Journal of Halacha and Contemporary Society

Number VIII

Published by
Rabbi Jacob Joseph School

Journal of Halacha and Contemporary Society

Number VIII
Fall 1984 / Succot 5745

Published by
Rabbi Jacob Joseph School

The Journal of Halacha and Contemporary Society is published twice a year by the Rabbi Jacob Joseph School, Dr. Marvin Schick, President. The Rabbi Jacob Joseph School, located at 3495 Richmond Road, Staten Island, New York, 10306, welcomes comments on this issue and suggestions for future issues.

It is the purpose of this Journal to study the major questions facing us as Jews in the twentieth century, through the prism of Torah values. We will explore the relevant Biblical and Talmudic passages and survey the halachic literature including the most recent Responsa. The Journal of Halacha and Contemporary Society does not in any way seek to present itself as the halachic authority on any question, but hopes rather to inform the Jewish public of the positions taken by Rabbinic leaders over the generations.

Manuscripts which are submitted for consideration must be typed, double-spaced on one side of the page, and sent in duplicate to the Editor, Rabbi Alfred Cohen, 1265 East 108th Street, Brooklyn, New York, 11236. Each article will be reviewed by competent halachic authority. In view of the particular nature of the Journal, we are especially interested in articles which concern halachic practices of American Jewish Life.

For subscription information contact Mrs. Rhoda Scheiner, Room 820, 299 Broadway, New York 10007, (212) 233-8333.

TABLE OF CONTENTS

Is it a Mitzvah to Administer Medical Therapy?

Rabbi Dr. Norman Lamm

When a physician prescribes a course of therapy and treats a patient, does he thereby perform a *mitzvah?*

At first blush, the answer is self-evident. We already know from the Mishnah in *Nedarim* 38b that the medical treatment of a patient is considered a *mitzvah.* The Mishna teaches that if someone takes a vow *(neder)* not to bestow any benefit upon his friend, he is permitted to heal him *refuat nefesh* but not *refuat mamon.* The terms are unclear, and the Gemara *(ib., 41b)* explains that *refuat nefesh* means healing the friend's body while *refuat mamon* refers to treating his animals. If you can take a vow not to benefit your friend, you may not act as a veterinarian for his livestock, but you may act as a physician for him. Why so? The Rosh and the Ran, citing the Jerusalem Talmud, maintain that human therapy is permissible because *mitzvah ka avid* — in the course of healing a human being you perform a *mitzvah,* and this *mitzvah* overrides the vow. Therefore, despite the *neder,* you are allowed to treat him medically. This does not hold for treating animals, because this does not entail the performance of a *mitzvah.*

What *mitzvah* is it that is performed in the course of treating a patient? The Rambam (Commentary to Mishnayot, *ad loc.)* and the Ran (to *Ned., ad loc.)* identify it as *hashavat avedah,* the return of a lost article to its rightful owner. On the verse *ve'hashevoto lo*

President of Yeshiva University

("thou shalt return it to him" — Dt. 22:2), the Sifre comments: *af et atzmo atah meshiv lo* — You must return to him not only what he possesses, but what he *is*, his very self. Hence, if you restore health to one who is dangerously ill, you have "returned" to him his own life, and thus have technically fulfilled the commandment of "Thou shalt return it to him." The Baraita *(B.K. 81b)* notes, concerning this return of self, that *ve'ein lekha hashavat avedah gedolah mi-zu* — there is no greater return of a lost article than the restoration of health that has been lost. Clearly, then, the medical treatment of a patient constitutes a *kiyyum ha-mitzvah* — that of returning a lost article. (There are even commentaries that conclude therefrom that the prohibition of *lo tukhal le'hitalem* — one may not ignore the lost item but must return it — applies to medical therapy, thus *obligating* the physician to administer treatment to any patient who requests it. See Maharsha to *Sanh. 73a; Ha'amek She'elah* to *She'ilot* 38:a.)

The author of *She'ilot (ibid.)* and Ramban (to Lev. 28:36) identify the *mitzvah* of healing as *ve'chei achikha imakh*, "thy brother shall live with thee" (Lev. 25:36) — and treating one's fellow medically is a way of keeping him alive. Other *Rishonim* (see *Tos. Rid* and *Tos. ha-Rash* to *Ber.* 60a) locate the *mitzvah* in the general rubric of *lo taamod al dam reiakha* — "thou shalt not stand by while thy brother's blood is being shed (Lev. 19:16)." A physician who has the means to revive his fellow man from disease is in the same category as one who knows how to swim and thus must save one who is drowning.

Despite the fact that we have posited three different *mitzvot* to which we can technically ascribe the *mitzvah* of the therapeutic process, our opening question remains a valid question. In order to explain the question more clearly, let us turn to a problem that is raised by a number of *Aḥaronim*.

In the *Shulchan Aruch* (which codifies only very few laws concerning medicine and physicians), we read the following about medical malpractice: *im ripa bi'reshut bet din*, if a physician licensed by the courts undertook treatment of a patient, and by error caused damage to the patient, then *patur mi-dinei adam ve'chayyav be'dinei shamayim:* he is morally culpable, but the tort

is not legally actionable. However, if he unwittingly caused the patient to die, he must go into exile *(Y.D.* 336:1). (This is in keeping with the general law of manslaughter, according to which one is neither executed not exonerated, but must flee to one of the "cities of refuge" where he must remain until the death of the High Priest.)

Now, the question posed by the *Acharonim* (*Maaseh Roke'ach, Tashbatz,* and others) is this: Why should the halacha prescribe *galut* (exile) for this case of medical manslaughter? Why not compare it to three other instances in which the manslaughterer goes free, namely, the bailiff who applied excessive force in summoning one to court and so caused his death, and the father and the teacher who caused the son or pupil, respectively, to die by administering excessive punishment? In these cases, Rambam *(Hil. Rotzeiach* 5:5,6) rules that the bailiff, the parent, and the teacher are not condemned to exile, because their misdeeds were perpetrated *be'shaat asot ha-mitzvah,* "in the course of performing a *mitzvah.*" Why does the *Shulchan Aŕuch* rule that the physician who unintentionally caused a patient's death be treated differently?

The author of *Yad Aѵraham* (to *Y.D., loc. cit.)* proposes the following solution: In the case of the first three — the bailiff, the father, and the teacher — the manslaughterers are involved in acts of *mitzvah.* They are teaching a child Torah or "wisdom" or a trade, or carrying out the instructions of the court, albeit they are doing it in the wrong way and with disastrous results. However, this does not hold true for the physician. If the doctor lost his patient, then by definition he did not heal him. If there was no healing, there was no *mitzvah.* In other words, the *mitzvah* quality of medical treatment is contingent upon the success of the therapy. If he succeeded in healing the patient, the physician performed a *mitzvah.* If he did not succeed, he accomplished no *mitzvah.* This is in contradistinction to the other three cases which are not result-oriented. This explains why in the three cases mentioned there is no punishment, whereas the physician is condemned to exile. The ruling of the *Shulchan Aruch,* therefore, is not contradicted by the Rambam.

This indeed is the substance of our question: is *Yad Aѵraham*

right, that a course of therapy does not entail a *kiyyum ha-mitzvah* unless it succeeds, or is it to be considered a *mitzvah* irrespective of the results?

In order to elucidate this important point, let us focus on the question of the *Acharonim*. It would seem that their argument with the *Shulchan Aruch* is misaddressed. While it is true that Rambam ordains exile as punishement for the first three cases, this decision is not unanimous. Indeed, Ramban *(Torat ha-Adam, Shaar ha-Sakanah)* holds that these three *are* punished by exile. Ramban adds to these three the case of a court-approved abortion in which the mother died. Hence, the halachic decision of *Shulchan Aruch* requiring exile for medical malpractice, while not according with the opinion of Rambam, does follow the view of Ramban. (See too *Bi'ur ha-Gera* to *Y.D., ad loc.*, and *Or Sameiach, Hil. Rotzeiach* 5:6.)

However, while *Yad Avraham's* strictures may not apply to *Shulchan Aruch*, they seemingly do hold with regard to Rambam himself. Whereas the latter does not say so specifically, he does imply that the physician is exiled. This we infer from Rambam's enumeration of only three cases in which a *mitzvah* was performed and hence no exile is ordained. Thus we may conclude that he considers all other such cases of manslaughter, including the malpracticing physician, as deserving of the punishment of exile. This would lead us to deduce that the Rambam (himself a physician!) did not subscribe to the thesis that medical treatment *per se* constitutes a *mitzvah* but rather that only *successful* therapy can be considered a *kiyyum hamitzvah*.

To summarize: both according to Rambam and Ramban, a physician who unwittingly caused a patient to die is to be penalized with exile. Their controversy concerns the other three cases: the bailiff, the father, and the teacher. Ramban holds that the performance of a *mitzvah* is no excuse, while Rambam disagrees. In addition, they differ with regard to the act of the physician: According to Rambam there is no *kiyyum mitzvah* in the course of treatment, while the Ramban may well hold that medical therapy in itself, successful or not, is to be regarded as an act of *mitzvah*.

Actually, this first controversy (regarding the three cases)

between Rambam and Ramban has an earlier source. The Mishna (*Mak.* 8a) discusses the *locus classicus* of manslaughter in the halacha — the Torah's description of a man who wields an ax, and in the course of lifting the ax it flies off its handle and kills someone. Exile is the prescribed punishment. Abba Saul is cited in the Mishna as declaring that every case of exile for manslaughter must be analagous to the act of chopping a tree: *Mah chativat etzim reshut* — just as the act of chopping a tree is *reshut*, i.e., neither a virtue nor a vice, neither a *mitzvah* nor an *issur*, so every case of manslaughter for which exile is prescribed must arise out of an act that is halachically indifferent or neutral. However, if it was an act of *mitzvah*, the perpetrator is not condemned to exile. Thus, the Mishna continues, the cases of the father, teacher, and bailiff who used excessive force and killed are excused from exile, because they were involved in acts of *mitzvah*. The Gemara says so clearly; the exemption arises because there was no *kiyyum mitzvah*.

However the Tosefta (*B.K.* 9:3 and *Mak.* 2:5 — see *hashmatot* from Ms. versions) says that in all these cases — the three mentioned in the Mishna, plus that of legal abortion in which the mother died and that of the malpracticing physician — all are required to undergo exile. Thus, the Tosefta disagrees with Abba Saul of the Mishna. Therefore, the controversy between Rambam and Ramban turns into a question of whether we follow the Mishna or the Tosefta. Rambam decides in favor of Abba Saul in the Mishna, while Ramban declares for the Tosefta.

It would seem, therefore, that while both Rambam and Ramban hold that the malpracticing physician is exiled, they differ as to whether medical treatment as such constitutes a *kiyyum ha-mitzvah* (Ramban) or not (Rambam). Yet, the matter requires further elucidation and the discovering of a source for their respective theories.

The source, I believe, is the famous baraita (*B.K.* 85a, *Ber.*60a): "In the school of R. Ishmael it was taught: 'he shall cause him to be healed' (Ex. 21:19 — in the case of battery and assault the offender must pay for the victim's medical bills); from this (redundance of the verb רפא) we learn that the Torah permits the physician to practice his healing arts." Rashi (*B.K., ad loc.*) comments: "and we

do not say that the Merciful One made sick, let the Merciful One heal" without human interference. Tosafot *(ib.,* s.v. *she'nitnah)* likewise explains that without this Scriptural dispensation we might prohibit medical treatment on the grounds that it contravenes the divine decree of illness. Most *Rishonim* similarly explain this baraita as negating the presupposition that man must not interfere in the natural process.

I believe that this is also the view of the Rambam. The baraita teaches that it is *permitted* to heal. The verse, previously mentioned, "thou shalt return it (the lost article) to him" adds the *requirement* or *mitzvah* to effect a medical cure (see Rambam, Commentary to the Mishnah, *ib.*).

Now, if indeed Rambam assigns medical care to the commandment of return of lost articles, then certain halachic consequences must flow from this particular rubric. Thus, if the finder takes the article with the intention of returning it to its owner, but for some reason the object disintegrates and the return is never consummated, certainly no *mitzvah* was performed despite the finder's best intentions and efforts. "Thou shalt return it to him" has not been achieved, and hence (on the technical halachic level, if not on the moral plane), no *mitzvah* was done. Similarly, for Rambam, if the patient died in the course of therapy, the "return of his body" (*hashavat gufo*) to the patient was not accomplished, and the physician cannot be accredited with a *kiyyum mitzvah.*

However, Ramban (in *Torat ha-Adam, Shaar ha-Sakanah)* has a completely different interpretation of this baraita (even though he is not always consistent, neither in *Torat ha-Adam* nor in his Commentary to the Torah). Thus, Ramban (*Torat ha-Adam,* ed. Chavel, p. 41) clearly implies that the Scriptural dispensation to heal is a psychological one:

> "From here we learn that the physician is permitted to practice." The explanation is: lest the physician say, "why do I need all this trouble of (practicing medicine)? Perhaps I will err and thus unwittingly cause someone's death." Therefore the Torah permitted him to practice medicine, and the physician like the judge is *commanded* to practice

> his profession. The judge too may say, "why do I need all this trouble?"... (Yet the Torah rules that) "the judge can rely only upon what his eyes see" (and, having performed to the best of his ability, should have no moral scruples or psychological distress about possible errors in judgment).

While Ramban also maintains the interpretations of the baraita by Rashi and Tosafot (that is, the dispensation to intrude into the natural process by effecting a cure for the malady), his major contribution is the interpretation of *reshut* as permission to enter a situation in which one might take a life unwittingly. Ramban's exegesis requires the assumption that medical treatment per se constitutes a *mitzvah*. Thus, in Ramban's words, the "dispensation" is a *reshut de'mitzvah* — in itself an obligation to heal (in contrast to *Perishah* to *Y.D* 336:4, who sees here a two-step process: once permission is granted to heal, thereafter the *mitzvah* arises to convert it into an obligation).

Support for this view comes from a Tosafist exegetical work on the Torah, *Moshav Zekenim* (to Ex. 21:19), which quotes Rashi on "he shall surely heal" only to disagree with him:

> We already know from the verse, "thou shalt not stand idly by the blood of thy neighbor" (Lev. 19:16), that if one witnesses his fellow drowning or beset by robbers etc., that he must help him, and we do not say, "The Merciful One made sick, left the Merciful One heal." Rabbi Hayyim interprets (the baraita), "From this we learn that the Torah permits the physician to practice his healing arts", to mean that there should be no (excessive) apprehenesion lest the patient die because of (the wrong) medication.

Clearly, this supports our understanding of Ramban, and this source too would support the thesis that medical treatment *per se* constitutes a *mitzvah*.

Further support for Ramban may be garnered from the following fascinating Midrash. It is a tale cited in *Midrash Shmuel* (ed. S. Buber):

> R. Ishmael and R. Akiva were once walking in the streets of Jerusalem together with a third person. A sick man met them and said, "Rabbis, tell me how I can be healed." They

> replied, "Take such and such (portions) until you are healthy." Whereupon their companion said to them, "Who afflicted him with his illness?" They said, "the Holy One, blessed be He." Said he to them, "Then you have intruded in a matter which is none of your concern. (The Holy One) afflicted and you will heal?!" Said they to him, "What is your occupation?" He answered, "I am a farmer, and the scythe is in my hand." They asked, "Who created the soil? Who created the vineyard?" He replied, "The Holy One, blessed be He."
>
> They continued,"And you intrude in a matter which is none of your concern? He created (the soil as is) and you by working it) eat of its fruits?" "But," he rejoindered, "do you not see the scythe in my hand? If not for the fact that I work and plow and turn the earth over and fertilize and prune, nothing would grow." Whereupon they said to him, "Fool! Have you not learned from your occupation that 'man's days are as grass (Ps. 103:15)?' Just as a tree offers nothing if it is not fertilized, pruned, and planted, and if it grows (fruit) but gets no water it dies, so is the (human) body like a tree, the medicine is like the fertilizer, and the physician is the farmer."

It is obvious from this Midrash that R. Ishmael and R. Akiva were not prepared to accept even the hypothesis of the quietistic view, according to which man has no right to interfere in the processes of nature by means of which illness afflicts people. Interestingly, it is the same R. Ishmael in whose school our baraita originated! This would lend further support to our interpretation of Ramban that the baraita's assertion of a Scriptural dispensation was not meant to answer the quietistic hypothesis ("the Merciful One made sick, let the Merciful One heal"), but rather is an assurance offered to calm the apprehensiveness of the physician who is concerned lest his error make his patient worse, by declaring the very process of medical treatment a *mitzvah*, independent of its success or failure.

Having begun this essay by citing views of the *Aḥaronim*, let us conclude in a similar manner. The law codified in *Shulchan Aruch* that the malpracticing physician must undergo exile is explained by the author of *Aruch ha-Shulchan* differently from the

way it was expounded in *Yad Avraham*. The former maintains that this punishment is ordained only when the physician himself knows that he has been negligent, such as not having studied the matter adequately. Otherwise, there is no reason to impose exile upon him. "For if he did study the matter properly, he has committed no sin, for it is a *mitzvah* to practice medicine. The sage once said, 'the physician's mistake is the Creator's intuition'... Without this element (of neglect), I believe (the physician) is not to be exiled, for he is no worse than the father, teacher, or bailiff — all of whom are exonerated from exile." Clearly, his view is that medical therapy is in itself a *kiyyum ha-mitzvah*, and we need not resort to the solution proposed by the author of *Yad Avraham* .

In summary, the question of whether medical treatment as such constitutes a *mitzvah*, independent of its results, is in dispute from the Tannaitic period — R. Ishmael and R. Akiva, through the Mishna and Tosefta — to the medieval period of Rambam and Ramban, and down to the latest period, that of the *Acharonim*, especially *Yad Avraham* and *Aruch ha-Shulchan*.

The Mitzvah Of Yishuv Eretz Yisrael

Rabbi Hershel Schachter

After the destruction of the first Temple, the prophet Yirmiyahu bewailed the neglect into which the land of Israel had fallen: "She is Zion; there is no one who inquires after her."[1] The Talmud understood this neglect to include an intellectual dimension, namely, a laxity in the study of laws pertaining to Eretz Yisrael. Therefore the Rabbis derived from the verse an obligation to delve into the halachot of Eretz Yisrael; "From this we infer that Zion ought to be inquired after."[2] This paper is one attempt at "inquiring after Zion".

* * *

Interestingly, the mitzvah of *Yishuv Eretz Yisrael* — living in the land of Israel — is discussed in the *Even HaEzer* section of the *Shulchan Aruch*,[3] (and even there), merely as a tangential issue arising from a mishna in *ketubot*. The Mishna[4] rules that should one partner in a marriage desire to move to Israel while the other opposes the move to the point of divorce, it is the spouse who wants to go who is considered justified in his claim, and the other one is guilty of breaking up the marriage. In practical terms this means that if the wife be the recalcitrant partner, she need not be paid the sum to which her *Ketubah* entitles her in the event of

1. Jer. 30:17
2. *Rosh Hashana* 30a
3. Chap. 75 sec. 3-5
4. *Ketubot* 110b

Rosh Yeshiva and Rosh Hakollel,
Yeshiva University

divorce or the death of her husband.[5] If the husband refuses to move, he must divorce his wife, if she so wishes, and pay her the amount of her *Ketubah*. In the Gemara[6] it is clear that the halacha sides with the partner who wishes to go because it is he who is conforming to the mitzvah of *Yishuv Eretz Yisrael*.

The Mitzvah — Biblical or Rabbinic

But if *Yishuv Eretz Yisrael* is a mitzvah, what is its biblical source? The Ramban, on two occasions,[7] points to the same verse[8]: "Conquer the land and dwell therein." The first phrase is understood by Ramban as obligating the Jewish community collectively to take control of the government of Israel, and "not leave it in the hands of another."[9] The second phrase, "and dwell therein," legislates a positive commandment for each individual to live in the land of Israel, even if the land is under foreign domination. These two mitzvot, according to Ramban, are applicable throughout history and are as relevant to our generation as to the generation led by Yeshoshua Bin Nun, who first entered Israel.

But it is Rambam's view on the issue that has most puzzled the later commentators. For although the Rambam in *Mishneh Torah* includes the various statements of the Gemara regarding living in Eretz Yisrael[10], he nonetheless omits both *Kibush Eretz Yisrael*

---

5. This penalty is imposed upon a woman only when she is responsible for the breaking up of her marriage. Thus, for example, if she is lax in her own personal observance of mitzvot, and her husband decides to divorce her, he must pay her *Ketubah*, for her personal religiosity is not said to bear on the state of her marriage. If, however, she refuses to observe the laws of family purity, and thus renders normal conjugal relations impossible, she is deemed to have failed in her marital duty, and loses her *Ketubah*. So, too, if she makes and violates her vows she loses her *Ketubah*, for the Talmud cites this particular transgression as the cause of the death of a couple's young children; thus her sin reflects a serious neglect of her duty to raise a family.
6. ibid
7. Commentary to Bamidbar 33:55; *Hashmatot* to Rambam's *Sefer HaMitzvot*, Positive Commandment no. 4
8. Bamidbar 33:55
9. Ramban's own words, *Hashmatot* to *Sefer HaMitzvot*, ibid.
10. See *Ishut* 13:19, *Melakhim* 5:12.

(conquering the land) and *Yishuv Eretz Yisrael* (living in the land) from his enumeration of the 613 mitzvot. Does his silence mean that he does not consider living in Israel to be a mitzvah? Or perhaps while considering it a mitzvah, Rambam refrained from counting it among the 613 due to some other reason peculiar to his methodology in selecting the mitzvot to be counted.

Some commentators[11] suggest that the Rambam considers *Yishuv HaAretz* to be a mitzvah, but only on a rabbinic level, with the verse cited by Ramban operative only during the original conquest of Israel.[12] If this is indeed the Rambam's position, then there would actually be no change in our attitude towards the observance of the mitzvah, for we are as scrupulous in our observance of rabbinic mitzvot as in those which are divinely ordained.

When Rabbi Avraham of Sochatshov, author of Responsa *Avnei Nezer,* was asked whether *Yishuv HaAretz* is a mitzvah today, and if so, why the great Chassidic Rebbeim of Europe never moved to Israel, he replied in a long *Teshuva* (responsum) in which he analyzed the Rambam's approach. In fact, suggests the *Avnei Nezer,* even the Rambam agrees that living in Eretz Yisrael is a biblical commandment in force in all periods in history. His failure to count it in his listing of mitzvot is due to an extraneous technical reason. Whenever the Torah lists two mitzvot, with one designed to lead up to and facilitate the performance of the other, Rambam regards the listing of both as unnecessary repetition[14], and only lists

---

11. *S'dei Hemed Ma'arekhet Eretz Yisrael* in the name of *Knesses HaGedolah* to *Yoreh Deah* 239; also *Ar'ah DeRabanan* quoting responsa of R. David B. Zimri (Radvaz).
12. The Rambam would then be following the very rule he laid down in the first part of his *Sefer HaMitzvot (Shoresh* 3) of not counting as a mitzvah anything of a temporary nature—*Hora'at Sha'ah.*
13. *Yoreh Deah* Vol. 2, no. 454
14. See *Sefer HaMitzvot, Shoresh* 9, where the Rambam rules that the same commandment, though repeated several times in the Torah, is counted only once. Thus, for eating the *sheretz putita,* the Rambam prescribes many punishments of lashes not because the prohibition of *sheretz* is repeated many times, but because there is a separate command not to eat a *sheretz* that flies, nor one that crawls, nor one that swims, etc. and the *putita* combines all the characteristics, and thus, all the different prohibitions.

the first of the two. For that reason, once the Rambam counts the mitzvah of building the Tabernacle[15] (whose purpose was to house the ark of the Law,) he sees no need to list the mitzvah of building the ark itself.[16] And similarly, once he enumerated the mitzvah of destroying the nations who impeded the Jewish conquest and settlement of Israel (*"Hachareim Tacharimeim,"*[17]) he no longer finds it necessary to count the actual conquest and settlement as separate mitzvot. Both of the above opinions agree that *Yishuv Eretz Yisrael* is a mitzvah according to the Rambam, and only differ as to whether its nature is biblical or rabbinic.

Rabbi Isaac de Leon in his commentary *Megillat Esther* on the Rambam's *Sefer HaMitzvot*[18] opens the door to the most radical interpretation of the Rambam, by explaining that Rambam's failure to mention *Kibush* (conquest) and *Yishuv* (dwelling) Eretz Yisrael indicates his view that they do not constitute mitzvot today. For, *Megillat Esther* explains, these mitzvot applied only in the days of Moshe, Joshua and David, before the Jewish nation was exiled, and they will resume only in the days of the *Moshiach* when the Jews will be returned to their land. So limited are these two commandments in their time of fulfillment, that Rambam saw fit not to count them among the *Taryag* (613) mitzvot. The *Minchat Elazar* wholeheartedly supports this understanding of the Rambam, which posits that *Yishuv HaAretz* is no longer a mitzvah today.

The overwheling majority of *Acharonim*, however, reject the explanation of the *Megillat Esther* on several grounds. Firstly, the *Avnei Nezer* points out that the Rambam himself counts the sacrificial rites as mitzvot, although these could only take place in the Temple. Clearly the fact that a mitzvah cannot be performed at certain times in Jewish history in no way diminishes its status as a mitzvah. The only time Rambam denies a commandment mitzvah status is when the command was issued as a one-time occurrence, as

---

15. *Shemot* 25:8; *Sefer HaMitzvot*, Positive Commandment no. 20
16. *Shemot* 25:10
17. Devarim 20:17; *Sefer HaMitzvot*, Positive Commandment no. 187
18. Commenting on Ramban's *Hashmatot*, Positive Commandment no. 4

for example, when Moses was ordered to "raise his staff and stretch out his arm over the sea"[19] to part the waters. Such commands constitute *hora'at Sha'ah,*[20] and the Rambam follows his own rule[21] in not counting them as independent mitzvot.

Furthermore, the contention of the *Megillat Esther* that in the days of Messiah a new mitzvah, heretofore non-existent for centuries, will be added to our observance, runs counter to a basic tenet of Judaism. We believe that the commandments of the Torah are eternal and will not be altered even in Messianic times.[22] This belief in the immutability of Torah forms part of Rambam's own thirteen principles of faith. In view of the difficulties inherent in the approach of the *Megillat Esther,* most *Acharonim* conclude that *Yishuv Eretz Yisrael* constitutes a mitzvah according to both Ramban and Rambam.

Exceptions and Exemptions

Rabbenu Chaim Cohen in Tosafot[23] cites two reasons why the mitzvah of *Yishuv HaAretz* should not apply in his times. First, the journey and subsequent life in Israel are fraught with danger; furthermore, poverty and other difficulties will make it impossible to observe the mitzvot connected to the land and lead to the violation of those mitzvot. The *Avnei Nezer*[24] dismisses both reasons, saying that they simply are no longer true. Neither danger nor hardship are severe enough to excuse one from *mitzvat Yishuv HaAretz.* If conditions were not a hindrance when the *Avnei Nezer* penned his responsum some ninety years ago, surely now they are no problem.

---

19. *Shemot* 14:16, 26
20. See note 12 above.
21. *Sefer HaMitzvot, Shoresh* 3.
22. The only law to be altered in the future was specified clearly in the Torah: When G-d expands the borders of Israel to include the territories of the Kini, Kenizi and Kadmoni nations, three more cities of refuge will be added to the six already existing (Devarim 19:9)
23. *Ketubot* 110b, beginning *Vihee Omeret.*
24. See note 13 above. See also *Pitchei Teshuva* to *Even HaEzer* 75:3 who cites Responsa of Maharit that the words of Tosafot were written by an erring student.

In *Baba Bathra*[25] the Gemara lists poverty as grounds exemption from the mitzvah. One who cannot make a comfortable living in Israel is not required to live there in penury. This rationale is cited by the *Pitchei Teshuva*[26] and many other *Poskim*, including Rabbi Shlomo Kluger[27] and the *S'dei Chemed.*[28] In fact, as we shall see, the *Avnei Nezer* builds upon it his elaborate responsum explaining why *Yishuv HaAretz* was often neglected by Jewish leaders. It must be stressed, however, that a comfortable life in Israel does not mean a life with every luxury available in the Diaspora. Even if one's standard of living drops in Israel, it is not grounds for exemption unless the new style of life is indeed intolerable.

In tractate *Avodah Zarah,*[29] permission is granted to leave Israel in order to learn Torah or to marry. Although both Torah and prospective spouses are readily available in Israel, the Gemara recognizes that cases may arise where a person feels he can only lead a normal life learning from a particular Rabbi or married to a particular person who resides outside Israel. The Tosafot[30] present two opinions as to whether exemption from *Yishuv HaAretz* is limited to cases of these two important mitzvot — Talmud Torah and marriage — or extends to any mitzvah which one can only perform in *Chutz LaAretz* (outside the Land).

The common denominator of these cases is the opportunity to lead a normal life. One is not expected to live in Israel under abnormal and unbearable conditions. If living in Israel means a life of poverty, or a life devoid of the Torah or companionship of one's choice, then the obligation falls away.

Put differently, it may be said that Eretz Yisrael, being the *land* chosen and sanctified by *Hashem* is the natural and proper place for Jews, the *people* chosen and sanctified by Him. For individual

---

25. 91a.
26. to *Even HaEzer* 75:3
27. Responsa *HaElef Lekha Shlomo, Even HaEzer* no. 118-120
28. *Ma'arekhet Eretz Yisrael* – Vol. 5 p. 11, sec. 9.
29. 13a
30. Ibid, beginning *Lilmod Torah.*

Jews there may be extenuating circumstances, such as those outlined above, in which it becomes clear that their place is not in Israel. Based on this rationale, it has been suggested[31] that the greatest scholars and leaders of the diaspora may be permitted, or even obligated, to remain in *Chutz LaAretz*. Since their sphere of influence is in *Galut*, and it is there that they will have the most beneficial effect in disseminating Torah, we cannot say that their place must be in Israel.

Avnei Nezer[32] seeks further justification for the failure of giants of Chassidut to immigrate to Israel in fulfillment of the mitzvah. He finds that, given the nature and purpose of the mitzvah, these Chassidic leaders could not possibly have fulfilled it in their circumstances. To fully understand this point, we must first examine the nature of *Mitzvat Yishuv HaAretz* as conceived by the *Avnei Nezer*.

The Nature of the mitzvah

Eretz Yisrael is described in the Torah as "the land upon which the eyes of *Hashem* are always turned."[33] The Talmud[34] interprets this added attention paid by G-d to Israel as denoting an extra measure of Divine Providence, or *Hashgacha P'ratit*, bestowed by G-d only upon Israel and its inhabitants. One manifestation of this special *Hashgacha* is the apportionment of rain, but it is really an all-around more intimate relationship that exists between *Hashem* and His people living in the Land of Israel. This relationship is spelled out by the statement of the *Talmud*[35] that outside Israel a person receives his livelihood from G-d through an angel, but in Israel the sustenance is provided directly by G-d himself. It is for this reason that Eretz Yisrael is called "The King's palace"[36], for although certainly G-d's dominion extends to the entire universe,

---

31. This was told to me by the Aschkanazi Chief Rabbi Avrohom Shapiro.
32. see note 13 above.
33. Devarim 11:12
34. *Ta'anit* 10a
35. ibid.
36. See *"Eim Habonim Smeicha,"* Jerusalem 5743 p. 157

"Melo chol ha'aretz kevodo"[37] there exists a unique, more personal connection to G-d in His chosen land.[38]

In light of this aspect of Eretz Yisrael, the *Avnei Nezer* redefines the mitzvah of *Yishuv Ha'Aretz*. The Torah did not command us simply to be physically present in the land of Israel. Rather, it required us to crave a closer personal relationship with *Hashem*, one endowed with more *Hashgacha P'ratit*. We are commanded to strive to live in Israel so that all our sustenance should come directly from G-d and not through any intermediary. When we live and work in Israel, our livelihood emanates from the hand of G-d.

Precisely for this reason, explains *Avnei Nezer*,most Chassidic giants did not attempt to live in Eretz Yisrael. Having no source of income in Israel, these Rabbis would have been forced to subsist off of funds sent them by Chassidim from *outside Israel*. Thus even in Israel, their livelihood would have come from the diaspora, through the agency of an intermediary angel. They would not have fulfilled the purpose of *Yishuv Ha'Aretz*, they would not have achieved closeness to *Hashem* through directly receiving sustenance, for that only happens when one finds a means of support from the land itself.[39]

---

37. Isaiah 6:3

38. Thus, even as there are gradations in the amount of Divine Protection afforded people, so too the amount of *Hashgacha* varies depending upon location. Among people, the *Tzaddik* will be both protected more and held accountable for more minor transgressions than will the average Jew, and the average Jew, in turn, is more clearly watched over than the wicked. And among lands, Israel is more closely supervised than *Chutz La'Aretz*.

    In supporting his point, the *Avnei Nezer* cites the Midrashic story of how Jacob, upon returning to Israel from Laban's house, gathered all his material goods into one pile, and presented them to Esau, in exchange for Esau's burial rights in *Me'arat HaMakhpelah*. On that occasion Jacob declared, "the possessions of *Chutz La'Aretz* are not worth my having." The *Avnei Nezer* explains this statement to refer to the superiority of goods gained in Israel, directly from *Hashem*, over those acquired while in *Chutz La'Aretz*, in a more indirect manner. Only with the former does one fulfill Mitzvat *Yishuv Ha'Aretz*.

    In a similar vein a Talmudic dictum of *Ketubot* 110b is explained: "He who lives in Israel is like one who has a G-d, and he who lives outside of Israel is like one who has none." In Israel, "the palace of the King," endowed with greater *hashgacha*, one is truly more closely associated with G-d.

39. Of course then it was much more difficult to derive a source of income from

The view of the *Avnei Nezer* as to the nature of *Mitzvat Yishuv HaAretz* is not, however, universally accepted. Another possibility is evident from the Gemara in *Sotah,*[40] which asks why Moshe Rabbeinu so yearned to enter Israel. Could it have been merely "to eat from its fruits and be satiated from its goodness"? the Gemara queries rhetorically. The Gemara does not offer the obvious answer, that *Yishuv HaAretz* was certainly a mitzvah in that generation, and Moshe, craving a mitzvah as a miser craves gold[41], longed to fulfill yet another. Apparently taking into account the fact that the mitzvah exists, the Gemara wants to know the *nature* of this mitzvah that Moshe was so eager to acquire. Thus it

---

within the land. Today, in addition to its being easier to earn a living, the mere transferral of funds from outside of Israel to Israel helps the economy, and in that way achieves a partial fulfillment of *Mitzvat Yishuv Ha'Aretz.*

The *Avnei Nezer* further explains a story recounted in *Ketubot* 110b-111a. The Talmudic sage Rabbi Zeira decided to emigrate from Babylonia to Israel, and therefore made a point of avoiding the presence of Rabbi Yehuda, who had forbidden the return to Israel from Bavel. Rabbi Yehuda derived his position from a verse in Jeremiah (27:22) referring to the vessels of the Temple during the time of the Babylonian exile: "They will be brought to Babylonia, and there they will remain, until the day on which I remember you..." Rabbi Yehuda understood this verse to refer not only to vessels, but also people, and not only to the first exile, but also the second. Thus he derived a special law prohibiting by implication any return from Bavel. But how may a prophet introduce a new law, and especially one which contradicts the biblical command to live in Israel? The *Avnei Nezer* resolves this difficulty based on *Berakhot* 57a. There Rabbi Zeira states that he didn't attempt the move to Israel until he saw barley in a dream. Barley is taken to be an auspicious token, because its Hebrew word — *Se'orah* — is reminiscent of a verse in Isiah (6:7) which speaks of atonement: "*VeSar Avonekha* —" "Your sin has been removed." Only when Rabbi Zeira received a sign of his righteousness in a dream, did he attempt to return from Bavel. This leads the *Avnei Nezer* to suggest that in Rabbi Zeira's view Jeremiah never *forbade* returning from Bavel; he said only that people who will return will not succeed in settling, and will have to leave again. There is no mitzvah of *Yishuv Ha'Aretz,* says the *Avnei Nezer,* unless one will have a *Klitah Tovah* — a successful absorption process. Therefore Rabbi Zeira did not think at first that he would be able to fulfill the mitzvah — surely the land would vomit him out because of his sins. Only when he had his encouraging dream did he realize that he was pure from sin and assured of a successful absorption in Israel. He acted accordingly.

40. 14a

41. See *Makkot* 10a in expounding *Kohelet* 5:9.

answers that many mitzvot can only be fulfilled in the land of Israel, and Moshe desired the opportunity to fulfill all the mitzvot linked to the land. The implication clearly is that the purpose of *Yishuv HaAretz* is to afford a person the chance of performing the mitzvot *HaTeluyot BaAretz*,[42] the commandments which can only be performed in Israel.

Tosafot in *Gittin*[43] appear to share this view. They propose a contradiction between Talmudic texts as to whether the city Acco is part of Eretz Yisrael and conclude that in the days of Ezra only half of the city received the sanctification of the land (*Kedusha Shniya*), with the accompanying obligations of tithes. Therefore only that half is part of Israel and is included in *mitzvat Yishuv HaAretz*. Tosafot clearly equate the obligation to fulfill the mitzvot *HaTeluyot BaAretz* with the mitzvah of *Yishuv Eretz Yisrael*.

The Ritva[44], however avoids Tosafot's question entirely by rejecting their premise. The Tosafot were forced into their position when faced by one Talmudic source[45] that denied to Acco *Kedushat Eretz Yisrael* and another text[46] which established it a mitzvah to live in Acco. By assuming that the mitzvah of living in Israel can exist only concurrently with (and because of) *Kedushat HaAretz*, the Tosafot had to conclude that the two sources were discussing different halves of the city. The Ritva, however, denies the concept that living in Acco being a mitzvah necessarily implies that the city had *Kedushat HaAretz* as well as *Mitzvot HaTelyuot BaAretz*. By divorcing the two issues, Ritva rejects the theory that the purpose of *Yishuv Eretz Yisrael* is the fulfillment of the mitzvot linked to the Land, saying that even were no such mitzvot to exist, one would still have to dwell in Eretz Yisrael, for it is the land chosen and beloved by G-d. Thus the Ritva's opinion would appear to concur with that of the *Avnei Nezer* that residence in Israel deepens the initimacy of one's relationship with G-d.

---

42. The *Avnei Nezer's* alternate way of explaining this Gemarah will be discussed later.
43. 2a, beginning *VeAshkelon*.
44. to *Gittin* 2a
45. Mishna, *Gittin* 2a
46. *Gittin* 76b

Based on the Ritva and the *Avnei Nezer,* we can suggest a novel interpretation of another statement made by the Gemara in *Ketubot.*[47] "It is preferable to live in Eretz Yisrael, even in a city where most of the inhabitants are non-Jews, than to live outside of Israel, even in a city where most of the inhabitants are Jewish." Ostensibly the Gemara means that although living in a city inhabited predominantly by non-Jews entails a degree of discomfort, one must bear the discomfort cheerfully for the sake of fulfilling the mitzvah of *Yishuv Eretz Yisrael.* In light of the Ritva and *Avnei Nezer* however, a new interpretation becomes possible.

The Tosafot elsewhere in *Ketubot*[48] state that although a city in Israel surrounded by a wall since the days of Yehoshua Bin Nun is endowed with added sanctity and, consequently, additional laws[49], nevertheless, when the city is inhabited by a majority of non-Jews, its special laws no longer apply. No source is cited by Tosafot for this statement, and many later commentators are baffled as to the origin of Tosafot's rule. Rabbi Menachem Ziemba[50], however, cites the *Biur HaGra* to *Hilchot Purim,*[51] where the Gaon of Vilna traces this law to the Jerusalem Talmud of *Megillah.*[52] There the Yerushalmi says that a walled city inhabited by a majority of non-Jews is considered to be in a state of ruin — *BeChurbana* — and therefore loses its special sanctity and accompanying laws.

This may explain as well our original Gemara: One might have claimed that just as a city which is surrounded by a wall loses its special status when the majority of its population is non-Jewish, so too, any city in Eretz Yisrael should lose its sanctity of the land of Israel when the majority of its population is non-Jewish, and since it would no longer have *Mitzvot HaTeluyot BaAretz,* there would be no mitzvah to live in such a city. This presumption the Gemara

---

47. 110b
48. 45b, beginning *Al Petah Beit Din.*
49. See Mishna *Keilim* 1:7.
50. *Otzar Ha Sifrei* (Introduction to *Sifra Zute*), Pg. 53.
51. *Orach Chayim* 688 sub sec. 2.
52. 1:1

comes to refute, saying that while that might have been so were the sole purpose of *Yishuv HaAretz* the fulfillment of *Mitzvot HaTeluyot BaAretz,* in fact there is a different purpose to the mitzvah. That purpose is, as formulated by the Ritva and *Avnei Nezer,* to become closer to G-d in His land, and is independent of *Kedushat HaAretz.*

Yet one obvious question on the approach of the Ritva and *Avnei Nezer* presents itself. If the purpose and nature of *Yishuv HaAretz* is to come closer to *Hashem,* why doesn't the Gemara in *Sotah*[53] say so explicitly when it asks why Moshe Rabenu desired to enter the land? Instead of answering that Moshe wanted to fulfill the mitzvot which can only be done in the Land, the Gemara should have replied that he wanted to attain a more intimate relationship with G-d. To this, the Ritva and *Avnei Nezer* would answer that for Moshe Rabbenu,with whom G-d communicated "face to face"[54], a closer relationship would have been impossible. Therefore, the Gemara asks, if the purpose of *Yishuv HaAretz* is closeness to *Hashem,* and Moshe had nothing more to gain in that area, why did he so desire to enter Israel? And the answer is given that there exists a *second* attraction to living in Israel, namely the opportunity to fulfill the *Mitzvot HaTelyuot BaAretz.*[55]

How to Fulfill the Mitzvah

Having ascertained the existence of a mitzvah to live in Israel, we can examine the parameters of the mitzvah. The *Magen Avraham*[56] presents two opinions as to whether one fulfills *Mitzvat Yishuv HaAretz* even partially by visiting Israel. The position that even a visit constitutes a partial fulfillment of the mitzvah is based

---

53. 14a
54. Devarim 34:10, also Bamidbar 12:8.
55. Along these lines it is said of the Ba'al Shem Tov that although he lived outside of Israel, he did not sit in a Sukkah on Shmini Atzeret, thus following the Israeli custom because a Tzaddik is said to be on a level corresponding to Eretz Yisrael, even in Chutz La'Aretz.
56. *Orach Chaim* (248:15). See also *Piskei Teshuvah,*vol. 2, 73-74 where he suggests a distinction between visiting for *less than* thirty days, or for less than twelve months, as opposed to visiting for a longer time period. His distinctions are based on the Gemara *Baba Bathra* (7b, 8a).

upon the statement of the Gemara[57] that one who merely walks four cubits in Israel attains atonement for his sins. Rabbi Bezalel Zolti,[58] the late Chief Rabbi of Jerusalem, suggested that this issue hinges upon a dispute between the Rambam and Ravad.[59]

One interpretation given by the Gemara[60] to the biblical prohibition of *"Lo Tichanem"*[61] is that we may not allow non-Jews to live in Israel. The Rambam and Ravad disagree whether the prohibition includes visits and tours made by non-Jews in Israel. Rav Zolti assumed that the nature of the prohibition *Lo Tichanem* is that whatever we Jews are commanded to do in the mitzvah of *Yishuv HaAretz* ,we are forbidden to allow a non-Jew to do. Thus, if we may not allow a non-Jew even to visit Israel, it may be inferred that we ourselves can partially fulfill the mitzvah of dwelling in the Land by visiting Israel.

A man who wishes to live in Israel despite the objections of his wife must have pure motives, writes Rabbi Shlomo Kluger.[62] Ordinarily we are guided by the Talmudic dictum[63]: "One should always engage in Torah and mitzvot (even) for impure motives (*Shelo Lishma*) for out of impure motives he will eventually reach pure motives." Yet we find occasional exceptions to this rule. The Mishna in *Avot*,[64] for example, rules that those who occupy themselves with work for the community (*Tzibbur*) should do so only if their motives are pure (*LeShem Shamayim*). In other words, the Mishna ordains that in activities not explicitly required by the Torah — i.e. the writing of a *sefer*, staging of a demonstration, engaging in communal work — if one voluntarily gets involved, it must be for unclouded motives. A *sefer* should be written to enlighten others and prevent Torah from being forgotten, not in

---

57. *Ketubot* 111a. See also *Pnei Yehoshua*, ibid, that such assurances always presuppose the good intentions and *Teshuva* of the individual.
58. Heard in a public shiur in Jerusalem.
59. Hilkhot *Avodat Kokhavim* 10:6
60. *Avodah Zarah* 20a.
61. Devarim 7:2
62. Responsa *HaElef Lekha Shlomo, Even HaEzer* 119.
63. *Pesachim* 50b and many other places.
64. 2:2

order to enhance the reputation of its author. Demonstrations and communal work must be done strictly for noble purposes. Similarly, on the rare occasions when the Torah permits performing a sin *Lishma*[65], the license is limited to those with pure intentions.

Rabbi Shlomo Kluger groups *Yishuv HaAretz* in the same category, ruling that a man may divorce his wife without paying the amount of her *Ketubah* only if his reason for wanting to live in Israel is to fulfill *Mitzvat Yishuv HaAretz*. Accordingly, Rabbi Kluger disqualified the claim of a man who insisted on moving to Israel not for the sake of the mitzvah but in order to better his financial prospects. This approach to *Mitzvat Yishuv HaAretz* is quite unique.

Limitations

Opposition to the modern return to Zion has often based itself upon the now famous Talmudic passage of the *Shalosh Shevuot*,[66] "The Three Oaths."

> ג' שבועות הללו למה אחת שלא יעלו ישראל בחומה ואחת שהשביע הקב"ה את ישראל שלא ימרדו באומות העולם ואחת שהשביע הקב"ה את העובדי כוכבים שלא ישתעבדו בהן בישראל יותר מדאי
>
> What are these three oaths? One, that the Jews should not go up (to take the land) by force, and one that G-d made the Jews swear that they would not rebel against the nations of the world, and one that G-d made the nations swear that they would not enslave the Jews too much.

In expounding the verse "I have made you swear, O daughter of Jerusalem," the Gemara relates that the Almighty administered three oaths to the Jewish people. The time and nature of these oaths are not clear, but one of them entailed a commitment on the part of the Jews not to return and conquer Israel by force. Many *Gedolim* in Europe took this to forbid any attempt at reestablishing the State of Israel before Messianaic times. Numerous refutations have been

---

65. *Horiyot* 10b and elsewhere. Regarding writing *Chidushei Torah shelo leshma*, see Responsa *Meshiv Davar, Orach Chayim* 14.

66. *Ketubot* 111a based on *Shir HaShirim* 2:7, 3:5.

offered to counter such an interpretation of the Gemara. Firstly, it is noted that this passage, whatever its true meaning may be, is not cited by Rambam or the *Shulchan Aruch*, and is therefore not halachically binding upon us. *"Ein Lemadim Min Hagaddah"*.

Beyond that, the Maharal of Prague[67] demonstrates that the term *shevuah* in its Scriptural use need not mean literally an oath. Equating *shevuah* with *brit*, the Maharal points out that *brit* need not always connote a formal convenant between two parties. If it were always to be taken literally, how could G-d be described as entering into a *brit* with salt[68] and bugs[69]? Rather *brit* and *shevuah* indicate an unchanging fact of life, a strong tendency implanted by G-d in nature.[70] Thus, the Maharal explains that G-d never actually administered an oath to the Jewish people; He merely told us that a return to Zion would be impractical because by the laws of nature such a return would not work out. Any attempt at return, then, is not forbidden, but discouraged as futile. Should an attempt succeed, it clearly has triumphed over nature and is not in defiance of G-d's will.

Others suggest that the prohibition was against taking the land *by force*. In view of the Balfour Declaration, the Partition Plan and other actions taken by the world community in recognition of the State of Israel, it is clear that the nations of the world voluntarily allowed us to return to Israel; our entry was not one of force.

Finally, it is pointed out[71] that the same Talmudic passage records that the Jews were not the only ones to swear. G-d concurrently elicited an oath from the nations of the world not to be overzealous in persecuting the exiled Jews. Two thousand years of relentless oppression bear witness to the fact that the nations

---

67. Sefer *Netzach Yisroel* Ch. 24 see Essay by Rabbi Shlomo Aviner, on the Topic, Noam vol. 20, sec. 13.
68. See *Sifrei* to Bamidbar 18:19; also quoted by Rashi to Vayikrah 2:13.
69. See *Nidah* 58b
70. See Rambam to Bereishit 6:18-19, who develops the concept of *brit* denoting something unconditional holding true regardless of future developments.
71. Rav Meir Simcha of Dvinsk, quoted in Rav Menachem Mendel Kasher's *HaTekufah HaGedolah*, p. 174.

have failed to uphold their obligations under the *Shalosh Shevout*. Consequently, we should no longer be bound by ours.

The *Minchat Elazar*[72] argues further that since the expulsion from our land was intended as a punishment, we are not permitted to avoid G-d's wrath by ending the exile, and must await redemption in the diaspora, at a time of G-d's choosing.

The foundations of this argument are very shaky. Surely Judaism does not forbid the attempt to avoid or curtail a punishment from G-d. Often sickness is a punishment inflicted on a person for his sins, and yet the Torah explicitly grants us license to seek a medical cure — *"VeRapo Yerapei"*[73] — from which we adduce the permission granted a physician to heal.[74]

Moreover, who is to say that the period of punishment has not elapsed? The very fact that an opportunity exists to return is proof that G-d no longer wishes to punish us. What further notification is necessary.?

In fact, failure on our part to recognize that the period of exile has ended can only be unwise and even dangerous. The Talmud[75] tells us that each time the Jewish people was exiled, the *Shechina*, G-d's Spirit, followed them, and thus it too was in exile — *Shechinta BeGaluta*. The significance of G-d's being in exile can best be understood by analogy to another law in the Talmud involving exile.

A person who kills accidentally is required by the Torah to flee to a city of refuge and reside there until the death of the High Priest.[76] At the same time, even while in exile, he is not expected to live a life of privation and hardship. From the phrase "and he shall live there"[77] the Rabbis derive that the exiled man is to be provided with everything he needs to live a completely normal life.[78] As Torah study is an essential element of life, the Mishna rules that

---

72. Vol. V No. 12.
73. Shemot 21:19
74. *Bava Kamma* 85a
75. *Megillah* 29a
76. See Bamidbar 35, Devarim 4:41-9, 19
77. Devarim 4:42
78. *Makkot* 10a

"when a student is exiled, his teacher is exiled with him."[79] The Rebbi is required to open a Yeshiva and provide Torah atmosphere for his exiled student. It is in this manner that G-d accompanied us into exile; being Master and Teacher of the Jewish people, He followed his students into exile to provide them with spiritual guidance and Divine protection.

But how long must the teacher remain in exile? Certainly when the High Priest dies and the student may return home, the teacher may return as well. And even if the student himself, having grown accustomed to his new surroundeing, desires to remain, that need not hinder his Rebbi from returning. Similarly, with the period of our exile at an end, G-d is free to return to His land, even should we choose to tarry. He need no longer reside in exile for our benefit. The prospect of continuing live to in *Galut,* with G-d's special protection removed, is frightening.

Finally, if we persist in staying in *Galut* even when our punishment is over, we will be following the dangerous precedent set by the *Eved Nirtza.* A Hebrew slave who grows to enjoy the conditions of his servitude and refuses to go free at the end of his six year term is made to undergo a *retziah* ceremony involving the piercing of his upper ear, after which he remains a slave until the Jubilee year.[80] One interpretation given to explain the symbolism of piercing the ear is based upon the assumption that the slave was originally sold as a thief, who, when apprehended, had no money with which to pay back his victim. "The ear which heard at Sinai 'Thou shalt not steal,' and yet (its owner)went out and stole deserves to be pierced."[81] On this explanation Rabbi Yehoshua Lein Diskin[82] asks why, if the piercing is a punishment for the theft, is it not carried out immediately, but only after six years of servitude?

---

79. Ibid.
80. Shemot 21:5-6, Devarim 15:16-17
81. *Mekhilta,* quoted by Rashi to Shemot 21:6. Rashi also cites the rationale in a case of man who sold himself: "The ear which heard 'for unto Me are the children of Israel slaves' and yet (its owner) went out and acquired a master deserves to be pierced."
82. *Chidushai Maril Diskin* begining of *Parshat Mishpotim.*

He answers that the true punishment for the theft is being sold into service for six years; no other punishment is ordinarily called for. But this particular thief, by displaying reluctance to go free after the six years are up, demonstrates that for him the servitude never constituted a punishment in the first place. On the contrary, he revels in his new surroundings: "I love my master, my wife and children; I shall not go free."[83] For such a man, to whom the punishment of the Torah means nothing, the Torah prescribes an additional punishment — the piercing of the ear.

One can argue that our presence in exile was a punishment, and, with our renewed access to Israel, that punishment is over. G-d forbid that we should sit back and willingly accept surroundings that are, essentially, meant as a punishment. G-d forbid that, by refusing to recognize the nature of one punishment, we bring upon ourselves another.

A National Obligation

Until now we have dealt with *Mitzvat Yishuv Eretz Yisrael* as derived, according to the Ramban, from the end of the verse "Conquer the land and dwell therein." But, as noted above, a separate mitzvah of the entire nation *(Tzibbur)* to conquer Eretz Yisrael is learned by the Ramban from the first part of the verse. This mitzvah, too, is conspicuously missing from the Rambam's enumeration of the 613 mitzvot. Moreover, the Rambam in his *Yad HaChazaka* doesn't even enumerate *Mitzvat Yishuv HaAretz*. Here, then, there are more grounds for claiming that Rambam felt the mitzvah to be applicable only when the Jews first entered Eretz Yisrael.

It is generally assumed, however, based on a Yerushalmi,[84] that this Mitzvah also applies throughout history, as the Ramban writes. The Yerushalmi offers a novel interpretation of a law cited in *Masechet Gittin*. The Gamara in *Gittin*[85] permits asking a non-Jew on the Sabbath to write and sign the document necessary to

---

83. Shemot 21:5
84. *Moed Katan* Ch. 2 Halacha 4.
85. 8b

purchase a house in Israel from its non-Jewish owner. Commentators speculate what precisely was the mitzvah involved which made possible the suspension of the rabbinic prohibition of *Amirah LeNachri,* (asking a Gentile to do work on Sabbath). The *Tashbets*[86] suggests that it is *Yishuv Eretz Yisrael,* settling in the land, that takes precedence over *Amira LeNachri.* The Ramban[87] and Rivash[88], however, suggests that it is the mitzvah of *Kibush* Eretz Yisrael, conquering it, which carries the day. The Ramban writes that since *Kibush HaAretz* is incument upon *Klal Yisrael* (the Jewish people) as a whole, it is classified as a *Mitzvah D'Rabim* (of the many) and, unlike ordinary mitzvot, a mitzvah *D'Rabim* is of a higher priority than the prohibition of *Amira LeNachri.*

The Yerushalmi supports the Rivash in saying that *Kibush HaAretz* was the underlying reason for the law and supports the Ramban in classifying *Kibush HaAretz* as a mitzvah for all generations. In explaining why one may instruct the non-Jew to violate Shabbat in order to buy a home in Israel, the Yerushalmi comments,''For Jericho, too, was conquered on the Sabbath''. Clearly the point being made is that buying a house from non-Jewish hands constitutes a partial conquering of the land of Israel. For a genuine and complete mitzvah of *Kibush HaAretz* such as the conquering of Jericho by Yehoshua Bin Nun, even biblical prohibitions are eased on Shabbat. For a partial fulfillment of *Kibush HaAretz,* only rabbinic laws, such as *Amirah LeNachri,* are waived. Thus without needing to classify *Kibush HaAretz* as a mitzvah *D'Rabim,* the Yerushalmi posits that this mitzvah falls in the same category as *Kidush HaHodesh*[90] and sacrificing public *Korbanot* whose time of sacrifice is specified.[91] All of these mitzvot, by their very nature, take precedence over Shabbat. Moreover, since the law of the Gemara in *Gittin* did not only apply to a particular

---

86. Responsum 21. See *Mishne Halachot* (R' Menashe Klein)
87. *Chidushum* to Shabbat (130b) vol. 3, p. 251.
88. Responsum no. 101
90. Mishna *Rosh Hashana* 22a
91. Pesahim 66a

period in history, it is clear that mitzvat *Kibbush HaAretz*, according to the Yerushalmi, applies equally to all times.

Conquering Israel by force clearly involves a fair amount of danger. One might have claimed that since *Pikuach Nefesh* (preserving Jewish life) takes precedence over most mitzvot of the Torah, one need not participate in *Kibush HaAretz* because of the element of life-threatening danger. The *Minchat Chinuch*[92], however, dispels any such thinking by pointing out that this mitzvah, by its nature, incorporates danger. Nevertheless, it was still commanded to the Jewish people. Any commandment which has danger woven into its very fabric cannot be suspended for considerations of *Pikuach Nefesh*. (Of course this presupposes that the *Kibush* accomplished will be real and lasting. Only if military experts feel that waging war would be essential to secure or protect the safety of the State and its citizens would the mitzvah apply, despite the accompanying loss of life.)

Rabbi Meir Simcha of Dvinsk, the *Meshech Chochma*,[93], cites the words of the famous Midrash[94] that the Jews merited redemption from Egypt because throughout their exile and enslavement they preserved their names, their language, and their unique dress. In explaining the significance of these seemingly trifling mitzvot, Rabbi Meir Simcha writes that although all mitzvot are equally important in the eyes of Jewish law and must all be observed, from an historical perspective some take on added significance. Thus, outside of Israel, it became historically very important that Jews retain their Hebrew names, tongue, and dress in order to combat the powerful forces of assimilation. In this manner, every period of history has its own mitzvot of the hour. Today, when every Jew settling in Israel contributes measurably to the security and economy of the State, and to the Jews in it, *Yishuv Eretz Yisrael* may indeed be called a mitzvah of the hour.

The author wishes to thank Moshe Rosenberg for his assistance in the preparation of this essay.

---

92. Mitzvah 425.
93. To Parshat Bechukotai on the Pasuk ואף גם זאת בארץ אויביהם.
94. *Vayikra Rabba* (32,5)

The Contemporary Kosher Bakery and Its Halachic Issues

Rabbi Dr. Yirmiyohu Kaganoff

Since the twentieth-century North American household does not bake its daily bread at home, a kosher bakery is a necessity for any sizable Jewish community. It becomes the responsibility of the local rabbinate to try to arrange proper supervision at such a bakery.

Numerous *kashrut* and *halachic* issues must be clarified to enable this supervision. The *Rav HaMachshir,* or supervising Rabbi, must assume many responsibilities, including ascertaining the *kashrut* of all incoming ingredients, the proper *kashering* of equipment, and the maintenance of separate production facilities for dairy and pareve, assuring that no dairy products are added to the breads,[1] and determining the practicality of the products' being *Pat Yisrael* (bread where a Jew participated in the baking). If the local bakery is Jewish owned, additional questions must be dealt with, including ritual immersion of equipment in a *mikveh,* Shabbat and Pesach production,and *hafrashat challah* -- proper separation of the *challah* portion. (It is important to clarify that the commonly used word *challah,* meaning Shabbat bread, is technically a misnomer. In this article the word *challah* will always refer to the special portion removed from dough, as mandated by Jewish law).

1. גמרא פסחים ל', שלחן ערוך יורה דעה רסי' צ"ז וגליון מהרש"א שם.

Rabbi, Young Israel of Greater Buffalo

Ingredients

The most common problem ingredients in a bakery include the stabilizers, emulsifiers, and dough mixes which are frequently animal-shortening based or include animal fats. It is interesting to note that many companies produce two almost identical items — an animal-oil based product, and a replacement product which is vegetable-oil based and produced under responsible kosher supervision. Government regulation does not require the listing of every ingredient on the label of a product. For example, release agents are considered production aids and therefore do not have to be listed on the label. Release agents, which may be animal shortening, keep food products from sticking to machinery. They are sprayed or smeared directly on food or on equipment immediately before food items are placed on them.

Shabbat and Pesach

Frequently a local rabbinate is unable to arrange for a Jewish-owned bakery to be closed on Shabbat. This creates a strong moral dilemma for the *rabbonim* involved. Although the results of work done by a Jew in intentional violation of the Shabbat are permitted for use immediately following the Shabbat for anyone except the Shabbat desecrator,[2] by providing such a bakery with kosher certification, the rabbinate is giving a tacit approval to public desecration of Shabbat. A Rabbi must carefully weigh the alternatives and determine what approach he feels is appropriate.

A more serious problem is the instance of a bakery which is open on Pesach. Any *chametz* owned by the bakery during the festival is forbidden for use even after Pesach.[3] (For more thorough discussion of these laws, see the article on *chametz she'avar alav ha-Pesach,* which appears elsewhere in this Journal.) The rabbinate could remove supervision after Pesach until all *chametz* items that were owned during the holiday have been consumed, thus permitting only items which were acquired after Yom Tov, but of

---

2. ש״ע אורח חיים רסי׳ שי״ח ובנ״כ וע׳ במשנה ברורה שם סק״ה דמותר אף למי שנתבשל בשבילו.
3. משנה פסחים כ״ח., שלחן ערוך או״ח סי׳ תמ״ח ס״ג.

course this leaves the commumity without "Kosher" bread for the duration. Based on a responsum from Rav Moshe Feinstein,[4] some rabbis arrange a sale of all *chametz* items with a standard *m'chirat chametz* document, but not all authorities agree that this sale has validity. The *Maharam Schick*[5] and others state that the sale of *chametz* is only effective for someone who demonstrates that he does not want to own *chametz* during Pesach. According to this opinion, the *m'chirat chametz* of a bakery which is open on Pesach would have no halachic validity, and a complete circulation of *chametz* stock would have to take place before the bakery's products could be used.

Pat Yisrael

The Mishna in *Avodah Zarah* states

> "ואלו דברים של עובדי כוכבים אסורין ואין איסורן איסור הנאה חלב שחלבו עכו"ם ואין ישראל רואהו והפת והשמן שלהן רבי ובית דינו התירו השמן והשלקות."[6]
>
> The following items of a non-Jew are forbidden to be eaten but are permitted for benefit: milk milked by a non-Jew without a Jew supervising; bread and oil of a non-Jew, although Rebbe and his rabbinic court permitted the oil of a non-Jew, and items cooked by a non-Jew [*bishul akum*, which if certain conditions exist, would not be permitted].

The latter items are prohibited because of the likelihood that increased social interaction would lead to intermarriage.[6] Many of the *Rishonim*[7] (commentaries of the medieval era) note that there is evidence that the prohibition against *Pat Akum*, bread baked by a non-Jew, was not accepted in all places when introduced, because of the principle of "אין גוזרין גזרה על הצבור אלא א"כ רוב הצבור יכולין לעמוד בו" — a rabbinic injunction only becomes universally binding if the majority of people abide by it at the time of its

---

4. עשו"ת אגרות משה א"ח ח"א סי' קמ"ט וח"ב סי' צ"א.
5. עשו"ת מהר"ם שיק א"ח סי' ר"ה, שו"ת דברי מלכיאל ח"ד סי' כ"ד סק"י.
6. עבודה זרה ל"ה:.
7. שם בתוס' ד"ה מכלל ובראי"ש ובמרדכי.
8. רי"ף שם, רמב"ם פי"ז ממאכלות אסורות הי"ב, רשב"א בתורת הבית.

introduction — places that had not accepted the injunction would not be bound by it. Other opinions[8] state that the permissibility of *Pat Akum* is dependent on the availability of *Pat Yisrael* (bread baked by a Jew), that is, that *Pat Paltar,*[9] which they permit, and bread baked for private use, which would still bear the rabbinic injunction of *Pat Akum.*

Shulchan Aruch[10] reaches the following conclusion: In a place where the custom is to use *Pat Paltar,* one is permitted to use bread prepared for commercial usage — provided that no comparable *Pat Yisrael* is available. If *Pat Yisrael* becomes available, then the *Pat Paltar* should not be used until the *Pat Yisrael* is no longer available. The Ramo[11] disagrees and says that *Pat Paltar* can be used even when *Pat Yisrael* is available in any place where the custom is to permit *Par Paltar.* The *Bach*[12] and the *G'ra*[13] follow the opinion of the Ramo, whereas other opinions[14] agree with *Shulchan Aruch* and permit *Pat Paltar* only when *Pat Yisrael* is not available and in a place where the custom is to be liberal.

During the Ten Days of Repentance,[15] עשרת ימי תשובה, even a place where the custom is to be lenient in the usage of *Pat Paltar* is required to be stringent. Most opinions also agree with the *Magen Avraham*[16] who states that on Shabbat one should use only *Pat Yisrael.*

The entire issue of whether and under what circumstances a Jew can eat bread baked by a non-Jew is only problematic if the entire baking procedure is done without any participation of a Jew. However, if a Jew increases the heat of the fire being used for baking in any way, even by merely symbolically adding a splinter to the fire,[17] the bread baked is considered *Pat Yisrael.* Ramo

---

9. ריי"ף, רמב"ם, רשב"א שם.
10. שלחן ערוך יו"ד סי' קי"ב סעיפים ב', ד', והי'.
11. שם בס"ב.
12. שם.
13. שם סק"ז.
14. חכמת אדם כלל ס"ה אות ב', ש"ך יו"ד סי' קי"ב סק"ט.
15. ש"ך הנ"ל, וש"ע א"ח סי' תר"ג ובנ"כ.
16. מג"א סי' רמ"ב סק"ד, חיי אדם כלל א' אות ד', מ"ב סי' רמ"ב סק"ו ועוד אחרונים ודלא כאליהו רבה שם סק"י דחולק על המג"א.
17. ש"ע יו"ד שם ס"ט.

furthermore states that if a Jew increased the fire once, and the oven was not turned off for twenty-four consecutive hours, then all the bread is considered *Pat Yisrael.*[18] *Chochmat Adam*[19] concurs with the Ramo, although the *Aruch HaShulchan*[20] does not accept all the leniences described above.

In conclusion, according to predominant opinion, if a Jew participated in the heating of the oven, then the bread is considered *Pat Yisrael.* If no Jew participated in the heating of the oven, the bread baked by a non-Jew can be used wherever there is no suitable *Pat Yisrael* substitute in a place where the custom is to allow the usage of *Pat Paltar,* except during the Ten Days of Penitence and Shabbat. According to the Ramo, in a place where the custom is to be lenient, one can use *Pat Paltar* even if *Pat Yisrael* is available.

Taking Challah

The Torah describes the mitzvah of *challah* in the following passage:

> ...בבאכם אל הארץ אשר אני מביא אתכם שמה. והיה באכלכם מלחם הארץ תרימו תרומה לה'. ראשית עריסתכם תרימו תרומה כתרמת גורן כן תרימו אותה.
>
> ...when you enter the land to which I am bringing you, and it will be when you eat from the bread of the land you shall separate a *trumah* offering for G-d. The first dough of your kneading-troughs shall be separated as *challah,* like the *trumah* of your grain shall you separate it.[21]

According to Torah law, any dough kneaded from the five grains (wheat, rye, oats, barley, spelt)[22] in Israel in an era when most Jews reside there must have the *challah* portion removed[23] and given to the *cohen.* Today this portion is burned, as will be explained later. If the dough mixed has less than an "*omer*" of

---

18. שם ס"י.
19. חכמת אדם שם אות ה'.
20. יו"ד סי' קי"ב סקכ"ז.
21. במדבר ט"ו, י"ח-כ.
22. משנה חלה רפ"א.
23. ש"ע י"ד סי' שכ"ב ס"ב.

flour, equal to the amount of manna each Jew received as his daily portion in the desert, there is no requirement to take *challah*.[24] Contemporary authorities have placed this amount as equivalent to three to five pound of flour.[25] Accepted practice is to take *challah* without a *bracha* from a dough of between three and five pounds of flour, and with a *bracha* for a dough of five or more pounds of flour. We treat the former case as a situation of *safek* -- doubt as to whether any requirement to take *challah* exists, and therefore we take the *challah* but omit the *bracha* because of the principle of ספק ברכות לקולא a *bracha* is not made under questionable circumstances. Since it is uncertain whether there is a requirement to take *challah* with this amount of flour, no *bracha* is recited.

The Torah does not establish a minimum size portion to be set aside for *challah*.[26] The Mishna records a rabbinically introduced minimum — 1/48 of a dough kneaded for commercial sale and 1/24 of a dough kneaded for private consumption — as *challah*.[27] This *challah* portion is given to the *cohen* for him and his family to eat in purity (בטהרה). Many opinions state that the sages established a minimum portion only for an era when *challah* would be eaten by the *cohen* and his family. Since today we cannot achieve the status of *taharah*, purity, that would allow the eating of *challah*, the *challah* portion is burned and not eaten, and therefore according of these opinions the law reverts back to the Torah requirement and there is no minimum size portion required.[28] Ramo states that the Ashkenazic practice is to follow these opinions, but adds that the custom according to the Maharil is to take a *Kizayit*, the size of an olive, as a minimal portion.[29]

Under rabbinic requirement *challah* must be separated from a dough that is kneaded outside of Israel, if the dough is owned by a Jew.[30] Halachic authorities are explicit that the mitzvah of *challah* is

---

24. משנה חלה פ״ב מ״ו ובמפרשים ובש״ע י״ד רסי׳ שכ״ד.
25. כן שמעתי מכמה פוסקי זמננו וכן מצאתי בס׳ עדות לישראל להרה״ג ר׳׳א הנקין זצ״ל ובספר שערים המצויינים בהלכה סי׳ ל״ה אות ב׳.
26. ש״ע שם סי׳ שכ״ב ס״א.
27. משנה חלה פ״ב מ״ז, ש״ע שם.
28. טור יו״ד סי׳ שכ״ב בשם יש אומרים.
29. רמ״א סי׳ שכ״ב ס״ה, מהרי״ל הלכות חלה.
30. בכורות כ״ז., ש״ע י״ד סי׳ שכ״ב ס״ג.

dependent on whether the dough is owned by a Jew or a non-Jew.[31] Therefore if a Jewish-owned business has non-Jewish employees handling production, there is still a responsibility to take *challah.* Conversely, if a non-Jewish owned business has Jewish employees handling production, there is no requirement to take *challah.*

The obligation to take *challah* often creates difficulties for a kosher bakery. If the bakery employs *Shomer Shabbat* staff, then the responsibiltiy to take *challah* can be delegated to those employees. However, a bakery that has no *Shomer Shabbat* individuals on premises presents a predicament. Granted that any Jew can actually separate the *challah* portion, the halacha stipulates that a *Shomer Shabbat* must ascertain that *challah* was in fact taken.[33] In many communities hiring a *Shomer Shabbat* for this task would make the cost of kosher supervision prohibitive, and other ways must be found to comform to the halacha.

Jewish communal leaders have sought a variety of solutions to this problems. Many *rabbonim* only assume responsibility for the ingredients but advise the consumers to take *challah* themselves after purchase. Although this practice is very widespread, the stumbling block for people who do not realize that *challah* must taken is a serious concern,for often people relying on supervision do not remember or realize that they must take *challah* from every loaf they purchase.

Another approach is for the non-*Shomer Shabbat* staff to separate *challah* from each dough. These *challah* portions are set aside and periodically checked by the *mashgiach.* Here there is much room for error, as it is impossible to ascertain that *challah* is indeed always being taken. Furthermore, it may be halachically invalid for *challah* to be separated by a non-observant Jew. Still another recommendation is to arrange a "sale" whereby a non-Jew would in effect own the flour, and the Jewish-owned company would act as a contractor to process the flour into bread. The method for such a contract would be similar to the selling of *chametz* done for Pesach. However, many do not approve this.

---

31. ש"ע שם רסי' ש"ל.

33. ש"ע שם סי' קי"ט ס"ה וס"ז.

Granted that the usage of such a sale has become accepted among Jewry to avoid the prohibition of owning *chametz* on Pesach and for a few other halachic issues, it is difficult to extend this leniency into an area that *poskim* have never recommended or advised.[34]

Another solution that might come to mind is to take *challah* once from each shipment of flour. However,the Mishna in *Challah* states: "המפריש חלתו קמח אינה חלה וגזל ביד כהן", "If one attempts to separate his *challah* portion while it is still flour, the *challah* does not take effect, and it would be considered stolen property in the hands of the *cohen.*" Since there is no requirement to take *challah* before the flour is mixed with water, it is meaningless to take *challah* before making the dough, and the portion given to the *cohen* is not his property and must be returned.

However, the *Tur*[36] and *Smag*[37] quote the opinion of Rabbi Eliezer of Metz that although *challah* cannot take effect when separated from flour, *challah* can be taken from flour to take effect when the flour becomes dough. The rationale for this opinion is as follows: There is a halachic principle that a contract or procedure can be set up to take effect later if conditions exist whereby the procedure could already be implemented. For example, A can sell an item to B and delay the sale to a future date provided that A already owns the item. Since A has the legal right to sell the item now, he is able to delay the date of sale. Similarly, one could separate the *challah* from flour, intending it to take effect when it becomes dough, if certain circumstances are met, since he is already able to mix the flour with water and create the responsibility of *challah*-taking. Of course, the *challah* would not take effect until the dough is mixed.

The Gemara that serves as the basis for Rabbi Eliezer's reasoning expounds how *trumah* can be separated in this fashion.[38]

"תנן התם אין תורמין מן התלוש על המחובר ואם תרם אין

---

34. בהרבה מקומות בש"ס ומובא בשלחן ערוך בחושן משפט סי' ר"ט ס"ה.
36. עי"ד שם סי' שכ"ז.
37. מצוות עשה קמ"א.
38. קדושין ס"ב.

תרומתו תרומה בעא מיניה רב אסי מר' יוחנן אמר פירות ערוגה זו תלושים יהיו תרומה על פירות ערוגה זו מחוברים, פירות ערוגה זו מחוברים יהיו תרומה על פירות ערוגה זו תלושים לכשיתלשו ונתלשו מנו א"ל כל שבידו לאו כמחוסר מעשה דמי."

The Mishna[39] says that since there is no requirement to take *trumah* before harvesting, one cannot separate the *trumah* portion from grain that has been cut, with the intention of fulfilling the requirement of taking *trumah* for grain that is still connected to the ground. If he attempted to do so, the *trumah*-taking has no effect. Rav Asi (post-Mishna era) asked Rav Yochanan, "Is the taking *trumah* valid if one makes the following declaration: 'The cut fruits of this furrow should be *trumah* for the unharvested fruits of the next furrow when those fruits are cut', or if he makes this declaration: 'The unharvested fruits of this furrow should be *trumah* when cut, for the cut fruits of the next furrow'?"

Rav Yochanan responded, "As long as a person can create the responsibility for *trumah*-taking by cutting the grain, even though it is still premature to take *trumah*, he would be able to set that procedure into motion."

Rav Asi's uncertainty was based on the following question: Ordinaily one cannot set up a procedure to take effect later unless he is able to perform that procedure now. In this instance one cannot take *trumah* on produce still connected to the ground. However one could cut the grain and then take *trumah*. Is this considered having the ability to perform the procedure immediately? To this question Rab Yochanan responded literally "Anything that a person can perform himself, is not considered as lacking that action." Whenever a person can create the responsibility to perform a certain action, we can treat it as if the situation already existed.

Based on this discussion, Rabbi Eliezer of Metz reasons that the same principles apply to the taking of *challah*. If one separates *challah* from flour, intending for the *challah* to take effect when the

---

39. תרומות פ"א מ"ה.

flour is mixed into dough, the *challah*-taking would be valid, assuming that all the requirements for *challah*-taking have been met.

This opinion of R. Eliezer is codified in the *Shulchan Aruch*[40] as follows:

> המפריש חלתו קמח אינו חלה וגזל ביד כהן ... ודוקא באומר שיחול עליה שם חלה בעודו קמח אבל המפריש קמח ואומר כשתעשה עיסה יחול עליה שם חלה דבריו קיימים...
>
> If one attempts to separate his *challah* portion while it is still flour, the *challah* does not take effect, and it would be considered stolen property in the hands of the *cohen* ... all this is true when he wants the *challah* to take effect immediately. However, if he separated flour and said that *challah* should take effect when the flour is mixed into dough, then the *challah* does take effect...

The principle of Rabbi Eliezer of Metz can now be applied to a moderately different set of circumstances. If one were to remove a *Kizayit* from a dough that still bears the responsibility for *challah*-taking and specifies that this *Kizayit* will will become *challah* for a different, as yet unmixed, dough, the *challah*-taking will become valid when the second dough is kneaded. Since one *could* knead the second dough immediately and create the requirement to take *challah* , he can set in motion a procedure that will cause the *challah* to be taken automatically.

Let us further extend the circumstances. If one were to remove a sampling from a dough that still requires *challah* and specify that an additional *Kizayit* of this sampling become *challah* for every dough which will be mixed in the course of the day, the *challah* will automatically be considered as being taken as each dough is prepared, provided the following six criteria are met:

1. *Challah* must be taken מן החיוב על החיוב,[41] *min hachiyuv*, from that which bears the responsibility of *challah*-taking, i.e. the sample of dough being designated as *challah* must have an as-yet-unfulfilled responsibility *(chiyuv)* at the time. *Challah* cannot be

40. יורה דעה סי' שכ"ז ס"א.
41. יוצא מש"ע י"ד סי' שכ"ז סוף ס"ב.

taken מן הפטור על החיוב, *min hapatur*, from a dough which does not bear (or no longer bears) the responsibility of *challah*-taking.

This principle has the following specific applications: (a) The dough from which the *challah*-sample is taken must contain sufficient flour for it be definitely *chayov* in *challah*, i,e, it must contain at least five pounds of flour. (b) The requirement to take *challah* from that dough must still be unfulfilled. If *challah* was already taken for this dough, then the dough now has the status of *patur* – that which is not currently obligated in *challah*-taking – and a *challah* sample taken from it would have the status of *min hapatur*.

2. The *challah*-sample must contain a *kizayit* of dough for each dough to be kneaded later. Each mixing of dough creates another automatic *challah*-taking, and each *challah*-taking requires another *kizayit* according to the Ramo mentioned above.

3. All dough whose *challah* requirements are being met automatically by this *challah*-sample must be kneaded before the *challah*-sample is burned. Since the *challah*-taking takes effect when the doughs are mixed, the sample must still be extant for the *challah* to take effect.

4. This *challah*-taking will only be valid for flour already owned by the bakery at the time that the *challah* portion is separated. Since the owner cannot create the *chiyuv* of *challah* on that which he does not own, arranging an automatic *challah*-taking for flour he does not possess would have the status of אין אדם מקנה דבר שלא בא לעולם creating a contract for something not in one's possession.

5.The *challah* being taken should be adjacent (*mukaf* מוקף), to the rest of the dough for which the *challah* is being taken. The definition and basis for *mukaf* is explained below.

6. Separate *challah*-samples must be taken from wheat dough and rye dough. Although a *challah*-sample taken from a wheat dough can remove the requirements for *challah* from all varieties of wheat dough, it cannot accomplish the mitzvah of *challah* for rye doughs, and vice-versa (i.e., a *challah* sample taken from a rye dough can remove the requirements for *challah* from all varieties of

rye dough but it cannot accomplish the mitzvah of *challah* for wheat doughs.[42])

In several places the Mishna[43] mentions the requirement to take *trumah* and *challah min hamukaf*, from an adjacent area. Rashi (*Sota* 30) says that the reason for *min hamukaf* is based on the Torah verse which states that *trumah* must be taken ממנו[44], from the item itself. Although one is required to take *challah* and *trumah* from adjacent areas, taking from non-adjacent areas fulfills the mitzvah, and there is no necessity to take *challah* or *trumah* a second time.

What are the criteria of *Mukaf*? The Rambam states:[45]

> אין תורמין תרומה גדולה אלא מן המוקף. כיצד היו לו חמישים סאה בבית זה וחמישים סאה בבית אחר לא יפריש מאחד מהם שתי סאים על מאה, שנמצא מפריש ממקום זה על מקום אחר. ואם מפריש שלא מן המוקף תרומתו תרומה ... פירות המפוזרין בתוך הבית או שתי מגורות שבבית אחד תורם מא' על הכל; חביות של יין עד שלא סתם את פיהן תורם מאחד על הכל. משסתם תורם מכל אחת ואחת.
>
> One can take *trumah* only from adjacent areas. For example: if there were 50 measures in one house and 50 measures in a different house, one cannot take two measures of the production in one house as *trumah* on the entire 100 measures because that is considered taking *trumah* from non-adjacent areas. If one did take from non-adjacent areas, the *trumah* is still valid ... Fruits that are scattered throughout a house or two piles of produce in one house, *trumah* can be taken from one group on the entirety. Sacks of grain or of dried figs or barrel of dates that were piled in one circle can have *trumah* taken from one sack for all the produce. *Trumah* may be taken from one barrel of wine to include several unsealed barrels. If the lids are sealed, *trumah* must be taken from each barrel independently.

---

42. משנה חלה פ"ד מ"ב, ש"ע שם סי' שכ"ד ס"ב.
43. חלה פ"א מ"ט ופ"ב מ"ח.
44. במדבר פרק י"ח פסוק כ"ו.
45. הלכות תרומות פ"ג הי"ז וי"ח.

The exact definition of adjacent areas remains ambiguous. The Vilna Gaon[46] explains these words in the following fashion: There are three separate sets of conditions which can constitite adjacency: 1) If the produce is not stored in any vessel, it is considered *mukaf* if it is all stored in the same building. 2) If the produce is in a vessel which is open on top, then *mukaf* requires proximity. 3) If the vessels are completely closed, then they will never be considered *mukaf* even if they are proximate.

It should be noted that many halachic authorities[47] are of the opinion that the requirements of *mukaf* for *challah* are more stringent than those delineated by the Rambam for *trumah*. However, it is evident that the *Shulchan Aruch* and the later commentaries are of the opinion that *challah* and *trumah* have the same criteria for adjacency, and that the above criteria used by the Rambam for *trumah* would also be valid for *challah*. We have quoted the *Shulchan Aruch*,[48] which concludes that one can take a portion of a dough and state that it should become *challah* for other flour when that flour is mixed into dough. Rabbi Akiva Eiger[49] poses an intriguing query. Is the criterion of *mukaf* met if, at the time that the latter dough is mixed, the *challah* is no longer adjacent to it? Rabbi Akiva Eiger explains the requirements for *mukaf* will be met at the time of the removal of the *challah* portion and not at the time it takes effect. Since at the time that the *challah* was separated, all the flour and dough included were adjacent, the qualifications for *mukaf* have been met.

The solution that Rabbi Akiva Eiger offers will not satisfy our application of the principle of Rabbi Eliezer of Metz. When *challah* is set aside for many doughs which will be mixed later, it will only be *mukaf* if all the flour is adjacent at the time of separation. The alternate way to accomplish *mukaf* would be to have both the *challah*-

---

46. הגהות לש״ע יו״ד סי׳ שכ״ה סק״ח.

47. המחמירים הם תוס׳ פסחים מ״ו: סוד״ה הואיל; הר״ש בסופ״ג דמעשר שני ובחלה פ״א מ״ט ופ״ג מ״ח ומ״ט; והערוך השלחן סי׳ ס״ב.
המקילים הם הרמב״ם הל׳ בכורים פ״ה הי״ג וי״ד, שלחן ערוך סי׳ שכ״ד סי״א וט״ז שם סקי״ג וש״ך שם סקי״ט, וגר״א סי׳ שכ״ה סק״ח.

48. שכ״ז ס״ב.

49. שם בחידושיו.

portion and the newly-made dough adjacent at the time of kneading. A more practical recommendation is to have the *challah* take effect when the dough is cut and shaped rather than when it is mixed. The reason for this is that since the mixing takes place inside a vessel, the above-mentioned criteria for *mukaf* require that the vessels be adjacent to one another. Since the shaping takes place on flat surfaces, it would be similar to the third category of the *Vilna Gaon* mentioned above, and *mukaf* would merely require that the *challah* be located in the same building as the doughs.

Conclusions for Challah Taking

According to what we have explained above, *challah* can be taken by separating a piece of dough from a mix that contains at least five pounds of flour and declaring that a *Kizayit* of this portion should become *challah* for every dough that will be mixed, to take effect at the time the dough is cut. The following conditions must exist:

1. Both the flour used for the *challah* portion and the flour which is having its *challah* requirement fulfilled must already be in the possession of the owner of the bakery.
2. A *Kizayit* (the size of an olive) of dough must be separated for each dough to be included later.
3. The *challah* taken must not be burned until the last dough is mixed.
4. *Challah* must be taken separately for wheat and rye flour.

A study of the halachic source material indicates that methods do exist whereby *challah* can be taken in a practical and effective manner. Hopefully, this research will be of practical usefulness to Rabbis faced with these circumstances.

This article was written to serve two purposes. Firstly, to present the multi-faceted issues of *kashrut* and halacha pertaining to a "commonplace" *hashgacha*. One will appreciate the care, complexity and responsibility involved in this or any kosher supervision. Secondly, it is desirable to explore avenues to make practicable the dictates of halacha in all Jewish communities. It is not my intention to make halachic decisions for any community but merely to shed some new light on this issue and perhaps enable others to cope with an otherwise difficult situation.

Priests' *(Kohanim)* Studying and Practicing Medicine

Fred Rosner, M.D.

Introduction

The question as to whether or not a priest *(kohen)* in modern times is permitted to study and practice medicine has been debated in the rabbinic responsa literature for over a century. Very little on this subject has been written in English although brief summaries by Jakobovits[1,2,3,4] and Bleich[5] are available. The present essay reviews the controversy of *Kohanim* as medical students and physicians, and attempts to present the varying viewpoints.

Ban Against Priestly Defilement

> And the Lord said unto Moses: Speak unto the priests the sons of Aaron, and say unto them: There shall none defile himself for the dead among his people; except for his kin

---

1. Jakobovits, I. *Jewish Medical Ethics.* New York, Bloch. 1959, pp. 238-243.
2. Jakobovits, I. May a *Kohen* Study Medicine? *Tradition* Vol. 4, 1962. pp. 262-4.
3. Jakobovits, I. *Jewish Law Faces Modern Problems.* New York. Yeshiva Univ. Press. 1965. pp. 61-63.
4. Jakobovits, I. *Journal of a Rabbi.* New York. Living Books. 1966. p. 172.
5. Bleich, J.D. *Judaism and Healing.* New York, Ktav. 1981, pp. 37-42.

Director, Department of Medicine, Queens Hospital Center Affiliation of the Long Island Jewish - Hillside Medical Center; Professor of Medicine, Health Sciences Center, State University of New York at Stony Brook.

> that is near unto him, for his mother, and for his father, and for his son, and for his daughter, and for his brother, and for his sister a virgin[6].

Based upon this biblical admonition, Jewish law states[7] that if a *Kohen* defiles himself for a dead body other than that of any of the six relatives expressly stated in the Torah, or for his wife, and there are witnesses to testify to this effect and due warning has been given him, he is subject to the penalty of flagellation as it is written: *there shall none defile himself for the dead among his people.*

Similarly, R. Joseph Karo's Code of Jewish Law *(Shulchan Aruch)* rules[8] that a *Kohen* is forewarned not to defile himself through a corpse nor through any of the defilements that emanate from it nor through a burial stone nor through a tombstone. Hence, it seems clear from Rambam and *Shulchan Aruch* that *Kohanim* are forbidden to come into contact with a dead body except in the case of the death of a close relative because they would thereby become ritually defiled.

On the other hand, R. Abraham Ibn Daud, popularly known as Ravad, states[9] that

> *Kohanim* nowadays are already ritually defiled by the dead; therefore, they are not charged with the guilt of defilement and he who wishes to charge them has the onus of adducing evidence to prove the charge.

The reasoning behind Ravad's position is that since, in the absence of the ashes of the red heifer, there is no means nowadays to effect purification of a priest ritually defiled through corpse contact, the *Kohen* remains in a permanent state of impurity. Additional contact with a corpse does not add to this state of impurity.

---

6. Leviticus 21:1-3.
7. Maimonides, M. *Mishneh Torah, Hilchot Avel* 3:1.
8. Karo, J. *Shulchan Aruch, Yoreh Deah* 369:1.
9. Ravad's gloss on Maimonides' *Hilchot Nezirut* 5:15.

In a lengthy responsum, Rabbi Shmuel Huebner[10] analyzes the talmudic discussion[11] upon which Ravad's opinion is based and lists the three possible interpretations. Some authorities such as Rabbi Judah Rozanes[12], Rabbi Isaac Samuel Reggio[13] and Rabbi Akiba Eger[14] maintain that, according to Ravad, there exists no prohibition whatsoever against a *Kohen*'s coming into contact with a corpse if he has indeed previously become ritually impure. Other authorities[15,16] are of the opinion that Ravad's position is that defilement by corpse contact is not today considered to be a biblical offense but is still rabbinically prohibited. Yet others, such as Rabbis Ezekiel Landau[17], Moses Schreiber[18], Moshe Zvi Fuchs[19] and Yehudah Leib Zirelson[20] interpret Ravad to mean that the offense, while still biblically forbidden, is nowadays not subject to the penalty of flagellation. Rabbi Landau apparently changed his opinion in that he first agreed with Rabbi Rozanes that nowadays there is no prohibition at all for a priest who is already defiled from defiling himself through corpse contact. Rabbi Landau's change of heart is claimed by Rabbi Schreiber to have occurred following a lengthy meeting in Prague between Rabbi Landau and Rabbi Nathan Adler.

Whatever the correct interpretation of Ravad's opinion, it is and remains a minority view opposed by most early and present day authorities who maintain that each additional act of defilement is a separate transgression.

Kohanim As Medical Students

A recent erudite discussion on the subject of *Kohanim* as

---

10. Huebner, S. *Hadarom*, New York, Elul 5721, pp. 17-28.
11. *Nazir* 42b.
12. Rozanes, J. *Mishneh Lemelech* commentary on Maimonides' *Hilchot Avel* 3:1.
13. Reggio, I.S. *Kerem Chemed*, Vol. 8, 1854.
14. Eger, A. Responsa *R. Akiba Eger, Mahadura Tinyana* #18.
15. Schneierson, M.M. Responsa *Tzemach Tzedek* #238.
16. *Yeshu'ot Yaakov, Orach Chayim* 343:2. Cited by Bleich (ref. 5).
17. Landau, E. *Dagul Me-Revavah, Yoreh Deah* 372:2.
18. Schreiber, M. Responsa *Chatam Sofer, Yoreh Deah* #338 and *Orach Chayim* #34.
19. Fuchs, M.Z. Responsa *Yad Ramah* #128.
20. Zirelson, Y.O. Responsa *Gevul Yehudah, Yoreh Deah* #31.

medical students is offered by Rabbi J. David Bleich[21]. Rabbi Bleich traces the halachic discussion in the course of the past century or so. He notes that lenient opinions generally are forthcoming only from Rabbis who have never been accepted by other rabbinic scholars as halachic authorities. He points out that the question was first answered by the Italian scholar Rabbi Isaac Samuel Reggio in 1854 in regard to a *Kohen* whose livelihood was at stake because he had been appointed by the king to inspect corpses to verify the signs of death and then to arrange for burial. Rabbi Reggio permitted the *Kohen* to maintain his job for several reasons, one of which is the Rabbi's interpretation of Ravad that nowadays there is no prohibition at all for a priest to come into contact with a corpse since all *Kohanim* are already defiled and there exists no method today to purify them. In 1868, Rabbi Tzvi Benjamin Auerbach [22] charged Rabbi Reggio with a "patent falsehood" for allowing the *Kohen* to defile himself on the strength of Ravad's opinion. Most recent responsa also support Rabbi Auerbach's position *(vide infra)*.

The second reason for Rabbi Reggio's permissive ruling is based on the talmudic statement[23] that a *Kohen* may defile himself by leaving the land of Israel "for monetary reasons, to save a life, to sanctify the new moon, to intercalate the year, to save his field from a gentile, to study Torah and to marry a woman." Therefore, he states, the *Kohen* whose livelihood depends on touching corpses is permitted to do so. Rabbi Bleich points out that the editor of *Kerem Chemed* correctly called attention to the fact that the Talmud cites cases of acts without which financial losses would be incurred. However, that does not give a *Kohen* the right to plan his livelihood if he knows in advance that he will have to defile himself by corpse contact. Furthermore, the Talmud only permits a *Kohen* to avoid a monetary loss by moving out of Israel which is only a rabbinic prohibition, but not to defile himself by touching a corpse which is a biblical prohibition.

---

21. Bleich, J.D. *Torah She Ba'al Peh*, Jerusalem, Mossad Harav Kook, 5742 (1982), pp. 84-94; and in *Halachah Urefuah* (Edit M. Hershler). Vol. 3. Jerusalem, Regensberg Institute, 5743 (1983), pp. 199-210.
22. Auerbach, T.B. Responsa *Nachal Eshkol*, introduction.
23. Avel Rabati 4:25.

A third reason which Rabbi Reggio offers for permitting a *Kohen* to become defiled is that he believes that all the warnings to *Kohanim* against defilement cited in Leviticus relate only to laws applicable when there is a Temple. Since there is no Temple and no sacrifices and no method of purification, the priests no longer have to avoid defilement. Bleich states that such reasoning is contrary to Rambam's explicit statement in *Hilchot Nezirut* that *Kohanim* are forewarned against defilement even in our own times. Bleich points out other mistakes in Reggio's reasoning and bemoans the fact that Reggio's erroneous conclusions were compounded by Rabbi Tzvi Hakohen Sherashefsky who repeated them thirty years later[24]. Sherashefsky added that "nowadays our *Kohanim* are only considered to be true *Kohanim* for rabbinical but not biblical matters because *Kohanim* today do not inspect signs of leprosy nor declare lepers clean", to which Bleich comments: "is the inspection of leprosy signs nullified because of the absence of *Kohanim* who can prove their true pedigree?" It should be noted that Reggio was never accepted by rabbinic scholars as an *halachic* authority.

Bleich also dismisses the suggestion that *Kohanim* are allowed to study medicine because they will later save lives. He notes that because Rabbi Ezekiel Landau[25] specifically forbids it because there is no patient immediately at hand *(lefanenu)* whose life is to be saved and because there are other non-*Kohanim* (i.e., Israelites and Levites) who can study medicine and save lives without trangressing this prohibition. Bleich also dismisses the suggestion of Rabbi Abraham Preiss[26] that priests are permitted to study anatomy if they wear gloves because only rabbinic defilement is involved and is set aside for the *mitzvah* (commandment) of healing. Bleich, quoting Rabbi Moshe Feinstein,[27] states that there is no obligation for a *Kohen* to study medicine and discusses this point in great detail.

Finally, Bleich discusses the suggestion of Rabbi Shlomo

24. Sherashefsky, T.H. *Hamelitz* 5644, folio 1.
25. Landau E. Responsa *Nodah Biyehudah, Mahadura Tinyana, Yoreh Deah* #210.
26. Preiss, A. *Mishnah Avraham* commentary on *Sefer Chasidim*, Part 2, p. 283.
27. Feinstein, M. *Noam*, Vol. 8, 5728 p. 9 and Responsa *Iggrot Moshe, Yoreh Deah*, Part 3 #155.

Goren[28] that a priest should wear on his body a metal object which became defiled by corpse contact. Rabbi Goren's reasoning is based on Rambam[29] who states that the talmudic expression[30] "the sword is equal in uncleanness to the corpse"[31] means that metal utensils which touch a corpse incur seven day uncleanness. The commentary of *Tosafot* states that a *Kohen* is only forbidden to become defiled by corpse contact but not by contact with metal utensils which themselves are defiled by corpse contact. Hence, suggests Goren, any simultaneous contact by a *Kohen* wearing a defiled metal object does not constitute a punishable transgression. Bleich agrees that only if a priest incurs seven day uncleanness by corpse contact can he not become simultaneously defiled by contact with another corpse. However, even that is forbidden according to Rambam[31a]. The wearing of a ritually defiled object does not remove the prohibition of his becoming defiled by simultaneous corpse contact, and hence it is forbidden.

Rabbi Mordechai Hakohen[32] cites Rabbi Ben Zion Uziel[33] who allows anatomical dissection of human cadavers for the sake of studying medicine provided it is done with dignity and respect and that all parts of the body including the minutest portions are buried. One of the reasons for this permissive ruling is the later saving of lives *(piku'ach nefesh)* by the physician after he completes his medical training. Based on this reasoning, Rabbi Hakohen allows a *Kohen* who is strongly desirous of studying medicine and whose entire motivation is to heal the sick and to save lives to attend medical school even if that includes ritual defilement of that *Kohen* by corpse contact.

---

28. Goren, S. unpublished responsum dated 2 Adar 2, 5741 (copy kindly provided to me by Rabbi Moshe David Tendler).
29. Maimonides, M. *Mishneh Torah, Hilchot Tumat Met* 5:3.
30. *Nazir* 53b.
31. Based on Numbers 19:16.
31a. Maimonides, M. *Mishneh Torah, Hilchot Avel* 2:15.
32. Hakohen, M. *Torah She Be'al peh.* Vol. 6, 5724 (1964). Jerusalem, pp. 74-81. Also in *Sinai.* Vol. 14 #1-2, Tishrei-Cheshvan 5724, pp. 40-46 and *Machanayim* #123, Kislev 5730, pp. 120-129.
33. Uziel B.Z. Responsa *Mishpetei Uziel,* Part 1 #.

A similar permissive ruling was already enunciated several decades earlier by Rabbi Chaim Hirschenson[34] who quotes Rabbi Bernard Revel[35] and Rabbi Elyakim Goldberg,[36] both of whom prohibit a *Kohen* from studying medicine. Nevertheless, says Hirschenson "my opinion is that nowadays he who can find a permissive ruling according to the Torah for those things for which the people have a strong craving is obligated to do so." However, he continues, one should not rely solely on the opinion of Ravad which is a minority view. He then devotes twenty-three pages of responsum to a lengthy analysis of the question and concludes that *Kohanim* throughout the generations have been and continue to be careful not to ritually defile themselves. Nevertheless, if a *Kohen* has a very strong desire to study medicine he is allowed to do so because most if not all corpses nowadays are non-Jews and, according to many authorities, do not defile, and also because such a priest-physician would later save lives. Like Reggio, Hakohen and Hirschenson are not considered by rabbinic scholars to be halachic authorities on this matter, and their views are not accepted.

Rabbi Feinstein[27] strongly rejects the opinion of Hirschenson and Hakohen and states that only if one already is a physician is one obligated to heal and to save lives. However, one is not obligated to study medicine to become a physician anymore than one is obligated to conduct a lot of business to become rich in order to give charity. Rabbi Feinstein disapproves of this viewpoint by stating that "it is foolish and vain and should not be articulated by any intelligent person." Rabbi Feinstein also strongly denounces *Kohanim* who rely on this opinion and attend medical school:

> It is clear to me that if the *Kohanim* who study medicine and ritually defile themselves through contact with corpses would really wish to know the true law in this regard, they would know whom to ask... rather, they are not at all concerned about this prohibition and delude themselves... by claiming to have found [a lenient ruling in] some pamphlet upon which they rely...

---

34. Hirschenson, Ch. *Malki Bakodesh*, Part 3 # pp. 9-12 and 153-176.
35. Revel, B. *Yagdil Torah*. Vol. 8, 5676, pp. 85-90.
36. Goldberg, E. *Yagdil Torah*, Vol. 8, 5676. pp. 19-21, 135-141 and 256-259.

Rabbi Feinstein concludes that

> ...it is absolutely clear that it is prohibited for a *Kohen* to ritually defile himself through contact with a corpse and this fact is well known throughout the world. Therefore, it is absolutely clear that even if the most learned Rabbis in the world would be lenient [and say otherwise], one should not listen to them ...
>
> ... it is prohibited for *Kohanim* to study medicine in medical schools in countries where it is necessary to have contact with corpses. One should not point to some of our ancient Sages who were both *Kohanim* and physicians and were able to learn all of medical science by oral teachings without any observations on or physical contact with corpses. In our times, this is impossible and therefore it is prohibited.

Rabbi Yekuthiel Yehudah Greenwald[37] also voices the view of most authorities that

> it is totally prohibited for a *Kohen* to study medicine because in our times, before he completes his studies he must know the parts of the human body including the veins and internal organs and anatomy. Medical students take home for study portions of the flesh of organs from corpses. It is an absolute prohibition for a *Kohen* to ritually defile himself even by touching a gentile corpse. Often without knowing it, they even dissect Jewish or apostate corpses.

Rabbi Greenwald cites the lenient rulings of Reggio and Sherashefsky and others and states that most rabbinic authorities are strongly opposed to these lenient rulings which are based on misinterpretations of Ravad (vide supra). Furthermore, Ravad is a single opinion and Jewish law always follows the majority view. Rabbi Greenwald cites rabbinic responsa which point out the gross errors and lack of substance in these lenient rulings and asserts that "their words fly in the air", that is to say are of no consequence.

---

37. Greenwald, Y.Y. *Kol bo Al Avelut* Section 5:22, pp. 81-84.

It is also prohibited for a priest to attend dental school because the dental curriculum involves the study of skulls and teeth from corpses and such skulls and teeth impart ritual defilement.

Loss of Privileges for Priests Who Attend Medical School

The practical consequences to a *Kohen* who disobeys the prohibition against ritual defilement by corpse contact are cited in the *Shulchan Aruch* [38]. Such a *Kohen* may not recite the priestly benediction nor be called first to the Torah reading until he repents and undertakes henceforth to avoid contact with corpses. Based on the *Shulchan Aruch* Rabbis Moses Schreiber[39], Abraham Schreiber[40], Abraham Zvi Hirsh Eisenstadt,[41] and others[42] rule that a *Kohen* who defies the prohibition against ritual defilement loses his priestly privileges. Rabbi David Hoffman[43] asserts that a *kohen*-medical student should not be honored in the synagogue by being called up to the Torah until he ceases and desists from further contact with corpses; otherwise his conduct would be erroneously viewed as being rabbinically sanctioned. The Rabbi must so inform his *gabbai* or sexton. If the Rabbi's recommendation is likely to be ignored, he may remain silent so that the offense is unwitting rather than deliberate.

Rabbi Yehudah Assad[44] states that a *Kohen* would not intentionally disobey the prohibition against ritual defilement and that a *kohen*-medical student either erroneously believes the prohibition not to include corpse contact with non-Jews or else erroneously assumes that the later saving of lives allows him to disregard the prohibition. Hence, continues Assad, one is obligated

---

38. Karo, J. *Shulchan Aruch, Orach Chayim* #128:41.
39. Schreiber, M. Responsa *Chatam Sofer, Yoreh Deah* #338.
40. Schreiber, A. Responsa *Ketav Sofer. Orach Chayim* #16.
41. Eisenstadt, A.Z.H. *Pitchei Teshuvah, Yoreh Deah* #370:1
42. cited by Steinberg, A. in *Sefer Assia,* Jerusalem, 5736 p. 311: *Shevet Miyehudah,* Part 1, Chapt. 13:7 ff; *Harefuah VeHaya'haduth, Chapt. 21; Hadarom,* Elul 5721; *Hakinus Hashishi Le Torah She Be'al Peh* (Mossad Harav Kook). p. 75; *Machanayim* #123 p. 120.
43. Hoffman, D. Responsa *Melamed Leho'il, Orach Chayim* #31.
44. Assad, Y. Responsa *Yehuda Ya'aleh* #47.

to speak softly to this medical student and to show him the *Shulchan Aruch* to correct his misconceptions. If he fails to repent by making a solemn declaration to henceforth avoid any corpse contact, he is not to be accorded the usual synagogue privileges of a *Kohen* cited above. Rabbi Schreiber requires the *Kohen* to take a non-cancellable vow *(neder)* to avoid henceforth ritual defilement by corpse contact before the honors and privileges of the priestly office are restored to him.

Kohanim As Practicing Physicians

Once a *Kohen* has become a physician, the questions then arise as to whether or not he is permitted to practice medicine, to treat the terminally ill *(gosses)* and/or to visit and treat non-critically ill patients in a hospital where corpses are frequently present. Rabbi Joseph Karo[45] prohibits a *Kohen* to enter a house where there is a dying person, whereas Rabbi Moses Isserles (Ramo) cites opinions that permit it[46]. Based on Rav Karo's ruling, Rabbi Jacob ben Samuel[47] prohibits a priestly physician to defile himself on behalf of a dying person. Rabbi Jakobovits asserts that Ramo means that Rav Karo's ruling does not apply to physicians. Thus, many authorities[48-51] sanction medical visits by priestly physicians to terminally ill patients. Some authorities[39,52] limit this permissibility to the situation where no other physician is available. If there is another non-priestly physician, permission to the *Kohen* physician depends on whether the patient specifically requests the priestly physician's care.

Rabbinic authorities[48-51] also state that if the patient has already been pronounced dead, the *Kohen* physician should assist

---

45. Karo, J. *Shulchan Aruch, Yoreh Deah* #370:1.
46. Isserles, M. *Ramo* on *Shulchan Aruch, Yoreh Deah* #370:1.
47. Jacob ben Samuel. Responsa *Bet Yakov* #130.
48. Eisentadt, Z.H. *Pitchei Teshuva* and *Nachalat Zvi* on *Yoreh Deah.* #370:4.
49. Chayes, Z.H. *Darchei Hahora'ah* #1.
50. Tirni, D. *Ikrey Dinim, Yoreh Deah* #35:32.
51. Waldenberg, E.Y. Responsa *Tzitz Eliezer, Ramat Rachel,* Section 28, paragraph 3.
52. Steinberg, A. Responsa *Machazeh Avraham,* Part 2, *Yoreh Deah* #19.

in the resuscitative efforts because of the possibility, however remote, of restoring the patient's life. Many authorities quote the famous question by the commentary of *Tosafot*[53] as to how Elijah the Prophet who was also a *Kohen* was permitted to revive a dead boy[54] by direct physical contact. The reply given is that Elijah knew the successful outcome of his efforts because they were divinely instructed. Hence, the boy was not really dead since the resuscitation efforts were successful.

Other references concerning the permissibility for a priestly physician to practice medicine are cited by Rabbis Jakobovits[1], Bleich[5], Steinberg[55] and others.

Priests As Patients In A Hospital

Is a *Kohen*, irrespective of whether or not he is a physician, permitted to enter a hospital for medical treatment? Does it matter whether or not the medical condition requiring treatment is serious? Rabbi Sholom Mordechai Schwadron[56] discusses the permissibility of such treatment in a hospital even for a non-serious illness. Rabbi Samuel Engel[57] permits hospital treatment for a *Kohen* provided the mortuary is not attached to the main hospital building. Rabbi M. Arak[58] allows such treatment for a serious illness in which there may be danger to life even if such treatment can safely be given at home.

Rabbi Mordechai Breisch[59] distinguishes between hospitals where most patients and hence corpses are gentiles and those hospitals where most patients are Jews. Since most hospitals today fall in the former category, Rabbi Breisch gives a lenient ruling allowing *Kohanim* to seek treatment in a hospital. Breisch also discusses the question[60] of whether the pregnant wife of a *Kohen*

---

53. *Baba Metzia* 114b.
54. I Kings 17:17 ff.
55. Steinberg, A. *Sefer Assia*, Jerusalem, 5736 p. 312.
56. Schwadron, S.M. Responsa *Maharsham*, Part 2 #233.
57. Engel, S. Responsa *Maharash Engel* Part 3 #27.
58. Arak, M. *Vayelakket Yoseph*, 5672, Vol. 14 #74.
59. Breisch, M. Responsa *Chelkat Yaakov*, Part I #27.
60. *Ibid.* #28.

may give birth to a baby in a hospital because of the prohibition against defiling the priestly infant[61]. He rules in the affirmative even if most patients and corpses in that hospital are Jews. Rabbi Shlomo Zalman Auerbach, however,[62], recommends that such infants be sent home as soon as medically possible, preferably after twenty-four hours.

Hospital Employment for A Kohen

Is it permitted for a *Kohen* to accept and maintain employment in a hospital? Rabbi Shlomo Kluger[63] allows male *Kohanim* to serve as nurses in hospitals to earn their livelihood even if dead bodies are housed there from time to time. The reasoning cited by Rabbi Eliezer Waldenberg[64] for this lenient ruling is that at the time the *Kohen* enters the hospital, he does so legitimately assuming there are no corpses there at the time. If a patient later dies in the hospital, the male nurse is allowed to remain to care for the seriously ill patients to which he is assigned.

Rabbi Eliezer Chayim Deitsch[65] allows *Kohanim* to serve as chaplains in a hospital to visit the sick and recite the *viduy* or confession prayer with dying patients.

On the other hand, Rabbi Moshe Feinstein[66] only permits a *Kohen* to work in a hospital if he can leave the hospital when a death occurs and if most patients are non-Jews. From the practical and pragmatic standpoint, Rabbi Feinstein thus allows *Kohanim* to secure and maintain hospital employment.

Non-Physician Kohanim Visiting The Sick

Is a non-physician *Kohen* allowed to visit patients in the hospital to fulfill the commandment of *bikur cholim*? This question

---

61. Karo, J. *Shulchan Aruch, Yoreh Deah* #373.
62. cited by Steinberg, A. in *Sefer Leb Abraham*, Jerusalem, Vol. 1 Chapt. 21, note 10.
63. Kluger, S. Responsa *Tuv Ta'am Vada'at*. Vol. 3, Part 2 #212.
64. Waldenberg, E.Y. *Responsa Tzitz Eliezer*. Vol. 4, Sect. 4:9.
65. Deitsch, E.C. Responsa *Duda'ey Hasadeh* #100.
66. Feinstein, M. Responsa *Iggrot Moshe, Yoreh Deah*, Vol. 1 #241.

was reviewed at length by Rabbi S. Arieli[67] who concludes in favor of permitting such visits unless it is definitely known that a dead person is there at the time. He confirms rulings of others[68]. Rabbi Feinstein[69] also answers the question in the affirmative because of "great need" such as emotional pain and anguish. He thus permits such visits to a parent or child or spouse or to one's wife's relatives because we assume that most patients are non-Jews and any corpse or parts thereof in the hospital at any given time are those of non-Jews and do not impart ritual defilement by being in the same room or building with a Jew. If possible, one should inquire if a Jewish corpse is there but if it cannot be ascertained with ease one can assume that there is none there. Other authorities[70] who allow *Kohanim* to visit patients in hospitals also advise the *Kohen* to inquire in advance whether or not there are any Jewish corpses there at the time.

Perhaps in part because of the impracticality of the above suggestion, some authorities[71] oppose such visits by *Kohanim* to patients in hospitals for fear that large, modern hospitals contain not only corpses but preserved human organs or embryos which ritually defile *Kohanim.*

Priests On An Airplane With A Corpse

Rabbi Feinstein[72] discusses if a *Kohen* is permitted to travel on an airplane in which a Jewish corpse is being transported in the baggage compartment for burial in Israel since the entire plane is made of metals other than the six types of metal which transmit ritual defilement, viz. gold, silver, copper, iron, tin and lead. Since the plane is made primarily of other types of metal such as aluminum and magnesium, it does not transmit defilement. The

---

67. Arieli, S. *Noam* Vol. 2, p. 55 ff.
68. Greenwald, Y.Y. *Kol Bo Al Avelut,* Section 1:5 p. 19.
69. Feinstein, M. Responsa *Iggrot Moshe, Yoreh Deah,* Vol. 2 #166.
70. Tabak, S.J. Responsa *Teshurat Shay* #559.
71. Meskin, J. Responsa *Even Yaakov* #47-51. also cited by Steinberg, A. in *Sefer Assia.* Vol. 2. Jerusalem 5741 p. 15.: Responsa *Shevet Halevi, Yoreh Deah* #205;
72. Feinstein, M. *Iggrot Moshe, Yoreh Deah,* Part 2. #164.

presence of insulating layers or wall coverings also serves to contain the defilement within the baggage compartment.[73]. Nevertheless, Rabbi Feinstein rules that a *Kohen* may not travel in the same plane with a Jewish corpse.

Conclusion

Kohanim are commanded to avoid ritual defilement through corpse contact. Since anatomical dissection of humans is part of the medical curriculum, it is prohibited for *Kohanim* to attend medical or dental school as students, and the lenient rulings enunciated by some Rabbis to allow *Kohanim* to become physicians are firmly rejected by all accepted halachic authorities. The reasons offered include the assumption that the ban against priestly defilement is not applicable nowadays; the later saving of lives by the priestly physicians; the extenuating circumstances of the need to make a livelihood; and the strong desire to become a physician. All these reasons are dismissed by the most respected rabbinic authorities who maintain that *Kohanim* are not only prohibited from attending medical school but their priestly privileges are revoked if they defy the ban.

Once a *Kohen* has become a physician, many authorities sanction medical visits to critically or terminally ill patients and even to non-seriously ill patients. *Kohanim* are allowed to enter a hospital for care if they are patients and may also visit close relatives who are ill in a hospital such as a parent or child or spouse. If possible, they should inquire in advance whether or not there are any Jewish corpses there at the time.

---

73. Tendler, M.D. Personal communication, May 11, 1984.

The Halachic Controversy Concerning the Israeli Census

Rabbi J. David Bleich

The United States conducts a census each decade for the purpose of determining the population of the country and of its various geographic areas. Quite apart from the matter of reapportionment of congressional districts, the demographic information compiled in this manner is of highly significant value in economic planning. Other information elicited in the course of taking the national census provides valuable information regarding many facets of changing sociological conditions. Censuses are similarly undertaken by other countries for the selfsame reasons. There have been no indications that any sector of the Jewish community in the diaspora has demurred with regard to participation in a national census.

Not so in the State of Israel. Newspaper accounts describing the recently completed census undertaken by the government of Israel — the fourth since the establishment of the state of Israel — are replete with reports of refusal to participate on the part of certain groups within the Orthodox community and of rabbinic disagreement with regard to the permissibility of participation.

The census of 5743 was, however, by no means the first occasion on which this matter received the attention of rabbinic

Rosh Yeshiva, Rabbi Isaac Elchanan Theological Seminary; Tenzer Professor of Jewish Law and Ethics, Benjamin N. Cardozo School of Law, Yeshiva University

scholars. The earliest item dealing with the question of a modern-day census appears to be a responsum written by R. Ben-Zion Uziel, *Mishpetei Uzi'el, Choshen Mishpat, Inyanim Kellaliyim,* no. 2, reprinted in *Piskei Uzi'el* (Jerusalem, 5737), no. 40. That responsum, dated 4 Tammuz 5697, predates the establishment of the State of Israel and was written at a time when the census was apparently undertaken in a less formal manner by the national labor union and local authorities. Subsequent to the establishment of the State, on the occasion of the second census which was conducted in 5721, responsa dealing with the propriety of a census undertaken by a Jewish state were authored by a number of leading rabbinic scholars. Of these, the most significant are the responsa of R. Yechiel Ya'akov Weinberg, *Ha-Pardes,* Tammuz 5721, reprinted in *Seridei Esh,* II, no. 48 , and of R. Eliezer Waldenberg, *Tzitz Eli'ezer,* VII no. 3.[1] Rabbi Weinberg found no objection to participation in the census, while Rabbi Waldenberg presented a lengthy discussion of the manifold aspects of the problem and expressed strong reservations with regard to its permissibility.

Public controversy concerning the halachic propriety of the Israeli census dates at least to the third census conducted in 5732. At that time, the then Chief Rabbi, Rabbi Iser Yehudah Unterman, issued a statement declaring the census to be permissible according to "the majority of the authorities." That statement has now been published in *Techumin,* IV (5743), 335. At the same time, however, formal prohibitions against participation in the census were issued by the *Bet Din* of the *Edah ha-Charedit,* headed by R. Yitzchak Ya'akov Weiss and by the Steipeler Rav, R. Ya'akov Kanievsky of Bnei Brak. The text of those pronouncements was published in

1. Other items which appeared at that time include: R. Joseph Kapah, *Ha-Tzofeh,* 2 Tammuz 5721; R. Mordecai Yehudah Leib Zaks,*Ha-Torah ve-ha-Medinah,* vol. XI-XIII (5720-5722); R. Saul Israeli, *Shanah ba- Shanah,* 5722, reprinted in *Amud ha-Yemini,* no 13; and N.B. Lerner, *Machanayim,* Sivan 5722. R. Menachem Kasher's discussion, published in the addenda to *Torah Shleimah,* (Jerusalem, 5724) was also occasioned by the census of 5721. At a much earlier time, an article by R. Shemaryahu Weinson analyzing the nature of King David's transgression in counting the populace was published in *Knesset ha-Gedolah,* IV (Warsaw, 5651), 155-159.

No'am XVI (5733), 89. Rabbi Kanievsky's *issur* of 5732 has been reissued by his son in conjunction with the present census.[2] The *Edah Ha-Charedit* also reissued its original pronouncement in cautioning against participation in the present census.[3] The same volume of *No'am* contains two articles expressing a permissive view authored by Rabbis Nathan Zevi Friedman and Menachem Kasher. Rabbi Kasher's contribution is a reprint of material included in the addenda to his *Torah Sheleimah,* XI (Jerusalem, 5724), and also appears in his responsa collection, *Divrei Menachem,* I, no. 36.

The halachic problems attendant upon participation in a census have received renewed attention in conjunction with the census of 5743. Of particular interest is a brief, annotated monograph bearing the title *Mispar Benei Yisra'el* devoted to the laws of "counting the children of Israel," authored by Rabbi Joel Schwartz, *mashgiach ruchani* of Yeshiva Dvar Yerushalayim, and published by that institution. A valuable discussion of the sources is presented by Rabbi Menachem Friedman, Rosh Yeshiva of Kolel Chasidei Belz of Jerusalem, in *Ha-Machaneh ha-Charedi,* 28 Sivan 5743. Rabbi Friedman's articles on halachic topics are regularly featured in *Ha-Machaneh ha-Charedi,* an excellent news and feature weekly published by the Belz chasidic community. The halachic problems attendant upon participation in a census are also discussed by Rabbi Shlomo Goren in a three-part article which appeared in the weekend edition of the Israeli newspaper *Ha-Tzofeh,* 29 Sivan, 6 Tammuz and 13 Tammuz 5743. Disclaiming responsibility for issuing a definitive ruling since he is no longer Chief Rabbi, Rabbi Goren fails to present an unequivocal conclusion, but formulates several arguments auguring against participation. A number of novel insights are advanced by Rabbi Chaim Kanievsky in a brief section devoted to a discussion of the census issue included in his recently published comprehensive work on the *mitzvah* of *eglah arufah, Nachal Eitan* (Bnei Brak, 5737) 6:10, sec. 7. Rabbi Chaim Kanievsky is the son of the Steipeler Rav and is a prolific author and recognized scholar in his own right. A valuable bibliography as

2. See *Ha-Tzofeh, 15 Sivan 5743, p. 8, col, 1.*
3. *See Ha-Edah, Parshat Be-Ha'alotekha,* 5733.

well as description of the manner in which the present census was conducted is presented by R. Yochai Baruch Rudick, *Techumin*, IV (5743). Appended to that article are facsimiles of the census forms employed, the statement of Rabbi Unterman issued in 5732, a statement issued by R. Chaim Kanievsky in 5743 as well as a statement by the present Chief Rabbis of Israel.

The Sources

A prohibition against counting Jews is recorded by Rambam, *Hilchot Temidim u-Musafim* 4:4; *Magen Avraham, Orach Chayyim 156:2; Pri Chadash, Orach Chayyim* 55:1; and *Kaf haChayyim 13:10.* Various scriptural verses are cited as the basis of the prohibition.

1. The source which suggests itself most readily is Exodus 30:12. Moses is commanded to count the children of Israel by collecting a half-shekel from each person in order "that there be no plague among them when you number them." Indeed, the Gemara, *Berachot* 62b, depicts God as telling David , "Behold I will make you stumble over a matter which even school children know, namely, that which is written, 'When you take the sum of the children of Israel according to their number, then shall they give every man a ransom for his soul unto the Lord ... [that there be no plague among them].'" Here the Gemara declares that even "school children" are aware of a prohibiton expressed in Exodus 30:12.

This verse also serves to explain that counting the people of Israel is prohibited because of an inherent danger, viz., the danger of plague attendant upon direct counting of individuals. Rashi explains that the rationale underlying the prohibiton against census-taking is danger resulting from an "evil eye." This concept is explained by Rabbenu Bachya, Exodus 30:12, as predicated upon the manner in which divine providence is manifest. Providence may extend to an individual either *qua* individual or as a member of a larger group. When providence is directed toward a group even an undeserving individual may receive benefits since judgment is made with regard to the preservation and well-being of the group as a whole. However, when providence is directed toward an individual *qua* individual only his personal actions and merit are considerd in

determining whether he is to be deemed worthy of divine guardianship. The counting of individuals, explains Rabbenu Bachya, has the effect of singling out the individual counted in this manner for particular scrutiny. If he is found lacking in merit he may receive punishment for misdeeds which otherwise might escape scrutiny. By way of analogy, Rabbenu Bachya draws attention to the words of the Shunammite woman. Elisha asked her, "what is to be done for thee? Wouldst thou be spoken for to the king or to the captain of the host?" And she answered, "I dwell among my own people" (II Kings 4:13). The Shunammite woman did not wish to be singled out for mention to the king or to the captain of the host. So long as she remained anonymous she had nothing to fear from them. She was fearful, however, that were Elisha to cause those individuals to focus their attention upon her, the result might be detrimental rather than beneficial.[4]

2. Yet, elsewhere, *Yoma* 22b, the Germara adduces entirely different sources in establishing a prohibition against a numerical survey of the Jewish population. R. Yitzchak declares that it is forbidden to count Israel "even for purposes of a *mitzvah*" and derives the prohibition from I Samuel 11:8. Prior to engaging in battle to defend his nation against Nahash the Ammonite, an encounter which clearly constituted a *milchemet mitzvah*, Saul found it necessary to have an accurate reckoning of the populace. Accordingly, "He counted them *be-vazek*." R. Yitzchak interprets this phrase, not as identifying the town or village in which the census was taken, viz., Bazek, but as indicating the means by which the count was ascertained. The word "*bazek*" is interpreted as denoting shards of pottery. Thus Scripture reports that each person delivered a shard of pottery to be counted by the census-takers. The

---

4. See also Seforno, Exodus 30:12. Cf., however, Ralbag, Exodus 30:12, and *Akeidat Yitzchak, Parshat Tazri'a, sha'ar* 61, as well as *Kli Yakar*, Exodus 30:12. For amplification of Rambam's position regarding the evil eye see *Teshuvot ha-Rambam* (ed. Friemann), no. 260; *Migdal Oz, Hilchot Shechenim* 2:16; and *Bet Yosef, Choshen Mishpat* 158. See also Me'iri, *Pesachim* 109b. Cf., Abarbanel's commentary on Exodus 30:12 in which he offers a naturalistic explanation of the harm caused by the "evil eye."

inference drawn by R. Yitzchak is that this cumbersome method was necessary because direct counting is forbidden.

In response to the objection that *"bazek"* may be a place name, the Gemara cites I Samuel 15:4, "and Saul summoned the people and numbered them by means of lambs *(tela'im)."* Standard biblical translations similarly render *"tela'im"* as a place name. *Tosafot Yeshanim, Yoma* 22b, and Radak, I Samuel 15:4, likewise indicate that such is the "simple meaning" of the verse. However, according to talmudic exegesis, prior to engaging in war against Amalek, Saul did not count the populace *at* a place known as Tela'im; rather he counted *by means of* lambs *(tela'im).* Rashi, I Samuel 15:4, following the interpretation of the Gemara, explains the verse as stating that Saul provided the populace with lambs which he then retrieved in taking the census.

Targum Yonatan indicates that the census was undertaken by Saul in conjuction with the offering of the paschal sacrifice. A rough estimate of the populace was achieved by counting the number of paschal lambs offered. Noteworthy is the statement of the Gemara, *Pesachim* 64b:

> Our Rabbis taught: King Agrippa once wished to cast his eyes on the hosts of Israel [to ascertain their number.] Said he to the High Priest, "Cast your eyes upon the paschal sacrifices." [The High Priest] took a kidney from each [paschal sacrifice] and 600,000 pairs of kidneys were found there, twice as many as [the number of] those who departed from Egypt, excluding those who were unclean and those who were on a distant journey; and there was not a single paschal sacrifice for which more than ten people had not registered; and they called it "The Passover of the dense throngs."

A similar narrative is recorded by Josephus, *Wars of the Jews,* Book VI, chap. 9.[5]

---

5. Rabbi Goren points out that an imprecise census may be permissible under all circumstances. If so, derivation of a prohibition from this narrative according to the interpretation of *Targum Yonatan* is problematic. According to *Targum Yonatan,* Saul was able to achieve only a rough approximation of the populace counted. Following this line of interpretation, the Gemara must be understood as

3. In the same discussion, the Gemara, *Yoma* 22b, adduces yet another source for the prohibition against counting the populace. R. Eleazar derives a negative prohibition from Hosea 2:1 which he renders as "The number of the children of Israel shall be as the sand of the sea which *shall not* be measured nor numbered (*lo yimad ve-lo yisafer),*" rather than as "which *cannot* be measured nor numbered." R. Nachman bar Yitzchak finds that this verse establishes, not one, but two prohibitions, viz., "shall not be measured" and "shall not be numbered."[6]

Maharsha, in his commentary on *Yoma* 22b, questions why, in this discussion, the Gemara cites prophetic verses in establishing a prohibition and fails to rely upon Exodus 30:12 as does the Gemara in *Berachot* 62b. Maharsha explains that Exodus 30:12 might be understood as requiring the contribution of a half-shekel for each person as "a ransom for his soul unto the Lord" because of the prior transgression incurred in serving the golden calf. However, absent such transgression, it might be presumed that a census poses no danger and hence is not prohibited.

Addressing the same question, Rabbi Weinberg and Rabbi Waldenberg both suggest that citation of a verse from the prophetic writings is necessary in order to establish a prohibition against the taking of a census "even for purposes of a *mitzvah*" since the pentateuchal verse does not necessarily encompass such contingencies.[7] A similar explanation is advanced by *Iyun Ya'akov*

---

deriving the prohibition against census-taking from the verse "And he counted them by means of lambs" on the basis of the assumption that Saul was constrained to satisfy himself with an imprecise counting because of a prohibition against an accurate census.

6. Cf., *Teshuvot Chavot Ya'ir,* no. 9.

7. R. Chaim Joseph David Azulai, *Petach Einayim, Yoma* 22b, R. Yehudah Aryeh Leib Alter of Ger, *Sefat Emet, Yoma 22b,* and R. Yisra'el Yehoshu'a of Kutna, *Yeshu'ot Malko. Likkutei Torah,* p. 74b, suggest that, in context, Exodus 30:12 refers only to a census of the entire populace. Accordingly, *Yoma* 22b adduces verses from prophetic sources in establishing a prohibition against counting even a portion of the populace. Cf., however, *Chiddushei Chatam Sofer, Yoma* 22b, cited below. See also *Tzitz Eli'ezer,* VII, no. 3, sec. 11, who suggests that other, more explicit verses are required because Exodus 30:12 might be interpreted as forbidding a census only when undertaken by a "king or leader of Israel. " Indeed *Midrash Talpiyot,* no. 20, cites an opinion to the effect that "a ransom"

and *Etz Yosef* in their respective commentaries on *Ein Ya'akov*, *Yoma* 22b.[8]

4. Rashi, I Chronicles 27:24, seemingly ignoring the sources cited in both *Berachot* 62b and *Yoma* 22b, posits two entirely different verses as sources for this prohibition. The passages "If a man can number the dust of the earth, then shall your seed also be numbered" (Genesis 13:16) and "'Look now toward heaven and count the stars if you be able to count them'; and he said unto him, 'So shall your seed be'" (Genesis 15:5) are interpreted by Rashi, not simply as blessings, but as prohibitions against counting the progeny of Abraham. In his comentary on I Samuel 15:4, Rashi cites yet a third verse, "I will surely do you good and make your seed as the sand of the sea which cannot be numbered for multitude" (Genesis 32:13) which he renders as "which *shall not* be numbered for multitude."[9]

According to Rashi, who views the verses in Genesis as establishing a prohibition against counting the population of Israel, it may perhaps be presumed that the Gemara, *Yoma* 22b, adduces prophetic verses because the verses in Genesis refer only to the counting of *all members* of the community of Israel. The prohibition established on the basis of the prophetic verses cited in *Yoma* 22b, however, clearly applies to the counting of even a

---

is required only when the census is undertaken by a king.

It should however be noted that Rambam, *Hilchot Temidim u-Musafim* 4:4, cites only the reference to I Samuel 15:4 discussed in *Yoma* 22b and omits any reference to Exodus 30:12 as a source for such a prohibition. Unlike *Berachot* 62b, *Yoma* 22b may have regarded Exodus 30:12 as referring only to the census undertaken in the wilderness, but not as establishing a prohibition for posterity. If so, the prohibiton against counting would be regarded by Rambam as binding solely by virtue of prophetic tradtion (*mei-divrei kabbalah*) rather than as expressly biblical in nature. See *Mispar Bnei Yisra'el*, p. 19f; cf., however, *Seridei Esh*, II, no. 48, and *Tzitz Eliezer*, VII, no. 3, sec 1. It is, however difficult to sustain any explanation which posits a conflict between *Berachot* 62b and *Yoma* 22. In *Berachot* it is R. Eleazar who cites Exodus 30:12 as the source of the prohibition and it is also R. Eleazar who is quoted in *Yoma* as establishing the prohibition on the basis of Hosea 2:1.

8. See also *Tosafot Ri ha-Lavan*, *Yoma* 22b; cf., *Be'er Sheva*, *Tamid* 28a.
9. Cf., *Meshech Chochmah*, *Parshat Naso*, *s.v. be-haftorah*.

segment of the populace. Thus, Scripture records that when Saul took the census prior to his battle against Ammon "The children of Israel were 300,000, and the men of Judah 30,000" (I Samuel 11:8); later, prior to the war against Amalek, Saul counted "200,000 footmen and 10,000 men of Judah" (I Samuel 15:4). The small numbers recorded, as well as the discrepancy between the figures, clearly indicate that the potential warriors counted by Saul constituted only a portion of the populace. Moreover, the Gemara, *Yoma* 22b, declares that, in the Temple, each priest extended a finger to be counted because it is forbidden to count people.[10] The counting of only the priests in the Temple certainly would not have constituted a census of the entire people. Nevertheless, it was permitted to count only outstretched fingers but not the priests themselves.[11] Thus, according to this analysis, the direct counting of even a portion of the populace is forbidden.[12]

Curiously, the sources which serve to prohibit even a partial census were apparently overlooked by one biblical commentator. R. Elijah Mizrachi, in his supercommentary on Rashi, Exodus 30:12, expresses the opinion that "perhaps" the prohibition against counting the populace is operative only if the entire people, or the major portion of the populace, is counted, as was the case with regard to the census undertaken by Moses in the wilderness. For

---

10. Cf. However, Ramban's novel interpretation recorded in *Hilchot Temedim u-Musafim* 4:3.
11. R. Meir Dan Plocki, *Klei Chemdah, Parshat Ki Tissa,* explains that although it is forbidden to count individuals directly, the counting of fingers is deemed a permissible form of indirect counting. Translated literally, Exodus 30:12 states "when you count the *head* of the children of Israel..." The prohibition, explains *Klei Chemdah,* is understood as applying only to the counting of "heads" or of "organs" upon which life is dependent. A similar explanation is advanced by the author of *Pe'at ha-Shulchan* and rebutted by *Chatam Sofer, Kovetz She'elot u-Teshuvot* (Jerusalem,5733), no. 8. Cf., Abarbanel, Exodus 30:12.
12. As noted earlier, *Petach Einayim, Sefat Emet* and *Yeshu'ot Malko* independently explain that, in establishing a prohibition against the direct counting of the populace, the Gemara cites the verse describing the census taken by Saul rather than Exodus 30:12 because the latter passage serves to prohibit only the counting of the entire populace while the prophetic verses serve to prohibit the counting of even a portion of the populace.

this reason, opines Mizrachi, there were no untoward results when David took a census prior to engaging in battle against Absalom and his company (II Samuel 18:1-2). On that occasion David divided the people into three groups and assigned Joab, Abishai the son of Zeruiah and Ittai the Gittite to conduct the census, charging each with counting one-third of the populace. Thus, there was no single census of the entire people. Subsequent writers have pointed out that Mizrachi's position is contradicted by the Gemara's statement declaring that it was forbidden to count the priests in the Temple. Indeed, Mizrachi's view also seems to be contradicted by the Gemara's analysis of the census conducted by Saul. Even though only a segment of the nation was included in that census, Saul found it necessary to count the populace by means of shards and lambs in order to circumvent the prohibition.[13]

King David's Error

Particularly perplexing is the fact that King David apparently ignored the prohibition against counting the populace despite the protestations of Joab (II Samuel 24:1-4 and I Chronicles 21:1:3) who demanded, "Why does my lord require this thing? Why will he be a cause of trespass to Israel?" (I Chronicles 21:3). Joab was indeed correct in opposing the undertaking of a census as indicated by Scripture: "And God was displeased with this thing; therefore He smote Israel" (I Chronicles 21:7); "So the Lord sent a pestilence upon Israel from the morning even to the time appointed; and there died of the people from Dan to Beersheba 70,000 men" (II Samuel 24:15). David himself conceded his guilt saying, "I have sinned greatly in what I have done ... for I have done very foolishly" (II Samuel 24:10; and, with minor variation, I Chronicles 21:8).[14]

---

13. Cf., *Petach Einayim, Yoma* 22b. For a summary of various attempts to reconcile Mizrachi's comments with these sources see *Tzitz Eli'ezer*, VII, no. 3, secs. 35-37.
14. Cf., however, Abarbanel, Exodus 30:12, who maintains that the misfortune which was visited upon the populace following David's census was a punishment for their treasonous conduct in supporting Sheba ben Bichri. Abarbanel's interpretation appears to be at variance with both *Berachot* 62b and *Yoma* 22b as well as contrary to the plain meaning of these scriptural verses. See R. Ben-Zion Uziel, *Mishpetei Uzi'el, Inyanim Kellaliyim*, no. 2.

Biblical commentators have advanced a variety of theses explaining the nature of David's error. A number of halachic ramifications flow from those diverse explanations.

1. Ramban, in his commentary on Exodus 30:12, explains that David did not properly understand the nature of the prohibition and endeavors to elucidate the nature of David's error. Ramban notes that Exodus 30:12 fails to specify whether the prohibition against counting the people is binding in all generations or whether it was intended to apply only during the period of wandering in the wilderness. According to Ramban, David erred in assuming that the prohibition lapsed upon entry into the promised land.[15] Ramban thus clearly understands David's census as having been undertaken in a direct manner and not by means of counting half-shekels or the like. This is certainly the interpretation placed upon the incident by the Gemara, *Berachot* 62b. According to Ramban, only a direct census is forbidden; indirect counting by means of half-shekels or a similar expedient is permitted.[16] This is also the position of

---

15. Maharal of Prague, *Gur Aryeh*, Exodus 30:12, explains that David erred in assuming that danger of an "evil eye" existed only in the wilderness where all of Israel was assembled in one location. *Ben Yehoyada, Berachot* 62b asserts that David erred in assuming that the prohibition pertained only to a census conducted in the wilderness which was a place of danger but not in the Land of Israel where the merit of residence in the land protects against danger. *Kli Yakar*, Exodus 30:12, opines that David's error lay in assuming that only the first census, which was undertaken when population figures were entirely unknown, required collection of half-shekels; however, subsequent counting, when the numbers were known at least in an approximate manner, in David's opinion, did not require collection of half-shekels, Cf., however, *Tzitz Eli'ezer*, VII, no. 3, sec. 53. and *Mispar Bnei Yisrael*, p. 31, note 11, and p. 36, note 1.

16. As will be noted below, R. Chaim ibn Attar, *Or ha-Chayyim*, Exodus 30:12, permits indirect census-taking in the absence of a legitimate "purpose" only by means of collecting half-shekels. Cf., *Kovez She'elot u-Teshuvot Chatam Sofer*, no. 8. *Tzitz Eli'ezer* VII, no. 3, sec. 22, suggests that according to *Or ha-Chayyim* who permits census-taking only by means of collecting half-shekels, such a procedure may be permissible only when the half-shekels are delivered to the Temple treasury.

R. Jacob Zevi Mecklenburg, *Ha-Ketav ve-ha-Kabbalah*, Exodus 30:12, advances a novel view in stating that a portion of the populace may be counted indirectly by means of pieces of shard, or lambs, or the like. However, in his opinion, the entire populace may never be counted even indirectly other than by means of half-shekels which serve as a "ransom."

Rambam, *Hilkhot Temidim u-Musafim* 4:4.[17]

2. However, in a subsequent comment Ramban contradicts his own earlier interpretation. In his commentary on Numbers 1:3 Ramban remarks, "To me it [appears] unlikely that David should not be careful with regard to that which Scripture states, 'that there be no plague among them when you number them.' If perhaps David did err why did Joab not do [the census by means of] shekels ... so that he should not sin?" Ramban proceeds to explain that a census such as was undertaken by David is forbidden even when conducted by means of counting half-shekels since it was unnecessary and not designed to serve a valid need or "purpose" (*tzorech*). David's census, asserts Ramban, was not designed to serve a military purpose or any other national need. That census, he declares, was undertaken by David simply in order to "gladden his heart" by demonstrating that he reigned over a large populace. In support of this thesis Ramban cites *Bamidbar Rabbah* 2:17:

> Whenever Israel was counted for a purpose, their number did not diminish; but when they were counted for no purpose, they became diminished. When were they counted for a purpose? In the days of Moses and for the [setting up of the] standards and at the division of the land. [When were they counted] for no purpose? In the days of David.

Similar statements appears in *Pesikta Rabbati* 11:3, *Pesikta de Rav Kahana* 2:17 and *Midrash Tanchuma, Parshat Ki Tissa,* sec. 9.

It is clear that even a census undertaken for a "purpose" is permitted only if taken indirectly by means of half-shekels or the like. The counting of the priests in the Temple was clearly necessary in order to determine which priests were to perform the sacrificial ritual. A number was arbitrarily selected and the priests were counted seriatim until the previously announced number was reached. The priest with whom the enumeration culminated was assigned a role in the sacrificial service. This procedure was designed to assign priests to their tasks in an orderly manner and to

---

17. This interpretation is also reflected in the comments of the *Zohar, Parshat Pekudei,* p. 225b. Cf., *Tzeidah la-Derech,* Exodus 30:12.

prevent jeopardy to life and limb such as had existed at an earlier time when the priests were themselves permitted to seize the initiative for participation. Although the numbering of the priests was conducted for a "purpose," the counting was of outstretched forefingers rather than of people.[18]

This is also the position of *Tosafot Rid, Yoma* 22b; Radak, I Samuel 15:4 and II Samuel 24:1; and *Tosafot Ri ha-Lavan, Yoma* 2b. It should however be noted that *Tosafot Rid and Tosafot Ri ha-Lavan* speak of indirect counting being permitted for the "purpose of a *mitzvah*" rather than simply for any "purpose." Similarly, R. Naphtali Zevi Yehudah Berlin, *Meromei Sadeh, Berachot* 62a, stipulates that the counting must be for the purpose of a *mitzvah*.[19] A similar position is advanced by *Petach Einayim, Yoma* 22b, in the name of R. Menachem Azariah of Panu. On the other hand, R. Chaim ibn Attar, *Or ha-Chayyim*, Exodus 30:2, permits the indirect counting of even the entire populace by means of half-shekels despite the absence of a legitimate "purpose."

Parenthetically, it is significant that in these comments Ramban speaks of a prohibition devolving upon the census-taker. Joab is described as being troubled because he would incur transgression by virtue of taking a census. Although Ramban is silent with regard to a transgression on the part of those who are counted, it is clear that the danger of epidemic (or, according to *Chizkuni*, Numbers 31:49, the danger of being killed in battle) clearly devolves upon those who are counted. However, *Sefer Chasidim* (Frankfurt am Main, 1924), no. 1411, adopts a contrary position. According to *Sefer Chasidim*,the prohibition devolves only upon those who are counted, but not upon the census-taker. It may also be noted that *Yalkut Shim'oni*, II Samuel 24, records that God's anger was aroused against Israel at the time of Joab's census

---

18. Rabbi Friedman *No'am* XVI, 87, errs in stating that, according to Ramban, a direct counting of the populace is permitted when undertaken for a "purpose."
19. Cf., however, R. Chaim Kanievsky, *Nachal Eitan* 6:10, sec. 7, who understands the concept of counting for the purpose of a *mitzvah* as formulated by *Tosafot Ri ha-Lavan* as permitting even indirect counting only upon specific divine command, rather than for the purpose of enabling the fulfillment of some other commandment.

because the populace did not resist Joab in his endeavor.

3. Advancing an alternative explanation in his comments on Numbers 1:3, Ramban declares that the entire populace may not be counted even by indirect means. Therefore, even when undertaken by means of counting half-shekels, a census may include only those twenty years of age and older.[20] David, however, commanded that all above the age of thirteen be counted. Such a census yields a population count of the entire people which is forbidden under all circumstances.[21] According to this explanation, David erred in assuming that a census of the entire populace including even those under twenty years of age is permitted when undertaken in an indirect manner.

Ramban further cites a *"midrash aggadah"* — presumably a reference to the earlier cited aggadic statement recorded in *Berachot* 62b — which explains that David sinned in taking the census directly rather than by means of half-shekels. Thus the diverse explanations advanced by Ramban in his commentaries on Exodus 31:1 reflect different strands of midrashic interpretation.[22]

4. R. Mordecai Jaffe, *Levush ha-Orah,* and Mizrachi, in their respective commentaries on Exodus 30:12, explain that King David erred in assuming that this verse does not establish a prohibition against census-taking. According to this interpretation, David understood Exodus 30:12 as requiring a half-shekel simply as a

---

20. See also Maharit, *Tzofnat Pa'aneach, Parshat Ki Tissa, derush* 1, and *Nachal Eitan* 6:10, sec. 7.

21. Surprisingly, Rabbi Goren fails to cite Ramban's comments in this regard but does indicate that Rashi, in citing the various verses in Genesis rather than those adduced by *Berachot* 62b and *Yoma* 22b, intended to establish the basis for a prohibition against counting the *entire* populace.

22. See, however, *Meromei Sadeh, Berachot* 62b, and *Tzitz Eli'ezer,* VII, no. 3, sec. 15, who resolve the apparent contradiction between the two talmudic discussions by suggesting that *Berachot* 62b ascribes a two-fold error to David: census-taking in the absence of a legitimate purpose which was compounded by failure to collect half-shekels because the census was not undertaken for legitimate pupose which was compounded by failure to collect half-shekels. Cf., however. *Tosafot Rid, Yoma* 22b, who remarks that Joab did not require the collection of half-shekels because the census was not undertaken for a legitimate purpose and, accordingly, collection of half-shekels would not have mitigated the transgression.

"ransom" to avert a calamity and, assuming that the "ransom" need not necessarily be delivered prior to the census but could be paid after the counting as well, intended to collect such an offering subsequent to completing the census.[23] Maharal of Prague, *Gur Aryeh*, Exodus 30:12, advances a similar explanation but comments that David believed that the half-shekel donated annually by each person for the purpose of purchasing communal offerings was suffficient to serve as "ransom." *Levush* further comments that the true import of the commandment was not known until after the misfortune which occurred following David's census.

The basic notion advanced by *Levush* and Mizrachi, viz., that the giving of a "ransom" need not be simultaneous with the taking of the census, is found in the comments of an early authority. Rashbam, Numbers 31:49, speaks of an offering subsequent to the taking of the census as serving as a form of "ransom."

Parenthetically, it should be noted that *Levush*, Mizrachi, Maharal and Rashbam apparently maintain that the collection of half-shekels serves to permit a direct head count of the populace. Such a position is entirely compatible with a literal reading of Exodus 30:12 and Numbers 1:2. Similary, *Yalkut Shim'oni, Parshat Ki Tissa*, speaks of individuals passing beyond a wooden platform, presumably for purposes of being counted directly. However, Rashi, Exodus 30:12, carefully explains that the collection of half-shekels was designed to enable the census to be taken indirectly by means of counting the half-shekel coins rather than by a direct count of individuals. According Rashi, direct counting of people is never permissible.

---

23. R. Yerucham Fischel Perla (Mahari Perla), in his commentary on Sa'adya Ga'on's *Sefer ha-Mitzvot, lo-ta'aseh*, nos. 264-265, p.322b, opines that, in the event that a person has been counted, he must contribute a half-shekel to charity as "ransom." *Tzitz Eli'ezer*, VII, no. 3. sec. 16, suggests that, according to Marhari Perla, any coin minted as a half of the monetary unit which constitutes the coin of the realm may be sufficient for this purpose even if its value is less than that of half a shekel. However, *Tzitz Eli'ezer* fails to offer compelling evidence in support of this contention.

Chatam Sofer's Position

R. Moshe Sofer, in a responsum published only in recent years, *Kovetz She'elot u-Teshuvot Chatam Sofer* (Jerusalem 5733), no. 8,[24] a significant portion of which is also included in his talmudic novellae, *Chiddushei Chatam Sofer, Yoma* 22b, adopts a position which, while incorporating elements found in Ramban's exposition, is at variance with that of other authorities. As noted earlier, Ramban, in one explanation, asserts that a direct census which is accurate and precise in nature is forbidden even if limited to a portion of the populace. The expedient of indirect counting is employed, according to *Chatam Sofer,* not because indirect counting is intrinsically permissible, but simply because indirect counting admits of error and is, by it very nature, not precise. Although each person, rich or poor, is commanded to contribute a half-shekel, no more and no less, there is no guarantee that the directive will be adhered to scrupulously. Imprecision is also likely to result when the census is taken by counting lambs or bits of pottery. Similarly, in counting the forefingers extended by the priests, it is possible that error will occur because some may not extend a forefinger and some may extend a multiple number of fingers. According to *Chatam Sofer,* it is precisely because the true number will not be known with certainty that the taking of a census by indirect means is permitted.

The counting of people, even of a portion of populace, in a manner that is not designed to yield an accurate reckoning, asserts *Chatam Sofer,* may be undertaken only by means of half-shekels which serve as "ransom."[25] The extension of fingers by the priests, even though it was not accompanied by collection of half-shekels, asserts *Chatam Sofer,* was permitted because it was not done as a

---

24. This responsum, together with the query and subsequent response of his interlocutor, R. Yisra'el of Shklov, the author of *Pe'at ha-Shulchan,* was first published in *Sefer ha-Yovel le-Doktor B.M. Levin* (Jerusalem, 5700), ed. R. Yehudah Leib Fishman.

25. Cf., *Or ha-Chayim,* and *Ha-Ketav ve-ha-Kabbalah,* cited above, note 16.
It should be noted that in his concluding remarks *Chatam Sofer* states that counting by means of half-shekels or by way of *goral* is permitted only for the purpose of a *mitzvah.*

means of counting the priests but by way of *goral,* or lot, in order to assign roles in the performance of the sacrificial ritual. The procedure began with the announcement of an arbitrarily selected number. Thereupon, the outstretched fingers were counted seriatim until the previously announced number was reached. The number announced prior to counting the fingers extended by the priests might indeed be greater than the total number of individuals present.This would require that at least some priests be counted more than once. Thus the intention was clearly not to obtain a census in any sense of the term. In a highly novel explanation, *Chatam Sofer* asserts that the shards and lambs collected by Saul were similarly designed, not to establish a census, but as a device by which to assign various roles in combat. Since the procedure was in the nature of a *goral,* rather than of a census, half-shekels were not required. It would appear that, according to the opinion of *Chatam Sofer* as expressed in this responsum, a contemporary census, even if undertaken in an indirect manner (and even if it be imprecise in nature) is not permissible since it is not accompanied by the contribution of a half-shekel. On the other hand, the author of *Pe'at ha-Shulchan,* as quoted in *Kovetz Teshuvot Chatam Sofer,* as well as *Klei Chemdah* and *Pardes Yosef* in their respective commentaries on Exodus 30:12, permit the counting of nonvital organs or of items of clothing as constituting indirect forms of census-taking.

Contemporary Factors and Rulings

Rabbi Weinberg, *Seridei Esh,* II, no. 48, finds that a census undertaken in Israel under contemporary conditions is permitted because such a census is conducted by means of questionnaires which are filled out by individual householders. The names inserted in the blank spaces provided on the forms are then tabulated in order to reach a final count. The tallying of names, rules Rabbi Weinberg, is an indirect means of counting. He further contends that the considerations of economic planning and national security which require an accurate census suffice to constitute a "purpose." Accordingly, Rabbi Weinberg concludes that the taking of a census is permited even according to the first analysis presented by

Ramban in his commentary on Numbers 1:3. Rabbi Uziel, *Mishpetei Uzi'el, Choshen Mishpat, kellalim,* no. 2, also permits the taking of a census on the grounds that it is conducted indirectly by means of written documents and is undertaken for a legitimate purpose. This is also the opinion of both Rabbi Friedman and Rabbi Kasher.[26] Rabbi Kasher adds further support to this conclusion by citing the comments of Ralbag, Numbers 1:2 and Numbers 26:53, who declares categorically that the counting of written names is not encompassed within the prohibition. Contradicting the view of other biblical commentators, Ralbag states that the later censuses undertaken by Moses were not conducted by means of collection of half-shekels but "according to the number of names" as indicated in Numbers 1:2 and Numbers 26:53.[27] It should be noted that R. Naphtali Zevi Yehudah Berlin, in his biblical commentary *Ha'amek Davar,* also interprets both verses in an identical manner.[28]

---

26. See also *Einayim la-Mishpat, millu'im, Berachot* 62b.
27. Rabbi Kasher, *Torah Shleimah,* XXI, 168, further contends that tabulation by mechanical means is not prohibited since the actual counting is not accomplished by a human act. This view is disputed by Rabbi Schwartz, *Mispar Bnei Yisra'el,* p. 29.
28. In his commentary on Numbers 1:42, *Ha'amek Davar* cites an intriguing oral tradition attributed to the Ari ha-Kadosh. Ari advances a resolution to a textual difficulty in which he clearly assumes that those censuses were undertaken by counting slips of paper or the like upon which the names and tribal identification were recorded. Ari ha-Kadosh explains that these slips were collected from the entire community of Israel and deposited in a single place. Thereupon the *nasi* of each tribe came and selected those bearing the names of the members of his tribe and placed them in a separate receptacle. The slips in each of those receptacles were then counted in order to arrive at a census for each tribe. With the removal of the slips bearing the names of the members of the first eleven tribes, all remaining names were perforce known to be names of persons belonging to the twelfth tribe without need for any further selection. Accordingly, explains Ari ha-Kadosh, with regard to each of the first eleven tribes, Scripture states "Of the sons of ... according to the number of names;" whereas with regard to Naphtali, the last tribe to be counted, Scripture states simply, "The sons of Naphtali...". With regard to each of the first eleven tribes, explains Ari, the names counted were of the sons of that tribe only, to the exclusion of slips bearing names of members of other tribes. Hence the phrase "*of* the sons..." which excludes all others. However, when it came time to count the tribe of Naphtali, *all* names remaining in the hands of Moses were counted since no other names remained.

Participation in censuses conducted in the Diaspora does not ordinarily present a problem because the prohibition against counting is limited to the counting of the Jewish populace.[29] Counting Jews as part of a census of the general population with no effort to ascertain the precise size of the Jewish community entails no violation of Jewish law. However, participation in a census which is designed to determine the specific number of members of each religious group, including the Jewish community, would be problematic. Such a census would presumably be sanctioned by the authorities who permit the Israeli census, but only when conducted by means of a written questionnaire and undertaken for a legitimate purpose.

Rabbi Kasher, however, sanctions a census of both Jews and non-Jews even when the census is designed to yield population figures for the Jewish community. Rabbi Kasher's permissive view with regard to the the Israeli census is based in part upon the consideration that the Israeli census is not limited to the Jewish populace but includes non-Jews residing in Israel as well. Rabbi Kasher, without citing sources or developing a compelling argument, views this procedure as permissible despite the fact that the census is also designed to determine the specific number of Jews residing in Israel. Rabbi Kasher's conclusion in this regard is sharply contested by *Tzitz Eli'ezer*, VII, no. 3, sec. 2.

Rabbi Kasher finds additional grounds to permit the Israeli census despite the fact that it is ostensibly designed to yield the number of Jewish nationals within the State of Israel. He maintains, as does *Chatam Sofer*, that an inaccurate reckoning is merely an approximation. Moreover, unlike *Chatam Sofer*, Rabbi Kasher is prepared to permit an inaccurate reckoning even without accompanying half-shekels as "ransom." Accordingly, he argues that since many individuals who have not undergone valid conversion procedures are counted as Jews by the census-takers, the

---

29. R. Rachamin Yitzchak Pelaggi, *Yafeh la-Lev*, I, *hashmatot*, no. 55, sec. 2, cites R. Berachyah Berach, *Zera Berach, Parshat Bamidbar*, who permits all forms of counting in the Diaspora on the basis of kabbalistic considerations. *Tzitz Eli'ezer*, VII, no. 3, sec. 30, dismisses those comments as a homiletic excursus rather than as a halachic ruling

results are inaccurate and hence constitute a mere appoximation of the Jewish populace.[30]

It should be noted, however, that in addition to *Chatam Sofer,* another authority, *Ramat Shmu'el,* cited by *Etz Yosef* in his commentary on *Ein Ya'akov, Yoma* 22b, forbids even an approximate tabulation. In the view of *Ramat Shmu'el,* the prohibition against counting the populace applies even when the method employed is inaccurate and hence yields only an approximation. In support of this postion *Ramat Shmu'el* cites Genesis 32:13 which he renders literally as "which shall not be *estimated (lo yimad)* and shall not be counted."[31]

Other authorities question the undertaking of a census by the government of the State of Israel on the basis of a variety of considerations:

1. Rabbi Goren concedes that, were each individual to fill out a separate form, the subsequent counting of the forms themselves, i.e., the counting of individual pieces of paper, would present no problem. However, he views the counting of individual names recorded on such forms as being significantly different in nature. That distinction, as earlier noted, is contradicted by Ralbag and *Ha'amek Davar.*

2. Rabbi Goren further contends that the concept of "purpose" or "necessity" *(tzorech),* as formulated by Ramban, is limited to a need involving elimination of danger to life. Accordingly, he expresses reservation with regard to the legitimacy of a census undertaken for purposes of economic planning. Rabbi Goren concedes that the censuses undertaken by Moses were not predicated upon a "purpose" involving a threat to life. He maintains, however, that Moses' censuses were permitted only because the half-shekel collected in conjunction with the census served as a "ransom." However, it should be noted that in the words of Ramban, who formulated the concept of "purpose" there

---

30. Rabbi Rudick, *Techumin* ,IV, 332 observes that the fact that there are, unfortunately, some Jews who seek to conceal their Jewish identity further contributes to the inaccuracy of the tabulation of the size of the Jewish populace.

31. Cf., *Mispar Bnei Yisra'el,* p. 29. note 10b.

is no suggestion that the concept is limited to a life-threatening consideration.

It is noteworthy that a thesis similar to that advanced by Rabbi Goren is propounded by one biblical commentator in order to resolve the contradictory midrashic explanations of the nature of King David's transgession. *Or ha-Chayyim*, Exodus 31:12, explains that David erred in conducting a census which was not undertaken for a valid purpose. In advancing this explanation *Or ha-Chayyim* follows Ramban, Numbers 1:3, and the midrashic sources cited by the latter. As noted earlier, the Gemara, *Berachot* 62b, indicates that had David followed the procedure stipulated in Exodus 30:2 and taken the census by means of a collection of half-shekels he would have incurred no transgression even though the census was undertaken in the absence of a legitimate purpose. Ramban regards this contradiction as reflecting diverse midrashic traditions. *Or ha-Chayyim*, however, resolves the contradiction by postulating that, when undertaken by means of half-shekels which are contributed to the sancturary as a "ransom," a census may be undertaken even absent a valid "purpose."[32] *Or ha-Chayyim*, however, does not restrictively define the concept of "purpose "as limited to a matter involving danger to life.

3. Other authorities also argue that the present census serves no legitimate function, but do so on entirely different grounds. Rabbi Schwartz, *Mispar Bnei Yisra'el* p. 31, note 11, and p. 36, note 1, cites an assertion to the effect that, when the approximate size of the population is already known, a census designed to yield more precise figures does not serve a legitimate "purpose". This appears to have been Rabbi Waldenberg's major reservation with regard to the 5721 censes as recorded in *Tzitz Eli'ezer*, VII, no. 3, sec. 53.

4. Rabbi Goren further contends that a census of the population of the State of Israel may constitute a counting of "all of Israel" which he argues (without citing the second analysis presented by Ramban, Numbers 1:3) is forbidden under all circumstances. With regard to an entirely different matter, Rambam, *Hilchot Shegagot* 13:2, basing himself upon *Horiyot* 3a,

---

32. See *Tzitz Eli'ezer*, VII, no. 3, sec. 22, cited above, note 16.

declares that the halachic concept of a "community" is limited to Jews who reside in Israel. This point is made by Rabbi A.I. Kook, *Mishpat Kohen*, no. 143, p. 308, and by other authorities with regard to other facets of halacha, but is the subject of considerable dispute.[33]

5. In prohibiting participation in the Israeli census despite the fact that it is conducted by means of a written questionnaire, Rabbi Chaim Kanievsky, in his statement issued in 5732, relies in part upon an opinion of *Chatam Sofer* which is reported in *Teshuvot Ketav Sofer, Yoreh De'ah*, no. 106. Rabbi Kanievsky quotes *Chatam Sofer* as prohibiting counting "even by means of writing."[34]

However, *Chatam Sofer* as cited by *Ketav Sofer* (as distinct from the position taken by *Chatam Sofer* both in his *Kovetz Teshuvot* and in his novellae) states only that no distinction is to be made between "speaking" and "writing" with regard to census-

---

33. See R. Ovadiah Yosef, *Yabi'a Omer*, VI, *Orach Chayyim*, no. 41, and *Contemporary Halakhic Problems*, II, 180.Parenthetically, it should be noted that counting the majority of the Jewish people is tantamount to a census of the entire community of Israel. See *Tzitz Eli'ezer*, VII, no. 3. sec. 24. This is evident from the categorization of the census conducted by Joab as a violation of the prohibition despite the fact that Joab excluded the tribes of Levi and Benjamin and hence his census involved only ten tribes. See Rashi and Radak, II Samuel 24:9 and Maharit, *Tzofnat Pa'aneach, Ki Tissa, derush* 1. *Tzitz Eli'ezer*, VII, no. 3, secs. 20 and 37, maintains that, for purposes of this prohibition, the counting of inhabitants of an entire city and, *a fortiori*, of an entire country constitutes the counting of an entire "community." *Nachal Eitan* 6:10, sec. 7. opines that the counting of any specific class of individuals, e.g., potential conscripts for military service, is similarly encompassed within the ambit of this prohibition.

The counting of the population of local areas and subsequent tabulation of the population of the entire community on the basis of those figures is forbidden according to all authorities. Indeed, as recorded by *Yalkut Shim'oni*, II Samuel 24, Joab conducted his census by means of compiling the aggregate tabulation of family groups.

Tzitz Eli'ezer, VII, no. 3, sec. 2, declares that, even in the event that figures for specific groups or areas have already been obtained, it is forbidden to tabulate the total population by combining the previously ascertained figures.

34. For a similar view with regard to written oaths and vows see *Teshuvot Chatam Sofer, Yoreh De'ah*, nos. 220 and 227 and *Choshen Mishpat*, no. 79. Cf., however, sources cited by *Tzitz Eli'ezer*, VII, no. 50.

taking. Thus, according to *Chatam Sofer*, it would be prohibited to count people by means of recording numbers just as it is forbidden to count them orally. Certainly, if no distinction is made between speaking and writing, it would be forbidden to record names and numbers in serial order in order to yield a total count. However, the counting of slips of paper bearing names,[35] or the counting of the names recorded on slips of paper, is not necessarily banned by *Chatam Sofer* (as reported by *Ketav Sofer*).[36]

Nevertheless,it need not be assumed that this distinction was overlooked by Rabbi Kanievsky in his brief comments. It should be noted that the census form contains a box in which the total number of family members is to be entered by the census-taker.[37] Thus there is a direct written declaration of the total number of members in the family unit.

In light of the foregoing, even assuming that, contrary to the positions of *Chatam Sofer*, there is no prohibition against a written tabulation, the census-taker would be required to exercise care in determining the number of members within the family unit solely by counting the names recorded on the form rather than by eliciting the information orally from the householder.[38] It is noteworthy that

---

35. *Tzitz Eli'ezer*, VII, no. 3, sec. 41, suggests that recording names on a list which has been prenumbered in the margin may also be permissible.
36. See *Nachal Eitan* 6:10, sec. 7.
37. *Mispar Bnei Yisra'el*, p. 38, states that on the census forms employed in 5743 people were asked to record names of all family members on unnumbered lines and the box in which the total number of all family members was to be entered was "abrogated." Such a box does, however, appear on the form reproduced by Rabbi Rudick, *Techumin*, IV, 333. Presumably, this box although present, was not used pursuant to the agreement reached with the Chief Rabbinate. See below, note 41 and accompanying text.
38. It should, however, be noted that *Pe'at ha-Shulchan* permits the counting of people when such counting is carried out other than in their presence. As evidence he cites the Mishnah, *Shabbat* 148b, which provides that a person may count his guests orally on the Sabbath. *Pe'at ha-Shulchan* explains that the prohibition against counting does not apply under such conditions because the counting is done in preparation for the meal prior to the arrival of the guests. *Chatam Sofer*, however, understands the Mishnah as permitting the counting of guests only in the sense of permitting the counting of portions prepared for each of the guests.

the present Chief Rabbis, in a letter addressed to the appropriate government official, confirm an agreement to the effect that the census-takers would not record these numbers.[39]

6. Rabbi Kanievsky also follows Ramban and *Tosafot Rid* in forbidding even indirect counting unless undertaken for a "purpose." From the context of his remarks it is evident that Rabbi Kanievsky does not view contemporary censuses as being undertaken for a valid pupose. Indeed, it may be that consideration which he regards as determinate. Whether or not a census serves a valid purpose is an issue which is essentially factual in nature and is contingent upon the exigencies of the situation.

In conjunction with the 5732 census, Rabbi Unterman ruled that the recording of names in answer to the questions posed on the census questionnarire is to be deemed "an indirect" form of counting. He further advised that persons who are not prepared to rely upon this permissive view should merely inform the census-taker of any change in the number of members of the household which may have occurred since the prior census without disclosing the total number of family members.[40]

Various modifications were introduced in conjunction with the 5743 census as a result of an agreement between the government and the Chief Rabbinate. The agreement provided that only names of family members would be recorded, that the accompanying numbers on the blank lines provided for this purpose would be eliminated and, as noted earlier, that the number of persons in the household would not be totaled by the census-takers. The agreement further provided that the tabulation of all demographic information be performed entirely by means of electronic devices and that the process in no way involve calculations performed by human beings.[41]

Danger as Distinct from Transgression

At least two authorities, *Klei Chemdah, Parshat Ki Tissa,* and *Nachal Eitan* 6:10, sec. 7, assert that the danger inherent in the

39. *Techumin,* IV, 336. It may be assumed that this tabulation was omitted because of the likelihood that the information would be elicited orally and in order to conform with the opinon of *Chatam Sofer* as recorded by *Ketav Sofer* and that it was further stipulated that all calculations be made electronically in order to conform with the opinion of *Chatam Sofer* as expressed in his *Kovetz Teshuvot.*

40. See *Techumin,* IV, 335. 41. See *Techumin,* IV, 336, and *Mispar Bnei Yisra'el,* p.38.

taking of a census is entirely independent of any prohibition concerning counting the populace.[42] Therefore, according to these authorities, even in situations in which (according to some opinions) no prohibition pertains, e.g. only a portion of the populace is counted or the census is taken by indirect means, the procedure nevertheless involves an inherent danger and should be eschewed for that reason. Other authorities maintain that, although it may be forbidden to count even a portion of the populace, danger is present only when a census of the entire people is taken.[43]

Of interest with regard to the question of danger is the opinion of an anonymous authority cited by *Midrash Talpiyot,* no. 20.[44] According to this view the danger of a plague is present only when the census is taken by a "king" for vainglorious motives. Some evidence for this view may be found in *Yalkut Shim'oni,* II Samuel 24. *Yalkut Shim'oni* records that Joab attempted to suppress accurate results of his census and did not wish to apprise King David of the total number counted.[45] Ostensibly, once the counting was completed, the harm had already been done and the delivery of an accurate report to the king would have involved no further transgression.[46] However, if it is the king's hubris which engenders danger, Joab's desire to prevent David from receiving this information is readily understandable since in suppressing the results he would succeed in averting danger to the populace.[47]

Mispar Bnei Yisra'el, p. 31, note 12, declares that any form of publicization or dissemination of the results of a census is forbidden since it is to be assumed that the "evil eye" is enhanced thereby. That consideration may well have been the reason that Joab sought to withhold accurate results of his census from David.

---

42. See also *Mispar Bnei Yisra'el,* p.20.
43. See *Mispar Bnei Yisra'el,* p.21.
44. See *Tzitz Eli'ezer,* VII, no. 3, sec. 11, and *Mispar Bnei Yisra'el,* p.21, note 4.
45. See also *Bamidbar Rabbah,* 2:10.
46. In complying with the directive of King David even though he recognized it to be at variance with Halacha, Joab was faithful to his own non-normative view, recorded in *Sanhedrin* 49a, to the effect that the prohibition against *lese majeste* applies even under such circumstances. Alternatively, he may also have felt that disobedience to the command of the king would imperil his own life.
47. Cf., however, *Tzitz Eli'ezer,* VII, no. 3, sec. 2, who states that, as reported by *Yalkut Shim'oni,* Joab transmitted the "smaller" number but not the "larger" because tabulation of a census of the larger populace by means of adding the sum of smaller groups is also forbidden. According to *Tzitz Eli'ezer,* Joab transmitted the figures for various groups counted, i.e., the "smaller" tabulations, but declined to combine the numbers in order to determine the aggregate or "larger" number. See above, note 33.

Chametz After Pesach

Rabbi Alfred S. Cohen

The halachic requirements regarding the Festival of Passover are many and complex. For centuries rabbinic scholars have expended great diligence and ingenuity in studying the Law and following its many stipulations to their practical conclusions. The fine points of Pesach regulations have occupied the greatest minds of Judaism; every observant Jewish household is witness to the major impact the laws of Passover have upon the Jewish lifestyle.

But one of these many laws was usually accepted as a fairly simple rule, almost in the nature of a postscript to the complex regulations concerning *chametz* and matzo.That rule states that any *chametz* which was in the possession of a Jew during Pesach may not be used after Pesach at all. In days gone by, there was not much trouble in observing this Law — in close-knit Jewish comunities where virtually everyone strictly observed all the minutiae of the Passover regulations, the identity of the few individuals who did not destroy or somehow get rid of their *chametz* was known to all, and everyone in town would scrupulously avoid buying foodstuffs from them or using any of their foods.

Today, however, not only the social dispersion of the Jewish community but also the highly sophisticated economic environment in which most of us operate have transformed this once simple and straightforward regulation into a practice of bewildering

---

Rabbi, Young Israel of Canarsie; Instructor of Talmud, Yeshiva University High School for Boys

complexity. In modern times many Jews are non-observant, and it is not always easy to gauge the extent of their commitment to Passover laws; furthermore, many businesses are not owned by individuals but are organized as corporations. What effect will that have on the observance of *chametz she'avar alav haPesach*, the laws concerning *chametz* owned by a Jew during Passover? Another bizarre complication is presented by the growing number of Jews who *do* sell their *chametz* before Pesach but nevertheless continue to keep their stores open during Pesach and sell (the ostensibly sold) *chametz* to their customers.

The halachot of *chametz she'avar alav haPesach*, *chametz* which was in the possession of a Jew during Pesach, warrant our re-examination: to what extent do conscientious Jews have to take measures to assure that they do not inadvertently transgress this stricture, and what, if any, modification do the complex modern economic structures entail?

Prior to addressing this complex issue, a brief outline of the sources would be most helpful.

Chametz she'avar alav haPesach is a concept which first appears in the Mishna[1],

> חמץ של נכרי שעבר עליו הפסח מותר בהנאה ושל ישראל אסור בהנאה.
>
> *Chametz* which belonged to a Gentile during Pesach, one may derive benefit from it; but *chametz* of a Jew (which remained in his possession over Pesach) is forbidden, for the Torah says no leavening may be in your possession.[2]

In the Gemara, this statement occasions a disagreement between Rabbi Yehudah and Rabbi Shimon. According to Rabbi Yehudah, the origin of the rule concerning *chametz* in the possession of a Jew during Pesach is biblical, and if one does eat this *chametz* after Pesach, he has violated a negative

---

1. משנה פסחים כח
2. Both Rambam פירוש המשניות and the *Rav miBartinoro* in their commentaries question the addition of the word הנאה since *chametz* of a non-Jew should be allowed even for אכילה. In this connection they discuss a text in the *Yerushalmi* פסחים פרק ב משנה ב'.

commandment;[3] however, there is no punishment of *karet* (which there would be if he ingested it on Pesach). But Rabbi Shimon opines that all *chametz* would be totally permissible after Pesach were it not for a rabbinic fiat to forbid it — this being in the form of a *k'nas*, a penalty forbidding the use of any *chametz* after Pesach which had remained in the Jew's domain. This was done, he says, to ensure that everyone would indeed destroy or remove all *chametz* before Pesach — by removing any opportunity to profit from the *chametz* after Pesach, the Rabbis hoped to remove the temptation not to destroy it before Pesach.

The Talmud does not offer a clear resolution to the dispute[4], but virtually all *Rishonim* appear to accept the view of Rabbi Shimon, that the Mishna was recording a rabbinic and not a biblical regulation[5].

In *Mishneh Torah*, Rambam teaches,

> *Chametz* of a Jew which remained in his possession during Pesach is forever forbidden from any benefit, and this matter is a fine instituted by the Scribes since the person transgressed the prohibition of 'it shall not be seen nor found in your domain'; (therefore) they forbade it. Even if he left it over by mistake or against his will, (they instituted the fine) so that no person will leave over *chametz* in his domain during Pesach in order to have it after Pesach.[6]

The *Shulchan Aruch*, too, cites the law in that way:[7]

> The *chametz* of a non-Jew is permitted after Pesach, even for eating; but that of a Jew, which remained in his

---

3. Since the Torah repeats the verse forbidding chametz three times, there must be a reason. The repetition teaches that it is forbidden even after Pesach.
4. חתם סופר או"ח קכ"ד. פסחים כט discusses why the *k'nas* is so severe and applies even to a person who did not violate the *issur*. See also חק יעקב תמ"ג ס"ק ט. In regard to the חמץ of a child see שו"ת הר צבי ס' מ"ה.
5. The Rif and Rosh concur, but the *Ba'al Halttur* is the only exception cited by *Tur* או"ח תמ"ח, who holds that eating *chametz* of a non-Jew after Pesach is also forbidden.
6. הלכות חמץ ומצה א־ד.
7. או"ח תמ"ח - א. The lenient ruling applies likewise to *chametz* not owned by anyone *(hefker)*, since no one thereby violated the *issur* of בל יראה.

possession over Pesach, even if he left it over by mistake or against his will, is forbidden[8].

The *"k'nas"* for *chametz she'avar alav haPesach* seems to be considerably more severe than other fines[9], but the Gemara teaches that the fine is levied only on *chametz* which is in its pristine state, not on that which is mixed with other substances[10]. Furthermore, the "mixture" in this case would only have to contain one part of *chametz* to six parts of other ingredients. The guideline is that there must be less than a *K'zayit* בכדי אכילת פרס.[11] As an example, let us consider ketchup, which contains vinegar. Assuming that the vinegar in the product is of grain derivative and therefore *chametz*, the ketchup would nonetheless be permitted for consumption after Pesach if the vinegar constitutes less than one-sixth of the product.[12]

---

8. רדב"ז חלק ג תקפ"ט עיין שם ס' ג. The law forever forbids using *chametz* which was in the possession of a Jew during Pesach, even if it belonged to him only for a minute, or even if he had it only on the eighth day, which day is not biblically ordained but is rather a rabbinic addition. The commentaries to *Pesachim 30a* note that when Ravva told the people that they could purchase *chametz* after seven days of Pesach, he meant the people in Eretz Yisrael, where there are only seven days of the Festival, and that in addressing people outside the Land, his intention was that they could buy *chametz* after the eighth day.

   חתם סופר או"ח קי"ד discusses the question of *chametz* which was owned by a Jew on *Erev* Pesach, but after noon (when it is already forbidden). See also the *Noda Biyehudah*, ס' ס"ג who writes that the *k'nas* was instituted only for that *chametz* which was in a Jew's domain at the conclusion of Pesach. Even if the Jew sold his *chametz* to the Gentile during the holiday, it would be permitted for eating; also, if the Jew were to die during the holiday, and the *chametz* no longer belonged to a Jew, it would similarly be permitted.
9. In most cases of *k'nas*, the item is forbidden to the sinner only, not to others (מו"ק יג), but in this case it is forbidden to all forever.
10. פסחים ל.
11. כף החיים תמ"ב אות ג. וראה משנה ברורה תמ"ב אות א שבסוף החמיר.
12. מגן אברהם תמ"ז ס"ק מב writes that one may dilute the *chametz* prior to Pesach so that it may be used after Pesach, and this is not considered מבטלין איסור לכתחילה. In משנה ברורה תנ"ג אות כ the *Chafetz Chaim* also considers such a case and concludes that in case of great need one may rely on the lenient opinion and the *chametz* may be utilized. ערוך השולחן תמ"ז אות מ"ב rules that the amount needed to make *chametz* be considered null after Pesach is רוב, provided it was diluted after Pesach. See also מקראי קודש חלק ב ס' ע"ה.

A vexing question in connection with *chametz she'avar alav haPesach* is the not uncommon phenomenon of a storeowner's selling his *chametz* prior to the holiday but nevertheless continuing to sell his wares during Passover[13]. This happens when the storeowner is not personally an observant Jew and keeps his store open during Yom Tov itself. Are we to take this as an indication that there was no bona fide sale, and that it was never the intention of the Jew to actually sell his *chametz* before Pesach? Or should one argue that actually the sale is totally valid, but the storeowner, in selling *chametz* to his customers during Pesach, is stealing those goods from the Gentile to whom he has previously sold them?

Rabbi Moshe Feinstein has dealt with this issue a number of times[14] and concluded that even the storeowner's "selling" of his wares during the holiday does not invalidate the sale of that *chametz* prior to Pesach; however, in addressing the same question at a later date, he does add a number of precautions[15]. Rabbi Feinstein urges the Rabbi in charge of the sale transaction before Pesach to instruct the storeowners that it is forbidden for them to deal in these products during the Festival and also that they may not purchase any new *chametz* during the Passover holiday. Furthermore, he rules that the Rabbi should not issue a letter advising the public that the owner sold his *chametz* and that it is permissible to buy there subsequent to Passover, since the owner might buy *chametz during* Pesach, and that is surely not covered by any sale executed before the holiday.

---

13. It is a fact that most organizations granting kashruth supervision or Rabbis executing the sale of *chametz* for stores do permit the stores to continue to operate during Passover. However, the ⓤ is currently working on changing its policy and in the future will not allow establishments under its supervision to remain open on Pesach to sell *chametz*.

    It is also problematical if it is permissible to sell one's *chametz* to a non-Jew before Pesach (to be bought back after Pesach) if the item is truly total *chametz*. *Maase Rav* reports that the Vilna Gaon was opposed to such a sale; Rabbi J.B. Soloveichek has been reported as often urging that this practice be abandoned. Despite this, most people do continue to dispose of their *chametz* before Pesach in this fashion. The ⓤ and the Lubavitch Kashrut Supervision also allow true *chametz* to be sold by establishments under their supervision.

14. אגרות משה או"ח קמ"ט

15. אגרות משה או"ח חלק שני סי' צ"א

Apparently Rabbi Feinstein was not entirely satisfied with his earlier responsa, because he continues in a later responsum to probe the significance of the seller's intentions at the time of the original sale of the *chametz*[16]. In his latest *tshuva* on the subject to date, Rabbi Feinstein also considers the situation in which one is unsure after Pesach just which *chametz* was sold by the storekeeper to the non-Jew prior to Pesach and which of his merchandise might have been acquired in the course of Passover week[17]. If the consumer cannot determine when the entire stock of questionable *chametz* has been replenished — at what point may he resume shopping there, based on the principle ספק רבנן לקולא that one may be lenient in a case of doubt concerning a rabbinic regulation? He concludes that if a supermarket sold its *chametz* before Pesach but nevertheless continued to stay open during Pesach, sell *chametz*, and purchase new *chametz*, one should not buy there without being reasonably certain that at least half the *chametz* presently in the store was covered by the sale before Pesach. Otherwise, one should not buy there until all the *chametz* which was purchased during Pesach has been depleted. (This rule of thumb applies only to a large establishment where the workers have no vested interest in the sales volume; however, if the store is a small grocery owned and operated by a few individuals, they cannot be relied upon not to deceive the customers about the nature of their *chametz*, and one should not shop there until all the *chametz* which was in the store at any time during Pesach has been totally replenished.)

The volume of correspondence printed in the responsa of Rabbi Feinstein and the frequency with which he returns to the subject are indicative of the resistance which his point of view has met in rabbinic circles. Many rabbinic authorities hold that the subsequent selling of products during Pesach is a clear indication that the sale of *chametz* before Pesach was fraudulent and that the owner never in his own mind believed that he was transferring his property through the sale he engineered with the Rabbi. Therefore,

---

16. אגרות משה או״ח חלק שלישי צ״ה
17. אגרות משה

they contend that one should not patronize such establishments after Passover at all, until such time as one can be quite sure that none of the old stock remains.[18]

The *din* of *chametz she'avar alav haPesach* when that *chametz* is owned by a corporation presents a somewhat thorny problem. *Chametz* is liable to the rabbinic penalty if (a) it belonged to a Jew during Pesach or (b) if a Jew was responsible for it then (*achrayut*). Let us first address the latter requirement.

It is evident from a passage in *Pesachim* 5b that even if one does not own *chametz* on Pesach but had *achrayut* for it, that *chametz* is forbidden. In that context, the Gemara teaches,

> Rava said to the people of Mehoza, "Get rid of the *chametz* in your houses which belongs to the soldiers [who apparently required the Jews to keep grain for the soldiers in their houses] because [even if it is not your property] if it were stolen you would be required to pay for it; therefore it is as if it were yours and is forbidden."

This Talmudic passage indicates that even *chametz* which one does not own but for which he is responsible is subject to the penalty of *chametz she'avar alav haPesach*. How is this principle translated into the modern phenomenon of a corporation? It would seem that, by definition, owners of shares in a corporation have "limited liability", meaning that they do not have any personal responsibility for the *chametz* which the corporation might own.

However, while it is true that none of the shareholders in a corporation may be liable for the *chametz*, yet that fact alone would not necessarily render it permissible, for there is still the factor of ownership to be considered. To whom do the assets of the corporation belong? Does each stockholder own a little bit of the

---

18. See also מהר"ם שי"ק ס' ר"ה - מגן אברהם תמ"ז
דברי מלכיאל חלק ד ס' כ"ד אות י.
For a discussion regarding the question of whiskey owned by a Jew on פסח see
אבני נזר תקמ"ב אות ט"ו
משכנות יעקב יו"ד ל"ד
משנה ברורה תמ"ב סק"ד
שדה חמד כרך ז' ח

chametz, or does the "corporation", a discrete entity, own it?[19]

After consultation with a lawyer, I was informed that actually the concept of a corporation in American jurispudence would be difficult if not impossible to translate into precise halachic terminology. The closest conceptual analogy might be the *"kehillah"* (congregation). In Jewish law, the question arises as to ownership of an object which the *kehillah* possesses. It is evident from an inspection of the discussion in the Talmud and law codes[20] regarding a *lulav* and *ethrog* purchase by a *kehillah*, or a *Sefer Torah* owned by a *kehillah*, that each member of the congregation is considered as having ownership of a part of that community-owned object. Thus, the assets of a corporation could be considered, under Jewish law, as belonging in part to each person who owns stock in that corporation. Under the circumstances, the *chametz* owned by a corporation whose stockholders are (mainly) Jewish could be in the category of *chametz she'avar alav haPesach.*

This question has not yet received a definitive answer by leading rabbinic authorities. The Kovner Rov did not accept the legal definition mentioned above. One may summarize his reasoning as follows: halacha accepts the principle that *"dina de'malchuta dina"*, the law of the land is law (for monetary matters). Since the law of the secular state decrees that a corporation is indeed a distinct entity, that legal fiction is valid even as far as halacha is concerned. He would say that Jewish

---

19. Some people would like to draw a parallel from the laws of *ribit* to the laws of *chametz she'avar alav haPesach.* R. Moshe Feinstein has written that it is permissible for Jews to own shares in a bank corporation which receives *ribit* because none of the shareholders has any liability *(achrayut)* in the corporation. However, the analogy is not entirely successful, for there are some pertinent differences between the two situations. The above citation by Rava indicates that even if a person does *not own* the *chametz* but is responsible for it, it is still his responsibility to remove all that *chametz* from his property before Pesach. And if the chametz *belongs* to him, even if he is not liable for any damage from that *chametz*, surely he must remove that *chametz* too!

We should note however, that for the Kovner Rav there was another element of difference which he considered to be highly relevant. See further in the text.

20. בבא בתרא מג, הלכות לולב תרנ"ח ס"ט

stockholders do not own the *chametz* of the corporation because the corporation itself owns its assets. If the law of the land views the business as a corporate "body", then Jewish law should accept that definition. And furthermore, since there is also no liability on the part of the shareholders, we can say that the *chametz* of a corporation does not fall within the purview of *chametz she'avar alav haPesach*.

However, Rav Brown in *Shearim Behalacha* cites the *Zechar Yitzchok* as rejecting this view.[22] Albeit there is "limited liability" for the shareholders, nevertheless they *are shareholders*, which means that a share of the corporation belongs to each one; i.e. a share of the *chametz* too. Therefore he would not permit such *chametz* to be used by Jews after Pesach.

Most corporations are not wholly owned by Jews. How does "mixed" ownership affect the halachic status of corporation-owned *chametz*? Earlier Rabbis have addressed the question of *chametz* which was jointly owned by a Jew and non-Jew during Pesach; in such a partnership, the *chametz* of the Gentile is permitted but that which belonged to the Jew is forbidden. The Rabbis discuss how to determine which is which. *Sha'agat Ařyeh*[23] establishes the following principle:

There is a concept in rabbinic law called *breira*, which means that an action can retroactively affect the status of an object. For example, if a Jew and a Gentile jointly owned *chametz* during Pesach and later decided to divide their stock, the principle of *breira* establishes that the *chametz* which is taken by the Gentile as his share after Pesach was really his all during Pesach and that the part subsequently claimed by the Jew was retroactively his all along. Since the point in question is a rabbinic and not a biblical issue, *Sha'agat Ařyeh* rules that, based on *breira*, one may use the *chametz* which was jointly owned by both and then taken by the Gentile as his — but the part claimed by the Jew is considered as having been in his domain all along is and therefore forbidden as

---

22. או"ח שם.
23. שו"ת שאגת אריה פט-צא

chametz she'avar alav haPesach.[24]

Sefer Brit Yehudah wants to expand this application of *breira* even to a case where the owners do not eventually split up their stock. He would say that whenever Jews and Gentiles together owned *chametz* during Pesach, the buyer can ascribe the *chametz* which he buys to the portion which the Gentile owned on *Pesach.*[25]

How does the principle of *breira* apply with respect to a corporation? And how can the principle of *breira* be employed in cases where the "partners" do not divide their stock but remain joint owners? *Sefer Brit Yehudah*[26] enters into a long discussion of this question and notes that the first person to grapple with this modern issue was Rabbi Shlomo Ganzfried, the author of *Kitzur Shulchan Aŕuch.* Rabbi Ganzfried wrote that it is forbidden by Jewish law for a Jew to borrow money to be repaid at interest from a bank (a corporation) which has Jewish as well as non-Jewish shareholders[27] *Sefer Brit Yehudah* further notes that the author of *Shoel Umayshiv* took strong exception to this ruling and importuned Rabbi Ganzfried to omit this section in later reprintings of his *Kitzur Shulchan Aŕuch. Shoel Umayshiv* held that there was no violation involved in paying or receiving interest from a corporate bank; similarly, he found no *issur* in buying *chametz* from a corporation which held it during Pesach.

However, *Sefer Brit Yehudah* proceeds to cite many authorities who did not agree with *Shoel Umayshiv*[28]. He goes so far as to maintain that even those Rabbis who did render lenient opinions

---

24. See also ערוך השלחן תמ"ח אות ב
25. ספר ברית יהודה פרק ל-מג - מלמד להועיל חלק ב נט-ס
26. פרק ל אות מג
27. עיין שואל ומשיב שהביא מקש"ע חלק ג קמ"א ס' ל"א
28. מנחת פתים יו"ד ס' ק"ס also discusses the possible differences in halacha if the clerk is a Jew. In footnote 47 of ספר ברית יהודה the author directs the reader to chapter 2, which examines the question of a Jewish part-owner of a bank accepting a share of the profits made on a loan extended to a Jew. One should note that banks owned by Jews commonly employ the *heter iska* to avoid the manifold problems arising out of this situation. See "Ribit: A Halachic Anthology" by Joseph Stern in *Journal of Halacha and Contemporary Society*. No. IV, for a fuller explication of the *heter iska*. Of course, the *heter iska* has no bearing whatsoever on the question of *chametz she'avar alav haPesach*.

about *chametz* did so only in an attempt to find retroactive justification for the Jews involved, but never to sanction such an act a priori.

In his discussion of the laws of *chametz*, Rabbi Shlomo Kluger[29] also rules that shareholders of a corporation do not need to be concerned about corporate ownership of *chametz* during Pesach. As he sees it, the individual shareholder has no actual control over the daily workings of the business; his stock "entitles him only to gain or to lose money but gives him no right to instruct or to give opinions about the operations of the business..." Inasmuch as this is so, he considers the obligation to get rid of all *chametz* prior to Pesach as not applicable to a corporation.

The commonly accepted practice today is to regard a supermarket corporation in the same way as one would consider a privately-owned store. If the corporation is primarily owned by Jewish stockholders, all the strictures which apply to any Jewish establishment would apply to the corporation. However, if more than half the shareholders are non-Jewish, one may conclude that the *chametz* was owned on Pesach by a non-Jew and is permitted. However, some authorities consider the pertinent factor in a corporate situation to be who is the ultimate policy-maker. If, despite multiple owners, the corporation is basically run by a Jewish manager, then we must regard the store as being a Jewish establishment.[30]

An interesting footnote to our inquiry is the practical observation that, regardless of the considerable doubt as to any actual halachic *issur* in using *chametz she'avar alav haPesach* due to the complexities of modern economics, most observant Jews nevertheless adopt a strict posture with respect to this question. Despite any *heterim* which might apply to corporate supermarkets

---

29. האלף לך שלמה רל״ח

30. אגרות משה או״ח חלק ד צ״ו
For a discussion on the question of bankruptcy of a corporation and how it affects te officers of the corporation, see משנה הלכות חלק ו רע״ז.

and the like, they customarily avoid buying in Jewish controlled supermarkets for weeks, if not months, after Passover.

* * *

A halachic topic which is not actually part of the question of *chametz* may nevertheless render much of our discussion of *chametz she'avar alav haPesach* moot in practical usage. Many only nominally observant Jews, and even some who are not otherwise observant of mitzvot, are nevertheless careful to sell their *chametz* to a Gentile before Pesach. It may be that an individual who so blatantly disregards the halacha that he does not even bother to sell his *chametz* or otherwise dispose of it has passed beyond the definition of "Jew" for the purposes of the Jewish law. The legal status of a non-observant Jew — whether he is to be considered as a Jew or as a Gentile for the purposes of legal categorization — is a self-contained topic which is ancillary to the laws of Pesach. The resolution of this question has important repercussions in many areas of Jewish law.[31] (It is interesting to note parenthetically that although the reason for the Jew's lack of observance is often an important factor in determining his status, none of the rabbinic authorities who discuss this question in connection with Pesach touch on this aspect of it at all[32]. Usually, it does make a difference if the Jew who disregards the law is acting deliberately or out of ignorance, like a "babe who was kidnapped by Gentiles.")

31. Some of the areas in which this question is important include the following: his participation in an *eruv* — או״ח שפ״ה
can a Jew ask him to work for him on Shabbat, או״ח תקכ״ו
what is the status of an animal which he slaughtered, יו״ד ס״ב
bread and cheese prepared by him, יו״ד קט״ו וקכ״ד
can a Jew borrow or lend money at interest from him יו״ד קנ״ט
can he contract a valid marriage, is a Sefer Torah written by him permitted and other matters, תרומת הדשן רכ״ד.

32. טור אבן העזר פרק מד
אבן העזר 157:4
סנהדרין מד ישראל אף על פי שחטא ישראל
ערוך השלחן אבן העזר מד
חזון איש או״ח ל״ט־כ״ד, אבן העזר קי״ח ו
אגרות משה או״ח כ״ג - אבן העזר ב כ
בנין ציון כ״ג

In connection with *chametz* during Pesach, the authorities disagree whether a Jew who did not dispose of his *chametz* should be considered equivalent to a Gentile, based on the principle מומר לחלל שבת הוי כעבו"ם "one who deliberately violates the Sabbath is like an idol-worshipper", or whether we should follow the dictum that "a Jew, even if he sins, is yet a Jew."

Another factor to be considered is that the stricture against using *chametz* kept by a Jew during Passover is after all a rabbinic *k'nas*, a fine instituted in the hope that by removing any opportunity for profit from the illicit *chametz*, we have removed the temptation not to sell it. But what value is such a *k'nas* in the case of a non-observant Jew who is probably not even aware of it? He has no difficulty selling his *chametz* after Pesach to non-Jews and the only ones being inconvenienced are the observant Jews! Why then should the *k'nas* continue to be imposed?

In one of his responsa, *Shoel Umayshiv* records the case of a Jew who had sold his *chametz* to an individual whom he believed to be non-Jewish. During *chol hamoed*, however, he was informed by the man's wife that her spouse had been born Jewish but had converted. *Shoel Umayshiv* ruled that there is no problem with the *chametz*, and it may be used just as if it had been sold to any other Gentile.[33]

But former Sephardic Chief Rabbi of Israel, Ovadia Yosef, writes[34]

> ...and in general from their words we learn that it is forbidden to buy after Pesach from a non-observant Jew who does not keep Torah and mitzvot.

After elaborating on his conclusion, Rabbi Yosef confronts the text in *Chulin*[35] which apparently contradicts his thesis:

> *Chametz* of sinners is permitted immediately after Pesach because they exchange it...

---

33. שואל ומשיב כרך ג חלק שני ס' ס
See also שו"ת הר צבי סמ"ו
34. יחוה דעת חלק ג ס' כח. See also ערוך השולחן תמח־א,
35. חולין ד יד. See רש"י ד"ה מותר and משנה ברורה אות ה.

Although the implication seems to be that *chametz* retained by a non-observant Jew during Pesach may be used, Rabbi Yosef counters that the Gemara is considering the case of an individual who has sinned, but after discovering his error wishes to avoid further transgression and therefore exchanges his own *chametz* for some other. This follows the reasoning that לא שביק היתרא ואכיל איסורא a person will not ordinarily ignore the permitted and deliberately eat a forbidden food. However, Rafflbi Yosef maintains that in our time, any Jew can readily sell his *chametz,* and if he delifflerately chooses not to do so, he cannot be considered as within the category of one who avoids—sin if he can. We cannot therefore ascriffle to him the wish to avoid compounding his sin, nor can we assume that he will have exchanged his forbidden, unsold *chametz* for some other[36].

In באר היטב תמ"ח י"א there is further definition of the general dictum that a person prefers the permitted and avoids the forbidden. He writes that the rule only applies to a person who sins בתיאבון, due to temptation which he is unable to resist. We may indeed assume that under ordinary circumstances when it is just as easy for him, he will prefer the permitted and avoid the forbidden. However, if one sins להכעיס deliberately, he is not entitled to this presumption of good will. However, באר היטב cites rabbinic authorities who feel that in a case of great need, it might be permissible to utilize the money realized from sale of the *chametz* owned by the deliberate sinner to a non-Jew, or else to exchange it for *chametz* of a non-Jew. This ruling is cited by the *Mishnah Brurah.*[37]

Our brief perusal of this topic serves to indicate the surprisingly complex nature of *hilchot chametz she'avar alav haPesach.* Many of these questions still await final halachic resolution.

---

36. Rabbi Yosef adds that even if the storeowner claims to have sold his *chametz* he is not to be believed without a signed certificate from the Rabbi attesting to the sale.

37. או"ח תמ"ח

Providing and Accepting Medical and Psychiatric Treatment

Dr. Sylvan Schaffer

As medical technology has advanced there has been an increased interest in the ethical applications of its use. Among the issues which are the subjects of bioethical consideration are the responsibilities of those who can provide treatment, making treatment available to those who require it, and the patient's role in consenting to or refusing the proffered treatment. These issues have also been addressed by Jewish Law — halacha.

This discussion will address the responsibility of physicians, layman, and the community to provide treatment to those who need it; the role of the patient in consenting to, or refusing treatment, and a comparison of physical and psychiatric illnesses in Jewish law. Psychiatric illnesses will be treated as a separate issue since it is important to determine if such problems which may be non-physical are treated in the same manner as other (physical) illnesses. Also, by their very nature, psychiatric problems raise the issue of the patient's ability and capacity to voluntarily consent to treatment.

Obligation to Provide Treatment

Even before dealing with the the physician's responsibility to provide treatment, the halacha deals with the question of whether a

---

Attorney and Family Therapist;
Faculty, Yeshiva University and Queens College

physician has the right to treat a patient. This question is based on the premise that G-d controls the destiny of each individual person *(hashgacha pratit* — divine providence).

Several sources have been cited which grant the physician the right to treat and which may in fact incur a positive obligation on the physician (and others) to provide medical treatment. One source "רפא ירפא", "and heal he shall heal"[1] is cited by the Talmud[2] as granting the physician the right to practice.

A second source in conjunction with the other is "והשיבות", "and you shall return it to your brother"[3].

Ramban[4] refers to "and you shall love thy neighbor as thyself"[5] as the source of the physician's obligation.

Finally, yet another verse is cited "לא תעמוד על דם רעך", "Neither shalt thou stand idly by the blood of thy brother"[6] which refers to both financial and physical losses and injury.*

Generally, when one speaks of the obligation to provide for the care of the sick, one immediately thinks of the physician, However, there is no specific reference which limits to physicians the duty to provide care. While it is true that most medical treatment is provided by physicians, care is also provided by an assortment of other professionals, i.e. nurses, dentists, psychologists, podiatrists, etc. However, the duty to treat is not limited even to this array of health care professionals. The duty to care for the sick falls on every individual who is in a position to aid the patient and it is also a responsibility of the community.[7]

*For a full discussion of the sources of the right to provide medical treatment see Rabbi Norman Lamm's article in this issue of the Journal of Halacha and Contemporary Society.

---

1. Exodus 21:19.
2. *Baba Kama* 85a.
3. Deut. 22:2.
4. *Torat Ha-adam* in "Kitvai Haramban" ed. B. Chavel II, 43.
5. Leviticus 19:18.
6. Leviticus 19:16.
7. שו"ת הרא"ש כלל פ"ה ס"ב 15:40 ציץ אליעזר.
   Rabbi Waldenberg, citing Rambam, holds that the responsibility to provide

Obligation to Accept Medical Treatment

The above discussion deals with the obligation of various parties to provide treatment to those who need it. However, there is a second aspect to the treatment issue: the patient's receptivity to the proferred medical assistance. In this matter, halacha may differ significantly from American civil law.

Briefly stated, under the common law which deals with the

---

medical care falls on everyone who can help the patient. He says that this responsibility entails not only providing the actual medical care, but also the financial aid necessary to obtain such care. This obligation is derived from "and you shall return it (his health) to him" In fact, the obligation to provide such indirect medical and financial assistance is so strong, that there is some debate as to whether or not the patient has to repay the money that others have provided for his treatment (without his having asked them to do so) since their actions were not so much as his agents but rather as a result of their independent duty to provide such help.

It is important to note that in obligating a physician (and others) to provide medical treatment, Jewish law differs form American civil law which does not obligate a physician to provide treatment. In fact, there are circumstances under which a physician would be prohibited from rendering such service (see below).

This halachic duty to provide medical assistance exists on a community and governmental level as well. It is the responsibilty of the govermnent to allocate funds for medical care. This governmental responsibility involves not only the treatment of already existing illness, but involves the dedication of funds for prevention. In addition, the Jewish community, in the person of its Rabbis and leaders, has the obligation to require the funding of a competent physician to look after the needs of the poor.

This responsibility may take the form of building hospitals and geriatric care centers. According to the *Chafetz Chaim* (אהבת חסד פרק י״ז) the building of nursing homes for the aged is not only a matter of charity, but also involves the responsibility to provide medical care and save lives, since neglect of the elderly could shorten their life expectancies.

Rabbi Waldenberg, (חלק ט״ו ס׳ ל״ח) in emphasizing the need for individual and community support for the building and maintaining of Jewish hospitals, says that he who donates money for such a cause has a part in the saving of thousands of lives. He therefore cites with approval the halachic statement of Rabbi Chaim Berlin that one may even take out time from the learning of Torah to participate in building a hospital since such actions are equated with saving lives.

Thus it seems that the providing of health care for those in need is not only permitted by Jewish law, it takes on the status of a vital individual and community obligation.

torts of assault and battery and their derivative, the doctrine of informed consent, competent patients could not be compelled to accept medical treatment without their consent. This approach is based on the long-held common law belief in an individual's right to be free from unwanted intentional interference with his person. This doctrine has been enunciated by an Appellate Court:

> The free citizen's first and greatest right, which underlies all others — the right to the inviolability of his person ... is subject to universal acquiescence, and this right necessarily forbids a physician or surgeon ... to violate without permission the bodily integrity of his patient...[8]

One exception to this rule is medical emergency in which actual consent by the patient is not necessary since the consent is implied on the assumption that the patient would have consented had he been able to. Therefore, if a patient is competent he or she may refuse the treatment offered by a physician, even when the illness is potentially life threatening.

Under Jewish law, however, the patient has a duty to accept, and even seek out, medical treatment, Thus, the halacha would recognize the need for involuntary medical treatment[9]. This approach is also derived form the verse "and you shall return it to him". The obligation of the patient to seek and accept medical care is mentioned by Rambam[10] who says that physical health is vital to one's spiritual well being. Therefore, he says that one must seek to prevent the occurrence of illness, and if one is sick, to seek a remedy for the disease. The patient's obligation to accept treatment, and the physician's right to provide involuntary treatment has been recognized when the patient's life is endangered[11] since the prohibition "neither shalt thou stand idly by the blood of your neighbor"[12] applies both to the patient and those who are in a position to help him.

---

8. *Pratt v. Davis* 118 I11. App. 161 (1905) See also Compulsory Medical Treatment: the State's Interest Re-evaluated. 51. Minn. Law Review 293 (1966).
9. ציץ אליעזר ט״ו: סימן מ׳
10. רמב״ם הלכות דעות פ״ד הלכה א׳
11. מור וקציעה אורח חיים סימן שכ״ח
12. ויקרא י״ט:ט״ז

The obligation to accept treatment has been extended to illnesses which are not life threatening[13].

It is vital to note the crucial and, at times, primary role that medical treatment plays in Jewish law. The talmud says that "one can use any manner to treat illness except for the three cardinal sins (murder, idolatry and incest)"[14]. Under this formulation one could violate even prohibitions which would othewise be capital offenses, such as eating on Yom Kippur and violating the Sabbath, in order to save a life.

In general, halacha follows the principle ספק דאורייתא לחומרא, which means that when one has some doubt about the applicability of a biblical law one should take a strict approach and observe the law. However, when there is even a remote possibility that an action which would otherwise be in violation of biblical law, could save a life, then the halacha allows and even requires such a violation.[15] This ruling would be true even if the life thus saved would only be extended for a very short period.[16]

This concept of the supremacy of human life is based on several sources which may also explain the attitude of halacha toward involuntary treatment. One source cited by the Talmud in discussing why the Sabbath may be violated, says that "it is better to violate one Sabbath so that others may latter be observed"[17]. In commenting on this approach, Rabbi Bleich[18] states, "Implicit in this formulation is the notion that the observance of divine law must be maximized."

Another biblical source cited for this principle is "You shall therefore keep my statutes and my ordinances which if a man shall do, he shall live by them..."[19]

Therefore, according to Jewish law, when there is a need for

---

13. מעשה אברהם יו"ד סימן נ"ה; ציץ אליעזר חלק ט"ו סימן מ'
14. פסחים כ"ה
15. *Orach Chaim* 329:3.
16. *Orach Chaim* 329:4.
17. *Yoma* 85b.
18. Bleich VO: 1 p. 130.
19. Leviticus 18:5.

medical treatment, the physician is obligated to provide such care, and the patient obligated to accept it. This statement seems rather obvious, yet if we probe deeper, we will find that the advances of medical treatment in our day have opened up a Pandora's box of ethical, moral, and religious questions dealing with the *quality* of life as well as with its length. New situations challenge the bland acceptance of certain halachic dicta and raise questions as to which halachic principles apply in a given situation.

Despite the high value placed on human life in Jewish tradition, there are situations in which the patient may express a desire to forego treatment — for example, when there is extreme pain and suffering and the likelihood of a cure is remote. An elderly patient who has been diagnosed as having terminal cancer may not want to add to the suffering by undergoing treatments such as surgery or chemotherapy which themselves may be painful and which may prolong his suffering without offering the prospect of a cure. Is such a patient obligated to accept the medical treatment? Is the refusal of such treatment the equivalent of suicide and therefore forbidden?

Although we may think of it as a modern problem, the issue has long been addressed by halacha. There are a number of cases cited in both the Bible and Talmud in which people have chosen not to prolong their suffering or have actually chosen to end their lives. Despite the prohibition against suicide, the halacha seems to have sympathy for the suffering which motivated these choices.

Perhaps the most famous incident involves King Saul, who fell upon his own sword[20]. Our rabbis sought some justification for this willful act of self-destruction, which on its face is forbidden. Some commentators such as the Radak and the Ralbag suggest that Saul committed suicide in order to avoid falling into the hands of the enemy who would either torture or embarrass him, causing a *chilul Hashem*.

Another example of hastening imminent death is mentioned in the Talmud[21] in the death of Rabbi Hanina ben Teradyon (one of

---

20. שמואל א׳ ל״א
21. עבודה זרה י״ח

the "Ten Martyrs"). The Romans were executing Rabbi Hanina by burning him with a Torah wrapped around him, and put wet rags near his heart in order to prolong his suffering. As they watched his torture, his students called out to him to open his mouth in order to allow the flames to enter and end his suffering. But Rabbi Hanina refused, saying that to do so would be forbidden. However, when his Roman executioner offered to hasten Rabbi Hanina's death if the Rabbi could guarantee that he would receive a share in the world to come, Rabbi Hanina agreed, and the executioner quickly removed the wet rags and let him die. Thereupon a heavenly voice declared that the executioner would indeed merit *Olam Habo*.

If it is forbidden to hasten one's death, why did Rabbi Hanina permit the Roman to do it? It would seem that Rabbi Hanina distinguished between his own active participation in the hastening of his death and a hastening which was the result of the actions of another person. In addition, the reward granted to the executioner seems to reflect the view that he too did not sin.

The Talmud also recounts an incident involving the imminent death of Rebbe (Rabbi Judah the Prince), who was dying from a dreadful malady. In order to prevent his death, his rabbinic disciples prayed fervently for his survival. However, Rebbe's maid saw how much he was suffering, and she therefore prayed that he would die so that his sufferng would be relieved.[22] Her prayers were answered.

Yet another incident is described in the Talmud in which death was the chosen alternative to suffering and degradation. Four hundred boys and girls were abducted by the Romans for immoral purposes. When they realized why they had been taken, they chose instead to drown themselves.[23] In relating their tragedy, the Talmud appears to approve their action.

The responsa analyze these incidents in order to formulate a positon concerning the conflict faced by those who must choose either suffering or death.

---

22. כתובות ק"ד

23. גיטין נ"ז: see however תו"ס ע"ז יח: ד"ה ועל

The case of Saul is mentioned by most of the sources. His example is cited for those who are faced with a situation in which they face torture if they do not commit suicide.[24] Such cases arose, for example, when Jews were tortured in order to force their conversion. Rabbi Azulai cites sources which are sympathetic with those who choose death over torture, but emphasizes that they may choose death not because it will relieve suffering, but rather for fear that through their suffering they may give up their faith. He justifies Saul's suicide because of the possibility that if he had been captured and tortured, the Jews would not have been able to stand by idly and would therefore have gone to war, and many thousands would die. Therefore, Saul chose to kill himself and thus save many other lives.[25]

Another responsum questions the advisability of choosing death, which is irreversible. One who is forced to convert may yet have the opportunity to return to his faith at a later point;[26] not so one who perishes.

Saul's choice is also explained in another way. Saul knew that he would certainly die that day since Samuel had already told him so. Therefore, in choosing to kill himself rather than be captured, he was simply hastening the inevitable. Such a choice might not be appropriate in a situation in which death was not already certain.[27]

In terms of the right to refuse medical treatment, perhaps the most relevant point raised by the responsa relates to the role that the person has in his own demise. The sources draw a distinciton between somone who dies at the hand of another and one who kills himself, distinguishing between active and passive hastening of death. One commentary justifies the prayer of Rebbe's maid since she did not actually do an *act* that hastened his death, she only prayed that he die.[28]

---

24. שאלות ותשובות חיים שאל (חיד"א), סימן מ"ו
25. ים של שלמה ב"ק פ"ח
26. Ibid.
27. שאלות ותשובות חיים שאל סימן מ"ו
28. תפארת ישראל יומא פ"ח משנה ח'

Similarly, Rabbi Hanina would not open his own mouth in order to hasten his death, but he allowed the executioner to hasten it.

There are other sources which support this distinction between active and passive causation of death. One is obligated to refuse to convert and must suffer death as a result, since one is not killing himself but rather is being executed by another.[29] But the halacha does not state that a person should kill himself in order to escape the threat.

Similarly, one is not allowed actively to hasten the death of a *goses*, (a person on his deathbed), yet one is permitted to remove any impediments which would prevent the *goses* from having a smooth peaceful death.[30]

One contemporary writer on Jewish medical ethics has clearly stated this distinction:

> It is clear then, that, even when the patient is already known to be on his deathbed and close to his end, any form of *active euthanasia* [emphasis included] is strictly prohibited. In fact it is condemned as plain murder... At the same time Jewish law sanctions, and perhaps even demands, the withdrawal of any factor ... which may artificially delay his demise...[31]

There are other problems raised by the advances of modern medicine.

In a responsum[32] dealing with the matter of heart transplants, Rabbi Moshe Feinstein opines that it is forbidden to do anything to prolong the life of the *donor*, for it is prolonging his pain, which is forbidden. Rav Feinstein differentiates between an act done in order to improve the health of the patient and one done merely to keep him alive, the latter being forbidden if it will cause him to suffer, which he says it surely will.

In this responsum, Rav Feinstein writes

---

29. ים של שלמה ב"ק פ"ח citing the ראי"ש פ' אין מעמידים
30. טור יו"ד של"ט
31. I. Jakobovits, *Jewish Medical Ethics*, Bloch Publishing Co., 1975, p. 123-4.
32. אגרות משה יו"ד ח"ב קע"ד סעיף ג'

אבל ודאי דאסור לעשות אמצעים להאריך חיי שעה באופן שיהיה ביסורין

...It is certainly forbidden to take steps to prolong transitory life in a way which will be with suffering...

Does Rav Moshe Feinstein mean that all methods are forbidden to keep alive a patient who will suffer, or does this statement refer only to a transplant donor, who is being hooked up to a machine not for the purpose of curing or helping him, but only to keep him alive until his organs can be used for transplant? If we accept the latter reading, then the responsum can be taken to imply that if the measures taken might be curative in nature, then the person must accept the treatment, even if there is tremendous pain.

However, Rabbi Herschel Schachter[33] chooses to interpret Rav Feinstein's ruling in a broader sense. According to his approach, there would be three alternatives when a person does not want to accept medical treatment:

a) If there is a presumption that most people would want such a treatment, then we would follow the majority and require the person to accept such treatmemt;

b) If there is a presumption that most people would not want to undergo this treatment, then again we follow the majority and do not require the patient to be treated;

c) If there is no presumption either way, and we do not know how the majority would choose, then the decision is up to the patient (except when the patient is not capable of making such a decision, when it would be left up to the physician.[34])

In the same responsum Rav Feinstein takes strong exception to a position taken earlier by Rav Shlomo Kluger. Rav Kluger ruled that a person need not do something degrading to himself in order to save another person's life, but Rav Feinstien opines that if the Almighty Himself sets aside His commandments, such as Shabbat, for the purpose of saving a life, surely a person's dignity is of

---

33. Unpublished responsum of Rabbi H. Shachter.
34. שאלות ותשובות מלמד להועיל ח"ב סימן ק"ד

trivial concern when it comes to saving a life. Albeit Rav Feinstein totally discounts personal dignity as a factor to be taken seriously in a life-threatening situation, we do have to note the fact that Rav Shlomo Kluger, a giant of the previous generations, did consider it a factor worthy of mention. Perhaps if a person wishes to reject a life-saving medical maneuver as being something that he just does not want to live with, the opinion of Rav Kluger might be taken into account.

Another point exceedingly germane to our discussion is to one raised by Rav Yaakov Emden and cited by Rabbi Schachter. Rav Emden distinguishes between medical treatment of known value,which a person cannot refuse, and that kind of treatment whose value is dubious and questionable. In the latter situation, Rav Emden rules that the sick person has the option to reject such experimental measures if he does not want to undergo the pain of treatment.[35]

Therefore,it is possible that the elderly cancer patient might not be required to accept painful medical treatment which might not cure him and would instead increase his suffering. In analyzing such a problem according to Rabbi Schachter, one should look to the effectiveness of the treatment and how most other people would choose.[36]

Psychiatric and Psychological Conditions

Whereas the halachic approach to the obligations concerning the treatment of physical medical disorders is fairly well documented, the approach to psychiatric illnesses is somewhat less

---

35. Rav Emden concludes, however, that the patient should put his trust in the true Healer. See also ציץ אליעזר חלק ט־מ״ז, who discusses whether one may pray for death for a person in great pain. He disallows it, although he cites the *Yalkut Shimoni, parshat Ekev,* which tells about a Tanna who advised an old woman who wished for death to end her suffering, how to accomplish that end.

36. Rabbi David Cohen indicated in a personal communication to the author and to the editor, that he has heard a מסורה from Rabbi Chaim Ozer that in cases of extreme suffering, the request of the patient is to be considered a factor in deciding whether or not to continue treatment. See also אהל דוד חלק א שמואל א־לא.

documented since the definition, diagnosis and effects of psychiatric and psychological problems are not as clearcut, quantifiable and predictable as physical disorders.

Therefore, it is important to ask whether or not the principles which apply to the treatment of physical illnesses apply to psychiatric problems as well. If such principles do apply, are they based on the notion that psychiatric illnesses are the same as other medical problems, or is there an independent source for the halachic approach to these maladies?

By way of introduction,it should be pointed out that in many instances civil law does differentiate between the involuntary treatment of medical and psychiatric problem. While the civil law will not allow the involuntay medical treatment of a competent adult patient who is capable of consenting to, or refusing, a physician's medical intervention, it will often allow the involuntary treatment of the incompetent psychiatric patient. Because such patients have been deemed incapable of giving informed consent, they have been held legally unable to refuse psychiatric treatment, i.e. anti-psychotic drugs. The Supreme Court reviewed this right to refuse treatment in 1982[37] and found that any right to refuse treatment would have be found in state law, rather than in federal law. Generally, however, recent cases have held that the traditional notions of battery and informed consent are not applicable to the involuntary treatment of the mentally ill with anti-psychotic medications[38] and actions for malpractice for involuntary treatment have generally not proven successful[39].

The bases of the power to enforce the administration of anti-psychotic medication to hospitalized mental patients are: 1) *parens patriae*, the power alloted to the state to take care of citizens who would otherwise be able to care for themselves because they are deemed to be under actual or legal incapacity; and, 2) the police power — the right of the state to protect its citizens from harming

---

37. *Mills* v. *Rogers* 102.
38. Ibid.
39. *Whitree* v. *State* 290 N.Y.S. 2d 486 (ct. cl. 1968) see also Forcible Medication, 82 Columbia Law Review 1720 (1982).

themselves or others. Under these doctrines the state cares for children, regulates child labor, and controls the medical and psychiatric care of mental patients without their consent[40].

The halacha also recognizes the need to care for psychiatric illnesses. In halacha, a mental incompetent is often referred to as a *shoteh*, a term used both for someone who is suffering from mental illness and for someone suffering from mental retardation. An example given by the Talmud of behavior which would qualify someone as a *shoteh* is "one who goes out alone at night, one who spends the night alone in a cemetery, and one who tears his garments".[41] (There is some dispute in the Talmud as to whether any or all of these symptoms are required for the diagnosis).

Is there an obligation to treat mental illness as there is to treat a physical illness? There are many sources which treat mental illness as any other medical problem subject to many of the same principles. Mental illness is compared to physical illness in that it too has an element of danger which threatens the life of the patient. Although mental illness may differ from a physical illness (such as appendicitis or heart disease) since a physical illness may itself cause the death of the patient, whereas a mental illness itself is rarely fatal, there is an element of danger for a psychiatric patient as well. While the mental illness may not cause the death of the patient, it may lead to such a danger, i.e., if the patient commits suicide or has an accident as a result of his incapacity.[42]

This risk is recognized in a ruling that allow Jewish patients to be treated in a hospital where non-kosher food is served if his illness was such that he was a danger to himself and no hospital serving kosher food is available.[43] (However, he is only allowed to eat those foods which are essential for his health — he is not permitted to eat whatever non-kosher food he wishes). Similarly, birth control was permitted for a mother who had several breakdowns and it was felt that her mental illness presented a threat

---

40. *Winters* v. *Miller* 446 f2d 65 (2d Cir. 1971).
41. חגיגה ג:
42. ציץ אליעזר ח"ד סימן י"ג
43. אגרות משה יו"ד חלק ב' סימן נ"ט

to herself as well as to her small children[44]. *Poskim* also hold that the Sabbath may be violated for a woman in labor in order to prevent her psychological decompensation[45].

One application of this rule applies to rulings which would consider the psychiatrically-based danger to the mother when assessing the possibility of a therapeutic abortion[46]. It should be noted that in this area, the considerations cited do not relate simply to stress that the pregnant mother would feel if she were to give birth; rather, they deal with the potentially self-destructive behavior of the mother.

The obligation to recite *hagomel,* a blessing of gratitude for survival of a crisis, is required of one who has recovered from a psychiatric illness as it is for one who has recovered from a physical illness[47].

Also, as with medical treatment, halacha requires that psychiatric teatment be rendered even when the patient will not, or cannot, consent. However, an additional reason is provided for treating an incompetent psychiatric patient who cannot give informed consent. Comparing him to a child, Rabbi Waldenberg[48] adds that psychiatric treatment should be provided for the psychiatric patient who cannot consent under the doctrine of זכין לאדם שלא בפניו[49], one can act in a manner beneficial to another person in that person's absence.

This halachic approach, which views mental illness as a form of physical illness, stresses the need for treatment because of the potential danger to the patient. Thus, the biblical sources which require medical treatment would be applicable to psychiatric treatment as well.

One might question, however, whether the obligation to treat would also be true for milder psychosocial disturbances which lack

---

44. אגרות משה אבן העזר סימן ס״ה
45. שבת קכ״ח: רמב״ם הלכות שבת ב׳: י״א
46. Spero, M., Judaism and Psychology, Ch. 12. (1980).
47. ציץ אליעזר חלק ט״ו סימן ל״ב; חלק י״ב סימן י״ח
48. ציץ אליעזר חלק ט״ו סימן מ׳
49. *Ketuboth* 11a.

a physical component and pose no threat to the life of the individual, and what forms of treatment may be used.

One reference which may allude to what is now known as psychotherapy is דאגה בלב איש ישחנה[50]. The Gemara explains this verse as meaning that when a man's heart is troubled, he should discuss his troubles.[51] While we may infer from this interpretation that the Talmud was aware of the positive effects of verbal catharsis, there is no indication that any halachic imperative exists to provide such treatment.

One halachic source of an obligation to provide treatment for psychological anguish may be derived from Rambam.[52] He refers to character traits and problems which do not present a psychiatric hazard, but which he nevertheless characterizes as חולי הנפש, illnesses of the spirit, and for which he mandates treatment:

> ומה היא תקנת חולי הנפשות? ילכו אצל החכמים שהם רופאי הנפשות וירפאו חליים בדעות שמלמדין אותם עד שיחזרום לדרך הטובה...
>
> ...and what is the treatment for illnesses of the spirit? One should go to experts who are physicians of the soul, and they will treat the illnesses with the knowledge that they have learned.

Rambam goes on to chastise one who knows that he is afflicted with such a problem and does not seek out treatment.

Another relevant source which indicates that mental anguish should be treated is the body of law dealing with צער, pain and suffering. Suffering is one of the damages which a tortfeasor is required to pay, and the relief of such suffering is recognized as an imperative. For example, although a son is not permitted to 'wound' (draw blood) from his parent even for medical reasons such a surgery[53], he is permitted to do so in order to relieve the parent's pain and anguish.[54] 'Suffering' is defined as including psychosocial

---

50. Proverbs 12:25.
51. *Sanhedrin* 100b.
52. הלכות דעות ב'
53. *Shulchan Aruch, Yoreh Deah* 241:3.
54. *Shulchan Aruch, Yoreh Deah* Ramo 241:3.

anguish, i.e., anything which would prevent a person from interacting with others[55].

The right to relieve suffering is relevant to the consideration of voluntary and involuntary treatment of pychiatric patients with psychotropic medication. Use of such drugs may lead to significant negative side effects such as tardive dyskenesia (an irreversible neurological disorder which causes involuntary muscle movements) which may affect over 20% of patients receiving such treatment.[56] There are also potential side effects from the "minor tranquilizers" used for the treatment of milder psychological distress such an anxiety. Therefore, it is important to determine whether the treatment of such emotional discomfort justifies the risk inherent in the treatment[57].

The Talmud allows one to engage in certain regularly occurring activities which entail an element of risk [58]. This is justified by the verse "Since many have trodden thereon, the Lord preserveth the foolish"[59]. This means that if a risk is commonly deemed to be acceptable, one may rely on divine protection and engage in that activity. This principle may be applied to the use of medications which entail some risk, but whose use is accepted medical practice.

Ramban[60] and the Ran[61] both point out the risks of medical treatment such as physician error and negative side effects of the medication. In referring to side effects, Ramban says that "what cures one may kill another." Yet, both the Ran and Ramban allow treatment despite the risks.

A contrary positon is taken by Rabbi Emden[62] who wrote that the relief of pain alone did not justify the risk of surgery to remove

---

55. תוספות שבת נ:
56. *Davis* v. *Hubbard* 506 F. Supp. 915 (N.D. Ohio 1980).
57. Bleich, D., Contemporary Halachic Problems, Vol II, p. 80.
58. *Shabbat* 129b; *Yevamoth* 72a.
59. Psalms 116:6.
60. *Torat Ha-adam* in *Kitvai Haramban* ed. Chavel II. 43.
61. Commentary, *Sanhedrin* 84b.
62. מור וקציעה או"ח שב"ח

a non-life-threatening gallstone. R. Bleich,[63] acknowledging R. Emden's position, nevertheless cites a number of influential sources which allow the taking of such risks in order to relieve pain. Thus, although there are possible side effects from the use of psychotropic medications, these side effects are generally not life-threatening, and thus their use in order to relieve the suffering of the patients would seem to be acceptable according to those who agree with Ramban and the Ran.

Conclusion

Jewish law takes special care to indicate its emphasis on human life and health. Although the halacha recognizes G-d as the ultimate source of life and health, it permits, and in fact obligates physicians and laymen alike, to do all in their power to provide health care. This individual and communal obligation involves rendering of direct medical treatment, providing financial aid to support treatment and taking measures to prevent illness.

Just as Jewish law requires that medical care be provided, in most situations it obligates the patient to seek out and accept such care. This is true for both physical and mental illnesses and reflects the halachic philosophy that health care is an obligation rather than an option. Because of its high regard for life, Jewish law allows the violation of all but three cardinal sins in order to preserve life. However, Jewish law is also sensitive to pain and suffering and under some circumstances may not require a patient to accept treatment which would only prolong such suffering, though it would not accept the active hastening of death in order to relieve pain.

---

63. Contemporary Halachic Problems (1983) p. 84.

The Status of Non-Halachic Marriage

Rabbi David Friedman

There are few issues in halacha as vital and sensitive as those of matrimony and personal status. Throughout most of our history, when Jewish communities enjoyed varying degrees of total or partial autonomy, volumes of responsa were generated to examine and clarify the many issues arising from the problems of family life. The contemporary scene, however, has brought an essentially different gamut of problems. These difficulties stem from two radical changes in the nature of modern Jewish life: A) Assimilation and estrangement from Torah values have resulted in the wholesale disregard of even the most serious violations of Torah law, and B) and Reform Jewish practice often annuls the authority of the Oral Law, thus sanctioning civil legal codes to replace the halacha; this is especially problematical in the realms of marriage, divorce and *mamzerut*. Because of these factors, fealty to halachic norms is no longer the *sine qua non* for the vast majority of world Jewry.

Thus, it has become necessary for modern *poskim* to analyze not only the application of halacha, but also to research the basic components and premises upon which the halacha is founded. It is my hope to outline here elements of an issue of contemporary concern — the status of civil, common-law and other non-halachic marriages from the perspective of the halacha.

Ishut

In Jewish law, marriage is technically a procedure by which a

---

Instructor in Talmud and Jewish History, HAFTR — Hebrew Academy of the Five Towns and Rockaway; Rabbi, Cong. Darchei Noam of Oceanside.

man "acquires" a wife *(Kinyan-Kiddushin)*, accepting upon himself certain obligations which are specified in the marriage contract *(Ketubah)*. Her acquiescence in the undertaking is indicated by accepting a ring from him; the entire procedure must be duly witnessed by two adult Jewish men *(edim)*. In the event the two parties to the marriage wish to sever their relationship, again they must have recourse to a formal legal procedure, the *Get*, which can only be effected by following the precise requirements of the halacha.

In America today, many Jewish couples do not enter into marriage through an Orthodox wedding ceremony. Nevertheless, by Jewish law their relationship might still be considered as a binding marriage requiring a *Get*, even if they were married by a Reform Rabbi or even in a civil ceremony.

What is the Jewish legal status of these couples? Is their living together as man and wife sufficient to effect a halachically valid marriage status or not? The ramifications are enormous because many couples who get married in a civil ceremony may rely on a civil divorce alone to end their relationship. But if their marriage was halachically valid, only the *Get* can formally end it. If either partner subsequently remarried without a *Get*, there may arise serious problems of adultery, bigamy, and *mamzerut* (bastardy) of the offspring of the second marriage.

Thus, the status of a marriage performed not in accordance with halacha is an issue of vital concern. This is the question we wish to address herein.

As we have noted, *ishut*, a halachically valid marriage relationship, is effected through *Kiddushin*, when she accepts a ring from him. Alternately, *kiddushin* can also be effected through a sexual liaison.

The *Shulchan Aruch* states explicitly:[1]

> אין האשה נחשבת אשת איש אלא על ידי קידושין שנתקדשה כראוי, אבל אם בא עליה דרך זנות שלא לשם קידושין אינו כלום

A woman is not considered as married except through the

---

1. אבן העזר כו: א

valid *kiddushin* process, but should a man have intercourse in a promiscuous fashion, without the *intention* of effecting a betrothal *(Kiddushin),* the act is void . . . .

ואפילו בא עליה לשם אישות, בינו ובינה אינה נחשבת כאשתו

And even if he intends thereby to create the marriage relationship, should the intercourse be done privately (without the knowledge of witnesses) she is not considered his wife.

It would seem, then, that *positive intention to effect the marriage* is a requirement, in addition to the presence of witnesses.

At most, any non-valid sexual relationship would render to the woman the status of *Pilegesh*-concubine, the legality of which, today, is a major point of dispute among the *Rishonim:*[2] it remains, though, a relationship that is severed by mutual consent, not requiring a *Get.*

But a problem does arise from the halacha's *assumption* of the legitimate contraction of marriage when circumstances do tend to bear it out. That is to say, their very living together as man and wife *might* effect the betrothal or at the very least, be seen as proof that at one time a valid betrothal had taken place. This assumption is found in the formulation[3]

חזקה שאין אדם עושה בעילתו ביאת זנות

It is assumed that a man does not live promiscuously.

The halacha accepts the assumption that when given the opportunity to effect a valid relationship, a man will utilize such an opportunity rather than engage in licentious behavior. Therefore, halacha assumes the individual will intend his sexual intercourse for *kiddushin.* The source of this concept is the mishna in *Gittin* 81a.

המגרש את אשתו ולן עמה בפונדקי בית שמאי אומרים אינה צריכה הימנו גט, ובית הלל אומרים צריכה הימנו גט שני.

---

2. עיין רמב"ם פ"א מהל' אישות הל' ד' והשגות הראב"ד שם מגיד משנה וכסף משנה שם. פ"ד מהל' מלכים הל' ד' שו"ת הרשב"א המיוחסות לרמב"ן סי' רפד שו"ת הריב"ש סי' שצ"ח.

3. אבן העזר כו: א

If a man divorces his wife and then spends the night with her at an inn, Bet Shammai does not require the issuing of a second *Get*, but Bet Hillel does.

The Gemara goes on to explain the underlying principles of Bet Hillel:

1) חזקה שאין אדם עושה בעילתו ביאת זנות
2) הן הן עדי יחוד, הן הן עדי ביאה

1) It is assumed that a man will not engage in sex promiscuously.
2) The witnesses to their privacy can assume intercourse and are therefore *de facto* witnesses to a *Kiddushin*.

Both the Rambam[4] and the *Shulchan Aruch*[5] cite the view of Bet Hillel as authoritative.

סוקלין ושורפין על החזקות

The Bet Din may impose capital punishment (in cases of illicit sexual relations) when a familial or sexual relationship is assumed (based upon behavior and common knowledge)[6]. The source of this concept is in *Kiddushin* 80a in reference to blood relationships. The *Yerushalmi Kiddushin* Chap. 4, Halacha 10, extends the concept to the marriage relationship.

This talmudic principle implies that even without legal proof that a technically valid marriage was effected between two people, their own claim to be married, or the public perception of them as being married, suffices to render their relationship a halachically valid and binding marriage.

איש ואשה שבאו ממדינת הים הוא אומר אשתי היא והיא אומרת בעלי הוא.... הוחזקו הורגין עליהן משום אשת איש עד כמה... עד שלשים יום

If a man and woman come from a foreign land, and he claims "This is my wife", and she claims "This is my

4. פרק י' מהל' גירושין הל' יז-יח-יט
5. שו"ע אה"ע סי' קמ"ט סע' א'
6. עיין בית שמואל סי' יט ס"ק א-ב, חלקת מחוקק ס"ק ג' ובערוך השולחן שם

husband"... If their marriage attains accepted status, she can be punished (for crimes) as a married woman. How much time must pass for their status to be established?..... 30 days."[7]

The Rambam[8] and *Shulchan Aruch*[9] codify both these statements. This gives some measure of legitimacy even to a marriage ceremony which is lacking in the requirements of halacha, possibly even to a civil ceremony.

Witnesses

A third factor to be considered in this matter is raised by Harav Moshe Feinstein שליט"א.[10] If valid witnesses are present at a ceremony, even when it is performed by a Reform or Conservative clergyman, their presence at the time of the giving of the ring creates a serious possibility of valid *Kiddushin* having been effected.

Given the principles enumerated above, civil marriages, non-Orthodox marriages, possibly even common-law relationships may attain the status of halachically-binding marriage and may require a *Get* to release the parties from the relationship. Since very often the people involved may not be aware of the importance of a *Get* and remarry without one, serious problems can arise. In the following section I will explore the avenues of *heter*, leniency, which may possibly apply to these couples, to free them and their children from the taint of adultery, bigamy, or bastardy.

The presumption that a man does not engage in sex promiscuously אין אדם עושה בעילתו בעילת זנות is the issue most commonly raised by the *Poskim*. As noted above, the source of this principle is a case of a man living in privacy with his former wife. The Talmud itself notes[11] that the woman had to have been at one time fully married to him and not simply betrothed prior to the

7. אבן העזר יט: ב
8. פרק א' מהל' איסורי ביאה הל' כ"כא
9. שו"ע אה"ע סימן יט סעיפים א, ב
10. אגרות משה אבן העזר חלק ראשון סי' ע"ז
11. גיטין פ"א ע"ב

divorce, for this principle to be applicable, because only then can we assume that לבו גס בה he is sufficiently familiar with her to resume sexual relations, and those relations will be of marital, and not casual, intent.

It is for this reason that Rambam[12] limits the principle solely to the cases of מחזיר גרושתו (one who takes back his divorced wife) and one who gives a conditional *Kiddushin* and then consummates his *Kiddushin* through intercourse; both of these are cases where the marital intentions of the man are clear. Rambam criticizes those *Geonim* who extend the principle beyond these limited parameters to require issuance of a *Get* for any sexual liaison between consenting partners.

Elsewhere,[13] Rambam emphasizes that the principle applies only to

> תלמיד חכם... או אדם כשר שהוא ברוך בדקדוקי מצות
>
> A scholar or worthy individual known to be meticulous in the minutiae of the mitzvot.

The Rambam's definition is clearly borne out by the *Tosefta's* statement[14].

> כל ביאה שהיא לשם קידושין מקודשת, ושאינה לשם קידושין אינה מקודשת
>
> Only intercourse accompanied by the clear intention of betrothal effects betrothal; if not, it does not effect such a betrothal.

Further proof to Rambam's position is adduced by Rashba,[15] quoting from the Gemara:[16]

> נושא אדם אנוסת אביו ומפותת אביו
>
> A man can marry a woman raped or seduced by his father.

If every sexual liaison were to require the issuing of a *Get* (as

---

12. See note 4
13. פרק ד׳ מהל׳ נחלות הל׳ ו׳
14. קידושין א:א
15. מגיד משנה על הרמב״ם מובא הל׳ י״ט
16. יבמות צו:

per the *Geonim's* opinion) then, argues Rashba, these women would have been prohibited to the son altogether, for fear of being אשת אביו the father's spouse. Ravad[17] agrees in principle with Rambam, but upholds the *Geonim's* opinion by arguing that the average Jew deports himself in a morally proper way and only those who are known to be promiscuous would be accused of בעילת זנות "casual sex."

Although Rambam's delineation of the principle is quoted by the *Shulchan Aruch,* most later *Poskim* tend to agree with Ravad's argument and look to other sources for a lenient ruling *(heter).*

One of the earliest authorities to define *heter* in actual practice is Rivash,[18] R. Isaac Ben Sheshet Perfet of 15th-Century Spain and Algiers. The incident to which he addressed himself involved a Jew and Jewess on the island of Majorca, both of whom became apostates to Christianity (marranos) under the impact of the Inquisition and were later married in a Church service. No individuals other than apostates (marranos) similar to the couple actually witnessed their living together as man and wife. Ultimately the husband disappeared. Was she to be considered by the Jewish community as a married women or not? If considered married, she would be an *Agunah,* a married woman whose husband is missing and who is perforce forbidden ever to remarry. In the Responsum, Rivash raises a number of points to free the woman in question from *Agunut.*

1) Since all the attendants at the wedding were apostates, the lack of acceptable witnesses in this case should immediately free us of the problem of the ceremony's being valid even though it did not conform to halacha. Only in the instance of proper Jewish witnesses can a non-halachic procedure nevertheless attain validity.

2) Rashba is quoted as saying that the presence of reliable witnesses is a factor only in effecting betrothal when the husband is aware of their presence; otherwise it is assumed that the husband knows that *Kiddushin* cannot be effected and thus his intention to

---

17. רמב"ם, הלכות אישות, פרק א
18. שו"ת הריב"ש סי' ו'

consummate his betrothal cannot be assumed

3) Even if we accept the above-mentioned stringency of the *Geonim* which extends the concept of ...אין אדם עושה בעילתו to any sexual liaision of consenting adults, our case here is unique. The couple clearly intended marriage on the basis of the Church wedding cereony, living together afterwards as husband and wife on the understanding that it was that ceremony which rendered to them that status. Although subsequent intercourse was not promiscuous, yet neither was it for *Kinyan-Kiddushin*. Thus her status is that of a *pilegesh* (concubine).

4) "And in this situation there are certainly none as promiscuous as those who brazenly attended church (עכו"ם) and his ultimate abandonment of her proves his original intentions."

5) An individual who openly flaunts the prohibition of *Niddah* (as the marrano did) certainly is not concerned with avoiding promiscuity. Again this would counteract the Talmudic presumption that a man does not engage in sex promiscuously.

These five points made by Rivash serve as the basis of most of the discussions and decisions of latter commentators and *Poskim*. In a similar incident to that of Rivash, Radvaz[19] treats a case in which an apostate remarried his wife, (who had previously been married to him and divorced while both were still practicing Jews) in a non-Jewish civil ceremony and then lived with her in the presence of reliable witnesses. Radvaz released the woman from any need for a *Get* because the husband, as an apostate, was considered to be פרוץ בעריות ובנכריות licentious in sexual matters, and the usual assumption that a man does not engage in sex casually was obviously inapplicable here.

It should be noted that many *Aharonim*[20] limit the reasoning utilized by Rivash and Radbaz to cases where the individual in question willingly transgresses an *issur* of *niddah* or *arayot* — prohibitions of serious consequence. Where lesser violations are involved (such as living with a woman without have a *ketubah*, and

---

19. חלק א' סימן שנ"א

20. פתחי תשובה אה"ע סי' כ"ו אות א', שו"ת יביע אומר חלק ו', חלק אה"ע סימן א' אות ב', אגרות משה חלק א' אה"ע סי' ע"ד

the like) it is far more logical to assume the talmudic dictum *(Hullin 4)* that לא שביק התירא ואכיל איסורא "A man will not simply overlook an easy opportunity to act in a moral and legally sanctioned way and choose to act illicitly." As these *Acharonim* point out, this differentiation is implicit in the very formula אין אדם עושה בעילתו בעילת זנות since sex as a form of *Kiddushin* is itself forbidden by rabbinic decree.

Rabbi M. Feinstein, in two Responsa[21], also qualifies the *Niddah* issue. Rabbi Feinstein argues that if fear, or difficulty, or ignorance were factors in a man's failure to adhere to the laws of *Niddah*, it might still be presumed that where promiscuity, זנות, could easily be avoided, a man will avoid it. In other words, just because a man's wife does not attend the Mikvah does not mean that he does not consider her as being his lawful wife. At the same time, though, one could argue and so might Rivash, that once a doubt exists as to the integrity of the individual who is transgressing as grave a matter as *Niddah*, even in extenuating circumstances, then the dictum that ordinarily a man does not engage in sex promiscuously cannot automatically be presumed to apply. (Rav Feinstein does conclude that where a *Get* cannot be obtained, cases of civil marriage may sometimes be dissolved without the Jewish bill of divorce).

An additional reasoning to be lenient in such cases and to dispense with the issuing of the *Get* was formulated by the renowned author of the *Sha'agat Aryeh*. In a responsum quoted by the שו"ת בית אפרים[22] the argument is proposed that only when intercourse as an operative form of *Kiddushin* was countenanced by Jewish law could the entire principle חזקה אין אדם עושה בעילתו בעילת זנות be applicable. However, once the Rabbis banned

---

21. Ibid סימנים ע"ה, ע"ז

Rabbi Feinstein emphasizes that the contemporary American scene needs its own evaluation in this matter, in that most American Jews, totally removed from Torah constructs and values, have little concern for many prohibitions. On the other hand, many ostensibly observant Jews in this country, while careful in regards to some Mitzvot, do disregard *Taharat Mishpacha* for any number of reasons.

22. סימן ג'

intercourse as a method of effecting *Kiddushin*, then the necessary *intention* for *Kiddushin* to be effective also lapsed with its continued disuse.

A major dissenting voice to the leniencies developed above is that of the late Gaon Rav Y.E. Henkin זצ"ל. In his פירוש איברא[21] Rav Henkin argues that *Ishut* does not require the intention of the partners for the legal acquisition of the halacha to be operative. Simply the intention alone to live as man and wife suffices. He bases his opinion upon an extensive analysis of the necessity of כוונה, intent, in the entire realm of *Kinyanim*, "Acts of Acquisition", and concludes that those *Kinyanim* which by their very nature demonstrate control and ownership (קנינים טבעיים as opposed to חוקיים, in the language of R. Henkin) do not require specific intention to be effective. Undoubtedly marital relations enter this category. He reinforces his argument by noting that *Kiddushin* (betrothal) requires a clear statement of intent to accompany it in order to be effective[23]. No such statement is required in *Nissuin* (marriage), where the very nature of *chupa* is the bringing of the bride into the domain of the groom[24]. Thus, according to R. Henkin, the general knowledge of reliable witnesses that a couple lives as man and wife is sufficient to fulfill the requirements that there be proper witnesses to *Kiddushin* (הן הן עדי קידושין, הן הן עדי יחוד). Support for this view is brought from the *Rishonim*[25].

A unique approach is developed by a number of authorities quoted in *Otzar HaPoskim*[26]. The basic argument runs as follows: although the Torah posits an act of *Kiddushin* as an obligation devolving upon the Jew as a prerequistite for marriage, one can still effect *Ishut* without this, as do Gentiles. Without *Kiddushin*, the

---

23. אות י"ח
קידושי ביאה also requires אמירה because the Rabbinic stricture against relations between אירוסין and נישואין renders to the original intercourse the appearance of זנות, unless the appropriate intention is articulated.
24. עיין היטב בערוך השלחן אה"ע ס נ"ה ס י"ד-י"ח
25. עיין שיטת הרא"ה המובא בשו"ת הריב"ש הנ"ל
26. אוצר הפוסקים סי' כ"ו ס"א בשם הר' זילברשטיין

couple is married, although considered as being negligent in the fulfillment of the positive commandment of *Kiddushin*. It was not the Torah's intention to override or annul *Ishut* in its original pre-Sinaitic forms; but rather for the Jew to preface this *Ishut* with the *Kiddushin* act. It is clear, however, that in cases of common-law marriage it must be clarified that the partners intend to live with one another exclusively for the duration of their relationship.

* * *

We noted earlier that סוקלין ושורפין על החזקות Jewish courts used to punish persons for transgressions of an adulterous nature, based on the commonly-accepted marital status of the parties, even if legal proof of the married status were lacking. To what extent is this principle operative in Jewish law?

In the recently published responsa of the late Rabbi Israel Krieger of Boston[27] this issue is analyzed in dealing with a woman who lived for a while with her husband and then wished to marry someone else. She came to the Bet Din with a documented claim that having never been married by a Rabbi, she had divorced her husband through civil channels only and needed no religious divorce. After a lengthy analysis, Rabbi Krieger shows why the woman should be permitted to remarry, and concludes that:

a) The presumption of valid marriage cannot create a marriage status, it only assumes that a halachically valid relationship exists. If it can be shown that no such relationship was ever effected, the presumption per se is meaningless.

b) Rather than contradicting the presumption (חזקה) of marriage (which she is not empowered to do), here the woman is clarifying a mistaken supposition, showing that she was never married.

* * *

It is our hope that the brief overview presented herein will serve to demonstrate the complex issues arising from non-halachic marriages.

---

27. ספר קדושת בית ישראל ס' א־ג