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Halachic and Medical Perspectives on Banking Umbilical Cord Stem Cells

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Rabbi Shimon Isaacson, J.D., L.L.M.*

Introduction

Despite countless seminars and debates, the topic of embryonic stem cells remains controversial.¹

In contrast, a subset of stem cell technology focused on “adult” stem cells as opposed to “embryonic” ones, has quietly generated a considerable amount of scientific research, and has already demonstrated significant clinical efficacy. Since 1988,² hundreds to thousands of successful adult stem cell transplantations have saved the lives of patients suffering from

1. *U.S. News and World Report*, “The Promise and Peril of Stem Cell Research: Scientists Confront Thorny Ethical Issues” (5/31/1999). A sampling of recent parallel press releases also illustrates the point: From the Coalition for the Advancement of Medical Research – “Praises Governor of New Jersey for New Stem Cell Institute” (2/24/04), while from the U.S. Conference of Catholic Bishops – “Bishops’ Official Condemns New State ‘Fetus Farm’ Law” (1/5/04).

2. Actually, bone marrow transplants that also utilize adult stem cells have been performed successfully for over 30 years. We, however, will be focusing on stem cells specifically derived from neonatal umbilical cord blood.

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hematological, oncological or immune disorders.³ Using material derived from umbilical cord blood rather than from human embryos, this approach conveniently avoids much of the ethical baggage associated with its more controversial counterpart.

However, it appears that some of the early enthusiasm for this promising new technology has dissipated in response to the commercialization currently dominating the field.⁴ Commonly, vulnerable prospective parents are warned that storage "could, one day, save their baby's life."⁵ At times the appeal can be quite disarming. The Detroit News Health Section reported recently that one magazine ad reads, "\$899 can ensure a lifetime of precious memories."⁶ The fear and guilt aroused by such advertising has succeeded in prompting many young parents of healthy children to spend considerable amounts of money to store stem cells for indefinite periods of time.⁷ The issue of unethical advertising is no doubt important, and certainly warrants further discussion. In this paper, however, we will first focus on several other significant issues related to

3. Gluckman E, Broxmeyer HE, Auerbach AD, et al, "Hematopoietic Reconstitution in a Patient with Fanconi's Anemia, by means of Umbilical-Cord Blood from an HLA-Identical Sibling," *N Engl J Med*, 1989;321:1174-1178. Wagner JE, Kernan NA, Steinbuch M, et al, "Allogeneic Sibling Umbilical-Cord Blood Transplantation in Children with Malignant and Non-malignant Disease," *Lancet* 1995;346:214-219.

4. Johnson F, "Placental Blood Transplantation and Autologous Banking: Caveat Emptor," *J Pediatr Hematol Oncol*. 1997;19:183-186. Sugarman J, Kaalund V, Kodish E, "Ethical Issues in Umbilical Cord Blood Banking," *JAMA* 1997;278:938-943.

5. "Umbilical Cord Blood Banking Industry Flourishes Amid Controversy," *The Detroit News*, 4/10/2004.

6. Ibid.

7. Collection and processing fees range from \$1,000 to \$1,740 initially, with at times an additional \$150 courier fee, and another \$75 to \$100 annual storage fee in the U.S. In Israel the rates are reportedly cheaper.

private cord blood stem cell banking that are uniquely relevant to prospective parents committed to halacha. In the end, the elucidation of the halachic issues may have bearing on the controversy currently facing general society as a whole.

Medical Background: What are stem cells? How do embryonic and adult stem cells differ?

Following fertilization (when a sperm cell unites with an egg), the resulting single, totipotent cell (i.e. possessing the potential to become any type of cell) divides and ultimately differentiates into the various cell types that make up the organ systems of the human body. The process of cell differentiation occurs in specific stages. Initially, the totipotent cell gives rise to pluripotent stem cells that maintain the potential to develop into many different types of cells. Ultimately, there is a commitment of certain pluripotent stem cells to a specific organ system while maintaining the potential for further specialization within that given area. For example, we will be focused on hematopoietic stem cells that are capable of further differentiation into all the components of the hematologic (blood) system such as red blood cells, white blood cells and platelets. Hematopoietic stem cells are “adult” stem cells, derived from bone marrow, peripheral blood, or umbilical cord blood through a process described in detail below. Precisely because there is no significant risk to either mother or infant, and because there is no need for embryonic or genetic manipulation, this approach has raised far less opposition in both the medical or lay communities.

Current Practices and Attitudes Towards Hematopoietic Stem Cell Transplantation

Medicine has made fantastic strides in the treatment of many genetic, hematologic and oncologic diseases. Nevertheless, when chemotherapy or other conventional treatments fail or

are deemed inappropriate, bone marrow replacement is considered the only treatment option available. Classically, this has been accomplished through transplantation of donor-derived bone marrow collected from relatives or strangers registered in the bone marrow banking system with adequate HLA matching cells.⁸ This approach has several disadvantages compared to cord-blood-derived stem cell transplantation.⁹ Consequently, many view cord blood derived hematopoietic stem cells as a preferred source for transplantation.

Obviously, storing a child's own stem cells from birth would appear to offer the ideal insurance policy for an individual's lifetime. There are, however, several limitations to this assumption. Diseases that require transplantation of blood stem cells are still rare, although the list of diseases amenable to treatment has grown. Current estimates for the likelihood of any given individual to require a stem cell transplantation at some point in his/her life range between 1:1000 to 1:200,000,

8. HLA stands for Human Leukocyte Antigens, which are the antigens (proteins located on the white blood cell surface) which help the immune system recognize foreign substances in the body. Every individual has six groups of HLA antigens, three pairs of which (called A, B, and DR) are particularly important in stem cell transplants. As with all organ transplants, complications are less likely to develop the closer the match is between donor and recipient.

9. The disadvantages of this approach compared to cord blood derived stem cell transplantation include: the requirement of the donor to undergo anesthesia and be exposed to a small risk of infection when the marrow is harvested, delay of weeks to contact and test prospective bone marrow donors before being able to use the marrow, the expense of the entire process, the requirement of a perfect six out of six HLA antigen matching between donor and recipient and the significant risk of graft versus host disease (GVHD). See Grewal SS, Barker JN, Davies SM, et. al, "Unrelated Donor Hematopoietic Cell Transplantation: Marrow or Umbilical Cord Blood?" *Blood* 2003; 101:2924-2931. Frassoni F, Podesta M, Maccario R, et al, "Cord Blood Transplantation Provides Better Reconstitution of Hematopoietic Reservoir Compared with Bone Marrow Transplantation." *Blood* 2003;102:1138-1141.

and some believe those to be significant overestimations.¹⁰ Moreover, autologous transplantation (transplanting one's own organs or cells back into them) is inadvisable because childhood cancers, anemias and immune disorders are often believed to have a genetic basis.¹¹ Thus, the indications for autologous transplantation are limited while the cost of collection and long term storage remains high. These potential drawbacks were considered significant enough for the American Academy of Pediatrics to have recommended that "private storage of cord blood as biological insurance is unwise. Philanthropic donation of cord blood for banking at no cost for allogenic transplantation is encouraged."¹²

10. "American Academy of Pediatrics: Cord Blood Banking for Potential Future Transplantation: Subject Review," *Pediatrics* 1999;104:116-118. Additional limitations include the fact that banked stem cells provide insurance only for as long as the frozen cells remain viable. Current research has confirmed viability for up to 15 years only, although scientists believe they will remain viable for far longer periods of time. Wagner JE, Kernan NA, Steinbuch M, et al, "Allogeneic Sibling Umbilical Cord Transplantation in Children with Malignant and Non-malignant Disease," *Lancet* 1995;346:214-219. In addition, the stored cells will provide useful therapy only if there are enough of them to successfully become engrafted after transplantation. Gluckman E, Vanderson R, Agnes B-C et al, "Outcome of Cord-Blood Transplantation from Related and Unrelated Donors." *NEJM* 1997;337:373-381.

11. Sibling transplantation in such cases may still be viable.

12. For the full text, see "American Academy of Pediatrics: Cord blood banking for potential future transplantation: Subject Review." *Pediatrics* 1999;104:116-118. On March 16, 2004, the European group on ethics in Science and New Technologies (EGE), an independent body which advises the European Commission, issued the following Opinion (no.19) on ethical aspects of umbilical cord blood banking: The EGE is in favor of public donation, because: "in all the current uses of cord blood, ... the transplants are allogeneic and the cells used are obtained from donation." (section 1.4) The EGE is opposed to private storage, because "the possibility of using one's own cord blood stem cells for regenerative medicine is currently purely hypothetical." (section 1.7)

Umbilical Cord Stem Cell Collection Procedure

Although there are minor variations in the collection and storage process between the various companies involved, the procedure typically follows the steps outlined below:

1. An ordinary blood test is performed on the mother.
2. After birth of the baby and before placental delivery (a post placental delivery approach can also be performed), the umbilical cord collection site is prepped with iodine.
3. A needle is inserted into the prepped site and a collection bag is passively filled as blood flows by gravity. Alternatively, some companies use the conventional syringe suction method to extract the blood.
4. The collection bag or tubes are rotated in order to mix the anticoagulant.
5. The collection is labeled appropriately and placed in a sealed container.
6. The specific stem cell bank is notified so that the specimen can be transported and processed within 24 to 48 hours.

HALACHIC CONSIDERATIONS

A Lack of *Bitachon*

Does banking umbilical cord blood stem cells in anticipation of possible future illness demonstrate a lack of confidence in G-d? The halachic obligation to seek medical attention when indicated, and the license for a physician to heal, are well established and have been discussed extensively.¹³ As we have

13. See, for example, J. David Bleich, *Jewish Bioethics: The Obligation to Heal in the Judaic Tradition*, in particular the section on "Medical Intervention, the Theological Dilemma," pp. 20-23.

all grown accustomed to these facts, it almost seems unnecessary to ask whether one may prepare potential treatments ahead of time for possible use against life-threatening illnesses. Surely preventive medicine is sanctioned as much as is therapeutic medicine.¹⁴ Closer scrutiny, however, reveals that our inquiry is somewhat unique and therefore does warrant further elaboration.

Previous discussions of preventive care in halacha have focused on the obligation to avoid risky situations and the need to maintain a healthy lifestyle.¹⁵ These concepts, originally recommended by *Chazal*, were later codified by the Rambam in the *Mishneh Torah*¹⁶ and Rav Yosef Karo in the *Shulchan*

14. Truthfully, one may wonder just how far the physician's license to heal actually reaches. An argument can be made that perhaps the Torah's intent in *verapo yerapeh* does not include disease prevention. In the course of a response to a question on the need for intra-venous prophylaxis to allow an individual to fast on Yom Kippur, Rav Moshe Feinstein (*Iggerot Moshe Orach Chaim* III, 90) stated "it is possible that the Torah did not permit overriding Divine decrees except to heal the sick of their disease." Based on that, Rav Moshe raised the possibility that initiating medical intervention solely for the purpose of allowing one to fast, may be prohibited. Does Rav Moshe's assertion preclude preventative therapy as well? Almost certainly it does not. Rav Moshe most likely meant that it is allowable to cure illness and also to prevent it altogether but was excluding specifically non-medically related objectives. This is clearly expressed by Rav Moshe's sanctioning Tay-Sachs testing (*Iggerot Moshe Even Haezer* IV, *Siman* 110) which involves wound infliction on healthy individuals for the sake of disease prevention, rather than treatment. Finally, he dispels all doubt by his later explicit statement (*Iggerot Moshe, Orach Chaim* IV *Siman* 101) that "also, in reference to what I wrote in the [earlier] response... obviously one can also take medication when he is fully healthy to prevent disease from coming." See also Shalom S. Buchbinder and James DiPoco, "Preventive Medicine," *Journal of Halacha and Contemporary Society*, Number XLVI p.70; Howard D. Apfel, "Fetal Intervention: Halacha's Response to a New Bioethical Dilemma," *Journal of Halacha and Contemporary Society*, Number XLV p.9, for more on this topic.

15. Ibid. Buchbinder; *Nishmat Avraham, Yoreh De'ah*, Introduction to *Siman* 336; *Refuit*, Avraham Steinberg, article on "Preventive Medicine."

16. *Mishneh Torah, Hilchot De'ot*, Chapter 4. See *Iggerot Moshe, Choshen*

Aruch.¹⁷ The Ramo expanded upon these principles by maintaining that one must be vigilant to avoid dangerous situations even when they are uncertain, stating that “one who guards his soul will keep far from it [i.e. even uncertain danger] and it is forbidden to rely on a miracle or to endanger his soul in any similar way.”¹⁸ None of this, however, appears to be directly applicable to our discussion. The objective in privately banking one’s own child’s stem cells does not involve the improvement of his physical condition, the prevention of any disease, nor even the direct avoidance of a specific danger real or imagined. Instead, one is implementing a medical intervention on an otherwise healthy individual for the sole purpose of acquiring a potential future therapy, for a theoretical future illness, that is most likely never to be manifest. That, it seems, raises an entirely different issue.

Tamim T’hiyeh Im Hashem Elokecha

In the context of outlawing the various forms of illicit soothsaying and superstitious practices used to predict the future, the Torah inserts the verse “*tamim t’hiyeh im Hashem Elokecha*,” often translated as “you shall be wholehearted with Hashem your G-d.”¹⁹ What is the intent of this divine command? Does it merely (as it appears from context) complement the specific prohibitions enumerated before it and after it? If so, it may serve to highlight that there are permissible, divinely sanctioned alternatives for making predictions about the future.²⁰ Viewed that way, the Torah’s concern would appear

Mishpat II,76, where Rav Moshe maintains that the Rambam is only making healthful suggestions and not necessarily formulating a halachic imperative.

17. *Shulchan Aruch, Orach Chaim* 155.

18. *Yoreh De’ah* 116.

19. Deuteronomy 18:13.

20. See Ramban commentary, *ibid.*

to be over the specific methodology employed in anticipating the future, rather than being critical of the notion of “predicting” itself. On the other hand, “*tamim t’hiyeh*” may introduce an entirely independent, far more encompassing obligation. Perhaps, to be “wholehearted with Hashem” demands that we inculcate a passive, wholly submissive approach to life in general, as opposed to an overly assertive, anticipatory one.²¹ According to this approach, it may be wrong for a Jew to strive to anticipate the future by any means. Such attempts apparently express a lack of faith in G-d by either suggesting that one may alter preordained events, or that G-d is incapable of handling difficult situations Himself should they arise.²²

21. For example, the *Or Hachaim HaKadosh* states “If you have wholesome faith in G-d, all the soothsaying of magicians and prophets will be meaningless to you because G-d will reverse any evil tidings against Israel. The proof is from Abraham and Sarah who were doomed in the course of natural law not to have children together – but G-d reversed the message of the stars. If so, Israel needs no sorcery, only wholehearted obedience to G-d.”

22. The Stone Editon *Chumash* (Deuteronomy 18:13) Artscroll series, Mesorah publication, for example, offers the following: “because it is human nature to want to know the future and to utilize whatever means to successfully pursue that end, the Torah forbids Jews to copy the practices used by the nations to foretell events. To Hashem these practices are abominable. They were not the way of life ordained for Israel. Jews were to have faith that Hashem would give them whatever knowledge they needed, and they were to act upon it, with faith and loyalty.” Contrast that with remarks made by Rav Yosef Dov Soloveitchik in “The Lonely Man of Faith” (*Tradition: A Journal of Orthodox Thought*, 1965, pp. 52-53): “The doctrine of faith in G-d’s charity, *bitachon*, is not to be equated with the folly of the mystical doctrine of quietism which in its extreme form exempts man from his duty of attending to his own needs and lets him wait in “holy” idleness and indifference for G-d’s intervention. This kind of repose is wholly contrary to the repose which the halacha recommends: the one which follows human effort and remedial action. Man must first use his own skill and try to help himself as much as possible. Then, and only then, man may find repose and quietude in G-d and be confident that his effort and action will be crowned with success. The initiative belongs to man; the successful realization, to G-d.” It is unclear whether or not Rav Soloveitchik would include attempts to predict the future as part of the initiative that is open to man.

The most famous and oft-quoted advocate of the latter approach is Rashi in his commentary on Deuteronomy 18:13. In his comments on the words "*tamim t'hiyeh*," he states: "trust in what He has in store for you, and do not delve into the future. But rather whatever comes upon you accept with wholeheartedness and then you will be within and of His portion." Many have interpreted Rashi to be suggesting an obligation for Jews to pursue the relatively acquiescent approach to life, described above.²³

While Rashi's Bible commentary is rarely a direct source for normative decisions,²⁴ it is important to note that Rashi's understanding does appear to underlie Rav Moshe Feinstein's halachic analysis of Tay-Sachs disease screening.²⁵ Rav Moshe initiated that discussion as follows:

It appears to me that, despite the rarity of infants being born like those, [i.e. with Tay-Sachs disease] and therefore it is relevant to say on this the verse "be wholehearted with Hashem" and like Rashi's commentary in *Chumash*, where he wrote: *hithalech imo bet'mimut u'tetsapeh lo velo tachkor achar haatidot...*"

23. See, however, the comments of *Siftei Chachamim* who understood Rashi's comments differently.

24. Even the normative impact of Rashi's *perush* on the Gemara is open to discussion. See Rabbi J. David Bleich, "Of Cerebral, Respiratory and Cardiac Death," *Tradition*, 24 (3), 1989, p.65, note 33) where he points out: "some authorities, including *Teshuvot Radvaz*, V, no. 108 and *Bet Yosef, Orach Chaim* 60, assert that Rashi's commentaries are not to be given the same weight as normative rulings of codifiers of the law, ... Chazon Ish asserts that this principle is limited to comments that might reflect hypothetical positions or that might be construed as explaining an individual opinion recorded in the Gemara, but not to be applied to comments that are clearly intended as normative and definitive. Moreover, declares Chazon Ish, 'all this could be discussed if there were some [authority] who disputed the matter and we would have need of deciding in accordance with the majority of opinions'." Rabbi Bleich adds that others dispute the principle formulated by Radvaz and *Bet Yosef* entirely.

25. *Iggerot Moshe, Even Haezer* IV, Siman 10.

[trust in what He has in store for you, and do not delve into the future].

Ultimately, Rav Moshe dismissed the applicability of *tamim t'hiyeh* to Tay-Sachs screening, solely because it was so easily accomplished that one who avoids it is "*ki segirat ha'aynaim lirot ma she'efshar lirot*" [like one who closes his eyes from what is easily seen]. Clearly, however, Rav Moshe did entertain the possibility that screening healthy people for a rare condition may be prohibited on the basis of Rashi's approach to "*tamim t'hiyeh*." Apparently, the small likelihood of the anticipated occurrence was one of the determining factors for invoking this issue. This implies that were it not for the ease with which Tay-Sachs screening could be achieved, Rav Moshe may have upheld a halachic imperative not to overly anticipate and prepare for future problems.²⁶

Some have raised the possibility that privately banking stem cells for unlikely but possible future illness might be discouraged on this basis as well.²⁷ Going to the trouble and expense of storing an infant's stem cells for possible use as an adult does appear to be "delving into the future" in a fairly complex way. Furthermore, the major objective of Tay-Sachs screening is disease prevention, and thus might be permissible on that basis alone.²⁸ In contrast, as noted above, stem cell banking has no independent therapeutic nor even preventative value.

Despite the seeming cogency of the preceding discussion,

26. The fact that it provides immediate benefit in the form of psychological and emotional relief to anxious couples was another reason Rav Moshe cited for his lenient ruling.

27. Yosef Eitan, *Isuf dam chevel hatabur be'et haleda beshabbat*, published by the Puah Institute of Fertility and Medicine in Accordance with Halacha. The author subsequently dismissed the suggestion.

28. By identifying individuals who carry the recessive gene for Tay-Sachs disease, marriages that might lead to affected children can be avoided.

there are several strong arguments against it. First, many other *rishonim* disagree with Rashi's understanding of "tamim t'hiyeh." For example, the Ramban in several places describes the Torah's directive as specifically aimed at limiting the methodology utilized in predicting the future, rather than discouraging making predictions in principle.²⁹ Thus, he qualifies "tamim t'hiyeh" as specifically referring to acceptable avenues open to Jews interested in foretelling events, such as true prophecy and the *urim v'etumim*. Rashbam³⁰ (Rashi's grandson and close *talmid*) and Sforno³¹ offer similar alternative interpretations. Finally, the Rambam's comments on this issue in the *Mishneh Torah* reveals that he too understood "tamim t'hiyeh" quite differently from Rashi.³² There, he suggests that this verse serves mainly to qualify the prohibited methodologies listed earlier by the Torah, as vain and irrational. Apparently, for the Rambam, the message being conveyed by "tamim t'hiyeh" is simply to have common sense and avoid such foolish practices.³³ Thus, it would appear that the broad application of "tamim t'hiyeh" suggested by Rashi is a minority view among the *rishonim*.

Nevertheless, one cannot ignore the implications of Rav Moshe Feinstein's comments noted above. Despite the approaches of the other *rishonim*, Rav Moshe did consider Rashi's approach to "tamim t'hiyeh" as halachically relevant. Moreover, as noted above, perhaps the relatively unconventional process of stem

29. Commentary on Deuteronomy 18:13; *Sefer Hamitzvot shichechat ha'asin le'daat ha Ramban, Mitzvah* 8.

30. Commentary on Deuteronomy 18:13.

31. Commentary on Deuteronomy 18:13.

32. *Hilchot Avodah Zarah*, Perek 11.

33. In explaining why the Rambam did not list "tamim tehiyeh" in his *Sefer Hamitzvot*, *Megillat Esther* notes the reason to be that "that verse is inclusive of all that was stated above in the section"; he then cites the Rambam's comments from *Mishneh Torah* as proof.

cell collection and long term storage meets the requisite threshold of complexity for transgressing "*tamim t'hiyeh*" which the simple blood test required in Tay-Sachs disease screening was lacking.

While that possibility is itself debatable, in the end we believe the entire discussion of "*tamim t'hiyeh*" relative to cord blood stem cell acquisition to be moot. One could argue that by merely collecting stem cells, one is not actually being "*choker achar ha'atidot*" [delving into the future]. As will be discussed shortly, stem cell collection is more analogous to a young healthy person buying life insurance. No attempt to predict the future is even being considered in either case. Instead, those involved are merely preparing for an eventuality, albeit an unlikely one. Therefore, one is not really getting involved in the issue of "*tamim t'hiyeh*" even according to Rav Moshe's rendering of Rashi's view.

The Issue of Divine Providence

Having eliminated the issue of "*tamim t'hiyeh*" from consideration, some suggest that neonatal stem cell acquisition might still indicate a lack of faith in G-d from a slightly different perspective. Perhaps the aggressive pursuits involved in stem cell banking, and the need for this "biological insurance" altogether, insinuate that without human intercession, Hashem would not have provided the necessary therapy. That obviously would be tantamount to a denial of Divine Providence. However, this suggestion, too, can easily be dismissed. To begin with, the Gemara in *Megillah* (13b) states: "*Ain haKBH maceh et Yisrael eleh im ken bore lahem refuah techila*" (Hashem does not strike Israel unless He has first created a cure). Who is to say that the ability of physicians to collect and store stem cells is not one example of the Divinely provided *refuah* referred to? Furthermore, what possible source is there for the idea that optimal preparation for possible misfortune is off limits to man,

indicating a lack of faith in Divine intervention? In fact, many sources seem to imply the exact opposite. For example, the notion that “*ain somchin al haness*” (one does not rely on a miracle) is well known and fundamental to Judaism. In that vein, *Chazal* cautioned that a person must take proactive steps to secure his health and well being and specifically not rely solely on faith.³⁴

Rav Moshe Feinstein completely dispelled the advisability of passively sitting back in anticipation of Divine salvation in response to a question similar to ours regarding conventional life insurance.³⁵ There, Rav Moshe concluded that not only was acquisition of insurance permissible, it was a wise and worthy activity for “*yiray shamayim*.” It is arrogant for one to assume that they are deserving of Divine sustenance without personal endeavor, he explained, and it is also inconsistent with Hashem’s design for human activity following Adam’s expulsion from *Gan Eden*. When an individual expresses appropriate concern and takes the necessary preparatory steps to insure future well being, he is not indicating a lack of faith, nor denying the mastery of the Almighty. Instead, he is expressing wisdom, humility, and a mandatory participation in the Divinely ordained service of *tikun olam*. The clear application to our situation is that absent specific violation of prohibitions encountered during the collection process itself, the banking of stem cells from neonatal umbilical cord blood is not only permissible, but advisable.

34. *Shabbat* (32a). Later in the same tractate (82a) the Gemara describes Rav Hunah chastising his son for not attending a lecture on preventative medicine. Similarly, in an introduction to the laws of medicine in *Nishmat Avraham*, Dr. Abraham Sofer Abraham cites the Meiri (*Moed Katan* 10b) as permitting medical interventions designed solely to preserve health. He also ascribes similar sentiments to Rav Shlomo Zalman Auerbach and Rav Yehoshua Neuwirth (author of *Shemirat Shabbat keHilchata*).

35. *Iggerot Moshe Orach Chaim* II:111.

Cord Blood Collection On Shabbat

The collection of the stem cells from the umbilical cord must be performed shortly after the delivery of the baby. Consequently, should birth take place on Shabbat, several significant halachic questions may be raised. First, does drawing the umbilical cord blood violate the *issur deorayta* of *chavalah* (wounding)? When the cord blood is mixed with the transparent anticoagulant, is the *melacha* of *tzoveah* (dyeing) violated? The cord blood that is drawn would presumably be *muktze* on Shabbat, and drawing it for speculative future use likely would violate the *issur* of *hachanah*.³⁶ To what extent would the rabbinic prohibitions of *muktze* and *hachanah* militate against harvesting the cord blood and thereby missing this, literally, once-in-a-lifetime opportunity to retrieve these stem cells? Needless to say, if the cord blood collection qualifies as *pikuach nefesh* (life-saving therapy) or even *safek* (doubtful) *pikuach nefesh*, then any Shabbat prohibitions would be waived. However, to what extent would speculative and statistically low-probability risk to life qualify as a bona fide *safek pikuach nefesh* situation?

Hachovel B' Shabbat (Wounding)

The Mishnah (*Shabbat* 107b) states that one violates a biblical prohibition by inflicting a wound on either a person or an animal on Shabbat. There is a major dispute in the *rishonim* regarding the identity of the specific *av melacha* to which the *issur* of *chavalah* relates. Most *rishonim* hold that *chavalah* is a

36. The normal process of harvesting the blood might involve certain additional Shabbat violations, such as *tofer* (sewing), when affixing the patient identification sticker to the collection bag, and *kotev* (writing), when filling out various forms and documentation. A discussion of these *melachot* is omitted in the text, as these activities can easily be performed either before the onset, or after the conclusion, of Shabbat, and are not indispensable to the collection of the blood on Shabbat.

toldah of *netilat neshama* (slaughtering).³⁷ The Rambam disagrees and holds that the *issur chavalah* is *mefarek* (extracting), a *toldah* of *dosh*.³⁸ A view cited by Rashi suggests a third possibility, that *chavalah* is a *toldah* of *tzoveah* (dyeing).³⁹

One major ramification of whether *chavalah* is a *toldah* of slaughtering or *dosh/tzoveah* that will have bearing on our discussion is whether the umbilical cord is considered an actual part of a living organism or a mere piece of flesh, *basar be'alama*. If *chavalah* is prohibited because of slaughtering, then obviously the *issur* would not be applicable to *chavalah* performed on a non-living organism.⁴⁰ If, however, the *issur* is *dosh* or *tzoveah* it could apply even to *basar be'alama*.

Chavalah as a Toldah of Slaughtering

It is somewhat curious that *Chazal* often refer to the *melacha* of slaughtering as “*netilat neshama*” (taking the soul).⁴¹ In a very real sense, however, this unusual terminology captures the essence of the definition of the *melacha*, which is perhaps best defined as the severance of the life force (the *neshama*)

37. Rashi, *Shabbat* 107a s.v. *v'hachovel*; Tosafot, *Shabbat* 107a s.v. *shemoneh*; Tosafot, *Ketubot* 5b s.v. *dam*; Ramban, *Shabbat* 107a s.v. *matni'*; Rashba, *Shabbat* 107a s.v. *v'hatzidan*; Ritva id. s.v. *matni'*; Ran, id. s.v. *hatzidan*; Meiri, id. s.v. *amar*. See also *Biur Halacha*, 316(8), s.v. *v'hachovel*.

38. Rambam, *Hil. Shabbat* 8:7.

39. Rashi, *Shabbat* 107a s.v. *v'hachovel*. *Chavalah* raises the specter of *tzoveah* when the blood dyes a substance that comes into contact with it. The *melacha* of *tzoveah* is discussed below in the text in the context of the cord blood mixing with and dyeing the anticoagulant.

40. Some even question whether one can violate the *melacha* of *netilat neshama* on an animal that has *simanei treifa* and is destined to die. *Minchat Chinuch*, *Mosach Hashabbat*, *Melechet Shochet*. See also *Tosafot Rid*, *Shabbat* 136b, citing the Rivam who holds that killing a *treifa* involves no Shabbat prohibition since “*treifa kmeita damia*” (a mortally wounded animal resembles a dead one).

41. See, e.g., *Jerusalem Talmud*, *Shabbat* 7:2.

from the body itself (*netilat neshama*). This is most obviously accomplished by actual killing. However, based on the *pasuk* “*ki hadam hu hanefesh*,”⁴² the Torah expanded the idea of slaughtering, by teaching that the life force of an animal or person is lodged in the blood flowing through the circulatory system. Accordingly, many *rishonim* assume that causing a wound separating the life-producing force of circulatory blood from the body (*chavalah*) constitutes a *toldah* of *netilat neshama*.⁴³

The Gemara in *Ketubot* (5b) is well understood with this concept in mind. The Gemara questions whether *biah rishona* is permissible on Shabbat. The Gemara explains that at issue is whether virginal blood that is released from the woman’s body is (I) “*mifkad pakid*” (collected and stored), in which case, its release would not be an *issur* of *chavalah*, or (II) “*chiburei mechbar*” (attached to the circulatory system),” in which case, its release would violate the *issur* of *chavalah*.⁴⁴ What difference does it make whether the blood is *mifkad pakid* or *chiburei mechbar*, in

42. Deuteronomy 12:23.

43. Rabbenu Tam cited in *Tosafot, Ketubot* 5b, s.v. *dam*; *Tosafot Shabbat* 75a s.v. *ki*.

44. The distinction between “*mifkad pakid*” and “*chiburei mechbar*” is explained by the *rishonim* in two different ways. Rashi in *Ketubot* 5b (s.v. *mifkad pakid*) explains that if virginal blood is *mifkad pakid* it is already “collected and stands distinct and separate from the uterine walls such that no act of wounding is required for the blood to be released; rather, the blood is sealed behind a closed door, which is opened and the blood is released.” *Chiburei mechbar*, on the other hand, requires a wound for the blood to be released. According to Rashi, the language of “*chiburei mechbar*” comes from the fact that a “*chaburah*” (a wound), is necessary to violate the *issur* of *chavalah*. See also Rashi *Shabbat* 133b (s.v. *mahu d’teima*). The Ritva and Rabbenu Tam, cited in the *Shita Mekubetzet* in *Ketubot* 5b (s.v. *dam*), suggest that the language of *chiburei mechbar* is derived from the word “*mechubar*,” attached or connected. Blood that is *chiburei mechbar* is connected to the body, and the severance of that connection is the *issur* of *chavalah*. Blood that is *mifkad pakid* is not connected to the body. Rather, it is viewed merely as held in a container, and its release would not be *chavalah*.

either case blood is being released from the body? The answer is very clear in light of the verse that the blood is the life force. The prohibition of *netilat neshama* applies only to the removal of blood containing the *neshama*, i.e., the life force of the organism. Blood that is *chiburei mechbar*, namely, circulatory blood, possesses the quality of "containing the life force". Blood that is *mifkad pakid* does not share this quality, and accordingly its removal would not be a violation of *chavalah*.

Thus, in deciding whether or not harvesting cord blood constitutes a prohibition of *netilat neshama*, one must first determine whether the umbilical cord at the time of collection is considered to be part of a living entity. This could be so only by virtue of its connection either to the circulatory system of the newborn baby or to that of the mother. Since harvesting stem cells is performed after the baby has already been separated from the cord, the only option that remains is the continued connection of the cord to the placenta, which generally will still be in the mother's body at the time the stem cells are extracted. However, presumably mere physical attachment of the placenta to the maternal uterine wall is not enough. To be considered an actual "living" part of the mother in those few moments after delivery, the placenta must be considered in some sense to be connected to the mother's circulatory system.

In actuality, the placental connection to the maternal circulation is quite complex. Many anatomic and physiologic variables come into play. Halachic decisors will likely have to take all or some of these issues into account in determining how the biology fits with the halachic concept of *chiburei mechbar*, since umbilical-cord-derived blood vessels of the placenta are clearly not connected to the maternal blood vessels in the conventional sense.

Even if blood flowing to and from the fetus via the umbilical cord would be considered *chiburei mechbar*, the question for the *posek* is what about after disconnection of the newborn baby

from the placenta? Does the remaining non-conventional circulatory connection of the umbilical cord vessels themselves (i.e. now independent of fetal needs) still qualify as *chiburei mechbar*? If it does, then a strong argument could be made that the collection of blood from the cord on Shabbat would be a *deorayta* violation of *netilat neshama* according to the view of most *rishonim*.⁴⁵ If it does not, then it would be no different than the status of the cord following delivery of the placenta. Where the harvesting is performed after delivery of the placenta, there would be no violation of *netilat neshama* whatsoever. The cord would certainly not be part of a living being at this point and there could be no prohibition of *netilat neshama*.

Chavalah as a Toldah of Dosh

The Rambam disagrees with the predominant view of the *rishonim* and holds that *chavalah* constitutes the prohibition of *mefarek*, a *toldah* of *dosh*.⁴⁶ If *chavalah* is prohibited because of *mefarek*, there should be no difference whether or not the umbilical cord is “alive,” i.e., attached to the mother at the time of the harvesting of the cord blood.⁴⁷ Thus, drawing blood from the umbilical cord even post-placental delivery would seem to be a violation of *dosh* according to the Rambam.⁴⁸

45. Others have suggested that once the cord is outside the mother’s body, even though, as suggested, it continues to be anatomically linked to the mother, the cord blood cannot be considered to be *chiburei mechbar*. See Eitan, Id.

46. Rambam, *Hil. Shabbat* 8:7. One reason suggested for why the Rambam rejects the majority view is because he holds that the *melacha* of *netilat neshama* requires actual and complete killing – extracting of blood does not qualify as an act of slaughtering. *Lechem Mishneh*, ibid. 8:9; *Minchat Chinuch*, *Mosach HaShabbat*, *Melechet Dosh*.

47. The Gemara in *Shabbat* (75a) discussing the extraction of *techeilet* of the *chilazon* clearly implies that the *melacha* of *dosh* does not presume a living entity.

48. It is somewhat questionable whether *halacha lema’aseh* we are *choshesh*

However, collecting cord blood might still be permissible even within the view of the Rambam. Many *acharonim* are bothered by an apparent difficulty in the Rambam's approach. *Mefarek* (the Rambam's understanding of *chavalah*) is violated whether the liquid being extracted is *mifkad pakid*⁴⁹ or *chiburei mechbar*. Why, then, according to the Rambam does the Gemara in *Ketubot* (5b), in the case of virginal bleeding, suggest that *chavalah* would only be violated if virginal blood is *chiburei mechbar*?⁵⁰

In response to this problem, the *Eglai Tal* suggests that the type of action necessary to violate the *issur* of *mefarek/dosh* will differ depending on whether the liquid being extracted is considered *mifkad pakid* or *chiburei mechbar*. Where the liquid is *chiburei mechbar* (defined now as embedded deeply in solid tissue), any form of extraction would be prohibited. However, where the liquid is *mifkad pakid* (i.e., the blood is more superficially located), then a real action of squeezing is required to violate the *issur*.⁵¹ In the case of virginal blood, the extraction

for the view of the Rambam with respect to his view of the *issur* of *chavalah*. See *Mishnah Berurah*, *Siman* 316, (s"k 29) who only brings the majority view that the prohibition of *chavalah* is because of *netilat neshama*. But see *Biur Halachah* *Id.* s.v. *v'hachovel*, who discusses each of the three *shitot*.

49. For example, most *rishonim* assume milking a cow is prohibited because of *mefarek*, yet the milk in the udder is a classic example of *mifkad pakid*. *Rashi*, *Shabbat* 95a s.v. *cholev*. Similarly, *Tosafot* on the *sugya* of squeezing the *techeilet* out of the *chilazon*, claims that the *techeilet* is *mifkad pakid* in the body of the *chilazon*.

50. See, e.g., *Chiddushei Chatam Sofer al HaShas*, *Ketubot* 5a s.v. *mifkad*; *Minchat Chinuch*, *Mosach HaShabbat*, *Melechet Dosh*; *Eglai Tal*, *Dosh*, *Siman* 15, s"k 6-7. The *Minchat Chinuch* adds that the Rambam himself states that the liquid found in olives and grapes is *mifkad pakid* (Rambam, *Hil. Issurei Mizbeach* 6:7 and *Hil. Tuma'at Ochlin* 9:2), yet holds that squeezing olives and grapes for their juice is *mefarek*. The *Minchat Chinuch* concludes (and repeats a number of times) that according to the Rambam, the *sugya* in *Ketubot* "has no explanation whatsoever."

51. According to this understanding of the Rambam, *mifkad pakid* versus

of blood does not come through a *mefarek*-like squeezing action. Accordingly, causing such bleeding will only be *dosh* if the blood is *chiburei mechbar*, and not if it is *mifkad pakid*.

This understanding of the position of the Rambam will bear directly on whether the extraction of the cord blood on Shabbat constitutes a violation of *mefarek*. Collection of the cord blood is accomplished by inserting a needle into the umbilical vein, and either passively filling the collection bag by gravity or using the conventional syringe suction method. In either case, no action of squeezing is involved. Thus, according to the approach of the *Eglai Tal*, the permissibility of collecting the cord blood on Shabbat will again hinge on whether the cord blood is considered *mifkad pakid* or *chiburei mechbar*. If it is decided that the umbilical blood vessels qualified as *chiburei mechbar* (i.e., they are sufficiently embedded in solid tissue) a prohibition would exist even following delivery of the placenta.

The *Melacha* of *Tzoveah* (Dyeing)

The question of the *melacha* of *tzoveah* is raised both when the cord blood is collected and combined with the anticoagulant, and when the iodine is placed on the umbilical cord collection site. The Gemara (*Shabbat* 75a) makes clear that the *melacha* of dyeing can be violated when the dyeing agent is blood.⁵² Unlike the case of slaughtering, however, here no benefit is derived from the coloration of the anticoagulant. To what extent is *tzoveah* violated if no real benefit is derived, and the colored object has not been enhanced as a result of the dyeing?

chiburei mechbar may be defined differently than above in the discussion of *netilat neshama*. Rather than be concerned with the type of connection to the maternal circulation, our focus would now shift to the extent to which the blood is considered buried within the solid tissue.

52. One who slaughters an animal on Shabbat violates the *melacha* of *tzoveah* because the blood colors the neck of the animal, indicating to potential purchasers of meat that the animal has been freshly slaughtered.

The *Shulchan Aruch* permits adding spices to food even though they will color the food (apparently holding *ein tzviah beochlin*),⁵³ but adds that one should avoid drying one's hands on a garment if it will cause the garment to be colored.⁵⁴ Many *poskim* disagree with the latter ruling arguing that the inadvertent coloring of a garment by drying one's hands on it is "*derekh lichluch*," (getting dirty) and, as such, does not constitute the prohibition of dyeing.⁵⁵ The *Magen Avraham* defends the *Shulchan Aruch* arguing that just as there are *rishonim* who prohibit wetting a garment even *derekh lichluch* when it comes to the *melacha* of *melabein* (laundering being the exact antithesis of *derekh lichluch*), the same would hold true for the *melacha* of *tzoveah*.⁵⁶ The *Mishnah Berurah* concludes that although *lechatchila* one should follow the view of the *Mechaber*, in light of the *poskim* that are lenient in the case of *tzoveah derech lichluch*, if the coloration is otherwise

53. However, dyeing is prohibited where food is the dyeing agent, as long as food is not the dyeing surface. The *Agur* (*Siman 484*), quoted in the *Darchei Moshe*, disagrees with the *Sefer HaYeraim* arguing that the inadvertent coloring of a garment by drying one's hands on it is "*derekh lichluch*," and, as such, does not constitute the prohibition of dyeing.

54. *Shulchan Aruch, Orach Chaim*, 320(20).

55. E.g., *Sefer Ha'Agur* (*siman 484*); *Shu't Radbaz* no. 131. The *Chacham Tzvi* supports this ruling from the fact that the Gemara (*Ketubot 5b*) only questions whether virginal bleeding on Shabbat is prohibited from the perspective of the *melacha* of *dosh* / slaughtering, without considering the fact that the sheets would become colored by the blood. *Shu't Chacham Tzvi, Likutim al Shulchan Aruch* No. 1. Apparently, concludes the *Chacham Tzvi*, dyeing *derekh lichluch* is permitted. Another proof is that the Gemara (*Shabbat 139b*) permits one to strain wine dregs with a white handkerchief even though the handkerchief will become colored. Again, this coloration is *derekh lichluch*.

56. *Magen Avraham, Siman 320, s"k 24*. Indeed, the *Shulchan Aruch lechatchila* seems to be *choshesh* for these *rishonim* in the context of laundering. *Shulchan Aruch, Orach Chaim* 320(10). Accordingly, argues the *Magen Avraham*, if the *Mechaber* encourages one to be *machmir* for laundering even *derekh lichluch*, one could certainly assume that the *Mechaber* would apply the same *chumra* to the *melacha* of *tzoveah*.

unavoidable, one can rely on the leniency.⁵⁷

In the case at hand, there is no benefit whatsoever derived from the coloration of the anticoagulant. Indeed, the blood soils the anticoagulant, thereby qualifying as *derekh lichluch*. Although one would normally attempt to follow the stringent ruling of the *Mechaber*, since in this case there is no real alternative to preserve the cord blood after collection other than in the anticoagulant, the leniency of the *Mishnah Berurah* should be applicable.⁵⁸

Muktzeh

Any item that has no inherent utility on Shabbat, and was not set aside for Shabbat use, is *muktzeh*, and cannot be handled on Shabbat.⁵⁹ There is little doubt that the cord blood collected on Shabbat would be classified as *muktzeh*.⁶⁰ The real question is whether any of the leniencies applicable to *muktzeh* apply in the instant case.

Certain leniencies apply to *muktzeh* in the case of a sick person, but in the normal case of private banking of stem cells, there is no sick person present that is being benefited currently by the handling of the blood. Accordingly, application of the leniency of *choleh* would not lift the prohibition of *muktzeh*.

There are certain cases of loss in which *Chazal* lifted the prohibition of *muktzeh*. Thus, the *Mechaber* cites an opinion

57. *Mishnah Berurah*, *Siman* 320 *s"k* 59.

58. See further *Shemirat Shabbat Kehilchata*, 35:12, and accompanying notes.

59. See, generally, *Shulchan Aruch, Orach Chaim*, *Siman* 308.

60. The cord blood could fall into any one of several categories of *muktzeh*. The cord blood certainly would be *muktzeh machmat gufo* (inherent *muktzeh*). It might also be classified as *nolad* (something newly in existence on Shabbat). The container holding the cord blood likewise would be *muktzeh*. See *Shulchan Aruch, Orach Chaim* 266:9; *Magen Avraham* id. *s"k* 13.

that in a situation of potential financial loss (*hefsed*), such as fire or where there are thieves on the prowl, one may handle *muktze* to prevent the possible loss.⁶¹ One might argue that the opportunity to collect the cord blood is literally “now or never.” If this opportunity is squandered, these stem cells will be lost forever. However, application of the *heter* of *hefsed* to this case is also questionable.

The *poskim* explain that the basis for the *heter* of *hefsed* should not be viewed as a broad all-encompassing leniency applicable to all cases of financial loss. The *heter*, in fact, is a very narrow one. The reason for the leniency is because “*adam bahul al mamono*” [a person is anxious about his money]. As such, if the Sages did not permit him to save his money by violating the relatively lenient rabbinic prohibition of *muktze*, then the individual might actually violate the more severe prohibitions of extinguishing the fire or carrying in order to save his money.⁶² Thus, specifically in these cases of sudden loss, in order to protect a more severe prohibition, *Chazal* permitted handling *muktze*. In a sense, there is no actual *heter* of handling *muktze* because of financial loss. In our case, the *heter* of “*adam bahul al memono*” is not applicable. A person will not come to violate more stringent *issurim*, if the prohibition of *muktze* is not lifted.

A Jew would be allowed to instruct a Gentile to handle the

61. *Shulchan Aruch, Orach Chaim, Siman 334(2)*. The *Mechaber* cites a dissenting view that even in the face of financial loss handling *muktze* is prohibited. Another view cited in the *Mechaber* maintains that even asking a gentile to move the *muktze* to prevent its loss is prohibited. The *Bach*, quoted favorably by the *Mishnah Berurah* (s”k 6), assumes that the *Shulchan Aruch* rules like the lenient view.

62. *Magen Avraham*, id. s”k 3; *Mishnah Berurah* id. s”k 6, 7; *Aruch Hashulchan* id. s”k 21. Thus, where a person is less anxious about potential financial loss such that he won’t come to violate more severe prohibitions, for example, “where rain begins falling on a person’s merchandise,” then the *issur* of *muktze* is not lifted.

cord blood on his behalf.⁶³ In addition, *muktzeh* may be handled using body parts other than one's hands (*tiltul begufo*).⁶⁴ Accordingly, if practical, the cord blood container could be handled with body parts other than the hands.

Hachanah (Preparing on Shabbat for After Shabbat)

The *issur* of *hachanah* is a rabbinic prohibition that bars a person from engaging in activities that constitute preparation from Shabbat to *chol*, Shabbat to *yom tov*, or Shabbat to a subsequent Shabbat.⁶⁵ Not all activities of preparation, however, are included in the prohibition of *hachanah*. If the activity is preparatory in nature but involves little or no additional burden (*tircha*), and the activity is done by rote without expressly considering that the purpose of the action is for after Shabbat, no *issur hachanah* is violated.⁶⁶ Furthermore, provided that no *tircha* is involved, one may engage in an action on Shabbat for *chol* if the action at stake could not be performed after Shabbat and a loss would be involved.⁶⁷ It would appear that collection

63. *Shulchan Aruch, Orach Chaim, Siman* 307(5). This would be a classic case of "shvut d'shvut bemakom hefsed" (a double *derabanan* in case of loss), which is permissible. See also *Magen Avraham* id. s"k 7.

64. *Tosafot, Shabbat* 43b s.v. *d'kulei*, *Rosh, Shabbat* 3:19, *Shulchan Aruch, Orach Chaim Siman* 311(8), *Mishnah Berurah*, id. s"k 30. But see *Chazon Ish, Siman* 47(12,13) who takes a more stringent view of the *heter* of *tiltul begufo*.

65. *Shabbat* 113a.; *Tosafot, Shabbat* 113a, s.v. *mekaplrim, Shabbat* 118a.

66. *Mishnah Berurah, Siman* 503, s"k 1,5. *Biur Halachah* id. s.v. *aval*; *Shemirat Shabbat Kehilchata* 28:81; *Minchat Shlomo (Tinyana)* No. 36. Thus, one may return a book to its place on the shelf after use, or may bring his *talit* or *siddur* home after shul. For the same reason, one may return food to the refrigerator. All of these examples are permissible because they are activities which do not involve any real *tircha*, and one does not consider that he is doing these activities for after Shabbat.

67. *Shemirat Shabbat Kehilchata* 28:83. Thus, one would be allowed to bring clothing in from outside without the intent to wear them on Shabbat if they might get ruined or stolen. *Shu"t Maharshag* 1: 61.

of cord blood, although a relatively benign procedure, would involve *tircha* on Shabbat and thus would fall within the *issur hachanah*. The prohibition of *hachanah* would, therefore, be another reason, subject to the question of *pikuach nefesh* (discussed below), to prohibit collection of stem cells on Shabbat.

Pikuach Nefesh

The obligation to save a life is one of the most fundamental principles in Judaism. Were private banking of stem cells for future personal use to be considered by halacha as an act of *pikuach nefesh*, our entire prior discussion would be superfluous. However, despite the fact that the stem cells collected might actually save an individual's life one day, that *per se* does not render the collection process itself an act of *pikuach nefesh*.⁶⁸ ⁶⁹ Thus, *pikuach nefesh* overrides the most stringent of prohibitions even in cases of great doubt.⁷⁰ Should private stem cell collection

68. The halacha generally requires a *refuah beduka* (proven therapy) before allowing intervention even in life-threatening situations. The specific parameters of a *refuah beduka* are a major point of contention amongst the rishonim. See Rabbi J David Bleich, "Experimental Procedures and Pikuach Nefesh: The Concept of Refu'ah Bedukah", *Tradition*, 25 (1) 1989; p.50, for a detailed discussion of this issue. See *Tzitz Eliezer* VIII, no.15, chap.8 as well. In reference to our stem cell transplantation discussion, based on the proven clinical efficacy of stem cell transplantation treatments in many cases, this treatment qualifies as *refuah beduka* according to all views analyzed in those sources.

69. *Yoma* 84b, Rambam, *Hilchot Shabbat* 2:1, *Shulchan Aruch*, *Orach Chaim* 328:3.

70. For purposes of clarification, when the Gemara and *poskim* discuss *pikuach nefesh* overriding prohibitions even when there is extreme doubt, they are generally referring to doubt about the efficacy of the therapeutic intervention or the degree of threat to the life of the individual. The situation leading to the issue of doubtful danger itself is clearly present here and now. For example the case in *Yoma* refers to the definite collapse of a building (a clearly present and current danger). The doubt arises relative to whether an individual is in the collapsed building, and if so, whether he is still alive, and is he one for whom the Shabbat may be violated. The ensuing discussion

with the specific goal of providing life-saving therapy, despite the low likelihood that it ever will provide such therapy, be placed into the same category? In an overview of embryonic stem cell usage in medical research, Drs. Fred Rosner and Edward Reichman noted such a possibility: "As stem cell research is targeting a cure for diseases such as diabetes and cancer, one could argue that the threshold for *pikuach nefesh* is met."

However, many authorities do not appear to accept this assumption. Previous medical halachic discussions have suggested specific parameters for meeting the threshold of *pikuach nefesh*. Almost all discussions began with the famous response of Rabbi Yechezkel Landau on the permissibility of autopsies to gain useful medical information.⁷¹ In that response, Rabbi Landau established the principle that *pikuach nefesh* requires that the act being done result in the possible saving of a life known to be presently in danger before us (a *choleh lefaneinu*) and potentially benefiting immediately from the act itself. Rabbi Landau explained the rationale for this limiting approach to be that if one always had to consider the possibility of a life-threatening situation arising, one would constantly be involved in overriding prohibitions for such an eventuality. He added, "*ulechalek bein chashasha lezman karov lechashasha lezman rachok kasheh lechalek*," (and to differentiate based on probability of current or distant occurrence is difficult). Apparently, to avoid the slippery slope of inappropriate disregard for halacha, the line had to be drawn somewhere. Rabbi Landau saw it at *choleh lefaneinu*, irrespective of the likelihood of potential life-threatening danger that may arise.

above focuses upon circumstances where presently no danger exists, but the possibility remains that it may arise.

71. *Teshuvot Noda bi-Yehudah, Mahadurah Tinyana, Yoreh De'ah*, no. 210. Rabbi Moshe Sofer, *Teshuvot Chatam Sofer, Yoreh De'ah* no. 336, is frequently cited as maintaining the same position.

Obviously, private stem cell collection for future use does not meet this requirement.

However, surely an illness that is definitely life threatening and that is considered likely to occur would constitute *pikuach nefesh* by many *poskim* today despite no actual *choleh lefaneinu*.⁷² One famous example often mentioned in this context is the account of Rav Yisroel Salanter directing the entire population of Vilna (including those perfectly healthy at the time) to eat on Yom Kippur because of the potential threat of a cholera epidemic afflicting the area in 5621 (1861).⁷³ It would seem, therefore, that the concept of *choleh lefaneinu* is not absolute and some broadening of its scope is warranted. Expansion of this principle was offered by the Chazon Ish: "The difference [between what constitutes *pikuach nefesh* and what doesn't] is not whether an [at risk] individual is actually here or not, but rather, '*im matzui hadavar*,' is the thing [i.e. the danger] here."⁷⁴ In other words, no actual sick individual is required to be before us to constitute a *pikuach nefesh* situation as long as the illness or danger itself is present. Rather than *choleh lefaneinu* specifically, *machalah* or *sakana lefaneinu* is all that is required. In the case of Rav Salanter noted above, that threshold clearly was met by the presence of the dreaded and mobile cholera disease near the town.⁷⁵ In the case of privately-banked stem

72. For example in *Shemirat Shabbat Kehilchata* 40:69,71 a doctor or a nurse are allowed to return to their area of responsibility on Shabbat, despite possible violation of biblical prohibitions, if there is a strong possibility that a life-threatening situation may arise.

73. Rabbi J. David Bleich, "Fetal Tissue Research: Jewish Tradition and Public Policy," *Tradition*, 24(4) 1989, p.87 (note 39).

74. *Chazon Ish, Ohalot* 22:32. The Chazon Ish compares the case of a disease that is "*mehalechet*" (moving towards the town) to the case in *Eruvin* 45a where "*Oyvim shetzaru bair hasamuch lasapar*" is considered a case of *pikuach nefesh* and "*masriin alah*" despite no attack at the moment.

75. It would seem that this view is a modification of the view of Rabbis Landau and Sofer. However, it may also be explained as only explanatory of

cells, however, where not even an illness is present, it again appears to have fallen short.

Others have expanded the scope of *pikuach nefesh* even further. Rabbi J.D. Bleich⁷⁶ notes that certain rabbinic authorities would allow for overriding biblical prohibitions even in the clear absence of an existing danger.⁷⁷ After citing several examples, Rabbi Bleich concludes that according to those rabbinic authorities, "present awareness of the statistical probability of impending danger renders the danger itself present in nature." In contrast, Rav Shlomo Zalman Auerbach is quoted by *Nishmat Avraham* as limiting expansion of the ruling of *Chazon Ish* to situations where the presence of the disease is such that a *choleh* is "vadai" (certainly) found, and that the intervention will be able to have an immediate ("miyad") salutary effect.⁷⁸ According to this latter view, private stem cell collection is again excluded as no *choleh* is *vadai* going to be present.

Some perspective on our particular case may be garnered from a statement made by Rabbi Akiva Eiger in a *teshuva*

that view rather than contradictory. Rav Moshe Sternbuch describes the dissenting opinion of the Vilna Bet Din lead by Rav Bezalel against Rav Salanter's broad leniency. In analyzing the argument between the two sides in Vilna, Rav Sternbuch seems to suggest an approach that reflects this idea. All agree that a tangible danger to people must exist at the present time to constitute *pikuach nefesh*. The disagreement is only over what constitutes a "present" danger to people; an affliction specifically in their body literally, or an affliction threatening them from nearby. Rav Moshe Sternbuch in *Mo'adim u-Zemanim*, II, no. 140.

76. Rabbi Bleich, *ibid.*, *Tradition*, 24(4) 1989 (pp.77-80).

77. For example, he mentions the case of the nurse from *Shemirat Shabbat Kehilchata* noted above. He also describes the lenient rulings of Rav Isser Yehudah Unterman (*Torah she-be-al Peh*, XI (5729), 14 and *Ha-Torah ve-ha-Medinah*, V, 29) regarding organ banks during times of war and regarding preparation and transport of ammunition in time of danger.

78. *Nishmat Avraham*, *Yoreh De'ah* 349:2. He also cites there the extreme position of the *Binyan Tzion* (*simanim* 170,171), that autopsy is forbidden even in the presence of a *choleh lefanainu*.

grappling with whether or not an item whose removal would lead to a *sakanah* (life-threatening danger) qualifies as a *chitzizah* (physical barrier) to ritual immersion.⁷⁹ Rav Eiger maintained that something that had only a “one in a thousand” chance of leading to the danger did not constitute even a doubtful danger and would therefore not allow for overriding of any biblical prohibitions.⁸⁰ According to this, a situation of potential danger (even life threatening) does not constitute even a doubtful *pikuach nefesh* situation if the chances of its occurring are less than one in a thousand.

As we saw earlier, when it comes to anticipating the likelihood of requiring privately banked stem cells for life-saving therapy the most liberal estimate was one chance in a thousand.⁸¹ Thus we are forced to conclude that, even allowing for the most broad application of *pikuach nefesh* (i.e. that noted by Rabbi Bleich), private stem cell banking falls short. Any biblical prohibitions confronted during the collection process would then obviously remain in place, and even the rabbinic prohibitions would require individual rabbinic assessment as to permissibility.⁸²

79. *Teshuvot Rabbi Akiva Eiger* no. 60, s.v. *ulaniyat da'ati*.

80. This idea that there are limits to the degree of doubt that still constitutes even *safeik pikuach nefesh* is consistent with a statement by Rav Moshe Sofer (*Teshuvot Chatam Sofer, Yoreh De'ah* no. 338) as to the need to delay burial for fear of misidentifying death and cessation of breathing. He ruled that the very small chance of a person being alive under such circumstances (“once in a thousand years”) does not render it a case of doubtful *pikuach nefesh* to override the prohibition of delaying burial.

81. As noted earlier, the estimated range of risk goes as low as 1 in 200,000 and no higher than 1 in 1000.

82. It is worth noting that there are opinions that permit the overriding of prohibitions even for non-life saving needs of a patient in whom one is already performing a life-saving action (such as the delivery of a newborn baby). See, for example, the comments of the *Magid Mishnah* to Rambam, *Hilchot Shabbat* 2:14 citing the Ramban in *Torat Ha'adam*. See, however, *Shemirat Shabbat Kehilcheta*, 32:22-23, based largely on the discussion in the *Mishnah*

Public Stem Cell Donation and *Pikuach Nefesh*

Until now we have focused almost entirely on the halachic issues relevant to and potentially limiting of “private” stem cell collection. However, as noted earlier, there is another option available to parents of newborn infants. Rather than banking privately, they can opt instead to donate their newborn’s stem cells for general use by the public.⁸³ As we have shown, private collection does not meet the threshold of *pikuach nefesh* even by the most liberal criteria. In contrast, we believe public stem cell donation might. Unlike standard blood donations in which there is no guarantee that they will be used for life-saving therapy, the only indication for stem cell transplantation is to cure life-threatening disease.⁸⁴ Furthermore, although there is no literal *choleh lefaneinu*, an argument can be made in cases of public donation, for the presence of *machalot lefaneinu*. Unlike private stem cell collection which anticipates the rare development of illness in a given individual or a sibling, public donations are made available to any matching individual in need in the entire world. The hematological, oncological and immunological diseases treated with these cells clearly abound at any given time. While there is no absolute guarantee that every donation will in fact be used, out of 71,842 donations recorded by Netcord (an international consortium of 13 public

Berurah and *Biur Halacha* siman 328, that only activities that if omitted would be dangerous to the patient, or are “*kdei lechazek u’lera’anen et gufo*” (serve to directly strengthen or bolster the patient) are permitted when violating biblical prohibitions.

83. Currently the only limitation to this option is financial resources.

84. In *Iggerot Moshe* (*Choshen Mishpat* 103) Rav Moshe Feinstein notes that one cannot apply *pikuach nefesh* status to a standard blood donation because there is no guarantee that it will necessarily be used for a life-threatening indication, as at times it is not. The implication, however, is that were the use of blood donations limited to *pikuach nefesh* situations, as long as the unit will certainly be used by someone at some time, donating could be considered life-saving therapy.

cord blood banks), as of September 2003, 2592 had been used for life saving therapy and this number will almost certainly rise in the future. This translates to an at least 1 out of 30 chance that a donation will be used. Obviously, poskim would have to decide based on the data available at the time in question, whether or not even public stem cell donation truly rates as a *pikuach nefesh* intervention to override any aspects of Jewish law.

A Jewish Attitude toward Public vs. Private Stem Cell Donation

Currently, stem cell collection is an “either/or” proposition. Parents have to decide between privately banking the cells for their family and possibly donating it to the public. One cannot do both.⁸⁵ Obviously, for the family in which there is an already afflicted individual or one that is genetically at risk for conditions that might require stem cell transplantation, private banking is highly preferable. Absent those specific circumstances, the current predominate medical recommendations are to donate publicly rather than privately. Which is preferable from a Jewish perspective?

Although in *hilchot Tzedaka* in general, a person must secure his own needs and those of his family first, the current estimates of the unlikelihood of private stem cell use by a given not-at-risk individual render it a *miuta de-miuta* (minute possibility) and hence halachically irrelevant. In contrast, public donation of stem cells is an act of giving that has a fairly good chance of saving a life, making it an obviously very significant mitzvah.

In his commentary on the Mishnah, the Rambam notes that

85. That may soon no longer be the case, as much current research is aimed at in-vitro expansion of the stem cell population, allowing hopefully for the splitting of the cord blood yield for both public and private use.

the verse “*ve-hashevota lo*” commands us to heal the afflicted “*oh be-gufo oh be-mamono oh be chochmato*” by direct physical intervention, through the offering of monetary assistance, or through the offering of our wisdom and guidance.⁸⁶ For the most part, wisdom and guidance are limited to the medical community, and the majority of people are relegated to fulfilling this obligation of healing only through making charitable donations. Increasingly, however, many are also giving a physical part of themselves by voluntarily donating blood or bone marrow to improve the health of others. Clearly, donating stem cells derived from cord blood accomplishes the same great act of *chesed* potentially in dramatic life-saving fashion. The self-sacrifice involved does not entail the pain and inconvenience of blood and marrow donations but rather the willingness to forgo the natural tendency towards self-preservation for the sake of others.

86. *Nedarim*, Perek 4.

Internet Commerce On Shabbat

Rabbi Alfred Cohen

Introduction

Perhaps one of the most innovative factors in our rapidly changing world is the astounding spread of use of the internet. Cyberspace has become the essential and at times even the primary tool for communication and business. With breathtaking speed and efficiency, the worldwide web has transformed our lives. And, as always when new situations arise, we want to measure the new phenomenon within the context of Jewish law, to assess whether – or how – we are to embrace these new opportunities.

It is fascinating and inspiring to realize that our ancient Torah, received in the primitive desert, readily presents us with guidelines and precedents for adapting new inventions to the demands of Jewish law. The present study will focus on the issue of doing business via the internet on Shabbat and Yom Tov. Is maintaining a business website on Shabbat permissible for a Jew who is Sabbath-observant? Why might it not be? To what extent is the halacha affected by the reality that a website can easily run on “automatic” on Shabbat, without the assistance or even knowledge of any person?

Since use of the internet is such a new practice, there has scarcely been time for a body of broadly accepted halachic literature or rabbinic comment to develop. Consequently, much of our study will involve trying to find cognate situations

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discussed in earlier generations, to identify the appropriate categories of activities discussed in rabbinic literature which could guide us in the current situation. It is desirable to consider also *hashkafic* factors which may inform the halacha.

Commercial activity on Shabbat was proscribed by our Sages, initially as a precaution lest one write something down in the course of a transaction, which is biblically forbidden on Shabbat.¹

Since doing business on the internet is such a recent phenomenon, rabbis are still grappling with the halachic issues involved, and their conclusions are yet somewhat tentative. When asked whether a business must close down its website for the duration of Shabbat (calculated by when it is Shabbat for the owner), Rav Heinemann initially wrote in *Kashruth Kurrents* that it must be closed², because the owner's property (his website) is making money for him on Shabbat, which is forbidden, even if it occurs automatically.³ Although there is no person transferring the buyer's money to the vendor's cash register, Rav Heinemann was under the impression that clicking a button *automatically* causes a charge to be registered against the buyer's credit card and instantaneously transfers the funds to the seller. Subsequently, he was apprised that some of his information was incorrect, and he perforce amended his ruling.

Rabbi Heinemann noted in the next issue of *Kashruth Kurrents* that credit card processors and banks never actually *transfer* funds on Saturday or Sunday (since the Federal Reserve System is closed on weekends), which removes this concern from the halachic screen; however, there might still be a problem on Yom Tov. Rav Heinemann recommends designing the website in

1. *Shabbat* 148; *Mishneh Torah*, *Hil. Shabbat* 23:12.

2. Vol.24:2, Winter 5764 – 2004.

3. This aspect of doing business will be discussed later in this study with respect to a pivotal responsum of Dayan Weiss, writing in *Minchat Yitzchak*.

such a way as to defer credit transfers on a Yom Tov which occurs on a weekday, which is relatively easy to do.

In conversations with a representative of Amazon.com, this writer also received information which does not support the contention that when a buyer "buys" something on the internet, the vendor is immediately paid. Such a scenario would certainly be problematic on Shabbat, for a variety of reasons. However, Amazon.com informed me that although a buyer's credit card number is noted and an immediate (automatic electronic) check is made for the validity of that account and the sufficiency of its funds, there are many businesses (including in some cases Amazon) which do not process the charge and receive payment until they have determined that they actually have the merchandise on hand and are able to send it out. Since there is an option of delaying receipt of the buyer's funds until the goods are shipped, this particular issue could readily be avoided on Shabbat; the seller would merely have to design the web page so that no money would actually be transferred until after Shabbat, i.e., there could be a notice on the "shopping cart" that the order will not be processed till after Shabbat. (In light of the new information gleaned by Rabbi Heinemann about credit card transfers, it is possible that even this precaution might be unnecessary.)

Amazon.com also informed this writer that at times they sell merchandise on consignment (called "market place sellers") and in that case, as soon as the item is sold, they automatically transfer it to the account of the seller who gave them the item on consignment. This might be a problem, for R. Akiva Eiger forbids acquiring an item (*kinyan*) on Shabbat even if no funds are transferred.⁴

4. *Sh'ut R. Akiva Eiger* 159.

In an internal memo circulating within the Orthodox Union, Rav Belsky also addressed the question of placing a bid on an internet sale (such as eBay) which may end on Shabbat.⁵ He differentiates between a bid where the buyer has placed his bid beforehand and, in the event his bid wins, he will then have to arrange with the seller for purchase and delivery; since this can be done after Shabbat, there is no problem. However, there are also “proxy” bids, whereby the buyer makes a maximum bid and eBay’s computers automatically bid for him, up to the maximum. If that bid wins, it automatically becomes his on Shabbat, and that would not be permitted. Rabbi Belsky’s ruling is based on the aforementioned responsum of R. Akiva Eiger, to the effect that the *issur mekach umemkar* is limited to one who actually acquires an object (*kinyan*) on Shabbat. In the former case, there is no *kinyan* until after Shabbat, while in the proxy situation, it occurs on Shabbat. (*Kinyan* modes will be discussed hereinafter.)

S'char Shabbat and Havla'ah

While all rabbinic scholars agree that doing business – *mekach umemkar* – is forbidden on Shabbat, various reasons for the prohibition are adduced. In his Torah commentary, Ramban finds a biblical level of prohibition,⁶ while others see the source as rabbinic fiat.⁷ The Talmud explains that the rabbis forbade people to engage in buying and selling for fear that they might

5. Dated Oct. 21, 2003.

6. *Vayikra* 23:24; see also *Ritva, Rosh Hashanah* 24b; *Rambam, Hilchot Shabbat* 21:1; *Minchat Chinuch* 297:1.

7. *Mishnah Berurah* 306:32; *Shu't Chatam Sofer Choshen Mishpat* 195. The *Mishnah Berurah* 444:20 discusses whether the prohibition applies if the intent is for a mitzvah, such as selling one’s *chametz* on Shabbat which occurs on *erev Pesach*, or (206:11) buying land in Israel from a non-Jew on Shabbat. *Shemirat Shabbat Kehilchata* 29:72 explains when it may be permissible on Shabbat to give a Gentile an animal that is about to give birth to a first-born.

forget the Sabbath and write something down, which is a Torah prohibition.⁸

In Gemara *Bava Metzia* 58a, the Talmud address the question of a Jew's getting paid for doing something on Shabbat and Yom Tov, even something which is permissible to do on Shabbat, such as babysitting. In a straightforward statement, the Gemara rules "*ain notnim lo s'char Shabbat*" "he cannot get paid for what he did on Shabbat." Rashi explains that this is because it looks like he is doing business on Shabbat.⁹ There is considerable debate among halachic decisors whether monies earned by a Jew on Shabbat may even be utilized.¹⁰ *Shulchan Aruch*¹¹ writes that if a non-Jew uses a Jew's oven on Shabbat and proffers in payment some of the bread he baked, it is forbidden for the Jew to use the loaves. *Shulchan Aruch Harav* (19) adds that not only the oven owner, but all Jews are precluded from eating the bread. According to Ritva, who ruled similarly, the earnings

8. *Beitzah* 27b.

9. Rashi, *Ketubot* 64a, *בשוכר בשבת*.

10. The Talmud (*Chullin* 16a) rules, and the normative halacha remains (*Orach Chaim* 318:1), that someone who cooks food on Shabbat may never consume that food, although other persons may eat it after Shabbat. (If the cooking was only rabbinically forbidden, see *Biur Halacha*, *ibid.*, and *Mishnah Berurah*, note 3.) If the cooking was done unintentionally, then the food may be consumed by everyone, but only after Shabbat. Is it legitimate to apply the same modality to money that was earned on Shabbat by a website?

In *Bava Kamma* 71a, cited in *Shaar Haziyun* 318:7, the Gemara explains that if a sin was committed in preparing the food, it is forbidden for *consumption* by the perpetrator, but not restricted from other benefit (*hana'ah*). Adopting this analogy, we would have to rule that any money earned by a Jew from his website on Shabbat should be permissible for him to use. We can see this rationale in a responsum by R. Moshe Feinstein, *Iggerot Moshe*, *Orach Chaim* II 71, where he permits using an object found on Shabbat, even though it was found by lighting a candle –thus violating Shabbat. Although there was a violation, it was the candle, not the found object, which was involved in the transgression.

11. 245:6.

of Shabbat must be “thrown into the sea.”¹² A slightly less drastic position is taken by the Chatam Sofer and Rav Moshe Feinstein, who rule that everyone except the person for whom the work was done may use the items or the money.¹³

This raises a host of questions which have been ruled upon over the ages, such as hiring a babysitter or a waiter, etc., to engage in their permitted activities on behalf of others on Shabbat.¹⁴ The usual halachic solution is to hire the worker for the *job*, not specifically for the hours worked on Shabbat. Then, he or she can be paid for watching the baby or setting the table throughout the week, and not just on Shabbat.¹⁵ In other words, if a person is hired by the week or month or year, then the Sabbath activity is included, and permissible.¹⁶ This practice is called “*havla’ah*”.

The *issur* of making money on Shabbat extends to making money from objects which the Jew owns. Although one is permitted to rent out items to gentiles which may be used by

12. *Avoda Zara* 26.

13. *Chatam Sofer, Choshen Mishpat* 194; *Iggerot Moshe Orach Chaim* IV 59.

14. Whether this rule about not getting paid for things done on Shabbat applies also to a person who is performing a mitzvah – such as a *chazzan* leading the prayer services – needs clarification; see *Orach Chaim* 406:7 and *Yabiya Omer* I:20 and II:17. The prohibition of being paid for activities done on Shabbat includes not just monetary payment but encompasses also any other compensation, such as doing a reciprocal favor. All are considered *s’char Shabbat*. There is one important exception: if the person is not giving the other something but only watching it for him, this does not constitute *s’char Shabbat*, according to Rabbi Simcha Bunim Cohen in *Hilchot Shabbat haShayachot labayit*, chap. 3.

15. Rashi, *Bava Metzia* s.v. *notnim lo*. This is similar to the text in *Nedarim* 36 which discusses paying a teacher. It used to be the custom to send the student to study with the teacher daily, including Shabbat, and it might appear that the teacher was being paid for working on Shabbat.

16. See *Orach Chaim* 306:4. *Shemirat Shabbat Kehilchata* 28:59 comments that “*havla’ah*” refers to work done either before or after Shabbat, but not both.

them on Shabbat (אין אלו מכוונים על שביתת כלים),¹⁷ it is with the proviso that they not be rented out *only* for Shabbat **ובלבך שלא שכר שבת אלא בהבלעה**.¹⁸

In a rather sweeping *heter*, *Shemirat Shabbat Kehilchata*¹⁹ suggests that if there are expenses incurred during the week for something that will only be used for Shabbat – for example, a hotel has guests for Shabbat, but needs to clean and cook during the week – then the payment is not considered as money earned on Shabbat, since the costs can be subsumed over the entire week. Further, *Shemirat Shabbat Kehilchata* also permits paying for a warm mikvah to be used on Shabbat, which is paid for before or after Shabbat, on the grounds that the cost of maintaining and warming the mikvah are incurred during the week.²⁰ This is a further example of *havla'ah*.

If we apply the above principles to, say, a music site on the web, where a subscriber may sign up for a week or a month or longer, there would not be any problem in this regard with staying open on Shabbat, inasmuch as the customer is paying for a block of time, including Shabbat, but not only for Shabbat. Thus, the Jew's property is not making money for him specifically on Shabbat.

17. *Shulchan Aruch, Orach Chaim* 246.

18. See *Shemirat Shabbat Kehilchata* 29:70, in the name of R. Shlomo Zalman Auerbach.

19. 28:62; see also the sources cited *ibid*, note 136. It is interesting to note that the *issur* of earning money on Shabbat places all the strictures on the recipient of the money, not the giver; see *Orach Chaim* 334:25, which rules that a Jew is permitted to pay a non-Jew for extinguishing his fire for him on Shabbat, inasmuch as the non-Jew is permitted to do work then. See also *Tehilla leDavid* 243.

20. *Ibid*, note 64; see also notes 140 and 141. He cites the opinion of R. S. Z. Auerbach that one can be lenient on this question only if the object or service being paid for will be used on Shabbat.

The inclusion of payment for services during the week together with services for Shabbat, *havla'ah*, provides a simple rationale for permitting activities to be performed on one's behalf on Shabbat. It is less clear that a site which offers music rentals by the song, for example, would be allowed to stay open on Shabbat. However, Rav Shlomo Zalman Auerbach rules that a customer's making even a single purchase on Shabbat alone is permissible, because he factors in the expenses the owner incurs during the week, to keep the site going at all times, and considers this a type of *havla'ah* as well.²¹

Halachic Issues

Since doing business on the internet is a relatively new phenomenon, we have to extrapolate from responsa on similar questions to gain insight into the halacha.²²

One such similar situation concerns a person who owns a candy or soda machine, which he places on the street or some such place accessible to passersby. The question arises whether he is allowed to take the money paid into the machine on Shabbat, or whether he needs to close it down. Dayan Weiss allows the machine to dispense its wares, if the owner meets the following conditions.²³

- (a) The machine is located in a public place.²⁴

21. Ibid.

22. A possible problem, which need not be discussed herein, is the question of "shema yetaken"—the Rabbis forbade playing musical instruments on Shabbat "lest one repair" them if they break while being used. That is one of the reasons one may not have a radio playing on Shabbat, even if it is turned on automatically. However, since even if the website goes down on Shabbat the owner will not be aware of it, there is no need to contemplate this particular *issur* here.

23. *Minchat Yitzchak* 3:34, 1:56. See also *Techumin* 19, p.349.

24. This eliminates the impression others might have (*mar'it ayin*) that

(b) The owner stipulates that any items purchased on Shabbat have actually been acquired retroactively by the buyer before Shabbat.²⁵

(c) The owner of the machine stipulates that he will not acquire the money until after Shabbat. (Although ordinarily a person's property is considered as "acquiring" for him – such as if someone put a box on my property it now becomes my box – yet a contrary stipulation can negate that principle).²⁶

(d) As for earning money on Shabbat, here Dayan Weiss relies on a precedent of the *Noda Biyehudah*, who reasons that the purchase price includes the cost of the product as well as the owner's profit. We can therefore argue that the profit is subsumed in the total purchase price (*הבלעה*), and therefore permitted.²⁷ (This is the same as the argument made by R.

someone bought something from the Jewish business on Shabbat.

25. This is termed *bereira*. The suggestion that it is permitted to earn money on Shabbat, provided that one mentally decides that the money is not his until after the end of Shabbat, is a bit of rabbinic theory which requires explanation. Although on the surface it resembles legerdemain, it is important to bear in mind that the entire prohibition of doing business on Shabbat arises only from a rabbinic enactment (*gezera*) as a precaution to prevent a person writing on Shabbat or engaging in some other biblically-prohibited action. Consequently, since the prohibition arises from a rabbinic fiat, it is quite legitimate to probe the limits the rabbis themselves may have intended.

26. In *Ketubot* 64, the Gemara discusses the case of a man who was refraining from marital relations with his wife; as a penalty for his failure to live up to his marital obligations, the rabbis added money to the value of her *Ketuba* on a weekly basis, until he agreed to comply with his obligations to her. Then the Gemara assumes that the amount of money which her *Ketuba* increased in value over Shabbat needs to be considered *s'char Shabbat*. From this we see that a person does not need to actually take possession of the money on Shabbat for it to be considered forbidden earnings. It is not clear to this writer how Rav Weiss explained the Gemara.

27. *Noda Biyehudah, Orach Chaim* 26. In the case addressed by Rav Landau in this responsum, he argued that since the matter concerned a mitzvah, there was more reason to permit it. See *Shemirat Shabbat Kehilchata* 29:28; see

Shlomo Zalman Auerbach, discussed above.)

Mar'it Ayin

Rabban Shimon b. Gamliel says, "A person should not rent his bathhouse to a non-Jew for Shabbat, since it bears his [the Jew's] name and the idolater does work there on Shabbat and holy days."²⁸

The Rabbis were concerned that there would be the appearance of work being done for the Jew on his premises by the non-Jew, which is a Sabbath violation. Even if in reality the Gentile is working for himself, אידעתה דנפשיה עבד, which would be permissible, but since it might give people the wrong impression, the Rabbis forbade it. This precaution is called *mar'it ayin*, refraining from an action so as not to give the appearance of wrongdoing. Thus, if a website were easily identifiable as belonging to a Jewish establishment, the same concern would also need to be addressed. On the other hand, one could argue that everyone using the internet realizes that there is no one there actually doing any work as the website is being used, it is all mechanized, and therefore we need not worry about *mar'it ayin* since everyone realizes that the Jew is not actively engaged in any business activity on Shabbat.

Furthermore, *Orach Chaim* records the rule that if a Jew's business establishment is regularly rented out, year after year, so that people realize that work being done there on Shabbat is not for him but for the renters, it would be permissible.²⁹ In

also his notes 70 and 71 for further sources.

28. *Avoda Zara* 21b; *Orach Chaim* 243:1,2. The Talmud distinguishes between a field and a bathhouse; the former may be rented to a Gentile, because everyone realizes that he is working the field as a sharecropper, which means that he is really doing the work for himself, and is not laboring on behalf of the owner.

29. 243:2; *Chelkat Yaakov* II:102 and I:49, 63.

other words, if there is no concern that people will get the mistaken impression that workers are doing business for the Jew on his premises on Shabbat, there is no concern for *mar'it ayin*. Since this is certainly the case with a website, it would not be forbidden due to *mar'it ayin* to keep it open on Shabbat, although there may be other issues which would preclude it. And as a further precaution for an obviously Jewish website, a message could be inserted informing the user that the order will not be filled on the Jewish Sabbath.³⁰

Zilzul Shabbat

The Gemara rules that one is permitted to initiate an activity before Shabbat that will automatically continue on Shabbat: "One may open a water channel from a spring to a garden before Shabbat...and it keeps filling up the entire [Sabbath] day."³¹ Although watering a garden to make things grow is forbidden on Shabbat, inasmuch as no one is doing any action, it is permissible.

However, the Gemara does not permit placing wheat into a watermill to be ground up before Shabbat, unless the grinding is entirely finished before Shabbat.

What is the difference between these two cases? In one, the garden is being automatically watered, in the other wheat is being automatically ground? Rabba answers that, in the second case, the mill makes noise as it grinds the wheat, and this is considered lack of respect (*zilzul*) for the sanctity of Shabbat.³²

30. *Mareh Habezek* V:p.94.

31. *Shabbat* 18a; Rambam, *Hilchot Shabbat* 6:1, says that the action is nevertheless forbidden by rabbinic decree, for fear that people will take Shabbat lightly and start doing the forbidden activity itself on Shabbat.

32. According to Rashi, the *zilzul* arises from the loud sound which is an affront to the serenity of the Sabbath.

It is difficult to delineate precisely the parameters of *zilzul*. How much impact does noise have on the normative halacha? Is it any noise, or only a harsh, grating, loud sound? The Ramo rules,³³

We are not concerned about emitting a sound [as the activity is done on Shabbat]....but there are those who forbid [using] grinders and in any situation where there might be emitted a sound; and that has become the custom in the best case (*lechatchila*). However, in a situation which involves monetary loss, one can be lenient.³⁴

When it comes to using the internet, there is no problem with “making noise”, and thus at least in this regard there would appear to be no problem with regard to *zilzul Shabbat*. Yet there are those who take a broader view of *zilzul*, among them Rav Moshe Feinstein, who adamantly prohibited using an electric timer to cook food on Shabbat, even though there is no sound generated thereby:³⁵

There is no greater *zilzul Shabbat* than that [cooking], and it is clear that were this [to have occurred] in the days of the *Tannaim* and *Amoraim*, they would have prohibited it, just as they forbade instructing a Gentile to do one’s work on Shabbat or YomTov, for the same reason.

On this account *Shemirat Shabbat Kehilchata*, 42:43, forbids allowing cleaning equipment or a dishwasher to run on Shabbat, or to have a radio playing, even if they are turned on automatically.

33. *Orach Chaim* 252:5.

34. Merely not making money is not considered a “loss” (הפסיד), *Shemirat Shabbat Kehilchata* 42:No. 147.

35. *Iggerot Moshe, Orach Chaim* IV:60.

In a similar vein, Rav Breisch, in his *Chelkat Yaakov*, denounces the very idea of a store owner installing an answering machine which would record orders placed by customers on Shabbat, to be retrieved after Shabbat:³⁶

And it may be that in the near future it will be possible to have a large business run by an "automat" [i.e., function electronically]...with the store opening by itself at the desired time and the customers could come there even if no person were there...[and this would be] a diminution of the sanctity of the Sabbath.³⁷

However, Rav Breisch does permit a vendor whose answering machine is on all week to keep it on for Shabbat; he distinguishes between turning the machine on, on Friday, for use on Shabbat, and turning it off on Friday, so that it won't work on Shabbat. Although he and other *poskim* have expressed concern that increased sophistication in electronics might make it possible for business to be transacted on Shabbat by machines without active human intervention, others question why such an eventuality would be problematic –what is wrong with a machine doing “work” if the owner is totally uninvolved?

Consequently, there are those who challenge the position taken by Rav Breisch and Rav Feinstein. Rabbi Moshe Shtern, the Debreciner Rav, writes forcefully:

I have seen the response of the *Chelkat Yaakov* [referring to the ruling quoted above]...and he has made himself into a judge who can issue a decree, and he is making a new decree. And certainly there is no rabbi, whoever he may be, who can undertake on his own to issue new decrees unilaterally...A single rabbi certainly does not

36. III:94.

37. However, see *Melamed LeHoiL Choshen Mishpat*, p. 102, which disagrees.

have the authority to make a new decree.³⁸

Lifnei Ivair

An area of serious concern when dealing with the permissibility of keeping a website open on Shabbat is the issue of *Lifnei Ivair*. The Torah³⁹ cautions that it is forbidden “to place a stumbling block before the blind,” which means not only placing a physical impediment before a person, but also creating any situation which might cause a fellow Jew to stumble spiritually. In other words, one is not permitted to create a situation where others are likely to or tempted to engage in a forbidden activity.⁴⁰ Consequently, the person leaving his website on over Shabbat has to take into consideration that he may be helping or even encouraging other Jews to sin by ordering merchandise on Shabbat. Even if no biblical prohibition is violated, certainly some rabbinic ones will be.

In discussing the scope of the prohibition not to place a stumbling block before the blind, the Gemara elaborates:

Rabbi Natan said, “From where do we learn that a person should not offer a glass of wine to a *nazir* [a person who has sworn not to drink wine] nor [offer] a limb cut off from a living animal to a Gentile [all “sons of Noah” are forbidden to eat flesh cut off from a living creature]? Because it is written...’Do not place a stumbling block before the blind.’”⁴¹

38. *Sh'ut Be'er Moshe*, chelek 6, Kuntrus Electric 50. See also *Yechave Da'at* III 18.

39. *Vayikra* 19:14.

40. Rambam, *Sefer Hamitzvot*, Negative Commandment 232.

41. *Avoda Zara* 6b; the reason the rabbi mentions wine rather than non-kosher food is that wine is permitted to be drunk, and therefore the *nazir* might be tempted, but non-kosher food is a far less likely temptation; Rashi to the Rif, *ibid.*, “lest he drink from it.” Note that Rashi prohibits making this offer even

In other words, any Jew who causes or helps another person to commit a transgression has himself violated a biblical injunction, namely, placing a “stumbling block”; according to some authorities, this applies even if the sinner could have accessed the sinful object somewhere else.

The Ran⁴² is of the opinion that a violation of Torah law occurs only when the sinner could not have sinned without assistance, but if he could have sinned even without help, then the one who gave him the forbidden object has no transgression of *lifnei ivair*,⁴³ although it would still be rabbinically forbidden. Tosafot, however, maintain that if the sinner could have acted without help, there is neither a biblical nor even a rabbinic prohibition.⁴⁴

The question was asked whether Jews in Israel may stage a protest against *chilul Shabbat* on Shabbat, which will cause the police and others to desecrate Shabbat in the course of responding to the public protest demonstration. An article in *Techumin* discussing the ramifications of this situation relies on a responsum of Maharil and concludes that the demonstrators need not be concerned with the Sabbath desecration done by others in response to their protest.⁴⁵ Applying this to the question

if the chances are slight that the *nazir* will drink.

42. *Avoda Zara*, *ibid.*

43. *Mishneh Lamelech, Hilchot Malveh veLoveh* 4:2, holds that the *issur* does not apply if the act can be done with the assistance of a person not obligated with *lifnei ivair*, such as a non-Jew; but if the assistance is available only from another Jew, the *issur* would apply. See *Sdei Chemed, Maaracha* 6, *kellal* 26, *ot* 9 for differing opinions.

44. *Avoda Zara* 6b, “*minayen*”; *Chelkat Yaakov* I:67.

45. Rav Yitzchok Zilberstein in *Techumin* VII p. 117, note 2; he also raises the point that a parent is not allowed to hit his older child, for fear that the child might strike back, which is a major biblical sin. The father’s sin arises from the prohibition of *lifnei ivair*.

of keeping a website open on Shabbat, this issue would not preclude a Jew's keeping his site open. Of course, other factors might prevail, as we shall see, and it might therefore still be forbidden.

The author of *Shulchan Aruch* addresses the question whether it is permissible to sell items for use in Gentile religion to a non-Jew, and follows the opinion of Rambam that it is forbidden.⁴⁶ In his commentary, Ramo adds,

There are those who say that it is forbidden to sell them objects which pertain to their [religious] service, but that is specifically when there are not others...from whom they could buy them. However, if they can buy them elsewhere, it is permitted to sell them anything. But there are those who are strict in this regard, although it has become customary to follow the lenient opinion; but a pious person will be strict with himself.

Another approach is expressed in *Shearim Metzuyanim Behalacha* 80:3: The Gemara records that Rav Ashi used to sell wood from the forest he owned to a temple where fire was worshipped. When he was challenged about this, since it is forbidden to assist someone in doing a forbidden act, and even non-Jews are forbidden from idol worship, Rav Ashi's answer was that since most wood is used for burning and not for idolatry, he was justified in relying on the assumption that they would not be using it for an illicit purpose.⁴⁷

46. *Yoreh Deah* 151:1; however, he also lists exceptions.

47. *Shevi'it* 5-6, *Nedarim* 72b. Rabbi Braun does note that all these lenient opinions do not apply in certain cases. For example, a laundry business where customers can come to wash their clothes would certainly not be allowed to remain open on Shabbat. It is similar to a situation described in *Orach Chaim* 245:6. There, a Gentile used a Jew's oven to bake bread on Shabbat, against the wishes of the Jew; then, for using the oven, he wanted to pay with the bread he baked. It is not permitted for the Jew to take the

Banks in Israel

In the past few decades, as Israeli society has progressed technologically, some technical halachic problems have already been addressed by the Rabbinate. One issue involves having an ATM machine remain open on Shabbat. Rav Shlomo Goren ruled in the negative.⁴⁸

In the course of his discussion, the author of an article in *Techumin* raised an intriguing question: after Rav Goren had ruled that the Israeli bank could not keep its ATMs open on Shabbat, the bank had been sold. The new owners wanted to know if it was permissible to ask another rabbi for his own ruling about the ATM. Apparently, not everyone felt it necessary to be as strict as Rabbi Goren; it seems that Rav Eliashiv, relying on the Maharil responsum cited above, arrived at the conclusion that one is not required to forego profits so that another person will not sin.⁴⁹

Another question is whether the Bank has to forego its business in order to stop Jews from sinning. According to the Maharil, a Jew has no obligation to forego his own legitimate profit in order to prevent another Jew from sinning. The *Shulchan Aruch* maintains that when one is dealing with a religiously observant Jew, there is an obligation to see to it that he not sin. However, in the case of an apostate, there is no such responsibility.⁵⁰

bread, if it was baked on Shabbat; but if baked during the week, he could. See also *Shemirat Shabbat Kehilchata* 28:74,75, and *Shana Beshana* 1981, pp. 176-184, which examines the question of whether a bank may leave its ATM machines accessible on Shabbat (in Israel).

48. *Shana Beshana* 1981, pp. 176-182; *Techumin* 19, p. 349; *Techumin* 20, p. 421.

49. *Ibid*, p. 361, note 5. As to whether one is permitted to accept interest paid by a bank, which accrues daily including Shabbat, see *Iggerot Moshe*, *Orach Chaim* IV:59 and *Minchat Yitzchak* IX:59.

50. *Shach, Yoreh Deah* 151:6.

Others extend this leniency to include anyone who deliberately commits a sin.⁵¹

Further Practical Applications of *lifnei ivair*

Is one permitted to hire a printer to print his work, when it is known that the business has Jewish employees and they will be working on Shabbat? Rav Yaakov Ettlinger ruled that since the printer is open for business for others, not just the Jew, and he could certainly be working on these other contracts on Shabbat, there is no Torah violation in giving him the work to do, although a rabbinic prohibition does apply.⁵² He adds an interesting note: in his view, *lifnei ivair* is violated only when the assistance and the sin occur at the same time, and only if the one offering the assistance is certain that the sin will occur. Consequently, giving the material to the printer is permissible inasmuch as one doesn't know when the printer will decide to do the work.

Rav Moshe Feinstein was asked by a caterer whether it was permitted for him to cater a party where mixed dancing would take place. Rav Moshe permitted it, because the celebrants could easily find another caterer and hold their party anyway. Furthermore, since the caterer is bringing in kosher food, he is actually saving them from committing the further sin of eating non-kosher food. In addition, Rav Feinstein holds that even the rabbinic prohibition would apply only if the item being offered to the sinner is to be used in committing the transgression, but the purpose of the food is only to serve a meal, not facilitate mixed dancing.⁵³

Rav Ovadia Yosef was asked about the propriety of a store

51. *Dagul Mirevavah* in commentary to *Shach*.

52. *Binyan Zion* I:15.

53. *Iggerot Moshe Yoreh Deah* I:72; *Melamed LeHo'il* I:34; *Meishiv Davar* II:32.

selling immodest clothing for women. Relying on the *Mishneh Lamelech* cited above, Rav Yosef concludes that since all the other stores in the neighborhood are owned by Jews, this question involves a biblical prohibition (i.e., only Jews can provide the improper clothing to Jewish women). However, since there is some uncertainty whether the women will wear the clothing in an immodest manner, Rav Yosef is prepared to be lenient.⁵⁴

Applying these precedents to the question of maintaining an open website for business on Shabbat, we will have to consider a number of points in order to arrive at a halachic decision:

Are there other sites on the internet where the same product could be purchased?

Are the items to be sold generally exclusively for Jews, such as Jewish music tapes, religious objects, etc.?

Partnership with a non-Jew

If a business maintains a web site selling products exclusively to a Jewish clientele, would it be advisable for the business owner to form a partnership with a non-Jew (with the non-Jewish partner receiving the profits from Sabbath business)?⁵⁵ According to the Gemara,⁵⁶ this arrangement would permit the Jew to take the profits from, say, Monday, and the Gentile to take the profits from Saturday. In recording this rule, the *Shulchan Aruch* adds that it does not matter whether the profits

54. *Yechave Daat* III:63. See *Gilyon Maharsha*, *Yoreh Deah* 151, based on a text in *Bava Kamma* 69a; see also *Meiri* and *Ritva* and *Tosafot* to *Avoda Zara* 6b.

55. See *Mareh Habezek* V:p. 99.

56. *Avoda Zara* 22a.

from Shabbat are greater or lesser than that of other days.⁵⁷ The permit is based on the rationale that the non-Jew is working on Shabbat for himself (inasmuch as the profit is his) and not as an agent for the Jew, which would be impermissible.⁵⁸

Many contemporary rabbis express hesitation about sanctioning this type of arrangement in America at the present time. Rav Soloveichek was known to oppose allowing a Jew to enter a partnership with a non-Jew for the express purpose of keeping his store open on Shabbat.⁵⁹ *Iggerot Moshe* allowed it only in certain circumstances.⁶⁰ Why does Rav Feinstein in his *Iggerot Moshe* express hesitation about accepting a leniency which even the Talmud approved? He explains,

My mind was not at ease about this, even when I lived in Europe, because it is a great *Harama* (deceit) and it is also sometimes clearly against the halacha.⁶¹

In the view of R. Moshe, the entire procedure of arranging with a non-Jew to take the Sabbath profits is *Harama*, a sham, because in truth the non-Jew is working for the Jew in his business; the profit to the Gentile exists only on paper, not in reality. Since in America Sabbath observance is not what it should be (the responsum is not dated), the ersatz partnership

57. *Orach Chaim* 245:1.

58. Ramo, *ibid*. See *Iggerot Moshe, Orach Chaim* 53, who permits it even if the non-Jew gets a commission for each item sold. See also responsum 57.

59. *Nefesh Harav* p. 168, cited also in *Yesodei Yeshurun* III:126-137.

60. *Iggerot Moshe Orach Chaim* 54, 55; *Iggerot Moshe Orach Chaim* 245:4. Rav Moshe reiterates opposition to this type of arrangement and comments that although it might have been acceptable in Europe many years ago, the same situation does not exist here in America and therefore the leniency should not apply.

61. *Iggerot Moshe Orach Chaim* IV:55. In the preceding responsum, no. 54, Rav Moshe does permit a Jew to lend money to a non-Jew to maintain a business which sells on Shabbat, but with the proviso that no one knows that the money came from the Jew. See also *Orach Chaim* 245:4.

with a non-Jew could lead to rampant *chilul Shabbat* on the part of many. Rav Moshe is prepared to allow it only if the profits for Shabbat and Yom Tov are actually transferred to the non-Jew, while the Jew gets the profit for another day. It would require careful bookkeeping to guarantee that this actually happens. Rav Moshe, in the next responsum, (56) offers a specific wording for such a contract including this stipulation.⁶²

Kinyan

In Jewish law, in order for a purchase to be valid, it has to conclude with a *kinyan*, which, roughly translated, means an act of acquisition. There are various types of *kinyan*.⁶³ For example, if the buyer performs some sort of act upon his purchase, that demonstrates his ownership (*chazaka*); or if he lifts his purchase off the ground a certain amount (*hagbaha*); or if he beats the animal he bought, to make it walk, or pulls it by its bridle (*meshicha*); if the seller hands the object over to the buyer (*mesira*); an exchange of objects by two people (*chalipin*). Whether paying money for something is a valid act of acquisition represents a difference of talmudic opinion: Rabbi Yochanan accepts it even on a biblical level of acquisition,⁶⁴ while Reish Lakish maintains that the proper *kinyan* for purchases other than real estate is *meshicha*.⁶⁵

Regardless of which type of *kinyan* is valid, one point is clear: without *kinyan*, in Jewish law no “sale” has taken place. Consequently, it might be possible to argue that the entire

62. Another version of an agreement appears in responsum no. 58. However, see *Shevet Halevi* III:23, and *Chatam Sofer Orach Chaim* 49.

63. Before the *kinyan* takes place, there has to be an agreement about price and other terms, preferably with witnesses.

64. *Bava Metzia* 47a.

65. *Kiddushin* 26a.

discussion concerning commerce on the internet is moot, since in selling on the internet on Shabbat, there really is no sale taking place, inasmuch as it does not result in an act of *kinyan*.

However, in addition to all the types of acquisition listed above, there also developed another form, called *kinyan situmta*,⁶⁶ whose specific meaning is a matter of controversy. Rashi writes that wine merchants kept huge wine barrels in their cellars; after selecting which ones he wanted, the buyer would affix some sort of mark on the barrels to indicate they were sold. Ritva considers that it was a special coin given to the seller by the buyer,⁶⁷ while Rosh explains it as a handshake to seal a deal.⁶⁸ Whatever the exact meaning of *kinyan situmta*, it represents a binding agreement in Jewish law to acquire a product, and it is a *kinyan*.

In drawing up the laws of purchase, the *Shulchan Aruch* notes that “any arrangement that merchants have agreed upon for buying” is to be considered valid by Jewish law,⁶⁹ with one caveat: it must be accompanied by some type of action. In other words, if two parties agree verbally to a sale, even if that is the accepted practice in that locale, it is not binding in halacha unless accompanied by some action (such as a handshake, or, in the case of the internet, pushing buttons on a keyboard).⁷⁰

66. *Bava Metzia* 74a.

67. *Shita Mekubetzet*, *ibid.*

68. *Ibid.*

69. *Choshen Mishpat* 201:2. *Pitchei Teshuva* 1 probes whether this is binding on a biblical or rabbinic level.

70. Rosh is also not prepared to accept the validity of local custom if it is not accompanied by some action, terming it a “*minhag garua*”, *Sh’ut Rosh*, 12:3. However, *Mordechai, Shabbat*, chapter 19, pp. 462-463 questions just how effective this *kinyan situmta* is. In Jewish law, if there is an *asmachta* involved, a *kinyan* is not effective; does this include a *kinyan situmta*? See *Pitchei Teshuva* 1, discussing another issue: a *kinyan* is only considered valid if the object purchased already physically exists, but not if it has not yet

Rav Waldenberg was asked to rule in the following situation: a man and woman had decided to get divorced. The husband agreed to certain stipulations and then gave her a *get*. However, thereafter he claimed that he had only agreed to the stipulations in order to induce her to accept the *get*, and therefore the stipulation should not bind him. Rav Waldenberg responded:

It is the custom of the state that writing up an agreement between the two parties and their signing [the agreement] obligates both sides so that they cannot retract...which means that the signature on the agreement is like a type of *situmta*...and it is considered a totally valid *kinyan* and neither one of them can go back on it.⁷¹

Conclusion

This brief survey is in no way intended as a comprehensive analysis of the halachic question of whether commerce on the internet is permitted on Shabbat. The topic is so new, and the issues so complex, that it is not possible at this point to find clear cut halachic indiciae. In the area of *hashkafa*, we have noted that there are some modern-day *poskim* who recoil from having electronic devices virtually override centuries of strictures regarding Sabbath observance. Clearly, there is room for concern that the spirit of Shabbat, if not the letter of the law, might be seriously impaired were technological advances allowed to obviate the sanctity of Shabbat. This is an important area which will almost certainly have to be dealt with in the near future.

come into being. Would *kinyan situmta* apply in such a case? (See *Pitchei Teshuva*). See also *Ketzot* 201:1 and *Netivot* for differing opinions on this question, as well as *Shu"t R. Akiva Eiger* #134 and also his comments to *Choshen Mishpat* 21.

71. *Tzitz Eliezer* XVI:53. Also in No. 50 s.v. "ela".

In the meantime, this study will hopefully serve as a preliminary look at the problems which might exist and possible solutions. What is certain, even at this early stage, is that Jewish law is fully adaptable to all challenges of modern life.

The Halachot of *Refuah* on Yom Tov

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Unlike the halachot of *refuah* on Shabbat that are mentioned often in Talmud *Bavli*¹ and set forth in the *Shulchan Aruch*,² the halachot of *refuah* on Yom Tov are not well defined by *Chazal* or early *poskim*. In fact, there is no direct mention of any such set of halachot in the entire Talmud *Bavli* or *Shulchan Aruch*. This article aims to trace and provide an understanding of the sources of the halachot of *refuah* on Yom Tov.

Introduction

A basic understanding of *hilchot refuah* on Shabbat is necessary to properly place the rules of Yom Tov in context.³ There are two categories of *refuah* that are potentially problematic on

1. Several places in *Masechet Shabbat*.
2. Primarily in O.C. *siman* 328. See an overview of *hilchot refuah* on Shabbat by R. Alfred Cohen in *Journal of Halacha and Contemporary Society*, vol. X, pp. 5-29.
3. These halachot are described in the *Shulchan Aruch* and commentaries, particularly in O.C. *siman* 328.

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Shabbat. One category comprises means of healing that involve a *melacha*, an action that is ordinarily forbidden on Shabbat, such as creating a fire, writing, etc. The permissibility of such actions for the purpose of *refuah* is determined by an algorithm that considers the severity of illness and severity of the otherwise forbidden action. For example, even a biblically prohibited act is permitted in treating a patient with a life threatening illness, whereas only acts of lesser severity are permitted in treating a patient with a less severe illness.

The second category comprises means of healing such as swallowing medication that do not entail the performance of a *melacha*. These are included under the rubric of a rabbinic decree that forbade seemingly halachically innocuous activities used for healing, out of concern that were these activities permitted, people would be led to the performance of a halachically problematic activity.⁴ This rabbinic decree applies only to those with a *מיחוש בעלמא* – a mild discomfort.⁵ It will be assumed that were a given category of restriction applied to Yom Tov, it would share the same details as on Shabbat.

It is important to keep these two categories of *refuah* separate when discussing the halachot of *refuah* on Yom Tov. Although they may share several common principles, in general the halacha of one does not necessarily affect the other. We will therefore treat them as independent subjects and discuss them sequentially rather than concurrently. In addition, there are significant differences in the halachot of *refuah* on the first day of Yom Tov from those of the second day of Yom Tov in the Diaspora and, of course, from *Chol Hamoed*. We will initially deal with the principles and halachot that pertain to *refuah* on

4. The *Shulchan Aruch* 328:1 writes: *מי שיש לו מיחוש בעלמא והוא מתחזק והולך כבריא אסור לעשות לו שום רפואי גזירה ממשום שהייקת סממניהם.*

5. All agree that it is an illness that does not adversely affect the entire body or require bed rest.

Yom Tov *Rishon* and later discuss those that pertain to Yom Tov *Sheini* and *Chol Hamoed*.

Refuah That Entails Melacha

There is a basic principle in *hilchot Yom Tov*: “אין בין שבת ליום טוב אלא אוכל נפש בלבד,” “with the exception of *melacha* done for the sake of food preparation, there is no difference between the laws of Shabbat and Yom Tov.”⁶ This would lead us to assume the strictures of *refuah* on Shabbat should apply equally to Yom Tov. In fact, the *Shulchan Aruch*⁷ explicitly rules in the case of a dye used as an eye treatment in the times of the Talmud that one may not perform an ordinarily rabbinically forbidden act for purpose of *refuah* just as on Shabbat. Do the halachot of *refuah* on Yom Tov in any way differ from those on Shabbat?

There is a fundamental leniency that applies to the performance of *melacha* on Yom Tov. *Melacha* done for the purpose of food preparation, “*ochel nefesh*”, is permitted on Yom Tov. This *heter* applies to all *melachot* normally performed for food preparation beginning from the stage of *losh* (kneading)

6. *Megilla* 7b and *Beitza* 36b, based on *Shemot* 12:16. This broad statement of the Mishnah refers only to the classification of given acts as biblical prohibitions. Tosafot in *Beitza* 37a clarify that there are significant differences between Shabbat and Yom Tov with regard to rabbinic prohibitions. There are also many differences in the ramifications of transgressing a biblical prohibition. For example, Tosafot in *Megilla* 7a state that the punishment on Shabbat is *skilah* whereas on Yom Tov it is *malkot*, and the Meiri in *Beitza* 37a states that one is liable for punishment for each individual transgression on Shabbat whereas on Yom Tov one is liable only once even for multiple transgressions.

7. O.C. 496:2, based on *Beitza* 22a, according to the opinion of most *Rishonim*. “אין חילוק בין ראשון לשני אלא לעניין מת וכן לחייב את העין או שאר חולי העין בו סכנתה.” Although there are prominent *Rishonim* who learn that this Gemara is not dealing with *refuah* at all, the *Shulchan Aruch* follows the majority opinion. We will later explain this text in greater detail.

in the sequential list of *melachot*.⁸ Although many halachic authorities extend the definition of “food” to include physical comforts (e.g. providing warmth or washing one’s face with warm water) or even spiritual needs,⁹ it is generally accepted that healing is not included in even this broad definition.¹⁰

8. The Rambam in *Hilchot Yom Tov* 1:7-8 states that all *melachot* in food preparation preceding the stage of kneading as well as those not usually done in the course of food preparation are not included in this *heter*.

There is one significant caveat to this halacha that in general is not relevant to the discussion of *refuah*. Many *Rishonim* hold that even food-related *melachot* are permitted only if they could not have been performed before Yom Tov. Rashi in *Beitza* 23b, Tosafot in *Megilla* 7b, and *Behag* in *Hilchot Yom Tov* *siman* 16 hold this is biblically prohibited, whereas Tosafot in *Beitza* 3a, *Yeraim* *siman* 113 (*siman* 304 in a variant numbering system), and Rambam *Hilchot Yom Tov* 1:5 hold it is rabbinically prohibited.

9. The discussion on this topic is based on the Mishnah and Gemara in *Beitza* 21b and *Shabbat* 39b. The Rambam in *Peirush Hamishnayot* in *Beitza* 21b and *Hilchot Yom Tov* 1:16, Ramban in *Shabbat* 39b, and Rashba in *Avodat Hakodesh Beit Moed* 3:5 appear to hold that *melachot* performed for physical comforts are included in *ochel nefesh*. The Rosh in *Beitza* 2:19 and Tosafot in *Beitza* 21b and *Shabbat* 39b hold that the *heter* of *ochel nefesh* is restricted to actual food related *melachot* and the principle of *mitoch* is needed to extend the *heter* to other physical pleasures. Although the Ran on 21b and Rashba in *Beitza* also appear to limit the *heter* of *ochel nefesh* to actual food, many assume that both the Ran and Rashba retracted this opinion in favor of the former opinion. Several of these opinions are cited in *Shaar Hatziyun* 511:2. R. Eliezer Waldenberg in *Shut Tzitz Eliezer* 1:20:3 proves that most *Rishonim* and later *poskim* hold that *melachot* performed for physical comfort are indeed included in the *heter* of *ochel nefesh*. As will be explained later (footnote 13), the *Sefer Hachinuch* 298 (or 315 in a variant numbering system), *Yeraim* 113 (or 304) and Rabeinu Tam in Tosafot in *Beitza* 12a appear to have a much broader definition of those activities included in the *heter* of *ochel nefesh*. Also see footnote 16.

10. However, the *Sdei Chemed* in *Ma’arechet Yom Tov* 1:26, similar to the position of the *Sefer Hachinuch* mitzva 298 (or 315), proposes that liquid medication is included in “food”. R. Moshe Shternbuch in *Teshuvot V’Hanhagot* 1:316 proposes that the relief of intense discomfort is tantamount to food needs. The Ramban in *Torat Haadam* at the end of *Shaar Hameichush* (p.22 in the Chavel edition) and the *Baal Hamaor* and *Raaviya* quoted in the *Mordechai* in *Beitza* *perek* 2 *siman* 684 explain that any state of health that leads to a decreased appetite is included in the rubric of ancillary “*machshirei*” *ochel*

What then is the rationale to apply the heter of *ochel nefesh* to cases of *refuah*?

The answer lies in another fundamental principle of *hilchot* Yom Tov. The Talmud,¹¹ followed by the *Shulchan Aruch*,¹² rules in accordance with the position of Beit Hillel who broadens the heter of *ochel nefesh* with the principle, *מתוּךְ שְׁחוֹתָרָה לְצַוְּרָךְ*, *חוֹתָרָה נְמִי שְׁלָא לְצַוְּרָךְ*, colloquially referred to as “*mitoch*”.¹³ In essence, this principle states that any action that would be permitted were it performed for food preparation is also permitted even if performed for a purpose other than food

nefesh. However, the Ramo in *Darchei Moshe* 496:1 follows the majority of *Rishonim* who disagree with this broad definition of *machshirei ochel nefesh* and therefore rejects this argument in deciding practical halacha. Also, even if *refuah* were included in the category of *machshirei ochel nefesh* as is the understanding of many *Rishonim*, it would not permit *melacha* on Yom Tov *Rishon*. This is because we do not follow the opinion of R. Yehuda who permits *melacha* for *machshirei ochel nefesh* (either because the actual halacha follows the rabbis who hold *machshirei ochel nefesh* is not included in the *heter* of *ochel nefesh*, or because although the actual halacha is in fact like R. Yehuda, it is “*halacha v’ain morin kain*”). In any case, even if healing were included in the category of actual *ochel nefesh*, many hold that the *heter* for food itself is restricted by the requirement of *shaveh l’chol nefesh*.

11. *Beitza* 12 and *Ketubot* 7.

12. O.C. 518:1.

13. Why should *melacha* for other purposes be permitted if the Torah explicitly mentions the *heter* only in the context of food preparation? Of the several explanations offered, two are found most commonly. One is based on the *Shita Mekubetzet* in *Ketubot* 7a and likely agreed to by the Ramban in *Vayikra* 23:7. They hold that the Torah intended to permit certain *melachot* in their entirety and used the language of “*melachot* involved in food preparation” merely as a means of identifying those *melachot* included in the *heter*. A second explanation is found in the *Sefer Yeraim* *siman* 113 (or 304) and apparently agreed to by the *Sefer Hachinuch*, *mitzva* 298 (or 315). They state that in fact all other needs are included in the words “*ochel nefesh*” which is more accurately defined as “nourishment for the body or soul”, even including *melachot* needed for fulfilling *mitzvot*. See *Kehilat Yakov* in *Beitza* *siman* 17 on the topic of *mitoch* and *Moadim B’halacha*, p.3, for further explanation and application of this position.

preparation, provided that it is for a valid Yom Tov need.¹⁴ This additional leniency permits a wide range of activities that are unrelated to food preparation that otherwise would have been forbidden.¹⁵ This leads to the understanding that *melachot* that are included in the *heter* of *ochel nefesh* and expanded by *mitoch* may in fact be permitted on Yom Tov for the sake of *refuah*.

There is one caveat to the free application of *mitoch*. The Talmud¹⁶ derives from the verse “אך אשר יאכל לכל נפש”—“that

14. The requirement that it be for a Yom Tov need is found in *Tosafot* and the *Rosh* in *Beitza* 12a and is agreed to by the *Ramban*, *Rashba*, *Ritva*, and *Meiri* as well as *Ramo* in 518:1. See *Beit Yosef* and *Biur Halacha* there for an extensive discussion of the *Mechaber*’s position that differs from the *Ramo*, based on *Rashi* on 12a, the *Rambam* in *Hilchot Yom Tov* 1:4, and other *Rishonim* who do not require that it be for a Yom Tov need. See footnote 16.

15. There is a discussion as to which *melachot* are included in the *heter* of *mitoch*. The *Gemara* in *Beitza* 12a mentions only three *melachot* – *shechita* (slaughtering), *hotzaah* (carrying in a public domain), and *havaara* (transferring or raising a preexisting flame). The *Meiri* there expands the *heter* to other similar *melachot* but does not clearly identify the scope of this expansion. The *Bach* in *siman 495*, *Pnei Yehoshua* in *Beitza* 23a and other *poskim* discuss the possible application to other *melachot*. The *Mishnah Berurah* in 518:1 writes that only the *melachot* of *hotzaah*, *havaara*, *shechita*, as well as baking or cooking are indisputably included.

16. *Ketubot* 7a. It is interesting to note that the *Rambam* (*Hilchot Yom Tov* 1:16 and 4:6) does not seem to recognize the requirement of *shaveh l’chol nefesh*. The source of this halacha is a *machloket Rishonim* concerning the *Mishnah* in *Beitza* 21b that permits heating water on Yom Tov for the purpose of washing one’s face but not one’s entire body. There is a similar *machloket Rishonim* concerning the *Mishnah* in *Beitza* 28 regarding the *heter* of creating heat for warmth. *Tosafot*, the *Rosh*, and the *Mordechai* in *Beitza* as well as the *Chinuch* in *mitzva* 298 (or 315) understand this *Mishnah* in the context of *mitoch* and *shaveh l’chol nefesh*. This explains the application of the *heter* only to a physical comfort enjoyed by most such as washing one’s face. *Melacha* performed for comforts that are not *shaveh l’chol nefesh*, such as washing one’s entire body (at least in the days of the *Gemara*), remains biblically forbidden. On the other hand, the *Rambam*, *Smag*, and perhaps other *Rishonim* hold that *melacha* performed for any physical comfort is inherently included in the *heter* of *ochel nefesh* without need for *mitoch* or *shaveh l’chol nefesh*. They

which can be eaten by all people" that the *heter* of *mitoch* covers only those activities that are in general suitable for all people. This is known as the principle of "דבר חזקה לכל נפש" – "shaveh *l'chol nefesh*". This is the crucial point in the issue of *refuah* on Yom Tov that entails a *melacha* – is *refuah* considered to be

maintain therefore that the source of the prohibition on washing one's entire body is a rabbinic prohibition enacted for other concerns. The positions of the Ran and Rashba are unclear, as they both appear to issue contradictory opinions in various places as discussed by the Bach, *Pri Chadash*, *Magen Avraham*, and *Taz* in *siman* 501 as well as the *Imrei Bina* in *Hilchot Yom Tov* *siman* 2 and R. Auerbach in *Meorei Aish* p.16. These halachot are mentioned in *Shulchan Aruch* O.C. 511:1-2 and 4. The position of the *Shulchan Aruch* with regard to the *machloket Rishonim* is not clear, as there is no direct mention of the words "shaveh *l'chol nefesh*" in *simanim* 501 or 511. However, it seems likely that the *Shulchan Aruch* sides with the position of *Tosafot* (see the *Magen Avraham*, *Taz*, and *Mishnah Berurah* in *simanim* 501 and 511). Also, the *Beit Yosef*, in *siman* 511, indicates that he sides with *Tosafot* as he does not even mention the Rambam's opinion, mentions the position of the Ran only in *Beitza* 21b where he sides with *Tosafot* (and not 31b where the Ran seemingly sides with the Rambam), and concludes with the position of the *Maharil* that is also cited by the *Ramo*, which clearly accepts the concept of *shaveh *l'chol nefesh**. Although the *Shulchan Aruch Harav* in *siman* 511 writes that the opinion of the Rambam is the primary opinion (*Aruch Hashulchan* in *siman* 495:19-20 offers an explanation of this position in light of the seemingly unopposed statement of the *Gemara* in *Ketubot*), he agrees that in actual practice we follow the position of *Tosafot*. There is one argument to support the possibility that *Beit Yosef* follows the position of Rambam. As *Rosh* writes in *Beitza* 12a *siman* 18, and as explained further by *Pnei Yehoshua* there, it seems that this *machloket Rishonim* concerning the need for *shaveh *l'chol nefesh** is connected with another *machloket Rishonim*, mentioned in footnote 14, concerning the requirement that an act be done for a Yom Tov need. If *shaveh *l'chol nefesh** is required, then certainly we require that to qualify for *mitoch*, the act be done for a Yom Tov need – because if it serves no purpose on Yom Tov it is in fact not *shaveh *l'chol nefesh**. The *Beit Yosef* in his comments on the *Tur* and in *Shulchan Aruch* 518:1 follows the position of the Rambam, who does not require that the act be done for a Yom Tov need. Based on this reasoning, one could conclude that the *Beit Yosef* would also follow the position of the Rambam in *siman* 511 and not recognize the need for *shaveh *l'chol nefesh**. However, the *Korban Netanel* on the *Rosh* #30 explains that these two disputes in the *Rishonim* are in fact independent of one another. It is therefore likely that the *Beit Yosef* in fact in *siman* 518 follows the Rambam and in *siman* 511 follows *Tosafot*.

shaveh l'chol nefesh and therefore included in the *heter* of *mitoch* or is it not?

There is no clear answer to this question. *Tosafot*¹⁷ state that *melacha* may be performed to achieve a therapeutic sweat, because activities performed for health purposes and not mere pleasure are defined as *shaveh l'chol nefesh*. This is true even if they are not engaged in by most people and therefore do not fulfill the normative technical required parameters of *shaveh l'chol nefesh*.¹⁸ A similar position is found in the *Ramban*¹⁹ as well as the *Rashba* and the *Ran*.²⁰ This ruling is applied to practical halacha by several prominent *Acharonim* and *poskim*.²¹

What is the explanation for this expansion of the leniency of *mitoch* regarding those actions that are *shaveh l'chol nefesh*? Why is *refuah* considered “suitable for all people” when in fact it is seemingly not? There appear to be two possible explanations. One is that although all people do not individually use a particular means of *refuah*, all pursue the common goal of good health, the result of all *refuah* actions. It is this common goal that is *shaveh l'chol nefesh*.²² A second possible explanation is that even the individual *refuot* themselves are in fact *shaveh l'chol nefesh*. This is so because all people afflicted with a

17. *Shabbat* 39b.

18. Although there are those, including *Pnei Yehoshua* in *Shabbat* 39b, who seem to hold that to qualify as *shaveh l'chol nefesh*, *all* must use it, most, including *Pri Megadim siman* 511:4 hold that it is sufficient if *most* people use it. See the *Beit Meir* in *Y.D.* 197 who holds that the percentage of people who actually use such a *melacha* is irrelevant – all that matters is that all desire to use it. See footnote 24.

19. *Torat Haadam, Shaar Hameichush* p.22.

20. *Shabbat* 39b.

21. Including *Pri Megadim O.C. M.Z.* 511:2. See also *Pri Megadim A.A.* 514:4, *Pnei Yehoshua Shabbat* 39b, *Chatam Sofer, Beitza* 22b, *Shu"t Ktav Sofer siman* 66, *Mor Uik'tzia siman* 511.

22. *Avnei Nezer O.C. II* 394:8 and *Shu"t Ktav Sofer siman* 66.

particular illness would typically receive this particular method of *refuah*. It is only due to circumstance that more people do not contract this illness and therefore need not avail themselves of this therapeutic option.²³

Following this reasoning, any *refuah* that entails a *melacha* included in *ochel nefesh* and *mitoch* (e.g. heating water, carrying in a public domain, etc.) would be permissible on Yom Tov. Even according to this lenient position, however, therapies that entail *melachot* not included in the *heter* of *ochel nefesh* or *mitoch* are prohibited on Yom Tov just as on Shabbat.²⁴

However, there are those who contend that the halacha follows the more intuitive notion that *refuah* is *not shaveh l'chol nefesh*. This is for the simple reason that only a minority of people, namely those who are ill with a particular illness, use it.²⁵ This opinion rejects the aforementioned suggestions for leniency and holds that we consider only the individual patient and *refuah* in determining whether a particular action is *shaveh l'chol nefesh*. A means of bridging the apparent gap between this intuitive approach and the aforementioned opinion of *Tosafot*²⁶

23. We find a similar explanation in *Rishonim* in *Beitza* 22b cited by the *Mishnah Berurah* 511:25, who states that one may perform a *melacha* on Yom Tov for a non-food-related purpose that is used only by wealthy people. This is considered *shaveh l'chol nefesh* despite the fact that only a minority of the general population uses it, because that is due solely to circumstance. Were everyone wealthy, all would use it. This is the concept behind the position of the *Beit Meir* in *Y.D. siman* 197:3 mentioned in footnote 19. See also *Mavo to Shemirat Shabbat KeHilchata* 3:14 and *Hilchot Hamoadim* 2:10.

24. As in the case of the eye treatment discussed in the Talmud and cited in the *Shulchan Aruch*, that may entail the *melachot* of coloring or writing.

25. Anonymous *Rishon* quoted by the *Ramban* in *Torat Haadam Shaar Hameichush* p.22, *Rosh Melunel*, quoted in *Tamim Deim* 140, *Sefer Yeraim* 113 (or 304), *Nachal Eshkol Hilchot Moed Katan* 43 quoted in *Avnei Nezer* O.C. 394, *Imrei Bina Hilchot Yom Tov siman* 2, and R. Shlomo Zalman Auerbach in *Shemirat Shabbat KeHilchata* 33:24.

26. Albeit not the *Ramban*, according to whom such a distinction is not possible.

is that there is a difference between “health promotion” and “healing”.²⁷ Activities used to promote and enhance the general health and well being of even healthy people²⁸ are indeed *shaveh l'chol nefesh* even if not actively used by most people. However, this is not the case with means of healing utilized only by ill people, which are deemed *not shaveh l'chol nefesh*.

According to this reasoning, any action performed for the purpose of healing that is forbidden on Shabbat would also be forbidden on Yom Tov *Rishon*.

Medication on Yom Tov

As described in the introduction, there is a related yet separate category of *refuah* that does *not* directly entail a *melacha*. The most common application of this category is the ingestion of oral medication. These means of *refuah* are subject to a rabbinic decree of *ניראה ממש* *שחיקת סמנים*, that forbade such means of *refuah* on Shabbat for relatively minor ailments. This decree was a result of a concern that were one permitted to take oral medication that had been prepared prior to Shabbat, he would erroneously believe that he is permitted to actually grind the medication on Shabbat. Grinding is one of the 39 *melachot* that are biblically prohibited on Shabbat.

While the application of this prohibition on Shabbat has clear sources in the Talmud²⁹ and *Shulchan Aruch*,³⁰ there is no direct source for the application to Yom Tov in either the Talmud

27. This distinction is explained by R. S. Z. Auerbach in *Shulchan Shlomo* on Yom Tov 1:511:4:5, R. Neuwirth in *Shemirat Shabbat KeHilchata* 33:89 and R.S. Z. Grossman in *Hilchot Hamoadim* 2:52.

28. Such as perspiring in a sauna, as mentioned by *Tosafot*, or smoking, which at one time was thought to aid digestion, in the case of the *Pnei Yehoshua*, *Pri Megadim* and *Mor Ukk'zia*.

29. *Shabbat* 53b.

30. *O.C.* 328:1

Bavli or *Shulchan Aruch*! Although there are sources in the Talmud *Yerushalmi*³¹ from which inferences may be made, these are not conclusive nor are they reckoned with by later *poskim*.

We will first examine possible arguments for each side of the question and then attempt to locate sources in *Chazal* for a definitive ruling. The possible application to Yom Tov of the rabbinic decree proscribing the taking of medication can be explained in one of two ways. One approach is that the same concerns that led to the enactment of the rabbinic decree on Shabbat apply equally to Yom Tov, and therefore it is only logical that the decree also applies to Yom Tov.³² The other approach assumes that perhaps the same concerns in fact do not apply to Yom Tov. However, Yom Tov will nevertheless be subject to the same strictures as Shabbat due to a general principle that we do not apply unnecessary leniencies to Yom Tov for fear that this will lead many to erroneously act leniently on Shabbat as well.³³

What are possible reasons to hold that the rabbinic decree prohibiting medication would *not* apply to Yom Tov? There are two lines of reasoning. One argument is that it is inconceivable that the rabbis would issue a decree that may result in increased discomfort or suffering on Yom Tov, even if

31. *Beitza* 1:9 according to the explanation of *Sefer Chareidim*; *Beitza* 4:4 according to one explanation in the *Korban Haeida*, as well as *Beitza* 5:2 and *Shabbat* 17:2. See also a *drasha* found in *Medrash Hachefetz*, a recently published compilation of early *medrashic* material; also quoted in *Torah Shelaimah* in *Sefer Shemot* 12:342 – “אֲבָל לֹא לְרִפְאָה”.

32. This appears to be the position of the Rashba in *Avodat Hakodesh*, *Beit Moed Shaar HaRishon*, that *tochein* is not included in the *heter* of *ochel nefesh*.

33. This appears to be the position of *Tosafot*, *Shabbat* 93a and *Shabbat* 124a, who hold that we apply a *lo plug* on Yom Tov as a *gezeira Yom Tov Attu Shabbat*. The *Avnei Nezer* in 395:2 states this explicitly in this context. We find that in general, rabbinic decrees apply equally to Yom Tov; see the Mishnah in *Beitza* 36b and *Pesachim* 65b as well as the *Beit Yosef* in the beginning of *siman* 495 and *Mishnah Berurah* in *siman* 586:83.

they would do so for Shabbat.³⁴

The other argument originates in the writings of the *Rishonim* and has been invoked by leading *poskim* throughout the ages.³⁵ They reason as follows: The reason for the rabbinic decree proscribing the taking of medication on Shabbat is that one may be led to the actual grinding of spices, an act which is biblically forbidden on Shabbat. It follows that were actual grinding of spices for medication permitted, there would be no need for a decree to prevent it from occurring. Furthermore, there also could be no decree to prevent its occurrence if it were prohibited only rabbinically, in line with the principle that we do not create a rabbinic prohibition for the sole purpose of protecting another rabbinic prohibition. This is the case on Yom Tov, when actual grinding of spices for food purposes is at most rabbinically prohibited or perhaps even permitted, due to the *heter* of *ochel nefesh* which is expanded by the principle

34. Notes of R. Elazar Moshe Horowitz on *Shabbat* 134b, adduced by R. Elyashiv in his comments cited in footnote #241, Mossad Harav Kook edition of Rashba on *Beitza* 21b. Although R. Elyashiv mentions this opinion in the context of the applicability of the halacha of *machshirei ochel nefesh*, the true basis for this position is apparently based on the Gemara in *Yevamot* 114a as alluded to by R. Horowitz and explicitly mentioned in *Chazon Ovadia*, on *Hilchot Yom Tov siman 7*. Although several *Rishonim* learn that this Gemara refers to a *choleh she'ain bo sakana*, the *Bach*, *Elya Rabba*, and *Mishnah Berurah* in 328:33 (M.B. 328:108 and 110) follow the opinion of Rabbeinu Tam in *Yevamot* 114a and *Ketubot* 60a, who says the Gemara refers to one with only a discomfort of hunger. (See *Mor Uktzia*, who assumes that the severity of the hunger is one that can lead to severe illness. However, the simple reading of Rabbeinu Tam does not lead to this understanding.) The fact remains that other *poskim* have not recognized this Gemara as a source of *heter* for taking medication on Yom Tov. The *Shaar Hatziyun* in 496:9 explains that the majority of *poskim* must learn that the case of the Gemara in *Yevamot* is unique in that it does not entail even a rabbinically prohibited act, and therefore it has no bearing on other cases of *refuah*.

35. *Ritva*, quoted in *Shita Mekubetzet*, *Beitza* 22a; R. Shlomo Kluger in *Sefer Hachaim* siman 328 quoted by the Maharsham in *Daat Torah* siman 532; and R. Yosef Sholom Elyashiv, quoted in Mossad Harav Kook edition of Rashba on *Beitza* 22a, note 241.

of *mitoch* to include grinding even for non-food uses such as medication. It follows that there is no reason for a rabbinic decree on Yom Tov aimed at precluding the grinding of spices for medicine. Therefore, provided that no other *melacha* is involved, there would be no problem with taking medication on Yom Tov.

This line of reasoning is subject to scrutiny at several levels. First, does the *heter* of *ochel nefesh* apply to the *melacha* of *tochein*, grinding? All agree that in general, *melachot*, including *tochein*, that are listed prior to *losh*, are not included in the *heter* of *ochel nefesh*, as they are generally performed for mass production of large quantities for long-term use. There is a difference of opinion among *Rishonim* whether these preceding *melachot* are prohibited biblically or rabbinically.³⁶ The *Shulchan Aruch*³⁷ follows the opinion of the majority that hold such *melachot* are only forbidden rabbinically. According to this view, there are no grounds for a rabbinic decree to protect this rabbinic prohibition.³⁸ Furthermore, even according to the opinion that holds *tochein* is biblically forbidden, the specific act of grinding spices for food preparation is unique in that it is included in the *heter* of *ochel nefesh* despite its being a form of *tochein*. This is found in the *Mishnah*³⁹ and in *Shulchan Aruch*.⁴⁰ As the *Ran* there explains, it is considered actual *ochel nefesh*, not just *machshirei ochel nefesh*. It is now understandable that there is no reason to protect one from grinding spices on Yom Tov, as this

36. See the discussion on this topic in *Nesivot Habayit* by R. Shalom Meir Youngerman (a commentary on the Rashba's *Avodat Habayit*) and a list of the respective opinions of *Rishonim* in *Hilchot Hamoadim*, chapter 2, notes 9 and 19.

37. 495:2.

38. This is the view of R. Elyashiv in the note to the Rashba, and R. Ovadia Yosef in *Shut Yabia Omer* Y.D. 5:23:3.

39. *Beitzah* 14a.

40. 504:1. See also *Mishnah Berurah* 504:1.

act is itself completely permissible.⁴¹

However, according to either of these views, there is one crucial link that must be examined. The mere fact that grinding for *food* use is considered *ochel nefesh* and therefore permitted is not sufficient reason to obviate the grounds for a decree to protect against grinding for *medicinal* use, which is not directly included in the *heter* of *ochel nefesh*. The principle of *mitoch* must be invoked to expand the *heter* of grinding for food use to grinding for other uses, such as producing medication. The question now becomes, does the principle of *mitoch* in fact apply to *tochein*?⁴²

The first step in addressing this question is to ascertain that grinding for food purposes is in fact considered actual *ochel nefesh* and not merely *machshirei ochel nefesh*. If it were included in the latter category, many *Rishonim* are of the opinion that we would not apply *mitoch* to expand the *heter*.⁴³ Even assuming, as was mentioned earlier,⁴⁴ that grinding for food preparation is included in actual *ochel nefesh*, does *mitoch* apply to this *melacha*? This is in fact not clear and the majority opinion appears to be that we do *not* apply *mitoch* to *tochein*.⁴⁵ It follows from

41. This is the view of the *Ritva*, R. Shlomo Kluger, and the questioner to the *Maharsham* in *Daat Torah*.

42. On a biblical level, according to those who argue that grinding is a rabbinic prohibition, or specifically to grinding spices according to those who argue that grinding is completely permitted.

43. *Rashi* and the *Ran* appear to hold that we do apply *mitoch* to *machshirei ochel nefesh*, but most other *Rishonim*, followed by most *poskim*, hold that we apply *mitoch* only to actual *ochel nefesh*. See *Shut Chatam Sofer* O.C. 147; *Shut Avnei Nezer* O.C. siman 409; *Mavo* to *Shemirat Shabbat KeHilchata*, vol.3; and *Shulchan Shlomo* on *Hilchot Yom Tov*, from R. Shlomo Zalman Auerbach, for a discussion of *Rishonim* on this topic.

44. *Ran* in *Beitza* 14a.

45. The *Pnei Yehoshua* in *Beitza* 14 and *Avnei Nezer* 394 assume we do apply *mitoch* to the permitted forms of *tochein*, but the *Sefer Simchat Yom Tov*, p.14, as well as the implicit assumption of the *Mishnah Berurah* and other

this majority view that there remains a biblical prohibition on grinding for non-food purposes and therefore there is ample justification for the decree against ingesting medication.⁴⁶

However, even if we follow the opinion of those who hold that we do apply *mitoch* to grinding, there remains one more issue. As was discussed earlier, to be eligible for inclusion in *mitoch*, an action must be *shaveh l'chol nefesh*. As we have seen, whether *refuah* is considered *shaveh l'chol nefesh* is in fact a matter of dispute.⁴⁷

There is one potential source in Talmud *Bavli* for the question of whether the rabbinic decree against medication applies to

poskim indicate that we do not apply *mitoch* to the *melacha* of *tochein*.

There is one other possible route of understanding. Rabbi Elyashiv suggests that in a case of *refuah* involving a *melacha d'rabenon*, we can rely on the opinion of R. Yehuda on *Beitza* 28b who holds that *machshirei ochel nefesh* are included in the *heter* of *ochel nefesh*, and therefore permit grinding of spices for medicinal use without the need for *mitoch*. This obviates the need for a decree to protect against such an act. However, as mentioned earlier, we do not find a precedent for this reliance on R. Yehuda and in fact find explicitly in many *Rishonim* that we do not rely on this position on *Yom Tov Rishon* even for a *choleh*.

46. Also, the *Maggid Mishnah* in *Rambam, Hilchot Yom Tov* 1:5, explains that even according to those who hold that it is *shaveh l'chol nefesh*, the reason grinding spices is granted a special *heter* despite its early appearance in the order of *melachot* is that spices are not an actual food but are used as a condiment to enhance other foods. This reason cannot be applied to grinding for medicinal use, in which the grinding is done for its own purpose. Therefore, no *heter* for grinding can be justified. This is the position of the *Maharsham* in *Daat Torah*. It is possible that the underlying explanation for the position of the *Maggid Mishnah* is that the applicability of *mitoch* to a particular *melacha* depends on its general use. A *melacha* is not included if it is generally performed in mass quantities to produce large amounts. In general, the *melacha* of *tochein* falls into the category of *melacha* performed for mass production. However, the subset of grinding spices is performed to produce small quantities for immediate use and therefore eligible for inclusion in *mitoch*. It is unclear if this reasoning applies to grinding spices for medicinal use.

47. Many of the opinions of *Acharonim* and *poskim* as to whether *refuah* is *shaveh l'chol nefesh* are in fact found in the context of this discussion of medication and not in that of the previous discussion of *refuah* via a *melacha*.

Yom Tov.⁴⁸ In questioning the permissibility of applying a dye ointment to the eye on Yom Tov, the Gemara concludes that it is permitted only on Yom Tov *Sheini*⁴⁹ but not on Yom Tov *Rishon*. Although many *Rishonim* understand this act involved a *melacha* (i.e. writing or coloring),⁵⁰ other *Rishonim* understand the Gemara as censuring the mere healing of the ointment independent of any *melacha*.⁵¹ According to these latter *Rishonim*, this Gemara may serve as a source for the application of the rabbinic decree on medication to Yom Tov *Rishon*. However, due to the disparity of opinions in the *Rishonim*⁵² and the fact that most later *poskim*⁵³ accept the former understanding of the case, no conclusion can be drawn from this Gemara to the applicability of the rabbinic decree on *refuah* to Yom Tov.

Another early source in *Chazal* that may be relevant to this issue is the *Tosefta* in *Moed Katan*⁵⁴ that states that there is no prohibition on taking medication on *Chol Hamoed*. The *Magen Avraham*⁵⁵ states that the *Tosefta* implies that such a prohibition does in fact exist on Yom Tov itself. The *Pri Megadim* further clarifies this inference and states that this *Tosefta* is a source for the application of the rabbinic decree on medication to Yom

48. *Beitza* 22a. רבashi מאמייר מהו לחייב את העין ביום טוב".

49. The halachot of Yom Tov *Sheini* will be discussed later.

50. Ramban in *Torat Haadam Shaar Hameichush*, Ran on the Rif in *Beitza* 22b, and *Chidushei Ben HaRambam* *Beitza* 22b. These *Rishonim* seem to learn that the ointment was not applied with therapeutic intent and therefore is not relevant to the halacha of *refuah*.

51. Tosafot in *Shabbat* 93a, Rashba in *Beitza* 22b, and Ritva quoted in *Shita Mekubetzet* in *Beitza* 22b.

52. There is also a lack of discussion on the issue by the Rif, Rambam, or Rosh.

53. Including *Mishnah Berurah* 496:5.

54. 2:6; brought in *Shulchan Aruch O.C.* 532:2. שותין מי זבלין וממי דקלין וכוס עקרין במנועך."

55. 532:2.

Tov. The *Mishnah Berurah* later cites this ruling.⁵⁶

However, the inference from the *Tosefta* is by no means conclusive. Several alternative explanations of the *Tosefta* offered by later authorities in effect eliminate the proof adduced by the *Magen Avraham*. For example, the *Nachal Eshkol*,⁵⁷ *Chasdei David*⁵⁸ and *Nishmat Adam*⁵⁹ suggest that the case of the *Tosefta* is one of healing by means of a *melacha* thus leaving no inference about the rabbinic decree on healing that does not entail a *melacha*.

Others agree that the subject of the *Tosefta* is the halacha of non-*melacha* medication, but differ in their understanding of the details of the case. The *Avnei Nezer*⁶⁰ suggests that the case of the *Tosefta* is one in which the medication takes several days to take effect and therefore provides no benefit on Yom Tov itself. This echoes the position of the *Ritva*,⁶¹ who holds that one may take medication on Yom Tov if it will have immediate effects.

The *Sfat Emet* in a reply to *Avnei Nezer*,⁶² suggests that the *Tosefta* is not concerned at all with the therapeutic properties of the medication but rather with its unpleasant side effects that may result in a *bitul* of *simchat* Yom Tov. The *Keren Orah*,⁶³ R. Yakov Emden,⁶⁴ and the *Aruch Hashulchan*⁶⁵ also favor this

56. 532:5.

57. *Hilchot Moed Katan* 43:4; see, however *Avnei Nezer* O.C. 394:13, who rejects this suggestion.

58. Notes on the *Tosefta*.

59. *Klal* 110:2.

60. O.C. 394.

61. Cited in *Shita Mekubetzet* in *Beitza* 22a. See a detailed explanation of this position by R. Eliezer Waldenberg in *Shut Tzitz Eliezer* 8:15:16.

62. Printed in *Avnei Nezer* O.C. 395:7.

63. *Moed Katan* 10:2.

64. *Mor Uktzia* O.C. 532.

explanation. Based on this understanding, any medication that does not cause adverse side effects would be permitted on Yom Tov.

What are the sources for a definitive ruling in later poskim? Based largely on the inference from the *Tosefta*, the *Magen Avraham*,⁶⁵ *Pri Megadim*, *Mishnah Berurah*,⁶⁷ *Chaye Adam*,⁶⁸ *Kitzur Shulchan Aruch*,⁶⁹ *Aruch Hashulchan*,⁷⁰ *Shemirat Shabbat KeHilchata*⁷¹ and (reluctantly) the *Sfat Emet* and *Avnei Nezer*⁷² hold that the rabbinic decree enacted against taking medication on Shabbat applies equally to Yom Tov. However, the *Beit Yosef*,⁷³ followed by R. Shlomo Kluger⁷⁴ and later by R. Eliezer

65. O.C. 532.

66. 532:2.

67. 532:2 .

68. 103:2.

69. 98:33 .

70. 532.

71. 33:24.

72. *Shut Avnei Nezer* O.C. 394-395.

73. This follows the simple reading of the *Beit Yosef* on the *Tur*, *Hilchot Yom Kippur* O.C. 613. The *Beit Yosef* is based on the opinion of the Maharam Rottenberg cited in the joint notes of Rabeinu Peretz and R. Moshe of Zurich on the *Smak siman* 221 (*siman* 218:207 in the Zurich edition) as well as the *Tashbetz siman* 136. The reasoning of the *Beit Yosef* is unclear. Perhaps he shares the understanding of the *Ritva*, but there is no conclusive indication of this. See *Machatzit Hashekel* 496:4, who notes that the *psak* of *Beit Yosef* seems to contradict the inference from the *Tosefta*. He therefore learns that *Beit Yosef* must refer to a case in which *refuah* would be permitted even on Shabbat. This is also suggested by *Matcheh Ephraim* and *Elef L'Matteh* 613:3 and seemingly agreed to by the *Mishnah Berurah* in *Shaar Hatziyun* 613:13. It is also possible that the *Beit Yosef* was not referring to the halacha of *refuah* on Yom Tov per se but rather to the stricture unique to Yom Kippur of washing one's self. This appears to be similar to the understanding of R. Eliyahu Mizrachi in his *Peirush* on the *Smag* in *Hilchot Yom Kippur* 32:1.

74. *Sefer Hachaim* 328:6.

Waldenberg,⁷⁵ R. Ovadia Yosef⁷⁶ and perhaps R.Y.S. Elyashiv⁷⁷ are of the opinion that one may rely on the lenient view. Although there are several specific instances of leniency proposed by various *poskim*,⁷⁸ ultimately all *poskim* take only one absolute position or the other.

It is evident that there is a strong tendency toward leniency even among many of the *poskim* who eventually rule stringently. Perhaps there are other considerations in the general nature of the decree against medication that may be taken into account in deciding the halacha in cases of need. This topic is too large to be dealt with in a comprehensive manner here, but several salient points can be raised. One point is the position of the Radvaz,⁷⁹ who infers from earlier *Rishonim* that the decree proscribing oral medication is inherently weak and therefore subject to a greater degree of leniency than other rabbinical prohibitions. Several recent *poskim* have mentioned this concept in the context of *refuah* in general,⁸⁰ and some have explicitly applied it to *refuah* on Yom Tov.⁸¹

A second point is the notion that the underlying rationale for the original decree against taking medication no longer exists today in an age of pharmacies and commercially-

75. *Shut Tzitz Eliezer* 8:15:16.

76. *Shut Yabia Omer* vol. 5 Y.D. 23:3; and *Chazon Ovadia, Hilchot Yom Tov* 7.

77. Based on the comments found in footnote # 241, Mossad Harav Kook edition of *Rashba Beitza* 22b.

78. For example, the *Sfat Emet*'s argument in cases where there are no side effects and the *Avnei Nezer*'s (and the *Ritva*'s) argument in medication that takes effect on Yom Tov.

79. *Shut Radvaz* 3:1068 (or 640) quoted by the *Mishnah Berurah* in 328:121.

80. Including *Nishmat Avraham*, volume 5, p.28; *Tehila L'David* 328:21; *Shut Minchat Yitzchak* 1:108; *Shut Tzitz Eliezer* 11:37:2, and 14:50:7; *Shut Beer Moshe* 2:33:9; and *Shut Shevet Halevi* 9:67.

81. R. Waldenberg in *Shut Tzitz Eliezer*, 8:15:16, and R. Gavriel Zinner in *Nitei Gavriel* on *Hilchot Yom Tov*, volume 1, chapter 35, and *Teshuva* 8 based

produced pharmaceuticals.⁸²

A third point is the opinion that medication taken daily may be taken on Shabbat without concern for the general rabbinic decree on medication. The rationale for this is that one who knows in advance that he will need medication will prepare beforehand and will not be led in haste to grind the ingredients on Shabbat or Yom Tov. There is therefore no decree against taking medication for chronic illness.

Yom Tov Sheini Shel Goluyot

The preceding discussion has concerned *refuah* on Yom Tov *Rishon*.⁸³ The halacha of *refuah* on Yom Tov *Sheini Shel Goluyot*⁸⁴ may perhaps be significantly different. The *Shulchan Aruch*⁸⁵ views certain forms of healing that are prohibited on the Yom

on opinions mentioned in *Shearim Metzuyanim B'halacha* 91:3 and *Shut Beer Moshe* 2:32.

82. The basis for the concept of bypassing a rabbinical decree for which the underlying reason no longer applies is found in *Rishonim*, most notably *Tosafot* (*Beitza* 6a and 30a, *Brachot* 53b, *Chullin* 95a, *Avoda Zara* 57b and 35a). It is applied to the decree against medication by R. Chaim Naeh, in *Ktzot Hashulchan* 134:7, and others, including *Shut Torat Chessed* O.C. 17; *Shemirat Shabbat KeHilchata*, chapter 34, note 7; *Shut Tzitz Eliezer* 15:15:4, *Eretz Hatzvi*, siman 19, *Nefesh Harav* p.173; *Nitei Gavriel Hilchot Yom Tov*, vol.1, chapter 35; and *Nishmat Avraham*, vol.1, pp. 164-166. The *Avnei Nezer* and *Tzitz Eliezer* mention this in the context of *refuah* on Yom Tov.

83. This refers to the first days of Sukkot and Shavuot, the first and seventh day of Pesach, and Shemini Atzeret. We will not discuss the status of the second day of Rosh Hashanah, which may follow the rules of Yom Tov *Rishon* in accordance with the ruling of the *Shulchan Aruch* in 496:2.

84. These days are observed by those who reside primarily outside Israel, and include the second and eighth days of Sukkot and Pesach, the second day of Shavuot, and Simchat Torah. The strictures of Yom Tov *Sheini* are indisputably rabbinic in nature (see *Pesachim* 52 and *Shulchan Aruch* 496:1). However, in general the halachot are identical to those of Yom Tov *Rishon*. See the *Shulchan Aruch* in 496:1 and *Mishnah Berurah* 496:2 for a discussion of the extent of this equality.

85. 496:2, concerning the aforementioned eye therapy.

Tov Rishon as permitted on *Yom Tov Sheini*. Most *poskim*, including the *Magen Avraham* followed by the *Mishnah Berurah*,⁸⁶ understand that not only is this permission granted to taking medication but even to means of *refuah* for one with a minor ailment that entails an act that would otherwise be rabbinically prohibited.⁸⁷ The *Ramo*⁸⁸ states that the only means of *refuah* that remain prohibited on *Yom Tov Sheini* are those that involve a biblical prohibition for anyone without a potentially life-threatening illness.⁸⁹

What is the understanding of this leniency on *Yom Tov Sheini*? Why is *refuah* different from most other prohibitions that apply equally to *Yom Tov Rishon* and *Yom Tov Sheini*?⁹⁰ This appears to be the subject of a dispute among the *Rishonim* and early *poskim*. The *Ran* and *Rashba*⁹¹ as well as the *Ramban*⁹² hold

86. 496:5; the *Machatzit Hashekel* in 532:5 learns that the *Magen Avraham* there assumed that the inference from the aforementioned *Tosefta* indicated that the same stringencies of *refuah* on *Yom Tov Rishon* apply to *Yom Tov Sheini*. However, the *Pri Megadim* and *Levush* there understand the *Magen Avraham* as having nothing to do with *Yom Tov Sheini*. For other alternative explanations of the *Magen Avraham*, see *Aruch Hashulchan* 532:2 and R. Reuven Margolios in *Nefesh Chaya* 496:2.

87. This is the simple understanding of the *Mishnah Berurah* based on the *Maggid Mishnah* 1:21, as understood by *Shemirat Shabbat KeHilchata* 31:28 and *Yom Tov Sheini KeHilchata* 1:22. It is possible to learn that the *heter* extends only to one who has reached the state of *choleh* but not to one with merely a *meichush b'alma*. Perhaps this would depend on the understanding for the reason of the *heter refuah* on *Yom Tov Sheini*.

88. 496:2, based on the *Ran* in *Beitza* 22a and *Ramban* in *Torat Haadam* p.20, quoted by the *Maggid Mishnah* in *Hilchot Yom Tov* 1:24.

89. See *Shaar Hatziyun* 496:9 and *Shemirat Shabbat KeHilchata* 31:28 for a discussion of the permissibility of such an act performed in an unusual manner.

90. Although the *Mishnah Berurah* 496:7 cites the *Levush*, who writes that *Chazal* were lenient on *Yom Tov Sheini* with regard to physical comforts because of the very fact that it is rabbinic in nature, we seem to require an explanation for why they chose this particular area in which to be lenient.

91. *Beitza* 22a.

that this lenient ruling indicates that all *machshirei ochel nefesh* are permitted on Yom Tov *Sheini*.⁹³ However, the *Tur*⁹⁴ and Maharshal in *Yam Shel Shlomo*⁹⁵ argue that this lenient ruling is a special dispensation for unusual circumstances such as *refuah*, but may not be extrapolated to other cases.⁹⁶ Although the *Beit Yosef*⁹⁷ and *Biur Halacha*⁹⁸ favor the latter view, the favoring of one reason over another does not change the basic lenient halacha of *refuah* on Yom Tov *Sheini*.⁹⁹

92. *Torat Haadam Shaar Hameichush*.

93. They apply this to other *machshirei ochel nefesh* such as extinguishing a flame for purpose of *tashmish hamitta* as is discussed in *Tur* and *Shulchan Aruch O.C. siman 514*. This is the simple understanding of the Gemara on *Beitza* 22a and is the position of most *Rishonim*.

94. Implicit in *O.C. siman 496*.

95. *Beitza siman 31*.

96. One difference between these two opinions as to the reason for the *heter* of *refuah* on Yom Tov *Sheini* may be as follows: may one perform an act that will yield a *refuah* after Yom Tov but not on Yom Tov itself? According to those who hold that the reason for the *heter* is that it is merely *machshirei ochel nefesh*, perhaps only *refuah* for Yom Tov itself would be permitted as is the halacha with *melacha* done for actual *ochel nefesh*, which is permitted only for Yom Tov itself. However, those who understand that the *heter* is a special dispensation unrelated to other known *heterim* of *ochel nefesh* may hold that *refuah* is permitted on Yom Tov *Sheini* even if the results will occur only after Yom Tov. The reticence of the *Ramo* on this issue seems to indicate that he concurs with the latter opinion.

97. *Siman 496*.

98. *Siman 514 d"h assur*.

99. There is one issue remaining: We find elsewhere that *Chazal* were wary of creating any inequalities, however halachically legitimate, between Yom Tov *Rishon* and Yom Tov *Sheini* out of concern that this would lead to a denigration of the status of Yom Tov *Sheini*. Why is this not taken into consideration in the leniency of *refuah* on Yom Tov *Sheini*? One answer (found in *Shut Hitorerut Teshuva* 1:61 and elsewhere) is that only something that is fixed and recurring, such as *havdala* or *sefirat haomer* has the potential to create a denigrating attitude, but a halacha that is only occasionally applied does not raise this concern. Although there are those (*Shut B'tzel Hachochma* 2:68:1) who attempt to prove that there is in fact a concern for denigration of Yom Tov *Sheini* even in things that occur only occasionally, there appears to

Refuah on Chol Hamoed

As with *refuah* on Yom Tov itself, there is no mention in Talmud *Bavli* of the halachot of *refuah* on *Chol Hamoed*. The source for these halachot is the aforementioned *Tosefta*¹⁰⁰ that is cited in the *Tur* and *Shulchan Aruch*¹⁰¹ who conclude, “All *refuah* is permitted on *Chol Hamoed*”. What forms of *refuah* are included in this *heter*? The plain reading of the *Tosefta* as reflected in the opinions of the *Beit Yosef* and *Magen Avraham*¹⁰² is that it is permitted to take medication, as there is no rabbinic decree on such *non-melacha* forms of *refuah* on *Chol Hamoed*. Later *poskim*¹⁰³ unanimously agree that the *heter* is not restricted to *non-melacha* forms of *refuah* but extends to *refuah* that entails the performance of *melacha*, even of a nature that is biblically prohibited on Yom Tov.

What is the reason for the *heter* to perform actual *melacha* on *Chol Hamoed* for purpose of *refuah*?¹⁰⁴ We find three explanations for the reason for this *heter*: One, *melacha* is permitted for legitimate *Chol Hamoed* needs, and *refuah* certainly fulfills that criterion.¹⁰⁵ Two, *melacha* is permitted to prevent a loss from

be room for leniency in halachot that are of a private nature and not publicly displayed. See *Yom Tov Sheini KeHilchata* chapter 1, note 74, based on *Shut Ktav Sofer* O.C. siman 10.

100. *Moed Katan* 2:6.

101. O.C. 532:2.

102. 532:2.

103. *Pri Megadim* 532 A.A. 2, *Chayei Adam* and *Nishmat Adam* 110:17, and *Mishnah Berurah* 532:5.

104. *Melacha* on *Chol Hamoed* is prohibited, likely even biblically, and therefore requires a rationale to be permitted in a given situation. There are several accepted reasons to permit *melacha* on *Chol Hamoed*. See *Shulchan Aruch* O.C. 530, based on *Chagiga* 18a, and *Biur Halacha* d”h *umuttar*. Which of these serve to permit *melacha* for *refuah*?

105. *Pri Megadim* 532 A.A. 2.

occurring, and there is no greater loss than impaired health.¹⁰⁶ Three, *refuah* is considered equivalent to *ochel nefesh* as far as the laws of *Chol Hamoed* are concerned.¹⁰⁷ These reasons are not mutually exclusive, as it is possible for multiple reasons to be true.¹⁰⁸

What degree of illness is covered by the *heter* of *melacha* for *refuah* on *Chol Hamoed*? At a minimum, it includes a *choleh she'ain bo sakana* because a special *heter* is not needed to do any *melacha* for a *choleh sheyaish bo sakana*. Does the *heter* extend even to someone with a minor ailment?¹⁰⁹

106. *Nishmat Adam* 110:17. This is originally found in *Ritva* and *Meiri* in *Moed Katan* 10b. This parallels the statement of the *Rambam* that the mitzva of *refuah* in general is an extension of *hashavat aveida*.

107. *Shulchan Atzei Shittim Melechet Boneh* 3:1, quoted in *Shaar Hatziyun* 540:16. The reasoning for this argument is as follows: The Mishnah in *Moed Katan* 8, brought in *Shulchan Aruch* 546:5, writes that women may apply cosmetics on *Chol Hamoed*. The *Ritva* on 9b and 14b, brought in *Biur Halacha d'h kol*, explains that this is permitted despite the fact that it involves *melacha* because it is for the sake of the body and therefore akin to *ochel nefesh*. The *Shulchan Atzei Shittim* applies this concept to *refuah* in the case of the *Magen Avraham* in 540:9, brought in *Mishnah Berurah* 540:19, of performing *melacha* to warm a cold room where we apply the dictum that all people are considered ill in the cold. The source for this *heter* of warming a room is the explanation of the *Ritva* that equates bodily needs with *ochel nefesh*. It is important to note that this has no implications in the classification of bodily needs on *Yom Tov* itself.

108. There appear to be several potential differences between these reasons. One, according to the first reason, the *heter* is restricted to a *maase hedyot* (amateurish act) whereas the others include even a *maase uman* (professional act). Two, according to first and possibly the second reasons, the *heter* would not apply to situations that entail excessive effort. Three, according to the first and second reasons, the *heter* would not apply to a case where the *refuah* was scheduled before *Yom Tov* to be done on *Chol Hamoed*. Four, according to the first and possibly third reasons, the *heter* would not include actions that would take effect only after *Yom Tov*.

109. Of course, any amateurish act (*maase hedyot*) is permitted because it is a *Yom Tov* need and also because the decree against medication does not apply. The question concerns a therapeutic maneuver that entails a *melacha* and is classified as a professional act (*maase uman*).

The answer is not clear. There are many *poskim*, including R. Moshe Feinstein¹¹⁰ and *Shemirat Shabbat KeHilchata*,¹¹¹ who rule leniently and permit *melacha* even for someone with only a *meichush b'alma*. However, earlier *poskim*, including the *Pri Megadim*¹¹² and *Mishnah Berurah*,¹¹³ state only that *melacha* is permitted for *refuah* of a *choleh she'ain bo sakana*. The *Biur Halachah*¹¹⁴ states clearly that the *heter* does not apply to one with merely a *meichush b'alma*.¹¹⁵

Even if one were to be stringent in this matter, it has little relevance in actual practice. As was mentioned, all agree that one may take medication and do a *maase hedyot* for any degree of illness on *Chol Hamoed*. Also, there are those¹¹⁶ who hold that even according to the stringent position, one may give an intramuscular injection that even on Shabbat is only rabbinically forbidden. Also, the *Meiri*¹¹⁷ states that one may do *melacha* for a completely healthy person to prevent an illness, and certainly for one with a minor illness to prevent a worsening of his

110. *Iggerot Moshe O.C. 3:78.*

111. 66:20; see also *Nishmat Avraham* vol.1 *siman 532* and *Chol Hamoed KeHilchata* 7:59, who follow this opinion.

112. 532 A.A. 2.

113. 532:5.

114. 531 *d"h kol*. See also *Shut Beer Moshe* 7:16 who agrees with this stringent ruling

115. It is possible that the later *poskim* learn that the *Pri Megadim* and *Mishnah Berurah* are not to be taken literally and really include less severe illness than a *choleh she'ain bo sakana* in the *heter melacha*, and that the *Biur Halacha*'s ruling is restricted to the halacha of haircuts. Although they cite the *Nishmat Adam* in 110:2 as the source for their lenient ruling, a close reading of the *Nishmat Adam* seems to indicate that it is in fact a proof to the contrary! See *Sefer Zichron Shlomo* on *Hilchot Chol Hamoed* in *Biurim siman 6*.

116. *Shut Beer Moshe* 7:16.

117. *Moed Katan* 10b, cited by *Shut Beer Moshe* *ibid.* and *Shemirat Shabbat KeHilchata* 66:20.

condition. Finally, it is also permitted¹¹⁸ on *Chol Hamoed* to perform *melacha* in a diagnostic workup even of a benign-appearing symptom, if doing so will relieve the patient's anxiety.

The one thing that perhaps remains problematic on *Chol Hamoed* is a routine yearly checkup that involves the performance of *melacha* (i.e. phlebotomy, EKG, etc.). All agree that one may not schedule such an exam with a Jewish physician merely for convenience, but some permit a visit to a non-Jewish doctor on *Chol Hamoed* if the appointment cannot conveniently be made for another time.¹¹⁹

Summary

With respect to Yom Tov *Rishon*, while several prominent *poskim* permit the performance of otherwise rabbinically forbidden acts for a *choleh she'ain bo sakana*, many *poskim* hold that the halachot of *refuah* on Yom Tov are identical to those of Shabbat. However, even according to this stringent position, there are several mechanisms by which these actions can be performed in a halachically acceptable manner through the application of other halachic principles that are unique to Yom Tov.¹²⁰ Regarding the rabbinic decree against taking medication for a minor discomfort, although most *poskim* hold that it applies fully to Yom Tov *Rishon*, there are several prominent recent *poskim* who feel that there is room to allow taking medication on Yom Tov *Rishon* in certain cases.

On Yom Tov *Sheini*, most *poskim* hold that one may perform

118. *Shut Beer Moshe*, ibid.

119. *Shut Beer Moshe* ibid.; but see *Iggerot Moshe Teshuva* #16 printed in *sefer Zichron Shlomo*, who writes that on *Chol Hamoed* one should not make a routine visit to *any* doctor even if *no melacha* will be performed, because doing so is a denigration of *Chol Hamoed*.

120. I.e. *marbeh b'shiurin*, etc. see *Shemirat Shabbat KeHilchata* 33:25-27 for several examples of these legal mechanisms for carrying in a *reshut harabim* or heating water for a *choleh*.

an otherwise rabbinically prohibited act for *refuah* of a *choleh she'ain bo sakana* and likely even for a minor illness. All apparently agree that one may take medication even for a minor illness.

On *Chol Hamoed*, one may perform an act that would even be biblically forbidden on Shabbat and Yom Tov for a *choleh she'ain bo sakana* and likely even for a minor illness. However, one should avoid routine visits to a physician if at all possible.

Conclusion

This article in no way purports to offer a definitive ruling on any practical halacha. As with all matters of halacha, one must consult a competent halachic authority for guidance in every individual case. It is hoped that this study may serve as a vehicle to elucidate the sources of the halachot of *refuah* on Yom Tov and many principles of *hilchot* Yom Tov in general.¹²¹

121. For additional discussion of various aspects of the halachot discussed herein, see all primary sources and *teshuvot* quoted in the footnotes, as well as the following secondary sources: *Shemirat Shabbat KeHilchata* 33:24; *Assia Sivan* 5731, vol.1 p.33; *Nishmat Avraham*, vol.1 siman 496, *Halacha U'refuah*, vol. 1, p.190; *Nitei Gavriel*, *Hilchot Yom Tov*, vol.1, ch.35, and *Teshuva* 8, *Piskei Teshuvot*, *simanim* 496 and 511; *Hilchot Hamoadim* 2:10; and *Ohalei Shem* siman 6.

Baco Bits and Non-Kosher Taste: Halacha and *Hashkafa*

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Introduction

American kosher consumers apparently crave ever-increased variety, and the food industry has responded by developing an expanded range of kosher certified products. There are now kosher "Baco Bits" that taste like bacon, and kosher fake shrimp that looks like real shrimp. This trend dates to the 1960s when "Bacos," an inexpensive, non-meat, kosher substitute for bacon made from soy-fatted flour, became America's first commercially successful industrial soy food product.² Many of these products are either soy based or employ *surimi*, an ancient Japanese process that converts minced fish into a protein base,

1. A portion of this material was presented at the OU "Halachic Seudah" at Levana's Restaurant in Manhattan, a part of the Mesorah Conference held on 11 Iyar 5754. The author thanks Rav Dr. Binyamin Katzoff for assistance in researching this topic.

2. According to Mark Hasteen (phone interview, July, 2005), one of the co-developers of Bacos, they were developed in the early 1960's by General Mills as a healthy, cholesterol-free alternative to bacon and it was unrelated to the kosher market. The work took place in Minneapolis and the local rabbi, Rabbi Yom Tov (Jerry) Herzog, was asked to inspect the process and certify it as kosher. He did, and eventually became the plant *mashgiach*. Rabbi Alexander Rosenberg (1903-1972) was rabbinic coordinator for OU kashrut and oversaw the granting of OU certification to the product. Today there are two similar products: Bacos produced by Betty Crocker (General Mills) and Bac'n Pieces-Bacon Flavored by McCormick (Hunt Valley, MD). Both are OU certified.

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which is then used in the preparation of various consumer products. Kosher *surimi* is used to make imitation crab legs, lobster, and shrimp, and all are deemed reasonable facsimiles of the real thing.

How does Jewish law and philosophy look upon the desire for such items and upon these foodstuffs? Is there anything wrong with serving Baco Bits at a bar mitzvah? Should one try to contain his desire for fake shrimp? Should kashrut agencies ideally avoid certifying such products? Should rabbis and teachers discourage consumption of these items? Rav Moshe Feinstein, in an unrelated discussion (*Iggerot Moshe, Yoreh De'ah* 2:41), observed that something that is permitted might nonetheless be *m'chu'ar* – reprehensible.³ There is some, albeit little, direct discussion of these matters in contemporary literature and these sources will be cited along with classical literature, from which relevant inferences will be drawn.

Halachically prohibited foods can be grouped into two distinct classes. Some items are categorically forbidden, and no manner of alterations can render them permissible for consumption. Other items are prohibited because of the time or manner in which they are produced or consumed. Examples of the first category are the non-kosher animals and animal parts that are prohibited by the Torah. There is no way to modify or slaughter a pig to make it permissible. Neither *cheilev* (prohibited fats) nor blood can be altered to make them allowable. The taste of pork, *cheilev*, or blood is clearly distinct from permitted tastes.

On the other hand, bread is permissible before Pesach but prohibited on Pesach, and grain products that are normally permitted become prohibited if planted intermingled (*kilayim*) with other produce. *Terumah* (priestly tithe) separated from a pile of produce is indistinguishable from the rest of the pile,

3. I thank Rabbi Yaakov Luban for pointing out this source.

yet it is prohibited while the remainder becomes permitted. The taste of cake made from *kilayim* is no different from that of permitted cake, the taste of *terumah* grapes is identical to that of the permitted grapes, and bread on Pesach tastes the same as bread before and after Pesach. Thus, seemingly there can be nothing wrong in desiring the taste of the items in this category, and of enjoying them in the permissible time or manner. But what about the taste of the forbidden items in the first category which are, from the perspective of dry halacha, permitted?

For everything prohibited, a permitted counterpart

The Talmud (*Chullin* 109b)⁴ records an interesting observation by Yalta, wife of Rav Nachman. She noted that every item that God prohibited has a permitted counterpart. For example, He prohibited blood, but He permitted liver [which is considered to be made of blood], He prohibited the *cheilev* of domesticated animals (*b'haimah*) but permitted it in non-domesticated animals (*chayah*), He prohibited the flesh of swine, but permitted the brain of the *shibuta*⁵ (a fish whose brain tastes like pork). Based on this categorical observation, she requested, nay demanded, that she be enabled to sample the taste of meat cooked with milk. In response, her husband ordered up some broiled udder.

This statement and anecdote not only identify methods to experience the forbidden, but also imply its acceptability. Furthermore, it is clear that the listed items were not avoided.

4. Parallel versions of this important statement exist in various other *midrashim*, most dated later than the Talmud. For example: *Vayikra Rabbah* (Vilna), *parsha* 22; *Tanchuma* (Warsaw) *Shmini*, 8; *Yalkut Shimoni*, *Shmini* 536; *Yalkut Shimoni*, *Tehillim*, 888. *Tosafot* (*Chullin* 109b, s.v. *niddah*) cite an alternate version recorded in a *parshat Parah* *piyut* of Rav Eliezar Hakalir.

5. Various suggestions have been offered for the identity of the *shibuta* including sturgeon, mackerel, codfish, and mullet.

The *shibuta* was widely eaten in Bavel (Iraq).⁶ When illustrating the hands-on involvement of *Amoraim* with preparations for Shabbat, the Talmud (*Shabbat* 119a; *Kiddushin* 41a) records that Rava would personally salt the *shibuta* for the festive meal.

On the other hand, it may be that Yalta was making a non-judgmental statement and grouping all possibilities into one observation. She included in her list the prohibition of a brother's wife, but observed that it is permitted as a levirate marriage (*yibbum*). Permitted? It is more than that – it is a positive commandment. Yet no one would suggest that it is a mitzvah to eat udder or *shibuta*. Further, Yalta noted that “it is forbidden for us [to marry] a non-Jew, but a “beautiful captive (*y'fat to'ar*)” is permitted. Yet, not only is there no requirement to seek out a *y'fat to'ar*, most of the rabbis frowned upon the practice.⁷ Thus, from Yalta's statement one cannot discern whether the talmudic sages thought that one should seek out forbidden tastes, frowned upon it, or merely non-judgmentally noted the possibility.⁸

It may also be possible to distinguish between Yalta's comments, in which she searched for God's permitted substitutes, and the active desire to imitate and create non-kosher taste.

6. The Rosh (*Shu"t HaRosh, klal 2, siman 16*) states that the *shibuta* was eaten in France as well.

7. See Rashi to Deut. 21:11 citing *Kiddushin* 21b. See also *Sanhedrin* 107a, that the biblical presentation of *y'fat toar* is immediately followed in the Torah by the laws of *ben sorer u'moreh* (a rebellious son), to caution that one who marries the former will beget the latter.

8. One could argue that Yalta was expressing an alternative view that *y'fat to'ar* need not be avoided. Her statement then supports the view that prohibited tastes do not carry negative connotations. An indication that at least the food items do not have a negative connotation is the fact that Yalta requested it, and Rav Nachman obliged her.

Learning from the “*mon*”

Another clue to the rabbinic attitude towards non-kosher taste may be gleaned from their treatment of the episode of the manna (*mon*) that God provided for the Israelites during their 40 years of wandering in the desert. The traditional belief is that the taste of the manna was miraculously in compliance with the desires of the eater.⁹ A two-part question is raised: If one desired the manna to taste like an intrinsically non-kosher item, did it comply? And if the answer is in the affirmative, did the person then violate the law prohibiting consumption of that substance?¹⁰ There are three possibilities: *Mon* could not assume the taste of non-kosher products; it could and it was not an halachic issue; or it could and the person eating it would violate a prohibition.

The *Chiddushei HaRim* (*Sefer ha-Z’chut*, Bnei Brak, 5747, *Baha’alotcha*, p.44) asserts that manna in the desert could not assume the flavor of forbidden foods. The Chida (*Pesach Einayim*, *Chullin* 109b, s.v. *ba’inyan*) disagrees, and holds that indeed the *mon* would taste like the desired non-kosher item.¹¹

The Chida cites the statement by Yalta (*Chullin* 109b) that, for example, the taste of pig can be experienced by eating the brain of the *shibuta* fish. There is thus nothing wrong with desiring that taste which is common to the pig and the *shibuta*, and the manna could taste like *shibuta*, which, *inter alia*, tastes

9. See for example *Sh’mot Rabbah*, *B’shalach*, *parsha* 25.

10. This question may be a nonstarter because the Talmud states (*Sanhedrin* 59b) that “*ein davar tamei yored min hashamayim*” nothing non-kosher comes from heaven, even if it is in the shape of a donkey.

11. The Ragotchever Gaon, Rav Yosef Rozen (*Tzafnat Panaiach*, 5739, #3) addresses the issue in response to a question whether it was permitted to taste forbidden flavor in the *mon*, implying that he felt that the *mon* could have such tastes.

like pig. In other words, according to the Chida, if the food is permissible, the taste is of no relevance. *Mon* was a permitted food and hence could taste like anything without violating any law (almost like tofu).¹²

Support for the *Chiddushei HaRim* can be found in the talmudic debate about what the *mon* could NOT taste like. There were indeed limitations on its possibilities. The Talmud (*Yoma* 75a)¹³ expounds on the meaning of Numbers 11:5 wherein the Israelites demanded five food items they fondly recalled from Egypt. Why did they make this demand if they had the infinitely versatile *mon*? One opinion is that *mon* tasted like everything except the five items enumerated in the verse.¹⁴ The other opinion is that not only could the *mon* assume any taste, but in all instances save the five items listed in the verse it also acquired the substance of the item, while for those five items it only had the taste.

Yet this discussion is clearly not complete. Numbers 11:4 records that in addition to those five items, the Israelites also demanded meat. If the *mon* could assume any taste other than the five listed items, why the demand for meat?¹⁵ *Tosefet Beracha* (by R. Baruch Halevi Epstein) suggests the following: In Exodus 16:31 the taste of *mon* is compared to honey. In Numbers 4:7 it

12. The Chida does quote the Gemara (note 10) that if indeed there is a prohibition, God would not permit a Divine act to be the cause of a violation.

13. For a parallel passage see *Sifri, Bamidbar*, 87.

14. According to Rashi (*Yoma* 75a, s.v. *halalu*), based on *Sifri*, these five items are bad for pregnant and nursing women and for the fetus. According to *Midrash Lekach Tov*, they are bad for one's learning. The *Yedei Moshe* commentary on *Midrash Rabbah* (*Sh'mot Rabbah, B'shalach, parsha 25*) says that in general the taste of *mon* was limited due to health issues.

15. The *Ba'al Haturim* (Numbers 11:4) explains that the demand was not related to a "problem" with the *mon* or to the current situation. Rather, they assumed that they would soon be crossing the Jordan River into Israel and would be unable to take their large quantity of livestock with them.

is compared to oil. The Talmud (*Avodah Zara* 39b) notes that meat cooked in oil and honey is unhealthy. Hence *mon* could not taste like meat.¹⁶ There is thus an opinion that there were other tastes that the *mon* could not assume. Once these exemptions are recognized, it is plausible that there were additional restrictions on the *mon*'s versatility, including the exclusion of prohibited taste.¹⁷

Support for the position that the *mon* could assume the taste of a non-kosher product and that consuming it would then violate a prohibition can be found in a most amazing *Midrash Talpiot* (*Anaf Yayin*).¹⁸ The *midrash* asserts that Nadav and Avihu, the sons of Aharon, were punished for entering the sanctuary while drunk, and that their "drunkenness" was a result of imbibing from the miraculous well water¹⁹ and willing it to taste like wine. If water modified to wine by thought alone causes halachic drunkenness, so, too, *mon* with the taste of pork should cause culpability.

A similar discussion occurs regarding whether a person who wills *mon* to taste like matzah could thereby fulfill his

16. Note that the *Mechilta* (*Yitro*, s.v. "vayichad yitro") specifically says that it could taste like bread, meat, fish, grasshoppers, and all other good things.

17. An alternative explanation for the meat demand is offered by the *Chiddushei HaRim*. According to Rav Yehuda, non-sacrificial meat was prohibited in the desert and thus could not be tasted in the *mon*. Sacrificial meat could also not be tasted because without the proper sprinkling of the blood it, too, is prohibited. However, *Karnei Re'em*, (by Rav Aryeh Mordechai Rabinowitz, 5755) p. 45, cites a *midrash* that states explicitly that the *mon* could taste like meat.

18. This is cited by the *Pardes Yosef HaChadash al HaTorah*, *Baha'alotecha*, 204. I thank Prof. Ya'akov Spiegel for pointing it out to me. To my chagrin, I have checked several editions of the *Midrash Talpiot*, and they all appear the same, but I have been unable to locate this statement.

19. Cf *Mechilta* (*Yitro*, ibid.) that the well water could taste like old wine, new wine, milk, honey, and all other sweet drinks.

obligation.²⁰ The Ritvah seems to imply that one cannot (*Kiddushin* 37b). However, *Igrah d'kallah* (R. Tzvi Elimelech Shapiro of Munkatsch and Dinov; on *Shlach*) asserts that in his opinion one can indeed thereby fulfill his obligation to eat matzah and even recite the appropriate *beracha*. The implications of this debate relate to tasting *issur*. The general rule is that one can fulfill the requirement to eat matzah only with something that could, under other circumstances, lead one to violate the prohibition of eating *chametz* on Pesach. It is thus clear that *Igrah D'Kallah* is of the opinion, like the Chida, that *mon* could assume the taste of prohibited *chametz* on Pesach, and that its consumption might even be culpable.²¹

From the analysis of *mon*, several conclusions can be reached. According to the Chida it would seem that there is no issue with Baco Bits – just as there is no problem with *shibuta* or the *mon* tasting like pork. The *Chiddushei HaRim* may have more of a problem. Or it may be that he held that Divine *mon* was limited, but that there is no problem with human-engineered Baco Bits.

Craving non-kosher taste

Rabbinic sources actually do discuss the acceptability of craving non-kosher taste (and other forbidden acts). Rashi (on Lev. 20:26) quotes R. Elazar ben Azaryah (*Sifra, Kedoshim*) who

20. *Mishkenot HaRo'im* (R. Yechiel Michal Hibner, Lemberg, 1865, p. 49a) rejects this discussion out of hand. He says that it is patently obvious to everyone that there can be no prohibition of *chametz* with *mon*, and likewise the mitzvah of matzah cannot be fulfilled with *mon*. For further discussion on this point and on fulfilling the mitzvah of matzah with *mon*, see R. Avraham Yisrael Rozental, *K'motzei Shlal Rav, Shemot*, pages 210-212 who also cites Rav Tzvi Pesach Frank, *Mikraei Kodesh*, Pesach 2:12.

21. One could of course counter argue that *chametz* is not a substance that is prohibited by its very nature. It is indeed permitted for the majority of the year. Thus, it is plausible that *mon* could taste like *chametz* all year, and on

maintains that one should not say "I do not desire pork," rather a person should assert that he abstains because his Father in Heaven has prohibited it to him.²² The Rambam (*Introduction to Avot* ["*Shmonah Perakim*"], chapter 6) approvingly cites this in the name of Rabban Shimon ben Gamliel as: "A person should not state 'I do not desire meat and milk [together], I do not desire to wear *shatnez*, I do not desire to lie with an *ervah*; rather I do desire, but what can I do? My Father in Heaven has decreed upon me [that they are forbidden]'." Clearly, according to the Rambam and this *Sifra*, desire for food,²³ clothing, and sexual gratification are not inherently bad, and in and of themselves need not be repressed as desires. Rather it is their actualization that needs to be contained. It seems that indeed it is preferable to have these desires and subjugate them to God's will rather than not to have them at all.

The *Shla*,²⁴ in the name of his father, links this *Sifra* to the above-cited statement of Yalta. He wonders why a distinguished woman like Yalta would discuss apparently trivial matters with her illustrious husband, and why the Talmud saw fit to record the entire statement of Yalta when only Rav Nachman's response was relevant to the ongoing discussion. His father had explained that this Gemara is in accord with the principle stated by Rabban Shimon ben Gamliel in the *Sifra*: abstinence from an experience should be motivated by adherence to a divine prohibition and not as an expression of personal preference. And that was Yalta's concern. How can we know what we are missing if we have

Passover such *mon* would be prohibited. Thus, it might not prove that *mon* could taste like pork or some other inherently prohibited item.

22. See the Malbim, that a person who conquers such desires is better than a *tzadik* who lacks these desires. However, that may not mean that one should *cultivate* such desires. He may be discussing existing personalities rather than a desired persona.

23. See *Oznayim LaTorah*, Deut. 6:11 (s.v. *u'batim*) that the Torah actually refers to *chazir* as "*kol tov*" because people desire it.

never experienced it? Therefore, corresponding to all that is prohibited, God provides a comparable pleasure which is permitted so that we may thereby know what we are missing. Yalta wanted to know what she was missing by observing the prohibition of meat and milk. By knowing what pleasure she was barred from, she could have a genuine desire for the prohibited pleasure that she would then refrain from fulfilling solely because of God's command.²⁵

The *Shla* refers to his father's explanation as "exceedingly sweet," and subscribes to the belief that such is the proper worship of God. It would thus seem that ideally a person should experience the full range of different types of pleasures in order to appreciate the Torah's restrictions. The prohibitions themselves do not interfere with this because, as Yalta explained, there is always something similar that is permitted.

Abstaining from Pleasure

The Talmud *Yerushalmi* concludes its commentary on *Kiddushin* (4:12) with an enlightening statement. We are told:

Rabbi Chizkiya said in the name of Rabbi Kohen who said in the name of Rav: In the future man will have to provide a reckoning on all that he saw but of which he did not partake. Rabbi Lazar took this opinion into account and would save up his pennies and eat each food type at least once a year.

The *Korban Ha'edah* relates the sin to needless asceticism. Both

24. In one of his introductions, *Be-Asarah Ma'amarot*, 1959 edition p. 67. I am indebted to Rav Daniel Eidensohn for pointing out this source.

25. The statement of Yalta begs to be explained, and the explanation of the *Shla* is one possibility. Rav Dessler offers a totally different view (*Michtav Mi'Eliyahu*, 5725, vol. 1, p. 263). He suggests that if there were no permissible counterparts for the forbidden items, a person's curiosity and passions might

Korban Ha'edah and *Pnei Moshe* explain Rabbi Lazar's point in actively seeking these items as a means of praising God for all the variety in His creation. Rav's declaration did not remain in the realm of *aggadetah*; Rav Ganzfried saw fit to include it in his *Kitzur Shulchan Aruch*, 59:19 where he quotes it in its entirety.²⁶

On the other hand, how does Judaism view the abstinence from common permitted pleasures, i.e. how is asceticism perceived? Numbers 6:2-8 defines a *nazir* as one who refrains from ingesting wine and grape products, cutting his hair, and becoming impure via contact with a corpse. With respect to the *nazir* and asceticism in general the Rambam (*Hilchot De'ot* 3:1-4) offers the following:

Perhaps a person will say that because lust, desire for honor, and such traits are a bad path ... I will absolutely abstain from them and go to the other extreme, to the extent of not eating meat, not drinking wine, not getting married; I will not live in a nice house, and I won't wear nice clothing ... like the priests of Christianity. This too is a terrible approach to life, and it is forbidden to conduct oneself this way. A person who follows such an approach is called a sinner.²⁷ We see concerning the *nazir* that he requires atonement (Numbers 6:1) and the

be too strong and lead him to violate the prohibition. God therefore provided, and the rabbis revealed, the permitted substitutes to assist a person in fighting his temptations.

26. The *Yerushalmi* seems to be a general statement, and that is how the *Kitzur Shulchan Aruch* understood it. However, others understood it to be specifically referring to seasonal vegetables. For example the *Mishnah Berurah* (228:19) quotes "acharonim" who learn from the *Yerushalmi* that one should eat each fruit annually in order to show that God's creations are cherished by him. When the *Aruch Hashulchan* (OC 225:1) cites it, he actually has the original saying that Rabbi Lazar bought each new *fruit* yearly. He then rules (OC 225:5) that it is a mitzvah annually to taste each type of fruit to thereby

sages stated that if a *nazir* who only abstained from wine requires atonement, one who withholds from himself everything, how much more so [will he require atonement]. Therefore, the sages have commanded that one should not abstain except from those things that the Torah has forbidden ... Thus the sages say, "Is it not enough what the Torah has prohibited, [why do] you want to prohibit other things?" ... Concerning these matters and the like, King Solomon commanded and stated: "Do not be too much of a *tzadik* and think you know better, for why should you destroy yourself" (*Kohelet* 7:61)?²⁸

Others view a *nazir* and asceticism in a more positive light. Extrapolating from the case of the *nazir*, the Talmud (*Ta'anit* 11a-b) probes the merits of fasting. Shmuel, whose opinion the Rambam adopts, labels someone who fasts a sinner. Rabbi Elazar calls him *kadosh* (holy) if he can tolerate it well, otherwise he calls him a sinner.²⁹ To Resh Lakish such a person is a *chasid* (pious). The *Shulchan Aruch* (*Orach Chaim* 571:1) rules like Rabbi Elazar: for one who can tolerate it, fasting is meritorious, but if it causes weakness, it is sinful. The Ra'avad instituted what is commonly known as *Ta'anit haRa'avad* – the Ra'avad's fast – in

28. The Rambam also discusses this point in *Shmonah Perakim*, chapter 4. See too the Netziv (Numbers 6:2) that only one in very unusual circumstances with no other recourse should become a *nazir*. By denying himself legitimate pleasure, the *nazir* is not doing God's will.

29. See the various discussions if the self deprivation of a *nazir* is good or not. See *Nazir* 3a, 19a, *Nedarim* 9b, 10a, and commentaries there. See especially *Nazir* 19a that implies that even *tahor nazirs*, are sinners (as opposed to *Nazir* 3a that implies that only *tamei* ones are sinners). See also *Kli Yakar* to Numbers 6:11, and *Pri Tzaddik* (Rav Tzadok Hakohen) to *Naso*:14. It is generally agreed that asceticism outside the framework of a *nazir* is a sin. See *Shu't haRashba* (4:262) who ruled that one should not fast excessively because it makes it difficult to study Torah properly. See also *Nodah B'Yehudah*, *Kammah*, OC:35 and *Birkei Yosef* OC 585:8 that one should rather do good deeds in place of fasting.

which one contains his appetite and demonstrates self-restraint by leaving over a portion of a tasty dish (See *Magen Avraham* OC 571:2).

The Talmud (*Ketuvot* 104a) states that on his deathbed, the fabulously wealthy Rabbi declared that he had not benefited from this world. Tosafot (s.v. *Lo*) explain that this statement was based on the dictum that a person should pray that pleasures not enter his body.

Additional Considerations

The attitude towards such foods may also depend on how one views the prohibition of *chukat ha'akum* (Gentile customs). The strictest interpretation prohibits the imitation of any non-Jewish practice.³⁰ However, to violate this may require the ingestion of real pork, not ersatz bacon. On the other hand, if the action is driven specifically by a desire to mimic the Gentile experience, it may be an issue of violating *chukat ha'akum*.

Various rationales are offered for the Torah's insistence on a dietary code. There are reasons suggested for individual prohibitions and there are rationales suggested for the whole package. Health reasons are sometimes suggested, but they relate to the substance of the food. That the taste of prohibited foods has a deleterious effect is not one of the reasons suggested. However, another reason suggested is the separation it causes between Jews and non-Jews. The ability to break that barrier with these foods may be another strike against them.

A final point relates to the quality of excess. While it may be meritorious to have certain desires, and permitted to fulfill them within certain guidelines, one must be mindful of the

30. On this topic, see R. Zvi Teichman, "The Jew in a Gentile Society: Chukat Ha'Akum," *Journal of Halacha and Contemporary Society*, Fall 1981, 2:64-85.

concept made famous by the Ramban (Lev. 19:2) that one should not overindulge, even in permitted items. One should not be a *naval b'reshut haTorah* – a repugnant character using items technically permitted by the Torah. He explains that one becomes holy by limiting consumption even of permitted wines and foods.

Does consuming imitation items fall into that category? The Ramban stresses the importance of self-control, suggesting that it does. On the other hand, it may be a matter of quantity, of limiting amount, not selection. Overindulging in permitted types of meats and wine, as Rav Moshe Feinstein notes regarding a *ben sorer u'moreh*, is wrong. But perhaps sampling a variety of interesting foods, including those with “non-kosher-taste,” is acceptable if it is done in moderation.

Contemporary opinions and *marit ayin*

Some of the contemporary discussion seems to relate to an ancillary point, that of terminology and perception – the perception or misperceptions that can arise from those foods or their names. For example, Detroit author and educator Rabbi Hayim Halevy Donin (*To Be a Jew*, 1972, 1991, p. 105) wrote:

Vegetable products or condiments processed in such a way as to provide an artificial flavor or appearance similar to a prohibited food have been known to appear on the market. Though these foods are kosher, the use of such terms as “kosher bacon” or “kosher shrimp” is objectionable to this writer. The terms are contradictory since nothing can be done to make true bacon or shrimp kosher. Its use is deceptive and misleading and should be avoided.

Rabbi Donin’s objection seems to be purely one of terminology and perception.

It is reported³¹ that some time around 1968-69, Rav Moshe Feinstein stated: "*Mentchen fregen mir vegern di naye essens, tzu zai zainen kosher tzu nit. Ich entfer zai az di essens zainen kosher, ober der hechsher iz nit [tzu vos darf a yid di alle essens]?*" "People ask me, regarding the new foods, whether they are kosher or not. I answer them that the foods are kosher but the *hechsher* (rabbinic approval) is not [why does a Jew need all of these foods?]." In other words, Rav Moshe acknowledged that these foods were kosher but was not in favor of them. Again, it may have more to do with *marit ayin* than with anything else. But it seems that Rav Moshe objected to more than just appearances and was uncomfortable with the desire for these items as well.³²

In a recent *Jewish Observer* article,³³ Rabbi Matisyahu Salomon, *mashgiach ruchani* of Beth Medrash Govoha of Lakewood, NJ, is quoted as saying this even more explicitly:

Think of this. Every single new food that is developed for the market immediately sparks a competition for who gets to give the *hechsher* and who gets to package and distribute it for the kosher market. Has it ever occurred to anyone that there is no mitzvah to experience every possible taste and texture? That on the contrary,

31. Reported to this author in the fall of 2003 by R. Aaron Lopiansky, Rosh Kollel in Silver Spring, Maryland.

32. In *Iggerot Moshe, Yoreh De'ah* 3:35 in his discussion of why marijuana is prohibited, he points out that the Torah criticizes a *ben sorer u'moreh* for his excess desires and overindulgence in permitted pleasures. In *Iggerot Moshe, YD*:3:71 (p. 320) he criticizes "*minhag America*" to try to experience every "good time." Rather, Rav Moshe says, the proper way is to know how to limit one's desires to that which is required, and we should know that even though God has blessed us with a land of plenty that does not mean that God desires us to strive to acquire all manner of pleasure. So, too, in his discussion (*Iggerot Moshe, CM* 2:76) regarding smoking, he notes that even ignoring the health issue, it would be prohibited to get addicted to smoking because it is wrong to increase one's desires and pleasures.

33. "A Separation Between Light & Darkness," *Tevet* 5764, 37(2):6-9.

there is a mitzvah of *kedoshim tihyu*, of keeping our pleasurable indulgences under control?

A *dayan* in England asked me about a certain new food made from ingredients that simulate exactly the taste of pork; that's how it's advertised in the mainstream press. Someone in the community had approached this *dayan* and asked him to give the *hechsher* on this product for the kosher market. He wanted to know if he should do it.

I don't understand. Should a Jewish person go out and buy a product whose advertising point is that it tastes exactly like pork? Is this the point that we've reached? Should we be so intent to share the experiences and pleasures of the Gentiles?³⁴

Rabbi Matisyahu Salomon clearly decries the desire for such products. This attitude of "there is no need for more" is reminiscent of the attitude expressed by the Chazon Ish when he propounded his position that to permit eating new species of animals, even ruminants with split hooves, a tradition is required.³⁵ At the very end he states: "And it is enough for us the cattle and sheep for which we have a tradition,"³⁶ i.e. why the need for additional species?

Several of these opinions seemed to be concerned with image or perception – *marit ayin*. This brings to mind some of the earliest examples of kosher equivalents. For the last several

34. This general theme is emphasized by Rav Salomon in *Matnot Chayim: Kuntres Hamavdil bein Kodesh l'chol*, Lakewood, 5761; this story can be found there on p. 17.

35. For a discussion of this position, see Ari Z. Zivotofsky, "Kashrut of Exotic Animals: The Buffalo", *The Journal of Halacha and Contemporary Society*, Fall 1999/Sukkot 5760, Number XXXVIII.

36. *Hilchot ba'heima v'chaya tahora*:11:letters 4 & 5.

decades there have been non-dairy creamers that are served at meat meals.³⁷ These are reminiscent of “almond milk” discussed in the halacha. It is permitted to drink such “milk” together with meat on the condition that it is obvious that it is not real milk. This can be accomplished by having some almonds nearby.³⁸

Today, permitted mixtures of “meat” and “milk” can be accomplished using non-dairy creamer for the milk or tofu burgers or pareve “chopped liver” for the meat.³⁹ Each of these products can be purchased individually with the most stringent kashrut certifications. Yet several years ago when an Israeli company advertised that their product can be used to produce kosher cheeseburgers, the Beth Din of the Jerusalem *Eida HaCharaidit* (*Badatz*) demanded the advertisements be stopped.

This concern of *marit ayin* seems to have motivated the opinion of many contemporary authorities. Rav Avigdor Nebenzal,⁴⁰ Rav Shraya Duvlitzki,⁴¹ Rav Shlomo Aviner,⁴² Rav Yaakov Ariel,⁴³ and Rav Meir Mazuz⁴⁴ all suggest that in their opinion

37. One could distinguish between Baco Bits, which mimic a non-kosher item, and dairy creamer, which imitates a kosher item that would merely be prohibited at that moment because of circumstances, similar to the distinction made at the outset of this paper between two categories of forbidden food.

38. See Ramo, *Shulchan Aruch* YD:87:3. The *Shach* (*ibid, s.k. 6*) rules that such precautions are required even if the perceived prohibition is only rabbinic in nature. A similar discussion exists about drinking permitted fish blood (*Shulchan Aruch* YD 66:9).

39. The kashrut of “soy burgers” and the other items discussed herein has been assumed. It should be noted that there is a definite need for kashrut supervision on these items.

40. Personal letter, 11 *Tammuz*, 5764.

41. Personal letter, 11 *Tammuz*, 5764.

42. Personal letter, 24 *Tammuz*, 5764.

43. Chief rabbi, Ramat Gan. Personal letter, 14 *Av*, 5764.

44. An important Tunisian *posek*. Personal letter, 11 *Tammuz*, 5764. He

it is improper for the name of the prohibited substance to be part of the product name, i.e. "kosher fake shrimp" or "imitation bacon".

Rabbi Emanuel Holzer,⁴⁵ chairman of the Rabbinic Kashrut Commission of the RCA, reports that when the OU was asked to certify Baco Bits, they indeed deliberated about the issues discussed here. They would have preferred a different name, but had no control over that and General Mills was not interested in changing the name.⁴⁶ And they were concerned about possible misunderstandings and errors that could result, but decided that with proper education that problem was surmountable. Rabbi Herzog recalls that after the OU began certifying the product as kosher, Rabbi Rosenberg received letters critical of the decision and expressing concern that people would become confused.⁴⁷ Again, after deliberation they decided that just as people adjusted to pareve margarine at a *fleishig* meal, so too they can learn that these products are imitations and not the real thing. Rav Ariel similarly made it known that such products are permitted only if consumers are aware that they are imitation.⁴⁸

Conclusion

As we have seen, most of the traditional sources are not averse to either the desire or actualization of the desire to eat Baco Bits. They may even imply that one *should* eat Baco Bits,

pointed out that "*mei raglayim*" may not be brought into the *mikdash* even though one opinion holds that it is the name of a spring. It is the name that makes it inappropriate. Because of this, if the product carries the name, e.g. bacon bits, it should be strongly avoided as a disgusting object.

45. Phone conversation 25 Tammuz 5764.

46. The OU decision *may* have been different if it were a Jewish company. However, at one point there was a product called Mendel's Heimish Shrimp that was under OU supervision.

47. Phone conversation, 26 Tammuz, 5764.

and offer a variety of sometimes mutually exclusive reasons: One thereby exhibits an enhanced love for G-d when refraining from the real item; it increases the desire for the true item, thus enhancing the temptation and the concomitant reward for abstinence; upon experiencing the forbidden taste, one's desire for the forbidden item is diminished because it is no longer an unattainable fantasy ("*mayim genuvim*"); to appreciate all of God's wondrous creations.⁴⁹ Yalta's famous statement can be understood as a *carte blanche* endorsement. Indeed Rav Shraya Duvlitzki⁵⁰ explicitly states, based on Yalta, that "there is no hesitation" to eating these foods, and this notion is implicitly endorsed by Rav Chaim Kanievsky.⁵¹

Yet many of the contemporary authorities seem to have expressed a strong aversion to these products.⁵² It may be that they are addressing different realities than the classical sources. The classical sources are talking about the ideal world in which indeed there is no need to be concerned about such desires. Rav Moshe Feinstein, Rav Matisyahu Salomon, and other contemporaries are dealing with current Western society where even among religious Jews the pursuit of all pleasures is far beyond what *chazal* would ever have imagined. Eating Baco Bits is certainly not an egregious pleasure. However, in a society in which the yardstick of an activity is "are we having fun yet" rather than "am I doing something useful or productive", the

48. Personal letter, 14 Av, 5764.

49. There may be practical differences between the reasons. According to the last reason, maybe one should eat Baco Bits once or at most once a year, as Rabbi Lazar in the *Yerushalmi* did. According to the first reason, it may be meritorious to eat many of them often.

50. Personal letter, 11 Tammuz, 5764.

51. Personal postcard, 17 Tammuz 5764.

52. All this is based on the assumption that the person eating it knows that the product is imitation pork and is eating it (at least partially) for that reason. The attitudes expressed here may be different if the person is unaware

drive for all pleasures must be evaluated.⁵³ In a vacuum the response would be that bacon bits are not inherently prohibited or wrong. In today's environment, that may no longer be the response.

In the abstract there is nothing wrong with a person "having both worlds", learning and living Torah and also enjoying God's creations. The Mishnah states (*Avot* 6:4) that "the way of Torah is that one will eat bread with salt and drink water by the measure and will sleep on the ground." Rav Chaim Volozhiner (*Ruach Chaim* on *Avot*) comments that indeed if one's focus is on exotic foods he will not succeed in Torah. However, it is not that one is required to subsist with the bare minimum; rather one must be prepared to forego pleasures for the sake of Torah.⁵⁴ But if God nonetheless grants him both worlds, there is nothing wrong with enjoying this world (based on Rava in *Horyot* 10b).

The problem is that even Torah-observant Jews in contemporary Western society are focused on maximizing worldly pleasures. This motivated Rav Yitzchak Zilberstein⁵⁵ to write "that from a purely halachic perspective such foods are of course permitted." But in practice our generation is far below that of the Chida's and he wrote (I assume in hyperbole) that "if the Chida [who held that *mon* could taste like pork]

of that and is eating it simply because he enjoys the taste.

53. This malaise of our society is beautifully explained in a Purim *sicha* delivered by Rav Aharon Lichtenstein in 5750 and available as "Because they partook of the feast of the wicked one" at <http://www.vbm-torah.org/purim/ralpur.htm>. It is an important article for our generation, wherein he explains: "A person who holds the view that every excess and every pleasure is permitted – so long as it doesn't run counter to the laws of kosher foods or the laws of mixing meat and milk – is making a fatal mistake. While taking pains over the tiniest details of the laws of kashrut, one may still completely miss the point of Divine service."

54. Cf. *Shabbat* 83b.

were alive today, a generation so far below what was in his time, he would prohibit such products." Rav Zilberstein's major concern appears to be the potential for error.

Both the *Korban Ha'edah* and the *Pnei Moshe* explained that Rabbi Lazar actively sought to taste every item as a means of praising God for the vast variety in His creation. It is under such circumstances that Baco Bits pose no danger. It is difficult to believe that such is the motive of most people today. If the goal is simply to taste one more item, enjoy one more pleasure, then the contemporary rabbis indeed have a point. The Rambam (*Hilchot Teshuvah* 7:3) included "chasing after food" as a character trait that one needs to modify as part of the overall *teshuva* process.

The perception that the Torah world is today not willing to live with less is widespread. Rav Aharon Lichtenstein, in the course of explaining and advocating *Torah u-Madda* wrote: "But I fail to understand opponents of *Torah u-Madda* who think it is perfectly legitimate to labor long and engrossing hours in order to eat lamb chops, drive a Volvo, or vacation in St. Moritz, but illicit to devote those hours instead to exploring, with Plato or Goethe, vistas of thought and experience. I do not, of course, equate Plato with lamb chops. I just hope we are not so Philistine as to value him less."⁵⁵

The world was not created bland. God made a world with color, a world with taste, a world with smell, and it is all there for man to use and enjoy. But that is on the condition that priorities are maintained, that the motivation is pure, and that it is remembered Who created it.

55. Personal letter, 11 Tammuz, 5764.

56. Rav Aharon Lichtenstein, "Torah and General Culture: Confluence and Conflict," in J.J. Schacter (ed.), *Judaism's Encounter with Other Cultures*, Aronson, 1997, p. 270.

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