard to the recitation of **shema** should be satisfied with his recitation of **shema** in conjunction with **korbanot** but, should the congregation recite the **shema** before the expiration of **z'man kri'at shema**, the **shema** of **korbanot** should not serve to satisfy that obligation.

Mishnah Berurah presumes that the sole reason one would not seek to fulfill one's obligation regarding the **shema** with the first recitation in conjunction with **korbanot** is because of the consideration that reciting **shema** without **tefillin** is tantamount to offering false testimony, as is indeed reflected in the comments of **Dagul me-Revavah**. However, R. Akiva Eger makes no mention of that consideration, or even of the fact that the person of whom he speaks is not wearing **tefillin** while reciting **korbanot**. Moreover, **Dagul me-Revavah** clearly distinguishes between weekdays and Shabbat with regard to the need to disclaim fulfillment of the mitzvah of reciting the **shema** in indicating that, in light of the fact that **tefillin** are not worn on Shabbat, such disclaimer is not necessary on Shabbat. In contradistinction, R. Akiva Eger makes no such distinction.

It would appear that, in actuality, R. Akiva Eger's concern is an expression of the view that it is preferable to fulfill the obligation of reciting **shema** in the context of the blessings pronounced before and after the recitation of the **shema** in the course of **shacharit**. If one fulfills the obligation with regard to recitation of the **shema** before commencing the morning service, the biblical obligation can no longer be fulfilled in conjunction with pronouncement of the rabbinically

It should be added that although, according to *Sho'el u-Meshiv* and *Bet Yitzchak*, a person who recites the **shema** without **tefillin** in order not to delay such recitation beyond the prescribed time or in order to pray with a **minyan** is not deemed to have offered false testimony, nevertheless, as cogently pointed out by R. Shalom Mordecai Schwadron, *Teshuvot Maharsham*, III, no. 359 (and appended to his *Da'at Torah*), a person who does so obviously does not achieve the positive benefit of reciting the **shema** while wearing **tefillin** which constitutes the mitzvah *min ha-muvchar* or optimal performance of the mitzvah.⁹

ordained *berachot*. (See *Aruch ha-Shulchan* 46:15. See also *Teshuvot Pri Yitzchak*, no. 1, who discusses that issue at length and deems it preferable to recite **shema** in conjunction with the *birchot kri'at shema* even *be-yechidut* rather than to recite the **shema** without *birchot kri'at shema* privately before the expiration of *z'man kri'at shema* and then repeat the **shema** together with the *birchot kri'at shema* in conjunction with *tefillah be-tzibbur*.) It is of interest to note that *Aruch ha-Shulchan* 46:15 cites *Dagul me-Revavah* as authority for the need to recite the **shema** wearing **tefillin** but does not cite R. Akiva Eger as a source for that ruling.

The novellum in R. Akiva Eger's comment is his establishment of the principle that one can recite the **shema** conditionally. For a fuller discussion of the efficacy of such conditions and how the stipulation should be formulated, see Rabbi Zevi Pesach Frank, *Mikra'ei Kodesh: Ha-Yamim ha-Nora'im*, chap. 27, sec. 3 as well as the comments of R. Yosef Cohen, *ibid.*, *Harerei Kodesh*, note 3; Rabbi Shlomo Zalman Auerbach, *Halichot Shlomo*, chap. 7, *Dvar Halacha*, no. 20; and Rabbi Yitzchak Yosef, *Yalkut Yosef*, I, *Hilchot Kri'at Shema u-Birchot ha-Shema*, note 4, pp. 101-107. Cf. the cryptic comments attributed to the Brisker Rav to the effect that the **shema** cannot be recited conditionally because a conditional acceptance of the yoke of Heaven is meaningless ("she-ein shayach la'asot t'nai be-kabbalat ol malchut shamayim"). See *Ha-Tefillah be-Tzibbur*, chap. 3, note 106. See also *Ishei Yisra'el: Hilchot Tefillah*, ed. R. Avraham Yeshaye Pfoifer (Jerusalem, 1998), 18:18, note 45.

9. This observation is reflected in the comments of *Teshuvot Bet*

IV. *Tefillah* with Tefillin or Tefillah be-Tzibbur without Tefillin?

1. The Position of Magen Avraham

Magen Avraham, *Orach Chayim* 66:12, addresses the question of priorities with regard to prayer with *tefillin* versus *tefillah be-tzibbur* (communal prayer) without *tefillin*. If a person does not have immediate access to *tefillin*, is it appropriate to pray together with the *tzibbur* and to put on *tefillin* after completing the service or is it proper for him to delay his prayers until *tefillin* become available even though he will then be able to pray only as an individual? Magen Avraham concludes that it is preferable to forego prayer with a *minyan* in order to pray while wearing *tefillin*.¹⁰ Magen Avraham's position is followed by a host of authorities, including *Chayei Adam* 20:8; *Shulchan Aruch ha-Rav* 66:11;

Yitzchak, *Yoreh De'ah*, II, no. 88, in the discussion of the situation of an individual who follows the practice of wearing *tefillin* on *chol ha-mo'ed* but finds himself in a locale in which the local congregation does not. The individual cannot wear *tefillin* while praying with the congregation because of the consideration of *lo titgodedu* (see *infra*, note 12). Bet Yitzchak recognizes that, according to his own thesis, it would be permissible to pray with the congregation without *tefillin* and don *tefillin* later in the day since Bet Yitzchak maintains that intention to put on *tefillin* at a later time negates the consideration of offering false testimony. Nevertheless, Bet Yitzchak advises that the individual pray *be-yechidut* in order to obtain the optimal benefit of reciting *shemoneh esreh* while wearing *tefillin*. Bet Yitzchak, in effect, maintains such optimal benefit supercedes considerations of *tefillah be-tzibbur*.

10. Magen Avraham advances two arguments in support of this position, both of which are rebutted by Eliyahu Rabbah 58:5, who, nevertheless, concurs in the ruling of Magen Avraham. Cf., however, Rabbi Shabbetai Feinberg, *Afikei Meginim*, ad locum, 66:13, who both refutes the argument and contests Magen Avraham's ruling.

Kitzur Shulchan Aruch 10:22; Siddur Derech ha-Chayim, Dinei she-Yishtadel Adam le-Hitpallel be-Tzibbur, sec. 7; Mishnah Berurah 66:40; Aruch ha-Shulchan 66:17; Kaf ha-Chayim 25:28 and 66:34; Teshuvot Mahersham, III, no. 359, reprinted in *Da'at Torah*, I, no. 38; Rabbi Yisra'el Ya'akov Algazi, *Shalmei Tzibbur*, Dinei Tefillin, no. 3; and by other decisors cited in *Birur Halachah*, I, *Orach Chayim* 66.

2. An Opposing View

In an unpublished responsum cited by his son, Rabbi Yitzchak Yosef, *Yalkut Yosef*, vol. I, *Hilchot Tefillah*, note 7, Rabbi Ovadiah Yosef notes that it would appear that *Pri Chadash* disagrees with the position of *Magen Avraham*. In his concluding comments to *Orach Chayim* 496, *Pri Chadash* recounts that, although he resided in *Eretz Yisra'el*, on one occasion, he was a visitor in Egypt over the course of a *Yom Tov*. Since it was his intention to return to *Eretz Yisra'el* he was perforce required to treat the second day of *Yom Tov* as a weekday and, accordingly, he was obligated to fulfill the mitzvah of *tefillin* on that day. Since members of the Egyptian community did not don *tefillin* on the second day of *Yom Tov*, he had the choice of either praying in private with *tefillin* or of putting on *tefillin* in private and praying with a *minyan* without benefit of *tefillin*.

Pri Chadash reports that he chose to don *tefillin* in private in order to recite the *shema* because of the consideration that one who recites the *shema* without wearing *tefillin* is regarded as having committed perjury. Upon concluding the recitation of the *shema*, *Pri Chadash* removed his *tefillin* and then proceeded to go to the synagogue where he silently recited the weekday *shemoneh esreh* while the congregation recited the

Yom Tov shemoneh esreh.¹¹ Rabbi Yosef notes that *Pri Chadash* did not complete the morning service by reciting the *shemoneh esreh* at home privately so that he might recite *shemoneh esreh* while wearing *tefillin*. From that narrative Rabbi Yosef deduces that *Pri Chadash* disagreed with the view of *Magen Avraham* and maintained that *tefillah be-tzibbur* is of greater importance than praying *shemoneh esreh* while wearing *tefillin*.

According to Rabbi Yosef's analysis of *Pri Chadash*'s position, the latter authority disagrees with the position of

11. Ostensibly, choice of this procedure involves an antecedent presumption that an individual who recites a weekday *shemoneh esreh* together with a *minyan* that is reciting the Holy Day prayer is considered to be engaged in *tefillah be-tzibbur*. Rabbi Yosef Shalom Eliashiv concurs in that view. See R. Yerachmiel David Fried, *Yom Tov Sheni ke-Hilchato* (Jerusalem, 1998), chap. 3, notes 42-45. For a contradictory opinion see Rabbi Shlomo Zalman Auerbach, cited in Rabbi Yehoshu'a Neuwirth, *Shmirat Shabbat ke-Hilchatah*, I, chap. 31, note 89, who appears to be of the opinion that a disparate prayer cannot be considered *tefillah be-tzibbur*.

However, it is not necessarily the case that *Pri Chadash* attended synagogue and participated in the *minyan* in order to fulfill *tefillah be-tzibbur* but rather because he felt that, as a public personage, his absence from the synagogue due to the fact that he was not observing the second day of the festival would lead to a demeaning of the festival (*zilzul yom tov*). If so, *Pri Chadash*'s personal conduct does not serve as evidence of his position with regard to fulfillment of *tefillah be-tzibbur* in this fashion. See Rabbi Yitzchak Plazker, *Sha'arei Yitzchak*, *Kuntres Bi'urei Hilchot Yom Tov Sheni* 10:3, cited in *Yom Tov Sheni ke-Hilchato*, chap. 3, note 43. As reported in *Yom Tov Sheni ke-Hilchato*, chap. 3, note 45, Rabbi Eliashiv disputed that contention and noted that there is no mention in *Pri Chadash* or in later authorities that *Pri Chadash*'s attendance in the synagogue was to assure that the festival not be demeaned. For a fuller discussion of this issue as well as of Rabbi Auerbach's position regarding this matter, see *Yom Tov Sheni ke-Hilchato*, *ibid.*, notes 43 and 44.

Magen Avraham. It is noteworthy that the position of *Pri Chadash* is accepted by several other authorities, most notably *Chayei Adam* 103:4; *Kaf ha-Chayim* 496:35; and *Shalmei Tzibbur, Dinei Tefillin*, no. 18. If Rabbi Yosef is correct and *Pri Chadash* disagrees with **Magen Avraham** and maintains that prayer with a *minyan* takes precedence over wearing *tefillin*, then each of those authorities (*Chayei Adam*, *Kaf ha-Chayim* and *Shalmei Tzibbur*) espouse contradictory positions.

That is so because *Chayei Adam*, *Kaf ha-Chayim* and *Shalmei Tzibbur* all follow the position of *Pri Chadash* in ruling that a resident of *Eretz Yisra'el* finding himself in the Diaspora on the second day of the festival should don *tefillin* in private in order to recite *kri'at shema* but then remove them in order to recite *shemoneh esreh* in the synagogue with a *minyan*. Rabbi Yosef observes that this position contradicts the view of **Magen Avraham** who rules that wearing *tefillin* for *shemoneh esreh* supercedes *tefillah be-tzibbur*. However, as noted previously, those selfsame authorities all rule in accordance with **Magen Avraham**'s view that a person who does not have his own *tefillin* should forego *tefillah be-tzibbur* and delay *shemoneh esreh* until he has access to *tefillin*. According to Rabbi Yosef, those two rulings are contradictory in nature since each reflects a different view with regard to whether wearing *tefillin* for *shemoneh esreh* should be accorded priority over *tefillah be-tzibbur* or vice versa. Rabbi Yosef himself, in a parenthetical comment included in his unpublished responsum, *Yalkut Yosef, I, Dinei Tefillah*, note 7, notes the contradiction inherent in the two rulings of *Shalmei Tzibbur* but fails to note a similar contradiction in the parallel rulings of *Chayei Adam* and *Kaf ha-Chayim*.

3. Possible Reconciliation of Both Opinions

It has been assumed that **Magen Avraham** maintains that being able to don *tefillin* for *shemoneh esreh*, even though the individual doing so has already recited the *shema*, takes

precedence over *tefillah be-tzibbur* without *tefillin*, i.e., a person finding himself without *tefillin* should not pray with a *minyan* but should wait until *tefillin* become available after the congregation has completed its prayers. *Shulchan Aruch*, *Orach Chayim* 66:8, rules that although there is an obligation to recite *shemoneh esreh* immediately after the blessing of *ga'el Yisra'el* without interruption or delay (*semichat ge'ulah le-tefillah*), nevertheless, if for some reason one is not wearing *tefillin*, one may delay *shemoneh esreh* in order to put on *tefillin*. *Magen Avraham* observes that since *Shulchan Aruch* 101:3 maintains that *semichat ge'ulah le-tefillah* is of greater importance than *tefillah be-tzibbur* it then follows that donning *tefillin*, which is of greater significance than *semichat ge'ulah le-tefillah*, certainly takes priority over *tefillah be-tzibbur*. *Magen Avraham* is discussing a case in which *tefillin* are sought solely for the purpose of wearing *tefillin* while reciting *shemoneh esreh*, i.e., the individual has already recited the *shema* and the accompanying blessings.

A rather common practical ramification of the dispute between *Magen Avraham* and *Pri Chadash*, according to this analysis, arises in the case of a person who wears *tefillin* on *chol ha-mo'ed* but attends a synagogue in which the practice is not to wear *tefillin*.¹² According to this understanding of *Magen*

12. The problem arises because of the biblical prohibition “*lo titgodedu* — you shall not cut yourselves” (Deuteronomy 14:1). Rabbinic exegesis renders the phrase as “do not make yourselves diverse communities” (*agudot agudot*). See *Mishnah Berurah* 31:8. Cf., however, sources cited in *She'arim Metzuyanim be-Halacha* 10:36, who maintain that it is permissible for a person who does not wear *tefillin* on *chol ha-mo'ed* to pray with a *minyan* that does wear *tefillin* because the onlooker has no reason to ascribe such conduct to a divergent custom but may assume that the individual is not wearing *tefillin* because of a gastrointestinal disorder that renders it impermissible for him to do so. See also *Ishei Yisra'el* 41:71, note

Avraham, that individual should recite the *shema* and *shemoneh esreh* in private and join the *tzibbur* only for *mussaf* (since *shemoneh esreh* with *tefillin* takes precedence over *tefillah be-tzibbur*); however, according to *Pri Chadash*, the person should recite the *shema* with *tefillin* in private and then remove his *tefillin* and proceed to the synagogue for the recitation of *shemoneh esreh* since, according to *Pri Chadash*, *tefillah be-tzibbur* takes precedence over *tefillah* with *tefillin*.¹³

However, Rabbi Yechiel Avraham Zilber, *Birur Halachah*, I, *Orach Chayim* 66 — without adducing compelling evidence — argues that Magen Avraham's ruling to the effect that donning *tefillin* takes precedence over *tefillah be-tzibbur* applies only when the *tefillin* are to be worn for both *shema* and *tefillah*, i.e., *tefillah be-tzibbur* is overridden only in face of two countervailing considerations: concern not to recite the *shema* without *tefillin* in order not to give false testimony plus the need to recite *shemoneh esreh* while wearing *tefillin*. Accordingly, Rabbi Zilber argues that, in a situation in which a person has already recited the *shema*, *tefillah* with *tefillin* should not be accorded priority over *tefillah be-tzibbur* without *tefillin*.¹⁴

134.

13. Cf., however, *Ishei Yisra'el* 41:71, note 136, who cites a host of authorities who rule that, in such circumstances, one should pray *be-yechidut* with *tefillin* on *chol ha-mo'ed* since *shemoneh esreh* with *tefillin* takes precedence over *tefillah be-tzibbur*.

14. Rabbi Zilber himself concedes that Magen Avraham's comments, as cited earlier, indicate that Magen Avraham regards wearing *tefillin* while reciting *shemoneh esreh* as having priority over *tefillah be-tzibbur*. Nevertheless, Rabbi Zilber contends that Magen Avraham's comments in that regard are only tentative and that, in actuality, Magen Avraham would agree that *tefillah be-tzibbur* takes precedence over *shemoneh esreh* with *tefillin*. Although this understanding of Magen Avraham is somewhat forced, the thesis is

According to Rabbi Zilber, the ruling of Magen Avraham is limited to the situation of a person to whom tefillin were unavailable before commencement of services. In such a situation, the options are either to pray with the minyan and recite both **shema** and **shemoneh esreh** without tefillin or to delay one's prayers and recite both **shema** and **tefillah** with tefillin after the minyan has concluded its prayers. According to Rabbi Zilber, it is only in those circumstances that Magen Avraham maintains that donning tefillin has priority. Consequently, in a situation in which one has tefillin available for the **shema** and **shemoneh esreh** but would be unable to utilize them for **tefillah be-tzibbur** — such as the case of an Israeli who finds himself in the Diaspora on the second day of the festival — and hence the individual has the option either of reciting the **shema** with tefillin and removing the tefillin in order to join the minyan for **tefillah** without tefillin or of reciting both the **shema** and the **shemoneh esreh** **be-yechidut** with tefillin, even Magen Avraham, according to Rabbi Zilber, would agree that **tefillah be-tzibbur** takes precedence over **tefillah** with tefillin. If so, Magen Avraham would agree with Pri Chadash's ruling regarding an Israeli who is in the Diaspora on the second day of the festival.

Similarly, it would appear that, according to this thesis, in a situation in which one has the opportunity to don tefillin for **shema**, e.g., by borrowing tefillin from a friend, but does not have the opportunity to wear them while reciting **shemoneh esreh** immediately thereafter (because he must return them to their owner so that the latter may pray in his tefillin), it is appropriate for the individual to recite **shemoneh esreh** with the minyan albeit without tefillin.

There is some support in earlier sources for the thesis

entirely cogent on its own merits.

advanced by Rabbi Zilber. A close reading of *Chayei Adam* 20:8 and *Shalmei Tzibbur*, *Hilchot Tefillin*, no. 3, indicates that, in citing the position of *Magen Avraham* to the effect that wearing *tefillin* takes precedence over *tefillah be-tzibbur*, those authorities emphasize that this is because of the fact that reciting the *shema* without *tefillin* is tantamount to providing false testimony. Indeed, as Rabbi Zilber himself seems to recognize, for those authorities, the thrust of *Magen Avraham*'s ruling is that wearing *tefillin* for the recitation of *shema* takes precedence over *tefillah be-tzibbur*, not that wearing *tefillin* for *tefillah* takes precedence over *tefillah be-tzibbur*.¹⁵ It seems that those authorities maintain that the sole consideration that should cause a person to forego *tefillah be-tzibbur* is the overriding need to wear *tefillin* while reciting *shema* lest he be guilty of bearing false witness. Since *shemoneh esreh* may not be recited until after *shema* has been recited, the effect is to forego *tefillah be-tzibbur* solely for the sake of wearing *tefillin* while reciting *shema*. However, as between *tefillah be-tzibbur* and wearing *tefillin* while reciting *shemoneh esreh*, priority must be given to *tefillah be-tzibbur*. Thus, for those authorities, it is not a combination of *shema* and *shemoneh esreh* with *tefillin* that supercedes *tefillah be-tzibbur* but only *shema* while wearing *tefillin* that is accorded priority over *tefillah be-tzibbur*.

Accordingly, it is not surprising that *Chayei Adam*, *Kaf ha-Chayim* and *Shalmei Tzibbur* rule in accordance with *Pri Chadash* in declaring that an Israeli in the Diaspora on the second day of the festival should recite the *shema* with *tefillin* privately and then recite the *shemoneh esreh* with the *tzibbur*

15. As noted, on the basis of *Magen Avraham*'s argument it would appear that *tefillah* with *tefillin* takes precedence over *tefillah be-tzibbur*, and indeed that is the position of Rabbi Shlomo Zalman Auerbach as cited in *Yom Tov Sheni ke-Hilchato*, chap. 3, notes 43-44.

without **tefillin**. This is due to the fact that once a person has recited the **shema** with **tefillin** he is no longer confronted with the problem of bearing false witness and the question becomes solely one of which has greater priority: **tefillah** with **tefillin** or **tefillah be-tzibbur**. **Pri Chadash**, followed by **Chayei Adam**, **Kaf ha-Chayim** and **Shalmei Tzibbur**, maintains that **tefillah be-tzibbur** has precedence.

According to this analysis, in circumstances in which one will be unable to recite the **shema** with **tefillin**, it might be argued that even **Pri Chadash** would agree that wearing **tefillin** for **shema** takes precedence over **tefillah be-tzibbur**. Consequently, when a person does not have his own **tefillin** and needs to borrow a pair of **tefillin** from a friend after the latter has concluded his prayers with the **minyan**, it would follow that, unlike the position of Rabbi Yosef,¹⁶ **Pri Chadash** would concur with **Magen Avraham** that **shema** with **tefillin** take precedence over **tefillah be-tzibbur**.

Nevertheless, numerous later authorities understand **Magen Avraham** literally and assume that even recitation of **shemoneh esreh** while wearing **tefillin** supercedes **tefillah be-tzibbur**. That view is inherent in the position of the many authorities who rule that an individual who dons **tefillin** on **chol ha-mo'ed** should recite **shacharit** privately rather than attend a synagogue where worshippers do not wear **tefillin**.¹⁷

4. Rabbi Yosef's Compromise

In his previously cited responsum, Rabbi Yosef notes that, according to his analysis, since **Pri Chadash** disagrees with **Magen Avraham**, the position that donning **tefillin** for prayer

16. It should be noted that the only authority who explicitly disagrees with **Magen Avraham** is **Afikei Meginim**, **Orach Chayim** 66:13.

17. See **supra**, note 13.

takes precedence over **tefillah be-tzibbur** is not unanimously accepted. Accordingly, he suggests the following compromise: Since the principal benefit of **tefillah be-tzibbur** is to assure that one's prayers will be accepted, an individual who is confident that he has the proper intent in reciting his prayers and that his prayers will certainly be accepted should don **tefillin** for **shemoneh esreh** even at the expense of **tefillah be-tzibbur**. However, an individual who is uncertain whether he will have the requisite **kavvanah** for his prayer to be accepted as the prayer of an individual should pray with a **minyan** without **tefillin** (and rely on the opinions that **tefillah be-tzibbur** takes precedence over prayer with **tefillin**) and delay fulfilling the mitzvah of **tefillin** until after he has completed his prayers.

5. The Ambiguity Inherent in *Minchat Yitzchak*'s Ruling

Contemporary writers, including Rabbi Y.Y. Fuchs, *Ha-Tefillah be-Tzibbur*, chap. 3, p. 29, note 60 and *Ishei Yisra'el*, chap. 12, note 44, cite Rabbi Ya'akov Yitzchak Weiss, *Minchat Yitzchak*, II, no. 107, as maintaining that one who wishes to do so may pray with a **minyan** even at the expense of not praying with **tefillin**. However, a careful reading of *Minchat Yitzchak* does not necessarily yield that conclusion. *Minchat Yitzchak* discusses a situation in which the schedule of communal prayer is such that the **tzibbur** misses the **z'man kri'at shema** and in order to participate in such a **minyan** it is necessary to recite the **shema** prior to commencement of the communal services. Dayan Weiss cites the earlier-noted sources to substantiate the position that, given the fact that the individual plans to pray later with **tefillin**, prior recitation of **shema** does not constitute false witness. Accordingly, he rules that if a person would prefer to pray with a **minyan** rather than to pray in private with **tefillin**, he may avail himself of that option even though he will not have the advantage of reciting **shema** while wearing **tefillin**.

Dayan Weiss does not discuss the issue of whether **tefillah**

with **tefillin** is itself sufficient to be accorded precedence over **tefillah be-tzibbur**. Dayan Weiss simply rules in accordance with the view that intention to don **tefillin** at a later time negates the consideration of bearing false witness; he says nothing with regard to the relative weight of the less significant consideration that requires recitation of **shemoneh esreh** with **tefillin**. Although it is entirely plausible that he would maintain that one has the option to choose **tefillah be-tzibbur** over prayer with **tefillin** (similar to his position with regard to **shema**, albeit for a different reason), he does not state so explicitly and does not explicitly rule contrary to the previously cited position of **Magen Avraham**.

Accordingly, in a situation in which the options are either to recite both **shema** and **tefillah** with a **minyan** but without **tefillin** or to don **tefillin** for both recitation of **shema** and **shemoneh esreh** but to do so **be-yechidut**, it would appear that the student should be advised to pray **be-yechidut** since that is clearly the position of **Magen Avraham**, which is not disputed by other authorities (with the exception of **Afikei Meginim**, **Orach Chayim** 66:13, and Rabbi Yosef's analysis of **Pri Chadash**). It should be added that if the student relies upon Rabbi Yosef's opinion and prays with the **minyan** without **tefillin**, the student should be reminded to don **tefillin** before eating breakfast since, as recorded by **Mishnah Berurah** 70:20, one should not eat before one has fulfilled the mitzvah of **tefillin**.¹⁸

V. Prayer without Tefillin for the Sake of a Minyan

Rabbi Yisra'el Avraham Abba Krieger, Teshuvot China

18. See also Rabbi Reuven Margolis, **Nefesh Chayah**, **Orach Chayim** 37:2, for a further analysis of the issue of partaking of food before donning **tefillin**.

de-Chayei, no. 30, raises the question of whether a person who does not have *tefillin* but is the tenth man for the *minyan* should be permitted — or advised — to pray without *tefillin* in order that the other nine individuals be enabled to participate in *tefillah be-tzibbur*.¹⁹ Rabbi Krieger recommends that one should pray without *tefillin* in order to provide the *tzibbur* with the merit of *tefillah be-tzibbur*.²⁰

Rabbi Shlomo Zalman Auerbach issued a similar ruling in a somewhat different context. Rabbi Auerbach discusses a situation in which there is a bare *minyan* of individuals and one member knows that if he participates in the *minyan*, circumstances will compel him to absent himself in the middle of the reader's repetition of the *shemoneh esreh* or of *kri'at ha-Torah*. Ramo, *Orach Chayim* 55:2, rules that a person is

19. Rabbi Krieger assumes that it is necessary for all ten members of the *minyan* to pray together in order to constitute *tefillah be-tzibbur*. This is also the opinion of Rabbi Moshe Feinstein, *Iggerot Moshe*, *Orach Chayim*, I, nos. 28-30, and of Rabbi Shlomo Zalman Auerbach, *Halichot Shlomo* 5:8. For a contradictory opinion see *Minchat Yitzchak*, IX, nos. 6-7, who maintains that even for *tefillah be-tzibbur* it is sufficient to have six members praying together. According to this latter opinion, Rabbi Krieger's question could be rephrased: If five members have *tefillin* and five do not, would it be permitted for one of them to pray without *tefillin* so that the five with *tefillin* will be enabled to acquire the advantage of *tefillah be-tzibbur*? For a survey of the halachic literature regarding the number of individuals required to pray as a group in order to constitute *tefillah be-tzibbur* see *Ishei Yisra'el*, 12:7, note 15.

20. See Rabbi Y. Y. Fuchs, *Ha-Tefillah be-Tzibbur*, chap. 3, note 60, who cites *China de-Chayei* as espousing this view. However, a careful reading of *China de-Chayei* would indicate that, although he adduces some support for this conclusion, the main thrust of his argument is to demonstrate that *tefillah be-tzibbur* in general takes precedence over praying with *tefillin*. That conclusion is in disagreement with the basic premise of *Magen Avraham* (whom *China de-Chayei* fails to cite).

prohibited from leaving a **minyan** when fewer than a quorum remain and, should he do so, he is deemed an **ozev HaShem** ("abandoning God") because his departure results in disruption of the **minyan**. Nevertheless, Rabbi Auerbach rules that one should participate in the **minyan** to the extent possible. Rabbi Auerbach reasons that, since the individual's participation will enable the **tzibbur** to acquire the merit of communal prayer, he is benefiting the public (i.e., he is *mi-machazikei ha-rabbim*) and that that consideration overrides the consideration of being among the **ozvei HaShem**.²¹ The common denominator in these two situations is that what would otherwise be less than optimal comportment is commendable when the purpose is to acquire the benefit of **tefillah be-tzibbur** on behalf of the community.

Rabbi Shlomo Yehudah Tabak, **Teshurat Shai**, I, no. 487, discusses the situation of a synagogue that, on **chol ha-mo'ed**, cannot muster an entire **minyan** of individuals who wear **tefillin** or an entire **minyan** of individuals who do not wear **tefillin**. Since, because of the consideration of *lo titgodedu*²² there cannot be a mixed congregation, some wearing **tefillin** and some without, the **minyan** on **chol ha-mo'ed** would have to be cancelled. **Teshurat Shai** recommends that those who wear **tefillin** don them at home in private and recite the **shema** and then go to the synagogue and pray without **tefillin**. Thus there will be a **minyan** of non-**tefillin**-wearing worshippers and the synagogue will be able to maintain its **minyan**. However, as earlier indicated, **Teshurat Shai**'s opinion is less novel than the ruling of **China de-Chayei** since the situation addressed by **Teshurat Shai** involves an individual who is able to recite **shema** with **tefillin** and consequently **Teshurat Shai**'s ruling permits **tefillah be-tzibbur** to take precedence only over

21. See **Halichot Shlomo** 5:13.

22. See *supra*, note 12.

shemoneh esreh with **tefillin**. For a further discussion of the proper procedure to be followed on **chol ha-mo'ed** see *Ishei Yisra'el* 41:71, note 136.

VI. Conclusion

It would appear that, in a situation in which a student arrives at school without **tefillin**, and has the choice either of praying without **tefillin** with a **minyan** or of reciting **shema** and **shemoneh esreh** with **tefillin** but **be-yechidut**, many authorities would rule that it is preferable for the student to don **tefillin** and pray **be-yechidut**. However, should the school feel a need to reinforce the importance of **tefillah be-tzibbur**, there is sufficient authority to support the position that there is no prohibition against reciting **shema** without **tefillin** because of a concern regarding false testimony since the student plans to put on **tefillin** later. Moreover, as explained earlier, since some **poskim** rule that the concern is only that **shema** not be recited without **tefillin**, those decisors would advise that the student borrow **tefillin** for the purpose of reciting **shema** before commencing the **shacharit** prayers and that, after returning the **tefillin** to their owner, the student participate in **tefillah be-tzibbur** without **tefillin**. Since the issue is one of priority rather than of prohibition, there is room to take cognizance of a broad spectrum of considerations in determining school policy.

In any event, a skilled educator can readily use this practical question as a vehicle for analyzing the relevant considerations with students. Precisely because the question involves a matter of priority rather than of prohibition, it is appropriate to emphasize that there is not necessarily a single correct answer applicable to every situation. Emphasis should also be placed on the fact that the entire situation is one of a **be-de'aved** but that the goal of a **ben Torah** must be to strive to perform **mitzvot** in the mode of **le-chatchilah** and to avoid being confronted by such **she'elot** in the first place!

Art or Idolatry? The Laws of Forbidden Images

Rabbi Michoel Zylberman

Introduction

The recent Indian hair controversy focused observant Jewry's attention on a surprisingly practical application of the laws of idolatry. In general, while idolatry is one of the three cardinal sins of Judaism, its contemporary relevance remains limited in a predominately non-pagan world. One corollary of this prohibition, however, the injunction against creating images of celestial bodies or of man, governs aspects of our daily activity. We must explore this area of halacha to determine whether we can buy a birthday card with a picture of the sun, surf the internet, allow our children to play with dolls, or construct a *menorah* in our synagogues. In this article we will present the halachic framework for addressing these issues and the opinions of contemporary Rabbinic authorities regarding practical applications.

Source of the Prohibition

The Talmud (*Avodah Zarah* 42b-43b)¹ derives a series of related halachot from the verse in *Yitro* (20:20) "*Lo taasun iti elohei chesef v'elohei zahav lo taasun lachem*," "You shall not make with Me gods of silver and gods of gold you shall not make for yourselves," specifically that one may not produce images of

1. All subsequent references to the Talmud and its commentaries refer to this passage unless otherwise noted.

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the upper celestial sphere's inhabitants, namely angels, the lower celestial sphere's inhabitants, including the sun, moon, stars, and signs of the Zodiac, or of man.² In addition to the biblical prohibition of *asiyah*, creating any of these images, the Talmud indicates that there is an additional rabbinic injunction against *shehiyah*, retaining these images.³

Although these prohibitions apply regardless of whether or not the forbidden images are actually intended for worship or are worshipped, Rambam and *Chinuch* view them as a precaution against idolatry. Rambam (*Sefer Hamitzvot Laavin 4*) writes that the Torah prohibited creating these images lest one be misled to think that they are idols. *Chinuch* (39) claims simply that *lo taasun iti* is meant to further distance ourselves from idolatry.

Creating images of the sun, moon, and stars

Tosafot (*Avodah Zarah* 43b s.v. *veha*) and Rambam (*Hil. Avodah Zarah* 3:11) prohibit all three-dimensional images of the sun, moon, and stars, be they protruding images (*boleit*) or sunken images (*shokeiah*). (This is in distinction to the prohibition of images of man, which, as we will see, only applies to protruding images.)⁴ Tosafot write that the prohibition extends to sunken images because in the sky the sun, moon, and stars are sunken.⁵

2. The Talmud also derives an injunction against replicating the structure of vessels of the *Beit HaMikdash*. We will deal with this separately later.

3. Ran (19a) appears to indicate that *shehiyah* is of biblical origin.

4. Rashba (*Teshuvot* 1:167), Ritva (43b s.v. *hatam*), and Ran (19b) dispute this and seem to permit creating sunken images of the sun, moon, and stars.

5. Presumably this means that we perceive these bodies as sunken. Contrast this with Ritva (43b s.v. *hatam*) who writes that the sun, moon, and stars appear as protruding and not sunken and therefore

This is the ruling of *Shulchan Aruch* (Yoreh Deah 141:4).

The question of whether *lo taasun iti* extends to two-dimensional imagery of the sun, moon, and stars is slightly more complex. Among earlier authorities, Rambam and Maharam take opposing sides on the issue.⁶ *Taz* (141:13) permits two-dimensional imagery of the sun, moon, and stars, while *Shach* (141:25 and *Nekudat HaKesef*) prohibits it.⁷ As we shall see, the consensus of later *poskim* is that we follow *Shach*'s stringent opinion.

Yad Ketanah in his commentary on Rambam (*Minchat Ani* 3:33, excerpted in *Darkei Teshuvah* 141:46) opines that any drawing that reflects the standard way people illustrate the sun falls under this prohibition. Thus, one may not sketch a circle with emanating rays, even though the actual sun does not have rays protruding from it, as we typically identify this image with the sun. Similarly, drawing a small circle with points coming out of it should be prohibited, as this picture would easily be associated with a star.⁸ Along these lines, R. Pesach Eliyahu Falk of Gateshead (in an article published in *Am HaTorah Mahadurah* 3, Vol. 5, pp. 49-70) writes that one should not draw a picture of the night sky while leaving some white spots, as

permits sunken images.

6. Rambam (3:11), in prohibiting producing an image of these celestial bodies on a tablet, presumably refers to two-dimensional images. *Darkei Moshe*, however, infers from Maharam (quoted in *Mordechai Bava Batra* 549) that drawing a two-dimensional picture of the sun, moon, or stars is permissible. While *Shulchan Aruch* (141:4) implies that two-dimensional imagery is forbidden, Ramo, despite his citation of Maharam in *Darkei Moshe*, is silent.

7. See *Pitchei Teshuvah* (141:6,8) who quotes *teshuvot* on both sides of the issue.

8. *Iggerot Moshe Orach Chaim* Vol. 5 (9:6) appears to accept *Yad Ketanah*'s ruling.

those spots clearly represent stars.

Darkei Teshuvah (141:38) quotes Maharam Alshich (77) who holds that the prohibition of drawing the sun, moon, and stars applies only to full pictures. Maharit, however, (*Yoreh Deah* 35) writes that a half moon does fall under *lo taasun iti* because the moon often appears as such. Using similar logic, Rabbi Falk prohibits drawing a sun covered by clouds and a setting sun, as we often view the real sun in such positions.⁹ Rabbi Falk does concede that one may draw part of a sun on a corner of a piece of paper in such a way that there is no room to draw the rest, as this is not a normal perspective of the sun.¹⁰

In addition to the sun, moon, and stars, the Talmud also prohibits creating images of the Zodiac's signs. While *Taz* (141:13) assumes that the prohibition extends to the image of any single member of the Zodiac, *Shach* (141:30) limits it to all twelve signs together.¹¹

Drawing for Educational Purposes

Is it permissible to encourage or even allow children to draw pictures of the sun, moon, and stars? *Iggerot Moshe (Orach Chaim* Vol. 5 9:6) writes that a picture that accurately captures what it

9. Rabbi Falk quotes R. Nissim Karelitz of Bnei Brak as permitting both of these, as does R. Shmuel Wosner (*Shevet Halevi* Vol. 7 134:7). R. Hershel Schachter agrees with this position. All citations of R. Schachter, unless otherwise noted, are from personal conversations with the author and their accuracy was subsequently verified by R. Schachter.

10. This leniency was also conveyed to me by R. Azriel Auerbach of Jerusalem.

11. Meiri, who prohibits a single image, suggests that the Talmud only prohibited making dots in the shape of the constellations but not replicating the animals or other representations that we identify with the Zodiac (42b s.v. *din oseh*).

is supposed to represent should be prohibited once a child reaches the age of *chinuch*. Even though most children are not proficient enough in their artwork to produce something that actually looks like the sun, *Iggerot Moshe* frowns upon the educational message imparted by encouraging children to draw that which would be prohibited if they did it properly.¹²

R. Shmuel Wosner (*Shevet Halevi* ibid. 134:8) posits a possible leniency for allowing children to draw pictures of the sun, moon, and stars for *Parshat Bereishit* (creation) and *Parshat Vayeshev* (Yosef's dreams) projects. The Talmud indicates that the prohibition of *lo taasun iti* is waived for purposes of *l'hitlamed* (to teach). This is one explanation the Talmud presents for why Rabban Gamliel HaNassi was permitted to retain images of the moon that he presented to witnesses who sighted the new moon. The simple reading of the Talmud, as reflected in the rulings of *Rosh* (3:5) and *Tur* (*Yoreh Deah* 141), presents *l'hitlamed* only as a justification for retaining otherwise forbidden images but not for creating them. However, *Rif* (18b) presents the talmudic passage in a way that even permits creating these images where *l'hitlamed* is applicable. *Shulchan Aruch* (141:4) seems to follow *Rif*'s reading, referring to *l'hitlamed* in the context of creating images.

Although *Shulchan Aruch* quotes the leniency of *l'hitlamed*, its scope is unclear. From the instances in the Talmud, it would seem to be limited to knowledge that *bet din* or the leading rabbinic authorities must have in order to rule properly (see *Shabbat* 75a, *Sanhedrin* 68a, *Avodah Zarah* 18a). The Talmud never invokes *l'hitlamed* to permit to a layman an otherwise forbidden activity.¹³ However, *Meiri* (42b s.v. *dinacheirim*) permits creating

12. R. Hershel Schachter and R. Azriel Auerbach expressed similar sentiments.

13. See, however, R. Moshe Feinstein, *Iggerot Moshe*, *Yoreh Deah*

images of celestial bodies for the purpose of learning astronomy. *Shach* (*Nekudat HaKesef* on *Taz* 141:13) appears to go even further, suggesting that images of constellations in *machzorim* do not constitute a violation of *lo taasun iti* because they are considered *l'hitlamed*.¹⁴ R. Wosner writes that *Shach*'s expansive understanding of *l'hitlamed* should permit allowing children to draw pictures of the sun, moon, and stars for educational purposes.

Others dispute this extension of *l'hitlamed*. R. Hershel Schachter thinks that *Shach*'s leniency is difficult to understand and has not been accepted. In a slightly different context, R. Yaakov Yosef Weiss (*Minchat Yitzchak* 10:72) assumes that *l'hitlamed* applies only when one cannot otherwise achieve the educational objective.

Creating images of man

The prohibition against creating images of man is slightly less rigorous than that of the sun, moon, and stars. The generally accepted approach is that only protruding images are prohibited, while sunken images, and by extension two-dimensional images, are permissible.¹⁵ According to this position, photography of people is permissible.¹⁶

3:33, who refers to *Keritot* 5a, which permits producing *shemen hamishcha*, the anointing oil, that would otherwise be prohibited, "lilmod", to learn. He suggests that the simple reading of this passage allows for this action even where there is no practical benefit.

14. *Shach* does not rely on this alone to permit the pictures in *machzorim*. He combines this suggestion with the fact that the images in question are not complete.

15. This is the opinion of *Tosafot* (43b s.v. *veha*) and *Rambam* (3:10), and is the ruling of *Shulchan Aruch* (141:4).

16. See R. Ovadiah Yosef (*Halichot Olam*, *ibid*, and *Yabia Omer* Vol. 4 *Yoreh Deah* 22:3) for a list of authorities who permit photography.

Shulchan Aruch (141:7, based on Rosh, *Avodah Zarah* 3:5), rules that forming an image of a human face without a full body is permissible.¹⁷ R. Yaakov Emden, *Sh"ut Ya'avetz* I 170, quoted in *Pitchei Teshuva* 141:10, however, reinterprets this opinion to permit only a blank face lacking distinct facial features. A face with facial features, even when not connected to a body, or a full body even with a blank face, would be prohibited.¹⁸

Chatam Sofer (2:128), responding to the query of a Jewish student in art school, suggests that one could avoid violating *lo taasun iti* by sculpting an entire human body except for an eye and having a non-Jewish colleague complete the work.¹⁹

R. Yaakov Emden (*Sheelot Yaavetz* 1:170, quoted in *Pitchei Teshuvah* 141:1, and *Megilat Sefer*, Jerusalem, 1979, p. 57) records the fierce opposition of his father, the *Chacham Tzvi*, to efforts of the London Jewish community to have his portrait painted, but indicates that this was more of a *midat chassidut* than a strictly halachic consideration. R. A.Y. Kook (*Da'at Kohen* 66) notes that common practice is to allow photography but that there is a *midat chassidut* in refraining from photographing a complete image of a person.

There is a minority opinion of Ramban (43a s.v. *d'akshina*, quoted in *Taz* 141:12) and Ritva (43b s.v. *v'ibait eima*) that *lo taasun iti* applies even to sunken images of man. *Divrei Malkiel* (3:48) thinks that one should be stringent on this matter, as the potential prohibition is biblical in nature, and therefore prohibits photography.

17. *Shach* (141:25) supports this position and also permits a profile image. *Taz* (141:15) and *Shach* (141:32) quote *Semag* who prohibits even a human face alone, and *Shach* adds, "he who is stringent in this matter is blessed."

18. R. Hershel Schachter says that one should follow *Yaavetz*'s opinion. *Shevet Halevi* (Vol. 7 134:2) writes that the consensus opinion of later authorities is against R. Yaakov Emden.

19. This assumes that *lo taasun iti* does not apply to non-Jews, for otherwise there would be a prohibition of *lifnei iver*. This seems to be a subject of dispute between *Tosafot* and *Rambam*. *Tosafot* (43b s.v. *shani Rabban Gamliel*) write that commissioning a non-Jew to create images of the moon is only a violation of *amirah l'akum*, which is

Chatam Sofer's solution presumably only helps according to the simple interpretation of the *Shulchan Aruch* and not the stringency of R. Yaakov Emden.

Cameras, Machines, and Computers

Modern technology raises additional issues: May one photograph the sun or the moon? Do we consider the image as being created through the act of taking a picture or only through developing the film?

R. Wosner (*Shevet Halevi* Vol. 7, 134:5) writes that film photography of the sun, moon, and stars is permissible, as the image is only created on film.²⁰ R. Schachter points out that the person who develops the film violates *lo taasun iti*. If the developer is Jewish, giving him the film would constitute *lifnei iver*. If the developer is not Jewish, even if we assume that non-Jews are not bound by *lo taasun iti*, there would still be a problem of *amirah l'akum*, having a non-Jew perform an activity that is prohibited to a Jew on the Jew's behalf.

rabbinic, and thus permissible for purposes of a mitzvah. The fact that Tosafot do not raise the issue of *lifnei iver* implies that they hold that non-Jews themselves may create images that are included in *lo taasun iti*. Rambam (*Melachim* 9:2), however, prohibits Noahides from creating images for aesthetic purposes. *Minchat Chinuch* (39) wonders why *Shulchan Aruch* does not record the opinion of Rambam that the prohibition applies to non-Jews. *Tosafot R' Akiva Eiger* (*Rosh HaShanah* 2:11) assumes that there is no prohibition of *lo taasun iti* for non-Jews. *Shach* (141:23) seems to be of the same opinion, as, like Tosafot, he only raises the issue of *amirah l'akum* and not of *lifnei iver*. This also appears to be the assumption of R. Moshe Feinstein (*Iggerot Moshe*, *Yoreh Deah*, 2:54) who permitted Jewish residents of a city to contribute to the erection of a Kennedy statue where the city had already begun its production.

20. R. Nissim Karelitz (cited in Rabbi Falk's article) assumes that film photography is prohibited.

May one press a button on a machine to start an assembly line process that results in the production of dolls? May one click an icon on a computer that sends a message to a printer to print a picture of the sun? To answer these questions we must address two issues. Firstly, does halacha view the products of these situations as being created through a direct action (*ma'aseh*) or an indirect action (*grama*)? Secondly, if all that occurs here is a *grama*, does one violate *lo taasun iti* through *grama*?

There are two basic approaches in rabbinic literature to defining *grama*. According to the approach favored by R. Yosef Dov Soloveichik, any action which starts a process leading directly to the result, even if there is a time delay, is considered direct action and not *grama*.²¹ This would accurately describe the mechanism of both of the above scenarios. According to the second approach, as long as there is a time delay, the action is considered *grama*.²² In the case of the doll-producing machine there would likely be a time delay involved, rendering the initial activity *grama*. Whether the printer case involves *grama* according to this definition might depend on how long the print command takes to be implemented.

R. Natan Geshtetner (*Lehorot Natan* 3:50) writes that creating a forbidden image through *grama*, an indirect action, is permissible. He reasons that since the Talmud (*Shabbat* 120b) distinguishes between *ma'aseh* and *grama* regarding the laws of Shabbat based on the verb “*taaseh*” (“*lo taaseh kol melachah*,” “you shall not make any forbidden labor” – *Shemot* 20:10), the

21. See R. Hershel Schacter, *B'ikvei HaTzon* (Jerusalem 1997), pp. 44-45 for a presentation of this position.

22. See R. Ovadia Yosef, *Yabia Omer* (Vol. 3 *Orach Chaim* 17:4) for a list of authorities who support this view. See also Rabbi Yitzchak Halperin, *Maaseh U'grama Behalacha* (Institute for Science and Halacha, Jerusalem 1978) for a thorough discussion of the topic.

same should be true for forbidden images where the Torah uses a similar verb, “*taasun*.”

R. Schachter notes that R. Yosef Rozen, the Rogachover Gaon, distinguishes between two types of prohibitions, an *issur peulah*, an action-oriented prohibition, and an *issur chalot* (or *nitpael*), a result-oriented prohibition. When it comes to an *issur peulah*, only a direct action is prohibited, as the forbidden activity itself is the focus. However, regarding an *issur chalot*, since the prohibition is result-oriented, even an indirect action which leads to the problematic result is prohibited (*Shut Tzafnat Paaneach*, New York, 131). As *lo taasun iti* is most likely a result-oriented prohibition, since its basis is *avodah zarah*, creating a forbidden image should be prohibited even through *grama*.

How does *lo taasun iti* apply to computer monitors? Does one violate the prohibition by causing a picture of the sun to appear on a monitor? R. Schachter opines that since the image that appears is temporary in nature the prohibition does not apply. Presumably this applies to the image on a digital camera as well. This is in line with Maharit (*Yoreh Deah* 35), who posits that *lo taasun iti* only applies to permanent images.

Retaining images

The Talmud (43b) further indicates that *shehiyah*, retaining one of the prohibited images, is itself forbidden because of *chashad*, or suspicion. Tosafot (s.v. *veha*) demonstrate that the Talmud initially understood the *chashad* as suspicion that the individual created the object in violation of *lo taasun iti*. The conclusion, though, is that the *chashad* is suspicion that the owner worships the object. This is also the opinion of Rashi (s.v. *chashada*).²³

23. Netziv, *Ha'amek Shealah* 57:3, who suggests that Rosh is of the opinion that even according to the Talmud's conclusion the *chashad*

Ramo (141:3) and *Shach* (141:16) hold that even nowadays, when worshipping human and celestial images is no longer in vogue, the prohibition of *shehiyah* remains. *Chochmat Adam* (85:6), though, argues that since no one worships images of man anymore, retaining such an image is permissible.²⁴ He makes no mention of a similar dispensation for images of the sun, moon, and stars, but such an extension might be reasonable.²⁵ R. Schachter thinks that common practice to own such images is based on this lenient position.²⁶ Many *poskim*, however,

is that the person created the object. See also *Beur HaGra* 141:19, 21. R. Tzvi Hersh Orenstein, grandson of the *Yeshuot Yaakov*, in a lengthy *teshuvah* printed in his grandfather's work following *Yoreh Deah* 141, claims that Rambam is of the opinion that the only *chashad* that we must be concerned about is *chashad asiyah* and that *Tosafot* only deny the existence of *chashad asiyah* based on a premise that *Shulchan Aruch* does not accept. R. Ben-Tzion Uziel (*Mishpitei Uziel* Vol. 2 *Yoreh Deah* 18) suggests that *Tur* also understood the Talmud as referring to *chashad asiyah*. R. Hershel Schachter assumes that one should be concerned about this type of *chashad* in addition to *chashad avodah zarah*. Thus, even in situations where the *chashad* of worshipping does not apply, the *chashad* of creating, or perhaps even commissioning the creation, would still be relevant.

24. This seems to be the position of *Ritva* (43b s.v. *v'ibait*).

25. *Darkei Teshuvah* (141:18) quotes *Mekor Mayim Chaim* that *shehiyah* is not prohibited where the casual observer would readily assume that retention of the object is for aesthetic purposes.

26. *Netziv* (*Haamek She'alah* 57:3) observes that people commonly own full images of man, as no one would suspect them of idolatry. R. Binyamin Zilber (*Az Nidberu* 8:59) rules like *Chochmat Adam* regarding storeowners displaying manikins. See also *Darkei Teshuvah* (141: 31,34).

If we are concerned about *chashad asiyah* as well (as per footnote 24), the fact that no one worships human images or the celestial bodies anymore should be of no significance, as the point of concern is that people might suspect one of creating the image. However, this would not be the case with mass produced products. Thus, if we combine the leniency of *Chochmat Adam* with the consideration of

assume that the prohibition of *shehiyah* still applies.²⁷

If we assume the prohibition of *shehiyah* to be binding even nowadays, how can one purchase a newspaper with a picture of a sun, peruse an astronomy book, or own a doll in human likeness? The Meiri quoted above extends the leniency of *l'hitlamed* to astronomy and would permit owning books with pictures of the sun, moon, and stars for educational purposes. Rabbi J. David Bleich proposes that *Shach*'s aforementioned leniency for images in *machzorim* reflects a broader definition of *l'hitlamed*, possibly allowing one to retain any image that has some minimal educational value. For example, perhaps a picture of a lunar eclipse in a newspaper serves to educate us about that phenomenon.²⁸ If one does not accept this argument, presumably drawing a line through a picture of the sun or otherwise defacing the image should remove the prohibition of *shehiyah*.²⁹

Regarding dolls, the Chazon Ish and, *l'havdil bein chaim l'chaim*, R. Elyashiv hold that one should destroy the nose or an eye to avoid violating *shehiyah*.³⁰ R. Ovadiah Yosef (*Yabia Omer* Vol. 3

chashad asiyah, it would be permissible to retain a factory-manufactured doll but not a picture of the sun drawn by an amateur artist.

27. See *Iggerot Moshe, Yoreh Deah* 2:54-55. Meir Greenman, *Dinim v'Hanhagot Mimaran HaChazon Ish* (Bnei Berak 2003, p. 23) records that the Chazon Ish assumed that owning a doll in full human likeness is prohibited. This is also the position of R. Yosef Shalom Elyashiv, as conveyed to me by R. Azriel Auerbach and R. Dovid Morgenstern, and of *Shevet Halevi* Vol. 7, 134:1-2.

28. Personal conversation with R. Bleich.

29. R. Azriel Auerbach agreed with this leniency.

30. *Chochmat Adam* writes that if one wishes to be stringent it is sufficient to deform an eye. According to R. Yaakov Emden's position, one violates *lo taasun iti* with anything short of a blank face, and merely cutting off a nose would not suffice. *Shevet Halevi* (ibid) assumes this way. However, Rabbi Falk argues in the aforementioned article,

Yoreh Deah 8, *Yechaveh Daat* 3:64) suggests two grounds for leniency, although he still recommends not purchasing dolls in full human form. Firstly, if we accept the contention of *Maharit* (*Yoreh Deah* 35) that *lo taasun iti* only applies to images that are permanent, dolls may not be subject to the prohibition. Secondly, the Mishnah (42b) indicates that if one finds an otherwise forbidden image on a utensil that is used for degrading or mundane purposes (*mevuzin*), such as drinking utensils, it is not prohibited. R. Ovadiah Yosef suggests that dolls are *mevuzin*, as children often roll with them in the mud or the like.³¹ ³²

Replicating vessels of the Temple

Among the series of *derashot* on *lo tassun iti*, the Talmud includes the prohibition of replicating parts of the *Beit Hamikdash*. One may not produce a house in the shape of the *heichal*, a porch in the shape of the *ulam*, a courtyard in the shape of the *azarah*, a table in the shape of the *shulchan*, or a candelabrum in the shape of the *menorah*. Although the Talmud seems to group this prohibition with the aforementioned applications of *lo taasun iti*, *Rambam* codifies it in *Hilchot Beit*

quoting a ruling of R. Nissim Karelitz, that breaking the nose of an existing face would satisfy even this stringent opinion, as a visibly broken image should not be prohibited. *Beit Lechem Yehudah*, while not addressing the dispute between R. Yaakov Emden and the lenient authorities, writes that the barometer for whether an image is adequately destroyed is whether it is recognizably broken.

31. In the earlier *teshuvot* R. Yosef does not think that these leniencies would suffice to allow producing such dolls. However, in *Halichot Olam* (Vol. 7, *Masei* 3), he proposes that even creating dolls should be permissible, combining the fact that dolls are not permanent and *mevuzin* with the opinion that the prohibition of *shehiyah* no longer applies.

32. Presumably, neither of these points should be relevant to china dolls, which are designed to be permanent and are not *mevuzin*.

Habechirah (7:10) with the laws of *mora hamikdash*, awe for the Temple.

There is a difference between the application of this prohibition to the *menorah* and to the Temple structures. According to the simple reading of *Shulchan Aruch* (141:8), while replicating the other rooms is only problematic if their dimensions are identical to those of the Temple,³³ reproducing a *menorah* is prohibited even if the height is different, so long as there are seven branches. One may only produce a candelabra that would be unfit for use as a *menorah*. Since the *menorah* in the Temple is usable even if its required height is lacking, a replica of the same size would be prohibited.³⁴

Using this principle, R. Ovadia Yosef (*Yabia Omer*, Vol. I *Yoreh Deah* 12; *Halichot Olam* Vol. 7 *Masei*, 6, quoting a series of earlier responsa on the topic) permits electric *menorahs* in synagogues. The *menorah* in the Temple needed to have cups for inserting oil and wicks. Since electric candelabra are closed on the top and cannot hold oil and wicks, they could not be construed as replicas of the Temple's *menorah*.³⁵

Pitchei Teshuvah (141:14, and see also *Darkei Tesuvah* 141:56),

33. According to this, making a miniature model of the Temple should be permissible. This is the opinion of R. Ovadiah Yosef, *ibid*, and *Minchat Yitzchak* (10:73), both of whom add that this is especially true where there is an educational component, as per the *l'hilamed* dispensation. Both of these responsa do quote other sources that prohibit replicas even when they are not of the same dimensions.

34. This is the opinion of *Maharik* (75, quoted in *Beit Yosef*) and *Shach* (141: 35-36). *Shach* adds that a candelabra made out of metals other than gold is prohibited, as such a *menorah* would be admissible in the Temple, but this is not the case with wood.

35. R. Natan Geshtetner (*Lehorot Natan* 3:48) writes that a seven-branched candelabra on which only six cups can hold oil should be permissible.

quotes an opinion of *B'chor Shor* who assumes that the prohibition applies without qualification to any seven-branched candelabra. Along these lines, R. Ben-Tzion Uziel (*Mishpitei Uziel* Vol. 2 *Yoreh Deah* 18) suggests that as long as the basic shape of the *menorah* is the same, even if it uses light bulbs and not oil, it should be prohibited.³⁶ R. Schachter is of the opinion that common practice is to be stringent on this matter.

Summary

The following is a brief summary of the issues explored in this article.

1) Creating images of the sun, moon, and stars: *Shulchan Aruch* rules explicitly that creating three-dimensional images of these bodies is prohibited, and the consensus of later rabbinic literature prohibits two-dimensional images as well. Although later authorities argue about some of the detailed applications, they generally subscribe to *Yad Ketanah*'s principle that any drawing that reflects the standard way people view these bodies is prohibited.

2) Drawing for educational purposes: *Iggerot Moshe* and others disapprove of allowing children to draw pictures of the sun, moon, and stars. *Shevet Halevi* permits children's drawing for educational purposes in light of *Shach*'s dispensation for images in *machzorim* that have an educational component.

3) Creating images of man: The consensus in rabbinic literature prohibits only three-dimensional images, as in sculptures, but permits two-dimensional images, as in portraits. Everyone agrees that one may sculpt a blank face lacking any distinct facial features. Whether one may sculpt a face with facial features that is not connected to a body or a full body

36. See also *Shoel U'Meishiv* (I 3:71).

with a blank face is subject to dispute.

4) Modern technology: According to Maharit, the prohibition of *lo taasun iti* does not apply to creating temporary images. This is relevant to images on a computer screen or digital camera. However, developing film or printing an image on a printer may constitute creating a forbidden image.

5) Retaining images: *Shehiyah*, retaining one of the prohibited images, is forbidden because of *chashad*, which most render as suspicion that the individual worships the object. Whether this prohibition applies even in societies where such objects are not worshipped is subject to a dispute between *Shach*, who is stringent, and *Chochmat Adam*, who is lenient. While some contemporary authorities subscribe to the lenient opinion, many assume that *shehiyah* is still prohibited. Even if retaining forbidden images is prohibited, some permit *shehiyah* for educational purposes. Chazon Ish holds that one should deform part of a doll in human image, while R. Ovadia Yosef suggests possible leniencies.

6) Replicating vessels of the Temple: According to most authorities, the prohibition of not replicating structures of the Temple applies only if the model's dimensions are identical to those of the Temple. However, producing any seven-branched *menorah* poses a problem. Contemporary authorities disagree about whether one may fashion a seven-branched electric *menorah*, which would be unfit for use of the Temple as it cannot hold oil.

Letters

To the Editor:

In the article "Halacha and Technology: Erasing G-d's Name from a Computer" (Pesach 5763, number XLV), I inaccurately equated the opinion of the *Nodah B'yehuda* with that of *Beit Ephraim* (*Yoreh Deah* 61), who permits the indirect erasing of G-d's name in all cases. In fact, the *Nodah B'yehuda* (*Orach Chaim* 17) only permits the indirect erasing of G-d's name when it occurs as the result of performing a mitzvah. As he states, "*grama* is permitted in the case of immersion in a mikvah [i.e. a mitzvah]," but if done in regards to an act that is not a mitzvah even *grama* would be prohibited.

Therefore, there are three opinions as to when the indirect erasing of G-d's name is allowed: The *Beit Ephraim* permits *grama* in all cases. The *Nodah B'yehuda* permits *grama* if it occurs as the result of performing any mitzvah. Finally, the *Aruch Hashulchan* (*Yoreh Deah* 276:36) only permits *grama* that occurred specifically in the case of one's immersion in a mikvah.

ARYEH BRUECKHEIMERR