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We are proud to dedicate
this issue of the Journal
In Memory of

Zalman C. Bernstein

זלמן חיים בן יעקב לייב ע״ה

A man of great vision and charity
whose philanthropy has benefitted
Torah education throughout the world
and the
entire Jewish nation

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The Journal of Halacha and Contemporary Society is published twice a year by the Rabbi Jacob Joseph School whose main office is at 3495 Richmond Road, Staten Island, New York, 10306. We welcome comments on the articles included in this issue and suggestions for future issues. They should be sent to the Editor, Rabbi Alfred Cohen, 5 Fox Lane, Spring Valley, New York 10977.

Manuscripts that are submitted for consideration must be typed, double-spaced and on one side of the page and sent in duplicate hard copy to Rabbi Cohen. Each article will be reviewed by competent halachic authority. In view of the particular nature of the Journal, we are especially interested in articles that concern contemporary halachic issues.

More generally, it is the purpose of this Journal to study through the prism of Torah law and values major questions facing us as Jews in the twenty-first century. This encompasses the review of relevant biblical and talmudic passages and the survey of halachic literature, including recent responsa. Most importantly, the Journal of Halacha and Contemporary Society does not present itself as the halachic authority on any question. Rather, the aim is to inform the religious Jewish public of positions taken by respected rabbinic leaders over the generations.

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Shemittah

Rabbi Dovid Cohen

In the last 200 years, as Jews have settled in *Eretz Yisrael* in great number, we once again have the opportunity to fulfill the mitzvot of *shemittah*, the Sabbatical year.[1] Most of the halachot of *shemittah* relate to farmers in Israel and those who use their produce; this study will focus primarily on those aspects of the laws of *shemittah* which relate to persons living outside the Land of Israel.

A. When is *shemittah*

The *shemittah* year 5768 began on September 13, 2007, and will end on September 29, 2008.[2] On a number of occasions this document will refer to "*shemittah* produce". The Gemara (*Rosh Hashanah* 13b) questions at what point in its maturation is the produce considered to be *shemittah* produce – when it was planted, when it started growing, when it ripened? After some discussion, the Gemara indicates that the defining point

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1. Unless otherwise noted, all references to Rambam, Ra'avad and *Derech Emunah* are in *Hilchot Shemittah V'yovel*, and all references to Mishnah and *Chazon Ish* are in *Shevi'it*.

Most *Poskim* hold that nowadays, the mitzvah of *shemittah* is *d'rabbannan* since there is no mitzvah of *Yovel* (jubilee year, celebrated once in 50 years) (see *Tur* towards the beginning of *Y.D.* 331 with *Beit Yosef* ד"ה ובשביעית, *Chazon Ish* 3:7-8, and the many opinions cited in *Derech Emunah*, *Tziun HaHalacha* 10:53-57).

2. The first *shemittah* was shortly after the Jews entered *Eretz Yisrael* approximately 3,280 years ago, and has occurred every 7 years since then. As a point of interest, the year of *shemittah* is always divisible by 7 without a remainder (i.e., 5768 / 7 = 824).

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in time which determines whether an item is considered *shemittah*-year produce varies, depending on whether one is discussing a vegetable, grain, or fruit.

For vegetables, the defining moment is harvest, which means that a pepper harvested after September 13, 2007, is considered a *shemittah* pepper even if it was planted and grew before *shemittah*. The defininitive time for grains is when they reach 1/3 of maturation; most fruits are judged by when they reach *chanatah* (an early stage in the fruit's development). In practical terms, this means that fresh *shemittah* vegetables will be in market from the very beginning of 5768, but *shemittah* fruits will not be available for sale until later in 5768 and even into 5769. Foods processed from *shemittah*, particularly those with an extended shelf life, such as wine and canned goods, will be on the market well into 5769 and possibly even beyond that point. Consequently, although *shemittah* lasts for only one year, it affects consumers for much longer than that.

B. General Halachot

The following is a brief overview of the basic halachot of *shemittah*:

1. Working the ground

One may not plow the land, nor plant, prune, water or otherwise cultivate items growing in *Eretz Yisrael*.[3] These halachot relate primarily to homeowners who have gardens and to farmers, but even a visitor must be careful about pouring water onto the grass, breaking branches off trees, purchasing and/or caring for a potted plant and other related activities where one may inadvertently violate these intricate regulations.

2. Rights to the produce

Produce of the *shemittah* year is free for anyone to take;

3. These halachot are delineated in chapters 1-3 of Rambam.

the owner of the land may not restrict others from doing so.[4]

Contemporary *Poskim* rule that if someone works the ground during *shemittah* or restricts others from taking *shemittah* produce, the produce itself nevertheless remains permitted despite the violation of halacha.[5] Therefore, while any Jew visiting Israel must be personally careful not to violate any of these rules, nevertheless the prohibitions are, in practice, of little consequence for consumers outside the land purchasing Israeli products. In contrast, the following three halachot are quite relevant to all Jewish consumers everywhere.

3. *Kedushat shevi'it* – the sanctity of the Sabbatical year

Fruits, vegetables, grains, herbs, and spices which are *shemittah* produce are endowed with a special holiness known as "*kedushat shevi'it*". This means they cannot be wasted, used for a non-typical purpose, used in transactions in the traditional manner – nor may they be taken out of *Eretz Yisrael*.[6] [See the footnote if these rules apply to flowers].[7] In the event that food with *kedushat shevi'it* is

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4. Rambam 4:24.

5. *Chazon Ish* 10:6, *Tzitz Eliezer* VI:39:3, *Iggerot Moshe* O.C. I:186 and *Minchat Shlomo* I:44 ד"ה מבואר, accepting the opinion of Rambam 4:15 & 8:12 as opposed to Ra'avad 4:15 and Rabbeinu Tam (cited in Tosafot, *Succah* 39b ד"ה במה דברים אמורים), who are *machmir* (strict) on these two issues. [See also *Derech Emunah*, *Tziun HaHalacha* 4:316, 4:188 & 4:312].

6. These halachot are delineated in chapters 5-6 of Rambam.

7. [Much of the following is based on *Chazon Ish* 14:9]. Mishnah 7:6-7 says that there is *kedushat shevi'it* on flowers that are used to impart taste into foods. *Yerushalmi* 7:1 questions whether the same applies to spices which have a fragrance but no taste. However, inasmuch as the *Yerushalmi* does not resolve the issue, it is generally accepted that one should treat them with *kedushat shevi'it* (see end of *Chazon Ish,* ibid). Contemporary *Poskim* debate whether the aforementioned *Yerushalmi* dictum is limited to spices whose primary use is for fragrance or even includes the many decorative flowers that happen to have a pleasant fragrance (see *Mishpitei Eretz* 14:2 and

sold, the money used in the transaction also acquires *kedushah* (and the food retains its original *kedushah* as well).[8] More details of these intricate laws will be presented below (Section D).

4. *Biur*

Once there is no more of a specific type of *shemittah* produce (e.g.,grapes, figs) left in the field for animals to eat, one may retain in the house three meals' worth of that type of food for each member of the family; the rest must be declared *hefker*/ownerless.[9] This procedure is known as *biur*. [*Biur* is done differently by Sephardim.] Once *biur* is done, anyone – including the original owner – may take possession of the food and eat or use it as before, with *kedushat shevi'it*. Rabbinic groups in Israel produce lists of when the time of *biur* occurs for each type of fruit.

If one did not perform *biur* at the correct time, the food

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footnote 10 there, citing Rav S.Z. Auerbach as taking the former position and Rav Elyashiv as accepting the latter.

8. Rambam 6:1, 6 & 7. The money with *kedushat shevi'it* must be used to purchase food items, at which point the *kedushah* passes from the money and to the foods (and those foods must now be treated with *kedushat shevi'it* as outlined in the text) (ibid.).

9. The halachot of *biur* are delineated in chapter 7 of Rambam. There are 3 opinions as to what the mitzvah of *biur* entails (see *Chazon Ish* 11:6-8 & *Derech Emunah* 7:17 for more details):

– Ramban (*Vayikra* 25:7) maintains that *biur* merely requires the person to declare the food *hefker* on the given day; only if he fails to do so does the food become forbidden.

– Rambam (7:3) holds that all food (other than 3 meals' worth per person) must be destroyed on its respective day of *biur*.

– Ra'avad (ad loc.) holds that there are two forms of *biur*, an earlier one (when the food is unavailable in the cities) which is like Ramban, and a later one (when the food is not available in the fields) where the mitzvah is as described by Rambam.

On this matter, Ashkenazic *Poskim* generally follow Ramban's position (see for example *Chazon Ish, Seder HaShivi'it* point #1 (reprinted after chapter 26 of *Chazon Ish, Hil. Shevi'it*)), while Sephardim accept Rambam.

becomes forbidden and must be destroyed.[10] There is disagreement whether this last strictness applies even if *biur* was not performed due to a mistake or due to something out of the person's control.[11] One should consult a competent Rabbi if this problem arises.

5. *Sefichin*

Chazal found that people were planting vegetables during *shemittah*, yet claiming that they had grown on their own (technically, such self-growing vegetables, known as *sefichin*, would be permitted in the *shemittah* year by Torah law). Therefore, the Rabbis made an amendment that all items that are replanted annually – including vegetables, grains, herbs, and spices – which grow during *shemittah* are forbidden, even if they grew on their own, without human intervention.[12] This far-reaching prohibition potentially affects many of the foods exported from Israel.

In summary, *shemittah* obligates the land owner not to work his field and to allow anyone to take his produce. If he ignored either of these requirements, the produce nonetheless remains permitted. There are special halachot relating to the consumption of *shemittah* produce, including not wasting it, nor taking it out of the country nor doing business with it, and at a certain point there is also a mitzvah to declare the fruits *hefker* (ownerless). In practice, these halachot are limited to fruits, as most annual produce grown during *shemittah* – including vegetables, grains, spices and herbs – are completely

10. Ramban, ibid.

11. Among the *Poskim* who have expressed opinions on this matter are *Chazon Ish* 14:13, who is strict regarding someone who accidentally or inadvertently (or even due to circumstances beyond his control) didn't perform *biur*, and *Minchat Shlomo* (I:51 point 15 or 16 depending on the edition) who is lenient.

12. Rambam 4:1-3.

forbidden as *sefichin*.

Clearly, most of these halachot are limited to those who reside in or visit *Eretz Yisrael*. However, much to the surprise of many consumers, some processed foods, and even fresh herbs or vegetables found in local American grocery stores, are of Israeli origin.[13] In reality, then, some of the halachot of *shemittah* apply to Jewish consumers in all countries. Consequently, we must first consider how Israeli farmers and companies confront the aforementioned halachot of *shemittah*, and then see if and how they apply to those who reside in other countries.

C. Israeli Farmers and Companies

Israeli farmers and companies take five basic approaches to the restrictions of *shemittah*:

1. Disregard the halacha

   Unfortunately, many Jews living in Israel are not religious and completely ignore the halachot of *shemittah*. As noted above, foods grown by such farmers do not automatically become forbidden; however, vegetables, grains, spices, and herbs would indeed be forbidden as *sefichin*, and fruits would retain *kedushat shevi'it* and require *biur*.

2. *Heter mechirah*

   A century ago, Rabbonim of great stature permitted the land of *Eretz Yisrael* to be sold to a non-Jew for the

13. See for example http://www.arv.co.il/eMall/shop Department. asp?sc=1760&id=51430&fid=11170, http://www.israflora. com/fresh-produce.htm, http://www.israflora.com/fresh-herbs.htm, http://www.israflora.com/fresh-herbs2.htm, and http://www.agrexco.co.il/home.asp (in Hebrew) where 3 of Israel's export companies describe the vegetables, herbs, and fruits that they export to Europe and North America, and which times of the year those products are available.

duration of *shemittah*, in order to help struggling Jewish farmers avoid financial ruin. Since that time, there has been much heated debate whether this type of sale – known colloquially as the *heter mechirah* – is valid, if and how it should be performed, and what it permits the farmers (and consumers) to do. Rav Y.D. Soloveitchik *zt"l* suggested that the entire discussion of the *heter mechirah* is predicated on a financial need which certainly does not apply to American consumers, and he therefore recommended that they not rely on it.

This strict position is almost uniformly accepted by the mainstream kashrut-certifying agencies (*hashgachot)* in the United States, and by many Israeli kosher certifications as well. As a result of this, some Israeli items such as wine will lose their regular *hechsher* for an entire year, if the manufacturer chooses to rely on the *heter mechirah* but the *hashgachah* does not accept it. Therefore, consumers need to be particularly vigilant to check labels for proper kosher certification during this time, for products that they are used to buying may temporarily not be certified.[14]

The Israeli Chief Rabbinate has traditionally supported the *heter mechirah* and broadly offered it for all Israeli farmers. For *shemittah* 5768, the Chief Rabbinate took a stricter stance: (a) only performing a *mechirah* that could be justified for farmers in desperate need for the *heter* and (b) allowing the local community Rabbinates to decide whether to accept items produced under the *heter*. The latter decision received much media coverage, but it is the former decision that has much more of an impact on American consumers, because as a result of that decision

14. For a detailed analysis of the halachic issues involved with the *heter mechirah*, see Volume 26 of this Journal.

the average Israeli fruit or vegetable found in an American supermarket is not covered by the *heter mechirah*. Therefore, those who in previous *shemittah* years would have purchased Israeli produce in the USA based on the *heter mechirah*, should not do so this *shemittah* unless they can verify with certainty that the produce was in fact covered by the *mechirah*.

3. Purchase ingredients from Arab farmers

There are manufacturers who choose to buy their ingredients from Arabs who own and farm land within the halachic borders of *Eretz Yisrael*. [Packaged items made from such produce may be marked as "יבול נכרי"]. As the security situation in the West Bank and Gaza has deteriorated, this type of arrangement – which, among other things, requires *Mashgichim* to ensure that the "Arab" produce is not actually Jewish produce diverted to Arab lands – has become less practical.

A common thread characterizing the previous two methods is that any leniency is based on the land belonging to non-Jews. On this issue, *Beit Yosef* and *Mabit* had a fundamental disagreement; the former held that such produce does not have *kedushat shevi'it,* but the latter argued that it does.[15] According to *Mabit*, it would be forbidden to sell the produce commercially or to export it from Israel (among other restrictions noted above). The custom in Jerusalem and most communities is to accept the lenient opinion, while in B'nei Brak and some other areas they follow Chazon Ish, who defended and promoted the strict position.[16] [All agree that the

15. See *Avkat Rochel* 22-25 and *Responsa Mabit* I:11, 21, 217 & 396. See also *Responsa Maharit* I:42-43 (by the son of *Mabit*) who claims that *Beit Yosef* changed his mind later in life.

16. See *Pe'at HaShulchan* 23:12 and *Chazon Ish* 3:25 & 20:7, who respectively defend the lenient and strict opinions.

prohibition against *sefichin* does not apply to produce of a non-Jew's field].[17]

4. *Otzar Beit Din*

Farmers who participate in an *Otzar Beit Din* (a "collective", supervised by the Jewish court) do not do any prohibited work on their fields. They allow public representatives to harvest any fruit that grows by itself, and these fruits are then sold to the public for the minimal cost needed to compensate the people who harvested and delivered the fruit to the market. The public representatives are appointed by a Jewish court (*Beit Din*), and in many cases the owner of the field is the one chosen to serve as the representative so as to provide him with some income during *shemittah*. Items distributed via *otzar Beis Din* have *kedushat shevi'it*.[18] Among other things, this means that *Otzar Beit Din* produce should not leave *Eretz Yisrael* and is not likely to be found in an American supermarket.

5. Use non-*shemittah* produce

Some companies make arrangements during *shemittah* to purchase ingredients from foreign countries or from parts of the State of Israel that are outside the halachic borders of *Eretz Yisrael*. A modern variation of this is to grow products in specially built greenhouses, an option which will be discussed in more detail below (see Section E). Others stockpile ingredients or finished goods from before *shemittah* so they will be able to produce and service their customers during the *shemittah* year.

Inasmuch as there are so many caveats relating to

17. Rambam 4:29.

18. The halachot of *Otzar Beit Din* are based on *Tosefta*, *Shevi'it* 8:1-3 (cited in Ramban, *Vayikra* 25:7) as clarified by the later *Poskim*; see many details in *Derech Emunah* 6:19.

shemittah produce, it is prudent for consumers in the United States to be alert for such produce and preferably avoid purchasing it. This is most important for fresh produce (peppers, tomatoes, dates, grapes, herbs, etc.), and is also relevant to processed foods, where consumers should be more careful to check for proper kosher certification than they might be during other years. If someone already bought *shemittah* produce, they should consult with their local Rabbi for detailed instructions as to whether those foods are forbidden as *sefichin*, how to treat the food with *kedushat shevi'it*, and when and how to perform *biur*.

The following sections deal more closely with two issues discussed briefly above – *kedushat shevi'it* and greenhouse produce. Of these issues, the second is more relevant to consumers outside Israel.

D. *Kedushat Shevi'it*

The halachot of *kedushat shevi'it* can be divided into the following areas (the mitzvah of *biur* was discussed above):[19]

1. Eating without wasting

One may use *shemittah* produce for just about any use as long as that use is not considered a "waste" of the fruit. In this context, the term "wasting" includes any use other than the common ways that item is used. For example, lemons are almost always consumed as a juice, so they may not be eaten as-is, oranges are commonly eaten as-is or as juice so they may be eaten in either manner, but peach juice is so rare that one is "wasting" a peach if he uses it for juice production. Similarly, one may not cook a *shemittah* pear since this fruit is typically eaten raw; there

19. The first two areas discussed below (wasting & exporting) are delineated in chapter 5 of Rambam, and the third (transacting) can be found in chapter 6.

are also restrictions on which foods may be fed to animals, or given to a non-Jew to eat, or used as oil in a Chanukah Menorah, Shabbat lights or lamp. The application of these halachot fluctuates based on people's eating habits – for example, in the USA, pomegranate juice is now much more common this *shemittah* than in previous ones – and one should consult with a Rabbi to resolve any uncertainties.

Although there is no obligation to eat *shemittah* produce, another element of the aforementioned halacha is that one may not actively waste it.[20] Therefore, for example, one may choose not to eat the peel of a *shemittah* apple but the peel cannot be thrown out; a person does not have to drink up all the wine from *havdalah*-- but he may not extinguish the *havdalah* candle in that wine.[21] Many people keep a special "*shemittah* bin" in which they place leftovers, peels, and other *shemittah* produce which is not going to be eaten; the food remains in the bin until it is inedible, at which point it may be discarded.[22]

2. Remaining in *Eretz Yisrael*

Foods with *kedushat shevi'it* may not be taken out of the halachic borders of *Eretz Yisrael*,[23] except for small amounts necessary for a trip.[24] This means, of course, that s*hemittah* produce cannot be brought back to the United States from a trip to Israel. (This rule may pertain to *ethrogim;* in fact there is considerable rabbinic discussion whether--and why--*ethrogim* may be exported from Israel for the Sukkot holiday in the year following *shemittah*.)

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20. *Chazon Ish* 14:10.

21. See *Chazon Ish* ibid. and *Derech Emunah, Tziun HaHalacha* 5:19 for these and other examples.

22. *Derech Emunah* 5:13; see there for more details.

23. Rambam 5:13.

24. *Derech Emunah* 5:95.

One should note, however, that certain parts of the present State of Israel are outside the halachic border of *Eretz Yisrael*, and there is some question whether the strictures we have mentioned apply there. Consumers should seek the guidance of a Rabbi before bringing food from Israel to the Golan Heights, the Negev, and other areas close to the State's borders.

3. Buying and selling

Shemittah produce may not be sold in the normal manner, which stricture includes even selling fruit by weight or quantity (i.e., three for a dollar). Some of the methods one may employ to circumvent parts of this prohibition include buying the *kedushat shevi'it* product together with non-*shemittah* items, paying with a credit card (i.e., no money changes hands), or prearranging with a merchant to serve as your agent to buy food from the farmer/producer. Consumers who wish to purchase such produce are encouraged to discuss these issues with an Israeli Rabbi for practical directives. As noted earlier, if food with *kedushat shevi'it* is sold in any manner, the monies used in the transaction also acquire *kedushat shevi'it* (and the original food retains its *kedushah*).

Even if one violated any of these halachot, however, the food remains permitted and may be consumed.

E. Greenhouse Produce of *Shemittah*

Israel is a leading developer of greenhouse technology. The primary impetus for these innovations was a desire to help farmers obtain larger crops than otherwise possible and to allow for agricultural development in areas not considered arable. It was later discovered that this method of growing could also bring great benefit to kosher consumers because conditions in the greenhouses could be manipulated to produce vegetables free of insects.

However, our inquiry will focus on another possible benefit of growing produce in a greenhouse, namely, that it may be free of *shemittah* concerns. There are two reasons why greenhouse produce might not be considered "*shemittah* produce": (1) items grown in a greenhouse do not derive any nourishment from the ground and (2) the food is grown indoors. As we shall see, these features (known respectively as עציץ שאינו נקוב and זורע בבית) present grounds for leniency; there are also other factors for leniency.

Resolution of the issue of greenhouse produce bears particular resonance for Jews living outside the Land of Israel because greenhouse produce is exported in great quantity from Israel, especially before *Pesach* when many consumers are concerned to buy bug-free Romaine lettuce for use as *marror* at the *Seder*. In many cases, such produce will be marked as being from a "מצע מנותק" (disconnected bed) or from "חממות" (greenhouses).

1. עציץ שאינו נקוב (a plant growing in a pot without a hole)

Items which grow in flowerpots that have no holes in them (עציץ שאינו נקוב), are by Torah standards (*mid'oraitah)* not considered to be growing in the "ground", inasmuch as the plants cannot draw nourishment from the ground. Nevertheless, as far as rabbinic law is concerned (*mid'rabbanan)*, such plants are generally to be considered as attached to the ground.[25] However, the *Chazon Ish*[26] points out that the Gemara never actually extends this principle to *shemittah* produce; he suggests therefore that it is possible the Rabbis were especially lenient in this regard due to the hardship of observing *shemittah*. Although *Chazon Ish's* conclusion is to be strict (*machmir)* on this point,[27] we will see that he considers it

25. See, for example, Rambam, *Hil. Terumot* 5:14-16.

26. *Chazon Ish, Shevi'it* 22:1 & 26:4. See also *Minchat Shlomo* I:41:4 who suggests other reasons and proofs to be lenient.

27. *Chazon Ish* ibid. and 20:5.

as a contributing factor towards being lenient in certain cases.

Some greenhouse-grown produce might not always qualify for the technical definition of עציץ שאינו נקוב due to particular methods of production.[28] However, during the *shemittah* year many companies take the precaution of lining the floors of their greenhouses with thick plastic sheeting to guarantee that their produce is in compliance with the halachot regarding an עציץ שאינו נקוב.[29] In modern Hebrew, produce grown in this manner is termed as coming from a "מצע מנותק" (disconnected bed [of soil]), and is often labeled accordingly.

(As a footnote to this discussion, we should note that (a) most *Poskim* hold that the blessing (*bracha)* on produce of an עציץ שאינו נקוב is *shehakol,*[30] but nevertheless (b) such produce may still be used for *marror* at the Seder.[31]

2. זורע בבית (house-grown food)

A further issue impacting the status of greenhouse-grown

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28. Among the details are the type of material used in the "flowerpot", whether leaves hang over the sides of the pot, and the size of any holes in the flowerpot. The details of these halachot are beyond the scope of this document; for our purposes, we will assume that during *shemittah* this produce qualifies as an עציץ שאינו נקוב.

29. The Badatz (an Israeli kosher-certification group) is not convinced that a layer of plastic suffices to free greenhouse produce from halachic concerns, and requires that the greenhouse floor be elevated off the ground and that there be a double layer of plastic (*Teshuvot V'hanhagot* IV:258 pages 272-274).

30. *Chayei Adam* (51:17 & *Nishmat Adam* 152:1). (See also *Yechaveh Da'at* 6:12 and *Machzeh Eliyahu* 28), as opposed to *Responsa Shevet HaLevi* I:205 (on *Magen Avraham* 204:4). See the coming footnote.

31. Rav Yosef Ephrati, in a letter dated מוצאי שבת פרשת ויקהל פקודי תשס"א (*Adar* 5761/March 2001), cites this from *Chazon Ish* (*Kilayim* 13:16) and *Eglei Tal* (*Dash* 8:4) who in turn deduce it from Gemara, *Pesachim* 35b (which is discussing matzah). These *Poskim* do not mention *Chayei Adam* cited in the previous footnote, but it is noteworthy that *Eglei Tal* holds that the Talmud in *Pesachim* is arguing on one of *Chayei Adam's Yerushalmi* sources. Thus, it would appear that *Eglei Tal* considers the two statements in the text as contradicting one another.

foods is the talmudic discussion concerning foods that are grown in a house (זורע בבית). The Palestinian Talmud (*Yerushalmi)*[32] fails to reach a conclusion whether they are subject to the laws of *shemittah*, and the debate continues among *Acharonim* regarding this halacha. Rav Ovadiah Yosef[33] accepts the ruling of *Pe'at HaShulchan,*[34] who is lenient, inasmuch as the obligation to observe the laws of *shemittah* nowadays is merely *d'rabbanan*, a rabbinic enactment (and generally the halacha is lenient concerning rabbinic rules). Others[35] follow *Chazon Ish,*[36] who takes a stricter approach regarding items grown in a house.[37] *Chazon Ish* writes that, although he personally assumes that the same stringency should apply even if the pots being used in the house also qualify as עציץ שאינו נקוב (i. e., they have no drainage holes), nevertheless one need not protest those who are lenient in such circumstances.

At first glance, this discussion seems to match exactly the case of produce grown in a fully enclosed greenhouse (where the plants are also in an עציץ שאינו נקוב, as above), and such items should be free of *shemittah* concerns according to the

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32. *Yerushalmi*, *Orlah* 1:2.

33. *Torah Sheb'al Peh* Vol. 42 pages 28-29 (and beyond). In addition, on page 33, Rav Yosef argues with *Chazon Ish* cited in the coming text as to whether the greenhouse has to be detrimental to the growth of the produce.

34. The main body of the book *Pe'at HaShulchan* 20:23 quotes *Yerushalmi's* uncertainty, and the ruling given here in the text is from his commentary, *Beit Yisrael* 20:52.

35. *Halichot Sadeh* 5752 pages 21-22 (Rav Elyashiv), *Teshuvot V'hanhagot* IV:258 page 271 (Rav Shternbuch), and *Minchat Shlomo* I:41:4, I:51:7 & III:58:5 (Rav Auerbach).

36. *Chazon Ish*, *Shevi'it* 22:1 and 26:4 takes the stricter approach cited in the text. Some of the sources cited in the previous footnote cite a letter in which Chazon Ish permitted farmers *l'chatchilah* to use a greenhouse where both reasons to be lenient applied (עציץ שאינו נקוב and זורע בבית); the letter to this effect is reported to have been publicized in the *Elul* 5739 edition of *Moriah,* but this author was unable to find the letter in that journal.

37. *Chazon Ish*'s reasons to be strict is that even according to the lenient position in *Yerushalmi*, it may be forbidden *mid'rabbanan*.

lenient opinions. However, many contemporary *Poskim* do not accept this comparison, based on *Chazon Ish's* analysis of the *Yerushalmi*.[38] *Chazon Ish* reconciles *Yerushalmi* with Mishnah, *Shevi'it* 2:4 by suggesting that *Yerushalmi* only considers that one may plant in a house during *shemittah* when doing so is detrimental to the growth of the plants. But in cases where one covers or encloses a plant in a manner that protects and helps it, there is no question that such plants are included in all restrictions of *shemittah*.

The *Poskim* express a number of different approaches relating to the halachic issue of plants grown in greenhouses:

- Many say that although modern greenhouses are completely enclosed, their primary role is to facilitate <u>better</u> growth, and therefore, based on *Chazon Ish*, produce of a modern greenhouse does not qualify for any leniency.[39] Some of those who take this approach are willing to be lenient if there are other mitigating factors.

- Dayan Yisrael Yaakov Fisher[40] agrees with the basic premise of this position, but argues that greenhouse produce is not as tasty as similar items grown in the traditional manner. He therefore rules that one may plant in such an environment during *shemittah*.

- Rav Moshe Sternbuch[41] basically agrees with the strict approach but says that as relates to *marror* it is preferable

38. *Chazon Ish*, *Shevi'it* 20:6.

39. *Halichot Sadeh* 5752, pp. 22-23, apparently maintains that modern greenhouse techniques are not detrimental to tomatoes and cucumbers (and presents different positions regarding leafy vegetables). *Minchat Yitzchak* X:116 (Dayan Weiss) and *Minchat Shlomo* III:158:7 seem to hold that greenhouse growth is not detrimental to any produce.

40. *Even Yisrael* VIII:74 pg. 69 s.v. *v'chol*.

41. *Teshuvot V'hanhagot* IV:258 p. 274 s.v. *u'lachar* (and elsewhere), holds that modern greenhouses are not detrimental to tomatoes and cucumbers (but are for leafy vegetables); his position regarding *marror* is noted at the end of that *teshuvah* and in *teshuvah* 259.

to be lenient on this issue rather than eat "regular" Romaine lettuce and take a chance of eating bugs (which would be a Torah violation, much more severe than the rabbinic rules of *shemittah*) There are a number of other possible reasons to be lenient regarding greenhouse produce during *shemittah*, as follows:

a. Sell to a non-Jew

It has been suggested that the "flowerpots" and their contents can be sold to a non-Jew, and non-Jews can do all biblically-forbidden activities for the plants. Although at first this may sound very much like the well known *heter mechirah* rejected by many, the truth is that such a sale of flowerpots and greenhouses avoids the main problems that earlier *Poskim* had with the *heter mechirah*. For this reason, Rav Elyashiv finds this arrangement acceptable if done in conjunction with עציץ שאינו נקוב and זורע בבית (as described above).[42] Much of greenhouse produce sold during *shemittah* with "*Mehadrin*" certification is based on this ruling. Although Rav Wosner[43] concedes that this halachic conclusion is correct, he argues that (a) exploiting this type of loophole on a grand scale is against the spirit of *shemittah* and (b) doing so will lead people to believe erroneously that the general *heter mechirah* is acceptable. Thus, foods grown in greenhouses sold to non-Jews, or where the proscribed work is performed by non-Jews, are subject to the controversy whether such foods retain *kedushat shevi'it*, as was explained above.

b. Location of the greenhouses

We may note in passing that the question of greenhouse produce of *shemittah* was first addressed by *Poskim* in previous Sabbatical years when the bulk of this type of farming was

42. *Halichot Sadeh* 5752 page 23 section 4 and page 24 point 4.

43. *Shevet HaLevi* VI:167, VIII:245, IX:237-238 and X:199; also see his post-script to *Halichot Sadeh*, ibid.

done in *Gush Katif*, an area that may be out of the halachic borders of *Eretz Yisrael* (as relates to *shemittah*). At the time, some considered that point to be contributing factor for leniency.[44] Since then, the Israelis have chosen to abandon *Gush Katif,* and it has become a moot issue.

c. Insect-free produce

As noted earlier, some *Poskim* who are otherwise strict on greenhouse produce during *shemittah* are nevertheless inclined to be lenient for using Romaine lettuce at the Seder.

3. Summary

We have seen that there are quite a number of reasons to permit greenhouse produce during *shemittah*. Following is a summary of the final conclusions of contemporary halachic *Poskim,* listed more or less in ascending order of strictness (starting with the most lenient):

- Rav Yosef permits greenhouse produce in all cases since it grows indoors.
- Dayan Fisher is inclined to permit all greenhouse produce since it grows indoors, and says that if it is also grown as an עציץ שאינו נקוב , it is surely permitted.
- Rav Auerbach is lenient if the pots are also considered עציץ שאינו נקוב.
- Rav Elyashiv is lenient only in the limited cases where the greenhouse environment is detrimental to the produce's growth and the "pots" are עציץ שאינו נקוב which is sold to non-Jews and all actions prohibited by the Torah during *shemittah* are performed by non-Jews.

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44. *Halichot Sadeh* 5752 pg. 22 s.v. *u'bidvar* holds that the location is not even a factor towards being lenient, while *Teshuvot V'hanhagot* IV:258 p. 270 s.v. *v'hinei* (and many other times) takes exactly the opposite approach.

- Rav Wosner agrees with Rav Elyashiv on halachic grounds, but holds it is improper to rely on this rationale on a large scale.
- Rav Shternbuch permits leafy vegetables from areas that may be out of the halachic borders of *Eretz Yisrael* (e.g. *Gush Katif*) if it is not possible to purchase bug-free produce from non-Jews.[45]
- Dayan Weiss appears to hold that it is improper to use greenhouse produce under any circumstances.

End of *shemittah*

As noted above, the restrictions of *shemittah* produce commonly apply even after *shemittah* ends, particularly relating to fruits – wich may not come to market until well into the *shemittah* year or the year after – and packaged goods with an extended shelf-life. This issue is particularly relevant to Jews in the diaspora who choose to use an *Ethrog* from *Eretz Yisrael* for Sukkot 5769; consumers are encouraged to seek guidance from their local Rabbi.

Lastly, there is one mitzvah of *shemittah* which applies to all Jews in the world – *shemittat kesafim*. Briefly, this mitzvah requires that once *shemittah* ends, no one may claim payment for a debt from any fellow Jew, unless the creditor has written a special document (*pruzbul)* before the end of *shemittah*.[46] Details of this mitzvah were discussed in Volume 21 of this Journal.

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45. It is not clear whether he would be lenient nowadays when the produce no longer comes from *Gush Katif*.

46. The halachot of *shemittat kesafim* and *pruzbul* are delineated in chapter 9 of Rambam.

Co-education – Is it Ever Acceptable?

Rabbi Aryeh Lebowitz

I. Introduction

The issue of co-education, especially in a formal academic setting such as a Jewish day school, is one that had not been addressed by the *poskim* until recent times. The obvious reason for this omission is that formal Jewish education for girls began to occur broadly only in the last century. Certainly, the concept of providing boys and girls with similar enough education to properly serve both genders in the same classroom is a novel one, and is the subject of ongoing debate by leading educators and rabbinic authorities. A discussion of the halachic propriety of teaching Gemara and other parts of *Torah she'ba'al peh* to girls is well beyond the scope of this essay.[1] Our focus will be the halachic advisability of mixing the genders in a school setting, and a discussion of the parameters of any leniency in this area. More specifically, we will discuss whether the mingling of the genders is an ideal in Jewish education, and if not, under what parameters and circumstances, it might be permissible to do so.

A number of points will help to structure this discussion:

A. People commonly assume that the issue of co-education is purely one of personal choice. In this essay we will attempt

1. The reader is referred to a full treatment of this topic by Rabbi Moshe Weinberger in the *Journal of Halacha and Contemporary Society* IX, pp. 19 ff.

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to prove that the issue is addressed by the Torah and requires the guidance of a Torah authority before any final decision can be made, whether on a community-wide or personal level. When discussing co-education, people often quote the latest educational studies and their findings,[2] but such studies are not necessarily dispositive in establishing a religious community's decision regarding how to run a school.[3] A halachic issue cannot be resolved solely based on contemporary secular literature. Instead, educational and psychological considerations need to be weighed carefully along with the guidance of traditional Torah sources.[4]

B. While this paper will paint the issue in broad outline, it should be evident that each community, each school, and each family presents a unique set of circumstances. One cannot pass judgment on any given school, community or family without a thorough understanding of the community's history, the

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2. By contrast, while we acknowledge that educational and psychological factors can impact the halacha, our emphasis will be on the halachic issues involved, and how various leading halachic authorities have addressed these issues.

3. One of the more common arguments presented to defend co-education is the idea that children need to learn how to interact with the opposite gender. A lack of experience in doing so may cripple the child in his social relationships as an adult, most significantly in marriage. While this argument may seem compelling, there has been significant research to indicate that the opposite is in fact true. When children are able to develop independently, without the self consciousness that a co-ed environment engenders, they are better equipped to adjust socially as adults. (1998 study conducted by Dr. Fishel Mael, commissioned by the U.S. Department of Education).

4. Arriving at a halachic ruling on this issue is complex, for considering the different degrees to which boys and girls may interact, it is difficult to declare coeducation as either purely permissible or purely forbidden. We will instead focus on a general direction that the Torah guides us in, rather than specific guidelines to be obeyed by every institution. As Rav Ahron Lichtenstien pointed out: "You ask another question and it is not a question just of *issurim*: *assur mutar*, *mutar assur*… in education you run a wide gamut from relatively minimal situations to maximalist situations". (AMODS Convention, Center for the Jewish Future, 2007).

religious commitment and outlook of its members, the already existing schools in the community (if any), and the unique challenges, financial or otherwise, that it faces.[5] Nor can one even assume what a specific *posek* would have ruled for one community based on what that *posek* ruled for a different community.[6] Therefore, it would be wrong for a community to base its decision for the type of educational institution(s) it establishes on the decision of a different community in a different milieu.[7] Each school, when making this decision, must do so in careful consultation with the local rabbinic leadership. It is also an issue that should be revisited from time to time, at least as to its detailed implementation, given changing circumstances.[8]

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5. See, for instance, Responsa *Shevet Halevi* I:29 who writes regarding a school that has mixed classes between the ages of five and eleven "since there are *talmidei chachamim* who are known to possess *yirat shamayim* in that place, perhaps they have already objected and they were not listened to, or perhaps the situation was previously even worse and they are correcting the situation gradually (in stages). It is therefore difficult for me to judge the matter from a distance. It is appropriate to bring the matter to the attention of the leaders of that community."

6. Rabbi Ahron Silver recounted the following incident in the name of his father who had witnessed it: "Rav Aharon Kotler *zt'l* once got up at a Torah U'mesorah convention and said that one has to be *makpid* on certain co-educational issues. When Rav Aharon finished speaking, one of the day school principals in attendance got up and said that he accepts whatever Rav Aharon says as he is a *gedol hador*, and he will have to resign from his position as they will never accept such guidelines in his school. Rav Aharon responded that he never meant that the principal should resign, rather he just meant that one should insist on these things if it is possible in one's school." (email correspondence) This incident illustrates how a particular *pesak* in a given situation cannot be universally applied, especially with nuanced issues such as school policies.

7. See *Nefesh Harav* page 237. Certainly, for a family to make a decision based on the decision of another family would be an equally flawed approach. A very prominent Rosh Hayeshiva from the past generation once remarked "When it comes to co-education there are two *Shulchan Aruch*'s, one for New York and one for the rest of America". (email correspondence with Mr. Julius Berman).

8. For instance, many day schools that were established decades ago were

C. While this essay will focus on the issue of co-education, it should be obvious that this is just one of dozens of issues to weigh before choosing a school. To conclude whether any given school should be viewed in a positive or negative light based on the findings of this essay, would be overly narrow; co-education is but one of a number of factors to consider when evaluating the choice of schools for a child. What this essay attempts to accomplish is two fold. First, we will discuss whether co-education should be viewed as a drawback, advantage, or neutral point. Second, to the extent that co-education is viewed as a drawback, we will outline how different *poskim* have approached this issue and the range of extenuating circumstances that they considered in reaching a particular decision.

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serving children who had come from non-observant families. In the absence of a co-educational institution many of those children would have certainly received either no or little Jewish education. The demographics of many neighborhoods have changed over the past few decades, resulting in many of these same institutions serving an exclusively Orthodox parent body that would send their children to a yeshiva regardless of the availability of a coeducational institution. It goes without saying that very frequently revisiting issues that would require drastic changes may not be advisable, as it may upset the equilibrium of the school. However, it is advisable for schools to revisit major policy decisions once in a long while in order to ensure that they are serving their parent body to the best of their ability. Rav Ahron Lichtenstein has identified the policy of co-education as one that must be revisited from time to time. He stated: "I do feel however, that if that (allowing a co-ed institution due to financial hardship) is done in a particular community there should be an element of *b'dieved* about it to begin with, and part of the situation of *b'dieved* is the striving eventually to move from *b'dieved* to *lechatchila*. If you open such a school because of financial or budgetary restriction, you can't have classes with three students in them, it should be done with a sense which at a minimum at least the *ba'alei batim* and the *mechanchim* understand we are doing this now because it is important and we do not want to leave one of the genders outside, but our hope is in due time we want to have a larger school with budgetary possibilities which would enable having both with both genders represented."

II. The Halachic Issues

As we noted earlier, most of the classical sources relating to separation of the genders are not addressing an educational context.[9] However, analogies from other situations can be applied, with care, to other contexts.

A. The following is a list of sources, cited by a variety of *poskim*, to suggest that co-education is frowned upon in the halacha:

1. The lone source in medieval halachic literature that actually deals with co-education is a comment of the Meiri to a text in *Kiddushin*. The Gemara warns a father not to teach his son a profession "amongst the women". This passage is traditionally understood to mean that a father should not teach his son a profession that will require frequent interaction with women.[10] However, the Meiri explains that it means that

9. Dr. Seth Farber, in his book *An American Orthodox Dreamer: Rabbi Joseph B. Soloveitchik and the Maimonides School*, suggests (p. 79) that "it may be argued that the lack of a standard primary source highlights the absence of a definitive prohibition." This is a questionable assertion. To the contrary, as Dr. Farber himself notes "One cannot find an extensive discussion of co-education in traditional Jewish legal sources since women did not receive formal education until the modern period." Clearly, the lack of a clear statement of *Chazal* prohibiting co-education is no different than the lack of a clear statement of *Chazal* prohibiting the use of a laptop computer on Shabbat. *Chazal* simply did not think of such a possibility. Leading *poskim*, though, are adept at applying various statements of *Chazal* and *Rishonim* to contemporary issues and coming to a clear and definitive position based on the direction that *Chazal* have established. In fact, there is no clear statement in *Shulchan Aruch* requiring a *mechitza* in a synagogue. The *Mishnah Berurah* 156:4 cites a lengthy list of basic requirements that, for one reason or another, are not included in *Shulchan Aruch*. Indeed, many of the *poskim* who have written on this matter have asserted that the lack of a clear singular source is due to the fact that the prohibition is so obvious based on multiple sources.

10. See Responsa *Shevet Halevi*, *Even Ha'ezer* V:206, who says that while we cannot mandate that women not join the workforce because the financial difficulties many families are faced with compel women to work, one should be very careful that the workplace not be a breeding ground for the *yetzer*

the boys and girls should not be placed in the same vocational school to learn the same profession, lest they grow accustomed to one another, which could lead to sin.[11]

2. The Gemara derives a requirement for a separation between men and women at the *simchat beit ha'shoeva* from the prophet Zechariah's description of the eulogy of *Mashiach ben Yosef*.[12] The prophet describes "*Mishpachat beit Dovid l'vad, u'nsheihem l'vad*" "the family of Dovid by itself and their wives by themselves." If in a time of eulogy, when one is not inclined toward frivolous behavior, and in the future world, after the evil inclination has been slaughtered, the Torah still demands that men and women gather separately, certainly in times of celebration, when the evil inclination is still active, the Torah demands that we separate men from women.[13]

3. The Rambam writes that during the holidays, when people tend to socialize, the *beit din* has a responsibility to appoint officers to search in the gardens and homes to prevent people from socializing with members of the opposite gender.[14] Furthermore, people should be warned in advance

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hara. He continues to say that this should serve as open rebuke to co-educational institutions where the children are taught to become accustomed to having access to the opposite gender, which is in direct contrast to the Torah.

11. Meiri, commentary to *Kiddushin* 81a. See, also, *Sefer Chasidim* #168 who warns not to mix boys and girls together lest they sin. To support this prohibition, *Sefer Chasidim* cites a verse in *Zechariah* 8:5 which states that "young boys and young girls will play in its (Jerusalem's) streets", and notes that the verse does not say "young boys with young girls", but that the two groups will play separately.

12. *Zechariah* 12:12.

13. *Sukkah* 52a. While this passage may also serve as a primary source in a discussion of *mechitzah* in a synagogue or at social functions, those topics are beyond the scope of this essay. The environment of *simchat beit ha'shoeva* and the environment of Torah education are similar in that both are supposed to be conducive to sanctity and the performance of an important mitzvah.

14. This comment of the Rambam seems to be based on the statement of the Gemara in *Kiddushin* 81a that the most challenging time of year to uphold high standards of *tzeniyut* is during the holidays. Rashi explains that

about the dangers of such mingling in their homes.[15] The *Shulchan Aruch* echoes the Rambam's ruling, adding that it is important to retain our sanctity.[16]

4. Perhaps the most unambiguous source to stress the need to separate the genders is the ruling of the *Shulchan Aruch* that one should distance himself from women "very very much".[17] The *Sefer Api Zutri* explains the unusually strong language employed by the *Shulchan Aruch* based on similar language that appears in a Mishnah in *Pirkei Avot*, where the Mishnah warns: *"meod meod hevei shefal ruach"* ("one should be very

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on the holidays men and women gather to hear the *derasha* after which they frequently discuss what they had just learned with each other. [One may argue that in our times, when women are in the work force, the challenges in this area are greater on regular weekdays than they are on holidays.] It is notable that the concern for a compromise of *tzeniyut* actually begins with the performance of a mitzvah – the requirement to learn about the holiday on each holiday.

Rabbi Avigdor Nebenzal suggests that this may be the connection between the end of *Parshat Re'eh* and the beginning of *Parshat Shoftim*. Although, throughout the Torah the accepted opinion is that we do not derive laws from the juxtaposition of two *parshiyot*, all agree that in *Sefer Devarim* we do. The end of *Parshat Re'eh* discusses the holidays, while the beginning of *Parshat Shoftim* discusses the requirement to appoint judges and officers. Rabbi Nebenzal suggests that this may be an allusion to what the Rambam says about appointing *tzeniyut* officers specifically during the holiday season (*Sichot l'sefer Devarim).*

15. *Hilchot Yom Tov* 6:21.

16. 529:4. See *Mishnah Berurah* ad loc. who writes that great care must always be taken in this area. The *Shulchan Aruch* specifically stresses holidays because that is when people most commonly stumble in these areas. See also *Sha'ar Ha'tziyun* ad loc. #21 that there are certain places where there has been a breakdown in this area even on weekdays, and it is a "great sin" that anybody with the power to stop should do so.

17. *Shulchan Aruch Even Haezer* 21. See also *Aruch Hashulchan, Orach Chaim* 583:4 who says that in a community where women attend *tashlich* services on the first day of Rosh Hashana, it is best for men not to attend. One of the reasons for the requirement to limit interaction between the genders is the problem of *shemirat einayim* (making sure not to gaze at women). When one regularly interacts with women, particularly amongst young adults, it is very difficult to avoid the sin of gazing inappropriately at women.

very humble").[18] The Rambam explains that while we normally try to attain the golden mean in most of our character traits, regarding arrogance one must remain as far as possible to the opposite extreme.[19] Similarly, when relating to issues of mixing of the genders, it is critical to avoid a moderate stance and stay as far to the cautious extreme as possible.[20]

B. Of course, proper analysis of any source must include a discussion as to the source's applicability to modern times. Numerous arguments have been advanced by modern educators to encourage a more lenient stance than the one implied by the classical sources toward co-education, either on the grounds that an educational setting is fundamentally different than the settings the Gemara had spoken about, or on the grounds that our students have different sensitivities because they are growing up in a more permissive environment.

1. Some educators have argued that these concerns are not valid in a classroom setting where each student is focused on their work, and is much less likely to be overcome by lewd thoughts. Rav Ovadya Yosef points out that when the Gemara (*Kiddushin* 82) warns about teaching a child a profession that will require substantial interaction with women, the *Tosafot HaRosh* comments that the Gemara specifically emphasizes the idea of separating men from women during times of work because one may have mistakenly thought that while one is concentrating on work there is no reason for concern. Similarly, while the atmosphere of a classroom may minimize the problem, it would be a mistake to assume that it would solve the problem entirely.[21] Furthermore, on a practical level, it is nearly impossible to see to it that the students only

18. *Avot* chapter 4.
19. Rambam *Hilchot De'ot* 2:3.
20. Cited in Responsa *Yabia Omer* X:23.
21. Responsa *Yabia Omer* IV *Even Ha'ezer* #4.

interact in the classroom and not in the far less formal areas of the school like the hallways, dining room, and school bus.[22] Finally, Rabbi Yaakov Kaminetzky and Rabbi Mendel Zaks point out that perhaps allowing for a co-ed atmosphere in a Jewish school is even worse than allowing for it in other contexts. The Yeshiva's purpose is to educate our sons and daughters to observe Torah properly. It is particularly damaging to the education of the child when the very institution that is assigned to teach observance takes liberties in implementing observance on campus.[23] For all of the above reasons, Rabbis Yosef Chaim Sonnenfeld, Avraham Yitzchak Hakohein Kook,[24] and Yaakov Moshe Charlop *zt"l* all signed a ruling to separate boys and girls in school.[25]

2. Some have suggested that we be more lenient today because of all of the *peritzut* (sexually liberal attitude and dress) in the streets. After all, one may suggest that our children have developed a higher tolerance for sexual immorality and are less likely to become tempted by a co-ed environment. The merit of this line of thinking seems to be the subject of debate among the leading *poskim*. The *Levush* cites the comment of *Sefer Chasidim* who writes that one should not recite the joyous blessing of *"she'hasimcha b'm'ono*" at a wedding where there is mixed seating, because the mixing of the genders detracts from the joy of a Jewish celebration. The *Levush* comments that nowadays, when women more

22. Indeed, Rabbis Yaakov Kaminetzky and Mendel Zaks write that "certainly it is a very great sin" (*B'mechitzat Rabeinu*, pages 88-89).

23. *B'mechitzat Rabeinu*, ibid.

24. Rav Kook's position on the matter is firmly established in a number of his letters. In *Iggerot Harayah* II: 392 he writes that "there is no limit to the destructive educational influence that comes through this unnatural joining of the genders in school for young and older children". Furthermore, in I:279 he writes: "the administrators of the school have joined the two genders together… without any regard for *tzeniyut*". See approbation of Rabbi Simcha Kook to *Sefer Kedoshim Tihiyu*.

25. This declaration was signed in the year 5674 (cited in Responsa *Yabia Omer* X:23).

regularly mingle with men, they have become like "white geese" (i.e. something we are accustomed to) and no longer the subject of illicit thoughts.[26]

Similarly, in a much celebrated comment, the *Aruch Hashulchan* writes that now that women regularly walk in the streets with their hair uncovered, one would be permitted to recite *berachot* in front of a married woman whose hair is not covered. Although there is a prohibition to recite a *berachah* in the presence of *ervah*, the status of uncovered hair as *ervah* is subjective. Thus, the fact that we regularly see uncovered hair has desensitized us to the sexual appeal of hair.[27] While not addressing interaction between men and women, the implication of the *Levush* and *Aruch Hashulchan* is that familiarity can breed a desexualized attitude to what otherwise would have been considered sexually charged.

Rabbi Ovadya Yosef argues that the opposite is true. More innocent times afford us a *greater* level of trust that higher standards of *tzeniyut* can be maintained in challenging situations. Rabbi Yosef demonstrates this from a comment of R. Yochanan who said that he remembered a time in Israel when a boy and girl of sixteen or seventeen could play together without sinning. He lamented that, in his generation when so much innocence had been lost, this is no longer the case.[28] Rabbi Yosef notes that if R. Yochanan felt that innocence had been lost in his generation, he certainly would have had a similar assessment of our generation. To suggest that when youngsters are used to co-ed environments from a young age they are less likely to sin is simply "*negged*

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26. *Levush Hachor, minhagim* #36. While it is debatable whether the *Levush* would have applied this logic to co-education, he certainly expresses the idea that familiarity weakens a sense of sexual tension.

27. *Aruch Hashulchan, Orach Chaim* 75:7. It should be noted that the *Aruch Hashulchan* does not permit married women to keep their hair uncovered. In fact he uses very strong language to express how sad it is that so many women do not cover their hair. See also *Nefesh Harav* page 255.

28. *Bava Batra* 91b.

ha'metziut" (contrary to reality).[29] [30]

III. How Separate?

Even those who agree that unconstrained mingling of the genders creates a halachic problem may still disagree as to how far we have to go to separate boys from girls. One may argue that a skilled administrator, running a co-educational institution, may tactically limit inappropriate social contact. This raises the question of how separate does the school have to be in an ideal halachic world?

A. *Constant Contact*. Some educators have suggested that familiarity between the genders breeds a greater respect and removes a great deal of the sexual tension that would exist for people who are not accustomed to interacting with the opposite gender.[31] While each school may have a different experience with this, the classic rabbinic literature seems to take a clear position to the contrary on the matter. Rashi notes

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29. Responsa *Yabia Omer* IV:*Even Ha'azer*:#4. See also *Sukkah* 52b and *Sanhedrin* 107a where the Gemara states that the more one feeds his desires for sexual immorality the greater those desires become. Furthermore, the Gemara in *Yevamot* (*daf* 76), when discussing how to arouse a man in order to diagnose a physical ailment, states that, if the man is steeped in sexual immorality, he will be aroused by even the slightest hint of a woman (seeing women's clothing), whereas it would be a far greater challenge to arouse a man who is far removed from sexual immorality (like Ya'akov Avinu).

30. It seems especially to run counter to the Gemara in *Kiddushin* that advises a man to teach his child a profession that will not require the child to associate with women frequently. The Gemara seems to assume that the most effective way to avoid sin is to avoid situations of temptation. Additionally, the Gemara *Yevamot* 21a encourages us to add extra safeguards to avoid situations of sin (*"asu mishmeret l'mishmarti"*). The idea of avoiding temptation is further highlighted in *Avodah Zara* 17a and 58b where the *nazir* is warned to avoid a vineyard entirely, and this concept is extended to discourage everybody from situations where one might sin.

31. Rabbi Dr. Steve Bailey, *Eylu V'Eylu:* A *Case For Jewish Education*, argues forcefully in support of co-education. However, by his own admission he confesses that he has no expertise in Jewish law. His opinion, therefore, is irrelevant to a discussion of halacha.

that the Gemara refrains from identifying a particular family by name, because this family would allow married men and women to live in very close proximity to each other. Although they were always careful about laws of *yichud*, *Chazal* did not approve of a living arrangement where men and women had ready access to each other.[32] Based on this, Rav Shlomo Aviner writes that while one can't help but to encounter and deal cordially with women throughout the course of his life, one is prohibited from setting up a framework in his life to be in constant contact with women.[33]

B. *Different Classes or Different Buildings*? Most *poskim* who deal with issues of co-education speak about a mixed classroom, but do not address a mixed campus, with boys and girls in separate classes. Rav Ovadya Yosef, though, was asked about a high school that already had separate classes. The only interaction between the boys and the girls took place in the courtyard of the school during breaks. The principal of the school wanted to know whether it was necessary to build a wall in the middle of the courtyard to keep the boys and girls separate at all times. Rav Yosef responds in the affirmative. He reiterates the dangers of close access and congratulates the principal for beginning the mitzvah (by separating the classes), but urges him to complete the mitzvah (by building a wall to separate the two sides of the campus).[34] One gets the impression that the restrictions suggested for a totally co-ed

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32. Commentary to *Sanhedrin* 86a s.v. *shel beit ploni*.

33. Letter printed in *Kedoshim T'hiyu* page 247. See also, Responsa *Mispar Ha'sofer* (cited in Responsa *Yabia Omer* X:23) that "anybody who has eyes can see that in co-educational institutions it is impossible to avoid excessive closeness between the genders… and they treat a severe prohibition as if it were permissible… and they violate an explicit prohibition of *"lo tikrevu l'galot ervah*".

34. Responsa *Yabia Omer* X:23. In encouraging the building of a fence, Rav Yosef employs a play on the words of Rashi at the beginning of *Parshat Kedoshim*, "*kol makom she'atah motzei geder ervah atah motzei kedusha*" ("wherever one finds a fence to avoid sexual immorality, one finds holiness").

school (i.e. prohibition to open such a school in the absence of major need, etc.) would not apply, in Rav Yosef's opinion, to a school that has separate classes, though it is certainly ideal to split the genders as much as possible.

IV. At What Age?

Once we have established a clear halachic preference to try to keep gender separation in our schools, the question becomes: When does it become necessary? It is almost a universally accepted practice to send young children to co-ed playgroups. Clearly children at that age do not have the *yetzer hara* of a high school student.

As noted earlier, the *Sefer Chasidim*, without defining an exact age, states that the children should be separated even at a young age.[35] The *poskim* seem to be split on the issue of precisely what age one should aim to split the classes, particularly when faced with financial or other difficulties:[36]

A. Rabbi Moshe Feinstein offers an interesting halachic analysis of this question. The issue hinges on how we

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35. #168 - To support this prohibition, *Sefer Chasidim* cites a verse in *Zechariah* 8:5 which states that "young boys and young girls will play in its (Jerusalem's) streets", and notes that the verse does not say "young boys with young girls", but that the two groups will play separately. He cites further textual support from the verse in *Yirmiyah* 31:12 that states "the young maiden will rejoice in a circle, and the young and old men will rejoice together". The verse clearly separates the celebration of the young girl from that of the young boy together with the old men. Furthermore, the verse in *Tehillim* 148:12 states "young men and also (*v'gam*) young women; the old with (*im*) the young", indicating a separation between the young men and women.

36. There is a similar, but not necessarily related discussion regarding the age at which a girl is required to dress in accordance with the laws of *tzeniyut*. The *Biur Halacha* (*siman* 75) writes that from the age of three, a girl should be trained to dress with all of the halachic guidelines that would govern the dress of an adult woman. The *Chazon Ish (Orach Chaim* 16:8 s.v. *katav*) argues that a girl only must begin dressing in a *tzanua* fashion when she is of the age to affect a man's *yetzer hara*.

understand the nature of the mitzvah of *chinuch*. On the one hand, one may argue that the obligation of *chinuch* applies when, other than the child's age, all other factors put the child in a position to observe a mitzvah the way he would as an adult. Alternatively, one may argue that the mitzvah of *chinuch* is to train the child to do exactly what he would be required to do as an adult. Rabbi Feinstein asserts that the preferred approach is the subject of a dispute between the *Magen Avraham* and *Mishnah Berurah* that arises when training a child in the mitzvah of *lulav* on the first day of *Sukkot.* The *Shulchan Aruch* rules that one may not give his *lulav* to a child before the adult has used it for the mitzvah on the first day of *Sukkot* because, while the child has the legal ability to acquire the *lulav,* a child cannot transfer ownership back to the father. However, the *Shulchan Aruch* suggests that if the parent holds it together with the child, never ceding possession to him, the child has never taken possession and the parent may use the *lulav* for the mitzvah.[37]

The *Magen Avraham* writes that when the child and parent hold on to the *lulav* together, the parent has not fulfilled his obligation of *chinuch* because the child must be trained to do the mitzvah in the same way he will do it as an adult. If never taking possession would not suffice for an adult, it does not suffice for a child either. The *Mishnah Berurah,* on the other hand, argues that the father does fulfill his mitzvah of *chinuch* in this way because the requirement is only for the father to train the child in the mitzvah, not necessarily to have all of the conditions for normal fulfillment in place.[38]

Rabbi Feinstein argues that when we relate this debate to our question of co-education in younger grades, the rulings would be reversed. According to the *Magen Avraham* who holds that all conditions must be in place for the mitzvah of *chinuch* to apply, there would be no sense in separating the

37. *Shulchan Aruch, Orach Chaim* 658:6 based on Gemara *Sukkah* 46.

38. See *Mishnah Berurah,* ibid #28, and *Sha'ar Ha'tziyun* #36.

genders at a young age because the most basic condition for the mitzvah (a real *yetzer hara* for *arayot*) is missing.[39]

Just as an adult who does not possess a *yetzer hara* would not be required to stay away from social settings with women,[40] we would have no requirement to train a child who does not yet have any *yetzer hara* for *arayot* to stay away from the opposite gender.[41] According to the *Mishnah Berurah*, though,

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39. Rabbi Ahron Silver has pointed out that this approach seems to be supported by a comment of the Brisker Rav in his commentary to *Arachin* 2b. The Gemara states that a child who still requires his mother's assistance is exempt from *sukkah*. The Brisker Rav explains that a child who still needs his mother would certainly be *mitzta'er* (pained) by going to the *sukkah* without his mother. Considering that an adult who is *mitzta'er* is exempt from *sukkah*, a child in the same position is certainly exempt.

40. See *Ketubot* 17a where Rav Acha would dance with the bride on his shoulders, and explain that she is no more than an inanimate wooden beam to him. See *Pitchei Teshuvah Even Ha'ezer* 65:1 in the name of *Torat Chaim* to *Avodah Zara* 17a.

41. In a follow-up responsum *Iggerot Moshe, Yoreh Deah* II:104, Rabbi Feinstein suggests that in the case of co-education, perhaps the *Magen Avraham* would also prohibit from the youngest ages because one may distinguish between not being *mechanech* a child, as in the case of *lulav*, and being *mechanech* a child to do the wrong thing, as is the case when children get used to mixing with the opposite gender. Rabbi Feinstein argues further that even if there were no formal prohibition to have mixed classes at the youngest ages, people are not very good at defining where the line must be drawn, and ultimately will mix older grades as well. For precedent Rabbi Feinstein points to a passage in *Chagiga* 3a where Rabbi Eliezer ben Azaryah states that children were brought to *hakhel* "to give reward to those who bring them". Rabbi Yehoshua was so excited to hear this explanation that he praised it a great deal. Rabbi Feinstein points out that this passage is perplexing. After all, isn't it obvious that if the Torah requires one to bring the children, those who bring them will be rewarded? What was so novel about R. Eliezer ben Azarya's statement? Rabbi Feinstein explains that when approaching the task of teaching a child Torah, it is very enticing for a parent to say that the child isn't ready to understand yet. Very often, parents will sell their children short and will neglect their obligation to teach the children until the children are well past the age that they should have begun learning. To counter this attitude, R. Eliezer ben Azaryah says that God commanded us to bring even the youngest children to hear the reading of the Torah. Even the children who are certainly too young to understand what is being read are brought. This way, a parent can never procrastinate in

that the point of the mitzvah of *chinuch* is to train the child to become accustomed to perform the mitzvah, separating the genders should be required at the youngest of ages. Rabbi Feinstein rules in accordance with the *Mishnah Berurah*'s understanding of the mitzvah of *chinuch* and therefore requires gender separation at the youngest of ages (presumably as soon as a child notices the difference between boys and girls).[42]

B. Rabbi Ovadya Yosef disagrees with Rabbi Feinstein's stringency for younger children. Rabbi Yosef argues that prior to the onset of the *yetzer hara* for *arayot* there is no halachic obligation to separate the boys from the girls.[43] Rabbi Yosef suggests that one cannot prove anything from the *Mishnah Berurah's* ruling regarding the child taking a *lulav*, because the Rashba in his commentary to *Yevamot* (*daf* 114) suggests that the requirement of *chinuch* applies only to positive commandments such as *lulav*. One is not required to prevent children from violation of negative commandments, such as the mingling of the genders, even according to the *Mishnah Berurah*.[44] Additionally, Rabbi Yosef believes that the *Mishnah*

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starting his child's Torah education. Similarly, if co-education were permitted in the younger grades, it would be very easy to fall into the trap of saying that the child will remain unharmed throughout elementary and junior high school, when in fact, the *yetzer hara* for *arayot* becomes active considerably earlier.

42. Responsa *Iggerot Moshe, Yoreh Deah* I:137.

43. Interestingly, the Gemara in *Yevamot* 114a, while discussing a case of keys that were lost in a public domain on Shabbat, says that one may bring the young boys and girls to play in that area so that if they find the keys they will bring them back. The implication is that the little boys and girls (below the age of *chinuch*) may play together in a common area.

44. Although, generally one may not provide a child with a prohibited item (*Yevamot* 117a; see this author's article on "Kashrut for Children", *Journal of Halacha and Contemporary Society*, Spring 2007), Rabbi Yosef assumes that, when a child has no *yetzer hara,* there is no problem of providing him with the prohibition (*lo ta'achilum*). Rabbi Yosef specifically addresses the issue of *chinuch* according to those who understand that we must get the child used to doing the right things even if he is not of age for

Berurah's opinion is a minority view, and the normative halacha would follow the view of the *Magen Avraham*.

Rabbi Yosef proves that young children should be permitted to sit in co-educational classes from a text in *Chagiga* that asks whether a blind child is obligated in the mitzvah of *aliyah l'regel*. The Gemara clarifies that we are speaking of a child who will get better (before his bar mitzvah[45]). The question hinges on the issue of whether he is obligated to do the mitzvah so that he will be trained to do the mitzvah when he becomes an adult, or is exempt because even an adult in his situation is exempt. The Gemara concludes that he is exempt and the Rambam rules this way as well.[46] Similarly, just as an adult who has no *yetzer hara* would be permitted to sit in a co-ed class, a very young child, who also has no *yetzer hara* for these matters, should be permitted to be in a co-ed class. Therefore Rabbi Yosef rules that beginning at the age of nine, children's classes should be separated.[47]

Rabbi Yaakov Kaminetzky agrees that, prior to the age of nine, there is room to be lenient because the child doesn't have a *yetzer hara*. Furthermore, the obligation of *chinuch* in passively performed mitzvot only begins at age nine.[48]

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the mitzvah to be applicable. Even according to those who extend the requirement of *chinuch* to this extent, Rabbi Yosef suggests that this extension would not apply to the avoidance of prohibitions. It should also be noted that the opinion of the Rashba is not universally accepted. *Tosafot Yeshanim* (*Yoma* 82a) cite conflicting views as to whether the obligation of *chinuch* extends to negative commandments.

45. Tosafot, ibid.

46. *Hilchot Chagigah* 2:3

47. Responsa *Yabia Omer, Even Haezer* IV:4. Rabbi Yosef does point out that one may distinguish between blindness, an unfortunate ailment that may strike the young or old, and the *yetzer hara* which naturally becomes part of a person as he grows older, and may therefore be prohibited. However, he does not view this distinction to be halachically compelling.

48. *B'mechitzat Rabeinu*, pages 88-89. The only circumstance with which Rabbi Kaminetzky is willing to be lenient is when the children will be forced to go to public school. He urges, though, that the community spend

C. Although we have noted authorities who require separation of the genders at a particular age, dividing by age seems impractical as we divide our children based on grade level. Rabbi Ahron Kotler therefore maintains that boys and girls should be separated beginning in the fifth grade.[49]

V. Mitigating Factors That Support Co-educaton

Despite the prevailing rabbinic wisdom that co-education past the fifth grade should be discouraged, under a variety of circumstances, *Gedolim* have sanctioned the operation of co-educational institutions. The nature of those circumstances is broadly debated.

A. Rabbi Moshe Feinstein writes that when a community cannot possibly support two separate institutions, and an attempt to separate the genders would result in one gender attending public school,[50] the community may operate an institution where boys and girls learn together at the youngest of ages. Even the *Mishnah Berurah*, who maintains that the mitzvah of *chinuch* is to acclimate the child to mitzvot, (precluding even the youngest children from a co-educational environment), would agree that where proper *chinuch* for one gender would result in a complete abandonment of the *chinuch* of the other gender, one can accommodate both genders with a secondary level of *chinuch*. However, Rabbi Feinstein omits

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generously to ensure a proper school for both the boys and girls separately.

49. *Mishnat Rabbi Aharon* III, page 169 "*Hachinuch b'yeshivot ketanot*". See there where Rabbi Kotler adds: "the reasons for this are known, as learning in a mixed environment has a negative effect on learning, particularly the learning of Gemara." He continues that "there is no need to elaborate because all yeshiva principals know this clearly." Finally, he states "regarding mixed high schools all agree that it is an absolute prohibition and should be completely nullified."

50. More frequently the splitting of boys and girls would lead to both genders attending public school, as many communities are unlikely and unable to support an institution that serves only one gender, often with only three or four students in a class.

any allowance for older children to be exposed to co-educational environments, presumably even if one gender would be forced to attend public schools.[51]

Apparently, Rabbi Feinstein maintains that while there may be pressing circumstances that would allow us to follow a normally rejected opinion regarding the obligation to educate a child, there are no circumstances that would sanction the formation of a co-educational school for older children (e.g. high school). This is not to suggest that given the option of enrolling a high school student in a co-ed yeshiva or in public school, that Rabbi Feinstein would suggest enrollment in public school. He merely suggests that from a community perspective, a co-ed yeshiva high school may never be started.[52]

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51. Responsa *Iggerot Moshe, Yoreh Deah* I:137. See also Responsa *Shevet Halevi Yoreh Deah* X:178 who allowed a school in the Ukraine to remain mixed until they had enough resources to separate the boys and girls. Rabbi Wosner, though, is careful to point out that he is only lenient because the school serviced only very young children, the supervision was going to be impeccable, and it is only a *hora'at sha'ah* (a temporary allowance) until the school is able to separate as the halacha requires.

52. This dichotomy is most poignantly formulated by Rabbi Yaakov Weinberg, the late Rosh Yeshiva of Ner Israel Rabbinical College (not to be confused with Rabbi Yechiel Yaakov Weinberg, author if *Seridei Eish*, whose opinion is also discussed in this essay). Rabbi Weinberg stated: "Sometimes a public acceptance does so much damage that you have to sacrifice the individual for the sake of the policy. For example, we cannot accept a co-ed high school. Does that mean that a boy of a girl is better off in a public school than in a Jewish co-ed high school? Of course not. But the policy in terms of the *k'lal* has to be that we do not accept a co-ed high school because it is destructive. It goes against the halacha and against *k'lal Yisrael*'s whole essence and morality. Therefore we must be publicly opposed and say no even though we know that it will mean that a number of *Yiddishe neshamot* will get lost in a public high school. These people who create co-ed high schools are undermining the existence of *Klal Yisrael*. But with the individual boy or girl, if the choice is between a public high school and these high schools that should not have been opened, of course they are better off in the Jewish co-ed high school. It is not hypocritical and it is not evading; it is the reality of how we, unfortunately, have to deal with the situation because the public posture does make a difference…" (*Rav Yaakov Weinberg Talks About*

B. Rabbi Ovadya Yosef offers a more expansive ruling than Rabbi Feinstein. Rabbi Yosef suggests that when a community is unable to support two schools, even if the older children will be placed in a co-educational environment, it is better to maintain a single co-ed school than to put one gender in a public school environment. While co-education is certainly a less than ideal way to educate children, *sha'at hadchak k'dieved dami* (when faced with unusual challenges one may rely on less than ideal policies). Rabbi Yosef maintains that it is permissible, and even obligatory, to choose the lesser of two evils specifically in areas of *arayot*.

His proof is a Gemara that says that if men sing and women answer it is considered an act of *peritzut*, violating the halachot of *kol isha*.[53] However, if women sing and men answer, it is even worse because the men are paying careful attention to the women to know when to answer. The Gemara asks what difference it makes which is worse once we know that both arrangements are forbidden? The Gemara answers that we need to know which is worse so that, if they will only listen to stop one activity, we can have them stop the worse of the two evils. Similarly, Rabbi Yosef argues, although a co-educational institution is a definite compromise, when the alternative is a greater compromise of our standards of *tzeniyut*, we may choose the lesser of two evils.[54]

In a different responsum, Rabbi Yosef points out that this logic would only work for the students who have to choose the lesser of the two evils for themselves. What, if anything, would be the logic to allow a teacher to teach in such a school? The teacher would not be forced to compromise *tzeniyut* if he taught in a different school. To address this issue, Rabbi Yosef points out that, according to the Gemara,[55] it is better for a

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Chinuch; edited by Rabbi Doniel Frank, Targum Press 2006).

53. *Sotah* 48a.

54. Responsa *Yechave Da'at* IV:46.

55. *Eruvin* 32b.

talmid chacham (Torah scholar) to violate a lesser prohibition than to allow an *am h'aretz* to violate a more severe prohibition. Similarly, the teacher can violate the minor prohibition of accommodating the education of children in a co-ed environment, rather than allow the children to violate the more severe prohibition of attending public schools and attempting to withstand all of the pressures that they would be faced with in that environment.[56]

C. Rabbi Hershel Schachter, in presenting the opinion of his Rebbe, Rabbi Yosef Dov Halevi Soloveitchik,[57] suggests a more

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56. *Yabia Omer,* IV *E.H.* #4. Although Tosafot (*Shabbat* 4) limit this concept to cases where the *amei ha'aretz* are not completely negligent about their Judaism, and the parents of these children who are otherwise going to send them to public schools are clearly negligent, the children themselves have done nothing wrong. Therefore, the children should be treated the same as a *tinok she'nishbah*, about whom it is clear that one can violate a minor prohibition in order to save them from far more severe prohibitions.

57. Whether or not Rabbi Schachter's portrayal is indeed an accurate reflection of Rabbi Soloveitchik's opinion has been the subject of debate. Rabbi Soloveitchik founded the Maimonides School in Boston, Massachusetts. Among its most innovative features was that Maimonides was, and remains, a co-educational institution where all classes are mixed from kindergarten through high school. Considering Rav Soloveitchik's stature as a *posek* and communal leader, our analysis of this entire question would lead to a far more balanced conclusion if Rav Soloveitchik indeed supported the notion of co-education as an ideal. As Rav Ahron Lichtenstein has said: "If the Rav thought it proper to do what he did I certainly do not regard myself in a position or have any desire to challenge him on halachic grounds. I would make a … fool out of myself and that I do not want to do." Unfortunately, as Dr. Seth Farber notes, "Rabbi Soloveitchik left no written testimony that would explain the ideology behind these decisions, nor did he speak publicly about these matters" ("An American Orthodox Dreamer", pg. 75). Dr. Farber notes that "this was certainly not an oversight." While this is clearly true, the fact that Rabbi Soloveitchik never publicly addressed the issue leaves us guessing as to his reasoning behind founding and continuously supporting the Maimonides school. As such, the door was left open for various students and followers of Rav Soloveitchik to develop their own impressions of his view. Considering the lack of evidence, a complete and accurate analysis of Rav Soloveitchik's opinion is impossible. Instead, the reader is referred to Dr. Farber's presentation which, by its very nature, is based largely on heresay.

liberal approach than both Rabbis Feinstein and Yosef. He suggests that even if the girls would not be relegated to public school through a division of the schools, but would merely be subjected to an inferior yeshiva education, the school should remain co-ed. This fits with Rabbi Soloveitchik's general view that boys and girls should be given equal education.

1. While both Rabbi Schachter (in Rabbi Soloveitchik's name) and Rabbi Yosef agree that whenever feasible an institution should be separated, they do not discuss their attitudes toward an institution that has the financial wherewithal to support separate institutions for boys and girls, but still keeps a single co-educational institution. Should one disassociate from such an institution? Should people stop supporting such institutions? Rabbi Shlomo Aviner suggests that just as the Rambam writes that each individual is judged based on the majority of his actions,[58] so too each institution should be judged based on its overall positive impact and productivity. A single wart should not exclude an entire institution from our support and encouragement. Rabbi Aviner agrees that co-educational programs involve a serious breach of *tzeniyut*, and this breach should not be taken lightly,

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Additionally, it should be noted that while shying away from making a definitive statement on the matter, Rav Ahron Lichtenstein gave a similar explanation to that of Rabbi Schachter for Rabbi Soloveitchik's decision to open Maimonides as a co-ed school. Rav Lichtenstein said: "In some communities the option is either a co-ed school or a strikeout for either boys or girls; usually that means a strikeout for girls. I am committed to girls' education for many, many reasons on many, many levels. I would be deeply pained if I had to determine in a particular community that there is no option of a Torah education for women. My information is in the past, not only the Rav minimally held that in such a situation you can have a co-educational school – that is the way the school developed in Boston." In terms of why Rav Soloveitchik, or anybody else involved in running Maimonides, never made a serious attempt to separate the school, Rav Lichtenstein believes "there was a lot of inertia to it but *lechatchila* I believe as far as I know, that (the need to educate boys and girls on an equally high level) was the reason behind it."

58. *Hilchot Teshuvah* 3:1.

but if an institution does many positive things it must be viewed, on a whole, in a positive light. These institutions are indeed worthy of our support provided that they contribute positively to Jewish education. While there may be circumstances that would require the institution to remain co-ed in order to continue to have a positive impact, when the institution can separate the genders without sacrificing their overall mission, they must do so.[59]

D. Whereas Rabbi Feinstein did not permit co-education for older children under any circumstance, Rabbi Yosef only permits co-education when the alternative is public school, and Rabbi Schachter (in the name of Rabbi Soloveitchik) only allows it when the alternative is an inferior Jewish education to one gender. Rabbi Yechiel Yaakov Weinberg takes these leniencies one step further. Rabbi Weinberg believes that a view of the long term effects of the education of the children is also important. Even if the local children would initially attend whatever program is offered, if the result of separate institutions or *kiruv* organizations will be that children will find the religion to be antiquated and will be turned off from long–term commitment to Judaism, or unable to withstand social pressure to abandon their religion, a co-educational environment which will better connect to the youth is the proper choice. Rabbi Weinberg was asked specifically about the Yeshurun organization in France after the Second World War.[60] Rabbi Weinberg describes in vivid detail, the religious condition of the Jewish citizens of France, and concludes that the German educational model that they follow is certainly the one most likely to be successful. The ability to connect to the youth and have them feel that Judaism is vibrant cannot be

59. Letter published in *Sefer Kedoshim Tiheyu*, pages 246-249.

60. Rabbi Weinberg describes that they would have boys and girls in the same room, but on separate benches, singing *zemirot* together. They do not have any Torah classes together, and the counselors are God fearing and diligent enough to assure that boys and girls are under direct supervision at all times.

underestimated. Rabbi Weinberg believes that German rabbis were more attuned to the needs of their youth and were therefore far more successful at developing generations of committed Jews than their Eastern European counterparts.[61]

VII. Conclusion

Many have pointed to anecdotal evidence of boys and girls raised in separate environments who have found ways to socialize inappropriately, while some students in co-ed schools manage to avoid similar misdeeds. Indeed, the Gemara tells us that the evil inclination for sexual immorality is active both when the opportunity for sin is in front of us, as well as when it is hidden from us.[62]

Based on our analysis of the sources**,** from a Torah perspective, the majority of leading *poskim* who have publicly commented on the matter all seem to agree that a co-educational environment is, at best, not ideal.[63] They take this stance in spite of the fact that in many communities this is a highly unpopular position to hold.[64] It should be noted,

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61. *Seridei Eish* #76. R. Weinberg relates that when R. Yisroel Salanter returned from a visit to Germany where he saw R. Ezriel Hildesheimer giving lectures in *Tanach* and *Shulchan Aruch* to young women, he commented "If one of the rabbis of Litta were to try to do the same in his community, he would deservedly be fired. Nevertheless, I only wish that I can earn a portion in the world to come together with Rabbi Hildesheimer."

62. *Chagigah* 11b. See Tosafot *Sotah* 8a s.v. *gemiri* that this is only true once one has already seen the *ervah*.

63. Many *poskim* address the issue only briefly because they find it obvious that co-education is to be avoided. See, for example Responsa *Shevet Halevi* I:29 who says "why discuss the obvious at length." Rav Ahron Lichtenstein summed up the issue by saying: "...I certainly would challenge the kind of educational philosophy that you have in some segments of Israeli society, maybe you have it here (the United States) also, of regarding mixed schools not as a *b'dieved* at all but as a *lechatchila she'b'lechatchila*, the kind of thing that the *kibbutz dati* has been pushing for a long time. That I would certainly reject."

64. See Responsa *Yabia Omer* X:23 where Rav Ovadya Yosef states that he was publicly ridiculed and mocked by a school administrator for criticizing

though, that separating the genders is an important factor in judging how appropriate a school may be for one's child, but it is far from the only factor. The primary consideration in choosing a school should be the level of sincere *yirat shamayim* that permeates the institution.[65] Certainly, the possibility exists that a separate school where the students are known to be disrespectful or dishonest may be a far more negative influence on a child than a co-educational institution where the students and faculty are noted for their sincerity, integrity, and commitment.[66] Ideal schools exist only in an ideal world; our job as parents is to make realistic choices balancing multiple factors and knowledge of our children.

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co-educational institutions.

65. See Tosafot *Baba Batra* 21a s.v. *ki mi'tziyon tetzei Torah* who explains that initially when R. Yehoshua ben Gamla instituted the idea of teaching children in a school environment (rather than having each father educate his own son at home) he only established a yeshiva in *Yerushalayim*. Tosafot explain that his thinking was that it is imperative that the atmosphere for Torah education be one of *yirat shamayim*. When a child witnesses the great sanctity of the city and the *kohannim* engaged in the *avodah*, he will be able to focus more on learning Torah and obtaining *yirat shamayim*. Tosafot compare this to the requirement to bring *ma'aser sheini* to *Yerushalayim*, which the Medrash explains is meant to help us recharge our spiritual batteries by witnessing the great sanctity of *Yerushalayim* and the people who live there. Rabbi Baruch Epstein in his commentary to the siddur, *Baruch She'amar,* writes that the reason we ask for *yirat shamayim* twice in the paragraph of *Rosh Chodesh bentching* is that we ask for *yirat shamayim* both in a general sense as well as in our study of Torah. This comment underscores how critical it is that the environment for Torah study be saturated with a strong sense of *yirat shamayim*. Rav Ahron Lichtenstein echoes this idea as well, specifically in relating to co-educational high schools – "a sense of growth, a sense of wanting to maintain a vision of greatness is *critical* for what we are trying to inculcate in *talmidim*, even if we are speaking only in general secular standards. But we are not speaking in secular standards, we are speaking in Torah standards and in Torah standards the aspiration for *yirat shamayim* and for *lomdut*–that is what a fourteen or fifteen year old has to have on his mind. He's got more of that on his mind in a non-co-educational school than in a co-educational school."

66. Rav Ovadya Yosef (*Yabia Omer* X:23) strongly questions the *yirat shamayim* of most co-educational institutions, even insisting that their Torah is like the Torah of Do'eg in that it is completely insincere.

Spousal Emotional Stress: Proposed Relief for The Modern-Day Agunah *

Rabbi Dr. A. Yehuda Warburg

In 1994, pursuant to the tenets of halacha, Avraham and Sarah Cohen were married. Eventually, they had children. After being married five years, tension between the spouses began to surface and the couple began to live separately under the same roof. Though the wife desired to engage in conjugal relations with her spouse, her husband willfully and unjustifiably refused to live together with her. For the sake of their children, both husband and wife remained outwardly married while in actuality they lived separately in the marital home for five years.

In 2004, Sarah Cohen desired a *get*, i.e., a Jewish writ of divorce from Avraham, her husband of ten years. Both he and his wife, being observant American Jews, considered themselves bound as much by halacha as by civil law. Both appeared in front of a Beth Din, i.e. a rabbinical court, and it was resolved that it is proper that the parties divorce. However, the husband initially refused to give his wife a *get*, and according to halacha, the dissolution of matrimonial ties is dependent upon the voluntary agreement of both spouses. Failure of one party to assent to the divorce action will impede execution of the divorce.

To coerce the granting of a *get* against a recalcitrant spouse

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produces a *get* which is arguably invalid, i.e., a *get meuse* (coerced *get*). In the absence of a *get*, each party is unable to remarry without violating the norms of halacha. In effect, in our scenario the woman became an *agunah*, i.e. a "chained woman", unable to remarry because of her husband's refusal to grant her a *get*. If she remarries without receiving a *get* from her husband, she is an adulteress in the eyes of Jewish law. Any future issue of a second marriage will be *mamzerim*, i.e., offspring born from a prohibited relationship, unable to marry all types of Jews.[1]

Outraged and emotionally distraught by her husband's intolerable behavior during their marriage, Sarah wants to file a claim in Beth Din against her husband for the infliction of emotional stress for the five years of separation prior to the Beth Din's directive recommending divorce.

This experience of mental anguish, she argues, is shorthand for severe mental harm and not ordinary stress, normally associated with living in an imperfect world. Despite her bouts with emotional stress, she never utilized the services of a therapist and therefore did not submit a claim for therapeutic expenses. Though Sarah was not a victim of spousal violence, her husband's insensitivity to her feelings and outrageous behavior inflicted upon her severe emotional distress, she argues, which ought to be sufficient grounds for a recovery of damages. Can a psychologically impaired person recover such damages? Given the particular circumstances of the case, prior to the granting of a *get,* can this modern-day *agunah* submit such a claim in Beth Din against her husband for refusal to engage in conjugal relations during their marriage?

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1. Rambam, *Hilchot Gerushin* 10:4; *Hilchot Issurei Bi'ah* 15:7,21;Ben Zion Schereschewsky, " Divorce" in Menachem Elon (ed.), *The Principles of Jewish Law* (Jerusalem: 1975), pp. 414-415.However, a *mamzer* may marry another *mamzer* or a convert.

I.

Assuming a contemporary Beth Din were empowered to address a claim for emotional stress,[2] what is the basis of such a claim?

The Talmud instructs us,

> R. Eliezer b. Ya'akov said: "A man must not marry a woman if it is his intention to divorce her, as it says, 'Devise not evil against your neighbor, seeing he lives securely by you'."[3]

As *Sefer Hachinuch*[4] exposits, in such a situation the wife is considered a married woman, yet the husband views her as a divorcee. Entering into the marital agreement requires that both spouses are "on the same page," intending to remain married to each other. A marriage which is factually dead, i.e., the absence of conjugal relations, and in which the husband either lives separately under the same roof, or moves out of the marital home while formally married as husband and wife for the sake of the children (or other reasons) or refuses to grant a *get*, in the eyes of the classic codifiers, Rambam, *Tur* and *Shulchan Aruch*,[5] is a violation of the aforementioned norm. As R. David b. Samuel Halevi notes,

> Even though it is permissible to design evil which means to divorce your wife pursuant to Jewish law …therefore he who desires to act in such manner ought to do it and not delay in the divorce. Therefore the verse states "he

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2. For an examination of various rulings including that of R. Yosef Elyashiv which lead to this conclusion, see this writer's " Toward Recovery for Spousal Emotional Stress: Proposed Relief for the Modern-Day *Agunah*," *Jewish Law Annual* 18(2009) at text accompanying notes 22-59.

3. *Yevamot* 37b;*Gittin* 90a.

4. *Sefer Hachinuch, Mitzvah* no. 455.

5. Rambam, *Hilchot Issurei Bi'ah* 21:28, *Hilchot Gerushin* 10:21; *Tur,Even Haezer* 119, *Shulchan Aruch, Even Haezer* 119:1-2.; *Chelkat Mechokek, Shulchan Aruch Even Haezer* 119:1; *Taz, Shulchan Aruch Even Haezer* 119:2

lives securely with you," that is the essence of the prohibition. [6]

Hence, a husband's recalcitrance either due to a personal vendetta during the marriage, sheer hatred of his wife or a desire to use the *get* as a bargaining chip for financial concessions, rather than halachically bona fide considerations, involves a violation of 'devise not evil against your neighbor, seeing he lives securely by you' even if during the period of recalcitrance he refrains from living with her.[7] We find that the violation of this norm has psychological consequences recognized by halacha. The inability of a wife to engage in conjugal relations during an ongoing marriage, where there is no contemplation of divorce from her estranged husband, means that she is barred from living with someone else; she remains formally a married woman "living alone". The concomitant emergence of *tza'ar*, i.e., mental anguish for an *agunah*, a "chained woman" who is prevented from remarrying because of a husband's refusal either to live together during their marriage[8] or divorce her is embossed upon the warp and woof of the tapestry of various halachic norms concerning marital relations.

Among a husband's monetary rights and obligations to his wife are the obligations to provide maintenance for his wife, pay for ransom and burial expenses, being entitled to his wife's finds and to be her sole heir.[9]

One of the governing rules regarding these financial matters is that "in matters of *mammon* one's stipulation is valid," i.e. in matters of monetary matters such as spousal support one may

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6. *Taz*,ibid.

7. *Rambam, Hilchot Gerushin* 10:21; *Tur Even Haezer* 119; *Shulchan Aruch, Even Haezer* 119:1. See also, *Beth Shmuel, Shulchan Aruch Even Haezer* 119:1; *Pri Chadash, Shulchan Aruch Even Haezer* 119:2. Cf. *Mishneh Lemelech, Hilchot Gerushin* 10:21, who questions this position.

8. For defining *tza'ar* as emotional stress see infra note 16.

9. Rambam, *Hilchot Ishut* 12:2-3.

stipulate contrary to biblical law.[10] In other words, the parties may decide to agree to establish their own rules regarding their monetary affairs. Do private arrangements extend beyond the realm of monetary affairs into the sphere of personal matters? Can a husband stipulate that he is under no duty to have intercourse with his wife? If the husband stipulates that he is under no obligation to engage in conjugal relations, such private agreement is invalid.[11] Expounding upon the biblical verse "her conjugal rights shall not diminish"[12] and the concept of "*shi'ebud*" (servitude) within the realm of conjugal relations,[13] Netziv writes,

> Reason tells us that man is so duty bound. It is, as we all know, for this purpose that a bride embarks upon marriage…Hence, if he denies her sexual relations, she is

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10. *Kiddushin* 19b.

11. *Tur* and *Beth Yosef Even Haezer* 88; *Shulchan Aruch Even Haezer* 38:5; Ramo, ad.loc. Cf. Jerusalem Talmud *Bava Metzia* 7:7; *Tosefta Kepeshuta, Kiddushin* 3:7, pp. 947-948.

12. *Shemot* 21:10. The contravention of this duty occurs only if the husband refrains from relations in order to cause her grievous pain. See Rambam, *Hilchot Ishut* 14:7; *Shulchan Aruch Even Haezer* 76:11. For a nuanced difference between Rambam's and *Shulchan Aruch*'s views see *Adath Maoz, Even Haezer* 2:76:11.

13. *Yevamot* 65b; *Nedarim* 81b; *Ketubot* 71b; *Chiddushei Harashba, Gittin* 75a and *Nedarim* 15b; *Shulchan Aruch Even Haezer* 154:6;*Piskei Din Batei Din Harabbanim* (hereafter: PDR) 1:5.Just as a wife acquires servitude rather than title to his body, similarly, the husband acquires servitude to her body. See *Nedarim* 15b, Rashi, ad.locum, s.v. *d'omar Rav Huna*; and *Chiddushei Harashba,Nedarim* 15b; *Chiddushei R. Avraham Min Hahar*, *Nedarim* 15b; Rashi, *Ketubot* 61b s.v. *ha-madir*. For the distinction between servitude and title concerning marriage, see J. David Bleich, "*Kiddushei Ta'ut*: Annulment as a Solution to the *Agunah* Problem," *Tradition* 33 (1998), pp. 90,116.

In fact, the implementation of a *kinyan* to establish matrimonial ties articulates the parties' willingness to assume the duties and rights associated with marriage rather than evidence that the man has acquired title to his prospective wife. See *Birkat Kohain*, pp. 101-123; *Torah Temimah* on *Vayikra* 22:11.The act of matrimony is but one example of undertaking obligations in halacha via use of a *kinyan*. For other illustrations of obligations see *Ketubot* 101b; Rambam, *Hilchot Mechirah* 11:15; *Shulchan Aruch Choshen Mishpat* 50:1.

deprived of her right. [14]

Nothwithstanding a wife's "*shi'ebud*" to have sexual relations with her husband, there exists equally the husband's duty to engage in sexual relations, which are the essence of marriage. Depriving a woman of this right creates "*tza'ar gufa*", i.e., emotional pain.[15]

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14. *Birkat Hanetziv, Mechilta de R. Yishmael, Mishpatim* 3 (ed. Horowitz-Rabin), pp. 258-259. For the precedent, see *Mechilta* ad. loc. See also, *Shita Mekubetzet, Ketubot* 63a. In fact, should a husband initially fail to address her desire to have conjugal relations and then dutifully engage in relations, his behavior is construed as a "*mitzvah haba'ah be-aveirah*", i.e., the transgression of the sin of "her conjugal rights shall not diminish" accompanies the halachic obligation. See *Shita Mekubetzet, Ketubot* 62b s.v. *ve-katvu*. Whether the commission of the transgression actually nullifies the mitzvah or not is beyond the scope of our presentation.

15.*Yevamot* 118a; Rashi *Kiddushin* 19b; Ran, *Kiddushin* 19b; Rashbam *Bava Batra* 126b; *Taz, Shulchan Aruch Even Haezer* 38:7; *Beth Shmuel, Shulchan Aruch Even Haezer* 76: 7 and *Ba'air Heitev,* ad. loc; *Levush, Even Haezer* 38: 5; *Aruch Hashulchan, Even Haezer* 38:12.

Nevertheless, a wife has no duty of *onah* and hence may consent to forgo her conjugal rights provided that the mitzvah of *p'ru u-revu* has been fulfilled. See *Tur Shulchan Aruch, Even Haezer* 76:6; *Shulchan Aruch Even Haezer* 76:11; *Birchei Yosef, Even Haezer* 1:2.Yet, a wife is entitled to change her mind and reinstate her right to conjugal relations. See *Lechem Mishneh, Hilchot Ishut* 15: 1; *Shu't Mahari Weil* no. 1. Cf. *Shu't Ranach* II, no.44.

The frequency of sexual intercourse of a man with his wife is dependent upon his occupation and health. See *Ketubot* 61b. Given that refrainment from *onah* causes *tza'ar* to the wife, the psychological underpinnings for fulfilling her need on the basis of her husband's job and health require further study. See *Shu't Iggerot Moshe, Even Haezer* III, no.28.

In contradistinction to a husband's duty to engage in *onah* a wife is bound to him, i.e.,"*shi'ebud*". See *Nedarim* 81b; *Ketubot* 71b; Avraham Min Hahar, *Chiddushim Nedarim* 15b; *Shu't Machane Chayim* II, *Even Haezer* ,no. 44.The difference between a duty and *shi'ebud*, as well as analyzing the halachic paradigm of marriage establishing a mutual undertaking of *shi'ebudim* concerning sexual relations [see supra note 13] and the husband's duty of *onah*, are beyond the scope of this presentation.

However, according to R. Shimon Shkop, the nature of the violation, whether it is biblical or rabbinic, will determine whether abstinence from *onah* generates emotional fallout for the wife. Pursuant to numerous decisors (Rambam, *Hilchot Ishut* 12:2; *Tur,Even Haezer* 69; *Beth Yosef*, ad. loc.) a

Allowing a husband to withhold sexual intercourse contributes to a wife's emotional scarring and may have repercussions for the future of the marriage. This awareness of emotional hurt is underscored in other contexts. For example, with the potential increase of domestic conflicts and the potential for marital breakdown due to feelings of mental anguish, the Talmud debates whether the execution of a *get* is a boon for the wife or whether, notwithstanding the marital tensions, the woman still prefers *ne-cha de-gufa*, the gratification of her bodily desires.[16]

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husband's failure to engage in sexual relations involves a contravention of a biblical prohibition (" *She'erah kesutah ve'onatah lo yigra*" - *Shemot* 21:10). In the mind of R. Shkop, such violation has negative repercussions for a spouse's persona. Elaborating upon his perspective, R. Chaim Shemuelevits notes in the name of R. Shkop,

> All biblical prohibitions are proscribed because higher wisdom recognizes that this is as bad for Israel, as poison, and the fact is that that the prohibition and the warning exists because the matter is bad... Rabbinical prohibitions are the exact opposite. The matter is good…and the proof is that the Torah did not proscribe it, it isn't bad, rather the Torah mandated us to listen to the rabbis.

[*Sefer Ha-zikaron Lichvodo Ulezichro shel Rabeinu Hagadol Maran Rabbi Chaim Shemuelevits* (Jerusalem:1979 or 1980), p. 285. See also, *Sha'arei Yosher, Sha'ar* 1, Chapter 10].

In effect, should a husband refrain from conjugal relations he is violating a biblical prohibition and therefore is causing harm to his wife. And as the *poskim* explain (see infra note 16) the harm caused is one of causing mental anguish to one's spouse. Cf. *Sefer Yeraim* no. 191 and *Semag, Negative Act* no. 81, who maintain that failure to comply with this duty entails a rabbinic prohibition. Adopting R. Shkop's perspective, such violation given its rabbinic underpinnings will not cause any harm to the wife.

16. *Yevamot* 118b. This notion has been expressed as *simchat ishto*, i.e., the rejoicing of his wife. See *Devarim* 24:5; *Pesachim* 72b; Ravad, *Ba'alei Hanefesh, Sha'ar Hakedusha*; R. Isaac of Corbeil, *Smak, Positive Commandment*, no. 285. This requirement to instill *simcha* applies equally to a pregnant and/or barren wife. As R. Moshe Feinstein aptly notes, "conjugal relations do not depend on the possibility of conception but are part of a husband's obligation toward his wife, to give her pleasure and not cause her pain." See *Shu't Iggerot Moshe, Even Haezer* I, no. 102. See also, *Maggid Mishneh, Hilchot Ishut* 15:1. The initiation of conjugal relations by the husband is for her pleasure while a husband's pleasure in this engagement is a beneficial

The talmudic response is: "*tav le-meitav tan du mi-le meitav armelu*", i.e. better to dwell as two than to dwell alone. The Talmud is teaching us that a woman has a compelling desire for marriage such that she will even acquiesce to the adverse effect of a marital relationship marked by quarreling. Furthermore, given that a woman's need for sexual relations through the husband's fulfillment of "*onah*" is rooted in the existential fact of her personality rather than conditioned by certain political, social or cultural factors impinging upon the woman's personality, a woman prefers remaining married.[17] Hence, a husband's refusal to engage in sexual relations undermines the continued emotional stability of his wife.

However, at the end of the day, given the deteriorating conditions of a particular marriage, a wife may want to opt out of such a relationship where her spouse is refraining from engaging in conjugal relations while residing under the same roof or while de facto being separated from each other.

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consequence of imparting pleasure to his wife. See Rashi, *Devarim* 24:5.

Lest one suggest that "*tza'ar gufa*" or "*ne-cha de-gufa*" refers to physical pain rather than emotional anguish, the halachic norms indicate otherwise. The emotional underpinnings of the quality of the mitzvah of engaging in sexual relations is underscored by the requisite need to refrain from conjugal relations with one's wife while either being in a state of intoxication, harboring feelings of enmity or intending to divorce her. See *Yevamot* 37b; *Shulchan Aruch Orach Chaim* 240:3, 10. Thus, the instilling of *simchat ishto* refers to a wife's emotional equanimity and integrity. Hence, the absence of these relations, unless requested by the wife will engender feelings of mental anguish.

17. This ontological understanding of the "*tav le-meitav tan du mi-le meitav armelu*" was developed in an address delivered by Rabbi Dr. Joseph B. Soloveitchik. A summary of his remarks was published in *Light*, 17 Kislev 5736, pp. 11-15 and 18 and reprinted in the *Jewish Press*, October 16, 1998, pp. 32 and 34. For the parameters of this presumption, see Bleich, supra note 13, at 102-108. Obviously, his conclusion can be equally extended towards explaining the notion "*tza'ar gufa*" concerning the mitzvah of *onah*. The underpinnings of this conclusion are grounded in the halachic notion of "*innui nefesh*" as denoting in certain contexts abstinence from conjugal relations. See *Bereshit* 31:50, *Yoma* 77b; *Vayikra* 16:29, *Yoma* 76a.

The withholding of a *get* by the husband, under these conditions, results in

> the daughters of Avraham remaining grass widows with living husbands…they are left starving and thirsty and destitute. And we shall be concerned lest they follow paths of immorality…. Moreover, these women are young and vivacious (and will not be able to wait with restraint).[18]

The Rabbis equated this tragedy with a *goses*, a moribund individual in imminent danger of death.[19] Moreover, while withholding a *get* does not constitute murder *per se*, in the eyes of R. Yosef Henkin, it is a stricture ancillary to the prohibition of murder (*abizrayhu de-retzichah*).[20]

Failure for a husband to live with his wife potentially opens up the floodgates to traumatizing a woman, causing her undue emotional distress, and opens the door for potential promiscuity. By a husband's localizing his wife's injury within her own mind, dismissing the harm and blaming the victim for not mitigating her own anguish is no defense. To

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18. *Shu't Noda Biyehuda, Even Haezer*, I, no. 29. Translation culled from Aviad Hacohen, *The Tears of the Oppressed* (N.Y.: 2004), p.14. Though this description of an *agunah* relates to a situation which involves the disappearance of the husband and therefore the inability to execute a divorce in his absence, this depiction applies equally to the modern-day *agunah* who fails to receive a divorce due to her husband's recalcitrance.

19. Rashi, *Yevamot* 122a. Clearly the analogy to a *goses* is metaphorical. Though generally withholding *onah* does not lead to death, nonetheless, both the wife and *goses* may experience psychological and emotional fallout due to their respective conditions. Hence, the common experience of emotional stress serves as the basis for this analogy.

20. Y. Henkin, *Kitvei Hagaon Rabbi Yosef Henkin* (N.Y.: 5741), I, p. 115b. For emotional abuse as grounds for divorce in rabbinical writings and contemporary Israeli Beth Din judgments, see Eliav Shochetman, " Violence Against Women as Grounds for Divorce," *Professor Menachem Elon Jubilee Volume*, ed. Aviad Hacohen [forthcoming]; File No. 1-21-016788168 Israel's Supreme Rabbinical Court, May 10,2001; File No. 54/168, Israel's Supreme Rabbinical Court, November 17, 1994.

marginalize the harm by claiming that the injury is gender-specific, reflecting a distinctly masculine astonishment that any woman should be so silly as to allow herself to be frightened or emotionally scarred, is to argue that a woman's *tza'ar gufa* is a transient psychological and/or culturally conditioned behavioral pattern rather than an existential fact of the human persona.[21] Just as halacha proscribes a husband from aggrieving his wife by abstaining from sexual relations during their marriage,[22] analogously, in a case of a marriage which is factually over, a husband must grant a *get* allowing his wife to pursue her plans, including those of possible remarriage, rather than violate the aforementioned prohibition.

How does one categorize the nature of the act of emotional distress being perpetrated by the husband?

According to black-letter halacha of damages, i.e., *dinei nezikin min ha-din*, there are five types of payments for personal injury:[23]

1. *Nezek*, (injury), is compensation for financial loss as result of the loss of earning capacity due to the permanent loss of a limb.

2. *Tza'ar*, physiological pain resulting from physical contact is compensated.

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21. Lest one conclude that emotional harm due to abstinence from conjugal relations is limited to a wife due to her gender, emotional grievance concerning abstinence from conjugal relations perpetrated by a wife against her husband is equally construed as a violation of halacha. See Rambam, *Hilchot Ishut* 14:9, 11-12.

22. Rambam, *Hilchot Ishut*, 14:7; *Sefer Hamitzvoth*, *Negative Commandment* no. 262; *Shulchan Aruch, Even Haezer* 76:11; 77:2. As Rambam points out both in *Hilchot Ishut* and *Sefer Hamitzvoth*, abstinence from relations in order to pain one's wife entails a violation. However, if there is no such intent, a husband has not violated the prohibition. See also, *Shu't Mabit* III, no.131; *Shu't Alsheich* no. 50.

23. *Bava Kamma* 91a; *Shulchan Aruch, Choshen Mishpat* 420:3.

3. *Ripu'i*, healing, is payment for the hospital and medical expenses including drugs.

4. *Shevet*, i.e., loss of actual earnings due to the injury, treatment and convalescence period.

5. *Boshet*, shame, is compensation for the humiliation suffered by the injured party.

Under which type of damage would one categorize the infliction of emotional stress? Although in black-letter halacha of *nezikin* this term is associated with physiological pain rather than emotional stress, yet we may adopt the conventional language which translates "*tza'ar*" as emotional stress.[24] Alternatively, such mental anguish should be categorized as "*boshet*". In secular literature shame implies an intimate connection with the victim's personality and with those upon whom we depend to confirm the sense of one's self-esteem.[25] However, unlike a secular conception of shame, halacha requires that this act of humiliation be a consequence of an injury generated by physical impact[26] having been witnessed by a third party.[27] Moreover, the victim must be aware of being humiliated.

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24. *Bava Kamma* 85a; *Piskei Harosh, Bava Kamma* 8:1; *Tur Choshen Mishpat* 420:17 and *Beth Yosef* ad. loc; *Shulchan Aruch Choshen Mishpat* 420:16. For the grounds for translating "*tza'ar*" as emotional pain, see Warburg, supra note 2, at text accompanying notes 22-59, 82.

25. John Rawls, "Self-Respect, Excellence and Shame," in *Dignity, Character and Self Respect*, ed .Robin Dillon (New York: 1995), pp. 125,128; Gabriele Taylor, *Pride, Shame and Guilt* (New York:1985)p. 64. Following in the footsteps of Rawls, our presentation employs the notions of self-esteem and self-respect interchangeably. Cf. Larry Thomas, "Morality and Our Self-Concept," *Journal of Value Inquiry* 12 (1978), p. 258.

26. *Bava Kamma* 91a. Cf. *Jerusalem Talmud Bava Kamma* 8:6 which provides for recovery for humiliation absent physical impact only if the victim is a great scholar.

27. *Shulchan Aruch Choshen Mishpat* 420:7; Ramo *Shulchan Aruch Choshen Mishpat* 420:8; *Shu't Riv'vot Ephraim* VI, no. 453; *Shu't Az Nidbaru* VIII, no. 63. Cf. *Tosafot Ketubot* 65b s.v. *be'zeman* who argues that the presence of a third party witnessing the injury is not required.

The Talmud[28] queries whether liability for *boshet* should extend to a person who embarrasses a person by undressing him while sleeping and he subsequently expires while sleeping, unaware of the embarrassment. In these circumstances, can the heirs sue for family humiliation? If the grounds for liability depend upon third party awareness, then he should be liable to the victim's heirs. However, if liability is grounded in the victim's feelings of shame given his unawareness, then the injurer would be exempt from liability. Though family members were indirectly humiliated, nonetheless, a *boshet* claim arises only if the victim himself experiences shame; hence, in the Talmud's case, the injurer is exempt.[29]

However, there is an additional meaning of shame. B*oshet* is defined by the subjective feelings of the humiliated party *absent physical contact* between the injurer and the victim and unrelated to any third party's knowledge. For example, breaking an engagement which does not entail physical contact may be grounds for *boshet* payments due to the sudden diminution of social status of the jilted party and reduced prospects for finding a prospective spouse, i.e., *boshet be'saitair*, private embarrassment, rather than to the jilted party's feeling of embarrassment that people are aware of that which transpired.[30] Articulating this meaning of *boshet*, R. Joseph

28. *Bava Kamma* 86b.

29. Pursuant to Rosh's opinion, Ramo and *Sema* rule that the victim's heirs cannot sue for for *boshet*. See *Piskei Harosh Bava Kamma* 8:7; *Shu't Harivash* no. 27 [cited by *Beth Yosef, Yoreh Deah* 343:7-8]; *Ramo, Shulchan Aruch Choshen Mishpat* 420:35; *Sema, Shulchan Aruch Choshen Mishpat* 420:43. Cf. others who contend that the Talmud never resolved this dilemma; therefore, we must refrain from extracting money from the injurer. See Rambam, *Hilchot Chovel Umazik* 3:3; *Shulchan Aruch, Choshen Mishpat* 420:35.

30. This dual meaning of "*boshet*" regarding broken engagements was raised by *Piskei Din, Beth Din Harabbanut Yerushalayim* (hereafter: *BDHY*) 3: 205,210, however, it was left as an open question. Despite the fact that the second type of *boshet* entails the subjective feelings of the humiliated party absent physical contact between the injurer and the victim and unrelated to

Shaul Nathanson observes,

> Shame is that which touches one's body. Therefore, when it does not touch his body, he is exempt. However, an engagement impacts upon the rational soul and is much worse than physical injury and hence regarding broken engagements even in the absence of physical contact one is liable. And one who embarrasses his friends with matters (lit. words), will not receive a share in the world to come even though he did not physically injury him. [31]

Accordingly, in the eyes of R. Nathanson, "*boshet devarim*", embarrassment by words, is not limited to verbal insult or defamation of character.[32] *Boshet devarim* encompasses feelings of emotional stress unaccompanied by physical contact and unrelated to third party awareness such as the emotional fallout generated by broken engagements.[33]

Moreover, the consequence of violation of the interdict against refraining from living with one's wife and/or delaying the granting of a divorce[34] extends beyond the recognition of *tza'ar-boshet*, i.e., mental anguish, and well-beyond the realm of domestic relations, of sexual relations between marital

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a third party's knowledge of the event, halacha recognizes this type of *boshet*. See Warburg, supra 2, at text accompanying notes 22-59, 88.

31. *Shu't Shoel Umeishiv, Mahadura Tanina* IV, no. 69. See *Kezot Hachoshen Choshen Mishpat* 207:7 Cf. *Shu't Maharik, Shoresh* 29. For defining emotional anguish as a form of *boshet*, see also Tosafot *Ketubot* 65b s.v. *be'zeman*; *Nedarim 27b s.v. asmachta, Kiddushin 8b s.v. maneh.*

32. *Shulchan Aruch Choshen Mishpat* 420:38; *Shu't Radvaz* III, no. 480; *Shu't Chatam Sofer Choshen Mishpat* no. 181.

33. Cf. *Shu't Maharik,* supra note 31 and *Shu't Beth Yitzchak, Even Haezer* I, no. 112, who claim that a broken engagement comprises the presence of a physical act, i.e., upon breaking the engagement, the party who terminates the relationship becomes engaged to another party, as well as *boshet devarim*. *Ketzot Hachoshen* (*Shulchan Aruch, Choshen Mishpat* 207:7) argues that obligating oneself by performing a *kinyan*, i.e., the execution of an engagement document (*shtar shidduchin)*, generates *boshet* liability.

34. See supra text accompanying note 3.

spouses. Additionally, we may regard these emotions generated by a husband's preventing his spouse to engage in conjugal relations as requiring protection due to one's membership in the Jewish covenantal faith. As the Talmud teaches us,

> Just as there is a prohibition against causing one needless mental anguish in commercial matters, similarly there is a violation in causing needless mental anguish through a verbal exchange. One should not inquire into the price of an article and he has no intention to purchase it. Similarly …if he was the son of converts, one should not remind him "remember your ancestors' deeds". [35]

The causing of needless mental anguish is a prohibition both in a social context as well as a commercial framework. In the latter context, pricing an article without any intention to purchase it is a violation labeled "*ona'at mammon*". Lest this behavior be construed as simply a prohibition against deceitful business practices, the Mishnah incorporates as an example of "*ona'at devarim*" the reminding a convert of his past ancestral lineage, to teach us that "*ona'at mammon*" equally entails the causing of needless stress.

In effect, *ona'at devarim* serves as a paradigm for conveying the value of protecting an individual's emotional persona from an unjustified verbal assault.

However, a plain reading of the Talmud instructs that *ona'at devarim* is not limited to "the power of words" or the abuse of words. As the Talmud instructs us,

> One may not feign interest in a purchase when he has no money. [36]

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35. Mishnah *Bava Metzia* 4:10.

36. Pursuant to R. Judah's dictum, see *Bava Metzia* 58b. See also, *Sefer Yeraim* no.180; *Semag*, *Negative Commandments* no. 171; *Piskei Harosh Bava Metzia* 4:22; *Shu't Chikrei Lev*, *Yoreh Deah* IV,no. 80. For additional sources, see Ya'akov Sofer, "In the Matter of *Ona'at Devarim*," 9, pp. 41,51. Cf. *Tosefta*

Walking into a store and spending thirty minutes examining a sales item without communicating verbally with a sales person is a violation of *ona'at devarim*. Upon the consumer's departure from the store, the sales person's expectations have been dashed, causing him needless anguish. Like *boshet*, it emerges from an intimate connection with one's persona. Various decisors have invariably characterized *ona'at devarim* as the infliction of "dread and fear", "pain of the body", and "pain and distress".[37]

And there is a special interdict against *ona'at devarim* concerning one's wife.[38] *A fortiori*, a husband's precluding his wife from engaging in conjugal relations is an additional illustration of *ona'at devarim.* Such behavior is personal assault upon her personhood and emotionally scars the victim.

In effect, when a Beth Din is empowered to apply halacha concerning a husband's preventing his spouse from engaging in sexual relations it is simultaneously implementing its mandate to deal with behavior violating "devise not evil against your neighbor, seeing he lives securely with you" as well as its resultant contraventions of *ona'at devarim* as well as *tza'ar-boshet* related injuries.

Bava Metzia 3:25 and *Torat Kohanim, Behar* 3:2 who record a different tradition of R. Judah's dictum. *Pesachim* 112b and Rabad, *Torat Kohanim*, ibid, who convey the concept of *ona'at devarim* as an interdict limited to an objectionable verbal inquiry.

37. See Rambam, *Sefer Hamitzvot* no. 251; Ravad, *Shitah Mekubetzet Bava Metzia* 58b; R. Jonah Gerondi, *Sha'arei Teshuva* 3:24; R. Samson R. Hirsch, *Commentary on the Torah*, *Vayikra* 25:14-17; R. J. David Bleich, "*Ona'at Devarim*" *Hadarom* 35 (5732), pp. 140,141; Binyamin Ben Porat, "Contractual Justice in Talmudic Law," Master's Thesis, Hebrew University, 5762, page 38. Cf. others who argue that the notion of *ona'at devarim* entails deception. See *Ohr Hachaim*, *Vayikra* 25:1; *Sheiltoth Rav Achai Gaon,Parshat Behar, Sheiltah* no. 113; *Sefer Hachinuch Mitzvah* no. 337.

38. *Tur Choshen Mishpat* 228; *Shulchan Aruch Choshen Mishpat* 228: 3.

II.

In short, there are various grounds for providing monetary relief for the emotionally distraught, estranged and lonely wife due to the absence of conjugal relations. However, prior to addressing and awarding such a claim, the exercise of a Beth Din's capacity in deliberation does not suffice. Patience dictates that prior to entertaining a wife's claim for her husband's infliction of emotional stress, it is incumbent upon the Beth Din to engage in mediation either in the form of assuaging the victim with words of appeasement or the injurer voluntarily offering monetary recompense.[39]

During the mediation, a wife need not prove that she is a victim of emotional abuse. Since the halachic system posits that mental anguish is generated by a husband's abstention from conjugal relations, proof is not required. Relying upon *gaonic* precedent, various legists argue that

> the nature of appeasement is according to the subject matter and pursuant to the status of the perpetrator of the humiliation and the status of the victim of the humiliation…[40]

Depending upon the circumstances surrounding the embarrassment and the relative religious and/or social status of the involved parties, the Beth Din will attempt to mediate the issues either through verbal or monetary appeasement.

Should attempts at mediation be unsuccessful and the

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39. Ramo, *Shulchan Aruch*, *Choshen Mishpat* 1:5.

40.*Shu't Rav Natronai Gaon* , Brody ed. (Jerusalem: 5754) at p. 329; *Piskei Harosh, Bava Kamma* 8:3; *Perisha, Tur Choshen Mishpat* 1: 12; *Levush Choshen Mishpat* 1: 5. Relying upon *gaonic* precedent (see R. Sherira Gaon, *Shu't Sha'arei Tzedek Helek* 4, *Sha'ar* 1, no.19) pursuant to *Shulchan Aruch Choshen Mishpat* 1:6 there is the option of imposing a communal sanction of social shunning, i.e., *niddui*. Its parameters and contemporary applicability is beyond the scope of this presentation. Once payment approximating the damages is calculated, the injurer is released from the ban, regardless of whether the victim is appeased or not.

standards for invoking Beth Din's authority have been met,[41] the Beth Din assumes its responsibility to assess the damages caused by the husband's infliction of emotional stress.[42] Meting out damages for emotional stress due to a husband's recalcitrance simultaneously accomplishes two goals:

(1) Such a halachic arrangement allows for meting out liability for this type of injury.[43]

(2) Optimally the system should not only compensate the deserving victims, but should also serve to deter this halachically reprehensible behavior in the future. Hence, it is of no surprise to hear the words of R. Natronai Gaon,

> One may penalize monetarily at a minimum or at a maximum in order to prevent the increase of perpetrators in Israel; this is the tradition of rabbinic courts and we learn from them; this is our judicial practice. [44]

Given that we are dealing with punitive damages, the amount of the award will be proportionate to the iniquity being addressed. Taking into account the various permutations of reality, awards for similar injuries may vary considerably from case to case.

Moreover, given that the amount of the award is discretionary, wide variations in monetary awards will result.

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41. See Warburg, supra note 2, at text accompanying note 131.

42. Ibid. at text accompanying notes 133-145.

43. See Warburg, supra note 2, at text accompanying notes 31-59.

44. R. Natronai Gaon, supra note 40. Based upon this source, our conclusion was furnished in a communication with Dr. Amihai Radzyner. The discretionary nature of the assessment without any mention of a policy of limiting an award is stressed in *PDR* 3: 131,151, 5: 322,327 as well as in *Shu't Avodat Hagershuni* no. 74; *Shu't Givat Pinchas* no. 74; *Shu't Chatam Sofer Even Haezer* no. 134; *Shu't Rav Pealeim* II, *Even Haezer* no. 3; *Shu't Zera Emet, Yoreh Deah* no. 112; *Shu't Vayomair Yitzhak*, I, no. 121. Some of these sources emphasize that the fine should be calculated based on the status of the perpetrator of the embarrassment and the status of the victim of the humiliation.

The variations in award are not unique to the halachic system. In American law, for example awards for emotional stress between spouses have ranged from $15,000 to $362,000 and as high as $500,000.[45]

In our scenario, having been separated from her husband during five years of marriage and subsequently having been unable to receive from her recalcitrant husband a *get* for over three years, how does she proceed to submit a claim for emotional stress engendered for the period of five years of initial separation prior to the execution of a *get* ? [46]

Upon both the husband and wife obligating themselves to submit to the authority of a Beth Din[47] to resolve the wife's

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45. *Twyman v. Twyman*, 855 S.W. 2d 619, 620 (Texas 1993) [trial court award]; *Massey v. Massey*, 807 S.W. 2d 391,395 (Tex. Ct. App. 1991), *writ denied*, 867 S.W. 2d 766 (Tex. 1993); *Chiles v. Chiles*, 799 S.W. 2d 127 (Tex. App.-Houston [14th Dist.] 1989,writ requested) [trial court award]. The commonality between the two legal systems is limited to the wide variations in monetary awards. However, the grounds for proving the infliction of emotional stress between spouses differ widely from one system to the other.

46. Whether such a claim runs afoul of the strictures of *get meuse*, see Warburg, supra note 2, at text accompanying notes 147-165, 172-173 which focuses upon the views of R. Shlomo Dichovsky, R. Elyashiv, R. Moshe Feinstein and R. Shilo Refael.

47. The signing of an arbitration agreement by the parties, i.e. *shtar berurin*, halachically imparts authority for a Beth Din to resolve this matter. See Ramo, *Choshen Mishpat* 12:7; *Sema, Choshen Mishpat* 12:18; Yoezer Ariel, "The Halachic Need for *Shtar Boreruth*," *Techumin* 14 (1994), pp. 147,152; *Mishpa'techa Leya'akov*, 2:405-406; Zvi Lifshitz, "Compensation for Verbal Embarrassment," *Techumin* 17 (1997) pp. 381,388. Assuming this decision complies with the rules of secular arbitration procedure, this decision is legally enforceable in a competent civil jurisdiction. See *Uniform Arbitration Act*, Section 1.

A proposed clause of a *shtar boreruth*, addressing a potential claim for emotional stress which will bind both parties halachically and be legally enforceable in civil court is the following:

"The parties acknowledge that the Beth Din is authorized to resolve all disputes related to and arising from the dissolution of the marriage, including but not limited to issues relating to the *Get*, distribution of assets,

claim for mental anguish, Beth Din then addresses the merits of the claim. Should Beth Din rule in the wife's favor and resolve to hand down an award, Beth Din will direct the husband to pay this monetary award. Should a husband refuse to pay the *tza'ar-boshet* award, the award can be enforced in civil court. On the other hand, should the husband accept the Beth Din's decision, he has the option to approach his wife requesting her to waive her right entitlement to the monetary damages in exchange for a *get*; and the resulting *get* will not be tainted by coercion.[48]

However, what happens if a husband refuses to accept Beth Din's decision concerning a wife's claim for mental anguish due to failure to engage in conjugal relations with her during their marriage? Upon Beth Din's determination that his

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spousal support, child support, child custody and a spouse's refusal to engage in conjugal relations with the other spouse."

The signing off on this clause can be construed as a threat that either spouse may in the future assert a claim for mental anguish due to spousal recalcitrance in permitting the other spouse from engaging in conjugal relations during their marriage or marrying another mate due to spousal refusal to consent to a *get*. Here again, this type of threat will not impact upon the subsequent legitimacy of the execution of a *get* in order to thwart and stave off this claim or payment of an award due to the submission of this claim. See Warburg, supra note 2, at text accompanying notes 158-160.

Should the validity of this *get* be challenged due to this monetary award, the subsequent execution of a *get* is valid provided that the award is free-standing and independent of the *get*, such as damages for *tz'ar-boshet*. See R. Dichovsky, infra note 54, p. 300. Shlomo Dichovsky, "Monetary Steps of Enforcement Against *Mesarvei Get*," *Tehumin* 26 (5766), pp. 173, 175-177.

48. See Warburg, supra note 2, at text accompanying notes 147-165, 172-173. See also, *Shu't Beth Ephraim*, III, *Even Haezer*, no. 73 (p. 288a-b); *Shu't Zerah Anashim*, no. 36. Even if there is an *umdena de-muchach*, i.e., a categorical presumption [see Warburg, op. cit., at text accompanying note 159], the compromise negotiated between the spouses whereby the husband is financially induced to grant a *get* is no different than an individual who due to financial need sells his house in order to receive cash, and one cannot void the purchase due to duress. See *Shu't Chemdat Shelomo*, *Even Haezer* 80:2 and *Shu't Maharshach* I, no. 67, who draw the analogy between the halachot of *gittin* and the halachot of sales.

intransigence is groundless, Beth Din will issue a *sh'tar seruv*, i.e., a contempt order of Beth Din with its attendant consequences,[49] and a *heter ark'aot*, i.e., permission for the other party to initiate proceedings in civil court.[50] Alternatively, prior to the wife's request to have Beth Din issue a *sh'tar seruv* and *heter ark'aot*, she may pose the question to her rabbi whether she can proceed to civil court without permission of Beth Din or if a *heter ark'aot* is required must she approach only the Beth Din who dealt with her claim or is the she allowed to approach another standing Beth Din and request permission to proceed to have her claim addressed in civil court.

As we elaborated, assertion of such a claim is generated solely to address protecting the psychological and emotional integrity of the wife during her marriage. Hence, just as Beth Din may entertain the merits of such a claim, in cases of an "*alam*", i.e., a recalcitrant defendant-husband, a wife's

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49.There are two different types of "*mesarev le-din*": An individual who is "*mesarev le-din*" is subject to *niddui,* i.e. social shunning. See *Shulchan Aruch Choshen Mishpat* 11:1; *Shu't Iggerot Moshe Yoreh Deah* III, no. 142:2; *PDR* 11, 168-181. One can be equally labeled a "*mesarev le-din*" if one refuses to comply with a decision rendered by a Beth Din. See *Shulchan Aruch Yoreh Deah* 334:43; *Shu't Maharil Diskin, Pesakim*, no. 52; *Shu't Chatam Sofer, Choshen Mishpat*, no. 177.

50. *Shulchan Aruch Choshen Mishpat* 26:2; *Aruch Hashulchan Choshen Mishpat* 26:5; *Shu't Ramo*, no. 52; *Shu't Maharsham* 4:105.Others contend that generally or under certain conditions, permission is not even required. See *Gedulei Terumah Shaar* 62:3; *Tumim*, *Chosen Mishpat 26:7;Kesef Kodshin, Choshen Mishpat* 26 and *Shu't Tuv Taam Va'daat* III, no. 261. Given that the question of litigating in civil court entails "*issur ve-heter*", therefore R. Diskin argues that one can approach any Beth Din to request permission. See *Shu't Maharil Diskin* [*Pesakim* and *Shu't Kezarot*] no. 13. Based upon this logic, R. Asher Weiss argues that one's rabbi may give permission. As R. Weiss aptly observes, the customary practice today is to receive permission from the Beth Din. See Asher Weiss, "Permission to Litigate in Civil Court," *Kovetz Darchei Ho'ro'ah* 5 (Nissan 5766), pp. 99,102.

However, a *heter ark'aot* does not mean that the wife receives a *carte blanche* to advance any and all claims for emotional stress in civil court. For further discussion, see Warburg, supra note 2, at text accompanying notes 170-172.

submission of such a claim in civil court may be addressed on its merits.[51] Furthermore, even if one could demonstrate that the civil court will award more damages than Beth Din, she may retain the entire award handed down by a civil court.[52]

III. Concluding Remarks

The foregoing examination focuses upon the case of a particular type of modern-day *agunah*. We dealt with the grounds for a wife to submit a claim for mental anguish due to her husband's refusal to engage in conjugal relations while living in the marital home.

This scenario raises another significant issue: Given that the emotional trauma emerging during the last years is due to her husband's recalcitrance in granting a *get* rather than refusing to engage in conjugal relations, may the wife advance a claim for damages for this period? [53]To sharpen this question, may any modern-day *agunah*, even one who lives together with her husband throughout the marriage, who decides to seek a divorce due to irreconcilable differences or spousal abuse and is confronted with her husband's intransigence regarding her *get*, advance a claim for mental anguish for the period of his recalcitrance?

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51. It appears that no action for damages for precluding a spouse from engaging in sexual relations has ever been brought before an American court. Hence, whether American courts would recognize such emotional harm is an open question. For the grounds for such recognition, see *Restatement (Second) of Torts* Section 46, comments d,e, f and j. (1965). For an incisive analysis of the Restatement, see Daniel Givelber, "The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct," 82 *Columbia Law Review* (1982), p. 42.

Moreover, as noted earlier, whereas in halacha there is no need to prove that emotional stress occurred, American law would require evidentiary proof that such stress occurred due to the spouse's conduct.

52. *Kesef Kodshin, Choshen Mishpat* 26:2.

53. Regarding such a claim running afoul of the strictures of *get me'use*, see Warburg, supra note 2, at text accompanying notes 175-176.

R. Shlomo Dichovsky argues that a wife may collect *tza'ar-boshet* damages due to being emotionally traumatized by her husband's recalcitrance in granting her a *get*. An award of these damages is for the husband's past conduct and even if a *get* is granted, the monetary debt remains. And even if the wife waives her right to *boshet* damages, this decision will in no way impact upon the propriety of the *get*.[54] Should a

54. R. Shlomo Dichovsky, "Rabbinical Courts and Civil Courts: Thoughts Concerning the Overlapping Boundaries Between them in Family Matters," *Meoznei Mishpat* 4 (2005), pp. 261, 295-298. Cf. Rabbis Wosner and Weiss who argue that secular legislation mandating an award for a husband's recalcitrance in granting *get* is improper monetary pressure would dissent from R. Dichovsky's position and contend that the subsequent execution of the *get* under these circumstances would be tainted. See *Shu't Shevet Halevi*, V, *Even Haezer* no. 210; *Shu't Minhat Yitzhak*, VIII, no. 136. However, given that this award is based upon *boshet*, as a free-standing duty these decisors may very well concur with R. Dichovsky's view. If our understanding of their positions is correct, should a husband refuse to appear in Beth Din to address this claim, both R. Wosner and R. Weiss would agree that a wife has the opportunity to advance her claim based upon grounds of *boshet* in civil court.For the significance of this duty being free-standing and independent of the *get*, see Warburg, supra note 2, at text accompanying notes 134-146.

For other potential challenges to R. Dichovsky's posture, see Dichovsky, ibid. pp. 299-301.

A proposed clause of a *shtar boreruth*, addressing a potential claim for emotional stress which will bind both parties halachically and be legally enforceable in civil court, is the following:

"The parties acknowledge that the Beth Din is authorized to resolve all disputes related to and arising from the dissolution of the marriage, including but not limited to issues relating to the *Get*, distribution of assets, spousal support, child support, child custody and a spouse's refusal to give or receive a Jewish divorce from the other spouse."

The signing off on this clause can be construed as a threat that either spouse may in the future assert a claim for mental anguish due to spousal recalcitrance in spousal recalcitrance to give or receive a *get*. Here again, this type of threat will not impact upon the subsequent legitimacy of the execution of a *get* in order to thwart and stave off this claim or payment of an award. See Warburg; supra note 2 at text accompanying notes 158-160.

Moreover, though our presentation focuses upon a recalcitrant husband who refuses to give a *get*, the aforementioned *shtar* envisions a claim for mental anguish that can be equally advanced against a recalcitrant wife who refuses to receive her *get*. Such refusal which engenders *boshet* feelings may

husband refuse to submit to the Beth Din's authority, such a claim based upon *boshet* may be submitted to civil court. Additionally, based upon the failure to heed the Beth Din's recommendation to divorce his wife, R. Hedaya suggests that possibly financial penalties may be imposed upon a recalcitrant husband.[55]

What is the purpose of providing an award for emotional stress to the various types of modern-day *agunahs*? First, the opportunity to bring an action to Beth Din provides a public recognition of the intrinsic value of human dignity by formally acknowledging its violation. The avoidance of shame and psychological torment undergirds other realms of Jewish living.[56] As we know, despite the proscription against hurting oneself and self-endangerment, yet to avoid shame and relieve mental discomfort, certain types of cosmetic surgery and plastic surgery are permissible.[57] Protection of a woman's dignity should equally be extended to her emotional persona throughout her marital life. The awarding of these damages

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be equally experienced by a husband who is a victim of his wife's recalcitrance. See supra note 21.

55. *Shu't Yaskil Avdi* , VI, no. 96. In addition to being a *mesarev ledin* [see supra note 49], the recalcitrant husband is violating proscriptions against denigrating a Torah scholar and a *dayan*. See *Shulchan Aruch, Yoreh Deah* 243: 6-7, 334:47; *Choshen Mishpat* 27:1-2. Whether R.Yosef Elyashiv and R. Shilo Refael would concur with this position see Warburg, supra note 2, at note 178.

In fact, R. Dichovsky serving as a *dayan* on the Israeli Rabbinical Courts in accordance with halacha and Israeli civil law has directed the civil courts to imprison recalcitrant husbands. See Sholmo Dichovsky, "Divorce Enforcement," 25 *Techumin* (5765), pp. 132,138-143. The underlying premise of this position is that imprisonment in contemporary prisons does not run afoul of the strictures of a *get meuse*. See *Mishpetei Shaul*, no. 36; *Shu't Yabia Omer Even Haezer* 3: 20:34.

56. See Alfred Cohen, "The Valence of Pain in Jewish Thought and Practice," *The Journal of Halacha and Contemporary Society* 53 (Spring 2007), pp. 25, 30-35, 47-50.

57. Tosafot *Shabbat* 50b s.v. *bishvil*; *Shu't Helkat Ya'akov,* III, no. 11; *Shu't Mishnah Halachot* , II, nos. 246-247; *Shu't Minhat Yitzhak,* VI, no. 105:2

for mental anguish gives symbolic recognition to the significance of a wife's bodily and emotional integrity. If the suit is successful, the wife will be compensated for the emotional loss caused by such infringements upon her being.

Furthermore, a successful suit can publicly reprimand and economically penalize a recalcitrant husband who unjustifiably withholds *onah* and/or a *get*, thereby deterring others members of the community from committing the same violations. In effect, the satisfaction of such claims may deter other husbands from becoming "*mesarvei le-get*". Realizing that there may be a suit filed for this infraction, a husband may think twice before refusing to live with his wife or withholding a *get*.

In sum, such an award seeks to punish a husband and hopes to deter others from engaging in the same course of conduct in the future, as well as compensate the wronged party.

For all the above reasons, prior to accepting to resolve a divorce situation, a Beth Din should inform the parties that a spousal claim for emotional stress will be within their scope of authority[58] should the need arise due to past, present and/or future behavior. Moreover, rabbinical courts should insist that resolving the issues of the end of marriage includes addressing a spousal claim for mental anguish. Should a recalcitrant husband refuse to arbitrate such a claim, a Beth Din should decline to address the other issues of the end of marriage.The failure to insist on an "all or nothing approach" simply promotes the pervasive phenomenon of shopping around for "the right Beth Din" which will serve a husband's needs rather than addressing all the issues of the end of

58. In other words, the claim or the possibility of a future claim will be incorporated into the arbitration agreement accompanied by a provision empowering the Beth Din to obligate the parties to deal with a husband's recalcitrance in engaging in conjugal relations. See supra notes 47 and 54. As we have elucidated, a Beth Din can address this claim based upon *tza'ar*, *boshet devarim* and/or *ona'at devarim*.

marriage satisfying the needs of both husband and wife. Just as Beth Din should insist on hearing all claims associated with the end of marriage, a woman should insist that all of her claims be heard in Beth Din.[59]

On the other hand, a Beth Din's refusal to hear the claim and, if justified, to grant damages, effectively bestows upon the injurer a form of "halachic entitlement" to cause the injury. Perceived weakness of the Beth Din can only lead to increased violation of the halacha because others have done it with impunity. Given the prevalence of modern-day *agunahs*, it is not surprising to find twentieth-century decisors such as Rabbis Herzog and Hedaya stressing the importance of "*mitzva le'shmo'ah le'divrei chachamim*", i.e., one is duty-bound to heed the words of Torah scholars, regarding compliance with a Beth Din's issuance of a divorce judgment.[60]

These words of admonishment should be applicable equally to our situation. Failure to deliberate upon this claim[61] may undermine a community's trust and confidence in rabbinic authority in general and in rabbinical courts in particular. We hope that our articulation of this claim and its implications will allow Batei Din to live up to their mission addressing openly and forthrightly the challenges of our community.

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59. Parties who intend to be married should execute a prenuptial agreement which states: "The parties agree that the Beth Din is authorized to decide all disputes, including a spouse's refusal to engage in conjugal relations during marriage, a spouse's refusal to grant or receive a Jewish divorce, child custody, visitation, child support, division of financial assets as well as any other disputes that may arise between them."

60. *Shu't Heichal Yitzchak Even Haezer* I, no.1:5; *Shu't Yaskil Avdi* , supra note 55.

61. Assuming that the decisional standards elaborated upon in our expanded presentation have been satisfied, then and only then should this type of claim be entertained and if the facts dictate such an award it should be forthcoming. See Warburg, supra note 2, at text accompanying notes 22-59.

Triage in Halacha: The Threat of an Avian Flu Pandemic

Rabbi David Etengoff

Triage in Secular Society

Medical resources, like all other resources, are limited in nature. The proliferation of life - threatening diseases and the persistence of chronic health conditions put consistent stress upon the healthcare delivery systems. Stated somewhat differently, even the most medically advanced countries do not have 100% of the necessary physicians, nurses, equipment, hospital beds, medicine, and lab facilities to meet their citizens' needs. As a result, these resources are ostensibly rationed in a manner that is reminiscent of Jeremy Bentham's (1748-1832) utilitarian calculus: "the greatest good for the greatest number." The process of determining who ought to be the recipients of limited medical resources, and the order in which they should be received, is generally referred to as "triage." The U.S. Department of Health and Human Services, through the Agency for Healthcare Research and Quality (AHRQ), describes the origin of the triage process in the following fashion:

> The word "triage" is derived from the French verb "trier," to "sort" or "choose." Originally the process was used by the military to sort soldiers wounded in battle for the

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> purpose of establishing treatment priorities. Injured soldiers were sorted by severity of their injuries, ranging from those that were severely injured and deemed not salvageable, to those who needed immediate care, to those that could safely wait to be treated. The overall goal of sorting was to return as many soldiers to the battlefield as quickly as possible.[1]

As suggested above, the exigencies of modern living have forced the triage process to become part and parcel of many pragmatic medical decisions. For example: which emergency room patient should be seen first, who should receive an organ transplant or dialysis for renal failure, and who should be placed on a ventilator, are several of the heart-rending scenarios faced by the medical profession on a daily and on-going basis.

Holiness of Human Life in Judaism

There is no higher value in the Torah than the sanctity of human life. With the exceptions of murder, idol worship, and forbidden sexual relations,[2] nothing whatsoever stands in the way of saving a person's life. An example of the emphasis placed upon the sanctity and uniqueness of human life by our Sages is found in the following famous Mishnaic passage:

> Therefore man was created singly, to teach that he who destroys one soul of a human being, the Scripture considers him as if he destroyed a whole world, and he who saves one soul of Israel, the Scripture considers him as if he saved a whole world. And also because of peace among creatures, so that one should not say: "My grandfather was greater than yours;" and also that the heretic shall not say: "There are many creators in heaven;"

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1. http://www.ahrq.gov/research/esi/esi1.htm#chapter1.

2. See Babylonian Talmud, *Sanhedrin* 74a and *Mishneh Torah*, *Hilchot Yesodei HaTorah* 5:6.

> and also to proclaim the glory of the Holy One, blessed be He. For a human being stamps many coins with one stamp, and all of them are alike; but the King of the kings of kings, the Holy One, blessed be He, has stamped every man with the stamp of Adam the First, and nevertheless not one of them is like the other.[3]

A logical extension of this concept is the absolute obligation to do everything within our power to save and preserve the life of someone in mortal danger, even if his life will be extended by only a view fleeting moments. Thus, the Rambam (1135-1204) in the context of the laws pertaining to rescuing someone on Shabbat, unequivocally states:

> Someone upon whom a ruin has collapsed [and there exists] a doubt as to whether or not he is there [under the debris] or not there [nonetheless] we remove everything from upon him. If we find him alive, even though he is torn apart, and it is impossible that he will ever recover, we continue removing the debris from upon him and we take him out [from under] to live for but a few moments.[4]

An additional corollary to the sacrosanct nature of human life, and the obligation to attempt to save and preserve that life, is the notion that no one's life may be set aside to save another's. Our Sages used the Hebrew phrase "*sh'ain m'abdin nefesh mipnei nefesh*" in their formulation of this idea. Thus the Rambam wrote:

> From where is it known that even in life-threatening situations these three sins may not be committed? It is written, "You shall love the Lord your G-d with all your heart, with all your soul and with all your might" – this

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3. Ibid., 37a. Translation, Michael L. Rodkinson, with my emendations to improve readability.

4. *Mishneh Torah*, *Hilchot Shabbat* 2:18, based upon *Yoma* 85a. It should be noted that this halacha is codified, as well, in *Shulchan Aruch*, *Orach Chaim* 329:3-4.

> applies even if G-d is about to take one's soul. Concerning killing one Jew in order to cure another or to save another from a forced situation; common sense tells us that we don't kill one person to save another[5] (emphasis added).

Given all of the above, it is *prima facie* very difficult to understand how the triage process can fit into the world of halacha. After all, triage criteria, by default, may ultimately entail choosing who shall live and who shall die. This is never man's choice; it is the sole province of G-d. In order to solve this conundrum, let us now turn to an examination of some of the classic Jewish texts that touch upon this thorny issue.

Triage: Halachic Sources and Perspectives

The first source that we will examine is *Baba Metzia* 62a. Its proof text is *Vayikra* 25:36 "*v'chei achicha imach,*" "in order that your brother should live with you":

> If two are traveling on a journey [far from civilization], and one has a pitcher of water; if both drink, they will [both] die, but if only one drinks, he can reach civilization, — the Son of Patura taught: "It is better that both should drink and die, rather than that one should behold his companion's death." Until R. Akiba came and taught: "'that thy brother may live with thee:' thy life takes precedence over his life." (Soncino translation)

This *Beraitha* discusses a scenario wherein one of the two individuals "traveling on a journey" owns a very limited supply of water, i.e. a case of first party ownership. Ben Patura (The Son of Patura) opines that the water should be shared so that one of them does not witness the other's death – even though the water is the property of only one of them. It seems

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5. *Mishneh Torah, Hilchot Yesodei HaTorah* 5:7. The Rambam bases himself upon *Sanhedrin* 74a and *Pesachim* 25b.

that he is emphasizing, "in order that your brother should live" and therefore, maintains that the water should be shared. In contrast, Rabbi Akiba stresses the importance of the very end of the verse "with you." In a word, yes, you should do everything in your power to enable your fellow Jew to live. Nonetheless, "*chayecha kodmin l'chayeh chaveircha*" "**your** life takes precedence over your fellow Jew's life" when you are the owner of the limited resource.[6] The Rif and the Rosh quote this *Beraitha* verbatim, indicating that they concur as a matter of halachic practice with Rabbi Akiba's opinion.

As we have seen, *Baba Metzia* 62a focuses upon a case of first party ownership of the scarce resource. The owner *qua* owner, according to Rabbi Akiba, is entitled to fully exercise his ownership rights and drink the water – even though this will result in the death of his companion. The second source we will present does not deal with the ownership of a finite item. Instead, it focuses upon the hierarchy of which captive is to be rescued first in the case of ransoming captives (*pidyon shevuiim*). Given its singular importance for our discussion, I will quote it in its entirety:

> MISHNAH Chapter 3 Mishnah 7: A man takes precedence over a woman in matters concerning the saving of life and the restoration of lost property, and a woman takes precedence over a man in respect of clothing and ransom from captivity. When both are exposed to immoral degradation in their captivity, the man's ransom' takes precedence over that of the woman.
>
> GEMARA. Our Rabbis taught: If a man and his father and his teacher were in captivity, he takes precedence over his teacher and his teacher takes precedence over his father; while his mother takes precedence over all of them. A

6. This interpretation is in consonance with that of the Rosh and the Maharsha. The latter notes that if the water was owned jointly, then Rabbi Akiba would agree that they should share the water, even if it would eventuate in both their deaths.

scholar takes precedence over a king of Israel, for if a scholar dies there is none to replace him, while if a king of Israel dies, all Israel are eligible for kingship. A king takes precedence over a High Priest, for it is said, "And the king said unto them: 'Take with you the servants of your lord etc.'" A High Priest takes precedence over a prophet, for it is said, "And let Zadok the priest and Nathan the prophet anoint him there," Zadok being mentioned before Nathan; and furthermore it is stated, "Hear now, O Joshua the High Priest, thou and thy fellows, etc.," lest it be assumed that these were common people it was expressly stated, "For they are men that are a sign," and the expression "sign" cannot but refer to a prophet as it is stated, "And he give thee a sign or a wonder." A High Priest anointed with the anointing oil takes precedence over one who is only dedicated by the additional garments. He who is dedicated by the additional garments takes precedence over an anointed High Priest who has retired from office owing to a mishap. An anointed High Priest who has retired from office on account of a mishap takes precedence over one who has retired on account of his blemish. He who has retired on account of his blemish takes precedence over him who was anointed for war purposes only. He who was anointed for war takes precedence over the Deputy High Priest. The Deputy High Priest takes precedence over the *amarkal*. What is *amarkal*? — R. Hisda replied: "He who commands all." The *amarkal* takes precedence over the Temple treasurer. The Temple treasurer takes precedence over the chief of the watch. The chief of the guard takes precedence over the chief of the men of the daily watch. The chief of the daily watch takes precedence over an ordinary priest.

The question was raised: In respect of Levitical uncleanness, who takes precedence, the Deputy High Priest or the Priest anointed for War? Mar Zutra the son of R. Nahman replied: "Come and hear what has been taught: 'If a Deputy High Priest or a Priest anointed for

> War were going on their way and came upon a corpse the burial of which is obligatory upon them, it is better that the Priest anointed for War shall defile himself rather than the Deputy High Priest; for if the High Priest meet with some disqualification, the Deputy High Priest steps in to perform the Temple service." Has it not been taught, however, that the Priest anointed for War takes precedence over the Deputy High Priest? Rabina replied: "That Beraitha deals with the question of saving life."
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> MISHNAH Chapter 3 Mishnah 8: A priest takes precedence over a Levite, a Levite over an Israelite, an Israelite over a *mamzer*, a *mamzer* over a *nathin*, a *nathin* over a proselyte, and a proselyte over an emancipated slave. This order of precedence applies only when all these were in other respects equal. If the bastard, however, was a scholar and the High Priest an ignoramus, the learned bastard takes precedence over the ignorant High Priest.
>
> GEMARA: A PRIEST TAKES PRECEDENCE OVER A LEVITE, for it is stated, "The sons of Amram: Aaron and Moses; and Aaron was separated that he should be sanctified as most holy." A LEVITE takes precedence OVER AN ISRAELITE, for it is stated, "At that time the Lord separated the tribe of Levi, etc." AN ISRAELITE takes precedence OVER A *Mamzer,* for the one is of legitimate birth and the other is not. A *Mamzer* takes precedence OVER A *NATHIN* for the one comes from an eligible origin and the other from a non-eligible origin. A *NATHIN* takes precedence OVER A PROSELYTE, for the one was brought up with us in holiness and the other was not brought up with us in holiness. A PROSELYTE takes precedence OVER AN EMANCIPATED SLAVE for the one was included in the curse; and the other was not included in the curse. (*Horayot* 13a, Soncino translation).

Rabbi Dr. Moshe Yeres aptly summarizes this hierarchy of allocating limited ransom money to redeem captives from

their captors, as presented in this source. He notes that "social and societal worth, personal dignity, and religious and intellectual status" appear to be the main operative principles when apportioning these funds.[7] This opinion is shared, as well, by Dr. Fred Rosner, who noted in a 1983 article appearing in this journal: "It thus seems that Judaism considers religious status, personal dignity and social worth as determining factors in the allocation of limited ransom money to redeem captives from their captors."[8] This passage, therefore, clearly speaks to one of the major issues in triage, namely, the precedence of care.

Thus far we have presented and discussed the concept of triage in secular society, the holiness of human life in Judaism, and classic Jewish texts that are germane to the triage process. We are now ready to apply this material to a particular instance of potential triage: the possibility of a pandemic of the avian flu.

The Threat of Bird Flu

> Bird flu, known as the avian flu and H5N1 is spreading from Indonesia, Vietnam, Thailand, and other countries in Asia, to Europe and Africa. So far, the main threat is to birds. However, doctors say a mutation could lead to easier transmission of the virus from human to human. Vaccine research and emergency planning is underway worldwide. Doctors say the worst-case scenario could be an epidemic similar to the flu epidemic of 1918.

This information was contained in the sidebar to the November 12, 2006 homepage of sciencedaily.com, a site dedicated to breaking scientific research. It should be noted at

7. "Whom Do We Treat First? Jewish Ethics and Rationing Finite Medical Resources: A Unit for Study and Discussion Developed for High School Students," as found at: www.pathcom.com/~u1064136/Etgarhtml.htm.

8. "Rationing of Medical Care: The Jewish View," Number VI, Fall 1983.

this point that the influenza epidemic of 1918 infected 500 million people (one third of the world's population at that time) and killed a total of 50 million people.[9] The main article on the sciencedaily.com homepage was entitled: "Next Flu Pandemic: What To Do Until The Vaccine Arrives?" It is based upon a paper published in the November 10, 2006 issue of *Science* with this same title. That paper's main author is Stephen Morse, PhD, Associate Professor of Clinical Epidemiology in the Department of Epidemiology at Columbia University's Mailman School of Public Health, and its Director of the Center for Public Health Preparedness.

Dr. Morse notes that we now know precious little about combating a pandemic: "…there's a lot we don't know about what may very well be our best defenses."

Moreover: "…there are no readily accessible compendia of best practices or even comprehensive databases of community epidemiologic data which might help to design the most effective interventions."[10] He advocates intense research during normal flu seasons to better understand the "effectiveness of non-pharmaceutical interventions such as social distancing, hand washing, face masks, and the like."[11] It is clear, however, that the best prevention for the avian flu will be a yet-to-be developed vaccine.[12]

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9. "1918 Influenza: the Mother of All Pandemics," by Jeffery K. Taubenberger and David M. Morens, *Journal of Emerging Infectious Diseases*, Vol. 12, No. 1 as found at the Center for Disease Control's website: http://www.cdc.gov/ncidod/EID/vol12no01/05-0979.htm.

10. Paraphrase of Dr. Morse's statements as quoted in http://www.sciencedaily.com/releases/2006/11/061112094603.htm.

11. Ibid.

12. As of 11/12/06 the website of the Centers for Disease Control and Prevention noted: Currently no vaccine is available to protect humans against the H5N1 virus that is being seen in Asia. However, vaccine development efforts are under way. Research studies to test a vaccine to protect humans against H5N1 virus began in April 2005. (Researchers are also working on a vaccine against H9N2, another bird flu virus subtype.) See http://www.cdc.gov/flu/avian/gen-info/vaccines.htm for further

Given the best-case scenario, a vaccine will be developed in time to mitigate the horrendous projected effects of a pandemic of the avian flu. It is clear, however, that we will almost surely have to ration the distribution of such a vaccine, since initial manufacturing capabilities will most likely be insufficient to meet the world's needs. This conundrum led the Wall Street Journal's Sharon Begley to write a thought-provoking article entitled: "If We Must Ration Vaccines for a Flu, Who Calls the Shots?"[13]

Begley presents the following agonizing possibility:

> You have 100 doses of a vaccine against a deadly strain of influenza that is sweeping the country, with no prospect of obtaining more. Standing in line are 100 schoolchildren and 100 elderly people.
>
> The elderly are more likely to die if they catch the flu. But they also have fewer years left to live and don't get out enough to easily spread or catch the disease. The kids are more likely to act like little Typhoid Marys, sneezing virus over anyone they encounter, and have almost their whole life ahead of them. But they're also less likely to die if they get sick. Whom do you vaccinate?

Begley quotes a May 2006 paper completed by the National Institutes of Health questioning our current policy "…that aims to save the most lives by first vaccinating the old, the very young and the sick, putting last those who are two to 64 years of age." Instead of this approach, the paper's authors, led by Dr. Ezekiel Emmanuel, Director of the Center for Ethics in Managed Care at Harvard Medical School, suggests that vaccines ought to be distributed based upon "the value of life." In their view, the value of life depends on age. Begley summarizes their position in the following manner:

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information.

13. *The Wall Street Journal*, Marketplace: Science Journal, Friday, October 6, 2006, page B1.

> A 60-year-old has invested a lot (measured by education and experience) in his life, but has also reaped most of the returns. A child has minimal investment. A 20-year-old has great investment but has reaped almost none of the returns. Conclusion: To maximize investment in a life plus years of life left, 13- to 40-year-olds should have first claim on rationed vaccine…

Thus, for Emmanuel and others who share his view, a simple and seemingly rational calculus should decide the rationing of a future avian flu vaccine: Investment in life divided by the likely number of years left to live. This then, is the position of a leading and respected secular bio-medical ethicist. Let us now compare and contrast this position to those elucidated by recent Rabbinic authorities.

Halachic Perspectives

Historically, the ethics and practical ramifications of triaging medical care and resources is a topic that has generated a variety of opinions among the *Poskim* (halachic decisors).[14] I would like, however, to specifically focus upon the question "Whom do you vaccinate first?" within the context of the views of four of the most prominent *Acharonim* of our era: Rabbi Avrohom Yeshaya Karelitz (Chazon Ish, 1878-1953) Moshe Feinstein (1895-1986), Rabbi Shlomo Zalman Auerbach (1910-1995) and Rabbi Eliezer Yehudah Waldenberg (*Tzitz Eliezer*, 1915-2006), *zichronom l'vracha*. As we shall see, their answers often refer back to the above-cited major sources in *Baba Metzia* and *Horayot*.

The Opinion of the Chazon Ish

The Chazon Ish appears to present two different views

14. Excellent synopses are offered by Dr. Fred Rosner, op. cit., and Rabbi Moshe Weinberger (Holon, Israel) in his article entitled: "Priorities in the Treatment of Patients (in Case of Insufficiency of Staff or Medication)" in *Emek Halachah Assia*, (Jerusalem, Israel, 1985, pages 109-117) (Hebrew).

concerning the application of the Talmud's criteria regarding ransoming of captives to the allocation of a limited medical resource.[15] In *Likutim al Baba Metzia* 62a, in the case of medicine that is owned by the hospital that is insufficient for two patients with an equal degree of pathological presentation, he opines that one is duty-bound to follow the hierarchy of allocation presented in the above-cited passage of *Horayot* 13a. Yet, in his glosses on Rav Chaim Soloveitchik's novella on the Rambam's *Mishneh Torah*, *Yesodei Hatorah*, chapter 5, he takes a different position. He rules that in the case of two people in the desert who desperately need water belonging to a third party, that it must be equally divided between the two parties. In this instance he does not invoke the rules of allotment that are referenced in the Gemara. As a result, it remains unclear as to exactly which position was held by the Chazon Ish in the case of two equally ill patients (or in the case of an avian flu pandemic, potentially ill patients) in need of the same scarce pharmaceutical treatment.[16]

The View of Rav Moshe Feinstein

Rav Moshe Feinstein, in a 1982 responsum written to Drs. Ringle and Jacobovits,[17] discusses emergency room triage procedures. What is one to do in the case of two patients who arrive simultaneously? Who takes precedence? Should one follow the rules found in *Horayot* 13a? Should any other criteria be employed? Rav Feinstein responded:

> Since it is commonly the case that a patient does not know his true condition, because we are careful not to reveal

15. Please note that all cases to be discussed are presented in the context of *third party ownership* (hospital, government etc.) of the insufficient medical resource, since this is the most likely scenario that would be encountered in the case of a pandemic.

16. See Weinberger, op. cit., pages 109-111, for a further discussion and possible rectification of this apparent contradiction.

17. *Iggerot Moshe*, *Choshen Mishpat*, vol. II, Section 72:2

> this to him, and it is prohibited to do so, therefore, the one who arrives at the emergency room first must be the first one to be brought into the [actual] emergency room [for treatment]…therefore in such an instance where it is unlikely that the condition of the first-to-arrive patient's condition would not deteriorate if the second-to-arrive patient were to be admitted first, hence, as a matter of course, the people in charge should admit the first-to-arrive first, even if the first patient to arrive is deemed to be incurable.

Rav Feinstein's approach in this responsum is congruent with an oral communication given by Rabbi Dr. Moshe David Tendler at a 1983 symposium on "*Torah Shebe'al peh*" wherein he related that his father-in-law (Rav Feinstein) had been asked "by then Chief Rabbi of Israel, Rav Herzog, what to do if there were ten patients but only medication for four of them. Rav Feinstein is said to have responded that the first four should get the medicine."[18] This position is repeated, as well, in an article that appeared in the *Mount Sinai Journal of Medicine*, vol. 51, no 1, January-February, 1984: "In our own time the great rabbinic authority Rabbi Moses Feinstein was asked to rule on a situation in a hospital in Israel which had limited doses of penicillin and several patients on the ward who needed it. He ruled that the proper Jewish course of action was to give the penicillin to the first person the doctors encountered who needed it."[19] While Rav Feinstein does not use the phrase "*kol hakodem bahen zocheh*"[20] " the first person to arrive acquires the object" *per se*, he seems to follow precisely this approach in his determination of who should be the first to receive the requisite antibiotic (or by extension, vaccine) or medical attention. He, therefore, does not employ the

18. Rosner, op. cit., page 29.

19. Marc A. Gellman, PhD, *Rabbinic Comment: Triage of Resources to Patients*, page 115.

20. See Babylonian Talmud, *Baba Kama* 30a, for the proper use of this phrase.

hierarchy of allocation of ransom funds, as found in *Horayot* 13a, as a determinant of who takes precedence in the distribution of insufficient medical resources.

The Position of Rav Shlomo Zalman Auerbach

Rabbi Shlomo Zalman Auerbach addresses the issue of precedence of care and the triage of scarce medical resources in *Minchat Shlomo*, *Tanina*, section 86:1. He begins by citing Rav Yosef ben Meir Teomim's ruling in his work *Pri Megadim* on *Shulchan Aruch*, *Orach Chaim* section 328 (*Mishbetzot Zahav*, 1) that states the following: "If one [patient] is positively in great danger according to the doctors, etc., and the other [patient] is only in questionable danger and only one curative (*refuah*) is available that is insufficient for both of them, then the one in imminent danger takes precedence over the one in questionable danger." Rav Auerbach continues and suggests, "we must ascertain the fundamental nature of the degree of danger and the prognosis for cure [when determining precedence of care]." He further notes that the age of the patient plays no role in determining the order of care. At that point, he directs us to: "look at the end of *Horayot* [see above] in the Mishnah and the Gemara concerning the hierarchy of ransoming captives and in regards to *Tzedakah,* etc." Clearly, in the best of all worlds, Rav Auerbach would have definitely wanted to utilize this hierarchy as the determining factor in any and all triage situations. Yet, he admits, "I believe, however, that in our time, it would be most difficult to act according to this [order of precedence]."[21]

21. Rav Auerbach's sons published this *teshuvah* in 2000. In light of this, it is fascinating to note that in 1984, Dr. Avraham-Sofer Avraham, in his work *Nishmat Avraham*, Section *Yoreh Deah*, page 156, quoted a personal communication written by Rav Auerbach to him wherein he states: "*ki rak l'inyan hatzalah yeish din kadimah*" ("only in the instance of saving someone's life do we adopt the principle of precedence"). One can readily conclude, *hatzalah* – yes, *refuah* – no.

Rabbi Eliezer Yehudah Waldenberg's Viewpoint

Rabbi Eliezer Yehudah Waldenberg discusses the issue of triaging scarce medical resources in *Tzitz Eliezer*, vol. 9:28, subsection 3. In his presentation and subsequent decisions, Rav Waldenberg reviews the following: the *piskei din* of Rabbi David ben Zimri (the Radbaz) as presented in the third volume of his *Responsa*, section 627; the above-cited view of the *Pri Megadim*, Rabbi Naftali Halevi's decision as presented in his work *Chaker Halacha* 8:2; and the views of Rav Naftali Tzvi Yehudah Berlin (*Netziv*) in his *Haamek Sheilah, Sheilta* 147:4. The *Tzitz Eliezer* explicitly addresses the scenario that is most similar to the mode of allocation of the yet-to-be created bird flu vaccine: The hospital has one dose of a medicine available for two equally ill patients. In such a case, Rav Waldenberg refers back to *Baba Metzia* 62a, wherein Rabbi Akiba decided that if the water in question belonged to one of the parties who is attempting to cross the desert and it is insufficient to be shared (i.e., or both will die), then the owner of the water must drink the entire amount based upon the principle of "*chayecha kodmin*" "your life takes precedence." In contrast, Ben Patura ruled that the water, on any account must be shared. Thus, the *Tzitz Eliezer* states:

> …in such an instance where the curative item (*refuah*) belongs to the hospital [rather than to one of the patients] then Rabbi Akiba's position of "*chayecha kodmin*" ["your life takes precedence"] is irrelevant. We, therefore, follow the view of Ben Patura. This means that we are required to distribute it [the medicine in question] equally between the two grievously ill patients and so it seems to me. The decision to follow this view [Ben Patura] is even more cogent in this situation than in the case [presented in the Gemara] of two who were walking in the desert. [This is so] since both of the parties are ambulatory and it is only because of the professional opinion of the doctors that we deem them to be in equal danger and with the identical need to take the curative item. Therefore, in this case,

> there is an even greater reason to say that it should be equally split [between the two of them.] (Translation, my own)

Rav Waldenberg's touchstone in his responsum, as well as in all of the sources that he analyzes, is the above-quoted passage from *Baba Metzia* 62a. He makes no reference whatsoever to the above-cited Gemara in *Horayot* 13a. Therefore, Rav Waldenberg does not view the hierarchy of ransoming captives, as presented in the latter source, as a legitimate determinant in the distribution of an insufficiently available medical resource.

Conclusion

As we have seen, in the case of demonstrated equal need and third party ownership, at least one view held by secular bio-medical ethicists relies upon a seemingly rational and formal calculus in making the agonizing decision as to who should receive a yet-to-be created vaccine against the avian flu. Recent *Poskim*, however, have not followed any such type of calculus in the triaging of scarce medical resources. As we have seen, the Chazon Ish appears to have held two different views, one positive and one negative, as to whether or not one should utilize Gemara *Horayot*'s hierarchy of ransoming captives as the deciding factor in the allocation of scarce medical resources. As in one view of the Chazon Ish, Rav Shlomo Zalman Auerbach suggests that following the approach in *Horayot* 13a would be the ideal method for such distribution. He nonetheless says that it is essentially impractical and, therefore, not to be used for rendering an actual decision. Instead, he suggests that the medicine, etc., must be distributed on an "as needed" basis with preference given to the patient in the greatest danger.

In contrast to the above-summarized positions, neither Rav Moshe Feinstein nor the *Tzitz Eliezer* make reference to the Gemara in *Horayot*. Rav Feinstein seems to suggest, instead,

that one must follow the rule of distributing the scarce medical resource on a first-come first-served basis, regardless of any other potential factors. Rav Waldenberg disagrees with this position and maintains, instead, that one is duty-bound to follow Ben Patura's position in *Baba Metzia* 62a, and distribute the *refuah* (medical resource) equally between the parties in question. In a true pandemic scenario, however, this position would probably be very difficult to maintain.

The above-cited and elucidated positions of the recent *Acharonim* are presented as a review of the literature. No position is presented as a practical *halacha l'maaseh* (halachic decision). As in all halachic matters, one is urged to seek the opinion of a qualified halachic expert.

Making *Berachot* on Non-Kosher Food

Rabbi Elli Fischer

At first glance, the issue of making *berachot* on non-kosher food would seem to be a non-starter. The *Shulchan Aruch* writes unambiguously in *Orach Chaim* 196:1:

> If one ate a prohibited food, even if it is only rabbinically prohibited, he may not be included in a *zimun*, nor should he make a *beracha* on it, neither before nor after [he eats].

Mishnah Berurah (196:3) explains the *Shulchan Aruch*'s rationale:

> Since it is a prohibited food, and there is a sin in eating it, he is cursing God with his *beracha*, as it says (*Tehillim* 10:3) ובצע ברך נאץ ה', "One who blesses the robber (*botzei'a*) curses God."

In *Orach Chaim* 204:9 the *Shulchan Aruch* rules, "If one ate or drank a prohibited food because of danger, he makes a *beracha* both before and after." This reinforces the *Mishnah Berurah*'s explanation that the impropriety of making a *beracha* stems from the *issur achilah* -– the sin of eating the particular food. In the case of danger, where the sin of prohibited consumption is overridden, the obligation to recite a *beracha* remains intact.

The source of this ruling is a fairly well-known *beraita* to which the *Mishnah Berurah* makes reference. This *beraita* appears in several places in the *Bavli* (*Sanhedrin* 6b would appear to be the "home" *sugya*, as only there is the *beraita*

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quoted in its entirety), in the *Yerushalmi* (*Sanhedrin* 1:1, 18b), and in the Tosefta (*Sanhedrin* 1:2). There are minor variations in the standard printed texts which, however, can have strong practical ramifications. The three occurrences are as follows:

1) תוספתא מסכת סנהדרין (צוקרמאנדל) פרק א

ר' אליעזר בן יעקב אומר מה ת"ל לומר ובוצע ברך ניאץ י"י משלו משל למה הדבר דומה לאחד שגנב סאה של חיטין טחנן ואפאן והפריש מהם חלה והאכיל לבניו היאך זה מברך אין זה מברך אלא מנאץ על זה נאמר ובוצע ברך ניאץ י"י.

Tosefta *Sanhedrin*, Chapter 1

R. Eliezer b. Yaakov said: "What is taught from *Uvotzea berech ni'etz Hashem?* A parable is given to what it can be compared: to one who stole a *sa'ah* of wheat, ground it, baked it, separated *challah*, and fed his children. How can he make a *beracha*? This is not a *beracha*, but a curse. Regarding this it says, "*Uvotzea berech ni'etz Hashem*".

2) תלמוד בבלי מסכת סנהדרין דף ו עמוד ב

רבי אליעזר אומר: הרי שגזל סאה של חיטים וטחנה ואפאה והפריש ממנה חלה, כיצד מברך? אין זה מברך אלא מנאץ, ועל זה נאמר: ובוצע ברך נאץ י"י.

Babylonian Talmud *Sanhedrin* 6b

R. Eliezer b. Yaakov said: "If one who stole a *sa'ah* of wheat, ground it, baked it, separated *challah*, how can he make a *beracha*? This is not a *beracha*, but a curse. Regarding this it says "*Uvotzea berech ni'etz Hashem.* "

3) תלמוד ירושלמי מסכת סנהדרין פרק א דף יח טור ב / ה"א

תני רבי ליעזר בן יעקב אומר מה תלמוד לומר ובוצע ברך נאץ י"י משלו משל למה הדבר דומה לאחד שגנב סאה חיטין והוליכה לנחתום והפריש חלתה והאכילה לבניו הרי זה מברך ואינו אלא מנאץ.

Jerusalem Talmud *Sanhedrin*, Chapter 1

> It was taught: R. Eliezer b. Yaakov said: "What is taught from '*Uvotzea berech ni'etz Hashem* '? A parable is given to what the thing can be compared: to one who stole a *sa'ah* of wheat, brought it to a baker, separated *challah*, and fed his children. He makes a *beracha*, but it is naught but a curse."

The general thrust of each version of this *beraita* is identical. Each gives a metaphor to explain the verse in *Tehillim* cited by the *Mishnah Berurah*. In this metaphor, a person steals wheat, makes bread, and then makes a *beracha*. This *beracha* is regarded as a curse.

However, there are several minor but significant variations between the versions:

- The Tosefta describes how he feeds the bread to his children, and asks rhetorically, "How can he bless? This is not blessing; it is a curse!"

- The *Bavli* (Babylonian Talmud) never mentions that the bread is eaten. The thief, upon baking the bread, wishes to fulfill his obligation to separate a portion of the dough as *challah*, a gift to God that He appropriates to the *kohanim*. This mitzvah of separating *challah* mandates a *birkat ha-mitzvot*, about which the *beraita* asks rhetorically, "How can he bless? This is not a blessing; it is a curse!"

- The *Yerushalmi* follows the Tosefta until the last line. Rather than ask a rhetorical question, it simply states, "Behold he makes a *beracha*, and it is nothing but a curse."

It is neither possible nor halachically relevant to determine which of these three variants is most ancient or authentic. It is sufficient to note that the perspectives reflected in these variations also manifest themselves in the dispute among the *Rishonim* about the obligation to make *berachot* on prohibited foods. The medieval disputants may be grouped into four basic positions.

- The *Bavli* seems to understand this *beraita* as a case of

mitzvah ha-ba'ah be-aveira – a mitzvah which is the result of a transgression, in this case making an offering of stolen bread (other classic examples are rending a stolen garment, shaking a stolen *lulav*, or eating stolen matzoh – see *Yerushalmi Challah* 1:4, 58a). In an instance of *mitzvah ha-ba'ah be-aveira,* the performance of the mitzvah is neutralized, and an attempt to make a *beracha* over it only further aggravates the hypocrisy. To bless God Who has "sanctified us with His mitzvot and commanded us…" over an act of sheer hypocrisy, is no blessing at all.

Rabbeinu Nissim and Rabbeinu Yonah (to both *Sanhedrin ad loc.* and *Berachot* 45a) invoke the concept of *mitzvah ha-ba'ah be-aveira* with regard to this *beraita*. It also seems to be the position of the Ra'avad (on *Mishneh Torah Hilchot Berachot* 1:19) who insists that the sole determinant of whether one should make a *beracha* is whether or not he enjoyed eating it (*hana'ah* – presumably based on *Berachot* 35a), and in this case he definitely did. R. Tzvi Pesach Frank (*Har Tzvi Orach Chaim* 1:38) is the only source that this author has encountered who explicitly distinguishes between *berachot* on mitzvot and *berachot* on food items. In this context, though, it seems like a very intuitive distinction, and is at least implicit in several *Rishonim*, and seemingly in the *Bavli* itself.

• The *Yerushalmi* seems to be saying that indeed, even when eating stolen food, one is not absolved from making a *beracha*. Nevertheless, such a *beracha* is hypocritical and actually constitutes a "curse" of God (imagine seeing someone steal food and then bless on it, and imagine what that makes you think about that person's Object of worship). This is how R. Shimshon b. Tzemach (*Responsa Tashbetz* IV:3:29) and Rabbeinu Asher (Rosh *Berachot* 7:2) understand this *beraita*. *Tashbetz* even adds the following argument for making a *beracha*: "Someone who ate garlic and has bad breath, should he eat more garlic and have even worse breath?!" – i.e., just because one stole, does not mean he should compound the problem by not making a *beracha*.

• The Tosefta clearly implies that the problem is with making a *beracha* upon eating the food, because of the hypocrisy involved. However, there are two ways to understand why one would be absolved from making this *beracha*:

1. Because such a *beracha* is not really a *beracha*. The hypocrisy transforms it into a curse. Thus, technically one still may be obligated to make a *beracha*, but with no way of discharging the obligation, it becomes moot. This appears to be the position of Rambam (*Hilchot Berachot* 1:19) and Rashba (commentary to *Berachot* 45a), as well as the *Shulchan Aruch* and latter-day authorities.

2. There is no obligation to make a *beracha*, because eating prohibited foods, with regard to making a *beracha*, is not even considered eating! This is the position of the Tosafot and Ritva (both on *Berachot* 45a s.v. *achal*).

A practical difference (*nafka mina*) between these last two positions would be a case of danger or unavoidable accident. According to Rambam et al, there is no hypocrisy, and therefore the obligation to make a *beracha* can be discharged. According to Ritva, such an act is still not considered "eating" because of the prohibition, and adds that if he has no other choice, then he does not actually derive benefit from the eating. Therefore, there is no circumstance under which a *beracha* would be recited over a prohibited food according to Ritva.

There are a number of statements by *Rishonim* which have been left out of this discussion because their positions on this issue can only be inferred indirectly. For example, Rashba, who makes his opinion clear, cites a Mishnah in *Demai* (1:4) as a proof text. The comments of R. Shimshon of Sens on that Mishnah effectively neutralize Rashba's proof. Likely as it may be that R. Shimshon disagrees with Rashba in practice, it is by implication only and therefore he will not be listed among the medieval disputants. Additionally, although several proof

texts are enlisted by each side of the dispute, since each is ultimately neutralized, this essay will not address them.

To summarize, there are four positions in the *Rishonim*:

1. Ra'avad, R. Yonah – make the *beracha*, because if you enjoy the food, you are obligated to make the *beracha*.

2. *Tashbetz*, Rosh – make the *beracha*, even though it is hypocritical, because you are not absolved from the obligation to make a *beracha* just because you stole the food.

3. Rambam, Rashba, *Shulchan Aruch* – if you are violating something by eating, then your *beracha* is an act of hypocrisy and you should not make it. If, however, circumstances force one to eat prohibited food, a *beracha* should be recited.

4. Ritva, Tosafot – consumption of prohibited food, even under circumstances which would render it permissible, is simply not defined as "eating", and does not generate an obligation to make a *beracha*.

It is worth pointing out that the *Magen Avraham* (196, introductory comments) advocates *bentching* in such a situation, for two reasons:

a) We should be strict concerning a biblical obligation like *bentching*.

b) After consumption, the food no longer remains in its prohibited state. It has been sufficiently altered to lose its identity. It is noteworthy that the *Magen Avraham* applies principles of *mitzvah ha-ba'ah be-aveirah* to this scenario.

The *Mishnah Berurah* (196:4), in the wake of the *Taz*, rules that one may *bentch* only in a situation where the prohibited foods were consumed unwittingly (*be-shogeg*). Their rationale is that if one transgresses unwittingly, then the subsequent *beracha* would not be a "curse" or an act of hypocrisy. Interestingly, this ruling is in direct opposition to the Rambam, who, as noted above, serves as the basis for the

Shulchan Aruch's ruling, though they agree in principle that a hypocritical *beracha* is a curse and should not be recited. It should be noted that this could not be applied to the *beracha* recited prior to eating since, by definition, if the consumer was a *shogeg*, he would have assumed the food to be permissible and made a *beracha* accordingly.

Ever since non-observance of mitzvot became prevalent for many Jewish people, *poskim* have been faced with the question of how to treat mass transgression halachically.[1] When dealing with *berachot*, according to Rambam and the many *poskim* who follow his rationale, the operative principle is whether the act of eating non-kosher food can be considered hypocritical. One would be very hard pressed to conceptualize the transgressions of the millions who simply were not raised in kosher homes as rebellious or wanton, and thus the *berachot* that they make as curses. Rather, the situation that the Rambam himself describes for *oneis*, and which *Mishnah Berurah* et al extend to *shogeg* (inadvertent) for *bentching*, may apply to the vast majority of contemporary Jews consuming non-kosher food.

One could argue that Jews who are not ready to keep kosher should be encouraged to recite *berachot* on food that they eat, given the following:

a. The Rambam's category of *oneis* (unwitting or unavoidable error) may include most contemporary consumers of non-kosher food.

b. A number of later authorities, including *Magen Avraham*, *Taz*, and *Mishnah Berurah* (and also the *Bi'ur Ha-Gra* ad loc) expanded this category to include any instance where the *beracha* is not hypocritical.

c. The majority of remaining *Rishonim* advocate making a *beracha* in any case.

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1. For an excellent survey of this topic, see Schacter, Jacob, ed. *Jewish Tradition and the Non-Traditional Jew*. New York: Jason Aronson, 1992.

Nevertheless, there are certain extra-halachic issues that remain. It can be argued that advocating *berachot* on non-kosher food is not educationally sound, inasmuch as it might be construed as condoning the consumption of non-kosher food. On the other hand, *berachot* are designed to affect and sensitize the character of those who recite them (cf. *Bava Kamma* 30a). Limiting the opportunities of such a large population to recite *berachot* would be unfortunate indeed. Thus, the tendency to play it safe and not recite *berachot* in cases of doubt, while common to the general rules of *berachot*, does not abrogate the need to arrive at definitive conclusions whenever possible.

Cherem Rabbenu Gershom: Reading Another Person's Email

Rabbi Alfred Cohen

It is not uncommon to hear of employers checking on the email of their employees, or of school administrators reading the correspondence of students in school dorms; as use of electronic devices proliferates, communications between people are often intercepted, whether by employers, co-workers, or parents. How do these, and similar practices, sit with Jewish law?

About a thousand years ago, the rabbinic leaders of the Jewish communities in Ashkenaz – the area which would later develop roughly into France and Germany – got together to accept certain rules and restrictions in common.[1] Many of

1. When Rabbenu Gershom and his *Beit Din* instituted their bans, they enacted them to be in force till the year 5000 in the Jewish calendar (1240 CE). Long before that time, the Jewish communities of Ashkenaz had renewed his legislation and accepted the bans for all time. (There is a discussion in the Tosafot whether a ban needs to be formally rescinded or whether it lapses automatically when its effective date expires. See Tosafot *Beitza* 5a, *d.h. kol). Pitchei Teshuva Even Haezer* 1:19 cites many authorities who opine that no time limit was written into the bans; but he also mentions others who maintain that there was a time limit. As for halacha *lema'aseh*, the *Shulchan Aruch Even Haezer* 1:10 writes, "and he [R. Gershom] did not issue a ban later than the end of the fifth thousand [the year 1240= 5000]." The Ramo, however, comments, "nevertheless, in all these [Ashkenazic] communities the enactment and the custom remain in place, although there are those who say that nowadays we should not coerce someone who violates the *cherem* of R. Gershom inasmuch as the 5000th year has passed." See a further discussion in *Otzar Haposkim* I, note 76, as well as *S'dei Chemed*, IV, p. 133. We might therefore question whether the *cherem* enacted a thousand

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these regulations were to be enforced with the punishment of *cherem* – a form of religious/social excommunication;[2] furthermore, the name of the most prestigious and famous rabbi of that time was attached to these strictures, and they are known to this day as *cherem d'Rabbenu Gershom*. Perhaps the most well-known *cherem* remains the prohibition of reading another person's mail.[3]

The question which needs to be addressed in modern times is whether email and other forms of electronic messaging, such as IM, are included in the *cherem*. Just because they share the name "mail", does that mean that email, or voice mail, or texting, qualify as "mail" for the purposes of halacha? Is there the same expectation of privacy when sending email as when one seals an envelope and drops it into the mailbox? These are among the questions we will explore in the present paper.

Our study will focus on these new permutations, but will also consider other aspects of the *cherem*, which are not necessarily modern but whose clarification is mandatory for a full understanding of the scope of the *cherem*: does the *cherem*, whatever its scope, apply also to family members such as a

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years ago still is in effect as a *cherem* or only as a communal custom.

There is an enigmatic addendum attached to the heading in the *Shulchan Aruch* of *Dinei Nidui v' cherem*, which reads as follows: "All the laws in this section are not practiced nowadays, and have been forbidden by the rabbis in our time, predicated on the principle *dina demalchuta dina*, (the law of the land is the law); but see the comments of the *Taz* at the end of this section." It may be assumed that this postscript to the laws was necessary at a time when the secular government objected to the use of *cherem* by the Jewish community. This interference of the government is no longer an issue.

2. *Terumat Hadeshen* 142 rules that the punishment for violating the *cherem* entails various distancing measures enacted by the communities; no person has the option to aver that he is prepared to pay a heavy fine, in order to be permitted to act contrary to the *cherem*—the community is not allowed to accept a monetary payment in lieu of imposing the penalties.

3. In addition to the *cherem* for reading another's mail, there are also two *charamim* dating to the time of Rabbenu Gershom against marrying two wives or divorcing a woman against her will.

spouse[4] or a parent, or to those acting *in loco parentis*? Are there exceptions to the regulation, and if so, when do they come into play?

Let me clarify at the outset, that there does not seem to be any justification in halacha in differentiating between modern methods of reading—or receiving—mail from the traditional ones, and therefore, for the purposes of this study, they will be treated equally.

Cherem

What is a *cherem*, and whence comes its authority? [5] We find the term *cherem* used in three different contexts:

(a) *ibud vehashchatah*—"loss and destruction"—if something is pronounced "*cherem*", no one may have any benefit from it, including the owner.

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4. There is a rabbinic controversy regarding the meaning of a standard phrase inserted in the *tennaim* (engagement agreement, which is actually usually signed just before the wedding ceremony). That phrase says that "they will rule over their possessions equally." *Maharsham* 1:45, cites this principle in the name of R. Shlomo Kluger, but does not agree with it. He seems to feel that it is only a gracious literary form, without actual legal import; but *Maharik*, 57, is of the opinion that it means that the woman actually owns and is in charge of 50% of their joint assets, and could even give away half of their belongings if she wanted to. It has been argued (see article by Rabbi S. Tchaikovsky in *Techumin* XI, p. 307) that based on this rationale that they share everything 50-50, it would entitle each of them to open the other's letters and read the other's email. However, extending the concept of "sharing everything equally" to invalidating the *cherem* in their case seems, to the present writer, a bit of a stretch.

5. The institution of *cherem* may be considered an oath on a rabbinic level (*shevua miderabbanan)* or it may derive from *divrei kabbala,* an ancient tradition. See *Encyclopedia Talmudit*, p. 326. *Choshen Mishpat* 34,5 rules that someone who violates a *cherem* is unfit to render testimony in a Jewish court. The *Terumat Hadeshen* 282 rules that if someone is willing to pay a fine in order to be able to violate a communal *cherem,* it is not acceptable; the fine imposed by the community is in the nature of an atonement (*kappara)* for the transgression, not a charge that someone can pay in order to be able to ignore the *cherem*!

(b) *lashon kelallah"*—"a figure of speech denoting a curse". Anyone who uses this object, or who does this thing, will be cursed.[6, 7]

(c) Rashi interprets "*cherem*" as "*lashon hekdesh"*, denoting consecration.[8]

The term *cherem*, as used in the Torah, implies something set aside, often for dedication to G-d or the Sanctuary, and therefore forbidden to be used by a private individual.[9] A transgression of the sanctity of the *cherem* carried a severe religious punishment.[10] A famous example of this kind of consecration is to be found in the Book of Joshua 7:11, where Joshua consecrated the city of Jericho, which was the first conquest of the Children of Israel upon entering the Land; when Achan appropriated some items he found in the city and hid them in his tent, he was punished with death.[11]

When King Saul declared a *cherem* against any soldier eating while the Jewish army was engaged in battle, his own son Yonatan, unaware of the *cherem*, tasted some honey, and the king was prepared to put him to death. Only the intervention of the army saved him.[12] This particular episode indicates that, despite the severity of the *cherem*, there are circumstances when it is possible for the penalty to be waived.[13]

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6. Radak, *Sefer Hashoroshim*, "*cherem*".

7. See also *Sefer Hachinuch* 357.

8. *Yechezkel* 44:29.

9. See, for example, *Vayikra* 27:28.

10. *Shevuot* 15a. See also *Shu"t Ran* 48; *Commentary of Ramban, Vayikra* 27:29; Rashba IV 296, "*Ovair al cherem chayav mita"*, "someone who violates a *cherem* is liable to death."

11. "To teach that whoever violates a *cherem* is comparable to violating the five Books of the Torah." *Midrash Tanchuma, Vayeshev* 2; *Sefer Chassidim* 106. Ramban rules that "whoever violates a *cherem* is liable to the death penalty" (Leviticus 23:29), which is why Achan had to die.

12. I Samuel 14: 44.

13. One of the reasons the army insisted that Yonatan be exempted from punishment is that G-d had enabled him miraculously to bring victory

There was a further *cherem* instituted by Joshua, cursing anyone who rebuilt the city of Jericho. Some 500 years later, Chiel of Bethel rebuilt the city, and as he laid its foundation, his first son died; by the time he erected the gates enclosing the city, he had buried his last child.[14]

In addition the term *cherem* is used to denote someone who has sinned and thereby himself becomes *cherem*, such as the verse "…do not bring idolatry into hour house, *"pen tiheye cherem kemohu"* "lest you become *cherem* like it."[15]

As we have noted, leaders of the Jewish community are empowered to declare a *cherem*, to ban an activity as they feel warranted. However, they do not have *carte blanche* – the rules which they wish to enforce have to be reasonable. So, for example, the *Beit Din* could not make a *cherem* against leaving the city or against *davening* in a certain shul (which is kosher), because these are normal, acceptable activities which they have no right to curtail.[16] Furthermore, no one can enact any agreement, stipulation, or *cherem* which is contrary to Jewish law. For example, one time a consortium of wine merchants loaned money to their Jewish community, and instead of charging interest, they wanted permission to raise the price of their wine. Since, in effect, they would be earning "interest" on their loan, by getting a concession to charge more for their product, the entire agreement was declared invalid.[17]

An additional feature to be noted is that a *cherem* is issued on a <u>person</u>, not on a place.[18] Thus, if a person is in a town where

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singlehandedly against the Philistines; furthermore, since he had been busy fighting the enemy, he had not heard about the *cherem* and consequently violated it unintentionally. See Ramo *Shu't* 44, Rashba IV:396, Ramo *Yoreh Deah* 334:22.

14. II Kings 16:34.

15. *Devarim* 7:26.

16. *Mahari Bel*, part II, 72.

17. Rosh, 108:21; Rivash, 98.

18. *S'dei Chemed* V, p. 133, note 17 discusses whether a person who violates

a *cherem* is declared, even if he leaves the town he is still bound by the terms of the *cherem.* The response literature records the case of a man who lived in a city where there was a *cherem* against having two wives; subsequently, he moved to a place where the *cherem* had not been accepted and wished to take an additional wife there. However, the *Beit Din* ruled that,

> The *cherem* concerning two wives was enacted for all the people of his [R. Gershom's] province and their children for all time…inasmuch as it is not a *cherem* on the place but on the individuals… However, it is possible that if the [first] wife agrees, it can be permitted. Or it may even be that we do not have to search for a leniency, for inasmuch as the ban was instituted for the benefit of the woman and she says she does not want [to benefit from] this regulation of the Sages—we listen to her.[19]

Two very interesting points emerge from this halachic decision: first of all, that the beneficiary of the *cherem* is apparently entitled to waive the protection afforded him or her. (We will return to this topic later.) However, some authorities dispute the ability to waive; although the *cherem* forbidding a man from having two wives benefits the woman, that is not the only reason it was instituted. The very existence of this *cherem* creates a modicum of equilibrium in the home, which is a positive good for society, not only for the individuals involved. Furthermore, were she able to waive her prerogative, the husband might badger or coerce her until she acquiesced. [20]

The second feature is that a *cherem* issued upon a person remains obligatory upon his descendants as well. Rashba

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a *cherem* of R. Gershom needs a warning before he can be punished, and concludes that it is a matter of debate. See also *S'dei Chemed, Ishut*, no. 20; *Terumat Hadeshen* 242; *"Shu"t R. Akiva Eiger* 114; *Chatam Sofer, Hashmatot Even Haezer* no. 203; *Noda Biyehudah Tinyana* 22.

19. *Shu"t Ran,* no. 28, cited by *Beit Yosef Yoreh Deah* 228, p. 156.

20. *Shu"t Ran* 48; R. Akiva Eiger, *Even Haezer* I:7.

affirms that indeed a *cherem* can be binding on people yet unborn, citing the precedent of Joshua's placing a *cherem* for all time on the rebuilding of Jericho, cursing whoever would do so.[21]

We noted earlier that Yonatan was saved from the penalty for violating the king's *cherem* due to the outcry of the men in the army, acting as a *Beit Din*. This leaves the impression that, under certain circumstances, there may exist an option for canceling the effects of the *cherem*. There is some speculation that R. Gershom himself incorporated into the ban the option that a rabbinic court might exercise the power of suspending his ban in special circumstances:[22]

> Because R. Gershom was not unaware that in future generations radical transgressions may occur and it will be forbidden to uphold them [the bans].....and [therefore] the matter [of the *cherem*] needs to be clarified in a *Beit Din*.[23]

Rabbenu Gershom *Me'or Hagolah*

Although the prohibition of reading someone else's mail is universally ascribed to Rabbenu Gershom, in truth he did not unilaterally pronounce the ban.[24] Rather, in a conclave of rabbis and representatives of all the communities of Ashkenaz,

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21. *Shu"t Rashba,* 142, part 4 -296. Ritva, *Bava Bathra 121;* Rosh, 5:4; *Yoreh Deah* 228:35. See also *Pitchei Teshuva,* no. 30.

22. *Encyclopedia Talmudit*, Vol. 17, p. 415. Note 471 there cites the *Sefer Chassidim* in this context, but I was unable to find that text in the edition of Mossad Harav Kook.

23. *Shu't Chacham Tzvi* 2 introduces the concept of *hora'at sha'ah* (an exceptional, unique situation).

24. Similarly, the *pruzbul* attributed to Hillel in the Gemara, as well as the regulations of Rabbi Yochanan after the *churban*, while bearing the name of the individual who supposedly enacted them, were actually legislated with the concurrence of a *Beit Din* at the time. See Louis Finkelstein, *Jewish Self-Government in the Middle Ages*, p. 28.

certain legislative and religious rules for the maintenance of communal discipline were adopted,[25] and to give these strictures additional import, some of the regulations were pronounced with a ban upon whoever violated them.

In order to gauge the proper application of the ban, it is important to know what the authors hoped to achieve by this enactment as well as the other legislation associated with the time of Rabbenu Gershom. There is speculation that the rationale for instituting a ban on the reading of private mail arose from the exigencies of life for Jews in Ashkenazic communities some thousand years ago. Many, if not most, were involved in commerce, and business deals had to be cemented by mutual trust. Inasmuch as governmental delivery of mail was non-existent, and delicate financial negotiations between parties in different towns had to be entrusted to travelers, it was absolutely essential that the privacy of these negotiations and transactions be maintained. Hence, to prevent the curiosity (or cupidity) of the messenger from tempting him to violate the confidentiality of a letter he might be carrying, the ban gave strong assurance that the privacy of the parties involved would be protected. In the environment of those days, when most people were exceptionally G-d-fearing, a *cherem* was a very strong and important guarantee of the inviolability of written communications.

Protecting the privacy of communications between

25. "The problem which confronted him as lawgiver was different from that which had come before any Jewish leader for generations…. Living in lands of petty principalities it was natural for the European Jews to develop small, independent and jealous communities…each community now had its own traditions….R. Gershom undertook no less a task than that of bringing all these scattered communities into a federation….R. Gershom proposed to establish a voluntary constitution among the communities that would claim its authority solely from those whom it governed…R. Gershom never stepped beyond the limits set in the Talmud to local legislation….It was mainly in the field of civil law…that he undertook to introduce innovations." Finkelstein, pp. 21-22.

individuals is very much in keeping with Jewish philosophy, and its further protection by a *cherem* is in keeping with the tradition of guarding the dignity of persons by not revealing secrets, where possible. In the biblical account of Yosef's meeting with his brothers, note that the Torah tells us that Yosef "was not able to hold back [his emotions] in front of all the people standing around him." But before he revealed his identity, he ordered "remove everybody from before me", and there were no outsiders present when he spoke those stirring words: "I am Yosef—is my father still alive?"[26] Notice two things: Yosef was careful not to have anyone outside the family be privy to the tension which had existed between the brothers. *Da'at Zekenim* explains his thinking – why let the Egyptians know that there had been bad blood between the brothers? The Egyptians are going to be the hosts for the Children of Israel – why let them have pejorative information about them? Furthermore, after he had revealed his identity to them, the Torah says that he then said to them, "'draw near to me'…and he said, 'I am Yosef your brother, whom you sold down to Egypt.'" *Da'at Zekenim* explains that this time, Yosef called to his brothers to come close, so that only they –but not Binyamin—would hear. What purpose would be served by Binyamin's becoming aware of the whole sordid episode?

Clearly, Judaism considers that whenever possible, a person's private matters should be guarded. Thus, the *cherem* protecting the privacy of correspondence is part and parcel of the Jewish way of life.

A Person In *Cherem*

What does it mean to "be in *cherem*"? The particulars are listed in *Bava Metzia* 59b and enumerated by Rambam:[27] One

26. *Bereishit*: 45:1-4.

27. *Hilchot Talmud Torah VII:4-5.* See the *Kesef Mishneh* there who explains why the Rambam fails to mention that others remove their shoes (as a sign of mourning), although the Gemara from which we learn the rules relates

may not speak to him; the excommunicated one, like a mourner, cannot wash his body; in addition, he cannot be counted as part of a minyan or a *mezuman*.[28] Furthermore, one should not sit within 4 *amot* of that person (this may include the wife and children),[29] nor learn Torah with him, although he may learn by himself. In brief, he is cut off from interaction with others, and is only permitted to do enough business to cover his basic needs.[30]

Furthermore, the *Beit Din* is empowered to add further restrictions and penalties upon the recalcitrant individual. Thus, although a person in *cherem* is not counted towards the quorum of 10 to make a minyan, yet Ramo permits him to join in the prayer[31]—unless, according to the *Shach*, the rabbis decide to impose this additional restriction on him.[32]

The *Shulchan Aruch* further rules that *Beit Din* can decide "not to circumcise his newborn sons, nor to bury him should he die, and to expel his children from school and his wife from the synagogue—until he accepts the judgment upon him."[33] Others do not concur that the wife and children can be included in the shunning, inasmuch as they did nothing

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that that was what R. Eliezer did. See also *Yoreh Deah* 334:2.

28. See comments of *Shach, Yoreh Deah,* ibid, 8, if this applies also in a situation where the person is in *cherem* due to financial misdeeds. *Shu"t RivashI* 62 and *Tashbetz* I:123 raise the question, if a person marries two women, is he automatically in *cherem*, or does a *Beit Din* need to issue a *cherem*.

29. See *Yoreh Deah* 334:2, both *Mechaber* and Ramo; *Moed Kattan* 15b discusses whether his wife is permitted to engage in marital relations with him.

30. See Ramo *Yoreh Deah* 334; in no. 228, Ramo rules that a person cannot claim ignorance of the *cherem* as a defense, because the *cherem* applies nonetheless.

31. *Yoreh Deah*, ibid, and *s.k.* 8.

32. *Shach,* ibid,no. 10.

33. *Yoreh* Deah 334:6. *Pitchei Teshuva* questions whether the court can stop a father from personally circumcising his own son.

wrong.[34] However, they would permit refusing circumcision for the child and burial for the perpetrator, since these are specifically the father's obligation and for his honor. If a person dies while still in *cherem*, he can nevertheless be buried in his family plot, if they choose.[35]

Cherem Of Rabbenu Gershom

As noted, Rabbenu Gershom and his colleagues instituted a number of amendments in communal life, enforcing some of them with a *cherem*.[36] Understanding the reasons which motivated enactment of the *cherem* will lead to a better understanding of how and where to apply its terms. If the main purpose was to protect the privacy of a communication, it might apply today to opening someone's computer files or reading another's email. Since these technologies did not exist a thousand years ago, it is important to know if the *cherem* is limited to a narrow situation or whether it was intended to cover all similar contingencies which might arise in the future.

Although there is very little written about the *cherem* not to read another's mail, there is extensive discussion of the other *charamim* of Rabbenu Gershom (dealing with compulsory divorce and multiple wives), from which we may legitimately extrapolate indications how the prohibition about reading mail might apply in modern situations.

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34. *Yam shel Shlomo, Bava Kamma* 11-13.

35. Rashba, V:236, I:763, IV:229; *Shach*, *Yoreh Deah*, ibid, no. 18, p. 36, note 1.*Sefer Chassidim* 707 writes that he should be buried in a separate part of the cemetery; *Shu"t Imrei Yosher 2-3; Menachem Meishiv* I:16 no. 6; Rivash 173.

36. Three in particular are unquestionably authored by Rabbenu Gershom himself: not to divorce a woman against her will, not to have more than one wife at a time, and not to read another's mail. While some other ordinances are occasionally also attributed to him, these three appear in all the sources listing the regulations of the communities, with attribution to Rabbenu Gershom personally. See *Teshuvot Maharam MiRothenburg 1022* and 153; *Machzor Vitry* 576; *Be'er Hagolah Yoreh Deah* end of No. 334.

One of the primary issues to be clarified is the extent and application of the *cherem*. It may not have been intended as an absolute fiat but could possibly be waived in certain situations:

In assessing the impact of the *cherem* of R. Gershom forbidding divorce against the woman's wishes, Rashba writes,

> He only made [his legislation] in order to put limits on *perutzim* (lawless individuals) and those who cast aspersions on their wives, without justification [so as to be able to divorce without paying her the required settlement], but he did not intend that his regulation should apply to those [women] who the rabbis have ruled should be divorced without getting a settlement.[37]

In other words, the *cherem* about not divorcing a woman against her will was intended to protect women whose husbands might try to escape their financial obligations by making false accusations about their purity; it was not intended to protect women who behaved improperly from the consequences of their aberrant behavior. Such a woman can be divorced against her will, *cherem* notwithstanding.[38]

Similarly, when discussing whether the *cherem* against having two wives should apply in the case of a man whose wife was missing but there was only one witness who said she was dead (and in Jewish law, one witness is not enough to establish that as a fact), the *Noda Biyehudah* allowed him to marry someone else, explaining that the *cherem* was never intended to force this unfortunate man to remain in limbo all his life since he could not definitively establish her death; rather, "it was only legislated against *perutzim* (lawless individuals) to prevent their taking advantage of their wives…"[39]

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37. Quoted in *Maharik, shoresh 101; Darchei Moshe* I:10.

38. See *Mordechai, Ketubot* 196,*Shu"t Rashba* I-864, *Terumat Hadeshen* 242, Ramo 115:4, 119:6.

39. *Noda Biyehudah* 141 *Even Haezer* 33; *Korban Netanel, Yevamot,* chap. 10,

It is clear that rabbinic authorities considered that the bans were not absolute, and could be waived when the situation warranted. However, the rabbis were not naïve and did not allow a man to manipulate the system. Thus, if a man claims that his wife committed adultery and therefore he can divorce her against her will, the *Beit Din* will not automatically accept his testimony alone, and will not allow him to divorce her against her will, for fear that he may have an ulterior motive and is just proffering this "evidence" in order to overcome the obstacle of the *cherem* against divorcing a woman against her will.[40] Nor will a *Beit Din* accept a man's plea that his wife is preventing him from fulfilling the mitzvah of going to live in Israel and therefore he should be permitted to divorce her against her will or to take a second wife: "For if so, whoever wanted to divorce his wife and marry another woman would say that he intends to make *aliya*; and maybe he won't even go to live in Israel, or will go and leave—and the upshot will be that he has two wives!"[41]

The *cherem* against reading someone's mail may also need to be set aside at times, depending on the situation. However, it is abundantly clear that it is not the prerogative of any individual to decide for himself that in this circumstance, the *cherem* does not apply. Even if a situation arises where suspension of the *cherem* might be warranted—such as a principal who is convinced that this is the only way to catch a drug dealer in his school, or a husband who is sure that this is the way he will ascertain if his wife is cheating on him, or even the parent who is concerned about friends the child is hanging around with—all need to realize that it is only a *Beit Din* which can grant a waiver from the *cherem*.[42] It is a well known

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no. 200.

40. *Mordechai, Kiddushin* 530; but see Ramo 178:9 and R. Akiva Eiger 88, who disagree.

41. *Otzar Haposkim* 68:11; *Ha'elef Lecha Shelomo* 119. *Poskim* also discuss the situation of a woman whose husband is in jail or is a hostage.

42. The guidelines for when a *Beit Din* might determine to set aside the

psychological reality that a person is always able to justify his action in his own mind; therefore, it is absolutely essential that prior to undertaking interception of any kind of mail, the persons involved seek the advice of a *Beit Din* qualified to judge such an issue.

Severity

How strictly should bans be interpreted and applied? The Maharik considered them virtually equivalent to Torah law: "Whoever violates a *cherem* is as one who violates something from the Torah."[43]

This statement is not to be taken lightly: when there is a question concerning Torah law, we must be strict, but when it concerns a rabbinic enactment, we should be lenient. Regardless of the literal reality of the *cherem*, many rabbinic authorities have accepted with great rigor the principle that "someone who violates it is similar to one who violates Torah law."[44]

Not all authorities concur with all parts of this position, however. Some rabbis consider that we must be strict in enforcing the *cherem* because it has the same status as an oath,[45] while others consider it equivalent to "*divrei kabbalah*"

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cherem will be discussed hereinafter, in the section *bemakom mitzvah.*

43. *Maharik, shoresh* 184.

44. *Halachot Ketanot* 109 was asked by a person who had been asked to deliver a letter for someone, what he should do since he was afraid that the contents of the letter might jeopardize him; he wanted permission to read the letter before delivering it. The rabbi responded that he should either return the letter to the sender unopened, or else throw it away. What is striking is that the rabbi is willing to countenance a possible biblical-level transgression (throwing away someone's property) rather than relax the ban on reading another's mail!

45. *Otzar Haposkim* I:76. The difference in practice if the *cherem* is considered as being on a biblical level or a rabbinic level of prohibition would be in a case of doubt, whether one would rule strictly or leniently.

(tradition);[46] yet others would categorize the bans as rabbinic enactments only.[47] Regardless of the technical status of the *cherem*, it is normative practice to force compliance when possible,[48] and there is a definite proclivity to make issuance of any exemption (*heter*) difficult.[49]

The Ban On Reading Another Person's Mail

Let us turn now to the specific prohibition of reading the mail of another person, and try to determine its scope and application in the present day.

1) What is entailed in the cherem *not to read another's mail—what the rabbis legislated or what people commonly perceived it to be?*

2) What if the recipient of the letter threw it out? Is discarded mail included in the cherem?

3) What if following the dictates of the cherem result in nullification of a mitzvah?

4)Is the beneficiary of the ban permitted to waive his/her privileges under the ban; in other words, can a person decide to forgo the benefit of the cherem?

Unlike Torah law, which is divine fiat, rabbinic law has certain limitations. When the rabbis make an enactment, if the people accept it, then it becomes law; but if "most people cannot abide by it", finding the regulation too restrictive or difficult, the ordinance does not become law. An example is that the rabbis decreed that one could not eat (kosher) food that was cooked by a Gentile (*Bishul akum),* and that ruling was accepted and remains the law; by the same token, they

46. *Noda Biyehudah* 141, *Yoreh Deah* 146.

47. Maharik, *shoresh* 28; *Shu"t Rashbash* 397.

48. *Ritva, Yevamot* 44a.

49. *Achiezer* I;10, note 2; see also *Shu"t Marcheshet* II:1, where he considers the *cherem* to be equivalent to a vow, not an oath.

decreed that one may not use kosher oil prepared by a Gentile (*shemen akum)* but the people found that just too difficult to live with, and therefore it never became law.[50]

There is a third possibility: the rabbis may make a rule, and the people accept part, but not all of it. What is the status of that ruling? Does the entire ban apply, as issued by the rabbis, or does it come into effect following the commonly-accepted version, which may not include all the points decreed by the rabbis?[51]

To apply this putative condition to the *cherem* of Rabbenu Gershom: If[52] it was intended that the *cherem* apply even if it leads to annulment of a mitzvah, but the people found that too hard to live with—then what is the actual scope of the *cherem*? That which Rabbenu Gershom intended, or that which the people assumed?

Writing about the extent of the *cherem* not to divorce a woman against her wishes, R. Yehudah Greenfield writes that he saw in *Responsa HaRim Even Haezer* that originally the *cherem* against divorcing a women against her will seems to have applied also even to the witnesses to the divorce and the *sofer* who wrote the document, but "we do not have to be concerned to observe anything other than what has been accepted in this prohibition; and for what was not accepted,

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50. Another example: R. Gershom made a *cherem* that a man could not leave his wife for 18 months; *Shu"t Maharshag, siman* 200, writes that nevertheless, this ban was not accepted, inasmuch as it was not uncommon for men to be away for several years on business ventures, and no one ever mentioned that they are in violation of a *cherem*!

51. The people who have to accept the ban are the people affected by it at the time it is issued; it is not the prerogative of later generations to decide that it is too hard. See *Torat Chaim* III:47, who insists that it is forbidden to read another person's correspondence, "even though, due to our sins, the numbers have increased of those who brazenly break the rule and secretly read others' letters."

52. This is only theoretical, not a statement that this was indeed the intent of R. Gershom.

there is no *cherem*, even if Rabbenu Gershom did enact it."[53]

Perhaps we can similarly assume that the *cherem* against reading someone's mail was accepted by people with the understanding that the ban would not apply if it prevented parents and teachers from knowing what situations faced the young people in their charge, whom it was their mitzvah to protect and guide. If *roshei yeshiva* and other responsible individuals have been reading letters for many years, perhaps we should assume that this is the way the *cherem* was understood and accepted by the community.

Albeit Rabbenu Gershom and his colleagues legislated for the Ashkenazi community—and their rules were not accepted and generally do not apply to the Sephardic world–nevertheless, this particular *cherem* against reading another's mail was accepted and remains universally recognized. It is customary to write on the outside of an envelope (בחדר"גמה בחרם ד'רבנו גרשום מאור הגולה) or else פג'ין (*pag"in*)(פורץ גדר י–שכנו נחש) [54] ("someone who breaks through a fence [i.e., the "fence which the rabbis erected] will be bitten by a snake.") However, even if there is no such warning written on the missive, the *cherem* applies.

Discarded mail

On the other hand, the existence of the *cherem* does not necessarily apply to all written communications. If someone writes a post card, he can hardly expect confidentiality, since by its very nature, a post card is open to all eyes. As for reading a discarded letter, one could argue that no one expects someone to go through the garbage to retrieve a letter, and that by discarding it the recipient was hardly implying that he didn't mind if it were read by another. In both of these cases,

53. *Shu"t Maharshag* III:44, discussing whether the ban on *kitniyot* includes oil made from *kitniyot* or only the *kitniyot*.

54. *Kohelet* 10:8.

writes *Leket*,[55] one may assume that it is acceptable to read the letter, unless the writer wrote פג׳ין on it, indicating that he was concerned to retain the privacy of the information he wrote. *Be'er Hagolah*[56] similarly rules that "it is forbidden to look at the writing of his fellow man without his permission unless he threw it away."

This raises an interesting question – while it may be true that by discarding the letter the recipient indicates that he doesn't mind what happens to it, yet, how can one know if the writer of the letter wouldn't mind? Perhaps he wrote the letter secure in the knowledge that, due to the *cherem*, no one else would see it, and he would not want the contents known? The author of *Halachot Ketanot* indeed raises that point and therefore rules that one may not read even a discarded letter.[57]

Thus, we must conclude that there is rabbinic sentiment that the *cherem* protects both the writer and recipient of every letter. Even absent any derogatory material in the letter, some say that one is not permitted to share the contents.[58] The Chafetz Chaim, in his *sefer* about constraints on speech, rules that by telling over even seemingly innocuous contents, one may inadvertently cause harm or distress to the writer, and therefore it should not be done.[59]

Bemakom Mitzvah

Perhaps the weightiest issue to resolve in elucidating the parameters of the *cherem* about reading others' mail is, did

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55. 209.

56. *Yoreh Deah* 334.

57. I:59. The *Aruch Hashulchan Yoreh Deah* 334:20 expresses his ambivalence whether it is permitted to read a post card addressed to someone else. Apparently, he feels that possibly the *cherem* protects the privacy not just of the author but also of the recipient.

58. *Chikekei Lev* 1-49.

59. *Shemirat Halashon, Lashon Hara, kellal 2, note 27*. See also *Be'er Ma'im Chaim* No. 27.

Rabbenu Gershom intend his *cherem* to apply *bemakom mitzvah* – when adherence to the *cherem* would prevent a person from fulfilling a Torah commandment? It is one thing for rabbis to enact legislation for the improvement of communal life; issuing a *cherem* is a strong weapon in the rabbinic arsenal, one employed rarely but judiciously. Regardless of the rabbinic prerogative to legislate for the community, for Jews the ultimate authority is always the Torah. And even regarding Torah mitzvot, at times, some take precedence over others. For example, a *rebbe* is permitted to slap his recalcitrant student, even though it is generally forbidden to strike another Jew. But since the *rebbe* is performing the mitzvah of teaching Torah, his discipline is acceptable. Now, if the prohibition to hit a Jew is set aside in order to facilitate the mitzvah of learning Torah, it may be that a rabbinic ban should also be set aside in order to perform a mitzvah.[60]

There is a very great mitzvah to save someone from harm, particularly a child for whom one is responsible; parents, teachers, and administrators sometimes need to have information about a young person's private dealings in order to know if the young person is involved in potentially dangerous activities. If there is concern that the youngster may be into drugs or other harmful behavior, does that permit violation of the *cherem* in order to ascertain this crucial information? How about a parent, who is responsible for the welfare of his child, would he be permitted to read the child's letters, intercept IM's, or read his email?

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60. *Otzar Haposkim* I:14 records a ruling by *Dvar Moshe Even* Haezer I, in a case where a young man married a woman whom his family found totally unacceptable. He therefore wanted to divorce her, but she refused to accept a *get*. *Dvar Moshe* writes that he can marry a second wife, explaining that (a)perhaps the *cherem* was not intended for all time, (b) that *cherem* was not accepted all over, and (c)since there is the additional factor of *kibd av v'em* (honoring one's parents), R. Gershom would never have legislated in such a situation. Similar rulings, setting aside a *cherem*, can be found in Ramo 115:4 and 119:6.

Although it is difficult to find an authoritative opinion of a *Rishon* on this specific question, we may extrapolate from rulings concerning other *charamim.* According to the *Mechaber* of the *Shulchan Aruch*, the *cherem* (against having two wives) does not apply when it impedes performance of the mitzvah of *yibum* (which was still in practice among Sephardic Jews in his time),[61] as he ruled in an instance of the *cherem* against having two wives preventing a person from performing a mitzvah. There was a man who died childless, and his brother would not be able to perform the biblical mandate of *yibum* (marrying the widow) because he was already married; therefore, Rav Karo permitted it.

Ramo concurs with this ruling of the *Shulchan Aruch* that if following a *cherem* of Rabbenu Gershom would impede performance of a mitzvah, then the *cherem* does not apply.[62] In his gloss to the *Shulchan Aruch* there, he writes, "*vehu hadin bechol makom mitzvah*" ("and this is the rule whenever it is a matter of performing a mitzvah"). Ramo notes that although there is a *cherem* of Rabbenu Gershom not to divorce one's wife against her will, but if a couple has lived together for ten years without having children, he is permitted to divorce her in order to marry someone else and try to fulfill the mitzvah of having children.[63] Nevertheless, he concedes (*yesh omrim)* that there are those who do not agree with him but maintain that the *cherem* of Rabbenu Gershom applies regardless, even for performance of a mitzvah. [64]

The Ramo's ruling seems equivocal, for it does not indicate what the actual halacha is— should one follow the *cherem* or

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61. *Even Haezer* 1:8.

62. *Even Haezer* 1:10. This is analogous to the concept that often the rabbis specified that their decrees did not apply in cases of great pain or monetary loss.

63. Ramo, ibid; *Maharik, shoresh* 91 and 102.

64. Rambam, *Hilchot Ishut* 15:7; *Shulchan Aruch* 154:10; Rashba III:446; Radvaz I:126; Ramo *Even Haezer* I:10 and 119:6.

set it aside in order to fulfill a mitzvah? According to *Ein Yitzchak*,[65] when the *Shulchan Aruch* or Ramo make a statement, and then "hedge" the ruling with the observation that "there are those who say differently" (*yesh omrim*), we follow the first ruling, not the partial retraction. Thus, the authoritative ruling would be that for mitzvah fulfillment, the *cherem* may at times be abrogated.

If one assumes that Rabbenu Gershom did not institute his *cherem* in a situation where it would lead to violation of a mitzvah, then a principal or parent would be permitted to read mail of a young person for whom he is responsible.[66] However, if we accept the argument of those who claim that the *cherem* applies in all situations, the adult would not be able to invade the privacy of the student/child.

We hasten to emphasize once again that the decision to set aside a *cherem* is a serious issue which no individual is qualified to decide for himself; only a qualified *Beit Din*[67] can permit a step of such magnitude.[68]

On the other hand, we need to note that in order to rectify a transgression, the rabbis readily suspend a *cherem*; thus, if a *kohen* married a divorcee, which the Torah forbids, the rabbis will allow him to divorce her even against her will, because he should not have married her in the first place.[69] In other cases, where a woman abandoned her husband and ran off with

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65. *Ein Yitzchak* II 57.

66. Rabbi J.D. Bleich, in *Tradition* vol. 16, no. 3, p. 119, quotes an article by Rabbi Chaim David Halevi in the Adar and Tammuz issues of *Shma'atin* 5736 as expressing the same opinion. This ruling was later incorporated by R. Halevi in his book *Aseh Lecha Rav*, part 1, 42.

67. *Shu"t Yeshuot Malko Even Haezer* 7; *Meishiv Davar* 4:9.

68. This is not such a burdensome requirement: in American law, the police cannot search someone's home unless they get a warrant.

69. *Terumat Hadeshen* 256; *Iggerot Moshe Even Haezer* I:2 agrees, but raises the question if a "permit from 100 rabbis" is needed if she refuses. Suspension of a mitzvah in the face of a sin is discussed by Tosafot, *Sota* 18a.

another man, or committed adultery, the rabbis permitted him to divorce her even without her consent.[70]

The author of *Chikekei Lev* does not seem to accept the premise that "in the case of a mitzvah, the rabbis did not intend their decree to apply."[71] He bases his responsum on the issue of why the *cherem* about reading mail was instituted: if it was done to prevent someone from cheating or fooling another person (*gonev da'at habriot*), or any other form of intellectual theft, then it would be forbidden to read the letter, even in case of a mitzvah. *Chikekei Lev* maintains that the fact that people assume that the *cherem* doesn't apply in this case does not change the reality that it does apply. Whether or not a *Beit Din* can overrule the *cherem* is, in his opinion, debatable.[72]

Umdenah

Do the rules concerning the *cherem* apply even if it is common knowledge that people are going to violate it? For example, if students in a dorm or campers in camp know that administrators feel they are entitled to intercept and read the mail of their young charges, does that make it permissible for the administrators to do so?

In order to be able to address this situation correctly, we have to clarify a number of issues:

1.There is a concept in Jewish law called *umdenah*, which roughly translates as "a common assumption."[73] Does

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70. *Pitchei Teshuva Even Haezer* 1:16.

71. *Yoreh Deah* 49. The case concerned someone who has in his possession a closed letter sent by a person who, he fears, is out to harm him, and the question was whether he could read the letter to protect himself.

72. Ultimately, he does permit the person to open the letter, but for a different reason.

73. For more detailed parameters of this term, and when and where it is used in legal parlance, see my article on *Umdenah, Journal of Halacha and*

"common practice" change the rules? Are we entitled to assume that everyone knows that phone conversations, computer files, email, and text messages are readily accessed by others, and that by employing these devices, the users have tacitly forfeited their right to privacy? Are administrators of schools and dormitories justified in claiming that students know that in this place reading students' email is common practice, or does the *cherem* remain intact despite their prior knowledge and apparent acceptance of the terms of attendance in this school?[74]

It may be analogous to the rule regarding a post card, which is almost certainly not covered by the *cherem*, inasmuch as everyone realizes that anything written on a post card can be read by anybody at all; it was never intended as a private communication and the *cherem* simply does not apply here.

Waiver

A further question is whether a person may voluntarily forego the right to privacy guaranteed by the *cherem*. A possible parallel may be found in the marital obligations which the Torah places upon a man; [75] if she so wishes, the wife may exempt her husband from his personal obligation to her. Moreover, the obligation does not fall equally on all husbands—those engaged in certain professions have different

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Contemporary Society, Vol. IXL, p. 51.

74. Ritva, *Yevamot* 44a, *d"h eitza tova.* Rav Engel in his book of *Shu"t* 4:36, brings the case of a man who married a 35-year old woman, and lived with her for seven years without children. Now he wants to divorce her and marry someone else, in order to have children, but the wife doesn't want to accept the *get*. Therefore, he wanted permission to take a second wife. Rav Engel expresses his hesitation about ruling, and criticizes the man for getting himself into the situation of childlessness, when he willingly married a woman who was already late in her childbearing years! This is akin to the situation of students who willingly enter an institution where they know their mail will be monitored.

75. *She'ar, kesut, onah. Shemot* 21:10.

rules.[76]

Can we extrapolate from this halacha that a woman can exempt her husband from the strictures of the *cherem*, and, if so, that in other situations a *cherem* may similarly be abrogated? [77]

The Ran asserts his view that the prerogative of waiver does indeed exist. He is even prepared to grant a woman the right to permit her husband to have more than one wife. Since the *cherem* against two wives was instituted for her benefit, Ran opines that she can forego it.[78] As previously noted, others strongly dispute this assertion—perhaps he will pressure her so much that she feels compelled to acquiesce; therefore it can not be countenanced under any circumstance. Despite some other lenient opinions, the Ramo does not accept the contention that a woman has the option to forego her rights under the *cherem* of having two wives or unwilling divorce. For him the bottom line is, "in my whole life I have never seen someone marry two woman, even if the first would be reconciled to his doing so."[79]

However, even if we were to follow the minority view that it is possible to voluntarily forfeit one's rights, we cannot extrapolate from that to the *cherem* of reading another person's mail, because in the latter case, there are two parties involved: the sender and the recipient. Even if the recipient does not care who reads the letter, the sender might harbor inhibitions about

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76. *Shulchan Aruch Even Haezer* 76.

77. Thus, despite the existence of a *cherem* by R. Gershom that a woman cannot be divorced against her will, it is the woman's pretogative to agree to marry someone with the proviso that that *cherem* will not apply to ther marriage. See *Chelkat Mechokeik Even Haezer* I, note15, and *Shu't Me'il Tzedek,* par. 33.

78. *Shu"t Ran* 48; *Hagahot of Rabbi Akiva Eiger* No. 7. *S'dei Chemed* vol. 4, p.133, no. 18.

79. *Darchei Moshe Even Haezer* 1:8; *Beit Shmuel* 20; *Shu"t Chaim veShalom* #26 writes, "if this were so [that she could forego her rights], what did R. Gershom accomplish with his ruling?

it. This is true not only with respect to regular mail, but also to email. And to return to our putative situation in a school dorm, even if the student realizes that others might read the mail, the sender almost certainly is not aware of the need for caution.

If we accept the premise that even if the recipient of a letter is willing to let its contents be known, the writer perhaps still retains his right to assume that the correspondence will remain private, how then is it permissible to publish personal letters which were sent to the author? Yet, it is quite common to find printed responsa sent by rabbis to persons who asked a halachic question, or personal letters of *gedolim (*outstanding individuals) to their family or friends. We need to examine this question more closely, because public figures may present an exception to the general rule.

Privacy Of A Public Figure

We have been inculcated with the conviction that "all men are created equal" and therefore the law should be administered equally to all, irrespective of other factors. In actual fact, many cultures have long realized that that is not necessarily a wise or desirable approach, and in our own American society, persons such as senators, judges, and the President himself have privileges and immunities which others do not. In Jewish thinking, a person who holds a leadership position has special responsibilities, which set him apart. Paradoxically, he sometimes has less privilege than others, not more.

The Talmud relates some rather surprising incidents of invasion of privacy, perpetrated to learn the Torah's teachings about proper behavior in private situations:

R. Elazar admits that once he followed R. Yehoshua into a privy, and learned three laws of behavior by observing him. When he was challenged—how could you do such an outrageous thing! he answered simply "It is Torah, and I need

to learn it."[80] Similarly, ben Azai reports that he too once followed his teacher into the bathroom, giving the same reason—"it is Torah, and I need to learn it."[81] The same rationale was offered by a student who even went so far as to hide under his *rebbe's* bed on the latter's wedding night!

Both these incidents, recorded without any censure, illustrate that in the protocol of the Talmud, a rabbinic teacher cannot really have a private life: his disciples need to learn from his behavior the proper way to go about their own private lives. People need to learn from the life and struggles of great Jewish figures, and therefore—as in the Talmudic precedents—a person who holds a prominent position in society or the community is in some ways not entitled to enjoy the same level of protection of privacy as "ordinary" individuals.

Therefore, it may be quite legitimate to publish even private correspondence of major communal figures.[82] However, that does not imply carte blanche to invade their privacy by discussing matters which are not in any way important to be known.[83]

We should also take into account that *Chazal* differentiated between the audiences of private revelations: although an incident concerning an important person may be true, it may not be necessary to expose it to the entire world; nevertheless, scholars need to know the truth and a leader's privacy cannot

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80. *Berachot* 62a.

81. Ibid. Although his rabbi had taught him the laws verbally, ben Azai contended that seeing these directives being performed by his teacher would assure that the concepts would be more firmly rooted in his mind.

82. Rav Y.Y. Weinberg, author of *Seridei Eish*, once wrote some derogatory remarks about an individual in a letter, which letter was printed in a book of his letters vol.II (#109). Amazingly, he writes in another letter published in the same book (#110) that he would not have wanted his derogatory opinion to be publicized—yet he apparently allowed it to be published in his very own book!

83. Rabbi JJ Schachter, *Torah U'Madda Journal,* Vol. VIII, pp.200-277.

be shielded from them. So, for example, the Gemara teaches that when we read publicly from the Torah, the verses relating the sin of the Golden Calf are read aloud, but are not to be translated (as was the custom for the rest of the Torah reading). Their thinking was plain: the verses reveal the unhappy truth that Aharon had a hand in fashioning the Calf; scholars who understand Hebrew will understand what happened, but ordinary people will not be aware of the nuances of the episode. The truth has to be recorded; those who are able to understand it, need to learn it; but it is not necessary for everyone to hear about the less than proud events. So Aharon's dignity is preserved to some extent, although not totally shielded from those who need to know.[84]

It seems that a distinction is made between information which will be widely disseminated to a broad audience, and other information, such as responsa literature (*Shu"t*), intended primarily for Torah study by scholars who can handle the truth with discretion. That distinction should properly be respected when it comes to writing biographies: those that are directed toward a popular audience need to be very careful about the *cherem* of Rabbenu Gershom; a book about the life of a great man, which is directed towards serious scholars, may need to adhere to different parameters.

If, as we have seen, R. Gershom's *cherem* may be suspended in order for a person to be able to perform the mitzvah of bringing up children properly, then it follows that the *cherem* whose object is to protect privacy may also be suspended when it comes to teaching Torah values from the private lives of outstanding individuals.[85]

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84. This may in part be the reason why many leading rabbis objected to a recent book, *The Making of a Gadol*, inasmuch as some of the revelations are not suitable for a general audience, who may mock them due to their lack of understanding.

85. There is a halachic debate relevant to this question: The *Shach* (*Choshen Mishpat* 292:35), relying on the Tosefta, permits someone to "steal" [sic] another person's Torah, apparently adopting the position that Torah is

Perhaps this explains why rabbis often publish letters written to them, asking for a halachic opinion, without seeming to be concerned about the *cherem* of Rabbenu Gershom. Correspondence of a public figure may be important for the public to know and therefore cannot be covered by the protection of the *cherem*. It is instructive to note, however, that if the subject of the inquiry was of a personal nature, Rav Moshe Feinstein was careful to shield the identity of the questioner. Also in the published letters of Rav Hutner and of the Chazon Ish, the name of the person to whom these *gedolim*

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public property; the Gra concurs with this view. However, in *Yoma* 4b, the Talmud takes the opposite view, and rules that it is forbidden to repeat a private conversation to someone else. The Talmud bases this understanding on the repetition of the phrase "*vayomer Hashem el Moshe laimor*" "*Hashem* said to Moshe to say [to the Jewish people]…", absent that last word, *laimor*, Moshe would not have been permitted to repeat to the Jewish people anything which he had been told in private. The word *laimor,* according to this understanding, indicates that Moshe needed special permission to repeat to others any private conversation with *Hashem.*

This debate is the subject of an article by the then Chief Rabbi of Israel, R. Shlomo Goren, responding to a letter from R. Shaul Yisraeli, who objected to Rabbi Goren's publishing some Torah thoughts that R. Yisraeli had sent him in a private letter. Rabbi Goren cites the sources named above, and argues that there is no privacy or private ownership of *divrei Torah.* Interestingly, neither of the rabbis mention the view of the Chafetz Chaim, in *Shemirat Halashon, Be'er Mayim Chaim, Hilchot Lashon Hora* 2:27: the format of *Hashem's* conversations with Moshe Rabbenu presents a special situation which cannot serve as a precedent in most situations. *Hashem* spoke to Moshe from *ohel moed,* the Tabernacle in the desert. The Voice reached Moshe and no one else, and it was as if Moshe was drawn into a private space and told, "I have something to say to you, which only you can hear." Therefore, it required a special directive from the All-mighty to Moshe, permitting him to tell others as well. From this, we learn that unless the speaker demonstrates, by action or word, that the conversation is private, one is indeed permitted to repeat it. By extension, only if the person writing a letter of Torah thoughts specifically writes "בחדרג"מה, פגי"נ must the letter be kept private; otherwise, it can be repeated and publicized. However, this does not mean that, absent such a warning, anyone is free to publish or disseminate the Torah writings of another person, because even if there is no problem about the *cherem*, there may still be an issue of causing someone a financial loss, which is of course forbidden.

were responding is never included.

However, revelation of some private matters in biographies may be justified because learning about the life and growth of an outstanding individual can serve as a guide and inspiration for others. To paraphrase the Talmud, "it is Torah, and we need to learn it." Similarly, it seems that elucidating the opinions of *gedolim* through their private correspondence may serve a beneficial purpose for the Jewish community and might be countenanced for that reason.

Conclusion

As we have seen, the term *cherem* denotes a serious infringement of religious law, carrying with it anathema and disgrace. In our study, we have sought to flesh out the particular image of the *cherem* against reading someone's mail. While there may be some technical exemptions granted to email, or voice "mail", or other forms of electronic communication developed in the modern age, we ought to look not at the technical exceptions but rather try to internalize the underlying philosophy of Judaism expressed by the *cherem*. Our rabbis intended, through their regulations, to safeguard the sanctity of other people's privacy and to foster respect for the dignity of the individual.

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