

Journal of Halacha and Contemporary Society

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**Rabbi Alfred S. Cohen,
Editor**

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

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

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Judging Transgression in the Absence of Witnesses

Rabbi Alfred Cohen

It is sad but true that nowadays one can hardly pick up a newspaper without reading about yet another teacher, minister, counselor or authority figure who is accused of moral turpitude. Unfortunately, these accusations have become commonplace. Yet one wonders – what is the proper response in such cases? With all the scandals being unearthed or alleged in every walk of life, be it government, religion, the marketplace, politics, education, it is important to realize that many persons accused (and even some convicted) of wrongdoing are in actuality quite innocent of the charges against them.¹ In the face of heated denials by the accused, is it legitimate to destroy a person's life merely on the word of a child or someone who might be disgruntled for whatever reason, if there is no evidence of the truth of the accusation? What happened to the American principle of innocent until proven guilty? And more pertinent for the discussion we wish to present here, what guidelines does Judaism offer for a

1. One is reminded about the ruined reputation of the entire Lacrosse team at Duke University a few years ago, based on an accusation which was only much later proved to be false. In Jewish history, such false accusations have also done incalculable harm to outstanding rabbinic personalities. In *Megillat Eivah*, Rav Yom Tov Lippmann Heller documents how malicious accusations by Jews, presented to the royal authorities in Vienna forced him to flee for his life to Poland (17th century); the author of *Sdei Chemed* was falsely accused of immoral conduct by a servant girl who had been bribed to make the charge, and he suffered disgrace for many years.

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situation where, by its very nature, there is often no evidence to substantiate an allegation of misconduct? How can we strike the right balance between the rights of the community and the rights of the individual, whether perpetrator or victim? These issues, with all their permutations, will be discussed hereinafter.

The truth, which may be very unpleasant to admit, is that there are situations where it is simply not possible to know what actually transpired and whether allegations are false or true.² The halachic guidelines are not clear cut, but it is the considered opinion of this writer, based on halachic writings of rabbinic sages for centuries, that the responsibility of communal leadership is to try to protect the community.

In the Torah there is a singular law, about a possibly-wayward wife, the *sotah*. The *sotah* is a woman whose husband suspects her of adultery; he has warned her about being sequestered with a certain man, but she ignored his warning. Now he does not know whether she did commit adultery or not. The only way to determine the truth is for her to undergo a certain trial procedure in the Temple courtyard, where she must drink bitter waters; if she sinned, the waters will kill her, but if she remained pure, the waters will become a blessing in her. However, before making her drink the waters, as part of the protocol the *kohen* in charge puts the *sotah* through an exhausting and degrading ritual, taking her first to one place in the courtyard, then to another, then partially removing her head and bodily covering (to shame her) and making her take an oath, to frighten her.

The rabbis question, “how [is it right] to shame her based only on a doubtful situation?”³ After all, she may be totally

2. To speak about these allegations or to write about them, is just *lashon hara*, pandering to salacious instincts or calculated to sell newspapers. This specifically does *not* include those situations where secular law mandates reporting suspicion of abuse.

3. *Yerushalmi, Sotah 1:5 and Sanhedrin 7:8*. The Chafetz Chaim (*Issurei Lashon*

innocent, as she protests! Rav Samla answers, “Everywhere that there is sexual promiscuity, *andromolusia* comes to the world”.⁴ Thus, in order to protect the community from disaster befalling them in the form of *andromolusia*, strong measures are taken to get her to confess, to save the community from harm.

This feature of the *sotah* law is instructive: when the community is in danger, the rights of the individual to be considered innocent until proven guilty have to defer to the overarching necessity of safeguarding the community.

In the present study, we will examine the many-sided aspects of this dilemma. Since by the very nature of certain transgressions it is not possible to have witnesses establish the veracity of a charge, the principle of the *sotah* must be kept in mind when confronting charges about immoral acts. Although it may be impossible to establish guilt or innocence, that should not preclude the Jewish community’s taking measures to protect itself. It is not powerless to act against an accused person. Although he might be innocent – he might also be guilty. The concern of the communal leadership must be to protect the community. This includes not only punishing transgressors but also setting up safeguards to prevent future

Hara, kelal 7, ot 31) reasons that *bet din* was justified in this “persecution” of the accused woman because it is their responsibility to maintain public morality and decency. *Techumin* XVI, p. 346 features an article which offers a different rationale which, in this author’s opinion, would be rejected by the Chafetz Chaim as being contrary to *Choshen Mishpat* 4. There are also other ways to answer the Gemara’s question: The fact that she ignored her husband’s warning not to spend time alone with the alleged paramour could also be a factor in permitting her mistreatment at this point. In *Otzar Meforshei HaTalmud* there are notes to the text in *Bava Metzia* 24a which cites *Geonei Batra* 41 that based on this, a court may at times be permitted to act on circumstantial evidence. The article in *Techumin* also quotes the *Tzofenat Paneach, mahadura Kashar*, 42, as discussing the case of a rabbi who did something wrong. I am unable to find this topic in the place cited.

4. The *Pnei Moshe* (ibid) explains that *andromolusia* is disaster which indiscriminately kills good and bad people.

problems, as will be discussed hereinafter.

The problem of believing an allegation goes back to biblical times, and is analyzed by the Talmud: In the Book of *Yirmiya*, the *Tanach* tells about Gedaliah ben Achikam -- who was appointed to be governor over the remnant of Jews who remained in the country after the destruction of the first Temple in Jerusalem, following the execution of the last king of Judah and the exiling of most of its inhabitants.⁵ As he was planning to meet with some Jewish delegates, one of his advisers warned him that among the delegates there were individuals who were jealous of his leadership position and were planning to assassinate him. Gedaliah, a righteous individual, was indignant that this adviser was speaking *lashon hara* (talebearing) to him, and he ignored the warning. Unfortunately for him, his enemies had indeed plotted against him and he was murdered the next day. The remaining Jews had to flee the country to avoid Babylonian retribution for the assassination of the government's officer. Since that day, Jews have observed a day of fasting, *Tzom Gedaliah*, to mark the tragic final chapter of the destruction of the Jewish state and the era of the First Temple.

In its discussion of this event, the Gemara seems critical of Gedaliah's naivete in summarily refusing to heed the warning, which resulted not only in his murder but also the death of all the people with him and the exile of the remainder: "For he should [at least] have been concerned about the report of Yochanan ben Kore'ach [who had warned him]; since he did not take care, Scripture condemns him as if he had killed them [the others]."⁶

This talmudic conclusion is puzzling – why should Gedaliah be condemned for not accepting *lashon hara* about his enemies?

5. *Yirmiyah* 40 – 41.

6. *Niddah* 61a and comments of Maharsha, *ibid*. See also *Shemirat Halashon, Issur Lashon Hara, kelal* 7:7.

Isn't that what Jewish law requires?⁷ Elsewhere, the Talmud provides the answer – "even though he should not have *accepted* it, he should have been *concerned* [and taken precautions] for it."⁸ The Gemara is spelling out a general policy about how to react to accusations not substantiated by witnesses: one is not permitted to accept them, because they are *lashon hara*, sinful talebearing. On the other hand, one is not permitted to ignore these allegations either, because they may actually be true, and not responding to ward off imminent danger is also forbidden.

The Gemara adduces another incident, involving a leading *Tanna*, whose actions verify that that is the proper approach: there were individuals in the Galilee, and word spread about them that they had killed some people. The Roman government sent out officers to take these Galileans into custody, whereupon they fled and sought refuge with Rabbi Tarfon, an outstanding Torah sage. Rabbi Tarfon was in a quandary: on the one hand, these Jews were begging him to hide them, to help them; how could he fail to aid fellow Jews, who would certainly be executed by the Roman authorities? But yet, they were accused of murder! How could he protect

7. The laws of *lashon hara* are many and complex. They are masterfully explained in the classic *Sefer Shemirat Halashon* by the Chafetz Chaim. A few of the major features of the sin of *lashon hara* include the following: *Lashon hara* is considered a sin, an affront to G-d, not just man. See *Erechin* 16b and *lashon hara* 3:1 in *Minchat Chinuch*. Furthermore, the truth or falsity of the speech does not alter the severity of the sin, *Shu"t Shevut Yaakov* I:179. In almost all circumstances, it is forbidden to speak ill of a fellow Jew, Rambam, *Hilchot Sanhedrin* 7:20.

Jewish law reserves some of its harshest diatribes against those who speak *lashon hara*: "Whoever speaks *lashon hara* rejects the main part [of the faith]," *Chagiga* 15b and ff; Rambam, *Hilchot Deot* 7:2. "Whoever speaks *lashon hara*, the Almighty says, 'he and I cannot live together in this world'", *ibid*. "Whoever speaks *lashon hara* and whoever accepts *lashon hara* is worthy of being cast to the dogs," *Pesachim* 118a. The one exception to the strict prohibition of *lashon hara* appears to be if it is spoken "*leto'elet*", for a positive purpose.

8. *Pesachim* 118a.

murderers? Ultimately, he declined to hide them, advising them to flee elsewhere for protection, for he said “this *lashon hara*, even though it is not right to accept it, but I have to pay attention and be concerned about it.”

Rashi in his commentary explains the rabbi’s reasoning – if you did indeed kill someone, how can I help you? ⁹ But Rosh finds Rashi’s analysis unacceptable: to him it is inconceivable that on the basis of a rumor alone, Rabbi Tarfon would not have saved Jews’ lives. Rosh, instead, accepts the view of the *She’iltot*, that even though one cannot accept a rumor, one still needs to be concerned that it might be true and take appropriate steps to protect oneself and the community. Consequently, Rabbi Tarfon reasoned that if he helped the fugitives he would himself be in grave danger from the authorities, and additionally his town might be prey to murderers. Tosafot also accept this rationale of the *She’iltot*, concluding “that one must be concerned about a rumor (*lashon hara*) to believe it to the extent that he will be careful to prevent harm to himself and to others.” The carefully nuanced language of the *She’iltot* is instructive:

It is forbidden to accept [believe] *lashon hara* and to act upon it, but it is required to be concerned about it, to distance oneself from it.¹⁰

In other words, one may not believe the rumor and certainly not act upon it; but one must be vigilant to protect oneself as

9. *Responsa Chavot Ya’ir* No.146 writes that Rabbi Tarfon was willing to accept the rumors and not help the fugitives [although he did not report them to the authorities], because if the allegations were true, it is forbidden to help a murderer escape. See also *Chochmat Shlomo Choshen Mishpat* 420.

10. In his commentary to the *She’iltot* 40, the Netziv (ibid, note 4) writes that if Rabbi Tarfon would have been sure that the fugitives were innocent victims of a false rumor, he would surely have helped them. But here, where there was an element of doubt – and an additional concern that he himself could be put in danger – he was not obligated to assist them. See further in *Bet Yosef, Choshen Mishpat* 426.

well as the community – just in case the rumor is true.¹¹

Writing in the last century, the Chafetz Chaim cites a case reported by the Maharik in the 15th century. A woman accused a certain man of acting sinfully with her, which he denied. Nevertheless, rumors spread and eventually the townspeople shunned him and decided that they would not call him up to the Torah (*aliya*). The Maharik “reacted angrily to them, because it is a great sin to believe *lashon hara*.”¹² He insisted that the very next Shabbat the accused man be given an *aliya* in shul. These are the Maharik’s words:

And the [accuser] who embarrassed him [the alleged perpetrator] should beg [Heaven] for mercy upon himself...because certainly “it is an abomination before G-d” whoever does this and his punishment will be very great...because what is said [in the Torah and Talmud] about someone who causes a person’s face to pale with embarrassment is much worse than [what is said regarding] someone who commits adultery with a married woman....Even though the [halachic concept] that the Jewish courts should whip and punish transgressors beyond what is expressly mandated by the Torah (*makin ve’onshin shelo min hadin*) [technically] does not apply here (since there was no explicit warning not to do it) [but this person cannot be punished in this case.]

These are very strong words indeed, because slander is a

11. *Masechet Derech Eretz Rabbah*, chapter 5:4, tells about another person who was visited by someone suspected of wrongdoing. Albeit he gave him food and drink, and gave him a place to sleep in the attic – he removed the ladder leading to it, so that the guest would not be able to leave the attic without the homeowner’s presence. (And during the night, the man did try to come down from the attic to rob the house, but since the ladder had been removed, he fell!)

12. Chafetz Chaim in *Shemirat Halashon*, pp. 231-235; *Shu”t Maharik* 181 (this responsum also appears at the end of *Shemirat Halashon*).

major sin in Jewish law – not only for the bearer of tales but also for the one listening to them. The Maharik echoes the Gemara's rationale about not accepting a rumor but yet not ignoring its implications. He deduces this also from the behavior of Rabbi Tarfon, who did not believe that the fugitives were murderers and even helped them by advising them to hide somewhere else. Yet, Rabbi Tarfon was concerned also with the safety of the community and did not want them exposed to possible murderers.

What we discern from the ruling of the Maharik is an attempt to achieve the optimal balance between accepting a slander which might be false and thereby destroy an individual's reputation, but which might also be true, in which case the community needs to be protected from a predator.¹³

To apply this principle to modern life, we can envision a scenario where there is talk that a certain teacher abuses the children. To fire the teacher would be unfair; to let him remain in the classroom would also be grossly unfair. Perhaps a solution would be to transfer the teacher to some non-teaching position, where there would be no more opportunity for any infraction. (Just shifting the teacher to a different classroom or different school obviously solves nothing.) Alternatively, the classroom could be electronically monitored. In that way, everyone would be protected. Another circumstance where this precaution should be applied would be to insist that all professionals (doctors, dentists, counselors, rabbis, psychologists, etc.) who meet with women or children or other

13. We find a similar ruling in *Shulchan Aruch Even Haezer* 178:20, in a case where a married woman complained that a certain man was "starting up with her", a charge he denied. The ruling was that the man cannot be punished for the deed, inasmuch as there is no proof. On the other hand, a "restraining order" (akin to restraining orders issued by secular courts in America to protect a woman from her alleged abuser) should be issued to guarantee that the man would not be able to approach the woman or talk to her. And if the man is already suspect in the community's eyes, the restrictions on him should be even more severe.

vulnerable persons, never do so alone. There should always be an attendant or, failing that, an open door. This would protect not only a potential victim, but also individuals providing care from being falsely accused of wrongdoing.

Testimony

It is an axiom of justice that there must be “kosher” witnesses to establish the validity of an accusation. In Jewish law, this requires two adult male witnesses, observant of Jewish law and not related to each other or to any of the principals.¹⁴ Obviously, however, there are situations when, by the nature of a crime or transgression, it is done furtively, hidden from the public eye. A pedophile, for example, would be careful never to do something wrong where others might see. A doctor or rabbi or teacher or psychologist or wife-beater would hardly act inappropriately in the presence of others. Should they therefore be beyond the reach of Jewish law?

This specific issue is the source of considerable controversy among leading rabbis over the ages: how much to bend the requirement for adult male eyewitnesses in assessing the validity of an accusation. Writing in the late 13th century, Rashba in Spain criticizes certain Jewish community courts (*batei din*) for their lenient behavior on this point:

I see from the notes that you have written [me] that you rely on female witnesses. Perhaps you have found a precedent from one of the earlier rabbis in places where women enter there [i.e., Jewish courts]. But we don't know of such things nor have I ever heard [of this practice], and it is not proper to rely on them.¹⁵

A totally opposite opinion is to be found in the *Terumat*

14. *Devarim* 17:6. *Bava Kamma* 14 and *Choshen Mishpat* 408:1,2.

15. Cited by the *Bet Yosef*, *Choshen Mishpat*, end of 35. See also Rambam, *Hilchot Nezikei Mammon* chapter 8 and Mordechai, *Yevamot* 464.

HaDeshen,¹⁶ a leading Ashkenazi *posek*: "...For in matters where men are not usually knowledgeable, we rely on [the testimony of] women, even to extract money [from the accused]." This is not *carte blanche* approval of accepting witnesses who, according to the strict halacha, are not to be heard, for he does append an exception – only where it is a situation which occurs infrequently, where there is no other way to ascertain the truth. This *posek* retains the fear that relying on children and others who are usually not qualified to testify might cause great harm. It is instructive, therefore, to note the addendum of Maharik (citing the precedent of Rabbenu Tam) on this issue:

In any case, the early rabbis did rule that a woman or relative or child¹⁷ are to be believed when they testify about beatings or insult to a scholar or for any issue of strife where it is not customary for witnesses to be present or there is no time to call these witnesses.¹⁸

Maharik does add, however, that the accuser must be certain of the facts, having witnessed them personally, and that the entire case should not rest only on the testimony of these technically disqualified witnesses.

In following generations, the Ramo accepted this as the basis of his ruling on the question:¹⁹

... There are those who say it was an amendment of the

16. 353. See also *Maharik* 180 and *Mordechai*, end of *Hilchot Nidui*.

17. It is difficult to rely on the credibility of a minor's testimony, since often children will say what they think an adult wants to hear.

18. It is also in *Kol Bo* 116, listed as one of the amendments instituted by Maharam Rothenburg.

19. *Choshen Mishpat* 35:14. See also *Shu"t Radvaz* I:366 "and when they cannot find someone [else] to testify, it is proper to accept women's testimony." Rambam, *Pirush haMishnayot*, *Bava Kamma* 1:3, as well as in *Mishneh Torah*, *Hilchot Eidut* 11:1-5, indicates that unqualified witnesses should never be used. On the other hand, *Sefer HaChinuch* 252 as well as *Pitchei Teshuva* 7:11 and Ramo, *Yoreh Deah* 354:21 apparently accept them.

earlier rabbis that in a situation where it is not common for a man to be present...or some other situation which arises infrequently, women are reliable²⁰...and therefore there is one who wrote that even a lone woman or a relative or a minor are to be believed...but this only when the accuser maintains that he is totally certain of his facts.²¹

In line with this, the *Aruch HaShulchan* rules,²² “and therefore it seems that the law is that if in the opinion of the *Bet Din* there is no substance to their words [children, relatives, etc.] and the alleged perpetrator denies it totally, they should not rule based on their testimony.”

The upshot of the rabbinic rulings is that a *bet din* may accept the testimony of witnesses who are technically not qualified if they find it credible.

The Transgressor's Family

An integral feature of the justice system is to identify a criminal and enforce a punishment. In that regard, Jewish law is no different from secular law. However, there are certain

20. The *Pitchei Teshuva* 35:14 distinguishes between an unqualified witness, whose testimony may be relied on to fill in details about a known circumstance, and unqualified witnesses who seek to establish the circumstance itself – this is unacceptable. For example, medical evidence indicates that a woman was raped; her testimony can be accepted to identify the perpetrator. Or, a doctor confirms that a child was abused; the child's testimony can be used to point to the one who did it. But a child alone cannot establish the veracity of the charge of pedophilia.

The *Aruch HaShulchan Choshen Mishpat* 13:14 adds that if there is enmity between the man and the woman, her testimony would not be accepted alone; and the testimony of a deaf or mentally impaired person is not acceptable under any circumstances.

21. For an interesting elaboration, see *Noda Biyehudah Tanina* 58, about two women who testified that they saw a stolen object in a certain person's house – why he did not accept their words.

22. *Aruch Hashulchan Choshen Mishpat* 34:13; see also *Rashba* III:301.

instances when the *bet din* seeks to enforce compliance with its demands by putting pressure on the sinner; the most drastic measure is *cherem*, where the person is ostracized from the community, virtually excommunicated, in order to force him to comply with the dictates of the court. A case is brought by Rav Palti Gaon about a person who lost a claim in court, was told to pay his litigant, but refused. In order to force compliance, the Jewish court put him in *cherem*, ordered his children to be expelled from the Hebrew school, his newborn son not to be circumcised, and his wife told she was not welcome in the *bet kneset*.²³

The *Yam Shel Shlomo* expresses his consternation: he notes that the Rif, the Rambam, the Tur, and the *Shulchan Aruch* do not mention any such procedure (indicating that they did not approve it), and he is appalled that the innocent wife and children would be punished for the misdeeds of the father.²⁴ He also expresses concern that extreme measures might possibly drive the man or his family members away from the religion altogether. Consequently, *Yam Shel Shlomo* suggests that perhaps the ruling of Rav Palti Gaon was only intended for a specific place and person, in the nature of a special, one-time ruling (*hora'at sha'ah*), akin to the talmudic principle that when rabbinic leaders find that their generation lax in certain areas of religious observance, they are mandated to "beat and punish more than the law permits."²⁵ Moreover, *Yam Shel Shlomo* is appalled at the directive to bar the recalcitrant

23. *Yam Shel Shlomo*, *Bava Kamma* 10:13, citing Rav Palti Gaon; see also *Maharik* 181.

24. There seems to be no concern for embarrassment to the *parents* of the sinner. The Gemara in *Megillah* 25b approves calling a sinner by a derogatory name, including insulting his parents. How a *tzaddik* like Yitzchak could have a son as evil as Esav is discussed in several places: See *Sefer Chassidim mekor chesed* 480:6 and also 1103; *Mabit*, III, 206, and others cited in *Margoliot Hayam Sanhedrin* 52a-1,2,3.

25. For discussion whether this prerogative applies to all rabbis or only to expert ones, or whether this judicial activism is required or only permitted, see *Sefer Hamaftach* to Ramban, *Hilchot Sanhedrin* 24.

sinner's children from Torah study, "since the entire world exists only by virtue of the breath from the mouths of children" learning Torah. "Heaven forbid" that this should be done! "It is obvious that there is no reason for this thing..."

This dismay at imposing a punishment which will affect the wife and children of a miscreant is echoed in the *Shulchan Aruch*, which rules that extended sanctions should not include family members. A fascinating distinction, however, is made by the Chatam Sofer, who distinguishes between the types of aberrations of the guilty father:²⁶ if he is a person with false ideas about the religion, we may be fairly certain that these negative concepts and values will be transmitted to his children. In such a case, there is no need for the *bet din* to be concerned with the effect on these children, because they are virtually doomed to follow in his heretical steps in any case. However, if the guilty party is simply a sinner, but without a twisted worldview, we should be careful about the wife and children, for there is no reason to assume that they would not continue to be part of the Torah-true community.

Based on the *Yam Shel Shlomo*, we should realize that, where possible, it is necessary to take into account what will happen to the wife and children of a man accused of wrongdoing *where it is not possible to know if he really did it*. If a teacher is suspected of being a pedophile – but there is no way to know if that allegation is true – certainly steps can and should be taken to remove him from the classroom or at least supervise him constantly, both in and out of school. But at the same time, it is important not to make public these allegations, because they may not be true and yet will totally destroy not

26. Chatam Sofer *Yoreh Deah* 322 (it strikes me that this opinion is contrary to the *Derashot HaRan*, regarding Avraham's choice of a wife for Yitzchak); *Pitchei Teshuva Yoreh Deah* 334 discusses a case where the guilty party really deserves to be put in *cherem*, but there is concern that it may cause the wife and children to leave the fold entirely. Ramo and *Taz Yoreh Deah* 334:1 also consider what to do if the ban will cause him to abandon the religion.

only the man, who may be innocent, but also his family, who are surely innocent of any wrongdoing. In the absence of certainty, it is wrong to inflict so much trauma upon the family.

Despite the pain of the family, however, the Jewish court also has to consider the welfare of the community, which needs to know about and be protected from predators. Albeit it is sadly true that the children of a person convicted or exposed for wrongdoing will suffer greatly, nevertheless the law is the law, and if out of pity the court fails to act, there will be a general breakdown in morality and respect for the law; people will come to think "there is no law and there is no judge."

Even so, the sinner, and certainly his family, are the children of Avraham, Yitzchak, and Yaakov and must be treated with respect (*kevod haberiot*). Trying to arrive at the appropriate response to an accusation which must be taken seriously but cannot be substantiated is one of the most difficult aspects of the dilemma facing those who must judge what to do. The shame and pain on the faces of family members whose loved one is publicly condemned for some wrongdoing is unfortunately a scene witnessed by many in recent years. Children suffer terribly from taunts of their schoolmates, women are shunned by their friends.²⁷ Therefore, wherever possible, the *bet din* has to consider the impact of their pressure tactics not only on the sinner but also his family. It could be that the ancillary effects of punishing a sinner may be overly harsh, more than is warranted. On this, Rambam writes that the *dayan* "must direct all his deeds for the sake of Heaven ...and only to increase honor to Hashem."²⁸

27. To save them embarrassment, it is sometimes even permitted to violate rabbinic law. See *Berachot* 19b; see also *Noda Biyehudah Yoreh Deah*:55.

28. Ramban, *Hilchot Sanhedrin* 24:10. The same statement about acting "for the sake of heaven" appears in the *Radvaz* 187. *Iggerot Moshe Choshen Mishpat* II:1 writes that if a *bet din* does not act "for the sake of heaven", it is not a

Viheyitem Nekiim

Up to this point, we have been looking at the issue from the point of view of those who must administer punishment or take whatever steps may be necessary against the accused, or even to determine whether there is any basis for taking any kind of action. But there is another side of the coin – what course of action should be followed by a person who is the subject of a rumor or who has been accused of wrongdoing – assuming of course that he is indeed innocent? Is one entitled to ignore accusations as being beneath contempt? Or should one try to set the record straight?

As always, we can find instructive guidelines in the Torah. Hannah, an unhappy, childless woman, prays fervently – and silently – in the Tabernacle, beseeching G-d to grant her wish for a child. Eli the High Priest, seeing her passionate murmuring, mistakenly concludes that she is drunk and reprimands her for it. Now Hannah was a great woman, a prophetess, who would later give birth to the prophet Samuel, but she was not too proud to answer softly, “No, my lord, I have drunk neither wine nor whiskey”, but was rather pouring out the pain in my heart before the Almighty. From her example, says Rabbi Elazar, “we learn that someone who is suspected of something which he did not do, is obligated to set the record straight.”²⁹

This is a very important feature of every citizen’s responsibility to maintain the welfare of the community. While it may be extremely uncomfortable to have to defend

true *bet din*, and we do not apply the principle “that even if it was not done for the sake of heaven it will come to be for the sake of heaven.” The Radvaz expresses the same sentiment in his responsum #187. See also *Rashba* III:393 and I:290.

29. *Berachot* 31b. An interesting additional note, however, is that while one must deny his own part in a suspected wrong, it is forbidden to implicate another person, even if he is the true perpetrator. See *Sefer Shemirat Halashon*, *kelal* 10, of 31.

one's honor and answer challenges to one's uprightness, that is what is owed the community. Moreover, it is forbidden to act in a way that will arouse suspicion, as the Torah teaches in three places, "*Viheyitem neki'im meHashem umeYisrael*", you must act in such a way that your innocence will not be impugned.³⁰ The Gemara³¹ cites several instances of righteous people who acted in a highly irregular manner, but made certain to explain their actions thereafter, so that no one might suspect them of immorality.³²

When the Torah writes *Viheyitem neki'im meHashem umeYisrael*, we see that it is not enough to *actually be innocent*, because certainly G-d knows the truth whether one is innocent or guilty; the verse includes Yisrael – the Jewish community also has to be convinced of one's innocence. That makes it mandatory – not just advisory – for every person to act in such a way as to arouse no suspicion. And if rumors do arise, it is the responsibility of the accused to explain his actions and to convince others that he is without guilt. Moreover, it is the responsibility of every person always to be careful never to act in a manner which might arouse suspicion.³³

The Gemara tells about the Gormu family, who were singularly skilled in mixing the incense for the *ketoret*. None of the women in their family ever went out wearing perfume [so

30. *Bamidbar* 32:22, *Yehoshua* 22-22, *Mishlei* 3:4.

31. *Shabbat* 127b.

32. Meiri, *Chibbur HaTeshuva* p. 91. *Shu"t Mahari Bruna* 38 questions how these rabbis were even permitted to act in ambiguous ways in the first place and arouse suspicion, and responds that since they *were* great rabbis, they knew that (a) they intended to explain their actions and (b) in the interim, they would not be suspected.

33. Although the Gemara in *Shabbat* 118b advises that a person should always wish "let my lot be with those who are suspected, but it [the sin] is not in him", because a person who comes under false suspicion receives *kappara* through the embarrassment, that equation is viable only when the person is truly blameless. But if a person acts heedlessly and thereby brings suspicion upon himself, he is doing the wrong thing. See also Meiri, *Moed Katan* 18b, s.v. *l'olam*.

that no one would think the men took home some of the spices they worked with and gave them to their wives and daughters]...because of the commandment "*Viheyitem neki'im meHashem umeYisrael*."³⁴ Similarly, the Avtinah family, who specialized in preparing the *Lechem hapanim*, the showbread in the Temple, never ate fine white bread in their homes, so that no one would think that they took home flour from the Temple to bake their own bread.³⁵

In the same vein, the Talmud records the rule that persons charged with distributing products to the poor, when there are no poor people to give them to, should sell the objects to other people [in order to raise money for charity] but should not buy it themselves, for it says "*Viheyitem neki'im meHashem umeYisrael*."³⁶ If the administrators of the food kitchen were seen taking foodstuffs home, it might arouse suspicion.

The *Magen Avraham* makes a definitive ruling that it is sometimes permitted to violate rabbinic law in order to avoid a situation which would arouse suspicion about oneself: *ve'afilu al yedei bitul mitzvat aseil shel divreihem, lefi shetzarich ha'adam latzet yedei haberiot*.³⁷

The *Magen Avraham* extends this rule even to a person who has a sterling reputation, even if he is known to be ultra-pious, he must not allow people to harbor bad thoughts about him. It was for this reason that Rabban Gamliel, the head of the Sanhedrin, was very much concerned about using diagrams of

34. Yoma 38a. Rashi in the Mishnah *Shekalim* 3:2 explains that the Gemara also adduces the verse from *Mishlei* 3:4, "*umetzah chen vesechel tov be'ainei elokim ve'adam*" to conclude that one must avoid even arousing a baseless suspicion. See *Encyclopedia Talmudit* XIII, p. 568, for the difference between *chesed* and *mar'it ayin*.

35. Yoma 38a.

36. *Pesachim* 13a, and in *Yoreh Deah* 257:1. A similar ruling is brought in the *Yerushalmi*, *Shekalim* 3:2.

37. Cited by *Piskei Teshuvot Orach Chaim* 156:22.

the phases of the moon³⁸ to fulfill his responsibility to declare the New Moon, and only did so after being reassured that since he was using the diagrams with a judicial group, no suspicion of idolatrous practices would attach to them.³⁹

Given the prevalent loose sexual morality in American society, the Jewish community needs to be concerned that some of that lifestyle may affect our own behavior, whether consciously or unconsciously. Furthermore, in the current climate, people have become quite jaded; exposures of serious wrongdoing by persons who were previously trusted figures in society – priests, teachers, principals, senators – have made it much easier to believe in slanderous gossip. That being the case, people must take extra precautions to conduct their lives so that not even a hint of scandal could be intimated about them.

In practical terms, this requires that no individual who deals with others on a one-on-one basis – whether doctor, dentist, rabbi, psychologist, principal, etc. – ever permit an ambiguous situation to exist. There must always be a nurse or attendant in the room or nearby. No rabbi or psychologist should ever meet with someone behind closed doors or in an office where others are not around. No child should be examined without a parent or nurse in the room. The door to the principal's office should remain open, or else a large glass window should be installed. It is not possible to detail each and every precaution that ought to be taken, *at all times*. This should be done not only to protect a possible victim of abuse, but also to protect the caretaker from accusations of impropriety, or even from innuendo. Members of the Jewish community must become pro-active in restoring purity to our lifestyles. *Viheyitem neki'im* requires not only that we act properly but also that we conduct our daily affairs in a totally blameless manner.

38. Technically, one is not supposed to make pictures of the sun or moon, but these diagrams were important to identify the new moon precisely.

39. *Rosh Hashana* 24b; Meiri, *Chibbur Hateshuva*, p.90.

Will such precautions bring an end to unacceptable behavior? That is highly doubtful. No one has yet been successful in stamping out sin. However, we must do as much as we can to reduce opportunities for such incidents and also to minimize the lecherous gossip which swirls around many public figures, and which can destroy innocent lives.

How far must one go to avoid people thinking evil of him? Realistically, there are always going to be people prepared to think the worst of others, and if one tries to satisfy all the conditions in the minds of the multitudes, he will be virtually paralyzed from doing anything. Our rabbis indicate, therefore, that a person need not be concerned that the ignorant or common people will think he is doing something wrong; as long as the more learned and knowledgeable people realize that his actions are perfectly acceptable, he is blameless. This was the case with Boaz, the ancestor of King David, when he married Ruth, a convert from the tribe of Moab. While the Torah prohibits intermarriage with converts from Moab, the highest rabbinic court in the land had recently ruled that this stricture applied only to men but not women from Moab. Therefore, Boaz was totally within the parameters of Jewish law when he married Ruth, a Moabite convert, although some plain people might have thought he was doing the wrong thing. From his precedent, the rabbis learn to what extent one need be concerned with raising suspicion.⁴⁰

Rumors

Although there is a tendency to downplay a rumor, "it's just talk," the Talmud opined that there was some truth or at least some basis to many a rumor.⁴¹ That is not to say that all rumors are true, but the thinking is that there has to be at least

40. Radak, *Joshua* 22:22, however, opines that one must be concerned even with the assumptions and suspicions of the common people.

41. *Moed Katan* 18b .

some connection between the rumor and the truth. The Gemara says, “a person is not suspected of doing something unless he has [actually] done it; and if he did not do it entirely, he at least did it in part. And if he did not do it even partially, then [at least] in his heart he thought about doing it.”⁴²

The talmudic rabbis were not naïve, and they themselves included exceptions to their statement that most rumors are true: if there is hatred between the parties, then one might make up a story about the other, just out of dislike or in order to anger the person he hates and cause him trouble. So, for example, Joseph brought tales about his brothers to his father (which they, in turn, had deliberately provoked to mislead him and get him into trouble), because there was rivalry between them.⁴³

That is also how the Gemara explains the virtually incomprehensible charge that the Jews in the desert suspected Moshe Rabbeinu of acting improperly with their wives.⁴⁴ There was certainly not a shred of evidence for anything like that, but due to the jealousy some felt for Moshe’s high position, it distorted their thinking.

So when the Gemara opined that “all rumors are true”, they were referring to persistent rumors (*kola delo pasik*), innuendos which surface over and over, not a one-time slander (*kola depasik*) or one that emanates from only one person who started the rumor. It is the Talmud’s opinion that rumors that do not subside probably have some basis in reality. Those that “do not stop” are defined as those that last more than a day and a half, and are repeated by all the people; less than that, we can assume they are groundless. (These criteria do not apply when people fear retribution for spreading a rumor, which might frighten them into silence).

42. See Ritva *Shabbat* 118b, s.v. *ledidi*.

43. *Moed Katan* 18b.

44. *Sanhedrin* 110a. See Maharsha there as well.

We have already mentioned that rumors may be taken seriously only when they do not emanate from enemies. Rumors which are spread by hatred should not be heeded at all.⁴⁵

Hezek Mammon

When an accusation is leveled against a person, there are two principles which must be kept in mind when considering a response: first of all, it is much more serious to fire a person than not to hire him in the first place. The *Mishnah Berurah* cites opinions that it is legitimate not to hire a person if there is “talk” about him, even unsubstantiated.⁴⁶ However, there are different rules once a person has the position. Thus, the *Shulchan Aruch* rules that “it is forbidden to remove a *chazzan* from his position unless some flaw was found in him.”⁴⁷ Here, the Ramo explains that he may not be fired simply because “there is talk about him.” There must be substantive proof, such as informing on someone to the government or if he was caught consorting with a non-Jewish woman. And there must be valid witnesses to authenticate the charge.

The second principle to keep in mind is that when a person is removed from his job, it results in financial loss, which also requires strict rules of evidence. Nevertheless, the *Magen Avraham* rules that if there is a *kola delo pasak*, a persistent rumor about misconduct on the part of a *chazzan* or rabbi, or the like, it is permitted to dismiss him. The *Chafetz Chaim*, author of *Mishnah Berurah*, expresses amazement at this ruling,

45. Ritva to *Moed Katan* 18b.

46. *Mishnah Berurah Orach Chaim* 75 brings opinions that just *not* to hire someone, there is no requirement to have the testimony of valid witnesses when there is “*rinun b'alma*” (“talk”) about him.

47. *Orach Chaim* 53:25. The *Knesset Hagedolah* states that the same rule applies for any position of authority or honor except those where a time limit has been stipulated. That does not mean that he was given a contract for only a specific time, but rather that all positions in the community are held for only a certain term, such as a 2-year limit.

which seems to contradict the dictum of the *Shulchan Aruch* cited above. Furthermore, in Jewish law, if someone is to be deprived of money (as would happen with the loss of a job), two valid witnesses must validate the charge.⁴⁸ Nevertheless, he tries to justify the ruling of the *Magen Avraham*:

No doubt, the community would never have appointed a *chazzan* or rabbi or other official who behaves so brazenly that it would lead to persistent rumors of sexual impropriety about him; therefore, he should have been careful not to allow such a situation to arise.⁴⁹

Firing A Rabbi Or Public Official

Although the common estimation of a congregational rabbi in America is that he is an employee of the synagogue, that is not the halachic understanding. Unlike an employee, for one thing, the rabbi cannot ordinarily be relieved of his duties:

If the entire congregation accepted [a rabbi] upon themselves, and even more so if it was done with the approval of the government, no great rabbi in the world can overrule him or remove him from his position.⁵⁰

As far as Jewish law is concerned, when a person achieves a position of honor or authority in the community, not only is it

48. Gittin 89a; Choshen Mishpat 408. *Be'er Mayim Chaim*, *Issurei Rechilut*, kelal 7a, ot 20. The Chafetz Chaim adds, in *Hilchot Lashon Hara* kelal 3, ot 7 that even where there is no financial loss involved, it is still forbidden to speak *lashon hara* about someone.

49. The Chafetz Chaim does say that the *chazzan* must be given due warning that his behavior is arousing unacceptable rumors. (p. 221 of *Shemirat HaLashon*). He also theorizes that the man may be deprived of his livelihood because it is not respectable for the community to be led in prayer by such a person.

50. Ritva, end of second chapter of *Makkot*. This emerges from the concept that in matters of holiness, we elevate but do not demote. See Rambam, *Hilchot Kelei Hamikdash* 4:20/21, *Rivash* 271, *Maharashdam Yoreh Deah*:90.

his for life, the privilege is even passed on to this children.⁵¹ However, if the rabbi or other official has sinned or acted improperly, this proviso no longer applies.

An ancillary issue which arises from these rulings is how to go about removing an honored individual who has sinned, and whether he retains any rights to that position if he claims that he has repented.⁵²

Unfortunately, in today's world, people who hold positions of trust in the Jewish community have not been spared from disgrace. Although we have noted the standards for removing a rabbi from his position, it is not a step which can be undertaken lightly. Aside from the halachic prerogatives assigned to this position of honor, there is the reality that the rabbi represents, or should represent, the acme of religious devotion, the public face of Judaism, and is the representative of the community to the secular world. Thus, his disgrace redounds to the disgrace of the community. Consequently, his removal should be dealt with somewhat differently.

The Gemara reports that "in Usha they made a regulation that if the head of the court sinned, they would not expel him [from the community] but rather say to him, "you may maintain your honorable position, but stay in your house." In other words, rather than create a public spectacle, the leadership tried to quietly assure that this person would no longer function publicly. However, continues the text, "if he relapsed and sinned again, he is to be expelled

51. The *Mabit* 3:200 rules that if the kehillah leaders voted that the son of the rabbi should inherit his position, but others want to appoint a different rabbi, the son should get the position, as long as he is qualified, even if there are others more qualified than he.

52. *Magen Avraham* 153:49. in *Piskei Teshuva* to *Orach Chaim* 53, note 201, there are listed numerous responsa concerning this topic. The upshot of most of these responsa is that inasmuch as there is so much discord and animosity in the Jewish community, which may be the source of many rumors about people, great caution should be exercised before removing anyone from an official position.

(excommunicated) because of *chilul Hashem*.”⁵³ If the rabbi persists in his sinful path, he must be publicly removed and degraded, for to allow him to remain in office would cause people to think that justice is not being done to him as it would be for an ordinary sinner (*chilul Hashem*). Reish Lakish disagrees, however, maintaining that a Torah scholar who sinned should not be repelled publicly.⁵⁴ And Rav Papa lauded himself “I will certainly get a great reward [in heaven] because in my entire life I have never put a *talmid chacham* in *cherem*.”⁵⁵ The *Shulchan Aruch*, in codifying this issue, makes an exception “if the scholar is involved in heretical books or.... his colleagues are embarrassed by his behavior and the Name of Heaven is desecrated by him”, he is surely to be condemned publicly.⁵⁶

The disagreement between prominent *poskim*, above, demonstrates the delicate balance which the halacha seeks to achieve.⁵⁷ If the rabbinic scholar is perceived as being above the law, if he can “get away with it”, then others will feel justified to try the same. Nevertheless, due to his distinction in Torah knowledge, he is entitled to a modicum of respect or at least consideration above that of ordinary persons. Consequently, the Talmud advises admonishing him privately, quietly removing him from the public eye. But if his behavior is so egregious that failure to respond forcefully would cause a *chilul Hashem*, then that becomes the primary

53. *Moed Katan* 17a; *Shu"t Mabib* I, 317. The Gemara maintains that if a Torah scholar did commit a sin, surely he repented by the next day. However, whether he may thereafter resume his position of authority, there is some discussion. See *Makkot* 13a, and comments of Ritva, Meiri, and Mordechai, as well as *Orach Chaim* 153:22 and *Magen Avraham* 49 with the *Machatzit Hashekel*.

54. In *Menachot* 99b, there is a slight emendation of the text, which here reads, “we do not embarrass him publicly.”

55. *Moed Katan* 17a.

56. *Yoreh Deah* 334:42.

57. *Tosafot Yom Tov*, *Eduyot* 5:6, “lest people think there is favoritism” in the application of Jewish law.

consideration.⁵⁸

The upshot of the debate is that the course of action has to be determined by what will produce the most benefit (or the least trauma) to the Jewish community. If there is a negative feeling that institutions try to cover-up the peccadilloes of their leadership and that important people can get away with outrageous behavior, then the paramount responsibility of judges is to demonstrate that such is not the case. If, conversely, the downfall of a respected rabbi would dishearten the community, that also has to be weighed and dealt with accordingly.

Despite the desirability of discretion in handling so volatile a situation as the removal of a rabbinic figure, the *Aruch Hashulchan* concludes that if the rumors swell and persist, leading to disrespect for Judaism and the Torah, then he must surely be publicly censured. No matter how important or learned he is, there is no way that we can give priority to his honor compared to the honor of the Almighty.⁵⁹

The Rambam sums it up best in his succinct style:

The *bet din* in every place and in all times should publicly flog a person who has a bad reputation and people are saying bad things about him....⁶⁰

Heveh Dan Lekaf Zechut/Choshed Bekeshairim

Judaism requires that in a questionable situation, we give another Jew the benefit of the doubt; we may not jump to an unfavorable evaluation of his character or actions, [*choshed bekeshairim*] but ought rather to assume he is innocent. This is

58. *Aruch Hashulchan*, #35 appends that the matter should be handled quietly “unless it is evident that many will be misled by this, and then he should be given no special treatment.”

59. *Ibid.*

60. Rambam, *Hilchot Sanhedrin* 24:5.

not just an incidental admonition – it is an important concept in Jewish ethics.

A graphic example of just how wrong it is to assume the worst of others – and the punishment meted out for this negativism – can be seen in an incident involving no less than Moshe Rabbenu himself: at Moshe's encounter with Hashem at the burning bush, he was commanded to go to Egypt and confront Pharoah with the demand to let the Jews go. Moshe was also bidden to inform the Jews of his being sent by G-d to prepare for their coming redemption. But Moshe remonstrated with the Almighty – how can I go, who am I to approach Pharoah, and anyway what is the point of my speaking to the Jews, “they won't believe me”, *veheim to ya'aminu li*.⁶¹ This gratuitous slur of the Jewish people evoked the wrath of Heaven, as we see in the following verse, when Moshe is told to “put your hand into your bosom” and when he withdrew it, it was totally covered with *tzara'at*, which is the biblical punishment for speaking *lashon hara*. In this way, Hashem let Moshe know that He would not tolerate anyone saying bad things about His people.⁶²

Judaism considers it sinful to suspect another person of doing wrong for no reason. *Choshed bekeshairim*, suspecting the innocent, is not only an insult to the blameless individual, it also tarnishes the character of the one harboring negative thoughts.⁶³ While it is true that there are times when it is

61. *Shemot* 4:1; see also *Midrash Rabbah*, *Shemot* 3:15 and *Midrash Ruth*.

62. See Ramban to *Shemot* 3:6. See also Netziv's comments to *Sheiltot* 40:6.

63. There are those authorities who consider it a sin, while others consider it a bad character trait, one which will prevent the person from accepting reproof and therefore stop him from repenting for misdeeds and trying to improve. See Rambam, *Hilchot Teshuva* 4:4 and Meiri, *Chibbur Hateshuva*, p. 84, who have differing opinions on this matter, discussed more fully in *Sefer Hateshuva*, *Peticha*, Chapter 4. In *Shabbat* 97a we find the expression *choshed bekeshairim lokeh begufo*, which means that someone who suspects an innocent person of wrongdoing will suffer physically. The Gemara interprets this to mean that although in other cases of sin, a person is

necessary to question another person's motives, it is a degrading process for all involved. The Gemara gives a vivid illustration of this: On Yom Kippur, the *kohen gadol* (High Priest) was the central figure in the multiple services and sacrifices that had to be performed. In the days of the Second Temple, the *kohen gadol* was sequestered on the Eve of Yom Kippur and had to take an oath that he would perform the services faithfully, in accordance with traditional ritual. This was done to assure that he did not follow the heretical teachings of the Sadducees, whose ideology challenged the traditions of the Sages. After the oath was administered, the Talmud continues, the *kohen gadol* would cry and the rabbi administering the oath would cry. Why was this so? The *kohen gadol's* tears are understandable, because it was degrading to have to swear to his innocence. But why did the rabbi cry? Because he was forced by circumstances to suspect the *kohen gadol* of harboring evil intentions; it caused him anguish that he had had to suspect the innocent, even though it was a necessary precaution to protect the sanctity of Yom Kippur.⁶⁴

A teaching of the Rambam underscores the principle that one should be careful never to misinterpret another person's actions or words in a negative way: Rambam lists 24 things which "hinder repentance", and one of them is suspecting another Jew of having done something wrong when he was actually innocent.⁶⁵

Furthermore, the Sages find an allusion in a biblical verse

punished first by damage to his worldly possessions and only thereafter to his body, if he is guilty of mistrusting someone else, the punishment comes directly to his body.

64. *Yoma* 19b, based on the Mishnah on *Yoma* 18b. See also *Berachot* 31b which discusses the transgression of Eli in the *Mishkan* (Tabernacle), when he mistakenly assumed that Chana was drunk, not realizing that she was praying silently.

65. *Hilchot Teshuva* 4:4. This list appears also in the *Rif* to *Yoma* and in the Meiri's *Chibbur Hateshuva*; however, the source for this list cannot readily be identified.

that it is a mitzvah to “judge everyone for the good (*heveh dan et kol adam lekaf zechut*).” The Torah teaches “*betzedek tishpot amitecha*,”⁶⁶ which strictly speaking is an instruction to judges to treat both litigants equally. However, the Sages saw another dimension to this verse, one should judge his fellow Jew *betzedek*, as being just and upright.⁶⁷

What exactly does this mean? In general, it means that we have to give another person the benefit of the doubt: if his actions seem bad but could possibly be innocuous, we ought to assume that he is not knowingly doing anything wrong.⁶⁸ (How to determine the fine line between thinking everyone is only good and being hoodwinked by a scoundrel is a topic to be discussed elsewhere). The Talmud goes so far as to assure us that even if we see a Torah scholar doing something wrong in the evening, we should not change our estimation of him as a worthy person – certainly by the next morning he will have repented, and we should continue judging him as righteous.⁶⁹ (The exception is that if it concerns a monetary issue, the Torah scholar must first return the money or valuable object before he is entitled to be judged for the good.)⁷⁰

An episode in the Talmud illustrates how far one must go to find justification for the behavior of another and avoid even thinking negatively about a fellow Jew.⁷¹

66. *Vayikra* 19:15.

67. *Shevuot* 30b, *Sefer HaChinuch* 225 says that even though women cannot serve as judges in a *bet din*, the verse applies to them in regard to judging others in a positive manner. See also Rambam, *Hilchot Sanhedrin* 23:10; idem, *Mitzvat Aseh* 177.

68. An added benefit of this attitude is that G-d judges us measure for measure (*midah keneged midah*), which means that G-d will also interpret our actions in a positive manner, *Shabbat* 127b; Meiri, *Chibbur Hateshuva* p. 91.

69. *Berachot* 19a.

70. Rashi, *Peah* 1:1; *Ya'avetz*, *Mishnah Avot* 1:6; *Iggerot Pachad Yitzchak* 268 and idem, *Shevuot*, *ma'amar* 3.

71. *Shabbat* 127a. The Gemara also brings other incidents to illustrate the importance of judging someone's actions in a positive way. This is one of the

There was an incident concerning a certain person, who worked for a landowner for three years. On the day before Yom Kippur, the worker finished his contracted time and asked the boss for his pay, so that he could return to his wife and children and support them. The employer responded "I'm sorry, I don't have the money to pay you." The worker then asked to get produce equivalent to his wages, but again the response was, "I don't have any." The worker then asked to take his pay in land, in cattle, in other objects of value, but the response to all this was "I'm sorry, I don't have anything to give you." With no alternative, the disheartened worker⁷² returned to his family empty-handed, with nothing to show for his years of labor.

To his amazement, after Sukkot the landowner arrived at the worker's house, laden with all the money he owed him and even some presents. The man then turned to his worker and asked, "Tell me, what did you think when I said I don't have the money for your wages?" The worker answered that he thought the employer must have invested his money and was unable to access it.⁷³ "And what did you think when I said I have no land or cattle to give you in payment?" "I assumed you had leased them out to others." And when I said I have no fruits to pay you with?" "I thought you had not yet taken off the tithes and presents which are owed to the kohen and levite [and one is not permitted to give untithed crops to an unlearned person]."⁷⁴

Whereupon the landowner said, "I swear that [all these

6 things that a person does for which he will reap payment both in this world and the next.

72. The *Sheiltot* 40 identifies him as Rabbi Akiva; this incident, which happened long before he became a great rabbi, shows that even then he had beautiful character traits.

73. For a different interpretation of this answer, see commentary of the Netziv to *She'iltot* 40.

74. Why the landowner didn't give those presents then, when the worker asked him for payment, see Maharsha and *Ha'amek She'ila* 40.

circumstances] is precisely what happened....and now, in the same way that you judged my actions in a good way, may God judge you in a good way.”⁷⁵

A fundamental belief in Judaism is that G-d treats us the way we treat others, *midah keneged midah*, measure for measure. If we try to find justification for others' actions, then our own actions will be judged favorably; and so in reverse. Thus, our rabbis counsel us to try and explain the actions of others in a favorable way, try to show that the other person didn't really intend to do something wrong. “But if he finds fault with his fellow man, it turns out that he is doing the same to himself [i.e., he is causing his own actions to be judged negatively by Heaven].”⁷⁶

There is also a major misconception about *lashon hara*: The Gemara in *Erechin* 16a states that any matter which happened in the presence of three people or was heard by three people is not *lashon hara*, since “everyone” already knows it. However, there are many limitations to this 3-person exception. (The parameters are clearly outlined in the Artscroll edition of the Gemara, footnote No. 1 to that page. This should be mandatory reading for anyone who is serious about adhering to Jewish law.) There is absolutely no doubt that repeatedly dredging up a scandal just to sell newspapers or to win media attention is a vicious travesty of this “exception” to the prohibition of *lashon hara*.

It is quite clear that Jewish thinking requires one to judge a

75. There are variant versions of the text cited by Meiri. Jewish law operates on the principle that people should not be assumed to be evil – *achzukei inish berishei lo machzekinan* – but *Chavot Yair* (58), *Maharashdam*, *Choshen Mishpat* 310, and *Sdei Chemed ma'arechet* I, #71, debate whether it should be employed in an environment where many people are prone to cheat. They basically conclude that it should apply to people who are aware of Jewish law, but questionable whether it comes into play in a case where benefit would accrue to the person involved.

76. *Sefer Ba'al Shem Tov*, *parshat Mishpatim*, “*al tashet yadecha im rasha..*”.

fellow Jew's actions in a positive light.⁷⁷ But it is equally clear that many times people do do the wrong thing; it would be foolish to go through life with a Pollyanna attitude. Serious harm could come to people who do not recognize when others are dealing deceitfully or even criminally. Thus, it is obvious that the obligation to judge others favorably cannot apply at all times and in all circumstances. We will try to delineate the parameters of this principle, because it is at the core of the issue we are exploring: How to react when an individual is accused of acting improperly, if by the nature of the offense there really is no way to substantiate an accusation of wrongdoing? Are we to deny the accuser the right to be heard? How can the accused be vindicated – simply by insisting that his actions should be interpreted in a good way?

When they grapple with accusations of child molestation, of abuse, of other malfeasance, this is precisely the issue which a *bet din* must put to the test – how far does this principle extend, that all people should be judged favorably? *Poskim* have varied in their approaches.

The Meiri writes that only when it is a person who is “*muchzak bechassidut*” (known to be thoroughly righteous) would we be willing to stretch our interpretation of his behavior to justify him, even when it appears that he has acted inappropriately.⁷⁸ But there is a flip side to this too – when a person has a long-standing reputation as an evildoer, then even when he does something which might seem good – we should suspect him of doing it for ulterior motives. Further fleshing out aspects of this commandment, the Meiri writes

77. *Shevuot* 30a and *Sefer Hamitzvot Gedolot* 224 say that one is obligated to judge another favorably; Ramban, *Hilchot De'ot* 5:7 considers it an admirable trait, especially for a Torah scholar; Rabbeinu Yonah in *Sha'arei Teshuva*, *Sha'ar* 3:218 and Meiri to the talmudic text in *Shevuot* consider it a specially pious trait. See also Introduction to *Sefer Shemirat Halashon*, *Be'er Mayim Chaim* 3:3, who also discusses this.

78. Meiri, *Chibbur Hateshuva* p.91. See also Rambam, *Commentary to the Mishnah*, *Avot* 1:6.

that with regard to an ordinary person,⁷⁹ one without a reputation for either good or bad, or perhaps even someone we don't know – when we see him acting in an ambiguous manner, we are obligated to give him the benefit of the doubt.

The Chafetz Chaim goes even further, writing that if a person of good character sees another person doing an action which seems to be sinful, he should not jump to an unfavorable conclusion.⁸⁰ Let it rather remain in his mind as a doubt. But if someone who has repeatedly demonstrated contempt for Jewish law acts in a questionable manner, there is surely no obligation to judge him favorably or even give him the benefit of the doubt. One may even disparage him publicly.

Exception: *Chilul Hashem*

Our inquiry to this point leads to a fairly straightforward conclusion: it is imperative to safeguard the rights of the individual against false accusations, while at the same time it is always necessary to protect the community from predators who might hide behind the technicalities of the law. Finding the proper balance between these two desiderata, which may at times be diametrically opposed, is the challenge of a *bet din*, a Jewish court which must carefully weigh the factors in each individual case.

There is one principle, however, which rises virtually above all others and which must always be at the forefront of their evaluations: the danger of *chilul Hashem* – literally, causing desecration of the Name of G-d. The greatest sin a Jew can commit is bringing disgrace upon the Jewish people or Judaism, because in the public eye that is equivalent to

79. We should assume that this negative deed is an aberration.

80. *Sefer Shemirat HaLashon Issurei Lashon Hara*, kelal 3 and 7. He considers this a *midah tova*, a good characteristic, but not one required by Jewish law. See also *Be'er Mayim Chaim*, ot 10.

diminishing respect for the Almighty.

The term “*chilul Hashem*” is bandied about a great deal, but what actually constitutes a *chilul Hashem*? How is it defined technically? The Gemara in *Yoma* (86a) says in the name of R. Yitzchak of the Yeshiva of Rav Yannai: “anyone whose friends are embarrassed because of his reputation” – that is a *chilul Hashem*. This appellation holds even if the rumors about him are false, created by gossip. But since the public perception is that a rabbi, a *talmid chacham* has sinned, that in itself causes a desecration of G-d’s Name. This standard is codified in the *Shulchan Aruch*: “...if his colleagues are embarrassed due to him, and the Name of Heaven is desecrated by him, he is to be ostracized (*mishmatin le*).”⁸¹

The foremost obligation to reflect honor upon G-d and His people, not ever to do anything to bring disrepute upon Judaism, or the Torah, or Jews, must always be factored into any decision made by the court. The *dayanim* (judges) definitely do have to take into account the impact upon the community – both Jewish and non-Jewish – which might result from public revelation of immorality on the part of a prominent Jewish leader. **This should never be taken to mean that they should sweep it under the rug in order to avoid publicity.** What it does mandate is careful, discreet handling of a volatile situation, as we will see.

In the 16th century, the Radvaz was presented with a very serious issue: there were some Jews in the community who were brazenly and openly defying Jewish law. When the community elders rebuked them, these hooligans responded that if the pressure continued, they would abandon Judaism altogether. Whereupon the rabbis turned to the Radvaz for guidance – should they turn a blind eye to the blatant

81. *Yoreh Deah* 334. The *Maharsha* to *Yoma* 86 derives from the episode of the two sons of the High Priest Eli (*Shmuel* 2:1) who were reprimanded by their father, “the report about your actions is not good”, that their expiation could only be achieved by their death.

dereliction of Jewish law in order to prevent those individuals from committing the even greater sin of apostasy?

In his responsum, Radvaz reveals that he had been troubled by this issue for many years, and digresses to discuss the larger picture:

Despite what I have written about the halachic issues herein, nevertheless it is necessary for the leader of the generation to be patient in these kinds of matters, inasmuch as not all people are the same, and not all transgressions are equal...and it all depends upon how the leader-judge perceives it. But only when he means it for the sake of Heaven.⁸²

Although it would certainly make arriving at decisions easier, the halacha actually does not offer specific guidelines for dealing with an alleged sinner, nor do certain sins elicit equal reactions in all cases. It may depend on the nature of the sin, it could hinge upon the status of the sinner, it could even be a reflection of the *Zeitgeist* which will be the determining factor in arriving at the proper reaction. Sometimes there is no ideal solution but only different ways to minimize the fallout, whether for the individual, or the local community, or Jews vis-à-vis the gentile world.

Let us return now to the central question – how should the Jewish community, or leaders of that community, or administrators of the institution where some wrongdoing is alleged to have taken place respond to these charges?

Obviously, it is far more serious when a rabbi commits an infraction than when an ordinary citizen does so.⁸³ While “boys will be boys” may be the indulgent reaction to some

82. *Shu"t Radvaz* I:187. This issue represents a disagreement between the Ramo and the *Shach*, *Yoreh Deah* 334.

83. The same question is found in the *Chavot Yair* 141 and in *Sefer Maharatz Chayut*, *Darchei Hora'ah* 6:95 and in *Shu't Yaavetz* I, 79 and *Chatam Sofer*, *Yoreh Deah* 322.

peccadillo that is reported in the media, that is hardly the case when a major communal figure is involved – and all the more so when a religious leader (allegedly) loses his way in the moral area. *Chilul Hashem* could arise no matter how the judges rule – if they try to keep it quiet and then it is revealed, there will be dreadful *chilul Hashem* because people will think that rabbis and other important people can get away with doing the wrong thing; on the other hand, if the court publicly denounces or punishes him, the very fact that a religious leader could sin so egregiously will also create a *chilul Hashem*. People will scorn the religion and its adherents. In such a terrible situation, the judges must carefully consider all their options and try to minimize the negative responses.

Furthermore, the kind of misdemeanor also makes a difference: Pedophilia is far worse than fraud, and stealing from the *pushka* (charity box) is taken more seriously than taking home pens from the office, even though both are stealing. All these, and many other considerations, have to be weighed by community leaders before they can react responsibly when someone is accused. Obviously, not all cases should evoke the same response.

Another factor that has to be weighed in considering how to respond to allegations of serious wrongdoing are societal norms in the community at the time. Rabbis cannot act in a vacuum; they must take into account not only the rights of the accuser and the rights of the accused – they also have to be concerned by how the community will react to revelations of moral turpitude among its heretofore most respected leaders. Not only that, they also have to consider the possible scenarios if they do not take action – and then the “cover-up” is revealed. The resultant brouhaha is sure to arouse anger and cynicism at best, and perhaps rejection of religious teachings at worst. It can result in a worse *chilul Hashem* than would have been engendered by revelation of the misbehavior in the first place.

There may be times when the malfeasance of which a person

stands accused is serious, but could be dealt with quietly and yet preserve the dignity of the individual and his family. In today's climate, and also by virtue of the fact that innuendo and gossip instantaneously become grist for the internet mill, that may not be possible. The authorities may feel impelled to demonstrate publicly their commitment to "zero tolerance" of any kind of wrongdoing. In that case, paradoxically, great injustice may actually occur, with the punishment far greater than what is called for by the "crime". Additionally, those "crimes" which are in the public eye nowadays may loom larger than truly heinous misdeeds. Ludicrous as it may seem, in the public eye financial fraud may "trump" eating on Yom Kippur!

Devarim Hanikkarim

When a person is accused of some misdeed, and there is neither proof nor witness – often because the nature of the deed is that it occurs furtively – the ones hearing the accusation face a dilemma: are they permitted to pay any attention to this accusation, or is this *lashon hara*? One of the more difficult concepts concerning of *lashon hara* is the special proviso for "*devarim hanikkarim*", a term that is difficult to translate. Generally, it means that the accusation makes a lot of sense, it resonates with plausibility.⁸⁴ With certain limitations (see below), *devarim hanikkarim* can be accepted.

This is how the Gemara rationalizes David's acceptance of the slander voiced by Tziva, servant of Mephiboshet. When King David was being attacked by his son Absalom and had to flee Jerusalem, he was accompanied by many of his supporters. Noticeable by his absence was Mephiboshet, the crippled son of Yonaton son of Saul; but Tziva, Mephiboshet's servant did come to David and reported that Mephiboshet

84. Just because a situation is plausible doesn't make it reasonable to conclude that it is true: if a man is observed speaking to a woman, there is no basis to assume that they are having an affair.

was delighted that David was being threatened by his own son. His hope was that they would kill each other and he, Mephiboshet, as the last scion of the House of Saul, would be returned to the throne. Furious when he heard how he had been betrayed by Mephiboshet, whom he had supported for years, David confiscated all his property and handed it over to Tziva. Months later, when David finally was able to return to Jerusalem, Mephiboshet came out to greet him and explained why he had not come to accompany David earlier, when he was in danger – his servant Tziva betrayed him and would not provide him with a horse to ride on. Mephiboshet was crippled and could not get around without the help of Tziva, and therefore he had been unable to join David in his flight.

The Gemara asks how David, who was certainly a righteous individual, would accept the *lashon hara* conveyed to him by Tziva? But David believed him “because he saw *devarim nikkarim* in the report”,⁸⁵ which made it permissible to believe and accept.⁸⁶ The *Shulchan Aruch Harav* rules similarly, “the one who accepts *lashon hara* is punished more than the one who say it *unless he sees it as devarim hanikkarim*”.⁸⁷

This shows that it is not forbidden by Jewish law to listen to and give possible credence to a charge which could very well be true. But the Chafetz Chaim insists that the *lashon hara* should not be just believable but highly probable and persuasive, “*nikkarim mamash*”.⁸⁸ What this means in practice is that apparently there is no other plausible way to explain the circumstances other than the scenario envisioned by the *lashon hara*. Absent such very strong indicators, every Jew is

85. *Shabbat* 56a; *Tosafot Yeshanim Yoma* 22b, cited by *Sefat Emet, Shabbat*.

86. *Hagahot Maimoniyot*, to Rambam, *Hilchot Deot* 7:4.

87. 157:10.

88. *Sefer Shemirat Halashon*, P. 133 asterisk addendum. The Chafetz Chaim warns that a person's *yetzer hara* employs various ruses to trick a person into thinking that a slander is not *lashon hara*; therefore, he should seek concrete evidence that there is substance to the rumor.

obligated to give every other Jew the benefit of the doubt.

What is good and proper for a judge is equally wise and prudent for the general public. Rather than jumping to conclusions, rather than being willing to accept every morsel of slander that too many persons rejoice in spreading around, people ought to take a wait-and-see attitude, giving others the benefit of the doubt.

Length Of Punishment; *Teshuva*

When is enough, enough? How long should the perpetrator of wrong be shunned by the Jewish community? Can he ever be totally rehabilitated? Judaism is far more concerned with rehabilitation of a sinner than with his punishment. No matter how awful a person's transgression, it is always our hope that through sincere repentance (*teshuva*), his soul can be restored to its pristine state and he can rejoin the Jewish community. So, while it is mandatory to punish, castigate, and scorn those who do evil, nevertheless, our rabbis have warned not to overdo it, lest rejection turn a weak sinful person into a deliberately wicked one.

"Many wicked people (*resha'im*) have been created when they are totally rejected."⁸⁹ If a person feels there is no hope of his ever being restored to his former status, he may feel so dejected that he abandons being part of the Jewish community.⁹⁰ A tragic example of this reaction is Gehazi, the attendant of the prophet Elisha. The prophet had performed a great miracle for a non-Jew, Naaman, and refused to take any payment, declaring that it was G-d who did it, not himself. This was a great *kiddush Hashem* (sanctification of G-d's name). But Gehazi could not withstand the temptation and ran after Naaman, telling him that Elisha had changed his mind, and

89. *Shu"t Rashba* V, 238-9.

90. It was partly to dispel this desperate feeling of rejection by G-d after commission of a dreadful sin that Rambam wrote his *Iggeret HaShmad*.

asked for some gifts. When Elisha realized what his attendant had done and how he had used the miracle to enrich himself, he angrily banished Gehazi and also decreed eternal *tzara'at* upon him. Disheartened, Gehazi felt he could never do *teshuva*. The rabbis censure Elisha for being too harsh in his rejection.⁹¹ No matter how justified the anger, one must be careful never to close the door entirely for another person's doing *teshuva*.

As a matter of fact, our rabbis teach that "in the place where the repentant stand, even a perfect *tzaddik* cannot stand."⁹² Every soul is precious, even that of the sinner, and it should not be lost forever. Consequently, even though the Talmud has a difficult protocol which a sinner has to accomplish in order to convince the community that he is truly repentant,⁹³ the Rashba⁹⁴ advises authorities not to be too zealous in enforcing all the steps, lest they cause the sinner, out of frustration, to abandon his quest for rehabilitation. The Gemara itself observes that the Torah warns not to overdo whipping a criminal for his infraction, "'lest your brother [Jew] be degraded in your eyes';⁹⁵ once he has received his punishment, [the Torah calls him] 'your brother.'"⁹⁶

In the course of thousands of years, the leaders of the Jewish communities have taken steps to assure that transgressors would be severely punished so that they (and others) would feel it not worthwhile repeating the sin. On the other hand, they have also made regulations easing the burden of repentance to enable sinners to repent readily. As an example, the Gemara mentions *takkanat hashavim*,⁹⁷ a rabbinic

91. *Sanhedrin* 127b.

92. *Berachot* 34b.

93. *Sanhedrin* 25a.

94. See note 98.

95. *Devarim* 25:3.

96. *Makkot* 13a.

97. *Succah* 51.

amendment to the biblical requirement that a thief return the items he stole. If he fails to return the theft, then all his protestations of repentance are worthless. However, the rabbis realized that if they set the bar too high, a potential repenter might be discouraged: for example, if a man stole a pile of bricks and used them to build his house: requiring him to return those specific bricks would entail his destroying the entire house, costing far more than the worth of the bricks he pilfered. This might discourage him from attempting repentance. In such a case, the rabbis permitted monetary restitution rather than insisting on the strict letter of the law, that he return those exact bricks.

We should note, however, that there are exceptions to these leniencies. If a person is reinstated because he appears to have repented sincerely – and then repeats his sinful behavior – he is treated much more harshly the second time, and has to prove emphatically that he will act properly in the future.⁹⁸ The *Rishonim* posit that albeit G-d created man to be upright and honest, an individual only retains the status of presumptive decency as long as he clearly shows through his actions that he is worthy of that righteous designation.⁹⁹ Albeit Judaism accepts the possibility of repentance for any wrongdoing, the reality of social experience has shown that some aberrations are almost impossible to expunge from the personality.

Conclusion

To follow the halachic guidelines which we have examined in the forgoing pages of this study is like walking a very fine line, almost a tightrope which requires exquisite balance. There are numerous prerogatives which compete for our attention: society must be protected from predators and

98. Rashba, loc. cit.

99. Maharashdam, *Choshen Mishpat* 300.

sinner; victims, potential or actual, must be protected, compensated, vindicated; accused perpetrators must be brought to justice or else have their reputations restored; innocent family members should also be safeguarded where possible. Most importantly, respect for Jewish law, mores, and procedures must be upheld.

It is abundantly clear that there cannot be one solution to all the problems. Judges, or those who are called upon to react to allegations of wrongdoing, need to muster all their wisdom in order to deal with these situations with justice and sensitivity. A *bet din* is charged with administering justice, and the Torah commands, *tzedek tzedek tirdof*,¹⁰⁰ justice must be pursued. That is because justice is not readily available, it must be sought out. Justice entails not only punishing the sinner but also leaving the door open for his rehabilitation. Justice does not mean revenge or retribution. Above all, justice means finding a resolution which will enhance respect for Torah and G-d, and will be accepted as being fair to all parties concerned.

Unfortunately, the types of allegations discussed in these pages are not unknown; many Jewish communities and institutions have suffered shame and pain due to these revelations. Perhaps we should devote a few moments to consider how these issues might be addressed wisely and fairly. A few examples from recent headlines will suffice:

Last year, rumors surfaced in Israel and America about a *Rebbe* in a yeshiva in Israel who had done things he should not have done. The most widely circulated version of the rumor had it that the rabbis in charge had spoken to him quietly, privately, and prevailed upon him to leave the yeshiva immediately and go to learn somewhere where he would not have contact with young persons. But after a while the rabbis, who were monitoring the situation, realized that he was not abiding by the terms of the agreement. Thereupon they

100. *Devarim* 16:20.

publicly denounced him, bringing about an abrupt and total cessation of his activities, and his total degradation in society.

It strikes me that these rabbis handled the situation masterfully and honestly, in keeping with the Torah directive that “all her [Torah] ways are pleasant.” They tried to protect potential victims, they tried to protect the man’s family, they even tried to protect the man from his own evil urgings. But they did not lose sight of the fact that above all they had to protect the integrity of Jewish law. They tried to deal with the problem discreetly, and when that failed, they had to take a bolder direction.

Years ago, I heard about a teacher in a Hebrew school who was also suspected of acting improperly. The Rosh Yeshiva called him in and told him that he was dismissed, effective at the end of the school year. In the meantime, he could continue in the classroom, but with an assistant at all times. Furthermore, the rabbi of his shul was apprised of the situation, so that he could keep an eye on his interaction with children. The *Rebbe* was warned that even one further infraction would trigger a public denouement.

I was not in a position to monitor this situation, and therefore cannot guarantee that it was successful. But I laud it as a creative, admirable, sensitive attempt to address a problem. Conversely, I can only lament what happens nowadays in similar situations – immediately there is a buzz in the community, the press features it daily, the internet explodes with salacious details (or imagination), lives are ruined, reputations destroyed – and no one is even sure whether there was any truth to the whole rumor.

Consider another scenario – a kosher butcher is discovered to be selling non-kosher meat. Within a day everyone knows about it. The family name is blackened, tongues wag incessantly, the media have a field day. Wouldn’t it be much better for the dignity of the Jewish people if the situation were handled circumspectly? The butcher could be called in by the

rabbis for a private confrontation, forced to leave the food business altogether, his compliance monitored, and a public announcement would only be forthcoming if he strayed from the agreement.¹⁰¹

Let's be clear – we do not approve of covering up wrongdoings, but rather trying to prevent repetition and maintaining the integrity of Jewish institutions. No one has a perfect solution, but there are decent ways to take care of problems and also less desirable ways, which lead only to shame and desecration. We have tried herein to outline the areas of concern, to indicate the thinking of halachic experts for thousands of years, and to suggest factors which ought rightfully be taken into consideration when addressing major issues. As the Rambam indicated, the major motive has to be “*leshem shamayim*”, to act for the glory of Heaven.¹⁰²

In a final, personal note, I want to add another comment: just like the *kohen gadol* cried, and his interrogator cried, at the necessity to guarantee that the Temple services would be conducted properly, I also have found it a painful necessity to investigate the topics in this article. It is with a heavy heart that I find so many examples of moral turpitude in the worldwide Jewish community, so numerous that there is a need to clarify how these issues should be handled. This is not a proud moment in our history. Hopefully, the pendulum will soon swing in the other direction, and the Jewish people will once again be able to take pride in our moral rectitude.

101. The issue of *kashering* dishes used with non-kosher meat does not apply, since it is a *safek derabbanan*.

102. Hopefully this article will serve as a springboard to further discussion within the Jewish community, leading to higher standards of behavior and suggesting precautions to protect the community. May it serve *lehagdil Torah uleha'adira*, to enhance and glorify our religious commitment.

Fertility Treatments on Shabbat¹

Rabbi Dovid Sukenik

Introduction

Couples undergoing fertility treatments are often confronted with a variety of unique halachic questions. This essay will address the issues that may arise when these treatments coincide with Shabbat, as well as the principles of Shabbat laws that must be applied in such situations. Our discussion will be limited to those issues that are relevant to the treatments themselves, and not the resulting secondary issues.

Status of a Woman Undergoing Fertility Treatment

Before discussing the particulars of specific treatments and the halachic problems they present with regards to Shabbat observance, we must first address a fundamental question: Is a woman undergoing fertility treatments allowed to violate any of the laws of Shabbat in the pursuit of those treatments? The permissibility of violating Shabbat regulations for a *choleh* (ill person) depends on their status in regards to the “illness”. The categories which are discussed by the *poskim* in relation to a woman undergoing fertility treatments are *sakanat eiver* (danger to a limb), *choleh she-ein bo sakana* (ill person who is not

1. The author wishes to thank Rabbi Dr. Zalman Levine, reproductive endocrinologist at the Fertility Clinic of New York and New Jersey, for verifying the medical information in this article.

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in danger) and *bari* (healthy person).²

The consensus of the contemporary *poskim*, including R. Moshe Feinstein, R. Shlomo Zalman Aurebach, R. Yosef Shalom Elyashiv and others, is that a woman undergoing fertility treatments would be assigned the status of a *choleh she-ein bo sakana*.³

There are two possible rationales for this ruling. The first reason is based on the verse in which Rachel bemoans her fate as a childless wife: "Give me children – otherwise I am dead!"⁴ The Gemara also equates one who does not have children with a "dead" person.⁵ Although neither the verse nor the Gemara

2. For a medical opinion on this matter, see R.P. Dickey, et.al., "Infertility is a Symptom, Not a Disease," in *Fertility and Sterility* 74:2 (August, 2000): 398.

3. *Birchat Banim* (R. Zand, p. 270 fn. 32), Richard V. Grazi (Rabbi Gideon Weitzman), *Overcoming Infertility* "Fertility Treatment on the Sabbath and Festivals," (The Toby Press), 383, nt. 54, *Techumin* (vol. 23, p. 230, fn. 35), and R. Yitzchok Zilberstein, *Melachim Omnayich* (ch. 5, nt. 13). This is also the opinion of R. Asher Weiss; *Techumin*, *ibid.*, p. 220 and R. Herschel Schachter, whose opinion was related orally to this author. See also *Sh"ut Nishmat Shabbat* 5:378 in the name of the Satmar Rav and *Sh"ut Shevet Halevi* 1:61.

The article in *Techumin* reports that this is the opinion of Rav Mordechai Eliyahu, Rav Yaakov Ariel, and Rav Ephraim Greenblatt as well. (See, however, *Sh"ut Rivevot Ephraim* 6:198:2, where Rav Greenblatt assumes that such a woman has the status of *sakanat eiver*). This is also the opinion of Rav Asher Weiss; *Techumin*, *ibid.*, p. 220, in a letter written to Machon Puah, and Rav Hershel Schachter as told to this author. (Rav Schachter suggested that this woman could possibly also have the status of *sakanat eiver*). In *Sh"ut Nishmat Shabbat* 5:378, the Satmar Rav is quoted as saying that a woman undergoing fertility treatments has the status of *choleh kol gufo*. According to the Ramo (*Shulchan Aruch Orach Chaim* 328:17), this is the same status as a *choleh she-ein bo sakana*.

4. *Bereishit* 30:1.

5. *Nedarim* 64b. Maharal (*Gur Aryeh Bereishit* 30:1) explains that this is because an infertile person has no continuation after *his* death. R. Chaim Shmuelewitz (*Sichot Mussar* 5732:31 "*Badad Yeisheiv*") suggests that the measure of a living human being is the ability to give to others, and one who has no children is in some way lacking that ability to give, which on some level equates him with someone who is not alive and does not have the ability to give at all. This holds true for the other examples in the Gemara as

are meant to be taken literally, we can presume that their descriptions correspond to the psychological pain of a childless woman, and that psychological pain itself might grant her the status of a *choleh*.⁶ A second reason to consider a woman undergoing fertility treatment as a *choleh* is that she is in a situation that requires medical attention. Even though she suffers no physical pain or symptoms of illness, the fact that her life situation is of medical concern makes her a *choleh*.⁷

The status of a *choleh she-ein bo sakana* implies certain leniencies that may be relevant to our situation. One leniency is that one may ask a non-Jew to perform a *melacha de-oraita* (act forbidden by Torah law) on Shabbat on behalf of the *choleh*.⁸

A second leniency regarding a sick person who is not in mortal danger (*choleh she-ein bo sakana*) is the possibility of asking a Jew to perform an *issur de-rabbanan* (act forbidden by rabbinic law) for the *choleh*. *Shulchan Aruch* cites a number of opinions among the *Rishonim* regarding this issue.⁹

well. A blind person can't see when someone else is in need and thus can't necessarily give to them. A poor person doesn't have the resources to give to others. A *metzora* ("leper") is required to sit in solitude outside of the Jewish encampment and has no social interaction, which prevents him from giving to others.

6. R. Yaakov Emden, *Mor U-Ketziyah* (Orach Chaim 328, Magen Avraham 9), writes that someone who is not ill but suffers *tza'ar* (pain) is equivalent to a *choleh she-ein bo sakanah*. See *Techumin* 23, p. 220. See also Sara Barris, "Emotional Issues of Orthodox Couples Experiencing Infertility," in *Medicine and Jewish Law III* (Yashar Books Inc.), 3.

7. *Chelkat Yaakov*, Orach Chaim 150, advances this logic. See also *Birchat Banim*, p. 268, nt. 32.

8. *Shabbat* 129a; *Shulchan Aruch*, Orach Chaim 328:17.

9. *Shulchan Aruch*, *Ibid.* Rambam (*Hilchot Shabbat* 2:10) differentiates between Torah prohibitions, which cannot be violated for a *choleh she-ein bo sakana*, and rabbinic prohibitions, which may be violated for a *choleh she-ein bo sakana*, even if there is no *sakanat eiver*. See *Maggid Mishnah* and *Kesef Mishneh* there, and *Tur* and *Beit Yosef*, Orach Chaim 328:17. The *Shulchan Aruch* also cites *Ran* (*Shabbat* 39b in the *dapei Ha-Rif*, s.v. *u-meha*, s.v. *nimtza*, see also *Chiddushei HaRan Shabbat* 129a), who assumes that a regular case of

Ramban¹⁰ (quoted by *Tur*) and Rashba¹¹ (quoted by *Beit Yosef*) assume that a *choleh she-ein bo sakana*, even when not a case of danger to a limb (*sakanat eiver*), would warrant violation of a rabbinic prohibition through a change in the way that the act is performed (*shinui*), while in a case of *sakanat eiver*, one may violate the prohibition even without a change. *Mishnah Berurah* notes that the opinion of Ramban is adopted by most *Acharonim* (*Taz*, *Magen Avrohom*, *Gra* and others); a Jew may therefore perform a rabbinic prohibition with a modification on behalf of a *choleh she'ein bo sakana*.¹² Specific applications of such leniencies will be discussed later in this article.

Some *poskim* maintain that a woman undergoing fertility treatments has the status of *sakanat eiver* (danger to a limb).¹³

choleh she-ein bo sakana in which there is no *sakanat eiver* does not warrant a violation of a rabbinic prohibition, and only *amira le-nochri* (asking a non-Jew to perform a forbidden act on behalf of a Jew) would be permitted in such a case. However, a Jew could violate an *issur de-rabbanan* in a case of *sakanat eiver*. See *Rosh*, *Avodah Zarah* 2:10, who questions whether or not this is correct.

10. *Torat HaAdam*, *Sha'ar HeMeichush*.

11. *Chiddushim*, *Shabbat* 129a, s.v. *amar lei hilchita*. See, however, *Sh"ut Rashba* 3:272, where he seems to contradict his statement in his *chiddushim*. See *Taz* (328:10) and *Nishmat Adam* (69:3, s.v. *u-ma she-katav Beit Yosef*, s.v. *le-inyan ikar ha-din*, s.v. *shavti ve-ra-iti*), who discuss this issue. They assume that the opinion recorded in the responsum is mistaken and the real opinion of Rashba is the one that is found in the *chiddushim* as quoted by *Beit Yosef*.

12. *Mishnah Berurah* 328:57. See, however, *Bach*, *Levush*, *Eliya Rabba* and *Eliya Zuta*.

13. *Chelkat Yaakov*, *Orach Chaim* 150; *Rivevot Efraim* 6:198:2; R. Y.Y. Neuwirth, quoted in *Nishmat Avraham* 4, *Orach Chaim*, p. 38 (6 volume edition). Ironically, *Chelkat Yaakov* suggests that she has the status of *sakanat eiver* without having any status of *choleh* (normally we assume that *sakanat eiver* is one step beyond *choleh she-ein bo sakana*). His approach is based on a comment of *Chaye Adam* (69:13) who mentions this notion of having a *sakanat eiver* without being a *choleh* at all.

It is interesting to note that elsewhere (*Yoreh De'ah* 62:6), *Chelkat Yaakov* writes that this woman has at least a status of *miktzat choleh* (slightly ill) because she is unable to have children without medical treatment. That

Since the parts of the body associated with childbirth are not functioning properly in their current state, she cannot have children and she is in danger of losing the ability to give birth entirely as she ages. R. Chaim Na-eh writes that any situation in which a limb is not functioning properly and will not start working until the limb is treated medically is assigned the status of *sakanat eiver*.¹⁴

As noted above, a Jew may violate a rabbinic prohibition (*issur de'rabbanan*) in a case of *sakanat eiver*, even without modification.¹⁵

R. Moshe Stern was asked whether a woman who needed to take pills in order to help her conceive could take these pills on Shabbat. R. Stern's response was that this woman is not sick and therefore we should allow her to take the pills since the rabbinic decree of *shechikat samimonim* (grinding spices) was not instituted for a healthy person (although ideally, he suggests dissolving the pills in water before Shabbat and drinking the water on Shabbat to minimize violating any prohibitions). It would appear from his response that R. Stern maintains that a woman undergoing fertility treatments has the status of a healthy person (*bari*) because there is presently

teshuva was written in *Av* 5716. In *Tevet* 5724, R. Breisch indicates definitively that such a woman would have the status of *sakanat eiver*. At the end of the *teshuva* in *Yoreh De'ah*, R. Breisch notes, "Nevertheless it appears in my humble opinion that because of the greatness of the mitzvah to have children (*peru u-revu*) after the great destruction [i.e., the Holocaust] and for the purpose of peace between husband and wife, as is known that this can interfere with the peace at home, it is an obligation on the Rabbis of Israel to exert themselves and to permit [these treatments] according to the principles of the Torah and the *Shulchan Aruch*."

14. *Ketzot Ha-Shulchan*, *Badei Ha-Shulchan* 138:18, quoted in *Shemirat Shabbat Ke-Hilchata* 33:1:5*, nt. 8.

15. Some *Rishonim* assume that *sakanat eiver* has a similar status to danger of the entire body (*sakanat kol ha-guf*). See *Meiri Avodah Zarah* 28a, *Tosafot Sukkah* 26a s.v. *ve-afilu*, *Sh"ut Seridei Aish* vol.1 p. 308-309, *Teshuvot Ve-Hanhagot* 5:97 and *Be-ikvei Hatzon* 10:6.

no illness.¹⁶ According to this classification, even violations of rabbinic prohibitions would be forbidden on Shabbat, although ingesting pills would be permitted, inasmuch as the *gezeira* of *shechikat samimonim* would not apply (see below, “Oral Hormone Pills”).¹⁷

Initial Workup

In the initial stages of fertility treatment, the doctor performs a workup to help determine where the problem lies so that appropriate measures can be taken to treat the couple. This testing may include monitoring a complete menstrual cycle through blood-work, ultrasounds, an HSG test (hysterosalpingogram), semen analysis,¹⁸ hysteroscopy, and other tests. These tests are not treatments and need not be performed on Shabbat. They should therefore be scheduled during the week.¹⁹

Oral Hormone Pills

Doctors often prescribe hormone pills (such as Clomid) to regulate and strengthen ovulation. Generally speaking, these pills are taken for a number of consecutive days. It is crucial that not even a single day be missed, as this could potentially ruin the pill’s effect. It is probable that someone taking these

16. *Be’er Moshe* 1:33.

17. It should be noted that R. Stern was responding to a question of *shechikat samimonim*. As mentioned earlier (based on the *Chaye Adam*), it is possible for a *bari* to also assume the status of *sakanat eiver*. Thus, although R. Stern classified the woman as a *bari*, it does not preclude him from allowing other acts to be violated under the classification of *sakanat eiver*. One cannot assume, based on R. Stern’s response, that all other violations would be prohibited based on the *bari* status.

18. Before acquiescing to a semen analysis, a rabbinic authority must be consulted, as the process can entail certain halachic prohibitions.

19. Generally speaking, the doctors prefer to schedule these tests for weekdays anyway, as weekends are reserved for timely procedures, such as IVF.

pills will need to take them on Shabbat as well.

Ingesting pills on Shabbat, and indeed any type of healing (*refuah*) (healing), was proscribed by the Rabbis (*Chazal*). In *Chazal*'s time, medications were prepared by grinding different spices together. Such grinding is a violation of the prohibited Sabbath activity (*av melacha*) of *tochein* (grinding). Out of concern that one might come to grind ingredients to create a medication,²⁰ *Chazal* forbade resorting to any type of healing.²¹ Although medications in our time usually come ready-made, the decree is still in force.²² It has limitations, however; *Chazal* did not apply their stricture in cases of *bari*²³ or *choleh*.²⁴ Therefore, while a person assigned the status of *meichush* (slight discomfort) or *miktzat choli* (slightly ill) would not be allowed to take medication on Shabbat, it may be permitted in other cases.²⁵

A *bari* is allowed to take medications because the concern of *Chazal* was that a sick person would be nervous about his illness and would come to violate Shabbat in a moment of panic. A healthy person who simply wants to take some form

20. See *Shabbat* 53b and Rashi, s.v. *gezeira*; *Shulchan Aruch*, *Orach Chaim* 328:1.

21. See *Bach*, beginning of *Orach Chaim* 328 and *Am Mordechai*, *Shabbat* 34:6.

22. *Tzitz Eliezer* 8:15:15:4 notes that there are still certain medications that are prepared at home and the concern of *Chazal* is therefore still relevant. See also *Ketzot Ha-Shulchan* 134:4 #2 and *Nefesh Ha-Rav*, 173.

23. *Shulchan Aruch* 328:37.

24. *Ramo* 328:37 and *Mishnah Berurah* s"n 121.

25. Some *poskim* mention that even if one is permitted take pills on Shabbat, it should ideally be done with a change (using a *shinui*). See *Birchat Banim* 10:3, *Iggerot Moshe*, *Orach Chaim* 3:53 (a case where he permits taking medication), *Be'er Moshe* 1:33 and *Teshuvot Ve-Hanhagot* 5:94:2. *Mishnah Berurah* 328:121 quotes *Radvaz* as saying that the requirement to use a *shinui* by *shevut* for a *choleh she-ein bo sakana* (the opinion of *Ramban* quoted above) is only applicable to *melachot de-rabbanan*, not *gezeirot de-rabbanan* (acts that were forbidden by *chazal* in order to prevent one from violating an *issur de-oraita*), like *shechikat samimonim*. According to this opinion using a *shinui* when taking medicine would be unnecessary.

of medicine for general strengthening or some other reason would be allowed to do so.

Thus, the permissibility of a woman's ingesting a hormone pill on Shabbat depends on the classifications discussed above. R. Moshe Stern, for example, suggests that a woman should ideally put the pill in water before Shabbat and drink it on Shabbat, but he notes that it is certainly acceptable to swallow the pill on Shabbat, as he considers an infertile woman a *bari*.²⁶ According to the *poskim* who consider this woman to be a *choleh she-ein bo sakanah* or as having *sakanat eiver*, she would likewise be permitted to take pills since the prohibition to grind medications does not apply to such circumstances.

Some *poskim* would allow the pills to be ingested in a regular manner as long as she had begun taking the prescription before Shabbat. This is the opinion of R. Shlomo Kluger,²⁷ which is followed by numerous *poskim*.²⁸

One source for this opinion is the Gemara that states that one may not replace a bandage that fell off of a wound on Shabbat.²⁹ Rashi explains that this is because we are concerned that a person will smooth medicine on the wound, a Sabbath violation of the *melacha* of *memare-ach* (smoothing).³⁰ Tosafot note that Rashi was not concerned with the problem of "grinding spices" because the bandage was already on from

26. *Be'er Moshe* 1:33.

27. *Sefer Ha-Chaim, Orach Chaim* 328:37; *Kuntres Chayei Nefesh*, chapter 6, *Sh"ut She-not Chaim* 152:4 and addition to #4 at the end of the *Teshuva*. R. Kluger cites this as a "*margela be-fumei de-inshi*," a common saying.

28. See *Shemirat Shabbat Ke-Hilchata* 34:19 and nt. 76 (see also the emendation of R. Auerbach in vol. 3 of *Shemirat Shabbat Ke-Hilchata*); *Chazon Ish* (quoted in *Imrei Yosher, Mo'ed* 97, *Orchot Rabbeinu* vol. 1, #214 p. 155, *Dinim Ve-Hanhagot* 15:1); R. Yosef Shalom Elyashiv, *Kovetz Teshuvot* 1:40:2; and R. Eliezer Waldenburg, *Tzitz Eliezer* 8:15:15:15-17, 12:45:5-6. Az Nidberu 1:31:5 considers this opinion of R. Shlomo Kluger as a possible leniency to be used in combination with other possible leniencies.

29. *Eiruvim* 102b.

30. S.v. *aval*. This is also the opinion of Rosh (10:17).

the day before.³¹ By extension, if medicine was taken before Shabbat, we are not concerned with the regulation of grinding spices. Maharsham rejects this proof, noting that there is no indication in the Gemara's case that there was medicine on the wound before Shabbat, only that the bandage was present.³² A careful reading of *Sefer Hachaim* indicates that R. Kluger was aware that this proof was not absolute. However, he notes that the case of the bandage is somewhat similar to our case and the ruling seems logical, so we should accept the proof. The logic, as stated by R. Kluger, is that when one has already started taking medicine before Shabbat, they are aware that they need to prepare the medication in advance. However, someone who starts medication on Shabbat may not necessarily have been aware that any preparation was needed. Thus, there is concern that he may prepare medication on Shabbat and we are thus concerned for *shechikat samimonim*.

Another possible source for this view is a statement of Rambam, who says that on Shabbat one may not soak *chilitit*, which was used in the preparation of a medicinal drink, unless he had already done so previously on Thursday and Friday.³³ Similarly, any medications that were begun before Shabbat and must be taken on consecutive days may be continued on Shabbat itself. This conclusion is difficult in light of Rambam's source. The Gemara states this halacha, but stipulates that permission is granted because refraining from taking this pill would constitute danger to one's health (a *sakana*).³⁴ Although this phrasing of the Gemara is recorded in

31. S.v. *machzirin*. It should be noted that Tosafot question the position of Rashi and conclude that there is a problem of *shechikat samimonim* in such a case. See Rosh for a defense of Rashi's view.

32. *Da'at Torah, Orach Chaim* 328:37.

33. *Hilchot Shabbat* 21:22, 22:7, according to the understanding of the *Maggid Mishnah*.

34. *Shabbat* 140a.

full by *Shulchan Aruch*,³⁵ Rambam left out the last point.³⁶ Perhaps, then, one would not be permitted to continue taking medicine on Shabbat if refraining does not constitute a matter of *sakana*.³⁷

A third possible reason why one would be permitted to continue medications on Shabbat, if they started beforehand, is that we assume that a sick person (*choleh she-ein bo sakana*) is permitted to take medications; and *Chazal* did not apply their stricture against medicine in such a case.³⁸ Thus, a sick person or one who would be in danger (*choleh she-ein bo sakana*) or if skipping a day of medication would eventually place a person in danger, would be permitted to continue taking the medication.³⁹

R. Mordechai Willig notes that according to this last line of reasoning, one would even be allowed to **begin** taking the

35. *Orach Chaim* 321:18.

36. *Mishnah Berurah* 321:72 notes that *Eliya Rabba* had a different text of Rambam, in which Rambam continues to say that a person may only continue to drink the *chiltit* on Shabbat if it is the manner of healthy people in that area to do so. In such a case, even though this specific person is drinking it for *refuah* purposes, he may continue to do so on Shabbat. According to this understanding of Rambam, one would not be permitted to continue taking hormone pills on Shabbat, as healthy people do not ordinarily take these pills.

37. R. Avigdor Nevenzhai, (*Be-Yitzhak Yikarei* 321:18), is strict regarding this matter in a case of non-danger, as it seems from the Gemara and *Shulchan Aruch* that this leniency should not apply.

38. This is suggested in *Halacha U-Refuah* vol. 1, p. 87-88; see also *Am Mordechai*, *Shabbat* 34:5. It would seem that R. Kluger did not assume this line of reasoning because he was referring to a case where the taking of medications would have otherwise been prohibited if not for the fact that the regimen started before Shabbat. *Halacha U-Refuah* rejects the sources of R. Kluger and quotes a Gemara that seems to go against him. *Halacha U-Refuah* suggests that the “*margela be-fumei de-inshi*” was not a *chiddush* in the *halachot* of *refuah*, but rather an assumption that one who must take medications for consecutive days would presumably have the status of a *choleh she-ein bo sakana*.

39. See *Aruch Ha-Shulchan* 321:45.

medication on Shabbat,⁴⁰ but according to the first two proofs, the medication could only be **continued** on Shabbat. This issue could be relevant if medication for ovulation must be started on a specific day of the menstrual cycle or in the case of a one-time pill.⁴¹

Other *poskim* maintain that one is not generally permitted to continue taking medication on Shabbat.⁴² Even according to these *poskim*, however, it may still be permissible for a woman undergoing fertility treatments to continue medication depending on her status – whether as a *bari*, *choleh she-ein bo*

40. *Am Mordechai*, *Shabbat* 34:5. In *Orchot Rabbeinu* vol. 1, #214 p. 155 (quoted above). R. Gedalyah Nadel is mentioned as having quoted the Chazon Ish that one may take a medication that needs to be taken for at least seven days (in which case it will inevitably run into Shabbat) even on Shabbat. His reasoning is because *Chazal* only forbade the taking of medication in case of someone only feeling discomfort (*meichush*). However, for someone who has a *machala* (disease), it was never forbidden by *Chazal*, even in an instance where there is no *sakana*. Chazon Ish assumed that if one must take medication over the course of many days, he would have the status of a sick person, not just one experiencing discomfort (*machala* and not merely *meichush*). R. Yaakov Yisroel Kanievski (the Steipler Gaon) relied on this opinion of the Chazon Ish. *Orchot Shabbat* vol. 2 chapter 20 fn. 180 p. 281 points out that according to this line of reasoning one should be able to start medication on Shabbat as well, not merely to continue on Shabbat. It should be noted that although this line of reasoning could help for a woman taking medications for a number of days, in a case where only one pill was necessary (for example, in the case of male infertility, discussed below) this logic would not apply.

41. See “Male Infertility” below.

42. This is the opinion of Maharsham, *Da’at Torah*, *Orach Chaim* 328:37. R. Moshe Feinstein, *Iggerot Moshe*, *Orach Chaim* 3:53, is lenient only in extenuating circumstances, such as when the patient is on the verge of a nervous breakdown. He concludes by saying that this is not usually the case. *Be’er Moshe* 1:33:7 writes that he thinks it should be forbidden to continue medication on Shabbat, despite rumors that R. Shlomo Kluger was lenient (he did not have access to R. Kluger’s *Sefer Ha-Chaim*). Although he agrees with Maharsham, *Be’er Moshe* concedes that R. Kluger’s opinion can be relied upon if one must be lenient. See also *Avnei Yashfeh* 1:90:3; *Shraga Ha-Me’ir* 2:40; *Emek Halacha* 24; *Ohr Le-Tzion* 2:36:9; and *Be-Yitzchak Yikarei* 321:18, who all take stringent views.

sakana or *sakanat eiver.*, in which case the *gezeira* of *shechikas samimonim* would not apply.

Injections

A doctor may prescribe hormone injections (such as Menagon, Pergona, and Gonal-F) for a few days in order to regulate and/or strengthen ovulation.⁴³ There are number of issues involved with receiving injections on Shabbat.

Causing Bleeding

Even if the injection is subcutaneous and not meant to enter into any blood vessels, it may cause bleeding and thus potentially violate an *issur de-oraita* (see “Blood Tests” later on). Because the goal of the injection is not to cause blood, such causation of blood would be deemed a *melacha she-eino tzericha le-gufa*.⁴⁴ If the injection were intramuscular, it would be considered a *pesik reisha*, as bleeding would almost certainly result, but it would be deemed “*lo neicha lei*” because one certainly does not care for the blood.⁴⁵ As such, causing bleeding through an injection is only rabbinically prohibited⁴⁶ and would therefore be permitted in a case of *choleh she-ein bo sakana* or *sakanat eiver*.⁴⁷ If we would consider this woman a

43. A doctor may also prescribe an injection in order to time ovulation within a specific window of time (HCG). This will be discussed below.

44. See Rashi *Shabbat* 93b s.v. *V'Rabi Shimon*.

45. See *Le-Torah Ve-Horaah* vol. 9, p. 13, where R. Elimelech Bluth quotes R. Moshe Feinstein to this effect.

46. Tosafot *Shabbat* 103a s.v. *lo*; *Shulchan Aruch* 320:18 and *Mishnah Berurah* s”k 53. The *Aruch* (quoted in Tosafot) however, maintains that a *pesik reisha de-lo neicha lei* is *muttar*.

47. It should be noted that R. Moshe is quoted as allowing the injections, which are thus violating a rabbinic prohibition for a *choleh she-ein bo sakana*, even without using a *shinui*. This seems to be against the accepted approach, quoted above, that one must use a *shinui* in such a case. He permits it because it would be impractical to give injections with a modification and would thus be impossible any other way. *Chaye Adam* (69:12) writes that in a

bari then we would not allow a rabbinic prohibition to be violated.

Attaching the Syringe

If the syringe used for injection is disposable, it must be attached to the needle, potentially causing a problem of *boneh* (building) when attached to the needle for use and *soter* (destroying), if it is destroyed after use.⁴⁸ Most *poskim* assume that attaching a disposable syringe is permitted on Shabbat because it is made for a one-time use and is therefore not meant to last. Temporary *binyan* ("building") is forbidden only rabbinically,⁴⁹ and would therefore be permitted (with a *shinui*) for a sick person, *choleh she-ein bo sakana*. According to the opinion that considers this woman as having *sakanat eiver*, even a *shinui* would not be required. However, if she were given the status of *bari* – healthy – then we would not allow any rabbinic prohibitions to be violated.

Ideally, the syringe with the medication should be attached before Shabbat. If that is not possible (based on the doctor's

case where a non-Jew is unavailable and it is impossible to do the act without a *shinui*, the rabbinic prohibition may be violated for a *choleh she-ein bo sakana* in the regular manner.

48. Another potential problem, although not related to the treatment itself, is that of applying an alcohol swab to the area that will be injected. This could potentially involve a problem of *sechita* (squeezing), as well as problems with opening the package. Regarding the packaging, it is recommended to tear it at a place that will not rip through letters (which could violate *mocheik*, erasing). Since the packaging will be destroyed by tearing it, it is considered destructive and therefore permissible on Shabbat (*Shemirat Shabbat Ke-Hilchata* 9:12).

49. See *Shulchan Aruch, Orach Chaim* 313:6; *Mishnah Berurahh, Orach Chaim* 313:6:46; *Shemirat Shabbat Ke-Hilchata* 33:9 and nt. 43, vol. 3 35:63; *Minchat Shlomo* 2:19; *Tzitz Eliezer* 13:46, 14:27:5, 15:17, 16:15; *Minchat Yitzchak* 8:27; *Yechaveh Da'at* 2:56; *Teshuvot* of R. Shlomo Zalman Auerbach and R. Yitzchak Weiss printed at the end of *Nishmat Avraham, Orach Chaim; Shalmei Nissan, Perek Eilu Kesharim*, p. 115; *Ben Ish Chai*, year 2, *Parshat Vayakhel* 5. See, however, *Ohr Le-Tzion* 2:36:19, who forbids attaching syringes.

assessment), it is permitted to attach the syringe on Shabbat. One should do so with the intention of detaching it after usage. After administering the injection, the syringe should be detached before being discarded.⁵⁰ The reason for this is that it confirms its status as only a temporary “building”. Moreover, Tosafot (*Shabbat* 102a s.v. *hy*) note that the rule of *ein binyan be-keilim* applies to cases where the utensil does not require a professional for assembly. Detaching the syringe shows that it does not require a professional and therefore we can apply the principle of *ein binyan be-keilim*.

Mixing Powder and Liquid

Injectable medications come in two forms. In some instances, a small glass bottle with a rubber top is used (similar to insulin bottles). In such a case, the syringe pierces the rubber top to draw out the medication inside the bottle. In other cases, a small glass container with powder inside is snapped off at the top, and the powder inside is mixed with a liquid solution before being drawn into the syringe.

Mixing powder and liquid together may potentially run into the prohibition of *losh* (kneading). However, *Chazon Ish* writes that as long as there is significantly more water than powder in the mixture, there is no concern, as *losh* does not apply when there is an abundance of water.⁵¹ In addition, *losh* does not apply when the powder dissolves and is no longer noticeable.⁵²

Making a *Petach* in the Body

In the course of an injection, a needle inevitably creates a

50. *Tzitz Eliezer* 15:17. See *Birchat Banim* 10:19 and nt. 29.

51. *Chazon Ish*, *Orach Chaim* 58:9, s.v. 156a, s.v. *u-mani*.

52. See *Iggerot Moshe*, *Orach Chaim* 4:74, *Losh* #1, where R. Feinstein argues that it is permitted to dissolve powdered cocoa in a drink without a problem of *losh*, similar to dissolving sugar in a drink.

hole (*petach*) in the body. Creating a *petach* (opening) is a violation of the forbidden Sabbath activity of *makeh bi-patish*.⁵³ R. Moshe Feinstein is quoted as maintaining that an injection only constitutes a *petach* on a rabbinic, not biblical level, as it is only made to enter, not to exit.⁵⁴ It is therefore permitted when dealing with a *choleh she-ein bo sakana* (see note 47) or *sakanat eiver*. But if this woman would be given the status of *bari*, then the creation of a *petach* would potentially pose a problem.

Who Should Administer Injections?

Given the numerous issues that result from injections on Shabbat, they should ideally be administered by a non-Jew.⁵⁵ But R. Yosef Shalom Elyashiv is quoted as saying that a Jew may administer injections for fertility treatments.⁵⁶

Timing of the Injections

Doctors recommend that injections be administered around the same time every day. If one plans in advance to receive the injections around the time of *shekiat ha-chama* (sunset), Shabbat issues can be avoided; one injection can be taken around the time of candle-lighting on Friday afternoon and another injection can be received immediately after the conclusion of Shabbat.⁵⁷

53. See *Shulchan Aruch, Orach Chaim* 328:28.

54. *Le-Torah Ve-Hora'ah* vol. 9, p. 13.

55. It is ideal to minimize the violation, as *pikuach nefesh* (saving a life) on Shabbat is *dechuya*. See Rambam *Hilchot Shabbat* 2:1, *Sh"ut* Rashba vol. 1 #689, *Ran Beitza* 9b *Dapei Ha-Rif* s.v. *u'miha*. See, however, *Rosh Yoma* 8:14 who quotes the opinion of *Maharam Me-Rottenburg* who assumes that Shabbat is *hutra* for *pikuach nefesh*. See *Mishnah Berurah* 328:39.

56. R. Yisroel Pinchas Bodner, *Halachos of Refuah on Shabbos* (Feldheim Publishers), 339 nt. 1. It is unclear from the reference whether one should ideally seek out a non-Jew or if one can simply allow a Jew to administer the injection.

57. *Birchat Banim* 10:18. See also, *Orchot Rabbeinu* vol. 1 # 217, p. 156 in the name of the Chazon Ish. This will only work for medications that are taken

HCG (Human Chorionic Gonadotropin) Injections

HCG is a hormone that, when administered when one or more mature follicles are present, produces ovulation thirty-six hours later. This allows the doctor to remove a mature egg and ready it for fertilization. There is generally around a two-hour timeframe in which the eggs can be extracted for fertilization.

HCG was originally intended to be an intra-muscular injection, which almost always causes bleeding. As noted above, R. Moshe Feinstein is quoted as saying that this is not a problem on Shabbat because it is a *pesik reisha de-lo nicha lei*, which is only rabbinically prohibited and therefore permitted for a *choleh she-ein bo sakana* or *sakanat eiver*.⁵⁸ According to those who consider this woman a *bari*, any causation of bleeding would be problematic.

Recent studies have shown that this injection can be administered subcutaneously without losing its potency.⁵⁹ If done in this manner, the injection does not necessarily cause bleeding and therefore would be a preferable solution, so as not to violate an *issur de-rabbanan*.

In-Vitro Fertilization (IVF)

In-Vitro Fertilization involves the removal of a healthy egg from the woman, which is then fertilized outside the womb.

for at least a few days. HCG is a timely injection that must be taken at a very specific time, and this suggestion will therefore not help. Dr. Abraham S. Abraham, *Assia* 55 (*Tevet*, 5755): 42, assumes that it would be forbidden to receive an injection that is administered over the course of a few days, on Shabbat, since it is possible to do before Shabbat. He assumes that it would only be permitted in a case of the two days of Rosh Hashana or when Yom Tov falls out on a Friday or Sunday.

58. *Le-Torah Ve-Hora'ah* vol. 9, p. 13.

59. See James R. Stelling, et. al., "Subcutaneous versus intramuscular administration of human chorionic gonadotropin during an in vitro fertilization cycle," in *Fertility and Sterility* 79:4 (April, 2003): 881-885.

This process has been discussed extensively by the *poskim*. Relevant for our discussion are the parts of the process that may need to be performed on Shabbat.⁶⁰ In addition to the HCG injection discussed above, the woman must check for the time of her ovulation and the husband's semen must be purified so that only viable sperm will be used to fertilize the egg.

In any round of fertility treatment, the doctor will test the woman to examine the status of eggs and how close she is to ovulation. Treatment will depend on these results. There are three ways to monitor ovulation: BBT (basal body temperature), home ovulation-testing kits, and blood work with ultrasounds.

BBT

By monitoring a woman's temperature at different points during the day, it is possible to determine if and when she ovulates.⁶¹

Checking temperature on Shabbat could be problematic because it is a form of measuring.⁶²

Poskim mention three possible reasons why it would be permissible to use a thermometer to determine basal body temperature on Shabbat, despite the prohibition against

60. With careful planning before the commencement of the cycle, it is almost always possible to avoid the actual performance of the IVF procedure on Shabbat. Doctors can usually tweak the shots so that the eggs will be ready within a certain time frame. See below for our discussion about choosing a doctor. See also Richard V. Grazi, "Halachic Dilemmas of the Process of IVF," in *Medicine and Jewish Law III* (Yashar Books Inc.), 35. Dr. Grazi mentions that transference of embryos during the IVF process achieves the same results on days two and three, so transference of embryos can always be done on a day other than Shabbat.

61. Nowadays, this form of monitoring is generally not used by doctors, but rather by couples themselves before they seek medical assistance.

62. *Shulchan Aruch* 323:1.

measuring.⁶³

63. This leniency would only apply to a mercury thermometer, not a digital one. The reason is because digital thermometers involve other possible prohibitions, such as the LED display, which could involve *koteiv* (perhaps only *de-rabbonon* because it displays a temporary reading) and the use of batteries, which according to many *poskim* involves a rabbinic prohibition. In general, we try to minimize the amount of violations that are necessary. As such, a mercury thermometer would be recommended unless it is not available.

Using a thermometer on Shabbat may entail other prohibitions as well. For example, there could be a problem with shaking down the thermometer. *Shevet Ha-Levi* (1:61) and *Le-Horot Nattan* (5:19) assume that this constitutes *makeh be-patish*, as it prepares the thermometer for use. (R. Gestetner suggests placing the thermometer in cold water to cool down the temperature. He assumes, based on Rashi, *Shabbat* 74b, s.v. *tanur*, that *makeh be-patish* is only violated if the result happens immediately. Placing the thermometer into cold water would gradually move the temperature down.) R. Shlomo Zalman Auerbach (*Shemirat Shabbat Ke-Hilchata* ch. 40, nt. 7), R. Yosef Shalom Elyashiv (*Kovetz Teshuvot* 1:40:3), R. Menashe Klein (*Mishneh Halachot* 4:49), R. Moshe Stern (*Be'er Moshe* 6:56) and R. Binyomin Zilber (*Az Nidberu* 1:62, 4:35) assume that there is no problem of *makeh be-patish* in shaking down a thermometer.

When inserting the thermometer in the rectum, one ideally should not use vaseline to ease insertion, as this could be a problem of *memare'ach*. If possible, it is better to dip the thermometer in baby oil. If not possible, R. Shlomo Zalman Auerbach (*Shemirat Shabbat Ke-Hilchata* 40:2 and nt. 5; *Shulchan Shlomo*, *Erchei Refuah* vol. 2, p. 143; *Orchot Shabbat* vol. 2, 20:167) permits the use of vaseline as long as it is not applied directly on the thermometer.

When cleaning off the thermometer, one should preferably not use alcohol swabs, as this could entail *sechita* (squeezing). Likewise, one should not dip a piece of gauze or cotton into alcohol. Instead, one should dip the thermometer into alcohol and wipe it off with a gauze pad or cotton ball (*Shemirat Shabbat Ke-Hilchata* 40:2 and nt. 5; *Orchot Shabbat* vol. 2, 20:168; see also R. Bodner, *Laws of Refuah on Shabbos*, 356). When finished with the thermometer, one should not clean it again unless one plans to re-use it on Shabbat.

R. Moshe Shternbuch (*Teshuvot Ve-Hanhagot* 1:207, *azharot bishul* #3) prohibits the use of mercury thermometers on the grounds that if the temperature rises, it can cook the mercury inside the thermometer. Since this is the way the thermometer is meant to be used, it would constitute *bishul* (cooking). He concedes that in a case of great need, *sha'at ha-dechak*, one need not be strict. *Minchat Yitzchak* (3:142, 10:31:8) also mentions this concern

First, the Gemara notes that although it is forbidden to measure on Shabbat, it is permitted in a case of a mitzvah,⁶⁴ and Rambam⁶⁵ and *Shulchan Aruch*⁶⁶ record this as the halacha. A case of a couple trying to conceive is considered one of a mitzvah, and measuring would therefore be permitted.⁶⁷

Second, many *poskim* assume that using a thermometer is not even considered measuring. Tosafot are of the opinion that measuring is prohibited because it is an ordinary weekday activity associated with weighing; items are weighed before sale.⁶⁸ Since a thermometer is used to check a person's temperature and has nothing to do with measuring items to be sold, it is not considered an ordinary weekday activity and is

(although he writes that he did not have time to properly contemplate the issue). *Chelkat Yaakov* (*Orach Chaim* 151:3) writes that he spoke to a physicist who explained how a mercury thermometer works; his findings were that the mercury is not cooked by a raised temperature but it is rather spread out in the thermometer. As such, there would be no problem of *bishul*. *Sh"ut Mahari Shteif* (123) is also lenient regarding this issue. His reasoning is that the temperature on the thermometer cannot become high enough to cook anything. He also notes that this cooking would not be comparable to cooking in the *Mishkan*, as they never used human heat to cook in the *Mishkan*. R. Shlomo Zalman Auerbach (*Shemirat Shabbat Ke-Hilchata* 40:2, nt. 3) agrees with the notion that the temperature does not reach high enough to cook anything and adds that human heat is like *chamah*, not *ohr*. See *Nishmat Shabbat* 5:336.

Chelkat Yaakov (*Orach Chaim* 151:4) notes that since there is a permissible use for the thermometer, it is not *muktza* even after its use. This is also the opinion of R. Shlomo Zalman Auerbach (*Shemirat Shabbat Ke-Hilchata* 40:2, nt. 3).

64. *Shabbat* 157a.

65. *Hilchot Shabbat* 24:5.

66. *Orach Chaim* 306:7.

67. *Be'er Moshe* 6:56, *Chelkat Yaakov*, *Orach Chaim* 150.

68. *Mishnah Berurah* 306:34 cites *Magen Avraham Orach Chaim* 306:16, who quotes this opinion as the halacha. Rambam (*Hilchot Shabbat* 23:13) seems to assume that measuring is forbidden because it is used in business dealings; one who measures might write things down and perform business transactions. See Rashi *Beitza* 29a s.v. *ve-ata*.

therefore permitted on Shabbat.⁶⁹

Finally, *Tzitz Eliezer* assumes that using a thermometer is not considered measuring because the person only places the thermometer in a certain place and it is the thermometer which checks the temperature. You therefore only cause the temperature to be taken, but do not actually measure anything yourself.⁷⁰

Home Ovulation-Testing Kits

Home ovulation-testing kits contain a strip that the woman dips into her urine. If it turns a certain color, she knows that she has ovulated. The potential problem involved with this procedure on Shabbat is the Sabbath prohibition of *tzoveya* (coloring).⁷¹

69. This is the opinion of R. Shlomo Zalman Auerbach, (*Me'orei Aish*, 66; *Shemirat Shabbat Ke-Hilchata* vol. 1, 40:2, nts. 2, 3), R. Moshe Feinstein (*Iggerot Moshe* 1:128), R. Eliezer Waldenburg (*Tzitz Eliezer* 3:10, 11:38, 12:44:5), R. Yitzchak Weiss (*Minchat Yitzchak* 3:142), R. Moshe Stern (*Be'er Moshe* 2:22:1, 4, 6:56), and R. Shmuel Vosner (*Shevet Ha-Levi* 1:61). See also *Minchat Yitzchak* 7:22 and *Kinyan Torah* 3:39.

70. *Tzitz Eliezer* 3:10.

71. The *poskim* discuss a similar strip that is used as a thermometer. There are two different types of these thermometers; one is a strip that changes colors when it reaches certain ranges, and the other displays a number reading. *Shemirat Shabbat Ke-Hilchata*, ch. 40, nt. 8, cites R. Shlomo Zalman Auerbach, who argues that permissibility depends on whether the letters or colors are already present on the strip and just become more visible or if they are not there at all and use of the strip makes them visible. *Be'er Moshe* (vol. 6, *Kuntres Electric* #77) writes that it is preferable to use a mercury thermometer on Shabbat, as opposed to one of these strips, but *bedieved* these strips would be permissible because they only entail a temporary coloring in an indirect manner. He also notes that a mercury thermometer is better from a medical standpoint because it gives a more accurate reading. In the case of the home ovulation-testing kit and the BBT method, the opposite is true, as home ovulation-testing kits are more accurate.

Tzitz Eliezer (14:30, 31) differentiates between these two types of strips. Strips that only change color are permitted. If writing appears on the strip (for example, the number of the temperature), then it is permissible for use only if the writing was visible beforehand and now simply became darker.

Some *poskim* permit use of these strips.⁷² *Tzitz Eliezer* gives a few reasons for the leniency:

First, the coloring of the strip is not the desired result. The person who takes such a test is not interested in the coloring but rather in finding out the results of the test. Thus, it is not comparable to the coloring that was done in the Tabernacle in the desert, where the colors themselves were the desired result.

Another possible reason to be lenient is the amount of substance which is prohibited to color on Shabbat. The Mishnah writes that the amount is a four-*tefach* string,⁷³ which is more than the amount of the strip that is colored in this case.

A third reason that use of these strips should be permitted is that the coloration is temporary; soon after use, the strip reverts back to its original status.⁷⁴

Ultrasound

Ultrasonounds are used to check follicle size. Based on the size of the follicles, the doctor can determine if ovulation has occurred, or when the projected time of ovulation is, as well as the number of mature eggs that will be available that month.

However, if the numbers only became visible during its use, it would be prohibited to use on Shabbat because of *koteiv* (writing). The strips that are used in ovulation kits usually only produce coloring, not writing, and would therefore be permissible according to *Tzitz Eliezer*. *She'arim Metzuyanim Be-Halacha* (91:11, *Kuntres Acharon*) is also lenient in this matter for many of the above reasons. See also *Yechaveh Da'at* 4:29; *Machazeh Eliyahu* 65-66; *Nishmat Shabbat* 5:339.

72. See *Shemirat Shabbat Ke-Hilchata* 33:20 and nt. 83; *Tzitz Eliezer* 10:25; *Be'er Moshe* 8:24:16. R. Shlomo Zalman Auerbach suggests placing only the edge of the test strip near the urine and allowing the urine to diffuse through the stick on its own, thereby only indirectly causing the stick to change colors.

73. *Shabbat* 105b. See Rambam, *Hilchot Shabbat* 9:13.

74. See Rambam, *Hilchot Shabbat* 9:13; *Magen Avraham* 320:25, and *Machatzit Ha-Shekel* *ibid*.

An ultrasound is performed using machinery that runs on electricity. There is a debate among the *poskim* whether the prohibition of using electricity on Shabbat is rabbinic or biblical in origin.⁷⁵ According to the *poskim* who assume that using electricity on Shabbat is *de-oraita*, all machinery should be operated by a non-Jew (according to those *poskim* who assume that the woman has a status of *sakanat eiver* or *choleh she-ein bo sakana*; however, if she were considered a *bari*, then this act would be forbidden even when done by a non-Jew). According to those who maintain that using electricity on Shabbat is *de-rabbanan*, then it would depend on her classification. If she were given the status of *sakanat eiver*, then a Jew would be able to operate the machinery. If she has the status of *choleh she-ein bo sakana*, then a Jew would be allowed to operate the machinery with a modification. Once again, if she is considered a *bari*, then machinery may not be operated on her behalf. In any event, a rabbinic authority should be consulted.

Blood Tests

The most accurate way to determine time of ovulation is through blood tests (to check for a surge of the LH hormone). Drawing blood on Shabbat is a violation of a biblical prohibition.⁷⁶ There are three opinions among the *Rishonim* as to the exact nature of the transgression. Most *Rishonim*⁷⁷ assume that it is prohibited because of *netilat neshama*, a *toldah* of the *melacha* of *shochet* (slaughtering). According to

75. See, for example, *Chazon Ish*, *Orach Chaim* 50:9, *Minchat Shlomo* 1:11. See "The Use of Electricity on Shabbat and Yom Tov," *Journal of Halacha & Contemporary Society*, No. XXI, Spring 1991, p. 4.

76. See *Bi'ur Halacha* 316:8, s.v. *ve-ha-chovel*.

77. Rashi (*Shabbat* 107a, s.v. *ve-ha-chovel*, second opinion), *Tosafot* (*Ibid.*, s.v. *shmoneh*; *Shabbat* 75b, s.v. *ki*; *Ketubot* 5b, s.v. *dam*), *Rashba* (*Shabbat* 107a, s.v. *ha-tzadan*), *Ritva* (*Ibid.*, s.v. *matnitin shemoneh*), *Ramban* (*Ibid.*, s.v. *matnitin shemoneh*) and *Ran* (*Shabbat* 38b in the *dapei ha-Rif*).

Rambam,⁷⁸ it constitutes *mefarek*, a *toldah* of *dosh* (threshing). According to Rashi,⁷⁹ it is *tzoveya*.⁸⁰

Because the blood itself is desired in order to test it, the act of drawing the blood is a *melacha ha-tzericha le-gufa*.⁸¹ It is not permitted to perform a biblical prohibition for a person who is a *sakanat eiver*, *choleh she-ein bo sakana*, or *bari*. Therefore, according to all opinions, testing blood for ovulation is prohibited on Shabbat.⁸²

A question that may arise is whether a non-Jew would be able to draw the blood or perform the ultrasound. The reason to permit such an act is because it is instructing a non-Jew to perform a forbidden action for the Jew on Shabbat, *amirah le-nochri*, which, depending on the classification of the woman, could perhaps be permitted on Shabbat. The reason that it might be halachically problematic is because the woman is in some way aiding (*mesayeya*) the technician or doctor in drawing the blood or performing the ultrasound.

There seems to be a contradiction in the Gemara regarding the issue of *mesayeya*. The Gemara in *Makkot* 20b, in the case of *makif* and *nikaf* (cutting the hair), assumes that *mesayeya yesh bo mamash*, it is considered playing a significant enough role in the process so that one is held accountable for the action. The Gemara in *Beitza* 22a (a case of allowing a non-Jew to put drops in one's eye), however, assumes that *mesayeya ein bo*

78. *Hilchot Shabbat* 8:7.

79. *Shabbat* 107a, s.v. *ve-ha-chovel*, first opinion.

80. A difference between these opinions is that according to Rambam (*dosh*) and Rashi (*tzoveya*), there is a minimum *shi'ur* required in order to violate the *de-oraita* prohibition. The minimum *shi'ur* required to violate the *av melacha* of *dosh* is the size of a *grogeret* (Rambam *ibid*). The minimum *shi'ur* for *tzoveya* is the size of a four-*tefach* string (*Shabbat* 105b). According to the other *Rishonim*, however, any amount of blood drawn would violate the *melacha* of *netilat neshama*.

81. *Ohr Le-Tzion* vol. 2, 36:21.

82. See *Birchat Banim* 10:8. Thus, a couple would have to wait until the next month to resume fertility treatments. See *Birchat Banim* nt. 12 *ibid*.

mamash, it is not considered playing a significant role in the action. In trying to resolve this contradiction, *Shach*⁸³ assumes that the opinion that we say *mesayeya* is not significant is normative, and the case of hair cutting is an exception.⁸⁴ *Taz*⁸⁵ assumes a split decision – if one helps in the beginning of the act (as in the haircutting case in the Gemara then they are considered to have played a significant role in the action. However, if they didn't help in the initial stage of the act (like the case of the eyes, where the person's eyes are already open and he only helps out by blinking after the drops are already in the eyes) then we assume that helping is not significant.

Regarding ultrasound and blood tests, the woman does help out at the beginning of the action, and thus it would seem that according to the *Taz* there is a problem of *mesayeya*. It would seem that our issue is dependent on this rabbinic dispute. With careful planning, the need for blood tests on Shabbat can and should be avoided. In case of great need a rabbinic authority should be consulted.⁸⁶

Purifying Semen

Before the fertilization process, a semen sample from the husband must first be purified to discard any inactive cells and seminal fluid. The semen is prepared for fertilization by placing it in a centrifuge and density gradient, which removes everything except the healthy, viable sperm to be used in the fertilization process. The centrifuge runs on electricity and therefore would depend on the issue cited above by ultrasound. In case of need, a rabbinic authority should be

83. *Nekudot Ha-kesef Yoreh Deah* 198:21. See also *Shach* 198:25, *Ritva Makkot* 20b s.v. *Be-mesayeya*.

84. Because of a *gezeirat hakatuv*.

85. *Orach Chaim* 328:1; *Yoreh Deah* 198:21. See also *Magen Avraham* 328:16, *Rebbi Akiva Eiger* *ibid.*, and *Chatam Sofer* *beg. Orach Chaim* 328.

86. See *Halachos of Refuah on Shabbat*, Bodner, p. 51, *Sh"ut Nishmat Shabbat* 5:432, *Techumin* (vol. 23, p. 222).

consulted.⁸⁷

Another halachic issue that may arise regarding the centrifuge and density gradient is whether or not this violates the act of *borer* (separating). Ostensibly, the healthy viable sperm cells are separated from the inactive or dead sperm cells, which could be *borer*.

A centrifuge is a machine that spins around at extremely high speeds. As the sperm mixture is spun, sperm cells fall to the bottom of the test tube, producing a mass of dense, highly active sperm. The use of the centrifuge would seem to cause a separation between the sperm and anything else which can interfere with the effectiveness of the healthy sperm (such as seminal fluid, dead sperm cells, etc.).

Density gradient is a test tube that is filled with multiple layers of liquids of different densities. The sperm sample is placed at one end of the layer of liquid and the test tube is spun in a centrifuge. After it is spun, the active, healthy sperm will make their way through the layers of liquid in the test tube, while the inactive or dead sperm will get caught in the liquid layers. These layers can be removed in order to obtain the active sperm from the test tube. It would seem that the density gradient is not *borer*, as the separation happens as a result of the healthy sperm swimming on their own through the layers of density.

As a result of the issue of *borer* regarding the centrifuge (which involves a Sabbath prohibition on a biblical level), we would allow a non-Jew to operate the machinery for a *choleh she-ein bo sakana* or for a *sakanat eiver*. However, this process would not be allowed for a woman if she were given the status of *bari*.

87. This issue would be more complicated in Israel, where many, if not most technicians in fertility labs are Jewish.

Intrauterine Insemination (IUI)

IUI is a process wherein the sperm sample is collected from the man and injected into the woman's uterus so that when ovulation does occur, fertilization can take place with as few obstacles as possible. Due to the life span of the sperm, there is a larger window of time for IUI. If ovulation takes place on Shabbat, it is possible to perform the IUI on Friday. If ovulation is on Sunday, the IUI can be performed on Sunday. As such, it should never be necessary to perform IUI on Shabbat. Therefore, one is not allowed to violate any laws of Shabbat in order to perform it.⁸⁸

Male Infertility

If the difficulty in conceiving is due to the husband's sperm count, the protocol is usually IVF. Other possibilities include procedures such as varicocele removal, which should not be scheduled on Shabbat. Generally, this is not a concern because it is not a time-bound procedure; doctors generally schedule these procedures for weekdays.

In certain instances, the husband may take medication, such as Viagra, to promote fertility.⁸⁹ R. Shmuel Vosner forbade a husband from receiving injections on Shabbat before marital relations.⁹⁰ However, R. Vosner is quoted as saying that taking pills would be permissible for these purposes because the rabbinic stricture against medication on the Sabbath is overridden by the mitzvah of *onah* (marital relations) and certainly by the mitzvah to have children.⁹¹ R. Elyashiv is

88. See "Choosing a Doctor" later in this article.

89. See Rabbi Yoel Catane, *Assia*, Nisan 5764 and Rabbi J. David Bleich, *Tradition* 41:4, Winter 2008, for discussions about the permissibility of taking Viagra on Shabbat.

90. *Shevet Ha-Levi* 8:287, see also 9:67.

91. *Halachos of Refuah on Shabbos*, 341-2. *Minchat Yitzchak* 1:108 writes that taking pills to allow the fulfillment of marital relations on the *mikvah* night is permissible on Shabbat. See *Nishmat Shabbat* 5:382:2. In commenting on the

quoted as saying that these pills may be taken only if they were started before Shabbat and are just continuing on Shabbat, as discussed above. Taking a one-time pill would thus be prohibited.⁹²

In December 2003, the FDA approved a new drug called Cialis, a competitor to Viagra. One of the advantages of this pill is that its effects last up to thirty-six hours, as opposed to those of Viagra, which last only four. This pill could be taken before Shabbat, thus avoiding all related halachic issues. Of course, one must consult with a doctor before deciding which pill is more appropriate. From a purely halachic perspective, it would seem that Cialis is the better choice.

Choosing a Doctor

Choosing a fertility doctor entails a number of factors. Location is very important for fertility treatments, as any sperm sample that is brought to the doctor must be delivered within a short time after its emission. It is also important to use a doctor whom the couple feels comfortable with. Obviously, it is also recommended to seek the best doctors available.

One important factor that can play a role in fertility treatment is the ability to work with a religiously observant, God-fearing doctor. If this is not possible, it is important to ensure that the doctor is sensitive to religious observance. The advantages of using an observant doctor are sensitivity to Jewish marital laws and appreciation of religious limitations on fertility treatments. It is usually easier to explain oneself to

opinion of the *Minchat Yitzchak*, *Tzitz Eliezer* 8:15:15:14 writes that this halacha is not unique to the *mikvah* night but applies any time that the couple wants to have relations.

92. See, however, "Taking Hormone Pills Orally", above, in the name of *Halacha U-Refuah*. According to this explanation, if the man also has a status of *sakanat eiver*, *choleh she-ein bo sakana* or *bari* when taking medicine for fertility treatments, it would be permissible anyway.

a religious doctor who shares these sensitivities. For example, some doctors have a protocol to perform IUI on the day of ovulation. If that day falls on Shabbat, they may insist that it be done that day. It would be easier to deal with an observant Orthodox doctor who understands that since it is medically acceptable to perform IUI on Friday in such a case, Shabbat cannot be violated. With careful planning from before the cycle starts, even IVF can almost always be avoided on Shabbat. Not every doctor is willing to accommodate such requests. For this reason (and others), Rabbis generally recommend using observant doctors when possible.⁹³

Conclusion

Modern medicine has given hope and opportunity to couples who even thirty years ago might never have been able to conceive. This is a gift from G-d that has been bestowed upon our generation. It is up to us to show Him that we appreciate this gift and will only use it only in accordance with halacha. In this merit, may He continue to shower us with His kindness.

93. See *Birchat Banim* 9:20 and nt. 38; R. Binyomin Forst, *The Laws of Niddah*, vol 1 (Artscroll – Mesorah) 422, 437, *Piskei Teshuvot Hilchot Shabbat* 328:9 and letter from R. Menashe Klein printed in back of *Piskei Teshuvot Hilchot Shabbat*, p. 256.

Sitting or Standing for *Kriat Hatorah*

Rabbi Moshe Walter

A typical American *shul* consists of a multitude of (*minhagim*) customs which reflect the *shul* membership. Because Jews from across the globe have found a safe haven on the American shore together with the growing number of young men studying in different *yeshivot*, it is rare to find a *shul* that has a uniform *minhag* followed by every member. This fact has numerous halachic ramifications on many communal practices. This article will specifically address two issues that are presently clouded in confusion.

1. Should one sit or stand during *Kriat Hatorah* (reading of the Torah)?
2. May some members of a congregation sit while others stand in the same *minyan*? And would this be a violation of *Lo Titgodedu* (conflicting practices)?

The Mishnah and Gemara in both Talmud *Bavli* and *Yerushalmi* make no explicit statements as to whether or not the congregation should sit or stand for the Torah reading; however, the Gemara does mention that the person reading from the Torah on behalf of the congregation (*ba'al korei*) must stand.¹ One can infer from the words of the Gemara that only

1. *Megillah* 21a. The custom among many congregations to stand for the *Aseret Hadibrot* and *Az Yashir* will not be dealt with in this essay. See *Iggerot Moshe Orach Chaim* volume 4 *siman* 22, *Responsa Shemesh u'Magen Orach Chaim siman* 57, *Responsa Mishneh Halachot* volume 5 *siman* 16 and volume 11 *siman* 118, who support this *minhag*. *Responsa Yechaveh Da'at* volume 6 *siman*

he who is reading from the Torah must stand; however, the congregation is not required to do so.² From the words of the *Talmud Yerushalmi* one can posit a similar conclusion.³ The *Yerushalmi* deals only with the requirement of standing for the *ba'al korei*. No mention at all of the congregation's assumed position is dealt with.⁴ The silence of the *Rishonim* on this issue also seems to indicate that there is no requirement to stand. Were such a practice to exist, surely mention would have been made of the rule or practice to do so.

Maharam Rothenburg

The earliest source recording a practice to stand for *Kriat Hatorah* can be traced to a responsum of the Maharam Rothenburg.⁵ In a very terse statement, the Maharam writes that he stood for the reading of the Torah and the circumcision of a baby boy. He supports this opinion based on the verse, "the nation stood for the *brit*," and a further proof from the Talmud that also states explicitly that those at a *brit* stand. However, this statement of the Maharam is surprising: Why did the Maharam stand for *Kriat Hatorah* if he only presented

8, *Yabia Omer* volume 6, *Yoreh Deah siman* 32, #3 follow the opinion of Rambam in *Responso* (Friedman edition *siman* 46, Blau edition *siman* 263) who is in favor of abolishing the custom to stand for *Aseret Hadibrot* because people will begin to believe that this portion of the Torah takes precedence over others. See *Kuntras Mesorah* volume 1, *sefer Harerei Kedem* volume 2 *siman* 117 for resolution of our custom to stand for *Aseret Hadibrot* in light of view of the Rambam.

2. *Beit Yosef Orach Chaim siman* 141 #1 makes this inference and immediately comments "and such is the custom."

3. *Talmud Yerushalmi Megillah* 27b.

4. *Tashbetz siman* 182 and *Pri Chadash Orach Chaim siman* 146 #4 each have their own insight into the Gemara to prove this point.

5. *Responso Maharam Rothenburg*, Prague edition *Responsum* #504 cited as well in *Mordechai* to tractate *Shabbat siman* 422. Because the halachic position of Maharam Rothenburg plays a major role in the Ashkenazic halachic process, *Rishonim* and *Acharonim* struggle to understand his viewpoint and ruling.

evidence that one should stand for a circumcision?⁶

Mordechai

To accept the practice of the Maharam becomes even more difficult in light of the two statements of the *Mordechai* that appear to contradict each other.⁷ The *Mordechai* in one statement quotes the *Responsa of the Maharam* which indicate acceptance of his *minhag*. In another statement the *Mordechai* writes that those who stand for *Kriat Hatorah* do so based on the verse “and when it opened the nation stood.” However, the *Mordechai* mentions that the proof is questionable because the Gemara *Sotah* explains that the word “stood” in this verse means silence.⁸ The *Mordechai* states, as well, that based on the *Yerushalmi Megillah* (referred to above) it is clear that only the *ba'al korei* must stand. How can these two statements of the *Mordechai* be understood and how can the practice of the Maharam be reconciled with the Gemara’s statement that when the verse states “stand”, its real meaning is “silence”?⁹

6. See *Bigdei Yesha* to *Mordechai Shabbat* chapter 19 *siman* 422, *ibid.* who deals with this difficulty. See also *Chidushei Anshei Shem* to *Mordechai* *ibid.* who also has this problem.

7. *Mordechai* to tractate *Shabbat* Chapter 19 *siman* 422. *Mordechai* to Tractate *Menachot* 34a, *Halachot K'tanot* *siman* 968. See *Beit Yosef Orach Chaim* *siman* 141 #1 who quotes both sources.

8. The *Mordechai* in *Halachot K'tanot* writes that the verse “and the nation stood” is in *Ezra*; however, it is found in *Nechemia*, chapter 8, verse 5. *Mordechai* also quotes that the Gemara is in *Brachot*, but it is found in *Sotah* 39a. The Gemara states in the name of Raba the son of Rav Huna that once a *Sefer Torah* is opened it is forbidden to talk, even for the sake of halacha. Raba proves this based on the verse in *Nechemia* which states that when Ezra opened the Torah the nation stood, and “stood” means silence. Rav Zeira in the name of Rav Chisda proves this rule to be true based on an earlier verse in *Nechemia* which states that the ears of the nation were focused towards the Torah.

9. It is based on this statement of the Gemara that the *Tur Orach Chaim* *siman* 146 # 4 quotes Rav Sar Shalom’s experience that he never heard of a congregation standing for the duration of *Kriat Hatorah*. *Beit Yosef* comments that *Sefer Hamanhig* also quotes the opinion of Rav Sar Shalom.

The *Chidushei Anshei Shem* and *Sefer Bigdei Yesha* deal with this contradiction in *Sefer Mordechai*.¹⁰ They suggest that when Maharam stood for *Kriat Hatorah* it meant that he was called to the Torah for an *aliyah*. This aligns with the second statement of *Mordechai* that only the *ba'al korei* stands because the one who is called to the Torah reads along with the *ba'al korei* and takes that status. *Chidushei Anshei Shem* concludes that such a resolution is difficult because the verse which the Maharam quotes states that the entire nation stood, not only the individual called to the Torah. *Sefer Bigdei Yesha*, as well, takes issue with this resolution because Maharam in his *Responsa* states clearly that he stood for the entire duration of *Kriat Hatorah*. He does not write that he stood only when he was called to the Torah. *Bigdei Yesha* concludes that Maharam stood because he was stringent in his own practice.

Approach Of Acharonim To Maharam's Practice

Much of the literature of Torah scholars over the centuries has been written questioning this practice of the Maharam in light of the Gemara in *Sotah*. Of the earlier sources to deal with this issue is the *Responsa Maharam M'Pano*.¹¹ Although the Maharam M'Pano responds to the questioner that he is correct in questioning the practice of standing for *Kriat Hatorah*, he suggests three reasons for standing:

1. Even though the Gemara explains the word in *Nechemia* "*amida*" to mean "silence," a few verses later it records "and the nation stood," which Rashi explains that the Jews stood on their feet (during the reading of the Torah.)
2. The blessing made on the Torah "*Borchu et Hashem Hamevorach*" is considered to be a *davar b'kedusha* (holy

10. *Bigdei Yesha* *ibid.*, *Chidushei Anshei Shem* *ibid.* and also *Chidushei Anshei Shem* to *Mordechai* in *Halachot K'tanot*.

11. *Responsa Maharam M'Pano* *siman* 91.

benediction), and one must stand for such statements. If the congregation was permitted to sit for the reading of the Torah, maybe the congregation would come to neglect standing even for the blessing on the Torah.

3. Even though the Gemara explains “*amida*” to mean “silence,” it also means that the nation stood.

Three alternative explanations have been made by later *Acharonim* in an attempt to explain the Maharam.

The *Bach* offers as a rationale that the Maharam did not stand because of halachic requirements, but rather because *Kriat Hatorah* is a re-enactment of the receiving of the Torah; just as we stood then, so too should we stand now.¹²

The *Divrei Chamudot* suggests that the Maharam had a different manner of understanding the Gemara in *Sotah*, and read the verse literally, “and when it opened, the nation stood.”¹³

The *Taz* is equally troubled by the practice of the Maharam. He too suggests that “*amida*” must be translated literally to mean “stand,” but stand quietly.¹⁴

Halachic Codification Of Maharam

Based upon these conflicting explanations of the Maharam’s

12. *Bach* to *Orach Chaim siman 146/1*.

13. *Divrei Chamudot* to *Berachot* chapter 1 #36. He repeats his explanation in his *Malbushei Yom Tov* on the *Levush* to *Orach Chaim siman 146 #2*. He explains that the Maharam learned that one cannot talk once the Torah is opened from the verse that Rav Chisda brings, therefore leaving the verse Raba brings literally to mean “stand.” See footnote 8 for citation of the Gemara. *Yad Aharon Orach Chaim* *ibid.* has a similar explanation.

14. Unlike Maharam M’Pano, *Bach* and *Divrei Chamudot* who come to defend the practice of the Maharam, the *Taz* concludes outright that one should stand for *Kriat Hatorah*. See *Eliyahu Rabba Orach Chaim siman 146 #4* who assumes that *Divrei Chamudot* and Maharam M’Pano state outright to stand. See *Ma’amar Mordechai* who takes issue with the theory of *Taz*.

custom to stand for *Kriat Hatorah*, the views of the *Mechaber*, *Ramo* and later halachic authorities may be understood. The *Mechaber*, based on the *Tur*, posits in the name of Rav Sar Shalom that one does not have to stand while listening to *Kriat Hatorah* because the *Gemara Sotah* understands the word "*amida*" to mean "silence" and not "stand".¹⁵ The *Ramo* in his gloss on the *Shulchan Aruch* writes that there are those who are strict in their practice, and that is what the *Maharam* did.¹⁶

The *Pri Chadash*, *Magen Avraham*, and *Gra* write that the halacha follows the *Mechaber* while the *Taz* says that one should follow the *Ramo*.¹⁷ The *Aruch Hashulchan*, *Kitzur Shulchan Aruch*, *Chayei Adam* and *Sharei Efraim* also acknowledge that to stand for *Kriat Hatorah* is a stringency, not a mandate.¹⁸ *Aruch Hashulchan* is a strong proponent of standing while *Chayei Adam* seems to indicate that the halacha is strictly like the *Gra*. *Kitzur Shulchan Aruch* writes that it is appropriate to stand, while the *Sharei Efraim* writes that the custom is to sit. The *Mishnah Berurah* quotes that the *Pri Chadash* and *Gra* ruled like the *Mechaber*, and that is the

15. *Shulchan Aruch Orach Chaim siman 146 #4*. The *Mechaber* in his *Beit Yosef* to *siman 141 #1* writes as well that the custom is to sit for *Kriat Hatorah*. See also *Be'ar Hagolah siman 146 #20*.

16. The wording the *Ramo* uses to formulate his statement can be explained as follows: This practice is only a *chumra* because the *Gemara* and *Rishonim* do not explicitly require standing. Only the *Maharam* had such a practice and he himself does not reveal where this practice originated. Furthermore, this custom seems to be against a clear statement in the *Gemara*.

17. *Pri Chadash*, *Orach Chaim siman 146 #4*, *Biur HaGra* *ibid.* #4, *Magen Avraham* *ibid.* #6, *Taz* *ibid.* #1. It comes as no surprise that the *Gra* rules that one does not have to stand since the *Gra* always rules in line with "*Dina D'Gmara*". See introduction of sons of *Gra* to *Shulchan Aruch Orach Chaim* and *Kovetz Iggerot Chazon Ish* volume 3 # 28, who explain the methodology of the *Gra*. See also *Kovetz Yeshuron* volume 5, *Nisan 5729*, pages 749-751 for further elaboration.

18. *Aruch Hashulchan siman 141 #2*, *Chayei Adam* *klal 31 #3*, *Kitzur Shulchan Aruch siman 23 #6*, *Sharei Efraim* *shaar 4 #9*.

custom.¹⁹ He then quotes the above mentioned position of the *Bach* as to why the Maharam stood.

The Arizal

Students of the *Arizal* write that their *Rebbe* would sit for the reading of the Torah. As a result, his students write that one should specifically sit for *Kriat Hatorah*.²⁰ The practice in many Sephardic and Chasidic congregations is based upon the custom of the *Arizal*.²¹ The *Sdei Chemed*, however, takes issue with those who claim that according to the *Arizal*, one cannot stand. The *Sdei Chemed* believes that it was only the custom of the *Ari* to sit; however, were he to have been opposed to standing for *Kriat Hatorah*, the halacha should follow the *Ari* because works of Kabbalah are decisive when there are conflicting halachic views.²²

19. *Mishnah Berurah siman 146 #19*. He adds that one who is weak, and has a hard time standing and as a result will not pay attention well, should sit. In #18 *Mishnah Berurah* states clearly that for the words *Borchu et Hashem Hamevorach Boruch Hashem Hamevorach L'olam Va'ed* one must stand because these words have the status of *d'var b'kedusha*. See as well *Responso Rama M'Pano siman 91*. *Kaf Hachaim Orach Chaim siman 146 #20,21* quotes opinions that one does not have to stand even for this portion of the blessing.

20. *Sefer Da'at Torah* of the Maharsham, *Orach Chaim siman 146# 4* in the name of the *Pri Etz Chaim* and *Mishnat Chasidim*, *Kaf Hachaim* *ibid.* in the name of *Sha'ar Hakavanot* and other students of the *Ari*. *Sefer Taamei Minhagim*, *Laws of Kriat Hatorah Kuntras Achron #7*. *Responso Betzel Hachochma* vol. 5 *siman 1* also quotes from other sources in the name of the *Arizal* that one must sit.

21. *Sefer Halacha Berurah* from Rav David Yosef *siman 141 #3*.

22. *Sdei Chemed*, *Klalim Marechet Beit, Pe'ar Hasadeh siman 29 D"H Annom L'dati*, *Responso Dvar Yehoshua* volume 2 #15 *se'if 12*. In *Orchot Rabenu* volume 1, page 73 #36 (*minhagim* of Steipler Gaon), Rav Horwitz *zt"l* testifies that the Steipler did not stand for *Kriat Hatorah* in the last ten years of his life (prior to that, Rav Horwitz does not have a clear recollection of his practice). This practice may only suggest that the Steipler sat because he was weak, and not because he was making a statement about sitting or standing for the Torah reading. *Sefer Halichot Shlomo, Tefilah* chapter 12, addendum 30 writes that *Acharonim* have established that the custom is to sit for *Kriat Hatorah*. His sources are *Mishnah Berurah* quoting *Gra* and *Pri Chadash*. He also quotes

Lo Titgodedu

The Torah tells us: בנים אתם ל' אלוהים לא תתגודדו ולא תשימו – קרחה בין עיניכם למת – “You are children of God; do not cut yourself or make a bald spot between your eyes.”²³ The simple understanding of this verse prohibits deliberately injuring one's body as a source of comfort or memorial over the loss of a loved one. However, the Gemara and *Rishonim* derive a second halacha from this verse: לא תתגודדו: לא תעשו – “Factions should not be made when observing a particular mitzvah.”²⁴

The Gemara records a dispute between Abaye and Rava as to when this negative commandment applies. Abaye states that two courts in the same city may not issue opposing

this custom from *Da'at Torah* in the name of *She'arei Kneset Gedolah*. This author was unable to find this source in either of the two places. *Da'at Torah* as mentioned earlier only quotes students of *Ari* that the practice was to sit. Furthermore, *Kaf Hachaim siman 146 #4* quotes that *She'arei Kneset Gedolah* saw many people stand for *Kriat Hatorah*. In the printed *shiurim* of Rav Yosef Dov Halevi Soloveitchik zt"l to *Masechet Megillah*, *Perek Hakoreh Omed 21a*, the issue of the Maharam Rothenburg is dealt with, and there is indication that standing for *Kriat Hatorah* would be appropriate. In *Teshuvot V'Hanhagot Orach Chaim* volume 1 *siman 141* and *Orach Chaim* volume 3 *siman 64*, Rav Shternbuch advises in the name of the Brisker Rav to stand for a similar reason as Rav Soloveitchik gives above. In a Responsum to this author, Rav Rafael Hamburg, author of *Shorshei Minhag Ashkenaz* wrote: גדולי הפוסקים באשכנז (לעשרות) העידו שהמנהג הוא לישב בקריאת התורה. יש מקצת שהביאו את הידור העמידה כגון יוסף אומץ ור"י עמדין.

"Many great *Poskim* in Germany testified that the custom was to sit during the Torah reading. A few mentioned the enhancement of standing, such as *Yosef Ometz* and Rav Yaakov Emden."

23. *Devarim* 14: 1; Rashi explains that this was the practice of the Emorites.

24. Gemara *Yevamot* 13b, Rambam: *Laws of Avoda Zara* chapter 12, halacha 14, *Sefer HaMitzvot* negative commandment #45, *Sefer HaChinuch* mitzvah #467. See *Sdei Chemed Marechet Lamed* #78 for a lengthy discussion if this is a biblical commandment or merely an *Asmachta*. *Sdei Chemed* also addresses if *Lo Titgodedu* is considered a *Lav Sh'BeChalalot*. See also *Orchot Chaim* (Rav Nachman Kahana, *Av Beit Din Spinka*), *Orach Chaim siman 493 #7*, *Da'at Torah* of the Maharsham *siman 493*, and *Responso Iggerot Moshe* volume 4 *siman 34*.

rulings (one court sides with *Beit Shamai* and the other court with *Beit Hillel*) on the same issue. Two courts in different cities may, however, issue separate or even contradictory rulings. Rava argues that *Lo Titgodedu* is only applicable if a single court in the city is split, and half of the court rules one way and the other half rules another way. Two courts in the same city may issue different rulings on the same case according to Rava.²⁵ As is always the case, the Gemara and halachic authorities rule in accordance with Rava versus Abaye²⁶ (except for six cases where Abaye's view prevails). *Lo Titgodedu* therefore only applies when within one courtroom there is a difference of opinion.

There is a fundamental contradiction among the *Rishonim* as to what the reasoning for *Lo Titgodedu* is. Some *Rishonim* understand that it may appear as though there are two Torahs, while other *Rishonim* understand that such course of action could lead to controversy.²⁷ Based on these two approaches of the *Rishonim*, later *Acharonim* derive a crucial practical difference between them. Does *Lo Titgodedu* apply when it comes to a *minhag* (custom)? Those *Rishonim* who understand that *Lo Titgodedu* is prohibited because it appears as though there are two Torahs, only state such a reason when it comes to issuing a ruling of halacha, but different customs or *minhagim* do not fall within the category of two Torahs. According to the other group of *Rishonim* who explain that *Lo Titgodedu* is prohibited because of controversy, certainly

25. *Yevamot* 14a.

26. *Kiddushin* 52a, see Rosh and Tosafot *D"H Yal KGM*. This is clearly the *psak halaha* according to Rif *Yevamot* 3b, Rosh *Yevamot* chapter 1 *siman* 9, *Sefer HaChinuch* *ibid.*, *Sefer Agudah Yevamot* Chapter 1 #5. See also Mordechai *Yevamot* chapter 1 #4.

27. Rashi *Yevamot* 13b *D"H Lo*, Nimukei Yosef to Rif *Yevamot* 3b state explicitly that the reason for this negative commandment is that it looks like there are two Torahs. Rambam, *Hilchot Avoda Zara* *ibid.*, *Sefer HaChinuch* *ibid.*, understand that the reason for this commandment is because of controversy.

differing customs in a particular area will also lead to *machloket*.²⁸

Although these *Acharonim* enlist statements from the Gemara to support both sides of the debate, there is no clear indication from the Gemara or a consensus among the majority of *Rishonim* whether or not *Lo Titgodedu* will apply to *minhagim*. *Acharonim* do, however, seem to understand that the simpler textual reading of the Gemara indicates that *Lo Titgodedu* is prohibited because such a difference of opinion will give the impression that we have two Torahs. The logical conclusion of this understanding is that *Lo Titgodedu* does not apply to *minhagim*.²⁹

Rambam's Approach To *Lo Titgodedu*

Based upon the principles outlined above, Rambam's position on this issue is controversial for two reasons. The Rambam writes:

ובכלל אזהרה זו שלא יהיו שני בתי דינין בעיר אחת זה נוהג במנהג
וזה נוהג במנהג אחר שדבר זה גורם למחלוקת גדולה וכתוב לא
תתגודדו לא תעשו אגודות אגודות.³⁰

1. The Rambam posits a view akin to that of of Abaye (two courts in the same city that rule differently falls under the prohibition of *Lo Titgodedu*) against Rava. This position of the Rambam would appear to contradict the Gemara's rule, and all the halachic authorities who always rule with Rava against Abaye except for the six

28. *Meishiv Davar siman* 17 #4, 5, *Keren Orach Yevamot* 13b, 14a, *Sdei Chemed Marechet Lamed klal* 79.

29. *Meishiv Davar* *ibid.* (of the Netziv) toward the end of *siman* 1, *Meromei Sadeh* to *Yevamot* 14a, *Responsa* (of the Netziv) *Ohalei Tam siman* 170, *Responsa Meil Tzedakah siman* 50, *Magen Avraham Orach Chaim siman* 493 #6. See also *Ha'amek Davar* to *Devarim* 14:1, who differentiates between two forms of *minhagim*.

30. *Laws of Avodah Zara* chapter 12, halacha 14.

cases which the Gemara lists.³¹

2. The Rambam states emphatically that differences of *minhagim* fall within the prohibition of *Lo Titgodedu*, which at first glance does not align with Gemara's reason for *Lo Titgodedu*.

However, the Rambam can be understood where at the end of the halacha he states explicitly that *Lo Titgodedu* is prohibited because it will lead to great controversy.³² *Lo Titgodedu* will, therefore, according to the Rambam, apply to *minhagim* and to two separate courts in one city because in either case controversy is inevitable.³³

The negative commandment not to create factions in the observance of mitzvot is not once codified by the *Mechaber*, Rav Yosef Karo in the *Shulchan Aruch*. In his introduction to *Sefer Beit Yosef*, Rav Karo writes that when deciding the halacha, he will consistently rule with any two of the three *Rishonim* (Rif, Rambam, Rosh) who reach a similar halachic conclusion. This fact should dictate that, regarding *Lo Titgodedu*, the halacha ought to follow the Rif and Rosh, who align with Rava against Abaye, and thus *Lo Titgodedu* should not apply to *minhagim*.³⁴

31. Much ink has been spilled by rabbis to resolve the Rambam's opinion. Among them are *Kesef Mishneh* ibid., *Lechem Mishneh* ibid., *Responsa Radbaz* volume 5, *siman* 384, *Responsa Ohalei Tam siman* 170, *Responsa Meishiv Davar siman* 17 #4, *Sifri to Parshat Re'eh piska* 96 with explanation of Rav Dovid Pardo, *Sifri* ibid. *piska* 44 with explanation of Netziv, *Sefer Pe'at Hashulchan siman* 3 halacha 14, *Sdei Chemed Marechet Lamed siman* 79, and many others.

32. Rambam states this as well in *Sefer HaMitzvot, Lav* #45, *Responsa Pe'er Hador siman* 151.

33. This is the logical understanding of the Rambam based upon *Meishiv Davar* ibid. #4, and conclusion in #5, and *Keren Orach* ibid. An almost identical approach can be found in the *Sefer Zicharon Vayeta Eshel* for Rav Aharon Drayzen in an article entitled *Lo Titgodedu*.

34. Against the opinion of the Rambam (as explained earlier in this article) who rules like Abaye and states explicitly that *Lo Titgodedu* applies equally to *minhagim*.

The Ramo

The Ramo, in his gloss on the *Shulchan Aruch*, makes one brief comment regarding *Lo Titgodedu*:

ולא ינהגו בעיר אחת מקצת מנהג זה ובקצת מנהג זה משום לא
 ינהגו – “In one city some people should not observe
 one part of the *sefira*, and some people should not
 observe the other part of the *sefira* because of *Lo
 Titgodedu*.”³⁵

At first glance the ruling of Ramo is surprising for two reasons:

1. He rules that *Lo Titgodedu* applies to *minhagim*, which is the minority opinion.³⁶
2. He rules like Abaye that in one city different customs are prohibited. However, the majority of *Rishonim* mentioned side with Rava that only a single *beit din* cannot be split in its opinion.³⁷

However, these two difficulties in the Ramo are identical to the problems that the *Acharonim* raised with the position of the Rambam on *Lo Titgodedu*. In light of the explanation given (earlier) to explain the Rambam, it would follow logically that the Ramo agrees with the opinion of the Rambam who states that *Lo Titgodedu* applies to *minhagim* as well as to different courts within one city.³⁸

35. *Siman* 493, *se'if* 3. The Ramo prior to this comment mentions that there exist two customs as to when to observe the 33-day mourning period for the students of Rabbi Akiva who died during this time period. As a result of these two customs the Ramo made this next statement.

36. *Meishiv Davar* *ibid.*, *Magen Avraham* on Ramo *ibid.* #6, and other *Acharonim* are bothered by the ruling of Ramo for this reason.

37. *Pri Chadash* *siman* 493 in his commentary on Ramo, *Mekor Chaim*, on his commentary on Ramo and other *Acharonim* ask this question on Ramo.

38. This is the conclusion drawn by the *Acharonim* listed in footnotes 36 and 37 above. This also seems to be understanding of the Vilna Gaon in *Biur HaGra* *siman* 493 #14 as explained by *Damesek Eliezer* on *Biur HaGra* to

Even with this explanation of the Ramo, many of the great halachic authorities in their commentaries on *Shulchan Aruch* argue with the position taken by the Ramo. The *Magen Avraham* concludes that because the Rosh and Rif only quote the ruling of Rava and do not discuss the applications of *Lo Titgodedu* in relation to *minhagim*, they must rule that *Lo Titgodedu* applies equally to *minhagim*. However, *Magen Avraham* concludes that this is only the case in one *beit din* according to Rava.³⁹

Acharonim And Lo Titgodedu

Acharonim unanimously follow the ruling of *Magen Avraham* that *Lo Titgodedu* applies equally to *minhagim* in a single *beit din*.⁴⁰ Later *Acharonim* explain that according to Rava whom the halacha follows, just as two courts in one city ruling inconsistently on a single issue is not prohibited by *Lo Titgodedu*, similarly, two shuls or communities in one city with different customs does not violate the prohibition of *Lo Titgodedu*.⁴¹ However, within one shul some members are not allowed to follow one *minhag* simultaneously with other members who follow a different *minhag*.⁴² That said, can some members of a shul sit for *Kriat Hatorah* while other members choose to stand?

Shulchan Aruch and *Sefer Pe'at Hashulchan* of Rav Israel of Shklove (student of the Gra) *siman* 3 #14 in his *Peirush Beit Yisrael* toward the end of footnote #31.

39. *Magen Avraham* *ibid.*

40. *Pri Chadash* *ibid.*, *Gra* *ibid.*, *Responsa Chatam Sofer* volume 6 #7, *Chidushei Chatam Sofer* to *Orach Chaim* *siman* 493 #3. *Chok Yakov* and *Biur Heitev* to *Shulchan Aruch* *siman* 453 #3 also agree with the *Magen Avraham*. See as well *Machtzit HaShekel* on the *Magen Avraham*.

41. *Kaf Hachaim* *Orach Chaim* *siman* 468 #65 quoting many halachic authorities who rule this way including the *Beit Yosef* in *Avkat Rochel* #32 and *Shach* to *Yoreh Deah* *siman* 242 in his *Hanhagot Issur V'Heter* #10. *Pe'at Hashulchan* *ibid.* quoting many great *Acharonim* is adamant about this. *Iggerot Moshe* *Orach Chaim* volume 1 *siman* 159 makes this point at the outset of his response on weddings during *Sefirat HaOmer* in New York.

42. See footnotes #39 and #40.

Surprisingly, only a few *Responsa* have dealt with this specific question.⁴³ There are several possibilities which must be addressed that may in turn explain this omission. *Acharonim* learn from the Gemara in *Yevamot* that this prohibition does not apply if onlookers will not realize that a person or group is doing something differently.⁴⁴ Regarding *Kriat Hatorah*, if some are standing while others are sitting, it is possible to assume that they are sitting because their legs hurt or for another similar reason.⁴⁵ A second possibility why the prohibition of *Lo Titgodedu* does not apply is that this prohibition was only stated when two different rules or customs are being upheld at the same time. This, however, is not the case, since standing for *Kriat Hatorah* was codified as a *hidur mitzva* (glorification of a mitzvah) or stringency, and for this reason there will never be two customs colliding in a single session.⁴⁶ A third reason why some may stand for *Kriat Hatorah* while others sit is that *Lo Titgodedu* is only prohibited in an instance where some are instructing others to follow their practice when a bona fide custom exists. If two opposing customs are being practiced because each person is doing as he wishes without instructing others to do so, the prohibition

43. There is also a relatively small amount of early *Responsa* literature on the topic of *Lo Titgodedu* in general. The reason for this may be for the simple reason that almost all communities had a uniform constituency who had similar practices, *minhagim* and set of rules all under the auspices of one Rav.

44. *Magen Avraham* *ibid.*, *Netiv Chaim* to *siman* 493 #3, *Korban Netanel* to *Yevamot* Chapter 1 #4 also rule this way based on an opinion of *Yam Shel Shlomo* to *Yevamot* Chapter 1 #10. See also *Eshel Avraham* *siman* 493 who deals with this at length.

45. *Mishneh Halachot* volume 6 *siman* 120. *Magen Avraham* does not rule this way in his conclusion.

46. *Responsa Maharam Brisk* volume 1 *siman* 57. See *Shulchan Aruch* and *Ramo* to *siman* 146 #4 and earlier portion of article that show clearly that standing for *Kriat Hatorah* is a well-documented stringency. In a shul that sits for *Kriat Hatorah* because of a source-based reason or strong custom, based on *Arizal* or *Gra* (previously referred to), maybe *Lo Titgodedu* would apply according to this understanding.

does not apply.⁴⁷

Although the negative commandment of *Lo Titgodedu* does not apply here for *Kriat Hatorah*, halachic authorities raise a different possibility why such behavior would not be appropriate.⁴⁸

47. *Responsa Maharshdam Yoreh Deah siman 153, Responsa Maharshag volume 2, siman 12, Maharsham in Daat Torah Orach Chaim siman 493.*

48. Based upon these three reasons there should be no problem for some to sit for *Chazarat Hashatz* while others stand. The source of the Ramo's comment in *Darchei Moshe* and Ramo to *Orach Chaim siman 124 #4* to stand for *Chazarat Hashatz* is a statement of Rabbeinu Eisik Tirna in his *Sefer Minhagim, Hag'hot Minhagim* (page 11 in *Machon Yerushalayim* edition). Ramo finished his comment in *Darchei Moshe* by stating that Rav Tirna brings a partial proof to his own ruling. Ramo posits to stand in his gloss on the *Shulchan Aruch. Responsa Halachot Ketanot Orach Chaim volume 2 siman 80, Ohr Gadol* in his commentary on *Mishnah Rosh Hashana chapter 4, mishnah 9* and *Rashash to Yoma 87b* question the position of the Ramo and his source to stand for the *Chazarat Hashatz. Be'ar Heitev to Shulchan Aruch, siman 124 #9* quotes the *Halachot Ketanot*. See *Biur HaGra ibid. #4, Sefer Emet L'Yaakov on Shulchan Aruch* and *Sefer Nefesh Harav* page 123 for alternative sources proving the requirement of standing for *Chazarat Hashatz. Kaf Hachaim siman 124 #24, Yechaveh Da'at volume 5 siman 11, Sefer Yalkut Yosef siman 124 #12, Sefer Halichot Shlomo chapter 9 footnote 35 and Az Nidberu volume 12 siman 59* for further elaboration on this topic. *Mishnah Berurah siman 124 #20*, quoting the *Pri Megadim*, makes a very clear statement. He writes that the earlier generations followed the custom to stand, but now, to our dismay, everyone does as he wishes and some sit and talk.

The *Mishnah Berurah*, *Responsa* literature and halachic commentaries on *Shulchan Aruch* mention the prohibition of *Lo Titgodedu* in various instances that are appropriate to mention and explore:

1. *Mishnah Berurah siman 31 #8* quotes the *Sefer Artzot Hachaim* of the Malbim who writes that it is not appropriate in one shul for some to wear *tefillin* on *Chol Hamoed* and others not to wear *tefillin*, because of *Lo Titgodedu*. *Acharonim* are divided into two camps in dealing with this statement of the *Mishnah Berurah. Responsa Heishiv Moshe* of Rav Moshe Halberstam *zt"l siman 31, Eshel Avraham (of Butchatch) siman 31, Aruch Hashulchan siman 31*, all agree with *Mishnah Berurah. Responsa Maharsham volume 3 siman 359, Responsa Maharshag volume 2, siman 12, and Responsa Iggerot Moshe Orach Chaim volume 5 siman 24* show why the prohibition of *Lo Titgodedu* does not apply.

2. *Mishnah Berurah siman 68 #4* quoting *Magen Avraham* and *Pri Megadim* rules that Ashkenazi Jews who *daven* with Sephardim and vice

versa have fulfilled the obligation of *tefilla* if they *daven* their own personal *nusach*. Many *Acharonim* explain that the reason that the *Mishnah Berurah* does not mention the prohibition of *Lo Titgodedu* is because he is only referring to the parts of *tefilla* that are recited privately, but *Kedusha* and the 13 Attributes of Mercy, and any other portion of the *davening* that is said in unison must be said like the custom of the local shul. This is the opinion of the Netziv in his *Meishiv Davar* at the end of *siman* 17. *Iggerot Moshe* volume 2 *simani* 23 agrees with the ruling of the Netziv for a different reason. Rav Aharon Yoffen in his footnotes to *Ritva Yevamot* (Mosad Harav Kook) 13b #951 deals with this question as well. *Responsa Levushei Mordechai* volume 1 *siman* 14, *Responsa Salmat Chaim simanim* 45 and 46, and *Responsa Teshuvot V'Hanhagot* volume 1 *siman* 68 and *siman* 150 also deal with the issue.

3. *Mishnah Berurah siman* 131 #6 quotes the *Chaye Odom klal* 32 #33 that it is inappropriate for some to lean on the right hand while others lean on the left hand for *Tachanun*, because such practice violates the prohibition of *Lo Titgodedu*. This is also the opinion of *Kaf Hachaim* *ibid.* #39 quoting the *Chida*. See also *Responsa Ohr L'zion* volume 2, *Laws of Nefilat Apayim* chapter 9. However, there is room not to prohibit such practice based upon the three reasons already mentioned in this article. See *Sefer Ishei Yisrael* chapter 25 footnote 21, *Responsa Netivot Adam siman* 4, *Responsa Kinyan Torah* volume 2 *siman* 18 and *Responsa Az Nidberu* volume 5 *siman* 26, who bring up these possibilities to allow conflicting *minhagim* during *Tachanun*.

4. *Shaarei Teshuva* to *Orach Chaim siman* 671 #7 quotes *Responsa Kneset Yechezkel siman* 17 that there is no prohibition of *Lo Titgodedu* for an Ashkenazi to light his own *menorah* if he lives with a Sefardic Jew. *Kaf Hachaim*, *ibid.*, also brings this ruling.

5. *Mishnah Berurah siman* 666 #2 writes that it is simple that if many people are eating in a *sukkah* on the second night of *Sukkot*, some men should not make the blessing of *Shehecheyanu* first and then the blessing on the *sukkah* and other men vice versa. *Kaf Hachaim* *ibid.* #2 quotes the opinion of *Mishnah Berurah* and argues that such practice does not violate the prohibition of *Lo Titgodedu*.

6. *Aruch Hashulchan* and *Eshel Avraham siman* 651 *se'if* 6 rule that there is no problem of *Lo Titgodedu* for some members of a *shul* to shake the *lulav* in a different direction than the rest of the congregation because shaking the *lulav* is not a "complete obligation." *Aruch Hashulchan* brings further proof to his opinion from *Mishnah in Sukkah* 37b. See *Chayei Adam klal* 148 #4 who states that one should not change the direction from the custom of the *shul*. *Sefer Orchot Rabeinu* volume 2 page 292 states that the Steipler Gaon would first shake the *lulav* at home according to his custom in order that when he would be in *shul* he would shake like the rest of the congregants.

The *Imrei Bina* quotes the *Responsa Kol Eliyahu* who writes that one cannot be stringent to require standing for *Kriat Hatorah* in a *shul* where the *minhag* is to sit because it will make the congregation look as though they are not honoring the Torah properly.⁴⁹ The *Imrei Bina* disagrees with the *Kol Eliyahu* and states that according to the *Taz* and the language of the *Ramo*, one should stand, and therefore any individual may continue to be strict and to stand even in a *minyán* where others sit. *Responsa Dvar Yehoshua* follows the ruling of the *Imrei Bina* and explains that the reason why the *Ramo* adds that “the practice of the *Maraham* was to stand” is in order to teach that one may stand even though the congregation sits. *Dvar Yehoshua* suggests (based on the way the *Mordechai* quotes the *Maharam*) that the *Maharam* was only strict in his

7. See *Mishnah Berurah siman* 94 #10-12 regarding facing a different direction than the rest of the congregation during *tefillah*. See also *Biur Halacha siman* 150 D”H *Shehu*, and *Sefer Eretz Hatzvi siman* 12 seif 8 #2.

8. *Mishnah Berurah siman* 496 #13 writes that one who is visiting Israel (with intent on returning to original place of abode) and keeping two days of *Yom Tov* should nonetheless recite the *Yom Tov* prayers in a secluded and private place. A separate *minyán* for a group keeping *Yom Tov Sheini* should not be established. *Mishnah Berurah* does not give a reason for this ruling and does not cite the prohibition of *Lo Titgodedu*. Rav Yosef Karo in *Responsa Avkat Rachel siman* 26 allows for such a *minyán* and writes that such practice does not fall in the category of causing controversy. This responsum is the basis for the widely accepted practice for second day *minyanim* on *Yom Tov* in Israel. The reason that *Mishnah Berurah* and Rav Karo independently do not mention the prohibition of *Lo Titgodedu* is because it is similar to a case of two courts in one city who ruled differently, which is halachically valid. See *Sefer Yom Tov Sheini K’hilchato* chapter 2 se’if 2, and *miluim siman* 9 #4.

The *Sdei Chemed marechet lamed siman* 79 and footnote #986 to *Chidushei Ritva* (Mosad Harav Kook) from Harav Aharon Yoffen zt”l both deal at length with the application of *Lo Titgodedu* to *minhagim*. The *Sefer Yom Tov Sheini K’hilchato* of Rav Yerachmiel Fried in the *miluim siman* 11 deals with this issue as well.

49. *Imrei Bina Orach Chaim siman* 13 #4. See also *Kaf Hachaim Orach Chaim siman* 146 #22. The *Orchot Chaim* of Rav Nachman Kahana zt”l, quotes the *Kol Eliyahu* as well. *Teshuvot V’Hanhagot Orach Chaim* volume 1, *siman* 141 agrees with *Imrei Bina*.

own practice to stand for *Kriat Hatorah* while the congregation sat, and the intention of the Ramo is to quote the Maharam to teach that one can follow his stringency even if an entire congregation is sitting.⁵⁰

Based upon the reasoning of the *Imrei Bina* in *Responsa B'tzel Hachochma*, Rav Betzael Stern zt"l writes that one may sit for *Kriat Hatorah* in a *shul* where the custom is to stand because sitting for *Kriat Hatorah* also has a strong source in halachic literature.⁵¹

As is true in many areas of halacha, it is imperative to trace the source of a particular practice while simultaneously keeping a close eye on the accepted custom. In this regard, the issue of sitting or standing for *Kriat Hatorah* and its ramifications to the prohibition of *Lo Titgodedu* is no different.

50. *Responsa Dvar Yehoshua*, volume 2 #15, adds that only one who consistently acts with piety should be stringent in this situation, but in a *shul* where there are older people who are all sitting, it may be inappropriate to be strict.

51. *Responsa B'tzel Hachochma* volume 5 *siman* 1. He adds that this does not fall into the category of "not to stand between those sitting, and not to sit between those standing" as stated in the 7th chapter of Tractate *Derech Eretz Rabbah*, because standing and sitting for *Kriat Hatorah* are both valid *minhagim*.

Letters

To the Editor:

Congratulations to the *Journal of Halacha and Contemporary Society* and Rabbi Dovid Cohen on the excellent article "Celiac: A Guide to Mitzvah Observance." The article was truly a masterpiece and a valuable and needed contribution to the halachic literature.

I have just one issue with the article, which is the material in footnote five, where the author attempts to demonstrate that oats is really one of the five grains. Rabbi Cohen concludes (and adopts this view throughout his article) "we will assume that oats are שבולת שועל and are therefore suitable for all mitzvot which require one of the five grains."

I do not think this is an obviously correct view given the presence of a clear and direct dispute in the *rishonim*. A better summary should be that "whether oats is one of the five grains remains a dispute between the *rishonim* and for matters of Torah law (and certainly for the mitzvah of matzoh), one ought to be strict for all the views." A survey of the *rishonim* and the Talmud sources makes this clear.

The earliest source I am aware of to discuss this topic is the *Aruch* s.v. שבל which quotes two views, the second of which is that שבולת שועל is oats and the first is that it is a sub-species of barley named segala. It is true that a number of *rishonim* adopt the second view in the *Aruch*, translating שבולת שועל as *avina*, the Latin word for oats. In that group are Rabbeinu Gershom (*Menachot* 70b) and Rashi (*Pesachim* 35a and *Menachot* 70b) as well as many others. On the other hand, there are a large number of *rishonim* who do not, and who make it clear that they think that שבולת שועל is a sub-species of barley called in Latin segala.

This group of *rishonim* has been given considerable support by the reappearance of the Rambam's commentary on the Mishnah *Kelaim* 1:1 where Rambam is clear that he is of the

view that שבולת שועל is not oats at all. Other *rishonim* in that group include *Leket Yosher* (OC 1:74) and Rabbenu Natan Av Hayeshiva in his commentary on the Mishnah.

Furthermore, the translation of the term שבולת שועל to oats is difficult for many technical reasons that relate to the scientific description of שבולת שועל found in the Talmud. The Gemara (*Pesachim* 35a and *Kelaim* 1:1) states directly that whatever exactly שבולת שועל is, it is a sub-species of barley, and this is cited by many *rishonim*. Oats is clearly not a part of the barley family – it is a distinct species of grain, unlike segala, which is a form of barley. Furthermore, the Mishnah in *Kelaim* 1:1 indicates that שבולת שועל and שיפון and barley can all cross-breed, which is simply false for oats (but true for segala). This ability to crossbreed is explicitly codified as true in *Shulchan Aruch* YD 294:14.

Indeed, if one simply looks at the plants and the grain themselves, it is clear that oats do not even look like barley, unlike segala (which does).

Furthermore, the Jerusalem Talmud in *Challah* 1:1 notes that שבולת שועל grows in a row, which is consistent with the definition of segala (also known as two-rowed barley) and not for oats.

One can say with some confidence that oats simply do not fit the botanical description found for שבולת שועל in the Mishnah, Talmud, *Shulchan Aruch* or later codes. This fact casts significant doubt on the correctness of the definition of many *rishonim* and inclines one to think that Rambam is correct, and that שבולת שועל has to be a sub-species of barley. No less a contemporary authority that Rav Shternbuch in *Teshuvot Vehanhagot* 1:302 notes that our “oats” (which he calls “Quakers”) are not שבולת שועל, a view seconded by *Yad Chanoch* 22.

Indeed, once one realizes that שבולת שועל might not be oats but a sub-species of barley, many other rules make sense, such as the listing of mixable grains found in *Yoreh Deah* 324:2,

which only actually make sense if שבולת שועל is a type of barley and not if it is oats.

It is of course true that the tradition found in the *acharonim* to identify oats as the fifth grain (see *Chayei Adam* 1:50:3, *Mishnah Berurah Sha'ar Hatzion* 453:20 and *Aruch Hashulchan* 453:3) is the common one of the last centuries (and perhaps reflects the distance Jews have socially experienced from many agrarian matters for centuries), and maybe for most matters (*brachot* and the like) it is reasonable to follow that historical understanding of the halacha, as these are very much matters of *mesorah* (since *m'ikar hadin* at least *bede'eved* one can make a *mezonot* on any food, say *hamotzi* on any grain-based bread, and perhaps even recite *birkat hamazon* on any grain-based bread. See *Iggerot Moshe* OC 4:40(1), *Nishmat Avraham* 1:58:2, *Yabia Omer* OC 7:35.) Certainly, one should never consider fermented oats not *chametz*, against Rashi and those many *rishonim* who agree with him.

But when it comes to the eating of oat matzah, there are three grounds to be strict, and the historical practice is to be strict, and not to use oat matzah for the mitzvah at the Seder.

The argument of *mesorah* is at its weakest in the context of matzoh. First, there always was a very strong tradition not to use oat matzah at the Seder (as noted by *Shevet Halevi* 9:117 and *Minchat Yitzchak* 9:49). Second, there is a unique and special *bracha* recited (*al achilat matzah*) which according to all the *rishonim* who disagree with the categorization of oats as שבולת שועל is simply a blessing in vain and a sin. Even those who defend the definition of שבולת שועל as oats (as Rav Efrati does in "What is *Shebolet Shual*" *Mesorah* 13:66-71) only do so as a stricture (*lechumra*) and not as a leniency (*lekula*) – to argue that people should never stop considering oats as *chametz*. Using oats as the matzah for the Seder is beyond that parameter, but represents the use of oats as one of the five grains *lekula*, which is factually highly problematic.

So, what should a celiac do who simply cannot eat wheat? First, such a person might very well be exempt from the

mitzvah as Rabbi Cohen notes. Second, there might well be a better solution. *Shulchan Aruch* 453:2 states that one can make matzah from a mixture of wheat and rice flour and so long as the mixture has the taste of wheat flour, one fulfills the mitzvah, because rice flour is so bland that it merely serves as filler. Both *Mishnah Berurah* and *Aruch Hashulchan* permit this in a time of need even if the amount of wheat flour is less than the minimum measure of a *kezayit* (as do the vast majority of *rishonim*). In consultation with food experts and after a number of sample bakings, it is clear that a mixture which is 90% rice and 10% wheat flour has the wheat taste and one can fulfill the mitzvah of matzah with such matzot, and almost all celiacs can, in fact, digest without harm less than 10 grams of wheat (for three matzahs) or less than 3 grams (for one matzah).

Even though eating these matzot entails being lenient on the custom of *kitniyot*, it would seem to me that this is a much better halachic solution to the issue of matzah at the Seder for one who suffers from celiac than to rely on the use of oat matzah, which presupposes that oats are one of the five grains, against many *rishonim*, and is in tension with the Talmud's own scientific description of שכולת שועל as one of the five grains, which is as a sub-species of barley.

Of course, a person who is completely intolerant of any wheat should use oat matzah without the unique *bracha*, as certainly a plausible fulfillment of a mitzvah without a *bracha* is better than nothing. But the mixture of wheat and rice is superior to that in that the Talmud endorses this solution explicitly, as do the vast majority of *rishonim*, the *Shulchan Aruch* itself, as well as most *acharonim*.

Let me end where I began. This article was a truly excellent contribution to the halachic literature of our community and Rabbi Cohen is to be commended for writing it and the *Journal of Halacha and Contemporary Society* for publishing it.

MICHAEL J. BROYDE

Rabbi Dovid Cohen responds:

Thank you, Rabbi Broyde, for taking the time to fill in some sources that were not included in my recent article, and for your questions on my assumptions regarding oats.

The first portion of your letter documents some *Rishonim* who hold that שבולת שועל is not oats and suggests proofs to that position. You are correct that some *Rishonim* do adopt that position but I nonetheless stand by the conclusion to reject that opinion because, as you yourself state, “the tradition found in the *Acharonim* to identify oats as the fifth grain...is the common one of the last centuries”. The first to question that tradition in recent time was Dr. Felix, and therefore the article focused on his points rather than on the (more significant) *Rishonim* debate. [As relates to the position of contemporary *Poskim*, I believe the letter-writer’s quote from *Teshuvot V’hanhagot* is taken out of context.]

In the middle portion of your letter you suggest that even if one adopts the view that oats are שבולת שועל as relates to certain halachot, there are a number of reasons not to rely on this as it relates to eating matzah at the Seder. Your first reason is that *Shevet HaLevi* and *Minchat Yitzchak* cite a tradition not to use oat matzah at the Seder. I see no mention of such a custom in *Shevet HaLevi*, and the *minhag* discussed in *Minchat Yitzchak* is not to use any non-wheat matzah (an issue discussed in the article) with no mention of any special reason specifically not to consider oats as an acceptable grain.

Your final reason is – to paraphrase your words – that even Rabbi Ephrati who defends the definition of שבולת שועל as oats only does so *lechumrah* and not *lekulah*. A more careful reading shows that Rabbi Ephrati cites *Chazon Ish* who rules that one should assume oats is שבולת שועל even *lekulah*, and that position is readily understood, as follows: There are disagreements in many areas of halacha, but once the *Poskim* have determined that the halacha follows one of the opinions, we generally accept that ruling in all circumstances whether

that leads to a strict or lenient position. An appropriate example of this idea is the *machloket* as to the translation of the word “אורז” (see *Mishnah Berurah* 208:25). The accepted halacha is that אורז is rice, and that applies to all halachot even as relates to the special, lenient status of matzah made of a blend of wheat and אורז, which you yourself suggest at the end of the letter! Thus, just like one can be lenient and eat rice/wheat matzah, so too they can be confident in the tradition and eat oat matzah at the Seder.

This leads us to the final portion of the letter where you suggest that celiacs consider eating matzot made with a small amount of wheat. An early version of the article discussed this worthwhile suggestion, but that section was removed from the final version because of (a) concerns that it might not be medically sound for celiacs to consume such matzah, (b) the fact that such matzah is not commercially available, and (c) the assumption that most celiacs cannot produce such matzah by themselves (due to practical and halachic issues).

Thank you once again for your comments,

DOVID COHEN

* * *

To the Editor:

As a certified financial planner professional working at a wealth management firm, I was very interested in Rabbi Warburg’s article, “The Investment Advisor: Liabilities and Halachic Identity” in the Fall 2009 issue. I was dismayed that Rabbi Warburg used the terms “broker” and “investment advisor” interchangeably, as the two do not have the same standards of conduct toward clients under current U.S. law.

An investment advisor and a broker provide very different levels of service to clients. An investment advisor is like a personal chauffeur, whereas a broker is like a used car salesman. An investment advisor is held to a fiduciary standard, which means that he must put his clients’ interests

first at all times. With discretionary accounts, investment advisors typically get paid as a percentage of assets under management. Therefore, their income increases only when their clients do well. A broker's job is to get the clients to buy investments. His source of income is the commission from clients' purchases and sales. The more transactions, the higher the broker's compensation. The investments cannot be completely inappropriate, but they do not need to be in the clients' best interests either.

This exception to the fiduciary standard for brokers is called the "Merrill Lynch rule." It is currently being challenged as part of the financial reform overhaul as it is very misleading to people outside of the investment management profession. In the meantime, people who seek investment advice need to be aware whether the professional they are dealing with must act as a fiduciary toward them or not.

Sincerely,

MARINA GOODMAN, CFP

* * *

Rabbi Warberg responds:

Legally, as Ms. Goodman correctly states, the Investment Advisors Act of 1940 obligates an investment advisor to act solely in the best interests of his clients. On the other hand, a broker is regulated by the Nat'l Association of Securities Dealers which mandates a "suitability standard" whereby an investment must be suitable for the client, and in many instances the portfolio recommended by the broker frequently serves the broker's interests, i.e., increased commissions at the expense of the client's best interests.

However, in halacha, any false misrepresentation exhibited by either a broker or an investment planner are both examples of fraud. Whereas our essay addresses the impropriety of an investment advisor who negligently misrepresents information to his client, a broker's conduct promoting his

own interest at the expense of his client is a form of "*genevat daat*", i.e. creating a false impression, and as such is equally violative of halacha's fiduciary standard of refraining from false misrepresentation. Hence, halacha would reject the broker suitability standard subscribed to by American law.

Given that in halacha the standard of conduct for both professionals is identical, in our essay we utilized the terms "investment advisor" and "broker" interchangeably. Had this essay dealt with American law, we would have fine-tuned the distinction between these two types of professionals, but equally noting halacha's disapproval of the broker's standard of professional conduct endorsed by American law.

* * *

To the Editor:

I would like to offer two corrections regarding Rabbi Alfred S. Cohen's stimulating article, "Vaccination in Jewish Law" (no. LIX).

First, Rabbi Cohen cites the last responsum in *Avnei Nezer* (*Choshen Mishpat*, #193) which deals with a patient's right to refuse medical treatment when the treatment requires ingesting non-kosher food. Rabbi Cohen incorrectly attributes the responsum to Rabbi Avraham Bornstein (d. 1910), the main author of *Avnei Nezer*. The author of this particular responsum is Rabbi Ze'ev Nahum Bornstein, Rabbi Abraham's father. Rabbi Ze'ev Nahum served as *av bet din* in Biala, Poland, in the 19th century.

Second, Rabbi Cohen says the responsum denies a patient's right to refuse medical treatment on religious grounds.

But the responsum concludes the exact opposite: "Even one who is not generally a saint is, in this case, permitted to be stringent concerning *kashrut* by refusing medical treatment." It would seem that Rabbi Bornstein may have provided some

halachic precedent for those who wish to refuse vaccinations on religious grounds.

Sincerely,

SETH WINBERG

* * *

Rabbi Cohen responds:

Thank you for pointing out that the author of *Avnei Nezer* himself writes that this responsum is from his father; I should have noted it in the article.

With respect to your other remarks, I have to disagree with you: the responsum is exactly as I reported in the article. The concluding words of this part of the responsum are as follows:

וא"כ אפ' מי שאינו צדיק אפילו הכי מותר לו להחמיר על עצמו
במאכלות אסורות נגד הרופאים

Therefore, even someone who is not a tzaddik can be stringent with himself concerning [not eating] forbidden foods, contrary to medical advice.

In your letter, you said that the responsum of [the father of] the *Avnei Nezer* says that one does not have to listen to medical advice, when clearly he only said that **concerning eating non-kosher food**, one need not follow doctors' advice. Claiming that therefore this permits not getting vaccinated, despite medical advice, is simply a leap of faith on your part, with no basis in the responsum itself.

The responsum ends with another paragraph, where the author discusses the option of not going to a doctor at all. I intentionally left that out, because careful perusal of the responsum shows that the author had a very negative opinion of the medical establishment at his time and in his place (Russia in the nineteenth century). He characterizes doctors as לקלקל מועדים – i.e., “known to cause harm”. In other words, he

found doctors to be incompetent and often causing harm. Since this harsh assessment does not by any stretch of the imagination concur with the realities of today, in America, I deliberately left that out. While there may indeed be incompetent doctors, yet by and large most doctors are definitely performing a public service.

I thank you for taking the time and trouble to study my article, and taking the time to write.

RABBI A. COHEN

* * *

To the Editor:

I read with great interest Rabbi Cohen's article on vaccination in the Pesach 5770 issue of the *Journal*. While I have no disagreement with his halachic conclusions, I respectfully believe that Rabbi Cohen, in his righteous desire to be fair-minded and even handed, erred in quoting "scientific information" from non-scientific sources. Legitimate medical literature and opinion should never be contrasted with opposing statements from individuals without scientific credentials or legitimacy.

Case in point: In his article, Rabbi Cohen cited an article from "*Mothering Magazine*", a lay publication, as the "counterbalance" to science and medical authority. The lay author of this *Mothering* article provided outdated erroneous medical information to support her position, which Rabbi Cohen unintentionally legitimized by republishing it in his prestigious Journal.

To wit: Rabbi Cohen quoted *Mothering* magazine that "polio has not occurred in this country for years – but the vaccine itself paralyzes eight children a year (in the United States)". This is patently untrue. Both the US and Canada stopped

using live (Sabin) vaccine in the year 2000, and have used only inactivated (Salk) vaccine – which cannot cause polio –since then. The “eight cases of vaccine related polio per year” are based on data from the last century; indeed, there have been NO cases of vaccine-related polio in the United States since 2000, except for unvaccinated patients in contact with immigrants from countries where oral live vaccine is still used. Such unvaccinated people remain highly susceptible to polio. Additionally, footnote 42 quotes the same egregious inaccuracy – “similar statistics apply also to diphtheria and hepatitis B (vaccine)”. Again, this is patently absurd. Both of these vaccines do not contain live virus and simply cannot cause the serious and potentially fatal diseases they clearly prevent.

All vaccines are not created equal. There are vaccines that are poor; there are vaccines that have side effects. There are vaccines designated only for specified “*high risk*” individuals. However, to offhandedly lump vaccines together as was implied by the *Mothering* article is medically, morally and halachically *dead* (*pun intended*) wrong.

The single most important medical innovation Hashem has allowed us is the development of effective vaccines that prevent crippling, fatal childhood / other diseases. 20,000 people died annually from polio, and thousands were horribly crippled, before the advent of effective vaccination. To argue, as does the author of the *Mothering* article – “what would be the consequences if no one got polio vaccine” – is horrific.

In my humble medical and rabbinic opinion, to reject appropriate polio, diphtheria and hepatitis B vaccination when there is no justifiable medical contraindication is scientifically incorrect, absolutely dangerous, and thus, anti-Torah *hashkafa*. When anyone asks me – should they and/or their children receive such vaccines – my *psak halacha* is a clear and unequivocal: ABSOLUTELY YES. We do our congregants a grave (*pun intended*) disservice if we bend over backwards to

present all sides to a story that in reality does not have "another side".

Sincerely,

RABBI AARON E. GLATT,
MD, FACP, FIDSA, FSHEA

Assistant Rabbi, Congregation Anshei Chesed and
the Young Israel of Woodmere, Spokesperson,
Infectious Diseases Society of America, Professor of
Clinical Medicine (Infectious Diseases), NY Medical
College, President and Chief Executive Officer, New
Island Hospital

* * *

Response to Rabbi Glatt:

Thank you for your informative and well-reasoned critique of my article about vaccination. As a matter of fact, a number of other people had also pointed out to me that some of the issues raised by the anti-vaccine advocates were a bit fuzzy in their reasoning and facts.

However, since articles such as appeared in *Mothering* magazine are indeed read by laymen—who do not have the scientific/medical background to discern when statistics may be old and no longer relevant—it was my desire to address those issues which concern people who are contemplating vaccination. And while I have no doubt that in this case your information about polio and other vaccines is correct, I believe you will concede that there have been numerous instances when the medical establishment has been less than candid with the public. It has happened more than once that one group of doctors will challenge the findings of another medical group, or even government guidelines. (And the article in *Mothering* quoted doctors – not laymen – for the dire statistics.) Perhaps this is why there is an aura of distrust about vaccines, medical-establishment assurances notwithstanding.

But that was not the point of my article. My purpose in writing this article was to give voice to the concerns people have (even though some of their fears may be misguided), and then to consider what Jewish law would have to say about each of them. There is no question that in order to arrive at a proper *psak halacha*, a *posek* would need to consider the authentic scientific information and how it impacts on halachic principles, and that is not always an easy task.

The *Journal of Halacha and Contemporary Society* sees as its mandate to educate the Jewish public about halachic issues which arise in the modern world, but not ever to *pasken* these issues, which is why I avoided expressing my own opinions. However, on a personal note I will tell you that after researching this article extensively, I did get a flu vaccine this year and told everyone who asked me that they should do likewise. Furthermore, it is my position that if parents do not vaccinate their child with the standard childhood vaccinations, the yeshiva where they would want to send their child can and should refuse to let him/her attend, due to the possible danger this might present to other students. As far as I can see, it is no different from the situation where R. Moshe Feinstein ruled that it is forbidden to smoke in a Beit Midrash, for the smoke may harm others learning there. (This ruling is mentioned in my article).

Thank you again for taking the time to read my article and to write me your most helpful comments.

RABBI A. COHEN

* * *

To the Editor:

I read with great interest Rabbi Broyde's article: "Can a Convert sit on a *Beit Din* for Conversion."

In the Rambam's *Introduction to the Mishnah* he writes that four people came from congregations of converts: Shmaya, Avtalyon, Rabbi Akiva and Rabbi Meir. They all were head of their respective *Beit Din*.

In addition, the Babylonian Tractate *Yevamot* 101b says Rav Shmuel bar Yehuda removed himself from his *Beit Din* in regard to *chaliza* because he was a convert.

I have the following questions based on the article and the conclusion. (I agree with Rabbi Broyde's conclusion.)

1. How was it possible that Shmaya and Avtalyon were the *Av Beit Din* and *Nasi* (*Pirkei Avot* 1:10) when they were true converts?

2. Can a convert assume a role of Jewish rabbinic leadership, i.e. judge, and is the criterion that at least the mother is Jewish? Then Rabbis Akiva, Meir, Shmuel bar Yehuda all had mothers that were Jewish, but if not, how were they allowed to be in position of judges / rabbinic authority?

RABBI JUSTIN SCHWARTZ
Jewish Educator TBA Tarrytown NY
Chaplain of the Spring Valley
Fire Department Spring Valley NY

* * *

Rabbi Broyde responds:

Thank you for your letter. There is a great deal of uncertainty as to what the Rambam means in his *Introduction to the Mishnah* that Shmaya and Avtalyon were from a community of converts. As the *Tosafot Yom Tov* (*Avot* 1:10) notes, maybe their mothers were Jewish (although certainly others do not agree with this; see *Meiri*, *Yoma* 71b). *Chatam Sofer Nidah* 49b explains how they perhaps could have headed the Sanhedrin even if they were converts. For more on this issue, see footnote 449 on page 611 of volume 26 of the *Encyclopedia Talmudit* on the article entitled "*Kevod Chachamim*".

As to the halachic matter you raised, the *Shulchan Aruch* in YD 269:11 and CM 4:1 both record that a person whose mother is Jewish may sit on a *bet din* for financial matters even if his father is a convert.

* * *

To the Editor:

I read with great interest the article regarding mitzvah observance for one with celiac (No. LIX, Spring 2010). In the beginning of the article, you discuss if there is justification for not performing a mitzvah if doing it will make you sick. I would like to add one more important *mar'eh makom*. R. Moshe Feinstein in *Iggerot Moshe Orach Chaim* I, 172, was asked if someone recovering from a mental illness has to leave the Rehab in order to fulfill the mitzvah of shofar. R. Moshe responded that he does not have to, because getting better is important to this person at least as much as 1/5 of his money, and that fact is also a reason to exempt him from the mitzvah. So, it would seem that if by doing this mitzvah the person will get sick to the point that he would spend 1/5 of his money to get rid of the sickness, then he would be *patur*. (My father showed me this *mar'eh makom*).

Respectfully,

SHMUEL ZEV BLUMBERG

Student, Yeshiva Gedola of Passaic

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