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Rabbi Jacob Joseph School

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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.

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The Parent as a Patient: Polemics and Possibilities

Rabbi Howard Apfel, MD
Rabbi Elchanan Poupko

Introduction

Parents naturally delight in the professional achievements of their children. Success in the area of medicine in particular, seems to elicit a very high level of satisfaction. The stereotypical Jewish mother reveling in the glory of her "son the doctor" has been incorporated into popular culture. In truth, however, having a child become a physician offers substantial practical benefits that far surpass any considerations of exaggerated parental pride. To begin with, there is the obvious economic advantage of procuring a physician who is unlikely to charge you a professional fee for services. Furthermore, one can also eliminate the common concern that medical decisions are motivated by profit seeking rather than patient best interest. In addition, such an arrangement provides convenient and reliable access to healthcare in an age where the provider bureaucracy has grown increasingly complex and limited in the options offered. Finally, a son or daughter physician is guaranteed to give their maximal effort in treating their parent, alleviating

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another common source of patient anxiety.[1]

Notwithstanding the considerable advantages just enumerated, having one's own child as primary healthcare provider may at times pose a unique halachic challenge.[2] In the context of specifying certain sins as punishable by death, the Torah includes the prohibitions of cursing or striking one's parents.[3] In elaborating upon this prohibition, *Chazal* pointed out that any action that causes any degree of bleeding to the parent meets the threshold warranting the death penalty.[4] It is

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1.Thus for example, they are likely to spend extra time researching the best therapeutic options, and even refer out when another physician is more qualified to design or carry out the treatment plan.

2.It is important to note that the code of ethics of the AMA (2012-2013 edition, clause 8:19) discourages physicians from treating themselves or family members. This provision presumes that the emotional involvement of the physician with the patient is likely to affect decision making and the physician's ability to treat the patient in the most rational and beneficial way. This paper does not suggest otherwise; neither does it provide additional legal or medical background that might support or challenge the AMA provision. What this paper attempts to do is highlight some of the halachic perspectives on the matter but only in cases in which it has already been deemed beneficial, appropriate, and necessary for a physician to treat his or her parent. For further discussion see *Ares, E.*, "Rare Skin Disorder Illustrates the Need for Caution When Prescribing for Friends," *Journal of the American Academy of Nurse Practitioners*. 20(8) p. 389-95, 2008; and Kenneth Oberheu et al. "A Surgeon Operates on His Son: Wisdom or Hubris?," *The Annals of Thoracic Surgery* (2007), available at http://ats.ctsnetjournals.org/cgi/content/full/84/3/723.

3.*Shemot* 21:15. This prohibition is numbered as one of the six hundred and thirteen mitzvot by both the Rambam (*Sefer HaMitzvot* Prohibition #319) and the *Sefer Hachinuch* (Mitzvah #48). See also Ramban in his addendum to Rambam's *Sefer Hamitzvot* (ad loc.) who argues with the Rambam as to whether this prohibition is included under the umbrella warning against any injury of one's fellow. See also Rabbi Eliezer Schach in *Avi Ezri* (*Mamrim* 5:7) on this topic.

4.*Sanhedrin* 84a. This definition of "injury", though obvious to the Talmud *Bavli*, was not so obvious to the Talmud *Yerushalmi* (*Sanhedrin* 55a) who started off asking if the definition of injury here is injury like we find in *hilchot Shabbat* (which means a wound that has blood, even blood that remains under the skin as a "black and blue mark") or is it like the meaning of injury with regard to damages-*nezikin*. The *Yerushalmi* then goes on to say

not uncommon for many of the therapeutic procedures performed by doctors or dentists to cause incidental bleeding. Therefore, the overall severity of this prohibition raises the realistic possibility that healthcare providers be prohibited from treating their mothers or fathers, despite the parent's strong desire and urging that they do so.[5]

While discussing the various parameters of the prohibition to strike a mother or father, the Gemara digresses to discuss our particular concern in much detail.[6] Conceding to the assumption that bloodletting is therapeutic,[7] the Gemara inquires if a son may draw blood from his parents despite the severe prohibition to wound them. Two lenient opinions are offered in response to this question. According to Rav Matna it

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that the difference between these two positions is pronounced in a case where the person injured has nothing "missing" and is not considered "damaged", yet nevertheless had blood withdrawn from them. Despite the uncertainty the *Yerushalmi* shows, the *Bavli* seems to understand that injury here should be compared to that of the laws of Shabbat. The final conclusion of the definition of injury here is one that elicits blood despite the fact that the definition of hitting/"injuring" another person, which is also a Scriptural prohibition and is very similar to this one, means even just hitting the person. What makes this distinction more understandable is that unlike the prohibition against hitting another person, which is a negative Scriptural commandment, the prohibition against injuring a parent carries with it a capital punishment. It is easy to understand that someone who intentionally hurt their parent to the extent that they bleed will be more culpable of capital punishment than for hitting a parent.

5. A related contemporary challenge, though seemingly with far less at stake, are recreational pastimes that can result in bruising such as paintballing or contact sports. This question will be addressed with more detail later on in this essay.

6. *Sanhedrin* 84b.

7. Even today blood-letting in certain forms and in certain contexts is considered acceptable medical practice. See for example: "Leech Therapy and Bleeding Wound Techniques to Relieve Venous Congestion," E. Clyde Smoot III ,Natalio Debs, Dennis Banducci, et al.,J reconstr Microsurg,1990;6(3): 245-250; also "Clinical and Scientific Considerations in Leech Therapy for the Management of Acute Venous Congestion": An Updated Review Weinfeld, Adam B. MD; Yuksel, Eser MD; Boutros, Sean MD; et al, Ann PlastSurg 2000;45: 207-212.

should be permitted based on the verse "you shall love your fellow as yourself" (*Vayikra* 19:18). In general the Torah only forbids us from doing to others what they would not want done to themselves.[8] Therefore, since we can assume that the son would have no problem undergoing this therapy were he in need, and that the father wants to be treated as well, the son may certainly be the one to administer treatment. Rav Dimi Bar Chanina, however, suggests a different source for the leniency by comparing it to the prohibition to wound another's animal; just as it is prohibited to injure someone's animal only if this is done in an injurious manner, as opposed to a reparative or therapeutic one, so too in our case.[9]

Unexpectedly, the Gemara next presents two stories that seem entirely inconsistent with the permissive tone just noted. First, the Gemara relates that Rav did not allow his son to take out a splinter from his flesh lest he unintentionally cause him to bleed in the process. In addition, Mar, son of Ravina, also did not allow his son to open a boil for the very same reason. Although not directly addressing the contradictory statements, the Gemara later does challenge the strict practices of both Rav and Mar son of Ravina. Assuming that their refusal to allow their sons to treat them was motivated by the Biblical prohibition of wounding a parent, the Gemara asks why it is that they would allow unrelated parties to treat them if wounding by anyone is Biblically prohibited as well.[10] Somewhat cryptically, the Gemara differentiates between the two scenarios. If a son were to wound his father intentionally it would carry with it the death penalty; in contrast, if an unrelated person were to wound any other intentionally that would only result in a penalty of lashes. Apparently the two

8. Rashi ad loc, cv "*ve'ahavta*".

9. See *Minchat Yitzchak* (Vol I *Siman* 27) as to whether there is a practical difference between these two opinions and what that difference might be.

10. There is a scriptural prohibition for any Jew to hurt his fellow Jew; why should there be any difference between a son accidentally hurting him and someone else doing so?

scholar's strict practice was generated by the severe nature of the basic prohibition as indicated by its severe level of punishment.[11]

Nevertheless what is most unclear from the Gemara cited is exactly how to relate the two stories expressing the stringent stance to the permissive opinions they followed. Do they represent dissenting opinions coming to say that even beneficial cases of operating on the parent are prohibited? Or do all opinions agree in principle to be lenient, and the cited stories merely express each particular Rabbi's personal predilection to be strict?[12]

We find in the *Rishonim* diverse ways of dealing with this issue. The Rambam, for example, states that a son should not

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11. A very important implication of this statement is for the following case. In a case where a physician is operating on a patient in a way that may save the patient's life, yet at the same time might endanger that same person's life, in such a case making that mistake is something that if done intentionally – i.e. murder – carries with it a capital punishment. The question thus arises, how may a physician treat a patient ever? How come it is not prohibited under the same prohibition presented here against treating a parent due to the fear that one may violate such a severe transgression even accidentally? The Ramban, in *Torat Ha'adam* (end of *Sha'ar Ha'sakana* pp. 42-43 in the Mossad HaRav Kook edition) suggests that since there is a specific verse that permits a physician to treat and cure a person from his ailments, included in that "dispensation" is the permission for the physician to treat the patient according to the physician's best judgment despite the risk involved in making those difficult decisions. The implication of this logic is that if indeed the son is a professional doctor, that is included in the "permission for the physician to heal", then he would be permitted to operate on and draw blood from his parent and that the entire discussion of the Gemara is when the son is not a professional physician. This has obvious practical ramifications. See, however, *Bach* (in his commentary to *Tur* YD 241), who later on deals with the same issue and comes to a different conclusion. See also *Prisha*, ibid, who is of the opinion that the entire discussion in the Gemara is regarding a son who is a physician and that if the son is not a physician there is no question that he is forbidden to perform any kind of procedure on his parent.

12. A stringency emanating from the serious regard we see the Torah had to this matter, so much so that if done purposefully it would deserve a capital punishment.

draw blood or do anything else that may cause even an unintended bleeding injury to his parent.[13] However, he adds that if there is no one else present to do the procedure, then it is permissible.[14] The implication of course is that the Rambam understood the initial lenient approach as the basic normative view, while the two stories are solely examples of personal strictness. In contrast, other major *Rishonim*, like Rabbi Yitzchak Alfasi (the Rif)[15] and Rabbainu Asher (the Rosh)[16] understood the Gemara to be presenting two separate schools of thought on the basic ruling in these cases. Rav and Mar son of Ravina are coming to argue with the previous lenient opinions and are actually prohibiting any form of injuring a parent, whether for therapeutic purposes or not.

Rambam's Unique Approach

In further elucidating what appears to be the more lenient approach of the Rambam, it is worthwhile to explore a different but related issue. As noted previously, aside from the prohibition against injuring a parent there is a separate more general prohibition against hitting any other person. In defining that prohibition, the Rambam writes that it is only prohibited on a Biblical level if it is done with malice or in a hostile fashion ("*derech nitzayon*"[17]); the implication of this is

13. Rambam, *Hilchot Mamrim* 5:7.

14. Most commentaries explain the Rambam's rationale to be that in principle he permits parental wounding for therapeutic purposes; however, if at all possible, one should avoid doing so. See *Kesef Mishneh* ad loc. and other commentators there.

15. P.19a in his commentary to *Sanhedrin*.

16. In his commentary to *Sanhedrin* Chapter 10:1.

17. It is important to note that there is extensive discussion [see *Encyclopedia Talmudit* Vol 12 p 683 footnote 86] if the proper version in the Rambam is "*derech nitzayon*"(which is the version of the *Semag asay* 70 and some others) which means in a way of adversity, or "*derech bizayon*" which means in a humiliating way and is the common version found in the Rambam we have.

that if injury was not inflicted in a hostile fashion it is not included at all in the prohibition against striking another person. If the prohibition against injuring a parent is viewed as an extension or upgraded version of the general prohibition, then the rules pertaining to one of these prohibitions might apply to the other. Thus the application of this stipulation to the law against injuring parents might explain the Rambam's lenient stance permitting even bloodletting procedures on parents as long as not done in a spiteful way. Interestingly, however, the Rambam only mentions this particular provision when discussing the laws of striking an ordinary person and not in the laws against injuring a parent. This suggests that he understood the two prohibitions to be unrelated, and lack of belligerent intent is an invalid reason for leniency in our context.

Minchat Chinuch's Approach to Personal Prerogatives

An additional source brought by some in deciding the definitive halacha is the novel suggestion of Rabbi Yosef Babad in his *Minchat Chinuch*. He discusses the dilemma of categorizing the prohibition against injuring one's parent as a prohibition that is primarily *bein adam le'chavero*, between man and his fellow man, or *bein adam la'makom*, between man and God.[18] If it were established to be solely *bein adam le'chavero*, it might allow for permission granted by the parent to absolve the child of any violation in causing them to bleed.[19] In what

18. Generally speaking, mitzvot can be divided into two categories: mitzvot and commandments which pertain to the way we are to treat one another, known as mitzvot *she'bein adam le'chavero*, and commandments that pertain to our relationship with God (*bein adam la'makom*) and are our responsibility towards Him. An important manifestation of this distinction is the issue of forgiveness. Although there is nothing that can permit one to transgress a Torah commandment when it is a sin that is *bein adam lamakom*, if a person allows his friend to do something to him, there will be no prohibition since he has given his friend permission and therefore what takes place is no longer a transgression.

19. Whether or not a person has ownership of his own body is a

seems to be a deviation from the mainstream approach, Rabbi Babad[20] argues that just as in any other interpersonal issue, a party can forgive ("*mechila*") their right to property, so too here in the prohibition against injuring a parent, *mechila* is possible.[21] This position, although presented with clear rationale, seems to run counter to the explicit Gemara noted above. If indeed forgiving the injury is the parent's prerogative, then why does the Gemara need to offer a separate source permitting it if done for medical purposes? Furthermore, why is it that the scholars of the Talmud would ever hesitate to allow their children even to take a splinter out of them lest they injure them? In defense of his position, *Minchat Chinuch* makes the seemingly strained proposal that in

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fascinating and broad question with many halachic implications. For an elaborate discussion of this issue see Rabbi S.Y. Zevin in his essay "*Mishpat Shylock Lefi Hahalacha*" (*Le'or Ha'halacha* pp 310-328).

20. *Minchat Chinuch* Mitzvah 48:3. This is also the opinion of the Ralbach (*Kuntres Hasmicha* 101 cv "*od ani omer*").

21. This would mean that not only will the child be exempt from capital punishment, but it would even be permissible to do so (*le'chatchila*) This position is used often when defending the practice of parents going paintballing with a child, arguing that since the *Minchat Chinuch* seems to be saying that this prohibition is the parent's personal prerogative, the parent can excuse the child as he wishes. This is a serious mistake for two reasons. The first is the simple and obvious one, and that is that there is no excusing of the child that takes place. While indeed the parent does concede to the actual game, it is hard to imagine that if right before the child is about to fire a paintball bullet that will give the parent a black and blue mark the parent was asked if this is something they agree to, they would agree. Furthermore, as will be shown later in this essay, this opinion of the *Minchat Chinuch* is by no way a matter of consensus, and even *poskim* who take it into account when making a halachic decision do so in consideration of various extenuating medical and financial circumstances which by no means can be applied to the case of paintballing. This argument and line of thought is not only a reason to reconsider the practice of parents going paintballing with their children, but brings into question the entire practice of paintballing altogether, since there is also a prohibition of *chovel bachavero*, prohibiting the injuring of any other person (*Devarim* 25:3, Talmud *Sanhedrin* 58a, and Rambam, *Hilchot Sanhedrin* chapter 16:17) which can be easily violated during such an activity.

all these cases there was no parental consent. This opinion, although disputed by many,[22] nevertheless does play a decisive role in practical rulings on this issue.[23] Although not accepting this opinion as a final ruling, certain *poskim* do take it into account when there are other mediating factors.[24]

Codification

Interestingly, despite each accepting the stricter basic interpretation of the Rif and Rosh cited above, the *Beit Yosef* and the *Bach* argue as to the practical ramifications of that approach. On the one hand, the *Beit Yosef* assumes that there is a fundamental argument between the two sides, on a Biblical level. According to him, their strict ruling emanates from the verse prohibiting the injury of parents. The implication would be that performing even a therapeutic procedure on one's parent in any way that would cause bleeding is scripturally prohibited and carries with it a capital punishment. On the other hand, the *Bach* interpreted these rulings of the Rif and Rosh in a more lenient fashion.[25] Although he too agrees that there is a real halachic argument in the Gemara between the

22. This is the opinion of Rav Achai Gaon (*She'iltot, she'ilta* 60) who says that although a father can excuse a son from his obligation to honor him, he cannot excuse him from being forbidden to curse or hit the father. This opinion is echoed by other *Rishonim* including the Rivash (*She'elot U'teshuvot* 220) in the name of the Ravad as well as by the Ran. It is also the opinion of Rabbi Naftali Tzvi Yehuda Berlin (the *Netziv,* in his commentary *Ha'amek She'elah* to the *Mechilta,* ad loc). Rabbi Shlomo Zalman Auerbach in footnote two to his aforementioned *teshuva* (*Minchat Shlomo* 32) suggests that these opinions need not be seen as clear and decisive to the question of injuries for medical purposes, since one can argue that if it is the father's will that the splinter be removed, then perhaps the blood drawn does not need to be defined as an injury.

23. See later that the opinion of Rabbi Eliezer Yehuda Waldenberg in his *Tzitz Eliezer* (vol 17, *siman* 14 pp31-32) relies on this opinion as a matter of final ruling.

24. For example, Rabbi Shlomo Zalman Auerbach (in *Sh"ut Minchat Shlomo* 32), as will be demonstrated later.

25. *Bayit Chadash* (*Bach*) *Tur* YD 241: cv.

first opinions and the latter, it is not on a Biblical level, but rather the stricter latter ruling is only Rabbinic in nature. Thus, therapeutic procedures on parents are really not included in the scriptural prohibition at all; rather, due to the severity of the prohibition, the Rabbis instituted a unique prohibition against doing so lest one mistakenly and unnecessarily wound the parent. Furthermore, this Rabbinic prohibition is in place only when one has the choice of allowing someone else to do the procedure on the parent. If, however, there is no one else available to perform the procedure, one may even perform the procedure on the parent themselves. According to this understanding, there is not much of a practical difference between the Rambam's approach and that of the Rif and Rosh. All agree that ideally one should refrain from performing any procedures on their parent; however, in the absence of such a possibility one may do so themselves.

Shulchan Aruch

The strict interpretation of Rabbi Yosef Karo in the *Beit Yosef* appears to be echoed in his *Shulchan Aruch* (YD 241:3). "If a person's father has a splinter in his flesh he should not take it out for he may wound his father; additionally, if a person is a blood drawer or a doctor he should not let blood from his father or cut [a wounded] limb for him even though his [the son's] intention is to cure him". The unqualified wording of the *Beit Yosef* appears to suggest that under no circumstances (unless it is life threatening) may a doctor operate on his own father.[26]

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26. This seems to be the opinion of the *Shulchan Aruch* as one can clearly follow from what Rabbi Yosef Karo wrote in his *Beit Yosef*. However Rabbi Yosef Chaim of Bagdad, the "Ben Ish Chai" (*Ben Ish Chai, Shana bet, Parashat Shoftim ot* 24), is of the opinion that Ramo's commentary here is not inconsistent with the *Shulchan Aruch* and that the Ramo is just coming to explain the opinion of the *Shulchan Aruch*. According to this *Ben Ish Chai* there will be no practical difference in these halachot between those who follow the opinion of the *Mechaber*, Rabbi Yosef Karo, and those who follow

The Ramo (ibid), however, clearly presents a more lenient opinion. Consistent with the Rambam's approach, the Ramo modifies the *Shulchan Aruch*'s decision by adding that, "When is all this said, when there is someone else there that can do it; however, if there is no one else there to do it and he [the parent] is in pain, he [the son] may draw blood and cut as much as the parent allows him". The Gra explains[27] that the Ramo, like the Rambam, was of the opinion that there is no argument at all in the Gemara. The opinion of Rav Matana that there is no prohibition whatsoever is accepted by all. However, as expressed in the stories the Gemara cited later on, due to the severity of the prohibition against injuring a parent and because of the possibility that the son may take out blood in an unnecessary way, if someone else can do it, they should.

Contemporary Applications and Elaborations

Although the halacha as outlined in the *Shulchan Aruch* and Ramo above seems quite simple, contemporary *poskim* grapple with many difficult unresolved details that require further elaboration. To begin with, and most fundamental, what is the extent of the lenient and modifying clause in the Ramo saying that if "there is no one else there", then the son may operate on the parent? Does this mean no one else at all? What if there is someone else there, yet the son is more capable than that person? What if, as often is the case, the parent is simply more comfortable with the son operating on them than a stranger? Or what if the son is willing to operate on the parent for a minimal cost while others are only willing to do so at a high expense?

Definition of "No One Else Available"

The first to be presented with this issue in a modern day

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the opinion of the Ramo, as they are both one lenient opinion. Cf. *Nishmat Avraham* where Rabbi Shlomo Zalman Auerbach is not comfortable with this *Ben Ish Chai's* reading of the *Shulchan Aruch*.

27. In his commentary to *Shulchan Aruch*, ibid footnote 5.

context was Rabbi Yechiel Tukachinsky, Rosh Yeshiva of Yeshiva Etz Chaim in Jerusalem.[28] Rabbi Tukachinsky was asked by a paramedic whose mother was in serious need of injections on a regular basis, if he could give them to her, or did she have to go to someone else despite the inconvenience, and that she would be charged a fee for doing so. If we were to follow the literal ruling of the Ramo it would seem that since there is someone else able to give the injection it should be prohibited for the son to do so. Rabbi Tukachinsky, however, disagreed. He argued that since a son is not obligated to forfeit his own money to fulfill the mitzvah of honoring parents (*kibbud av va'em*) and he is the only person willing to do it for free, we judge things as if there is no one else there.[29]

Rabbi Zvi Pesach Frank, Chief Rabbi of Jerusalem at that time, and Rabbi Isaac Herzog, Chief Rabbi of Israel at the time, took sharp issue with this argument. While in principle Rabbi Tukachinsky's argument that a son is not obligated to forfeit his own money to fulfill the mitzvah of honoring parents (*kibbud av va'em*) is true, this does not apply to the case at hand. A child is indeed not obligated to lose his own money in order to honor his parent, but once they are obligated to help the ailing parent recover and there is a secondary external obstacle to delivering that help (in this case the prohibition against injuring a parent), then the money spent is not looked at as money spent on the parent, but rather as money the child is personally spending in order to avoid this prohibition. It is

28. His *teshuva*, as well as the *teshuvot* of Rabbis Frank, Herzog, and Auerbach, all appear in Rabbi Tukachinsky's response *Gesher HaChaim*, vol. II *siman* 1.

29. It is important to note that even the primary advocate and originator of this idea, Rabbi Yechiel Tukachinsky, did not rely on this argument as a stand-alone and fully reliable argument but rather as an added reason for leniency when other mitigating factors are involved. Later authorities quoting him (*Minchat Yitzchak* and *Nishmat Avraham*), however, quote this reason as one that stands on its own merit. This leniency of Rabbi Tukachinsky appears in the *Chelkat Yaakov* (vol II, chap 39) and the *Yaffe La'lev* (Vol III 241) as well.

important to note that while both of the latter *poskim* rejected the original suggestion of Rav Tukachinsky, Rabbi Isaac Herzog was nevertheless inclined towards a lenient ruling. Interestingly, he did not base this on Rav Tukachinsky's logic but rather largely on the aforementioned idea of the *Minchat Chinuch*. Specifically, the parent must explicitly express their prior forgiveness for any unnecessary injuries the son may inflict on them even accidentally during the procedure.[30] Rabbi Frank, on the other hand, ends off on a stricter note and does not seem to accept either approach, and is strict in his final ruling.

Other *poskim*, Rabbi Shlomo Zalman Auerbach[31] and Dayan Yitzchak Weiss,[32] not only adopt the line of thinking of Rabbi Tukachinsky, but offer further support for it from earlier sources.[33] Dayan Weiss posed the following rhetorical question: What can the condition stipulated by the Ramo "no one else there" possibly mean? Is it referring specifically to the same room, or the same house, or even the same country? One has to derive this from the original source itself. Since the procedure discussed in the Gemara, taking a splinter out of the parent's flesh, is not a very complicated one, it is obviously something that can be done by many people, almost any normal adult. Therefore, it must be that only a scenario specifically the same or more available than that, should be judged as "someone else being there".[34]

This additional rationale for leniency is highly

30. This approach is also taken by Rabbi Eliezer Waldenberg, in his *Tzitz Eliezer* (vol 17:14), who does not elaborate on the matter but just assumes that we rely on this opinion of the *Minchat Chinuch*.

31. *She'lot U'teshuvot*, *Minchat Shlomo*, *kama* vol I, *siman* 32.

32. *Minchat Yitzchak* Vol I *siman* 27.

33. See *Yaffe Lalev* ibid.

34. This is especially true, argues Dayan Weiss, if the hassle involved in going often to the hospital to receive the necessary treatment might cause the parent to be reluctant or negligent in going. A similar consideration is found in the responsum written by Chief Rabbi Herzog.

consequential, especially when dealing with the modern day medical reality. While the financial considerations weighed by Rabbi Tukachinsky and Rabbi Shlomo Zalman Auerbach are important they may not apply to cases where health insurance will generally cover the costs of the procedure in either case.[35] According to the approach of Dayan Weiss, however, if the son is willing to operate or perform whatever procedure necessary immediately rather than make the parent wait, or if the son has a higher proficiency and level of performance in the relevant field, one can argue that it meets the threshold of "no one else there" and the son will be allowed to operate on the parent.

Differences between Various Medical Treatments

Since the prohibition against injuring parents revolves around the possibility of causing the parent to bleed, the degree of likelihood that any given treatment will result in the parent bleeding as well as the essential nature of its being performed by the child may determine its permissibility.

Injections and Insulin Shots

In general, injections need to be divided into two categories – those that definitively cause bleeding, like intravenous placements, and those that may not, like intramuscular or subcutaneous injections. Obviously there is more room for leniency in the latter than in the former. This is true even if the blood remains under the skin. Several *poskim*[36] maintain that in such a situation the child is obligated to hire a medical professional to do the procedure. However, even in the case of IV placement and the like, if for example there is tremendous financial burden, excessive need to travel to and

35. The noteworthy exception for this may be the case of a dentist, a case that will be discussed in detail later on in the essay.

36. Rabbi Tzvi Pesach Frank in the above *teshuva* printed in *Gesher HaChaim* (Tukachinsky) Vol II pp 13-15.

from doctors' offices, or a serious possibility that the parent may be reluctant to receive necessary treatment altogether, there are those that allow it.[37]

Dentists

Because being a dentist generally spares one from having to deal with life-threatening situations, it is most challenging, as there seems to be very little room for leniency. The reason for this is twofold. The first is that dental treatments rarely constitute an immediate threat and thus the nature of the treatment is not urgent nor does it necessitate a very specific person to be the one to carry out the treatment. Indeed there are many outstanding dentists, and rarely can one argue that having a specific dentist is what is absolutely necessary. The second difficulty with a child dentist treating a parent is that almost always dental treatments result in some kind of bleeding. It is therefore highly advisable that a child not be the one to provide the parent with dental treatments when avoidable.[38]

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37. These include the *Tzitz Eliezer, Minchat Yitzchak*, possibly Rav Shlomo Zalman Auerbach (the term possibly is used here because the case Rabbi Auerbach discusses and permits is a case were there will be no blood that comes out if shots will be given, and he also takes into consideration the fact that the parent was poor and was not easily able to afford having someone else give them the shot. However, as he takes the *Minchat Chinuch*'s lenient opinion as a real consideration and as he takes the idea that having to pay money for someone else do it as possibly being considered "no one else there", he may also permit in cases that involve blood coming out.). As mentioned, although Rav Moshe did not relate directly to the issue we can try and deduce from what he wrote what his opinion might be. It would make sense to assume that he was of the opinion that we rule that any injury for medical purposes would be permitted and that the rabbis of the Gemara who did not allow their children to help them in ways that might cause them to bleed did so out of a fear of unnecessary bleeding. In this line Rav Moshe would follow the ruling of the Ramo that if there is no one else there the child would be permitted to perform it, as the Ramo has ruled. Whether Rav Moshe would agree with his contemporaries' definitions of "no one else there" can be left to speculation.

38. See, however, the opinion of Rav Achai Ga'on *She'iltot, parashat*

Other Fields of Medicine

In general, as long as a treatment does not usually involve the possibility of any bleeding or injury, there is no reason for a child not to be the one to treat the parent as long as the parent consents to such help. For example, a gastroenterologist, oncologist, or neurologist, if avoiding invasive procedures, should have no halachic obstacles to treating a parent. The fear of causing the parent inconvenience or discomfort per se, though being important, does not exclude the child from treating the parent.

Sephardic Physicians

As mentioned, many of the above *poskim* are based on the lenient approach the Ramo takes and the way he learns the Gemara in *Sanhedrin*. However, as noted earlier, the *Shulchan Aruch* rules stringently on the matter, taking the position of the Rif and the Rosh. The implication of this is that those who follow the rulings of the *Beit Yosef*, usually Sephardic Jews, cannot operate on a parent even when the aforementioned "no one else is available" circumstances apply.

Rabbi Yitzchak Yosef in his monumental work *Yalkut Yosef*,[39] which has become for many the code of Sephardic halacha, indeed follows this line of reasoning and maintains that a parent's permission would not allow a child to "injure" the parent. Rabbi Yosef goes on to conclude that in medical cases

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Mishpatim:60 quoted by *Nishmat Avraham* (Hebrew) YD 141 footnote 1) that includes the possibility of pulling out an aching tooth with other medical necessities. The reason this is not a reason for leniency in usual modern day dentistry is because usually another equally good dentist can be found and it is not very common to have immediate pressing dental emergencies. If indeed that is the case, then it would seem that the Ramo's rule that if there is no one else there it is permitted can be applied. Even in this case, however, the cleaning of the teeth that usually precedes dental treatment should be done by someone else, as it often causes some kind of bleeding.

39. *Yalkut Yosef, Hilchot kibud av va'em*, Vol. II pp 536-554.

Sephardic physicians must take the stringent position and only when there is literally no other way to get hold of another physician can one rely on the lenient *poskim*. However, in any case short of the above, one must "make an effort and try hard" to find someone else to perform the treatment. According to Rabbi Yosef, the lenient opinions may be relied on only in dire situations when all attempts to find another physician have failed. It is important to note that when it comes to the discussion of administering shots to a parent, even Rabbi Yosef[40] takes a lenient position as long as it is a shot that usually does not cause any bleeding; he notes that his own father, Rabbi Ovadia Yosef *z"l*, acted on this position several times and had his own son give him a shot.

Another noteworthy exception to this is the position of Rabbi Yosef Chaim of Baghdad, the *Ben Ish Chai.*[41] He holds the unique position that the *Shulchan Aruch* and the Ramo are not in conflict, and that they both follow the same lenient position.[42] Thus, Sephardic physicians who follow the position of the *Ben Ish Chai* as well may rely on all that was mentioned above. It is important to note that the *Ben Ish Chai* is not alone in holding this position. Other Sephardic[43] and Yemenite[44] *poskim* also take this position that in cases of a significant need one may rely on the lenient positions that permit medical injuring coupled with parental consent.

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40. Ibid p 545.

41. In his magnum opus *Ben Ish Chai*, *parashat shoftim, se'if* 24.

42. See above, footnote 27.

43. Mahari Castro in footnote three to the Ramo ibid. Mahari Castro writes "and the opinion of all *poskim* agrees that if there is no one else there and the father is in pain he[the son] may extract blood or cut [his father's flesh] to the extent that they [his parents] allow him". See *Yalkut Yosef* (ibid, pp. 542-543), who cites many more Sephardic *poskim* who side with this lenient position. While Rabbi Yitzchak Yosef is aware of all of the Sephardic lenient positions, he still rules that Sephardim should abide by the stringent position of the *Beit Yosef* and rely on the lenient positions only in times of serious need.

44. *Shulchan Aruch Hamekuztar*, written by Rabbi Ratzhabi, p 70.

Recreational and Non-Therapeutic Activities

While the issue of wounding a parent is obviously most significant in the context of medical treatments, it may also be relevant to other common day-to-day situations. Thus care must be taken during grooming activities such as hair or nail cutting for example. The prohibition is probably most commonly encountered in the context of certain recreational activities such as contact sports or paintballing that carry with them a significant risk of wounding. As mentioned above, many of the advocates for the permissibility of such engagements refer to the position of the *Minchat Chinuch*. The obvious problem with that approach in this context is at least in the case of paintballing the very intention of the players is to avoid being struck by an opponent and not acquiesce to injury. Although the parent may consent to participate in the game and is well aware that this involves the risk of getting hurt, it would be very difficult to argue that the parent would respond positively if asked a moment before wounded if they agree to this particular strike. In the broader context it is also important to note that leniency is unlikely in light of the extent to which *poskim* struggle to find permission for scenarios where there is a real and sometimes urgent need for intervention and even then are reluctant to take lenient positions. One can therefore assume that in sports in which it is likely for one player to injure the other, there is little room to assume permissibility. Needless to say that in sports which involve definite injury, such as wrestling, boxing, and many martial arts, it should also be prohibited to partake in the sport having one's parent as a partner.

Does *Psak* Apply to Matters of *Hashkafa*?

Rabbi Yosef Gavriel Bechhofer

1. The Issue

The Gemara[1] relates that Rabbi Abba said in the name of Shmuel: Beit Shammai and Beit Hillel argued for three years, each side claiming the halacha was as they maintained. A *bat kol* [heavenly voice] then came forth and stated: "*Eilu va'eilu divrei Elokim chaim* [these and those are the living words of Hashem], but the halacha is according to Beit Hillel."

Disputes in halacha must end with a pragmatic resolution that regulates our behavior – viz., a *psak halacha*. There are many principles that guide the pursuit of a *psak halacha* – e.g., halacha follows Beit Hillel over Beit Shammai, Rabbi Yochanan over Rav, later decisors over earlier ones, the majority of opinions, the more stringent opinion in *d'oraita* issues [biblical laws], the more lenient opinion in *d'rabbanan* [rabbinic] issues, etc.

Are these principles applicable to matters of *hashkafa* – beliefs and attitudes?[2]

For example, let us say we could somehow determine that,

1. *Eruvin* 13b.

2. *Hashkafa* literally means "perspective." In this context it refers to philosophies and attitudes that are not definitively within the purview of halacha.

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on the one hand, a majority[3] of halachic authorities are opposed to Religious Zionism, yet, on the other hand, are supportive of the existence of the State of Israel – does that mean that an observant Jew must accept that position and may not follow either the very positive *"da'at yachid"* (lone opinion) of Rav Kook towards the State of Israel nor the very negative *"da'at yachid"* position of the Satmar Rebbe?

Similarly, in matters of Jewish law (halacha) we have a principle that instructs us to follow the *Minhag HaMakom* – local custom. If one takes up residence in a city in which the majority of the inhabitants follow the perspectives on divine service espoused by *Mitnagdim*, is he therefore forbidden to follow the perspectives of *Chasidim*?

2. Contemporary Sources

Contemporary thinkers, including outstanding *roshei yeshiva* and renowned writers, have expressed opinions on both sides of this issue.

Rabbi Aharon Feldman, *Rosh HaYeshiva*, Yeshivat Ner Yisroel in Baltimore, writes:

> It should be pointed out that the principle, the majority opinion rules, applies equally to ideas as well as to practical halacha. Beliefs, besides falling under certain commandments, affect a Jew's status with respect to various laws and are therefore also part of practical halacha.[4]

Rabbi Herschel Schachter, *Rosh Yeshiva*, Yeshivat Rabbeinu

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3. To be sure, the notion of determining the existence of a majority of rabbinic authorities is an elusive one. *Chazon Ish* (*Orach Chaim, Eruvin* 112:10), notes that such majorities must be "weighted" majorities – i.e., the stature and reasoning of each *posek* must be weighed when considering his views and counting his *psak* in the halachic equation.

4. "The Slifkin Affair" in *Eye of the Storm*, p. 161 note 40; available online at zootorah.com/controversy/SLIFKINARTICLE.doc.

Yitzchak Elchanan, writes:

> People are wont to say that the Torah is comprised of two separate parts, that there is halacha and there is *hashkafa*. But I heard from Rabbi Aharon Kahn that he heard several times from our Master [Rabbi Yosef Dov Halevi Soloveitchik, *Rosh HaYeshiva*, Yeshivat Rabbeinu Yitzchak Elchanan] that he learned from his forefathers that this distinction is erroneous, for even that which is called *hashkafa* is also a part of halacha. Just as there are halachot concerning what one is permitted to do, what one is forbidden to do and what one is required to do, so too there are halachot concerning what one is permitted to think, what one is forbidden to think and what one must think.[5]

A different perspective is reported by Rabbi Aryeh Kaplan, renowned prolific author and popularizer of many Jewish concepts. Basing himself on a number of eminent authorities (see footnote below), he records their opinion that,

> In a question of halacha, after there is a discussion of different opinions, we must come to one conclusion. Anyone not abiding by that conclusion is going against halacha – *ke-neged halacha*. However, in the case of *hashkafa*, or historical questions, this is not true. The Rambam makes this point in his *Peirush HaMishnayot*...[6] In any case, the Rambam says clearly that in questions of *hashkafa* or history, there is no *psak*. In other words, if an opinion is found in *Chazal* or in our accepted Torah *sefarim*, one cannot say that we do not *pasken* (rule) like that opinion. Thus, the Rambam often takes a *da'at yachid* (the opinion of just one person) and builds an

5. *MePninei HaRav,* p. 206; a snippet is available at http://books.google.com/books?id=icTXAAAAMAAJ&focus=searchwithinvolume&q=%D7 %94 %D7%A9%D7%A7%D7%A4%D7%94.

6. We will examine Rambam's perspective in greater detail below.

entire *hashkafa* on it. He may use this opinion because it fits into his system of logic, even though it may be a minority opinion. He can do this, since the entire concept of *psak* only applies to questions of halacha and not to questions of *hashkafa*.[7]

3. The Scope of the Issue

In order to address this question and seek resolution, we must first determine what is meant by *hashkafa*.[8] A reasonably accurate definition can be found in the Wikipedia entry on "Orthodox Judaism:"

> Since there is no one Orthodox body, there is no one canonical statement of principles of faith. Rather, each Orthodox group claims to be a non-exclusive heir to the received tradition of Jewish theology, *while still affirming a literal acceptance of Maimonides' thirteen principles* [author's emphasis].
>
> Given this (relative) philosophic flexibility, variant viewpoints are possible, particularly in areas not explicitly demarcated by the halacha. The result is a relatively broad range of *hashkafot* within Orthodoxy. The greatest differences within strains of Orthodoxy involve the following issues:
>
> The degree to which an Orthodox Jew should integrate and/or disengage from secular society, based, in part,

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7. *The Age of the Universe – A Torah-True Perspective*, p. 7ff; available online at http://www.simpletoremember.com/faqs/Kaplan-SimpleTo Remember .com.pdf.

8. See *Alei Shur* vol. 2 p. 144, where Rabbi Shlomo Wolbe asserts that the entire contemporary concept of *hashkafa* is actually a foreign transplant, a graft of the German concept of a *weltanschauung* onto Judaism, and a negative phenomenon. In making this point he refers to Rashi to *Bereishit* 18:19: "Any time the word *hashkafa* appears in Scripture it is in a negative context, except in the case of 'Gaze *[Hashkifa]* from your holy abode', etc." (*Devarim* 26:15).

> on varying interpretations of the Three Oaths,[9] whether Zionism is part of Judaism or opposed to it, and defining the role of the modern State of Israel in Judaism.
>
> Their spiritual approach to Torah such as the relative roles of mainstream Talmudic study and mysticism or ethics...
>
> The validity of authoritative spiritual guidance in areas outside of halakhic decision (*Da'at Torah*).(*sic*)
>
> The importance of maintaining non-halakhic customs, (*sic*) such as dress, language and music the role of women in (religious) society. The nature of the relationship with non-Jews.[10]

4. *Hashkafa* vs. Foundational Beliefs

The Wikipedia entry implies a distinction between areas of *hashkafa* – such as the examples it provides – and foundational beliefs ["Maimonides' thirteen principles"]. Not all philosophies, attitudes nor beliefs can be classified as *hashkafa*. Some beliefs are mandated by halacha. Our foundational concepts and core beliefs are halachic issues, that are mandated by halacha, and that have halachic ramifications. One who does not accept these core beliefs will fall into one of several categories of non-believers – e.g., a *min*, a *kofer*, an *oved avoda zara*, etc. – and these categories have definite halachic parameters and halachic repercussions.

A case in point is a Talmudic text that relates Rav Yosef's treatment of Rabbi Hillel's position concerning *Mashiach* (Messiah)– a position that relates to our foundational belief in the coming of *Mashiach*.

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9. See *Ketubot* 111a.

10. Wikipedia, *Orthodox Judaism*, http://en.wikipedia.org/wiki/Orthodox_Judaism.

The Gemara[11] cites the opinion of Rabbi Hillel:[12] "The Jewish people [will] have no *Mashiach*, as they already consumed it [i.e., the Messianic period] in the days of [King] Chizkia." Rav Yosef repudiates and invalidates Rabbi Hillel's position. He states: "May his Master [Hashem] forgive Rabbi Hillel! When did Chizkia [reign]? In the period of the First Temple. Yet [the prophet] Zecharia prophesied [later] during the Second Temple period, and he states:[13] *Rejoice very much, O Daughter of Zion, trumpet, O Daughter of Jerusalem, behold your king will come unto you, righteous and redeemed...*"

Rabbi Hillel's perspective is one that rejects the very belief which Rambam ultimately codified as the twelfth belief on his list of Judaism's thirteen core beliefs – the eventual advent of *Mashiach*. Moreover, *Chatam Sofer*[14] states categorically that since the overwhelming majority of sages have rejected Rabbi Hillel's perspective, one is not allowed to defy the majority opinion and adopt Rabbi Hillel's perspective. *Chatam Sofer* asserts that this case is essentially the same as the case – discussed elsewhere in the Talmud[15] – of Rabbi Eliezer, who ruled that *machshirei milah* may be performed on Shabbat (e.g., cutting wood to make charcoal to smelt iron to make a knife in order to perform a circumcision on Shabbat). During Rabbi Eliezer's lifetime, the members of his community were entitled to abide by his ruling. However, since the majority of the sages rejected his view, anyone outside his community – and, after he passed away, even the members of his own community – who would perform *machshirei milah* on Shabbat would be considered to be desecrating the Sabbath.

At first glance, it might seem that *Chatam Sofer* here is

11. *Sanhedrin* 99a.

12. Evidently an Israeli *Amora*, perhaps Hillel II, to whom the fixed calendar is often attributed.

13. *Zecharia* 9:9.

14. *Teshuvot, Yoreh Deah* 2:356.

15. See *Yevamot* 14a.

applying principles of *psak halacha* to an issue of *hashkafa*. This would seem all the more so to be the case based on what *Chatam Sofer* goes on to state – viz., that the beliefs in the eventual redemption and the coming of *Mashiach* are not in and of themselves essential principles of Judaism. However, *Chatam Sofer* goes on to explain that one who denies these beliefs is implicitly rejecting the validity of Zecharia's prophecy. Accordingly, by extension, he is rejecting the underlying essential principle of belief in the Torah and in the words of the prophets. Thus, by virtue of its grounding in prophecy, the belief in the coming of *Mashiach* has become in and of itself a foundational belief. Consequently, the concept and the principles of *psak halacha* certainly do apply to the issue of the coming of *Moshiach*.

5. *"Nimnu V'Gamru"*

Let us turn, then, to sources pertaining to "pure" *hashkafa* – viz., matters which have neither any halachic ramifications nor any connection to any foundational beliefs.

A Baraita[16] relates that for two and a half years the academy of Shammai (Beit Shammai) and the academy of Hillel (Beit Hillel) disputed a matter of *hashkafa*. Beit Shammai maintained that it would be "better" (*"no'ach lo"*) for man not to have been created rather than to have been created, while Beit Hillel maintained that it is better for man to have been created rather than not to have been created. The Baraita then relates that *"nimnu v'gamru"* – they "voted and concluded" – that it would have been better for man not to have been created, but that now that he has been created, he should scrutinize his deeds (*"yefashfesh b'ma'asav"*) or, as some say, analyze his deeds (*"yemashmesh b'ma'asav"*).

The expression *nimnu v'gamru* would seem to indicate that in this issue – which seems to meet our criteria for consideration as pure *hashkafa* – the Sages voted and,

16. *Eruvin* 13b.

following the majority, came to a definite conclusion – i.e., a *"psak"* in *hashkafa*. This is certainly the most simple and straightforward understanding of the language of the Baraita. However, the commentators advance other possible interpretations. *Maharasha*[17] writes that *nimnu* here does not refer to a vote, but to a count. He explains that the *Tana'im* counted the number of positive commandments (*mitzvot aseh*) and negative commandments (*mitzvot lo ta'aseh*) in the Torah.[18] When they found that there were more negative mitzvot than positive ones (365 vs. 248), they concluded that man is more likely to violate negative commandments and become liable to punishment, than to fulfill positive commandments and merit reward. They therefore agreed that it would have been "better" for man not to have been created.[19]

Alternatively, Maharal[20] explains that the entire description of the dispute is allegorical (including the two and a half year time span of the dispute), and understands *nimnu v'gamru* as indicating that they reached a philosophical consensus, as opposed to a vote or *psak*.[21]

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17. *Makkot, Chiddushei Aggadot* 23b *d.h. Taryag*.

18. Evidently, the determination of what was a mitzvah and what kind of mitzvah it was, took two and a half years.

19. The Munkatcher Rebbe (the *Minchat Elazar*) derived an interesting "halachic" conclusion from *Maharsha*'s explanation. In a speech that he gave in honor of the birthday of the president of Czechoslovakia, he stated that it is not customary for Jews to celebrate birthdays, and that this is on account of the Baraita's conclusion that it would be better for man not to have been created. However, he qualifies, this only applies to Jews, as it is based on the count of *mitzvot lo ta'aseh* vs. *mitzvot aseh*. Non-Jews, on the other hand, who are only obligated to fulfill seven mitzvot, do not face the vast pitfalls of myriad negative commandments. Therefore, he concludes, non-Jews – and especially *Chasidei Ummot HaOlam* such as the Czechoslovakian president – properly celebrate their birthdays as days of *mazal* and *simcha* (*Divrei Torah* 88, cited in an essay by Rabbi Zvi Ryzman on the topic of birthdays, which can be found at http://www.haoros.com/Archive/Index.asp?kovetz=999&cat=9&haoro=3).

20. *Derech Chaim* 2:9.

21. According to *Mahari Mintz* this Baraita does have halachic

6. *"Halacha B'Yadu'a"*

Another source bearing on the question at hand is the comment of Rashi:[22] "It is a known halacha (*"halacha b'yadu'a"*) that Esav hates Yaakov." Maharatz Chiyus[23] derives from Rashi's expression that the term "halacha" applies to *hashkafa* as well. He explains the application on the basis of *Aruch*,[24] who writes that the term "halacha" connotes a concept that goes on (*"holeich"*) from beginning to end, or, alternatively, a matter by which the Jewish nation goes.

On the other hand, numerous commentators note that in the *Sifri*[25] text which is the source of this statement, the language is different. There it is stated as a question: "Is it not known (*"ha'lo b'yadu'a"*) that Esav hates Yaakov?"[26] Moreover, Rabbi

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ramifications. It is on its basis, he explains, that *Chazal* phrased the *Birchot HaShachar* in a negative format – viz., "that He has not made me a non-Jew," "that He has not made me a slave," "that He has not made me a woman" – as opposed to a positive format – viz., "that He has made me a Jew," "that he Has made me a free person," "that He has made me a man." *Mahari Mintz* explains that our Baraita's conclusion means that so far as a person's soul is concerned, it would have been better for it to have remained in its original spiritual state and not to have been placed in a physical body. He writes that the reason Hashem takes a soul out of its holy source and places it in a body is for it to add to its perfection by exercising its free will in this material world and following in Hashem's pathways through its performance of Torah and mitzvot. Yet, all too often, once the soul comes into the material world it follows base desires and commits evil. For such persons, coming down into this world was counterproductive. Accordingly, they cannot thank Hashem for being made a certain way, as they would have been better off not being made! They can only thank Hashem that once they had to be made nonetheless, they were not further disadvantaged by being made in a way that would make their success in *Avodat Hashem* even more difficult to accomplish.

22. To *Bereishit* 33:3-4.

23. *Darkei Moshe, Kol Kitvei Maharatz Chiyus* vol. 1 p. 479.

24. *Erech Halach*.

25. *Sifri, Bamidbar* 69 *dh. O B'Derech*.

26. It has been suggested that the original form of the statement in Rashi was הל' בידוע, and that the typesetter erroneously understood the abbreviation to connote halacha, whereas it actually connoted *ha'lo*

Moshe Feinstein[27] poses the question (according to Rashi's version) of how the term "halacha" is relevant here, and explains that it means to teach us that just as halacha never changes, so too this hatred never changed.

7. *Bavli* vs. *Yerushalmi*?

According to Rabbi Avraham Yitzchak HaKohen Kook,[28] a difference between the *Bavli* and the *Yerushalmi* at the beginning of *Perek Eilu Hein HaNechnakim* in *Sanhedrin* indicates that the question of whether the concept of *psak* applies to *hashkafa* is the subject of a dispute between the two Talmuds.

Both the *Bavli* and the *Yerushalmi* there are examining the verse[29] that introduces the law of the rebellious elder (*zaken mamrei*). The verse reads: *And if a matter* [davar] *becomes extraordinary, between blood and blood, between judgment and judgment or between affliction and affliction, matters of contention within your gates...* The Torah goes on to instruct that such matters be brought before the Great Court in the place that Hashem shall designate. The Torah subsequently teaches the law in the case of a rebellious elder who refuses to accept the ruling of the Great Court.

Both the *Bavli* and the *Yerushalmi* expound the word *davar*. The *Bavli*[30] states that *davar* refers to halacha, while the *Yerushalmi*[31] states that *davar* refers to *agada* – i.e., matters of *hashkafa*. Rav Kook understands the *Yerushalmi* to mean that the Great Court would determine not only matters of halacha, but also matters of *agada*, whereas the *Bavli* limits their

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(Introduction to the 1982 edition of *Sifri* p. 32 note 26).

27. *Iggerot Moshe, Choshen Mishpat* 2:77.
28. *Iggerot HaRayah* no. 103.
29. *Devarim* 17:8.
30. *Sanhedrin* 87a as well as several *Midrashei halacha.*
31. *Sanhedrin* 55a in the Vilna edition.

jurisdiction to matters of halacha.[32] Rav Kook posits that after the eventual redemption will take place, the operative perspective will be that of the *Yerushalmi*, but until then (even in *Eretz Yisrael*), the operative perspective is that of the *Bavli* – viz., that *currently* there is no concept of a *psak hashkafa*.

Be that as it may, Rav Kook's interpretation of the *Yerushalmi* is not the commonly accepted explanation. Both standard commentaries on the *Yerushalmi* – i.e., the *Pnei Moshe* and *Korban HaEdah* – explain that the *Yerushalmi*'s statement concerning the implication of the term *davar* as part of its definition of a *muflah she'b'beit din* – the foremost member of the Great Court – who must be involved in a legal procedure in order for the law of *zaken mamrei* to be applicable. The novelty of the *Yerushalmi*'s definition is its requirement that the foremost member of the Great Court be not only an expert in matters of halacha, but also in matters of *agada.* Accordingly, the text in the *Yerushalmi* would not pertain to the question of whether there exists a concept of a *psak hashkafa.*

8. Rambam's Position

In his *Commentary on the Mishnah*, Rambam writes in three places about this issue:

1. Commentary to *Sotah* 3:3: "And I have already told you more than once that whenever the Sages dispute a matter of perspective or opinion that has no bearing on any actual practice, one cannot say the law is in accordance with one of them."
2. Commentary to *Shavuot* 1:4: "And we have already

32. Rav Kook suggests that in *Eretz Yisrael* the Torah learning was imbued with a prophetic character, which diminished the distinction between halacha and *agada*, whereas in *Chutz LaAretz* the learning was limited to what could be attained by logic alone, so that definitive clarity in matters of *agada* cannot be achieved.

explained that in regard to any logical position that does not pertain to any actual practice it cannot be said that the law is in accordance with so-and-so."

3. Commentary to *Sanhedrin*, Introduction to Chap. 10, in regard to the question of who does and does not have a portion in the World to Come: "We have already mentioned to you several times that in regard to any dispute among Sages that does not pertain to actual practice, but is solely in the realm of ideas, there is no room to render a *psak* in favor of one of them."

These statements would seem to indicate beyond a doubt that Rambam rejects the application of the concept of *psak* to *hashkafa*. However, some contemporary writers assert that Rambam himself contradicts this principle in *Hilchot Teshuva* (7:4).

The Gemara[33] cites a dispute between Rabbi Yochanan and Rabbi Avahu as to whether a *Baal Teshuva* (a Jew who repents of his sinful lifestyle) is on a higher level than someone who never needed to do *Teshuva* in the first place, or vice versa. Rambam (*Hilchot Teshuva,* ibid.) seems to rule in accordance with the opinion that a *Baal Teshuva* is on a higher level than someone who never sinned. As this is an issue of "pure" *hashkafa* – viz., it does not concern a foundational belief, nor does it possess any practical ramification – Rambam's ruling seems to indicate that the concept of *psak* does apply to matters of *hashkafa*, apparently contradicting his position in the *Peirush HaMishnayot.*

It is possible, however, to contend that there is no contradiction. It is Rambam's wont in *Mishneh Torah* (particularly at the end of a section of laws) to include exhortations and advice that are not, strictly speaking, halachic. It may be that Rambam in this statement intended to provide encouragement to *Baalei Teshuva*. As part of that

33. *Berachot* 34b.

encouragement, Rambam writes that "the Sages said that the place in which *Baalei Teshuva* stand is one that complete *Tzaddikim* cannot attain." Accordingly, he did not mean to issue a halachic ruling. Rather, Rambam is citing this opinion to inform *Baalei Teshuva* that such an opinion exists, indicating the great stature that a *Baal Teshuva* can aspire to attain.[34]

9. Conclusion

In conclusion, it is evident that there is significant difference of opinion about whether or to what extent matters of belief are obligatory in the same way as matters of Jewish practice. While the concept of *psak* [a definitive, obligatory ruling] certainly pertains to a number of beliefs considered foundational, it is a matter of dispute whether *psak* pertains equally to *hashkafa* in general, which would require that an observant Jew must accept the majority opinion, just as in Jewish law. However, according to the perspective that rejects the application of the concept of *psak* to *hashkafa*, it emerges that in regard to an issue that does not touch on a foundational

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34. This issue – and others, some of which we have dealt with, and some not – are raised at http://www.jewswithquestions.com/index.php?/blog/1/entry-2-paskening-hashkafa-academic-vs-practical-rationales/. The other issues raised there can be addressed in manners similar to the way we have addressed this issue. See also the discussion at http://youngerlight.blogspot. xcom/2011/04/psak-in-hashkafa.html. Other sources that are brought to bear on the question of whether there exists a concept of *psak* in *agada* include the question of issuing a ruling in a matter that is *Hilchata l'Meshicha* (see *Kiddushin* 71a with Ramban, Raavad, Ritva). In fact, however, that issue is irrelevant to our discussion, as it concerns halacha – not a halacha that is currently relevant, but a halacha nonetheless. Another source is the Gemara in *Kiddushin* 36a. Rashba (*Teshuvot* 1:194) considers the issue there – viz., whether a *Meshumad* (apostate) is *metamei b'ohel* just like an observant Jew or not. He mentions there that "according to Rabbi Meir he is also included in *banim* (sons)." This statement, however, is not necessarily meant to be the basis of the *psak*. He may only be mentioning a point of fact, that according to R' Meir, a *Meshumad* is still included in the category of *Banim atem la'Hashem Elokeichem* (you [Jews] are sons of God). For further elaboration, see http://rygb.blogspot.com/2010/08/psak-in-hashkafah-or-aggadah.html.

belief – and that also does not have any halachic ramifications – one is not bound to follow the "majority opinion," and may accept a perspective advocated by a minority of thinkers – even a perspective that is a lone opinion, a *"da'at yachid*," just as Rambam did.

Returning to a prior example, Rav Kook saw the establishment of a state in the Land of Israel as the *atchalta d'geula* – the beginning of the ultimate redemption. The Satmar Rebbe, on the other hand, saw the establishment of the state as a violation of the Three Oaths mentioned in *Ketubot* 111a. Most authorities do not accept either view in its entirety. If *hashkafa* is subject to the same rules as halacha, then – except in certain locations that are inhabited predominately by followers of either Rav Kook or the Satmar Rebbe – one would not be allowed to adopt either of their perspectives. If *hashkafa* is not subject to the same rules of halacha, a person would be allowed to adhere to Religious Zionism, or to Satmar anti-Zionisim, based on personal inclination (or, preferably, the guidance of his mentors), even though the vast majority of authorities rejects their perspectives.

Creating Human Embryos Using Reproductive Cloning Technologies

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Abstract

Recent scientific discoveries have enhanced the capacity of scientists and clinicians to generate human pre-implanted embryos in the laboratory. These embryos can be transferred into a woman's uterus to allow the development of a healthy child. In 2013, new technologies in the area of human cloning may also be applied to human reproduction. One such biotechnology, known as "somatic cell nuclear transfer" or SCNT, involves fusing one cell that contains all 46 chromosomes of DNA into an egg whose nuclear DNA has been removed. This reconstituted egg can now be induced to divide and differentiate in the laboratory to generate a 4-6 day old human embryo that can be transplanted into a woman's uterus. One potential clinical advantage of SCNT is the capacity to use non-sperm cells of infertile men to generate a healthy embryo. Yet, this technology raises many halachic issues such as the status of fatherhood in an embryo generated by "fertilizing" an egg without male sperm and the permis-

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sibility of using SCNT to clone a woman. Here, we address these relevant issues and offer halachic decisions regarding the use of this technology in human reproduction.

Introduction

Understanding human reproduction has challenged human intellect throughout history. Aristotle, Hippocrates, Galen, the Talmud, and post-Talmudic sources all have examined the process by which a human embryo is conceived.[1]

Yet, only in the last few hundred years has science begun to elucidate the various mechanisms of human reproduction. Currently, new technologies, based on our successful understanding of the mystery of human reproduction, are being developed to generate human embryos in ways previously never imagined. These biotechnologies include in vitro fertilization (IVF), stem cell biology, and somatic cell nuclear transfer (SCNT).

In this paper, we briefly summarize both a secular- and Torah-oriented history of human reproduction research from a basic understanding of human conception to recent technologies in human cloning. Then, critical halachic issues emerging from these new technologies are presented. Finally, specific halachic approaches regarding issues of fatherhood and parenthood are presented.

Brief history of scientific insights into human reproduction

Aristotle's (384 – 322 BCE) biological insights regarding human reproduction dominated human thinking for almost

1. Reichman, Edward, (1997), "The Rabbinical Conception of Conception: an Exercise in Fertility", *Jewish Law and the New Reproductive Technologies*. (Eds. Emanuel Feldman and Joel B. Wolowelsky, Ktav Publishing House, Hoboken, NY). Pg 1-35.

2,000 years. Aristotle believed that an embryo was created from human male semen that caused menstrual blood to initiate early embryogenesis to form the essential organs of a fetus. Once these basic organs were formed (usually within 40 days), Aristotle believed that the soul entered the fetus.

Unlike Aristotle's opinion that only the male member of our species initiated human reproduction, Galen (130 – 200 CE) accepted the theory of Hippocrates (4-5th century BCE) and stated that both the male and female members of our species contribute "semen" that initiates human conception. Galen believed that male semen provided the form and essence of fetal movement whiles female semen provided the material, i.e., the menstrual blood, from which the fetus is formed. Interestingly, Herophilus (about 330 BCE) discovered ovaries and called them "female testes" but understood neither their structure or function.[2]

It took almost an additional 2000 years for William Harvey, in 1651, to suggest that human and other mammalian reproduction began with a sperm fertilizing an egg. This was a remarkable hypothesis since no one had ever observed a human egg. Shortly thereafter, in 1677, Antony Von Leeuwenhoek observed human sperm under a microscope. A century and a half passed before the mammalian ovum was actually visualized under a microscope by Ernst von Baer in 1827. However, the process of fertilization and conception is scientifically credited to Oskar Hertwig who, in 1875, reported that fertilization begins with the penetration of a sperm into an egg.

The Talmudic description of human reproduction in Tractate *Niddah*[3] clearly acknowledges the equal partnership of husband and wife in human reproduction, and preceded the

2. Herrlinger, Robert and Feiner, Edith, (1964) "Why did Vesalius not discover the fallopian tubes?" *Med Hist*, 8(4): 335–341.

3. 17b and 30b.

secular world's understanding of human conception by about 1500 years. While our understanding of the biological details described in the Talmud may be lacking, the description is nonetheless highly significant and insightful.

The Talmud states:

> שלשה שותפים יש באדם: הקב"ה, אביו ואמו. אביו מזריע הלובן, שממנו עצמות, וגידים, וציפורניים, ומוח שבראשו, ולובן שבעין; אמו מזרעת אודם, שממנו עור, ובשר, ודם, ושערות, ושחור שבעין; והקב"ה נותן בו רוח, ונשמה, וקלסתר פנים, וראית העין, ושמיעת האוזן, ודיבור פה, והילוך רגליים, ודעת, ובינה, והשכל.

> There are three partners in man, the Holy One, blessed be He, his father and his mother. His father "seeds" the white substance out of which are formed the child's bones, sinews, nails, the brain in his head and the white in his eye; his mother "seeds" red substance out of which is formed his skin, flesh, hair, blood and the black of his eye; and the Holy One, blessed be He, gives him the spirit and the breath, beauty of features, eyesight, the power of hearing and the ability to speak and to walk, knowledge, understanding and discernment.[4]

Furthermore, many aspects of female anatomy and of human reproduction were known to our halachic sages long before the secular scientific community acquired this understanding. For example, based on *Niddah* 17b, Rambam acknowledges the existence of "female seed" in his statement that "between the *heder* and *prozdar*, there are two ovaries of the woman and the pathways (Fallopian tubes) wherein her seed matures."[5]

The sages of the Talmud also recognized that marital relations are not essential to human reproduction. *Chaggigah*

4. Ibid.

5. *Hilchot Issurei Biah* 5:4.

13a describes how a virgin woman can get accidentally pregnant if she enters a public bath immediately following a man who entered the bath before her. The Talmud assumes in this case that the man emitted sperm into the bathwater before leaving the bath, and that some of the sperm entered into the woman who came to bathe after the man, and impregnated her. The primary objective of this Talmudic discussion was not the issue of who is the halachic father, but, rather, whether a *Kohen* can halachically marry a virgin who conceived a child without engaging in marital relations. While post-Talmudic scholars argue whether this case is realistic[6] or merely a hypothetical situation,[7] there are many modern-day halachic implications derived from these types of Talmudic discussions.[8]

One essential element in reviewing these Talmudic discussions is understanding the role of scientific information in halacha. In post-Talmudic literature, an authoritative statement concerning the interaction of Torah Law with secular scientific information is attributed to Rabbi Sherira Gaon,[9] who states:

> We must inform you that our Sages were not physicians. They may mention medical matters that they noticed here and there in their time, but these are not meant to be a mitzvah. Therefore you should not rely on these cures and you should not practice them at all unless each item has been carefully investigated by medical experts who are certain that this procedure will do no harm and will cause no danger [to the patient]. This is what our ancestors have taught us – that none of

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6. Rabbi Shimon Ben Tzemach Duran (Tashbetz) *Responsa* 3:#263.

7. Rabbi Judah Rosnes, *Mishneh le Melech, Hilchot Ishut*, 15:4 and *Hilchut Issurei Biah* 17:15.

8. See Steinberg, Avraham, "Definition of Fatherhood", *Techumim*, 30:122-128, 2009.

9. *Otzar Hageonim*, *Gittin* 68, #376.

> these cures should be practiced, unless it is a known remedy and the one who uses it knows that it can cause no harm.

Indeed, some halachot are not modified by scientific facts. For example, the eighteen *trefot* of an animal are all *"halacha l'Moshe mi-Sinai"* (an oral transmission which must be accepted as is) and are not modified by any new development in veterinarian science. However, the halacha that defines *trefah* in humans, as in defining critical illness in reference to Shabbat and Yom Kippur laws, depends upon the medical knowledge of the times.[10] In response to a scientific- or medically-based halachic question, a *posek* must navigate information obtained from medical scientists. If the information is accurate, then the halacha generated can be based on that information. If the factual accuracy of the scientific or medical information is questionable or controversial, then the *posek* must rely on established halachic principles to arrive at a *psak*.[11]

The Rambam's dictum described below provides a fundamental principle and guideline on how to assess scientific and medical information.[12]

Regarding issues of capital crime and death penalty decisions where halacha adheres to strict rules, Rambam recognizes the dynamic nature of halacha and states that the "doctors establish whether a specific injury is life threatening or not".[13] In other words, life and death decisions are made based on medical information provided by the medical experts of the time. If that information changes over time, halacha must reevaluate its conclusions in accordance with halachic

10. *Shulchan Aruch, Orach Chaim, Hilchot Shabbat* #328:10.

11. In cases that involve a Torah law, halacha must be stringent; in cases that involve a rabbinic law, then halacha can rely on lenient decisions (*Rosh HaShanah* 34b, *Eruvin* 5b, 45b-46b; and *Taanit* 27a).

12. Rambam, *Hilchot Rotzeach*, Chapter 2:8.

13. Ibid, note #12.

principles. Thus, scientific consensus can serve as the basis of halachic decisions and as a precedent in addressing new halachic issues including those emerging from new reproductive biotechnologies.

Current technologies in reproductive medicine

Over the past thirty years, *in vitro* fertilization (IVF) technology has emerged as a viable method for infertile couples to conceive. Over 5 million babies have been born via IVF. However, over the past few years new technologies, such as human cloning, are being developed that may revolutionize human fertility in practical ways that were never previously conceived or imagined.

Human cloning, commonly defined as the creation of a genetically identical copy of a human being, could theoretically serve as an innovative method to generate progeny that possess the same genetic information as one of the parents. However, cloning has traditionally been viewed as an unethical method for human reproduction, despite biological precedents that utilize cloning as a viable means of reproduction.[14] One alleged ethical concern regarding human cloning is that it violates the divine gift of free will or divine providence by creating an individual that is a genetic copy of someone else. This ethical concern may not be entirely valid because identical twins are the most commonly recognized

14. There are other biological precedents where organisms use cloning as a normal method of reproduction. Many plant species and single-celled organisms like bacteria reproduce via cloning. Higher-level species such as worms, fish, lizards, and frogs undergo a process called parthenogenesis where a female can produce genetically identical offspring without engaging a male partner. Leiolepis ngovantrii, for example, is a reptile commonly found in Vietnam that is an all-female species that reproduces via cloning. The female Amazonian ant, Mycocepurus smithi, is an example of an insect species that reproduces via cloning. These ants have reproduced via cloning for thousands of years resulting in the virtual disappearance of their sexual organs.

form of natural human cloning. Despite the fact that identical twins possess an identical genetic code, they exhibit different behaviors, physical traits, and health issues, because each twin is exposed to different environmental experiences.

Scientific and Clinical Applications of Human Cloning Technologies

Since cloning is an established biological phenomenon,[15] scientists have been intrigued in understanding both its mechanism and its potential medical or scientific benefit. In 1997, public opinion claiming that human reproductive cloning was unethical drew worldwide attention[16] in response to the publication of a major scientific breakthrough where Ian Wilmut and his colleagues successfully cloned a sheep from a frozen mammary cell obtained from another adult sheep. To clone this sheep, Dolly, they used a technology called **s**omatic **c**ell **n**uclear **t**ransfer (SCNT). [17] In SCNT the genetic material contained in the nucleus from any cell is transferred or injected into an enucleated egg (i.e., an egg whose nuclear DNA has been physically removed) to initiate the creation of an embryo. This reconstituted "fertilized egg" is then allowed to develop into a blastocyst in the laboratory and subsequently implanted into a host animal for embryological development.

The resulting clone, like Dolly, contains 99.9% of the genetic material from the donor cell while the remaining genetic material is obtained from the DNA present in the mitochondria of the enucleated recipient egg.[18] The

15. Ibid #14.

16. Petersen, A. *Replicating Our Bodies*, (2002), "Losing Our Selves: News Media Portrayals of Human Cloning in the Wake of Dolly, Body and Society", 8: 71-90.

17. Wilmut, I., A. E. Schnieke, et al. (1997). "Viable offspring derived from fetal and adult mammalian cells." *Nature* 385(6619): 810-813.

18. Evans, M. C. Gurer, J.D. Loike, A. Schnieke, E.A. Schon. "Mitochondrial genotypes in nuclear transfer-derived cloned sheep". *Nature Genetics*

mitochondrion is an organelle that provides cells with metabolic energy and contains a small, but important, amount of genetic information. Mitochondria are unique organelles in that their genetic information is maternally transmitted to all future progeny.

While scientists have used this SCNT technology to clone over twenty species of animals, many countries have banned applying this technology to clone human beings.[19] These governments feared that applying such technology to human reproduction may create highly defective human embryos and children. Similarly, critics have raised concerns over future technological advancements in reproductive cloning that could, in theory, lead to the creation of "designer babies". Many bioethicists believe that it is unethical to allow parents to select the genetic composition of their children for physical enhancement or for non-health reasons. The fear in creating designer babies is that it may herald a new era of "consumer eugenics" with potentially unknown social and health consequences for humankind.

Nonetheless, various laboratories around the globe continue to research the application of cloning (specifically SCNT) to enhance the welfare and health of human beings. SCNT technologies may be used to enhance our knowledge of:

- Human organ regeneration from stem cells,
- Infertility and the design of new medical solutions for infertility,
- Designing patient-specific potential therapies,
- Helping women with mitochondrial diseases to have healthy offspring,[20]

23:90-93, 1999.

19. Niemann H., A. Lucas-Hahn. (2012). Somatic cell nuclear transfer cloning: practical applications and current legislation, Reprod Domest Anim., Suppl 5:2-10. doi: 10.1111/j.1439-0531.2012.02121.x.

20. Loike, J.D., M. Hirano, H. Margalit. (2013). "Three-Way Parenthood".

- Helping women who have difficulties in fertility due to age or disease.[21]

However, the application of SCNT to human beings has proven to be an exceedingly difficult task. Many unsuccessful attempts were made in trying to generate a viable human pre-implanted embryo or blastocyst, via SCNT.

Sixteen years after the cloning of Dolly using SCNT was reported, the first successful application of SCNT to generate a human blastocyst was reported in May of 2013. Dr. Shoukhrat Mitalipov from the Oregon Health and Science University led an international team to modify SCNT technology to generate human blastocysts and embryonic patient specific stem cell lines.[22] This work was an extension of their research using SCNT to generate embryonic stem cell lines from non-human primates. Incorporating innovative technical modifications, Dr. Shoukhrat Mitalipov and his colleagues successfully fused the nucleus obtained from a baby's skin cell and applied SCNT technology to generate a human blastocyst from which they could isolate and maintain human embryonic stem cells

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October 1st, *The Scientist*.

21. The reduced capacity of eggs obtained from older women or women who are carriers for specific genetic disorders such as Fragile X syndrome may be due, in part, to their egg's inability to accurately reprogram the DNA after fertilization. One could conceive of obtaining eggs from these women, removing the nucleus from selected eggs (that do not have the mutated gene) and transferring the nucleus, via SCNT, into an egg obtained from a young and healthy woman. This reconstituted egg would contain over 49% of the DNA from the affected woman and less than 1% of mitochondrial DNA from the egg donor and can then be fertilized using the husband's sperm, via IVF. The hope is that the donor egg would have a greater capacity to facilitate DNA reprogramming and therefore be more successful in helping these women produce a healthy child, via IVF.

22. Tachibana, M., P. Amato, M. Sparman, N. M. Gutierrez, R. Tippner-Hedges, H. Ma, E. Kang, A. Fulati, H. S. Lee, H. Sritanaudomchai, K. Masterson, J. Larson, D. Eaton, K. Sadler-Fredd, D. Battaglia, D. Lee, D. Wu, J. Jensen, P. Patton, S. Gokhale, R. L. Stouffer, D. Wolf and S. Mitalipov. (2013). "Human embryonic stem cells derived by somatic cell nuclear transfer." Cell, 153(6): 1228-1238.

in the laboratory.

Dr. Mitalipov's motivation in applying SCNT to human beings was not to clone a human being. Rather, it was to obtain patient-derived embryonic stem cell lines that can be used to study and potentially treat various human diseases. In fact, their group chose to generate stem cells from a patient with a genetic defect called Leigh syndrome.[23] These patient-derived embryonic stem cells obtained from the baby with Leigh syndrome will be used to test various types of therapeutic protocols. In addition, patient-derived stem cells, obtained using SCNT from individuals with Parkinson's, Huntington's, ALS and Alzheimer's, heart disease, and liver diseases, could be a valuable scientific asset in designing and testing treatments to manage or cure these devastating diseases.

While Dr. Mitalipov and his colleagues claim that their technology is not designed to clone human beings, the SCNT technology described does in fact have the potential to be used to implant a human blastocyst into a woman to create a human embryo. What is significant here, from a scientific and halachic perspective, is that a variety of cell sources, aside from sperm and eggs, can theoretically be fused with an egg obtained from a woman to create a human embryo.

Halachic Parenthood

As described above, SCNT offers a scientific methodology to generate human embryos without a man donating human sperm. This raises the following question: How does halacha

23. Leigh syndrome is a severe genetic neurological disorder that typically arises in the first year of life. This condition is characterized by progressive loss of movement and mental functions and results in death within a couple of years. Leigh syndrome can be caused by mutations in one of over 30 different genes. While most people with Leigh syndrome have a mutation in nuclear DNA, about 20 to 25 percent have a mutation in their mitochondrial DNA.

define "fatherhood status" in the case of a child created without human sperm? There are numerous discussions and articles about halachic parameters of motherhood in reproductive medicine but there are few articles that discuss the halachic ramifications of generating human beings without the use of human sperm.

Specifically, this technology raises two related halachic issues that are rarely discussed.[24] First, what is the role of genetics in establishing a parental halachic relationship? Second, what is the role of *zerah* (sperm) in establishing fatherhood? Specifically, does halacha recognize fatherhood (paternity) status only in situations when a man provides sperm or can the status of halachic paternity be established when a man donates a non-sperm cell to generate an embryo that leads to a live birth?

The halachic issue of genetic parenthood arising from SCNT has no clear or definitive halachic precedent. In this regard, we may follow the approach of the Rambam (see above) that halacha can rely on accurate scientific or medical information provided by experts to consider the current scientific status of this technology. The current consensus within the scientific community regarding the definition of human reproduction can be summarized as "the union of two nuclei in an egg to produce an embryo that can be gestated and where the mitochondrial genes are provided by the egg." If this definition has universal acceptance within the scientific community as being accurate, it may also be recognized by the halachic community as well. This means that the nucleus of a sperm cell has no special paternity status over the nucleus of any other cell. Thus, a person donating genetic material, even from non-sperm cells, to create an embryo can be considered as the halachic father of the child.

Furthermore, this technology raises another halachic

24. Ibid #8.

question. Should genetics be the sole determinant of parenthood? In the secular sphere, parenthood is generally established by genetic relationships where two individuals contribute cells (or DNA) leading to the formation of an embryo. However, legal parenthood can also be established via adoption in the absence of any genetic relationship between the adoptive parent and child.[25] There are situations, however, where a halachic definition of family relationship differs from a genetic definition. While halacha generally acknowledges the important role of genetics in parenthood, in the following cases genetics do not determine familial relationships. Specifically,

a) A child fathered by a non-Jew has a genetic father and is halachically Jewish by virtue of the fact that the mother was Jewish. However, halacha does not grant the non-Jewish genetic father parenthood status and no halachic familial relationship exists between the genetic non-Jewish father and the Jewish child.

b) A child fathered by a Jewish man cohabiting with a non-Jewish woman is not granted halachic familial status with the child. Although he remains the genetic father, the child is not Jewish.

c) Conversion to Judaism by a child severs familial relationships with respect to parenthood, fatherhood, and even sibling status.

d) A child fathered by a *Kohen* who impregnated a Jewish divorcee does not transmit the "*Kehuna*" status to the child, although the *Kohen* is recognized as the halachic father.

In the above cases halacha ascribes unique characteristics to the concept of family relationship (*yichus*) that may be at

25. Margalit, Yehezkel, Levy, Orrie, Loike, John D., "Advanced Reproductive Technologies: Reevaluating Modern Parentage", *Harvard Journal of Law and Gender*, in press 2013.

variance with classical genetics. Aside from delineating specific limitations on the role of genetics in human reproduction, halacha introduces a third component into the definition of human reproduction – *kedusha* or the sanctity of Jewishness. This principle of *kedusha* and genetics is particularly directed to the status of *Kohanim* and their children.

Halachic analysis of specific cases involving SCNT technology

The four cases presented below represent current possible applications of SCNT to human reproduction:

1. Transferring the nucleus of a skin cell (non-sperm) from an infertile Jewish husband into the egg of his Jewish wife to create an embryo.
2. Generating an embryo from three parents (two females and one male) to create a child that does not express a dangerous mitochondrial genetic disease.
3. Transferring the nucleus of a skin cell from a woman into her own enucleated egg to clone herself.
4. Transferring the nucleus of a skin cell obtained from a Jewish man into an egg obtained from a Jewish non-spousal married woman to create an embryo.

The halachic resolution of these cases must also consider who gestates (carries) the embryo. The woman who gestates the embryo could be the genetic mother, a Jewish (married or single) surrogate woman, or a non-Jewish (married or single) surrogate woman. In this paper, we primarily focus on paternity issues related to SCNT and avoid the halachic issue of maternity related to the woman who gestates the embryo.[26]

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26. See Loike, J.D., Tendler, M.D, "Halachic Perspectives of Gestational Surrogacy", *Hakirah,* In Press, 2013; ibid #8.

In general, halacha states that a Jewish man who donates sperm, whether he is the husband or a stranger, is the halachic father. As mentioned above, until modern times, there is no halachic precedent, discussion, or reference concerning the paternity status of a man who donates "genetic material" by using non-sperm to generate an embryo.

Case #1. Transferring the nucleus of a skin cell (non-sperm) from an infertile Jewish husband into the egg of his Jewish wife to create an embryo.

There are two ways this process can be done. In the first, scientists could transfer a nucleus (containing the full complement of 46 chromosomes) from a skin cell into an egg whose nucleus was physically removed (such an egg is called an enucleated egg). In the second scenario, scientists could transform a skin cell into a cell containing only 23 chromosomes and transfer its nucleus into a human egg that containing its normal 23 chromosomes.

The main halachic concern in these two cases is whether a man contributing non-*zerah* genetic material can attain halachic paternal status of the child. Current scientific information substantiating the generation of such a child without the use of sperm could be the basis for an affirmative rule that the husband serving as the genetic donor maintains paternal halachic status. Moreover, if safe, this technology might be considered as an halachically acceptable therapeutic intervention for infertile couples, particularly in situations where a man cannot produce viable sperm.

It is also important to note that SCNT does not involve any known halachic prohibitions. Rabbi Yisrael Lifshitz, author of the Mishnah commentary *Tiferet Yisrael*, highlights an important halachic dictum that can be applied to SCNT:

> Anything that we have no reason to prohibit is permitted in halacha without having to find a reason for its permissibility, for the Torah does not mention every

> permissible thing but rather only those things which are forbidden.[27]

There may, however, be other halachic concerns related to this technology. Do human beings, for example, have the right to engage these methodologies to produce children? The halachic response seems to be in the affirmative. The Talmud states:

"Rabbi Yishmael taught: 'he shall surely be healed' (Exodus 21:19) [meaning] to teach us that a doctor is permitted and even obligated to heal."

Rashi explains this Talmudic concept that our attitude should not be that God has made him ill and the doctor is (doing the opposite and) healing him. In other words, it is not God's will that this person remain ill or that it is forbidden to heal him.

Although we generally do not derive *psak* from Midrashim, the Midrash[28] expresses this idea rather beautifully in the following story:

> Once Rabbi Yishmael and Rabbi Akiva were walking in the streets of Jerusalem, and encountered a certain man who was ill and asked the rabbis. "My masters, tell me, how can I become healed?"
>
> They said to him, "Do such and such and you will be healed." He asked, "But who struck me (with this illness)?" They replied, "It was God."
>
> He then said, "Are you not interfering in something divine which is not your business? After all, God struck me with this illness, and now you are healing me. Are you not contradicting His will?"
>
> They asked him, "What is your occupation?" He

27. Mishnah, Tractate *Yadayim* 4:3.

28. *Midrash Shemuel* 4:5.

> answered, "I am a laborer of the soil. See, I am carrying my sickle." They asked him, "Who created the vine?" He answered, "God."
>
> They said, "Are you then not involving yourself in something which is not your business? God created it, and you cut down its fruit!"
>
> He said to them, "Do you not see the sickle in my hand? Were it not for my plowing and cutting down and fertilizing and weeding, nothing would grow!"
>
> They answered, "Foolish man! By virtue of the nature of your work you should know what is written in *Barchi Nafshi*, 'Man's days are like the harvest' (Psalms 103). Just as a plant in ground that is not weeded, fertilized or plowed cannot grow, and if it begins to grow but lacks water or fertilization, it will not survive – so too is the human body. The 'fertilizers' in this case are the drugs and medicines, and the 'farmer' is the physician."
>
> The ill man then said to the sages, "Please [forgive me and] do not punish me."

Ramban[29] incorporates this philosophy when commenting on God's directive to Adam to "conquer (the Earth)"; "God gave man power and control on Earth to do as he wishes with the animals and insects and everything which crawls on the Earth, and to build, to uproot what is planted, to quarry copper from the mountains, etc." In other words, human beings are commanded to serve as partners in God's creation in order to better the human condition. This principle is consistent with the following Midrash:[30]

Rabbi Akiva was challenged by the Roman general, Turnus Rufus, to defend the Jewish practice of circumcision, which the general believed was an apparent mutilation of a work of the

29. Ramban, Genesis 1:28.

30. Midrash *Tanchuma, Tazriah* 19.

Creator of the world. Rabbi Akiva answered Turnus Rufus that the works of man, (such as making bread) representing a finishing touch to nature, are better than the unfinished works of the Creator (the kernels of "natural" wheat).

Furthermore, this theological principle is enunciated every Friday evening in the Kiddush phrase, "And God blessed the seventh day, and hallowed it; because in it He rested from all His work which God in creating had made." The subject of the Hebrew word *la'asot* is man – that God also blessed the work that man is instructed to do.

Clearly the preferred reproductive method in Jewish thought and halacha is embodied in the Talmudic statement that there are three partners in the creation of a person (father, mother, and God).[31] However, there is no proof that the Talmudic sages were stipulating an obligation that this is the only way to procreate; they were merely indicating that the husband and wife donating their seed in forming an embryo is the normative method of reproduction. However, even an embryo that is formed when a woman donates her "seed" and the man donates genetic material from a cell that is not "seed" will still receive a human-spiritual essence from God.

Another issue in this case is whether this method of reproduction fulfills the commandment פרו ורבו ("to be fruitful and multiply")?[32] The answer to this question depends on a dispute between halachic authorities regarding children born via IVF.[33] Some rabbinical authorities state that children produced via IVF fulfill the mitzvah of reproduction.[34] This view is consistent with that of several halachic authorities who

31. Ibid #3.

32. Genesis 1:28, 9:1, and 9:7.

33. See Avraham Steinberg and Fred Rosner, *Encyclopedia of Jewish Medical Ethics, Feldheim Publishers*, New York, pp. 571–585, 2003.

34. *Nishmat Avraham, Even Ha'ezer*, 1:3; Rabbi A. Nebenzahl, (1986), *Assia* 5:92-93.

rule[35] on the status of the child born from a woman who become pregnant in a bathhouse, that the biological donor of the sperm has fulfilled the precept of halachic reproduction. Other Rabbinic authorities rule[36] that such a genetically-related child is not considered to be the halachic offspring of the biological parents and cannot be considered as their fulfilling the mitzvah of פרו ורבו because this mitzvah requires natural sexual relations. Even those Rabbinic authorities who rule that the couple engaging in IVF does not fulfill the mitzvah of פרו ורבו, do, however, agree that the couple would fulfill the precept of "populating the world".[37] Our position is that the mitzvah of פרו ורבו is concerned not with how the union is carried out but rather with the result – the birth of a living child. Thus, such a couple might, in fact, be considered as fulfilling the commandment to be "fruitful and multiply".

There are other halachic issues related to this case that will need to be addressed:

1. Laws of *arayot*[38](forbidden relationships) and *k'rovim*

35. See Rosner, F., (1970), "Artificial Insemination in Jewish Law", *Judaism*, Fall 1970.

36. Rabbi Y. Gershuni, (1979), *Or Hamizrach* #92:15-21.

37. *Yevamot* 62a-62b cites a number of opinions regarding the mitzvah of *p'ru ur'vu* and the mitzvah to populate the world.

38. An intriguing question should be posed in cases of donor sperm (AID) – is there a violation of *arayot* when it is an embryo, fertilized by donor sperm, and not the sperm itself that is transferred to a married woman? It is important to highlight several views regarding the underlying reasons for *arayot*. Rambam (*Moreh N'vuchim* 3:49) states that this principle serves as a safeguard against excessive physical relations with relatives with whom one would likely be in close contact. Maharal (*N'tivot 'Olam; N'tiv Ha'anava* 4) quotes R. Chama b. Chanina (*Sotah* 4b) that a haughty or self-centered individual is viewed as if he violated all of the *arayot* prohibitions and proposes that the root of haughtiness is an excessive pre-occupation with one's own ego and lack of love and concern for others. A haughty individual fixated as he is on his own self and self-gratification and not the needs of others, does not absorb this message of viewing even activities accompanied by physical pleasure as a form not of self-service but of Divine service. Rabbi Samson R. Hirsch (Genesis 2:25), suggests that at least the Noahide *arayot* are

(relatives).

2. Laws of *Kohen, Levi or Yisrael* lineage.
3. Laws concerning respecting and honoring parents.
4. Laws of inheritance.[39]
5. Laws of *Yibum* and *Chalitza*.

Case #2. Generating an embryo from three parents (two females and one male) to create a child that does not express a dangerous mitochondrial-based genetic disease.

Almost all cells of the body contain mitochondria that serve as the energy generator that cells need to function. Mitochondria possess unique genetic (DNA) information that is distinct from the cell's nucleus and entirely self-contained that enables these organelles to function. Mutations that arise in mitochondrial DNA can have profound health consequences and cause a myriad of human conditions, such as muscular dystrophy, heart problems, liver failure, brain disorders, blindness, hearing loss, myopathy, and in the most extreme cases, death. These mitochondrial disorders are currently incurable and are passed down maternally from generation to generation. Sadly, one in 6,500 children worldwide is affected with mild or severe mitochondrial defects.

Using a SCNT-like procedure, scientists will be able to transfer "healthy mitochondria" obtained from the egg of one

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prohibited so as to ensure character diversity within the couple. Relatives are more likely to have similar strengths and weaknesses. In modern terms, Rabbi Hirsch appears to be advocating that genetic diversity is an important consideration in human reproduction.

39. See Tosafot *Ketubot* 11a that states that a child born from a woman who underwent conversion during pregnancy is considered a convert and yet inherits its mother's estate.

woman into the egg of another woman who expresses mitochondrial DNA defects. This genetically-reconstituted egg can then be fertilized in the laboratory using IVF protocols to generate an embryo to be implanted into the woman with mitochondrial disease. The child produced from this process will then contain enough healthy mitochondria to compensate for defective mitochondrial and be disease free. Moreover, all of the mitochondria (healthy and defective) will be transmitted to all future offspring and result in mitochondrial disease-free offspring.

The halachic issue here is whether such a procedure would be acceptable and whether a child can have more than two parents (sperm, egg, and mitochondrial donors). In addition, the halachic novelty in this case is that while mitochondrial DNA comprises less that 0.1% of the total human genome it contains essential genetic elements to maintain the health of a person. As this procedure is designed to be therapeutic it also adds value in implementation and might be halachically permissible.

There are several Midrashim that have been used to understand the issue of multiple parenthood.[40] However, as stated above, many halachic scholars state that using a Midrash as a halachic source is inappropriate, as halachot are not derived from *agadot* [41](non-halachic material).

At the very least, this case of multiple parenthood is a *safek* (doubtful) and may be similar to another case regarding the

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40. *Sotah* 42b describes how Orpah (Naomi's daughter-in-law and Ruth's sister-in-law) returned to her native country and engaged in evil and sinful activities. Eventually, she slept with 100 different men in one evening and gave birth to the Philistine giant Goliath that David killed in the famous battle described in Samuel. Rashi, commenting on this Talmudic discussion, states that only one man can be the father, whereas Tosafot provide several sources supporting the position that several men can be the father. It is unclear from Rashi and Tosafot whether they are arguing biologically or halachically or if these discussions only impart a moral message.

41. *Yerushalmi, Pe'ah* chapter 2 halacha 5.

halachic status of a child who was gestated in the womb of a non-related-non-Jewish woman. Rabbi Shlomo Zalman Auerbach and Rabbi Moshe Feinstein both rule that because we do not know the status of a child who has both a gestational and a genetic mother, both women *b'safek* serve as the halachic mothers of the child and the child must undergo conversion to retain Jewishness.[42] We apply this halachic ruling to our case, that all parties donating genetic materials to generate an embryo may possibly (*b'safek*) have a status of parenthood.

1. Case #3. Transferring the nucleus of a skin cell from a woman into her own enucleated egg to clone herself.

In this scenario, a woman clones herself and gestates the embryo. There is little doubt that this woman is the halachic mother because she contributes the egg, including all the genetic materials, and gestates the embryo. However, does this cloned child have a father? One might speculate this woman's father should be considered the halachic father because a significant part of the genetic materials can be traced originally to her father. However, once again there is no precedent to make such a halachic ruling.

Another halachic concern might be that this child has the status of a *shiduki*, a child whose father can never be established. The halachic ramification of a *shituki* is severe, as the child is forbidden to marry any Jewish man, for fear that she may marry a halachic relative. In our case, the cloned child is not a *shituki* because the genealogy of the cloned female child is halachically known and all the progenitors are identified. In contrast, in the classical case of a *shituki* the genealogy of this child remains uncharacterized.

In our case, the child's mother is the only genetic donor to generate the child, and therefore serves as the halachic mother.

42. Ibid #26.

There is no halachic precedent to claim that this mother could serve as both the halachic mother and father. Thus, the logical conclusion in this case is that this child will have no halachic father.[43]

Case #4. Transferring the nucleus of a skin cell obtained from a Jewish man into an egg obtained from a Jewish non-spousal married woman to create an embryo.

The unique halachic issue emerging from this case is whether the laws of *momzerut* (illegitimacy) or *safek momzerut* (possible illegitimacy) apply. This issue has been discussed regarding whether a married Jewish woman can use sperm from a non-spousal Jewish man for artificial insemination. There are three different conclusions proposed by *poskim*.[44] Some claim that the child is a real *momzer*; while others claim that the child is a *safek momzer* (bastard) and all stringencies of *momzer* apply. Finally, there are a few *poskim* who claim that the child is not illegitimate at all. If halacha accepts the scientific position that this technology can create a human embryo, then the man who provides the nucleus is the halachic father. Moreover, since no forbidden marital act took place, the child conceived is not illegitimate. Based on rulings of Rabbi Moshe Feinstein[45] we propose that if science is able to adequately demonstrate the safety of this procedure, then the man who provides the nucleus for SCNT should be considered the halachic father. Moreover, since no forbidden marital act took place, the child conceived may not be illegitimate. However, Rabbi Moshe Feinstein did not rule on the use of SCNT to resolve normal issues of infertility. Rather he ruled on specific individual cases.

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43. See *Megilla* 13a stating that Esther had no halachic father.

44. Ibid #8 and #26.

45. Personal communications to Rabbi Moshe D. Tendler.

Conclusions

SCNT offers a powerful and intriguing technology to enable infertile couples to have genetically-related offspring by allowing men to donate genetic materials from non-sperm cells. The halachic issue discussed in this paper is whether these men will attain halachic fatherhood status. We suggest that in fact, halacha can rely on scientific technology that a man providing genetic material from a non-sperm cell may attain an halachic status of paternity.

Likewise, SCNT technology offers the real promise of generating healthy children from women who have defects in their mitochondrial DNA. In this latter case, children will be generated from more than two parents, thereby raising the issue whether a child can have more than two halachic genetic parents. As there is no defined halachic precedent in this situation, all the genetic contributors must be considered as possible or doubtful halachic parents *(b'safek)*.

The cases presented in this article are but a few of many scenarios that rabbinical authorities will need to address as SCNT and stem cell technology progress. In the future one can envision the following cases that will require further halachic analysis: 1) the transfer of nuclei from two women (one Jewish and the other not Jewish) to an enucleated egg obtained from one of these donors to create an embryo, 2) the transfer of nuclei from two men (one a *Kohen* and the other a *Yisrael*) to an enucleated egg obtained from a single Jewish woman, and 3) using a machine that synthetically synthesizes DNA into 46 chromosomes to custom-generate a genetic blueprint to implant into the enucleated egg obtained from a Jewish single or married woman. Each of these cases presents different halachic issues that will need to be the focus of future study.

Rules of Recruitment and Retention of Torah Teachers

Rabbi Yona Reiss

I. Introduction

There is perhaps no loftier profession than that of serving as a Jewish educator (*mechanech*). Those who dedicate their lives to teaching and inspiring new generations of Jewish children are the primary sustainers of Torah life in our communities. The Talmud[1] records a discussion between Rav Chisda and Rav Chiya regarding which of them would be most capable of restoring the crown of Torah. Rav Chisda asserted that if the Torah would ever be forgotten, he would surely be most capable of resurrecting Torah knowledge through his "*pilpul*," his brilliant erudition. Rav Chiya, in turn, retorted that he had already assured that Torah would never be forgotten. To accomplish this goal, he personally planted flax from which he fashioned nets to hunt deer. He then fed the meat to orphans, fashioned Torah scrolls from the hide, and found schoolchildren in places where there were no Torah teachers, and taught each child from a different scroll. Most significantly, he assured that the children would then teach each other so that the Torah teaching process would be self-perpetuating. In his letter *Mezakeh et HaRabaim*,[2] the Alter of Novordak points to Rav Chiya as the paradigmatic Jewish educator who ensures that the purity and the passion of Torah

1. *Bava Metzia* 85b.
2. Printed in *Madregat Ha'adam*, pages 433-452.

Av Beth Din, Chicago Rabbinical Council; Rosh Yeshiva, Rabbi Isaac Elchanan Thelogical Seminary.

learning continue to infuse, inform and inspire future generations.

Accordingly, this article is written with a sense of respect and reverence for the role of the Torah educator. Because of the seminal role that such individuals play within our community, it is imperative for us to review the basic rules of employment that pertain to these professionals. Without having a proper understanding of the principles that govern their employment, we risk the possibility of acting improperly towards *mechanchim*, or exposing them to needless conflict.

Specifically, we will address questions that arise in the realm of the recruitment and the retention of Jewish educators.

First, what are the obligations of Torah institutions that enter into an agreement to employ a Torah teacher? Is it ever permissible to renege upon such an agreement, such as when there is a decrease in enrollment or when unsavory information is discovered regarding the teacher? What if a superior candidate is found? What are the consequences of breaking a contract? Under what circumstances is it permissible for the school to fail to renew a contract?

Second, there is the question regarding the desire of a Jewish day school to retain its teachers, even when they would like to leave. Sometimes an educator wishes to move from one school to another school, often prior to the beginning of a new school year. What if this decision takes place after there has been a signed contract between the school and the educator, or at least a tacit understanding that the educator was going to remain at the school for the following year? Unfortunately, it is not uncommon that the educator's decision to leave the school leads to bad feelings as well as recriminations against the deserting teacher. In extreme cases, the rejected school may even seek to interfere with the hiring of the teacher by the second school. Are there in fact restrictions upon the freedom of movement by the teacher, or is the teacher permitted to leave at his/her whim?

Third, questions arise regarding the propriety of recruiting educators from another institution. Sometimes a school concludes that it would like to hire a talented educator from a different school, and is tempted to approach that individual even though he/she is still in the middle of their contract with the first school. Is it ever appropriate to approach educators from another institution to entice them away from their current employment? What about the reverse situation, when an educator wants to send out feelers that he/she would like to be employed by a different institution?

Finally, it is important to clarify how aggressively a teacher can seek alternative employment. What if the job that is sought is currently occupied by another teacher? Does it matter if the hiring institution has sent out indications that it is planning to dismiss the current teacher or not renew that teacher's contract for the following year?

In this article, we will attempt to establish basic guidelines and principles for the purpose of addressing these specific situations. Obviously, each individual case has its own nuances and circumstances that require individualized analysis. Nonetheless, it is hoped that this presentation of the halachic sources and considerations will prove to be helpful in assessing appropriate behavior and preventing conflict.

There are a couple of important points to be made at the outset. First of all, the term utilized by classical Jewish authorities to refer to Jewish educators is "*melamed*."[3] For purposes of this article, we will translate "*melamed*" as Jewish educator or Rebbe. However, since there are nowadays many female Jewish educators as well, we will try to note those instances where the rules would appear to be the same with respect to a "*melamedet*" or "*morah*." Hence, this article will, to

3. See, e.g., *Choshen Mishpat* 333:2, 334:4, and 335:1. Another common term is "*mikri dardeki*" (teacher of small children). See *Bava Metzia* 109a. The two terms are sometimes used interchangeably. See Tosafot, *Bava Batra* 21a (s.v. "*Sach Mikri Dardeki*").

the fullest possible degree, encompass rules relating to both genders in the field of Jewish education.

Additionally, in most of the "*melamed*" employment situations depicted in the classical Jewish sources, the *melamed* was hired by a "*ba'al habayit*,"[4] an individual householder who retained the services of the *melamed* for the private education of his own child. In the contemporary context, the hiring is generally done by an educational institution. In general, the laws pertaining to the "*ba'al habayit*" in the context of such employment agreements are essentially the same as those which would pertain to a larger, more communal hiring entity. However, to the extent that there is a possible difference with respect to the rights and obligations of educational institutions as opposed to private parties, those distinctions will be noted below.

II. The Employer's Obligation to Honor an Employment Agreement

The Talmud[5] states that there are two stages to the finalization of an employment contract.[6] In the first stage, the employer and employee reach an agreement regarding the terms of employment. In the second stage, the employee actually begins employment. Between the first stage and the second stage, if either party withdraws from the employment arrangement, there is no monetary liability, but rather the aggrieved party is simply entitled to have a "complaint" (a "*taromet*"). Authorities disagree regarding the nature of this

4. See, e.g., Ramo, *Choshen Mishpat* 335:1.

5. *Bava Metzia* 75b-76b.

6. There are two primary categories of workers in Jewish law – one is a "*poel*" – a day laborer, who is hired for a set period of time, and the other is a "*kablan*" – a contractor, who is hired to do a job. For purposes of this article, we will focus upon the category of "*poel*" because the vast majority of Torah educators are hired in the context of a set period of time, rather than for the completion of a specific task.

complaint. According to some authorities, it means that while there is normally a prohibition against bearing a grievance against another Jew in one's heart, this case is an exception.[7] According to others, the aggrieved party can even vocalize their grievance towards the offending party, and possibly even in a public fashion.[8] In the event that no harm ensues to the employee, because he/she is able to find alternative employment at a salary and conditions as good as the first job, there is not even the right to a "*taromet*"[9] although the employer may still, according to some authorities, be in violation of the prohibition to be "*mechusar amanah*" (i.e., somebody who does not keep his word).[10] If there was a good reason for the termination of employment, such as the discovery by the employer that the employee had a bad reputation in previous positions, then even a "*taromet*" would not be permitted. [11]

There is one exception to this principle of non-liability. If the employee could have retained employment at the time of the agreement between the parties, but has lost that opportunity at the time that the employer reneges on the agreement prior to the starting date, then the employee is in fact entitled to damages.[12]

However, in the event that the employee has already begun working, and the employer terminates employment, the employer will bear liability even if the employee would not otherwise have been able to find gainful employment

7. See *Chelkat Binyomin* 333:7.

8. See *Darchei Choshen* 1: 299-300.

9. See *Shach, Choshen Mishpat* 333:1.

10. *Sema* 333:1.

11. *Aruch Hashulchan, Choshen Mishpat* 333:1, *Shvut Yaakov* 1:174 (employer was justified to renege on employment agreement when it was discovered that employee had a reputation as a thief).

12. *Choshen Mishpat* 333:2.

elsewhere.[13] In the event that the parties had entered into a "*kinyan*" – a formal and binding transaction – then the employer incurs liability for breaking the contract even prior to the actual beginning date of employment.[14] Since a written contract serves as a conventional *kinyan* for employment contracts, it would seem that in any case where a school had entered into a written contract with a teacher, the school would in fact incur liability for breaking the contract even prior to the beginning date of employment.[15] Additionally, in the context of the appointment of a *melamed* by a group of people ("*rabim*"), the *Darchei Moshe* rules (based on the *Hagahot Mordechai*) that even in the absence of a formal *kinyan*, an agreement in principle is as binding as an actual *kinyan*.[16] Arguably, a communal institution that is responsible for teaching Torah to students would be viewed as having the status of *rabim* so that it would bear liability for terminating an employment agreement even in the absence of a formal contract.[17]

The normal standard for the amount of liability is to be paid as a "*poel batel*" (literally, an "idle worker") – the amount that a working person would be willing to take in order not to have to work at all.[18] There are different opinions regarding the appropriate calculation of *poel batel*.[19] It seems to this writer that many rabbinical courts adopt, absent extenuating

13. *Pitchei Choshen*, *Hilchot Sechirut* 10:7.

14. Ramo, *Choshen Mishpat* 333:1, *Shach* 333:3; see *Chelkat Binyomin* 333:18.

15. This is also the conclusion of the *Chelkat Binyomin* 333:10 based on *Noda Biyehuda* (*mahadura kama*) *Choshen Mishpat* 30, paragraphs 8-9. See also *Poel Emet*, pp. 49-50, that any kind of contractual agreement based on common custom (*situmta*) would be binding, at least on a rabbinic level. See *Bava Metzia* 74a. *Peulat Sachir* (p. 101) assumes that a written contract of employment would be binding on this basis alone.

16. *Darchei Moshe*, *Choshen Mishpat* 333:5.

17. See *Pitchei Choshen*, *Hilchot Sechirut*, 7:4

18. Ramo, *Choshen Mishpat* 333:1, *Shach* 333:8.

19. See *Radvaz* 2:793 who indicates that this is a subjective determination based on the energy level of the worker as well as the difficulty of the work.

circumstances, the standard of the *Taz* that the amount is fifty percent of the wages that would have otherwise been payable to the worker.[20] However, in the event the worker finds other employment during the period of the contract, the worker is then only entitled to the difference between the amount received under the new employment contract and the amount that he would otherwise have received.[21] There is a dispute among commentators to the *Shulchan Aruch* as to whether this differential is calculated according to the standard of "*poel batel*"[22] or whether it is a straight calculation.[23] There is also a dispute among the authorities as to whether the laid-off worker has the right to insist upon being paid as a *poel batel* or whether he/she can be required to work if a job opportunity is available at a lesser salary.[24] Some authors suggest that all authorities would agree that the worker does not have the option to refuse alternative employment if the termination of contract took place prior to the commencement of the job.[25]

However, there are several professions for which the payment standard of *poel batel* is the full amount of the contract based on the theory that the worker would be weakened by virtue of being idle,[26] and one of these professions is that of a Torah teacher.[27] Unlike other forms of

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20. *Taz*, *Choshen Mishpat* 333, s.v. "*she'ayno domeh*."

21. *Choshen Mishpat* 333:2.

22. See *Sem*a, *Choshen Mishpat* 333:10.

23. See *Shach*, *Choshen Mishpat* 333:10.

24. See *Shach, Choshen Mishpat* 333:9 who cites this latter opinion in the name of the *Bach*, but registers his disagreement.

25. See, e.g., *Pitchei Choshen*, *Hilchot Sechirut* 10:(11), citing the *Divrei Mishpat*.

26. See *Choshen Mishpat* 335:1 with respect to ditch diggers or agricultural workers. The original source of this consideration is the Talmudic passage in *Bava Metzia* 77a which speaks about "*uchlushi d'mechuza*" – workers in the town of Mechuza who carried large bundles and would be weakened when they sat idle (see Rashi, ad loc).

27. Ramo, *Choshen Mishpat* 334:4, and 335:1. The *Sema* (*Choshen Mishpat* 335:4) notes that there are really two separate consideration with respect to a

professional work, where it is presumed that the worker would be happy to be on vacation, a Torah teacher suffers distress when unable to transmit Torah to students. Therefore, if a school terminates the employment of the teacher in the middle of a contract without cause, the halachic remedy of payment, absent a showing of extenuating circumstances,[28] would be the full amount of the contract.[29]

In addition to imposing liability, can an employer ever be forced to retain an employee, or for that matter can an employee be forced to continue to work against his/her will?

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melamed – (1) that "*pikudei Hashem yesharim me'samchei lev*" – the act of teaching Torah gladdens the heart, and a *melamed* would thus be saddened not to perform his vocation, and (2) most *melamdim* are involved in teaching during the entire day and a change to their routine could cause them to become ill, similar to the consideration with respect to ditch diggers.

28. The Ramo (*Choshen Mishpat* 335:1) notes that the special dispensation for teachers is based on the assumption that a teacher is happier teaching than being idle. If it was apparent that a particular teacher does not mind being idle from the pursuit of teaching, such a teacher would in fact be paid as a *poel batel* and not be entitled to receive the full amount of the contract.

29. See *Mishpat Hapoalim* 13 (17) who concludes that this rule would apply equally to male and female Torah teachers based on local custom, at least with respect to termination of the employment in the middle of the school year (the author is specifically referring to the local custom in *Eretz Yisrael*) although he cites a ruling from a Bet Din Rabbani that included Rav Yosef Shalom Elyashiv (*Piskei Din Rabbaniim* 8:162) in which the Bet Din ruled that a female teacher who had been dismissed when she became pregnant (she had previous children who were at home) only needed to be reimbursed as a "*poel batel*" because in a way her life had been made easier because she no longer had to travel long distances to arrive at work and would also save money on daycare expenses. The author of *Mishpat Hapoalim* notes that this was not in any event a blanket ruling with respect to female teachers but an assessment as to whether the standard of paying a lesser *poel batel* amount was appropriate in that particular case. See previous note. A related query is whether, based on the reasoning that a *melamed* gets paid the full amount since he would normally spend his entire day in the pursuit of teaching Torah, a male or female part-time teacher who devotes a substantial amount of the day to other pursuits, such as caring for children, would be precluded from receiving more than a *poel batel* amount upon termination of employment.

There is a minority opinion that it would be prohibited for the employee to terminate the contract following a *kinyan*,[30] but this is not the generally accepted view.[31] While a *kinyan* may obligate the employer to continue to employ the employee,[32] it does not appear that this obligation provides a remedy of specific performance in the event the employer is prepared to pay the full extent of the applicable damages for breaking the employment contract.[33]

III. Termination for Cause

There are other considerations from the standpoint of the employer. One such consideration is whether the termination is for cause, in which case there would be no liability on the part of the employer.[34] The Talmud lists various infractions by a schoolteacher that would constitute sufficient cause for termination, including a Rebbe who imparts mistaken information to his students.[35] Because the Rebbe is entrusted with the vital job of imparting our Torah traditions to

30. See *Shach* 333:14, citing the opinion of the *Ritva*. See also the extensive discussion of the import of different types of *kinyanim* in employment contracts in *Poel Emet*, pages 25-38.

31. See *Shach*, id., *K'tzot Hachoshen* 333:5, and *Chazon Ish*, *Bava Kamma* 21:30. See also the discussion in *Machaneh Ephraim*, *Hilchot Sechirut Poalim* 1-2. R. Ezra Basri in *Dinei Mamonot* (volume 3, page 8) suggests that if the employee enters into a "*kinyan*" and explicitly agrees to accept the opinion of the *Ritva*, then it would be prohibited to terminate the contract. This is, however, questionable, based on the rationale of the *Shach* that the reason a *kinyan* is not binding is because it would be in violation of the principle that a worker may not be a "servant to servants." Assuming this to be the case, a condition in violation of this principle would be against the rules of the Torah (*matneh al mah she'katuv b'Torah*) and hence would not be binding.

32. See, *e.g.*, *Chazon Ish*, *Bava Kamma* 23:1.

33. See *Pitchei Choshen*, *Hilchot Sechirut* 10:(15) and *Mishpat Hapoalim* 15:(31), although the latter source does quote a minority dissenting opinion from the *Michtam Le'Dovid* (*Choshen Mishpat* 17).

34. See, *e.g.*, *Pitchei Choshen*, *Hilchot Sechirut* 10:9.

35. *Bava Metzia* 109a-b, and Rashi,ad locum, s.v. "*mikri dardeki*"; *Iggerot Moshe, Choshen Mishpat* 1:77. See also Ramo, *Choshen Mishpat* 333:5.

students, he is considered to be "*musrah ve'omed*" – to have been forewarned from the inception of employment that any serious infraction can result in immediate termination.[36] Otherwise, there is a presumption that it is inappropriate to terminate a Rebbe in the middle of his term of employment, even if the employer finds a superior teacher in the interim.[37]

IV. Non-Renewal of Contract

Another consideration is whether the employee could be let go without cause at the expiration of his/her contract, which may depend upon whether the position constitutes a "*serarah*" – a communal position of authority. Whether a job as a Rebbe in a school constitutes *serarah* for these purposes is the subject of dispute.[38] Rav Moshe Feinstein, without explicitly

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36. *Bava Metzia* 109b, *Bava Batra* 21b; *Cf.* Ramo, *Choshen Mishpat* 306:8, who cites the opinion of the *Nemukei Yosef* that a teacher should not be dismissed unless there is either a *chazakah* – a pattern of infractions – or at least one warning.

37. See *Pitchei Teshuva* 333:10, based on the *Teshuvot HaRosh* (104:4). It is therefore impermissible to terminate a teacher even at the end of a school year if the contract is for multiple years. However, the *Pitchei Teshuva* does note that if there is a *minhag* to "test out" a Rebbe at the beginning of the year with the understanding that he can be replaced by a preferred choice afterwards, this custom would be valid. The commentators note that this ruling appears to be in contradiction to the ruling of the *Shulchan Aruch* (*Yoreh Deah* 245:18) based on the opinon of Rav Dimi in *Bava Batra* 21a, that a *melamed* can be dismissed if a more capable *melamed* becomes available. The *Minchat Yitzchak* (4:75) explains that in the ruling in *Yoreh Deah*, there was no contractual period arranged with the first *melamed*, and it was understood that he could be replaced at any time. See also *Mishpat Hapoalim* (ch. 17, note 2, citing the *Piskei Din Rabbanim* 8:129 explaining that the ruling in *Yoreh Deah* connotes that it would be permissible to replace a *melamed* for the benefit of the students, while the Rosh was noting that the employer would still be liable to pay the *melamed* for the duration of his contract) and *Po'el Emet* (pp. 131-133, suggesting that an individual householder may not dismiss a *melamed* for a better one but a communal institution has that prerogative). See also the discussion *infra* in Section IX.

38. See, *e.g.*, *Mishpat Hapoalim* 14(13) who assumes that *melamdim* are not considered appointments of *serarah*. *Pitchei Choshe*n, *Hilchot Sechirut* 10:35 (based on *Teshurat Shai* 1:436). The *Pitchei Choshen* cites in the name of the

addressing the issue of *serarah*, is of the opinion that since there is no permission granted according to halacha to terminate a *melamed* without cause, the position may not be terminated absent the explicit permission of a rabbinical court.[39] Many other authorities, however, are of the opinion that since nowadays there is an accepted custom in many communities that the employment agreement terminates upon the expiration of the contract term, a school always retains the right to terminate a Rebbe or other Torah teacher at the conclusion of the term, provided that proper notice has been provided.[40] If a school has a policy to offer tenure to certain teachers, the implications of that appointment would be dependent upon local custom.[41] There are also different customs with respect to the payment of severance upon the termination of a position, but that subject is beyond the scope of this article.[42]

Levushei Mordechai (*Yoreh Deah* 37 – the citation to *Yoreh Deah* appears to be a typographical error) that while a *melamed* of individual students is a non-*serarah* position, a *melamed* appointed by a communal institution constitutes *serarah*; however, he notes that the *Knesset Hagedolah* (at the conclusion of his commentary to *Choshen Mishpat* 333) explicitly states otherwise. With respect to the general notion of maintaining someone who is in a position of *serarah*, see Rambam, *Melachim* 1:7.

39. See *Iggerot Moshe*, *Choshen Mishpat* 1: 76-77. See also ibid. CH 2:34, in which Rav Feinstein does cite *serarah* as an additional why it would be impermissible, absent a Bet Din process, to dismiss a rabbi of a shul/*shtiebel* who was also hired to deliver Torah lectures.

40. See *Peulat Sachir*, p. 47 (the author suggests that this is particularly true if the school has the practice of providing a severance package upon termination), *Mishpat Hapoalim*, ibid.

41. See *Choshen Mishpat* 331:1. See also the comments of *Iggerot Moshe* 1:77, *s.v. "af"* indicating that there is a strong presumption of competence on the part of a *melamed* whose annual contract has been renewed on multiple occasions.

42. On the question of severance, see *Pitchei Choshen, Hilchot Sechirut* 10(35), *s.v. "ul'inyan"* who concludes that it is appropriate to follow local custom, and when there is no local custom, to act in accordance with the principle of "*ve'asita hayashar vehatov*" (see *Devarim* 6:18, and Ramban ad loc) – doing what is proper and just in the eyes of G-d.

V. Retraction in Emergency Circumstances (*o'nes*)

What about a situation in which the Torah teacher is not terminated based on any wrongdoing, but where there was an "*o'nes*" – an "accident" or extreme situation of hardship for the employer which necessitated the termination? This can include a situation where the academic institution is in severe financial distress and therefore has to "downsize", or a situation where there is a significant decrease in the enrollment of students so that fewer teachers are needed. The halachic rule in such a situation is that the employer is always exempted from liability when termination is necessary based on circumstances beyond the employer's control, including when such circumstances could have been anticipated as well as when they could not have been anticipated, with the exception of a case when the circumstances were known to the employer but could not reasonably have been known by the employee.[43] For example, if both the school and the teacher were aware at the time of the teacher's employment that the school was in dire financial straits and was considering downsizing its staff, then a termination based on an inability of the school to garner sufficient funds over time would not trigger liability (although the school would still be obligated to provide the contractually-agreed-upon salary to the teacher through the time that the teacher actually worked). However, if only the school knew about its dire financial situation but this information was withheld from the teacher, then the school would be liable to provide payment for the duration of the contractual term.

VI. *Makat Medinah*

One possible exception to this general rule is a case of "*makat medinah*" – a "national plague" that make it impossible for the job to be performed. For example, a landscaper is hired to

43. See *Choshen Mishpat* 334:1.

work on a property, and a giant hurricane, such as Hurricane Sandy, destroys all of the properties in the region. Another classic example is the outbreak of a war[44] that requires people to stay away from the war zones and thus cancel real estate rental contracts or catering affairs in that geographical region.[45] Just as insurance companies often provide an exception from coverage in the event of a "natural disaster" or "act of G-d" so too there is a concept in halacha, based on a discussion in the Talmud relating to land-tenants,[46] that an employer may not be protected from liability if the "accident" was not specific to the employer but afflicted the entire region. In this case, there is no reason to attribute the accident to the employee's bad luck any more than the employer since everybody is affected.[47] On this basis, the Ramo ruled, based on the Mordechai, that a *melamed* who was prevented from teaching due to a *makat medinah* – namely, that the ruler of the local government issued an edict prohibiting the instruction of Torah – would still have to be paid in full.[48] The Ramo further indicates, through a cursory cross-reference in the section of *Shulchan Aruch* dealing with the hiring of workers, that this principle would extend to all employer-employee situations.[49]

However, many commentators do not agree with the ruling of the Ramo that the principle of *makat medinah* is applicable to routine employment situations. The *Netivot Hamishpat* argues that the dispensation in the Talmud only relates to the right of a land-tenant to decrease the amount of his rental payment if

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44. See *Sefer Hazikaron* (by the author of the *Chatam Sofer*), pages 51-52, indicating that a war constitutes a *makat medinah*.

45. See R. Zalman Nechemia Goldberg 8 *Sha'arei Zedek* 124-130 (with respect to the cancellation of rental contracts based on *makat medinah*), R. Ovadia Yosef Toledano, *Meishiv Mishpa*, ch. 47, (with respect to the cancellation of catering affairs based on *makat medinah*).

46. *Bava Metzia* 103b-104a.

47. See *Aruch Hashulchan* 321:1.

48. Ramo, *Choshen Mishpat* 321:1.

49. Ramo, *Choshen Mishpat* 334:1, *Sema* 334:2.

there is a national plague that ruins the field, but that in an employment situation, where the payer is the employer, and not the employee, it would be the employee who would be disadvantaged in the event of natural disaster. Accordingly, he reinterprets the Ramo as only applying this principle to a Torah teacher, but not to other employees, because the primary justification for paying Torah teacher is "*s'char shimur*" – compensation for babysitting – and the *melamed* is still capable of performing this function even if the local government forbids the teaching of Torah.[50] Based on this approach, the potential liability for an employer upon the occurrence of a *makat medinah* would only be applicable when the employee is still ready, willing and able to perform, but not if the *makat medinah* causes the employee to be uninterested in performing the job anymore.[51] The *Sema* introduces a third approach, namely that when there is a *makat medinah*, both the employer and employee need to share in the loss, even in the case of the *melamed*. Additionally, the *Maharam Padva* held that a plague or natural disaster that only affects a limited segment of the local population would not qualify as a *makat medinah*. [52]

One interesting case study arose in the aftermath of the World Trade Center tragedy, when the adjacent area of Battery Park was shut down for a period of time. A Talmud Torah institution in that area had to close its doors as well, thus terminating the contracts of teachers who had been hired to teach during that semester. The teachers brought a claim for lost wages. Did the Talmud Torah have the obligation to pay

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50. *Netivot Hamishpat* 334:1 (*Biurim*). The *Pitchei Teshuva* (321:1) raises a number of objections to this approach, including his argument that the primary basis for paying Torah teachers is in fact "*s'char batalah*" (money paid to compensate for not taking other jobs instead of teaching Torah).

51. See *Aruch Hashulchan* 334:10.

52. *Maharam Padva* 86, cited by the *Shach*, *Choshen Mishpat* 334:3 (in connection with a student who fled from his teacher's locale during a time of persecution when many others remained).

those teachers based on the principle of *makat medinah*? This situation raised some of the questions that have previously been posed: (a) did the World Trade Center tragedy represent a *makat medinah* because of its huge impact on the country and on the work environment in the immediate region, in which case there would arguably be employer liability, or was it to be treated as an *o'nes* because the affected geographical area was relatively small, and most of the city continued doing business as usual within a few days afterwards, and (b) was this case distinguishable from the case of the *Mordechai* insofar as the teachers themselves probably wanted to avoid the area of the school in the months following the World Trade Center terrorist attack? Fortunately, in this particular case, the issues did not ultimately require a Beth Din proceeding since the school officers and teachers were ultimately able to iron out an amicable agreement. In a different case, when schools needed to be shut down during wartime, the Chatam Sofer ruled that the teachers should be paid half of their wages.[53]

VII. Right of Employee to Retract

Up until now we have discussed the consequences of an employer terminating an employment contract. What about the employee? With respect to the employee, there appears to be much more freedom of movement according to the halacha. The operative principle as formulated in the Talmud is that פועל יכול לחזור בו אפילו בחצי היום – a worker is permitted to terminate his employment even in the middle of the day. The reason for this principle is because we are bidden to be servants only to G-d and not "servants to servants."[54] In order to avoid the stigma of servitude, a worker hired for a set period of time must have the ability to withdraw from that

53. See Rabbi J. David Bleich, *Contemporary Halakhic Problems*, vol. 4, pp. 364-367, who quotes the opinion of the Chatam Sofer and discusses this general issue in the context of school closings in Israel at the time of the Gulf War. See also *Orchot Hamishpatim* 7:10.

54. *Bava Metzia* 10a, based on the verse in *Vayikra* 25:55.

employment at any time.[55] As a result, even if the employer would have to pay a second worker more money to complete the term, the first worker is entitled to full payment for the period in which he/she worked.[56] Additionally, according to some authorities, if the employer is able to hire somebody at a lower salary to complete the term, the first worker is entitled not only to the salary he/she earned prior to terminating employment, but to the extra money that the employer saved during the remaining period of time as well. [57]

Nonetheless, there is still a concept that the employer may harbor a *taromet* against a defaulting employee, whether the cancellation of the contract is prior to the beginning of the agreed-upon employment or after the employee has begun.[58] Thus, while a worker may cancel an employment contract at any time without liability, he/she may not do so with impunity, unless there is no direct harm caused to the employer because another worker can easily be hired.[59]

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55. This is also the reason why a worker is technically not allowed to enter into a contract for longer than three years, because the six-year term of servitude of Hebrew servant is described in the Torah as "double the term of an employee." See Ramo, *Choshen Mishpat* 333:3. However, many authorities are lenient as long as the term is less than six years. See *Shach, Choshen Mishpat* 333:17. Since the concern is not to be like a Hebrew servant, there may also be leniency for a worker who is only hired on a part-time basis. See *Pe'ulat Sachir* p. 25, n.2.

56. *Choshen Mishpat* 333:3-4. This advantage accruing to the first worker is called "*yado al ha'elyona*" (literally, "he has the upper hand").

57. See *K'tzot Hashulcan* 333:4, who rules like the *Tur* that the employee is entitled to the extra windfall based on the fact that a worker is compared to an *Eved Ivri* (Hebrew indentured servant) who always receives the benefit of market fluctuations for the remainder of his unserved term, pursuant to *Kiddushin* 20a. However, the *Choshen Mishpat* 333:6 (*Biurim*), disagrees on the basis that the law permitting a worker to quit his job in the middle of his term is precisely to distinguish him from being treated as an *Eved Ivri*, and therefore this privilege of an *Eved Ivri* would not apply to him.

58. See *Pitchei Choshen*, *Hilchot Sechirut* 11:1.

59. See *Pitchei Choshen*, ibid., note 2.

VIII. *Davar Ha'avud* and Torah teachers

There is, however, an important caveat to the rule that an employee may cancel an employment contract at any time without liability. The Talmud describes a case in which a worker's job is to soak flax in a large vat of water. If that worker leaves in the middle of the day, causing the flax to spoil, he has caused irretrievable loss (*davar ha'avud*) for his employer.[60] In such a case, the Talmud rules that he does not have the right the leave the job in the middle of the day without compensating the employer for the loss.[61] Similarly, the Ramo rules that a *melamed* who leave his job in the middle of the employment contract causes irretrievable loss for the institution that hired him.[62]

There are two fundamental reasons given as to why the departure of a *melamed* constitutes "irretrievable loss." According to the *Shach*,[63] it is because the failure for children to be educated in Torah, even for a brief period of time, constitutes a "*pseida delo hadar*" (*lit*., a loss that cannot be restored). According to the *Maharit*,[64] it is because students are not equally capable of learning from every teacher, and once they are accustomed to one Torah teacher, it is impossible to replace that person precisely. A possible distinction between these two reasons would be whether a yeshiva administrator

60. *Bava Metzia* 77b; see *Choshen Mishpat* 333:5.

61. The *Shach* (333:15) notes, however, that even in the case of *davar ha'avud* one cannot compel specific performance.

62. Ramo, *Choshen Mishpat* 333:5, based on his comments in the *Darchei Moshe* 333:3. However, it is interesting to note that the Ramo indicates that in those situations in which the departure of the *melamed* would not constitute a *davar ha'avud,* he would be allowed to break his employment like any other *poel*. This is in contradistinction to the opinion of the *Hagahot Mordechai* that he cites in the *Darchei Moshe* 333:5, that a *melamed* is never allowed to withdraw in the middle of his employment because he is not viewed as a "servant" of a human being, but rather as a servant of G-d.

63. *Choshen Mishpat* 333:26.

64. *Maharit*, Volume 2, responsum 50 (*Yoreh Deah* section).

would be able to leave in the middle of a contract term without causing a *davar ha'avud*. According to the reasoning of the *Shach*, it is possible that the failure of the school to have steady leadership would cause a *pseida delo hadar*. However, according to the reasoning of the *Maharit*, if the administrator did not directly serve as a teacher of the pupils, there would not be grounds for a *davar ha'avud* and the administrator would be able to break the contract without liability.

According to either explanation of why it would be a *davar ha'avud* for a *melamed* to break his contract, it would seem that the same reasoning would clearly apply to a *melamedet/morah*. Torah education is as crucial for a female educator's students just as much as a Rebbe's students. In the event that the students in the class were all female, one could argue that the imperative of Talmud Torah is greater for boys who have (or will have) a scriptural obligation to study Torah, as opposed to young girls.[65] However, since girls are also obligated to learn Torah with respect to laws that pertain to them,[66] and in fact there has arisen over the past one hundred years a growing recognition of the vital need to have formal Torah education for girls,[67] it does not seem that the rules should be any different regardless of the gender composition of the class or the school.

However, later authorities limit the *davar ha'avud* consideration with respect to Torah educators. While it would be difficult to argue that leaving in the middle of a school term would not constitute a *davar ha'avud*, nonetheless, if the cancellation of employment occurs prior to a new school year when there is sufficient time for the school to hire a teacher who is just as good, this would not constitute a *davar ha'avud* and, due to the lack of harm incurred by the employer,[68]

65. See *Kiddushin* 29b.

66. See Ramo, *Yoreh Deah* 246:6.

67. See, *e.g.*, *Likutei Halachot*, *Sotah* 20b (by the author of the *Chafetz Chaim*).

68. See *Shach* 333:26.

would most likely not be cause for a *taromet* either.[69] Accordingly, if a teacher who signed a contract for the following year provided notice to the employer prior to the beginning of the school term that he/she had decided not to teach, and the school was able to find a teacher who was objectively just as good, this should not be problematic from a halachic perspective.

There are, nonetheless, two important considerations that need to be borne in mind. First, the *Chazon Ish*[70] notes that whenever a worker is permitted to withdraw from a job, the worker must give sufficient notice prior to quitting that would enable the employer to find an alternative teacher without difficulty. The *Chazon Ish* derives this rule from the laws of renting a house, in which the rule is that at the conclusion of the lease term the renter is permitted to terminate the lease, but is obligated to provide 30 days' advance notice in order to enable the landlord to find a new tenant. In each community, there is normally a certain period during the year in which quality educators are available to be hired, and it is vital to give notice prior to the closure of this window of time. Secondly, the general dispensation for a worker to leave a job in order not to be like a servant is only if the worker is leaving for reasons other than receiving more money elsewhere, but if the only reason for departure is to secure a better monetary package, the halacha does not allow breaking a contract for that reason alone.[71]

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69. It is questionable whether such a scenario would still present an ethical breach of being "*mechusar amanah*." Some authorities are of the opinion that there would not be such a defect in the context of an employee breaking a contract based on the leeway that they must be allowed to in order not to experience a condition of servitude. See *Nachalat Zvi* (towards the end of his commentary to *Choshen Mishpat* 237) who explicitly makes this point with respect to the right of a *melamed* (as well as a community rabbi) to leave his position for a different position (when there is no *davar ha'avud* involved).

70. *Chazon Ish*, *Bava Kamma*, chapter 23, paragraph 2.

71. Ramo, *Choshen Mishpat* 333:4. However, some Jewish law authorities conclude that leaving one position to assume another position that the

Interestingly, a teacher's departure in the middle of a contract term will be more problematic if the teacher is extraordinarily good, and is therefore more difficult to replace.[72] This leads to the paradoxical situation in which it would be beneficial for the school to argue that the teacher is too good to be allowed to leave, and where the exiting teacher would be motivated to argue that he/she is really not so great.

The practical consequence of those situations which would be a *davar ha'avud* is that the exiting teacher would be responsible for the losses that were suffered from the school. Thus, if a comparable teacher could only be hired at a more expensive rate for the remainder of the year, the school would have the right (if all of the elements of the claim could be proven to satisfaction) to deduct the additional amount that it had to pay for the remainder of the contract from the amount of salary paid to the teacher during his/her term of service.[73] Obviously, if the money had already been paid, and there was a doubt regarding the liability (in terms of whether the teacher was easily replaceable, or in terms of whether sufficient notice had been given) the teacher would be in a stronger position to

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worker likes better is completely permitted, because this is the essence of what it means not to be in servitude. See *Aruch Hashulchan*, *Choshen Mishpat* 333:17, who also opines that even in the Ramo's case where a worker leaves a job in order to earn more money elsewhere, there is no prohibition per se, but rather a forfeiture of the *yado al ha'elyona* protection so that if the employer needs to pay extra to somebody else to complete the term, the employer may deduct the extra amount from the unpaid amounts due to the first worker. See also *Pitchei Teshuva, Choshen Mishpat* 333:4 who leaves unresolved the question regarding the right of a worker to break one contract in order to work for another employer.

72. *Mishpat Hapoalim*, chapter 16, n. 52. See *Maharit* Y"D 2:50 who rules on this basis that it is more problematic for a Rebbe of older students to leave his job because it would be more difficult to find another Rebbe who would be able to duplicate his style of teaching to which the students had become accustomed. It would seem that the same argument would be applicable to a teacher of younger students who has forged a special bond with the students.

73. See *Choshen Mishpat* 333:5-6.

keep the money as the "*muchzak*" (person in possession for Jewish law purposes) than if the money had not yet been paid.

As in the case of the employer terminating a contract, an employee who cancels a contract in a case of *davar ha'avud* is not held liable if the departure was due to an *o'nes* – circumstances beyond the employee's control. Thus, in the context of a teacher, if the departure was due to sickness, or a family emergency, the teacher could not be held liable for breaking the contract even in the middle of the school year and even when the teacher cannot be properly or quickly replaced. Similarly, in a situation where a schoolteacher's spouse needs to relocate for professional reasons, it can be argued that the teacher is essentially in an *o'nes* situation requiring him/her to leave the job. However, based on the criteria formulated for an *o'nes* with respect to an employer, it would seem that the claim of *o'nes* would be weakened in a situation where the teacher knew of the possibility of having to leave the job in the middle of the term, but neglected to inform the school/employer. [74]

In any event, in all such situations where a teacher is planning to leave the employment contract before the expiration of its term, it is always the proper and honorable course of conduct to have a discussion with the heads of the educational institution as soon as possible to discuss such plans, in order to ensure that a smooth and amicable transition plan can be put into place that will be most beneficial for the teacher, the school and the students.[75]

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74. See *Chelkat Binyomin* 333:120, quoting from the *Meiri* (*Bava Metzia* 76b, s.v. "*kol she'amru*") that the employer would have a *taromet* in such a case.

75. See *Chatam Sofer*, *Choshen Mishpat* 122 that it is a "*mishnat chasidim*" (a pious trait) to avoid reneging on a contract even when permitted according to halacha, based on the principle of ושארית ישראל לא יעשו עולה (that the Jewish people avoid unseemly conduct). As an extension of this principle it seems obvious that one should take steps to mitigate bad feelings as much as possible when curtailing one's employment contract, even beyond the strict letter of the law. See also *Peulat Sachir*, p. 43.

IX. Recruitment of Torah teachers from Existing Positions

Another common situation that arises is when a school actively pursues an educator who is already working for another school. The main source addressing this practice is Tosafot in *Masechet Kiddushin*.[76] The Talmud[77] cites the case of an "*ani mehapech b'chararah*" – of the impropriety of someone taking away a "cookie" from a poor person who is in the process of securing it for himself, even though the pauper has not yet gained lawful possession of the item.[78] The Talmud extends this concept to other transactions, including real estate contracts and *shidduchim*.[79] The commentary of Tosafot proceeds to apply this principle in the context of Jewish educators.

> ומכאן נראה למהר"ר יצחק שאסור למלמד להשכיר עצמו לבעל הבית שיש לו מלמד אחר בביתו כל זמן שהמלמד בביתו שמאחר שהוא שכיר שם ילך המלמד במקום אחר להשתכר שם אם לא שיאמר בעל הבית דאין רצונו לעכב המלמד שלו. אבל אם שכר בעל הבית מלמד אחד יכול בעל הבית אחר לשכור אותו מלמד עצמו ואינו יכול לומר לו הבעל הבית לך ושכור מלמד אחר דנימא ליה אין רצוני אלא לזה שהרי כמדומה לי שזה ילמוד בני יפה ממלמד אחר.

> And from here Rabbeinu Yitzchok derived that it is prohibited for a *melamed* to hire himself to a *ba'al habayit* who already has another *melamed* in his home so long as that other *melamed* is still in his home, because since the

76. Tosafot, *Kiddushin* 59a, *s.v.* "*ani*."

77. *Kiddushin* 59a.

78. The specific phraseology of this proscription is in the form of an ethical opprobrium: עני מהפך בחררה ובא אחר ונטלה הימנו ... נקרא רשע – "if a poor person was turning over a cookie and someone else came along and grabbed it away from him, the second person is called wicked."

79. See *Kiddushin* 58b-59a, Rambam, *Ishut* 9:17, and *Maggid Mishneh ad locum*. See also *Iggerot Moshe, Even Haezer* 1:91 who discusses at length the applicability of the *ani hamehapech b'chararah* principle in the context of interfering with another person's *shidduch*.

> other *melamed* is already hired there, the [new] *melamed* should go somewhere else to gain employment, unless the *ba'al habayit* has announced that he is not planning to keep this current *melamed*.
>
> However, if a *ba'al habayit* has hired a particular *melamed*, a second *ba'al habayit* can hire that same *melamed* and the first *ba'al habayit* cannot tell him to go and find a different *melamed*, because the second *ba'al habayit* can respond that he only wants this particular *melamed* because he feels that his son will not learn well from a different *melamed*.

According to the words of Tosafot, there emerges a fascinating distinction. On the one hand, one *melamed* is prohibited from attempting to secure the job of another *melamed*. On the other hand, a *ba'al habayit* is allowed to try to snatch away a *melamed* hired by a different *ba'al habayit*. The opinion of Tosafot with respect to both of these cases is codified as law in *Shulchan Aruch*.[80]

The background behind this distinction appears to be based on the opinion of Rabbeinu Tam[81] that the prohibition of *ani mehapech b'chararah* is only applicable with respect to a common commercial item that can easily be obtained elsewhere. However, when the item being sought is "*hefker*" or a "*metziah*" – a free and abandoned item, or a rare opportunity that cannot easily be duplicated, then there is no violation in seizing an item that is being pursued by somebody else. This is in contradistinction to the opinion of Rashi,[82] who applies the prohibition to the case of *hefker*. The generally accepted halacha is in accordance with the opinion of Rabbeinu Tam,[83]

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80. *Choshen Mishpat* 237:2.

81. Tosafot, *Kiddushin*, ibid; Tosafot, *Bava Batra* 21b s.v. "*marchikin*."

82. *Kiddushin* 59a, s.v., "*ani*."

83. Ramo, *Choshen Mishpat* 237:1. This also appears to be the opinion of the *Shulchan Aruch* in *Choshen Mishpat 237:2* although he quotes both opinions in 237:1.

although it is considered meritorious to be stringent for the opinion of Rashi when possible.[84]

Accordingly, the opinion of Rabbeinu Yitzchok, cited in Tosafot, seems to be that in case of the teacher, any employment opportunity is viewed as replaceable, insofar as employment can be sought elsewhere. Therefore, it would be forbidden to interfere with somebody else's contractual employment in order to seize an employment opportunity. However, when it comes to the actual student, or a father hiring a teacher to educate his son (and presumably the school institution hiring a teacher to educate its students), any particular teacher who is sought is viewed as a *metziah* who can therefore be lured away from a different employment opportunity or arrangement in order to be hired by the second party.[85] In this case, it seems, due to the tremendous urgency when it comes to hiring top-notch educators for Talmud Torah, there isn't even a desideratum recorded to try to be stringent in accordance with the opinion of Rashi.[86]

There is an obvious conundrum in the words of Tosafot. From the simple reading of Tosafot, the case depicted seems to include a situation where the *melamed* was already hired, and not merely a situation in which the parties were in the course of finalizing a contract. If so, the case is clearly distinguishable from the situation of *ani mehapech b'chararah* which focuses upon the moral obligation not to interfere with a personal or business opportunity prior to the consummation of a deal. However, once a deal has been struck, interference with an existing contract may constitute outright theft.[87] Accordingly,

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84. See, *e.g., Shulchan Aruch Harav, Hilchot Hefker v'Hasagat Gvul* 10.

85. See *Poel Emet*, p. 133, who provides this explanation in the name of the *Atzmot Yosef*.

86. See *Aruch Hashulchan, Choshen Mishpat* 237:5, who rules that this special dispensation only applies to a position such as a *melamed* that involves the performance of a mitzvah. Others, however, disagree, and apply this rule to any specialized profession. See *Mishpat Hapoalim* ch. 23, para. 14.

87. See *Chatam Sofer Choshen Mishpat* 79 who indicates that even Rabbeinu

the permission given by Tosafot for an employer to recruit away somebody else's teacher is difficult to understand since it appears that the interference is permitted even during the actual employment term.

Based on this problem, the *Netivot Hamishpat* [88]concludes that the dispensation for a prospective employer to lure away a teacher from a different employer only applies prior to consummation of a contract, but not once the employment has already begun. Here, too, if the employee already indicated his/her interest in leaving the employer at the conclusion of the term, or even prior to the conclusion of the term based on the principle of פועל יכול לחזור אפילו בחצי היום (at least in situations that would not constitute a *davar ha'avud*) the second employer would be entitled to capitalize upon that interest and enter into employment talks. However, in the absence of a showing of interest on the part of the employee, the luring away of a Rebbe during his term of contract would constitute tortious interference. If the solicitation of the Rebbe/teacher was only for the period following the expiration of the contract term, it would appear to be permitted since there is no expectation that an employee will remain forever based on the freedom of movement enjoyed by workers according to halacha.[89] One could argue according to Rav Moshe Feinstein that in the case of a Rebbe, a contract term is automatically presumed to be forever, and therefore it would be impermissible to lure away

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Tam would agree that once a teacher is hired, any interference with the contract would be a violation of "*yored l'umnut chaveiro*" (tortious interference with another person's livelihood). This also seems to be reflected in the words of Tosafot (id.) who distinguish between interference in the case of "*ani hamehapech*" in an instance of ownerless property which is permitted according to Rabbeinu Tam, and the case of the fisherman who has already spread out his nets to catch fish, where it is prohibited for others to take away the fish which have already gathered towards his nets. See *Bava Batra* 21b.

88. *Netivot Hamishpat*, *Choshen Mishpat* 237:5 *(chidushim)*.

89. This is the conclusion of Rabbi Akiva Eiger, *Choshen Mishpat* 237:2. See also *Mishpat Hapoalim* ch. 23, note 31.

a Rebbe absent his affirmative indication of interest. However, it seems that this argument can be refuted because even Rav Feinstein only presumes an indefinite contractual obligation on the part of the employer, but not on the part of employee, who has freedom of movement, certainly absent any contractual commitment to serve for a longer term of employment.[90]

Nonetheless, the *Shulchan Aruch* does not seem to draw the distinction of the *Netivot Hamishpat i*n codifying the ruling of Tosafot.[91] One possible explanation offered by the author of *Mishpat HaPoalim* is that, based on the principle that a worker is always permitted to leave his job (absent a *davar ha'avud*), there is never a time when it can absolutely be ascertained that the *melamed* is in the middle of his contractual term.[92] Since he can leave the job at any moment, a prospective employer should be entitled to lure him away at any moment. The obvious fallacy with this approach is that the job of *melamed* is presumed to be a *davar ha'avud*.[93] However, this problem could perhaps be averted if the prospective employer articulates that he only intends for the *melamed* to leave his position in the event that a suitable replacement can be found, so that his departure would not constitute a *davar ha'avud*.

In any event, based on the above discussion, it appears clear that there would not be an impediment to recruit away a *melamed*, *morah* or other Jewish educator for a period that would only commence following the conclusion of his/her current employment term.[94] It should be noted, however, that some contemporary authorities rule that if the recruitment of an employee at the end of his term will cause irretrievable loss

90. See *Aruch Hashulchan , Choshen Mishpat* 333:15.

91. See also *Sema* 237:8 who does not offer any qualifying condition to the ability of a prospective employer to recruit an existing employee.

92. *Mishpat Hapoalim* ch. 23, note 33.

93. This objection is noted in *Po'el Emet*, page 134.

94. See *Mishpat Hapoalim* ch. 23, n.31, *Maharshal* 36.

to the employer, it would still impermissible to recruit the first teacher.[95] This consideration may also apply to educational institutions in the event that the loss of a key employee would engender its collapse.

With respect to prospective teachers seeking employment, there are a number of important exceptions to the rule restricting teachers from seeking an existing position. First of all, as noted by Tosafot, if the employer has already broadcast the intention not to retain the first teacher, it would be permissible for the teacher to seek employment with that employer.[96] Secondly, contemporary authorities rule that an employee is permitted to publicize his/her availability and credentials without targeting a particular position.[97] Similarly, if an employer is an institution with many teachers, prospective teachers should be able to send out their resumé to the school, as long as there are multiple positions and they are not clearly competing for a particular teacher's job. If there is a specialized position such as the principal of the school, and somebody applied for the position of principal while the

95.See *Mishpat Hapoalim*, ch.23, note 36, quoting the *Minchat Zvi* (2:5, n.34) (it should be noted that the *Minchat Zvi* was not specifically discussing educational institutions). The ensuing discussion by the *Minchat Zvi* (notes 35-37), regarding the parameters of when it is prohibited to entice the customers of another is also relevant to the question of whether it is appropriate for Torah institutions to engage in the active recruitment of students currently studying in other institutions. Based on this discussion, it would seem that there should be leeway when (a) the recruitment is directed at the general public and just happens to reach the student's attention; (b) when the student approached the second school on his/her own; or (c) when the second institution feels that its particular brand, style or quality of education would be more suitable for the student. Cf. *Po'el Emet*, pp. 133-134 (indicating that it would be impermissible to recruit a student who has already agreed to attend a different yeshiva institution).

96. See also *Choshen Mishpat* 237:2.

97. See *Mishpat Hapoalim,* ch.20, n. 10, who derives this dispensation from the principle articulated in *Bava Batra* 21b that different storekeepers can engage in promotional activities in order to advance their own brand for the general marketplace.

present principal was still in the middle of his contract term, this would obviously be more problematic.

What about a situation where it was known that a particular teacher's contractual term was going to expire, such as in a school where every teacher is hired on a yearly basis, and a prospective teacher applied for that person's job with the understanding that employment would only start the following year? Some commentators have noted that based on the wording of Tosafot that it is impermissible for a prospective teacher to compete for the job "so long as that other *melamed* is still in his [the employer's] home" it would be forbidden for a prospective teacher to apply for that position because the expectation is that any particular teacher will be re-hired at the conclusion of his/her term, unless the employer has explicitly broadcast otherwise.[98] This is especially true with respect to a Rebbe if one takes into account the opinion of Rav Moshe Feinstein that the position of a Rebbe is presumed to last in perpetuity even if the contract specifies a shorter term of service.

Notwithstanding the foregoing analysis, it is always advisable for an institution that wishes to lure away another institution's employee to inform the other institution of its designs so that they can work together in a spirit of

98. See *Pitchei Choshen*, *Hilchot Sechirut,* ch. 7, n. 47, in the name of the *Be'er Shmuel* (66). Rabbi Akiva Eiger, *Choshen Mishpat* 237:2, quotes in the name of the *Maharshal* (36) that this assumption would only apply if the teacher is "out in the wilderness" when there is a greater expectation of re-employment. However, others have cast doubt on this distinction, arguing that the assessment needs to be made more on a case-by-case basis, based on local custom and expectations. See *Nachalat Zvi*, chapter 237, *Mishpat Hapoalim* chapter 23, note 20. The *Minchat Zvi* (2:5, note 31) cogently argues that this particular consideration is not relevant to the efforts of a prospective employer to hire a teacher at the conclusion of his current term of service, because there is no concern regarding "*yored l'umnut shel chavero*." See *Mishpat Hapoalim*, ch. 23, n. 31, who is not as convinced as a general matter with this distinction, although he seems to ultimately concede the point in the case of a *melamed*.

cooperation and good-faith.[99] In addition, in those cases where an employee has sought out the employment of a new institution, it is not unreasonable for the new institution to ask the employee to receive the blessing of his current institution before departing. Of course, such appropriate gestures of courtesy and etiquette should not be misconstrued as granting any one institution the right to treat its teachers or employees as indentured servants, which is clearly antithetical to halacha. Such conversations may, however, be useful platforms for determinations of how to identify and avoid *davar ha'avud* situations, particularly when a teacher or other educational professional wishes to leave in the middle of a contractual term, or when a competing institution wishes (sometimes unwittingly) to recruit such an individual in the middle of his/her contractual term.

X. Concluding Thoughts

It should be noted that halacha views a proliferation of Torah teachers to be beneficial to the welfare of the Jewish community. קנאת סופרים תרבה חכמה[100] – competition among Torah teachers increases the aggregate amount of Torah wisdom. While there are restrictions regarding the right of Torah teachers to terminate their employment without adequate warning or to encroach upon another teacher's employment opportunity, as well as certain possible restrictions regarding the recruitment of teachers, halacha generally favors the creation of multiple Torah institutions.

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99. This is based on the ubiquitous principle of בקש שלום ורדפהו – "seek peace and pursue it" (*Tehillim* 34:45), as applied by R. Aaron Levine, who routinely employed this principle and similar ethical principles to establish normative halachic practice in employment and business transactions. See, e.g., *Moral Issues of the Marketplace in Jewish Law*, pages 19-21, 23-24 (with respect to the principle of "seek peace and pursue it"), and *Economic Public Policy and Jewish Law* 14-20 (with respect to the imperative of *Imitatio Dei* in the commercial marketplace).

100. *Bava Batra* 22a; Ramo, *Choshen Mishpat* 156:6.

When it comes to teaching Torah, there can never be too much of a good thing. The Chazon Ish writes in his sefer "*Emunah U'Bitachon*"[101] that often there are vicious fights in communities regarding the attempt to prevent the creation of a new Torah institution, but if people would calibrate their emotional outrage to be in accordance with Talmudic principles, these fights would never arise in the first place.

At the same time, as we have seen, there can be legitimate reason to complain in cases when competing educational institutions engage in predatory practices. While there may be, for example, a justification in certain circumstances to lure away a teacher, particularly at the conclusion of his contractual term, this does not translate into carte blanche permission to undermine the structural and financial viability of another Torah institution. In all of these matters, it is important to be guided by the principles of Jewish law that are recorded in *Shulchan Aruch* and addressed by contemporary halachic authorities. In this manner, we will preserve the purity and perpetuate the passion of the Jewish educational profession in accordance with Rav Chiya's timeless principles.

101.*Emunah U'bitachon*, chapter 3, paragraphs 1, 14-15.

Meshulachim – Do We Have To Give Everyone?

Rabbi Moshe Revah

It's a familiar situation: You are deeply engrossed in a complex Talmudic topic, or just starting to *daven* – and you hear an all-too-familiar ringing of the doorbell or jangle of coins signaling another poverty-stricken person trying to earn his living. Are we obligated to donate to each person who knocks at the door and to every person who appeals to us? And, if indeed there is such an obligation, what are the limits, if any? That is the topic we will explore in this study.

The Obligation

Let us begin our discussion by establishing that there is an obligation to give *tzedaka* to each individual. The Gemara in *Bava Batra* (9A) states that if a poor person is reduced to soliciting funds door to door, then one is obliged to give him something, even if it is only a small token donation.[1]

The *Rishonim* seem to be of the opinion that one must respond positively to every (valid) solicitation, based on the verse in *Tehillim* 74:21, "Don't turn away the poor in shame", and Rambam rules accordingly.[2] In fact, there are several

1. The understanding is that had the individual not collected from the general public, one would be responsible to donate a larger sum. See the *Tur, Yoreh Deah* 250, with commentaries for a dispute in this regard; however, that circumstance is not the focus of this article.

2. Rambam, *Matnot Anyiyim* 7:7. There is a dispute among the *Rishonim*: Rashi, Tosafot and Rosh all are of the opinion that the Gemara is referring to

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Biblical prohibitions cited in *Hilchot Tzedaka*[3] *(Lo Te'ametz* – "Do not harden your heart" and *Lo Tikpotz* – "Do not close your hand" against your destitute brother) which forbid turning away a request for *tzedaka*. Commenting on these prohibitions, however, the author of *Imrei Binah* suggests that it is possible those restrictions apply only when the poor person has asked only one individual for help, but has not made his plight a public concern.[4] If you are the poor man's only recourse, you are not allowed to ignore his suffering, for that would constitute "hardening your heart", which is expressly forbidden by the Torah. However, once the individual has turned to the public for donations, those prohibitions may not apply, because one may assume that his needs will be covered by others. Perhaps this is the reason that Rambam derives the prohibition of turning away the destitute from a passage in *Tehillim* and not from a direct Biblical source.

The suggestion of the *Imrei Binah*, however, is not mentioned in any other halachic literature, nor does it appear to be the consensus of modern *poskim*. We may conclude, therefore, that according to the majority of *poskim,* by ignoring a *meshulach*, (a "collector" seeking charity), one is violating not only the verse in *Tehillim* (which even the *Imrei Binah* would agree to), but also the original prohibitions as well.

Additionally, wealthy individuals must also be aware that if the indigent person targets only wealthy people, he may not

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the (community charity collection agent) *gabbai tzedaka* specifically, whereas Rambam learns that the Gemara refers to a private individual. Nevertheless, it is clear from the *Acharonim* (see *Beit Yosef,* ibid. and *Bach,* as well as the conclusion of the *Prisha*) that all *Rishonim* are of the opinion that one is indeed forbidden from turning away any solicitation. The other *Rishonim* must opine that, even though there is no clear Gemara which states that it is forbidden to turn down a request, it is common sense that the aforementioned prohibition would apply to every request.

3. *Devarim* 15:7; see *Yoreh Deah* 247.

4. *Orach Chaim* 13:3.

fall into the category of a poor man going door to door and then, even according to this suggestion of the *Imrei Binah,* all the prohibitions enumerated above would apply if one turns down his request.

Since the halacha posits an obligation to donate to a person who asks for help, it stands to reason that one should be required to secure money should he have none on him at the time (e.g., he must go to an ATM or to his house to get money). This obligation is, in fact, brought down by R. Chaim Kanievski in *Derech Emuna,*[5] although he qualifies his ruling by stating that the needy individual has the prerogative not to wait around for your dollar and, in that case, you would be absolved of any further obligation. Even though it is unlikely that a poor person would want to wait around for the donor to come back with a small donation, which renders this ruling moot for all practical purposes, it nonetheless illustrates how far-reaching is the obligation to give *tzedaka*.

How Much Must be Given?

One need not donate a large sum for each request – Rambam says a fig is enough![6] R. Chaim Kanievski calculates that this amounts to the value of 1/12th of a *pruta*.[7] In other words, even offering a drink of water would suffice. It is only forbidden to turn the destitute away empty handed. Furthermore, R. Kanievski writes that if the person refuses your token gift, you are absolved of your obligation.[8] In shul, offering a quarter would suffice and one may even offer less, if it is accompanied with a smile and an explanation of how one would love to give more but doesn't have the means. Of

5. *Matnot Anyiyim* 7:8.

6. Ibid.

7. *Derech Emuna, Biur Halacha* 7:1. This would amount to less than a penny in modern US currency, the point being that only a minimal donation is required, as long as something is changing hands.

8. *Shaar Hatziyon* 107.

course, if a very small sum would be viewed as an insult, one would be forbidden from offering it. Generally, however, with an explanation one can avoid any hard feelings.[9]

One who has already fulfilled his *ma'aser* obligations

Jewish law requires every individual to give a percentage of his income to charity, generally 1/10 or 1/5 of his earning. If a person has already fulfilled this obligation, does he still have to give charity to every individual who asks?[10] The *Rishon Letziyon*[11] is of the opinion that if he has already donated his required percentage, the aforementioned prohibitions are not transgressed. Yet, there exists a third prohibition (*Lo Yera Levavcho,* "Let your heart not feel bad when you give him" – *Devarim* 15:10), which most commentators understand as applying to one who donates with a sour countenance – see

9. See the *Shulchan Aruch* 247:1-3, 249:3-4, to gain a better perspective on giving *tzedaka* and on how to act if one must turn down a request.

10. *Ma'aser Kesafim* is the obligation to donate 1/10th of one's earnings to *tzedaka*. There is a dispute among the *poskim* if this obligation is Biblical (Tosafot, *Taanit* 9A, among other *Rishonim*), Rabbinical (*Taz, Yoreh Deah* 331:32, *Birkei Yosef* 249:3) or just a custom (see *Pitchei Teshuva, Yoreh Deah* 331:12); see also *Aruch Hashulchan* 249:5). Among the contemporary *poskim,* the Steipler opines that it is just a *minhag*, nevertheless, one should abide by this *minhag* (see *Orchot Rabbbeinu*, 1 pg. 295). Additionally, I have heard from reliable sources that this is the view of R. Moshe Feinstein as well. R. Shach (*Michtavim Uma'morim* 3 pg. 78; 4, pg.74) rules that *ma'aser kesafim* is Biblical and one should be extra scrupulous vis-à-vis this obligation, for failing to give one's *ma'aser* results in the continuous violation of this commandment. The Chafetz Chaim (*Ahavat Chessed* 2, 18:2) discusses, at length, the proper procedure for the distribution of *ma'aser*. The topic of giving *ma'aser*, including which income is subject to *ma'aser*, to whom and how to distribute these funds is not covered in this article. It should be noted that the Chafetz Chaim is of the opinion that one must give up to 1/5th of his earnings (more than 1/5th would be considered praiseworthy but not obligatory) if there are people who are requesting money (*Ahavat Chessed* 2 19:4, 20:3). See there for a detailed discussion and additional sources. See *Ahavat Chessed* 2, 19:4, where the Chafetz Chaim quotes from the letter of the Vilna Gaon in *Alim L'Trufa* in which he cautions in very strong terms that one always make sure he has properly set aside his correctly calculated funds for *ma'aser*.

11. *Yoreh Deah* 247.

Shach 249:9) which is violated even under these circumstances. He qualifies this by stating that even this prohibition applies only if the solicitor is in extreme need. One can also deduce from the *Rosh* in *Shavuot*[12] and from the *Teshuvot Maharil Diskin*[13] that after donating the required amounts, one no longer has an obligation to donate.

Yet, even if one has already fulfilled his obligation to donate *tzedaka*, the ruling of Ramo[14] that it is forbidden to turn away any poor person empty handed seems to offer no leniency in this regard. This ruling seems to be a blanket requirement to give, because the gloss is written on the ruling that one must be sensitive to the feelings of the poor man. The aforementioned sources (*Rosh*, *Maharil Diskin, Rishon Letziyon*) are discussing giving larger donations based on the halachot of giving *tzedaka* and are not relevant to this obligation of at least giving something, which is based on the need to be sensitive to a person collecting. In fact, the Rosh instructs one *never* to close his hands from donating to the destitute.[15]

On the other hand, if a person has not yet donated (or set aside) the required minimum percentages of his earnings for charity, he would violate all the aforementioned prohibitions every time he is approached and abstains from giving.[16]

Possible Leniencies

Notwithstanding the apparent universal prohibition of turning away a *meshulach* empty-handed, there are many circumstances which may limit its application.

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12. 25A.

13. 24.

14. In his gloss to *Shulchan Aruch* 249:4.

15. *Orchot Chayim* 78. The contradiction with the previous *Rosh* can be easily reconciled with this explanation.

16. Note, however, that both the *Teshuvot Maharil* (54) and the *Nodah Biyehudah* (*Yoreh Deah, Kamma* 73) state that if one donated more money than his current 1/10th obligation for *ma'aser*, he may deduct it from any future *ma'aser* requirements.

1. *Osek B'Mitzvah*

One factor that may well mitigate the obligation to contribute is that of *Osek B'mitzvah* — being presently involved in fulfilling a mitzvah obligation. The halacha follows the opinion of the Ritva, that if one is involved in one mitzvah he need not expend effort in the performance of another mitzvah. One of the prime examples of a mitzvah that "takes effort" is giving a coin to a solicitor.[17] Being preoccupied with a mitzvah includes someone who is in the middle of *davening*,[18] preparing to put on *tefillin*, listening to *chazarat hashatz* (review of the *Shemonah Esrai*) or to the Torah reading. During all these times, one need not donate because of this principle.[19] Additionally, helping one's wife or children around the house is also considered as being involved in performing a mitzvah.

Women also have the obligation to give *tzedaka*, but need not interrupt a mitzvah in order to do so.[20] Thus, if a woman is in

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17. *Mishnah Berurah* 38:29; see also *Biur Halacha* there.

18. Even *psukei d'zimra* or other *tefillot* one adds on after *davening*.

19. In fact, among contemporary *poskim* there is a dispute whether one is permitted to donate during these times. *Derech Emuna, Matnot Anyiyim* 10 in *Shaar Hatziyon* 96 states that one need not donate. *Teshuvot Ve'Hanhagot* 3:287 says that during recital of *Shema* it is forbidden, whereas during the other parts of *tefilla* it is not obligatory. In *Halichot Shlomo* (*Tefilla* 7:12), however, it is brought down that even though R. Shlomo Zalman Auerbach *Zt'l* was of the opinion that people should not solicit during *davening*, if he was approached during *davening*, he would donate with a smile.

20. There is a caveat in the halachot regarding married women donating money without their husbands' consent. The *Shulchan Aruch* (248:4) rules that one should not accept a large amount of money from married women (in effect forbidding her from donating without her husband's consent – *Derech Emuna* 7:88). A small amount of money (with the term "small" being defined based on their level of wealth) is permitted without her husband's knowledge unless he explicitly forbids her from donating at all (*Shulchan Aruch* ibid.). There are various factors that would influence the halacha regarding women donating larger amounts. Briefly, if she were using money that was hers (i.e., through an inheritance, etc.) it would depend on her husband's knowledge of her owning the money (see *Shulchan Aruch, Even Haezer* 90:9-11 and *Minchat Yitzchak* 8:134). If she has a job, there are grounds

her home and is approached by an individual going door to door while she is busy with her children, she need not answer the door. If the indigent does not ask her for money but rather asks for her husband, she would not be violating halacha by explaining that her husband is not home since this is not considered refusing a request for charity.

Interestingly, however, during learning Torah there is no leniency [*heter]* of *osek b'mitzvah,* and one would be required to stop his learning if solicited.[21] If one is learning in a *bet midrash* which has rules against anyone coming to collect during learning or *davening*, then it is not necessary to donate because the person has no permission to collect during that time. There is no requirement to care for someone who isn't doing the correct thing.[22] The rabbis in charge of the *bet midrash* certainly have the right to request that all solicitations take place after the learning session is over. Although there is a fairly well-known objection from the Chafetz Chaim[23] to the practice of preventing solicitations, it is only an objection regarding preventing the destitute from going door to door throughout the town, not in the *bet midrash*. Indeed, several major *Batei Midrash* throughout the world have adopted this policy.[24]

2. In Shul

In addition to the leniency of *Osek B'mitzvah*, which can be used in a shul setting, another possible leniency for the shul

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to permit her to give *tzedaka* without restriction (*Aruch Hashulchan* 248:12). Additionally, there are *poskim* who rule that in our times women have permission to donate larger sums even from their husbands' accounts (see *Aruch Hashulchan* ibid.).

21. Rambam, *Talmud Torah* 3:4.

22. See *Halichot Shlomo, Tefilla* 7:12 who says that one need not donate to women who are going around areas they should be avoiding.

23. *Ahavat Chessed* 2:17.

24. See *Sh'ailot U'Teshuvot Shevet Halevi* 10:157 that there are sufficient grounds to permit such practice.

setting is based on the understanding that the entire premise of this halacha is that one must concern himself with the feelings of the individual being turned down. Since the average person collecting in a shul knows that most people turn him down, he may not construe it as an insult if yet another person turns him down. This idea has been suggested by R. Felder of Lakewood, but it seems most *poskim* do not accept it. Even R. Felder rules that this leniency applies only in shul, whereas at home one would still have to donate at least a token amount every time.[25] Once again, if one has not yet designated his *ma'aser*, he would have to donate to each request.

An anecdote recorded about an encounter of the Steipler Gaon, Rav Kanievski, with Rav Chaim Ozer Grodzenski of Vilna, author of *Achiezer*, has been cited by some as the basis for a lenient ruling regarding giving charity to every person who asks.[26] It seems that when he was in a shul with a large group of impoverished people asking for money, the Steipler asked the author of *Achiezer* whether he must donate to each and every individual, as per the Rambam's ruling cited previously. R. Grodzenski responded that he used to say hello to every single individual (based on the Gemara that advises one to always extend a greeting to people first); however, when things got out of hand (because there were too many people) he decided to no longer extend greetings to anyone! The halacha concerning *tzedaka*, R. Grodzenski suggested, would be the same here.

Perhaps the rationale for the somewhat surprising ruling of Rav Grodzenski is based on understanding that the requirement to contribute to every request is not really an obligation arising from the laws of giving *tzedaka* but is rather based on not making people feel bad. If an individual's

25. Printed in a small booklet entitled *Halacha Handbook: The Laws of Tzedaka*, Footnote 71.

26. Recorded in *Orchot Rabbeinu* 3, pg.141.

request is rejected, he would understandably be hurt and offended; on the other hand, it is much harder to hurt the feelings of an entire group. Consequently, turning down a multitude of collectors would not violate this obligation.

If we are correct in our interpretation of Rav Grodzenski's permit [*heter]*, then we should note that this leniency applies only in the unusual circumstance of the Steipler's case, where it was described as being "many poor people lined up one on top of the other". In the average shul scenario, even the ones frequented by *meshulachim*, there is not that volume of people. Even those shuls which do attract an abnormally large population of solicitors, however, would usually not qualify for this leniency because they generally collect as single individuals and are not all present at once.

3. *Gabbai Tzedaka*

Many *poskim* are of the opinion that when an individual is collecting for a Yeshiva, Kollel, or other mitzvah-oriented organization, there is no obligation to contribute to him, even if he is taking a percentage of the funds and supporting himself thereby. This is because the verses mentioned above mandating giving charity refer specifically to turning down the *destitute*. Additionally, even if the individual is acting as a *gabbai* (agent) collecting for other poor people and, even if he were to take a cut of the collected funds to support himself in his capacity as a *gabbai*, one need not donate.[27] However, the *sefer Teshuvot Ve'Hanhagot* remains uncertain on this point,[28] whereas *sefer Tzedaka Umishpat* cites sources that obligate one to donate even to *gabbaim*.[29]

Obligation of a Needy Individual To Give *Tzedaka*

Although poor people need not give 10% of their income to

27. *Derech Emuna* 7:48, *Tziyon Halacha* 114.
28. 3:287.
29. 1:fn3.

charity,[30] nevertheless, halacha states that even poor people must give at least some form of *tzedaka* throughout the year to fulfill the mitzvah of *tzedaka*.[31] What we can glean from this is that a poor person is not exempt from any monetary responsibilities that we have to each other. Hence, even a poor person, or a student in Yeshiva, must give a token donation to each request. As mentioned, this obligation is only in order to demonstrate to the poor that you empathize with his troubles; thus, a token donation suffices. If one cannot spare the quarter for each solicitation, then perhaps buying candy to distribute (instead of the usual shrug of the shoulders or acting incognizant) would be an idea. Although this suggestion may seem frivolous at first glance, it is, nevertheless, the obligation that Rambam states – even to give a fig! It must of course be distributed in an appropriate fashion befitting a mature adult, perhaps with an explanation of how you would love to give more but this is all you are able to do at this present moment, and you wish him all the best. However, if this gesture could be construed as an insult, it should be avoided; perhaps with a brief explanation one could avoid that problem, and possibly even get the individual to smile.[32]

Who is Permitted to Collect?

How needy does a person have to be in order to permit him to ask for *tzedaka*? The definition of a poor person is disputed among the *poskim*. Some say it includes anyone who does not have sufficient funds to cover one year's worth of living expenses at the standard to which he has always been accustomed. Each person would have to estimate his own expenses such as rent, food, phone bills, etc., based on the

30. *Shulchan Aruch* 251:3, see *Tzedaka Umishpat* 1 footnote 15 for a dispute as to what constitutes a poor person with respect to *ma'aser*.

31. *Shulchan Aruch* 248:1. The definition of poor with regard to this segment of the overall obligation to *ma'aser* is not relevant to our discussion.

32. See *Bava Batra* 9B.

smallest amount required by those in his class. If he comes from a wealthy background, it would still be considered *tzedaka* to help him maintain that lifestyle. Some authorities permit a person to collect sufficient funds to enable him to live off the interest of those funds or to set up a new business.[33]

However, if one has a steady income, from which he can live according to his standard, then even if he does not have sufficient money for a full year, he is not permitted to accept public charitable funds.[34]

If one owns many objects which he does not need in order to maintain his minimum standard of living, he is required to sell them before he agrees to take *tzedaka*.[35] If he owns an item that is necessary but he has a very expensive model, he would have to sell it for a cheaper model. But if a person has money saved for his child's tuition or marriage expenses he need not use that money to support himself before accepting charity.[36]

The *Shulchan Aruch* specifies that one need not sell his house in order to qualify to take *tzedaka*. However, there is a difference of opinion if the house he lives in is much larger or more extravagant than necessary. *Sh'ailot U'Teshuvot Shevet Halevi*[37] rules he may collect without first selling his house, but the *Mishnah Rishonah*[38] rules that one must first sell off a larger house,[39] but not if it is only possible to sell at a loss. In practice,

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33. See *Shulchan Aruch* 253:1-2.

34. The statements from *Chazal* concerning avoiding accepting *tzedaka* would be more appropriate in a different article. Suffice it to say that *Chazal* did not take kindly to one who encumbered the public to provide for him if he could avoid taking *tzedaka*.

35. *Shulchan Aruch* 253:1.

36. *Chelkat Yaakov, Yoreh Deah* 137, *Teshuvot* from R. Chaim Kanievski at back of *sefer B'oreach Tzedaka* 105.

37. 2:125.

38. *Peah 8:8*.

39. However, even according to the opinion of the *Mishnah Rishonah* one would probably not be required to sell a house in a more expensive

it has become the norm not to require someone to sell off a house before accepting *tzedaka*.

If one does not have enough money to survive the year (a poor person by Torah standards) but due to laziness he refuses to work (after all, panhandling can bring in a considerable amount) one probably does not have to donate to him. In truth, this halacha is not explicit in the *Shulchan Aruch;* rather, the *Shulchan Aruch* discusses the case of a rich person who refuses to use his personal money for his own needs and turns to the public for the funds. Here the *Shulchan Aruch*[40] rules not to contribute to him.[41] This ruling cannot be extrapolated to include our case, in which the person is poor, and, indeed, the *Tzedaka Umishpat*[42] is uncertain of the halacha in our case. Based on a text in *Drisha,* one may derive that it is permissible to collect even under such circumstances, for the *Drisha*[43] states that the requirement of a father to fully support his son is irrelevant if the son is capable of working, because the father can tell the son to go collecting door to door! The *Maharashdam,*[44] on the other hand, states clearly that one need not donate to someone who has the capacity to work.

Nevertheless, concerning the laws of *tzedaka* as well as many other situations, it behooves us to realize that we can never really know the details of another person's situation. It is very possible that an individual is really incapable of working, despite appearances to the contrary. The fact that a person

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neighborhood and move to a cheaper one even if it would obviate the need to collect because we support a person based on the standard to which he is accustomed ("*kdei machsoro*").

40. 253:10.

41. It should be noted that the *Aruch Hashulchan* writes that if he is starving himself (or in need of medical assistance) and refuses to assist himself, then we must help him out with the funds, but we force him to pay us back.

42. 3:1.

43. *Even Haezer* 71:1.

44. *Y.D*. 166.

appears physically well does not always guarantee that he is capable of gainful employment. Many individuals have psychological or emotional issues that preclude their holding on to a job.[45] Moreover, many jobs do not generate sufficient income to support large families.[46]

The Gemara *Pesachim* 113A states that "it is better to skin a dead animal in the marketplace [and sell its hide]" and earn an honorable living rather than to collect *tzedaka.* However, according to leading *poskim*, this teaching does not apply in our days to a *talmid chacham.*[47] They explain that this Gemara was applicable only in Talmudic times, when everyone respected Torah scholars for their outstanding knowledge, their occupation notwithstanding. Nowadays, when the authority and respect of Torah scholars is under constant challenge, a *talmid chacham* would not have to resort to demeaning labor to support himself.

One who takes charity when he is not destitute by Torah standards is called a thief.[48] According to Jewish law, the *beit din* can force the imposter to pay back.[49] If one determines, without a doubt, that the individual requesting funds is a charlatan, it is permitted even to scream at him in rebuke.[50]

Perhaps someone wants to donate to a solicitor even if he realizes that he is not poor, to spare him the embarrassment of calling his ruse; despite his altruistic motive, it might not be permitted. Halacha states that if one intends to sin by eating

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45. *Sefer Emet L'Yaakov, Yoreh Deah* 253 footnote 141.

46. See *Derech Emuna* (9:84 with accompanying *Biur Halacha*) where it states that if people have special expenses during the year aside from day to day living (such as marrying off children), they may take *tzedaka* because that is considered their bare minimum for this year.

47. According to the *Rishon Le'Tziyon* (255) and the *Aruch Hashulchan* (255:1).

48. *Sh'ailot U'Teshuvot HaRashba* 1:872, see also *Shulchan Aruch* 255:2.

49. *Shach* 253:4.

50. *Aruch Hashulchan* 249:13.

non-kosher meat, but in reality the meat he eats is actually kosher, he is nevertheless considered to be a sinner. In a similar vein, this false beggar thinks he is fooling the donor and intends to steal; consequently, one who donates would, in effect, be helping him sin![51]

Questioning the Integrity of an Individual

Inasmuch as giving charity to a person who does not need it is something to be avoided, how does one know whether the person asking for help is authentic, or a charlatan?

The Gemara in *Bava Batra* (9A) states that when one is approached for food, one must donate immediately without checking into the veracity of the claim. However, if one is asked for clothing or just money in general, one may check into the person's credentials before donating. If the poor person refuses to verify his situation, one may withhold his donation. Furthermore, the requirement to give food without asking for verification of need is understood by the *poskim* to apply exclusively when actual food is requested;[52] however, if money is requested to buy food, one may ask for some sort of proof before donating.[53]

However, merely turning down the individual based on this

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51. *Tzedaka Umishpat* 2 footnote 57, see similar cases in *Minchat Shlomo* 1:35.

52. See *Tzedaka Umishpat* (Blau) 3 Note 2 who brings this and other relevant laws.

53. The Gemara in *Ketubot* 68A says that we should be thankful to the charlatans because they will be our excuse to *Hashem* as to why we didn't constantly donate. Interestingly, this Gemara is not brought down in the *Shulchan Aruch* and when R. Chaim Kanievski was questioned as to the reason for the omission, his attendant responded that he refused to answer this question many times. It appears that the Gemara is merely providing us with an excuse to avoid punishment in the future judgment, but the requirement to give remains intact. It should be noted that based on this Gemara, the contemporary *sefer Avnei Yishpeh* (4:101) states that if one has *high grounds for suspicion* regarding the veracity of a collector, one may turn him down outright, contravening the Ramo.

is insufficient. If one does not want to expend the time to investigate the claim, he would have to donate. The Gemara does not give one the right to say "I don't trust you", it only gives the right to check credentials. In other words, when approached with a request, generally one must donate.[54]

Even one who acts unpleasantly still must be given the token donation and courtesy due a human being.[55] Perhaps it is not necessary to give to a person acting brazenly if one has already designated his obligatory *ma'aser* and has, as his only requirement, that of obviating ill feelings and embarrassment. As mentioned above, we are not responsible to care for the feelings of people who are not careful about themselves, with the proviso of R. Yaakov Kaminetski that one never knows the details of another person's situation and it is possible that his situation is causing him to act inappropriately.

Natton Titten

In commanding the mitzvah of charity, the Torah used the term "*Natton Titten* – you must surely give"; our rabbis explain the double use of the word "give" to clarify that one must give – "even 100 times". Even if the same person asks you for money twice in the same day, you must donate twice.[56] However, this obligation is only if the second time is for a different need. For example, he collects for his breakfast and then collects again for his lunch. But if he is collecting the entire time for the same *hachnasat kalla* (helping a needy couple

54. It should be noted that the *sefer Be'Oreach Tzedaka,* P. 354, quotes R. Elyashiv that, even though we do give to everyone "because we are a merciful nation", he is unsure if one is violating any of the prohibitions mentioned because of the large number of imposters around. The same *sefer* (pg.336) states that R. Shlomo Z. Auerbach gave every individual request a token donation.

55. *Tzedaka Uma'aser* 22.

56. Although this *drasha* is fairly well known, the truth is that it is only brought down in a *Medrash Tannaim* in *Devarim* 15:10. The Gemara in *Bava Metziah* 31B has a different *drasha* from this verse.

get married), for example, one would not have to donate twice. The reasoning is again very simple. As explained, the obligation to donate to each individual who asks is primarily to avoid hurting their feelings by our indifference; so, if you explain that you already donated for that cause, there should be no hard feelings.[57] Thus, if one donated at his home or office and then encountered the same individual at shul the next day, he need not donate twice, although he should explain that he has already donated to the cause. Making the individual feel bad is the negation of the intent of the mitzvah. Furthermore, although there is no obligation to donate twice to the same cause, one nevertheless gets a mitzvah.

To put the mitzvah of *tzedaka* in perspective, we must see what *Chazal* say about the greatness of giving, and the terrible things they say about one who ignores and turns away a poor man. It is elaborated upon, in depth, in the *Tur* and *Shulchan Aruch*.[58] Poor people are just like us; they are going through hard times and we must be gentle, accommodating and understanding of them.

Thus, our discussion has shown an obligation to donate to every solicitation made of a person unless there are mitigating circumstances, as enumerated herein.

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57. This understanding of the *drasha* can be proven from the *Talmud Yerushalmi* in *Peah* (8:5). The Gemara there asks a question about donating to a poor person twice. According to R. Chaim Kanievski (See R. Chaim's commentary to the *Yerushalmi*), the Gemara is asking if one donates twice to the same person is it considered *tzedaka*? The Gemara responds that it is considered *tzedaka* but the poor person must realize that it is as if he is stealing. (This assumes that the individual did not inform the person that he was already approached.) According to other explanations of the text (see *Mahari Fulda*) there is no proof, for that Gemara is discussing a case where a poor individual left the city and came back, and questions if we are responsible for his lodgings or may we assume that he will leave again before the evening.

58. *Yoreh Deah* 247.

The Halachic Acceptability of Soft Matzah

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Introduction

The Torah (*Shmot* 12:18) commands all Jews, men and women alike, to eat matzah on the first night of Pesach; yet nowhere does it explain how to make this required product or how it should look. For most Jews today, matzah is a thin, hard, cracker-like bread, that is often baked months in advance of Pesach and can be stored for long periods of time. In the last few years, "soft-matzah," which is thicker and pita-like (but without a pocket, i.e., like a laffa), has become commercially available. This availability has raised a number of questions, including whether or not modern commercial soft matzah is the same as what was used in yesteryear and whether there are halachic concerns that should encourage or discourage one from using either hard or soft matzah.

Definition of *Chametz* and the Leavening Process

There are two significant differences between what is commonly known as "Ashkenzai" and "Sephardi" matzah: the former is exceedingly thin and hard, while the latter is relatively thick and soft. Both of these characteristics, which are not necessarily inter-dependent, will be examined to see if

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they have halachic significance. Because each type of matzah has exactly the same ingredients, flour and water,[1] the explanation of how they look and feel so different must lie elsewhere. While it may seem simple, there is in reality, a complicated chemical and physical relationship between oven type, temperature, and flour-to-water ratio[2] on the final product.[3] The process is so sensitive that every year, the flour itself requires different amounts of water to achieve the same consistency of dough. Typical Ashkenazi matzah uses a vastly drier batter than what is used to make soft matzah. In a machine factory with powerful mixers and kneaders, the ratio of water to flour is about 300 ml of water for a kg of flour, while in a hand factory it is between 400 and 480 ml for the kg. Compared to that, soft matzah uses a much wetter, looser batter. In the various (hand) soft factories we visited, the ratio was between 550-830 ml per 1 kg of flour. The *Chazon Ish*, echoing contemporary Ashkenazic practice, wrote[4] to be careful not to use too much water and that the batter should be as hard, i.e. dry, as possible. The ratio that he used was ½ a kilo flour with half a cup (?) of water and that yielded a dry

1. There is a long history regarding the preference, indifference, or objection to adding salt to matzah, and to this day some Yemenites still add salt as an ingredient. See: *Melach b'matzot – issur, heter, oh hidur, Madrich Hakashrut of Badatz Yoreh De'ah*, 5772 (volume 15), pages 33-111 as well as *Yabia Omer* 9:OC:43 , and Yisrael Ta-Shma, *Minhag Ashkenaz haKadmon*, 5752, ch. 12 Matzah*h M'lucha b'Pesach*, pages 249-259.

2. Keeping track of a "good" ratio is important. The Chatam Sofer wrote (*shu"t OC* 127; p. 315 5771 ed.) that he had been baking matzah for almost 30 years and used the following ratio: a *log* of flour with a little under a *revi'it* water, i.e., the water should be less than a quarter the amount of flour

3. See *Pesachim* 37a which contrasts the baking properties of dry wood to wet wood, a hot oven to a less hot oven, and a metal oven to an earthenware oven, in which all of the former prevent *chimutz* more than the latter. Regarding the baking process Rabbi Akiva stated (*Pesachim* 48b): "Not all women [bakers], not all wood, and not all ovens are alike". The *Ohr Zarua (Hilchot Challa* 226) suggested that oven type can affect the leavening process.

4. *Kovetz Igrot*, vol 1, letter 185, *se'if* 9.

batter.[5] Using our standard cup size (which he may not have been referring to), that means 1 kilo of flour with about 236 ml of water, a ratio not possible even with machine matzah.

The *Shulchan Aruch* (OC 459:2) says that from the moment the flour and water touch, if it is not continuously worked, it takes the time of an average person to walk a *mil* for the dough to become *chametz*, which he says is 18 minutes.[6] The Ramo (ibid) is concerned that other factors, such as heat and friction from the hands working it, can cause the process to be accelerated and he therefore says that it should be done as quickly as possible. This makes sense chemically, as heat will cause the fermentation process of the yeast to happen quicker, hence causing leavening.

Indications of what type of matzah was used in past generations

Unfortunately, in the traditional sources there are few physical descriptions of matzah or the baking process. There was simply never a need to describe it. Everyone was intimately familiar with the process because, until close to the modern era, one and all baked their own matzah. Some Jewish communities, for example Yemenites, never lost the custom of baking soft matzot. They offer a living tradition from which we can learn what (a type of) soft matzah might have been like. Yemenite women typically bake three thicker matzot, about the thickness of an adult's finger, each with multiple *kezaytim*, and from the instant of mixing the flour and water they are fully baked within 5-6 minutes.

The Moldy Bread Proof

The Gemara (*Pesachim* 7a) discusses the case of a moldy loaf found in a bread bin about which one is unsure if it is *chametz*

5. *Haggada shel Pesach: Chazon Ish*, 5764, page 29.
6. See *Biur Halacha* 259:2 for alternative times of 18, 22.5 and 24 minutes.

or matzah. To the modern ear this sounds strange; after all matzah and bread as we know them look very different. How could it be that one could not tell the difference? Clearly, in Talmudic times matzah and bread looked the same, and indeed the Torah calls matzah "*lechem oni*", poor man's bread (*Dvarim* 16:3), so it makes sense that it resembled bread. Modern Yemenites refer to matzah as "*lechem*" (bread) and their matzot and pita actually look quite similar, the difference only being yeast, oil, and flavorings in the bread. Indeed the *Mishnah Berurah* (446:12) explains that this case is referring to a period when the custom was to bake thick matzot that resembled *chametz* loaves. And lest one suspect that they had both kosher-for-Pesach, hard matzah and *chametz* hard matzah, as is sold nowadays,[7] the continuation of the Gemara makes it clear as to how the matzah looked. The Talmud explained that if several "matzah days" had passed, it can be assumed that matzah was baked daily and that each day fresh matzah was thrown into the bin, causing the older one to become moldy. This only makes sense for a description of soft matzah, for no matter how much "new" fresh thin hard matzah is thrown on top of a hard dry crackery "old" matzah, it will not become very moldy within a week. However, soft, pita-like matzah will indeed become moldy that way.[8] From this Gemara it is clear that in Bavel in the Talmudic period matzah was soft and resembled the bread of the time.[9,10]

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7. Although the *Aruch Hashulchan* (OC 446:12) does at first suggest something similar, he says that really this halacha is simply not applicable in our times.

8. We experimented, and indeed pita put into a closed container quickly became moldy. Yet a sealed plastic bag in a new box of hard machine matzah does not become moldy.

9. It seems that bread in the Talmudic period was typically flat, relatively small, and pita-like as evidenced by the numerous references to "*r'diat hapat*", removing bread stuck on the wall of the oven. Rarely (e.g. *Pesachim* 31b and *Beitzah* 34a) the Gemara refers to "*pat porni*" – large-oven bread that required a large oven with a door.

10. In the course of discussing Yemenite matzah with Rav Shlomo

The Finger in the Dough

The Gemara (*Pesachim* 37a) states that for the mitzvah of matzah at the seder one can use "matzah *hina*", which Rashi describes as not fully baked matzah. The Gemara then queried as to how to determine if it is sufficiently baked so that it will not become *chametz*. It responded that the matzah must be baked so that, if broken, "threads" of uncooked, still sticky dough will not pull from it when the parts are separated. When the *Shulchan Aruch* cites this case, the *Mishnah Berurah* (461:13) describes another sign of sufficient baking not mentioned in the Talmud. He says that sticking a finger into it and having it come out dry is a sign of its being sufficiently baked.[11] The Chazon Ish points out[12] that with the very dry batter used to make our cracker-like matzah, the finger will come out dry even if it is not baked at all. As a result, it is evident that the Gemara and *Shulchan Aruch* are addressing a reality different from the extremely dry batter used for modern hard, thin matzot.

The *Isaron* Matzah Proof

The *Tur* (end of OC 475) quoting his father the Rosh (early 14th century) wrote that the custom in France and Germany was to make the three matzot for the seder from one *isaron* (a tenth of an *ephah*) of flour. An *isaron*, equal to 43.2 eggs, is the amount that is obligated in *challah* and even according to

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Machpud, a leading Yemenite *posek* in Israel, we asked him about when *erev* Pesach falls on Shabbat. In such a case one needs to eat *lechem mishna* before the time that bread becomes forbidden because matzah may not be eaten *erev* Pesach. However, if the bread and matzah are essentially the same, why can *chametz* bread be eaten? He explained that bread batter is mixed with oil and yeast and other ingredients and has a richer taste than matzah. What is evident though, is that the matzah and bread of the Yemenites were similar in physical appearance.

11. Even today, a cake is checked to see if it is fully baked by inserting and removing a tooth pick and checking if any batter sticks to it.

12. *Sefer Chazon Ish* OC, *Moed* [5733] 120:17, page 190a.

relatively small measurements it is over 1200 grams, yielding matzot of at least 400 grams a piece. This practice is mentioned by the Ramo (475:7) 250 years after the *Tur*. The *Mishnah Berurah* (475:46) observes that in the 19th century this custom had been forgotten in some places, clearly implying that in many places it was still observed. Such a practice can only be accomplished with very large matzot or thick matzot. The standard, modern thin hand matzot are each only about 70 gram. Even using the smallest *isaron* opinion, that would mean that a thin matzah made from a 1/3 of an *isaron* comes out to be the surface area of many times a modern matzah, many feet in diameter, [!] something not realistic, as it would not fit in an oven. In addition, the Ramo (454:1) says not to make the matzah too wide. The fact that 3 matzot were made from one *isaron* indicates that their matzah had to be significantly thicker than any modern matzah.

This proves that in the past they used thick matzah and most likely it was soft. If each matzah were made from a 1/3 of an *isaron*, the sources that instruct to give a *kzayit* to each member of the family from the 3 matzot from the seder plate make sense, for those matzahs would indeed suffice. Owing to the desire to give everyone a *kzayit* from the 3 seder matzot, the *Darkei Moshe* (OC 475:6) suggests that someone with many children should combine several batches of dough in order to make 3 matzot that have even more *kzaytim*. But today each matzah has barely more than one *kzayit*. Either their *kzayit* was much smaller or their matzot were much thicker. Or both. The *Chok Yaakov* (d. 1773; 475:26) writes that the middle matzah should be extra-large, such that every member of the household can get two *kzaytim* from it. He can only mean thicker than usual because diameter is limited by oven size. The Chatam Sofer gave each person a *kzayit* from a whole matzah and a *kzayit* from the broken matzah.[13] Today's

13. *Minhagei Maran ba'al haChatam Sofer* (d. 1839); 5731, 10:17 [page 51]. This is especially interesting in light of the fact that Chatam Sofer most likely

standard hard, thin matzot have barely 2 *kzaytim* in them, certainly not two for each person, while a standard soft Yemenite matzah easily has over 10 *kzaytim* in it.[14] Rav Moshe Feinstein (*Iggerot Moshe* OC 5:16:4) explains that it used to be that each matzah had much more than a *kzayit*, but for more than 100 years now we use thin matzah with barely 2 *kzaytim* in each, and he therefore recommends that each person at the seder have their own set of 3 matzahs.

The Not-Too-Thick Proof

The *Shulchan Aruch* (OC 460:5) says not to make matzah too thick. But what is too thick? Not more than a *tefach*, somewhere between 3.5 – 4 inches[15] (see Yerushalmi *Pesachim* 2:4; *Pesachim* 37a).[16] The Ramo (OC 460:4) was concerned about such thick matzah[17] and advises to make the matzah "*r'kikin*" i.e. thin matzot, because they are slower to leaven than other bread. The lack of a specific thickness in the Ramo's statement might lead one to believe that the Ramo is advocating paper-thin cracker-like matzot similar to what is used today. However, this is not so. The *Be'er Heitiv* (460:8) cites the *Beit*

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used thin matzah, having reported (see *shu"t OC* 121) that thick matzah does not bake well and that in most Ashkenazi communities they made enactments not to make them.

14. In one soft matzah factory, a Yemenite rov showed us how they would put 4 fingers on the matzah with their thumb underneath and pull off that amount. He said, this was a *kzayit* and each person received it from the matzah of the *ba'al habayit*.

15. *Iggerot Moshe* OC 1:136.

16.. See MA 460:4 that *post-facto* even thicker can be kosher and *Machatzit Hashekel* 460:4 who seems to permit even *ab initio* if done correctly. However see *Biur Halacha* 460:*pat aveh* who takes issue with the lenient position.

17. In general, in the pre-Ramo era, it was the Ashkenazi *rishonim* who were lenient and permitted thick matzah up to a *tefach* and the Sephardim who were more concerned. See a list in Yaakov Spiegel, *Matzot avot b'Pesach, Yerushatenu*, 5774, pages 195-196. Note that the *Talmidei HaRosh* (*Moriah* 5771, page 11) say that the matzot should not be too thick, rather average, but the matzah *shmura* is customarily made very thin and that is proper.

Hillel[18] that the custom was to make matzah thinner than normal bread and to make them an *etzbah* (finger) thick, i.e. thicker than even today's commercial soft matzah. The *Pri Megadim* (*Eishel Avraham* 460:4) says an *etzbah* is the width of a thumb, and that this was for the matzah that was ground to make matzah meal. Apparently, his matzah was hard and thus finger-thick matzah could not realistically be eaten so he assumes that such thick matzah was ground, while thinner matzah was made to be eaten. In addition, while *r'kikin* means thin breads, it clearly does not mean exceedingly thin as some might understand it. In fact, the Rambam, who we assume had soft matzah,[19] makes reference to his own matzot as *r'kikin* (*Hilchot Chometz u'Matzah* 8:6). Even most of today's soft matzahs are thinner than an *etzbah*. It is likely, though not definitive, that most *etzbah* thick matzah was soft. If today's hard matzahs are compared to cardboard, a hard matzah that is an *etzbah* thick would be like a tree trunk!

Summary

From the data presented above plus other historical evidence, it is clear that over time there was a move away from the daily baking of matzah that was thick and resembled *chametz* bread. First, for halachic reasons there was a move to bake all matzah before Pesach. This was followed by a tendency to make drier and thinner batter, again for halachic reasons. Eventually, possibly thanks to matzah-making machines, commercial ovens, and the commercial production of matzah meal, sometime in the early 20th century, the ultra-

18. *Yoreh De'ah* 97 [page 35a in 5451 edition]; died 1690.

19. Some have suggested a proof that Rambam had soft matzah from the fact that he said (*Hilchot Chametz u'Matzah* 8:6) to put the broken piece in the whole piece. However, the Rambam is merely citing *Brachot* 39b and the meaning seems to be under and not within. Rashi actually seems to have a text that explicitly states "under" and Tosafot understands that it means under. The *Bach* (473, *sv u'mashekasuv chetzyah*) says that all the commentaries understood it as Rashi did.

thin, cracker-like matzot that are ubiquitous today become the overwhelmingly dominant matzah.

Halachic Issues With Thick Or Thin matzah

There are indeed authentic halachic concerns with both standard ultra-thin hard matzah and with commercial soft matzah. Some of these will now be presented.

Thick matzah: The *Kol Bo* (≈14th century; Siman 48) and later the *Levush* ([d.1612] OC 475:7) quote the Ra'avad as saying that for the matzot mitzvah one should make the matzah *r'kikin* and small, not thick and large, because thick and large is not *lechem oni*. While they were concerned that thick, large matzah is not *lechem oni* this is likely not a concern with today's soft matzah which is not nearly as thick as matzah was centuries ago.

With the way that soft matzah is made today, there is a very real concern of *chametz*. We have visited many matzah factories and in some of the soft matzah bakeries we saw what appears to us to be not fully baked dough, as opposed to fully-baked soft bread. The *Shulchan Aruch Harav* (460:10) says that thick matzot are kosher – in theory. But one must inspect them carefully to ascertain that they are truly baked through the entire thickness. His admonition should be taken very seriously. Note that soft matzah is often made much faster than hard matzah. Recently, a Yemenite woman who is in Israel only four years showed us how she made the matzah in Yemen. There is no rolling or *reddling*; it is simply kneaded and put in to the oven. From start to finish it was under 5 minutes. Thus, in that regard soft matzah has less of a *chametz* concern than hard matzah.

Concern relates to the degree to which the interior of the matzah is baked. It is disconcerting that the modern soft matzot are baked mimicking the process used for Ashkenazi matzot during the last 150 years. However, the ovens of soft matzah were different years ago, and certainly not as hot as

modern matzah ovens, where a hand matzah is often baked within 30 seconds. Such hot furnaces will quickly heat the outside of the thick matzah, making it look well baked but not yet baking the inside. Removing it from the oven will yield a soft matzah looking well-done outside, yet possibly *chametz* on the inside. This is not a new concern – the Chatam Sofer reported (*Shu"t OC* 121) that thick matzah does not bake well. Soft is not what should be looked for, rather fully baked is required.

Issues With Hard Thin Matzah

Bracha: The assumption is that matzah is the normal bread for Pesach and therefore, like all bread, should require the *bracha* of "*hamotzi*". The Gemara (*Brachot* 41-42) discusses the rules of *Pat Haba'a Bekisnin* – a type of pseudo-bread (*Shulchan Aruch* OC 168:6) that if eaten in small quantities gets a blessing of *mezonot*. There is a major three-way *machloket* (conflict) of how to define *Pat Haba'a Bekisnin* , with one opinion being that it means thin, hard crackers. This would seem to exactly describe modern matzah. Based on this, many authorities ruled that one says *mezonot* on hard matzah. The *Shiurei Knesset Hagdola* (OC 158, *Hagahot Beit Yosef* 1) says that matzah gets *hamotzi* because it is not so hard, implying that his matzah was neither soft like bread nor hard like crackers and therefore he ruled to say *hamotzi*. It seems that he would rule to say *mezonot* on modern, very hard matzah. Rav Ovadia Yosef (*Yechave Da'at* 3:12) cites a laundry list of similar-minded authorities, and that is standard practice among most Sephardim. Nonetheless, there are significant Ashkenazi authorities (e.g. *Minchat Yitzchak* 1:71 and *Tzitz Eliezar* 11:19) who labor to defend the Ashkenazi practice of saying *hamotzi*. The primary explanation for why it receives *hamotzi* is that, when eaten, it forms the basis of the meal (*kviat seudah*), implying that it is not inherently "real bread". An indication of this is that on real bread there is no minimum *shiur* (amount); even the smallest piece gets *hamotzi* (*Shulchan Aruch* OC

168:10; *MB* 168:47, 60). However small pieces of maztah, i.e. matzah crackers, even if they are identical to matzah, get the blessing *mezono*t because they are eaten as a snack. This is a strong argument against modern matzah being considered "*lechem*", and raises a concern about using it for the seder.

In addition, the *Mishnah Berurah* (168:37) writes that for very, very thin (*dak min ha'dak*) crackers that are baked (see *Sha'ar haTziyun* 168:36) by putting the batter between two metal plates and baking instantly, the *bracha* is *mezonot* even if one makes a meal out of it. These crackers are halachically less significant as bread than *Pat Haba'a Bekisnin*. Rav Moshe Sternbuch (*Tshuvot v'Hanhagot* 3:73) raises the possibility that hard machine matzah falls within that category and therefore should not be *hamotzi* and not be acceptable for the mitzvah (see Rambam, *Hilchot Chametz u'Matzah* 6:7). He justifies using them because they are not baked instantly and are thus *dak* (thin) and not *dak min ha'dak* (ultra-thin). He concludes that they may be *Pat Haba'a Bekisnin* and one who wants to be *machmir* (strict) should only eat them as part of a bread meal. It seems to us that while machine matzah does not bake instantly, there are hand matzah factories that take pride in the paper-thinness of their matzah and the fact that the oven is so hot that the matzah bakes in mere seconds. According to Rav Sternbuch, those matzot may indeed be truly problematic.

Gebrocht – there are two reasons suggested for the *chumrah* (stringency) of *Gebrocht*.[20] The *Sha'arei Tshuva* (460:2), *Machatzit Hashekel* (458:1), and *Mishnah Berurah* (458) explain that the concern is for unkneaded dough within the matzah, and that the unbaked flour will not even be roasted. As the *Mishnah Berurah* explains, this is less of a concern nowadays with ultra-

20. There is actually a third reason not related to a concern of *chametz* with what is being eaten. Rather it is a regulation instituted (*gzaireh*) lest people get confused and bake with real flour instead of matzah meal (see *Tur* OC 463; *Knesset Hagdola* 461; Rav Shlomo Kluger in *Chochmat Shlomo* 463; Rav Yosef Engel, *Gilyonei HaShas* to *Pesachim* 40b).

thin matzah. The *Shulchan Aruch Harav* was concerned for flour on the surface of the matzah, and he says this is a bigger concern with the modern dry batter. It is clear that the concerns relate to the reality of the situation,[21] and as opposed to *Sha'arei Tshuva*, *Shulchan Aruch Harav* was concerned more with the very dry matzah, which can be a real issue with modern matzah. With very wet batter there is no concern of flour not being mixed with water and indeed no one mentions that concern until the last several hundred years.

Old matzah – Hard matzah affords the ability to bake well in advance, which means that many people are eating matzah for the mitzvah that is older than 30 days. Matzah older than 30 days is debated in the Yerusalmi (*Pesachim* 2:4; see Gra OC 458). The *Beit Yosef* (OC 458) discusses this Yerushalmi text, and the *Mishnah Berurah* (458:1) observes that the consensus is that "old" matzah, if made for Pesach, is acceptable. Nonetheless, the *Bach* rules otherwise and Rav Shlomo Zalman Auerbach[22] made sure that all matzah he used for the mitzvah was baked within 30 days of Pesach. Interestingly, the innovation that has permitted the recent commercialization of soft matzah is the ability to freeze it. Thus, although it is less than that for hard matzah, a certain percentage of soft matzah is also baked more than 30 days before Pesach.

In order to fulfill the mitzvah, the matzah must be defined as

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21. *Iggerot Moshe* (OC 3:64) says that regarding modern, ultra-thin matzahs there would seem to be no concern. Nonetheless, he says, if there is a *minhag* (tradition) to prohibit, then *gebrochot* is forbidden even if there is only a small concern. On the other hand, it would seem that with machine matzah there is no *chashash* (concern) and no *minhag*.

Rav Shmuel Auerbach related (*Orach David*, Jerusalem, 5771, page 106) that his father, Rav Shlomo Zalman Auerbach, once asked the well-known Yerushalayim *tzaddik* (and son-in-law of Rav Akiva Yosef Shlesinger) Rav David Baharan what *chumrot* are appropriate for Pesach and he responded to eat machine matzah and to eat *gebrocht* because of *oneg yom tov*, the joy of the holicay. (The Chacham Zvi is similarly quoted (see end *Sha'arei Tshuva* 460:10) that avoiding *gebrocht* is a *chumra* that impinges on *simchat yom tov).*

22. *Halichot Shlomo*, ch.7 note 54 [page 159].

"lechem" (see Rashbam to *Pesachim* 119b, sv *sufganim*). Among the types of matzah that the Gemara says (*Pesachim* 119b) is **not** acceptable for the mitzvah because it is not *lechem* is *iskreetan*, which Rashi defines (*Pesachim* 37a sv *iskreetan*) as matzah made from very thin dough. Modern hard matzah might fall into this category.

Acceptability Of Soft matzah For Ashkenazim

Pre-modern discussions: The *Shulchan Aruch* (OC 486) explains the measure of a *kzayit*. In commenting on or paraphrasing that section, the *Mishnah Berurah* 486:3 (by the "Chafetz Chayim", d. 1933) the *Shulchan Aruch Harav* 486:2 (by Rav Shneur Zalman of Liady, d. 1812) and the *Aruch Hashulchan* 486:2 (by Rav Yechiel Michel Epstein, d. 1908) all discuss the minimum size requirements in order to fulfill the mitzvot of matzah and *marror*. They all note that the measurement does not include air gaps that are found in the folded leaves of the vegetable used as *marror*. Furthermore, they state, air pockets in the matzah are also not included. They then all make a statement that is based on a ruling of the *Machatzit Hashekel* that is based on a Mishnah in *Uktzin* (2:8). They state that matzah that is "soft and spongy" can be evaluated as is and the air pockets need not be excluded.

There is little question that all three of these giants of Ashkenazi halacha ate thin hard matzah and in all likelihood never saw soft matzah. Yet all three discuss the halacha of soft, spongy matzah even though it is not mentioned explicitly in the *Shulchan Aruch* or the *Machatzit Hashekel*. And most importantly, all three: the *Mishnah Berurah*, the *Aruch HaShulcha*n and the *Shulchan Aruch HaRav*, mention soft, spongy matzah without giving any value judgment. They simply state the halacha regarding the way to measure the *shiur* without any qualifications regarding its appropriateness. They seem to accept the possibility that a good, eastern European Ashkenazi Jew might indeed use such matzah.

Modern Discussions

There are those who suggest that it is better if an Ashkenazi does not eat soft matzah. Rav Shlomo Zalman Auerbach[23] said that although one may, according to the letter of the law, make thick matzah, today the custom is to make all matzah very thin, and an Ashkenazi should not eat matzah thicker than what is today customary. He does not discuss hard vs. soft.

Rav Asher Weiss[24] writes that the basic halacha is that soft matzah is permissible, but he is concerned that we are not experts in making them soft and thick and guarding against *chimutz*; there is therefore a concern about *chametz*.[25] He suggests that possibly that concern led to Ashkenazi matzot being so thin and hard. Furthermore, he says that he is wary of innovation and such things fall under the rubric of "do not forsake the Torah of your mother" *(Mishlei* 1:8), and certainly on Pesach it is worthwhile to accept stringencies.

Rav Herschel Schachter disagrees and both in a personal conversation and in a letter (dated Purim Kattan 5771) stated that eating spongy matzah is certainly permitted for Ashkenazim and is not considered changing a *minhag*. He compares it to changing the color of the *perochet*; color is obviously not an essential part of the *minhag* and can certainly be changed. He explains that when the Ramo wrote (OC 460:4) to make them thin he did not mean hard, but he meant not thick as a *tefach* or an *etzbah*. But certainly it is not necessary to make it like a cracker.[26] An argument in line with what Rav

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23. *Halichot Shlomo* chap. 9 note *peh*, page 281; *Mikraei Kodesh* [Harari], *Halichot Leil Ha-seder,* page 286.

24. *Hagadah Minchat Asher*, 5764, *siman* 15, page 322.

25. Indeed the *Sha'arei Tshuva* 460:10 says that it is because of the extra care needed in making thick, soft matzah that there is a real concern for unkneaded portions.

26. The Munkatcher Rebbe (*Nimukei OC* 394:2) and Rav Moshe Sternbuch (*Haggadah Moadim U'zmanim* (5747) p. 97, both note the matzahs in the time of the Ramo were much thicker than what is used today.

Shechter describes was raised during the "machine matzah wars."[27] The anti-machine camp in *Modaah L'bet Yisrael* written by Rav Shlomo Kluger in 1848 cited the fact that machine matzot are square as a reason to forbid them. It seems that the custom of round matzot was the ancient one according to him and changing it was not acceptable. In response, Rav Yosef Shaul Natanson in the *Bitul Modaah* printed in 1849 mocked them, saying that changing the shape is in no way a significant issue. Similarly, Rav Schachter argues, the hardness of the matzah is not an essential component.

Rav Sternbuch (*Tshuvot v'Hanhagot* 5:131:4) explains that we are no longer expert at recognizing *chimutz* and therefore matzah should be very thin with a thick (dry ?) batter, and that he will not give *hashgacha* to thick matzah.

The Chazon Ish several times permitted matzah in his "bakery" that was intended to be very dry and hard and yet was soft on the inside (*Haggadah shel Pesach: Chazon Ish*, 5764, page 31). While many might consider this a real issue of *chametz* he apparently held it was not *chametz*, and furthermore that there was no problem with a soft matzah.

Conclusions

Soft matzah has become more widely available in recent years due to several factors. First is the ability to mass produce them in a way that our forefathers never imagined, as well as the ability to freeze them so that they stay soft until needed. Real soft matzah quickly becomes stale and hardens and that is why those who used them in the past baked them daily. The technical innovations, coupled with a renewed sense of Sefardi pride and a desire to practice the customs of their ancestors, have resulted in the commercialization of soft matzah that is

27. On this interesting halachic-historical controversy see: Ari Y. Greenspan and Ari Z Zivotofsky, "Hand or Machine: Two Roads to Fulfilling the Mitzvah of Matzah", *Jewish Observer*, April 2004, pages 20-31.

now widely available in Israel and the US. They are frozen until the seder, at which point they are warmed and then kept covered so that the moisture and softness remain.

In the Talmudic period matzah was thicker and softer and resembled standard bread baked by being smacked on to the side wall of an oven and removing it after it was fully baked but before it fell off to be burned in the coals below. This skill is termed by the Gemara *rediat hapat*. All of this is impossible with hard matzah. In the time of the *rishonim* (early medieval rabbis), matzah got thinner and harder, and this process continued until the modern era, when matzah is now ultra thin and very hard. The process was driven by two halachic stringencies: the desire to bake everything before Peach to take advantage of *bitul*[28],[29] and the concern that with thick matzah it is more difficult to prevent *chimutz*. This historical process seems to have occurred in both Ashkenazi and Sephardi lands, with the single, significant exception being Yemen, where soft matzah continued to be baked daily until today. The development of the modern thin, hard matzah thus seems to have been driven by halachic concerns rather than practical issues or a "*minhag*" to have a particular type of matzah. The primary hesitation to use soft matzah today would therefore seem to be practical – do the bakers have the expertise needed to produce fully baked, non-*chametzdik* matzah? Those who today bake and supervise the commercial soft matzah, overwhelmingly Yemenites, maintain that they are indeed expert and that when done properly the soft matzah is preferable to the thin, hard matzah. Modern *poskim* have addressed this topic and reached varied conclusions – we have come only to present the issues involved.

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28. There might have also been a sociologic factor due to the huge increase of population centers and immigration from the small villages and the impossibility of baking such large amounts daily to supply enough matzah.

29. Despite this concern, many people continued to bake matzah on *erev* Pesach after *chatzot*(mid-day).

Letters

Dear Editor,

Thank you for your dedication towards publishing sophisticated works that touch on so many pertinent topics in halacha. However, I would like to take issue with an article published in the Sukkot 5774/Fall 2013 issue ["May you invite for Shabbat someone who may desecrate the Sabbath to Attend?"]. Rabbi Bechhofer discusses whether one may invite a non-observant Jew to his home on Shabbos, where it is clear that he would violate the Shabbos in attending. While he quotes a (subsequently revoked) *teshuvah* from Rav Shlomo Zalman *zt"l*, who seems to allow doing so, Rabbi Bechhofer takes the liberty to suggest that Rav Moshe Feinstein *zt"l* would also rule the same way [to permit such an invitation], if he were faced with the question today.

Despite the fact that Rav Moshe has three *teshuvot* [responsa] in which he specifically rules *against* allowing such invitations, Rabbi Bechhofer feels that in today's world of organized *Kiruv*, where the intentions are to bring the non-observant closer to Torah observance, such an invitation is not defined as *Lifnei Iver* [putting an obstacle in front of a person who is blind to the prohibition], and that indeed Rav Moshe would rule differently today. However, the author's assertion – that the intentions of the questioners to Rav Moshe were for some other purpose, and not in order to draw the participants closer to Torah – is solely the projection of the author, and not implied in Rav Moshe's words at all.

Moreover, the author suggests that if the objective of the invitation is to bring him closer to Torah observance, that would justify causing him to sin in the process of getting there! The idea that if one's intentions are to bring the person to an ultimate good there would be no concern of *Lifnei Iver* is quite a novel idea. While it might have been suggested by others, there is nothing in Rav Moshe's writings to support such an allegation at all. (See *Iggerot Moshe,* EH 4:61 and EH 5:6, where Rav Moshe does *not* use this logic for *Lifnei Iver*.)

The basis of this "reevaluation" of Rav Moshe's opinion, the author writes, is the "common practice" to minimize dispute. However it goes without saying that this concept, like any other part of Torah learning, is only when it will lead to greater clarity or understanding of the ruling. It certainly cannot result in arbitrary postulation that Rav Moshe would rule differently today from what he ruled in the past. At best, the writer can propose a different halachic conclusion other than Rav Moshe's, and let the readers decide on their own.

Moreover, Rav Moshe's own family and *talmidim* have pointed out that Rav Moshe himself never made such a distinction. Members of the family have told this writer that Rav Moshe consistently ruled in accordance to what he had written in the *Iggerot Moshe*, even for people or organizations doing "professional" *Kiruv* throughout the seventies and eighties, forbidding them from holding programs that would cause the participants to drive on Shabbat and Yom Tov. In addition, Rav Shmuel Fuerst *shlit"a* of Chicago has related to me and others that in the seventies, an influx of Russian Jews came to Chicago. The Rabbonim there wanted to organize a Pesach Seder for them, to try to bring them closer to Torah observance. However, Rav Moshe refused to allow them to organize such an event, because it would have led to *chillul Yom Tov* by the attendees.

I reiterate – while the author of an article is entitled to state his own or any other halachic viewpoint on this question, he is certainly not entitled to postulate that R. Moshe would be in agreement with this position, and it should be made abundantly clear from R. Moshe's own writings that this opinion would *not* be shared by Rav Moshe.

Thank you again for publishing a journal which is an excellent forum for so many pertinent topics; may we merit seeing the day when these *she'eilot* will be extinct.

MOSHE ZEV KAUFMAN

Rabbi Kaufman is the General Editor for the Rav Moshe Feinstein Foundation, and has co-edited *Iggerot Moshe* Volume 9, *Dibrot Moshe* on *Sanhedrin* and *Mesorat Moshe* Volume 1.

* * *

Rabbi Bechhofer responds:

Towards the beginning of Rabbi Kaufman's communication, he writes: "While he quotes a (subsequently revoked) *teshuvah* from Rav Shlomo Zalman *zt"l*, who seems to allow doing so..." The words in the parentheses capture the difference in perspective between us.

In *Iggerot Moshe* (*Yoreh Deah* 3:21), Rabbi Moshe Feinstein protests against a plan to publish his rulings without the reasoning behind them. This is an idea that he elaborates in the Introduction to the first volume of *Iggerot Moshe*. Reb Moshe posits that the ruling in a *teshuvah* cannot be divorced from the reasoning that underlies and leads to it. Reb Moshe maintains that a *teshuvah* must be understood and assessed by its premises, arguments and logic. Reb Moshe's perspective stands in diametric opposition to the methodology of affirming and rejecting rulings by "appeal to authority." Accordingly, it is irrelevant whether a *teshuvah* was "subsequently revoked".[1]

Moreover Rabbi Kaufman's expressions – e.g., "Rabbi Bechhofer takes the liberty to suggest," and "Rabbi Bechhofer feels," etc. – might lead the reader to assume that I had not presented any logical arguments or explanations when I proposed that, "Rav Moshe Feinstein *zt"l* would also rule the same way [to permit such an invitation], if he were faced with the question today."

To the contrary! It is when Rabbi Kaufman posits that, "the

1. In any event, the implication of the phrasing "subsequently revoked" – viz., that the *teshuvah* may not be regarded as authoritative – is dubious. *Teshuvot* are omitted from subsequent editions of *Shu"t* for various reasons. Moreover, in this case I have been informed by a reliable source that the omission was not at the direction of the author, Rabbi Shlomo Zalman Auerbach, but of one of his sons. Furthermore, even if the validity of a *teshuvah* would actually hinge on its "authorized" publication in a *Shu"t*, in this case the *teshuvah* is validated by its publication in the *Rivevot Efraim*, by which Rabbi Efraim Greenblatt, a *posek* in his own right – and a *talmid muvhak* of Reb Moshe – makes it abundantly clear that he regards Reb Shlomo Zalman's position in the *teshuvah* as valid, authoritative, and halachically correct.

author's assertion – that the intentions of the questioners to Rav Moshe were for some other purpose, and not in order to draw the participants closer to Torah – is solely the projection of the author, and not implied in Rav Moshe's words at all" – that without any discussion of the basis of my "projection" we are being asked to accept Rabbi Kaufman's position as the authoritative understanding of Reb Moshe's position.

I am more hard-pressed to comprehend Rabbi Kaufman's next critique: "Moreover, the author suggests that if the objective of the invitation is to bring him closer to Torah observance, that would justify causing him to sin in the process of getting there! The idea that if one's intentions are to bring the person to an ultimate good there would be no concern of *Lifnei Iver* is quite a novel idea."

While Rabbi Kaufman's reiteration of my "suggestion" is inaccurate, it is difficult to understand why he writes that this is a novel idea, when in the very next sentence he acknowledges that "...it might have been suggested by others" – those others including Reb Shlomo Zalman in the aforementioned *teshuvah*![2]

I certainly concur with Rabbi Kaufman's statement in regard to minimizing disputes, that "...it goes without saying that this concept, like any other part of Torah learning, is only when it will lead to greater clarity or understanding of the ruling." In my essay I explained how and why I thought this was the case here. Rabbi Kaufman dismisses my contention peremptorily.

Rabbi Kaufman's next critique is based on his assertion that "...Rav Moshe's own family and *talmidim* have pointed out that Rav Moshe himself never made such a distinction. Members of the family have told this writer that Rav Moshe consistently ruled in accordance to what he had written in the *Iggerot Moshe*, even for people or organizations doing 'professional' *Kiruv* throughout the seventies and eighties, forbidding them from holding programs that would cause the participants to drive on

2. Rabbi Kaufman refers to *Iggerot Moshe, Even HaEzer* 4:61 and 5:6. This is not the place to expand on the issue, but I must state that, as interesting as those *teshuvot* are, they are not immediately relevant to the issue at hand.

Shabbat and Yom Tov."

This assertion cuts to the core of a prevalent problem in contemporary halacha.

In researching my essay, I found conflicting rulings in the name of Rabbi Yosef Dov Soloveitchik. Both rulings were cited by distinguished students of Rabbi Soloveitchik, yet they were diametrically opposed. The *Journal's* policy in such cases is to discourage the inclusion of these sourcse in the essay, and therefore I omitted mention of them.

The point is obvious – and very much in line with Reb Moshe's opposition to issuing rulings *sans* reasoning. Verbal rulings are difficult – often impossible – to verify. Moreover, they are highly subjective, and may hinge on nuances very specific to the circumstances that led to the query. In such cases we are being asked by the person recounting the ruling to recognize him as an ultimate authority on the *sole* and *universal* interpretation of the position of the *posek* in whose name he is relating a ruling – often as if the ruling must be accepted by *fiat*, as verbal rulings are rarely accompanied by the reasoning which led the *posek* to arrive at his conclusion.

Thus, when Rabbi Kaufman relates that "...Rav Shmuel Fuerst *shlit"a* of Chicago has related to me and others that in the seventies, an influx of Russian Jews came to Chicago. The Rabbonim there wanted to organize a Pesach Seder for them, to try to bring them closer to Torah observance. However, Rav Moshe refused to allow them to organize such an event, because it would have led to *chillul Yom Tov* by the attendees" – we cannot necessarily extrapolate from that verbal *psak*. It is very possible that in that case the participants were *definitely* going to come to the Seder by car, and/or the organizers were not able to offer the participants accommodations – in which case Reb Shlomo Zalman would also have refused to allow the event!

I will close by paraphrasing Rabbi Kaufman's concluding remarks: The author of a communication is entitled to assert the authority of his own viewpoint on any halachic question. However, in the absence of definitive evidence and/or compelling logic, others certainly need not accept his assertion.

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