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Dedicated To

Dr. Marvin Schick

For his sixty years of
tireless and indefatigable efforts
on behalf of Klal Yisroel and Jewish education
and for thirty-six years of inspiring leadership of
the Rabbi Jacob Joseph School and its divisions,
including the Jewish Foundation School for the
past eighteen years.

May Hashem grant him the strength and vitality
to continue his important work and may he and
his wife, Malka, have many more years together
in good health, happiness and nachas from their
children

Rabbi Dr. Richard & Devorah
(Baruch) Ehrlich
Dean, Jewish Foundation School
Staten Island, New York

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Editor

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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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Correcting the *Ba'al Koreh*:[1] Punctilious Performance vs. Public Embarrassment

Rabbi Moshe Rosenberg

Introduction

In 1947, *Rishon LeTzion*, Rabbi Ben Zion Meir Chai Uziel, the Sephardic Chief Rabbi of Israel, was approached with a sensitive query:

> יורנו רבנו בענין העולה לתורה בשבת ברביעי ולא קרא את הטעמים בדקדוק, דהיינו ג׳ או ד׳ פעמים לא הבדיל בין פשטא לאזלא או בין זרקא לפשטא והנה זה שעלה אחריו בחמישי התחיל לחזור את רביעי מתחלתו באמרו שיש בזה דין נשתתק. ורק אחרי שהפצירו בו מחשובי הקהל חזר בו וקרא מתחילת חמישי, אבל בעגמת נפש ממש.
>
> ולכן האם אין בזה ע״י החזרה משם בושה וכלימה לזה שקרא את רביעי, ויוהרא לזה שעלה לחמישי ורצה לקרוא את רביעי

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1. I wish to express gratitude to Rabbi Hershel Schachter, Rabbi Mordechai Willig, Rabbi Dovid Cohen and Rabbi Zvi Harari for giving of their time and wisdom in discussing issues related to this paper, and to Dr. David Berger and Mr. Eric Freudenstein, *z"l*, for graciously reading an earlier version of it and offering illuminating comments.

This article is dedicated to the memory of my father, הרב ישראל דוד צבי בה״ר יצחק מרדכי who made the love of accurate Torah reading a part of my soul, even as he inspired generations of Bar Mitzvah boys, one at a time.

One might consider correcting the very term "*ba'al koreh*," and opting instead for "*ba'al keriah*," even in the singular. I must confess my lack of expertise to decide this weighty issue; my impression is that both terms are technically acceptable.

Rav of Congregation Etz Chaim of Kew Gardens Hills and teacher of Judaic Studies at the SAR Academy.

מתחילתו? האם אין בזה הוראת הלכה שלא במקומה? אנו מחכים למעכ"ת שיפקח עינינו בהוראתו ויתן לנו לשתות לרויה מזרם מימיו הכבירים הטהורים.

Please teach us, our Master: Regarding a Torah reader who read the fourth aliyah *[the Torah reading] on Shabbat, but did not read the* trope *[musical notations] accurately, that is, three or four times failing to distinguish between* pashta *and* azla *or between* zarka and pashta. *Then the reader who followed him for the fifth* aliyah, *began to reread the fourth* aliyah, *saying that the previous reading was [unacceptable and] tantamount to the reader's having lost his voice. Only after important members of the congregation repeatedly insisted on it, did he relent and read from the beginning of the fifth* aliyah, *but the incident involved tremendous anguish.*

Doesn't the second reader's attempt to repeat the fourth aliyah *involve embarrassment and shame to the reader who read that* aliyah*, as well as arrogance on the part of the second reader? Does it not involve passing judgment on a matter of law in an inappropriate context? We await His Torah Eminence to open our eyes with his decision, and allow us to drink our fill of the flow of his pure and powerful waters [of Torah].* [2]

Few mitzvot of the Torah require greater attention to detail and accuracy than the public reading of the Torah. Correct Hebrew pronunciation, memorization of vowels, placement of emphases and chanting of *trope* are all hurdles a *ba'al koreh* (the congregation's designated public reader) must overcome on the way to a competent Torah reading through which his listeners will discharge their obligation. If he is successful, his listeners will be uplifted and inspired, feeling themselves back once more at Sinai receiving the Torah.

Yet hardly any mitzvah is so fraught with opportunities to publicly embarrass a fellow Jew. Every shul has its own horror

2. Responsa *Mishpetei Uziel* Vol. 3, addenda, no. 8.

stories of *ba'alei keriah* who finished their task with the bitter taste of public degradation in their mouths because of numerous corrections, necessary and unnecessary, whispered and shouted, by *gabbai* (sexton) or persons at prayer, which punctuated the *keriat haTorah*. Epithets, like "Captain Milra" or "The Gotcha Gang," have been lavished upon those irrepressible shul-goers who feel the need to call out corrections, not wanting to rely on the Rav or *gabbaim*. An entire subgenre of humor has developed of how *ba'alei keriah*, infuriated by such corrections, have schemed to make the correctors look as foolish as those they purport to correct. Conversely, every shul-goer can recall when poor, even painful, readings were tolerated, and corrections not made, with the justification that the reader needed to be encouraged, not intimidated.

And the tension remains. Surely a congregation is entitled to expect an accurate and halachically acceptable reading, but what of those times when the price to pay is the discomfiture of the reader? Surely a reader is entitled to dignity and respect, but what if the price is a flawed Torah reading; is that not a diminution of the dignity due to the congregation (let alone the Torah itself)? Must a *ba'al koreh* be corrected at all? What errors warrant correction? Are there circumstances in which extra leniency can be applied, such as for a Bar Mitzvah or a Torah reader whose ego is easily bruised?

This article will attempt to trace the development of the rules governing the correction of the *ba'al koreh* from talmudic times to authorities of our own generation. It will focus on the view of the Ramo, most prevalent in Ashkenazic circles, that only errors that change the meaning of the reading require correction. It will establish which errors must be corrected for those who follow the Ramo, as well as which non-correctable errors, commonly unremarked upon, may be tightened up by those congregations with the ability to do so. Finally, it will suggest an educational approach, encompassing all parties to the mitzvah, for how a shul might achieve the highest quality

keriah, while chancing the least embarrassment of well-intentioned readers.

Rambam vs. *Manhig*

The primary dispute regarding the correcting of a *ba'al koreh* appears in the *Tur*.[3]

> כתב בעל המנהיג אם טעה הקורא או החזן המקרא אותו טוב שלא להגיה עליו על שגגותיו ברבים שלא להלבין פניו דאף על פי שטעה בה יצא ידי קריאה דאיתא במדרש שאם קרא לאהרן הרן יצא והרמב"ם ז"ל כתב קרא וטעה אפי' בדקדוק אות אחת מחזירין אותו עד שיקראנה בדקדוק:

> *The author of the* Sefer HaManhig[4] *wrote: If the reader or the Chazan erred, it is good not to correct him in public for his errors, in order not to embarrass him, for even though he erred, he has fulfilled the obligation of reading, for the Midrash says that one who reads "Aharon" as "Haron" has fulfilled his obligation. But Maimonides wrote: One who read and erred, even in a minor point* (dikduk) *of one letter, is sent back to repeat until he reads it with precision.*

What emerges appears[5] to be a dispute extending from one extreme to the other, with the Rambam requiring every minor error to be corrected, and the *Manhig* allowing them to be disregarded, at least when there is a possibility of embarrassment.[6] Let's take a closer look at both of these opinions.

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3. *Orach Chaim* 142.

4. R. Avraham b. Natan (ha-Yarchi) of Lunel (1155-1215).

5. But see below for what is more likely the precise view of the *Manhig*.

6. Here is a good place to note the obvious: Barring the potential for embarrassment, every *posek* would advocate correcting all errors, whether or not they change the meaning, be they in words, vowels or melody. It is only because such a practice is often impossible, and leads to embarrassment and strife, that leniency is suggested by some. Were a *ba'al koreh* to explicitly request to be corrected, officially forgiving any potential embarrassment in advance, the door would be open to correcting everything, in accordance with the view of the Rambam. Such a course, however, could create other

Rambam

The *Beit Yosef* suggests that the source of the Rambam's stringent view is a passage in the Jerusalem Talmud:[7]

טעה בין תיבה לתיבה מחזירין אותו אפילו טעה בין אם לואם

One who errs between words is to be sent back, even between "im" *and* "v'im."

He suggests proofs for this position, including another passage in the *Yerushalmi*[8] which states that minor errors may be overlooked in the reading of the Megillah, implying that such a dispensation would not apply to Torah reading. This proof is considered conclusive by the Gaon of Vilna,[9] who rules in accordance with the Rambam. R. Yosef Karo records this as normative, first in his *Beit Yosef* commentary on the *Tur*, and then in the *Shulchan Aruch*.[10] A noted dissenting viewpoint, whose opinion continued to reverberate for centuries, is R. Yoel Sirkes, known as the *Bach*, who writes[11] that although the *Tur* seems to rule in favor of the Rambam by listing him last, nevertheless the common practice was in accordance with the *Manhig's* approach. R. Ovadia Yosef,[12] recording the practice among Sephardim who follow the rulings of R. Yosef Karo, prescribes the correction of all mistakes in words, though not those involving melody.

Even after a more moderate position was codified for Ashkenazim by the Ramo, as will be discussed below, there were still authorities who insisted on hewing to the Rambam's

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problems, particularly in matters of parity among readers and pressure on others to live up to the near-impossible standard of one.

7. *Megillah* 5:5.
8. Ibid 2:2
9. *Biur HaGra*, O. C. 142.
10. *O.H.* 142:1.
11. *Tur O.H.* 141:2.
12. *Yalkut Yosef*, Laws of *Keriyat HaTorah.*

path. In a story related by his grandson, Rabbi Chaim Soloveitchik of Brisk is said to have ruled in accordance with the position of the Rambam.[13] Rav Yosef Dov HaLevi Soloveitchik related how once, as a youth, he was called to read a *Haftarah*. Flanking the sides of the *shulchan* (table upon which the Torah scroll rests) were his grandfather and R. Simcha Zelig, the *Dayan* (judge) of Brisk. R. Chaim Soloveitchik warned his grandson not to make a mistake even in the *trope*--because they would correct him! In retelling the story, Rabbi Hershel Schachter provided his teacher's explanation: The *Yerushalmi* that formed the basis of the Rambam's position excuses minor errors in the reading of *Megillat Esther,* because the Megillah refers to itself as *iggeret,*[14] implying a less formal document. This leniency applies neither to the reading of Torah nor that of *Neviim* (Prophets). Hence the most minor error, even in a *Haftarah,*[15] must be corrected.

The *Manhig*

Before discussing the content of the *Manhig's* view, it must be noted that the citation to which the *Tur* refers does not appear in most editions of *Sefer HaManhig* that are commonly available. The passage in question was restored to the text in the scholarly edition published by Mossad HaRav Kook, based upon a single ("New York") manuscript. This would seem to be the authentic reading, inasmuch as the view of the *Manhig* is referred to, in various ways, by the *Tur*, the *Terumat Ha-*

13. See R. Tzvi (Hershel) Schachter, *Nefesh HaRav*, p139; *Masorah* (periodical of Orthodox Union), Vol. 6, p.25.

14. 9:29.

15. This would not seem to be the prevalent attitude towards corrections in *Haftarot*. Some maintain that there is no need to correct *haftarot* at all, since the *tzibbur* should be reading along, while others would correct nonetheless. I have not been able to find sufficient discussion in print regarding correcting *Haftarot*, and would be grateful to any reader who could refer me to such literature.

deshen,[16] and the Mahari Bruna.[17] Moreover, similar views proliferate among Ashkenazic scholars, such as Ra'aviah, the *Agur*, the *Orchot Chaim*, and the *Sefer Chasidim*, as we shall see.

In its simplest reading, the *Manhig's* position is that one need not correct errors even when they change the meaning of a word, because this might entail humiliation of the *ba'al koreh.* Rabbi Yehiel Michel Epstein, author of *Aruch Ha-Shulchan*, could not envision such far-ranging license, which flies in the face of the Jerusalem Talmud cited above. Furthermore, he contested the *Manhig's* use of the Midrash regarding the changing of "*aharon*" to "*haron*," claiming that the language of the Midrash refers only to a child or unlettered person in their private conduct, not a representative of the congregation.[18]

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16. *Ketavim U-fesakim*, 181.

17. A student of the *Terumat Ha-deshen*, who reproduces his teacher's responsum verbatim, with a brief addendum, in his *teshuvot*, no. 90. This duplication was explained by Prof. Ephraim Kanarfogel, in a private communication, as follows: "The phenomenon that you describe is not uncommon, if not fully explained. There are a number of such 'reproductions', both by R. Yisrael Bruna who was a student of *Terumat ha-Deshen* and by others of this period. (A number of *Teshuvot Maharil*, for example, are also reproduced by various of his students or their students). Whether this was for preservation, for sharing the material with others or mostly in order to respond is not always clear. Indeed, as you may have noticed, #180 in *Terumat ha-Deshen* is reproduced verbatim in *Mahari Bruna* #89 with no addendum, the one (181/90) that you are working with ratifies the *Terumat ha-Deshen* and adds what Mahari Bruna did (without his mentioning his name), and the next set has two from the *Terumat ha-Deshen* (182-83) with a long discussion by Mahari Bruna (#91), in which he includes and 'signs' his name. And these are not the only cases, as I mentioned. Yedidya Dinari has a brief discussion of this phenomenon in his *Hachmei Ashkenaz be-Shilhei Yemei ha-Benayim* [sic] but doesn't offer a full explanation, other than the possibilities that I mentioned above."

18. The *Aruch Ha-Shulchan's* objection might be sustained against the language of the Midrash in *Shir Hashirim Rabbah,* but it is clear from the *Manhig's* language and his application that he was working from a version of the Midrash more akin to the formulation found in Tosafot to *Avodah Zarah* 22b s.v. *digla*, where the language clearly refers to the discharging of an obligation, and not the mistaken act of a child or boor: מנין לקורא בתורה שקרא לאהרן הרן שיוצא.

These considerations led the *Aruch Ha-Shulchan* to argue that the *Manhig* formulated his leniency only with respect to mistakes in *trope*, but not those in words. The obvious difficulty with this resolution is that the Midrash is clearly referring to a mistake in a word – *Aharon*.[19] Likewise, neighboring Midrashim in *Shir Hashirim Rabbah* deal with mistakes in words that change meaning, such as saying "*V'ayavta*," instead of "*V'ahavta*." Nevertheless, an examination of the complete citation from the *Manhig* supports the *Aruch Ha-Shulchan's* conclusion:

> אם טעה הקורא בתורה או החזן המקרא אותו טוב לו שלא להגיה לו על שגגותיו מלהלבין את פניו ברבים כי אע"פ שטעה יצא ידי קריאה, דאמרי' במדרש מנין שאם קרא לאהרן הרן ולאברהם אברם שיצא ידי חובתו שנא' ודגלו עלי אהבה פי' ושקר שלו במשלי קסם על שפתי מלך במשפט לא ימעל פיו, בדינא לא לידגול פומיה, תלמ' חכמים המדגילין זה לזה בהלכה, וכן פרש רבנו יעקב מ"כ פ' אין מעמידין בע"ז דיגלא בחבריה ידע ואלו הן ראיותיו אך אם טעו ביתרון אות אחת או בחסרון או שקרא לדלת ריש או לריש דלת בדבר שהוא כלפי מעלה שהוא כמחריב את העולם אין עצה ואין תבונה לנגד יי', ויש עלינו להגיה לו בקול רם עד שיחזור בו לקרות כהוגן וכדת.
>
> *If the Torah reader or the Chazan erred, it is good not to correct his mistakes (so as) not to embarrass him in public, for even though he erred, he has discharged his obligation to read. For we say in the Midrash, "From where (can we derive) that if he read 'Aharon' as 'Haran,' or 'Avraham' as 'Avram,' that he has discharged his obligation? As it says, 'And his banner* ('diglo'*) is over me with love.'" This* ('diglo'*) means 'his lie.' The verse in Proverbs (says) "A divine sentence is in the lips of the king; his mouth lies not in judgment," [and the Targum renders the latter phrase:] "*b'dina lo **lidgol** pumei." *(And this is the same sense as the talmudic phrase) "scholars who lie (*ha-**madgilim**) *to each other in halacha." So Rabbi Jacob, may his rest be in honor, explained in the chapter* Ein Ma'amidin *of Tractate* Avodah Zarah, *on the phrase "*digla

19. See his way of solving this difficulty in 142:3.

b'chavrei yada*," and these were his proofs.*

But if they erred with an extra or deficient letter, or read a [letter]* dalet *as a [letter] resh or vice versa, in a matter which refers to the One above* (klapei ma'ala*), which is tantamount to destroying the world, then "There is no counsel or understanding before Hashem...," and we must upbraid him loudly, until he returns and reads it properly and according to law.

In the latter part of his words, the *Manhig* makes clear that a mistake which is serious enough must be corrected. One could cavil over whether that means only those that are particularly blasphemous,[20] or any error that changes the meaning of a word, but the initial, all-encompassing license one would have expected based on the citation in the *Tur* undergoes limitation.

Even if the view of the *Manhig* is thus curtailed in scope, it must be observed that other authors of early Ashkenaz most certainly adopted the broader form of the leniency. The clearest such example is R. Yehuda He-Chasid in *Sefer Chasidim*:[21]

אם יפלא בעיניך על אותן המגמגמין בלשון וקורין לחי״ת ה״א ולשי״ן סמ״ך ולקו״ף טי״ת ולרי״ש דל״ית איך מתפללים או איך קוראים בתורה ואומרים דבר שבקדושה כשמגיעים לנפשנו חכתה לא נמצאו מחרפים ומגדפים אל תתמה על החפץ כי בוראינו אשר הוא בוחן לבות אינו שואל כי אם לב האדם אשר יהיה תמים עמו ואחרי שאינו יודע לדבר כענין מעלה עליו כאילו אומר יפה. וכן אותם הקוראים פסוקי דזמרה בקול רם ונעים זמר ואינם יודעים הפסוקים ואומרים בטעות תפילתם וזמירותם מתקבל כריח ניחוח. וגם הקב״ה שמח עליו שמחה גדולה ואומר כמה הוא מזמר לפני לפי דעתו על זה נאמר (שה״ש ב׳ ד׳) ודגלו

20. I believe a case could be made that the reference to "destroying the world" and the example of interchanging the *dalet* and *resh* letters may be a reference to the error mentioned in the *Sefer Chasidim* below, in which a *kohen* said "*ve-yishmidecha*," rather than "*ve-yishmirecha*." This would leave the *Manhig's* position basically intact regarding all but the most egregious errors.

21. Cp. 18; p. 81 in Margaliyot Ed.

עלי אהבה מעילתו עלי אהבה. במשפט לא ימעל פיו (משלי ט״ז י׳) מתרגמינן לא ידגל פומיה.

If you are surprised at how those who stutter in their speech, and pronounce a chet *as a* hey, *a* shin *as* a samech, *a* kof *as* a tet *and a* resh *as a* dalet, *can pray [in public] or chant the Torah and say* devarim she-bikedushah--*when they reach the words* nafshenu chikta *[with a beginning* chet, *meaning "our soul awaits G-d," and say instead* nafshenu hikta, *with a beginning* hey, *meaning "our soul strikes..."] are they not blaspheming? Do not be astonished at the matter. Our Creator, who sees into every heart, requires only that one's heart be perfect with Him, and when one cannot speak properly, considers it as if he had. Likewise, those who recite the* pesukei de-zimrah *aloud, with a melodic voice, but are unfamiliar with the verses and err, have their prayers and melodies accepted like an offering of pleasant aroma. Moreover, G-d rejoices greatly over such a person, saying, "See how much he sings before me, according to his understanding!" Concerning such a case the verse says* (Shir Ha-Shirim *2:4)* Ve-diglo alay ahava *– [homiletically understood as:] his sin* (me'ilato) *against me is beloved, [as we find the phrase in Prov.16:10] "In judgment he* ***sins*** *not" translated by the Targum as "*lo **yidgal** pumei*."*

An incident occurred concerning a certain Kohen *who used to spread his hands in blessing, and say ("May G-d bless you and) destroy you,"* (yishmidecha*, rather than* yishmirecha *– "keep you.") A certain* Chacham *was there, and removed the* Kohen *from the prayer stand because he did not know how to pronounce the letters in the priestly blessing. From heaven this* Chacham *was told that if he did not restore the* Kohen*, he would be punished.* (This paragraph does not appear in the Hebrew text above.)

While not as emphatic as the *Sefer Chasidim*, other writers of the same period assume that the *Manhig's* position encompasses even errors which change the meaning of a word.

The Ra'avia,[22] after quoting the prohibition of appointing a *shaliach tzibbur* (prayer leader) who reverses letters, writes:

> ובמדרש אגדה אמרינן מנין לקורא אהרן הרן שיצא תלמוד לומר ודגלו עלי אהבה אפילו דגלים שבך עלי אהבה.
>
> *The Midrash Aggadah states: From where do we derive that one who reads "Aharon" as "Haron" has discharged his obligation? Therefore the verse says:* Ve-diglo alay ahava – *even your* degali*m (lies? sins?) are beloved to me.*

The lack of qualification leaves open the possibility that the Midrash is to be applied even to gross errors.

The *Sefer Ha-Agur*[23] records:

> איתא במדרש אע"פ שטעה הקורא בתורה בקריאתו יצא כמו קורא לאהרן הרן.
>
> *The Midrash records: Even if the Torah reader erred in his reading, he has discharged his obligation, such as one who reads "Aharon" as "Haron."*

He balances this citation with the view of the Rambam, but leaves the permissive view in the most general terms, and clearly understands it to refer to a public discharging of one's obligation of *keriat ha-Torah*.

Interestingly, this view appears to have survived as far as the eighteenth century, in the writings of R. Jacob Lorberbaum of Lissa, author of the commentary *Derech Ha-Chaim* on the Siddur:

> אמנם מי שאין חוזר אפי' במקום שהענין משתנה אין למחות בידו
>
> *However, if a reader does not repeat, even in a situation where*

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22. R. Eliezer ben R. Yoel Halevi, (1140-1220), Germany Cp. 53; Aptowitzer Ed. p. 31.

23. R. Yaakov Baruch b. Yehuda Landau, 15th Century, Germany; Cp. 191; p. 44 in Hirshler Ed.

the meaning is changed [by an error] one need not protest.[24]

The *Mishnah Berurah* cites the *Derech Ha-Chaim*, but disagrees with his position:

ובדה״ח הפריז על המדה ופסק דאפילו במקום שהענין משתנה מי שנוהג להקל שלא להחזיר אין למחות בידו והביא זה מא״ר ולא מסתברא להקל כ״כ בדבר שמעיקר הדין חוזר בכל גווני כמו שהוכיח הגר״א ודי לנו להקל במה שהקיל הרמ״א:

The author of Derech Ha-Chaim *went too far and ruled that even in a situation where the meaning is changed, one need not protest the behavior of a reader who does not repeat, quoting this view from the* Eliyahu Rabbah. *But it is not logical to be so lenient in a matter which one must, according to the letter of the law, repeat in all cases, as the Gaon of Vilna has proven, and we must suffice in being lenient only as far as the Ramo permits.*[25]

The *Mishnah Berurah* traces the *Derech Ha-Chaim's* view to the *Sefer Eliyahu Rabbah.* The *Eliyahu Rabbah*, in turn, attributed his stance to the *Bach*, who disagreed with the *Beit Yosef*-Rambam approach, and identified the prevailing practice as following the *Manhig*.[26] In dismissing this position, the *Mishnah Berurah* cites the Gaon of Vilna, who, as we have seen, supported the view of the Rambam. The *Mishnah Berurah* recommends following the ruling of the Ramo, which represents the final step in the circumscribing of the permissive view of the *Manhig*, the *Sefer Chasidim*, the *Agur* and the Ra'aviah. Here are stages in that trend:

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24. *Derech Ha-Chaim,* Laws of *Keriyat Ha-Torah.*

25. *Biur Halacha* 142 s.v. *aval im ta'ah.*

26. Though it appears that this most permissive view faded into obscurity with the acceptance of the ruling of the Ramo, I have come across two recent sources that make practical use of it.

The Steipler Gaon (*Karyana D'Igrita* no. 139, cited above), rules that in a case of doubt as to whether an error changed the meaning of a word, if the *ba'al koreh* has read several verses further, one can depend upon the opinion of the *Bach* not to send him back.

1. The *Orchot Chaim*[27] limited the permissive approach to the reading of the *Chazan beit ha-knesset*, since he did not make a blessing, whereas the actual *oleh* would be corrected.

2. The *Terumat Ha-Deshen*,[28] in a responsum repeated verbatim by his student Mahari Bruna,[29] reported having seen the leniency applied by his teachers only in cases of melody and vocalization.

> ואע״פ שכתב הרמב״ם שאם טעה הקורא בדקדוק אחד מחזירין אותו, משמע קצת דאפילו בדיעבד לא יצא. הא כתב בטור א״ח דראבי״ה פליג אהא, וכתב דאין להכלימו ולהחזירו על כך, מייתי ראייה ממדרש דאם קרא לאהרן חרן יצא. ואותו מדרש מייתי נמי בהגה״ה באשירי בשם מהרי״ח פרק במה אשה. משמע בפשיטות דבשעת הדחק קורין לכתחילה בדרך זה, וכן ראיתי כמה פעמים לפני רבותי ושאר גדולים שטעו הקוראים בדקדוקי טעמים, וגם בפת״ח וקמ״ץ סגו״ל וציר״י, אע״פ שגערו בו קצת, מ״מ לא החזיר מהן.
>
> *And although Maimonides wrote that we send back a reader who errs even in a small detail, which might imply that even after the fact one has not fulfilled his obligation, nevertheless the* Tur *in* Orach Chaim *wrote that the Ra'aviya [sic*[30]*] disagrees with that ruling, and wrote that one should not embarrass him and send him back for this. He brings a proof from the Midrash that if one called Aharon "Haron," he fulfills his obligation, and the same Midrash is cited in the* Hagahot Asheiri *in the name of Mahariah, in the chapter* Bameh Isha. *This implies straighforwardly that in exigent circumstances we may read this way in the first place.* ***And I***

27. R. Aharon ben R. Jacob ha-Cohen of Narbonne, (13th-14th century), France; laws of *keriyat ha-Torah* sec. 18.

28. Rabbi Israel ben Petachyah Isserlein, (1390-1460), Germany; *Pesakim u'chtavim*, no. 181.

29. R. Yisrael ben R. Chaim, (ca. 1400-1480), Germany; #90.

30. This is, of course, the *Manhig's* opinion, as cited in the *Tur*. The misattribution is seen by Aptowitzer in his glosses to the Ra'aviya (p. 31) as the source for the mistaken assumption of the *Peri Megadim* that the Ra'aviya authored the *Sefer Ha-Manhig*.

have seen a number of times before my teachers and other great authorities that the readers erred in details of the* trope, *also [interchanging]* patach *and* kamatz, or segol *and* tzeireh, *and even though they scolded them a little, they did not send them back.

The difference between *kamatz* and *patach*, *segol* and *tzeireh* would likely imply minor errors, in which there is no change in the meaning of a word. It is this nuance that is picked up by the Ramo, who codifies the Ashkenazic position for future generations:[31]

ודוקא בשינוי שמשתנה ע"י זה הענין, אבל אם טעה בנגינת הטעם או בניקוד, אין מחזירין אותו, אבל גוערין בו

...specifically a change through which the meaning is altered. But if he erred in the melody or vocalization, we do not make him repeat, but rather scold[32] *him.*

This, then, is the source of the oft-cited ruling that one only

31. *Orach Chaim* 142:1

32. My friend and colleague Rabbi Jeremy Wieder, in a *shiur* to *gabbaim* sponsored by the Orthodox Union, and available at OU.org, maintained that the term "*go'arin*," (scold), actually means that one must correct the reader. "*Ein machazirin*" simply means that if the *ba'al koreh* went on, we need not send him back, if the meaning was not changed. According to this much stricter approach, any mistake, even if it does not change the meaning of the word, must be corrected, or one does not discharge one's obligation. This is not the approach that I am presenting in this paper. I understand "*go'arin*" to mean that, after the reading, the Rav or other figure of authority must chastise the reader, and ensure that the error will not recur. "*Machazirin*" means that a correction must be made on the spot, and, if necessary, the reader who has read on must be sent back. I have not found another authority who adopts R. Wieder's stricter reading, and have found my understanding confirmed explicitly in the *Eshel Avraham* and the *Teshuvah Afarkasta D'anya* II, *Orach Chaim* no. 23. Furthermore, it is hard to explain the phrase "*go'arin bo ketzat*," used by the *Terumat Ha-deshen* and others, if *go'arin* means to correct. How would one correct "a little?" (Since originally writing these lines, I have found a source for R. Wieder's reading, in one view cited in the *Mekor Chaim* (Bachrach), cited in Meler, *Ha-keriya Ba-Torah V'Hilchoteha*, Jerusalem, 5769, p166 footnote 7. It is, in my opinion, a minority view.)

corrects the *ba'al koreh* for mistakes that change the meaning of the words. But reaching this point only raises new questions: What constitutes "a mistake that changes the meaning?" Does the Ramo mean to say that no mistake involving melody or vowel need be corrected, even if it changes the meaning? What exactly is the difference between *machazirin oto* and *go'arin bo*? Answering these questions will occupy the next section of this paper.

Mistaken Corrections

אֵת \ אֶת

Certain corrections are commonly, but unnecessarily made, as the mispronunciations do not change the meaning of the word. For example, if a *ba'al koreh* reads *eit* instead of *et* (*tzeireh*, rather than *segol*,) or vice versa, he need not be corrected. The *tzeireh* form is used when the word has its own *trope* sign; the *segol* form is used when the word is connected through a *makaf* to one or more other words, under the same *trope* sign.

Pausal Form

Similarly, in the following cases, no correction is necessary when a *segol* and *kamatz* are interchanged:

דֶלֶת	דָלֶת
קֶבֶר	קָבֶר
יֶלֶד	יָלֶד

In these and similar cases, the *kamatz* replaces the *segol* at a pause in the verse, but the meaning is not changed.

Non-Shabbat Readings

Before defining the parameters of error, we must limit the

expanse of readings in which correction plays a crucial role. Of course, when there is no consideration of *kevod ha-beriyot* (respect for people) or fear of confusing the *ba'al koreh*, one would correct everything, all the time, but in deciding what to correct in typical circumstances, it is important to know when the failure to correct would disqualify the reading. Here it is important to note that during the readings of Monday, Thursday and Shabbat Mincha, unlike that of Shabbat morning, the failure to correct would not automatically disqualify the *keriya*. The basis for this exception is the difference between the obligation to read on Shabbat, as opposed to the other readings. Whereas on Shabbat there is an obligation on the *tzibbur* (congregation) to have the entire *parasha* (biblical section) read, on Monday, Thursday and Shabbat Mincha, the obligation is to call three *olim* (individuals called up for the reading), each to read a minimum of three *pesukim* (verses), and to read, with rare exceptions, a minimum total of ten *pesuki*m. If the minimum numbers are met, even if mistakes are subsequently made, the halacha is satisfied, and the whole *parasha* will be read correctly on Shabbat. This leads to the following leniencies:

1. If a *ba'al koreh* omits a word or a verse, but his omission is only discovered after three *olim* have read ten *pesukim*, as well as the concluding blessing, he need not repeat.

2. If a *ba'al koreh* makes a mistake that changes the meaning of a word (and certainly if the error is in the vowels or melody), once three *olim* have read ten *pesuki*m, he may not need to repeat.[33]

Determining Errors

On a Shabbat morning, in accordance with the ruling of the

33. The *Biur Halacha* to *Orach Chaim* 142, end of s.v. *mahazirin oto* expresses a doubt whether an error has the same status as an omitted verse, or is more severe.

Ramo, errors which change the meaning of a word must be corrected. At first glance, it might appear that determining which errors fall into the correctable category would be a simple matter, able to be performed by any reasonably intelligent and literate listener. On closer examination, it becomes clear that at least three factors have to be taken into account in the split second one has to make the decision whether or not to correct a *ba'al koreh*:

(1) Objective considerations of language, grammar, *trope*, etc.

(2) The assumptions of the listeners.

(3) The reading style of this particular *ba'al koreh*.

In the course of analyzing particular types of errors, the interplay between these factors will become clear. In general, the first factor serves to identify an ostensible error, while the latter two sometimes mitigate the identification and eliminate the need to correct.

Omitting/Adding Words or Letters

A *ba'al koreh* who omits a word or a letter, even if the meaning is not thereby affected, must return and read the verse correctly.[34] The addition of a letter that doesn't change the meaning need not be corrected.[35] The addition of a word that doesn't change the meaning is discussed on a case by case basis by *poskim*.[36]

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34. *Biur Halacha* to *Orach Chaim* 142:1 s.v. *aval im ta'ah*.

35. *Mishnah Berurah* 142:4.

36. See Lerner, Yosef Yitzhak, *Shegiot Mi Yavin*, (*Otzar Ha-Poskim*, Jerusalem, 5760), I:18 f.n.101. Rabbi Simcha Rabinowitz, in *Piskei Teshuvot II* (Jerusalem, 5762), 142:3 writes that in a case where an added letter or word does not change the meaning, it is not necessary to repeat. Both of the above works are treasure troves of information and are recommended for issues not covered in this article.

Vocalization

From the language of the Ramo, cited above ("...but if he erred in the vocalization or melody we do not send him back"), one might have concluded that errors in *nikkud* or *te'amei ha-mikra* are not correctable. This, however, is not the understanding of the *Mishnah Berurah* and other *poskim* with respect to the Ramo; rather, the Ramo meant that usually such mistakes do not change the meaning, and, if so, would not have to be corrected. If they do change the meaning, correction is required. Here are some examples, ranging from the obvious to the subtle, and often overlooked. When relevant, the stressed syllable is in bold font--sometimes both *nikkud* and accent are at issue in a given example.

Word read	Meaning	Should have read	Meaning
וְיָצָא	he shall go out	**וַיֵּצֵא**	he went out
חֵלֶב	fat (of)	**חֵלֶב**	milk of
חֵטָאתִי	my sin	**חָטָאתִי**	I have sinned
וַיִּרְאוּ[37]	they saw	**וַיִּירְאוּ**	they feared
יַעֲשֶׂה	he shall do (*binyan pa'al*)	**יֵעָשֶׂה**	it shall be done (*binyan nifal*)

The first example in the table above demonstrates a most common error: When the letter *vav* with the vowel *patach* is the prefix for a verb, it is called the *vav ha-hipuch*, and serves to

37. The presence of this word in the Torah with only one *yod* and the fact that few readers actually distinguish may mitigate the need to correct, as discussed below.

reverse the tense from future to past. *Vayetzeh* – he went out; *V'yatza* – he will/should go out. Sometimes the *vav* with a *sheva* can reverse the tense from past to future – e.g. *asa* (he did) becoming *v'asa* (he will do). This example shows one way the *nikkud* of the *vav* can change the tense.

The third example shows how easy it is for incorrect vocalization to convert a word from a verb into a noun or vice versa. It should be noted that for a *ba'al koreh* reading with *havara sefaradit* (Sephardic pronunciation), the only difference between the two forms would be in the placement of the accent.

Mappik Heh

One common error in vocalization which can change the meaning of a word is the omission or addition of a *mappik heh*. The *dagesh* in the concluding *heh* of a word can demonstrate possession, and thus

her husband	אישהּ	woman	אשה

Rabbi Avraham David Wahrman rules that the failure to pronounce the *mappik* is not cause for repeating. His reasoning is that there is at least one verse in which the Torah itself does not insist on the *mappik*--in *Bamidbar* 32:22 the word "*la*" appears without a *mappik*, even though the rules of grammar would dictate the need for one. If the Torah is not insistent on the *mappik*, the *ba'al koreh* who omits it elsewhere cannot be held fully accountable.[38]

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38. *Eshel Avraham* to *Orach Chaim* 142 in discussing *Vayikra* 21:3. (The *Eshel Avraham* is the commentary on *Shulchan Aruch* by R. Avraham David b. Asher Anshel Wahrman, (1770-1840), Rav of Boczacz in Galicia, to be distinguished from the commentary of the same name penned by the *Peri Megadim.)*

However, R. Mordechai Carlebach[39] suggests three categories of *mappik heh*: 1) Where it is clear that there is no change in meaning, because no alternative word exists with a different meaning. "*La*" would be an example of this type – it is never found meaning anything else without a *mappik*, and so no correction is called for. 2) Where it is clear that the meaning is changed by the addition or deletion of a *mappik*. "*V'hishka(h)*" (*Bamidbar* 5:24, 27) would be an example – the meaning changes, and it bears correcting. And finally, 3) where it is unclear whether the change implies a different meaning. His example is "*ba*," ending with a *mappik*--perhaps the absence of the *mappik* would make it possible to be confused for "*ba*" ending with *alef*, meaning "come" or "came". He leaves this as a doubt.

A final consideration which may be relevant is the particular style of the *ba'al koreh*. Below we will cite the view of Rabbi Mordechai Willig, that a *ba'al koreh* who never distinguishes between *sheva na/nach* or *kamatz gadol/katan* would not be corrected on those errors. It may well be that a *ba'al koreh* who is sadly oblivious to the existence of *mappik hehs* would be in the same category.[40] Thus one would be advised to correct a mistake in the placement or omission of a *mappik heh* in cases where the meaning is changed, provided the *ba'al koreh* generally does correctly pronounce such words. One must also be on guard against the unnecessary insertion of a *mappik* in cases where the meaning is changed; here one does not have

39. *Chavatzelet Ha-Sharon Al Ha-Torah* (Jerusalem, 5767 p.1022), to be distinguished from the Responsa of the same name. I am indebted to Rabbi Tzvi Harari of Yeshiva University for drawing my attention to this source.

40. Dr. David Berger cited the observation of Dr. Richard Steiner concerning the existence of a reading tradition in their shul, that pronounces the *kametz* as *oo* in an open syllable, and *o* in a closed one, and thus distinguishes between *ishah* with a *mappik* (pronounced *ishoh*) and without (pronounced *ishooh*), even though the *mappik* itself is not pronounced. This can be important, when we factor in the expectations of a given audience, as will be discussed below.

the leniency of the *ba'al koreh's* personal style upon which to fall back.

Accents

There are many cases in which misplacing the stress from one syllable to another can change the meaning. Some such examples are documented in *poskim*. Probably the most famous is the difference between

And behold his daughter Rachel **is coming** with the sheep	והנה רחל בתו בָּאָה עם הצאן	בראשית כט, ו

and

And Rachel **had come**	ורחל בָּאָה עם הצאן	בראשית כט, ט

In this case, the difference between the *mil'el* (first syllable) and *milra* (later syllable) accentuation is a change in tense. The need to correct such an error is documented by the *Aruch Ha-Shulchan*,[41] among others.

A similar potential error is found in *Megillat Esther* (2:14):

In the evening, she would come	בערב ׀ היא בָּאָה	אסתר ב, יד

Here, too, shifting the accent to the first syllable would yield "she came." The *Aruch Ha-Shulchan* rules that such an error be corrected.[42]

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41. *Orach Chaim* 690:20 regarding *Esther* 2:14. Note that if the correction was not made, the *Aruch Ha-Shulchan* rules that one nevertheless fulfills one's obligation.

42. Unlike the first example, here the shift in tense would not be between

There are occasions when the misplacing of an accent not only changes the tense of a verb, but actually substitutes one totally different verb for another. Joshua R. Jacobson[43] points to one verse which incorporates two unrelated verbs that are identical, but for the stress.

(But if, in the land of their captivity, they repent of their sinful ways) and **return** to you with all their heart and with all their soul, in the land of their enemies who **led them away captive...**	וְשָׁבוּ אליך בכל לבבם ובכל נפשם בארץ אויביהם אשר שָׁבָוּ אתם	מלכים א ח, מח

The first instance in the verse derives from the root *shin-vav-vet*=return, while the second comes from *shin-vet-heh*=take captive.[44]

V'ahavTA--V'aHAVta

Based on the principles developed in the last two sections, namely that either a *vav* misvocalized or a stress misplaced can change the meaning, it should surely follow that the following common errors would require correction:

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present and past, but between the usage of the past to indicate a habitual activity ("She was wont to come"), and the simple past tense.

43. *Chanting of the Hebrew Bible*, Jewish Publication Society, 2002 p.21.

44. An example of more practical import to the *ba'al koreh*, which appears in the Torah, rather than *Neviim*, and involves a word with this root that could mean two totally different things is *shaVU* (not *SHAvu*) *vayavozu* in *Bereishit* 34:29. My thanks to Dr. David Berger for drawing it to my attention.

Word Read	Meaning	Should have read	Meaning
וְאָהַבְתָּ	And you loved	וְאָהַבְתָּ	You should love
וּמָשַׁחְתָּ	And you drew	וּמָשַׁחְתָּ	You should draw
וְשָׂמַחְתָּ	And you were happy	וְשָׂמַחְתָּ	You should be happy

In each of the above cases, the *vav ha-hipuch* is replaced by the *vav ha-chibur* (the conjunction *and*), the accent shifts from the last syllable to the penultimate one, and the result is a shift in tense and meaning. Surely, one should have to correct the *ba'al koreh* on the spot, and even send him back after the fact. Indeed, many grammar-focused writers have singled out this error.[45] It is certainly an error that one should correct if

45. In an erudite article in the journal *Ohr Torah* (5748, p. 608), Nisan Sharoni collects an impressive group of sources to argue for the need to correct. Some of those sources deal with *tefilah*, as opposed to *keriyat ha-Torah*, and stress the need to pronounce our supplications properly if we hope for a positive Divine response. Some are general exhortations for careful pronunciation, without specifying whether or not correction would be required. Others, like Rav Yosef Shalom Eliashiv and Rav Yisrael Yaakov Fisher, work off of the example of "*ba'ah*," a specific case already enshrined in halachic literature, and which all authorities would apparently correct. They are quoted as saying that an error like "*ba-ah*," which changes the meaning would require correction, but no examples nor written source is given. Sharoni cites a letter of the Steipler Gaon, R. Yaakov Yisroel Kanievsky (*Karyana De-igrita* no. 139, p. 155) as ruling strictly, but fails to quote the very telling context:

ובדבר ושמעתי כי חנון אני שקרא הנגינה מלעיל וכותב מעכ"ת שזהו שינוי המשמעות דכשהנגינה מלרע משמעותו על העתיד וכשהנגינה מלעיל משמעותו לשעבר, בעניותי איני בקי בחכמת הדקדוק ולא ידוע לי מי הוא הקדמון שאמר כלל זה. ואם כלל זה הוא מגדולי הפוסקים לכאו' הוא שינוי בהענין וכתב במ"ב שם סק"ג דה"ה בשינוי בנגינת הטעמים כשהענין משתנה מחזירין אותו. אבל מ"מ צ"ע דמתוך דברי הפרשה מוכח דקאי על העתיד וצ"ע.

In this letter, the Steipler both professed his lack of familiarity with the

possible, and a standard towards which one should steer the Torah reading in any minyan.

However, modern decisors have ruled that in a typical contemporary minyan, in which embarrassment of the ba'al koreh *is a consideration, and sensitivity to the nuances of biblical Hebrew is only average, it would not be necessary to correct this error.*

A clear statement of this counter-intuitive position is found in a letter of Rav Shlomo Zalman Auerbach, *zt'l.*[46] Rabbi Menachem Jacobowitz had asked, "In words like '*ve-amarta*' or '*ve-yashavta*,' if they do not coincide with a *sof-pasuk* or *etnachta*, and are not followed by a word that begins with an accented syllable, if they refer to the future, they must be pronounce *milra*, (otherwise they would refer to the past). However, most *ba'alei keriya* are not familiar with the grammatical rules, and do not distinguish. In these matters, should one not be insistent, since most people do not distinguish (just as Ashkenazim do not distinguish between *ata*, with an *ayin* and *ata* with an *aleph*), or perhaps one should follow the grammatical experts and correct this imprecise reading?"

Rav Shlomo Zalman responded, "In *keriat Shema*, as well, people say '*ve-ahavta*,' and the like, and are not so punctilious, and yet they discharge their obligation even though this is the first verse of the *Shema*."

Among contemporary American *poskim* queried, this

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grammar involved, and entertained the possiblity that no correction would be needed because of clarity through the context of the verse. (The factor of clarity through context, also raised by the *Eshel Avraham (*with reference to *Devarim* 10:2--*ve-echtov/va-echtov)*, is clearly assumed by some *poskim*, but I have not found clear guidance as to the extent of its efficacy.) Once more it is important to stress, that of course ideally all of these errors need to be extirpated, but the point of this article is to provide halachic guidance in typical situations, where one must curtail corrections to the minimum required. (See also the text in connection with n.47 below.)

46. Stepansky, Nahum, *V'alehu Lo Yibol*, Jerusalem, 5759, Vol. 1 p. 268.

position is also taken today by Rabbi Hershel Schachter, Rabbi Mordechai Willig and Rabbi Dovid Cohen.

The popular rationale for this position is predicated on the fact that how languages are pronounced and understood changes over time, and that an error is measured based on how the language is pronounced and understood at that time by its audience. Just as Ashkenazic Jews no longer insist on a distinction between the pronunciation of *aleph* and *ayin*, despite the Mishnah's clear requirement of such a distinction, so, in an era when many, if not most listeners to *keriat ha-Torah* are not sensitive to the difference between *ve-aHAVta* and *ve-ahavTA*, we need not correct for the wrong pronunciation.[47]

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47. This explanation is alluded to in the question of Rabbi Jacobowitz, and was given, in similar ways by Rabbis Schachter, Willig, and Cohen. Rav Dovid Cohen actually used the *aleph--ayin* analogy.

A second possible explanation, offered by Rabbi Tzvi Harari, involves an extension of the reasoning mentioned above regarding the *mappik heh.* We find at least one verse in which the Torah itself seems to disregard the difference in *vav* and stress which we have been discussing. In *Devarim* 6:18, the word *u-VAta* is used, when we would have deemed *u-vaTA* to be more appropriate. Attempting to say "You shall come," which would normally require a *vav ha-hipuch* and the *milra* stress, the Torah uses a form which seems to incorporate the *vav ha-chibur* ("and") and the *mil'el* stress, which would normally mean "and you came." Therefore, the argument goes, if a *ba'al koreh* blurs the distinction elsewhere in the Torah, he need not repeat.

Rabbi Willig added one additonal factor to the mix--the style of the *ba'al koreh* himself. Even if we were normally to correct for a certain error beyond the vocalization, but the style of the *ba'al koreh* is such that it is clear that he never distinguishes in such cases, one would not correct. If, for example, a *ba'al koreh* switches a *sheva na* with a *sheva nach*, in such a way that would change the meaning, but this particular *ba'al koreh* is not at the level of proficiency where he usually distinguishes between the two types of *sheva,* we would not correct his error. The specific example adduced by Rabbi Willig is the word *shafta/shofta* , (read in *havara sefaradit*), which can mean "she judged," if the first *shin* is read with a *kamatz gadol*, or "judge!" if read with a *kamatz katan*. If a *ba'al koreh* never distinguishes between *kamatz gadol* and *kamatz katan*, it does not make sense to correct him.

As to why *poskim* insist on correcting *ba'ah*, but not *ve'ahavta*, Rabbi Mordechai Willig suggested that the former is found, in both *mil'el* and *milra* forms in the Torah (see *Bereishit* 29:6 and 29:9 and Rashi), and one could be

Factoring audience expectation into the calculation for determining errors can be found explicitly in the commentary *Eshel Avraham* to the *Shulchan Aruch*.[48] In considering whether it would be necessary to correct a *ba'al koreh* who read *le-ohvdam* (with a *cholam*) rather than *le-ovdam* (with a *kamatz katan*), the *Eshel Avraham* writes, among other factors, that since the public does not generally distinguish between the two sounds, it is not necessary to correct.

Additional Changes in Meaning

Having reached this stage, it should be clear that even finer distinctions exist which can change the meaning of a word, but would generally not bear correction. If *ve-ahavTA* need not be corrected, many of these gradations of error should follow *a fortiori.* We will list them nonetheless, because a few instances still would bear correction, and because it is important, as we shall soon discuss, to constantly perfect the level of *keriat ha-Torah* in our synagogues, and strive to reach the level at which we polish even the slightest imperfections without creating ill will.

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confused for the other, whereas it is exceedingly rare to find a *vav ha-hipuch* word which is pronounced *mil'el*.

48. *Orach Chaim* 142. The extensive comments of the *Eshel Avraham* deserve a treatment of their own. Later sources draw heavily from his examples, which span the entire Torah reading cycle. Moreover, many of his entries read like a Rabbi's log, inviting the reader to share the thought processes of a skilled Rav and *posek*, as he struggles to make split-second decisions, and revisits them later. In addition to his opinions scattered through these footnotes, it is worthwhile pointing out three of his more startling ideas: 1) If a Rav corrects the *ba'al koreh*, and the congregation hears the correction, but the *ba'al koreh* reread with the same mistake, there is no need to send him back again, because the correct reading was made clear to the *tzibbur*. 2) A *ba'al koreh* may look in a *Chumash*, and then immediately read from the Torah, even saying the words before he sees them, because of the rule of *toch k'dei dibbur*. 3) A shift from future to past in a command of G-d may not require correction, because the will of G-d is considered as if it were already done.

Sheva Na vs. *Sheva Nach*

A slight stress in pronunciation is placed on letters that bear a *sheva na*. On occasion, omitting that stress, or stressing a *sheva nach*, can result in a change of meaning undetectable to most listeners. For example, in the phrase

וַיִּיקַץ יַעֲקֹב מִשְּׁנָתוֹ

the *shin* is to be pronounced with a *sheva na - mishenato*, and translated *from his sleep*.

Substituting a *sheva nach*, and pronouncing *mishnahto*, would yield the translation *his learning.* Nevertheless, as we have said, this mistake would not bear correction in the typical minyan.[49]

Mistakes in *Trope*

Even misgrouping words by applying incorrect *trope* (melodic) signs can change the meaning of a word or phrase. One clear example is the phrase *Arami oved avi*, found in *Devarim* 26:5. The *trope* signs on these words read *pashta*, (pause) *munach, zakef-katon*, and naturally lend themselves to the translation *An Aramean tried to destroy my father.* Such is the translation of Rashi, which is also adopted in the Pesach Hagaddah. Change the *trope* to *mahpach, pashta, zakef-katon*, however, and you have linked the first two words, and made possible the translation of the Ibn Ezra: *My father was a wandering Aramean*. See the chart below for a graphical rendition of this example.

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49. An eyewitness reported to me seeing this exact error corrected twice in one week at morning minyanim at Yeshiva University. The correction is not normatively mandated. Rabbi Mordechai Willig suggested that this type of correction might depend upon the level of the *ba'al koreh,* and whether he normally distinguishes between *sheva na* and *sheva nah*.

A wandering Aramean	אֲרַמִּי אֹבֵד	An Aramean	אֲרַמִּי
		tried to destroy	אֹבֵד
was my father	אָבִי	my father	אָבִי

This is but the tip of the iceberg, when it comes to possible meanings changed by the misapplication of *trope*,[50] but again, most minyanim would not be required to correct such errors.

Rabbi Mordechai Willig suggested that *trope* errors which misplace pauses in such a way as to convey a different or opposite meaning should be corrected. If the biblical brother-in-law of *Devarim* 25:8 is represented as saying, *lo! chafatzti l'kachta,* ("No, I do want to marry her,") rather than *lo chafatzti l'kachta* ("I do not want to marry her"), then correction is in order. This may be the intent of the *Shulchan Atzei Shitim* quoted in the *Mishnah Berurah* (142:5), who refers to reversing a *mesharet* (connecting) and *mafsik* (separating). Clearly most *trope* errors do not fall into this category.

Misapportioning the Pauses Generated by *Trope*

Professor Aharon Dotan[51] goes even further, asserting that it is possible to change the meaning of a verse, by assigning too long a pause to one *trope* sign, relative to another. His example:

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50. For some contemporary literature that deals with the *trope* in its interpretive capacity see Breuer, R. Mordechai, *Ta'amei Ha-mikra be-chaf alef sefarim u-v'sifrei emet*, Michlala Publishing, 1982, pp. 368-90; Ahrend, Moshe, *"Aleph Bet Be-te'amei ha-mikra u-v'mashma'utam ha-parashanit"* in his *Yesodot be-hora'at ha-mikra,* Bar Ilan University Press, 1987; Kogut, Simcha, *Bein Te'amim le-parshanut,* Magnes Press, 5756. .

51. *"Inyanei hagiya be-tefillah u-ve-keriat ha-Torah", Sefer Shavtiel*, 5752, pp. 68-76.

פְּקֻדֵיהֶם לְמַטֵּה רְאוּבֵן || שִׁשָּׁה וְאַרְבָּעִים אֶלֶף וְחֲמֵשׁ מֵאוֹת׃
פְּקֻדֵיהֶם לְמַטֵּה רְאוּבֵן שִׁשָּׁה וְאַרְבָּעִים || אֶלֶף וְחֲמֵשׁ מֵאוֹת׃

The first version correctly inserts the main pause after the *etnachta trope*, and therefore the number yielded is 46,500. The second version, on the other hand, incorrectly prolongs the pause on the *tevir trope*, and forces one to translate 46+1500=1546.

Dotan notes, "It is important to remember that there is not always a correspondence between the length of a *trope* sign and the degree to which it serves as a pause. The *trope* signs employing the highest notes and most intricate melodies--like *pazer, telisha-gedola, gershayim*--are among the briefest pauses, and *telisha ketana* is even a connective sign. One must pause the reading after the major pausive *trope* signs, even if the melody doesn't seem to require it."

Dotan himself admits that he has never seen a *ba'al koreh* sent back for such an error, and indeed, according to what we have said, it would not be necessary to send him back, but this, too, is an area to bear in mind when striving for the perfect *keriat ha-Torah*.

Errors that Contradict a Halachic Midrashic Interpretation

There are times that an error, even in *trope*, can change meaning, not of the literal translation of a word, but of a rabbinic gloss or Midrash based on it. An example takes us back to the dawn of the era of American *tikkunei keriya*. The Scharfstein *tikkun* (reader's manual), from which many *ba'alei keriya* trained in the mid-twentieth century, was a valiant pioneering effort, but left some accuracy to be desired. For our purposes note its rendition of *Bereishit* 7:14, listing the winged creatures that were taken aboard the ark by Noah--

כָּל-צִפּוֹר כָּל־כָּנָף׃

whereas the correct rendition, as found in more accurate texts, is

כֹּל צִפּוֹר כָּל־כָּנָף׃

The seeming trifling difference is highlighted by Rashi, who maintains that the second version, which emphasizes and isolates the word *kol*, by giving it the entire *tipcha*, implies that any winged creatures at all were included in the command, even insects. Of course, this would not require the correction of the *ba'al koreh*.

Summary

Thus far we have traced the question of when to correct Torah reading errors to a dispute between the Rambam and the *Sefer Ha-Manhig*, who base themselves on sources in the Talmud *Yerushalmi* and Midrash. We have traced both views through history down to their most recent proponents, and examined the differing opinions of R. Yosef Karo (the *Mechaber*) and R. Moshe Isserles (Ramo) in the *Shulchan Aruch*, the former adopting the strict approach, and the latter espousing a circumscribed version of the lenient approach. Finally, we expanded upon the view of the Ramo that only errors which change a word's meaning bear correction. We showed how such errors can be caused not only by the omission or substitution of words, but also by incorrect vocalization or misplaced accents. We also showed that contemporary *poskim* do not, in the final analysis, require correction of the *v'aHAVta/v'ahavTA* error, nor of numerous other finer errors, although grammatically they do change the meaning, and should be discouraged.

Rav Uziel's Conclusion

Armed with this information, we can now understand the answer Rav Ben Zion Chai Uziel gave to the question with which we opened this article. When asked if the *ba'al koreh* of

the next *aliyah* had acted properly when he re-read the previous *aliyah* to correct the errors of his predecessor, who had "three or four times fail(ed) to distinguish between *pashta* and *azla* or between *zarka* and *pashta*," he replied that, inasmuch as these errors do not change the meaning of the text, they certainly did not need to be corrected, especially in light of the public discomfiture of the *ba'al koreh*. This ruling, it should be noted, would satisfy both the *Mechaber* and the Ramo, since we are dealing only with *trope* errors. At the same time, Rav Uziel's implication is clear: If the meaning of the verse had been changed, one would have been obligated to correct the *ba'al koreh*, regardless of any embarrassment the correction would cause. The factor of *kevod ha-beriyot*, while sufficient to obviate the need for correction of minor errors, does not trump the actual fulfillment of the commandment. Thus the oft-heard claim that "*keriat ha-Torah* is only a rabbinic commandment, but public embarrassment is a biblical prohibition," is not accepted in this context – apparently because the accurate rendition of the reading, through which listeners can discharge their obligation, should be the paramount concern of the *ba'al koreh*, as well, who should welcome necessary corrections toward that end.

This last point leads us to the final and, arguably, most crucial section of our discussion. If the Rav of a shul is at the stage of deciding whether to opt for a kosher reading or the avoidance of public embarrassment, then the battle is already lost in that shul. The only effective way to regulate this very sensitive area of synagogue life is by making sure that it never becomes necessary to make that stark choice. By creating the proper culture of *keriat ha-Torah* in his synagogue, and adopting certain procedures to insure that both accuracy and dignity can co-exist, the Rav can keep his congregation far from the precipice of such no-win scenarios. The remainder of this paper is devoted to describing that culture and suggesting some procedures for inculcating and maintaining it.

Assumptions

The optimal fulfillment of the communal mitzvah of *keriat Ha-Torah* involves a three-way partnership, with each partner assiduously performing his task and discharging his responsibility. If even one partner neglects his role, the negative results can range from an unpleasant *keriya*, to one through which listeners cannot discharge their obligation, to, G-d forbid, one which leads to incidents of public embarrassment.

I. *Ba'al Koreh*

First and most visible of these partners is the *ba'al koreh*. By agreeing to read, the *ba'al koreh* accepts upon himself the serious commitment of many hours of preparation. Even one who has read a *parasha* before cannot legitimately avoid the halachic requirement of intensive review.[52] The nature of the preparation is to aim, not for adequacy, but for perfection. If a *ba'al koreh* discovers the week before, or even on the morning of his reading, that he is unable to devote the necessary time for a top-notch reading, he should let the Rav or the *gabbaim* know. This admission, born of integrity, may result in a last-minute substitution.

The *ba'al koreh's* side of the partnership continues on the day of the reading. As he steps to the *shulchan* to read, and has *kavanah* (intention) to help the entire *tzibbu*r discharge their obligation, he must consciously realize that an accurate, halachically-correct reading outweighs any considerations of

52. A survey of the *poskim*, from the *Mishnah Berurah* (142:6) to the *Aruch Ha-Shulchan* (142:5), to the *Kaf Ha-Chaim* (letters *aleph* and *bet*, quoted in Lerner,18, note 85), makes it abundantly clear that a *ba'al koreh's* preparation must extend far beyond general vocalization, to accuracy in *dagesh* placement, to distinguishing between *sheva na* and *sheva nach*, and to precision in the *trope*. The *Kaf Ha-Chaim* cites the *mekubalim* that even with no change of meaning, the correct vowels are crucial, as they reflect various esoteric points that should not be blurred.

his ego, or even his dignity. That being the case, he must welcome corrections from the *gabbaim* or the Rav. While they will only correct things which they judge essential, he may want to request in advance that he be corrected for any word error, or perhaps even for errors relating to the *trope*. In so doing he will be following the standard demanded by Rav Soloveitichik who, at his own private minyan, used to correct *trope* errors. (The Rabbi may, for countervailing considerations, decide that the *tzibbur* is not ready for such a step, inasmuch as it may impede the reading or cause dissension among readers of different levels, but the possibility should be entertained.)

II. Rav and *Gabbaim*

The second actor in the drama of *keriat Ha-Torah* is the combination of Rav and *gabbaim* – those synagogue officials who have a direct role in creating and preserving a high standard of accuracy and attention to detail on behalf of the entire congregation.

The Rav and the *gabbaim* require knowledge, reflexes, and, often, more than a drop of courage. But, most of all, they require a behind-the-scenes system underpinning their visible efforts.

The knowledge they must possess includes a great deal of grammar (*dikduk*), because grammar can often be the determinant of whether an error warrants correction. They must also know the laws of *keriat haTorah*, and the meaning of the words of the *parasha*.

Quick reflexes must combine with the knowledge, because most corrections are split-second decisions. Wait too long, and the *ba'al koreh* will have gone on, and perhaps even said the name of G-d, which would now be unnecessary.

It takes courage to inject a correction in public, and even more to insist that a correction isn't necessary when others insist that it is. A *gabbai*, and certainly a Rav, in most

situations, must correct only mistakes that would disqualify the reading and nothing more, unless a special arrangement has been made. Excessive corrections spook the *ba'al koreh*, who then, in his anxiety, will make more mistakes, leading to more corrections, in a downwards spiral.

Therefore, at least one of the *gabbaim* at the *shulchan* on any given Shabbat must be capable of quickly and effectively recognizing errors and interjecting corrections. Even among talented and dedicated *gabbaim* this is hard to find, and therefore, if the *gabbaim* present on a given Shabbat are not certified by the Rav as able to correct properly, then a member of the shul, previously approved by the Rav, should stand at the *shulchan*. The *gabbaim* are thus the first line of defense against error, with ambiguous cases being referred to the Rav. In case of the Rav's absence, the *gabbaim* approved by the Rav or the member mentioned above (in their absence) will be the final word on whether a correction is called for.

III. Congregation

The third and final partner in the sacred task of *keriat ha-Torah* is the Congregation, the *tzibbur* on whose behalf the *Parashat Ha-Shavua* is being read. With the proper activation of the roles of *ba'al koreh* and *gabbaim*/Rav, the *tzibbur* can experience this mitzvah in calm concentration and serene silence. They must listen carefully to every word, and avoid conversation, even between *aliyot*, and even on subjects of Torah.

Congregants do not make corrections, even if they feel the *gabbaim* and the Rav missed one. The likelihood is that either the congregant did not hear correctly or the error was noticed by the *gabbaim* or Rav, but was not considered serious enough to warrant correction. Even if a congregant is certain that a correction was "missed," he may not call it out, nor approach the *shulchan* during the *aliyah*. Rather, after the *aliya*, he may approach the Rav, or in the Rav's absence, the *gabbaim*, to present his claim. In all cases, the Rav's decision, or in his

absence, that of the *gabbai* or designated corrector, will be final.

This procedure is critical to the success of the whole endeavor of Torah reading, because corrections coming from the audience can intimidate a *ba'al koreh* and create a hostile, antagonistic atmosphere. Such corrections are also, as a rule, uneven, often correcting things that do not need correction, and serving to besiege the *ba'al koreh*, who then makes more errors, and to undermine the effectiveness of the *gabbaim* and Rabbi, who will hesitate to correct future errors, because so many trivial corrections were called out.

Not every congregant has the self control necessary to remain silent, and, on the contrary, may tend to call out corrections almost reflexively. It is such *mitpallelim* who must be encouraged to make a conscious effort to leave the correcting to the *gabbaim* and Rav, or designated corrector. Once they see that the shul's official personnel take seriously their role in careful correction, part of the battle will be done. While some will never totally overcome the unhealthy reflex, all should gain at least a measure of self control.

Implementation

Let us assume a shul in which disputes have broken out concerning corrections. Flurries of corrections are called out by worshippers who claim that the Powers That Be are ignoring mistakes and allowing readings that do not meet even minimal standards. The readers, meanwhile, feel that to be the *ba'al koreh* is to take one's life in one's hands, because it is open season on *ba'alei keriah*. The number of people willing to take on the "gotcha gang" is dwindling, and families are hesitant to have Bar Mitzvahs in the shul, for fear that their sons' first exposure to public reading will be a harrowing one. Can this *keriah* be saved?

Delivering speeches about a three-way partnership will not douse the flames here; the correctors are waiting to hear how they can be guaranteed a kosher reading. (Some of them

would prefer to have a regular *ba'al koreh* and minimize the intrusions of readers of differing levels. If the Rav feels that it is important to allow a variety of people to read, he must stand his ground and explain his position. While not fully satisfied, most of those seeking to narrow the pool will suffice with an assured kosher *keriah*.) Those fed up with the correcting want to know how uncalled-for and disconcerting corrections can be curbed. Both sides need to be presented a transparent system, and then see tangible results. Here are the steps I would recommend:[53]

1. The Rav must publicly address the issue, laying out the conflicting priorities, and stressing that all the congregation really want the same thing: an acceptable reading that does not entail detracting from the dignity of the reader. Every Rav knows his congregation best and will decide on content and presentation.

2. Simultaneously, the Rav must announce that beginning immediately, no *ba'al koreh* will be permitted to read in the shul without having first been heard twice by the Rav, the *gabbai* or a qualified designee. The first session will take place three weeks before his scheduled reading, and will be for the purpose of identifying potential errors, and bringing them to the reader's attention. The second session, one week before, will be to see if the corrections have been incorporated into the reader's *keriah*. At the conclusion of this session, the final determination will be made if this individual may read publicly.

There will always be readers who are acknowledged to be so skilled that they do not need to be heard in advance, but likewise there will be those who only perceive themselves to be of that rarified stratum. To distinguish between the two groups, my synagogue adopted the criterion that only those

53. To the extent that I have implemented these recommendations in my shul, I have met with success, but obviously this is a work in progress, and every Rav will judge for himself.

who have read two complete *parshiot* within the last year are exempt from being heard. Even so, there will be those who resent having to be "*fahrhered*" (tested), insisting that "they have been reading this Bar Mitzvah *parasha* for twenty five years, without being corrected," (not realizing, perhaps, that they were taught mistakes at the tender age of thirteen, and have been perpetuating them ever since.) Others will argue that they have read this *parasha* in the presence of great Rabbis (read: greater Rabbis than you, Rabbi,) and were never corrected. It is not recommended that the Rav detail a list of reasons why those great Rabbis never made corrections, as tempting as that may be. Instead, he should point out quite accurately that by submitting to such a system, as unnecessary as it is, the reader is, in fact, serving as a model and inspiration for other readers, who do need the oversight, to allow themselves to be listened to.

It is not enough that the announcement be made, nor even that it is implemented. It must be transparently followed, by posting monthly sheets, spelling out who will be reading and whether the two sessions have taken place. A typical chart could look like this:

***Ba'alei keriah* - September**

Heard 3 weeks before	Heard one week before	Date	Parasha	Ba'al Koreh

Even as this system is being put into place, an educational component must complement it. The Rav must teach the public which mistakes truly require correction, and which should be allowed to pass – for now. He must make clear what

is expected of each member of the three-way partnership, and provide the motivation and information for each to properly play his role.

Change will not occur overnight, but gradually. As correctors see the quality of readers settle at an acceptable level, and observe the Rav and *gabbaim* carefully correcting that which needs correcting, they will reduce their unwanted corrections, leaving only the instinctive, most visceral ones. Readers and their families will be less hesitant to stand before the congregation, when they see a kinder, gentler audience in the wings and the congregational personnel in firm control.

The process can be speeded along through the application of appropriate positive reinforcement. When a capable and good-natured *ba'al koreh* agrees to be heard in advance in order to set an example, the Rav should make a public announcement of how he sacrificed for the sake of fostering a quality reading in shul. When a teenager reads reasonably well, and will not be embarrassed by such an announcement, the Rav should explain to the congregation that this young man prepared well, and is reading as perfectly as a budding star should, and that it is the shul's newly inaugurated system that enables him and those like him to develop at their appropriate pace, without fear of embarrassment or setback.

The Bar Mitzvah Boy

Correcting the reading of a Bar Mitzvah is an area of particular delicacy which warrants its own discussion before bringing this paper to a close. While I have heard colleagues say that they will simply not correct a Bar Mitzvah, opting for *kevod ha-beriyot* over an accurate reading, I feel that such an approach betrays a lack of planning, and unacceptably sacrifices the congregation's right to fulfill their obligation.

To begin with, Rabbis and *gabbaim* should make use of any and all leniencies discussed up to this point, certainly not correcting errors that do not change meaning, and taking full

advantage of the factors of audience expectation and reader's style. Thus, emphases that change tense (like *v'aHAVta*, but not like *ba'ah*) and missing *mappiks* (for a boy who is oblivious to the concept) would not be corrected. Here, too, the work done in training the congregation not to inject corrections, but to leave correcting to trained personnel, will be of particular value.

But even this will be insufficient in some extreme cases, and the only solution is the proverbial ounce of prevention. A Rav must be familiar with the frequently-used Bar Mitzvah teachers of his community, and be satisfied that any boy he allows to read in his shul has been prepared properly. In most cases, track record alone will be sufficient to know that a particular teacher produces a competent young reader. It may be helpful to have the tutor stand near his student, since he can most seamlessly make the corrections that might disconcert the young man if emanating from other quarters. Still, that does not exempt the regular *gabbai* from being present and providing gentle correction, if the need arises. If the teacher is not known to the Rabbi, it may be necessary to interview him in advance to make sure that his concept of an acceptable reading accords with that of the synagogue. Just as a Rav is responsible to have a system in place to insure that food entering the premises is of an acceptable kashrut standard, and that *ba'alei tefilah* and *ba'alei tokeiah* (shofar blowers) on the High Holidays are well versed in meeting the synagogue's expectations of them, he must feel equally responsible to know that any Bar Mitzvah has been adequately trained. Ultimately, there are no shortcuts.[54]

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54. A survey of *minhag* manuals of Jewish communities reveals that most communities did not have the custom of a Bar Mitzvah reading his entire Torah portion. Some, in fact, forbade the practice, limiting him to reading only the first *aliyah*. Surely one of the reasons for this was a conscious effort to avoid the kind of awkward situations that would force a congregation to choose between embarrassing a well-intentioned lad and enduring an unacceptable reading. In our own day, one could make a powerful argument

Conclusion

Maintaining a quality standard for *keriat ha-Torah* is a never-ending, often thankless, behind-the-scenes task. Like housework, its value is only realized in its absence. Unlike housework, it can never be allowed to lapse, because a case of public embarrassment may be only one *parasha* away, and one such situation in a congregation is one too many.

A well-read *parasha* is a delight to hear and a pleasure to read. It pleases the mind and uplifts the soul. It is not incompatible with the ideal of training new readers, and need not lead to any compromise of *kevod ha-beriyot*. With the necessary education of all parties involved, and the proper system in place, the re-experience of the spectacle of Sinai is not a pipe dream, but a goal within reach of every *kehillah*.

דרכיה דרכי נעם וכל נתיבותיה שלום

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that the time spent coercing a young man with no flair for music or *keriat ha-Torah* to commit innumerable verses to memory, just because his classmates are doing the same, could be better spent on a learning or *chesed* project that could foster love of Jewish tradition, rather than an allergic reaction to the sight of a *tikkun*.

Shomer-Shabbat Residency

Rabbi Dr. Raymond Sultan and
Dr. Sammy Sultan

1. Introduction

The Jewish doctor who is in keeping with communal standards of halacha stands as an icon in the Modern Orthodox community. Looking at the landscape of such people, we see an array of accomplished general surgeons, OB/GYNs, orthopedists, and physicians in multiple other subspecialties without any *shomer-Shabbat* training option. One may wonder, though, why there are not instead a handful of physicians in our community practicing primarily internal medicine, emergency medicine, anesthesiology and a few other fields which do offer *shomer-Shabbat* training? While there are Orthodox Jews in every field of medicine, in order to get there, every doctor faced a crossroad during the fourth year of medical school when he or she encountered the question of whether or not to apply for a non-*shomer-Shabbat* residency.

The conversation about whether a Jewish medical student must enroll in a residency that guarantees no scheduling conflict with Sabbath observance, rather than having been debated and grappled with, has too easily been substituted by a sleight of hand, a shift of focus to the subsequent question of "how should a doctor act in the hospital on Shabbat". To clarify, when Orthodox Jewish medical students think about

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Rabbi Dr. Raymond Sultan is a urology resident at Robert Wood Johnson University Hospital.

Dr. Sammy Sultan is a general surgery resident at Weill Cornell Medical Center.

residency, logically they must ask themselves two questions: (1) "Is there a *heter* to put myself in a situation where I may have to work for the hospital on Shabbat?" and subsequently and separately (2) "Once I find myself in such a situation as a doctor, (whether as a resident in a non-*shomer Shabbat* program, or even as an attending despite possibly having trained in a *shomer-Shabbat* residency program) how should I act?" A wealth of articles, responsa and books address the latter question, a strictly halachic one: How does one handle a sick patient, a beeper, physician orders, etc. The former question, on the other hand, both halachic and *hashkafik*, has largely been presupposed and down-played.

Before delving into the topic, it is important to state clearly that this article is not intended to substitute for each individual's personal obligation to explore this topic with his or her *posek*, but rather to inform those interested by laying out the relevant primary sources and quoted public opinions on the topic. Again, this article resists the urge of discussing popular doctor-on-Shabbat topics (e.g. how to avoid or minimize *melacha* once in the hospital, how to get to and from the hospital, etc.) in order to focus exclusively on a more *hashkafik* "why" question, namely, "why even get into this scenario"?

2. The Match

The Process

For senior medical students to get accepted into a residency program they must participate in a process known as "The Match". The Match is run primarily by one non-profit organization known as the National Resident Matching Program (NRMP),[1] and was first used in 1952. The process

1. Various algorithms have been proposed for the match, but for purposes of this article, we will focus only on that currently in use by the NRMP, as of 1998.

begins with the applicant privately drafting a "rank order list" – a list of hospitals he or she would like to match at, in a specific order of preference. At the same time, after having interviewed the senior medical students, the residency program also submits its rank list. Around March 15th each year, a central computer runs an algorithm on all the rank lists. Beginning with the applicant's top choice, an applicant is tentatively matched to a program so long as the program also ranked the student on its rank order list. However, once another applicant tentatively matches at that same program, then the applicant who appears higher on the hospital's rank order list will remain matched. If an applicant thereby loses the initial tentative match, then the process repeats itself for that applicant now with the applicant's second choice, continuing that way until either the applicant remains matched at his or her highest available choice, or he or she does not match.

Once matched and graduated from medical school, residents are full-fledged doctors. They earn the M.D. degree upon graduating, and during residency they practice while training, with malpractice liability and licensed through the hospital. What separates a resident from an attending doctor is a requisite number of years of training and board-certification.

General Match Data

When the Match was first implemented, there were 6,000 US applicants for 10,400 available positions. Both the number of applicants and the positions available have gradually increased over the years, yet at differential rates, such that in 2008, 35,956 applicants vied for 25,066 positions through the NRMP. 94.4% of those positions were filled by the Match, the highest percentage ever, signifying a very successful, but also highly competitive, Match. Of course, the overall figures do not capture the entirety of the picture. At one extreme, for example, there were 326 US applicants, (with 793 in total, including foreign applicants), for 508 positions in pathology in

2008. On the other hand, for the 30 positions in dermatology available through NRMP, there were 167 US applicants, and a total of 189. Similarly, even within a given specialty, the various programs have different levels of competition, such that the best programs in any field may prove difficult to match at.

Shomer-Shabbat Programs

While some programs offer an official *shomer-Shabbat* position through the NRMP, many students make arrangements with the program director on an individualized basis to be guaranteed not to have to work on Shabbat. That being the case, circumstances may change from year to year. One anesthesia program, for example, which offered a *shomer-Shabbat* position a few years ago, is now strongly opposed to the idea. In this setting, it is difficult for a *shomer-Shabbat* applicant to obtain accurate and comprehensive information about such options based on word-of-mouth alone.

Dr. Andrew Gutwein therefore created a website (ShomerShabbatResidency.com) in January 2007 with a listing of all such information, which was last updated in February 2009 (at the time of this writing). To summarize his findings: in a survey of 243 programs (the list had 165 in 2008), across 136 (81 in 2008) different institutions in 84 (37) cities across the country, for 15 different specialties, there are a potential of roughly 8 (6) spots in anesthesia, 1 (2) in emergency medicine, 30 categorical spots in internal medicine and 25 for one year of preliminary medicine, 4 (3) in neurology, 2 (1-2) in pathology, 11 (12) in pediatrics, 3 in PM&R, 5 (7) in psychiatry, 2 in radiation oncology, 20-30 (7) in radiology, and 2 (1) in EM-IM. Yet, there are numerous other accredited specialties (e.g. general surgery, neurosurgery, OB/GYN, ophthalmology, orthopedics, otolaryngology, plastic surgery, and urology) for which nothing is listed, because such positions are either completely non-existent or extremely rare. Moreover, only a handful of these are official and run through the Match as a

shomer-Shabbat position, and so the applicant must proceed carefully in trying to secure a *shomer-Shabbat* spot, especially in light of the rule prohibiting any commitment outside the Match: "Both applicants and programs may express their interest in each other; however, they shall not solicit verbal or written statements implying a commitment. It is a breach of the applicable Match Participation Agreement for either party to suggest or inform the other that placement on a rank order list is contingent upon submission of a verbal or written statement indicating ranking intentions."

3. Sources

Looking at the spectrum of Jewish professionals, one might wonder about the dearth of Orthodox astronauts or professional athletes, to name two examples. We all know the importance of observing Shabbat, which renders certain professions simply off-limits for an observant Jew, as the nature of the profession often necessitates violating Shabbat restrictions. The field of medicine, however, is unique in that should a conflict arise, it would be in the context of *pikuach nefesh*[2] (saving of a life) for which the *Shulchan Aruch* states "one who has a dangerous illness, it is a mitzvah to desecrate the Shabbat for him."[3] Therefore, the question for someone planning to become a doctor is more subtle: Is one obligated to preempt a foreseeable Shabbat conflict, even if the given act, when the need arises, may be permissible at that time?

The Baal Hamaor's principle

The Gemara *Shabbat* 19a says:

One may not set out on a boat less than three days before

2. Whether treating a non-Jew on Shabbat is a mitzvah, see *Avodah Zara* 26a, Tosafot there s.v. *Savar*, *Mishnah Berurah Orach Chaim* 330:8, Responsa *Chatam Sofer Yoreh Deah* 131, and *Iggerot Moshe Orach Chaim* 4:79.

3. *Orach Chaim* 328:2.

> the Shabbat. What was this said in reference to? With regard to a *devar reshut (*optional action); however for a *devar mitzvah*, it is permissible. One should negotiate that the boat should stop on Shabbat, according to Rebbe, while Rav Shimon ben Gamliel says one does not have to.

What prohibition underlies this halacha? Tosafot (ibid) suggest that the concern is that one might come to build a raft, whereas a later Tosafot text suggests that the concern is that one may steer the boat. Rabbeinu Chananel says that one may go outside the *techum Shabbat*. The Rif states that the concern is that one will thereby be *mevatel oneg Shabbat* – ruin the joy of Shabbat. The Ramban says the concern is that on a small boat you will likely cause *melacha* to be done on your behalf. However, it is the *Ba'al Hamaor*'s approach to this halacha that is relevant to our topic. He states that one should not go on a boat so close to Shabbat because a sea voyage engenders a "*mekom sakana* (dangerous situation)" and it appears as though one is setting out to violate the Shabbat since "nothing (including Shabbat) stands in the way of *pikuach nefesh*".[4] If one sets out Tuesday or earlier, things should be squared away by the time Shabbat arrives, but if one starts a sea voyage so close to Shabbat, one is setting him- or herself up for a conflict with Shabbat.

Arguably, one can draw a parallel between the *Baal Hamaor*'s principle and signing up for a non-*shomer Shabbat* residency, with a common theme of knowingly placing oneself in a situation that will require *pikuach nefesh doche Shabbat*. At the same time, the halacha that the *Ba'al Hamaor* is dealing with is limited by the qualifier that for a *devar mitzvah,*[5] one is

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4. If one does find themselves in a *mekom sakana,* even if they created this situation out of their own negligence, of course it is permissible to perform *melacha* in the context of *pikuach nefesh*. *Iggerot Moshe Orach Chaim* 1:127 .

5. The Ramo *Orach Chaim* 248:4 defines this expansively as "anyone who is traveling for business, or to see the face of a friend". The *Magen Avraham* includes a business trip not only for livelihood but even if it is for extending one's wealth. The only time a trip is considered a *devar reshut* is when it is for

permitted to embark on the journey.

The *Baal Hamaor*'s principle is reiterated in a debate with the Ramban over a case from *Shabbat* 143b. At the time of the Gemara it was considered in some locales a *sakana* (danger) to a newborn's health if the child wasn't washed with hot water following a *brit*. If a *brit milah* were to take place on Shabbat, a bowl of hot water would be prepared in advance. What if the hot water spilled out before the *brit*? Should one perform the *brit* and then, having created a situation of *pikuach nefesh* for the endangered child, cook water on the Shabbat, or should one preempt such a scenario by not performing the *brit* altogether? The Ramban states that one should proceed with the *milah*, because, "*ain lamitzvah elah lesha'atah*". The *Baal Hamaor* states that if the water spilled, then "the *milah* should be pushed off, and the observance of Shabbat should not be pushed off".

Given the relevance of the *Baal Hamaor*'s principle, it is important to know whether it is accepted *lehalacha*. Numerous other questions may hinge on this principle:

1. Can one perform a *brit milah* for a convert (who electively schedules the date of the *brit*, as opposed to a new-born) on a Thursday, considering that by the time Shabbat starts he may require *chillul Shabbat* on account of his recovery?[6]

2. Can one have a non-emergency operation performed on a Thursday, such as a hip replacement to help one walk better?[7]

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a "*tiyul*" – i.e., leisure.

6. The *Tashbetz* (1:21) first introduces this idea based upon the *Baal Hamaor*. The *Shach* (*Yoreh Deah* 266:18) says that since *milah* is a *devar mitzvah*, it is permissible. The *Mishnah Berurah* (*Orach Chaim* 331:33) quotes the *Shach* and the concept of "*ayn machmitzin et ha mitzvot* (one should not delay preformance of a mitzvah)" (*Mechilta* on *Shemot* 12:17). *Acharonim,* in debating this issue, weigh the likelihood of the *chillul Shabbat* scenario arising. See further *Taz* 262:3, *Sheelat Yaavetz* 2:95.

7. Rav Ovadya Yosef (*Yalkut Yosef* 248:10) prohibits such an action. So too does *Shmirat Shabbat Kehilchita* 32:33; however in footnote 97, he quotes Rav

3. If a pregnant woman is past term, can she receive a hormone infusion to induce pregnancy even if that induction will likely lead to delivery on Shabbat?[8]

4. If one has the option of committing a lesser sin earlier in time rather than having to find oneself on Shabbat with the possibility of needing to perform *melacha* for the sake of *pikuach nefesh*, which choice is preferable?[9] For example, if Yom Tov falls out on Friday and one can anticipate that on Shabbat there will be a situation of *sakanat nefashot* (life threatening), can one preemptively commit a lesser sin Friday (*melacha* on Yom Tov is considered less severe than *melacha* on Shabbat) to avoid the dire situation on Shabbat?[10]

5. If one works at a hospital not within walking distance of his or her home, with a sick person in their care, can he or she leave the hospital Friday afternoon knowing they may well need to do *melacha* in order to return on Shabbat?[11]

Shlomo Zalman Auerbach that if an expert surgeon only operates on that day, it would be classified as a "*devar mitzvah*" and therefore permissible.

8. One may do so if her, or the unborn child's, health is in danger, according to *Shmirat Shabbat Kehilchata* 32:footnote 98.

9. The *Netziv* in the *Ha'amek Davar* says that these two options were espoused by Moshe and Aharon in *Bamidbar* 17:12. In order to stop the plague, incense was needed. Carrying burning incense from the inner sanctuary is a lesser sin than lighting incense outside. Moshe told Aharon to commit the lesser sin of carrying the already burning incense to the people assuming the plague was still rampant. Aharon, concerned that the plague had ended, did not commit the lesser sin of carrying lit incense but instead waited to arrive in the camp to confirm that the plague was still present and subsequently committed the greater sin of lighting incense outside the courtyard in the context of *pikuach nefesh*.

10. The *Netziv* in the *Harchev Davar Bamidbar* 17:12 states that if one is sure the situation of *sakana* will arise on Shabbat, then it would be better to commit a lesser sin on Friday. However, if there is the possibility that that *sakana* may not arise, then it is better not to do anything on Friday and should the *sakana* indeed arise on Shabbat, then at that point commit the "greater sin".

11. Rav Neuwirth (*Shmirat Shabbat Kehilchita* 40:22) states that generally speaking one should not leave the hospital. However, in a footnote he notes

6. In theory, if one were able to predict accurately the day of childbirth by tracing back to the day of conception, would one be permitted to have marital relations on a day of the week that would cause childbirth to fall out on the Shabbat?[12]

In considering the application of the *Baal Hamaor*'s principle, the *acharonim* discuss the following variables: (a) the likelihood that the action in question will actually lead to a *chillul Shabbat*; (b) whether there is an alternative option – another opportunity to perform this action without risking a conflict with Shabbat; (c) once this "*chillul Shabbat*" arrives in the context of *pikuach nefesh*, whether it is considered "*hutra*" or "*dechuya*".[13]

Lo min kol adam zoche lehitrapot

Beyond debating the *Ba'al Hamaor*'s principle and the extent of its application, it is important to consider whether there is a relevant counter-principle. In other words, in contrast to always looking ahead to avoid potential conflicts, perhaps there is a mandate to act only in the moment, along the lines of Moredchai's famous charge to Queen *Esther "Mi yodea im la'et*

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that he heard that if the doctor was already home, Rav Shlomo Zalman Auerbach was favorable towards being lenient if by staying in the hospital he would thereby ruin his and his family's *oneg Shabbat*, for in such a circumstance it would be a "*devar mitzvah*". Rav Moshe Feinstein (*Iggerot Moshe Orach Chaim* 1:131) writes that if a physician knows that he has to be in the hospital on Shabbat he should arrange in advance to sleep in or near the hospital. The only instance where one doesn't have to do so is if the physician can't sleep (well) in such an arrangement and the patient specifically asks for this doctor.

12. *Niddah* 38a states that the "Pious ones of old would cohabit only on a Wednesday so that their wives would not come to violate the Shabbat". From the discussion there it appears that in the time and locale of Shmuel, women would only give birth 271, 272, or 273 days after cohabitation and therefore would avoid cohabitation Sunday through Tuesday so as not to have a delivery on Shabbat. See *Iggerot Moshe Orach Chaim* 1:127.

13. See *Yuma* 85, *Shulchan Aruch Orach Chaim* 328:12, the Ramo and *Taz* there, *Mishneh Torah:Zmanim:Shabbat*:2:1-3.

kazot higa'at la'malchut,"[14] insisting that she play her part, assuming a role that extends beyond the anticipated.

In discussing the scenario in which a doctor vowed that a person would derive no benefit from him, the Gemara *Nedarim* 41b states that should the patient fall ill, the doctor should nevertheless treat the patient. The Ran explains that even if another doctor is available there is a mitzvah of returning a lost object (a person's health), and there is no greater act of returning than this. So despite another doctor's availability, he should treat the person because "*Lo min kol adam zoche lehitrapot* – not from every person is one merited to be healed." The phrase that the Ran expressed was borrowed from the *Yerushalmi Nedarim 4:2*.

The Gemara in *Avodah Zarah* 55a states that when illness comes to someone, it is decreed to start on a specified day, and decreed not to leave until a specified date and time, by a specific person and specific remedy. While the simple reading of the text in which this statement is expressed implies the contrary to the Ran, namely that an illness will be relieved at a specific time, no matter who is playing doctor (even a voodoo-magic, idol-worshipping doctor as is the case in the story there), on a deeper level the story and phrase *Lo min kol adam zoche lehitrapot* impart that *Hashem* works with a master plan and each agent is supposed to play his role.

Become a Baki[15]

Alternatively, even if we accept the *Baal Hamaor*'s principle of looking forward, perhaps it is important to consider a different vantage point. As the *Shulchan Aruch* states: "The Torah gives permission for a doctor to heal, and it is a mitzvah included under the rubric of saving a life. If you withhold

14. *Megillat Esther* 4:14.

15. *Baki* is generally translated as expert, specialist, knowledgeable, experienced, qualified, etc. See *Shulchan Aruch Yoreh Deah* 336:1; *Nishmat Avraham Yoreh Deah* 336:1; *Tzitz Eliezer Ramat Rachel* 5:22.

yourself it is as though you spilled blood, even if there is another doctor available, for *Lo min kol adam zoche lehitrapot*. Nevertheless, do not deal with healing unless you are a *baki* (expert), and there is no one greater than you for if not so it is as though you are spilling blood."[16] Here we see a difficult and delicate balance: a doctor has a responsibility to heal, but only "if you are a *baki,* and there is no one greater than you." Essentially, then, this challenge mandates that a doctor "be the best." In this light, in addition to asking whether you can put yourself in a situation that will lead to *chillul Shabbat*, perhaps it is also relevant to ask whether you can put yourself in a situation that will lead to the inability to best treat a patient. One could even suggest a requirement to pursue the best medical training possible, irrespective of the guaranteed *shomer-Shabbat* status.

4. Contemporary *Poskim*

Having discussed the primary sources that serve as the basis for this discussion, let us now turn to the published opinions of contemporary *Poskim*.

Rav Moshe Feinstein zt"l

In response to the situation of a resident being "on call" on Shabbat, Rav Moshe Feinstein *zt"l* rules[17] that one must do his best to receive permission to arrange his schedule so that he will not be required to be in the hospital on Shabbat.

Rabbi Moshe Tendler

Rabbi Tendler writes that R. Moshe Feinstein was asked orally: "Is a physician obligated to seek training, employment, or attending-physician status at a hospital where there is a minimal or no conflict between hospital policy and Sabbath

16. *Yoreh Deah* 336:1.

17. *Iggerot Moshe, Orach Chaim* 4:79.

observance? Should a house officer seek training at an inferior quality hospital where he is "guaranteed" not to have to work on the Sabbath or should he seek training in a hospital where training and overall patient care is far superior, but where there may be interference with the Sabbath spirit but not with the observance of halachic restrictions?" (Oral answer of R. Moshe): "A physician must seek association with the most reputable and prestigious hospital possible to ensure excellent training and continuing education."

Rabbi Tendler appends his own comments: "Jewish law requires that the physician acquire maximum skill and competence to practice his chosen profession. Therefore, he should forgo the personal comfort and convenience of training in a hospital that is sympathetic to his religious needs in favor of the hospital that will provide him with the best possible training, provided that he is certain of his fortitude in maintaining all halachic requirements, despite the less favorable environment. If the superior training is to be acquired at the price of Sabbath desecration, even of rabbinic ordinances only, the student-physician must forgo the educational advantages of the prestigious hospital. It is important to emphasize that residents in non-*shomer Shabbat* programs have often found themselves under great stress from the hospital administration and mentors who are unsympathetic to their religious convictions. Open discussion with the training hospital must be initiated before accepting such an appointment."[18]

Rabbi Herschel Schachter

"A brilliant person is not obligated to go to medical school in order to learn medicine in order to save lives. Only one who

18. This was a ruling of Rav Moshe Feinstein as reported by Rabbi Moshe Dovid Tendler and Dr. Fred Rosner, *Practical Medical Halacha*, Rabbi M. D. Tendler and Dr. F. Rosner, p.150, 1998. Complete text available at http://daneisenberg.com/sstshuvahtendler.pdf.

already knows medicine is obligated to take time away from his learning to attend to issues of *pikuach nefesh*…However, all of these halachot only apply once someone is already a doctor. We would not, however, allow one to be *mechalel Shabbat* in order to attend medical school in order to save lives at some later time… There is a terrible misconception that the laws of Shabbat do not apply to doctors. This is absolutely incorrect. No profession exempts anyone from any mitzvot. Medical students are certainly not exempt from Shabbat observance. And even after having completed his school years, the future doctor must take special care to make sure he has a Sabbath-observant residency. If this can not be arranged, the student must simply look for a different profession."[19]

Rav Neuwirth

Though he doesn't specifically address the issue of *shomer-Shabbat* residencies, Rav Neuwirth does state "In general one is obligated to do any preparations possible; nevertheless, *meikar hadin* (according to the letter of the law), there is no obligation to do an action with "*torach gadol* (great effort)" in order not to have to do *melacha* on Shabbat."[20]

R. Dovid Cohen

R. Dovid Cohen maintains that *lechatchila (a priori)* a person should pursue a *shomer-Shabbat* residency, but if he can't, he can't, and must find ways to cope.[21] When asked whether a person should choose which field he or she will practice for his or her career based on the availability of a *shomer-Shabbat* residency, he said: no, a person should choose a field that they want to be in, that they're interested in, that they have a *"geshmak*" (yen) for. And lastly, when asked whether someone should choose a program that offers a better training at the

19. http://www.torahweb.org/torah/special/2007/rsch_*Shabbat*1.html.

20. *Shmirat Shabbat Kehilchita* 32:34.

21. Personal correspondence.

expense of not guaranteeing a *shomer-Shabbat* schedule, he responded: "It's the judgment of the doctor; if it's an area where there's a lot of *pikuach nefesh*, then he or she should pursue the best training, but there are a lot of fields where it doesn't matter so much, and a person should judge this issue for him- or her-self. This is what I heard from the late Gaon Rav Gustman."

5. Discussion

The central halachic question of this article is whether one is obligated to pre-empt a foreseeable Shabbat conflict, even if when the need arises, the given act may be permissible at that time. For the individual, the next question is a *hashkafik* one: Why would I? Why should I?

At the heart of the matter, for those tolerant of non-*shomer-Shabbat* residency, there is an undercurrent of a perceived need, to have in and for the Jewish community at all times, "the Jewish doctor." Some doctors amenable to non-*shomer-Shabbat* residencies argue: "Isn't our community sufficiently diverse, our laws abundantly complex and not infrequently esoteric, and our genetic and medical needs great enough as to occasionally require a guide and provider with a common language and value system?" Some even consider the Jewish doctor indispensable as the product that affirms Modern Orthodoxy's value system. This issue has been addressed by a number of contemporary *Poskim*, with somewhat diverse conclusions, as we have noted.

In drawing to a close, it is important to add a critical qualifier. At the outset we stated that the question of *shomer-Shabbat* residency really subsumed two questions: (1) why put myself in such a situation and (2) once there, how does one navigate. It is not our intention by limiting our focus to the first question to imply that the second issue is, practically speaking, navigable or even feasible. The first question, to which this article is dedicated, pales in comparison to the number and gravity of issues that arise with respect to the

second question. In our firsthand experience, in the current environment of U.S. residency in which one cannot hire a non-Jewish shadow, we want to attest that there lay too many challenging scenarios, compromising situations and gray areas to, in good conscience, convey the presumption that if one does sign a contract for a non-*shomer-Shabbat* residency he or she will be able to deal with the second question in a way that doesn't harm their *neshama* (soul).

6. Conclusion

No profession exempts anyone from any mitzvot. Observance of Shabbat renders certain professions simply off-limits for an observant Jew. *Shomer-Shabbat* residencies help avoid any compromising scenarios, yet not every field of medicine, especially the more specialized and competitive ones, offer *shomer-Shabbat* residency spots. The field of medicine, however, is unique in that should a conflict arise, it would be in the context of *pikuach nefesh.* There are principles in halacha that would discourage, and some that would neutralize or even encourage one from pursuing a non-*shomer Shabbat* residency. Contemporary *Poskim* have publicized statements with regard to this topic, with variant conclusions.

Morgue Construction and *Tum'at Kohanim*

Rabbi Yaakov Jaffe
Rabbi David Shabtai

The authors were recently contacted by a local nursing home as consultants for a project to explore potential sites for the nursing home's morgue relocation. The religious leadership of the home wanted to situate the morgue in such a way so that *Kohanim* who live in the home, or those who may visit, would not regularly violate the prohibition of contracting *tum'ah* (ritual impurity).

This article will address the issues involved for the various potential locations throughout the nursing home complex. While there may be other potential violations of *tum'at Kohanim* involving the transportation of recently deceased residents from their place of death to the morgue, the authors were not asked to consult on such issues and as such will not address them at this time.

At the time of our visit, the morgue was situated in a completely separate building from the rest of the nursing home complex. Such an arrangement prevents any problems for *Kohanim* visiting the nursing home proper. The home's administration suggested relocating the morgue to the back edge of an underground parking garage, beneath the home

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Yaakov Jaffe is Rabbi of the Maimonides Minyan in Brookline, MA, member of the faculty and coordinator of the Halacha Program at the Maimonides School, Yeshivat Rambam.

David Shabtai has semicha from RIETS, Yeshiva University, and is a fourth-year medical student at NYU.

and the residents' floors. The morgue would be a six-foot tall refrigerated unit, housed in a room enclosed by concrete walls on all sides, leaving substantial room above the unit for fans, with a single door in the center of one wall to be opened and closed as needed.

A. Background

Before dealing with the specific issues at hand, a brief overview of the laws of *tum'ah* is in order.

Kohanim are forbidden from contracting *tum'at meit* – ritual impurity that emanates from dead bodies [or that which represents them].[1] The prototypical source of *tum'at meit* is a human corpse, which for all intents and purposes, functions as a primary source of *tum'ah*. That which it comes into contact with is also *tamei*, albeit on a lower level, and that second object or person can impart *tum'ah* to a far more limited set of objects than a primary source of *tum'ah*.

Tum'ah is contracted by: 1. Coming into physical contact with a corpse (*maga*); 2. by situating oneself above or below a corpse (*ma'ahil*) but not coming into physical contact; 3. by being in the same room under one roof as a corpse. The latter category, *tum'at ohel*,[2] is the most complicated option: *Tum'ah* can only spread in an *ohel* through continuous open areas beneath a contiguous roof. Thus, a person standing in the same room as a corpse will contract *tum'ah*, but a person in an adjacent room will not, if there is a closed door separating his location from that of the corpse [that is, the door halts the continuous open space with the corpse]. Just as an *ohel* can induce the spread of *tum'ah,* it can similarly inhibit its spread. If a corpse is found within a **closed** *ohel* that contains a volume of a cubic *tefach* (handbreadth), the *tum'ah* is confined to that

1. *Vayikra* 21:1.

2. An *ohel* is literally defined as a tent, but in the context of *tum'ah*, it generally refers to any roofed structure.

ohel (*Ohalot* 3:7). Thus, a corpse found within a closed room or container of sufficient size will permit the spread of *tum'ah* within the contained spaces, but the *tum'ah* is prevented from spreading beyond their confines. The morgue in question will provide a further example of application of these principles.

At first glance, the placement of the new morgue in the underground parking lot should pose no problem whatsoever for any of the home's residents. As the corpses are secluded from view, the residents are effectively protected from coming into physical contact with them, limiting the potential spread of *tum'ah* via *maga*. Moreover, the spread of *tum'ah* to a person situated above or below is limited to a primary source of *tum'ah*, namely a human corpse. Since the bodies would be contained entirely within a large, closed refrigerated unit, the spread of *tum'ah* is limited to the space within the refrigerated unit, but cannot extend beyond it. Therefore, any concern for *tum'at ma'ahil* is also effectively muted, since being above the refrigerated unit itself poses no problem, as the *tum'ah* cannot extend beyond its walls.

The only realistic probability of contracting *tum'ah* in this situation, would be by being under the same roof as the corpses. In our case, the morgue would potentially open [exclusively] into a parking garage and not into the nursing home itself. Considering that most of the time the door to the morgue is closed, *tum'ah* could not travel from the morgue into the home during those times, because there are no open passageways connecting the two locations. Even when the door to the morgue would be opened, *tum'ah* would also not spread into the home. This is because a corridor with double doors on both sides connects the nursing home to the parking garage. When closed, these doors function as effective barriers to the spread of *tum'ah* by precluding a continuous open space between the morgue and the nursing home. The chances are slim to none that all three doors would be opened simultaneously, thereby allowing the *tum'ah* to move unimpeded from the morgue into the nursing home. As such,

this method of *tum'ah* spreading is similarly limited.

Lastly, the *tum'ah* would not rise from the morgue into the nursing home. Since there would be a void of empty space above the deceased of a cubic *tefach*, we rule that the *tum'ah* remains in [or cannot penetrate] that empty space, and therefore cannot rise up and penetrate the ceiling and enter the floors of the home above (Rambam, *Tum'at Meit*, 7:5).

B. The Morgue as a Sealed Grave

There is however, one way in which the morgue can present a problem. If the *tum'ah* were not contained within the structure of the morgue, but if the morgue itself qualified as a primary source of *tum'ah*, the rules would change. Were we to consider the morgue to be a "*Kever Satum*," or sealed grave, it would be subject to a series of special rules regarding the spread of *tum'ah*, much like an actual corpse. The Gemara in *Nazir* (53b) teaches that a sealed grave conveys *tum'ah* in its own right,[3] apart from whatever impurity the deceased imparts on his or her own. In the words of the Mishnah (*Ohalot* 7:1):

> נפש אטומה הנוגע בה מן הצדדין טהור מפני שטומאה בוקעת ועולה בוקעת ויורדת אם היה מקום הטומאה טפח על טפח על רום טפח הנוגע בה מכל מקום טמא מפני שהיא כקבר סתום.

> One who touches the side of a burial crypt remains pure because the *tum'ah* emanating from it [only] travels vertically. If the space of the *tum'ah* [within the crypt] is a cubic *tefach,* then one who touches it on its side is *tamei*, as this crypt is comparable to a sealed grave.

If the morgue qualifies as a sealed grave, then the concrete roof and the walls of the morgue would impart impurity on

3. The sealed grave represents the notion of death on its own (though it, itself, is nothing more than stone), and not just as a container that holds a corpse within it.

their own whenever a corpse rested within its walls. There would thus be no void of empty space between the *tum'ah* (now the concrete ceiling of the structure instead of the corpse) and the main floor of the nursing home, posing a serious problem for any *Kohen* standing on the home's ground floor.[4] The Gemara never provides limitations or other criteria for the category of a sealed grave that would forestall viewing this morgue as a sealed grave.[5] This situation would prohibit *Kohanim* from entering the main floor of the nursing home in its entirety, as the *tum'ah* of the morgue (as a *kever satum*) would penetrate through the ground level and impart *tum'ah* to all areas sharing the same ceiling with the main floor (as all the buildings shared a common ground level and were all open to each other, this would include the ground level of each of the six buildings).

Limitations of a sealed grave

While absent from the Gemara, the *Rishonim* and *Acharonim* deduce several criteria that are necessary for an area to qualify as a *kever satum*. An analysis of these factors would argue that the nursing home's morgue would not qualify as a sealed grave and therefore does not pose a *tum'ah* problem as a *kever satum*.

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4. Although the refrigerated section that will actually hold the bodies will not reach the ceiling of the room that houses the unit, about half of the refrigerated section was to be covered by fans and other machinery, thereby obliterating this space. The floor between the garage and the main floor of the nursing home did have some thickness to it, but we were told that it was full of pipes, wires, and the like and its dimensions could not be ascertained.

5. The Mishnah (*Ohalot* 7:1) does provide a limitation, that there must be a void of air space of one cubic *tefach* inside the structure to qualify as a *kever satum*. This limitation would not exclude our case from qualifying as a sealed grave, since the morgue would contain enough space to hold several corpses, a much larger void than the required cubic *tefach*. This limitation is subject to much debate and discussion. See the position of Ri in Tosafot *Bava Batra* 100b (and Rashash ad loc.), and the *Chiddushei Rav Chaim ha-Levi* on the Rambam, *Tum'at Meit* 7:4.

A. The Tosafists (*Bava Batra* 100b) note that when the Mishnah (*Ohalot* chapter 4) describes *tum'ah* found in a chest of drawers, it entirely neglects the notion of a sealed grave. From this observation, the Tosafists derive the principle that a *vessel* containing *tum'ah* does not qualify as a sealed grave, because one has no intention to "leave the *tum'ah* in [that] place indefinitely" when placed in a vessel. This exclusion is based on the idea that a grave is a permanent resting place for the deceased, not a place where *tum'ah* is housed temporarily; this exclusion is specifically not predicated upon the intricacies of the laws of vessels. Though the nursing home's morgue is not a vessel in the same manner as the Mishnah's chest of drawers, it nonetheless should not qualify as a sealed grave because the *tum'ah* will certainly not be left in the morgue indefinitely.

B. Elsewhere, the Tosafists note (*Berachot* 19b, *Nazir* 53b s.v. *cherev*) that coffins are not included in the biblical category of sealed graves, even though the deceased will remain in the coffin indefinitely [thereby discounting limitation (a) above].[6] Consequently, the Tosafists deduce a second limitation to the rules of graves – already alluded to by the Mishnah in *Ohalot* - that any grave that has an opening cannot be considered to be "sealed." They postulate that the coffins referred to by the Gemara had small openings and therefore were excluded from the regulations of the laws of graves. The Tosafists fail to specify, however, what size opening is sufficient to disqualify a grave from being considered to be sealed.

Ultimately, the question may revolve around the logical basis as to why a grave must be sealed in order to attain this

6. Coffins only qualify as having rabbinic *tum'ah* because we are concerned that a given coffin may contain *tum'ah retzutzah*, *tum'ah* that has the power to break through a closed ceiling of the coffin lid because there is no void of airspace in the present container for the *tum'ah* to reside in. This decree only applies when the void of space is quite small and one may come to confuse the case in question with that of *tum'ah retzutzah*, but would not apply in the case of a large morgue.

higher level of *tum'ah*. Two explanations present themselves:

(1) The Torah's decree that a grave qualify as a primary source of *tum'ah* was only issued specifically in reference to a *sealed* grave. Therefore, any size opening, by definition, excludes a structure from being considered a sealed grave.

(2) The rules of a sealed grave are only triggered in a situation where the *tum'ah* is trapped entirely within the grave and cannot leave by any means. If the *tum'ah* can spread beyond the confines of the grave, then the grave does not qualify as a primary source of *tum'ah*, because it no longer traps *tum'ah* within it.

If we adopt the second explanation, then the opening would need to be large enough for the *tum'ah* to leave, to disqualify a room from the rules of sealed graves. In that vein, Rosh (*Shu"t ha-Rosh* 30) rules that the air space must be a square *tefach* for the room not to be considered a sealed grave, since *tum'ah* cannot travel through smaller spaces (as per *Ohalot* 3:7).

Derishah (*YD* 371) however, disagrees and argues that even a smaller opening suffices. This approach is in accordance with the first explanation above, that any size opening is sufficient to unseal the grave, and therefore the Torah's unique regulations no longer apply.

Tiferet Yisrael (*Ohalot* 4:8) extends *Derishah's* line of reasoning, claiming that any "grave" with a door is not considered a sealed grave, even were that door to be closed (based on Rambam *Tum'at Meit* 7:1 and *Bava Batra* 12a). The Torah's rule of sealed graves applies only to graves that are not intended to be opened. It is limited to permanent resting places and does not apply to rooms that contain a door to facilitate easy access. According to this approach, a morgue never qualifies as a sealed grave on any terms.[7]

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7. *Chiddushei ha-Gershuni* (commenting on *Taz YD* 371:10), accepts this position as well, when the closed door is 16 x 16 inches.

C. Rambam gives a different interpretation as to why coffins are not considered to be sealed graves (*Tum'ah Meit* 12:6). He limits this rule to stone burial crypts and not wooden coffins.[8] Even Rabad seems to agree to this distinction as well. Rambam specifically excludes wooden coffins, but it appears that he was limiting this rule to the usual means of burial – namely stone graves and burial crypts. To this approach, a morgue with a metal door would not be considered a grave, for it, too, is not made of stone. On a more halachic level, in the spectrum between that which is considered a vessel (*kli*) and that which is considered an *ohel*, stone tends to qualify as an *ohel*. Metal objects, however, almost always qualify as *keilim* (vessels). Wood objects tend to fall somewhere within this spectrum. Since the Rambam is drawing a distinction between wood and stone, it would appear that metal objects would be excluded as well.

Elsewhere, Rambam states that a grave is a structure that is "built up and closed" (*Tum'at Meit* 2:15), implying that a second, related reason why coffins are exempt is particularly because they are not a built-up structure. *Tiferet Yisrael* interprets this approach (*Ohalot* 7:12 and 9:73) to mean that there must be a constructed burial space, almost like a

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8. Rabad's (12:6) resolution to the Gemara's apparent contradiction as discussed in the text above is that really all coffins do attain the *tum'ah* of sealed graves, but nonetheless, *Kohanim* are not prohibited from becoming defiled in such a manner. This is probably because Rabad viewed the nature of *tum'ah* of sealed graves as akin to other forms of *tum'ah* that do not relate to human death and dying (like a leper or animal corpse), which *Kohanim* are not forbidden from coming into contact with (*Nazir* 48a).

Rabad understands that the *tum'ah* of the sealed grave only involves touching the walls of the grave, that is *tum'at maga*, and not the added *tum'at ohel*. Ordinarily, imparting *tum'at ohel* is a veritable litmus test for determining which forms of *tum'ah* relate to human death and dying. Thus, it is understandable why a *Kohen* need not be concerned with this type of *tum'ah* (See Rivan 53b; Rabad *Bava Batra* 12b; Rambam *Tum'at Meit* 7:4, 25:2). Most authorities (*Beit Yosef* 369), however, disregard this position of Rabad.

mausoleum, to qualify as a sealed grave. A morgue is not an independent structure but rather only a small part of a much larger building and, according to this approach, is not considered to be a sealed grave.

And so, on the basis of these three limitations provided by the *Rishonim*, there appears to be room to argue that this morgue does not qualify as a sealed grave. Residents and visitors of the home who are *Kohanim* would be permitted to stand above the morgue, or to touch the external wall of the morgue, without violating the laws of purity incumbent upon *Kohanim*.

C. The Deceased Will Eventually Leave the Morgue

Though the standard regulations of *tum'at ohel* prevent *tum'ah* from spreading beyond a closed room, there is an additional mechanism that may allow exactly such a possibility. The Mishnah (*Ohalot* 7:3) teaches that any place to which the *tum'ah* is destined to spread is already to be considered *tamei* even before the *tum'ah* is moved into it. This idea, wherein we rule that certain locations are *tamei* in anticipation of the future spread of *tum'ah,* is popularly referred to as "*sof tum'ah latzeit*."

Returning to the case of the sealed chest of drawers, the Mishnah (*Ohalot* 4:1) rules:

> היה עומד בתוך הבית - טומאה בתוכו הבית טמא, טומאה בבית מה שבתוכו טהור שדרך הטומאה לצאת ואין דרכה להיכנס...
>
> תיבת המגדל יש בה פותח טפח ואין ביציאתה פותח טפח – טומאה בתוכה הבית טמא, טומאה בבית מה שבתוכה טהור שדרך הטומאה לצאת ואין דרכה להיכנס. ר' יוסי מטהר מפני שהוא יכול להוציאה לחצאים או לשרפה במקומה...[9]

9. The Tosafists assume (*Chulin* 125b s. v. *yachol*), that Rabbi Yossi's ruling is limited to the specific facts of this Mishnah and that he does not deny the concept of anticipatory *tum'ah* in its entirety. See *Tosafot Yom Tov*, *Ohalot* 4:2,

היה עומד בתוך הפתח ונפתח לחוץ – טומאה בתוכו הבית טהור, טומאה בבית מה שבתוכו טמא שדרך הטומאה לצאת ואין דרכה להיכנס.

If a chest [of drawers] was located within a house and there was *tum'ah* contained within the chest – then the house is *tamei*; if the *tum'ah* was located within the house – that which is in the chest remains pure, as the nature of *tum'ah* is to exit and not to enter.

[Regarding] a drawer within a larger chest [in a house] where the drawer's volume exceeds a cubic *tefach*, but the interface between the drawer and the house is smaller than a square *tefach*: if *tum'ah* was located within the drawer – the house is *tamei*; if *tum'ah* was located within the house – that which is in the drawer remains pure, as the nature of *tum'ah* is to exit and not enter. R. Yossi states that [in the first case] the house remains pure because he can remove the *tum'ah* from the drawer in portions [smaller than that which generally spreads *tum'ah*], or can burn the *tum'ah* in its place.

If the chest was located in the doorway to a house and its opening faced the outside: if there was *tum'ah* within the chest – the house remains pure; if the *tum'ah* was locaated within the house – that which is in the chest is *tamei*, as the nature of *tum'ah* is to exit and not to enter.

Since the only way that *tum'ah* can leave the chest of drawers is by entering the house, the house becomes *tamei* even when the chest is still closed and the *tum'ah* has not yet spread to the house [via mechanisms of *tum'at ohel*]. Since we anticipate the *tum'ah's* future movement, the outer room is *tamei* even now. Only if the *tum'ah* had an alternate means of egress (i.e., the chest stands in the doorway and so the *tum'ah* can leave directly without entering the house), will the house be exempt from these unique rules of anticipatory *tum'ah*.

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and super-commentaries for further discussion.

Returning to the nursing home and taking this principle into account, whenever a deceased is found within the morgue, the entire underground parking garage would be considered *tamei*, even when the door to the morgue is closed. Since we anticipate that the deceased will leave the morgue through the garage (on its way to a funeral or cemetery), even now, when there is no mechanism of *tum'at ohel* connecting the morgue to the parking garage (since the door to the morgue is closed), we consider the *tum'ah* to be present in the garage. We therefore advised the religious leadership of the home to place a sign outside the garage cautioning *Kohanim* to use only the outdoor parking lot.[10]

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10. We should note that Rambam denies the entire concept that we treat places as *tamei* on account of anticipation that *tum'ah* will eventually arrive at that point. This disagreement between Rambam and most other authorites revolves around the interpretation of a Mishnah in *Ohalot*:

> המת בבית ובו פתחין הרבה כלן טמאין נפתח אחד מהן הוא טמא וכלן טהורים חשב להוציאו באחד מהן או בחלון שהוא ארבעה על ארבעה טפחים הציל על כל הפתחים.
>
> If a corpse is located within a house containing many [closed] doorways – all of the dorways are *tamei*. Were one of the doors to open – the open doorway is *tamei* and the rest are pure. If he thought to remove the corpse [from the house] through a specific doorway or via a window that is at least 4 by 4 *tefachim* – he has spared all of the other doorways [from becoming *tamei*].

Almost all commentators explain that this Mishnah teaches the rule of *sof tum'ah latzeit*, adding the caveat that in cases where we are not yet sure what exit the deceased will take, all potential exits are *tamei* even at the earlier point. [On its face, this is an odd ruling, for we are assuming that two contradictory futures are both going to happen, essentially a *tartei de-satri*.] Yet, Rambam interprets this Mishnah as referring to an outgrowth or extension of the laws of a sealed grave (7:2), without even mentioning anticipatory *tum'ah*. For Rambam, all of the doorways are *tamei* because the house is a sealed grave, which imparts *tum'ah* to all its sides, as above.

Meanwhile, Rambam explains the previously-mentioned *Mishnayot* in the fourth chapter of *Ohalot* similarly without mentioning the concept of anticipatory *tum'ah*. Rather, he invokes the principle that "*ohel betoch ohel tamei*" – a larger room can become *tamei* if there is *tum'ah* anywhere within it, even if that *tum'ah* is within a smaller container that prevents its spread to the larger room. For Rambam, the outer room is *tamei* not because we anticipate the *tum'ah* to exit its smaller container and enter the larger room.

After leaving the parking garage, the hearse containing the deceased must pass through the entry gate to the nursing home complex, as there is only one exit. Therefore, once any of the home's residents has died, we should anticipate that the hearse containing the deceased will depart through that gate, thereby imparting *tum'ah* upon that entrance from the moment of death. It would therefore stand to reason that *Kohanim* should refrain from entering the entire nursing home complex from the moment of death until the deceased has been escorted out. Upon questioning, we were informed that this process may take between several hours to several days, causing much difficulty for *Kohanim*.

Still, the agreement of virtually all *Poskim* is that *Kohanim* need not be concerned with anticipatory *tum'ah* near the nursing home's gate. On the one hand, Ramo (*YD* 371:4) does quote the position of *Terumat ha-Deshen* that we indeed do ascribe *tum'ah* to the city gates, so long as the deceased has not yet left the city, since we anticipate that the deceased will exit through these gates on the way to the cemetery. However, most *Poskim* (*Dagul me-Revavah*, *Pitchei Teshuvah*, *Be'ur ha-Gra*, ad loc; *Shu"t Minchat Yitzchak* 10:124) disregard this position on the basis of an explicit Mishnah. The Mishnah (*Ohalot* 11:1) limits the rule of anticipatory *tum'ah* only to those rooms continuous with its current location, meaning all rooms and hallways that the deceased will pass through until such time that it reaches the outdoors. Once outdoors, however, the power of anticipatory *tum'ah* is mitigated. Even if we know for certain that the deceased will ultimately be brought into

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Rather, it is *tamei* because at this very moment there is *tum'ah* in it, albeit in a container. [Other authorities argue that this principle is an invention of Rambam and an incorrect reading of the Mishnah, since the Mishnah should be understood through the principle of *sof tum'ah latzeit* (see also *Shu"t Minchat Yitzchak* 6:138).] See also Rambam *Tum'at Meit* 20:7-8, where Rambam again fails to invoke *sof tum'ah latzeit* in a context in which almost all other commentators have done so. [In this case, *Chatam Sofer Yoreh Deah* 340 disagrees with Rambam .]

another structure (such as a funeral home), since that second location is not contiguous with the first, *tum'ah* is not imparted on that second structure until the deceased is brought under its roof.

Conceptually, we can explain this phenomenon as follows. At first glance, one might reason that despite our anticipation, the **original** *tum'ah* of the deceased cannot spread beyond the confines of the morgue and into the garage; after all, we know that *tum'ah* requires an opening to allow for its spread and cannot leave a windowless room with a closed door. Rather, it seems that whenever we invoke *sof tum'ah latzeit* we essentially treat the hallway or the parking garage **as if** it contained *tum'ah* – although we realize that no actual *tum'ah* is present in that area. This interpretation would fit well with the position that this anticipatory *tum'ah* is only rabbinic in nature; biblically there is no *tum'ah* in the garage at all.[11] Were this interpretation true though, why would we distinguish between indoors and outdoors; why would anticipatory *tum'ah* be limited only to those structures contiguous with the current location of the deceased? As such, it behooves us to find a different interpretation for the nature of this anticipatory *tum'ah*.

An alternative interpretation is that in fact the rule of *sof tum'ah latzeit* teaches that, under certain circumstances, "real *tum'ah*" can actually spread through a closed door (as opposed to teaching that a new "anticipatory *tum'ah*" is created in a space into which the *tum'ah* is destined to travel [but as of now cannot spread]).[12] This position works well within the view that *sof tum'ah latzeit* is biblical in nature.[13] Stated precisely, the

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11. Rashi *Chulin* 125b, *Beitza* 10a, Bartenura *Ohalot* 7:3, *Tashbetz* 3:1, *Shu"t Maharil* 150, *Shach YD* 371:8.

12. Rav Shlomo Zalman Auerbach adopted the stringencies of both interpretations. See *Shu"t Minchat Shlomo* 1:72.

13. See Rashi *Beitza* 38a (whose position is reinterpreted by *Pnei Yehoshua* at 10a and 38a), Rashi *Eruvin* 68a, *Tosafot Yom Tov Ohalot* 7:3 (*Ma'adanei Yom*

principle is that we view *tum'ah* as spreading through closed doors, if we anticipate that the *tum'ah* will exit through that door. If it is true that *sof tum'ah latzeit* is nothing more than stating, "closed doors are considered to be open [vis-à-vis the spread of *tum'ah*] if we anticipate that the deceased will pass through them," it is clear that the rule would not apply between non-contiguous structures (meaning, that the deceased would have to travel outdoors to reach the second location). For even if we applied the rule to all the doors on the path, this position limits to the spread of *tum'ah* to spaces with contiguous roofs.

In any event, we can therefore assume that though the entire underground garage is considered to be full of *tum'ah* (via *sof tum'ah latzeit*), that *tum'ah* cannot spread beyond the underground garage to the outdoor portions of the nursing home campus, including the main entrance gate. Therefore, there should not be a problem for *Kohanim* to enter and exit via the main entrance gate, even when the morgue houses a recently deceased resident.

Is there any room to be lenient about the parking garage itself? Generally, our assumption is in accordance with the Tosafists (*Yevamot* 61a), equating the laws of *tum'ah* between Jewish and gentile deceased (*Yoreh Deah* 372:2). Though the opinion of Rambam (*Avel* 3:4, *Tum'at Meit* 1:13) is to be lenient and deny that a gentile corpse imparts *tum'ah* to a surrounding *ohel* – Rambam's opinion is generally not accepted in our practice.[14] Still, many authorities were willing to draw a distinction between Jew and gentile regarding the application of anticipatory *tum'ah*. They reason that even were we to accept the Tosafist's assertion regarding the spread of *tum'at*

Tov, *HilchotTum'ah*, no. 80), *Magen Avraham OH* 343:2, *Chochmat Adam* 159:8.

14. See however the position of R. Moshe Feinstein (*Shu"t Iggerot Moshe YD* 1:230 and also that of *Shu"t Tzitz Eliezer* 14:66 who is willing to use this lenient opinion as one of issues of doubt (*sefeikot*) in more complicated scenarios.

ohel, we should nonetheless adopt the lenient approach of Rambam with regard to anticipatory *tum'ah*. This logic is particularly reasonable if we view *sof tum'ah latzeit* as a new rabbinic creation and not an expansion of the standard biblical *tum'ah* (*Tiferet Yisrael Ohalot Boaz* 16:5; *Petach ha-Ohel* 5:2; *Shu"t Maharsham YD* 233; see also *Shu"t Yeshuot Malko* 70). To these authorities, *Kohanim* could enter the garage so long as the only deceased in the garage are gentiles, for a gentile corpse does not engender anticipatory *tum'ah*.

D. Can *Tum'ah* Leave via the Windows of the Parking Garage?

We will continue working with the assumption that *tum'ah* is present in the underground parking garage whenever a deceased is found in the morgue or in the garage. As noted in the previous section, the *tum'ah* cannot spread beyond the front door of the garage because the space beyond the garage doorway is entirely open to the heavens and the spread of *tum'ah* is limited to roofed structures.

However, there may a possibility that *tum'ah* could leave through the windows of the parking garage. The parking garage has four large windows surrounding its perimeter, formed by cut outs in the upper third of the concrete wall. They contain no glass and are covered only by a fencelike material, with side-by-side circular holes, an inch or so in diameter, linked together by small metal pieces. Normally, *tum'ah* cannot travel through a space smaller than a square *tefach* (at least 3.15 x 3.15 inches), so it cannot pass through the small openings in these windows. However, the rule is different if the opening has a specific purpose:

> העושה מאור בתחלה שעורו מלא מקדח גדול של לשכה... חשב עליו לתשמיש שעורו בפותח טפח למאור שיעורו מלא מקדח. הסריגות והרפפות מצטרפות כמלא מקדח כדברי בית שמאי בית הלל אומרים עד שיהא במקום אחד מלא מקדח (להביא הטומאה ולהוציא הטומאה רבי שמעון אומר להביא הטומאה אבל להוציא את הטומאה בפותח

טפח) חלון שהיא לאויר שעורה מלא מקדח בנה בית חוצה לה שעורה בפותח טפח נתן את התקרה באמצע החלון התחתון בפותח טפח והעליון מלא מקדח. (אהלות יג:א)

A window that was built from scratch is considered to be a conduit to transport *tum'ah* if it is the size of a large boring hole... If the builder had in mind to use the hole as a window, the minimum size is the diameter of a boring tool, but if he had in mind to use the hole for other uses, then it is only considered a conduit once it is a *tefach* in size. The airspace between the lattices combine to form the size of a boring hole according to *Beit Shamai*, but *Beit Hillel* say that it is only a conduit if there is enough airspace in one place without anything dividing in between. [The above applies both to bringing *tum'ah* into the room, and to allow *tum'ah* to leave the room; although Rabbi Shimon says that the above is only in regard to bringing *tum'ah* into the room, but a full *tefach* is always required for *tum'ah* to leave the room].

This window that faces towards the outdoors may be the size of a boring hole; but if another room is built on the other side of the window [so that it now faces indoors and not outdoors] then the window must be a *tefach* to act as a conduit. If the roof of that other room is built up to half of the height of the window, then the lower half of the window must measure a *tefach* to act as a conduit, though the upper half which faces outside needs only to be the size of a boring hole. (*Ohalot* 13a)

Though normally a passageway must contain a square *tefach* for *tum'ah* to pass through it, a window used for light allows *tum'ah* to pass in even smaller space.[15]

However, this stringency only applies to a window designed exclusively for light.[16] Ostensibly, *tum'ah* cannot leave a

15. See also Rashash to *Chullin* 126b.

16. The phrase "a window made towards the airspace" (*Ohalot* 13:2) does

window designed for ventilation if there is not a square *tefach* of area to pass through (see, however, the dissenting view of *Tiferet Yisrael* and *Mishnah Acharonah*, ad loc.).

Thus, we are left asking, what was the original intention of the parking garage architects in constructing these windows: Did they want to improve the lighting in the garage and help save on the cost of electricity by making large windows for light? Or was their purpose aesthetic, to make the garage seem less gray, monotonous, and plain? Perhaps the primary purpose was for ventilation, intending to fulfill a building code or health protocol allowing for safe dispersal of carbon dioxide fumes from the garage? Most likely, multiple purposes overlapped. We felt that there would be room to be stringent – at least a partial purpose of these windows may have been to provide light, allowing *tum'ah* to spread through these windows. Even if the purpose was ventilation, however, there is a small minority view (noted above) that claims that *tum'ah* can spread through ventilation spaces as well, even when they are smaller than a square *tefach*.

Of course, as per the standard rules of *tum'at ohel*, the concern of *tum'ah* spreading through the window is only relevant if there is a roof above the window under which the *tum'ah* can spread further. If there is no roof, the case of these windows is parallel to the case of *tum'ah* exiting through the front door, for *tum'ah* cannot move in an un-roofed space. In the case of this nursing home, there is something closely resembling a roof above the windowsills that complicates the situation case – a wide-branched tree.

E. Can *Tum'ah* Travel Under Trees?

A row of trees surrounds the southern wall of the building

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not refer to a window used for ventilation, but rather to a window used for light or sight (Rash, *Rambam*, *Bartenura*, *Melechet Shelomo*, *Tiferet Yisrael*, ad loc.).

that houses the underground parking garage. There are no trees on the other sides of the garage, but the trees do cover the entire southern length, overlapping each other, flowing as one great green sea, so that the viewer barely notices where one tree ends and the next begins. A branch of one of these trees extends so far that the tips of its branches brush ever so slightly upon the wall directly above one of the garage windows. And so, we might be concerned that the *tum'ah* spreads from the garage to the space underneath the row of trees, as they essentially function as a roof above the windowsill.

The last tree in the row is slightly larger than the rest, as if the others were all replanted after some construction work, while this one remained from before the buildings were built on this portion of land. The branches of this final tree extend so far as to create a natural awning right in front of the main door to the building, a flight higher and on the opposite side from the parking garage entrance. If *tum'ah* can indeed travel under trees, then perhaps *tum'ah* spreads from the garage, travels under the trees, and re-enters the building through the aforementioned doorway (whenever the building's front door is open – hundreds of times each day). Under those circumstances, no *Kohen* could enter or remain on the main floor of the nursing home whenever a deceased is in the morgue. As long as he is standing on the main floor, he would become *tamei* again and again, each time the door reopens, numerous times each day violating the prohibition against defiling himself. The *tum'ah* would pass from the morgue, to the garage, through its windows, under the southern trees, and back into the home's main floor, which is quite large and shared by the entire complex.

This assumes, of course, that *tum'ah* can spread underneath trees.

The Gemara in *Mo'ed Katan* (5b) speaks about the practice of marking trees that have *tum'ah* underneath them, known as

"*sechachot*" – ostensibly indicating that *tum'ah* can spread beneath a tree's overhang. These trees must be marked to ensure that no *Kohen* stand beneath them and contracts *tum'ah* unknowingly. Four interpretations are given for this phenomenon of *tum'ah* beneath trees:

A. The printed commentary for Rashi in *Mo'ed Katan* gives a simple explanation of the issue (s.v. *ilan*): "There is certain *tum'ah* beneath one branch, but it is not known which one, so they make a mark." *Tum'ah* spreads beneath a tree's branches just as it spreads in any normal circumstance: the roof (i.e., the branch) must be a *tefach* (3-4 inches) wide and it must be continuous from the point at which it hovers over the *tum'ah* to the place where the *Kohen* stands.[17] These trees must be marked to make it known that while there certainly is *tum'ah* in the vicinity of this tree and standing under almost any of its branches should not impart *tum'ah*, nonetheless, *Kohanim* should refrain from standing beneath any part of this tree so as to avoid any doubt in these matters. There is little out of the ordinary here; all of the standard rules that we have come to expect of *tum'at ohel* are in effect. This approach is echoed by the Rivan and Rosh to *Nazir* (54a-b).

B. Tosafot second Rashi's interpretation but give a somewhat alternative account of the case (based on largely semantic considerations): "We are not sure whether there is *tum'ah* beneath this *tree* or not." Again, Tosafot assume that *tum'ah* travels beneath a tree's branches in the same way as it travels in other places (only under sections that are a *tefach* wide and are continuous above both the *tum'ah* and the person standing beneath the tree), and the purpose of marking off this tree is to clarify whether *tum'ah* is found in this location in the

17. Rashi assumes that *tum'ah* does not automatically spread from one branch to another if they do not cross at a point where they are both 3-4 inches in diameter, or else there would be no need to mark which branch houses the *tum'ah*.

first place, not whether it is under a particular branch.

These two interpretations fit well with the context of the talmudic discussion in *Mo'ed Katan* and in the context of a parallel Gemara in *Niddah* (67a), which address asking a Samarian to identify the truth with regard to the *sechachot*. Rashi and Tosafot realize that the Gemara's discussion of *tum'ah* beneath trees must involve some state of doubt or unsurity regarding these trees, or else there would be no need to ask the Samarian about the facts on the ground and no need to mark the trees. Either we are not sure if there is *tum'ah* beneath this tree at all (b), or we are not sure which branch hovers above the *tum'ah* (a). Not surprisingly, Rashi, in his commentary to *Niddah,* offers explanation (a), namely that the branches are spread apart so that *tum'ah* cannot travel from beneath one to the next, and there is a need to identify which branches hang above *tum'ah* and which do not.

The difficulty with this interpretation of Rashi and Tosafot is a passage found later in Gemara *Niddah* (68b), that identifies the nature of the spread of *tum'ah* via *sechachot* as "a rabbinic decree," distinct from the biblical requirement for a complete *ohel*. However, the accounts of both Rashi and Tosafot essentially apply the standard **biblical** laws of *tum'ah* to the space beneath the trees – that according to the standard rules, *tum'ah* should spread beneath any roofed structure that has the proper dimensions, in this case, the tree's branches. There seems to be little in the way of rabbinic decrees about this account for the spread of *Tum'ah*! In a weak attempt to respond to this potential problem, Rashi (68b) and Tosafot (57a) argue that biblically, a *Nazir* (and potentially a *Kohen* as well) only violates the prohibition against defilement where there is a definitive source of *tum'ah* present; however, if the existence of the *tum'ah* is only doubtful, although he becomes defiled upon entering such a space, no prohibition is

violated.[18] Thus, even if the **structures**, that is the *ohel*, under consideration are judged by biblical criteria, the **violation** by the Nazir is only rabbinic.

C. This question led the Rambam to give a radically different account for the case of *sechachot* (*Tum'at Meit* 13:1-2, *Commentary to the Mishnah: Niddah* 7:5). Rather than explaining *sechachot* as standard structures that should biblically transmit *tum'ah* if not for the state of doubt, Rambam rules that *sechachot* in fact constitute irregular structures that can transmit *tum'ah* only on a rabbinic level.

According to Rambam, biblically, a roof must retain a certain level of stability and strength to be considered an *ohel*; it must be able to bear the weight of a medium-sized drop-ceiling. Since tree branches are too flimsy and weak, they cannot qualify as a biblical *ohel*. The Rabbis decreed that for halachic purposes, we should consider them strong nevertheless, thereby defining a tree as a rabbinic *ohel*. The tree branches follow all the general rules regarding the construction of *ohalot*, with the one exception that their lack of strength can be mitigated.

In this analysis, the Rambam fails to address why the Gemara considered *sechachot* to be cases of doubtful *tum'ah* (*Tum'at Meit* 8:9). Perhaps he felt that *sechachot* generally were rabbinic in nature, while some had an added consideration of involving a case of doubtful *tum'ah*, in a matter described in (a) above. This approach is also taken by *Tosafot Yom Tov* (*Ohalot* 8:2).

All commentaries agree that the ability to bear the weight of a medium drop-ceiling is relevant to all structures transmitting *tum'ah*, on account of the Mishnah in *Ohalot* 8:2. Their disagreement would revolve around whether this is a

18. Rashi attributes this to a scriptural decree (*Alav – be-mechuveret alav*), while Tosafot and Rosh attribute this to the principle that *safeik tum'ah be-reshut ha-yachid tahor*.

criteria for biblical transmission of *tum'ah* alone (Rambam), or (as Rashi and Tosafot would argue) a *sine qua non* for all cases of transmitting *tum'ah*, whether biblical or rabbinic.

D. A fourth opinion explaining the rabbinic character of *sechachot* is found in the commentary of the Rash to the above Mishnah. Similar to Rambam, Rash assumes that *tum'ah* imparted via the *sechachot* is rabbinic in nature and not biblical. But whereas Rambam argues the rabbinic extension is to merely allow *tum'ah* to pass beneath a weakly structured *ohel*, Rash argues that the rabbinic extension is to consider a tree an *ohel* in the first place.

As noted previously, *tum'ah* can normally only pass under a roof that is a *tefach* (3-4 inches) wide. Yet, most trees contain vast swaths of space where the branches hovering above are narrower than the required size. To Rashi, *Tosafot*, and Rambam, even when *tum'ah* is certainly found beneath one of these branches, it cannot spread because the "roof" (i.e., the branch) is simply not wide enough.

However, in rare cases, other halachic principles may apply that would qualify such branches as an *ohel* despite lacking the requisite size, namely "*gud achit*" or "*havot rami*." These principles allow for halachically viewing smaller distinct objects as one larger unit and are applicable in various realms of the halachic corpus. *Gud achit* allows for combining small vertically related objects, while *havot rami* allows for combining smaller units separated by a horizontal distance. A detailed discussion of the numerous technical details relevant to each of these is beyond the scope of this article.

However, the simple reading of the Gemara indicates that *gud achit* is only relevant when the vertical distance does not exceed three *tefachim* and *havot rami* only applies to objects in horizontal relation to each other when they are at least one *tefach* in width. Yet Rash invokes such principles in discussing *tum'ah* underneath trees, even though the branches are often too vertically distant from each other and narrower than the

required size. However, perhaps since all the branches are in essence part of one tree, Rash considers them as one unit to allow the spread of *tum'ah*.

Even with his more expansive understanding of these principles, in the end, Rash admits that this rabbinic decree is further limited. He allows for its application only if the trees can carry a medium weight drop ceiling and if, when combined via these principles, the narrow branches would produce a real *ohel* of proper dimensions. This approach is also taken by Rabad (*Tum'ah Meit* 13:2) and the Ramban school (Ritva, *Moed Katan* 5b; Ramban and Rashba, *Niddah* 57a).

Since the spread of *tum'ah* in these instances is only through rabbinic decree, no biblical punishment is meted out upon its contraction (*Nazir* 54a). There is some discussion among the commentaries whether *Kohanim* are prohibited from contracting such forms of *tum'ah* (*Tosafot Berachot* 19b, *Shabbat* 152b, *Sh"ut Rashba*, 1:476), but the ruling of *Shulchan Aruch* (*YD* 369:1) is that both a *Nazir* and Kohen must refrain from contracting such forms of *tum'ah* as well.

Both the *Tur* and *Shulchan Aruch* operate using the first and simplest understanding of *sechachot*, ignoring the more expansive interpretations. This view is also accepted by *Perishah*, *Shach*, and *Taz*, and it would seem that this is the normative halacha (*Shu"t Shevet Ha-Levi* 8:257) – although many have encouraged stringency in deference to the Rash and Ramban school. Even this stringency is only relevant in cases where the combined branches themselves (in the horizontal plane) would create a meshwork one *tefach* wide without their leaves (as per *Shu"t Eitan Ha-Ezrachi* 6-7). In the case of the nursing home, trimming the trees so they do not create an extended roof with the parking garage, or so that they do not overhang over the front entrance, would easily avoid these problems.

F. Conclusion

Our conclusions were to prohibit *Kohanim* from entering the

underground parking garage and to trim the trees near the main entrance to insure that *tum'ah* does not spread back into the home.

It is worthy of note that a number of assumptions must be made to be concerned that the *tum'ah* has reentered the home after leaving the garage, namely:

a. That we should be stringent for the interpretation of Rash in the matter of *sechachot*;

b. That the windows in the garage are halachically defined as windows made for light; and

c. That (when there are no Jews in the morgue) deceased gentiles impart anticipatory *tum'ah*.

While there may be reason to be lenient in each of these areas, the common practice is to act stringently on each of these matters. However, even if we make these three assumptions, the end result would only be a rabbinic prohibition because:

i. The prohibition of *sechachot* is only rabbinic.

ii. The prohibition of anticipatory *tum'ah* may only be rabbinic.

Thus, even though the common practice is to be stringent regarding each of these issue independently, one wonders if there is room for leniency if the trees are not trimmed, when combining all of these various elements in reference to a rabbinic position. The preferred situation would be to be stringent, but there may be room for leniency if that proves impossible.

"Concierge" Medicine and Halacha

Noam Salamon

A physician who does not charge for his services is worthless. (Talmud *Bava Kama* 85a)

A physician who refuses to treat the indigent is worthy of going to Hell. (Rashi explaining Talmud *Kiddushin* 82a)

Introduction

Over the past few decades physician frustration has grown over decreased reimbursements, increased malpractice costs, onerous administrative paperwork and additional burdens on the physician. This has especially affected primary care physicians, leading to a reduction in medical students pursuing a career in primary care. In response, the last few years have seen an upsurge of concierge medicine practices.

"Concierge," or "boutique medicine," charges a fee in exchange for enhanced services and increased access.[1] The patient agrees to pay an annual fee or retainer to a physician (which is not a substitute for insurance) while the physician in return agrees to provide additional services beyond typical care. This is provided based on the increased availability of the primary care physician through capping the number of patients that he allows in his practice (typically from 3000-4000 down to 100-600).

Organized and centralized concierge medicine has recently

1. Portman, *J Health Life Sci Law*. 2008 Apr;1(3):1, 3-4 fn. 1, 35.

Noam Salamon is a third-year medical student at the Albert Einstein College of Medicine, Bronx, NY

developed into a franchised market in which organizations, such as MD2 and MDVIP, have led to the increased prevalence of this so-called boutique medicine. Fees for such services range from $60 to $20,000 annually, with an average between $1500-$2000 (MDVIP charges $1800 while MD2 charges $20,000).[2] Proponents of the program argue that it improves quality care and increases the attention and time allotted to a patient's appointment. For example, in MDVIP a patient is guaranteed a comprehensive physical examination and a follow-up wellness plan as well as medical records in CD-ROM format, personalized web sites for each patient, same or next day appointments that start on time as well as unhurried visits. [3] Furthermore, concierge medicine gives the physician financial security, allowing him to focus primarily on medicine with less emphasis on financial burdens. This would diminish physician burnout from overwork.[4]

However, detractors worry that concierge medicine will lead to elitism, discrimination, patient abandonment, restricted access to medicine, and reduced quality care for the general population. Eighty-five percent of patients would be dropped from their current physician. If a majority of primary care physicians become boutique doctors, it will exacerbate an already tiered healthcare system, leaving quality care in the hands of the wealthy while overburdening the remaining patient population, who will then receive sub-par care.

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2. Government Accountability Office (GAO). "Report to Congressional Committees, Physician Services: Concierge Care Characteristics and Considerations for Medicine", GAO-05-929 (August, 2005). Available at www.gao.gov/new.items/d05929.pdf.

3. Carnahan, "Law, Medicine and Wealth: Does Concierge Medicine Promote Health Care Choice or is it a Barrier to Access". *Stan L & Pol Review*. 121, 123-129 & 155-163 (2006). Also Portman, *J Health Life Sci Law*. 2008 Apr 1(3): 27.

4. "Boutique Medicine: When wealth buys health," CNN.com, October 19, 2006; "Doctors' New Practices Offer Deluxe Services For Deluxe Fees," *The New York Times*, January 15, 2002; and "For a Retainer, Lavish Care by Boutique Doctors", *The New York Times*, October 30, 2005.

Moreover, concierge medicine may allow a physician to selectively choose those patients who are healthier and require less maintenance. This will leave sicker patients to a more drained and less accessible health care system. Furthermore, treating only those who can afford the retainer, according to the New York Attorney General's Office, might violate non-discrimination laws.[5]

Halachic Analysis

The goal of this paper is to explore the halachic issues that may occur for a physician looking to become a boutique physician. This article will analyze the power of the physician to charge for health care services rendered. Specifically, what is a physician allowed to charge and is there a concept of overcharging regarding patient fees. Furthermore, is a physician allowed to deny care for a patient, especially for monetary reasons.

Physician Fees

The Talmud[6] explains that if a person takes a vow to avoid giving benefit to someone, he can still administer medical treatment to him. *Rishonim*[7] explain that healing a person is a positive biblical commandment, something that a person cannot take a vow against. Exactly what commandment is being fulfilled by healing a sick person? The Talmud[8] and

5. Joseph Baker, Chief of Health Care Bureau of New York Attorney General's office, April 2004: "If you are treating patients differently based on ability to pay, that may run afoul of New York State [non-discrimination] laws, quoted in "Patients with Perks: Advocates Say 'Concierge Medicine Is Like Having the neighborhood Doctor Back; Critics Call it Elitist", *Newsday,* Jan 1, 2005 B06.

6. *Nedarim* 38b.

7. Ran and Rosh ibid.

8. *Sanhedrin* 73a.

Sifre[9] explain the verse "*vehashevota lo*",[10] "you shall return it to him" as applying not merely to inanimate objects but also regarding the obligation for everyone who can to return health to a person who is sick. Although a literal interpretation of the verse would seem to be focusing on returning property, the Talmud[11] expands the scope of the verse's application by explaining that there is no greater act of returning than to restore someone's health. It is this verse that Maimonides[12] and Ran[13] quote as the source for the biblical obligation to heal a sick person. Even those *Rishonim* who disagree with Maimonides and Ran do so over a minute detail, regarding exactly which verse is the source of the commandment. However, all agree that a biblical obligation exists.

Assuming the commandment of healing the sick is on a biblical level, irrespective of the exact source,[14] many *Rishonim* wonder how it is possible that a physician can charge for his services since the Talmud[15] teaches that just as Moses was taught laws from G-d without payment, so too teachers should educate without receiving payment.[16] This concept of not receiving payment is not localized to the positive commandment to teach the Torah but applies to all positive commandments.[17] Thus, just as a teacher is forbidden to receive funds for his profession, so too a physician cannot be allowed to receive payment for his services.

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9. Deuteronomy 22:2.

10. Ibid 22:2.

11. *Bava Kama* 81b.

12. *Peirush Hamishnayot, 4:5.*

13. *Nedarim* 41b.

14. Some practical differences do exist regarding exactly from which verse to deduce the obligation. See *Bracha L'Avraham* p. 216 fn. 24.

15. *Nedarim* 37a; see also Meiri there.

16. Some *Rishonim* (Ran and Maharsha commenting on *Nedarim* ibid) interpret the talmudic passage as follows: Just as Moses taught the Jewish people the Torah for free, so too you should teach it without charging.

17. *Beit Hillel* commenting on *Shulchan Aruch Yoreh Deah* 336:6.

However, the Talmud takes it for granted in many places that a physician may in fact get paid for his services. For example, the Talmud[18] mentions: "A person with eye pain should pay the doctor [to treat him]". Elsewhere, the Talmud[19] comments on a person who is successful, "You will be considered a crafted physician and will get a large salary". Interestingly, the Talmud's example of a vocation that receives a large salary is a physician. Finally, and most strikingly, the Talmud[20] comments on physician salaries, "A physician who practices for free is worthless". Many *Rishonim*[21] explain this passage as follows: if a physician were to work for free, he would not be able to concentrate fully on the patient's care and needs. Having a salaried physician is important in ensuring the proper quality of care and attention to the patient.

Thus, a seeming contradiction exists as to whether physicians are allowed to receive fees for their service according to Jewish law. Although many *Rishonim* provide answers to this question it is important to first elucidate two observations as to where this question would apply. First, the contradiction may exist only where the verse "*vehashevota lo*" would apply – to a patient who has already been diagnosed and is being treated for a known ailment. However, well visits, checkups, physical examinations, or preventive procedures may not fall under the rubric of returning a person's health and thus would pose no problem in charging money according to Jewish law. Only if the patient has lost his health and the physician is actively returning it to him would there be a fulfillment of a positive biblical commandment.[22] It is also

18. *Ketubot* 105a.

19. *Sanhedrin* 91a.

20. *Bava Kama* 85a.

21. Rosh commenting in *Bava Kama* 8:1, *Shitah Mikubetzet* ibid.

22. See *Halacha U'Refuah,* vol. 2 p. 142; *Responsa Maharam Shik Yoreh Deah* 343; *Encyclopedia Talmudit,* vol. 10 p. 345.

a possibility that preventive medicine, although not falling under the category of returning lost property, may be biblically obligatory according to many *Rishonim*,[23] based on a separate obligation of "*heshamer lechah ushhemor nafshechah*",[24] "protect yourself and guard your soul." If this would be the case, charging a fee for preventive medicine would remain problematic.

Secondly, it should be noted that some[25] explain the positive commandment of healing a person as being contingent on the success of the treatment. If a person recovers, then the physician has done a positive commandment; however, if the treatment fails and the person remains ill, no commandment has been fulfilled. This would seem to fit well with those who use the verse "*vehashevota lo*" as being the source for healing the sick. Just like a person fulfills the obligation of returning a lost article when the owner receives his object in return, so too a physician fulfills his obligation when the patient has re-acquired his health. Thus, according to the *Yad Avraham*, as long as the physician charges for his services rather than for the outcome of the treatment, there would appear to be no contradiction as cited above.

To answer the seeming contradiction, the following question is posed by many *Rishonim*: If the biblical obligation to heal a sick person is derived from the verse "*vehashevota lo*", then why does the Torah have a more explicit reference for healing

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23. Maimonides, *Yad Chazakah Rotzeach* 11:4, and *Shulchan Aruch Choshen Mishpat* 427:8. (The *Minchat Chinuch* #546 questions whether *Chazal* referred to this verse only as pertaining to avoiding forgetting G-d or also to protecting one's physical body.) For further discussion see Buchbinder, "Preventive Medicine" *Journal of Halacha and Contemporary Society,* XLII pp. 70-101.

24. Deuteronomy 4:15.

25. *Yad Avraham Yoreh Deah* 336:1, also see Rabbi Norman Lamm in *Journal of Halacha and Contemporary Society,* VIII, pp. 7-10.

a person: "*verapo yerapey*",[26] "he shall surely be healed." While this seemingly extraneous verse has many interpretations,[27] many explain[28] that this verse gives the physician legal permission to collect a fee for his work despite the general concept of abstaining from collecting money when performing a biblical obligation. Thus, the "permission" that the Talmud explains based on the verse "*verapo yerapey*" is the permission to accept a fee for medical services.

However, although this biblical exegesis is documented and supported by many *Rishonim,* it does not appear in the codified Jewish law. What does appear in the magnum opus of Jewish law[29] is a prohibition regarding physicians receiving payment for services rendered. However, a physician may be compensated for having refrained from other employment that he could have been involved in while delivering services

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26. Exodus 21:19.

27. Tosafot, Rashba, and *Tosafot HaRosh* commenting on *Berachot* 60a, include healing for disease that are not directly caused by man; Rav Kook, *Daat Kohen* 140 – The verse gives permission to treat when it is uncertain; *Shach Yoreh Deah* 336:1 – a warning to treat the sick lest a person avoid treating someone for fear of killing them; *Torah Temimah,* Exodus 15:27 and Deuteronomy 22:2 – since the main source for healing is only exegesis by the Rabbis, another verse is necessary to unequivocally mention the obligation. Alternatively, "*verapo yerapey*" only gives permission for the physician to heal but "*vehashevota lo*" elevates healing the sick to a biblical obligation; Ibn Ezra, Exodus 21:19 – The Torah only gives a physician the power to heal external visible injuries [*Krayti U'Playti* – 188:5 – since only in external injuries can a physician make an accurate diagnosis. However, regarding internal injuries where the physician cannot see the injury it is the speculation and imagination of the physician and not pure scientific knowledge that makes the diagnosis]. The simple context of the verse "*verapo yerapey*" refers to an assailant's obligation to reimburse the individual attacked for the money he has spent for medical care. This may thus not be a compelling source for an obligation to heal a sick person but rather a source for specific monetary obligations in a case of tort (see also *Gur Aryeh,* Exodus 21:19).

28. Rashi, Onkolus, and *Targum Yonatan* on verse "*verapo yerapey*", Exodus 21:19; also Tosafot and *Tosafot HaRosh* on *Berachot* 60a.

29. *Shulchan Aruch Yoreh Deah* 336:2.

to the patient (*s'char batalah*)[30] and for time and effort (*s'char tirchah*).

The logical explanation given for why some payments are acceptable and others not is as follows: *S'char batalah* and *tirchah* are permitted by the *Shulchan Aruch* as they are not directly a part of the biblical obligation, while payment for knowledge and teaching a patient is prohibited since they are the essence of the biblical obligation to heal the sick.[31] Based on this differentiation, Rav Gedalyah Rabinovitz[32] points out that *s'char tirchah* should be prohibited just like payment for knowledge, since there is a biblical obligation to invest time and effort to save a person's life. He explains that *s'char tirchah* is permissible only if the sick person is not in danger, in which case there is no obligation to seek out the sick person immediately. Thus, even charging for time and effort *(tirchah)* is prohibited in many cases.

Defining in contemporary times exactly what is considered time and effort and what is considered knowledge and teaching can at times be ambiguous. For example, some[33] hold that writing a prescription is considered teaching a patient, while others[34] understand it as a function of the physician's time and effort. Thus, although the *Shulchan Aruch* delineates what a physician can charge for, it is difficult to extrapolate into contemporary medical practice.

The source of paying for *s'char batalah* appears in the Talmud[35] in a discussion of a witness who may be paid for missed employment (by bearing witness to an event he is

30. For exactly how to pay a person for *s'char batalah* see *Encyclopedia Talmudit*. vol. 11, pp. 82-83.

31. *Halacha U'Refuah* vol. 2, p.141, based on Nachmanides *Torat Haadam* and *Kiddushin* 58b.

32. *Halacha U'Refuah* vol. 2 p. 142 explaining Nachmanides.

33. *Tzitz Eliezer* 5, (*Ramat Rachel)* #24.

34. *Aruch Hashulchan Yoreh Deah* 336:3, *Aseh Lechah Rav* vol. 3 #31.

35. *Bechorot* 29b.

avoiding violating a biblical negative commandment). The cases in this talmudic passage appear to revolve around individuals who are partaking in a biblical commandment but have another source of employment. Thus, it would appear that payment of *s'char batalah* would be limited to an individual who is not fully employed in a field that involves a biblical obligation. However, if such an individual is engaged full time in a biblical obligation, such as a modern-day physician, it would be impossible to pay them for their missed wages since they do not have an alternate occupation.[36]

Using the same logic, Rav Moshe Feinstein[37] and Rav Shlomo Zalman Auerbach[38] rhetorically ask that even if a physician were only able to charge for *s'char batalah*, how would it be calculated in a person who is not dually employed? Should one assume that if these individuals were not physicians they could have entered into a high-reimbursement profession? That is an unknown, based on pure speculation and not computable. Additionally, the *Tashbetz* and *Tosafot Yom Tov* maintain[39] that the prohibition of a physician's collecting for more than *s'char batalah* (i.e. knowledge and time) does not apply if the two parties agreed in advance to the fee. Thus, many modern day halachic authorities have determined it to be halachically permissible for a physician to collect a fee even for his knowledge and time.[40]

It is important to note the Ramo[41] rules that if a person is

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36. *Ketubot* 105a, according to *Nishmat Avraham Yoreh Deah* 336; Rosh *Bechorot* ibid; Tosafot, *Ketubot* 105a; *Tosafot Yom Tov*, commenting in *Bechorot* 4:6; *Responsa of Radbaz*, vol. 2, 622; *Iggerot Moshe Yoreh Deah* vol 4, #52.

37. *Yoreh Deah* vol. 4 #52; see also *Responsa of Rosh* 56:5 who points out that *s'char batalah* exists only if a person has a job that he has taken a break from.

38. See *Nishmat Avraham Yoreh Deah* 336.

39. *Tashbetz* 1:145, *Tosafot Yom Tov* ibid; see further discussion below.

40. See *Encyclopedia of Jewish Medical Ethics* p. 801; also see further discussion.

41. *Shulchan Aruch* ibid. Also see *Kesef Mishneh Talmud Torah* 3:10, Tosafot

wealthy, it is forbidden for him to earn money from teaching Torah. If this ruling is applied to the case of a physician, one must question how the Ramo would approach the talmudic passage mentioned above, stating that any physician who works for free is worthless. To help understand if the Ramo would apply this talmudic passage to a physician, a deeper analysis is necessary of the reasons behind the above-mentioned passage. The context of the passage deals with a person who injures another and is obligated to pay his medical bills. The Talmud explains that the injurer may not force the injured to get free medical care since the attention and care of the physician would be called into question if he was not receiving any money. Thus, the talmudic passage may be limited to a case of attempted coercion of the injured party into utilizing a free physician over another more expensive option. The passage might not reflect halachic reality and may rather be only a justified claim that the injured party may use when choosing a physician. Alternatively, some interpret this talmudic passage as reflecting the obligation of the patient, while not addressing a physician's responsibility.[42] If a physician would like to treat pro bono, he may.

It is also important to note that Maimonides,[43] himself a physician, disparages teachers of Torah who receive any payment whatsoever from teaching. Many *Rishonim*[44] argue with Maimonides point by point on his numerous proofs. One such dissenter, the *Tashbetz*,[45] argues forcefully that Maimonides was a unique figure of his time – respected as a superb physician and Torah scholar due to his stature. It would be easy for him not to have to collect fees for his work.

Ketubot 105a "*gozrei gezeirot*".

42. *Shoshanat Ha'amakim* "*verapo yerapey*" #71, see later discussion regarding refusal to treat.

43. *Peirush Hamishnayot Avot* 4:5, *Yad Chazakah Talmud Torah* 3:10; position elucidated by *Tosafot Yom Tov* commenting on Mishnah *Bechorot* 4:6.

44. *Kesef Mishneh* ibid.

45. Responsa 147.

However, most other people need to actively seek a livelihood. If they would not collect a payment for their services they would starve to death! If this position of Maimonides was applied to all biblical obligations, (as most halachic authorities hold[46]) it would be prohibited for a physician to charge any money, including *s'char batalah*. It is possible to argue that Maimonides' position may apply only to teaching Torah since the many passionate reasons that he gives for not taking a wage are specific to Torah learning[47] and would not necessarily apply to other positive commandments.[48] Just as the Rabbis instituted a payment for someone who returns a lost object and fulfills a positive biblical commandment,[49] so too the Rabbis can institute the payment of fees to physicians.[50]

Prima facie it would appear that Nachmanides,[51] also a physician, disagrees with almost everything that has been presented thus far, arguing that the practice of medicine is incongruent with a G-d-fearing existence. In his discussion regarding the ultimate blessings, he writes that the Jewish people will be above the rules governing nature. No disease will exist, for G-d is the ultimate physician. "Those who seek out the prophets cannot seek out a physician. There is no place for a physician in the house of a G-d fearing person." Nachmanides explains that the purpose of the verse "*verapo yerapey*" is to give a physician the ability to treat a person who

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46. *Beit Hillel* ibid, Nachmanides *Torat Haadam*.

47. *Talmud Torah* ibid.

48. See also *Even Haezel Gezeylah* 3:12 and *Encyclopedia Talmudit.* vol. 11 pp. 80-81.

49. Using the precept of "*hefker beit din hefker*", see Maimonides *Peirush Hamishnayot Nedarim* 4:2, *Tiferet Yisrael Nedarim* 4:2 , Rosh *Bava Metziah* 2:28 and *Encyclopedia Talmudit.* vol. 11, pp. 80-81.

50. See *Halacha U'Refuah* vol. 2 pp. 140; *Machaneh Efraim* 17 differentiates between returning lost objects where there is no obligation to seek out a lost object and a seriously ill person where the Torah requires a physician to seek out such a person.

51. Leviticus 26:11.

inappropriately sought out medical help. It would seem according to Nachmanides that there is no biblical obligation for a physician to treat a patient and thus no legal impediment to the collection of fees.

However, if this is in fact his opinion, many questions surface. First, how does Nachmanides explain the talmudic passage in *Bava Kama* 81a which specifically states that healing the sick is a biblical commandment? Furthermore, the *Tzitz Eliezer*[52] poses another question based on a different talmudic passage[53] which rejects sanctioning a prayer for a sick patient that focused on not seeking human help for disease. The rejection of this prayer by the Talmud is upheld after citing the verse "*verapo yerapey*". Thus, permission is also given to the **patient** to seek medical attention and he is not obligated to rely solely on a miracle. Moreover, Nachmanides[54] himself cites the verses "*verapo yerapey*" and "*vechai achichah imach*" as a positive commandment. The *Nishmat Avraham*[55] suggests that Nachmanides may be referring only to a patient seeking medical attention as a preventive measure where there is no hint of a disease. However, *Nishmat Avraham* points out that such a stance is against the view of contemporary halachic authorities like Rav Shlomo Zalman Aurbauch and Rav Moshe Feinstein.[56]

With these points in mind many contemporary halachic authorities[57] explain Nachmanides' opinion, rejecting human intervention in curing disease, as referring to a precise time and specific circumstances during the rule of the prophets of early Jewish history. However, he never intended to apply this to the circumstances of the Diaspora when prophetic times have ceased.

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52. *Tzitz Eliezer* vol. 5:20 (*Ramat Rachel*).
53. *Brachot* 60a.
54. *Torat Haadam* "*Inyan Hasakanah*", Leviticus 25:36.
55. *Yoreh Deah* 336 p. 274.
56. See *Nishmat Avraham Yoreh Deah* 336 p. 275.
57. *Tzitz Eliezer* ibid, *Yechaveh Daat* 1:81.

Determination of Fee

From the above discussion, halachic authorities have determined that it is legal according to Jewish law for a physician to charge money for services rendered. However, it is important to understand exactly how a physician can determine his fees and if he may charge a high fee. The *Shulchan Aruch*,[58] in discussing the fee that witnesses to a divorce document receive, points out that a clause exists stipulating that if due to them a problem arises, they would have to pay for another divorce document. Therefore, due to their high risk activity monetarily, these witnesses are allowed to charge a high fee. The *Nishmat Avraham*[59] feels that this case would apply to physicians as well. Furthermore, the *Tashbetz*[60] mentions that as long as the fee was discussed before the administration of treatment, there is no legal hindrance for the physician to charge a high fee.

It is also essential to determine whether, if a physician charges a high fee, he would be allowed to collect the fee. Would he be violating a Jewish prohibition of overcharging,[61] may the physician legally collect from the patient who has not paid, and is the patient allowed to claim a reimbursement if he does pay the high fee? The *Shulchan Aruch*[62] rules in a case where someone is fleeing from jail and for a very large fee employs a sailor to assist him in crossing a river: the person is only obligated to pay the normal fee for crossing a river.[63] If

58. *Even Haezer* 130:21.

59. *Yoreh Deah* 336.

60. Responsa 1:145.

61. See *Bava Metziah* 49b for further details.

62. *Choshen Mishpat* 264:7.

63. *Yam Shel Shlomo Bava Kama* 10:38 gives two reasons: First, there is a set fee that sailors usually get for the trip. Alternatively, he already has a biblical obligation to save this person; see also *Shitah Mekubetzet* in the name of Ramo – the person can claim that he was joking with the sailor in regards to the extra amount.

this ruling were extrapolated to a physician, it would appear that although a physician may have the ability to charge a high fee, the patient may not have an obligation to pay the full fee, and the physician would not have the right to collect the full unpaid fee. Some *Rishonim* and *Acharonim* do apply this ruling to the case of a physician.[64] However, most commentaries on the *Shulchan Aruch*[65] do not. They write that once the patient agrees to the physician's terms, it is incumbent on him to pay the agreed upon amount.

Furthermore, even according to the opinion that a physician may only charge for *s'char batalah*, if they agreed upon payment for the physician's knowledge and expertise, the patient is still obligated to pay in full, irrespective of how large the fee.[66] Moreover, if the patient has already paid the fee he has no legal standing to request that it be returned in part or in full. The above case of the runaway, according to these halachic authorities, is unique in that the employment of the sailor is temporary and fixed, unlike a physician's job which is not bound by time. It is thus the normative halachic opinion that a patient must pay the physician the entire agreed upon fee, no matter how large.[67] A psychological explanation is

64. *Mordechai Bava Kama* 172; *Responsa of Radvaz*, 3:556; Ritva *Yevomot* 106a – since he only agreed to the payment due to the stress of his sickness. See also Rashi and Tosafot *Bava Kama* 116b.

65. Ramo, *Taz* and *Shach Yoreh Deah* 336; also *Yam Shel Shlomo Bava Kama* 10:38 and *Mordechai* 174; see also Nachmanides *Torat Haadam Shaar Hasakanah*.

66. Ramo *Choshen Mishpat* 264:7 – since it is normative practice to pay physicians a high fee. See also Rosh *Bava Metziah* 2:28 and *Lechem Mishneh Gezeylah* 12:7 (explaining the opinion of Maimonides) who understands that the person must pay whatever the agreed upon amount was, without any limits. See also *Ketzot Hachoshen* 264:2. *Chidushei R. Shimon Shkup Bava Kama* 19 argues that even though the Rosh permitted large fees, he did have a maximum amount based on the maximum salary that the person could have made in his other profession. How the Rosh, according to the interpretation of Rav Shkup, would apply this maximum amount is unclear, since modern physicians do not have alternate occupations.

67. Similar to *Shulchan Aruch* and Ramo *Choshen Mishpat* 264.

given by some *Acharonim*[68] as to why this is the case: Otherwise people would avoid choosing a career as a physician; also, this rule will prevent physicians from refusing treatment unless they are paid in full in advance.[69]

An argument does exist among halachic sources as to whether this rule applies if there is only one physician in a city. Many[70] feel that if only one physician is located in the city, there is no obligation for the patient to pay the entire high fee. Others,[71] including Ramo,[72] disagree and hold that even when there is only one physician in the city, if the patient and physician agree upon a certain price, no matter how high it may be, the patient is obligated to pay it in full. However, this ruling would not hold true if the patient indicated at the time of agreeing to the high payment that he was doing so due to extenuating circumstances.

Using the above principles, many contemporary halachic authorities have determined that it is halachically permissile for physicians to charge a high fee. Rav Moshe Feinstein[73] explains that people would not dedicate themselves to the study of medicine were they not assured of an acceptable fee (and it is as if the patient had agreed in advance – see above). In a similar vein some[74] cite the high cost of medical education and the large debt that most students accrue. If a physician would not be allowed to charge a high fee to pay back these

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68. *Mateh Moshe Gemilut Chasadim* 4:3 and *Tzedah Laderech* 5 #2:2 elaborated in *Encyclopedia of Jewish Medical Ethics* p. 801.

69. See below if this is allowed.

70. *Levush Yoreh Deah* 336, Radvaz *Choshen Mishpat* 264:7, *Responsa Radvaz* 3:556, *Tzitz Eliezer* 5:25 (*Ramat Rachel*).

71. *Yam Shel Shlomo Bava Kama* 10:38.

72. *Choshen Mishpat* 264:7; see also *Encyclopedia of Jewish Medical Ethics* vol. 3 p. 801.

73. *Iggerot Moshe Yoreh Deah* 4:52.

74. Since studying medicine is not biblically mandated; *Barkai* 5745 vol. 2 pp. 32-33; *Halacha U'Refuah* vol. 2 p. 141; Responsa *Teshuvot Vehanhagot* vol. 1 #887.

large debts, it would be another factor steering people away from becoming physicians, especially primary-care physicians.[75] Additionally, since modern physicians do not have other employment, it is permitted for them to charge for their time and knowledge, something that is truly priceless.[76]

In the same responsum mentioned above, Rav Moshe Feinstein gives an additional explanation. Many patients prefer a high fee if it means greater availability and better quality of care. This further benefits the patient by preventing the physician from needing to seek alternate sources of livelihood and allows him to focus solely on the practice of medicine. Thus, charging a fee, even a high one, is something that is beneficial to the community. However, this permutation would not exist if the fee was exorbitant, in which case it would be prohibited[77] and those who charge such a fee would not reap the reward for the biblical obligation of healing the sick.[78] Although not specifically discussing physicians,[79] the Talmud[80] discusses and condemns a person who works for the community fulfilling a biblical obligation while receiving an exorbitant salary. Likewise, R. Ovadya MeBartenurah comments on a Mishnah[81] that the decisions of judges who accept a salary are void, "There are rabbis who charge ten golden coins for half an hour to write a divorce document…Such a rabbi, in my eyes, is a thief and a

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75. For these and many other contemporary concerns of primary care physicians see "The Physicians' Perspective: Medical Practice in 2008" by the Physicians Foundation in http://www.physiciansfoundations.org/usr_doc/PF_Report_Final.pdf

76. Nachmanides *Torat Haadam* end of "*Shaar Hamichush*", Nachmanides and Rashba *Yevamot* 106a, *Yam Shel Shlomo Bava Kama* 10:38.

77. *Halacha U'Refuah* vol. 2 pg 141, *Brachah L'Avraham* pp. 237-238.

78. *Responsa Teshuvot Vehanhagot* vol. 1 #887.

79. Based on discussions presented above, medicine may also be considered as being a communal profession that fulfills a biblical obligation.

80. *Shabbat* 56b and 139a, commenting on the sons of Samuel.

81. *Bechorot* 4:6 (Author's translation).

rapist…and I would be concerned that the divorce document is worthless."

What determines whether a fee is typical, and when should it be considered excessive? Dr. Aviad Hacohen[82] elucidates the difficulty in a precise determination. He comments that pricing in medicine is dependent on many factors, such as time and degree of expertise necessary for a procedure. Furthermore, the need as expressed by the patient and/or a third party is imperative in establishing proper pricing. For example, the psychological aspect on the patient, the potential loss of function or potential cosmetic implications may also be included in determining the suitable fee.

Refusing Patients

The Torah declares that there is an obligation not to stand idly by your friend's blood, "*lo ta'amod al dam re'echah*".[83] The Talmud and *Shulchan Aruch*[84] associate this verse with a person who abstains from assisting someone who needs health care. Furthermore, as discussed above, there is a positive commandment to heal those who are sick. Additionally, the Maharsham[85] cites the verse[86] discussing the prohibition against making an orphan suffer, "If you inflict suffering on him [orphan or widow]… I will kill you" as applying to all types of suffering that one person causes another, whether passive or active. Thus, it would appear that if a physician[87] denied a patient treatment he would be violating both a

82. *Brachah L'Avraham* pp. 230-231.

83. Leviticus 19:16.

84. *Sanhedrin* 73a, *Yoreh Deah* 336:1.

85. *Responsa,* 2:210 (second responsum – responding to the Aderet).

86. Exodus 22:22-23.

87. *Iggerot Moshe Yoreh Deah* vol.2 #151: These obligations would not pertain to a non-physician since there is no obligation for a person to learn medicine in order to save someone's life. Rather, the obligation is for a person to do what he can with what he has. (Responsa *Levushai Mordechai Orach Chayim* 29 and Responsa *Chelkat Yaakov* 1:82 disagree and hold it is an obligation to study medicine).

positive and (possibly) two negative biblical precepts. It is therefore understandable that Rashi explains the statement in the Talmud,[88] "the best physicians [go] to hell" as pertaining to a physician who has the ability to treat a destitute patient but refuses to help him.

This raises a number of significant questions: May a physician take a vacation, can he retire? Must a physician answer all calls at night and while resting? How would a patient who has the funds but refuses to pay a fee be characterized?

Although the physician should be treating patients as much as possible, it should not come at the expense of the quality of care that each patient receives. The more patients a physician has, the busier he will be and the less time will be available for each patient. Moreover, an overworked physician may lack the same focus he would have if he worked less hours with fewer patients. The psychological needs of the physician should also be considered, as taking breaks and avoiding burnout may be necessary in ensuring the best quality of care. Moreover, the busier a physician is, the greater the chance that a mistake may occur. Even inadvertent mistakes are seen by many *Rishonim* as bearing some physician liability and needing reparations.[89] Similarly, many contemporary halachic authorities[90] consider an accidental inappropriate injection of the wrong drug as being similar to an intentional act. Thus, an overload of patients can over-burden the physician and compromise patient care, potentially leading to careless mistakes.[91] It is plausible to suggest that setting limits to patients will be beneficial for all parties.

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88. *Kiddushin* 82a.

89. *Tzitz Eliezer* 5:23 (*Ramat Rachel*) explaining the opinions of the Ramban, *Tur* and *Shulchan Aruch*.

90. *Tzitz Eliezer* ibid and Responsa *Minchat Yitzchak* 3:105, unlike Responsa *Chatam Sofer* 1:177 (Responsa to *Orach Chaim*).

91. Similar to arguments made in the Libby Zion case of 1984, see "Libby Zion", *The New York Times*. March 6, 1984.

Recent halachic sources highlight that in the modern developed world, it is uncommon for cities to have a shortage of physicians. If a physician were to refuse, either passively or actively, from responding to a sick patient there are ample physicians who remain to treat that person. Thus, Rav Shalom Elyashiv[92] writes that if a person is not seriously ill and not in need of urgent care, if a physician is eating, sleeping, or resting he is not obligated to tend to the patient. However, a seriously ill patient falls into a different category. The *Tzitz Eliezer*[93] writes that although a physician who does not aid a seriously ill patient in a time of need may not be responsible monetarily for damages, he nevertheless has an obligation to come to the patient's aid. If he does not he will be punished by Heaven. *Nishmat Avraham*[94] comments that this distinction may not apply if the inactivity occurred after the physician began treating the patient. The Talmud[95] explains that if a person indicates that he is depending on someone, then that someone is liable for any loss incurred. The *Shulchan Aruch*[96] applies this law even if this statement was not specifically stated but was implied and obvious (such as the implied relationship between a physician and a patient). Consequently, *Nishmat Avraham*[97] concludes that a physician who denies treatment to an existing patient is liable monetarily. It would appear that Jewish law regarding refusal to treat a person is dependent on the severity of sickness and whether a physician-patient relationship had previously been established.[98]

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92. *Zichron LehaGriv Jolti* 5747, cited by *Mishnat Ya'avetz, Yoreh Deah.* See also *Kovetz Ateret Shlomo* vol. 7 188:2.

93. Responsa 19:63.

94. *Yoreh Deah* 336.

95. *Bava Kama* 100a.

96. *Choshen Mishpat* 306:6.

97. In the name of Rav Shalom Elyashiv.

98. A similar delineation exists in common law: A physician is not obligated to treat every patient unless a physician-patient relationship has

An important halachic discussion exists surrounding the case of a physician who refuses to treat a patient due to lack of funds. As quoted above, Rashi explains the statement in the Talmud[99] "the best physicians to Hell" as pertaining to a physician who refuses to help the patient. If a person truly cannot afford the medical treatment, a rabbinic court can force the doctor to treat the patient.[100] However, the courts can only coerce the physician if there are no other physicians in the city. Otherwise, it is not possible to coerce one physician over another and it is the responsibility of the court to raise money to pay a physician to treat the poor.[101] Although the Talmud[102] comments that "a physician who receives no payment is worthless" this does not mean that a physician cannot heal pro bono, rather it means to say that a patient is obligated to pay what he can.[103]

Throughout history, practicing Jewish physicians have highlighted the importance of treating the poor. Yitchak Yisraeli[104] highlights this in a statement to physicians: "There is no greater mitzvah than treating the poor". R. Eliezer Pappa contends[105] that the quality of care offered to the indigent must be comparable to that offered to the wealthy. A physician who is called upon must act quickly, irrespective of time or

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been established. See Katz & Marshall, "When a Physician May Refuse to Treat a Patient", *Physician's News*. Feb 2002. Available at www.physiciansnews.com/law/202.html.

99. *Kiddushin* 82a.

100. Responsa *Teshuva M'ahavah Yoreh Deah* 3:408.

101. *Tzitz Eliezer* 15:40:7 delineates the possible biblical prohibitions if such a fund is not established and discusses the biblical verses that are fulfilled when such a fund is established.

102. *Bava Kama* 85a.

103. *Shoshanat Ha'amakim "verapo yerapey"* #71, see also *Taanit* 21b and *Gilyonei Hashas Bava Kama* 85a.

104. *Mussar Harofim* #30; see also "Oath of Assaf" (quoted in F. Rosner *Ann Int Med* 63:317, 1965) and "Oath of Jacob Zahalon" (in *Otzar Hachayim*).

105. *Peleh Yoetz* #510 "Rofeh".

economic status. Furthermore, from as early as the 13th century, "Bikur Cholim" societies have been set up to allow those who cannot afford medical care to receive adequate attention.[106] The *Chafetz Chayim*[107] questions if a community does not set up a fund to care for the poor whether it would amount to violating the prohibition of "*lo ta'amod al dam re'echah*" – not remaining idle while your friend is in danger.

An interesting contemporary application of a physician's ability to refuse to care for patients occurred during a physician's strike in Israel in 1983[108] which lasted four months. At the time Rav Shlomo Zalman Auerbach[109] permitted the strike on condition that it did not threaten patients' lives. He specified that physicians may not abandon the hospitals and may not make themselves unavailable by traveling far distances. As the strike progressed, Rav Shlomo Zalman Auerbach and Rav Yaakov Yitzchak Weiss[110] clarified the practical level of staff that physicians must supply during the strike as being of the level that would be supplied on Shabbat (which would be the medically-determined level needed to ensure saving life in an emergency and ensure proper care for the hospitalized patients). Thus, halachic authorities throughout Jewish history have balanced the personal and psychological needs of the physician with the importance of the destitute and severely infirm receiving adequate access to health care.

Conclusion

The surge in primary care physicians in the United States

106. For further details see *Encyclopedia of Jewish Medical Ethics,* vol. 3 p. 1120, and *Brachah L'Avraham* pp. 221-223.

107. *Ahavat Chesed* vol. 3 "Bikur Cholim" 48b.

108. Strikes also occurred in Israel in 1973 (one month), 1976 (three months).

109. Cited in *Nishmat Avraham Choshen Mishpat* 333:1.

110. Cited in *Encyclopedia of Jewish Medical Ethics* p. 803.

converting their practices into concierge or retainer practices raises many halachic questions. As highlighted above, although providing medical care is a biblical obligation and one may only charge *s'char tirchah* and *s'char batalah*, this may not be the case with contemporary physicians who practice medicine as their sole source of income. Furthermore, in order to avoid common law issues, it has been advised that concierge physicians clearly stipulate in their contract with the patient exactly what services the retainer fee covers and that those stipulated services are of non-medical nature.[111] Accordingly, a concierge physician would not charge a fee for direct medical services. Thus, the payment is not contingent on the performance of a biblical obligation and would be exempt from the prohibition of charging for fulfilling a biblical commandment.

Both Jewish and United States law recognize, except for emergencies, a physician's right to choose where he or she practices and whom to treat.[112] However, once a person is an existing patient it is imperative, according to both halacha and common law, that his treatment is continuous and he is not abandoned. According to United States Law and the AMA's ethical code, it is forbidden for a physician to abandon a patient.[113] A physician is obligated to transition all his patients into a new retainer practice, whether they will continue to be patients or not. Those patients who will not be part of the new practice must continue to be cared for until they can be safely transferred to a new physician. The entrance of a physician

111. Portman, *J Health Life Sci Law*. 2008 Apr;1(3):1, pg. 26, 37.

112. Assuming that no laws are violated (for example, discrimination laws). For a more detailed discussion regarding common law applications see "Principles of Medical Ethics" www.ama-assn.org/ama/pub/category/2512.html. For a more detailed discussion regarding halacha see the discussion above regarding denial of care.

113. "AMA Report to the Council on Medical Services of Special Physician-Patient Contracts", CEJA Report 9-A-02 (June 2002); and Portman, *J Health Life Sci Law*. 2008 Apr;1(3):1, pg. 30.

into a concierge practice must be tempered with the strong emphasis placed in halacha and Jewish literature upon the necessity for a Jewish physician to treat the indigent. This is a point that the AMA has itself highlighted – the need for concierge physicians to offer charitable medical care.[114] Interestingly, it has been noted by a study that among concierge medical practices, 84% provide charity care and many continuously see patients despite their not having paid the retainer fee.[115]

At the present time it has been determined by the United States Government that concierge medicine is too small a phenomenon to reach the level that it will limit a patient's (specifically a Medicare patient's) access to health care. Such retainer practices have been limited to larger cities with sizable population pools as opposed to rural areas with limited primary care physicians.[116]

It has been noted that, "As the economic pressure on physicians and their traditional medical groups intensifies…more retainer practices are likely to surface around the country." [117] As time continues and concierge medicine evolves it is imperative to re-evaluate the halachic and common ethical dilemmas that arise.

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114. AMA "Principles of Medical Ethics"; AMA, "Report of the Council on Ethical and Judicial Affairs: Disrespect and Derogatory Conduct in the Patient-Physician Relationship" (June 2003).

115. Alexander GC et al. "Physicians in Retainer Practice: A National Survey of Physician, Patient and Practice Characteristics", 20 *J Gen Internal Med*. 1079-1082 (Dec, 2005).

116. GAO report, supra note 2.

117. Portman, *J Health Life Sci Law*. 2008 Apr;1(3):1, pg. 8.

The Investment Advisor: Liabilities and Halachic Identity

Rabbi Dr. A. Yehuda Warburg

Already in 1988, more than ten million Americans wishing to invest in the securities markets consulted financial planners each year. During 1986-1987 alone, more than 22,000 clients of brokerage firms lost over $400 million due to a planner's incompetence, breach of contract, negligent misrepresentation and fraudulent misconduct. [1]

The purpose of this essay is to analyze the scope of the duty owed by a Jewish financial planner to his Jewish client or to a Jewish third party for negligent misrepresentation, as understood by Jewish law. A broker may be liable for negligent misrepresentation if in the course of his employment or profession he supplies false information such as misrepresenting the level of risk incurred by the purchase or by promising a specified rate of return. In contrast to fraud, which entails a willful intent to deprive another of his legal rights, negligent misrepresentation involves a breach of standards of care and competence recognized within the industry, minus the intent to do a wrongful act. The client seeks recovery for losses attributable to the investor's negligence.

1. The NASAA Survey of Fraud and Abuse in the Financial Planning Industry (July 1988).

Dayan in Chassidic, Modern Orthodox and Yeshiva communities in New York and New Jersey

The Broker and *Hilchot Nezikin*

To address the parameters for invoking the claim for negligent misrepresentation, this article examines various questions and scenarios which will assist us in defining the responsibility of an investment advisor vis-à-vis his clientele. We are dealing with a discretionary investment account which gives the broker the authority to buy and sell, either absolutely or subject to certain restrictions, based on an express written agreement such as a prospectus or offering memorandum, or based upon their mutual understanding. Are casual conversations and predictions between a broker and client sufficient to establish a duty of care? Is a licensing requirement and/or reliance upon the broker's words a prerequisite for establishing liability for providing bad financial advice? Should there be a market meltdown or a broker's failure to follow his client's instructions resulting in a decline of the portfolio's value, would the client be able to recover his market losses?

Let us examine a possible scenario: If a client invests with a Jewish broker who was supposedly managing certain assets and, unbeknownst to him, the money manager invested in another fund which became an investment-gone-bad due to fraudulent activity perpetrated by a second Jewish money manager, how does halacha address this situation? If the terms of the offering memorandum allowed the first manager to choose a second one, but the memorandum stipulated that the first manager would continue to monitor the activities of the second manager, how does this provision impact upon halacha? There may be allegations that the first manager had repeatedly turned a blind eye to potential "red flags" that the second manager was committing fraud by dissipating his client's assets.[2] Is the initial money manager who was not

2. At first glance, this fact pattern seems to resemble the facts and allegations relating to the claims submitted by various investors against a NY money manager. But, in fact there is a major difference between our

actively managing the investments and was a "glorified mailbox" liable for dissipation of these "feeder" funds that were entrusted to the second money manager? Having failed to monitor the client's investments, is he liable for any ensuing losses?

Expounding upon the biblical verse "…before a blind person you shall not place a stumbling block", *Sifra* on *Torat Kohanim* instructs us:[3]

> What does it means before a blind person? In front of someone who is blind regarding a matter. If he takes advice from you, you shall not provide advice which is improper for him.

Though it is forbidden to knowingly provide "bad advice", nevertheless a violation of this prohibition entails no halachic-judicial remedy. In other words, if it is unclear whether there is reliance upon his advice and there is ensuing injury, the advisor is not liable. Halacha recognizes the damage as remote, i.e. *grama,* and therefore the advisor would not be held liable at all for giving bad advice.[4]

That being said, how does one understand the following talmudic passage, wherein the Talmud proceeds to implicitly challenge this ruling of *Sifra*:

> If one shows a dinar to a money-changer [in order to determine whether it is good so that he may accept it, and the money changer says it is good], but it turns out to be

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scenario and the circumstances surrounding the allegations advanced against the NY money manager. We are addressing investments which may not necessarily create a partnership interest rather than focusing on a relationship between a money manager and his clients who chose to invest their assets in a business partnership.

3. *Torat Kohanim,* Leviticus 19:14.

4. *Yam Shel Shlomo, Bava Kamma* 6:4; *Darchei Moshe, Tur Choshen Mishpat* 306, Ramo, *Choshen Mishpat* 306:3. Should there be an expression of reliance for the advisor, Ramo argues that the advisor would be liable. See Ramo, *Choshen Mishpat* 129:2.

> bad – one *baraita* states that if he is an expert, he is absolved from liability [for recurring damage resulting from his advice], while if he is a layman, he is liable. However, another *baraita* states he is liable regardless of whether he is an expert or a layman. R. Papa stated: "The statement that an expert is exempt from liability relates to those like Dankho and Issur [who were exceptional experts] who have no need for further training. So what was their error? They erred in [appraising] a new coin which recently had been minted."[5]

Clearly, pursuant to this passage, according to one opinion a layman who serves as a money-changer and proffers advice is liable for any ensuing damages should his advice be acted upon. Similarly, according to R. Papa, an expert money-changer would be equally liable.

One approach for resolving this seeming contradiction is that the case of the *Sifra* deals with an individual who gives a casual "curbside opinion" and is therefore not liable. However, in the money-changer's case, we are dealing with an individual who communicates investment advice during the course of his professional employment. The client is relying on his advice, and he is therefore liable for any negligent misrepresentation. [6] However, as noted in the Talmud, in the absence of reliance, no liability would ensue.[7]

Post-talmudic decisors have expounded upon various indicators which demonstrate the client's reliance upon the investor's advice. One suggestion is that the reliance factor is satisfied if the client explicitly states that he is relying upon the

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5. *Bava Kamma* 100b.

6. *Shulchan Aruch Choshen Mishpat* 306:6; Ramo, *ad. locum.; Shach,ad. locum 12* in the name of *Shiltei Gibborim* and *Yam Shel Shlomo.*

7. For an alternative approach towards understanding this contradiction, see Ramban, *Kuntres Dina Degarmi*, 47 culled from *Shiurei Harav Aharon Lichtenstein: Dina Degarmi* (Alon Shevut: 5760), 36; Mordechai, *Bava Kamma* 116; *Hagahot Asherei, Bava Kamma* 9:16 (in the name of Rabbeinu Ephraim).

investment advice.[8] Should the client's words be open to interpretation[9] or if the words of reliance were given in response to laymen's advice which one should refrain from heeding given his lack of expertise, any ensuing damages would fail to engender liability.[10] Or if the rendering of a professional opinion in this matter is complicated and therefore there is no expectation by the planner that the client will rely on his advice even if the client expressed reliance, the advisor would be exempt from liability.[11]

Others argue that apparent reliance which may be distilled from the surrounding circumstances of the situation rather than an explicit reliance statement suffices to engender liability.[12] For example, if the investment advisor approaches the customer on his own initiative and informs him: "This investment is sound," clearly he is liable. In such a case, the planner supposedly researched the matter and deliberated before approaching the prospective client to offer his unsolicited advice. [13]

Another approach is to calibrate the reliance factor based upon the advisor's financial expertise. The greater the degree of expertise, the greater the presumption that the customer will rely upon his advice. Therefore, a financial planner who has the education, earned a license in financial planning, and has no need for further education may be classified as a

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8. *Teshuvot Tashbetz* 2:174. According to some decisors this expression of reliance would suffice for a layman who gives advice. See infra n. 15, *Maharam Baruch*.

9.*Teshuvot Sefer Yehoshua, Choshen Mishpat* 110.

10. Ibid; *Teshuvot Minchat Yechiel* 41.

11. *Teshuvot Chavot Yair* 64.

12. *Shulchan Aruch Choshen Mishpat* 306:6; Ramo *Choshen Mishpat* 306:6; *Shach, Choshen Mishpat* 206:12. Cf. *Urim Vetummim, Choshen Mishpat* 129.

13. *Aruch Hashulchan Choshen Mishpat* 129:3. Adopting this posture, *Aruch Hashulchan* clarifies Ramo *Choshen Mishpat* 129:2 which establishes a duty of care without a requirement of a statement of reliance on the part of the client. See also, *Mishkenot HaRoim, Maarechet Ot Ayin*- 105.

"mumcheh" (expert)[14] and be exempt from liability unless there was negligent misrepresentation.[15] On the other hand, a laymen proffering advice would be liable.[16]

Finally, some maintain that the determining factor is "the pecuniary interest". In other words, if the investment advisor receives money for his advice he becomes liable.[17] According to many authorities, this is a relevant yardstick to establish reliance only regarding an expert advisor.[18] In fact, one

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14. Such an advisor falls into the category of Danko and Issur who were labeled as great experts. See *Bava Kamma* 99b. The burden of proof to demonstrate a planner's expertise lies with the planner. See *Mishneh Torah, Hilchot Sechirut* 10:5; *Teshuvot Beth Halevi* 3:20 (2).

15. *Netivot Choshen Mishpat* 306:12; *Shach Choshen Mishpat* 306:12. This exemption applies even if the customer states that he is relying upon him. See *Ohr Zarua, Bava Kamma* 137. Cf. *Maharam Baruch* who argues that an expression of reliance will trump the investor's expertise. See *Shach Choshen Mishpat* 306:12.There is a dissenting opinion which requires a statement of reliance in the case of an expert in order to be exempt from liability. See Maharich's view cited by *Hagahot Asheri* on Rosh, *Bava Kamma* 9:16 and *Shiltei Gibborim, Bava Kamma* 99b.

16. *Shulchan Aruch Choshen Mishpat* 306:6. Cf. Tosafot, *Bava Kamma* 99b, *s.v. achvai*; Rosh *Bava Kamma* 9: 16*; Yam Shel Shlomo Bava Kamma* 9:24; Ramo *Choshen Mishpat* 306:6 in the name of "*yesh omrim*". In such circumstances, the expert who offers negligent information is adjudged as an *"onus"*, i.e. under duress. See Tosafot*, Bava Kamma* 99b*, s.v. emah*; *Magid Mishneh, Mishneh Torah, Hilchot Sechirut* 10:5. On the other hand, the communication of advice places the layman in the category of a person who intends to cause injury to another. See Meiri*, Bava Kamma* 56a.

17. *Aruch Hashulchan Choshen Mishpat* 306:13. Even the possibility of payment is sufficient to establish reliance. See *Tarshish Shoham Choshen Mishpat* 99. To engender liability, this payment must be in exchange for this investment advice rather than any other indirect benefit accruing to the advisor from servicing the customer. See *Mishkenot HaRoim,* supra n. 13. For example, where the advisor receives no direct remuneration, but nevertheless stands to benefit, giving as one example a bank officer or corporate officer who provides information regarding a company. In such a situation, liability would not ensue.

18. Rosh, supra n. 16; *Tur* and *Shulchan Aruch, Choshen Mishpat* 306:6. Cf. *Chidushei Haritva Bava Kamma* 99b *s.v. amar Rav Papa* who argues that pecuniary gain will not be grounds for liability for an expert or a layman.

opinion posits that this view is "*pashut*", i.e. clear.[19]

In short, there are four criteria for assessing the reliance factor and thus creating a fiduciary relationship between the parties: an explicit expression of reliance, apparent reliance based upon the circumstances, the expertise of the advisor, and payment to the advisor for his services.

According to normative halacha, which reliance factor(s) serve as guidelines for dealing with negligent misrepresentation of a broker? One approach is that remuneration is not a prerequisite for liability, and therefore a broker with expertise is always exempt from liability while a layman is always liable, regardless of whether or not there is payment for services. However, the more accepted view is that receipt of payment exempts the expert from liability unless there was negligent misrepresentation, but the layman who has been relied upon by his customer is always liable irrespective of payment.[20]

Given this difference of opinion, *Mahari Ibn Lev* concludes that one cannot extract money from the broker.[21] In effect, pursuant to this position, one will be unable to file a claim in a *beth din* against a negligent expert broker who was paid for his services. However, *Shach* demurs and argues that normative halacha reflective of Rambam, *Tur* and *Shulchan Aruch*[22] allows

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19. *Netivot Hamishpat Beurim Choshen Mishpat* 306:11. See also, *Teshuvot Rabbi Akiva Eiger 23; Aruch Hashulchan*, supra n. 17.

According to *Tashbetz*, supra n. 8, an expert who receives no payment is exempt for liability, unless the customary practice is to impose liability. In the United States, most states require that a planner be paid for his advice prior to imposing liability. In a minority of jurisdictions, no such requirement exists. Clearly, if the expectation of the parties is to follow secular law, these expectations become the bedrock of the customary practice. See *Chazon Ish Sanhedrin, Likkutim* 16:1.

20. Rambam, supra n. 14; *Tur* and *Shulchan Aruch* , supra n. 18. Cf. *Yam Shel Shlomo, Bava Kamma* 9:24.

21. *Teshuvot Maharbil 3:30.*

22. See supra n. 21.

one to sue a negligent expert broker who receives payment for his investment advice.[23]

Assuming that we adopt *Shach's* posture and we are dealing with the common scenario of an expert planner who receives payment, on what grounds of *nezikin (*damages), can he be sued for negligent behavior? This question must be addressed in two different scenarios: a case of an experienced investor who loses money due to a market downturn and a situation of a novice investor who sues to recover losses after allegedly relying upon negligently-given advice from an investment planner. Assuming we are dealing with a client who is relatively naïve and unsophisticated, "chases returns" and assumes that past performance guarantees future results and the advisor fails to make his client aware of the risk of the investment, can the investor recover his losses? In effect, the broker's advice is an indirect cause for the damages incurred by his client.

That being said, can the broker be liable for indirect causes of damage? Jewish law distinguishes between *garmi*–direct cause–which entails monetary liability, and *grama*–indirect cause–which does not. According to most decisors, an action is a direct cause of the ensuing damage if the damage is instantaneous and inevitable (*bari hezekah)*, such as burning someone's note of indebtedness. However, if the damage is not inevitable or damage is not instantaneous, the damage is labeled "*grama*".[24] If in the course of his employment or profession the broker supplies false information such as misrepresenting the level of the risk entailed in the investment, such an action is subsumed in the category of *garmi* and the broker must bear the loss. However, if at the time of the investment the advice was sound advice but

23. *Shach, Choshen Mishpat* 306:11.

24. Tosafot *Bava Batra* 22b; Rosh*, Bava Kamma* 9:17; *Encyclopedia Talmudit,* "Garmi", Section 2.

subsequently there was a decline in the value of the portfolio, the cause of the damages is neither instantaneous nor inevitable, and therefore the advisor would be exempt from liability.[25]

It should be noted that there is an authoritative opinion, albeit in variance with the accepted view, that there really is no distinguishing characteristic between *garmi* and *grama* actions. However, for punitive purposes, i.e. *kenas, Chazal* have classified usual and frequent injuries as *garmi* and unusual and infrequent injuries as *grama*.[26] The underlying rationale for attaching tort liability is to deter individuals from harming their fellowmen.[27] Should the aforementioned types of negligent misrepresentation be commonplace today in the brokerage industry, then there may be grounds for mandating liability based upon the actions being deemed *garmi*. The number of cases filed with the New York Stock Exchange rises annually, and in 2002 alone $139 million in damages were awarded. Thus, there may be grounds for liability based upon *garmi*.[28]

Yet, one may conclude pursuant to *Shach's* position that even if such reliance is commonplace, if there is no intent to injure, there is no liability. In other words, liability for *garmi* based upon punitive grounds (*kenas),* will not be operative if the

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25. *Pitchei Choshen, Nezikin* 4:22, n. 56, page 161. Such a conclusion may be inferred from *Teshuvot Teshurat Shai* 142, *Teshuvot Dvar Yehoshua* 4, *Choshen Mishpat* 3 and *Teshuvot Lehorot Natan* 3:99.

Whether *grama* actions may engender liability based on considerations of "*lifnim meshurat hadin*" is beyond the scope of this presentation. See *Bava Kamma* 99b.

26. Ramo, *Choshen Mishpat* 386:3; *Be'ur Hagra, Choshen Mishpat* 386:10.

27. *Aruch Hashulchan Choshen Mishpat* 386:20. See also Ramo, *Choshen Mishpat* 386:3.

28. If one contends that the loss of investment in the market is to be labeled as a "*hezek sheino nikar*", i.e. indiscernible damage, adopting this punitive approach to meting out liability may be in place. See *Teshuvot Minchat Yitzchok* 4:104.

broker caused the damages unintentionally, i.e., *beshogeg*.[29]

In sum, whether one adopts the approach of *din* [Jewish law]–that there is a difference between *garmi* acts and *grama* acts– or the approach of *kenas* [penalty]– there is no difference between the two actions–damages caused by reliance on a broker's sound advice are subsumed in the category of *grama* and cannot be indemnified.[30]

Are there grounds for an intelligent and experienced investor who is aware of the risks and knows full well that past performance does not guarantee future results to be

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29. *Shach, Choshen Mishpat* 386:1, 6. Antecedents of this view may be found in Mordechai, *Bava Kamma* 10:180; *Shitah Mekubetzet Bava Kamma* 117b in the name of Rabbi Yehonathan. However, if the damage was intentionally caused, he is liable. See *Netivot Hamishpat Choshen Mishpat* 234:1.

30. However, it should be noted that there may still be four other possible grounds for mandating liability in cases of a novice investor as well as a sophisticated investor: (1) Assuming that both parties are willing to sign an arbitration agreement or execute a *kinyan* (a symbolic act of undertaking an obligation) empowering *dayanim* (arbitrators) to resolve this matter based on *peshara krova ledin,* i.e. court-ordered settlement or *peshara,* i.e. compromise, then it is in the panel's discretion to award damages for acts of *grama*. (2) Another ground for mandating liability is if the arbitration agreement provides for a clause that states that the *dayanim* may use their own discretion in awarding acts of *grama*.

(3)If secular law mandates liability for *grama*, the halachic doctrine of "*dina demalchuta dina"*, i.e. the law of the land is the law, may serve as grounds for mandating liability for such damages. Finally, (4)if parties are willing to appear before a *beth din*, they may agree to execute an arbitration agreement which adopts secular law as the governing law to address their dispute. The underlying motivation to execute such an agreement is to benefit from the provisions of the secular law in a particular situation rather than to affirm the acceptance of the norms of a secular legal system as governing one's affairs. Given such motivation, said agreement is valid and is not a violation of the prohibition of litigating in secular courts. See *Teshuvot Harashba* 6:254;*Sema Choshen Mishpat* 26:11;*Netivot, Choshen Mishpat* 26:11; *Sema, Choshen Mishpat* 61:14; *Piskei Din Rabbaniyim* 18:319,324;Rabbi Zalman Nechemiah Goldberg, *Lev Hamishpat*, vol. 1, page 286. Rabbi Ezra Batzri, *Dinei Mammonot* 3, p. 197.

compensated for his losses? Clearly, halachically speaking, the experienced investor is barred from recovery against a professional broker who proffers sound advice if the investor expressly agrees to accept the risk or understands the nature of the risk and voluntarily chooses to subject himself to the risk, i.e. " *volenti non fit injuria*".[31] There is an explicit or an implied assumption of risk which exempts a *mazik* [damager] from liability for ensuing damages.[32] Hence, when dealing with an experienced investor, the broker is exempt from liability for any losses generated by complying with his sound professional advice.[33] Upon proving the existence of the assumption in a particular situation, he is exempt from liability. The investor who accepts market risk is no different from the Jew who injures his fellow Jew while sharing together in the joy of Purim or engaging in a wrestling match. Just as a wrestler accepts that he may win or lose his bout, similarly an investment client accepts the possibility of profiting from or losing his investment. In each of these instances, there is an implicit waiver of filing a claim for damages against the other.[34] However, should the professional broker offer negligent advice, the customer may sue for damages. Clearly, his assumption of risk was limited to receiving sound investment counsel.

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31. *Shulchan Aruch, Choshen Mishpat* 301:10; 380:1.

32. The burden of proof that such an assumption of risk exists lies with the *mazik*, i.e. the broker. See Ramo, *Choshen Mishpat* 382:1. Should halacha fail to require that the burden of proof lies with the broker, every broker will state ""my client allowed me to cause him loss". See *Sema, Choshen Mishpat* 382:3; *Taz, Choshen Mishpat* 382:1.

33. Should the advice be negligent, based upon the norms *grama*/*garmi*, he equally would be exempt from liability.

34. *Tur, Choshen Mishpat 421:7*; *Sema, Choshen Mishpat* 421:10; *Shulchan Aruch, Orach Chaim* 695:2. For other rationales, see Ramo, *Choshen Mishpat 378:9*; *Chazon Ish*, *Choshen Mishpat, Likkutim* 12:13-14; *Mishnah Berurah*, *Orach Chaim* 695:13-14, 696:31.

Additional Obligations of the Investment Advisor: the broker as a *shomer*

The foregoing presentation has focused upon obligations emerging from an act of *nezek*, i.e. injury, whereby the conduct of the broker causes the client to suffer damage, so that the latter acquires a claim against the injurer for indemnification in respect to the damage caused. Damage for reliance upon an expert broker's advice that is being remunerated is generally speaking not collectible unless there was negligence.

But in addition, halacha recognizes that obligations may be created by parties undertaking duties based upon oral or written agreements, whereby each party acquires a claim against the other which the latter is obligated to honor. In order to deal comprehensively with the parameters of a broker's responsibilities, we have to address also the additional aspect of the investment adviser's halachic identity, namely his serving as a *shomer*, i.e. bailor. The bailment is established by dint of the broker's advice to invest in a particular company or fund.[35]

An investor's purchase–including but not limited to stock certificates, bonds, annuities, mutual funds or limited partnership interests in a partnership–can be characterized as "*gufo mammon*", i.e. of intrinsic value. As such, they are the objects of the bailment and subject to *dinnei shemirah*, i.e., rules of bailment.[36] Absent any agreement to the contrary, from the moment the broker receives the funds for investment in exchange for receiving a management fee, he becomes a *shomer sachar*, i.e. a paid bailee, who is liable for theft and loss. Since

35. For discussions regarding a *shomer's* liability for declining value of currency or prospective invalidity of a governmental document, see *Teshuvot Shealat Yavetz* 1:85; *Teshuvot Zekan Aharon* 1:112.. These responsa may serve as precedent for a broker's identity as a *shomer* of his client's portfolio.

36. *Brit Yehuda* 16:7, 18; *Pitchei Choshen Hilchot Pikadon Veshealah 1:21*.Cf. *Netivot Hamishpat* 232:7; *Teshuvot Imrei Yosher* 2:185; *Berurei Halacha*, Vol. 4, 7-13.

he undertook responsibility to guard the client's assets, he is negligent if the assets are stolen, lost or destroyed. And any individual who is negligent is to be viewed as a *mazik*, i.e. an injurer.[37]

In our scenario, we are dealing with two *shomrim*: the first broker who was engaged by his client to be the investment manager, and a second manager, who was delegated by the first manager to be the actual investment manager. The question is which *shomer* is liable for any loss or theft? Though generally speaking when one *shomer* transfers an object to another *shomer*, the first *shomer* remains liable for theft or loss,[38] nevertheless when such transfer is executed with the consent of the owner of the object, the first *shomer* disappears from the picture and the second *shomer* remains solely responsible.[39] Similarly, when the broker transfers the funds for investment purposes to a company or mutual fund, the respective enterprises who issue the financial certificates become liable. However, if pursuant to the terms of the prospectus or the offering memorandum there is a designation that a certain individual manage these monies, but in actuality another party was delegated investment discretion, then such a transfer would be invalid and the first *shomer*, the first manager who delegated his responsibility to a third party, would remain liable for any ensuing theft or loss.[40]

In our scenario, although the offering memorandum allows for the first manager to choose another manager, nevertheless,

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37. Rambam, *Hilchot Sechirut* 2:3; *Teshuvot Harashba* 5:166. Alternatively, a *shomer*'s liability is grounded in the fact that the *mafkid*, i.e. bailor, trusted in the *shomer's* ability to guard the object. See *Erech Shai*, *Choshen Mishpat* 291:5; *Machaneh Ephraim*, *Hilchot Arev*, 1.

38. *Pitchei Choshen, Hilchot Pikadon Veshealah* 4:1, 6. For exceptions to this rule, see *Pitchei Choshen,* ibid, 4: 1-13.

39. *Nimmukei Yosef* on *Bava Metzia* 19b; Ramo *Choshen Mishpat* 291:26;*Teshuvot Maharashdam Choshen Mishpat* 40;*Teshuvot Mabit* 1:304.

40. *Teshuvot Maharam Alshaker* 39 cited by *Knesset Hagedolah*, *Choshen Mishpat* 291: *Hagahot Hatur*, Section 150.

it provides that the first manager "will monitor the results "of the second manager's activities. Should it be proven that the first manager had repeatedly turned a blind eye to potential "red flags" that the second manager was committing fraud, the first manager would bear the loss for breaching the terms of his agreement.[41]

Would he be liable if an agreement was not signed? Clearly, if the first manager is aware that the second manager is stealing his client's assets, he is obligated to intervene; otherwise, he is liable for the loss.[42] If the first manager strongly suspects that the second manager is committing fraud, he is obligated to notify him to cease and desist [43] and to advance a claim against him in *beth din*.[44] And should the *beth din* lack authority to resolve criminal matters, he should file suit against him in secular court for theft.[45]

What are the implications of the phrase in the agreement that the first manager "will monitor the results" of the second manager, with respect to losses unrelated to fraud? We have shown in our earlier discussion of *hilchot nezikin* that, provided he gives sound advice, he is exempt from responsibility for portfolio losses due to a market downturn. But how does

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41.An investor executes an agreement which includes a provision that he or she has read the prospectus or the offering memorandum.

42. *Bava Metzia* 93b; *Shulchan Aruch, Choshen Mishpat* 303:8. Regarding recouping his expenditures for saving the assets, see *Netivot Hamishpat, Choshen Mishpat* 303:8.

43. *Teshuvot Maharsham* 1:77.

44. *Bava Kamma* 108b; *Shulchan Aruch Choshen Mishpat* 294:11, 305:2. Though he is not the owner, as a *shomer* he can and must file suit against him in *beth din. See Bach, Choshen Mishpat 494:11; Teshuvot Maharasham 4:7; Chazon Ish, Choshen Misphat 8:7.* If he is negligent and fails to file such suit he is responsible. See *Teshuvot Chatam Sofer, Orach Chaim* 105; *Chazon Ish*, op. cit.

45. Such an action would not entail "*mesirah*", i.e. informing to a non-Jewish governmental authority by a Jew. See *Aruch Hashulchan Choshen Mishpat* 388:7; *Teshuvot Tzitz Eliezar* 19:52. Additionally, if the second manager is a non-Jew, the Jewish manager may submit a claim against him in secular court. See *Shach Choshen Mishpat* 293:9.

halacha understand these words? As a *shomer*, it is his obligation to prevent natural deterioration of the objects entrusted to him. As one contemporary writer states,[46]

> Clothing should not be stored in trunks since mice find their way in and destroy the clothing. Rather it should be hung in a closet and out of reach of mice…Garments containing furs or skins must be stored in cool places; otherwise, they will spoil from the moisture in the walls of the closets.

Does a manager's standard of care extend to selling a portfolio due to its prospects of declining in value rather than just safeguarding the actual paperwork documenting the investment?

The resolution of this issue centers on the talmudic passage which addresses the case of a Jew depositing *chametz* as a *pikadon* (surety) with another Jew on the Eve of Pesach. If the Jewish *shomer* does not sell the *chametz* to a non-Jew before Pesach, the owner will forever be forbidden to derive benefit from it.[47] Is a *shomer's* responsibility limited to safeguarding the actual *chametz* or does it extend to guaranteeing that the value of the *chametz* is not lost for failure to sell it prior to Pesach? Most authorities concur that a *shomer's* responsibility is limited to protecting the halachic state of the object that was entrusted to him such as avoiding spoilage of fruit.[48] Pursuant to this opinion, although failure to preserve the halachic state of the entrusted object entails violation of the mitzvah to return a lost object to its owner (*hashavat avedah)*,[49] yet one

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46. Emanuel Quint, *A Restatement of Rabbinic Civil Law*, volume 8 (New York: 1997), 228.

47. *Pesachim* 13a.

48. *Bava Metzia* 38a; *Tosafot Bava Metzia* 30a ,*s.v. letzorcho;Teshuvot Meishiv Davar* 3:18; *Taz, Orach Chaim* 443:4; *Teshuvot Mishpatecha Leyaakov, Orach Chaim* 24:3; *Mishnah Berurah Orach Chaim* 443:12; *Teshuvot Iggerot Moshe, Choshen Mishpat* 2:16.

49. *Teshuvot Maharitz Chayot Hachadashot* 2: 130; *Shealot Yavetz,* 40; *Teshuvot*

cannot obligate a fellow-Jew to perform this mitzvah. [50] Similarly, *poskim* have argued that a *shomer* who is aware of any potential loss in the value of a financial instrument and fails to avert the loss by selling the funds has not been derelict in his duty. His responsibility begins and ends with protecting the actual paperwork attesting to the financial investment.[51] However, others argue that selling an object is within the ambit of a *shomer's* responsibility and therefore, if the Jew fails to sell the *chametz* prior to Pesach, he is liable.[52]Analogously, one can extrapolate that a *shomer* who is aware of a potential loss in the value of a portfolio and fails to avert it by selling the investment, bears the loss.[53]

Divrei Shalom Ve'emeth Orach Chaim 18. Cf. *Chok Chaim Orach Chaim* 443:8; *Chelkat Yosef* 27.

50. *Machaneh Ephraim*, *Hilchot Shomrim* 35.

51. *Teshuvot Imrei Yosher*,supra n. 39. Cf. *Chok Chaim Orach Chaim,* supra n. 49. Nevertheless, if the broker has been empowered by the broker to sell if market conditions dictate, then if he fails to sell he would bear the loss. In the absence of any agreement between the broker and the client regarding selling the investment, a broker's responsibility is to inform the client of the declining value of his portfolio in order for him to choose whether the investment should be sold or not. This conclusion may be extrapolated from *Pitchei Choshen*, supra. n. 38, 2: 37, n. 103.

52.*Magen Avrahom, Orach Chaim* 443:5; *Tumim Choshen Mishpat* 72:43; *Teshuvot Chatam Sofer*, *Orach Chaim* 105; *Teshuvot Beth Ephraim* 37; *Teshuvot Beth Yitzchak Choshen Mishpat* 53.

53. *Shealot Yavetz,* supra n.35; *Teshuvot Zekan Aharon* 1:112. Others argue that a *shomer's* liability extends to acts of *grama* and therefore his responsibility extends to averting the potential lost value of the investment. See *Shealot Yavetz,* supra n.35; *Teshuvot Teshurat Shai* 1:593. This conclusion applies equally to indiscernible damage such as the lost value of an investment portfolio. See *Tevuot Shor*, 18; *Teshuvot Maharam Schick*, *Yoreh Deah* 284; *Shaar Hamishpat* 176:4. A broker's liability for indiscernible damage extends even in a situation where the broker fails to explicitly assume responsibility for such loss. See *Shaar Hamishpat* 66:34; *Teshuvot Chelkat Yoav, Mahadurah Kamma, Choshen Mishpat* 12. However, pursuant to one opinion, everyone agrees that if one is dealing with an indiscernible damage such as the lost value of a portfolio, the broker can state "here, this is yours" and be exempt from responsibility. See *Beth Ephraim,* supra *n*. 52; *Erech Shai*, *Choshen Mishpat* 185. Nevertheless, there is an opinion cited approvingly by various decisors that even if the broker failed to obligate himself to assume

In short, if the agreement states that the first manager must monitor the results of the activities of the second manager, should there be prospects of a decline in the portfolio's value and the broker fails to sell the monies, it is subject to debate whether he is liable.[54] If there is an actual decline in portfolio value, he should sell it. However, absent any agreement to the contrary, if he fails to sell it, he is not liable for any loss.

The Broker as a *Shaliach*

We have focused upon obligations emerging from an act of *nezek* (injury), whereby the broker's advice causes his client damage. We have also noted that halacha recognizes that obligations may also be established based on an additional aspect of the broker's halachic identity as a *shomer*.

Last but not least,[55] the parameters of a broker's responsibility are molded by *hilchot shelichut*, i.e. agency. Based upon a verbal commitment, written agreement, or the conduct of the parties,[56] agency is formed whereby the *shaliach*

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responsibility for indiscernible damage such as market loss, he would liable. See *Shaar Hamishpat* 66:34.

54. See supra text accompanying n. 48. *Imrei Yosher*, supra n.36, argues that the defendant may advance the argument "*kim li*", i.e. "I hold the opinion of the school who contends that financial instruments are not subject to *Hilchot shomrim* and therefore I am not liable". Whether a *dayan* should opt for such a solution rather than utilize his own knowledge, acumen and discretion to resolve a problem we leave as an open question.

55. There is another realm of halacha which impacts upon a broker's identity, namely *Hilchot arevuth*, surety. Similar to an *arev* who assumes liability due to the fact that the creditor parted with monies on the strength of his assurance to repay the loan in case of default, the broker who was hired to transact business is liable because the investor relied upon him. See Ramo, *Choshen Mishpat* 129: 2. This aspect of a broker's halachic identity is beyond the scope of our presentation.

56. This section of our essay has profited from the presentation and sources which will be appearing in a forthcoming monograph published by the Department of Jewish Law, Ministry of Justice, Israel. See Michael Wygoda and Chaim Zafry, *Agency in Jewish Law – Section 9 of Israel's Agency Law* (Hebrew) (manuscript on file with this author).The analogies drawn

is empowered to bring about or alter a halachic relationship between the principal and himself or between the principal and third parties.[57] Unlike other situations whereby parties undertake obligations such as signing an agreement to buy and sell or entrusting objects for safekeeping, here the *shaliach* undertakes to facilitate the acquisition of right on behalf of the principal. Various contemporary *poskim* have applied *hilchot shelichut* to the broker who is empowered to follow the instructions of his clientele regarding their investment planning.[58]

A significant question is, which aspect of the halachic identity of the broker captures his essence? Is he an individual who must exhibit a duty of care which is in compliance with *hilchot nezikin*, is his role defined as a *shomer,* or is he serving as a *shaliach* for his customers? Implicitly addressing this question, Rabbi Yosef Trani deals with an agent who was remunerated and empowered to sell merchandise which he received from the principal, but failed to consummate the sale. In the interim the merchandise declined in value. Is he liable for the loss?[59] By virtue of being a *shomer sachar* concerning the asset, he simultaneously is empowered as a *shaliach*. [60] Though in terms of *hilchot nezikin*, the *shaliach* who was entrusted with the merchandise would be exempt from liability (since this situation would be classified as a *grama),* however, given that

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from their presentation toward defining the parameters of a broker's responsibility are my own.

Shulchan Aruch, Choshen Mishpat 182:1; *Be'ur Hagra, Choshen Mishpat* 182:3; *Beth Yosef, Tur Even Haezer* 121:5; *Shulchan Aruch, Even Haezer* 35:5.

57. *Shulchan Aruch Even Haezer* 141: 35.

58. *Iggerot Moshe*, supra n. 48; *Teshuvot Birkat Shlomo, Choshen Mishpat* 23;*Sefer Meishiv Behalacha* 138-140, 170.

59. Though the formation of an agency relationship does not require a *kinyan*, (a symbolic act of undertaking a duty), nevertheless whether a *kinyan* is a prerequisite for a *shaliach* to be liable for losses is subject to debate. See *Divrei Gaonim* 95:70, 96:47.

60. *Chiddushei Haritva, Bava Metzia* 31b; 35b; *Shulchan Aruch, Choshen Mishpat* 187:1; *Divrei Gaonim,* 95:85, 96:23.

the *shaliach* is also a *shomer* and therefore responsible for acts of *grama*, he is liable. In short, for Rabbi Trani and others, the broker's identity as a *shaliach* and *shomer* trump his duty of care which is limited to *hilchot nezikin*.[61] In effect, the investment advisor's duty of care has been enlarged and expanded due to his identity as a *shomer* and *shaliach*. Others argue that a broker's liability does not encompass actions of *grama*. They say that, regarding liability for a declining value of a piece of merchandise, the advisor's identity is defined by *hilchot nezikin* rather than *hilchot shelichut* or *shemirah*.[62]

Is a broker's responsibility, in his capacity as a *shaliach*, limited to loss due to violating his principal's instructions or due to declining value of an asset, or is he liable for losses unrelated to his violation of his principal's instructions? Is there is a concept of absolute responsibility even though there is no connection between the violation and the losses? According to *Shulchan Aruch*, for loss resulting from failure to follow the principal's instructions such as regarding an item to be bought, the *shaliach* is responsible,[63] provided that the loss is a result of market downturn rather than an unforeseen accident such as theft or a market meltdown .[64] However, the

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61. *Teshuvot Maharit, Choshen Mishpat* 110; *Shealot Yavetz,* supra n. 35; *Divrei Gaonim* 15:17. However Rabbi Trani adds the following caveat: If in the eyes of the advisor it is preferable to hold rather than sell and the investment continues to decline in value, he would be exempt from responsibility for the losses.

62. *Divrei Gaonim* 15:17 in the name of the *Shoel Umeshiv*. *Teshuvot Maharshach* 1:11 argues that we are dealing with indiscernible damage and therefore he is exempt from responsibility. In sum, both decisors understand that *Hilchot nezikin* is controlling regarding the halachic disposition of a situation of declining value of merchandise.

63. *Choshen Mishpat* 183:5.

64. *Shach, Choshen Mishpat* 183; 9. For viewing a market meltdown or recession as an "*ones*", see *Chazon Ish, Bava Kamma* 21:6. See also *Teshuvot Mabit* 1:179.

Cf. *Netivot, Choshen Mishpat* 183:7 and *Ketzot HaChoshen* 183:5 who contend that absent an agreement to the contrary, noncompliance with a principal's instructions under all circumstances engenders liability.

broker would be protected from liability for losses should the prospectus state,

> For temporary defensive purposes in times of adverse or unstable market, economic or political conditions, the Fund can invest up to 100% of its assets in investments that may be inconsistent with the Fund's principal investment strategies.

However, absent such a provision, if a broker deviates from his duty as an agent, is he liable even if there is no connection between his violation of the terms of the agreement and the actual losses? Alternatively, if his duty is viewed as grounded in an agreement of the parties and the principal cannot raise the objection "*litekuni shedartich vlo leavathi*", (lit., "It is for my benefit that I have authorized you to act – not to my detriment"),[65] then if the actual loss was unrelated to his noncompliance then he would be exempt from liability.

This question was the focal point of a seventeenth-century Egyptian *beth din* decision. Reuven sent merchandise from Egypt to Italy to his *shaliach* (agent) instructing him to sell the merchandise there. In exchange, it was agreed that the *shaliach* should purchase certain merchandise and send it to Reuven via ocean freight. Due to time constraints, the *shaliach* deviated from the instructions and forwarded Reuven a different type of merchandise. Subsequently, the boat capsized and the merchandise was lost. The two sides appointed a *dayan* as arbiter to resolve whether the *shaliach* was liable for the loss. His decision was that the *shaliach* was liable, even though there was no connection between the deviation from Reuven's instructions and the lost merchandise. But if the halachic identity of the broker would have been circumscribed to being a *shomer*, he would have been exempt from responsibility. According to numerous *poskim*, given that the *ones* (capsizing of the boat) would have occurred regardless of the broker's

65. *Kiddushin* 42b; *Ketubot* 99b.

negligence, we cannot impute liability to him.[66] However, given that *hilchot shelichut* equally apply to a broker, therefore the *dayan* argued that deviation from a principal's instructions engenders absolute responsibility, in which case the *shaliach* is liable even for the *ones*. This decision is defended by some authorities,[67] but others demur and argue that a *shaliach's* responsibility is limited and, therefore, if there is no connection between the deviation from the principal's instructions and the actual loss, the *shaliach* is exempt from bearing the loss.[68]

Conclusion

The foregoing discussion indicates that a number of factors impact upon the liability of the investment advisor. His liability will vary depending whether his responsibilities are viewed through the prism of *hilchot nezikin*, *hilchot shemirah* or *hilchot shelichut.* [69] Deciding between competing analogies is the sole prerogative of the *posek.*

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66. Mordechai, *Bava Metzia* 273; *Netivot, Choshen Mishpat* 125:2;*Ketzot HaChoshen* 183:5;*Teshuvot Rashbash* 390; *Teshuvot Lechem Rav* 104,182; *Teshuvot Maharitz* 129; *Teshuvot Maharshach* 3:65,66; *Teshuvot Hamabit* 1:304; *Teshuvot Maharashdam*, *Choshen Mishpat* 430; *Teshuvot Ginat Veradim*, *Choshen Mishpat* 1:5

67. *Teshuvot Maharashach* 3:66; *Teshuvot Oholei Yaakov* 45.

68. *Teshuvot Hamabit*, 1:179; *Shach*, supra n.64, *Sema, Choshen Mishpat* 176:47.

Machaneh Ephraim, Hilchot Sheluchim Veshutafim 157 argues that the defendant may advance the argument "*kim li*", i.e. I hold the opinion of the school who contends that a broker's liability is limited and therefore I am not liable.

69. There are two additional realms of halacha which impact upon a broker's identity, namely *Hilchot Shutafut,* partnership, and *Hilchot Arevut*, surety. See supra nn.2 and 55.

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Tel: 212.684.4001 / Fax: 212.684.4057
e-mail: starcomp@thejnet.com