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Editor**

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

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

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

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Pens, Pads, and PCs – Writing on Shabbat for Medical Care ¹

Dr. Raphael Hulkower

When visiting your doctor in the past year or two, you may have noticed something different. Rather than holding a chart, clipboard, or prescription pad, your physician may be sitting behind a computer screen or typing with a laptop or Ipad. While there is a valid concern that this new interface will diminish the humanism ingrained in a doctor-patient interaction – you may be facing the computer instead of a human face – computer technology can improve the quality and efficiency of medical care. By recording and storing information via computer, often termed an Electronic Medical Record (EMR) or Electronic Health Record, vital patient information is more readily available, less likely to be misplaced, and easier to transfer between the myriads of medical personnel involved in patient care. With one mouse click, orders can be sent from a doctor to a nurse; prescriptions can be “Eprescribed” directly to a pharmacy; and notes from a biopsy performed ten years ago can be available in just moments.

The use of electronic medical records stems not only from the desire to improve patient care, but also as a necessary

1. The author wishes to thank Rabbi Dr. Edward Reichman for his support and advice in writing this article.

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response to the changing demands of the modern medical system. Over the centuries, as medical care moved from the home to the hospital, patients began to be treated by teams of physicians, residents and nurses instead of the town doctor. With this change, recording information became an integral part of medical care. Concomitantly, the need for Jewish physicians to be able to record medical information on Shabbat also took on much greater importance. Rabbi Levi Yitzchak Halperin eloquently describes this change:²

In the past...a doctor decided upon management and administered it himself. In rare circumstances of need, [Jewish doctors] would record information on Shabbat and Yom Tov by asking a non-Jew. If one was unavailable, they used clinical judgment to determine if the illness was life threatening to permit writing. In contrast, in our times, medical care is centralized in large hospitals with care provided by medical teams that turn over between night and day, requiring the transfer of information from one team to the next...As one physician cares for many patients, he would not be able to remember the condition of each one without writing down the information. Similarly, one patient is treated by many personnel, requiring they all receive the same information.³

Rabbi Halperin remarks that while asking a non-Jew (*amira l'nachri*) to record medical information on Shabbat is halachically ideal, it is not always practical. Given the volume of writing needed in hospitals, there may not be enough manpower to ask others to write notes – doing so would lead to significant delays or errors. Thus, knowledge of the laws of writing (*ketiva*) and medical care (*refuah*) on Shabbat is

2. Founder and executive director of the Institute for Science and Halacha.

3. Rabbi Levi Yitzchak Halperin, "Medical Recordings on Shabbat, Introduction to chapter 10 (Hebrew)," *Sh"ut Maaseh Choshev* Volume 2. (Jerusalem: Institute for the Study of Technology and Halacha, 1985).

essential to Jewish medical professionals who may be required to record information on Shabbat. The first two sections of this article, therefore, are dedicated to the intersection of these two areas of halacha in order to provide a fundamental understanding of how and when a physician may write on Shabbat. The third section of the article addresses novel technological solutions to writing on Shabbat, from using disappearing ink to computer use and electronic medical records. The modernization of medical care has created new difficulties in Shabbat observance, especially regarding writing; but perhaps it also provides new solutions.

Does the Electronic Medical Record complicate Shabbat observance, or perhaps it provides new solutions?

The laws of Shabbat and of medical care are sensitive and complicated areas of halacha. This article provides a thorough analysis, but is not meant to replace the dialogue a medical professional needs to have with his/her own halachic authority.

This is especially true in that as much as writing has become an integral part of the medical system, not all writing is essential for immediate medical care of Shabbat. If one has the choice to minimize or avoid writing altogether without impacting patient care, this option should always be pursued.⁴

4. To illustrate this point, an observant attending Jewish medical professional may choose to make rounds with his or her team and verbally discuss the plan, but may consider recording the note after Shabbat has ended. While the note is essential for proper patient care, waiting until after Shabbat to perform the act of writing, even via computer, may not impact patient care. Similarly, many consult services will triage the patient they need to see. If a patient is stable, perhaps the actual note can be recorded on Saturday night, even if the recommendations can be verbally expressed to the primary team on Shabbat. Alternatively, many hospitals, especially those with electronic medical records, enable doctors to correct or addend their notes. In this way, a physician may record only the medical information pertinent to patient care on Shabbat, while after Shabbat correcting or adding any other non-essential information that is needed for hospital policy or educational reasons.

Section One: Writing on Shabbat

As with all *melachot*, the act of writing is prohibited on Shabbat based upon its role in the construction of the *Mishkan*.⁵ The *Mishkan*'s walls consisted of large pillars of acacia wood, which were gilded with gold and then labeled to ensure that the same arrangement was maintained each time the *Mishkan* was erected. Writing was used to make the symbol on each pillar to identify its correct position.⁶

In order to violate the biblical prohibition of writing, one must write in a manner which resembles the writing performed in the *Mishkan*; other forms of writing may still be prohibited on a rabbinic level. Accordingly, writing on Shabbat only violates the biblical prohibition when it meets the following criteria regarding quantity, language, meaning, performance and permanence of the writing:

- *Quantity*: The writing must contain at least two letters or symbols which can be brought close enough together to be read consecutively.⁷ Writing one letter or symbol may still involve a Torah violation due to the concept of *chatzi shi'ur*.⁸ Writing two letters is a biblical violation even if the two letters do not form a word, such as writing *aleph aleph* in Hebrew or "AA" in English.⁹ This is

5. BT *Shabbat* 49b.

6. BT *Shabbat* 103b. See also *Avnei Nezer* O.C. 199:10, who offers additional reasons: Moshe had to keep an inventory of all the materials donated for the *Mishkan*. Alternatively, the breastplate the high priest wore contained the names of the twelve tribes carved out onto its stones – and this carving is considered writing.

7. *Shulchan Aruch, Orach Chaim* 340; *Mishnah Berurah* 22.

8. *Shulchan Aruch Orach Chaim* 340; *Mishnah Berurah* 3. In brief, where a specific *shiur*, or quantity, is given for a prohibition, the purpose of the quantity is to know when one is obligated to bring a sacrifice. However, below this quantity one has still violated a Torah prohibition, but is not required to bring any sacrificial offering.

9. *Shuchan Aruch* O.C. 340; *Mishnah Berurah* 22.

especially relevant when writing shorthand, such as “BB” for Beta Blockers, or “CP” for chest pain.

- *Language*: Regarding the language of the writing, the Ramo rules that writing on Shabbat in any language beside Hebrew is only a rabbinic prohibition.¹⁰ The *Mishnah Berurah* argues that the Ramo’s decision is based only on the opinion of the *Ohr Zarua*, has no basis in the Talmud, and is disputed by all other authorities.¹¹ The *Nishmat Avraham*, however, notes that there are other *Rishonim* and *Achronim* who agree with the *Ohr Zarua*.¹²
- *Meaning*: The Rambam writes that not only does writing letters involve a biblical prohibition, but inscribing two meaningful symbols is similarly a violation.¹³ According to the Rambam in his *Perush HaMishnayot*, by symbols he means the use of letters to represent numerical values, such as *aleph* for number one, or *mem* for number forty.¹⁴ The *Maggid Mishneh*, however, quoting Rabbeinu Hai Gaon, understands the Rambam to be including symbols that are not letters.¹⁵ The *Mishnah Berurah* follows the interpretation given by the *Perush Hamishnayot*.¹⁶
- *Performance*: In practice we follow the Talmud’s

10. *Shulchan Aruch* O.C. 306:11. The Ramo also includes writing in Hebrew script as a rabbinic prohibition. Only Hebrew writing in *Ketav Ashuri* is considered to be a full Torah prohibition according to the Ramo.

11. *Shulchan Aruch* O.C. 306, *Mishnah Berurah* 47, and *Biur Halacha* ad loc; *Shulchan Aruch* O.C. 340, *Mishnah Berurah* 22.

12. *Nishmat Avraham Orach Chaim* 340, section 4.

13. *Mishneh Torah*, *Hilchot Shabbat* 11:10.

14. *Perush HaMishnayot*, *Shabbat* 12:3.

15. *Maggid Mishneh* ad loc, Rambam *Hilchot Shabbat* 11:10. Cf. *Shulchan Aruch HaRav*, *Orach Chaim* 340:7-8, who rules that writing any non-letter symbol is a rabbinical prohibition. However, he says this is only true if the symbol does not resemble letters at all, while even non-letter symbols that are commonly used are also considered to be in the same category as regular letter-based writing and would be biblically prohibited.

16. *Shuchan Aruch* O.C. 340, *Mishnah Berurah* 22.

majority opinion that only writing with one's dominant hand is a biblical prohibition, as writing with one's weak hand is not considered normal "writing." This is a unique concept by the *melacha* of writing, since regarding other *melachot* on Shabbat the violation is equal whether performed with the left or right hand. Thus, writing with one's weaker hand is only rabbinically forbidden. Similarly, if someone writes with the dominant hand but in a back-handed manner (*Shinui*), such as holding a pen upside down and flipping over the hand – this only involves a rabbinical prohibition since it is not normative "writing."¹⁷ If inverting one's hand is also not feasible, the *Nishmat Avraham* suggests that holding a pen in one's dominant hand between the fingers without the use of a thumb may also be considered writing in an unconventional manner.¹⁸

- *Permanence*: As the original writing performed in the *Mishkan* was meant to be enduring (having the letters rub off the pillars after a few days' journey in the desert would not have been helpful), only permanent writing on Shabbat violates a biblical prohibition. If one writes with either a non-permanent ink or uses a non-permanent surface, this writing is only prohibited rabbinically. Of note, writing on one's skin is considered permanent writing even though it will fade with time, since the skin itself is a permanent material but the skin's biological functioning causes the writing to erase. Furthermore, combining non-permanent ink with a non-permanent surface material still involves a rabbinical prohibition.¹⁹ The time period required for a material to be considered "permanent" will be discussed later.

17. *Shuchan Aruch* O.C. 340, *Mishnah Berurah* 22.

18. *Nishmat Avraham Orach Chaim* 340, section 2.

19. *Shuchan Aruch* O.C. 340, *Mishnah Berurah* 22. Writing with pencil is considered permanent writing according to the *Mishnah Berurah*.

The purpose of this discussion is to highlight what type of writing is prohibited biblically versus rabbinically, as this distinction is important in caring for patients with differing levels of medical need. However, all these forms of writing are still prohibited under normal circumstances.

Section Two: Medical Care (*Refuah*) on Shabbat

There is a constant tension between medical care and *hilchot Shabbat*. On the one hand, the very consumption of medicine is rabbinically prohibited on Shabbat to prevent people from grinding fresh medicine, a Torah prohibition of *tochein* (grinding).²⁰ Furthermore, for violating the Torah prohibitions against performing work on Shabbat, one may be liable for capital punishment.²¹ On the other hand, Jewish law is permeated by the concept that one may violate nearly all Jewish laws in order to save a life, *pikuach nefesh docheh kol hamitzvot*, a concept learned out from the famous phrase “*Vechai Bahem*.”²² One is even allowed to violate Shabbat when there is only the possibility that this will save a life, a *safek pikuach nefesh*.²³ A detailed discussion on this subject is beyond the scope of this article. However, a brief review of the basic principles of *refuah* on Shabbat is prudent for our purposes.

20. Shulchan Aruch, O.C. 328:1.

21. *Sefer HaChinuch*, Mitzvah 32; Rambam *Hilchot Shabbat* 1:1.

22. *Vayikrah* 18:5; Rambam *Hilchot Shabbat* 2:1. Shulchan Aruch O.C. 329:1. Yomah 85b states, “*Vechai Bahem, ve’lo sheyamut bahem*” – you shall live by them (the Torah’s laws) and not die by them. The Talmud there also suggests other reasons why one can violate Shabbat to save a life, including the rationale of Rabbi Shimon ben Menasya – “violate one Shabbat on his [the sick person’s] account, in order that he will observe many Shabbatot”. The Talmud concludes that of all the sources, the source of *Vechai Bahem* is superior because it also teaches that one may violate Shabbat where there is only a possibility of saving a life, a *safek pikuach nefesh*, either because one is not sure if the person requires assistance or because he is not sure the assistance will be of any avail.

23. BT Yomah 85b. See above footnote as well; Rambam *Hilchot Shabbat* 2:1; Shulchan Aruch O.C. 329:3.

This section will provide an overview while also applying these laws specifically to medical writing.²⁴

The laws of medical treatment on Shabbat are addressed in many chapters of the *Shulchan Aruch*. However, an entire chapter is dedicated to treating sick people on Shabbat, *Siman* 328. Based upon the four (or five) categories of sick people which are commonly discussed by the medieval commentators,²⁵ this chapter provides a type of “halachic triage” of people requiring medical care. Interspersed among the laws relating to specific medical ailments, chapter 328 outlines the extent to which Jewish law may be abrogated corresponding to the specific ailment’s level of severity; additionally, the chapter discusses who may perform the legal violations and in what manner. As such, sick individuals are separated into the following four (or five) general halachic-medical categories, from least to most severe:

1) *Michush*: A person suffering “minor pain or discomfort”.

1b) *Miktzat Choleh*: A person suffering significant pain or discomfort in part of the body but who is not sick enough to be considered a full *Choleh*. This intermediate category is not discussed by most *Rishonim* but is quoted in the *Shulchan Aruch*.

2) *Choleh She’ein Bo Sakanah*: A “non-critically ill

24. One should bear in mind that throughout this discussion and application, only writing that is necessary for patient care is permitted. When the option to avoid writing altogether is safely available, this option should be adopted even if it will require extra time later on the part of the physician.

25. For examples of the *Rishonim*’s descriptions of the categories of sick people, see *Beit Yosef Orach Chaim* 328:1; *Ritvah Shabbat* 129b s.v. *Davar She’ein bo Sakanah*. Ran on *Shabbat perek Shemoneh Sheratzim* 39b s.v. *U-meha* and *V’Nimtzeit*. All three commentators describe four clear categories: Critically ill patients, endangered limbs, non-critically ill patients, and minor pains. See also Rambam *Hilchot Shabbat* 6:9 and *Shulchan Aruch* O.C. 307:5 who seem to introduce a fifth category, *Miktzat Choleh*.

person" who is not in danger of losing life or limb, but is sick enough to be bedridden OR has an ailment causing pain in the entire body.

3) *Sakanat Ever*: A person who is in "danger of losing a limb" but whose life is not in danger.

4) *Choleh She'yesh Bo Sakanah*: A "critically ill person" whose life is in danger.

The following discussion will explain the basic laws relating to each of these categories and concisely address their specific application to medical writing on Shabbat.

***Michush*:** A *michush* refers to a minor pain or discomfort, such as mild heartburn or headache, or to a person suffering these commonplace aches and pains. As the *Shulchan Aruch* writes, this person "walks about strong and healthfully" as if nothing is wrong. For such minor ailments, no laws may be violated, even rabbinical laws, even when performed by a non-Jew. Furthermore, they may not even take medication, because this might lead one to grind fresh medicine on Shabbat.²⁶

As one is not permitted to violate any part of halacha on behalf of a michush, this category is not relevant to our discussion of writing on Shabbat for patient care, as all forms of medical writing still involve at least a rabbinic prohibition even in the best of circumstances.

***Miktzat Choleh*:** A *miktzat choleh* is a person suffering from an ailment which is neither a danger to life nor limb, does not affect his whole body nor cause him to be bedridden (i.e, not severe enough to be a *choleh she'ein bo sakanah*), but which causes more significant suffering than the minor pains of a *michush*. This intermediate category is not explicit in chapter 328 of the *Shulchan Aruch*, but is addressed in chapter 307. For

26. *Shulchan Aruch* O.C. 328:1. Examples include: Minor toothaches, headaches, heartburn, allergies and minor infections such as a mild cold. For a more extensive list, see R. Bodner's *Halachos of Refuah on Shabbos*, pp. 3-4.

such an ailment one is allowed to ask a non-Jew to perform a rabbinic prohibition. As the act of asking a non-Jew to perform work on Shabbat is itself only a rabbinic prohibition, the combination is termed a *shevut d'shevut* and is allowed when significant suffering is present. This person may not take medication as this still involves a rabbinic prohibition.²⁷ Possible examples of this category include a painful case of eczema or fungal infection, a first degree burn, or a strained joint.²⁸ *Although technically asking a non-Jew to write in a rabbinically prohibited manner would be allowed for such a person, there are conceivably few situations where this would be medically helpful.*

Choleh She'ein Bo Sakanah: This category of “non-critically ill” patients refers to all individuals who are not suffering from life-threatening illness, but are still sick enough to be bedridden, or who are not bedridden but suffer to the point that *chalah mimenu kol gufo*, “his entire body hurts.”²⁹ In other words, a person suffering “incapacitating” illness. Examples include second degree burns; acid reflux, arthritis, headache, menstrual cramps, muscle strain or sciatica, vertigo, diarrhea or constipation *if they are severe enough* to be incapacitating; “pink eye”; moderate fever; chronic internal organ disorders; a *mild* asthma attack.³⁰ This category is the most nuanced halachically, and correspondingly complex in its application to medical writing on Shabbat. For the needs of such a patient, a non-Jew may be asked to violate even Torah prohibitions on the patient’s behalf.³¹ What violations a Jew may perform

27. *Shulchan Aruch* O.C. 307:5 and 328, *Mishnah Berurah* 52.

28. Rabbi Michael Chizkiyah, *The Halachic Guide to Medical Practice on Shabbos*, (Michigan: Targum/Feldheim, 2005), 171-172. For a more extensive discussion on *Miktzat Choleh*, see chapters 29-30 of R. Chizkiyah’s *Guide*.

29. *Ramo to Shulchan Aruch* O. C. 328:17. *Ramo* explains that such suffering is viewed as if he is bedbound.

30. Rabbis Yisroel Bodner and Daniel Roth, *Halachos of Refuah on Shabbos* (Jerusalem: Feldheim, 2008), 133-303.

31. *Shulchan Aruch* O.C. 328:17 and *Mishnah Berurah* 47 ad loc. This

himself on behalf of a *Choleh She'ein Bo Sakanah* is a more complicated matter. The *Shulchan Aruch* quotes three different opinions.³² The first opinion, that of the *Tur* based on the Rambam, holds that a Jew may violate rabbinic prohibitions on behalf of such non-critically ill patients, and such actions may be performed in a regular manner.³³ The second opinion, that of the Ran, holds that a Jew himself may not perform even rabbinic prohibitions *even with a shinui* for a non-critically ill patient as long as a non-Jew is available instead.³⁴ Finally, the third opinion, which the *Shulchan Aruch* himself endorses,³⁵ is that of the Ramban. The Ramban holds that a Jew personally may perform rabbinic prohibitions for a non-critically ill patient, so long as the prohibition is done with a *shinui*, in an unconventional manner.³⁶ According to this third opinion of the Ramban, a Jew may perform the rabbinic violation with a

understanding appears to be held by all halachic opinions. See Ritva *Shabbat* 129b s.v. *Davar She'ein bo Sakanah*; Ran on *Shabbat*, perek *Shemonah Sheratzim* 39b s.v. *V'Nimtzeit*; Rambam *Hilchot Shabbat* 2:10.

32. *Shulchan Aruch* O.C. 328:17. The *Shulchan Aruch* does quote a fourth opinion, also based upon the Rambam. According to this fourth opinion, if the rabbinic violation *resembles* a Torah *melachah*, then it may not be performed by a Jew himself; otherwise it may be performed by a Jew himself – similar to the first opinion cited.

33. *Tur*, *Shulchan Aruch* 328:17. The *Tur* writes that his father, the Rosh, was unsure whether a Jew is allowed to violate a rabbinic prohibition with his own actions for such a non-critically ill patient, or whether one is only allowed to ask a non-Jew. Although asking a non-Jew, *amirah l'nachri*, is technically also a rabbinic prohibition, the fact that it is done by speech alone without action makes it a lower level violation. However, the *Tur* continues that the Rambam (*Hilchot Shabbat* 2:10) allows a Jew to perform rabbinic violations with his own actions on behalf of a non-critically ill person just as he may perform *amirah l'nachri*. See also *Maggid Mishneh* on Rambam *Hilchot Shabbat* 2:10, who clarifies that this is indeed the Rambam's opinion although not seen clearly in the text of the Rambam itself.

34. Ran on *Shabbat*, perek *Shemonah Sheratzim* 39b s.v. *V'Nimtzeit*.

35. *Shulchan Aruch* O.C. 328:17.

36. Ramban in *Torat Ha-Adam*, "*Sha'ar Ha-Michush*." Quoted in *Chidushei Ramban* on *Beitzah* 22a. Also quoted in *Tur*, *Shulchan Aruch* 328:17.

shinui, even if a non-Jew is available.³⁷ The *Mishnah Berurah* notes that the *Taz*, *Magen Avraham* and Vilna Gaon also follow the Ramban, and that even the second opinion agrees that if a non-Jew is unavailable, a Jew himself may violate rabbinic law with a *shinui* to help a *choleh she'ein bo sakanah*.³⁸

In application to medical writing, this ruling of the *Shulchan Aruch* dictates that if necessary medical information must be recorded for a non-critically ill patient, such notes should ideally be written by a non-Jew. Indeed, the *Nishmat Avraham*, Rabbi Dr. Abraham Abraham, writes in many of his works that discharge papers for a non-critically ill patient must only be written by a non-Jew. A Jewish doctor may not write the note himself even with a *shinui*, since presumably the Ramban's opinion only allows Jews to perform rabbinic prohibitions with a *shinui*, while writing in most cases involves a Torah prohibition.³⁹ However, as noted above, the Ramban's opinion, as understood by the *Mishnah Berurah*, would allow a Jew to write with a *shinui* if the writing performed involves only a rabbinic violation. Modern applications of this idea will be discussed later in this article.

37. *Mishnah Berurah* 54 ad loc.

38. *Mishnah Berurah* 53 and 57 ad loc.

39. *Nishmat Avraham Orach Chaim* 340:Notes 7 and 26 in Hebrew Edition; 340:4 (page 239) in English Edition; Abraham, Abraham, *Halachot for the Physician on the Shabbat & Festivals*. (Jerusalem: Rimonim, 1995), p. 36.

Of note, *Nishmat Avraham* also writes that one is allowed to ask a non-Jew to write the emergency room discharge papers even for a *healthy patient* if doing so will make more beds available for other sick patients to be treated, since this is considered a *tza'ar l'rabbim*. Also, regarding discharge papers from the medical wards, *Nishmat Avraham* makes it clear that he is discussing a situation where such papers are assisting in the care of the patient – for example if by leaving the hospital the patient will be able to better obtain follow-up treatment. However, one wonders whether this factor is essential when dealing with large volume hospitals. In such hospitals, even if discharging the patient is not related to their care, the discharge may free up more beds allowing patients waiting in the emergency room to receive care quicker, and would appear to be comparable to the situation of *tza'ar l'rabbim* that *Nishmat Avraham* mentioned specifically by emergency room beds.

Thus far, we have assumed that the Ramban's allowing a Jew himself to perform *melachot* on Shabbat with a *shinui* for a non-critically ill patient applies only to rabbinic prohibitions. While this understanding is directly stated by the *Mishnah Berurah*⁴⁰ and *Chayei Adam*,⁴¹ and clearly implied in the wording of the *Shulchan Aruch*,⁴² this assumption is not explicit in the words of the Ramban himself. In fact, the Ramban's language can be understood to mean that a Jew may perform even a *Torah prohibition* with a *shinui* on behalf of a non-critically ill patient, since the *shinui* downgrades the violation to the rabbinic level.⁴³ This approach is taken explicitly by *Shulchan Aruch HaRav*, *Eglei Tal*, *Tehillah L'David*, and *Ketzot HaShulchan*.⁴⁴ The *Nishmat Avraham*, as well, records that Rabbi Shlomo Zalman Auerbach stated that since all these halachic

40. *Shulchan Aruch* O.C. 328, *Mishnah Berurah* 54.

41. *Chayei Adam*, *Klal* 69 section 12. *Chayei Adam* also says that "the majority of the *poskim*" side this way as well.

42. *Shulchan Aruch* O.C. 328:17.

43. Ramban in *Torat Ha-Adam*, "*Sha'ar Ha-Michush*." Quoted in *Chidushei Ramban* on *Beitzah* 22a. The Ramban writes: "A person with an ailment that causes him to be bedridden but not in [mortal] danger, one may perform on his behalf the *shevut* (rabbinic prohibition) that does not have an action, which is *amirah l'nachri*. So, too, they permitted the *shevut* of an action performed with a *shinui*." Note, however, that the Ramban does not say explicitly that the *shinui* is being done with a rabbinic prohibition, but rather that the *shevut* is the performance of the *shinui*. The source of ambiguity in the Ramban lies in the fact that one can also read the Ramban's words to mean "they permitted the *shevut* of an action (pause, i.e. already a *d'rabanan*) that is performed with a *shinui*". It should also be noted that the Ramban still does not allow one to perform a regular rabbinic violation without a *shinui*. Thus, according to this explanation of the Ramban, a *Torah prohibition* performed with a *shinui* is viewed even more leniently than other rabbinic prohibitions, just as *amira l'nachri* is viewed. For an explanation of why this should be true, see *Badei HaShulchan* note 6 on *Ketzot HaShulchan* 134:4.

44. *Shulchan Aruch HaRav*, *Orach Chaim* 328:19; *Eglei Tal*, "*Melecheth Tochein*" 17:38 part 10; *Tehillah L'David*, *Orach Chaim* 328 note 22; *Ketzot HaShulchan* 134:4. The *Eglei Tal* specifically notes that he is "bothered" by the language of the *Shulchan Aruch* which clearly implies that one may only perform a rabbinic prohibition with a *shinui* when the Ramban in truth allows even a *Torah prohibition* with a *shinui*.

authorities allow a Jew to perform a Torah prohibition with a *shinui*, “it makes sense that one is definitely allowed to be lenient when it is not possible to have the violation performed by a non-Jew.”⁴⁵

In summary, according to the *Shulchan Aruch*, *Chayei Adam* and *Mishnah Berurah*, regarding a non-critically ill patient, a Jew himself may only perform a rabbinic violation in an unconventional manner – but he may do so even if a non-Jew is available. Other halachic authorities hold that one can even perform a Torah prohibition if done in an unconventional manner – but many of them stipulate that this is only to be done when asking a non-Jew is not possible.

In application to writing on Shabbat, these opinions who argue with the *Shulchan Aruch* and *Mishnah Berurah* would allow a Jew himself to write necessary notes, records, or prescriptions for a non-critically ill patient as long as the writing is performed with a *shinui*. However, one can only follow this approach when a non-Jew is unable to perform the act. This ruling and its application to writing as well are quoted in Rabbi Michael Chizkiyah’s *The Halachic Guide to Medical Practice on Shabbos*. Rabbi Chizkiyah writes:

*When necessary, and there is no non-Jew available, a Jew may record the required information in an unconventional manner (shinui), for example, by writing with his left hand or by holding the pen so that it points up and flipping over his hand to write.*⁴⁶

45. *Nishmat Avraham*, *Orach Chaim*, Introduction to *Siman* 328, page 389 in Hebrew second edition.

46. Chizkiyah, *Halachic Guide to Medical Practice on Shabbos*, p. 122. See footnote 3 there as well. See also Bodner and Roth, *Halachos of Refuah on Shabbos* p. 49 (English sub-text marked with asterisk). R. Bodner notes that many *poskim* only allow one to perform a rabbinic prohibition with a *shinui*. However, one may rely on the lenient views “where it is greatly needed for the incapacitated person (*choleh she’ein bo sakanah*)” which includes performing a Torah prohibition with a *shinui* as well as a rabbinic prohibition **without** a *shinui*.

Finally, it should also be noted that although the Ramban's opinion only allows a Jew to perform a Shabbat violation with a *shinui*, the *Mishnah Berurah* cites the *Chayei Adam's* opinion that when it is not possible to perform a rabbinic prohibition with a *shinui*, one may perform the action **without** a *shinui*.⁴⁷ As Rav Moshe Feinstein notes, this approach is further supported by the fact that the first opinion quoted in the *Shulchan Aruch* also holds one may perform a rabbinic prohibition without a *shinui* for a non-critically ill patient.⁴⁸ (This leniency is extremely important to note in discussing the use of electronic medical records, as the use of a computer may involve only rabbinic prohibitions, but one may not be able to perform them with a clearly defined *shinui*. It is conceivable that Rav Moshe and the *Mishnah Berurah* would allow such medical writing, when necessary, despite this lack of *shinui*.)

***Sakanat Ever*:** "An endangered limb" refers to injuries or ailments that pose a risk of losing function of a limb, but are not life threatening. This category most commonly applies to fractures of the arms, legs, fingers, and toes, but also includes deep cuts (of the hand), frostbite, herniated disks, as well as ear and eye ailments, such as infections or glaucoma.⁴⁹ An endangered limb is viewed more seriously in halacha, and therefore one is required to be more lenient regarding violating Shabbat on such a patient's behalf. In addition to allowing one to ask a non-Jew to violate even Torah prohibitions for a *sakanat ever*, all three opinions quoted in the *Shulchan Aruch* (see previous section) allow a Jew himself to violate rabbinic prohibitions, even without a *shinui*.⁵⁰ As it is often difficult for the average person (or many physicians) to

47. *Shulchan Aruch* O.C. 328, *Mishnah Berurah* 102.

48. *Iggerot Moshe, Orach Chaim Chelek* 3, number 53.

49. For more examples, see Bodner and Roth, *Halachos of Refuah on Shabbos* p. 133-303.

50. *Shulchan Aruch* O.C. 328:17.

know with certainty that a limb is at danger, one should note that a possible risk to a limb is also treated as an endangered limb.⁵¹ (It should also be noted that at times an endangered limb may also pose a great risk for infection, as with an open fracture or a severed limb, and should be treated as a life-threatening situation in such a case.)

Accordingly, one may ask a non-Jew to perform essential medical writing on behalf of a person whose limb is at risk, but a Jew himself may not write in a normal manner. However, writing in an unconventional manner (with the non-dominant hand, or with a hand flipped over) would be permitted as well since this only involves a rabbinic prohibition. Furthermore, this category presents another situation which may be dramatically impacted by the institution of electronic medical records – since this may present another method for writing which involves only rabbinic prohibitions.

***Choleh She'yesh Bo Sakanah*:** This category of “critically ill” patients refers to all people suffering an injury or illness which poses a threat to life. This includes a situation where there is only a doubt that the situation is life threatening.⁵² *Choleh She'yesh Bo Sakanah* is the paradigmatic situation referred to when halacha states that *pikuach nefesh* overrides all other mitzvot. As the *Shulchan Aruch* writes, violating Shabbat for such a person is not only allowed, but “a mitzvah for which a person who is proactive should be praised and those who ask questions are murderers.”⁵³ This category includes all internal injuries (except where it is well known that the specific injury is *not* life threatening), as well as many other specific conditions mentioned in *Shulchan Aruch Orach Chaim Siman* 328.

51. *Minchat Shlomo, chelek* 2, section 34:36.

52. BT Yoma 85b; Rambam, *Hilchot Shabbat* 2:1; *Shulchan Aruch* O.C. 329:3.

53. *Shulchan Aruch* O.C. 328:2.

While one is allowed to violate Shabbat on behalf of such patients, how freely may this violation be performed? Rambam and *Shulchan Aruch* state that when violating Shabbat to save these patients, the violations should not be performed by non-Jews or minors, but rather by “the well learned and the leaders of the Jewish people.”⁵⁴ However, the Ramban holds that when treating critically ill patients, one should minimize Shabbat violations or at least perform them with a *shinui* or via a non-Jew – provided that doing so will not delay the treatment.⁵⁵ Although some *poskim* do follow the Rambam,⁵⁶ the Ramo himself states that our custom is to follow the Ramban and try to minimize Shabbat violations when doing so will not impact patient care.⁵⁷ The *Mishnah Berurah*, quoting the *Taz*, explains that as this is not a long-standing custom, if one believes that a Jew will be more proactive in caring for the patient, one need not ask a non-Jew for assistance even when available.⁵⁸

In applying this principle to medical writing on Shabbat, therefore, one is allowed to perform necessary writing on behalf of a critically ill patient – even in a regular manner. However, whenever possible, one should still try to minimize the Shabbat violations – either by asking a non-Jew to write, by writing with a shinui, or perhaps by finding ways to write that only violate rabbinic prohibitions. If fact, many of the discussions of alternative forms of writing, such as invisible ink, were written in the context of treating life-threatening illness – with the goal of minimizing Shabbat violations – not in the context of non-critically ill patients.

54. Rambam, *Hilchot Shabbat* 2:3; *Shulchan Aruch* O.C. 328:12. Based upon Yoma 84b.

55. Ramban’s *Torat Ha-Adam* “*Sha’ar Sakanah*”, quoted in *Maggid Mishneh* on Rambam, *Hilchot Shabbat* 2:11.

56. See *Sh”ut Or L’Tzion*, *Chelek 2 Siman* 36 note 3.

57. Ramo on *Shulchan Aruch* O.C. 328:12.

58. *Shulchan Aruch* O.C. 328, *Mishnah Berurah* 37.

Section three: Advanced Writing Technologies

Thus far this article's discussions on the laws of writing and medical care on Shabbat have been based upon purely halachic concepts and practices which were easily available centuries ago. However, the technological revolution of the 20th century has provided new possibilities to address the subject of necessary medical writing on Shabbat.

The technologic impacts on medical writing are primarily based upon the idea that writing must be considered "permanent" to violate Shabbat on a biblical level. Work on Shabbat is defined based upon the "work" done in constructing the *Mishkan*. This highly detailed work required "skilled" or "calculated" labor – thus *melachah* which violates Shabbat must be done in a very skilled or calculated fashion, termed *melechet machshevet*.⁵⁹ So, too, only writing in a skilled fashion, as performed in the *Mishkan*, is a Torah violation of Shabbat. In addition, one must determine what actions are defined as *ketiva*, "writing," as discussed in section one. In order for technologies to be helpful in allowing one to perform medical writing on Shabbat, they must make use of one or both of these principles – they must either be done in a fashion which is not deemed to be *melechet machshevet* or not be considered writing by definition.

Disappearing (or Invisible) Ink⁶⁰

The first technology to make use of the principle of non-permanent writing on Shabbat was the disappearing ink pen. Disappearing or invisible ink is by no means a new technology. Now mostly marketed for toys or pranks, it was

59. See Rashi on *Baba Kamma* 26b s.v. "*Melechet*" and *Chagigah* 10b s.v. "*Melechet*" where *Melechet Machshevet* is defined as intentional or calculated labor. See Rashi on *Beitzah* 13b s.v. "*Eleh*" where it is defined as skilled labor.

60. Disappearing ink is often referred to as invisible ink but truly invisible ink is not useful for medical purposes.

once considered an essential part of national security or international espionage. In fact, in April 2011, the CIA released some of its oldest classified documents, including papers from 1917 instructing agents how to make invisible ink.⁶¹ Invisible ink is mentioned in the Talmud, discussing a divorce bill written in ink that only appears once a chemical is poured over it.⁶² Disappearing ink became an important part of the modern halachic world in Israel during the 1970s. Israeli scientists and rabbis working at the Institute for Science and Halacha as well as Zomet realized that writing was an essential part of record keeping necessary to run hospitals even on Shabbat. They developed special pens using disappearing ink – ink which lasted long enough for the information to be transcribed or photocopied after Shabbat or Yom Tov, but which disappeared fast enough for the original writing to be considered “non-permanent writing.”⁶³

Halachic Status of Non-Permanent Writing

The permissibility of such disappearing ink pens, called a Shabbat Pen (*Shabbat Eyt*) by Zomet, is based upon the following halachic discussion. The Mishnah in *Shabbat* 104b

61. Brett and Kate Mckay, “Man Knowledge: The History of Invisible Ink,” *The Art of Manliness*. September 9, 2011. Downloaded 2012-04-19 from <http://artofmanliness.com/2011/09/09/man-knowledge-the-history-of-invisible-ink/>; Bill Miller, “The Very Visible Battle Over Invisible Ink”. *Los Angeles Times*. June 13, 2001. Downloaded 2012-04-19 from <http://articles.latimes.com/2001/jun/13/news/cl-9673>. The papers were scheduled to be declassified earlier, but in 1999 the CIA requested that the documents remain in secret as they were still relevant to security.

62. BT *Gittin* 19b. See also Talmud Yerushalmi *Shabbat* 12:4.

63. Ari Goldman, “Religion Notes,” *The New York Times*. May 18, 1991. Downloaded 2012-04-19 from:

<http://www.nytimes.com/1991/05/18/us/religion-notes.html>. See also Clyde Haberman, “Alon Shevut Journal; Thank the Lord for Loopholes: Sabbath is Safe,” *The New York Times*. December 19, 1994. Downloaded 2012-04-19 from <http://www.nytimes.com/1994/12/19/world/alon-shevut-journal-thank-the-lord-for-loop-holes-sabbath-is-safe.html?src=pm>.

states that one is only biblically liable for writing on Shabbat if the writing is permanent:

If one wrote with liquids, with fruit juices, in the dirt of the roads, or with scribes' dust, or with any other matter that is not lasting, he is exempt [from bringing a *chatat* offering].⁶⁴

Although the Mishnah rules that one is not liable for writing with a non-permanent ink, a *davar she'eino mitkayem*, the *Ohr Zarua* and *Shulchan Aruch* rule that such writing still involves a rabbinic prohibition.⁶⁵ The Tosefta on *Shabbat* adds that one is exempt from a biblical violation not only when writing with non-permanent ink, but also when the surface onto which one writes is non-permanent.⁶⁶ The Rambam incorporates both the Mishnah and Tosefta into his Code of Law, ruling that one must write both with a permanent ink and on a permanent surface in order to be liable for writing on Shabbat.⁶⁷

In explaining why writing with a non-permanent ink or onto a non-permanent surface is not a biblical violation of the laws of Shabbat, one may take two different approaches. The most straightforward approach is that the Mishnah on *Shabbat* 104b and the Tosefta are simply applying a general rule regarding the laws of Shabbat specifically to the act of writing. An earlier Mishnah (*Shabbat* 102b) in the same chapter explains that one is liable for *all melachot* performed on Shabbat only if the result is lasting. Seemingly, the Mishnah about writing with non-permanent materials is demonstrating how this general rule applies to the *melachah* of writing.⁶⁸

64. BT *Shabbat* 104b.

65. *Shulchan Aruch* O.C. 340:4 and *Mishnah Berurah* 18; *Ohr Zarua chelek* 2, no. 76.

66. Tosefta *Shabbat* chapter 11, halacha 8 (Lieberman Edition).

67. Rambam, *Hilchot Shabbat* 11:15.

68. Rabbi Joshua Flug takes this approach as well in "The *Melacha* of Writing on Shabbat," *YUTorah.org*.

Rabbi Levi Yitzchak Halperin takes a different approach. Rabbi Halperin notes that there is a parallel Mishnah and Tosefta in *Gittin*, which state that in order for a divorce bill to be valid it must be written with permanent ink on a permanent surface. Obviously the principles of the laws of Shabbat do not apply to divorce documents. Rather, Rabbi Halperin deduces from these parallel sources that non-permanent writing by its nature is *not considered writing itself*. Therefore, the Mishnah on *Shabbat* 104b is teaching that non-permanent writing on Shabbat is not a biblical violation because the act itself is not “writing” in halacha. This is aside from the fact that such writing would not qualify as skilled labor, *melechet machshevet*, as explained by the Mishnah on *Shabbat* 102b, since all *melachot* must be enduring to meet this criterion.⁶⁹

A Major Debate: What Time Period is considered “Non-Permanent”?

While non-permanent writing does not violate Shabbat on a biblical level, the length of time that defines “temporary” writing is subject to dispute. The key to this dispute stems from the interpretation of a single word in the previously cited Mishnah on *Shabbat* 102b:

69. Rabbi Levi Yitzchak Halperin, “Ketiva al gabei davar she’eino mitkayem,” *Halacha U’Refuah*, Volume 1 Jerusalem: Regensberg Institute, 1980), 237-255. R. Halperin notes one distinction between non-permanent ink and non-permanent surfaces. Writing with a non-permanent ink is not liable by Shabbat law and is not a valid *Get* according to all opinions. Writing on a non-permanent surface, however, is subject to a dispute concerning a *Get*. Most *poskim* hold that such a *Get* is invalid on a biblical level, but Rambam disagrees. Thus for Rambam, while writing with a non-permanent ink is not considered “writing,” writing onto a non-permanent surface is considered halachic writing still valid for *Gittin*. Such writing is not a biblical violation of the laws of Shabbat because this process is still lacking in *Melechet Machshevet*, as it is not considered like skilled writing performed in the *Mishkan*.

This is the rule: Whoever performs work, and his work endures “*b’Shabbat*” is liable [to bring a *chatat* offering].⁷⁰

The word “*b’Shabbat*” is ambiguous, leading the medieval commentators to interpret this Mishnah in differing ways. According to the majority of *Rishonim*, including Rashi, Ran, Meiri, and *Tosafot Yom Tov*, the word “*b’Shabbat*” is detailing *when* the work is being performed – “on Shabbat.” According to these *Rishonim*, the Mishnah reads, “Whoever performs work and his work endures, and this work was done on Shabbat, he is liable.” While this appears to be the mainstream interpretation of the Mishnah, it is not without obvious difficulties. For example, the *Pri Chadash* asks why the Mishnah needs to state that the work is being done on Shabbat. This is obvious, as the entire Tractate *Shabbat* is dealing with Shabbat!⁷¹

This is in contrast to the opinion of the Rambam. The Rambam records this general rule of the Mishnah at the end of his discussion of the *melachah* of dyeing.⁷² While the Rambam’s language lends itself to the same ambiguity as the Mishnah, his choice to include the word “Shabbat” in his concise rulings implies that the term is necessary as it defines temporary vs. permanent for all *melachot*. Thus, for the Rambam, the Mishnah reads, “whoever performs work and his word endures *for the duration of Shabbat*, he is liable.”⁷³ This interpretation of “*b’Shabbat*” is simpler in language, but it brings up a conceptual difficulty which Rashi avoids. According to the Rambam, whenever any work or writing

70. BT *Shabbat* 102b. The word “*b’Shabbat*” is deliberately not translated as its meaning is the cause of debate.

71. See Rav Mordechai Eliyahu’s “Ketiva Cheyunit B’Shabbat B’Deyo Mitnadef” in *Techumin* 11, pp. 107-112, for a discussion of possible answers to the *Pri Chadash*.

72. Rambam, *Hilchot Shabbat* 9:13.

73. The understanding of the Rambam is also stated by the *Maggid Mishneh* ad loc.

lasts until the end of Shabbat, that act is a violation of Shabbat. This would mean that whether the work was done one minute after Shabbat starts and lasts nearly 24 hours, or was done at the end of Shabbat and lasts only a few minutes, in both cases the act would equally be viewed as a violation of Shabbat.

The *Sha'ar HaTzion* explains that this dispute regarding the definition of temporary work applies to the *melachah* of writing as well.⁷⁴ Thus, according to the Rambam, if one writes with ink that will last until the end of Shabbat, this writing is considered permanent and violates Shabbat biblically. However, according to Rashi, writing which lasts even beyond the end of Shabbat may still be considered “temporary writing” and may be useful in medical situations.

This dispute between Rashi and Rambam was applied in practice to the disappearing ink “Shabbat pens.” Rav Shlomo Zalman Auerbach permitted the use of such pens for necessary medical purposes, despite the fact that the pen’s ink does not disappear for a few days.⁷⁵ Rav Auerbach permitted the use of such pens based on a number of points. First, the act of writing must be similar to writing performed in the *Mishkan* which was used to label the pillars to keep their order. This writing was intended to last an indefinite period of time, certainly longer than the duration of Shabbat or a few days. Second, Rav Auerbach brings support from other *Rishonim* such as the Rashba, who explains that although writing does not need to last forever to be considered “permanent” as in the *Mishkan*, it must last a “significant period of time.” People do not regularly write anything important with the intention that it only last one day.⁷⁶ Third, Rav Auerbach provides examples

74. *Sha'ar HaTzion* 303:68.

75. Presumably to allow for situations where Yom Tov falls out next to Shabbat so that the writing cannot be re-written or copied for a number of days. This also allows a small time buffer for safety even after a regular Shabbat.

76. R. Auerbach references the *Mishnah Berurah* and *Nishmat Adam* who

where both the *Shulchan Aruch* and Rambam permit writing which may last longer than one day.⁷⁷ Finally, Rav Auerbach adds an extra reason for leniency. If one is writing in a language other than Hebrew, or at least in Hebrew script, such writing involves only a rabbinic violation according to the *Ohr Zarua* and other authorities.⁷⁸

In contrast to Rav Auerbach's position, Rabbi Yitzchak Yaakov Weiss, author of *Minchat Yitzchak*, believes that the use of disappearing ink pens whose writing lasts longer than a day violates a biblical prohibition. Rav Weiss states that he too reads the Rambam to mean that writing (or any *melachah*) is considered permanent once it lasts for the duration of Shabbat, and notes that this understanding of the Rambam was also the view of the *Chemdat Israel*, Rabbi Meir Dan Platzki. Rabbi Weiss believes that this opinion should be followed in practice for multiple reasons. First, he notes this is the clearest understanding of the Mishnah on *Shabbat* 102b. Second, Rabbi Weiss contends, the other *Rishonim* only argue with the Rambam on how to interpret the Mishnah; however, they may still agree with the Rambam in practice. Third, Rabbi Weiss references the same Rashba mentioned above by Rav Auerbach, but believes that it supports his view instead. He explains that the Rashba's point is that writing does not have to be everlasting to be considering "permanent." Rather, it must remain long enough to be useful in *sefer zichronot*, in record keeping. Rabbi Weiss explains that if a doctor is writing

also understood that halachic writing must last for a large period of time (certainly longer than one day).

77. The *Shulchan Aruch* permits one to scratch a mark on parchment even though such marks last at least a day. The Rambam himself rules that one is liable for writing on one's skin since the fading is due to the body's warmth. Rav Auerbach argues that the body's heat should be irrelevant, since writing on one's skin lasts longer than a day anyway, and should be considered permanent according to the Rambam's understanding of the Mishnah.

78. *Sh"ut Minchat Shlomo*, *Siman* 91, section 11. Also previously published in *Halacha U'Refuah*, Volume I.

with a disappearing ink pen in order to last long enough to re-copy the information later, then that time frame is considered “permanent” since the ink lasts long enough to serve the required function. Finally, he also cites examples supporting his approach.⁷⁹ These points taken together, Rabbi Weiss concludes saying that writing “which lasts at least **one day** and is done with full intention, *melechet machshevet*, to remember the information, involves a biblical violation.” However, he does acknowledge a weakness in his “one day” position, since the language of the Rambam implies that the definition of “permanence” is lasting until the end of Shabbat, regardless of when the writing was performed.⁸⁰

In response to Rabbi Weiss, Rabbi Halperin wrote an article further explaining the position of Rav Auerbach. He adds that the early 20th-century *posek*, *Ketzot HaShulchan*, Rabbi Avraham Chaim Naeh, explicitly stated that Rashi’s interpretation of the Mishnah is followed in practice. In addition, Rabbi Halperin states that one should feel comfortable going against the Rambam’s opinion because there are two majorities (*rov*) against it.⁸¹

Rav Mordechai Eliyahu also adopts the approach of Rav Shlomo Zalman Auerbach in his article in *Techumin* journal. Rav Eliyahu concludes by mentioning that normally when doctors or security personnel write down information they intend for that information to last an extended time period,

79. For example, regarding *Gittin* (divorce papers), the *Biur Halacha* rules that writing on food substances is considered permanent, despite the fact that many foods will not last even a few days before decomposing. R. Weiss also notes that the *Sha’ar HaTzion* implies that he follows the Rambam. See *Sha’ar HaTzion*, *Siman* 303, number 68.

80. *Minchat Yitzchak*, *chelek* 7 *Siman* 13, previously published in *Halacha U’Refuah*, Volume 1.

81. Rav Halperin, *Halacha U’Refuah*, Volume 1. First, most opinions differ with Rambam and hold that both non-permanent ink and surfaces are *not* considered “writing.” Second, most of the commentators do not follow his interpretation of the Mishnah on *Shabbat* 102b.

and never have the intention to copy the information at a later point. Therefore, this system of writing with disappearing ink and then copying the information after Shabbat is certainly not considered the normal manner of writing, and the original document is considered “non-permanent.” Rav Eliyahu concludes that it is preferable for physicians or soldiers to use such ink for essential writing on Shabbat, and recommends they try to use their weaker hand as well when possible to further minimize the Shabbat violations.⁸²

Pens in Practice

Thus, according to both Rav Shlomo Zalman Auerbach and Rav Mordechai Eliyahu, writing may endure longer than Shabbat itself and still be considered “temporary.” What remains to be determined is the specific time limit which defines “permanent.” Neither Rav Auerbach nor Rav Eliyahu address this directly and only speak of writing that will last two or three days as being permitted – enough time to be useful in most Shabbat or Yom Tov situations. Rabbi Halperin suggests defining “permanence” based upon the only *melachah* where the time limit of permanence is outlined – “tying knots.” Based upon Rashi’s discussion of types of knots, knots tied to last forever are biblically prohibited, while knots released every “week or month” are prohibited rabbinically.⁸³ Therefore, a knot which lasts less than a week is considered “non-permanent.” Similarly Rabbi Halperin extrapolates that writing which endures less than a week should still be deemed temporary writing.⁸⁴

This analysis is particularly important as the assumption

82. Rabbi Mordechai Eliyahu, 1, *Techumin*, Volume 11, pp. 107-112.

83. Knots untied every day are permitted. Rashi ad loc *Shabbat* 112a. See also *Shulchan Aruch* O.C. 317:1 and the *Mishnah Berurah’s* Introduction to *Siman* 317.

84. Rabbi Levi Yitzchak Halperin, “Storing Non-permanent Writing,” chapter 15 (Hebrew), *Sh”ut Maaseh Choshev* Volume 2. Jerusalem: Institute for the Study of Technology and Halacha, 1985.

that disappearing ink pens last 2-3 days is not always true – it depends upon the conditions. Rabbi Halperin notes that if the writing is left out in the open, it lasts for about 2 days. However, if the writing is placed in a drawer, it disappears in less than 24 hours. Alternatively, if the writing is placed in a protective nylon, the writing can last more than 40 days! In an experiment by the author of this article with Zomet's "Shabbat Pen," the ink lasted less than 24 hours when left in open air, and closer to 3-4 days in a filing cabinet.⁸⁵ (Also the ink does not disappear uniformly – letters become illegible early or later depending upon how firmly one pressed the pen tip.) These facts have significant consequences in both directions. Physician need to recognize that such notes, if filed away improperly, may disappear before they have a chance to copy the information, possibly leading to significant medical errors. Alternatively, improperly protected notes may last too long to be considered non-permanent, even according to Rav Auerbach and Rav Eliyahu.⁸⁶

Rabbi Halperin also warns that some disappearing ink reappears if heat is applied. This may be more problematic, since for *Gittin*, *Ritva*⁸⁷ and Rabbi Akiva Eiger hold that

85. All test writing was performed on a weekday with the date and time written on a piece of paper and observed every few hours for one day and then daily until the ink disappeared.

86. R. Halperin, *Sh"ut Maaseh Choshev*, Volume 3, pp. 233-239. For more on storing disappearing ink, see R. Halperin's *Sh"ut Maaseh Choshev* Volume 2, chapter 15. He writes that the ink should last less than 7 days without storage techniques. If it is essential to store the writing for longer, and the ink will disappear within 30 days, one may rely upon the Rashba (*Baba Kamma* 3a) who views the ink's life span based on its original potential and views external means of lengthening as *grama*. This may help those who want to be stringent for the opinion of the *Minchat Yitzchak*: If one devised a pen that lasted 24 hours or less naturally, but stored it in a protective sleeve which still allows the ink to disappear within 30 days. However, normally we do not follow this Rashba, but rather Tosafot and Rambam who considered this a Torah prohibition. See *Shulchan Aruch*, *Choshen Mishpat*, *Siman* 386:3.

87. *Ritva* ad loc *Gittin* 19b.

invisible writing that can be reconstituted is considered enduring.⁸⁸ When tested by the author of this article, Zomet's "Shabbat Pen" did *not* reappear when heat⁸⁹ was applied to the ink.

In concluding the discussion of disappearing ink, it is worth noting that no explicit mention is given as to when it is appropriate to use such pens. The halachic discussion revolves around the level of the prohibition, but no distinction is made between critically ill and non-critical patients.⁹⁰ Many authorities mention that obviously such pens are only intended for medical purposes, but they use terms such as "necessary" or "essential" writing instead of halachic categories. Perhaps they realized that in medicine there is not always a clear line dividing critically ill and non-critically ill patients, and that the threshold for using this pen should depend more upon the physician's judgment of what writing is "essential" to be recorded on Shabbat and what may wait. Some writing is nonessential even for a critically ill patient, such as a phone number; some writing is essential even for a non-critically ill patient, who may be in severe pain in need of a prescription.⁹¹ Alternatively, perhaps these halachic authorities were simply ruling that such pens involve only a rabbinic prohibition of writing. Thus, as discussed in section two, using a disappearing ink pen with a *shinui* (using the left hand or flipping over the wrist) would allow one to use this

88. R. Halperin, *Sh"ut Maaseh Choshev*, Volume 3, pp. 233-239.

89. A blow dryer was used on its highest settings at close range for approximately 3-5 minutes.

90. See http://www.yutorah.org/lectures/lecture.cfm/760955/Rabbi_Chaim_Eisenstein/Shabbat_21-koteiv-scrabble_and_how_to_write_on_shabbat; Also http://www.yutorah.org/lectures/lecture.cfm/763180/Rabbi_Ezra_Schwartz/Writing_and_Erasing_on_Shabbos_Part_2. Both Rabbi Eisenstein and Rabbi Schwartz understand that these pens are being used even for *choleh she'ein bo sakanah*.

91. This attitude was expressed to me by Rabbi Yisrael Rosen, Dean of Zomet, in a phone conversation.

pen for even non-critically ill patients.⁹² Whether a particular case is considered a great enough need to rely upon the more lenient views who allow one to perform a rabbinic prohibition without a *shinui* would depend upon the severity of the situation and the reason why a *shinui* could not be added.

Electromagnetic Records – or Writing that is Invisible to the Human Eye

As technology advanced, rabbis and scientists continued to look for ways to record information while minimizing Shabbat violations. Their efforts were inspired by two reasons. First, using disappearing ink has shortcomings. The pens are prone to tragic errors, since vital information is lost when medical personnel neglect or are unable to copy the information before the ink fades. Second, the increasing demands of running hospitals on Shabbat in Israel require that more efficient methods be arranged. The use of data storage on electromagnetic tapes was the next advance in medical “writing” or record keeping on Shabbat. Although this technology is now outdated, the halachic discussion has more modern applications as well.

Rabbi Halperin, in his responsa, *Maaseh Choshev*, discusses novel ways to record necessary medical information that minimize Shabbat desecration. The key topic discussed is the idea of verbally recording medical notes onto tapes, later using machines to read out the information.⁹³ The initial question which gives rise to this discussion is whether one is responsible for actions performed via voice. Based upon talmudic precedent in the laws of torts and Shabbat, Rabbi Halperin asserts that performing an action with one’s voice or breath is considered like performing an action with one’s own

92. Perhaps this is the implication of Rav Mordechai Eliyahu’s concluding remarks when he says that one should also try to write with the left hand when using these pens.

93. R. Halperin, *Sh”ut Maaseh Choshev*, Volume 2, chapter 10.

hands.⁹⁴ Thus, the point of using voice-based writing was increased efficiency, rather than an attempt to minimize Shabbat violation. However, Rabbi Mordechai Torczyner claims that perhaps voice recordings minimize violations compared to typing, because one only needs to turn the tape on and off once, in contrast to performing numerous pen or key strokes.⁹⁵ Nevertheless, this may depend on the type of voice recorder, as voice-activated recorders may turn each sound into a new on/off action.

When recording onto an electromagnetic tape, microscopic magnetic changes are made on the tape which are not visible to the human eye. While these markings are not considered “writing,” they may still be considered *roshem* – “marking.” The act of making a mark is related to, or incorporated in, the *melachah* of writing, as the Mishnah states:

One who writes two letters, whether with his right hand or his left hand, whether with one (type of) character or two, whether with one ink or two, in any language, is liable. Rabbi Yose said: They only obligated a person for [writing] two letters because of marking (*roshem*), because they used to write on the pillars of the *Mishkan* in order to know next to which pillar it should be placed.⁹⁶

While R. Yose believes that making a mark involves a Torah prohibition, how should one understand the position of the Sages with whom he argues? According to Rashi, Tosafot, Meiri, and Ran, the Sages believe *roshem* is a rabbinic

94. Ibid., pp. 172-73. R. Halperin bases his argument on multiple cases in the Talmud. Most notably, the Mishnah on *Baba Kamma* 90a states that one is monetarily responsible for damage caused by shouting in another person's ear. This is based upon Rashi's second interpretation ad loc. In addition, *Shabbat* 75b records that one violates Shabbat for the act of blowing glass.

95. Rabbi Mordechai Torczyner, “Medical Halachah: Data Entry on Shabbat.” YUTorah.org.

96. *Shabbat* 103a.

violation.⁹⁷ Rambam, however, believes the Sages agree that *roshem* is a biblical violation, but view it as a derivative (*tolda*) of the *melachah* of *ketiva*.⁹⁸ While the nature of the prohibition is debated, all agree that making meaningful markings is a Shabbat violation, as codified in the *Shulchan Aruch*.⁹⁹

However, Rabbi Halperin argues, based upon the Talmud's case of cooking with solar heat, that markings on a tape do not involve any prohibition of writing/marking, neither biblical nor rabbinic. As discussed above, while performing work with a *shinui* lowers the severity of the violation, using a *shinui* is usually considered a rabbinic violation of Shabbat. However, *bishul b'chamah*, cooking with solar heat, is permitted on Shabbat. Rashi explains that this is because "it is not the normal way to cook."¹⁰⁰ Based upon Rashi, the *Eglei Tal* deduces that there are two types of *shinui* in halacha, those in which the **performer** behaves unconventionally, and those in which the **activity** itself is done unconventionally. In cases like writing with one's weaker hand, the *performer* behaves unconventionally but the activity itself – writing – is the same as when it is performed with the strong hand. Thus, this type of *shinui* is still prohibited rabbinically, because the activity is essentially unchanged. However, in cases like cooking with solar heat, the activity itself – cooking – is done unconventionally by using solar heat instead of fire (or heated metal). This type of *shinui* is permitted, since the prohibited

97. Rashi s.v. *Mishum Roshem* ad loc; Tosafot on *Shabbat* 70b s.v. *Shem MiShimon*; Meiri and Ran on *Shabbat* 70b.

98. Rambam, *Hilchot Shabbat* 11:17.

99. *Shulchan Aruch* O.C. 340:5: "It is permitted to make markings with one's fingernail on a book, because this is not a permanent act." Thus it is clear from this statement that making a permanent "marking" would be prohibited. *Mishnah Berurah* 25 ad loc notes this as well and points out that making such a deep mark or marking wood or parchment would be prohibited.

100. See *Shabbat* 39 and Rashi ad loc.

activity itself has been changed in nature.¹⁰¹ Alternatively, the *Krit Sefer* explains that cooking with solar heat is specifically permitted on Shabbat because it does not resemble the process of cooking in the *Mishkan*.¹⁰²

Recording or “writing” onto a magnetic tape satisfies the permissive reasoning of both the *Krit Sefer* and the *Eglei Tal*. The tape markings are quite different than the markings made in the *Mishkan*, both because the markings are made by one’s speech and because the markings are not visible to the human eye (let alone intelligible even if they were visible). For this same reason, such markings should also be considered a *shinui* in the nature of the **activity** itself, to the point that the *Eglei Tal* would say such activity is permitted even rabbinically.¹⁰³

Rabbi Halperin also contends that recording onto a tape is not a violation of *tikkun manah* (perfecting or fixing an object) – one is merely *using* an existing object. Each specific taping is a unique variance in the total possible ways to mark the tape and should be view as one of many possible uses rather than as completing or perfecting the tape.¹⁰⁴

Voice Recognition or “Dragon” Software

This discussion has a more modern application – that of

101. *Eglei Tal*, *Melechot Ofeh*, number 44. R. Halperin notes that other *Rishonim*, such as the Rid and Meiri, also appear to adopt similar approaches to Rashi, as they too believe that cooking with solar heat is not considered halachic cooking.

102. *Krit Sefer* on Rambam, *Hilchot Shabbat* 9:2-3.

103. The *Beit Yitzchak*, Rabbi Yitzchak Schmelkes, prohibited recording onto a gramophone on Shabbat as a biblical violation of *roshem*. However, Rabbi Halperin argues that perhaps even the *Beit Yitzchak* would permit electromagnetic tapes, since the markings are not even visible to the human eye, making them significantly different from the markings made in the *Mishkan*. This idea is supported by Rabbi Moshe Feinstein’s ruling that erasing God’s Name which has been recorded on a tape does not involve any violation. *Beit Yitzchak*, *Yoreh Deah* 2:31. *Iggerot Moshe*, *chelek* 1:173.

104. R. Halperin, *Sh”ut Maaseh Choshev*, Volume 2, *Siman* 10.

dragon software or other voice-recognition programs. Based upon Rabbi Halperin's argument that a person is equally responsible for actions performed via voice as for actions performed with one's hands, writing via voice-recognition software is not inherently preferable to typing with one's hands. However, such software may be preferable if programmed so that multiple words or commands are recorded in one computer operation, minimizing the amount of electrical activity needed to compose the medical note.

Electronic Medical Records – Medical Writing via Computer on Shabbat

Computer technology has changed many aspects of our lives, including the way we write. In medicine, this is most clearly seen in the Electronic Medical Record (EMR) or Electronic Health Record. There is a rapidly growing trend to switch to electronic medical records. EMRs have the ability to save dramatic storage space and time. More importantly, they provide a highly efficient way to maintain and transfer information, making vital medical information more readily available.¹⁰⁵

The question to address in this article is how the Electronic Medical Record impacts medical writing on Shabbat. In order to cover this topic thoroughly, one must break down the act of writing electronic medical notes into specific areas of halachic concern, including: *Whether writing on a computer screen is considered "writing"? May one operate the computer itself to type the note? May one save or print the information in the notes?*

105. Realizing this potential, the U.S. Congress uses incentive programs to encourage hospitals to use only EMRs as part of the Health Information Technology for Economic and Clinical Health (HITECH) Act.

Are Words on a Computer Screen considered Halachic “Writing”?

To fully appreciate how writing on a computer screen is viewed in halacha requires at least a basic understanding of the different computer monitor designs.¹⁰⁶

- Cathode Ray Tube: Electron guns repeatedly fire electrons at a phosphor target which emits light for a moment each time an electron hits the target.
- Liquid Crystal Display (LCD): A fluorescent/LED light illuminates a plate containing liquid crystal. An electric current passes through the plate aligning the crystal molecules in different orientations to create different colors and images.
- Plasma Monitor: An electric current grid ionizes gas within each pixel emitting ultraviolet light. The UV light is then absorbed by phosphor in each pixel to emit visible light.

Are the letters which appear on such monitors considered halachic writing? Despite displaying words as clearly as ink, screen writing is unique in two ways. First, the letters themselves are composed of tiny discrete dots or pixels instead of whole letters. Rabbi Dr. Zev Lev raises this reason for leniency, noting that such writing is not valid for a divorce bill or *Sefer Torah*.¹⁰⁷ This aspect is not discussed by other halachic authorities, perhaps because the human eye cannot discern this difference, and even ink writing is really composed of microscopic clusters of ink.¹⁰⁸ Second, the nature

106. Erez Sharon, “Writing on Shabbat Using a Computer,” *B’or Ha’Torah*, Volume 20, 2010. pp. 68-69.

107. Zev Lev, *Ma’archei Lev*. (Jerusalem: Mossad Harav Kook, 1995), Chapter 8. Section 7-8. The idea that writing formed by combining small dots is not considered normal writing is based upon the Talmud Yerushalmi *Shabbat*, Chapter 12, Mishnah 4, and *Gittin*, Chapter 2, Mishnah 3, and the commentary of the *Korban HaEdah*.

108. Sharon, *B’or Ha’Torah*, p. 70.

of screen writing itself may be viewed as temporary writing. The image appears only so long as the monitor is turned on and current runs through the device. Furthermore, the image itself is based upon emissions of light which continuously shine and fade (or in LCDs, a constantly changing orientation of liquid material). Although this is not discernible to the human eye, one may view these screen letters as temporary images by their scientific nature.

Many modern halachic authorities have ruled on whether writing on a screen is considered halachic writing. Rav Ovadia Yosef in *Yabia Omer* discusses whether one is allowed to write on *Chol HaMoed* using a computer. After ruling leniently in the matter, he concludes:

In my opinion typing on a computer definitely has no concern at all of being a violation [of *ketiva*] since the letters are not printed onto a permanent material; rather they simply *appear* on the screen of the computer alone.¹⁰⁹

Similarly, the *Nishmat Avraham* cites Rav Shlomo Zalman Auerbach's opinion that screen writing is not a Torah violation of Shabbat since it is simply produced by the firing of electrons; however, he implies that it may still involve a rabbinic violation. *Nishmat Avraham* himself follows this approach explaining that the firing of electrons onto the phosphorus merely causes the *form* of letters to appear on the screen.¹¹⁰ Rabbi Dr. Zev Lev and Zomet recommend the newer LCD and plasma screens over the older cathode ray, since cathode ray monitors often use a heated incandescent filament as the source of electrons, which may violate a biblical prohibition of *maavir* or *bishul*.^{111, 112}

109. *Yabia Omer*, *Orach Chaim* 8:48. Italics added by author.

110. *Nishmat Avraham*, *Orach Chaim* 340:4. Hebrew, second edition.

111. *Maavir* is creating a flame or fire. *Bishul* is cooking.

112. [http://www.zomet.org.il/Eng/?CategoryID= 253&ArticleID=318_ & Page=1](http://www.zomet.org.il/Eng/?CategoryID=253&ArticleID=318_&Page=1). Downloaded 2012-05-01.

In *Halacha U'Refuah*, volume 5, Rabbi Gedalya Aharon Rabinowitz presents additional reasons why writing on a screen is considered non-permanent. First, the letters are only sustained while the computer is operating. If the computer is turned off, the letters disappear, demonstrating their transient nature. Second, he argues that writing on a screen is not comparable to writing performed in the *Mishkan*. In the *Mishkan*, the letters written on the beams were set in place on that surface, immobile, giving them a level of permanence. Letters written on a screen, however, are able to be moved around on screen. Third, Rabbi Rabinowitz highlights that no one actually intends for the letters to remain on the screen. Rather, the purpose is either to print the document or to store the information. The sole purpose of displaying the letters onscreen is to ensure the writing is correct.¹¹³ Fourth, he makes the technological point discussed above – that the letters are not constantly illuminated, but rather “flickering,” glowing and fading at speeds too fast to discern with the eye.¹¹⁴

Rabbi Rabinowitz's fourth argument is disputed by Rabbi Yisrael Dovid Harfenes in his Responsa *Nishmat Shabbat*. Rabbi Harfenes believes that halacha should only take into account what is visible to the eye. As humans cannot discern that

R. Lev, *Ma'archei Lev*, Chapter 8. Section 8. The heated filament used in cathode ray is only relevant when turning on the computer. Once the monitor is on, the author's understanding is that all screen types would be viewed equally.

113. This third argument, R. Rabinowitz says, depends upon a dispute between Ramo and *Levush*. In Responsum 119, Ramo rules that if one writes in a manner that could be enduring but his intention is that it not be enduring, he is not violating a Torah prohibition. *Levush* (*Orach Chaim* 340:4) argues with that position. As our practice is to follow the Ramo, one can extrapolate that screen writing should be permissible since one does not intend for the writing to endure.

114. Rabbi Gedalya Aharon Rabinowitz, “The Use of a Computer for Medical Purposes in the Hospital on Shabbat,” (Hebrew) *Halacha U'Refuah* Volume 5. Ed. M. Hershler. (Jerusalem: Regensberg Institute, 1987), 134-138.

Thus based on the third and fourth arguments, both the text and the intention can be viewed as temporary.

screen writing is flickering and not a constant image, it should be considered permanent. Nevertheless, he writes, the use of “screen savers” should resolve all concerns about screen writing, as the writing is programmed to last only a few minutes and erase on its own even without human intervention.¹¹⁵

In contrast, Rabbi Shmuel Vosner, the *Shevet HaLevi*, believes writing on a computer screen is a biblical violation of Shabbat. Rabbi Vosner argues that this act is not temporary since the writing “endures for an amount of time long enough to perform the complete required activity – which is the writing he desires – this is considered enduring.” Rabbi Vosner strengthens his assertion with an interesting comparison. As mentioned earlier, the Rambam rules that writing on one’s skin is a Torah violation even though it fades, since the writing itself is enduring while an outside factor (body heat) “erases” the original writing. So, too, when one performs a new task on the computer screen, this “erases” the previous writing, but the writing itself could have endured much longer if one had not used the computer. Rabbi Vosner also raises and refutes another possible leniency. He states that one should not view writing on a monitor as *Grama* (indirect action) on grounds that the letters are formed by typing on keys instead of directly by hand. Typing is the normal way to write on a computer, and when performing a *melachah* indirectly is actually the normal manner of performing the activity, this is still considered *melechet machshevet*, skilled labor that violates Shabbat on a biblical level.¹¹⁶

Rabbi Harfenes, in *Nishmat Shabbat*, agrees with the *Shevet HaLevi* in theory but also presents a rebuttal. Granted, the

115. R. Harfenes, *Sh"ut Nishmat Shabbat*, Volume 7, Number 137.

116. *Shevet HaLevi* 6:37. One can distinguish between writing on human skin and on a monitor. Writing on skin could endure if not that an outside process, body heat, erases it. Computer writing is the opposite – the writing itself can only be sustained by the outside process, the flow of the electricity.

writing would remain on the screen if one did not “erase” it by performing another task. Nevertheless, some *poskim*, such as the Ramo, permit the use of writing *designed* to be constantly written and erased, such as the words written on the sides of the pages of a library book.¹¹⁷ Since the book is designed to be opened and closed, the words on the sides of the pages will be formed and erased over and over and should not be considered permanent. Similarly, although letters on a screen could be sustained if another task were not performed, the intended design of a computer is for writing to be displayed and then erased to display new information. According to these authorities, suggests Rabbi Harfenes, writing on a monitor would still be considered temporary writing.¹¹⁸

In summary, it would appear that the majority of opinions do not view writing on a computer screen to be considered a Torah violation of writing on Shabbat. However, in order to address the concerns of the *Shevet HaLevi* and the *Nishmat Shabbat*, Rav Shaul Yisraeli and others have suggested that one should make sure to install a “screen saver” on the monitor. In this way, the writing will be “erased” from the screen on its own, even if one does not perform another task on the computer, and may be viewed as non-enduring writing even according to the *Shevet HaLevi*.¹¹⁹ This suggestion is included in Zomet’s recommendations for computer usage for essential medical purposes on Shabbat.¹²⁰

117. *Sh”ut Ramo* 119. This is the same responsum cited by Rabbi Rabinowitz. See footnote 110.

118. Rabbi Yisrael Harfenes, *Sh”ut Nishmat Shabbat*, Volume 7 (Brooklyn: Harfenes, 1995), Number 137.

119. *Encyclopedia Hilchatit Refu’it*, Volume 7, p. 500, footnote 678. Rav Shaul Yisraeli’s suggestion is recorded by Rabbi Yisrael Rosen in “Halachico-Technical Solutions to Using a Computer on Shabbat designated for Input and Receiving Patients (Hebrew),” *Assia*, Volume 4, pp. 135-138 and note 2.

120. <http://www.zomet.org.il/Eng/?CategoryID=253&ArticleID=318&Page=1>. Downloaded 2012-05-01.

May One Operate the Computer Itself in order to Write Electronic Notes?

The use of electrical appliances on Shabbat is a tremendous halachic topic beyond the scope of this essay. Nevertheless, one must briefly address the concern of whether a computer may be operated in order to record medical information on Shabbat. Even if writing on a screen may only involve a rabbinic violation on Shabbat, this would not be of any use if operating the computer itself involved a Torah prohibition!

As the modern computer does not make use of incandescent lights, the concern in its operation revolves around the use of electricity itself. A wide variety of halachic arguments have been advanced to explain why the use of electricity is prohibited on Shabbat, ranging from a biblical prohibition (*boneh* or *makeh b'patish*) to a rabbinic prohibition (*molid*) to a tradition without an exact basis in the laws of Shabbat. The strong majority of halachic authorities rule that the prohibition is only rabbinic. However, as the *Chazon Ish* famously ruled that completing an electrical circuit (even without lights) involves a Torah prohibition of *boneh* or *tikkun manah*, halachic authorities commonly take his view into account.¹²¹ According to the *Chazon Ish*, turning on a computer, or any electrical appliance, is a biblical prohibition. As such, if one is attempting to consider only rabbinically prohibited ways to record information on Shabbat, the computer must be turned on before Shabbat, or at least by a non-Jew on Shabbat.

Assuming that one is working with a computer that has been turned on prior to Shabbat, are there halachic concerns in operating the computer – such as pressing keyboard buttons or clicking the mouse? From a technological point of view, “clicking” a mouse or key button does close an electrical

121. Rabbis Michael Broyde and Howard Jachter, “The Use of Electricity on Shabbat and Yom Tov,” *The Journal of Contemporary Halacha and Society*, Volume 21 (Spring 1991), pp. 4-47.

circuit for an extremely short period of time, on the order of a millionth of a second. Rabbi Dr. Zev Lev explains that according to the *Beit Yitzchak*, who holds that completing electrical circuits violates the rabbinic prohibition of *molid*, one is certainly violating a rabbinic prohibition when pressing a key, as this *creates* an electrical pulsation. Although the circuit is only closed for a millisecond, the action of creating something new is considered enduring since a command is followed by the computer as a result.

Rabbi Rabinowitz, in his *Halacha U'Refuah* article, argues that even the *Chazon Ish* would agree that one is not violating *boneh* or *tikkun manah* every time a key is pressed. Turning on electricity is considered turning an unusable object into a usable device according to the *Chazon Ish*. However, pressing a key is simply giving a command to an already functional computer; *using* the object, not creating it.¹²² In addition, states Rabbi Rabinowitz, the small circuits closed by pressing a key are only closed for a moment and then immediately reopened to allow other keys to be pressed. Even if the *Chazon Ish* would consider pressing a key to be *boneh*, this split-second act of “building” is not long enough to be considered permanent.¹²³ Rabbi Rabinowitz states that Rav Shlomo Zalman Auerbach also understood the *Chazon Ish* in this manner.¹²⁴ Rabbi Dr. Zev Lev makes similar arguments, adding that even the intention of computer users is that the circuits only close temporarily, enabling them to press other keys. Rabbi Dr. Lev concludes by

122. R. Rabinowitz believes that when the *Chazon Ish* said that completing an electrical circuit violates *boneh*, this refers to constructing the appliance, not the electrical circuit, as it is inconceivable to consider the circuit itself a “device.” Thus, pressing a key is simply using the constructed computer, even if a new circuit is closed as a result.

123. R. Rabinowitz, *Halacha U'Refuah*, Volume 5.

124. See *Minchat Shlomo* 10:6. Although R. Rabinowitz’s position is strengthened based upon the agreement of Rav Auerbach, R. Rabinowitz also states that this argument can be made regarding saving information to a disk or hard drive – a matter in which Rav Auerbach clearly disagrees, as will be discussed.

mentioning a new keyboard technology where no circuits are closed in its operation. This technology of “modulating current” would likely not be *boneh* according to the *Chazon Ish* (as the circuit is always complete) and perhaps not be considered *molid* according to the *Beit Yitzchak*, since current is only “modulated” but not created anew.¹²⁵

Rabbi Yisrael Rosen, Dean of Zomet, explains that his institution as well follows this approach that pressing keys is only a rabbinic violation. However, he cites Rav Shaul Yisraeli’s recommendation that one operate the computer with a *shinui*. He suggests using a plastic thimble placed on one’s finger that extends beyond the finger’s length, with a knob on the end to allow one to press buttons.¹²⁶ This “modification” is adopted in Zomet’s recommendations, where they also suggest using a stick, spoon handle (or other stylus).¹²⁷

The use of a mouse raises similar concerns to that of pressing keyboard buttons, since its movement and “clicks” may also close electrical circuits without involving lights. As such, according to most opinions its use would only involve a rabbinic violation. Rav Yisraeli’s suggestion to use a *shinui* would still be ideal where possible. Also, Zomet recommends use of an optical mouse instead of the older ball mouse, since an optical mouse is essentially a camera, whereas the ball mechanism involves a series of circuits. Touch sensitive surfaces (common to laptops) are less ideal, as they use even more numerous circuits in series.

Touch screens, such as those utilized by iPads or other tablets, raise a more complex discussion. In some respects they are equally or more problematic for Shabbat usage. They still

125. R. Lev, *Ma’archei Lev*, Chapter 8, Section 3.

126. Rav Yisrael Rosen, in “Halachico-Technical Solutions to Using a Computer on Shabbat designated for Input and Receiving Patients (Hebrew),” *Assia* Volume 4, pp. 135-138 and note 2.

127. <http://www.zomet.org.il/Eng/?CategoryID=253&ArticleID=318&Page=1>. Downloaded 2012-05-01.

make use of numerous circuits, since the signals travel from the touch screen to the processor as electrical impulses. Also, some types of touchscreen are harder to operate using a *shinui*. The older “resistive” touchscreens operate on a mechanism responsive to pressure, which allows the user to activate the screen commands with either a finger (even gloved) or a stylus. Such models more easily enable one to use a *shinui* as recommended by Zomet and Rav Yisraeli. However, newer “capacitive” touchscreens require minimal pressure, but may only be operated by touch with a material that can conduct electrical current, such as an ungloved finger but not with a stylus. As such, some *shinui* methods are not compatible with capacitive touchscreens.¹²⁸ In other respects, touchscreen use may be preferable. Sophisticated touch operations may allow one touch to replace numerous key strokes, perhaps minimizing the amount of Shabbat violations one has to perform to write medication orders or notes.

In an attempt to make computer operations on Shabbat less problematic, Zomet sells a “Shabbat mouse” and “Shabbat keyboard” both of which operate on the principle of indirect action (*grama*).¹²⁹ These products make computer use even more ideal, since operating a computer is now two rabbinical steps removed; closing electrical circuits without lights is only a rabbinic violation, and using *grama* is only a rabbinic violation (permitted in cases of need). These products may be even superior to regular *grama*, since they use the new technology of “modulating currents.” The current is always present, but the frequency or voltage is changed. In this way, no “new” circuit is created, potentially avoiding a problem of *boneh* or *molid*.¹³⁰

128. <http://electronics.howstuffworks.com/iphone2.htm> Downloaded 2012-8-16.

129. <http://www.zomet.org.il/Eng/?CategoryID=253&ArticleID=318&Page=1>. Downloaded 2012-05-01..

130. See Rav Israel Rosen, “Changing Electrical Current on Shabbat – Halachico-Technical Principles and Applications (Hebrew),” *Techumin*

Saving Information to the Computer's Memory

Having discussed the halachic issues involved in operating a computer and typing onto a screen, one must also address the indispensable act of saving the electronic information to a portable memory or hard drive. Rav Shlomo Zalman Auerbach held that saving information onto a hard drive or diskette on Shabbat may be a violation of *boneh*. The reasoning, as explained by the *Nishmat Avraham*, is that saving information may be viewed as turning the hard drive or disk into a new article. Using materials to create an object of greater value is conceptually similar to building a house.¹³¹ Or as Rav Neuwirth explains, an empty disk essentially has no value. By adding information to it, you *create or build* something of new *value*.¹³² Retrieving previously saved information, such as lab values or a prior note, however, would not be a problem, as this is simply using the existing object.

Other halachic authorities adopt a different approach to saving information. As discussed above, Rabbi Halperin argued that recording information onto electromagnetic tapes presents no halachic problems, neither of writing nor of *tikkun manah*. While using different technology, saving to a hard drive is conceptually very similar to recording a tape. Both produce invisible magnetic traces that require processing and interpretation to become meaningful, unlike true writing. Also, as with tape recordings, saving data may be considered as a repeatable, reversible process to be viewed as *using an object* rather than creating a new one. Rabbi Dr. Zev Lev makes

Volume 26 pp. 83-100. As R. Rosen points out, this technology could revolutionize what people traditionally consider "Shabbat" activities, raising concerns of *mar'it ayin* (people appear to do *melachah*) or *Uvadin d'chol* (regular weekday behavior), but seems to avoid classic concerns about electricity on Shabbat.

131. *Nishmat Avraham*, Volume 1: *Orach Chaim*, Chapter 19. p. 240 (English Edition); Hebrew, second edition, p. 569.

132. *Shmirat Shabbat K'Hilchata* Chapter 66, Note 211.

this argument explicitly regarding saving information onto a diskette, and Rabbi Harfenes makes the argument regarding a hard drive.¹³³ Rabbi Harfenes adds that one could even argue that saving data *decreases* the value of the memory device due to limited data capacity.¹³⁴ Presumably these arguments could be applied to CDs, DVDs, and flash USB drives as well.

Rabbi Rabinowitz suggests that perhaps one should distinguish between different situations of data storage. He states that according to the *Chazon Ish*, entering a diskette into the disk drive (presumably a CD, DVD, or USB drive is comparable) may violate *tikkun manah* as one prepares the object for use in its originally intended manner. Similarly, Rabbi Rabinowitz suggests that preparing the disk to receive information (i.e. “formatting” a disk, or erasing data to create new space) is also considered “preparing the object for use.”¹³⁵ Alternatively, using a hard drive, or a removable memory device inserted before Shabbat with adequate memory for all of Shabbat, would avoid any problems of *tikkun manah* or *boneh*. This is based upon the same logic described above by keyboard typing. Saving information on a disk or hard drive is not considered fixing an object but rather *using* an existing object. As such, it may not violate *boneh* even according to the *Chazon Ish*.¹³⁶ Furthermore, Rabbi Rabinowitz cites Rabbi Halperin’s arguments that saving data does not violate “writing” or *roshem*. As the data code is not made of discernible letters and the code markings are not “detectable by the senses,” creating such invisible magnetic markings does not violate the biblical prohibition of *roshem*.¹³⁷

133. R. Lev, *Ma’archei Lev*, Chapter 8, Section 3.

134. R. Harfenes, *Nishmat Shabbat*, Volume 7, Number 139.

135. Rabbi Dr. Lev states this concern about formatting as well. See *Ma’archei Lev*, chapter 8, section 3.

136. Rabinowitz, *Halacha U’Refuah*, Volume 5. p. 136.

137. Ibid. R. Rabinowitz supports the idea that undetectable markings are not *roshem* based on the Ramo (*Orach Chaim* 340:4), who rules that writing letters in the air is permitted. *Taz* (ad loc note 3) explains that this is because

Rabbi Yisrael Rosen explains that Zomet's position is to view data storage on a computer as only a rabbinic violation.¹³⁸ However, to account for those who view the matter more stringently, they recommend the action be performed at least with a *shinui* (as with other computer operations) or ideally through *grama* using their "Shabbat mouse."¹³⁹

Printing Notes from a Computer

While typing on a monitor, operating a computer, and even saving to a hard drive are all actions that many halachic authorities rule are only rabbinic violations, printing from a computer is viewed as a more serious violation.

The *Nishmat Avraham* cites Rabbi Yehoshua Neuwirth's opinion that printing is a biblical violation of Shabbat. If one must print, he suggests asking a non-Jew to perform the action. If this is not possible and one is dealing with a critically ill patient, he suggests pressing the print key with the knuckle of a finger instead of using the finger itself in order to minimize the violation through a *shinui*.¹⁴⁰ Elsewhere, Rabbi Neuwirth and Rabbi Harfenes both write that one should *not* view operating a printer in a normal manner as an "indirect" act since the writing is not created by his hand directly. Rather, simply pressing the button is considered the act which causes the printer to function. This idea is supported by the *Chazon Ish*'s view that one violates the *melachah* of plowing on Shabbat even by using a mechanical plow, because pressing the button is considered to cause the activity to occur.¹⁴¹

"the marking is not detectable." R. Harfenes agrees with R. Rabinowitz in *Nishmat Shabbat*, Volume 7, number 139.

138. R. Rosen, *Techumin*, Volume 26, p. 93.

139. <http://www.zomet.org.il/Eng/?CategoryID=253&ArticleID=318&Page=1>. Downloaded 2012-05-01.

140. *Nishmat Avraham*, *Orach Chaim*, Hebrew, second edition p. 571.

141. *Shmirat Shabbat K'Hilchata* Chapter 66, Note 211; *Chazon Ish*, *Orach Chaim* 36. Harfenes, *Nishmat Shabbat*, Volume 7, number 140. *Chazon Ish*

Furthermore, the *Beit Yitzchak* and Rabbi Tzvi Pesach Frank, writing in the context of telegraphs and electrical thermometers (respectively), also hold that one is directly responsible for the actions caused by conventional machines when one's action starts the chain of events.¹⁴²

Similarly, in discussing electromagnetic tapes, Rabbi Halperin explains that using a machine to print information is considered an act of "writing" by enabling its production. The resulting effect of connecting two objects together is directly ascribed to a person, as seen by the *melachah* of *havarah* (lighting a flame) where one is liable not only for directly creating fire but also for bringing straw close to an existing fire.¹⁴³ Rabbi Rabinowitz concurs as well.¹⁴⁴

While the above positions all hold that printing is a biblical violation of writing since a person is fully responsible for *melachah* caused by pressing a button, Rabbi Moshe Feinstein appears to disagree. In the context of trying to minimize Shabbat violations when treating critically ill patients, Rabbi Feinstein was asked by Rabbi Dr. Yaakov Tendler about the following situation: If one needs labels for patient identification (i.e. for lab tests), is it preferable to write the label by hand so that one may only write the minimum information required and possibly use their opposite hand, or should one use an electric stamping machine which will print additional non-vital information (such as the patient's phone number). Rabbi Feinstein ruled that using the electric

points out that, as it is, plowing is usually done by a cow and not directly by hand. In this sense, perhaps printing is different because true writing is done by hand. Alternatively, as printing has become a conventional way of writing, maybe this parallel to the electrical plow still holds true.

142. R. Lev, *Ma'archei Lev*, Chapter 8, Section 9. See also *Sh"ut Beit Yitzchak, Orach Chaim* 57 and *Sh"ut Har Tzvi* 185:3.

143. R. Halperin, *Sh"ut Maaseh Choshev* Volume 2, p 194.

144. R. Rabinowitz, *Halacha U'Refuah* Volume 5. Rabbi Ribiat (39 *Melochos* p. 953) also considers printing to be *ketiva*.

stamping machine was preferable because “no biblical prohibition is performed by the person.” The use of electricity in his opinion did not violate any biblical prohibition and thus the only concern was the *melachah* of writing. He ruled that this writing as well did not involve a biblical violation because:

Only [a person’s] initial force is viewed as a person’s action to be considered an act of writing... but not that which is written by a second force, which is the electrical writing. Even though the person caused this [machine] to write, this is definitely not considered a true act of the person.¹⁴⁵

Although Rabbi Feinstein was not writing in the context of printing from a computer, pressing a button to cause an electrical stamping machine to print out letters is a very close parallel, and he considered this preferable even to writing by hand with a *shinui*, which is only a rabbinic violation. Alternatively, perhaps Rabbi Feinstein would view printing from a computer as more stringent since it has become a common way to write, while stamping machines are still less “conventional.” In any case, the majority of halachic authorities do consider a person directly responsible for *melachah* performed by pressing an electrical button.

Rabbi Dr. Zev Lev makes an interesting distinction in the types of printing. He argues that although printing with a laser printer or an inkjet printer may involve a Torah prohibition, printing with a dot matrix printer may only be a rabbinic prohibition. As the letters are produced from closely printed dots instead of full letters, one can argue that such writing is abnormal and only rabbinically prohibited. Currently, however, this insight may no longer be practical as such outdated printers are scarce or incompatible with

145. Rabbi Moshe Feinstein, “Writing on Shabbat in the Hospital (Hebrew).” *Techumin*, Volume 4, pp. 423-25.

modern computers.¹⁴⁶ Rabbi Rosen of Zomet suggests modifying the printer to operate indirectly, using *grama*. This solution was endorsed by Rabbis Dov Lior and Shaul Yisraeli, although Rabbi Yisraeli adds that one should press the print key using a *shinui*, such as wearing a plastic thimble. Rav Ovadia Yosef as well endorsed the *grama* printer, even for use with non-critically ill patients.¹⁴⁷

Conclusion

While this article addressed many halachic aspects of writing on Shabbat for medical purposes, the primary focus has been on newer writing technologies. As mentioned, this article is intended to be a resource for rabbis, health care providers and others, but not meant to replace the detailed conversation one should have with a personal halachic advisor. Nevertheless, some important conclusions are apparent based upon the previous discussions.

Modern changes in medical practice have made writing an essential part of medical care, introducing an additional halachic concern into caring for patients on Shabbat. At the same time, it would appear that modern technology has provided opportunities to downgrade this halachic concern from the Torah level prohibition that *ketiva* normally attains to at least the level of a rabbinic violation. With the notable exception of the *Minchat Yitzchak*, most authorities view writing with disappearing ink as only a rabbinic violation. Using such pens in an unconventional manner further improves the situation. However, with the advent of EMRs, the invisible ink solution may soon be obsolete. Nearly all

146. R. Lev, *Ma'archei Lev*, Chapter 8, Section 9. Also cited in *Encyclopedia Hilchatit Refu'it*, Volume 7, p. 501. Rabbi Dr. Lev also raises the concern that printing with a laser printer may involve a prohibition of *mav'ir* (creating a flame) since the paper is heated to high temperatures in this printing process.

147. R. Rosen, *Assia*, Volume 4, pp. 135-138 and note 2.

halachic authorities surveyed in this article found substantial reason to assume that writing medical notes via computer will violate only rabbinic Shabbat prohibitions (excluding printing).¹⁴⁸ For those involved in patient care, this analysis is extremely encouraging. As electronic notes are becoming the standard of care, one may now be able to write notes in a standard and reliable format, instead of worrying about their ink disappearing too early for the patient's sake or too late for halachic concerns.

Rabbinic violations are extremely significant violations and should be avoided whenever possible. However, the ability to write on Shabbat using only rabbinic violations is potentially of tremendous benefit for physicians and health care workers treating both critically ill and non-critically ill patients. Regarding critically ill patients, one should try to minimize the necessary Shabbat violations when it will not delay care. Electronic notes may allow physicians to write notes efficiently for very sick patients while still only violating rabbinic prohibitions. In addition, there are situations where one may violate rabbinic violations for the sake of non-critically ill patients, such as when the rabbinic violation is performed with a *shinui*, or even without a *shinui* in situations of great need where a *shinui* is not possible. This is important in hospital settings since most admitted patients are at least sick enough to be considered a *choleh she'ein bo sakanah* and the distinction between the two categories is not always clear in practice.

Even with regard to printing or saving, computer use may make hospital work easier to accomplish halachically on Shabbat. Asking another doctor or nurse to simply press the print key is a simple favor that takes only a second – far more feasible than requesting that they transcribe a note by hand. In this way, one may find more easy means to employ *amirah*

148. Though this may involve rabbinic prohibitions in multiple categories – *ketiva* for screen use; *molid* for electricity.

l'nachri, further helping to treat even non-critically ill patients. Asking a non-Jew to press the "save" key may also be a simple way to downgrade the violation to address the concern of those *poskim* who hold that saving information is a Torah prohibition of *boneh*. Alternatively, a computer can be programmed to perform an "auto-save" every few minutes, which Rabbi Dr. Zev Lev suggests is permissible in situations of *hefsed* (loss), for which most medical illness should qualify.¹⁴⁹

The hardest aspect of this discussion is how one defines what is essential and necessary for medical care. Even when dealing with rabbinic violations, one is only permitted to write what is necessary to help treat the patient. Some information such as phone numbers, social or family history, may not be necessary to treat the patient on Shabbat even if this information is usually included as standard protocol. Is one permitted to record pertinent negative findings? If a stable patient's condition worsens on Sunday or Monday, knowing the "normal" findings from Shabbat may still be useful in their care. Knowing exactly where to draw the line remains extremely difficult. For this reason, as much as the Electronic Medical Record may assist health care professionals in halachically treating patients on Shabbat, one must still use clinical judgment and seek constant halachic guidance to decide what writing is permissible on Shabbat.

149. Lev, *Ma'archei Lev*, Chapter 8, Section, 10, p. 353.

Compelled to Inoculate: May Parents Refuse Vaccinations for Their Children?

*Rabbi Aaron E. Glatt, Dr. Fred Rosner,
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The largest outbreak of mumps in the United States in recent years began in the summer of 2009 in New York's Rockland and Sullivan counties. Hundreds of teenage campers from the Hassidic communities of Monsey and Kiryas Yoel contracted the mumps after being exposed to one youngster from the United Kingdom who was not inoculated against the disease.¹

1. MMWR (Morbidity and Mortality Weekly Report) Vol.59 No.2 2/12/10. Of special interest is a major study analyzing this mumps outbreak in the Orthodox community. The authors of that study postulate that "chavrusa study, with its prolonged face-to-face contact, resulted in high inoculum exposures" which overcame the standard two-dose MMR coverage that these students received. Nonetheless, the researchers concluded that this immunization was effective in both reducing the severity of the cases and preventing the spread of this outbreak to surrounding communities.

A. Barskey, C. Schutte, J.B. Rosen et.al " Mumps Outbreak in Orthodox Jewish Communities in the United States." *N Engl J Med* (2012) 367

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The Maimonides Fellowship is an interdisciplinary think tank of scholars on the interface of medicine, law, and bioethics with halacha, under the leadership of Dr. Fred Rosner.

Despite the proven efficacy of the MMR (mumps, measles, and rubella) vaccine, some parents have refused to have their children inoculated, claiming a causal link between the vaccine and autism – a claim that has been thoroughly repudiated by numerous research studies.² In a comprehensive report on autism and the MMR vaccine on the NIH website, the National Institute of Child Health and Human Development states categorically: "To date there is no definite, scientific proof that any vaccine or combination of vaccines can cause autism."³ Indeed, the lead researcher, Andrew Wakefield, whose study sought to demonstrate a link between the MMR vaccine and autism, was found to be "dishonest and irresponsible" in his research and subsequently lost his license to practice medicine in the UK.⁴

Nevertheless, significant questions remain:

Do parents have the right to refuse MMR inoculations for their children, where refusal to do so may lead to serious illnesses and potentially life-threatening complications for their offspring and others? By the same token, do adults have the right to decline flu vaccinations, where the risks of adverse reaction to the vaccine are negligible, and the benefits to one's self and others are significant?

pp.1704-1713.

2. M. Hornig, T. Biese, T. Buie, M.L. Bauman, G. Lauwers, et al. "Lack of Association between Measles Virus Vaccine and Autism with Enteropathy: A Case-Control Study." Accessed at: [www.plosone.org/article/info doi/10.1371/journal.pone.0003140](http://www.plosone.org/article/info%2Fdoi%2F10.1371%2Fjournal.pone.0003140) B.Taylor, E. Miller, C.Farrington, et al. "Autism and Measles, Mumps and Rubella Vaccine: No Epidemiological Evidence for a Causal Relationship." *Lancet* (1999) 353 pp.2026–9.

3. "Autism Research at the NICHD," accessed at www.nichd.nih.gov/publications/pubs/upload/autismMMR.pdf at 2 on December 18, 2011.

4. "MMR Row Doctor Failed in His Duties, " *Yorkshire Evening Post* accessed at www.yorkshire-evening-post.co.uk/news/latest-news/central-leeds/mmr-doctor-failed-in-his-duties.

I. Medical Background:

Do MMR inoculations and influenza vaccinations pose any serious side effects or risk factors to those who are being immunized? What is the risk-benefit ratio (comparing projected benefits versus possible risks)?

There have been over 20 major studies whose findings refute any causal relationship between MMR inoculations and autism. Most are large population or cohort studies, some with over a million children.⁵ Additionally, there is no evidence that MMR vaccine is associated with the development of allergies.⁶

Life-threatening allergic reactions from flu immunizations are extremely rare. According to the CDC website, allergic reactions are more likely to occur among persons with a severe allergy to eggs, because the viruses used in the influenza vaccine are grown in hens' eggs; hence the warning for those with a history of allergic reactions to eggs or to flu shots not to be immunized without consulting a physician. Another rare illness, Guillain-Barré syndrome (GBS), which is characterized by fever, nerve damage, and muscle weakness, may be associated with "no more than 1 or 2 cases per million people vaccinated [with current flu vaccines]." ⁷

While there is no evidence of serious allergic reactions or side effects to MMR immunizations, the risks from not being vaccinated are significant. A major study reported that children in the United States with non-medical exemptions (e.g., religious or philosophical) between 1985 and 1992 were

5. "MMR and Autism," accessed at www.immune.org.nz/?t=719 Also, *ibid.*, 2.

6. MDB Roos, Cvd W Johannes. "Measles, Mumps and Rubella Infections and Atopic Disorders in MMR-Unvaccinated and MMR-Vaccinated Children." *Pediatric Allergy and Immunology*. (2008);19(6) pp.544-51.

7. "Influenza (Inactivated) Vaccine Side-Effects 2010-11," accessed at CDC website: www.cdc.gov/vaccines/pubs/vis/downloads/vis-flu.pdf.

35 times more likely to contract measles than vaccinated children.⁸

A critical complication of measles is encephalitis, an inflammation of the brain which can cause seizures. Measles can also develop into pneumonia and ear infections. The CDC reports that "about one out of 10 children with measles also gets an ear infection, and up to one out of 20 gets lifelong disabilities... [or] pneumonia. About one out of 1,000 gets encephalitis, and one or two out of 1,000 die."⁹ Mumps and rubella are also serious illnesses which may cause rare, but potentially fatal complications.

II. Law and Bioethics: *Legal Precedent*

Do parents have the legal right to refuse MMR inoculations for their children, who may later transmit these diseases to their classmates or fellow campers? Does reduction of potentially serious childhood illnesses in a school setting constitute a "compelling state interest" to protect public health, which can override constitutional due process interests in bodily integrity and the refusal of unwanted medical treatment?

The fact that departments of health have the authority to mandate immunizations for school-age children derives from a landmark 1905 United States Supreme Court case – *Jacobson v. Massachusetts*.¹⁰ In what has been widely-regarded as arguably the most important judicial decision in public health, the Supreme Court upheld the rights of states to impose compulsory vaccination laws by recognizing that individual

8. D.A. Salmon, M. Haber, E. G. Gangarosa, L. Phillips, N. Smith, R. T. Chen "Health Consequences of Religious and Philosophical Exemptions from Immunization Laws: Individual and Societal Risks of Measles" *JAMA* (1999) 282: pp. 47-53.

9. "Overview of Measles Disease," accessed at CDC website: www.cdc.gov/measles/about/overview.html.

10. *Jacobson v. Massachusetts*, 197 US 11 (1905).

freedoms, with appropriate safeguards, must occasionally be subordinated to the common good.

The Jacobson decision followed an outbreak of smallpox in the Boston area between 1901 and 1903. Henning Jacobson maintained that the scientific basis for vaccination was unsound and that he would suffer if he were to be vaccinated. He refused to be vaccinated, and was fined five dollars – a substantial sum in that era. He appealed for relief to the courts, and the Massachusetts Supreme Court found compulsory vaccination under these circumstances to be consistent with the state constitution, whereupon Jacobson appealed to the United States Supreme Court. The Supreme Court examined whether involuntary vaccination violated Jacobson's "inherent right of every freeman to care for his own body and health in such way as seems to him best....." It balanced this personal right against the principle "that persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the state..."

Since Jacobson, a host of courts have routinely sustained state laws that condition admission to public schools on submission of proof of vaccination against highly contagious childhood diseases, e.g. rubella, whooping cough, tetanus.¹¹ In recent years, the Supreme Court has greatly expanded the parameters of constitutionally-protected interests entitled to due process protection by deeming them protected liberties. In addition to liberties that are explicitly guaranteed in the text of the Constitution such as freedom of religion and freedom of speech, fundamental liberties now include freedom from unwanted bodily intrusion, freedom from unwanted compulsory medical treatment (even that necessary to save life), and a more generalized, though nebulous, right to privacy. Mandatory vaccination laws obviously impact on these rights. However, just because a right is identified as a

11. See, e.g., *Zucht v. King*, 260 US 174 (1922).

fundamental liberty interest does not mean it is inviolate. Even fundamental rights can be overridden if there is a compelling governmental interest that cannot be achieved by less intrusive means. In other words, infringements of liberties that are constitutionally protected may be justified only if the end purpose is compelling and the means chosen are necessary to achieve that purpose.

As noted, courts routinely uphold the validity of mandatory childhood vaccination laws. The courts are deeply concerned about highly contagious diseases spreading over a large general population of vulnerable individuals who will be exposed to each other for long portions of the day. The prevention of serious disease among a large school-age population is surely a compelling state interest and a mandatory vaccination policy appears to be the only way to achieve that goal.

Mandatory vaccination polices may also infringe on the constitutional requirement of equal protection, in addition to the infringing of personal liberty under the due process clause (e.g., bodily integrity, unwanted medical treatment, privacy). All mandatory vaccination statutes such as childhood vaccination laws may also include a medical exemption and a religious or even a philosophical one. These equal-protection concerns have led some courts and commentators to conclude, even in the context of childhood immunization laws, where the interest of the state in the preservation of public health is most compelling, that equal protection must allow any person to opt out for any reason.¹² This, of course, converts a supposedly-mandatory program into an optional one, which may significantly undermine the justification for the program

12. See *McCarthy v. Boozman*, 212 F. Supp. 2d 945(WD Ark. 2002); *Boone v. Boozman*, 217 F. Supp. 2d 938 (EDArk. 2001). See also *In re Le Page*, 18 P. 3d 1177 (Wyo. 2001) ; A. Novak, "The Religious and Philosophical Exemptions to State-Controlled Vaccinations: Constitutional and Other Challenges," *University of Pennsylvania Journal of Constitutional Law*,7(2005 pp.1101 -1129).

in the first place. Even so, it is probable that a program that requires “opt-out” to be excluded is likely to be much more successful than a program that requires “opt-in” to be included.

Bioethics

The question of mandatory childhood inoculations presents a serious conflict between two cardinal principles in contemporary bioethics: patient autonomy, the right of an individual to reject even low-risk, high-benefit medical treatment versus the “collective good” of the public, reflected in the principles of beneficence and non-maleficence. Are there limits to patient autonomy?

The principle of beneficence in contemporary bioethics incorporates preventive medicine, and typically includes inoculations and vaccinations. Nowadays, when flu vaccinations are considered high-benefit-low-risk procedures, one can argue that they should be mandated much the same as departments of health require childhood inoculations for school admissions. Yet, the principle of patient autonomy allows individuals to refuse even high-benefit-low-risk procedures, trumping the principle of beneficence. Would patient autonomy still predominate when it conflicts with the greater good of the community, such as when there is a risk of an epidemic?

Rabbi Abraham Isaac Kook speaks to the bioethical conflict between the individual and the community.¹³ R. Kook views the community as one organic body, and every individual as a limb of that body. As critical as any limb or organ may be to the body's well-being, Jewish law permits endangering a limb when necessary to save the entire organism. Accordingly, health authorities may endanger part of the population, when deemed necessary, in order to protect the community as a

13. Y. Shafran, “Halakhic Attitudes Towards Immunization,” *Tradition* 26 (1991) pp. 4-12.

whole. It may be argued that individuals, in rabbinic teachings, are not perceived as limbs of a national body, but rather, as "worlds unto themselves," thus pitting one organism against another. In such an instance, the Gemara¹⁴ teaches that if an enemy threatens to murder an entire Jewish community if they refuse to arbitrarily submit one of their own for execution, they must all die rather than acquiesce to this demand.

Critical to our discussion is one central issue: Would the principle of patient autonomy allow individuals to refuse immunizations when they may put the lives of others at risk? Typically, patient autonomy permits individuals to make medical decisions which relate to their own personal care and do not affect others. Patients have the right to refuse pacemakers and amputations, even though these interventions are low-risk, high-benefit procedures which could save their lives. Individuals may choose to undergo high-risk surgery as a medical option of last resort. In these decisions, the attendant risks and benefits are limited to the patient. However, when individuals refuse immunization, they pose the very real risk that, in so doing, they may contract the disease and begin infecting others, though, as noted, their personal risks are quite limited. Arguably, then, the principle of patient autonomy might not extend to the right to refuse immunizations.¹⁵

III. Preventive Medicine in Jewish Law

Would halacha consider immunization against infectious

14. Ibid.

15. See J. Harris, S. Holm "Is There a Moral Obligation Not to Infect Others?" *British Medical Journal* (1995) 311 pp.1215-1217. While this paper is focused on a physician's obligation to be immunized in order not to infect his patients, its moral argument may be applied to parents who knowingly admit their uninoculated children to school, thus possibly exposing their classmates to a potentially dangerous disease.

diseases to be integral to the mitzvah to maintain good health (*shmirat haguf*)? Would Jewish law mandate that all schoolchildren be immunized because of possible transmission of life-threatening diseases to their classmates (*safek pikuach nefesh d'rabim*)? Would there be instances where halacha might recognize the right of an individual to decline vaccinations?

Maintaining Good Health – *Shmirat Haguf*

In Jewish tradition, one is obliged to safeguard his health, which would include maintaining an appropriate diet, getting adequate sleep and exercise, seeking medical treatment as needed, and avoiding health risks such as drug or alcohol abuse. There is a broad spectrum of opinion in halacha about whether the source of the obligation to safeguard one's health is biblical, rabbinic, or possibly a combination of both.¹⁶

The most oft-quoted sources are the verses in Deuteronomy: "Only guard yourself and protect your soul..." (4:9) and "And you shall protect your souls exceedingly..." (4:15). Yet, these verses, in context, refer to one's spiritual health – not directly to one's physical well-being. Nonetheless, the concept that one is obligated to safeguard his health is universally accepted in Jewish tradition and is codified in halacha.

Rambam underscores the importance of preventive medicine. Indeed, he offers guidance to maintaining good health in *Mishneh Torah* (*De'ot* 4: 1). He prefaces his advice with a strong directive: "Since maintaining a healthy and wholesome body is among God's ways... one should distance himself from things which are detrimental to it, and accustom himself to things which are healthful and healing...." In his medical writings, Rambam declares:... "Medicine is an indispensable wisdom in every time and place, not only

16. See *Encyclopedia Hilchatit Refuit* (Jerusalem, 2006), Vol. 2, p. 348 for a comprehensive guide to the sources for caring for one's health (*shmirat haguf*).

during illness, *but also during times of health* (italics added)...."¹⁷

There were many things that the Sages forbade because they may endanger one's life... and anyone who violates these prohibitions and says "I will put my life in danger or I don't care [about this ruling]," receives lashes [as rabbinically mandated]. Among the items: a man should not put his mouth over a flowing pipe and drink, nor should he drink from a river or pond at night, lest he swallow an undetected leech; nor may one drink from exposed water, lest a snake drank from it [and deposited its venom].¹⁸

This rabbinic legislation was enacted to prevent direct exposure to potentially life-threatening dangers; other rulings addressed serious hygienic concerns, such as the admonition against putting coins in one's mouth. The Ramo cautions: "one should be most careful to avoid anything which may place him in danger for [we treat matters of] mortal danger more stringently than [those of other] prohibitions, and we are more concerned about potential threats to one's health than we are about possible violations of Jewish law."¹⁹

What is the threshold of potential danger to one's health which should concern us?

Rabbi Moshe Feinstein observes that nowadays, we may drink water without any concern that it might have been exposed to snake venom. He writes that even in the talmudic era, drinking such contaminated water was a "remote possibility," which in other areas of Jewish law, would not

17. *Ketavim Refuim*, vol. 4, *Sefer HaKatzet* (Jerusalem: Mosad HaRav Kook, 1965) pp.110-111. See also critical citations from the Chafetz Chaim and Chazon Ish about the need to preserve and maintain one's health through natural means, in "Vaccination in Jewish Law," A. Cohen, *The Journal of Halacha and Contemporary Society*, LIX (2010) p.89.

18. *Mishneh Torah*, *Rotzeach* 11:5-6; *Shulchan Aruch Choshen Mishpat* 427:9; *Shulchan Aruch Yoreh De'ah* 116:5.

19. Ramo, *Shulchan Aruch Yoreh De'ah* 116:5.

trigger a prohibition. However, Rabbi Feinstein maintains that wherever there is a confirmed life-threatening risk to life, albeit small, the Sages took preventive measures.²⁰

The question then arises: Is there any confirmed level of life-threatening risk in being immunized? As has been noted, there is no evidence of life-threatening allergic reactions from MMR inoculations, while allergic reactions from flu vaccinations are extremely rare. Would these rare reactions to immunization meet the threshold of confirmed life-threatening risk to provide dispensation for those who wish to refuse immunizations?

In Jewish law, the 1 or 2 in a million odds of an individual contracting Guillain-Barré syndrome (GBS) from flu immunizations do not meet the risk threshold of concern to refuse immunizations. The halachic precedent for a minimal risk threshold dates back to the 18th century. In 1772, the Duke of Mecklenburg issued a decree forbidding burial of a deceased individual on the same day that physicians determined he had died. He required a three-day waiting period after the establishment of cardiopulmonary death because of the concern – albeit highly remote – that this individual was misdiagnosed and may still be alive. This decree caused great consternation in the Jewish community where burial is generally required within 24 hours after death. *Chida* (R' Chaim Joseph David Azulai) asserted that we must bury the deceased within 24 hours after the symptoms of death based on the halachic criteria for pronouncing death. R. Azulai declares "even if he was the one in many tens of thousands who was still alive, there would be no prohibition whatsoever in burying him.... we are not concerned about such a remote possibility – *d'l'miuta d'miuta lo haisheenen*."²¹ In this vein, Rabbi Hershel Schachter rules that "if the adverse reaction risk for any given vaccine was in the range of one in

20. *Iggerot Moshe Orach Chaim* II, no. 100.

21. *Responsa Chaim Sha'al* II, no.25.

one million, the concept of *batla da'to etzel kol adam* (lit., his opinion is nullified by the majority view) would be applied to mitigate an individual's fear which might have prevented him from being vaccinated."²²

Endangering the Lives of Others

Individuals who refuse immunization not only place themselves at risk, but may possibly put others at risk by transmitting a contagious disease to their family, friends, and the community at large. Indeed, there is a biblical mandate for one to be proactive in protecting the health and welfare of others: "If you build a new house, you shall make a fence for your roof, so that you will not place blood in your house if one falls from it." (Deuteronomy 22:8). This mandate goes far beyond preventing potential environmental hazards, and extends to avoiding and preventing transmission of life-threatening plagues and virulent diseases: ".... one should flee from a city afflicted by a plague, and one shall leave at the beginning of it – not at the end... it is forbidden to rely on a miracle or to endanger one's life in any similar way."²³

The imperative to "flee from a city afflicted by a plague..." was promulgated by Rabbi Jacob Molin, the Maharil. Shortly before R. Molin's birth, the Black Death pandemic was rampant throughout Europe, killing an estimated 25-60% of its population. In hindsight, the wisdom of the Maharil's advice to evacuate a city suffering from an epidemic in order to prevent contagion and transmission of disease seems clear.

From the 17th through the 20th centuries, smallpox was the scourge of civilization. Smallpox has been estimated to have

22. J.DiPoce and S. Buchbinder, "Preventive Medicine," *The Journal of Halacha and Contemporary Society*, XLII (2001) p.98, f.n. 135.

23. Responsa of Maharil no.35 cited in Ramo, *Shulchan Aruch Yoreh De'ah* 116:5. Rabbi Chaim Palagi discusses the applications of the Maharil's directive to flee the community at the beginning of an epidemic to the smallpox outbreak of his time.

killed more people than any other disease in history. In the 20th century alone, approximately 300 million people died from smallpox. Thanks to the efforts of the WHO (World Health Organization), this disease has been eradicated, and since 1972, there have been no immunizations in the United States against the disease.

In 1796, Dr. Edward Jenner created the first vaccine to combat smallpox when he inoculated an unexposed individual with cowpox, thus creating immunity to the disease. Jenner's medical breakthrough, however, was not without risk. Immunity was achieved by removing infected fluid from one who suffered a mild form of smallpox and, by puncturing the skin, putting it into the bloodstream of an unexposed person. In the early years, in particular, a number of unexposed individuals who were inoculated contracted smallpox and died. This raised concerns at the time about whether the small risk of contracting smallpox from the inoculation was worth the benefit of immunity. Rabbi Abraham Nasich, who lost two children to smallpox, wrote a book devoted to the permissibility of inoculation. In Rabbi Nasich's work, *Aleh Terufah*, published in 1785, he articulates a strong position to permit smallpox inoculations.²⁴ A major authority of that era, Rabbi Yisrael Lipschitz, in his commentary on the Mishnah, *Tiferet Yisrael*, writes: "it appears to me that inoculations are permissible... Even if one out of a thousand die as a result of the inoculations, there is a far [greater and] more imminent danger should one naturally contract the disease than the remote danger of dying as a result of the inoculation..."²⁵

24.A. Nasich, *Aleh Terufah* (Alexander and Son: London, 1785). For a full treatment of these issues, see E. Reichman, "What Does Halacha Say about Vaccination?" *Jewish Action* 69:2 (Winter, 2008), pp.10-14, and E. Reichman, "The Impact of Medical History on Medical Halacha," in *Medicine and Jewish Law: Volume 3* (Brooklyn, NY: Yashar Books, 2005), pp. 172-173.

25.R. Lipschitz, *Tiferet Yisrael*, *Yoma* 8:3. It should be noted that though R. Lipschitz tolerated the risk of "1 out of 1000 who may die as a result of the

Contemporary Applications

Would Jewish law require a healthy individual to be immunized, when there is no threat of an epidemic or where he would not be exposed to a very vulnerable population, such as school children or patients in healthcare facilities who are clustered together in close quarters for extended periods of time? In other words, would one be obligated to put himself at any risk when there is no apparent or immediate risk to others?

There is no doubt that the regular protocol of childhood immunizations prevents disease from the child and in the general population. However, there are parents who are fearful of possible dangers about immunizing their children.... Rabbi Yehoshua Neuwirth ruled that though, as a result of this fear, "we may not compel parents to have their children vaccinated [when they have concerns about any risks to their health], we are obligated to strongly urge them to vaccinate their children."²⁶

This ruling leads to a Catch-22 dilemma: if, for example, a statistically significant number of healthy children are not vaccinated, then diseases such as measles and mumps, may very well re-emerge as serious public health threats. Thus, the question remains: Are we collectively obligated to be vaccinated [where health risks are miniscule (e.g., a severe allergic reaction to the vaccine or a one in 1 million possibility of contracting Guillain-Barré syndrome (GBS)], in order to provide herd immunity to protect ourselves and others from future epidemics?

inoculations," when weighed against the far greater risks of many dying in an epidemic, in contemporary medicine, this level of risk would not be acceptable.

26. *Nishmat Avraham, Choshen Mishpat* 427:3 (5). It should be noted that Rabbi Neuwirth was not addressing the issue of whether parents have a right to refuse vaccinations for their children when they are mandated by the government.

Jewish law has critical concerns about preventing or avoiding possible life-threatening risks, particularly those which affect the community, and they are not limited to clear and imminent dangers, but extend to those which may not be immediate. Consequently, while an individual who refuses a vaccination may not present any clear and imminent danger to himself or others, he may still be obliged to be vaccinated for the sake of the greater good of the community. In halachic terms, even an extremely low level of risk which might not present a life-threatening danger to an individual is of far greater concern when applied to the community (*safek pikuach nefesh d'rabim*).

Halacha's profound concern about even the most remote life-threatening danger to the larger community was clearly demonstrated in a 1992 ruling by Rabbi Shlomo Zalman Auerbach. R. Auerbach was asked whether an autopsy should be performed on an infant who died within hours after receiving a routine inoculation against a viral liver infection. The Ministry of Health requested a post-mortem examination of the baby to determine if the cause of sudden death was in any way related to the inoculation. Rabbi Auerbach maintained that though the public health threat was highly remote, the autopsy must be conducted. He stressed that in such matters of life and death, we must be painstakingly careful, so that under no circumstances would our laxity in taking precautions lead to the death of a single person.²⁷

27. M. Halperin "The Laws of Saving Lives, The Teachings of Rabbi S.Z.Auerbach," *Assia – Jewish Medical Ethics* 3:1 (1997) pp.44-49. In a February 12, 2012 e-mail communication to the authors, R. Halperin proposed that we classify those who refuse to be inoculated into two categories:

1. An individual who refuses to be inoculated during a life-threatening epidemic could be considered a " *rotzeach b'grama*" (indirect homicide), and, consequently, would be held culpable by the heavenly court.
2. An individual who refuses to be inoculated and, consequently, could be transmitting a non-life-threatening disease which causes pain and suffering to the infected could be considered a "*mazik*," (one who

Beyond the concern for any possible public-health dangers, Rabbi Yosef Shalom Elyashiv maintains that routine immunizations are an essential personal obligation in order to maintain good health (*shmirat haguf*). R. Elyashiv submits that it is incumbent upon parents to assure that their children are vaccinated because immunizations are the accepted and standard medical practice:

The question was put to Rabbi Elyashiv, who ruled that the parents should accede to immunization despite their concerns. When asked if the reason behind this ruling was the issue of fairness and the obligation to share responsibility, Rabbi Elyashiv indicated that it was; his reason was that since immunization of children is normal practice throughout the world, one should follow that normative course. In fact, Rabbi Elyashiv went so far as to assert that failure to immunize would amount to negligence. Refusing childhood immunizations on the basis of unsubstantiated fears of vaccine side-effects is irresponsible and out of order halachically. The danger of precipitating epidemics of measles, poliomyelitis and other diseases with potentially devastating complications is far more real than the dangers attributed to vaccines on the basis of anecdotal claims. Until objective evidence to the contrary accrues, the halachically correct approach is to do what is normal. In addition, a legitimate government's legislation concerning standards of medical conduct adds weight to their halachic acceptability.²⁸

The "unsubstantiated fears of vaccine side-effects," which Rabbi Elyashiv terms "irresponsible," refers to the popular notion among some parents that the MMR vaccine is responsible for autism – a claim which has been thoroughly

damages), which, according to Rabbenu Yonah (*Avot* 1:1) is a subcategory of "gezel" (theft).

28. A. Tatz, *Dangerous Diseases and Dangerous Therapy in Jewish Medical Ethics*, (Jerusalem: Targum Press, 2010) p. 48.

discredited by all medical authorities. R. Elyashiv's declaration that parents who fail to immunize their children are guilty of negligence has an early precedent, dating back to the smallpox epidemic. A number of rabbinic responsa required parents to remove their children from dangerous locations where there is an outbreak of a contagious disease, and parents who failed to do so would be guilty of a grave sin.²⁹ In reference to the government's authority to mandate vaccinations, Rabbi Hershel Schachter asserts that "where vaccines are mandated by the state, such as in the case of immunization before entering school, one would be obligated to be immunized based on the concept of *dina d'malchuta dina* [the law of the land is the law]." ³⁰

IV. Conclusions:

1. The medical benefits of mandatory immunizations clearly outweigh any potential risks. High levels of herd immunity resulting from effective immunization programs confer protection upon society at large and have eradicated many serious diseases. Mandatory vaccination protocols fit into the general scientific model that it is a public health imperative to perform a procedure or implement a policy which is overwhelmingly positive for the health and well-being of the community, with the most minimal, if any, real danger to an individual or to the community at large. While the actual degree of benefit (i.e., lives saved, improved health, decreased morbidity and mortality) is difficult to quantify, mandatory

29. See *Magen Avraham* 576:3 and *Mishnah Berurah* 576:14 to *Shulchan Aruch Orach Chaim* 576.

30. *Ibid*, 22, p.99. Rabbi Eliezer Waldenberg in his *Tzitz Eliezer*, 15:40, declares that "it is clear and simple that the government, whose primary concern should be the health of the community, is not only able but even obligated [to take necessary measures]. This leaves little doubt that in the view of this leading *posek*, accepting vaccination would be an imperative." Rabbi A. Cohen, "Vaccination in Jewish Law", *The Journal of Halacha and Contemporary Society*, LIX (2010) pp. 111-112.

immunizations would certainly save more lives, reduce morbidity and are extremely cost-effective health measures.

2. It seems that the landmark Jacobson case, which upheld the rights of States to impose compulsory vaccination laws, applies to those living or working with any vulnerable population group, from infants to the sick and frail elderly. Thus, there appears to be a "compelling state interest," in protecting the health of children by requiring school-age children to be properly immunized in order to be admitted to school.

Major *poskim*, based on both the right and obligation of government to protect public health (*dina d'malchuta dina* and *safek pikuach nefesh d'rabim*), support mandatory childhood immunizations and influenza vaccinations, providing there are no medical contraindications.

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Jewish Perspectives on Burial in a Mausoleum

Rabbi Jason Weiner

Does Judaism recognize multiple alternative options for burial? While traditional Jewish burial has generally been underground, various contemporary concerns, such as finances and lack of space, have led to a number of alternative methods of burial. As a result of our general reticence to discuss end-of-life matters, and the complex issues involved, this topic is generally not addressed in a deep and serious manner in Jewish publications, leaving many individuals to make quick and very difficult decisions without properly understanding the issues involved.

Whether mausoleum¹ burial meets the demands of traditional Jewish law, and on what conditions, is a challenging contemporary halachic issue. While mausoleums may have efficiency and financial advantages, this article seeks to enable the reader to make informed Jewish halachic decisions on this issue. We will explore what traditional Judaism requires in the way of burial, the reasons behind these requirements, review the opinions of the great *Poskim* on these

1. Originally referring to the ancient tomb of King Mausolus of Caria, built in 350 BCE, and known as one of the Seven Wonders of the World, the term “mausoleum” refers to a structure built for multiple above ground interments. These above ground structures, also known as “crypts” or “wall spaces” are generally pre-fabricated and can accommodate a single family or as many as a few thousand corpses in a relatively small area. Although the use of a mausoleum was once seen as a sign of status, today they are often erected simply because of limited ground space for side-by-side burial.

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matters, and analyze if mausoleums fit either the letter or spirit of the tradition.

I. The Obligation to Bury

It is a Torah obligation to bury the dead,² based on the verse, “You shall surely bury him.”³ If one is not buried, it is a violation of the first part of this verse, which states “A body shall not remain overnight...”⁴ It is insufficient to simply place the body into a coffin.⁵ The dead must actually be buried in the ground⁶ in order to comply with the verse, “to dust shall you return.”⁷ While a body placed in a coffin and then buried under the earth is still considered to have been buried in the ground, the ideal manner of burial is for the body to actually be in contact with the ground,⁸ as the verse says “The dust

2. Talmud *Bavli*, *Sanhedrin* 46b; Rambam, *Hilchot Avel* 12:1; *Sefer Hamitzvot*, *Mitzvat Aseh* 231; *Sefer Hachinuch* #537; *Sheiltot* 133 bases this obligation on the verse detailing Miriam’s death and burial (Numbers 20:1). There is a minority opinion that burial for anyone besides an executed criminal is a rabbinic obligation, R. Saadya Gaon’s *Sefer Hamitzvot*, positive precept 19; Rabbeinu Chananel, *Sanhedrin* 46b s.v. “*Amar Lei Shvur Malka*”; *Responsa Chavot Yair* 139.

3. Deuteronomy 21:23.

4. Most *Rishonim* explain that this verse not only applies to those who are killed by the court, but also to anyone who has died. Although some *Rishonim* argue that the mitzvah applies only to those killed by the court, the vast majority of *Acharonim* conclude that the mitzvah applies to everyone. See Chazon Ovadia, *Avelut* vol. 1 pg. 369 for a summary of the opinions.

5. *Tur/Shulchan Aruch*, *Yoreh Deah* 362:1

6. *Ibid.*; *Aruch Hashulchan* *Yoreh Deah* 362:1-2.

7. Genesis 3:19.

8. *Tur/Shulchan Aruch*, *Yoreh Deah* 362:1; *Aruch Hashulchan* *Yoreh Deah* 362:1-2; the Talmud *Yerushalmi* (*Kelaim* 9:3) records the last will of Rabbi, in which he requests not to be buried with too many shrouds and that his casket be perforated. The Ramban (*Torat Ha’adam* p. 117), and *Tur* (YD 362:1) explain that Rabbi wanted the bottom board removed from his casket so that his body would actually be in contact with the ground. This form of burial is still most commonly practiced in Israel, where the verse “And His land will atone for His people” (Deuteronomy 32:43), is applied, though the verse “to dust shall you return” applies everywhere, each locality according to its

returns to the ground, as it was.”⁹

II. Mausoleum: The Permissive Approach

A. History

In biblical and talmudic times, burial was generally not done in the type of grave that we have come to know today, but often took place in a cave tomb, usually a natural cave or a chamber cut into soft rock, near the city. The most prominent biblical example of this practice is the burial cave that Abraham purchased to bury his wife Sarah,¹⁰ and in which Jacob requested to be buried.¹¹ Similarly, the prophet Isaiah, in reference to digging a grave, instructs them to “carve out an abode in the rock.”¹² Biblical references indicate that bodies would be laid on rock shelves provided on three sides of a chamber, or on the floor. As generations of the same family used the tomb,¹³ skeletons and grave goods might be heaped up along the sides or put into a side chamber to make room for new burials.¹⁴

The Talmud also suggests that burial often took place in caves, hewn tombs, and catacombs. The Mishneh describes the custom of burial in recesses carved into the walls of chambers

custom (*Tur* YD 362:1). “His land will atone” implies even greater attributes of atonement to the soil of the land of Israel.

9. Ecclesiastes 12:7.

10. Genesis 23:9 & 19.

11. *Ibid.*, 49:29-32; 50:13.

12. Isaiah 22:16.

13. This practice of family burial is one source of the expressions “to sleep with one's fathers” (1 Kings 11:23) or “to be gathered to one's kin” (Genesis 25:8, 49:29) in reference to death.

14. Delbert Hillers and Reuben Kashani, *Encyclopedia Judaica*. Eds. Michael Berenbaum and Fred Skolnik. Vol. 4. 2nd ed. Detroit: Macmillan Reference USA, 2007, “Burial” pp. 291-294.

beneath the ground.¹⁵ These catacombs were often family burial places that consisted of multiple chambers with numerous recessed niches (“*Kuchin*”), which served as the graves.¹⁶ The Mishnah explains that the catacombs were built depending on the nature of the rock into which they were dug, and the consistency of the soil in which they were constructed.¹⁷ Additionally, reference is also made in the Talmud to a structure called a “*Keve Binyan*,” which may also have been considered burial in the ground.¹⁸ According to many *Rishonim*, these structures were above-ground burial tombs.¹⁹

Although rock vault burial may be the most ancient custom, when Jewish life moved to Babylon, where the soil was not suited for cave interment, ground burial became the norm.²⁰ Another change that has developed over time is that burial is no longer necessarily done in direct contact with the soil, but is usually in a coffin.²¹

This issue became especially pertinent in the nineteenth century, when Rav Yitzhak Elchonon Spector (1817–1896) was asked about the permissibility of *temporarily* interring bodies into a “house” (mausoleum-like structure on the ground),

15. *Bava Batra* 100b; *Moed Katan* 8b.

16. Rashbam, *Bava Batra* 100b.

17. *Bava Batra* 101a.

18. *Moed Katan* 8b; *Sanhedrin* 47b.

19. Rashi, *Sanhedrin* 47b s.v. “*B’kever Binyan*” explains that this was a structure built above, and separate from, the ground. The *Nimukei Yosef* also writes on that statement in the Talmud that these were above-ground burial chambers, and *Talmid R’ Yechiel MiParis* adds that these were constructed of hewn stone covered with lime. The Rambam refers to “building” a grave in *Mishneh Torah*, *Hilchot Yom Tov* 7:15 which the *Hagahot Maimoniyot* #20 says refers to a “*Keve Binyan*,” and in his commentary on the Mishnah, *Moed Katan* 1:6, Rambam defines “*Kevarot*” as structures for graves built above ground. Rosh, *Moed Katan* 3:9 also writes that a “*Keve Binyan*” is on top of and separate from the ground; *Or Zarua*, *Hilchot Avel* 423.

20. *Tur*, *Yoreh Deah* 362:1; *Encyclopedia Judaica*, Vol. 4. 2nd ed. pp. 291-294.

21. *Tur*, *ibid*.

surrounded by stones and sealed with a locked iron door, into which corpses could be placed in multiple niches. This was needed as a temporary emergency measure to protect the bodies, possibly against autopsies.²² Rav Spector quotes the Rambam who rules that the process of burial in a cave is that once the corpse is placed into it, "we then place the earth and the stones back in place above it."²³ From this we see that the soil was only placed onto the corpse after it had been placed in the hollows of the cave. However, Rav Spector cites the *Tur*'s comment that every locality buried according to its own custom, generally based on the climate and composition of the local soil, and the *Tur* explicitly states that in some places no soil was put onto the corpse.²⁴

Since historically there were places that did not put soil onto the corpse, Rav Spector concludes that such burial in a cave underneath the ground is sufficient to be considered burial in the earth. Furthermore, as we will see, placing soil and earthen material onto the mouth and eyes of the corpse would fulfill the need to return the corpse to the earth. Rav Spector thus argues that even though the proposed temporary tomb was not to be beneath the earth, its construction of bricks and stones would still be considered earth in Jewish law,²⁵ so that this could nevertheless be considered burial with soil. Indeed, although most mausoleum structures are built out of cement, not actual soil, most *poskim* rule that substances such as bricks,

22. In the 19th century (during Rav Spector's lifetime) bodies were often sold for profit by grave robbers who exhumed bodies from their graves and sold them at very high prices to medical schools and researchers. See *Death, Dissection and the Destitute*, by Ruth Richardson, 15; "Grave robbing and ethics in the 19th century," by Hutchens MP in *JAMA : The Journal of the American Medical Association* 278(13):1115, 1997 Oct 1; *Jewish Medical Ethics*, by Immanuel Jakobovits, 1148-50.

23. *Mishneh Torah*, *Hilchot Avel* 4:4.

24. *Tur*, *Yoreh Deah* 362. See also the explanation of the *Bach*.

25. *Chulin* 88b, codified by *Shulchan Aruch*, *Yoreh Deah* 28:23 regarding which substances may be used to fulfill the mitzvah of covering the blood of a slaughtered animal with earth.

cement,²⁶ or marble²⁷ are considered soil with regard to burial. Rav Spector thus permitted *temporarily* placing the bodies into this mausoleum-like structure, with soil placed on the bodies, followed by moving them into a subterranean grave when possible.²⁸

B. The Reasons for Burial and their Implications

At this point it is necessary to take a step back and examine the purpose of burial. The Talmud gives two reasons for the requirement of burial.²⁹ The first reason is that if a body were allowed to decompose in public view, it would be a disgrace (*"Bizayon"*) to the deceased,³⁰ their family,³¹ and all humanity.³² The second reason is that burial achieves atonement for the deceased. The reason the Talmud raises this question is to deal with the case of one who declares that they do not wish to be buried after they die. If the reason for burial is to avoid disgrace, since this is suffered by other people and not only the deceased, a person does not have permission to refuse burial. However, according to the reason that burial is

26. *Responsa Havalim Beneimim* 3:63; *Iggerot Moshe* YD3:144.

27. *Responsa Beit Yitzchak* YD 2:153.

28. *Ayn Yitzchak* YD 2:33.

29. *Sanhedrin* 46b. Additional reasons that have been suggested for the mitzvah of burial include the prohibition of deriving benefit from a corpse (*Mishnah Temurah*), and the idea that the body belongs to the earth and returning it to its rightful owner is akin to returning a stolen object – *V'hashiv et Hagezeila* (*Kli Chemda*). Furthermore, *Kol Bo al Aveilut*, vol. 1, 173, points out that a corpse is owed respect in gratitude for its service to us during our lifetime and to demonstrate faith in its ultimate resurrection.

30. Rashi, *Sanhedrin* 46b s.v. "*Mishum Bizyona*;" *Chiddushei HaRan*, *Sanhedrin* 46b s.v. "*L'mai Nafka Mina*."

31. Rashi, *ibid.*, s.v. "*Lav kol k'minei*"; *Chiddushei HaRan*, *ibid.* s.v. "*L'mai Nafka Mina*."

32. *Tur Yoreh Deah* 348; *Chiddushei HaRamban*, *Sanhedrin* 46b s.v. "*Iboy Lahu*;" *Responsa Divrei Chaim* YD 1:64 argues that the disgrace of a human corpse being left out to decay is to humanity as a whole because all humans are created in the image of God.

intended to gain atonement, one might theoretically state that they do not desire atonement for themselves and forgo burial.³³

Leaving a body unburied is a disgrace because everyone can see the human remains decompose in public.³⁴ Indeed, the Torah considers this to be a particularly horrendous form of humiliation, which it describes as a curse for breach of the covenant: "Your carcass will be food for every bird of the sky and animal of the earth."³⁵ The prophets often repeat this threat as well. For example Jeremiah says, "With the burial of a donkey will he be buried – dragged and thrown beyond the gates of Jerusalem."³⁶

Although the *Shulchan Aruch* rules that simply placing a body into a casket without burying it in the ground is insufficient,³⁷ once a corpse is placed in a casket and shielded from public view, one could argue that there is no longer a concern of disgrace. As the *Aruch Hashulchan* writes, to avoid disgrace and to fulfill the verse, "You shall surely bury" all one would technically have to do is place the body in a casket

33. The Talmud does not resolve the question of which of these two reasons is the essential rationale for the institution of burial. Since there is a doubt about a Torah prohibition, the halacha takes both reasons into account, which is why even if someone makes it known that they would not like to be buried, they are to be buried anyhow (Rambam, *Hilchot Avel* 12:1, *Tur/Shulchan Aruch Yoreh Deah* 348:3 & *Shach* 6). Tosafot *Sanhedrin* 46b s.v. "*Kevurah Mishum Bizyona*" notes that although the Talmud doesn't directly answer which of these reasons is the main purpose ("*Ikar*") of burial, it is clear from *Sanhedrin* 47b that whichever is the primary purpose, gaining atonement is indeed part of the purpose of burial. According to Rabbeinu Chananel, *Sanhedrin* 47a s.v. "*Iboy Lahu*" the conclusion of this discussion in the Talmud implies that the atonement is in fact the essential reason.

34. Rashi, *Sanhedrin* 46b sv. "*Mishum Bizyona*." The *Aruch Hashulchan*, *Yoreh Deah* 262:1, argues that the purpose of burial is to ensure that the body not remain out in the open, which he considers "an obvious, logical idea."

35. Deuteronomy 28:26.

36. Jeremiah 22:19.

37. *Shulchan Aruch*, *Yoreh Deah* 362:1.

and put it into a basement.³⁸ Indeed, the idea that simply removing a body from public view by placing it into a casket, even without burial, is some level of fulfillment of the mitzvah can be seen by the ruling of the *Shulchan Aruch* that if people are in a city that is under siege, and they are unable to bury a body in the ground, they may begin their official mourning process once the body is placed into a casket.³⁹ The *Shulchan Aruch* states that “closing the coffin is like burial,”⁴⁰ which the *Shach* explains to mean that although we would normally require burial to take place in the ground, in difficult circumstances simply placing a body into a casket and putting it into another house would constitute perfectly acceptable burial, “*Kevurah Ma’aliyuta*.”⁴¹

However, the obligation to bury goes further, which brings us to the question of how burial in the ground effects atonement. According to Rashi, atonement is achieved because a person is being lowered down into the depths.⁴² Similarly, the Ran writes that this lowering down helps to grant a person atonement because it is tremendously humbling for a person who had been accustomed to rule over all other living beings of the earth to be lowered beneath them.⁴³

The Ran adds another intriguing comment about the reason for burial in earth. He writes that one does not fulfill the obligation of burial unless there is soil involved in the burial,⁴⁴ based on the verse “to dust shall you return” which teaches us that “soil is healing (*She’ha-afar Refuato*).”⁴⁵ It is also based on

38. *Aruch Hashulchan*, *Yoreh Deah* 362:1.

39. Only if they do not intend to come back later to bury the casket.

40. *Shulchan Aruch*, *Yoreh Deah* 375:4.

41. *Shach*, *Yoreh Deah* 375:5; *Responsa Teshuvot V’Hanagot* 3:YD370.

42. *Sanhedrin* 46b, s.v. “oh.”

43. *Chiddushei Haran*, *Sanhedrin* 46b s.v. “*L’mai Nafka Mina*.”

44. Interestingly, he does not say that there must be “*Kevurah B’karka*” (burial in the ground) but “*Kevurat Karka*” (burial with ground).

45. *Chiddushei Haran*, *Sanhedrin* 46b s.v. “*Remez L’kevurah*.”

this verse that the *Aruch Hashulchan* concludes that burial in a casket simply placed into a basement would not be sufficient. Based on this idea, one might argue that this verse could be fulfilled not only through being buried “in the depths” underground, as Rashi and the Ran initially argued, but also, to at least some degree, by simply placing soil into the casket and on the corpse. This idea may in fact be referenced by the Ran himself when he writes that burial in the ground is better (“*Yoter Tov*”) than being left on the surface of the earth,⁴⁶ but not necessarily obligatory, leaving room for the suggestion that while subterranean burial is ideal, there may be ways to inter a corpse above ground that have at least some degree of validity.

In fact, as mentioned above, the *Shach* rules that even though burial is supposed to take place in direct contact with the earth, a corpse may nevertheless be buried in a coffin because the earthen material that we place on the face of the deceased takes the place of the burial in the soil mentioned in the earlier sources.⁴⁷ The *Be'er Heiteiv* adds that their custom was to place a linen sack of soil under the head of the deceased, which is enough to be considered like burial in the earth.⁴⁸

We thus see that while placing a body into a coffin without burying it in the ground does not completely fulfill the mitzvah of burial,⁴⁹ it does seem to address the concern of

46. Ibid., s.v. “*L'mai Nafka Mina.*”

47. *Shach*, *Yoreh Deah* 362:1.

48. *Be'er Heiteiv*, *Yoreh Deah* 362:1, adds that using dirt from the land of Israel is even better. If one is unable to obtain soil from Israel, lime should be used because it assists in the speedy decomposition of the body (Ramo, *Yoreh Deah* 363:2).

49. This is assuming, as most sources do, that burial in the ground is the Torah obligation. However, according to those (such as the suggestion made by Rabbeinu Chananel quoted above), who conclude that burial in the ground is a rabbinic obligation, placing a body into a coffin may in fact fulfill the primary obligation to bury. See also *Responsa Teshuvot V'Hanhagot* 3:YD370.

disgrace. While burial above ground (still in contact with some soil) may not be complete atonement, the Ran followed by the *Shach* and others imply that there is still some atonement value. Furthermore, as we have seen, the Talmud rules that a person may choose to forgo this atonement altogether.⁵⁰

Support for this approach can be found in the rulings of Rav Ovadia Yosef,⁵¹ who quotes the responsa of Rav Yitzhak Yehudah Shmelkes, published in 1875,⁵² who suggests that based on these words of the Ran it may be sufficient to bury a body in a building on the ground.⁵³ Rav Yosef argues that everyone would agree that this is permitted if the building is made out of soil, as was done in the days of the Talmud. If the building is made out of cement, Rav Yosef argues that it would be better to at least add some dirt to the floor of the building, as well as soil between each casket. However, Rav Yosef argues that while allowing the body to touch the soil is of great benefit to the deceased, it is not absolutely required to fulfill the basic mitzvah of burial.⁵⁴

C. Contemporary Applications

This question has become particularly relevant today because many cemeteries have become filled to capacity, and it is not always practical to build new cemeteries far away from

50. Rav Shternbuch was asked if a woman who lived in Israel may choose to be buried outside of Israel, even though the ground of Israel atones, "*Vechiper Admato Amo*." He writes that one has the right to forgo atonement if they so choose, as one cannot be forced into atonement "*Ain kapara baal korchah*." Furthermore, he writes that if, in fact, a person does not desire this atonement, Rashi (*Sanhedrin* 46b, s.v. "*Ha Amar*") states that the ground would not atone for them (*Responsa Teshuvot V'Hanhagot* 3:YD370).

51. Chazon Ovadia, *Aveilut*, vol. 1, 431-433.

52. *Teshuvot Beit Yitzchak*, Yoreh Deah II 161.

53. Though the *Beit Yitzchak* quotes other sources that imply that this would not be permitted, he concludes that it is best to follow the ruling of Rabbi that the body be buried in direct contact with the ground.

54. Chazon Ovadia, *Aveilut* vol. 1, 431-433.

established communities.⁵⁵ Based on the above sources, Rav Ovadia Yosef allowed the *Chevra Kaddisha* of Argentina to bury in niches in a wall built above the ground. In fact, he reports that he himself advised the building of a wall in which to inter bodies in Alexandria when their cemetery ran out of space.⁵⁶ Other than requiring at least six “*Tefachim*” of soil between each grave, the specifications and design of this “wall” are not made clear.

The issue of lack of space is particularly acute in Israel, where the Chief Rabbinate came up with the idea of building layered burial chambers. They were to be constructed in such a way that although above ground, they would be contained within an artificial earthen mound, each grave concealed within soil on all sides, with concrete walls surrounding them.⁵⁷ Although a number of the rabbis had differing opinions on the matter, the Israeli Chief Rabbinate ultimately permitted the construction of these structures as long as they would maintain very specific criteria.⁵⁸ In 1987 Rav Shalom Messas, chief Sephardic rabbi of Jerusalem and Head of the Jerusalem Rabbinical Court, issued his permissive ruling based on the argument that while it would not be permitted to bury a corpse completely above ground without being in the

55. In addition to the solution of mausoleums, Rav Shlomo Amar, the Sefardi Chief Rabbi of Israel, permitted the Jewish community of Istanbul to address this concern by bringing in additional soil to their cemetery to cover up the existing graves and bury a new layer of bodies above the current ones (*Techumin*, vol. 27, pg. 429-435).

56. *Chazon Ovadia, Aveilut* vol. 1, 431-433.

57. In Rav Yisraeli's ruling on the matter, which will be discussed below, he specified that there should be at least an “*Amah*” of soil surrounding and above the structure, and it should be firm enough not to erode as a result of rain and wind, in order for it to be considered cave burial (*Responsa B'mareh Habazak*, vol. 4, 181).

58. The specifications were that the local *Chevra Kaddisha*, rabbi, and family agree, and the Chief Rabbinate would have the opportunity to inspect the construction of each structure before it was utilized. (See *Responsa B'mareh Habazak*, vol. 4, 176).

soil, it would be permitted to construct a hill in such a way that the graves are surrounded by earth on all sides. Rav Messas based his ruling on the discussion in the Talmud which prohibits deriving benefit from an object that has been used for the burial of a body, unless it is "*Mechubar L'karka*" (attached to the earth). His discussion concludes that one may not derive benefit from a "*Kever Binyan*" (burial structure) because it is separate from the ground.⁵⁹ However, Rav Messas argues that since the Talmud refers to a *Kever Binyan* being dug, it implies the construction of walls and a floor to strengthen the grave after it has been dug in the ground, creating a vault where a corpse can be placed, separate from the ground. He further argues that as long as the structure is connected to the ground, and the corpses are surrounded on all sides by soil in a structure constructed from concrete, then in a case of great need (such as lack of space) this would be a permitted form of burial.⁶⁰

We thus see that some *Poskim* do see mausoleum-like burial structures, *when properly constructed beneath earth to emulate caves*, as acceptable burial in the ground. Furthermore, many *Poskim* are of the opinion that the reasons for burial are satisfied by these structures, and can thus be permitted under extenuating circumstances. However, many leading authorities have expressed a great deal of opposition to these opinions, as will be discussed below.

III. Mausoleum: The Case Against

Despite the possible reasons for permissibility listed above, the vast majority of contemporary *Poskim* have been strongly opposed⁶¹ to burial in mausoleums. One of the primary

59. Rashi explains that a *Kever Binyan* "is built above, and separate from, the ground."

60. *B'netivei Chessed V'emet*, Annual Journal of the Tel Aviv-Yafo *Chevra Kaddisha*, 1988, 102-105.

61. For example, Rav Moshe Feinstein refers to burial in a mausoleum as

arguments against this sort of burial is that it does not properly fulfill the commandment to be buried, or the simple understanding of the mitzvah of burial in the ground,⁶² and one who is buried in such a structure is thus in violation of the command⁶³ that, "A body shall not remain overnight..."⁶⁴

A. History

Many *poskim* also argue that burial in a mausoleum is simply not the age-old Jewish custom⁶⁵ of plots in the earth and is rather an imitation of non-Jewish practices and thus in violation of the prohibition⁶⁶ of "You shall not walk in their statutes."⁶⁷ Today, mausoleums are often a cheaper form of burial than subterranean interment, but because they used to be much more expensive, many *Poskim* felt that those

an "Issur Gadol" a major prohibition (*Iggerot Moshe* YD 3:143); Rabbi Avraham Aharon Yudelovitz, the head Rav of the *Aggudat Hakehillot* of New York, strongly prohibited the practice of burial in a mausoleum in his *Av B'chochmah* (1927). He pointed out that this prohibition must be publicized because, "nearly all of the rabbis are unaware of this prohibition and rule mistakenly in the matter." Rav Nissan Yablonsky, who was the Rosh Yeshiva of Beit Midrash L'Torah in Chicago in the 1920's, ruled that burial in a mausoleum is "certainly forbidden" (*Responsa Nitzanei Nissan*, 166-171).

62. Rabbi Yitzchak Yaakov Weiss, head of the rabbinical court of the *Eidah Charedis* in Jerusalem, wrote in 1985 that burial in the actual ground ("Eretz Mamash"), not just having earth placed on the body, is the mitzvah (*Responsa Minchat Yitzchak* 10:122); *Iggerot Moshe* YD 3:143. Rav Moshe does not think that burial in a mausoleum violates "A body shall not remain over night..." but rather does constitute some form of burial since the mausoleum building is made of cement, bricks, and stones that are connected to the ground, and is thus "like ground," but he does argue that it is improper and that one certainly has not fulfilled the mitzvah of burial in this manner.

63. Deuteronomy 21:23.

64. *Sefer Av B'chochmah*, 124-125; *Kol Bo al Aveilut*, vol. 2, 48; *Responsa Minchat Yitzchak* 10:122; Rav Shaul Yisraeli in *Chavot Binyamin* 1:24.

65. *Iggerot Moshe* YD3:144.

66. Leviticus 18:3.

67. *Responsa Nitzanei Nissan*, 166-171; *Sefer Av B'chochmah*, 124-125; *Kol Bo al Aveilut* vol. 2 pg. 48.

mausoleums also contradicted the ancient Jewish burial philosophy of equalizing everyone, rich and poor alike, by displaying arrogance above the simple coffins in the ground.⁶⁸

Furthermore, Rav Shaul Yisraeli, as a member of the Israeli Rabbinat's high court, challenged a number of the sources that his colleagues in the Rabbinat marshaled in their approval of mausoleum-like structures in artificial above-ground mounds. He pointed out, based on a Midrash recounting the burial of Aaron which is quoted by Rashi,⁶⁹ that while it is true that ancient burial took place in caves, the bodies were in the sides of mountains and completely enclosed within earth, and thus technically underground.⁷⁰ A similar point was made by Rav Nissan Yablonsky, who was the Rosh Yeshiva of Beit Midrash L'Torah in Chicago in the 1920's. He ruled that burial in a mausoleum would not satisfy the requirements of burial because proper interment requires complete enclosing and encasing of the body. A mausoleum does not fulfill this requirement if a body can be easily accessed and removed.⁷¹ Rav Yablonsky concludes that mausoleums existed in the world in the days of the Talmud, but the Jews didn't make use of them, which implies that they rejected them.⁷²

B. Disgrace

Moving on to the issue of disgrace as a reason for the mitzvah of burial, some explain that burial in the ground was intended to preclude the likelihood that people could easily open the casket. Since simply placing a body in a casket and

68. *Responsa Nitzanei Nissan*, 166-171; *Kol Bo al Aveilut*, vol. 2, 48; *Iggerot Moshe* YD3:144.

69. Numbers 20:26.

70. *Chavot Binyamin* 1:24; *Responsa Nitzanei Nissan*, 166-171, makes a similar point.

71. *Responsa Nitzanei Nissan*, 166-171.

72. *Ibid.*

leaving it above ground does not address this issue, and it does not fulfill the mitzvah.⁷³ Similarly, many of the *Poskim* rule that burial in a building above ground raises the concern that it lacks permanence and may one day fall or be destroyed.⁷⁴ Indeed, Rav Greenwald noted that it was specifically the corpses of Jews interred in mausoleums in Germany that were the first to be removed from their graves by the Nazis and thrown to the dogs, precisely a concern that burial in the ground was intended to prevent.⁷⁵

C. Atonement

In reference to the goal of burial bringing about atonement, some have pointed to the Rashi in *Sanhedrin*, which (in addition to other *Rishonim*) explains that the body is specifically being “lowered down into the depths,” which serves as atonement for the soul of the deceased, and if a body is not lowered but left above ground, this atonement is not achieved.⁷⁶ Furthermore, many also argue that burial helps to induce the decomposition of the body, and as long as a body is not able to decompose it is unable to be granted atonement.⁷⁷ It is argued that delaying the body’s decomposition by withholding burial in the ground serves to extend the period of judgment, slow down and delay the process of atonement, and cause increased anguish to the soul of the deceased.⁷⁸

73. Rav Aharon Dovid Goldberg, *Sefer Avodat Dovid*, *Sanhedrin* 46b.

74. *Sefer Av B'chochmah*, 124-125; *Iggerot Moshe* YD 3:143.

75. *Kol Bo al Aveilut*, vol. 2, 48.

76. *Sefer Av B'chochmah*, 124-125; *Responsa Nitzanei Nissan*, 166-171; Rav Shaul Yisraeli quoted in *B'netivei Chessed V'emet*, 96.

77. *Kol Bo al Aveilut*, vol. 2, 48; *Iggerot Moshe* YD 3:143. Rav Moshe bases this on a Ramo in *Yoreh Deah* 363:2, who writes that one would be permitted to place lime onto a corpse in order to speed up the decomposition. The *Taz* (3) explains that this is based on the verse in Job 14:22, “His flesh will be pained over itself”, which means that as long as one’s flesh remains intact, one can not rest from judgment.

78. Rav Moshe bases this on the ruling in the *Shulchan Aruch*, *Yoreh Deah*

Although some have conceded that burial in a mausoleum does address the concern of disgrace by enclosing the body away from sight, the Rif, Rambam, and Rosh do not conclude if the primary purpose of burial is to avoid disgrace or to bring about atonement. Instead, all of them seem to try to satisfy both concerns, in which case they would apparently all oppose burial in a mausoleum.⁷⁹

D. *Kever Binyan*

Along similar lines, regarding the issue of "*Kever Binyan*" raised above, Rav Greenwald argued that this was a structure used in the times of the Talmud only in order to allow the bodies to decompose, after which their bones were properly buried.⁸⁰ In fact, the Talmud never clearly states that these buildings were an acceptable form of Jewish burial.⁸¹ Additionally, Rav Yablonsky argues that since most authorities require burial in the ground, and since a "*Kever Binyan*" or mausoleum is to be considered above and separate from the ground, it did not fulfill the requirements of burial. Additionally, if there is no soil in the mausoleum, it would certainly not fulfill the verse, "to dust shall you return," which is ideally fulfilled through contact with the earth. Although this verse can be fulfilled by burial in a sealed casket that is beneath the ground, it is not fulfilled in an above-ground structure.⁸² Although the *Beit Yitzchak*, quoted above,

363:1 that one should not re-inter someone who has already been buried. According to the *Shach* (1) this prohibition is rooted in the concept that the confusion would strike fear in the dead and we are prohibited from causing them increased pain.

79. *Responsa Nitzanei Nissan*, 166-171.

80. *Kol Bo al Aveilut*, vol. 2, 48.

81. A similar point can be made in response to the claim that archeological finds have shown mausoleum-like graves in ancient Israel. There is no indication that these were sanctioned Jewish graves. The vast majority of archeological finds have been beneath-ground graves.

82. *Responsa Nitzanei Nissan*, 166-171.

permitted such burial if there is earth placed on the body in the casket, Rabbi Yitzchak Yaakov Weiss argues that this would still not be considered burial in the ground, which is why this ruling seems to have been retracted by the *Beit Yitzchak* in his next responsum.⁸³

Another approach was taken by a number of authorities who explained that the concept of a “*Kever Binyan*” mentioned in *Sanhedrin* is not a building that was on top of the ground, but as the Ramban⁸⁴ and *Yad Ramah* say,⁸⁵ it refers to large holes or vaults in the ground, in which niches were cut out for the placement of bodies.⁸⁶ According to this approach, despite the construction of these structures, the actual burial still took place beneath the ground. Rav Yisraeli argues, based on a reading of the Talmud in *Sanhedrin*, that the concept of a “*Kever Binyan*” would only be a permissible form of burial if the structure was attached to the ground. Indeed, while others quoted Rashi’s statement that this structure was built above ground as proof that it could be compared to today’s mausoleums, Rav Yisraeli points out that Rashi only mentions that the building was above ground, implying (based on another statement of Rashi)⁸⁷ that perhaps the corpse was in fact buried below the ground, with the “*Kever Binyan*” simply serving as a monument for the deceased, built above the grave.⁸⁸

83. *Responsa Beit Yitzchak* 10:122.

84. *Torat Haadam*.

85. *Yad Ramah, Sanhedrin* 47b.

86. *Sefer Av B'chochmah*, 124-125; *Beit Yitzchak, Yoreh Deah* 2:161; This can be seen from the fact that the Talmud in *Sanhedrin* refers to it as being “dug out,” the implication being that the “*Kever Binyan*” was a structure within the soil, not above it.

87. *Sanhedrin* 48a, s.v. “*Nefesh*.” Rashi states that a “*Nefesh*” was a tomb-structure that was ornamentally erected over a burial plot. Rav Yisraeli’s point is that this “*Nefesh*” is also what is called a “*Kever Binyan*.”

88. *Chavot Binyamin* 1:24. Rav Yisraeli makes the same point on the *Yad Ramah*’s explanation of a “*Kever Binyan*,” implying that he also believes that the structure was simply built in the earth, and the corpse was placed into

E. Coffins

In response to the point made above that Jewish burial has shifted from direct contact with the soil to burial within coffins, numerous rabbinic sources make it clear that coffins have, in fact, been used throughout Jewish history and are thus an ancient Jewish practice.⁸⁹ Some have pointed out that it was simply a matter of location. While in the land of Israel burial took place in cave tombs, in Babylon burial took place in coffins with soil placed on the body of the corpse.⁹⁰ The authorities note that it has indeed always been perfectly permissible (“*Lechatchila*”) for one to be buried in a coffin; it is simply better to be buried directly in the ground when possible.⁹¹ The Rambam writes explicitly that “we may bury in a wooden coffin”, upon which the Radbaz goes so far as to claim that a wooden casket can in fact be considered soil because everything comes from the earth and will return to the earth.⁹² Similarly, some sources consider wooden coffins to be perfectly permissible because they eventually decompose and allow contact with the earth, something not true of a mausoleum.⁹³ In fact, the *Avnei Nezer* writes that being buried in a wooden coffin in the ground is “*Chashiv K’ara Samichta*” as if one is connected to the ground.⁹⁴ While many *Rishonim*

this underground structure.

89. Some examples of talmudic reference to their use of coffins include: *Brachot* 19b; *Shabbat* 151a; *Sanhedrin* 46a; *Sanhedrin* 98a–b; Talmud *Yerushalmi*, *Kilayim* 9:3, 32b.

90. *Hilchot Rabbeinu Yitzchak Ibn Geyut*, Bamberger edition, 2:30.

91. *Divrei Sofrim* on *Shulchan Aruch* YD 362:3; The *Levush*, YD 362:1 is one exception to this. Though he also notes that one may be buried in a coffin, he writes that burial directly in the ground is the true intention of the mitzvah (“*Stam kavur b’aretz mamash mashma*”) and is thus the ideal form of burial.

92. *Hilchot Avel* 4:4.

93. Talmud *Bavli*, *Nazir* 51a, Rashi s.v. “*Eizehu Meit*,” Talmud *Yerushalmi*, *Pesachim* 8:8 & *Korban Haeida* there which refers to burial in a wooden coffin as “*k’kavur*”, like being buried.

94. *Responsa Avnei Nezer* YD 472.

permit the use of a coffin,⁹⁵ the *Yad Ramah* actually suggests that there is a mitzvah to use it. The Ravan explains that this is based on the Midrash in which R. Levi interprets the biblical phrase that Adam and Eve hid themselves in the wood of the garden to mean that their descendants would be placed within coffins of wood.⁹⁶

IV. Conclusion

The purpose of this discussion has been to explore various reasons and types of Jewish burial, not to imply halachic rulings on the matter. This topic is complex and in any practical case one should consult a competent Rav for guidance. From the above sources and discussion, it does become very clear that Jewish burial is ideally fulfilled through burial in the ground and that interment in a mausoleum is problematic from the standpoint of Jewish law. We have also seen that defining precisely what constitutes burial in the ground has many nuances. It is also important to understand that halacha recognizes gradations of preference, and that some acts are better than others, while other options are worse than others. Today, various concerns lead many away from traditional Jewish burial and Jewish cemeteries. To our sorrow, they often opt for cremation instead, which is certainly worse than interment in a mausoleum from the perspective of halacha.⁹⁷

It should thus be kept in mind that, to the extent that mausoleum burial can constitute some form of burial in the ground if done correctly, and that it can address some of the reasons for burial, it may be possible to justify certain types of mausoleum-like burials if they are built and utilized

95. For example, *Chiddushei haRan*, *Sanhedrin* 46b, s.v. "Remez L'kevurah."

96. *Bereshit Rabbah* 19:8.

97. An often cited responsum against cremation is *Achiezer* 3:72, but a complete study of the prohibition against cremation in Jewish sources is beyond the scope of this article.

appropriately, as discussed above. This would clearly only be true in cases of great need when traditional underground burial is for some reason not an option, and in consultation with a competent Rav, as a choice that is not as good as burial in the ground, but may be better than many other "alternative" forms of burial. It should be kept in mind that many contemporary mausoleums are not constructed or utilized in a manner that conforms to the above requirements. Furthermore, despite any sources or historical precedent that can be marshaled, we must remain cognizant of the fact that the traditional Jewish psyche often expects underground burial and can be highly uncomfortable with the notion of any sort of interment above the ground or in a wall. It is our hope that through further education on the topic, that the history, sources, and reasons for traditional Jewish burial in the ground will be better understood and more people will appreciate and utilize this highly preferred method of burial despite any competing issues.

Determining Priorities and Triage¹ in Medical Care

Rabbi Moshe Walter

An ambulance with three paramedics arrives at the scene of a car accident. There are a total of eight passengers that require serious medical attention. To which of these eight people do the three paramedics tend first? How should an intensive care unit at a hospital with a limited number of beds and equipment decide who is admitted first? When there are insufficient organs for transplantation to help patients dying of organ failure, what is the appropriate protocol to determine which patient receives the necessary organ first?

Decisions regarding the allocation of scarce medical resources are continuously being made in hospitals, doctors' offices, pharmacies, emergency rooms, intensive care units, and organ transplantation programs. These decisions are emotionally challenging, heart wrenching, difficult to make, and may well determine whether a patient lives or dies. As such, attempts have been made to establish rules to determine the priorities to deal with these questions. Unfortunately, little definitive evidence is available to assist the physician in deciding which patient to admit for medical reasons, and sparse data are available for the system to determine strategies to optimize capacity, efficiency, and the use of ICUs.²

1. The assessment of priorities is called triage, which is a French word meaning to select or choose. The Hospital de Triage was the French Army's emergency medical aid station during the Napoleonic war.

2. C.L. Sprung and P.D. Levine – "Modifying triage decisions to optimize

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The American Thoracic Society stated that triage decisions are “too morally problematic to define, and ranking relative degrees of potential benefit with ambiguity, bias, or subjectivity is extremely difficult, and [therefore patients] should be treated the same on a first-come first-served basis.”³ The Society of Critical Care’s position is that “priority for admission should be given to patients who are more likely to benefit from ICU care when compared with non-ICU care.”⁴ As a result of the lack of definitive protocol in this area, many hospitals have established committees made up of doctors, communal workers, and ethicists to clearly define the criteria and rules of selection to deal with triage decisions.⁵ As always, we must look toward the halacha to determine Jewish law as well as to offer us direction in the area of medical ethics and conduct.

I. Rabbi Akiva and Ben Peturah

An important source that may shed light on priorities in medical care can be found in *masechet Bava Metzia*:

Two people were traveling along the way, and one of them had in his possession a flask of water; if they both drink from it they will both die [there is not enough water to sustain both of them]. However, if only one of them drinks, he will be able to reach a settlement. Ben Peturah taught that it is better that both should drink and die, and

long term care”, pp. 235 – 244 in Surviving Intensive Care by Derek c. Angus and Jean Carlet.

3. Surviving Intensive Care, *ibid*; American Thoracic Society Bioethics Task Force (1997) “Fair allocation of I.C.U. resources”, 156: 1282-1301.

4. Surviving Intensive Care, *ibid*; *Society of Critical Care Medicine* (1994), “Ethics committee consensus statement on the triage of critically ill patients”, 271: 1200-1203.

5. Surviving Intensive Care, *ibid*; *American Society of Critical Care Medicine*, 16: 807, 1988. “Scarce medical resources”, *Columbia Law Review* 1969, volume 60, pp. 620 – 692. See Dr. Fred Rosner’s *Biomedical Ethics and Jewish Law*, pp. 435 – 450, “The allocation of scarce medical resources”.

one of them should not witness the death of his fellow, until Rabbi Akiva came and taught, based on the verse, “that your brother may live with you,” which implies that your own life takes precedence over your fellow’s life.⁶

There are a few points that must be addressed in this Gemara.

1. The Gemara relates a disagreement between Ben Peturah and Rabbi Akiva, but does not conclude which opinion should be followed. Similarly the Rif, Rambam, Rosh, *Tur*, and *Shulchan Aruch* do not adopt a position in either of their respective halachic works as well.⁷ However it is understood that the halachically accepted opinion is that of Rabbi Akiva.⁸

6. *Masechet Bava Metzia* 62a, citing *Sifra Parshat Behar Parshata* 5 #3. Responsa *Tzitz Eliezer*, volume 17 *siman* 72 #21, notes some differences between the two sources which may have halachic ramifications.

7. See Responsa *Binyan Tzion*, volume 1 *siman* 175; Responsa *Achiezer*, volume 2 *siman* 16 #5, and Responsa *Iggerot Moshe Yoreh Deah*, volume 7 *siman* 145, who point out the Rambam’s omission of this halacha, and suggest independent reasons to resolve the Rambam’s positions. See footnote 8 regarding the position of the Rosh.

8. This can be gleaned from the Gemara first citing the opinion of Ben Peturah and then bringing the opinion of Rabbi Akiva with the introduction – “until Rabbi Akiva came out and taught” which indicates that once Rabbi Akiva ruled that “your own life takes precedence over your fellow’s life” it is Rabbi Akiva’s opinion that is accepted. Responsa *Tzitz Eliezer*, volume 17 *siman* 72 #27, suggests that analysis of the Gemara. See *Sifra*, *ibid*, which does not introduce Rabbi Akiva’s position in the same fashion as the Gemara. This may reveal that the Gemara is actually siding with Rabbi Akiva as opposed to merely citing the *Machloket* as the *Sifra* does. Although the Rosh does not side with either Rabbi Akiva or Ben Peturah, in his *Kitzur Piskei Harosh Bava Metzia perek Eizehu Neshech* #6, the Rosh rules conclusively like Rabbi Akiva. The Netziv in his commentary *Ha’amek She’eilah* to the *She’iltot*, *She’ilta* 147 #4, writes “it is known that the halacha follows Rabbi Akiva.” The Netziv may very well be referring to the talmudic principle (*Eruvin* 46b) that anytime Rabbi Akiva argues with an individual opinion, Rabbi Akiva’s opinion is accepted. *Seder Tanaaim v’Amoraim* #15 and 16, cited in *Shem Ha’gedolim* of the Chida, *ma’arechet sefarim : samach*, posits like this Gemara. *Minchat Chinuch mitzvah* 296 #23, and Responsa

2. Rabbi Akiva and Ben Peturah debate a case where “two people were traveling along the way, and one of them had in his possession a flask of water.” If the halacha follows Rabbi Akiva, then the individual with the water is not obligated to share it with his friend because he is responsible to save his life first.⁹ The Gemara however does not address a case where there is a third party. Imagine two people were traveling along the way and a third person appeared who did

Binyan Tzion, *ibid*, rule like Rabbi Akiva in this case based on this principle. The Netziv further proves that the halacha follows Rabbi Akiva based upon a parallel *machloket* between the Rabanan and Rav Yosi in *masechet Nedarim* 80b and 81a. See *Ran ibid*, *D”H Maayan shel B’nei Hair*. The *Sheiltot* and Netziv rule like Rav Yosi whose opinion mirrors that of Rabbi Akiva.

There is further room to suggest that Ben Peturah himself agrees with Rabbi Akiva. Ben Peturah rules “that it is better that both should drink and die.” The fact that Ben Peturah only says that it is “better” may indicate that one does not have to share his portion of water, but it is an act of graciousness. However, according to the letter of the law Ben Peturah would agree with Rabbi Akiva that one can keep the water for himself. See *Tzitz Eliezer*, *ibid*. Again the *Sifra* does not use the word “better,” which would indicate the Gemara taking a stand on Ben Peturah’s position.

9. This would be the halachic outcome based on sources cited in note 8, who posit like Rabbi Akiva. Therefore if two people are drowning, and only one of them has a life vest, the owner of the life vest must save himself and is in no way obligated to give it to his friend. This would be true even if his friend is higher up on the list of people to be saved, based upon the priorities listed in the Mishnah in *Horayot*, Chapter 3, Mishnah 7 and 8. Similarly the *Iggerot Moshe Chosen Mishpat*, volume 2 *siman* 73#2, and Responsa *Tzitz Eliezer*, volume 17 *siman* 72, rule that a hospital may not disconnect from a respirator a patient who is not likely ever to get taken off of the respirator in favor of an incoming patient who, if connected to that respirator, would ultimately come off it and continue to lead a healthy life. The basis of their position is that the patient who is already connected to the respirator has no obligation to give up his life once the tools for saving it are in his hand. This is also the position of Rav Shlomo Zalman Auerbach, cited in *Nishmat Avraham Yoreh Deah*, *siman* 252 #2. See also *Encyclopedia Hilchatit Refuit* by Professor Avraham Steinberg, volume 5, *kadimut b’tipul Refui* pp. 515-517 *Alef*, and pp. 533-534. On page 534 footnote 164, the author cites dissenting opinions on this matter. See as well Responsa *Teshuvot v’Hanhagot*, volume 1 *siman* 858.

not need any water but had enough for one person to reach a settlement. Who should he give the water to? The situation is seemingly a direct parallel to the cases raised at the beginning of this article.

A closer look at the Gemara may indicate that Rabbi Akiva's and Ben Peturah's positions cannot be used to resolve which of the two people a third party should give the water to. Rabbi Akiva only taught that saving one's life supersedes another's, but not how to decide between two people who are equally in need of the available water. Ben Peturah stated that it is better that both should drink and die, and one of them should not witness the death of his fellow. In this case, however, if the third party splits the water between the two parties he will witness the death of two fellows. As a result of this difficulty, the *Chidushei HaRim* concludes that one should leave the water, and allow the situation to take its course. However, in a case similar to the ones raised at the beginning of this article, where one can't just "leave the water," the *Chidushei HaRim* leaves the question unresolved.¹⁰

The Chazon Ish, however, proves that this Gemara is a valuable source to ascertain third-party priorities in saving someone's life.¹¹ The Chazon Ish reasons that according to Ben Peturah one should split the remaining water between the two parties even though they will both die. This is because even if the third party is to give it to one person, that person will then have to split the water with his fellow according to Ben Peturah. The Chazon Ish continues that according to Rabbi Akiva, however, the third party should give the water to one of the two individuals. Even though Rabbi Akiva only rules that your own life take precedence over another's, and here the third party is not in need of the water, helping one person live is tantamount to saving one's own life. The Chazon Ish

10. *Chidushei HaRim* (Rav Yitzchak Meir of Gur, the first Gerrer Rebbe) *Likutim*, *Bava Metzia* 62b and *Responsa Tzitz Eliezer*, volume 17 *siman* 72 #21.

11. *Chazon Ish*, *Chosen Mishpat Likutim*, *siman* 20, *Bava Metzia* 62a.

then concludes that the third party should choose which of the two individuals he wishes to save unless one of the individuals has priority based upon the Mishnah in *Horayot* (cited below).¹²

II. *Hilchot Kedimah*

A second source that halachic authorities have pointed to in order to glean important rules regarding priorities in medical care is a Mishnah in *Horayot*:

A man takes precedence over a woman where the need is to sustain life or to return a lost object, and a woman takes precedence over a man where the need is to clothe or to free her from captivity. A *Kohen* precedes a *Levi*, a *Levi* precedes a *Yisrael*, a *Yisrael* precedes a *mamzer*, and a *mamzer* precedes a freed Canaanite slave. When does this order of precedence apply? When they are all equal in their wisdom, but if the *mamzer* was a Torah scholar and a *Kohen Gadol* was an ignoramus, the *mamzer* who is a Torah scholar precedes the *Kohen Gadol* who is an ignoramus.¹³

Genealogy, Religious Status, and Scholarship Factors in Triage Decisions

The Mishnah's statement that a *Kohen* precedes a *Levi*, a *Levi* a *Yisrael*, etc., is codified by the Rambam, *Tur*, and *Shulchan*

12. *Chazon Ish*, *ibid*. Although the *Chazon Ish* does not rule explicitly that the halacha follows Rabbi Akiva, based upon what is written there and the sources cited in footnote 8 it would seem that this is his opinion. See however *Gilyonot Chazon Ish to Chidushei Rabbeinu Chaim HaLevi Al HaRambam* where the *Chazon Ish* writes that the third person should split the water between both parties because if he gives it to both, they will both live now, as opposed to if he gives the water to one of them, the second person will die immediately.

13. Mishnah *Horayot* chapter 3 #7,8. See *Masechet Horayot* 13a for an elaboration on the Mishnah.

Aruch in the laws of *tzedakah*.¹⁴ The placement of this halacha in the laws of *tzedakah* begs the question as to its applicability to triage situations. Some halachic authorities are of the opinion that the Mishnah's list of priorities vis a vis genealogy is specifically referring to *tzedakah* distribution, redemption of captives, and order of honors attributed, but not as a list of priorities regarding saving someone's life.¹⁵ Proof to this position is the fact that the Mishnah is codified in the laws of *tzedakah* distribution and not in the context of a life-threatening situation. Clearly the Rambam, *Tur*, and *Shulchan Aruch* understood that the Mishnah was specifically dealing with *tzedakah* distributions and not saving someone's life.

The mainstream halachic position, however, is that the genealogical priorities listed in the Mishnah are indeed referring to precedence regarding saving someone's life.¹⁶ Proof to this position is that the Mishnah begins by stating that a man is saved before a woman, and the Mishnah immediately follows with the set of priorities relating to genealogy. This would indicate that the genealogical list is predicated on the first clause of the Mishnah regarding saving someone's life. Furthermore, the fact that the Mishnah's rule is codified in the laws of *tzedakah* is because *tzedakah* distribution is an expression of saving a life. If the list of priorities is true regarding *tzedakah* distribution, it should certainly be true in the context of saving someone's life. Finally, no halachic authorities commenting on the Rambam or *Shulchan Aruch*

14. Rambam *Hilchot Matnot Aniyim* Chapter 8 *Halachot* 17 and 18. *Tur* and *Shulchan Aruch siman* 251 *se'if* 9.

15. Responsa *Tzitz Eliezer* volume 18 *siman* 1. He supports this position based on the commentary of the *Pnei Moshe* to *Yerushalmi Horayot* Chapter 3 Mishnah 4, and the commentary of the *Meiri* to *Horayot* 13a. [See as well commentary of *Tiferet Yisrael* to Mishnah *Horayot* chapter 3 Mishnah 8 *Yachin* #33].

16. This seems to be the position of *Beit Yosef Yoreh Deah siman* 151#8, and *Be'er Sheva* to *Horayot* 13a, cited by *Shach*, *ibid*, *siman* 251 #11, and *Taz*, *ibid*, *siman* 252 #6.

note that the genealogical list should not be applicable in a life-threatening triage situation.

According to either position, there are two reasons why the genealogical order of priorities listed in the Mishnah may not apply in triage situations today:

1. Halachic authorities assert that because the lineage of *Kohanim*, *Leviim*, etc. is difficult to verify, the list should not be followed.¹⁷
2. The second reason will be addressed in Section III below.

Indeed the Rambam, *Tur*, and *Shulchan Aruch* quote the Mishnah's rule that the order of precedence does not apply when one of the lower ranking individuals listed would be a Torah Scholar, however, this rule would not apply in life-threatening triage situations. The reasons for this are similar to the two just mentioned above regarding genealogies.¹⁸

Gender as a Factor in Triage Decisions

Although the Rambam, *Tur*, and *Shulchan Aruch* codify the genealogical priorities cited in the Mishnah in each of their respective halachic works, the Mishnah's statement that a man should be saved before a woman is not codified by the above

17. *Shach*, *Yoreh Deah*, *siman* 251 #13 and 16, *Magen Avraham*, *Orach Chaim*, *siman* 201 #4. *Mishnah Berurah*, *ibid*, #13, cites *Magen Avraham*. See *Sefer Ahavat Chesed* of the Chafetz Chaim, volume 1 chapter 6, *seif* 6, who does cite the order listed in *Shulchan Aruch*. See also *Iggerot Moshe Yoreh Deah*, volume 1 *siman* 144, *Mishnah Berurah siman* 547 # 12, and *Responsa Tzitz Eliezer*, volume 18 #69, written to Professor Avraham Avraham regarding the application today of the priorities listed in the Mishnah. Professor Avraham cites this responsum and related literature regarding this question in his *Nishmat Avraham Yoreh Deah*, volume 4 *siman* 251 #1.

18. *Sefer Nishmat Avraham Yoreh Deah*, volume 4 *siman* 151 #1 *D"H U'Leinyan*.

mentioned halachic authorities.¹⁹ The Ramo notes the *Shulchan Aruch's* omission of this halacha and rules that a man's life should be saved before a woman when both are in danger of drowning to death.²⁰ The Ramo's position is supported by later halachic authorities²¹ and is not challenged; nonetheless, there are two reasons why this rule is not cut-and-dried:

1. A disciple of the Ramo, Rav Mordechai Yaffe, in his *Sefer Levush*, redefines the position of the Ramo. The *Levush* explains that the Ramo is not ruling like the beginning of the Mishnah in *Horayot* which states that a man's life is saved before a woman's, but rather like the latter half of the Mishnah which states that a man should be redeemed from captivity before a woman when both are subject to degradation (molestation).²²

19. Responsa *Tzitz Eliezer*, volume 18 *siman* 1, notes this omission as well. He suggests that because the Rambam himself (in his commentary to *Mishnah Horayot* chapter 3) explains that the reason why a man is saved before a woman is because a man is obligated in more mitzvot than a woman; therefore the Rambam did not codify this halacha because at times a woman may follow more halachot than a particular man. As such, the Rambam did not want to state as a fact that a man's life should always be saved before a woman. Even if one is to accept this explanation, it does not have practical halachic ramifications because the Ramo rules unequivocally that a man's life is saved before a woman.

20. Ramo *Yoreh Deah siman* 252 #8. The source of the Ramo's gloss on the *Shulchan Aruch* is the *Beit Yosef Yoreh Deah, siman* 251 #8. It is all the more perplexing that the *Shulchan Aruch* (authored by Rav Yosef Karo) does not codify this law if the Ramo's source is the *Beit Yosef* which was also authored by Rav Yosef Karo as a precursor to his *Shulchan Aruch*.

21. *Be'er Sheva, Horayot* 13a *D"h H'aish*, cited by *Shach* *ibid, siman* 251 #11 and *Taz* *ibid, siman* 252 #6, support the position of the Ramo. This position is also quoted by *Be'er Hagolah* *ibid. siman* 251 #11, and *Biur Hagra* *ibid, siman* 252 #13.

22. *Levush Yoreh Deah siman* 252 #8. The *Levush's* understanding of the Ramo fits very well in the Ramo's words, "If both of them (a man and a woman) are about to drown in a river, a man is saved first." See *Birkei Yosef* *ibid. siman* 252 #1 who argues with the assertion of *Levush*. The *Shach, Taz*, and *Gra* cited in footnote 21 clearly do not understand the Ramo as the *Levush* did.

As such, the Ramo is not ruling explicitly whether a man or woman should be saved first in a life-threatening situation.²³

III. Triage in life-threatening illnesses and short-term versus long-term life expectancy

Later halachic authorities posit that a patient's overall diagnosis, expectation for recovery, and other situational factors trump the list of priorities cited by the Mishnah (and

23. Rabbi Abraham S. Abraham M.D., in his *sefer Nishmat Avraham* volume 4 *Yoreh Deah siman* 251 #1 writes "The *minhag* today is not to save a man before a woman because we do not know whose merit is greater." Rabbi Avraham proves his point based on a story from *Masechet Taanit* 23a, a story from *Masechet Ketubot* 67B, as well as from a citation from a responsum of Rav Moshe Feinstein *zt"l*. Although Rabbi Avraham's halachic conclusion may be true as has been mentioned, his proofs are questionable for the following reasons:

1. Not knowing whose merit is greater is not sufficient reason to argue against the Ramo who rules explicitly that a man's life is saved before a woman's. The *Tzitz Eliezer* suggests similar logic to explain why the Rambam, *Tur*, and *Shulchan Aruch* omitted this halacha, but he never suggested that not knowing whose merit is greater is sufficient reason to argue with the Ramo's explicit ruling.
2. Rabbi Dr. Avraham Steinberg in his *Encyclopedia Hilchatit Refuit* volume 5, page 520 footnote 106, argues that Rabbi Avraham's proofs from the above sourced stories that prove that we do not know whose merit is greater are difficult because those stories took place during the Tannaitic and Amoraic time period, and the Mishnah (Tannaitic source) *Horayot* nonetheless rules that a man's life should be saved before a woman's.
3. Rabbi Avraham cites from *Iggerot Moshe*, *Yoreh Deah*, volume 2, *siman* 74 #1 that "even regarding these [set of priorities listed in the Mishnah in *Horayot*] it is difficult to act [based upon the list] without proper investigation."

Rav Moshe *zt"l* is not disregarding the list of priorities listed in the Mishnah, he is simply pointing out that there may be other factors that should be heavily taken into account when deciding whose life to save. This is clear from another responsum of Rav Moshe *zt"l* where he specifically refers to the order of priorities listed in the Mishnah in *Horayot*. (*Iggerot Moshe Choshen Mishpat*, volume 2, *siman* 25, *se'if* 2).

halachic authorities) when assessing triage decisions. The following are three such examples:

1. A patient who is definitely dangerously ill takes precedence over a patient who is only possibly dangerously ill.²⁴
2. A relatively healthy person takes precedence over a dangerously ill patient.²⁵
3. A person who may be cured takes precedence over a patient who is likely to survive only a short period of time. This can be seen from independent responsa of Rav Moshe Feinstein and Rav Eliezer Waldenburg:

Two doctors asked Rav Moshe Feinstein which patient to admit to an emergency room when only one bed remained. One patient was clearly in need of the resources of the emergency room, but did not have a good long-term prognosis, while the second patient did not need the emergency room resources as much but had a good chance of a full recovery. Rav Moshe z"tl ruled that the second patient should be admitted first because precedence should be given to the patient who may be cured from treatment administered rather than to the patient who is likely to survive only a short period of time.²⁶ Rav Moshe zt"l understands that priority be given to the patient who has a better long-term life expectancy. Rav Moshe does add, however, that in a situation where the patient with the short-term life expectancy recognizes that he is being given up on, which may cause him to lose hope and suffer mental anguish, this prioritization does not apply.

A certain emergency room in South Africa had the policy not

24. *Pri Megadim Orach Chaim*, siman 328 #1, in *Mishbetzot Zahav*.

25. *Be'er Heiteiv Orach Chaim*, siman 334 #22, and *Chidushei Rav Akiva Eiger Yoreh Deah*, siman 339 #1, citing *Sefer Chasidim* siman 724.

26. *Sefer Iggerot Moshe Chosen Mishpat*, volume 2 siman 73 #2. *Ibid*, siman 75 #2.

to place a patient with a short-term life expectancy on their only ventilator because a second patient might be admitted imminently who could return to full health if placed on this ventilator. The chief emergency room physician asked Rav Eliezer Waldenberg whether this policy was in line with halachic protocol. Rav Waldenberg ruled that the hospital policy is in line with halacha because a patient who can be completely healed should receive precedence over a patient whose life will only be prolonged a short period of time.²⁷

How could the latter halachic authorities dismiss the set of priorities listed in the Mishnah and *Shulchan Aruch* in light of long term life expectancy? Rav Moshe Feinstein himself answers this question. He writes “even regarding these [set of priorities listed in the Mishnah in *Horayot*] it is difficult to act [based upon the set of priorities] without proper investigation.”²⁸ Rav Moshe zt”l is not disregarding the list of priorities written in the Mishnah, but is simply pointing out that there are other factors that should also be taken into account, and which often outweigh these set of priorities when deciding between whose life to save. When all things are equal, the Mishnah in *Horayot* is the rule, but practically speaking, the determining factor is life expectancy. The reason for this is because in a situation where one patient has a better chance of survival than another, that patient becomes the first priority, and the Mishnah’s set of priorities do not play a role. It is for this reason that, more often than not, genealogy,

27. Responsa *Tzitz Eliezer*, volume 17 *siman* 72 #15. This doctor actually posed this question to Rav Moshe Shternbuch. See his Responsa *Teshuvot v’Hanhagot*, volume 1 *siman* 858. Rav Moshe Shternbuch, then of South Africa, turned this question to other contemporary halachic authorities, one of whom was Rabbi Waldenberg. See beginning of Responsa *Tzitz Eliezer* *ibid.* *Tzitz Eliezer* (*ibid.* 14) proves from *Chazon Ish Ohalot*, *Siman* 22 #32, and Responsa *Achiezer*, *Yoreh Deah Siman* 16 #6, that even though both patients are not coming at the exact same time, because the second patient can come imminently, based on the hospital’s statistics, it is as if they are coming simultaneously.

28. *Iggerot Moshe Chosen Mishpat*, volume 2 *siman* 74 #1, d”h *Achar Kach*.

scholarship, and gender are not taken into account when assessing life-threatening triage situations.

There is another reason that genealogy, scholarship, and gender do not play a role when assessing life-threatening triage situations. Halachic authorities understand that the Mishnah's dispensation of priorities is only upheld when both parties in need are coming at the exact same time.²⁹ As such, when paramedics arrive at the scene of an accident and have to decide immediately whom to work on first, the individual who can be reached first should be treated first because it is not a situation that can be classified as the "same time".³⁰ Rabbi Yitzchak Herzog zt"l asked Rav Moshe Feinstein which individuals should receive a limited supply of the penicillin vaccine that was sent to Israel. Rav Moshe responded that the doctor should administer the vaccination to the first patients he encounters.³¹

IV. Priorities regarding non-life-threatening illnesses

Is a physician who works in public hospital, private office, or emergency room obligated to treat the waiting patients in the order of priorities listed in the Mishnah in *Horayot*?

The Mishnah rules only that a man is to be saved before a woman. This implies that priority is limited to life-threatening triage situations alone.³² The Mishnah never indicates that a

29. The Mishnah's case is when both parties are in need at the same time, otherwise there is no contradiction. *Iggerot Moshe Choshen Mishpat*, volume 2 *siman* 74 #1 *D"H Achar Kach*, states this emphatically. *Nishmat Avraham*, *Yoreh Deah siman* 252 seif 8 #2, writes that this point is "*barur*" (obvious). See earlier footnote 27.

30. Most paramedic units send enough paramedics to tend to all in need, however there are still situations where this is not the case.

31. *Sefer Kevod HaRav* page 169. Reported by Rabbi Moshe David Tendler and other students of Rav Moshe Feinstein.

32. This is the way the *Taz Yareh Deah*, *siman* 252 #6, and *Shach* *ibid*, *siman* 251 #11, understand the Mishnah as well.

doctor has to follow a particular set of priorities when two patients whose illnesses are not life threatening are waiting to be seen. However, Rav Shlomo Zalman Auerbach zt"l writes "why should [the set of priorities] be limited to life-threatening situations alone? If we see that a *Kohen* precedes a *Levi*, etc. regarding the return of a lost object and *tzedakah* distribution, certainly when it comes to medical issues that are not life threatening the set of priorities should also be in effect."³³ Common practice, however, is that the set of priorities are not followed in non-life threatening triage situations.³⁴

The best reason to explain this phenomenon is because of a universal understanding that the line, waiting list, or appointment schedule determines which patient will be seen.³⁵ This is not an ironclad halachic explanation, but an accepted understanding. Certainly there are exceptions to this understanding. It is appropriate for a doctor, or emergency room attendant to first help a patient who is in severe pain although non-life threatening. The same is true regarding an outstanding Torah scholar, widow, or orphan. It is also appropriate to help one who is waiting for a quick response before taking a patient who will require longer attention.³⁶

Clearly there are many factors to take into account when making triage decisions. Many triage decisions must be made instantly, while others can be deliberated longer. This article

33. This statement was written to Rabbi Avraham Avraham and quoted in *Sefer Nishmat Avraham, Yoreh Deah siman 252 seif 8* footnote 5, in response to the author only listing prioritization in relation to life-threatening situations.

34. Many of the reasons suggested in the earlier portion of this article as to why the set of priorities do not apply in life-threatening triage situations would be true in non-life-threatening situations as well.

35. *Halacha U'Refuah*, volume 3, Rav Yitzchak Zilberstein, page 91; *Responsa Tzitz Eliezer*, volume 18 *siman* 69 #3; *Sefer Nishmat Avraham, Yoreh Deah* volume 4 *siman* 151 #1.

36. These exceptions were penned by Rav Yitzchak Zilberstein in *Halacha U'Refuah* 3. See pp. 91-108.

attempts to familiarize the reader with the sources and logic that are the backbone of what goes into making such weighty decisions. Practical answers to such questions should not be determined from this article, but should be addressed to the greatest halachic authorities of our generation.

Casual Saturday?

Dressing Down For Shabbat

Dr. Wallace Greene

Dressing down usually means a severe scolding – in other words, an act or expression of criticism and censure. In contemporary parlance dressing down also refers to a situation characterized by informal or lackluster clothing (as opposed to dressing up). Our concern here is the former definition because of the latter definition, as it relates to how some individuals today garb themselves publicly on Shabbat.

As we navigate further into the twenty-first century, we are experiencing more and more of a relaxation of standards in all areas of societal comportment. One area of concern is how we should dress on Shabbat.

In general, there is a tendency for men and for women to adopt present-day fashion, even if inappropriate and immodest, in both formal and informal settings.¹ Not so long ago there were standards even in the general population of what was acceptable attire. Everyone “dressed up” when

1. Since proper attire, including a jacket and head covering are required for *davening* and men pray thrice daily, plus the recitation of *birkat hamazon* with a quorum of three or ten might also require proper dress, many are always dressed and ready for a *minyan*. See *Shuchan Aruch* O.C. 91:4-5; *Mishnah Berurah* *ad loc*; *Chayyei Adam* 22:8, *Aruch haShulchan* 91:5. See also *Berachot* 51a and *Kitzur Shulchan Aruch* 44:6. In addition there is the requirement that Torah scholars must always appear properly dressed as a symbol of *kevod haTorah*. See Rambam *M.T. Hilchot De'ot* 5:9.

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going to the theater, to the opera, to the movies, to a restaurant, even to the ballpark. Even the most non-observant Christian or Jew, male or female, followed the norms of how to dress when attending religious services, a wedding, a funeral, or any formal event.

Today, even at Orthodox Jewish functions, one finds people inappropriately attired. How one should dress in general and how one must dress during *davening* are subjects which have been addressed elsewhere at length. Our focus here is to concentrate on the special nature of appropriate Shabbat attire.

The sartorial laxity that has affected American society in general has seeped into our holy Shabbat as well. There were times when not everyone had a separate set of clothes for Shabbat. That is why the *Shulchan Aruch* ruled that at the very least one's everyday clothes – if that is all one has to wear – should be neat and clean (O.C. 262:2). Today, however, almost everyone has at least one good set of clothes for special occasions, and Shabbat is one of them.

We find a relationship between Shabbat attire, the priestly vestments, and clothes we wear for prayer.² The three experiences of Shabbat, prayer, and priestly service share in common that they all involve, on some level, designated clothing. In his *Mesillat Yesharim*, R. Moshe Chayyim Luzzato attributed this relationship between clothing and divine service to the fact that these are all experiences of greeting God's Divine Presence.³

The inner character of a person is of supreme religious significance. Nevertheless, outward appearance is also important, as Rambam writes:

A scholar must always wear clean dignified clothing.

2. See *Sefer HaChinuch*, Mitzvah #99; *Shulchan Aruch*, *Orach Chaim* 98:4 & 262:2 and *Mishnah Berurah* 262:5.

3. See *Mesillat Yesharim*, Chapter 19.

There should be no stain on his garments. He should not wear clothing associated with royalty, for this attracts attention to him. Nor should he wear garments worn by the poverty-stricken, for this will shame him. He should wear clean, moderately-priced garments. (*Hilchot De'ot* 5:9).⁴

As far as the priestly garments are concerned, the Talmud teaches that the priestly service is invalid if performed without the specified clothing (*Zevachim* 17b). The specific language used in the Talmud is critical. The wearing of the priestly vestments determines if the *kohen* is functioning as a real *kohen* or as an imposter. The Rambam (*MT Klei HaMikdash* 10:4, and more explicitly in his *Commentary to Mishnah, Sanhedrin* 19:2) stresses that a priest who performs his service without the priestly vestments is like a non-*kohen*, and is therefore subject to the same punishment as a *zar* (non-*kohen*) who performs the priestly service. A *kohen* without his garments is no more than a *Yisrael*. In light of these sources, the requirement of special clothes sounds almost like a prerequisite for being a priest than a prerequisite for priestly service.

Why is a priest without his vestments less of a priest? The Malbim explains that the physical body is clothed in garments, called *madim* (see *Vayikra* 6:3, "*mido bad*"), the modern Hebrew term for a soldier's uniform. Similarly the *nefesh* (spiritual self) is clothed in one's *middot* (personality and character). A person's *middot* reflect his strengths. The priest must clothe his body in physical garments, but that is not enough. The priest is commanded to transform himself while putting on his special clothing, just as wearing *madim* demands that one "wear" *middot* (Malbim to *Sh'mot* 28:2). The transcendent act of putting on the garments prepares the priest to approach the priestly service with the proper frame of mind. He is now ready for the priestly service, and only then is the priesthood thrust upon him. Otherwise, he is merely a *zar*, a non-*kohen*. The clothing's

4. See also *Shabbat* 145a.

influence on the priest reveals an additional dimension to the special clothing. The clothing's transformation of the priest serves as a powerful symbol of repentance.⁵ Their effect is not limited to the priest, but the entire priestly service is a different service.

The same is true of special Shabbat clothes. Our Shabbat attire does not merely reflect our reverence and appreciation of the sanctity of Shabbat, it also signifies that we are ready to be enveloped by the holiness of Shabbat.

Most people set aside special clothing for Shabbat.⁶ We have Shabbat dresses and Shabbat suits; we have Shabbat sheitels; we have Shabbat hats and coats. The question is – what is the actual halachic obligation? What was the obligation during the time of the Gemara? Does the obligation change based upon what people are doing?

The Talmud (*Shabbat* 113a) cites the verse from Isaiah 58:13: "...and you shall honor it [Shabbat] by not doing your daily ways," to teach us that our Shabbat clothing should not be like our clothing during the week. The *Talmud Yerushalmi* (*Peah* 8:7) cites Rabbi Chanina that a person must have two *atifin* (suits/cloaks), one for the week and one for Shabbat, as it is written (Ruth 3:3) "And you shall wash and anoint and place your garments upon yourself." This refers to special Shabbat clothing.

All *Rishonim* concur and rule that special Shabbat clothing is mandatory,⁷ and it is codified by the *Shulchan Aruch* (O.C.

5. See *Zevachim* 88b; *Arachim* 16a and *Vayikra Rabbah* 10:6.

6. See *Responsa Radvaz* 1:12; and *Responsa Tzitz Eliezer* 14:34, concerning the need to have special Shabbat shoes.

7. See Rambam, *Mishneh Torah*, H. *Shabbat* 30:3; *Machzor Vitry* 293; *Tur*, O.C. 242; *Bet Yosef* 242; Meiri and *Pisqei Or Zarua* to *Shabbat* 119a. See *Encyclopedia Talmudit* Vol. 27, s.v. *kevod Shabbat*, for a fuller listing. See also *Sefer Avudraham*, *Shacharit shel Shabbat*, where he derives this obligation from another source and compares it to the priestly garments which are for *kavod v'tiferet*, honor and splendor.

262:2-3). The Talmud and the *Shulchan Aruch* understood that not everyone has the luxury of having many changes of clothing. The key is that what you wear and how you dress on Shabbat needs to be different from the weekday attire. If one cannot afford different or special clothing, then Shabbat can be made special by either laundering and pressing one's clothing or, as the Ramo *ad loc.* suggests, rolling the sleeves and cuffs down, the assumption being that while working, the cuffs and sleeves are rolled up. Some later authorities have phrased the requirement as "have special clothing according to your ability," and in some cases people simply wore a special Shabbat caftan over their weekday clothing.⁸

Today most people do have dressy outfits/suits for weddings and other special occasions. Since Shabbat is the special occasion *par excellence* that is the standard to follow:

One should wear nice clothes and rejoice at the onset of Shabbat in the manner that one does on formal occasions [greeting a king] and at a wedding (S.A. O.C. 262:3).⁹

8. See *Shulchan Aruch HaRav* O.C. 262:3; *Chayyei Adam* 263:7; and *Ra'avyah, Shabbat* 197.

9. This parsing of the *Shulchan Aruch* is corroborated by Rav Herschel Schachter in a personal communication. The language comes from the *Tur* who states that one should wear nice clothing and then says that you put on those clothes and go out and rejoice. Rav Schacter quotes, in *MiPninei HaRav*, p. 68 that Rav Soloveitchik z"l was insistent that one wear "*Shabbosdik*" clothing whenever one is in public, to the extent that he chastised someone who left his jacket in shul during a heat wave. See also *Responsa HaRosh* 21:3 – "You have asked: In a private alleyway enclosed by an *eruv*, is it permissible to walk about without a hat or coat on Shabbat in the manner that one walks about during the week? Answer: This depends on the local custom since it is not prohibited as a matter of rabbinic law. Rather, the [Jewish] world is accustomed to honor the Shabbat by changing one's garments and one's way of walking about from what it does during the week. All of this is governed by custom, not legislation, but this custom must not be denigrated since the custom of our forefathers has the weight of Torah law even if the local custom is not the same as in another country." Thanks to Rabbi Josh Flug for this reference.

The issue of Shabbat robes or hostess gowns is a delicate one. There is a distinction between what one wears in the privacy of one's home and what one wears in public on Shabbat.¹⁰ On the one hand some robes are quite fancy and expensive, and worn with jewelry. Many women entertain wearing them. Some women will wear them outside the home on occasion. However, if they are not worn to weddings, or business meetings, despite their comfort and practicality, they may not meet the *Shulchan Aruch's* standard for Shabbat attire outside the home.

In Judaism, Shabbat and its attendant holiness commence on Friday night. Therefore it is incumbent to be appropriately dressed when Shabbat begins. Obviously this necessitates getting home early enough prior to Shabbat in order to change into Shabbat attire. The *Mishnah Berurah* (256:1) and the *Aruch HaShulchan* (262:4) praise those (especially women) who get home early enough from the marketplace in order to bathe and put on their Shabbat finery prior to candle lighting. He admonishes those who aren't careful about this, especially on short Fridays. The *Sefer Chasidim* castigates those who only "dress up" on Shabbat morning and compares them to Christians who go to services only on the morning of their Sabbath.¹¹ The sin of implying by our manner of dress that our Shabbat only begins during the day – because then people see how we are dressed – is quite serious. Tosafot (*Bava Kama* 37a *dibur hamatchil "harei"*), say that even animals recognized when people were dressed for Shabbat. Rabbi Eliezer Waldenberg is concerned that if one is not wearing Shabbat attire he might forget it is Shabbat and recite the weekday prayers.¹²

The general tenor of how we approach Shabbat is that as

10. See *Biur Halacha* O.C. 262:3 who cites the *Magen Avraham*. See also previous footnote.

11. See *Sefer Chasidim* (Margoliot ed.) *Brit Olam V'Shomer HaBrit* #57. See also *Elyah Zuta* 262 who concurs.

12. *Responsa Tzitz Eliezer* 13:25.

much as possible we distinguish it from the regular weekday. "...and you shall honor it by not doing your daily ways." (Isaiah 58:13) Not only do we dress differently, we eat differently, we walk differently, we pray differently, we behave differently and everything we do is geared to honoring Shabbat. Many are accustomed to recite "*l'khvod Shabbat kodesh*" (in honor of the holy Sabbath) when eating special Shabbat delicacies. Everything that we do differently to make Shabbat a special day is considered *kevod Shabbat*.¹³

Aside from wearing nice clothes or clothing set aside for Shabbat, there is a tradition to have a special *tallit* for Shabbat.¹⁴ Furthermore, many are accustomed to wear a fancy embroidered or silver *atarah* or collar band on their Shabbat *tallit*.¹⁵

In general Chasidic circles, the long black wool or polyester frock (*rekel*, *bekishe*, *capote*) worn on weekdays is replaced with a colorful silk (*zaidene*) *capote*, and the hat is replaced with a round mink *shtreimel* or a tall sable *spodik*. In Chabad, suits are replaced with longer silk *capotes*. Ties are seen more often. Some are accustomed to wear a special *tisch bekishe* (*khalat*) during Shabbat *mincha* until after the *melaveh malka*. It has been suggested that the word *bekishe* is an inverted acronym for *Beged Shabbos Kodesh*. The "Yeshivish" world, i.e., non-Chasidic, has a more subtle change. A different hat, a nicer tie, French-cuff shirts and other accessories are used to dress up Shabbat.

One need not look only to the ultra-Orthodox world for examples of special Shabbat attire. The concept of special clothes for special occasions is well entrenched in most societies. That is why tuxedos and formal wear were invented.

13. See *Mesillat Yesarim* Chap. 19.

14. See *Elyah Zuta*, 262 who cites this custom from the Maharil.

15. This is based on the *Magen Avraham*, O.C. 262-2, who writes that just as we wear nicer clothing on Shabbat, one should wear a special *tallit* on Shabbat as well. See *Shaar Haotiyot*, *Chullin* (p. 112a in the Amsterdam 1648 edition).

So, if Shabbat requires our best special clothing, then reason might dictate formal wear. Thus in many Orthodox synagogues in the New York area during the early and mid-twentieth century and even today in some places, the clergy and officers wore morning suits and in some cases top hats.¹⁶

The special sanctity of Shabbat exists from before the moment Shabbat actually begins, so that we can properly prepare to greet Shabbat, until after Shabbat ends with *Havdalah*. However, in some communities/homes it is common for children to change after shul or after lunch on Shabbat into play clothes. Similarly some men come casually attired to *shul* for *mincha* as if the Shabbat holiness is somehow lessened later in the day. There may be a source for this widespread custom of not wearing a tie (and other dress-down practices) when going to *shul* for *mincha* on Shabbat afternoons. Rashi and Ran on *Nedarim* 77a note a custom for women to remove their Shabbat jewelry on Shabbat afternoons towards the end of the day. Based on this, the *Responsa Gur Aryeh Yehuda O.C. #13*, argues that the requirement to wear Shabbat clothes is no longer in force from late afternoon onwards. In fact, there is a custom among certain Chasidim who generally wear flowery or colorful *bekeshes* on Shabbat to wear a plain black *bekeshe* from *mincha* time until the

16. The author remembers growing up in Inwood at the tip of Manhattan in the '50's. Every Shabbat the rabbi wore a formal morning suit – dark gray jacket and striped trousers. In many synagogues in the '50's, especially in the German communities, women without white gloves would never be seen on Shabbat any more than a man without a hat. It has also been observed that some European Jews come to the *seder* in tuxedos and formal gowns. The Rav z"l (Rabbi Yosef Dov Soloveichik) very often said that popular *minhag* was an accurate filter of the halacha. See R. Zvi Schechter, *Nefesh haRav*, pp. 24-26. It's what Haym Soloveitchik calls "mimetic." "Halakhah [*sic*] is a sweepingly comprehensive *regula* of daily life...it constitutes a way of life. And a way of life is not learned but rather absorbed. Its transmission is mimetic, imbibed from parents and friends, and patterned on conduct regularly observed in home and street, synagogue and school." See his "Rupture and Reconstruction: The Transformation of Contemporary Orthodoxy," *Tradition*, Vol. 28, No. 4 (Summer 1994).

conclusion of Shabbat.¹⁷ The *Erech Shai* writes that the reason one is not required to wear Shabbat clothes at this time is to recall that Yosef, Moshe, and David died on Shabbat afternoon.¹⁸

However, even if it applies at all, the *Nedarim* citation applies only to jewelry and cannot be extended to include any other Shabbat clothing.¹⁹ Indeed, the *Magen Avraham* (O.C. 262:2) and *Mishnah Berurah* (262:8) rule very clearly that one should not remove one's Shabbat clothes until after *Havdalah*. We are taught that those who observe the *Seudat Melaveh Malka* – a meal after the formal conclusion of Shabbat – are to remain in their Shabbat finery until this ritual is concluded. The clear implication is that people should remain in special Shabbat clothing all Shabbat long.²⁰

Now that it has been clearly established that Shabbat requires a higher level of adherence to an objective dress code, we need to address the issue of Shabbat informality that exists in many communities nowadays. It is true that local customs play a part in determining acceptable attire.²¹ Rambam (*Mishneh Torah, Hilchot Tefillah* 5:5) writes that it depends on what people in that place consider respectful.²² For example,

17. See *Shalom Rav, Sha'ar HaHalacha*, 7:7.

18. See *Erech Shai*, O.H. 262.

19. See *Orchot Chayyim* O.C. 300:2.

20. See *Ra'avyah* 378, *Magen Avraham* 262:2; *Elyah Zuta* 262.

21. See *Responso HaRosh* 21:3 cited above..

22. In subsequent literature, the *Shulchan Aruch* (*Orach Chaim* 91:4) adopts Rambam's language and later authorities generally accept it. *Magen Avraham* (91:5) quotes a responsum from R. Moshe Mintz (no. 38), who also ruled that people may not enter a synagogue while wearing sandals. However, on further examination it is clear that this meant that people must wear shoes rather than sandals. *Birkei Yosef* (*Orach Chaim* 91:5, 151:8) quotes Rashbash at length, as does *Kaf Ha-Chaim* (91:25). *Aruch Ha-Shulchan* (*Orach Chaim* 91:5, 151:9) insists that the entire discussion centers on wearing socks but not shoes. Everyone, he claims, requires one or the other because otherwise you appear to be following a Muslim practice. For many years the Jews of Djerba, Tunisia, prayed barefoot, and to this day, there are sand floor

the Gemara (*Megillah* 28a-b; *Berachot* 62b) lists disrespectful actions that are incompatible with the honor due a synagogue. Tosafot (*Shabbat* 10a sv. *rami*) rule unequivocally that one must wear shoes while praying, except for Yom Kippur and *Tisha B'Av*, when we are restricted regarding footwear.

The Rashbash (*Responsa* no. 285), writing in fifteenth-century Algiers, explains that there are two kinds of respect and disrespect. The ultimate, true type is entirely spiritual. However, even the apparent kind, which is subjective, must be maintained. The definitions of this kind of respect and disrespect are bound by time and geography. Proper behavior depends on contemporary attitudes, what people consider respectful and not. Therefore, Rashbash concludes, in Muslim countries (e.g. Egypt where the Rambam lived) one may not enter a synagogue while wearing shoes. Since people in those places consider entering a home while wearing shoes disrespectful, and certainly when appearing before a king, they must accord even greater respect to a synagogue. In Christian countries, however, one must wear shoes in a synagogue because, in those places, that is considered proper behavior. At one time Jews wore white on Shabbat.²³ In some places Jews wore turbans or other headgear to distinguish that special day.

In North America and in Europe, acceptable attire on Shabbat, especially in the synagogue, means a suit and tie, or at the very least a jacket and tie for men, and a dress for women, and shoes with socks. "One should wear nice clothes and rejoice at the onset of Shabbat in the manner that one does on formal occasions [greeting a king] and at a wedding." (S.A. O.C. 262:3).

synagogues in the Caribbean where worshippers remove their shoes.

23. See Commentary of R. Asher ben Yehiel and R. Shlomo Luria to *Bava Kamma* 82a. According to many kabbalistic sources, "clean" garments means white garments.

The sartorial laxity that has affected American society in general has seeped into our holy Shabbat as well, and at times belies the preponderance of halachic opinion as to appropriate attire. It's not just during the warmer months, or "in the mountains" or on vacation.

In Israel it is accepted in *dati-leumi* circles to wear white open collar shirts without a jacket or tie on Shabbat. According to the definition of the *Shulchan Aruch*, it would not seem appropriate, however, for Americans to follow this practice and come to *shul* without a jacket and tie. If the standard is dressing the way one dresses for a wedding or for an important meeting, the conclusion seems obvious.

Seasons should not matter, nor should location. Shabbat is still Shabbat regardless of the calendar or the location. Shabbat is still Shabbat at home, at a conference, or on vacation, at a bungalow, or in Israel. The *poskim* specify that you must wear your Shabbat clothing even when you are among non-Jews, or even if you are celebrating Shabbat alone.²⁴ In fact a number of responsa specify the wearing of nice Shabbat clothing even in inclement weather.²⁵ Similarly, the preponderance of opinions also rules that Shabbat clothing is worn on *Shabbat Hazon* prior to *Tisha B'Av*.²⁶

Many great rabbis have captured the essence of various aspects of Shabbat. Rav Ben-Zion Meir Hai Uzziel (1880-1953), former chief rabbi of Israel, sets forth the rationale for this essay, the importance of dressing in special clothes for Shabbat:

"A man should not go out [on Shabbat] as he does during the week unless he has something with him to show that it is Shabbat so he will not desecrate it." (OC 301:16). The Rabbis are teaching us a fundamental rule about fulfilling

24. See *Chayyei Adam*, *Hilchot Shabbat* 5:7; and his *Zichru Torat Moshe* #1.

25. See sources listed in *Respona Siach Yitzchak* #133.

26. See *Mishnah Berurah* 551:6..

the sanctity of Shabbat. "You shall honor it by avoiding daily tasks, your Shabbat clothing shall not be your weekday clothing, your manner of walking on Shabbat shall not be as your walking during the week, and your speech on Shabbat shall be different from your manner of speaking during the week." (*Shabbat 113b*).

These fundamental precepts of Torah teach and emphasize that the goal of Shabbat's sanctity is to liberate Jews from the daily travail and angst of secular monotony which corrode body and soul. It generates anger, rage, jealousy, and defiles the mind and the spirit. [Shabbat] provides emancipation for the soul, spiritual elevation, and a clear balanced understanding which brings with it joy, pleasantness, spirituality and communion with The Holy One of Israel, Who sanctifies His people Israel with His Holiness. Suffused with this supernal holiness we cast off our workaday clothes and put on garments of the Holy Shabbat, through which we honor Shabbat by thus removing all secularity, foggy thinking, and despondency. We are now garbed with an additional soul [*neshamah yetera*] which is pleasing and pleasant to both body and soul. This is the *miztvah* of Shabbat. (*Responsa Mishpetei Uzziel* 3, O.C.. 39).

Letters

To the Editor:

In the Fall edition of this journal [LXIV], Rav Binyamin Cohen, *sh"lita*, comments on an earlier article about child molestation. There, the author had relied on the ruling of Ramo [CM 35:14], that it is permissible for *beit din* to accept the testimony of a minor if there is no other choice. Rav Cohen argues, however, that this ruling should not apply to a child's accusations about what was done to him, because he is a litigant in the matter, and the testimony of a litigant is not acceptable in a Jewish court. (On the other hand, if the child is testifying about something he saw being done to another person, Rav Cohen would allow Ramo's ruling to apply.)

However, I wish to point out what I think is a fundamental error in his objection: in these situations, our *batei din* are not sitting in judgment concerning punishment or payment. They are seeking to protect the members of the community, trying to determine whether the accused offender is to be dismissed from the position which gives him opportunity to molest. Their function is not to gather "evidence", but rather to make a finding according to *umdenah* (a logical or reasonable inference: even circumstantial evidence). Anyone's "testimony" can be used to establish an *umdenah*.

The problem of molestation in a community therefore does not go under the label of *nezikin* (damages) but rather under the rubric of *hilchot rotzeach ushemirat hanefesh* (laws of murder and protecting life), and the *batei din* are simply there to protect the victims. If it is necessary to incarcerate the offenders in order to protect the victims – so be it.

RAV DOVID COHEN
Brooklyn, NY

* * *

To the Editor:

I found the article "Scriptural Inscriptions on Jewelry", by Rabbi Eli Ozarowski, in the *Journal of Halacha and Contemporary Society* Fall 2012 issue (LXIV) very enlightening.

It reminded me of an incident before my *chasuna* in 1966. I had wanted to use a ring inscribed with the *posuk* "*Ani L'dodi V'dodi Li*" for the *Kiddushin*. I asked my Rebbi, Rav Moshe Feinstein zt"l, if this would be permissible. He answered that it was permitted; however, what would the *Kallah* / wife do with it when she would go into the bathroom? He said that a ring with a *posuk* on it would be prohibited from being taken into the bathroom. Needless to say, we did not use such a ring.

Sincerely,

AARON GOLD

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