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

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

Manuscripts which are submitted for consideration must be typed, double-spaced on one side of the page, and sent in duplicate to the Editor, Rabbi Alfred Cohen, 1265 East 108th Street, Brooklyn, New York, 11236. Each article will be reviewed by competent halachic authority. In view of the particular nature of the Journal, we are especially interested in articles which concern halachic practices of American Jewish Life.

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Parameters and Limits of Communal Unity from the Perspective of Jewish Law

Rabbi J. David Bleich

Among the most pressing needs of the Jewish community in this country — and even more so in Israel — is the need for adequate communication between the various diverse sectors of which it is comprised. Absence of common cause directed toward common concerns, frequent misunderstandings and even acrimonious disputes between ideologically divergent factions of the community are directly attributable to simple lack of communication. The transcendent mandate of *ahavat Yisra'el* and our sacred obligation to reach out to every Jew with concern and love require that we actively seek areas of ongoing contact and cooperation. Unity within the community is clearly desired by all for reasons which are both ideological and pragmatic in nature.

Unity, not unlike mother love and apple pie, receives the approbation of one and all. Why, then, is the very quest for unity likely to be so divisive? The answer is to be found in the agenda of many — but not all — of the exponents of this utopian ideal.

Tafasta merubah lo tafasta — one's reach ought not to exceed

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one's grasp. There are matters regarding which persons of diverse *Weltanschauungen* can neither agree nor cooperate — and indeed no one who espouses the concept of religious, moral or intellectual pluralism should anticipate either cooperation or agreement in such matters. One to whom the taking of fetal life is anathema cannot be expected to endow an abortion clinic. A pacifist can hardly be expected to participate in war games. A Marxist is an unlikely candidate for the position of Vice-President in Charge of Reducing Workers' Wages. The Jewish community is hardly monolithic, monoprax or monodox. No responsible call for unity has ever been predicated upon a platform calling for the setting aside of all differences. Rather, it has consisted of a call for (1) agreement to respect differences which do indeed exist; and (2) the forging of bonds of cooperation between various sectors within the Jewish community in order to promote goals and ideals to which we are all committed.

Were the agenda to consist of the second item exclusively, the goal would not be unattainable; certainly, there would exist no impediment rooted in principle or ideology. Problems arise with regard to the first item which is — not improperly — regarded by many as a necessary condition for the achievement of the second. Agreement to respect differences which do indeed exist may mean one of two things. Minimally, respect connotes awareness and concomitant abjuration of antagonistic words and deeds. On a different level, respect also entails acceptance. Acceptance is quite different from toleration. Linguistically, "toleration" is a term used to describe a mode of thought and behavior vis-a-vis that which is the subject of disdain. Individuals, each of whom professes to possess absolute truth, may indulge one another and one another's beliefs simply because there exists no other viable *modus vivendi*. The alternative is mutual abnegation and mutual destruction. Since the negative effects of the alternative are contrary to the self-interest of each of the parties there emerges reciprocal agreement to exercise restraint in interpersonal and intramural relationships.

Acceptance differs from toleration in that acceptance requires the legitimization of pluralism, i.e., acceptance requires not only sensitivity to the fact that others have differing viewpoints and

ideologies but also tacit affirmation that espousal of those views and ideologies is endowed with equal validity. This form of acceptance and respect is hardly unknown to Judaism. The dictum *elu va-elu divrei Elokim hayyim* certainly implies transcendental legitimacy for conflicting views even though protagonists engaged in the *milhamta shel Torah* do not and dare not give quarter to conflicting positions. Ravad,[1] followed by Duran[2] and Albo,[3] was willing to accord precisely the same type of legitimacy even to certain contradictory propositions each purporting to express theological truth.

Nevertheless, it is the attempt on the part of some to require conferral of legitimacy upon their ideologies and practices as a condition of unity which has made attainment of this goal impossible. It is the fear that cooperation within certain frameworks will constitute *de facto* acceptance and legitimization which creates an insurmountable barrier to unity in the eyes of that sector of our community which is dedicated to uncompromising adherence to the traditional teachings and practices of Judaism.

Halacha is remarkably tolerant, nay, accepting, but only within certain rather clearly defined parameters. Those parameters involve matters of dogma primarily. To be sure, there are numerous controversies regarding various articles of faith which have never been resolved in a definitive manner. For the most part, such controversies pertain solely to matters of belief and have little, if any, impact upon how Jews comport themselves. It is presumably for this reason that adjudication between diverse doctrines concerning the nature of Providence or the unfolding of eschatological events was not deemed imperative. However, acceptance of Torah as the revealed word of G-d and acknowledgment of its immutable nature are matters which are both unbeclouded by controversy in traditional Jewish teaching and which are also of profound significance with regard to virtually every aspect of Jewish life. These principles are fundamental to an

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1. *Hilkhot Teshuvah* 3:7.
2. *Magen Avot*, chaps. 8-9.
3. *Sefer ha-Ikkarim*, Book I, chap. 2.

axiological system which serves to define the intrinsic nature of Judaism. The distinction between the practices of Ashkenazim and Sephardim, of Hasidim and Mitnagdim, could be accommodated by normative Judaism and ultimately find acceptance rather than mere toleration. Sadducees, Samaritans and Karaites could, at most, anticipate toleration by rabbinic Judaism. The halachic differences between oriental and western Jews and even the theological differences between Hasidim and Mitnagdim could be accommodated within a single axiological system. The differences between Sadducees and Pharisees, between Karaites and Rabbanites, between Samaritans and Jews could not be accommodated precisely because of the renunciation of the Oral Law, in whole or in part, by these sectarian groups. Indeed, an ideological system based upon acceptance of the revealed and immutable nature of both the Written and the Oral Law could not accommodate such diversity without committing the fallacy of self-contradiction.

The fact that certain contemporary sectarians may reject these axioms or reinterepret them in a manner which makes it possible for them to claim equal or even exclusive authenticity for their beliefs is entirely irrelevant. The Sadducees proclaimed the Pharisees to be charlatans; the Karaites taught that Rabbanites had falsified the *mesorah;* the Samaritans asserted that Jews had emended the Pentateuch to serve their own purposes. In each case we are confronted with two conflicting axiological systems which cannot concede one another's validity. Rabbinic Judaism finds itself in an entirely analogous position at present.

Judaism has always distinguished between those who transgress and those who renounce. Transgression is to be deplored, but transgression does not place the transgressor beyond the pale of believers. Renunciation — even without actual transgression — is a matter of an entirely different magnitude. Even misrepresentation of Halacha is equated in Jewish teaching with falsification of the Torah and hence with denial of the divine nature of the content of revelation.

This position is eloquently expressed in R. Shlomoh Luria's analysis of a narrative recorded in *Baba Kamma* 38a. The Gemara

reports that the Romans sent two officials to the Sages in the Land of Israel to study Torah. The officials expressed satisfaction with what they learned with the exception of one aspect of tort liability in which Jewish law seems to manifest prejudice against non-Jews (viz., the Jewish owner of an ox which gores an ox belonging to a non-Jew is not liable for damages, while the non-Jewish owner of an ox which gores an ox belonging to a Jew must make restitution). Despite their discomfiture with this legal provision, the officials promised that they would not divulge this aspect of Jewish law to the governmental authorities in Rome. R. Shlomoh Luria, *Yam shel Shlomoh, Baba Kamma* 4:9, raises an obvious question. Imparting this information to the Roman officials could easily have had catastrophic consequences for the entire Jewish people. There was, after all, no guarantee that the officials would be kindly disposed and would not deliver a full report to the government in Rome. Why, then, did the Sages not misrepresent the law by telling the Roman emissaries either that, in the case in question, both a Jew and a non-Jew would be culpable for damages, or that neither would be culpable? *Yam shel Shlomoh* responds by declaring that Torah may not be falsified even in the face of danger; falsification of even a single detail is tantamount to renunciation of the Torah in its entirety.

It would appear that *Yam shel Shlomoh's* position is reflected in the well-known narrative related by the Gemara, *Gittin* 56a. Bar Kamtza determined to betray the Jewish people to the Roman Emperor:

> He went and said to the emperor. The Jews are rebelling against you. He said, How can I tell? He said to him: Send them an offering and see whether they will offer it [on the altar]. So he sent with him a fine calf. While on the way he made a blemish on its upper lip, or as some say on the white of its eye, in a place where we [Jews] count it as a blemish but they do not. The Rabbis were inclined to offer it in order not to offend the Government. Said R. Zechariah b. Abkulas to them: People will say that blemished

> animals are offered on the altar. They then proposed to kill [Bar Kamtza] so that he could not go and inform against them, but R. Zechariah b. Abkulas said to them: People will say one who makes a blemish on consecrated animals is to be put to death. R. Johanan thereupon remarked: Through the forbearance [*anvatnuto*] of R. Zechariah b. Abkulas our house has been destroyed, our Temple burnt and we ourselves exiled from our land.

It is popularly assumed that the Gemara, in describing *anvatnuto* of R. Zechariah ben Abkulas, is censuring him for misplaced humility and lack of initiative. This understanding is reflected in a note in the Soncino translation (page 225, note 2), which renders this term as "humility." Yet Rashi renders the term "*anvatnuto*" as "*savlanuto,*" which must be translated as "his forbearance" or "his patience." Forbearance is a matter quite different from humility and does not seem to warrant censure. The Gemara's categorization of R. Zechariah's action is thus a statement of fact and is not a criticism.

The reaction of the Sages was quite predictable. The prohibition against offering an animal with a blemish may certainly be ignored in order to preserve life. Bar Kamtza, who instigated the Roman Emperor, was certainly in the category of a *rodef*, an aggressor who causes the death of innocent victims through his actions. Causing the death of the messenger who had made a blemish in the animal would certainly have been permitted as an act of self-defense. But R. Zechariah ben Abkulas did not respond in the obvious, intuitive manner of his colleagues. His concern was not with any single infraction of Jewish law. He was concerned lest "people will say that blemished animals may be offered on the altar" and lest "people say that one who makes a blemish on consecrated animals is to be put to death." The overriding concern was that the act might not be perceived as an *ad hoc* emergency measure designed to prevent loss of innocent lives, but that it might be misinterpreted as normative Halacha. Falsification of Halacha, opined R. Zechariah b. Abkulas, is not permissible even in face of the threat of death, destruction of the Temple, and exile

of the Jewish people. Perversion of the *mesorah*, even with regard to a single halacha, is tantamout to denial of the Sinaitic revelation.

II

Religious issues which contribute to divisiveness within our community must be seen against this backdrop. This is not to say that these issues must remain divisive. They are divisive only because the solutions demand conferral of equal legitimacy upon conflicting ideologies. Toleration, if not acceptance, is certainly within the realm of possibility provided that the protagonists are willing to accept neutral pragmatic solutions and do not insist upon scoring points on behalf of denominational interests.

An analysis of some of these issues — and why it is that they are destined to remain divisive — is in order. Among the most divisive issues in the United States is the *issur* against membership in the Synagogue Council of America and the New York Board of Rabbis promulgated by a group of eleven leading *Roshei Yeshivah* in 1956.

The question of participation in such umbrella groups has often been portrayed as identical to that of *Austritt*, a matter that became the subject of controversy between Rabbi Samson Raphael Hirsch and Rabbi Seligman Baer Bamberger. Hirsch demanded that the members of his community resign from the Frankfurt *kehillah* which was dominated by Reform elements; Bamberger counseled against so divisive a step. However, the issue in the Synagogue Council and the New York Board of Rabbis dispute is not parallel to that involved in the Hirsch-Bamberger controversy. There are no grounds for assuming that even those who did not favor *Austritt* a century ago would approve participation in rabbinical and synagogal umbrella organizations. On the basis of the voluminous material written by the protagonists in the latter controversy it is clear that a paramount issue was the fear of possible negative influence which might be exercised by the members of the larger and more powerful group. Although Hirsch regarded secession to be mandated on ideological grounds, for many, the primary fear was that with the passage of time religious commitment and observance of the Orthodox might become diminished.

Accordingly, so eminent an authority as R. Chaim Ozer Grodzinski[4] was prompted to declare that Hirsch and Bamberger were in conflict, not over a matter of Halacha, but over an assessment of socio-religious realia and that, therefore, the question is one which admits of diverse answers in different locales and at different times. The European *kehillah* system was primarily ethnic in nature; religious groups within the *kehillah* were, in some cities, permitted to conduct their own affairs in an autonomous manner. Under such circumstances membership in the central *kehillah*, it was argued, did not imply endorsement of the activities of organizations and institutions subsidised by the *kehillah*. Even opponents of *Austritt* refused to sanction such participation when those conditions did not obtain. Indeed, it is often forgotten that Bamberger himself demanded *Austritt* in Carlsruhe, Vienna, Wiesbaden, and indeed in Frankfurt as well, at a time when the autonomy of Orthodox institutions was as yet not guaranteed.[5]

In contrast, the issue in the United States in not that of possible negative influence but of legitimization. Organizations such as the Synagogue Council of America and the New York Board of Rabbis are, by their very nature, religious organizations; their *raison d'etre* is to enable diverse religious groups to speak with a common voice. It is precisely a union of synagogal bodies *qua* synagogue bodies and/or clergymen *qua* rabbis which confers, or appears to confer, legitimacy and recognition of equal ideological validity.

And it is precisely for this reason that men of goodwill would not find this obstacle to be insurmountable. It would be entirely possible for the Synagogue Council of America to coopt a number of secular Jewish organizations, to engage in a *shinuy ha-shem* and to emerge as an organization doing exactly what it does at present but without any implication of mutual recognition of doctrinal legitimacy. The New York Board of Rabbis would find a similar expedient a bit more difficult but by no means impossible.

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4. *Ahi'ezer: Kovetz Iggerot*, ed. Aron Sorasky (Bnei Brak, 5730), I, no. 150.
5. See R. Simchah Bamberger, *Teshuvot Zekher Simhah*, no. 130

On the Israeli scene, *giyur ke-halachah,* the most emotion-laden of problems, is the easiest to resolve. The Law of Return of 26 Tammuz, 5710[6] confers automatic Israeli citizenship upon certain classes of people. Other persons are by no means excluded from Israeli citizenship. They must, however, undergo a naturalization process. The provisions of the Law of Return, as they apply to naturally-born Jews, pose no problem whatsoever. However, since the Law of Return confers citizenship in a like manner upon converts to Judaism a problem arises with regard to conversions performed under non-Orthodox auspices.

Halachic Judaism can never sanction conversion in the absence either of ideological sincerity or of unreserved acceptance of the "yoke of the commandments." Thus no candidate may be accepted for conversion in the absence of a firm commitment to *shmirat ha-mitzvot.* Sincerity of purpose in face of obvious ulterior motivation can be determined only by a competent *Bet Din* on a case-by-case basis.

Moreover, halacha recognizes the validity of a conversion only if performed in the presence of a qualified *Bet Din.* The qualifications for serving on a *Bet Din* are carefully spelled out by halacha. Conversion, even when accompanied by circumcision, immersion in a *mikveh,* as well as acceptance of the "yoke of the commandments," is null and void unless performed in the presence of a qualified *Bet Din.*

A number of proposals have been advanced in an attempt to satisfy the desires and aspirations of the Conservative and Reform movements without doing violence to the principles of the Orthodox. The crux of these proposals is that all conversions be recognized as valid, regardless of the auspices under which performed, provided that the halachic requirements of immersion and circumcision are properly carried out. Conservative and Reform groups would undertake scrupulously to adhere to these halachic requirements.

Alas, such proposals, well-meaning as they may be, are unacceptable because they ignore one crucial factor: conversion to

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6. *Sefer ha-Hukkim,* no. 51, 21 Tammuz 5710, p. 159.

Judaism is valid only if performed in the presence of a qualified *Bet Din*. In both the United States and in Israel — as in most countries — a judge cannot sit on the bench without first being sworn to uphold the laws of the land. In the absence of such a commitment his judicial decisions are legally meaningless — regardless of whether or not they reflect the law correctly. Jewish law does not require an oath — other than the one sworn by each of us at Mount Sinai — but it does state clear requirements for holding judicial office. One need not necessarily be an ordained rabbi in order to serve on a *Bet Din* for purposes of accepting a convert, but one must be committed to the acceptance of Torah — both the Written and Oral Law — *in its entirety*. One who refuses to accept the divinity and binding authority of even the most minor detail of halacha is, *ipso facto*, disqualified. Long before the Law of Return became a controversial issue, it was the stated opinion of halachic authorities that ideological adherents of Reform and Conservatism fall into this category. One of the foremost rabbinic scholars of our generation, R. Moses Feinstein, has written in at least six different responsa which appear in his *Iggerot Mosheh* that all who identify themselves as non-Orthodox clergy must be considered to be in this category.[8]

For this reason, no serious halachist can be receptive to any proposal which would provide for inclusion of non-Orthodox clergymen as participants in the statutory three-member *Bet Din* required for conversion. However, proposals have been advanced in some quarters calling for the establishment of a *Bet Din* composed of at least three qualified Orthodox rabbis with additional participants drawn from non-Orthodox groups. Such proposals are designed to provide the appearance of participation without providing a substantive role for non-Orthodox members of such a body. This proposal, it has been argued, should be

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7. See, for example, Jakob J. Petuchowski, "Plural Models within the *Halachah*," *Judaism*, vol. 19, no. 2 (Winter 1970), 77-89.
8. See *Iggerot Mosheh, Even ha-Ezer*, I, no. 135; *Even ha-Ezer*, II, no. 17; *Even ha-Ezer*, III, no. 3; *Yoreh De'ah*, I, no, 160; *Yoreh De'ah*, II, no. 125; *Yoreh De'ah*, III, no. 77. See also *Iggerot Mosheh, Even ha-Ezer*, I, nos. 76-77 and 82, sec. 11; and *Yoreh De'ah*, II, nos. 100 and 132.

acceptable to all. The concern of Orthodox Jews that validity of the conversion not be compromised by the absence of a qualified *Bet Din* is obviated by assuring that three participants are fully qualified. In effect, the Orthodox members — and the Orthodox members alone — would constitute the *Bet Din*. Other participants are entirely superfluous and hence, it is argued, from the vantage point of halacha they should be viewed as observers whose presence is non-participatory and hence entirely innocuous. Non-Orthodox sectors of the community would be able to ignore this salient consideration and to claim participation of their representatives as full-fledged members of the *Bet Din*.

In point of fact, there does exist a halachic analogue which provides a paradigmatic distinction between participatory and non-participatory members of a *Bet Din*. *Halitzah*, which provides for release from the obligations of levirate marriage, must be performed in the presence of a *Bet Din*. The *Bet Din* for *halitzah* is not composed of the usual three-man complement but consists of five persons. However, the additional two members of this body play no substantive role whatsoever. Since they are assigned no function other than that fulfilled by their mere presence, they are known in rabbinic parlance as *"die shtume dayyanim,"* i.e., "the mute judges." The proposed *Bet Din* for conversion would be entirely similar to the *Bet Din* recognized by halacha for purposes of *halitzah*. Non-Orthodox participants would in fact be *"shtume dayyanim."*

Establishment of a *Bet Din* of this nature is not acceptable to large sectors of the Orthodox community for reasons which, not surprisingly, find expression in the regulations governing the composition of the five-member *Bet Din* required for purposes of *halitzah*.

Although *halitzah*, in order to be efficacious, must be performed in the presence of a *Bet Din*, there is nothing intrinsic to that ritual which requires a five-member judicial body. The basic requirement for the presence of a *Bet Din* could be discharged by a three-man body; the enlarged bench is required solely for purposes of publicization of the ritual — either to assure that the woman's status be known to the public at large so that she will not

subsequently marry a *kohen*, or in order that prospective suitors be aware that there is no longer an impediment to seeking her hand. The unusual presence of additional members, even though they are assigned no participatory function, serves to publicize the proceedings.

The non-participatory nature of the additional two members is reflected in the seating arrangements employed. According to some authorities, the two additional members are assigned seats opposite the three members who constitute the *Bet Din* proper; others maintain that it is the practice for the additional members not to be seated opposite the three-man panel but at the side of the bench or row of seats occupied by the three-member *Bet Din*.

Logically, since the additional two members are not participants in the *Bet Din*, there is no intrinsic reason why they must be qualified to serve as judges. For example, Jewish law provides that members of a *Bet Din* may not be related to each other or to those appearing before them. This restriction clearly applies to the three persons sitting together as the *Bet Din* for *halitzah*. But does it apply to the two non-participating members who are coopted solely for purposes of publicization? This issue is the subject of controversy among early authorities. Ritva, cited by *Nemukei Yosef, Yevamot* 101a, maintains that restrictions governing qualifications of members of a *Bet Din* do not apply to these additioinal two members. *Nemukei Yosef* further infers from the phraseology employed by Rambam, *Hilkhot Yivum ve-Halitzah* 4:6, that the latter disagrees and rules that all five should be required to satisfy the identical requirements; *Tur Shulchan Aruch, Even ha-Ezer* 169, and Ramo, *Even ha-Ezer* 169:3 espouse the position of Rambam.

The analysis of this controversy presented by *Bet Shmu'el, Even ha-Ezer* 169:4, is quite instructive. *Bet Shmu'el* notes that *Shulchan Aruch* and Ramo record divergent practices regarding seating arrangements for the additional two members: *Shulchan Aruch* 169, *Seder Halitzah*, sec. 12, records the earlier practice which provides for the two coopted members to be seated opposite the first three; Ramo announces the modified practice of adjacent sitting at the side.

Bet Shmu'el proceeds to explain that when the additional two members sit opposite the *Bet Din* it is apparent to all that the coopted individuals are in fact not members of the bench; hence authorities who propose opposite seating for the coopted participants would find no reason for them to meet the qualifications established for fullfledged participants. However, explains *Bet Shmu'el,* an onlooker finding a seating arrangement such as that described by Ramo might well be unable to discern the essential distinction between the two groups. Accordingly, were unqualified persons permitted to occupy the two additional seats on the five-man panel, the uninformed bystander might conclude that the same relaxation of requirements applies to all members of the *Bet Din.* In order to prevent such error, concludes *Bet Shmu'el,* even the two non-participating members of the *Bet Din* must meet the requirements for participatory members of the *Bet Din.* Accordingly, declares *Bet Shmu'el,* those authorities whose practice did not require separate seating required that all five participants be fully qualified. Thus Ramo, for example, adopts an entirely consistent position with regard to both matters.

It is thus evident that all who are perceived by the public as members of a *Bet Din* must be qualified for service on that body even though, in actuality, they are not members of the *Bet Din.* Surely, the same principle applies to a *Bet Din* which sits for purposes of accepting converts to Judaism. Halacha forbids even the appearance of participation in such a judicial body by any person not fully qualified for actual participation.

Participation of non-Orthodox clergymen in such bodies even as non-participatory *"shtume dayyanim"* is cause for even more serious concern since it serves to legitimize the credentials of such participants and of the ideologies they represent. The considerations giving rise to opposition to joint participation in umbrella bodies such as the Synogogue Council of America and the New York Board of Rabbis certainly apply with even greater cogency and force to establishment of a common *Bet Din* for purposes of acceptance of converts.

There is nothing in this position which should be a cause for animus directed against the Orthodox rabbinate. The Orthodox

posture on this matter is based upon objective criteria of Jewish law and in no way reflects political, partisan or personal considerations. Those who differ ideologically may disagree, and even deplore, this position; but intellectual honesty should compel them to recognize that it is a sincerely held view which is the product of a firm commitment to halacha in all its guises.

Nevertheless, a solution does exist. The objection is based upon implicit State recognition of the validity of such conversions, not upon conferral of citizenship *per se*. Since no one has ever argued that non-Jews should not be granted citizenship by the State of Israel, there could hardly be an objection to bestowing citizenship upon a person who remains a gentile because of an invalid conversion procedure. The solution is as obvious as it is simple: restrict the Law of Return to naturally-born Jews and allow converts to apply for naturalization in the usual manner. Non-Jews affirming loyalty to the State are granted naturalization as a matter of course at the discretion of the Minister of the Interior in accordance with sec. 5 of the Nationality Law of 5712.[9] Surely, no one will object if State officials, without in any way passing on matters of halacha, use objective judgment in considering even technically invalid conversion as evidence of an applicant's sincere desire to identify with the aspirations and common destiny of the citizens of the State of Israel.[10] It must be remembered that the present law provides that economic and social benefits associated with citizenship are automatically conferred upon even non-Jewish spouses and children of Jews claiming citizenship under the Law of Return as amended on 2 Adar II 5730.[11] The relevant section states:

> The rights of a Jew under this Law and the rights of

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9. *Sefer ha-Hukkim*, no. 95, 13 Nisan 5712, p. 146.
10. There is even a biblical precedent for treating naturally-born Jews and proselytes differently in terms of their relationship to *Eretz Yisra'el:* A convert has no claim to *yerushat ha-aretz*. Similarly, it is not at all anomalous to accept the claim of a Jew to citizenship automatically but to subject the bona fides of a convert to at least cursory scrutiny via the naturalization process.
11. *Sefer ha-Hukkim*, no. 586, 11 Adar II 5730, p. 34.

> an *oleh* under the Nationality Law, (5712-1952), as well as the rights of an *oleh* under any other enactment, are also vested in a child and a grandchild of a Jew, the spouse of a Jew, the spouse of a child of a Jew and the spouse of a grandchild of a Jew, except for a person who has been a Jew and has voluntarily changed his religion.

No demurrer has been heard with regard to these provisions of the law.

Unity requires neither legitimization nor acceptance, but it does require tolerance. Tolerance, without which co-existence becomes impossible, at times demands tht ideological issues be skirted rather than solved. Removal of the "Who is a Jew?" issue from the political agenda would serve as an ideological victory for no one, but would constitute a definite victory for the cause of unity.

Recognition of non-Orthodox clergymen and the question of solemnization of marriages proscribed by halacha are problems which do not readily lend themselves to a facile solution. The State of Israel has, in effect, preserved the millet system which granted autonomy to each religious community in matters of marriage and divorce. The Samaritans and the Karaites have been granted recognition as autonomous religious communities. In effect, such autonomy implies recognition of the beliefs espoused by these groups as sufficiently different from those of Judaism as to constitute separate religious faith-communities. Orthodox Judaism cannot recognize other trends as legitimate expressions of Judaism. This, however, does not prevent the State of Israel from extending recognition to such groups as dinstinct and autonomous faith-communities. If the goal is to secure redress of grievances and civil liberties such a procedure would produce the desired effect. If, however, the goal is recognition of the legitimacy of those trends as different but nevertheless authentic expressions of Judaism, recognition as distinct faith-communities would be counterproductive.

Most significantly, a solution of this nature is antithetical to the fostering of unity. The danger of a new Karaite schism born of

rejection of matrimonial law, as was the original Karaite schism, is a very real one. Conferment of autonomy in matters of marriage and divorce upon non-Orthodox groups can only hasten the process. The threat to genealogical purity which existed in only an incipient form in the early days of the Reform movement prompted personages such as R. Moses Sofer[12] and, much later, R. Chaim Ozer Grodzinski[13] to propose a call for such a schism. Orthodox Judaism has made its stand very clear. It is regretfully willing to accept schism rather than enter into ideological compromise. The ball is in the other court. Others must ask themselves: Does there exist any ideologically compelling reason which requires them to destroy Jewish unity? Assuming a negative answer to this query, the sole remaining question to be asked is: Is a measure of denominational pride an unreasonable price to pay for preservation of some vestige of communal unity?

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12. *Teshuvot Hatam Sofer*, VI, no. 89.
13. *Ahi'ezer: Kovetz Iggerot*, I, no. 150.

The Rationing of Medical Care: The Jewish View

Dr. Fred Rosner

Introduction

This essay focuses on some of the current ethical dilemmas in the allocation of limited medical resources and discusses some of the present practices used to cope with these dilemmas. Hospitals and doctors make most of the decisions in the allocation of their resources. Limited funds may not allow a hospital to buy both additional respirators and additional dialysis machines or new defibrillators. The hospital must then decide what to buy or replace. A physician with a limited supply of a new drug must decide which patient will receive it and to which patient it will be denied. Since resources are not unlimited, medical care must, in a sense, be rationed.

The Example of Hemodialysis

Hemodialysis illustrates the ethical issues related to a classic situation involving the rationing of medical care or the allocation of scarce medical resources. In 1973, the United States Congress legislated that all patients with kidney failure who need

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hemodialysis or kidney transplantation should have access thereto and that Medicare would assume the cost for the entire End Stage Renal Program. Prior to 1973, allocation decisions were made in a two-step process. First, rules of exclusion were applied to narrow the number of potential treatment recipients. Second, rules of selection were applied to choose between the remaining applicants. Some factors such as age may be invoked in both the exclusion and selection process.

Factors of exclusion may include: (a) *patient desires* such as inability or unwillingness to travel to a distant location for treatment or preference for a particular doctor or hospital; (b) *hospital function* and orientation such as Veterans' hospitals which only service veterans and only for service-related disabilities; (c) *age* such as exclusion of patients below 10 or above 60 years of age; (d) *treatment requirements* such as the need to come to the hospital several times a week for hemodialysis or the need for running water and electricity for home dialysis; (e) *psychosocial requirements* such as psychological stability, intelligence and cooperation of the patient and stability of the family; (f) *medical criteria* such as the relative contraindication of hemodialysis for diabetics and patients with certain other disorders; (g) *maximum utilization requirements* such as the exclusion from an acute hemodialysis program of patients requiring chronic hemodialysis; (h) *ability to pay;* (i) *social worth* of the patient such as the exclusion of drug addicts, criminals, prostitutes, and the mentally retarded or psychotic; (j) *physician bias.*

The three basic approaches in the selection process of patients for the allocation of scarce medical resources are: (a) comparison of the *social worth* of the various patients remaining in the selection pool; and (b) selection based on chance such as a *first-come, first served* rule or (c) selection by a *lot.* Most physicians seem to prefer the selection of patients by a lot or on a first-come, first-served basis. Ethical problems, however, arise when exceptions need to be made in applying the first-come, first-served rule. Should the President of the United States or a brilliant scientist receive preference in the allocation of a scarce resource? Should a mother of little children or a young person be given preference over a

single or older person? Does such preference not negate the first-come, first-served rule and apply the social worth approach which is so objectionable to many people? Practical necessity and the public conscience may, however, require exceptions to be made.

In 1973, when Congress passed the now-famous End Stage Renal Program, all ethical problems relating to hemodialysis were seemingly solved. Hemodialysis was no longer to be considered exotic or "extraordinary" care. This formerly scarce medical resource was to be made available to all who needed it and paid for by Medicare. The number of patients being dialyzed increased from less than 2000 in 1968 to more than 70,000 in 1981. Many patients previously not dialyzed such as diabetics and old people were entered into dialysis programs but the total cost of the program became prohibitive. In 1982, major governmental reductions in budgetary allocations for many programs began to be implemented. The resources for hemodialysis are again becoming scarce and limited as they were prior to the 1973 legislation. The ethical dilemmas described above are again with us but now new dimensions have been added.

The critical issues are not ony who the allocators should be, but what should be decided? Is it worthwhile to dialyze all patients with end stage renal disease? Is it worthwhile to expend time of medical personnel to search for a dialysis program for a social outcast? Between 1973 and 1982, when Medicare paid for most hemodialysis in the United States, criteria were relaxed, the number of eligible patients multiplied manyfold and hemodialysis facilities were markedly expanded. Economic necessity now dictates new decisions and allocations. The magnitude of the problem may become marked again as it was before 1973 since directors of renal units often do not admit to any shortfall in available places, claiming that medically suitable patients are not being rejected. In other words, a process of rationalization occurs in which medical indications are unconsciously determined by medical and financial resources.

The Jewish View

In Jewish tradition, a physician is given specific divine license

to practice medicine.[1].

> אם יקום והתהלך בחוץ ... ונקה המכה ... רק שבתו יתן ורפא ירפא.
>
> In a case where one person strikes or wounds another, then "if he (the victim) gets up and walks around outside, then the aggressor is not guilty ... only he (the aggresor) must pay for his (the victim) inability to work until he is entirely healed."

According to Maimonides and other codifiers of Jewish law, it is in fact an obligation upon the physician to use his medical skills to heal the sick.[2]

> לא תעמוד על דם רעך.
>
> Do not be responsible for your brother's death.

Not only is the physician permitted and even obligated to minister to the sick, but the patient is also obligated to care for his health and life.[3]

> ונשמרתם מאד לנפשותיכם.
>
> Guard your lives very carefully.

Man does not have full title over his life or body. He is charged with preserving, dignifying and hallowing that life. He must eat and drink to sustain himself. He must seek healing when he is ill.[4]

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1. שמות כא:יט
2. ויקרא יט:טז
3. דברים ד:טו
4. However, the Ramban in ויקרא כו:יא writes that long ago, the truly righteous would not go to a doctor when struck by disease. Rather, they sought advice from a prophet as to the [spiritual] cause of the problem.

Another cardinal principle in Judaism is the inestimable value of human life.[5] The preservation of human life takes precedence over all biblical commandments with three exceptions; idolatry, murder, and forbidden sexual relations.[6] Life's value is absolute and supreme. Thus, an old man or woman, a mentally retarded person, a monster baby, a dying cancer patient and their like, all have the *same* right to live as you or I. In order to preserve a human life, the Sabbath or Day of Atonement may be desecrated[7] and all other rules and laws, save the above three, are suspended for the overriding consideration of saving a human life.

The corollary of this principle is that one is prohibited from doing anything that might shorten a life even for a very brief time since every moment of human life is also of infinite value.[8] How does Judaism resolve the dilemma of two patients dying of kidney failure and only one available dialysis machine? Who takes precedence? How does one decide? Is one not condemning one patient to death by offering the dialysis machine to the other patient?

The classic source in Judaism which discusses priorities is the Talmud[9] which states that a man takes precedence over a woman in matters concerning the saving of life (because he has more biblical commandments to fulfill) and the restoration of lost property, but a woman takes precedence over a man in respect of clothing (because a woman's shame of wearing shabby clothes is greater than that of a man) and ransom from captivity (because she may be raped by her captors). When both are exposed to immoral degradation in their captivity, the man's ransom takes precedence over that of the woman (to spare him the indignity of pederasty).

The Talmud[10] continues:

> If a man and his father and his teacher were in captivity, he takes precedence (in procuring his

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5. סנהדרין לז
6. שולחן ערוך יורה דעה קנ"ז-א
7. יומא פה
8. שולחן ערוך אורח חיים שכט-סק' ד
9. הוריות נ:ז
10. שם יג

> ransom) over his teacher and the latter takes precedence over his father while his mother takes precedence over a king of Israel, for if a scholar dies, there is none to replace him while if a king of Israel dies, all Israel are eligible for kingship. A king takes precedence over a High Priest ... a High Priest takes precedence over a prophet....

Finally the Talmud[11] concludes that:

> A Priest takes precedence over a Levite, a Levite over an Israelite, an Israelite over a bastard, a bastard over a *Nathin* (descendant of the Gibeonites whom Joshua made into Temple slaves cf. Joshua 9:27), a *Nathin* over a proselyte and a proselyte over an emancipated slave. This order of precedence applies only when all these are in other respects equal. If the bastard, however, was a scholar and the High Priest an ignoramus, the learned bastard takes precedence over the ignorant High Priest.

It thus seems that Judaism considers religious status, personal dignity and social worth as determining factors in the allocation of limited ransom money to redeem captives from their captors.

It is also a cardinal principle of Judaism that one may not sacrifice one life to preserve another. In his *Mishneh Torah*[12], Maimonides states that "logic dictates that in regard to taking the life of an Israelite to cure another individual or to rescue a person from one who threatens violence, one may not destroy one human life to save another human life". The reason is cited in the Talmud[13] in that "the blood of one person is no redder than the blood of another".

The classic example is cited by Maimonides as follows:[14]

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11. הוריות ג:ח
12. הלכות יסודי התורה ה:ז
13. פסחים כה:
14. הלכות יסודי התורה ה:ה

> ...if heathens said to Israelites: "surrender one of your numbers to us, that we may kill him: otherwise, we will kill all of you", they should all let themselves be killed rather than surrender a single Israelite to them...

When a physician chooses one patient over another to provide a scarce or limited type of treatment such as dialysis, he is not actively killing the other patient. However, if six patients occupy six intensive care beds and another patient arrives, should the physician transfer one of the six patients out to make room for the new person? Does such an act constitute an act of murder if the patient transferred out of the intensive care unit dies? Certainly not! The transfer had to be made. But what criteria does Judaism require to make the determination to transfer one patient to make room for another if "one person's blood is not redder than that of another"? The case of the two dialysis patients is different since the physician is only initiating treatment for one of them since no dialysis machine is available for the other. In the intensive care unit, however, the physician is actively removing the patient from the intensive care unit and relegating him to receive less than intensive care.

Another classic Jewish source relating to the allocation of scarce resources is the case cited in the Talmud[15] of two people in the desert and one has a container of water. If both drink, they will both die, but if one only drinks, he can reach civilization. One sage rules that it is better that both should drink and both die, rather than that one should behold his companion's death. But R. Akiba rules that only the one who owns the pitcher drinks because "thy life takes precedence over his life", i.e., do not sacrifice your life to save another since "he should live by them (the Mitzvot)". Some commentaries assert that if neither owned the pitcher, then both should drink because of the principle "one may not sacrifice one life to preserve another". This case seems to be somewhat analagous to the lifeboat ethics situation. If the lifeboat is about to capsize because of excessive weight, should one or more people be

15. בבא מציעא סב

thrown overboard to save the others or should everyone remain on board and all will drown? There are no easy answers.

The hierarchy of precedences in Judaism enumerated above seems to contradict the rule that "one may not sacrifice one life to preserve another". The precedences seem to suggest that qualitative distinctions can be made on the basis of social worth or personal dignity or religious status. The rule that "one may not sacrifice one life to preserve another" seems to imply that no qualitative distinctions should be allowed. How can these two approaches be reconciled? In certain cases, a person's organs can be used for transplantation to save the lives of others after he dies. He cannot, however, say: kill me and transplant my organs to preserve others because "his blood is no redder than theirs". Therefore, in the allocation of scarce medical resources, perhaps a lottery system or a first-come, first-served approach, or pure medical criteria might be preferable in Judaism.

An approach based on medical cariteria is suggested by R. Eliezer Yehuda Waldenberg in his *Responsa*[16] where he states that a patient with a potential for cure takes precedence in the allocation of scarce medical resources over a patient whose illness would be at best only temporarily controlled. This rule, however, applies only when the incurable patient is passively neglected in favor of the curable patient. To terminate the therapy of the incurable patient, continues Rav Waldenberg, so that the curable patient can be given those resources, is forbidden. The same author rules[17] that if there is only sufficient medication for one of two patients, then the critically ill patient takes precedence over the less seriously ill patient. If the medication, however, belongs to the less seriously ill patient, he is not obligated to give it to the critically ill patient because "thy life takes precedence over his life". If both patients are dangerously ill and the medicine belongs to neither, one should divide the medication equally thereby providing each patient with a one or two-day extension of life. In the meantime,

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16. שו"ת ציץ אליעזר חלק ט י"ד
17. שם חלק ט כח-ג

either Divine intervention may heal them or additional medication may be found.

However, at a symposium on "*Torah Shebe'al peh*" held this year, Rabbi Moshe Tendler related that his father-in-law, Rav Moshe Feinstein, had once been asked by the then Chief Rabbi of Israel, Rav Herzog, what to do if there were ten patients but only medication for four of them. Rav Feinstein is said to have responded that the first four should get the medicine.

In addition to the axiom that "thy life takes precedence over his life", Jewish law prescribes a specific sequence of priority in regard to assisting one's fellowman in that *thou shalt open thine hand unto thy brother, to thy needy, and to thy poor, in thy land*[18]. Does this sequence also apply to matters of life and death and to the allocation of scarce medical resources? Would Judaism require that a religious Jew receive precedence over a non-religious Jew in the decision about who is to be dialized if only one machine is available, or who is to receive the intensive care bed if only one is available?

The infinite worth of man, a Judaic axiom already cited earlier, is compromised by limited or finite resources. Why should a resident physician have to decide which patient gets the intensive care bed? Why not create more intensive care beds rather than support museums? Why not build more dialysis machines rather than buy more tanks or battleships? These are societal decisions and one may legitimately ask whether allocation decisions and axioms affecting individuals apply equally to societal or institutional problems. Is society a separate being and more than the sum of its component parts? According to R. Moshe David Tendler[19], the answer is strongly affirmative. Societal ethics are indeed different than individual ethics. Society or government,

18. פתח תפתח את ידך לאחיך לעניך ולאביונך בארצך — דברים טו:יא

19. Presented at a Symposium on "Medical Ethics: The Jewish Point of View" held at the Mt. Sinai School of Medicine, New York, N.Y., Nov. 17, 1981; co-sponsored by the Page & William Black Post-Graduate School of Medicine of the Mt. Sinai School of Medicine (CUNY) and the Committee on Medical Ethics of the Committee on Religious Affairs of the Federation of Jewish Philanthropies of New York, Inc.

according to Tendler, is needed to prevent man from destroying his fellow man. Therefore, society is not bound by the same ethical principles that bind individuals such as the infinite worth of man. Support for this view can be found in several Jewish writings.

The Talmud[20] asserts that captives should not be redeemed for more than their value, to prevent abuses. The reason for this rule, according to the commentator R. Obadiah of Bertinoro, is so that captors should not be encouraged to seize more and make excessive ransom demands. The Talmud[21] then raises the question:

> Does this prevention of abuses relate to the burden on the community (to redeem the captives) or the possibility that the bandits will be encouraged to increase their activities? Come and hear: Levi ben Darga ransomed his daughter for 13,000 denari of gold (showing that if an individual is willing to pay more he may do so, and the reason for forbidding high ransom applies only to the community.) Said Abaye: But are you sure that he acted with the consent of the Sages? Perhaps he acted contrary to the will of the Sages.

Thus, two reasons are given why it is forbidden to pay an exorbitant amount of money to ransom anyone: to discourage kidnappers and to prevent society from becoming impoverished by having to divert its resources to the ransoming of captives. Society would thus be unable to provide for the needs of all the people which it serves.

However, a husband may ransom his wife for any amount and a father may ransom his son or daughter for any amount as did Levi ben Darga. Thus, we clearly see that societal ethics are different than individual ethics.

Rabbi Tendler cites another source to support his thesis that society is not bound by the same principles as are individuals in the allocation of scarce medical resources. The Talmud[22] describes a

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20. גיטין ד־ו
21. גיטין מה
22. נדרים פ:

situation of a water supply belonging to town A situated on a hill. Town B situated at the bottom of the hill cannot obtain water unless the townspeople of town A do not water their flock and/or launder their clothes. R. Jose rules[23] that the townspeople from town A at the top of the hill take precedence over those of town B. Although the immediate danger is to the people of town B who have no water at all, the long-term danger from not washing one's body and clothes to the people of town A who have the water, overrides the immediate needs of the people of town B at the bottom of the hill. The Talmudic Sage Samuel said[24] that scabs of the head caused by not washing can lead to blindness; scabs arising through the wearing of unclean, i.e., unlaundered, garments can cause madness; scabs due to neglect of the body can cause boils and ulcers.

Thus we have clear evidence that society must be concerned about future generations and for long-range planning. Society must be concerned about the long-range effects of its actions. This is not so for individuals. The doctor in the intensive care unit must make decisions that affect individual patients here and now. The two individuals in the desert with a single pitcher of water should share that water if it belongs to neither one because they have to be concerned about preserving their lives here and now; maybe they'll be rescued tomorow. The allocation of a medicine or treatment to one of two patients if there is not enough for both is a decision needed for the here and now care of one or both patients. An individual researcher using radioisotopes is concerned with the immediate safety from radiation of himself and his co-workers. But society has to be concerned about the disposal of nuclear wastes because of the danger to future generations of the radioisotopes used today.

One cannot, however, totally divorce individuals from responsibility to consider future generations in the allocation of resources. Perhaps this point is most beautifully depicted in the

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23. However, the *Be'er Shmuel* אבן העזר ס' פ אות ט"ו does *not* accept the dictum of Rabbi Jose and rules otherwise.
24. נדרים פא

Talmudic story[25] of the righteous Choni the Circle-Drawer who was journeying on the road and saw a man planting a carob tree; he asked him; how long does it take for this tree to bear fruit? The man replied: seventy years. Choni then further asked him: are you certain that you will live another seventy years? The man replied: I found ready-grown carob trees in the world; as my forefathers planted these for me, so I, too, plant these for my children.

Conclusion

The allocation of scarce resources is a complicated multifaceted issue associated with many moral and ethical dilemmas. Many systems have been proposed to address the problem of the rationing of medical care and to equitably distribute the finite medical resources by making allocation decisions which are consonant with basic principles of ethics. None are perfect. All have positive and negative attributes. The criteria to be used by an individual or clinic or hospital division or department may differ from those to be used by large institutions or governmental bodies.

Judaism views each human being as being of supreme and infinite value. It is the obligation of both individuals and society in general to preserve, hallow and dignify human life and to care for the total needs of individual citizens to enable them to be healthy and productive members of society. This fundamental principle should help guide the physician making life and death decisions at the bedside for individual patients, as well as governmental bodies that are responsible for deciding short and long term health needs and priorities for the population as a whole.

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25. תענית כג

Child Custody: Halacha and the Secular Approach

Sylvan Schaffer

The emotional pain experienced by divorcing couples is a source of great communal concern. Of equal importance is the effect of divorce on the innocent children in these families.

While most Jews realize that one component of the divorce, the *get*, is governed by halacha, not as many realize that this is also true for issues of child custody and support.

As with almost any halachic topic, the issues of child custody and support are subject to many different opinions in the *Rishonim* and *Aharonim*. It is not the purpose of this paper to review (and certainly not resolve) all of these positions. Our goal is to identify and analyze the common thread running through the child custody halachic literature and also to compare it with the approaches of civil law.

Before analyzing the halachic sources, it would be useful to survey briefly the evolution of the civil law in this area as well as some of the psychological aspects of child custody.

The author wishes to thank Dr. Marcy Shaffer, without whose invaluable assistance this paper could not have been written.

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Historical overview of child custody under civil law

The civil law related to the child custody issue has been characterized by an evolutionary process that has resulted in an almost complete reversal of the standards used to determine custody.

In ancient Rome, Persia, Egypt, Greece and Gaul, the father had absolute power over minor children, including the permit to sell his children and even put them to death. However these powers were vested only in the father and not the mother.[1]

Under English law the right of the parent was viewed in the context of the power of the king or feudal lords. The king (through his courts) could intervene between parent and child based on the need of the king to protect his subjects.[2]

Under French civil law the father had exclusive authority over his children until they reached the age of twenty-one. The mother only had power over the children if the father died before the children reached majority.[3]

A gradual change affected the preference for the father shown by the British and American legal systems. The most dramatic change was the British Act of 1839 which directed that children under the age of seven years be put in the mother's custody. This preference for the mother evolved into the "tender years doctrine" which is a presumption favoring the mother for the custody of young children.

Some states based custody on the success of the parties in the divorce action. Thus the party which was found to be "at fault" often lost on the custody issue.[4] Other states, such as Kansas, Oregon, and Pennsylvania, gave equal custody rights to both parents.[5]

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1. A. Roth, Tender Years Presumption 15, Journal of Family Law 423 (1976-77). W. Forsyth, A Treatise on the Law Relating to the Custody of Infants in Cases of Differences Between Parents or Guardians. 7-9 (1850) [hereinafter, Forsyth.]
2. A. Story, Commentaries on Equity Jurisprudence 557-62 (§§ 1327-30) see also Cardozo in *Finlay* v *Finlay* 240 N.Y. 429, 433-34 (1925)
3. G. Abbott, The Child and the State (1949)
4. La. Cio. Code Ann. Art 157 (West Supp. 1976); Ga. Code Ann. title 30 §127 (1969)
5. See Abbott above

In 1970, the National Conference of Commissioners on Uniform State Laws approved the Uniform Marriage and Divorce Act. The Act adopted a test based on the best interests of the child. Several states have adopted the Act.[6]

Recently the "tender years doctrine" which gave preference to the mother was weakened by both state statutes and judicial decisions. In states such as New York, statutes were enacted stating that neither parent had any prima facie right to the custody of the child.[7] In addition, the United States Supreme Court ruled in *Orr v. Orr*[8] that a state statute which gave preference to women in regard to alimony was unconstitutional since it violated equal protection. This may also then be true for a rule which gives women preference in custody cases.

Another recent alternative which has been implemented in a number of cases is 'joint' or shared custody.[9]

Many of these developments reflect changing societal perceptions with respect to interpersonal relationships.

Halachic approach:

The sources which provide a Jewish Court (Beth Din) with the basis for custody decisions are in part explicit rabbinic statements concerning child custody as well as other statements concerning the responsibility for child support from which custody rules are inferred.

A caveat is crucial at the outset of this section: none of the rules hereinafter cited should be used in their skeletal form as rules of *psak* (decision), but should be viewed in context of the explanations of the *Rishonim* and *Aharonim* who clarify the appropriate application of the rules in the light of the specific facts in each case.

Responsibility for support:

In the eyes of the halacha, the most basic rule of child support

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6. 9 U.L.A. 455 (1970); Ariz. Rev. Stat. Ann. §25-311 to 25-339
7. N.Y. Domestic Relations Law §240.
8. 99 Sup. Ct. 1102 (1979).
9. *Braiman* v. *Braiman* 407 N.Y.S. 2d 449, 450 (1978)

is that the burden of support rests solely on the father and not on the mother.[10]

א. כשם שאדם חייב במזונות אשתו, כך הוא חייב במזונות בניו ובנותיו הקטנים...

ב. ואם לא רצתה האם שיהיו בניה אצלה אחר שגמלתן אחד זכרים ואחד נקבות הרשות בידה ונותנת אותן לאביהן או משלכת אותן לקהל אם אין להן אב והן מטפלין בהן.

a. The same way that a person is obligated to support his wife, so too is he obligated to maintain his young children.

b. If after weaning her sons or daughters, the mother does not want to keep them with her, she does not have to, and she may give them to their father or cast them upon the community for support if they have no father.

This rule applies to claim for support by the children. For example, it is possible that in a situation in which the mother and father entered into an agreement which stated that the mother would provide a portion of the child support, the children have no claim against the mother for such support. Their claim would be limited to the father who bears the responsibility for their upkeep. However, the father could turn to the mother and enforce his claim against her based on their agreement.[12]

There is some controversy about the source of the father's responsibility for child support: Some sources[13] say that the duty to support the children is part of the husband's duty to support his wife, their mother. Other sources[14] say that the father's duty is

10. רמב"ם הלכות אישות פי"ב הל' י"ד
11. רמב"ם הל' אישות פכ"א הל' י"ח
12. שרשבסקי **דיני משפחה** 334 n.2
13. כתובות ע"ה:; ר"ן שם; רש"י שם ד"ה יוצא בעירוב אמו; רמב"ם אישות י"ב הל י"ד
14. שו"ת הרא"ש כלל י"ז סימן ז'; שו"ת הריב"ש מ"א

based on a direct, independent obligation to the children and is not dependent on the duty to the wife.

Two important differences result from the outcome of this controversy: if the responsibility of the father is based on his duty to the mother then a) the amount of his obligation would be based on *his* customary living stadard as is his obligation to his wife; b) his duty to the children would not exist in a situation in which the duty to the mother did not exist, i.e. if the child were born out of wedlock or when the mother were no longer the father's wife (after divorce or her death). However, according to those who hold that the responsibility is directly to the children, then a) the father's obligation is measured by the needs of the *children* and not his means and b) the obligation exists even for a child born out of wedlock. The second approach seems to be the more widely accepted.[15]

Whereas there is general agreement that the duty to support children falls on the father, the age until when such a duty exists and the nature of that duty is not as clearcut, i.e. after the child is six years old the duty may arise as a component of charity. Therefore, in order to avoid any problems which might be detrimental to the children, in Israel the Chief Rabbinate has instituted the practice that the father is responsible for support until the children reach the age of fifteen.[16]

Custody

The general rules of child custody which emerge from halachic research are:

1. Until the age of six years, both boys and girls are usually in the custody of the mother even if after the divorce she remarries another.[17]

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15. שו"ע פ"ב ז'; משנה למלך אישות י"ב, י"ד פסקי דיני הרבנות (פדר) 22, 16, 42: 551, 01: 7; פלדער נחלת צבי 283:
פסקי דיני הרבנות (פדר) 1:55,61,62; פד"ר 7:10,24

16. פריימן: התקנות החדשות של הרבנות הראשית לא"י בדיני אישות, "סיני" כרך י"ד, רנ"א־רנ"ח שרשבסקי 340

17. כתובות ס"ה:; רש"י שם ד"ה יוצא בעירוב אמו; רמב"ם אישות כ"א י"ז; מגיד משנה שם. טור והב"י פ"ב; שו"ע פ"ב ז'

2. After the age of six years, boys generally are in the custody of their fathers and the girls are in the custody of their mothers.[18]

At this point it is important to explain how these basic rules are applied. Although the rules serve as substantive guidelines for the Beth Din, the application of the rules is subject to the general priniciple of the best interests of the child which the *dayanim* weigh in light of the specific facts of each case.[19] In fact, according to many *poskim* the topic of child custody actually refers primarily to the rights of the children to be appropriately placed and cared for, and not to the "right" of the parent to have custody of the child.[20] Although it is possible to debate whether the halachic approach is founded on a duty-based system or on a right-based system[21], the emphasis should nevertheless be on the implementation of the substantive rules in a manner beneficial to the children.

The first rule cited above indicates that until age six, both boys and girls should be with their mother. However, since the mother is not obligated to support her children she is also not obligated to accept custody. Her right to refuse exists even in the case of a child so young that he is still being suckled. The mother has the right to turn the children over to the father.[22] However, if the child who is being suckled is capable of recognizing his mother, she must continue to feed him (and will be compensated by the father) because failure to do so could prove dangerous to the child.[23] At this point if the father claims that since he is already paying the mother to feed the child therefore he may as well hire a

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18. כתובות ק"ב: ק"ג.; רא"ש שם; תשובות הרא"ש כלל פ"ב ב'; רמב"ם אישות כ"א י"ח; מגיד משנה, שם. שו"ת המבי"ט חלק ב' סימן ס"ב.
19. תשובות הרשב"א המיוחסות להרמב"ן סימן ל"ח. פרר א' 61; שו"ת הרדב"ז חלק א' קכ"ג. שו"ע פ"ב פ"ת ז' שרשבסקי 343. נחלת צבי 283.
20. פד"ר א' 145. 147
Warburg 14 Israel Law Review 480 1979.
21. Warburg op. cit.
22. רמב"ם אישות כ"א י"ח; אבל כנראה הרמב"ם סותר דבריו באותו הפרק. וצ"ע. מגיד משנה, שם; טור, פ"ב; שו"ע פ"ב ח'; נחלת צבי, 284.
23. רמב"ם אישות כ"א ט"ז; אבן העזר פ"ב ה'.

wetnurse, the Beth Din will not allow this since it is in the child's best interest to be fed by his mother.[24]

An interesting situation arises when a boy reaches the age of six years and custody should normally be transferred to the father according to halachic custody rules.

According to Rambam[25]

> ואחר שש שנים יש לאב לומר אם הוא אצלי אתן לו מזונות ואם הוא אצל אמו לא אתן לו מזונות.
>
> After the child is six years old, the father can say "If the child stays with me, I will support him but if he stays with his mother, I will not pay for his support."

There are three different interpretations of the Rambam's position on the enforced transfer of custody in such a situation:

1. The father cannot remove the son from the mother against her will, but if the son remains with the mother then the father is absolved from his duty to support him.[26]
2. The son can be removed against the will of the mother, but not against his will.[27]
3. The son can be removed until the age of thirteen.[28]

It is important to point out that according to the first approach, the exemption of the father from child support is only in a case in which the son, due to his own volition, decides to stay with his mother. However, if the Beth Din decides that it is the best interest of the child to remain with the mother after age six, then the father is still obligated to support the boy.[29]

The halachic rules for child custody indicate the presence of other concerns in addition to the best interests of the child.

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24. מהרשד"ם אבן העזר קצ"ג.
25. רמב"ם אישות כ"א י"ז.
26. מהר"ם אלשיך שאלה ל"ח; מהר"י אבן לב ח"א כלל י"ב שאלה ע"ב.
27. חלקת מחוקק שו"ע שק"ט, מגיד משנה, שם.
28. מביט על הרמב"ם, שם.
29. פר"ר ז' 10 א' 55, 61, שרשבסקי 349

First, although the father has considerable control, he is not granted absolute power and discretion over his children; the interest and needs of the children are seriously taken into account. In fact, until the age of six, the father has most of the obligations and few of the custodial benefits. Second, the halacha incorporates principles into the process for assigning custody which evidence an understanding that the needs of very young chidren differ from those of older children. In addition there is an awareness that as the child gets older, i.e. after age six, boys and girls benefit from same-sex role models.[30]

Finally, the halacha demonstates a flexibility in child placement. Exceptions to the usual custody rules, for example when a son wishes to remain with the mother after age six, are dealt with in great detail (see discussion above).

Best interests of the child:

The central importance of "the best interests of the child" principle has been stated unequivocally:[31]

> היסוד לכל פסק בענינים אלה הוא הכלל שהניח הרמב"ן בתשובות המיוחסות סימן ל"ח בדברו בענין הבן והבת אצל מי: דאע"ג דמצד הדין... לעולם צריך לדקדק בדברים אלו אחר מה שיראה בעיני בית דין בכל מקום ומקום שיש בו יותר תיקון.. לחזור אחרי תיקונן.
>
> וביאר דבריו בתשובות דרכי נועם שאלה כ"ו:
>
> „כי חכמי התלמוד אמרו על הסתם, דסתם מילתא הבת אצל האם והבן ג"כ בקטנותו ואחר כך עם האב... שכל זה תיקון הילד על הסתם, ואם ראו ב"ד שאין בזה תיקון אלא אדרבא קלקול, מחזירין אחר תקנתן כפי ראות עיני הדיינים. וכל הפוסקים הסכימו לזה שהכל תלוי כפי ראות עיני ב"ד מה שהוא תיקון לולד."
>
> היינו שאין כלל יציב בדבר מקום ילדים אלא רק כלל של „סתמא," אם אין הכרעה אחרת.

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30. אוצר הגאונים בתובות חלק התשובות סימן תל"ד.
31. פד"ר א' 55, 61

> The basic rule of thumb to be followed in these matters is the general principle laid down by the Ramban in Paragraph No. 38, wherein he discusses with whom the son or daughter ought to be:... Each Beth Din must ponder at great length which way will be best to proceed and which is the most beneficial.."
>
> The opinion of Ramban is further elaborated by *Darkei Noam* 26:
>
> "Speaking generally, the Rabbis of the talmud felt that it was usually best that a girl remain with her mother and that a young boy also should remain with his mother and thereafter be with the father ... If however for some reason the Court feels that it would not be beneficial or might even be detrimental, then they may amend the decision in any way they feel best for the child. And all the Rabbis agree that the prevailing principle is that the Court must rule as it considers best for the good of the child."
>
> Thus, there is no firm rule regarding placement of the children, only a general guideline if there is no contraindication.

It is clear from these statements that the halacha does not apply the custody rules in an impersonal, rote manner, i.e. all boys must be with the father after age six with no exceptions. Rather, a review of actual *piskei halacha* indicate that rules are often taken only as presumptions[32] and their application is subject to the general prinicple of the child's best interests, which serves as the foundation for the specific rules.[33]

By seeking recourse to the underlying priniciple, the child's best interests, the Beth Din is able to resolve conflicts between specific rules. A classic demonstration of the use of this approach involved the question of whether a custodial father could leave Israel with his 2½ year old son for about six months. The father

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32. 61.59 פד"ר א' Warburg above
33. Warburg at 495

had custody of the son as result of an agreement with the mother (see discussion on custody agreements below). The wife claimed that if the father left the country, custody should be transferred to her since otherwise she would be denied her visitation rights.

The Beth Din weighed several issues in its decision making process. First, the child should not be leaving Israel:

"...הכל מעלין לארץ ישראל ואין הכל מוציאין"

> A person can be forced to come up to the Land of Israel, but no one can be forced to leave ...[34]

The court also considered the role of the mother and father in raising the child until that point. Finally, the court said that the issue had to be resolved from the child's perspective and to his advantage. Although it is better for a child to remain in Israel, it is still more important for the child to remain with his father. The court found that although the child was under six years old, the primary caretaker was the father and a transfer of custody, even on a temporary basis, could be psychologically harmful. It found that the father was, in a sense, the 'psychological parent'. Thus we see how the court weighed the various rules and found that the visitation rights of the mother and the requirement to stay in Israel were both subject to the doctrine of the best interests of the child.

The best interests principle also governs private agreements made between the father and mother concerning custody, support, or any other matter affecting the children. For example, if the wife agrees to free the father of all support obligations in exchange for a *get*, she can later renounce the agreement since it is not in the best interest of the children who lose out monetarily, and:

"אין חבין לאדם שלא בפניו"

> A person cannot be caused damage in his absence.[35]

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34. כתובות קי: פד"ר 175, 1:173
35. כתובות י"א א'

Also, if the agreement embodies a custody arrangement which does not follow the usual halachic rules, i.e. the daughter is placed with the father, the daughter is not bound by such an agreement unless it is shown that it is in her best interest.[36] The burden in such a situation is on the parent who seeks to vary the usual rules.[37] Finally, if a custody agreement is made by the parents and approved by the Beth Din, the other parent will not be estopped from requesting at a future time that custody be transferred, as long as such transfer is in the best interest of the child, since the approval which was given was based on the facts at the time of the decision and is subject to change as needed to implement the interests of the child.[38]

Given the central role that the child plays in these custody deliberations, it is appropriate to consider the child's preference if the child seems capable of making an informed choice which is not merely the result of undue influence by the parent. However, if the Beth Din feels that it is not in the child's best interest to honor his choice, it is not bound to do so.[39] In doing so, however, one must be very cautious since forcing a child to choose between parents can be very stressful. Therefore when the judge or *dayan* is interested in the child's preference, he will often elicit it indirectly.

Since the custody rules are designed to help the children, they are generally not to be used to punish a parent for wrongful acts committed during the marriage. Such behavior is not held against the parent when the custody decision is made unless such behavior would have a negative impact on the child.[40]

Visitation:

The rules of visitation for the non-custodial parent are also based on the needs of the children. There is a privilege of visitation designed for the benefit of the child so that the bond with the non-

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36. שרשבסקי 348
37. נחלת צבי 286
38. שרשבסקי, 348
39. שרשבסקי, 348°9
40. שרשבסקי, 346; פד"ר 2:3.5.8

custodial parent should be maintained.[41] The visitation privilege is not a proprietary right of the parent.[42] If the Beth Din determines that such visits are harmful to the child, the visits may be curtailed. Another purpose of the visitation rules is to enable the father to provide חינוך (education) for a son living with the mother. Considerations of visitation and חינוך also affect the right of the custodial parent to travel with the child to another city.[43]

Conclusion:

While the placement of children has posed a difficult problem to judges since Solomon, the halachic approach has long attempted to minimize the trauma to the children by emphasizing their interests as central to the custody process. Unlike the various civil law systems, which, until quite recently emphasized the parental right to custody, the halacha has given primacy to the doctrine of the best interests of the child.

The halacha does seem to differ from American law in that it does still seem to apply the tender years doctrine, favoring the placement of very young children with the mother. However, the halacha applies this rule based on the premise that such placement is in the best interest of the child, and not because of a discriminatory policy against fathers. Should the Beth Din determine that placement of a child with the father would be advantageous for that child, it would do so. Unlike the American system, which has begun to apply equal protection rules to gender discrimination, the halacha recognizes differences between the sexes and will follow a gender-related presumption if such a presumption will help the child.

The current emphasis in the psychological literature on the father as role model for boys is not in conflict with the halachic approach. Although halacha favors the placement of very young

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41. מגיד משנה הלכות אישות פכ"א הל' י"ז; שרשבסקי, 347.
42. פד"ר 1:158, 176.
43. פד"ר 7:10, שרשבסקי, 342, קידושין כ"ט עמוד ב; הרא"ש, שם מ"ב, רמב"ם הלכות תלמוד תורה א' ג', שו"ע יורה דעה רמ"ה.

children with the mother, it recognizes the importance of contact between the father and son even during that period.

In contemporary American society, we find an increasing sensitivity for the many factors which ought to be considered in settling a child custody issue. While this bespeaks a growing awareness of the complexities of the problem, the halacha has always taken cognizance of the many factors which must be weighed in arriving at a decision bearing momentous consequences.

Medical Management of Asthma on Shabbat:

An Halachic Analysis and Some Guidelines for Practice

Howard J. Schwartz, M.D.
Rabbi Moshe Halevi Spero

I

This paper will examine the medical management of asthma on Shabbat. Asthma is a common condition whose adverse consequences range from temporary and mild bronchial discomfort to chronic respiratory distress and definite risk of respiratory failure, contributing to an average 2000 asthma-related deaths per year in the United States. Of course, the range of consequences varies with specific factors to be discussed below. Generally, asthma should be medically managed not only by therapeutic treatment of the acute asthmatic attack, but more importantly by administration of prophylactic or preventive medication on a continuous, daily basis.

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The principles of the halachic problem in treating asthma on Shabbat are basic. Halacha proscribes engaging in certain activities on Shabbat which fall under the general rubric of "work" (*melachah*). Some of the activities are biblically defined, while others have been rabbinically identified in that they either are functionally similar to or have a significant potential to result in biblical work. As relevant examples, compounding medicine (*mehikat samimanim*) is forbidden on Shabbat since this activity generally involves the biblical activity of grinding (*tohen*), while taking or using medicine is forbidden by rabbinic decree lest one compound medicine.[1]

All Shabbat prohibitions (and most other ritual prohibitions[2]) can be waived when danger to life exists, in accord with the axiom that "Preservation of life" (*pikuach nefesh*) precedes all biblical and rabbinic prohibitions.[3] Physical and mental illness can represent impediments to health under which circumstances, further defined below, Shabbat prohibitions may be violated.

In order to arrive at the most halachically and medically accurate conclusions (although we do not wish to identify these as authoritative rulings [*halachah le-ma'aseh*]) we will present two background discussions: first, current medical opinion regarding the condition and treatment of asthma; second, the halachic approach to the classification of illness in terms of the prerogative to waive Shabbat prohibitions. Following these discussions, we will present some tentative guidelines for the professional and patient.

II

Asthma is defined medically as a syndrome whose primary characteristic is reversible airways obstruction. Easily recognizable as asthma are acute, usually reversible episodes of smooth airway muscle spasm, mucus hypersecretion with impaired mucociliary clearance, and bronchial mucosal edema resulting in symptoms of

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1. טור או"ח שכח:א.
2. חוץ מג"ע, ש"ד, וע"ז.
3. יומא פה:, ועי' גם בטור או"ח שכח:ב, מ"ת הל' שבת ב:ג.

breathlessness and wheezing. However, isolated symptoms such as cough, vague chest discomfort after exertion, vague chest pressure and/or breathlessness often go unrecognized as manifestations of asthma. While these latter symptoms are mild, they can be both confusing and progressive. That is, an adult male with chest pressure and cough occurring with exertion will often be regarded as a patient with cardiac distress rather than as an asthmatic. Moreover, these same symptoms can progress into severe breathlessness and wheezing, under circumstances which cannot be defined and therefore cannot be guarded against.

Asthma is usually the result of many trigger mechanisms whose underlying causal mechanism is hyperirritability of the asthmatic airway to a variety of stimuli, including allergens, minor changes in air temperature, humidity, barometric pressure, infections, exercise, irritants, airborne particles, gases, and drugs. One or several of these mechanisms can be operative in any flare of disease, causing cough, wheezing, and dysapnea.

Asthma therapy is tailored and modified from broad principles, to be discussed, in response to the situation presented by each individual patient. Control of the disease is paramount. Asthma often cannot be cured since the characteristic airway hyperreactivity cannot yet be permanently abolished by any current method of treatment. However, this feature can be sufficiently neutralized with currently available drugs so that asthma *symptoms* are abolished. The 2000 or so asthma-related deaths in the United States each year are thus viewed medically as largely avoidable!

A complete understanding of asthma requires the additional recognition that: (a) any attack is potentially life-threatening, and (b) control for each individual involves several management strategies, including identification and avoidance of aggravating factors as well as the use of ongoing drug therapy.

In the past, outpatient management of asthmatic patients focussed on the patient's acute symptomatic periods. However, recent medical research indicates that the sporadic use of "a little" bronchodilator medicine is insufficient to keep an asthmatic healthy, fully functional, and out of the hospital. Proper medical

managment in the 1980's focuses on *preventing* asthmatic flare-ups. This requires (1) continuity of care, (2) realization that therapy in the broadest sense may last for years, and that (3) the patient has responsibilities in helping to maintain health. It must be recognized that an acute exacerbation of asthma is often due to (1) undermedication with oral drugs; (2) overuse of nebulizers, especially those available without prescription so that the physician is not even aware they are in patient's use; (3) the failure to recognize respiratory infections early in their course, and (4) failure of the patient or his physician to recognize the severity of the asthma attack in early stages. The properly managed adult asthmatic patient should rarely need hospitalization if the above (and other strictly medical) factors are anticipated and avoided.

Asthma can be categorized by the degree of functional disturbance. Such categorization helps stage therapeutic interventions necessary to bring relief to the patient, and is important for any halachic categorization.

(1) *Mild asthma* includes annoying, usually brief, intermittent episodes of bronchospasm with no loss of work, no activity restriction, many normal days and close to normal pulmonary function. In such patients, treatment with a single drug usually suffices and is perhaps not needed on an around-the-clock basis. In this type of patient, everyday medication is used only when an activity known to be asthmagenic for the person is scheduled.

(2) *Moderate asthma* is more distressful to the patient; subjective periods of breathing discomfort occur daily and can last up to 10 or 12 hours. Such patients are unable to participate in activities requiring exertion; physical examination will reveal wheezing; pulmonary function tests are clearly abnormal and may fluctuate at night; and the patient will often miss work and/or school. In such patients, regular, around-the-clock (i.e., chronic) therapy, often with several drugs in combination, is essential.

(3) *Severe asthma* is present when patients have sleep disturbance due to breathing distress and are aware that they are wheezing daily for most of the day. Their activity is obviously restricted by respiratory difficulty; work and school performance is compromised, and oxygen desaturation is present. Hospitalization

and treatment with steroids is usually required. If untreated, this stage leads to *respiratory failure;* severe hypoxia and elevation in arterial carbon dioxide is present, and these in turn can lead to compromised function in other parts of the body, especially in patients with concomitant disease. There can also be confusion, disorientation, and other signs of disordered cerebral function (especially in patients with cerebrovascular disease), or compromised cardiac function in patients with coronary artery and myocardial disease.

While these categories are helpful therapeutically, it must be kept in mind that not every attack will start as a mild episode progressing in an orderly fashion to more severe stages. At times the attack will be very severe from the onset; and this is most true of the adult chronic asthmatic though not so true of the child with intermittent asthma. In addition to being intermittent or chronic, asthma can vary in severity and in the types of medical therapy needed. It is thus also useful to categorize the asthmatic patient by degree of response to therapeutic modalities:

(1) *Mild:* Those patients who show good response in their respiratory symptoms and pulmonary function abnormalities to only occasional drug therapy. These patients may have long symptom-free periods and may be able to sustain 24 hours or longer without therapy

(2) *Moderate:* Those patients who manifest good therapeutic response with prolonged symptom-free periods to non-steroid drug therapy, but in whom this good response requires chronic (daily) therapy.

(3) *Severe:* Those patients who require chronic steroid therapy in combination with maximum use of other drugs on order to achieve successful clinical control.

(4) *Refractory:* Those patients who demonstrate a poor response to all the above therapies and who therefore require hospitalization.

The assessment of severity should not be dependent on a single clinical or laboratory variable. The real risk to the patient is underestimating the danger of the clinical situation. It is true that asthma patients with very mild and only intermittent symptoms

may require nothing more than occasional drug therapy. However, if, for example, a patient begins to need to use a nebulizer more often than twice daily, and if nighttime symptoms cause loss of sleep, the physician should be contacted so that appropriate around-the-clock drug therapy can be instituted, efforts made to determine the reason for the patient's worsening state, and specific treatment rapidly instituted to avert the possibility of rapid progression to severe, life-threatening disease. The physician is in the best position to assess and deal with changing environmental conditions (e.g., prevelant respiratory infections, smog alert) which may dramatically influence the condition of the asthmatic.

III

The final background for our discussion is a brief review of some halachic parameters. Halacha delineates four paradigms of unhealth, partly defined in terms of realtive ability to waive biblical or rabbinic Shabbat prohibitions regarding specific types of medical activity (e.g., surgery, writing prescriptions, preparing medicine):

(1) *holeh she-yesh bo sakanah* - life-threatening or "critical" illness, where threat to existence or normal functioning of vital life processes is present or impending;

(2) *holeh she-ein bo sakanah* - illness in general, where threat to life is not present or anticipated, but where the individual is febrile or infirm or infectious, or in great pain and/or bedridden;

(3) *holeh be-mikzat* - "slight illness", such as a cold or a mild allergy; and

(4) *mihush be-alma* - "mere discomfort", where the individual has some slight malaise or distress, but yet is in no real sense ill; e.g., a mild stomachache or headache.

Halacha also recognizes that illnesses can progress from less to more severe levels, and adjusts its leniency accordingly regarding initiating otherwise forbidden activity. For example, when danger to a specific limb *(sakanat ever)* exists, and the individual is sick but in no overall life-threatening danger, he would be allowed on Shabbat to initiate forbidden rabbbinic activities without modifying the manner of their execution (*shinuy*) — whereas such modification is required in treating the *holeh she-ein bo sakanah*

whose illness does not involve *sakanat ever*. On the other hand, when illness of a specific limb or organ system does or is anticipated to adversely effect the entire body, especially an internal organ such as the lung upon which vitality depends, most halachic codifiers view this state as no longer merely *holi she-ein bo sakanah* but possibly *yesh bo sakanah*, meriting initiation on Shabbat of any action deemed medically necessary.[4] Similarly, while slight discomfort is classified as *mihush be-alma*, more extreme or pervasive distress or pain (*zar*) which begins to weaken the entire person (*michush she-miztaer mimenu kol gufo*) is viewed in a more lenient perspective.

Practically, the following general parameters obtain:[5]

() For a *holeh she-yesh bo sakanah*, any biblical or rabbinic activity may be initiated in order to save life;

(2) For a *holeh she-ein bo sakanah*, one may not violate biblical prohibitions, but may perform rabbinically forbidden activities in modified form (*shinuy*), or instruct a non-Jew to perform even biblically forbidden activities;

(3) For a patient in severe pain or who feels so ill as to become bedridden, even in the absence of obvious danger to life, one may violate rabbinic prohibitions in modified form as in the case of (2);[6]

(4) For a *holeh she-ein bo sakanah* whose condition includes *sakanat ever* (even in the absence of severe pain radiating throughout the body, or bedriddenness), one may violate rabbinic prohibitions without modification.[7a] Furthermore, according to those authorities who consider *sakanat ever* in our day to involve generally the possible danger of *sakanat nefesh*, one may initiate even biblically forbidden activity.[7b]

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4. או״ח שכח, מ״ב ס״ק מט, נז; שולחן ערוך הרב או״ח:יט; ש״ע יו״ד קנז, שו״ת ציץ אליעזר, ח׳ ח, סי׳ טז; (ט״יד); שו״ת מלמד להועיל ח׳ יו״ד, לב, ועיין ש״ך סק״ג דמסופק בדין זה.
5. עי׳ אונציקלופריה תלמודית, ״חולה״, טורים רעה־רעו.
6. או״ח שכח:יו וברמ״א שם ובמ״ב ס״ק א, י, ק, קיח, קבא; או״ח שז מ״ב ס״ק ה; שמירת שבת כהלכתה כא:ג ובשש״כ החדשה (ח׳ ב) לד:טז.
7a. או״ח שכח:ג ובשו״ע הרב שם ס׳ יט, נכלל ב״סכנה אברי״ לא רק איבוד האבר וכוחותיו אבל גם כשלון פעולותיו הנרמלים, כמו (בלע״ז) ״היפוסענסיתבי״ וגם ״היפרסענסיתבי״ ועי׳ ע״ז בשש״כ ח׳ ב, לג, דף תנט, ובקצות השולחן חי׳ ז׳, סי׳ שכח בבדי השולחן סוף י״ח, ע״ע כבאר הלכה בשו״ע או״ח שכח:ג, ד״ה ודוקא.
7b. p. 57 עשו״ת ציץ אליעזר חלק א סי׳ טו״ו ובלב אברהם חלק א,

(5) When there is illness in a limb but no danger of its destruction *or* loss of normal function (see fn. 7a), and the individual overall is in no severe discomfort or unhealth, then one can only initiate rabbinically forbidden activities through a non-Jew.[8]

We are now prepared to focus on a possible halachic classification of asthma which will lead to some recommendations regarding the performance on Shabbat of specific therapeutic or preventative medical procedures.

IV

It would be helpful to recruit some talmudic or later rabbinic categorization of asthma, but no clear statement is available. One specific talmudic reference to asthma is *ru'ach kazeret* (or *kazrit*) mentioned in a mishnaic discussion of physical conditions which disqualify a priest from Temple service.[9] This illness appears to involve breathing difficulty and potential for more extensive loss of bodily strength, but it is also viewed as caused by the demon *Nala* or, following Rambam and R. Ovadiah, severe melancholia (*marah shehorah*).[10] There is also no suggestion here as to how grave an illness *ru'ach kazeret* might be.

In a second reference, the Talmud recounts that R. Aha bar Yosef suffered from *"yokra de-liba"*, which Rashi translates as a "feeling of heaviness in his heart."[11] One could presume that this condition refers to "heaviness of breath" or breathing difficulty (as in congestive heart failure), as Rashi elsewhere refers to sighing *(gonech)* or groans due to heart pain, but these appear to be symptoms of angina pectoris rather than asthma.[12] The condition of *ganach* has indeed been classified as a *holi she-ein bo sakanah,*[13] but one cannot assume the two conditions are identical. However, a

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8. או"ח שכח במ"ב ס"ק נב.
9. בכורי מד:.
10. ע"ש פירוש הרב ובפירוש המשניות להרמב"ם.
11. שבת קמ.
12. תמוי טו:, ב"ק פ., כתו' ס..
13. או"ח שכח:לג, מ"ב ס"ק קז.

careful analysis of the ruling in R. Aha's case indicates that at least his *yokra de-liba* was not of life-threatening nature.[14]

Before turning to contemporary halachic literature, it is noteworthy that Rambam wrote a medical treatise on asthma, which anticipated the role played by psychological stress in this condition.[15] And Rambam, in the very first paragraph, calls asthma a "grave illness" (following S. Muntner's translation), but the Hebrew term, *"ha-holi ha-ne'eman"*, does not aid our search for specific categorization.

Two contemporary authors view asthma as an example of *holi she-ein bo sakanah.*[16] Rabbi Neuwirth indirectly indicates that this categorization applies only in the absence of *sakanat nefesh,*[17] but Dr. Abraham, who cites Neuwirth, does not note this qualification.

Additional comments concerning this last categorization are in order: (1) The aforementioned authors also categorize epilepsy as *holi she-ein bo sakanah* despite the fact that other authorities classify epilepsy as a potentially life-threatening illness, in view of the loss of bodily control which characterizes the epileptic crisis.[18] Recall that Rambam defines *ru'ach kazrit* as having the same potential, and current medical opinion confirms that for many very young and elderly and for most untreated patients, one of the concomitants of the severe asthmatic crisis is temporary loss of bodily control and occasionally mental confusion. This risk is considered probable in the case of moderate to severe asthma. Certainly, *status asthmaticus* constitutes *sakanat nefesh.* There thus seem to be instances when asthma should be classified as involving potential *sakanah.*

(2) The physiopathology of the untreated, more than mildly asthmatic lung can represent *sakanat ever* to the degree that the asthmatic's airways are abnormally sensitive and chronically

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14. חידושי הר"ן, שבת קמ..

15. .J.B. Lippincott: Phila. ,1963 ספר הקצרת

16. ספר לב אברהם חי' ב, רף כח; שש"כ החדשה לג:א (ד). ועי' גם בשו"ת אבני זכרון חי':86 סי' מ (אבל אינו תחת ידי).

17. בההוצאה הישנה של שש"כ (כ:א (ה)), אבל בההוצאה החדשה (לג:א (4)) זה יותר מדויק.

18. ט"ז ליו"ד פר, ס"ק כ"ד, ועי' גם בערוך השולחן שם ס"ק צה וגם בשו"ת ציץ אליעזר, חי' יג סי' לה:א.

disposed to potentially life-threatening reaction. Thus, more-than-mild asthma may involve *sakanat ever* which, depending on concurrent medical complications, age, psychological make-up, and quality of treatment, can potentially extend into *sakanat nefesh.*

(3) A third point concerns terminology. Rabbi Neuwirth defines *holeh she-ein bo sakanah* as:

> מתהלך כבריא אבל עלול ליפול למשכב אם לא יקבל טיפול בעוד מועד, כגון חולי הקצרת . . .
>
> "One who walks about like a healthy person, but might become [sick enough as to need to lie down] if he would not take medicine at a prescribed time, such as an asthmatic. . ."

However, in view of current medical understanding, this term may be somewhat misleading when applied to some asthmatics.

(a) Although the patient may indeed "walk about like a healthy person", there often is present clinically abnormal organ functioning on a level which renders him a *safek sakanat ever.*[19] (b) While it may generally be true that a mild asthmatic's failure to continue the prophylactic regimen will result merely in *"nefilah la-mishkav"* of non-life threatening nature, it is also potential with all asthmatics that without the maintenance of appropriate medicine levels, relatively innocuous stimuli can unpredictably elicit sudden asthmatic crises which deteriorate rapidly (sometimes in less than 5 minutes). In the light of this, we suggest that asthma *not* be viewed *generally* as a condition which in the absence of appropriate medication will result in no more severe reaction than on the level of *ein bo sakanah.*

V

The case of R. Aha, discussed previously, is important, for it establishes the basic permissibility to take medication on Shabbat

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19. אינו ברור מתוך הפוסקים ז"ל אם צער גדול בתוך האבר בשאין איזה פגם ממשי בבשר או בגדים וגו' נכלל בסכנת אבר. אבל עי' בביאור הלכה באו"ח שכח:ג בד"ה ודוקא ובהערה ז' לעיל.

which has been prescribed before Shabbat, and which must be continued lest the abnormal condition for which it was prescribed regress or the individual be left in a state which disposes him to ill health or danger. The Talmud discusses R. Aha's "heaviness of heart" for which a continuous treatment was instituted prior to Shabbat. The treatment required a medicine made by steeping *asafoetida* (*hiltis*) in hot water. Preparing this medicine on Shabbat would thus violate the prohibition against weekday activity. The Talmud rules, however, that since the regimen was begun before Shabbat and the individual may become "endangered" (*misstaken*) if the regimen is not maintained, he is permitted to steep the herb in cold water and place it in sunlight to warm up.[20]

Now if the rabbis were ruling leniently out of concern for possible *sakanah*, surely it would be permissible to initiate even biblically forbidden activities (i.e., the patient should have been allowed to *boil* the herb)? One response is that the term "*sakanah*" mentioned by the Talmud here does not imply true danger to life, but actually refers to a less grave level of illness, perhaps merely on the level of *michush* ("general discomfort").[21] From this viewpoint, the rabbis had indeed ruled leniently. In fact, Rambam in the Code uses the phrase "*kedai she-lo yichleh*", "in order that he not become sick", conspicuously deleting the talmudic phrase, "*ey lo shati be-Shabbat misstaken.*"[22] What emerges is that while the level of R. Aha's symptomatic condition of *yokra de-liba* may in fact have been less serious, more serious levels of this illness could be classified as *ein bo sakanah* or even *yesh bo sakanah* (and the same is true of the heart condition of which *ganach* is symptomatic).

Two principles follow: (1) When true danger to life or *potential* danger to life or limb threatens if medication begun prior to Shabbat were to be discontinued on Shabbat, this condition may be classified as *safek yesh bo sakanah*, or, in other cases — typically true of asthma — at least *yesh bo sakanat ever* for which

20. שבת קמ:; או״ח שכא:יח.
21. ערוך השולחן או״ח שכא ס״ק מה ובחידושי הרי״ן לשבת קמ:.
22. מ״ח הל׳ שבת כב:ז.

rabbinic prohibitions might be set aside and, if the *sakanat ever* threatened to pervade into *sakanat nefesh*, even some biblical prohibitions.[23] In such cases where it is important to assess the potential of danger, halacha would also be particulary concerned *about the za'ar* or distress of child patients,[24] as well as the *za'ar* incurred by an asthmatic whose alternative to continued medication on Shabbat is to remain homebound.[25]

(2) The talmudic debate in the case of R. Aha centers upon *preparation* of medicine on Shabbat. *Taking already prepared medicine* when there is serious illness or pain would in fact be permissible when *za'ar gadol* is present and certainly for the treatment or prevention of *holi she-ein bo sakanah*. In this case, no modification (*shinuy*) in the manner of taking the medicine would be required.[27]

In terms of the categorizations discussed in Section II, the *mild* asthmatic appears to be a *holeh be-mikzat*, for whom the question of violating Shabbat in order to take medicine arises only in situations where failure to take medicine on Shabbat will likely lead to more serious consequences. If Shabbat activity and the patient's average expectable environmental conditions do not include suggestions of danger — and the patient does not labor under any anxiety on this account — then there may be no warrant for permitting medication on Shabbat. More complicated levels of "mildness", however, especially in the case of children, may reach the level of *holeh she-ein bo sakanah* or *yesh bo sakanat ever* for which rabbinic prohibitions may be waived. Should an asthmatic attack occur, the patient enters at least the category of *holeh she-*

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23. או״ח שכ״ח:ג במ״ב ס״ק ח.
24. או״ח שכא:יח ובסי׳ שכח. מ״א ס״ק מ: סימן רעח בביאור הלכה ד״ה בשביל. ועי׳ גם באו״ח תריח:א בבאר הלכה ד״ה חולה.
25. יומא פד:. ובשו״ע הרב או״ח שכח:טו ועי׳ עע״ז בשו״ת הלכות קטנות חי׳ ב סי׳ י. עי׳ שבת נ: בתוס׳ ד״ה בשביל.
26. במ״א ס״ק מד. שעורים מצויינים בהלכה: קונטרוס אחרון לסי׳ צא ס״ק ב: שו״ת הרדב״ז חי׳ ג סי׳ תרמ ובאלף סה: קצות השולחן חי׳ ז סי׳ קלח בבדי השולחן אותיות יג־יד: ועי׳ בחידושי הרב שלמה קלוגר בספר החיים או״ח שכח סי׳ לז: ועי׳ עמ״ש הרב א. ד. אוירבך, ״בדין שימוש בתרופות בשבת.״ ספר אסיא ח׳ א, רפים יד־כג (תשמ״ב).
27. או״ח שכח במ״ב ס״ק קכא ובקצות השולחן חי׳ י סי׳ קלד בבדי השולחן ס״ק ז.

ein bo sakanah, but must also be monitored for signs of *sakanat ever.* Even short of a full asthmatic attack, substantial bronchial discomfort or stress constitutes a type of *za'ar* for which taking medicine on Shabbat is permitted by many rabbinic decisors.

Moderate and *severe* patients, to the degree that their health requires maintenance of daily medication lest they enter a state of potential *sakanah,* are certainly to be regarded in a more lenient capacity. The *refractory* patient is usually a *holeh she-yesh bo sakanah,* certainly when the refractory state threatens to complicate other conditions within the patient.

VI

The following guidelines apply to the actual implementation of therapeutic or preventative measures on Shabbat for the asthmatic patient.

(1) In the case of moderate to severe asthma — and, under certain conditions, even lesser afflicted asthmatics — who are on a chronic (daily) preventative regimen, one must recognize that the *possibility* of ill effect begins to increase the longer the interval between medications. Thus, while one might wish to skip a Friday night or Saturday morning dose of medicine, this becomes less advisable as Shabbat continues, and completely inadvisable under certain other physiological or environmental conditions. It must be emphasized also that many of these medications are short-acting drugs and pass through the body with loss of therapeutic benefit by 4 to 6 hours after use.

(2) Leniency with waiving rabbinic prohibitions on Shabbat — including *taking* medicine — is warranted by many rabbis when actual or anticipated bronchial crises represent *sakanat ever,* and certainly when such *sakanat ever* has the potential to extend into *sakanat nefesh.*[28]

(3) Halacha requires that in all cases where forbidden rabbinic ativities are initiated on Shabbat only in anticipation of *sakanat nefesh* or *sakanat ever,* but *sakanah* is not yet present, such

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28. משמע מהערוך השולחן שם ס״ק יח שבמקרה כזה מותר לחלל שבת אפילו באיסורי דאורייתא.

activity should be performed in modified manner (*shinuy*) if possible.[29]

(4) Furthermore, Rav Moshe Feinstein has ruled that even when no reasonable risks actually exist consequent to the suspension of prophylactic therapy, but the patient is nonetheless *extremely* anxious about the possibility of risk, the patient may continue to take the medicine, though with a *shinuy* if possible.[30]

(5) As far as specific methods of treatment are concerned:

(a) Rav Feinstein is further cited as ruling that no biblical or rabbinic prohibitions are involved in the use of hand-operated aerosol sprays or mists (nebulizers) through which anti-asthma or bronchodilator medicine is delivered (e.g., Vanceril, Isuprel, etc.).[31] Inhaling vapors *per se* also represents no halachic problem.[32]

(b) Some medications (e.g., Intal) are administered through a simple hand-operated device in which a capsule is placed in a specially designed two-piece tube wherein downward pressure of the top piece closes two small "teeth" which puncture the capsule (e.g., Spinhaler®). The medicine is then absorbed by inhaling: the intake airflow spins a small propellor which delivers particles of medicine into the mouth and lungs. Such devices are discussed by halachic authorities and are considered permissible on Shabbat for use by a *holeh she-ein bo sakanah*.[33] However, some reservations exist and Shabbat treatment would have to be discussed with a rabbinic authority.

(c) Spinhalers® are supplied with an optional piece which fits over the end of the device and produces a whistle sound during air intake. This device is used for child patients as an indicator of adequate inhalation. The Rabbis forbade making musical sounds on

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29. עי׳ ברמב״ן שהביא הב״י בטור או״ח שכח וגם בהרשב״א, ר״ן, וריטב״א בחידושיהם לשבת קלד:, וע״ע באו״ח שכח:יב ברמ״א ובאו״ח שלא במ״ב ס״ק כד.

30. שו״ת אגרות משה או״ח חי׳ ג סי׳ נג, וע״ע בשו״ת יוסף אומץ סי׳ מ ההובא בכף בחיים או״ח שכח ס״ק רטז ובהגהות מהרש״ם לאו״ח שכח ס״ק כו ובשו״ת צי״א חי׳ ח סי׳ טז:טז (א״ז, טו״יז, כ״בא), ובחי׳ ט סי׳ יז:ב (מא).

31. מוהה״ג ר׳ משה פיינשטין ההובא בספר הלכות שבת (מאת ר׳ ש. איידר) פרק ח:ד (כה) ובפי׳ ט:ד (ה). מדידת הטרופה (לפי טיפות בר״כ) מותר בשבת לחולה שאב״ס כמו שכתוב באו״ח שו:ז ובמ״ב ס״ק לו.

32. כ״ב בכף החיים או״ח שכח ס״ק ריד ובש״ע וביה ס״ק ל באו״ח שכח.

33. ששי״ב החדשה לג:כב בהערה פז וע״ע באו״ח שיד במ״ב ס״ק ז.

Shabbat even when not in the customary manner of music, so long as one is utilizing an instrument specifically made to produce sound.[34] However, the Talmud also states that one may use on Shabbat an instrument used to make sounds which will lull a sick person to sleep.[35] This precedent might apply to the present case, especially in view of the fact that rabbinic prohibitions may be waived in the case of a *holeh*.

(d) Though rare, some asthmatics are treated with daily injections of forms of epinephrine. Intramuscular injections are generally viewed as only rabbinically forbidden and could thus be implemented when conditions warrant the waiver of rabbinic prohibitions, or could be administered by a non-Jew.[36] In acute circumstances when adrenaline must be administered by injection, the patient is usually classifiable as *yesh bo sakanat ever* or worse so that such injections are certainly permissible.

(e) The use of electric air pump nebulizers for the administration of medication (e.g., Intal, Bronkosol) involves the halachic problem of the use of electricity on Shabbat. Rabbinic authorities advise that such pumps should not be used unless *safek sakanat nefashot* is anticipated, or *sakanat ever* of such nature which is expected to rapidly become extensive. (Regarding the use of such pumps on *Yom Tov*, one must also consult a halachic authority.) Practically, the patient can switch to hand-operated nebulizers (see above) on Shabbat, or to pill or liquid medicine. However, in the case of small children who are only responsive to drugs which can *only* be administered via nebulizers, and who have great difficulty utilizing hand-operated nebulizers, and where such children need continuous treatment in order to avert *sakanah*, the following options can be suggested: (1) have a non-Jew turn on the electric pump, or (2) set the pump on an electric timer.[37]

(6) It is permissible to eat on Yom Kippur when danger to health is anticipated; and in such cases it is certainly permissible to

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34. עירו׳ קר. ואו״ח שלח:א ובמ״ב שם.

35. עירו׳ קר. ובאו״ח שלח במ״ב ס״ק א (ג); ערוך השולחן שם ס״ק ד״ה ובכף החיים שם ס״ק ה.

36. עי׳ לב אברהם חי׳ ב דפים צא־צב ובשש״כ לג:ז ובשעורים מצויינים בהלכה חי׳ ב בקונטרוס אחרון דף רצו.

37. שש״כ לג:כב

swallow medicines without water (or with water to which some bitter taste has been added) since this is not the customary "pleasurable" manner of eating.[38] In *Ziz Eliezer*, Rav Waldenberg affirms that this is certainly so on the "minor" fasts, even when the patient is in no graver state of unhealth than *holeh she-ein bo sakanah*.[39] The use of nasal inhalers and aerosol mouth sprays on Yom Kippur would be allowed for those whom the halacha permits to take medicine.[40]

Summary

In conclusion, we can say that while mild cases of asthma may often be no more severe than *holi be-mikzat* or *holi she-ein bo sakanah*, there are concommitant risks — such as the very unpredictable nature of the condition itself and the possibility of *sakanat ever* — which may require categorization of asthma as *holi she-ein bo sakanah aval yesh bo sakanat ever* and sometimes *safek holi she-yesh bo sakanah*. It is also accepted that asthmatics may continue their prophylactic regimen on Shabbat.

Patient education and compliance are important factors in successful management of asthma. Recent studies have shown that asthmatics often complicate their treatment by noncompliance motivated among other things by denial of their illness or its severity. It has been occasionally reported by medical professionals that noncompliance with taking medication on a continuous basis including Shabbat occurs among religious patients who offer a variety of apparently valid halachic objections to such regimens. Sometimes such objections are indeed valid; other times they are in fact inaccurate, and are based upon either incorrect halachic understanding (based on incorrect medical information), or are manifestations of psychological denial couched in religious terms. For the religious Jewish patient, denial of the severity of his condition is adopted by viewing it as not yet mandating the

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38. שו"ת שואל ומשיב תנינא חי' א סי' נה; שו"ת אג"מ או"ח חי' ג סי' צא בסוף; שו"ת צי"א חי' י סי' כה (כב); שו"ת כתב סופר או"ח סי' קיא.

39. שו"ת צי"א חי' י סי' כה (כב). עיין גם בלב אברהם, חלק א'. דף קיז, בנוגע ללקיחת כדורים נגד מיחושים בימי צום, פרט ליוה"כ ות"ב.

40. או"ח תריב במ"א ס"ק ד' ובמ"ב ס"ק יח.

violation of Shabbat. It is important for the sake of maintaining the necessary doctor-patient rapport that such claims not be arbitrarily dismissed or belittled, but rather that the patient be urged to allow his physician to consult the patient's halachic advisor and discuss therapeutic plans in light of the guidelines suggested in this paper. Successful assurance to the patient of the halachic propriety of the proposed medical regimen will help insure necessary compliance as well as the fulfillment of the Divine imperative to "preserve yourselves very well."

Kitniyot in Halachic Literature, Past and Present

Rabbi Alfred S. Cohen

There is no Jew who is unaware of the *issur* of eating *chametz* on Pesach. For millenia, the strictures and minutiae of the Passover laws have been assiduously studied by Jews throughout this world, and it is fascinating to witness the many accretions in law and customs which have developed in tandem with *hilchot Pesach*. A major concern in many Jewish homes at Pesach time is *kitniyot*, a topic within the halachot of Pesach which has had an unusual history and aroused a surprisingly wide range of opinions. In this paper, we will seek to find the basis for the *dinim* of *kitniyot* and the framework within which the rules of *kitniyot* apply.

What are *kitniyot*? What do they have to do with *chametz*? Why should they be forbidden on Pesach? We will see that these elementary questions lead to a variety of complex answers.

What are *kitniyot*? Nowhere do the halachic decisors list the specific items in this group. *Kitniyot* is generally understood to mean rice, peas, beans, and the entire family of legumes, although as we shall note later, there was some question about this. The truly pertinent question to be answered is why should rice or beans be forbidden at all on Pesach.

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In the Torah, we learn that it is forbidden to eat any *chametz* or any leavened food.[1] *Chametz* occurs when flour and water mix, initiating a fermentation process. Already in the Mishnah, there is some dicussion as to when and how *chametz* is produced. The Mishnaic ruling[2] is that *chametz* can only be made from certain grains, and the Mishna enumerates them: Wheat, barley, rye, spelt and oats. In the discussion which ensues in the Gemara, this ruling is accepted and explained. Because these are the only grains which can ever become *chametz*, they are the only ones which may be used in making matzoh.

Millet and rice are not included in this listing, explains the Gemara, because they never ferment, they only spoil בא לידי סרחון (in the presence of water). However, there is a disclaimer to this view, for Rabbi Yohanan ben Nuri counters that rice *could* become *chametz*, "and anyone who lets it become *chametz* is liable for *karet* (death penalty)."

Thus we see that at a very early point in halachic development, there already existed some disagreement about the properties of rice as a *chametz*-producing agent. However, Rabbi Yohanan ben Nuri's argument was not accepted, because later the Gemara records a tale by Rav Huna, relating that at the Seder, he used to see Rabba eat two dishes.

> What were these two dishes? Rav Huna said, "Beets and rice" ... Rav Ashi said, "From this story we can readily see that Rabba was not concerned about the dictum of Rabbi Yohanan ben Nuri to the effect that rice can became *chametz*".[3]

This, then, became the accepted conclusion of the Gemara, that rice cannot become *chametz*. Accepting this, the *Baale Tosafot* explain "because it does not ferment but rather begins to spoil."[4]

The lone dissenting voice of Rabbi Yohanan ben Nuri is

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1. שמות יג, ג
2. פסחים לה.
3. שם קיד:
4. שם ד"ה ליה דרוש

apparently disregarded by Rambam:[5]

> אין אסור משום חמץ בפסח אלא חמשת מיני דגן בלבד. והם שני מיני חטים שהן החטה והכוסמת, ושלשה מיני השעורים שהן השעורה ושבולת שועל והשיפון. אבל הקטניות כגון אורז ודוחן ופולים ועדשים וכיוצא בהן אין בהן משום חמץ אלא אפילו לש קמח אורז וכיוצא בו ברותחין וכסהו בבגדים עד שנתפח כמו בצק שהחמיץ הרי זה מותר באכילה שאין זה חמץ אלא סרחון.

> On Pesach there is no prohibition regarding *chametz* except with respect to five types of grain only. These are two types of wheat ... And three types of barley ... but *kitniyot* such as rice ... and the like have no such prohibition of *chametz*. Even if a person were to knead rice flour or the like with hot water and cover it with a cloth until it rises like dough which fermented, it is still permissible to eat it, for this is not fermentation but decomposition.

It is not until about 700 years ago that serious disagreement is evident on the question of *kitniyot*. In his halachic compendium, the *Smak* notes that "since the times of the *Geonim*, we do not eat *kitniyot* during Pesach."[6]

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5. חמץ ומצה פרק ה' הלכה א'. However, at this point we detect the first glimmer that this might not be a totally accepted *psak*. It is only a glimmer, for we cannot know for sure, historically, what the actual truth is. The law as enumerated by Rambam above is numbered paragraph 1; the next law, #2, deals with the question of adding juice to flour instead of water, and here Rambam rules that it is permissible. However, the Ravad challenges his ruling: "this is not so simple, and not everyone agrees because even though it is not *chametz* and one is not liable for the death penalty for causing it to ferment, still it is *chametz nuksha* and is forbidden."

   The standard editions of the Yad have this comment cited with regard to law #2; however, the *Chaye Adam* writes that he saw it with the comment attached to law #1 — which would mean that Rambam's contemporary did *not* agree with him on the crucial issue of whether rice would be permitted on Pesach.

6. רכ"ב

ועל הקטניות כגון פוייש ורייש ועדשים וכיוצא בהם רבותינו
נוהגים בהם איסור שלא לאכלם בפסח כלל.

> and concerning *kitniyot* such as ... lentils and the like, our Rabbis customarily consider them forbidden to eat at all on Pesach.

Although Rambam and *Smak* and many others employ the term *kitniyot*, it is not absolutely certain what they had in mind by this term. The *Shaare Teshuva* [7] considers the question of whether a coffee bean is included in the beans which are proscribed, and Rabbi David HaLevi (*Taz*) also found that he could not define the exact parameters of the term.[8]

In *Iggerot Moshe*, Rabbi Moshe Feinstein writes that there are many places where people consider peanuts as *kitniyot*, and these people should continue their custom. However, if a person lives in a place which has no established *minhag*, (custom) it is not necessary for him to refrain from eating peanuts.[9]

The very *existence* of an enactment *(gezera)* restricting the use of *kitniyot* strikes one as anomalous. If the Gemara considered and then rejected the possibility that rice and related foodstuffs could become *chametz*, if the Rabbis of the Talmud used to eat rice on Pesach, how are later Rabbis permitted to rule that rice may not be eaten?

Indeed, the custom of *kitniyot* was apparently not readily accepted by many decisors, and it evoked the opposition of many. In a responsum attributed to the Rosh[10] (although there are many who doubt that the Rosh is the authentic author of this book), he writes:

> This seems to us very strange, since the Gemara specifically considers it permissible. And I do not

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7. או״ח תנ״ג אות א׳
8. ט״ז שם אות א׳
9. אגרות משה או״ח חלק ג׳ סי׳ ס״ג
10. שו״ת בשמים ראש סי׳ שמ״ח

> know of any Beth Din in any place that made a regulation regarding it.

The author of *Smak*, tells about Rabbi Yehiel of Paris who used to eat white beans on Pesach.[11] Rabbi Yehiel was the leading Tosafist of his day, and his practice therefore was an expression of his disdain for an enactment which he could not countenance. The *Bet Yosef* similarly concludes that "it is an excessive restriction and people do not follow it."[12]

A number of theories have been advanced in response to this puzzling phenomenon: The *Smak* offers the reasoning that:

> Since grain is cooked in a pot and *kitniyot* are cooked in a pot (similar to grain) ... and also people make bread out of it, (therefore the Rabbis restricted its use) lest they accidently mix them up.[12a]

On the other hand, *Hagahot Maimoni*[13] and *Tur*[14] consider that the prohibition arose from the common custom of adding some grain flour to the rice flour to give it better consistency. Obviously, such a blend of flours, even if predominantly rice flour, would be considered *chametz*, and therefore the custom arose not to use rice and other *kitniyot* at all.[15] Other reasons for the custom are also offered, but they need not concern us here.

Despite the fact that leading Rabbis made light of any *issur* of *kitniyot*, others considered it a serious prohibition and applied it strictly. The *Maharil*[16] writes that "one who violates this restriction is liable to the death penalty and has transgressed the prohibition

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11. הגהות סמ"ק סי' רכ"ב
12. חתם סופר או"ח קב"ב, שו"ת צמח צדק או"ח נ"ו see also או"ח תמ"ג
12a. סמ"ק שם
13. שם
14. שם
15. Those Sehpardic Jews who do eat rice during Pesach take special precautions to assure that no admixture of any foreign substance is in the rice. They inspect each kernel and also rinse the rice three times. (*Hida* notes that even so, many Sephardim do not eat rice and even those that do, often do not rely on the women to check the kernels but do so themselves. This is reported by R. Ovadia Yosef in his Haggada — "מצרכי מזון")
16. הלכות פסח סי' ב"ה

of 'do not deviate from the matters which they (the Rabbis) teach you.''' Writing in the *Shulchan Aruch*, Rabbi Yosef Karo rules that "... rice or other types of *kitniyot* do not become *chametz*, and it is permissible to cook them,"[17] but the gloss of R. Moshe Isserles[18] immediately takes exception: "But there are those who forbid it, and the custom in Ashkenaz is to be strict, and one ought not to change." Later, the Vilna Gaon[19] concurs with this, as do *Shulchan Aruch HaRav*[20] and *Aruch Hashulchan*.[21]

Based on their respective halachic decisors, then, the Ashkenazic and Sephardic communities have developed quite different traditions connected with the observance of Pesach. We will discuss later what happens when these two cultured norms collide.

Exceptions

Given that avoiding *kitniyot* was accepted as the Ashkenazic tradition, howsoever dubious its origin, what is the scope of this *issur*? Does it imply that, as far as we are concerned, *kitniyot* should be regarded in the same way as *chametz*; if not, to what extent is it different?

The *Mishnah Brurah*[22] writes that a sick person who needs *kitniyot* may eat them. This is so, he rules, even if it is not a sickness which endangers life.

ופשוט ... לחולה אף שאין בו סכנה דמותר לבשל לו אם צריך לזה.

This *psak* of the *Mishnah Brurah* has direct application to the question of medicine, especially the way in which medicine is formulated today. Most medications come in the form of pill, tablet, or capsule, wherein the active drug is mixed with a starch as a binder. Often the starch employed is corn starch, which is *kitniyot*. Does the above-stated rule of the *Mishnah Brurah* imply that such a pill can be taken by a sick person on Pesach? We

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17. או"ח תכ"ג ס"ק א'
18. שם.
19. אות ג'
20. סק"ה
21. סק"ר
22. או"ח תנ"ג אות ז'

cannot jump to conclusions, because one could well argue that the sick person needs the *drug*, the active ingredient, and *not* the *kitniyot* starch, which is simply an inert binder which makes it easier to ingest the medicine, but does not affect a healing process. Therefore, if the *kitniyot* starch is the major ingredient, a Rabbi would have to study the question of whether that medicine could be taken. A further factor to be considered is the amount of *kitniyot* contained therein. If there is more medicine than starch, then the starch is considered halachically void and there would be no question that the tablet could be taken. As we shall see, this consideration affects many other aspects of the halacha.

A general principle of Jewish law is that if a forbidden ingredient (יבש) falls into a kosher food (יבש) but constitutes less than half of the total mixture, one is permitted to use it (*batel berov*). However, for Pesach the ruling is in the reverse — "Even one part out of a thousand does not become *batel*." But this strict principle is operative *only* with respect to *chametz* on Pesach and definitely not to *kitniyot*. Ramo rules that if "rice or other *kitniyot* fell into the food it is permitted to eat it."[23]

With this in mind, we should take another look at the furor which in the past few years has arisen concerning chocolate and candy manufactured in Israel under the supervision of the Rabbinate. Many candies contain corn syrup as the sweetener: Should this be considered a problem for Ashkenazic Jews? Based on the principle that if *kitniyot* are less than half of the total the food may be eaten, many people see no reason why such candy should be avoided. However, it is necessary to ascertain what percentage of each individual type of candy is *kitniyot* — if more than half, Askenazic Jews would not eat it.

The difference between candy and medicine is obvious. If *kitniyot* is a major ingredient in medicine, a Rabbi might still rule that the patient should take it during Pesach. It would depend on the severity of the condition for which the medicine is prescribed. However, no such leniency exists with respect to candy.

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23. שם

Just as the *issur* of *kitniyot* is not equal in force to the *issur* of *chametz*, it differs also as to the time of its application. *Chametz* which was in the possession of a Jew during Pesach is forever forbidden, but Ramo writes that "it is permitted to keep all kinds of *kitniyot* of a Jew after Pesach."[24]

With respect to the time when the *issur* of *kitniyot* begins, there is a little discussion. The first Lubavitcher Rebbe, writing in his *Shulchan Aruch HaRav*[25], theorizes that even if we accept the *issur* of *kitnyot* as a proper prohibition, certainly it cannot be stricter than the actual laws of *chametz* and matzoh. Therefore, if one were to be careful to treat the *kitniyot* just as one would treat regular flour and, observing all the rigors of the law, produce a matzoh using *kitniyot* flour (rather than grain flour), why should it be forbidden on Pesach? He holds that it is permitted, and the *Pri Megadim* further allows one to eat it on the day before Pesach (*erev* Pesach, when one is not permitted to eat either *chametz* or any matzoh which can be used at the Seder. Since a rice matzoh cannot be used for the Seder, not being one of the five grains, then it should be permissible to eat it on that day). However, *Shoel Umashiv* disagrees with this theory.[26] Some students of halacha would like to claim that the *Pri Megadim*[27] also approved *kitniyot* (as such, and not made as a matzoh is made) for *erev* Pesach, for he saw the *issur* of *kitniyot* as applying only to the holiday of Pesach and not to the day preceding it. However, a careful reading of the *Pri Megadim* will not suport such an interpretation.

In *Siddur Pesach KeHilchata*[28] Rabbi Grossman, after citing the *Avnei Nezer* and *Kaf HaChaim*, writes that he heard from Rav Weisz that our custom is not to eat any *kitniyot* whatsoever, even on *erev* Pesach.

Other exceptions further hedge the scope of the *kitniyot* restriction.

In time of great need, when a person does not have

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24. שם
25. או"ח תנ"ג אות ה'
26. מהדורא קמא חלק ראשון קע"ה
27. או"ח א"א תמ"ד
28. See sub-heading קטניות there.

> what to eat without great penury, it is permitted to cook *kitniyot*.[28a]

Halachic history indicates that this lenient clause was accepted and acted upon over the years. The *Nishmat Adam*[29] writes that at the time of a dreadful famine in 1771 in Fiorda, a Beth Din was convened and ruled that the prohibition of *kitniyot* would be waived for that year. Also, in 1810, the province of Westphalia experienced famine, and the Rabbis similarly allowed the residents to eat *kitniyot*.The *Minchat Kenaot* writes[30]

> ... and for three years now, our Rabbi, the great Rabbi Leib, has permitted *kitniyot* during Pesach, a time of very high prices, it being a time of destruction and famine.

The *Mishnah Brurah*[31] concurs with this practice, and indicates that in time of great need, it is permitted to use *kitniyot* for Pesach, although he does advise singeing them in a lot of water (so that the *kitniyot* will never be able to ferment) in accordance with the views of the *Hatham Sofer*. And there were years when the Rabbis of Eretz Yisrael allowed the people to eat *kitniyot*, due to the difficult economic situation.[31a]

Derivatives

Is it only the item of *kitniyot* itself which is forbidden, or does the *issur* apply also to its extract or derivative?

I have been told by people who were living there, about the great brouhaha which ensued upon the announcement by the then Chief Rabbi of Israel, Rav Kook z'l, that corn oil could be used for Pesach. Corn is *kitniyot*, and this ruling permitted extract of *kitniyot* to be used. They remember vividly the signs posted on all the walls by his opposition, warning the people that under no circumstances should they rely on this *heter*.

28a. חיי אדם הלכות פסח
29. סי' כ'
30. שו"ת מהר"ץ חיות נדפס תר"ט
31. אות ז'
31a. המועדים בהלכה רס"ב

The question applies not only to the oil, but to any derivative of a *kitniyot* product. Concerning Israeli candy, which was previously discussed, we should note that in the event corn extracts do *not* fall within the definition of the *kitniyot issur*, there would be no question regarding their permissibility on Pesach, regardless of the percentage of corn syrup in the mixture.

The Rav Kook controversy was just another chapter in the longstanding debate regarding the status of *kitniyot* derivatives. As early a decisor as the *Trumat Hadeshen*[32] forbids their use; *Melamed Le-ho'il*[33] also discusses it.

In his gloss to *Shulchan Aruch*, Ramo holds that although we do not use *kitniyot* on Pesach, yet "it is permissible to use the oil of *kitniyot* to kindle a light."[34] This statement leaves the clear implication that *kitniyot* derivates may be used for some beneficial or practical purpose, but cannot be consumed.[34a] Not all decisors have accepted that implication. In *Sridei Esh* we find a listing of the major authorities on either side of the question of permissibility of peanut oil for Passover.[35] Those forbidding its use for Ashkenazim are the *Avnei Nezer* and *Minchat Eleazar*,[36] while included in the camp of those permitting it are the Kovner Rov[37] (if it is made before Pesach), the MaHarsham, *Melamed Le-ho'il*, and Rabbi Samson Raphael Hirsch.[38] Rav Moshe Feinstein rules that those who do observe the prohibition of *kitniyot* with respect to peanuts should also refrain from using peanut oil. However, if it is the person's custom to eat peanuts, he may also use peanut oil.[38a]

There has even been some discussion concerning cottonseed

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32. קי"ג
33. חלקת יעקב סי' צ"ז, מקראי קודש ב; שרי חמד חמץ ומצה see also או"ח פ"ז, פ"ח
34. תנ"ג אות א'
34a. One wonders why the Ramo found it necessary to add that one may keep *kitniyot* in the house during Pesach. If he permits use of *kitniyot* for oil, does that not automatically presuppose that it is permissible to keep the *kitniyot* in the house?
35. חלק ב' ס' ל"ד-ב
36. או"ח שע"ג - תקל"ג
37. באר יצחק או"ח תשובה י"א
38. מלמד להועיל או"ח פ"ז, פ"ח
39a. אגרות משה או"ח חלק ג' ס' ס"ד

oil, which some persons were concerned might be considered part of the *kitniyot* ban. But Rav Chaim Soloveitchek is cited as having allowed it[38b]; it is also reported that in Jerusalem in 1927 the Rabbis, under the leadership of R. Zvi Pesach Frank, did permit cottonseed oil for Pesach.[38c].

Kitniyot further differs from *chametz* in that one may derive benefit from it on Pesach, as noted above. *Chametz* may not be owned or used by a Jew in any shape or form on Pesach, but that is not true of *kitniyot*.[39] A person may feed it to his animals, for example, and as mentioned, may use its oil to illuminate his house. Virtually all halachic decisors concur that *kitniyot* are forbidden only for consumption but other uses are permitted, although the *Maharil* notes that some exceptionally pious persons would not use *kitniyot* oil even for lighting on Pesach.[40] However, the normative ruling is that *kitniyot* are only restricted as human food on Pesach and may even be in the possession of a Jew throughout the holiday without qualm.

Children

It is interesting to find among the responsa of the Chief Sephardic Rabbi of Israel, Rabbi Ovadia Yosef, a *psak* addressed specifically to Ashkenazic Jews.[41] At the end of a long treatise on *kitniyot* and why Sephardim do eat them, Rabbi Yosef appends a message "to our brothers, the Ashkenazim". Rabbi Yosef probes the issue of giving *kitniyot* to a youngster — is it also forbidden for a child to eat *kitniyot* as it is for an adult? He refers to the controversy between the Rambam and Rashba whether one is permitted to feed a child food which is rabbinically but not biblically forbidden. He proves that the *Shulchan Aruch* rules, in agreement with Rambam, that it is forbidden. Nevertheless,

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38b. צבי פסח פרנק, מקראי קודש חלק ב' דף ר"ז

38c. שם סי' ס'

39. או"ח תנ"ג סי' א'

40. שם also see תרומת הדשן, who relates that the custom was not to derive any pleasure from any derivative of *kitniyot*.

41. יחוה דעת חלק א' שאלה ט'

kitniyot are not within the category of food even rabbinically forbidden, he maintains. It is only a *chumra,* a stringency which the community adopted, and therefore Rabbi Yosef advocates allowing children to eat items with *kitniyot* in them. Although many people might not wish to avail themselves of this opinion in ordinary circumstances, yet in the case of medicine for a child, it can be considered as a further factor for allowing a child to take even that medicine which is primarily made from *kitniyot.* He also advises that it is not necessary to be overly strict with children regarding candy which may contain some *kitniyot.*

Marriage

A situation which did not arise with great frequency in the past is now raising a question in many a household. Since the Sephardic and Ashkenazic communities, so long separated by distance, economics, and politics, now live in close proximity to one another, it was inevitable that more "intermarriage" should occur. Which customs do the newly-married young people follow? R. Moshe Feinstein rules[42] that a woman upon marriage should assume all of the customs which her husband accepts, both those which are more strict and more lenient than those she previously observed. Although *Siddur-Pesach KeHilchato*[43] basically agrees with the *psak* of R. Moshe, yet without further elaboration, he adds[43]

> ספרדיה הנשואה לאשכנזי נוהגת כבעלה ואסורה בקטניות, ואם אין בעלה מקפיד על כך אינה צריכה לנהוג איסור בזה.
>
> A Sephardic woman who is married to an Ashkenazi follows the customs of her husband and is forbidden to eat *kitniyot.* But if her husband does not care about it, then she need not accept this stricture...

Furthermore, he adds

> וכן אשכנזיה הנשואה לספרדי יכולה לנהוג בהיתר קטניות אם זהו רצון בעלה.

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42. אגרות משה או"ח קנ"ח
43. פרק ט"ז אות י"ג

> Also an Ashenazic woman married to a Sephardi is allowed to follow her husband's custom and be lenient about *kitniyot* if that is the wish of her husband.

Without explaining how he comes to this conclusion, Rabbi Grossman apparently feels that the operative factor in the "clash"of conflicting cultures is the reaction of the husband. It would be interesting to understand why — but he does not elaborate.

A somewhat different picture emerges from the writing of Rabbi Ovadia Yosef.[44] He rules that even a wife who abstains from *kitniyot* is permitted to prepare foods containing *kitniyot* for her husband and other members of the family. To some extent, Rabbi Yosef seems to leave the option of whether to eat *kitniyot* or not in the hands of the woman involved, not her husband.

As for Ashkenazic relatives or friends who happen to be eating at the house of a Sephardi on Pesach, Rav Yosef rules that if the food is not *kitniyot*, there is no need to inquire if the pots in which the food was prepared were used for *kitniyot* within the past 24 hours.[45]

The topic of *kitniyot* is an absorbing study of the complexity of Jewish law. An investigation of the origins, implications, and scope of the halacha lead one to many intriguing insights into the development of normative Jewish practice.

Particularly in our time, when the Jewish people seem to be coming together "from the four corners of the earth," an appreciation for the rationale underlying divergent customs will have a salutory effect in bringing us together and will hopefully foster greater respect for our own traditions as well as for those of our brethren from other lands.

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44. הגרה של פסח also, in יביע אומר, ה:לז. Rav Yosef presents an exhaustine overview of the halachot involved in the customs of an Ashkenazi woman married to a Sephardic man. Among others, he cites the רשב"ץ (in his אות ד') who went so far as to consider her possible need to continue Sephardic customs even after the death of her spouse.

45. שם דף נ"ה

Visitors in Israel and Yom Tov Sheni

David Horwitz

Jews from the Diaspora who visit Israel for the holidays are invariably faced with the question whether to observe a "second day"(*Yom Tov Sheni*) or to follow their Israeli hosts and keep only one day. Although for hundreds of years this dilemma was rarely encountered, today this question concerns a large and growing number of Jews. Not only has the great ease in travel increased the number of visitors to and from Israel at holiday times, but there is also quite a large cadre of "foreign" students who spend a year or two studying at the various yeshivot and institutes in the Holy Land. In this essay, an attempt will be made to show how the theoretical questions concerning the nature of *Yom Tov Sheni* influence the practical decisions concerning this matter. In addition, the various opinions on the issue will be presented.

The halachot of *Yom Tov Sheni* are rooted in the manner by which the Jewish solar-lunar calendar was fixed. Months were inaugurated by Beth Din in Jerusalem after receiving and accepting the testimony of witnesses who claimed that they had seen the new moon. The witnesses would be asked questions concerning the position of the moon relative to the sun, its height in the sky, and the direction in which it was "pointing'. If the answers contained

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astronomical impossibilities, the testimony was disqualified. If, however, both witnesses independently corroborated each other's statement, and no impossibilities were attested to, Beth Din would accept the testimony. The head of Beth-Din would then declare מקודש (the new month is sanctified) and the crowd of people who heard the declaration would respond מקודש מקודש, thus inaugurating the month.[1]

Yet Beth Din could, under certain contingencies, set the date of the new month regardless of any testimony.[2] The current situation, in which all our months have been pre-calculated (by the Nasi Hillel II, who lived in the fourth century c.e.)[3] is sanctioned by the halacha that allows for fixing the calendar by calculation in the absence of Beth Din.

Originally, a smoke signal was the method that Beth Din used to notify the Jewish communities outside of Israel of the establishment of the new month and the precise day of any holidays to be observed during that month. A huge bonfire would be lit on the Mount of Olives. When the bonfire was sighted by people situated on another mountain further north, another bonfire would be lit on that mountain. The progressive fires continued until they reached the Jewish communities in Babylonia. When this notification procedure was foiled by the Samaritans, a system involving messenger runners was inaugurated.[4] However, if the messengers did not arrive at points in the Diaspora by the fifteenth of the month (e.g., Nisan) the Jewish communities there observed the first day of Passover on that day (based upon the possibility that the previous month had only twenty-nine days) as well as on the following day (on the possibility that the previous month had thirty days and the "fifteenth" of the following month was a day later. According to the Jewish calendar a month can have only twenty-nine or thirty days). Thus, at a very early stage in history,

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1. See *Rosh Hashana* 23b-24a
2. Ibid., 25a
3. See Rambam *Hilkhot Kiddush Hahodesh* 5.2
4. The Yerushalmi to *Rosh Hashana* 2-1 mentions that Rebbe (Rabbi Judah the Prince, the compiler of the Mishnah) was the one who discontinued the smoke signal (due to the Sadducees).

communities in the land of Israel observed one day of festivals while those in the Diaspora occasionally observed two days, due to doubt as to the exact date.

The Gemara does not mention when the earliest observance of *Yom Tov Sheni* was. R. Saadia Gaon claims that as *halacha leMosheh MiSinai* it was ordained that Jews in the Diaspora should observe the holidays for an extra day. (This complements R. Saadia's declaration that in reality the months were *always* pre-calculated, and the witness-Beth-Din procedure was only a formality. R. Hai Gaon declares that R. Saadia's statements on this score served as a "stick" with which he refuted the arguments of heretics who altogether denied the validity of the rabbinic calculations.)[5] R. Hai Gaon suggests that at the time of Joshua, observance of *Yom Tov Sheni* by those Jews who were in the Diaspora was an accepted procedure, and the *Yerushalmi* (in *Massechet Eruvin)* calls *Yom Tov Sheni* of Rosh Hashanah מתקנת נביאים הראשונים (a decree from the early prophets). Yet throughout the era that Beth-Din was establishing the months, the extra day observed out of doubt had the halachic status of *safek* (possible) Yom Tov.[6]

Once the pre-calculated calendar was instituted, the Diaspora communities had no further need to observe an extra day. Nevertheless, they continued to do so. The Gemara in *Beitzah 4b* mentions why the institution, with all its concomitant prohibitions, remained in force.

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5. *Otzar HaGeonim* to *Beitzah* 4b. R. Saadia also claimed that the rules of the calculated calendar, such as the impossibility of Rosh Hashana falling on Sunday, Wednesday, or Friday, were always followed, and discussions in the Gemara that assume that Rosh Hashana actually occured on those days were of only a theoretical nature. A full discussion of R. Saadia's position, which apparently was followed by Rabbeinu Hananel as well, can be found in volume 13 of *Torah Shelemah* (ed. Rabbi M. M. Kasher, New York, 1949) pp. 40-66.

6. See *Dikdukei Soferim* to *Beitzah* 4b where the text is recorded. The aforementioned *teshuva* of R. Hai Gaon (op. cit. ✡5) states explicitly that there are two distinct explanations given why *Yom Tov Sheni* is observed today. See also Tos. *Taanit* 2a (s.v. *Me'ematai*) and comments of R. Zvi Hirsch Chajes ad. loc. See also Rosh (*Teshuvot* 23:8) and Radvaz, in *Teshuvot Radvaz* ✡594.) See also comments of Hida quoted in *Eretz Israel in the Responsa Literature*, Rabbi Israel Schepansky, (Jerusalem, Mosad Harav Kook, 1978) p. 432.

הזהרו במנהג אבותיכם בידכם זימנין דגזרו המילכות גזרה ואתי לקלקולי

> Give heed to the customs of your fathers which have come down to you; it might happen that the government might issue a decree (thereby preventing knowledge of the exact Hebrew calendar date) and it will cause confusion in ritual.

The statement contains two distinct components: מנהג אבותיכם (your fathers' customs) and גזרה (fear of a decree). Are these two separate and independently operative reasons for maintaining the institution of *Yom Tov Sheni* or is only one of them the operative factor? Both opinions on this matter are found in the subsequent halachic literature[7].

A related question is — what is the status of the subsequent observance of *Yom Tov Sheni?* The Baale Tosafot understand *Yom Tov Sheni* to be formal *minhag* (custom), proving from *Yom Tov Sheni* the general rule that one may recite blessings on a mitzvah-act that is a *minhag*.[8] Rabbenu Nissim, on the other hand, remarks that the observance of *Yom Tov Sheni* is a *takana mid'rabbanan* (decree of rabbinic law), hence one cannot adduce from it the permissibility of reciting benedictions on *minhagim*.[9]

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7. Of course, the applicable commandments and prohibitions were performed on each of the days. Yet, as both days were surely not *Yom Tov*, one could perform certain acts based upon a certainty that *one* of them was a weekday. (see *Beitzah* 6a.)
8. Rambam *Hikhot Yom Tov* 6:14 and *Talmud Torah* -:14. See the formulation of the Rambam's position by R. Yitzhak Ze'ev Soloveitchik (within the context of the Rambam in *Hilkhot Berakhot* 11:16.)
9. Rabbeinu Nissim's position can be found on page 22a of the pages of the Rif on *Sukkah*. He maintained that although the *reason* for the continued observance of *Yom Tov Sheni* was ספק, its *nature* is that of a *takana*. In another context, he stated that those acts which were performed based upon the assumption that *one* of the two days of Yom Tov must be a *yom hol* (such as setting down an *'eruv tehumim* on the first day of *Yom Tov* and making use of it on the second day) can still be employed today. (Rabbeinu Nissim on p. 13a of Rif on *Beitzah*.) This dovetails nicely with his position that today, there is a "*takana*" to keep the earlier situation. Thus, nothing that was allowed when the Jews actually kept two days *misafek* could now be prohibited. The Rambam, on the other hand, stated that as there is

The formulation of *Yom Tov Sheni* as a *minhag* leads to an evaluation of the halachot pertaining to one who travels from one place to another with different *minhagim*. Which custom does he follow? The Mishnah in *Pesahim* states:

> נותנים עליו חומרי מקום שיצא משם וחומרי מקום שהלך לשם

> We impose upon him the restrictions of the locality from which he departed and the restrictions of the locality to which he has gone.[10]

Rav Ashi, quoted in *Pesahim* (51a), introduces the qualification of דעתו לחזור – planning to return to one's original place of residence. The temporary visitor is required to keep the *minhagim* of his hometown (חומרי מקום שיצא משם), but not those of the city he is currently staying in; whereas one who becomes a permanent resident of a different city adopts the new city's customs. Due to a second factor, אל ישנה מפני המחלוקת (one should not deviate from the norm, lest he cause a rift), the temporary visitor must not publicly practice his hometown *minhagim* in the city that he is visiting.[11]

If the observance of *Yom Tov Sheni* is viewed in this context, then when one travels from the Diaspora (where the *minhag* of *Yom Tov Sheni* is observed) to Israel (where it is not) he should be obligated to observe two days while temporarily in Israel. When the author of *Bet Yoseph* (R. Joseph Caro) was asked what Jews should do when they visited Israel for *Yom Tov*, concerning *Yom Tov Sheni*, he indeed responded in such a manner.[12] Yet this is not

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now a minhag to observe *Yom Tov Sheni b'torat vadai*, the aforementioned acts can no longer be performed. (*Hilkhot Yom Tov* 6:15)

10. *Pesahim 50a.*

11. Ibid., 51a. See also *Hullin* 18b. *Tos. (Pesahim* 51a s.v. *Rabbah)* points out that according to the Gemara's explanation, the Mishnah is split off into two disconnected parts, with חומרת מקום שיצא משם applying when one has in mind to return to his former residence, and חומרת מקום שהלך לשם applying when one plans to remain in his new city.

12. *Teshuvot Avkat Rochel,* #26.

the only opinion on the matter. R. Moshe Hagiz recounts that many authorities instructed young men who came to Israel for the holidays to observe only one day, and he further maintains that their status is not necessarily that of רעתו לחזור (planning to return), for if they would find a bride they would stay in Israel. He points out that married men who leave their families to visit Israel, as well as boys who are still dependent upon their families economically ,סומכים על שולחן אביהם, must observe two days.[13]

The *Hacham Zvi*, however, forcefully argues that *anyone* temporarily staying in Israel should observe only one day. To him the concept of חומרי מקום שיצא משם, "stringent customs of one's native place of residence" is irrelevant. "*Humrah*" is conceivable only when such an act "could" have been practiced in that place where it was not. People living in Israel, however, could not have observed an extra day of *Yom Tov*, as that would violate the biblical prohibition of בל תוסיף, adding another mitzva act to those prescribed in Torah. One who sits in a sukkah in Israel on *Shmini Azeret* would be adding an eighth day to the *seven* commanded in the Torah. Thus, he concludes, not only should temporary residents of Israel recite the weekday prayers, but they should not abstain from work either, for if they take it upon themselves to observe another day, they too will violate this prohibition.[14]

The *Hacham Zvi's* son, R. Jacob Emden, disagrees with his father's ruling. Accepting in theory that his father's guidelines for determining when the concept of חומרי מקום שיצא משם is applicable, he nonetheless challenges the assumption that people living in Israel are forbidden to observe two days. Quoting the Gemara in *Beitzah* concerning *Yom Tov Sheni*, he declares that observing a second day משום גזרת שמד, due to a decree, logically applies in Israel as well!

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13. *She'elot u'teshuvot Halakhot Ketanot*, Vol. 1, #4. (This *teshuvah*, as well as the other *teshuvot* dealing with the issue of *Yom Tov Sheni*, is quoted in Rabbi Israel Schepansky, *Eretz Israel in the Responsa Literature* (Jerusalem, Mosad Harav Kook.) pp. 413-492.)
14. *She'elot u'teshuvot Hakham Zevi* #167.

> ואי לאו דמיסתפינא הוה אמינא דכל בני ארץ ישראל צריכים לנהוג כל שני יום טוב של גליות דמאי שנא אינהו מדידן האידנא זיל בתר טעמא דשלחו מתם הזהרו במנהג אבותיכם וכו' . . . ואתי לאיקלקולי'.
>
> If I would not be afraid to do so, I would state that all people living in Israel must observe every *Yom Tov Sheni*, for what is the difference today between them (Jews living in Israel) and us (Diaspora Jews)? We must follow the reason for *Yom Tov Sheni* — "keep your fathers' customs...a confusion in ritual may result," which is possible in Israel as well as in the Diaspora.[15]

He continues that even if those living in Israel did not accept the observance of a second day, as it is within their purview to do, a Diaspora Jew who visits Israel for the holidays should certainly observe the *humrah* of observing the extra day while in Israel.

R. Jacob Emden's logic is based upon the assumption that משום גזרת שמד, the future possibility of a decree, stands as a reason for *Yom Tov Sheni* regardless of the factor of מנהג אבותיכם (keeping the fathers' customs). Thus the decision to keep *Yom Tov Sheni* in spite of having no doubt as to the exact date of *Yom Tov* was a directive based on a scope wider than that of the earlier law that *Yom Tov Sheni* be observed in the Diaspora due to doubt.

The *Hida*, on the other hand, assumes that one must understand מנהג אבותיכם as the exclusive factor for *Yom Tov Sheni*, and it is precisely for this reason that its observance was limited to the Diaspora. (Another possible answer that may be implicit in the words of the *Hacham Zvi* is that the Rabbis were simply less afraid of a גזרת שמד in Israel). The *Hida* interprets the Gemara in *Beitzah* as saying that *because* of the possibility of גזרה those in the Diaspora who already had observed two days should keep their מנהג אבותיכם.[16]

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15. *She'elat Yavetz*, Vol. 1, #168.
16. Op. cit. #7 (end).

Most subsequent *poskim* follow the *Bet Yoseph's* reasoning and conclude that two full days *Yom Tov* should be observed, during which one should recite all the *Yom Tov* prayers and hear the Torah reading assigned to *Yom Tov.*[17] The *Mishnah Brurah* also mentions that on the second day one should pray the *Yom Tov* prayers in private, in deference to the principle אל ישנה אדם מפני המחלוקת.

One Rabbi who was reputed as leaning towards the position of *Hacham Zvi* was R. Shumuel Salant, his rationale being that during the time of the second Beth Mikdash, Jews who travelled to Israel for the holidays certainly observed only one day. The injunction to "be careful to maintain the customs of your fathers" cannot impose upon us a custom more stringent than that which those fathers kept! If Jews in ancient times did not observe the second day of *Yom Tov* when going up to Israel from Babylon for the festival, we certainly cannot be obligated to do so now. Therefore, the principle of retaining the stringences of one's place of origin should not apply in this situation.

Stated this way, R. Salant's position equals that of the *Hacham Zvi.* Yet another version of his view is that only vis-a-vis prayer and reading of the Torah did he advocate following the *Hacham Zvi.* With respect to work, however, he held that two days of abstention should be observed. (This idea of taking both sides of the issue results in what is now popularly called the "day and a half" position.)[18]

R. Yehiel M. Tukechinsky devotes a section of his book of laws pertaining to Jerusalem עיר הקודש והמקדש to the question of *Yom Tov Sheni.* He lists six practical rules for one who observes two days yet wishes to be *machmir* for the *Hacham Zvi's* position as well.

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17. *See Pri Hadash, Orah Hayyim* 468:4, *Pe'at Hashulhan, Hilkhot Eretz Yisrael* 2:15, and *Birkei Yoseph,* 496:7.

18. In the aforementioned article, an opinion is quoted that even the "day and a half" position was once practiced only in Jerusalem (where R. Salant lived), whereas in the rest of Israel it was customary to observe two full days.

1. On *Motzaei Yom Rishon* (the second night) one should hear *havdalah* from an Israeli and should not make *kiddush.*
2. On the next day one should recite *Chol Hamoed* prayers (e.g. on Sukkot he should mention וביום השני during the *musaf* prayer). One may even receive an *aliyah* to the Torah for the portion וביום השני. Nevertheless, he should abstain from work as he would on *Yom Tov.*
3. On Shmini Azeret one should *not* sit in the sukkah. That night, weekday prayers (אתה חוננתנו not יעלה ויבא) are to be said.
4. The next day (Simchat Torah in the Diaspora but a regular day in Israel) one should don *tefillin* and recite weekday prayers but should nonetheless abstain from work.
5. On the second night of Pesach, besides the aforementioned procedure concerning *motzaei Yom Tov Rishon,* there is the problem of conducting the seder. If one decides to do so, he should eat a כזית of matzoh and maror *without* the *berachot,* recite the *berachot* only on the first and third (*birkat hamazon*) cups of wine, and should recite the haggadah *without* the concluding blessing.
6. When *Yom Tov* falls on Thursday, the Diaspora Jew in Israel will have to abstain from work on Friday. Therefore, he will require an *Eruv Tavshilin* to permit him to prepare food on Friday for Shabbat. He should make the *Eruv Tavshilin* on Wednesday, but without a *bracha.*

R. Hayyim Elazar Shapira of Munkatsch records that he refused to stay in Israel for Shavuot as he was unsure whether to decide for the *Hacham Zvi* or against him.[19] He further quotes a passage from *Masechet Megilla* which posits that, concerning whether one reads the Megilla on the fourteenth or the fifteenth of Adar, one follows the custom of the place where he is currently staying, regardless of the custom in his hometown.[20]

Another interesting point he raises is the case of one who would be in Israel for the "first days" of *Yom Tov* but not the

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19. *Minhat Elazar* Vol. 3, #59
20. Ibid. The passage is on p. 19a

"last days." R. Shapira (discussing a native of Israel sojourning outside of his country for part of *Yom Tov*) remarks that one must act in a consistent manner throughout the entire *Yom Tov*.[21]

The *Hatam Sofer* suggests that the nature of *Yom Tov Sheni* of Shavuot is different from that of Pesach or Sukkot.[22] According to Gemara, the date of Shavuot is not fixed, but is calculated as the fiftieth day from Pesach, whether it falls on the fifth, sixth or,a seventh day of Sivan.[23] Now, even in ancient times, by the advent of Shavuot, everyone knew the correct date of Pesach, even those who lived in far-off places that had observed an extra day of Pesach out of doubt. Nonetheless, two days of Shavuot were observed.[24] Thus, even according to the opinions that the *safek* status of *Yom Tov Sheni* remains in effect today, the case of *Yom Tov Sheni* of Shavuot, which was always observed *b'torat vadai*, would be different.[25]

A question to which R. Moshe Feinstein has addressed himself is whether a Jew in Israel observing two days can ask an Israeli

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21. Ibid.
22. *Teshuvot Orah Hayyim* #145 (end).
23. See *Rosh Hashana* 4b. The opinion that held that even when Bet-Din was establishing the months, the sequence must be a cycle of a full month (30 days) followed by a "missing" month (29 days), certainly realized that by the time of Shavuot its date (50 days after Pesach) was already known.
24. See Rambam *Hilkhot Kiddush Hahodesh*, from which he draws his inference (3:12).
25. Shavuot would then have the same law as those places which received the messengers on Hodesh Nisan (in time for Pesach) but not on Hodesh Tishrei for Sukkot. Messengers were sent out on Rosh Hodesh Elul on the assumption that, as since the days of Ezra the month of Elul was never full, the thirtieth day from Rosh Hodesh could be considered Rosh Hashanah. On the possibility that even in Israel two days of Rosh Hashanah were proclaimed, those in the Diaspora also observed two days Rosh Hashanah (See *Beitzah* 5a). (Beth Din would establish a second day of Rosh Hashanah if the witnesses to the new moon came מן המנחה ולמעלה.) If two days of Rosh Hashanah were observed, the "first day of Tishrei" would be on the second day, and Yom Kippur and Sukkot would date from that day. As there were many days in Tishrei on which the messengers couldn't travel, some places which were notified by Pesach when the first day of Nisan was were not notified by Sukkot when the first day of Tishrei was. The Gemara declared that the members of these communities should observe an extra day of Pesach as well as an extra day of Sukkot. (*Rosh Hashana* 21a). Observing Shavuot for two days is another example of this לא פלוג halacha.

(who considers the extra day either *Chol Hamoed* or a regular weekday, depending on the case) to do work for him on the "extra day" of *Yom Tov*. Is this to be compared to אמירה לעכו"ם (the prohibition of asking a non-Jew to do one's work on Shabbat or *Yom Tov*) and therefore prohibited? One case concerns a Jew from North America, who had a store in Israel with Israeli workers. R. Moshe Feinstein allowed him to keep the store open on *Yom Tov Sheni*.[26] Another case involved a foreigner actually asking the Israeli to do work for him on *Yom Tov Sheni*, and this he determined to be forbidden.[27] In *Iggerot Moshe*, Rabbi Feinstein explains the distinction between the two cases.[28] Just as in the days when *Yom Tov Sheni* was observed out of doubt *(misafek)* one who *knew* that the day was already a weekday (or *Chol Hamoed*) could do work for those who were observing an extra day, so now too the *workers* can work for one who is maintaining the halachic *safek*. Yet the man who is himself observing an extra day accepts thereby the prohibition of אמירה לעכ"ום as well. Thus *he* may not ask someone observing only one day to do work for him.

Rav Feinstein[29] also discusses how much time one must spend in Israel before he is removed from the category of "intending to return" דעתו לחזור. One defined as an Israeli resident according to the halacha would certainly observe only one day of Yom Tov. The most lenient opinion, expressed in שו"ת זרע אברהם, is that a person who arrives in Israel with the intention of settling there is immediately considered a resident of Israel, even if later (and during *Yom Tov* itself!) he plans to return to the Diaspora.[30]

Most other opinions assume that there is an initial period of time that one must stay in Israel in order to establish residence. The question then become whether categories of residency requirements in different areas of the halacha can be applied here.[31]

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26. *Iggerot Mosheh, Orah Hayyim*, (Vol. 2) #99.
27. Vol. 3 #71
28. *Orah Hayyim*, (Vol. 4) #105. (See also Vol. 4 #107)
29. Vol. 4, #108.
30. *She'elot u'teshuvot Orah Hayyim*, #13.
31. See R. Judah Gershuni in *Or Hamizrah*, Nisan 5731.

The *Aruch Hashulchan* states that one who plans to stay in Israel for over a year is to be considered a "resident of Israel" for our case. Yet R. Moshe Feinstein returns to a distinction already made in שו"ת הלכות קטנות[32]. Although one who is totally on his own can establish himself as a resident of Israel, students who study in Israel, even for two or three years, are to be categorized as דעתו לחזור, for they are still tied to their families in the Diaspora.[33]

However, often people come to Israel but are not sure whether they will truly settle permanently. The question of how to proceed in such a circumstance is mentioned by R. Moshe Sternbuch, in his *Moadim U'zmanim Hashalem.* He cites the opinion that even those who would ordinarily follow the practice of observing a "full" extra day were they *certain* that they are returning to the Diaspora must modify their behavior if they are unsure. The *Hacham Zvi's* position might play a role, to the extent of saying weekday prayers and the like.[34]

Among the authorities who hold that one who intends to leave Israel and return to his home outside the land must observe two complete days with all the *Yom Tov* prayers, there is not universal agreement with the aforementioned declaration by the *Mishnah Brurah*[35] that these prayers must be recited privately. The *Hida* quotes the *Bet Yoseph* as holding that אל ישנה מפני המחלוקת the directive not to practice publicly one's divergent customs applies only to *work* on *Yom Tov.* Thus *Yom Tov* prayers, for example, could be recited in public. The *Hida* himself, however, claims that this rule *does* apply to prayer.[36] R. Zvi Pesach Frank rules that even native Israelis may participate in a *minyan* made up of Jews from the Diaspora reading the *Yom Tov* portion of the Torah on the second day.[37]

Just because a town is geographically situated within the

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32. Op. cit. note #14.
33. *Iggerot Mosheh, Orah Hayyim* (Vol. 2) #101
34. Vol. 7, #120
35. Op. cit. #19
36. *She'elot u'teshuvot Tov 'Ayin,* #14.
37. *She'elot u'teshuvot Har Zevi, Orah Hayyim,* #70.

borders of Eretz Israel is not yet sufficient grounds for observing only one day of *Yom Tov* therein. Another factor which may be considered is whether, historically, this was one of the places to which messengers were sent monthly to inform the residents of the new month. Ritva[38] declares that once the months were established by calculation, all of Eretz Israel, even those areas that had not been notified by the messengers, proceeded to observe one day. The גזרה שלחו משם applied *only* to the Jews in the Diaspora. Rambam, on the other hand, recognizes no distinctions between Israel and the Diaspora on this account, but only between those places where the messengers did arrive in time and those where they did not. The ruling that Jews should continue to observe an extra day of *Yom Tov*, as their ancestors had, was imposed only in areas that fell under the latter category.[39] Thus Jews in new settlements in Israel situated in areas to which the messengers were not sent in ancient times would, strictly speaking, have to observe two days. Following this reasoning, the Gaon of Rogachov, R. Joseph Rozin, advised his son-in-law living in Petach Tikva to observe *Yom Tov Sheni*. The *Hazon Ish* was also known to observe another day of *Yom Tov*, on the possibility that the ancient messengers might not have reached B'nei B'rak. Nevertheless, the generally accepted custom in this matter is for native Jewish residents throughout Israel to observe only one day, as per the ruling of Ritva.[40]

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38. *Hiddushim* to *Rosh Hashanah* 18a.
39. Rambam *Hilkhot Kiddush Hahodesh* 3:11
40. The *Hazon Ish* discusses this point and maintains that even according to Rambam, in an area in Israel through which the messengers *may* have (originally) passed, one would observe only one day of Yom Tov, whereas a similar case of *safek* in the Diaspora would require one to observe two days. Thus the practical difference between the Rambam and the Ritva is minimized. (See *Hazon Ish al Harambam*, s.v. *Hilkhot Kiddush Hahodesh*, 5:4). While discussing the Rambam's position, Maran Harav Joseph B. Soloveitchik mentioned the *safek* of his uncle (Rav Yitzhak Ze-ev) whether the mesengers had passed through the place where he lived (in Jerusalem!) and who was *mahmir* concerning *dine d'oraita* on *Yom Tov Sheni*. The Rav also understood that the Rambam does not define categories of "places" (i.e., Israel or Diaspora), but areas where the messengers came and areas where they didn't, חומרת מקום שיצא משם, and the resultant questions of residency are not applicable. If one could be *certain* that he was in a place where the messengers had

Summary

Three views exist concerning the manner in which a temporary resident of Israel should act on *Yom Tov Sheni*. The majority of *Poskim*, beginning with the *Bet Yoseph*, assume that two days should be observed in their entirety, even with respect to prayers and reading of the Torah. The *Hacham Zvi* is of the opinion that only one day should be observed, while the intermediary third opinion maintains that with regard to abstinence from work one should observe two days, yet the weekday prayers should be recited and *tefillin* donned. If one has stayed in Israel a sufficient length of time, or if one is doubtful whether he will return to the Diaspora, then some *Poskim*, mandate that only one day of *Yom Tov be observed*.

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arrived, he would, even as a temporary resident, only have to observe one day of *Yom Tov*.