Journal of Halacha and Contemporary Society

Number LXXI

Published by
Rabbi Jacob Joseph School

In Honor of

The Yovel 50th Anniversary

of

The Young Israel of Staten Island Community

and The Person Responsible For Its Mosdot Chinuch And Jewish Education

Dr. Marvin Schick

With Great Hakarat Hatov

לכל מעשיך וטובותך

Rabbi Jay Marcus
1960 – RJJ Henry Street, NY

Rabbi Raphael Marcus
1964 – RJJ Henry Street, NY

Rabbi Aharon Marcus
1982 – RJJ Staten Island, Yeshivat Reishit, Israel

Rabbi Eliezer Marcus
1984 – RJJ Staten Island, Yeshivat Reishit, Israel

Rabbi Doni Marcus
1986 – RJJ Staten Island, Yeshivat Reishit, Israel

Rabbi Chaim Marcus
1988 – RJJ Staten Island, Congregation Israel, Springfield, NJ

Mrs. Ora Michel
1992 – RJJ Staten Island, Camp Hasc, Israel

Journal of Halacha and Contemporary Society

Number LXXI
Spring 2016 / Pesach 5776

Published by
Rabbi Jacob Joseph School

Rabbi Dovid Cohen,
Editor

The Journal of Halacha and Contemporary Society

Pesach 5776
Number LXXI Spring 2016

TABLE OF CONTENTS

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 Dovid Cohen at editor@journalofhalacha.org.

Manuscripts submitted for consideration should be in Word format and sent via email to Rabbi Cohen. Each article will be reviewed by competent halachic authority. In view of the particular nature of the Journal, we are especially interested in articles that concern contemporary halachic issues.

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

Inquiries regarding subscriptions, back issues of the Journal and related matters can be faxed to 718-686-1506 or sent by email to mschick@mindspring.com, or call 212-334-2285.

Correspondence can be sent to Journal of Halacha and Contemporary Society, 1276 - 50th St., Room 9, Brooklyn, NY 11219.

Hospital Visits on Shabbat

Rabbi Raphael Hulkower

Introduction

Case 1: *A woman's elderly father has been sick for many days. She receives a phone call from the hospital a few minutes before Shabbat informing her that her father's condition is worsening and he may pass away in the next few hours.*

Case 2: *On Shabbat, a man is informed in shul by a Hatzalah member that his wife was hit by a car and has been taken to the hospital.*

The above scenarios are two of the scariest moments a person can experience. Heaven forbid, if someone is faced with a similar situation, one's immediate concern may be to accompany the relative in the hospital. The halacha is *pikuach nefesh docheh kol ha-mitzhot*, one may violate nearly all Jewish laws in order to save a life.[1] However, in modern times most lifesaving activities are solely performed by doctors, nurses and other medical professionals. Despite this fact, relatives can provide an essential part of medical care, calming and comforting a sick relative, while also providing valuable information for the medical team. This essay seeks to address whether there are any halachic grounds which allow a person to violate Shabbat in order to visit a critically ill relative.

1. *Vayikrah* 18:5; *Rambam, Hilchot Shabbat* 2:1; *Shulchan Aruch Orach Chaim* 329:1;*Yoma* 85b.

Rabbi Hulkower received his Smicha from YU/RIETS and his MD from Albert Einstein College of Medicine. He is currently an Endocrinology Fellow at Montefiore Medical Center, NY.

This question may be subdivided into two different scenarios as illustrated by the above cases: Case 1. *What is the halacha when the relative will only provide emotional support?* This woman is coming primarily to comfort her elderly father in his passing hours, but she will not be able to travel to the hospital before Shabbat. Would there be grounds for her to violate any rabbinic or Torah violations to accomplish this mission? To address this matter, one must establish if halacha views the emotional distress of a sick person as a threat to life? If so, would this be grounds to allow even Torah violations? Would there be a difference if the elderly father specifically asked for his relatives to visit? **Section 1** of this article will address these questions. **Section 2** will discuss additional contemporary questions in this area of halacha raised by the technologic advances in recent decades.

Case 2. *What is the halacha when visiting will improve or assist medical care?* This poor husband may need to provide medical information on his wife's behalf if she is unable to communicate. He may have to make decisions or provide consent for her medical care. As such, his presence in the hospital may enable many essential goals aside from simply comforting his wife. His role in her care raises additional halachic questions. Even if one assumes that preventing the mental anguish of a sick relative is NOT grounds for Shabbat violations, do other considerations exist that may permit travel to a sick relative on Shabbat? If relatives provide information on a patient's behalf or advocate for better care, does halacha deem these relatives to be involved in true *pikuach nefesh*, lifesaving matters, giving allowance for Torah violations if necessary? **Section 3** of this article will discuss these matters.

Section 1: If Visiting Will Provide Emotional Support

Abrogating Halacha to Comfort the Dying

The Talmud in *Bava Batra* 156b provides a fascinating halachic dispensation granted in order to comfort one who is

dying. Normally, performing an act of acquisition, a *kinyan*, is rabbinically forbidden on Shabbat because it resembles a business transaction.[2] However, the Sages made an exception in the case of a *shechiv merah*, a person on his or her deathbed:

> Rabbi Levi said: One may perform an act of acquisition with a *shechiv merah* even on Shabbat… because we are concerned that his mental condition will deteriorate, *titrof da'ato*[3] [if we do not carry out his wishes].[4]

Rabbi Levi's teaching, codified in practice by the *Shulchan Aruch*,[5] appears to serve as a precedent permitting rabbinic violations in order to protect a dying person from mental anguish (which might worsen his condition).

Based upon Rabbi Levi's ruling, both the *Or Zarua* and the *Mordechai* apply this precedent to the realm of visiting a sick relative:

> A sick person who fears he may die[6] and requests the presence of his relatives, is permitted to send a non-Jew to travel on Shabbat to bring his family, as perhaps his mental condition will deteriorate.[7]

---

2. *Beitzah* 37a and 27b; *Rashi s.v. Mishum* on *Beitzah* 37a; *Rambam, Hilchot Shabbat* 23:12-13; *Shulchan Aruch Orach Chaim* 306, *Mishnah Berurah* 33.

3. *Bava Batra* 156b. In fact, the preceding Mishnah on *Bava Batra* 156a explains that a *shechiv merah* is capable of transferring his possessions simply via oral command without any formal act of acquisition. According to Rav Nachman on *Bava Batra* 147b, allowing oral acquisitions as well was enacted to prevent any anguish to the dying person that might cause him to deteriorate. Therefore a *shechiv merah* does not even need to perform a *kinyan* in order to transfer property; nevertheless, the Sages permitted a *kinyan* performance lest the dying person fear that no one will follow his wishes without a formal *kinyan*.

4. See *Tosafot* s.v. *Konin* and *Rashbam* s.v. *Kinyan* ad loc. who clearly state that the dying person's mental anguish stems from concern that their final wishes will not be followed after death. See also *Rosh* ad loc.

5. *Shulchan Aruch Choshen Mishpat* 254.

6. The exact wording used is: *takif lei alma*, literally, "the world weighs heavily upon him."

7. *Mordechai* on *Shabbat*, *Siman* 314; *Or Zarua*, volume 2, *Hilchot Erev*

Although the *Or Zarua* and the *Mordechai* both quote this ruling in the name of an earlier authority, Rabbeinu Simcha, there are small but potentially significant differences in their word choice. First, while the *Or Zarua* does not stipulate who the messenger is travelling to notify the relatives, the *Mordechai* indicates in context that one is asking a non-Jew. Second, while the *Mordechai* states that one is permitted to ask the messenger to travel, the *Or Zarua* permits even "hiring" the messenger. The *Shulchan Aruch* cites the *Mordechai* verbatim in *Orach Chaim* chapter 306, which addresses what subject matter one is permitted to discuss on Shabbat.[8]

Rabbi Yosef Caro's[9] choice to include this ruling in *Orach Chaim* chapter 306 – the subject matter permitted for discussion on Shabbat – as opposed to chapter 328 – which contains the majority of laws pertaining to treating sick persons on Shabbat, raises a vital question. *What level of Shabbat violation did the Sages permit to enable one to visit a sick relative to prevent mental deterioration?* Certainly, someone on his or her death bed qualifies as a *choleh she'yesh bo sakanah*, a critically ill person. For such individuals, Rabbi Caro writes that one should zealously violate even Torah prohibitions.[10] Some authorities even allow one to violate Shabbat for non-essential aspects of the care of critically ill persons.[11]

Shabbat, p. 3. The translation reflects the wording of the *Mordechai*, as is explained in text.

8. *Shulchan Aruch Orach Chaim* 306:9.

9. Rav Caro is author of *Shulchan Aruch*.

10. *Shulchan Aruch Orach Chaim* 328:2.

11. *Rambam Hilchot Shabbat*, Chapter 2, *Maggid Mishnah* 5; *Shulchan Aruch Orach Chaim*. 328:4, *Magen Avraham* 4, *Mishnah Berurah* 14 and *Biur Halacha s.v. kol* ad loc. *Maggid Mishnah* cites the *Ramban* in *Torat Ha-Adam* (*Sha'ar Sakanah*) who writes that one may provide the critically ill with food and medicine even if withholding these items would not worsen the condition. *Biur Halacha* notes that other authorities, such as *Rashi* and *Meiri*, disagree. *Mishnah Berurah* suggests a compromise whereby Torah violation for non-essential care should only be performed via a non-Jew, but rabbinic violations can be treated more leniently.

Furthermore, regarding a woman in labor, the *Shulchan Aruch* rules that one is permitted to violate Shabbat for any of her needs. This includes Torah prohibitions, such as lighting a candle, even for a blind woman, *in order to calm her mentally*.[12] Despite these rulings, the wording of the *Mordechai* and the *Shulchan Aruch* implies that one is only allowed to perform *amira l'nachri*, the rabbinic violation of asking a non-Jew to violate Shabbat, in order to visit a dying relative. Perhaps preventing mental deterioration is considered distinct from true *pikuach nefesh*.

What Level of Prohibition May One Violate to Comfort a Critically Ill Relative?

The level of prohibition one may violate to visit a critically ill relative is debated by many halachic authorities. The broad spectrum of opinions on this matter range from those who allow only minor rabbinic violations such as *amira l'nachri* to those who permit even Biblical violations.

A. Lower Level Rabbinic Violations

The context and wording of the *Shulchan Aruch* imply that he only permits the violation of *amira l'nachri* in order to visit a sick or dying relative. In *Orach Chaim* 306:9 the *Shulchan Aruch* writes:

> One is *not* allowed to ask a non-Jew to travel outside the *techum*[13] to gather a dead person's relatives in order to eulogize the deceased. However, if a sick person feels his end is near and requests that they summon his

12. *Shulchan Aruch Orach Chaim* 330:1 (Based on *Shabbat* 128b.) See also *Mishnah Berurah* 3 ad loc.

13. *Techum* is the 2000 cubit radius around a city or populated area. Travel outside this area involves a rabbinic prohibition. See *Shulchan Aruch Orach Chaim* 397.

relatives, *this is definitely permitted.*[14]

Although the *Shulchan Aruch* does not specify what prohibition is permitted in the latter case, the implication is that he only allows the same act which was forbidden in the former case – asking a non-Jew to perform the violation. As mentioned, this is also supported by the fact that the *Shulchan Aruch* includes his ruling in chapter 306 as opposed to chapter 328.

The *Aruch HaShulchan* explicitly states that one is allowed to violate *only amira l'nachri* to visit a sick or dying relative. After ruling that one is "obligated" to send, or even hire, a non-Jew to contact the sick man's relatives for concern that his mental status may deteriorate, the *Aruch HaShulchan* adds "however, a Jew himself is not permitted to violate a rabbinic violation *because this is not considered medical therapy* but rather a general concern.[15]" Similarly, a 19th century contemporary, Rabbi Aryeh Horowitz, rules in his Responsa, *Harei Bisamim,* that one may only violate *amira l'nachri* since this is a rabbinic violation performed without direct action (*lav she'ein bo maaseh*). His reasoning is that one may only violate a rabbinic law *with* an action when it is clear-cut that this action will prevent a sick person's mental deterioration. However, in our case there is simply a "general concern" for this deterioration.[16] For this same reason, he *requires that the sick*

14. *Shulchan Aruch Orach Chaim* 306:9.

15. *Aruch HaShulchan* 306:20. Italics inserted by this article's author.

16. Rabbi Aryeh Horowitz, *Sh"ut Harei Bisamim*, second edition, Section 189. This opinion is based upon the *Rosh's* understanding of *Bava Batra* 156b. When the Talmud permits an acquisition on Shabbat for a *shechiv merah*, the *Rosh* rules this is only permitted when the dying man asks to transfer *all of his property* proving that he is truly on his deathbed, and refusing his request may worsen his mental state. However, if he only asks to transfer *some* of his property, then one is not allowed to perform this transaction on Shabbat. *Tosafot* and *Rashbam* ad loc. disagree and make no distinction. R. Horowitz implies that if one does follow these more lenient opinions, the relative would be allowed to violate a single rabbinic law (even *with* an action) to visit and calm a sick relative.

person personally request the presence of relatives as a prerequisite for any laws to be transgressed.[17]

One may postulate that the *Mishnah Berurah* and the *Shulchan Aruch HaRav* also only permit lower level rabbinic violations in this case. In citing this ruling permitting one to send a non-Jew to contact a dying person's relatives, both the *Mishnah Berurah* and the *Shulchan Aruch HaRav* add a fascinating clause. They write that one is permitted to send the non-Jew in order to bring the relatives *after Shabbat.* In theory, the relatives might have been capable of arriving on Shabbat by violating only the prohibition of travelling outside the *techum*. By forbidding the relatives to arrive on Shabbat, the implication is that only *amira l'nachri* is permitted in this case.[18] *Sefer Yaskil Avdi* elucidates this minimalist approach: *Chazal* only permitted violations necessary to put the sick person's mind at ease. Once the sick man observes that his request to send for his relatives is being obeyed, his mind will be calmed even before his relatives arrive, since he knows that it may take many hours for his relatives to travel.[19]

A difficulty with this reading of the *Mishnah Berurah* and the *Shulchan Aruch Harav* (as well as the *Aruch HaShulchan*) is that these authorities write that one is permitted to *hire* the non-Jewish messenger, a business act which involves a rabbinic violation distinct from *amira l'nachri*.[20] One could suggest that these authorities view the act of hiring a worker on Shabbat as a lower level rabbinic violation, on par with *amira l'nachri*, as both violations are learned out from the same verse in

17. Ibid. See also *Shut Machzeh Avraham*, *Orach Chaim*, section 46 who argues for this same prerequisite.

18. *Shulchan Aruch Orach Chaim* 306, *Mishnah Berurah* 41; *Shulchan Aruch HaRav* 306:22. This reading of the *Shulchan Aruch HaRav* and *Mishnah Berurah* is suggested by the son of the *Chelkat Yaakov* in his glosses on his father's responsa. See *Chelkat Yaakov Orach Chaim* volume 2, section 108, footnote 1.

19. Rabbi Ovadia Hedaya, *Sefer Yaskil Avdi Orach Chaim,* volume 7, section 22; note 2.

20. See *Shulchan Aruch Orach Chaim* 307:2.

Yishayahu.[21]

Among contemporary authorities, Rabbi Yehoshua Neuwirth in *Shmirat Shabbat K'Hilchata* rules that if a critically ill person requests the presence of his or her relatives, one is permitted to ask a non-Jew on Shabbat to contact them. Alternatively, a Jew himself may walk, even outside the *techum*, to beckon the relatives; however he stipulates that a Jew may not use the phone or travel in a cab to accomplish this goal.[22]

Thus, according to these authorities, the concern that a dying person's mental state may worsen if his request for his relatives is not respected is *not* a matter of true *pikuach nefesh*. This is because the danger stems from emotional distress and not the actual medical condition.[23] As such, even most rabbinic laws are not permitted to be violated. Still, for the sake of a sick or dying person's peace of mind, the Sages did allow minor transgressions such as *amira l'nachri*.

B. Torah Violations

Ruling in the other extreme, some halachic authorities indicate one may even violate Torah prohibitions to visit a sick or dying relative for fear that his mental state will deteriorate. The *Levush*, Rabbi Mordechai Yaffe, is the earliest opinion to

---

21. "*Mimtzo Cheftzecha v'daber davar*," *Yishayahu* 58:13.

22. Rabbi Yehoshua Neuwirth, *Shmirat Shabbat K'Hilchata* Chapter 38: 3. In note 19, R. Neuwirth cites the opinion of Rav Shlomo Zalman Auerbach that although a Jew may walk outside the *techum* to contact the sick person's relatives, he may not travel beyond 12 *mil* (1 *mil* = ~ 1 kilometer) which may involve a Torah level prohibition, as will be discussed later. In allowing the rabbinic violation of *techum*, Rabbi Neuwirth may prove to be more lenient that other authorities in this section and perhaps closer to those discussed later in section C.

23. Rabbi Moshe Feinstein also points out that although mental deterioration can be life threatening, this is only true for a healthier individual who might commit suicide as a result. This is not true of a dying or hospitalized patient. See *Iggerot Moshe Orach Chaim* volume 5, number 18.

support this view. In citing the ruling that one is permitted to send a messenger on Shabbat to beckon the family of a dying person, the *Levush* adds, *v'havei bichlal pikuach nefesh*, "and this is included in the concept of life-saving activity."[24] Using nearly the exact idiom two centuries later, the *Levushei Serad* states that this act is "included in the concept of life-saving activity which pushes away Shabbat (violations)."[25]

Rabbi Yosef Te'omim, the *Pri Migadim*, appears to adopt a similar position. In his *Eschel Avraham,* Rabbi Te'omim justifies the *Magen Avraham's* ruling that one may *hire* a messenger to contact a dying man's relatives by stating, "all life-saving activities permit even Torah violations, all the more so when it comes to rabbinic violations (i.e, hiring on Shabbat)."[26] While one might argue that Rabbi Te'omim is using hyperbole and only intends to justify rabbinic violations, Rabbi Shalom Mordechai Schwadron indicates in *Teshuvot Maharsham* that he understood Rabbi Te'omim's position as literally permitting even Torah violations.[27]

This approach – that one may violate even Torah violations in order to protect a sick person's mental state – is also supported by the *Rashba* and the *Rambam*. In his reponsa, the *Rashba* permits one to write an amulet on Shabbat itself for a sick person or woman in labor "if they need it, to calm their mental state."[28] *Rashba* permits this act, even though writing on Shabbat is a Biblical violation. The *Rambam* writes that one who sustains a snake bite or scorpion sting is permitted to recite an incantation over the wound site on Shabbat, even though this has no medical effect, "in order to calm his mental state."[29] The *Rambam* permits this act even though he normally

24. *Levush HaChur* 306:3.

25. *Levushei Serad* 306:12.

26. Rabbi Yosef Te'omim, *Eschel Avraham Orach Chaim* 306:18.

27. Rabbi Shalom Mordechai Schwadron, *Teshuvot Maharsham*, volume 4, section 54.

28. *Shut Rashba* volume 4, number 245.

29. *Rambam Hilchot Akum* 11:11.

rules that all incantations are Biblically forbidden as a form of idolatrous sorcery.[30]

Among contemporary authorities, Rabbi Yisrael Harfenes in *Nishmat Shabbat* endorses this approach. Regarding a hospitalized relative, he writes:

> If one evaluates that the sick person will certainly be scared and his mind will not be at rest until he knows that one of his relatives is present to help organize matters – it is permitted to violate Shabbat to calm his mind since this is considered soothing his mental state in connection to his medical care. About this the *Ketzot HaShulchan* writes that one is allowed to violate Shabbat even with Biblical violations.[31]

The *Nishmat Shabbat* does urge that one should try to find a non-Jew to drive him if this option is available without causing significant delay. He also suggests using a train or bus, even if one will need to carry money to pay the fare. When no other option is available, Rabbi Harfenes rules that one is allowed to violate even Torah prohibitions, given that many authorities consider this *pikuach nefesh,* as discussed.[32] However, he understands that the *Levush* and *Levushei Serad* would only be lenient in a case where the sick person himself

---

30. *Devarim* 18:11. *Rambam Hilchot Akum* 11:10.

31. Rabbi Yisrael Harfenes, *Sh"ut Nishmat Shabbat*, volume 5, section 230. R. Harfenes does not cite which *Ketzot HaShulchan* he is referring to. This is difficult as well, seeing as *Ketzot HaShulchan* number 135, *Badei HaShulchan* 1 writes that nowhere do we find that one may violate a Torah violation for a concern of mental deterioration.

32. In addition to citing the authorities discussed in this article, Rabbi Harfenes also notes that the *Sh"ut Tashbetz* (volume 1, number 54) deduces from the case of lighting a candle for a scared woman in labor that "one is allowed to violate Shabbat to calm a sick person's mind even when it does not relate directly to the medical care." He adds that he heard the *Chazon Ish* once permitted relatives to violate Shabbat to visit a patient after surgery to help his recovery.

requests the presence of his relatives.[33]

Rabbi Aryeh Broda in *Metzpeh Aryeh* goes a step further allowing one to violate Torah prohibitions to calm and comfort a sick relative, *even without the relative's request*. Writing in the 19th century, he claims this matter was quite common and that many Jewish courts of law were permitting relatives to travel on Shabbat to visit a sick relative. He argues that calming a sick person's mind is considered genuine *pikuach nefesh,* based upon the Talmud's teaching that one may light a candle to comfort a blind woman in labor.[34] He understands this case as being the true legal precedent to our discussion rather than Rabbi Levi's ruling that one may perform a *kinyan* on Shabbat with a *shechiv merah*.[35] Rabbi Broda supports his view with additional Biblical verses and Talmudic passages describing cases where visiting and comforting the sick improved recovery, ultimately leading Rabbi Akiva to state, "Whoever does not visit the sick is considered as if he shed blood."[36] Finally, Rabbi Broda explains that the lifesaving effects of visiting a sick relative are so significant that one may do so even without the relative's request. He believes the only reason that some authorities mentioned a request is for pragmatic reasons – the messenger needs to know whom to contact! Contacting close relatives such as a parent or spouse should be permitted even without any request.[37]

Thus, it appears these authorities understood the concern

---

33. *Sh"ut Nishmat Shabbat*, volume 5, section 230 and section 232.

34. *Shabbat* 128b. See also *Shulchan Aruch Orach Chaim* 330:1.

35. *Bava Batra* 156b as discussed above. Rabbi Broda explains that in the case of a *shechiv merah* only rabbinic violations were permitted because the level of mental anguish is different in each case. The case of *shechiv merah* only deals with monetary matters and the associated mental anguish may only lead to mild harm. However, the anguish of being without relatives when sick or dying is more severe and more likely to cause harm.

36. *Nedarim* 40a; *Berachot* 5b; *Beresheit* 33:10; *Mishlei* 16:15.

37. Rabbi Aryeh Broda, *Shut Metzpeh Aryeh*, volume 2, section 21.

that a sick or dying person's mental state may deteriorate if his request for his relatives is not obeyed as real *pikuach nefesh*. As such, if necessary, even Torah violations are permitted. This is in sharp contrast to the *Aruch HaShulchan* and others who believe that this potential for mental anguish is not a legitimate lifesaving matter.

C. All Rabbinic Violations

Other authorities have suggested a third approach, whereby any rabbinic violation is permitted for a person to visit a critically ill relative when requested. This approach is often attributed to the *Magen Avraham*. In commenting on the *Shulchan Aruch's* ruling allowing one to send a non-Jewish messenger to retrieve the dying man's relatives, the *Magen Avraham* adds that "one is even allowed to hire" the messenger.[38] However, in contrast to the *Mishnah Berurah* or the *Shulchan Aruch HaRav*, the *Magen Avraham* does not make any restrictions on this allowance, implying that the relatives would even be permitted to journey ON Shabbat if doing so would violate only rabbinic ordinances.[39] Similarly, in his 18th century halachic work, *Menorah HaTehorah*, Rabbi Uzziel Meisels rules that "one may hire a messenger or permit a Jew to travel if a non-Jew is not available, since [travel outside] the *techum* is also only a rabbinic violation."[40]

In the 19th century, this approach was followed in a controversial ruling by the *Sho'el U'Meshiv*, Rabbi Yosef Shaul

---

38. *Magen Avraham Orach Chaim* 306:18.

39. One might argue that perhaps the *Magen Avraham* is only permitting lower level rabbinic violations such as *amirah l'nachri* or *hiring* a non-Jew, but not ALL rabbinic violations. While this is plausible, it should be noted that some authorities consider hiring workers to be a more stringent matter, perhaps even a Biblical violation. See *Biur Halacha* on *Shulchan Aruch Orach Chaim*. 306 s.v. *V'davka*; *Sh"ut Chatam Sofer Choshem Mishpat* 185; *Sh"ut Chavot Ya'ir* 53.

40. Rabbi Uzziel Meisels, *Menorah HaTehorah,* 306:9, *Kanei HaMenorah* note 13.

Nathanson. When a local man received word that his wife was critically ill in another town, Rabbi Nathanson permitted the man to travel by horse on Shabbat to visit his sick wife. In permitting this travel, which involves rabbinic violations, Rabbi Nathanson cites the *Magen Avraham* as support. He also acknowledges that the *Shulchan Aruch's* wording implies that only *amirah l'nachri* is permitted, but counters that "riding [an animal] on Shabbat is also only a rabbinic violation." Thus, Rabbi Nathanson makes it clear that he believes all rabbinic violations are permitted in our case. Interestingly, Rabbi Nathanson realized the controversial nature of his ruling: He writes that he gave the husband a written copy of his ruling, and also advised the man to dress incognito when travelling so that no one would recognize he was Jewish and lead to *chilul Hashem*.[41]

This middle ground approach can already be seen in rulings centuries earlier. Writing in the 13th century, the *Hagahot Maimoniyot* states that one may hire a messenger to contact a dying man's relatives, but does not mention any restriction on the relatives from travelling on Shabbat.[42] In addition, as discussed above, the *Or Zarua* permitted one to hire a messenger on Shabbat but did not stipulate that the messenger be a non-Jew – the implication being that even a Jew himself may violate rabbinic law to prevent the mental deterioration of a critically ill person. Ultimately, this approach has strong precedent from the original ruling in *Bava Batra*, where the Talmud permitted the rabbinic violation of making a business transaction on Shabbat in order to prevent the mental anguish of a *shechiv merah*.

---

41. Rabbi Yosef Nathanson, *Sh"ut Sho'el U'Meshiv*, third edition, volume 2, number 180. Presumably, the husband found out his wife was ill before Shabbat, so that R. Nathanson was able to provide him with written permission.

42. *Rambam Hilchot Shabbat* chapter 2, *Hagahot Maimoniyot* number 5. See also *Hagahot Ashri Bava Batra* 9:36.

One may argue that the *Levush* and *Pri Migadim* agree with this approach, and did not truly intend to permit Torah violations in this case. When the *Levush* writes that sending for the relatives of a dying person is "*bichlal pikuach nefesh,*" (within the parameters of *pikuach nefesh*) he may mean to say that preventing mental deterioration is similar enough to *pikuach nefesh* to allow some halachic dispensations; however, in adding the word "*bichlal*" he also implies that such an act is not equivalent to true *pikuach nefesh.*[43]

Rabbi Eliyahu Shapira of Tykocin appears to understand the *Levush* this way in his commentary *Eliyah Zutah.* In his commentary, Rabbi Shapira deduces that "based upon this [*Levush*], it is permissible for even the Jew to travel outside the *techum* and certainly for the [returning] relatives."[44] If preventing the dying person's mental anguish was a true act of *pikuach nefesh*, it would be unnecessary for Rabbi Shapira to adduce any specific dispensation from the *Levush*, as *pikuach nefesh* is grounds for almost all violations. Similarly, it is gratuitous for the *Pri Migadim* to justify the *rabbinic* violation of hiring a messenger if preventing mental anguish was sincerely defined as *pikuach nefesh*. Rather, he may simply be using hyperbole in comparing our case to a lifesaving act, but does not intend to permit Torah violations.[45]

One may even suggest that the *Mishnah Berurah* and the *Shulchan Aruch HaRav* permit all rabbinic violations to visit a sick or dying relative. Although both authorities only allow a

---

43. *Levush HaChur* 306:3. The same argument is true for the *Levushei Serad* (306:12) who uses the same phrase.

44. Rabbi Eliyahu Shapira, *Eliyah Zutah* number 4 on *Levush HaChur* 306:3. As mentioned above, in most cases travelling outside the *techum* only involves a rabbinic violation.

45. See *Sh"ut Minhat Yitzchak* Volume 4, section 8 number 9 where Rabbi Yitzchak Yaakov Weiss appears to understand the *Pri Migadim* in this way. See also *Ketzot HaShulchan* number 135, *Badei HaShulchan* 1 who writes that nowhere do we find that one may violate a Torah violation for a concern of mental deterioration.

dying person's relative to visit *after Shabbat*, this may be based on the assumption that the relatives are travelling from a great distance. Although travelling outside the *techum* is only a rabbinic violation, according to some opinions travelling more than 12 *mil* (1 *mil* = 2000 *amot*, or ~ 1 kilometer) may involve a Torah violation.[46] If the relatives were travelling a shorter distance – perhaps even the *Mishnah Berurah* and the *Shulchan Aruch HaRav* would permit them to visit their relative ON Shabbat.[47]

Among contemporary authorities, Rabbi Shmuel Wosner in his respona *Shevet HaLevi* appears to advocate for this middle approach. He writes, "I am not inclined to simply permit Torah prohibitions for the concern of a sick person who does not want to be alone, unless there are significant grounds for concern that this will lead to the possibility of a lifesaving matter."[48] Rabbi Wosner's remarks highlight the tension in this approach. These authorities are willing to entertain the idea that mental deterioration may become a medical concern. Therefore, they are willing to permit rabbinic violations to prevent it; however, they are uncomfortable with the idea that such a remote possibility should be an indication to violate Shabbat on a Biblical level in every case.[49]

D. Conclusion – Case by Case

The above discussion demonstrates the wide variety of halachic opinions on the permissibility of violating Shabbat for the sake of visiting a sick relative to calm his or her mental

---

46. See *Rambam*, *Hilchot Shabbat* 27:1; *Rif* on *Eruvin*, end of chapter 1, p. 5a.

47. This approach is suggested by Rabbi Aharon Liberman, "Travel on Shabbat for the sake of a sick person requesting that his family visits him," *HaBerachah* Volume 5, Jerusalem 2010, pp. 151-161.

48. Rabbi Shmuel Wosner, *Shut Shevet HaLevi*, volume 8, number 65.

49. Please see the end of section 2 in this article, where the *Tzitz Eliezer* and the *Nishmat Avraham* also appear to permit all rabbinic violations in the case of enabling one to visit a sick relative on Shabbat for emotional support.

state. However, at the root of the dispute is not a disagreement about the laws of Shabbat but rather each authority's understanding of the level of danger involved in being lonely or scared when one is critically ill. This is obviously something that can change depending upon the level of illness and the particular constitution of each person. For this reason, both the *Orchot Chaim* and the *Kaf HaChaim* suggest that this matter be decided by the local rabbinic authority on a case-by-case basis to prevent widespread Shabbat desecration in unnecessary cases.[50] Similarly, Rabbi Yitchak Yaakov Weiss in *Minchat Yitzchak* rules that this halacha in practice depends upon the unique circumstances of each case.[51]

Section 2: Contemporary Challenges

Calling a Cab vs Computer Apps (i.e, Uber)

Modern advances in technology and communication raise additional halachic questions regarding Shabbat violation for the sake of the emotional well-being of the critically ill. Having established that many authorities (those is sections B and C) would permit one to violate a rabbinic prohibition to visit a sick relative and prevent mental anguish, one could therefore travel via taxi or public transportation to the hospital in such a case. Such travel would in most cases only involve rabbinic violations, such as travel outside the *techum*, business transactions, and *amira l'nachri*. As these matters are time-sensitive by nature, one is more likely to prefer the expediency

50. Rabbi Nachman Kahane, *Orchot Chaim*, *Hilchot Shabbat* section 306 number 13; Rabbi Yaakov Sofer, *Kaf HaChaim* section 306, notes 76 and 79. See also *Sefer Yaskil Avdi*, *Orach Chaim* volume 7, section 22, note 5.

51. Rabbi Yitzchak Yaakov Weiss, *Sh"ut Minchat Yitzchak* volume 4, number 8, note 9. Rabbi Weiss highlights that even the *Aruch HaShulchan* – who seems to take the more stringent approach – explicitly writes that if the doctors state there is genuine danger if the person's request for his relatives is not followed, one may treat this case like any other critically ill patient (for whom one may violate even Torah prohibitions).

of a taxi over travel via bus or train.

Although many authorities appear to permit such rabbinic violations, one would seemingly still be required to minimize the level and extent of Shabbat violation as much as possible – as with all matters of *pikuach nefesh* – provided this will not cause a significant delay.[52] This raises the question of whether using a smartphone or tablet application to arrange transportation, such as Uber, is preferable to calling a cab over the phone. On the one hand, using such transportation applications would appear to involve *physically* less Shabbat violations, since one can contact a driver with a few taps on a screen. On the other hand, one must consider that touch screens still involve the use of electricity, creating numerous electrical impulses to transmit signals back and forth from the screen to the processor. While the exact prohibition involved in using electricity on Shabbat is a subject of great debate, the strong majority of halachic authorities rule that the prohibition is only rabbinic, provided that incandescent lights are not involved.[53] As most cell phones or home phones use electricity without incandescent lights, using a phone to call a cab would also involve a similar level of Shabbat violation. Both methods also involve additional rabbinic prohibitions aside from electricity. Typing or forming images on the smartphone involves a violation of *ketiva* (writing) on Shabbat;[54] however, this would only be a rabbinic violation since screen images are only temporary (*davar she'eino mitkayem)*.[55] Using a phone may

52. *Shulchan Aruch Orach Chaim* 328:16; *Shmirat Shabbat K'Hilchata* Chapter 32:28-29.

53. The *Chazon Ish* famously rules that completing an electrical circuit (even without incandescent lights) involves a Torah prohibition. For more on electricity on Shabbat, please see Rabbis Michael Broyde and Howard Jachter,"The Use of Electricity on Shabbat and Yom Tov," *The Journal of Contemporary Halacha and Society*, Volume 21 (Spring 1991). pp. 4-47.

54. *Shabbat* 103b; *Rambam, Hilchot Shabbat* 11:9-10; *Shulchan Aruch Orach Chaim* 340; *Mishnah Berurah* 22.

55. *Shabbat* 104b; *Rambam, Hilchot Shabbat* 11:15; *Shulchan Aruch Orach Chaim* 340; *Mishnah Berurah* 22. For more halachic discussion regarding

also be a rabbinic violation of producing noise on Shabbat, *hashma'at kol*, since it using microphones and speakers.[56] As both methods of contacting a car driver create innumerable electrical impulses along with additional rabbinic violations, distinguishing between the two would appear to be halachically inconsequential.[57]

However, two important factors should be considered when deciding between "calling" a cab and using a transportation "app." 1) Even when performing a rabbinic violation, one should still attempt to make use of the concept of *shinui*, performing a violation in an unconventional manner, to further minimize the level of violation.[58] Thus, for example, one should try to operate the phone or touch screen with the back of a spoon or with one's knuckle. If one method of contacting a driver makes the use of *shinui* more feasible, this would be the preferable method.[59] 2) Again, as these matters relating to the critically ill are time sensitive, one should give preference to whichever method will procure a driver more quickly.

Video Conferencing, such as Skype, with a Critically Ill Relative

If, for pragmatic reasons, one cannot be physically present with a critically ill relative in need of vital emotional support,

---

writing on a computer screen on Shabbat for medical purposes, please see Raphael Hulkower, "Pens, Pads, and PCs – Writing on Shabbat for Medical Care," *The Journal of Contemporary Halacha and Society*, Volume 65 (Spring 2013). pp. 5-54.

56. *Shabbat* 18a and *Rashi* ad loc; *Shulchan Aruch Orach Chaim* 252:5 and 338:1. For more discussion on the prohibitions involves in using a phone on Shabbat, please see Rabbi's Broyde and Jachter article cited above.

57. See *Ramo's* glosses to *Shulchan Aruch Orach Chaim* 328:16 and *Mishnah Berurah* 44 ad loc.

58. *Ramo's* glosses to *Shulchan Aruch Orach Chaim* 328: 12; *Shmirat Shabbat K'Hilchata* Chapter 32:29.

59. Thus, for example, Uber might be preferable if one already has the hospital's address saved so that only a few easy knuckle taps are necessary to arrange transportation.

would there be a halachic argument to allow video conferencing with such a relative? Such a scenario could arise if a loved one is stricken ill out of town, or if one's relatives live too far away to travel, or are physically disabled. To address this question requires considering what prohibitions are involved in using such communication technology.

In most cases, video conferencing involves multiple rabbinic prohibitions. First, as mentioned, the use of electrical devices involves a rabbinic violation according to most authorities since smartphones and tablets do not make use of incandescent lights. Second, the production of a video image may be a violation of *ketiva* on Shabbat, as this *melacha* includes the prohibition to make any meaningful images.[60] However, as video images are temporary in nature, *davar she'eino mitkayem,*[61] such an act would only be a rabbinic violation of *ketiva*, not a Torah violation.[62] Lastly, such communication would involve the rabbinic prohibition of producing noise, *hashma'at kol*, as discussed above regarding phones. Accordingly, if one genuinely believed that such video communication would prevent the mental deterioration of a critically ill patient this would be permissible according to those authorities who permit rabbinic or Torah violations. However, those authorities such as the *Shulchan Aruch* and the *Aruch HaShulchan*, who only permit *amira l'nachri*, would forbid such communications. For these reasons, video conferencing would appear to be halachically as challenging as taking a taxi or public transportation to the hospital.

---

60. *Shabbat* 103b; *Rambam, Hilchot Shabbat* 11:9-10; *Shulchan Aruch Orach Chaim* 340, *Mishnah Berurah* 22.

61. This is true on multiple levels. On a macro level, the image itself changes during video recording. On a micro level, the screen images themselves are comprised of tiny flickerings of light emitted at speeds too fast for the naked eye to discern.

62. *Shabbat* 104b; *Rambam, Hilchot Shabbat* 11:15; *Shulchan Aruch Orach Chaim* 340, *Mishnah Berurah* 22.

In addition to these halachic concerns, there are multiple practical concerns which make video conferencing less desirable than live visits. First, as much as social media has influenced our lives, there is still no replacing the value of emotional support shared live in person. Skype or video chat cannot compare to even a silent presence at bedside or holding a loved one's hand. It is conceivable that even those authorities who permit rabbinic or Torah violations would only do so to add the value of a live visit by relatives but would not find enough value in video conferencing to condone Shabbat violations. Second, many critically ill patients are weak and sometimes confused. They are unlikely to be able to operate a smartphone or tablet even if they have one available to them. The frustration of a lost attempt to connect with relatives could also be stressful if the device malfunctions on either end. In such a case, one might consider whether speaking over the phone, which also involves multiple rabbinic violations, would be a viable way to calm the emotional state of the ill person. Third, as will be discussed in Section 3, there are significant benefits for critically ill patients in having relatives physically present in the hospital. However, should one be physically unable to travel to the hospital and there is significant concern for the patient's mental state, one is advised to discuss with their local halachic authority if using a phone or video conference is a permissible alternative.

A Farewell Message

If a dying person is unable to reach his family on Shabbat, would he be permitted to make a voice or video recording for his relatives to view after Shabbat? Making such a recording would involve multiple rabbinic violations as described above, such as the use of electricity and temporary writing in the case of a video. Presumably *hashma'at kol* would not be relevant since the recording will not be replayed on Shabbat. If a non-Jewish hospital staff member is kind enough to perform the recording, this would downgrade some of the prohibitions to

amira l'nachri alone, although the patient may still be using electricity if the software is voice activated. If only *amira l'nachri* is performed, perhaps such an act would be permitted according to all halachic opinions – if there is a genuine concern for mental deterioration.

While this idea is fascinating in theory, in practice this scenario is quite rare. Rarely are doctors able to predict when a conscious patient will pass away. In the cases where death truly is imminent, patients are usually too sick to produce any coherent messages. However, if such a case did ever occur and those present at bedside strongly believe that such a recorded message would prevent the mental anguish of a critically ill patient, one could theorize that asking a non-Jew to record this message is a modern equivalent to asking a non-Jewish messenger to travel and contact one's relatives.

Further Applications – Where is the Limit?

The above discussion raises the question of where to limit the concept of permitting Shabbat violation to prevent the mental deterioration of a critically ill person. While true *pikuach nefesh* is grounds for violating even Torah prohibitions, many modern authorities are concerned that the notion of violating Shabbat for mental anguish may lead to unnecessary Shabbat desecrations.[63] As Rabbi Shlomo Zalman Auerbach once questioned, "Can it be permitted to carry in an area without an *eruv* in order to bring a newspaper or book to calm a sick person?!"[64] Rabbi Auerbach's implication is clear – one is not permitted to perform any Shabbat violations simply to increase the comfort of a sick patient. Such dispensations are only given when there is a genuine concern that the sick person's mental anguish will impact their medical condition.

---

63. See section 1d above.

64. *Shmirat Shabbat K'Hilchata* Chapter 32, note 82. Also quoted in *Nishmat Avraham, Orach Chaim* 306:9

Even when halachic violations are permitted, some authorities have suggested an important distinction. When the patient's mental anguish relates directly to medical care, one may even perform Torah violations. Thus, for example, if a critically ill person believes he needs a certain treatment, one may violate Shabbat if necessary to provide it – even if the doctors do not believe it is necessary (and thus it impacts only emotional wellbeing). However, if a sick person's mental anguish is not directly related to medical care, one may only perform rabbinic violations to sooth him. This is why one is permitted to make a business transaction with a *shechiv merah* or perform rabbinic violations to enable relatives to visit a critically ill person. This approach is offered by both the *Tzitz Eliezer* and the *Nishmat Avraham*.[65]

Section 3: If Visiting will Improve Medical Care

The previous sections addressed the halachic literature regarding a case where the sole purpose of the visiting relatives is to provide emotional support. However, there are other equally significant roles that relatives play in visiting hospitalized patients. *First,a relative can act as a spokesman for a patient*. In our modern age of complex and advanced medical care, a patient's medical history can significantly impact the medical management. Accurately knowing a patient's past medical problems or current list of medications can improve medical care. Sick patients, especially the elderly, are often unable to provide this information to the medical team. In these cases, a visiting relative can provide essential collateral information. *Second, relatives can advocate for a patient*. Not all sick patients can advocate for themselves properly. Patients may have new or old cognitive deficits preventing them from communicating their needs, such as pain. They may also have

65. Rabbi Eliezer Waldenberg, *Sh"ut Tzitz Eliezer* volume 8, chapter 15, section 9; Rabbi Dr. Avraham Avraham, *Nishmat Avraham, Orach Chaim* 306:9.

difficulty contacting their nurse for assistance or communicating with doctors about decisions in their care. Again, this is especially true for the elderly. A visiting relative can be an essential patient advocate, organizing and coordinating the medical attention that a patient desperately needs.

The halachic literature addressing these additional roles for visiting relatives is sparse, given that these roles have only become important in the era of hospitalized medicine. Still, two contemporary responsa works discuss this important situation. In his *Shevet HaLevi*, Rabbi Shmuel Wosner was asked: *When a sick person is sent to the hospital, is one allowed to contact the relatives via phone to let them know about the development?* Rabbi Wosner divides the case into two situations – where the patient is still *conscious* and where the patient is *unconscious*. When the patient remains conscious, Rabbi Wosner believes that the primary purpose visiting relatives serve is to give emotional support to prevent mental deteriorations. As discussed in the first section of this article, in this case Rabbi Wosner is not inclined to permit any Torah violations of Shabbat (but therefore implies that rabbinic violations would be acceptable).[66]

When the sick person is *unconscious*, Rabbi Wosner takes a different approach, stating "in this case it is clear-cut that there is a mitzvah to contact the family." He explains that the purpose of notifying the family is for them to come to the hospital to engage with the doctors or to solicit specialists. Without the family's presence, Rabbi Wosner fears that the sick person may not be receiving adequate medical care, as "it is known that if the hospital staff sees that no one is concerned about the welfare of a patient or takes interest in them, at times this may lead to disregard for the patient's wellbeing." He adds that this is especially true for elderly patients, where "simple, nonobservant physicians are accustomed to giving up

66. *Sh"ut Shevet HaLevi*, volume 8, number 65.

hopes of recovery quickly." For these reasons, Rabbi Wosner believes that when a patient is unconscious the family's presence actually serves a role directly connected to the medical care – truly *pikuach nefesh.* In this case, Rabbi Wosner makes no limitations upon what violations are permitted to enable relatives to visit, indicating that even Torah violations may be violated if necessary.[67]

In *Nishmat Shabbat*, Rabbi Yisrael Harfenes take a similar but more nuanced approach to the *Shevet HaLevi*. Rabbi Harfenes as well expresses strong concerns that patient care is suboptimal without family present. He remarks that when family is not present to oversee the medical treatment, the care may not be adequate and the staff is reluctant to provide expert consultations. Therefore, he rules that if a patient is taken to the hospital without anyone who knows him well, his relative is certainly permitted to travel to the hospital. Even if someone does accompany the patient, if that person does not know the patient's background well, Rabbi Harfenes permits another relative to travel to the hospital to better communicate and organize medical care. It is important to note that Rabbi Harfenes does NOT distinguish between a conscious or unconscious patient.[68]

What if the patient is accompanied by a non-relative who is familiar with the patient or with a member of Hatzalah? Rabbi Harfenes expressed strong confidence in the members of Hatzalah, "who have such self-sacrifice that they will stay with a patient until he receives appropriate medical attention, and will assist in organizing care." In this case, Rabbi Harfenes states that the relatives may not violate Torah prohibitions to visit the patient, but may travel if they are driven by a non-Jew (thereby violating only rabbinic prohibitions).[69] He justifies

67. *Sh"ut Shevet HaLevi*, volume 8, number 65.

68. *Sh"ut Nishmat Shabbat*, volume 5, section 230.

69. At one point in the piece, R. Harfenes writes parenthetically that one should stipulate not to pay the non-Jewish driver on Shabbat. However, as

this ruling by reasoning that even when Hatzalah bring the patient, the care is still further improved when family is present. Finally, consistent with his opinion in section 1 of this article, Rabbi Harfenes adds that if the family is genuinely concerned that the patient will be scared if left alone without family present, one may even violate Torah prohibitions (such as driving oneself) if a non-Jew is not available.[70]

While one would hope these concerns about suboptimal care in modern hospitals are the exception to the rule, they raise an important psychosocial observation. Human interactions are greatly impacted by the knowledge that someone has social support. This observation is anything but modern. In fact, the *Tiferet Yisrael*, in his commentary on the Mishnah, sees this lesson in the laws of *Eglah Arufah*. When a murdered corpse is found but a perpetrator cannot be identified, the nearest town's elders axe the neck of a cow. Afterward, they recite, "our hands have not spilt this blood, and our eyes did not see."[71] The Mishnah explains that obviously the elders did not kill this person, but rather they are declaring, "we did not leave him without food; we did not send him off without escort."[72] On this point, the *Tiferet Yisrael* elaborates, "had they sent him out alone, it might be possible that *this is why he was killed* – for bandits thought he was *a person whom no one cares about* to avenge him.[73] When relatives are present by the hospital bed, they show the sick person that he or she is loved. Perhaps as important, they remind the hospital staff about the patient's humanity – this sick person is a mother, a father, a sister or a brother with a whole family wishing for his or her health.

---

he does not list this limitation in his initial summary remarks, it remains unclear if this is an absolute requirement or simply the most ideal method.

70. *Sh"ut Nishmat Shabbat*, volume 5, section 230.

71. *Devarim* 21:7.

72. Mishnah, *Sotah* 9:6.

73. Rabbi Yisrael Lipschitz, *Tiferet Yisrael* on Mishnah *Sotah* 9:6.

Further Reading

This article has attempted to address extensively the matter of violating Shabbat to visit a hospitalized relative. How a patient or relative must behave halachically in a hospital on Shabbat is a topic deserving of its own separate attention. Many matters are discussed in chapter 40 of *Shmirat Shabbat K'Hilchata.* A highly practical and extensive English review of this topic has recently been compiled by Rabbi Jason Weiner entitled "Guide to Traditional Jewish Observance in a Hospital."

Conclusion

When relatives visit a sick person, they provide essential emotional support. *Chazal* recognized the importance of this act in their emphasis on visiting the sick.[74] This principle attains such importance that at times the Rabbis even permitted Shabbat prohibitions in order to preserve a sick person's mental state. Over the centuries, halachic authorities have debated what level of violations should be permitted for this purpose of visiting a sick relative. At the heart of these disputes lies the question of how dangerous one views the impact of mental deterioration. Those who see mental anguish as mere physical suffering may only permit minor violations such as *amira l'nachri*. Others see the potential for life endangerment and permit other rabbinic or even Torah prohibitions on grounds of *pikuach nefesh*.

In modern times, some halachic authorities have noted that relatives provide more than emotional support when they visit a *hospitalized* patient. They may directly impact a sick person's medical care by providing important medical information, as well as advocating and navigating on behalf of an incapacitated patient. In these cases, the act of visiting a sick relative may take on the status of *pikuach nefesh* even according

74. See *Nedarim* 40a.

to those authorities who might otherwise view mental anguish alone as a matter of lesser importance. Just as halacha permits one to light a candle for a woman in labor to reassure her that her needs will to be easy to see, so too, relatives are the candle lights to patients in the hospital – illuminating their medical situation to hospital staff.

These laws of *pikuach nefesh* and Shabbat are complex and depend upon the details of each case. A competent halachic authority should always be consulted on these matters if they should, G-d forbid, become practical issues.

Kashrut Rulings by Rabbi Belsky, *zt"l*

In January, the Jewish community suffered a severe loss, with the passing of the renowned and beloved Rabbi Chaim Yisroel Belsky, zt"l. Aside from his erudition and his depth of Torah learning and leadership, Rav Belsky's expertise in the laws of kashrut and his ability to apply ancient principles to innovations in the technology of food preparation enabled him to make a singular contribution to strengthening kashrut observance.

The following sampling of kashrut-related rulings given by Rabbi Belsky are presented as a tribute to the important role which he played in American kashrut during his close to three decades as Posek *for the OU's Kashrut Division. Many individuals involved in kosher food production [not only those in the OU], consulted with Rav Belsky and treasured his advice. The rulings recorded herein were originally written up and distributed by and to kashrut professionals in 2012 as a "*zechut*" when Rabbi Belsky was ill, and they are now presented here as a memorial to that significant element of his life. Brief explanatory notes and sources have been added in the footnotes. The names noted in the footnotes indicate which Rabbi reported Rav Belsky's ruling.*

Basar B'chalav

Aged Cheese[1]

1. The *Ashkenazic minhag* (custom) is that after eating "hard cheese" one should wait 6 hours before eating meat, and *Shach* says that any cheese which is aged more than 6 months qualifies for this characterization.[2] Rav Belsky clarified that

1. Submitted by Rabbi Dovid Cohen.
2. *Ramo* Y.D. 89:2 as per *Shach* 89:15.

this applies only to cheeses which truly "age" for 6 months and develop the pungent taste and hard texture which require the 6-hour wait. However, a standard packaged cheese (e.g., mozzarella) which happened to sit in the refrigerator for 6 months is not aging in any meaningful manner and is not considered a "hard cheese" in this context.

Cheeseburger with Pareve Cheese[3]

2. The halacha is that someone who serves "almond milk" (an ancient source of "pareve" milk) at a meat meal must put some almonds on the table as a *heker* (indication) that the milk is pareve.[4] Rav Belsky said that this subtle *heker* is not one that everyone will notice, yet it is still considered "good enough" for these purposes. Accordingly, he ruled that if a restaurant is serving cheeseburgers made with real meat and pareve cheese, it is enough for them to print "made with pareve cheese" on their menu and receipts, even though some people might never pay attention to the notice.

Dairy Bread[5]

3. Halacha states that bread must always be pareve, lest it be used inadvertently with a meat (or dairy) meal.[6] In most circumstances, this precludes the certification of dairy breads even if all of the ingredients are kosher. Rav Belsky held, however, that such bread is not "*treif*", and equipment used to produce non-certified dairy bread which contains only kosher (albeit dairy) ingredients may still be used to produce kosher dairy cakes and other products that are allowed to be dairy.

---

3. Submitted by Rabbi Dovid Cohen.
4. *Ramo* Y.D. 87:3.
5. Submitted by Rabbi Zushe Blech.
6. *Shulchan Aruch* Y.D. 97:1.

Heker[7]

4. If two people are eating at the same table with one eating meat and the other eating milk, there must be a *heker* on the table so that they do not accidentally eat from one another's plates.[8] Rav Belsky said that the *heker* must be large enough to be noticed and thereby serve as a reminder.

Melted Hard Cheese[9]

5. *Yad Yehudah*[10] states that eating hard cheese softened by cooking/baking does not necessitate waiting six hours. Rav Belsky maintains that the *Yad Yehudah's* leniency refers to cheese melted **into** a food, not to cheese melted **onto** a food that is not integrated with the food to become part of the food.

Berachot

Cheerios[11]

6. Rav Belsky holds that Cheerios are not *pat* ("bread"). This is because Cheerios are made by cooking the oats. Although afterwards they undergo a drying process, Rav Belsky held that since this drying does not cause *krimat panim* (forming of a crust/ caramelization) but rather just dries out the O's to give them crunch, they are more similar to bread that is baked by leaving it out in the sun. On such bread one does not say *hamotzi*. This has important implications for *keviat seuda*—"establishing a meal". According to this, if one ate a meal's worth of Cheerios they would still only make a preliminary blessing of *mezonot* and a concluding prayer *al hamichya*. However, he thought there was reason to be strict (*machmir)* and avoid such situations. Furthermore, according to this

7. Submitted by Rabbi Eliyahu Ferrell.
8. *Shulchan Aruch* 88:2.
9. Submitted by Rabbi Eliyahu Ferrell.
10. *Yad Yehudah* 89:30 (*Katzar*), cited by *Darchei Teshuvah* 89:43.
11. Submitted by Rabbi Eli Gersten.

ruling, one may eat Cheerios during the interval between Rosh Hashanah and Yom Kippur (*aseret y'mei teshuva)*, when there is a *minhag* (custom) to be careful only to eat bread baked by a Jew-- *pat Yisrael*.

Wraps[12]

7. When Rav Belsky came to Toronto a few years ago, we had the honor to host him for lunch, at which time we served a variety of "wraps". Rav Belsky recited the blessing *borai minai mezonot* on the wheat-based wraps.[13]

Bitul

Bitul of a *Davar Pagum*[14]

8. There is a general halacha that ingredients that are *pagum* (foul tasting) are considered "nullified" if they constitute only a minor part of a mixture-- *batel b'rov*.[15] Rav Belsky felt, however, that this only applies where the *pegimah* is still noticeable in the final mixture. In situations where the offending material is diluted to the point where it cannot be detected – but not *batel b'shishim* (less than 1/60 of the mixture) – then it (the ingredient which contains the *davar pagum*) is not *batel*.

Darko L'Hishtamesh B'shefa[16]

9. Under certain circumstances, large utensils that have been

12. Submitted by Rabbi Tsvi Heber.

13. See, however, http://bit.ly/wZuF7l (point "g") and http://bit.ly/zbjkgW (page 9) where somewhat different rulings on this issue are presented in the name of Rabbi Belsky.

14. Submitted by Rabbi Zushe Blech.

15. See *Shulchan Aruch* Y.D. 104 and 122.

16. Submitted by Rabbi Zushe Blech.

used for non-kosher products may be used for kosher productions without *kashering*. The basis of this *heter* (leniency) is that such utensils always contain product that is more than 60 times the volumetric displacement of the material of the utensil, thereby rendering any non-kosher elements absorbed *batel*—i.e., effectively nullified.[17] Rav Belsky felt that this *heter* (where applicable) applies only where the amount of non-kosher flavor absorbed by the utensil is minimal-- i.e., the non-kosher material that had compromised its kosher status had only a small amount of *treif* ingredients. If the utensil had been used to cook a fully non-kosher product, then this *heter* (technically termed *darko l'hishtamesh b'shefa)* would not apply.

Estimating *Bitul* in a Tank[18]

10. In a situation where kosher food was processed in a non-kosher tank, the proper way of calculating if the non-kosher *b'liot (*absorbed materials*)* are rendered null because they are less than 1/60 of the mixture (*batel b'shishim)* is to compare the volume of the metal which comprises the tank's walls to the volume of the kosher food (rather than its weight). Rav Belsky created the following relatively easy formula to calculate an estimate of this type of ratio for a cylindrically shaped tank: [R * H * F] / [A (2H + R)] where A = thickness of the metal walls of the tank (in inches); F = percentage of the tank which is Full (e.g. 1 = 100%, 0.8 = 80% full); H = Height of the tank (in inches); R = interior Radius of the tank (in inches). For an explanation of the basis for this formula and examples of how it is used, see http://bit.ly/OU-N-16.

Non-Dairy Creamer[19]

11. I once asked Rav Belsky if someone can be *mevatel*

17. See *Shulchan Aruch* Y.D. 99:7 and commentaries ad loc.
18. Submitted by Rabbi Dovid Cohen.
19. Submitted by Rabbi Yosef Wagner.

(dilute) milk *b'shishim* in one's coffee during the six hour waiting period after eating meat (i.e., add some non-dairy creamer that has a little bit of milk in it). He said yes, as the *minhag* is on the **person** to wait six hours, and thus his action would not violate the prohibition to intentionally dilute forbidden items (*ein mivatlin issur l'chatchilah*).

Cosmetics & Toiletries

Mouthwash[20]

12. The opinion of the *Taz* 98:2 is that one is not allowed to taste a non-*kosher* food with one's tongue because the person may come to eat it. Many mouthwashes contain a large amount of glycerin (which may be *treif*) which gives a refreshing taste, and Rav Belsky said that since the mouthwash is sometimes swallowed, the above ruling of *Taz* applies and one should therefore only use mouthwash that is free of sensitive ingredients or has a *hechsher* (kosher certification). [Rav Belsky also did not accept the argument that mouthwash is inedible (*nifsal m'achila)*].

Soap[21]

13. Rav Belsky maintains that it is worthwhile to be concerned for those opinions who are *machmir* regarding *sichah keshesiah* (rubbing non-kosher food into one's body is as forbidden as eating it) and therefore to use only kosher body soap. I explained to Rav Belsky that "out of town" it is difficult to find kosher soap. To this he responded that as relates to this question, one could be lenient and assume that all liquid body/hand soap is acceptable even if it contains glycerin.

---

20. Submitted by Rabbi Moshe Dovid Lebovitz.

21. Submitted by Rabbi Yissachar Dov Krakowski.

Toothpaste[22]

14. Rav Belsky said, based on a ruling from Rav Yaakov Kaminetzky, that when the primary ingredient in toothpaste was inedible calcium carbonate (chalk), the other ingredients were effectively nullified because they are minor additives (*batel b'rov)* and one could use any toothpaste. However, recently, in many types of toothpastes, calcium carbonate has been replaced with hydrated silica which comprises less than 50% of the paste. Since the other ingredients are regular foods – water, glycerin and sorbitol – one cannot rely on the principle of *bitul b'rov* that they have been nullified. Therefore Rav Belsky said that one should only use a toothpaste that does not contain glycerin or has a *Hechsher (*kosher certification).

Fish

Hot Smoked Fish[23]

15. Rav Belsky is of the opinion that even though theoretically hot smoking does not require that it be done by Jews (*bishul Yisrael)* because it is treated like food which was smoked,[24] the current process of hot smoking is not the same as that of the Gemara, for the cooking and the smoking elements of the present-day process are not the same (the heat is not from the smoke, rather from a separate cooking element). Practically, this is not a concern on most smoked fish since it is edible after the brine step, before the cold smoking step (even if the cold smoking is not separate from the hot smoking process but one continuous process). Each fish and manufacturer should be evaluated separately, by having samples – before and after hot smoking – tasted by someone

22. Submitted by Rabbi Moshe Dovid Lebovitz.

23. Submitted by Rabbi Chaim Goldberg.

24. See *Shulchan Aruch* 113:13.

familiar with fish. [To see Rav Belsky's *teshuva*h on this topic, see http://bit.ly/OU-A-142.]

Menhaden Oil[25]

16. The menhaden is a small, oily fish from which a refined fish oil is produced. The oil is commonly used in Europe to produce margarine and other products, and has made some inroads in the United States due to its purported health benefits. Due to the small size of the fish, they are not processed by hand; rather, they are caught in large nets and dumped into cookers for processing. While the menhaden is a kosher species of fish, it is impossible to check each fish being processed to ensure that non-kosher by-catch was not caught at the same time. Rav Belsky ruled that if the company has systems in place to prevent any significant amount of by-catch, then one may use such oil, since any possible contamination would be rendered very much nullified (*batel).*

Salmon[26]

17. By its appearance alone, one cannot generally identify the species of fish from which a filet was produced. In most circumstances, Rav Belsky does not permit use of (uncertified) fish filets unless the skin is still attached, which would allow one to check for the scales necessary to determine that it is kosher. However, he considers red salmon to be kosher even without such evidence, because he holds that it has been reliably determined that **all** species of red-fleshed fish are kosher. He believes that this proof is even stronger – and unrelated – to the position quoted by the *Beit Yosef*[27] regarding red fish roe. While species other than salmon may be "colored" by feeding them food containing red dyes, such fish

25. Submitted by Rabbi Zushe Blech.

26. Submitted by Rabbi Zushe Blech.

27. *Bet Yosef* towards the end of Y.D. 83.

are invariably of the salmon family and kosher-feeding red food coloring to a (non-kosher) catfish would not create a similar red color in its flesh. Soaking or painting a red color on an otherwise colorless fish would also not yield the red color characteristic of salmon.

Herring[28]

18. Rav Belsky feels that most fish filets require constant kosher supervision (*Hashgacha Temidit)*, since one cannot usually verify the kosher status of a filet once the skin has been removed. However, he has ruled that herring filets may be used, because the silvery skin on the outside of the filet is a *siman muvhak* (clear and strong indication) that it is herring (a kosher fish).

Gevinat Yisrael

Cheese owned by Jews[29]

19. Rav Belsky held that the extraordinary rule of *Gevinat Akum* only applied to cheese that was owned by a non-Jew (see below). In situations where a Jew actually owns the cheese company – including the milk and rennet – he felt that it could be considered kosher without having a Jew add the rennet, because it was quintessentially *Gevinat Yisrael*.

Cottage Cheese[30]

When milk curdles, it forms curd and whey, and cheese is produced by separating the curd. Since many types of cheese are produced using an animal enzyme preparation known as rennet to create the curd, *Chazal* required – in a rule known as *Gevinat Akum* – that someone Jewish be involved in the cheese

28. Submitted by Rabbi Zushe Blech.
29. Submitted by Rabbi Zushe Blech.
30. Submitted by Rabbi Zushe Blech.

production. [The custom is to require that the Jew actually add the rennet as required by the *Shach*.] The curd of cottage cheese, however, is produced by acidifying the milk, and rennet (if used) plays an insignificant role. Rav Belsky felt that there never was a *minhag* to consider cottage cheese to be included in the prohibition of *Gevinat Akum*, and allowed the certification of cottage cheese (as well as cream cheese and ricotta cheese) provided all of the ingredients used were kosher.

Insects

Copepods in New York City Water[31]

20. Rav Belsky permits drinking New York City water without a filter. His primary reason is that the reservoir, by definition and in function, is a *bor* (water pit) and therefore the creatures that develop there are permitted.[32] Although the permit to use water of a water pit is only to drink straight from the pit (since once removed from the pit, the creatures are considered "*piraish*"/separated and become prohibited),[33] in our case this is not a concern. This is because in New York City all the creatures show up dead at the tap, due to chlorination. There are *Rishonim* who are lenient and rule that once dead, the creature remains permitted, even when separated.[34] We are allowed to follow this opinion when there is a *tziruf* (additional lenient factor). Here, the *tziruf* is that the incidence of the creatures is not very common, generally being only a small percentage (*miut hamatzui)*. Rav Belsky himself drank unfiltered water.

---

31. Submitted by Rabbi Yaakov D. Lach.
32. See *Shulchan Aruch* 84:1.
33. See *Shulchan Aruch* 84:3 and commentaries ad loc.
34. See *Shulchan Aruch* 84:4.

Kashering

Brine Tanks[35]

21. Many types of cheese are soaked in salt water (brine) after they have been formed into a loaf or wheel. Kosher cheese productions use kosher brines and, in most cases, the brine vats are dedicated to kosher productions. In situations where it is not possible to dedicate tanks, they must be *kashered* prior to being filled with fresh (kosher) brine. Older tanks are often made of fiberglass with an epoxy coating, and it is virtually impossible to *kasher* them. Rav Belsky felt that if an additional layer of epoxy (1/4 inch) is applied to them, then the inside layer becomes a new "container" (*kli)* and no *kashering* is required.

Glass Stovetop[36]

22. Rav Belsky holds that a glass stovetop has the status of a *chatzuvah* (stovetop grate) which *Ramo* 451:4 rules can be *kashered* with *libun kal* (a form of *kashering* which uses heat rather than boiling water). He suggests that this could possibly be accomplished using a specially constructed piece of sheet-metal which is the size of the stovetop and has holes cut out over the areas where the stovetop's burners are. The metal should be put on the stovetop and the fires turned on to their highest. This will cause the glass to heat up to *libun kal* temperatures but will allow enough heat to escape through the holes so that the glass will not break. As with all methods of *kashering*, one may only use this procedure if he is confident that it will not cause the glass stovetop to crack.

Libun Kal Temperature[37]

23. One way to make utensils kosher is through *libun kal*

35. Submitted by Rabbi Zushe Blech.
36. Submitted by Rabbi Dovid Cohen.
37. Submitted by Rabbi Dovid Cohen.

(*kashering* by applying heat to a utensil, rather than with boiling water). What temperature is required for *libun kal*? It is well documented in earlier *Poskim* that *libun kal* is accomplished when heat is applied to a surface until the back-side side of that surface reaches a specific temperature known as *yad soledet bo* (~160-175° F). However, Rav Belsky has said that those *Poskim* were only discussing a case where the person put fire or coals directly onto the non-kosher surface. If one merely heats up a chamber, then the metal must reach a considerably hotter temperature before *libun kal* is accomplished. In order to accomplish *libun kal* in that scenario the chamber must maintain a temperature of 550° F for one hour, 450° F for 1.5 hours, or 375° F for two hours.

Sight Glass[38]

24. The *Ashkenazic* custom is that glass cannot be *kashered*,[39] but Rav Belsky has said that nonetheless one may *kasher* metal equipment which contains a sight glass (a small viewport installed in some industrial equipment). He bases this decision on a combination of two factors. Firstly, the sight glass occupies a relatively small part of the overall equipment such that even if the sight glass is considered not to have been *kashered* it is akin to a non-kosher utensil which is *asui l'hishtamesh b'shefah* (see #9 above) where many allow its use without *kashering*, especially if the equipment has not been used for 24 hours (*aino ben yomo*). Secondly, the fact that *Darchei Moshe*[40] allows the consumption of food made on glass which had been *kashered, b'dieved,* indicates that the aforementioned custom is merely a stringency (*chumrah)*, not actually required.

38. Submitted by Rabbi Dovid Cohen.

39. *Ramo* O.C. 451:26.

40. *Darchei Moshe* O.C. 451:19.

Meat

Bedikat Chutz for Lamb[41]

25. In recent years, there have been those who insist on a *bedikat chutz* for lamb-- i.e., checking of lungs after they have been removed from the thoracic cavity, to ensure there are no adhesions (*sirchot*). Rav Belsky, however, said that there is nothing wrong with the way that has been done until now (only checking the lungs while they are still in the thoracic cavity) since we are particular that the *bodek pnim*[42] does not accept any lamb whose lung has even the slightest imperfection.

Hindquarter *Nikkur*[43]

26. Rabbi Belsky permits the use of the hindquarters of a wild animal (such as deer). The *chailev* (certain fats in the animal) is permitted, being that it is a *chaya* (undomesticated animal).[44] The prohibited sinews/nerves (*gidin)* apply to a *chaya* as well, and the Gemara, *Rishonim*, and early books on *nikur* clearly say that there is no difference between a *behaima* (domesticated animal) and *chaya* with regards to the laws of *nikkur*. Still, Rabbi Belsky permits *nikkur* of the *gidin* to be done on a *chaya* without removing every trace of innervation the

---

41. Submitted by Rabbi Sholem Y. Fishbane.

42. I.e., Rabbi responsible for checking the lungs before they are removed from the thoracic cavity.

43. Submitted by Rabbi Yaakov D. Lach.

The hindquarters of animals are not used in the USA for kosher production. This is because they contain the prohibited *chailev* fat, the *gid hanashe* (sciatic nerve), and *gid hachitzon* (femoral nerve). Eating *cheilev* brings with it the punishment of *karet* (excision) and is therefore treated very seriously. The issue of the prohibited *gidin* is a Rabbinic one (since the part of the *gid hanashe* that is Biblically prohibited is easily removed), yet this too is a factor, since we remove every last innervation of these nerves into the meat, a tedious process that requires great skill and *yirat shamayim*.

44. *Shulchan Aruch* Y.D. 64:1.

way we do for a domesticated animal. The reason is that he feels that the current practice employed for domesticated animals is the result of stringencies (*chumrot)* that have evolved over the years, and are not part of the original regimen that existed in the times of the Gemara and *Rishonim*. Therefore, while these practices are binding and obligatory, this is so only with regard to *behaimot*, whose *nikkur* was commonplace. With regard to *chayot*, the original tradition remains intact, and a simple *nikkur* of the main nerves and their primary innervations into the meat is sufficient. Rav Belsky relates that a *menaker* in *Eretz Yisrael* related to him that he recalls performing *nikkur* on deer in Europe before World War II, and doing a much simpler *nikkur* on the *gid hanashe* than in domesticated animals.

Lamb Tongue *Nikkur*[45]

27. While we are particular to take out the whole forbidden nerve (*gid)* in a cow tongue, *nikkur* on lamb tongues is harder to do since they are much smaller, which makes the work very tedious. Rav Belsky has said that in the case of lamb tongue the *giddin* are so small that they are more comparable to chicken *giddin* (which do not have to be removed) and therefore puncturing the tongue is sufficient.

Lipase enzymes derived from animal sources[46]

28. Lipases are enzymes that break down lipids (fats) to enhance their flavor, and are commonly used to produce lipolyzed butter oils and enzyme modified cheese. Traditionally, these enzymes are made from the oral gastric tissue of lambs and kids. Rav Belsky holds that enzymes derived from animal carcasses (*neveilot)* may not be used in kosher products, whether produced from the ground up tissue

45. Submitted by Rabbi Sholem Y. Fishbane.

46. Submitted by Rabbi Zushe Blech.

or extracted from it. Even the use of tissue derived from kosher-slaughtered animals may not be added to dairy products. However, if the enzyme is extracted from kosher tissue – and then treated to remove all meat flavor – it may be used in kosher dairy products.

Mitzvot of *Eretz Yisrael*

Eilat[47]

29. Rav Belsky maintains that Eilat and vicinity are not within the halachic borders of *Eretz Yisrael* and are therefore excused from the obligatory tithe (*ma'aser)* for foods grown there. Rav Belsky also ruled that Eilat is considered "outside the parameters of the Land" for all purposes. Rav Belsky said that for someone to leave *Eretz Yisrael* to go to settle in Eilat they would need no less of a justification than to go to settle in Brooklyn.

Non-Kosher Environment

Coffee[48]

30. There are possible halachic justifications for permitting coffee prepared or served in utensils which were possibly washed with non-kosher dishes, but Rav Belsky held that it is not within the spirit of the law to permit such items. Rather, it is the mission of kosher supervision agencies not to recommend products which are "not so bad" and not to rely on leniencies (*heteirim)*. Rav Belsky himself did not drink coffee made on an airplane; instead, he asked the stewardess to give him a cup of hot water in a disposable cup which he then mixed with the instant coffee that he proudly carried with him for such situations.

---

47. Submitted by Rabbi Yissachar Dov Krakowski.

48. Submitted by Rabbi Sholem Y. Fishbane.

Water Coolers[49]

31. Rav Belsky said that using the hot water from an office water cooler is permissible even when one's co-workers do not keep kosher—unless one **notices** that a co-workers inserts the water spigot into his cup. However, one is not obligated to be concerned about such an insertion in the **absence** of having seen it.

Pat & Bishul Yisrael

Beets[50]

32. Rav Belsky holds that beets do not require cooking by a Jew (*bishul Yisrael)*. This is because it is common to eat beets raw together with one's horseradish. We have contacted companies that sell horseradish with beets and they confirmed that they do not cook them. I had thought that perhaps the beets marinate in the vinegar, and therefore do not need cooking, but Rav Belsky told me that he prepares his own beets and horseradish on *Pesach*, and it is ready to use immediately. Therefore, it is like cooked ginger which is not subject to the laws of *bishul akum* (as discussed in *Mishnah Berurah* 203:11), since it is eaten raw together with sugar.

Cake and Cookies[51]

33. Bread is subject to the rules of *pat palter* (bread baked by a non-Jewish baker, which most authorities assume are not subject to the prohibition of *pat akum*) which, for *Ashkenazim*, allows the OU to certify bread on a broad basis. The question then comes up whether cake and cookies are subject to the leniency of *pat palter*, or whether they fall under the umbrella of products subject to *bishul akum* concerns (which generally

49. Submitted by Rabbi Eliyahu Ferrell.

50. Submitted by Rabbi Eli Gersten.

51. Submitted by Rabbi Zushe Blech.

prohibits a Jew to eat food cooked by a non-Jew without the participation of a Jew in the cooking process). Rav Belsky ruled that we could rely on the *Beit Meir*,[52] who holds that since *pat haba b'kisnin* (cakes, pies, and crackers which are made of flour and water but are not true bread) has certain *halachot* of "bread" – i.e. if one is *koveah seudah* on it one would be required to wash, make *hamotzei*, and *bentsch* – it may be considered "*pat*" as regards the *halachot* of *pat palter*. On the other hand, cooked grain products which are not *pat haba b'kisnin* – such as noodles – are subject to the rules of *bishul akum*.

Canned Corn[53]

34. Rav Belsky explains that canned corn does not require *bishul Yisrael*, because fresh corn is considered edible raw, and therefore the rule does not apply. Although this sounds surprising, if one were to test this out, they would be pleasantly surprised as to how good raw fresh corn tastes. It is irrelevant that the majority of people only eat cooked corn, because the majority is not avoiding raw corn because of any revulsion, only perhaps that they prefer the taste of it cooked. Rav Belsky points out that all the examples that the Gemara gives for items that require *bishul Yisrael* (meat, fish, eggs) are all foods that the majority of people are disgusted or would have difficulty eating raw. The *Issur V'heter* (43:4) makes a similar point about hard pears. He writes that although hard pears are mostly eaten cooked, there is no issue of *bishul akum*, since they can be eaten raw and their *beracha* even raw is *ha'eitz*.

Convection Oven[54]

35. Convection ovens shut off when the door is opened. That

52. *Beit Meir* to *Shach* Y.D. 112:18.

53. Submitted by Rabbi Eli Gersten.

54. Submitted by Rabbi Yosef Wikler.

means that if a Jew originally turned on the oven and a non-Jewish cook opens the door to put the food inside, keeping it open for a few minutes, during that time the oven will cool down. Then, when he closes the door after, say 5 minutes, he has begun the cooking under his own power-- rendering the food as *bishul akum,* food cooked by a non-Jew, which a Jew may not eat. Rav Belsky said that the cutoff temperature as to what is considered too cool (and the Jew's original lighting of the fire is considered to have finished) is when the oven is no longer at a point that it can cook, which is about 170 degrees Fahrenheit. He further said that this temperature is measured by the air in the oven, not the heat of the walls, which will be much higher.

Light bulb[55]

36. There are two lines of reasoning as to why a Jew's minimal participation in the cooking of a food (*hashlachat kisem*, literally: throwing in a splinter) suffices to create *pat Yisrael* (or according to *Ramo, bishul Yisrael*) even though the participation is insignficant.[56] *Rif* says that it hastens the cooking (*mikarev bishulo*) and *Rambam* says that it acts as a *heker* (indication that the food is only permitted if a Jew 'participates' in the cooking). Rav Belsky said a light bulb left on all the time inside an oven does not satisfy either of these requirements. It does not act as a *heker*, because one cannot create a *heker* before the non-Jew lights his fire. It is also not *mikarev bishulo*, because that requires a measurable benefit in the cooking. A light bulb, or even a glow bar in a large oven, will not affect the length of time that the food needs to cook. If no one will adjust their cooking time because of the light bulb or glow bar, then it is not sufficient.

---

55. Submitted by Rabbi Eli Gersten.

56. See *Shulchan Aruch* and *Ramo* Y.D. 112:9 and 113:7.

Maintaining a Jew's Fire[57]

37. If a Jew turns on an oven, even though the fire cycles on and off, the hot oven is considered a "Jew's fire". Rav Belsky has said that even if a non-Jew turns up or down the oven we do not view the oven as losing the original "kindling" by the Jew so long as the oven always remains hot enough to cook. This temperature is approximately 80 C (176 F) which is usually the lowest setting for an oven, below which presumably the oven would not function to cook food. Rav Belsky has said that this idea can be applied to boilers as well. If a boiler is turned on by a Jew, even if it is subsequently turned off and turned back on by a non-Jew, so long as the boiler always remained above 80 C, food cooked with the steam/hot water from that boiler can be considered *bishul Yisrael*.

Measuring Edibility[58]

38. Rice that is cooked by a non-Jew beyond the point when it is passably edible (*ma'achel ben drusai*, which is one-third to one-half cooked) is forbidden because of *bishul akum*. However, *Teshuvot Avkat Rochel* (Rav Yosef Karo)[59] rules that if the grain is subsequently dried out to the point that it is no longer edible, then it "loses" the cooking and becomes permitted again. Rav Belsky pointed out that this *heter* only applies if the grain absolutely requires *bishul* to make it edible. However, if a mere soaking in lukewarm water for several minutes is sufficient to reconstitute the grains, then it remains *assur*, even though it was inedible in its current state. Conversely, Rav Belsky ruled that couscous that was *bishul Yisrael* and then dried out remained *bishul Yisrael*, since it was able to be reconstituted with a 30-minute soaking in lukewarm water.

---

57. Submitted by Rabbi Eli Gersten.

58. Submitted by Rabbi Eli Gersten.

59. *Teshuvot Avkat Rochel* 30.

Mumar[60]

39. Rav Belsky has said that although we do not drink wine touched by a *mumar* (apostate) or Sabbath desecrator,[61] still we may eat food cooked by them. The *Rishonim* bring two lines of reasoning for their decree of *bishul akum* (a Jew may not eat food cooked by a non-Jew, even if it is otherwise kosher). Most say the Rabbis required that food be cooked by a Jew for fear of intermarriage encouraged by eating socially with a gentile. However, *Rashi* brings an additional reason, because we are afraid they might add something non-kosher. According to *Rashi* the prohibition should apply to a *mumar* as well. However, since most *Rishonim* only mention the concern for intermarriage, and this does not apply to a *mumar,* the prohibition would not apply. Rav Belsky reported that Rav Moshe Feinstein was also lenient. However, in factories, it is difficult to be lenient, because the *mumar* does not have reliability when he says that he turned on the fire, making it "cooking by a Jew". So, unless a *shomer Shabbat* witnessed him doing so, we would not accept this as *bishul Yisrael*.

Remote Lighting & Timers[62]

40. Some factories are located in remote areas and it is difficult for *Mashgichim* (kosher supervisors) to visit frequently or on short notice. If such a factory requires that the food be cooked by a Jew (*bishul Yisrael)*, it may be impossible to send a *Mashgiach* every time the boiler needs to be turned on. Rav Belsky said that it is acceptable to have the *Mashgiach* turn on the boiler remotely, from his cell phone, by dialing in a special code. Of course, a system would need to be set up that ensures that this is the only method for turning on the boiler. Also, if the *Mashgiach* sets a timer in the evening to turn on the fire the

60. Submitted by Rabbi Eli Gersten.

61. *Shulchan Aruch* Y.D. 124:8.

62. Submitted by Rabbi Eli Gersten.

next morning this is also acceptable. However, Rav Belsky only allows timers for a one- time use but not if they turn on the oven again and again, because then the Jew's action is lost. Rav Belsky said that a timer for its first use is a real "action", and is not only a *gerama* (indirect cause); however, subsequent uses are only a *gerama,* which is not adequate.

Rice Milk[63]

41. Rice milk is made from grains of rice that are cooked under pressure together with enzymes and a large amount of water. The enzymes break down the rice, and what exits the pressure cooker is a rice mash. Rice syrup is separated from this mash and turned into rice milk. Rav Belsky has ruled that when a single continuous process is used to convert a food into a form that is not *oleh al shulchan melachim*,[64] it does not require *bishul Yisrael*. We are not concerned that perhaps if we would have stopped the process in the middle, we would have found cooked rice in a state that is potentially suitable for being served at a "king's table", since the original intention was to reduce it to a mash, and there was no break in the process. However, if we find ourselves at the end of an intermediate step with cooked rice which is suitable for a royal table, then even if it is further processed so that the final product is just a mash, it would still not be permitted.

Shulchan Melachim – Not Determined by *Min*[65]

42. It is well known that Rav Belsky holds that we determine whether something is *bishul akum* by the individual way in which it is prepared, and not according to the *min* (type of food). For example, although a potato cooked by a non-Jew would be forbidden as *bishul akum*, potato **chips** would be

63. Submitted by Rabbi Eli Gersten.

64. Suitable to be served at a royal table.

65. Submitted by Rabbi Eli Gersten.

permitted because potato chips are a snack food and as such are not fit to be served at a royal table—*oleh al shulchan melachim*. Similarly, cooked rice made by a non-Jew is forbidden because it is served *al shulchan melachim*, but rice cakes are not served *al shulchan melachim* and are therefore exempt from the stricture (*issur).*

Shulchan Melachim – Served at Royal Banquet[66]

43. Rav Belsky has said that the definition of *oleh al shulchan melachim* is what a king would serve at his banquet, not what he privately eats. Although a king might eat corn flakes for breakfast, this does not make corn flakes subject to *bishul akum*. Furthermore, Rav Belsky holds that imitation-style foods, such as soy burgers, are not subject to *bishul akum*, because they are also not *oleh al shulchan melachim*. Imitation foods by definition are second class, for those who would rather be eating the real thing, but cannot afford to, for health reasons or otherwise. So although the king himself might eat tofu burgers if he is placed on a strict diet, still it is not a food he would serve at a wedding or banquet.

Pesach

Equipment Used for *Chametz* on *Pesach*[67]

44. If a Jewish-owned company produced products on *Pesach* which contained *chametz* ingredients, Rav Belsky has ruled that the equipment could be used for certified products after *Pesach* (without *kashering*) once the equipment was not used for 24 hours (*aino ben yomo)*. This ruling was based on a combination of the opinions mentioned in *Sha'arei Teshuvah* and *Mishnah Berurah*.[68]

---

66. Submitted by Rabbi Eli Gersten.

67. Submitted by Rabbi Dovid Cohen.

68. *Sha'arei Teshuvah* 447:2 (*kashering* is never required for *chametz she'avar alav hapesach*) and *Mishnah Berurah* 447:4 (there is no *gezairah aino ben yomo*

Kashering after *Kitniot*[69]

45. Rav Belsky ruled that since the custom not to use *kitniot* (loosely, legumes and rice) has become so well established and accepted for all *Ashkenazim*, if a utensil was used with *kitniot* it is required to *kasher* that utensil before using it for *Pesach* food. Nonetheless, he suggested that if *kitniot* was used in a pan over the fire without liquid, there would possibly be no requirement to *kasher* the pan with a thorough *kashering* process-- *libun gamur*. He reasoned that as relates to *chametz* there are some *Rishonim* who hold that *libun* is almost never required (except for *cheress*) because *chametz* is essentially a kosher item *(hetairah balah)*; although we do not accept that position as relates to *chametz,* we may rely on it as relates to *kitniot* since the prohibition of *kitniot* is considerably less strict.

Non-food Items (assorted)[70]

46. Rav Belsky said the following regarding *Pesach*: One should only purchase dishwashing soap with a *hechsher* (kosher supervision). Glue which is on the back of stamps or envelopes should not be licked on *Pesach* because the glue might contain wheat starch which would be *chametz*. One is permitted to use lump charcoal for a barbeque during *Pesach* since it is just burnt wood. However, regular charcoals may not be used, since the ashes that make up the charcoal are stuck together with glue that might be *chametz*. Non-chewable pills are not considered edible items and are therefore permitted to be taken as medication on *Pesach*. [This does not apply to vitamins.] If there is an available substitute it is always preferred and it is therefore worthwhile checking out one's medicines for *Pesach*.

---

atu ben yomo in this case).

69. Submitted by Rabbi Dovid Cohen.

70. Submitted by Rabbi Moshe Dovid Lebovitz.

Paper Towels[71]

47. Rav Belsky said that there is no "starch problem" with paper towels and one may place food directly on the paper towels on *Pesach*. There is no need to be concerned, or even a *minhag*, to prevent a drop of *kitniot* from falling into food. The *Shulchan Aruch*[72] says that one can use a lamp filled with *kitniot*-based oil even though it is certain that some of the *kitniot* will be sprayed into the food. More so, in the case of the paper towels there is no certainty at all of any of it seeping into the food. It has never been confirmed that even a molecule of starch from the paper towel leaked into food. The *kitniot* starch is so firmly bonded to the paper towel that even an iodine test would not reveal its presence.

Quinoa[73]

48. There has been a great debate in recent years as to whether quinoa is *kitniot*. Rav Belsky is of the strong belief that quinoa is indeed *kitniot* because it fits every criterion for *kitniot*. It is a staple grain in its country of origin. It is grown in proximity of and can be mixed up with the five grains. It is collected and processed (*digun*) the same as the five grains and it is cooked into porridge and breads the same as the five grains. Rav Belsky says that one cannot compare quinoa with peanuts or potatoes, but rather one should compare it to corn (also a new-world grain). Although Rav Moshe Feinstein *zt"l* permitted peanuts for those who did not already have a contrary *minhag*, because peanuts are a new-world legume and there is no need to create new customs regarding *kitniot*, Rav Belsky explained that this line of reasoning only applies to items which are not clearly *kitniot*, such as peanuts and potatoes that do not fit every criterion of *kitniot*. For example,

71. Submitted by Rabbi Moshe Dovid Lebovitz.

72. *Shulchan Aruch* O.C. 453:1.

73. Submitted by Rabbi Eli Gersten.

peanuts are not cooked into porridge and breads, and potatoes would never be confused with grains. Since we cannot say for sure that peanuts or potatoes would have been included in the prohibition, we have no need to include them. However, since quinoa and corn certainly would have been included in the prohibition had they been known at the time, they are by definition *kitniot*.

Sakanah

Water Fountain[74]

49. The *Ramo*[75] rules that one may not drink directly from a faucet because of danger involved. Rav Belsky said not only should one not drink from a regular tap nowadays, but one should not even drink from a water (drinking) fountain.

Shabbat & Yom Tov

Convection ovens on Shabbat and Yom Tov[76]

50. The prohibition of *amira l'Nachri* (instructing a non-Jew to perform an action prohibited to a Jew) generally forbids a Jew from instructing – or even allowing – a non-Jew to turn an oven on and off on Shabbat or Yom Tov, but Rav Belsky allowed one to instruct a non-Jew to open and close convection ovens on Shabbat and Yom Tov. Even though the non-Jew would be turning the fan and/or flame on and off when the doors were opened and closed, he felt that it was considered a *davar sheino mitkaveyn* (unintended consequence) since the non-Jew had no intention to turn these features on and off. Although it is clearly a *psik reisha* (an unavoidable result of his action), the rule of *psik reisha* does not apply to non-Jews.[77]

---

74. Submitted by Rabbi Yissachar Dov Krakowski.

75. *Ramo* Y.D. 116:5.

76. Submitted by Rabbi Zushe Blech.

77. See *Ramo* 253:5 as understood by *Mishnah Berurah* 253:99, and *Mishnah*

Turning Off Lights[78]

51. Rav Belsky holds that non-Jews should not be allowed to turn off the lights and blow out the Shabbat candles after the Friday night meal in a kosher-certified cafeteria or dining room. Even if the non-Jew was never formally told to perform those functions, he would believe that the Jews want him to turn off the lights once everyone leaves the room, and therefore that activity is not being done *adatah d'nafshey* (for his own benefit).

Tevillat Keilim

Broken Utensil[79]

52. If a Jew purchases a utensil which requires *tevillah* (immersion in a mikveh) and then that utensil is "broken" and repaired by a Jew, the utensil no longer requires *tevillah*. Rav Belsky has clarified that in order for a utensil to qualify as sufficiently broken to qualify for this leniency, the utensil must have been broken to the point that it was no longer usable and that only a skilled craftsman would be able to perform the repair.

Large Equipment [80]

53. Rav Belsky is of the opinion that even if equipment is very large and holds more than 40 *se'ah* it must undergo *tevillat keilim* before it is used. If a Jew has a large piece of industrial equipment which is virtually impossible to *toveil*, Rav Belsky has suggested that he sell a $1 share in the equipment to a non-Jew so as to obviate the need for *tevillah*.[81]

Berurah 337:10.

78. Submitted by Rabbi Dovid Cohen.

79. Submitted by Rabbi Dovid Cohen.

80. Submitted by Rabbi Dovid Cohen.

81. See *Ramo* Y.D. 120:11.

Generally we do not rely on this type of "sale" on a permanent basis, but in this case there is no choice and it is therefore acceptable. For more details, see *Daf HaKashrus* IX:4 & 6.

Transfer of *Ta'am* (Taste)

Loss of *Charifut* for Onions[82]

Pri Megadim and *Yad Yehudah* say that an onion cooked in water loses its *charifut* (sharp taste which allows for 'easier' transfer of taste --*ta'am*). In this context, Rav Belsky clarified that if a cook puts onions in a frying pan with oil and heats up everything at the same time, by the time the contents of the pan are at *yad soledet* (the temperature at which transfers occur), the onion will have lost its *charifut*. On the other hand, if the oil was brought to that temperature before the onion was introduced into the pan, the onion will function as a *davar charif*.

Microwave Insert[83]

54. Rav Belsky ruled that if someone uses separate microwave "inserts" for meat and dairy, they can use the same microwave for both. Rav Belsky said that even though these inserts have small holes for the steam to escape, they are still permitted to use because air/vapor can only escape and not reenter.

Nitzuk Chibur[84]

55. Steam jacketed kettles are commonly used to heat and cook foods. After the steam heats the product, the condensate that results from the cooling of the steam may be returned to

82. Submitted by Rabbi Eliyahu Ferrell.

83. Submitted by Rabbi Yissachar Dov Krakowski.

84. Submitted by Rabbi Zushe Blech.

the boiler to be heated and converted to steam for re-use. In situations where the steam was used to heat non-kosher material, the condensate is considered non-kosher, and may not be used to create steam to heat kosher products. Some have argued that a steam system cannot be used to heat kosher and non-kosher products simultaneously even if the condensate from the non-kosher system is not returned, since the entire steam system is considered "connected" based on the concept of *nitzuk chibur* (items poured into one another are considered "connected"). Rav Belsky held that this is not a concern, since *nitzuk chibur* is a concept limited to *s'tam yaynam*, where pouring kosher wine into non-kosher wine "connects" them;[85] it has no relevance to conventional questions of absorption.

Thermoses and Styrofoam Cups[86]

56. Thermoses and styrofoam cups are designed to **preserve** heat. Since the leniencies on Shabbat associated with a *keli sheni* (secondary container) stem from the **cooling** effect of the walls of the secondary vessel, Rav Belsky has stated that thermoses and styrofoam cups do not have the status of a *keli sheni* when receiving food and beverages from a *keli rishon* (primary container).

Two-Chambered Ovens[87]

57. Rav Belsky said that if one has a two-chambered oven, it is permissible to use one chamber for meat foods and the other for dairy foods. If there is no *zei'ah* (vapor) going from one chamber to the other, it is permissible to use both chambers simultaneously.

---

85. See *Shulchan Aruch* Y.D. 126:1, and see also *Ramo* 126:5.

86. Submitted by Rabbi Eliyahu Ferrell.

87. Submitted by Rabbi Eliyahu Ferrell.

The Status Of Minority Opinions In Halacha

Rabbi Micah Segelman

A number of principles govern the resolution of halachic disputes. One key principle is that the halacha (normative Jewish law) is usually decided in accordance with the majority opinion (*yachid verabbim halacha kerabbim*).[1] Nonetheless, not all minority opinions are equal. There are minority opinions that have great halachic significance and others which have little or no halachic significance.

The halachic status of minority opinions is relevant to a number of interrelated questions, including the following:

1. When can a later authority decide to adopt the minority position in a dispute between earlier authorities?

2. When does the existence of a lenient minority opinion provide a basis for leniency in a *shaat hadchak* (a situation of pressing need)?

I will begin with a discussion of some basic concepts regarding halachic rulings – *psak* – and then proceed to address these questions, including considering the following specific contemporary examples:

- May one adopt the minority opinion that the Sages might have erred in scientific matters?

1. Gemara, *Berachot* 9a and elsewhere.

Rabbi Micah Segelman studied in Yeshiva Chofetz Chaim (Rochester and Queens) and is currently a PhD candidate in Health Services Research and Policy at the University of Rochester.

- Can one follow the position of some *Rishonim* that women may wear *tefillin*, in light of the fact that *Ramo* rules that they may not?
- Is it acceptable to recite the *bracha* of "*she'asani Yisrael*", ["Who has made me a Jew"] the text recorded by some authorities, and omit the *brachot* of "*sheloh asani goy*" ["Who has not made me a gentile"] and "*sheloh asani isha*" ["Who has not made me a female"]?

The Nature Of *Psak*

The mitzvot of *Acharei Rabim Lehatot,*[2]*(*follow the majority*)*, *VaAsita Al Pi Hadavar* (act in accordance with the directives of the Sages*)*, *Lo Tasur* (do not deviate from their rulings*)*, and *Zaken Mamrei* (even one of the Elders is not permitted to rebel against the majority ruling*)*,[3] demonstrate that the majority opinion is to be considered binding, requiring that a dissenting halachic authority submit to the majority. Nonetheless, the simple reading of the Gemara in *Horayot* (2b) indicates that an individual who is qualified to make halachic decisions cannot rely on the lenient view of the majority of the High Court *(Beit Din Hagadol)* when he personally disagrees. The *Ramban* (comments to *Sefer HaMitzvot Shoresh Aleph*) and *Sefer Hachinuch* 496 (regarding the mitzvah of *Lo Tasur*) resolve this apparent contradiction[4] and say that the Gemara in *Horayot* only applies when the individual did not present his opinion to the *Beit Din*. Once he presents his opinion and it is considered by the *Beit Din*, he must accept their opinion and

2. *Shemot* 23:2. For a discussion of the underlying rationale of *Acharei Rabim Lehatot,* see *Ein Aya Brachot* 6:16.

3. These three *mitzvot* (*VaAsita Al Pi Hadavar*, *Lo Tasur*, and *Zaken Mamrei*) can be found in *Devarim* 17:8-13.

4. See R. Yonason Sacks, "The *Mitzvah* of *Lo Tasur*: Limits and Applications", *Tradition* 27:4, quoting R. David Zevi Hoffman and R. Baruck HaLevi Epstein, for other approaches to resolving this contradiction.

cannot be stringent in accordance with his own opinion.[5]

How can the minority authority violate what he believes to be the correct halacha and follow the majority opinion? A comment of R. Elchonon Wasserman (*Kuntrus Divrei Soferim*, *Siman 4*, in Volume 2 of *Kovetz Shiurim*), sheds light on this point.[6] Reb Elchonon explains that the "true" halacha is not

---

5. The *Minchat Chinuch* (*Mitzva* 78:2) cites the *Get Pashut* who makes the same distinction regarding the mitzvah of *Acharei Rabim Lehatot* and says the Torah's rule to follow the majority only applies when the opposing sides meet face to face. R. Elchonon Wasserman (*Kuntrus Divrei Soferim*, in Volume 2 of *Kovetz Shiurim, Siman 4*) and the *Maharitz Chiyot* (*Mishpat Hahoraah* Chapter 4) both cite this opinion of *Ramban* and explain, in slightly different ways, why the B*eit Din*'s decision is only binding once they consider the alternative position.

6. The background to Reb Elchonon's comment is as follows: When only two authorities disagree (so *yachid verabbim halacha kerabbim* is inapplicable), one follows the authority who is greater in *chochma* or *minyan* [wisdom] (*Avoda Zarah* 7a). When the disputants are equal, Rabbi Yehoshua ben Karcha (*Avoda Zarah* 7a) rules that one should follow the strict opinion for Torah laws and the lenient position for Rabbinic laws.

This Gemara in *Avoda Zarah* seems to be contradicted by another Gemara (*Eruvin* 6b – 7a, *Chullin* 43b – 44a) which cautions against following either all of the leniencies or all of the stringencies of two conflicting authorities. Rather, one must choose one opinion and follow that opinion consistently for both its leniencies and stringencies.

Rishonim (See *Ramban Chullin* 44a; *Rashba Chullin* 44a; *Ritva* [*Eruvin* 6b]) resolve the contradiction by limiting the requirement to not follow conflicting stringencies to where two conditions are met: a) the conflicting authorities differ on two separate issues, and b) these two issues intersect in a given situation such that both authorities would be lenient, albeit for different reasons.

Furthermore, according to the conclusion of the Gemara in *Eruvin*, the requirement not to follow conflicting stringencies applies only when the stringencies are actually mutually exclusive – i.e., the authorities differ on one issue which has two separate implications, such that each authority is stringent with respect to one of the resulting implications and lenient with respect to the other. From the *Ramban* (*Chullin* 44a) it appears that according to the conclusion of the Gemara, one would be required to be strict even when the two conditions listed above are met so long as the two stringencies are not actually mutually exclusive. The *Ritva* (*Eruvin* 6b) and *Rashba* (*Chullin* 44a), however, appear to hold that one is permitted but not required

the determining factor in deciding how one should conduct themselves. Rather, the Torah itself prescribes how to act in cases of disagreement – for example, by instructing one to follow the majority opinion. The Torah's command is to listen to "the judge who will exist in those days."[7] Thus, the question one faces is not which opinion is objectively correct but which authority is the one that the Torah requires that we follow. This reasoning applies to the situation of submitting to the majority when required by halacha to do so. Even if the minority authority is actually correct, the halacha demands that one submit to the majority opinion. (*Sefer Hachinuch* 496 writes similarly).[8]

This idea, that halacha specifies how disputes are to be resolved, and that people are not held accountable for the objective truth, seems implicit also in the ruling of the *Chazon Ish* that if one is a student/follower of a particular authority, he follows his teacher both for stringencies and for leniencies. It also appears implicit in the ruling of R. Moshe Feinstein that there is no prohibition of *lifnei iveir* [misleading someone] or *messayea* [helping someone to sin] for Person A to cause Person B to do something which Person A considers forbidden, if Person B is acting based on a valid *psak*.[9]

---

to be strict in this case.

Reb Elchonon is troubled by this halacha that in some situations one has the right to choose which opinion to follow. Shouldn't one always be required to be strict? To resolve this question, Reb Elchonon offers the explanation above.

7. *Devarim* 17:9.

8. A *Talmid Chacham* offered the following penetrating question to help clarify these concepts. What would happen if a *Zaken Mamrei* [an elder who rebelled against the majority ruling of the court] was convicted and then the *Beit Din* reversed their original *psak* and decided the *Zaken Mamrei* was actually correct?

9. The *Chazon Ish* (*EH Nashim* 134 on *Yevamot* 14a, *Sheviit* 23) uses the idea that one follows his teacher to resolve the contradiction between the Gemara in *Avodah Zarah* and the Gemara in *Eruvin*/*Chullin* discussed previously (see also the comments of R. Moshe Feinstein on *Chullin* 44a in *Iggerot Moshe* OC

With this background, we will now explore the issue of when it is permissible to rule according to a minority opinion.

Relying on a Minority View in a *Shaat hadchak*

The Gemara in *Nidda* (6b, 9b) says that one can rely on a minority opinion in an urgent situation (*shaat hadchak)*, and that this only applies when there was no formal decision (*lo itmar hilchata*) to accept the majority view and to reject the minority opinion. When a formal decision was made (*itmar hilchata*), the minority opinion loses any halachic standing.

The *Raavad* (*Eduyot* 1:5, 1st explanation),[10] without citing this

---

5 – 24:6). The *Chazon Ish* says that one need not ask his teacher each time the same situation arises and may even be able to follow his teacher against a majority of contemporaries or contemporaries of greater stature.

Similar to the *Chazon Ish's* idea that one follows his teacher is the principle that a person is bound to follow the halachic positions of their community. Ashkenazim and Sefardim need to follow the respective traditions of their communities. R. Moshe Feinstein writes (*Iggerot Moshe* OC 5 – 24:6) that a Rav cannot give a *psak* for an Ashkenazi according to the *psak* that would be appropriate for a Sefardi or vice versa. See also *Pesachim* 30a that the *Amora* Shmuel was hesitant to contravene the ruling (*psak)* of Rav in Rav's own town.

For support, the *Chazon Ish* points to the example of those who lived in the town of Rabbi Yossi Haglili, who ate chicken with milk, even though Rabbi Yossi Haglili's position was opposed by other contemporary halachic authorities. The *Ritva* (*Shabbat* 130a) similarly says that those who lived in the community of Rabbi Eliezer acted correctly, and properly fulfilled the commandment of *Lo Tasur (*"do not deviate from the ruling of the authorities") , in following his minority opinion to do certain preparations for a *Brit* on Shabbat, since there was no formal ruling to follow the majority. Once there was a formal ruling this would have been binding. The *Chazon Ish* and Rav Moshe also stipulate that the permission to act based on a *psak* no longer applies if a formal halachic decision was reached against that *psak* (the parameters of what constitutes a formal halachic decision are explored below).

R. Moshe Feinstein (*Iggerot Moshe* OC 1:186) also cites the example of Rabbi Eliezer and says that if a person follows a *psak* they are doing nothing wrong even if the *psak* is not the actual truth. It is for this reason that *lifnei iveir* or *messayea* do not apply as described above.

10. The *Raavad* cites the *Tosefta* (*Eduyot* 1:2) as making this exact point and

Gemara, interprets the Mishnah in *Eduyot* (1:5) to mean that the reason that minority opinions are cited in Mishnah is precisely to allow for leniency in an urgent situation (*shaat hadchak)*. Based on the Gemara, the *Raavad* must mean that the minority opinion is recorded not only to demonstrate that a minority opinion exists but also to convey that there was no formal decision to adopt the majority opinion.

We see from this Gemara that in a situation where no formal ruling was issued (*lo itmar hilchata)*, although the halacha may favor the majority opinion, this does not mean that the minority opinion is "wrong." It is not rejected. For this reason, it is considered *middat chassidut* (pious behavior) to fulfill a strict minority opinion (see *Mesillat Yesharim*, Chapter 14). R. Hershel Schachter[11] explains that this is based on the principle that both positions are divine truth *(eilu v'eilu divrei elokim chaim*). This reasoning only makes sense because halacha itself prescribes how to act in the situation of a halachic dispute. Otherwise, if the determining factor is absolute, objective truth, why can one rely on a minority opinion?

Arguing with Earlier Authorities

The *Raavad* (*Eduyot* 1:5, 2nd explanation) and *Tosafot Shantz* offer an additional explanation for the Mishnah in *Eduyot* discussing the reason for citing minority opinions, and say that the authorities in a later generation would not be able to argue with the consensus of the authorities in an earlier generation unless the later authorities are superior to the earlier ones in both *chochma* and *minyan* (wisdom and number). However, when there is a minority opinion in the

---

in fact the *Metzapeh Shmuel*, commenting on the *Tosefta*, refers to the Gemara in *Nidda* (6b).

11. *Kuntrus B'Inyanei Psak Halacha, Beit Yitzchok* 38, 5766. For further discussion of the concept of *eilu v'eilu*, see "*Mezuzos, Machlokos* and *Eilu va'Eilu Divrei Elokim Chayim*" [sic] by Rabbi Yosef Gavriel Bechhofer <http://www.aishdas.org/rygb/eilu.htm>.

earlier generation, the later authorities can side with the minority opinion. Does this apply to **any** minority opinion? I assume that the *Raavad's* 2nd explanation would make the same basic distinction as the *Raavad's* 1st explanation (see above) between whether or not a formal decision was made to adopt the majority position.

This is precisely the way that the *Maharitz Chiyot* (*Mishpat Hahoraah* Chapter 7) interprets this Mishnah and explains the apparent contradiction between this Mishnah and the following one (*Eduyot* 1:6). The *Maharitz Chiyot* (Ibid, Chapter 4), based on the *Ramban* (comments to *Sefer HaMitzvot Shoresh* 1), distinguishes between the principle of *acharei rabim lehatot* (follow the majority) and the rule that *yachid verabbim halacha kerabbim (*the halacha is according to the majority, not the individual). The absolute imperative to follow the majority only applies when all of the rabbis meet to discuss the issue so that both views are represented and considered in one forum. When these criteria are not met, then we follow the principle that we should follow the opinion held by the majority of decisors, and not a dissenting opinion, (see also *Maharitz Chiyot Mishpat Hahoraah,* Chapter 5). In this scenario, both opinions have halachic standing and the majority opinion is accorded greater weight.

The *Maharitz Chiyot* explains that if the Mishnah only recorded the majority opinion, this would imply that all of the sages who lived at the time of the Mishnah had formally decided in favor of the majority opinion. Therefore, the Mishnah records both opinions to show that no final decision was made.[12]

---

12. This is why an *Amora* can disagree with *Tannaim* as long as there is a *Tannaitic* opinion upon which to rely. In contrast, an anonymous teaching in the Mishnah means that the *Beit Din* of Rabbi Yehuda Hanasi (Rebbi), which consisted of all of the Sages of that time, had reached a final decision. The *Maharitz Chiyot* explains that the reason Rav can sometimes argue with an anonymous (*stam)* Mishnah is that he was considered one of the Sages who was active at the time that Rebbi and his *Beit Din* codified the Mishnah. If he

was not present when Rebbi's *Beit Din* was deciding a halacha and was not able to present his arguments, the criteria for *acharei rabim lehatot* are not met.

The *Maharitz Chiyot* (*Mishpat Hahoraah,* Chapter 6) applies these ideas to answer a question on the *Rambam*. The *Rambam* (*Mamrim* 2:1) says that although a later *Beit Din Hagadol* cannot disagree with an earlier *Beit Din Hagadol* regarding amendments and decrees (*takanot* and *gezerot)* unless they are greater in wisdom and number, they can disagree regarding halachic interpretation – *sevara u'drasha* (these are the words of the *Maharitz Chiyot*). The *Kesef Mishneh* asks that based on this *Rambam*, *Amoraim* should be able to disagree with *Tannaim.* (For additional discussion of this *Kesef Mishneh*, see the introduction to *Dor Revii* by R. Moshe Shmuel Glazer on *Hulin* http://hebrewbooks.org/37184).

The *Maharitz Chiyot* asserts that the *Rambam* in principle agrees that even regarding halachic interpretation a later *Beit Din* can only reverse an earlier decision if they are greater in *chochma* and *minyan*. However, the *Rambam* holds that when later authorities suggest a new idea, this new idea was not explicitly considered and rejected by the earlier authorities. Thus, there is no formal decision to follow this position. The *Maharitz Chiyot* adds that although a later *Beit Din* can argue, this is limited to a *Beit Din* – not to individuals (although it is not clear why this is the case). This resolves the question of the *Kesef Mishneh*. Rav Ashi and his *Beit Din* could in fact argue with Rebbi and his *Beit Din* in a matter of *sevara u'drasha* despite their relative inferiority. But this license does not apply to individual *Amoraim*.

R. Elchonon Wasserman (*Kuntrus Divrei Soferim*, in Volume 2 of *Kovetz Shiurim, Siman* 2) addresses the *Kesef Mishneh*'s question differently. Reb Elchonon says that the Mishnah was finalized with most of the Sages present and thus has the status of the *Beit Din Hagadol* as explained above. Individual *Amoraim* cannot disagree, while a subsequent *Beit Din Hagadol* can disagree, regarding *sevara u'drasha*, even if they are not greater in *chochma* and *minyan*. Therefore, since the finalizing of the Gemara again had the status of the *Beit Din Hagadol*, the *Amoraim* at the finalizing of the Gemara could in fact argue with *Tannaim* regarding *sevara u'drasha*.

I am not aware of any indication that the *Maharitz Chiyot* maintains that when all of the Sages meet together they have the status of the *Beit Din Hagadol* or that the *Mitzvot* of *VaAsita Al Pi Hadavar* and *Lo Tasur* apply to them. According to the *Maharitz Chiyot*, the binding authority of a decision made by all of the Sages stems from the fact that the Torah mandates that halachic uncertainties be settled by the majority. If someone chooses to rely on a rejected opinion on a particular issue, say in the halachot of Shabbat, they are violating the halachot of Shabbat. Halacha prescribes that halachic uncertainties are to be resolved by the majority decision and thus the rejected opinion is no longer a valid opinion in the halachot of Shabbat. Reb Elchonon, in contrast to the *Maharitz Chiyot*, adds that one may also be in

The *Maharitz Chiyot* thus provides a rationale why *Amoraim* are precluded from arguing with *Tannaim* when the *Tannaim* formally decided the halacha. R. Elchonon Wasserman (*Kuntrus Divrei Soferim*, in Volume 2 of *Kovetz Shiurim, Siman 2*) provides a different rationale. Reb Elchonon says that a gathering of all or most of the Sages has the status of the *Beit Din (*Supreme Jewish Court) which would mean that the biblical mandates to follow the rulings of the authorities and not deviate – *VaAsita Al Pi Hadavar* and *Lo Tasur* – apply to them.[13]

While both the *Maharitz Chiyot* and Reb Elchonon say there is a formal halachic reason that individual *Amoraim* cannot disagree with *Tannaim*, the *Kesef Mishneh* (on the *Rambam Hilchot Mamrim* 2:1) seems to disagree and says that following both the conclusion of the Mishnah and the conclusion of the Gemara, there was a general acceptance not to disagree with the conclusions of the former era. The *Chazon Ish* (on the *Rambam Hilchot Mamrim* 2:1) explains that those in the later era saw their level of Torah knowledge had declined substantially

---

violation of the biblical mandate to follow the rulings of the authorities and not deviate – *VaAsita Al Pi Hadavar* and *Lo Tasur*.

13. Note that the extent to which the *mitzvot* of *VaAsita Al Pi Hadavar* and *Lo Tasur* apply outside the *Beit Din Hagadol* in the Temple enclave *(Lishkat Hagazit)* is a source of controversy. See *Sefer Hachinuch* and *Minchat Chinuch* 495. See R. Yonason Sacks, *Tradition* 27:4, who maintains that there are three approaches in the *Rishonim* to this question. Reb Elchonon's approach is not identical with any of these three approaches.

It apparently seems from Reb Elchonon that even the law of *Zaken Mamrei* (a rebellious Sage) would apply to a gathering of all or most of the Sages even though it does not apply when the classical *Beit Din Hagadol* was outside the *Lishkat Hagazit* (This seems clear from *Sanhedrin* 14b and *Sifri Parshas Shoftim* 22. See also *Yerushalmi Horayot* 1:1). Reb Elchonon says that a *Beit Din Hagadol* outside of the *Lishkat Hagazit* loses their status as the *Beit Din Hagadol* whereas a gathering of all or most of the Sages does not need to be in any specific place to have the status of the *Beit Din Hagadol.* In contrast, R. Sacks, ibid, writes that even if one assumes that the *Beit Din Hagadol outside of the Lishkat Hagazit* retains their status as the *Beit Din Hagadol,* the law of *Zaken Mamrei* only applies to the *Beit Din Hagadol* in the *Lishkat Hagazit.*

since the previous era and that they therefore no longer had the right to argue.[14]

Can a consensus of *Poskim* after the close of the Gemara preclude a later authority from disagreeing? Can a later authority decide to adopt the minority position in a dispute between earlier (but post-Talmudic) authorities?[15]

The *Shach* (YD 242 *Pilpul B'hanhagot Horaot B'Issur V'Heter*) cites the *Raavad's* reasoning (*Eduyot* 1:5 2nd explanation) to explain why the *Shulchan Aruch* quotes minority opinions even regarding Torah laws, in light of the fact the *Shach* holds that one cannot rely on a minority view regarding a Torah law even in a *shaat hadchak*[16] (and thus the purpose of citing the minority view cannot be to allow for leniency in a *shaat hadchak*). The *Shach* writes that without citing the minority

14. The *Chazon Ish* supports his position from the fact that Rav could disagree with *Tannaim* and does not acknowledge the suggestion of the *Maharitz Chiyot* to explain the status of Rav.

15. See also R. Jeffrey Woolf, "The Parameters of Precedent in *Pesak Halakhah*", *Tradition* 27:4 and Dr. Eli Turkel, "The Nature and Limitations of Rabbinic Authority", *Tradition* 27:4.

16. Note that the *Shach* disagrees with the *Maharitz Chiyot* (see *Mishpat Hahoraah* Chapter 5 where the *Maharitz Chiyot* acknowledges this disagreement) and does not distinguish between whether or not the disputants meet face to face. Thus the *Shach* does not distinguish between a "formal" and an "informal" majority. To the *Shach*, anytime that *yachid verabbim halacha kerabbim* applies, there is a Torah requirement to follow the majority view and thus it is impossible (regarding a Torah law) to be lenient in a *shaat hadchak*. The *Shach* holds that the Gemara in *Nidda*, which allows relying on a minority opinion in a *shaat hadchak*, only applies to a Rabbinic law. The *Shach* explicitly disagrees with the *Taz* (*YD* 293:4 and see *Nekudot Hakesef* there) who allows leniency in a *shaat hadchak* even regarding a Torah prohibition.

How can the *Shach* hold there is a Torah requirement to follow the majority opinion and still hold a later authority can side with the minority? Presumably the reason is that *yachid verabbim halacha kerabbim* applies only when there is a halachic uncertainty. To those authorities who maintain the minority opinion, there is no halachic uncertainty so *yachid verabbim halacha kerabbim* does not apply.

view, it would give the impression that the majority opinion is "*Torat Moshe* or accepted by the Mishnah or Talmud and no *Acharon* can disagree even with proofs."

The *Shach* thus holds that whether a later authority can rule like an earlier minority opinion depends on the authority's stature. Possessing the stature to decide between earlier authorities is not the same as possessing the stature to reject a consensus of earlier authorities – including siding with a minority opinion when a consensus against this opinion eventually emerged. Note that even when there is no consensus, one must be of eminent stature and qualifications to decide in accordance with the minority view as articulated by the *Ramo* (*CM* 25:2). The expertise needed to decide between earlier opinions goes beyond the typical requirement of being qualified to issue an halachic ruling which is generally required.[17] The idea that one cannot decide between authorities of much greater stature is reflected in the explanation of the *Chazon Ish* (on the *Rambam*, *Hilchot Mamrim* 2:1), mentioned above, of why the conclusions of the Mishnah and Gemara are binding. R. Moshe Feinstein (*Iggerot Moshe OC* 1 – 51:1) similarly writes that *Rishonim* have no right to decide a dispute between *Tannaim* or *Amoraim* (which was left unresolved by the Talmud).[18] The same reasoning would place

17. For discussion of the requirements of *higi'a lehora'ah* see Walter, R. Moshe, *The Making of a Halachic Decision*, Menucha Publishers 2013 Brooklyn, NY, Chapter 9 footnote 5 (p115). See also the letter from R. Hershel Schachter dated *Shevat* 5774 on the topic of "Partnership Minyanim" which is relevant to this point http://www.rcarabbis.org/pdf/Rabbi_Schachter new_letter.pdf. See also R. Hershel Schachter, *Nefesh HaRav, B'Inyanei Mesorah.*

18. Presumably, Rav Moshe would distinguish between *Rishonim* vis a vis the Gemara and *Amoraim* vis a vis the Mishnah based on the *Raavad's* statement that minority opinions are cited in the Mishnah to allow later authorites to agree with the minority opinion. It is also clear from the Gemara and *Rashi* (in the discussion in *Nidda* 7b that we do not learn halacha from Talmud) that *Amoraim* may decide the halacha in a dispute between *Tannaim* based on their own independent judgment.

limitations on the ability of later authorities to decide between the opinions of *Rishonim* and *Acharonim*.[19]

Relying on a Minority View in a *Shaat hadchak* – what is considered *Itmar hilchata*?

The *Chazon Ish* and other *Poskim* disagree whether there is room for leniency to rely on a minority opinion in *shaat hadchak*. The Gemara in *Nidda* says that in a situation of *lo itmar hilchata* one can be lenient in a *shaat hadchak* and in a situation of *itmar hilchata* one cannot[20]. The *Chazon Ish* (*Sheviit* 23:3) holds that when *yachid verabbim halacha kerabbim* applies, it is considered *itmar hilchata* and one cannot rely on the minority opinion even in a *shaat hadchak*. This applies both to a dispute in the Gemara or a dispute among later *Poskim*. It is only considered *lo itmar hilchata* when the minority opinion is accorded special significance such as in the dispute in *Brachot* (27a) between Rabbi Yehuda and the Rabbis where the Gemara explicitly says that either opinion can be followed.[21]

The *Chazon Ish* explicitly disagrees with the *Shach* (YD 242 *Pilpul B'hanhagot Horaot B'Issur V'Heter*) who allows one to rely on a minority opinion in a *shaat hadchak* for a Rabbinic prohibition. Note that R. Moshe Feinstein (*Iggerot Moshe* OC 1 – 51:1) does not accept the position of the *Chazon Ish*. Rav Moshe maintains that if the Gemara did not explicitly rule like the majority opinion, then the minority opinion can be relied

19. See *Yechave Daat* Vol 1 *Klallei HaPoskim HaAchronim* where R. Ovadia Yosef is quoted as saying that a later authority can only argue with a *Rishon* if there is support for his position from another *Rishon*. See also *Ramo CM* 25:1 about later authorities arguing with earlier *Poskim*.

20. See *Biur Hagra CM* 25:19 who learns that this Gemara only allows reliance on a minority opinion in a *shaat hadchak* after the fact.

21. The *Chazon Ish* brings a proof from the Gemara in *Beitza* (11a). The Gemara asks why Rav Matna would need to say the halacha follows the opinion of the majority – we already know this. From this, the *Chazon Ish* infers that for Rav Matna to formally decide the halacha like the majority adds nothing to the existing rule of *yachid verabbim halacha krabbim*.

upon in a *shaat hadchak* for a Rabbinic prohibition according to the *Shach* and for a Torah prohibition according to the *Taz* (*YD* 293:4 and see *Nekudot Hakesef* there). When the Gemara explicitly rules like one position, however, one cannot rely on the opposing position even in a *shaat hadchak*.[22]

The *Chazon Ish* (*Sheviit* 23:4) gives the example that if the *Shulchan Aruch* and the *Acharonim* reach a consensus that the halacha follows one position, this is considered that the halacha has been ruled upon – *itmar hilchata* – and the other opinion can no longer be followed even in a pressing situation.

R. Moshe Feinstein appears to agree with this example. Rav Moshe says (ibid) that a consensus of *Poskim* to follow one opinion in the Gemara does not preclude leniency in a *shaat hadchak* because later *Poskim* are not qualified to resolve a dispute in the Gemara. They are simply deciding based on the principle of *yachid verabbim halacha kerabbim* which allows for leniency in a *shaat hadchak*. The clear implication is that if the consensus of *Poskim* went beyond the principle of *yachid verabbim halacha kerabbim*, then one could not be lenient in a *shaat hadchak*. This is the case when later *Poskim* decide between earlier *Poskim* (such as the *Shulchan Aruch* or *Acharonim* deciding a dispute between *Rishonim*). It is true that their *psak* is only binding based on the relative stature of the *Poskim* involved and could theoretically be overturned by a sufficiently qualified authority.[23] However, the current (and likely the permanent) reality is that the *psak* is binding and the rejected opinion is not considered a legitimate halachic position.

I believe that this reasoning explains the position of Rav Yonaton Eyebshutz (author of *Urim veTumim*),[24] cited in the

22. See Rabbi Moshe Walter *The Making of a Halachic Decision*, Chapter 13, footnotes 27 and 37 (pp158, 160).

23. In the case of a consensus of the *Shulchan Aruch* and *Acharonim*, this presumably could not actually be overturned (see *Iggerot Moshe YD* 1 101:5).

24. See R. Moshe Walter, ibid, Chapter 13 footnote 6 (p153).

Netivot Hamishpat (25:20), that if the *Shulchan Aruch*, *Ramo*, *Sma*, and *Shach* all agree that the halacha follows one opinion, one cannot claim *kim li* (the principle that one may have the ability to rely on minority opinions in financial matters to avoid being forced to pay money) based on the rejected opinion. (Note that the rules of when one can claim *kim li* are not the same as the rules for when one can be lenient in a *shaat hadchak*).[25]

An important conclusion of this discussion is that whether one may rely on a minority opinion in a situation of pressing need (*shaat hadchak*) and whether a later authority can side with a minority opinion are two distinct issues. According to the *Shach*, there is a Torah requirement to follow the majority opinion. Thus, regarding Torah law, one cannot rely on a minority opinion even in a *shaat hadchak*. Nevertheless, a qualified authority can side with a minority opinion in a post-Talmudic dispute. On the flipside, according to R. Moshe Feinstein (as opposed to the *Chazon Ish*), a dispute in the Gemara that is not resolved will have the permanent status of *yachid verabbim halacha kerabbim*. One can be lenient in a *shaat hadchak* (according to the *Shach* only for Rabbinic laws and according to the *Taz* even for Torah laws). However, a later authority is not considered qualified to decide in accordance with the minority view.

Following One's Own View When Opposed by a Majority

A related question to the issues discussed thus far is whether an halachic authority nowadays who issues a ruling which is opposed by the majority of his contemporaries can (and/or must) continue to maintain his minority opinion.

---

25. For example, the *Chazon Ish*, who maintains that one cannot rely on a minority opinion in a *shaat hadchak*, and the *Shach*, who maintains that one cannot rely on a minority opinion regarding a Torah law in a *shaat hadchak*, still accept the principle of *kim li*.

According to the *Ritva* (*Yevamot* 14-15), an authority who rules leniently against the majority cannot conduct himself according to his own opinion (see also *Minchat Chinuch* 78). This is in fact the simple reading of the Gemara (*Yevamot* 14-16) which says that according to Rav, Beit Shammai did not follow their own positions in practice because Beit Hillel were the majority. However, the Ritva clarifies that an authority who rules that one should be strict on a certain issue, but the majority of Rabbis rule that one may be lenient, must personally conduct himself according to his own opinion, though he should do so as inconspicuously as possible, and he cannot instruct others to be strict.[26]

Do other *Rishonim* accept the *Ritva* that there are restrictions on the ability of the minority to follow their own opinion even in the absence of a formal decision? *Tosafot* (*Yevamot* 14b) say that the reason that Beit Shammai did not follow their own opinion is because of *Lo Titgodedu* (the principle that it is unacceptable under certain circumstances for there to be a lack of uniformity in halachic practice) and that for this reason they even followed the lenient customs of Beit Hillel – the majority – except when they could inconspicuously be strict for their own position. The *Ramban* (*Yevamot* 14b) says that based on *Lo Titgodedu*, Beit Shammai were not lenient according to their own position and did not teach others to follow their own position, but they nonetheless were strict according to their own positions. There is no indication

26. There are additional nuances to the *Ritva's* position. The *Ritva* agrees that if the authorities are in separate locations, there are no restrictions on the minority opinion (see *Chazon Ish EH Nashim* 134 on *Yevamot* 14a). However, the *Ritva* in *Shabbat* (130a) says that if the halacha is formally decided in accordance with the majority, the minority can no longer follow their own view even if they are in a separate location. Thus the restrictions on the minority described by the *Ritva* in *Yevamot* apply even when there was no formal decision. The *Ritva* maintains that the majority opinion is partially binding even in the absence of a formal decision. For further discussion of this *Ritva* see R. Refoel Yoffen's comments on the *Ritva* (*Yevamot* 14a), Mossad HaRav Kook, footnotes 995 and 6.

according to these *Rishonim* that the fact that Beit Hillel were the majority is an independent reason that precludes Beit Shammai from following their own position. The *Rashba* (*Yevamot* 14a) explicitly states, in direct contrast to the *Ritva*, that Rav holds that Beit Shammai did not follow their own opinion because of *Lo Titgodedu*. The fact that Beit Hillel were the majority (or the existence of a heavenly voice (*bat kol)* according to the second approach of the Gemara) is just a reason why Beit Shammai rather than Beit Hillel were the ones who needed to defer in order to avoid *Lo Titgodedu*. But opposing the majority is not an independent reason that prevents the minority from following their own view.[27]

Examples

It will be enlightening to illustrate the principles discussed above by applying them to several contemporary examples.

Fallibility of the Sages in Scientific Matters

About 10 years ago, some leading Torah scholars argued that one may not adopt the viewpoint that the Sages could have erred in scientific matters as a result of being limited by the scientific knowledge of their time. Although this viewpoint has been espoused by some Torah greats, they argued that this has the status of a minority opinion which can no longer be followed.[28]

---

27. Against the simple understanding of *Tosafot*, the *Chazon Ish* (*EH Nashim* 134 on *Yevamot* 14a) suggests that *Tosafot* maintains that Rav holds that Beit Shammai did not follow their own position because Beit Hillel was the majority. Reish Lakish holds there is the added reason of *Lo Titgodedu*. According to Rav, Beit Shammai needed to be strict based on their own position but according to Reish Lakish, based on the reason of *Lo Titgodedu*, they did not need to be strict unless it could be done inconspicuously.

28. In the words of the Rosh Yeshiva, R. Aharon Feldman:

"… although these giants did indeed espouse this view, it is a minority opinion which has been rejected by most authorities since then... Thus, for practical purposes we reject the view of R. Avraham…In any event,

One initial point to consider in evaluating this argument is that it is unclear whether to apply considerations of *psak* (normative law) to *hashkafa* (ideology, or beliefs) altogether[29]. While a distinction may be drawn between general *hashkafa* and matters of fundamental belief, with the latter operating more similarly to halacha (due at least partially to its direct halachic implications in defining categories of non-believers), does the question of whether the Sages could err in scientific matters fall into the category of fundamental beliefs?

Granting that *psak* would apply in this context, I would argue that there are two questions to consider here. The first is whether in this case the minority opinion is valid within the framework of *eilu v'eilu divrei elokim chaim*.[30] Regarding halacha, if the minority opinion is valid in this sense, it may be able to followed in a *shaat hadchak* in the realm of *issur v'heter*,

---

R. Avraham's opinion is a minority opinion, one of many which have fallen by the wayside in the course of the centuries and which we no longer follow… Can an individual on his own decide to follow the minority opinion? No more than he is permitted to do so in any matter of Jewish law…"

The only aspect of this controversy that I wish to consider here is how it relates to the question of the status of a minority view. Other objections to this view, or R. Natan Slifkin's argument, in his letter to R. Feldman, that the position that the Sages could err is actually the majority opinion among *Rishonim*, are beyond the scope of this discussion. R. Slifkin's letter, and the essay "The Slifkin Affair – Issues and Perspectives," by R. Aharon Feldman, cited above, are available at http://www.zootorah.com/controversy/.

29. See "Does *Psak* Apply to Matters of *Hashkafa*", by R. Yosef Gavriel Bechhofer in the *Journal of Halacha and Contemporary Society* Number LXVII. It seems to me that the question of applying *psak* to *hashkafa* actually depends on two points: 1) the degree to which *hashkafa* / *aggada* is binding (and there may very well be different types of *aggada* with different degrees of authority), and 2) even if/when it is binding, whether the standing of a minority view in *hashkafa* is different than the standing of a minority view in halacha.

30. Gemara, *Eruvin* 13b. This principle states that both opinions in a Mishnaic or Talmudic halachic argument are based on the words of *Hashem* and have some element of merit in the eyes of halacha. The literal translation of the phrase is "These and those [opinions] are the words of the living God".

or may enable a litigant to claim *kim li* in the realm of financial matters. Regarding *hashkafa*, I suggest that if the minority position is valid in the sense of *eilu v'eilu* – it is legitimate, albeit with more weight given to the majority approach.

The *Shach* holds that one cannot rely on a minority view regarding a Torah law even in a *shaat hadchak*. And the *Chazon Ish* holds that when *yachid verabbim halacha kerabbim* applies, it is considered *itmar hilchata*, and except for certain exceptions, one cannot rely on the minority opinion even in a *shaat hadchak*. According to these positions, it is relatively more difficult to argue for the legitimacy of a minority opinion. According to those who disagree with these approaches (the *Taz* and *Maharitz Chiyot* each disagree with the *Shach* as described above, and R. Moshe Feinstein, in addition to the *Taz* and *Shach*, disagrees with the *Chazon Ish)*, it is relatively easier to argue for the legitimacy of a minority opinion and more difficult to argue that a minority opinion should be considered illegitimate. However, even according to the most permissive approaches, if a very strong consensus exists, similar to the situation described above when the *Shulchan Aruch* and subsequent *Acharonim* reach an overwhelming consensus, this would preclude the minority opinion from being considered legitimate.

The second question here is whether someone who is a qualified Torah authority is entitled to adopt the minority view based on their own analysis. Regarding this question, the disputes between the *Shach* and *Taz*, between the *Shach* and the *Maharitz Chiyot*, and between the Chazon Ish and R. Moshe Feinstein are irrelevant. The question instead depends on the stature of the Torah authority and on the strength of the consensus against the minority opinion.

Women Wearing *Tefillin*

Several years ago, controversy arose over the question of whether women can wear *tefillin*. Although the *Ramo* (*OC* 38:3)

forbids women wearing *tefillin*, perhaps one can one chose to follow the *Rishonim* who allow it (for example the *Sefer Hachinuch* Mitzvah 421).

Contemporary halachic authorities[31] strongly rejected this reasoning and argued that despite the *Rishonim* who approved of women wearing *tefillin*, there is a long-standing consensus to follow the *Ramo* who, as noted, rules that they cannot. This is a good example of a case where the *Shulchan Aruch* (in this case the *Ramo*) and the *Acharonim* reach an overwhelming consensus. Thus despite the earlier disagreement, these opinions are not currently relevant as a legitimate alternative to the *Ramo*. An additional argument is that even if there was no overwhelming consensus, someone cannot simply choose to follow even a perfectly legitimate minority opinion. While there may be a basis to rely on a legitimate minority opinion in a *shaat hadchak*, it would seem difficult to argue that the question of women wearing *tefillin* should be viewed as an urgent situation, a *shaat hadchak*. Note that if there were a qualified authority who wished, based on independent halachic analysis, to adopt the opinion that women could wear *tefillin*, the latter argument might not be an issue but the former argument would still present an obstacle. Another possible difference between these two reasons is that perhaps

31. See R. Mayer Twersky's essay on this subject: http://www.cross-currents.com/archives/2014/04/02/women-and-tefillin-r-twerskys-magisterial-approach/ which also noted the *teshuva* of R. Herschel Schachter available here http://www.theyeshivaworld.com/wp-content/uploads/2014/02/rh.pdf. Note that while authorities rejected the possibility of choosing to follow other authorities instead of the *Ramo*, R. Shlomo Brody suggested that an argument can be made that according to some approaches in the *Acharonim* (the *Taz* and *Aruch Hashulchan*), the *Ramo* himself would allow women to wear *tefillin* under very specific conditions. See "Women, *Tefillin*, and the Halakhic Process" by Rabbi Shlomo Brody http://www.torahmusings.com/2014/02/women-tefillin-and-the-halakhic-process/. If correct (and leaving aside other possible reasons to oppose this practice), this argument raises the issue of how to navigate among the different opinions in the *Acharonim* – which would need to be considered in light of the same issues I have considered in this article.

it is viewed somewhat more favorably if someone follows a legitimate minority opinion (even though in the absence of a *shaat hadchak* this is wrong) than if someone follows a rejected minority opinion.

The *Bracha* of *Sheloh Asani Isha*

Several years ago, controversy arose when several leaders suggested omitting the blessing of *sheloh asani isha* ("Who has not made me a woman") because they felt that this *bracha* implied a lack of respect for women. One attempted justification of this practice[32] was to apply the principle that in a *shaat hadchak* one can rely on minority opinions. In this case, there are opinions (see *Gra OC* 46) that one makes the *bracha* of *she'asani Yisrael* ("Who has made me a Jew") rather than *sheloh asani goy* ("Who has not made me a gentile"). And, the suggested halachic reasoning continues, that once one makes the *bracha* of *she'asani Yisrael,* one no longer makes the *brachot* of *sheloh asani eved* ("...not a slave")or *sheloh asani isha* since many authorities maintain that the *bracha* of *she'asani Yisrael* renders them redundant (see *Bach*, *Taz*, *Magen Avraham*, and *Mishnah Berurah OC* 46).

It seems this reasoning inappropriately applies the concept of *shaat hadchak*. First, although there may be opinions that one recites the *bracha* of *she'asani Yisrael*, these opinions would maintain that one nonetheless recites the *brachot* of *sheloh asani eved* and *sheloh asani isha* (as recorded in *Menachot* 43b). Thus, to choose to recite *she'asani Yisrael* only would be to follow neither opinion. Second, this is probably a case where a consensus to recite *shelo asani goy* (rather than *she'asani Yisrael*) exists. Although the *Gra* records that there are early sources

32. See the essay by R. Yosef Kanefsky at http://morethodoxy.org/2011/08/08/a-clamer-and-fuller-articulation-r-yosef-kanefsky/. For further discussion of this topic see the *teshuva* of R. Yehuda Herzl Henkin *Bnei Banim* 4:1 available at https://dailydaf.files.wordpress.com/2011/04/shut-benei-banim-4-1-shelo-asani-isha.pdf.

for *she'asani Yisrael*, this does not imply that he follows this approach. Third, it seems incorrect to categorize discomfort with the majority halachic position as a *shaat hadchak*. Permission may be granted to set aside the majority halachic position when an external factor in a specific case makes it very difficult to fulfill this position. This is very different than arguing that discomfort with the majority position itself, which by definition can exist in every scenario, is itself a reason to follow a minority position. Even worse is that the minority position here does not in any way disagree with the majority position on the appropriateness of the *bracha* of *sheloh asani isha* – only about whether to say *she'asani Yisrael* or *sheloh asani goy*.

Conclusion

In this essay I have considered: a) when a lenient minority opinion provides a basis for leniency in a *shaat hadchak* and when such leniency is unwarranted; b) when a minority opinion enables a subsequent authority to dissent from the majority position, and when later authorities are required to adhere to the majority position. In examining these questions I have argued that these questions are distinct from each other.

Also, in the process of addressing these two primary questions, I have touched on several related issues. I have offered a general perspective on *psak*. I have considered the issues of whose opinion to follow in a halachic dispute when there is no majority and when one is a student/follower of one of the disputants. And I have considered the status of a halachic authority whose ruling is opposed by a majority of his contemporaries. The examples discussed, along with many others that could have been chosen, show that many controversies surround the proper role of minority opinions in formulating a *psak*.

A quintessential feature of halacha is that in many cases, issues are not decided definitively. Multiple viewpoints dot the landscape and are brought to bear in reaching a *psak*.

While this feature of halacha allows for diversity and flexibility, the halachic system itself imposes limits on this diversity and flexibility.

Acknowledgements

I appreciate that several individuals, including Rabbi Yitzchak Adlerstein and Rabbi Yosef Gavriel Bechhofer, took the time to review earlier versions of parts of this manuscript and/or to discuss these issues with me. Both their expertise and their words of encouragement were very helpful. I alone take responsibility for the contents of this article.

Yom Tov Sheini in Israel

Dr. Aryeh Zinkin

Translation and discussion of an article by Rabbi Yaakov Luban

Note from Rabbi Yakov Luban:

The following essay is based on a Shiur *that I delivered in my shul, Congregation Ohr Torah, a number of years ago.*

One of the primary objectives of my shiurim *is to demonstrate how the halachic process operates. To the uninitiated, it may appear that* poskim *render decisions about new situations based on arbitrary feelings, sensitivities and* hashkafic *preferences. In fact the process of* psak *halacha [rendering final decisions in Jewish law] requires broad mastery of all facets of Torah literature and entails rigorous thought and deep analysis of many complex issues.*

The controversy between the Beit Yosef *and the* Chacham Tzvi*, whether a Diaspora Jew observes one or two days Yom Tov when visiting Eretz Yisrael, is a perfect example of the above. To a lay person who has not had an opportunity to study the topic in depth, it often appears that the conflicting opinions are built on differences in attitude towards the land of Israel, Zionism, and the like. In fact the dispute revolves around complex halachic issues which have been explored for hundreds of years by great Torah scholars. This article attempts to present an in-depth analysis of the underlying*

Aryeh Zinkin, M.D. is a practicing physician and a congregant at Congregation Ohr Torah in Edison, NJ, led by Rabbi Yaakov Luban. Rabbi Luban is also the Executive Rabbinic Coordinator of the Kashruth Department at the Orthodox Union.

rationales of the positions of major poskim, *as well as exploration of some of the proofs and counter-proofs for each position.*

It will hopefully become clear that hashkafa *[ideology] and love of the land play no role whatsoever in this matter. Of course one should love Eretz Yisrael, but the centuries-old controversy about a* ben chutz la'aretz *[resident of the Diaspora] is not about ideologies, and competent rabbinic guidance is essential to chart one's own personal course of action.*

Overview

The first mitzvah given to the nation of Israel is the mitzvah of *Rosh Chodesh* – to establish the beginning of each new lunar month. It is on the basis of knowing when the month begins that we are able to know when the *Yomim Tovim* (particularly Sukkot and Pesach, which are in the middle of the month) actually begin.

A lunar month is approximately 29 ½ days. Since a day cannot be divided, a month was calculated as being "short" or "long" – i.e., 29 or 30 days long. The decision as to when the month began was determined based on testimony by witnesses who came to the Court in Jerusalem, who reported on seeing the new lunar crescent in the sky. If the new month started on the 30th day, then the Court would send out notification on that day. If the month started on the 31st day, then the Court would not have to send out notification and people would know by default when *Rosh Chodesh* was.

Initially, notification was done by setting up a series of fires on mountain tops. This allowed for extremely rapid dissemination of knowing when *Rosh Chodesh* started. The system worked well enough that even some areas outside of Israel could know the proper day. Unfortunately, this system of notification had to be stopped when the process was sabotaged by the *Kutim* (Samaritans) who were at ideological warfare with Israel. The *Kutim* would set fires on the wrong

day to cause confusion and disruption of the holidays. Therefore, the Court decided that instead of fires, communities would be notified by messengers sent by the Court.[1]

Although the system worked, it would take the messengers 10 – 14 days to reach many of the further out communities. This meant that those places (even in parts of Israel proper) that were even farther away would not know which was the actual day of *Rosh Chodesh* and therefore would be uncertain as to which was the first day of the *Yom Tov*. This uncertainty is called *sfaikah d'yomah*. Therefore, those areas beyond the 14-day reach would celebrate two days in order not to make a mistake

Centuries after the destruction of the Temple, Hillel the Second (lived circa 330 – 385 C.E.) established a permanent calendar that would establish all of the dates for *Rosh Chodesh* and *Yom Tovim* for all future time. The Gemara itself asks, "Why, if we now know with certainty when *Rosh Chodesh* will be, should we still have two days of *Yom Tov*?"[2] The Gemara answers that the halachic authorities in Israel instructed the communities in the Diaspora to maintain the custom (*minhag)* of their forefathers to observe two days of *Yom Tov* as they had practiced it in the days when there was uncertainty. They instituted this out of concern that in the future the governments in the Diaspora might forbid the keeping of the Jewish calendar and the communities would not know when to observe *Yom Tov*.

By establishing this *takanah* (ruling), the establishment of the two-day *Yom Tov* was set and is no longer based on the issue of certainty or not. Those who question the need to observe two days of *Yom Tov* in the Diaspora when there is no longer a *sfaikah d'yomah* are obviously unaware of the basic rationale for *Yom Tov Sheini* (the second day of *Yom Tov*) as expressed in the Gemara.

---

1. *Rosh Hashana* 22b.
2. *Beitza* 4b .

There is considerable discussion among the *poskim* as to how exactly this *takanah* affects different areas, but this question is well beyond the scope of this paper. In brief, the Ritva's opinion[3] is that the *takanah* created a new geographic reality, namely that any place in Israel is under the one-day rule and any place outside of Israel is under the two-days rule – even if in the time of the Temple they might have held one day because of their proximity to Yerushalayim. The Rambam,[4] on the other hand, feels that any place that observed one day in the time of the Temple should continue to observe one day and any place that held two days should continue to hold two. However, those places that were established after the *takanah* was made would need to hold two days. This issue came up with communities such as Bnei Brak and Eilat. From a practical point of view, all places that are considered part of the greater Israel are under the rule of a one-day *Yom Tov*. All places outside of Israel are under the two-day rule.

We will now begin the discussion of what one does when they go from Israel to outside Israel (*chutz la'aretz),* or from outside Israel to Israel. The basis for most discussions about this stems from a mishnah in *Pesachim* 51a that states that if one goes from one community to another, he should continue to keep the stringencies of the place from which he came. He must also observe the stringencies of the place he is in, so as to avoid conflict and controversy.

For the sake of brevity and maintaining focus of this article, we will not discuss the many issues that relate to a person from Israel (*ben Eretz Yisrael)* who travels to *chutz l'aretz* for *Yom Tov*. The Gemara in *Pesachim* 51b allows such a person to keep one day in a desert (or non-Jewish area) but mandates observance of *Yom Tov Sheini* in a Jewish neighborhood to avoid *machloket* (controversy). *Poskim* debate whether *melacha* (activities forbidden on *Yom Tov*) can be done in private, and

3. *Rosh Hashana* 18a.
4. *Hilchot Kiddush Hachodesh: Perek 5; Halacha 4.*

the *Mishnah Berurah* and many other halachic authorities prohibit even private acts of *melacha* in a Jewish area.

The more difficult issue is that of a *ben chutz l'aretz* (one who lives outside of Israel) going to Israel for *Yom Tov*. Strangely, the Gemara does not address this. It is clear that in the time of the Temple, a person coming to *Eretz Yisrael* would celebrate only one day and bring a sacrifice only on the one appropriate day. The problem is what to do since the loss of the Temple and in view of the *takanah* mentioned above.

The *Beit Yosef* writes in a *sefer* attributed to him, *Avkat Rochel* 26A, that one who comes from *chutz l'aretz* to Israel, with the intention of returning to his original home outside Israel, is in the category of one who lives in *galut (chutz l'aretz)* and should therefore keep two days. Interestingly, perhaps paradoxically, Rav Yosef Karo, author of the *Beit Yosef*, does not address this issue at all in his definitive halachic compendium, the *Shulchan Aruch*. Some have taken this as an indication that he may have reversed his opinion, although he does not mention a contrary opinion either.

The *Chacham Tzvi*, on the other hand, takes issue with this position. His opinion is that the mishnah mentioned above is not relevant because the custom of observing two days is driven by geographic considerations. In the words of the *Chacham Tzvi*, "*hamakon gorem"* – it is the place that drives the practice of law. Therefore, it is a geographic determination that decides if one or two days are to be observed. If in Israel, then only one day of *Yom Tov* should be held. Some report that this position was supported by Rav Kook, the first chief Rabbi of Israel.

A third position, a sort of "compromise" between the two mentioned above, was given by R. Shmuel Salant. This is the so-called "day and a half". The basic position is that one should not do the specific mitzvot of the *Yom Tov Sheini* on the second day (e.g., *seder* or the *Yom Tov davening*) but should still refrain from doing *melacha.*

With this brief background, I now present Rabbi Luban's article. As noted, personal practice should only be established after careful rabbinic consultation. (Note: the author has added some additional information, such as biographical data or more specific source citations, or, occasionally, some clarifying comments that were not in Rabbi Luban's original).

Dispute Between *Avkat Rochel* and *Chacham Tzvi*

It is universally accepted that a resident of Israel, or a *ben Eretz Yisrael* (which will be abbreviated as BEY – translator's preference) who finds himself in the Diaspora (*chutz l'aretz*) is forbidden to do work (*melacha*) on the second day of *Yom Tov* (*yom tov sheini shel galuyot* – to be abbreviated as YTSG – translator's preference), even if it is his intention to return to Israel. This is implicit in the statement of Rav Ami in the Gemara:[5]

> "Within a town (in *chutz l'aretz*), it is forbidden [for a BEY to do *melacha*]; but in the desert, it is allowed. This is because we put upon him the restrictions of the place to which he goes so that he shouldn't act differently, thereby avoiding disputes with the townspeople."[6]

However, the *Rishonim* disagree as to whether it is permissible for a BEY to do *melacha* in private while in *chutz l'aretz* on the second day of *Yom Tov*. The *Taz*[7] rules[8] in accordance with those who are lenient and would allow *melacha* in private because it will not lead to public dispute. In contrast, the *Magen Avraham*,[9] [10] forbids *melacha* even in

5. *Pesachim* 51:b.

6. *Pesachim* 50: a&b.

7. R. Dovid Halevi Segal: born in Ludmir, in 1586, died in Lemberg 1667.

8. *O.C.* 496:2.

9. R. Avraham Abele Gombiner: born in Gombin, Poland 1635; died in Kalicz 1682.

10. *O.C.* 496:4.

private. This ruling is supported by the *Mishnah Berurah,*[11] [12] the *Aruch Hashulchan,*[13] [14] and other decisors in accordance with the *Magen Avraham* – that even in private, *melacha* on the second day is forbidden.

However, the law concerning a person from the Diaspora (a *ben chutz l'aretz* – to be abbreviated as BCL – translator's preference), who finds himself in Israel on the second day of *Yom Tov*, is not discussed at all in the *Shulchan Aruch*. However, in the Responsa of the *Avkat Rochel* (Responsum 26) he rules that one is obligated to keep two days of YTSG. This is surprising because Rav Yosef Karo is the author of both the *Beit Yosef* and the *Shulchan Aruch,* and probably also the *Avkat Rochel*.[15] He writes in the *Avkat Rochel* that, "it has been a widely accepted custom from the days of old and practiced by the great scholars of the world; and they would gather together many congregants from the Diaspora and pray the *Yom Tov* services."

On the other hand, the *Chacham Tzvi*[16] in his *Responsa*, No. 167, disagrees with the *Beit Yosef* and holds that one should keep only one day; and that those who hold two days transgress the prohibition of *bal tosif* – the prohibition not to add on to the mitzvot of the Torah::

> "Even when they no longer relied on messengers being sent from the *Beit Din* in Israel [i.e., when there was a fixed calendar and the actual dates were known], the

11. R. Yisroel Meir Kagan: born in Dzyatlava, Russia 1839l died in Radun, Poland 1933.

12. *O.C.* 496:9.

13. R. Michel Epstein: born in Babruysk, Russia 1829; died in Navahrudah, Russia 1908.

14. *O.C.* 496:4.

15. R. Yosef ben Ephraim Karo: born in Toledo, Spain 1488; died in Safed, Israel 1575.

16. R. Tzvi Hirsch ben Yaakov Ashkenazi: born in Hasburg, Moravia 1650; died in Lviv, Ukraine 1718

> Gemara warns that they should, nevertheless, keep the customs of their forefathers because maybe a ruling foreign government will seek to disrupt Jewish life by disallowing the use of the calendar. However, this concern does not apply within *Eretz Yisrael* proper. Therefore, those who come from *chutz l'aretz* are forbidden to practice two days of YTSG for the entire time that they are in Israel (even if it is only a transient stay) since *hamakom gorem* – it is the place that creates the obligation. And this would not fall under the general rule that one should "keep the restrictions of the place from which he comes".

This dispute has already been well discussed by many great scholars. It has been the decision of the *Mishnah Berurah,*[17] the *Aruch Hashulchan,*[18] and the *Iggerot Moshe,*[19] [20] and many other contemporary *poskim* (rabbinic authorities), to side with the *Avkat Rochel*. On the other hand, one cannot discount the opinion of the *Chacham Tzvi* out of hand. In *Ir Hakodesh v'Hamikdash,*[21] by R. Yechiel Michal Tukuchinsky,[22] he quotes the opinion of Rabbi Shmuel Salant,[23] who essentially agreed with the *Chacham Tzvi* . However, he did not want to go against the rulings of his mentors and peers and therefore advised that in practice, one should adhere to the stringencies of both opinions.[24]

---

17. *Mishnah Berurah*: O.C. 496:13.

18. *Aruch Hashulchan* O.C. 496:5.

19. R. Moshe Feinstein: born in Uzda, Russia 1895; died in New York, USA 1986.

20. *Iggerot Moshe* O.C. 4:101.

21. *Ir Hakodesh Ve'Hamikdash* Vol 3; 19:11.

22. R. Yechiel Michel Tukuchinsky: born in Lyakhovichi, Russia 1872; died in Israel 1955.

23. R. Shmuel Salant: born in Bialystok, Poland 1816; died in Israel 1909.

24. This position created what is now popularly referred to as the "day and a half" practice. The idea behind this is that one formally adheres to the practice of the first day. On the second day, he should not recite the *Yom Tov*

We will now analyze the dispute between the *Avkat Rochel* and the *Chacham Tzvi* and try to understand the basis for their dispute.

Hamakom Gorem

We have seen that, according to the opinion of the *Avkat Rochel*, there is an obligation for a BCL, who is in Israel, to keep the custom of a second day of *Yom Tov* because "we put upon him the stringencies of the place from which he comes". On the other hand, the *Chacham Tzvi* holds that this reasoning does not fall under the category of requiring "the stringencies of the place from which he came" because *hamakom gorem* – it is the place where the person is, that determines whether there is an obligation.

The apparent position of the *Chacham Tzvi* is that the obligation to follow the customs of the place from which one comes is applicable only if the custom is not linked to the place itself. In such instances, it is not the place itself that creates the custom, it is just that the people of that place so happen to have that custom. For example, (as mentioned in the Gemara *Pesachim* 51a) in *chutz l'aretz* they do not eat the fat from a certain area of the animal's stomach. However, in Israel, they do eat it. It is not the place that creates the custom one way or the other. It just so happens that in Israel they do eat it and in *chutz l'aretz* they do not eat it. If so, the custom is dependent on the people in the community, not the place itself in which they live. As such, we say that anybody who is a part of the community is obligated to continue to maintain those customs of his community, even if he is now in a different location. He must still consider himself as part of his community, as long as he intends to return. Therefore, it would be forbidden for a BCL to eat the fat from the animal's stomach even when he is

---

kiddush, he should *daven* the *chol hamoed* or weekday *davening*, but he should not do any *melacha*.

in Israel since he remains a member of his community in *chutz l'aretz.*

In contrast, there are other places where it is not appropriate to impose upon him the stringencies of the place from which he came. For example, according to the opinion that *terumah* and *maaser* (tithes) are applicable in our time as a rabbinic requirement – it is obvious that a BEY who finds himself in *chutz l'aretz* is not obligated to separate *terumah* and *maaser* from domestic fruits, even if it is his custom to do so in Israel. This is because *hamakom gorem* – it is the place that causes the custom. Our sages obligated this separation for tithes only for the fruits of *Eretz Yisrael* because of the holiness of Israel. It is not reasonable to have a mitzvah to separate *terumah* and *maaser* from fruits of other countries.

Therefore, it is the opinion of the *Chacham Tzvi* that the custom of observing a second day of *Yom Tov* (YTSG) is in the category of *hamakom gorem,* a stringency placed upon communities outside the land of Israel; consequently, he maintains that a BCL should not observe the restrictions of the place from which he came. In contrast to this, it would appear that the opinion of the *Avkat Rochel* is that YTSG should be considered as a custom of the people of *chutz l'aretz* and that it is not the place that establishes the custom.

At first glance, the opinion of the *Avkat Rochel* seems more logical. It is true that during the era when the month was sanctified on the basis of witness testimony, the concept of *hamakom gorem* would be applicable. Since the messengers of the Court could not reach outlying communities *chutz l'aretz* in time, those communities perforce would observe two days of *Yom Tov* because of doubt. Therefore, the geographic reality established the custom. However, today, when we have the calendar and we know the actual day, the custom of observing a second day is strictly on the basis of a rabbinic ruling (*takanat chachamim)* imposed on the people in the Diaspora to "keep the customs of our forefathers."

The *Chacham Tzvi* specifically addresses this issue and writes that the concern that hostile governments would prohibit using the Jewish calendar applies only in the Diaspora.[25]

One may reasonably ask why we shouldn't be worried about the threat of disruption even in Israel?[26] It may well be based on the statement by the *Meiri*[27] (on *Beitza* 5a) that "we are not worried that Torah will be forgotten in *Eretz Yisrael*". Indeed, the very fact that the rabbis did not institute a second day of *Yom Tov* in Israel implies that there never was a concern that Torah or the Jewish calendar would be forgotten there, even if hostile governments sought to cause disruption. Since the second day *Yom Tov* was instituted for fear of disruption of the calendar, which could only occur in *chutz la'aretz*, this is clearly an example of *hamakom gorem* as the *Chacham Tzvi* maintains.

What is the logic of the *Avkat Rochel,* who does not view this as a *takanah* (enactment) based on the principle *hamakom gorem,* that the geographical location is the determining factor? The *Avkat Rochel* must disagree with the premise of the *Chacham Tzvi* that there is no concern of calendar disruption occurring in *Eretz Yisrael*. In the opinion of the *Avkat Rochel*, a disruption can occur anywhere, including *Eretz Yisrael*. If so, why was the *takanah* of *Yom Tov Sheini* not imposed upon *Eretz Yisrael*? The answer must be that the *takanah* was made only in *chutz l'aretz* where there was a previous custom of keeping two days of *Yom Tov*. It was only there that the rabbis declared that, because of the worry of potential disruption, they should continue to keep two days as was the "custom of their forefathers". However, in Israel, where there was no previous *minhag* of keeping two days of *Yom Tov* (because the

25. This issue is not as far-fetched as it seems. This was a real problem for Soviet Jews in the 1950's and 60's.

26. Indeed, many of the rulings by the Greeks and Romans when they controlled Israel were directed at restricting the access and use of the Jewish calendar.

27. Rabbi Menachem Meiri: born in Perpignan, France 1249; died 1310.

messengers arrived on time), the rabbis did not want to create a new custom.

This position is reflected in the *RaN*[28] who, in his comments on *Sukkah* 44a, states that the basis of the *takanah* of keeping two days is rooted in the concern over calendar disruption. However, if it were only this concern, the rabbis would not have imposed this ruling, were it not for the fact it was also a long-standing community custom, *minhag avotaihem*. Therefore, even though the concern might also apply in *Eretz Yisrael*, it is not sufficient on its own to warrant imposing a new custom. Thus, we cannot say that the *takanah* to keep two days is based on the locale (*hamakom gorem*). Despite any theoretical concern of calendar disruption, *Yom Tov Sheini* was not instituted in *Eretz Yisrael* because the community in Israel never observed this *minhag*. Thus it is the communal distinctions that currently accounts for the distinction between Israel and the Diaspora. Hence, according to the *Avkat Rochel* , a visitor from abroad who finds himself in *Eretz Yisrael* is obligated to keep the second day because of the principle of "keeping the stringencies of the place from which one comes" which is not subject to the principle of *hamakom gorem* .

In conclusion, we can state that the dispute between the *Avkat Rochel* and the *Chacham Tzvi* is based on the answer to the following question: What is the reason that the sages did not make a *takanah* of *Yom Tov Sheini* even in *Eretz Yisrael*? The *Chacham Tzvi,* like the *Meiri*, accepts that in *Eretz Yisrael* there is no concern of disruption and the *takanah* was enacted only specifically for the places which are geographically outside Israel. Hence, the operative principle is that the place determines the behavior – *hamakom gorem* – and we do not obligate a person to keep the customs of the place from which he came when those customs are only a function of the place – the *makom*.

---

28. Rabbeinu Nissim ben Reuven: born in Barcelona, Spain 1320; died in Barcelona 1380.

On the other hand, the *Avkat Rochel,* like the *RaN*, feels that we are worried about calendar disruptions even in Israel, and therefore in theory, the *takanah* might have been imposed in all places. The rabbis, however, did not impose the *takanah* of *Yom Tov Sheini* in a place where there was not already a previous custom to observe two days. Hence, it is not a *minhag* based on the locale alone (*Hamakom gorem)*, and therefore the rule to "keep the stringencies of the place from which one comes" does apply when a BCL visits in Israel.[29]

The Opinion Of Rabbi Shmuel Salant

It seems clear that the *Chacham Tzvi* feels that it is not appropriate to impose "the restrictions of the place from which one comes" on a BCL who is in *Eretz Yisrael,* because of the principle of *hamakom gorem*. There is an additional position that supports the conclusion of the *Chacham Tzvi* that a BCL should only keep one day when in Israel, based on the analysis of Rabbi Shmuel Salant, presented by his grandson, Rabbi Yechiel Mechal Tukuchinsky in his book *Ir Hakodesh*

---

29. According to the *Chacham Tzvi,* why do we not apply the principle of *hamakom gorem* in a consistent manner and obligate a BEY who finds himself in *chutz l'aretz* to keep two days? If the obligation to keep two days is based on a geographic location, then it would seem logical to require a BEY to keep the customs of Jews outside the Land of Israel. Although we do find that the rabbis rule that a BEY who is in *chutz l'aretz* is not allowed to do *melacha* (forbidden work) on the second day, this is only because we don't want to create public disagreement. However, in theory, it would be allowed for him to keep only one day. In fact, we find in the *Shulchan Aruch* (as mentioned earlier) that if one was alone in the desert in *chutz l'aretz,* he would be allowed to keep one day. So the question remains, why doesn't the principle of *hamakom gorem* apply in reverse?

To resolve this question, we would have to say that in order for the concept of *hamakom gorem* to obligate one to keep two days of *Yom Tov*, it would only apply in a place where there is a rabbinic decree already in place. As we have seen, however, such a *takanah* was never instituted for a BEY who is in *chutz l'aretz,* and therefore he is exempt. The decree was only established in *chutz l'aretz* because of the concern over calendar disruption and this concern never involved those that came from *Eretz Yisrael*. Therefore, the principle of *hamakom gorem* is not applied.

v'Hamikdash (chapter 19:2). He reasons that the original *takanah* of YTSG was based on the sending of messengers, and those areas beyond the range of the messengers should, nowadays, continue to keep two days to "keep the custom of your forefathers".

But there is no reason or justification to be any stricter nowadays than they were at the time when the *takanah* was made. If a BCL in Israel would only keep one day in the time when the *takanah* was made, how can we now impose upon him to keep two days on the basis of "keeping the custom of your forefathers"? In his book, Rabbi Tukuchinsky speculates that perhaps Rabbi Salant saw this as the reasoning of the *Chacham Tzvi*, but it is Rabbi Luban's opinion that this is not consistent with the *Chacham Tzvi's* own clear statement that the reason for not keeping two days in Israel is *hamakom gorem*.

A possible question can be raised against the positions of R. Salant. If we hold that the requirements of one or two days should not be any stricter, nowadays, than when the *takanah* was first instituted, then a BEY should be required to keep two days if he is in *chutz l'aretz* just as he would have had to do back in the days when the new month was established by the testimony of witnesses. The answer to this challenge may be that the rabbis never created a *takanah* of a second day *Yom Tov* for a BEY who finds himself in *chutz l'aretz.* The *takanah* was only for a BCL who was in *chutz l'aretz* to keep the "customs of their forefathers".

Perhaps the *Avkat Rochel* argues against this reasoning, based on the following question: Do we follow the custom of a second day *Yom Tov* nowadays in the same manner as it was practiced when *Rosh Chodesh* was established by witnesses? Clearly, R. Salant assumed *Yom Tov sheini* is observed today exactly as it was in the past. Therefore, since, in the time when *Rosh Chodesh* was based on the witnesses seeing the new moon, a BCL visiting Israel would not observe *Yom Tov sheini*, we should not be any stricter and impose a second day *Yom Tov* on a BCL in Israel today. On the other hand, perhaps the

Avkat Rochel holds that *Yom Tov sheini* is not observed today as it was in the past: In the past, when the calendar was established by witnesses and notification was made by messengers, the second day of *Yom Tov* was observed out of doubt as to the correct day. Therefore, in Israel – where there was no doubt – everyone observed one day, including visitors from the Diaspora. Today, however, the reason we have a second day is because of the *takanah* created by the rabbis. Therefore, today, it still makes sense to impose the obligation on a BCL who finds himself in Israel to continue to keep two days.[30]

The Dispute Between Rav And Rav Asi

In truth, this question of how we view the second day of *Yom Tov* is a matter of significant complexity.

Ostensibly, it appears to be a dispute in the Gemara[31]

---

30. At this point, we have established clear lines of differences in understanding the rules and implications of YTSG.

1. According to the *Chacham Tzvi*, the primary reason for the *takanah* of YTSG is because of concern of disruptions to the calendar – but only in *chutz l'aretz*. Therefore, since the *takanah* is based on the geographic reality, it only applies in *chutz l'aretz*. Consequently, a BCL in Israel keeps only one day because *hamakom gorem*.

2. According to R. Shmuel Salant, the primary reason for the *takanah* is because of keeping *minhag avoteinu,* the customs of the forefathers. Since that *minhag* was imposed only for those in *chutz l'aretz,* we should not be any stricter than when the *minhag* was established. Therefore, a BCL in Israel should only keep one day.

3. According to the *Avkat Rochel*, the primary reason for YTSG is the *takanah* that was imposed by the rabbis. Therefore, regardless of one's location, one must continue to see oneself as a member of one's community and therefore keep the "restrictions of the place from which one comes". Therefore, a BCL in Israel needs to keep two days.

From this point on, the article continues to analyze the underlying structure and reasoning of the *takanah* itself. This analysis is only applicable to the position of the *Avkat Rochel*. According to the *Chacham Tzvi,* regardless of the reasoning, the concept of *hamakom gorem* would still apply.

31. *Beitzah* 4b.

between Rav and Rav Asi, who argued about the status of an egg that was laid on the first day of *Yom Tov*. The issue is whether the egg can be eaten on the second day or not. The concern is that halachically an object that came into being on *Yom Tov* is considered *muktzah*, and therefore could not be used. According to Rav Asi, the egg would be forbidden because both days are considered as one holy day. R. Zeira states that the position of Rav Asi reflects the view that even though nowadays we know when the actual day of *Yom Tov* is, we still hold two days. This would imply that if the rabbis saw fit to make a *takanah* for a second day even when there is no doubt as to the correct day, then the status of the second day is as forceful as the first. That is why the egg would be forbidden.

On the other hand, the opinion of Rav (whom we generally follow in halacha), is that it is permissible to eat the egg because there are two distinct aspects of holiness between the two days. Abayei states that the position of Rav reflects the view that even though we now know the correct day, we still observe two days in order to maintain the "customs of the forefathers". What does Abayei mean that there are "two aspects of holiness", and how does it affect the status of the egg? The comments of the *Rishonim* indicate that they understood Abayei as saying that we treat the second day of *Yom Tov* as a *safek* – an uncertain day of *Yom Tov* – in spite of the fact that the rabbis instituted *Yom Tov sheini*. As such, an egg hatched on the first day may be consumed on the second day because of the following logical construct: If the first day is *Yom Tov*, the second day is *chol* (weekday) and the egg can be consumed on a weekday. If the second day is *Yom Tov*, the first day must have been *chol*, and an egg laid on a weekday is permissible.

This is consistent with the comments of the *RaN* on his commentary to Gemara *Sukkah* in the third chapter. He states, "Even though we now know the true day for the beginning of the month and *Yom Tov*, we nevertheless accept upon

ourselves to act as if there were still a doubt, and that is because of the concept of *minhag avoteinu,* maintaining the customs of our fathers." This is also the position of the *Ritva*,[32] who states, "Even though we know, nowadays, the actual start of the month and the true first day of a *Yom Tov*, nevertheless, we make a second day *Yom Tov* on the basis of a *takanah* by our sages of *minhag avoteinu*. We do this as if we did not know with certainty which is the correct day."

Now, since we follow the ruling of Rav, that the egg would be allowed to be eaten on the second day of *Yom Tov*, it would seem that we keep the custom of a *Yom Tov sheini* as a *safek*, uncertainty, in the same manner it was observed in the past. If this is so, then it would follow that the explanation of R. Salant is correct and that a BCL who is in Israel should not have a requirement that is stricter than what was customary during the time when the month was established on the basis of witnesses.

The Position of the *Rambam*

However, the issue is not closed. To fully analyze whether *Yom Tov sheini* is treated as an "uncertainty", we must examine the position of the *Rambam*.

When *Yom Tov* falls on Friday, one is not permitted to cook for the Sabbath on *Yom Tov*, unless one made an *eruv tavshilin*. The *eruv* cannot be executed on *Yom Tov*, and must be prepared the day before. The *Rambam*[33] discusses a case[34] where one forgot to make an *eruv tavshilin*[35] before a two-day *Yom Tov* which fell on Thursday and Friday. Many argue that

32. Yom Tov ben Avraham Ashbilli: born in Seville, Spain 1250; died in Saragossa, Spain 1330.

33. R. Moshe ben Maimon "Maimonides": born in Cordoba, Spain 1135; died in Fostat, Egypt 1204.

34. *Hilchot Yom Tov* 6:14.

35. The recitation would allow cooking on a Friday *Yom Tov* for Shabbat.

it is permissible to execute an *eruv* on Thursday because the second day of *Yom Tov* is treated as a *safek*, uncertainty, and therefore one could stipulate as follows: If today, Thursday, is *Yom Tov*, then Friday is a weekday, and I can cook on Friday for Shabbat. However, if Friday is *Yom Tov*, today is a weekday, and I therefore declare that the *eruv tavshilin* I prepare today will be valid.

The *Rambam* disagrees: he rules that in the times when messengers notified the Diaspora when *Rosh Chodesh* was set, it would have been possible to establish an *eruv* on the Thursday, because at that time, *Yom Tov* was either Thursday or Friday and therefore one could make a conditional *eruv tavshilin*. In contrast, today, the date of *Yom Tov sheini* is no longer an uncertainty, but is rather a rabbinic enactment. Therefore a conditional *eruv* would not be valid. The *Rambam*'s statement that *Yom Tov sheini* is no longer treated as a *safek* would support the position of the *Avkat Rochel* that a BCL in Israel should keep the custom of two days because the custom is, in fact, different today than it was at the time when *Rosh Chodesh* was established by witnesses.

However, all is not so simple, as the *Rambam* appears to contradict himself. The *Rambam* (*Hilchot Yom Tov*, 1:24) rules that an egg laid on the first day of *Yom Tov* may be eaten the second day, in accordance with the viewpoint of Rav. This indicates that *Yom Tov sheini* is treated as a *safek*. Thus, the *Rambam*'s position that an *eruv tavshilin* cannot be made conditionally (because *Yom Tov sheini* is a *takanah* and not a *safek*) stands in opposition to his position that an egg laid on the first day of *Yom Tov* may be eaten on the second day (because each day is a *safek*). How do we reconcile this contradiction?

The *Lechem Mishneh*[36] answers that in the case of *eruv tavshilin* he must articulate a condition. The rabbis did not

36. Avraham Hiyya de Boton: born 1560; died 1603.

allow a person to do so because he cannot state that perhaps each day might be *chol* when in reality we know which day is *Yom Tov*. Expressing the condition would be dishonest. On the other hand, an egg laid on the first day of *Yom Tov* is permitted on the second day without any verbalization, and that is acceptable.

It would follow that with respect to a BCL observing the second day of *Yom Tov* in Israel, the *Rambam* would agree that we treat the second day as a *safek*, as is the case with an egg, since no verbalization is necessary. As such, the objection of Rav Shmuel Salant to the position of the *Avkat Rochel* remains in place.

However, Rav Chaim offers a different response to the apparent contradiction in the *Rambam*, and this would allow us to resolve the objection of Rav Shmuel Salant to the *Avkat Rochel* as well.

Rav Chaim maintains that when we view each day of *Yom Tov* individually, each is treated as a *Yom Tov* with certainty because the rabbis made a *takanah* (enactment or decree) to observe the second day of *Yom Tov*. However, if we view both days as a unit, we are forced to treat each one as an uncertainty, because it is an halachic impossibility for both days to be *Yom Tov*.

Thus, with respect to an egg that is laid on the first day of *Yom Tov*, the egg is permitted on the second day because it is the status of both days of *Yom Tov* that would contribute to the restriction. An egg laid on a weekday can be eaten on the following day of *Yom Tov*, and an egg laid on *Yom Tov* can be eaten on the following weekday as well. An egg can only be prohibited the day after it is laid if both days are absolute days of *Yom Tov*. When examining the egg, we must consider the status of both days simultaneously, and when we do so, we are forced to treat each day as a *safek*. Since only one day can actually be *Yom Tov*, the egg is permitted on the second day (because if the egg was laid on *Yom Tov*, the second day is a weekday).

In contrast, with respect to *eruv*, there is a restriction to perform an *eruv* on *Yom Tov* which is not contingent on viewing both days simultaneously. Therefore, we cannot make a conditional *eruv* and say "if today is a weekday".. or "if tomorrow is a weekday".. because each day is *Yom Tov* with certainty by virtue of the rabbinic decree.

According to Rav Chaim's understanding of the *Rambam*, we can say that just as the *Rambam* confers an absolute status to *Yom Tov sheini* (because of the rabbinic decree) with respect to a conditional *eruv*, by the same token, he would confer an absolute status of *Yom Tov sheini* with respect to a BCL in Israel. The two cases are parallel in that we can view the second day of *Yom Tov* without the first.

As such, there is a major distinction between today and the past regarding a BCL in Israel on *Yom Tov*. In years past, when the month was established by witnesses, a BCL kept the second day of *Yom Tov* because of a *safek*. When he visited Israel there was no *safek* and he could therefore do *melacha* on the second day of *Yom Tov*. In contrast, today after the rabbinic *takanah* to observe *Yom Tov sheini*, when considering the status of a BCL in Israel on *Yom Tov*, *Yom Tov sheini* will be viewed as an absolute *Yom Tov* and not as a *safek*. The prohibition of doing *melacha* on *Yom Tov sheini* today has no connection to the first day. As such, the *Avkat Rochel* maintains that a BCL cannot do *melacha* on *Yom Tov sheini*.

There remains one serious objection to this presentation. Though the *Rambam* does not allow a conditional *eruv* on *Yom Tov*, other *Rishonim* disagree. The *Shulchan Aruch* (OC527:22) rules against the *Rambam* and allows one to make a conditional *eruv*. Thus the *Shulchan Aruch* rules that we treat *Yom Tov sheini* as a *safek* even in cases where each day is viewed independently. As such, the same will hold true (that we treat *Yom Tov sheini* as a *safek*) for a BCL in Israel on *Yom Tov sheini* as well. In that case, Rav Shmuel Salant's objection still stands.

Nonetheless, one can suggest that the *Rishonim* and the

Shulchan Aruch accept the premise of the *Rambam* as expressed by Rav Chaim that after the rabbinic decree, *Yom Tov sheini* is treated as an absolute in cases where each day is viewed independently. Why then do the R*ishonim* reject the Rambam's position on a conditional *eruv*? There is a very subtle logic to their position. The dissenting *Rishonim* consider *eruv* to also be a situation where both days are viewed simultaneously. Although the restriction of making an *eruv* on either day of *Yom Tov* does not necessitate viewing both days simultaneously, that is not the case when one makes a conditional *eruv*. The conditional *eruv* is only invalid if both days are *Yom Tov*. When considering if the conditional *eruv* is valid we are forced to view the status of both days together. (The *Rambam* disagrees with this last point, as he views each day independently since the basic prohibition of making an *eruv* on *Yom Tov* does not presuppose any linkage between the two days.)

Thus, we can maintain our response to Rav Shmuel Salant's objection to the *Avkat Rochel*. When dealing with restrictions of doing "work" on *Yom Tov sheini* for a BCL in Israel, we do not treat *Yom Tov sheini* as a *safek*. Everyone is in agreement that is so because each day of *Yom Tov* is independent. This contrasts to a conditional *eruv* and to an egg laid on *Yom Tov*, where the two days of *Yom Tov* are intertwined and are therefore treated as a *safek*, as was explained before.

The *Iggerot Moshe*

Rav Moshe Feinstein in his *Iggerot Moshe*[37] also disagrees with the reasoning of R. Shmuel Salant. He states:

> When a BCL comes to *Eretz Yisrael,* it is forbidden for him to do *melacha* on the second day of *Yom Tov* and he is required to keep all of the mitzvot of *Yom Tov* as he would in *chutz l'aretz.* This is in spite of the fact that

37. O.C.: 4:106.

> during the time when a second day of *Yom Tov* was observed in *chutz l'aretz* because of doubt only, it would have been acceptable to keep only one day in Israel. This is because the status of uncertainty that was imposed on a BCL because of the concern of calendar disruption was established in all circumstances, wherever a BCL would be. It is not comparable to when there were was actual uncertainty and there was no decree in place, and there was no reason to decree and they conducted themselves according to the letter of the law.
>
> Therefore, originally, when one came from *chutz l'aretz* to Israel, where there was no doubt as to the correct day, there was no need to give any consideration to keeping a second day. However, today, when the *takanah is* because of the concern of disruption, those who come to Israel for a short time are planning to return to *chutz l'aretz* where they will have the same concern of calendar disruption, they are under the specific ruling that was put upon a BCL to keep the rules of a second day *Yom Tov* even when in Israel.

Rav Moshe poses the very same argument as Rav Shmuel Salant, that the status of a BCL in Israel today should not be more stringent than it was at the time when there was a genuine uncertainty. The response of Rav Moshe appears to be that while it is true that the second day is observed only due to uncertainty, nevertheless it was imposed on a BCL because of a fear of disruption of the calendar. As such, a BCL must remain accustomed to observing two days of *Yom Tov* in case that disruption occurs. Even when he is in *Eretz* Yisrael, it is appropriate for a BCL to observe two days to remain accustomed to doing so when he returns to the Diaspora.

Is it necessary to continue "keeping the restrictions from the place from which one comes"?

I have one more suggested response to Rav Shmuel Salant's

argument that the status of a BCL in Israel today should not be more stringent than it was at the time when there was a genuine uncertainty. The *Avkat Rochel*'s response may be that the status is indeed more stringent today because of the concept, articulated in *Pesachim* 50b, that "one must keep the stringencies of the place from which one comes". Since the Jews of the Diaspora maintain two days, a BCL must follow the *minhag* of the Diaspora even when in *Eretz* Yisrael.

On the other hand, perhaps R. Salant might hold that it is improper to require a BCL in Israel to keep two days on the basis of "keeping the stringencies of the place from which one comes" because the Talmud in *Beitza* 4b states that when the *takanah* of *Yom Tov sheini* was instituted, the sages in *Eretz Yisrael* sent a message to the Diaspora, "Be careful to maintain *minhag avoteichem*, the custom of your forefathers". If the *takanah* was to maintain the ancestral customs, it had to be observed exactly as it was practiced in earlier times. Since the custom then was that a BCL did not observe two days *Yom Tov* when visiting *Eretz Yisrael*, the *minhag* had to be observed in the same manner after the *takanah*. As such, intrinsic to that original *minhag* is that a BCL would only keep one day in Israel.

On the other hand, the *Avkat Rochel* might hold that the concept of a *minhag* only applies to positive actions and not to the absence of activity. One cannot say, "I have a *minhag* not to observe *Yom Tov sheini*". Therefore, one cannot consider it a *minhag* for a BCL not to keep a second day in Israel. Hence, we are left only with the principle of one being obligated to "keep the stringencies of the place from which one comes", and that obligates a BCL to observe *Yom Tov sheini* even when visiting *Eretz Yisrael*.

Translator's Summary:

This article is not intended to offer a definitive *halachic* ruling but rather to present an analytic understanding for the different views on the matter.

In brief, there are three main viewpoints:

1. The position of the *Chacham Tzvi* is that the *takanah* of observing two days in *chutz l'aretz* is essentially defined as *hamakom gorem* – that is, the rule was applicable for and only in *chutz la'aretz* and is not applied when one is in Israel.

2. The position of R. Shmuel Salant is that we should not impose more severe requirements than originally observed. Therefore, since a BCL was not required to keep two days in Israel when the month was set by witnesses, we should not impose this requirement on him now. However, in deference to his mentors, who opposed this, he developed what is commonly referred to as the "day and a half". This is where one does not formally act as if it is *Yom Tov* (e.g. Kiddush) but does not do any *melacha*.

3. Finally, and the focus of much of this paper, is the position of the *Avkat Rochel,* who maintains that there is an obligation to "keep the stringencies of the place from which one comes", and therefore a BCL in Israel should observe two days of *Yom Tov*.

It is my hope that this study will allow those who seek advice on the matter to appreciate that the decision is not based on political orientation or emotional preference. Rather, it must be the result of careful and intensive halachic analysis. May we all merit a time when the Temple is rebuilt and our holidays are once again declared by the Sanhedrin.

* * *

The author wishes to acknowledge the help of Rabbi Dov Silber of Edison, NJ, in preparing this article.

Korban Pesach Today: A Survey of Halacha and History

Rabbi Shimshon HaKohen Nadel

In recent years, an organization in Israel has been selling a share in a sheep or goat, should they be able to sacrifice and offer the Passover Offering, *Korban Pesach*. They have even received the approbation of R. Chaim Kanievsky. In addition to an annual mock ceremony held in Jerusalem, educating the public on how the *Korban Pesach* was offered, a group petitions Israel's Supreme Court each year to be granted the right to bring the *Korban Pesach* on the Temple Mount. And each year their request is summarily denied.

But according to Jewish Law, can we offer the *Korban Pesach* today?

Over the centuries, authorities have examined and debated the issues involved. The result is a rich discussion of both halacha and history. And while there are a number of obstacles that stand in the way, *Korban Pesach* has a number of advantages over other offerings, making it potentially easier to be brought today.

What follows is a survey of some of the halachic issues discussed and debated over the centuries.

Rabbi Nadel serves as Director of Recruitment at the David Shapell College of Jewish Studies and Midreshet Rachel v'Chaya in Jerusalem. His articles on Jewish law and history have appeared in the Journal of Halacha and Contemporary Society, Hakirah, and Techumin.

Beit ha-Mikdash

One of the most obvious challenges is that the *Beit ha-Mikdash,* the Holy Temple, is not standing. *May one bring a sacrifice without a Beit Mikdash?*

The Mishnah teaches that indeed sacrifices may be brought even without the Holy Temple,[1] and so rules *Rambam* in his *Mishneh Torah*.[2] According to tradition, this law was taught by one of the three prophets, Chaggai, Zechariah, and Malachi, who ascended to Jerusalem with the Jewish People, following the Babylonian Exile.[3]

Historically, offerings were brought without the Temple standing. During the 'Return to Zion,' in the days of Ezra and Nechemiah, the Jewish People brought sacrifices even before the Second Temple was completed.[4] The Book of Ezra describes how, "they commenced offering burnt offerings to the Lord, but the foundation of the Lord's sanctuary was not yet laid."[5]

And evidence suggests that even after the destruction of the Second Temple, the *Korban Pesach* was still being offered. For example, the Mishnah (Pesachim 7:2) describes how Rabban Gamliel instructed his servant, Tavi, to roast the *Korban Pesach*. Both R. Shimon ben Tzemach Duran[6] and R. Yaakov Emden[7] identify this Rabban Gamliel as Rabban Gamilel II, who served as *nasi* (president) of the Sanhedrin in Yavneh following the

1. *Eduyot* 8:6. See also *Zevachim* 107b; *Shevuot* 16a; *Megillah* 10a.

2. *Hilchot Beit ha-Bechirah* 6:15; *Hilchot Ma'aseh ha-Korbanot* 19:15. Cf. *Hilchot Beit ha-Bechirah* 2:4.

3. *Zevachim* 62a.

4. See Rashi to *Megillah* 10a, s.v. *kla'im la-heichal*. See also R. Yechiel Heilpern, *Seder ha-Dorot*, *Elef ha-Revi'i*.

5. Ezra 3:6.

6. *Commentary to the Haggadah Shel Pesach*, s.v. *Rabban Gamliel hayah omer*.

7. *She'eilat Ya'avetz*, Vol. 1, no. 89. See also R. Zvi Hirsch Chajes, *Teshuvot Moharatz, Kuntrus Acharon Avodat ha-Mikdash*, Chap. 3.

destruction of the Second Temple.[8] *Sanhedrin* 11b relates how Rabban Gamliel attempted to intercalate the year (i.e., add an extra month before Nissan, the month of Passover), because of Pesach. For R. Naftali Tzvi Berlin, this too suggests that the *Korban Pesach* was offered following the destruction of the Holy Temple.[9]

In his *Historia Arcana,* the historian Procopius records how Sixth Century Byzantine Emperor Justinian issued an edict prohibiting the Passover Offering from being brought.[10] Jews who were found to have eaten from the *Korban Pesach* were forced to pay heavy fines to the magistrates.[11] This account too suggests that the *Korban Pesach* continued to be offered by some for centuries following the destruction of the Second Temple.

Impurity

When the Temple stood, pilgrims ascending to Jerusalem were purified before they could enter the Temple's courtyard and bring their offerings. Today, it is assumed that everyone is 'impure,' having knowingly or unknowingly come into contact with a corpse. Without the ashes of the Red Heifer (*para adumah)* to purify, entry into the courtyard of the Temple is prohibited today, making bringing offerings impossible. However, the Mishnah (*Pesachim* 7:6) states: "If the [entire] congregation, or a majority are impure, or the *kohanim* are impure and the congregation is pure – it is done in impurity."[12] *Rambam*, based on statements in the Mishnah and Talmud, rules that if the majority of the community is impure, time-sensitive offerings may be brought, even in a state of

8. For other examples of Talmudic evidence of sacrifices being offered following the destruction of the Temple, see *Teshuvot Moharatz,* Ibid.

9. *Ha-Emek Davar* to Lev. 26:31 and Deut. 16:3.

10. Chap. 28.

11. Ibid.

12. See also *Pesachim* 79a.

impurity.[13] This applies to communal offerings as well as the Passover Offering.[14]

In 1313, Ishtori ha-Parchi made his way to Jerusalem following an expulsion of Jews from France. In his *Kaftor va-Ferach*, an important study of the geography and laws related to the Land of Israel, he records that in 1257, R. Yechiel of Paris (or R. Chananel, or R. Chaim, in some versions) wanted to ascend to Jerusalem and offer sacrifices.[15] In his account, Ishtori ha-Parchi concludes like *Rambam*, that the issue of impurity does not prevent *korbanot* from being brought today.[16]

Sanctity of the Temple Mount

The mid-Nineteenth Century saw a renewed interest in restoring the sacrificial order, as R. Zvi Hirsch Kalischer, a Prussian rabbi with pre-Zionist plans for returning to Israel, who was a student of R. Akiva Eiger, began writing letters to leading rabbis about returning to the Land of Israel and restoring the sacrificial service. He also wrote to wealthy Jews, encouraging them to support the movement. His letters were the catalyst for a flurry of scholarship, with many of the issues still being debated today.

For R. Kalischer, redemption is predicated on the restoration of the sacrificial order. As he describes it, the Jewish People will first return to the Land of Israel and begin offering sacrifices, only thereafter to be followed by the coming of the Messiah and the building of the Holy Temple. *Korbanot* are a *sine qua non* in R. Kalisher's eschatology.

A major issue, which R. Kalischer addresses, is the sanctity

13. *Hilchot Bi'at ha-Mikdash* 4:9-13; *Hilchot Korban Pesach* 7:1.

14. Ibid.

15. *Kaftor va-Ferach,* Chap. 6.

16. Ibid. See, however, *Shu"t Yaski Avdi*, Vol. 1, *Yoreh De'ah*, no. 18, where additionally the issue of *tumat zav* is raised.

of the Temple Mount, today. A Tannaitic dispute on whether the Temple Mount retains its sanctity following the destruction of the Temple appears on many folios of the Talmud. The *Rambam* rules that the Temple Mount's holiness endures forever, as it was sanctified "at that time and for all eternity."[17] But the *Raavad*, in his glosses, argues that the Temple Mount no longer has sanctity,[18] making sacrifices on the Temple Mount today impossible in his view.

R. Kalischer came up with a creative, albeit controversial, solution. If the *Raavad* is indeed correct, R. Kalischer writes, then an altar built on the Temple Mount can be considered a *bamah*, a private altar.[19] R. Zvi Pesach Frank,[20] R. Shlomo Zalman Auerbach,[21] and R. Eliezer Waldenberg[22] were just a few of the authorities who disagreed with R. Kalischer's suggestion.

Still, many authorities assume like *Rambam*, that the Temple Mount retains its sanctity and indeed it is possible to construct an altar and offer sacrifices on the Temple Mount.[23] Some, however, suggest we should be stringent for the opinion of *Raavad*.[24]

Priestly Pedigree

In responding to R. Tzvi Hirsch Kalischer, R. Akiva Eiger elicited the help of his son-in-law, R. Moshe Sofer, known as *Chatam Sofer*. R. Eiger questioned whether sacrifices were even feasible on the Temple Mount in Jerusalem, at that time under

17. *Hilchot Beit ha-Bechirah* 6:14-16; *Hilchot Ma'aseh ha-Korbanot* 19:15.
18. *Hilchot Beit ha-Bechirah* 6:14.
19. *Drishat Zion* (Jerusalem: Mossad Harav Kook, 2003), pp. 90-91.
20. *Mikdash Melech* (Jerusalem, 1968), pp. 14-29.
21. *Minchat Shlomo*, Vol. 3, no. 140.
22. *Tzitz Eliezer*, Vol. 10, no. 5.
23. See *Yabia Omer, Yoreh De'ah*, Vol. 5, no. 26; *Yechave Da'at*, Vol. 1, no. 25.
24. See *Likutei Halachot, Zevachim*, p. 66b.

Ottoman rule. In his response, *Chatam Sofer* answers that the governor "is exceedingly strict, for he said no one who is not of the Islamic faith may sacrifice there."[25] He continues and addresses a number of concerns, one major issue being priestly pedigree.[26] For this purpose, he refers to an episode in the Book of Ezra:

Upon returning from Babylonia, Ezra the Scribe insisted that the *kohanim*, priests, be able to prove their lineage. The Book of Ezra describes families who "searched for their genealogical record, but they could not be found, and they were banned from the priesthood."[27] Ezra would only allow *kohanim m'yuchasim*, priests able to trace their lineage to those who served in the First Temple, to perform the service in the Holy Temple.

But today, priests who can trace their lineage are few in number. Most priests are *kohanim muchzakim*, meaning they have a chain of tradition that they are priests.[28] *Chatam Sofer* rules that indeed *kohanim muchzakim* would be allowed to bring offerings.[29] After all, as some explain, we allow *kohanim* today to recite the priestly blessing and make the blessing at a *pidyon haben*, redemption of the first-born.

Ezra's insistence on *kohanim m'yuchasim*, as R. Kalischer explained, was because many *kohanim* had intermarried, and those who did ascend were plagued with problematic or questionable lineage in general. Others assume that Ezra was able to insist on *kohanim m'yuchasim* as there were just a few generations separating the *kohanim* from their forebears who

25. *Chatam Sofer, Yoreh De'ah*, no. 236.

26. Ibid. See also the letter of R. Akiva Eiger to R. Zvi Hirsch Kalischer concerning priestly pedigree, published in *Drishat Zion*, pp. 100-103.

27. Ezra 2:62; Neh. 7:64.

28. See *Rambam*, *Hilchot Issurei Biah* 20:1.

29. *Chatam Sofer, Yoreh De'ah*, no. 236. See also *Drishat Zion*, pp. 103-107, and *Chazon Ish*, *Even ha-Ezer* 2:7.

served in the First Temple. Today, after a lapse of two millennia, such a requirement would be impossible to fulfill.[30]

Priestly Garments

Another concern in response to R. Kalischer, which was heavily debated, was the requirement of priestly garments, as a *kohen* may not bring an offering without the priestly garments.[31] R. Akiva Eiger was specifically concerned about the *tzitz*, the golden frontlet worn on the forehead of the High Priest, the stones for the breastplate, and the *techelet* and *argaman* dyes.[32] In response, the *Chatam Sofer* writes that the lack of priestly garments would not stand in the way of *korbanot* being brought.[33]

Shekalim

R. Yaakov Emden raised an objection to the possibility of bringing *korbanot* today, as communal offerings must be purchased with the half-shekel collected annually.[34] R. Emden concludes, however, that the *Korban Pesach* may be offered, as it is not purchased with money from the public coffers.[35] In fact, R. Yaakov Emden[36] and *Chatam Sofer*[37] assume that the Tosafists who wanted to restore the sacrificial service in the 13th Century, as described by Ishtori Ha-Parchi, must have been interested in offering the *Korban Pesach*, precisely for this reason.

---

30. Still, many authorities conclude that *kohanim muchzakim* today are full fledged *kohanim* for all intents and purposes, without any doubt. See *Aruch ha-Shulchan, Yoreh De'ah* 305:55.

31. *Mishnah Zevachim* 2:1. See also *Zevachim* 17b-18b.

32. See *Drishat Zion*, pp. 102-103.

33. *Chatam Sofer, Yoreh De'ah*, no. 236.

34. *She'eilat Ya'avetz*, Vol. 1, no. 89.

35. Ibid.

36. Ibid.

37. *Chatam Sofer, Yoreh De'ah*, no. 236.

Location of the Altar

Rambam writes that the "location of the altar is very precise and may never be changed from its place."[38] Indeed the exact location of the altar, and its dimensions, were passed from one generation to the next. Following the Babylonian Exile, the prophets who returned to the Land of Israel with the Jewish People testified as to the location of the altar and its dimensions.[39] It is reasonable that the location of the altar needs to be precise, as according to tradition it is the site where earth was taken to form Adam, the place where Adam offered a sacrifice to God, where Cain and Abel and Noah too brought offerings, the site of the Binding of Isaac, and the altars of David and Solomon.[40]

While there is debate as to the exact location to place an altar on today's Temple Mount, the general area has been identified.[41] For some this poses no problem,[42] but R. Avraham Yitzchak Kook ruled that the location of the altar must be precise and exact, in accord with the view of Rambam.[43] A novel solution, offered by some, would be to create an altar that meets the minimal size requirements within the general larger area in which the altar of the Temple stood.[44]

---

38. *Hilkhot Beit ha-Bechirah* 2:1.

39. *Zevachim* 62a.

40. *Hilchot Beit ha-Bechirah* 2:1-2.

41. See R. Yosef Elbaum, "*Chiddush ha-Avodah B'zman Hazeh*," *Techumin* (5744), vol. 5, pp. 448-449, where he suggests excavating the site to provide an accurate location of where the altar stood. See also R. Chaim Sova, *Karnot ha-Mizbe'ach* (Jerusalem, 2003), pp. 16-30.

42. See R. David Friedman of Karlin, *Kuntrus Drishat Zion v'Yerushalayim*, published as an appendix to his *She'eilat David*. See also *Hilchot Beit ha-Bechirah* 2:17, where *Rambam* himself rules that any length and width is acceptable as long as the altar's dimensions are at least one cubit by one cubit.

43. *Mishpat Kohen*, no. 91. See also R. Ovadiah Hedaya, *Yaskil Avdi*, Vol. 1, *Yoreh De'ah*, no. 18.

44. *Drishat Zion*, pp. 91-92; R. Yechiel Michel Tukachinsky, *Ir ha-Kodesh*

Inaugurating the Altar

The Mishnah states that the altar must be inaugurated by offering the daily offering of the morning (*tamid shel shachar*).[45] But since the daily offering must be purchased from the communal coffers, this would create a problem for those who argue that only the *Korban Pesach* can be brought since it is purchased with private funds. R. Zvi Pesach Frank offers a novel solution, and suggests that since the *Korban Pesach* carries the punishment of *kareit* (see below) it would override the requirement of inaugurating the altar.[46] Once inaugurated by the *Korban Pesach*, the altar would presumably be usable for other *korbanot*.

"A Satisfying Aroma"

When a sacrifice is offered, it must be offered with the intent of providing a satisfying aroma (*rei'ach nicho'ach*).[47] Yet a verse from the Torah's Admonition (*Tochacha*) suggests that following the destruction of the Temple, Hashem does not desire our offerings: "I will lay your cities in ruin and I will make your sanctuaries desolate; I will not savor your satisfying aromas."[48] Citing this verse, R. Yaakov Ettlinger objected to R. Kalisher's attempt at restoring the sacrificial service.[49]

But as R. Naftali Tzvi Berlin notes, the Torah does not mention a "satisfying aroma," in the context of the *Korban Pesach*, implying that the *Korban Pesach* may indeed be brought

---

V'hamikdash (Jerusalem, 1970), Vol. 5, pp. 61-70.

45. *Menachot* 4:4.

46. *Mikdash Melech*, p. 152. See also *Kuntrus Drishat Zion v'Yerushalayim* and R. Shlomo Zalman Auerbach, *Minchat Shlomo*, Vol. 3, no. 140, where the possibility of offering a conditional offering is suggested.

47. *Mishnah Zevachim* 4:6.

48. Lev. 26:31.

49. *Binyan Zion*, no. 1.

following the destruction of the Temple.[50] R. Berlin assumes that the Passover Offering is to be "observed" even during the Exile, as alluded to by the verse, "Observe the month of the springtime, and keep the Passover unto the Lord your God" (Deut. 16:1).[51]

Kareit

Korban Pesach is one of only two positive commands that carry a penalty of *kareit*, spiritual excision, if not performed, which conveys the seriousness of this mitzvah. In fact, following the Six Day War, R. Menachem Mendel Schneerson, the Lubavitcher Rebbe, told his followers to leave Jerusalem before Pesach and Pesach *Sheini*, lest they be held accountable for having the ability to bring the Passover Offering and not doing so.[52] But in 1975, after it became clear that the political reality would not allow for the *Korban Pesach* to be offered in any case, the Lubavitcher Rebbe retracted his ruling.[53]

Conclusion

While the topic of restoring the sacrificial service is the subject of much controversy, some of the leading authorities of the Modern Era ruled that the *Korban Pesach* may be brought, at least in theory, given certain requirements be met.[54] Among

---

50. *Ha-Emek Davar* to Lev. 26:31; *Meishiv Davar*, *Yoreh De'ah,* no. 56. But see also *Kli Chemdah* to *Ki Tavo*, where it is argued that *Korban Pesach* does indeed require a *rei'ach nicho'ach.*

51. *Ha-Emek Davar*, Ibid. See also *Ha-Emek Davar* to Deut. 16:3.

52. See *Likutei Sichot* (Brooklyn, NY: Kehot, 2006), Vol. 12, pp. 220-221 and R. Neriah Guttel, "*Ha-im Chayavim l'hitrachek mi-Yerushalayim b'Erev Pesach?!*," *Hatzofeh,* Pesach Supplement (March 27, 2002), p. 13. See also R. Shlomo Yosef Zevin's letter and the Rebbe's response, published as an appendix to *Chiddushim u'Biurim B'Shas* (Jerusalem: Kehot, 1979), Vol. 1, pp. 347-349, and *Tzitz Eliezer*, Vol. 12, no. 47.

53. *Likutei Sichot*, Vol. 12, p. 216; *Sha'arei Halacha u'Minhag* (Jerusalem: Kehot, 1993), Vol. 2, pp. 139-140. See also R. Neriah Guttel, ibid.

54. See *Tzitz Eliezer*, Vol. 10, no. 7, where he suggests that these opinions

those approving were R. Akiva Eiger, *Chatam Sofer,* R. Yaakov Emden, and R. Zvi Hirsch Chajes. Tradition has it that the Vilna Gaon encouraged his students to bring offerings should they be permitted to do so.[55] Even the *Chazon Ish* ruled that should the Israeli government grant permission, the *Korban Pesach* should indeed be offered.[56]

As discussed above, the *Korban Pesach* possesses a number of advantages over other offerings, making it easier to be offered in our day. Given the significance and centrality of the *Korban Pesach,* the issues involved should continue to be discussed and debated until we merit to "rejoice in the rebuilding of Your city, and rejoice in serving You. And there we will eat from the offerings and from the Passover Offering."[57]

---

are all purely theoretical, and would require many conditions to be met before offering sacrifices today.

55. *Ir ha-Kodesh V'ha-Mikdash,* Vol. 5, p. 14.

56. *Chazon Ish, Even ha-Ezer* 2:7.

57. *Hagadah Shel Pesach*.

Letters

To the Editor:

Two comments on the "Sale of *Chametz* in Colleges" article in the LXIX issue of this Journal:

1) The authors question the validity of *Chametz* sales located within a college dormitory, according to the *Poskim* who hold that the theoretical right of access must be provided to the buyer.

This assertion does not appear to conform with the reality of many college dormitories, as far as I can tell. If, for example, a stolen cellphone was geolocated to a dorm room, the owner would contact the university's police or officials in residential life. Then the owner would be enabled to retrieve the phone, or the phone might be brought to him. Either way, by following a simple protocol, the items would quickly be returned to their rightful owner.

This is similar to *Chametz* located in a Manhattan office tower, where an unscheduled visitor would be permitted access only after they have fulfilled various security measures, including, likely, an escort to the office where the *Chametz* is located. Certainly the authors do not seek to question all *Chametz* sales in office buildings.

2) The authors suggest that a *Mezuzah* need not be hung on a college dormitory room. This is based on the approach of the *Avnei Nezer (Yoreh Deah* 380) concerning *Mezuzot* in hospital rooms. In fact, this *Avnei Nezer* is actually extended by the *Be'er Moshe (Yoreh Deah 95)* to Yeshiva dormitories, a position not cited by the authors.

Nevertheless, it would seem that the realities of the contemporary college dormitory are not akin to a hospital room or a Yeshiva dormitory, and require a *Mezuzah*. Students typically pay one fee for their education and a separate fee for

their housing, often, with a formal housing contract which actually mimics a standard lease in an apartment building. Even the restrictions on this student lease, which may forbid subletting or open flames, echo those in many apartment buildings. As such, students should be considered (for halachic purposes) "renters" and required to put up a *Mezuzah*.

Incidentally, there are other issues associated with *Mezuzot* in college dorms including the preferred mounting method, *Tzniut* issues, removal at the end of the lease, and more.

As a matter of principle, it is imperative that we seek to treat college students as grown adults. Contemporary student development theory hinges on the responsibility of the student to take "ownership" of their acquisition of educational knowledge. Judaic educators ought to parallel this approach whenever feasible, for it will help develop the next generation of committed, knowledgeable, and practicing Jews.

Sincerely,

HERSHEY NOVACK

Director and senior campus rabbi at Chabad at Washington University in St. Louis - Rohr Center for Jewish Life.

Response

Rabbi Novack raises some interesting questions with our discussion, and we thank him for raising some important questions, and citing some sources of which we were not aware. In the end, our disagreements touch less on the underlying halachic theory (vis a vis the need for "buyer's access" and the need for "renter's control"), and more on understanding the status quo in American universities. Indeed, we agree that our arguments about the impossibility of the sale of *chametz* would not apply at any university where the status quo is as Rabbi Novack argues.

That said, we maintain that our arguments are generally correct when considering what we believe to be the status quo in most universities. It is impossible to do an exhaustive survey of the housing contracts and campus police policies at the more than 2,500 four-year institutions in the US, but the institutions we did research seem to conform to our general description. However, if there is a university which matches Rabbi Novack's description, we agree that the halacha would change as he argues.

To be more specific, one of our halachic contentions is that when the rental agreement strips the tenant of classical control over the location, then the rental agreement falls short of classic *s'chirut* [rental agreement in Jewish law] and which are not echoed in conventional apartment buildings. In our research, most university dormitory agreements leave tenants with little power. Take, for example, the University of Michigan's policy that, "the University may terminate a housing contract on nondisciplinary grounds when a resident graduates or becomes ineligible to live on campus before the contract expires." Allowing an individual's academic status to override an otherwise viable rental contract is unheard of in both halachic *s'chirut* and in United States rental agreements outside of college campuses. More flagrantly, in the event of a conflict between students, UMich reserves the right to "transfer you to another room or terminate your contract, and/or prevent you from entering University Housing." The University of Pennsylvania allows itself nearly unrestricted access to the dorms; students may not deny access to "University personnel attempting to exercise the University's rights."

This list could be roughly reproduced at any school, including Rabbi Novack's campus, Washington University in St. Louis. Almost all universities maintain discretion regarding who can enter a dormitory building, and certainly reserve the right to bar access to the purchaser (of the *chametz* goods) even after a security check and even with an escort;

thus, the comparison to an office building is also not apt.

We also wish to comment on the larger educational vision question which underlies the last paragraph of Rabbi Novack's letter. We, too, are invested in enabling and empowering our students; treating them like adults goes without question. However, in our view, the way to develop mature thinking and deep treatment of Judaism and halacha, is by being mindful of the differences between college and post-college life, instead of just artificially reproducing or mimicking adult observance at the younger ages. (To give but one example: though many of us would agree that married women caring for their children are not expected to *daven* with a minyan three times a day, the general convention in many campuses is for young women to do so, precisely because the goal is to craft a halachic lifestyle that matches their particular circumstance, not those of adults 10 and 20 years their seniors).

In fact, we believe that asking students to take a critical look at their rental agreement and to think honestly about how a buyer would have meaningful access to their purchases is the most mature thing we could ask of them, namely, to deeply consider the application of a halachic principle to a new circumstance. We can now report many anecdotes about students turning around and having interesting conversations with their parents about what they own and what they are borrowing -- questions and ideas that normally go unconsidered. We invite every observant collegiate to think critically about their halachic lives, and we hope that our article only serves to ignite more curiosity.

DAVID PARDO

YAAKOV JAFFE

The Journal of Halacha and Contemporary Society

Pesach 5776
Number LXXI Spring 2016

TABLE OF CONTENTS

Typeset and Printed by
STAR COMPOSITION SERVICES, INC.
170 Hewes Street / Brooklyn, NY 11211
Tel: 212.684.4001 / Fax: 877.568.2009 / e-mail: starcomp@thejnet.com