

# Journal of Halacha and Contemporary Society

Number LXIII

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In testament to the rich heritage  
and the glorious days of the  
**RABBI JACOB JOSEPH YESHIVA,**  
and in tribute to its President,  
**DR. MARVIN SCHICK,**  
who tirelessly perpetuates its legacy,  
this issue is dedicated to the memory  
of a life-long friend and musmach of the Yeshiva

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son-in-law of the revered Rosh Yeshiva,  
**RABBI SHMUEL DOVID WARSHAVCHIK ZT”L.**

His outstanding Torah scholarship,  
his prolific works on the interface  
between economics and Jewish law,  
his mark on generations of students at  
Yeshiva University  
as Professor of Economics and  
Chairman of the Department,  
and his indomitable spirit in the rabbinate for  
thirty years were graced with humility and piety.

**SARAH LEVINE AND FAMILY**

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**Rabbi Alfred S. Cohen,  
Editor**

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

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

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

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# Addressing Child Molestation in School Settings: A Halachic and Religious Perspective

By Rabbi Yona Reiss

## 1. Introduction

When Rabbi Eliezer Judah Waldenberg,<sup>1</sup> the late author of the *Tzitz Eliezer* and *posek* of Shaare Zedek Medical Center in Jerusalem, was approached with the question of how to deal with a kindergarten teacher who was molesting children, he pointed out that sexual molestation is compared in the Jewish tradition to outright murder.<sup>2</sup> Obviously, all steps must be exercised to eliminate such conduct from the community, in the classical tradition of “eradicating evil from your midst.”<sup>3</sup> It is important to underscore this fundamental point at the outset of any discussion regarding sexual abuse. There is no room for forbearance, no necessity for multiple warnings, and no basis for leniency.<sup>4</sup> To tolerate sexual acts of aggression against children would be to defy the fundamental tenets of our tradition and vitiate the ethos of our educational system.

Furthermore, one of the main justifications for a teacher of Torah to be compensated altogether, according to halacha, is

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1. 1917-2006, Jerusalem, Israel.

2. See *Tzitz Eliezer* 19:52.

3. See *Devarim* 17:7.

4. See *Bava Bathra* 21b (teachers of children are always considered to be forewarned).

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“*s’char shimur*,” the payment for guarding the physical and spiritual welfare of the students.<sup>5</sup> If a teacher is hired and paid for the purpose of protecting students, it is certainly unthinkable to retain a teacher who has engaged in the physical molestation of those students.

According to the Talmud in Tractate *Chagigah*,<sup>6</sup> based on a verse in Malachi,<sup>7</sup> a person should only learn Torah from a teacher who resembles an angel of G-d. It is imperative to remember that the most important quality in a teacher, counselor, or youth leader, is neither pedagogical brilliance nor personal charisma but rather fine character. A community should refrain from hiring individuals with serious character flaws to function in a position of responsibility towards children.

In two recent volumes of the *Yeshurun* journal,<sup>8</sup> edited by Rabbi Shlomo Gottesman, several major rabbinic authorities, including Rabbi Zalman Nechemia Goldberg, Rabbi Asher Weiss and Rabbi Tzvi Gartner, authored important and groundbreaking articles highlighting Torah sources relating to the responsibility of the community to confront and curtail incidents of child abuse. The journal also included relevant responses by Rav Yosef Shalom Elyashiv to questions posed by Rabbi Feivel Cohen regarding these issues.<sup>9</sup>

We will explore four aspects of this issue: (a) the halachic imperative to address child abuse; (b) the halachic parameters of *mesirah* in this context; (c) spiritual guidance for school staff and victims; and (d) rehabilitation of offenders.

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5. See *Nedarim* 37a and the *Peirush HaRosh* ad loc., s.v. “*s’char Shimur*.”

6. *Chagigah* 15b.

7. *Malachi* 2:7.

8. *Yeshurun*, volume 15, pp. 634-666 (2005), volume 22, pp. 584-597 (2010).

9. These materials have served as a valuable resource in the preparation of this article. See also A. Abraham, *Nishmat Avraham*, Volume 4, notes to *Choshen Mishpat*, *Siman* 388 (2007).

## 2. The Halachic Imperative to Address Abuse

The Talmud<sup>10</sup> teaches that the mitzvah of “do not stand idly by your fellow’s blood”<sup>11</sup> enjoins us to take proactive measures, even at personal expense, in order to prevent harm to others. The instance of harm caused through sexual abuse qualifies for special status based on its inclusion in the laws of the “pursuer” pursuant to which the potential victim, and rescuers of the potential victim, are sometimes authorized to take physical (including lethal) action against the would-be perpetrator in order to prevent the abuse.

Even if the victim insists upon leaving the perpetrator alone, Rambam<sup>12</sup> rules that it is appropriate to take all necessary measures in order to prevent the crime.<sup>13</sup> Commentators explain that the victim’s desire to protect the perpetrator is predicated upon the victim’s fear of being punished by the perpetrator for attempting to thwart the assault.<sup>14</sup> Despite this understandable fear, Jewish law does not permit the victim’s rescuers to be so easily intimidated.

The same principle applies to modern-day occurrences of teachers or other figures in a school setting engaging in child molestation. Even if the child is reluctant to report the offender, there is a responsibility upon school officials and any knowledgeable parties to take necessary steps to prevent this type of harm from occurring.

Such steps certainly entail immediate removal of any molester from a school setting. However, the question arises

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10. *Sanhedrin* 73a.

11. *Vayikra* 19:16.

12. Rabbi Moses ben Maimon, b. Cordova, Spain 1138, d. Egypt 1204.

13. *Hilchot Rotzeach* 1:13.

14. See *Sema*, *Choshen Mishpat* 426:12. In a child abuse context, Dr. Norman Blumenthal pointed out (e-mail correspondence to author) that sometimes the victim may also be protective of the abuser based on a misplaced sense of affection or concern.

whether it is additionally appropriate to report molesters to the police so that they can be duly prosecuted and punished. As a general rule, Jewish law requires that internal disputes within the Jewish community be presented to a *Beit Din* (rabbinical court) for adjudication. Does this case warrant different treatment? We will analyze this question in the following section.

### **3. Halachic Parameters of *Mesirah* in the Case of a Child Molester**

With broad consensus, the rabbinic authorities in the aforementioned *Yeshurun* journal agree that in the case of a child molester, it is appropriate to turn over the offender to criminal authorities in order to curb the molestation. There are a number of different steps towards understanding this conclusion.

First of all, rabbinical courts today enjoy jurisdiction only within the domain of civil law, not criminal law. Criminal law remains within the purview of local governmental authority. According to the *Dvar Avraham*,<sup>15</sup> this authority is based on the talmudic principle that “*makin v'onshin sheloh min hadin*”<sup>16</sup> – i.e., even a *Beit Din* has the ability to punish in a manner more severe than what Torah law strictly prescribes, if necessary to preserve law and order.<sup>17</sup> Every duly established government has the same authority to take these types of steps to preserve law within society. Furthermore, the rabbinical courts nowadays simply do not have the ability to enact punitive measures such as incarceration or corporal punishment, and must necessarily cede this authority to governmental authorities.

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15. *Dvar Avraham* 1:1.

16. *Sanhedrin* 46a.

17. See extensive comments of Rashba in his *Responsa* 3:393, quoted by the *Beit Yosef*, *Choshen Mishpat* 2.

Also, there is talmudic precedent for turning over individuals who have engaged in criminal behavior to the government. The Talmud<sup>18</sup> records the story of Rabbi Eliezer ben Shimon who proved to be so effective at apprehending criminals that he was appointed by the local government to serve as its district attorney. When he was reprimanded by Rabbi Yehoshua ben Korcha for turning over his own people for punishment, he responded that he was “eliminating thorns from the vineyard.” Despite Rabbi Yehoshua’s rejoinder that “let the Owner of the vineyard eliminate His own thorns,” many commentators understand that the conversation only related to the probity of a person of Rabbi Eliezer’s saintliness engaging in such activity, but that the enterprise of apprehending criminals was perfectly permissible.<sup>19</sup> Indeed, the Talmud also recounts that Rabbi Yishmael ben Yosi engaged in a similar vocation.

The more limited reading of the talmudic story is that the profession of apprehending criminals was only permitted because of the fact that Rabbi Eliezer ben Shimon and Rabbi Yishmael ben Yosi were officially serving as agents of the government. However, in a legal regime where many caretakers are essentially mandated reporters under the law, such mandated reporters would presumably be deemed as having similar status. Moreover, even when an individual who knows of the abuse is not a mandated reporter, many authorities conclude, based on the talmudic precedent combined with the principle of “*tikkun ha’olam*” (i.e., the need to preserve law and order), that reporting the offender is permissible and appropriate behavior.<sup>20</sup>

This conclusion may appear puzzling in light of the well-

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18. *Bava Metzia* 83b.

19. See, e.g., *Chiddushei Ritva*, *ad loc.*, s.v. “*amar lahem*.”

20. See, e.g., the *teshuva* from Rav Yosef Shalom Elyashiv in *Yeshurun*, Volume 15 (supra, note 8), at 641, and the articles in that volume by Rabbi Moshe Halberstam, at 643, and Rabbi Asher Weiss, at 656.

known prohibition known as “*mesirah*,” against turning members of the community over to criminal authorities.<sup>21</sup> However, Rabbi Waldenberg notes that the prohibition against *mesirah* does not apply to this type of situation for at least two reasons: (1) sexual molestation is a crime that allows pre-emptive measures even more severe than turning someone over to criminal authorities; and (2) in the opinion of Rabbi Yechiel Michel Epstein (author of the *Aruch HaShulchan*), there is no violation of *mesirah* to hand over someone who is actually a criminal to a just and legitimate government entity.<sup>22</sup> Additionally, several of the contributors to the aforementioned *Yeshurun* journal quote the ruling of Maimonides that whenever there is a public nuisance, there is no violation of *mesirah* to turn over the public offender to criminal authorities.<sup>23</sup> A child molester, who threatens the well-being and stability of a community’s educational institutions and families, is in the category of a public nuisance and therefore should be handed over to the authorities.

#### 4. Uncertain Cases

The above analysis is straightforward enough when it is established without any doubt that a person has indeed committed child molestation. The more difficult determination is in a case where it is difficult to know for a fact that molestation has occurred, or that a particular person is a threat to commit acts of molestation.

One hurdle is that acts of child molestation typically occur in private, with only the children able to testify about what has transpired.<sup>24</sup> However, the commentators point out that unlike

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21. See Rambam, *Chovel U'Mazik* 8:9.

22. *Aruch Hashulchan*, *Choshen Mishpat* 388:7.

23. Rambam, *Chovel U'Mazik* 8:11; brought in *Choshen Mishpat* 388:12; see also Ramo, *Choshen Mishpat* 388:7 (quoting the opinion that a victim of physical abuse may report the abuser to the secular authorities).

24. See generally Rabbi Alfred Cohen, “Judging Transgression in the

most Jewish law matters, minors may serve as witnesses in this type of case, pursuant to the ruling of Rabbi Moshe Isserles (the Ramo) that if the only individuals present in a particular venue are minors, they are believed to testify with respect to actions committed in that venue.<sup>25</sup>

Nonetheless, sometimes the testimony is missing or unclear, and the case is premised upon circumstantial evidence. Even the slightest apprehension must be taken seriously out of concern for the welfare of the children, but at the same time reporting or incriminating a party who is truly innocent could cause permanent harm to the life and career of such an individual. This is the “doubled-edged sword” dilemma that requires careful consideration.

Among the responses to this concern are: (1) criminal authorities do not convict without sufficient evidence, so ultimately if a person is innocent, he will be exonerated; (2) studies have indicated that the vast majority of times in which child abuse is alleged, there is some truth to the allegations;<sup>26</sup> and (3) the Talmud teaches us that even though one should not believe *lashon hora* that is unsubstantiated, nonetheless one has to at least worry that it may be true<sup>27</sup> and therefore an instructor who is accused of molestation, even without compelling evidence, should be removed immediately.

It is difficult to be completely sanguine with any of these responses. With respect to the first assertion, even an innocent party who is ultimately exonerated can suffer terribly during the ordeal and may not ultimately be viewed as innocent or trustworthy even following exoneration. It also seems naïve to assume that any justice system is infallible, or to assume that

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Absence of Witnesses,” *Journal of Halacha & Contemporary Society*, No. LX, Fall 2010, pages 5-47.

25. *Choshen Mishpat* 35:14.

26. See footnotes 75-76, and accompanying text, in Dr. Isaac Schechter’s chapter in *Breaking the Silence* (Pelcovitz and Mandel eds., Ktav, 2010).

27. *Nida* 61a.

parties in charged environments can always count on being treated fairly. Indeed, out of fear that even innocence may not be recognized, accused parties may be motivated to accept a plea-bargain conviction that will permanently identify them as an offender even if in reality they did not engage in wrongdoing.

With respect to the second assertion, it is difficult for anyone who has not thoroughly done all of the research to rely upon assertions by others, including those of experts who have conducted studies, that have the effect of eroding the basic presumption of innocence that all accused parties are supposed to enjoy in criminal proceedings. Even if a majority of previous cases would indicate that allegations were well-founded, it would seem to be a violation of basic due process to allow such previous history to create a predisposition against an accused party in a completely new case when the circumstances of that case may place it in the rare category of cases where allegations are in fact unfounded.<sup>28</sup>

Finally, with respect to the third assertion – that the mere existence of the allegation justifies the removal of the accused individual – although this rationale is brought in the responsa of the *Shoel U'Meishiv* by Rabbi Yosef Shaul Nathanson,<sup>29</sup> this premise does not automatically flow from the proof-text cited in the Talmud in Tractate *Nida*. The talmudic passage indicates that the governor of Jerusalem, Gedalia ben Achikam (after whose assassination the fast of Gedalia is named) should have at least been worried about the report that he received that Yishmoel ben Netanya was planning to kill him, even if he refused to believe the report on the basis that it was *lashon hora*. However, the Talmud does not indicate that it would

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28. See, however, the discussion in *Moed Katan* 18a about occasions in which it is appropriate to take even unsubstantiated rumors seriously (this text is also cited by the *Shoel U'Meishiv*, *infra*). See also *Kiddushin* 81a (“*Amar Rav Malkin al Lo Tova Hashmuah*”).

29. See *Shoel U'Meishiv* 1:185.

have been appropriate for the governor Gedalia to have taken other action against Yishmoel (as had been volunteered by Yochanan ben Kareach),<sup>30</sup> but rather that he should have been more cautious once the report was rendered.<sup>31</sup> It is not clear that punitive measures – such as firing somebody – are warranted based on unsubstantiated accusations, although greater caution is certainly in order.<sup>32</sup>

There is, however,<sup>33</sup> an accompanying passage that appears immediately afterwards in the Talmud that may provide a sounder basis for discriminatory measures against accused parties. According to this second passage, Rabbi Tarfon refused to provide safe harbor to individuals accused of murder based on the same principle of having to be “worried about the report” that he received. According to Rashi,<sup>34</sup> his refusal to help was because he was concerned that perhaps the report was true and therefore he did not want to assist murderers in escaping from the law. According to Tosafot,<sup>35</sup> Rabbi Tarfon’s refusal was predicated more upon his own self-preservation since he worried about getting into trouble with the criminal authorities. However, harboring the fugitives would apparently not have been otherwise problematic.

The Maharshal, in his commentary to this talmudic passage,<sup>36</sup> avers that even according to Tosafot one is not allowed to assist a criminal, except that according to Tosafot,

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30. See Jeremiah 40:15.

31. See *Maharsha ad loc.*, s.v. “asher hikah.”

32. In fact, Rabbi Nathanson himself makes this observation based on a similar distinction found in the *Maharik* (188), but concludes that his case (dealing with a teacher accused of molesting young boys) warranted dismissal of the teacher because there was actual testimony rendered by the children claiming to have been molested.

33. *Nida* 61a.

34. *Rashi ad loc.*, s.v. “Meichash.”

35. *Tosafot ad loc.*, s.v. “Atmarinchu.”

36. *Chochmat Shlomo*, s.v. “Uvesheiltot.”

this prohibition only applies when it is absolutely clear that the person has committed the criminal action. Nonetheless, one could argue that at least according to Rashi, it is appropriate to refuse to assist an accused offender based on the concern that the allegations may be true. However, one can distinguish between firing somebody from an existing job, and not providing such a person with new opportunities, the latter of which seems more analogous to the scenario described by Rashi.<sup>37</sup>

Partially based on these concerns, a number of measures have been enacted in different communities for the purpose of dealing with accusations of abuse in a manner which is protective of the victims and at the same time sensitive to the possibility of unfounded or exaggerated allegations of child molestation. First, in some jurisdictions, a responsible "liaison" personality, appointed to work together with the local district attorney's office, helps to ensure that abuse allegations from the community are treated with the seriousness they deserve, but at the same time are not blown out of proportion. Secondly, special "community *batei din*" made up of rabbinic leaders, community leaders, therapists, psychiatrists and social workers, have been established in certain locations such as Chicago and Los Angeles that are able to work sensitively with schools, victims and accused parties in coordination with the relevant criminal authorities, as appropriate. Finally, a number of rabbinic authorities have recommended that even when these mechanisms are not in place, reporters of unsubstantiated abuse cases consult first with a qualified *posek* to determine that the case rises to the level where reporting is appropriate.<sup>38</sup>

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37. Indeed, in the case of the *Sho'el U'Meishiv*, *supra* notes 31 and 34, allegations of inappropriate conduct had been rendered prior to the time that the individual was retained in his position, and this may also have been a relevant factor in the determination that he should be discharged from that post.

38. See, e.g., the *teshuva* of Rav Elyashiv in *Yeshurun*, *supra* note 8, at 642.

Is the last recommendation appropriate? It has generated some controversy, particularly among those who believe that requiring prior consultation with rabbinic authorities might discourage parties from reporting real cases of child abuse, and might place decision-making power in the hands of those who are not truly expert in determining what types of cases or allegations raise red flags. While the latter concern could be alleviated somewhat by requiring consultation with an authority possessing a certain level of expertise in the area of abuse, the concerns that have been raised are understandable, particularly from the perspective of public perception. Nonetheless, while a requirement of prior consultation may not be strictly necessary when a party genuinely feels that there is a potential child abuse situation, there is no question that all members of the community can benefit from better education and available resources in knowing how to identify and properly address these issues when they arise.

Another concern relating to the reporting of offenders is that of *chillul Hashem* (desecration of G-d's name). When these cases are brought into the public sphere, they could result in a backlash of public scandal and aspersions against the religious community. However, the reality is that a much larger specter of *chillul Hashem* would ensue from a perception that child molesters are being protected and shielded from disciplinary action. The fact that the community takes seriously the responsibility to protect children from molestation is indeed a reflection of the *kiddush Hashem* promoted through maintaining a safe learning environment for children within our Torah community.

## **5. Spiritual Guidance for School Staff and Victims**

When it comes to issues of child abuse, confusion and misinformation abounds, leading to the potential for unhealthy cynicism or misplaced zealotry. It is crucial that administration and faculty members, as well as parents and students, are educated by qualified experts with respect to the

relevant issues. Children need to be aware of the potential for abuse, the warning signs, and the resources available to them to report their fears and experiences. Parents need to learn how to identify physical or psychological warning signs in their children and how to utilize school and community resources to address their issues of concern. Members of the faculty and administration of schools should be similarly attuned to worrisome phenomena, and also sensitized to definitions of appropriate boundaries in relationships and interactions with students.

One of the overarching guideposts in Judaism when it comes to these matters is the notion of "*Veheyitem Nek'i'im Mai'Hashem U'Mi'Yisrael*"<sup>39</sup> – to act in a fashion which is beyond reproach and beyond suspicion. This entails both vigilance in personal relationships as well as the creation of an effective infrastructure for identifying potential problems and weeding them out quickly and decisively.

However, when abuse does happen, the effects upon a child's life can be long lasting and devastating. As a result of incidents of child molestation, a victim can suffer traumatic consequences and require a lifetime of counseling. Schools need to have access to appropriate resources for counseling and other necessary interventions in order to assist victims and their families. In addition, the religious leaders in each school setting should speak out on a regular basis against types of abusive behavior in order to send the message that the administration cares about the issue, can be contacted about concerns, and views an atmosphere of non-abuse as a critical cornerstone of the school's religious mission. This is analogous to the message of the Talmud *Yerushalmi* that a community rabbi has a fundamental responsibility to enunciate the overriding value of *pikuach nefesh* to his

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39. *Bemidbar* 32:52.

constituents.<sup>40</sup> An educational institution must underscore this similarly critical message in a clear, unmistakable fashion.

In this author's opinion, there should also be a clear policy of non-retaliation with respect to students who register complaints about the behavior of school officials. Even if a complaint does not result in a criminal conviction and even if a particular report is ultimately not deemed credible, there should be a safety zone for children to be able to report their fears, concerns and experiences, without fear of repercussion or recrimination. While many people are familiar with stories of alleged victims fabricating torrid tales of abuse with dire consequences to the lives of the accused (such as the scandal in North Carolina of the dancer who alleged she was assaulted by members of the Duke Lacrosse team),<sup>41</sup> these stories have no relevance to this essential point. Small children must not be inhibited even as we must remain sensitive to the due process of all parties involved. As the Talmud notes, the universe is sustained based on the breaths of air that emanate from the mouths of our schoolchildren.<sup>42</sup>

Several rabbinic authorities have noted<sup>43</sup> that victims may also be able to avail themselves of civil remedies, which could be provided by duly convened *Batei Din* (since this would be in the realm of typical *Beit Din* monetary jurisdiction), in the form of financial compensation for harm suffered and medical expenses.<sup>44</sup> At the same time, it seems that in order for these matters to be appropriately handled within the framework of *Beit Din*, the criminal and civil elements of the case would

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40. See *Yerushalmi Yoma* 8:5 “*hanishal megunah*” and commentary of the *Korban Ha'Edah ad loc.*

41. See *Newsweek*, April 23, 2007 (“What Really Happened that Night in Duke”).

42. *Shabbat* 119b.

43. See, e.g., the articles by Rabbi Y. Silman and Rabbi M.M. Stern in *Yeshurun*, volume 22, *supra* note 8.

44. See *Mishnah Bava Kama* 8:1.

have to be bifurcated. This type of bifurcation is easier when the actual abuse in question is not technically defined as criminal, or where the offender's criminal culpability has been previously established and the parties enter into the *Beit Din* proceeding only for a determination of actual damages.

## 6. Rehabilitation of Offenders.

An additional question that arises is with respect to rehabilitating past offenders into the community or even into their previous positions. Is it possible to do *teshuvah*, to achieve a full repentance for the misdeeds of child molestation?

While Jewish tradition places a high value upon the possibility of repentance,<sup>45</sup> it is important to distinguish between repentance and reinstatement. There are certain types of offenses that serve as a future disqualification from previous positions.

In this regard, Rambam writes that if a "Rosh Yeshiva"<sup>46</sup> sins in public and flagrant fashion, he may not be restored to his previous position even in the event that he has repented from his sins.<sup>47</sup> Independent of considerations as to the degree to which rehabilitation can ever be complete if a person has exhibited tendencies towards abusive behavior, Jewish law recognizes that certain positions of authority and responsibility become demeaned and compromised if serious infractions do not engender permanent disqualification.<sup>48</sup> This is particularly pertinent with respect to instances such as

45. See, e.g., Rambam, *Hilchot Teshuvah*, 7:5-7.

46. The reference here is to the "Nasi" of the Sanhedrin; see *Kesef Mishneh* (Rabbi Joseph Karo) to *Hilchot Sandhedrin* 17:9. The *Magen Avraham*, *Orach Chaim* 153:49, applies this principle to other positions of authority as well.

47. *Hilchot Sanhedrin* 17:9; see also Rambam, *Hilchot Rotzeach* 7:14.

48. See *Kesef Mishneh* ibid. See generally Rabbi Mark Dratch, *What to do with Abusive Rabbis: Halachic Considerations*, JSafe: The Jewish Institute Supporting an Abuse Free Environment.

educators of children, in which the occupants serve as a role model for the community.<sup>49</sup>

Additionally, the Mishnah in *Makkot*<sup>50</sup> indicates that there is an obligation of disclosure on the part of a person who has committed certain offenses. Thus, an individual who has served a sentence in “exile” following a conviction for manslaughter, and is offered a position of honor in his new community, has an obligation to disclose his criminal record prior to accepting such a position.<sup>51</sup> The Jerusalem Talmud even extends this principle to the obligation of a Torah scholar to disclose mistaken assumptions regarding his scholarship that could lead to undeserved honor.<sup>52</sup> Therefore, it seems clear that a community should not be left in the dark regarding the prior history of child molesters who are seeking new positions.

Nonetheless, the Talmud in *Masechet Chagigah* indicates that even in the event that a Torah scholar has “gone rancid,” acting in a way that subverts the values of the Torah, the Torah that was taught and disseminated by such individual should not be discounted.<sup>53</sup> A Torah insight taught by such an individual, or an inspiring talk that such a person may have given, may still be of lasting value, even as we condemn the individual’s subsequent misdeeds.<sup>54</sup> Additionally, such an

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49. See Radvaz, *Teshuvah* 2078.

50. *Makkot* 12b, Rambam, *Hilchot Rotzeach* 7:7.

51. See Rabbi Dr. Aaron Levine’s discussion concerning this source and the following source from the Jerusalem Talmud in *Economics and Jewish Law*, pp. 14-16 (Ktav Publishing House, 1987).

52. See Jerusalem Talmud, *Makkot* 2:6, “*Amar Abaye Talmid Chacham Tzorich Le’farsem*” and the commentary of the *P’nei Moshe ad loc.*

53. *Chagigah* 15b.

54. This may serve in contrast to the interdiction against reading *seforim chitzonim*, see Rif, *Sanhedrin* 19b, and Rabbi Ahron Soloveichik, *Logic of the Heart, Logic of the Mind*, pp. 45-47, for an explanation of this category. Also, see *Apiryon* Vol. 2 (pp. 223-224, published 1924-25) in which the editor, R. Shlomo Miller, homiletically interprets the talmudic passage in *Shabbat* 114a

individual should not be publicly humiliated, unless his deeds create a *chillul Hashem* and public embarrassment, in which case public censure is appropriate.<sup>55</sup>

Ultimately, the failures of a leader or educator remind us of the dictum in *Pirket Avot*, “*Al Taa’men Be’Atzmecha ad Yom Motcha*”<sup>56</sup> – that no person is impervious to the possibility of sinful behavior until the day of death. The Talmud relates the story of Yochanan Kohen Gadol who abandoned his Torah principles and became a Sadducee after serving faithfully as the High Priest for eighty years.<sup>57</sup> When a distinguished educator commits unfathomable acts of abuse against minors, it is yet another reminder to the community’s caretakers that they must engage in constant introspection to ensure that they always behave in a morally impeccable fashion in accordance with true Torah values.

## 7. Conclusion

It is heartbreaking to have to write on the subject of abuse as a practical problem rather than as a theoretical abstraction. Certainly any incident of abuse is antithetical to the ideals and value system of the Torah. However, we must be forthright about the existence of this phenomenon and the problems that can arise in communities, families and the lives of victims when the underlying issues are not addressed. The more

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that כל תלמיד חכם שנמצא רבב על בגדו חייב מיתה to denote that any talmudic scholar with a “spiritual stain” upon his character does not merit to be “kept alive” as part of the permanent chain of Torah transmission. This insight appears consistent with Rambam’s explicit exclusion of the infamous Elisha [ben Avuya] (“Acher”), from his official listing of the *chachmei ha-mishnah* in his *Introduction to the Commentary on the Mishnah* (despite teachings recorded in Elisha ben Avuya’s name in *Avot* 4:20 and, together with other sages of his time, in *Moed Katan* 20a).

55. *Yoreh Deah* 334:42; see also *Yoma* 86b (“*mefarsemin et hachanafin*”), and comments of Rashi *ad loc.*

56. *Avot* 2:4.

57. *Berachot* 29a.

mechanisms that are established to spread awareness and prevent the problems from occurring in the first place, the stronger we will be as a Torah community, and the more successful we will be in fulfilling the mandate of educating our children *b'kedushah v'tahara* – in holiness and purity, in accordance with our highest Torah traditions.

# Aging Ovaries and Age-Old Tradition: Elective Egg Freezing in Jewish Law

*Dr. Eli A. Rybak*

Age-related fertility decline presents a challenge to women seeking to conceive during the latter portion of their reproductive years. Married women can account prospectively for this inevitable biological reality; single women in their thirties and forties, however, often find their related efforts at finding a suitable spouse and building a family confounded by a dual dilemma: inexorable ovarian decline and an increasing threat to their (perceived) marriageability stemming, in part, from an appreciation of this specific phenomenon.

This paper represents an effort to suggest some of the halachic and *hashkafic* (philosophical) issues that might be pertinent to the appraisal by rabbinic authorities of elective egg freezing performed by unmarried women for potential future self-use. Indeed, technological advancement in oocyte cryopreservation (egg freezing) in recent years offers an opportunity to maximize – not guarantee – the chances that a single woman will bear genetically-related offspring at some future point when she has married. The author, as a medical practitioner, makes no claims about the correctness of these suggestions; rather, this article is written with an eye to educating interested persons to the reality that what they may

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perceive as simply a medical option which an individual may freely select is, in reality, a complex halachic issue which may – or may not – be precluded by Jewish law.

The essay proceeds from an overview of both age-related fertility decline and the current status of egg freezing, to the possible determinants that might shape the halachic appraisal of elective egg freezing. These factors include the relevance of the 1960s responsa (*teshuvot*) on cosmetic surgery, particularly as they relate to the issues of self-endangerment and *chavalah* (injury), propriety of assisted reproduction – specifically in vitro fertilization (IVF) – in Jewish Law, protection and promotion of the marriageability of (older single) women, assessment regarding a woman's obligation to procreate and, finally, social considerations and the fact that egg freezing might defer and/or introduce significant halachic and *hashkafic* dilemmas.

## I. Infertility and Age-Related Fertility Decline

The American Society for Reproductive Medicine (ASRM) characterizes infertility as “a disease defined by the failure to achieve a successful pregnancy after 12 months or more of regular unprotected intercourse. Earlier evaluation and treatment... is warranted after 6 months for women over age 35 years.”<sup>1</sup> Why? What exactly happens to women at age 35? For the individual woman, perhaps nothing. Statistically, however, most women begin experiencing a progressive decline in fecundability (probability of conceiving in a given cycle) during the latter half of their thirties, and this stems directly from a quantitative and qualitative decline in their pool of ovarian follicles. At puberty, a young woman possesses 200,000 to 400,000 oocytes (eggs). Typically, a woman with normal reproductive function will ovulate only

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1. Practice Committee of the American Society for Reproductive Medicine. “Definitions of infertility and recurrent pregnancy loss.” *Fertility and Sterility* 2008;90:S60.

0.1% of these oocytes (200 to 400) during her reproductive life span. The remaining 99.9% of her oocyte pool is lost as a result of follicular atresia and cell death (apoptosis) of the oocyte – a process that accelerates for most women during their late thirties. Furthermore, as women age, the occurrence of aneuploid (chromosomally abnormal) eggs increases.<sup>2,3</sup> By the time a woman reaches age 45, nearly 100% of her remaining oocytes are aneuploid.<sup>4</sup>

On a practical level, this decline in ovarian function diminishes a woman's ability to conceive spontaneously or even via assisted reproduction as she transitions to her later reproductive years. In an often-cited study<sup>5</sup> assessing the chance of a woman remaining childless based upon the age at which she first marries, the historical data demonstrate a 6% chance for women marrying in their early 20s, 9% for women marrying in their late 20s, and 15% for women marrying in their early 30s. Women aged 35-39 at marriage have a 30% chance of remaining childless, and women who first marry at ages 40-44 have a 64% chance of childlessness. This study does not account for the benefit accrued by assisted reproduction – but, it must be clearly emphasized, the success of IVF is strictly age-dependent:<sup>6</sup> Controlled ovarian hyperstimulation (fertility

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2. Volarcik K, Sheean L, Goldfarb J, Woods L, Abdul-Karim FW, Hunt P. "The meiotic competence of in-vitro matured human oocytes is influenced by donor age: evidence that folliculogenesis is compromised in the reproductively aged ovary," *Human Reproduction* 1998;13:154-60.

3. Battaglia DE, Goodwin P, Klein NA, Soules MR. "Influence of maternal age on meiotic spindle assembly in oocytes from naturally cycling women," *Human Reproduction* 1996;11:2217-22.

4. Pellestor F, Andreo B, Arnal F, Humeau C, Demaille J. "Maternal aging and chromosomal abnormalities: new data drawn from in vitro unfertilized human oocytes." *Human Genetics* 2003;112:195-203.

5. Menken J, Trussell J, Larsen U. "Age and Infertility," *Science* 1986;233:1389-94.

6. Hence, using the summary data collected annually by the CDC and the Society for Assisted Reproductive Technology (SART) from all reporting fertility clinics nationwide, the 2007 live birth rate from ART cycles using

injections) does enable retrieval of multiple eggs from older women; however, the likelihood that these eggs are chromosomally abnormal remains high.<sup>7</sup> Accordingly, older women undergoing IVF using their own eggs experience success rates far inferior to what they could achieve were they to use eggs donated by younger women, typically in their 20s.<sup>8</sup> The reality of this age-related fertility decline is indisputable and inescapable. The effort to mitigate its impact by freezing the eggs of an unmarried woman for potential future self-donation will hinge upon both the technological and halachic feasibility of elective egg freezing.

## II. Oocyte Cryopreservation (Egg Freezing)

### 1. Brief Overview of Egg Freezing:

As in a standard IVF cycle, an egg-freezing cycle involves the administration of fertility injections designed to recruit multiple follicles, all with potentially mature eggs, which are then aspirated via applied suction by a transvaginal ultrasound-guided needle that traverses the posterior fornix (back wall of the vagina) prior to puncturing the ovary and harvesting the eggs. General anesthesia is commonly used; alternatives include regional anesthesia (epidural or spinal), intravenous sedation or, rarely, no anesthetic agent at all. Nearly all patients are discharged home within 1-2 hours of the procedure. The eggs are counted, assessed for maturity

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fresh nondonor eggs is as follows: 44.2% at age 25, 41.9% at age 30, 32.9% at age 35, 24.5% at age 38, 17.1% at age 40, 9.5% at age 42, and 3.2% at age 44. Available at: [http://www.cdc.gov/art/ART2007/sect2\\_fig5-15.htm#14](http://www.cdc.gov/art/ART2007/sect2_fig5-15.htm#14).

7. Munne S, Alikani M, Tomkin G, Grifo J, Cohen J. "Embryo morphology, developmental rates, and maternal age are correlated with chromosome abnormalities," *Fertility and Sterility* 1995;64:382-91.

8. The 2009 SART data reveal a 55% live-birth rate for all fresh donor egg cycles, regardless of the recipient's age; providing further corroboration that age-related fertility decline results exclusively from ovarian aging, not uterine aging. Available at: <https://www.sartcorsonline.com/rptCSR/PublicMultYear.aspx>.

and frozen in the embryology laboratory that same day. The frozen eggs remain cryopreserved in liquid nitrogen indefinitely – until they are summoned for IVF, whereupon they are thawed and then fertilized.

## 2. History of Egg Freezing: 1986 – Present

The first live birth resulting from frozen-thawed sperm in the modern medical era was reported in 1953, and the first live birth resulting from a frozen embryo (created by IVF; frozen and subsequently thawed) was reported thirty years later.<sup>9</sup> Both technologies are currently well established and have been routinely performed worldwide for many years.

The development of egg freezing, however, proved far more challenging. First reported in 1986,<sup>10</sup> there were only five live births from frozen-thawed eggs during the ensuing decade. The technical challenges were partially overcome with a “slow-freeze” protocol using sucrose (as anti-freeze, to prevent ice damage to the egg’s meiotic spindle) and ICSI (intracytoplasmic sperm injection, to better penetrate the zona pellucida, which hardens after freezing/thawing) – a feat first reported in 1997.<sup>11</sup> Two years later, the first live birth was reported after egg freezing/thawing using a newer technique: vitrification.<sup>12</sup> From 1997 to 2005, close to 100 live births were achieved by frozen/thawed eggs using “slow-freeze”

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9. Trounson A, Mohr L. “Human pregnancy following cryopreservation, thawing and transfer of an eight-cell embryo.” *Nature* 1983;305:707-9.

10. Chen C. “Pregnancy after human oocyte cryopreservation.” *Lancet* 1986;1:884-6.

11. Porcu E, Fabbri R, Seracchioli R, Ciotti PM, Magrini O, Flamigni C. “Birth of a healthy female after intracytoplasmic sperm injection of cryopreserved human oocytes.” *Fertility and Sterility* 1997;68:724-6.

12. Kuleshova L, Gianaroli L, Magli C, Ferraretti A, Trounson A. “Birth following vitrification of a small number of human oocytes: case report.” *Human Reproduction* 1999;14:3077-9. Vitrification entails ice-free cryopreservation by rapidly cooling the oocyte in a minimal volume of solution to induce high viscosity and solidification at its glass transition temperature.

technology, and at least 10 live births by the newer vitrification method.<sup>13</sup>

### **3. Assessment of Egg Freezing: “Experimental” or “Established Medical Treatment”?**

The Practice Committee of the American Society for Reproductive Medicine (ASRM) – the professional society for the fertility community – issued a position paper in 2007 stating that “oocyte cryopreservation is not an established medical treatment. (It is) an experimental procedure that should not be offered or marketed as a means to defer reproductive aging, primarily because data relating to clinical outcomes are limited.”<sup>14</sup> The ASRM also advised counseling by a qualified mental health professional and institutional review board (IRB) oversight prior to allowing a woman to freeze her eggs.

This strong stance by the ASRM generated a firestorm of controversy, given a widespread feeling that its labeling of egg freezing as experimental, however well-intentioned as a deterrent against the inevitable and unseemly rush towards marketing this technique to older single women, nevertheless misuses the term “experimental” and places an unwarranted impediment before the very women who may yearn for the opportunity to maximize their chances at bearing children using their own eggs.<sup>15,16</sup> Indeed, others view the status of egg freezing quite differently: The Israel National Bioethics

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13. Oktay K, Cil AP, Bang H. “Efficiency of oocyte cryopreservation: a meta-analysis.” *Fertility and Sterility* 2006;86:70-80.

14. ASRM Practice Committee. “Essential elements of informed consent for elective oocyte cryopreservation: a practice committee opinion.” *Fertility and Sterility* 2007;88:1495-6. See also: ASRM Practice Committee. “Ovarian tissue and oocyte cryopreservation.” *Fertility and Sterility* 2008;90:S241-6.

15. Rybak EA, Lieman HJ. “Egg freezing, procreative liberty, and ICSI: the double standards confronting elective self-donation of oocytes.” *Fertility and Sterility* 2009;92:1509-12.

16. “ASRM Practice Committee response to Rybak and Lieman: elective self-donation of oocytes.” *Fertility and Sterility* 2009;92:1513-4.

Council views egg freezing as an accepted practice today, and rejects the experimental label.<sup>17</sup> Unsurprisingly, then, recent guidelines issued by the Israel Ministry of Health permit registered fertility centers to freeze eggs using the vitrification technique without requiring IRB (Helsinki Committee) oversight.<sup>18</sup>

Briefly put, an experimental procedure is one whose safety and/or efficacy are unproven. There is no debate regarding the safety of egg freezing for a woman undergoing the process. A large and consistent literature derived from thousands of IVF cycles strongly demonstrates the rarity of serious complication (0.08%-0.7% incidence of intra-abdominal bleeding requiring surgical intervention, abscess, ovarian torsion, cyst rupture, or severe ovarian hyperstimulation syndrome, OHSS, requiring hospitalization) stemming from the controlled ovarian hyperstimulation and transvaginal egg harvest needed for egg freezing.<sup>19,20,21,22</sup> There is less concrete evidence "proving" the safety to offspring created from

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17. Shkedi-Rafid S, Hashiloni-Dolev Y. "Egg freezing for age-related fertility decline: preventive medicine or a further medicalization of reproduction? Analyzing the new Israeli policy." *Fertility and Sterility* 2011;96:291-4.

18. Available at: [http://www.health.gov.il/download/forms/a3763\\_mr14\\_2010.pdf](http://www.health.gov.il/download/forms/a3763_mr14_2010.pdf).

19. Aragona C, Mohamed MA, Espinola MSB, et al. "Clinical complications after transvaginal oocyte retrieval in 7,098 IVF cycles." *Fertility and Sterility* 2011;95:293-4.

20. Bodri D, Guillen JJ, Polo A, Trullenque M, Esteve C, Coll O. "Complications related to ovarian stimulation and oocyte retrieval in 4,052 oocyte donor cycles." *Reproductive Biomedicine Online* 2008;17:237-43.

21. Maxwell KN, Cholst IN, Rosenwaks Z. "The incidence of both serious and minor complications in young women undergoing oocyte donation." *Fertility and Sterility* 2008;90:2165-71.

22. Liberty G, Hyman JH, Eldar-Geva T, Latinsky B, Gal M, Margalioth EJ. "Ovarian hemorrhage after transvaginal ultrasonographically guided oocyte aspiration: a potentially catastrophic and not so rare complication among lean patients with polycystic ovary syndrome." *Fertility and Sterility* 2010;93:874-9.

frozen/thawed eggs. However, similar processes and materials involved in the freezing/thawing of sperm and embryos during the past quarter-century have failed to demonstrate any risks to subsequent offspring and, accordingly, are deemed safe and established medical practice. Thus far, two papers have reported no increase in adverse outcomes among offspring derived from frozen/thawed eggs.<sup>23,24</sup>

Regarding efficacy, the gap in clinical outcomes between IVF using fresh eggs (standard IVF) and frozen/thawed eggs has narrowed significantly. In several recent studies involving women with mean average ages of 27-32, ongoing pregnancy and/or live-birth rates per mature oocyte frozen/thawed (approximately 4-5%)<sup>25,26,27,28</sup> rivaled the yield of fresh oocytes at a major IVF center (live-birth rate of 4.5-6.8% per oocyte).<sup>29,30</sup>

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23. Chian RC, Huang JYJ, Tan SL, et al. "Obstetric and perinatal outcome in 200 infants conceived from vitrified oocytes." *Reproductive Biomedicine Online* 2008;16:608-10.

24. Noyes N, Porcu E, Borini A. "Over 900 oocyte cryopreservation babies born with no apparent increase in congenital anomalies." *Reproductive Biomedicine Online* 2009;18:769-76.

25. Barratt J, Luna M, Duke M, et al. "Report of four donor-recipient oocyte cryopreservation cycles resulting in high pregnancy and implantation rates." *Fertility and Sterility* 2007;87:189.e13-7.

26. Cobo A, Kuwayama M, Perez S, Ruiz A, Pellicer A, Remohi J. "Comparison of concomitant outcome achieved with fresh and cryopreserved donor oocytes vitrified by the Cryotop method." *Fertility and Sterility* 2008;89:1657-64.

27. Grifo JA, Noyes N. "Delivery rate using cryopreserved oocytes is comparable to conventional in vitro fertilization using fresh oocytes: potential fertility preservation for female cancer patients." *Fertility and Sterility* 2010;93:391-6.

28. Noyes N, Knopman J, Labella P, McCaffrey C, Clark-Williams M, Grifo J. "Oocyte cryopreservation outcomes including pre-cryopreservation and post-thaw meiotic spindle evaluation following slow cooling and vitrification of human oocytes." *Fertility and Sterility* 2010;94:2078-82.

29. Patrizio P, Sakkas D. "From oocyte to baby: a clinical evaluation of the biological efficiency of in vitro fertilization." *Fertility and Sterility* 2009;91:1061-6.

30. Indeed, subgroup analysis by age stratification in the Patrizio paper

Data remain lacking, however, regarding the efficacy of egg freezing by women in their late thirties (and beyond). Interestingly, a recent case report described a live birth to a 41 year-old woman derived from her own eggs that she froze at age 38.<sup>31</sup>

In the final analysis, critics of the ASRM position on egg freezing can concede that reliance upon egg freezing as a form of "fertility insurance" that would justify elective deferral of marriage is both risky and inadvisable, particularly for women in their late thirties and beyond. However, egg freezing that is pursued concurrent to, not in lieu of, efforts to marry and start a family can only improve the odds that a single woman will bear a genetically-related child.

### III. Elective Egg Freezing – Halachic Analysis

Elective egg freezing raises numerous halachic and *hashkafic* considerations. Similar to other examples of technological innovation, its sanction depends upon its surviving the scrutiny of a halachic risk-benefit analysis. The next section of this paper will attempt such an analysis by elucidating the problems of, justifications for, and possible alternatives to elective egg freezing in halacha. Given that transvaginal egg retrieval is an invasive procedure, the first two issues that must be addressed are *sakanah*/self-endangerment and *chavalah*/injury.

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involving fresh eggs revealed a 6.8% oocyte to live-birth rate for egg donors (all under age 32 – and equivalent to the age cohorts in the egg freezing studies cited above), roughly 4.5% for women under age 38, 3.1% for women aged 38-40, and 1% for women aged 41-42. It is important to emphasize that the commonly-cited IVF success rate of 50% for younger women at top fertility centers refers to the percentage of embryo transfers resulting in a live birth – and, incidentally, this success rate has been attained as well in the recent egg freezing reports.

31. Knopman JM, Noyes N, Grifo JA. "Cryopreserved oocytes can serve as the treatment for secondary infertility: a novel model for egg donation." *Fertility and Sterility* 2010;93:2413.e7-e9.

### 1. Self-endangerment

The Gemara in *Bava Kamma* 85a derives the physician's license to heal from the words in Exodus 21:19 – *ve-ra'po ye-ra'pe* (and he shall surely be healed) – from which the Talmud derives that the Torah grants permission to the physician to heal. Rashi and Tosafot question the need for a specific source to sanction the beneficent mission of medicine. Their common answer: Divine license assures us that medical intervention is not viewed as interference with, or a contravention of, a Divinely ordained destiny. Ramban (Nachmanides) offers a different insight: A license to heal in Jewish tradition is necessary precisely because medical intervention is often potentially dangerous, even lethal. Every drug has side effects and every procedure has attendant risks and associated potential complications.<sup>32</sup>

This begs the obvious question when an observant Jewish patient ponders an elective procedure: does an individual have the right to assume the risks, however minimal, associated with the given elective procedure? In general, the rabbinic response refers to the principle *shomer peta'im Hashem*, which means that we can rely upon Hashem to protect people following a generally accepted practice, even if that practice or behavior might entail a certain element of risk.<sup>33</sup>

There is a range of opinion in halacha regarding the mechanism of *shomer peta'im Hashem*, the level of risk that this principle might negate or override, and how liberally *shomer*

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32. Ramban, *Torat Ha-adam, Sha'ar Ha-sakanah* – also cited in the *Beit Yosef, Tur Shulchan Aruch, Yoreh Deah, Siman 241*.

33. Two previous articles from this journal are strongly recommended for their excellent background material and citation of the salient primary sources on risk-taking in halacha and the parameters of *shomer peta'im Hashem*: Cohen D, "Taking Risks." *Journal of Halacha and Contemporary Society* 1997;33:37-70; and Shabtai D, Sultan R, "Medical Risk-Taking in Halacha: a case study – *Metzitzah B'peh*." *Journal of Halacha and Contemporary Society* 2006;51:12-43.

*peta'im Hashem* should be applied in affording a person the license to assume risk. Certainly, *shomer peta'im Hashem* is not a concept applied without constraint, and is limited by the Gemara (*Pesachim* 8b, *Kiddushin* 39b) when danger is prevalent. The *Achiezer* (*Even Ha'ezer* 1:23) rules that *shomer peta'im Hashem* can be used to permit a *mi'ut she'aino matzui* – an uncommon occurrence.<sup>34</sup>

Nevertheless, many *Poskim* have demonstrated a reluctance to apply *shomer peta'im Hashem* even to uncommon occurrences. Most explicit is the opposition of the former Klausenburger Rebbe, R. Yekusiel Yehuda Halberstam: “Behold, that rule must be carefully considered, and in circumstances where the talmudic sages did not specifically apply *shomer peta'im Hashem* to permit risk-taking, we have no such authority to do so.”<sup>35</sup> In similar fashion, the *Avnei Nezer* (*Yoreh De'ah* 1:321) issued an apparent ban against non-lifesaving surgery because “all surgery involves unavoidable risk – *chezkat sakana*.”<sup>36</sup>

This stance is not universally accepted, however. In parallel responsa issued in the 1960s permitting the use of cosmetic/plastic surgery – specifically, a rhinoplasty (nose job) to enhance the appearance and marrigeability of a young woman, R. Moshe Feinstein (*Iggerot Moshe, Choshen Mishpat* 2:66) does not even raise the issue of risk-taking or self-endangerment – despite the small but real risks of general

34. See Shabtai D, Sultan R, *ibid*. Drs. Shabtai and Sultan attempt to define the risk threshold, and cite the *Mishkenot Ya'akov* (*Yoreh De'ah* 17) and R. Hershel Schachter quoting R. Yosef Dov Soloveitchik that *mi'ut ha-matzui* (a “prevalent minority”) reflects a 10% or 14.5% occurrence, respectively.

35. R. Yekusiel Yehuda Halberstam, *Divrei Yatziv*, *Yoreh De'ah* 1:31, beginning of section 5.

36. The question posed to the *Avnei Nezer* involved a neonate born with a crooked leg; the physician wanted to place it in a cast, and this threatened to delay the *Brit Mila*. In his response, the *Avnei Nezer* emphasized that his allowance of the procedure was specifically because it was not an “operation” (invasive surgery).

anesthesia. R. Yaakov Breisch (*Chelkat Ya'akov, Choshen Mishpat* 31) cites the view of the *Avnei Nezer* mentioned above – but then disputes it, arguing: “Not all surgeries nor all circumstances are identical.” Based on the Ramban,<sup>37</sup> R. Breisch claims that medical intervention is inherently risky and that this reality cannot derogate from the halachic license to heal. He proceeds to defer any halachic concerns regarding the risks inherent to cosmetic surgery by a straightforward application of *shomer peta'im Hashem*: “If a *yoledet* (parturient) is considered as a person in danger, can we really prohibit her from childbearing? Indeed, this is the manner of the world, and given that many have already trodden upon its path, the Almighty protects the simple-minded. And we have seen many cases of this in the Talmud... and, similarly, in this case – since many people freely subject themselves to elective surgery despite the attendant risks... and our own eyes see that the vast majority are cured/avoid complication...we can trust the physicians...and [we invoke] *shomer peta'im Hashem*.”

## 2. *Chavalah* – Injury

The biblical prohibition against inflicting injury, *chavalah*, is derived from Deuteronomy 25:3. The Gemara in *Bava Kamma* 91b cites a *Tannaitic* dispute whether self-injury is similarly proscribed. Rambam (Maimonides), *Hilchot Chovel Umazik* 5:1, rules that self-injury is, in fact, prohibited. Does this apply to elective surgery as well? Does the normative license to heal defer the prohibition against *chavalah* (any degree of bleeding) wrought by elective procedures as well?

In their respective responsa cited above, allowing cosmetic surgery to enhance the appearance and marriageability of a woman, both R. Breisch and R. Feinstein discuss why, in their view, the prohibition of *chavalah* does not apply in this

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37. See note 32, *supra*.

circumstance.<sup>38,39</sup> Their reasoning, however, diverges: R. Breisch extends the physician's license to heal to include intervention aimed solely at removing pain which, he argues, includes psychological pain. On the other hand, R. Feinstein allows cosmetic surgery in this instance because he construes the *chavalah* violation more narrowly; essentially, medical intervention which is desired by a person does not violate or degrade him, and for this reason it cannot be considered a violation of *chavalah*, inflicting injury.

Regarding *chavalah*, R. Breisch differentiates between injury committed for gain (monetary advantage etc., "le-tzorech") which is prohibited, and causing injury in the process of treating pain, *tza'ar*, which is permitted. Tosafot in *Bava Kamma* 91b (s.v. *ela hai*) are quoted as the source to prohibit *chavalah* even *le-tzorech*, and the Ramo in *Yoreh Deah* 241:3 is quoted as the source to permit *chavalah* in the process of treating pain.

The *Mechaber* (YD 241:3) had prohibited a son from therapeutically removing a thorn from his father's body, bloodletting, or amputating his father's limb given the capital prohibition against a child injuring a parent, despite beneficent intent. The Ramo limits this prohibition to circumstances where other individuals have the capability to assist the parent. If the son is the only capable person and the father is in pain, the Ramo allows any necessary therapeutic intervention performed with the father's consent. In the words of Ramo (based on Meiri): "So long as there is no other capable individual and they (the parents) are endangered or in pain, it

38. *Chelkat Ya'akov*, *Choshen Mishpat* 31 and *Iggerot Moshe*, *Choshen Mishpat* 2:66, respectively.

39. Three prior reviews contain excellent summaries of these and other contemporary responsa regarding cosmetic surgery: R. Chaim Jachter, "Cosmetic surgery – A review of four classic *teshuwot*," *Grey Matter*: English, 2008, Volume 3, pp. 48-54; Eisenberg D. "Judaism and cosmetic surgery," *Assia* (English) 2009;7(1):24-30; Geisler D. "Cosmetic Surgery in Halacha," *J Halacha Contemporary Society* 2004;48:29-44.

is allowed *lechatchila*, and it is a mitzvah (for the son) to do so.”<sup>40</sup>

Next, R. Breisch cites the Gemara *Shabbat* 50b, allowing a man to remove a crusting of dirt or a scab from his body because of pain, but not for self-beautification. *Tosafot* (s.v. *bishvil tza'aro*), however, add that if a man has no physical pain from this blemish but feels embarrassed by his appearance, then he, too, is allowed to remove the blemish because there is no greater pain than this (embarrassment). Based on this precedent, R. Breisch equates the psychological pain felt by a woman embarrassed by a physical deformity (especially if it also hinders her marriage prospects) with physical pain – and per the Ramo/Meiri cited above, permits the elective/cosmetic surgery.

Rav Moshe also permits cosmetic surgery to enhance a woman’s marriage prospects. He argues, based on his reading of Maimonides (*Chovel Umazik* 5:1), that *chavalah* applies only to injury committed in an aggressive (*derekh nitzayon*) or demeaning manner (*derekh bizayon*), but not to requested medical intervention, regardless of its elective nature. R. Feinstein marshals several talmudic sources demonstrating that a non-aggressive/non-demeaning injury does not contravene the prohibition of *chavalah*.

In sharp contrast to these two *Poskim*, however, R. Eliezer Yehuda Waldenberg (*Tzitz Eliezer* 11:41) opposed cosmetic surgery for beautification as a contravention of Divine will and rejection of Divine design. Accordingly, R. Waldenberg categorically excludes cosmetic surgery from the biblical license for a physician to heal. Between these poles exist the positions of other *Poskim* who express uncertainty regarding the permissibility of cosmetic/elective surgery for women.<sup>41</sup>

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40. R. Breisch cites the Meiri’s emphatic statement as the source for the Ramo’s position: Meiri, *Beit Ha-bechira, Sanhedrin* 84b, s.v. *ha-chovel b'chaveiro*.

41. R. Yitzchak Ya’akov Weiss, *Minchat Yitzchak* 6:105.

### 3. Interim Summary

Similar to rhinoplasty, controlled ovarian hyperstimulation with transvaginal egg retrieval is a common and low-risk, albeit invasive, therapeutic intervention. It is possible that the responsa by R. Breisch and R. Feinstein allowing a woman to undergo cosmetic surgery for the purpose of improving her marriage prospects might provide an halachic precedent for permitting egg freezing by a single woman seeking to improve both her marriage prospects and her odds of bearing genetically-related children in the future.

While an analysis of the various challenges confronting a single woman in the Orthodox world as she attempts to find a suitable spouse and start a family is beyond the scope or expertise of this paper, even an amateur observer can surmise some of the factors that complicate the efforts of women in their thirties and beyond who seek courtship from men of corresponding age. Although many of the considerations motivating men to seek marriage with substantially younger woman might be frivolous, one consideration cannot be so easily dismissed – age-related fertility decline of older women. Arguably, this concern might be mitigated by the existence of frozen eggs.

One *Posek* who has explicitly addressed the interrelated topics of fertility preservation for older single women, the difficulties older women encounter in their pursuit of marriage, and the possibility of egg freezing is Rabbi Shlomo Daichovsky, a longtime senior judge at the Supreme Rabbinical Court in Jerusalem. In his remarks delivered at the January 2009 annual Puah Institute conference in Jerusalem,<sup>42</sup> R. Daichovsky suggested the possibility of egg freezing for older single women, but expressed serious halachic public policy reservations with an alternative tactic to preserve

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42. Available in DVD format from Machon Puah, Annual Puah Conference, January 2009, Audio File 21.

fertility among older single women – donor insemination (see section 7 below).

Halachic authorities who have declined to permit cosmetic surgery even to enhance a woman's marriage prospects would probably similarly decline to permit elective egg freezing. On the other hand, the gravity of looming age-related infertility might alter the calculus of halachic assessment, but this is speculative, for to date no halachic decisions on this topic have appeared (to this writer's knowledge). Regardless, even for *Poskim* who do allow cosmetic surgery, and who might provide halachic sanction for egg freezing by a single woman in her thirties, there would still remain the hurdle of determining the halachic propriety of eventual IVF with the frozen eggs, and an evaluation of other determinants that will be explored below.

#### 4. Propriety of IVF<sup>43</sup>

Contrary to the overwhelming sentiment among contemporary *Poskim*, R. Waldenberg explicitly forbids IVF under all circumstances – even for a married couple using the husband's sperm and wife's egg.<sup>44</sup> He cites several classic reasons for his prohibition of IVF despite his (reluctant) allowance for artificial insemination using the husband's sperm:

a – Failed conception during artificial insemination is no different than failed natural conception; the ejaculate has been placed *in vivo*; accordingly, there is no prohibited wasteful emission of sperm. This cannot be said of IVF

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43. Two excellent secondary sources for the halachic appraisal of IVF are the *Nishmat Avraham*: Hebrew, 3rd edition, 1993, Volume 3, pp. 13-6; English, 1st edition, 2004, Volume 3, pp. 15-7 and the *Encyclopedia Hilchatit Refuit*: Hebrew, 1991, Volume 2, pp. 115-50; English, 2003, Volume 2, pp. 571-86. The classic responsum of R. Waldenberg and rejoinder by R. Nebenzahl are available at: <http://www.medethics.org.il/articles/ASSIA/ASSIA5/R0051084.asp#11>.

44. *Tzitz Eliezer* 15:45.

wherein, even if there is successful fertilization, the remainder of the ejaculate has essentially been emitted for naught.

b – Given the severity of the religious prohibition of wasteful seminal emission, leniency is warranted only for artificial insemination that treats male factor infertility. IVF, however, is necessitated by a female cause of infertility (i.e. tubal factor infertility).<sup>45</sup>

c – Artificial insemination leads to a “natural” fertilization *in vivo*; IVF in a laboratory setting, however, is “unnatural” and involves the agency of a third party – the embryologist – to assure fertilization. Hence, the husband will fulfill neither the biblical mandate nor the rabbinic mandate to procreate.<sup>46</sup> Moreover, Rav Waldenberg maintains that the halachic relationship between a child born after IVF and the parents is complicated, and perhaps even severed.

d – Artificial insemination involves the production of a

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45. This responsum was authored prior to the advent of intracytoplasmic sperm injection (ICSI), first reported in 1992, which revolutionized the treatment of male infertility. This technique enables the embryologist to take a male specimen with very poor sperm concentration, motility or morphology and directly inject a single sperm into the cytoplasm, interior, of the egg. Couples with severe male factor infertility, having previously been consigned to repeated, futile cycles of artificial insemination, now witnessed a dramatic improvement to their effort at conception with *in vitro* fertilization using the ICSI technique to enhance fertilization. (In routine IVF, an egg is incubated overnight in a petri dish – “test-tube” – with approximately 100,000 sperm. Fertilization requires a competitive race among the sperm to penetrate the zona pellucida – outer shield of the egg – and thereby fertilize the egg. ICSI bypasses this natural selection, and affords a higher fertilization rate.) Accordingly, this specific consideration – that IVF is indicated only for female infertility – is no longer valid. However, based on his other considerations, R. Waldenberg maintained his stance prohibiting IVF.

46. A rabbinic mandate to procreate can be derived from Isaiah 45:18 (“*Lashevet*”) and/or from *Kohelet* 11:6 (“*V’la-erev*”). See discussion in the Gemara *Yevamot* 62.

specimen that is “washed” (processed) and promptly placed in the wife’s uterus. Supervision of the specimen (to avoid misidentification and use for another couple) is logically far easier and more straightforward in this case than what would be needed during IVF: supervision of eggs, sperm and embryos over a 3-6 day interval. Thus, in his view the former is permitted, but IVF is prohibited.

e – IVF invites the possibility for further embryological manipulation, including cloning.

R. Avigdor Nebenzahl, while declining to permit IVF, nevertheless expresses reservations with R. Waldenberg’s considerations for the following reasons:<sup>47</sup>

a – Prohibition of IVF will ensure that the husband (if artificial insemination has not been successful) will not (fulfill the biblical or even the rabbinic mandate to) procreate. Worse, the marriage may well become embittered, even endangered.

b – If one of the central purposes of marriage and sexual intimacy is to establish future generations, greater leniency is warranted when IVF is the only means to achieve that end. Additionally, equating the wasting of unused sperm during IVF to Onanism overlooks the fact that the former entails procreation without self-gratification and the latter entails the reverse.

c – Fertilization – whether naturally (*in vivo*) or in a laboratory – is the same process, and the same link between parents and child is created. Thus, it is not apparent that the “unnatural” fertilization occurring *in vitro* precludes fulfillment of *P’ru U’rvu* (“be fruitful and multiply”) or severs the parent-child relationship in halacha.

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47. Available at: <http://www.medethics.org.il/articles/ASSIA/ASSIA5/R0051084.asp#11>.

d – “Slippery-slope” speculation wrought by IVF regarding cloning and other concerns should not necessarily outweigh consideration for the welfare of the current infertile couple.

The *Nishmat Avraham* mentions the opinion of several authorities who allow IVF provided that donor sperm is not used, and where there is no other alternative to IVF. Specifically, he cites R. Ovadiah Yosef<sup>48</sup> and R. Elyashiv – both of whom stipulate that all handling of gametes during IVF be performed under strict supervision.<sup>49</sup> Similarly, R. Yitzchak Zilberstein allows IVF both for infertility (unresponsive to conservative management) and for preimplantation genetic diagnosis.<sup>50</sup>

Regarding contemporary practice, three decades after the birth of the world’s first IVF baby, it is fair to say that *Poskim* are nearly unanimous in their allowance of IVF when using sperm from the husband and eggs from the wife, and once less invasive steps (e.g. ovulation induction, intrauterine insemination) have failed or are deemed inappropriate given the specific diagnosis. To be sure, various *Poskim* do differ widely – primarily because of the halachic severity of seminal emission, but also due to other reservations as articulated by R. Waldenberg – regarding how soon IVF can be considered, when male testing may be performed, and the precise methodology used to procure a specimen from the husband.

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48. R. Ovadiah Yosef, *Responsa Yabia Omer, Even HaEzer* 8:21. The position of R. Yosef is also cited by Abraham S. Abraham in his *Sefer Lev Avraham*, Part I, 30:3.

49. *Nishmat Avraham*, English, 1st edition, 2004, Volume 3 (*Even HaEzer* and *Choshen Mishpat*), p. 15.

50. R. Yitzchak Zilberstein, “Selection of embryos for transfer in order to prevent transmission of genetic disease and for gender selection” (Hebrew). *Assia* 5752;51-52(13:3-4):54-8. Available at: <http://www.medethics.org.il/articles/ASSIA/ASSIA8/R0081046.asp>.

### 5. Promotion of Marriageability

The tendency of rabbinic Sages to enact, emend, or adjust various laws to simplify an individual's (especially a woman's) path to marriage is well established. For example, Tosafot<sup>51</sup> point out that a widow's monetary claim on her husband's estate (for her *Ketubah*) takes precedence over competing claims by other heirs and creditors, in order to facilitate her remarriage. (A widow with more financial resources would presumably find greater favor in the eyes of suitors.) Another example of rabbinic sensitivity to a woman's marriage prospects is found in a ruling by the author of *Terumat HaDeshen*. Despite a ruling in *Mishneh Torah* (*Issurei Bi'ah* 21:31) prohibiting a man from endangering himself by marrying a *katlanit* (a woman deemed dangerous given that she had already been widowed twice), many rabbis were nevertheless marrying such widows, and the *Terumat HaDeshen* (1:211) reluctantly allowed this practice "*mishum iguna*" – out of concern for the welfare of these widows who would otherwise be relegated to a life of loneliness and perhaps waywardness.

### 6. A Woman's Obligation to Procreate

The exhortation to "be fruitful and multiply" is repeated several times in Genesis – 1:28, 9:1, 9:7, and 35:11. The question whether the biblical commandment to procreate applies only to men or to women as well is debated in the Mishnah and ensuing Gemara in *Yevamot* 65b, where the conclusion is that women do not have a biblical imperative to procreate. Halachic sanction for elective egg freezing by a single woman, however, does not (necessarily) require a determination that a woman has her own obligation, distinct from that of a man, to procreate. Interestingly, a *rabbinic* obligation upon women to procreate is asserted by various authorities. The *Ran*<sup>52</sup> states

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51. *Ketubot* 84a, s.v. *li-ketubat isha mishum cheena*.

52. *Kiddushin* 41a, Commentary on the *Rif*, 16b; Also see his *Responsa*

that she accrues a mitzvah for assisting her husband. The *Magen Avraham*<sup>53</sup> and the *Chatam Sofer*<sup>54</sup> state that women are obligated (by “*Lasheveth*”) to populate the world.

Despite the commandment and importance of procreation in Judaism, rabbinic authorities no longer prevent a man from marrying a woman beyond her reproductive years or who is known to be infertile.<sup>55</sup> Additionally, a husband is no longer compelled to divorce his wife and remarry after a decade of infertility has elapsed. Hence, men marrying older women might find their chances of fulfilling either a biblical or, at least, a rabbinic mandate to procreate enhanced by the existence of frozen eggs – if reproduction is not possible with the woman’s current eggs. This ability to assist the procreative effort of a future husband might be a factor in the ultimate halachic decision (*psak*) whether to permit egg freezing by a single woman for potential future self-use.

## 7. Egg Freezing and its Alternatives

Halachic rulings regarding medical intervention often cannot be rendered for universal application and are, instead, highly dependent upon the complexities of individual circumstance. Furthermore, there are numerous variables, not all halachic, that complicate the appraisal of egg freezing for older single women to increase their chances of bearing a genetically-related child, because *hashkafa* issues (philosophical or conceptual premises) must also be considered. For example, egg freezing, if allowed, may evolve into an expectation – seriously disadvantaging the marriage prospects of women who choose not to partake, or cannot afford the costs. Another dilemma would be over establishing an age cut-off at which point *Poskim* might allow / recommend

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#32.

53. *Orach Chaim* 153, *se’if katan* 9.

54. *Responsa of the Chatam Sofer*, *Even HaEzer* 1:20.

55. See *Ramo* in *Even HaEzer* 1:3.

egg freezing. Finally, the risk looms that permission issued reluctantly/*bedieved* can be misconstrued as a license for some to electively defer marriage and/or childbearing *lechatchila* (ab initio) in order to pursue educational, career, or other goals during the interim.

A strong counter-argument in favor of allowing or recommending egg freezing, however, derives from the significantly thornier halachic and *hashkafic* concerns raised by the reproductive alternatives to egg freezing for older single women: the use of donor eggs by a woman who marries later in life and cannot conceive using her own eggs, or the pursuit of donor insemination by an older single woman before her ovarian aging precludes the use of her own eggs. Given substantial rabbinic opposition to both of these alternatives (as discussed below), it is possible that egg freezing by a woman for her own future use might be considered more acceptable.

### **A – Use of Donor Eggs by a Married Woman**

The halachic literature on egg donation is dominated by the evolving controversy regarding the determination of maternity when eggs from one woman are implanted into another woman's uterus (after being fertilized by sperm from the latter's husband). Based on *Yevamot* 97b, the predominant view among *Poskim* has been that the gestational/birth mother is the halachic mother.<sup>56</sup>

Fascinating as it is, this debate overlooks the more basic question – is egg donation allowed or acceptable. A *Kol Koreh* signed by leading authorities – R. Elyashiv, R. Wosner, R. Yechezkel Roth, R. Nissim Karelitz and R. Yitzchak Weiss –

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56. R. Eliezer Waldenberg, *Tzitz Eliezer* 19:40, 20:49; R. Zalman Nechemiah Goldberg, *Techumin* 5744:5:248-59; R. Moshe Hershler, *Halacha U'refiah* 5740:1:307-20. There is uncertainty as to the ultimate halachic positions of Rav Shlom Zalman Auerbach and Rav Eliashiv; see *Nishmat Avraham*, Hebrew, 2nd edition, Volume 4, *Even HaEzer, Hilchot Piryah V'Rivya* 5:12:2, p.186; R. Ya'akov Ariel, *Responsa B'Ohalah Shel Torah* 1:70; R. S.M. Amar, *Response to Dr. Richard Grazi*. *Assia* 2010;87-88:101.

prohibiting all egg donation and surrogacy, was publicized in *Sivan* 5769/spring 2009. Opposition of leading *Poskim* to such third-party reproduction was not new. The *Nishmat Avraham* quotes at length the disapproval of R. Auerbach, R. Elyashiv, R. Waldenberg, and R. Wosner.<sup>57</sup> Common sentiment was that this causes “*Irbuvi’ah*” – mixing/confusing the lineage. R. Wosner is quoted as stating that this is a non-capital but blatant contravention of the biblical imperative derived from Genesis 2:24: “And he shall cling to his wife (and not his fellow man’s wife – Talmud *Sanhedrin* 58a) and they shall be as one flesh (Rashi: i.e. their offspring is the result of their union as one flesh).”

Interestingly, R. Zalman Nechemiah Goldberg, a son-in-law to R. Shlomo Zalman Auerbach, expressly permits surrogacy/egg donation for a childless couple – provided that it is pursued under strict guidelines and supervision. Additionally, a maximum effort at determining the egg donor’s identity should be undertaken.<sup>58</sup> For practical purposes, a couple contemplating surrogacy or egg donation would be well advised to heed the succinct admonition of R. Bleich: “[These] issues represent matters of grave halakhic and moral significance requiring informed halakhic guidance.”<sup>59</sup> [sic]

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57. Ibid, pp. 184-6.

58. R. Z.N. Goldberg, “Problems arising from embryo transfer” (Hebrew). *Techumin* 5749;10:273-81. Available at: <http://www.medethics.org.il/articles/conference2/R9981333.asp>; “Regarding egg donation, surrogacy, cryopreservation of sperm from an unmarried man and posthumous procurement of sperm” (Hebrew). *Assia* 1999;65-66:45-9. Available at: <http://www.medethics.org.il/articles/ASSIA/ASSIA65-66/ASSIA65-66.08.asp>. Also see R. Mordechai Halperin, “Egg donation: Legal and ethical aspects” (Hebrew). Available at: <http://www.puah.org.il/ViewArticle.aspx?ArticleId=180>.

59. R. J. David Bleich, “In vitro fertilization: Questions of maternal identity and conversion.” *Tradition* 1991;25(4):82-102. Among the many complex halachic issues that arise are the requirement for/ performance of *Giyur le-chumra*, status of the child if the father is a Kohen, etc.

## B – Donor Insemination of an Unmarried Woman<sup>60</sup>

The halachic consensus opposes the use of donor sperm by unmarried women, although there is diversity in the rationales adduced. R. Eliezer Waldenberg is emphatically opposed: “Donor insemination of a single woman is a major abomination and may result in the violation of serious rabbinic/biblical prohibitions (if an anonymous Jewish donor is used) – including the possibility that a male offspring may marry his half-sister.”<sup>61</sup> Additionally, this offspring might be misconstrued in future years as a product of the single woman, now married, and her husband. Accordingly, this child could be used erroneously to excuse his mother from *chalitzah*, should she subsequently be widowed without further children. The use of a non-Jewish sperm donor is similarly condemned by R. Waldenberg, and he employs the term “spiritual destruction” to lament the breach in *Kedushat Yisrael* (the sanctity of the Jewish people) perceived by this endeavor.

Overall, R. Waldenberg’s strong opposition to anonymous donor insemination and the creation of offspring outside of marriage and without clear lineage stems from the statement in the Mishnah, *Yevamot* 41a, which he cites: “A childless widow subject to *Yibum* or *Chalitzah* (a levirate bond) must wait three months; likewise, all women must wait three months after a marriage ends prior to a new engagement/

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60. The halachic discussion and literature on artificial insemination far exceed the space constraint and focus of this paper. The discussion here is limited to the propriety of using donor sperm to inseminate an unmarried woman. Also, an alternative method of childbearing by an unmarried woman – use of donor sperm for IVF – is not specifically discussed in this paper. However, the objections raised against the use of donor insemination by an unmarried woman seemingly apply to the use of donor sperm for IVF.

61. *Tzitz Eliezer* 9:51 (*sha'ar daled*) and, subsequently, 15:45 (1981) – wherein R. Waldenberg clarifies that his use of the term “*hafra'ah melachutit*” in 9:51 actually refers to “*hazra'ah melachutit*” – artificial insemination. (The term “*hafra'ah melachutit*” is typically reserved for IVF – introduced in 1978, prior to the later responsum).

marriage." The Gemara there queries why all women must wait. R. Nachman in the name of Shmuel cites Genesis 17:7, "to be a G-d to you and to your descendants after you." The Gemara intuits from this verse the importance of conclusive determination of every individual's lineage. The waiting period is thus imposed to ensure clarity regarding the paternity of any child born to a woman who remarries.

The *Nishmat Avraham*<sup>62</sup> records that he was approached by a physician representing an observant woman in her thirties who had despaired of finding a husband and wanted to conceive via donor insemination, with the following stipulation: the donor would be Jewish, he would not have any defect (*p'sul*) in his lineage (*yichus*), and his identification would be recorded by the Ministry of Religion to avoid future complications (*shema yisa achoto mei'aviv*). The *Nishmat Avraham* describes his opposition to this endeavor, but articulates his uncertainty as to whether this would be expressly prohibited if the sperm was already available.<sup>63</sup> He concludes by noting that upon his query, R. Shlomo Zalman Auerbach likewise opposed this endeavor, and that Rav Auerbach cited *Mishlei* 4:24 to emphasize three considerations motivating this opposition: a single woman conceiving via donor insemination adopts an inevitable taint of impropriety ("*chashad shel znut al atzmah*"), future complications (regarding

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62. *Nishmat Avraham*, Hebrew, 2nd edition, Volume 4, *Even HaEzer, Hilchot Piryah V'Rivya* 1:13:3, p.181.

63. The *Nishmat Avraham* relates that the physician also attempted to infer support from the sentiment of R. Nebenzahl, cited above, wherein he expresses his reservations with the blanket prohibition against IVF issued by the *Tzitz Eliezer*, in part, by arguing that "slippery slope" / public policy considerations should not necessarily outweigh halachic sensitivity to the plight of those presently suffering from childlessness. The *Nishmat Avraham* distinguishes between the case addressed by R. Nebenzahl – an infertile couple seeking IVF (using their own gametes) as a means to fulfill a divine commandment (to procreate) and maintain *shalom bayit*, and the present situation involving insemination of a single woman which he describes as "a desire to be a mother in a manner not consistent with the path of daughters of Israel."

the status of the offspring) are likely to arise, and one should be wary of the spiritual defect arising from progeny resulting from the attendant act (by the sperm donor) of wasteful seminal emission.

These opinions, solidly opposed to donor insemination of a single woman, contrast with the views of other *Poskim* who refrain from permitting this endeavor, yet hesitate to prohibit it outright. The *Seridei Eish* (3:5 - *Chelek Gimel, Sof Siman Heh*), at the end of his discussion regarding artificial insemination, states the following: "There is a doubt regarding the permissibility of a single woman accepting donor sperm. To accept sperm from a(n anonymous) Jewish donor invites concern that a male offspring might marry his sister. However, with sperm from a Gentile donor, there is no such concern apparently (*lichorah*)."<sup>64</sup> He concludes with an important caveat: "My entire discussion was merely to expound the different considerations; not to issue an halachic decision for actual practice."

R. Mordechai Halperin, editor of *Assia*, discusses the issue of donor insemination of a single woman,<sup>64</sup> and expresses his reservations with the concern cited in the *Nishmat Avraham* – that the single woman exposes herself to rumors/*chashad shel znut*.<sup>65</sup> R. Halperin concludes: "To summarize, despite the

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64. R. Mordechai Halperin, "Posthumous artificial insemination – prohibition and license" (Hebrew). *Assia* 2006;77-78:113-23. Available at: <http://www.medethics.org.il/articles/ASSIA/ASSIA77-78/ASSIA77-78.15.asp#>

65. Regarding the other concern cited by the *Nishmat Avraham* regarding insemination of a single woman – that the offspring is tainted by its creation from a wasteful seminal emission – R. Halperin cites the *machloket Rishonim* (dispute) as to whether the source of the offense entailed by wasteful seminal emission stems from its frustration of the procreative endeavor or from its violation of the seventh commandment, "*Lo Tinaf*". Regarding contemporary *Poskim*, R. Halperin cites R. Yisrael Zev Gustmann as adhering to the first view and therefore permitting, *lechatchila*, any seminal emission performed for procreative effect. R. Halperin cites R. Moshe Feinstein as adhering to the view that *ni'uf* is involved; hence, permission for

rumors and suspicion that she engaged in immorality... it is difficult to prohibit a single woman seeking to conceive via insemination by a *known* Jewish donor given that the concern of a brother (unwittingly) marrying his sister is not applicable. Additionally, the concern that her action provokes salacious rumors is considerably mitigated by the contemporary widespread awareness of the prevalence of artificial insemination."

R. Shlomo Daichovsky, in an address to the annual Puah Institute conference in January 2009 titled "Fertility preservation for older single women: ethical and halachic perspectives,"<sup>66</sup> articulates the halachic complexity of a single woman using donor insemination: "From the perspective of halacha, it is possible to find many reasons why there is no (strictly halachic) violation. However, from the perspective of halachic public policymaking (*medini'ut ha-halacha*), there is a problem... There is the critical value of the Jewish family [unit]... There is a problem with a family established *lechatchila* [deliberately, ab initio] with only one parent... [Even when orphaned,] a child knows that his/her father is in heaven, and the father's family is known to the orphaned child... It is a very heavy price to pay and, accordingly, *Poskim* have not permitted donor insemination of single women..."

#### IV. Conclusion

The social pressures confronting older single women in the Orthodox world are severe, and only exacerbated by the ticking "biological clock" as these women advance in age.

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actions involving seminal emission is far more limited. It is not clear to what extent R. Halperin intended to apply R. Gustmann's license to defer the concern that a sperm donor contravenes a serious transgression. Indeed, one can posit that R. Gustmann's license is only when a seminal emission is performed in the pursuit of the commandment to procreate.

66. Available in DVD format from Machon Puah, Annual Puah Conference, January 2009, Audio File 21.

Established clinical options do exist for women who cannot conceive using their own eggs, or who choose to conceive outside the confines of marriage. These options, however, are the subject of controversy and debate among halachic authorities (use of donor eggs by married women), and generally prohibited by Jewish law (donor insemination of unmarried women).

Egg freezing is a novel endeavor that is increasingly characterized as an established medical treatment for women into their mid-thirties. It does not provide a guarantee of a future live birth. However, if pursued as part of a broader strategy to seek marriage and natural conception as imminently as possible, then egg freezing can maximize the likelihood that an older single woman will conceive a genetically-related child. Moreover, this increased likelihood of autologous childbearing might well facilitate a single woman's marriage prospects. Social repercussions of widespread egg freezing – careerism, pressure to avail oneself of novel and expensive technology – invite halachic scrutiny but, unlike the reproductive alternatives for older single women – possibility of eventual egg donation upon marriage or donor insemination while single – egg freezing does not pose a challenge to the purity of the Jewish family [*kedushat mishpachat yisrael*], albeit other halachic or *hashkafic* hurdles may remain. The apparent absence of halachic impediment, the absolute and relative virtues of egg freezing to mitigate the reproductive consequence of ovarian aging, and our tradition of zealous advocacy on behalf of the unmarried and childless, suggest that this is an area which halachic authorities might need to confront in the near future. We have seen that they will need to consider not only the intrinsic permissibility of certain actions, but will undoubtedly also grapple with their impact upon fundamental Jewish values.

The present study has tried to identify possible considerations of both a halachic and *hashkafic* nature that might determine the permissibility for an unmarried Jewish

woman to freeze her eggs for possible use at a later time. As the possibility of egg freezing enters the consciousness of our community, practical action will require prior discussion, guidance, and approval by major halachic authorities. *Yelamdenu Rabbenu.*

# Sabbath Mode Ovens

*Rabbi Alfred Cohen*

Technological innovations advance so rapidly, they are transforming our lifestyle in the modern age. This is true not only globally, but in the Jewish world as well. As Jews in this new world, one of our challenges is to integrate the new technology into the Orthodox Jewish lifestyle in a manner consonant with halacha. Jewish law, halacha, informs virtually every facet of our existence, and rabbinic scholars are adept at applying halachic principles to the most arcane modern problems. Sometimes they are able to adapt the technology to halachic requirements – but it is not an easy task. Beyond the technical issues of harnessing electronic and other technologies for use in the Jewish home and workplace, there are also issues of *hashkafa* (philosophy) – just because something might be halachically doable does not mean it is always desirable in the long run. One must give thought also to what is desirable and proper, not only what is feasible.

The present study will address one such issue – the “Sabbath mode ovens,” which have a mechanism whereby it is possible to program ovens to go off and on in such a way that one could use them on *Yom Tov*. There are a number of issues which affect the Jewish consumer: some of the common problems with modern ovens include the twelve-hour safety cut off, whereby the oven automatically turns itself off after 12 hours; lights, icons, and temperature displays that may be turned on by opening the oven door, and timed-bake features

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that must be manually turned off to silence the bell when the oven shuts itself off.<sup>1</sup>

The Star-K Kashrut organization has worked extensively with appliance manufacturers to obviate or override these problems, and there are ovens currently available on the market which conform to their standards. The Star-K did two things (a) create a Sabbath mode so that people can use their ovens on Shabbat and *Yom Tov* without violating *issurim* (prohibitions) and without the auto-shutoff turning it off, and (b) build in a special feature so that one could raise and lower the temperature on *Yom Tov* according to their *psak*. Of these two points, "a" has been a rousing success and is appreciated and used by all observant Jews, and "b" is the subject of this article. Inasmuch as the laws of cooking on Shabbat differ substantially from rules for cooking on *Yom Tov*, **we will not be discussing the use of these ovens on the Sabbath at all, only for *Yom Tov*.**

These appliances have become highly popular in recent times, but there are voices being raised challenging the halachic reliability of the Star-K certification, as well as those who challenge the entire concept of this undertaking. In this study, we will examine the underlying rationale of the Star-K in permitting their use on *Yom Tov* and explain the arguments of those challenging them.

Unlike Shabbat, when cooking is entirely forbidden, it is generally permitted to cook on *Yom Tov* to prepare food to be eaten on that day; nevertheless there are limitations as to what may be done.<sup>2</sup> Among other actions, one may not ignite a fire or strike a match, nor may one extinguish a fire. But in modern ovens, when the temperature gauge is raised, it activates an electronic ignition, and similarly when it is turned down or off. Let us start with the explanation offered by the Star-K as to

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1. *Kashrus Kurrents*: "Oven Kashrus: For *Yom Tov* Use," at Star-K Online.

2. See *Beitzah*, third perek.

what modifications they have arranged with manufacturers that would make it possible for a Jew to turn the oven higher or lower on *Yom Tov* and to open the oven door (which lets in “colder air” and might make the ignition go on).

According to the Star-K,

The halachic interpretation of a *melacha* is the action that one performs which causes a direct result. For example, when one **strikes** a match, one directly causes a fire to ignite. When the resulting prohibited action is an indirect result of one’s action, it is called a *grama*. For example, setting a mouse trap is a *grama* for the *melacha* of *tzod* (hunting).<sup>3</sup> *Gramma* of a *melacha* is permitted by Torah law, but is Rabbinically [sic] prohibited.

Where there is a combination of factors that individually may have been restricted by Rabbinic law, there may be room for leniency when combined with one another. Therefore, where a *grama* will cause a *melacha* to be done that is unintended and unwanted on *Shabbos* (*lo nicha leih*) [sic], the action may be done. This is the basis for allowing one to open a refrigerator door on *Shabbos*. In that case, a thermostat will sense the change in temperature and cause the compressor motor to run; this is considered a *grama*. The running of the motor gives off sparks of fire which are not wanted or intended. Thus the *melacha* taking place is *lo nicha leih*. Opening the refrigerator results in a *grama* to an unintended and unwanted *melacha*. In the same vein one may open an oven door on *Shabbos* when one removes **all** the food from the oven. The resulting *grama* (the *melacha* of *havarah*) is unwanted and unintended.<sup>4</sup>

Some Sabbath mode ovens are designed to work with a random delay. This feature allows one to raise the

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3. See *Tosafot, Shabbat 17b*.

4. *Ibid.*, “*Gramma*”.

temperature on *Yom Tov* at any time, regardless of when power is flowing to the oven. This is because when one adjusts the dial or keypad, it is not directly causing the temperature to change. These “instructions” are being left for the computer to read at random intervals. The computer will then follow the “instruction” to raise the temperature. Therefore, this action is only causing a *grama*, an indirect action, which in turn will cause the temperature to be raised. Even in these ovens, it is better to lower the temperature only when necessary for food preparation or your enjoyment of *Yom Tov*.<sup>5</sup>

### *Gramma*

The Mishnah indicates that *grama* is permitted:<sup>6</sup>

ועושין מחיצה בכל הכלים בין מלאין בין ריקנים בשביל שלא העבר  
הדלקה. רבי יוסי אוסר בכלי חרס חדש מלאין מים לפי שאין יכולין  
לקבל את האש והן מתבקעים ומכבין את הדלקה.

[If there is a fire burning, and one wants to prevent it from spreading], one makes a barrier [by placing] vessels, whether full or empty, so that the fire will not spread [beyond that point] [i.e. this is *grama* and is permitted.] Rabbi Yosi forbids [doing it with] new earthenware vessels filled with water, inasmuch as they [the new vessels] are not able to withstand the fire and they will break and [the water inside] will extinguish the fire.

Already at this early date, in the Talmud, we see a debate about the extent of *grama*, causation. The *Shulchan Aruch*,<sup>7</sup> more than a thousand years later, codifies the law in agreement with the majority, not with R. Yosi: “It is permissible to emplace a barrier using all kinds of

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5. Star-K Online, *Kashrus Kurrents: Oven Kashrus: For Yom Tov Use*.

6. Mishnah, *Shabbat* 120a.

7. *Orach Chaim* 334:22.

vessels...because **causing extinguishment** [*gram kibui*] is **permitted**.” [emphasis added]. However, in his gloss to the *Shulchan Aruch*, the Ramo adds a crucial limitation: that *gram kibui* is permitted “*rak bim’kom p’saida*”, only in a circumstance of [considerable] loss. While accepting that indirectly causing a fire to be put out is permissible on the Sabbath, he limits this permit to cases of significant loss only.

Does the Ramo maintain this position also with respect to *Yom Tov*? After all, on *Yom Tov*, the rules are not the same, because using fire to cook is permitted on *Yom Tov*. Therefore, it is still necessary to ascertain whether the Ramo persists in his position also with respect to the laws of *Yom Tov*, and here we will find a significant omission in his ruling: here he **omits the phrase** limiting *gram kibui* only to a case of significant loss: “[on *Yom Tov*] it is permitted to set up a candle in a place where the wind blows so that it will go out.”<sup>8</sup> There is no mention of any kind of limitation to this permit to indirectly cause a fire to be extinguished. This leaves a puzzling dichotomy – the Ramo seems to differentiate between the laws of *grama* on the Sabbath and *grama* for a holiday. On Shabbat he forbids *gram kibui*, but on *Yom Tov* he permits it – yet the Gemara itself, which is the source for the principle that *grama* is permitted, does not seem to posit any difference in the rule between Shabbat and *Yom Tov*.

## Defining *Gramma*

Basically, then, the *heter* (lenient halachic permit) used for the “Sabbath mode ovens” to adjust the temperature, etc., on the oven relies on the concept that it is *grama* – i.e., an indirect causation – and *grama* is permitted on a *Yom Tov*.<sup>9</sup> This basic premise, however, is the subject of a great deal of rabbinic discussion and controversy, and there is lack of consensus

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8. *Orach Chaim* 514:3.

9. *Mishnah, Shabbat* 120a. This will be discussed more fully hereinafter.

even about the meaning of some of the terms, specifically *grama*. It is therefore problematic for some that Rav Heineman, in his *teshuva*, relies on the *heter* of *grama*, a concept which has been variously defined and applied by *poskim*, sometimes markedly differently from the way he appears to do.<sup>10</sup>

Despite the reality that *grama* is mentioned so many times in the Talmud and rabbinic halachic literature, the rules about how to characterize an action as *grama* and how *grama* applies

10. The concept of *grama* applies in various areas of Jewish law:

Murder: *Sanhedrin* 77a and *Chullin* 16. In this case, the Gemara is talking about a person who is tied down, and another person releases a lever which causes water to cascade over him, drowning the tied-down person. The Gemara writes that it is only the first gush of water for which the lever-puller is responsible [called *koach rishon*], but that the rest of the water is called *koach sheni*. Rashi terms this secondary water – *grama*.

Other halachic areas where the concept of *grama* applies include the following:

Erasing the Holy Name of G-d (*mechikat Ha-shem*) *Shabbat* 120b

Shabbat: *Shabbat* 17b, and 120b, 47b; *Bava Kamma* 60a

Damages (*Nezek*): *Bava Kamma* 26b. The question raised is whether there is culpability for indirectly causing damage, and the Gemara concludes that certainly one is not allowed to cause damage, even by *grama*.

Causing something to become chametz: *Menachot* 56b: "heini'ach se'or al gabei issa."

Giri delai – *Bava Bathra* 22b – where one shoots an arrow which breaks a window. Even though there is a time delay, it is considered that he actively did it – i.e., it is not *grama*.

In *Choshen Mishpat* 155 there is a long list of actions which are forbidden, because they will cause damage later, and discussion why they are not considered *grama* and are therefore not permitted.

Following is a list of some of the numerous *teshuvot* about *grama*, for those who want to pursue the topic further: *Chatam Sofer Yoreh Deah* 214; *Tzitz Eliezer* I,20:5, no. 10. *Chelkat Yaakov* I, 52; *Shevet Halevi* II, 154; *Iggerot Moshe Even Haezer* IV, 73:4; *Iggerot Moshe Choshen Mishpat* II, 18; *Noda Biyehudah Tanina Orach Chaim*, at end of 17; *Chazon Ish Yoreh Deah* 164:12. *Sh"ut Vedibarta Bam*, #104; *Har Tzvi Orach Chaim* I, "kotev" (about putting food into an electric oven on Friday which is set to go on on Shabbat – whether it is permissible to eat the food).

Also in *Biur Halacha* 264:4, *gram kibui*.

are not consistent; actually, the Talmud and rabbis never quite specifically define *grama*, and even where a tentative definition seems to appear, it does not apply consistently in all cases! An example of this paradox can be seen in *Bava Kamma* 60, which discusses the prohibited activity (*melacha*) winnowing on Sabbath. This *melacha* entails separating the good from the bad. The Gemara rules that a person who throws grain into the air, whereupon the wind separates the wheat from the chaff, is guilty (*chayav*) of Sabbath desecration. One wonders why – isn't this separation accomplished by the wind, which means that the action of tossing the grain in the air is really only *grama*, inasmuch as it is the wind and not the person which does the actual separating? And since the Talmud has specifically ruled that *grama* is permitted on Shabbat, why is this apparent *grama* prohibited?

A further example of [apparent] *grama* on Shabbat which is nevertheless forbidden by Jewish law is *tzod* – hunting. *Shulchan Aruch Orach Chaim*<sup>11</sup> rules that it is forbidden on the Sabbath to set a trap for an animal, because it is hunting, even though obviously it is not the human catching the animal but rather the trap. One would think that a person setting up the device to entrap is only doing *grama* – an indirect causative action – yet it is forbidden. In another example, there are those who consider that the act of cooking (*bishul*), which is clearly forbidden on Shabbat, is actually **always** done in a *grama* manner.<sup>12</sup> It seems, therefore, that there are instances where *grama* is forbidden on Shabbat, despite the statement of the Mishnah above. Possibly the exceptions to the *grama* rule apply when the act is inherently always done in a *grama* manner, such as winnowing.

From a responsum of Rav Moshe Feinstein it is possible to infer his position on the topic of *grama*: The question he addressed was whether it is permitted to bring *tefillin* to a

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11. 317:2.

12. *Chazon Ish* 38:1; *Har Tzvi* I, 188; *Achiezer* III, 60.

person with a contagious disease, which requires that everything he uses be burned thereafter. Rav Moshe definitively forbade bringing him the *tefillin*. This was clearly a case of one person's action indirectly causing a sinful action at a later time – the one bringing the *tefillin* would certainly not be the one burning them [which is forbidden on a biblical level]. At most, his action would indirectly, at a later time, cause a sin to be committed.<sup>13</sup> When Rav Moshe forbade it, clearly he did not consider that a time-delayed indirect action is what is meant by *grama* (inasmuch as *grama* is definitely *muttar*, and he said this was definitely *assur*). On the other hand, Rabbi Gifter, Rosh Yeshiva of Telshe Yeshiva in Cleveland, wrote a letter to R. Moshe, arguing that it is only *grama*, and should therefore be *muttar*. This indicates that Rav Gifter apparently agrees with the position of Rav Heineman that indirect action constitutes *grama*.<sup>14</sup>

### ***Yom Tov***

We have noted the discrepancy between what the Ramo writes concerning *grama* in one place – that it is permitted only "when there is great loss involved" – and how he rules elsewhere, when he simply confirms that *grama* is permitted. Consequently, there are those who interpret this discrepancy to indicate that Ramo is forbidding *grama* on the Sabbath [unless there is a great loss], but permits *gram kibui* on *Yom Tov*.

Since cooking is forbidden on the Sabbath but permitted on *Yom Tov*, that appears to be the rationale for differentiating between the Sabbath and *Yom Tov* rules regarding *grama* or *gram kibui* which is evident in various explications of the halacha. Thus, in their talmudic commentary, *Tosafot* permit

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13. *Iggerot Moshe, Orach Chaim I*, 4-6. The same question is discussed in the *Chelkat Yaakov III*, 44, and the same negative ruling is given.

14. *Iggerot Moshe, Orach Chaim I*, 5.

cutting off the bottom of a burning candle on *Yom Tov* – i.e., by making the candle shorter, one has caused the fire to go out sooner.<sup>15</sup> This is permitted because *gram kibui* is allowed on *Yom Tov*, even where there is no question of loss.<sup>16</sup>

This halachic position is reiterated by the *Shulchan Aruch*, which notes that it is permitted to cut off part of a burning candle on *Yom Tov* and also permitted to put a burning candle in a place where the wind blows, so that it will be extinguished.<sup>17</sup> As previously noted, when *Ramo* in his gloss to the *Shulchan Aruch* discusses the laws of *Shabbat*, he qualifies this permit “only when there is loss involved (*hefsed*).” However, he makes no such limitation when discussing the same activity on *Yom Tov*.<sup>18</sup> In order to explain the disparity in the *Ramo*’s rulings, there are some who explain that on *Shabbat*, *grama* is generally forbidden other than in exceptional cases (such as *hefsed*), but on *Yom Tov* it is *muttar* across the board. To resolve the apparent discrepancy, the *Mishnah Berurah*<sup>19</sup> has ruled that in practice, *grama* is not *muttar* on *Shabbat* [absent urgent circumstances], but is permitted on *Yom Tov*.

While there are those who argue that *gram kibui* is forbidden even on *Yom Tov*, they are in the minority.<sup>20</sup> Based on this, the Star-K rules that, “one may follow the majority and rule that *gram kibui* is permitted on *Yom Tov*, and allow use of the oven

15. *Beitzah* 22, “hamistapek, umikahn yesh lehatir ‘kandele’ shel sha’ava gedola..” *Tosafot*, however, posit that this cutting cannot be performed with a knife; see *Rosh*, *Beitzah*, chapter 2:17. The *Rosh* disagrees with the ruling of *Tosafot*.

16. *Sha’ar Hatziyun*, 514, ot 31, in the name of *ma’amar Mordechai*.

17. *Shulchan Aruch Orach Chaim* 514:3.

18. For an explanation of why there is a difference, see *Orach HaShulchan* 514:11.

19. *Orach Chaim* 514.

20. See *Kitzur Shulchan Aruch* 98:25. R. Shlomo Zalman Auerbach quotes *Shulchan Aruch Harav*, *Chayei Adam*, and *Magen Avraham* as agreeing with the “minority” opinion.

with a [Sabbath] mode.”<sup>21</sup>

Rabbi Heineman, administrator of the Star-K, has opted to rely on the *Mishnah Berurah* – designing the Sabbath mode ovens in such a way that pushing the dial or key pad to raise the temperature will, after a delay, cause the oven to ignite.<sup>22</sup> As he explains, this is only *grama*, which the *Mishnah Berurah*, among others, has ruled is permissible on *Yom Tov*, even absent a *hefsed*. Rav Heineman further points out that centuries ago, the *Taz* questioned the basis for the *Ramo*’s ruling that *gram kibui* is forbidden on *Shabbat* unless there is a *hefsed*,<sup>23</sup> using the term “*ain lo chaver*” [indicating that there are none who agree with him] and that the *Taz* himself did not agree with it. The *Kitzur Shulchan Aruch*<sup>24</sup> concurs with the *Taz*, as does the *Har Tzvi*.<sup>25</sup> Thus, reasons R. Heineman, the majority of *poskim* agree that *gram kibui* is permitted even without a *hefsed*, and that is the basis of his *heter*.

In certifying that modern ovens could be modified by the manufacturers to conform to halachic requirements concerning *gram kibui* on *Yom Tov*, the Star-K had to investigate the technical aspects of these appliances, and some of the problems were quite technical:

Some Sabbath Mode ovens are designed to work with a random delay. This feature allows one to raise the

21. “And therefore, in our case, since there is a time delay longer than ‘*toch kedai dibbur*’ (the brief moment it takes to greet someone), there is no *issur* of igniting or extinguishing on *Yom Tov*.” See *Aruch Hashulchan* 334; *Mishnah Berurah* 334.

22. It is interesting to note that *Mishnah Berurah* 514:3, even while ruling leniently, does add (in the *Biur Halacha* and in *Sha’ar Hatziyun*) the advice that nevertheless one should follow the strict opinion. Surprisingly, none of those opposed to Rav Heineman’s *heter* mention this caution.

23. 514:6.

24. 98:25.

25. I, 141. The *Taz*, the *Kitzur Shulchan Aruch* and the *Har Tzvi* all agree with the *Mishnah Berurah* and Rabbi Heineman’s position, which is the basis for his *heter*.

temperature on Yom Tov at any time, regardless of when power is flowing to the oven. This is because when one adjusts the dial or keypad, it is not directly causing the temperature to change. These “instructions” are being left for the computer to read at random intervals. The computer will then follow the “instruction” to raise the temperature. Therefore, this action is only causing a *grama*, an indirect action, which in turn will cause the temperature to be raised. Even in these ovens, it is better to lower the temperature only when necessary for food preparation or your enjoyment of *Yom Tov*.<sup>26</sup>

We should note that not all *poskim* are in agreement with his halachic ruling, for a number of reasons.<sup>27</sup> Although Rav Heineman contends that the “the majority of *poskim*” agree with the *Mishnah Berurah*, upon whom he relies – Rav Fuerst of Chicago claims that actually that is not so, and that the reality is that most *poskim* do **not** agree with the position taken by the *Mishnah Berurah*.<sup>28</sup> Among the dissenters are *Achiezer*<sup>29</sup> who, in the last century, cited the *Yeshuot Yaakov* as opining that *gram kibui* is permitted only when it is not specifically intended to extinguish the fire; if it is intentional,<sup>30</sup> it is a *melechet machshevet*, which is forbidden (see below). And Rav Moshe Feinstein<sup>31</sup> disapproves of moving the pegs on a Sabbath clock

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26. Star-K Online, *Kashrus Kurrents: Oven Kashrus: For Yom Tov Use*.

27. The responsum of the Star-K, written by Rav Heineman, appeared in *Yeshurun* 20.

28. The opinions of Rabbi Fuerst appeared in *Keren Hayovel*, published by the Yeshiva of Telshe, Chicago, Tevet 5771.

29. III, 60.

30. See, however, *Mishnah Berurah* 334:55 and *Ramo* 514, who seem to rule that *gram kibui*, even if intentional, is *muttar*.

31. *Iggerot Moshe Orach Chaim* IV, 91:5, and *Yoreh Deah* III, 47:4. Rabbi Fuerst also writes that he has heard that Rav Eliashiv also considers such an action as actually doing the *melacha* and not just *grama*, and also that for that reason Rav Eliashiv was opposed to the “*gram-telephone*” in Israel, which operates on the same principle. He maintains that Rav Eliashiv even held that it was preferable for a doctor to answer a regular phone on Shabbat

(to turn appliances off and on Shabbat or *Yom Tov*), considering it “*maaseh beyadayim*”, as if the person had done it with his own hands, even though the pegs on the clock will only turn lights off or on at a later time. The *Chaye Adam*<sup>32</sup> explains his own negative feeling: in a situation where the *melacha* [the forbidden action] is customarily performed by indirect means, it is equivalent and considered as if the person had done it with his own hands (winnowing on Shabbat or setting a trap for an animal are examples). It is reported that Rav Eliashiv and Rav Shmuel Auerbach similarly rule that “any matter that is customarily/usually performed by *grama* is forbidden, and is considered as doing the act directly.”<sup>33</sup>

This consensus of negative halachic opinion [based on various rationales] is noted by Rabbi Fuerst in his disapproval of the Sabbath mode ovens certified by the Star-K.<sup>34</sup>

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rather than the *gram*-telephone. In *Shemirat Shabbat Kehilchata* chapter 13, note 90, it reports that Rav Shlomo Zalman allows for moving the pegs.

32. 92:8.

33. Reported in *Shevut Yitzchak* VI, 15.

34. The following information about a new device which obviates some of the problems with Sabbath mode ovens was published in *Sappirim*, January 2012. *Sappirim* is a publication of the cRc, written by Rabbi Dovid Cohen, Kashruth Administrator:

An electrical engineer named Chaim Chesler came up with his own method of adjusting an oven’s temperature on *Yom Tov* which he believed would be acceptable to all opinions. He approached Rav Belsky and Rabbi Zushe Blech with the design for this device, which he called a “Tweaker”, and they agreed that it was suitable for use on *Yom Tov* with certain conditions. A few months ago, Chaim approached the cRc (Chicago Rabbinical Council) for their approval, and Rav Schwartz decided to investigate the device as a community project in conjunction with Rav Shmuel Fuerst. These two *Poskim* saw the device installed in someone’s home, learned the details behind how it operates, and issued a limited endorsement of the device [as will be explained below].

The thermometer in a modern oven is actually a specialized piece of metal that has electrical current passing through it, and that current is continuously monitored by a computer. Since the nature of electricity is that as metal becomes warmer it conducts electricity less efficiently, the computer is able to calculate the temperature in the oven based on the flow

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of electricity through the “thermometer”. The main part of the Tweaker is a potentiometer (basically, a dimmer switch) which is installed between the thermometer and the computer. When the Tweaker’s dial is turned the electrical flow is adjusted, which “tricks” the computer into thinking that the oven is hotter or colder than it actually is. In other words, the computer measures temperature based on the flow of electricity, and by turning the Tweaker one is manually adjusting the flow which affects the computer’s calculations. [Turning the Tweaker does not increase or decrease the amount of electricity flow.] The other part of the Tweaker is an indicator light that turns on when the oven’s pilot/glowbar is on.

On Yom Tov if the indicator light shows that the oven is “on”, one can turn the Tweaker such that the computer thinks the chamber is colder than it actually is, thereby causing the flame to stay on longer. If the indicator light shows that the oven is “off”, the person can turn the Tweaker in the opposite direction so that the computer thinks the oven is hotter and therefore stays off longer. In either case, the adjustments maintain the status quo and merely have the effect of prolonging the time before the oven turns on or off.

The original Tweaker device gives the consumer the ability to fully adjust the electrical flow, but this raised [some problems]. Accordingly, the Chicago *Rabbonim* only endorsed the “Reduced Range Tweaker” which operates in a smaller band of temperature such that it is impossible to run afoul of the problematic issues. The Reduced Range Tweaker has the added advantage of being less “techie” and has only two settings (“high” and “low”) which is more suited for the average layperson than the original Full Range Tweaker. Installation of the device takes 30-45 minutes and is accomplished by opening connection points that are intended to be opened (to service the oven) and inserting additional wiring (and hardware) in between the connection points. Accordingly, it would seem that one would not void the warranty when adding a Tweaker to an oven, but that has not yet been discussed with the manufacturers.

The following is the wording of the endorsement letter [issued by Rabbis Schwartz and Fuerst of the cRc], dated October 26, 2011 ב' חשוון תשע"ב: In order to allow people to adjust the temperature of their home ovens on Yom Tov, Chaim Chesler has developed a device known as the “Tweaker”. We have investigated the principles behind this device and seen it in operation, and recommend the reduced-range Tweaker for the members of our community under the following conditions:

The professionally installed device should include:

1. A reduced-range Tweaker marked with “high” and “low” settings. The difference between a reduced-range and a full-range Tweaker, and the potential pitfalls for an average consumer using a full-range Tweaker, are beyond the scope of this letter.
2. An indicator light that shows whether the oven’s glow bar is lit.

Rabbi Shlomo Miller of Toronto also considers it totally unacceptable to permit manipulation of the oven temperature on a "Sabbath mode" oven in this manner on *Yom Tov*, although for a different reason.<sup>35</sup> He argues that if we permit this type of *grama* in the present circumstance, then the practice could be extended to make permissible many other types of *melacha* [forbidden activities] on *Yom Tov*, simply by means of a *grama* device, an option which he considers totally unacceptable. Computers and other electronic devices of the modern age could thereby be programmed in such a way as to totally circumvent the proper observance of *Yom Tov*.<sup>36</sup>

Rabbi Miller's concern, however, is not a new one. It is

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- 3. The Tweaker cannot be used on Shabbos.
- 4. Before *Yom Tov*:
  - a. Set the oven into Shabbos-mode.
  - b. Set the oven temperature for 350° F. At this setting, the Tweaker's "high" setting is equivalent to 350° F and the "low" setting will maintain a temperature of approximately 200° F in the oven chamber.
- 5. On *Yom Tov*:
  - a. When the indicator light is on, the Tweaker's knob may be moved from the low setting to the high setting.
  - b. When the indicator light is off, the Tweaker's knob may be moved from the high setting to the low setting.

Star-K was approached and asked if the oven manufacturers might be encouraged to approve the use of a Tweaker, and the Star-K responded that as a matter of policy the companies do not approve of add-on devices. At the suggestion of Rav Fuerst, in Chicago the cRc will be training one or more *frum* technicians from the community as to how to build and install the device to the specifications approved by the *Rabbonim*.

See [www.TorahTechnologies.org](http://www.TorahTechnologies.org) for more information on the Tweaker and the following licensing agreement: Reb Chaim makes the invention design freely available to all Jews (to build and use at their own risk) and would also make it available to any appliance manufacturer or kashrus agency that might want to incorporate it, with the only request that it be used in the merit of his father, Avraham ben Betzalel *z"l*, and his maternal grandfather Nussin ben Shimon HaKohen *z"l*.

35. See *Yeshurun* 20.

36. See note 31, above.

almost precisely the concern R. Moshe Feinstein articulated a generation ago when he opposed the use of "Shabbat clocks" to program lights to go off and on on the Sabbath. He saw it as the first step on a "slippery slope" leading to elimination of the strictures of performing *melacha* on the Sabbath. Yet, for some reason which is not clear, this concern of R. Moshe did not find a responsive audience, and the use of Shabbat timers seems to be totally accepted in all circles of observant Jewry.<sup>37</sup>

Moreover, there are other *poskim* who assert that if an activity is customarily performed [i.e., not on *Yom Tov*] in an indirect manner, then doing it that way on *Yom Tov* is *assur*. That was the example mentioned previously, of winnowing, which is customarily performed in an indirect manner – the wheat is thrown up in the air, and the wind does the separation of wheat from chaff. All agree that even such indirect separation of the good from the bad is forbidden on the Sabbath. Therefore, they claim that when one uses an external force to perform a *melacha*, it is considered as if he had done it personally. This cannot be the *grama* which the Talmud had in mind when it permitted *grama*, they argue, inasmuch as the Talmud itself forbids this kind of indirect action. Perforce, we will need to find a different definition for *grama*, since "indirect action" cannot be what is meant.

### ***Melechet Machshevet***

In the Talmud,<sup>38</sup> Rav Ashi expounds on a concept unique to Shabbat, called *melechet machshevet*. This means that intentional, purposeful action which effects a result desired by the doer, even if it is accomplished indirectly, is nevertheless forbidden.<sup>39</sup> Therefore, according to Rav Ashi's explanation,

37. *Iggerot Moshe Orach Chaim*, IV:60; *Shemirat Shabbat Kehilchata*, chap. 13, footnotes 90-99, 103 and 109; *Yabia Omer* III, *Orach Chaim* 18. *Tzitz Eliezer* I, 20.

38. *Bava Kamma* 60a.

39. Rav Shlomo Zalman Auerbach writes that it is permissible to open a

winnowing is forbidden on the Sabbath, even if the grain gets separated by the wind and not directly by a person.

This concept of *melechet machshevet* is a factor in many areas of Sabbath law.<sup>40</sup> Rabbi Fuerst writes that if a person does an action with the intent to perform a certain *melacha*, even if it is done indirectly, that is not called *grama*, but rather *melechet machshevet* –i.e, an intentional act. The fact that it is achieved in an indirect manner does not make it permissible *grama*. One example is milking cows on the Sabbath by using electronic pumps which are programmed to go on and off at a pre-set time; another is using pre-set microwave ovens to cook food on Shabbat. Rabbi Fuerst appears to be making a fundamental statement about the halachic definition of *grama*, as not just “indirect action.” He apparently maintains that if the usual,

door on Shabbat which will allow cold air to blow on a thermostat, without having to take special precautions to prevent the door opening from causing the furnace to go on. However, he adds, one should not specifically open the door so that the cold air will activate the furnace, since that will remove the action from the category of “something he did not intend to happen” [*aino mitkaven*). (Following this logic, moving the dial on an oven thermostat might not be considered *aino mitkaven*).

So, for example, where pitchers of water are installed to stop a fire from spreading – the fire just happened to break out, and therefore it is permitted to do this. The Gemara has another example of this – if it happens that a man has to immerse himself in a mikvah, and he has the name of G-d written on his hand, when he immerses, it will be erased. This is permitted because the circumstances were not planned, they just happened. It was not his intention to erase the Name. See *Shemirat Shabbat Kehilchata*, 23, n.64, quoting the *Mishnah Berurah* 316, number 10, *Shaa'ar Hatziyun* 13, who writes that if this is the normal way of doing it, it is *assur*.

40. Scholars define *melechet machshevet* as a situation where the person intended a specific activity to be done and it was done. The example of this is winnowing, separating the wheat from the chaff; this is done by throwing the grain into the air, and although it is the wind which performs the action, it achieves the purpose intended by the thrower. This is forbidden as *melechet machshevet*. However, the Rosh to *Bava Kamma* 60 considers winnowing, and trapping, as exceptions to the rule that *grama* is *muttar*, because this is the way that activity is normally accomplished. There are other ways of explaining how come winnowing is forbidden; see *Otzar Mefarshei Hatalmud* to *Bava Kamma* 60, note 17.

customary manner of accomplishing an action is in an indirect manner, then that is not *grama*, but rather the *melacha* itself.

Rabbi Fuerst writes that he discussed this question with many noted scholars in Eretz Yisrael, and all agreed that a difference exists between a machine made specifically to do a forbidden action on Shabbat by an indirect method [*grama*] – such as a “Sabbath telephone” or a “Sabbath milking machine” – which they do not permit, and a machine used regularly during the week which can be used on *Yom Tov* via *grama*, which is *muttar*.

## If Not Done Always

A further objection voiced by Rav Shlomo Miller is that it is not permissible to engage in a *grama*-caused action on a permanent, intentional basis, but only occasionally and in an ad hoc manner. He cites the ruling of *Shemirat Shabbat Kehilchata* that if someone wants to extinguish a flame on *Yom Tov* (an action that is prohibited), in order to save gas, and he therefore deliberately allows a pot of water to boil over and put out the fire – it is forbidden, even though the action is *gram kibui* – i.e., he did something that indirectly caused the fire to be put out.<sup>41</sup> Faced with virtually the same question, Rav Shlomo Zalman Auerbach, the author of *Minchat Shlomo*, writes that “in my opinion, one should not permit this to be done on a regular basis.”<sup>42</sup>

We see then a great deal of hesitation about permitting *grama* – allowing something to be done in an indirect manner. Although the Gemara has ruled that *grama* is *muttar* on Shabbat, we note that the *Ramo* permits it only when there is considerable loss involved, and that other *poskim* object to having forbidden actions accomplished on the Sabbath or *Yom*

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41. Chapter 13, no. 13, note 58.

42. *Minchat Shlomo* II, end of 22, where he writes that this cannot be on a permanent basis.

*Tov* by means of a technicality [i.e., *grama*]; and even where they are reluctantly prepared to permit it, certainly it would not be on a planned or regular basis, but rather occasionally or to take care of an unfortunate circumstance that arose.

### ***Bimkom Hefsed***

We have seen that the *Ramo* introduces a crucial limitation to using *grama* – that it can only be used in a situation of considerable loss (*hefsed*). What would constitute a *hefsed*?<sup>43</sup> *Shulchan Aruch Harav*<sup>44</sup> writes that *grama* is not limited only to *hefsed* but also “for a great need”. When the *Shulchan Aruch Harav* permits *grama* for “the needs of a mitzvah” or for some “great need”, he indicates that this is a lenient opinion that one can rely on. Would that “great need” include the desire to spend the *Yom Tov* in a pleasant manner, which might not be possible if [a] the oven is constantly burning for 2-3 days or [b] the oven is turned off for the entire *Yom Tov*, precluding serving certain foods warmed? And how do we measure the convenience and ease for the housewife who will be able to use her oven on the holiday?

On the question of using pre-programmed milking machines on *Shabbat* and *Yom Tov*, the *Chazon Ish* considered loss of the cows’ milk as well as the pain the cows would experience if they were not milked to be extenuating circumstances to permit that activity.<sup>45</sup>

The author of *Minchat Shlomo* writes that in his opinion, if something needs to be done for the benefit of a guest on *Yom Tov*, it can be considered *hefsed* if one could not prepare food

43. Using the Sabbath mode to make the oven shut off early is intended to save money for the gas or electric – but this is not sufficient to qualify as *hefsed*. But if a person purchased a Sabbath mode oven expecting to save money by having the oven off for part of the *Yom Tov* – some might argue that it should qualify as a *hefsed* if he could no longer use the oven that way.

44. 514, no.3 in *Kuntrus Acharon*.

45. *Chazon Ish, Orach Chaim* 38:4.

for the guest on the holiday, and he is prepared to allow *grama* in such a case even on Shabbat.<sup>46</sup>

## The View Of The Chazon Ish

It is the opinion of the Chazon Ish that in using electricity on Shabbat, the concern is not only the prohibition of lighting a fire and cooking but also violation of the prohibition of *boneh* or *tikkun mana*.<sup>47</sup> According to his understanding, then, pushing a switch to activate electricity is desecration of the Sabbath on a biblical level. Even without the issue of *grama*, according to this view of the Chazon Ish, if one pushes a switch or a dial on an oven, which sets in motion the electronic ignition which will turn on the oven, it is a Torah violation, even on *Yom Tov*.

There are many questions asked about the Chazon Ish's theory that even flipping a switch to turn on a light on Shabbat is the biblically forbidden activity *boneh* (by closing a circuit). Rav Shlomo Zalman Auerbach wrote to him, asking – how is that different than opening or closing a house door on Shabbat? No one considers that when I open the door to my house, I am “breaking the wall”, nor does anyone think that when I close the door, I am “building the wall!” The Chazon Ish explained that there is a distinction between doors and electricity: opening and closing doors, which are constructed for the purpose of letting someone in or keeping others out, is the normal and intended use of the door. But the electrical switch is only meant for use when it is in an “on” position. After using the light, the switch is shut off, and the switch has no function in the “off” position. It is only turned off to conserve electricity, but it serves no function in its off position. Thus, that is not the “normal” use of the switch. In short, when the switch is off and then someone turns it to “on”, that is

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46. *Minchat Shlomo* II, 23:2.

47. *Chazon Ish* 50:9, d.h. “*od yesh bazeḥ*”, “*uvepetichat hachashmal*”.

*boneh*, “building” [completing a circuit].<sup>48</sup> Rav Auerbach objected that just as a door is constructed to be opened and closed, so too a switch is designed to be turned off and on, and this cannot be considered *boneh*, nor *makeh bepatish*. Although the halachic position of the Chazon Ish concerning electricity on Shabbat/Yom Tov as *boneh* has not been accepted by most *poskim*, who do not consider its use as a biblical level of transgression but rather rabbinic, nevertheless they do take his opinion into account.<sup>49</sup>

Following the logic of the Chazon Ish, the Star-K permits setting the oven on *Yom Tov*, reasoning that it does not constitute *boneh*, inasmuch as the timer/thermostat functions at all times – to maintain the proper heat, not letting it get too hot or too cold.<sup>50</sup>

### Not visible to the eye

There is one additional feature of the *heter* which underlies the use of Sabbath mode ovens: in these specially-calibrated

48. For the full correspondence between these two greats, see *Minchat Shlomo* I, 11.

49. Based on this logic of the Chazon Ish, Rav Auerach permits use of a thermostat in a refrigerator, since it functions both when the motor is running and when it is not. The function of the thermostat is to register the temperature, maintain it at a certain degree of cold, and prevent the refrigerator from getting too warm. Thus, causing the thermostat indirectly to go on is no violation, because there is no *issur* of *boneh* when the object is functioning throughout the day, whether it is off or on. *Minchat Shlomo* I, 10, and II, 22 (see also footnote 39 in chapter 16). *Shemirat Shabbat Kehilchata*, and *Mishnat Rav Aharon*, *Orach Chaim*, 4, forbid opening a refrigerator on Shabbat, even by a child. (To accommodate this halachic position, there are those who have a refrigerator that goes off and on at certain intervals and is not activated by the temperature in the refrigerator.)

50. Writing on a related topic, the author of *Achiezer* addresses the question of speaking on the telephone on Shabbat, and he cites the *Sh"ut Beit Yitzchak*, *Yoreh Deah* 31, in the *hashmatot*, that by completing the electrical circuit it creates electric power [presumably he refers to picking up the receiver]...and certainly this is forbidden because of *ma'avir* (making a fire) *Sh"ut Achiezer* IV, 6.

ovens, the internal computer is programmed so that there is a random delay period between the person's pushing buttons to set the oven, and the actual implementation of that command [this is apparently what Rav Heineman considers the *grama* feature]. Furthermore, no readout appears and no change is visible on the outside of the appliance. It is the contention of the Star-K, part of the basis of their *heter*, that inasmuch as the Torah is given to humans, Jewish law only takes into account that which the human eye can perceive. The fact that the internal computer of the oven has been set to react in a certain way at a certain time is not something that is visible to the human eye.

As an example of this principle, Rav Heineman cites a *teshuva* of R. Moshe Feinstein that what the human eye sees is what counts as reality.<sup>51</sup> This principle precludes the need for sophisticated machines to scan *tefillin*, for example, to see if the letters are whole and perfect. If they appear to be unbroken letters, then they are fine halachically. The criterion for "kosher" *tefillin* is what the eye sees.<sup>52</sup> Also, *tefillin* need to be square, but it is not necessary to measure them with a protractor to check that they are truly square. If they look square, then as far as the halacha is concerned, they are

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51. *Iggerot Moshe Yoreh Deah* II, 146.

52. Rav Heineman also quotes the *Mishnah Berurah* 32:25 as ruling that even if one takes a pair of *tefillin* and examines them in bright sunlight, and sees that part of a letter is missing, it might still be acceptable for use, if that missing part is not visible when one looks at it under normal circumstances. (Wearing glasses doesn't change the rule, because glasses only restore a person's vision to normal, not super-normal.)

This author wishes to point out a difficulty with this ruling of *Mishnah Berurah*: the Gemara itself, in three places, mandates checking something in sunlight: in *Chullin* 56a, it says that when certain parts of a slaughtered animal need to be checked, they should be held up to the sunlight. In *Chullin* 37b, regarding checking whether a grasshopper has wings that cover the entire body, which would make it kosher, the Gemara says to hold it up to the sunlight; and *Avoda Zara* 39a, it says that fish should be checked for scales in the sunlight. Consequently, it is difficult to understand why the *Mishnah Berurah* seems to negate the use of sunlight for checking *tefillin*.

square. Another example is the obligation to check for insects in fruits and vegetables: they need only be checked by the naked eye, not by a microscope or special instrument.<sup>53</sup> Insects not visible to the naked eye are permitted according to the halacha.<sup>54</sup>

Following this reasoning, the *heter* of the Star-K argues that since any instructions programmed into the oven's computer make marks and changes that are not visible to the eye [i.e., they are all on the internal working of the oven], there is no *issur* involved in pushing a key pad on *Yom Tov* to effect any changes in the appliance's operation.<sup>55</sup>

There is strong opposition to this part of the *heter*, because following this line of reasoning, it could theoretically be possible to do all kinds of work on a computer, sans a monitor, which would make the effects of the typing not discernible to the eye. Many think that this would undeniably be forbidden on *Shabbat* or *Yom Tov*, and therefore they object to any lenient ruling based on this rationale.<sup>56</sup> They argue that all

53. *Iggerot Moshe Yoreh Deah* II, 146, *d.h.* "ve'agav echto", writes that Rav Simcha Zelig, Rav Chaim Soloveichik, and all other greats in the past, agreed that it is only what the naked eye sees that is relevant.

54. However, in *Iggerot Moshe Yoreh Deah* II, 146, Rav Moshe writes that if a person looks dead, and one cannot hear his heart or see him breathing – but an EEG shows brain activity, we consider him to be alive. It is difficult to understand his reasoning in this case.

55. The authors of the Star-K *heter* do have some reservations about this contention. They concede that even though at the time of pushing the keypad, human faculties cannot discern any change, nevertheless, when the oven does begin to function, it will be evident that a change has transpired. That might be considered that it is *nireh la'einayim*, visible to the eye. This concept has also been discussed by Rav Tzvi Pesach Frank, in *Har Tzvi, Orach Chaim* I, "kotev", no. 1, where he discusses whether it is permissible for a person to record something on a tape on *Shabbat*, which of course makes no visible change – yet, when the tape is played, the recorded change is evident.

56. In his responsum, Rabbi S. Miller writes that it is forbidden either because it creates a noise (*molid kol*) or violates the biblical prohibition of *boneh* or *makeh bepatish*.

kinds of machines could be built to do work on Shabbat and *Yom Tov*, which would definitely not be acceptable to what Shabbat is supposed to be.<sup>57</sup>

As was mentioned earlier, a similar question came up more than a generation ago, when R. Moshe Feinstein objected to the use of timers on Shabbat to turn lights off and on. His responsum then was remarkably prescient:

In my humble opinion, it is clear that it is forbidden to permit this, for by [use of] such a timer it will be possible to do all *melacha* (forbidden Sabbath activity) on Shabbat and in factories, and there is no greater denigration of Shabbat (*zilzul Shabbat*) than this. And it is clear that were this the time of the *Tannaim* and *Amoraim*, they would have forbidden this...and perhaps included in this prohibition is that they forbade telling a non-Jew to do work on Shabbat, and forbade any of his [the non-Jew's] work that was done for a Jew upon the instruction of a Jew...and even more so [would they forbid] work done by a Jew.<sup>58</sup>

Thus, we see R. Moshe was concerned about the “slippery slope” of permitting timers to turn on lights, which could lead to having timers start other machines; furthermore, he specifically voices the opinion that the action of a Jew which initiates or activates work on Shabbat is totally forbidden. He continues the responsum:

And an even greater rationale for forbidding [timers on Shabbat] is the denigration of Shabbat [*zilzul Shabbat*] and even the denigration of *Yom Tov* which was forbidden [by the rabbis] ....and since it is obvious that [timers] denigrate the Sabbath, it is included in their prohibition.

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57. Ibid. He continues “and to my mind, following the rationale of the one who wants to permit this, it will result in a terrible destruction of the observance of Sabbath sanctity.”

58. *Igerot Moshe Orach Chaim* IV, 60.

R. Moshe ends his responsum that even though he was not successful in preventing the observant Jewish world from using Sabbath timers for lights, but at least one should not add extensions to the use of these timers, to do cooking or other forbidden activities.<sup>59</sup>

On the other hand, R. Moshe has a *teshuva* that he wrote to a doctor who asked him how to minimize *chilul Shabbat* in a situation where blood is drawn from a patient, and the vial needs to be labeled with the patient's name. R. Moshe told the doctor to type the patient's name into a computer [without a monitor] and then press the print button.<sup>60</sup> His reasoning is that the even if there are "sparks" generated inside the computer by the typing, they are not considered as anything. The only possible prohibition would be pushing the print button, and the only forbidden part of that is the printing of the first letter, or maybe only the first part of the first letter [which is not enough to qualify as a biblical transgression].

Regardless of the rationale, which need not concern us here, it is evident that Rav Feinstein was not troubled by the prospect of someone typing into a computer. [Possibly the difference is that typing on a typewriter makes noise, but not the computer.] This does seem to resemble the rationale of the Star-K in permitting one to press the keypad of an oven to activate it later on.

This brief survey of the permissibility of using a Sabbath mode oven raises some important and intriguing issues about Sabbath observance in the modern day.<sup>61</sup> The present study is intended to educate the Jewish consumer to the complexities of Sabbath observance in the context of electrical contrivances that were not even dreamed of a few decades ago.

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59. Albeit this responsum is written about Shabbat and not *Yom Tov*, the reasoning of *zilzul* applies equally.

60. *Iggerot Moshe, Even Haezer*, IV, 73, part 4.

61. In Eretz Yisrael, numerous *rabbonim* published letters protesting the use of a Sabbath mode oven as forbidden.

Our study indicates that Rav Heineman of the Star-K has relied on two principles of halacha in the implementation of the “Sabbath mode” for appliances: [a] that *grama* is permissible and [b] that if an action is not visible to the human eye, it is of no significance. For these suppositions, he has impressive authorities upon whom he relies. On the other hand, we see that equally honored authorities dispute the premises underlying his *heter*. Moreover, their disagreements go beyond the parameters of strict halacha and express additional concerns reflecting, perhaps, conflicting attitudes about the extent to which modern technology may be incorporated into our Jewish lifestyle without diluting traditional Jewish values. There are also significant differences between scholars about how desirable it may be to seek these accommodations with the modern world.

# A Tale of Two Cities? Shushan Purim in Modern-day Jerusalem

*Rabbi Etan Schnall*

## I. Introduction

The holiday of Purim is unique, inasmuch as halacha mandates that the date of its observance varies amongst different Jewish communities. The vast majority of Jews celebrate Purim on the 14th of Adar, while Jews living in cities surrounded by walls at the time of Yehoshua bin Nun observe the 15th of Adar, known as Shushan Purim. The Talmud establishes guidelines for determining when cities receive the latter designation.

In modern times, expansions of city limits have compelled Jewish legal authorities to formulate current applications of these guidelines in contemporary municipal settings. The most prominent contemporary example of a locality in question is modern-day Jerusalem and its environs, as *Chazal* indicate that Jerusalem was surrounded by walls at the time of the conquest of the land by Yehoshua bin Nun. The present essay will attempt to outline the issues relevant to defining the boundaries of a walled city. Following this analysis, we will present the city of Jerusalem as a case study in understanding some of the practical applications of our discussion.

## II. Historical Background of the Two Days of Purim

The institution of Purim and Shushan Purim as two distinct commemorations traces its roots to the narrative of *Megillat*

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*Esther* (Chapter 9). Haman initiated a royal proclamation calling upon subjects of Achashveirosh to attack the Jewish people on the 13th of Adar. Though Haman was executed prior to this date, the decree, issued under the auspices of the king, could not be rescinded. Instead, Achashveirosh proclaimed the right of the Jews to defend themselves and retaliate against their attackers.

When the 13th of Adar arrived, the Jewish people successfully defeated their enemies. The victory was decisive; in the capital city of Shushan alone, five hundred anti-Jewish antagonists were killed, and Haman's ten sons were publicly hanged. Seventy-five thousand were killed throughout the rest of the kingdom on that single day of battle.

Outside of Shushan, the Jewish people observed the subsequent day, the 14th of Adar, as a holiday of celebration following the miraculous national triumph. However, Mordechai and Esther requested that Achashveirosh permit the Jews of Shushan to continue battling their adversaries on the 14th as well. The king granted their wish and another three hundred enemies were killed the following day. The Jews of Shushan rested on the following day, the 15th of Adar, rejoicing in appreciation of God's salvation.

*Megillat Esther* explains that the institution of the holidays of Purim and Shushan Purim reflects these two independent commemorations. Purim, the 14th of Adar, is designated as the day observed by most Jews around the world, as in the time of Mordechai and Esther. Shushan Purim, the 15th of Adar, is observed only by Jews residing in walled cities. The purpose is to highlight the extended victory marked on that day by the Jews of Shushan, also a walled city at the time. In practice, the date of the observance of Purim can thus vary in different localities, as it did following the miraculous downfall of Haman almost 2,500 years ago.

### III. Primary Definition of a Walled City

The Talmud (*Megillah* 2b) records a debate among the Rabbis regarding the criterion used in defining when cities qualify as “*kerachim hamukafim choma*,” cities surrounded by a wall, whose residents observe Purim on the 15th of Adar.

R. Yehoshua ben Korcha rules that halacha only recognizes a city surrounded by a wall at the time of the Purim miracle. However, the position of the author of the Mishnah (*Megillah* 2a) is that the era of Yehoshua bin Nun determines the status of cities. Only cities that were walled at the time of the original Jewish conquest of *Eretz Yisrael*, led by Yehoshua, are classified as *kerachim hamukafim choma*. The Babylonian Talmud (*ibid.*) further explains that R. Yehoshua ben Korcha patterns the observance of Shushan Purim after the city of Shushan itself, for the primary miracle of Purim originally occurred within its boundaries. The Talmud attributes the Mishnah’s ruling to exegetic derivation of verses in the Torah and in *Megillat Esther*.

However, the Talmud Yerushalmi (*Megillah* 1:1) offers a different rationale for associating Shushan Purim with the era of Yehoshua bin Nun. R. Simon reported in the name of R. Yehoshua ben Levi that the Rabbis desired to pay respect to *Eretz Yisrael*, which lay in ruins during the inter-Temple era when the events of Purim occurred. By using the period of the conquest of *Eretz Yisrael* as the determinant, the miracle of Purim was commemorated in the context of honor and tribute to *Eretz Yisrael*. The halacha follows the opinion of the Mishnah, as codified in *Shulchan Aruch* (O.C. 688:1).

Once it is established that a city was walled at the time of Yehoshua bin Nun, observance of Shushan Purim may not be limited to the perimeter of the original walls. Areas adjoining the original boundaries can stretch the city’s limits, as long as there is no interruption in the continuity of residential structures. From the perspective of halacha, a gap in

settlement less than approximately 141 *amot*<sup>1</sup> is insignificant, and the residential development is still considered contiguous. In this scenario, neighboring communities are annexed to the original city by virtue of their proximity, and their residents will celebrate Purim on the 15th of Adar, as well.<sup>2</sup>

This rule is derived from the laws of *techum Shabbat* that govern how far from one's city a Jew may travel on Shabbat. In this area of Jewish law, halacha first defines what constitutes the limits of a city, before calculating the extent one may travel beyond those limits. Regarding *techum Shabbat* as well, bordering neighborhoods are annexed to a city when they are within 141 *amot* of each other. This principle is known as "*iburo shel ir*," the extension of municipal boundaries, as codified in *Shulchan Aruch* (O.C. 398:6).

While this is the prevailing opinion among Jewish legal authorities, there is a minority view that distinguishes between the laws of Purim and those of *techum Shabbat*. R. Yechiel Michel Tukachinsky<sup>3</sup> refutes the comparison. Regarding the laws of Purim, he maintains that the only determining factor of city limits should be the actual perimeter of the city as defined by its walls. Therefore, the concept of *iburo shel ir* will not allow neighborhoods adjacent to a walled city to observe Shushan Purim.

#### IV. Extended Definitions of a Walled City: *Samuch* and *Nireh*

There are instances in which all agree that the observance of Shushan Purim will take place outside the actual boundaries

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1. According to R. Avraham Chaim Naeh, this measures approximately 211.5 feet. According to *Chazon Ish*, this is the equivalent of approximately 282 feet. Some scenarios would not permit a gap of more than approximately 70 *amot*, see *Shulchan Aruch*, O.C. 498:7.

2. See *Chazon Ish*, O.C. 151, *Mikraei Kodesh*, Purim 21.

3. *Ir HaKodesh V'HaMikdash*, vol. 3, pg. 383.

of a walled city. The Talmud (*Megillah* 2b) records a tradition that confers special status upon certain areas that surround a walled city:

אמר רבי יהושע בן לוי ברך וכל הסמוך לו וכל הנראה עמו נידונו  
כברך.

R. Yehoshua ben Levi rules that any region adjacent to [*samuch*] or visible from [*nireh*] a walled city carries the same status as the walled city [and observes the 15th of Adar].

The Talmud indicates that this law is alluded to through a series of seemingly extraneous words in *Megillat Esther* (9:28). The details of this halacha will be discussed in detail below.

## V. Definition of *Samuch*

The above talmudic discussion limits the application of *samuch* to one *mil*, or 2,000 *amot*.<sup>4</sup> In other words, an adjacent neighborhood must be proximally located within 2,000 *amot* of a walled city for its inhabitants to observe Purim on the 15th of Adar. The aforementioned discussion of whether to include *iburo shel ir* in the definition of a walled city will have great impact on the application of *samuch*. According to most *poskim*, the *mil* will be calculated from the last point of residential development that is contiguous to the walled city. However, according to R. Tukachinsky, the 2,000 *amot* are measured from the walls of the city or from where they once stood.<sup>5</sup> No community beyond this point will celebrate Shushan Purim.

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4. According to R. Avraham Chaim Naeh, this measures approximately 6,000 feet. According to *Chazon Ish*, this is the equivalent of approximately 8,000 feet.

5. The current walls of the Old City of Jerusalem were built by Suleiman the Magnificent in the late 16th century. Of concern to halacha would be either the walls present at the time of Yehoshua's conquest, or the walls present at the time of the Babylonian exile. See *Ir HaKodesh V'HaMikdash*, p. 420.

Notwithstanding this, even among *poskim* who apply *iburo shel ir*, some believe that the *mil* is calculated from the original walls of the city. Effectively, these *poskim* concede in part to the position of R. Tukachinsky. In their opinion, continuity extends the physical city, but does not change the point from where *samuch* is measured.<sup>6</sup> Nevertheless, according to all opinions, whatever ultimately qualifies as *samuch* need not be *nireh* as well. A neighborhood situated in a valley or on a mountain adjacent to the city will follow the practice of the walled city, even if this neighborhood cannot be seen from the walled city itself.

## VI. Definition of *Nireh*

The concept of *nireh* is not clearly defined in earlier rabbinic literature. Therefore, *Acharonim* attempt to identify what is considered visible by halachic standards.

Indeed, there are many mitzvot that require one to see an event or an object as a prerequisite to the fulfillment of these laws. For example, a *ba'al k'ria* must see the text of the Torah scroll that he is reading from. A kohen who decides the impurity of *tzara'at* ("leprosy") must see the blemish in question in order to determine its status. One who wishes to recite *kiddush levana* must see the new moon before beginning the blessing. In all of these cases, *poskim* discuss whether one must see the item naturally, with only the naked eye, in order to perform the mitzva. Perhaps the requirement of "*re'ia*," seeing, is strictly defined according to one's natural ability to see, unassisted by external aids. If so, one who wears eyeglasses and is unable to see without them would be unable to perform these mitzvot.

In practice, authorities generally agree that eyeglasses are

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6. *Chazon Ish*, O.C. 153.

acceptable.<sup>7</sup> Based on this assumption, R. Chaim Palagi<sup>8</sup> suggests a further innovation. If we are to accept the use of eyeglasses, perhaps what is visible through a telescope or binoculars is also considered visible according to halacha. This could greatly increase the number of regions observing Shushan Purim under the rubric of *nireh* by extending the visible distance from a walled city. However, this approach is questionable. The rationale for accepting eyeglasses is as follows: for one who requires vision correction, wearing eyeglasses is deemed to be that individual's normal mode of vision. As such, using eyeglasses to read from the Torah is not problematic, because it is still considered the natural mode of vision for one who routinely employs this instrument. However, to introduce a new tool that allows one to see much further than any human could naturally see, may overstep the bounds of halachic *re'ia*.<sup>9</sup>

Even if halacha limits *nireh* to the strength of the naked eye, what exactly must be seen is unclear. Suppose a particular neighborhood is indeed visible from a walled city. Depending on the topography or the size of the neighborhood, only part of it may actually be visible from the city. This scenario is quite relevant to the communities built upon the hilly terrain surrounding Jerusalem. A neighborhood may be located on a hill just outside the city, yet only one side of the hill, facing the city, will be in sight from Jerusalem. Perhaps the requirement of *nireh* only entails that part of the neighborhood be visible in order to dictate that all of its inhabitants observe Shushan Purim. Alternatively, it may be that a strict definition of *nireh* should be applied: only those residences actually in view of the walled city observe Shushan Purim, effectively dividing the city.

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7. *Sh"ut Halachot Ketanot*, vol. 1, 99. See *Sha'arei T'shuva*, O.C. 426:1, *Darkei T'shuva*, Y.D. 1:193. See also *Kovetz Bait Aharon V'Yisrael*, vol 55, pg. 88.

8. *Ruach Chaim*, O.C. 688:1.

9. See *Sh"ut Beit Yitzchak*, E.H. vol. 1, 87, *Kol Avinoam*, pg. 251.

Maharil, R. Yehoshua Leib Diskin, struggles with this quandary.<sup>10</sup> Initially, Maharil views splitting the city as an untenable resolution. As proof, he cites a ruling of the Talmud (*Yevamot* 14a) regarding communal practices. The Talmud quotes the verse in *Devarim* (14:1) that states, “*lo titgodedu*,” the prohibition against harming one’s body out of grief. The Talmud offers an additional level of interpretation, “*lo ta’asu agudot agudo*,” you shall not form differentiated groups. *Chazal* derive that it is prohibited for a single community under unified jurisdiction to be divided in its observance of Jewish law. Rather, a community must maintain a consistent approach to the fulfillment of halacha amongst its members. Maharil postulates that if some residents of a neighborhood would observe Purim on the 14th of Adar and others on the 15th, this would be a violation of the above stricture. Therefore, he writes, the entire community must celebrate Purim on the same day. Maharil proposes that such a neighborhood should follow the principle of “*acharei rabim l’hatot*.” That is to say, if the majority of the community is visible from the walled city, the minority will also be treated as *nireh*, and visa-versa.

Ultimately, Maharil rejects this approach as well, in favor of considering the entire neighborhood as *nireh*, even when only a minority of the residences can be seen from the walled city. Therefore, all inhabitants would read *Megillat Esther* on the 15th of Adar. However, it is important to note that Meiri clearly indicates otherwise. In his commentary to the Talmud (*Megillah* 2b), Meiri states that a village qualifies as *nireh* only when it is entirely visible from a nearby walled city.<sup>11</sup> Therefore, in the aforementioned scenario, all residents would

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10. *Sh”ut Maharil Diskin, Kuntres Acharon*, 103.

11. However, R. Tzvi Pesach Frank cites contextual evidence that may reveal an alternate understanding of the Meiri that does not contradict Maharil’s conclusion. See *Sh”ut Har Tzvi*, O.C. 123.

observe Purim on the 14th of Adar.<sup>12</sup>

## VII. Limitations of *Nireh*

Even when a neighboring area is entirely visible from a walled city, the status of *nireh* will not necessarily be conferred upon this adjacent region. The physical proximity of the village may still be a factor in determining its status. *Rishonim* debate whether the 2000-*amot* limitation of *samuch* applies to regions that are *nireh* as well. According to Rashi, Rashba, and others, for inhabitants of a suburb to observe Shushan Purim, the suburb must be located within one *mil* of the walled city. However, this is only true in a scenario where the suburb is not visible from the city. When the suburb is visible from the city, the inhabitants will observe Shushan Purim even if it is beyond one *mil* of the city.

However, Rambam apparently subscribes to a different approach. In *Hilchot Megillah* (1:10) he writes:

וברך וכל הסמוך לו וכל הנראה עמו אם אין ביניהם יתר על אלףים  
אםיה הרי זה בכרך וקוראין בחמשה עשר.

Regarding a city and any region adjacent to or visible from the city, if there is no more than 2,000 *amot* between them, the second region follows the practice of the city and its inhabitants read [the *Megillah*] on the 15th.

Rambam mentions the limitation of *mil* only after he records both the examples of *samuch* and of *nireh*, respectively. It is

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12. In an unpublished responsum dated Adar II, 5757 [archived at *Machon Minchat Asher*, Jerusalem], R. Asher Weiss offers a novel approach that would include some such areas under the rubric of *nireh*. *Poskim* interpret the terminology of the Talmud, “*nireh imo*,” as “visible from the walled city” (see *Beit Yosef*, O.C. 688:2). However, a literal rendering would be, “visible **with** [the walled city].” R. Weiss adopts this literal understanding and rules that if there is a point between the city and the suburb from where one could see both, the suburb would observe Shushan Purim. This allows for a situation where the suburb would not have been entirely visible from the walled city, but is entirely visible from the point in the middle.

noteworthy that Rambam mentions *nireh* second, seemingly to indicate that the qualification of *mil* is relevant for an area that is *nireh* as well.<sup>13</sup> This suggests that both categories are bound by the same caveat: any location celebrating Shushan Purim must be within 2,000 *amot* of a walled city, even when visible from the city. *Tur* (O.C. 688) presents a similar formulation, apparently concurring with the opinion of Rambam.<sup>14</sup>

R. Yosef Karo codifies this ruling in *Shulchan Aruch* (O.C. 688:2) with one slight deviation from the language of the *Tur*:

ובין הרים הנראים עמהם אפי' אינם סמוכים... או סמוכים להם  
אפילו אינם נראים עמהם... ובלבד שלא יהיו רוחקים יותר ממיל.

Similarly, villages visible from walled cities, even if they are not adjacent [observe Shushan Purim]. The same is true of villages adjacent to a walled city, even if they are not visible from the city, provided that they are no more than 2,000 *amot* from the city.

Some commentaries note that *Shulchan Aruch* first mentions the law of *nireh* and then mentions the law of *samuch*. As a result, the qualification of *mil* can be understood to define only the law of *samuch* (to which it is appended) and have no relevance to the earlier reference to *nireh*. Perhaps the intention of *Shulchan Aruch* is to allow the application of *nireh* under all circumstances; any area in view of the walled city is given the status of *kerachim hamukafim choma*. Only areas that are nearby but not visible from the walled city are subject to

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13. See *Beit Yosef* (O.C. 688:2).

14. Commentaries offer suggestions to explain the significance of *nireh* in light of the *mil* limitation. For example, see *Beit Yosef* (*ibid.*) who differentiates based on the method used to measure the *mil*. To determine if an area is *samuch*, 2,000 *amot* will be measured based on the actual distance one must walk from the city to the neighboring area. Therefore, varying topography will limit the inclusiveness of *samuch*. However, when evaluating *nireh*, 2,000 *amot* will be calculated based on the aerial distance between the two points, allowing for greater inclusivity. See also *Taz* (O.C. 688:5).

the 2,000-*amot* rule. According to this interpretation, the *Shulchan Aruch* deliberately reversed the order of *samuch* and *nireh* as found in *Rambam* and *Tur* in order to convey this distinction. This interpretation is advanced by *Magen Avraham*, *Biur HaGra*, *Birkei Yosef* and others (*ibid.*). As such, the surrounding areas need not be within 2,000 *amot* in order to follow the practice of the walled city. However, *Pri Chadash*, *Elya Rabba* and others (*ibid.*) maintain that *Shulchan Aruch* does not intend to differ from the opinion of *Rambam* and *Tur*. As a result, the ruling of *Shulchan Aruch* remains ambiguous.

### **VIII. Understanding the Principles of *Samuch* and *Nireh***

R. Aryeh Leib Ginzberg in *Turei Even* (*Megillah* 3b) presents a fundamental perspective of great importance to our discussion. He explains that standards of *samuch* and *nireh* are significant based on practical reality. When two cities or villages are close to each other, it is only natural for inhabitants of the two to intermingle, whether for commercial, social or other reasons. The two populations will be so closely linked that *Chazal* deemed it necessary for them to share the same date of Purim observance. Otherwise, residents of one location would continue their normal, weekday business, while their neighbors and friends in close proximity would be performing all of the mitzvot of Purim. To prevent a situation that might appear ridiculous to people – and risk compromising the integrity of the law in their eyes – *Chazal* declared both areas to be one, unifying their observance. From the perspective of halacha, the two regions are integrated, and even the area outside of the walled city proper is subsumed under its municipal boundaries.

R. Ginzberg's understanding allows for a very broad application of the principles governing *samuch* and *nireh*. The determining factor is not simply the physical closeness of the two areas, but the practical relationship of their populaces. When the inhabitants of a walled city associate and interact

with those in surrounding areas – or when areas are linked by taxation, municipal services and the like – observance of Shushan Purim can extend far beyond the *mil* described in the Talmud.

The approach of *Turei Even* is reflected in the words of several *rishonim*. *Ritva* (*Megillah* 2b) succinctly encapsulates this position:

אבל בנהרא כל שהוא נראה עמו ומשתתף עמו בענייניהם לית ליה  
שיורא.

So long as the neighboring area is visible from the walled city, if the suburb is involved with the matters of the walled city, there is no limit to the distance between them. *Rashba* (*Megillah* 3b) differs slightly, though maintaining the same underlying fundamentals:

וטעמא דכל הסמור והנראה... בשעת מלחמה מתאסתין ובאין אל ערי  
המבצר והולכ'r הרי הן בגיןש הברך ממש והרי הן במוקפין חומה  
מיומת יהושע.

The rationale behind *samuch* and *nireh*... is because [residents of the outlying village] will flee to the fortifications of the walled city for protection at a time of war.<sup>15</sup> Therefore, they are treated as actual residents of the walled city; it is as if they, too, were surrounded by a wall in the days of Yehoshua bin Nun.

In this context, R. Ovadia Yosef<sup>16</sup> emphasizes that despite the fact that the nature of warfare has changed dramatically, the standards nevertheless remain as originally dictated by *Chazal*.

## IX. Other Factors in Applying *Samuch* and *Nireh*

As explained above, the parameters of application of *samuch* and *nireh* are subject to dispute. To avoid this disagreement

15. See commentary of Ibn Ezra to *Tehillim* (122:3).

16. *Sh"ut Yabia Omer*, vol. 7, O.C. 58:4.

and expand city limits according to all authorities in contemporary municipal settings, some *poskim* suggest alternative approaches. *Kaf HaChaim* (O.C. 688:10) offers the possibility of evaluating the distance of *mil* in a revolutionary fashion. *Chazal* measure the ability of the average man to traverse a distance of 2,000 *amot* in 18 minutes. Perhaps, *Kaf HaChaim* suggests, we must redefine this measure by modern standards. Current methods of vehicular transportation permit the individual to travel much faster. Many miles can be crossed by car during an 18 minute interval. Therefore, *Kaf HaChaim* proposes allowing any area within 18 minutes-travel (by modern standards) from a walled city to observe Purim on the 15th of Adar.

In support of this assertion, he marshals a precedent in a different area of halacha, namely the laws of *aveilut* (mourning). In some instances, the distance between members of a mourning family at the time of the loss and during the week of *shiva* will determine when each member begins the seven days of initial mourning.<sup>17</sup> In previous generations, many *poskim* assumed that this distance should be evaluated based on practical considerations. Specifically, the advent of railroad transportation increased the speed of transportation and reduced travel time between family members. This position was accepted by many authorities.<sup>18</sup> Similarly, posits *Kaf HaChaim*, the distance of *mil* as relates to Purim may be modified in accordance with technology and modern transportation. Others, including R. Ovadia Yosef, soundly disagree with this approach by drawing lines of distinction between the laws of mourning and the laws of Purim.<sup>19</sup> R. Yosef concludes that the guidelines offered by *Chazal* will not change in this respect.

Authorities have also discussed the possibility of viewing an

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17. See *Shulchan Aruch*, Y.D. 375:8.

18. See *B'Ikvei HaTzon*, pg. 123.

19. *Sh"ut Yabia Omer*, *ibid.*

area enclosed by an *eruv* as a single city, regardless of how far the boundaries of the *eruv* expand. The laws of Shabbat allow one to carry within a single *reshut*, or domain. An *eruv* can unite a locality into a single domain to permit carrying within its boundaries. Likewise, when measuring the *techum* of a city, the 2,000 *amot* distance one may walk on Shabbat outside of his city begins at the limits of the *eruv*; everything enclosed by the *eruv* is viewed as part of the city. Similarly, an *eruv* may unite a bordering region with a walled city with respect to the laws of Purim. This opinion has been advanced by R. Shlomo Zalman Auerbach,<sup>20</sup> R. Yosef Shalom Elyashiv,<sup>21</sup> and others. According to this line of reasoning, any region surrounded by an *eruv* that also encompasses a walled city would observe Purim on the 15th of Adar.

Several arguments have been made to counter this position. For example, this approach appears incongruent with the explanation of *Turei Even* and the supporting *rishonim* mentioned above. *Samuch* and *nireh* are principles applied to surrounding neighborhoods when it is practically relevant for its population to be integrated with that of a walled city. An *eruv*, however, could theoretically join two cities many miles apart, even if their residents do not regularly associate with each other. As a result, some *poskim* have rejected the use of *eruv* vis-à-vis Purim and the laws of *samuch* and *nireh*.<sup>22</sup>

## X. Applications in Modern-Day Jerusalem: Har Nof

Over 150 years ago, Jews attempted the first settlements outside the walls of the Old City of Jerusalem. In subsequent decades, the New City of Jerusalem expanded slowly, until 1967. Following victory in the Six Day War, expansion of the city exploded beyond the Green Line, as well as in areas

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20. *Sh"ut Minchat Shlomo*, vol. 2, 57, *Halichot Shlomo*, Purim, 20:10.

21. *Shvut Yitzchak*, Purim, pg. 62.

22. See *Noam*, vol. 7, pg. 105, *Sh"ut Minchat Yitzchak*, vol. 8, 62, *Sh"ut Yabia Omer*, *ibid.*, 5. See also *Sh"ut Divrei Yatziv*, O.C. 295.

previously under Israeli control. Among the most successful communities created in the last four decades are Har Nof, to the west of the Old City, and Ramot, a series of neighborhoods built upon the hills north of Jerusalem proper. In the early 1980s, as these communities grew, *poskim* first addressed their status as *samuch* and *nireh* to determine if their inhabitants should observe Purim or Shushan Purim.

Har Nof was built in greater proximity to the already established New Jerusalem, but not directly adjacent to any preexisting community. The closest neighborhood at the time was Givat Shaul. In fact, Har Nof was originally referred to as "Givat Shaul Bet," now used to refer to the industrial zone that lies between the two. Today, it is generally accepted that residents of Har Nof observe Shushan Purim with the rest of Jerusalem, as a continuous line of residential area runs from the Old City to Har Nof itself with no significant interruption. Historically, Har Nof was originally subject to the standards of *samuch* and *nireh*. However, as Givat Shaul and Har Nof expanded, the gap between them narrowed and Har Nof eventually became contiguous with Jerusalem proper. Therefore, residents of Har Nof observe the 15th of Adar, because it is deemed annexed to the walled city of Jerusalem, by virtue of the principle of *iburo shel ir*.

However, even today the status of Har Nof is not universally agreed upon. In fact, the status of many of the older communities that are situated between Har Nof and the Old City hinge upon a similar issue. As explained above, *poskim* debate the method of calculating the *mil* of *samuch*. R. Tukachinsky argues that *samuch* only includes neighborhoods within 2,000 *amot* of the walls, regardless of the expansion of the city. R. Tukachinsky went to great lengths to determine how far the original walls of Jerusalem extended and which neighborhoods would be encompassed. He published detailed charts indicating how far from the walls various neighborhoods are located, in an effort to clarify the halacha

within this framework. According to R. Tukachinsky,<sup>23</sup> the western limit of the walled area is no more than 300 meters beyond Jaffa Gate. Much of the residential area in the vicinity of Machane Yehuda is already beyond this point. Therefore, residents of Har Nof and many other communities would celebrate Purim on the 14th, as any non-walled region would.

To this day, many residents of the neighborhood where R. Tukachinsky once presided still abide by his ruling. Despite the fact that his opinion was not generally accepted, his descendants continue to publish his position in the annual *"Luach Eretz Yisrael,"* a well-respected compendium of many practical laws associated with the Jewish calendar, originally composed by R. Tukachinsky.<sup>24</sup>

## XI. Applications in Modern-Day Jerusalem: Ramot

One of the first responsa to tackle the question of Ramot was written by R. Ovadia Yosef in 5742. R. Yosef analyzes many of the factors discussed above and comes to the conclusion that inhabitants of Ramot must celebrate Purim on the 14th of Adar. At the time, the closest neighborhood to Ramot was Sanhedria, with far more than 141 *amot* between them. Indeed, even today Ramot is not directly contiguous to Jerusalem, though new areas have since been developed that narrow the gap. R. Yosef notes that Ramot is also beyond 2,000 *amot* from the city and therefore not *samuch*. Those who attempted could not see Ramot from the Old City. He adds that even if they

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23. *Ir HaKodesh V'HaMikdash*, pg. 421. See *Sh"ut Teshuvot V'Hanhagot*, vol. 2, 347 and vol. 3, 233.

24. Even at the time of R. Tukachinsky's ruling, halachic precedent was not in line with his opinion. *Sh"ut Tzitz HaKodesh* 52 cites an earlier ruling of the author of *Chesed L'Avraham* of Lublin instructing residents of a home for the elderly at the outskirts of Jerusalem to celebrate Purim on the 15th of Adar. The home was located approximately where Jerusalem's Central Bus Station is located today, not contiguous to residential area, but within 2,000 *amot* of the last house. This location is well beyond R. Tukachinsky's borders.

could, it would not necessarily be deemed as *nireh*, for it exceeds the distance of a *mil* from the walls of Jerusalem.

R. Yosef also adopts the position that the Jerusalem *eruv* that includes Ramot would not change its status. He further argues that even if an *eruv* would normally be an acceptable way to expand the limits of a walled city regarding the laws of Purim, it would not change the status of Ramot. This is because a separate *eruv* was constructed around Ramot itself. An independent *eruv* may be viewed as an act of secession from the connection provided by the larger *eruv* that encompasses all of Jerusalem. This point is also made by R. Yitzchak Weiss in a separate responsum.<sup>25</sup> R. Yosef concludes that residents of Ramot must observe Purim on the 14th of Adar. He adds that it would be *midat chassidut*, pious behavior, to perform the mitzvot of Purim on the 15th as well, without reciting the *brachot* upon the reading of *Megillat Esther*. The basis for this stringency is to satisfy the opinions of those who maintain that Ramot should follow Jerusalem. The *Beit Din* of the *Eidah HaChareidit* of Jerusalem, under the leadership of R. Weiss issued a similar ruling, instructing residents of Ramot to observe Purim on both days, reciting *brachot* only on the 14th, out of doubt.<sup>26</sup> This was also the initial decision of R. Yosef Shalom Elyashiv.<sup>27</sup>

R. Auerbach, as above, accepted the *eruv* as a means of viewing Ramot as part of Jerusalem and ruled accordingly. Furthermore, even in the fledgling years of Ramot, he saw basis for this ruling in the rationale of *Turei Even*. At that time, Ramot was integrated with the Jerusalem municipality in many regards, such as taxation. Furthermore, they shared

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25. *Minchat Yitzchak*, ibid.

26. Ibid.

27. *Halichot Shlomo*, Purim, 20:24. These considerations were also important in R. Auerbach's determination that Hadassah Hospital in Ein Kerem should be included in the borders of Jerusalem as regards Purim, at a time when other authorities were in doubt.

many municipal services, such as postal administration, public transportation systems and the like. In this respect, Jerusalem and Ramot were joined by common interests, much as Ritva and Rashba describe the underpinning of the rules of *samuch* and *nireh*. R. Yitzchak Kolitz and R. Shalom Messas, former Ashkenazic and Sephardic Chief Rabbis of Jerusalem, respectively, also favored Ramot following the practice of Jerusalem.<sup>28</sup>

Over time, many of the *poskim* who originally viewed Ramot as separate from Jerusalem have since revised their positions. Further integration of Ramot with Jerusalem, as well as modifications to the *eruv*, have allowed these northern suburbs to identify completely with Jerusalem for the purposes of Purim. Most notably, R. Elyashiv (as of Purim 5757)<sup>29</sup> is among those who now believe residents of Ramot are to observe Shushan Purim unconditionally.<sup>30</sup>

R. Yosef and others, however, continue to maintain the opposing position today. Accordingly, there are communities in the neighborhoods of Ramot that continue to observe both days of Purim, as above. However, in a fascinating development, recent years have brought new initiatives with the goal of permitting all residents to celebrate Shushan Purim, according to all opinions. Jerusalem City Councilman Eli Simchayof, a member of the Shas party, has suggested building a row of caravans stretching between Jerusalem proper and Ramot.<sup>31</sup> The plan utilizes the principle of *burgenin*,

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28. *Sh"ut Shemesh U'Magen*, 51, 52, cited in *Sh"ut Yabia Omer* ibid., 59.

29. *Shvut Yitzchak*, Purim, pg. 77.

30. See the unpublished responsum of R. Asher Weiss (cited above), where the author mentions other factors that lead to this conclusion. Among these, R. Weiss notes that Ramot is *samuch* and *nireh* vis-à-vis the grave of the prophet Shumel in Ramah. Based on the tradition of the Jerusalem Talmud (*Megillah* 1:1), this location was surrounded by walls at the time of Yehoshua bin Nun.

31. See <http://www.moreshet.co.il/web/shut/shut2.asp?id=99659> and <http://www.haaretz.com/print-edition/news/making-purim-twice-as->

a dispensation that uses temporary dwellings to expand the boundaries of a city by closing gaps in residential development.<sup>32</sup> However, this plan has met opposition from secular environmentalist groups, because building must traverse forest area that lies near Ramot.<sup>33</sup>

The development of these rulings has been critical as the growth of Jerusalem continues. As new neighborhoods are founded, they are ultimately evaluated through the prism of the rulings that we have recorded in our discussion. Among the most recent communities to join Jerusalem in celebrating Shushan Purim according to all opinions is the southeastern suburb, Har HaChoma, in 5769.<sup>34</sup>

## XII. Pre-1967 Jerusalem

Following the War of Independence in 1948, the Old City of Jerusalem fell into Jordanian hands. Under the circumstances, the status of the New City of Jerusalem was once again in doubt. Do residents of neighboring areas celebrate Shushan Purim even when the walled city itself has no Jewish settlement? *Gra* and *Birkei Yosef* (O.C. 688:8) debate this question, based on varying interpretations of the Jerusalem Talmud (*Megillah* 1:1). Prominent local authorities of the time, including R. Tzvi Pesach Frank, ruled that inhabitants of Jerusalem should continue their previous practice.<sup>35</sup> Because extensions of the Old City were contiguous to the walls, modern Jerusalem effectively remained partially inhabited by Jews, for the adjacent development is viewed as an expansion

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32. *Shulchan Aruch*, O.C. 398:6.

33. Personal communication from R. Avraham Yosef (son of R. Ovadia Yosef).

34. See R. Elyahu Adri, *Ani Choma* (available via *Otzar HaChochma*). See also <http://www.theyeshivaworld.com/article.php?p=31142>.

35. *Sh"ut Har Tzvi*, O.C. vol. 2, 131.

of the city itself, as explained above.<sup>36</sup>

### XIII. Other Cities

Jerusalem is the only city in Israel undoubtedly considered surrounded by walls at the time of Yehoshua. However, in a number of other localities there are some who observe both the 14th and 15th of Adar because of traditions pointing to the possibility that these cities were also surrounded by walls at the time.<sup>37</sup> Given the uncertainty, both Purim and Shushan Purim are observed although *brachot* are only recited upon the mitzvot performed on the 14th. Among the cities in question are: Hebron, Acre, Jaffa, Lod, Safed, and Haifa.<sup>38</sup> Doubts regarding such cities relate to matters such as the historical determination of which cities were walled, when the modern localities that carry names of biblical cities should be identified with their antecedents, and the like.

There is a disagreement amongst *poskim* as to the application of the laws of *samuch* and *nireh* in such cases. *Biur Halacha* (O.C. 688:2) cites *Birkei Yosef* who rules that these principles do not apply to regions that observe both days of Purim based on halachic uncertainties. Rather, neighborhoods adjacent to these cities observe only the 14th. *Chazon Ish* (O.C. 153:2) argues that no differentiation should be made, and both days must be observed.

Consistent with his opinion, the *Chazon Ish* personally

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36. Some authorities add that the Talmud (*Bava Batra* 75b) seems to indicate that Jerusalem's original walls stretched beyond where they are located today, encompassing parts of contemporary neighborhoods. This is another reason to consider Jerusalem as inhabited by Jews even when the Old City was under Arab control. See *Chazon Ish*, O.C. 154, *Sh"ut Tzitz HaKodesh*, 52:6 and *Chazon Ovadia*, Purim, pg. 101.

37. However, authorities differ as to whether *Al HaNisim* is said on the 15th. See *Orchot Rabbeinu*, vol.3, pg. 37.

38. See R. Tukachinsky's *Sefer Eretz Yisrael* (Chap. 8), *Kaf HaChaim* 688:17 and *Kovetz T'shuvot* of R. Yosef Shalom Elyashiv, vol. 1, 68 - 69.

observed both days in B'nei Brak where he resided. For years, Chazon Ish suspected that B'nei Brak was perhaps subject to the same classification as Jaffa, given their proximity.<sup>39</sup> By the final years of his life, municipal development in the region eventually created a continuous link from Jaffa to B'nei Brak by way of Tel Aviv and Ramat Gan. At that point (Purim 5713), Chazon Ish instructed others in B'nei Brak to act accordingly. R. Chaim Kanievsky reports that Chazon Ish presumed that even *Birkei Yosef* might agree to the ruling given the circumstances.<sup>40</sup>

In *HaIggeret HaZot*, R. Shraya Deblitsky postulates that the conditions present at the time of Chazon Ish's determination are no longer extant. In the 1970s, Israel began construction of the Ayalon Highway in Gush Dan, the Tel Aviv metropolitan area. This major intracity freeway ultimately created an interruption of the continuity stretching between Jaffa and B'nei Brak.

In his analysis, R. Deblitsky includes a formal letter from the government-owned company Ayalon Highways, Ltd. regarding the width of the highway, measured upon his request. A survey concluded that at its most narrow point, highway property presents a gap of 90 meters (approximately 295 feet) between developments on opposite sides of the road. This interruption will not permit B'nei Brak to be subsumed under the *iburo shel ir* of Jaffa, as it amounts to a distance greater than 141 *amot*. The author further asserts the opinion of Chazon Ish (O.C. 153, cited above) that the 2,000 *amot* of *samuch* may not be measured from the limits of the *iburo shel ir* (in this case, where the highway divides the Tel Aviv area). Rather, it

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39. The opinion of Chazon Ish also brings into question the status of many relatively new areas in Israel. For example, Modi'in Iilit may be subject to the status of the city of Lod; see R. Yechiel Danziger's *Kuntress Sfeika D'Mukafin*. Regarding Beitar Iilit, see R. Elazar Chashin in *Otzarot HaTorah*, Purim 5765, pg. 19.

40. *Orchot Rabbeinu*, vol. 3, pg. 36.

is measured from the original city walls. B'nei Brak is more than 2,000 *amot* from ancient Jaffa, where the walls once stood. Therefore, R. Deblitsky concludes that Chazon Ish would reverse his own ruling today, instead instructing residents of B'nei Brak to observe only the 14th of Adar. Nevertheless, others maintain that residents of B'nei Brak should observe Shushan Purim even today based on other considerations, including possible applications of the laws of *techum Shabbat* that would unite B'nei Brak with Jaffa despite construction of the Ayalon Highway.<sup>41</sup>

## XIV. Conclusion

The burgeoning development of Jerusalem is a constantly increasing blessing for the Jewish people. Likewise, municipal growth has allowed more and more neighborhoods to gain full designation as part of the city.

*Chazal* tell of a future time when God will increase the size of Jerusalem dramatically, and the city will encompass a huge portion of *Eretz Yisrael*.<sup>42</sup> In these Messianic times, a wall will indeed surround this city of massive proportions. However, this wall will be built by God Himself, as *Zecharia* (2:9) describes, “And I will be to [Jerusalem] a surrounding wall of fire,” and His presence will rest within, for the honor of the Jewish people who reside between the walls.<sup>43</sup> May we merit to experience the fulfillment of this prophecy, and to see Jerusalem rebuilt – *בָּעֵיר שָׁחֶבֶת לְהַיְדָוּ*,<sup>44</sup> as a city unified as one.

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41. See *Kiryat Ariel*, pg. 309.

42. *Pesachim* 50a.

43. *Maharsha Pesachim*, *ibid.*; commentary of Rashi to *Zecharia* (*ibid.*).

44. *Tehillim* 122:3.

# Contemporary Modalities of *Bikur Cholim*

*Rabbi David Etengoff*

## Introduction

*Bikur Cholim* is a mitzvah of singular import in that it enables man to imitate G-d's actions:

Just as Hashem clothed the naked [in the case of Adam and Chava]... so, too, should you clothe the naked. Just as Hashem visited the sick [in the case of Avraham after his brit milah]...so, too, should you visit the sick. Just as the Holy One Blessed be He comforted the mourners [in the case of Yitzhak after Avraham's passing]...so, too, should you comfort the mourners. Just as the Holy One Blessed be He buried the dead [in the case of Moshe Rabbeinu]...so, too, should you bury the dead. (*Sotah* 14a)

The Rambam notes that while this commandment is rabbinic in nature (*chiuv*), its fulfillment (*kiyum*) constitutes part of the biblical mitzvah of loving one's fellow Jew (*v'ahavata l' reiecha kamocha, Vayikra* 19:18):

It is a positive commandment of rabbinic origin *to visit the sick*, comfort mourners, to prepare for a funeral, prepare a bride, accompany guests, attend to all the needs of a burial, carry a corpse on one shoulders, walk before the bier, mourn, dig a grave, and bury the dead, and also to

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bring joy to a bride and groom and help them in all their needs. These are deeds of kindness that one carries out with his person that have no limit. Although all these mitzvot are of rabbinic origin, they are included in the scriptural commandment: "Love your neighbor as yourself." That charge implies that whatever you would like other people to do for you, you should do for your comrade in the Torah and mitzvot. (*Mishneh Torah, Hilchot Avel* 14:1)<sup>1</sup>

*Nedarim* 40a contains a powerful vignette in which Rav Kahana proclaimed that Rabbi Helbo had become ill. Somewhat enigmatically, his fellow Sages failed to visit him:

Rabbi Helbo fell ill. Thereupon Rav Kahana went and proclaimed: Rabbi Helbo is sick. But none visited him. He rebuked them [the scholars], saying, "Did it not once happen that one of Rabbi Akiba's disciples fell sick, and the Sages did not visit him? So Rabbi Akiba himself entered [his house] to visit him, and because they swept and sprinkled the ground before him [i.e. Rabbi Akiva's student], he recovered [due to the improved hygienic conditions]. 'My master,' said he, 'you have revived me!'" [Straightway,] Rabbi Akiba went forth and lectured: "He who does not visit the sick is like a shedder of blood." (Translation, *Soncino Talmud*, with my emendations for clarity).

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1. The Rambam's categorization of *Bikur Cholim* as a rabbinic commandment is widely, but not universally accepted. By way of example, Rav Moshe Sternbuch, the *Av Beit Din* and Chief Rabbi of the Edah HaChardit in Jerusalem, in his work *Teshuvot v' Hanhagot* vol. II, *Yoreh Deah*, 592 opines: "In my humble opinion, it appears to me quite simple that if the invalid needs the visitors to support him in words, acts of kindness, words of encouragement, or by praying on his behalf, then they are biblically obligated in this commandment. When, however, are they only rabbinically obligated? This is the case when the *choleh* (sick person) does not immediately need these particular visitors since others are already looking after his basic needs."

Given Rabbi Akiva's unquestioned stature and seminal halachic status, one would have thought that all of the *poskim* (halachic decisors) would have followed his lead and thereby rule in accordance with his above-cited statement: "*kol me sheain mevaker cholim k'eilu shofach damim*" ("He who does not visit the sick is like a shedder of blood"). Yet, the Rambam alone codified Rabbi Akiva's statement as law:<sup>2</sup>

It is a mitzvah incumbent on everyone to visit the sick. Even a person of great spiritual stature should visit one of lesser stature. One may visit many times during the day. Whoever increases the frequency of his visits is praiseworthy provided he does not become burdensome. Whoever visits a sick person removes a portion of his sickness and relieves him. Whoever does not visit the sick is considered as if he shed blood. (*Mishneh Torah, Hilchot Avel* 14:4)

Allow me to briefly explicate this halacha, since it touches upon some of the basic components of the *Bikur Cholim* experience:

1. *Bikur Cholim* is equally incumbent upon every Jew.
2. Personal stature is immaterial as to whom one is obligated to visit. The greatest *talmid chacham* should visit the least lettered individual if this will be helpful to the latter.
3. *Bikur Cholim* has no upward limit as long as the visitor does not become a burden to the one who is ill.

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2. Rabbi Moshe Feinstein discusses this passage in the context of his analysis of the halachic propriety of a person of greater stature visiting an ill person of lesser stature (*Iggerot Moshe, Yoreh Deah* I: 222). He opines that Rabbi Akiva's student was not ill with a life-threatening condition (*pikuach nefesh*) and suggests that this was the reason why the Sages refrained from visiting him. Rav Feinstein maintains that Rabbi Akiva rejected this view of the *Chachamim* and held that if one were to refrain from visiting a sick individual who was not in a state of *pikuach nefesh*, he might eventually act in the same manner for a patient that was in the midst of a life-threatening ailment – hence Rabbi Akiva's decision.

4. The act of visiting the sick, in and of itself, ameliorates some of the pain and suffering of the patient.
5. Whoever fails to fulfill the mitzvah of *Bikur Cholim* when it is within his power to do so “is considered as if he shed blood.”<sup>3</sup>

## **Modalities of *Bikur Cholim***

A survey of halachic literature points to four ways whereby one, in some fashion, can fulfill the mitzvah of *Bikur Cholim*:

1. In person
2. By letter
3. By telephone
4. Video Conferencing

Let us now examine each of these approaches to the mitzvah.

### ***Bikur Cholim* in Person**

According to *Mechilta d’Rabbi Yishmael*, *Mesechta d’Amalek* II, *Baba Metziah* 30b and *Baba Kama* 100a, the biblical support (*asmachta*) for the rabbinically-based mitzvah of *Bikur Cholim* is found in *Shemot* 18:20: “And you shall admonish them concerning the statutes and the teachings, and you shall make known to them **the way they shall go** and the deed[s] they shall do.” The Gemara identifies the phrase “the way they

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3. It must be noted that the Rambam also included prayer (*tefillah*) on behalf of the *choleh* as one of the constitutive elements of *Bikur Cholim*. Thus he states that the visitor is obligated to: “entreat G-d for mercy on his [the patient’s] behalf and depart.” (*Mishneh Torah, Hilchot Avel* 14:6.) Maimonides is following a plethora of talmudic sources in this ruling. In light of these sources, it is fascinating to note that Rabbi Feinstein, op. cit., *Yoreh Deah* IV, 51, considered that the “essence of the mitzvah of *Bikur Cholim* is to enable the visitor to pray on the *choleh*’s behalf when he sees him [and that the substance of the prayer should be] that the Holy One blessed be He should send the ill individual [complete] health.”

shall go" ("*haderech yeilchu*") as directly referring to *Bikur Cholim*. The former Chief Sephardic Rabbi of Israel, Rabbi Ovadiah Yosef, utilizes this talmudic passage to stress the importance of being physically present when attempting to fulfill the mitzvah of visiting the sick:

Behold, our Sages explicitly mentioned "*halicha*" ("going") regarding the commandment of visiting the sick. This is the case, since by physically going to visit the sick, one is able to stand by his side to attend to all of his needs and to extend to him every possible manner and variety of assistance. [By being present, the visitor can ascertain] if he [the patient] is missing any type of food, drink or medicine, and give him good and wise advice as it states in the verse: "Without strategy the people fall, but with many counselors there is victory" [*Mishle* 11:14], as well as physically clean his living environment.<sup>4</sup>

In addition, Rabbi Yosef cites the following responsum from Rabbi Moshe Feinstein as one of his essential sources:

... but in the case where it is possible to visit the sick person in person – one is obligated to do so. This is based upon the rationale that the sick person will most likely derive pleasure from seeing his visitor face to face – something that is simply not possible when the visitor is not before him. In addition, based upon the visitor physically seeing the patient, he will come to be more empathetic toward him and pray more powerfully and with greater supplications on his behalf... In addition, it is possible that such [heartfelt] prayer will more likely be accepted since the *Shechinah* [Divine Presence] is with the one who is ill.<sup>5</sup>

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4. *Sheilot u'Teshuvot Yechave Daat* III: 83.

5. Op. cit., *Yoreh Deah* I: 223. So, too, Rav Mordechai Yaakov Breisch *Chelkat Yaakov*, *Yoreh Deah* II:128. Strong support for this position is found in the glosses of Rabbi Moshe Isserles to *Shulchan Aruch*, *Yoreh Deah* 335. He, in turn, bases his view upon the Ramban.

Beyond a doubt, the ideal method (*lechatchilah*) of performing the mitzvah of *Bikur Cholim* is to be physically present with the *choleh* so as to ascertain and attend to his myriad needs in an immediate fashion. Moreover, "... based upon the visitor physically seeing the patient, he will come to be more empathetic toward him and pray more powerfully and with greater supplications on his behalf."

What should one do, however, when it is simply not possible to be with the sick person in this manner? In addition, what aspects of this mitzvah, if any, can be fulfilled even when the would-be visitor cannot be present? It is to these questions that we now turn.

### ***Bikur Cholim* by Letter**

Given the above, logic dictates that *Bikur Cholim* by letter is a pale substitute for actually visiting the invalid, since there is no dialogue or joint discussion of any kind between the two parties. Nonetheless, there is talmudic precedent for this indirect type of "visitation":

**Mishnah:** If an individual took a pledge (*neder*) that proscribed him from benefitting from another party, [and the one who pledged became ill,] the other party may visit him [for the purpose of *Bikur Cholim*...] Gemara: ... An objection was raised: If the individual who took a pledge that proscribed him from benefitting from another party became ill, the other party may visit him [for the purpose of *Bikur Cholim*]. Yet, if the one who took the *neder* has a son who became ill, the other party may not visit the son and must limit himself to asking after the son's welfare in the marketplace (*shuk*).

(*Nedarim* 38b-39a)

The sole purpose of inquiring about the son is to enable the questioner to ascertain his health status- a relatively small but significant aspect of *Bikur Cholim*. This led Rav Feinstein to draw a substantive distinction between fulfilling the mitzvah

(*kiyum hamitzvah*) in a highly limited manner, and the complete execution of his obligation (*yotzei yidei chovato*). Finding out about the son through public inquiry constitutes a form of *kiyum hamitzvah* but does not effectuate one being *yotzei yidei chovato*:

Behold it is clear in my humble opinion that even though one fulfills the mitzvah of *Bikur Cholim* in a limited fashion, it is irrelevant to say that he has thereby effectuated his total obligation. This is the case since this mode of visitation is lacking other aspects of the mitzvah of *Bikur Cholim*. [Moreover] he only fulfills his obligation [in this limited manner], if and only if, it is impossible for him to fulfill the commandment by being physically present before the invalid. He has by no means, however, completed this commandment. Nonetheless, he must visit him in every possible way – even if this means he addresses only one or two aspects of the mitzvah... This is what was meant by the law mentioned in Talmud *Bavli*, *Nedarim* 39a: "If the one who took the *neder* has a son who became ill, the other party may not visit the son and must limit himself to asking after the son's welfare in the marketplace.<sup>6</sup>

Therefore, for Rabbi Feinstein, *Bikur Cholim* by letter may enable the would-be visitor to fulfill his obligation, albeit in an incomplete manner.

Rabbi Moshe Sternbuch discusses a parallel topic in his work of responsa, namely, the question of comforting the mourner by letter.<sup>7</sup> While there are important differences between *Nichum Avelim* and *Bikur Cholim*<sup>8</sup>, they are similar in that both

6. Ibid. This responsum was actually written in regards to *Bikur Cholim* by telephone. I believe, however, that Rav Feinstein's comments apply in equal measure to the case of "visiting" the sick by letter.

7. Op. cit., *Yoreh Deah*, 587.

8. I.e. *Nichum Avelim* is an act of kindness (*gemilut chasadim*) for the living and the departed, while *Bikur Cholim* is only for the living. As such,

entail the act of visitation with the emphasis firmly placed upon comforting the parties being visited. In this context, Rabbi Sternbuch quotes the view of Rabbi Yitzhak Zev Halevi Soloveitchik that unmitigatedly maintains that one would fulfill the mitzvah of *Nichum Avelim* by letter:

...since it is not a law that is solely contingent upon *dibur* (vocalization) for its fulfillment. This is clearly the case, since if one were to visit someone for the purpose of *Nichum Avelim*, and not say a single word to the mourner; he would nonetheless fulfill this mitzvah, simply based on the comfort offered as a result of his being present. This is the case as well, since, here too, the mourner is comforted as a result of the letter.

Whether we view *Bikur Cholim* by letter from the direct perspective of Rabbi Feinstein or the parallel case of the Brisker Rav, it is now clear that one would fulfill at least some aspect of this mitzvah through this modality.

### ***Bikur Cholim* by Telephone**

In light of the above-quoted passage highlighting Rabbi Yitzhak Zev Halevi Soloveitchik's position regarding *Nichum Avelim* by letter, it is quite likely that he would have recognized *Bikur Cholim* by telephone as a legitimate halachic gesture. It is probable that he would have ruled *a fortiori*: Since *Nichum Avelim* is not contingent upon *dibur*, and one can thereby fulfill his obligation of comforting the mourner through the means of a letter, this should certainly be the case regarding *Bikur Cholim* by telephone wherein *dibur* is the actual mode of communication.<sup>9</sup> As referenced earlier, Rav

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Maimonides, in *Mishneh Torah, Hilchot Avel* 14:7 rules that the former takes precedence over the latter when one can perform but one of these obligations.

9. Interestingly enough, Rabbi Sternbuch disagrees with the Brisker Rav's position and maintains that *Nichum Avelim* is composed of two parts: 1) Comforting the mourner and 2) *tikkun v'tovah l'meit k'shebaim levaker* (to

Feinstein explicitly stated that *Bikur Cholim* by telephone would allow for a partial fulfillment of the mitzvah. Rabbi Ovadiah Yosef's conclusion follows Rabbi Moshe Feinstein's ruling in this matter:

It therefore appears to be the case that if one is able to visit the invalid in person, he will be unable to completely fulfill this obligation by means of either the telephone or a letter. [He will, however, be able to partially fulfill this obligation.] The request for mercy for the patient [through prayer], however, may be facilitated from a distance such as through a *mi shebarach* in a prayer quorum comprised of 10 men, since in all such quorums G-d's Divine Presence is to be found. This is explained in Talmud *Bavli, Sanhedrin* 39a. Nonetheless, prayers before the *choleh* are more likely to be accepted in accord with our Sages statement in Talmud *Bavli, Berachot* 34a.<sup>10</sup>

Rabbi Eliezer Yehudah Waldenberg, known as the "Tzitz Eliezer" after the title of his prodigious multi-volume collection of responsa, offers a position that is congruent with both Rabbis Feinstein and Yosef:

In general, when there is no possibility for the would-be visitor to see the invalid in person, based upon a variety of exigencies – including active Torah study which in some ways outweighs all other commandments (*haosek b'talmud Torah sh'he keneged kulam*) – it appears to me that he does fulfill certain aspects of this mitzvah (*d'yeish inyan shel yetziah yedei hamitzvah*) through asking after the *choleh*'s welfare from knowledgeable individuals and family members that he may happen upon in public.

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benefit the departed). Rav Sternbuch maintains that the first part alone may be achieved through the modality of a letter. Therefore, *Nichum Avelim* with its two aspects, and *Bikur Cholim* with its multiple requirements, if undertaken by letter, would allow for only incomplete fulfillment of these mitzvot.

10. Op. cit.

Then, too, he may do this via the telephone, as we find in *Nedarim* 39a...There is a strong possibility that in this manner of asking after the invalid's welfare in public or through the use of the telephone, that the questioner fulfills certain aspects of the mitzvah of *Bikur Cholim* according to that which is now necessary...[inclusive of] bringing the sick individual comfort and praying on his behalf. These actions may be fulfilled to a lesser or greater degree by asking after the patient's welfare, since the relatives of the *choleh* will pass on his well-wishes to him and thereby bring him comfort when he hears that someone else is offering care and concern.<sup>11</sup>

Rabbi Mordechai Yaakov Breisch in *Chelkat Yaakov, Yoreh Deah*, II:128, presented a contrary ruling to these opinions in a responsum written to the Cheziner Rebbe, Harav Shalom Yechezkel Shraga Rubin Halberstam<sup>12</sup>:

In my humble opinion, it appears beyond a shadow of a doubt, that one may fulfill the essence of the mitzvah (*ikar mitzvah*) solely by traveling (*kesheholchin*) to visit the invalid in person...Without question the essence of the mitzvah is fulfilled solely when the visitor enters the invalid's room in the actual place wherein he is lying down upon his sickbed and joins him in his misery and prays on his behalf.<sup>13</sup>

In summary, there is no doubt that the ideal means of fulfilling the mitzvah of *Bikur Cholim* is to be present beside the invalid's bed in order to take care of any and all of his needs and to provide him with succor. Moreover, the visitor's mercy and empathy will be aroused by seeing the *choleh* in

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11. *Tzitz Eliezer, Ramat Rachel* 8.

12. Rav Halberstam's query concerned itself with *Bikur Cholim* by telephone, letter, and *shaliach* (messenger).

13. Rav Breisch maintains, as well, that any partial fulfillment of this mitzvah is not part of the commandment at all. Instead, it constitutes a subset of general *gemilut chasadim*.

*extremis*, and he will thereby pray for him with greater effort and compassion than if he did not stand before him. Thus, for most *poskim*, the modalities of letter, telephone, and messenger, at best, offer the would-be visitor an incomplete way of fulfilling this mitzvah.

### ***Bikur Cholim* and Video Conferencing**

The Oxforddictionaries.com defines a videoconference as: "a conference in which participants in different locations are able to communicate with each other in sound and vision."<sup>14</sup> This technology is extensively utilized in both the corporate and consumer environments; a search on Google.com using the term "video conferencing," provides a researcher with over 19 million references. Major companies use large screens and projectors, in conjunction with professional quality video cameras and speakers, to provide extremely immersive and realistic audio and video experiences. In many instances, these conferences have already replaced, or will soon replace, most corporate travel, since they offer tremendous cost savings and efficiencies in today's hyper-competitive business environment. A recent article on the prestigious British website, "Air and Business Travel News," suggests the following regarding the pace at which this process is poised to take place:

Video conferencing is going to replace more and more corporate travel in the near future, according to Regus' Simon Hunt. The product director for the serviced office and video conferencing provider said video will become more of an alternative to travel, with more meetings being done remotely. He said he expects a large increase in the use of videoconferencing in the next four or five months, as the technology and accessibility improves. The advent of HD [High Definition images] has changed people's

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14. [http://oxforddictionaries.com/definition/videoconference?\\_region=us#m\\_en\\_us1304181.003](http://oxforddictionaries.com/definition/videoconference?_region=us#m_en_us1304181.003).

perceptions of telepresence, he said: "You can feel like you're taking part in a meeting without actually being there." Hunt also said telepresence technology would soon be bookable through Microsoft Outlook, via an externally supplied plugin, which would make a dramatic difference to the ease of booking.<sup>15</sup>

The consumer space is a very different environment than the corporate world. Most private parties do not have hundreds of thousands of dollars to spend on huge screens and near-perfect audio equipment. Nonetheless, individual consumers are avid users of videoconferencing. The most widely used application in the private sector is software provided by Skype Limited, a company based in Luxembourg City, Luxembourg. Skype's software is available for all computer platforms, including Microsoft Windows, Apple Macintosh OS X, and Linux. Since this is a product designed for individual home-based users, relatively inexpensive audio and video hardware configurations are sufficient for quality videoconferencing – especially when the conference participants are using robust Internet connections.

In the context of the previously reviewed halachic decisions, we can now examine whether or not *Bikur Cholim* performed through videoconferencing allows the visitor to completely, or only partially, fulfill the mitzvah. As already noted, Rabbi Breisch adopted a maximalist position regarding *Bikur Cholim*. He demanded nothing less than the visitor's physical presence before the *choleh* in order to fulfill this commandment. While he by no means addressed videoconferencing, it is theoretically possible that he could have viewed such two-way audio and video communication between the patient and telepresence visitor as being the functional equivalent of

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15. <http://www.abtn.co.uk/news/0815632-video-will-replace-travel-says-regus-boss>, by Sara Turner, April 8, 2011. The article provides case studies where companies such as Ikea, have already saved very significant dollars by replacing corporate travel with corporate videoconferencing.

standing before the *choleh*. Thus, this form of communication could, indeed, provide a new and legitimate means of fulfilling the mitzvah of *Bikur Cholim*. In truth, however, we can only speculate as to how he might have ruled.

Like Rav Breisch, Rabbis Soloveitchik, Feinstein, Yosef, and Waldenberg did not directly address the topic of videoconferencing and *Bikur Cholim* in their responsa. Nonetheless, based upon the analyses of their positions regarding other modes of communication, it would appear that they would heartily endorse telepresence technology in the service of *Bikur Cholim*, and thereby recognize its halachic efficacy. Indeed, the only element of the total *Bikur Cholim* experience that is missing in this scenario is the ability to pray directly before the *Schechinah* who is present with the invalid. Thus, if we revisit Rabbi Feinstein's terminology, it appears that videoconferencing certainly constitutes a rigorous form of *kiyum hamitzvah* and allows the would-be visitor to be almost completely *yotzei yidei chovato*.

Further proof of the halachic legitimacy of utilizing telepresence technology to perform the mitzvah of *Bikur Cholim* was presented by the Chezinover Rebbe, in a question submitted to Rav Yitzhak Yaakov Weiss, the former Chief Rabbi of the Edah HaChardit in Jerusalem.<sup>16</sup> Amazingly, this question was submitted to Rabbi Weiss in 1956 – when this form of communication was a mere science fiction dream! Rabbi Weiss responded to Rabbi Halberstam in the following fashion:

In regards to our topic [i.e. *Bikur Cholim*], the words of his honored Torah [i.e. the Chezinover Rebbe] are both elegant and totally correct. If a television should ever be created for completely private use like telephones are today, and it will thereby be possible to see the patient and to speak with him, like a person speaks with his

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16. *Minchat Yitzhak*, II:84:10.

friend face to face, without question it will not be necessary to view [the *choleh* in order to fulfill the mitzvah of *Bikur Cholim*]; since it does not matter at all if there is or is not an actual [unaided] physical view of the patient.<sup>17</sup>

Clearly, for both the Cheziner Rebbe and Rabbi Weiss, there is no halachic difference whatsoever between being physically present or utilizing videoconferencing to create a telepresence. In both cases, one may completely fulfill the total obligation (*yotzei yidei chovato*) of *Bikur Cholim*.

### Conclusion:

The goal of this paper has been to examine modern modalities of *Bikur Cholim*, as viewed through the halachic lens of discernment of a number of recent *poskim*. We have seen that there are a variety of different opinions and approaches that either embrace or reject, in whole or in part, new technologies whereby the mitzvah of visiting the sick may in some manner be fulfilled.

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

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17. Rav Weiss further suggests, in accord with the Cheziner Rebbe's view, that while one can indeed fulfill the mitzvah of *Bikur Cholim* by calling on the telephone, this is only after one has already visited the invalid in person. In this way, a would-be visitor will not "stumble in the dark" and will know when his calls would be an intrusion or bring the *choleh* hope, encouragement, and comfort. Although this concept is presented immediately after the above-quoted passage dealing with videoconferencing, it appears that it does not apply to this concept and is limited to *Bikur Cholim* by telephone.

# What About – Joulies?

*Rabbi Dovid Cohen*

**Editor's Note:** The following article is actually an internal memorandum of the Kashrut Division of the Chicago Rabbinical Council (cRc). It deals with a new, technologically-based product whose use raises questions for observant Jews. The Journal of Halacha and Contemporary Society is publishing it here in order to apprise our readers of innovations which may impact their lifestyle. We invite others to bring to our attention new products or activities which are of interest to the Jewish public.

Two inventors came up with an interesting product that they called "Joulies" (pronounced "Joo-lees"). Each Joulie looks like a 2- inch long stainless steel coffee bean and is filled with a proprietary material. The material inside the Joulie is designed to absorb heat that is more than 140° F and then release that heat when the surrounding area cools below 140° F. Consumers are supposed to put Joulies into their coffee mugs so that the Joulies will quickly cool the coffee to a drinkable temperature; then, as the coffee cools, the "magic beans" release their heat and thereby maintain the temperature of the coffee. This article will address a number of questions (kashrut, Shabbat, and others) that are raised by this product. We will start with a more detailed description of the product.

## PCM

The company is understandably secretive about what the Joulies are filled with, but the cRc [Chicago Rabbinical Council] was able to come up with an educated guess as to what the material is. We based this on (a) the pieces of

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information they provided, (b) review of scientific literature on the topic, and (c) physical and chemical analysis of the material, as follows:

The company website and literature note that Joulies are “filled with a proprietary substance called a ‘Phase Change Material’ (PCM) that melts at 140°F and is 100% edible food-grade magic.” The company also told me (via email) that “the PCM inside is made from plants”.

We purchased a set of Joulies and had one cut open, revealing that the PCM is a white, waxy, somewhat-grainy material. When the (open) Joulie was put into boiling hot water, the PCM began to melt and the liquid floated to the top of the water. (After the water cooled, the liquid solidified.)

The following is a helpful definition of the term “Phase Change Material”:

PCM materials have high heats of fusion so they can absorb a lot of energy before melting or solidifying. A PCM temperature remains constant during the phase change, which is useful for keeping the subject at a uniform temperature.<sup>1</sup>

In other words, a PCM is a type of material which requires a relatively large amount of energy to convert it from a solid state/phase to a liquid state/phase (i.e., high heat of fusion) so that the material absorbs heat/energy as it melts (i.e., as it changes “phases”). Thus the material remains at a constant temperature (its melting point) as it changes from a solid into a liquid. When the surrounding material cools below the PCM’s melting point, the latent heat in the liquid PCM is released back into the surrounding material as the PCM changes back into a solid.

In recent years, a number of papers have been written in

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1. <http://www.colorado.edu/engineering/ASEN/asen5519/1999-Files/presentations/ben-mottinger.pdf>.

scientific journals<sup>2</sup> detailing the dozens of different PCMs available and describing the properties of each. Armed with the knowledge that the PCM used in Joulies has a melt-point of 140° F, is a food-grade material, is claimed to be made of plant materials, and has a solid waxy consistency at room temperature, we reviewed some of those articles to see if we could pinpoint which PCM is inside a Joulie. This investigation showed that the PCM used in Joulies is most likely palmitic acid which has a melting point of 61-64° C (142-147° F) or possibly myristic acid (which has a melting point of 49-58° C / 120-136° F). Both of these fatty acids have a relatively high heat of fusion (185-204 kJ/kg), are waxy solids at room temperature, and can be food-grade materials made of plant products. We then had a cRc certified company run the PCM through a Gas Chromatography (GC) Mass Spectrum which confirmed that it is, in fact, palmitic acid.<sup>3</sup>

## Kashrut

Palmitic acid is definitely a kosher-sensitive ingredient, as it is often derived from animal fat,<sup>4</sup> and even when it is derived

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2. For purposes of this investigation, the most helpful article was *Review on Thermal Energy Storage with Phase Change: Materials, Heat Transfer Analysis and Applications*, by Belén Zalba, José Marín, Luisa F. Cabeza, and Harald Mehling in *Applied Thermal Engineering* 23 (2003) 251–283 available at <http://ecaaser5.eca.ntu.edu.tw/weifang/pcm/Review%20of%20PCM.pdf>. Other articles can be found at <http://resource.tcc.edu.tw/resdata/3703/a%20review%20on%20phase%20change%20energy%20storage--materials%20and%20 applications.pdf>, <http://www.iea-shc.org/publications/downloads/task32-Inventory%20of%20PCM.pdf>, and [http://web.mit.edu/3.082/www/team2\\_s02/phase%20change.html](http://web.mit.edu/3.082/www/team2_s02/phase%20change.html).

3. The test also showed traces of oleic acid. Oleic acid is not a known PCM and therefore it is most likely that the traces of oleic acid are due to impurities in the palmitic acid rather than an intentional additive.

4. Palmitic acid (like most fatty acids) is isolated by “splitting” fats or oils at very high temperatures (~700° F) into two parts – glycerin and fatty acids. The mixture of fatty acids derived from the given fat or oil is then further processed at high temperatures (~150-250° F) to separate, purify, and deodorize them for use. The sophisticated equipment used for these

from plant materials, as the company claims,<sup>5</sup> the palmitic acid is commonly produced at high temperatures on large equipment which is also used for animal fat. Thus, even if the Joulie PCM is, in fact, “made from plants” it might not be kosher.<sup>6</sup>

There are, however, a few reasons why even if the PCM is not kosher, one might still be permitted to use it in hot kosher beverages.

Firstly, a Jew who tasted the PCM said that it was basically tasteless with a waxy consistency. If so, it would seem that we should be able to apply the ruling of Ramo, 103:2, that one does not have to be concerned about *b'liot* (absorbed taste) from forbidden items which are tasteless.<sup>7</sup> There are a number

processes is (a) at times used for both animal and vegetable products, (b) often not cleaned between products (since the products do not easily spoil, and the distillation and other purifications remove impurities), and (c) relatively large (such that absorbed non-kosher taste may not be *batel b'shishim* [nullified in a 1 to 60 ratio] into subsequent kosher products).

5. There may be basis for accepting the company's claim even as relates to a potential *issur d'oraitah* [violation of a Torah commandment] based on the principle of *אומנו לא מרע* (*Shach* 98:2 and *Iggerot Moshe* YD 1:55).

6. If the PCM is plant-based and is only non-kosher due to absorbed non-kosher taste, should we possibly apply the rule of *בלא רוטב יוצא...* *אין הכל愁* (*Shulchan Aruch* 105:7) and say that the absorbed *ta'am* cannot transfer into the stainless steel shell since there is no liquid medium between the PCM and shell? This suggestion is incorrect for two reasons: 1) The absorbed non-kosher animal fat is a *davar shamein* which most hold can transfer from food into a *kli* (utensil) without a liquid medium (see *Badei HaShulchan* 105:112), and 2) when the Joulie is put into hot water the PCM changes into a liquid!

7. This line of reasoning was suggested by R. Eli Leibenstein of Chicago. See *Aruch HaShulchan* 103:19 and *Pri Megadim* SD 103:2 who explain why the case of tasteless food is different than the case of *Shach* 103:2 about food which is *notein ta'am* (imparts a taste) but the *ta'am* does not contribute positive (or negative) taste into the kosher food.

If this line of reasoning is legitimate, it would seem that one could even *l'chatchilah* put the Joulie into hot coffee and it would not be considered *bitul issur l'chatchilah*, (deliberately nullifying something prohibited), because (a) in this case where no one will eat even a drop of the forbidden PCM, and there is no *ta'am* transferring into the coffee, it is not clear that this even

of concerns with this line of reasoning:

- It would seem that a decision that the PCM is tasteless should be based on the tastings of multiple people.

Whether other Jews are permitted to taste the *safeik issur* (possible, questionable prohibited item) and whether the permitted level of tasting is sufficient to determine that the food is tasteless is discussed in *Taz* 98:2, *Pri Megadim* ad loc, and *Yad Yehudah* 98:2. On the other hand, it may be sufficient that the gut reaction of all those who saw and touched the PCM was that it would be tasteless, and this may not be much different than *Ramo*, *ibid.*, who assumed that bee legs are tasteless even though we can only imagine that he never actually tasted them.

- Scientific reference works<sup>8</sup> indicate that palmitic acid has almost no “taste” but does provide some element of mouthfeel. Seemingly, mouthfeel qualifies as “*ta'am*” (taste) even if scientifically it may not be considered “taste”, which would imply that these items are not “tasteless”. On the other hand, it may well be that the subtleties detected by flavor chemists may be too insignificant to qualify as “*ta'am*” for the average person.
- *Torat Chattat* (*Ramo*), *Shach* and others say that nowadays one may not rely on a Jew’s tasting of a food to determine that it does not have a taste of meat so as to subsequently deliberately (*l'chatchilah*) mix it with dairy; rather, “tasting” (even by a Jew) is only relied upon for

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qualifies as *bitul issur* at all since the person is not putting *issur* into the *heter* (permitted), (b) there are those that hold that the *issur d'rabbannan* of *bitul issur l'chatchilah* does not apply to *safeik issur* (see *Badei HaShulchan* 99:29), and (c) this case may well qualify as **אין כוונתו לבטל** where *bitul issur l'chatchilah* does not apply.

8. Fenaroli page 1478 and Arctander 2447.

cases of *b'dieved* (post facto).<sup>9</sup> The reasons<sup>10</sup> given for this *chumrah* (stringency) would appear to apply also to determining that a food is tasteless. Does this mean that one may not *l'chatchilah* use Joulies in hot beverages even if multiple Jews and scientific publications would inform us that the PCM is tasteless?

- On the other hand, it may be that our case is somewhat more lenient due to the fact that (a) the PCM is only *safek issur* (questionably forbidden), (b) no one will ever eat the PCM but rather our concern is that it is *notein ta'am* into the beverage, and (c) the only way it can be *notein ta'am* is if taste passes through the metal shell, and the ability for *ta'am* to pass through metal is itself a *safek*.<sup>11</sup>

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9. *Shulchan Aruch* 98:1 codifies the Gemara's halacha that there are situations in which one can rely on a non-Jew's tasting of a food to determine that it does not have an absorbed non-kosher taste. Ramo records that the Ashkenazic custom is not to rely on a non-Jew's tasting under any circumstance. *Shach* 98:5 deduces from Ramo's wording that this custom is limited to a non-Jew's tasting, but if a Jew tastes a food and says that it does not have the taste of *issur* (e.g. *terumah*, meat), then one may rely on that determination and permit the food.

*Shulchan Aruch* 96:1 continues with this assumption and says that if a radish was cut with a meat knife, one may eat the radish with dairy if a Jew tastes the radish and determines that it does not have a meat-taste. However, *Torat Chattat* (Ramo) 61:1 and *Shach* 96:5 argue that although we have seen above that a Jew's tasting may be relied upon, that is limited to cases of *b'dieved* where the food was already mixed with *issur* (or the meat suspected of having absorbed a meat taste has already been mixed with dairy), but one may not rely on even a Jew's tasting to make a *l'chatchilah* (ab initio) decision to mix two foods together.

The use of a Joulie *l'chatchilah* in a kosher beverage based on a Jew's tasting of the PCM and determining that it is tasteless, would appear to be an example of the case where *Torat Chattat* and *Shach* say that one may not rely on even a Jew's tasting.

10. *Pri Megadim* SD 96:5 cites two reasons for this: 1) there may be a *mashehu* (smidgen) of taste, and 2) nowadays, we may not be sufficiently capable of detecting taste.

11. See *Shulchan Aruch* 92:5 and the *Poskim* ad loc. We calculated that each Joulie holds approximately 0.5 cubic inches of PCM and the company recommends that one Joulie be used for every 4 ounces of beverage. At that

In addition, Joulies are never used in a *kli rishon* (a primary cooking vessel) and the PCM only has contact with hot beverages as a *kli sheini* (secondary utensil).<sup>12</sup> If so, *ta'am* cannot transfer more than *k'dei klipah*,<sup>13</sup> which means that *ta'am* from the PCM cannot transfer through the *k'dei-klipah*-thick stainless steel shell. Therefore, even if the PCM is non-kosher, the status of the hot coffee or other beverage should not be affected by the PCM. [Furthermore, *b'dieved* one does not have to be concerned about the transfer of *ta'am* in a *kli sheini*.]<sup>14</sup> The concerns with this line of reasoning are:

- If a person would ever put his Joulies into the dishwasher – and if a dishwasher has the status of a *kli rishon*<sup>15</sup> – the (possible) non-kosher taste of the PCM would be fully absorbed into the stainless steel shell such that it could subsequently be released even with an *irui kli rishon*.<sup>16</sup>
- On the other hand, it is generally assumed that any *b'liah* that is extracted via an *irui kli rishon* (i.e. when coffee

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ratio, there is approximately 16 times as much beverage as PCM. [4 ounces is approximately 7.2 cubic inches, and the metal in the Joulie is approximately 0.8 cubic inches] That is not enough for *bitul b'shishim* but does somewhat minimize the concern, especially if the PCM is basically flavorless (see *Shach* 103:5).

12. The company advises that one put the Joulies into the mug before pouring the coffee in such a way that the outer shell's contact with the hot beverage is via *irui kli rishon* (pouring from the cooking utensil). However, as relates to the PCM (which is the potential non-kosher item) the contact is *irui kli rishon* which is *יריע דקילין*, which has the status of a *kli sheini* (Ramo 68:10). [If, as we suspect, some people put the Joulies into the mug after the coffee is already inside, even the contact with the shell will be as a *kli sheini*.]

13. See Ramo YD 92:7 and elsewhere. *K'dei klipah* refers to a thin layer.

14. Ramo 68:11.

15. For a thorough treatment of the status of dishwashers see the sources and discussion in the article on dishwashers by Rabbi Yisroel Rosen in *Techumin* 11.

16. In addition, should we be concerned that in the factory the Joulies are likely sealed shut with direct heat (welding), and therefore each was used as a *kli rishon* (albeit not in the presence of a kosher beverage)?

is poured over the Joulie) is *batel b'shishim* into the hot water.

## Summary

Joulies are filled with a material known as PCM that may possibly be non-kosher. The reasons to nonetheless consider permitting the use of Joulies in hot kosher beverages are that:

- The PCM is only *safek issur* (questionably forbidden).
- The PCM appears to be tasteless, such that (a) its *b'liot* cannot affect other foods, and (b) any minimal taste may possibly be *batel b'shishim* (see footnote 11).
- The PCM only has indirect contact with the beverage and it is a *safek* if (and how much) *ta'am* can pass through metal.
- The Joulies are only used in a *kli sheini*, such that (a) *b'liot* cannot pass through the shell, and (b) *b'dieved* we are not *machmir* for *kli sheini*.

Although there are questions on some of these individual reasons and some only apply *b'dieved*, it seems that the combination of all of these factors may be enough to permit the use of Joulies in kosher foods. Others will undoubtedly choose to be strict (*machmir*) and not use them due to the kashrut concerns.

Under the assumption that the use of Joulies does not pose a general kashrut concern, we now turn to some other questions that relate to their use.

## Other Kashrut Issues

Some of the leniencies noted above do not apply on Pesach,<sup>17</sup>

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17. For example, *b'liot* in a *kli sheini* are forbidden even *b'dieved* (Ramo 447:3 as per *Mishnah Berurah* 447:25).

and it therefore seems prudent to be *machmir* and not use Joulies (even new ones) on Pesach.

It is obvious that one may not use the same Joulie for both meat (e.g. soup) and dairy (e.g. coffee with milk). Furthermore, the custom is that if one owns two of the same item and one is designated for dairy use and the other for meat use, the one designated for dairy use should be "marked"<sup>18</sup> so that it will not mistakenly be used for the wrong use.

## Shabbat

The general rule is that the prohibition against cooking on Shabbat does not apply to foods which have already been cooked once before (אין בישול אחר בישול).<sup>19</sup> Foods which are in liquid form are an exception to that principle, because once the food cools down it loses its "cooked" status.<sup>20</sup> *Magen Avraham*<sup>21</sup> clarifies that as relates to this halacha ambient temperature animal fat has the status of a solid food even though it liquefies as it warms up. He therefore rules that the prohibition against cooking on Shabbat does not apply to animal fat which was cooked before Shabbat. We can apply this same principle to the palmitic acid PCM;<sup>22</sup> it was cooked before Shabbat<sup>23</sup> and is now in solid form such that if one

18. Ramo 89:4 (end).

19. *Shulchan Aruch* 318:15 as per *Mishnah Berurah* 318:92-93 & 95.

20. *Shulchan Aruch*/Ramo 318:15 as per *Mishnah Berurah* 318:24 & 99.

21. *Magen Avraham* 318:40 cited in *Mishnah Berurah* 318:100.

22. *Iggerot Moshe* OC 4:74:f (in the *bishul* section) and *Shmirat Shabbat K'hilchato* 1:58 (as explained there in footnote 173) disagree as to whether *Magen Avraham*'s leniency applies to butter which is cooked in a liquid form (as milk) and cools (i.e. attains an "un-cooked" status) before it solidifies, in the same way that it applies to animal fat which solidifies (i.e. becomes a solid) as it cools. However, the physical properties of palmitic acid are similar to that of animal fat (both solidify as they cool) and therefore all would agree that *Magen Avraham*'s ruling applies to PCM.

23. As noted in an earlier footnote, one step in separating fatty acids such as palmitic acid from oils (or fats) is to cook the oil at very high temperatures

would put a Joulie into hot water there would be no violation of the prohibition against cooking on Shabbat.<sup>24</sup>

However, it would seem that it is forbidden to use Joulies with hot beverages on Shabbat due to the *issur d'rabannan* of *nolad*, intentionally converting an item from solid to liquid form.<sup>25</sup> We have already seen that this change in form is critical to the Joulie performing its “magic”, and therefore that change is considered intentional and forbidden.

### *Tevillat Keilim*

The functional portion of the Joulie is the PCM which is a material that does not require *tevilat keilim* (dipping in a mikvah). However, since the stainless steel shell comes in contact with the food, and the Joulie would clearly not function without the shell, the Joulies must undergo *tevilat keilim* before they are used, and one should recite a *bracha* on that *tevillah*.<sup>26</sup>

### **Summary**

Joulies are filled with a material known as PCM that may possibly be non-kosher, but there are nonetheless reasons to permit their use in kosher beverages. Separate Joulies should be used for meat and dairy. One may not use Joulies on Shabbat, and it seems appropriate not to use them on Pesach. Before Joulies are used, they should undergo *tevillah* with a *bracha*.

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(~700° F) which obviously qualifies as a “cooking” for that oil.

24. In addition to the reason noted in the text there is no prohibition of *bishul* in this case because the Joulie is placed into a *kli sheini*.

25. Ramo 318:16 as per *Mishnah Berurah* 318:105. In our case, it appears that all conditions of *nolad* (a meaningful amount of liquid which does not immediately become mixed into another food) apply.

26. Based on Ramo 120:7 (end). *Chochmat Adam* 73:11 says that this type of case requires *tevillah* and the fact that he does not say “*tevillah* without a *bracha*” (as he does for other cases in that same halacha) implies that a *bracha* should be recited in this case.

## Letters

Dear Editor,

I read with great interest the article of Dr. Rosman, "Deactivating Implantable Pacemakers and Defibrillators in Terminally Ill Patients," in the Fall 2011 issue. It is an important contribution addressing a lacuna in the medical halachic literature. In the section discussing the halachic approach to deactivating defibrillators, Dr. Rosman suggests that deactivating a defibrillator is halachically equivalent to withholding a "painful therapy that is not directed at treating the underlying illness." For such therapies, the *poskim* mentioned, Rav Moshe, *zt"l*, Rav Shlomo Zalman Auerbach, *zt"l*, and Rav Elyashiv, *Shlit"a*, are in agreement that it can be permissible to withhold treatment. While there is ample logic to extend this *psak* to deactivating a defibrillator, there is one essential distinction between these cases.

In all the cases discussed by the aforementioned *poskim*, the withholding of treatment constitutes a passive act, or an act of omission (*shev v'al ta'aseh*). In contrast, however, the deactivation of the defibrillator is an act of commission, or *ma'aseh b'yadayim*. However, this *ma'aseh b'yadayim* is fundamentally different from other such acts in the medical context, such as disconnecting a ventilator, or the cessation of intravenous medication needed to maintain blood pressure. First, at the time of deactivation there is no direct impact whatsoever on the health of the patient, as the device is designed to deliver a shock only in the event of abnormal cardiac activity. In addition, it is by no means guaranteed that even if left in place, the defibrillator would ever fire, as a significant percentage of patients have no defibrillator activity after implantation.

These mitigating factors may indeed lead some *poskim* to permit the deactivation of a defibrillator, and it could very well be that Rav Moshe and Rav Shlomo Zalman Auerbach would have allowed such a procedure (though this is of course

speculative). However, according to Rav Yitzchak Zilberstein, with the concurrence of his father-in-law Rav Elyashiv, the removal or deactivation of a defibrillator is considered a halachically relevant action nonetheless, and is thus prohibited. [See Dr. Y. Kuperman and Rav Y. Zilberstein, "Disconnecting a Cardiac Defibrillator," (Hebrew) *Techumin* 30 (5770), 103-107.]

Rav Zilberstein does hasten to add an exception to this *psak* in the name of Rav Elyashiv. If the patient is adamant about the deactivation of the defibrillator, and the continuation of its presence will cause extreme anxiety and psychological (and possibly physical) detriment to him (*tiruf da'at*), it would be permitted to deactivate the defibrillator externally, though not to surgically remove it. Even this permissive ruling only applies if the following criteria are met: 1) The patient does not require frequent shocks, and the deactivation will not likely cause any immediate harm. 2) The patient will continue to receive excellent medical care. 3) If the patient sustains a cardiac arrest, routine CPR will be performed in the conventional fashion.

Rav Zilberstein does, however, allow a patient to refuse the initial implantation of a defibrillator, or even the battery replacement, if the patient feels that it would only prolong his life of suffering. These examples of acts of omission are perfectly consistent with the generally accepted approach of the *gedolei haposkim* mentioned above.

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To the Editor:

I have one question on Dr. Rosman's article on deactivating implantable pacemakers (Fall 2001, vol. LXII). You quote several *poskim* who discuss whether one needs to continue to

administer medicine that only temporally helps a suffering patient. You then conclude that since defibrillator therapy in terminally ill patients is painful and doesn't solve the underlying disease, it would be permissible to deactivate the defibrillator.

I was not convinced of the conclusion. There is a major difference between an active and passive action. The various *poskim* are discussing the question of whether one is required to give treatment to such a patient. Thus, withholding the treatment is a passive action which they permit under appropriate circumstances. Deactivating the defibrillator is an active action which it is not clear they would also permit.

Sincerely

ELI TURKEL

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Dr. Rosman responds:

It was brought to my attention by Rabbi Dr. Edward Reichmn that Rav Elyashiv discussed the issue of deactivating a defibrillator. In *Techumin* 30 (5770), pp. 103-107, Rav Zilberstein quotes his father-in-law Rav Elyashiv as saying that in general it is prohibited to deactivate a defibrillator. Rav Elyashiv would only permit deactivation if a terminally-ill patient is adamant that the defibrillator be deactivated and not honoring his request may cause psychological damage. Rav Elyashiv reiterates that once the defibrillator has been deactivated the patient should still receive optimal medical treatment including resuscitative efforts.

Since almost a third of defibrillator patients receive shocks in the last couple months of their lives,<sup>1</sup> patients request their defibrillators be deactivated because they are fearful of receiving shocks. In my experience, these patients are extremely anxious about defibrillator therapy and are often

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1. See *Nishmat Avraham, Yoreh Deah*, vol. 2:339.

adamant about deactivating their defibrillator. Rav Elyashiv is of the opinion that everything should be done to prolong life in a patient who is suffering from his terminal illness. Even he would permit that under the above circumstances it would be permissible to deactivate a defibrillator.

In response to Eli Turkel's letter to the editor that "deactivating the defibrillator is an active action" and *poskim* only permit "passive actions":

There is a major difference between defibrillator therapy and the therapies that the *poskim* discuss. Therapies such as intravenous hydration, nutrition, antibiotics and chemotherapy are all designed to prolong life by treating patients' medical deficiencies (hydration, nutrition) or medical illnesses (antibiotics, chemotherapy). The positive act of withdrawing these therapies has an immediate harmful effect on the patient. It directly shortens life by eliminating that supporting therapy or treatment. Defibrillator therapy is neither a supportive therapy nor a treatment. It is a heart monitor that will shock only if the patient has a lethal heart rhythm. Therefore the act of deactivation has no immediate harmful effect on the patient. It does not curtail life: rather it allows for the patient to die without shocking and possibly reviving the patient. This is truly a unique form of therapy, and deactivating a defibrillator should not be compared with withdrawing other therapeutic modalities.

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Dear Editor,

I want to elaborate on a statement that I made in my article regarding inappropriate shocks.

Terminally-ill patients are more prone to receive inappropriate shocks for non-lethal heart rhythms (the defibrillator misdiagnoses the patients' heart rhythm).<sup>2</sup> There

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2. Lewis WR, Luebke DL, Johnson NJ, et al, "Withdrawing Implantable

is evidence that these inappropriate shocks have a detrimental effect on the heart and actually increase mortality (further studies evaluating this relationship are ongoing).<sup>3,4</sup> In addition, most terminally ill patients will die from their underlying illness and not sudden cardiac death (ventricular tachycardia or ventricular fibrillation). It is therefore important to consider that in the last few months of life the benefits of a defibrillator are limited.

JONATHAN ROSMAN, MD

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Dear Rabbi Cohen,

I hope you do not mind me asking you a question on your article on Artificial Insemination, from 1987.

In the final paragraph of the article, you translate Rav Moshe's *z"tl teshuva* from 22 Kislev 5725. In the final sentence you translate, "...under no circumstances should anyone be lenient on this other than an outstanding rabbi."

When I followed the footnote to the *Chelkat Yaakov* and looked it up (<http://www.hebrewbooks.org/908> *teshuva* 16), the final sentence seems to say, "under no circumstances should anyone be lenient on this, even an outstanding rabbi."

The difference being one letter in one word - "ach" or "af".

Am I correct in my reading? Is there another source that supports the translation that you provided?

Thank you.

SIDNEY GOTTESMAN

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Shock Therapy in Terminally Ill Patients," *Am J Med* 2006;119:892-896.

3. Daubert JP, Zareba W, Cannom DS, et al, "Inappropriate implantable cardioverter-defibrillator shocks in MADIT II: frequency, mechanisms, predictors, and survival impact," *J Am Coll Cardiol* 2008;51:1357-1365

4. Poole JE, Johnson GW, Hellkamp AS, et al, "Prognostic importance of defibrillator shocks in patients with heart failure," *N Engl J Med* 2008;359:1009-1017

Rabbi Cohen responds:

I have reviewed the sources you sent me, and actually Rav Moshe Feinstein's *teshuva* (responsum) says both what you say and what I said. This responsum, as you note, does not appear in *Iggerot Moshe* but was published in *Tzvi Chemed*, p. 34. Rav Breisch, author of *Chelkat Yaakov*, wrote to Rav Moshe about the latter's lenient rulings on artificial insemination and mentioned this responsum, which you quoted, wherein Rav Moshe cautioned that this halachic question should only be answered by **גדול בתורה ומפורסם בהוראה**, "someone who is great in Torah and well-known as one who issues rulings." Further on in the same responsum, Rav Moshe wrote that if it is possible that others who are not qualified to make such a ruling will do so anyway, **צריך לנדר גדר שלא יתирו זה בשום אופן אף רב היוטר מובהק**, "it is necessary to erect a barrier so that no one will permit this [artificial insemination], even the most expert rabbi." In the letter which appears in *Chelkat Yaakov*, dated 22 Kislev, 5725, Rav Breisch proceeds to request that inasmuch as Rav Moshe himself expresses concern that unqualified individuals might misuse the lenient rulings, he should publicly announce that his rulings were in error and he is hereby retracting them. But in his response to Rav Breisch, which is the very next entry in the *Chelkat Yaakov*, dated 24 Kislev, 5725, Rav Moshe refuses to go along with this request, and Rav Breisch notes that despite the exhortations of his colleague, Rav Feinstein did not change his mind.

Thus, it is evident that R. Moshe both urged that only highly qualified individuals should rule on this issue, and also contemplated disqualifying anyone at all from ruling on this – yet, ultimately he was not prepared to withdraw his lenient opinions. I appreciate your letter, which pointed out what is correct and afforded me the opportunity to clarify this issue.

Dear Rabbi Siev,

I enjoyed your article on "Saving lives: Are there Limits?" (JHCS LXII, Fall 2011). In section IV you discuss saving the masses. I just wanted to add to this the thoughts of Rav J.B. Soloveitchik that one is permitted and perhaps obligated to give up one's life for the masses.

Rav Soloveitchik, cited in *Noraot Haarv* Vol. 10, pp. 58-61, discusses whether one can or should sacrifice his life to save the community. He brings the story of Rav Mann in Vilna in the late 1700s, who confessed to stealing an icon from the church in order to save the community of Vilna. The Rav of Vilna wanted to consult with the Vilna Gaon but then Rav Mann told him that he had already made up his mind to sacrifice himself. He was then executed on the first day of Shavuot. After his death all the synagogues of Vilna twice a year said a *Kel Maleh Rachamim* including the phrase "the soul of the holy R. Mann the son of R. Mann".

Rav Soloveitchik taught that the *heter* for such behavior comes from Queen Esther who was told by Mordechai that it was her obligation to sacrifice her life in order to save the community. Furthermore, this is the primary lesson derived from *Megillat Esther*.

Sincerely,

ELI TURKEL

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