

# Journal of Halacha and Contemporary Society

Number LII

Published by  
Rabbi Jacob Joseph School

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# The Journal of Halacha and Contemporary Society

Number LII

Succot 5767

Fall 2006

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

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

Manuscripts which are submitted for consideration must be typed, double-spaced on one side of the page, and sent in duplicate to the Editor, Rabbi Alfred Cohen, 5 Fox Lane, Spring Valley, New York, 10977. Each article will be reviewed by competent halachic authority. In view of the particular nature of the Journal, we are especially interested in articles which concern halachic practices of American Jewish life.

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# **Yarmulkas and Hats: Societal Custom or Halachic Imperative?**

*Rabbi Henoch Morris*

## **Introduction**

In our society, hats, yarmulkas and other head coverings are considered one of the more conspicuous marks of a normative Jewish lifestyle. Responding to the question, "Why are you wearing that cap on your head?" has become virtually a rite of passage for young Jewish boys. Yet many wonder why head covering has become such a firmly established practice.

This article examines classical sources dating from the Talmud to the writings of contemporary *poskim* that address this issue. Part one cites the sources for covering one's head and discusses the level of duty to do so: When is head covering actually obligatory, when is it a *midat chassidut*, and when, if ever, is it completely unnecessary? Part two shows how the answers to those questions affect the acceptability of certain types of head coverings. Part three clarifies guidelines for some head covering issues such as: What is the minimum acceptable size? Must it be made of a particular material? Who, if anyone, is exempt from head covering? Are there any places where one is exempt from head covering?

## **Part One: Obligation or *Midat Chassidut*?**

Many authorities discuss the question of whether head covering is obligatory or *midat chassidut* during mundane activities and during *devarim shebikedushah* (Lit. *matters of*

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*Rosh Kollel, Columbus Community Kollel, Ohio*

*sanctity).*<sup>1</sup> In this section we will examine the following:

- Early sources that discuss the reasons for head covering and the resulting level of obligation during mundane activities.
- Early sources addressing head covering during *devarim shebikedushah*.
- The positions of *Shulchan Aruch* and later poskim.

## I. Head Covering During Mundane Activities -- Early Sources

The prevalent practice of keeping one's head covered at all times – even during mundane activities – originates in the Talmud.

Said R. Yehoshua ben Levi: A person is forbidden to walk four *amot* with an erect posture, because it is said: *The entire world is full of His glory*. Rav Huna son of Rav Yehoshua would not go four *amot* with an uncovered head, saying, "The Divine Presence is above my head" (*Kiddushin* 31a).

Said Rav Huna son of Rav Yehoshua: "May [a reward] come to me for I have never gone four *amot* with an uncovered head" (*Shabbat* 118b).

The above talmudic passages indicate that head covering is always appropriate as a show of respect for G-d's Omnipresence. Yet the Mishnah and Gemara in *Nedarim* 30b indicate that men did not always cover their heads.

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1. Our discussion will reflect the thinking of most authorities: that a head covering is more necessary during *devarim shebikedushah* than during mundane activities. *Taz* (*Orach Chaim* 61:1), however, takes the opposite approach. *Taz* argues that a head covering is less necessary during *tefillah* and the like – when one is already in awe of G-d's presence – than during mundane activities, when one is more relaxed and thus more prone to forget G-d's presence. *Pri Megadim* rejects his arguments for a number of reasons; see there for a full discussion.

If someone takes a vow [forbidding benefit] from “the dark-headed,” he is forbidden to [derive benefit even from] bald men and old [white-haired] men. But he is permitted to [benefit from] women and children, for none but [adult] men are called “dark-headed.” . . . What is the reason for the latter ruling? It is because adult men sometimes cover their heads and sometimes leave them uncovered. [Thus, they cannot be called “bare heads” or “covered heads,” so they are called “dark-headed,” because most men have dark hair – Ran]. But women always cover their heads [so they are called “covered heads”] and children never do [so they are called “bare heads].”

Taking the above sources together, Maharshal notes the following: (1) The Gemara in *Nedarim* states that men do not always cover their heads. (2) The Gemara in *Shabbat* states that R. Huna brei d'R. Yehoshua felt entitled to special reward for never walking four *amot* bareheaded, implying that head covering is not mandatory when walking. (3) After explicitly forbidding walking with erect posture, the Gemara in *Kiddushin* 31a notes that a certain sage would not walk bareheaded, but it never explicitly forbids bareheadedness.<sup>2</sup> Accordingly, Maharshal (#72) concludes that head covering during mundane activities is a *midat chassidut* but not halachically required. *Beit Yosef* (*Orach Chaim* 91) and *Darcei Moshe* (*ibid.* 2:2) cite *Kol Bo*, who concurs;<sup>3</sup> *Tur* and *Bach* agree as well.<sup>4</sup> According to this,

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2. Said R. Yehoshua ben Levi: A person is forbidden to walk four *amot* with an erect posture . . . Rav Huna son of Rav Yehoshua would not go four *amot* with an uncovered head . . .

3. *Darcei Moshe* also cites the assertion of *Terumat Hadeshen* (*Pesakim* #203) that he found no explicit prohibition against bareheadedness even while mentioning G-d’s Name! See later in the text for further clarification of *Terumat Hadeshen*’s position.

*Beit Yosef*’s own position on this issue seems somewhat unclear, as we will show later.

4. See *Bach* 2 s.v. *V’Yichase* and *Taz* 2:4; their positions will be more fully

*Kiddushin* and *Shabbat* are recording only acts of piety of certain talmudic Sages and not halachic requirements.

## II. Covering the Head During *Devarim Shebikedushah* -- Early Sources

The earliest discussion about head covering during *devarim shebikedushah* is found in *Masechta Sofrim* (4:15), which records two views as to whether *Shema* may be recited bareheaded.

A barelegged person whose knees are visible or someone whose clothing is torn or someone whose head is uncovered may recite the *Shema*. However, some say: While his knees are visible or his clothing is torn he may recite, but not while he is bareheaded, and<sup>5</sup> he is not permitted to pronounce G-d's Name [while bareheaded]. Either way he may serve as translator [at the public Torah Reading], but he may not read the Torah [publicly] nor go before the ark [to lead the congregation in prayer] nor raise his hands [to give the Priestly Blessings].

There is, however, disagreement as to which view is accepted by halacha.

1. Lenient View: Maharshal (Responsum #72) cites *VaYikra Rabbah* (27:6) as support for the view that a head covering is not needed while reciting the *Shema*.

Said R. Berachiah: "When a human king sends a royal letter to his subjects, what do they do? They all rise to their feet, bare their heads, and read it with fear, awe and trepidation. But the Holy One Blessed is He tells the Jewish People: 'Read my royal letter — the *Keriat Shema* — for I do not trouble you to read it standing or bareheaded . . .'"

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discussed in note 27.

5. According to Maharshal's version of text; *Gra* loc. cit. inserts *for* and deletes *and*; the text of the standard Vilna *Shas* has neither word.

The *Midrash* is clearly stating, argues Maharshal, only that it is permitted to cover one's head while reciting *Shema*, and reciting it while bareheaded is equally if not more acceptable.<sup>6</sup> After further discussion, however, he balks at permitting this in practice, given the widespread custom of head covering. He therefore rules that one should avoid mentioning G-d's Name bareheaded as a *midat chassidut*, and that a Torah scholar should not study Torah at all while bareheaded – even without mentioning G-d's Name.

*Biur HaGra* (*Orach Chaim* 8:6<sup>7</sup>) cites talmudic support for Maharshal's position. In *Berachot* 60b, the Gemara lists the first *berachot* of the day, and indicates that when one reaches the blessing *Oter Yisrael B'Tifarrah* one places a cap on his head, implying that the previous *berachot* were recited with the head still uncovered. This proves, argues Gra, that halacha does not require head covering while reciting *berachot*. Gra's argument assumes, notes Rabbi Ovadiah Yosef,<sup>8</sup> that the morning *berachot* are listed in the order they are to be recited.<sup>9</sup> But *Shittah*

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6. *Pri Megadim* (*Mishbetzot* to *Orach Chaim* 61:1) questions Maharshal's proof, asserting that the *Midrash* might be exempting head covering during *Shema* only under biblical law while agreeing that rabbinic law requires it. *Shevut Yaakov* (Vol. 3 #5) categorically rejects the proof based on the overall context of the *Midrash* (cf. *Eliyahu Rabbah* 2:4). See also *HaElef Lecha Shlomo* for a different, more stringent interpretation of the *Midrash*.

7. *Yabia Omer* Vol. 6 15:5 cites *Yeshuot Yaakov* (#2), who suggests an interesting twist. Perhaps the *Midrash* permits bareheadedness specifically while reciting *Shema*, when one is wearing *tefillin*, because *tefillin* themselves engender fear of Heaven. When, however, *tefillin* are not being worn (during *Maariv* or other *devarim shebikedushah*), the *Midrash* would agree that a head covering is needed to engender fear of Heaven. See also note 1.

8. *Yabia Omer* Vol. 6, *Orach Chaim* 15:2.

9. For if the *berachot* are listed in order, then when the Gemara puts *Oter Yisrael B'Tifarrah* (which is recited when donning one's cap) near the end of the list, it implies that the prior *berachot* are to be recited bareheaded. This

*Mekubetzet* asserts that they must be listed out of order, because the hand washing *beracha* is listed after many others -- even though halacha precludes reciting any *beracha* upon awakening before hand washing!

Most *Rishonim*,<sup>10</sup> however, disagree with *Shittah Mekubetzet* and maintain that the Talmud's list is in the sequence of recital. According to this (majority) view, the Gra's proof stands.

2. Stringent view: *Or Zarua* (Vol. 2 #43) maintains that we must follow the stricter opinion in *Sofrim* and consider a head covering mandatory when pronouncing G-d's Name (e.g. while reciting any *beracha*).<sup>11</sup> [He does note that the Sages of France permitted reciting ordinary *berachot* while bareheaded, and grants that they may base their custom on the lenient opinion in *Sofrim*.<sup>12</sup> Still, he rejects their view and requires the head covering during *berachot* as per the stringent view.] Rabbeinu

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proves Gra's point that head covering is not required while reciting a *beracha*. But if the *berachot* are not listed in the order of recital, then their place in the list obviously has no significance.

10. Rabbeinu Yonah and Rosh ad loc., *Teshuvot HaRashba* #153; see Rabbeinu Yonah for a rejoinder to *Shittah Mekubetzet*'s argument.

11. For an explanation of why the stringent opinion should be adopted even though head covering is of rabbinic origin, see *Yaskil Avdi* Vol. 6 addendum #1 at the end of *Orach Chaim*. See *Or Zarua* for two additional sources to support his stringent ruling.

12. *Sefer Hamanhig* (Laws of Meals 12), however, states that the custom in France was to cover one's head or to wear a hat while reciting *berachot*. *Sdei Chemed* (gimmel, ¶ 71) notes that this contradicts *Or Zarua*'s record of the French custom. And since *Sefer Hamanhig* and *Or Zarua* lived during the same era, he feels compelled to conclude that different regions in France had different customs. *Yabia Omer* (15:4), however, suggests reconciling the differing records of the French custom as follows: Perhaps they indeed recited almost all *berachot* bareheaded (as *Or Zarua* attests) — except for those of *birkat hamazon* (and those are the *berachot* to which *Sefer Hamanhig* refers). According to this interpretation, the French Sages did not fully accept the lenient ruling in *Sofrim*. Rather, their custom followed the position of Rambam (cited below), who requires head covering during *tefillah* and not for other *devarim she'bikedushah*.

Yerucham (*Netiv* 16, quoted in *Beit Yosef Orach Chaim* end of 91) concurs. *Terumat Hadeshen* #10 also seems to assume that a head covering is obligatory for *berachot*, since he discusses the permissibility of reciting a *beracha* when covering one's head with his own hand.<sup>13</sup>

3. A Middle Course: Some *Rishonim* require a head covering for some (but not all) *devarim shebikedushah*, for a variety of reasons.

### During *Tefillah* (Rambam)

Rambam mentions a head covering in his list of proper dress for *tefillah* (*Hil. Tefillah* 5:5). Since some other things in the list clearly apply only during *tefillah* and not during other *devarim shebikedushah* (e.g., not wearing a money belt), *Yabia Omer* deduces that Rambam requires head covering only for *tefillah*. Maharshal also attributes the above view to *Tur*, who codifies the head covering requirement in his *Laws of Tefillah* but not in his *Laws of Shema*.

Such a position, however, seems completely inconsistent with both opinions in *Masechta Sofrim*: the stringent one, which

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13. And this would surely be permissible if head covering were not obligatory at all during *berachot*. We will discuss this ruling more in depth later.

*Yabia Omer* (*ibid* 15:5) notes that this responsum of *Terumat Hadeshen*, which requires a head covering while reciting *berachot*, seems to contradict his own ruling in *Pesakim* 203. When asked there about removing one's hat while taking an oath to the authorities in G-d's Name, *Terumat Hadeshen* writes that he never found any explicit prohibition against mentioning G-d's Name while bareheaded!

I would suggest the following possible resolution. Perhaps *Terumat Hadeshen* (#10) indeed requires head covering when mentioning G-d's Name during a *davar shebikedushah*, in accordance with the stringent opinion in *Sofrim*. Still he maintains that not even the stringent opinion requires a head covering while mentioning G-d's Name in a mundane context, e.g., while taking an oath (cf. explanation of *Yabia Omer* *ibid.* at the end of 15:1).

requires a head covering even for *Keriat Shema*, and the lenient one, which requires it only when leading the prayers but not during one's own *tefillah*. Rabbi Menachem Cohen (quoted in *Yabia Omer* 15:3) suggests that Rambam interprets the lenient opinion to mean that bareheadedness is irreverent only when leading the congregation, and he accepts that view. Still, he requires head covering during *tefillah* [not as a show of reverence, as per *Sofrim*'s stringent opinion, but rather] to fulfil the verse in *Amos* 4:12, "*Prepare to meet your G-d, O Israel*", which refers to dressing appropriately for *tefillah*.<sup>14</sup>

### In Shul (Rabbeinu Peretz)

Rabbeinu Peretz maintains<sup>15</sup> that people should be dissuaded (*yeish limchot*) from entering a Shul bareheaded. Gra suggests the following incident in *Masechta Kallah* as a possible source: Two young men once passed a group of sages; one's head was covered and the other's was not. One of those sages, R. Akiva, insisted that the latter would not have had the audacity to walk bareheaded past a group of sages unless he were of tainted lineage; an investigation substantiated R. Akiva's hunch. If walking past sages bareheaded is so objectionable, suggests Gra, then walking that way into a synagogue where G-d's Presence is manifest, is surely inappropriate, as Rabbeinu Peretz maintains. Based on this incident, Gra forbids walking bareheaded in the presence of sages just as it is forbidden in

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14. *Shabbat* 10a cites this verse as the source for forbidding shorts during *tefillah*, a halacha which the Rambam codifies right after his head covering ruling. And although the Gemara itself never mentions the verse in connection with head covering, *Chaye Adam* (22:8) does rule that a hat is required during *tefillah*, right after citing the verse. (We will discuss *Chaye Adam*'s position at greater length later.)

15. Cited in Maharshal #72 and recorded in *Shulchan Aruch* (91:3) as a *yeish omrim*.

Shul.<sup>16</sup>

A passage in *Yoma* 25a might also have bearing on Rabbeinu Peretz's ruling. The Gemara states that a daily lottery for performing the Temple service was held in the *Lishkat HaGazit*,<sup>17</sup> it began with the presiding official removing the priestly head covering (*mitznefet*) of one Kohen. Tosafot there question why the lottery was held in the *Lishkat HaGazit* rather than in the Temple Courtyard proper. In the first answer, Tosafot suggest that standing without the *mitznefet* would have been disrespectful in the Temple Courtyard but not in the *Lishkat HaGazit*. Now, if our synagogues deserve the same respect due the Temple Courtyard, then the Gemara (according to this answer of Tosafot) supports Rabbeinu Peretz's ruling discouraging bareheadedness in a synagogue. *Levushei Serad* to *Magen Avraham* 282:8 in fact assumes this to be the case.<sup>18</sup> *Machatzit HaShekel*, on the other hand, maintains that a synagogue's sanctity is more comparable to that of the sanctified area in the *Lishkat HaGazit*, where the *mitznefet* may be removed.

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16. Malbim in *Artzot HaChaim* (*Eretz Yehudah* 8:4) cites another source disallowing bareheadedness in the presence of Sages. *Sanhedrin* (101b) states that Yerovam was punished for removing his *tefillin* in the presence of King Solomon. According to Rashi, the sin was that while removing his *tefillin*, Yerovam bared his head [albeit for a moment] in the presence of King Solomon. This seems to support Gra's view forbidding bareheadedness before sages.

Malbim bases his conclusion on rulings of Rambam and *Shulchan Aruch*, which clearly assume that the bareheadedness was forbidden because Solomon was a sage. Rashi's wording in *Sanhedrin*, however, seems to indicate that the objection was because he was a king. According to him, then, bareheadedness might be permitted in the presence of sages who are not kings. See Malbim for a fuller discussion of this topic.

17. The Temple compound included an office called *Lishkat HaGazit*, part of which was sanctified and part of which was not. The Gemara states that the lottery took place in the sanctified area.

18. He notes that according to this, the wording of Rabbeinu Peretz's ruling [one should not *enter* the synagogue bareheaded] is somewhat inexact, since he may not even stand bareheaded after he enters.

According to him (and his interpretation of *Magen Avraham*), then, this Gemara is not a source for disallowing bareheadedness in a synagogue.<sup>19</sup>

### While wearing a *Tallit* (*Baal HaIttur*)

3) *Sefer HaIttur*<sup>20</sup> writes that when someone wraps himself in his *tallit*, he should cover his head with it so as not to remain bareheaded. *Darcei Moshe*<sup>21</sup> understands this to mean that a head covering is obligatory while wearing a *tallit* but only a *midat chassidut* at other times.<sup>22</sup>

Having surveyed the early rabbinic opinions about head covering during mundane activities and *devarim shebikedushah*, we will proceed to analyze the position of *Shulchan Aruch* and later *poskim*.

## III. *Shulchan Aruch's Position on Head Coverings*

R. Yosef Caro seems to rule inconsistently on two fundamental issues.

**A) When is head covering obligatory?** R. Yosef Caro states

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19. *Beit Meir*, *Orach Chaim* 2; see *Yabia Omer* 15:2 for a fuller discussion of this point.

20. *Laws of Tzitzit*, also cited in *Tur OC* 8.

21. *Orach Chaim* 8:3.

22. Though he does not comment on why this should be true. *Perishah* states that according to *Baal HaIttur*, the obligation derives from a requirement of head covering while reciting a *beracha* over the *tallit* and during *tefillah*. According to this, *Baal HaIttur* does not belong in this list, for he is simply concurring with *Or Zarua*'s position that head covering is needed during all *devarim shebikedushah* (see above). One can argue that this is not *Darcei Moshe*'s intent, however, because he writes that head covering would not be obligatory *b'lo tzitzit*, if he were not wearing *tzitzit*, and he makes no reference to the *beracha*. See further in the text under *Tallit as a Head Covering* for other interpretations of *Baal HaIttur*.

at least five times in *Orach Chaim* that head covering is required during various *devarim shebikedushah*,<sup>23</sup> which implies that it is not required during mundane activities. Moreover, he states explicitly in *Beit Yosef* 91 that head covering during mundane activities is only a *midat chassidut*. Yet, in some early chapters of *Orach Chaim* he states three times that head covering is obligatory even during mundane activities!<sup>24</sup>

Two possible explanations have been suggested:

a. Many maintain that there really is no inconsistency because according to R. Yosef Caro, head covering during mundane activities is sometimes obligatory and sometimes not. While walking four *amot*, it is obligatory; when walking less than that, it is a *midat chassidut*.<sup>25</sup> (Of course head covering is always obligatory during *devarim shebikedushah*, even when not walking at all.)

b. *Magen Avraham* and others maintain that R. Yosef Caro was initially uncertain about the obligation/*midat chassidut* question; that is why he stated different positions in different chapters. His final position, however, is that head covering is

23. See *Beit Yosef* 183 and *Shulchan Aruch* 91:3, 91:5, 151:6, 206:3.

24. *Shulchan Aruch* OC 2:6 (based on *Kiddushin* 31b):" It is forbidden to walk with an erect posture, and one should not walk four amot bareheaded"; *Beit Yosef* 8 s.v. *U'Michaseh . . .*" for how could the fellow have gone about his business without a head covering"; *Beit Yosef* 46 (s.v. *V'chi*):" And it seems to me that the reason for this *beracha* [i.e., *oter yisrael b'tifarrah*] is that it is forbidden to walk bareheaded, as implied in *Shabbat* 118b."

25. Second approach of *Magen Avraham* 282:8 as understood by *Levushai Serad* (cf. *Machatzit HaShekel*), *Pri Megadim*, *Eishel Avraham* 2:6 & 91:3, and *Biur Halacha* there.

*Taz* 2:5 equates riding an animal or riding in a wagon with walking, requiring head covering during rides as well. *Shaarei Teshuvah* (2:3) goes further, maintaining that one should cover his head even when standing or sitting. *Mishnah Berurah* (2:11) cites *Shelah*'s view that it is a *midat chassidut* to cover one's head even while sleeping.

always a *midat chassidut* during mundane activities, whether one is walking four *amot* or less. It is obligatory only during *devarim shebikedushah*.<sup>26</sup>

The latter approach seems somewhat problematic, however, for when discouraging bareheadedness, *Shulchan Aruch* (2:6) speaks of not walking four *amot* bareheaded. This indicates that he does differentiate between four *amot* walks and shorter ones! *Machatzit Hashekel* (2:6) suggests that the Gemara and *Shulchan Aruch* use “four *amot*” as a figure of speech, not literally, for they never meant to differentiate between short and long walks.<sup>27</sup> Rabbi Moshe Feinstein disagrees, maintaining that four *amot* is surely literal, so the *Shulchan Aruch* must be distinguishing between shorter and longer walks. He suggests, therefore, that the distinction reflects different expectations for different people. For ordinary people, only a walk of at least four *amot* warrants a head covering as a *midat chassidut*, and *Shulchan Aruch* in 2:6 is addressing ordinary people. For Torah scholars or the especially pious, however, head covering is a

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26. *Magen Avraham* 91:3, *Bircei Yosef* 2:2, *Rabbi Akiva Eiger* 91:4 and *Yechave Daat* vol 4 #1. *Yechave Daat* explains that according to this approach, R. Yosef Caro’s ruling that one should not walk four *amot* bareheaded (*Shulchan Aruch* 2:6) is meant as a recommended *midat chassidut* and not as an obligation. Furthermore, R. Yosef Caro retracted his assertions in *Beit Yosef* 8 & 46 that head covering is mandatory during mundane activities.

27. I.e., “four *amot*” is used idiomatically to mean “walking any distance.” *Bach* himself (OC 2 s.v. *V’Yichase*) concurs with this ruling, though he maintains that *Tur* limits the *midat chassidut* to walks of at least four *amot*; cf *Taz* 2:4, who holds that *Tur* applies the *midat chassidut* to any walk.]

But why would the Gemara use the expression “four *amot*” if it really refers to shorter walks as well? *Bach* suggests the following: Had the Gemara spoken simply of head covering “while walking,” we might have limited the ruling to outdoors, where bareheadedness shows a more callous attitude toward the Creator (see Maharshal # 72 quoted below under **Head Covering Where? Indoors vs. Outdoors**). The Gemara therefore prescribes head covering “when walking four *amot*,” as if to say: no matter how far or where you walk (i.e., even for a tiny stretch such as four *amot* or indoors), head covering is still appropriate.

*midat chassidut* when walking any distance at all.<sup>28</sup> When *Magen Avraham* writes that head covering is a *midat chassidut* even for walks of less than four *amot*, he is addressing them.

**B) During which *devarim shebikedushah* is head covering obligatory according to *Shulchan Aruch*?**

R. Yosef Caro's rulings on the issue seem contradictory. In 91:3, he cites the opinion requiring head covering whenever G-d's Name is mentioned. In a similar vein, he quotes Rabbeinu Yerucham's view requiring it while reciting a *beracha*.<sup>29</sup> But he also cites Rabbeinu Peretz's view requiring it only when entering a synagogue (*Shulchan Aruch* 151:6, latter part of 91:3) and Rambam's view (*ibid* 91:5) requiring it only during *tefillah*.

Addressing this issue, R. Ephraim Ardit (cited in *Yabia Omer* 15:3) suggests that there are different reasons for requiring head covering during various types of *devarim shebikedushah*. One is out of deference to G-d's Presence, and that is reason enough to require head covering whenever mentioning G-d's Name. But the verse *Prepare to meet your G-d, O Israel*<sup>30</sup> indicates a special requirement during *tefillah*, presumably more stringent than the ordinary requirement. Accordingly, although *Shulchan Aruch* requires head covering during any *davar shebikedushah* (even while reciting *berachot*), he also codifies Rambam's ruling about covering one's head specifically during *tefillah* -- to convey that head covering standards during *tefillah* are higher than

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28. *Iggerot Moshe Orach Chaim* Vol. 1 #1; see also *Gra* 8:5 who suggests such a distinction to answer a different contradiction. See also Rabbi Shlomo Kluger in *HaElef Lecha Shlomo* #3 (cited below **How Large Need the Head Covering Be?**), who suggests another possible distinction between four *amot* walks and shorter ones.

29. See *Beit Yosef* 183 and *Shulchan Aruch* 151:6

30. *Amos* 4:12; see above note 14.

during other *devarim shebikedushah*.<sup>31</sup>

### **Taz's Alternative Approach to Head Coverings**

Thus far we have assumed that the reason for head covering is G-d's presence, and our discussion has centered on whether the head covering is obligatory or a *midat chassidut*. *Taz* in 8:3, however, advances a completely different reason for head covering: the prohibition against following the established practices of non Jews (*b'chukoteihem lo teileichu*). And since non Jews generally remove their hats when coming in from the street, the above prohibition bids us to cover our heads instead of mimicking their practice – especially since head covering engenders a fear of Heaven and is thus a good idea anyway. Because of this, *Taz* requires a head covering at all times; *Mishnah Berurah* 2:11 seems to concur.<sup>32</sup>

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31. R. Ardit suggests, for example, that someone else's hand could not serve as a head covering during *tefillah* even if it would suffice during *berachot*.

Though R. Ardit's distinction seems logical, it is difficult for me to accept it as a valid interpretation of *Shulchan Aruch* given the order of halachot in *Orach Chaim* 91. In 91:2, he requires a belt during *tefillah* based on the verse in *Amos*. In 91:3, he requires head covering while mentioning G-d's Name that, according to R. Ardit, is out of deference to the *Shechinah*. He then codifies Rambam's ruling about head coverings during *tefillah*. If the last requirement were based on *Amos*, as R. Ardit maintains, he should either have stated so explicitly or juxtaposed the ruling to 91:2! We will soon see, however, how Rabbi Ardit's approach can shed light on *Chayei Adam*'s ruling about hats.

32. According to this, *Taz* should require head covering even while sitting, yet in 2:5, he requires it only while walking or riding (see note 25). R. Moshe Feinstein (*Iggerot Moshe* OC Vol. 1 # 1) suggests that *Taz* in 2:5 was delineating the head covering requirement as understood by *Shulchan Aruch*, i.e., for the reason of showing reverence for G-d's presence. However, *Taz* himself surely requires it while sitting as well.

*Maharitz Chiyut* to *Nedarim* 30b asserts that *Taz*'s explanation is refuted by the Gemara there, which states that men were colloquially called "dark-headed" because they cover their heads *sometimes*; see above. Now, if bareheadedness is actually a forbidden non-Jewish practice, why would men ever have gone with their heads uncovered? Perhaps *Taz* would respond

It must be noted that *Shulchan Aruch* and earlier authorities make no mention of *Taz*'s reason. Moreover, although *Mishnah Berurah* (2:11) cites *Taz*, Rabbi Feinstein and Rabbi Yosef reject his ruling for different reasons.

Rabbi Moshe Feinstein (*Iggerot Moshe* OC Vol. 4 #2) actually accepts the ruling in theory, but contends that it is inapplicable nowadays. For unlike the prevailing condition that *Taz* describes, non-Jews no longer wear hats outdoors and then remove them indoors as a social convention; neither do they consider bareheadedness particularly distinguished looking. In fact, hats have gone out of style for men (except for weather related reasons). Therefore, concludes Rabbi Feinstein, bareheadedness is no longer classified as an "established non-Jewish practice."<sup>33</sup>

Rabbi Ovadia Yosef (*Yechave Daat*, Vol. 4 *Yorah Deah* #1) goes further, and actually challenges *Taz*'s ruling from *Shulchan Aruch*'s interpretation of the prohibition against following non-Jewish practices. In *Yoreh Deah* 178, *Beit Yosef* and *Ramo* both cite *Maharik* (#88), who limits the prohibition to clothing that looks provocative, that fulfills some senseless social convention, or that is an idolatrous icon. Thus, if someone wears non-Jewish clothing for a good reason, such as to look distinguished or to appear in uniform, he has done nothing wrong. Likewise, argues Rabbi Yosef, if someone goes bareheaded because it is very hot

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that bareheadedness was not a non-Jewish rite in talmudic times, but has since become one. (See *Iggerot Moshe* in next paragraph, who clearly assumes that such social conventions change over time).

33. Thus, according to Rabbi Feinstein, head covering during mundane activities is only a *midat chassidut*, as explained above.

In a later responsum (*Iggerot Moshe* OC Vol. 4 #40:14), however, Rabbi Feinstein adds that praying bareheaded is an established non-Jewish rite even nowadays. He therefore concludes that head covering during *tefillah* is obligatory, and seriously considers the possibility that one would have to repeat his *tefillah* if he recited it with his head uncovered.

or even out of sheer laziness, he has not violated *b'chukoteihem* (see there for a list of *Acharonim* who support this view).<sup>34</sup>

However, Rabbi Yosef does write in *Yechave Daat* that a head covering is obligatory nowadays for a different reason. The yarmulka has come to symbolize Torah observance; observant Jews generally wear them and nonobservant ones do not. Hence, walking bareheaded raises the question of *marit ayin*; people will just assume that he is nonobservant. Therefore, Rabbi Yosef strongly suggests covering one's head as a matter of course, rather than treating it as just a *midat chassidut*.<sup>35</sup>

### Summary (Part One)

Reasons for head covering: The Talmud explicitly recommends covering one's head whenever walking four *amot* or more as a show of reverence for G-d's Omnipresence.<sup>36</sup> *Taz* advances an additional reason not mentioned in the Gemara: the prohibition against following non-Jewish rites.

Level of Obligation: According to *Taz*, head covering is always obligatory because of a prohibition against following non-Jewish rites. *Taz*, however, is a minority opinion.

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34. In *Yabia Omer* Vol. 6 (15:5) Rabbi Yosef grants that Gra (*Yoreh Deah* 178:7) rejects Maharik's view and considers *any* non-Jewish rite to be subject to *B'Chukoteihem*. Nevertheless, he rules in accordance with the many authorities who do accept Maharik's distinction.

Rabbi Yosef also notes that if *Taz* were correct about *B'chukoteihem*, a tiny yarmulka would surely suffice according to the letter of the law, since non-Jews do not wear yarmulkas of any size. It would seem that the same could be true if, as Rabbi Yosef writes in *Yechave Daat*, a yarmulka is needed only due to *marit ayin*. Rabbi Yosef does, however, state at the end of *Yabia Omer* 15:5 that most of the head needs to be covered when entering a synagogue.

35. See there, where he may be suggesting a stronger level of duty in Eretz Yisrael than in the Diaspora.

36. *Kiddushin* 31a, see also *Shabbat* 118b.

Those who reject *Taz* differentiate between mundane activities and *devarim shebikedushah*.

During mundane activities: Many *poskim* (including *Mishnah Berurah*) consider head covering obligatory when walking or riding four *amot*, and many others consider it a *midat chassidut* (including Rabbi Feinstein and Rabbi Yosef). When walking less than four *amot*, however, virtually no one considers head covering obligatory,<sup>37</sup> though many consider it *midat chassidut*.

During a *davar shebikedushah* (while not walking four *amot*): *Sofrim* (4:15) records a dispute as to whether head covering is obligatory or a *midat chassidut* – during a *davar shebikedushah*.<sup>38</sup> *Rishonim* and *poskim* take three positions:

- Some (including *Gra*) subscribe to the lenient view that head covering is *midat chassidut*.<sup>39</sup>
- Some consider it obligatory during certain *devarim shebikedushah* and not during others.<sup>40</sup>

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37. Except for Rabbeinu Yonah as interpreted by *Bach*; see *Bach OC* 2 s.v. *V'Yichase*.

There is some discussion as to the scope of the *midat chassidut* of head covering when walking less than four *amot*. *Machtzit HaShekel* maintains that the *midat chassidut* applies to anyone. According to Rabbi Moshe Feinstein, however, it applies only to Torah scholars or the especially pious; others need not even consider it a *midat chassidut* for such short walks.

*Shaarei Teshuvah* holds that head covering is also a *midat chassidut* when sitting; according to *Shelah* (cited in *Mishnah Berurah* 2:11), it applies even while sleeping.

38. Except while leading the services or during the Priestly Blessings, when head covering is required according to both opinions.

39. French Sages cited by *Or Zarua* ibid, *Maharshal* responsum #72, *Biur HaGra* OC 8:6. *Gra* does state, though, that it is proper for the pious to wear head covering all day and for everyone else to do so in the presence of sages, in a synagogue, or during *tefillah*.

40. According to Rambam, during *tefillah*, according to Rabbeinu Peretz, when entering the synagogue and possibly in the presence of great sages, according to *Sefer HaIttur* (*Darcei Moshe*'s interpretation), while wearing a

- Some consider it obligatory during all *devarim shebikedushah*.<sup>41</sup>

*Shulchan Aruch* codifies the last view, though he seems to hold that there is an added obligation during *tefillah*.<sup>42</sup>

## Part Two: Practical applications

Thus far, we have a) cited two possible reasons for head covering, b) discussed whether head covering is obligatory or *midat chassidut*, and c) noted the possibility of a special obligation during *tefillah*. Let us now discuss some halachic ramifications of the above.

### Reverence for G-d vs *B'Chukoteihem* Obligation vs *Midat Chassidut*<sup>43</sup>

#### 1. Head Covering on the Job

In *Iggerot Moshe* OC Vol 4, #2, Rabbi Feinstein was asked about a job applicant who was told to arrive at an interview bareheaded or face rejection. Rabbi Feinstein responds that if the reason for head covering is deference to G-d's Omnipresence (even if this is obligatory), still it is no more stringent than any other positive commandment. And since one need not spend more than 20% of his assets to perform a positive commandment,

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*tallit*.

41. *Or Zarua* (Vol 2 #43), Rabbeinu Yonah according to *Bach* (OC 2), Rabbeinu Yerucham (*Netiv* 16 cited in *Beit Yosef* OC 91), possibly *Terumat Hadeshen* #10 (see note 13).

42. Based on *Amos* 4:12: *Prepare to meet your G-d, O Israel*. As explained by Rabbi Ephraim Ardit; see note 31.

43. In other contexts, the difference would be obvious: performance of any "obligation" is required whereas performance of a *midat chassidut* is optional. Rabbi Moshe Feinstein writes (*Iggerot Moshe* OC Vol 4, #2), however, that since head covering has become a firmly established Jewish custom (*hinheegu zeh b'chol Yisrael*), everyone must observe it — even if the practice originated as a *midat chassidut*. What difference does it make, then, whether head covering is classified as obligatory or not?

he certainly need not forfeit a job, which would bring him substantial income.<sup>44</sup> But if bareheadedness violates the negative commandment of *b'chukoteihem*, as *Taz* maintains, he would need to pass the job up, since one is required to part with all his possessions to avoid violating a negative commandment. (As mentioned above, most authorities feel that *Taz*'s ruling does not apply nowadays.)

## 2. Toupees

Many authorities discuss whether toupees qualify as head coverings. *Be'er Heitev* (2:6) cites *Olat Tamid*, who disallows their use because of *marit ayin*, the fact that his head *looks* uncovered. *Pri Megadim* (*Eishel Avraham* 91:4) codifies *Olat Tamid* and applies the prohibition even to toupees with a cloth backing that fully covers the head, because he still *looks* bareheaded. *Malbim* in *Artzot Hachaim* (*HaMeir La'aretz* 2:54) disagrees, however, on the grounds that head covering is only *midat chassidut*, and *marit ayin* restrictions do not apply to a *midat chassidut*. After citing both views in his gloss to *Shulchan Aruch* (91:4), Rabbi Akiva Eiger takes a middle course. He suggests that toupees be allowed for walking four *amot*, when head covering is a *midat chassidut*, but not while mentioning G-d's Name, when he considers head covering obligatory. According to this, the authorities who disagree over whether head covering is obligatory or *midat chassidut* would also disagree over the permissibility of toupees. This explains why *Mishnah Berurah* (2:12), who considers head covering obligatory (at least when walking four *amot*), forbids toupees (*yeish le'esor*).<sup>45</sup>

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44. In Rabbi Feinstein's case, the questioner needed to remove his hat for the interview but was assured that once hired, he would be allowed to cover his head. Nevertheless, it seems that his logic is equally applicable to someone who would be required to consistently work bareheaded. Similarly, *Aruch Hashulchan* 2:10 permits walking bareheaded in secular courts if the law of the land demands it.

45. He does, however, cite *Malbim* as a dissenting opinion (*v'yeish meikilin*).

### 3. *Hands as Head Coverings*

A number of authorities discuss whether one's own hand is considered a valid head covering. *Terumat Hadeshen* (#10) cites *Or Zarua* (Vol. I #128) as an early source for stringency. After noting the prohibition against reciting a *beracha* while "one's heart sees his *ervah*,"<sup>46</sup> *Or Zarua* notes that Rabbeinu Tam – before drinking in a bath – would cover his chest with clothing and then recite the *beracha*. But why didn't he simply cover his chest with his own hand? Apparently, infers *Or Zarua*, one's own hand must not halachically "count" as a body covering or, by extension, as a head covering.

[*Terumat Hadeshen* challenges *Or Zarua*'s ruling from *Shabbat* 120b. The Gemara there states that if someone wants to immerse in a *mikvah* and G-d's Name is written on his body, he should cover the Name with rubber to avoid exposing it while unclothed. He may not simply cover it with his hand, continues the Gemara, lest he forgetfully move his hand during the immersion and thereby expose the Name. This proves, reasons *Terumat HaDeshen*, that while the hand is covering the Name, it is a valid covering!]

Responding to his own question, *Terumat HaDeshen* notes that the hand in the Gemara's case is covering the ink that spells G-d's Name, whereas *Or Zarua* is discussing the issue of covering a body part. And although a hand qualifies to cover ink (if not for the concern that it might move), still it might well be unfit to cover another part of the same body, as *Or Zarua* maintains.]

Maharshal, however, challenges *Or Zarua*'s basic

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46. I.e. the chest area must be separated from the *ervah* through a covering and/or a belt -like separation. See *Berachot* 24b and *Orach Chaim* chap. 74 for a full discussion of these laws.

assumption,<sup>47</sup> but in practice, permits covering one's head with his own hand only infrequently and when donning a yarmulka is inconvenient, e.g., if someone wakes up at night for a drink and needs to recite a *beracha*, or if someone is in the bath house.

*Shulchan Aruch* (91:4), *Ramo* (74:2), and *Magen Avraham* (91:4) all codify *Or Zarua*'s ruling disqualifying one's own hand as a head covering (although *Shulchan Aruch* does allow using it to cover someone else's head). On the other hand, *Taz* (8:3 and 74:2) endorses Maharshal's acceptance of hands as a head covering during mundane activities.<sup>48</sup>

*Mishnah Berurah* (2:12) concludes that it is best never to use one's own hand as a head covering. Instead, one should pull his sleeve down and simply use that to cover his head.

### **Head Covering During *Tefillah***

#### *1. Hats vs Yarmulkas*

*Chaye Adam* writes (22:8) that during *tefillah*, "One should wear a hat, as he does when walking in the street, and not merely the small cap he usually wears under his hat." Clearly, *Chaye Adam* requires a larger head covering during *tefillah* than at other times. Why? One possibility is that he requires a hat whenever head covering is obligatory but not when it is a *midat chassidut*. Thus, if *Chaye Adam* considers head covering obligatory during *devarim shebikedushah* (e.g., *tefillah*) and a *midat chassidut* while walking, he would understandably require a

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47. That an invalid chest covering is likewise unfit as a head covering.

48. In a similar vein, *Pri Megadim* (*Eishel Avraham* 2:6) accepts one's hand as a head covering during a mundane activity (even if head covering is obligatory for such activities) but not upon entering a synagogue [and the like], when the obligation is more stringent. *Eliyahu Rabbah* (91:5) endorses *Taz*'s ruling and, in cases of pressing need, even permits using one's hand during a *davar shebikedushah*. [*Taz* bases his leniency on his opinion that head covering is needed only to comply with *b'chukoteihem*. As noted in the summary

hat for the former and only a small cap for the latter.

There is, however, a second possible interpretation based on the approach of Rabbi Ardit cited above, i.e., that head covering during *tefillah* is more stringent than at other times based on the verse in *Amos*. According to that, even if *Chayei Adam* considers head covering obligatory both during *devarim shebikedushah* and while walking, he would still require a better head covering during *tefillah*.

I believe that the text of *Chayei Adam* supports the second interpretation. For earlier in the same halacha, *Chayei Adam* writes that one may not wear shorts or pajamas during *tefillah* based on the verse in *Amos*. He then continues that one should wear a hat during *tefillah*. This, I believe, implies that the source for wearing a hat stems from the same verse in *Amos*.<sup>49</sup>

*Mishnah Berurah* 91:12 quotes *Chayei Adam* and adds: “ . . . for it is not usual (*ragil*) to stand before important people [without a hat].” *Tzitz Eliezer* (Vol. 13 #13) senses a difference between *Chayei Adam*’s head covering standard taken on its own and the way *Mishnah Berurah* renders it. According to *Chayei Adam*, wearing any head covering generally worn in public (such as yarmulkas, if people wear them in public) is perfectly permissible during *tefillah*. According to *Mishnah Berurah*, however, hats would be needed during *tefillah* if that is what people wear in the presence of important persons -- even if they do wear yarmulkas in public.

## 2. *Tallit as a Head Covering*

It is customary in many communities for men to pray with their *tallitot* over their heads. What is the source for the practice?

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to part one, however, this is a minority opinion.]

49. This also explains why *Chayei Adam* requires a hat only during *tefillah* and not during other *devarim shebikedushah*. According to the first interpretation, on the other hand, a hat should be needed during any *davar*

*Tur* quotes *Sefer HaIttur*'s ruling that when performing *atifah* (wrapping the *tallit* around one's body while the *beracha* is recited), one should also extend the *tallit* over his head so as not to remain bareheaded. *Beit Yosef* cites a talmudic source in *Kiddushin* 29b:

[While speaking] to Rav Huna, Rav Chisda praised Rav Hamnuna, [describing] him as a great man. [Rav Hunal] replied to [Rav Chisda]: When he comes to [visit] you, bring him to [meet] me. When he (Rav Hamnuna) came to [meet Rav Hunal], [Rav Hunal] noticed that he (Rav Hamnuna) was not wearing a cloth [i.e., a cloth covering that married men generally wore on their heads -- Rashi]. [Rav Hunal] said to him: Why are you not wearing a cloth [covering on your head]? [Rav Hamnuna] replied to him: [It is] because I am not married ...

Now, Rav Hamnuna was obviously wearing some head covering, reasons *Beit Yosef*, since even unmarried men would not walk bareheaded. Apparently then, the pious (*tzenuim*) would wear an additional cloth over their ordinary head coverings as an extra show of humility to help engender fear of Heaven. A *tallit*, suggests *Beit Yosef*, serves this purpose, and that is why one should cover his head with his *tallit*. *Bach* adds that one should keep his *tallit* over his head as long as he is wearing it. *Mishnah Berurah* (8:4) cites these rulings.<sup>50</sup>

*Magen Avraham* 8:3 states that one should be both married and a Torah scholar before covering his head with a *tallit* because 1) the above passage in *Kiddushin* is discussing a married man and 2) a passage in *Kiddushin* 8a states that Rav Kahana (a married Torah scholar) might cover his head with cloth (such as, presumably, a *tallit*) but others would not.<sup>51</sup> *Be'er Heitev*

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50. He limits the *Bach*'s ruling to only when the man is *davening*, which is difficult to explain.

51. Said Rav Ashi: "We never said [that a cloth is worth five *selaim*] except to someone like Rav Kahana, who is a great man and [thus] needs the cloth

(17:4) argues that the second point is irrelevant, however, because *Kiddushin* 8a could be discussing some rabbinic cloth used as an auxiliary head covering. It might well be, though, that even married laymen should wear a *tallit* over their heads.

*Mishnah Berurah* concurs with *Be'er Heitev*, for in 8:4 he rules that unmarried men should not wear a *tallit* over their heads and married men should, without differentiating between Torah scholars and laymen. *Kaf Hachaim* goes even further, maintaining that anyone who is either married (even if he is a layman) or a Torah scholar (even if he is unmarried) should wear his *tallit* over his head.<sup>52</sup>

Citing *Devar Shmuel* #123, *Shaarei Teshuvah* (8:3) notes that there are different customs regarding wearing a *tallit* over one's head. But, he adds, if a community's prevalent custom is not to cover the head with the *tallit* during *tefillah* and the majority object to those who do, the custom of the majority must be followed.

### Summary (Part Two)

A number of halachic issues hinge on what the purpose of head covering is, whether it is obligatory or a *midat chassidut*, and whether it is being worn during *tefillah*. Some examples follow:

Need one cover his head if this will cost him his job? If the purpose of head covering is compliance with *b'chukoteihem*, then yes; if the purpose is simply a show of reverence for G-d (as many authorities maintain), then no.

Can one's own hand count as head covering? If head covering

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to [cover] his head, but not to anyone else."

52. *Kaf Hachaim* 8:12 cites Kabbalistic sources as proof for both points and *Be'er Heitev* to defend his second point.

is due to *b'chukoteihem* alone, then yes; if it is a show of reverence, then the hand counts only if covering is a *midat chassidut* and not if it is obligatory.<sup>53</sup>

Do toupees count as head covering? If head covering is obligatory, then no; if it a *midat chassidut*, then yes.<sup>54</sup>

Is the law any different during *tefillah*? *Chayei Adam* and *Mishnah Berurah* require a hat during *tefillah* even though a yarmulka suffices at other times.<sup>55</sup> A yarmulka covered with one's *tallit* also suffices during *tefillah* (in communities where prevalent custom is to cover the head with a *tallit*).<sup>56</sup> However, *Mishnah Berurah* requires that a man be married before wearing a *tallit* over his head, whereas *Kaf Hachaim* endorses it also for unmarried Torah scholars.

### Part Three: Other Issues

#### 1. Head Coverings for Whom?

##### Rabbis vs. Laymen

There is some discussion about whether a Torah scholar's obligation to cover his head differs from that of an ordinary person. Rambam (*Deiot* 5:6) writes that Torah scholars conduct

53. *Iggerot Moshe* OC Vol 4, #2. *Taz* permits using one's hand because he holds that head covering is due to *b'chukoteihem* alone, but most later *poskim* assert that it is also a show of reverence for G-d's Presence and one's own hand is thus unacceptable. See also next note.

54. See *Mishnah Berurah* 2:11-12 and *Biur Halacha* 91:3 s.v. *V'Yeish Omrim*. Rabbi Akiva Eiger to 91:4 therefore permits toupees when walking but not while mentioning G-d's Name. *Pri Megadim* (*Eishel Avraham* 2:6) makes a similar distinction regarding using one's hand as a head covering.

55. *Tzitz Eliezer* infers that Rabbi Feinstein also requires that all or at least most of the head be covered during *tefillah*; see below note 65. *Yabia Omer* OC Vol. 6 15:5 also requires that most of one's head be covered when entering a synagogue.

56. *Shaarei Teshuvah* 8:3.

themselves with great modesty “*[in that] . . . they do not uncover their heads.*” This seems to imply, deduces Malbim in *Eretz Yehudah* (8:4), that head covering applies exclusively to Torah scholars.<sup>57</sup> In fact, Rabbi Shlomo Kluger (*HaElef Lecha Shlomo* OC #3) was asked this very question: Is the idea of covering one’s head out of respect to the Divine Presence limited to Torah scholars, since the Divine Presence hovers over *their* heads, or not?<sup>58</sup> Rabbi Shlomo Kluger dismisses such a possibility: If the need for head covering were limited to Torah scholars, then wearing one would constitute arrogance, which drives the Divine Presence away. This would create a catch-22 situation: A head covering is needed in the presence of the Divine, but covering one’s head drives the Divine Presence away! Clearly, then, the head covering laws must not differentiate between Torah scholars and laymen. Malbim likewise concludes from the context of Rambam’s ruling that he treats Torah scholars and laymen the same regarding the need for head covering. *Lechem Mishneh* 4:4 suggests that perhaps Rambam applies the laws of head covering to everyone, but maintains that Torah scholars need to be especially meticulous in their observance.

Gra, however, does differentiate between the especially pious and ordinary people (even though he considers any head covering to be only *midat chassidut*, as noted above).<sup>59</sup> The former, he says, really ought (*nachon hadavar mitzad hamussar*) to cover their heads all day whereas the latter have this level of moral obligation only during *tefillah* or in the presence of great people. As noted above, Rabbi Feinstein also distinguishes along these lines albeit somewhat differently. According to him, it is a

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57. I.e., except during *tefillah*, when Rambam agrees that everyone requires head covering, as noted above (see *Hil. Tefillah* 5:5).

58. See *Kiddushin* 31a quoted above.

59. OC 8:6; see note 39.

*midat chassidut* for the pious to cover their heads during walks of any length while for ordinary people, the *midat chassidut* applies only for walks of at least four *amot*.

### Men vs. Women

Chatam Sofer (*Chiddushim* to *Nedarim* 30b) notes the prevalent custom of girls and unmarried women walking and even reciting G-d's Name without a head covering. *Or Zarua* Vol. 2 #43 cites *Vayikra Rabbah* 19:4 as an early source for the custom. After interpreting *Kohelet* 10:18 to be advocating a head covering, the Midrash cites an alternative explanation: "R. Abahu interpreted the verse [to be] concerning women . . ." and then expounds the verse to be decrying the immodest women's attire of those times. This implies, reasons *Or Zarua*, that when the previous interpretation calls for head covering, it was not addressing women.

Now why, asks Chatam Sofer, should women be exempt from covering their heads? If men need head coverings out of deference to G-d's presence — though a man's bareheadedness is not inherently immodest — then women certainly should since a woman's bareheadedness is considered immodest at times.<sup>60</sup> In response, Chatam Sofer suggests that the halachic imperative for head covering is not due to G-d's presence but rather due to the prohibition against following established practices of non-Jews, as *Taz* (8:3) maintains. Now, although non-Jewish men walk bareheaded, non-Jewish women often do not, because they consider hats stylish. Thus, concludes Chatam Sofer, there is no halachic reason for unmarried Jewish women to cover their heads.

But what if the reason for head covering is not *b'chukoteihem*

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60. I.e., for a married woman who, according to Jewish law, may not go out with her hair uncovered.

but rather deference to G-d's Presence, as many authorities maintain? According to them, why do the classical sources make no mention of head covering for unmarried women? The answer, writes Rabbi Yosef,<sup>61</sup> is that a man's bareheadedness is considered irreverent in G-d's Presence only because men deem it basic courtesy (*derekh eretz*) to cover their heads in the presence of great people. But unmarried women are not expected to cover their hair for anyone, so there is no reason for them to do so in G-d's Presence either.

## 2. Head Covering Where? Indoors vs. Outdoors

There is also some question as to whether walking indoors is any different from walking outdoors. Maharshal (#72) quotes an unnamed source that head covering (and likewise avoiding erect posture) applies only outdoors, where bareheadedness truly shows indifference to the Creator. And, he continues, though *Terumat HaDeshen* (#10) does equate indoors with outdoors, he does so with reference to reciting G-d's Name, when bareheadedness is indeed irreverent anywhere. During mundane activities, however, *Terumat HaDeshen* might well limit the need for head covering to outdoors.

Later poskim, however, adopt a more stringent position. *Pri Megadim* (*Eishel Avraham* 2:6) writes that walking bareheaded is just as forbidden indoors as outdoors, though he does permit sitting barehead indoors. On the other hand, *Be'er Heitev* (2:6) does state that *Olat Tamid* permits walking bareheaded indoors in times of need based on Maharshal's ruling. But *Shaarei Teshuva* questions the accuracy of *Be'er Heitev*'s presentation of Maharshal and therefore eschews walking bareheaded indoors with one exception. He concedes that in a bath house, head

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61. *Yabia Omer* Vol. 6 15:11; he also writes that he consulted with Rabbi Shlomo Eliashiv, who agreed with this conclusion.

covering is not even a *midat chassidut* (although he personally always covered his head there with a towel). *Shaar HaTziyun* 2:17 seems to concur with *Shaarei Teshuva*'s position.

### 3. How Large Need the Head Covering Be?

Earlier we discussed the minimum size of a head covering used during *tefillah*, but we have not yet considered the minimum size for walking four *amot* during mundane activities. There is some discussion about this point, since the passages of Gemara advocating (or perhaps mandating) head coverings never explicitly stipulate a minimum size. Rabbi Shlomo Kluger<sup>62</sup> seems to opine that the Gemara cannot be decrying complete bareheadedness, because the need for some head covering when walking any distance is so obvious that it goes without saying! Thus, when the Gemara in *Kiddushin*, for example, advocates head covering when walking four *amot*, it is advocating covering one's entire head when walking four *amot* and allowing a partial covering when walking less than that.<sup>63</sup> But walking completely bareheaded, in Rabbi Kluger's opinion, is never permitted under any circumstances.

*Yaskil Avdi*<sup>64</sup> also seems to require that one's head be fully covered even during mundane activities. When asked whether a small yarmulka (*ktantan*) covering the middle of the head suffices, he responded negatively based on two sources. First, *Kiddushin* 31a gives the *Shechinah*'s Presence over a person's head as the reason for covering the latter. Since the *Shechinah* undoubtedly hovers over the entire head, *Yaskil Avdi* writes, the entire head needs covering. Second, when advocating head

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62. *HaElef Lecha Shlomo* #3.

63. Rabbi Kluger adds that the four *amot* must be outdoors in order to warrant a full head covering, though he does not provide a source for the outdoor specification.

64. Vol 6, Addendum #1 to *Orach Chaim* (at end of the volume).

covering in deference to the *Shechinah*, the *Zohar* adds: . . . for if it [the *Shechinah*] would depart from a person's head, he would immediately die.<sup>65</sup> Since head covering is thus a matter of life or death, we must be stringent and cover the entire head. Moreover, he adds, since small yarmulkas are not generally worn in the presence of great people, it is an affront to the *Shechinah* to wear one anywhere — all the more so to wear it while *davening* in a synagogue, the *Shechinah*'s dwelling place.

Rabbi Moshe Feinstein strongly disagrees, asserting that the Gemara's wording in *Kiddushin* provides no basis at all for Rabbi Kluger's position (that the Gemara's discussion is limited to covering the *entire* head). Moreover, continues Rabbi Feinstein, many authorities discuss whether one's hand qualifies as a head covering (see above) — even though a hand cannot possibly cover the entire head! He therefore rejects Rabbi Kluger as a minority opinion, maintaining instead that the letter of the law permits walking more than four *amot* or reciting blessings with even a partial head covering.<sup>66</sup> In addition, writes Rabbi Feinstein, even if one's "entire" head does need covering, as Rabbi Kluger maintains, still covering most of the head would undoubtedly suffice based on the halachic principle that *most of something is tantamount to its entirety (rubo k'kulo)*. Hence, Rabbi Feinstein concludes, even if one wants to follow Rabbi Kluger's stringent opinion, it suffices to cover most of the head.<sup>67</sup>

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65. *Ryah Hennia* in *Parashat Naso*.

66. *Tzitz Eliezer* observes that Rabbi Feinstein never specifies how small the head covering may be. ("Is a button-sized yarmulka also acceptable?" he asks rhetorically.) He also infers that since Rabbi Feinstein mentioned walking four *amot* and reciting *berachot*, he would presumably agree that during *tefillah*, a hat covering all or at least most of the head would be needed.

67. I am not sure if *Yaskil Avdi* would agree with this point. Presumably it would depend on whether we rely on *rubo k'kulo* in questions of life and death, a point beyond the scope of this article. See note 34 for Rabbi Yosef's view on this matter.

#### 4. Does the Fabric Make a Difference?

##### Straw Hats and Knitted Yarmulkas in Halachic Literature

*Terumat Hadeshen* dismisses the folk wisdom of his day that disqualified straw hats as head coverings. In responsum #10, he cites a precedent for leniency from *Ketubot* 72b, which accepts baskets as hair coverings for married women.<sup>68</sup> And if a basket, whose weave is loose and leaves a number of holes, is acceptable for a married woman, then a tightly woven straw hat is surely acceptable as a man's head covering. Gra to *Shulchan Aruch* 91:4 cites additional support for using straw as a covering from *Tosefta Berachot* 2:14: If someone was standing unclothed in the field . . . [and it was time to recite the *Shema*], he should cover himself with hay, straw or anything and recite it . . . *Shulchan Aruch* thus accepts woven and knitted head coverings and cites no dissenting opinions.

##### Summary (Part 3)

There is a consensus about the following guidelines:

- 1) The laws of head covering apply to all men, laymen or scholars alike,<sup>69</sup> but not to unmarried women.
- 2) Head coverings may be made from any material, including knitted material.

There is discussion, however, about the minimum size of a head covering during mundane activities or while reciting *berachot*: Rabbi Feinstein permits a partial head covering,

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68. See there for clarification of when baskets are acceptable for women under biblical law only and when they are acceptable even rabbinically.

69. That is, when head covering is obligatory, the obligation devolves upon scholars and laymen alike. However, scholars may have a responsibility 1) to be more meticulous about fulfilling the obligation or 2) to cover their heads even when it is only a *midat chassidut* to do so.

whereas *Yaskil Avdi* requires a full head covering based on Kabbalistic and other sources.

### **Endnote**

*Aruch HaShulchan* closes his laws of head covering (*Orach Chaim* 2:10) with a practical observation. Experience shows that covering one's head does engender fear of Heaven while the evil inclination inevitably gets the better of someone whose head is uncovered. For this reason, concludes *Aruch HaShulchan*, one should always cover his head, so the question of whether halacha demands head covering is only of theoretical interest.

# **Sale Or Donation Of Human Organs**

*Rabbi Alfred Cohen*

In the past few decades, medical procedures which were once considered fantasy have entered the world of the commonplace. We scarcely marvel anymore that livers, corneas, even lungs and hearts can be transplanted from one person to another, let alone that blood, semen, and eggs are routinely transferred. With new realities, however, come new ethical and religious questions which need to be addressed. The new reality is that there are now thousands upon thousands of desperately ill persons waiting for organs vital to their survival to become available for transplantation; the reality is that every day, 15 people die while waiting for these scarce organs.<sup>1</sup> Predictably, a new situation has developed, with sick people or their families offering huge sums of money to prospective donors for their body parts.

In this study, we will consider the religious questions which may attach to the phenomenon of selling human organs – usually for transplantation but possibly also for research. Does halacha (Jewish law) countenance it? Even though transplantation of human organs is obviously a modern development, it is fascinating to observe that the ancient Jewish law remains our constant and unfailing resource for finding solutions and guidelines for even the most arcane contemporary situations.

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1. Ronald Bailey, "The Case for Selling Human Organs", *Reason Magazine*, April 18, 2001, at <http://reason.com/rb/rb041801.shtml>.

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The question is multi-faceted: first of all, is a Jew even permitted to have organs removed without reference to his own health? Secondly – and this is the major question we want to address herein – even if our research concludes that organ donation is permissible, we need to confront a more basic issue, one which resonates in many other aspects of Jewish practice. Namely, if a person gets financial remuneration for performing a mitzvah act – is it still a mitzvah? We will need to analyze the essence of a mitzvah, which means “commandment”: The customary paradigm is that when a person fulfills the command of G-d, he is performing an act of service and devotion to his Creator, which elicits divine favor. Doing this same act “*shelo lishmah*”, not for the “sake of Heaven” but for pecuniary remuneration, may rob it of its value and transform it from a positive action into a crass commercial undertaking antithetical to all religious values, possibly rendering it *assur*, forbidden.

Although sale of human organs is illegal in this country, a lively black market flourishes nevertheless, and those with the wherewithal and the connections can often obtain these organs relatively quickly, rather than languishing for years on a waiting list.<sup>2</sup> This has given rise to a debate among ethicists, lawyers, doctors, even economists, about legalizing and regulating the sale of human organs.<sup>3</sup> Few doubt that ultimately this practice

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2. Even a cursory search reveals that this black market exists and is accessed by many persons in need. See, for example, “Organ Shortage Fuels Illicit Trade in Human Parts”, at NationalGeographic.com/news, January 16, 2004; “Dozens Killed for Body Parts,” originally published in *The Sunday Times*, July 29, 2001, appearing at [www.vachs.com](http://www.vachs.com); “Brazil: Poor Sell Organs to Trans-Atlantic Trafficking Ring,” at [www.ipsnews.net](http://www.ipsnews.net), 8/11/05. In November 2005, the New York Times featured an article by a doctor relating how she had purchased (through the Internet[!!]) an organ to save her own failing health.

3. Henry Hansmann, “The Economics and Ethics of Markets for Human Organs”, in *Organ Transplantation Policy: Issues and Prospects*, Duke

will be sanctioned in one form or another in many areas of the modern world. It is quite appropriate, therefore, to consider the questions from the vantage of Jewish law, particularly as Jews are in no way immune from the ravages of disease and will undoubtedly need to address these issues not only from a theoretical position but equally from an intensely personal need.

A number of preliminary issues need elucidation before we can properly examine the question whether selling one's organs removes the donation from the category of "mitzvah": these factors include the following, not necessarily in the order they will be considered: When is it permitted to "damage oneself" (*chovel be'atzmo*)? What about the issue of a donor putting himself into a precarious situation by agreeing to donate an organ (*safek saknat nefashot*)? Removal of an internal organ such as a kidney is certainly major surgery, and general anesthesia also carries risks. Is an individual permitted to endanger himself in order to save another person's life? May one be obligated to do so? Is there a prohibition against stealing an organ, or other chicanery, in order to save someone's life? Our inquiry will also direct us to a number of Jewish ethical and religious values ancillary to the specific question of selling or even donating human organs. Only from the vantage of a thorough grounding in Jewish thought can we approach the inherent question if a person merits a mitzvah if he gets paid for his actions.

### **The mitzvah to save a life: parameters and limitations**

The primary mitzvah to save someone's life or preserve their health, if possible, is derived from the biblical mandate to return a lost object (*Devarim 22:2 – veahashevoto lo*), which would include also restoring a fellow Jew's lost health. Another

source for this mitzvah is “*lo ta’amod al dam re’acha* (*Vayikra* 19:16), “do not stand [idly] by your fellow’s life” [literally, “his blood”]. This directive mandates taking an active role to save another person.

Although these biblical commandments are readily understandable, they are not absolutes and may not apply automatically when the saving of life might harm the one doing the mitzvah of saving; other Torah principles may also apply. *Sefer Chassidim*, for example, cautions that although it is a great mitzvah to save someone from drowning, if the rescuer would himself be in danger of drowning as well, it is better not to attempt the rescue.<sup>4</sup> How much risk is acceptable in order to save someone’s life? Is it permitted for a person to place his own health in question, possibly even precipitate his own death in order to maximize another’s chances for survival? This question has been addressed since ancient times and up to the present, without definitive resolution.

The *Yerushalmi, Terumot* (at end of chapter 8), rules that even if there is possible danger involved, a person must undertake to save the life of a fellow Jew who is certainly in danger of losing his life. אֵם צָרֵךְ אָדָם לְהַכְנִיס עַצְמוֹ לְסֶפֶק סְכָנָה כִּי לְהַצִּיל חָבְרוֹ (מוֹזָדָאִי סְכָנָה). However, the author of *Beit Yosef* does not mention such a rule, for he notes that the Rif, Rambam, and Rosh all fail to include it. He concludes that apparently they were of the opinion that the Babylonian Talmud did not agree with this rule. Consequently, the position of *Beit Yosef*, who is universally accepted as a major *posek*, appears to be that a Jew is not obligated to endanger himself even to save someone’s

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4. *Sefer Chassidim*, No. 674; whether this principle would extend to a case of saving not only one individual but a larger group, is discussed in a number of places: See *Mishnah Makkot* 12b; *Klei Chemdah*, *parshat Pinchas* (at beginning); *Leor Hahalacha* p. 15; *Mishpat Kohen* 143; “*Hatzalat Nefashot*”, *Encyclopedia Talmudit*, footnote #73.

life.<sup>5</sup>

*Beit Yosef's* ruling is not challenged, but its application is fleshed out in a variety of ways by later *poskim*. Rav Waldenberg addresses the question whether there is an obligation or even a mitzvah for a person to donate an organ, such as a kidney, to another individual who will die if he does not get a transplant.<sup>6</sup> In the course of his detailed analysis,<sup>7</sup> Rav Waldenberg examines the position of Radvaz, who discusses specifically whether a person must sacrifice a limb in order to save a person who will otherwise definitely die,<sup>8</sup> summing up the Radvaz's conclusions:

- 1) There is no obligation to endanger one's life in order to save another; someone who does so is deemed *chassid shoteh* "a pious fool" (with exceptions that will be noted hereinafter).
- 2) If a person wants to donate an organ to someone else, when that donation will not endanger his own life, he is acting with piety ("midat chassidut"). He distinguishes between an internal organ, which for him represents a dangerous donation [i.e., a kidney], and other body parts, such as blood or skin. Since no significant danger arises in the latter situation, he considers it a highly laudable gift.

What we may glean from this rabbinic discussion indicates that one need not place oneself in danger in order to save

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5. For further on this topic, see *S'ma*, and *Beit Yosef, Choshen Mishpat* 426; *Pitchei Teshuva*, *ibid*, #2; *Shu"t Radvaz*, 1052 and 10582. *Tzitz Eliezer* VIII 15, 10, 13 and XIII 101; *Iggerot Moshe, Yoreh Deah* 2, 174:4; Rav Ovadia Yosef, *Sefer Dinei Yisrael*, vol. 7, p. 25. *Mishnah Berurah* 329:19.

6. *Tzitz Eliezer* IX:45. Although it is possible for a person without functioning kidneys to undergo dialysis at regular intervals, life expectancy is certainly diminished under such circumstances, not to speak of quality of life.

7. Some sources he refers to include: *Beit Yosef*, 426; *Shulchan Aruch, Choshen Mishpat*, 426; *Aruch Hashulchan*, 426. *Pitchei Teshuva*, *ibid*, note 2, also mentions further references from the Babylonian Talmud.

8. *Shu"t Radvaz* 626.

another person; on the other hand, one should weigh realistically how probable that danger might be to the rescuer. In the case of organ transplant, if no significant danger exists, it is considered by many to be a highly meritorious act.<sup>9</sup>

When it comes to donation of body parts, rabbinic literature differentiates between various scenarios. Obviously, not all body part donations are equal – blood or semen are not comparable to a kidney or liver lobe. Already in the Gemara<sup>10</sup> the rabbis concluded that there is no problem with a person's cutting off hair and selling it to someone else.<sup>11</sup> Depending on a number of factors, the major obstacle to donating body parts is, for many leading modern *poskim*, the *issur* of causing pain or wounding oneself. The pain involved in giving blood or bone marrow is relatively mild and, since the body will soon generate

9. Based on *Pitchei Teshuva* and *Aruch Hashulchan* to *Choshen Mishpat* 426. *Shemirat Shabbat Kehilchata* has an interesting comment: Assume a scenario where a person has cooked food for himself for Shabbat. His neighbor becomes deathly ill and needs food, but doesn't have any. If the first person doesn't give him his own already-cooked food, the sick person will have to cook on Shabbat to save his health. *Shemirat Shabbat Kehilchata*, chapter 32, No. 166, rules that the first person is not obligated to give or share his food with the other. See also *Ahavat Chesed* (by the Chafetz Chaim) II, chapter 20, who writes that since it is a negative commandment not to allow someone to die, a person must spend all his money to prevent it. However, the Chatam Sofer, *Orach Chaim* 526, has written that saving a life is a negative commandment which requires no action; in such a circumstance, a person need spend only up to 20% of his assets to perform it. As far as the Chatam Sofer is concerned, the determining criterion is whether the mitzvah requires an action or not, not whether it is a positive or negative commandment. What is interesting is that R. Shlomo Zalman Auerbach wonders whether each individual is obligated to spend up to 20%, or, if others are also obligated but do not contribute, how does that affect his obligation? *Minchat Shlomo* II, 86 #4.

10. *Nedarim* 65b, *Yerushalmi Shabbat* 11.

11. R. Moshe Feinstein even rules that it is permissible to sell one's blood (*Iggerot Moshe, Choshen Mishpat* I, 103). This speaks directly to the issue of whether payment obviates the mitzvah status of an action, and we will return to it. It is also obvious that it is hardly legitimate to apply the permit to sell hair or blood to the case of a kidney. We will return to this question as well.

replacements, these procedures hardly present a halachic issues.<sup>12</sup> Skin grafts, on the other hand, may be more problematic. To donate a kidney requires major surgery, involving considerable pain and danger, not only in the procedure but also leaving the donor in more precarious health.

Modern medical techniques have evoked responses from *poskim* which run the gamut from laudable, to acceptable, to forbidden. Before considering their positions, we need to examine more closely additional religious factors which inform their conclusions.

### **The prohibition to injure oneself (*chovel be'atzmo*)**

The Gemara in *Bava Kamma* 91b notes that it is forbidden for a person to intentionally cause physical damage to his own body.<sup>13</sup> In their commentary, the *Tosafot* conclude that it is *assur* to inflict a wound in one's body (*chovel be'atzmo*) even if he benefits from it. Following the principle laid down by the

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12. Rav Moshe Feinstein was asked (*Iggerot Moshe, Choshen Mishpat* I 103) whether one could sell his blood to a blood bank (as distinct from donating it for a specific person in need, which is permissible). He permits it – if it is acceptable to give it away for nothing, there is no problem with getting money for it. He addresses the talmudic text (*Bava Kamma* 91b) which precludes a person's causing himself physical injury; although *Tosafot* rule that wounding oneself is *assur* even if the person receives benefit for doing so, which would make it seem *assur* to give blood unless to save a life, Rav Moshe issues a lenient ruling, arguing that blood-letting was a common medical procedure in earlier generations and consequently does not qualify as "wounding". On the contrary, it was considered a beneficial procedure. Therefore, he concludes, "it may be that there is no reason to forbid this [type of] injury, and one who wants to be lenient should not be prevented, since this is a strong argument."

13. This is one of the issues involved in cosmetic surgery. For a full discussion, see David Ettengoff, "Halachic Implications of Cosmetic Surgery," in the *Journal of Halacha and Contemporary Society* XV, p. 79, as well as XLVIII of that Journal, P. 29, in the article by Dan Geisler, "Cosmetic Surgery in Halacha". Whether a dieting regimen which causes pain is permitted is discussed by *Iggerot Moshe, Choshen Mishpat*, II, 65-66.

Tosafot, we would have to say that surgery for removal of an organ to give to someone else would be an unjustified damage to the body. (In a life-or-death situation, however, presumably the objection of Tosafot would be removed.<sup>14</sup>)

Rav Moshe Feinstein, however, reads the situation quite differently, relying on the Rambam, who writes that *chavala* (wounding oneself or another person) is forbidden only if it is done for the purpose of injury or degradation (*derekh bizayon/derekh nitzachon*).<sup>15</sup> By extension, Rav Moshe rules, if a person “wounds” himself for a perceived benefit, it would be permissible. Consequently, he permits an unmarried girl to have cosmetic surgery which she hoped would enhance her ability to get married.<sup>16</sup> Rav Feinstein has opened a new window on this talmudic text; his explanation permits surgery which is done for the benefit either of the person or someone else; following this rationale, organ donation would be permitted.

### Organs from living donors

As we have seen, a major question in Jewish thought is whether it is permissible for a person to place himself in a situation which might be life threatening in order to save the life of a person in mortal danger. Although, as noted above, the Radvaz rules that a person is in no way obligated to enter into a potentially hazardous situation even to save another’s life, he does term it a highly laudable act (“*midat chassidut*”).<sup>17</sup> At the

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14. *Shemirat Shabbat Kehilchata* chapter 36:3, note 4, rules that a pregnant woman is permitted to opt for a Caesarean section to save the life of her unborn child, even though she is “wounding” herself, when her own life is not threatened.

15. Rambam, *Hilchot Choveil Umazzik* 5:1. (Variant versions of this text exist in different editions).

16. *Iggerot Moshe, Choshen Mishpat* II 66.

17. The specific question which he was asked to rule upon was a situation where the government threatened to kill a certain Jew unless another Jew

end of his *teshuva*, Radvaz adds the following:

“Her ways [the Torah’s] are ways of pleasantness”, and it is necessary that the laws of our Torah will accord with reason and rational thought. How could it occur to us that a person should allow his eyes to be blinded or his hands to be cut off...so that his friend should not be killed? Therefore, I cannot countenance any ruling [such as] this, other than an act of outstanding piety [*midat chassidut*]. Blessed is the portion of one who can withstand this; however, if there is [even] a possible danger to his life [in the procedure], then he is a pious fool [*chassid shoteh*], for the potential danger to his own life takes precedence over the certain [danger] for his friend.

Other *poskim*, however, feel differently and incline towards the view that a person is obligated even to suffer pain, if that is all that is involved in saving the other’s life.<sup>18</sup> Among these *poskim* is R. Shlomo Zalman Auerbach, who writes that a person should certainly be willing to undergo pain in order to save a *choleh lefanenu* – a person presently suffering from disease, whose life (or limbs) will be saved by the procedure. Furthermore,

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allowed his arm to be cut off. *Shu”t Radvaz*, III 1052 (627), cited in *Pitchei Teshuva* 157:15; *Shach* 3; *Or Sameach* 7 *Hilchot Rotzeach* 5:1 (if it is a question of danger to a limb, not life); *Iggerot Moshe*, *Yoreh Deah* II 174, #4; *Tzitz Eliezer* X 25:7 rules that a parent may donate an organ to a child as long as there is no mortal danger involved in the procedure and the recipient’s life will be saved thereby; *Yechave Da’at* III 84; *Minchat Yitzchak* VI 103; *Klei Chemda*, *parshat Ki Teitzei*, p.192 (he discusses whether the rule may change in the case of saving a large group or even the entire nation, such as in the case of Esther); *Nishmat Avraham*, *Yoreh Deah* pp. 263-266, discusses the specific danger involved in donating each organ.

18. *Or Sameach*, *Hilchot Rotzeach* 7:5. It is interesting to note that he cites the Radvaz (above) as his source. See also *Tosafot Yom HaKippurim*, *Yoma* 82, *d.h.* “*ve’im omrim*”; *Ha’amek She’elah*, *parshat Shelach* 129:4; *Chochmat Shlomo*, *Choshen Mishpat* 426:1; *Encyclopedia Talmudit*, “*hatzalat nefashot*”, p. 350; see also *Ketubot* 33b.

he sanctions participation in medical studies which involve only minor pain – such as testing blood– in order to further medical knowledge. On such matters, he rules, the person does have control (*ba'alut*) over his body.

### **The pain of one person for the life of another**

Although we might intuitively think that every Jew should be prepared to tolerate some pain in order to save another's life, there is actually a great deal of discussion of this point in rabbinic literature,<sup>19</sup> but no clear consensus emerges. Based on a talmudic text in *Nedarim 80a*, it seems that people are entitled to take advantage of their legal rights in order to protect their own interests, even to the detriment of others: It depicts a theoretical case of two cities, where City A has a well which provides water for them and also flows to City B. However, it transpires that there is only enough water to meet the needs of the residents of City A. The Gemara rules that they are allowed to shut off access for the people in the second city. "They are permitted to shut off [the water] so that it doesn't flow to the other city...for the water is theirs and their lives take precedence over the lives of others." Furthermore, continues the Gemara,

[The water for] their laundry comes before the laundry of the others. [If it is a matter of] the lives of the others and the laundry [of the residents of the first town], the lives of the others take precedence over the laundry [of the first town]. But R. Yossi says that their laundry takes precedence over the lives of the others.

How could R. Yossi say that the people in City A can withhold

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19. There is even discussion in rabbinic literature if extreme pain, such as torture, might reduce the severity of a sin which would otherwise be strictly prohibited, such as agreeing due to torture to perform idolatrous acts, or murder or sexual immorality. See *Shita Mekubetzet*, *Ketubot 33b*, and the opposing view of *Tosafot*, *ibid*.

life-saving water from people in the next town just so that they can wash their own clothes?!<sup>20</sup> It seems bizarre! Perhaps we have to look more closely at the options: how much inconvenience do the people in the first town have to accept in order to help out the other town? In his commentary on the talmudic text,<sup>21</sup> R. Ovadia Yosef concludes that we must be discussing a situation of the relative inconvenience of each town rather than the convenience of one group over the death of the others. Where the residents of the second city still have the option of moving elsewhere or procuring water from a different, less convenient source, town A can restrict its water supply to its own residents. However, if no alternative exists, the Gemara has indicated that the residents of City A have to suffer the discomfort attendant upon sharing their water in

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20. There is a possible explanation offered later in the Gemara, that it was believed that if people could not bathe themselves and wash their hair, it might lead to blindness, and having to wear dirty clothes could bring about dementia. *Chochmat Shlomo* maintains that one need not suffer humiliation or extreme embarrassment in order to save someone in mortal danger; however *Iggerot Moshe, Yoreh Deah* II, 174:3 rejects that position. After begging forgiveness of the illustrious scholars who accept that ruling, Rav Feinstein writes "It is clear that this is an absolute error...Heaven forbid the the words of *Chochmat Shlomo* should be repeated...."

21. *Torah sheh B'al Peh*, XIX, 1973 p. 21. This may be analogous to the situation portrayed in *Even Haezer* 80:12, where a pregnant woman who is experiencing great discomfort wants to eat certain food to alleviate it, which food may harm her baby. The ruling in *Shulchan Aruch, Even Haezer* is that "there are those who say that the husband cannot prevent her from ingesting these items even though there is danger to the fetus, because her physical pain takes precedence [over the life of the fetus!]. However, there are those who say he can prevent her." There is a general rule that when the *Shulchan Aruch* cites two opinions, each labeled "there are those who say", it is an indication that the *Shulchan Aruch* rules according to the second option. Accordingly, the normative ruling of the *Shulchan Aruch* is that the husband is able to prevent his wife from endangering their child, albeit she suffers pain in the process. See also the *Magen Avraham* 156 and *Choshen Mishpat* 22 and *Beit Shmuel, Even Haezer* ibid, No. 15.

order to save the lives of their fellow Jews.<sup>22</sup> For many decisors of Jewish law, this principle applies not just in the case of water, but in any situation where Jews can help other Jews; they have to be prepared to experience some discomfiture.

### Getting paid for a mitzvah

Having established that many *poskim* rule that donating an organ to save someone else's life, while not mandatory, is nevertheless a great mitzvah,<sup>23</sup> we move to another scenario – instead of donating the organ, selling it. There may well be people who are not moved by altruism to endanger or damage their bodily health by donating a body part, but who would nevertheless be prepared to do so if there were a considerable financial incentive. The current reality is that many people sell their blood to blood banks; without the financial incentive, rare blood types would be in even higher demand than they currently are.<sup>24</sup>

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22. Obviously, not all pain has equal valence. The inconvenience of not having water to wash clothing hardly compares to the pangs of not having water to drink! As mentioned earlier, in the talmudic scenario, not being able to wash their clothing would have created intolerable discomfort, or worse, for the residents of the town.

23. Notwithstanding the text in *Yerushalmi Terumot* cited previously, that one is obligated to enter into a possibly dangerous situation in order to save someone in mortal danger, *Beit Yosef* rules that a person need not do so. His ruling reflects the fact that neither Rambam, Rosh, nor Rif cite it.

24. However, at the present time it is illegal in the United States to get paid or to pay for an organ for transplant. Numerous voices have been raised challenging this position as counterproductive (see notes 1-3) and leading to many deaths which could have been prevented. According to the United Network for Organ Sharing there are more than 75,000 individuals listed on various national organ transplant waiting list (see note 1). The president of this organization, Patricia Adams, has pointed out that there simply are not enough organs being donated to meet the high demand. Legalizing sale of organs would seem to make eminent economic and medical sense. However, there are those who decry this suggestion, claiming that it decreases respect for human life and the sanctity of a person's body. The current system, they

In secular American society, some powerful arguments have been made for permitting an economic incentive to enter into the transplantation process. Leading economists point out that since we do not flinch at the sale of blood, platelets, semen, or eggs, it seems irrational not to treat bodily organs as economic commodities. The laws of supply and demand would guarantee that a great many more organs would become available, thus saving many lives. To maintain some kind of taboo on the sale of organs is actually, in their eyes, not increasing respect for life but rather allowing hundreds of needless deaths each year.<sup>25</sup>

How does Judaism view it – is a person despicable for not being willing to help someone unless he gets paid? Would he still be performing a mitzvah, even if he receives compensation? Obviously, the altruistic individual is worthy of the highest praise, but what about the more mercenary one? What is the status of his action – forbidden? tolerable? Perhaps even a mitzvah?

Judaism sees a mitzvah as an action seeking to comply with the Divine will, and therefore it is generally forbidden to accept payment for the performance of a mitzvah.<sup>26</sup> However, getting paid for performing a meritorious act need not always be seen as mercenary or despicable, nor did our Sages automatically express contempt for persons who put their own welfare ahead of others'. An example which may serve as a precedent for our issue can be found in a talmudic text relating to a midwife or doctor who are called upon to tend a distant patient on the Sabbath.<sup>27</sup> The Gemara permits these individuals to return home

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claim, establishes a personal link between donor and recipient; it should be publicized and advocated more forcefully. Absent this intense personal response, they claim, in the long run there will be less, not more organs available.

25. See Footnote 3.

26. Mishnah *Nedarim* 37a; *Yoreh Deah* 221.

27. *Beitzah* 11b.

on Shabbat, after the patient has been attended to and there is no longer any danger to his/her life (although the caregivers will be traveling more than the permitted distance on Shabbat, and carrying their instruments as well). The rationale is simple – if the medical caregiver knows that once (s)he tends to the patient (s)he will be stuck far away from home for the remainder of the Sabbath, the midwife or doctor might simply refuse to go in the first place. Therefore, Jewish law permits them to return, understanding that we cannot simply rely on their good will.

In view of the current dearth of organs for persons desperately in need, the reality is that we may need to offer an incentive to people to do something important and lifesaving, and not rely only on their love of others. That is certainly the outlook of *Chazal*, who understood that if a caregiver would be greatly inconvenienced on Shabbat, he or she would be reluctant to get involved in the mission altogether. In the present situation of organ need, the same rationale might apply.

But since in general one should not get paid for doing a mitzvah, how is it permissible to pay a doctor for healing the sick, or a *mohel* for doing a *milah*, or a Rebbe for teaching? The rabbis ruled that he is entitled to receive payment for the time and effort he expends. The Rebbe is not being paid for teaching (which is a mitzvah) but for his time, when he could have been earning money. This is called “*sechar batala*”. Through this legal rationale, he is considered as having done a mitzvah for free, but being paid for the time he took from gainful employment in order to perform the mitzvah.<sup>28</sup>

Thus, it follows that although it is a mitzvah for the doctor – just as for any Jew – to help a fellow Jew, yet if he is not prepared to do it without pay, he may demand payment. But

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28. See the end of *Yoreh Deah* 336.

the question remains – is it still a mitzvah? Once the Talmud has established the principle that one is not permitted to get paid for doing a mitzvah,<sup>29</sup> it may create a sort of “catch-22” conundrum: (a) If a person does get paid, does it mean that his action was not a mitzvah? (b) Specifically, if donating an organ is not a mitzvah (because he is being paid for it), does it then become forbidden, due to the *issur* of causing oneself bodily harm (*chovel be'atzmo*)? Or may we posit that the person is not being paid for the organ, but rather being compensated for the pain he undergoes in having it removed?

Let us consider the primary question: does getting paid obviate the mitzvah status of one’s actions? In his responsa *Iggerot Moshe*,<sup>30</sup> Rabbi Moshe Feinstein tangentially seems to offer an answer to this question. Rav Moshe was asked by a doctor whether he could switch his hospital rotation for Shabbat with another doctor, a non-observant Jew. In his answer permitting it, Rav Moshe noted that

When the [non-observant] doctor remains at home, he will be deliberately transgressing the Sabbath with any activity that comes up, no less than the forbidden activities that he does in the hospital. But it is more likely that [the actions he does in the hospital] are diminished [in their severity] because there are many sick people for whom it is permitted [to do these things on the Sabbath], and many of the [doctor’s] actions are [only] forbidden rabbinically, while what he does at home is mostly forbidden on a biblical level.

In this responsum, R. Moshe Feinstein has inherently assumed that a mitzvah remains a mitzvah, even if a person is getting

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29. *Bechorot* 36a.

30. *Orach Chaim* 79. See also *She'elot Uteshuvot Ketav Sofer*, *Orach Chaim* 59.

paid to do it. Albeit the non-observant doctor is carrying out his duties in the hospital as part of his job, he is nevertheless performing a mitzvah by healing the sick [and therefore his activities are permitted on the Sabbath]. Despite his being paid, for R. Moshe that apparently does not alter or diminish the mitzvah aspect of his actions. Applying this reasoning to our question about payment for organ donation, we could conclude that it is permissible to get paid, because it could be subsumed under the rubric of compensation for the pain and loss of time involved.

Nevertheless, the opposite approach is adopted by R. Shlomo Zalman Auerbach, as reported by the author of *Shemirat Shabbat Kehilchata*. For Rav Auerbach, if a person performs a good deed as part of his job, without the intention to fulfill a Divine mandate, it is no mitzvah.

The issue under discussion was whether a person who is in urgent need of medical care on the Sabbath should seek to be healed by an observant doctor or go to a non-observant one (assuming both are equally qualified). One might think that it would be better not to cause a Sabbath-observant doctor to violate the Sabbath sanctity, yet that is not the conclusion of Rav Auerbach, who advises going to the Sabbath observer to be treated, even though that doctor will now have to undertake actions which are generally forbidden on Shabbat:

Inasmuch as his [the doctor's] intent is to do a mitzvah, while the non-observant doctor [will be violating Sabbath] only for the profit he will gain. And even though [the medical care] is considered a mitzvah act, still it is like the case of an individual who intended to eat pork and [inadvertently] ate a piece of lamb.<sup>31</sup>

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31. *Shemirat Shabbat Kehilchata*, chapter 32, #45, note 125. The same sentiment is found in *Beit HaLevi al HaTorah, Parshat Shmot*, s.v. "vaya'ar et

It is evident that these rabbinic responsa conflict on a seminal issue: for Rav Auerbach, one's intent is a major factor in determining the status of an action. If a person is healing the sick just because he is being paid, Rav Auerbach does not consider him to be performing a mitzvah. However, Rav Moshe Feinstein holds that regardless of motivation, if one is performing a mitzvah act, it is a mitzvah nonetheless.

This issue had been discussed earlier, in the *Mishnah Berurah*,<sup>32</sup> citing a text in *Bava Metzia* 82a. The Gemara there debates whether a person who lends a pauper money in order to be able to use the pawn the pauper leaves with him – whether that lending can be considered a mitzvah. Two conflicting opinions are recorded, which indicates that at least some rabbis were willing to concede mitzvah status to an act that was done – at least in part – for pecuniary reasons.<sup>33</sup> Relying on these precedents, perhaps a person selling an organ for transplant could claim that inasmuch as he is performing a mitzvah, it removes the prohibition of injuring oneself.<sup>34</sup> On the other hand, it is necessary to be mindful that a number of major *poskim* do not sanction the practice at all.

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*Bnei Yisrael.*"

32. *Biur Halacha* 38:8, d.h. "kotvei." The question was whether a *sofer*, a man writing a *Sefer Torah*—for pay—could be considered as doing a mitzvah; if so, then he might be able to rely on the principle "*ha'osek bemitzvah patur min hamitzvah*", that a person involved in performance of one mitzvah does not have to stop in order to perform another mitzvah. The *Mishnah Berurah* rules that indeed he is considered as performing a mitzvah albeit he is paid for his work.

33. In a somewhat related vein, the *Mishnah Berurah* 328:24 rules that a midwife may receive payment for delivering a child on Shabbat, and he reiterates this in 526:32. The same conclusion is reached in *Shemirat Shabbat Kehilchata* 28:67; *Har Tzvi, Orach Chaim* I 204; *Tzitz Eliezer* VIII 15:13; *Yabia Omer* V 25. To explain why such payment is *muttar*, see *Nishmat Avraham, Orach Chaim*, 306, who discusses whether the same guidelines would apply to a doctor working in a hospital on Shabbat.

34. *Mishnah Berurah* rules that we follow the talmudic opinion which deems the action a mitzvah despite the monetary compensation.

## Donating Organs for Research

A number of years ago, the White House was in the process of formulating a position on organ donation for medical research, and various religious organizations submitted documents explaining their respective positions on that issue. Rabbi Moshe Sherer, then president of Agudath Israel in America, turned to Rav Moshe Feinstein for guidance and, based on Rav Feinstein's input, reported the following points as being essential Jewish beliefs:

- 1) In Jewish thought, a person is not the owner of his body; G-d is.
- 2) For sure, the family of a deceased person (or someone who cannot speak for himself) is not in charge of the body and should have no say.<sup>35</sup>
- 3) The body of a deceased person is *assur behana'ah* – forbidden to be used for any purpose.
- 4) A person has to be buried with all body parts intact, or at least in the state it was in at the time of death. To do otherwise is considered *nivul hamet*, a disgraceful mutilation of the dead.

These principles have been accepted for millennia; there is nevertheless some room for a "lenient opinion". Any option of performing an autopsy or harvesting organs for research or donation relies on the famous responsum issued in the eighteenth century by R. Yecheskel Landau, where he added an important exception to these principles: if there is a *choleh lefanenu*, a sick person before us, whose life or health will benefit from the autopsy or other procedure on the dead body, it is permitted.<sup>36</sup> For example, if five people have been struck with a mysterious

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35. The same is found in *Le'Or HaHalacha*, in an essay titled "Shylock".

36. *Noda Biyehuda* II *Yoreh Deah* 210, in a query regarding a kidney operation.

malady, and one of them succumbs, this proviso of R. Landau permits performing an autopsy so that the doctor may study the ravages of the disease and learn how to treat the other sick persons.

However, only a “clear and present danger” to another sick person allows for suspending the prohibition of mutilating a dead body. Healing the sick after using organs for research is such a nebulous prospect that many consider it forbidden by Jewish law; we may find ourselves on the proverbial slippery slope – although medical knowledge may be enhanced and advanced by this kind of study, it is something of a stretch to term the benefits as accruing to a *choleh lefanenu*, a sick person laying there in front of us.

The author of *Nishmat Avraham*, an important book on modern medical issues, writes that he approached R. Shlomo Zalman Auerbach about the permissibility of donating or selling one’s body, while alive, to be used for research after death, and the rabbi wrote back, “G-d forbid that a person should sell or give away his body.”<sup>37</sup> *Nishmat Avraham* continues by citing the opinion of *Iggerot Moshe*,

According to the law of the Torah which our rabbis of blessed memory have received, from mouth to mouth going back to Moshe Rabbenu, may he rest in peace, which we received at Sinai – no person is the owner [*ba’al*] of his body to direct [what to do] with his body, even for one limb...and certainly children and relative have no authority over it [the body].<sup>38</sup>

It is appropriate, however, to point out that the *Chazon Ish* held that if a sick person was involved in some kind of medical experiment for a major disease before his death, an autopsy

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37. *Nishmat Avraham*, *Yoreh Deah* 349: 3:1.

38. *Ibid.*

should be performed. This is not because the deceased is not master of his own body but rather because if he was suffering from a common disease [such as cancer] to which many are susceptible, the information gleaned from an autopsy might help researchers determine how effective the experimental medicine was. Since the autopsy and research may help save many lives, it is permitted.<sup>39</sup>

The sharply divergent opinions of major halachic decisors makes it evident that this issue remains in need of definitive resolution.<sup>40</sup>

### **Stealing in order to save one's life**

When a person or his loved one is desperately ill and in need of a transplant, there is almost nothing they will not do to save that life. Being placed on the bottom of a transplant list which has thousands of names on it is, for some, tantamount

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39. Some would argue that since so many kinds of transplants can now be successfully performed, and the need is very great, it is therefore permissible to sign an "organ donor" card, so that one's organs can be harvested for use by others. The rationale given is that since so many people need organs, it is akin to a case of universal *pikuach nefesh*. However, this appears to the present author (and many others) to be an unwarranted leap, beyond the limits of the halacha. At the present time, the Uniform Anatomical Gift Act does allow for a person to limit his proposed donation to specific individuals, or for the donor to designate a particular rabbi who would make the ultimate decision if a donation would indeed be warranted. For those who want to sign an Organ Donor card and yet meet the requirements of Jewish law, this proviso would be essential.

40. In *Torah She'be'al Peh* XI 5729, Rav Untermann, who was then Chief Rabbi of Israel, extended the concept of *choleh lefanenu*, a sick person who is presently here and will benefit from the procedure, to permit soldiers in the Israeli army to erect a field hospital on Shabbat, even if at the time there were no casualties. Since there would almost certainly soon be persons needing immediate medical care, he extended the principle to include them. This may serve as a precedent allowing for harvesting of certain organs, even if there is not a sick person waiting to have a transplant—because surely there will be one soon who can benefit from the organs.

to a lingering death. In fact, many thousands of people do die while waiting for a donor organ. In such desperate circumstances, those who have the connections try to get their names put at the top of the list, to qualify for immediate transplantation. How ethical is such a practice? Bear in mind that by employing various machinations to get one's name at the top of the list, one has in effect taken a heart or a lung or a kidney away from someone who had a previous claim on it. That person, too, is desperately ill. Does Jewish law allow such an action? It is also well known that there exists a black market for organs. Those with the connections and the money can buy an organ and have it transplanted almost at once. (We will discuss later the ethics of inducing someone to undergo drastic surgery just for the money.)

In a broader sense, we need to ask – how far may one go in order to save his life? Although it is well known that one may do virtually everything to save a life (*pikuach nefesh*) short of the three cardinal prohibitions of idolatry, murder, and sexual immorality, it is nevertheless necessary to contemplate that the rights of others may represent limitations to these efforts.

In *Bava Kamma*<sup>41</sup> the Talmud explores this question in the context of an incident which involved King David. According to the Gemara, King David was at one time involved in a battle with the Philistines and sought to approach their camp by burning down adjacent fields.<sup>42</sup> The Gemara reports that prior to undertaking this, King David asked the *Beit Din* whether he was permitted to save his life if it meant destroying the property of someone else:

מהו להציל את עצמו בממון חברו שלחו ליה אסור להציל עצמו  
בממון חברו

41. 60b. See also *Yad Ramah, Sanhedrin* 74.

42. Samuel II 23: – ר'יתאזה דוד ויאמר מי ישקני מים מבור בית לחם.

The response of the *Beit Din*, according to the plain reading of the Gemara (as presented by Rashi), is that it is forbidden to save oneself at the expense of someone else's property. ר"י: הוайл ואסור להציל את עצמו בממון חברו.<sup>43</sup>

Rav Moshe Feinstein does not accept that the Gemara is really discussing whether one can save his life by stealing or ruining someone else's property.<sup>44</sup> If it is permissible even to transgress the Sabbath to save a life, certainly the sanctity of private property would not represent an obstacle to saving one's life! Rather, he writes, the question under discussion, which King David was asking and which the Gemara analyzes in depth, is whether in a case where there is only a possibility of life endangerment, are all prohibitions set aside? King David was not going to die if he didn't use the stratagem of burning a field, but he might have been in more danger. That was his question.

Furthermore, it is necessary to clarify the status of the object which was "stolen" or damaged – does the person who was trying to save his life have to pay for the damage? Does the object become his to keep, inasmuch as he acquired it legitimately to save his life?

Tosafot do not accept Rashi's reading of the talmudic text, but offer a different interpretation. They argue that the topic of discussion cannot be whether it is permissible to steal to save one's life, inasmuch it is permitted to do far worse things (such as desecrating Sabbath) for that goal. Rather, they interpret

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43. *D.h. "vayatzila"*. A similar situation is discussed in *Bava Kamma* 80a, and the Meiri comments that although in a case of *pikuach nefesh* all restrictions are abrogated...it is nevertheless proper to be very strict about something that was forbidden by the rabbis for fear of causing loss to others. See *Shita Mekubetzet*, *Bava Kamma* 114, *Yoma* 83b, *Aruch Hashulchan*, *Choshen Mishpat* 359:6, for instances where rabbis appropriated other people's possessions in order to save their lives.

44. *Iggerot Moshe*, *Yoreh Deah* I:214.

the question as seeking to define the nature of that act – King David wanted to know if one must pay for the stolen item.<sup>45</sup> If one does steal or ruin someone else's goods in order to save his life, must he pledge or intend to pay for the loss?<sup>46</sup> According to Rav Moshe, who follows the reading of Tosafot, that is really what the talmudic debate is about.<sup>47</sup> As support for his reading of the Gemara, Rav Moshe cites other talmudic texts which, on the surface, appear to be discussing the same question of the permissibility of stealing in order to save one's life, but actually deal with a less obvious situation.<sup>48</sup>

For our issue of harvesting organs from the dead, the importance of the debate between Rashi and the Tosafists lies in the application of their views: According to Rashi, it is not permitted to steal in order to save one's life, but what that really means is that Rashi sees inherent restrictions in how far a person may go to save his life.<sup>49</sup> Accepting the principle that

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45. See Raavad, Ramban, and Rosh to *Bava Kamma*, *ibid*, as well as the Rashba IV:17. Meiri, *Bava Kamma* 60a, also opines that one may seize another's objects in order to save his life, but must pay for them. In footnote #36, *ibid*, sources are cited supporting the position that if one is lacking the money, he may still take the objects, although he has to pledge to repay when he will be able to do so.

46. This view sees the quandary of King David (and the subsequent debate in the Talmud) as not knowing how much he would be taking from each field and therefore not being able to pay for the damage.

47. *Iggerot Moshe, Yoreh Deah* I:214.

48. For example, *Ketubot* 19a, which ponders whether one may sign a false IOU in order to save his life. However, see the view of Ramban, as cited by *Shita Mekubetzet*, *ibid*, and *Maharatz Chayut*, *Bava Kamma* 60b. Another example is the text in *Yoma* 83b; see also *Perashat Derachim* 9; *Chida, Petach Einayim, Temura* 15b; *Sedei Chemed, Ma'aracha* 1:16.

49. For discussion of this issue, see *Yam shel Shlomo, Bava Kamma*, No. 27, who writes that it is not only permissible to steal to save one's life but absolutely mandatory to do so, "and if he does not...he is responsible for his own death (*mitchayev benafsho*)."<sup>50</sup> But *Binyan Tzion* 167:8; *Sho'el Umaishiv* 141:2, 174; *Devar Yehoshua* III 24 (quoted in *Nishmat Avraham Yoreh Deah*, p. 64) all rule in line with Rashi's interpretation. In their view, the language of the text

stealing is forbidden in such a case would certainly impact on the question of whether it is permissible to use influence or money to have one's name placed at the top of a transplant list, because in effect that is "stealing" someone else's right to receive that organ. However, if we follow Tosafot's rationale that virtually all mitzvot are set aside to save a life, it might be *muttar* to do so.

*Acharonim* (*poskim* in the early modern era to the present) are divided on this question, which is most germane to the present issue.<sup>50</sup> The overwhelming majority follow the view of the Tosafot, although some do rule in accordance with Rashi's interpretation. *Binyan Tzion* is one of the latter group; he writes that since it is proper to follow Rashi's approach, it is forbidden to extract organs from a person who has died, even if the potential recipient is presently there and will die without it.<sup>51</sup> Rav Moshe Feinstein in *Iggerot Moshe*, *ibid*, does not accept this view at all, and there are others who agree with him.<sup>52</sup>

### Organs from donors after death

There are three issues attendant upon taking or donating organs from a dead person: (1) There is a principle of Jewish law that a dead person's body is precluded from anyone's receiving benefit (*met assur be'hana'ah*); (2) a dead person should

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indicates that the talmudic sages were debating whether it is permissible to appropriate another person's property to save oneself, not whether he has to pay for it. The Gemara would have said "if he takes the item, does he have to pay" rather than saying "can he take it".

50. See previous note, as well as *Shu"t Maharam Schick*, *Yoreh Deah* 347, 348; *Shu"t Maharsham* V 54; *Chatam Sofer*, *Yoreh Deah* 319; *idem*, *Choshen Mishpat* 359:4, "he may not take it except with the intent to pay."

51. *Binyan Tzion* 169; he also cites various talmudic texts which follow Rashi's approach.

52. *Binyan Tzion* 170. If we follow the Tosafists who rule that one has to pay for the items taken – whom does one pay for an organ taken from a dead person? See also *Shulchan Aruch Harav*, *Gezelah* 2.

be buried as quickly as possible; (3) it is forbidden to do anything to “disgrace” the body (*nivul hamet*), which after all has been the repository of the soul.

On the face of it, these principles would seem to present an obstacle to removing any organs after death. However, there are *poskim* who do allow it under certain conditions. Rav Ovadia Yosef is lenient and permits it, but insists that there must be a Jewish recipient presently waiting for the organ (*choleh lefanenu*), rather than extracting it to bank for later use.<sup>53</sup> Moreover, he does not permit the family to make this decision – only the person himself can indicate during his lifetime that he is willing for his organs to be harvested.

On the other hand, Dayan Weisz, author of *Minchat Yitzchak*, does not sanction organs being removed after death, his reasoning being that saving someone’s life through organ donation is a mitzvah – but the dead are absolved from performing any mitzvot, and removal of organs is *nivul hamet*.<sup>54</sup> Rav Waldenberg, author of the *Tzitz Eliezer*, also would preclude organ donation after death, even if the person gave permission while still alive. However, he would allow it if there presently is a sick person waiting for that organ, due to the overriding importance of *pikuach nefesh*.<sup>55</sup>

Rav Waldenberg’s position is detailed in this lengthy responsum, penned after he was approached by a Dr. Abraham to clarify the halacha about organ transplants. Inasmuch as Rav Moshe Feinstein had ruled liberally,<sup>56</sup> while Dayan Weisz had ruled negatively,<sup>57</sup> doctors committed to halacha did not

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53. *Yabia Omer* III *Yoreh Deah* 22.

54. V:8; see also *Shevet Halevi* I 211.

55. XIII 91.

56. *Iggerot Moshe*,*Yoreh Deah* II 174.

57. *Minchat Yitzchak* V 7.

know how to proceed. In his exposition, Rav Waldenberg first posits that a cadaver may not be mutilated; just as one is required to return the soul back to the Creator pure and whole, so, too, the body must go to the grave complete. As for those rabbis who have written that it is permissible, he notes,

ששות אחד מהרבנים והתלמידי חכמים שכתב להתיר בזזה בזמןנו לא  
יהא מוכן לקיים את ה"אם אתה עושה כן".

None of the rabbis or scholars who have written to permit it in our day are prepared to act [upon] – “Would you do it?”

Rav Waldenberg adds that it is forbidden to keep the potential donor alive artificially in order to wait for an immediate recipient of his organs, nor is it permissible to do anything to precipitate his death. Rav Waldenberg also notes<sup>58</sup> that in his day, the Chatam Sofer had forbidden persons to donate their organs for medical research after death, *מפני שהוא איןנו נכנס בוגדר פקוח*, since it is not directly saving someone’s life.<sup>59</sup>

In another responsum on this topic, Rav Waldenberg again reiterates his opposition to donation of corneas for transplant, even though the cornea effectively has no blood, so it would not entail taking the cadaver’s blood, which circumstance the questioner had thought might be grounds for leniency.<sup>60</sup>

### Selling organs

One major hurdle remains for us to confront: who is it that is

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58. *D. h. “Hein amnam.”*

59. *Yoreh Deah* 336. Rav Waldenberg does quote other *poskim* who would allow medical research on cadaver organs, because the body is not being mutilated for any person benefit or pleasure (*hana’ah*), and thus is permissible.

60. *Yoreh Deah* 84. The *Seridei Eish* discusses whether the potential recipient need be blind in both eyes to qualify as sick enough to permit transplant, or whether being blind in one eye is sufficient.

selling his organs? Almost certainly, it will be individuals who are so desperate for money that they are willing to mutilate themselves for it. This is not the same as selling blood, hair, or semen, which are all “renewable resources”. It is also not comparable to a father donating one of his own kidneys to his child. Rather, these sellers of their own body parts are either so poor or so obsessed with money that they are prepared to undergo pain, health deterioration, perhaps even death, in return for great material gain. Undoubtedly, there are many people who will volunteer on such a basis, or who may be induced to do so. What are the ethics of taking advantage of another person’s desperate need or compulsive drive to get rich, or other weaknesses of character? Jewish law might preclude *buying* an organ under such circumstances.<sup>61</sup>

The Malbim has a fascinating explanation to offer for a law legislated in the Torah: In *Devarim*,<sup>62</sup> the Torah teaches that if a man divorces his wife, and she subsequently marries someone else and is divorced by him as well, she cannot thereafter remarry her first husband. Why not, asks the Malbim? He turns to a text in *Sifre* 134 commenting on this verse, and explains it as follows:

When the verse writes “and do not bring sin upon the Land,” our early Sages have explained that it leads to despicable things when [people] switch wives. The rich men will “put their eyes” on the wives of the poor to mislead the poor man [and convince him] in his great poverty to divorce his wife for a certain interval, for a large payment of money, and he [the rich man] promises that the wife will thereafter return to him. When she

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61. Due to the prohibition of *lifnei iveir* (placing an obstacle before a person who is “blind” to the consequences of his actions).

62. 24:4. The interpretation of Malbim, as well as those of other commentaries, is cited in the *Sha'arei Aharon* to that verse, p. 787.

sees how good it is for her to live in the house of the rich man, she will not return to [the poor former husband], and he will be roused by jealousy to take revenge and thereby come to spilling blood.

Similarly, the Ramban earlier had commented on that verse:

The reason for this negative command is so that people will not swap their wives with each other, to write her a divorce paper at night and take her back the next morning. This is the reason for "and do not contaminate", to warn *Beit Din* about this matter.

What the Torah is teaching us is that it is despicable for a person to use his wealth/power/position to coerce the poor to do what they don't really want to do just because they need money so badly. Without considering any other halachic aspects of the question, this issue alone seems to create an untenable situation.

The possibility of such an eventuality is presaged in the Torah's teaching about a divorced woman remarrying her husband. Then, as now, it is the responsibility of the *Beit Din*, which in Jewish society was not just a court but also had quasi-legislative functions, to maintain the proper morality within the community.<sup>63</sup> In considering the wisdom of permitting human organs to be purchased by private individuals, we have to be mindful of the many pitfalls which loom, not only to the persons involved, but also to the fabric of society.

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63. *Orach Chaim* 529:4: "The *Beit Din* has to appoint policemen on the holidays [when people would come from all over to celebrate in Jerusalem], who will go around and check gardens and vineyards and on riverbanks, to make sure that people do not congregate there to eat and drink, men and women, and possibly come to engage in sin..."

# ***Berachot on Medication***

*Rabbi Akiva Bergman, M.D.*

The Gemara in *Masechet Berachot* writes that the entire world is in the possession of *Hakadosh Boruch Hu*. It is therefore forbidden to derive enjoyment from this world without first reciting a *beracha* to thank *Hashem* for providing the means for this benefit.<sup>1</sup> Most common among the variety of pleasures for which *Chazal* mandated *berachot* is eating and drinking. One may not partake of any food or drink prior to expressing praise and recognition of its Source.

Although seemingly simple, the halachot of *birchot hanehenin* (blessings of thanks) are in fact very subtle and serious. The Gemara explains that deriving benefit from *Hashem*'s possessions without first expressing gratitude and praise is akin to stealing. On the other hand, one who recites a *beracha* inappropriately, either because it was not necessary or because a different *beracha* was required, transgresses the severe prohibition of uttering a *beracha l'veatala*, *Hashem*'s name in vain. This dual stringency of stealing from *Hashem* on one hand and *beracha l'veatala* on the other makes it imperative to ascertain when a *beracha* is needed and which is the appropriate *beracha* to recite on a given item.

In addition to food and drink, there are certain non-food items such as medications that are commonly ingested. Medication comes in many forms that are ingested orally and

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1. 35a.

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often may have some degree of a pleasant taste. Does medication ever require a *beracha*? If so, what are the guidelines for determining when a *beracha* is needed? There are several areas of *hilchot berachot* that form the basis for discussing this topic. We will attempt to elucidate the pertinent underlying *sugyot* (issues) and then clarify many of the practical consequences of the halachot.<sup>2</sup>

### ***Berachot on food***

Although the aforementioned dictum of the Gemara seems to mandate a *beracha* for any type of material enjoyment, the truth is that *Chazal* enacted *berachot* only for specific benefits.<sup>3</sup> We therefore cannot rely on logic and intuition alone to determine the nature of benefit or enjoyment for which a *beracha* must be recited. One example of this principle is that *berachot* on food and drink were enacted purely for *hanaat achila*, enjoyment that is experienced directly from the act of eating. This potentially includes nutrition, satiety, or taste, but does not include any ancillary benefit provided by the item. An item that does not provide nutrition, satiety, or taste when ingested does not require a *beracha* even if one benefits from it in another way. The prime example of this is the halacha that one who drinks water for reasons other than for quenching thirst<sup>4</sup> does

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2. Although a *beracha acharona* (blessing of thanks after eating) is also required in most cases where a *beracha rishona* (prior blessing) is required, it is not practically relevant to our discussion as medicine does not contain a *shiur* of *kzait* or *reviit* (i.e., not enough is taken to require a blessing). See *Shu"t Beer Moshe* 1:9. This is unlike a *beracha rishona* which is required on even a minute amount of food. See *Shulchan Aruch* 210:1, *Mishnah Berurah* 210:15 and *Shulchan Aruch Harav* 168:19.

3. See *Chiddushei Kehilat Yakov Hachadashim* on *Masechet Berachot* siman 10.

4. For example, to clear one's throat (*Mishnah Berurah* 204:40), aid in swallowing (ibid.), facilitate urination (*Sdei Chemed* vol.5 p. 260), and, as we will later discuss, to aid in swallowing a pill.

not recite a *beracha*.<sup>5</sup> Another ramification of this principle is that one does not recite a *beracha* prior to eating an item whose medical benefit or therapeutic effect is the sole benefit provided.<sup>6</sup> In such a case there is no halachically valid *hanaat achila* (pleasure of eating) that warrants a *beracha*. Therefore, when determining the need for a *beracha* on a medication, we must ignore its therapeutic properties and focus only on its gustatory benefit.<sup>7</sup>

### Nature of enjoyment from food

What is the nature of gustatory enjoyment or benefit that requires recitation of a *beracha*? Is it the taste or the nutrition and satiety that mandate a *beracha*? The resolution of this issue lies in a discussion in *Masechet Chullin*<sup>8</sup> concerning whether the prohibition to ingest forbidden food or drink applies to *hanaat may'ayim*, nutrition and satiety, or *hanaat garon*, taste.<sup>9</sup> Many apply the distinction found in this Gemara to *hilchot berachot*.<sup>10</sup> The accepted halacha is that *both* types of benefit require a *beracha*. One is required to recite a *beracha* prior to

5. *Masechet Berachot* 44a as explained by Tosafot ibid. and Gra in *Shnay Eliyahu*, cited in *Biur Halacha* and *Shaar Hatziyun* 204:7.

6. *Beit Yosef* in *siman* 204 cited in *Magen Avraham* 204:19 and *Mishnah Berurah* 204:43, which is based on the Gemara in *Masechet Berachot* 36a and 38a. Also see *Shulchan Aruch Harav* 202:10 and *Sdei Chemed Maarechet Berachot* 1:33.

7. With regard to *hilchot berachot*, the degree of illness does not play a role. There is no difference whether the one taking the medicine has a life threatening illness, (a *choleh sheyaish bo sakana*), has a minor ailment (*meichush b'alma*), or is merely taking vitamins – in all cases we look only at whether there is *hanaat achila* or not.

8. 103b.

9. The Rambam in *Mishneh Torah*, *Hilchot Maachalot Assurot* 14:3 and most *Rishonim* follow the opinion that holds that it is the *hanaat garon* that is forbidden.

10. See for example *Shu"t Minchat Yitzchak* 3:18, *Shu"t Chelkat Yakov* 3:68, *Shu"t Achiezer* 3:61, *Eglei Tal Tochein* 62:2, *Minchat Chinuch* 313:2, *Shu"t Chatam Sofer* O.C. 127, *Mor Uktzia* 196, *Shu"t Maharam Shick* O.C. 250.

eating something that will provide nutrition or satiety even if it does not have an enjoyable taste, provided that it is edible, eaten in a normal manner, and not repulsive.<sup>11</sup> Also, one is required to recite a *beracha* prior to eating something that has an enjoyable taste even if it will not provide any nutrition or satiety, provided that it is edible, eaten in a normal manner, and not repulsive.<sup>12</sup> One need not swallow the item itself for it to be deemed an act of eating. It is sufficient to swallow the taste generated by the item, such as occurs in chewing gum and orally dissolvable items.<sup>13</sup> However, simply tasting without swallowing does not require a *beracha*, even though it provides enjoyment because it does not qualify as *achila*, a halachic act of eating.<sup>14</sup>

### Degree of enjoyment

Essentially, all food and drink provide at least a modicum of nutritional value and therefore require a *beracha*. Even those items that lack nutritional value, such as water, seltzer, and bland diet soda will also require a *beracha* if they quench even a small sense of thirst. Assuming that the food or drink is

11. See *Avnei Nezer* O.C. 124 and *Sharei Teshuva* 204:17. See also *Pitchei Halacha* ch. 4 notes # 20 and 36.

12. This is evident from the *Mishnah Berurah* 197:28 in the case of *achila gasa* in which there is no *hanaat may'ayim* as well as from the second opinion in the case of *matemet* in 210:2, from which we may infer that if one has intent to enjoy the taste of the food he recites a *beracha*, as is evident from *Mishnah Berurah* 210:17. Although the *Eglei Tal* in *Tochein* 62:2 makes the opposite inference from the first opinion in the case of *matemet*, the generally accepted practice is to follow the former view as explicitly stated by R. S.Z. Auerbach, cited in *Pitchei Halacha* ch.4 note #20.

13. *Shulchan Aruch* 202:15, *Mishnah Berurah* 167:35 and *Chayei Adam* 49:4, followed by *Shu"t Beer Moshe* 2:12 and *Shu"t Yabia Omer* 7:33. The explanation for this is that the *beracha* is recited on the swallowing of the taste, not on taste alone.

14. 210:2.

edible, eaten in a normal manner, and not repulsive,<sup>15</sup> the only time that that there is no *beracha* is for tasteless items such as medication or other non-food items that have absolutely no nutritional value and do not quench thirst or satiate hunger at all.<sup>16</sup>

What is the degree of enjoyment of taste required to warrant a *beracha*? One must recite a *beracha* on an item that provides a minimally enjoyable taste.<sup>17</sup> An item with no taste at all or with a taste that is not subjectively enjoyed does not require a *beracha*.<sup>18</sup> One does not recite a *beracha* on food that he finds repulsive, even if it provides nutrition or satiety and has a taste that is acceptable to most people.<sup>19</sup> The converse is also true – if one enjoys a particular item, he recites a *beracha* even

15. Even if the taste is disliked but not repulsive, all agree that the correct *beracha* is the original *beracha*. The *Mishnah Berurah* 202:18 writes that the discussion in earlier *poskim* as to whether the correct *beracha* is *shehakol* or the original *beracha* concerns only unripe foods.

16. It seems obvious that this is true even for medication that is taken as a food supplement or for vitamin deficiency. This is stated explicitly by R. Herschel Schachter in a *teshuva* on a different topic published by the OU in *Daf HaKashrus*, vol. 12, number 2, in November 2003.

17. *Mishnah Berurah* 204:42, based on the Gemara on 44a regarding drinking water. This is so even if one would eat a particular item only if he had nothing else to eat.

18. Of course, if the item provides nutrition or satiety, a *beracha* is required for *hanaat may'ayim*. In absence of *hanaat may'ayim*, no *beracha* is recited on an item without a subjectively positive taste, even if it is not repulsive or even disliked. See *Mishnah Berurah* 204:43, *Shaar Hatziyun* 204:37, and *Pitchei Halacha* ch.4 note# 38.

19. Eating such an item is not a halachic act of eating and therefore no *beracha* is made even if *hanaa* (benefit) is derived via nutrition or satiety. See *Shulchan Aruch* 202:2 and 202:4, based on the Gemara on 35b of *azukei mazik lei*. See also *Shulchan Aruch* 204:8, *Mishnah Berurah* 204:43 and 197:28, *Shaar Hatziyun* 204:37, and *Shulchan Aruch Harav* 204:14. This halacha refers to items that are repugnant and therefore "harmful" to the palate but are not actually physically damaging. See *Pitchei Halacha* ch. 4 note #22.

if others find it repulsive, provided that it is objectively edible.<sup>20</sup> Later, we will discuss several subtle yet halachically significant differences with regard to this halacha between food items and non-food items that are ingested.

### Role of intent

Another basic concept necessary for understanding the halachot of *berachot* on medication is the role of subjective intent in determining the need for a *beracha*. Does one recite a *beracha* on food that provides gustatory benefit or enjoyment if he has no intent to eat per se and is ingesting the item for reasons other than nutrition, satiety, or taste? There are two *sugyot* that are relevant to this halacha. The Gemara in *Masechet Berachot*<sup>21</sup> writes that one who is merely a *matemet*, tastes the food, need not recite a *beracha*. There is a dispute among *Rishonim* regarding the parameters of the halacha of *matemet*. The *Rif* and *Rambam* maintain that the exemption from reciting a *beracha* refers to one who actually swallows the food but has no intent to eat it per se.<sup>22</sup> *Rabbeinu Chananel*, followed by the *Rosh* and *Tosafot*, holds that one who swallows food must always recite a *beracha* regardless of intent, and the Gemara refers rather to one who merely tastes the food without swallowing it. The *Ramo* writes that we apply the dictum of *safek berachot l'hakel* which instructs us to rule in favor of omitting a *beracha* in case of doubt, and therefore one who swallows food for reasons other than eating should not recite a *beracha*.<sup>23</sup> The *Mishnah Berurah* adds that it is preferable for one who swallows

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20. *Bircat Habayit* 3:21. However, one recites only a *shehakol*, not the original *beracha*.

21. 14a.

22. See the *Mishnah Berurah* 210:13 who explains the rationale for this opinion.

23. *Shulchan Aruch* 210:2.

any tasted food to avoid the dispute and specifically have intent to eat and thereby be required by all opinions to recite a *beracha*.<sup>24</sup>

However, there is a second *sugya* that is more directly relevant to our case of medication. The Gemara elsewhere in *Masechet Berachot*<sup>25</sup> addresses the case of medicine that was made palatable by the mixture of another item. The Gemara followed by the *Shulchan Aruch*<sup>26</sup> concludes that a *beracha* is recited, even though there is no intent to eat.<sup>27</sup> Although the difference between this halacha and the one of one who tastes is not clear, we see that in the case of one who swallows medicine, we require a *beracha* even if there is no intent to eat *per se*.<sup>28</sup>

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24. *Mishnah Berurah* 210:19 based on *Chayei Adam*. See also *Shu"t Iggerot Moshe* O.C. 1:79.

25. 36a in the case of *anigron* and 38a in the case of *shesisa*.

26. 204:8.

27. As is clearly stated by the *Mishnah Berurah* there.

28. This issue was one aspect of the question that was discussed at length in several issues of the journal *Shomer Tzion Haneeman* in 5607 and subsequently in several *Teshuvot* including *Shu"t Yad Halevi* siman 35, *Shu"t Binyan Tzion* siman 10, and *Shu"t Shoel Hameishiv* 5:23.

The inherent difficulty with reconciling the two halachot of 210:2 and 204:8 is not dealt with by earlier *poskim* although the *Torat Chaim* O.C. 210:13 and *Shaar Hatziyun* in 210:30 are apparently sensitive to it. As the *Harerai Kodesh* in *Mikrai Kodesh* Pesach 2:40 and *Pitchei Halacha* ch.4 note #38 point out, there is no problem according to the opinion of *Tosafot* and *Rosh* as held by the *Magen Avraham* because they will say simply that the case in 204:8 is one where the item was swallowed and therefore requires a *beracha* regardless of intent, unlike the case of 210:2 in which the item was only tasted and therefore no *beracha* is needed without intent to eat. However, there remains a difficulty according to the opinion of the *Rambam* and *Rif* as held by the *Ramo* – why is intent to eat required in 210:2 but not in 204:8? One answer is suggested by *Shu"t Shevet Hakehati* 3:84 who opines that perhaps the case in *siman* 204 is where one eats a *kzait* whereas the case in *siman* 210 is where he ate less than a *kzait*. Another explanation offered by *Pitchei Halacha* ch.4 note#38 is that perhaps one who tastes will swallow the food only to avoid spitting it out, whereas one who takes medicine swallows willingly and intentionally and therefore is perforce considered to have intent to eat.

## Medication

We can now apply the underlying halachot to specific types of medication. There are many types of oral medication, each of which must be given individual attention. These fall into several categories. One category comprises pills that are swallowed, including tablets, capsules, and caplets. This includes pills that are not coated as well as pills that contain a flavor-enhancing coating. Another category comprises liquid medicine and chewable tablets. This includes those that are repulsive, those that are not flavored, those that are flavored but would not be enjoyed were it not for their therapeutic effect, and those whose flavor would be enjoyed independent of its medicinal value. The third category comprises those that dissolve in the mouth, both those without a flavor and those with a flavor. A closely related fourth category is medicine that dissolves or is chewed but not swallowed. The fifth category comprises medication that is mixed with other food or drink to make it palatable and able to be ingested.

### Pills that are swallowed

The first category of medication comprises pills of any form that are swallowed whole. If there is no flavor there is certainly no reason to recite a *beracha*, as there is no *hanaat achila*. Even if there is a modicum of enjoyment from added flavor that is tasted as the pill is swallowed, no *beracha* is required because swallowing medication without first chewing it is considered *shelo k'derech achila*, eating in an abnormal manner, and therefore not a halachic act of eating.<sup>29</sup> Furthermore, it is likely that such

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29. Although we follow the position of the *Shu"t Noda B'Yehuda Mahadura Kamma* Y.D. siman 35, *Shulchan Aruch Harav* 475:25 and *Shu"t Chelkat Yoav* Y.D. siman 9 (cf. *Torat Chaim Chullin* 120b and also see *Sdei Chemed Maarechet Beit* siman 105, R. Yosef Engel in *Beit Haotzar klal* 153, *Achiezer* 3:31 and *Shu"t Tzitz Eliezer* 5:12 and 6:16) who hold that swallowing is indeed

pills are considered *aino raoi l'achila*, inedible,<sup>30</sup> and therefore do not necessitate a *beracha*.<sup>31</sup>

### **Chewables and liquids**

The category of chewable and liquid medication is where the bulk of the questions regarding *berachot* occur.<sup>32</sup> Whether a

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considered a normal means of eating and is *k'derech achila*, R. Moshe Feinstein in *Shu"t Iggerot Moshe* O.C. 3:91 in the context of eating on Yom Kippur writes that one who swallows a pill without water is certainly considered to have eaten *shelo k'derech achila*. This leniency is also mentioned in *Shemirat Shabbat KeHilchata* 39:8 and notes 26-27. More significantly, R. S.Z. Auerbach in *Minchat Shlomo* 1:17 and 2:65 and *Shemirat Shabbat KeHilchata* ch. 40 note 169 (see also there note 167) writes that items that are made not to be eaten in a normal manner, such as pills, are by definition eaten *shelo k'derech*. (See *Techumin* vol. 15 p.353 for a discussion of R. Auerbach's leniency.) Based on R. Auerbach's ruling in *Shemirat Shabbat KeHilchata* chapter 40 note 63, it seems that even a pill coated with sweet or freshening coating that is swallowed whole would retain its status as *shelo k'derech achila* and therefore not require a *beracha*. (The *psak* of R.Auerbach regarding the requirement of reciting a *beracha* prior to taking coated pills cited in *Nishmat Avraham* vol. 4 p.7 refers to edible tablets, not those that are swallowed whole.) This is also the opinion of *Pitchei Halacha* ch. 4 note #39. (Cf. *Shu"t Shevet Hakehati* 2:84.) The concept of *shelo k'derech achila* is applied to *hilchot berachot* by *Shulchan Aruch* 202:2. Also see *Minchat Chinuch* mitzva 430 and *Shemirat Shabbat KeHilchata* 40:84. This is discussed by several *poskim* in the context of food wrapped in a covering and feeding via a nasogastric tube. For example, see *Achiezer* 3:61, *Shu"t Chelkat Yakov* 3:68, *Shu"t Riveivot Efraim* 1:131, and *Shu"t Teshuvot V'hanhagot* 1:184.

30. This subject is too involved to fully explain here. The source of this concept is *Masechet Avoda Zara* 67-68 and *Pesachim* 21b and 45b, based on *Devarim* 14:21. The halachot of *nifsal m'achila* are found predominantly in *Shulchan Aruch* Y.D. *siman* 103, and also in Y.D. 155:3 and 84:17 as well as O.C. 442.

31. *Shulchan Aruch* 202:2. See also *Pitchei Halacha* ch.4 note #20.

32. This discussion of flavored medicine applies to many children's medications as well as to an increasing number of adult medications that are increasingly available in flavored chewable, dissolvable, and liquid preparations. **Although this is not the subject of this piece, we are obligated to note that such medication poses a serious kashrut problem. A Rav must be consulted as to whether a particular medication may be**

*beracha* is warranted depends largely on one's subjective experience.<sup>33</sup> A *beracha* certainly must be recited on chewable or liquid medicine that has a taste that is subjectively enjoyed to the degree that one would ingest it even if it did not have medicinal properties.<sup>34</sup> On the other hand, as is the case with all food, one does not recite a *beracha* on medicine that is repulsive, even if it is acceptable to most people.<sup>35</sup>

What is the status of medicine that is merely palatable but not particularly enjoyed because it has no flavor or has a subjectively neutral flavor?<sup>36</sup> With regard to *food* that is eaten for its therapeutic effects, *poskim* write that one must recite a *beracha* even if one does not enjoy its taste, provided that he is

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**taken by a particular person for a particular illness. Certified kosher forms of many such medications are now available. The discussion that follows assumes that one is permitted to take the medication in question.**

33. The *Bircat Habayit* 5:4 suggest that if one does not know if he will enjoy the taste of a particular medicine, he should either taste a bit and spit it out or first make a *birchat shehakol* on a food item other than water that certainly requires a *beracha*.

34. This is the ruling of R.Auerbach as cited in *Nishmat Avraham* vol. 4 p.7 and vol. 5 p.12; *Pitchei Halacha* ch.4 note 39 alef; *V'ten Beracha* ch.13 note #15.1; and *V'zot Haberacha* p.115. It is also the ruling of R.Elyashiv cited in *V'zot Haberacha*, ch. 12 p. 113 in the 3rd edition, and *V'ten Beracha* ch.13 note 15. It is not similar to the case of the Ramo 204:8 that one who is coerced to eat something does not recite a *beracha*, because in our case, he willingly ingests the medicine even though he is forced to do so by his state of health. We find a similar explanation in *Mishnah Berurah* there and in *Shulchan Aruch Harav* 204:15. Also, even if the flavor is added to the active ingredient, a *beracha* is still recited despite the fact that the flavor is *tafel* to the actual medicine. See R. Auerbach's opinion cited in *Shemirat Shabbat KeHilchata*, vol. 1 ch.40 note 191, and vol. 3 in *tikunim umiluim* on that note. It is likely that even R. Neuwirth would agree that a *beracha* is required in this case – see later note # 41.

35. See note #15.

36. This likely includes flavored medication that is not enjoyed as well as flavored Golytely solution used for bowel prep prior to a colonoscopy, lemonade flavored oral contrast for a CT scan, and other similar liquids.

not repulsed by it.<sup>37</sup> Although there are those who apply this ruling to medication,<sup>38</sup> it seems that in fact this ruling applies only to *food* in which there is nutritional value or satiety, but not to medication in which there is no such benefit. In that case, no *beracha* is required on such medication.<sup>39</sup>

The most common, yet most difficult, question concerns chewable or liquid medication whose taste is enjoyed, but not to the degree that one would ingest it if not for its medicinal value. There are two lines of reasoning used by *poskim* to argue that a *beracha* is *not* recited on such medicine.<sup>40</sup> One, there certainly is no requirement to recite a *beracha* on the active ingredient; the only possible requirement is for a *beracha* on the added flavor or sweetener. In that case, no *beracha* need be made because that ingredient is *tafel* (secondary) to the actual medication and the halacha is that in the event one does not recite a *beracha* on the *ikar* (the primary ingredient) one is absolved from reciting a *beracha* on the *tafel*.<sup>41</sup> Two, even if one were to

37. *Mishnah Berurah* 204:43 and *Shaar Hatziyun* 204:37. See earlier notes # 11 and 15.

38. *Chasdei Avraham* 1:4:24 and *Encyclopedia Hilchot Refuit* p.109 note #95.

39. This is based on note #18.

40. This was the *psak* of R.Auerbach as cited in *Nishmat Avraham* vol. 4 p.7 and vol. 5 p.12, *Pitchei Halacha* ch.4 note 39a; *V'ten Beracha* ch.13 note #15.1; and *V'zot Haberacha* p.115. R. Auerbach orally gave this ruling independently to each of the authors of the aforementioned *seforim*. (Personal communication with the authors, *Adar* 5766). It is also the *psak* of the *Pitchei Halacha* ibid. and of the *Shemirat Shabbat KeHilchata* ch. 40 note #191. It is important to note that the comment of R. Auerbach cited in *Shemirat Shabbat KeHilchata* vol. 3 as a clarification of ch. 40 note #191 is not relevant to this case. That comment relates only to the question of *ikar* and *tafel* in a medicine that contains a flavor that would be desired even if not for its medicinal properties, not to the food status of a medicine that would not be desired independent of its medicinal value.

41. This explanation, proposed by R. Neuwirth, author of *Shemirat Shabbat KeHilchata*, is cited in many places, including *Nishmat Avraham* vols. 4 and 5, *Ner Yechezkel* p.117 cited in *Nishmat Avraham* vol. 5 p.12, *Shemirat Shabbat*

argue that a *tafel* of this nature requires a *beracha*, there is a more fundamental reason that a *beracha* is not warranted in this case. As we mentioned, *berachot* were instituted solely on enjoyment derived from an *ochel*, a food item. *Poskim* maintain that this type of medicine cannot be labeled an *ochel*, a food item, as evidenced by the fact that one would not eat it if not for its therapeutic properties.<sup>42</sup>

Other *poskim* reject both arguments and maintain that a *beracha* is in fact recited on such medicine because the fact is that there is an enjoyable taste.<sup>43</sup> They argue that although if not for its

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*KeHilchata* ch. 40 note 191, and at greater length in *Ateret Shlomo* 8:110. This may be subject to a larger discussion in the theory behind the exemption of a *tafel* when a *beracha* is made on the *ikar*. Is the reason that one does not recite a *beracha* on the *tafel* because the *tafel* is *batel* to the *ikar* or because the *beracha* on the *ikar* also covers the *tafel*? This is not merely academic and has several practical implications in addition to our case. In the event that no *beracha* is recited on the *ikar*, the former view would not require a *beracha* to be made on the *tafel*, whereas the latter view would. Most *poskim*, including *Chazon Ish* O.C. 27:9, *Shu"t Iggerot Moshe* O.C. 4:42, and *Shu"t B'tzel Hachochma* 6:88, follow the latter view.

42. This explanation was told by R. Auerbach to R. Binyomin Forst, published in *Pitchei Halacha* ch.4 note 39a, as well as to R. Pinchas Bodner, published in *V'ten Beracha* ch. 13 note 15.1, followed by *V'zot Haberacha* in *Birur Halacha* 41:7 in the 5762 edition. Also see *Nishmat Avraham* vol. 4 p. 7 and in English vol. 1 p. 90. *Poskim* invoke this intuitive explanation in other contexts as well. For example, the *Tzitz Eliezer* 17:32 writes that although the *Shulchan Aruch* Y.D. 116:1 writes that food stored under one's bed obtains a *ruach rah*, there is no problem with storing medicine in such a manner because it is not a food. We find a similar ruling in *Shu"t Beer Moshe* 8:41 regarding taking medicine into a bathroom. Cf. *Shu"t Shevet Hakehuti* 2:245 who writes that one should refrain from taking flavored medicine into a bathroom or storing it under a bed.

43. As in the case described by the *Shulchan Aruch* 204:8. This is held by several contemporary *poskim*, although there is no precedent for this exact *psak* in this specific case. Although this *psak* seems to be ascribed to R. Elyashiv in *V'zot Haberacha* ch. 12 p. 113 in the 3rd edition and *V'ten Beracha* ch.13 note 15, close questioning of the *poskim* who recorded this *psak* revealed that R. Elyashiv was not asked specifically about this intermediate case but may have very likely referred to medicine with a flavor that is thoroughly enjoyed,

medicinal ingredient one would choose to eat other things, the fact is that one derives enjoyment from the taste of this item and therefore it ipso facto is deemed an *ochel*.<sup>44</sup> Also, the accepted halacha is that a *beracha* is made on the *tafel* in the event that the *ikar* does not require a *beracha*.<sup>45</sup> These *poskim* therefore hold that one should recite a *beracha* on medication

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in which case all agree that a *beracha* is required. (Personal conversation with R. Pinchas Bodner and R. Shlomo Gissinger, Nissan 5766). Also, although R. Avigdor Nebenzhal, cited in *Halichot Shlomo* on *Hilchot Yom Kippur* ch. 5 note 42, has said that R. Auerbach at the end of his life reportedly retracted his initial *psak* and ruled that a *beracha* is required in this case, the true intent of R. Auerbach at that time remains unclear as R. Neuwirth, R. Azriel Auerbach, R. Forst, R. Bodner, all of whom personally heard from R. Auerbach that one does *not* make a *beracha* on such medication, are unaware of this retraction and are reluctant to rely on this report. (Personal communication during *Adar* 5766).

44. This is the implication of the *Ramo* in 204:11 and of the *Meiri* in *Berachot* 35b. Although R. Forst does not ascribe to this opinion, see *Pitchei Halacha* ch.4 note 39a and notes of R. Forst on *V'zot Haberacha* #9. This argument is found with regard to *food* eaten solely for its therapeutic benefit in earlier *poskim*, including *Shu"t Haelef Lecha Shlomo* siman 90, *Shulchan Aruch Harav* 204:15, *Shu"t Chatam Sofer* siman 202, and *Mishnah Berurah* 204:48. However, these *poskim* may not apply the same reasoning to actual medicine that is ingested, which may by definition not be deemed an *ochel* (food).

45. This is evident from the *Mishnah Berurah* in 174:39 and 212:1 and is pointed out by R.Auerbach himself as cited in *Shemirat Shabbat KeHilchata* ibid. Although the *Shu"t Riveivot Efraim* 4:55 explains R.Elyashiv's reasoning differently, the *Pitchei Halacha* in letter #4 printed in the back of the *sefer* clearly explains that R.Elyashiv's true intent is in accordance with this *psak*. This is also the *psak* of the *Maharsham* in *Daat Torah* 204:8 and of R.Ovadya Yosef cited in *Yalkut Yosef* 204 note 10. This may depend on the aforementioned discussion of the halacha of *ikar v'tafel*. See a longer discussion of this point in *Halacha U'refuah* vol. 3 pp. 283-284. Although there is room to argue that even the *Chazon Ish* and other *poskim* cited in note #41 would agree that a secondary ingredient that is thoroughly combined with the primary ingredient into a homogenous mixture would lose its identity completely and not require a *beracha* of its own (see *Pitchei Halacha* letter 5), R. Auerbach in *Shemirat Shabbat KeHilchata* vol. 3, in *tikunim umiluim* to ch. 40, note 191, based on the *Mishnah Berurah* 174:39, clearly rejects such a distinction. It is important to note that even if this argument were accepted, there remains the question of whether such an item has the status of an *ochel*.

that has a positive taste even if one would not otherwise ingest it.<sup>46</sup> There is no clear resolution to this issue and therefore many advise to recite a *beracha*, on an item that certainly requires a *beracha* prior to taking the flavored medication.

Flavored medicine that dissolves in the mouth or that is chewed without being swallowed is halachically comparable to chewable medication as it is put in the mouth and the taste is swallowed.<sup>47</sup>

### Medicine mixed with food or drink

What is the halacha of medicine that by itself would not warrant a *beracha* that is mixed with food or drink?<sup>48</sup> Does one recite a *beracha* on the mixture? This shares certain aspects of the discussion of flavored medicine. One may argue that although the food into which the medicine is mixed is a real food, it is

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46. As an aside, it is interesting to note that the question dealt with here potentially has ramifications on other areas of halacha. For example, the *Shulchan Aruch* O.C. 271:4 writes that one may not eat on Friday night prior to making *kiddush*. May one take medicine during that time? This may be relevant for one who must take a particular medication at a specified time prior to eating. The *Shu"t Minchat Yitzchok* 8:18, *Shu"t Shevet Hakehuti* 1:109 and *Shemirat Shabbat KeHilchata* 52:3 write, based on the *Terumat Hadeshen* in *siman* 158, cited by *Magen Avraham* and *Machatzit Hashekel* in 271:5 and *Mishnah Berurah* in 271:13, that prior to *kiddush* one may drink water to aid in swallowing a pill. This is because there is no *hanaat achila* in such a case, as is evident from the fact that no *beracha* is required. The implication of this ruling is that it would be forbidden to take pleasant tasting liquid or chewable medication during that time because there is *hanaa*, as is evident from the fact that a *beracha* is required. See also *Darchei Halacha* on *hilchot berachot siman* 16.

47. Although the actual item isn't swallowed, this is not similar to the case of *matemet* because in this case, flavor is swallowed. Therefore, it is similar to the case described in *Shulchan Aruch* 202:15 and in *teshuvot* cited earlier in note # 13, as is commonly practiced with chewing gum.

48. This includes items such as powdered medicine mixed with orange juice, crushed pills mixed in applesauce, barium-laced food or drink used for a modified barium swallow test or gastric motility studies, etc.

*tafel*, secondary, to the medicine and therefore perhaps not require a *beracha*.<sup>49</sup> However, based on our earlier conclusion, most *poskim* maintain that a *beracha* should in fact be made on the mixture. A similar question is found in the case of one who drinks juice to swallow a bitter pill to make it palatable. *Poskim* write that although the juice is in fact *tafel* to the medicine, a *beracha* is made.<sup>50</sup>

Assuming that in this case a *beracha* is required, does one recite the *beracha* normally required by the food item (i.e. *borei p'ri haetz* on chunky applesauce) or does one always recite a *birchat shehakol*?<sup>51</sup> The *Ramo*<sup>52</sup> holds that a *birchat shehakol* is recited regardless of the usual *beracha* of the food. The *Gra* and *Magen Avraham* argue that the correct *beracha* is that which the food item usually warrants. The *Mishnah Berurah* does not resolve this dispute and suggests that the best idea is to avoid this situation if at all possible.<sup>53</sup>

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49. The *Shulchan Aruch* in O.C. *siman* 212 clearly explains that the designation of *ikar v'tafel* in a mixture is determined by one's intent, not by relative amount or objective importance of each ingredient.

50. *Shu"t B'tzel Hachochma* 6:88. A seemingly contradictory *psak* is recorded in *Nishmat Avraham*, vol. 4 *siman* 204:8, p. 8, in which R.Auerbach ruled that a *beracha* is not recited on food that is laced with barium eaten for radiological enhancement. I am not clear as to the reason for this *psak*, especially in light of R.Auerbach's position that a *beracha* is required on the *tafel* when no *beracha* is required on the *ikar*. It is possible that there is a distinction between instances in which the food itself is needed, as is the case in studies for gastroparesis, and those in which the food is used solely as a vehicle to provide substance for the radio-opaque material, as is the case in a modified barium swallow evaluation. However, this distinction is tenuous because even in the latter case, the food is tasted and apparently retains its status as an *ochel*, even if deemed *tafel*.

51. See a detailed discussion of this question in *Halacha U'refuah*, vol. 3 p.284.

52. 212:1 based on the ruling of the *Terumat Hadeshen*.

53. 212:4-5.

If food itself is eaten for therapeutic reasons,<sup>54</sup> one recites a *beracha* if there is even minute enjoyment of its taste. If it is tasteless or its taste is not enjoyed, no *beracha* is required even if it provides nutrition or satiety.<sup>55</sup> If the food or drink is one that is not usually eaten by healthy people and is reserved for those utilizing its therapeutic properties, the choice of *beracha* depends on a dispute between the *Ramo*<sup>56</sup> and *Magen Avraham*<sup>57</sup> regarding whether a *birchat shehakol* is recited regardless of the original *beracha* on the item. The *Mishnah Berurah*<sup>58</sup> and *Iggerot Moshe*<sup>59</sup> follow the ruling of the *Magen Avraham* and hold that the original *beracha* is recited.

### Drinking to aid swallowing

Although this is not strictly a question of *berachot* on medication per se, a common question concerns one who drinks a liquid to be able to swallow a pill. Given that no *beracha* is recited on the medicine itself, is a *beracha* recited on the drink? We find a difference between water and all other drinks. Water is the one item that provides no *hanaat garon* nor *hanaat mayaim* if it is not drunk to quench thirst.<sup>60</sup> Therefore, one who drinks water for any other reason, including assisting with swallowing pills,

54. For example, honey or prune juice. See *Shaar Hatziyun* 210:30.

55. This is in contrast with items eaten for health benefit that provide an enjoyable taste but do not provide any nutrition, which do require a *beracha*. It is not clear why a *beracha* is required for items eaten for health purposes that provide solely *hanaat garon* but not for those that provide solely *hanaat may'ayim*.

56. 204:11.

57. 204:21.

58. 204:55.

59. *Iggerot Moshe* O.C. 1:82.

60. *Nishmat Avraham*, vol. 1, p. 90, suggests that one who drinks water without a particular reason must recite a *beracha* even without the specific intent to quench his thirst because if one enjoys the water, it is assumed that he must have been at least a bit thirsty.

need not recite a *beracha* unless he is thirsty at the time.<sup>61</sup> On the other hand, all other drinks are considered to provide a degree of satisfaction even when drunk for reasons other than to quench thirst and therefore a *beracha* must always be recited.<sup>62</sup>

### Related issues

We will briefly mention two other related questions that pertain to reciting *berachot* on medication. Is a *beracha* required on medication taken during a meal for which one has said a *birchat hamotzie*? What is the halacha if one with a minor discomfort recited a *beracha* on medication on Shabbat and then realized that he is not allowed to take it due to the rabbinic decree proscribing the ingestion of medicine for those without a serious illness? In the former question, one who takes flavored medicine during a meal must recite a *beracha* as the medicine is not eaten as part of the meal.<sup>63</sup> Regarding the question of medicine on Shabbat, it certainly is preferable to eat something else that is in front of him that he was planning on eating, rather than take any of the medication.<sup>64</sup> However, if that is not possible, there are those who rule that he may ingest a bit of the medicine so that the *beracha* he recited should not be in vain.<sup>65</sup>

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61. *Masechet Berachot* 44a, as explained by *Tosafot ibid.* and *Gra* in *Shnay Eliyahu*, cited in *Biur Halacha* and *Shaar Hatziyun* 204:7. Also see *Aruch Hashulchan* 204:18. The *Mishnah Berurah* 204:42 adds that if one is also thirsty, he recites a *beracha*.

62. *Mishnah Berurah* 204:42. This includes mineral water that has a bit of taste. The *Shu"t Mishneh Halachot* 6:44 writes that no *beracha* is recited on plain seltzer that is drunk to aid in swallowing; however, there is no source for this ruling and this case is in fact debated in *Pitchei Halacha* ch.4 note #29 and letter #24.

63. *Shulchan Aruch* 174:7. See *Shu"t Shevet Halekha* 3:78. Perhaps a flavored medicine that aids digestion or prevents gastrointestinal upset may be considered part of the meal and thus not require a *beracha*.

64. *Shulchan Aruch* 206:6.

65. We find many sources who address questions of *berachot* recited in

## Conclusion

Even if a particular medication does not technically require a *beracha*, one must still be cognizant of the fact that *Hakadosh Boruch Hu* is the One who allows the medicine to achieve its desired effect. *Chazal* formulated a *tefilla* to be said before taking any medication, regardless of whether a *birchot hanehenin* is recited.<sup>66</sup> One who expresses his recognition of the true source of the medicine's efficacy has surely fulfilled the spirit of the reason for which *birchot hanehenin* were instituted.

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error. For example, see the *Sdei Chemed* in *Bein Hametzarim siman 1:5*, regarding one who erroneously recited a *beracha* on meat and prior to ingestion realized that it was the nine days during which eating meat is forbidden. We find similar cases in the *Ramo* in *O.C. 271:5*, regarding food prior to *Havdala* on *Motzaei Shabbat*, in *Shemirat Shabbat KeHilchata 52:19* regarding food prior to *kiddush*, and in *Yabia Omer Y.D. 2:5* regarding food on a *taanit*, a fast day. These *poskim* rule in their respective cases that one who erroneously recited a *beracha* should eat a bit of the forbidden food to avoid a *beracha l'vatala*. This *psak* is issued in our case of medicine on *Shabbat* by the *Shu"t Shevet Hakehati 2:151* with the support of two additional reasons. One, perhaps there is no prohibition on *Shabbat* on taking a small amount of medicine that is not efficacious. Two, perhaps the prohibition on taking medicine on *Shabbat* applies only when one is taking it for purposes of *refuah* but not for other reasons such as avoiding a *beracha l'vatala*.

66. *Masechet Berachot 60a*, cited in *Shulchan Aruch 230:4* in the context of *hakazat dam*, bloodletting, and applied to medication by *Chayei Adam* and *Magen Avraham*, as cited by *Mishnah Berurah 230:6*. Certainly, this can not be recited *in lieu* of an appropriate *birchat hanehenin* when one is warranted; rather in such cases it is recited *in addition* to the appropriate *beracha*.

# Alzheimer's and Dementia in The Elderly: Halachic Perspectives

*Rabbi Zev Schostak*

As the population lives longer, we face critical decisions in caring for our elders. More than 34 million people are now 65 or older – 13 % of the total population of the United States. The percentage of people over age 65 will increase rapidly over the next few years as the " baby boom" generation reaches 65. Sadly, the fastest growing segment of our population – elders over 85 – have the highest risk of Alzheimer's disease. By 2050, 14 million older Americans are expected to have Alzheimer's disease. In fact, researchers recently projected that the number of new cases every year will double between 1995 and 2050 – from 377,000 to 959,000 – if current population trends continue and no preventive treatments emerge!

These developments raise some serious halachic concerns:

Contemporary secular medical ethics espouse the doctrine of patient autonomy, which declares that every individual with capacity has the right to make medical decisions for himself. One may express his or her preferences in advance (advance directives) to accept or refuse various medical interventions through a living will or health-care proxy.

When medical decisions must be made, physicians must fully inform *competent* patients or their proxies (if they no longer have capacity) of their treatment options (informed consent), and discuss with them the risks and benefits of the various alternatives and the possible outcomes/consequences of their

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decisions. Patients may then decide to undergo high-risk medical treatments that promise some hope for recovery, or refuse life-support interventions in certain circumstances. While halacha does not view patient autonomy as an absolute right, it would, under certain conditions, respect the wishes of patients to make these critical decisions within halachic guidelines. Against this backdrop, we must probe a number of questions:

Would halacha consider an Alzheimer's patient to be a *shoteh* (mentally deranged/halachically incompetent), and, if so, at what stage?

Once an individual is no longer able to care for himself, his family faces some agonizing decisions: Should they place him in a long-term care facility, where he will be cared for in a safe and secure environment? As children, are they abdicating their responsibilities to "honor thy father and thy mother," when they place their parents in the care of others? Does the Torah expect children to personally care for their chronically ill parents at home, regardless of the financial expense or emotional toll?

Lastly, are individuals with dementia or Alzheimer's obligated to perform mitzvot? For example, would a man still be obligated to don *tephillin* each weekday morning? Would he be counted in a *minyan*? Would a woman still be obligated to eat matzoh at the Seder or listen to the *megillah*?

### I. Advance Directives

An advance directive is a legal document that is drafted to express one's wishes for medical care if he or she no longer has capacity to make those decisions. These decisions concern whether to accept or deny certain medical treatments, including, among others: pain control, resuscitation, artificial nutrition and hydration, organ donation, and appointing an agent to make decisions on one's behalf. It is an important document to have at any stage of one's life, but particularly for elders who

become increasingly vulnerable to health problems in their later years. Without an advance directive in place, some of the most critical decisions affecting one's life would be left entirely in the hands of medical professionals, or family members who may be completely unaware or unsure of the principal's wishes.

It seems abundantly clear from the literature that in the early stages of dementia or Alzheimer's, many elderly patients will have the requisite capacity to express their wishes in advance directives. This underscores the need for these patients and, indeed, all elderly individuals to appoint health-care proxies and discuss their advance medical directives with them while they still have the ability to do so... The fact that there are many individuals who do not have advance directives on file is particularly distressing because research indicates that hospital-based physicians showed a remarkably improved ability to make treatment decisions aligned with patient wishes when advance directives, or "living wills", were available. In fact, with living wills, their decisions about patient care improved to a level better than decisions made by the primary care physicians. Their treatment choices were almost as accurate as decisions made by family members. Researchers noted that advance directives improved decisions by physicians in emergency rooms and on critical care areas to a level of someone well acquainted with the patient.<sup>1</sup>

In order to execute an advance directive, an individual must have the capacity to make those decisions and be able to weigh the benefits and risks of various treatment alternatives,

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1. Coppola KM, Danks JH, Smucker WD, "Accuracy of primary care and hospital-based physicians' predictions of elderly outpatients' treatment preferences with and without advance directives," *Archives of Internal Medicine* 2001; 161:431-440.

and the consequences of refusing treatment altogether. As dementia or Alzheimer's progresses, patients will eventually lose capacity to make their own medical decisions. At what stage of his illness does he still have sufficient capacity to make competent decisions? For example, does he comprehend the fact that refusal to accept a feeding tube could result in his death? When he is suffering from peripheral vascular disease, and amputation of his leg offers him a low-risk – high-benefit treatment alternative, does he fully understand the consequences of his refusal? Ultimately, would his decision reflect a truly autonomous choice – uncolored by depression and progressive dementia? In halacha, at what point would he be deemed a *shoteh* (lacking mental capacity) and become legally unfit to make any decisions?

### **Capacity in Cognitively Impaired Elders – The Research**

In early and mid- stage dementia and Alzheimer's, it is often difficult to assess whether patients genuinely understand treatment alternatives and can weigh their respective risks and benefits. Often, these patients may be able to converse comfortably about topics with which they are familiar and compensate socially for many of their memory and cognitive deficits.<sup>2</sup>

In order to assess a patient's capacity to make medical decisions, many studies indicate various common criteria or legal standards.<sup>3</sup>

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2. "Many individuals in the early stages of dementia or with mild delirium maintain a successful social façade, and their impairment may not be apparent on superficial questioning." Volicer L, Ganzini L: "Health professionals" views on standards for decision-making capacity regarding refusal of medical treatment in mild Alzheimer's disease," *Journal of the American Geriatrics Society* 2003; 51:1270.

3. Marson DC, Earnst KS et al: "Consistency of physicians' legal standard and personal judgments of competency in patients with Alzheimer's disease,"

One of the most widely used standardized tests to evaluate cognitive mental status is the Mini Mental State Exam (MMSE). It is a brief 30-point exam which assesses orientation, attention, immediate and short-term recall, language, and the ability to follow simple verbal and written commands. The MMSE provides a total score that places the individual on a scale of cognitive function. As might be expected, when individuals age, their median scores declines – from a median of 29 for those 18 to 24 years of age, to 25 for those who are 80 years and older, with much lower scores correlating to the degree of dementia. Recent findings conclude that the standardized MMSE is a good measure for classifying capacity to complete an advance directive; however, it is not adequate to measure legal competency.<sup>4</sup> Indeed, when considering the MMSE and other specialized instruments to measure capacity in the cognitively impaired, one important study concludes:

"Rarely is incapacity absolute; even people with impaired capacity usually possess some ability to comprehend, to communicate, and to form and express a preference. Thus, many older people are capable of understanding some things but incapable of understanding others. Persons with demented illness are often assumed, inaccurately, to be generally or globally decisionally incapacitated. The results of this research and that of others suggest that carefully screened persons with mild, moderate, and even severe dementia

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*Journal of the American Geriatrics Society* 2000; 48:913 See also Volicer, op.cit. 51:1271 for two earlier standards of competency— Grisso et al (1998) and Drane (1984).

4. Molloy DW, Silberfeld M et al, "Measuring capacity to complete an advance directive," *Journal of the American Geriatrics Society* 1996;44:1-4 and Marson DC, Chatterjee A et al, "Toward a neurological model of competency: cognitive predictors of capacity to consent in Alzheimer's disease using three different legal standards," *Neurology* 1996;46:666-672.

are able to demonstrate capacity to make some decisions, including the execution of a health-care proxy.<sup>5</sup>

### Capacity in Cognitively Impaired Elders – Halachic Sources

Are there any tests or assessment protocol to determine capacity, according to halacha? The late bioethicist, Benjamin Freedman, draws a fascinating analogy from passages in Tractate *Gittin* and relates them to contemporary competency standards:

The Mishnah (67b) records:

One who became speechless [lit., *nishtatek*; in contemporary Hebrew usage this connotes a stroke or paralysis which affects speech] and they said to him, "Let us write a divorce document for your wife," and he inclined [lit., *v'hirchin*, which connotes nodding to indicate consent] his head, we examine him three times: if he responds to – "no" – "no" and to – "yes" – "yes", then they may write it and deliver it.

The *Gemara* (70b) elucidates:

Should we suspect [when he nods his head repeatedly to a series of successive "yes" or "no" questions] that he might be suffering from a tremor?<sup>6</sup>

R' Yosef bar Manyomei said, "We speak to him at intervals (that is, "delaying a bit before we repeat the

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5. Mezey M, Teresi J et al, "Decision-making capacity to execute a health-care proxy: development and testing of guidelines," *Journal of the American Geriatrics Society* 2000; 48:187.

6. Rashi comments: "A disease of madness, which trains/habituates him to always shake or nod his head, and *he does not respond appropriately to the questions they are asking*." Neurologically, this husband may be suffering from Parkinson's or another palsy, which causes involuntary movements.

very same question" – Rashi). Should we suspect [when he repeatedly shakes or nods his head in the same direction] that his tremor is following a pattern? We ask him one 'no' question followed by two 'yes' questions and two 'no' questions followed by one 'yes' question."

They learned in R. Yishmael's school: "They speak to him about matters which are appropriate to the summer season during the rainy [winter] season, and matters which are appropriate to the winter season during the summer. What does this mean? Are we referring to [questions about] a woolen blanket [during the summer] and linen sheets [during the winter]? Perhaps, then, [during the summer], he was shivering [lit., "seized by cold"] and [during the winter], he was perspiring [lit., "seized by heat"]?"<sup>7</sup>

Freedman observes:

The passage seems reminiscent of a scientific experiment, to answer the question: Is the husband intentionally communicating through head movement? The reliability of the study is established through replication: The test is done three times. The experimenter wishes to control for, or to eliminate, confounding variables such as intermittent tremor, and so manipulates the experimental design in terms of timing and variation of appropriate response..... Communication, whatever its form, contains two elements: pattern and repetition.. The first colloquy... satisfies the need for repetition, but not for patterning; it is possible that this apparent indication is simply an intermittent but natural recurring

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7. Rashi comments: "...perhaps he is shivering during the summer season and even when he responds affirmatively about woolen blankets, he is not mentally incapacitated [lit., a *shoteh*].

phenomenon.... The element of patterning is supplied by asking a series of questions that should yield staggered, alternating responses, no-yes-yes-no-no-yes: "We ask him one question of no, and two of yes, and two of no, and one of yes." We have now demonstrated, through patterned repetition, that the phenomenon observed is meaningful. However, for it to constitute communication, it needs to be decodable into a language understood in common by both parties... This is the contribution of the school of Rabbi Yishmael: "They speak to him of summer matters during winter [the rainy season], and of winter matters during summer."

The same principles apply, of course, today. Some patients with profound paralysis retain the ability to communicate solely through blinking. With them, the first task is to ensure that their blinking is meaningful, and similar forms of patterned repetition in yes/no questions are employed to this end. The second task, ensuring a common language, is tested when we examine to see whether a patient remains oriented to time, place, and person.<sup>8</sup>

What, indeed, is the halachic criterion to determine legal incapacity? Is it global, meaning that the incapacitated individual lacks competency to make *any* decision, including advance directives, or is it decision-specific? We are familiar with the halachic principles relating to a mentally deranged or insane individual – *shoteh*: he or she is exempt from mitzvah

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8. Benjamin Freedman, *Duty and Healing: Foundations of a Jewish Bioethic*, London:Routledge, 1999,pp., 207- 212. Interestingly, the MMSE (Mini-Mental State Exam) and the Western Aphasia Battery include questions which test for patterning and orientation to person, place, and time, much like the talmudic protocol.

obligations and cannot legally transact a purchase or a sale.<sup>9</sup> Would an individual suffering from dementia or Alzheimer's be considered a *shoteh* at some stage? Would such an individual, who has recurrent moments of lucidity be treated as having capacity?

Seemingly, lucid moments are significant in keeping with the talmudic dictum:

One who has moments of lucidity and moments of insanity, when lucid is considered normal in every respect, and, when insane is considered insane in every respect.<sup>10</sup>

The primary source for our wide-ranging inquiry is the passage in *Chagigah* 3b:

Our Rabbis taught: Who is [deemed] insane? One who goes out alone at night [risking personal danger], and sleeps overnight in the cemetery, and rips his garments. It was taught: Rabbi Huna said, "He must do all three [to be deemed insane]." Rabbi Pappa said, "Even one of them."

What is the case? If he acted irrationally, then even one of these incidents would be symptomatic (of insanity). If he acted rationally (i.e., there are rational explanations for his erratic behavior), then even all these incidents would not be symptomatic. Actually, he acted irrationally ["and, nevertheless, we do not consider him (to be insane) on the basis of one occasion," Rashi notes, because each incident, by itself, may have a rational explanation]: He sleeps overnight in the cemetery, I might say, so that the spirit of impurity will possess him. He

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9. Rashi, *Chagigah* 3b.

10. *Rosh Hashanah* 28a.

goes out alone at night, I might say, because he is seized by melancholy. And he rips his garment, I might say, because he is preoccupied with his thoughts [and apparently tears it unwittingly]. Thus, since he does all [three of] these things, he is likened to an ox who has gored an ox, donkey, and camel and has become a *muad* [demonstrating an established pattern of culpable conduct] in every respect. Rabbi Pappa said, "Had R. Huna heard that which is taught: 'Who is [deemed] insane? He who loses everything that is given to him...' ['that for one erratic action he is deemed insane,' Rashi, ad. loc.] he would have retracted his opinion..."

Rambam attempts to define *shoteh* and other forms of mental illness in terms of their validity to render testimony:<sup>11</sup>

An insane individual is biblically disqualified from rendering testimony because he is exempt from mitzvot. Not only is he [considered to be] insane when he walks around naked, destroys articles, and throws stones, but anyone who is mentally deranged so that his judgment is always impaired in any matter, even though he speaks and responds appropriately in other matters, is disqualified and categorized as insane.

Extremely "retarded" people who do not recognize [obvious] contradictions and cannot comprehend matters the way others [normally] do, as well as those who are mentally confused and impulsive and those who are extremely crazed are categorized as "insane." The determination [of their psychological status] is in accordance with the judge's evaluation, since it is impossible to delineate mental [status] in print.<sup>12</sup>

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11. *Mishneh Torah, Edut* 9:9,10.

12. For contemporary definitions of various rabbinical designations for

Rambam's declaration that "... anyone who is mentally deranged so that his judgment is always impaired *in any matter, even though he speaks and responds appropriately in other matters*, is disqualified and categorized as 'insane'" – evokes much controversy. Is Rambam's intent to categorically disqualify an individual who functions normally in every aspect of his life, except one, even in those areas where his behavior is perfectly acceptable? On the surface, it appears that Rambam sees this individual as globally impaired, and he is "disqualified and categorized as 'insane'" across the board. Yet, if this be the case, why does Rambam belatedly introduce this concept when he discusses the laws of testimony in his *Mishnah Torah*, rather than in his earlier treatments of certain marital and civil laws?

The *T'vuot Shor* understands that the Rambam classifies an individual who does not function normally in one area of his life as being globally impaired even in other areas where he speaks appropriately.<sup>13</sup> He posits that there are many mentally ill individuals who are able to speak coherently, but, nevertheless, their occasional actions, in effect, speak louder than words. *Me'erot Aynaim* echoes his opinion and asserts

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mental illnesses, see Rabbi Y. Zilberstein's article, "The status of the mentally ill," *Emek Halakha-Assia* 5746 (1986) pp. 189-201. For example, *peti*, typically translated as "simple" (e.g., "God protects the *simple* – Psalms 116), R. Zilberstein defines as "retarded." He understands the term, *nechpazim* to refer to an impulse disorder, citing *Me'erot Aynaim* (22): " It appears that they are individuals who are not deliberate in their matters, but act hastily and do not comprehend the ultimate purpose (consequence) of their actions..." Rabbi Hershel Schachter, based on the responsa *Zichron Yosef* (cited in *Yad Avraham* to *Yoreh Deah* 1:5) offers different definitions for these halachic terms: a *peti* is not a retarded individual, but rather one who is somewhat immature and silly; accordingly, he is deemed to have capacity (*bar da'a t*) and, technically, could be counted in a *minyan* were it not a matter of *kavod hatzibbur* – respect for the integrity/dignity of the congregation. However, a deaf mute, who is unable to hear or speak and cannot be educated, would be regarded in halacha as seriously retarded, and treated on a par with a *shoteh*, whose behavior is psychotic.

13. *Yoreh Deah* 51.

that even if this individual is intelligent and speaks logically and cogently, he is still considered to be "insane" if there is *any* area where his psychological status affects his capacity to make sound decisions.<sup>14</sup>

Rabbi Moshe Feinstein, however, asserts that one's insanity is restricted exclusively to the one area of his life where his behavior is abnormal; in other areas where his behavior is completely appropriate, he is deemed to be normal. Consequently, in those areas where he is functioning normally, his statements and actions are regarded as legally binding. Even Rambam who declares "...anyone who is mentally deranged so that his judgment is always impaired *in any matter, even though he speaks and responds appropriately in other matters*, is disqualified and categorized as 'insane'..." does not mean that he has lost capacity to make decisions in every area of his life. Rabbi Feinstein offers an original interpretation to demonstrate that Rambam is not addressing the issue of his legal capacity, but rather his ability to render acceptable testimony.

Rabbi Feinstein posits that an individual whose behavior is abnormal in one area of his life may not be globally impaired: he may fully engage in transactions, empower agents to act on his behalf, and even issue a divorce to his wife! However, Rambam disqualifies this individual from rendering testimony for an altogether different reason: "An insane individual is biblically disqualified from rendering testimony *because he is exempt from mitzvot*. Testifying in court is a mitzvah obligation. Rabbi Feinstein reasons that just as a minor is legally exempt from all mitzvot, even those in which he may have the ability to participate, so, too, an insane individual is exempt from all mitzvot – across the board – even those in which his behavior is clearly normal. This explains why Rambam waited until the

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14. *Choshen Mishpat* 35:26.

laws of testimony to define insanity, rather than discuss it earlier in the laws regarding transactions and divorce.<sup>15</sup>

### **Contemporary Applications: Dementia and Alzheimer's – Stages of Capacity**

In the early stages of dementia and Alzheimer's, the patient, for the most part, may be lucid and oriented, but suffers from occasional memory loss and mild confusion/disorientation. In this instance, both bioethicists and halachic authorities would respect this patient's ability to prepare advance directives, appoint a health-care proxy, and, subject to capacity assessments, make certain medical decisions. Halachically, this patient might be regarded as "One who has moments of lucidity and moments of insanity" ... and treated as normal whenever he is lucid.<sup>16</sup>

In mid-stage dementia and Alzheimer's, there are no hard and fast rules: the progression of the disease may vary significantly from patient to patient. To the extent that the patient is alert and oriented to self and others, and is able to communicate his/her wishes, either verbally or physically (e.g., nodding or eye blinking), as confirmed by assessment protocol, we might consider their medical decisions to be valid. Medically and halachically, capacity is decision-specific and not global in scope. Consequently, every patient's decision should be evaluated on its own merits.

In end-stage dementia and Alzheimer's, the patient is totally disoriented, and is unaware of self, others (including family members), time and place. Both medically and halachically, this patient has no capacity whatsoever to make any decisions

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15. *Iggerot Moshe, Even Haezer*, 1:120.

16. *Rosh Hashanah* 28a, *Tur Choshen Mishpat* 235.

and would be regarded as "insane / *shoteh*." <sup>17</sup>

In halacha, is an adult child authorized to make medical decisions on behalf of a demented parent who has no advance directives? Rabbi Moshe Feinstein accepts the decision of family members to refuse treatment on behalf of a patient without capacity, where medical intervention may increase the life expectancy of the patient somewhat but will not cure him or alleviate pain.<sup>18</sup> But in the majority of instances, there are family members...who are engaged in the medical [decision-making] of the patient who are more responsible [than others] for his care, even by halacha." Indeed, Rabbi Feinstein observes that in the absence of a leading specialist who would prescribe a cure for this patient, a physician must always obtain consent from family, since some medications are not only worthless but possibly detrimental.

## II. Long-Term Care Placement

Our Rabbis measure the degree one must honor his parents with paradigms of dementia:

Come and hear: R. Eliezer was asked, "How far does the honor of parents extend?" He replied, " So that he (his father) should take a purse, throw it in his presence into the sea, and (the son should) not shame him."<sup>19</sup>

When R. Dimi came, he said: "He (Dama son of Nesinah)

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17. Rabbi Y. Zilberstein, op. cit., p. 199.

18. *Iggerot Moshe, Choshen Mishpat* 2:74, 2. For further discussion on the obligation of a community to provide vital medical treatment to minors, even against the wishes of parents, see *Tzitz Eliezer*, 15:40,3.

19. *Kiddushin* 32 a. "How far does honoring one's father and mother extend? Even were they to take his purse of golden coins and throw it in his presence into the sea, he should not embarrass, pain them or become angry, but accept the Torah's decree in silence." *Yoreh Deah* 240:8.

was once wearing a golden embroidered silken cloak and sat among Roman noblemen, when his mother came, tore it from him, struck him on the head, and spat in his face, yet he did not shame her.<sup>20</sup>

R. Assi had an aged mother. She said to him, "I want jewelry." So, he made them for her. "I want a husband." "I will look out for you!" "I want a husband as handsome as you." Thereupon he left her and went to Israel. Upon hearing that she was pursuing him, he went to R. Yochanan and asked, "May I leave Israel to go abroad?" "It is forbidden," he replied. "But what if it is to meet my mother?" "I do not know," he replied. He [R. Assi] waited for a short time and went back before him [R. Yochanan] again. "Assi, you are determined to go. May the Omnipresent bring you back in peace!"<sup>21</sup>

This last anecdote of R. Assi is truly enigmatic. A cursory reading of the text would suggest that after hearing his mother's unreasonable demands, R. Assi abandoned her and left the country! In the context of these talmudic anecdotes, all of which underscore the devotion and patience of our great rabbis toward their demented parents, R. Assi's response seems totally incongruous. Why did he leave her?

The Vilna Gaon in his glosses to that text writes that R. Assi's mother was indeed "deranged", and he directs us to Rambam.<sup>22</sup> R. Assi's mother's requests were apparently not the capricious whims of a lonely widow; rather, they were the ravings of a demented old woman. All the more reason, it would seem, for R. Assi to remain behind to attend to his

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20. Ibid., 31a. "There is a Midrash that she (his mother) was mentally deranged." Tosafot, ad loc.

21. Ibid., 31b.

22. Ibid., 31b [1]. *Mishneh Torah, Mamrim* 6:10.

mother's care. This difficulty in explaining R. Assi's reaction to his mother's dementia compels Rambam to propose a novel explanation:

One whose father or mother has become deranged should attempt to deal with them according to their capacity until they are treated with compassion (literally, [He] shall have had compassion upon them.")<sup>23</sup> However, if it is impossible for him to remain because they [his parents] have become extremely deranged, he may leave them and go on his way, and charge others to properly care for them.

While Rambam's explanation addresses the critical issue of how R. Assi seemingly abandoned his mother in her time of need, Rambam's protagonist, Ravad, challenges him:

This is not a correct ruling – if he, the son, leaves his father behind, whom shall he authorize to watch him?

Other authorities amplify Ravad's concerns:

A parent who has become deranged requires additional supervision... it is illogical that he should leave his parents (in the care of others) since he, the son, no longer needs to obey their (irrational/ inappropriate) requests... because they no longer have legal capacity... therefore, he is only obligated to provide for their physical needs and security and, so, how may he leave?<sup>24</sup>

If others are able to provide his father with proper

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23. The translation of this phrase is particularly troublesome. "He" might refer to God who will have compassion upon the demented parent and heal him (or, euphemistically, bring him eternal peace); alternatively, He may have compassion upon the son and other caregivers to strengthen them spiritually and emotionally through this crisis.

24. *Bach to Tur Yoreh Deah* 240.

care, certainly he, the son, is better able to fulfill his father's wishes and, therefore, he is *personally* obligated to do so.<sup>25</sup>

Radbaz offers a contemporary psychological insight into R. Assi's dilemma:

Certainly R. Assi instructed others to provide for her needs and this is [the only thing that could be] beneficial for her since she has longings [infatuation/fixation] for her son and was not embarrassed before him [to request that he seek a mate for her as handsome as he]; however, others will be able to reprimand her, while he is unable to do so.<sup>26</sup>

How are we to define a son's obligation to honor his father by providing for his care? Clearly, Rambam maintains that caring for a parent is not a personal obligation or a *mitzvah sheb'gufo* – a mitzvah which he, the son, must physically perform – and no one else; it is unlike the mitzvah of donning *tephillin* or sitting in a *sukkah* which one must personally fulfill and cannot delegate to others to act as agents on his behalf. Indeed, R. Assi arranged for his mother's care in Babylonia while he was studying in Israel. According to Rambam, there are circumstances under which a son or daughter may not be able to render personal care to a parent. In those situations, children are not exempt from their obligation to honor their parent; rather, their role and responsibilities have been transformed from direct caregivers to facilitators of their parent's care. In

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25. *Drisha*, ad loc. However, Dr. Abraham in *Nishmat Avraham* (p. 148) writes, "It seems to me that nowadays it is certainly possible to distinguish between supervision/care provided by a son who is not trained and knowledgeable and that of a nurse or facility where the staff is knowledgeable and trained in this matter and they know how to take care of demented individuals."

26. *Mishneh Torah, Mamrim* 6:10, ad loc.

other words, children are responsible to empower agents (*shlichut*) to care for their parents when they are unable to do so.<sup>27</sup>

Currently, we accept Rambam's position as normative:

However, if it is impossible for him [the child] to remain because they have greatly changed, he may leave them and charge others to properly care for them."<sup>28</sup>

Indeed, a particularly poignant responsum reflects this practice. Rabbi Eliezer Waldenberg addressed the inquiry of a talmudic scholar whose mother had become mentally deranged to the extent that her wild, erratic behavior seriously disturbed the harmony of his household. He asked Rabbi Waldenberg whether he would be permitted to fasten his mother to a chair in order to restrain her during her rowdy episodes. R. Waldenberg replied that although the son would be personally prohibited from physically restraining her, he should transfer her to the care of others who would do "what is absolutely necessary for her care and medically mandated."<sup>29</sup>

Since all talmudic precedents for placing one's parents in the care of others seemingly relate to cases where they were

27. See *K'tzot Hachoshen* 182 for the critical distinction between one's direct personal obligation – *mitzvah sheb'gufo* (e.g., taking the *Arba Minim*) and a mitzvah which may be done on one's behalf (e.g., building a *sukkah*). While *Drisha*, ibid. 9, would make the case that Ravad deems honoring parents a personal obligation – *mitzvah sheb'gufo*, the plain meaning of Ravad's words might suggest otherwise: "This is not a correct ruling – if he, the son, leaves his father behind, *whom shall he authorize to watch him*." Ravad's concern is logistical: if the son is far away, how will he be able to authorize/supervise his father's care? If, however, the son is nearby, he should be able to entrust his father's care in the hands of others.

28. *Yoreh De'ah* 240:10. Note that our text ("they have *greatly changed*") differs slightly from Rambam's, which reads that they, the parents, "have become *extremely deranged*." For other significant variations, see *Tzitz Eliezer* 12:59.

29. *Tzitz Eliezer* 12:59.

demented, how may we justify or explain our current practice of placing alert and oriented chronically/ terminally ill elders in nursing homes, when they can no longer care for themselves?

An insight which might explain our current practice may be gleaned in the opening words of the *Bach* we previously cited:

I say that the opinion of the Ravad is that R. Assi's mother was not demented but rather quite elderly, and since he wasn't able to obtain a husband for her as she wished, he left her so as not to disobey her future directives.<sup>30</sup>

In other words, where a child is thrust into a position where he is no longer able to honor his mother's unreasonable demands, he is not obliged to *personally* care for her. In contemporary terms, we might say that it is often emotionally traumatic for a child to comply with the whims of a manipulative and controlling parent. Nevertheless, we would be wise to recall the admonition of R. Saadia Gaon:

... and concerning the Torah rewarding a long life for honoring one's parents, Rav Saadia offered a rationale: Since elders often come to live with their children for a long time, and they [the elders] become an extremely heavy burden upon them, therefore, the Torah establishes the reward for this mitzvah – "in order that your days be lengthened," meaning that it is incumbent upon you, the child, to honor and live with them, and should you be pained by [the burdens you incur resulting from] their [long] lives, recognize that it will be at the pain of your long life [i.e., premature death].<sup>31</sup>

Though a son may feel compelled, as a last resort, to place

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30. *Bach to Tur Yoreh Deah* 240.

31. Cited in *Rabbeinu Bahya, Shmot* 20:12.

his mother in a nursing home, would he still be obligated to do so if, in the process, he would be violating an oath/promise to his mother never to "be sent away to a nursing home?"

It appears that, under extenuating circumstances, halacha might not regard this promise as a legitimate vow, *neder*; but, even if it did, there might still be ample grounds to annul it retroactively.

Case at point: A son promised his father twenty years ago that he would never place him in a nursing home; however, at the time this son made his pledge, he was younger, healthier, and had the financial wherewithal to provide his father with nursing care at home. Now, twenty years later, the son has experienced a tragic reversal of fortune: he contracted a debilitating, chronic illness or suffered major financial losses, either of which would make it virtually impossible for him to provide for his parent's care. Halacha might categorize his pledge as *nidrei onsim* – unforeseen circumstances or developments beyond one's control which result in the dissolution of the vow without the need for annulment.<sup>32</sup> However, even if his vow requires annulment, it may still be possible to do so, if the court discovers a reasonable basis (*petach*).<sup>33</sup>

For example, what if the son pleads that had he known that the medical and nursing expenses for maintaining his father at home would be far beyond his budget or that the emotional

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32. *Yoreh De'ah* 232:12.

33. *Yoreh Deah* 228:12. If either a daughter-in-law or son-in-law objects to their spouse's parent or relative living in their house, halacha would respect his/her wishes, even if he/she initially consented and allowed the parent/relative to live there for a period of time. *Mishneh Torah, Ishut* 13:14, *Benyamin Zev* 137, *Divrei Rivot* 140, and *Piskei Dinim Rabbanim* Volume 1, p. 201. Hence, a daughter-in-law's or son-in-law's objection to their spouse's aging parent living in their home would invariably affect family harmony (*shalom bayit*) and serve as grounds for an annulment of a vow.

stress on his family would be so intense he would never have promised him not to place him in a nursing home? Under these circumstances, a court could accept his statements as grounds for a retroactive annulment of his pledge.

### III. Mitzvah Obligations

May a Jewish man who suffers from dementia don *tephillin*, and participate in a *minyan*? Would a Jewish woman suffering from Alzheimer's fulfill the mitzvah of eating matzoh on Seder night?

In order for a Jew to participate in prayer, let alone be counted in the quorum for a *minyan*, he must be aware that he is "standing before God." This concept was introduced by Rabbi Chaim Soloveitchik to resolve a conflict in the words of the Rambam.<sup>34</sup> The Rambam writes, "Five things disqualify [literally, prevent] prayer (the *Amidah*)... and intention of the heart. How so? Any prayer without intention is not prayer, and if one prays without intention, he must repeat his prayers with intention. If he [literally, "finds himself"] is confused and anxious, he is forbidden to pray until he is settled [and able to concentrate]." Clearly, then, any prayer without intention is unacceptable. However, a few passages later, the Rambam records, "Whoever prays without intention should repeat the entire prayer with intention; however, if he has intention during the first blessing (*Avot*), he need not repeat. This implies that as long as one has recited the first blessing with intention, though he did not concentrate on the other blessings which follow, he has, post facto, fulfilled his obligation to pray.

Rabbi Soloveitchik distinguishes between two forms of intention during prayer. The first is the realization that one is standing before the Divine presence, which is the very essence

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34. *Chidushei Rabbenu Chaim Ha Levi, Mishneh Torah, Tefillah*, 4: 1.

of prayer. R. Soloveitchik contends that one's consciousness / awareness that he is standing before God is absolutely essential. Hence, if one is unaware that he is standing before God, it is as if he is preoccupied with some other activity, and his prayer is unacceptable. The second kind of intention refers specifically to the mitzvah of prayer itself. If one is conscious of the fact that he is standing before God, though he is not focused on the meaning of the prayer, his prayer is acceptable (with the exception of the first blessing, *Avot*.)

When assessing cognitive capacity, we look for three factors, namely that the individual in question be "alert and oriented," meaning that he or she is aware of self, location, and time. As the dementia / Alzheimer's progresses to more advanced stages, patients increasingly withdraw into their own worlds. They lose any sense of self and others and fail to identify even close relatives; moreover, they are unaware of where they are, the time of day, the date, and the season of the year. At this stage, Rabbi Yitzchak Zilberstein concludes:

It is reasonable that an elder whose mind is confused may be classified as deranged [*nitrefa daato*], and if he is unaware of his whereabouts and does not recognize his relatives, his halachic status is that of an insane / *shoteh* individual. Nevertheless, if he knows the time, but suffers memory loss and can't recall where he was yesterday and what he did a few hours ago, he is treated, halachically, as a normal person; however, he would be disqualified from rendering testimony.

Clearly, an individual suffering from advanced dementia / Alzheimer's is unaware of his surroundings and does not realize that he is in a synagogue or that he is participating in a *minyan*; consequently, he would be exempt from prayer. In Rabbi Soloveitchik's words, this demented individual would not be conscious that he is "standing before God."

The *Chafetz Chaim*, in *Biur Halacha*, comments on the ability

of a *shoteh* to participate in *zimun* [the minimum quorum of three for the preliminary invitation to recite grace after meals] and *minyan*. Referring to a *shoteh* who has " intent and understands," the *Chofetz Chaim* writes:

See glosses (of Ramo) on 199: 10, which imply that even a *shoteh* may join in the *zimun* quorum if he has intent and understands, and this ruling should apply to prayer (*minyan*), at least as a last resort [since, in a previous opinion of Ramo in his glosses on 55: 4, he implies that we are more lenient in counting a *shoteh* towards a *minyan* than for the *zimun* quorum... the rationale being that Jews should not be deprived of *Borchi* and *Kedusha* (i.e., prayers which require a *minyan*)]. See the *Magen Avraham* there (199: 8) who explains that we are not referring to a total *shoteh*. But this (the *Magen Avraham*'s statement) is not clear, since he (*Magen Avraham*) is attempting to resolve a difficulty from this chapter and he will be unable to do so according to our established rule of *Yoreh Deah* 1:5 that, biblically, even one erratic action renders him totally insane (*shoteh gamur*)... However, truthfully, *Magen Avraham*'s statement that we are not referring to a total *shoteh* [is normative]... and thus it is obvious that regarding prayer as well, they are not counted towards the *minyan* even as a last resort.... One who sometimes acts normally and at other times acts deranged is treated as normal during those times when he acts normally. [*Choshen Mishpat* 35:9]<sup>35</sup>

May a man who has dementia/Alzheimer's don *tephillin*?

The mitzvah of *tephillin* presents at least two challenges for those suffering from more advanced forms of dementia/

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35. *Orach Chaim* 55:8.

Alzheimer's. While one is wearing *tephillin*, he must be constantly aware of the fact that he is wearing them:

One who is suffering or whose mind is unsettled is exempt [from wearing *tephillin*] because it is forbidden to be distracted from them.<sup>36</sup>

The *Chafetz Chaim* explains that one "whose mind is unsettled" refers to an individual who is unable to clear his mind and focus; however, if he is able to do so, he is required to don *tephillin*.<sup>37</sup> Consequently, a demented individual who is unable to refocus his thoughts on the task at hand would be exempt from the mitzvah of *tephillin*.

Additionally, one who wears *tephillin* must be in a state of physical purity and cleanliness. Hence, if he is experiencing bouts of diarrhea or flatulence, he is exempt from *tephillin*; indeed, under these conditions, he is not even permitted to pray, though this means he may be compelled to recite the *Amidah* after its proper time.<sup>38</sup> As a result, a dementia/Alzheimer's patient who wears diapers and suffers from both urinary and fecal incontinence, as well as flatulence, would generally be exempt from *tephillin* and prayer/*minyan*.<sup>39</sup>

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36. *Orach Chaim* 38:9.

37. Ad loc., *Mishnah Berurah*, 31.

38. *Orach Chaim* 38:1,2 and 80.

39. In *Orach Chaim* 78 and 79, we find that halacha allows an individual, under certain conditions, to continue praying the *Amidah*, even if he accidentally leaked urine in the midst of his prayers, nevertheless, halacha finds no such dispensation for fecal incontinence. Also, see *Iggerot Moshe Orach Chaim* 1:27 who rules that a patient with an indwelling catheter may pray and recite blessings, providing that the catheter itself is covered. Note *Kaf haChaim* (1) who writes that it is a mitzvah to warn elders who are ignorant of the law not to recite *Shema*, *Amidah* and blessings. He contends that due to their advanced age and condition, the majority is not careful about preventing urine from leaking onto their clothing, and they do not pay attention to their personal hygiene nor do they change their pants/clothing before prayers.

Would a woman suffering from Alzheimer's be exempt from eating matzoh and participating in the Seder?

The mitzvah to eat matzoh on Passover night is time-activated and, as such, women would typically be exempt; in this instance, however, they are obligated since those who are included in the prohibition of eating *chametz* (which applies to women too) are included in the positive commandment to eat matzoh.<sup>40</sup> Interestingly, the *Shulchan Aruch* offers two related cases, which shed light on our inquiry:

If one eats matzoh without intention, for example, he was forced against his will to do so by gentiles or bandits, he has fulfilled his obligation since he knows that tonight is Passover and he is obligated to eat matzoh; however, if he thinks that it is a weekday night or that this is not matzoh, he has not fulfilled his obligation.<sup>41</sup>

The *Chafetz Chaim* observes that we generally subscribe to the dictum that "mitzvot require intention" in order to fulfill one's obligation, and, in this instance, he not only lacked intent but was compelled to eat the matzoh against his will; nevertheless, he fulfilled his obligation because he swallowed and enjoyed the matzoh and, "in food matters," we do not apply the dictum. Nevertheless, he notes that many authorities maintain that this dictum is universal and, consequently, if he lacks intent, he has *not* fulfilled his obligation. However, what is critical to our discussion about dementia / Alzheimer's is that, even according to the *Shulchan Aruch*'s position, namely that one fulfills his obligation though he lacks intent, is the proviso: "*since he knows that tonight is Passover and he is obligated to eat matzoh.*" Essentially, every Jew should be aware that this night – the night of the Passover Seder – is different from all

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40. *Orach Chaim* 472: 14.

41. *Orach Chaim* 475: 4 and *Mishnah Berurah*, ad loc.

other nights and that he/she is obligated to eat matzoh. Clearly, then, a demented individual who has no sense of time or place and is unable to focus on the task at hand would appear to be exempt from this mitzvah – even if intent is not required!

However, what would halacha rule in a case where, during the Seder, he also has lucid moments when he is fully alert and oriented?

If one experienced an epileptic attack while eating an olive-sized piece of matzoh, and subsequently recovered, he is [then] obliged to eat [another olive-sized piece of matzoh to fulfill his obligation] because at the moment he ate, he was exempt from any mitzvot.<sup>42</sup>

According to the *Chafetz Chaim*, the epileptic, at the moment of the attack, is treated as a full-fledged *shoteh* and is comparable to a minor who is not obligated to perform any mitzvot. Consequently, whatever matzoh he ate during his attack is inconsequential and, when he recovers later during the Seder, he must first fulfill his obligation by eating an olive-sized piece of matzoh. In his *Shaar HaTzion*, the *Chafetz Chaim* contrasts the case of an epileptic with that of one who is exempt from the mitzvah to eat matzoh, such as a watchman for a deceased individual. In the latter, the watchman is fully obligated to perform the mitzvah to eat matzoh, however, he has a dispensation since "one who is already engaged in a mitzvah is exempt from performing another [concurrent] mitzvah." Consequently, even if the watchman mistakenly ate the matzoh instead of caring for the deceased, he has nevertheless fulfilled the mitzvah, and is no longer obligated to eat matzoh later that night. An epileptic, however, at the moment of his attack, has no obligation to eat matzoh because he is not a fully intact person, and any mitzvah he performs at that time has no

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42. *Orach Chaim* 475: 5 on *Mishnah Berurah*, (39).

halachic validity; as a result, he must perform the mitzvah later when he recovers.

The *Chafetz Chaim*'s distinction would seem to have great bearing on defining the stages of dementia vis-à-vis mitzvah obligations. In early to intermediate stage dementia, the patient, for the most part, may be lucid and oriented, but suffers from occasional memory loss and mild confusion/disorientation. At this stage, the demented individual would be comparable to the watchman who is fully obligated to perform mitzvot: he is essentially intact, a person whose actions have halachic validity and need not be compensated at a later time. Halachically, this patient might be regarded as "one who has moments of lucidity and moments of insanity" ... and treated as normal whenever he is lucid. However, in intermediate to advanced dementia, a patient may be totally disoriented, and unaware of self, others (including family members), time and place. At this stage, he is no longer fully intact, and would be comparable to an epileptic during his attack, whose actions have no halachic validity. Unfortunately, though, this demented individual, whose condition is irreversible, will not have a later opportunity to perform the mitzvah in a lucid state, unlike the epileptic who will recover from his episode.

# Can Porcelain Be *Kashered*?

*Rabbi Moshe Walter*

The halachic guidelines that require one to immerse new vessels in a *mikvah* are familiar to those who have purchased new dishes. This is known as *tevilat keilim*. However, what are the steps that need be taken if one wishes to purchase used dishes? An individual may find himself passing through an antique shop, garage sale or a second-hand store which is selling a coveted piece of dinnerware. Quite often, that dish will remain on the shelf and not be purchased by the Jew because of the assumption that any dish used for non-kosher food may not be *kashered* (made acceptable for kosher use). Others, on the other hand, assume that just as a new dish requires immersion in a *mikvah* so, too, does a used dish prior to its use. This assumption is correct, as codified in *Shulchan Aruch Yoreh Deah siman 121 #2*. However *tevilah* can only take place after the utensil has been *kashered*. What, then, is one to do if one wishes to purchase used dishes?

The Jewish people, at an earlier time, were similarly puzzled by this issue. The Torah records that after defeating Midian in battle, *Bnei Yisrael* acquired many of their belongings, including their non-kosher vessels, and did not know what to do with them.<sup>1</sup> As a result, the Jewish people were taught the laws of *hechsher keilim* and how to properly *kasher* used utensils. This is necessary because utensils used in the preparation and cooking of non-kosher foods may absorb the taste of non-kosher food

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1. *Bamidbar* 31, 21-24.

or may have non-kosher residue on their surface.

The Mishnah and Gemara elaborate upon the biblical commandment and explain that the way to approach *kashering* used vessels is based upon the principle of *K'Bolao Kach Polto*, which means that the same way that a dish acquired a non-kosher taste, is exactly the way that the dish must be purged of its non-kosher taste.<sup>2</sup>

The Gemara outlines three applications of this principle:

1. Any vessel which was used for cold non-kosher food, must be *kashered* by washing the dish thoroughly in water.
2. Any vessel which was used for non-kosher food via a water medium, i.e. cooking, must be *kashered* through a process call *hagalah*. *Hagalah* is accomplished by cooking water to its boiling point, and then momentarily inserting the dish or utensil into this boiling water. When the dish is removed from this water, the dish is rendered kosher.
3. A vessel which was used for non-kosher food through a medium of fire, i.e. baking, frying on a stove top, or by barbecue, must be *kashered* through a process called *libun*. *Libun* is accomplished by scorching the vessel in fire on all its sides. When the vessel turns red hot, it is termed as *libun gamur* and becomes kosher. A lower level of *libun*, *libun kal*, is achieved when a feather can be placed on the outside of the vessel and is thereby burned. The type of *libun* which is used to *kasher* a vessel depends on the temperature of the fire when the vessel was previously used as a non-kosher vessel.

The Torah in the previously-cited passage as well as the Gemara's outline for *hechsher keilim* details only the rules for

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2. *Avodah Zarah* 75b.

*kashering* metal vessels. How then would one go about *kashering* earthenware? In *parshat Tzav*,<sup>3</sup> when discussing the laws of *notar* (a left over portion of a *korban* which is prohibited to eat) the Torah tells us that it is impossible to purge the taste particles absorbed into earthenware (*kli cheres*). The Talmud teaches that this rule is uniformly applied to all laws of *kashrut*, because the Torah postulates that an earthenware vessel coming into contact with hot non-kosher food becomes irreversibly non-kosher.<sup>4</sup> Therefore *hagalah* will not suffice. *Libun*, as well, will not work, because we are concerned that one will not do a proper *libun* out of fear that the piece may break. The *Ramo*, however, does point out that an earthenware vessel which was used only for non-kosher cold food is permitted to be used if it is washed and thoroughly cleaned.<sup>5</sup>

As new generations of earthenware were developed, namely porcelain and its derivative, china, questions arose regarding their halachic status.<sup>6</sup> At first glance, porcelain appears to be

3. *Vayikra* 6, 21, and *Vayikra* 15, 12. See as well tractate *Pesachim* 30b and *Tosafot d'h Hatorah* who quote in the name of the *Rashba*, that if one returns an earthenware vessel to a kiln it can be reused. See *Rosh* #30, who quotes various opinions on this topic. See as well *Sefer Hagalat Keilim* pp. 337- 340, footnote 94, which deals extensively with this issue and questions if returning an earthenware vessel to a modern-day oven would be acceptable.

4. *Pesachim* 30b. See *Tosafot* to *Chulin* 8a *d'h Shelibna*; *Rosh* to *Avodah Zarah* chapter 5, *siman* 34; *Shulchan Aruch HaRav Orach Chaim* *siman* 451, #6. See as well *responsa Zecher Yitzchak* by Rav Yitzchak of Ponovitch who explains that certainly an earthenware vessel can be purged of its contents, but since it is impossible to fully know when this takes place we do not permit *kashering* the vessel because of the principle *ayn safek motzi midai vadaay*.

5. *Yoreh Deah*, *siman* 121, #5.

6. The Oxford Dictionary defines porcelain as "a hard vitrified translucent ceramic". The Webster Dictionary defines porcelain as "hard fine-grained sonorous non-porous and translucent and white ceramic ware that consists of essentials of kaolin, quartz and feldspar and is fired at high temperatures". The Encyclopedia Britannica, under the entry Earthenware, is a good source of background information regarding porcelain and its makeup.

similar to earthenware because, like earthenware, it is fired in a kiln and any item fired in a kiln has the halachic status of earthenware.<sup>7</sup> However, often a glaze is applied to the surface of the vessel, which renders the product non-porous. This important distinction may define porcelain and china as glass, thus permitting their use without the need to *kasher*.<sup>8</sup>

The resolution of this issue will influence many practical applications in the modern kosher home, including four which will be presented and discussed in this article.

1. May an individual who inherits a set of china from a relative, who did not abide by the laws of *kashrut*, use these dishes?
2. A family, who does not observe the laws of *kashrut*, decides to keep kosher and wishes to *kasher* all their vessels, including an expensive set of china dinnerware. Can they incorporate this set into their newly kosher home?
3. A family moves into a new home and discovers that the previous non-Jewish owner has left a non-kosher porcelain dishwasher. May the dishwasher be used?
4. May an individual purchase used or antique china?

### Radbaz

The Radbaz investigated the composition of porcelain by performing the following experiment:<sup>9</sup> He took a china dish, which he weighed and then soaked in a pot of warm food.

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7. *Magen Avraham, Orach Chaim, siman 451 #4; Shulchan Aruch HaRav, 451, #25.*

8. *Darchai Teshuva, Yoreh Deah, siman 121, #26.*

9. *Responsa Radbaz, volume 3, siman 844.* In another experiment, the Radbaz subjected a dish to heat, and when he saw a flame emerge from the dish, he concluded that there must have been residue in the china which was the source of the combustion.

After rinsing the item well and drying it, the Radbaz found that the china weighed a bit more. He thereafter concluded that, like earthenware, porcelain and its derivative china absorb food residue, which he assumed can no longer be purged. The *Pri Chadash*, who agrees with the ruling of the Radbaz, adds that one should, at all costs, (*b'dieved*) avoid the use of porcelain dishes which have become *treif*.<sup>10</sup>

The *Mishnah Berurah*, quoting *Pri Megadim*, is also of the view that porcelain has the status of earthenware and therefore cannot be *kashered*. This is the predominant view of the later halachic authorities (*Acharonim*), and it is the accepted practice that porcelain has the status of earthenware and cannot be *kashered*.<sup>11</sup>

### The *Chacham Tzvi*

Many laymen are aware of the halachic premise that china or porcelain which became *treif* may regain the status of kosher, passively, by allowing the dish to remain unused for a full twelve-month period. The source of this unusual concept has its roots in a responsum of the *Chacham Tzvi*.<sup>12</sup>

A question posed to the *Chacham Tzvi* regarded an iron dish which had been used to cook *chametz* food and which, after a period of two years, was accidentally used to cook *Pesach* food. Can the food cooked in this pot be eaten on *Pesach*?<sup>13</sup>

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10. *Pri Chadash*, *Orach Chaim siman* 451 #26.

11. *Mishnah Berurah*, *siman* 451, #163. This is also the position of Rav Cohen in his *Sefer Hagalat Keilim*, pages 415, 416 and footnote 351, and Rav Gedalya Felder page 141 in his *Sefer Yesodei Yeshurun*. See *Iggerot Moshe* II *siman* 46 and III *siman* 27, as well as *Yabia Omer*, VII, *siman* 10 (cited in this essay), who are willing in extenuating circumstances to rely on the lenient opinion which assumes that porcelain is like glass.

12. *Responsa Chacham Tzvi* #75.

13. Note that the *Chacham Tzvi*'s response is to a question regarding an iron dish and at no point in the response does he relate to porcelain.

The *Chacham Tzvi* responded that if the *chametz* pot was cleaned of its *chametz* and was not used for twelve months, it is kosher for *Pesach* use. The basis for this ruling of the *Chacham Tzvi* is that any foodstuff that may have been present in the vessel, following a period of twelve months, disintegrates and is no longer *chametz*.

The *Chacham Tzvi* declares that the only instance in rabbinic literature where the halacha specifically permits waiting twelve months in order to reuse a non-kosher vessel is in regard to the prohibition of *yayin nesach* (forbidden wine). However, vessels used for other prohibitions (*basar bechalav* [meat and milk together] and non-kosher food) would not be subject to the leniency of waiting twelve months. To avoid this error, the *Chacham Tzvi* only permits *yayin nesach* and *chametz* laden pots to be used after twelve months because there is no distinction between *l'chatchila* (in an ideal manner) and *b'dieved* and is therefore unlikely to trigger a mistake.

This critical distinction drawn by the *Chacham Tzvi* was also accepted by Rav Akiva Eiger, who states that the leniency of the *Chacham Tzvi* applies only to vessels used for *yayin nesach* and *chametz* vessels used on *Pesach*, but to no other cases. For this reason, Rav Akiva Eiger did not allow an individual to use earthenware vessels purchased from a non-Jew, even though these vessels had not been used for twelve months.<sup>14</sup>

Of note, the *Chacham Tzvi* concludes his *teshuva* by emphasizing that ideally (*l'chatchila*) one cannot rely on this opinion to cook on *Pesach* with a vessel which was used for *chametz* even though it had not been used for twelve months.<sup>15</sup>

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Surprisingly, this distinction has never been raised as an issue.

14. *Responsa Rav Akiva Eiger*, siman # 43.

15. In his responsum, the *Chacham Tzvi* never addresses whether one is permitted to allow a porcelain dish which has become non-kosher to sit idle for 12 months in order to *kasher* it. From his conclusion, however, it seems

However, *b'dieved* (ex post facto) one can eat food that has already been cooked in such a vessel.<sup>16</sup>

### Applying the *Chacham Tzvi*'s position To Other Prohibitions

The *Chacham Tzvi* and most *Acharonim* appear to limit this leniency specifically to cases of *yayin nesach*. However, we do find a number of other *Acharonim* who did apply the leniency of the *Chacham Tzvi* to situations other than *yayin nesach*, but only under extenuating circumstances.

1. Rav Aharon Azriel in his *Kapei Aharon* claims that the disagreement between the *Chacham Tzvi* and opposing *Acharonim* is based on a prior dispute among the *Rishonim* (medieval commentaries).<sup>17</sup> This dispute is based on a Gemara in *Avodah Zarah*, which states that a *kli natar* (alum, which is a type of earthenware) may never be purified.<sup>18</sup> Rambam, Ritva and Rosh explain that even though a *kli natar* absorbs significant amounts of its contents, it may be used after twelve months regardless of the prohibition involved. However, the Rashba and Ran disagree and

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clear that the *Chacham Tzvi* would not permit this method. See footnote #31 to this article. This point must be weighed heavily when one quotes this apparent blanket leniency of the *Chacham Tzvi*.

16. Other *Acharonim* dispute the *Chacham Tzvi*'s ruling of waiting twelve months. See *Panim Meirot* in his *Responsa*, I siman 23; *Responsa of the Radbaz*, II, siman 739; *Pitchei Teshuva*, *Yoreh Deah*, siman 93, #3 and siman 122, #3; *Responsa Yad Eliezer* end of siman 97; *Responsa Yad David* *Yoreh Deah*, siman 93; *Aruch Hashulchan* siman 122 #4. See as well *Yabia Omer*, VII, siman 10, who quotes from other sources who argue with the *Chacham Tzvi*.

17. *Kapei Aharon*, *Yoreh Deah*, II siman 3 (page 21b).

18. *Avodah Zarah* 33b; see explanation of Rambam, Ritva, Rosh, Ramban and Ran. See *Tur*, *Yoreh Deah*, siman 135, #5 who quotes both sides of this dispute and concludes that his father, the Rosh, allowed waiting twelve months to use a *kli natar*. However, the *Shulchan Aruch* sides with those *Rishonim* who do not allow waiting twelve months. See *Biur Hagra* #17.

conclude that such a vessel may never be used. What emerges from this debate among the *Rishonim* is that the *Chacham Tzvi*'s opinion follows that of the *Rambam*, *Ritva* and *Rosh*, although he does not cite these *Rishonim* by name. This is definitely a strong point for those who wish to apply this leniency broadly.

2. The *Sdei Chemed* quotes extensively from other *Acharonim* who contend that one may follow the opinion of the *Chacham Tzvi* even with regard to other prohibitions.<sup>19</sup> These *Acharonim* believe that although the *Chacham Tzvi* does imply that his leniency can be relied upon only in cases of *yayin nesach*, nonetheless, after a period of twelve months, any and all absorbed food disintegrates completely. Thus, these vessels are no longer prohibited.
3. The *Beit Avraham* explains that the *Chacham Tzvi* only meant to explain that waiting twelve months for items other than *yayin nesach* would not be adequate to reverse a biblical prohibition such as meat and milk together cooked on the fire (*kli rishon*). A vessel that became prohibited through pouring (*irui*), a rabbinic prohibition would, however, be subject to the leniency of the *Chacham Tzvi*.<sup>20</sup>

### Rabbis of Venice

The *Minchat Yacov* in his gloss on the *Ramo*'s *Torat Chatat* quotes the *Nachlat Yacov*, that the Rabbis of Venice permitted

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19. *Maarechet Chametz U'matzah*, siman 7, #3 quotes the responsum *Zera Emet*, II siman 25, the *Maharshak* in the *Nidrai Zerizin*, II page 4; *Dvar Shmuel*, siman 123; *Shoel U'meshiv*, II siman 102, III siman 28.

20. *Yoreh Deah*, siman 8, #4, and cited by *Pitchei Teshuva*, *Yoreh Deah*, siman 122, #31. The *Pitchei Teshuva* comments that in order to rely on the *teshuva* of the *Beit Avraham* there must be another reason as well to be lenient. This is also the view of the *Atzei H'olah* in *hilchot keilim*, *klal 1* #27; however, he adds that one must also do *hagalah* three times, as will be discussed later.

the use of earthenware vessels after only twenty four hours.<sup>21</sup> The *Minchat Yacov* elicits proofs to question this innovative ruling of the Rabbis of Venice. However, he concludes, in the name of Rav Leib Saraval, that in a situation of significant monetary losses (*hefsed merubeh*), the ruling of the Rabbis of Venice may be followed. Later rabbinic authorities, such as the *Pri Megadim*, *Chochmat Adam*, *Aruch Hashulchan*, and *Pitchei Teshuva* encounter difficulty in the halachic predicate of the *Nachlat Yacov*, and therefore suggest refraining from using this leniency.<sup>22</sup> Rav Ovadya Yosef, on the other hand, finds a significant number of *Acharonim* who support the view of the *Nachlat Yacov* and thus concludes that the majority of responsa support the *Minchat Yacov*. Based on the foregoing, Rav Ovadya Yosef permits porcelain dishes on which non-kosher meat has previously been served to be *kashered*, because he deems it to be a situation of *hefsed merubeh*. Rav Yosef similarly permits porcelain dishes, which had become non-kosher during use in a kosher hospital, to be *kashered* because like the latter case it was also deemed *hefsed merubeh*.<sup>23</sup>

A more relevant issue that will have a significant impact on many of the questions under examination requires a precise halachic definition of *hefsed merubeh* – a "significant" monetary loss. Rav Akiva Eiger cites the leniency of the *Nachlat Yacov*, but agrees to his ruling only when a significant monetary loss is encountered to an individual vessel. On the other hand, if a large number of vessels became non-kosher, even if their total value exceeds the loss of one expensive vessel, this would not

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21. *Minchat Yacov*, *klal* 85, #64.

22. *Pri Megadim*, *Yoreh Deah*, *siman* 93, #17; *Pitchei Teshuva*, *siman* 122, #1, *Chochmat Adam*, *klal* 55, #7; *Aruch Hashulchan*, *Yoreh Deah*, *siman* 122, #2.

23. *Yabia Omer*, *Yoreh Deah*, I *siman* 6, #16,17 ; *idem*, VII, *siman* 10, #6. These two positions of Rav Ovadya Yosef relied on other considerations as well, which ultimately encouraged Rav Yosef toward this lenient conclusion.

be considered *hefsed merubeh*.<sup>24</sup> Many *Acharonim* take issue with Rav Akiva Eiger's distinction and assume that the leniency of *hefsed merubeh* is a blanket leniency and does not depend on the number of vessels in question.<sup>25</sup>

## Modern Responsa

### *Baalei Teshuva*

How do we treat previously used porcelain dishes belonging to a family who wishes to start observing the laws of *kashrut*? Is this family required to dispose of these dishes?<sup>26</sup> Both Rav Moshe Feinstein and Rav Ovadya Yosef have addressed this subject.

Both Rav Feinstein and Rav Yosef agree that even if more than twelve months had elapsed since these porcelain dishes were last used, the leniency of the *Chacham Tzvi* alone would not suffice to allow the family to use their porcelain dinnerware.

Rav Yosef, however, is willing to rely upon the opinion of the *Chacham Tzvi* when the following considerations apply: One, if the porcelain dishes were not used to cook the food [but only to serve] (*kli sheini*), they can be *kashered* merely by thoroughly washing the dishes. Two, one may also rely on the view of the *Baal HaIttur* that *hagalah* three times is adequate.<sup>27</sup> Three, Rav

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24. *Responsa Rav Akiva Eiger, siman 42.*

25. *Iggerot Moshe, Yoreh Deah, I siman 43, anaf 7; II #46; VII siman 27. Yabia Omer, ibid.* The monetary value of what is considered *hefsed merubeh* is not clearly defined and depends on each situation.

26. *Iggerot Moshe, Yoreh Deah, ibid. Responsa Yabia Omer VII, siman 10.*

27. *Yoreh Deah, siman 121, #2.* The logic for this can be found in the classic edition of the *Sefer HaIttur, Shaar Hechsher Habasar*, page 14b, and explained by the *Shaar Hechadash* #81. See *Chazon Ish, Hilchot Pesach, siman 122, #3* and *Chazon Ish, Hilchot Hechsher Keilim, siman 44, #3*, who requires new

Yosef adds that one may also rely on the minority opinion that porcelain dishes are not considered *kli cheres* and are more like glass and therefore *hagalat* would suffice. Finally, Rav Yosef believes that this is a situation of *hefsed merubeh* and the opinion of the *Nachlat Yacov* can also be applied.

Rav Feinstein, in addition to the aforementioned considerations, adds yet another compelling reason for leniency. Rav Feinstein felt that if this family, which is at the beginning stages of observance, were told that they must discard their porcelain dishes, they may have second thoughts regarding adherence to *kashrut*. This reason along with the others would then be enough to allow such a family to retain their porcelain dishes.<sup>28</sup>

### **Buying replacement china and inheriting a set whose status is questionable**

Rav Shlomo Kluger was asked about porcelain cups that were bought from a non-Jew who had last used them over six months ago. The questioner wanted to know if he could use them, even though the twelve months required by the *Chacham Tzvi* had not yet elapsed. Rav Kluger ruled leniently in this case because the cups had already been purchased, and he therefore concluded the situation to be *bedieved* (post facto). Rav Kluger added that since expensive china may have the status of glass and that since the cups in question have a *kli sheini* status, they may be used immediately.<sup>29</sup>

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water to be used for each of the three *hagalot*. See *Responsa Chatam Sofer, Yorah Deah*, siman 113, who is not willing to rely on the opinion of the *Baal Halittur*. See, however, *Sdei Chemed Issur Derabanan Maarechet* 5, #19; and *Aruch Hashulchan siman* 121 #26, 27 who deal with this at greater length.

28. It is unclear from both the responsea of Rav Feinstein and Rav Yosef as to how many of these conditions must be met in order to permit such dishes to be used.

29. *HaElef Lecha Shlomo, Yoreh Deah*, #192.

The Chida was similarly asked about a set of expensive china which had been gifted to an observant Jew who was unaware of their *kashrut* status. The questioner also added that the dishes had already been in his possession for two years. He specifically wanted to know if there was a way to *kasher* these dishes because of their high quality and expensive value.<sup>30</sup> The Chida responded that the leniency of the *Chacham Tzvi* would not be sufficient to permit the use of these dishes. However, since this is a double doubt (*sfek sfeika*), the Chida permitted the use of these dishes. Firstly, perhaps these dishes were never used by a non-Jew and secondly, even if they were used, perhaps they were not used for hot food. The Chida also adds that most people who send gifts send only new items. With this logic and the opinion of the *Chacham Tzvi*, the Chida ruled leniently.<sup>31</sup>

Although the logic of the Chida seems plausible, it may not be correct in our day and age. All replacement china and certainly estate china must be assumed to have been used.<sup>32</sup> In this circumstance, the *Mishnah Berurah* states clearly those dishes may not be used.<sup>33</sup> The *Aruch Hashulchan* and *Shulchan Aruch Harav* add that if a non-Jew volunteers to the Jewish consumer

30. *Chaim Shoal, II, siman 38, #86.*

31. The Chida does point out that the leniency of the *Chacham Tzvi* would not be applicable in a situation where one intentionally waits twelve months to use the dishes. A possible reason why some authorities disapprove of letting one wait twelve months in order to reuse porcelain dishes is that one may be negligent and forget that the dishes became *treif* and reuse them before twelve months have passed. See, however, *Sefer Maadanei Hashulchan, siman 91, #5*, in his *Peirush Matamei Hashulchan, #19*, where he quotes Rav Zelig Bangs, a former member of the *Bait Din* of Yerushalayim, who permitted waiting twelve months in a situation of *irui kli rishon* onto a porcelain plate as long as a note is placed on the *kli* as a reminder of when the twelve months will elapse.

32. Based on email correspondence with an expert in the field of porcelain, who told this author that any porcelain or china that has been off the market and is found in a replacement china firm has definitely been used.

33. *Siman 451, #3.*

that these dishes are new, those dishes may be used immediately.<sup>34</sup>

### Dishwasher

A frequently encountered issue for new homeowners is what to do with a porcelain-clad dishwasher used by the previous non-Jewish inhabitants. Rav Moshe Feinstein responded that, ideally, one should not use the dishwasher for twelve months, and prior to its first use, *hagalah* should be performed three times. Rav Feinstein ruled this way only in a situation where it would be a *hefsed merubeh*, for example, if the seller would not sell the house without the dishwasher.<sup>35</sup> Seemingly, in a situation where one can purchase the house without the porcelain dishwasher, or if the dishwasher can be replaced by a new one, it would certainly be preferable to do so. Rav Feinstein does add that in a situation of *hefsed merubeh*, when the dishwasher cannot be replaced, and where the use of the dishwasher is necessary, he would permit its use after twelve months. In any case, new dish racks must be purchased.<sup>36</sup>

Rav Feinstein cites his son, Rav Dovid Feinstein, who takes an even more lenient approach to this question and allows one to use a porcelain dishwasher as long as *hagalah* is done at least twenty four hours after its last use by a non-Jew.<sup>37</sup> Rav Dovid Feinstein's reasoning is based on the position of the *Tur* who rules that one may do *hagalah* with a non-kosher vessel

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34. *Aruch Hashulchan*, siman 451, #9, and *Shulchan Aruch Harav*, ibid #5.

35. *Iggerot Moshe Yoreh Deah*, III #28, 29. This would be considered *hefsed merubeh* even according to Rav Akiva Eiger (cited earlier) who was only lenient in a case where the *hefsed* involved a single item. Rav Feinstein, in addition, disagrees with the logic of Rav Akiva Eiger. See *Iggerot Moshe*, ibid, siman 43, anaf 7.

36. *Sefer Ohalei Yeshurun*, page 74, citing Rav Moshe Feinstein.

37. *Iggerot Moshe*, ibid. See, however, the conclusion of this responsum in which Rav Moshe Feinstein disagrees with his son's ruling.

when it is placed in another non-kosher vessel for the purpose of *hagalah*. Rav Dovid Feinstein believes that washing one's dishes in a non-kosher dishwasher is tantamount to such a procedure. However, R. Moshe does not agree.

This essay attempts to address the halachic status of porcelain which has come into contact with non-kosher food. The majority of *poskim* surveyed understand that porcelain has the status of *kli cheres*, thereby rendering it impossible to *kasher*. Further investigation of the often quoted responsa of the *Chacham Tzvi* reveals that simply waiting twelve months to reuse a non-kosher porcelain dish is not a blanket leniency, but there are certain conditions that must be met. Although there are dissenting opinions and many permutations, leniencies may apply. Therefore, it is necessary to discuss one's particular situation with a competent *moreh hora'ah*.

## Letters

To the Editor,

In his interesting discussion of how a Jew should relate to the pleasures of this world ("Baco Bits and Non-Kosher Taste," *JHCS*, Fall 2005, pp. 89-109), Rabbi Ari Z. Zivotofsky notes that "God made a world with color... with taste... 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." Indeed, Rabbi Zivotofsky's point is made by *Tosafot* (*Berachot* 37A, s.v. *Borey*) who notes that in the *bracha* of *Borei Nefashot* we are thanking *Hakadosh Baruch Hu* for creating a world that is not bland, but rather includes the varying tastes He created for our pleasure. This idea is also included in the blessing made on new fruit-bearing trees, where we express our gratitude to *Hashem* for creating a world that lacks nothing and includes beautiful trees that were created for the pleasure of mankind (*Berachot* 43B).

However, I do not think that Rabbi Zivotofsky is correct when he writes that most of the traditional sources would not be opposed to the desire to eat Baco Bits and that it is only contemporary authorities who are averse, due to the hedonistic nature of society today. I believe that Rabbi Zivotofsky has left out a whole school of traditional sources that explicitly call for a person to limit pursuit of pleasure in this world, fearing that such pursuit will inevitably lead away from *Hakadosh Baruch Hu* and Torah study. Such sources include the classic Bible commentary of Ramban (beginning of *Parshat Kedoshim*), Rambam (*Sefer Hamitzvot* negative prohibition 195), *Sefer ha-Chinuch* (the sixth of the constant *Mitzvot* brought down in *Biur Halacha* OC *Siman* #1, and also *Mitzvah* #248), and the overwhelming majority of classic *Mussar Seforim* who consider indulgence in worldly pleasures as a "great danger" (see *Mesilat Yesharim* chapter #13, *Chovat ha-Livavot Shaar Cheshbon ha-Nefesh* chapter 3 #25 and *Shaar ha-Perishut*). There are certainly

important nuances and distinctions among the above views. However, their general viewpoint is wariness of the potential dangers innate in the pleasures of this world.

More recently, Rav Menashe Klein (*Mishneh Halachot* 13:178, no. 3) brings down a decree from Rabbi Yechezkal Landau of Prague, the *Nodah Bi-Yehuda*, forbidding the bakers of his town from selling delicacies on the grounds that it was leading people into the pursuit of excessive pleasure. Indeed, in the *Tefillah Zaka* said by many Jews on *Erev Yom Kippur*, we ask for forgiveness for taking part in excessive pleasure during the week (as opposed to *Shabbat* when it is a mitzvah to do so).

While Rabbi Zivotofsky correctly analyzes whether the statement of Yalta, wife of Rav Nachman, can be used as a precedent for desire to partake in permissible pleasures (p. 92, note 8), additional proof can be brought that Yalta's statement is not normative halacha/*hashkafa*. Included in her list of permitted counterparts to forbidden items is a *Yevama*. Yet, we find that according to many opinions one should not do *Yibum* (see *Yevamot* 39B), due to the fact that one inevitably cannot have proper concentration. If even by a mitzvah the Rabbis feared that one may have improper intent, how much more so by an item that is not a mitzvah.

In general, I agree with many of the points made by Rabbi Zivotofsky, and I would like to thank him for his interesting and thought-provoking article. However, I do feel that the school of thought represented by the above-mentioned opinions was under-represented, thereby not giving the issue full balance. (For further discussion of this important topic, see Moshe Z. Sokol, "Attitudes Towards Pleasure in Jewish Thought: A Typological Proposal," in Jacob J. Schacter, ed., *Reverence, Righteousness and Rahamanut: Essays in Memory of Rabbi Dr. Leo Jung* (Northvale, 1992), 293-314).

RABBI YITZCHOK ORATZ  
Marlboro, NJ

P.S. It seems that note 25 (p. 98) was cut off mid-sentence.  
Please reprint the note in full. Thank you.

\* \* \*

Rabbi Zivotofsky responds:

I thank Rabbi Oratz for his insightful comments and additional references, in particular the material by Rav Menashe Klein, which speaks directly to the issue.

Rabbi Oratz cites several sources, some which further support my thesis. The *Ramban Al HaTorah* is cited in my article (p. 102) and seems to be concerned with gluttony, i.e., overindulgence. He does not explicitly also denounce excesses of variety, which is the topic under discussion. The Rambam in *Sefer HaMitzvot* is similarly dealing with gluttonous behavior and may also be concerned with excesses of time and effort expended in the effort, but it is not at all clear to me that he is in favor of limiting variety and exposure. *Biur Halacha* was more concerned with inappropriate *kavana* while enjoying this world, than with the enjoyment itself. A more recent discussion of the Torah sources that speak strongly against overeating can be found in Rabbi D. Feldmann, *Shimusha shel Torah*, 1951, p. 13-14.

Some modern authorities appear to lean towards limiting variety in order to avoid the need to *pasken* on new or difficult issues. Thus, the *Chazon Ish* (see "Kashrut of Exotic Animals: The Buffalo", *The Journal of Halacha and Contemporary Society*, Fall 1999/Sukkot 5760, Number XXXVIII, for a discussion of this position), in requiring a *mesorah* for animals, concludes (*Hilchot Behema v'Chaya Tehora*: 11: Letters 4): "and it is enough with cattle and sheep that have a *masoret*". Similarly, with regard to the kingklip fish, Rav Moshe Sternbuch was quoted as saying "there is an abundance of fish that are kosher according to all opinions, that it is proper to be stringent and require a tradition like the *Aruch L'ner*."

*Chametz* on Pesach is a possible exception (upon which I did not elaborate) to the principle presented in the article. Indeed, today there is "bread" that is *Kosher lePesach* and everyone has access to *Kosher lePesach* breakfast cereal. There is an opinion that because *chametz* on Pesach is akin to *avodah zara*, one should avoid mentioning it or even thinking about it. Rather, *before* Pesach one should think "I would like to eat *chametz* on Pesach, but what can I do, God has forbidden it." (*Minhag Yisrael Torah*, OC 469:2 quoting *Heichal Bracha*, Kumarna).

Rabbi Oratz offers a further analysis of Yalta's statement to which I would like to add an interesting supplementary source. The *Midrash Alpha Beta* states that although the Torah prohibited *n'veilot* and *treifot*, it permitted the similarly tasting *k'meihin* and *pitriot* (types of mushrooms). Today the Portobello mushroom (*Agaricus bisporus*) is used as a meat substitute, and one of the most popular meat substitutes in Europe today is Quorn, produced from the *Fusarium venenatum* fungus.

Probably the most famous item in Yalta's list is the *shibuta* fish. Various suggestions have been offered for the identify of the *shibuta*, including sturgeon, mackerel, codfish, and mullet. I believe these are all in error and the correct identification is a kind of carp known as *Barbus grypus*. See Zohar Amar and Ari Z. Zivotofsky, "Identification of the *Shibuta* fish" [Hebrew], *HaMa'ayan, Nissan* 5765, pages 41-46. I thank Ken Ovitz for originally pointing out this identification to me.

Rabbi Oratz is of course correct that there has often been an ascetic stream within Judaism, and the methodical article by Rabbi Moshe Sokol, which Rabbi Oratz cites, nicely summarizes the various attitudes in Judaism towards pleasure. Well before the modern Mussar Movement there were the *Chasidei Ashkenaz*. But who today follows the *Hilchot Teshuvah* of the Rokeach and rolls in the snow or sits in the boiling sun, as opposed to the mainstream acceptance of the Rambam? Ascetic movements in Judaism, from the break-off sects in the Second Temple

period to the present, were always small and always got left behind. Today when one talks about *mussar*, it is almost always the Slabodka flavor as opposed to the ascetic Novardok variety.

My intention, unlike Rabbi Sokol's, was not a global summary of Jewish attitudes towards pleasure. Rather, it was the narrow question relating to the desire for and attainment of non-kosher taste. I would thus suggest that the normative approach in Judaism towards pleasure is the "golden mean", in which one is encouraged to enjoy God's world but within reason. It was within this framework that I analyzed the sources as they relate to baco-bits in an effort to ascertain whether the middle of the road approach was limited in its acceptance of novel pleasures that had non-kosher overtones or was willing to accept them as well. Thus, in my analysis, even the "limiting" hypothesis was not globally limiting, but only limiting to exotic, unusual items with a non-kosher tinge. I did not touch upon the ascetic school because it seemed irrelevant. Their outlook was so limiting, to the point of seriously limiting mundane pleasures, that baco-bits, fake shrimp, and *kosher le-pesach* Cheerios are nowhere near the radar screen. If it is this school of thought that Rabbi Oratz is concerned that I neglected, he is correct, because it has always been a minority school for whom this topic is a non-issue.

Rabbi Oratz pointed out that note 25 was clipped. The full text should read:

The statement of Yalta begs to be explained, and the explanation of the *Shl"a* is one possibility. Rav Dessler offers a totally different view (*Michtav Mi'Eliyahu*, 5725, vol. I, p. 263). He suggests that if there were no permissible counterparts for the forbidden items, a person's curiosity and passions might become overwhelming and lead him to violate prohibitions. God therefore provided, and the rabbis revealed, the permitted substitutes to assist a person in his battle with temptation.